IN THE

# ARIZONA COURT OF APPEALS

DIVISION TWO

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IN RE TERMINATION OF PARENTAL RIGHTS AS TO A.H.,

No. 2 CA-JV 2023-0026
Filed August 7, 2023

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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NOT FOR PUBLICATION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. 602(i)(17).

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Appeal from the Superior Court in Cochise County
No. JD202100031
The Honorable John F. Kelliher Jr., Judge

**DISMISSED IN PART; AFFIRMED IN PART**

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COUNSEL

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*Counsel for Appellant*

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## MEMORANDUM DECISION

Presiding Judge Eppich authored the decision of the Court, in which Chief Judge Vásquez and Judge Gard concurred.

E P P I C H, Presiding Judge:

**¶1** Kevin H. appeals from the juvenile court's February 2023 order terminating his parental rights to his daughter, A.H., born in December 2016, based on his mental health and her length of time in court-ordered care. *See* A.R.S. § 8-533(B)(3), (8)(c). He contends the court erred in granting the termination rather than granting his motion for permanent guardianship. For the following reasons, we dismiss in part and affirm in part.

### Factual and Procedural Background

**¶2** We view the evidence in the light most favorable to affirming the juvenile court's ruling. *See Christina G. v. Ariz. Dep't of Econ. Sec.*, 227 Ariz. 231, ¶ 13 (App. 2011). In February 2021, the Department of Child Safety (DCS) received a report that A.H. had gotten out of her home without her parents—Kevin and Shalisa H.—noticing.[1] This happened repeatedly over the next several months, with A.H. being found wandering around the apartment complex where she lived—one time, she was alone near the community pool. During the investigation that followed, the family home was found to be "dirty," as was A.H., who was often wearing a soiled diaper. A.H. also had a rash and had not seen a pediatrician since 2018.

**¶3** In May 2021, DCS removed A.H. from the home and filed a dependency petition based, in part, on concerns over the state of the home, Shalisa's mental health, Kevin's failure to protect A.H. from Shalisa, and the parents' inability to provide for A.H.'s basic needs, including appropriate supervision and medical care. A.H. was placed with a licensed foster caregiver. Kevin pled no contest to the allegations in the dependency petition, and the juvenile court adjudicated A.H. dependent as to him. The court set a case plan goal of family reunification.

[1]The juvenile court also terminated the parental rights of Shalisa. She is not a party to this appeal.

**¶4** Over the months that followed, DCS offered reunification services, including supervised parenting time, parent aide services, parenting classes, family and individual counseling, parent-child relationship assessment, case management services, family connections, and housing and transportation assistance. However, according to the DCS case managers, Kevin failed to participate consistently in the services and failed to make "the necessary behavioral changes so that he could safely parent."

**¶5** In April 2022, Kevin completed a psychological evaluation. He was diagnosed with post-traumatic stress disorder, generalized anxiety disorder, and schizoid personality traits. The evaluating psychologist explained that individuals with those diagnoses "would have trouble providing a safe and effective home for a child . . . due to being distracted by their mental health symptoms" and that Kevin's relationship with Shalisa further called into question his ability to parent "safely and effectively." The psychologist additionally stated that Kevin tends "to withdraw and isolate, which would affect his ability to tune in to what [A.H.] needs."

**¶6** At a review hearing in October 2022, counsel for A.H. reported that A.H. wished to stay with her foster placement and requested a change in the case plan goal to severance and adoption. Kevin opposed the change and requested a permanent guardianship with A.H.'s paternal grandparents. The juvenile court ordered the case plan goal changed to severance and adoption but gave Kevin leave to file a motion for permanent guardianship.

