IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

MARIANA M.-L.,
Appellant,

v.

DEPARTMENT OF CHILD SAFETY, E.M., AND E.-M.,
Appellees.

No. 2 CA-JV 2021-0033
Filed October 12, 2021

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NOT FOR PUBLICATION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).

Appeal from the Superior Court in Pinal County
No. S1100JD201800113
The Honorable DeLana Fuller, Judge Pro Tempore

AFFIRMED

COUNSEL

Czop Law Firm PLLC, Higley
By Steven Czop
Counsel for Appellant

Mark Brnovich, Arizona Attorney General
By Emily M. Stokes, Assistant Attorney General, Phoenix
Counsel for Appellee Department of Child Safety

MEMORANDUM DECISION

Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Espinosa and Vice Chief Judge Staring concurred.

E C K E R S T R O M, Judge:

¶1 Mariana M.-L. appeals from the juvenile court's order terminating her parental rights to her son, E.M. (born July 2015), and her daughter, E.-M. (born May 2018), on the grounds of chronic substance abuse and out-of-home placement. *See* A.R.S. § 8-533(B)(3), (8)(c). She argues her due process rights were violated because the court did not appoint a guardian ad litem for the children. We affirm.

¶2 The Department of Child Safety (DCS) removed the children from Mariana's care after E.-M. was born with methamphetamine exposure. DCS filed a dependency petition, and the juvenile court appointed an attorney to represent both children as counsel, not as guardian ad litem under Rule 40, Ariz. R. P. Juv. Ct.; *see also* A.R.S. § 8-221(A) (juvenile entitled to counsel in dependency or termination proceeding); Ariz. R. P. Juv. Ct. 38 (governing appointment of counsel). Mariana did not object or ask that a guardian ad litem be appointed for the children. The court found both children dependent as to Mariana in May 2018.

¶3 In August 2020, the juvenile court changed the case plan to severance and adoption, and DCS filed a motion to terminate Mariana's parental rights under § 8-533(B)(3) and (8)(c). The court held a contested termination hearing. During closing arguments, children's counsel noted—consistent with trial testimony—that E.M. was "conflicted" about whether he wanted to live with Mariana or his foster family. Counsel argued, however, that termination was in E.M.'s best interests. Mariana moved for a mistrial, arguing that counsel was required to argue E.M.'s position, not his view of E.M.'s best interests, and had thus created a conflict of interest between counsel and the children. Noting E.M.'s "young age," counsel responded that he "consider[ed]" himself to be E.M.'s "best interest attorney." The court denied the motion and granted DCS's termination

motion on the grounds alleged, also finding that termination was in the children's best interests.[1] This appeal followed.

¶4 On appeal, Mariana argues that her right to a fair proceeding necessarily "includes a conflict-free relationship" between E.M. and his attorney and, thus, the juvenile court erred by denying her mistrial motion. Mariana is correct that "[p]arents possess a fundamental liberty interest in the care, custody, and management of their children." *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 24 (2005). And, due process requires that any proceeding to terminate those rights be fundamentally fair. *See id.* We review for an abuse of discretion the juvenile court's decision whether to disqualify counsel, *see State v. Marner*, 251 Ariz. 198, ¶ 8 (2021), or grant a mistrial motion, *see State v. Kleinman*, 250 Ariz. 362, ¶ 12 (App. 2020). The grant of a mistrial is an extreme remedy, available only when a fair trial was impossible. *See id.*

¶5 As Mariana recognizes, parents generally lack standing to interfere with their children's attorney-client relationship or to demand their children be appointed a guardian ad litem. *In re Pima Cnty. Juv. Severance Action No. S-113432*, 178 Ariz. 288, 291 (App. 1993). Challenges to another party's counsel are disfavored and will only be permitted "in extreme circumstances." *Alexander v. Superior Court*, 141 Ariz. 157, 161 (1984). Mariana nonetheless insists this case presents the type of "unique circumstance" warranting her interference with her children's attorney-client relationship.

¶6 First, we point out that a "unique" circumstance is not the type identified by our supreme court that would permit such interference; the court instead required the circumstances be "extreme." *Id.* And Mariana has not drawn any parallel between this case and cases where courts have disqualified an attorney at the request of another party.

¶7 Our supreme court has identified four factors to be considered before disqualifying another party's counsel: (1) whether the motion is being made to harass the other party; (2) whether the party bringing the motion would suffer any harm if the motion is denied; (3) the existence of alternative solutions that are less damaging; and (4) "whether the possibility of public suspicion will outweigh any benefits that might accrue due to continued representation." *Marner*, 251 Ariz. 198, ¶ 9

[1] The juvenile court also terminated the rights of the childrens' fathers. They are not parties to this appeal.

