

Pathway to Practice:

A Guide for Those Preparing for the Legal
Paraprofessional Juvenile Law Exam





Certification & Licensing

The Certification and Licensing Division develops and administers certification and licensing programs for the Arizona Supreme Court.

The Legal Paraprofessional Juvenile Law Exam has 100 multiple choice questions based on applicable laws, codes, statutes, and rules. The primary focus of this document is to provide a overview of resources relevant to the practice area. This study guide is updated bi-annually to ensure the content remains current and relevant. However, laws and regulations may change between updates. It is essential to consult official Arizona Revised Statutes, Court Rules, and other referenced materials while studying to verify the most up-to-date information. Users are encouraged to cross-check these references to ensure accuracy and compliance with any recent changes.

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Arizona Code of Judicial Administration § 7-210



ARIZONA CODE OF JUDICIAL ADMINISTRATION
Part 7: Administrative Office of the Courts
Chapter 2: Certification and Licensing Programs
Section 7-210: Legal Paraprofessional

A. Definitions. In addition to the definitions in ACJA § 7-201(A), the following definitions apply to this section:

“Advocacy” means course content or practical experience that demonstrates and develops skills that are associated with conducting court hearings and trials, administrative hearings, mediation and arbitration, and settlement and plea negotiation.

“Board” means the Board of Nonlawyer Legal Service Providers.

“Certification” means achievement of subject area competency within an endorsement.

“Civil procedures course” means at least 3 credits from a course dedicated to civil procedure and the remaining required credits can be obtained through a course or courses that cover an area of civil law, such as administrative law, if the course includes procedural law content.

“Endorsement” means an area of practice in which a legal paraprofessional may be licensed.

“Experiential learning” means learning through a format such as an internship, externship or clinical experience during which students develop knowledge, skills, and values from direct experiences outside a traditional academic setting.

“Legal Paraprofessional” means an individual licensed pursuant to this section to provide legal services without the supervision of an attorney in the areas of law and within the scope of practice defined herein.

“Legal specialization course” means a course that covers substantive law or legal procedures and that was developed specifically for, and that teaches practical skills needed by, paralegals or legal paraprofessionals. For clarity, courses in general “business law” designed for undergraduate or graduate business curriculums and law-related courses that focus solely on theory do not qualify as a legal specialization course.

“Substantive, law-related experience” means the provision of legal services as a law clerk, paralegal, or paralegal student including, but not limited to, drafting pleadings, legal documents, or correspondence; completing forms; preparing reports or charts; legal research; and interviewing clients or witnesses in areas of practice in which the applicant seeks to be licensed. Substantive law-related experience does not include routine clerical or administrative duties or preparation of legal documents for an entity or member of the public engaged in self-representation.

B. Applicability. This section applies to individuals who provide legal services within the exception to the prohibition of the unauthorized practice of law set forth in Rule 31.3(e)(4),

Rules of the Supreme Court, and this section. To provide legal services under this exception, individuals must hold a valid legal paraprofessional license, perform legal services only within the scope of the practice area(s) in which they are licensed, and comply with the other requirements for licensees in this section. No individual may claim to be a legal paraprofessional unless they hold an active license as a legal paraprofessional. This section is read in conjunction with ACJA § 7-201: General Requirements, and Rules 31 through 80, Rules of the Supreme Court, governing the practice of law. In the event of any conflict between the Rules of the Supreme Court, ACJA § 7-201, and this section, the Rules of the Supreme Court govern, followed by this section.

- C. Purpose.** The supreme court has inherent regulatory power over all lawyers or nonlawyers providing legal services to the public. Accordingly, this section provides for the effective administration of the legal paraprofessional licensing program.

D. Roles and Responsibilities.

1. Supreme Court. The supreme court establishes and administers a legal paraprofessional fund consisting of monies received for license fees, costs, and civil penalties. The supreme court is authorized to expend monies from the fund for the implementation, administration, and enforcement of the legal paraprofessional program.
2. Division Staff. The responsibilities of the Division's director, deputy director, and staff are as stated in ACJA § 7-201(D).
3. Board of Nonlawyer Legal Service Providers. The Board of Nonlawyer Legal Service Providers is established.
 - a. The board consists of eleven members appointed by the chief justice in the following categories:
 - (1) Two certified legal document preparers;
 - (2) Two legal paraprofessionals;
 - (3) One judge or court administrator;
 - (4) One clerk of the superior court or designee;
 - (5) One attorney;
 - (6) Two public members; and
 - (7) Two additional members.
 - b. The board must issue licenses to qualified applicants as provided in (E)(2) and (3).
 - c. On or before April 30 of each year, the board must file a report with the supreme court describing the status of the legal paraprofessional program. The report must include, but is not limited to, the following:
 - (1) The number of applications granted and declined during the previous calendar year;
 - (2) The number of licensed legal paraprofessionals as of December 31 of the previous calendar year;

- (3) The number and nature of charges filed against legal paraprofessionals during the previous calendar year;
 - (4) The number and nature of complaints initiated by the state bar during the previous calendar year;
 - (5) Discipline imposed during the previous calendar year, the nature of the conduct resulting in discipline, and the discipline imposed; and
 - (6) Recommendations concerning modifications or improvements to the legal paraprofessional program.
4. The State Bar of Arizona. The state bar must provide the board with the following information:
- a. On a calendar quarter basis:
 - (1) The number and nature of charges filed against legal paraprofessionals during the previous calendar quarter;
 - (2) The number and nature of complaints initiated by the state bar against legal paraprofessionals during the previous calendar quarter;
 - (3) Discipline imposed on legal paraprofessionals during the previous calendar quarter and the nature of the conduct leading to the discipline, and the discipline imposed; and
 - (4) The current list of licensed legal paraprofessionals that the state bar must submit to the clerk of the supreme court.
 - b. On or before January 31 of each year:
 - (1) The number of licensed legal paraprofessionals as of December 31 of the previous year; and
 - (2) Recommendations concerning modifications or improvements to the legal paraprofessional program.
 - c. Such other information as the board may request to prepare its report to the supreme court under (D)(3)(c).

E. Licensure. In addition to the provisions of ACJA § 7-201(E), the following requirements apply:

- 1. License Required. A person must not represent that the person is a legal paraprofessional, or is authorized to provide legal services, without holding a valid license issued in compliance with this section in one or more of the following practice areas:
 - a. Family law.
 - b. Civil.
 - c. Criminal law.

- d. Administrative law.
 - e. Juvenile law.
2. Examination.
- a. Timing of Examination. Before applying for licensure, a prospective applicant must achieve a passing score on the legal paraprofessional examination.
 - b. Administration of Examination. The procedures for examinations, which includes reexaminations, are as stated in ACJA § 7-201(E), legal paraprofessional examinations must be administered using a board-approved format and delivery method.
 - c. Contents of Examination. The legal paraprofessional examination, prepared with the assistance of subject matter experts, must test:
 - (1) Legal terminology, substantive law, client communication, data gathering, document preparation, the ethical code for legal paraprofessionals, and professional and administrative responsibilities pertaining to the provision of legal services; and
 - (2) Substantive knowledge of the law in each subsection (F)(2) practice area in which the applicant seeks to be licensed.
3. Forms. When notifying a prospective applicant that they have achieved a passing score on the examination and satisfied the examination requirement, the division will provide the forms the prospective applicant must complete and submit to the division to apply for licensure.
4. Fingerprinting. An applicant must comply with the fingerprinting requirements of ACJA § 7-201(E)(1)(d).
5. Qualifications. The board must grant a license to an applicant who demonstrates possession of the following qualifications in addition to the education or experience requirements in (E)(6):
- a. Is a citizen or legal resident of the United States;
 - b. Is at least twenty-one years of age;
 - c. Has not been denied admission to the practice of law in Arizona or any other jurisdiction;
 - d. Has not been disbarred or suspended from the practice of law in Arizona or any other jurisdiction unless the applicant requests an exception that is approved by the supreme court;
 - e. Is of good moral character;

- f. Complies with the laws, court rules, and orders adopted by the supreme court governing legal paraprofessionals in this state;
 - g. Has achieved a passing score on the legal paraprofessional examination, including a substantive law examination in each (F)(2) practice area in which the applicant seeks to be licensed;
 - h. The character and fitness for licensure including, but not limited to, a past and present record of honesty, trustworthiness, diligence, reliability, respect for law and legal institutions, respect for the ethical codes governing attorneys, and whether the applicant has:
 - (1) Been convicted of a misdemeanor involving a serious crime as defined in Rule 36(b)(2)(A), Rules of the Supreme Court, or of any felony;
 - (2) Engaged in unlawful conduct not resulting in conviction of a crime;
 - (3) Committed any act involving misconduct, dishonesty, a false statement or omission, fraud, deceit, or material misrepresentation;
 - (4) Engaged in abuse of legal process;
 - (5) Engaged in neglect of financial responsibilities;
 - (6) Neglected or disregarded ethical or professional obligations;
 - (7) Violated any order of a court, judicial officer, administrative tribunal, or professional regulatory entity;
 - (8) Engaged in conduct evidencing mental or emotional instability impairing the ability of the applicant to perform the duties and functions of a legal paraprofessional;
 - (9) Engaged in conduct evidencing substance abuse impairing the ability of the applicant to perform the duties and functions of a legal paraprofessional; and
 - (10) A history of any disciplinary complaints or disciplinary action by an attorney disciplinary agency or other professional disciplinary agency of any jurisdiction.
6. Education or Experience Requirement. The applicant must also have one of the following:
- a. An associate-level degree in paralegal studies or an associate-level, bachelor's, or advanced degree in any subject plus a certificate in paralegal studies approved by the American Bar Association or offered by an institution that is accredited by an institutional accrediting agency recognized by the U.S. Department of Education or the Council for Higher Education Accreditation (CHEA) and that requires successful completion of a minimum of 24 semester units, or the clock hour equivalent, in legal specialization courses including a minimum of:
 - (1) For family law: 3 credit hours in family law, 6 credit hours in civil procedure, 3 credit hours in evidence, and 3 credit hours of legal research and writing.
 - (2) For civil law: 6 credit hours in civil procedure, 3 credit hours in evidence, and 3 credit hours of legal research and writing.
 - (3) For criminal law: 3 credit hours in criminal law, 3 credit hours in evidence, and 3 credit hours of legal research and writing.

- (4) For administrative law: 3 credit hours in administrative law, 3 credit hours in evidence, and 3 credit hours of legal research and writing.
 - (5) For juvenile law: 3 credit hours in dependency law or completion of the Attorney General's Office internal employee dependency training program for potential Legal Paraprofessionals employed by the Attorney General's office, 3 credit hours in evidence, and 3 credit hours of legal research and writing.
 - (6) For all practice areas:
 - (a) A minimum of 3 credit hours in professional responsibility;
 - (b) A minimum of 120 hours or 3 credit hours of experiential learning, supervised by a licensed attorney or legal paraprofessional, that includes content on advocacy; and
 - (c) One (1) year of substantive law-related experience under the supervision of a lawyer or legal paraprofessional in the area of practice in which licensure is sought.
- b. A bachelor's degree in law from an accredited college or university and approved by the Arizona Judicial Council, including a minimum of:
 - (1) For family law: 3 credit hours in family law, 6 credit hours in civil procedure, 3 credit hours in evidence, and 3 credit hours of legal research and writing.
 - (2) For civil law: 6 credit hours in civil procedure, 3 credit hours in evidence, and 3 credit hours of legal research and writing.
 - (3) For criminal law: 3 credit hours in criminal law, 3 credit hours in evidence, and 3 credit hours of legal research and writing.
 - (4) For administrative law: 3 credit hours in administrative law, 3 credit hours in evidence, and 3 credit hours of legal research and writing.
 - (5) For juvenile law: 3 credit hours in dependency law or completion of the Attorney General's Office internal employee dependency training program for potential legal paraprofessionals employed by the Attorney General's office, 3 credit hours in evidence, and 3 credit hours of legal research and writing.
 - (6) For all practice areas, a minimum of 3 credit hours in professional responsibility and a minimum of 120 hours or 3 credit hours of experiential learning, supervised by a licensed attorney or legal paraprofessional, that includes content on advocacy.
- c. Attended a certification program, for credit or non-credit, for legal paraprofessionals approved by the Arizona Judicial Council; offered through an educational institution that is at least regionally accredited; and, while attending the certification program, the applicant must have completed:
 - (1) The credit hours, or equivalent clock hours, in courses required under (E)(6)(a) for the practice area in which licensure is sought; and
 - (2) The supervised hours of substantive law-related experience and experiential learning required under (E)(6)(a).
- d. A Master of Legal Studies (MLS) degree from an American Bar Association accredited law school including completion of at least:

- (1) For family law: 3 credit hours in family law, 6 credit hours in civil procedure, 3 credit hours in evidence, and 3 credit hours of legal research and writing.
 - (2) For civil law: 6 credit hours in civil procedure, 3 credit hours in evidence, and 3 credit hours of legal research and writing.
 - (3) For criminal law: 3 credit hours in criminal law, 3 credit hours in evidence, and 3 credit hours of legal research and writing.
 - (4) For administrative law: 3 credit hours in administrative law, 3 credit hours in evidence, and 3 credit hours of legal research and writing.
 - (5) For juvenile law: 3 credit hours in dependency law or completion of the Attorney General's Office internal employee dependency training program for potential legal paraprofessionals employed by the Attorney General's office, 3 credit hours in evidence, and 3 credit hours of legal research and writing.
 - (6) For all practice areas, a minimum of 3 credit hours in professional responsibility and a minimum of 120 hours or 3 credit hours of experiential learning, supervised by a licensed attorney or legal paraprofessional, that includes content on advocacy.
- e. A Juris Doctor (JD) degree from a law school accredited by the American Bar Association, or the foreign equivalent of a JD from a degree granting institution and a Master of Laws (LLM) degree from a law school accredited by the American Bar Association, that in either case included:
- (1) For family law: 3 credit hours in family law, 6 credit hours in civil procedure, 3 credit hours in evidence, and 3 credit hours of legal research and writing.
 - (2) For civil law: 6 credit hours in civil procedure, 3 credit hours in evidence, and 3 credit hours of legal research and writing.
 - (3) For criminal law: 3 credit hours in criminal law, 3 credit hours in evidence, and 3 credit hours of legal research and writing.
 - (4) For administrative law: 3 credit hours in administrative law, 3 credit hours in evidence, and 3 credit hours of legal research and writing.
 - (5) For juvenile law: 3 credit hours in dependency law or completion of the Attorney General's Office internal employee dependency training program for potential legal paraprofessionals employed by the Attorney General's office, 3 credit hours in evidence, and 3 credit hours of legal research and writing.
 - (6) For all practice areas, a minimum of 3 credit hours in professional responsibility.
- f. In lieu of the educational requirements in (E)(6)(a) through (e), has completed 7 years of full-time, substantive, law-related experience within the 10 years preceding application in each practice area in which the applicant seeks licensure.
7. Substantive Law-Related Experience. Establishing substantive law-related experience requires written certification by a supervising attorney or legal paraprofessional. The certification must include:
- a. The name and Bar number of all supervising lawyers or legal paraprofessionals;

- b. A statement that the work experience meets the requirement for substantive law-related experience, as defined in (A), in the practice area in which the applicant seeks licensure; and
 - c. The dates of the applicant's employment by or service with all supervising lawyers or legal paraprofessionals.
8. **Professionalism Course.** A newly-licensed legal paraprofessional must complete the state bar-approved course on professionalism within one year before or after initial licensure. A newly-licensed legal paraprofessional who fails to complete this requirement may be summarily suspended by the Board of Governors of the State Bar of Arizona on the request of the state bar counsel under Rule 62, Rules of the Supreme Court, provided that a notice by certified, return receipt mail of non-compliance has been mailed to the legal paraprofessional's last address of record at least 30 days before suspension.

F. Conduct of Licensees.

- 1. **Authorized Services.** A licensed legal paraprofessional may provide legal services in the areas of practice for which they are licensed as follows:
 - a. **Legal Services.** A licensed legal paraprofessional is authorized to provide the following legal services without the supervision of an attorney:
 - (1) Prepare and sign legal documents;
 - (2) Provide specific advice, opinions, or recommendations about possible legal rights, remedies, defenses, options, or strategies;
 - (3) Draft and file documents, including initiating and responding to actions, related motions, discovery, interim and final orders, and modification of orders, and arrange for service of legal documents;
 - (4) Appear before a court or tribunal on behalf of a party, including mediation, arbitration, and settlement conferences where not prohibited by the rules and procedures of the forum; and
 - (5) Negotiate legal rights or responsibilities for a specific person or entity.
 - b. **Scope of Practice.** A legal paraprofessional's authorization to provide legal services in a practice area is as follows:
 - (1) **Family Law.** Legal paraprofessionals licensed in family law may render authorized services in:
 - (a) Domestic relations, except that they may not provide services in the following areas unless the legal paraprofessional has met additional qualifications as established by the supreme court for:
 - (i) Preparation of a Qualified Domestic Relations Order (QDRO) and supplemental orders dividing retirement assets.
 - (ii) Division or conveyance of formal business entities or commercial property.
 - (iii) An appeal to the court of appeals or supreme court.

- (b) Adoption, to assist clients in all aspects of the adoption process, if the legal paraprofessional has met additional qualifications as established by the supreme court.
 - (2) Civil. Legal paraprofessionals licensed to practice in civil law may provide authorized services in any civil matter that is or could be in a municipal or justice court of this state other than matters in which a licensed attorney is not permitted to appear.
 - (3) Criminal Law. Legal paraprofessionals licensed in criminal law may render authorized services:
 - (a) At any initial appearance or, when the defendant is not represented by counsel in subsequent criminal proceedings, for the limited purpose of advocating for release of a defendant from pretrial detention.
 - (b) For criminal misdemeanor matters in a municipal or justice court of this state that is not subject to a penalty of incarceration upon conviction, whether by law or by agreement of the prosecuting authority and trial court.
 - (4) Administrative Law. Legal paraprofessionals licensed in administrative law may engage in providing authorized services before any Arizona administrative agency that does not preclude practice by legal paraprofessionals. Legal paraprofessionals licensed in administrative law are not authorized to:
 - (a) Represent any party in an appeal of an administrative agency's decision to a superior court, the court of appeals, or the supreme court except for filing an application or notice of appeal.
 - (b) Represent any lawyer or legal paraprofessional before the supreme court, presiding disciplinary judge, or any board, committee, or hearing panel.
 - (5) Juvenile Law. Legal paraprofessionals licensed in juvenile law may render authorized services in:
 - (a) Juvenile dependency proceedings for any party, except that they may not:
 - (i) Conduct a contested dependency adjudication;
 - (ii) Conduct a contested termination adjudication proceeding; or
 - (iii) Represent any party in a matter in which the child named in the petition is subject to the Indian Child Welfare Act (ICWA) as defined in Rule 102, Arizona Rules of Procedure for the Juvenile Court.
 - (b) Adoption, to assist clients in all aspects of the adoption process, if the legal paraprofessional has met additional qualifications as established by the supreme court.
2. Code of Conduct. Each legal paraprofessional must abide by the code of conduct in subsection (J).
 3. Identification. Legal paraprofessionals must include their name, the title "Arizona Legal Paraprofessional" or the abbreviation "LP," and their legal paraprofessional license number on all documents they prepare, unless expressly prohibited by a non-judicial agency or entity. Legal paraprofessionals must also provide their name, title, and license number to any person upon request.
 4. Notification of Discipline. A licensed legal paraprofessional whose license to practice law

is revoked, suspended or disbarred in any jurisdiction must provide notice of and information about the revocation, suspension or disbarment to the board and the state bar within 30 days of service of the notice of the revocation, suspension or disbarment.

5. Notification of Denial of Admission. A licensed legal paraprofessional who is denied admission to the practice of law in any jurisdiction must provide notice of and information about the denial to the board and the state bar within 30 days of service of the notice of the denial.

G. Complaints, Investigation, Disciplinary Proceedings, and Continuing Legal Education.

The Supreme Court Rules governing complaints, investigations, discipline, sanctions, reinstatement, continuing legal education, and public access to state bar records are applicable to legal paraprofessionals, with the following modifications:

1. Rule 44 is not applicable to legal paraprofessionals.
2. Rule 60(a)(1) is applicable to legal paraprofessionals, except that the term “revocation” replaces the term “disbarment.”
3. Reinstatement proceedings under Rules 64 and 65, Rules of Supreme Court, are applicable to legal paraprofessionals, except the term “revoked” or “revocation” replaces the term “disbarred” or “disbarment.”

H. Policies and Procedures for Board Members. The policies and procedures applicable to board member are as provided in ACJA § 7-201(I).

I. Continuing Legal Education Policy.

1. Purpose. Ongoing continuing legal education (“CLE”) is one method to ensure legal paraprofessionals maintain competence in the field after licensure. Continuing education also provides opportunities for legal paraprofessionals to keep abreast of changes in the profession and the Arizona judicial system.
2. Applicability. All legal paraprofessionals must comply with the continuing education requirements of Rule 45, Arizona Rules of Supreme Court. Continuing education must relate to the practice area in which the legal paraprofessional is licensed to practice.

J. Code of Conduct. All legal paraprofessionals in the State of Arizona must abide by the following code of conduct establishing the rules of professional conduct and minimum standards for performance by legal paraprofessionals.

1. Ethics. A legal paraprofessional is bound by Rule 42, Rules of the Supreme Court, Arizona Rules of Professional Conduct, as follows:
 - a. “Legal paraprofessional” or “legal paraprofessionals” is substituted for “lawyer” or “lawyers.”

- b. References to “applicant” or “applicant for admission to the state bar” are read as “applicant for a legal paraprofessional license.”
 - c. References to “admission to practice” or “admitted to practice” are read as “licensed as a legal paraprofessional.”
 - d. ER 5.5(a) and (b) apply to legal paraprofessionals. ER 5.5(c) through (h) are not applicable to legal paraprofessionals.
- 2. Professionalism. A legal paraprofessional must abide by Rule 41, Rules of the Supreme Court, with the exception of the Oath of Admission to the Bar.
 - 3. Trust Accounts. A legal paraprofessional must abide by Rule 43, Rules of the Supreme Court.
 - 4. Insurance Disclosures. A legal paraprofessional must abide by Rule 32(c)(13), Rules of the Supreme Court.
 - 5. Performance in Accordance with Law. A legal paraprofessional must:
 - a. Perform all duties and discharge all obligations in accordance with applicable laws, rules, or court orders.
 - b. Not represent that the legal paraprofessional is authorized to provide legal services that are not authorized by this section or are not within the scope of practice in the areas for which they are licensed.
 - c. Not use the designations “lawyer,” “attorney at law,” “counselor at law,” “Esq.,” or other equivalent words, the use of which is reasonably likely to induce others to believe the legal paraprofessional is authorized to engage in the practice of law beyond that allowed by a license issued under this section. Any communications by a licensed legal paraprofessional in connection with providing services must clearly identify the licensee as a licensed legal paraprofessional.
 - d. Not provide any kind of advice, opinion or recommendation about possible legal rights, remedies, defenses, options, or strategies unless the legal paraprofessional is licensed in the practice area and doing so is within the scope of the practice area.
 - e. Inform the client in writing that a legal paraprofessional is not a lawyer and cannot provide any kind of advice, opinion or recommendation to a client about possible legal rights, remedies, defenses, options, or strategies, or authorized legal services that are not within the scope of a practice area in which they are licensed.
 - f. Comply with the Arizona Rules of Procedure governing the scope of the legal paraprofessional’s authorized practice area, but, where “lawyer,” “attorney,” or other equivalent words are used, substitute “legal paraprofessional” for any procedural rule

governing conduct within the legal paraprofessional's scope of practice in (F)(1).

K. Fee Schedule.

1. Application Fees.

- a. Application Fee; Initial Licensure \$300.00
- b. Fingerprint Application Processing - rate set by Arizona law and is subject to change.

2. Examination Fees.

- a. Core Skills Test \$100.00
- b. Core Skills Test Reexaminations \$100.00
(For any applicant who does not pass the examination on the first attempt. The \$100 fee applies to each reexamination.)
- c. Core Skills Test Reregistration for Examination \$100.00
(For any applicant who registers for an examination date and fails to appear at the designated site on the scheduled date and time.)
- d. Subject Matter Test \$150.00
- e. Subject Matter Test Reexamination \$150.00
(For any applicant who does not pass the examination on the first attempt. The \$150 fee applies to each reexamination.)
- f. Subject Matter Test Reregistration for Examination \$150.00
(For any applicant who registers for an examination date and fails to appear at the designated site on the scheduled date and time.)

3. Miscellaneous Fees.

- a. Application. Printed Application for Admission or Character Report (materials available online for free) \$ 20.00
- b. NSF Fee \$ 40.00
- c. Document Deficiency Fee: assessed if required supporting documents are not filed with application. \$100.00
- d. Public Record Request per Page Copy \$.50
- e. Certificate of Correctness of Copy of Record \$ 18.00

f. Additional License Fee \$150.00
(For each additional practice in which licensure is sought more
than one year after the initial application)

4. Annual Dues for Arizona State Bar Affiliate Members. Each person licensed as a legal paraprofessional is subject to the membership fees and requirements of Rule 32(c), Rules of the Supreme Court.

Adopted by Administrative Order No. 2020-174, effective January 1, 2021. Amended by Administrative Order No. 2021-177, dated December 8, 2021, effective January 1, 2022. Amended by Administrative Order 2023-61, effective March 29, 2023. Amended by Administrative Order No. 2023-225, effective December 29, 2023.



Let's check your knowledge!



<https://quizlet.com/966618587/acja-7-210-flash-cards/?i=66y8kp&x=1jqt>

Arizona Juvenile Court Rules of Procedure



Arizona Juvenile Court Rules of Procedure

Rule 104. Applicability of the Arizona Rules of Evidence, Admissibility of Evidence and Reports

(a) Contested Adjudication Hearings. The Arizona Rules of Evidence apply in contested adjudication hearings in delinquency, dependency, termination, and Title 8 guardianship proceedings, except as otherwise provided by law or by agreement of all parties and the court.

