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See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

MAR 12 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MARY W.,)	2 CA-JV 2012-0100
)	DEPARTMENT A
Appellant,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 28, Rules of Civil
ARIZONA DEPARTMENT OF ECONOMIC)	Appellate Procedure
SECURITY and JADEA W.,)	
)	
Appellees.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. J201078

Honorable Leslie Miller, Judge

AFFIRMED

Ann Nicholson Haralambie, Attorneys, P.C.
By Ann Haralambie

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MILLER, Judge.

¶1 Mary W., maternal grandmother and guardian of Jadea W., born in January 2002, appeals from the juvenile court's order adjudicating Jadea dependent as to her. She

contends “the allegations in the dependency petition are insufficient as a matter of law to constitute a finding of dependency as to her” and maintains there was insufficient evidence to support the adjudication. We affirm for the reasons stated below.

¶2 In March 2012, Jadea was removed from Mary’s home, where she had lived since birth, after Child Protective Services (CPS) was informed by the Pima County Sheriff’s Department that it had received a report in January that Jadea’s seven-year-old cousin A.A. had been sexually abused by Jadea’s seventeen-year-old half-brother Anthony while in Mary’s home. Anthony lived in the home with Jadea and Mary. The Arizona Department of Economic Security (ADES) filed a dependency petition in April 2012 in which it alleged Jadea was dependent as to Mary on the ground of neglect because Mary was “unable or unwilling to protect Jadea from potential sexual abuse by her brother.” ADES further alleged (1) there was an ongoing criminal investigation related to the sexual abuse of A.A., who had described to law enforcement officers acts of oral and anal sexual abuse perpetrated by Anthony; (2) A.A.’s mother, who is Mary’s daughter, had confronted Mary about the sexual abuse and Mary had insisted the allegations could not be true, continuing to allow Anthony access to Jadea; and, (3) Mary had “threatened Jadea that she should not talk to CPS or law enforcement about the matter, even though it has been confirmed that A.A. confided in Jadea about the abuse, so her cooperation with investigations is important.”

¶3 Mary denied these allegations at the preliminary protective/temporary custody hearing. At the beginning of the contested dependency hearing on May 23, 2012, the parties stipulated to certain facts, which were set forth in an exhibit to that

hearing, and agreed the court could consider that evidence, along with testimony of Mary's therapist, Janet Rosenstock, and a redacted preliminary protective hearing report, which had been presented at the temporary custody hearing held in April and early May.

¶4 At the end of the contested dependency hearing on May 23, the juvenile court commented that it was “not convinced by the evidence that’s been presented that [Mary] understands and appreciates the potential danger to Jadea and the need to protect her from the risk.” After discussions with the parties, the court deferred making a decision on the petition and continued the hearing to August. In the meantime, ADES was to explore the kinds of services it could provide Mary to assist her in understanding the risk Anthony posed and arrange a psychological evaluation of her. At the end of the continued hearing in August, by which time Jadea had been placed with Mary but under the supervision of ADES, the court found the psychological report¹ had not addressed the issues previously discussed. Nevertheless, based on the evidence before it, the court adjudicated Jadea dependent, finding Mary had failed “to recognize the potential danger”

¹In arguing at the end of the hearing that the dependency petition should be granted, ADES reminded the juvenile court that it had not requested the psychological evaluation and had not asked that the report “be considered a[s] part of the dependency,” noting, “[i]t didn’t exist at the time,” presumably referring to the May 23 hearing. ADES then offered to introduce the report into evidence if the court wished to consider it as part of the evidence before it, but agreed with the court that it did not “see much that’s relevant to the question of dependency.” It appears the report was never offered by either party and was not admitted into evidence, nor is it part of the record before this court. To the extent the report was not made a part of the record on appeal but was considered by the court, we presume it supported the court’s determination that nothing in the report negated a finding that Jadea was, at that time, dependent as to Mary. *See Adrian E. v. Ariz. Dep’t of Econ. Sec.*, 215 Ariz. 96, ¶ 21, 158 P.3d 225, 231 (App. 2007) (“We generally presume items that are necessary for our consideration of the issues but not included in the record support the court’s findings and conclusions.”).

to and “provide[] adequate protection for Jadea,” given the allegations that Anthony had sexually abused A.A.

Did Mary Challenge the Sufficiency of the Dependency Petition in the Juvenile Court?

¶5 Mary first contends the dependency petition was insufficient as a matter of law because there was “no allegation that [Jadea] herself has been abused or threatened with abuse and no factual allegation supporting that she was at reasonable risk of being abused.” She maintains, too, that the petition was factually insufficient because it did not contain allegations that “Anthony or anybody else had molested or attempted to molest *Jadea*.”

¶6 We reject any challenge to the legal sufficiency of the dependency petition. It appears that Mary did not raise the legal sufficiency of the petition in the juvenile court,² and we typically regard as waived arguments or issues that are raised for the first time on appeal. *See Kimu P. v. Ariz. Dep’t of Econ. Sec.*, 218 Ariz. 39, n.3, 178 P.3d 511, 516 n.3 (App. 2008). To the extent Mary’s argument truly is a challenge as to the legal sufficiency of the dependency petition, it has been waived and we will not address it.

