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AUG - 9 2007
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

BILLIE JO M.,	)	
	)	2 CA-JV 2007-0004
Appellant,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
ARIZONA DEPARTMENT OF	)	Rule 28, Rules of Civil
ECONOMIC SECURITY, JOSAPHINE	)	Appellate Procedure
M., CODY M., and KACEE M.,	)	
	)	
Appellees.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 17451600

Honorable Nanette M. Warner, Judge

AFFIRMED

Peter G. Schmerl — Tucson
Attorney for Appellant

Terry Goddard, Arizona Attorney General
By William G. Hornung — Tucson
Attorneys for Appellee Arizona
Department of Economic Security

Doris Reed — Tucson
Attorney for Appellees Cody,
Josaphine, and Kacee M.

V Á S Q U E Z, Judge.

¶1 Billie Jo M. appeals from the juvenile court's December 2006 order terminating her parental rights to her three children: Josaphine (Josie), now seven; Cody, now five; and Kacee, now three years old. After a three-day trial, a jury found by clear and convincing evidence that termination of Billie Jo's parental rights was justified on grounds of abandonment, *see* § 8-533(B)(1), and the length of time the children had spent in court-ordered, out-of-home placement, *see* § 8-533(B)(8)(a). The jury also found by a preponderance of the evidence that termination of Billie Jo's parental rights was in the best interests of each of her children.

¶2 On appeal, Billie Jo contends there was insufficient evidence to support the jury's determination that the Arizona Department of Economic Security (ADES) had made "diligent efforts to provide appropriate reunification services." She also claims her counsel had been ineffective, and counsel for the children had been ineffective. We affirm.

Background

¶3 Viewed in the light most favorable to sustaining the jury's verdicts, *cf. In re Maricopa County Juvenile Action No. JD-5312*, 178 Ariz. 372, 376, 873 P.2d 710, 714 (App. 1994) (bench trial), the record establishes the following course of events.

¶4 In November 2004, Billie Jo and her husband were using drugs on a daily basis, and after being evicted from their residence, they voluntarily left their three children at a shelter. In May 2005, Billie Jo retrieved the children. Some weeks later, Billie Jo left the children with her mother and sister while she and her husband prepared to move into an apartment in Phoenix. When Billie Jo's mother was detained out of town for more than a

week, Billie Jo's sister became overwhelmed by the childcare responsibilities that had fallen to her and returned the children to the shelter. Concerned about the children's safety, a shelter employee took them to the Tucson Police Department, and on July 8, 2005, the Child Protective Services (CPS) division of ADES took temporary custody. The children were placed in foster care in November 2005.

¶5 ADES's original goal was reunification of the family, but Billie Jo failed to perform the steps outlined in her case plan. She did not participate in mandatory random urinalysis, substance-abuse assessment, or parenting classes, and frequently failed to attend scheduled visitations with her children. Although Billie Jo now complains that ADES failed to provide a psychiatric examination, CPS caseworker Lori Leon testified that she had referred Billie Jo for a psychological evaluation on four different occasions, but Billie Jo never kept any of the appointments. At the time of trial, Josie and Kacee were living in one foster home and Cody in another. Both foster families intended to pursue adoption and were committed to having the children maintain contact with each other and their maternal grandmother.

¶6 During trial, a juror had asked what outcome the children wanted, and the children's attorney attempted to answer that question in closing argument. She told the jury Cody and Kaycee were too young to communicate directly but that "Josie is different." She continued:

> She's verbal but she's only six. If you ask her, Josie will talk about two moms. Her biological mom, whom she misses—and she'll tell you that she loves both of her moms. When we talked about the case, she talked about going home. But she

> also knows that her mother was supposed to do some things, and her mother hasn't done those things and she's sad about that.
>
> And then she'll tell you all about her home with the [foster family] and what she's doing and her friends. . . . She's having difficulty, in terms of loyalty, in terms of deciding, and that's why you don't have very young children making a decision like this. It's up to the adults in their lives to do what's best for them; to decide what is best for them and what is right for them at this point.

¶7 In addition to counsel appointed to represent the children, the court appointed a guardian ad litem "to protect the[ir] interest[s]." Ariz. R. P. Juv. Ct. 40, 17B A.R.S. The guardian ad litem opined at trial that termination of Billie Jo's parental rights was in the children's best interests.

