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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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JOSHUA G., *Appellant*,

*v.*

DEPARTMENT OF CHILD SAFETY, N.G., W.G., *Appellees*.

No. 1 CA-JV 19-0078  
FILED 1-28-2020

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Appeal from the Superior Court in Maricopa County  
No. JD529202  
The Honorable Arthur T. Anderson, Judge

**VACATED AND REMANDED**

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COUNSEL

Law Office of H. Clark Jones, LLC, Phoenix  
By H. Clark Jones  
*Counsel for Appellant*

Arizona Attorney General's Office, Phoenix  
By Lauren J. Lowe  
*Counsel for Appellee Department of Child Safety*

**MEMORANDUM DECISION**

Presiding Judge Paul J. McMurdie delivered the decision of the Court, in which Judge Jennifer B. Campbell and Vice Chief Judge Kent E. Cattani joined.

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**M c M U R D I E**, Judge:

¶1 Joshua G. (“Father”) challenges the superior court’s order terminating his parental rights. We hold that the order was insufficient under Arizona Revised Statutes (“A.R.S.”) sections 8-533 and -538(A) because the court failed to make findings by clear and convincing evidence regarding the termination of Father’s parental rights. Given the absence of proper findings in this case, we vacate the termination judgment and remand for further proceedings consistent with this decision.

**FACTS AND PROCEDURAL BACKGROUND**

¶2 Father and Cherokee B. (“Mother”) were in a relationship and have had two children together, Nakayla and Wesley.<sup>1</sup> In September 2015, the Department of Child Safety (“DCS”) received a report that Father had serious mental health problems, excessively drank alcohol, and engaged in domestic violence with Mother. The report also indicated that Mother had mental health problems, engaged in domestic violence with Father, and consumed alcohol even though she was breastfeeding. As a result of the reports, DCS filed a dependency petition alleging Nakayla was dependent. DCS claimed Father was unable to parent due to mental health issues, substance abuse, and domestic violence. The court later adjudicated Nakayla dependent with a plan for family reunification. In September 2016, Mother gave birth to Wesley. Due to the same ongoing concerns with both parents, DCS took custody of Wesley and he was also adjudicated dependent. The court confirmed the plan for family reunification for both children.

¶3 Nakayla and Wesley both have significant special needs. Among other concerns, Nakayla has obsessive tendencies, mood changes, language and sleep struggles, an inability to follow directions or retain

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<sup>1</sup> Mother is not party to this appeal.

information, and cognitive delays. Wesley has a language disorder and developmental delays. Both children have autism and low frustration tolerances. Because of their various special needs, both children require a higher level of supervision and care than most children of the same age.

¶4 Per the reunification plan, Father engaged in various services between 2015 and 2018. Father participated in a psychological evaluation with Dr. Silberman, who concluded that the results of the assessment were not determinative because of Father's "extreme defensiveness . . . due to underreporting by attempting to present himself in an extremely positive light." Dr. Silberman noted that reports alleged Father had problems with alcohol, a bipolar disorder, and a personality disorder with antisocial features. Dr. Silberman concluded that Father had a "poor" prognosis of demonstrating adequate parenting skills in the foreseeable future because of his "denial of problems."

¶5 In 2015, Mother's one-year-old male child from another relationship, Raylen, began to act out sexually and reported being afraid of Father. Consequently, Father underwent a psychosexual evaluation in 2016 with Dr. Levitan. Dr. Levitan concluded that Father had an attraction towards adolescent Caucasian females aged 14-17 years old, Caucasian adult females, and Caucasian male children ages five years old or less. Dr. Levitan stated his findings suggested Father "may have a sexual interest in male children, but [he] may not have acted on the impulse" and that "testing was unable to pinpoint with exact accuracy if [he had] engaged in inappropriate sexual behaviors with [Raylen]." Father took a polygraph examination and denied any sexual contact with minors. The results indicated he was truthful. Throughout 2015 and 2016, Father participated in individual counseling, domestic violence services, couples counseling, and parent-aide services. He tested negative for drug and alcohol substances for six months, obviating the need for further testing.

