

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

ROSARIO B.,
Appellant,

v.

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

No. 2 CA-JV 2013-0116
Filed January 28, 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NOT FOR PUBLICATION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. Sup. Ct. 111(c); Ariz. R. Civ. App. P. 28(c).

Appeal from the Superior Court in Pima County
No. JD196322
The Honorable Peter W. Hochuli, Judge Pro Tempore

AFFIRMED

COUNSEL

Peter G. Schmerl, P.C., Tucson
By Peter G. Schmerl
Counsel for Appellant

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Thomas C. Horne, Arizona Attorney General
By Cathleen E. Fuller, Assistant Attorney General, Tucson
Counsel for Appellee Arizona Department of Economic Security

MEMORANDUM DECISION

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

V Á S Q U E Z, Presiding Judge:

¶1 Rosario B. appeals from the juvenile court's order terminating her parental rights to her daughter, A.M.,¹ born in January 2012, on time-in-care grounds pursuant to A.R.S. § 8-533(B)(8)(c) and severance of another child within two years for the same cause pursuant to § 8-533(B)(10). Rosario argues the court erred in finding the Arizona Department of Economic Security (ADES) had provided reasonable reunification services. She further claims termination of her parental rights to A.M. was not based on the same cause as the previous severance of her parental rights to another child, A., and § 8-533(B)(10) thus does not permit termination. We affirm.

¶2 We view the evidence in the light most favorable to upholding the juvenile court's order. *Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, ¶ 10, 210 P.3d 1263, 1266 (App. 2009). In February 2011, Rosario's daughter A. was removed from Rosario's custody based on her history of substance abuse and mental illness.² Rosario relinquished her rights to A. in January 2012.

¹A.M.'s father's parental rights were also terminated. He is not a party to this appeal.

²Rosario also had her parental rights to five other children terminated in California on abuse grounds.

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¶3 ADES later removed A.M. from Rosario's care shortly after her birth and filed a dependency petition citing Rosario's prior history, untreated mental health issues, and lack of housing and stability. Rosario admitted the allegations, and the juvenile court adjudicated A.M. dependent. ADES continued to provide Rosario with services, as it had during the proceedings related to A. In February 2013, ADES filed a motion to terminate Rosario's parental rights pursuant to § 8-533(B)(8)(c) and (B)(10). After a four-day, contested-severance hearing, the juvenile court terminated Rosario's parental rights to A.M., finding ADES had proven both grounds for termination and termination was in A.M.'s best interests.

¶4 To terminate parental rights, a juvenile court must find the existence of at least one of the statutory grounds for termination enumerated in § 8-533(B) and "shall also consider the best interests of the child." *Id.* Although statutory grounds for termination must be proven by clear and convincing evidence, only a preponderance of the evidence is required to establish that 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.*, 221 Ariz. 92, ¶¶ 9-10, 210 P.3d at 1265-66.

¶5 Rosario argues that ADES failed to tailor the reunification services it provided to account for her cognitive impairment and thus failed to "ma[k]e a diligent effort to provide appropriate reunification services" as required by § 8-533(B)(8). ADES complies with this requirement if it provides the parent "with the time and opportunity to participate in programs designed to help [him or] her become an effective parent." *In re Maricopa Cnty. Juv. Action No. JS-501904*, 180 Ariz. 348, 353, 884 P.2d 234, 239 (App. 1994).

¶6 We agree with ADES that Rosario has waived this argument. Rosario argued for the first time at the end of the contested-severance hearing that ADES had failed to provide appropriate services despite having ample opportunity to have

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raised the issue previously. *See Bennigno R. v. Ariz. Dep't of Econ. Sec.*, 233 Ariz. 345, ¶ 19, 312 P.3d 861, 865 (App. 2013); *Christina G. v. Ariz. Dep't of Econ. Sec.*, 227 Ariz. 231, n.8, 256 P.3d 628, 632 n.8 (App. 2011).

