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



DIVISION ONE  
FILED: 1/29/2013  
RUTH A. WILLINGHAM,  
CLERK  
BY: mjt

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

WENDY L., ROBERT L., ) No. 1 CA-JV 12-0108  
)  
Appellants, ) DEPARTMENT B  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
ARIZONA DEPARTMENT OF ECONOMIC ) Ariz. R.P. Juv. Ct. 103  
SECURITY, PAUL C., JILL C., ) (G); ARCAP 28)  
EMANI W., )  
)  
Appellees. )  
\_\_\_\_\_ )

Appeal from the Superior Court in Apache County

Cause No. S0100JD20080004 and S0100AD201000015

The Honorable Donna J. Grimsley, Judge

**AFFIRMED**

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By Eric Devany, Deputy County Attorney  
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By Brett R. Rigg  
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**N O R R I S**, Judge

¶1 This appeal arises out of a decision by the juvenile court denying a petition to adopt E.W. ("Child") filed by her biological grandmother, Wendy L., and her husband, Robert L. (collectively "Grandparents").<sup>1</sup> In denying Grandparents' petition, the court found it would be in Child's best interests for Jill C. and Paul C. (collectively "Foster Parents") to adopt her and granted their petition to adopt.

¶2 On appeal, Grandparents argue the juvenile court abused its discretion because: first, it understated the failures of Child Protective Services ("CPS") to follow applicable laws and its internal policy, which amounted to active obstruction of their efforts to become Child's placement and adopt her; second, it denied Grandparents' requests to change Child's placement and increase visitation, thereby creating an unfair situation which prevented the court from fairly evaluating their bonding with Child and fitness for adoption; third, it incorrectly found removing Child from Foster Parents would traumatize her; and fourth, it misinterpreted Arizona Revised Statute ("A.R.S.") section 8-103 (Supp. 2012) as emphasizing established relationships over biological relationships in the determination of adoptive placement. We

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<sup>1</sup>After the clerk of this court assigned this appeal to Department B, Grandparents requested oral argument. The court has determined the facts and legal arguments are adequately presented in the briefs and record. Therefore, the court denies Grandparents' request for oral argument.

disagree with each argument and affirm the court's decision denying Grandparents' adoption petition and granting Foster Parents' competing petition.

#### **FACTS AND PROCEDURAL BACKGROUND**

¶13 In March 2008, after Robert had committed to relocating to Saipan, an island of the U.S. Commonwealth, for a two-year position, Wendy learned her son's former girlfriend ("Mother") was pregnant. In May 2008, Mother gave birth to Child and signed a 90-day voluntary foster care agreement allowing CPS to have custody of Child; CPS placed Child with Foster Parents. Shortly after, doctors discovered Child had Citrullinemia Type I, a life-threatening genetic disorder in which the body does not process protein effectively and requires a strict diet and medication.

¶14 In June and July 2008, Wendy visited Child twice at Foster Parents' home. CPS case workers and their supervisor were aware of Wendy's visits and told her she could not contact Child until her son ("Father") established paternity. A CPS case worker at that time working with Mother and Child misinformed Wendy that Father needed a paternity test at his own expense, and Wendy made arrangements for Father to obtain such a test. In July 2008, Wendy gave the test results to this CPS case worker. CPS rejected the test for reasons not completely clear from the record, but which appear to relate, at least in

part, to chain of custody. On August 27, 2008, the Arizona Department of Economic Security ("ADES")<sup>2</sup> filed a dependency petition as to Father and Mother, alleging, among other things, that Father was the biological father of Child. In September 2008, Mother stipulated to dependency, and the court ordered a paternity test for Father. In October 2008, Grandparents moved to Saipan.

¶15 In November 2008, the juvenile court found Child dependent as to Father based on ADES's factual allegations and approved a case plan of reunification for Father and Mother. On or around November 25, 2008, CPS received the results of the court-ordered paternity test establishing Father's paternity, and Wendy found out about Father's paternity from him in December 2008. Although Father had established his paternity to Child, CPS did not contact Wendy to determine if she would be interested in becoming Child's placement.

¶16 In April 2009, CPS invited Foster Parents to adopt Child and told them no family had come forward. As of that date, CPS had still made no effort to contact Wendy or consider Grandparents for adoptive placement; nor had Wendy contacted CPS since October 2008 to ask about Child's case.

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<sup>2</sup>ADES filed a Notice of Non-Participation in this appeal. Although it initially supported adoption by Foster Parents, it changed its position before the adoption hearing and supported adoption by Grandparents.