Diligent Efforts

¶8 On review of a decision terminating parental rights, we will accept the jury's findings of fact "unless no reasonable evidence supports those findings" and will affirm a severance order unless it is clearly erroneous. *Jennifer B. v. Ariz. Dep't of Econ. Sec.*, 189 Ariz. 553, 555, 944 P.2d 68, 70 (App. 1997). Proof of a single statutory ground is sufficient for termination. *See Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, ¶ 27, 995 P.2d 682, 687 (2000). If we can affirm on any one ground, we need not address arguments pertaining to any other ground. *Id.*

¶9 Billie Jo relies generally on *Mary Ellen C. v. Arizona Department of Economic Security*, 193 Ariz. 185, ¶ 32, 971 P.2d 1046, 1052-53 (App. 1999), in arguing that ADES failed to satisfy its constitutional duty to provide Billie Jo "with the time and

opportunity to participate in programs designed to improve [her] ability to care for the child[ren]." Specifically, she contends the state had "never assessed [her] mental health" and had never "made a referral for a psychiatric evaluation." In its response, ADES argues that the jury's verdict on the ground of abandonment obviates the need to address this issue. *See Michael J.*, 196 Ariz. 246, ¶ 27, 995 P.2d at 687. It cites *Toni W. v. Arizona Department of Economic Security*, 196 Ariz. 61, ¶ 9, 993 P.2d 462, 465 (App. 1999), for the proposition that a "reasonable efforts" determination may not be required before parental rights are terminated on the ground of abandonment. And, the state argues, "to the extent that [the] Mother's claim constitutes a constitutional challenge to the juvenile court's authority to sever on the abandonment ground before first finding that ADES provided her psychiatric services, she has waived it by failing to first raise it below," citing, inter alia, *Trantor v. Frederickson*, 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994) (absent extraordinary circumstances, errors not raised in trial court cannot be raised on appeal). Billie Jo has not filed a reply.

¶10 Although § 8-533(B)(8)(a) requires a finding that ADES had "made a diligent effort to provide appropriate reunification services" before terminating parental rights based on the length of time the children had spent in court-ordered, out-of-home placement, there is no similar statutory requirement before parental rights are severed on the ground of abandonment. *See* § 8-533(B)(1); *Toni W.*, 196 Ariz. 61, ¶ 9, 993 P.2d at 465. The jury returned verdicts severing Billie Jo's parental rights on each of these grounds, but she does not specify which of the jury's verdicts she challenges on appeal. We agree with the state

that, to the extent Billie Jo's appeal can be read as a constitutional challenge to the jury's verdict on the abandonment ground, she has forfeited this argument, absent fundamental error, by failing to raise it at trial. *See Bradshaw v. State Farm Mut. Auto. Ins. Co.*, 157 Ariz. 411, 420, 758 P.2d 1313, 1322 (1988). The jury was instructed on the elements of abandonment as codified in § 8-533(B)(1), and Billie Jo never argued at trial that these jury instructions were incomplete or that the jury should also have been required to determine the adequacy of services offered to Billie Jo before reaching a verdict based on abandonment.

¶11 On appeal, Billie Jo has neither addressed her failure to raise this issue below nor argued that her omission should be excused to prevent fundamental error. Nor has she made any effort to distinguish *Toni W.*, in which Division One of this court held that, under the facts of that case, a mother "was not entitled, based on constitutional due process principles, to require ADES to provide her with reunification services before seeking severance of her rights on the statutory ground of abandonment." 196 Ariz. 61, ¶ 15, 993 P.2d at 467. "Failure to argue a claim usually constitutes abandonment and waiver of that claim," *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989), and we find such waiver here. *Cf. State v. Moody*, 208 Ariz. 424 n.11, 94 P.3d 1119, 1154 n.11 (2004) (mere citation to case authority in passing without development of argument results in waiver of issue).

