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AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

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

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LACY H., *Appellant*,

*v.*

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

No. 1 CA-JV 17-0379  
FILED 3-20-2018

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Appeal from the Superior Court in Yavapai County  
No. P1300JD201700053  
The Honorable Anna C. Young, Judge

**REVERSED AND REMANDED**

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COUNSEL

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By Florence M. Bruemmer  
*Counsel for Appellant*

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By Ashlee N. Hoffman  
*Counsel for Appellee Department of Child Safety*

## MEMORANDUM DECISION

Judge Jennifer M. Perkins delivered the decision of the Court, in which Presiding Judge Diane M. Johnsen and Judge Kent E. Cattani joined.

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**P E R K I N S**, Judge:

**¶1** Lacy H. (“Mother”) appeals the juvenile court’s order terminating her parental rights. For the following reasons, we reverse and remand for further proceedings.

### FACTS AND PROCEDURAL HISTORY

**¶2** Mother and biological father, Dee G. (“Father”), are the parents of H.G., who was born in October 2016. The juvenile court terminated both parents’ rights to H.G.; however, Father is not a party to this appeal. Prior to H.G.’s birth, Father was involved in dependency and severance proceedings with the Department of Child Safety (“DCS”) regarding his other children. Father’s unrelated pending case with DCS necessitated Mother’s cooperation with DCS assessments and guidance during her pregnancy.

**¶3** After H.G.’s birth, DCS received a report that Mother admitted to a nine-year history of methamphetamine abuse. Mother stated she had not used methamphetamine in the approximately two years prior to H.G.’s birth but admitted she used marijuana before discovering her pregnancy. H.G. was tested at birth and was not found substance-exposed. DCS did not immediately file a dependency petition but offered a referral for in-home services from February through April 2017, at which point, the provider closed the referral as successful.

**¶4** Mother participated in the services DCS recommended, including twice weekly meetings with a family preservation clinician. The assigned family preservation clinician noted that although Mother mildly resented the need to engage in services because she believed H.G.’s father’s behavior caused the engagement, she “seem[ed] highly motivated to make progress.” The clinician noted Mother was attentive, all protective factors fell within the healthy range, and Mother appeared to be caring and protective. He further observed H.G. was well-fed and Mother was always prepared with a bottle. The clinician also noted Mother had tested negative

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for substance use for well over a year. By March, the clinician indicated Mother was “doing very well” and that “she ha[d] highly developed protective instincts.”

¶5 On April 1, 2017, the clinician noted H.G. was eating well and was happy. Three days later, Mother took H.G. to see a doctor about the child’s conjunctivitis and cancelled appointments with the clinician scheduled for April 4 and 6 due to H.G.’s health issues. On April 6, Mother took H.G. to the pediatrician for a follow-up visit and reported her appetite was decreased. According to the medical record, H.G. was in the tenth percentile for weight at the visit. The pediatrician admitted H.G. to the hospital for her conjunctivitis, which appeared to be an allergic reaction. H.G. remained at the local hospital until April 8, when she was transferred to Phoenix Children’s Hospital (“PCH”).

¶6 On April 10, H.G. was discharged from PCH after being treated for severe chemical conjunctivitis related to a medication reaction. The next day, Mother returned to the doctor reporting worsening of H.G.’s conjunctivitis and decreased appetite, though H.G. had gained some weight.

¶7 Meanwhile, Mother’s sessions with the family preservation clinician dropped to once a week. On April 21, the clinician observed H.G. was in good spirits, without any hygiene issues despite slight residual darkness under her eyes. Two days later, Mother returned with H.G. to the emergency room with renewed symptoms of conjunctivitis and followed up with the pediatrician on April 25. Mother reported H.G. was very irritable, had fewer wet diapers, and was not eating as well. H.G.’s weight had dropped to the fifth percentile. The pediatrician admitted H.G. to the hospital once again over concerns that H.G.’s eyes had not healed, she was losing weight, and she could become dehydrated.

¶8 A week later, the pediatrician noted H.G.’s eyes were free of conjunctivitis but that she had contracted oral thrush. The pediatrician also noted H.G. appeared to have facial bruising that Mother claimed was from learning to crawl and was down to the fourth percentile in weight. The pediatrician noted the facial bruising was a “likely . . . mild injur[y] related with new crawling.” On the same day, the family preservation clinician discharged Mother from services for having successfully developed parental skills and remaining sober.

¶9 On May 15, 2017, Mother took H.G. to her pediatrician for her six-month well visit. The doctor again diagnosed H.G. with acute

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conjunctivitis and noted her weight was still in the fourth percentile. The pediatrician administered H.G.'s scheduled vaccinations and noted H.G. may have allergies.

