

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

KIMBERLY L.,
Appellant,

v.

DEPARTMENT OF CHILD SAFETY, M.L., AND D.F.,
Appellees.

No. 2 CA-JV 2019-0094
Filed January 10, 2020

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NOT FOR PUBLICATION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. JD20190205
The Honorable Kellie Johnson, Judge

AFFIRMED

COUNSEL

Domingo DeGrazia, Tucson
Counsel for Appellant

Mark Brnovich, Arizona Attorney General
By Cathleen E. Fuller, Assistant Attorney General, Tucson
Counsel for Appellee Department of Child Safety

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MEMORANDUM DECISION

Chief Judge Vásquez authored the decision of the Court, in which Presiding Judge Staring and Judge Brearcliffe concurred.

V Á S Q U E Z, Chief Judge:

¶1 Kimberly L., mother of M.L., born in March 2007, and D.F., born in October 2011, appeals from the juvenile court's order adjudicating the children dependent. She challenges the sufficiency of the evidence establishing the children were dependent on the grounds of abuse and neglect. We affirm.

¶2 A dependent child includes one who "has no parent or guardian willing to exercise or capable of exercising [necessary] care and control," A.R.S. § 8-201(15)(a)(i), or "whose home is unfit by reason of abuse, neglect, cruelty or depravity by a parent," § 8-201(15)(a)(iii). Neglect is defined as "[t]he inability or unwillingness of a parent, guardian or custodian of a child to provide that child with supervision, food, clothing, shelter or medical care if that inability or unwillingness causes unreasonable risk of harm to the child's health or welfare." § 8-201(25)(a). "A child may be dependent when the parent is unwilling or unable to protect the child from abuse." *Shella H. v. Dep't of Child Safety*, 239 Ariz. 47, ¶ 14 (App. 2016). The allegations in a dependency petition must be proven by a preponderance of the evidence. A.R.S. § 8-844(C)(1).

¶3 "We review an order adjudicating a child dependent for an abuse of discretion, deferring to the juvenile court's ability to weigh and analyze the evidence." *Shella H.*, 239 Ariz. 47, ¶ 13. We will not disturb the order if there is reasonable evidence to support it. *Id.* This court does not reweigh the evidence, *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 12 (App. 2002), rather, we view the evidence that was presented below in the light most favorable to affirming the factual findings, *Willie G. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 231, ¶ 21 (App. 2005).

¶4 Until 2017, Kimberly was married to Joshua L., M.L.'s legal father and the biological father of D.F. and two other children who are not the subject of this dependency. The family had lived in Texas, then California, and were in New Mexico in 2016 when child welfare services

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there received a report that the children were being neglected. They had no heat and were using hairdryers to keep warm. Kimberly and Joshua were divorced in 2017. Joshua apparently had physical custody of D.F. and another child, who is not the subject of this proceeding, and Kimberly had physical custody of M.L. and another child, also not subject to this proceeding. According to Kimberly, it was contemplated that the children would live with one parent during the school year and the other during the summer. In June of 2018, Kimberly filed a request for sole custody in New Mexico after she learned Joshua had been "abusive" toward the children. At the time this dependency proceeding commenced, M.L. and D.F. were living in Arizona with Kimberly and her new husband, referred to here as the stepfather.

¶5 In April 2019, the Department of Child Safety (DCS) and the Pima County Sheriff's Department received a report that M.L., twelve years old at the time, had told Kimberly that Joshua had sexually abused her when she was seven years old, while they were living together. Kimberly took M.L. to a behavioral health agency about two months later. M.L. expressed suicidal ideations, engaged in self-harm the year before, and had trouble at school, which included fighting. M.L. told an investigator for the Office of Child Welfare Investigations (OCWI) Kimberly and the stepfather "whooped" her with a wooden paddle, sometimes bruising her, and that Kimberly used to hit her with a "switch" from a tree and a belt. M.L. said she did "not feel welcome at her home" and was afraid of Kimberly and the stepfather. She also said she had waited to tell Kimberly about the sexual abuse by Joshua because she did not think Kimberly would believe her and she was afraid Joshua "would get in a lot of trouble."

¶6 Kimberly called law enforcement officers a few days later, saying she wanted DCS to "come and take" M.L., who had been suspended from school for fighting. Kimberly took M.L. to the Crisis Response Center (CRC). As Kimberly and M.L. were leaving the home, the stepfather stated, "Take her bitch ass somewhere else." M.L. told the investigator at the CRC that she was afraid to go home. She said she had read a text message between Kimberly and her aunt that the stepfather would "mess her up." M.L. also told the investigator that D.F. was afraid, even though he did not "get hit."

