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See Ariz. R. Supreme Court 111(c); ARCP 28(c);
Ariz. R. Crim. P. 31.21



DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

MICHAEL S.,) 1 CA-JV 10-0026
)
Appellant,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
) 103(G) Ariz.R.P. Juv.
ARIZONA DEPARTMENT OF ECONOMIC) Ct.; Rule 28 ARCAP)
SECURITY, ELIZABETH S.,)
)
Appellees.)
)

Appeal from the Superior Court in Maricopa County

Cause No. JD18419

The Honorable A. Craig Blakey, II, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General Mesa
By Kathleen Skinner, Assistant Attorney General
Attorneys for Appellee/Arizona Department of
Economic Security

David W. Bell Mesa
Attorney for Appellant/Father

K E S S L E R, Judge

¶1 Michael S. ("Father") appeals the juvenile court's determination that his daughter ("child" or "Elizabeth") was a dependent child under Arizona Revised Statutes ("A.R.S.") section 8-844(C)(1)(Supp. 2009). We hold that there was

sufficient evidence for the juvenile court to find that child was dependent as to Father. Therefore, we affirm.

FACTS AND PROCEDURAL HISTORY

¶12 Michael S. is the biological father of Elizabeth, born in October, 2008. The biological mother is Rachel S. ("Mother"). S.R., the maternal grandmother, filed a dependency petition alleging that child was dependent as to Father and Mother.¹ The petition alleged that Father used illegal drugs, had child pornography on his computer, severely neglected child, and that he was abusive and violent.

¶13 An initial hearing was conducted in October 2009. The court ordered that child remain in temporary physical custody of S.R. The court found that continuation of the child with parents was contrary to the welfare of the child due to risk of abuse or neglect. The child has resided with S.R. for most of her life. S.R. has been the primary caretaker of Elizabeth.

¶14 The evidence from the dependency hearing in February, 2010 shows that Father and Mother had been dating "on and off" for four years. They were living together when the child was born. About four to five months after the child was born, they separated and Mother moved in with S.R. Mother lived with S.R. from January 2009 until she reconciled with Father in September

¹ The court found Elizabeth dependent as to the Mother. Mother is not a party to this appeal.

of 2009. Throughout their relationship, Father and Mother have lived with different relatives and friends for only a few months at a time. At the time of trial, they were no longer together. Father was then residing with his grandmother.

¶15 Mother testified that Father was abusive. They had a "rocky" relationship and argued constantly. On one occasion, he "smacked [her] across the face." On another occasion, when she was pregnant, he pushed her and she fell on her bottom. As a result, she experienced some abdominal pain and was taken to the hospital. However, Mother had never reported any domestic violence to the police or Child Protective Services ("CPS").

¶16 Mother testified that during the time she lived with Father, she was Elizabeth's primary caretaker. He did not participate in the feeding, bathing or diapering of Elizabeth. On the other hand, the paternal grandmother testified that she saw Father feed, bathe and play with the child. Father and Mother fed cow milk to Elizabeth, instead of the baby formula they received from Arizona Women, Infants and Children ("WIC"). Mother testified that Father sold the baby formula on the internet, which Father denied doing.

¶17 T.T., a former roommate, witnessed during the time Father and Mother lived with her, that the child was put to sleep in a car seat, while the child's crib was still in boxes in the garage. T.T. testified that Mother and Father constantly

fought over the child. Both Father and Mother were verbally abusive to the child by telling her to "shut the fuck up or shut up." Father was also verbally abusive to Mother. T.T. further noticed that the child "would stay in the same clothes for two, maybe three days or longer." She never saw Father play with the child, give her a bath or change her diaper. T.T. and her boyfriend evicted Father and Mother due to stolen motorcycle parts that were found in the home.

¶18 During the dependency proceedings, Father was charged with theft of means of transportation and conducting a chop shop.² He was offered a plea bargain for a sentence of a year in prison. If convicted of all the charges, he faces between five to twelve years in prison.³ In addition to those charges, Father was also under investigation for child pornography. D.S., a detective, testified that he found sexual images of two different minors on Father's computer. He found pictures of Mother's fifteen-year-old sister that had been taken and sent to the Father by Mother. A picture of a seventeen-year-old girl was also found on Father's computer. While D.S. testified that the pictures did not meet the criteria under Arizona law for

² Father was indicted on two counts of theft of means of transportation, a class 3 felony, and one count of conducting a chop shop, a class 4 felony. He entered a plea of not guilty.

