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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

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CHRISTINA K., JOHNATHON T., *Appellants*,

*v.*

DEPARTMENT OF CHILD SAFETY, M.K., M.K., M.K., *Appellees*.

No. 1 CA-JV 22-0155
FILED 12-29-2022

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Appeal from the Superior Court in Maricopa County
No. JD38209
The Honorable Robert Ian Brooks, Judge
The Honorable M. Scott McCoy, Judge

**VACATED AND REMANDED**

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COUNSEL

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## MEMORANDUM DECISION

Judge Paul J. McMurdie delivered the Court's decision, in which Presiding Judge Brian Y. Furuya and Judge Jennifer B. Campbell joined.

**M c M U R D I E**, Judge:

**¶1** Christina K. ("Mother") and Johnathon T. ("Father") appeal from the juvenile court's judgment terminating their parental rights to three of four children. They argue there are insufficient grounds to support the termination.

**¶2** We cannot determine whether the court based a finding of parental unfitness on deficiencies existing at the termination hearing. Thus, we vacate the termination order and remand for further proceedings.

## FACTS AND PROCEDURAL BACKGROUND

**¶3** Mother and Father are the biological parents of Bethany, born in 2016; Cameron, born in 2019; and Dustin, born in 2020.[1] Mother has another child, Andrea, born in 2013, but Father is not her biological parent.[2] This appeal concerns Mother's and Father's parental rights to Andrea, Bethany, and Cameron. Dustin has never been found dependent as to Mother or Father and remains in their care.

**¶4** Mother has struggled with opioid abuse. When Bethany was born substance-exposed in 2016, the Department of Child Services ("Department") implemented a safety plan. The Department arranged in-home services for Mother, established Father as a safety monitor, and prohibited unsupervised contact between Mother and the children. But Father violated the plan by allowing unsupervised contact on at least two occasions. In April 2017, the Department removed Andrea and Bethany from the parents' home and filed a dependency petition based on substance abuse and neglect.

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[1] To protect the children's identities, we refer to them by pseudonyms.

[2] Andrea's biological father entered a no-contest pleading at the termination trial and is not a party to this appeal.

**¶5** The Department offered reunification services, including substance abuse treatment, psychological evaluations, therapy, and parenting education courses. Mother was prescribed medication to ease her addiction symptoms and reduce the risk of relapse. The Department also provided medical examinations for the children, and Andrea was diagnosed with cerebral palsy.

**¶6** The children's needs were not well-maintained while in foster care. As the juvenile court later found, Andrea had been "at a minimum, physically abused," leading to "extensive bruising on [Andrea's] body, arms, legs and neck." Moreover, in the year and a half Andrea was out of her parents' physical custody, she "ha[d] been in as many as eight separate placements."

**¶7** The Department moved to return Bethany to her parents' physical custody in September 2018, and Andrea was returned to Mother in December. Soon after, the Department's assigned family reunification agent reported troubling incidents. Two-year-old Bethany was found wandering the neighborhood alone in November, and the next month, the agent saw bite marks on Bethany's arm, back, and neck. In January 2019, the agent reported that Mother was "erratic and unstable" and resistant to mental health services.

**¶8** Yet, in March 2019, the Department moved to dismiss the dependency for both children. The juvenile court granted the dismissal for Bethany. But the court denied the dismissal request for Andrea because of concern over a positive drug test for amphetamines from Mother.

**¶9** In August 2019, the Department received a hotline report that the house was "trashed," like "a hoarding situation." There were dirty dishes, food waste, bags of diapers, piles of clothing, stacks of boxes five feet tall, and a "very strong" odor wafting out the front door. The children were reported to have "answer[ed] the door alone in the middle of the day after approximately thirty minutes of someone knocking" with "full, loaded diapers" while "mother and father were sleeping." Upon Department investigation, Mother admitted she "sometimes struggles to keep up with housework." Despite the home's condition, the Department concluded that "[w]hile the home was unkempt and messy, [the agent] did not observe an impending or present danger in the home."

**¶10** In October, Andrea's teacher reported that Andrea had not been in school for five straight days. On November 1, the police and Department conducted a welfare check at the home. The Department

reported finding "excessive clutter, garbage, and trash," the "smell[] of urine," and that the master bedroom was so full of items that it was inaccessible. Bethany was found with "little scratches" on her arms and shins along with possible bruises, though "it was hard to tell as she was dirty."

