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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



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

DELIA G., ) No. 1 CA-JV 10-0071  
)  
Appellant, ) DEPARTMENT B  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
ARIZONA DEPARTMENT OF ECONOMIC ) 103(G) Ariz. R.P. Juv.  
SECURITY, A. G., D. G., ) Ct.; Rule 28 ARCAP)  
MARCOS G., MARY G., )  
)  
Appellees. )  
)  
)

Appeal from the Superior Court in Maricopa County

Cause No. JD12016

The Honorable Benjamin R. Norris, Judge

**AFFIRMED**

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David W. Bell, Attorney at Law  
By David W. Bell  
Attorney for Appellant

Mesa

Robert D. Rosanelli  
Attorney for Appellees Marcos G. and Mary G.

Phoenix

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**B R O W N**, Judge

¶1 Delia G. appeals the juvenile court's order denying her petition to revoke the permanent guardianship of two of her

minor children<sup>1</sup> and return them to her care. For the following reasons, we affirm.

#### BACKGROUND

¶2 Delia G. ("Mother") is the biological mother of A.G., born in August 1998, and D.G., born in September 2001 (collectively "the children").<sup>2</sup> The fathers of the children are unknown.

¶3 In September 2002, Child Protective Services ("CPS") became involved with the children when Mother left them with a caretaker and did not return for them. The children were adjudicated dependent and were placed with their maternal grandmother, where they lived for one year until the grandmother indicated she could no longer care for them. In September 2003, Mother participated in a family group decision-making meeting<sup>3</sup> where it was decided that the children would be placed with Mother's maternal great uncle and aunt, Marcos G. and Mary G., in Utah. With Mother's consent, in August 2004, the court

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<sup>1</sup> On the court's own motion, it is hereby ordered amending the caption for this appeal as reflected in this decision. The above referenced caption shall be used on all documents filed in this appeal.

<sup>2</sup> Mother also has two other children who are in her care but they are not parties to this appeal.

<sup>3</sup> This meeting was coordinated and facilitated by CPS. Mother agreed to the family plan of relative guardianship of the children.

appointed Marcos and Mary as permanent guardians of the children.<sup>4</sup>

¶4 In July 2005, Mother wrote a letter to the court requesting "court ordered visits and phone calls" with the children. In her letter, she stated she had not had any contact with the children in nearly two years, despite efforts to reach the guardians by telephone. In August 2005, the children's Guardian ad Litem ("GAL") reported to the court that Mother wanted "to terminate the guardianship and regain her children." The GAL recommended that the court appoint counsel for Mother and the guardians. In October 2005, the court conducted a pretrial conference in which the court acknowledged that Mother had requested termination of the guardianship. The judge expressed his view that he did "not feel that the guardianship should be revoked" at that time and Mother withdrew her request to revoke the guardianship in exchange for court-ordered telephonic and therapeutic visitation. Mother participated in three therapeutic visits with the children during the months of December, 2005, and February and March, 2006. The therapist supervising the visits reported that they were positive for the

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<sup>4</sup> The Arizona Department of Economic Security ("ADES") is no longer involved in this matter and is not a party to this appeal. When the court ordered the guardianship, it dismissed the dependency and relieved ADES of further responsibility other than submitting a written report prior to the review hearing scheduled for August 2005.

children. In April 2006, the court granted Mother five days of unsupervised visitation during the summer. In July 2007, Mother and the guardians reached an agreement giving Mother increased visitation rights, including one weekend per month in Utah, alternating holidays in Arizona, and three weeks during the summer in Arizona.

