

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

DERRELL P.,
Appellant,

v.

ARIZONA DEPARTMENT OF ECONOMIC SECURITY AND M.W.,
Appellees.

No. 2 CA-JV 2013-0110
Filed March 3, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Civ. App. P. 28(c); Ariz. R. P. Juv. Ct. 103(G).

Appeal from the Superior Court in Pima County
No. S203923
The Honorable Geoffrey Ferlan, Judge Pro Tempore

AFFIRMED

COUNSEL

Armstrong Law Office, Tucson
By Bradley J. Armstrong
Counsel for Appellant

Thomas C. Horne, Arizona Attorney General
By Laura J. Huff, Assistant Attorney General, Tucson
Counsel for Appellee Arizona Department of Economic Security

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Pima County Office of Children's Counsel
By Sara E. Goldfarb, Tucson
Counsel for Appellee M.W.

MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Presiding Judge Vásquez and Judge Brammer concurred.

M I L L E R, Judge:

¶1 Derrell P. appeals from the juvenile court's order terminating his parental rights to his daughter, M.W.,¹ born in August 2010, based on Derrell's failure to file a notice of claim of paternity as required by A.R.S. § 8-106.01 and based on abandonment. A.R.S. § 8-533(B)(1), (6). Derrell argues that A.R.S. §§ 8-106, 8-106.01, and 8-533(B)(6) are unconstitutional, that there was insufficient evidence to support the court's abandonment finding because the court had failed to order a social study, that insufficient evidence supported the court's best interest finding, and that the court should have "bifurcated" his proceeding from that of A.W. "because the testimony in Mother's case tainted the case against Derrell." M.W. and the Arizona Department of Economic Security (ADES) argue in favor of the termination order. For the reasons that follow, we affirm.

¶2 To terminate parental rights pursuant to § 8-533(B), a juvenile court must find the existence of at least one of the statutory grounds for termination enumerated by that section and "shall also consider the best interests of the child." Although statutory grounds for termination must be proven by clear and convincing evidence, only a preponderance of the evidence is required to establish that

¹The parental rights of M.W.'s mother (A.W.) were also terminated. She is not a party to this appeal.

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severance will serve the child's best interests. *See* A.R.S. §§ 8-533(B), 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005). We will affirm an order terminating parental rights unless we can say as a matter of law that no reasonable person could find the essential elements proven by the applicable evidentiary standard. *Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, ¶¶ 9-10, 210 P.3d 1263, 1265-66 (App. 2009). And we view the facts in the light most favorable to sustaining the court's findings. *Christina G. v. Ariz. Dep't of Econ. Sec.*, 227 Ariz. 231, ¶ 13, 256 P.3d 628, 631 (App. 2011).

¶3 Derrell and A.W. were nineteen and fourteen, respectively, when M.W. was conceived. Derrell ceased all contact with A.W. shortly after she informed him she was pregnant. Despite A.W.'s repeated attempts to obtain support from Derrell, he refused to provide any. Child Protective Services (CPS), a division of ADES, took custody of M.W. from her mother in June 2011. ADES alleged A.W. was unemployed, without a means to support M.W., abusing substances, and suffered from mental illness. A.W. lied to ADES about M.W.'s paternity because she did not want Derrell to get into trouble for engaging in sexual intercourse with a minor. As a result, ADES named "John Doe" as a fictitious father who had failed to establish paternity or a parental relationship. The juvenile court found M.W. dependent as to John Doe.

¶4 In December 2012, M.W., through counsel, filed a petition to terminate John Doe's parental rights based on abandonment, failure to file a notice of claim of paternity, and time-in-care grounds. Derrell contacted ADES in January 2013, stating he had heard on the street or through social media about M.W. and that he might be her father. After paternity testing confirmed him to be M.W.'s father, the termination petition was amended to substitute Derrell in place of John Doe. Although Derrell began participating in services, including visitation, he did not provide M.W. with any support. After a contested severance hearing, the juvenile court found that termination of Derrell's parental rights to M.W. was warranted on abandonment grounds and due to his failure to file a notice of claim of paternity; the court further found termination was in M.W.'s best interests.

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¶5 Derrell raises numerous claims for the first time on appeal. He first argues that various statutes are unconstitutionally vague, specifically that §§ 8-106 and 8-106.01 are “vague, inconsistent, and contradictory” and that § 8-533(B)(6) improperly “bars an unmarried father from filing a Title 25 paternity action” and impermissibly “shifts and lowers the burden of proof required in a termination action.” He also argues for the first time that the juvenile court was required to bifurcate his termination proceeding from that of M.W.’s mother.

¶6 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). That waiver applies equally to constitutional claims. *Englert v. Carondelet Health Network*, 199 Ariz. 21, ¶ 13, 13 P.3d 763, 768 (App. 2000). Rather than imposing the waiver rule, however, in addressing the termination of parental rights 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.

¶7 Because Derrell has not argued fundamental error nor attempted to establish any resulting prejudice, the constitutional arguments are waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 7, 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). Accordingly, we do not address them further.

