

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

STACY S.,
Appellant,

v.

DEPARTMENT OF CHILD SAFETY, J.S., AND C.S.,
Appellees.

STACY S.,
Petitioner,

v.

HON. KEN SANDERS, JUDGE PRO TEMPORE OF THE SUPERIOR COURT
OF THE STATE OF ARIZONA, IN AND FOR THE COUNTY OF PIMA,
Respondent,

and

DEPARTMENT OF CHILD SAFETY, J.S., AND C.S.,
Real Parties in Interest.

Nos. 2 CA-JV 2020-0074 and 2 CA-SA 2020-0045 (Consolidated)
Filed January 12, 2021

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NOT FOR PUBLICATION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); Ariz. R. P. Spec. Act. 7(g), (i).

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Appeal from the Superior Court in Pima County
No. JD20200156
The Honorable Ken Sanders, Judge Pro Tempore
The Honorable Peter Hochuli, Judge

**AFFIRMED; SPECIAL ACTION JURISDICTION ACCEPTED;
RELIEF DENIED**

COUNSEL

Joel Feinman, Pima County Public Defender
By David J. Euchner, Assistant Public Defender, and
Adrienne A. Ticer, Assistant Public Defender, Tucson
Counsel for Appellant/Petitioner

Mark Brnovich, Arizona Attorney General
By Dawn R. Williams, Assistant Attorney General, Tucson
Counsel for Appellee/Real Party in Interest Department of Child Safety

MEMORANDUM DECISION

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

E P P I C H, Presiding Judge:

¶1 Stacy S. appeals from the juvenile court's order adjudicating her children, J.S. and C.S., dependent. She also filed a petition for special-action relief, challenging the court's denial of her motion to return the children to her pursuant to Rule 59, Ariz. R. P. Juv. Ct. We have consolidated the appeal and the special action. For the reasons stated, we affirm the dependency order and although we accept special-action jurisdiction, we deny relief.

Factual and Procedural Background

¶2 We review the juvenile court's order adjudicating a child dependent for an abuse of discretion, and will affirm the order unless no

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reasonable evidence supports the factual findings upon which it is based. *Louis C. v. Dep't of Child Safety*, 237 Ariz. 484, ¶ 12 (App. 2015). The allegations of a dependency petition must be proved by a preponderance of the evidence. A.R.S. § 8-844(C)(1); *see also Willie G. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 231, ¶ 2 (App. 2005). We view the evidence in the light most favorable to sustaining the order, *id.* ¶ 21, recognizing that the juvenile court "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 (App. 2004). Additionally, because the primary concern in a dependency case is the child's best interests, the juvenile court is given substantial discretion when placing a child. *Antonio P. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 402, ¶ 8 (App. 2008). Therefore, we review the court's ruling on a Rule 59 motion for an abuse of discretion. *See id.*

¶3 Stacy gave birth to J.S. in May 2016, when she was sixteen years old. Three years later, in May 2019, Stacy, J.S., and Stacy's father (Grandfather) left their home in Illinois to travel the country. Stacy became pregnant and, in March 2020, she gave birth to C.S. in Tucson. Hospital staff were concerned about discharging Stacy with C.S. because she had no clothes, diapers or car seat for the child, and appeared to be transient. Stacy claimed that, although she had been living in a camp in the desert, she and Grandfather had moved to a hotel. Hospital staff were also concerned that Grandfather might be the father of Stacy's children. Stacy denied this at the dependency hearing in July 2020, testifying she does not know the identity of either child's father because she had sexual encounters with different men when she and Grandfather travelled.

¶4 The Department of Child Safety (DCS) took custody of the children and at a Team Decision-Making Meeting (TDM) on March 10, Stacy acknowledged she lacked appropriate housing for the children and agreed DCS should take custody of them. The DCS investigator reported that Stacy had stated at the meeting J.S. had never been seen by a physician. She admitted she suffered from posttraumatic stress disorder (PTSD). Although Stacy signed a Voluntary Placement Agreement for a ninety-day foster-care placement, the program manager disapproved of the plan and DCS filed a dependency petition. The petition alleged Stacy did not have safe, stable housing and was unable to meet the children's needs, and suffered from untreated PTSD, putting J.S. and C.S. at risk for neglect.

¶5 During the preliminary protective hearing on March 16, 2020, Stacy's attorney informed the juvenile court that, for religious reasons,

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Stacy objected to immunizing her children. Because of this, DCS had difficulty placing J.S. and ultimately the children were placed in separate foster homes. Concerned about behavior he did not believe was normal, counsel also requested that J.S. be referred for a pediatric psychiatric evaluation; DCS agreed to arrange an evaluation by a pediatrician to avoid delay. Stacy's counsel stated Stacy did not object to a pediatric evaluation.