¶6 In late 2016, Mother notified DCS that Father "had been drinking more than he normally did." DCS asked him to "participate in 30 days of random urinalysis tests." He tested positive for alcohol on the final day of testing and stated that the positive result stemmed from his use of cold medication. In early 2017, Father completed a psychiatric evaluation at the Bayless Healthcare Group. The report concluded he displayed no signs of bipolar disorder, mania, depression, or psychosis. However, Father was "somewhat guarded during the examination" and showed some signs of "antisocial personality disorder with issues with anger/outbursts and resulting alcohol use."

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¶7 Father completed a second psychological evaluation conducted by Dr. Levitan. In the report, Dr. Levitan stated that Father “meets sufficient criteria for a diagnosis of Adjustment Disorder, Unspecified; Avoidant Personality Disorder; Unspecified Attention-Deficit/Hyperactivity Disorder; and Unspecified Alcohol-Related Disorder,” which could negatively affect his ability to parent effectively. Dr. Levitan reported that Father was less guarded and “made notable progress” reducing his defensiveness and becoming more open.

¶8 In late 2017, Father completed a bonding/best interest assessment with Dr. Capps-Conkle and a follow-up psychosexual evaluation with Dr. Leclerc. After observing Father interact with Nakayla and Wesley, Dr. Capps-Conkle concluded that “[t]here were no concerns noted during this observation.” Dr. Leclerc expressed concern that Father tested positive for alcohol “despite knowing the concerns and allegations of abusing alcohol made against him,” but credited him for staying sober the past eight months after his single positive test for alcohol. Dr. Leclerc concluded that Father meets criteria for child neglect because “he left the children in [Mother’s] care despite her unstable mental health, and he engaged in domestic violence with her” but if he continued with the report’s and DCS’s recommendations, then he “should be able to demonstrate minimally adequate parenting skills in the foreseeable future.” Finally, the creator of the examination used to determine that Father was attracted to young boys in the first psychosexual exam informed Dr. Leclerc that those 2015 results were invalid. Dr. Leclerc and the test’s creator concluded Father did not have a sexual propensity towards children after considering the follow-up psychosexual evaluation, and a second polygraph test resulted in “no indication that [Father] has sexual attraction to children or engaged in sexual behaviors with any child.”

¶9 In 2018, Father completed counseling and was no longer required to submit to drug screening. Dr. Capps-Conkle submitted an addendum to her bonding/best interest assessment for Father. Dr. Capps-Conkle acknowledged Dr. Leclerc’s positive report but raised new concerns about Father’s housing instability, hostility towards the children’s placement providers, cancelation of visits, missed medical appointments with the children’s doctors, and lack of understanding his children’s medical needs. She opined that if Father “is unable to show sustained consistency and stability over the next three to six months, it may be appropriate for the Court to consider case plan alternatives to reunification.” During a Foster Care Review Board meeting in July 2018, the case manager’s supervisor stated that Father had stable housing, made the

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necessary behavioral changes needed to achieve the permanency goal, and attended the children's medical appointments, but needed to engage more intensely with their therapy appointments.

¶10 The next month, a new parent aide referral was made. Over the next few months, the new aide expressed concerns regarding Father's ability to parent, including his ability to redirect the children during tantrums, failing to show up for the children's medical and therapy appointments, no longer providing home-cooked meals or appropriate portions of food, unwillingness to educate himself about the children's disabilities, maintaining a messy and dirty home, snapping his fingers at the children to get their attention, and shouting at them. The aide also expressed concern about Father's fiancé and their new baby. The aide was concerned that his fiancé would be unable to care for all the children alone when Father was at work and that the baby required too much time and resources to permit her to care for Nakayla and Wesley adequately. Because of these ongoing and unresolved concerns, DCS amended the case plan from reunification to severance and adoption.

¶11 DCS moved for termination of Father's parental rights, alleging he had been unable to remedy the circumstances causing the children to be in an out-of-home placement because of his inconsistent urinalysis drug testing, housing instability, negative feelings about placement, canceled visits, missed appointments, and lack of understanding his children's medical needs. DCS expressed "significant concerns about his commitment to his children, his mental health, his ability to safely and consistently parent his children, and his continued denial of the existence of problems."