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¶8 Derrell next claims the juvenile court erred by terminating his parental rights based on a finding of abandonment pursuant to A.R.S. § 8-533(B)(1) because the court had waived the social study required by A.R.S. § 8-536(A). Pursuant to that statute, a court must, upon the filing of a termination petition, “order that the department, an agency or another person selected by the court conduct or cause to be conducted a complete social study and that a report in writing of such study be submitted to the court before a hearing.” *Id.* The report “shall include the circumstances of the petition, the social history, the present condition of the child and parent, proposed plans for the child and other facts pertinent to the parent-child relationship,” as well as “a specific recommendation and the reasons as to whether or not the parent-child relationship should be terminated.” *Id.*

¶9 A juvenile court may waive the social study requirement “if the court finds that to do so is in the best interest of the child.” § 8-536(C). As we understand his argument, Derrell suggests the court’s decision to do so rendered the evidence of abandonment insufficient. He asserts without elaboration that various CPS reports admitted into evidence did not adequately address his relationship with M.W. But even if Derrell is correct that those reports are insufficient, he ignores the remaining evidence in the record concerning his relationship with M.W. and does not assert that evidence was insufficient to support the court’s abandonment finding. Moreover, he cites no authority suggesting that the court’s decision to waive a social study, standing alone, warrants relief on appeal. In short, Derrell has failed to present a meaningful argument that he is entitled to relief; accordingly, he has waived the argument, and we do not address it further. *See Bolton*, 182 Ariz. at 298, 896 P.2d at 838.

¶10 Derrell also complains that the juvenile court’s best-interests finding was not supported by sufficient evidence.² He

² Derrell claims without support or elaboration that the standard of preponderance of the evidence for best interests “violates the constitutional requirement that termination be proven by clear and convincing evidence.” He fails to support or develop

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observes that the case manager testified that visits had been appropriate and that nothing had occurred that would give her concerns about his ability to parent. Thus, he claims, her opinion that termination was in M.W.'s best interests was "inconsistent" with that testimony. As Derrell acknowledges, however, the case manager further testified that M.W. had been in out-of-home placement for twenty-two months,³ that her foster parents wished to adopt her, and that she was adoptable. And the case manager stated M.W. was comfortable and stable in her current placement and in need of the stability that termination of Derrell's parental rights would provide because it would make her eligible for adoption.

¶11 Derrell argues "it is irrelevant whether a child has a stronger attachment to their foster parents, whether foster parents are more 'nurturing,' or whether foster parents might be more capable or better parents than a natural parent." He relies primarily on our statement in *Audra T. v. Ariz. Dep't of Econ. Sec.*, 194 Ariz. 376, ¶ 5, 982 P.2d 1290, 1291 (App. 1998), that the juvenile court does not "weigh alternative placement possibilities to determine which might be better."

¶12 *Audra T.* does not support Derrell's argument. There, we addressed whether the state had "to rule out possible placements with biological relatives before considering other placements" and concluded it did not. *Id.* We expressly stated that the availability of adoptive parents favored severance and that the juvenile court should consider whether a current placement was meeting the child's needs. *Id.* We did not suggest that in making the best-

this argument and we thus do not address it. *See Bolton*, 182 Ariz. at 298, 896 P.2d at 838.

³Derrell suggests the juvenile court "rejected" this as a basis for its best-interests determination. It did not. In the portion of the court's ruling to which Derrell refers, the court determined that severance was not justified on time-in-care grounds pursuant to § 8-533(B)(8)(c) because "the circumstances bringing the child into care hav[e] been remedied." It did not suggest that the time M.W. had been in foster care otherwise was irrelevant.

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interests determination, the court was prohibited from evaluating how the child would benefit from being with potential placements in comparison to being placed with his or her natural parent. *Id.* Indeed, Derrell’s proposed interpretation would be inconsistent with Arizona law – a best-interests determination requires the court to evaluate “how the child would benefit from a severance or be harmed by the continuation of the relationship.” *In re Maricopa Cnty. Juv. Action No. JS-500274*, 167 Ariz. 1, 5, 804 P.2d 730, 734 (1990). And we find unavailing his reliance on *Santosky v. Kramer*, 455 U.S. 745 (1982). The Court there addressed the minimum burden of proof required for termination and did not discuss what evidence might be relevant to a best-interests determination under Arizona law. *See id.* at 769-70.

¶13 Derrell next argues the juvenile court erred in finding, relevant to best interests, that M.W.’s behavioral issues were “the result of introducing [M.W.] to [Derrell].” We first observe that the court’s finding was qualified – it noted only that M.W.’s behavioral issues “appear[ed]” to result from her introduction to Derrell and “an increase of visits between them.” Although Derrell identifies some evidence that the behavioral changes also could be attributed at least in part to her mother’s inconsistent visitation, the court’s finding nonetheless is supported adequately by the record. Both M.W.’s therapist and her case manager noted that M.W.’s behavioral problems had started when Derrell began visitation with her, and we must resolve all inferences in favor of upholding the court’s ruling. *See Christina G.*, 227 Ariz. 231, ¶ 13, 256 P.3d at 631.

¶14 For the reasons stated, we affirm the juvenile court’s order terminating Derrell’s parental rights to M.W.