¶6 J.S. was examined by a pediatrician in April, after which DCS filed a motion for a temporary order authorizing medical treatment. According to the foster mother, J.S. had been coughing persistently for three to four weeks. The pediatrician thought the cough likely was the result of a viral infection that had resulted in Reactive Airway Disease, which could develop into pneumonia. Stacy had been treating J.S. with herbal remedies and objected to any traditional medications. At a status conference on April 16, J.S.'s counsel informed the juvenile court that J.S. had been diagnosed with Reactive Airway Disease and failure to thrive. Counsel for the children and DCS informed the court they were concerned that Stacy had continued to object to giving J.S. certain medications, insisting he receive herbal or natural remedies she had provided DCS, putting J.S. at risk for becoming seriously ill and requiring hospitalization.

¶7 Pediatrician Dr. Soungwon Bae testified at the April 20 and 22 hearing on DCS's motion that she had prescribed various medications, including steroid breathing treatments and allergy medication, to treat J.S.'s Reactive Airway Disease, stating she was concerned his condition could worsen and become pneumonia, placing him at greater risk if exposed to the Covid-19 virus.¹ Stacy continued to object to giving J.S. medication based on her religion, which she claimed required use of "holistic living" and natural or "holistic medicine." She maintained she had been treated with such remedies her entire life, and she had always treated J.S. with natural remedies, which had been effective. The juvenile court denied the request by DCS and J.S. to permit him to receive the medications Bae had prescribed, finding DCS had not established a compelling interest that overcame Stacy's constitutional religious rights. The court ordered DCS to arrange for J.S. to be seen by a naturalist or homeopathic doctor and to follow any recommendations.

¹Although Dr. Bae focused on J.S.'s respiratory issues at that hearing, the medical records reflect that in addition to Reactive Airway Disease, the pediatrician who initially had examined him diagnosed "[g]ross motor delay" and failure to thrive, likely the result of "social and environmental deprivation and malnutrition."

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¶8 Under those circumstances, the foster mother would no longer care for J.S. DCS placed him with a new foster parent, who took him to a holistic medical provider. She recommended the use of essential oils for J.S.'s cough. The cough persisted, and the foster mother took J.S. to Dr. Fahd Al-Alou, who diagnosed mild persistent asthma and found he had met the criteria for failure to thrive.

¶9 On May 27, 2020, Stacy filed a motion for an order to return J.S. and C.S. to her physical custody, pursuant to Rule 59, Ariz. R. P. Juv. Ct. Shortly thereafter, DCS filed a motion for leave to amend the dependency petition to add failure to thrive as a basis for finding J.S. dependent. Over Stacy's written objection, the juvenile court permitted DCS to file an amended petition, assuring Stacy it would give the parties additional time to address the issue of J.S.'s failure to thrive if they needed it, granting them that time at the end of the dependency hearing on June 12.

¶10 After contested hearings were held over three days in June and July on the combined dependency petition and the Rule 59 motion, the juvenile court adjudicated the children dependent and denied the motion. Stacy challenged the denial of her motion by filing a petition for special-action relief, based on this court's decision in *Brionna J. v. Department of Child Safety*, 247 Ariz. 346, ¶¶ 10-11, 18 (App. 2019), concluding that a denial of a Rule 59 motion is not a final order from which a direct appeal may be taken. She has also appealed the order adjudicating the children dependent and this court has consolidated the proceedings.

Amendment of Dependency Petition

¶11 Rule 48(F), Ariz. R. P. Juv. Ct., formerly numbered and referred to below as Rule 48(E), Ariz. Sup. Ct. Order R-19-0037 (Dec. 12, 2019), provides that a dependency "petition may be amended by the petitioner upon order of the court not less than thirty (30) days prior to trial unless good cause is shown." Stacy contends the juvenile court abused its discretion by granting DCS's motion, filed two weeks before the dependency hearing, without finding good cause or that extraordinary circumstances justified the resulting extension of the ninety-day deadline for completing dependency proceedings, required by Rule 55(B), Ariz. R. P. Juv. Ct. See also A.R.S. § 8-842(C). In a related argument, Stacy complains that DCS was dilatory in obtaining J.S.'s medical records necessary to support the amended petition by the first day of the dependency hearing, further lengthening the time beyond the ninety-day period.

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¶12 Stacy concedes J.S. was diagnosed as suffering from failure to thrive on March 16, 2020. She also admits the children's counsel mentioned the diagnosis during the April 16 status conference. But, she asserts, only J.S.'s breathing issues and his related need for medication were discussed at the status conference. She asserts that Dr. Bae only focused on J.S.'s breathing issues when she testified at the April 20 and 22 hearing on DCS's motion regarding J.S.'s medical treatment. Stacy contends no medical records "suggest that Stacy was responsible for J.S.'s failure to thrive, nor did DCS ever put [her] on notice of its concerns in this regard," nor did it specify failure to thrive among the medical issues listed in the pretrial statement for the contested dependency proceeding.

¶13 As we previously noted, DCS did not file its motion to amend until May 29, 2020, two weeks before the hearing, which the juvenile court had set on April 16 for June 12. And although DCS stated in the motion that J.S. had been "recently medically diagnosed," as we have noted, the diagnosis was made in March. In her written objection to the motion, Stacy argued DCS did not establish good cause for granting it as required by Rule 48(F). She asked the court to continue the hearing to give her time to respond to the allegations if the court were to grant DCS's motion, stating this would constitute extraordinary circumstances under Rule 55.

