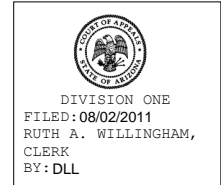


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FRANK D., DENISE D.,) No. 1 CA-JV 11-0017
)
Appellants,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
)
ARIZONA DEPARTMENT OF ECONOMIC) (Not for Publication -
SECURITY, CALEB D., TAVITA D.,) Ariz. R.P. Juv. Ct. 103(G);
MICAIAH D., ISRAEL D., ISAAH D.,) ARCAP 28)
)
Appellees.)
)

Appeal from the Superior Court in Yavapai County

Cause No. P1300JD201000031

The Honorable Robert M. Brutinel, Judge

AFFIRMED

Law Office of Patricia O'Connor
By Patricia O'Connor,
Attorney for Appellant Mother

Chino Valley

Law Office of Timothy V. Nelson
By Timothy V. Nelson
Attorney for Appellant Father

Chandler

Thomas C. Horne, Attorney General
Eric Devany, Assistant Attorney General
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Mesa

H A L L, Judge

¶1 Frank D. (Father) and Denise D. (Mother) appeal the juvenile court's order adjudicating their children, Caleb, Tavita, Micaiah, Israel, and Isaiah dependent. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Father and Mother are the biological parents of Caleb, born March 20, 1997, Tavita, born November 5, 1998, Micaiah, born July 7, 2001, Israel, born December 2, 2002, and Isaiah, born August 23, 2004 (the children). Since April 2008, Child Protective Services (CPS) has received numerous reports of neglect and abuse in this family. In late 2008, Department of Developmental Disabilities (DDD) in-home service providers reported that Mother is "mentally unbalanced." In October 2008, Mother sent an email to her DDD case manager stating that her "family was in crisis" and in "desperate" need of help. In early 2010, CPS received several reports that Father and Mother are subjecting the children to numerous unnecessary and invasive medical procedures. CPS workers who visited the family's home in June 2010 observed "extremely unsanitary" living conditions.

¶3 On June 14, 2010, the Arizona Department of Economic Security (ADES) filed a dependency petition. The petition alleged that the children were at imminent risk of abuse or neglect because Father and Mother "are subjecting the children

to unnecessary medical tests and invasive procedures based on fabricated or exaggerated diagnoses and illnesses." In addition, the petition also stated that CPS received two separate reports that doctors suspect the parents suffer from "Factitious Disorder by Proxy (formerly known as Munchausen Syndrome by Proxy)" and noted that the parents refuse to cooperate with ADES. On June 15, 2010, the children were removed from the parents' home.

¶14 At the Preliminary Protective Order Hearing, Father and Mother denied that the children are dependent. On January 7, 2011, following a five-day contested hearing, the juvenile court found the children dependent by a preponderance of the evidence. The juvenile court stated in relevant part:

At the time of the filing of the Dependency Petition, all of the children were alleged by the parents to be autistic. . . . Additionally, each of the children were diagnosed with mitochondrial disorder, functional antibody deficiency, asthma, gastroesophageal reflux, and methylenetetrahydrofolate reductase deficiency. Each of the children were receiving education services consistent with autism and were treated as having developmental delays. Following their removal, each of the children were assessed, and . . . [n]one of the children appear to have autism.

Based, at least in part, on medical history provided by the parents, each of the children were diagnosed with functional antibody disorder. Functional antibody disorder is characterized by frequent infections and illnesses. The children were receiving regular IVIG therapy requiring intravenous administration of blood products. This treatment has potentially serious medical risks. The children's medical histories prior to removal do not reflect

frequent infections, nor have the children suffered from frequent infections following their removal from their parents.

Based, at least in part, on medical history provided by the parents, each of the children were diagnosed with multiple environmental and food allergies. . . . An evaluation after their removal concluded that none of the children suffered from allergies. The children have had a normal diet following removal without any negative effects.

The Court finds that the children have been subjected to numerous invasive, painful and unnecessary medical tests and treatments because of the parents reported history and insistence on treatment. Some of the treatments are potentially dangerous. The children have been treated as developmentally disabled due to autism, when they are not developmentally disabled.

