

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

JOSHUA G., *Appellant*,

v.

DEPARTMENT OF CHILD SAFETY, A.G., *Appellees*.

No. 1 CA-JV 15-0400
FILED 6-21-2016

Appeal from the Superior Court in Maricopa County
No. JD510643
The Honorable Karen L. O'Connor, Judge

AFFIRMED

COUNSEL

Denise L. Carroll, Esq., Scottsdale
By Denise L. Carroll
Counsel for Appellant

Arizona Attorney General's Office, Phoenix
By Nicholas Chapman-Hushek
Counsel for Appellee Department of Child Safety

MEMORANDUM DECISION

Judge Maurice Portley delivered the decision of the Court, in which Presiding Judge Samuel A. Thumma and Judge John C. Gemmill joined.

P O R T L E Y, Judge:

¶1 Joshua G. (“Father”) appeals the juvenile court’s order adjudicating his child dependent. For the following reasons, we affirm.

FACTS¹ AND PROCEDURAL HISTORY

¶2 The child was living with his mother after Father was sent to prison for violating probation. The Department of Child Safety (“the Department”) received a report alleging the mother and her boyfriend had been involved in a drive-by shooting, with the child in the car. The Department removed the child, took him into temporary custody, and later placed him with Father’s sister.

¶3 The Department filed a paternity and dependency petition, alleging that Father, who was later determined to be the child’s father, was unable to parent because of his incarceration, and neglect. The juvenile court held an adjudication hearing, found that “the allegations of the petition [were] true by a preponderance of the evidence,” and concluded the child was dependent as to Father.² Father appealed, and we have jurisdiction pursuant to Arizona Revised Statutes (“A.R.S.”) section 8-235(A).³

¹ “On review of an adjudication of dependency, we view the evidence in the light most favorable to sustaining the juvenile court’s findings.” *Willie G. v. Ariz. Dep’t. of Econ Sec.*, 211 Ariz. 231, 235, ¶ 21, 119 P.3d 1034, 1038 (App. 2005) (citation omitted).

² The child had previously been found dependent as to Mother. She did not appeal the ruling.

³ We cite to the current version of the statute unless otherwise noted.

DISCUSSION

¶4 Father argues the juvenile court “erred when it held that [the Department] proved by a preponderance of the evidence that the child was dependent.” He contends the court erred by “focusing on [his] inability to parent at the time the dependency petition was filed . . . rather than his ability to parent at the time of the hearing,” and by finding that “he was ‘incarcerated’ . . . merely because [he] was on parole.”

¶5 The Department must only establish the allegations in the dependency petition by a preponderance of the evidence because the dependency determination is “not an irreversible decision.” *Cochise Cty. Juv. Action No. 5666-J*, 133 Ariz. 157, 159, 650 P.2d 459, 461 (1982). We will affirm a dependency adjudication unless there is “no reasonable evidence” to support it. *Willie G. v. Ariz. Dep’t of Econ. Sec.*, 211 Ariz. 231, 235, ¶ 21, 119 P.3d 1034, 1038 (App. 2005) (citation omitted). A determination of dependency, however, must be based on the allegations contained in the dependency petition, *see Carolina H. v. Ariz. Dep’t. of Econ. Sec.*, 232 Ariz. 569, 571-72, ¶¶ 10-13, 307 P.3d 996, 998-99 (App. 2013) (citations omitted), and the court must determine whether a child is dependent based upon “the circumstances as they exist at the time of the dependency adjudication hearing,” *Shella H. v. Dep’t. of Child Safety*, 239 Ariz. 47, 48, ¶ 1, 366 P.3d 106, 107 (App. 2016), rather than at the time of the child’s removal, *id.* at 50, ¶ 12, 366 P.3d at 109.

Insufficiency of the Evidence

¶6 Father argues the trial court erred by finding the Department proved by a preponderance of the evidence that the child was dependent. The court erred in concluding that the allegation that “Father [was] unable to parent due to incarceration” was proven. Father had been released and was on parole at the time of the dependency adjudication hearing. *See id.* at 48, ¶ 1, 366 P.3d at 107. Being on parole is not the same as being incarcerated, and it is not a basis for a finding of dependency. Consequently, the court erred by concluding that the Department proved that the child was dependent on that ground.

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¶7 We turn our focus to the court's determination of neglect. A child can be found dependent if the home is unfit by reason of "neglect," A.R.S. § 8-201(14)(a)(iii), defined as "[t]he inability or unwillingness of a parent . . . to provide that child with supervision, food, clothing, shelter or medical care if that inability or unwillingness causes unreasonable risk of harm to the child's health or welfare." A.R.S. § 8-201(24)(a).

¶8 Father testified that he was released after fourteen months in prison. He then lived at an undisclosed house for a month, but, at the time of the adjudication hearing, had been living with the mother of his oldest child for less than a week. The evidence, as a result, supports the court's finding that Father lacked stable housing.

¶9 The evidence also suggests that Father is trying to be a good parent. His sister testified that he had been providing diapers, clothing, money, a bed, food stamps, and anything else she needed for the child. He was visiting his son "two to three times a week," and recently started a full-time job that would allow him to continue to provide financially for his child. Although he is to be commended for his efforts, which we hope will continue, the lack of stable housing could cause an unreasonable risk of harm to the child's health or welfare. *See* A.R.S. § 8-201(24)(a). As a result, the court did not abuse its discretion by finding that the child was dependent as to Father.⁴ *See* A.R.S. § 8-201(14)(a)(iii).

⁴ Father also argues the juvenile court shifted the burden of proof to him. Although the court found that Father "ha[d] not established through the Department that [he] ha[d] a stable home," and that he had "not demonstrated through the Department that [he] ha[d] stable employment," the court was not shifting the burden of proof. The court was explaining there was no evidence contradicting the Department's evidence supporting the finding of dependency, which included Father's criminal history, the Department's progress reports, and Father's admissions that he had not been able to secure stable housing after his release from prison. Moreover, in context, the hearing transcript has the court stating "the Department has established by the preponderance of the evidence that the allegations in the petition are true." Accordingly, there is no support in the record for his argument.

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CONCLUSION

¶10 We affirm the dependency determination.



Ruth A. Willingham · Clerk of the Court
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