¶14 Granting the motion, the juvenile court acknowledged Rule 48(F) permits an amendment within the thirty days before the hearing for good cause, reflecting it was aware of the rule's requirements. Addressing the timing of the motion, the court pointed out that a dependency petition may even be amended at the hearing to conform to the evidence under Rule 55(D)(3), which incorporates Rule 15(b), Ariz. R. Civ. P.² The court noted that neither Stacy nor the children had stated they were unaware of the diagnosis and that, in fact, in their response to the motion, the children acknowledged the diagnosis had been made months earlier. Citing A.R.S. § 8-829(A), which requires courts to make protecting a child from neglect or abuse a priority, the court added that "[p]ermitting the proposed amendment would certainly aid the Court in addressing the full merits of

²We summarily reject Stacy's argument that the juvenile court's reference to Rule 55(D)(3) reflects it erroneously believed amendments are permissible at any time and "without limitation." The record belies this claim. Placed in context, the reference to that rule was made to illustrate that amendment is permitted even as late as at the hearing. Together with the citation to and contents of Rule 48, the record shows the court was aware of the correct standard applicable here.

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this case, as well as contribute to the Court's obligation to ensure the health and well-being of the children." Although the court did not continue the hearing at that time, it stated it would give Stacy and the children additional time to prepare a defense to this allegation if they needed it.

¶15 No published opinion interprets Rule 48 or determines what constitutes good cause under the rule to justify an amendment, and, there is no rule comparable to Rule 48 in parental termination proceedings. But, in the context of termination proceedings, where the consequences are permanent, this court has adopted language from Rule 15(a)(2), Ariz. R. Civ. P., stating that "[l]eave to amend shall be freely given when justice requires." *Roberto F. v. Ariz. Dep't of Econ. Sec.*, 232 Ariz. 45, ¶ 44 (App. 2013). "[N]otice and substantial prejudice to the opposing party are critical factors in determining whether an amendment should be granted." *In re Maricopa Cnty. Juv. Action No. JS-501904*, 180 Ariz. 348, 355 (App. 1994) (quoting *Owen v. Superior Court*, 133 Ariz. 75, 79 (1982)). "Due process requires 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections.'" *Id.* (quoting *In re Maricopa Cnty. Juv. Action No. JS-734*, 25 Ariz. App. 333, 339 (1975)). It is for the juvenile court to determine, in the exercise of its discretion, whether to grant such a motion, and we will not disturb its ruling absent an abuse of that discretion. *Maricopa Cnty. No. JS-501904*, 180 Ariz. at 355 (applying Rule 15(a), Ariz. R. Civ. P., and finding no abuse of discretion by permitting amendment of severance petition).

¶16 First, we find well taken DCS's suggestion that allegations in the initial dependency petition were sufficient to include J.S.'s failure to thrive and the amendment was not necessary. Although A.R.S. § 8-841(C)(3) requires that a dependency petition contain a "concise statement of the facts to support the conclusion that the child is dependent," the initial petition had alleged Stacy was homeless, transient and unstable, and she did not have sufficient income to meet the children's needs. This was broad enough to include an inability to meet J.S.'s nutritional needs; J.S.'s failure to thrive was the result of that privation. *See Pima Cnty. Juv. Action No. J-77188*, 139 Ariz. 389, 392 (App. 1983) (concluding petitioner not required to allege specific instances of sexual abuse).

¶17 In any event, contrary to Stacy's assertion, the juvenile court did make a finding of good cause, if not expressly by noting that requirement of the rule, then impliedly. The record shows the diagnosis was made in March and the children's counsel seems to have been aware

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of it since then. Additionally, Stacy concedes and the record shows that children's counsel mentioned it at the April 16 status conference. In her objection to the motion filed below, Stacy acknowledged DCS had told her on May 20, approximately three weeks before the first day of the dependency hearing, that it intended to file the motion to amend to add the allegation of failure to thrive. Based on the reasons the court gave for permitting the amendment, and the fact that Stacy was aware DCS and the physicians were concerned J.S.'s failure to thrive was the result of neglect, the court did not abuse its discretion in implicitly finding good cause to permit the amendment. Had it expressly found good cause for the amendment, the record would have supported the finding.