Ineffective Assistance of Counsel

¶12 Division One of this court has recently held that "ineffective assistance of counsel in termination proceedings may constitute reversible error." *Donald W., Sr. v. Ariz. Dep't of Econ. Sec.*, 215 Ariz. 199, ¶ 25, 159 P.3d 65, 72 (App. 2007). For the purpose of this appeal, we will assume, without deciding, that this is a correct statement of the law. *See, e.g., In re Santa Cruz County Juvenile Dependency Action Nos. JD-89-006 and JD-89-007*, 167 Ariz. 98, 101, 804 P.2d 827, 830 (App. 1990) ("Assuming, without deciding, that [ineffective assistance of counsel claim] is properly raised in the context of a dependency proceeding, we find no basis for reversal.").

¶13 Billie Jo argues her own counsel was unprepared for trial and was ineffective in failing to object when counsel for the children argued that their best interests were served by severance of Billie Jo's parental rights. She also maintains she has standing to claim the children's attorney was ineffective in failing to represent Josie's expressed preference by suggesting that severance was in the children's best interests.

Ineffective Assistance of Billie Jo's Counsel

¶14 Billie Jo devotes a mere five sentences in her opening brief to her claim that her counsel was unprepared for trial and that his performance had been ineffective. Her claim of ineffective assistance fails because she has not established any deficient performance by her counsel that deprived her of a fair trial or due process. *See Donald W.*, 215 Ariz. 199, ¶ 31, 159 P.3d at 74 (ineffective assistance of counsel found in severance case; "counsel's performance was so deficient the parent was deprived of an opportunity to be heard in adversarial proceedings" and therefore denied due process); *see also Strickland v.*

Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984) (ineffective assistance of counsel in criminal case requires proof that counsel's objectively unreasonable conduct deprived defendant of fair trial).

¶15 Billie Jo first complains that her counsel had been unprepared because, on the first day of trial, he reported to the court that his young daughter had just been released from hospital with a broken femur and requested a brief continuance to permit him to attend to family concerns. He made clear to the court, however, that the basis for his request was "entirely personal" and that he was prepared for trial. He told the court he had arranged to participate in at least the morning session of the first day of trial, and the court and the parties agreed that the proceedings could be adjourned after jury selection if counsel's situation required accommodation. By the time the court re-convened after lunch, Billie Jo's counsel reported that his personal concerns had been resolved; family had offered to help his wife, and his daughter was doing well.

¶16 Next, Billie Jo contends her counsel had been ineffective in not offering into evidence a letter that Billie Jo had written to her children, using the letter only to impeach a CPS caseworker's testimony. But this appears to have been a tactical decision, and Billie Jo presents no evidence or argument to the contrary. "[D]isagreements in trial strategy will not support a claim of ineffective assistance of counsel, provided the challenged conduct had some reasoned basis." *State v. Nirschel*, 155 Ariz. 206, 208, 745 P.2d 953, 955 (1987); *see also Donald W.*, 215 Ariz. 199, ¶ 29, 159 P.3d at 73 (same). Billie Jo also maintains that counsel was ineffective because he could not say, on the first day of trial, whether one of the

witnesses he intended to call had been convicted of a felony. But this lack of information had no effect on his examination of the witness the following day. And the record does not clearly support Billie Jo's suggestion that counsel was ineffective in failing to review final jury instructions.[1]

¶17 Billie Jo's final allegation is that "counsel never objected as children's counsel apparently stated her own position regarding best interests rather than representing her clients themselves." We agree that much of the closing argument made by counsel for the children was subject to objection on the ground, among others, that counsel was testifying. While it may be, as children's counsel argues here, that she accurately represented her impressions of Josie as a child who was ambivalent about returning home, counsel's impressions were not evidence, and no evidence had been admitted at trial to support such conclusions in argument.[2]

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[1]When the court inquired about objections to final jury instructions, Billie Jo's counsel stated that he had looked "through most of them" and had no objection. The court then offered counsel additional time to review the instructions, and counsel responded, "I'll take the break and just let you know, but I'm pretty confident." Apart from her general allegation that counsel was unprepared, Billie Jo does not contend that any particular jury instruction was objectionable.