¶15 In June 2009, Mother petitioned the court to revoke the permanent guardianship and return the children to her. Mother alleged that she was "successfully rehabilitated" and "completely capable of caring for the . . . children." She further asserted that "[i]t would be in the children's best interest to be returned" to her care. The guardians contested Mother's petition and the parties failed to reach an agreement at mediation. Over the course of several months, the court held a three-day hearing.<sup>5</sup>

¶16 Mother testified that when CPS took the children from her she was abusing drugs and alcohol, but that she is now drug-free, sober, steadily employed, and pays \$358 a month in child support for the care of the children. Mother also testified that although she lost her four bedroom house to foreclosure and she is currently living in a two bedroom apartment with several

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<sup>5</sup> On the first day of the hearing, the judge spoke with the children privately in chambers at the children's request and with the agreement of all parties. The substance of that discussion was not revealed to the parties or their counsel.

other family members, she intends to move to a larger house if the children come to live with her so they would have their own room. Mother further testified that the guardians have attempted to interfere with her relationship with the children. She stated that she had no contact with the children for the first three years after they were placed with the guardians, she received only two photographs of the children since the children have been with the guardians, and she has never received any of the children's school or medical records. She conceded, however, that the guardians had "done a good job" of caring for the children.

¶17 Guardian Mary also testified. She denied interfering with Mother's relationship with the children and claimed Mother had never asked for medical records, school records, or photographs of the children. Mary also testified that she has never done anything to keep Mother from talking to the children and claimed the children and Mother did speak on the phone during the time that Mother claims she had no contact with them. She further stated that the children tell her they want to live with her in Utah, but conceded that the children probably tell Mother that they want to live with Mother in Arizona.

¶18 During the hearing the GAL declined to take a position on whether the guardianship should be terminated.<sup>6</sup> However, the GAL argued in his closing brief that the children should be returned to Mother as soon as Mother is able to secure adequate housing to accommodate the children. Specifically, the GAL asserted that Mother had demonstrated a sufficient change in circumstances to merit a return of the children, but because of the lack of adequate housing, a return to Mother would not be in the children's best interests at this time.

¶19 After considering the testimony and the post-hearing closing arguments, the court denied Mother's petition for revocation of the guardianship but significantly increased Mother's visitation time with the children. The court concluded in part as follows:

Mother Delia has failed to show by clear and convincing evidence . . . [that her own rehabilitation by itself] is a sufficiently significant change in circumstances under [Arizona Revised Statutes section] 8-873(A) [(2010)]<sup>7</sup> to justify revocation of this guardianship in these particular circumstances.

. . .

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<sup>6</sup> We rely on the trial court's minute entry ruling for information as to the GAL's post-trial closing brief because the brief was not included in the record to this court.

<sup>7</sup> We cite the current version of the applicable statutes if no revisions material to this decision have since occurred.

Furthermore, the Court finds that terminating the guardianship would not be in the Children's best interests[.] There is a real question as to whether the Mother has adequate housing to take the Children on a permanent basis, i.e. not just as visitors.<sup>8</sup>

In reaching its conclusions, the court considered "all of the relevant circumstances taken together" and noted in particular the following:

Mother Delia admitted she did not oppose the guardianship when it was first put in place. In late 2005—over four years ago, and almost a year . . . into her sobriety—Mother first sought revocation of the guardianship. However, Mother Delia then withdrew her request to revoke the guardianship and substituted a request for telephonic contact and visitation rights.

. . .

Several years later, in July, 2007, Mother Delia effectively again agreed to the continuation of the guardianship, when she joined as a party in a stipulation regarding visitation and parenting time.

. . .

Only on June 11, 2009 did Mother file the petition to terminate permanent guardianship that [led] to this trial.

. . .

Even more importantly, the Children have been with the Guardians since 2003, i.e. for seven (7) years and for the better part of their lives. It is undisputed that the

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<sup>8</sup> The court expressly found that although Mother's housing was inadequate on a permanent basis, it was sufficient to allow the children to stay with Mother for visits.

