

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

FEB 15 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THOMAS W.,)	2 CA-JV 2012-0108
)	DEPARTMENT A
Appellant,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 28, Rules of Civil
ARIZONA DEPARTMENT OF ECONOMIC)	Appellate Procedure
SECURITY, WYATT W., and SPENCER W.,)	
)	
Appellees.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. JD19564900

Honorable K.C. Stanford, Judge

AFFIRMED

Curtiss Law, LLC
By Rebecca Curtiss

Tucson
Attorney for Appellant

Thomas C. Horne, Arizona Attorney General
By Laura J. Huff

Tucson
Attorneys for Appellee Arizona
Department of Economic Security

HOWARD, Chief Judge.

¶1 Thomas W. appeals from the juvenile court's order terminating his parental rights to his sons Wyatt W., born in May 2007, and Spencer W., born in September 2008, on the grounds of abuse pursuant to A.R.S. § 8-533(B)(2) and time in court-ordered, out-of-home care pursuant to § 8-533(B)(8)(c). Thomas argues that due process required the juvenile court "to find [there is] no less intrusive alternative . . . to terminating a parent's fundamental right to care, custody and control of their children" and, therefore, because Arizona's "current statutory scheme . . . favor[s] severance over guardianship," termination of his parental rights violated his due process rights.

¶2 In 2010, Child Protective Services (CPS), a division of the Arizona Department of Economic Security (ADES), removed the children from Thomas's and his then-spouse Angelina A.'s care based on allegations of child abuse. ADES filed a dependency petition, and the juvenile court found the children dependent as to both parents. The children were placed with their paternal grandparents, although Thomas was permitted to live in the grandparents' home. Thomas ultimately pleaded guilty to child abuse and was placed on probation. He was permitted unsupervised visitation with the children after he had moved out of the grandparents' home. In December 2011, after Angelina's son Patrick A.-S. alleged Thomas had choked him, the court changed the case plan to a concurrent plan of family reunification and severance and adoption. In March 2012, the court changed the plan to severance and adoption and ordered ADES to file a petition to terminate the parents' rights to the children. In that motion, ADES alleged

that termination of Thomas's parental rights was warranted on the grounds of abuse and time in court-ordered, out-of-home care.¹

¶3 Thomas signed consents to adoption for Wyatt and Spencer, and filed a cross-motion to terminate his parental rights based on relinquishment pursuant to § 8-533(B)(7). On the first day of the termination hearing, Thomas asked the juvenile court to “accept the relinquishments” but “not make a ruling on them or . . . a finding” until after Angelina's termination hearing had concluded. The court therefore deferred ruling on Thomas's cross-motion. Thomas later informed the Foster Care Review Board that he did not wish to relinquish his rights, but nonetheless testified at the termination hearing that he believed it would be in the children's best interests to be placed with their grandparents and that he was “willing to give up [his] parental rights.” Following the completion of the hearing, the court did not rule on Thomas's cross-motion, noting in its order that Thomas, during closing arguments,² had “asked to withdraw” that motion and “proceed to adjudication on the issue of severance.” The court terminated Thomas's parental rights to Wyatt and Sullivan, finding ADES had proven all grounds alleged and termination was in the children's best interests.

¶4 On appeal, Thomas does not contest the juvenile court's findings and instead argues Arizona's statutory scheme improperly “favors severance over the less

¹ADES also moved to terminate Angelica's parental rights to Patrick, Wyatt, and Spencer. The juvenile court granted that motion, but she is not party to this appeal.

²The closing arguments were not transcribed.

intrusive alternative of guardianship” and that preference violates due process because a parent has a “fundamental liberty interest” in parenting his or her children, making termination of parental rights a “last resort.” Thus, he asserts, we must reverse the order terminating his parental rights and remand the case to the juvenile court “with instructions to consider guardianship as a less intrusive alternative to severance.”

¶5 Thomas did not raise this argument in the juvenile court. In the civil context, a claim not raised below generally may not be raised on appeal. *See Cullum v. Cullum*, 215 Ariz. 352, n.5, 160 P.3d 231, 234 n.5 (App. 2007). In addressing the termination of parental rights, however, this court has reviewed claims not raised below for fundamental error “[b]ecause of the constitutional ramifications inherent in termination proceedings.” *Monica C. v. Ariz. Dep’t of Econ. Sec.*, 211 Ariz. 89, ¶ 23, 118 P.3d 37, 42 (2005). To establish such error, the complaining party ““must show that the error complained of goes to the foundation of his case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial.”” *Id.* ¶ 24, quoting *State v. Henderson*, 210 Ariz. 561, ¶ 24, 115 P.3d 601, 608 (2005). Additionally, the party must show prejudice resulting from that error. *Id.* ¶ 25.