**¶7** Later that month, DCS filed a motion for termination of the parent-child relationship, asserting as grounds that Kevin was unable to discharge his parental responsibilities because of mental illness or deficiency, *see* § 8-533(B)(3), and that A.H. had been in an out-of-home placement for a cumulative period of more than fifteen months, *see* § 8-533(B)(8)(c). Kevin subsequently filed a motion for permanent guardianship, requesting that the paternal grandparents, who reside in Pennsylvania, be named as A.H.'s guardians. He admitted that DCS had made "reasonable efforts" toward reunification and that further efforts were "unlikely to be productive and/or reunification [was] not in the best interest of the child."

**¶8** In January 2023, the juvenile court held a one-day severance trial. After hearing testimony and argument, the court orally denied the motion for permanent guardianship and granted the motion for termination. On February 28, 2023, the court issued its written minute entry, finding that DCS had proven both of the grounds alleged and that termination was in A.H.'s best interests. Kevin thereafter filed a notice of appeal from "the Court's final Order Terminating [his] Parental Rights," as contained in the minute entry that was "signed . . . and filed on February 28, 2023."

**Jurisdiction**

**¶9** As a preliminary matter, DCS contends that "this court lacks jurisdiction to review the juvenile court's pre-termination placement decisions or its denial of Kevin's motion for appointment of a permanent guardian because Kevin did not appeal from those rulings." It reasons that Kevin is arguing the juvenile court erred by not placing A.H. with the paternal grandparents starting in February 2022, but those placement decisions—even assuming they are appealable—were not timely challenged. *See* Ariz. R. P. Juv. Ct. 601(b)(2) (listing final orders from which appeal may be taken); Ariz. R. P. Juv. Ct. 603(a) (notice of appeal must be filed no later than fifteen days after entry of final order). In addition, DCS maintains that Kevin did not appeal from the denial of his motion for permanent guardianship because his "notice of appeal refers only to the minute entry for the termination trial and does not in any way suggest that he intended to appeal the denial of the guardianship motion." *See* Ariz. R. P. Juv. Ct. 603(b)(2) (notice of appeal must include "final order or portion of the order the party is appealing"); *Lee v. Lee*, 133 Ariz. 118, 124 (App. 1982) ("The court of appeals acquires no jurisdiction to review matters not contained in the notice of appeal.").

**¶10** In reply, Kevin maintains that he is not challenging any "pre or post severance placement decisions" but rather is arguing "the juvenile court erred when it terminated the parent-child relationship in lieu of awarding a guardianship which was timely requested, and a subject of the appealed order." He further asserts that this court should exercise jurisdiction over the denial of his motion for permanent guardianship because DCS was neither prejudiced nor mislead by any purported defect in his notice of appeal.

**¶11** Although Kevin's arguments seemingly implicate the juvenile court's earlier placement decisions, we agree with him that those decisions are not being directly challenged as part of this appeal. We

therefore need not address our jurisdiction to consider them. However, we conclude we lack jurisdiction over the denial of Kevin's motion for permanent guardianship, albeit for a reason different than the one raised by DCS.

**¶12** An order denying a motion for permanent guardianship is a final order that is appealable. Ariz. R. P. Juv. Ct. 601(b)(2)(I). However, the order "must be in writing, signed by a judge, and filed with the clerk." Ariz. R. P. Juv. Ct. 601(b).

**¶13** At the January 2023 severance trial, the juvenile court stated, "there will be no guardianship," and explained its reasoning. However, in the subsequently filed minute entry memorializing its findings and conclusions, the court did not mention, much less rule upon, Kevin's motion for permanent guardianship. Without a written, signed, and filed order denying his motion, Kevin cannot challenge it on appeal. *Cf. State v. Birmingham*, 96 Ariz. 109, 110-12 (1964) (discussing authority for procedural rule imposing jurisdictional requirement for final judgment to be written and signed). We therefore lack jurisdiction over his attempted appeal from the denial of his motion for permanent guardianship.

**¶14** Nevertheless, the thrust of Kevin's challenge on appeal appears to be that the juvenile court erred by granting DCS's motion for termination. Because there is a written, signed, and filed order severing Kevin's parental rights, and his notice of appeal properly identifies that order and was timely filed thereafter, we have jurisdiction over that portion of his appeal. *See* Ariz. R. P. Juv. Ct. 601(b)(2)(F), 603(a)(1), (b)(2). Most of his arguments can therefore be addressed from this perspective.

