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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

DANIEL S., *Appellant*,

v.

DEPARTMENT OF CHILD SAFETY, R.N., *Appellees*.

No. 1 CA-JV 18-0225
FILED 10-23-2018

Appeal from the Superior Court in Maricopa County
Nos. JD34977
JS19337

The Honorable Nicolas B. Hoskins, Judge *Pro Tempore*

VACATED AND REMANDED

COUNSEL

Arizona Attorney General's Office, Phoenix
By JoAnn Falgout
Counsel for Appellee Department of Child Safety

Clark Jones, Mesa
Counsel for Appellant

MEMORANDUM DECISION

Chief Judge Samuel A. Thumma delivered the decision of the Court, in which Judge Lawrence F. Winthrop and Judge James P. Beene joined.

T H U M M A, Chief Judge:

¶1 Daniel S. (Father) appeals from an order terminating his parental rights to his daughter, R.N. (born March 2017). Father argues the trial evidence is insufficient to support the finding that he neglected R.N. The Department of Child Safety (DCS) concedes error and asks that this court “reverse the juvenile court’s order terminating Father’s parental rights and remand.” Accepting that concession, this court vacates the order terminating Father’s parental rights to R.N. and remands for further proceedings.

¶2 In December 2017, DCS filed a petition to terminate the parental rights of Father (and the mother of R.N., who is not a party to this appeal). The petition alleged that Father, at the request of mother, shot and killed R.N.’s maternal grandfather in the family home. The sole ground for severance was neglect, Ariz. Rev. Stat. (A.R.S.) §§ 8-533(B)(2), 8-201(25) (2018), based on the allegation that:

Father knew or reasonably should have known that shooting the grandfather while the child was in or near the home would place the young vulnerable child at substantial risk of harm from the gunshot and any potential struggle, altercation or other mishap with the firearm. Father’s actions demonstrate his inability and/or unwillingness to provide the child with appropriate supervision and that places the child at substantial risk of harm.

Father denied the allegations and an April 2018 adjudication hearing followed.

¶3 At trial, DCS called a case manager as its only witness. The case manager testified based on her reading of “[a]round about 100 or so pages” of a 991-page police report. The case manager testified that the

gunshot occurred inside the home when R.N. was outside of the home. The case manager did not know the structure of the home or whether anyone outside of the home was at risk during the shooting and "had no idea" how far a person would need to be from the home to be outside of any "danger zone." She also admitted that one shot was fired and that the child was not injured.

¶4 When DCS sought to call Father as a witness, he asserted his Fifth Amendment rights. Without objection, the superior court explained that it would draw an adverse inference "on all disputed issues of fact about which the [F]ather may have firsthand knowledge." After trial, the superior court found that DCS had proven neglect by clear and convincing evidence and granted the petition. This timely appeal followed.

¶5 Father argues the trial evidence was insufficient in at least two significant ways: (1) it failed to show Father was unable or unwilling to provide R.N. with supervision, food, clothing, shelter or medical care; (2) it failed to show Father placed R.N. at an unreasonable risk of harm or that "R.N. ever actually faced any legitimate risk [of harm] whatsoever." DCS concedes that Father's opening brief "accurately states the facts and course of proceedings" and "correctly argues that insufficient evidence supported the" finding of neglect. Quoting the definition of neglect in A.R.S. § 8-201(25), DCS adds that "[n]othing in the testimony or exhibits at trial demonstrated that Father's inability or unwillingness to provide . . . supervision cause[d] unreasonable risk of harm to the child's health or welfare."

¶6 On this record, which does not support termination on the basis of neglect, the court accepts DCS' concession of error, vacates the order terminating Father's parental rights to R.N. and remands to the superior court for further proceedings.



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