³ All criminal charges are still pending at this time.

sexual exploitation of a child, the investigation was pending at the time of the hearings.

¶19 At the time of the dependency hearing, Father had been unemployed for about five to six months and was living on unemployment assistance. He was residing with his grandparents in a home with adequate space to accommodate the child. Father testified that despite the fact that he was unemployed, he had sufficient income to provide for the child's needs.

¶10 Father further testified that he had been seeing the child on a regular basis. The CPS case manager testified Father had been in constant contact with CPS. Father has participated in parent aide classes and undergone psychological evaluations. The reports indicate he has interacted with the child appropriately. Father completed four urinalysis tests, all of which returned negative.

¶11 The CPS case manager testified that it was the Department of Economic Security's ("DES") position that the child should not be sent home with her parents. She was concerned about the child pornography allegations, the domestic violence testimony and the possibility that Father would not be able to care for the child if he went to prison for the pending theft and chop shop charges. Another case manager testified that based on the allegations and the detective's testimony about the pending criminal investigation against him, it was

DES's opinion that the child would not "be safe to return to the family at [the] time."

¶12 Furthermore, Elizabeth's immunizations were not up to date and she was suffering from chronic ear infections. Doctor's reports indicate that the child needs surgery for her ear infections, but the child has not undergone surgery because CPS needed authorization from him. Father refused to authorize the surgery alleging that the infections were the result of S.R.'s neglect. The CPS case manager disagreed and did not believe the ear infections were caused by S.R.'s neglect. Father testified that he had attempted to talk to the child's doctor, but had been restricted from talking to the doctor about Elizabeth's medical records. He also testified that he would authorize the surgery if necessary. Other than the ear infections, the child is considered to be a healthy child. The case manager recommended that Father continue attending parenting classes and domestic violence counseling.

¶13 The juvenile court found by a preponderance of the evidence that Elizabeth was dependent with respect to Father. The court found that Father: 1) does not "participate in the feeding, clothing, bedding" of the child; 2) was "unable to adequately parent;" 3) was unwilling to provide for the child; 4) showed no consistency or stability regarding his home and employment situation; and 5) argued frequently with Mother. The

court also found evidence of possible domestic violence. The court approved the case plan for future family reunification and required parents to attend all parenting services.

STANDARD OF REVIEW

¶14 The juvenile court is "in the best position to weigh the evidence, judge the credibility of the parties, observe the parties, and make appropriate factual findings." *Pima County Dependency Action No. 93511*, 154 Ariz. 543, 546, 744 P.2d 455, 458 (App. 1987). On appeal, we review the juvenile court's findings of fact for clear error, *Anonymous v. Anonymous*, 25 Ariz. App. 10, 11-12, 540 P.2d 741, 742-43 (1975), and view the evidence in the light most favorable to affirming its decision. *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 250, ¶ 20, 995 P.2d 682, 686 (2000)(quoting *Maricopa County Juvenile Action No. JS-8490*, 179 Ariz. 102, 106, 876 P.2d 1137, 1141 (1994)). We will uphold the "juvenile court's ruling in a dependency action unless the findings upon which it is based are clearly erroneous and there is no reasonable evidence supporting them." *Pima County Juvenile Dependency Action No. 118537*, 185 Ariz. 77, 79, 912 P.2d 1306, 1308 (App. 1994).

DISCUSSION

¶15 Father argues that the petitioner and DES failed to demonstrate by a preponderance of the evidence that a dependency was legally necessary. He argues that the evidence was

insufficient to support findings that Father was unable to meet the child's basic needs and that he was not at least a minimally adequate parent. We disagree. The evidence presented reasonably supported a finding of dependency. A.R.S. § 8-844(C); *Pima County Juvenile Dependency Action No. 118537*, 185 Ariz. at 79, 912 P.2d at 1308.

¶16 To determine if a child is dependent under A.R.S. § 8-201(13)(a)(Supp. 2009), the evidence must show that: 1) the child is in need of proper and effective parental care and control; 2) the child is not provided with the necessities of life, including adequate food, shelter or medical care; 3) the child's home is unfit by reason of abuse, neglect, cruelty or depravity; 4) a child under eight years of age is found to have committed an act that would result in adjudication as a delinquent juvenile or incorrigible child; or 5) a child is incompetent and is alleged to have committed a serious offense. The status of dependency must exist the time of dependency adjudication hearing. A.R.S. § 8-844(C)(iii). If any of the above elements was met, we will affirm the juvenile court's decision given that the definition of dependency under A.R.S. § 8-201(13)(a) is in the disjunctive. See *Willie G. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 231, 232, ¶ 2, 236, ¶ 27, 119 P.3d 1034, 1035, 1039 (App. 2005) (court listed, in the disjunctive, three elements of the definition of child

dependency and only addressed one element to affirm juvenile court's finding of child dependency).