(b) Other Proceedings. Except as otherwise provided by law or by agreement of all parties and the court, in any proceeding not covered by section (a), any non-privileged evidence tending to make a fact at issue more or less probable is admissible unless the court determines the evidence lacks reliability or will cause unfair prejudice or confusion, or waste time.

(c) Admissibility of a Child's Statement or Conduct. In all adoption, dependency, termination, and Title 8 guardianship proceedings, evidence of a child's out-of-court statement or nonverbal conduct regarding acts of abuse or neglect perpetrated on the child is admissible if the time, content, and circumstances of the statement or conduct provide sufficient indicia of its reliability.

(d) Admissibility of Reports.

(1) "*Child Safety Worker's Report*" means a narrative report, as appropriate to the hearing, containing the following information:

The report may include any appendices or reports prepared by a person other than the child safety worker. The term report does not include a social study prepared under A.R.S. § 8-536 or pursuant to a court order in a termination proceeding, or the report required by A.R.S. § 8-872(F) and Rule 344(f).

(A) the reasons the child was removed from the custody of the parent, guardian, or Indian custodian;

(B) the services provided to prevent removal;

(C) the case plan goal and the services provided to achieve the goal;

(D) the steps taken by the parent, guardian, or Indian custodian to comply with the case plan;

(E) the child's current placement and, in the case of an Indian child, whether the placement falls within the preferences as set forth in ICWA or whether good cause exists to deviate from ICWA's preferences;

(F) the services provided to meet the child's needs;

(G) the efforts made to ensure the educational stability of a child, including but not limited to the appropriateness of the child's current school placement, school attendance, services to help achieve the child's education potential, special education services (when indicated), and grade level progress or progress toward graduation;

(H) the recommended dispositional orders;

(I) the recommended changes to the case plan goal, services, or placement; and

(J) the recommended permanent plan.

The report may include any appendices or reports prepared by a person other than the child safety worker. The term report does not include a social study prepared under A.R.S. § 8-536 or pursuant to a court order in a termination proceeding, or the report required by A.R.S. § 8-872(F) and Rule 344(f).

- (2) *Admissibility of Child Safety Worker's Report.* In any dependency, Title 8 guardianship, or termination hearing, the court must review a child safety worker's report and may admit the report into evidence if the worker or workers who prepared or approved the report are available for cross-examination and the report was disclosed to the parties no later than:
- (A) one day before a Rule 333 review of temporary custody hearing; or
 - (B) 15 days before any other hearing at which the report may be introduced.
- (3) *Evaluation Report.* In any dependency, Title 8 guardianship, or termination hearing, an evaluation report of any psychological, psychiatric, medical, neurological, psycho-educational, psycho-sexual, substance abuse, or similar evaluation concerning any party or participant, or any person with whom a child is or may be residing, is admissible into evidence if the report has been disclosed to the parties under Rule 315(a)(1) and the author of the report is available for cross-examination.
- (4) *Report Ordered Under Rule 344(f).* In a Title 8 guardianship adjudication hearing, in addition to reports admitted into evidence under this section, the court must review the investigative report prepared under Rule 344(f) and may admit it into evidence.
- (5) *Social Study.* In a termination adjudication hearing, a social study prepared under Rule 351, under A.R.S. § 8-536, or by court order admissible as evidence unless a party has filed a notice of objection as required by Rule 315(d)(1)(E). If the court sustains any objections, the court may:
- (A) admit the social study into evidence after redacting those portions to which objections were sustained and
 - (B) allow the petitioner a reasonable opportunity to call additional witnesses to testify regarding the redacted portions of the social study.
- (6) *Disposition Report.* The disposition report in a delinquency proceeding is governed by Rule 222.
- (7) *Other Reports.* The court may admit any other report that is court ordered or required by law, if the report has been timely disclosed and the author of the report is available for cross-examination.
- (8) *Admission of Reports.* If the court relies in whole or in part on a report under this section, the report must be admitted into evidence to ensure that the report is part of the appellate record.
- (9) *Reports Offered but Not Admitted.* A report under this section that is offered but not admitted into evidence must be marked for identification to ensure that the report is part of the appellate record if the report has been designated in a supplemental designation by a party to the appeal pursuant to Rule 604.
- (10) *Available for Cross-Examination.* For purposes of this section, a person is available for cross-examination if the person appears in court, is available for a virtual appearance under Rule 110, or is subject to the court's subpoena power, unless the person is subpoenaed and is unable or unwilling to comply with the subpoena.
- (11) *Admission in Other Proceedings.* A report admitted into evidence for one proceeding is not necessarily admissible in another proceeding involving the same child, especially if it involves different issues. The admission of a report in one proceeding does not create a presumption that it is admissible in other proceedings.

Rule 304. Appearance, Substitution, and Withdrawal; Responsibilities of Parties

(a) Applicability. As used in this rule, the term “attorney” includes a GAL.

(b) Attorney's Duties.

(1) Appearance. An attorney may appear as attorney of record by filing a notice of appearance, a petition, or a motion to intervene. An attorney may also enter an initial appearance by appearing personally or telephonically and advising the court that the attorney is representing a party. An attorney may not file a document in any action or act on behalf of a party without appearing first as attorney of record.

(2) Representation. After an attorney has appeared of record in any action, the attorney will be responsible for all matters involving the action until:

(A) another attorney is substituted as attorney of record for a party;

(B) the action is dismissed and the time for filing notice of appeal has expired;

(C) the court enters an order terminating representation and, if applicable, any time for filing a notice of appeal has expired; or

(D) if an attorney represented the party on appeal, the issuance of an appellate mandate.

(c) Withdrawal. An attorney of record may withdraw only by court order. The attorney's written or oral motion must state the reasons for withdrawal. A written motion must list the future hearing dates and must be accompanied by a proposed order. The attorney remains the person's attorney of record until the court grants the motion to withdraw.

(1) Client Consent. A written motion that contains the client's written consent may be presented to the court ex parte and must be accompanied by a proposed order. The withdrawing attorney must promptly provide the signed order to the other parties' attorneys. If an oral motion is presented on the record and the client is present and consents to a withdrawal, the court may rule on the motion at that time.

(2) No Client Consent. If the attorney does not move to withdraw under subpart (c)(1), the attorney must move to withdraw in writing and serve the client with the motion. The attorney also must provide a copy of the motion to the other parties' attorneys. The attorney must provide the court with the reasons for the withdrawal and the client's last known address, email address, and telephone number. The motion must include the attorney's certification that the client has been notified in writing of the status of the case including dates and times of any court hearings or trial settings and advised to comply with any existing court orders or face the possibility of sanctions. If a client cannot be located, the attorney may move to withdraw orally on the record or in writing. The court must endorse the client's last known address on the minute entry.

(3) Attorney or GAL for a Child. Subparts (c)(1) and (c)(2) do not apply to an attorney or GAL for a child. An attorney or GAL representing a child may withdraw or substitute only by court order.

(4) Limited Purpose. An attorney who appears for a limited purpose must file a notice of withdrawal upon completion of the limited purpose.

(d) Attorney Substitution.

(1) Generally. Except as provided in subpart (d)(2), an attorney may substitute as attorney of record in a pending action only by court order. The attorney must file a motion that contains the client's written consent and a proposed order. The motion and proposed order may be presented to the court ex parte. The substituting attorney must promptly provide the signed order to the other parties' attorneys.

(2) Within the Same Firm or Office. If a pending case is transferred within the same law firm or governmental office, the court must be notified of the new attorney of record, including any changes in the physical or email address. An order of substitution is not required.

(e) Withdrawal or Substitution of Counsel When Matter Set for Trial. The court may not permit an attorney to withdraw or substitute after a matter has been set for trial, unless the court finds ethical grounds or good cause for the withdrawal. If applicable, the motion must provide:

(1) From a New or Substituting Attorney: the name and address of the attorney and a signed statement from that attorney acknowledging the trial date and avowing that the attorney will be prepared for trial; or

(2) From a Self-Represented Party: when a client wishes to self-represent and the attorney is withdrawing, the client must put in writing or state on the record that the client has been advised of the trial date and has made suitable arrangements for self-representation and will be prepared for trial.

(f) Duty of Attorney After Withdrawal or Substitution. No later than 7 days after withdrawal or substitution, other than a substitution from within the same firm or office, the former attorney must transfer the file and provide the client's most current contact information and all disclosure to the new lawyer or to the client, if self-represented. The attorney must preserve the file if the client's whereabouts are unknown.

(g) Responsibility to the Court.

(1) Attorneys and Self-Represented Litigants. Each attorney of record, GAL, and self-represented litigant must remain informed of the status of, and the deadlines in, pending actions in which that attorney or self-represented litigant has appeared.

(2) Attorneys. An attorney who changes an office address, email address, or telephone number must notify the clerk in each of the counties in which that attorney has pending actions of the attorney's current office and email address and telephone number, and must file a notice in each case in which the attorney has appeared containing that information.

(3) Self-Represented Litigants. Self-represented litigants must file a notice containing their mailing address, telephone number, and any email address, and provide copies of the notice to the other parties' attorneys. It is the responsibility of a self-represented litigant to file an updated notice of any change in contact information no later than 7 days after the change, and to promptly provide a copy of the updated notice to the parties' attorneys.

Rule 309. Education Requirements for Court-Appointed Attorneys and GALs

(a) Scope. This rule applies to an attorney or GAL appointed by the court in a proceeding under Part III of these rules, and who is or will be subject to the requirements of Rule 306, 307, or 308.

(b) Generally. An attorney and GAL must be familiar with and stay current on substantive juvenile law, procedural rules, court decisions, regulations, and changes and developments in relevant federal and state laws--including laws concerning education and advocacy for children in schools.

(c) Initial Training. An attorney or GAL must complete:

(1) an introductory 6 hours of court-approved training before the first appointment, unless the presiding juvenile court judge in the county in which the attorney or GAL is practicing determines otherwise for good cause, and

(2) an additional 2 hours within the first year of practice in juvenile court.

(d) Later Training. Each year, an attorney or GAL must complete at least 8 hours of continuing education on the relevant state and federal juvenile laws described in section (b). This continuing education may include topics such as ICWA, child welfare policy, child and adolescent development (including infant/toddler mental health), bonding and attachment, behavioral health services, effects of parental incarceration, educational opportunities and challenges, parent and child immigration issues, the need for timely permanency, the impact of out-of-home placements, the traumatic effects of domestic violence, substance abuse and addiction, mental illness and treatment options, psychological evaluations and how to read them, the effects of trauma and trauma-informed practices, issues surrounding families involved in the dependency process, cultural awareness, issues in the child welfare system related to race, ethnicity, disability, sexual orientation, gender identity and expression, disproportionate involvement, implicit bias, and other topics and issues concerning abused or neglected children.

(e) Affidavit of Completion.

(1) Initial Training. An attorney or GAL must provide to the presiding juvenile court judge an affidavit of completion of the initial 6-hour, court-approved training requirement before appointment as an attorney or GAL, unless the juvenile court presiding judge in which the appointment is made waives this requirement.

(2) Later Training. Concurrently with the annual affidavit of compliance required by Supreme Court Rule 45, an attorney or GAL must provide an affidavit of completion to the presiding juvenile court judge of the later training required by section (d). An initial and a later affidavit of completion must contain a list of courses, including the dates and number of hours for each course, and the name of the training provider.

Rule 323. Simultaneous Dependency and Legal Decision-Making/Parenting Time Proceedings

(a) Transfer to Juvenile Division. If pending family law and dependency proceedings concern the same parties, the judge presiding over the juvenile case makes decisions concerning the children.

(1) Notice. The parties must notify the family division of a pending dependency proceeding.

(2) Effect of Transfer. If the proceedings are transferred, the juvenile division will hear custodial issues until the dependency is dismissed or the juvenile division defers jurisdiction to the family division.

(b) Referral to Family Division. If the juvenile division determines that a change of legal decision-making or parenting time is appropriate, it may decide those issues or refer the matter to the family division for further proceedings.

(c) Support Orders. During any dependency or guardianship proceeding in the juvenile division, the juvenile division may establish, suspend, modify, or terminate a child support order. Except in Title IV-D cases, the juvenile division also may make appropriate orders regarding any past due support or child support arrears and may direct that an income withholding order be quashed or modified. Any order regarding child support must be filed in both the family division and the juvenile division.

(d) Applicability of Family Law Statutes and Rules. In deciding issues of legal decision-making, parenting time, and support, the court must apply A.R.S. Title 25 and the Family Law Rules.

Rule 326. Required Admonitions and Findings

(a) Generally.

(1) During every hearing in a dependency, Title 8 guardianship, or termination case, the court must address the parents who are present and advise them of the consequences of failing to appear and failing to participate in reunification services.

(2) The requirement in subpart (a)(1) does not apply to a parent whose parental rights have been terminated or in cases in which the court has established a permanent guardianship.

(b) Admonition.

(1) At a preliminary protective hearing, or at an initial dependency, pretrial conference, initial guardianship, or initial termination hearing, the court must advise the parent who is present that the parent will be deemed to have admitted the allegations in the petition or motion if the parent fails to attend any of the following court hearings without good cause:

(A) a pretrial conference or an adjudication hearing in a dependency, guardianship, or termination hearing;

(B) a pretrial conference in a guardianship proceeding; or

(C) a status conference in a termination proceeding.

(2) The court also must advise the parent that if the parent fails to appear at any of these conferences or hearings, the court may adjudicate the case in the parent's absence and, based on the evidence presented, may grant the petition or motion.

(3) The court must determine at every hearing at which the parent appears that the parent understands the consequences of failing to appear at future court hearings and failing to participate in reunification services.

Rule 329. Service of the Dependency Petition, Temporary Orders, and Notice of Hearing

(f) Service on an Incarcerated Person. A person who is incarcerated in a jail or prison within Arizona or outside Arizona but within a judicial district of the United States may be served by mail or national courier service, with the return or confirmation of service completed by an official of the jail, prison, or correctional facility. The signature of an official of the jail, prison, or correctional facility on the return receipt or signature confirmation is sufficient proof of service on the person being served, as of the date of the signature. In addition, the petitioner must send copies of the documents being served to the inmate, and to the inmate's assigned dependency attorney, by first class mail.

Rule 332. Preliminary Protective Hearing

(a) Generally. At the preliminary protective hearing, the court must determine whether continued temporary physical custody of the child is necessary, giving paramount consideration to the health and safety of the child.

Rule 333. Contested Review of Temporary Custody

(b) **Burden of Proof.** The petitioner must show there is probable cause to believe that continued temporary physical custody of the child in an out-of-home placement is clearly necessary to prevent abuse or neglect pending the dependency adjudication pursuant to A.R.S. §§ 8-824(F) and 8-825(C).

(c) **Procedure.** At the temporary custody hearing:

(2) Evidence may be presented in support of, or to rebut a finding of, the need for the continued temporary physical custody of the child in an out-of-home placement. The court may admit evidence under Rule 104(b), including hearsay. See A.R.S. § 8-825.

(d) **Findings.** The court must find whether there is probable cause to believe that continued temporary physical custody is clearly necessary to prevent abuse or neglect.

Rule 334. Initial Dependency Hearing

(h) Continuance.

- (1) *Generally.* The court may continue the initial dependency hearing if:
 - (A) service of process on the parties and notification under ICWA has not been completed;
 - (B) additional time is required to comply with the requirements of ICWA or additional time is requested by the child's tribe;
 - (C) additional time is required to obtain and consult with an attorney and the child's best interests would not be adversely affected;
 - (D) it is necessary for the full, fair, and proper presentation of evidence and the best interests of the child would not be adversely affected; or
 - (E) the court makes a finding of extraordinary circumstances, which include but are not limited to acts or omissions that are unforeseen or unavoidable.
- (2) *Motion.* Any party requesting a continuance based on extraordinary circumstances must file a motion that specifies those circumstances and must file the motion no later than 5 days after discovering them.
- (3) *Finding.* The court's finding of extraordinary circumstances must be in writing and set forth the factual basis for the continuance.
- (4) *Duration.* A continuance cannot exceed 30 days unless the court makes a finding of extraordinary circumstances under (h)(1)(E).

Rule 335. Qualified Residential Treatment Program; Judicial Review

(d) QRTP Placement and Approval.

(2) Procedure.

(B) DCS must file a motion seeking approval of the child's placement in the QRTP no later than 10 court days after receipt of the QRTP assessment. The motion must contain supporting documentation, including the QRTP assessment. If no party objects to placing the child in the QRTP, the court may rule upon the motion based on the supporting documentation without a hearing.

Rule 342. Motion for Return of the Child

- (a) Generally.** At any time after the temporary custody hearing, a parent may file a motion with a supporting factual basis that asks the court to return the child to the parent's custody pursuant to A.R.S. § 8-861.
- (b) Time Limits.** The court must set a hearing no later than 30 days after the filing date of the motion unless the parties agree otherwise.
- (c) Burden of Proof.** The moving party has the burden of establishing by a preponderance of the evidence that the return of the child would not create a substantial risk of harm to that child's physical, mental, or emotional health or safety.
- (d) Report and Response.**

(1) *DCS is the Petitioner.* When DCS is the petitioner, it must file a report with the court at least 15 days before the hearing and provide copies to all parties. The report must address the following:

(A) the current case plan and goals of the case plan;

(B) the parent's compliance with the case plan; and

(C) the petitioner's opinion on whether returning the child to the parent would create a substantial risk of harm to the child's physical, mental, or emotional health or safety.

(2) *DCS is Not the Petitioner.* When DCS is not the petitioner, the petitioner must file a response to the motion at least 15 days before the hearing.

(e) Procedure. The court may consider evidence admissible under Rule 104(b), which may include hearsay, to determine whether the child can be returned to the parent. The court must consider any failure of the parent to comply with the terms of the case plan as evidence that return of the child would create a substantial risk of harm to the child.

(f) Findings and Orders. The court must make factual findings even when no party objects to the motion. All findings and orders must be in a signed minute entry or order. The court must:

(1) return the child to the parent if the court finds that the parent met the burden of proof under section (c); or if the parent did not meet the burden of proof under section (c), the court must deny the motion;

(2) set or affirm future hearing dates;

(3) address and advise the parent in open court that the failure to attend further proceedings without good cause and failure to participate in reunification services may result in the termination of parental rights or the establishment of a permanent guardianship of the child, based upon the record and evidence presented. The court must advise the parent that the hearings may go forward in the parent's absence. The court must make specific findings that it advised the parent of the consequences of failure to attend subsequent proceedings and participate in reunification services. The court may provide the parent with a copy of Form 1, request that the parent sign and return a copy of the form, and note on the record that the form was provided;

(4) if ICWA applies, and the court has not yet done so, make findings pursuant to the standards and burdens of proof required under ICWA and the Regulations, including whether placement of the Indian child is in accordance with ICWA § 1915 and 25 C.F.R. § 23.131, or whether there is good cause to deviate from the preferences; and

(5) make any other findings and enter any other orders appropriate or required by law.

Rule 343. Permanency Hearing

(a) Generally. At the permanency hearing, the court must determine the child's permanency plan and enter orders that are necessary to accomplish the plan within a specific time.

(b) Time Limits. Pursuant to A.R.S. § 8-862, the permanency hearing must be held:

(1) no later than 30 days after the disposition hearing, if the court under A.R.S. § 8-846 relieved DCS of the duty to provide reunification services;

(2) no later than 6 months after the removal of a child who was under 3 years at the time of removal from the child's home; or

(3) no later than 12 months after the child's removal from the home in all other cases, unless otherwise permitted by law.

(c) Procedure. At the permanency hearing, the court:

- (1) must consider testimony or documents admitted into evidence under Rule 104(b), which may include hearsay;
- (2) must consider the permanency plan proposed by DCS pursuant to a prior court order; and
- (3) may allow the child to speak with the court during the hearing to assist the court in determining a permanency plan for the child.

(d) Findings and Orders. All findings and orders must be in a signed minute entry or order. The court must make findings and:

- (1) determine the appropriate permanency plan for the child, make the determination required by Rule 325, and order the petitioner to accomplish the plan within a specific time;
- (2) set a review hearing within the time required by A.R.S. § 8-847(A), but every review hearing after the permanency hearing for that child may be designated a permanency hearing;
- (3) if the court determines that termination of parental rights or the establishment of a permanent guardianship is clearly in the best interests of the child, order DCS, the child's attorney, or the child's GAL to file a motion or petition pursuant to A.R.S. § 8-862 to terminate parental rights--or to establish a permanent guardianship--no later than 10 days after the permanency hearing, and appoint counsel for the parent as provided in Rule 303;
- (4) address and advise the parent in open court that failure to attend further proceedings without good cause and failure to participate in reunification services, if appropriate, may result in the termination of parental rights or the establishment of a permanent guardianship of the child, based upon the record and evidence presented. The court must advise the parent that the hearings may go forward in the parent's absence. The court must make specific findings that it advised the parent of the consequences of failure to attend subsequent proceedings and participate in reunification services. The court may provide the parent with a copy of Form 3 (if the permanency plan is guardianship) or Form 4 (if the permanency plan is termination of parental rights), request that the parent sign and return a copy of the form, and note on the record that the form was provided;
- (5) if there is reason to know the child is an Indian child, the court must make findings pursuant to the standards and burdens of proof required under ICWA, including whether placement of the Indian child is in accordance with ICWA § 1915, 25 C.F.R. § 23.131, and Rule 321, or whether there is good cause to deviate from the preferences;
- (6) if the child is in an out-of-home placement, the court must make a finding as to whether the placement continues to be appropriate and in the child's best interests; and
- (7) make other findings as appropriate or required by law.

Rule 344. Motion, Notice of Hearing, Service of Process, and Order for Permanent Guardianship

(a) Motion.

(1) *Generally.* Any party to a dependency proceeding may file a motion for permanent guardianship of a child who has been adjudicated dependent. The motion must contain all the information required by A.R.S. §§ 8-871 and 8-872.

(2) *Pre-adjudication Motion.*

(A) *Generally.* A motion may be filed before the dependency adjudication. If the child has not been adjudicated dependent, the court may grant a permanent guardianship if all parties have

been served and no party objects. If any party objects to the pre-adjudication motion, the court may schedule a settlement conference or mediation, or it may strike the motion and proceed with the dependency petition.

(B) **Non-DCS Petition.** If the pending dependency petition was not filed by DCS, the court must notify DCS of the motion for permanent guardianship no later than 14 court days after the petition's filing. No later than 10 days after the court sends the notification, DCS must investigate the petition's allegations and inform the court of its position on the guardianship. If DCS objects to the guardianship, it may file a motion to intervene in the dependency action or file a separate dependency petition. The court may order a guardianship report under A.R.S. § 8-872(F) to be prepared and provided to the court no later than 10 days after the filing of the order to provide the report.

(b) Notice of Hearing.

(1) *Generally.* A notice of hearing must inform the parent of the location, date, and time of the initial guardianship hearing.

(2) *Failure to Appear.* The notice of hearing also must advise the parent that the parent's failure to appear without good cause may result in a finding that the parent waived legal rights and is deemed to have admitted the allegations in the motion for guardianship. The notice also must advise the parent that the hearing may go forward in the parent's absence and may result in the establishment of a permanent guardianship based upon the record and evidence presented.

(c) Service.

(1) *Generally.* The moving party must serve the motion for guardianship and notice of hearing on the parties, including any person who has filed a petition to adopt or who has physical custody under a court order in a foster-adoptive placement, under Rule 106.

(2) *Indian Child.* If the motion alleges or the court has reason to know the child at issue is an Indian child, then in addition to service of process required by this rule, the moving party must also notify the parent, Indian custodian, and tribe by registered or certified mail with return receipt requested. If the identity or location of the parent or Indian custodian cannot be determined, the moving party must give notice by registered or certified mail to the Secretary of the Interior, who has 15 days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. The notice must advise the parent or Indian custodian and the tribe of their right to intervene.

(d) Hearing Involving an Indian Child. The court may not hold a hearing until at least 10 days after receipt of notice by the child's parent or Indian custodian and the tribe or the Secretary of the Interior. On written request by the parent, Indian custodian, or tribe, the court must grant up to 20 additional days to prepare for the hearing. The child's parent, Indian custodian, or tribe may waive the 10-day notice requirement for purposes of proceeding with the initial guardianship hearing.

(e) Providing Notice of the Hearing to Other Persons. In addition to serving the notice of hearing on the parties, the moving party must also provide a copy of the notice of hearing to the following persons:

- (1) the child's current physical custodian;
- (2) any foster parent with whom the child has resided within 6 months prior to the date of the hearing;
- (3) the prospective guardian if the guardian is not the current physical custodian; and
- (4) any other person the court orders to be provided with the notice of the hearing.

(f) Investigation and Report.

- (1) Upon filing of a motion for guardianship, the court may order DCS, if DCS is legal custodian of the child, to conduct an investigation and prepare a report for the initial guardianship hearing addressing whether the prospective guardian is a fit and proper person to become guardian of the child and whether it is in the best interests of the child to grant the guardianship.
 - (2) If DCS is not the legal custodian, the court may order the child's attorney, GAL, or a party to prepare this report.
 - (3) If the child is an Indian child, the report must address whether the prospective guardian falls within the placement preferences required under ICWA or whether good cause exists to deviate from the placement preferences.
 - (4) A copy of the report must be provided to the parties and the court at least 10 days before the initial guardianship hearing.
- (g) Other Orders.** Pending the hearing, the court may enter other orders that are in the child's best interests.

