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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

COURTNEY G., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY, STEPHANIE L., NICHOLAS L., and JENNIFER L., Appellees.	2 CA-JV 2010-0044 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. S19141399 and J16333600

Honorable Leslie Miller, Judge

AFFIRMED

Child Advocacy Clinic
By Paul D. Bennett, a clinical professor appearing under Rule 38(d), Ariz. R. Sup. Ct.
Tucson
Attorneys for Appellant

Terry Goddard, Arizona Attorney General
By Michelle R. Nimmo
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H O W A R D, Chief Judge.

¶1 Courtney G., mother of Stephanie, born December 2002, Nicholas, born December 2006, and Jennifer, born May 2008, challenges the juvenile court's order terminating her parental rights on the grounds of abuse and neglect, and prior removal of the children within eighteen months of their most recent out-of-home, court-ordered placement, pursuant to A.R.S. § 8-533(B)(2) and (11), respectively. She raises a number of issues, none of which merits reversal.

¶2 On appeal, we view the evidence and all reasonable inferences in the light most favorable to upholding the juvenile court's order. *See Manuel M. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 205, ¶ 2, 181 P.3d 1126, 1128 (App. 2008). So viewed, the evidence presented at the five-day, contested severance hearing established the following. This family has had a lengthy history of domestic violence. The children's father, Steban L., has a serious drinking problem and historically has become extremely violent towards Courtney when intoxicated. Each of the children had been adjudicated dependent in earlier proceedings; Stephanie had been adjudicated dependent twice before the dependency proceeding that resulted in the termination order on review.

¶3 The juvenile court had dismissed the most recent prior dependency proceeding in April 2009, upon motion by the Arizona Department of Economic Security (ADES), and had found ADES had "made reasonable efforts to achieve reunification." But, about a month later, Steban lost his job and started drinking again, and he and Courtney began arguing. After the couple argued during the morning of July 3, Courtney stayed in another room of the house. At some point during the day, then thirteen-month old Jennifer was severely, almost fatally, injured. Stephanie, then six, reported Steban had been drinking during the day, and she had seen him pick Jennifer up and drop her onto a tile floor more than once. Although Courtney testified at the severance hearing

she did not know Steban had been drinking on July 3, Steban told a Pima County Sheriff's detective, that he had been drinking all that day, that Courtney knew he had been drinking, and that the two had argued because of his drinking. And Courtney had stayed in another room, even though she knew Steban became violent when under the influence of alcohol.

¶4 Courtney has never disputed the severity of Jennifer's injuries, characterizing them on appeal as "catastrophic." The hospital records establish that when paramedics arrived at the house, Jennifer had to be resuscitated, "was in agonal respirations and an attempt was made to intubate" her but she vomited. She was diagnosed as having sustained a "closed head injury and subdural hematoma . . . most consistent with assault and abusive head injury." She sustained bilateral retinal hemorrhages and there was evidence of old and new physical trauma with bruises that were in various stages of healing. She was placed on a ventilator; at that time medical personnel believed she had "a high risk of mortality" because of the injury. Although her condition had improved by the time of severance hearing, the residual effects of the injuries she sustained are as catastrophic as the injuries themselves. Among other residual conditions, Jennifer is now blind, and her specialized medical and personal needs are extensive. Nicholas and Stephanie were traumatized by what occurred.

¶5 Courtney and Steban were arrested shortly after Jennifer was taken to the hospital. ADES took custody of the children and on July 8, filed a dependency petition and a petition to terminate Courtney's rights based on neglect or abuse and the fact that the children had been placed in an out-of-home placement within eighteen months of their return to the parents from a prior out-of-home placement. ADES subsequently filed a motion to discontinue reunification services, pursuant to A.R.S. §8-846(B)(1)(d), and

(B)(1)(f), which the juvenile court granted. The evidence at the five-day severance hearing established Steban had been drinking for weeks preceding the day Jennifer was severely injured in July 2009 and that Courtney knew or at the very least should have known he had been drinking during that time. Courtney knew that, based on his past behavior, he became extremely violent towards her when he drank. She knew or at least should have known he was drinking on July 3 and decided to stay away from him, sequestered in another room in the house, while the children were left with Steban.

¶6 Ruling from the bench on the last day of the hearing, the juvenile court granted ADES's petition and terminated Courtney's parental rights. Although the court's minute entry of that date contains minimum factual findings, the court made extensive findings on the record, the relevant portions of which are noted below as we address Courtney's arguments on appeal.

¶7 Before the juvenile court may terminate parental rights, it must find clear and convincing evidence establishes at least one of the statutory grounds for terminating the parent's rights exists and that a preponderance of the evidence establishes severing the parent's rights is in the child's best interests. *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶¶ 1, 41, 110 P.3d 1013, 1014, 1022 (2005). We do not reweigh the evidence presented to the juvenile court because, as the trier of fact, that court "is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts." *Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 4, 100 P.3d 943, 945 (App. 2004). Consequently, we will affirm the order if reasonable evidence supports the factual findings upon which it is based. *See Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002).

