IN THE

# ARIZONA COURT OF APPEALS

DIVISION TWO

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JEREMY W.,
*Appellant*,

*v.*

DEPARTMENT OF CHILD SAFETY AND A.E.,
*Appellees*.

No. 2 CA-JV 2019-0179
Filed July 2, 2020

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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
*See* Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f);
Ariz. R. P. Juv. Ct. 103(G).

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Appeal from the Superior Court in Cochise County
No. JD201900023
The Honorable John F. Kelliher Jr., Judge

**AFFIRMED**

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COUNSEL

Harriette P. Levitt, Tucson
*Counsel for Appellant*

Mark Brnovich, Arizona Attorney General
By Dawn R. Williams, Assistant Attorney General, Tucson
*Counsel for Appellee Department of Child Safety*

Joel Larson, Cochise County Legal Defender
By Benna Troup, Deputy Legal Defender, Bisbee
*Counsel for Minor*

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**MEMORANDUM DECISION**

Judge Espinosa authored the decision of the Court, in which Presiding Judge Eppich and Judge Eckerstrom concurred.

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E S P I N O S A, Judge:

**¶1** Jeremy W., biological father of A.E. born in October 2018, appeals from the juvenile court's December 2019 order terminating his parental rights on the ground of abuse, pursuant to A.R.S. § 8-533(B)(2). We affirm for the reasons stated below.

**¶2** Before it may terminate a parent's rights, the juvenile court must find clear and convincing evidence of at least one statutory ground for severance, and a preponderance of the evidence that terminating the parent's rights is in the best interests of the child. *See* A.R.S. §§ 8-533(B), 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41 (2005). We will affirm a termination order unless we conclude that no reasonable trier of fact could find the required grounds established under the applicable evidentiary standard. *Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, ¶ 10 (App. 2009). We view the evidence in the light most favorable to affirming the order. *Christy C. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 445, ¶ 12 (App. 2007). We will "accept the juvenile court's findings of fact if reasonable evidence and inferences support them, and will affirm a severance order unless it is clearly erroneous." *Alma S. v. Dep't of Child Safety*, 245 Ariz. 146, ¶ 18 (2018) (quoting *Demetrius L. v. Joshlynn F.*, 239 Ariz. 1, ¶ 9 (2016)).

**Background**

**¶3** One night in March 2019, Jeremy and Aredi B., A.E.'s mother, had an argument that escalated into domestic violence. Then five-month-old A.E. was injured and taken to a local hospital, where it was determined that she had a fractured skull and a fractured femur. She was transferred to a Tucson hospital, where she remained for a few days. Jeremy and Aredi gave the Department of Child Safety (DCS) child safety specialist and hospital personnel inconsistent explanations as to how A.E. had been injured. The DCS specialist testified at the severance hearing that shortly after the incident, Jeremy initially told her A.E. had rolled off the bed onto the floor, which was particularly hard because he recently had removed the

carpet. He then told her he had tripped over the carpet while holding the baby and had fallen on her.

**¶4** The DCS specialist also testified that Aredi had told her Jeremy had come home intoxicated and belligerent, walked into the bedroom while Aredi was changing A.E.'s diaper, and jumped on top of her and began to punch her. Aredi claimed A.E. was injured during that physical altercation. Aredi then gave a slightly different version of the event, telling the investigator Jeremy had been holding A.E. while hitting Aredi and jumping on top of her and that he had fallen while holding the baby. At the severance hearing Aredi testified that, as Jeremy was punching her in the face and choking her, she kicked him, and A.E., who had been on the bed next to her, ended up on the floor crying.