¶12 The court held a four-day termination trial. At the hearing, DCS conceded that Father's alleged substance abuse, domestic violence, and inappropriate sexual behaviors were no longer a concern. The children's therapist testified, however, that Nakayla and Wesley "need a higher level of care than minimally adequate" and require "exponentially more" care than a typically developing child because of their special needs. Father's parent aide testified that Father has eleven diminished parenting capacities and believed he would be unable to resolve any of them. She went on to say that Father was "not performing what he needs to do" and is "moving backward with his parenting." The case manager also testified that Father had not remedied the circumstances causing Nakayla and Wesley to be in out-of-home care and would not be able to do so in the near future because of his employment and housing, missed appointments for the children, and inability to understand the children's needs. Dr.

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Capps-Conkle explained the necessity for the children to attend their medical appointments and that the children deserved permanency.

¶13 The court terminated Father’s parental rights to both children. Father appealed, and we have jurisdiction under A.R.S. §§ 8-235(A), 12-120.21, and Arizona Rule of Procedure for the Juvenile Court 103(A).

**DISCUSSION**

¶14 The court terminated Father’s parent-child relationships under A.R.S. § 8-533(B)(8)(c), which requires DCS to establish by clear and convincing evidence that: (1) Nakayla and Wesley had been in court-ordered out-of-home placement for at least fifteen months; (2) DCS made a diligent effort to provide reunification services; yet, (3) Father had been unable to remedy the circumstances causing Nakayla and Wesley to be in court-ordered out-of-home care; and (4) it was substantially unlikely that he would be able to parent in the near future properly. *Donald W. v. DCS*, 247 Ariz. 9, 17, ¶ 25 (App. 2019); *Jordan C. v. ADES*, 223 Ariz. 86, 93, ¶ 17 (App. 2009). A diligent effort minimally requires DCS “to identify the conditions causing the child’s out-of-home placement, provide services that have a reasonable prospect of success to remedy the circumstances as they arise throughout the time-in-care period, maintain consistent contact with the parent, and make reasonable efforts to assist the parent in areas where compliance proves difficult.” *Donald W.*, 247 Ariz. at 23, ¶ 50 (emphasis omitted). If DCS establishes by clear and convincing evidence that despite its diligent efforts Father was unable to remedy the circumstances, then the superior court shall “[m]ake specific findings of fact in support of the termination of parental rights and grant the motion or petition for termination.” Ariz. R.P. Juv. Ct. 66(F)(2)(a). The court’s findings “must be ‘sufficiently specific to enable the appellate court to provide effective review.’” *Logan B. v. DCS*, 244 Ariz. 532, 537, ¶ 14 (App. 2018) (quoting *Ruben M. v. ADES*, 230 Ariz. 236, 241, ¶ 25 (App. 2012)). Those sufficiently specific findings shall include all ultimate facts, which are “those necessary to resolve the disputed issues.” *Id.* at ¶ 15 (quoting *Ruben M.*, 230 Ariz. at 241, ¶ 25).

¶15 For the reasons discussed below, we hold the court erred by failing to make sufficient findings to support its conclusion. Initially, the cause for the dependency was based on Father’s alleged alcohol abuse, mental health, domestic violence, and sexual misconduct. However, Father resolved those concerns or proved them false through his participation and successful completion of DCS services. As the dependency progressed, DCS became concerned with Father’s ability to parent based on his financial and

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housing circumstances, negative feelings about the children's placement providers, canceled visits, missed appointments, and his lack of understanding regarding his children's medical needs. Consequently, DCS went forward with termination on its new concerns. The superior court did not address in its findings whether DCS made a diligent effort to provide Father appropriate reunification services relating to the new concerns; nor did the court make a finding by clear and convincing evidence—explicit or implicit—in its ruling regarding Father's inability to remedy the circumstances that caused the children to be in an out-of-home placement. Thus, we cannot provide effective review and must remand. *Logan B.*, 244 Ariz. at 537, ¶ 14.

¶16 Father argues “[t]he court’s findings here were inadequately articulated” and failed to satisfy the 15-month time-in-care ground required by statute.<sup>2</sup> A.R.S. §§ 8-533(B)(8)(c), -537(B). In its written ruling, the court included the heading “Fifteen Months” with subheadings titled “Mother” and “Father.” Under the “Mother” subheading, the court made an explicit finding that “DCS has proven, by clear and convincing evidence, Out of Home Placement Under Court/DCS Supervision (ARS § 8-533(B)(8)(c)).” Under the “Father” subheading in the “Fifteen Months” section, the court did not make an explicit finding. Instead, the court made 12 statements under the subheading. The first five are biographical statements about Father's childhood, and the next four include some of Father's diagnoses throughout the dependency. The final four statements are more relevant, which are:

Father's mental health history discloses an array of concerns (perhaps impacted by defensiveness) that have not been therapeutically addressed. Father's behavior under stress and ability to care for special needs children is a concern.