. . . .

Following a psychological evaluation, [Father] was diagnosed by Dr. Sanders with Factitious Disorder, NOS and a personality disorder. Likewise, Dr. Sanders diagnosed [Mother] with Factitious Disorder, NOS and a personality disorder.

. . . .

Based on the evidence presented the parents behavior in seeking unnecessary treatment for the children is likely to continue.

¶15 Father and Mother timely appealed. The juvenile court's order is appealable under Rule 103(A) of the Arizona Rules of Procedure for the Juvenile Court. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) section 8-235(A) (2007).

DISCUSSION

¶16 We review a superior court's ruling in a contested dependency hearing for an abuse of discretion. See *Willie G. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 231, 234, ¶ 13, 119 P.3d 1034, 1037 (App. 2005). "On review of an adjudication of dependency, we view the evidence in the light most favorable to sustaining the juvenile court's findings." *Id.* at 235, ¶ 21, 119 P.3d at 1038.

¶17 In relevant part, a dependent child is defined as "a child who is adjudicated to be . . . [i]n need of proper and effective parental care and control and who has no parent or guardian, or one who has no parent or guardian willing to exercise or capable of exercising such care and control." A.R.S. § 8-201(13)(a)(i) (Supp. 2010). The petitioner has the burden of proving the child is dependent by a preponderance of the evidence. Ariz. R.P. Juv. Ct. 55(A), (C); see also A.R.S. § 8-844(C)(1) (Supp. 2010).

¶18 Father and Mother contend that the juvenile court erred by adjudicating the children dependent because ADES did not prove by a preponderance of the evidence that Father and Mother are unwilling or unable to parent the children due to medical abuse or neglect. "We generally will not disturb a dependency adjudication unless [there is] no reasonable evidence [to] support[] it[,] that is, that the adjudication is clearly

erroneous. *Willie G.*, 211 Ariz. at 235, ¶ 21, 119 P.3d at 1038. Finally, because “[t]he primary consideration in a dependency case is always the best interest of the child[,] . . . the juvenile court is vested with ‘a great deal of discretion.’” *Ariz. Dep't of Econ. Sec. v. Superior Court*, 178 Ariz. 236, 239, 871 P.2d 1172, 1175 (App. 1994) (quoting *In re Cochise County Juv. Action No. 5666-J*, 133 Ariz. 157, 160, 650 P.2d 459, 462 (1982)).

¶19 On the first day of the dependency hearing, Mary Sanders, Ph.D., a psychologist who specializes in child abuse and is considered an “expert” in diagnosing factitious disorder by proxy, testified on behalf of the State. Dr. Sanders testified that factitious disorder involves “someone intentionally falsif[ying] illness in order to meet their own psychological needs” and explained that factitious disorder by proxy, when a parent falsifies an illness on behalf of his child, is abuse because it causes the child to perceive himself as ill and is often accompanied by unnecessary evaluations and treatments that may create illness or other harm. She further testified that children who are victims of factitious disorder by proxy are often not permitted to attend school and have limited opportunities to socialize with their peers.

¶10 On July 29, 2010, Dr. Sanders observed the family and she conducted interviews with each of the parents individually

the following day. She also reviewed many of the children's medical records, stating that "there are more medical records in this case than any case I have seen." Based upon her review of the medical records and her interviews with Father and Mother, Dr. Sanders concluded that the "children have been the victims of factitious disorder by proxy." She opined that the parents provided false "medical information in order to promote illness in their children," including telling doctors that the children have illnesses for which they had never been diagnosed. She further testified that the children have been subjected to unnecessary and potentially dangerous invasive treatments, such as intravenous immunoglobulin (IVIG) procedures. Father and Mother also removed their children from school. Dr. Sanders concluded that both Father and Mother suffer from factitious disorder by proxy and stated that they will be unable to safely care for the children unless they submit to "meaningful treatment." Dr. Sanders also recommended that a medical case manager be assigned to the family to help make medical decisions regarding the children.

