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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

JOSIAH E., *Appellant*,

v.

DEPARTMENT OF CHILD SAFETY, M.E., V.E., *Appellees*.

No. 1 CA-JV 20-0400
FILED 2-10-2022

Appeal from the Superior Court in Maricopa County

Nos. JS 18922
JD 33768

The Honorable Jo Lynn Gentry, Judge

AFFIRMED

APPEARANCES

Josiah E., Phoenix
Appellant

Arizona Attorney General's Office, Tucson
By Autumn Spritzer
Counsel for Appellee, Department of Child Safety

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MEMORANDUM DECISION

Presiding Judge Jennifer B. Campbell delivered the decision of the Court, in which Judge Samuel A. Thumma and Judge Angela K. Paton joined.

C A M P B E L L, Judge:

¶1 Josiah E. (Father) appeals from an order terminating his parental rights to two of his children. He contends that the juvenile court failed to apply the correct standard and burden of proof and that the out-of-home placement grounds for termination are unconstitutional as applied to a parent who is incarcerated awaiting trial. *See A.R.S. § 8-533(B)(8)(a), (c).* He also argues the court denied him due process by finishing the consolidated dependency and termination hearings virtually during the COVID-19 pandemic. Because these arguments are without merit, we affirm.

BACKGROUND¹

¶2 In January 2017, Blanca G. (Mother) was shot multiple times and killed while putting her children, Roman and Isabella, in her car. Roman was two-years old, and Isabella was three at the time of their mother's murder. The police quickly arrested Father, Mother's ex-husband, and the State charged him with murder and two counts of endangerment. Father has been in custody in the county jail ever since awaiting trial.²

¶3 Following the shooting, the Department of Child Safety (DCS) took the children into custody, conducted forensic interviews, and petitioned to adjudicate Roman and Isabella dependent regarding Father. About two months after the shooting, DCS petitioned to terminate Father's parental relationship with the children, alleging he had emotionally abused them by abusing Mother in the children's presence during their marriage. *See A.R.S. §§ 8-201(2), 8-533(B)(2).* Both the dependency and termination petitions also initially included allegations that Father had shot Mother in front of the children, but DCS later amended the petitions to remove these allegations. More than two years after DCS first petitioned for termination,

¹ We use pseudonyms to protect the children's identities.

² Father's criminal trial was originally scheduled to occur in October 2017 but has been continued numerous times.

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and after proceedings were continued several times, DCS amended its termination petition to allege the nine-months and fifteen-months out-of-home placement grounds as the only grounds for termination. *See A.R.S. § 8-533(B)(8)(a), (c).*

¶4 Throughout the majority of the proceedings, Father represented himself, with the aid of advisory counsel, including during the consolidated dependency and severance adjudication hearing. Part of the hearing was held in-person in March 2020, but because of the COVID-19 pandemic, the juvenile court concluded it would be prudent to finish the hearing virtually by video conference. Father moved to continue the hearing until it could be held safely in-person, but the court denied his motion. The court concluded the consolidated hearing virtually in September and October of 2020. Following the hearing, the juvenile court found Roman and Isabella dependent regarding Father and terminated Father's parental rights based on both of the out-of-home placement grounds. Father timely appealed the termination ruling.

DISCUSSION

¶5 Father's opening brief appears to raise three main issues: (1) whether the juvenile court erred by failing to find the grounds for termination by clear and convincing evidence, (2) whether the nine- and fifteen-months out-of-home placement grounds for termination in § 8-533(B)(8)(a) and (c) are unconstitutional as applied, and (3) whether the court violated his due process rights when it denied his motion to continue and held hearings by video conference during the COVID-19 pandemic.³ We review the juvenile court's termination ruling for an abuse of discretion, but we review the interpretation and application of § 8-533 as well as constitutional issues *de novo*. *Jessie D. v. Dep't of Child Safety*, 251 Ariz. 574, 579, ¶ 10 (2021); *Brenda D. v. Dep't of Child Safety*, 243 Ariz. 437, 442, ¶ 15 (2018).

