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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

SHAWN I.,
Appellant,

v.

DEPARTMENT OF CHILD SAFETY, L.I., A.I.,
Appellees.

No. 1 CA-JV 16-0206
FILED 11-29-2016

Appeal from the Superior Court in Maricopa County
No. JD 529750
The Honorable Janice K. Crawford, Judge

AFFIRMED

COUNSEL

Vierling Law Offices, Phoenix
By Thomas A. Vierling
Counsel for Appellant

Arizona Attorney General's Office, Tucson
By Cathleen E. Fuller
Counsel for Appellee, Department of Child Safety

MEMORANDUM DECISION

Judge Patricia A. Orozco delivered the decision of the Court, in which Presiding Judge Andrew W. Gould and Judge Peter B. Swann joined.

O R O Z C O, Judge:

¶1 Shawn I. (Father) appeals the court's denial of his request for the return to him of physical custody of L.I. and A.I. (the children). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Father and J.I. (Mother)¹ are the biological parents of the children. In September 2015, Father and Mother separated. Pursuant to a court order, Father and Mother shared custody of both of the children. In February 2016, Arizona Department of Child Safety (DCS) initiated dependency proceedings as to both Father and Mother, alleging the children dependent as a result of abuse and neglect. The petition also averred the children were Indian children as defined by the Indian Child Welfare Act.

¶3 In March 2016, the court held a temporary custody hearing. A DCS investigator testified that a report was filed alleging physical abuse of the children in February 2016, specifically alleging A.I. suffered from severe diaper rash. After a few days in Father's care, the children were returned to Mother. Later that evening, Mother took the children to the hospital. A.I. had very severe diaper rash, a urinary tract infection, as well as trouble breathing, high temperature and chest congestion. L.I. also had diaper rash on his thighs and genitals that had become infected and scabbed. The investigator opined the diaper rash was so severe, it should have been brought to the attention of a medical professional sooner. As a result, the investigator concluded returning the children to Father put them at an imminent risk of neglect.

¶4 Father testified he had difficulty with Mother in regards to the medical needs of the children, alleging she failed to follow dosages of prescriptions treating the children's diaper rash. Father reported he

¹ Mother is not party to this appeal.


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primarily took the children to their medical provider and that L.I. had ongoing diaper rash issues since October 2015. He also admitted his parental rights to two other children had been terminated.

¶5 After testimony concluded, the court determined the children “suffered very severe medical neglect.” The court further found clear and convincing evidence that Father’s “continued custody of the child(ren) . . . [was] likely to result in serious physical damage and emotional harm.” The children remained in DCS custody following the hearing.

¶6 Father then filed a motion requesting a hearing to determine whether returning the children to him “would create a substantial risk of harm to the child[ren]’s physical, mental or emotional health or safety,” pursuant to Rule 59 of the Arizona Rules of Juvenile Procedure. After the hearing, the court found “that return of the children would create a substantial risk of harm to the children’s physical health or safety.” Father timely appealed.

¶7 While this matter was on appeal, the court held a contested dependency hearing as to Father and Mother. The court found the dependency allegations to be true and found the children dependent as to both parents. The court further found that “continued custody . . . [was] likely to result in serious emotional or physical danger to the children,” despite DCS’ active efforts to provide services designed to keep the family intact. The court confirmed the “care, custody and control” of the children to DCS.

¶8 We have jurisdiction pursuant to  Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes (A.R.S.) sections 8-235.A, 12-120.21.A.1 and -2101.A (West 2016).²

DISCUSSION

¶9 On appeal, Father argues the court erred in denying his request for return of custody because its conclusion was “contrary to substantial evidence in the record.” DCS argues Father’s challenge is moot because the court subsequently found the children dependent, precluding return to his care regardless of our review.

² We cite to the current version of applicable statutes absent any change material to this decision.

