

NOTICE: NOT FOR PUBLICATION.  
UNDER ARIZ. R. SUP. CT. 111(c), THIS DECISION DOES NOT CREATE LEGAL PRECEDENT  
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED.

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

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ANTHONY W., *Appellant*,

*v.*

ARIZONA DEPARTMENT OF ECONOMIC SECURITY, K.A., *Appellees*.

No. 1 CA-JV 13-0181  
FILED 12-3-2013

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Appeal from the Superior Court in Maricopa County  
No. JD22885  
The Honorable Cari A. Harrison, Judge

**AFFIRMED**

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COUNSEL

Denise L. Carroll Esq., Scottsdale  
By Denise Lynn Carroll

*Counsel for Appellant*

Arizona Attorney General's Office, Phoenix  
By Nicholas Chapman-Hushek

*Counsel for Appellees*

**MEMORANDUM DECISION**

Judge Randall M. Howe, presiding, delivered the decision of the Court, in which Judge Samuel A. Thumma and Judge Patricia A. Orozco joined.

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**H O W E**, Presiding Judge:

¶1 Anthony W. (Father) appeals the juvenile court’s order finding that the Arizona Department of Economic Security (ADES) met its burden of proving the allegations of its dependency petition relating to K.A., Father’s child (Child). For the following reasons, we affirm.

**FACTS & PROCEDURAL HISTORY**

¶2 Father and Charlene A. (Mother) are Child’s unmarried, biological parents. Child lived with Mother from birth until three years of age, when Mother abandoned her.<sup>1</sup> At that point, Father and his girlfriend, Bonita P. (Girlfriend), assumed Child’s care. In November 2010, Father was arrested on several felony charges and has been incarcerated since his arrest.

¶3 In light of Father’s incarceration and Mother’s unknown whereabouts, ADES filed a petition alleging that Child was dependent. Child Protective Services (CPS) recommended that Child remain in Girlfriend’s physical custody, with “appropriate medical, social, and educational authorizations.” In its petition, ADES reported that Child “feels comfortable in [Girlfriend’s] home and has established a routine with [Girlfriend].”

¶4 At a dependency adjudication hearing on June 6, 2013, Father testified that he could not parent Child while in custody. Father also testified that Girlfriend should serve as Child’s legal guardian, stating that “as far as I’m concerned, . . . [Girlfriend] is, you know, good enough for [Child].” Girlfriend agreed and testified that she intended to become Child’s guardian, but had not yet done so. Mother did not attend the hearing and has not participated in the dependency proceedings. At the

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<sup>1</sup> Mother’s whereabouts remain unknown and she is not a party to this appeal.

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close of the hearing, Father's counsel asked the court to find Child dependent.

¶5 The juvenile court found Child was a dependent child committed to the care, custody, and control of ADES. As relevant here, the court noted Father's inability to care for Child as reasons for declaring Child dependent. Finding guardianship by Girlfriend was the appropriate disposition, the court then set an initial guardianship hearing.

¶6 Notwithstanding his request that the court find Child dependent, Father filed a timely notice of appeal from that finding.

DISCUSSION

¶7 Father argues that the juvenile court erred by declaring Child dependent because the state failed to prove by a preponderance of the evidence that Child had no parent or guardian willing to exercise—or capable of exercising—such care and control.

¶8 Father is estopped from making this argument. Under the doctrine of judicial estoppel, "a party who successfully asserts a particular position in one judicial proceeding will not be allowed to assert an inconsistent position in a subsequent proceeding." *Hrudka v. Hrudka*, 186 Ariz. 84, 92, 919 P.2d 179, 187 (App. 1995). Three requirements must exist before a court can apply judicial estoppel: (1) the parties must be the same, (2) the question involved must be the same, and (3) the party asserting the inconsistent position must have been successful in the prior judicial proceeding. *State v. Towery*, 186 Ariz. 168, 182, 920 P.2d 290, 304 (Ariz. 1996) ("Prior success is a prerequisite to the application of judicial estoppel because absent judicial acceptance of the prior position, there is no risk of inconsistent results.").

¶9 The requirements for applying judicial estoppel have been fully satisfied. First, the parties on appeal are the same as the parties that appeared before the juvenile court. Second, the question presented at the dependency adjudication hearing is the same as the question presented on appeal: should Child be declared dependent? The third requirement is also satisfied because Father's counsel successfully requested that the juvenile court find Child dependent, arguing: "And Judge, *we would ask you to find a dependency* so the State can proceed to do the guardianship they want to do . . . ." Because Father was successful in his request for

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dependency in the proceeding below, he is estopped from asserting an inconsistent position on appeal.<sup>2</sup>

CONCLUSION

¶10 For the foregoing reasons, we affirm the juvenile court's dependency order.



Ruth A. Willingham · Clerk of the Court  
FILED: mjt

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<sup>2</sup> Even if this court had jurisdiction, however, we would affirm the trial court's finding of dependency because Father is incarcerated and Mother's whereabouts are unknown. *Carolina H. v. Ariz. Dept. of Econ. Sec.*, 232 Ariz. 569, 571 ¶ 7, 307 P.3d 996, 998 (App. 2013) ("Before a child can be found dependent, the State must allege and prove by a preponderance of the evidence one of the grounds found in [Arizona Revised Statutes] § 8-201(13)(a), which may include the fact that a child is '[i]n need of proper and effective parental care and control' and has no parent willing or able to exercise such care and control.").