Rule 349. Revocation of a Permanent Guardianship

- (a) Generally.** The child's guardian or any party to the dependency proceeding may file a petition pursuant to A.R.S. § 8-873 for the revocation of an order granting permanent guardianship.
- (b) Petition.** The petition must state a factual basis describing a significant change of circumstances supporting a revocation and address the appropriate factors cited in A.R.S. § 8-873(A). The petition must be verified.
- (c) Petitioner's Duties.**
- (1) *Generally.* The petitioner must provide a copy of the petition to the child's parents and the permanent guardian under Rule 106. The court must provide a copy of the petition to the attorney and GAL appointed for the child under subpart (d)(1).
 - (2) *Indian Child.* If the child is an Indian child, the petitioner must provide notice as required by ICWA to the parent, Indian custodian, and tribe by registered or certified mail with return receipt requested. If the identity or location of the parent or Indian custodian cannot be determined, the petitioner must notify the Secretary of the Interior by registered or certified mail, who has 15 days after receipt of mailing to provide the requisite notice to the parent or Indian custodian and the tribe. The notice must advise the parent or Indian custodian and the tribe of their right to intervene.
- (d) Court's Duty Upon Receiving a Petition.** Upon receiving a petition to revoke a permanent guardianship, the court:
- (1) must appoint an attorney and GAL for the child;
 - (2) must set an initial revocation hearing no later than 45 days after the filing of the petition and notify the petitioner, the child's attorney and GAL, the child's parent, and the permanent guardian of the hearing date; and
 - (3) may, if the court has reason to believe that the child is at risk of abuse or neglect, order DCS to investigate and provide a report to the court and the parties no later than 10 court days after the order is entered.
- (e) Initial Revocation Hearing.** At the initial revocation hearing, the court must determine whether a copy of the petition was served as required by section (c); whether DCS, if ordered to

investigate, provided its investigative report to the court and parties; and whether a parent, permanent guardian, the child's attorney, or GAL objects to the petition. At the conclusion of the initial revocation hearing, the court may:

- (1) continue the initial hearing to allow the petitioner and DCS to complete their responsibilities under subparts (c)(1) and (d)(3);
- (2) order the GAL to prepare a report to the court and to provide a copy of the report to the parties, and continue the initial hearing pending completion of those actions;
- (3) set a contested hearing if a party objects to the petition;
- (4) grant the petition if there is no objection and the court has made the required findings under section (g); and
- (5) enter interim orders.

(f) Contested Hearing. If the petition is set for a contested hearing, the petitioner must meet the burden of proof required by A.R.S. § 8-873 (C) or (D). The court may consider any evidence at the hearing that is admissible under Rule 104(b).

(g) Considerations. Before entering findings and orders, the court must consider:

- (1) the child's position;
- (2) the duration of the guardianship;
- (3) the level of contact between the parent and the child during the guardianship; and
- (4) any other relevant factor.

(h) Findings. The court's findings must be contained in a signed minute entry or order. If the child was adjudicated dependent, the court must make findings under A.R.S. § 8-873(C). If the child was not adjudicated dependent, the court must make findings under A.R.S. § 8-873(D). The court must also:

- (1) make findings related to the considerations in section (g); and
- (2) make findings required by ICWA if the child is an Indian child.

(i) Orders. The court must enter an order granting or denying the petition to revoke the permanent guardianship. Upon revoking the guardianship, the court may:

- (1) order the child returned to the legal and physical custody of a parent; and
- (2) enter other orders that may be appropriate.

Rule 408. Certification to Adopt

(a) Application for Certification. Any prospective adoptive parent must submit a written application for certification and be certified by the court as acceptable to adopt children, as provided by A.R.S. § 8-105, before filing a petition to adopt. This requirement does not apply to individuals identified in A.R.S. § 8-105(N).

(b) Dismissal of the Application Due to Insufficient Information. If the court is unable to certify the applicant as acceptable to adopt a child because the application lacks the information required by A.R.S. § 8-105, the court may dismiss the application or permit the applicant to submit supplemental information. If the court dismisses the application, the applicant may submit a subsequent application, in which event the court may consider information contained in the original application.

(c) Court Action. No later than 60 days after receiving the investigative report and recommendation required by A.R.S. § 8-105, the court may:

- (1) certify that the applicant is acceptable to adopt children;
- (2) require further investigation if it finds that additional information is necessary for making an appropriate decision regarding certification; or
- (3) determine that the applicant is unacceptable to adopt children, in which event it must notify the applicant and the person, department, agency, or entity responsible for preparing the certification report of the court's determination, the reason for the denial, and the applicant's right to a hearing on the denial of certification.

(d) Motion for Hearing on Denial of Certification. The applicant may file a motion requesting a hearing on the denial of certification. The motion must be filed no later than 30 days after entry of the minute entry or order denying certification. The court must set an evidentiary hearing that begins no later than 60 days after the filing of the motion. The court must notify the applicant and the person, division, agency, or entity responsible for preparing the certification report of the location, date, and time of the hearing.

(e) Pretrial Conference. On request of a party or on its own, the court may set a pretrial conference.

(f) Access to Information. The applicant may obtain a copy of the information contained in the court's file as prescribed by law. Before providing a copy, the clerk must redact the results of the criminal background check, information obtained from DCS records, and information provided by references, other than names.

(g) Burden of Proof. The burden is on the applicant, or any other party ordered by the court, to show acceptability to adopt by a preponderance of the evidence.

(h) Procedure. The hearing must be informal, and the court must consider all evidence admitted under Rule 104(b), including hearsay. Documents that the parties want the court to consider must be marked and entered into evidence. The court for good cause may continue the hearing.

(i) Findings and Orders. The court must make specific findings of fact concerning the applicant's acceptability to adopt based upon the evidence presented at the hearing. All findings and orders must be in a signed minute entry or written order. The court must advise the applicant of the right to appeal an adverse ruling.



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Arizona Revised Statutes



Arizona Revised Statutes: Title 8 - Child Safety

8-106.01. Putative fathers registry; claim of paternity; adoptive interest

A. A person who is seeking paternity, who wants to receive notice of adoption proceedings and who is the father or claims to be the father of a child shall file notice of a claim of paternity and of his willingness and intent to support the child to the best of his ability with the state registrar of vital statistics in the department of health services. The department of health services shall provide forms for the purpose of filing the notice of a claim of paternity. Forms shall be made available in the department of health services, the office of the clerk of the board of supervisors in each county, every hospital, every licensed child placement agency, the department of economic security, the department of child safety, sheriff's offices, jails, prisons, state department of corrections facilities and department of juvenile corrections facilities.

B. The notice of a claim of paternity may be filed before the birth of the child but shall be filed within thirty days after the birth of the child. The notice of a claim of paternity shall be signed by the putative father and shall include his name and address, the name and last known address of the birth mother and either the birth date of the child or the probable month and year of the expected birth of the child. The putative father who files a notice of a claim of paternity under this section shall notify the registrar of vital statistics of any change of his address. The department of health services shall maintain a confidential registry for this purpose. The department shall only respond to written inquiries of the confidential registry that are received from the court, the division, a licensed adoption agency or a licensed attorney participating or assisting in a direct placement adoption. The department shall provide a certificate signed by the state registrar of vital statistics stating that a diligent search has been made of the registry of notices of claims of paternity from putative fathers listing all filings found or stating that no filing has been found pertaining to the father of the child in question.

C. If the court determines the claimant is not the child's father it shall notify the department of health services and shall order the department to remove that person's name from the putative fathers registry.

D. If the mother denies that the putative father filing the notice of a claim of paternity is the father, the department of health services shall notify the putative father of his responsibility to establish paternity.

E. A putative father who does not file a notice of a claim of paternity as required under this section waives his right to be notified of any judicial hearing regarding the child's adoption and his consent to the adoption is not required, unless he proves, by clear and convincing evidence, both of the following:

1. It was not possible for him to file a notice of a claim of paternity within the period of time specified in subsection B of this section.

2. He filed a notice of a claim of paternity within thirty days after it became possible for him to file.

F. Lack of knowledge of the pregnancy is not an acceptable reason for failure to file. The fact that the putative father had sexual intercourse with the mother is deemed to be notice to the putative father of the pregnancy.

G. When a certificate provided pursuant to subsection B of this section is received by the court, the division, a licensed adoption agency or a licensed attorney participating or assisting in a direct placement adoption from the department that lists filings of a putative father or fathers, the putative father or fathers who filed timely notices of claims of paternity and who have not previously been served shall be served with the notice prescribed in section 8-106, subsection G. A putative father who fails to file a paternity action pursuant to title 25, chapter 6, article 1 within thirty days of completion of service of the notice prescribed in section 8-106 is barred from bringing or maintaining any action to assert any interest in the child.

H. If in any adoption proceeding there is not a showing that a putative father has consented to the adoption or has waived his rights regarding the proposed adoption, the petitioner shall file with the court, before the court enters a final decree of adoption, a certificate from the department of health services signed by the state registrar of vital statistics stating that a diligent search has been made of the registry of notices of claims of paternity from putative fathers and that no filing has been found pertaining to the father of the child in question.

8-272. Psychiatric acute care services; outpatient and inpatient assessments; definitions

A. If a child exhibits behavior that indicates the child may suffer from a mental disorder or is a danger to self or others, an entity may request that the child receive an outpatient assessment or inpatient assessment.

B. A psychologist, psychiatric and mental health nurse practitioner, psychiatrist or physician shall conduct an outpatient assessment at a time and place that is convenient for the psychologist, psychiatric and mental health nurse practitioner, psychiatrist or physician and the child. At the conclusion of the outpatient assessment, the psychologist, psychiatric and mental health nurse practitioner, psychiatrist or physician shall recommend that the child be either:

1. Provided with outpatient treatment services.
2. Admitted to a psychiatric acute care facility for inpatient assessment or inpatient psychiatric acute care services.
3. Provided with residential treatment services.
4. Discharged to the entity without further psychological or psychiatric services because the child does not suffer from a mental disorder, is not a danger to self or others or is not a child with a persistent or acute disability or grave disability.

C. A psychologist, psychiatric and mental health nurse practitioner, psychiatrist or physician shall conduct an inpatient assessment and provide the assessment to the entity within seventy-two hours after a child is admitted to an inpatient assessment facility, excluding weekends and holidays. At the conclusion of the inpatient assessment, the psychologist, psychiatric and mental health nurse practitioner, psychiatrist or physician shall recommend that the child be either:

1. Admitted to a psychiatric acute care facility for inpatient psychiatric acute care services.
2. Discharged to an entity and provided with outpatient treatment services.
3. Provided with residential treatment services.
4. Discharged to the entity without further psychological or psychiatric services because the child does not suffer from a mental disorder, is not a danger to self or others or is not a child with a persistent or acute disability or grave disability.

D. Within twenty-four hours after a child is admitted for an inpatient assessment, excluding weekends and holidays, the entity shall file a motion for approval of admission for inpatient assessment with the juvenile court. The motion shall include all of the following:

1. The name and address of the inpatient assessment facility.
2. The name of the psychologist, psychiatric and mental health nurse practitioner, psychiatrist or physician who is likely to perform the inpatient assessment.
3. The date and time the child was admitted to the inpatient assessment facility.
4. A short statement explaining why the child needs an inpatient assessment.

E. An entity that files a motion under subsection D of this section shall provide a copy of the motion to all of the parties and their attorneys. The court shall rule on the motion without response from any party, except that any party may request a hearing to review the child's admission for an inpatient assessment. If the court grants a hearing, the court shall set the hearing on an accelerated basis.

F. If the psychologist, psychiatric and mental health nurse practitioner, psychiatrist or physician who performed the outpatient assessment or inpatient assessment of the child recommends that the child receive inpatient acute care psychiatric services, the entity may file a motion for inpatient psychiatric acute care services with the juvenile court. If the psychologist, psychiatric and mental health nurse practitioner, psychiatrist or physician makes this recommendation after conducting an inpatient assessment, the entity shall file the motion for inpatient psychiatric acute care services not later than twenty-four hours after receiving the inpatient assessment, excluding weekends and holidays. The motion shall include all of the following:

1. A copy of the written report of the results of the inpatient assessment or outpatient assessment, including:

- (a) The reason why inpatient psychiatric acute care services are in the child's best interests.
- (b) The reason why inpatient psychiatric acute care services are the least restrictive available treatment.
- (c) A diagnosis of the child's condition that requires inpatient psychiatric acute care services.
- (d) The estimated length of time that the child will require inpatient psychiatric acute care services.

2. A written statement from the medical director of the proposed inpatient psychiatric acute care facility or the medical director's designee that the facility's services are appropriate to meet the child's mental health needs.

G. As soon as practicable after the filing of a motion under subsection D or F of this section, the court shall appoint an attorney for the child if an attorney has not been previously appointed. The court may also appoint a guardian ad litem for the child.

H. If a motion is filed pursuant to subsection F of this section, the court shall hold a hearing on the motion within seventy-two hours after the motion is filed, excluding weekends and holidays. If the child has been admitted for an inpatient assessment, the child may remain at the inpatient assessment facility until the court rules on the motion.

I. If a child is admitted for an inpatient assessment and an entity fails to file a motion pursuant to and within the time limit prescribed in subsection F of this section, the child shall be discharged from the inpatient assessment facility.

J. If the court approves the admission of the child for inpatient psychiatric acute care services, the court shall find by clear and convincing evidence that both:

- 1. The child is suffering from a mental disorder or is a danger to self or others and requires inpatient psychiatric acute care services.
- 2. Available alternatives to inpatient psychiatric acute care services were considered, but that inpatient psychiatric acute care services are the least restrictive available alternative.

K. The court shall review the child's continuing need for inpatient psychiatric acute care services at least every sixty days after the date of the treatment order. The inpatient psychiatric acute care facility shall submit a progress report to the court at least five days before the review and shall provide copies of the progress report to all of the parties, including the child's attorney and guardian ad litem. On its own motion or on the motion of a party, the court may hold a hearing on the child's continuing need for inpatient psychiatric acute care services. If requested by the

child, the court shall hold a hearing unless the court has held a review hearing within sixty days before the child's request. If requested by the child, the court may hold a hearing at any time for good cause shown. The progress report shall make recommendations and shall include at least the following:

1. The nature of the treatment provided, including any medications and the child's current diagnosis.
2. The child's need for continued inpatient psychiatric acute care services, including the estimated length of the services.
3. A projected discharge date.
4. The level of care required by the child and the potential placement options that are available to the child on discharge.
5. A statement from the medical director of the inpatient psychiatric acute care facility or the medical director's designee as to whether inpatient psychiatric acute care services are necessary to meet the child's mental health needs and whether the facility that is providing the inpatient psychiatric acute care services to the child is the least restrictive available alternative.

L. If a child is transferred from an inpatient psychiatric acute care facility to another inpatient psychiatric acute care facility, no new inpatient assessment or outpatient assessment is required. Unless the court orders otherwise due to an emergency, an entity shall file a notice of transfer with the juvenile court at least five days before the transfer of the child. The notice shall include all of the following:

1. The name and address of the facility to which the child is being transferred and the date of the transfer.
2. A statement from the medical director of the receiving inpatient psychiatric acute care facility or the medical director's designee that the receiving facility is an appropriate facility to meet the child's mental health needs and that it is the least restrictive available alternative.
3. A statement that the entity has contacted the child's attorney or guardian ad litem and whether the child or the child's attorney or guardian ad litem opposes the transfer.

M. Any party may request a hearing to review the transfer of a child to another inpatient psychiatric acute care facility pursuant to subsection L of this section.

N. Within fifteen days after a child is discharged, the inpatient psychiatric acute care facility shall prepare a discharge summary. Within twenty days after a child is discharged, an entity shall file a notice of discharge with the juvenile court. The notice shall include:

1. A statement of the child's current placement.

2. A statement of the mental health services that are being provided to the child and the child's family.

3. A copy of the discharge summary that is prepared by a mental health professional.

O. When possible, the child's attorney shall communicate with the child within twenty-four hours after a motion is filed pursuant to subsection D or F of this section, excluding weekends and holidays. The child's attorney shall discuss treatment recommendations and shall advise the child of the child's right to request a hearing. The child's attorney or designee shall attend all court hearings related to the child's inpatient assessment or inpatient psychiatric acute care services and shall be prepared to report to the court the child's position on any recommended assessments or treatment. The child may attend any hearing unless the court finds by a preponderance of the evidence that allowing the child to attend would not be in the child's best interests.

P. If the child is a dually adjudicated child, the entity that requests an order for inpatient psychiatric acute care services shall notify any other entity of all notices, motions, hearings or other proceedings related to the provision of inpatient psychiatric acute care services. Any entity may attend and participate in all hearings or other proceedings relating to the provision of inpatient psychiatric acute care services to a dually adjudicated child.

Q. Section 8-273 applies if residential treatment services are recommended after an inpatient assessment or outpatient assessment or any inpatient psychiatric acute care treatment. Section 8-341.01 applies if a child who is adjudicated delinquent or incorrigible and who is subject to the jurisdiction of the juvenile court requires residential treatment services. Section 41-2815 applies if a child who is committed to the department of juvenile corrections requires residential treatment services.

R. Information and records that are obtained or created in the course of any assessment, examination or treatment are subject to the confidentiality requirements of section 36-509, except that information and records may be provided to the department of juvenile corrections pursuant to section 8-341.

S. For the purposes of this section:

1. "Child" means a person who is under eighteen years of age or, if the juvenile court has retained jurisdiction over the person pursuant to section 8-202, subsection H, under nineteen years of age and who is either:

(a) Found to be dependent or temporarily subject to court jurisdiction pending an adjudication of a dependency petition.

(b) In the temporary custody of the department pursuant to section 8-821.

(c) Detained in a juvenile court detention facility.

(d) Committed to the department of juvenile corrections.

(e) Found to be delinquent and subject to probation supervision.

2. "Psychiatric and mental health nurse practitioner" has the same meaning prescribed in section 36-501.

8-273. Residential treatment services; definition

A. If a child exhibits behavior that indicates the child may suffer from a mental disorder or if it is recommended as a result of an outpatient assessment or inpatient assessment pursuant to section 8-272 that a child receive residential treatment services, an entity may file a motion requesting that the juvenile court order a child to receive residential treatment services. If the motion states that all parties, including counsel for the child, have been contacted and are in agreement, the court is not required to set a hearing on the motion.

B. A motion for residential treatment services shall be supported by a written psychological, psychiatric or medical assessment recommending residential treatment services. The court may waive the written assessment on a finding of good cause. The written assessment shall include at least the following:

1. The reason why residential treatment services are in the child's best interests.
2. The reason why residential treatment services are the least restrictive treatment available.
3. The reason why the child's behavioral, psychological, social or mental health needs require residential treatment services.
4. The estimated length of time that the child will require residential treatment services.

C. A motion for residential treatment services shall be supported by a written statement from the medical or clinical director of the residential treatment facility or the director's designee that the facility's services are appropriate to meet the child's needs.

D. As soon as practicable after an entity files a motion under subsection A of this section, the court shall appoint an attorney for the child if an attorney has not been previously appointed. The court may also appoint a guardian ad litem for the child.

E. The child's attorney shall discuss the treatment recommendations with the child. The child's attorney or designee shall attend all court hearings related to the child's placement in a residential treatment facility and shall be prepared to report to the court on the child's position regarding any recommendations or requests related to the provision of residential treatment services. The child may appear at any hearing, unless the court finds by a preponderance of the evidence that allowing the child to attend the hearing would not be in the child's best interests.

F. If the court orders a child to receive residential treatment services, the court shall find by clear and convincing evidence that both:

1. The child requires residential treatment services to address the child's behavioral, psychological, social or mental health needs.
2. Available alternatives to residential treatment services were considered, but that residential treatment services are the least restrictive available alternative.

G. The court shall review the child's continuing need for residential treatment services at least every sixty days from the date of the treatment order. The residential treatment facility shall submit a progress report to the court at least five days before the review and shall provide copies of its report to all of the parties, including the child's attorney and guardian ad litem. The progress report shall include the recommendations of the child's treatment facility and shall include at least the following:

1. The nature of the treatment provided, including any medications and the child's current diagnosis.
2. The child's need for continued residential treatment services, including the estimated length of the services.
3. A projected discharge date.
4. The level of care required by the child and the potential placement options that are available to the child on discharge.
5. A statement from the medical or clinical director of the residential treatment services facility or the director's designee as to whether residential treatment services are necessary to meet the child's needs and whether the facility that is providing the residential treatment services to the child is the least restrictive available alternative.

H. On its own motion or on the motion of a party, the court may schedule a hearing concerning the child's continuing need for residential treatment services. If requested by the child, the court shall schedule a hearing unless the court has held a review hearing within sixty days before the child's request. If requested by the child, the court may hold a hearing at any time for good cause shown.

I. If the child is a dually adjudicated child, the entity that requests an order for residential treatment services shall notify any other entity of all notices, motions, hearings or other proceedings related to the provision of residential treatment services. Any entity may attend and participate in all hearings or other proceedings relating to the provision of residential treatment services to a dually adjudicated child.

J. Information or records that are obtained or created pursuant to any assessment, examination or treatment are subject to the confidentiality requirements of section 36-509, except that

information and records may be provided to the department of juvenile corrections pursuant to section 8-341.

K. This section does not apply to a child who is either:

1. Committed to the department of juvenile corrections. Section 41-2815 applies if a child who is committed to the department of juvenile corrections requires residential treatment services.

2. Adjudicated delinquent or incorrigible and who is subject to the jurisdiction of the juvenile court. Section 8-341.01 applies if a child who is adjudicated delinquent or incorrigible and who is subject to the jurisdiction of the juvenile court requires residential treatment services.

L. For the purposes of this section, "child" means a person who is under eighteen years of age or, if the juvenile court has retained jurisdiction over the person pursuant to section 8-202, subsection H, under nineteen years of age and who is either:

1. Found to be dependent or temporarily subject to court jurisdiction pending an adjudication of a dependency petition.

2. In the temporary custody of the department pursuant to section 8-821.

8-451. Department; purpose

A. The department of child safety is established.

B. The primary purpose of the department is to protect children. To achieve this purpose, the department shall do and focus equally on the following:

1. Investigate reports of abuse and neglect.

2. Assess, promote and support the safety of a child in a safe and stable family or other appropriate placement in response to allegations of abuse or neglect.

3. Work cooperatively with law enforcement regarding reports that include criminal conduct allegations.

4. Without compromising child safety, coordinate services to achieve and maintain permanency on behalf of the child, strengthen the family and provide prevention, intervention and treatment services pursuant to this chapter.

8-514. Placement in foster homes

A. Subject to the provisions of section 8-514.01, the division or a licensed child welfare agency if so authorized in its license may place a child in a licensed foster home for care or for adoption. Notwithstanding any law to the contrary, the division or a licensed child welfare agency may

place a child in excess of the number of children allowed and identified in a foster parent's license if the division or agency reasonably believes the foster home has the ability to safely handle additional children, there are no outstanding concerns, deficiencies, reports or investigations known by the division regarding the foster home, and the child meets any of the following criteria:

1. The child is part of a sibling group that currently resides in the foster home.
2. The child is part of a sibling group that is being considered for placement in a foster home but because of the maximum child limit would otherwise have to be separated.
3. The child previously resided in the foster home.
4. The child is a kinship placement for the foster home.

B. The department shall place a child in the least restrictive type of placement available, consistent with the best interests of the child. The order for placement preference is as follows:

1. With a parent.
2. With a grandparent.
3. In kinship care with another member of the child's extended family, including a person who has a significant relationship with the child. A foster parent or kinship caregiver with whom a child under three years of age has resided for nine months or more is presumed to be a person who has a significant relationship with the child.
4. In licensed family foster care.
5. In therapeutic foster care.
6. In a group home.
7. In a residential treatment facility.

C. Notwithstanding subsection B of this section, the order for placement preference of a Native American child is as follows:

1. With a member of the child's extended family.
2. In a licensed family foster home approved or specified by the child's tribe.
3. In an Indian foster home licensed or approved by an authorized non-Indian licensing authority.

4. In an institution approved by the Indian tribe or operated by an Indian organization that has a program suitable to meet the Indian child's needs pursuant to 25 United States Code chapter 21.

D. At the time of placement there shall be presented to the foster parents, by the agency or division placing the child, a written summary of known, unprivileged information regarding the child, including the following:

1. Demographic information.

2. Type of custody and previous placement.

3. Pertinent family information including but not limited to the names of family members who, by court order, may not visit the child.

4. Known or available medical history including but not limited to:

(a) Allergies.

(b) Immunizations.

(c) Childhood diseases.

(d) Physical disabilities.

(e) Other idiosyncrasies.

(f) The child's last doctor, if known.

5. A summary of the child's history of adjudication on acts of delinquency, as may be public record and available in the file of the clerk of the superior court.

E. The responsibility of the agency or the division for a child placed in a foster home shall be defined in writing and accepted by the person receiving the child. The agency or division shall make available to the foster parents a method of acquiring emergency information that may be necessary to deal with situations that may arise pursuant to their responsibilities as foster parents.

F. Every foster home shall maintain a record of the children received, which shall include facts in regard to the children and their care and shall be in the form and kept in the manner prescribed by the division.

G. In addition to any other relevant factors, the department shall consider the following in determining whether a placement is in the best interests of the child:

1. The caregiver is interested in providing permanence for the child if reunification efforts ultimately fail.

2. The expressed wishes of the birth parent and child, if applicable, unless the wishes are contrary to law.
3. The relationship of the caregiver with the child and the child's family.
4. The proximity of the placement home to the parents' home and the child's current school or school district.
5. The strengths and parenting style of the caregiver in relation to the child's behavior and needs.
6. The caregiver's willingness to communicate and interact with the birth family to support visitation and the reunification process.
7. The caregiver's ability and willingness to accept placement of the child and all or any of the child's siblings.
8. If any sibling will be placed separately, the caregiver's ability and willingness to provide or assist in maintaining frequent visitation or other ongoing contact between the child and the child's sibling.
9. The child's fit with the family with regard to age, gender and sibling relationships.
10. If the child has chronic behavioral health needs:
 - (a) Whether the child's behavior will place other children in the home at risk.
 - (b) The caregiver's ability to provide the necessary level of supervision to prevent harm to the child or others by the child.
11. Whether placement in the home would comply with the placement preferences prescribed by 25 United States Code section 1915, if applicable.

H. Within thirty days after a dependent child who is at least eight years of age is placed in out-of-home care, unless otherwise recommended by a doctor or therapist, the department shall ensure that the child receives age-appropriate and developmentally appropriate materials and resources about sexual abuse, child sex trafficking and exploitation. The materials and resources must include a definition of sexual abuse, information about the dangers of online and in-person predators and methods for reporting abuse. The materials and resources may include a twenty-four-hour hotline telephone number.