**¶5** Jeremy was arrested the night of the incident and charged with assault/domestic violence and child abuse. Although he was released at one point, he was arrested again in May 2019, and remained in custody until the first week of August 2019, when he entered a guilty plea to aggravated assault/domestic violence of Aredi, and aggravated assault/domestic violence of A.E. *See* A.R.S. §§ 13-1203(A)(1) (person commits assault by intentionally, knowingly or recklessly causing physical injury), 13-1204(A)(3) (aggravated assault includes assault causing "temporary but substantial disfigurement, temporary but substantial loss or impairment of any body organ or part or a fracture of any body part"); *see also* A.R.S. § 13-3601 (defining domestic violence of a child). He was placed on four years' intensive probation on each count, to be served consecutively.

**¶6** DCS took custody of A.E., placing her in foster care, and filed a dependency petition.[1] Jeremy pled no contest to the allegations, and A.E. was adjudicated dependent in June 2019. The initial case plan was a concurrent plan of family reunification and severance and adoption. But in October 2019, DCS filed a motion to terminate both parents' rights. As to Jeremy, DCS alleged he had willfully abused A.E. or had failed to protect her from abuse. After a hearing in December, the juvenile court granted the

[1] DCS considered placing A.E. with Aredi, but because she was unable to adequately explain how A.E. had been injured, and because of her involvement with child welfare agencies in this and other states and untreated mental-health issues, DCS placed A.E. in a foster home. Aredi's rights have also been severed; she has appealed separately and her appeal remains pending. *Aredi B. v. Dep't of Child Safety*, No. 2 CA-JV 2020-0028.

motion from the bench and subsequently entered formal findings of fact and conclusions of law. Jeremy has appealed from that order.[2]

**Termination Under A.R.S. § 8-533(B)(2)**

**¶7** Jeremy first contends that although it is "uncontroverted" he pled guilty to aggravated assault/domestic violence and child abuse, that did "not create an irrebuttable presumption for termination of his parental rights." He claims he is "capable of remedying his conduct, and has been working diligently toward that end" by participating in various services. He asserts the evidence showed he "was able to remedy the circumstances which gave rise to the dependency," and "[t]here was no reason to believe he could not reunify with A.E. within a relatively short time."

**¶8** A juvenile court may terminate a parent's rights pursuant to § 8-533(B)(2) if the court finds the parent has "neglected or willfully abused a child." The statute further provides that "abuse includes serious physical or emotional injury or situations in which the parent knew or reasonably should have known that a person was abusing or neglecting a child." § 8-533(B)(2). Section 8-201(2), A.R.S., defines abuse, in relevant part, as "the infliction or allowing of physical injury, impairment of bodily function or disfigurement." Jeremy does not dispute A.E. was seriously injured and concedes that he pled guilty to child abuse related to these injuries. He seems to suggest, however, that as to A.E., the infliction of the injuries had not been intentional. In that regard, he testified at the severance hearing that although he accepted responsibility for what had occurred, A.E. had been injured accidentally during the course of "a domestic violence altercation." Jeremy appears to further suggest that, notwithstanding the fact that he pled guilty to related charges, he is not presumptively incapable of safely parenting A.E., particularly because he demonstrated he was motivated to improve as a parent and was working "diligently toward that end."

[2]Jeremy filed his notice of appeal before the court entered its final order. This court suspended the appeal and revested jurisdiction in the juvenile court so Jeremy could seek leave pursuant to Rule 108(B), Ariz. R. P. Juv. Ct., to file a new or amended notice of appeal. The court granted that request and Jeremy filed a "notice of delayed or amended notice of appeal," providing appellate jurisdiction in this court. *See* A.R.S. § 8-235; Ariz. R. P. Juv. Ct. 104(A).