¶8 Courtney contends there was insufficient evidence to support the juvenile court's termination of her rights on the ground of abuse or neglect. She asserts there was "no evidence that [she] willfully abused Jennifer," Steban is the one who had injured the child, and she "did not see or hear [Steban] inflict this terrible head injury." She adds that ADES did not argue below that she should have known Steban was abusing Jennifer, but had seemed to assert her rights could be severed because she knew the children were at risk of being abused by their alcoholic father. She maintains such assertions are legally insufficient and contends § 8-533(B)(2) requires proof that she should have known Steban actually was abusing Jennifer or one of the other children. Courtney argues the court applied an incorrect standard as well, by finding she would have known about the abuse had she not sequestered herself in a different room in the house.

¶9 Section 8-533(B)(2) provides that a parent's rights may be severed if that "parent has neglected or willfully abused a child." "Neglect" is defined as "[t]he inability or unwillingness of a parent . . . to provide [a] child with supervision . . . or medical care if that inability or unwillingness causes unreasonable risk of harm to the child's health or welfare." A.R.S. § 8-201(22). "Abuse" is defined as "the infliction or allowing of physical injury, impairment of bodily function or disfigurement . . . caused by the acts or omissions of an individual having care, custody and control of a child." § 8-201(2). "Serious physical injury" is defined, inter alia, as an injury that is diagnosed by a medical doctor and that creates a reasonable risk of death, serious or permanent disfigurement, serious physical pain, or serious impairment of health. § 8-201(30).

¶10 At the end of the severance hearing, the juvenile court noted Courtney had been involved in a prior dependency and found, inter alia, as follows:

> During that time, she developed a safety plan . . . in case the father resumed his drinking [and] . . . she had indicated that

> she understood that the father posed a risk to the children if he resumed drinking; . . . she knew the father to be an alcoholic and . . . believed that his recent unemployment would cause him to resume drinking. She believed he was associating with a friend with whom he would drink; that . . . he had been absent from the house intermittently for weeks prior to the incident and in conversation had shown signs and symptoms of intoxication.
>
> She indicated to officers that she had caught him drinking the weeks prior to the incident in question, but was unable to leave the home due to lack of resources and difficulty of the location of her home and no help from other sources, although this was part of the safety plan that had been developed should the father resume drinking.
>
> The Court finds that the mother had either believed or had reason to believe that the father had resumed drinking and left the children in the father's control, that while she was in the residence and the date in question she failed to have contact with the father despite . . . believing that he may have resumed drinking, that . . . the father . . . had indicated to officers that he had been drinking heavily on the day in question; that he had, in fact–and testified that he had, in fact, been drinking on that date.

¶11 The juvenile court further noted that six-year-old Stephanie knew her father had been drinking that day; she had observed he was showing signs of intoxication, and was "naughty and mean as he is when he is drinking beer." The court added that Courtney had "relied on the probation department and Court to protect her children," that she should have been aware that Steban had been drinking on that day, and that she had neglected to protect Jennifer from horrific abuse.

¶12 The record contains reasonable evidence to support these findings, which we adopt. *See Jesus M.*, 203 Ariz. 278, ¶ 16, 53 P.3d at 207-08. Contrary to Courtney's arguments on appeal, the juvenile court's comments reflect that it applied the correct standards for determining whether to sever Courtney's parental rights and considered all

of the relevant and required issues. The court terminated her rights primarily based on Courtney's neglect of the children, which had exposed them—Jennifer in particular—to a serious risk of harm and on the serious, almost fatal, harm Jennifer suffered as a result. To the extent there were conflicts in the evidence, it was for the juvenile court to resolve them and, in doing so, to decide whether to accept Courtney's testimony as true or to reject it. *See id.* ¶ 4.

¶13 Based on the evidence, the juvenile court readily could have found Courtney knew or should have known Steban had been drinking and that the children were at risk if left in his care. Included in the evidence that showed Courtney was aware of the risk to herself as well as the children was the testimony of a Child Protective Services caseworker that Courtney had written "a safety plan for herself and the children indicating that she would leave the father if she even suspected that he had began drinking . . . [and] [t]hat she would take the children with her to a shelter." Courtney admitted to psychologist Ralph Wetmore II that Steban's use of alcohol posed a risk to her and her children. And at the end of June, Courtney had told Steban's probation officer that she suspected Steban was drinking again.

¶14 The record established Courtney had stayed away from Steban when she knew or at the very least should have known he was drinking and when she knew that in this intoxicated state the children were at substantial risk for abuse. The record also showed Courtney understood and anticipated there was a direct correlation between Steban's drinking and extremely violent conduct. Yet she allowed the children to remain in another part of the house with him when she knew or should have known he was drinking and, consequently, they were at great risk. She did not execute the safety plan

that was designed to protect her and her children, ignoring the risk and thereby neglecting them instead.

¶15 We also reject Courtney's argument that the evidence did not establish that the harm Jennifer suffered was foreseeable. The record shows Courtney knew Steban became extremely violent and she left her children with him nevertheless. There were indications that the children may have been abused before the July 2009 incident. Reasonable evidence supported the juvenile court's implicit finding of a foreseeable risk that Steban would become increasingly intoxicated once he started drinking and would harm the children.