Children are doing well with the Guardians. Even Mother Delia concedes that notwithstanding the many disputes between Mother and the Guardians, the Guardians have done a good job raising the Children. The Children know the Guardians' home as their home, and go to school and have all of their friends in Utah, where the Guardians live. To move the children to Arizona in order to place them with [] Mother would be to remove them from literally everything they know as their day-to-day lives. Furthermore, the Court finds that the Children are bonded to **both** the Guardians and Mother Delia, as both Mother Delia and Guardian Mary admitted on the stand. Revoking the guardianship might well strengthen the Children's bond with their Mother, but given the so-far endless battles between Mother Delia and the Guardians, returning the Children to Mother Delia would almost certainly result in the Children being cut off from the Guardians, with whom they are strongly bonded as well.

The court also found that the children had insufficient contact with Mother and amended the visitation to significantly increase the time Mother and children had together.<sup>9</sup> This timely appeal followed.

#### DISCUSSION

¶10 Mother raises two issues on appeal: (1) whether the juvenile court "committed reversible error in ruling that Mother failed to show a significant change of circumstances"; and (2)

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<sup>9</sup> Mother's rights to have visitation with the children one weekend per month was replaced with Mother's right to have alternating Memorial Day breaks and spring breaks with the children, as well as alternating Christmas and Thanksgiving Day holidays. Mother was also given eight consecutive weeks of visitation with the children each summer.



whether the juvenile court "misinterpreted the law in determining that a revocation of the guardianship was not in the children's best interest." (internal capitalizations omitted).

¶11 "We will affirm a juvenile court's order based on findings of clear and convincing evidence unless no reasonable evidence supports those findings." *Jennifer B. v. Ariz. Dep't of Econ. Sec.*, 189 Ariz. 553, 555, 944 P.2d 68, 70 (App. 1997). Additionally, we will not reverse unless the court's order is clearly erroneous. *Id.*

¶12 Arizona Revised Statutes § 8-873 provides in pertinent part as follows:

- A. [A] parent . . . may file a petition for the revocation of an order granting permanent guardianship if there is a significant change of circumstances, including:
  - 1. The child's parent is able and willing to properly care for the child.
  - 2. The child's permanent guardian is unable to properly care for the child.
- . . .
- C. The court may revoke the order granting permanent guardianship if the party petitioning for revocation proves a change of circumstances by clear and convincing evidence and the revocation is in the child's best interest.

### A. Significant Change of Circumstances

¶13 The record supports the court's determination that Mother's sobriety and other positive changes, while commendable, are not by themselves sufficient to justify revoking the guardianship under the circumstances in this case.<sup>10</sup> Mother had a drug and alcohol problem when her children were taken by CPS in 2002 and was unemployed when the guardianship was first ordered in 2004. Mother testified at the guardianship revocation hearing that she has been drug-free since 2004, sober since 2005, and steadily employed since 2007.<sup>11</sup> However, Mother also testified that she lost her house to foreclosure and, at the time of the hearing, was sharing a two bedroom apartment with her husband and two children, her mother, and her brother, who is known to have had a recent drug problem. Although Mother testified that she has plans to move to a larger home, her

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<sup>10</sup> The juvenile court made detailed findings on this issue and based its decision on "a totality of [the] circumstances" involved. In A.R.S. § 8-873, the word "including" is used to set off a list of factors a judge may consider in deciding whether to revoke a permanent guardianship. The use of the word "including" denotes the list is illustrative and not exclusive. See *Prince & Princess Enter., LLC v. State ex rel. Ariz. Dept. of Health Servs.*, 221 Ariz. 5, 8, ¶ 15, 209 P.3d 141, 144 (App. 2008). Therefore, the juvenile court properly considered relevant factors other than those listed in the statute in making its determination.

<sup>11</sup> Mother initially testified that she had been sober since 2003, but she later admitted to having been arrested, and later convicted, for driving under the influence of alcohol in January 2005. Mother asserted that she has been sober since her arrest.

testimony lacked specificity regarding when such a move would occur.