¶18 We also reject Stacy's claim that she was prejudiced by the juvenile court's order permitting DCS to amend the petition because it delayed the completion of the dependency hearing beyond the ninety-day period of Rule 55(B) and § 8-842(C). As we previously noted, the court assured Stacy when it granted the motion to amend that it would give her additional time to prepare if she needed it, and she received the additional time. On June 12, 2020, the first day of the dependency hearing, DCS explained that, although it possessed J.S.'s medical records, it had been unable to obtain certified copies of those records in time for the hearing. DCS explained that "because of COVID-19" there was a shortage of hospital staff available to produce records. DCS asked that it be permitted to submit certified copies later, once they were obtained, rather than be required to present the physicians to testify in order to lay the foundation for admission of the records. Stacy objected, her counsel explaining that she did not have a complete set of records and she wanted to cross-examine the doctors, particularly in light of the amended allegations of failure to thrive. She argued DCS had failed to timely disclose the records, and had failed to show good cause for not having the records in time for the hearing, objecting to a delay in the completion of the dependency hearing. But the court found it had not been DCS's fault that it was unable to get the certified records. At the end of the hearing, over Stacy's objection, the court gave DCS additional time to get the certified copies of the records or arrange for physicians to appear. The court stated,

Given that the guiding principle of the Court is what is in the best interests of the children, and given that there will be no substantive prejudice to [Stacy] nor any procedural prejudice . . . in granting additional time, and as it would further the Court's obligation to insure the

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health and well-being of the children, the Court will permit additional time to be set to allow these witnesses to testify.

¶19 Stacy cannot show prejudice because she was given precisely what she requested: additional time to defend against the allegation of J.S.'s failure to thrive. We acknowledge that Stacy made it clear below that she was not conceding it would be proper for the court to extend the hearing beyond the ninety-day time limit if necessary to give her time to prepare. Nevertheless, she asserted that if the court were to find good cause to permit the amendment, it should then continue the hearing to allow her to prepare, conceding extraordinary circumstances would then exist to conclude the hearing beyond the ninety-day time limit. Based on the record before us, the court did not abuse its discretion.

J.S.'s Failure to Thrive

¶20 A dependent child is one who has no parent willing or capable of exercising proper parental care and control, is destitute or not provided necessities of life including adequate food, clothing, shelter or medical care, and a child whose home is unfit by reason of neglect. A.R.S. § 8-201(15). Neglect is defined in § 8-201(25)(a) to include "[t]he inability or unwillingness of a parent . . . 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"

¶21 In its detailed ruling, the juvenile court found DCS had sustained its burden of establishing Stacy had neglected J.S. by failing to provide him with adequate nourishment, resulting in his failure to thrive. The court found there was no evidence of other causes of J.S.'s failure to thrive, and "[t]he only reasonable conclusion that can be drawn from this evidence is that [J.S.] was malnourished while in [Stacy's] care." The court found the family had been living "hand to mouth with few resources." It further found Stacy's transient lifestyle and homelessness had resulted in emotional and psychological trauma to J.S., and the social deprivation most likely had resulted in "[s]evere social delay," and "emotional trauma," requiring "extensive social/psychological support and intervention." The court specified J.S. had been diagnosed with "[g]ross motor delay most likely due to social deprivation and lack of appropriate stimulation in the home environment." Finding Stacy had refused to engage in any services DCS had recommended and that it was unable to "find that anything substantive about [her] parenting ha[d] changed since the children's

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removal” in March, the court concluded J.S. would be at risk if he were permitted to remain in Stacy’s care and so, too, would C.S.

¶22 Stacy contends there was insufficient evidence to support the adjudication order, arguing the evidence failed to establish J.S.’s lack of weight gain was the result of malnourishment and neglect. She asserts that, other than the fact that he is – like she and others in her family – small, DCS introduced no evidence establishing his “small stature was the result of malnourishment.” She argues that Dr. Al-Alou, who diagnosed J.S. as failure to thrive, never testified J.S. was malnourished or that insufficient caloric intake was the only cause of the condition. Stacy claims the “undercurrent” of the juvenile court’s ruling and DCS’s actual motive for removing the children from her custody is the court thought she was the victim of incest, notwithstanding her denials, and disapproved of her transient lifestyle, including her sexual encounters with men whose identities she did not know.

¶23 The pediatrician who examined J.S. shortly after DCS had removed him from Stacy’s custody in March 2020, noted the child’s behavioral, emotional, and developmental issues. The foster mother had “observed severe emotional disturbances,” and told the pediatrician J.S. initially had refused to eat “until she fed him outside on the ground.” She claimed J.S. would push his food away, grab it back again, scream and ask for milk, throw the milk at the wall when she served it to him, and then cry for more. She told the pediatrician that J.S. would “sit on the toilet and scream[] hysterically for half an hour, [in]consolable.” The pediatrician concluded J.S. exhibited “[s]evere social delay and emotional, psychological trauma, [which] will require extensive social/psychological support and intervention.”³

³ DCS asserts in its combined response to the petition for special-action relief and answering brief that in her opening brief and special-action petition, Stacy only challenges the juvenile court’s findings related to J.S.’s failure to thrive. DCS asserts Stacy does not challenge other findings, including that the family had been homeless and transient and had been living “hand-to-mouth,” and that these factors had resulted in J.S.’s developmental delay, and apparent psychological and emotional trauma. DCS suggests these unchallenged findings alone are sufficient to support the dependency adjudication. In her reply brief, Stacy contends DCS failed to comply with the procedural rules by failing to cite the record sources and support for the portions the court cited or quoted. *See* Ariz. R. Civ. App. P. 13(a)(7)(B); *see also* Ariz. R. P. Juv. Ct. 106(A) (incorporating,

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¶24 The pediatrician also noted in her report that J.S. had an ear infection and was “significantly underweight,” diagnosing him as failure to thrive. As the juvenile court stated in its ruling, the pediatrician reported J.S. was in the fifth percentile for children his age for height, below the first percentile for weight, and in the third percentile for body mass index (BMI). The court also pointed out that the pediatrician had opined J.S.’s failure to thrive was “most likely” the result of his previous “social and environmental deprivation and malnutrition.” The records support the court’s further finding that while in DCS’s care, J.S. “showed signs of growth.”