³ Father also mentions this Court's lack of response to a request he made in his notice of appeal that we stay the termination order. After filing his notice of appeal, however, Father also filed a separate motion for a stay, which we denied. *See Josiah E. v. Dep't of Child Safety*, 1 CA-JV 20-0400 (Ariz. Ct. App. Feb. 9, 2021) (order denying motion to stay juvenile court's termination order). For these same reasons, and because it is now moot, we deny Father's original request.

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I. Burden of Proof

¶6 Father first contends the juvenile court's termination order denied him due process by failing to find parental unfitness by clear and convincing evidence. *See Kent K. v. Bobby M.*, 210 Ariz. 279, 285, ¶ 28 (2005) (citing *Santosky v. Kramer*, 455 U.S. 745, 769 (1982)). Father's contention misconstrues the court's ruling, however, which correctly described DCS's burden to prove the grounds for termination under § 8-533 "by clear and convincing evidence." *See A.R.S. § 8-537(B)*. The court specifically found DCS "ha[d] met its burden of proof" on the fifteen-months out-of-home placement ground for termination. *See A.R.S. § 8-533(B)(8)(c)*. The grounds for termination defined in § 8-533 equate with parental unfitness, so the court complied with its due-process obligations to Father. *See Sandra R. v. Dep't of Child Safety*, 248 Ariz. 224, 227, ¶ 12 (2020).

¶7 Because the court's findings were sufficient with respect to the fifteen-months ground, we need not address Father's arguments as to the nine-months ground, including his argument about the constitutionality of A.R.S. § 8-533(B)(8)(a). *See Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 3 (App. 2002) ("If clear and convincing evidence supports any one of the statutory grounds on which the juvenile court ordered severance, we need not address claims pertaining to the other grounds.").

II. Constitutionality of A.R.S. § 8-533(B)(8)(c)

¶8 Father next argues the fifteen-months out-of-home placement ground for termination of § 8-533(B)(8)(c) is unconstitutional as applied to a parent who is incarcerated while awaiting trial. He appears to contend that § 8-533(B)(8)(c) allows the juvenile court to terminate a parent's rights solely based on his incarceration, which he argues does not necessarily establish his unfitness as a parent. Father's argument relies on a misunderstanding of how a court must make the fifteen-months out-of-home placement determination prior to severance. A.R.S. § 8-533(B)(8)(c).

¶9 To order termination under § 8-533(B)(8)(c), the juvenile court must find (1) that the child has been in a qualifying out-of-home placement for fifteen months, (2) that DCS "has made a diligent effort to provide appropriate reunification services," (3) that "the parent has been unable to remedy the circumstances" that caused the out-of-home placement, and (4) "there is a substantial likelihood that the parent will not be capable of exercising proper and effective parental care and control in the near future." "The mere passage of time during which a child is in care, without more, is

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not a ground for terminating the parent's rights under § 8-533(B)(8)(c)." *Jordan C. v. Ariz. Dep't of Econ. Sec.*, 223 Ariz. 86, 98, ¶ 36 (App. 2009).

¶10 Thus, although a parent in custody awaiting a criminal trial may have little or no control over out-of-home placement, and little or no ability to remedy the circumstances causing it, termination under § 8-533(B)(8)(c) would not turn solely on the length of the parent's pre-trial incarceration. Instead, the juvenile court must necessarily consider whether the parent will be able to resume parenting responsibilities if released in the near future. *See, e.g., Lawrence T. v. Dep't of Child Safety*, 246 Ariz. 260, 261, ¶¶ 6-7 (App. 2019) (discussing juvenile court's finding that, despite dismissal of criminal charges, Father would need psychosexual evaluation and possible treatment before resuming parental responsibilities). In this case, the juvenile court found that, even if Father were to be acquitted, he would not "be in a position to safely and appropriately parent his children" because the damage to the parent-child bond "w[ould] take time and effort to overcome." The court did not terminate Father's parental rights solely because he is incarcerated. The court appropriately considered Father's incarceration as one factor in the multi-pronged analysis of the fifteen-months out-of-home placement ground for severance.