[2]Because the record contains no evidence about Josie's wishes, we are unable to consider whether, as Billie Jo argues, counsel for the children failed to perform within the ethical guidelines for representation of children. Moreover, this issue is not before us. *Cf. In re Wolfram*, 174 Ariz. 49, 53, 847 P.2d 94, 98 (1993) (ineffective assistance of counsel and violation of ethical rules are separate inquiries). We note that E.R. 1.14, Ariz. R. Prof'l Conduct, Ariz. R. Sup. Ct. 42, 17A A.R.S., which addresses an attorney's duty to a client with diminished capacity, does not create a "bright-line" rule, but provides "the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client" and further permits the attorney to "take reasonably necessary protective action" when the client is at risk of harm and cannot adequately act in her own interest.

¶18 Nonetheless, a review of closing argument by Billie Jo's counsel convinces us that his decision to withhold an objection to this argument was a tactical one and not subject to a claim of ineffective assistance of counsel. *Nirschel*, 155 Ariz. at 208, 745 P.2d at 955. He argued:

> [The children's counsel] has made a good case for what the children basically requested. Josie wants to go home. She loves her mom. That's what she said . . . . If this is what Josie is saying, the eldest, then you also get to apply your judgment to what you think the younger kids are saying as well.

¶19 If Billie Jo's counsel had successfully objected to statements made by the children's counsel, this argument would not have been available to him. Billie Jo has failed to establish that her counsel was ineffective, that she was prejudiced by his conduct, or that she was deprived of an opportunity to be heard at trial. She is therefore not entitled to relief on the ground of ineffective assistance of counsel. *See Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064; *Donald W.*, 215 Ariz. 199, ¶ 29, 159 P.3d at 73.

<u>Ineffective Assistance of Counsel for the Children</u>

¶20 Billie Jo argues that counsel for the children was ineffective because she substituted her own assessment of best interests rather than abiding by Josie's "decisions concerning the objectives of representation." *See* Ariz. R. Prof'l Conduct, E.R. 1.2(a), 1.14(a), Ariz. R. Sup. Ct. 42, 17A A.R.S. As an initial matter, Billie Jo urges us to find she is entitled to allege her children's attorney was ineffective based on a comment in a California case that a "[parent] has standing to assert his child's right to independent counsel, because independent representation of the children's interests impacts upon the

[parent]'s interest in the parent-child relationship." *In re Elizabeth M.*, 283 Cal. Rptr. 483, 489 (Cal. Ct. App. 1991), *abrogated on other grounds by In re Tabitha W.*, 49 Cal. Rptr. 3d 565 (Cal. Ct. App. 2006). ADES counters Billie Jo's claim is foreclosed by our decision in *In re Pima County Severance Action No. S-113432*, 178 Ariz. 288, 291, 872 P.2d 1240, 1243 (App. 1994) (in severance action filed by minor children, father lacked standing to appeal court's failure to appoint independent counsel or guardians ad litem for children).

¶21 Billie Jo has not attempted to distinguish *Pima County No. S-113432*, and although it is not directly on point, we find that case persuasive here. We conclude that she may not assert on appeal in this termination proceeding the ineffectiveness of her children's counsel. As our supreme court has made clear, "[i]n a best interests inquiry . . . we can presume that the interests of the parent and child diverge because the court has already found the existence of one of the statutory grounds for termination by clear and convincing evidence." *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 35, 110 P.3d 1013, 1020 (2005). Billie Jo has cited no evidence to rebut this presumption. "[P]rudential concerns dictate the exercise of judicial restraint" in this case, where Billie Jo's claim that counsel for her children was ineffective may well conflict with the children's interests. *Bennett v. Napolitano*, 206 Ariz. 520, ¶ 15, 81 P.3d 311, 315 (2003); *see State v. B Bar Enters., Inc.*, 133 Ariz. 99, 101 n.2, 649 P.2d 978, 980 n.2 (1982) (standing not jurisdictional requirement, but matter of judicial restraint); *cf. Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 15, 124 S. Ct. 2301, 2311 (2004) (parent lacked standing to bring claim on

behalf of child in pledge of allegiance case, in part because "the interests of this parent and this child are not parallel and, indeed, are potentially in conflict").

Conclusion

¶22 We find no reversible error and no basis for remand. Accordingly, we affirm the juvenile court's order terminating Billie Jo's rights to Josie, Cody, and Kacee.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

_____
PETER J. ECKERSTROM, Presiding Judge

_____
PHILIP G. ESPINOSA, Judge