¶25 Additional evidence in the record supports the juvenile court’s ruling. For example, Dr. Bae saw J.S. on April 6 for a follow-up appointment. Some of the behavioral issues persisted. Bae noted J.S.’s weight was below one percentile, his height was at five percentile, and his BMI was at two percentile, which, she stated was “[m]ost likely due to his previous social situation and malnutrition, deprivation.” She made the same observation again when she examined J.S. on April 13.

with specified modification, Rule 13, Ariz. R. Civ. App. P.). Stacy misapprehends DCS’s argument, which unambiguously refers not to the evidence in the record but to the court’s ruling. Thus, additional record citations were unnecessary to support DCS’s argument. Next, Stacy asserts that, in any event, there is evidence in the record that refutes these findings. And, she asserts, “no reasonable jurist could read DCS’s petition and find an allegation that J.S. is dependent due to developmental or psychological delay.” We disagree. DCS’s amended petition alleged generally that Stacy had been homeless, transient and unable to provide for the children’s needs at the time they were removed from her care. This, together with the medical records and the focus throughout this dependency proceeding on whether J.S. had suffered and whether he and C.S. were likely to suffer any physical, developmental, psychological, and emotional harm as a result, put Stacy on notice that these were issues in the case. In any event, even though Stacy attempts to refute these findings for the first time in her reply brief and we could have deemed the issue waived, *see Marco C. v. Sean C.*, 218 Ariz. 216, n.1 (App. 2008), we do not because the issues are intertwined with allegations of neglect based on J.S.’s failure to thrive. Because all of these findings together were the bases for the court’s conclusion that J.S. and C.S. are dependent, we consider below whether there was sufficient evidence to support them.

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¶26 In its ruling, the juvenile court referred to the testimony of Dr. Fahd Al-Alou, a pediatrician and internal medicine specialist who examined J.S. when he was taken to a clinic on May 8, 2020, for cold symptoms, asthma, and a cough, and again on June 16 for a follow-up appointment and his four-year-old checkup. Al-Alou testified that J.S. had a “cough and mild persistent asthma with exacerbation and failure to thrive, underweight.” He explained there are a number of things that can cause failure to thrive, including insufficient calorie intake, excessive caloric use, insufficient calorie absorption, or “underlying health conditions.” The court acknowledged Al-Alou was “reluctant” to give a definite opinion on the cause of J.S.’s failure to thrive, but observed there were no diagnoses of underlying health conditions mentioned in the medical records that would otherwise explain it. And, the court noted, Al-Alou had not ordered any additional testing, stating these diseases and conditions could be ruled out by giving J.S. a high calorie diet and seeing if he gained weight over a period of three to six months, adding that not enough time had passed. The record shows that when the court questioned Al-Alou, and informed him that since J.S. had been taken into DCS custody, his BMI of 13.7 had increased to 14.7, Al-Alou stated that this was an indication that J.S. probably did not have sufficient caloric intake. When the court asked him if “another term for insufficient caloric intake [is] malnutrition,” he responded that it was.

¶27 Specifying instances where Stacy’s testimony was contradictory, the juvenile court stated it attributed “little credibility” to her statements. This was the court’s prerogative. *See Jordan C. v. Ariz. Dep’t of Econ. Sec.*, 223 Ariz. 86, ¶ 18 (App. 2009) (juvenile court in best position to weigh evidence and judge credibility of witnesses). The court found Stacy’s characterization of the family’s transient lifestyle and homelessness as an adventure, was a “romanticized version of the truth.” The court also found the responsibility for J.S.’s “various and significant issues” fell “squarely on [Stacy’s] shoulders.” Stacy cites to evidence refuting these and other findings. For example, she claims there was evidence in March, at the time of the preliminary protective hearing that refuted evidence that J.S. was developmentally delayed. She also cites to evidence in her favor regarding her good parenting skills and her positive interaction with the children. But it was for the juvenile court, not this court, to resolve any conflicts in the evidence. *Jesus M. v. Ariz. Dep’t of Econ. Sec.*, 203 Ariz. 278, ¶ 12 (App. 2002).

¶28 Moreover, the juvenile court acknowledged some of the evidence favorable to Stacy, specifying she had performed well during visits with the children and, at the time of the hearing, she had obtained adequate “housing and employment.” The court nevertheless found that,

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given Stacy's persistent "attitude" about the children receiving proper medical care, her disagreement with the diagnosis of failure to thrive, her "non-religious objection to using conventional medical care," and her resistance to all services DCS offered, J.S. and C.S. were at risk for neglect. Based on the record before us, the court did not abuse its discretion.