**Discussion**

**¶15** Kevin contends the juvenile court erred in granting DCS's motion for severance "instead of" granting his motion for permanent guardianship. He maintains that "[t]ermination was not in A.H.'s best interests when a permanent guardianship was an option." This court "will affirm a termination order that is supported by reasonable evidence." *Jordan C. v. Ariz. Dep't of Econ. Sec.*, 223 Ariz. 86, ¶ 18 (App. 2009). Put another way, we will not reverse a termination order unless, as a matter of law, no reasonable factfinder could have found the evidence satisfied the applicable burden of proof. *Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, ¶ 10 (App. 2009). We defer to the juvenile court, as the factfinder, to

weigh the evidence, judge the credibility of witnesses, and resolve disputed facts. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 12 (App. 2002).

**¶16** The juvenile court may terminate a parent's rights if it finds by clear and convincing evidence that at least one of the statutory grounds for termination exists and by a preponderance of the evidence that termination of the parent's rights is in the child's best interests.[2] A.R.S. §§ 8-533(B), 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41 (2005). "At the best-interests stage of the analysis, 'we can presume that the interests of the parent and child diverge because the court has already found the existence of one of the statutory grounds for termination by clear and convincing evidence.'" *Alma S. v. Dep't of Child Safety*, 245 Ariz. 146, ¶ 12 (2018) (quoting *Kent K.*, 210 Ariz. 279, ¶ 35). "The 'child's interest in stability and security' must be the court's primary concern." *Id.* (quoting *Demetrius L. v. Joshlynn F.*, 239 Ariz. 1, ¶ 15 (2016)). "[T]ermination is in the child's best interests if either: (1) the child will benefit from severance; or (2) the child will be harmed if severance is denied." *Id.* ¶ 13.

**¶17** In finding that termination of Kevin's parental rights was in A.H.'s best interests, the juvenile court accepted the testimony of the DCS case managers as credible. The court then considered the factors listed in A.R.S. § 8-514(G) in determining whether granting the permanent guardianship was in A.H.'s best interests. Of particular note, the court found it was not in A.H.'s "best interests to have any contact with [Shalisa]," and the court was "concerned that [the] grandparents don't recognize that and would allow . . . [her] to have supervised contact." In addition, the court found that A.H. was not "confused about where she wants to be" and that "over a period of 20 months [A.H.] has come to accept, to love, to want to continue in that placement," with siblings whom she has developed a meaningful relationship. If it were to grant the guardianship, the court was concerned about a "transition plan" that would necessarily be "extended" given the paternal grandparents' residence in Pennsylvania: "All that means is more time."

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[2]Kevin does not challenge the statutory grounds for termination. Indeed, he admits that he "was not ready for reunification." We therefore do not address the juvenile court's statutory findings. *See Crystal E. v. Dep't of Child Safety*, 241 Ariz. 576, ¶ 5 (App. 2017) (by failing to challenge statutory ground on appeal, parent waives argument that court erred in granting severance on that basis).

**¶18** There is reasonable evidence in the record to support the juvenile court's best-interests finding. That evidence includes the DCS case manager's testimony that termination of the parent-child relationship would "benefit [A.H.] because it would further the plan of adoption," would "provide permanency as well as stability," and would "continue to foster the structured setting that she's in." There was also testimony that A.H. was "very attached and bonded" with her foster placement and that A.H. had repeatedly reported wanting to stay with her placement and not "live anywhere else." The placement was also bonded with A.H., who referred to her placement as her mother and wanted her placement to adopt her.

**¶19** In addition, the DCS case manager explained that DCS was recommending severance over permanent guardianship based on the best interests of A.H. She stated that "with a guardianship we are still anticipating that [the] parents may be able to safely parent in the future, while with . . . severance, parental rights are going to be terminated on a permanent basis." The manager opined that severance was appropriate here because the parents had failed to make any meaningful progress in the nearly two years since the start of the case.

