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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MELISSA R., Appellant, v. WADE T., ANDREW T., and CAMERON T., Appellees.	2 CA-JV 2009-0082 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 18790700

Honorable Stephen M. Rubin, Judge Pro Tempore

AFFIRMED

Sarah Michèle Martin
Tucson
Attorney for Appellant

The Hopkins Law Office, P.C.
By Cedric Hopkins
Tucson
Attorney for Appellee Wade T.

H O W A R D, Chief Judge.

¶1 Appellant Melissa R. is the biological mother of two teenaged sons, Cameron T., born in 1993, and Andrew T., born in 1995. The boys' father, Wade T., initiated this private severance action, seeking to have Melissa's parental rights terminated so that Wade's current wife could adopt the boys. Following a contested termination hearing held over three days in May and June 2009, the juvenile court granted Wade's petition. In a written ruling entered on July 20, 2009, the court ordered Melissa's rights terminated on the statutory ground of abandonment.[1]

¶2 On appeal, Melissa contends there was insufficient evidence to establish either that she had abandoned the children within the meaning of A.R.S. § 8-533(B)(1) or that severing her parental rights was in their best interests. *See* § 8-533(B)(1); *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, ¶ 12, 995 P.2d 682, 685 (2000). She further claims she was denied her right to substantive due process because the state failed to make a good-faith effort to preserve the family.

¶3 A juvenile court may terminate a parent's rights upon clear and convincing evidence establishing any one of the statutory grounds for termination enumerated in § 8-533(B), *see* A.R.S. § 8-863(B); *Michael J.*, 196 Ariz. 246, ¶¶ 12, 27, 995 P.2d at 685, 687, provided a preponderance of the evidence also establishes that severing the parent's rights is in the best interests of the child, *see* § 8-533(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005). On appeal, we view the evidence in the light most

[1]The court found unproven and therefore dismissed the dual allegations pursuant to A.R.S. § 8-533(B)(3) that terminating Melissa's rights was also warranted on grounds of mental illness and a history of chronic substance abuse.

favorable to sustaining the juvenile court's ruling, *Michael J.*, 196 Ariz. 246, ¶ 20, 995 P.2d at 686, and we accept the court's findings of fact as long as substantial evidence supports them, *Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, ¶ 4, 210 P.3d 1263, 1264 (App. 2009). We will affirm the court's ruling "'unless we must say as a matter of law that no one could reasonably find the evidence [supporting statutory grounds for termination] to be clear and convincing.'" *Id.* ¶ 10, *quoting Murillo v. Hernandez*, 79 Ariz. 1, 9, 281 P.2d 786, 791 (1955).

¶4 We first address Melissa's claim that there was insufficient evidence to prove she had abandoned Cameron and Andrew within the meaning of § 8-533(B)(1). "Abandonment" for purposes of § 8-533(B)(1) is defined in A.R.S. § 8-531(1) as follows:

> "Abandonment" means the failure of a parent to provide reasonable support and to maintain regular contact with the child, including providing normal supervision. Abandonment includes a judicial finding that a parent has made only minimal efforts to support and communicate with the child. Failure to maintain a normal parental relationship with the child without just cause for a period of six months constitutes prima facie evidence of abandonment.

Further, "abandonment is measured not by a parent's subjective intent, but by the parent's conduct: [§ 8-531(1)] asks whether a parent has provided reasonable support, maintained regular contact, made more than minimal efforts to support and communicate with the child, and maintained a normal parental relationship." *Michael J.*, 196 Ariz. 246, ¶ 18, 995 P.2d at 685-86. Uncontroverted evidence in this record overwhelmingly supports the juvenile court's conclusion that Melissa had abandoned these children.

¶5 Melissa and Wade were married to each other when Cameron and Andrew were born in 1993 and 1995. After their marriage was dissolved in Pima County in December 2000, they initially shared joint custody of their sons. In April 2004, however, Melissa asked Wade to keep the boys, then aged nine and eleven, for several weeks longer than his scheduled parenting time. She told Wade that the boyfriend with whom she had been living had been jailed for drug use, she was being evicted from their apartment, and she needed time to find a place to live. Soon afterward, Melissa stopped contacting Wade and the children, and Wade was unable to locate her through any of her family members.[2]

¶6 In June 2004, Wade petitioned the domestic relations court for a modification of its previous order for custody, child support, and visitation. The petition alleged that the boys had been in Wade's sole custody since April 2004 and that he had been unable to locate Melissa since May 7, 2004. Melissa was served with the petition, and she appeared in court for a status hearing in September 2004. But, after she failed to file a written response to the modification petition, failed to appear in conciliation court for a scheduled mediation, and failed to attend a further status conference, the court granted Wade's petition in December 2004. It awarded him sole custody of Cameron and Andrew and ordered Melissa to pay $176 per month in child support plus arrearages that then totaled $1,408 for the eight months from May through December 2004.