Violation of Stacy's Constitutional Rights Related to her Religion

¶29 The juvenile court found Stacy's testimony that her religious beliefs and practices as a Zen Buddhist forbade her from seeking conventional medical treatment, "neither coherent, consistent, nor credible." The court found she had rejected those services that she deemed unnecessary, "which is essentially all of them." The court stated that, even assuming Stacy "had a valid religious objection to providing her children with conventional medical treatment before [DCS's] involvement, she would not automatically be immune from a dependency finding." Acknowledging and quoting portions of the Supreme Court's decision in *Prince v. Massachusetts*, the juvenile court commented, although parents "'may be free to become martyrs themselves,'" they are not free "'to make martyrs of their children,'" and they are not entitled to "'expose the community or the child to communicable disease or the latter to ill health or death.'" 321 U.S. 158, 166-67, 170 (1944). The court noted Arizona's legislature has exempted a person practicing the religion of Christian Science from an automatic dependency adjudication by virtue of limiting a child's treatment to religious-based care. A.R.S. § 8-201.01(A)(1) (child who receives "good faith . . . Christian Science treatment by a duly accredited practitioner," may not, "for that reason alone, be considered to be an abused, neglected or dependent child"). But, the court observed, neither Buddhists nor certified herbologists are similarly exempt.

¶30 Stacy contends "[t]he juvenile court's ruling reflects complete disrespect for [her] religious views," which demonstrates the court violated her constitutional right to the free exercise of the religion of her choice. She argues the court improperly questioned the sincerity of her professed beliefs when it found some of her decisions were based on personal preferences unrelated to her religion, criticizing the court's referral to outside sources regarding Buddhist teachings. She asserts the court improperly regarded her conduct or statements that were inconsistent with those teachings as an indication that her religious commitment was disingenuous. DCS responds that Stacy has failed to show the action of DCS and the juvenile court was religiously motivated and that her ability to exercise her religious beliefs has been substantially burdened. DCS argues that, contrary to Stacy's assertion, the court never found her

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religious beliefs were not sincerely held and did not restrict her from practicing her religion. DCS maintains that, instead, the court properly considered the fact that Stacy refused to participate in services for reasons that were not religion based.

¶31 Parents have due process rights with respect to their children, and, “[c]oncomitant with that interest, . . . the right . . . to guide the religious upbringing of their children” under the Free Exercise Clause of the First Amendment. *Diana H. v. Rubin*, 217 Ariz. 131, ¶ 12 (App. 2007). Under Arizona’s Free Exercise of Religion Act (FERA), a person has the fundamental right to exercise religion of that person’s choosing. A.R.S. § 41-1493.01(A). The government may not impose a substantial burden on a person’s exercise of this right unless it shows that the burden is in furtherance of a compelling governmental interest, and the government has employed the least restrictive means of furthering that interest. § 41-1493.01(C). To establish a violation of this right, a person must show the person’s “action or refusal to act is motivated by a [sincerely held] religious belief,” and the government’s “action substantially burdens the exercise of religious beliefs.” *State v. Hardesty*, 222 Ariz. 363, ¶ 10 (2009).

¶32 We review constitutional claims de novo. See *State v. Fischer*, 219 Ariz. 408, ¶ 8 (App. 2008). To the extent there are questions of fact related to this issue, however, we defer to the juvenile court. See generally *Oscar O.*, 209 Ariz. 332, ¶ 4; see also *In re Cochise Cnty. Juv. Action No. 5666-J*, 133 Ariz. 157, 164 (1982) (whether Arizona Department of Economic Security, now DCS, proved compelling interest overcoming parent’s religious objections is fact-intensive question that must be made on case-by-case basis). Courts must weigh and balance the interests of the parent, the state, and the child. *Cochise Cnty. Juv. Action No. 5666-J*, 133 Ariz. at 160. A parent’s right to the care and custody of a child is not absolute. *Id.* at 161. If a parent does not provide for a child’s basic needs, the state has a duty to act on the child’s behalf. *Id.* Although the state may not interfere with a parent’s fundamental right to the custody of a child under such circumstances when there is no known medical danger, when a child is actually ill, “the scales” tip “and religious freedoms would be forced to yield.” *Id.* at 163-64 (citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972)). See also *Graville v. Dodge*, 195 Ariz. 119, 124 (App. 1999) (parent’s constitutional right to custody and control not without limit; state may regulate and determine well-being of children).

¶33 Throughout this dependency proceeding, the juvenile court accommodated Stacy’s right to the free exercise of religion. Even though

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J.S. was undeniably ill at the time and appeared to be malnourished, Stacy acknowledges that after she made her religious beliefs known at the preliminary protective hearing in March 2020, the court denied DCS's attempts to compel his medical treatment. The court also enforced Stacy's wishes, purportedly grounded in her religious beliefs, by ordering the children were not to be vaccinated without a court order.