**¶11** Following the visit, the Department removed the children, including five-month-old Cameron, from the parents' physical custody and filed a new dependency petition for Bethany and Cameron. The Department based its dependency petition on the parents' inability to provide supervision or a safe home, Mother's substance abuse, and Mother's failure to maintain her mental health. The Department reported that Mother had "failed to acknowledge and address underlying issues that prevent her from making lasting change." It also noted that Father plays a passive role and defers to Mother's decisions about the children. It concluded that Mother had "limited insight" into her responsibilities and could not meet the children's needs.

**¶12** In May 2020, the juvenile court granted the dependency for Bethany and Cameron but assigned physical custody to Mother and Father. The juvenile court based the placement decision on testimony from a parent aide who "express[ed] no concern—apparently at all" about the placement and was "adamant" that "they would do fine." The court gave this testimony "significant weight" because the aide "is the individual who has the most contact with the parents, the most contact with the children, and may be the only individual who has seen them interact."

**¶13** In March 2021, the Department received another report that Bethany and Cameron were dirty, and Bethany had bite marks covering her body. A Department agent visited the children at daycare and noted that each had bruises. The Department responded by removing them from the parents' physical custody. Though the Department continued to offer services, Mother claimed that she struggled to maintain consistency in participating based on complications from the COVID-19 pandemic. She testified that she had been reassigned to four therapists in one month.

**¶14** In November 2021, the Department altered its case plan to severance and adoption, partly based on Mother's missed appointments. In December 2021, the Department moved to terminate Mother's and Father's parental rights to Andrea, Bethany, and Cameron based on neglect, 15-months in placement, and recurrent removal. *See* A.R.S. § 8-533(B)(2), -533(B)(8)(c), -533(B)(11).

**¶15** After a four-day termination trial, the juvenile court entered a termination ruling. The court denied termination on the neglect ground, finding that although "the parents have neglected the children in each of the ways alleged, . . . . these various neglect incidents, in isolation, are not sufficient for termination." But the court granted the motion for the 15-months in placement ground. The court also granted the motion on the recurrent removal ground as to Bethany. The court found "Mother and Father made some, but insufficient, improvement" but that "[t]he issue is whether a parent's improvement shows the parent will be effective in the near future."

**¶16** In support of its decision, the court identified "two concerning patterns" in the parents' behavior. First, the court found:

> When the Department is intensively involved with the parents, such as providing in-home services with multi-day check-ins, the parents are adequately able to care for some of the children. However, when the Department is no longer available to provide intensive assistance, the parents are unable to meet the children's basic needs, or their special needs. The Court infers from this history and pattern that the parents will not be able to parent the children in the near future.

Second, the court found:

> Mother will participate to some degree but will slowly stop participating in those services. The Court notes this pattern in essentially all the services provided . . . . The Court infers from this pattern that Mother will similarly fail to follow-through the many services that each of the children need. Although Mother and [Father] have both made some progress, the Court maintains concerns about Mother's ability to maintain this progress.

The court added that while Father has the "ability to recognize the children's needs and address those needs," is "consistent with his services," and "ha[s] made progress, and in some areas great progress," he still "maintains a significant blind-spot with his ability to recognize when the Mother is not sufficiently meeting the children's needs."

**¶17** As for Dustin, the court noted that it was in an "unusual position: being asked to terminate parents' rights as to certain children based on parents' inability to parent, while a younger, more vulnerable

child is not even the subject of a dependency." The court justified its ruling, finding that "Mother and Father do have sufficient parenting skills and abilities to parent one child" but that "when the parents have more than one child in their custody, they become either overwhelmed or shutdown to such an extent that all the children's basic needs are neglected."

**¶18** Finally, the court found by a preponderance of the evidence that terminating the parents' rights would be in the children's best interests.

**¶19** Mother and Father appealed, and we have jurisdiction under A.R.S. § 8-235(A) and Arizona Rule of Procedure for the Juvenile Court 601(A).