**¶20** Moreover, A.H. has never lived with the paternal grandparents, did not have a strong relationship or bond with them, and "wouldn't mind visiting [them], but didn't want to live with them." *See* A.R.S. § 8-871(A)(2) (before court may establish permanent guardianship, child must be "in the custody of the prospective permanent guardian for at least nine months"). Given that the paternal grandparents reside in Pennsylvania, it was difficult for DCS to access how A.H. would respond to their care. Notably, the paternal grandparents were aware of the condition of the family home and Shalisa's mental health issues but did not take significant steps to remove A.H. before DCS became involved.[3]

**¶21** Kevin further contends that the juvenile court's "order of termination did not comport with placement preference" because § 8-514(B) gives grandparents a priority before others—like A.H.'s foster placement—who have a significant relationship with the child.[4] He reasons that the

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[3]In May 2021, before the dependency petition was filed, the paternal grandparents, who were visiting Arizona while on vacation, asked if they could take A.H. with them, but Shalisa refused.

[4]Section 8-514(B) provides that DCS "shall place a child in the least restrictive type of placement available, consistent with the best interests of

court's concern of an "extended" transition plan was "an unfair consideration" because if DCS had placed A.H. with the paternal grandparents in February 2022, after they obtained approval as part of the Interstate Compact on the Placement of Children (ICPC),[5] the "transition would have already occurred."

**¶22** But in considering A.H.'s best interests, the juvenile court was required to "consider the totality of the circumstances existing at the time of the severance determination." *Alma S.*, 245 Ariz. 146, ¶ 13. As relevant here, it matters not how the circumstances in January 2023 came to be, particularly given that the earlier placement decisions were not challenged. The court was therefore within its discretion in considering the need for an extended transition plan. *See Titus S. v. Dep't of Child Safety*, 244 Ariz. 365, ¶ 15 (App. 2018) (discussing standard of abuse of discretion).

**¶23** Kevin also seems to argue that several of the statutory factors favor guardianship over termination.[6] But his argument amounts to nothing more than a request that we reweigh the evidence. We will not do so. *See Jesus M.*, 203 Ariz. 278, ¶ 12. Instead, because reasonable evidence supports the juvenile court's best interests finding, we must affirm. *See Jordan C.*, 223 Ariz. 86, ¶ 18.

**¶24** Lastly, contrary to Kevin's suggestion, the juvenile court did not make any final placement decisions. Although A.H.'s foster placement expressed a desire to adopt A.H., the court did not enter any such order. Denial of the permanent guardianship does not automatically mean A.H. will be adopted by the placement. *See Antonio M. v. Ariz. Dep't of Econ. Sec.*, 222 Ariz. 369, ¶ 2 (App. 2009) (juvenile court's best-interests analysis "is

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the child." It lists, in part, the following "order for placement preference": (1) parent, (2) grandparent, (3) "another member of the child's extended family, including a person who has a significant relationship with the child," and (4) licensed foster caregiver. § 8-514(B).

[5] The ICPC, A.R.S. §§ 8-548 through 8-548.06, aims to facilitate "cooperation between states in the placement and monitoring of dependent children." *Ariz. Dep't of Econ. Sec. v. Leonardo*, 200 Ariz. 74, ¶ 9 (App. 2001).

[6] To the extent Kevin is suggesting the juvenile court should have applied A.R.S. § 8-103(C), we need not address this argument because it was not raised below and our jurisdiction is limited to the severance proceeding.

separate from and preliminary to its determination of placement after severance").

## Disposition

**¶25** For the foregoing reasons, we dismiss Kevin's appeal to the extent he is attempting to challenge the denial of his motion for permanent guardianship. However, we affirm the juvenile court's ruling terminating Kevin's parental rights to A.H.