IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

SOFIA C.,
Appellant,

v.

DEPARTMENT OF CHILD SAFETY AND P.B.,
Appellees.

No. 2 CA-JV 2015-0084
Filed September 14, 2015

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f);
Ariz. R. P. Juv. Ct. 103(G).

Appeal from the Superior Court in Pima County
No. JD20140806
The Honorable Catherine M. Woods, Judge

AFFIRMED

COUNSEL

Sarah Michèle Martin, Tucson
Counsel for Appellant

Mark Brnovich, Arizona Attorney General
By Laura J. Huff, Assistant Attorney General, Tucson
Counsel for Appellee Department of Child Safety

MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Judge Howard and Judge Kelly[1] concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Appellant Sofia C., the mother of P.B., appeals from the juvenile court's April 2015 order adjudicating P.B. dependent. She argues the juvenile court erred by granting the oral motion made by the Department of Child Safety (DCS) at the close of evidence to amend the dependency petition to conform to the evidence. She also argues the additional allegation—that without a custody order she could not keep P.B.'s father from having unsupervised visitation with P.B. and could not, therefore, adequately protect her—was an improper basis for adjudicating the child dependent. We affirm for the reasons stated below.

¶2 We review the juvenile court's order adjudicating a child dependent for an abuse of discretion. *See In re Pima Cnty. Juv. Action No. 93511*, 154 Ariz. 543, 546, 744 P.2d 455, 458 (App. 1987). On appeal, we view the evidence in the light most favorable to sustaining the juvenile court's finding that DCS sustained its burden of proving the allegations of the petition by a preponderance of the evidence. *See Willie G. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 231, ¶ 21, 119 P.3d 1034, 1038 (App. 2005); *see also* A.R.S. § 8–844(C) (allegations of dependency petition must be proved by preponderance of evidence). We will affirm the order "unless the findings upon which it is based are clearly erroneous and there is no reasonable evidence supporting them." *In re Pima Cnty. Juv. Action No. 118537*, 185 Ariz. 77, 79, 912 P.2d 1306, 1308 (App. 1994).

[1]The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

¶3 Sofia and Brandon B., P.B.'s father, who are not married, lived together from shortly before P.B. was born in December 2013, until September 2014. During this time, there were incidents of domestic violence between the parents. In January 2014, for example, when P.B. was one month old, Brandon was intoxicated and, holding a knife, threatened to hurt others and to kill himself in front of Sofia. In September, police officers interceded in a physical altercation between Brandon and Sofia. Brandon was cited for trespassing and for disorderly conduct (domestic violence); he subsequently moved out of the apartment they shared. Brandon had been diagnosed with bipolar disorder and told police at that time that he was schizophrenic. Although Sofia obtained a protective order against Brandon in November, it was modified thereafter at Sofia's request to permit him to contact her through electronic mail and text messaging regarding P.B.

¶4 At the beginning of November 2014, Sofia left P.B. in the car while she went to the office of the apartment complex where she lived to get a package; she accidentally locked her keys in the car. This was the second time this had occurred. Like the first time, Sofia called Brandon, who arrived with a spare key. Police officers arrived at the scene and subsequently reported the incident to DCS. Based on Brandon's accusations about Sofia's drug use, his claim that he was seeking an order of protection against Sofia to protect P.B., Sofia's apparent lack of concern about having locked the child in the car, and her history of leaving P.B. unattended, she was cited for endangering the life and health of a minor.

¶5 In mid-November, DCS filed a dependency petition alleging P.B. was dependent as to Sofia because Sofia had neglected and endangered the child by locking her in the car, repeatedly leaving her in the car and at home unattended, and testing positive for marijuana. As to Brandon, the petition alleged he did not have a custody order for P.B., had a history of polysubstance abuse and mental-health issues, and had been arrested for disorderly conduct and criminal trespassing, and that there was a protective order against him that prohibited him from contacting Sofia and P.B. About a week later, however, at Sofia's request, the protective order

was amended to permit Brandon to contact her via electronic mail and text messaging about P.B.