²The closest Mary came to making this argument before the juvenile court was when she asserted there was no evidence Jadea was at risk and that this factor, together with Mary’s purported understanding of the issues and risks since the allegations arose, did not “meet[] the statutory definitions of a dependency.” But that argument was part of a claim that ADES had not sustained its burden of proving the allegations of the petition, that is, Mary appeared to be challenging as to the sufficiency of the evidence, rather than the legal sufficiency of the dependency petition itself. We address that argument in detail.

Was The Dependency Adjudication Supported By Sufficient Evidence?

¶7 We also reject Mary’s second claim on appeal, which is that there was insufficient evidence to support the adjudication. ADES was required to prove the allegations of the dependency petition by a preponderance of the evidence. *See Michael M. v. Ariz. Dep’t of Econ. Sec.*, 217 Ariz. 230, ¶ 10, 172 P.3d 418, 421 (App. 2007). In reviewing the juvenile court’s ruling, we are mindful that it 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 Cnty. Juv. Action No. 93511*, 154 Ariz. 543, 546, 744 P.2d 455, 458 (App. 1987). Consequently, we view the evidence in the light most favorable to sustaining that ruling. *In re Maricopa Cnty. Juv. Action No. JD-5312*, 178 Ariz. 372, 376, 873 P.2d 710, 714 (App. 1994). We will not disturb the court’s order unless there is no reasonable evidence to support it. *Willie G. v. Ariz. Dep’t of Econ. Sec.*, 211 Ariz. 231, ¶ 21, 119 P.3d 1034, 1038 (App. 2005). That is, unless the findings upon which the order is based are clearly erroneous, we will affirm the ruling. *In re Maricopa Cnty. Juv. Action No. J-75482*, 111 Ariz. 588, 591, 536 P.2d 197, 200 (1975).

¶8 The evidence established A.A. had accused Anthony of sexually abusing her numerous times and had told Jadea about the abuse. Mary stipulated that in January 2012, she was told “that something bad had happened, and eventually, that Anthony had done something sexual” to A.A. The record shows Mary refused to believe the allegations, telling the CPS investigator and a Pima County sheriff’s detective A.A.’s accusations were false; she insisted “[A.A.] [had] made up the story because [A.A.] cries

‘for everything’” Mary refused to allow either the CPS investigator or the sheriff’s detective to talk to Anthony or Jadea.

¶9 Mary stated at one point that she would only believe Anthony had sexually abused A.A. “if she saw it happen.” Additionally, she told Jadea not to talk to CPS or law enforcement officers about the issue and did not appreciate the risk this posed for Jadea, permitting Anthony to have access to her. Mary stipulated she had sent Anthony to a therapist for depression but conceded she did not tell the therapist about A.A.’s accusations. She stipulated further that she had reported the allegations to the police and presumed if after investigating the allegations they found them to be true, they would arrest Anthony, suggesting that until then she would not believe there was a risk to Jadea. Mary also stipulated that she had asked Jadea if Anthony had ever sexually abused her and although she had emphasized “the importance of telling the truth,” Mary admitted “she may have told Jadea something about jail or CPS consequences for Jadea’s statements.”

¶10 We will not reweigh the evidence, which is essentially what Mary is asking us to do in questioning its sufficiency and pointing to evidence that was favorable to her. *See Jesus M. v. Ariz. Dep’t of Econ. Sec.*, 203 Ariz. 278, ¶ 12, 53 P.3d 203, 207 (App. 2002). Rather, we leave to the juvenile court the task of weighing the evidence. *Id.* Similarly, it was for the juvenile court, not this court, to resolve conflicts in the evidence related to Mary’s ability to protect Jadea from the risk of sexual abuse by Anthony. *See Ariz. Dep’t of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 4, 100 P.3d 943, 945 (App. 2004). The juvenile court acknowledged on the last day of the dependency hearing in August

2012 that the psychological evaluation had not addressed the key issue of whether Mary could protect Jadea. The court also commented that “the situation may have changed since the time of the testimony I heard previously.” But, the court went on to say that, based on the evidence before it, there was sufficient evidence that Jadea was dependent as to Mary at the time of the adjudication, and Mary’s assertion that there was insufficient evidence that Jadea was dependent as to Mary at the time of the actual adjudication in August is contrary to the record before us.

¶11 Finally, we again reject Mary’s suggestion that there could be no finding of dependency as to Jadea because there was no evidence that Anthony had sexually abused her or had directly threatened her with sexual abuse, an argument she seems to be making in challenging the legal sufficiency of the dependency petition as well as the sufficiency of the evidence to support the adjudication. Mary argued below and suggests on appeal that, with respect to the risk posed by Anthony’s presence in the home, “[t]o have molested a seven-year old cousin doesn’t mean he’s going to molest his ten-year old sister.” Given the nature of the allegations, the relatively close ages of the two girls, the fact that A.A. claimed she was sexually abused in Mary’s home, and the fact that A.A. was Anthony’s first cousin and Jadea was his half-sister, there was sufficient evidence from which the court reasonably could find Jadea was at risk for being sexually abused while in the home with Anthony. *Cf. In re Pima Cnty. Juv. Action No. 96290*, 162 Ariz. 601, 604, 785 P.2d 121, 124 (App. 1990) (conditions creating dependency to other children in home, including sexual abuse, may pose imminent risk of harm to another child in home who is subject of dependency petition).

¶12 There was reasonable evidence before the juvenile court to support its ruling and the dependency petition ADES filed was sufficient as a matter of law. Consequently, we affirm the order adjudicating Jadea dependent as to Mary.

/s/ Michael Miller

MICHAEL MILLER, Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge