

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



DIVISION ONE
FILED: 08/30/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

GEORGE A. and YOLANDA A.,)
)
Petitioners,) No. 1 CA-SA 11-0196
)
v.) DEPARTMENT E
)
THE HONORABLE HELENE F. ABRAMS,) Maricopa County
Judge of the SUPERIOR COURT OF) Superior Court
THE STATE OF ARIZONA, in and) No. JD 508641
for the County of MARICOPA,)
)
Respondent Judge,) **DECISION ORDER**
)
A.L. and D.L., Minor Children)
in Maricopa County Juvenile)
Court Action No. JD 508641,)
)
Real Parties in Interest.)
)

The court, Presiding Judge Jon W. Thompson, and Judges Daniel A. Barker and Ann A. Scott Timmer, participating, has considered the Petition for Special Action.

Petitioners currently have physical custody of their deceased daughter's minor children, A.L. and D.L., who have been adjudicated dependent as to their father ("Father"). The juvenile court has approved a case plan of family reunification, and Father has been participating in an array of services. Petitioners seek relief from the juvenile court's order entered

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August 3, 2011 transferring physical custody of the children to Father effective August 11, 2011 without first holding an evidentiary hearing as requested by petitioners. We accept jurisdiction of this special action as petitioners have no equally plain, speedy, and adequate remedy by appeal due to the immediacy of the court's order transferring physical custody. Ariz. R.P. Spec. Act. 1(a); see also *Antonsen v. Superior Court*, 186 Ariz. 1, 4, 918 P.2d 203, 206 (App. 1996) (accepting special action jurisdiction in part because custody issues involving young children warrant speedy resolution).

On August 3, 2011, the juvenile court held an emergency status conference at the request of the Arizona Department of Economic Services ("ADES") to discuss the appropriateness of going forward with a plan to transfer physical custody of A.L. and D.L. to Father with the assistance of a family reunification team in light of Father testing positive for marijuana and cocaine, which he admitted using. Petitioners challenged the impending transfer and orally moved for an evidentiary hearing to determine the best interests of the children. Petitioners stated that the children's physician was willing to testify that she recommends only supervised visits between Father and the children due to unexplained bruising suffered by one child while

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in Father's care. ADES stated that although the family reunification team had not been on the case long, it did not have any safety concerns; ADES would monitor the situation after the children were returned to Father, however. The guardian ad litem stated she was not comfortable with returning the children to Father at this time due to Father lying to her about his drug use and "suspicions" she had developed about the source of bumps to one of the children. Father's counsel admitted his client had "definitely gone off track" but contended Father could safely care for the children with reunification services.

The court denied the motion for an evidentiary hearing and ordered the children transferred to Father's physical custody by August 11. After petitioners initiated this special action, we granted their request to stay the juvenile court's order pending our decision on the special action petition. We review the court's placement order for an abuse of discretion. *Maricopa County Juv. Action No. JD-6236*, 178 Ariz. 449, 451, 874 P.2d 1006, 1008 (App. 1994).

As ADES asserts in its response to the petition, the juvenile court is required to conduct an evidentiary hearing before transferring physical custody of a dependent child to a parent to determine whether the transfer would create a

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substantial risk of harm to the child's health or safety. Ariz. Rev. Stat. ("A.R.S.") § 8-861 (2007) (permitting return of child "if the court finds by a preponderance of the evidence that the return of the child would not create a substantial risk of harm to the child's physical, mental or emotional health or safety"); Ariz. R.P. Juv. Ct. ("Rule") 59(A) (requiring court to "set a hearing to determine whether return of the child would create a substantial risk of harm to the child's physical, mental or emotional health or safety"). Because the court did not conduct such a hearing, the court erred by ordering return of the children to Father.¹ An evidentiary hearing was especially warranted due to Father's admitted illegal drug use, the guardian ad litem's suspicions, and the physician's purported reservations about allowing Father to have unsupervised visitation with the children. See *Ariz. Dep't of Econ. Sec. v. Lee*, No. 1 CA-SA 11-0146, 2011 WL 3298113, at *2, ¶ 9, *3, ¶ 12 (App. 2011) ("[T]he [c]hild's health and safety must be given

¹ Because this is a special action, we only have access to portions of the record provided by the parties. No party asserts that the juvenile court held a hearing pursuant to A.R.S. § 8-861 and Rule 59(A) prior to the August 3 hearing, however. And ADES affirmatively asserts no such hearing was held. Consequently, although the August 3 hearing was a status conference set to determine if a prior reunification plan should go forward, we conclude the juvenile court never conducted the required hearing prior to August 3.

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paramount consideration prior to release from temporary custody.").

IT IS ORDERED that the Court of Appeals, in the exercise of its discretion, accepts jurisdiction in this special action. We grant relief by vacating the juvenile court's order granting physical custody of A.L. and D.L. to Father and directing the court to conduct an evidentiary hearing pursuant to A.R.S. § 8-861 and Rule 59(A) before transferring the children to Father's physical custody.²

IT IS FURTHER ORDERED lifting the stay previously ordered by this court.

/s/
Ann A. Scott Timmer, Judge

² On the court's own motion, we modify the caption of this decision to refer to the children only by their initials.