

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

MICHAEL S.,
Appellant,

v.

DEPARTMENT OF CHILD SAFETY, D.S., E.S., AND F.S.,
Appellees.

No. 2 CA-JV 2016-0175
Filed March 16, 2017

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NOT FOR PUBLICATION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. JD20150662
The Honorable Gilbert Rosales, Judge Pro Tempore

AFFIRMED

COUNSEL

Jacqueline Rohr, Tucson
Counsel for Appellant

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Pima County Office of Children's Counsel, Tucson
By John Walters
Counsel for Minors

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

MEMORANDUM DECISION

Judge Vásquez authored the decision of the Court, in which
Presiding Judge Howard and Chief Judge Eckerstrom concurred.

VÁSQUEZ, Judge:

¶1 Michael S. appeals from the juvenile court's September 2016 order adjudicating his sons, D.S., E.S. and F.S., born in 2006, 2007, and 2014, dependent.¹ On appeal, he argues there is insufficient evidence to support the court's dependency ruling. We affirm.

¶2 Under A.R.S. § 8-201(15)(a)(i),² a "[d]ependent child" is defined as one who is "[i]n need of proper and effective parental care and control and who has . . . no parent or guardian willing to exercise or capable of exercising such care and control." A dependent child is also defined as one "whose home is unfit by reason of abuse, neglect, cruelty or depravity by a parent." § 8-201(15)(a)(iii). "Neglect" is defined, in relevant part, as "[t]he inability or unwillingness of a parent . . . to provide th[e] child with . . . shelter . . . if that inability or

¹ The children were also adjudicated dependent as to the mother, who is not a party to this appeal.

² Portions of the relevant statute were renumbered in 2016, but the applicable text was not amended. See 2016 Ariz. Sess. Laws, ch. 300, § 1. We refer to the current version of the statute in this decision.

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unwillingness causes unreasonable risk of harm to the child's health or welfare." § 8-201(25)(a).

¶3 We review a dependency adjudication for an abuse of discretion, deferring to the juvenile court's ability to weigh and analyze the evidence. *Louis C. v. Dep't of Child Safety*, 237 Ariz. 484, ¶ 12, 353 P.3d 364, 368 (App. 2015). We view the evidence in the light most favorable to sustaining the court's finding that the Department of Child Safety (DCS) sustained its burden of proving the allegations of the petition by a preponderance of the evidence. *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).

¶4 In September 2015, DCS filed a dependency petition based on an allegation of abuse and/or neglect by Michael, who lived in New York. The petition asserted Michael had failed to protect the children from the mother, with whom they lived in Arizona, and he had not taken any steps to obtain legal custody of the children despite the mother's "unstable mental health and substance abuse." The contested dependency hearing began in January 2016,³ after which DCS filed an amended dependency petition in May 2016, further alleging Michael had a history of substance abuse that impaired his ability to safely care for the children.

¶5 On the second day of the dependency hearing, held in July 2016, DCS moved to amend the pleadings to conform to the evidence to add allegations based on domestic violence and the denial of Michael's New York home study, which had been prepared

³At the January hearing, which Michael's attorney noted had been consolidated with the parents' divorce, the mother requested the dependency be dismissed and asked that legal decision making and physical custody be granted to Michael.

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pursuant to the Interstate Compact for the Placement of Children (ICPC), A.R.S. §§ 8-548 to 8-548.06. *See* Ariz. R. Juv. P. 55(D)(3); *see also* Ariz. R. Civ. P. 15(b). Michael agreed that DCS should be allowed to admit evidence that the home study had been denied, and thus did not object to that portion of DCS's motion, although he did object to the addition of the domestic violence allegations. The juvenile court granted DCS's motion to amend the pleadings on both grounds.

¶6 During the dependency hearing, DCS repeatedly asserted the juvenile court had "broad discretion as to what information is relevant in the Court's determination to whether or not the father can provide safe and appropriate care for the children." The court was presented with testimony by Suffolk County Child Protective Services caseworker Michael Graham, who had attempted to conduct the ICPC home study of the New York residence where Michael lived with his parents. The study had been disapproved because the paternal grandfather "was very adamant that he did not want the children" to live in his home, in part because one of the children had behavior issues which would "disrupt" his "peace and quiet." The study provided Michael was unable to care for the children; he does not have a residence "in which he can house the children"; he "has no concrete plan for care of [the] children while he is at work from 5am-4pm"; and "[t]here is a great lack of communication and understanding between [Michael's] family members." Graham also testified that in light of the paternal grandfather's position regarding the children, he had been unable to investigate Michael's substance abuse history, which would be required before placing the children with him.