¶11 The CPS supervisor assigned to the case, Barbara Woods, testified that after the children were removed from their parents' home, each of the children were medically evaluated. None of the children tested positive for any of the food allergies claimed by the parents and, since that time, the

children have eaten an unrestricted diet without adverse affects. None of the children have experienced any gastrointestinal issues requiring medical attention since they have been removed from the parents' home. The physicians who evaluated the children concluded that they are all healthy and none of them have autism. When asked how frequently Father and Mother took their children for medical visits, Woods testified that during the eighteen months before their removal from their parents' home, Caleb went to the doctor more than sixty times, Tavita went to the doctor more than thirty times, Micaiah and Israel went to the doctor more than forty times, and Isaiah went to the doctor approximately fifteen times. Since their removal, the children have all been enrolled in school and are now physically active. Based on her observation of the parents' supervised visits with the children, Woods concluded that the parents and children are quite bonded, but the parents treat the children as disabled and, because the children are not disabled, that parenting style is "holding [the children] back."

¶12 On the second day of the dependency hearing, the State called Dr. Albert Jacobson, M.D., the Chief of Ambulatory Pediatrics at Phoenix Children's Hospital (PCH) to testify. Dr. Jacobson explained that he supervises PCH staff and also participates in clinical care. In 2009 and 2010, two PCH pediatricians contacted CPS to report their suspicions that

Mother and Father were medically abusing the children. After CPS then removed the children from the parents' home in June 2010, Dr. Jacobson became their primary care physician. Dr. Jacobson testified that he evaluated the children, consulted with other pediatricians, and reviewed the children's medical records and concluded that none of the children had functional antibody disorder, autism, or environmental or food allergies. Dr. Jacobson also testified that the parents relayed different medical histories for the children to different providers and the diagnoses of autism and functional antibody disorder were based on these misleading histories rather than objective findings. Finally, Dr. Jacobson testified that the parents engaged in "physician bullying" and would threaten legal action when doctors refused to comply with their requests. He noted that the parents "fired" a PCH physician who would not do as they asked.

¶13 The State also introduced as an exhibit a report prepared by Susan M. Stephens, M.D., a pediatrician and the medical director for the Comprehensive Medical and Dental Program. In her report, Dr. Stephens explained that she reviewed the children's medical records and contacted numerous pediatric providers involved in their care. Based on her review of the medical records and the information she received from these medical providers, Dr. Stephens concluded that none of the

children have autism, functional antibody disorder, or any environmental or food allergies. She stated that none of the children are eligible to receive services through DDD or cash benefits from the Social Security Administration and determined that Father and Mother "manipulate[d]" the medical community as well as the state and federal agencies that provided the family services and cash benefits.

¶14 Father and Mother contend that the testimony of the State's witnesses that the children do not suffer from any chronic illnesses or allergies, based on medical evaluations of the children subsequent to their removal from parents' care, does not undermine their claim that the children previously suffered from these conditions and only "attest[s] to the improvement" in the children's conditions based on their medical treatment and procedures. Father and Mother also note that several physicians testified on their behalf and explained that objective evidence indicated the children suffered from illness. Finally, Father and Mother assert that the State failed to prove that the children suffered any harm as a result of their medical evaluations and procedures.

¶15 Essentially, Father and Mother ask us to reweigh the evidence, which we will not do. See *In re Pima County Juv. Dependency Action No. 118537*, 185 Ariz. 77, 79, 912 P.2d 1306, 1308 (App. 1994). "[T]he juvenile court [is] in the best