¶11 Father also contends § 8-533(B)(8)(c) is unconstitutionally vague because Title 8 does not define the phrases "diligent effort," "substantial likelihood," and "near future." "A statute is not void for vagueness simply because it does not define its terms," however. *Franklin v. Clemett*, 240 Ariz. 587, 595, ¶ 24 (App. 2016). Nor is it void "simply because it may be difficult to determine how far one can go before the statute is violated." *Berenter v. Gallinger*, 173 Ariz. 75, 81 (App. 1992). Instead, a statute is unconstitutionally vague only "if it fails to provide 'person[s] of ordinary intelligence a reasonable opportunity to know what is prohibited' and fails to contain explicit standards of application to prevent arbitrary and discriminatory enforcement." *State v. Poshka*, 210 Ariz. 218, 220, ¶ 5 (App. 2005) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)).

¶12 Father fails to cite any case holding this or similar language unconstitutionally vague, and the cases we can find undermine his contention. *See, e.g., Myers v. State*, 241 A.3d 997, 1010 (Md. Ct. Spec. App. 2020) (collecting cases holding "substantial risk" in child endangerment statutes to be sufficiently definite and not unconstitutionally vague). Moreover, Father does not explain how termination of his rights would have been improper under any reasonable interpretation of the phrases he challenges.

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¶13 In sum, Father has not shown that A.R.S. § 8-533(B)(8)(c) is unconstitutional as applied to a parent who has been incarcerated before trial, nor is it unconstitutionally vague.⁴

III. Denial of Motion to Continue During COVID-19 Pandemic

¶14 Father goes on to argue the juvenile court denied him due process by denying his motion to continue the trial until it could be held safely in person. After nearly three years of delays, the court set dates for the consolidated hearing in the first and fourth weeks of March 2020. The court held four days of the in-person hearing in the first week of March. But, by the second week of March, the COVID-19 pandemic was becoming a national and statewide crisis, necessitating emergency measures to “slow the spread” of the virus. *See Governor Doug Ducey, Declaration of Emergency *COVID-19**, OFFICE OF THE GOVERNOR DOUG DUCEY (Mar. 11, 2020), https://azgovernor.gov/sites/default/files/declaraton_0.pdf.

¶15 In mid-March 2020, the Arizona Supreme Court issued an administrative order suspending all in-person proceedings “to the greatest extent possible consistent with core constitutional rights.” Ariz. Supr. Ct. Admin. Order 2020-47 (Mar. 16, 2020). Through that order, and as supplemented and/or amended several times later, the Arizona Supreme Court encouraged judges to “[l]imit[] in-person courtroom contact as much as possible by using available technologies, including . . . teleconferencing [and] video conferencing.” *Id.* In compliance, the juvenile court vacated the remaining hearing days in March and reset them to proceed virtually by video conference in September 2020.

¶16 In September, Father moved to continue the hearing, citing concerns about his due-process rights and exposure to COVID-19. At that time, the Arizona Supreme Court continued to recommend limiting in-person proceedings “as much as possible.” *See* Ariz. Supr. Ct. Admin. Order 2020-143 (Aug. 26, 2020). Father’s COVID-related concerns included exposure to unmasked inmates in holding cells and on buses and exposure to detention officers who had been “in the ‘free world.’” At a status

⁴ Father also argues that § 8-533(8) is unconstitutionally overbroad “when it is applied to” a parent incarcerated before trial. Because Father does not develop his overbreadth argument or distinguish it from the as-applied challenge addressed above, he has waived it. *See Melissa W. v. Dep’t of Child Safety*, 238 Ariz. 115, 117-18, ¶ 9 (App. 2015) (failure to develop argument on appeal constitutes waiver).

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conference in mid-September, the court acknowledged the risk of transmission, but denied the motion to continue, finding it “d[id not] have any other options” but to proceed virtually “given the pandemic” and the fact that the matter had “been pending [for] over three years.”