**¶10** Two days later, Mother returned to the pediatrician, reporting H.G. "slept all day yesterday" except when waking to feed throughout the day. She also reported that H.G. vomited the night before and again the morning of the appointment. Mother's chief complaint, however, was a swollen area on the left side of H.G.'s head. Mother reported being with H.G. the past two days and told the pediatrician she did not recall any falls or head injuries. Mother indicated she noticed a bump on H.G.'s head the day before but was unconcerned at the time because she thought H.G. had bumped into the crib or hit herself with a toy. Mother further stated that she was not concerned by H.G.'s vomiting because the pediatrician had told her it was normal for babies to do so after receiving vaccinations.

**¶11** The pediatrician referred H.G. to the Yavapai Regional Medical Center, where an x-ray revealed no injuries, but a later computerized tomography ("CT") scan revealed a non-displaced linear skull fracture. The skull fracture was confirmed at PCH, where a healing tibial fracture was also discovered after a complete bone survey.

**¶12** DCS took H.G. into temporary custody on May 22, 2017. DCS filed a dependency petition three days later, and the juvenile court appointed a guardian ad litem ("GAL") to advocate on H.G.'s behalf.

**¶13** According to a May 25 DCS report, H.G.'s temporary placement relayed that H.G. had begun eating baby food but showed no interest in formula, often not finishing a six-ounce bottle. The placement further reported H.G. gained three pounds in a week; however, the pediatrician's records indicate that H.G. gained less than two pounds over the following two months.

**¶14** DCS proposed a case plan of reunification and provided Mother with services, with which she complied. At the first hearing on May 30, 2017, for reasons the juvenile court did not explain in its order, the court instead set the dependency case plan to severance and adoption and ordered the GAL to file a petition for termination within ten days. The court further set a dependency hearing for August 7.

**¶15** On June 6, the GAL filed a motion to terminate Mother's parental rights alleging a history of chronic substance abuse and abuse or neglect, and the juvenile court set the termination hearing for the same day as the dependency hearing: August 7. On August 1, Mother waived her

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right to a full severance hearing, over DCS's protest, and requested a "paper trial."

**¶16** The juvenile court held a contested adjudication hearing on August 7, 2017. Mother submitted a written statement to the court in lieu of testifying. In her statement, Mother alleged H.G. slept most of the day on May 16, the day after receiving vaccinations, but spent some time playing as well. Mother further alleged she noticed a small bump on H.G.'s head during the afternoon of May 16, but was unconcerned until the next morning, when the bump "looked very swollen." Mother took H.G. to her pediatrician that morning. The only witness who testified at the hearing was the assigned DCS investigator. After taking the matter under advisement, the court terminated Mother's parent-child relationship with H.G. on August 14, 2017, based on abuse, neglect or failure to protect, and chronic substance abuse. Mother now appeals.

## DISCUSSION

**¶17** Mother argues the juvenile court's findings were not supported by clear and convincing evidence.

**¶18** A parent's right to the care and control of her child is fundamental, but not absolute. *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 24 (2005). The juvenile court may, on clear and convincing evidence of one of the statutory grounds in Arizona Revised Statutes ("A.R.S.") section 8-533(B), terminate parental rights. *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 248-49, ¶ 12 (2000). The juvenile court must also find that termination of the parental relationship is in the child's best interests. *Id.*

**¶19** We will affirm the juvenile court's order unless the factual findings are clearly erroneous. *Audra T. v. Ariz. Dep't of Econ. Sec.*, 194 Ariz. 376, 377, ¶ 2 (App. 1998). On appeal, we view the facts in the light most favorable to upholding the juvenile court's order, as the juvenile court is in the best position to weigh the evidence, determine the credibility of witnesses, and resolve disputed facts. *Ariz. Dep't of Econ. Sec. v. Matthew L.*, 223 Ariz. 547, 549, ¶ 7 (App. 2010); *Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, 334, ¶ 4 (App. 2004). However, the juvenile court's termination order must be supported by clear and convincing evidence, that is, evidence that makes the proposition to be proved "highly probable or reasonably certain." *Kent*, 210 Ariz. at 284-85, ¶ 25. To the extent the juvenile court's findings are not supported by the record, they are clearly erroneous. *Schnepp v. State ex rel. Dept. of Econ. Sec.*, 183 Ariz. 24, 29 (App. 1995).

**¶20** In reviewing the record, we find the evidence presented wholly insufficient to support termination based on substance abuse. Moreover, the record contains no evidence to support the court's findings and conclusions that Mother through abuse, neglect, or failure to protect, caused or failed to prevent H.G.'s conjunctivitis, thrush, failure to thrive, or low weight. Similarly, nothing in the record suggests Mother failed to seek medical attention for H.G.'s illnesses or skull fracture. Additionally, we conclude the juvenile court erred in finding PCH determined the fractures were non-accidental in nature. In light of these conclusions, we cannot discern from the record whether the juvenile court would have terminated Mother's parental rights based on the evidence presented as to H.G.'s skull fracture and tibia fracture.