position to weigh the evidence, judge the credibility of the parties, observe the parties, and make appropriate factual findings." *In re Pima County Dependency Action No. 93511*, 154 Ariz. 543, 546, 744 P.2d 455, 458 (App. 1987); *Bob H. v. Ariz. Dep't of Econ. Sec.*, 225 Ariz. 279, 282, ¶ 12, 237 P.3d 632, 635 (App. 2010). As detailed above, the State provided substantial evidence that the children do not suffer from chronic illnesses or allergies and that the invasive treatments they were subjected to were medically unnecessary. Dr. Sanders testified that Father and Mother suffer from factitious disorder by proxy and Dr. Stephens concluded that Father and Mother have manipulated doctors and government agencies and received numerous services and benefits for which they were ineligible. Moreover, the case supervisor testified that the children are being emotionally harmed by being treated as disabled. Although the testimony of several doctors who testified on the parents' behalf supports their claim that the children previously suffered from some medical ailments, the juvenile court, as the fact-finder, was in the best position to resolve any conflicts in the evidence and we defer to the court's findings. Therefore, because substantial evidence supports the juvenile court's finding that the children are dependent to Father and Mother due to medical neglect and abuse, we affirm the juvenile

court's finding that Father and Mother are unable to provide the necessary care and control of their children.

CONCLUSION

¶16 Because the evidence supports the juvenile court's order of dependency, we affirm.

_____/s/_____
PHILIP HALL, Judge

CONCURRING:

_____/s/_____
PATRICIA K. NORRIS, Presiding Judge

K E S S L E R, Judge, specially concurring:

¶17 I write separately to express both my understanding for our decision and my concern over the type of evidence which the State presented to have the court declare these five children dependent. First, the majority properly explains that when there is a conflict in evidence, we leave the resolution of that conflict to the factfinder. As I explain below, to be sufficient for these purposes, the conflict in evidence before the trial court has to be more than physicians disagreeing over whether the prior diagnoses of and treatment plans for the children were correct. Rather, the conflict must be whether

those diagnoses and treatment plans in part were based on voluntary misreporting of symptoms by parents to meet their own psychological needs. Second, to some extent the State's case was based on possibly inaccurate reviews of treating physicians' records without having the State's own experts talk to those physicians and without having some of those original physicians testify. In this kind of case, the best interests of the child deserve more. Despite these concerns, I concur with the majority because I think there was evidence, although minimal, which met the preponderance of evidence standard needed to prove a dependency. I would hope, however, that the parents, CPS, and their respective attorneys, will proceed with some degree of cooperation in the future for the best interests of the children, rather than the need to prevail in litigation.

¶18 As the State explained to the trial court, this is not your typical parental dependency case dealing with illicit drugs, sexual or physical assaults, or abandonment in which any factual conflict usually involves eyewitnesses testifying about the alleged conduct. Rather as one of the State's key witnesses testified, this case is based on whether bright parents, who bonded with and love their children, were taking the children to physicians for treatments because the parents were voluntarily misreporting the childrens' symptoms to meet their own

psychological needs, a condition called, Factitious Disorder by Proxy ("FDP").¹

¶19 As the State's key witness on FDP, Dr. Mary Sanders, testified, the primary way to determine if the parents were subjecting the children to unnecessary treatments because of FDP is to search for a pattern of parental conduct in which the alleged symptoms based on parental reporting are not observed by other persons or the alleged disease is not responsive to appropriate treatment. As Dr. Sanders stated, such an analysis is complicated because pediatricians often have to rely on parental reports of symptoms.² Moreover, she testified a parent can simply exaggerate symptoms and not be diagnosed as FDP. As Dr. Sanders further explained, the evidence to show neglect or abuse through FDP must be based on careful examination of medical records and talking to treating and diagnosing physicians.

¶20 Accordingly, it is insufficient to prove FDP abuse based solely on physicians and psychologists stating in hindsight that the physicians previously diagnosing and/or treating the children were wrong in their assessments or treatment plan. Otherwise, parents merely following a

¹ The State's key witness on FDP, Dr. Mary Sanders, testified that the parents had not induced any illnesses in the children.

² Another of the State's medical witnesses, Dr. Susan Stephens, also testified physicians often have to rely on parental reports of symptoms.

physician's erroneous advice would be subject to having CPS remove their children from an otherwise healthy home and possibly having their parental rights severed. To avoid such a result, it is important to have the original and later physicians testify rather than just have CPS employees and consultants recount what they learned from reviewing records or talking to doctors. As one commentator has noted in a slightly different context,

Fairness is jeopardized when courts unnecessarily prevent the introduction of highly probative evidence from being heard by jurors. The testimony of a treating physician is, by its nature, often more relevant, material, and probative, than that of the retained expert who is not only paid for his testimony but often gleans it from a cold record.