**¶9** Nothing in § 8-533(B)(2) states or suggests that a parent's commitment to the child and to remedying the circumstances that resulted in the child's removal from the home is part of the inquiry in determining whether this statutory ground of abuse has been established. Nor does Jeremy cite any authority for this proposition. The finding of abuse under § 8-533(B)(2) establishes parental unfitness without more, and to the extent Jeremy suggests otherwise, he is mistaken. *See Alma S.*, 245 Ariz. 146, ¶ 9 (statutory grounds for termination equate with parental unfitness, ensuring compliance with due process requiring clear and convincing evidence of unfitness); *see also Sandra R. v. Dep't of Child Safety*, 248 Ariz. 224, ¶¶ 12, 24 (2020) (reiterating same and requiring proof of danger to non-abused child). Based on the record before the juvenile court, including the conflicting versions of how A.E. had been injured, and Jeremy's own testimony, there was sufficient evidence to support the finding that he willfully abused A.E. or failed to protect her from abuse. § 8-533(B)(2). He had done so by punching and choking Aredi either while he was holding A.E. or while A.E. was in close proximity to Aredi.

**¶10** Jeremy also contends DCS failed to make reasonable efforts to reunify him with A.E. He argues DCS did not provide appropriate services, did not maintain contact with him about his participation in various programs, and did not offer alternative programs during the five months he was in custody. He additionally argues that because DCS filed the motion to terminate his rights only two months after he was released from custody, he was deprived of the opportunity to rehabilitate himself further. To support this claim, he refers to an outdated version of the severance statute, former § 8-533(B)(6)(a), now numbered as § 8-533(B)(8)(a), which provides for termination of parental rights based on the length of time the child has been in court-ordered care. In his reply brief, Jeremy insists that, once DCS took custody of A.E. and established a case plan of reunification, it was obligated to provide appropriate reunification services. He cites no authority to support this assertion.

**¶11** For his contention that DCS was required to provide appropriate reunification services, Jeremy cites *Arizona Department of Economic Security v. Matthew L.*, 223 Ariz. 547 (App. 2010). In that case, the Arizona Department of Economic Security (ADES), now DCS,[3] appealed the juvenile court's denial of its motion to terminate the father's parental

[3]Until the establishment of DCS, ADES administered child welfare and placement services under title 8; Child Protective Services was a division of ADES. *See* 2014 Ariz. Sess. Laws 2nd Spec. Sess., ch. 1, § 20.

rights based on the length of his prison term under § 8-533(B)(4). The issue in *Matthew L.* was whether the record supported the juvenile court's conclusion that ADES had failed to establish the length of the father's prison term would deprive the child of a normal home for a period of years. *Id.* ¶ 9. It was in that context that this court examined the evidence regarding the father's efforts while in prison to improve his parenting skills and develop and nurture his relationship with his child, and the state's inadequate responses to his efforts. *Id.* ¶ 18. The case does not stand for the proposition that DCS must provide reunification services to a parent found to have abused his child. In fact, in *Matthew L.* this court confirmed the holding in *James H. v. Arizona Department of Economic Security*, 210 Ariz. 1, ¶¶ 6-10 (App. 2005), that there is no constitutional or statutory duty to provide reunification services to a parent when severance is sought under § 8-533(B)(4). *Id.* ¶ 20 & n.4.

**¶12** DCS is required to make diligent efforts to provide appropriate reunification services for terminations based on out-of-home placement under § 8-533(B)(8) and (B)(11). *See* § 8-533(D). DCS must also make diligent and reasonable efforts to preserve the family or show that preservation efforts would be futile before the juvenile court may terminate parental rights under § 8-533(B)(3) based on mental illness, *Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, ¶¶ 29-34 (App. 1999), and chronic substance abuse, *Jennifer G. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 450, ¶ 12 (App. 2005) (citing *Mary Ellen C.*, 193 Ariz. 185, ¶¶ 31-34). We are not convinced the same constitutional principles this court recognized in those cases to obligate DCS to provide reunification services apply when termination is based on abuse or neglect. *Cf. Bobby G. v. Ariz. Dep't of Econ. Sec.*, 219 Ariz. 506, ¶ 11 (App. 2008) ("[N]either § 8-533 nor federal law requires that a parent be provided reunification services before the court may terminate the parent's rights on the ground of abandonment."); *Toni W. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 61, ¶ 9 (App. 1999) (legislature amended § 8-533(B) to remove requirement that services be provided before parental rights may be terminated based on abandonment); *see also James H.*, 210 Ariz. 1, ¶¶ 8-9 (no constitutional requirement to provide reunification services when termination based on incarceration). Severance based on abuse is not listed in § 8-533(D), and nothing in § 8-533(B)(2) requires the juvenile court to find DCS made diligent efforts to provide reunification services. If the legislature had wished to engraft this requirement onto subsection (B)(2), or any other subsection, it could have done so. *See Schuck & Sons Constr. v. Indus. Comm'n*, 213 Ariz. 74, ¶ 26 (App. 2006).

