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Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 10/16/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JEFFREY C.) 1 CA-JV 12-0113
)
Appellant,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ARIZONA DEPARTMENT OF ECONOMIC) 103(G) Ariz. R.P. Juv.
SECURITY, SHANLEY C. and) Ct.; Rule 28 ARCAP)
DONOVAN C.,)
)
Appellees.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. JD21232

The Honorable Margaret R. Mahoney, Judge

AFFIRMED

John L. Popilek
Attorney for Appellant

Scottsdale

Thomas C. Horne, Arizona Attorney General
By Jamie R. Heller, Assistant Attorney General
Attorneys for Appellee Arizona Department of
Economic Security

Phoenix

T H O M P S O N, Judge

¶1 Jeffrey C. (Father) appeals from the juvenile court's order finding his daughter, Shanley, dependent. For the following reasons, we affirm the order of dependency.

FACTS AND PROCEDURAL HISTORY¹

¶2 Father received primary custody of Shanley and Donovan² in 2007 after he and Brenda Wunderlich (Mother) divorced. Shortly thereafter, Father married Amanda C. (Stepmother), who had one daughter named Lea,³ and the family moved to Arizona.⁴

¶3 In October 2011, Phoenix Police performed a welfare check on the home after Stepmother's mother had not been able to reach her. The police reported that there was an "overwhelming horrible stench coming from inside the house" of animal feces and urine, and that it was difficult to breathe. Trash and cat feces were all over the entire house, including all three of the children's bedrooms; and the kitchen counters were not visible due to the amount of dirty dishes, garbage, and cat feces that covered the counters. The toilet was completely clogged and

¹ We view the facts in the light most favorable to sustaining the juvenile court's ruling. *Lashonda M. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 77, 82, ¶ 13, 107 P.3d 923, 928 (App. 2005). We do not reweigh the evidence, and we defer to the fact-finder's resolution of any conflicts in the evidence. See *Vanessa H. v. Ariz. Dep't of Econ. Sec.*, 215 Ariz. 252, 257, ¶ 22, 159 P.3d 562, 567 (App. 2007); *Lashonda M.*, 210 Ariz. at 82, ¶ 16, 107 P.3d at 928.

² Born 1994 and 1996, respectively.

³ Stepmother and Lea are not parties to this appeal.

⁴ Mother moved to Florida.

over-filling, and the bathtub was "also filled with either human and/or cat feces and broken glass."⁵ Even the refrigerator had cat feces inside. All of the cat litter boxes were completely full and overflowing, and they appeared to have not been cleaned in several months. The police report stated that "this house was in no way suitable for human habitation especially children." Father told officers that he was sorry and embarrassed, and that he knew the living conditions were unhealthy and unacceptable. The police contacted Child Protective Services (CPS). Because of the home's condition, CPS removed the three children the same day. Father, Stepmother, and over twenty other people cleaned the home, installed new carpet and tile, and repainted. Father and Stepmother agreed to participate in Family Preservation services. CPS then inspected the home, determined that it was appropriate, and returned the children.

¶4 In December, before sending Family Preservation, CPS requested a welfare check to ensure that the children were doing well and that the home was appropriate. Father and Stepmother would not allow CPS caseworkers into their home. Arnoldo Lopez, a CPS caseworker, then returned to the home accompanied by police officers, but Father came to the door, refused to open it, and locked the deadbolt. He refused to let them see the

⁵ Only one out of the three bathrooms was in working order.

children and was verbally hostile towards the police. Lopez reported that the front blinds were open and he could clearly see trash and what looked like feces on the floor leading into the kitchen from the front room. He identified a strong smell of urine and other foul odors emanating from the closed door. Lopez opined that the home appeared "to be in a condition inconsistent with the safe and healthy living of children, and based on what was noted a removal would have been completed had we been granted access to the children and the home."

¶15 The Arizona Department of Economic Security (ADES) filed a dependency petition alleging that Shanley and Donovan were dependent children under Arizona Revised Statutes (A.R.S.) section 8-201(13) (2011), and that Father had neglected the children due to an unfit home that presents safety and health hazards.⁶ The children were not immediately removed because Father and Stepmother reported that they were out of state with relatives. CPS located the children at their local high school.