¶34 Stacy was persistent in objecting to treatment of J.S. for his health issues with conventional medical care. Again, the juvenile court denied DCS's Motion for Temporary Order Authorizing Medical Treatment for Child J.S., ordering Stacy to provide DCS with holistic, natural remedies to treat J.S. and ordered DCS to schedule a visit with a homeopathic or naturalist doctor. After Stacy refused to see a therapist DCS had recommended, claiming it was contrary to her religious beliefs, DCS searched for services that would be compliant with her religious beliefs and attempted to contact the therapist Stacy chose.

¶35 Although at one point Stacy claimed parenting classes were against her religious beliefs, she also insisted she did not need the classes; she then agreed to take an online course, which DCS did not approve. The case manager testified at the dependency hearing that "at times [Stacy] is willing to engage in services but at times she states that it is against her religion." Similarly, she refused to submit to a psychological evaluation, which the case manager testified was necessary to ensure Stacy was provided with services that would benefit her "as an individual as well as a mom," again claiming it was against her religion.

¶36 DCS and J.S.'s foster mother sought a naturalist doctor for J.S., but they were not successful, and the foster mother took him to an herbalist and "had an over-the-counter conversation with someone who worked there" regarding holistic treatment, although she was not a homeopathic physician or naturalist physician. The case manager testified further that this is the first case in which a parent has been permitted to dictate the kinds of services provided. When asked why, she explained it is because Stacy "does report that it is due to her religious beliefs" as a Zen Buddhist. However, the case worker testified further, Stacy never explained what tenet of her religion prohibited her from obtaining the various services DCS wanted her to obtain. Still, she stated when the juvenile court questioned her, "we at [DCS] are going to be sensitive to her religious beliefs," although DCS's priority is "[t]he safety of the children."

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¶37 Stacy's testimony during the dependency hearing supports the juvenile court's finding that she was inconsistent, leading the court to question not the sincerity of her religious beliefs, but whether it was religious or personal preference that prompted Stacy to reject certain services. She stated that her religion entails "[s]elf reliability, sustainability, caring for yourself, not having mainstream medical services involved." She explained she would seek conventional medical care for herself or her children after consulting at least two holistic doctors first. When asked if Zen Buddhism was a philosophy, not a religion, she responded, "It is a lifestyle."

¶38 On cross-examination Stacy testified she was qualified to "self-medicate" J.S. based on her training as a certified herbalist, after taking an online course, maintaining she had also learned about herbology and Buddhism from her father throughout her life. She stated it is against her religion to receive therapy or parenting classes other than from persons she had chosen, adding she had provided DCS with the name of a Zen Buddhist therapist. When asked what tenet of Zen Buddhism barred her from attending parenting classes, she responded, "It's something . . . like a family tradition as well." She was then asked whether it was true her objection was not based on her religion but the fact that she did not "agree with the parenting styles or services being offered," she answered, "Yes." She admitted she did not really know what was taught in a parenting class because she had never participated in one. In fact, in her opening brief Stacy now concedes that her decision not to take a parenting class was not based on her religious views. She was asked similar questions about submitting to a psychological evaluation, and admitted her objection was "mostly" based on the fact that she did not think it was necessary, rather than it being against her religion. Ultimately, Stacy admitted it was not against her religion to participate in these services; she just did not think she needed them.

¶39 The juvenile court questioned Stacy further about the nature of her beliefs and how Zen Buddhism influenced her parenting decisions. Based on that testimony, the court stated, "So I think we have established that you really don't have any religious objections to parenting education or individual therapy or anything like that. It's just they are contrary to your personal desires; correct?" Stacy responded, "Yes."

¶40 As we previously stated, we view the facts underlying this issue in the light most favorable to sustaining the juvenile court's ruling. See *Oscar O.*, 209 Ariz. 332, ¶ 4. We do not reweigh such evidence because

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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.” *Id.*; see also *Pima Cnty. Dependency Action No. 93511*, 154 Ariz. 543, 545 (App. 1987) (noting that in dependency appeal, “[w]e cannot substitute our opinion for that of the juvenile court”). Given the record before us, the court did not abuse its discretion in finding Stacy’s refusal to avail herself of services was grounded in her belief that she did not need such services rather than religion.

¶41 The juvenile court did not restrict Stacy from practicing her religion, nor did it order the children to undergo impermissible medical treatment.⁴ Stacy admitted at the time of the dependency hearing, J.S. was receiving holistic treatment. She acknowledged J.S. had asthma, which cannot be treated with holistic treatments, and she conceded if he had an asthma attack and natural remedies did not work, she should take him to a conventional medical doctor. She agreed J.S. should have an inhaler for emergencies, “[j]ust in case it gets too bad.” She testified it is not against her religion to have a pediatrician evaluate her children and she agreed it is a good idea for both children to be evaluated to be certain they do not have any medical issues, and that she was, in fact, planning to have that done. When asked why, then, did she not take J.S. to a pediatrician, she answered, “I didn’t feel it was necessary.”

¶42 Stacy has failed to sustain her burden of establishing that the juvenile court violated her constitutional right to freely exercise the religion of her choosing. We therefore reject this claim.

