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

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IJOHN T., *Appellant*,

*v.*

DEPARTMENT OF CHILD SAFETY, I.T., S.T., *Appellees*.

No. 1 CA-JV 17-0463  
FILED 4-3-2018

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Appeal from the Superior Court in Maricopa County  
No. JD33699  
The Honorable Bruce R. Cohen, Judge

**VACATED**

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COUNSEL

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By Robert D. Rosanelli  
*Counsel for Appellant*

Arizona Attorney General's Office, Phoenix  
By Jennifer L. Holder  
*Counsel for Appellee Department of Child Safety*

**MEMORANDUM DECISION**

Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge Jon W. Thompson and Judge James P. Beene joined.

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**S W A N N**, Judge:

¶1 A father who was absent from his children’s lives for several years appeals the juvenile court’s determination of dependency based on his inability to provide proper and effective parental care and control. The court concluded that the father was incapable because it was difficult to assess his ability to meet the children’s needs. The court’s rationale described a failure of proof, not evidence of incapability. The court effectively shifted the burden of proof from the Department of Child Safety to Father. We therefore vacate the dependency determination.

**FACTS AND PROCEDURAL HISTORY**

¶2 Ijohn T. (“Father”) and Tina A. (“Mother”) became parents to I.T. and S.T. (collectively, “the Children”) in Washington in 2008 and 2010.

¶3 The parents’ relationship ended. According to Father, he thereafter saw Mother “walking around on the street” in Washington and offered to give her money but was unable to do so because of her argument with a boyfriend. Mother told Father that she was staying with her mother, who resides near Father’s home in Washington, and he believed that she also stayed with a boyfriend.

¶4 Father’s contact with the Children ceased around August 2014, when Mother told Father that she wanted to move. Father asked Mother to not take the Children away from him, or to at least allow him to parent the Children in the summers. Mother denied Father’s requests and asked him not to call her. She told him that her boyfriend was the Children’s new father, and that the Children no longer needed Father. Mother blocked Father’s telephone number and changed her number. And though Father retained the ability to contact Mother on a social-media platform, he did not do so because he did not want to commit harassment or make the situation worse. He did speak to the Children’s maternal grandmother on one occasion. He told the grandmother that he wanted to see the Children. When she responded that the Children were with Mother,

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he did not pursue the matter. Father prepared a parenting plan but did not file it because of the costs involved and his lack of knowledge regarding Mother's location.

¶5 In January 2017, the Department removed the Children (along with other of Mother's children) from Mother's care after receiving reports that the family was homeless and that Mother had untreated bipolar disorder and post-partum depression, used the Children to beg for money but spent the funds on alcohol and cigarettes, drank alcohol daily and used marijuana, and had an abusive and constantly intoxicated boyfriend.

¶6 Also in January 2017, the Department filed a dependency petition. The Children were ultimately found dependent as to Mother, a status that is not at issue on appeal. With respect to Father, the Department alleged as the sole grounds for dependency that "the children are dependent due to abuse and/or neglect" because Father "neglected his children and is unwilling or unable to provide them with proper and effective parental care and control. Mother reported that Father is not involved in the children's lives. His whereabouts are unknown."

¶7 Through investigation, the Department discovered Father's address and telephone number. The Department effected personal service on Father in Washington in late March 2017. According to Father, he had also independently telephoned law enforcement when an acquaintance informed him of Mother and the Children's situation. The Department reported in mid-April that "[a]n ICPC [Interstate Compact on the Placement of Children] is being completed to assess [Father]'s ability to provide stability and safely parent his children."

¶8 Father appeared telephonically at a continued initial dependency hearing in early May, at which time he denied the dependency petition's allegations. The court's minute entry stated that Father would be provided "paternity testing, parenting classes through the community, domestic violence classes, as well as the ICPC." At a mediation hearing later that month, the parties agreed that Father would provide copies of the Children's birth certificates, would no longer be required to complete domestic violence classes, and would be permitted video contact with the Children.

¶9 The case manager spoke to Father in May about setting up telephone calls with the Children. But Father did not call the case manager until late June, blaming the delay on a loss of telephone service. The case manager promptly arranged for Father to have weekly calls with the

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Children. By that time, the Department had, in mid-June, successfully moved the juvenile court to set a dependency adjudication hearing for late September.

¶10 Father participated in calls with the Children starting in late June or early July, and the Children enjoyed the calls. But Father did not speak with the Children for several weeks in August, blaming a malfunctioning telephone. And when Father resumed speaking to the Children in early September, the Children's foster parent cut one call short after Father told the Children that he might never see them again if the judge did not allow him to have them back. The case manager reported that in his dealings with Father, Father often became angry and unable to be redirected when talking about the case. The case manager also reported that Father had threatened him on several occasions.

¶11 Father promised the Children that he would mail presents to them, but he never did so. According to Father, he purchased shoes for the Children but was unable to send them because he misplaced the address and the case manager failed to respond to his request that he be given it again. According to the case manager, he twice provided Father with a Department address to use for mailings to the Children.