¶16 The court scheduled a dependency adjudication for May 8 and 10, 2012, from 1:30 to 4:30 p.m. All parties agreed that the time allowed would be sufficient. In April, the court granted ADES's motions to stop Father's and Stepmother's visits with the children because it found that continued visits would endanger the children. Shanley and Donovan had stated that they

⁶ ADES filed a separate dependency petition concerning Lea.

were upset by the parents' behavior at the previous visit and they did not want any more visits at that time.

¶17 At the outset of trial, the court warned the parties of the time constraints and that no time could be added to the trial, stating:

Well, two half days is what I was told was needed. So, just from the outset, beware that's what everybody said they needed to present the evidence. And that's as much time as I have; we are complete[ly] booked.

So, I don't want anybody to start out thinking, oh, she'll be able to add on another couple of hours. It's not there on the calendar right now for the foreseeable future.

Father's testimony took up the entire first day of trial, except for a few minutes discussing ADES's late disclosure of exhibits. At the end of the day, the court ordered the parties to confer to ensure that everyone was prepared for the second day of trial and no time would be wasted.

¶18 During the second day of trial, ADES asked that the court dismiss the dependency as to Donovan because it had determined that Mother was an appropriate parent for him. Over Father's objection, the court granted the motion and dismissed Donovan's dependency. Father's testimony concluded, Stepmother testified, and all parties presented closing arguments. Counsel for Stepmother then pointed out to the court that Father and

Stepmother had witnesses they were unable to call because the time allotted for the hearing had expired. The court responded:

[I]f you think trial's not progressing the way you would expect it to in order for you to get to your . . . witnesses, then somebody needs to speak up in time for the Court to deal with it. Because when . . . I hear that at 5:02, it's late . . . when we were due to finish at 4:30.

¶19 The court held that the grounds alleged had been proven by a preponderance of the evidence and found that Shanley was dependent as to Father. Shanley was placed on an independent living plan because she will turn eighteen in December. The court found that Father's description of the case as a "dirty house" case "drastically understates the evidence."

It went on to state:

When the Children were removed, the house was in a state of extreme clutter and filth. The house was strewn with cat feces from 23 cats, who appeared to have free run of the house, with numerous full litter boxes throughout the house The parents testified that they do not believe there was any safety or health hazard posed by the deplorable state of the home. The Court disagrees.

. . . The parents testified that they have kept the home clean ever since it was cleared of all debris 7 months ago. However, the parents also refused to allow CPS back into the home to inspect it and to verify its condition. Given the parents' position that the house was not a problem at the time the Children were removed, the Court has seen no credible evidence that the house has remained clean and appropriate, as

the Court does not find reliable the parents' description of the home.

[Stepmother]'s credibility was also impeached by [Stepmother]'s candid admission that she and/or Father intentionally and knowingly lied to CPS about the Children's whereabouts when CPS was trying to locate the Children.

¶10 Father timely appealed. We have jurisdiction pursuant to A.R.S. § 8-235(A) (2007), 12-120.21(A)(1) (2003), and 12-2101(A)(1) (Supp. 2011).

DISCUSSION

A. Trial Time Limits

¶11 Father argues that the juvenile court violated his due process rights by failing to give him time to present his defense. Father never objected to the manner in which the court was conducting the dependency proceedings, and at no point did he request more time to present his witnesses. We could thus treat his argument as waived. See *Cullum v. Cullum*, 215 Ariz. 352, 355 n.5, ¶ 14, 160 P.3d 231, 234 n.5 (App. 2007) ("As a general rule, a party cannot argue on appeal legal issues not raised below."). But even assuming that this argument is properly before us, the record does not support it.

¶12 "[A] trial court has broad discretion over the management of a trial" *Gamboa v. Metzler*, 223 Ariz. 399, 402, ¶ 13, 224 P.3d 215, 218 (App. 2010). "An abuse of discretion exists when the record, viewed in the light most

favorable to upholding the trial court's decision, is 'devoid of competent evidence to support' the decision." *Little v. Little*, 193 Ariz. 518, 520, ¶ 5, 975 P.2d 108, 110 (1999) (citation omitted). Arizona Rule of Civil Procedure 16(h) explicitly permits the imposition of "reasonable time limits on [] trial proceedings or portions thereof," and Arizona Rule of Family Law Procedure 22(1) permits the trial court to "impose reasonable time limits on all proceedings or portions thereof and limit the time to the scheduled time." See Ariz. R.P. Juv. Ct. 6 (juvenile trials should "proceed in a manner similar to the trial of a civil action before the court sitting without a jury.")