¶7 The investigator talked to D.F., who told her that M.L. was hit with a switch and a paddle, and although he initially said that when he got in trouble, he was hit on the bottom with the paddle, he then denied being spanked. He said he was afraid of the stepfather, explaining the stepfather

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once kicked him in the face accidentally as the stepfather tried to kick his own son. The stepfather's son refused to be interviewed without his father there and the stepfather said he would not be interviewed because it was being recorded.

¶8 Kimberly was also interviewed by the investigator. Although M.L. said she had told Kimberly immediately after the sexual abuse had occurred, Kimberly did not recall that. She said that she did not call the police right after M.L. told her because M.L. said she did not want to report it. She admitted M.L. was paddled on the bottom as a form of discipline but stated that it only left marks on M.L. if she was "moving." Kimberly said that the stepfather had "hit" D.F. only one time.

¶9 DCS took custody of the children and filed a dependency petition on April 23, 2019. After a contested hearing in July, during which Kimberly, M.L. and D.F. denied a dependency existed and M.L. recanted her earlier statements, the juvenile court adjudicated the children dependent. At the end of the second day of the hearing, the court found DCS had established M.L. was dependent based on abuse. The court found DCS had failed to prove the allegation that Kimberly had known about the sexual abuse of M.L. for years, but found she knew "for a short period of time prior to DCS involvement that [M.L.] had been potentially sexually abused by" Joshua. The court added, Kimberly's "response to that disclosure [was] slow and inadequate, insomuch as [M.L.] clearly needed treatment and behavioral health services; the mother was slow to provide it." Additionally, the court found Kimberly failed to provide adequate supervision of M.L. "in that she had an inability to recognize the significance of" the child's abuse. The court found the physical discipline used in the home amounted to abuse.

¶10 With regard to D.F., the juvenile court found DCS had sustained its burden of proving neglect because he was able "to describe the physical abuse being inflicted upon his sister," demonstrating he knew it was taking place. The court found "it inappropriate and concerning that a child of [D.F.'s] age" could describe those acts against his sibling.

¶11 Kimberly first argues on appeal that the juvenile court erred by finding she had neglected D.F. by exposing him to the abuse of M.L. She challenges whether this exposure is a reasonable basis for a dependency adjudication under the definition of a dependent child in § 8-201(15)(a)(i), (iii), and the definition of neglect in § 8-201(25)(a). Kimberly concedes she disciplined M.L. by hitting her, but denies abusing her, and although she

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“recognizes that the court made a finding of abuse as to M.L.,” she insists that the facts relating to M.L. “do not create a basis for dependency as to D.F.” She argues that the evidence did not show that the abuse of M.L. harmed D.F. and would create an unreasonable risk of harm in the future, as reflected by the fact that he did not need any services or care in addition to what he had already been receiving, including medication for ADHD (attention deficit hyperactivity disorder) and speech therapy. Although she concedes abuse of a sibling can be the basis of a dependency, she argues that this is only if the abuse creates an imminent risk of harm to the child, which, she asserts, did not exist here.

¶12 As we stated, we will not disturb the order absent an abuse of discretion, deferring to the juvenile court with respect to all findings of fact. *Shella H.*, 239 Ariz. 47, ¶ 13. But questions of statutory interpretation and application are questions of law, which we review de novo. *Ariz. Dep't of Econ. Sec. v. Ciana H.*, 191 Ariz. 339, 341-42 (App. 1998).

¶13 As DCS correctly asserts, based on the plain language of § 8-201(15)(a), a child may be dependent based on conduct that is not directed specifically at the child in question if the exposure to that conduct creates a home that may be characterized as “unfit.” *See In re Pima Cty. Juv. Action No. 96290*, 162 Ariz. 601, 604-05 (App. 1990). In addition to the findings summarized and quoted above, the juvenile court found that an in-home dependency was “unworkable” given the “dynamics of this family.” Reasonable evidence supported this finding and the findings the court made or that we infer the court made under the statute. That evidence included evidence showing the stepfather had kicked and injured D.F. while trying to kick his own son, whom he disciplined by hitting with a paddle and sent to California to avoid DCS involvement. D.F. was afraid of the stepfather. The stepfather was belligerent, aggressive and uncooperative when DCS contacted him. The OCWI investigator testified that the stepfather “stormed out of” a Team Decision Making meeting she attended, and that when she had contact with him in the home, “he yelled and cursed and also slammed the door again.” She stated that “every single time he would explode and then when I did call him on the phone, he declined to interview.” She also stated Kimberly “had no concerns regarding” the stepfather’s “disciplinary action with” M.L. or D.F.’s safety with him. She added there is “great concern when the target child is removed [from the home] that another child will become the target.” In addition, as DCS points out, neither Kimberly nor the stepfather admitted any wrongdoing in disciplining M.L., and although Kimberly was willing to participate in services, the stepfather was not. We conclude there was

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sufficient evidence to support the findings upon which the court based its conclusion that D.F. had been neglected because the evidence showed he had been and would continue to be exposed to an unreasonable risk of harm.

¶14 Kimberly next argues the juvenile court abused its discretion in relying on the delay in obtaining services for M.L. after M.L. told Kimberly she had been sexually abused by Joshua. Kimberly asserts this is not a sufficient basis for the dependency adjudication, arguing this purported delay does not establish neglect under the statutory definition of that term. Kimberly concedes it took months to arrange services but asserts the delay was neither unreasonably long nor did it result in an unreasonable risk of harm to M.L. In the final issue, Kimberly contends the court abused its discretion in finding the way in which she disciplined M.L. amounted to abuse. She argues the evidence fell short of sustaining DCS's burden because she "dispute[d] the claims that any discipline left marks or bruises," asserting the children's recollections to the contrary were not enough.

¶15 As we stated above, neglect is defined, in part, as a parent's "inability or unwillingness . . . to provide that child with supervision, food, clothing, shelter or medical care if that inability or unwillingness causes unreasonable risk of harm to the child's health or welfare." § 8-201(25)(a). Abuse may also be the basis for finding a child dependent and the abuse includes the "infliction or allowing of physical injury." § 8-201(2), (15)(a)(iii). In other words, a child may be adjudicated dependent based on one parent's failure to prevent abuse of the child by another parent. *See Pima Cty. No. 96290*, 162 Ariz. at 605.

¶16 First, there was reasonable evidence to support the juvenile court's finding that the discipline amounted to abuse, and the court's finding in that regard was not erroneous as a matter of law based on the definition of abuse. Although the court acknowledged M.L. had recanted her initial statements, the court found her initial statements and D.F.'s with regard to the form of discipline consistent and credible. The court, in its discretion, weighed this evidence and concluded the way in which either Kimberly or the stepfather disciplined M.L. was abusive. That testimony included both children's descriptions of what took place.

¶17 M.L. reported during the interviews on April 11 and again on April 16 that Kimberly and the stepfather hit her using a paddle that is shaped like a sword and has holes in it, and that it has caused her to bruise

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on her buttocks. She stated that her most recent “beating” had been in March, the day after her birthday. She was asked why she gets paddled and answered Kimberly had told her she is “the most worst, defiant, and ungrateful child.” D.F. was questioned by the OCWI investigator and confirmed M.L. got hit by Kimberly and the stepfather with switches, belts, and paddles. According to the investigator, D.F. stated his sister was not safe in the home, she was hit often, and the stepfather was “very scary.” The investigator testified that Kimberly admitted the stepfather had built the paddle “to physically discipline [M.L.] with” it. This evidence sufficiently established that Kimberly either abused M.L. or permitted the stepfather to abuse her. To the extent there were conflicts in the evidence, including statements or testimony by Kimberly that contradicted the children’s statements, it was for the juvenile court to resolve those conflicts. *See Shella H.*, 239 Ariz. 47, ¶ 13.

¶18 Finally, Kimberly contends there was insufficient evidence she had neglected M.L. by what the juvenile court characterized as her “slow and inadequate” response when M.L. told Kimberly she had been sexually abused by Joshua. Kimberly suggests that the delay in getting M.L. help did not expose her to an unreasonable risk of harm. We need not address this issue because the dependency adjudication as to M.L. is sustainable on the ground of abuse. *Cf. Jesus M.*, 203 Ariz. 278, ¶ 3 (when one ground for severance of parental rights is properly established, alternative grounds need not be addressed on appeal). In any event, there was sufficient evidence to support the finding that Kimberly had neglected M.L. in this respect. As DCS points out, by the time Kimberly brought M.L. to a behavioral health agency, which was about two months after M.L. told her, M.L. was suicidal, engaging in acts of self-harm, and having difficulties at school.

¶19 The juvenile court’s order adjudicating M.L. and D.F. dependent is affirmed.