Christopher W. Dyer, *Treating Physicians: Fact Witnesses or Retained Expert Witnesses in Disguise? Finding a Place for Treating Physician Opinions in the Iowa Discovery Rules*, 48 Drake L. Rev. 719, 739 (2000).

¶21 Part of the problem in this case is just this type of second-hand evidence as well as what I would consider inadequate investigation by CPS coupled with possible recalcitrance by at least one family physician to cooperate with CPS. Thus, despite this being an adversarial process, the best interests of the children is the ultimate guide. I would expect that CPS would have had the physicians and consultants they hired after the

children were removed from the parental home conduct a complete investigation by reviewing *all* relevant medical records, discuss their concerns with the physicians who had previously diagnosed the children or treated them and ensure that all of the physicians were on the same page with the same records. Similarly, I would have hoped that the physicians who had diagnosed and treated the children in the past would have attempted to cooperate with CPS and its experts so that unnecessary errors could have been avoided. That kind of cooperation should also have resulted in true independent examinations of the children either before or after removal from the home, with both the State's experts and the prior physicians trying to cooperate to interpret those tests.

¶22 Very little of this occurred here. One of the key witnesses, Dr. Sydney Rice, never testified. Nor was a key letter written by her even introduced into evidence, but merely allegedly quoted in part by one of the witnesses. Similarly, several of the State's witnesses never bothered to contact some of the key physicians who diagnosed and treated the children prior to their removal from the parents' care. The psychologist for the parents testified that when he received boxes of medical records from the State to review, they were totally unorganized, making it extremely difficult to analyze. Some of the State's witnesses admitted they did not review all the medical records.

In at least one case, when Dr. Sanders attempted to call one of the family doctors (Dr. Hellmers) concerning his diagnosis and treatment for Functional Antibody Disorder ("FAD"), the doctor refused to talk to her based on advice of counsel.³

¶123 For example, Dr. Sanders was the only mental health provider who diagnosed the parents as meeting the criteria for FDP. She testified she never talked to at least two of the treating physicians, Drs. Schneider and Gregory. Nor did she have any substantive discussion with Dr. Hellmers, the physician who had diagnosed and treated four of the children for FAD. She also could not even recall if she examined all of Dr. Hellmers' records and in reaching her conclusions had never seen Dr. Schneider's or Dr. Gregory's records.

¶124 In turn, two of the other key CPS experts, Drs. Albert Jacobson and Susan Stephens, never bothered to contact Dr. Hellmers. This led Dr. Jacobson to conclude that Dr. Hellmers' intravenous treatment plan was for autism and was being done at Dr. Hellmers' office in Prescott. In fact, it was undisputed that Dr. Hellmers had authorized the treatment for FAD and it was being done at the hospital where Dr. Jacobson worked, Phoenix Childrens' Hospital.

³ It is unclear whether Dr. Hellmers refused to talk to Dr. Sanders because he thought he was being denigrated by CPS or because he did not have a release for him to discuss the children with Dr. Sanders.

¶25 This incomplete investigation at times appeared almost self-serving. Thus, one of the conditions which the State claimed the parents falsified was mitochondrial disorder.⁴ Dr. Sanders testified that she had not seen all the medical records⁵ and tried to compare parents reporting of problems with allegedly objective findings to see if FDP existed. She claimed that the parents had described the children to a Dr. Cohen who diagnosed probable mitochondrial disorder and that the Father later told Dr. Sipes, another treating physician for the children, that they had been diagnosed with mitochondrial disorder. She testified that based on her review of records, Dr. Cohen never actually saw the children and there was no

⁴ "Mitochondrial diseases are a clinically heterogeneous group of disorders that arise as a result of dysfunction of the mitochondrial respiratory chain. They can be caused by mutations of nuclear or mitochondrial DNA (mtDNA). Some mitochondrial disorders only affect a single organ . . . but many involve multiple organ systems and often present with prominent neurologic and myopathic features. Mitochondrial disorders may present at any age. Many affected individuals display a cluster of clinical features . . . However, considerable clinical variability exists and many individuals do not fit neatly into one particular category." Patrick F. Chinnery, Ph.D., *Mitochondrial Disorders Overview*, found at National Institutes of Health, U.S. National Library of Medicine Bookshelf ([www.http://nlm.nih.gov/books/NBK1229](http://nlm.nih.gov/books/NBK1229)) (last visited July 13, 2011).