(quoting *Alexander*, 141 Ariz. at 165). Even assuming a conflict exists in this case, none of these factors favor disqualification and, by extension, a mistrial.

¶8 The record demonstrates that Mariana was aware of the purported conflict well before the severance hearing: she testified that E.M. "tells [her] all the time he wants to come home." Her failure to raise the issue sooner not only smacks of tactical maneuvering but, by asking for a mistrial after the hearing was over, she also limited the juvenile court's ability to pursue a less disruptive solution—and she identified none below or in her opening brief.[2] Moreover, there is little risk of prejudice to Mariana caused by the juvenile court's denial of her mistrial motion.[3] There is no reason to believe that DCS would abandon termination if a mistrial were declared, or that the court would be likely to reach a different decision based on E.M.'s position. Finally, there is no apparent risk of public suspicion. In sum, Mariana has not met her burden under *Alexander* "to show sufficient reason why" children's counsel "should be disqualified from representing his client[s]." *Id.* at 161. Thus, the court did not err in denying her mistrial motion.[4]

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[2]In her reply brief, Mariana proposes that children's counsel could have requested a continuance to confirm E.M.'s position or the juvenile court could have then appointed a guardian ad litem. Even if we agreed these alternatives should have been apparent considering Mariana's only requested relief—a mistrial—we do not address arguments first raised in reply. *See Marco C. v. Sean C.*, 218 Ariz. 216, n.1 (App. 2008).

[3]Mariana asserts she was harmed because DCS initially had sought to withdraw the termination petition but, at the urging of child's counsel, the court first required Mariana to take an additional drug test, which she failed, prompting DCS to move forward with termination. But, *Alexander* appears to contemplate only prospective harm, *see* 141 Ariz. at 165, further illustrating that such issues should be raised promptly.

[4]We agree with DCS that Mariana has waived this issue for failing to timely raise it below. *See Shawanee S. v. Ariz. Dep't of Econ. Sec.*, 234 Ariz. 174, ¶ 16 (App. 2014). But, in our discretion, we have decided to address this claim on its merits. *See Marco C.*, 218 Ariz. 216, ¶ 6. However, because she also did not raise it below, we decline to address her related argument that a juvenile court must always appoint a guardian ad litem.

¶9 Although Mariana is not entitled to relief on appeal, we are nonetheless compelled to remind children's counsel of his ethical duties when representing children. Counsel was appointed as counsel for the children, not to act as their guardian ad litem or, as he asserted in response to Mariana's mistrial motion, their "best interest attorney."[5] Counsel's role, then, was to "advocate for his [clients'] subjective goals in the litigation," not to substitute his judgment for his clients' wishes, irrespective of their age or maturity level. *Castro v. Hochuli*, 236 Ariz. 587, ¶¶ 8, 10 (App. 2015). If "the child cannot express a preference or if that expressed preference would injure the child," counsel must "seek appointment of a guardian ad litem." *Id.* ¶ 10. Only the guardian ad litem "may make decisions in the child's best interests irrespective of the child's expressed wishes." *Id.* Thus, if counsel's advocacy reflected his beliefs about the children's best interests and those beliefs conflicted with his clients' subjective goals, he violated his ethical responsibilities. *See* ER 1.2(a), 1.4, 1.14(a), Ariz. R. Prof'l Conduct, Ariz. R. Sup. Ct. 42. We additionally note that counsel's apparent confusion about his role is not isolated; we recently addressed similar, albeit more troubling, conduct by the Pima County Office of Children's Counsel. *J.W. v. Dep't of Child Safety*, No. 2 CA-JV 2021-0027, ¶¶ 15-19, 2021 WL 4520211 (Ariz. Ct. App. Oct. 4, 2021).

¶10 We affirm the juvenile court's order terminating Mariana's parental rights to E.M. and E.-M.

[5]A "best interests attorney" is appointed in a family law proceeding to represent a child's best interests and, like a guardian ad litem, is not bound by the child's instructions or objectives. *See* Ariz. R. Fam. Law P. 10; *Castro v. Hochuli*, 236 Ariz. 587, ¶¶ 8, 10 (App. 2015); *Aksamit v. Krahn*, 224 Ariz. 68, ¶ 14 (App. 2010). That term is not used in the juvenile rules.