DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

GARY D., DEBORAH D., Appellants, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY, IVORY J., JOCELYNN D., Appellees.	)	1 CA-JV 11-0217 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Yavapai County

Cause No. P1300JD20070033

The Honorable David L. Mackey, Judge

AFFIRMED

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K E S S L E R, Judge

¶1 Gary and Deborah D. appeal the juvenile court's order continuing placement in foster care of two minor children, Ivory and Jocelynn. For the reasons stated below, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 Riva and Brian D. are the biological parents of Jocelynn, born in April 2007. Riva has one other child, Ivory, whose father is Tarran M. In January 2010, the Arizona Department of Economic Security ("ADES") filed a dependency petition based on allegations of sexual abuse. In March 2010, Riva and Brian D.'s parental rights were severed, and the girls were placed with Jocelynn's paternal grandparents, Gary and Deborah.[1] The placement lasted for fourteen months.

¶3 In June 2010, Dr. Glenn Moe, a licensed psychologist, conducted an assessment of attachment and best interest. Due to various behavioral difficulties, including reports of sexual acting out between the children, Dr. Moe "recommended that CPS and the Court consider permanency plans that would result in separation of the siblings while also encouraging frequent visitation contact." He further "recommended that consideration be given for Jocelynn's adoption by Gary and Deborah." In October 2010, however, Gary and Deborah informed the Foster Care Review Board that they would not adopt Jocelynn. A few days later, they moved to intervene in the dependency, but did not indicate in that motion that they had reconsidered their decision to adopt. Following Gary and Deborah's decision not to

[1] Tarran M.'s parental rights were later terminated in November 2010. Riva D., Brian D., and Tarran M. are not parties to this appeal.

adopt, and reports of progress in the children's behavior, Dr. Moe opined that it would be possible to consider permanency plans in which Ivory and Jocelynn would be placed together. In December 2010, the juvenile court granted Gary and Deborah's motion to intervene in the dependency action. The children were moved to an adoptive placement in April 2011.

¶4 In May 2011, ADES moved to dismiss Gary and Deborah as parties to the proceeding, alleging that their intrusive behavior contributed to the loss of two potential adoptive placements. Before the court issued a decision, Gary and Deborah filed a Notice of Intent to Adopt both children and requested the juvenile court set a permanency hearing to address a change in custody until the adoption could be finalized. The juvenile court denied ADES's motion to dismiss Gary and Deborah, but suspended their visits with the children.

¶5 Following a two-day evidentiary hearing, the court filed a signed minute entry on August 3, 2011, finding that ADES established by clear and convincing evidence that the children faced a substantial risk of harm if they were relocated from their current placement to Gary and Deborah. Accordingly, the juvenile court denied Gary and Deborah's request to change physical custody, adopt, and set a different permanency hearing. The minute entry stated it was "a final order regarding the Intervenors' involvement in the lives of the children."

¶6 At a permanency planning hearing in September 2011, Gary and Deborah raised an objection to the current placement and pending adoption. In an unsigned minute entry filed September 27, 2011, the juvenile court overruled their objection, but allowed them to continue to remain parties to the proceeding as a "backup should the adoption not take place."

¶7 Gary and Deborah appealed from the unsigned September 27 minute entry, and this Court suspended the appeal to provide them with the opportunity to obtain a signed order form. A signed copy was filed, and this appeal was reinstated.[2]

ISSUES AND STANDARD OF REVIEW

¶8 Gary and Deborah argue that the juvenile court erred by: (1) failing to follow the statutory preferences of Arizona Revised Statutes ("A.R.S.") section 8-514 (2007); and (2) refusing to allow evidence at the September permanency planning hearing. ADES argues that: (1) we lack jurisdiction to consider the August 3 placement order because Gary and Deborah did not

[2] While this appeal was pending, ADES went forward with an adoption of the children and the juvenile court dismissed the dependency action on December 19, 2011. At the request of the Appellants, we issued an order for supplemental briefing on the effect of such dismissal on this appeal. Appellants argued that the juvenile court lacked jurisdiction to issue the December 19 order while the appeal was pending and the order must be deemed void. They also contend that the December 19 order does not moot the appeal. ADES contends that if we vacate or reverse the September 27 order, the December 19 order would be voidable and the juvenile court could decide how to proceed. We need not decide the issue because we affirm the September 27 order.

timely appeal from that order; and (2) the juvenile court did not abuse its discretion on the placement issues or in refusing to allow further evidence at the September permanency planning hearing.