8-514.01. Placement of children with developmental disabilities

A. All foster placements of children with developmental disabilities made by the division shall be made to child developmental homes for children with developmental disabilities that are operated or licensed by the department of economic security pursuant to title 36, chapter 5.1,

article 3 and that provide specialized programs for children with developmental disabilities, except that placements of children with developmental disabilities to foster homes licensed pursuant to this article may be made if the division determines that such placement is in the best interests of the child.

B. A regular foster home shall apply for certification as a child developmental certified home pursuant to section 36-593.01 if either of the following applies:

1. The department of child safety has placed a foster child with a developmental disability in the foster home.
2. A foster child in the foster home has been determined by the department of economic security to have a developmental disability.

C. Subsection B of this section does not apply to a regular foster home or group foster home with a foster child with a developmental disability who was placed in the home before August 6, 2016. Any such placements shall continue to be licensed, certified and monitored by both the department of child safety and the department of economic security.

8-514.02. Placement of child

A. The department may place a child with a parent, a relative or a person who has a significant relationship with a child.

B. During an emergency situation when a child must be placed, the department shall not place a child with a relative or a person who has a significant relationship with the child unless each adult member of the relative's or person's household consents to both of the following:

1. A preliminary state and federal name-based background check.
2. Within fifteen calendar days from the date the name-based background check is conducted, the submission of a full set of the person's fingerprints to obtain a state and federal criminal records check pursuant to section 41-1750 and Public Law 92-544. The department of public safety may exchange this fingerprint data with the federal bureau of investigation.

C. Except for a placement pursuant to section 8-861, before a child who has been in out-of-home care is placed with a parent, the department shall conduct a background check pursuant to section 41-1750 of all adult household members and all adults who have been identified as having caregiving responsibilities of the child in the home. The results of this background check shall be considered when making a safety assessment of the placement.

D. The department shall immediately remove a child from a home if any adult household member fails to provide fingerprints as provided in subsection B of this section. If placement of the child in the home was ordered by the court, the department shall immediately request a change of physical custody from the court.

E. Unless approved in writing by the department, the parent or relative shall not allow the child to:

1. Be placed with any other person.
2. Have any contact with the allegedly abusive or neglectful parent, guardian or custodian or other person designated by the department.
3. Leave this state.

F. If a child is placed with a parent or relative pursuant to this section, the department shall inform the parent or relative about available financial and nonfinancial services and eligibility requirements and shall assist the parent or relative to complete the necessary applications.

8-514.03. Kinship foster care; requirements; investigation

A. The department shall establish kinship foster care services for a child who has been removed from the child's home and who is in the custody of the department. The program shall promote the placement of the child with the child's relative or a person with a significant relationship with the child for kinship foster care.

B. A kinship foster care parent applicant who is not a licensed foster care parent shall be at least eighteen years of age. The applicant and each member of the applicant's household who is at least eighteen years of age shall submit a full set of fingerprints to the department of child safety for the purpose of obtaining a state and federal criminal records check pursuant to section 41-1750 and Public Law 92-544. The department of public safety may exchange this fingerprint data with the federal bureau of investigation. The department of child safety shall determine if the applicant is able to meet the child's health and safety needs by conducting one or more home visits and interviewing the applicant. The department of child safety may interview other household members, review the applicant's personal and professional references and conduct department of child safety central registry checks.

C. If the department determines that a kinship foster care placement is not in the best interest of the child, the department shall provide written notification to the applicant within fifteen business days. The notice shall include the specific reason for denial, the applicant's right to appeal and the process for reviewing the decision.

D. A kinship foster care parent may be eligible to receive the following financial services for the child:

1. Full foster care benefits, including payment if the kinship foster care parent becomes a licensed foster care home or if the kinship foster care parent obtains a restricted license pursuant to section 8-509, subsection C.
2. Temporary assistance for needy families cash assistance payments for a child only case and supplemental financial support.

E. The department shall establish procedures for child welfare workers to inform kinship foster care families about available financial and nonfinancial services and eligibility requirements and shall assist the families in completing the necessary application.

F. If a family declines to apply for financial services, the family shall sign a statement indicating that the family declined services. The statement does not prevent the family from making application in the future. The worker shall provide a copy of the statement to the family.

G. The department shall provide nonfinancial services for a kinship foster care parent through existing means or referral. Nonfinancial services may include:

1. Family assessment.
2. Case management.
3. Child day care.
4. Housing search and relocation.
5. Parenting skills training.
6. Supportive intervention and guidance counseling.
7. Transportation.
8. Emergency services.
9. Parent aid services.
10. Respite services.
11. Additional services that the department determines are necessary to meet the needs of the child and family.

8-514.04. Kinship care program; requirements

A. The kinship care program is established in the department. The program shall:

1. Streamline, expedite and coordinate existing services and referrals.
2. Preserve families.
3. Meet the protection, developmental, cultural and permanency needs of children.
4. Enable families to sustain support for a child who cannot live with the child's parents.

5. Promote the best interests of the child.

B. The department shall adopt rules to prescribe application and eligibility requirements that provide an expedited process for kinship care families to receive child only temporary assistance for needy families.

C. The department shall use existing measures for outreach and marketing in order to facilitate community awareness regarding the program.

D. The department of economic security shall submit an amendment to modify the temporary assistance for needy families state plan to the United States department of health and human services. The amendment shall waive the face-to-face requirement for relative caregivers applying for temporary assistance for needy families, for a child only case.

E. Any kinship care family that applies for or receives cash assistance under this section on behalf of a dependent child who is under eighteen years of age shall conform to the requirements established pursuant to sections 46-292 and 46-295 and department of economic security rule unless the requirements have been modified pursuant to this section.

F. The department shall keep confidential information it obtains pursuant to this section.

8-514.05. Foster care provider and department access to child health information; consent to treatment

A. If a health plan, a health care provider licensed or certified pursuant to title 32 or title XIX of the social security act or a health care institution licensed pursuant to title 36, chapter 4 has provided or is providing services to a child placed in out-of-home placement and has custody or control of that child's medical or behavioral health records, the plan, provider or institution must provide the following to the child's foster parent, group home staff, foster home staff, relative or other person or agency in whose care the child is currently placed pursuant to this article or article 6 of this chapter:

1. Medical records.

2. Behavioral health records.

3. Information relating to the child's condition and treatment.

4. The child's prescription and nonprescription drugs, medications, durable medical equipment, devices and related information.

B. If a health plan, a health care provider licensed or certified pursuant to title 32 or title XIX of the social security act or a health care institution licensed pursuant to title 36, chapter 4 has provided or is providing services to a child for whom the department has legal custody or is providing foster care or substance abuse services and has custody or control of that child's

medical or behavioral health records, the plan, provider or institution must provide the following to the department's employees who are involved in the child's case management:

1. Medical records.
2. Behavioral health records.
3. Information relating to the child's condition and treatment.
4. The child's prescription and nonprescription drugs, medications, durable medical equipment, devices and related information.

C. If the department has temporary custody of a child pursuant to this title or has legal custody pursuant to a court order, the department:

1. May consent to any of the following:

- (a) Evaluation and treatment for emergency conditions that are not life threatening.
- (b) Routine medical and dental treatment and procedures, including early periodic screening diagnosis and treatment services, and services by health care providers to relieve pain or treat symptoms of common childhood illnesses or conditions.
- (c) Surgery.
- (d) Blood transfusions.
- (e) General anesthesia.
- (f) Testing for the presence of the human immunodeficiency virus.

2. May not consent to abortions.

3. To the extent possible, shall consult with each biological parent of the child whose parental rights have not been terminated when making health care decisions for a child in the department's custody.

D. The foster parent, group home staff, foster home staff, relative or other person or agency in whose care the child is currently placed pursuant to this article or article 6 of this chapter:

1. May give consent for the following:

- (a) Evaluation and treatment for emergency conditions that are not life threatening.

(b) Routine medical and dental treatment and procedures, including early periodic screening diagnosis and treatment services, and services by health care providers to relieve pain or treat symptoms of common childhood illnesses or conditions.

(c) Testing for the presence of the human immunodeficiency virus.

2. Shall not consent to:

(a) General anesthesia.

(b) Surgery.

(c) Blood transfusions.

(d) Abortions.

8-514.06. Out-of-home placement; documents; definition

A. If a child who is in the custody of the department and who is at least sixteen years of age is placed in out-of-home placement, the out-of-home placement provider:

1. Within sixty days after placement, shall obtain and provide the child access to the documents if the out-of-home placement provider is a child welfare agency.

2. May obtain and provide the child access to the documents if the out-of-home placement provider is a licensed foster home or a kinship foster home.

B. If an out-of-home placement provider requests a document pursuant to subsection A of this section and the department of child safety verifies the current placement, the department of health services or the department of transportation, as applicable, shall provide the out-of-home placement provider with the requested document that the relevant department maintains.

C. The department of health services shall waive any fees charged by an agency to provide a document prescribed by subsection A of this section.

D. The department of child safety shall provide a foster parent or kinship foster parent with the social security number of a child in the foster parent's or kinship foster parent's care for a lawful purpose within ninety days after the foster parent's or kinship foster parent's request.

E. The department of child safety shall provide a child who is in its custody and who is at least fourteen years of age with the child's social security card within one hundred twenty days after receipt of a written request from the child.

F. The department shall request a birth certificate for a child who is in the custody of the department and who is placed in out-of-home placement within thirty days after the child's

placement, unless the child is returned to custody of the child's parent within that thirty-day period.

G. For the purposes of this section, "documents" means all of the following:

1. The child's birth certificate.
2. The child's nonoperating identification license.
3. The child's immunization records.

8-514.07. Kinship foster care; relative identification and notification; due diligence search

A. If a child is taken into temporary custody, as part of the ongoing search, the department shall use due diligence in an initial search to identify and notify adult relatives of the child and persons with a significant relationship with the child within thirty days after the child is taken into temporary custody.

B. The search to identify adult relatives of the child or persons with a significant relationship with the child must include:

1. An interview with the child's parent.
2. An interview with the child.
3. Interviews with identified adult relatives.
4. Interviews with other persons who are likely to have information regarding the location of adult relatives of the child or persons with a significant relationship with the child.
5. A comprehensive search of available records that are likely to help identify and locate a person being sought, including:
 - (a) Employment records.
 - (b) Vehicle registration records.
 - (c) Child support enforcement records.
 - (d) Utility accounts.
 - (e) Previous residential addresses.
 - (f) Law enforcement records.

(g) State department of corrections records.

6. Thorough inquiries by the court of the parties during case hearings.

7. Any other means the department deems likely to identify adult relatives of the child or persons with a significant relationship with the child.

C. Within thirty days after the child is taken into temporary custody and at each subsequent review and report hearing or permanency planning hearing, the department shall file with the court documentation regarding attempts made pursuant to this section or as otherwise required by the court to identify and notify adult relatives of the child and persons with a significant relationship with the child. This documentation shall include a detailed narrative explaining the department's efforts to consider each potential placement and the specific outcome.

D. The department shall provide notice to adult relatives of the child and persons with a significant relationship with the child who are identified through the search requirements of this section. The notice shall do the following:

1. Specify that the child has been or is being removed from the child's parental custody.
2. Explain the options an adult relative of the child or a person with a significant relationship with the child has to participate in the care or placement of the child.
3. Explain that financial assistance and other forms of support are available to adult relatives of the child and persons with a significant relationship with the child with whom the child is placed.
4. Describe the process for becoming a licensed foster parent and the additional services and support that are available for children placed in approved foster homes.
5. Require an adult relative of the child or a person with a significant relationship with the child to respond within thirty days after receiving notice that the child has been removed from the home.

E. If the child is not placed with an adult relative of the child or person with a significant relationship with the child or the child is placed with an adult relative or person with a significant relationship with the child who is unable or unwilling to provide permanent placement for the child, the department shall continue to conduct an ongoing search for adult relatives of the child or persons with a significant relationship with the child. The department shall engage in search efforts if ordered by the court, a change in the child's placement occurs or a party shows that the search is in the best interest of the child.

F. The department shall file with the court documentation of both of the following:

1. The completed due diligence search efforts. This documentation shall include:

- (a) The names of and relevant information about adult relatives of the child or persons with a significant relationship with the child.
- (b) The steps taken by the department to locate and contact adult relatives of the child or persons with a significant relationship with the child.
- (c) The responses received from adult relatives of the child or persons with a significant relationship with the child.
- (d) The dates of each attempted or completed contact with an adult relative of the child or a person with a significant relationship with the child.
- (e) The reasons why an adult relative of the child or a person with a significant relationship with the child was not considered for temporary or permanent placement of the child.

2. All efforts for placement of the child through an interstate compact agreement pursuant to section 8-548. This documentation shall include:

- (a) The names of adult relatives of the child or persons with a significant relationship with the child who were considered for an interstate placement.
- (b) Any pending placement of the child through an interstate compact agreement.
- (c) All potential out-of-state placements outside of an interstate compact agreement and the reasons such placements have not been initiated.

G. If an out-of-state placement option exists and the department has failed to file a request with the receiving state pursuant to the requirements of an interstate compact agreement pursuant to section 8-548, the court shall enter a finding that the department has not made a due diligence search and shall order the department to file a request with the receiving state pursuant to the terms of the interstate compact agreement.

8-514.08. Educational decisions; parent contact information; inability to locate

A. If a child in the custody of the department is in out-of-home care and is receiving or in need of services pursuant to title 15, chapter 7, article 4, the department shall promptly notify the child's public education agency of the name and contact information for the child's parent, as defined in 34 Code of Federal Regulations section 300.30, unless a court has ordered otherwise.

B. If a public education agency notifies the department that the child requires an initial evaluation for special education and related services and the parent identified pursuant to subsection A of this section cannot be located or does not attempt to participate, the department shall promptly notify the public education agency of a parent, as defined in 34 Code of Federal Regulations section 300.30, who can consent to or refuse the initial evaluation in accordance with 20 United States Code section 1414.

C. When the biological or adoptive parent of the child attempts to act as the parent, the biological or adoptive parent is presumed to be the parent for the purposes of this section.

8-533. Petition; who may file; grounds

A. Any person or agency that has a legitimate interest in the welfare of a child, including a relative, a foster parent, a physician, the department or a private licensed child welfare agency, may file a petition for the termination of the parent-child relationship alleging grounds contained in subsection B of this section.

B. Evidence sufficient to justify the termination of the parent-child relationship shall include any one of the following, and in considering any of the following grounds, the court shall also consider the best interests of the child:

1. That the parent has abandoned the child.
2. That the parent has neglected or wilfully abused a child. This abuse includes serious physical or emotional injury or situations in which the parent knew or reasonably should have known that a person was abusing or neglecting a child.
3. That the parent is unable to discharge parental responsibilities because of mental illness, mental deficiency or a history of chronic abuse of dangerous drugs, controlled substances or alcohol and there are reasonable grounds to believe that the condition will continue for a prolonged indeterminate period.
4. That the parent is deprived of civil liberties due to the conviction of a felony if the felony of which that parent was convicted is of such nature as to prove the unfitness of that parent to have future custody and control of the child, including murder of another child of the parent, manslaughter of another child of the parent or aiding or abetting or attempting, conspiring or soliciting to commit murder or manslaughter of another child of the parent, or if the sentence of that parent is of such length that the child will be deprived of a normal home for a period of years.
5. That the potential father failed to file a paternity action within thirty days of completion of service of notice as prescribed in section 8-106, subsection G.
6. That the putative father failed to file a notice of claim of paternity as prescribed in section 8-106.01.
7. That the parents have relinquished their rights to a child to an agency or have consented to the adoption.
8. That the child is being cared for in an out-of-home placement under the supervision of the juvenile court, the division or a licensed child welfare agency, that the agency responsible for the care of the child has made a diligent effort to provide appropriate reunification services and that one of the following circumstances exists:

(a) The child has been in an out-of-home placement for a cumulative total period of nine months or longer pursuant to court order or voluntary placement pursuant to section 8-806 and the parent has substantially neglected or wilfully refused to remedy the circumstances that cause the child to be in an out-of-home placement.

(b) The child who is under three years of age has been in an out-of-home placement for a cumulative total period of six months or longer pursuant to court order and the parent has substantially neglected or wilfully refused to remedy the circumstances that cause the child to be in an out-of-home placement, including refusal to participate in reunification services offered by the department.

(c) The child has been in an out-of-home placement for a cumulative total period of fifteen months or longer pursuant to court order or voluntary placement pursuant to section 8-806, the parent has been unable to remedy the circumstances that cause the child to be in an out-of-home placement and there is a substantial likelihood that the parent will not be capable of exercising proper and effective parental care and control in the near future.

9. That the identity of the parent is unknown and continues to be unknown following three months of diligent efforts to identify and locate the parent.

10. That the parent has had parental rights to another child terminated within the preceding two years for the same cause and is currently unable to discharge parental responsibilities due to the same cause.

11. That all of the following are true:

(a) The child was cared for in an out-of-home placement pursuant to court order.

(b) The agency responsible for the care of the child made diligent efforts to provide appropriate reunification services.

(c) The child, pursuant to court order, was returned to the legal custody of the parent from whom the child had been removed.

(d) Within eighteen months after the child was returned, pursuant to court order, the child was removed from that parent's legal custody, the child is being cared for in an out-of-home placement under the supervision of the juvenile court, the division or a licensed child welfare agency and the parent is currently unable to discharge parental responsibilities.

12. Clear and convincing evidence that the parent committed a sexual assault against the petitioning parent and the child was conceived as a result of the sexual assault. If the parent who is the subject of the petition pleads guilty to or is convicted of a violation of section 13-1406 or a violation of an offense in another jurisdiction that if committed in this state would be a violation of section 13-1406, the court may accept the guilty plea or conviction as evidence that the child was conceived as a result of a sexual assault by that parent. For the purposes of this paragraph:

(a) "Oral sexual contact" has the same meaning prescribed in section 13-1401.

(b) "Sexual assault" means intentionally or knowingly engaging in sexual intercourse or oral sexual contact with a person without the consent of that person.

(c) "Sexual intercourse" has the same meaning prescribed in section 13-1401.

C. Evidence considered by the court pursuant to subsection B of this section shall include any substantiated allegations of abuse or neglect committed in another jurisdiction.

D. In considering the grounds for termination prescribed in subsection B, paragraph 8 or 11 of this section, the court shall consider the availability of reunification services to the parent and the participation of the parent in these services.

E. In considering the grounds for termination prescribed in subsection B, paragraph 8 of this section, the court shall not consider the first sixty days of the initial out-of-home placement pursuant to section 8-806 in the cumulative total period.

F. The failure of an alleged parent who is not the child's legal parent to take a test requested by the department or ordered by the court to determine if the person is the child's natural parent is prima facie evidence of abandonment unless good cause is shown by the alleged parent for that failure.

8-807. DCS information; public record; use; confidentiality; violation; classification

A. DCS information shall be maintained by the department as required by federal law as a condition of the allocation of federal monies to this state. All exceptions for the public release of DCS information shall be construed as openly as possible under federal law.

B. The department, or a person who receives DCS information pursuant to this subsection, shall provide DCS information to a federal agency, a state agency, a tribal agency, a county or municipal agency, a law enforcement agency, a prosecutor, an attorney or a guardian ad litem representing a child victim of crime pursuant to article II, section 2.1, Constitution of Arizona, a school, a community service provider, a contract service provider or any other person that is providing services pursuant to this article or article 9, 10, 11, 12, 13 or 14 of this chapter:

1. To meet its duties to provide for the safety and permanency of a child, provide services to a parent, guardian or custodian or provide services to family members to strengthen the family pursuant to this article or article 9, 10, 11, 12, 13 or 14 of this chapter.

2. To enforce or prosecute any violation involving child abuse or neglect or to assert the rights of the child as a victim of a crime.

3. To provide information to a defendant after a criminal charge has been filed as required by an order of the criminal court.

4. To help investigate and prosecute any violation involving domestic violence as defined in section 13-3601 or violent sexual assault as prescribed in section 13-1423.

C. The department shall disclose DCS information to a court, a party in a dependency or termination of parental rights proceeding or the party's attorney, the foster care review board or a court appointed special advocate for the purposes of and as prescribed in this title.

D. The department shall disclose DCS information to a domestic relations, family or conciliation court if the DCS information is necessary to promote the safety and well-being of children. The court shall notify the parties that it has received the DCS information.

E. A person or agent of a person who is the subject of DCS information shall have access to DCS information concerning that person.

F. The department may provide:

1. DCS information to confirm, clarify, correct or supplement information concerning an allegation or actual instance of child abuse or neglect that has been made public by a source or sources outside the department.

2. DCS information to a person who is conducting bona fide research, the results of which might provide DCS information that is beneficial in improving the department.

3. Access to DCS information to the parent, guardian or custodian of a child if the DCS information is reasonably necessary to promote the safety, permanency and well-being of the child.

4. DCS information if an employee of the department has a reasonable belief that exigent circumstances exist. For the purposes of this paragraph, "exigent circumstances" means a condition or situation in which the death of or serious injury to a child will likely result in the near future without immediate intervention.

G. The department shall disclose DCS information to a county medical examiner or an alternate medical examiner directing an investigation into the circumstances surrounding a death pursuant to section 11-593.

H. Access to DCS information in the central registry shall be provided as prescribed in section 8-804.

I. To provide oversight of the department, the department shall provide access to DCS information to the following persons, if the DCS information is reasonably necessary for the person to perform the person's official duties:

1. Federal or state auditors.

2. Persons conducting any accreditation deemed necessary by the department.
3. A standing committee of the legislature or a committee appointed by the president of the senate or the speaker of the house of representatives for purposes of conducting investigations related to the legislative oversight of the department. This information shall not be further disclosed unless a court has ordered the disclosure of this information, the information has been disclosed in a public or court record, or the information has been disclosed in the course of a public meeting or court proceeding.
4. A legislator who requests DCS information in the regular course of the legislator's duties. A legislator may discuss this information with another legislator. This information shall not be further disclosed unless a court has ordered the disclosure of this information, the information has been disclosed in a public or court record, or the information has been disclosed in the course of a public meeting or court proceeding. To request a file pursuant to this paragraph:
 - (a) The legislator shall submit a written request for DCS information to the presiding officer of the body of which the state legislator is a member. The request shall state the name of the person whose case file is to be reviewed and any other information that will assist the department in locating the file. The presiding officer may authorize a legislative staff member to attend with the legislator any meeting to review the file.
 - (b) The presiding officer shall forward the request to the department within five working days of the receipt of the request.
 - (c) The department shall make the necessary arrangements for the legislator to review the file at an office of the department, chosen by the legislator, within ten working days.
5. A citizen review panel as prescribed by federal law, a child fatality review team as provided in title 36, chapter 35 and the office of ombudsman-citizens aide.
6. An independent oversight committee established pursuant to section 41-3801.
7. The governor who shall not disclose any information unless a court has ordered the disclosure of the information, the information has been disclosed in a public or court record or the information has been disclosed in the course of a public meeting or court proceeding.
- J. A person who has been denied DCS information regarding a fatality or near fatality caused by abuse, abandonment or neglect pursuant to subsection L of this section or section 8-807.01 may bring a special action pursuant to section 39-121.02 in the superior court to order the department to release that DCS information. A legislator has standing to bring or to join a special action regarding the release of DCS information or to challenge the redaction of released DCS information. The plaintiff shall provide notice to the county attorney, who has standing and may participate in the action. The court shall review the requested records in camera and order disclosure consistent with subsections A and L of this section and section 8-807.01. The court shall take reasonable steps to prevent any clearly unwarranted invasions of privacy and protect

the privacy and dignity of victims of crime pursuant to article II, section 2.1, subsection C, Constitution of Arizona.

K. The department or a person who is not specifically authorized by this section to obtain DCS information may petition a judge of the superior court to order the department to release DCS information. The plaintiff shall provide notice to the county attorney and to the attorney and guardian ad litem for the child, who have standing and may participate in the action. The court shall review the requested records in camera and shall balance the rights of the parties who are entitled to confidentiality pursuant to this section against the rights of the parties who are seeking the release of the DCS information. The court may release otherwise confidential DCS information only if the rights of the parties seeking the DCS information and any benefits from releasing the DCS information outweigh the rights of the parties who are entitled to confidentiality and any harm that may result from releasing the DCS information. The court shall take reasonable steps to prevent any clearly unwarranted invasions of privacy and protect the privacy and dignity of victims of crime pursuant to article II, section 2.1, subsection C, Constitution of Arizona.

L. Except as provided in subsection M of this section, before it releases records under this section or section 8-807.01, the department shall take whatever precautions it determines are reasonably necessary to protect the identity and safety of a person who reports child abuse or neglect and to protect any other person if the department believes that disclosure of the DCS information would be likely to endanger the life or safety of any person. The department is not required by this section to disclose DCS information if the department demonstrates that disclosure would cause a specific, material harm to a department investigation. The department is not required by this section to disclose DCS information if, in consultation with the county attorney, the county attorney demonstrates that disclosure would cause a specific, material harm to a criminal investigation or prosecution.

M. A person who is the subject of an unfounded report or complaint made pursuant to this article or article 9, 10, 11, 12, 13 or 14 of this chapter and who believes that the report or complaint was made in bad faith or with malicious intent may petition a judge of the superior court to order the department to release the DCS information. The petition shall specifically set forth reasons supporting the person's belief that the report or complaint was made in bad faith or with malicious intent. The court shall review the DCS information in camera and the person filing the petition shall be allowed to present evidence in support of the petition. If the court determines that there is a reasonable question of fact as to whether the report or complaint was made in bad faith or with malicious intent and that disclosure of the identity of the person making the report or complaint would not be likely to endanger the life or safety of the person making the report or complaint, it shall provide a copy of the DCS information to the person filing the petition and the original DCS information is subject to discovery in a subsequent civil action regarding the making of the report or complaint.

N. The department shall provide the person who conducts a forensic medical evaluation with any records the person requests, including social history and family history regarding the child, the child's siblings and the child's parents or guardians.