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[2]Testifying at the termination hearing, Melissa acknowledged that she had been unemployed, homeless, and using methamphetamine between May 2004 and August 2006; that she had been incarcerated from August 2006 until February 2007; and that she had been in residential treatment for her substance abuse until May 2007.

¶7 Three years and eight months later, in September 2008, Wade filed the present petition to terminate Melissa's parental rights. On the first day of the contested termination hearing in May 2009, Wade testified it had been five years since Melissa had last seen Cameron and Andrew, despite the fact that Wade had kept the children in regular contact with Melissa's mother and other maternal relatives. During those five years, Melissa had never sent a card, letter, or gift to either of her sons, had not communicated with them, and had paid nothing toward their support. At the conclusion of the termination hearing, the juvenile court observed not only that "all the evidence points to an abandonment," but that the factual circumstances established as "egregious" an abandonment as any the court had encountered.

¶8 Melissa acknowledged that she had not had contact with her children for the preceding five years and had contributed nothing toward their support, but she claimed she had not abandoned them. Her defenses to the allegation of abandonment were that she had either been unable to locate Wade and the children for long periods of time, had been abusing drugs or incarcerated, or otherwise had been prevented from communicating with or contacting the children.

¶9 In its written ruling, the juvenile court made extensive factual findings. It specifically rejected Melissa's claim that Wade had actively "hid[den] the children" from her, finding instead that Melissa had done nothing to make contact with her children, to maintain a relationship with them, or to reestablish the relationship once it had been lost. The record

abundantly supports the court's finding that Melissa had abandoned Cameron and Andrew within the meaning of §§ 8-531(1) and 8-533(B)(1).

¶10 We turn next to Melissa's contention that "[t]here was no credible unbiased evidence presented at trial that termination of the children's more[-]than[-]ten[-]year relationship with their biological mother is in [their] best interests." "A best-interests determination need only be supported by a preponderance of the evidence." *Bobby G. v. Ariz. Dep't of Econ. Sec.*, 219 Ariz. 506, ¶ 15, 200 P.3d 1003, 1008 (App. 2008). "Evidence that a child will derive 'an affirmative benefit from termination' is sufficient to satisfy that burden . . . ." *Id.*, *quoting Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 6, 100 P.3d 943, 945 (App. 2004).

¶11 In support of her contention, Melissa relies on the testimony and written report of Kadie Goodwin, who in December 2008 performed the social study required by A.R.S. § 8-536(A). Goodwin concluded that severing Melissa's parental rights was not in the best interests of Cameron and Andrew, who, Goodwin wrote, "have questions, doubts and feelings regarding the lack of contact with their mother." Goodwin recommended the boys "begin therapeutic contact with their mother immediately and restore a relationship with [her.]" In testifying, Goodwin acknowledged there was no currently existing "normal child/parent relationship" between Melissa and her sons. But Goodwin testified she "felt like the boys just have a lot of questions and a lot of unanswered feelings and emotions that they need to have addressed" and reported that Andrew had said he wanted to see and talk to Melissa.

¶12 Melissa contends Goodwin's was "[t]he only unbiased, professional opinion presented to the court on best interests" and maintains the court erred in ignoring Goodwin's recommendation. But the juvenile court, as the trier of fact, was in the best position to weigh competing evidence, *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002), and the record supported its specific findings with respect to the boys' best interests. The court found

> by a preponderance of the evidence, that it is in the best interests of the minor children to grant the termination of parental rights so that they may be adopted by their step-mother, Anita Tripp.
>
> Both children were represented by [counsel] at trial. [Counsel] consulted with the children and advocated for their interests . . . . Both children also filed affidavits in this case advising the court that they wanted to be adopted by Mrs. Tripp, particularly because they both claim that she has served in the capacity of their mother since her marriage to their father and that they further did not want any contact with their mother.
>
> THE COURT FINDS that it would be a detriment to the minor children to deny the termination of parental rights and prevent them from receiving the benefit of being adopted by their step-mother.

¶13 The evidence established that Wade and Anita had been caring for the children exclusively since at least 2004. The court could, and did, appropriately consider that information in determining the boys would affirmatively benefit from the termination of Melissa's rights and adoption by Anita. *See In re Maricopa County Juv. Action No. JS-8490*, 179 Ariz. 102, 107, 876 P.2d 1137, 1142 (1994) (holding fact that foster parents were meeting child's emotional and physical needs "could be properly considered to prove both abandonment and the child's best interest").