Denial of Rule 59 Motion

¶43 In her special-action petition, Stacy challenges the juvenile court’s order denying her motion under Rule 59, requesting that J.S. and C.S. be returned to her custody. She cites this court’s decision in *Brionna J.*, 247 Ariz. 346, ¶¶ 7-8, 11 for the proposition that the denial of a Rule 59 motion is not an appealable order under A.R.S. § 8-235, see also Ariz. R. P. Juv. Ct. 103(A), and can only be challenged by special action. Arguably, the order is part of the dependency order and, as such, may be challenged in this direct appeal. As this court has acknowledged, there are inconsistencies in the case law establishing what constitutes an appealable

⁴ We agree with the juvenile court that sanctions might be appropriate in light of C.S.’s foster parent’s violation of the court’s order that C.S. not be vaccinated.

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order in juvenile cases. *Jessicah C. v. Department of Child Safety*, 248 Ariz. 203, ¶¶ 12-15 (App. 2020); *see also Dep't of Child Safety, S.P. v. Juan P.*, 245 Ariz. 264, ¶¶ 6-7 (App. 2018) (addressing appeal from order granting Rule 59 motion without discussing jurisdiction). It also seems indisputable that a parent is aggrieved by the juvenile court's refusal to return a child, particularly given the consequences of continuing a child in court-ordered care. *See* A.R.S. § 8-533(B)(8) (establishing length of time in court-ordered care as ground for terminating parental rights). "[B]ecause dependency proceedings implicate the 'important and fundamental right to raise one's children,'" we do "not apply a 'narrow, technical conception of what constitutes a final order' under A.R.S. § 8-235(A)." *Jessicah C.*, 248 Ariz. 203, ¶ 15 (quoting *Brionna J.*, 247 Ariz. 346, ¶ 8). In any event, assuming for purposes of this decision that we lack jurisdiction to address the denial of the Rule 59 motion as part of Stacy's direct appeal, we accept special-action jurisdiction to review the claim.

¶44 Rule 59 provides that a parent may file a motion requesting that a child be returned to the parent's custody any time after a temporary custody hearing. Ariz. R. P. Juv. Ct. 59(A). The juvenile court must return the child to the parent if it finds, after a hearing, that a preponderance of the evidence establishes doing so would not create a substantial risk of harm to the child's physical, mental or emotional health or safety. Ariz. R. P. Juv. Ct. 59(A), (E)(1); *see also Juan P.*, 245 Ariz. 264, ¶ 9 (moving party has burden of establishing return of child would not create substantial risk of harm to child's health or safety).

¶45 Articulating the correct standard under Rule 59, the juvenile court found Stacy had not sustained her burden "even by a preponderance of the evidence." The court stated that natural remedies such as "herbs, teas and tinctures . . . have their place, but," the court added, "not at the expense of a child's health or development." The court found these treatments were a "dismal failure" for J.S. and "the outcome for [C.S.] would be equally dire." The court noted Stacy's testimony that she does not need parenting education adding, "[g]iven this attitude, the Court has every reason to believe [Stacy] would continue to employ the same style of parenting that resulted in [J.S.]'s failure to thrive, gross developmental delays, as well as emotional and psychological trauma." Denying the motion, the court found that C.S. "would be at immediate risk of suffering the same neglect" as J.S., and that the court would "not imperil the children" by returning them to Stacy "prematurely."

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¶46 Many of Stacy's arguments regarding the denial of the Rule 59 motion are the bases for her challenges to the dependency adjudication. She again asserts the juvenile court abused its discretion by attributing J.S.'s lack of weight gain to malnourishment and by questioning the sincerity of her religious beliefs based on what the court unreasonably determined were inconsistencies in her testimony. She claims the court's questioning of her reflects a blatant disrespect of her right to the free exercise of religion.

¶47 We have rejected these arguments in the context of the juvenile court's order adjudicating J.S. and C.S. dependent. We reiterate that it is for the juvenile court, not this court, to resolve conflicts in the evidence and assess the credibility of witnesses. *Jesus M.*, 203 Ariz. 278, ¶ 12. Viewed in the light most favorable to sustaining the court's rulings, *see Oscar O.*, 209 Ariz. 332, ¶ 4, the record supports the court's finding that Stacy had neglected J.S. and that both children would be at risk of further neglect and harm if returned to Stacy's custody. The record supports the finding that Stacy's care of J.S. in pursuing her lifestyle had affected his developmental, psychological and physical health. The record also supports the court's conclusion that J.S.'s failure to thrive was likely the result of neglect. Again, the court did not violate Stacy's constitutional right to freely exercise her chosen religion. The court did not question the sincerity of Stacy's religious beliefs; it merely determined that Stacy's decisions at issue were unrelated to them.

Disposition

¶48 For the reasons stated, we affirm the juvenile court's order, adjudicating J.S. and C.S. dependent. Additionally, although we accept jurisdiction of Stacy's special action challenging the court's denial of her Rule 59 motion, we deny relief.