¶6 The dependency hearing began on February 5, 2015. During the parties' opening statements, DCS stated its position: P.B. was dependent as to Brandon based on his mental health, substance abuse and anger issues, and as to Sofia, based on her history of substance abuse and instances of having left the child unattended. DCS added that, "additionally, there are custody orders that would be needed in place to ensure the child's safety going forward." Brandon argued he and Sofia were capable of parenting P.B. and might reach at least a temporary parenting agreement. In her opening statement, Sofia acknowledged that the absence of a custody order was an issue but stated the parties were attempting to resolve that issue through stipulation. She argued that in any event, based on *Meryl R. v. Arizona Department of Economic Security*, 196 Ariz. 24, 992 P.2d 616 (App. 1999), the lack of such an order alone did not render P.B. dependent. She insisted there was no other basis for adjudicating P.B. dependent as to her in light of her progress with the case plan.

¶7 During its closing argument, DCS pointed to Brandon's lengthy history of serious substance abuse and domestic violence to establish P.B. was dependent as to him, although it commended him for participating in services to address those issues. DCS stressed that Brandon needed to continue in that direction before he could adequately parent P.B. With respect to Sofia, DCS noted her progress and participation in services as part of her case plan, but insisted she still needed to continue those services. "And more importantly," DCS stated,

> while the parents are making progress in their services, there's no custody order in place. There is the pending [paternity] case, but the mother doesn't have the legal ability to protect at this point. And given the newness of the father's sobriety and his working services, there would still be some concerns with the mother not having an order in place.

¶8 Before the other parties presented their closing arguments, the juvenile court interjected that the dependency petition did not allege Sofia lacked the ability to protect P.B. from the risk of abuse or neglect because there was no "parenting order." The court asked, "Do you believe it would be appropriate for me to factor that in today or in making the decision given that it was not alleged in the petition?" DCS responded it had alleged in the dependency petition as to Brandon that he lacked a custody order, but insisted it was a factor relating to Sofia as well. DCS asked the court to consider the evidence and the argument and requested that it "amend the petition to conform with the evidence."

¶9 Sofia objected to the amendment. Pointing to Rule 48(e), Ariz. R. P. Juv. Ct., she argued DCS was required to seek to amend the petition thirty days before the hearing began. She argued, "that would be tantamount to springing a challenge on the mother and it would be unfair to try to defend that, essentially during closing arguments after a trial is complete." Like Brandon, who also opposed the amendment, Sofia relied on *Meryl R.* for the proposition that the lack of a custody order alone could not be the basis for a finding of dependency. In its rebuttal closing argument, DCS conceded this was "a close case" but insisted the parents still needed oversight.

¶10 After taking the motion to amend and the dependency under advisement the juvenile court granted the motion and adjudicated P.B. dependent. Relying on and applying Rule 15(b), Ariz. R. Civ. P., the court found the lack of a custody order had been an issue in the case, and there were no objections to evidence relating to that issue. The court found the parties were neither unfairly surprised nor unfairly prejudiced by the amendment.

¶11 Rule 15(b), which is incorporated by Rule 55(D)(3), Ariz. R. P. Juv. Ct., states that a party may move to amend pleadings "as may be necessary to cause them to conform to the evidence" when "issues not raised by the pleadings are tried by express or implied consent of the parties." Ariz. R. Civ. P. 15(b)[2]. The rule further

[2]Sofia contends that the trial court violated her due process rights in allowing the amendment. However, an amendment

provides that the court may freely permit "the pleadings to be amended . . . when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits." *Id.*; *see also Parker v. City of Tucson*, 233 Ariz. 422, ¶51, 314 P.3d 100, 117 (App. 2013). "Failure to object to the introduction of evidence on the ground that it is not within the issues is sufficient to imply consent to try such issues." *In re Estate of McCauley*, 101 Ariz. 8, 18, 415 P.2d 431, 441 (1966).

¶12 We will not disturb the juvenile court's ruling on a motion to amend pleadings absent an abuse of discretion. *See In re Maricopa Cnty. Juv. Action No. JS-501904*, 180 Ariz. 348, 355, 884 P.2d 234, 241 (App. 1994). The court's ruling here shows it identified the correct legal standard for deciding the motion and correctly applied it. The fact that no custody order existed was identified in the beginning of the hearing as an issue in the case. The lack of a custody or parenting-time order was raised during the hearing. And, except for a relevance objection on Sofia's opinion about Brandon having visitation supervised by his family, evidence relating to these issues and the fact that Brandon should have only supervised visitation notwithstanding his progress, was admitted without objection. The record thus supports the court's findings that evidence on this issue was admitted without objection and that no party was unfairly surprised or unfairly prejudiced by the amendment of the petition accordingly.