¶7 At the time Rosario admitted A.M. was dependent as to her, reunification services had been made available to her for at least a year (because of her other child) and there had been multiple dependency review or permanency hearings. At each of those hearings, the juvenile court found ADES was making reasonable efforts to achieve the reunification case plan by offering various services. After the court determined A.M. was dependent as to Rosario, it held at least three more dependency review or permanency hearings and again found at each hearing that ADES was continuing to provide reasonable services, even after it filed a motion to terminate Rosario's parental rights.

¶8 Nothing in the record suggests Rosario asserted that the services being provided to her were inadequate or did not properly account for her cognitive limitations. She did not request an evidentiary hearing to litigate the services issue, nor did she seek review of the court's dependency finding. *See Ariz. R. P. Juv. Ct. 58(D)* (permitting party to request evidentiary hearing on contested issues at review hearing); *Lindsey M. v. Ariz. Dep't of Econ. Sec.*, 212 Ariz. 43, ¶ 7, 127 P.3d 59, 61 (App. 2006) (juvenile court's order issued pursuant to dependency review appealable).

¶9 Rosario claims, however, that she "has not waived the issue in this case" because *Christina G.* is not "mandatory or even persuasive authority" and *Bennigno* is distinguishable. We agree with Rosario that the court in *Christina G.* ultimately did not ground its final decision on waiver grounds because the state did not raise that argument. *See 227 Ariz. 231, n.8, 256 P.3d at 632 n.8.* But that does not render the court's discussion meaningless, as Rosario seems to suggest. The waiver principles examined in *Christina G.* and *Bennigno* are hardly unique in Arizona jurisprudence.

¶10 The purpose of the waiver rule is to afford the trial court and the opposing party "the opportunity to correct any

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asserted defects,” whether legal or factual. *Trantor v. Fredrickson*, 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994). Thus, a party is required “to object to inadequate findings at the trial court level so that the court will have an opportunity to correct them, and failure to do so constitutes a waiver.” *MacMillan v. Schwartz*, 226 Ariz. 584, ¶ 39, 250 P.3d 1213, 1221 (App. 2011), quoting *John C. Lincoln Hosp. & Health Corp. v. Maricopa Cnty.*, 208 Ariz. 532, ¶ 23, 96 P.3d 530, 538 (App. 2004). Similarly, a criminal defendant must object to a defective indictment before trial to permit the state to “remedy any duplicity by filing a new indictment.” *State v. Anderson*, 210 Ariz. 327, ¶ 17, 111 P.3d 369, 378 (2005). Rosario’s failure to bring the issue to the court’s attention deprived it of an opportunity to evaluate the services ADES had been providing and, if necessary, to order it to supplement or alter them to better suit the needs of Rosario and A.M.

¶11 Rosario is correct that some of the facts related to waiver in *Bennigno* differ from those presently before us. In that case, we found waiver because the parent had not only failed to raise a services issue “during the course of the dependency,” but also when the juvenile court “denied ADES’s first motion to terminate the parents’ rights.” *Bennigno*, 233 Ariz. 345, ¶ 19, 312 P.3d at 865-66. And we further found waiver because the parent had “maintained during closing arguments that the sole issue for the court to decide was whether termination of his rights was in the children’s best interests.” *Id.* What Rosario has not explained, however, is why those differences render a waiver finding inappropriate here. She does not suggest the juvenile court had insufficient information before it at the dependency review hearings, nor that she lacked sufficient information to raise the issue at those hearings.³ And the court in *Bennigno* did not suggest it was describing a minimum threshold for finding waiver.⁴

³The standard of proof for a dependency adjudication is by a preponderance of the evidence. A.R.S. § 8-844(C)(1). Conversely, termination requires clear and convincing evidence. A.R.S. § 8-537(B). But Rosario does not suggest this distinction is relevant to determining whether she has waived the argument that ADES did not provide sufficiently tailored reunification services. Nor do we

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¶12 For the foregoing reasons, the juvenile court's order terminating Rosario's parental rights to A.M. is affirmed.

see any pertinent distinction—there does not appear to be any factual question about the nature of the services provided.

⁴Because we conclude that Rosario has waived her only argument that termination was not warranted pursuant to § 8-533(B)(8)(c), we need not address her argument related to § 8-533(B)(10). See *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, ¶ 27, 995 P.2d 682, 687 (2000).