¶17 The evidence in this case supported a conclusion that the child was "not provided with the necessities of life, including adequate food, clothing, shelter or medical care." A.R.S § 8-201(13)(a)(ii). A "child is entitled to have his or her basic needs cared for." *Cochise County Juvenile Action No. 5666-J*, 133 Ariz. 157, 161, 650 P.2d. 459, 463 (1982).

I. Food, Clothing and Diapering

¶18 Father contends that there was no evidence of neglect and that he was at least a minimally adequate parent. Father testified that he consistently provided for his child by getting her diapers, wipes and food, while several other witnesses testified that he did not feed, bathe or change child's diaper or, at least, provide the mother with diapers. His roommate noticed that the child "would stay in the same clothes for two, maybe three days or longer" and that the child was put to sleep in a car seat during the time Father and Mother lived with her.

¶19 Father has the responsibility to properly care for the child. Father is responsible for providing the child with an adequate place to sleep, for bathing and changing her. He was also responsible for ensuring that the child received proper nutritional nourishment by feeding her adequate food for her age. Instead, there was evidence that Father and Mother fed

Elizabeth cow milk, while Father sold the free baby formula they received from WIC on the internet.

¶120 Given the conflict in the evidence, we defer to the trial court's conclusion that Father did not properly and adequately care for Elizabeth by providing her with the basic necessities of life, such as food, clothing and diapers.

II. Shelter

¶121 Father argues that instability of housing does not create a legal dependency so long as the housing does not place the child at risk. There is evidence in the record that throughout the life of the child, Father has not shown any type of stability with regards to his housing situation. He has lived with several different friends and family members for only a few months at a time. He has moved the child around from home to home without taking into consideration the needs of the child.

¶122 Regardless of how appropriate Father believed their living arrangements were, the record shows that neither Father nor Mother took the time to accommodate the child and provide her with the proper care. Parents owned a baby crib that, due to their unstable housing situation, was never taken out of the garage when they lived with T.T. in order to accommodate the child in the home. This shows that no sense of permanency existed in any given home for the well-being of the child.

¶23 Father has been unemployed for five to six months and has been living on unemployment assistance. Father currently lives with his grandparents and argues that living with them will allow him to meet his monthly expenses and provide for Elizabeth. Even assuming this is true, the juvenile court has found that there has "been no pattern of lengthy stays at any one residence." If Father decides to move out of his grandparents' home, it is uncertain that he will be able to meet the child's basic needs and provide adequate shelter.

¶24 Father has had a history of constantly changing residences. He has not resided in any given location for more than a few months at a time. Father is currently unemployed. While he testified that despite his unemployment, with his grandparents' assistance he will be able to care for the child, his living patterns do not support an assumption that he will reside with grandparents permanently. Therefore, there is reasonable evidence to support the juvenile court's finding that Father was unable to parent by providing adequate shelter for the child.

III. Medical Care

¶25 Father repeatedly claimed to be "at least a minimally adequate parent," yet there was evidence that he failed to meet Elizabeth's basic medical needs. Although Elizabeth is considered to be a healthy child, he has not ensured that her

immunizations are up to date. Father has also refused to authorize ear surgery to treat her ear infections, despite doctor's recommendations, because he believes that infections are due to S.R.'s neglect. Father has been more concerned with the ongoing family dispute between him, Mother and S.R. than with the medical care of the child itself. Therefore, we find sufficient evidence that Father has not met the child's basic medical needs.

CONCLUSION

¶26 There is sufficient evidence that Father has not provided the child with her basic needs, such as adequate food, clothing, diapers, shelter and medical care. The record supports the juvenile court's conclusion that Father has not actively taken care of the child, he has not been able to provide the child with a stable living environment and has refused to allow the child to receive medical treatment for her ear infections.

¶27 Accordingly, we affirm the juvenile court's finding of the child's dependency as to Father.

/s/
DONN KESSLER, Judge

CONCURRING:

/s/
DIANE M. JOHNSEN, Presiding Judge

/s/
PATRICIA K. NORRIS, Judge