¶13 This court's decision in *Carolina H. v. Arizona Department of Economic Security*, 232 Ariz. 569, 307 P.3d 996 (App. 2013), which Sofia relies upon, is distinguishable. There, the juvenile court found the Arizona Department of Economic Security (ADES) had not sustained its burden of proving the allegations in the dependency petition that the child was dependent because of the mother's abuse of the child and her substance abuse. *Id.* ¶ 8. Nevertheless,

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allowed in accordance with Rule 15 does not violate the opponent's due process rights. *See In Re Maricopa Cnty. Juv. Action No. JS-501904*, 180 Ariz. 348, 355, 884 P.2d 234, 241 (App. 1994).

concerned that the child required therapeutic services, the court found there was a "substantial disconnect" between the mother and her child and adjudicated the child dependent on that basis. *Id*. ¶ 9. In addition to suggesting a "substantial disconnect" was an insufficient basis for adjudicating a child dependent under former A.R.S. § 8–201(13)(a),[3] this court rejected ADES's argument that the court had the discretion to deem the petition amended to conform to the evidence. *Id*. ¶¶ 9-10.

¶14 Relying on our supreme court's decision in *Smith v. Continental Bank*, 130 Ariz. 320, 323, 636 P.2d 98, 101 (1981), this court observed that although a court may suggest to a party that it request such an amendment, Rule 15 does not permit the court to amend the pleadings sua sponte. *Id*. ¶ 11. But in *Carolina H*., as this court noted, the juvenile court had not suggested to ADES that it seek to amend the petition and the mother never had an opportunity to challenge the factual basis for the finding of dependency. *Id*. ¶¶ 11-12.

¶15 Here, DCS moved to amend the petition, albeit upon prompting by the juvenile court; the issue had been framed at the beginning of the hearing; evidence relating to the issue had been introduced throughout the proceeding; and the mother had ample opportunity to challenge the amended petition and did so vigorously during closing argument. The court did not abuse its discretion by granting the motion to amend.

¶16 Sofia also argues the juvenile court erred by adjudicating P.B. dependent as to her based solely on her lack of a custody order, contrary to this court's holding in *Meryl R*. We agree with DCS that this case is distinguishable from *Meryl R*. The mother in *Meryl R*. had been awarded custody of the child in a dissolution proceeding in Missouri but the child was living voluntarily with his father in Arizona, and the mother was living in Kansas. 196 Ariz. 24, ¶ 1, 992 P.2d at 617. The child's guardian ad litem filed a dependency petition in Arizona alleging that the mother was unfit

[3]Renumbered in 2014 as § 8-201(14). 2014 Ariz. Sess. Laws 2nd Spec. Sess., ch. 1, § 10.

to parent him because she had "neglected and abused him in the past" and that the father, although "both fit and willing to parent" him, "lack[ed] a legal basis for the physical custody" he was exercising. *Id*. ¶ 2. The juvenile court dismissed the dependency petition and the guardian ad litem appealed. *Id.* ¶ 4. Affirming the juvenile court, this court concluded the father's lack of legal custody did not render him incapable of parenting appropriately. *Id*. ¶ 5. This court noted the mother in that case was not trying to exercise her custody or visitation rights and the father had physical custody of the child without the interference of the purportedly unfit mother. *Id*. ¶¶ 7, 10.

¶17 In *Meryl R*., this court distinguished the holding in *In re Pima County Juvenile Action No. J–77188*, 139 Ariz. 389, 678 P.2d 970 (App. 1983), where the lack of a custody order was found to be a sufficient basis for the dependency adjudication, because of the risk of harm that posed to the child. *Id*. ¶ 7. Here, the juvenile court expressly found that, notwithstanding Brandon's progress, given his history of domestic violence, substance abuse, and mental health issues, he still was unable to effectively parent and his visitation with P.B. had to be supervised. And given his efforts to obtain sole custody of P.B., he posed a risk to the child and rendered Sofia's lack of a custody order pivotal to a finding of dependency as to her, though not the sole basis. This case is not like *Meryl R*. but rather is closer to *Pima County No. J-77188*, which we find persuasive here.

¶18 For the reasons stated, we affirm the juvenile court's order adjudicating P.B. dependent.