O. The department shall provide DCS information on request to a prospective adoptive parent, foster parent or guardian, if the information concerns a child the prospective adoptive parent, foster parent or guardian seeks to adopt or provide care for.

P. If the department receives information that is confidential by law, the department shall maintain the confidentiality of the information as prescribed in the applicable law.

Q. A person may authorize the release of DCS information about the person but may not waive the confidentiality of DCS information concerning any other person.

R. The department may provide a summary of the outcome of a department investigation to the person who reported the suspected child abuse or neglect.

S. The department shall adopt rules to facilitate the accessibility of DCS information.

T. The department or a person who receives DCS information pursuant to subsection B of this section shall provide DCS information to law enforcement and a court to protect the safety of any employee of the department or the office of the attorney general or to protect a family member of such an employee.

U. A person who receives DCS information shall maintain the confidentiality of the information and shall not further disclose the information unless the disclosure is authorized by law or a court order.

V. The department may charge a fee for copying costs required to prepare DCS information for release pursuant to this section or section 8-807.01.

W. Unless explicitly prohibited by law, it is the public policy of this state that the department shall provide both of the following:

1. All DCS information and direct remote access to the department's automated case management system to the office of the ombudsman-citizen's aide and the auditor general.
2. Direct remote access to the department's automated case management system and any DCS information that is necessary to perform the foster care review board's statutory duties to the supreme court.

X. A person who violates this section is guilty of a class 2 misdemeanor.

8-819. Determination of neglect

In determining if a child is neglected, consideration shall be given to:

1. The drug or alcohol abuse of the child's parent, guardian or custodian.

2. The use by the mother of a dangerous drug, a narcotic drug or alcohol during pregnancy if the child, at birth or within a year after birth, is demonstrably adversely affected by this use. For the purposes of this paragraph, "dangerous drug" and "narcotic drug" have the same meaning prescribed in section 13-3401.

8-825. Court determinations in preliminary protective hearing

D. The court shall also determine if reasonable efforts were made to prevent or eliminate the need for removal of a child from the child's home and if services are available that would eliminate the need for continued removal. If the child is:

1. In the custody of the department, the court shall order the department to make reasonable efforts to provide services to the child and parent to facilitate the reunification of the family, except as provided in section 8-846.

2. Not in the custody of the department and the department is not a party, the court may direct the parties to participate in reasonable services that will facilitate reunification of the family or another permanent plan for the child. The court shall not require the department to provide services pursuant to this paragraph.

8-841. Dependency petition; service; preliminary orders; hearing

A. Except as provided in subsection B of this section the department or any interested party may file a petition to commence proceedings in the juvenile court alleging that a child is dependent.

B. An interested party may not file a dependency petition concerning a child who has been adjudicated delinquent and is under the jurisdiction of the juvenile court, who is awaiting delinquency adjudication or disposition or who has been released from the department of juvenile corrections within the previous six months, unless both of the following occur:

1. The interested party contacts the department pursuant to section 8-455 at least fourteen days before filing the petition and provides the department with notice of the intent to file a petition pursuant to this subsection, the allegations contained in the petition and the factual basis supporting the allegations.

2. The interested party affirms in the petition that the requirements of paragraph 1 of this subsection have been met.

C. The petition shall be verified and shall contain all of the following:

1. The name, age and address, if any, of the child on whose behalf the petition is brought.

2. The names and addresses, if known, of both parents and any guardian of the child.

3. A concise statement of the facts to support the conclusion that the child is dependent.

4. If the child was taken into temporary custody, the date and time the child was taken into custody.

5. Whether the department believes that an aggravating circumstance described in section 8-846, subsection D, paragraph 1 exists.

6. A statement whether the child is subject to the Indian child welfare act of 1978 (P.L. 95-608; 92 Stat. 3069; 25 United States Code sections 1901 through 1963).

D. The person who files the petition shall have the petition and a notice served on:

1. The parents and any guardian of the child.

2. The child's guardian ad litem or attorney.

3. Any person who has filed a petition to adopt or who has physical custody pursuant to a court order in a foster-adoptive placement.

4. The department if the petition is filed pursuant to subsection B of this section.

E. The notice shall contain all of the following:

1. The name and address of the person to whom the notice is directed.

2. The date, time and place of the hearing on the petition.

3. The name of the child on whose behalf the petition has been filed.

4. A statement that the parent or guardian and the child are entitled to have an attorney present at the hearing and that, if the parent or guardian is indigent and cannot afford an attorney and wants to be represented by an attorney, one will be provided.

5. A statement that the parent or guardian must be prepared to provide to the court at the initial dependency hearing the names, the type of relationship and all available information necessary to locate persons who are related to the child or who have a significant relationship with the child.

6. A statement that the hearing may result in further proceedings for permanent guardianship or to terminate parental rights.

7. A statement that as a result of the hearing or further proceedings, the parent or guardian could be placed on the central registry of child abuse and neglect.

F. The petition and notice shall be served on a parent or guardian as soon as possible after the petition is filed and at least five days before the initial dependency hearing if the parent or guardian did not attend the preliminary protective hearing. If a parent or guardian does attend

the preliminary protective hearing, the petition and notice shall be served at the preliminary protective hearing.

G. Except as provided in subsection H of this section, on the filing of the petition, the court may issue any temporary orders necessary to provide for the safety and welfare of the child.

H. If a petition is filed pursuant to subsection B of this section, the court may not issue any temporary orders with respect to the department, including placing the child in the department's legal or physical custody, joining the department as a party or ordering the department to provide any services to the child or the family, without first conducting a hearing. At the hearing, the court shall take evidence on the request of the department or a party. The court shall provide the department and a party at least seventy-two hours' written or electronic notice of the hearing and an opportunity to be heard as to any proposed orders. If the department is provided proper notice and fails to appear, the court may proceed with the hearing.

8-842. Initial dependency hearing; deadlines

A. Except as provided in section 8-826, the court shall set the initial dependency hearing within twenty-one days after the petition is filed. If service by publication is required, the court may set an initial dependency hearing within a time period to allow for publication pursuant to the rules of procedure for the juvenile court.

B. At the initial dependency hearing, the court shall:

1. Determine if the parent or guardian is providing the court and the department with the names, the type of relationship and all available information necessary to locate persons who are related to the child or who have a significant relationship with the child.
2. Determine that the department is conducting a due diligence search pursuant to section 8-514.07 and attempting to identify and assess placement of the child with a grandparent or another member of the child's extended family including a person who has a significant relationship with the child.
3. If the child has siblings, determine that the department is attempting to identify and assess placement of the child with the child's siblings if this is possible and is in the child's best interests.

C. Unless the court has ordered in-home intervention, the dependency adjudication hearing shall be completed within ninety days after service of the dependency petition.

8-843. Initial dependency hearing; rights

A. At any dependency hearing, the court's primary consideration shall be the protection of a child from abuse or neglect.

B. At the initial dependency hearing, the court shall ensure that the parent or guardian has been advised of the following rights:

1. The right to counsel, including appointed counsel if the parent or guardian is indigent.
2. The right to trial by the court on the allegations in the petition.
3. The right to cross-examine all witnesses that are called to testify against the parent or guardian.
4. The right to use the process of the court to compel the attendance of witnesses.

C. If the parent or guardian admits or does not contest the allegations in the petition, the court shall determine that the parent or guardian understands the rights described in subsection B of this section and that the parent or guardian knowingly, intelligently and voluntarily waives these rights.

D. If the parent or guardian denies the allegations in the petition, the court shall set the settlement conference, pretrial conference or mediation prescribed in section 8-844.

E. The court shall also determine if reasonable efforts were made to prevent or eliminate the need for removal of a child from the child's home and if services are available that would eliminate the need for continued removal. If the child is:

1. In the custody of the department, the court shall order the department to make reasonable efforts to provide services to the child and parent to facilitate the reunification of the family, except as provided in section 8-846.
2. Not in the custody of the department and the department is not a party, the court may direct the parties to participate in reasonable services that will facilitate reunification of the family or another permanent plan for the child. The court shall not require the department to provide services pursuant to this paragraph.

F. Notwithstanding any other provision of this section, the court may stay the proceedings and order in-home intervention as provided in article 14 of this chapter.

8-844. Dependency adjudication hearing; settlement conference or mediation

A. Before a contested dependency case proceeds to adjudication, the court shall hold a settlement conference or pretrial conference or shall order mediation. All of the parties in the contested action shall participate in the conference or mediation.

B. The court shall take into consideration as a mitigating factor the availability of reasonable services to the parent or guardian to prevent or eliminate the need for removal of the child and the effort of the parent or guardian to obtain and participate in these services.

C. If, at the dependency adjudication hearing, the court:

1. Finds by a preponderance of the evidence that the allegations contained in the petition are true, the court shall:

(a) Make the following findings as to each parent:

(i) That the court has jurisdiction over the subject matter and the person before the court.

(ii) The factual basis for the dependency.

(iii) That the child is dependent.

(b) Conduct a disposition hearing.

2. Does not find by a preponderance of the evidence that the allegations contained in the petition are true, the court shall dismiss the petition.

D. The court may adjudicate a child dependent as to one parent or guardian and proceed with a disposition, review or permanency hearing or any other hearing as to that particular parent or guardian notwithstanding another parent's or guardian's request to contest the allegations in the petition or that another parent or guardian has not been served.

E. The court may hold the disposition hearing on the same date as the dependency adjudication hearing or at a later date that is not more than thirty days after the date of the dependency adjudication hearing.

F. If a parent does not appear at the pretrial conference, settlement conference or dependency adjudication hearing, the court, after determining that the parent has been instructed as provided in section 8-826, may find that the parent has waived the parent's legal rights and is deemed to have admitted the allegations of the petition by the failure to appear. The court may make a determination of dependency and disposition based on the record and evidence presented as provided in rules prescribed by the supreme court.

G. Evidence considered by the court in making a decision pursuant to this section shall also include any substantiated allegations of abuse or neglect committed in another jurisdiction.

8-844.01. Allegation of aggravating circumstance

At least fifteen days before the disposition hearing, the department shall give written notice to the court and the parties if the department intends to present evidence that an aggravating circumstance described in section 8-846, subsection D, paragraph 1 exists.

8-845. Disposition hearing

A. After receiving and considering the evidence on the proper disposition of the case, the court may place a dependent child in the care of the child's parents, subject to the supervision of the department. If placement with the child's parents is contrary to the child's welfare, the court may place the child as follows in accordance with the child's best interests:

1. With a grandparent or another member of the child's extended family, including a person who has a significant relationship with the child.
2. In a licensed foster home.
3. In an appropriate public or private agency licensed to care for children.
4. In a suitable school.
5. In the independent living program established pursuant to section 8-521.
6. With any adult as a permanent guardian pursuant to article 12 of this chapter.

B. In reviewing the status of the child and in determining its order of disposition, the court shall consider the health and safety of the child as a paramount concern and the following criteria:

1. The goals of the placement and the appropriateness of the case plan.
2. The services that have been offered to reunite the family.
3. If returning the child home is not likely, the efforts that have been or should be made to evaluate or plan for other permanent placement plans.
4. The efforts that have been made or should be made to place the child with the child's siblings or to provide frequent visitation or contact when placement with siblings has not been possible.

C. The court shall review the permanent plan that has been established for the child. In reviewing the status of the child, the court, insofar as possible, shall seek to reunite the family. If the court does not order reunification of the family, the court shall order a plan of adoption or another permanent plan that is in the child's best interest and that takes into consideration the placement of the child with siblings or that provides for frequent visitation or contact between siblings unless the court determines that either the placement with the siblings or the visitation or contact would be contrary to the child's or a sibling's safety or well-being. If the court finds that an aggravating circumstance described in section 8-846, subsection D, paragraph 1 exists, the department shall file a motion for termination of parental rights within ten business days after the date of the court order, unless termination of parental rights is not in the best interests of the child.

D. Notwithstanding subsection C of this section, reasonable efforts to place a child for adoption may be made concurrently with reasonable efforts to reunify the family.

8-846. Services provided to the child and family

A. Except as provided in subsections D, E and F of this section, if the child has been removed from the home, the court shall order the department to make reasonable efforts to provide services to the child and the child's parent.

B. If the court determines that services supplemental to those provided through the department are available from another source at no cost to this state, the court may order the services on agreement of the provider.

C. The court may employ an individual or individuals to facilitate collaboration between the parties and to ensure the delivery of court-ordered services. An employee acting in that capacity has access to all documents and information necessary to ensure service delivery regarding the child and the child's family without obtaining prior approval from the child, the child's family or the court. The employee may disclose documents and information the employee acquires, reviews or produces only as prescribed pursuant to section 8-807.

D. The court shall consider the following factors in determining whether reunification services are required to be provided. Reunification services are not required to be provided if the court finds by clear and convincing evidence that:

1. One or more of the following aggravating circumstances exist:

(a) A party to the action provides a verified affidavit that states that a reasonably diligent search has failed to identify and locate the parent within three months after the filing of the dependency petition or the parent has expressed no interest in reunification with the child for at least three months after the filing of the dependency petition.

(b) The parent or guardian is suffering from a mental illness or mental deficiency of such magnitude that it renders the parent or guardian incapable of benefitting from the reunification services. This finding shall be based on competent evidence from a psychologist or physician that establishes that, even with the provision of reunification services, the parent or guardian is unlikely to be capable of adequately caring for the child within twelve months after the date of the child's removal from the home.

(c) The child previously has been removed and adjudicated dependent due to physical or sexual abuse. After the adjudication the child was returned to the custody of the parent or guardian and then subsequently removed within eighteen months due to additional physical or sexual abuse.

(d) The parent or guardian committed an act that constitutes a dangerous crime against children as defined in section 13-705 or caused a child to suffer serious physical injury or emotional injury or the parent or guardian knew or reasonably should have known that another person committed an act that constitutes a dangerous crime against children as defined in section 13-705 or caused a child to suffer serious physical injury or emotional injury.

(e) The parent's rights to another child have been terminated, the parent has not successfully addressed the issues that led to the termination and the parent is unable to discharge parental responsibilities.

(f) After a finding that a child is dependent, all of the following are true:

(i) A child has been removed from the parent or guardian on at least two previous occasions.

(ii) Reunification services were offered or provided to the parent or guardian after the removal.

(iii) The parent or guardian is unable to discharge parental responsibilities.

(g) A child who is currently under six months of age was exposed to a drug or substance as described in section 8-201, paragraph 25, subdivision (c) and both of the following are true:

(i) The parent of the child is unable to discharge parental responsibilities because of a history of chronic abuse of dangerous drugs or controlled substances.

(ii) Reasonable grounds exist to believe that the parent's condition will continue for a prolonged or indeterminate period based on a competent opinion from a licensed health care provider with experience in the area of substance abuse disorders. For the purposes of this item "licensed health care provider" means a physician licensed pursuant to title 32, chapter 13 or 17, a psychologist licensed pursuant to title 32, chapter 19.1, a nurse practitioner licensed pursuant to title 32, chapter 15 whose population foci include psychiatric and mental health or a licensed independent addiction counselor licensed pursuant to title 32, chapter 33.

2. The parent or guardian of a child has been convicted of a dangerous crime against children as defined in section 13-705, murder or manslaughter of a child, or of sexual abuse of a child, sexual assault of a child, sexual conduct with a minor, molestation of a child, commercial sexual exploitation of a minor, sexual exploitation of a minor or luring a minor for sexual exploitation.

3. The parent or guardian of a child has been convicted of aiding or abetting or attempting, conspiring or soliciting to commit any of the crimes listed in paragraph 2 of this subsection.

E. The court shall consider any criminal prosecution relating to the offenses that led to the child's removal from the home and shall abide by any orders of the criminal court. Information may be provided by law enforcement or the county attorney.

F. If a dependency petition was filed pursuant to section 8-873.01 or 8-874, subsection J, the court may direct the division not to provide reunification services to the child's parents unless the court finds by clear and convincing evidence that these services would be in the child's best interests.

8-847. Periodic review hearings

A. After the disposition hearing, the court shall hold periodic review hearings at least once every six months as required by federal law.

B. At a proceeding to review the disposition orders of the court, the court shall provide the following persons notice of the review and the right to participate in the proceeding:

1. The authorized agency charged with the child's care and custody.
2. Any foster parents in whose home the child resided within the last six months or resides at present, except for those foster parents who maintain a receiving foster home where the child has resided for ten days or less. The petitioner shall provide the court with the names and addresses of all foster parents who are entitled to notice pursuant to statute.
3. A shelter care facility or receiving foster home where the child resides or has resided within the last six months for more than ten days. The petitioner shall provide the court with the names and addresses of all shelter care facilities and receiving foster homes that are entitled to notice pursuant to this paragraph.
4. The child's parent or guardian unless the parental rights of that parent or guardian have been terminated by court action or unless the parent has relinquished rights to the child to an agency or has consented to the adoption of the child as provided in section 8-107.
5. The child, if twelve years of age or older.
6. The child's relative, as defined in section 8-501, if that relative files a written notice of right of participation with the court.
7. A person permitted by the court to intervene as a party in the dependency proceeding.
8. A physical custodian of the child within the preceding six months.
9. Any person who has filed a petition to adopt or who has physical custody pursuant to a court order in a foster-adoptive placement.
10. Any other person as the court may direct.

C. At the first periodic review hearing, the court shall consider whether a parent of a child who is under three years of age has substantially neglected or wilfully refused to participate in reunification services offered by the department.

D. At any periodic review hearing, the court shall consider the health and safety of the child as a paramount concern.

E. At any periodic review hearing the court shall determine:

1. Whether the department has identified and assessed placement of the child with a relative or person who has a significant relationship with the child.

2. Whether the parent or guardian has complied with the court order pursuant to section 8-824, subsection D, paragraph 6 or section 8-842 subsection B, paragraph 1.

F. If the court finds that a child is no longer dependent, before it dismisses the proceeding the court shall provide notice of the sibling information exchange program established pursuant to section 8-543 to the following:

1. An adult who is the former dependent child in the proceeding for whom the periodic review hearing is held.

2. A parent or guardian with legal custody of the former dependent child for whom the periodic review hearing is held.



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Arizona Administrative Code

§ 21-6-309



Arizona Administrative Code § 21-6-309

R21-6-309. Capacity Requirements

A. The maximum capacity of a license shall not exceed five foster children, and may be restricted to fewer than five, if the foster home provides special services under R21-6-331 or an increase is not justified under subsection (F).

B. The total number of children in a foster home at one time, including the children of the foster parent and the children of a household member, shall not exceed eight.

C. Subject to subsection (F), OLR may permit an applicant or licensee to exceed the maximum number of children in the home:

1. To keep a sibling group together, if approved in writing by the DCS Director's office or designee;
2. If the total number of foster children exceed five and the additional requirements specified in R21-6-331 are met for a Group Foster Home; or
3. If the children living in the applicant or licensee's home would exceed eight, including any foster children, and the applicant or licensee meets the requirements of subsection (F);
4. To keep a foster child in the home as of the effective date of this Section.

D. The total number of children in the foster home at one time, including the children of the foster parent and any household member, any child placed for respite care, child care services, or babysitting shall not exceed:

1. Four who are five years of age or younger in the care of one adult; and
2. Two who are less than one year of age in the care of one adult.

E. OLR may permit the licensee to exceed the age limits of children in the foster home, as specified in subsection (D), to accommodate multiple birth siblings.

F. Recommendations of the licensing agency and decisions of OLR to establish or increase the capacity of a foster home or to exceed the limits as indicated in subsections (B) and (C), shall be justified by:

1. Adequate sleeping arrangements (as specified by R21-6-310 and R21-6-311),
2. The support network available to the foster parent, and
3. The licensee's willingness and ability to provide care for each additional foster child.

G. A foster parent is limited to the capacity, age, gender, and other conditions or restrictions specified on the license when providing care, including respite care.



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Alma S. v Department of Child Safety, (245 Ariz 146)



IN THE
SUPREME COURT OF THE STATE OF ARIZONA

ALMA S.,
Appellant,

v.

DEPARTMENT OF CHILD SAFETY, J.R., I.R.,
Appellees.

No. CV-17-0363-PR
Filed September 14, 2018
Amended by Order Dated December 13, 2018

Appeal from the Superior Court in Maricopa County
The Honorable Cari A. Harrison, Judge
Nos. JS18287
JD30481
AFFIRMED

Opinion of the Court of Appeals, Division One
244 Ariz. 152 (App. 2017)
VACATED

COUNSEL:

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JUSTICE LOPEZ authored the opinion of the Court, in which CHIEF
JUSTICE BALES, VICE CHIEF JUSTICE BRUTINEL, and JUSTICES
PELANDER, TIMMER, and GOULD joined. JUSTICE BOLICK concurred
in the result.

JUSTICE LOPEZ, opinion of the Court:

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¶1 This case concerns the inquiry juvenile courts must make to determine whether parental severance is in the “best interests of the child” for purposes of A.R.S. § 8-533(B). We hold that courts must consider the totality of the circumstances existing at the time of the severance determination, including the child’s adoptability and the parent’s rehabilitation.

I. BACKGROUND

¶2 Alma S. (“Mother”) was involved in a relationship with Esdras R. (“Father”). I.R. is the biological child of Mother and Father, and J.R. is Mother’s biological child but not Father’s. J.R.’s father abused Mother during their previous relationship. Father also routinely abused Mother and both children. Father, in May 2015, severely beat two-month-old I.R. while Mother was at work. When Mother returned, she failed to take I.R. to the hospital even though Father was absent for several hours. Without Father’s knowledge, I.R. was finally taken to the hospital the next day by Mother’s sister and cousin. Hospital staff determined that I.R. had a healing rib fracture, a right tibia fracture, a possible left femur fracture (ultimately ruled out), and multiple bruises. The staff also observed bruises on two-year-old J.R.

¶3 The Department of Child Safety (“DCS”) subsequently removed both children from Mother’s home, and the children were determined to be dependent. Over the next eighteen months, DCS provided Mother and Father with an array of services, including a parent aide, drug testing, and a psychological evaluation. Mother’s drug testing was discontinued after she passed consecutive tests. However, the psychologist who conducted Mother’s evaluation diagnosed her with mood and personality disorders, and multiple substance abuse disorders in self-reported remission. He noted Mother’s “poor judgment” in choosing abusive romantic partners and entrusting her children to someone “significantly unfit” to care for them. He concluded that Mother was unable to protect herself or the children from abuse, that she lacked insight into the dangers posed by abusive partners, that “[m]aintaining a relationship, even when destructive, becomes more important than the safety of [her] children,” and that her future parenting prospects were “poor at best.” Mother’s DCS case manager agreed, concluding that Mother was unable to protect the children.

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¶4 In December 2015, DCS moved to terminate Mother’s parental rights to both children on the ground that she was unable to protect them from abuse. *See* § 8-533(B)(2). Following a two-day evidentiary hearing in November 2016, the juvenile court severed Mother’s parental rights. It inferred that Mother was aware that Father caused I.R.’s injuries and did not report them or seek medical care. It also noted that although Mother claimed to have ended her relationship with Father, he had stated otherwise to his therapist. The court then determined that severance was in the best interests of the children because their current out-of-home placements were meeting their needs, the children were in an adoptive placement, and both children would be “considered adoptable if the current placement was not able to complete the adoption for any reason.” Mother appealed, challenging only the juvenile court’s best-interests finding.

¶5 The court of appeals vacated the juvenile court’s order, holding that “the record supporting the court’s best-interests determination is insubstantial.” *Alma S. v. Dep’t of Child Safety*, 244 Ariz. 152, 155 ¶ 1 (App. 2017). To terminate Mother’s parental rights, the court reasoned, DCS “must show that there is a substantial likelihood that the parent will not be capable of parenting effectively in the near future, not that someone with better parenting skills may be able to care for the child.” *Id.* at 162 ¶ 36 (citing *Roberto F. v. Ariz. Dep’t of Econ. Sec.*, 232 Ariz. 45, 53 ¶ 38 n.11 (App. 2013)). According to the court of appeals, when parent-aide services demonstrate “a parent’s ability to parent the children,” the parent and children have a bond, and the parent’s living situation is “safe and stable,” “the children’s adoptability, household stability, and the ability of their current placements to meet their needs are subordinate to the fundamental rights of the parent in determining best interests, unless severance removes a detriment caused by the parental relationship.” *Id.* ¶ 38. Throughout its opinion, the court stressed the importance of a parent’s constitutional right to raise her children. *See, e.g., id.* at 157 ¶ 11, 158 ¶ 20, 163 ¶ 39.

¶6 The court of appeals conducted a detailed analysis of the evidence presented to the juvenile court. In reaching its holding, the court rejected the juvenile court’s finding that Mother and Father were still in a relationship, *id.* at 158 ¶¶ 16–17, 160 ¶ 27, and disagreed with the DCS case manager and the psychologist’s conclusion that Mother lacked the ability to protect the children from abuse, *id.* at 158 ¶¶ 19–20, 160 ¶¶ 25–27.

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Despite the court's acknowledgement that the only issue on appeal was the juvenile court's best-interests determination, *id.* at 156 ¶ 7, it found that "it cannot be inferred from this record that Mother is an *unfit* parent," *id.* at 160 ¶ 24 (emphasis added).

¶7 We granted review to clarify the appropriate inquiry for a best-interests analysis under § 8-533(B) — an issue of statewide importance. We have jurisdiction under article 6, section 5(3) of the Arizona Constitution and A.R.S. § 12-120.24.

II. THE TWO-STEP SEVERANCE INQUIRY

¶8 Section 8-533(B) sets forth the grounds that "justify the termination of the parent-child relationship," and states that "the court shall also consider the best interests of the child" in deciding whether to terminate parental rights. We have interpreted § 8-533(B) as entailing a two-step inquiry. *See Demetrius L. v. Joshlynn F.*, 239 Ariz. 1, 4 ¶ 15 (2016). First, the juvenile court must find by clear and convincing evidence that a statutory ground for termination exists. *Kent K. v. Bobby M.*, 210 Ariz. 279, 286 ¶ 35 (2005); *see also* A.R.S. § 8-537(B) ("The court's findings with respect to grounds for termination shall be based upon clear and convincing evidence . . ."). Second, the court must determine by a preponderance of the evidence that severance is in the child's best interests. *Kent K.*, 210 Ariz. at 284 ¶ 22, 285–86 ¶ 31.

