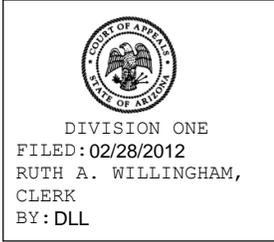


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ELVIRA B.,) No. 1 CA-JV 11-0194
)
Appellant,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ARIZONA DEPARTMENT OF ECONOMIC) 103(G) Ariz. R.P. Juv. Ct.;
SECURITY, YARITZA B.,) Rule 28 ARCAP)
)
Appellees.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. JD12173

The Honorable Bethany G. Hicks, Judge

REVERSED AND REMANDED

Denise L. Carroll
Attorney for Appellant

Scottsdale

Thomas C. Horne, Arizona Attorney General
By Michael Valenzuela, Assistant Attorney General
Attorneys for Appellee ADES

Phoenix

S W A N N, Judge

¶1 Mother's newborn child was removed from her care shortly after birth because the ongoing effects of a stroke she suffered years earlier raised concerns regarding her ability to care for the baby. The initial petition noted that after

delivering the baby, Mother was unable immediately to describe the details of proper newborn care, and that she had earlier been involved with CPS. At the contested dependency hearing, the superior court found that ADES had proved dependency by a preponderance of the evidence. For the reasons set forth below, we find that conclusion clearly erroneous. We therefore reverse and remand for a redetermination of the Child's dependency as to Mother.

*FACTS AND PROCEDURAL HISTORY*¹

¶2 Elvira B. ("Mother") gave birth to a daughter ("the Child") on April 28, 2011. When discussing post-discharge care with Mother, hospital staff observed that Mother was "showing problems of understanding the discharge planning instructions" related to the Child and that Mother had difficulty breast-feeding, could not properly mix baby formula, and could not describe the appropriate timing or amounts for bottle feedings. Hospital staff contacted CPS after learning from a "friend" that Mother had had prior CPS contact.²

¹ We view the facts in the light most favorable to sustaining the juvenile court's findings. *In re Maricopa County Juv. Action No. JD-5312*, 178 Ariz. 372, 376, 873 P.2d 710, 714 (App. 1994).

² Between 2001 and 2002, there were five reports to CPS regarding Mother's other three children. The only substantiated incident was in October 2002 in which Mother's home was unclean, unkempt and hazardous. Mother's rights to her other three children were terminated in January 2007.

¶13 CPS took the Child into temporary physical custody on May 1, 2011. The following day, Mother met with a CPS case manager about the reasons the Child was removed and even though "the reasons were explained thoroughly" Mother remained "truly puzzled" about why the Child was taken from her -- and still could not adequately explain how she would care for the Child.

¶14 At this same meeting, Mother reported that though she did not have "all her baby items or crib ready," she had housing, Social Security income, had no current substance abuse issues or domestic relationships, and was not engaged in criminal activities. Mother also reported that she had not received medical care for any ongoing concerns from her 2002 stroke since 2007. Mother told CPS that she "want[ed] her baby back" and that "she [would] do anything to accomplish this."

¶15 In her May 9, 2011 report, the CPS worker concluded that Mother was "ill-prepared" to care for the Child, that Mother's seeming lack of concern for her own health raised concerns about her ability to care adequately for the newly born Child, that the "underlying cause of her inability to parent" -- Mother's 2002 stroke -- had not changed and Mother had not pursued any medical interventions to prove otherwise.

¶16 The Arizona Department of Economic Security ("ADES") filed a dependency petition on May 4, 2011, asserting the concerns discussed in the May 9 report as the basis for the

dependency. Mother denied the allegations of the petition at the preliminary protective hearing and the court set the case for further proceedings. At the custody review hearing, on May 13, 2011, the court found that temporary custody by ADES was necessary and affirmed future hearing dates. On June 17, 2011, the court approved a mediation agreement and an order was filed noting the required services for the Child and listing parent aide services, a psychological consultation and directive to follow any recommendations, a neuropsychological evaluation, and transportation for Mother. Mother was also to receive a weekly two-hour visit, with an increase to two weekly two-hour visits after the parent aide intake was completed.

¶17 At the June 17, 2011 pretrial conference, after receiving the May 9 report into evidence, the court entered a finding of dependency, proceeding in absentia, after Mother did not appear. Later the same morning, the court vacated its dependency finding after Mother arrived and notified the court that the CPS-ordered cab was late, that she had called her own cab and that she had attempted to notify the CPS case manager. On September 13, 2011, the court held a dependency adjudication hearing. The court heard testimony from Mother and a CPS case manager who had read the documents admitted into evidence.