The most recent assessments of Father's parenting ability disclose a number of parenting concerns.

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<sup>2</sup> Father also argues the court's findings were not supported by reasonable evidence and that DCS failed to make reasonable efforts to adequately assist him with reunification. However, because we are remanding for additional proceedings, we need not address those arguments at this time. *See State v. Hardwick*, 183 Ariz. 649, 657 (App. 1995) (appellate courts may decline to reach remaining issues once it finds grounds for reversal).

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Father works two jobs to provide for his wife and newborn. As a consequence, his time at home is limited and the newborn is with Mother.

Mother and the two neighbor friends (babysitters or additional help) have their limitations. In any combination, these three are ill equipped to safely care for Father's two special needs children.

¶17 None of these four statements make an explicit finding by clear and convincing evidence that Father was unable to remedy the circumstances causing Nakayla and Wesley to be in court-ordered out-of-home care or that there was a substantial likelihood he would not be capable of exercising proper and effective parental care and control in the near future. A.R.S. § 8-533(B)(8)(c). The court also uses "Mother" but may be referring to Father's fiancé based on our review of the record. Because of the ambiguities and vagueness relating to the termination of Father's rights, we are unable to provide a review.

¶18 DCS argues that Father waived his argument that the findings were inadequate because he did not raise it in the superior court. *See Christy C. v. ADES*, 212 Ariz. 445, 452, ¶ 21 (App. 2007). Although waiver can be an appropriate remedy under such circumstances, it is within our discretion to decline to find waiver. *See Logan B.*, 244 Ariz. at 536, ¶ 9. Given the complete lack of findings supporting the termination ground, we decline to find waiver here.

¶19 DCS also argues that it is presumed the superior court "made all findings necessary to support the severance order if reasonable evidence supports the order" and we "may examine the record to determine whether the facts support an implicit finding." *See Mary Lou C. v. ADES*, 207 Ariz. 43, 50, ¶ 17 (App. 2004). To support its contention that the record establishes an implicit finding of Father's inability to remedy the circumstances, DCS highlights the court's concerns about Father, specific findings of the children's many needs, and the court's conclusion that "Father, [his fiancé], and their proposed babysitters, individually and collectively are unable to provide the specialized supervision and care the children need."

¶20 The court merely stated its "concerns" about Father's ability to parent, which does not equate to a proper finding for termination because it does not address Father's ability to improve the situation in a reasonable time. *See Logan B.*, 244 Ariz. at 537, ¶ 15 (written findings must include all ultimate facts necessary to resolve the disputed issues). Nor does



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it state that DCS made reasonable efforts to assist him with reunification given its concerns. Additionally, while we may examine the record to determine if it supports the court's decision, "[a]s an appellate court, 'our task for factual findings is solely to confirm that there is some reasonable evidence in the record to sustain them,' not to reweigh the evidence." *Id.* at ¶ 19 (quoting *ADES v. Oscar O.*, 209 Ariz. 332, 336, ¶ 14 (App. 2004)).

¶21 Finally, the court discussed Father's inability to provide adequate supervision for the children within the "Best Interests" section of its ruling, finding that "DCS has shown by a *preponderance of the evidence* that it is in the best interest of the Children to remain with this adoptive placement." (Emphasis added). Because this finding was not by clear and convincing evidence, it neither explicitly nor implicitly supports the termination of Father's rights. A.R.S. §§ 8-533, -537(B) (termination of a parent's parental rights requires the superior court to find at least one statutory ground by clear and convincing evidence). Therefore, we are unable to determine if the court found that DCS satisfied the 15-month requirement by clear and convincing evidence, if DCS provided diligent services related to the new concerns about Father's parenting, or what facts were used to determine grounds for termination.

CONCLUSION

¶22 We vacate the superior court's order terminating the parent-child relationships between Father and Nakayla and Wesley and remand for further proceedings consistent with this decision.<sup>3</sup>



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

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<sup>3</sup> The parties may present additional evidence on remand.