**Best Interests of the Child**

**¶13** Jeremy also challenges the sufficiency of the evidence to support the juvenile court's finding that termination of his parental rights was in A.E.'s best interests, arguing he was given no opportunity to demonstrate his rehabilitation. Our supreme court has stated that a parent's rehabilitation effort is a factor the juvenile court must consider when assessing the totality of the circumstances in deciding whether termination is in a child's best interests. *Alma S.*, 245 Ariz. 146, ¶ 15. We therefore address this issue in that context.

**¶14** Termination is in a child's best interests if either the child will benefit from severance or be harmed if the parent's rights are not terminated. *Demetrius L.*, 239 Ariz. 1, ¶ 16. Jeremy asserts, "[t]he only evidence regarding what would be in the child's best interests was the case manager's assessment that neither parent has been able to show that they are able to give A.E. permanency now or in the near future." But the juvenile court's findings and the record supporting those findings belie this contention. The court found termination of Jeremy's rights is in A.E.'s best interests because (1) she is with the foster mother, who has cared for her since she was removed from the home and wants to adopt her; (2) the foster mother is providing all of A.E.'s basic needs in a "drug-free home"; and (3) A.E. is bonded with her foster mother and removing her would be detrimental.

**¶15** Jeremy again points to evidence of his rehabilitation and efforts he made to be able to parent A.E., suggesting it negates the best-interests finding, adding that his biological relationship "should supersede the bond that was artificially established between the child and foster parents through state action."

**¶16** Jeremy is correct that the juvenile court had before it evidence that he had cooperated with DCS, as well as his interest in obtaining additional services, his participation in substance abuse and parenting classes, and his insistence that he loves A.E. and wants to parent her. But the court also had before it evidence, including the testimony of the caseworker, about the bond between A.E. and the foster mother, who has cared for A.E. since she was released from the hospital and is providing for all of her needs. She testified that in addition to the fact that A.E. and the foster family are bonded, it would benefit A.E. to terminate her parents' rights because the child "requires permanency and stability, and neither parent has been able to show the Department that they are able to do that

now or in the very near future." Additionally, when asked whether Jeremy had ever made statements indicating the foster family and A.E. could be at risk from him, the caseworker stated that the therapist had informed her Jeremy had said he knew who the placement was, and where they previously and currently resided. She added that Jeremy had also commented that he hoped the therapist understood that when he saw A.E. he was not going to let her go, suggesting he might physically remove her and not return her to the placement.

**¶17** We presume the juvenile court has considered the evidence that was before it. *See Fuentes v. Fuentes*, 209 Ariz. 51, ¶ 18 (App. 2004). It was for the juvenile court, not this court, to weigh and resolve any conflicts in that evidence; we do not reweigh the evidence on appeal. *See Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 12 (App. 2002); *see also Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 4 (App. 2004). The juvenile court, not this court, "is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts." *See Oscar O.*, 209 Ariz. 332, ¶ 4. The record contains reasonable evidence to support the court's finding that a preponderance of the evidence showed that termination of Jeremy's parental rights was is in A.E.'s best interests.

**Disposition**

**¶18** For the reasons stated, the juvenile court's order terminating Jeremy's parental rights is affirmed.