¶12 At some point, Father and the case manager discussed the possibility of Father flying to visit the Children in Arizona. The case manager reported that Father told him he was afraid to fly but, for the Children's sake, would do so if he needed to appear in person for court. But no visit ever occurred. According to Father, he was unable to visit because he lost his job when he asked for time off.

¶13 In late August, the juvenile court denied Father's motion to dismiss the dependency. The adjudication hearing proceeded as scheduled.

¶14 At the hearing, Father testified that he had been attending free anger-management counseling for three weeks; he also disclosed a certificate showing that he had completed a "Positive Solutions for Families" parenting class in Washington in August. Father stated that he loves the Children and wants to be a father to them. Father further testified that he had appropriate housing for Children, could provide food for them, and was willing to do "[w]hatever needs to be done as a parent." Father identified the school that the Children would attend in Washington. He stated that he would obtain counseling for the Children and that he was

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well-versed in using community resources to obtain services. He reported that he was in the training phase for a construction job.

¶15 The case manager testified that he had concerns about Father's ability to manage his anger. The case manager further testified that the Children were traumatized when they came into care, and were significantly behind in terms of their education. The case manager testified that I.T. received counseling and continued to struggle in school, and that S.T.'s emotional and behavioral issues had improved and she was making progress in school. The case manager testified that it would be disruptive to remove the Children from their school and therapy. The case manager further testified that the Children and Father do not know each other well, and that the Children are very attached to their older brother, who shares the same foster home. (Other siblings are in a separate foster home.) The case manager reported that Father had expressed willingness to care for the older brother as well as the Children.

¶16 The case manager reported that the Department had performed a background search on Father that revealed "marijuana charges . . . periods back." The case manager testified that he had assembled and submitted an ICPC packet for Father, but the ICPC was put on hold because it could not proceed without a dependency finding. The case manager stated that if the Children were found dependent as to Father, the Department would proceed with the ICPC and thereby have Father evaluated in Washington as a potential placement for the Children. The case manager testified that state-to-state services are unavailable without an ICPC, and that there would be no oversight of Father's care of the Children in Washington should the dependency be dismissed.

¶17 In closing argument, the Department emphasized Father's years-long absence from the Children's lives and the lapses in his attempts to reconnect with them. The Children's guardian ad litem emphasized the Children's trauma, the possibility that a move to live with Father would further traumatize them, and the absence of services in Washington absent a dependency. The guardian ad litem posited that a dependency would actually benefit Father by providing a mechanism for the implementation of reunification services in Washington.

¶18 The court ruled from the bench:

I do not believe that [Father] does not love his children or is not concerned or committed to their wellbeing. In fact, his testimony clearly was sensitive to their needs and wellbeing.

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I also don't think that he was a party to or in favor of his children leaving the state of Washington, and I don't [think] things went well for the children, following their departure from Washington. I think [Father] is -- has struggled financially, and that's probably led to the problems that exist.

A finding of dependency does not then mean that there is a negative -- well, there could be, but there isn't here, a negative connotation associated with you, [Father].

....

The dependency is based on the children.

....

And the children right now, because of circumstances that [Father] may have had nothing to do with creating, absenting the children from Washington, what they got subjected [to] after leaving Washington and specifically in Arizona.

He may have had nothing to do with that, but the children's status is that he has been absent from their lives for three years. *And I believe that he is more than willing to assume proper parental care and control.*

*And -- but those circumstances, in my opinion, render him unable to, because it's difficult to [assess] the needs the children have and [Father]'s ability to meet those needs, when he hasn't been part of their lives.*

If [Father] lived here or if we were in Washington, I think that there's a lot that could be done to figure out how to actually effectuate this notion of family reunification. And I think we need to figure out how to do that.

I am concerned that we also have three other children with whom [the Children] have a relationship . . . and that adds to the complication here.

It troubles me that if [Father] had the financial resources, he would have been here and participated in more

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of the services and maybe would not be in this position. The only reason -- one of the reasons he's in this position is the lack of resources.

But, again, that doesn't change the status of the children. So I find that the children are dependent children, as to [Father].

(Emphasis added.) The court then ordered a case plan of family reunification, and emphasized the need to find a way to reintegrate Father into the Children's lives. The court directed the Department to initiate the ICPC "now [that it can] be looked at . . . now that the dependency finding has been made."

¶19 The court issued a written order in which it concluded generally that "the allegations of the petition are true by a preponderance of the evidence and the children . . . are dependent as to the father." Father timely appeals.