¶14 Moreover, despite being sober and employed for a number of years, Mother chose to delay seeking the return of her children. In July 2005, Mother sought visitation rights but stated to the court that she was "not asking to terminate the Guardianship." In August 2005, the GAL reported that Mother "wishe[d] to terminate the guardianship and regain her children." However, at the pretrial conference held in October 2005, Mother withdrew her request to revoke the guardianship and the court ordered visitation.

¶15 In July 2007, Mother stipulated to an increased visitation schedule, without making any requests to change the guardianship, and did not challenge the guardianship again until she filed the instant petition in June 2009. By that time, the children had been living with the guardians for nearly six years and had established a strong bond with the guardians, developed friendships in their neighborhood, and settled in well at school. Given these facts, we find the juvenile court did not err when it found that Mother failed to prove a sufficiently significant change in circumstances to justify terminating the guardianship.

## B. Best Interest of the Child

¶16 We also conclude that the court did not “misinterpret the law” when it determined that revoking the guardianship would not be in the children’s best interest. In child custody cases, courts must determine the best interest of the child based on a showing that the child would either suffer a detriment from remaining in the custody relationship or affirmatively benefit from the removal. See *In Matter of Maricopa County Juv. Action No. JS-500274*, 167 Ariz. 1, 6-7, 804 P.2d 730, 735-36 (1990) (applying this standard in severance cases).

¶17 In her opening brief, Mother argues that the court erred by “emphasizing that the guardianship must remain in place to protect the relationship with the current Guardians” when it found that “so long as the guardianship is not revoked, this Court is in a position to preserve the children’s relationships with both Mother . . . and the Guardians by ordering specific visitation for Mother[.]” Mother argues the court based this concern on a “legal misunderstanding” of state visitation laws under A.R.S. § 25-415 (Supp. 2009). She does not direct us to any portion of the record where she raised this issue in the juvenile court nor has our own review revealed that it was previously raised. We therefore decline to address this argument. See *Christy C. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 445, 452, ¶ 21, 153 P.3d 1074, 1081 (App. 2007) (“We

generally do not consider [issues] raised for the first time on appeal.”).

¶18 In any event, the court’s concern about maintaining the children’s relationship with the guardians was only one of several reasons supporting its decision. The court also cited the significant amount of time the children have lived with the guardians, Mother’s current lack of sufficient housing, and the children’s bond with the guardians. The record also shows that the children are well cared for in their current environment. They have been with the guardians in Utah since 2003, when A.G. was five years old and D.G. was only two. The court noted that to return the children to Mother now “would be to remove them from literally everything they know as their day-to-day lives.”

¶19 Furthermore, as noted *supra* ¶ 9, Mother’s current living arrangement is not adequate, as the children would not have their own space or beds. Guardian Mary testified that the children have their own beds and rooms at the guardians’ home, are doing well in school, and are involved in sports activities and their church. Mother testified that the guardians are doing a “good job” raising the children and the children are bonded with and love the guardians. Mother also testified that the children are closer to the guardians than they are to her.<sup>12</sup>

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<sup>12</sup> The court recognized the children’s need to improve their bond with their biological mother when it ordered “significantly

¶20 The facts are sufficient to support the juvenile court's conclusion that the children are not suffering a detriment by remaining with the guardians and that they may be negatively affected if they were removed at this time. Therefore, the juvenile court did not err in finding that revoking the guardianship would not be in the children's best interest.

**CONCLUSION**

¶21 For the foregoing reasons, we affirm the juvenile court's ruling denying Mother's petition to revoke the permanent guardianship order.

/s/

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MICHAEL J. BROWN, Judge

CONCURRING:

/s/

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JOHN C. GEMMILL, Presiding Judge

/s/

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PHILIP HALL, Judge

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increased visitation" for Mother. The court also found that both Mother and the guardians had "attempted to use the Children against each other" and admonished both the parties "not [to] do anything to undermine the Children's relationship with" the other party.