¶17 Father did not have access to video conferencing equipment at the jail, so the court suggested he be transported to the courthouse so he could participate using a court-provided laptop. All other counsel and witnesses were to appear virtually; Father and his transportation officers were to be the only people in the courtroom. Deciding the risk of transport was too great, Father asked to appear by telephone from jail. The court advised Father that, if he appeared telephonically, he wouldn’t be able to see the demeanor of the witnesses or any exhibits that would be shown on screen. Father nevertheless insisted on appearing by telephone, explaining that he valued his life more than “some amenities that could be helpful in [his] defense.”

¶18 Accordingly, during the final four days of the hearing, Father appeared telephonically. All the other parties and witnesses appeared by video or by telephone. The court found that it was “able to assess the demeanor and voracity of witnesses even while they are appearing either telephonically or virtually,” and Father received copies of all exhibits offered by the State.

¶19 Although we typically review the denial of a motion to continue for an abuse of discretion, we review due process claims *de novo*. *Yavapai Cnty. Juv. Action No. J-9365*, 157 Ariz. 497, 499 (App. 1988); *Brenda D.*, 243 Ariz. at 442, ¶ 15. “The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal quotation marks omitted). To determine the extent of process due, we balance four factors: “the nature of the proceedings, the private interests at stake, the interests of the state, and the risk that the procedures used will lead to erroneous decisions.” *Maricopa Cnty. Juv. Action No. JD-561*, 131 Ariz. 25, 27 (1981) (citing *Lassiter v. Dep’t of Soc. Servs. of Durham Cnty.*, 452 U.S. 18 (1981)). Due process requirements are not “inflexible” and “universally applicable,” but rather they vary depending on the circumstances. *Dep’t of Child Safety v. Beene*, 235 Ariz. 300, 305, ¶ 11 (App. 2014).

¶20 Dependency and termination cases are civil proceedings that are to “be conducted as informally as the requirements of due process and fairness permit.” Ariz. R.P. Juv. Ct. 6; *see also Beene*, 235 Ariz. at 305-06, ¶ 12. The child’s best interests permeate, and indeed “are paramount,” in

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these proceedings. *Beene*, 235 Ariz. at 304, ¶ 9. Parents have a fundamental interest in the parent-child relationship, which weighs in favor of error-reducing procedures, but courts must balance this with the child's interest in permanence and security as well as the State's interest in protecting the child and reducing administrative burdens—all of which favor timely and efficient disposition. *See Kent K.*, 210 Ariz. at 286-88, ¶¶ 34-41; *see also Trisha A. v. Dep't of Child Safety*, 247 Ariz. 84, 91, ¶ 30 (2019) (stressing importance of timely resolution to provide child stability and permanency). In the context of a deadly pandemic, all of the parties had a heightened interest in conducting proceedings safely, including by using technology.⁵

¶21 To determine if conducting the proceedings virtually impermissibly increased the risk of error, we must consider the circumstances of the case, the procedural safeguards provided, and the probable value, if any, of additional procedural safeguards. *See Mathews*, 424 U.S. at 343; *see also Beene*, 235 Ariz. at 307, ¶¶ 17-18. While in-person proceedings may be preferable under normal circumstances, the COVID-19 pandemic presented extraordinary circumstances justifying a departure from normal court operations. *See Tracy D. v. Dep't of Child Safety*, 1 CA-JV 20-0204, 2021 WL 6139285, at *8, ¶ 35 (Ariz. App. Dec. 30, 2021); *see also* Admin. Order 2020-143. Conducting proceedings in-person could have increased the risk of transmission among the participants, jeopardizing the court's ability to resolve Father's case as well as other cases and contributing to the risk of community spread.

¶22 And here, holding the hearings by phone and video conference did not significantly increase the risk of erroneous results—the juvenile court was able to adequately assess the credibility and demeanor of the witnesses by listening to their testimony and observing them on-camera in real time. *See Anderson v. City of Bessemer*, 470 U.S. 564, 574-75 (1985) (discussing trial court's ability to assess credibility by demeanor, tone of voice, and contradictory evidence). Indeed, an in-person hearing would likely have presented similar challenges as credibility assessments might have been impaired to some degree by social distancing, mask-wearing requirements and other logistical limitations. *See Tracy D.*, 2021 WL 6139285, at *8, ¶ 35.