I. Mootness of Father's Appeal

¶10 As a general principle, “we will dismiss an appeal as moot when our action as a reviewing court will have no effect on the parties.” *Cardoso v. Soldo*, 230 Ariz. 614, 617, ¶ 5 (App. 2012). “It is not an appellate court’s function to declare principles of law which cannot have any practical effect in settling the rights of litigants.” *Progressive Specialty Ins. Co. v. Farmers Ins. Co. of Ariz.*, 143 Ariz. 547, 548 (App. 1985). However, our decision to decline consideration of a moot issue is an act of judicial restraint, as we are not constrained by the case or controversy requirements of the United States Constitution. *Prutch v. Town of Quartzsite*, 231 Ariz. 431, 435, ¶ 10 (App. 2013). When an issue before us is a matter of significant public importance or is capable of recurrence but evades review, we may choose to consider it. *Id.*

¶11 As previously stated, the court conducted a Rule 59 hearing and determined that the children should not be returned to Father because of the likelihood of serious physical damage and emotional harm to them. Subsequently, the court found the children dependent as to Father and awarded custody of the children to DCS. This subsequent custody determination renders this court’s determination related to Father’s Rule 59 request moot, and precludes any action of this court to grant Father the relief requested on appeal; return of the children.

¶12 However, because a parent’s right to control and custody of his child is a fundamental, constitutional right, *Matter of Maricopa Cty., Juv. Act. No. JA 33794*, 171 Ariz. 90, 91 (App. 1991), in our discretion, we consider the merits of Father’s appeal.

II. Adequacy of Evidence Supporting the Court’s Custody Determination

¶13 On appeal, Father contends the court’s denial of his Rule 59 request is “clearly erroneous and contrary to the substantial evidence in the record.” Father alleges testimony related to concerns about returning the children to his care are not sufficient to support the court’s findings, relying on *Roberto F. v. Ariz. Dep’t of Econ. Sec.*, 232 Ariz. 45 (App. 2013). Finally, Father argues the court erred by “focusing” on past circumstances, and not those in existence at the time of its ruling.

¶14 Rule 59 permits a parent to request return of a child “[a]t any time after the temporary custody hearing.” Ariz. R.P. Juv. Ct. 59.A. Following such a request, the court “set[s] a hearing to determine whether return of the child would create a substantial risk of harm to the child’s

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physical, mental or emotional health or safety.” *Id.* We review a custody determination for an abuse of discretion. *Owen v. Blackhawk*, 206 Ariz. 418, 420, ¶ 7 (App. 2003). We do not reweigh evidence on appeal, and defer to the court’s resolution of conflicting evidence in the record. *Jesus M. v. Ariz. Dep’t of Econ. Sec.*, 203 Ariz. 278, 282, ¶ 12 (App. 2002). When the record contains reasonable evidence supporting the court’s findings, we do not disturb them. *Id.*

¶15 Father’s reliance on *Roberto F.* is misplaced. There, the court excluded the “concerns” of two witnesses because they “failed to address the relevant issue before the court.” 232 Ariz. at 59, ¶ 67. Here, the testimony of the case manager was directly on point to the issue the court was required to consider pursuant to Rule 59 – whether returning the children to Father would put them at a substantial risk of harm.

¶16 Although Father contends the court “erroneously focused on past facts instead of [his] ability to parent at the time of the hearing,” he points to no evidence in the record suggesting the court improperly relied on these “past facts” in denying Father’s request for custody. In fact, the court expressed concern that “Father does not believe that . . . his actions, or lack of actions, cause these children any discomfort or pain, and Father needs to learn that.” This conclusion is supported by Father’s own testimony during the hearing; according to Father, he did not believe his inaction in obtaining medical treatment caused the children any discomfort or pain. Moreover, reasonable evidence in the record supports the finding that returning the children to Father’s care would expose them to a substantial risk.

¶17 The children’s DCS case manager testified the children were doing well and their health was much improved in their current placements. The case manager also testified Father had successful visits with the children, making sure their diapers were changed and they were cleaned appropriately. However, the case manager remained concerned that Father could not appropriately address the children’s medical needs. As a result, the case manager concluded returning the children would create a substantial risk of harm. Even with reunification team services, the interventions would be limited to two or three days per week; given the speed with which a medical concern could escalate, the case manager explained this was insufficient to ameliorate the risk to the children. Because the record supports a finding that returning the children to Father would subject them to a substantial risk of harm, we cannot say the trial court erred.

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CONCLUSION

¶18 For the foregoing reasons, we affirm the court's denial of Father's request to return the children to his care.



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