⁵ Dr. Sanders testified she reviewed all the records she was given. It is unclear what records she was given although it is clear she never received records of Drs. Hellmers or Schneider upon which to base her report.

formal diagnosis. However, there is no evidence in the record that she contacted Dr. Cohen or Dr. Sipes about mitochondrial disease.⁶ Dr. Sanders thought that Dr. Sipes may have talked to Dr. Stephens. Later in that same report, Dr. Sanders wrote that she had relied on a report issued by a CPS employee, Barbara Woods, for the conclusion that Dr. Sipes diagnosed mitochondrial disorder, but that Dr. Sipes later denied diagnosing the children with *autism* and that the children "talk through parents. Threaten lawsuits."

¶126 When one turns to the people who Dr. Sanders relied on (Dr. Stephens and Ms. Woods), there is no basis in the record for claims about misinformation concerning mitochondrial disorder. Dr. Stephens testified that Dr. Sipes was at a June 9, 2010 post-removal CPS staffing involving various doctors (but not Drs. Cohen, Schneider or Hellmers)⁷ and Dr. Stephens concluded, without explanation, that any such disorder was very common and did not require treatment. However, Dr. Stephens did

⁶ Dr. Sanders testified that she had reviewed Dr. Sipes' records and could not recall if he had reported that one of the children might have cerebral palsy, although she claimed Dr. Sipes told her later that he had never made that diagnosis.

⁷ Dr. Stephens did not adequately explain why she did not invite Drs. Cohen, Schneider or Hellmers to the June 9 staffing. When asked about this, she explained that she wanted to discover the original basis for diagnoses of various alleged disorders and thought Dr. Rice had originally diagnosed the autism. If so, why not invite Drs. Cohen, Hellmers and Schneider to the meeting since they had been the physicians relating to several of the other disorders.

not know if the parents had ever sought such treatment. For unexplained reasons, Dr. Stephens' report does not discuss mitochondrial disorder.⁸

¶27 In turn, Ms. Woods stated she did not review all the medical records. In her report she discussed the June 9 staffing and said that when the doctors conferred "most of these previously held diagnoses were dispelled". She summarily stated that it was determined that the parents had been reporting conflicting information to every pediatrician. However, the question was whether Dr. Cohen, who had never been contacted, had examined the children and diagnosed mitochondrial disorder or whether he had based any diagnosis solely or partly on the parental description of the children. There is simply no evidence presented about what Dr. Cohen diagnosed and on what basis and what the parents told Dr. Sipes about Dr. Cohen's

⁸ Dr. Jacobson, who examined the children after their removal, testified that his review of the medical records showed that the parents thought the children had mitochondrial disease, but his examination revealed that only one of them had any such disease and it was benign. It was unclear whether Dr. Jacobson reviewed complete records. He testified the records were obtained by Dr. Stephens and CPS. He later conceded he did not have Dr. Schneider's complete records and when he wrote his report, he mistakenly thought Dr. Hellmers had authorized an intravenous treatment for autism because he did not have Dr. Hellmers' complete records. When he obtained those records he discovered Dr. Hellmers authorized treatment for FAD. He also testified he did not consult with the prior diagnosing or treating physicians.

diagnosis. The State did not offer either Dr. Cohen or Sipes at trial.