¶9 In *Kent K.*, we implicitly equated the substantive grounds for termination listed in § 8-533(B) with parental unfitness. *Id.* at 285–86 ¶¶ 31–32. We now explicitly reiterate that conclusion, which ensures compliance with the due process requirement that a court find, by clear and convincing evidence, parental unfitness when a severance is contested. *See Santosky v. Kramer*, 455 U.S. 745, 769 (1982); *Kent K.*, 210 Ariz. at 285 ¶ 28. If a statutory ground were not synonymous with unfitness, a contested severance based on such ground would be constitutionally infirm.

¶10 Eight of the eleven statutory grounds in § 8-533(B) are proxies for parental unfitness because they demonstrate a parent's inability "to properly parent his/her child." *See Roberto F.* at 54 ¶ 42. They address the most serious instances of parental abuse, neglect, or incapacity. *See* § 8-533(B)(1) (abandonment of the child); § 8-533(B)(2) (neglect or willful abuse of the child); § 8-533(B)(3) (parent not capable of "discharg[ing]

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parental responsibilities” due to mental illness or chronic substance abuse); § 8-533(B)(4) (parent convicted of a felony that is demonstrative of unfitness); § 8-533(B)(8) (failure of a parent to “remedy the circumstances that cause [a] child to be in an out-of-home placement”); § 8-533(B)(9) (identity and location of parent is unknown despite three months of “diligent efforts” to find parent); § 8-533(B)(10) (parental rights to another child terminated within the preceding two years and the parent is “currently unable to discharge parental responsibilities due to the same cause”); § 8-533(B)(11) (failure of a parent to discharge parental responsibilities after child removed for second time within 18 months to out-of-home placement).

¶11 Section 8-533(B) also lists three other grounds for termination that are facially procedural and thus potentially not indicative of unfitness. These grounds address situations in which a parent has voluntarily relinquished her parental rights or waived her right to contest severance, and hence a finding of parental unfitness is not required. *See* § 8-533(B)(5) (a “potential father fail[s] to file a paternity action” after receiving notice under A.R.S. § 8-106(G)); § 8-533(B)(6) (a “putative father fail[s] to file a notice of claim of paternity as prescribed in § 8-106.01”); § 8-533(B)(7) (“[T]he parents have relinquished their rights to a child to an agency or have consented to the adoption.”). Thus, all eleven statutory grounds in § 8-533(B) either constitute a finding of parental unfitness or operate only when a parent fails to properly contest the severance.

III. THE BEST-INTERESTS INQUIRY

¶12 At the best-interests stage of the analysis, “we can presume that the interests of the parent and child diverge because the court has already found the existence of one of the statutory grounds for termination by clear and convincing evidence.” *Kent K.*, 210 Ariz. at 286 ¶ 35. Therefore, once the court finds “that a parent is unfit, the focus shifts to the interests of the child as distinct from those of the parent.” *Id.* at 285 ¶ 31; *see also Demetrius L.*, 239 Ariz. at 4 ¶ 15. The “child’s interest in stability and security” must be the court’s primary concern. *Demetrius L.*, 239 Ariz. at 4 ¶ 15 (quoting *Kent K.*, 210 Ariz. at 286 ¶ 34).

¶13 To this end, we have held that termination is in the child’s best interests if either: (1) the child will benefit from severance; or (2) the child will be harmed if severance is denied. *Id.* ¶ 16. “It is well established

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in state-initiated cases that the child’s prospective adoption is a benefit that can support a best-interests finding,” *id.*, but that does not mean that courts are free to disregard other evidence regarding a child’s best interests, *see Lawrence R. v. Ariz. Dep’t of Econ. Sec.*, 217 Ariz. 585, 588 ¶ 11 (App. 2008) (“While a [factfinder] *may* find that severance is in a child’s best interests if the child is found to be adoptable, the [factfinder] is not required to do so.”). Courts must consider the totality of the circumstances existing at the time of the severance determination. *Dominique M. v. Dep’t of Child Safety*, 240 Ariz. 96, 98–99 ¶¶ 11–12 (App. 2016) (noting that courts may consider the negative effect on a child of the continued presence of a statutory severance ground in a totality of the circumstances best-interests inquiry).

¶14 Here, the court of appeals erred by relying on *Lawrence R.* to support the proposition that adoptability alone can never support a best-interests finding “sufficient to overcome a parent’s constitutional rights.” *Alma S.*, 244 Ariz. at 162 ¶ 35. *Lawrence R.* does not reach that conclusion but merely notes that, under a prior statutory scheme, a jury may find that severance is in a child’s best interests if the child is adoptable. *Lawrence R.*, 217 Ariz. at 588 ¶ 11. Further, *Lawrence R.* comports with binding precedent from this Court. In *Demetrius L.*, we concluded that “[w]hen a current placement meets the child’s needs and the child’s prospective adoption is otherwise legally possible and likely, a juvenile court may find that termination of parental rights, so as to permit adoption, is in the child’s best interests.” 239 Ariz. at 4 ¶ 12.

¶15 We recognize that although the focus of the best-interests inquiry is on the child, courts should consider a parent’s rehabilitation efforts as part of the best-interests analysis. But what courts must not do, and what the court of appeals did here, *see Alma S.*, 244 Ariz. at 162 ¶ 38, is subordinate the interests of the child to those of the parent once a determination of unfitness has been made. Indeed, *Santosky* recognized that once such a finding has been made, the parent and child no longer “share a vital interest in preventing erroneous termination of their natural relationship,” and “the court may assume . . . that the interests of the child and the natural parents do diverge.” 455 U.S. at 760; *see also Demetrius L.*, 239 Ariz. at 4 ¶ 15; *Kent K.*, 210 Ariz. at 286 ¶ 35.

¶16 The court of appeals further erred in its best-interests analysis by quoting *Roberto F.* to support its statement that the material issue in the best-interests inquiry is “whether a parent has the ability to properly parent

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his/her child.” *Alma S.*, 244 Ariz. at 157 ¶ 13. *Roberto F.* did not address best interests; it only addressed parental fitness. 232 Ariz. at 54 ¶ 41 n.14. By citing *Roberto F.*, the court of appeals conflated the fitness inquiry with the best-interests inquiry.

IV. SUFFICIENCY OF THE EVIDENCE

¶17 Mother does not dispute that a statutory ground for termination was proven by clear and convincing evidence. She only contests the juvenile court’s best-interests finding. Whether that finding is supported by sufficient evidence is the relevant inquiry here.

¶18 “We accept the juvenile court’s findings of fact if reasonable evidence and inferences support them, and will affirm a severance order unless it is clearly erroneous.” *Demetrius L.* 239 Ariz. at 3 ¶ 9. “The appellate court’s role is not to weigh the evidence.” *State v. Fischer*, 242 Ariz. 44, 52 ¶ 28 (2017); *see also Dominique M.*, 240 Ariz. at 98 ¶ 9 (“Mother is in essence asking us to reweigh the evidence presented to the juvenile court. We decline to do so.”). The resolution of conflicting evidence is “uniquely the province of the juvenile court,” *Jesus M. v. Ariz. Dep’t of Econ. Sec.*, 203 Ariz. 278, 282 ¶ 12 (App. 2002), and this rule applies even when “sharply disputed” facts exist, *In re Pima Cty. Severance Action No. S-1607*, 147 Ariz. 237, 239 (1985).

¶19 The court of appeals erred in failing to abide by these standards and instead reweighing the evidence presented to the juvenile court. For example, the court disbelieved Father’s statement to his therapist that he and Mother were still in a relationship, rejected the juvenile court’s findings consistent with Father’s statement, and concluded that Father did not pose a danger to the children because he was “no longer present in [their] lives.” *Alma S.*, 244 Ariz. at 158 ¶¶ 16–17, 160 ¶ 27. The court of appeals also asserted that the juvenile court “did *not* find that Mother and Father were still in a relationship.” *Id.* at 158 ¶ 17. But the juvenile court did not find that Mother and Father’s relationship had ended, nor did it question Father’s credibility. In fact, the juvenile court appeared to question the truth of *Mother’s* assertion that her relationship with Father had ended, stating:

Only recently has Mother said that she is no longer with Father. However, Father has said otherwise to his therapist.

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Even if the Court accepts Mother is being honest and she is no longer in a relationship with Father, it is literally too little too late to demonstrate that she is willing to protect her children from an abusive person.

(emphasis added). Further, in its best-interests ruling, the juvenile court reasoned that “[w]hile Mother loves her sons, she chose to continue her own unhealthy, abusive relationship with Father . . . rather than ending the relationship to protect herself and her children.”

¶20 The court of appeals also reevaluated the testimony of Mother’s DCS case manager, finding that the case manager’s “casual inquiry into the facts is not sufficient to meet even minimal professional standards” and that the psychologist’s conclusions were “equally unfounded” and possibly “so lacking” that his testimony should have been inadmissible. *Id.* at 158–60 ¶¶ 20–24. But the record supported the juvenile court’s factual findings and conclusions. For example, the DCS case manager reviewed Mother’s case file, set up DCS services for Mother, and exchanged communications with Mother. Similarly, the psychologist conducted a five-hour psychological evaluation of Mother that included a “thorough clinical interview” with her, several psychological tests, and a review of DCS records, and drew his conclusions from his expertise.

¶21 Viewing the record in the light most favorable to upholding the court’s best-interests finding, *Demetrius L.*, 239 Ariz. at 2 ¶ 2, and applying our deferential standard of review, *see id.* at 3 ¶ 9, we conclude that sufficient evidence supports that finding. Both of Mother’s children were excelling in their out-of-home placements, the foster parents were planning to adopt the children, and the children are otherwise adoptable even if their current placements do not result in adoption. The juvenile court also found, as part of its consideration of the totality of the circumstances in its best-interests analysis, that Mother was still inclined to endanger the children despite her rehabilitative progress.

¶22 Justice Bolick concurs in the result in this case, but unlike Mother, he questions the constitutionality of Arizona’s termination of parental rights statutory scheme. Because Mother did not challenge the constitutionality of the statute, this issue is not before us and we decline to address it. *See, e.g., State v. City of Tucson*, 242 Ariz. 588, 599 ¶ 45 (2017) (“We generally do not reach out to decide important constitutional issues or to

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upset established precedent when no party has raised or argued such issues.”).

V. CONCLUSION

¶23 We vacate the court of appeals’ opinion and affirm the juvenile court’s judgment terminating Mother’s parental rights.

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BOLICK, J., concurred in the result.

¶24 I agree with my colleagues that, applying an abuse of discretion standard to the juvenile court's decision, the statutory grounds for termination of parental rights were met here. I concur only in the result and write separately because our statutes and rules, as the Court has interpreted and applied them here and elsewhere, do not adequately safeguard fundamental parental rights.

¶25 The primacy of parents in the upbringing of their children is a bedrock principle of American constitutional law. *See, e.g., Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents . . ."); *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality) ("[T]he interest of parents in the care, custody, and control of their children [] is perhaps the oldest of the fundamental liberty interests recognized by this Court."); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (listing cases). The principle of parental sovereignty is one that has distinguished our exceptional nation from authoritarian regimes. *See, e.g.,* Aaron T. Martin, *Homeschooling in Germany and the United States*, 27 *Ariz. J. Int'l. Comp. L.* 225 (2010) (tracing Germany's prohibition of homeschooling to Nazi regime); Nicole M. Skalla, *China's One-Child Policy: Illegal Children and the Family Planning Law*, 30 *Brook. J. Int'l L.* 329 (2004) (discussing China's prior one-child policy); Aleta Wallach, *Comparative Legal Status of American and Soviet Women*, 5 *Val. U. L. Rev.* 439, 479 (1971) (reporting that Soviet policy requires that parents "must bring up their children in the spirit . . . of communism").

¶26 With those rights come deep responsibilities, and failing to fulfill those responsibilities can lead to forfeiture of the rights. But the permanent severance of the parental relationship is a power of awesome magnitude that must be exercised with great rectitude and always cognizant of the fundamental rights at stake. The United States Supreme Court could not have established this principle more strongly. "The fundamental liberty interest of natural parents in the care, custody, and management of their child is protected by the Fourteenth Amendment, and does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). Parents faced with "irretrievable destruction of their family life" have a "critical need for procedural protections." *Id.* Thus,

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“[w]hen the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.” *Id.* at 753–54.

¶27 Our statutes and rules as interpreted and applied by this Court do not always measure up to the demanding constitutional requirements. See *Brenda D. v. Dep’t of Child Safety*, 243 Ariz. 437, 449–51 ¶¶ 44–54 (2018) (Timmer, J., dissenting) (holding that a parent who is late to a hearing may lose important rights); *Marianne N. v. Dep’t of Child Safety*, 243 Ariz. 53, 1008–13 ¶¶ 33–66 (2017) (Eckerstrom, J., dissenting) (holding that a parent who appeared at fourteen consecutive hearings and who failed to appear but attempted to participate telephonically in a status conference can have the proceeding converted to a final termination hearing and lose her children).

¶28 Termination proceedings in Arizona nearly always result in permanent severance of parental rights. According to Department of Child Safety (“DCS”) statistics, from October 2007 to March 2008, petitions for termination encompassed 510 children, and 484 severances were granted. Ariz. Dep’t of Econ. Sec., *Child Welfare Reporting Requirements: Semi-Annual Report for the Period of October 1, 2007 Through March 31, 2008*, at 61 (2008). From April to September 2017, ten years later, the number of petitions increased markedly to 3,097, and 3,095 (99.94%) were granted. Ariz. Dep’t of Child Safety, *Child Welfare Reporting Requirements: Semi-Annual Report for the Period of April 1, 2017 Through September 30, 2017*, at 68 (2017). These statistics by themselves do not demonstrate that deficiencies exist in individual cases. They do, however, counsel that we should take great care to ensure that our termination of parental rights process has not become a railroad with no stops and only one destination, in which judges act as mere conductors.

¶29 As the Court recognizes, we have typically applied a bifurcated process in termination proceedings, determining in the first stage whether one of the statutory grounds for termination was proved by clear and convincing evidence, and in the second stage whether termination is in the best interests of the child by preponderance of the evidence. *Supra* ¶ 8. This bifurcated process does not appear on the face of the statute, which instead directs that “in considering any of the . . . grounds” for termination, “the court shall also consider the best interests of the child.” A.R.S. § 8-533(B); see *Kent K. v. Bobby M.*, 210 Ariz. 279, 286 ¶ 32 (2005). Given that the statute treats termination grounds and the child’s best

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interests as part of the same analysis, the Court aptly today instructs that the juvenile court “must consider the totality of the circumstances.” *Supra* ¶ 1.

¶30 A glaring omission from the statute, from a due process perspective, is its failure to expressly require consideration of a parent’s rehabilitation where the statutory ground for termination does not necessarily suggest permanent unfitness. A.R.S. § 8-533(D) provides that “the court shall consider the availability of reunification services to the parent and the participation of the parent in these services,” but only as to § 8-533(B)(8) and (11) – where child is cared for in a supervised out-of-home placement and reunification services have been provided. By contrast, in *Santosky*, the state was required in the neglect context to make diligent efforts to encourage and strengthen the parental relationship. 455 U.S. at 748. Indeed, the dissenters emphasized that the “central purpose of the New York plan is to reunite divided families.” *Id.* at 771 (Rehnquist, J., dissenting). No such explicit requirement either on the state’s part to engage in such efforts, nor on the juvenile court’s part to consider such efforts, is present in Arizona’s statutory scheme.

¶31 Our court of appeals has long recognized this due process prerequisite. In *Mary Ellen C. v. Arizona Department of Economic Security*, the court of appeals held that in addition to proving a statutory ground, the state must prove “an additional element”; specifically, whether it “made reasonable efforts to preserve the family relationship[.]” 193 Ariz. 185, 191 ¶ 28 (App. 1999). The court explained that this inquiry is not statutory but is required “on constitutional grounds as a necessary element” of any termination proceeding by *Santosky*. *Id.* at 192 ¶ 32; accord *Mary Lou C. v. Ariz. Dep’t of Econ. Sec.*, 207 Ariz. 43, 49 ¶ 15 (App. 2004). As my colleague, then-Judge Gould, aptly described it in *Roberto F. v. Arizona Department of Economic Security*, “In any severance proceeding, the material issue facing the court is whether a parent has the ability to properly parent his/her child; it is irrelevant whether a child has a stronger attachment to their foster parents, whether foster parents are more ‘nurturing,’ or whether foster parents might be more capable or better parents than a natural parent.” 232 Ariz. 45, 54 ¶ 42 (App. 2013).

¶32 However, the Court today holds that all that must be proven by clear and convincing evidence is that the parent engaged in one of the

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statutory grounds for termination, which by itself “constitute[s] a finding of parental fitness.” *Supra* ¶ 11. The Court acknowledges that “the parent’s rehabilitation” should be part of the “totality of the circumstances” that a court must consider in a termination proceeding. *Supra* ¶ 1. However, it errs significantly by failing to accord proper weight to that central consideration, reducing it from an essential element in proving unfitness to merely considering it as one part of the child’s best-interests determination, where it is subordinate to other priorities.

¶33 That holding is at odds with *Santosky*, in which the statutory scheme before the Court required the state in the parental unfitness stage to prove, among other things, “the intensity of its agency’s efforts to reunite the family.” 455 U.S. at 762. Proof of the state’s efforts, *combined* with proof of the parent’s failings, both by clear and convincing evidence, “not only makes termination of parental rights possible; it entails a judicial determination that the parents are unfit to raise their own children.” *Id.* at 760. Here, by contrast, the Court rules that proof of the statutory ground, standing alone, proves unfitness, without a finding either that the state has made diligent efforts to reunify the family or that the parent has failed to remediate the problem. *Supra* ¶¶ 9, 11; *see also supra* ¶ 10 (statutory grounds are “proxies for parental unfitness”).

¶34 Relegating parental rehabilitation to the best-interests inquiry bodes serious ramifications that eviscerate the parent’s fundamental rights. The statutory grounds may reflect a moment in time, or unique circumstances, that justify removal of the child from the home but may not reflect permanent or even ongoing unfitness. The unfitness determination cannot properly be made without considering the state’s reunification efforts and the parent’s success in regaining or attaining parenting skills. *See, e.g., A.M. v. A.C.*, 296 P.3d 1026, 1035 ¶ 29 (Colo. 2013) (“Before terminating the parent-child relationship, the trial court must consider and eliminate less drastic alternatives, . . . and the parents must be given the opportunity to rehabilitate through participation in a treatment plan” (citations omitted)). Once the case moves to the dispositional stage, the parent’s rights are, at best, only one factor among many; for as the Court observes, in the best-interests inquiry, the child’s “stability and security” are the “primary concern.” *Supra* ¶ 12.

¶35 Additionally, consideration of parental rehabilitation during the dispositional stage reduces significantly the state’s burden, from clear

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and convincing evidence to preponderance of the evidence. Here, Mother's relationship with her children was permanently severed despite the fact that she received extensive rehabilitation services, and that DCS and the guardian ad litem agreed that Mother maintained a bond with her children and possessed adequate parenting skills. Although such considerations are important in determining a child's best interests, they are also central in making the predicate determination that the parent is unfit.

¶36 Indeed, as the Court observes, once unfitness is determined, the best-interests standard is satisfied upon a showing that the child will benefit from severance or will be harmed if severance is denied. *Supra* ¶ 13. Considering rehabilitation in that context, rather than as an essential element in proving unfitness, strips the parent's rights of their fundamental nature because the interests of the parent and child are presumed to diverge and the child's interests are paramount.

¶37 The Court goes on to declare that "what courts must not do, and what the court of appeals did here, . . . is subordinate the interests of the child to those of the parent once a determination of unfitness has been made." *Supra* ¶ 15. But that is not what the court of appeals said or did. Rather, the court of appeals stated that "[i]f a parent's ability to parent the children has been established by parent-aide services, there is a bond between the children and parent, and the parent has attained a safe and stable living situation, then the children's adoptability, household stability, and the ability of their current placements to meet their needs are subordinate to the fundamental rights of the parent in determining best interests, unless severance removes a detriment caused by the parental relationship." *Alma S.*, 244 Ariz. at 162 ¶ 38. In other words, if a parent has rehabilitated, the parent's rights generally remain paramount. *See, e.g., Reno v. Flores*, 507 U.S. 292, 304 (1993) ("[T]he best interests of the child' is not the legal standard that governs parents' or guardians' exercise of their custody: So long as certain minimum requirements of child care are met, the interests of the child may be subordinated . . . to the interests of the parents or guardians themselves.").

¶38 Mother has not argued that the statutes violate the Constitution on their face or as applied. Because the juvenile court considered the state's rehabilitation efforts and determined that the children remain at risk if reunited with Mother, and because we review that decision only for abuse of discretion, I join my colleagues in affirming the

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termination. However, the framework for terminating parental rights articulated by the Court here does not provide the “fundamentally fair procedures” that the Constitution requires.

¶39 For many if not most people who are fortunate enough to be parents, the loss of their children is far graver than any possible loss of liberty. It may very well be that the vast majority of parents against whom DCS files termination proceedings deserve ultimately to lose their children. But the framework set forth by the Court today and in other recent decisions allows for the very real possibility that parents who have rehabilitated themselves, who have followed our cumbersome rules to the best of their ability, who have retained a strong familial bond, and who have manifested the ability to parent, will nonetheless lose their children irrevocably. That is not only constitutionally impermissible but intolerable in a free society.

Kent K. v Bobby M. (210 Ariz 279)



Kent K. v. Bobby M

210 Ariz. 279 (Ariz. 2005) · 110 P.3d 1013
Decided Apr 28, 2005

No. CV-04-0209-PR.

April 28, 2005.

Appeal from the Superior Court, Pima County,
280 No. S-16021999, Michael O. Miller, J. *280

Law office of Patricia A. Taylor, by Patricia A. Taylor, Tucson, Attorney for Kent K. and Sherry K.

Randi E. Alexander, Attorney at Law, by Randi E. Alexander, Tucson, Attorney for Bobby M.

McGREGOR, Vice Chief Justice.

¶ 1 Arizona statutes governing the termination of the parent-child relationship require the trial court to make two findings before ordering severance of parental rights. The court first must find the existence of one of several enumerated statutory grounds for termination, Ariz.Rev. Stat. (A.R.S.) section 8-533.B (Supp. 2004), and that clear and convincing evidence establishes the grounds for termination. A.R.S. § 8-537.B (Supp. 2004). Next, the court must determine that termination of the parent-child relationship is in the best interests of the child. A.R.S. § 8-533.B. We granted review to determine whether the clear and convincing evidence standard also applies to measure the evidence presented to establish the best interests of the child.

I.

¶ 2 Kent K. and Sherry K. (appellants) are the maternal grandparents and legal guardians of Leeh M., the child of their sixteen-year-old daughter, Barbara, and eighteen-year-old Bobby M. Barbara

and Bobby M. married in March 1996, but divorced thirteen months later. Throughout their marriage, Barbara and Bobby M. engaged in a pattern of fighting and separation,¹ and both exhibited immaturity and an inability to cope with
281 *281 the responsibilities of parenting. Ultimately, appellants obtained full-time physical custody of Leeh and, in July 2000, became Leeh's legal guardians. Bobby M. initially contested the guardianship but discontinued his efforts after the first hearing because he could not afford an attorney.

¹ These actions led to several allegations of domestic violence against Bobby M. and to his conviction in January 1997.

¶ 3 Following the guardianship hearing, Bobby M. was incarcerated for violating probation and remained incarcerated from October 2000 to October 2002. During that time and afterward, Bobby M. failed to maintain a relationship with Leeh. While in prison, however, Bobby M. took several steps to better himself by completing a parenting class and obtaining substance abuse treatment, and he wrote several letters to both Barbara and Leeh expressing his desire to reunite their family. These letters could not be delivered to Leeh because appellants had obtained a restraining order against Bobby M. prohibiting him from contacting Leeh.

¶ 4 In April 2002, after nearly two years of caring for Leeh as her legal guardians, appellants instituted this action to terminate Bobby M.'s parental rights to Leeh.² See A.R.S. § 8-533.A

("Any person or agency that has a legitimate interest in the welfare of a child, including, but not limited to, a relative, . . . may file a petition for the termination of the parent-child relationship. . . ."). Following a severance hearing, the trial court found that appellants proved abandonment,³ a statutory ground for termination of parental rights, by clear and convincing evidence. The court also found, however, that appellants had not presented clear and convincing evidence that termination of Bobby M.'s parental rights would be in Leeh's best interests and, for that reason, refused to order severance.

² According to the record before this court, Barbara had consented to severance of her parental rights upon the condition that Bobby M.'s parental rights also be terminated.

³

"Abandonment" means the failure of a parent to provide reasonable support and to maintain regular contact with the child, including providing normal supervision. Abandonment includes a judicial finding that a parent has made only minimal efforts to support and communicate with the child. Failure to maintain a normal parental relationship with the child without just cause for a period of six months constitutes prima facie evidence of abandonment.

A.R.S. § 8-531.1 (Supp. 2004).

¶ 5 On appeal, appellants claimed that the trial court erred by applying the clear and convincing standard of proof to its inquiry into the best interests of the child.⁴ The court of appeals affirmed the juvenile court's ruling, holding that "the moving party in any action to terminate parental rights must prove all elements required

for severance, including the best interests of the child, by clear and convincing evidence." *Kent K. v. Bobby M.*, 2 CA-JV 2003-0059, slip op. at ¶ 9 (Ariz.App. 2004) (mem.decision).

⁴ Appellants raised three other issues at the court of appeals: (1) the juvenile court abused its discretion by "disregarding the great weight of the evidence"; (2) the juvenile court abused its discretion by disregarding the opinions of an expert witness; and (3) the length of time for trying the case was unreasonable. They did not ask this court to review any of these issues.

¶ 6 We granted review to clarify the standard of proof required for determining the best interests of the child in a parental severance proceeding. We exercise jurisdiction pursuant to Article 6, Section 5.3 of the Arizona Constitution and Rule 23 of the Arizona Rules of Civil Appellate Procedure.

