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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

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ARIZONA DEPARTMENT OF ECONOMIC SECURITY,)	2 CA-JV 2013-0042
)	DEPARTMENT A
)	
Appellant,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 28, Rules of Civil
ANGELICA V., EDWARD L., and I.L.,)	Appellate Procedure
)	
Appellees.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. J180610

Honorable K. C. Stanford, Judge

VACATED AND REMANDED

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V Á S Q U E Z, Presiding Judge.

¶1 The Arizona Department of Economic Security (ADES) appeals from the juvenile court's order denying its petition to terminate Angelica V.'s and Edward L.'s parental rights to their daughter, I.L., born July 2012. ADES argues that, in light of the court's finding that termination of the parents' rights was warranted based on their willful abuse of two of their other children, the court erred by failing to find termination warranted on that ground as to I.L. ADES further asserts the court erred by failing to find that termination was in I.L.'s best interests. We vacate the court's order concluding ADES had not proven a statutory ground for termination as to I.L. and remand the case to the juvenile court for further proceedings.

¶2 Angelica and Edward are also the biological parents of J., born December 2007, K., born December 2008, and I., born August 2010. Both parents have an extensive history of involvement with Child Protective Services (CPS), a division of ADES, largely based on the parents' continuous domestic violence and child abuse. Edward's parental rights to J. and K. were terminated in 2010 on multiple grounds, including abuse, after he failed to attend the termination hearing. In September 2011, Edward reported to CPS that Angelica had been abusing J. and K. CPS also received additional reports alleging that Angelica had abused J. and K. and that Edward had beaten Angelica. Pursuant to ADES's motion, the juvenile court adjudicated J., K., and I.

dependent as to Angelica, and I. dependent as to Edward. In March 2012, however, the court dismissed the dependency.¹

¶3 In August 2012, CPS received additional reports that Angelica had abused J. A CPS specialist examined J. and found excessive bruising on her back and arms as well as facial lacerations. Angelica and J.'s maternal grandmother had attempted to cover the bruises with makeup. CPS took custody of the children. A later physical examination of the children additionally found multiple injuries on I.'s body; the examiner could not rule out physical abuse as the cause.

¶4 ADES filed a dependency petition alleging the four children were dependent as to Angelica, and that I. and I.L. were dependent as to Edward. Approximately two months later, ADES filed a petition to terminate Angelica's and Edward's parental rights on the grounds of neglect or abuse pursuant to A.R.S. § 8-533(B)(2) and, pursuant to § 8-533(B)(11), because the children had been returned to the parents' custody but subsequently removed and the parents are currently "unable to discharge . . . parental responsibilities." After a combined dependency and termination hearing, the juvenile court found all four children dependent as to Angelica, and I. and I.L. dependent as to Edward. The court found statutory grounds to terminate Angelica's parental rights to J. and K. pursuant to § 8-533(B)(2) and (B)(11) and found termination would be in their best interests. Upon finding that termination was in I.'s best interests,

¹The juvenile court granted Angelica's motion to dismiss the dependency, over ADES's objection, finding the "status of dependency no longer exists." The court noted the parents' dissolution of marriage case, and further found the children were "safe and secure with their mother and have been for at least the last ninety days."

the court terminated both parents' rights to her pursuant to § 8-533(B)(11). However, the court denied the petition as to I.L. because it did not find a statutory basis for termination; consequently, the court made no best interests findings as to her. The court set a concurrent case plan of reunification and severance and adoption for I.L. This appeal followed.