Based on this evidence, the court found the Child dependent as to Mother.³

¶18 Mother timely appeals the dependency finding. We have jurisdiction under A.R.S. § 8-235 and § 12-120.21(A)(1).

STANDARD OF REVIEW

¶19 We generally accept the juvenile court's findings of fact and will not disturb the juvenile court's decisions regarding weight and effect of the evidence unless they are clearly erroneous. *Michael M. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 230, 233, ¶ 10, 172 P.3d 418, 421 (App. 2007) (citation omitted); *JD-5312*, 178 Ariz. at 376, 873 P.2d at 714 (citation omitted).

DISCUSSION

¶10 "[P]arents have a fundamental liberty interest in the care, custody and management of their children," but the right to parent is not absolute -- through its interest in the welfare and health of children, the state may act and interfere in the parent-child relationship to protect a child whose welfare is in serious jeopardy. *Maricopa County Juv. Action No. JS-6520*, 157 Ariz. 238, 241, 756 P.2d 335, 338 (App. 1988).

³ After the dependency finding, the court ordered ADES to investigate an in-home dependency and to conduct a home investigation within 20 days and for Mother to receive three visits per week. The court approved the permanency plan of family reunification.

¶11 The burden is on ADES to prove a child's dependent status by a preponderance of the evidence. Ariz. R.P. Juv. Ct. 55(C); see also A.R.S. § 8-844(C)(1). A.R.S. § 8-201(13)(a)(i) defines a dependent child as one who is: "In need of proper and effective parental care and control and who has no parent or guardian, or one who has no parent or guardian willing to exercise or capable of exercising such care and control."

¶12 ADES's petition alleged that the Child was dependent due to "abuse neglect" because:

Mother is unable to safely parent due to the results of a stroke in 2002 which left her with weakness on her left side, possibly a shunt in her head, subject to seizures, memory losses, and cognitive deficiencies. Mother stated that she has not seen her neurologist since 2007. Mother presented at the hospital with problems breastfeeding and bottle feeding the baby. Mother also demonstrated that she has problems mixing baby formula and knowing the appropriate amount to feed and the appropriate timing of feedings. Mother receives SSI for her disability. Mother has neglected her own medical needs and there is a concern that Mother is unable to provide for the basic needs of a baby.

¶13 Neither Mother nor the Child tested positive for controlled substances at birth, but based on CPS reports from four years before, ADES requested that Mother engage in "rule out" urinalysis testing. Mother called in as required for a period of two weeks and was never required to test. ADES did not request that Mother engage in another round of testing.

¶14 ADES presented no evidence regarding the environment in which Mother had lived for the past three years. ADES never visited her home or contacted the individuals Mother lived with before the dependency hearing, despite the fact that it was aware of her address.

¶15 ADES presented no evidence that Mother had a shunt in her head nor that she neglected any care necessary to her condition. Indeed, ADES presented no evidence that the effects of Mother's 2002 stroke required on-going medical treatment at all. The testimony and exhibits that were presented showed that Mother saw neurologist Dr. Gorman on August 15, 2011, and that she would continue to see him. But ADES presented no records from the visit with Dr. Gorman.

¶16 ADES had asked Mother to complete an updated neuropsychological evaluation. Mother complied, completing the evaluation with Dr. Walter on July 19, 2011. ADES provided Dr. Walter only the caseworker's May 9 report -- it provided him with no other evaluations despite its request that he review "all" of them before drafting his report. Dr. Walter's resulting report noted that his 2005 and 2006 evaluations of Mother showed she had made "significant gains" since 2002, but also that she continued to have problems with "insight and planning as well as organization, which interfered with her ability to parent." Regarding the present motor limitations

from Mother's stroke, Dr. Walter noted that though Mother "tended to not use her left hand," she could use it when the task required use of both hands. Mother told Dr. Walter that "she prepares for visits with her daughter and has diapers and food ready for her," leading Dr. Walter to believe this "suggested that she is much more prepared than she was [years earlier]" to care for the Child.

¶17 After testing, Dr. Walter concluded that Mother had "improved somewhat" since 2006 and that Mother was able to describe being more organized and attentive since the initial concerns about her ability to care for the Child. He noted the motor issues with her left arm and visual inattentiveness as ongoing problems. Despite an admonition that individuals with Mother's type of brain injury "often are inattentive and lack insight into their limitations and so *can be* safety risks for young children," Dr. Walter ultimately concluded that "*there is no indication in the neuropsychological testing per se that [Mother] would be unsafe with her child.*" (Emphasis added.) Dr. Walter accordingly deferred to the parent aides who had been working with Mother regarding Mother's ability to safely parent the Child.

¶18 Despite Mother's ongoing and regular participation in parent aide services and aide-supervised visitations, ADES obtained and presented only the July 2011 parent aide report at

the dependency hearing. The visitation report notes that Mother was happy to see the Child, greeted her and said good-bye with kisses and spoke to the Child "in a sweet voice" telling her, "I love you my baby"; Mother properly prepared formula and fed it to the Child and burped her; Mother checked the Child's diaper twice and changed her when it was wet at the end of the visit; and Mother bonded appropriately with the Child, held her affectionately and met her needs. The second report details nearly identical observations and adds that Mother noted a foul odor on the Child's neck, which she attempted to address by treating the visible irritation on the Child's skin, and that Mother properly supervised the Child when she fell asleep as Mother walked around with her.

¶19 An ADES case manager testified that ADES had not complied with the mediation agreement and order giving Mother two visits per week with the Child. The same case manager agreed that Dr. Walter's report did not indicate that Mother was unsafe to parent and that the report deferred to the parent aides regarding Mother's parenting abilities. She further acknowledged that the admitted parent aide reports were "favorable" and that ADES had failed to obtain any other reports prior to the hearing. The case manager asserted that "[Mother] has not shown us what has changed," in the four years since her other children were removed and agreed that ADES and the court

needed more information before making recommendations about Mother's abilities to parent. ADES argued in closing that "we just don't know whether or if [Mother] has recovered enough to safely parent this child."

¶120 The court ultimately found "by the smallest preponderance of the evidence" that the Child was dependent as to Mother on the ground that Mother was unable to safely parent due to the results of the stroke. The court relied on Dr. Walter's report, specifically that his inability to conclude that Mother was unsafe to parent made Mother's ability to parent "unknown."⁴ The court further noted that ADES could not prove that Mother had not improved because it failed to obtain an updated psychological evaluation before the dependency adjudication.

¶121 When a parent is willing to exercise proper care and control of the child, the burden is on the state to show by a preponderance of the evidence that the parent is incapable of properly and effectively parenting the child -- the burden does not rest with the parent to show she is capable. See A.R.S. § 8-201(13)(a)(i); Ariz. R.P. Juv. Ct. 55(C); see also A.R.S. § 8-

⁴ The court dismissed the remainder of ADES's allegations as "flimsy at the very best." The court could not find that there were reasonable efforts to prevent removal, but it did find that ADES had "been very lax in providing any services." The court also found that ADES knew the parent aide reports would be important given Dr. Walter's deference to them "yet did not have those to enlighten anybody."

844(C)(1). The ADES case manager here testified that “[Mother] has not shown us what has changed,” in the four years since her other children were removed and agreed that ADES and the court needed more information before making recommendations about Mother’s abilities to parent. As a matter of law, we hold that ADES’ mere uncertainty, unsupported by evidence of incapacity, does not establish dependency by a preponderance of the evidence.

¶22 It is undisputed that Mother is willing to care for the Child, and ADES was required to carry its burden to prove that Mother was not capable for the court’s finding to stand. ADES conceded “we just don’t know” about Mother’s abilities, yet asserts it carried its burden. At the hearing, ADES did nothing more than articulate concerns based on past circumstances, concerns that were unsupported by sufficient evidence to overcome the equipoise of “we just don’t know.” Accordingly, the court’s finding of dependency as to Mother was clearly erroneous.⁵

CONCLUSION

¶23 ADES presented suspicions regarding the Child’s dependency, but failed to prove those suspicions by a preponderance of the evidence. Accordingly, we reverse the

⁵ We do not hold that the child cannot be found dependent as to Mother should sufficient evidence be presented at a later proceeding.

finding of dependency as to Mother and remand for further proceedings consistent with this decision and the best interest of the child.

/s/

PETER B. SWANN, Presiding Judge

CONCURRING:

/s/

MICHAEL J. BROWN, Judge

/s/

JON W. THOMPSON, Judge