¶6 Thomas does not address on appeal his failure to raise this argument below, much less argue that we may review for fundamental error. And, even assuming fundamental error review is appropriate here, although Thomas asserts he has a “fundamental liberty interest” in retaining his parental rights, he does not otherwise suggest any error here was fundamental as defined by our supreme court. *See State v.*

Moreno-Medrano, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (failure to allege fundamental error on appeal waives argument); *see also Henderson*, 210 Ariz. 561, ¶¶ 20, 27, 115 P.3d at 607, 609 (burden rests on defendant to “establish . . . that fundamental error exists”); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (insufficient argument on appeal waives claim).

¶7 Furthermore, Thomas has made no effort to demonstrate resulting prejudice. Before a juvenile court may order ADES to file a motion to terminate a parent’s rights to his or her children, it is required to determine whether termination, adoption, permanent guardianship, “or some other permanent legal status is the most appropriate plan for the child.”³ A.R.S. § 8-862(B)(1). And, although Thomas did not provide this court with a transcript of the hearing that led the court to adopt a case plan of severance and adoption, we presume the court made the determination required by § 8-862(B) before doing so. *See State v. Ramirez*, 178 Ariz. 116, 128, 871 P.2d 237, 249 (1994) (trial court presumed to know and follow law); *State v. Zuck*, 134 Ariz. 509, 513, 658 P.2d 162, 166 (1982) (“Where matters are not included in the record on appeal, the missing portions of the record will be presumed to support the action of the trial court.”). Even were the juvenile court required to presume, as Thomas argues, that guardianship is the preferable disposition, Thomas does not suggest there would be any basis for the

³For this reason, we reject ADES’s argument that Thomas lacks standing to raise this claim because he did not request that the children be appointed a guardian; although he could have done so, *see* A.R.S. § 8-872, he is not required to do so for the court to consider whether that option is appropriate, *see* § 8-862(B).

court to conclude that appointing a guardian for the children, in lieu of terminating Thomas's parental rights, is the appropriate result here.⁴ *See Henderson*, 210 Ariz. 561, ¶¶ 20, 27, 115 P.3d at 607, 609 (burden rests on defendant to establish prejudice resulting from fundamental error; prejudice established by showing reasonable fact-finder "could have reached a different result" absent error). Accordingly, we do not address this argument further.⁵

⁴In any event, Thomas is incorrect that the statutory scheme "favor[s]" guardianship over severance. Although a juvenile court may not appoint a permanent guardian in lieu of terminating a parent's rights if severance is in the child's best interests, *see* A.R.S. § 8-871(A)(4), that requirement does not promote severance. It instead properly requires the court to evaluate which disposition is in the child's best interests—which is of at least equal, if not greater, importance than the parent's rights. *See Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, ¶ 11, 995 P.2d 682, 684 (2000) ("Severance of parental rights necessarily involves the consideration of fundamental, often competing, interests of parent and child."); *cf. Willie G. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 231, ¶ 21, 119 P.3d 1034, 1038 (App. 2005) (child's best interests "'primary consideration in a dependency case'"), *quoting Ariz. Dep't of Econ. Sec. v. Superior Court*, 178 Ariz. 236, 239, 871 P.2d 1172, 1175 (App. 1994). Although we agree a parent has a "fundamental liberty interest in the care, custody, and management of" his or her child, *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 24, 110 P.3d 1013, 1018 (2005), Thomas cites no authority—and we find none—suggesting that interest trumps the child's welfare. And the child clearly has an interest in the permanency available from severance and adoption—permanency that cannot be accomplished via guardianship because it is subject to revocation. *See* A.R.S. § 8-539 (order terminating parental rights permanently "divest[s] the parent and the child of all legal rights, privileges, duties and obligations with respect to each other"); A.R.S. § 8-873(A)(1) (order granting permanent guardianship may be revoked and custody returned to parent when "there is a significant change of circumstances" such as when "[t]he child's parent is able and willing to properly care for the child").

⁵We need not address ADES's argument that Thomas invited any error by filing, and then withdrawing during closing argument, a motion to relinquish his parental rights.

¶8 The juvenile court's order terminating Thomas's parental rights to Wyatt and Spencer is affirmed.

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

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Michael Miller
MICHAEL MILLER, Judge