¶5 On appeal, ADES first argues that, because the juvenile court found both parents had abused J. and K. pursuant to § 8-533(B)(2), its determination that no statutory ground for termination existed as to I.L. was clearly erroneous. We first note that neither Angelica nor Edward has filed an answering brief. Thus, if ADES has raised a debatable issue, we may “treat the lack of a response as a confession of error and reverse on that basis.” *In re Pinal Cnty. Juv. Action No. S-389*, 151 Ariz. 564, 565, 729 P.2d 918, 919 (App. 1986). A juvenile court may terminate a parent's rights only if it finds clear and convincing evidence of one of the statutory grounds for severance and a preponderance of evidence that termination of the parent's rights is in the child's best interests. A.R.S. §§ 8-533(B), 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005). “[W]e view the evidence and reasonable inferences to be drawn from it in the light most favorable to sustaining the [juvenile] court's decision.” *Jordan C. v. Ariz. Dep't of Econ. Sec.*, 223 Ariz. 86, ¶ 18, 219 P.3d 296, 303 (App. 2009) (citation omitted).

¶6 Pursuant to § 8-533(B)(2), “the juvenile court may properly sever a parent's rights if the parent has ‘neglected or willfully abused a child.’” *Mario G. v. Ariz. Dep't of Econ. Sec.*, 227 Ariz. 282, ¶ 13, 257 P.3d 1162, 1165 (App. 2011), quoting § 8-

533(B)(2). “[A]buse” includes “serious physical or emotional injury or situations in which the parent knew or reasonably should have known that a person was abusing or neglecting a child.” § 8-533(B)(2). As ADES correctly points out, § 8-533(B)(2) “permits termination of parental rights to a child who has not been abused or neglected, upon proof that the parents abused or neglected another child or permitted another to abuse or neglect another child.” *Mario G.*, 227 Ariz. 282, ¶ 15, 257 P.3d at 1165, *citing Linda V. v. Ariz. Dep’t of Econ. Sec.*, 211 Ariz. 76, ¶ 14, 117 P.3d 795, 798 (App. 2005). However, in such circumstances, termination is appropriate only when ADES proves “a ‘constitutional nexus’ between the prior abuse and the risk of future abuse to a different child.” *Id.* ¶ 16. That nexus may exist when there is evidence of recent abuse of another child, and the circumstances contributing to that abuse continue to exist. *See id.* ¶¶ 19-20.

¶7 Two premises of ADES’s argument are flawed. First, ADES contends the juvenile court found “by clear and convincing evidence” that Edward had abused or neglected the children, either directly or by failing to protect them from Angelica’s abuse. Although we agree with ADES that there was evidence that could have supported it, the court made no such finding. Edward’s parental rights to J. and K. had already been terminated and his parental rights to I. were terminated pursuant to § 8-533(B)(11), which does not require a finding of abuse or neglect.

¶8 Second, ADES suggests the juvenile court’s ruling is inconsistent because it made “an implicit finding that a sufficient nexus existed between [the parents’] abuse

of [J.]” and “the likelihood that the parents would abuse [K.]” But ADES misapprehends the court’s ruling—it identified evidence that Angelica had abused K. directly. Thus, it was not necessary for the court to evaluate whether a sufficient nexus existed in order to terminate Angelica’s parental rights to K. Therefore, the court’s finding that Angelica’s parental rights to J. and K. should be terminated on abuse grounds is not inherently inconsistent with its conclusion that no statutory ground for termination existed as to I.L.

¶9 The remainder of ADES’s argument is essentially a request that we reweigh the evidence on appeal, which we will not do. *See Lashonda M. v. Ariz. Dep’t of Econ. Sec.*, 210 Ariz. 77, ¶ 13, 107 P.3d 923, 927 (App. 2005) (appellate court does not “reweigh the evidence presented”); *Jesus M. v. Ariz. Dep’t of Econ. Sec.*, 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002) (“The juvenile court, as the trier of fact in a termination proceeding, is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and make appropriate findings.”). The juvenile court could have determined there was an insufficient nexus between the abuse of J. and K. and potential abuse of I.L. Evidence in the record suggests that Angelica’s abuse was focused primarily on J. because she resembled Edward’s side of the family, and the evidence of abusive behavior towards K. and I. was not overwhelming. Although the evidence clearly would support a finding that Angelica would continue to abuse her children and that Edward would be unable or unwilling to protect them from abuse, the evidence is not such that the juvenile court was required to make that finding.

¶10 As we noted above, in light of the parents’ failure to file answering briefs, we may conclude they have confessed error if the issue is debatable. *See Pinal Cnty. No. S-389*, 151 Ariz. at 565, 729 P.2d at 919. There is no question that whether the trial court erred in concluding ADES had not demonstrated a statutory ground for termination is a debatable issue. But, in our discretion and in light of the fundamental parental rights at stake, we are hesitant to conclude as a matter of law that the evidence in this record required the court to terminate the parents’ rights to I.L. *See Kent K.*, 210 Ariz. 279, ¶ 24, 110 P.3d at 1018 (“Parents possess a fundamental liberty interest in the care, custody, and management of their children.”). Thus, we decline to apply the confessed-error rule to that aspect of ADES’s argument.

¶11 That determination, however, does not end our inquiry. ADES argues in the alternative that we should remand the case to the juvenile court “with directions to apply the proper legal standards”—that is, to address whether termination was warranted because of Edward’s and Angelica’s previous abuse of their other children and whether a sufficient nexus existed between that abuse and potential abuse of I.L. ADES argued below, albeit in passing, that it had only to prove abuse or neglect as to one child for termination to be warranted pursuant to § 8-533(B)(2). Much of the court’s ruling would seem to support a finding not only that Angelica and Edward had willfully abused or neglected several of the children, either directly or by failing to protect them, as well as a finding that a sufficient nexus existed between the abuse of J. and K. and the potential abuse of I.L. But the court nonetheless did not expressly address the nexus requirement

or make any findings suggesting it had considered whether or not the abuse of J. and K. was germane to its determination whether the parents' rights to I.L. should be terminated.

¶12 A juvenile court is not required to make findings explaining its reasons for rejecting a motion to terminate a parent's rights. See *Ariz. Dep't of Econ. Sec. v. Matthew L.*, 223 Ariz. 547, ¶ 10, 225 P.3d 604, 606-07 (App. 2010). We presume that the court knows the law, applies it correctly, and considers the evidence before it. See *State v. Trostle*, 191 Ariz. 4, 22, 951 P.2d 869, 887 (1997) (trial judges presumed to know law and to apply it correctly in making decisions); *Fuentes v. Fuentes*, 209 Ariz. 51, ¶ 18, 97 P.3d 876, 880-81 (App. 2004) (appellate court presumes trial court considered evidence presented before making decision); cf. *In re William L.*, 211 Ariz. 236 ¶ 7, 119 P.3d 1039, 1041 (App. 2005) (juvenile court not required to expressly state applicable burden of proof, as appellate court will assume court used proper standard). But, in light of the strong evidence supporting termination of the parents' rights to I.L. in this case on the basis of abuse and the court's failure to address this basis for termination, we agree there is at least a debatable question whether the court applied the wrong standard in evaluating ADES's petition for termination of parental rights as to I.L. And instructing the court to reconsider the matter in light of that standard balances the fundamental rights of the parents and the compelling state interest in protecting children from abusive and neglectful parents. See *In re Maricopa Cnty. Juv. Action No. JD-6123*, 191 Ariz. 384, 391-92, 956 P.2d 511, 518-19 (App. 1997). Accordingly, in our discretion, we conclude the parents have conceded the court applied the incorrect legal standard in evaluating

whether their parental rights to I.L. should be terminated on the ground of abuse. In light of that determination, we decline to address ADES’s additional claim that the court erred in “fail[ing] to find” that termination was in I.L.’s best interests. The factors relevant to that determination may have changed in the intervening months.

¶13 For the reasons stated, the juvenile court’s order finding ADES had not proven a statutory ground for termination of Angelica’s and Edward’s parental rights to I.L. is vacated. We remand the case to the juvenile court for further proceedings consistent with this decision.

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ Michael Miller

MICHAEL MILLER, Judge