II.

¶ 7 Arizona statutes address both the grounds and the standard of proof required to sever parental rights. A.R.S. §§ 8-533.B, -537.B. Section 8-533.B defines the grounds that can be used to justify termination and requires that a court, "in considering any of the following grounds [for termination], . . . shall also consider the best interests of the child." A separate statute establishes the procedures for hearing termination cases and directs that "[t]he court's or jury's findings with respect to grounds for termination shall be based upon clear and convincing evidence under the rules applicable and adhering to the trial of civil causes." A.R.S. § 8-537.B.⁵ The statute

282 *282 thus clearly requires that the party seeking termination establish the grounds for termination by clear and convincing evidence.

⁵ The version of A.R.S. § 8-537.B in effect at the time of the severance proceeding in this case provided only for a judge to make findings with respect to the grounds for termination. A.R.S. § 8-537.B (1999). The

statute was amended in 2003 to allow either a judge or a jury to make these findings. See 2003 Ariz. Sess. Laws, 2nd Spec. Sess., ch. 6, § 9. The current version will sunset on January 1, 2007.

¶ 8 The issue presented by this case is whether the court, in determining whether termination is in the best interests of the child, should again apply a clear and convincing standard or should apply a preponderance of the evidence standard. The court of appeals interpreted section 8-537.B as requiring that both the statutory grounds for termination and the finding that termination is in the best interests of the child must be established by clear and convincing evidence. We disagree.⁶

⁶ We review questions of statutory interpretation *de novo*. *City of Tucson v. Clear Channel Outdoor, Inc.*, 209 Ariz. 544, 547 ¶ 8, 105 P.3d 1163, 1166 (2005).

¶ 9 Our prior decisions have never directly considered this issue. In *Michael J. v. Ariz. Department of Economic Security*, 196 Ariz. 246, 995 P.2d 682 (2000), we stated that "[t]o justify termination of the parent-child relationship, the trial court must find, by clear and convincing evidence, at least one of the statutory grounds set out in section 8-533, and also that termination is in the best interest of the child." *Id.* at 249 ¶ 12, 995 P.2d at 685. Appellants argue that this language clearly supports the conclusion that "Arizona breaks the inquiry into two parts," requiring separate standards of proof. See *Kent K.*, 2 CA-JV 2003-0059, slip op. at ¶ 6. In contrast, the court of appeals concluded that the passage supports the conclusion that best interests must be proved by clear and convincing evidence, because we did not state that a separate standard of proof applies. *Id.* at ¶ 7.

¶ 10 Both approaches read too much into our *Michael J.* opinion. The contested language merely restated the language of the statute. Indeed, we explicitly stated that we were not addressing the finding of best interests of the child, as the

appellant had not challenged that finding. *Michael J.*, 196 Ariz. at 249 ¶ 13, 995 P.2d at 685. Thus, we had no occasion to consider the proper evidentiary standard to be applied to the best interests inquiry.

¶ 11 Nor have we ever directly considered the question of the constitutionally required minimum standard of proof in a best interests inquiry. In *Maricopa County Juvenile Action No. JS-500274*, we held that the "best interests of the child are a necessary, but not exclusively sufficient, condition for an order of termination." 167 Ariz. 1, 5, 804 P.2d 730, 734 (1990). Because severance cases involve fundamental rights, we stated, these "constitutional rights can be overridden only by the combined elements of statutorily defined improper behavior by the parent and the child's best interests." *Id.*

¶ 12 The court of appeals has on occasion cited *JS-500274* for the proposition that the best interests of the child must be proved by clear and convincing evidence. See, e.g., *Maricopa County Juvenile Action No. JS-9104*, 183 Ariz. 455, 461, 904 P.2d 1279, 1285 (App. 1995) ("The severing court must find by clear and convincing evidence both the statutory elements plus the best interests of the child."); *Maricopa County Juvenile Action No. JS-8441*, 175 Ariz. 463, 465, 857 P.2d 1317, 1319 (App. 1993) ("A termination order must be supported by clear and convincing evidence establishing a statutory ground and the best interest of the child."). We understand how this misapprehension arose. Our classification of the statutory grounds and best interests as "combined elements" for severance cases could lead one to conclude, as counsel for appellee argued at oral argument, that these are two sides of the same coin. But holding that a particular finding is necessary to satisfy considerations of due process does not involve the same analysis as determining the degree of proof required to justify that finding.

¶ 13 We therefore now expressly consider, first, the standard of proof required by Arizona's statutes to be applied in a best interests inquiry and, second, whether the standard of proof required by statute satisfies constitutional due process requirements. *283

A.

¶ 14 We interpret statutes to give effect to the legislature's intent. When a statute is clear and unambiguous, we apply its plain language and need not engage in any other means of statutory interpretation. *Aros v. Beneficial Ariz., Inc.*, 194 Ariz. 62, 66, 977 P.2d 784, 788 (1999). If ambiguity exists, however, we determine legislative intent by looking first to the text and context of the statute and then considering its historical background, effects and consequences, and its spirit and purpose. *See People's Choice TV Corp., Inc. v. City of Tucson*, 202 Ariz. 401, 403 ¶ 7, 46 P.3d 412, 414 (2002).

¶ 15 We note at the outset that section 8-537.B is ambiguous. The statute explicitly establishes the standard of proof to be applied to the "findings with respect to grounds for termination." A.R.S. § 8-537.B. The statute, however, neither expressly defines the term "grounds for termination" nor specifically provides a standard of proof to be applied to the best interests inquiry. Thus, we must interpret this statute to determine what standard of proof the legislature intended to apply to the best interests inquiry.

¶ 16 Although sections 8-533.B and 8-537.B do not unambiguously establish the standard of proof required to satisfy the best interests inquiry, the statutory language does shed some light on the subject. Section 8-533.B distinguishes between the statutory grounds sufficient to justify the termination of the parent-child relationship on the one hand, and the mandatory consideration of the best interests of the child on the other. The distinction is set up by separate clauses requiring that the trial court first consider "any of the following grounds [for termination]" and then

requiring that the court "also consider the best interests of the child." A.R.S. § 8-533.B. This distinction between grounds for termination and best interests gains importance when read in conjunction with section 8-537, which requires clear and convincing evidence only "with respect to grounds for termination." Thus, the specific reference only to grounds for termination in section 8-537, read together with the distinction in section 8-533 between statutory grounds for termination and the best interests inquiry, evinces an intent on the part of the legislature to apply the standard of proof expressed in section 8-537 only to the grounds for termination and not to the consideration of best interests.

¶ 17 The historical development of these statutes buttresses this conclusion. *See Carrow Co. v. Lusby*, 167 Ariz. 18, 20, 804 P.2d 747, 749 (1990) ("Legislative intent often can be discovered by examining the development of a particular statute."). As originally enacted, Arizona's parental-rights termination statute did not mention the best interests of the child. 1970 Ariz. Sess. Laws, ch. 153, 2 ("Any person or agency that has a legitimate interest in the welfare of a child may file a petition for the termination of the parent-child relationship if one or more of the following grounds exist."). To sever parental rights under this statute, the court needed only to find by a preponderance of the evidence one of the enumerated grounds for severance. *See id.* ("The courts findings with respect to grounds for termination shall be based upon a preponderance of the evidence under the rules applicable and adhering to the trial of civil causes.").

¶ 18 In 1979, the legislature amended the termination statute to provide as follows:

Evidence sufficient to justify the termination of the parent-child relationship shall include any one of the following, and in considering any of the following grounds, the court *may* also consider the needs of the child.

1979 Ariz. Sess. Laws, ch. 86, § 1 (emphasis added). The 1979 amendment clearly established the demarcation between grounds for termination under the statute and best interests of the child by including the needs of the child as a permissive, rather than a mandatory, consideration for the court. Section 8-537.B, including its preponderance standard, remained unchanged until 1983.

¶ 19 Responding to the United States Supreme Court's holding in *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982), that "due process requires that the State support its allegations [in parental termination proceedings] by at least clear and convincing evidence," *id.* at 284 748, *284 102 S.Ct. 1388, and this court's acknowledgement of that rule in *Pima County Juvenile Action No. S-919*, 132 Ariz. 377, 646 P.2d 262 (1982), the legislature amended A.R.S. § 8-537.B in 1983 to replace the preponderance of the evidence standard with a clear and convincing evidence standard. 1983 Ariz. Sess. Laws, ch. 176, § 3. The legislature made no other changes at that time to the relevant sections of the termination statutes. Thus, as the statute stood following the 1983 amendment, an Arizona court could terminate parental rights simply by finding at least one statutory ground listed in section 8-533.B by clear and convincing evidence. After finding that statutory ground, the court was permitted, but not required, to consider the needs of the child in making the final termination decision. We think it unlikely that the legislature intended to require clear and convincing evidence of a finding that it left to the discretion of the trial court to consider in the first instance.

¶ 20 The statute reached its current form in 1994, when the legislature amended section 8-533.B to make the best interests inquiry mandatory. 1994 Ariz. Sess. Laws, ch. 116, § 4 ("[I]n considering any of the following grounds, the court *shall* also consider the best interests of the child.") (emphasis added).

¶ 21 Although Bobby M. asserts that this transition from permissive to mandatory consideration of the best interests of the child indicates that the legislature intended to make best interests one of the "grounds" for termination of parental rights, the legislature did not make any other textual changes that would support such a conclusion. In making the best interests consideration mandatory, the legislature left intact the remaining language of section 8-533.B, thereby continuing to distinguish statutory grounds for termination from the best interests inquiry. Nor did the legislature alter section 8-537.B to apply a heightened evidentiary standard to anything beyond proof of the statutory grounds for termination. Had the legislature desired to apply the clear and convincing evidence standard to the finding of best interests of the child, it easily could have done so.

¶ 22 For the foregoing reasons, we conclude that Arizona's statutes require that the party seeking termination of parental rights establish only the statutory grounds of section 8-533 by clear and convincing evidence and establish the best interests of the child by a preponderance of the evidence.

¶ 23 This conclusion does not end our analysis, however, as we must also consider whether the Due Process Clause of the Fourteenth Amendment requires that the best interests determination be supported by clear and convincing evidence.

B.

¶ 24 Parents possess a fundamental liberty interest in the care, custody, and management of their children. *Santosky*, 455 U.S. at 753, 102 S.Ct. 1388; *Michael J.*, 196 Ariz. at 248 ¶ 11, 995 P.2d at 684. As with other fundamental rights, however, parental rights are not absolute. *Id.* at ¶ 12. A court may order severance of parental rights under certain circumstances, so long as the parents whose rights are to be severed are provided with "fundamentally fair procedures" that satisfy due process requirements. *Santosky*, 455 U.S. at 754,

102 S.Ct. 1388. Application of the proper standard of proof in a termination hearing is a critical component of the "fundamentally fair procedures" necessary to satisfy due process.

¶ 25 As the Supreme Court has noted, "the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants." *Id.* at 755, 102 S.Ct. 1388 (citing *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979)). The preponderance of the evidence standard requires that the fact-finder determine whether a fact sought to be proved is more probable than not. *See* Black's Law Dictionary 1201 (7th ed. 1999). This standard essentially allocates the risk of error equally between the parties involved. Clear and convincing evidence, in contrast, reflects a heightened standard of proof
285 that indicates that "the thing to be proved is *285 highly probable or reasonably certain." *Id.* at 577. This standard places a heavier burden upon one party to prove its case to a reasonable certainty.

¶ 26 These two standards of proof allocate the risk of error in the determination of a given fact quite differently and can lead to quite different results. Bobby M. contends that, because of the importance of a parent's interest in a severance proceeding, the Supreme Court's decision in *Santosky* mandates that the party seeking termination of parental rights establish by clear and convincing evidence that severance serves the child's best interests.

¶ 27 In *Santosky*, the Supreme Court considered a New York statute that created a bifurcated proceeding in which a juvenile court first conducted a fact-finding hearing to determine whether the government had proved statutory grounds of parental unfitness.⁷ 455 U.S. at 748, 102 S.Ct. 1388. If the court determined that the State had met its burden for proving the parent's unfitness, the court moved to a subsequent

dispositional hearing at which it determined what placement would be in the best interests of the child. *Id.*

⁷ In *Santosky*, the State sought termination of parental rights on the statutory ground of "permanent neglect." 455 U.S. at 747, 102 S.Ct. 1388.

¶ 28 On a challenge by the Santoskys to an order terminating their parental rights under the New York statute, the Supreme Court held that the government could sever parental rights only by establishing the grounds for parental unfitness by at least clear and convincing evidence. *Id.* at 769, 102 S.Ct. 1388. The Court stated that "such a standard adequately conveys to the factfinder the level of subjective certainty about his factual conclusions necessary to satisfy due process." *Id.*

¶ 29 In determining how the risk of error should be distributed in parental rights termination proceedings, the Court balanced the three factors established in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976): "the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." *Santosky*, 455 U.S. at 754, 102 S.Ct. 1388. The Court held that in proceedings to sever parental rights, "the private interest affected is commanding; the risk of error from using a preponderance standard is substantial; and the countervailing governmental interest favoring that standard is comparatively slight." *Id.* at 758, 102 S.Ct. 1388. Thus, because the preponderance of the evidence standard essentially allocates the risk of error equally between the parents and the state, due process requires a higher standard of proof than preponderance of the evidence.

¶ 30 Despite its sometimes sweeping language, throughout the *Santosky* opinion the Court made it abundantly clear that its analysis of constitutional due process requirements addressed only the first stage of the New York termination proceedings,

the fact-finding hearing. For example, in describing the private interests affected by the proceeding, the Court acknowledged that both the child and the foster parents shared an interest in the outcome; however, "at the *fact-finding stage* . . . the focus emphatically is not on them." *Santosky*, 455 U.S. at 759, 102 S.Ct. 1388 (emphasis added). Moreover, at the fact-finding stage, the state may not presume that the child and her parents possess adverse interests. Rather, at the outset of a termination proceeding, parent and child "share a vital interest in preventing erroneous termination of their natural relationship." *Id.* at 760, 102 S.Ct. 1388.

¶ 31 The Court recognized, however, that at the dispositional stage, the government may assume that the interests of the parents and the child diverge. *Id.* Once a court determines that a parent is unfit, the focus shifts to the interests of the child as distinct from those of the parent. The weight of the presumption that the child shares the parent's interest in preserving the family relationship is greatly reduced by the potential harm to the child from maintaining a relationship with an unfit parent. Moreover, the court must consider the state's interest at the dispositional phase: "Any *parens patriae* interest in terminating the natural
286 parents' *286 rights arises only at the dispositional phase, *after* the parents have been found unfit." *Id.* at 767 n. 17, 102 S.Ct. 1388.

¶ 32 Arizona's statutory scheme differs slightly from the New York statutes discussed in *Santosky*. Arizona does not explicitly bifurcate its termination proceedings into fact-finding and dispositional stages. Nonetheless, as we have already discussed, A.R.S. § 8-533.B does distinguish between the finding of statutory grounds for termination on the one hand and the consideration of the best interests of the child on the other. Although the court considers the separate inquiries required under section 8-533.B in a single hearing, the two inquiries are comparable to the separate fact-finding and dispositional hearings conducted under the New

York statute. Thus, within the context of Arizona's legislative scheme, *Santosky* mandates only that the findings of the statutory grounds for termination be supported by clear and convincing evidence. The opinion does not define the minimum standard of proof required for determining the best interests of the child.

C.

¶ 33 We apply the *Mathews* test to determine the standard of proof required for a finding that severance of parental rights is in the best interests of the child. Under *Mathews*, determining the minimum standard of proof required to afford due process involves consideration of three factors: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U.S. at 335, 96 S.Ct. 893.

¶ 34 With respect to the private interests at stake, we previously have held that "[s]everance of parental rights necessarily involves the consideration of fundamental, often competing, interests of parent and child." *Michael J.*, 196 Ariz. at 248 ¶ 11, 995 P.2d at 684. Proceedings to sever parental rights involve two private interests. On the one hand, the parent possesses a fundamental liberty interest in the control and care of his or her child. The child, on the other hand, has an interest in a "normal family home." *Santosky*, 455 U.S. at 759, 102 S.Ct. 1388; see also *Pima County Juvenile Severance Action No. S-114487*, 179 Ariz. 86, 101, 876 P.2d 1121, 1136 (1994) (finding that in parental severance matters, judges must protect a child's interest in stability and security).

¶ 35 As the Supreme Court made clear in *Santosky*, until a court finds grounds for termination, parent and child "share a vital interest in preventing erroneous termination of their natural relationship." 455 U.S. at 760, 102 S.Ct. 1388. Thus, these interests must be assumed to "coincide to favor use of error-reducing procedures." *Id.* at 761, 102 S.Ct. 1388. In a best interests inquiry, however, we can presume that the interests of the parent and child diverge because the court has already found the existence of one of the statutory grounds for termination by clear and convincing evidence. See A.R.S. §§ 8-533.B, -537.B.⁸ Thus, while a parent already found unfit maintains some interest in the care and custody of his or her child, the court's determination that statutory grounds for severance of parental rights exist substantially reduces the importance of this interest. In considering the best interests of the child, the court must balance this diluted parental interest against the independent and often adverse interests of the child in a safe and stable home life.

⁸ In Arizona, the statutory grounds for termination of parental rights are serious in nature, involving grave misconduct, see § 8-533.B.1-2 (abandonment, neglect or willful abuse), or complete abdication of parental responsibilities, § 8-533.B.3-10 (mental deficiency, lengthy imprisonment, prolonged failure to exercise parental rights or responsibilities).

¶ 36 In light of the shifting of the personal interests at stake, we must also consider the second *Mathews* factor: "the risk of erroneous deprivation of private interests resulting from use of a 'fair preponderance' standard and the likelihood that a higher evidentiary standard would reduce that risk." *Santosky*, *287 455 U.S. at 761, 102 S.Ct. 1388. In *Santosky*, the Court found a magnified risk of error in applying the preponderance of the evidence standard during the fact-finding portion of New York's proceedings because the fact-finding focused solely on the

parent's conduct, pitting the immense resources of the state against the parent in an attempt to show parental unfitness. *Id.* at 762-65, 102 S.Ct. 1388. Because the focus is solely upon the parent at the fact-finding stage, without a heightened standard, the risk that a fit parent might be found unfit increases. Use of a heightened standard of proof at the fact-finding stage recognizes the severe consequence of an erroneous determination of unfitness: Error at this stage could lead to permanently extinguishing the relationship between a fit parent and his or her child.

¶ 37 During a best interests inquiry, however, the risk of error and the potential for reducing that risk by raising the standard of proof change dramatically. Unlike the fact-finding proceeding, the best interests inquiry focuses primarily upon the interests of the child, as distinct from those of the parent. In determining the child's best interests, the court must essentially balance the rights of an unfit parent against those of the child. At this stage, the child's interest in obtaining a loving, stable home, or at the very least avoiding a potentially harmful relationship with a parent, deserves at least as much weight as that accorded the interest of the unfit parent in maintaining parental rights. In such cases, in which two interests of relatively equal weight clash, allocating a greater share of the risk of error to one party serves no societal interest. Moreover, requiring proof by clear and convincing evidence that termination of parental rights is in the best interests of the child actually places the risk of an erroneous conclusion as to the *child's best interests* squarely upon the child.

¶ 38 An example underscores the problem that arises from imposing a clear and convincing evidence standard of proof on the best interests inquiry. Under a heightened standard of proof, a judge, after finding statutory grounds for termination of parental rights by clear and convincing evidence, might also find upon a preponderance of the evidence that severance of parental rights is in a child's best interests, perhaps

because the child would be jeopardized by the continuation of the relationship. See *JS-500274*, 167 Ariz. at 5, 804 P.2d at 734 (recognizing potential jeopardy as evidence of the best interests of the child). Under the test proposed by Bobby M., unless the evidence of the child's best interests meets the heightened clear and convincing evidence standard, that judge would be required to leave the child in status quo, despite finding by a preponderance of the evidence that doing so exposes the child to jeopardy. This result would give too much weight to a parent's interests at a stage at which the court should focus upon what is best for the child.

¶ 39 Finally, applying the third prong of the *Mathews* test requires consideration of two state interests at stake in parental rights termination proceedings. The state possesses both "a *parens patriae* interest in preserving and promoting the welfare of the child and a fiscal and administrative interest in reducing the cost and burden of such proceedings." *Santosky*, 455 U.S. at 766, 102 S.Ct. 1388. *Santosky* concluded that neither of these state interests was unduly burdened by applying the clear and convincing standard of proof during the fact-finding proceeding. *Id.* at 766-67, 102 S.Ct. 1388. First, according to *Santosky*, a heightened standard of proof should not place any substantial fiscal or administrative burden on the state. *Id.* at 767, 102 S.Ct. 1388. Second, because the state's *parens patriae* interest in termination does not arise until the statutory grounds for termination have been established, requiring a heightened standard of proof to establish those statutory grounds should not burden the state's *parens patriae* interest. *Id.* at 766-67, 102 S.Ct. 1388.

¶ 40 During the best interests inquiry, however, the court must consider the state's compelling *parens patriae* interest in protecting the child through terminating the natural parent's rights. See *id.* at 767 n. 17, 102 S.Ct. 1388; cf. *Cochise County Juvenile Action No. 5666-J*, 133 Ariz. 157, 161, 650 P.2d 459, 463 (1982). While shifting to

the best interests inquiry presumably does not alter the impact of a heightened standard of proof on the state's fiscal or administrative interests, use of the clear and convincing *288 standard during the best interests inquiry clearly could frustrate the state's "urgent interest in the welfare of the child." *Santosky*, 455 U.S. at 766, 102 S.Ct. 1388 (quoting *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981)).

¶ 41 After balancing these three *Mathews* factors, we conclude that due process does not require imposing the clear and convincing evidence standard for an inquiry into the best interests of the child pursuant to A.R.S. § 8-533.B. Rather, because the best interests inquiry requires a delicate balancing of the child's interests, along with the *parens patriae* interest of the state, against the interests of an unfit parent, we hold that the preponderance of the evidence standard adequately allocates the risk of error between these competing interests.

III.

¶ 42 In the case before us, the trial court determined that appellants proved the statutory ground for termination of parental rights, abandonment, by clear and convincing evidence, but held that they had not proved by clear and convincing evidence that severing Bobby M.'s parental rights was in the best interests of the child. The court of appeals affirmed both of these holdings. Because we hold today that preponderance of the evidence, rather than clear and convincing evidence, is the proper standard of proof to be applied to the best interests inquiry, we vacate the portion of the court of appeals' memorandum decision relating to this issue. We affirm that portion of the trial court's judgment concerning the statutory grounds for termination, reverse its finding as to best interests, and remand to the trial court to reconsider its best interests finding, applying the proper standard of proof.⁹

9 In a document recently filed with this court, Bobby M. suggests that a material change in circumstance has occurred that may affect the trial court's best interests inquiry. On remand, the court may consider evidence of events that have occurred since its initial decision.

CONCURRING: CHARLES E. JONES, Chief Justice, REBECCA WHITE BERCH, MICHAEL D. RYAN and ANDREW D. HURWITZ, Justices.

**Mary Ellen C.
v.
Arizona Dept. of
Economic Security,
(193 Ariz. 185), (971 P.2d 1046)**



Mary Ellen C. v. Arizona Dept. of Economic

193 Ariz. 185 (Ariz. Ct. App. 1999) · 971 P.2d 1046
Decided Jan 19, 1999

No. 1CA-JV 98-0130.

January 19, 1999.

Appeal from the Superior Court, Maricopa
186 County, Kenneth L. Fields, J. *186

Carol Coghlan, Phoenix, Attorney for Appellant.

Mary C. McDonald, Glendale, Attorney for
Appellee Child.

Grant Woods, Attorney General by Kim Zack,
Assistant Attorney General, Mesa, Attorneys for
Appellee Arizona Department of Economic
Security.

OPINION

FIDEL, Judge.

¶ 1 It is well established that the State, before acting to terminate parental rights, has an affirmative duty to make all reasonable efforts to preserve the family relationship. *See Maricopa County Juv. Action No. JS-6520*, 157 Ariz. 238, 241, 756 P.2d 335, 338 (App. 1988); *see also Maricopa County Juv. Action No. JA 33794*, 171 Ariz. 90, 91-92, 828 P.2d 1231, 1232-33 (App. 1991). The case law has been inconsistent, however, in establishing whether this affirmative duty entails an obligation to make a reasonable effort to rehabilitate a parent who suffers from a disabling mental illness. We hold in this opinion

187 *187 that, although the State is not obliged to undertake futile rehabilitative measures, it is obliged to undertake those which offer a reasonable possibility of success. We then

consider whether the State met its obligation to make a reasonable rehabilitative effort in the underlying case. Finding that the State did not make such an effort, we reverse the juvenile court termination order that gives rise to this appeal.

I. HISTORY

¶ 2 Mary Ellen C. is the natural mother of three daughters, one of whom, Destiny C., is the subject of this proceeding. Destiny, born July 15, 1990, in Phoenix, Arizona, is presently eight years old. Destiny's putative birth father is deceased.

¶ 3 On May 15, 1995, a Child Protective Services (CPS) caseworker investigated a report that Mary kept rats in her apartment and that she frequently left Destiny, then four, and her thirteen-year-old sister Jennifer home alone. The caseworker found the home to be filthy; ten to twenty-five rats occupied unclean cages in the children's bedroom, and the apartment emitted a strong odor.

¶ 4 Later that day, police discovered that Mary was the subject of outstanding arrest warrants. When they returned to Mary's apartment to arrest her, CPS took temporary custody of Destiny and Jennifer.

¶ 5 Mary spent five nights in jail. Shortly after her release, she was evicted from her apartment and lived with a friend for approximately six weeks. A period of homelessness followed, during which Mary sought assistance from a church and spent one night in a shelter. Eventually, Mary moved into a one bedroom trailer with a friend, where she

remained until approximately July 1997, when she took up residence with the parents of Harold H., a man to whom she had become engaged.