### **I. Abuse and neglect**

**¶21** The juvenile court found that Mother had either abused H.G. or failed to protect H.G. from abuse based on H.G.'s skull fracture, tibia fracture, poor weight gain, failure to thrive, thrush, and chronic conjunctivitis. Explaining its finding, the juvenile court noted that the child was not mobile at the time the injuries occurred and that the injuries "were determined by Phoenix Children's Hospital to be non-accidental." Under A.R.S. § 8-533(B)(2), termination on the ground of abuse requires the juvenile court to find Mother "inflict[ed] or allow[ed]" the "physical injury, impairment of bodily function or disfigurement" of H.G. A.R.S. § 8-201(2).

**¶22** The juvenile court additionally found that Mother neglected H.G. or failed to protect H.G. from neglect based on "numerous injuries that were in various stages of healing when she was taken into custody by" DCS, for which the court found that "Mother never sought medical care." The court further based its decision on H.G.'s diagnosis of "failure to thrive." Neglect means "the inability or unwillingness of a parent . . . of a child to provide that child with supervision, food . . . 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(25)(a).

**¶23** Addressing first H.G.'s thrush, low weight, and failure to thrive, the record is clear that all were caused, at least in part, by H.G.'s chronic conjunctivitis. Medical records submitted to the juvenile court show H.G.'s weight dropped substantially during April when she was hospitalized at least twice for conjunctivitis and associated infections. In turn, the record indicates H.G.'s conjunctivitis stemmed from an allergic reaction to the medical treatment for her initial conjunctivitis infection in early April. The GAL did not establish that the initial conjunctivitis

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stemmed from any action or inaction by Mother. Nor is there any support in the record for the conclusion that Mother failed to seek care for H.G.'s illnesses. Thus, no reasonable interpretation of the evidence suggests H.G.'s thrush, low weight, or conjunctivitis were the result of abuse or neglect.

**¶24** The record reflects Mother brought H.G. to the pediatrician's office six times during the relatively brief period from April 6, 2017, to May 17, 2017. The evidence further indicates three of those visits were to follow up on emergency room or hospital discharges. When the pediatrician referred H.G. to the emergency room for a CT scan, Mother checked H.G. into the medical center within fifteen minutes of leaving the pediatrician's office. Moreover, Mother's written statement to the juvenile court indicates she took H.G. to her pediatrician when she noticed swelling on H.G.'s scalp. Thus, the record does not support the juvenile court's finding that Mother failed to provide medical care for H.G.'s ailments. Despite this, concern remains as to the origin and circumstances surrounding H.G.'s fractures.

**¶25** As for H.G.'s fractures, the DCS investigator testified that PCH's child protection team reviewed H.G.'s case and concluded her injuries were not accidental and, but for neglect or abuse, the injuries would not have occurred. H.G.'s tibia fracture was diagnosed by doctors at PCH during a skeletal survey, performed after discovering H.G.'s skull fracture to look for any additional injuries. The tibia fracture was described as healing, of unknown origin, of unknown age, and was evidenced by no external signs at that time. Medical personnel at PCH did not conclude that the tibia fracture was caused by non-accidental trauma and reported the fracture was healing in anatomic alignment. While nothing in the record indicates Mother sought medical care for H.G.'s tibia fracture, it is similarly unknown when and how the fracture occurred.

**¶26** As for H.G.'s skull fracture, the record indicates H.G. sustained a linear non-displaced skull fracture sometime between May 15 and May 17. Mother took H.G. to her primary care physician for her six-month checkup and routine vaccinations on May 15. At that appointment, the doctor did not indicate any bruising, swelling, or other indication of trauma on examination of H.G.'s head. On May 17, Mother brought H.G. back to her primary care physician complaining of swelling, a soft area on the scalp, and vomiting. The physician examined H.G., noted an area of bruising and swelling, and suspected a skull fracture. The physician also noted she suspected child abuse, citing the head injury and lack of an explanation for the injury, and recommended Mother take H.G. to the emergency department.

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¶27 At approximately noon on May 17, fifteen minutes after Mother and H.G. left the primary care physician, the emergency department of a local hospital examined H.G. An x-ray performed at the hospital indicated no fractures anywhere on H.G.'s body, including H.G.'s skull. A subsequent CT scan revealed a non-displaced linear skull fracture and the x-ray report was amended to note that a "lucency," or dark area observed on the x-ray, was revealed to be a fracture. PCH later confirmed the skull fracture. Given the short time frame in which the injury could have occurred, Mother's decision to take H.G. to her physician and the hospital on May 17, and the fact that the physician examined H.G. on May 15, the record does not establish by clear and convincing evidence that Mother failed to provide medical care for H.G.'s skull fracture.