¶9 We review both the placement of dependent children and the juvenile court's evidentiary rulings for an abuse of discretion. *Antonio P. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 402, 404, ¶ 8, 187 P.3d 1115, 1117 (App. 2008) ("Juvenile courts have substantial discretion when placing dependent children because the court's primary consideration in dependency cases is the best interest of the child."); *Larsen v. Decker*, 196 Ariz. 239, 241, ¶ 6, 995 P.2d 281, 283 (App. 2000) ("We review the trial court's evidentiary rulings for a clear abuse of discretion; we will not reverse unless unfair prejudice resulted, or the court incorrectly applied the law." (citation omitted)); *see also Maricopa County Juv. Action No. JD-6236*, 178 Ariz. 449, 451, 874 P.2d 1006, 1008 (App. 1994) ("Our court is generally deferential when the juvenile court exercises its substantial discretion to make placement decisions in the best interest of dependent juveniles."). We review issues of statutory interpretation de novo. *State v. Ross*, 214 Ariz. 280, 283, ¶ 21, 151 P.3d 1261, 1264 (App. 2007).

> The primary aim of statutory construction is to find and give effect to legislative intent. Generally, if a statute is clear,

> we simply apply it without using other means of construction, assuming that the legislature has said what it means. When a statute is ambiguous or unclear, however, we attempt to determine legislative intent by interpreting the statutory scheme as a whole and consider the statute's context, subject matter, historical background, effects and consequences, and spirit and purpose.

Id. at ¶ 22 (citations and internal quotation marks omitted). We review issues of jurisdiction de novo. *Murphy v. Bd. of Med. Exam'rs*, 190 Ariz. 441, 446 n.8, 949 P.2d 530, 535 n.8 (App. 1997).

DISCUSSION

A. JURISDICTION

¶10 ADES contends that this Court does not have jurisdiction because Gary and Deborah appealed from the September 27 order, and not from the juvenile court's August 3 order denying their motion for placement of the children with them. While we conclude there is a debatable issue of jurisdiction, we need not decide that issue because, to the extent Gary and Deborah appeal from the rulings in the August 3 order, we will consider the appeal as a petition for special action relief, accept jurisdiction, but deny relief.

¶11 "Any aggrieved party may appeal from a *final order* of the juvenile court to the court of appeals." Ariz. R.P. Juv. Ct. 103(A) (emphasis added); *see* A.R.S. § 8-235(A) (2007). Such an appeal must be filed within fifteen days of entry of the

order. Ariz. R.P. Juv. Ct. 104(A). Gary and Deborah did not file a timely appeal from the August 3 order, and if that order was final and appealable, we would lack jurisdiction to review it.[3] *See Pima County Juv. Action No. S-933*, 135 Ariz. 278, 279, 660 P.2d 1205, 1206 (1982).

¶12 The definition of a final order, and whether the August 3 or September 27 orders are final and appealable, is unclear. *See* Ariz. R.P. Juv. Ct. 103(A). Neither the Arizona Rules of Procedure for the Juvenile Court nor the Arizona Revised Statutes define "final order." The Arizona Supreme Court has found that a "very narrow, technical conception of what constitutes a final order" is "inappropriate in cases involving the important and fundamental right to raise one's

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[3] Moreover, Gary and Deborah did not list the August 3 order in their notice of appeal, indicating that they were only appealing from the September 27 "judgment." Generally, a notice of appeal must list the orders the appellant seeks to appeal from. ARCAP 8(c). However, we will not dismiss an appeal on this basis if the opposing party was not prejudiced by the failure to list the order sought to be appealed. *Hill v. City of Phoenix*, 193 Ariz. 570, 573, ¶¶ 11-14, 975 P.2d 700, 703 (1999). Nor must a party list all interlocutory orders to perfect an appeal from a final judgment. *See* A.R.S. § 12-2102(A) (2003); *Dowling v. Stapley*, 221 Ariz. 251, 263 n.12, ¶ 36, 211 P.3d 1235, 1247 n.12 (App. 2009) ("[A]ppeal from the final judgment would include appeals from otherwise non-appealable interlocutory orders."). As discussed more fully in the body of this decision, we need not decide whether the failure to timely appeal from the August 3 order or to list that order in the notice of appeal deprives us of jurisdiction because we have decided to treat the appeal as a special action. *See infra* ¶ 15.

children." *Yavapai County Juv. Action No. J-8545*, 140 Ariz. 10, 14, 680 P.2d 146, 150 (1984).

> From a practical perspective, each periodic review of a dependency determination is a new determination of whether or not a child is dependent. Therefore, orders declaring children dependent and orders reaffirming findings that children are dependent are final orders subject to appeal by aggrieved parties. . . . This does not mean that [a parent] shall be able to challenge a custodial arrangement every week or every month. *What it means is that an aggrieved party may appeal an order issued pursuant to the juvenile court's periodic review of a determination of dependency or of a custodial arrangement.*

Id. (emphasis added) (citation omitted). Thus, examples of dependency proceeding orders which are final and appealable include orders "terminating a parent's visitation rights, or substantially limiting those rights," while interlocutory orders include orders moving a child from one foster home to another. *Lindsey M. v. Ariz. Dep't of Econ. Sec.*, 212 Ariz. 43, 45, ¶ 7, 127 P.3d 59, 61 (App. 2006) (citation omitted).

¶13 In contrast, this Court has held that orders entered after a permanency hearing are interlocutory in nature, and therefore, are not final and appealable. *Rita J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 512, 515, ¶ 8, 1 P.3d 155, 158 (App. 2000); *see* A.R.S. § 8-862 (Supp. 2011) (providing requirements for a permanency hearing).

> An order is interlocutory if it directs an inquiry into a matter of fact preparatory to a final decision and is not the final decision in the case. Orders entered after a permanency hearing . . . contemplate further proceedings that will determine the ultimate outcome of the case. The outcome remains uncertain, however, until those proceedings are conducted.

Rita J., 196 Ariz. at 515, ¶ 8, 1 P.3d at 158 (citation and internal quotation marks omitted). As we further explained in *Rita J.*,

> [p]ermanency orders are . . . analogous to the probable cause findings made in grand jury proceedings in an adult criminal prosecution. The determination of probable cause is essentially merged into any conviction, which must be based on a finding that all elements of an offense have been established beyond a reasonable doubt. Thus, challenges to the denial of a motion to remand a case for a new finding of probable cause must be made by a petition for special action.

Id. at ¶ 9 (internal citation omitted).

¶14 Gary and Deborah have appealed from the September 27 order continuing placement of Ivory and Jocelynn with their adoptive foster family. That order can be seen as either a final order and "periodic review of a determination of a dependency or of a custodial arrangement" under *J-8545*, 140 Ariz. at 14, 680 P.2d at 150, or as an interlocutory order issued after a permanency hearing, *Rita J.*, 196 Ariz. at 515, ¶ 8, 1 P.3d at 158. If the August 3 order is not final and the

September 27 order is final, we have jurisdiction to consider the appeal to the extent it seeks review of the August 3 order. If the August 3 order is final and the September 27 order is interlocutory in nature, we would have no jurisdiction to consider the appeal.

¶15 We, however, do not need to resolve this issue. Even if the September 27 order is interlocutory, "it is within our discretion to consider the matter as a special action." *State v. Perez*, 172 Ariz. 290, 292, 836 P.2d 1000, 1002 (App. 1992); *see* A.R.S. § 12-120.21(A)(4) (2003) (providing court of appeals jurisdiction over special actions, "without regard to its appellate jurisdiction"); *accord Lloyd v. State Farm Mut. Auto. Ins. Co.*, 189 Ariz. 369, 375, 943 P.2d 729, 735 (App. 1996). In the exercise of our discretion, we elect to treat this appeal as a petition for special action from both orders.

B. STATUTORY PREFERENCES

¶16 Gary and Deborah argue that the juvenile court erred by failing to follow the statutory preferences of A.R.S. § 8-514(B). Section 8-514(B) states that "[t]he department shall place a child in the least restrictive type of placement available, consistent with the needs of the child." Although the statute identifies a placement preference with a grandparent

or relative above placement in foster care,[4] placement according to the statutory preference scheme is not always required.

> The statute clearly states that the order of placement is a preference, not a mandate. Preference means a 'choice or estimation above another.' Preference does not mean that a certain choice or estimation is mandated. Section 8-514(B) provides the juvenile court with the legislature's preference for where or with whom a child is placed but it does not mandate that the order of preference be strictly followed when a placement is not consistent with the needs of the child. . . . The statute requires only that the court include placement preference in its analysis of what is in the child's best interest.

Antonio P., 218 Ariz. at 405, ¶ 12, 187 P.3d at 1118 (citation omitted).

¶17 While we recognize Gary and Deborah were probably acting in what they perceived as the children's best interest, there is substantial evidence in the record to support the juvenile court's decision to continue placement of Ivory and Jocelynn with their adoptive placement. First, the juvenile court heard testimony expressing concern over Gary and Deborah's inconsistency regarding their desire to adopt the children. In addition, Dr. Glenn Moe and Dr. Douglas Albrecht, two licensed

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[4] "The order for placement preference is as follows: (1) With a parent. (2) With a grandparent. (3) In kinship care with another member of the child's extended family, including a person who has a significant relationship with the child. (4) In licensed family foster care. (5) In therapeutic foster care. (6) In a group home. (7) In a residential treatment facility." A.R.S. § 8-514(B).

psychologists, testified that if the children were currently in a stable and committed home, they should be afforded the opportunity for the placement to be successful. Dr. Moe, Dr. Albrecht, and Renee Walden-Shea, a licensed professional counselor, discussed how an additional move could be significantly damaging, causing behavioral issues, emotional conflicts, and developmental harm. Moreover, Walden-Shea and Judith Helgeson, a Court Appointed Special Advocate ("CASA"), also testified that Ivory and Jocelynn appear to be happy and comfortable in their foster care surroundings, the foster parents are doing a good job handling the girls' behaviors and issues, and they are committed to adopting both girls. Based on this testimony, the juvenile court had sufficient evidence to support its conclusion that continued placement with the adoptive foster family was more consistent with Ivory and Jocelynn's needs and best interest. Accordingly, we find the juvenile court did not abuse its discretion in denying the motion to relocate the children from the foster placement to Gary and Deborah.

¶18 Gary and Deborah argue that the court erred on August 3 to the extent that it based its decision on a desire not to disrupt the children's foster placement, which Gary and Deborah argue was improper under A.R.S. § 8-514(B) *ab initio*.

¶19 We do not agree with Gary and Deborah, however, that the foster care placement continued by the August and September orders was based on a mere passage of time after ADES's decision to move the children from Gary and Deborah to foster care. As explained above, ADES initially placed the children with Gary and Deborah for fourteen months. After a psychologist suggested the two children be separated and only Jocelynn stay with her grandparents, Gary and Deborah then stated they did not intend to adopt Jocelynn. Psychological reports then indicated that the children could be kept together and ADES transferred them to foster care. During that period, there was evidence that the grandparents disrupted the foster care arrangements.

C. EVIDENTIARY REQUIREMENTS

¶20 Gary and Deborah also argue that the September permanency planning hearing did not comply with the evidentiary requirements of A.R.S. § 8-862 or the demands of due process. Specifically, they argue that the court erred by declining to take evidence at the hearing and argue they were denied the right to even make an offer of proof. We disagree.

¶21 At the hearing, the juvenile court stated that it had reviewed the report to the court for the permanency hearing dated September 20, 2011, and the CASA court report of August

29, 2011.[5] In addition, that same judge presided over the two-day evidentiary hearing that resulted in the August 3 order. The record establishes that the juvenile court had before it relevant information, which we presume it considered, to make the findings necessary to support its decision. *See In re Niky R.*, 203 Ariz. 387, 392, ¶ 21, 55 P.3d 81, 86 (App. 2002) ("We have long held that in reviewing the evidence we are mindful of the fact that the trial court will be deemed to have made every finding necessary to support the judgment." (citation and internal quotation marks omitted)).

¶22 Gary and Deborah do not contend that if they were given the chance to present further evidence at the September 27 hearing that they would have presented evidence that was not available to the juvenile court at the hearings leading to the August 3 order. From the transcript of the September hearing, we discern that they merely wanted to preserve something in the record, but the court adjourned without allowing them to do so. They argue on appeal that there was evidence the proposed adoptive parents were not sure when they would be ready to adopt, implying the proposed adoptive parents were wavering about adoption. As ADES points out, the only discussion at the

[5] Gary and Deborah did not object to the juvenile court's consideration of those documents. Failure to object below waived any error on appeal. *Shell Oil Co. v. Gutierrez*, 119 Ariz. 426, 437, 581 P.2d 271, 282 (App. 1978).

hearing concerning the timing of the adoption was about ADES's inability to give an exact date when it would file a petition for adoption because it still had to complete a parental mediation. The placement remained committed to adoption. Given this record and the fact that the juvenile court had recently held an evidentiary hearing on the appropriateness of the placement, we cannot say that the juvenile court abused its discretion in not permitting Gary and Deborah to introduce more evidence on September 27 or that such decision violated their due process rights. *See Banks v. Ariz. State Bd. of Pardons & Paroles*, 129 Ariz. 199, 202, 629 P.2d 1035, 1038 (App. 1981) ("Due process is a flexible concept and calls for such procedural protections as a particular situation demands."); *Ariz. Farmworkers Union v. Whitewing Ranch Mgmt., Inc.*, 154 Ariz. 525, 531, 744 P.2d 437, 443 (App. 1987) (stating that procedural due process is satisfied where the party is afforded adequate notice, an opportunity to be heard, and an impartial tribunal).

CONCLUSION

¶23 For the foregoing reasons, the judgment of the juvenile court is affirmed.

/s/
DONN KESSLER, Judge

CONCURRING:

/s/
DIANE M. JOHNSEN, Presiding Judge

/s/
ANDREW W. GOULD, Judge