¶128 Despite what I consider disturbing inaccuracies and gaps in the evidence, I concur with the majority because there was at least some conflict in the evidence about whether the parents exaggerated symptoms to obtain treatment. Primary among these is autism or autism spectrum disorder. There is evidence the parents might have presented inaccurate reports to Dr. Rice to obtain that diagnosis. Key to that conclusion is the testimony of Drs. Jacobson, Sanders and Stephens. Dr. Jacobson, chief of ambulatory pediatrics at Phoenix Childrens' Hospital, examined the children in June 2010 at the request of CPS' agent, Dr. Stephens. While it is unclear whether he reviewed all of Dr. Rice's records, he testified that Dr. Rice had refuted her earlier diagnoses of autism because they were based on parental reports of symptoms.⁹ Based on his screening evaluations, he concluded that none of the children had or ever had autism, although he referred M.¹⁰ for further evaluation, which was also negative. Dr. Jacobson also testified that while he had not seen the children before 2010 and did not know what their behavior was like, his screening of the children showed that Dr.

⁹ It is unclear whether Dr. Jacobson heard this directly from Dr. Rice or through Dr. Stephens or Ms. Woods.

¹⁰ I refer to individual children by their first initial for privacy purposes.

Rice had misdiagnosed the children based on what the parents had told Dr. Rice. This seemed to be confirmed by Dr. Sanders who testified that Dr. Gregory's records showed that the parents wanted C. to be diagnosed with autism so he could get therapy and that M. had been diagnosed in New York not to have autism at 33 months, but was diagnosed with autism in Arizona.¹¹ Dr. Sanders claimed in her report that she had talked to Dr. Rice who told Dr. Sanders that she "made her diagnoses of autism based on history and their presentation. She said she was worried about the information she was getting."

¶129 Similarly, Dr. Stephens testified that Dr. Rice had been at the June 9, 2010 staffing and claimed that in an August 31, 2010 letter from Dr. Rice, Dr. Rice stated that it was the parents who reported the children had autism, that evaluating the children was difficult because the parents would frequently interject for the children, that the diagnoses of autism is heavily dependent on parental history so that diagnosis would be inaccurate if the history was inaccurate and that evaluations

¹¹ Based on Ms. Woods' report, Dr. Sanders concluded that Dr. Gregory had diagnosed three of the children with autism and that Dr. Rice diagnosed the other two with autism. This is at odds with other testimony by Dr. Stephens stating that a review of Dr. Rice's records showed Dr. Rice never diagnosed the children with autism. Dr. Stephens' testimony, in turn, seems to be contradicted by an August 22, 2006, letter in which Dr. Rice stated she had done a neurobiological history of T. along with an examination and a development assessment and she concluded T. suffered from autism.

performed "now would be more accurate than evaluations performed when the children were younger." (internal quotation marks omitted) While this is somewhat at tension with the above-referenced August 22, 2006 letter from Dr. Rice and it would have been better to have Dr. Rice testify or have her August 31, 2010 letter introduced as an exhibit, this evidence, despite these disparities, would support a finding of at least one instance of the parents reporting symptoms or conditions which did not exist. This is further strengthened by evidence that the parents were reported as saying they were afraid they would lose "services" for the children and that a diagnosis of autism would allow such services to be given.

¶130 While the autism issue was not necessarily a pattern of misreporting by the parents, there is at least sufficient evidence that history of infections given to physicians related to FAD was also misreported. It is undisputed that Dr. Hellmers, a board-certified pediatrician and immunologist, treated four of the five children for FAD. His treatment was based in part on objective blood tests he took of the children. However, there is some evidence that the parents misreported the immunization history for the children, which Dr. Hellmers conceded would have skewed the tests and his resulting diagnosis. Moreover, Dr. Hellmers relied in part on the reports from the parents as to the rate of infections the children were

suffering from as well as recurring infections when the treatments were temporarily stopped.

¶31 CPS needed to prove by a preponderance of the evidence that the children were dependent because of abuse or neglect due to parental voluntary misreporting of health problems to meet their own needs. I concur with the majority that CPS met that burden for purpose of dependency, but I think just barely. However, I am hopeful that in the future the parents and CPS will attempt greater cooperation in assessing this family in the best interests of the children.

_ /s/ _____
DONN KESSLER, Judge