¶17 In May 2009, Wendy called the CPS case worker then assigned to the case, Brad H., and left a message requesting him to call her. Brad received Wendy's message but did not return her call. At the June 2, 2009 permanency hearing, the court found Father and Mother had failed to comply with reunification services and changed the case plan to severance and adoption by a non-relative. In the meantime, Mother alerted Wendy to the change in the case plan. Wendy then called Jill C., who said she and her husband wanted to adopt Child and read from a document stating "[Child] was an abandoned child [and] no other relatives [had] stepped forward."

¶18 On June 18, 2009, Grandparents moved to intervene in the case and expressed their interest in adopting Child. On July 28, 2009, Father and Mother consented to termination of their parental rights; the court allowed Grandparents to intervene and changed the case plan to adoption. In August 2009, Wendy returned to Arizona to pursue placement and eventual adoption.<sup>3</sup> Wendy then started to visit Child for two hours per week. Wendy's visits slowly increased over time, and she began overnight visits in September 2010.

¶19 In 2011, Grandparents and Foster Parents filed competing petitions to adopt Child. After a four-day contested adoption hearing, the juvenile court found that while both

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<sup>3</sup>Robert remained in Saipan until March 2012.

Grandparents and Foster Parents were suitable and loving, it was in Child's best interests to be adopted by Foster Parents.

## DISCUSSION

### *I. CPS's Failure to Search for Grandparents as Adoptive Placement*

¶10 On appeal, Grandparents assert CPS "interfered with and actively obstructed" their efforts to become Child's placement and eventually adopt her because CPS failed to follow the requirements of governing statutes, regulation, and its internal policy to give placement preference for relatives over non-relatives. Additionally, they argue the juvenile court "grossly understate[d]" the adverse impact on them of CPS's failures to follow these requirements. Although Grandparents do not restrict these failures to any particular time in their briefing on appeal, they focus their arguments on events that happened before the juvenile court changed the case plan to termination and adoption by a non-relative. See *supra* ¶¶ 4-7.

¶11 Based on our review of the record, and as the former CPS supervisor and case worker admitted at the adoption hearing, CPS simply "forgot" Wendy had visited Child, did not contact Wendy after Father had established paternity, and failed to "[c]omplete an extensive and documented search for grandparents" consistent with its internal policy for selecting an adoptive family. We do not condone these failures. Nevertheless,

despite these failures, the record also demonstrates that from the inception of the dependency to the time the case plan changed from reunification to termination, Grandparents chose not to pursue placement and were comfortable with Child staying with Foster Parents.

¶12 For example, before Wendy left for Saipan, Jill asked her whether she wanted to be the placement for Child while the reunification process went forward, and Wendy declined because her family was moving to Saipan; CPS had informed her she could not contact Child before Father had established paternity; and she thought reunification would take "years." Although CPS did not inform Wendy regarding the paternity result, she knew "for sure" she was the Child's grandmother in December 2008, yet waited until May 2009 to contact CPS because she "rested on" the assumption that Mother "had a year or two" to reunite with Child, and if reunification failed, Grandparents would have the first right to adopt. Wendy admitted she was "fine" with Child remaining in foster care during the reunification process. Although we might not characterize CPS's failures as "moot" as the juvenile court did, we agree that -- as long as the case

plan remained reunification -- Grandparents were "unwilling and unable" to be Child's placement as the court found.<sup>4</sup>

¶13 When the CPS case worker, Brad H., advised the Foster Care Review Board he did not believe reunification was a realistic goal in January 2009, and before inviting Foster Parents to adopt in April 2009, CPS should have contacted and evaluated Grandparents for adoptive placement. We cannot say, however, these failures amounted to active obstruction. As the record shows, not long after ADES requested the court to change the case plan from reunification to termination and adoption by a non-relative, Grandparents successfully intervened and asserted they were entitled to a statutory preference for Child's placement and wanted to adopt Child; accordingly, the court changed the plan to adoption. Subsequently, Wendy exercised her visitation with Child, received a home study, and was fully engaged in seeking placement and adoption. Therefore, even though CPS certainly "could have done things differently to facilitate [Grandparents'] placement and adoption" as the juvenile court pointed out, we cannot say CPS prevented them from pursuing adoption.

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<sup>4</sup>Grandparents also suggest CPS did not make sufficient efforts to achieve reunification with Mother. The record does not support this suggestion.