## DISCUSSION

**¶20** Mother and Father contend the Department failed to present sufficient evidence to support the termination of their parental rights. Parental rights must not be terminated absent proof by clear and convincing evidence that severance is warranted under A.R.S. § 8-533(B) and proof by a preponderance of the evidence that severance is in the child's best interests. *Kent K. v. Bobby M.*, 210 Ariz. 279, 288, ¶ 41 (2005); *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 248–49, ¶ 12 (2000).

**¶21** We may not reweigh the evidence presented to the juvenile court. *Alma S. v. Dep't of Child Safety*, 245 Ariz. 146, 151, ¶ 18 (2018). Even if the facts are sharply disputed, we must accept the juvenile court's findings if supported by reasonable evidence and inferences. *Id.* On the other hand, we must not affirm an erroneous termination order. *See id.* "[T]he right of parents to the care and custody of their child is a fundamental right" that "does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the state." *In re Maricopa County Juv. Action No. JS-6831*, 155 Ariz. 556, 558 (App. 1988). Thus, despite our deferential standard of review, we must remain mindful that severance is "a power of awesome magnitude that must be exercised with great rectitude and always cognizant of the fundamental rights at stake." *Alma S.*, 245 Ariz. at 153, ¶ 26 (Bolick, J., concurring).

### A. The Juvenile Court Erred by Terminating on the 15-Month Time-in-Placement Ground Without Finding that Mother and Father Are Presently Unfit to Parent.

**¶22** The juvenile court terminated both parents' rights under A.R.S. § 8-533(B)(8)(c). The 15-month ground for severance serves as a proxy for parental unfitness and reveals harm or risk of harm to a child.

*Alma S.*, 245 Ariz. at 150, ¶ 10; *see also Sandra R. v. Dep't of Child Safety*, 248 Ariz. 224, 229, ¶ 24 (2020). Severance under § 8-533(B)(8)(c) requires clear and convincing evidence that (1) the children have been in out-of-home placement for a cumulative period of at least 15 months, (2) the Department has made a diligent effort to provide appropriate reunification services, (3) Mother and Father have been unable to remedy the circumstances that caused the children to be in an out-of-home placement, and (4) there is a substantial likelihood that Mother and Father will be unable to exercise proper and effective parental care and control in the near future. A.R.S. § 8-533(B)(8)(c); *Donald W. v. Dep't of Child Safety*, 247 Ariz. 9, 17, ¶ 25 (App. 2019).

**¶23** Mother and Father both concede that the children were in out-of-home placement for more than 15 months. Father admits the Department diligently provided appropriate reunification services, but Mother argues that the Department's efforts were insufficient. Both parents challenge the juvenile court's determination that they have been unable to remedy the circumstances that led the children to be in out-of-home placement and that they would be unable to exercise proper and effective parental care and control in the near future.

**¶24** The juvenile court found that "two concerning patterns" in the parents' behavior justified termination because they support an inference of future unfitness. The court cited *In re Appeal of Maricopa County Juvenile Action No. JS-501568*, 177 Ariz. 571 (1994), for the proposition that when considering severance for parents who have improved, "[t]he issue is whether a parent's improvement shows the parent will be effective in the near future." But the juvenile court's reading misinterprets the case. There, a mother was facing severance under a subsection of A.R.S. § 8-533(B) that applied to a parent who "substantially neglected or willfully refused to remedy the circumstances caus[ing] the . . . out-of-home placement." *JS-501568*, 177 Ariz. at 575. We affirmed the termination order because the evidence proved substantial neglect where the mother was "continuously abus[ing] drugs or alcohol" for three years after the child's birth, and mother "was not around and her whereabouts were unknown for 26 months." *Id.* at 576. Yet we held in *JS-501568* that the Department had *not* proven a "substantial likelihood that the parent will not be capable of exercising proper and effective control in the near future." *Id.* at 577, n.2.

**¶25** *JS-501568* supports the parents' argument that termination is improper here. In *JS-501568*, because the mother "had been sober for eight months prior to the severance hearing and, according to testimony, was effectively raising her youngest child," we concluded that the Department

had not proven a "substantial likelihood that the parent will not be capable of exercising proper and effective control in the near future." *JS-501568*, 177 Ariz. at 577, n.2. Here, Mother is also effectively raising her youngest child and has "demonstrated ongoing and long-lasting sobriety."