¶14 At bottom, Melissa's argument on appeal is a request that we reweigh the evidence and accord dispositive weight to Goodwin's recommendations, but that is not our function. *See Jesus M.*, 203 Ariz. 278, ¶ 12, 53 P.3d at 207 (reviewing court does not reweigh evidence); *In re Pima County Juv. Action No. S-2698*, 167 Ariz. 303, 307, 806 P.2d 892, 896 (App. 1990) (reviewing court does not substitute its assessment of evidence for trial court's). The record contains ample evidence from which the juvenile court could find by a preponderance that terminating Melissa's parental rights would serve the best interests of Cameron and Andrew by allowing them to be adopted by their stepmother. We have no basis for disturbing the court's finding.

¶15 Next, Melissa contends the state violated her constitutional right to substantive due process by failing to make a good-faith effort to preserve the family by providing therapeutic services to her and her sons before the juvenile court ordered her parental rights terminated. The record does not show, and Melissa does not assert, that she presented this issue to the juvenile court. Her failure to raise the issue below—or to assert fundamental error as a putative vehicle for obtaining appellate review[3]—prevents her from urging this argument for the first time on appeal. *See Exxon Shipping Co. v. Baker*, ___ U.S. ___, 128

[3]In the criminal context, "[a] defendant who fails to object at trial forfeits the right to obtain appellate relief except in those rare cases that involve 'error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005), *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984); *see also State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (failure to allege fundamental error on appeal waives argument). *But see State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error it discovers).

S. Ct. 2605, 2617-18 (2008) (substantive due process claim can be waived if not raised below); *Trantor v. Fredrikson*, 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994) ("[A]bsent extraordinary circumstances, errors not raised in the trial court cannot be raised on appeal."); *see also Romero v. Sw. Ambulance*, 211 Ariz. 200, n.3, 119 P.3d 467, 471 n.3 (App. 2005) (doctrine of fundamental error used sparingly, if at all, in civil cases).

¶16 Even had Melissa asserted this argument in the juvenile court, the state has no obligation to provide reunification services to parties in a private severance action, and none of the legal authorities Melissa cites hold otherwise. *See generally* § 8-533(B)(8) (requiring "agency responsible for the care of the child" to have made "diligent effort to provide appropriate reunification services"); § 8-533(B)(11)(b) (same). We therefore reject her contention that the state had an obligation to provide therapy to her and her sons before the court could grant Wade's private petition to terminate her parental rights.

¶17 Finally, Melissa contends Wade failed "to provide clear and convincing evidence of [her] unfitness under A.R.S. § 8-533(B)(1)." Again Melissa fails to support her contention with relevant legal authority: there is no requirement in § 8-533(B)(1) that an abandoning parent must also be proven unfit. Moreover, despite the phrasing of her argument heading, the substance of Melissa's final argument is that Wade failed to prove she had abandoned the children because he "took active steps to prevent [her] from finding [them]" and prevented her "from seeing, and therefore having a relationship with, [them]." The juvenile court explicitly rejected this contention in its minute entry, and evidence in the record supports its finding.

¶18 In her reply brief, Melissa attempts to raise as an additional issue whether the juvenile court erred in "refus[ing] to allow any testimony regarding how [Wade] and his wife treated the maternal Grandmother in connection with her visitation with [the] children." But we will not address issues that have been raised for the first time in a reply brief. *Nelson v. Rice*, 198 Ariz. 563, n.3, 12 P.3d 238, 242 n.3 (App. 2000) (party waives argument by failing to raise it in opening brief); *Wasserman v. Low*, 143 Ariz. 4, n.4, 691 P.2d 716, 721 n.4 (App. 1984) ("An issue first raised in a reply brief will not be considered on appeal."); *see also* Ariz. R. Civ. App. P. 13(c) ("[A] reply brief . . . shall be confined strictly to rebuttal of points urged in the appellee's brief."); Ariz. R. P. Juv. Ct. 106(A) ("ARCAP 13 and 14 shall apply in appeals from final orders of the juvenile court . . . .).

¶19 Because none of the issues raised on appeal warrants reversal, we affirm the juvenile court's order terminating Melissa's parental rights to Cameron and Andrew.

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JOSEPH W. HOWARD, Chief Judge

CONCURRING:

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PHILIP G. ESPINOSA, Presiding Judge

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PETER J. ECKERSTROM, Judge