¶28 The medical records indicate that several practitioners at PCH noted the skull fracture was suspected to be non-accidental trauma, but a PCH forensic specialist's report explained that this type of skull fracture could occur from accidental or non-accidental trauma. Although the juvenile court found that PCH "determined" H.G.'s injuries were non-accidental, no such determination is contained in the medical reports in the record.

¶29 In sum, the record fails to show, by clear and convincing evidence, that H.G.'s illnesses, failure to thrive, and low weight were caused by abuse, neglect, or failure to protect by Mother. Nor does the record contain clear and convincing evidence that Mother abused, neglected, or failed to protect H.G. by failing to seek medical treatment for her illnesses. Finally, although the DCS investigator testified that H.G.'s fractures were non-accidental, the record does not support the court's finding that PCH determined that they were non-accidental.

## II. Substance Abuse

¶30 To terminate parental rights pursuant to A.R.S. § 8-533(B)(3), the juvenile court must find, in relevant part, that: (1) the parent has a history of chronic substance abuse; (2) the parent is unable to discharge her parental responsibilities because of her chronic substance abuse; and (3) the abuse will continue for a prolonged and indeterminate period. A.R.S. § 8-533(B)(3). Moreover, we have previously held that because there is a "fundamental liberty interest of the natural parents in the care, custody and management of their child," DCS must demonstrate by clear and convincing evidence that it made a reasonable effort to reunify the family or that the efforts would be futile. *Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, 192, ¶¶ 32-34 (App. 1999) (quoting *Santosky*, 455 U.S. at

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753); *see also Mary Lou C. v. Arizona Dep’t of Econ. Sec.*, 207 Ariz. 43, 49, ¶ 15 (App. 2004).

**¶31** Here, the GAL failed to show, by clear and convincing evidence, that Mother’s substance abuse would continue for an indeterminate period of time. Indeed, the record contains no evidence that Mother suffered from an ongoing substance abuse problem during the dependency. Before it filed the dependency petition, DCS provided services, including drug testing, and Mother successfully completed those services in April 2017. Although the record indicates Mother tested positive for marijuana in a urinalysis after H.G. was placed in foster care, she submitted a negative hair follicle test on the same day, May 30, 2017. Significantly, in a DCS progress report submitted to the juvenile court for the August termination hearing, DCS reported: “It does not appear that substance abuse continues to be an issue.” Six days later, at the termination hearing, the DCS investigator testified DCS had concerns about Mother’s sobriety because she had not been regularly submitting to urinalysis tests and had a positive test for marijuana. Though it is suggested by the DCS investigator’s testimony, nothing in the record establishes that Mother was required to submit to drug testing. In addition, although the DCS investigator noted she normally relies on reports from mental health professional and law enforcement, neither the GAL nor DCS provided the court with any psychological or psychiatric reports or police reports to support a conclusion that Mother had substance abuse issues.

**¶32** This evidence falls short of clear and convincing evidence of chronic drug abuse and a reasonable basis to find that drug abuse would continue for a prolonged indeterminate period. Accordingly, the GAL failed to make the necessary showing to justify terminating Mother’s parental rights based on a history of substance abuse.

### III. Best Interests

**¶33** Because we are unable to determine a sufficient basis for severance on this record we need not review the juvenile court’s best interests analysis. *Cf. Matter of Appeal in Maricopa Cty. Juvenile Action No. JS-6831*, 155 Ariz. 556, 558 (App. 1988) (“[T]ermination cannot be predicated solely on the best interests of the child.”).

### CONCLUSION

**¶34** The juvenile court terminated Mother’s parental rights for chronic substance abuse, and also for abuse, neglect, and failure to protect. However, as discussed, the record contains insufficient evidence to support

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the juvenile court's findings that H.G.'s conjunctivitis, thrush, failure to thrive, and low weight were caused by Mother's abuse, neglect, or failure to protect H.G. Nor is there evidence Mother failed to seek medical care for H.G.'s illnesses or her skull fracture, or that PCH determined H.G.'s fractures were non-accidental. Moreover, there was no clear and convincing evidence that Mother suffered from a history of chronic substance abuse that would continue for an indeterminate period. Because we cannot discern whether the juvenile court would have terminated Mother's parental rights based solely on the evidence in the record concerning H.G.'s fractures, we reverse the termination and remand for further proceedings consistent with this decision.



AMY M. WOOD • Clerk of the Court  
FILED: AA