¶7 DCS case manager Marti Craft opined as follows: "continued court oversight" was necessary to ensure the safety and well-being of the children; in light of the current denied home study, sending the children to reside with Michael in New York would violate the ICPC; the paternal grandfather's unwillingness to have the children in his home placed them at substantial risk of harm because they "have no place to live if they go to New York"; and the children would be at risk of abuse or neglect if returned to Michael's care now. Michael testified that if the children were returned to him, they would

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“temporarily” stay with him at the paternal grandparents’ home, and he would then “look[in]to getting [his] own place.”

¶8 During closing arguments, DCS asserted, inter alia, the evidence had established Michael was “unable to meet [the children’s] needs based on the lack of appropriate housing,” which “falls squarely under the definition of ‘neglect.’”⁴ Michael’s attorney maintained in closing that the allegations in the written dependency petition had not been proved, and argued that the additional allegations regarding domestic violence and the denial of the home study either were unsupported or “meaningless to the issue of a dependency,” asserting DCS had “not shown that homelessness or lack of housing is an ongoing significant problem.” At the conclusion of the July hearing, the juvenile court took the matter under advisement, but “telegraph[ed]” its concern to the parties regarding the availability of housing for the children in New York.

¶9 Ruling from the bench at the September 2016 dependency adjudication hearing, the juvenile court determined the children were dependent as to Michael based on neglect “for his inability and failure to provide the children with suitable housing.” The court noted it had carefully considered all of the evidence, including the credibility and demeanor of the witnesses and the denied ICPC transfer, and had “assigned the weight deemed appropriate to all of the evidence.” The court specifically referred to Graham’s testimony, stating the home study had been denied because “the paternal grandparents did not want the children to live in their home,” and noting Craft had not received any information suggesting the paternal grandfather “had changed his stance and was now willing to allow the children to live in their home.”

¶10 On appeal, Michael generally argues insufficient evidence supported the dependency adjudication, and specifically asserts the ruling “fails to show a valid nexus between the allegations

⁴The attorney for the children “agree[d]” with DCS’s closing argument, but pointed out that the children “want to go live with their father.”

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and the ruling as required.” Michael criticizes the juvenile court’s reliance on the denial of the ICPC transfer, asserting it was based “solely” on the paternal grandfather’s statement to Graham.⁵ Although this may be true, Graham notably testified that because of the grandfather’s position, he was unable to complete the home study, a factor Craft also apparently found persuasive in opining the children required continued oversight by the court. The juvenile court, as the trier of fact, “is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts.” *Ariz. Dep’t of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 4, 100 P.3d 943, 945 (App. 2004). We do not reweigh the evidence on review. *Id.* ¶ 14.

¶11 And as previously noted, Michael did not object to DCS’s request to amend the pleadings to conform to the evidence regarding the denial of the home visit and its related argument that he was unable to currently provide a home for the children, evidence that was introduced throughout the proceeding. Michael had the opportunity to challenge the facts supporting the amended grounds, which he did vigorously during the proceeding and closing argument. Accordingly, because the record amply supports the juvenile court’s finding of neglect based on Michael’s inability and failure to provide the children with suitable housing, the only ground the court expressly relied on, we find no abuse of discretion.⁶

⁵In his reply brief, Michael also argues the juvenile court improperly relied on Graham’s testimony regarding the paternal grandfather’s objection to the children living in his home, asserting the record was “unclear” whether the grandfather took this position, and this was “[n]ot an alleged ground for the dependency” because “housing was not specifically set forth in the petition.” Michael did not raise these specific arguments in his opening brief, and we thus do not consider them. *See Nelson v. Rice*, 198 Ariz. 563, n.3, 12 P.3d 238, 242 n.3 (App. 2000) (appellate court will not address issues raised for first time in reply brief).

⁶To the extent Michael challenges the sufficiency of the evidence supporting the other alleged grounds for dependency, because we find sufficient evidence for the sole ground expressly

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¶12 We thus affirm the juvenile court's order finding D.S., E.S., and F.S. dependent as to Michael.

relied upon by the juvenile court, we need not address those arguments. *Cf. Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, ¶ 27, 995 P.2d 682, 687 (2000) (appellate court need not address other statutory grounds for terminating parent's rights if there is sufficient evidence of one ground).