**¶26** Thus, the juvenile court erred by reading *JS-501568* to mean "[t]he issue is whether a parent's improvement shows the parent will be effective in the near future." Instead, under § 8-533(B)(8)(c), courts must find a substantial likelihood of future ineffective parenting *together with* failure to remedy the circumstances that caused the children to be in an out-of-home placement.

**¶27** A correct determination that Mother and Father have been unable to remedy the circumstances that caused the children to be in an out-of-home placement must be based on deficiencies "existing at the time of the severance that prevent[s] [them] from being able to appropriately provide for [their] children." *See Marina P. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 326, 330, ¶ 22 (App. 2007). Here, the circumstances causing the children to be removed from the home were Mother's substance abuse, her failure to maintain her mental health, and both parents' failure to provide adequate supervision or a safe home.

**¶28** In the juvenile court's order addressing these concerns, the court found the circumstances had improved or been remedied. As to Mother's substance abuse, the court noted her sobriety and concluded, "Although the court has some concerns about Mother's failure to participate in drug testing and the variety of positive tests, it does not see Mother's use of substances as a current and ongoing reason for the children to be in out-of-home care." As for her mental health, the court found "Mother has made progress in addressing her mental health and at various times appears close to demonstrating mental health stability. Standing alone, the court would not find Mother's mental health as a reason to keep the children in out-of-home custody." As for supervision, only one child, Dustin, is with the parents now. By all accounts, he is well-attended to and cared for. Finally, about the state of the home, the court found:

> The parents have made some progress on this issue: it appears that they do now have a stable home . . . . Although the court is concerned with the history of instability and unsafe housing, standing alone, the court does not find housing to be a circumstance necessitating out-of-home custody.

**¶29** The juvenile court questioned the parents' ability to "maintain this progress" or to keep providing for the children's needs. But the juvenile court's reasoning improperly focuses on the *history* of unfitness and the *anticipation* of future unfitness rather than what is statutorily required: whether the circumstances leading to removal have been remedied. *See* A.R.S. § 8-533(B)(8)(c). The juvenile court did not declare the parents failed to remedy the circumstances warranting out-of-home placement—a finding the court had no such reservations to make when assessing and terminating Andrea's biological father's parental rights.

**¶30** The juvenile court found that Mother and Father could parent Dustin safely "but are unable to meet the needs of any additional children." Yet this finding is not supported by sufficient evidence. True, there is evidence of the parents' past inability to provide a clean home. Were it otherwise, there would have never been a dependency. But there is no evidence of how the parents might *now* manage the home with multiple children because they have not had all the children since curing the defect resulting in the dependency.

**¶31** This is not to say that parental termination is always improper when children are not placed in a parent's home. But where the conditions of the home were the original evidence supporting a finding of unfitness, present parental unfitness cannot be established without evidence to show that the unfitness persists.

**¶32** Here, the evidence of present parental performance suggests the opposite. The court labeled care of Dustin "successful parenting" and noted that the parents have made "progress, and in some areas great progress," and identified that the parents "are adequately able to care for" the child. Granted, the juvenile court qualified its assessment by finding that Mother and Father can provide adequate care "[w]hen the Department is intensively involved with the parents." But termination under the statute does not require that the parents remedy the circumstances causing placement without assistance. The omission of a finding of unfitness is troubling because—although a statutory ground may serve as a proxy—parental unfitness is needed to sever parental rights to ensure compliance with due process. *Alma S.*, 245 Ariz. at 150, ¶¶ 9–10.

**¶33** The juvenile court hesitated over Mother's inconsistency in attending services. But termination of parental rights is not an appropriate sanction for a string of missed service appointments. *See Ariz. Dep't of Econ. Sec. v. Mahoney*, 24 Ariz. App. 534, 537 (1975) ("Termination of the parent-child relationship should not be considered a panacea but should be

resorted to only when concerted effort to preserve the relationship fails."); *see also Brionna J. v. Dep't of Child Safety*, 253 Ariz. 271, 278, ¶ 29 (App. 2022) ("The draconian consequences of severance (for both parent and child) are appropriate under § 8-533(B)(8)(c) only when the child must be protected from a parent who is incapable of exercising proper and effective care and control."). While service attendance and participation may correctly evidence progress and good faith, the failure to attend services is not, standing alone, sufficient proof of unfitness to parent.

**¶34** Finally, the juvenile court's only criticism of Father is his "blind-spot with his ability to recognize when the Mother is not sufficiently meeting the children's needs." But Father openly admitted to his and Mother's past failures at trial. He endorsed Mother only for her present ability to parent the children, which is justifiable given her success with the one child she is parenting, Dustin.

**¶35** We conclude that there is evidence supporting a finding of substantial likelihood of the parents' inability to exercise proper and effective parental care and control in the near future. But the court failed to find that Mother and Father have been unable to remedy the circumstances that caused the children to be in an out-of-home placement. This is a finding that we cannot infer from the record. *Francine C. v. Dep't of Child Safety*, 249 Ariz. 289, 295–96, ¶ 13 (App. 2020) ("[T]he primary purpose for requiring a court to make express findings of fact and conclusions of law is to allow the appellate court to determine exactly which issues were decided and whether the lower court correctly applied the law.").

**¶36** While we share the juvenile court's concern that the parents may become "overwhelmed" by the presence of multiple children and backslide into unfitness, mere trepidation cannot justify the termination of a constitutional right. *See Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, 194, ¶ 43 (App. 1999) ("Interference with a parent's fundamental right to the care, custody and control of her child is not permitted merely because the child might be better off in another environment."). Also, the court's finding does not satisfy the requirements of § 8-533(B)(8)(c). We thus conclude that the termination of the parents' rights on this ground was error without an express finding that the parents were currently unfit. Because we must vacate the order on this basis, we need not consider Mother's argument that the Department's reunification services were insufficient.

**B. Severance on the Recurrent Removal Ground Was Error Because Mother and Father Are Not Unfit.**

**¶37** The juvenile court also terminated the parents' rights to Bethany on the recurrent removal ground. Severance under § 8-533(B)(11) requires clear and convincing evidence that (a) the child has been in out-of-home placement under court order, (b) the Department has made a diligent effort to provide appropriate reunification services, (c) the child was returned according to a court order, and (d)

> Within eighteen months after the child was returned, pursuant to court order, the child was removed from that parent's legal custody, the child is being cared for in an out-of-home placement under the supervision of the juvenile court, the division or a licensed child welfare agency and the parent is currently unable to discharge parental responsibilities.

A.R.S. § 8-533(B)(11).

**¶38** Mother and Father do not contest that Bethany was removed from their care, returned, and removed again within 18 months. They argue that the Department did not fully prove the fourth statutory element because they *can* discharge parental responsibilities. The parents identify their sobriety, clean home, and current care of Dustin as proof of their ability to do so. In effect, their argument parallels the argument against termination on the 15-month ground.

**¶39** As we have already identified, the juvenile court did not find that the parents are currently unfit. And just as we hold there was insufficient evidence of current unfitness to justify termination on the 15-month ground without a specific finding, we similarly hold that the court's termination under A.R.S. § 8-533(B)(11) was error.

**¶40** Because termination on either ground was error without a current unfitness finding, we conclude that the termination order must be vacated. We decline, however, to dismiss the dependency. We recognize that the dependency and multiple removals were based on a pattern of parental unfitness. And we do not disturb the juvenile court's finding that the "concerning patterns" in the parents' behavior support the inference that Mother and Father may be unable to maintain their progress.

**¶41** Moreover, "the best interests of the child[ren] might still favor supplementation of parental efforts for a time under an appropriate court

order." *Brionna J.*, 253 Ariz. at 278, ¶ 31. *See* A.R.S. § 8-538(E) ("If the court does not order termination of the parent-child relationship, it shall dismiss the petition, provided that if the court finds that the best interests of the child require substitution or supplementation of parental care and supervision, the court shall make such orders as it deems necessary."); *see also* Ariz. R.P. Juv. Ct. 353(h)(4) (After the hearing, if the petitioner or moving party did not meet its burden of proof, the court must "deny the termination petition[] and if appropriate, order the parties to submit a revised case plan before the dependency review hearing.").

## CONCLUSION

**¶42** We vacate the severance order and remand for further proceedings consistent with this decision.

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