¶16 Similarly, we reject Courtney's suggestion that ADES was required to provide reunification services unless it could establish her neglect had been of "such a quality that it cannot be cured," and that the juvenile court violated her constitutional rights when it excused ADES from providing further reunification services. As ADES points out in its answering brief, § 8-846 contains no such requirement. And, because Courtney is raising the argument that the statute was not applied in a constitutional manner for the first time on appeal, we need not address it. *See Marco C. v. Sean C.*, 218 Ariz. 216, ¶ 6, 181 P.3d 1137, 1139-40 (App. 2008).[1] Early on in the case, the court

[1]When termination is sought pursuant to § 8-533(B)(2), nothing in the statute requires the juvenile court to consider "the availability of reunification services to the parent and the participation of the parent in these services." § 8-533(D). Even if we were to agree with the court's conclusion in *Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, ¶¶ 32-34, 42, 971 P.2d 1046, 1053-54 (App. 1999), that there is a constitutional obligation to provide reunification services when termination is based on mental illness or substance abuse, we are not convinced those same principles apply when termination is based on neglect or abuse. *See Bobby G. v. Ariz. Dep't of Econ. Sec*., 219 Ariz. 506, ¶ 11, 200 P.3d 1003, 1007 (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, ¶ 15, 993 P.2d 462, 467 (App. 1999) (ADES not required to

excused ADES from providing further services, pursuant to § 8-846(B)(1)(d) and (f), based on the abuse and neglect of the children and the fact that ADES had provided a panoply of reunification services in past dependency proceedings. Courtney did not appear at the hearing and she did not ask the court to reconsider its ruling after that hearing. She therefore has waived this argument.

¶17 In any event, Courtney's reliance on *Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, 971 P.2d 1046 (App. 1999), to support her argument that she was erroneously deprived of reunification services, is unavailing. In *Mary Ellen C.*, the court recognized ADES need not provide services that would be futile, emphasizing it must "undertake measures with a reasonable prospect of success." *Id.* at ¶ 34. *See also Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, ¶ 18, 83 P.3d 43, 50 (App. 2004) (even if offered, reunification services futile if parent could not complete them by time of severance hearing). There have been three dependency proceedings involving this family. The family was provided a plethora of services in the past. When the last dependency was dismissed, Courtney had agreed to a safety plan that she did not follow when she suspected Steban began to drink again. The juvenile court did not err in excusing ADES from providing additional services or in terminating Courtney's parental rights, notwithstanding the absence of such services in the most recent dependency proceeding.

¶18 Although we need not address Courtney's challenge to the sufficiency of the evidence to support the termination of her parental rights pursuant to § 8-533(B)(11)(d), *see Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, ¶ 12, 995 P.2d

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provide reunification services when parent has abandoned child). *See also James H. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 1, ¶ 9, 106 P.3d 327, 329 (App. 2005) (finding no constitutional requirement to provide reunification services when termination based on incarceration, which such services "could [not] ameliorate").

682, 685 (2000), we reject it summarily. There was an abundance of evidence establishing the elements of the statute and, again, ADES properly was excused from providing additional reunification services. The record supported the juvenile court's implicit finding that Courtney was "unable to discharge parental responsibilities." § 8-533(B)(11)(d). And she admitted at the severance hearing that she would be unable to care for Jennifer, given her special needs.

¶19 We also reject Courtney's argument that the juvenile court erred when it denied her request for a change of judge as a matter of right. *See* Ariz. R. P. Juv. Ct. 2(B). She may only challenge such a ruling by special action. *See Taliaferro v. Taliaferro*, 186 Ariz. 221, 221-23, 921 P.2d 21, 21-23 (1996); *see also Denise S. v. Corsaro*, 213 Ariz. 369, ¶ 1, 142 P.3d 245, 246 (App. 2006). Although Courtney concedes in her reply brief that this issue must be raised by special action, she contends for a variety of reasons, including the constitutional rights involved in a termination proceeding, that we should review this issue nevertheless. We are not persuaded.

¶20 Finally, we reject Courtney's suggestion that the juvenile court erred in finding termination of her parental rights was in Stephanie's best interests because the court did not consider Stephanie's wishes. This argument is waived because it has not been developed fully either on appeal or in the court below. *See* Ariz. R. Civ. App. P. 13(a)(6); Ariz. R. P. Juv. Ct. 106(A); *Trantor v. Frederickson*, 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994) (claim of error not raised in trial court generally will not be addressed when raised for first time on appeal). In any event, an abundance of evidence established termination of Courtney's parental rights to all three children was in their best interests. And counsel for the children pointed out during closing arguments that Stephanie wanted to be returned to Courtney. We can assume the court considered this,

together with all of the relevant evidence, in deciding termination of Courtney's rights was in the children's best interests.

¶21 Courtney has not sustained her burden of establishing the juvenile court erred when it terminated her parental rights to her children. We therefore affirm the court's order.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge