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



DIVISION ONE  
FILED: 07/31/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: sls

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

JOHN S., ) No. 1 CA-JV 12-0044  
)  
Appellant, ) DEPARTMENT C  
)  
v. ) **MEMORANDUM DECISION**  
)  
ARIZONA DEPARTMENT OF ECONOMIC ) (Not for Publication -  
SECURITY, TORY K., DESTINY S., ) Ariz. R.P. Juv. Ct. 103(G);  
JOHN S., ) ARCAP 28)  
)  
Appellees. )  
)  
)  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. JD509635

The Honorable Brian K. Ishikawa, Judge

**AFFIRMED**

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Robert D. Rosanelli, Attorney at Law Phoenix  
By Robert D. Rosanelli  
Attorney for Appellant, John S.

Thomas C. Horne, Arizona Attorney General Phoenix  
By Michael Valenzuela, Assistant Attorney General  
Attorneys for Appellee, Arizona Department of Economic Security

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**K E S S L E R**, Judge

¶1 John S. ("Father") appeals the juvenile court's order finding his children, Destiny S. and John S., Jr., dependent as to him and committing them to the custody, care, and control of the Arizona Department of Economic Security ("ADES" or "CPS"). For the following reasons, we affirm the order of dependency.

**FACTUAL AND PROCEDURAL HISTORY**

¶2 Father and Crystal F. ("Mother") are biological parents of Destiny S., born in April 2010; and John S., Jr., born in April 2005. Mother also has four other biological children—Alicia F. (fifteen years old), Celeste S. (twelve years old), Victoria F. (eleven years old), and Gregory M. (eight years old)—by men other than Father. All six children lived with Mother, but Father lived with his parents and stayed with Mother and the children about two times per week. Father and Mother are not married but have had an ongoing relationship for ten years.

¶3 On October 17, 2011 CPS responded to a report that Mother was abusing the children. CPS Case Manager, Nicholas Loya, interviewed the children and Mother. Loya relayed the information he gathered to the Mesa Police Department ("MPD") so that MPD could conduct forensic interviews of the children. CPS took the children into temporary physical custody on October 18, 2011.

¶4 Gregory and Celeste both reported to CPS and MPD that the night before the CPS interview, Mother and Father went out together, and when they returned Mother was yelling at Father. After Mother told Celeste and Alicia not to let Father in the house, Father punched Mother in the face and choked her.

¶5 Celeste told MPD that there was a history of domestic violence between Mother and Father and that Mother and the children had gone to domestic violence shelters because of Father. Celeste also explained that Father has hit Mother while she was holding Destiny (the youngest child) and hit Mother in the head, causing her to bleed. Police reports corroborate the history of domestic violence since at least 2005.

¶6 The children also reported that Father sells drugs. Gregory informed CPS that Father takes him and John Jr. when he sells "weed" to his friends.<sup>1</sup> Gregory described the weed as being "white like pop rocks." Celeste also reported to MPD that Father sells drugs, and Alicia told CPS that she has heard that Father sells drugs. Father has a history of arrest for drug related offenses, including arrests for possession and distribution of methamphetamines.

¶7 Gregory also reported to CPS and MPD that when he or John S., Jr. would sit in the front seat of the car, Father

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<sup>1</sup> Gregory similarly informed MPD that his father sells "white powdery stuff" to his friends.

would touch their testicles over their pants while tickling them. Gregory described the touching as lasting for about five minutes, and it had happened about ten times. Gregory was not sure if the touching was intentional or incidental. Mother told CPS that Father would touch the boys' testicles even though she had told him not to.

¶8 The interviews with CPS and MPD also revealed a lack of appropriate care at Mother's home. Celeste reported to MPD that sometimes she would not eat dinner because there was not enough food to go around, and it was her job to make sure her younger siblings eat. Victoria also explained that once the family went without food for a couple of days. She further informed the CPS case manager that Mother's house has cockroaches and bed bugs.

¶9 John S., Jr., Victoria, Celeste, and Gregory all reported to CPS that Mother spansks them with a belt. Alicia denied that Mother hits her but did indicate that Mother whips the other children with a belt. Victoria stated that Mother calls her and Celeste "whores," and Mother admitted to CPS to calling the girls "whores" and "bitches."

¶10 After CPS made its report, the children were split up and placed in various shelters and foster homes;<sup>2</sup> Gregory was

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<sup>2</sup> Celeste, however, was returned to her biological father's care without further CPS involvement.

placed in a shelter without any of his siblings. When he was interviewed after being at the shelter for two days, Gregory shook his head when asked about any history of sexual abuse. When asked about any history of physical abuse he responded, "ummm, nah."

¶11 ADES filed a petition alleging that the children<sup>3</sup> were dependent as to Mother due to abuse and neglect, and John S., Jr. and Destiny were dependent as to Father due to domestic violence against Mother, substance abuse, and neglect. Father denied the allegations during the preliminary protective hearing. Mother submitted to the court finding the children to be dependent as to her.

¶12 The court held a contested dependency hearing for Father. The parties stipulated to admit into evidence Exhibits 1-22 and then moved onto closing arguments.

¶13 The court found that Father is unable to parent due to: (1) domestic violence issues; (2) criminal behavior including substance abuse and/or the sale of illegal substances; (3) neglect because he has failed to provide his children with the basic necessities of life including but not limited to appropriate parental care, supervision, and protection; and (4) acts of sexual abuse.

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<sup>3</sup> Celeste was not listed in the dependency petition since she was returned to her father's care.

¶14 Father timely appealed. This Court has jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 8-235(A) (2007), 12-120.21(A)(1) (2003), and 12-2101(A)(1) (Supp. 2011).

#### STANDARD OF REVIEW

¶15 ADES must prove a dependency by a preponderance of the evidence. *Pima County Juv. Dependency Action No. 118537*, 185 Ariz. 77, 79, 912 P.2d 1306, 1308 (App. 1994). We will accept the juvenile court's findings of fact 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). Because the juvenile court must balance the interests of the parent, the state, and the child, it is vested with "a great deal of discretion." *Cochise County Juv. Action No. 5666-J*, 133 Ariz. 157, 160, 650 P.2d 459, 462 (1982). In a dependency action, the primary concern is always the best interest of the child. *Id.* at 161, 650 P.2d at 463. "On appeal from a dependency determination, this court will not substitute its judgment for that of the trial court unless no reasonable evidence exists to support the lower court's finding." *Maricopa County Juv. Action No. JD-500200*, 163 Ariz. 457, 461, 788 P.2d 1208, 1212 (App. 1989).

## DISCUSSION

¶16 Father argues that the juvenile court's findings that the children are dependent are clearly erroneous because they are not supported by the evidence.

¶17 ADES responds that the evidence supports the findings that Father is unable to parent because of his (1) continued domestic violence against Mother, (2) sale of illegal drugs, (3) acts of sexual abuse, and (4) neglect of the children.

¶18 One definition of "dependent child" is "[a] child whose home is unfit by reason of abuse, neglect, cruelty or depravity by a parent, a guardian or any other person having custody or care of the child." A.R.S. § 8-201(13)(a)(iii) (Supp. 2011). "Abuse" is defined in relevant part as "the infliction or allowing of physical injury, impairment of bodily function or disfigurement." A.R.S. § 8-201(2). Abuse includes molestation of a child pursuant to A.R.S. § 13-1410 (2010).<sup>4</sup> A.R.S. § 8-201(2)(a). "Neglect" is defined in relevant part as "[t]he inability or unwillingness of a parent . . . to provide [a] child with supervision, food, clothing, shelter or medical care if that inability or unwillingness causes unreasonable risk

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<sup>4</sup> A.R.S. § 13-1410(A) provides: "[a] person commits molestation of a child by intentionally or knowingly engaging in or causing a person to engage in sexual contact, except sexual contact with the female breast, with a child who is under fifteen years of age."

of harm to the child's health or welfare." A.R.S. § 8-201(22)(a).

¶19 Reasonable evidence supports the juvenile court's findings that Destiny and John S., Jr. are dependent as to Father.<sup>5</sup> First, the juvenile court found that the children were dependent because of domestic violence issues. While Father is correct that there is no evidence on the record indicating that he was physically abusive towards the children, Mother's and the children's statements provide that there was a long history of domestic violence by Father against Mother. These statements are corroborated by police reports dating from 2005 through 2010. Taken together, they support the juvenile court's finding that Father is unable to parent due to domestic violence issues.

¶20 The juvenile court also found that Father is unable to parent due to substance abuse and/or sale of illegal substances.

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<sup>5</sup> In parental severance cases, we often will affirm the trial court if any one of several statutory bases for severance is supported by the record. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 279-80, ¶ 2, 53 P.3d 203, 204-05 (App. 2002). This is because the parental severance statute, A.R.S. § 8-533 (B) (Supp. 2011), provides that if any one of the statutory subsections authorizing severance is proven and severance is in the best interests of the child, the court may sever the parental relationship. In contrast, A.R.S. § 8-201(13)(a)(iii) defines a dependent child as one whose home is unfit because of abuse, neglect, cruelty or depravity with varying definitions of abuse and neglect. Those categories are broader and the same evidence can support more than one category for dependency, as is the case here. Accordingly, we do not affirm on the basis that any one of the statutory categories has been met because evidence relating to Father supports the trial court's finding of abuse and neglect.



Father contends that there is no credible evidence that he is engaged in drug abuse or sales at this time, although he does concede to a history of arrests for drug related offenses, most recently being released from prison in 2009. However, Father overlooks the children's reports to CPS that Father was selling drugs after his release from prison and in their presence. Both Gregory and John S., Jr. said Father would take them with him to sell bags filled with a white substance. They both explain that Father keeps the baggies in a safe and then sells them to his friends. Gregory called the substance white "weed" and knew that the user smokes it. Mother also told the case manager that Father sold drugs and that Father is "a totally different person when [he] is not using meth." While Mother on a later occasion told the case manager that she had no knowledge that Father was selling drugs, the case manager believed that Mother had some knowledge of Father's illegal drug sales. Mother's and the children's initial statements provide reasonable evidence to support the juvenile court's finding by a preponderance of the evidence that Father is unable to parent due to the sale of illegal substances.

**¶21** Third, the juvenile court found that Father was unable to parent due to neglect. Father alleges that the only possible evidence of neglect towards the children is that it is believed that drug transactions occur when he takes the children out with

him. We do not agree. The record indicates not only that Mother's home sometimes lacked enough food, but also the children lacked adequate parental care and supervision stemming from Mother's abuse of all of her children. Father did not live with Mother and the children full time, and under Mother's care the children were often hit by Mother with both an open hand and a belt. John S., Jr. also reported that Mother would let Alicia hit him with a belt. As the focus of dependency statutes is status of the child, not the fault of the parents, an adjudication of dependency does not require a finding of fault on Father's part. *Santa Cruz County Juv. Dependency Action Nos. JD-89-006 and JD-89-007*, 167 Ariz. 98, 102, 804 P.2d 827, 831 (App. 1990). The children's reports provide a reasonable basis for the juvenile court's finding of neglect due to lack of appropriate parental care, supervision, and protection.

¶22 Fourth, the juvenile court found that Father was unable to parent due to acts of sexual abuse. Father asserts that these allegations are uncorroborated and not credible. Father's argument fails for two reasons. First, Mother corroborated that Father would touch the boys' testicles, despite the fact that she told him not to. Second, while it is true that when interviewed at the shelter Gregory denied any sexual abuse, Gregory's initial statement to MPD was that Father would touch his testicles any time Gregory sat in the front seat

of the car with him. It is the job of the juvenile court, not this Court, to weigh conflicting evidence. See *Maricopa County Juv. Action No. JD-500200*, 163 Ariz. at 461, 788 P.2d at 1212. Mother's statements and Gregory's first interviews with both CPS and MPD provide reasonable evidence to support the juvenile court's finding of sexual abuse.

¶23 Father also notes that MPD determined that there was no criminal intent involved in the touching. However, as noted above, the focus of a dependency is on the status of the child, not fault of the parent. See *Santa Cruz County Juv. Dependency Action Nos. JD-89-006 and JD-89-007*, 167 Ariz. at 102, 804 P.2d at 831. The important fact here is that Gregory felt sexually abused by Father, not Father's lack of criminal sexual abuse charges. Further, the lack of a criminal conviction does not undermine a finding of dependency. See *Pima County Juv. Dependency Action No. 118537*, 185 Ariz. at 79, 912 P.2d at 1308 (stating that acquittal of criminal sexual abuse charges does not undermine a dependency finding because a dependency requires a lower burden of proof than a criminal conviction).

#### **CONCLUSION**

¶24 For the forgoing reasons, we affirm the juvenile court's finding that Destiny S. and John S., Jr., are dependent