¶13 Contrary to Father's contention, the time restrictions were not unreasonable under the circumstances. Father agreed to the allotted time for the dependency hearing, and he then never mentioned or objected to the court's management of the trial schedule. He cannot now persuasively argue that the court violated his due process rights. See *Gamboa*, 223 Ariz. at 402, ¶ 14, 224 P.3d at 218 (affirming trial court's time limits when the party appealing the limits agreed to them). Father was fully aware of the time constraints on the court and could have monitored the trial time better and brought his concerns to the attention of the court before proceedings were thirty minutes past the scheduled finishing time.

¶14 Additionally, to prevail on appeal, Father must show harm resulting from the juvenile court's imposition of the time limitation. *Brown v. U.S. Fid. & Guar. Co.*, 194 Ariz. 85, 91, ¶¶ 33-34, 977 P.2d 807, 813 (App. 1998). Our supreme court has held that "[a]t a minimum," the complaining party must make "an offer of proof stating with reasonable specificity what the evidence would have shown." *State v. Towerly*, 186 Ariz. 168, 179, 920 P.2d 290, 301 (1996). We do not find in the record that Father made an offer of proof below. Ariz. R. Evid. 103(a)(2) (stating that in order to establish error in the exclusion of evidence a party must show that its substance was made known to the trial judge). Moreover, on appeal Father also has not shown any harm resulting from the imposition of the time limitation. Father was present throughout the proceedings and had the opportunity to be heard. The entire hearing was taken up with his testimony and that of Stepmother. He argues that his witnesses could have testified about his parenting and the major remodeling and renovating efforts he did to make the home livable. Considering that the court's decision was not based on Father's parenting skills, or lack thereof, and that no party disputed the cleanliness of the home just after it was renovated, the testimony of these witnesses did not bear on the disputed issues on which the court ruled. We note that the

state had an additional witness that it was also unable to present.

¶15 Under the circumstances, we hold the court did not abuse its broad discretion in holding Father to the agreed-upon schedule.

B. Evidence

¶16 Father also asserts that reasonable evidence did not support the court's finding of dependency. In a dependency action, the primary concern is always the best interest of the child. *Cochise County Juv. Action No. 5666-J*, 133 Ariz. 157, 161, 650 P.2d 459, 463 (1982).

¶17 A "dependent child" is "[a] child whose home is unfit by reason of abuse, neglect, cruelty or depravity by a parent, a guardian or any other person having custody or care of the child." A.R.S. § 8-201(13)(a)(iii). "Neglect" is defined in relevant part as "[t]he inability or unwillingness of a parent . . . to provide [a] child with supervision, food, clothing, shelter or medical care if that inability or unwillingness causes unreasonable risk of harm to the child's health or welfare." A.R.S. § 8-201(22)(a).

¶18 Reasonable evidence supports the juvenile court's findings that Shanley is dependent as to Father.⁷ Although

⁷ Father does not appeal the dismissal of Donovan's dependency and we do not address it.

Father told police that the living conditions were unacceptable, he testified in court that he did not believe the house was a health or safety risk to the children. Father minimized the unsanitary conditions and utter filth that permeated the house, even arguing to the court that cat feces is not hazardous to children's health because "the worst thing you can get from cat feces is diarrhea." Father refused to allow CPS to reassess the home's condition, but avowed to the court that the home was currently "in excellent condition," providing pictures of the home taken on the day of the renovation in October. The juvenile court did not find this testimony to be credible, and we find nothing clearly erroneous about this determination. The lower court had the added benefit of observing Father's live testimony, and we rely on the well-established principle that the juvenile court is "in the best position to weigh the evidence, judge the credibility of the parties, [and] observe the parties." *Pima County Dependency Action No. 93511*, 154 Ariz. 543, 546, 744 P.2d 455, 458 (App. 1987). The CPS caseworker that returned to the home saw trash and cat feces on the floor. He smelled urine and other foul odors emanating from the closed front door, and he opined that the home was not a safe and healthy place for children to reside. We therefore conclude that the court's findings were adequately supported by the evidence.

CONCLUSION

¶19 For the foregoing reasons, we affirm the juvenile court's finding of dependency.

/s/

JON W. THOMPSON, Judge

CONCURRING:

/s/

PATRICIA K. NORRIS, Presiding Judge

/s/

DIANE M. JOHNSEN, Judge