⁵ Notably, even before the pandemic, the juvenile court rules of procedure permitted "telephonic testimony or argument or video conferencing" in dependency and severance hearings. Ariz. R.P. Juv. Ct. 42.

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¶23 Most importantly, Father had a meaningful opportunity to participate during both the in-person and virtual portions of the hearing. He was able to call and cross-examine witnesses, to present and examine exhibits, and to testify on his own behalf.

¶24 Father contends “substantial testimony may have been lost” when hearing participants experienced technical difficulties with the video conference, but he cites no specific instances of participants having technical problems, nor does he explain how technical difficulties caused him prejudice. Our review of the record shows the court immediately addressed and remedied problems as they arose by halting testimony, asking for repetition, and troubleshooting connection issues as needed. Indeed, as reflected in this record, when Father experienced phone problems that could not be readily remedied, the court vacated the hearing and reset it for another day.

¶25 Father also complains that he was unable to confirm the identity or assess the demeanor of witnesses over the telephone. But parents have no confrontation rights in dependency and termination proceedings under the United States and Arizona constitutions. *Maricopa Cnty. Juv. Action No. JS-7499*, 163 Ariz. 153, 157 (App. 1989). Instead, due process requires that the trial court be able to assess the credibility and demeanor of the witnesses—something the juvenile court expressly found it was able to do here. *See generally Adams v. Indus. Comm'n of Ariz.*, 147 Ariz. 418, 420 (App. 1985).

¶26 Regardless, Father was able to cross-examine each of the State’s witnesses during the virtual hearings. And his inability to see them was largely the product of his choice to appear by telephone.⁶ Father seems to suggest he was presented with something akin to a Hobson’s choice, but he fails to explain how transportation to and from the courtroom would have resulted in significantly greater exposure to COVID-19 than that he already faced by being incarcerated inside the county jail.⁷

¶27 Considering the health risks posed by the pandemic and the fact that proceedings had been ongoing for more than three years, the juvenile court’s decision to finish the trial by video conference

⁶ The juvenile court permitted the children’s maternal aunt, who lives in Mexico, to testify by telephone about her relationship and experiences with Mother, Father, and the children.

⁷ In his motion to continue, Father expressed concerns about the spread of COVID-19 among inmates and detention officers in his jail.

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appropriately balanced Father's interest in accurate procedures, his children's interest in prompt disposition, and all of the participants' interest in conducting proceedings safely. *See Tracy D.*, 2021 WL 6139285, at *9, ¶ 40 (explaining that juvenile court may balance interests of parents, children, and State with nature of evidence expected and "length of time a case has been pending" in deciding how to conduct proceedings, "especially during a pandemic"). Thus, the court's denial of Father's motion to continue did not violate due process.

CONCLUSION

¶28 For the reasons above, we affirm the order terminating Father's parental rights as to Roman and Isabella.



AMY M. WOOD • Clerk of the Court
FILED: AA



Supreme Court

STATE OF ARIZONA

ROBERT BRUTINEL
Chief Justice

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TRACIE K. LINDEMAN
Clerk of the Court

August 29, 2022

RE: JOSIAH E. v DCS/M.E., V.E.
Arizona Supreme Court No. CV-22-0054-PR
Court of Appeals, Division One No. 1 CA-JV 20-0400
Maricopa County Superior Court No. JS18922
Maricopa County Superior Court No. JD33768

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on August 26, 2022, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

Chief Justice Brutinel and Justice Montgomery did not participate in the determination of this matter.

Tracie K. Lindeman, Clerk

TO:

Josiah Adam English III, T337357, Maricopa County Jail, Lower Buckeye
Autumn Spritzer
Joseph C Ramiro-Shanahan
Amy M Wood
ga