## *II. Grandparents' Requests to Change Placement and Increase Visitation*

¶14 Grandparents argue the juvenile court created an "unfair situation" which prevented it from objectively analyzing their "bonding" with Child and fitness for adoption because it denied their motions to change placement and increase their visitation, and failed to appreciate the importance of their familial ties to Child. In making this argument, Grandparents rely on A.R.S. §§ 8-514(B) (2007) and -845(A) (Supp. 2012), which address placement preference for grandparents, and Rule 84(b) of the Arizona Rules of Procedure for the Juvenile Court (in addition to child's best interests, adoption petitioner has burden to prove petitioner is "fit and proper"). Grandparents also rely on *Bechtel v. Rose*, 150 Ariz. 68, 722 P.2d 236 (1986), a case in which our supreme court recognized the important role of grandparents in a child's life. We review the juvenile court's orders concerning adoption, placement, and visitation for an abuse of discretion. See *Marco C. v. Sean C.*, 218 Ariz. 216, 218, ¶ 4, 181 P.3d 1137, 1139 (App. 2008) (adoption) (citation omitted); *Antonio P. v. Ariz. Dep't. of Econ. Sec.*, 218 Ariz. 402, 404, ¶ 8, 187 P.3d 1115, 1117 (App. 2008) (placement) (citation omitted); *Maricopa Cnty Juv. Action No. JD-5312*, 178 Ariz. 372, 375, 873 P.2d 710, 713 (App. 1994) (visitation) (citation omitted).

¶15 Because the primary consideration in dependency cases is the best interests of the child, a juvenile court has substantial discretion when placing dependent children. *Antonio P.*, 218 Ariz. at 404, ¶ 8, 187 P.3d at 1117; see A.R.S. § 8-514(B) (ADES "shall place a child in the least restrictive type of placement available, consistent with the needs of the child.") (emphasis added); A.R.S. § 8-845(A)(2) (court may award dependent child to grandparent when it is "in the child's best interests"). Furthermore, the order of placement in § 8-514(B) is a preference, not a mandate. *Antonio P.*, 218 Ariz. at 405, ¶ 12, 187 P.3d at 1118. Here, in denying Grandparents' November 2, 2009 motion to increase visitation and change placement, the juvenile court explained that "at 19 months of age, with [Child's] serious medical issues, increasing visitation and causing [Child] more separation anxiety [would be] detrimental to her emotional and perhaps physical well being." Although the court did not immediately grant Grandparents' subsequent requests to increase visitation, it ultimately permitted CPS to increase visitation and approved Wendy's overnight visits and out-of-state travel with Child. At the time of the adoption hearing, Child spent 56 hours per week -- 1/3 of a week -- with Grandparents.

¶16 Further, the court did not ignore Grandparents' familial bond to Child or their fitness to adopt. The court

found Wendy had a "wonderful, loving and strong" relationship with Child. It also found Grandparents -- like Foster Parents -- were suitable to adopt and had no issues with their home. Yet, as the juvenile court correctly recognized, despite the importance of Grandparents' role in Child's life, the primary consideration was Child's best interests. Because substantial evidence supports the court's finding it was in Child's best interests to be adopted by Foster Parents -- even though Grandparents were also fit and proper -- we cannot say the court abused its discretion in denying their motions to change placement and increase visitation.

### *III. Trauma to Child if Removed from Foster Parents*

¶17 Grandparents argue the juvenile court abused its discretion in finding separation from Foster Parents would cause Child trauma. We disagree. David McPhee, Ph.D., a forensic psychologist, testified if Child was removed from Foster Parents, her de facto parents -- even with transitioning to loving and competent alternative caregivers -- she would "experience significant developmental distress" and "possibly irreparable harm" because, based on his observation, she was securely attached to Foster Parents. Brian Merrill, Ph.D., a psychotherapist, noted in his report that while Child was positively attached to Wendy, "basic attachments are formed during the first 24 months of a child's life," and Foster

Parents had been present in Child's life during much of this period. Similarly, Betty Beaumont, a clinical therapist, testified that while transitioning can help reduce trauma and emotional distress, "[t]here is no guaranty of no trauma." Thus, based on the evidence presented to it at the hearing, the court did not abuse its discretion in finding the "only way to avoid any trauma to [Child] is to allow [Foster Parents] to adopt."

*IV. Established Relationships under A.R.S. § 8-103*

¶18 Grandparents challenge the juvenile court's interpretation that A.R.S. § 8-103(B) "emphasizes the importance of the established relationships between the child and prospective adoptive family rather than biological relationships." Section 8-103(B) provides in pertinent part that ADES

shall place a child in an adoptive home that best meets the safety, social, emotional, physical and mental health needs of the child. Other relevant factors for consideration, in no order of preference, shall include:

. . . .

3. Established relationships between the child and the prospective adoptive family as described in § 8-862, including placement with a grandparent or another member of the child's extended family including a person or foster parent who has a significant relationship with the child.