#### DISCUSSION

¶20 "[W]e afford broad discretion to the juvenile court, [and we] view the evidence adduced in dependency proceedings in a light most favorable to sustaining the juvenile court's findings." *Joshua J. v. Ariz. Dep't of Econ. Sec.*, 230 Ariz. 417, 424, ¶ 29 (App. 2012). But because parents have a fundamental constitutional right to raise their children, dependency proceedings must meet constitutional standards. *See Carolina H. v. Ariz. Dep't of Econ. Sec.*, 232 Ariz. 569, 571, ¶ 6 (App. 2013). The petitioner must prove its allegations by a preponderance of the evidence, and the court must make specific findings of fact. A.R.S. § 8-844(C); Ariz. R.P. Juv. Ct. 55(C), (E)(3). If the petitioner fails to meet its burden of proof, the court must dismiss the petition and return the child to the parent. A.R.S. § 8-844(C)(2); Ariz. R.P. Juv. Ct. 55(E)(2).

¶21 As relevant here, a child is dependent if proof and findings establish that he or she is "[i]n need of proper and effective parental care and control and . . . has no parent or guardian willing to exercise or capable of exercising such care and control." A.R.S. § 8-201(15)(a)(i). The Department alleged no other statutory ground for dependency. The dependency petition's references to "abuse and/or neglect" and "neglected" were made in the context of § 8-201(15)(a)(i), and did not establish an allegation of dependency under any of the grounds set forth in § 8-201(15)(a)(ii) to (v).

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¶22 The juvenile court specifically found that Father *was* willing to assume proper parental care and control, and the Department does not challenge that finding. The question is whether the dependency determination was supported by a well-grounded finding that Father was incapable of exercising proper parental care and control. We hold that it was not.

¶23 Parental capability is assessed based on whether the parent is fit to parent the child. *Meryl R. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 24, 25, ¶ 5 (App. 1999). The parent's past conduct may be relevant to the question of present capability. See *Shella H. v. Dep't of Child Safety*, 239 Ariz. 47, 51, ¶ 16 (App. 2016). But the inquiry centers not on the parent's culpability, but on the child's interests. *Maricopa Cty. Juv. Action No. J-75482*, 111 Ariz. 588, 590 (1975); *Ariz. Dep't of Econ. Sec. v. Superior Court (Baby Boy T)*, 178 Ariz. 236, 239 (App. 1994); *Santa Cruz Juv. Action No. JD-89-006*, 167 Ariz. 98, 102 (App. 1990). A parent may be unfit if a breakdown in the parent-child relationship – of whatever cause – has rendered the parent unable to provide appropriate care and control. *JD-89-006*, 167 Ariz. at 102.

¶24 Here, the court concluded that Father was “unable to [exercise proper and effective parental care and control], because it's difficult to [assess] the needs the children have and [Father]'s ability to meet those needs, when he hasn't been part of their lives.”<sup>1</sup> But the court's rationale does not describe parental incapability. It instead describes a finding that the evidence was insufficient to permit a determination regarding Father's capability.

¶25 The record did not compel a contrary finding. The Department presented evidence that Father had past drug charges, had been absent from the Children's lives for several years, and had for a limited period made only limited efforts to reconnect with them. The Department also presented evidence that the Children have special needs and have progressed in foster care, and that Father expressed anger toward the case manager and once inappropriately discussed the case with the Children. But the foregoing evidence, without more, did not require the court to find that Father is actually incapable of parenting the Children, because of a

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<sup>1</sup> The Department characterizes the court's oral statement as a “rumination,” and observes that the subsequent minute entry simply found that “the allegations of the petition are true.” We discern no inconsistency between the court's oral findings – which were required under Ariz. R.P. Juv. Ct. 55(E)(3) – and the minute entry. The minute entry was simply less detailed.



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breakdown in the relationship or otherwise. Indeed, the Department's evidence established that the Children enjoyed their contact with Father, and the Department presented no evidence that Father could not meet the Children's needs. On this record, the court reasonably found that it lacked sufficient information to determine whether Father could appropriately parent the Children. And in view of that finding, the court abused its discretion by concluding that the Children were dependent as to Father. In the face of insufficient evidence, the court must decide against the party with the burden of proof – here, the Department. *See Ariz. Comm. Mining Co. v. Iron Cap Copper Co.*, 29 Ariz. 23, 37 (1925) (“[W]here . . . the evidence introduced is insufficient to support [an issue], the finding thereon should be against the party having the burden of proof . . .”).

¶26 The conflict between the court's finding and the dependency determination may have resulted from a well-intentioned desire to maintain permanency and sibling connections for the Children, and to establish a framework within which Father could receive reunification services through the ICPC. But “[t]he government may not interfere with th[e] fundamental right [to parent] unless a court finds that . . . the parent is unable to parent the child *for any reason defined by statute.*” *Carolina H.*, 232 Ariz. at 571, ¶ 6 (emphasis added). Dependency must be assessed within the confines of A.R.S. § 8-201(15). It cannot be driven by super-statutory policy goals, however practical they may appear.

### CONCLUSION

¶27 For the foregoing reasons, we vacate the juvenile court's determination that the Children are dependent as to Father. We note that our decision has no effect on the court's unchallenged determination that the Children are dependent as to Mother. We further note that nothing in our decision prevents the Department from reinstating dependency proceedings as to Father based on new evidence, or from advising authorities in any state to which Father may remove the Children of this case's history.



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