¶ 6 Meanwhile, after a contested hearing on October 31, 1995, the juvenile court adjudicated the children dependent, placed Jennifer in a group foster home, and placed Destiny with a foster family. Destiny has remained in the same placement since 1995, and her foster parents wish to adopt her.

¶ 7 By February 1996, CPS had maintained custody of Mary's children for the better part of a year, yet had not referred her to parenting classes; had referred her for a clinical interview in November 1995, but had not yet referred or directed her to counseling; and, aside from arranging visitation,¹ had not yet provided her any services directed toward reunification with her children. Witness Sue Weil, who became Mary's caseworker in February 1996, could not explain "why services were not started prior to the time I got the case."

¹ Although Mary was essentially homeless and lacked transportation, she regularly made her scheduled visitation with her daughters.

¶ 8 In April 1996, Weil referred Mary to parenting classes, which she attended and completed. And two months later, more than a year after CPS took custody of Mary's children, Weil referred her to Dr. Armando Bencomo for psychological evaluation.

¶ 9 Dr. Bencomo interviewed Mary on June 18, 1996, reviewed referral information from CPS, administered psychological tests, and concluded that Mary suffered from major depression, post-traumatic stress disorder, a possible learning disability or borderline IQ, and dependent personality disorder with self-defeating features. Although Dr. Bencomo rendered a guarded

prognosis, he also held out the prospect that, with intensive psychiatric services, Mary might be turned around:

This client is poorly equipped to function independently, much less to take care of a child. She needs intensive mental health services. She should be evaluated psychiatrically with consideration of antidepressant medication and perhaps another medication to help her with her increasing paranoid ideation. She would probably benefit from participation in a day treatment program more than from individual counseling alone. Ideally, she should be on SSI and in a semi-sheltered residential program where she can have a reasonable level of nutrition and adequate housing. *188 Once she is having her survival needs adequately met and is stabilized psychiatrically, she would benefit from referral to the state Vocational Rehabilitation agency.

I doubt that Mary can sufficiently address all of her mental health issues in less than one year. Long term foster care or relative placement for Jennifer may be appropriate, and *Destiny might be a candidate for adoption. However, intensive psychiatric services might turn Mary around sooner than I expect, so you may wish to wait another six months before changing the case plan, in order to see if she avails herself of services and improves in her emotional and social adjustment.*

¶ 10 CPS did not follow Dr. Bencomo's recommendation to await a trial of intensive psychiatric services before changing the case plan. Nor did CPS make any significant effort to assist Mary to receive psychiatric services. Instead, in August 1996, after reviewing Dr. Bencomo's report, caseworker Weil provided Mary with the phone number for ComCare, the State's contract mental health provider, and encouraged her to

"selfrefer." Then, in November 1996, CPS changed Destiny's case plan to "severance and adoption" because, as Weil explained, Destiny had been in a stable foster placement for eighteen months and Mary "had made some progress but not very much" in stabilizing her living arrangements and mental health. In November 1996, however, although Mary had diligently followed-up on Weil's referral to ComCare, she still had a month to wait before receiving even a psychiatric evaluation from ComCare.

¶ 11 Mary did manage to receive some counseling and medication through ComCare before the end of 1996, and in January 1997, on her own initiative, she obtained a job as a waitress. Around this time, Ms. Weil noted "a change in her affect, her verbalizations. She wasn't as defensive or hopeless . . ." Yet neither Ms. Weil, who left the case in January 1997, nor her successor, Joan Johnson obtained ComCare records or reports concerning Mary's progress.

¶ 12 In February 1997, the State petitioned to sever Mary's parental relationship with Destiny. As grounds, the State alleged that Mary suffered from a mental illness that rendered her incapable of parenting the child, that this circumstance was likely to "continue for a prolonged indefinite period," and that Mary had not remedied and was unlikely to remedy the conditions that had necessitated Destiny's out-of-home placement for a period exceeding eighteen months. *See* Ariz.Rev.Stat. Ann. ("A.R.S.") § 8-533 (B)(3) and (B)(7)(b).

¶ 13 In October 1997, Dr. David Young conducted a psychological evaluation of Mary pursuant to court order. Dr. Young interviewed Mary, administered psychological tests, and reviewed information provided by CPS, including Dr. Bencomo's psychological evaluation of June 1996. During the interview, Mary reported that she had received approximately six counseling sessions from ComCare. Dr. Young did not seek or review ComCare records or reports.

¶ 14 Dr. Young diagnosed (1) dysthymia,² (2) parent/child relational problem, (3) neglect of child, and (4) borderline personality disorder. He reported that Mary's lack of progress after an extended period of services from CPS rendered her prospects for functional improvement "dismal."

² According to Dr. Young, dysthymia is "one of the descriptions of depression, involving low self-esteem, feelings of inadequacy, difficulty functioning on a rather chronic level. It's not to the point where it's incapacitating for a person. One, they feel quite uncomfortable, unhappy with their circumstances and their relationship as well as self-esteem."

¶ 15 The juvenile court conducted a severance hearing in March and April 1998. Dr. Young testified that Mary's "disorder and how she handles her problems are having a significant negative impact upon her parenting of a child." When asked if Mary's borderline personality disorder rendered her incapable of discharging her parental responsibilities, he responded, "[a]t the level that she is displaying it, yes."

¶ 16 Dr. Young acknowledged that all of Mary's diagnosed conditions were amenable to treatment. He rendered a negative prognosis, however, based upon what he understood ¹⁸⁹ to be Mary's minimal accomplishments since the time of Destiny's removal:

Based upon her performance in the past she is likely not going to be able to accomplish those things that have been asked of her in the foreseeable future. To rectify those things would require a great deal of effort, consistency and commitment. Based upon the past review of her efforts and accomplishments they have been quite poor. It is likely that she is not going to be able to make the major changes in the foreseeable future.

¶ 17 Dr. Young was asked to elaborate on the history and assumptions that underlay his negative assessment of Mary's progress:

A. I had asked her what she had accomplished and she had outlined to me what I reported in my report.

Q. Which would be what?

A. Well, she was residing with her boyfriend. She was not employed. She was not in therapy at the time. She was not on medications for sleep. And that is essentially what she outlined to me what she had accomplished.

Q. Did you explore at all with either her or CPS why she was not in counseling at the time?

A. I'm not sure why she was not in counseling except that it was required of her and asked of her and she wasn't complying.

Q. Did CPS ever tell you what counseling she was required to be in?

A. No.

Q. Was there any reference to the counseling that she was required to be in the materials that were provided to you by CPS?

A. Well, I would have to refer to the previous reports (In that issue. Essentially she needed to address the issues that were — that brought them into care.

Dr. Young added that Mary's six counseling sessions at ComCare were inadequate to address her need.

¶ 18 As it happened, Dr. Young's assumptions were mistaken. Although he assumed that CPS had provided Mary with significant mental health services and that Mary had been recalcitrant in taking advantage of them, all that CPS had

provided was the phone number of ComCare, whose services, according to Weil, Mary had diligently pursued. Although Dr. Young assumed that Mary was non-compliant by terminating her counseling after an inadequate six sessions, the evidence was undisputed that these six sessions were all that ComCare had made available to her by the time of his interview.

¶ 19 Dr. Young did not review records or reports from ComCare, although he agreed that such information would have been pivotal in evaluating Mary's progress:

A. Seeking treatment and participating in treatment is not in itself either a guarantee that a person has improved nor is it a demonstration that it has not worked either. So it depends on the reports that were received concerning the progress.

Q. Have you received or were you provided a copy of any reports from ComCare to review regarding my client's participation in ComCare, her diagnoses, her medications, and her carrying through with those medications? Anything at all of that nature?

A. No.

¶ 20 By the time of trial, some six months after Dr. Young evaluated her, Mary was receiving regular counseling and medication services through ComCare. She was receiving social security disability payments. She had been steadily employed as a part-time waitress for almost six months and had held employment during approximately thirteen of the past sixteen months.³

Between social security and her earnings from employment, Mary had personal income of \$930 per month. Mary had married her fiancé in October 1997, two weeks after her examination by Dr. Young, her husband was employed, and Mary and her husband owned a four-bedroom home. When asked whether any of these facts would alter

190 his prognosis, *190 Dr. Young testified that he

could not offer an opinion regarding Mary's current circumstances because he had not examined her since October 1997.

³ Mary had worked as a waitress from January through August 1997. She was between jobs when interviewed by Dr Young on October 3, 1997, and resumed new employment in November 1997, which she held in April at the time of trial.

¶ 21 Dr. Young was not alone in his inability to assess Mary's current circumstances. As noted earlier, none of Mary's CPS caseworkers had pursued meaningful contact with her physicians or counselors at ComCare. Indeed, Joan Johnson, who succeeded Sue Weil as Mary's caseworker and retained that position at the time of trial, had not pursued meaningful contact with Mary herself. Johnson's primary contact with Mary was during supervised visitation. Ms. Johnson had not interviewed Mary's husband, checked into his background, or visited Mary's home. She explained,

I don't think that's the issue. I think what we are looking at is, you know, I have had the case only for this period of time. The evaluation people have made recommendations as team members, you know, to helping us make this decision. And I don't think the home is necessarily an issue. It's, you know, her ability to parent, and I think that's been evaluated, clinically by, you know, several people.

Ms. Johnson added that the clinical evaluations she referred to were those of Drs. Young and Bencomo, but admitted that neither of those doctors had provided ongoing counseling to Mary or seen her interact with Destiny.

¶ 22 At the conclusion of the hearing, the juvenile court terminated Mary's parent-child relationship with Destiny. Finding that "[d]espite her efforts, [Mary] was unable to remedy the circumstances which cause the child to reside in an out-of-home placement," that Mary suffered from a borderline

personality disorder "so severe that she is incapable of adequately parenting a child, and that "[t]his disorder is not likely to be resolved in the foreseeable future," the juvenile court found severance appropriate under [A.R.S. § 8-533 \(B\)\(3\)](#) and (B)(7)(b). The juvenile court also concluded that a severance would benefit Destiny by facilitating her adoption into a permanent, stable home.

¶ 23 On the question whether the State had provided Mary with the requisite remedial services, the juvenile court made the following findings:

The child was taken into [CPS] custody in May 1995 . . . Since her removal, [CPS] has offered and referred [Mary] a variety of reunification services, including psychological testing, drug testing, parenting education, housing, vocational training, visitation, and referral to ComCare for mental health services.

¶ 24 On appeal, Mary challenges the sufficiency of the evidence in support of each of these findings. We reverse because the court lacked evidence to support the conclusion that Mary had received the requisite reunification services or that a reasonable effort to preserve the family had failed.

II. A REASONABLE EFFORT

A. The State's Duty

¶ 25 To accomplish a severance of parental rights, the State must establish each of the requisite elements by clear and convincing evidence. *Santosky v. Kramer*, 455 U.S. 745, 1 (92 S. Ct. 1388, 71 L.Ed.2d 599 (1982)); *Pima County Severance Action No. S-1607*, 147 Ariz. 237, 238, 709 P.2d 871, 872 (1985). A reviewing court will accept the juvenile court's findings in support of severance unless those findings are clearly erroneous. *Maricopa County Juv. Action No. JS-6520*, 157 Ariz. 238, 241, 756 P.2d 335, 338 (App. 1988).

¶ 26 Before terminating the parent-child relationship, the juvenile court must determine that at least one of the statutory grounds for severance applies. *Maricopa County Juv. Action No. JA 33794*, 171 Ariz. 90, 92-93, 828 P.2d 1231, 1233-34 (App. 1991). At the time of the trial,⁴ the pertinent statutory grounds were these:

⁴ In 1998, the legislature reduced the out-of-home-placement criterion of subsection 8-533 (B)(7)(b) from eighteen to fifteen months. 1998 Ariz. Sess. Laws Ch. 276 § 13.

Evidence sufficient to justify the termination of the parent-child relationship shall include any one of the following . . . :

191 *191

3. That the parent is unable to discharge the parental responsibilities because of mental illness, . . . and there are reasonable grounds to believe that the condition will continue for a prolonged indeterminate period.

7. That the child is being cared for in an out-of-home placement under the supervision of the juvenile court, the division or a licensed welfare agency, that the agency responsible for the care of the child has made a diligent effort to provide appropriate reunification services and that either of the following circumstances exists:

(b) The child has been in an out-of-home placement for a cumulative total period of eighteen months or longer pursuant to court order, the parent has been unable to remedy the circumstances which cause the child to be in an out-of-home placement and there is a substantial likelihood that the parent will not be capable of exercising proper and effective parental care and control in the near future.

A.R.S. § 8-533 (B).

¶ 27 The juvenile court found in Mary's case that the State had established both of the quoted statutory grounds for severance of parental rights. The court additionally found that a severance would serve the best interests of the child — a necessary element in any severance under Arizona law. See *Maricopa County Juv. Action No. JS-500274*, 167 Ariz. 1, 4-5, 804 P.2d 730, 733-34 (1990).

¶ 28 The dispositive question in this case is whether the State established an additional element that turns upon the State's own conduct. Did the State prove that it had made reasonable efforts to preserve the family relationship? See *Maricopa County Juv. Action No. 6520*, 157 Ariz. at 241, 756 P.2d at 338; *Maricopa County Juv. Action No. JA 33794*, 171 Ariz. at 91-92, 828 P.2d at 1232-33.

¶ 29 A preliminary question, however, is whether the State is obliged to make such efforts before seeking a severance on the statutory basis that a parent suffers from a mental illness of prolonged and indefinite duration. See A.R.S. § 8-533 (B)(3).

¶ 30 If the State's duty to make reasonable preservative efforts were merely statutory, the text of A.R.S. § 8-533 (B) might give reason to question whether that duty applies to a severance sought on mental illness grounds. As this court observed in a 1992 decision, part 3 of subsection 8-533 (B), the part relating to mental illness, does not expressly include language "requiring that DES make 'diligent efforts' to reunify the family." *Matter of Appeal in Yuma County J-88-201, J-88-202, J-88-203*, 172 Ariz. 50, 53 n. 2, 833 P.2d 721, 724 n. 2 (App. 1992). Part 7, in contrast, expressly requires that the State "ma[k]e a diligent effort to provide appropriate reunification services." The contrast between part 3 and other parts of A.R.S. § 8-533 (B) led this court to suggest in dictum in *Yuma County J-88-201* that the State need not make a diligent reunification effort before seeking a severance on mental illness grounds. *Id.*⁵

5 To suggest that the State had no duty to make a diligent reunification effort was dictum because it was not a basis for the court's decision. The court resolved the case by deciding that the State *had* made a diligent — indeed, a "prolonged, painstaking" — effort to reunify the family. *Id.* at 54, 833 P.2d at 725.

¶ 31 We reject the *Yuma County* dictum for two reasons. First, it overlooks a statutory requirement that implicitly incorporates the obligation to make *reasonable* efforts to preserve the family before seeking a severance on mental illness grounds. Specifically, the statute permits a severance only if the illness renders the parent "unable to discharge the parental responsibilities . . . and there are reasonable grounds to believe that the condition will continue for a prolonged indeterminate period." A.R.S. § 8-533 (B)(3). It is inherent within this requirement that the condition be proven not to be amendable to rehabilitative services that could restore a mentally ill parent's ability to care for a child within a reasonable time.

¶ 32 Second, by engaging in a purely statutory analysis, the *Yuma County* opinion overlooked that
 192 Arizona courts have not defined *192 the State's duty to make reasonable efforts to preserve the family as a duty merely statutory in origin. Rather, our courts have defined it on constitutional grounds as a necessary element of any state attempt to overcome what the United States Supreme Court has described as the "fundamental liberty interest of the natural parents in the care, custody and management of their child." *Santosky v. Kramer*; 455 U.S. at 753, 102 S.Ct. 1388; see also *JS-500274*, 167 Ariz. at 5, 804 P.2d at 734 (the "important consideration" in severance cases "is that there are fundamental constitutional rights involved"). Thus, in *Juv. Action No. JA 33794*, this court stated, "The combined effect of the fundamental character of a parent's right to his child and the severity and permanence of termination dictates that the court sever the parent-child relationship only in the most extraordinary

circumstances, when all other efforts to preserve the relationship have failed." 171 Ariz. at 91-92, 828 P.2d at 1232-33.

¶ 33 Arizona courts have long required the State, in mental-illness-based severances, as in others, to demonstrate that it has made a reasonable effort to preserve the family. See *Pima County Severance Action No. S-2397*, 161 Ariz. 574, 577, 780 P.2d 407, 410 (App. 1989) (severance on grounds of mental illness upheld where evidence established "that no other services could be offered that had not already been offered that might preserve the family"); *Maricopa County Juv. Action No. JS-5209 No. JS-4963*, 143 Ariz. 178, 189, 692 P.2d 1027, 1038 (App. 1984) (duty to attempt reasonable rehabilitation satisfied where mentally ill mother was provided the type of therapy that offered the most hope of enabling her to carry out parental responsibilities); see also *Maricopa County Juv. Action No. JS-6520*, 157 Ariz. 238, 245, 756 P.2d 335, 342 (App. 1988) (State established that mentally ill parent was not amenable to any treatment program).

¶ 34 In short, because fundamental interests are no less involved in mental-ill-ness-based severances than in others, the principle is no less applicable in mental-ill-ness-based severances than in others that "termination of the parent-child relationship should not be considered a panacea but should be resorted to preserve the relationship fails." *Department of Economic Sec. v. Mahoney*, 24 Ariz. App. 534, 537, 540 P.2d 153, 156 (1975); see also *JS-500274*, 167 Ariz. at 4-5, 804 P.2d at 733-34 and cases cited therein. This principle does not oblige the State to undertake rehabilitative measures that are futile. See *JS-5209*, 143 Ariz. at 189, 692 P.2d at 1038. It does, however, oblige the State to undertake measures with a reasonable prospect of success.

B. The State's Failure to Satisfy its Duty

¶ 35 CPS offered Mary no significant reunification services for almost a year after removing Destiny from her care. It waited more than a year after

removing the child before referring a mother with a serious mental illness for a psychological evaluation and did not steer her to ComCare for treatment until three months more had passed. As for steering Mary to Comcare, which was the sum total of CPS's response to Dr. Bencomo's recommendation of intensive psychiatric services, CPS gave Mary a phone number, encouraged her to self-refer, and never followed up sufficiently to secure ComCare records of her progress.

¶ 36 Up to October of 1997, Mary received six sessions of counseling at ComCare. This level of intervention obviously fell short of Dr. Bencomo's recommendation, and Dr. Young testified that six sessions could not adequately address Mary's needs.

¶ 37 Although CPS need not provide "every conceivable service," it must provide a parent with the time and opportunity to participate in programs designed to improve the parent's ability to care for the child. *Maricopa County Juv. Action No. JS-501904*, 180 Ariz. 348, 353, 884 P.2d 234, 239 (App. 1994). The State does not provide such opportunity or make a "concerted effort to preserve" the parent-child relationship when it neglects to offer the very services that its consulting expert recommends.

¶ 38 In *JS-5209*, before approving a termination on mental illness grounds, this court observed that 193 CPS had provided "the *193 type of therapy [that] offered the most hope for enabling the mother to carry out her parental responsibilities." 143 Ariz. at 189, 692 P.2d at 1038. In *Pima County S-2397*, before approving a termination on mental illness grounds we observed that no other services could be offered that had not already been offered and which might preserve the family. 161 Ariz. at 577, 780 P.2d at 410. In *J-88-201*, another termination on grounds of mental illness, we described DES's reunification effort as "prolonged, painstaking, yet futile." 172 Ariz. at 54, 833 P.2d at 725. Here, in contrast, we may accurately describe DES's effort as belated, fitful, and indifferent.⁶

⁶ The State offered evidence that, because Mary qualified for mental health services under Title IX, CPS policy prohibited her caseworker from making other, potentially duplicative referrals. The State also offered evidence that ComCare's financial difficulties at the time of Mary's referral may have prevented Mary from receiving extensive care. Such circumstances, in our view, neither relieved CPS of its obligation to provide Mary reasonable rehabilitative services nor excused CPS's failure to monitor her receipt of such services before seeking to sever her parental rights on grounds of incapacitating mental illness.

¶ 39 Nor did the State introduce clear and convincing evidence that additional services would have been futile. Although Mary's caseworker identified a lack of improvement in Mary's mental health as the primary basis for the decision to seek a severance, CPS made the decision to seek a severance without checking ComCare records and before ComCare had provided Mary even a psychiatric evaluation. Subsequently, as CPS pursued its goal of severance, it made only a negligible effort to learn what services Mary was receiving or how she was progressing. CPS neglected even to secure such information for Dr. Young, yet relied upon his assessment of Mary's progress to support severance, and asked the juvenile court to do the same.

¶ 40 CPS witnesses testified that Mary participated fully in all of the services offered to her and put forth her best efforts; yet this information they also failed to convey to Dr. Young. By the time of trial, according to Mary's evidence, her efforts were beginning to bear some fruit, despite the inadequate level of services available from ComCare. CPS offered no evidence to rebut Mary's recent progress, and Dr. Young, who was unaware of it, could offer no opinion as to its import.

¶ 41 According to Dr. Young, Mary's condition was "technically" amenable to treatment. Dr. Young's opinion that Mary would not improve was based on his own misconception that CPS had offered Mary the "intensive" psychiatric services Dr. Bencomo recommended, and that Mary had not availed herself of them. Because Dr. Young's opinion rested upon incorrect assumptions, it did not suffice to support a finding that additional services would be futile.

¶ 42 To establish a severance, CPS was obliged to prove by clear and convincing evidence that it had made a reasonable effort to provide Mary with rehabilitative services or that such an effort would be futile. CPS fell far short of this mark. On the record before us, the juvenile court could not reasonably conclude that the State made a concerted or diligent or reasonable effort to preserve the parent-child relationship.⁷

⁷ Because we conclude that: the State failed to demonstrate reasonable efforts to preserve the family, we need not linger over the parties' arguments regarding the sufficiency of the evidence to support the asserted statutory grounds for severance. It is evident from our conclusion, however, that the State failed to prove that it had made "a diligent effort to provide appropriate reunification services," as it was statutorily obliged to prove pursuant to [A.R.S. § 8-533 \(B\)\(7\)\(b\)](#), in order to achieve a severance on the ground of extended out-of-home placement. Further, the State's failure to show that it had provided reasonable rehabilitative services precluded it from proving under [A.R.S. § 8-533 \(B\)\(3\)](#) that "there are reasonable grounds to believe the parent's condition will continue for a prolonged, indeterminate period." *See Maricopa County Juv. Action No. JS-5209 No. JS-4963*, [143 Ariz. 178, 184, 692 P.2d 1027, 1033](#) (App 1984).

III. CONCLUSION

¶ 43 This case is troubling because the evidence is abundant that a present severance would serve Destiny's best interests by facilitating her adoption by foster parents who have provided her a stable home for the ^{*194} last three and one-half years. Yet the law does not permit a severance to be predicated solely on the best interests of the child. *See Maricopa County Juv. Action No. JS-500274*, [167 Ariz. 1, 5, 804 P.2d 730, 734](#) (1990). Interference with a parent's fundamental right to the care, custody and control of her child is not permitted "merely because the child might be better off in another environment." *Maricopa County Juv. Action No. JS-6520*, [157 Ariz. 238, 244, 756 P.2d 335, 341](#) (App. 1988).

¶ 44 This case is equally troubling because, while critical months stretched into years of out-of-home placement for Destiny, the State made only a negligible effort to provide rehabilitative services to her needy mother. This failure, harmful to all parties, has prevented the State from establishing a necessary element of its case. Because the State has failed to establish by clear and convincing evidence that it made a reasonable effort to preserve this family, we reverse the juvenile court's severance order and remand this matter for further proceedings consistent with this opinion.

GERBER, Presiding Judge, and GRANT, Judge, concur.

¹⁹⁵ *195

Donald W. v DCS, (247 Ariz 9)



IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

DONALD W., *Appellant*,

v.

DEPARTMENT OF CHILD SAFETY, M.D., *Appellees*.

No. 1 CA-JV 18-0322
FILED 5-21-2019

Appeal from the Superior Court in Maricopa County
No. JD20444

The Honorable Karen A. Mullins, Judge
The Honorable Jacki Ireland, Judge *Pro Tempore*
The Honorable William Brotherton, Judge (retired)
The Honorable Joan A. Sinclair, Judge

VACATED AND REMANDED

COUNSEL

Denise L. Carroll Esq., Scottsdale
By Denise Lynn Carroll
Counsel for Appellant

Arizona Attorney General's Office, Phoenix
By Sandra L. Nahigian
Counsel for Appellee

OPINION

Presiding Judge Paul J. McMurdie delivered the opinion of the Court, in which Judge Randall M. Howe and Judge Jennifer B. Campbell joined.

M c M U R D I E, Judge:

¶1 The issue before the court is whether sufficient evidence supports the termination of parental rights based on fifteen months' time-in-care. We hold that a termination based on fifteen-months' out-of-home placement requires the court to consider the totality of the circumstances throughout the dependency when determining whether the Department of Child Safety ("DCS") made a diligent effort to provide appropriate reunification services, including whether DCS's failure to act reasonably and diligently contributed to the circumstances causing the child to remain in out-of-home placement. We further hold that a request through the Interstate Compact on the Placement of Children ("ICPC") is not required when the evidence does not support a dependency concerning the out-of-state parent. Given the absence of evidence in this case, we vacate the termination judgment.

FACTS AND PROCEDURAL BACKGROUND

¶2 Donald W. ("Father") met Q'Nique T. ("Mother") in Sacramento, California, where they lived together for a short time. After discovering she was pregnant, Mother moved to Arizona. Given the brevity of the relationship, Father was unsure if he was the biological father of Mother's unborn child. He told Mother that if he was the child's father, he wanted to parent the child. Father maintained contact with Mother until October 2014. Father later discovered that Mother had married someone else around the time she stopped communicating with him.

¶3 Mother gave birth to Melody in Arizona on December 5, 2014. DCS took custody of Melody from the hospital the next day and placed her in foster care.¹ DCS filed a dependency petition regarding Melody naming

¹ Mother's parental rights to Melody were terminated, and she is not a party to this appeal. DCS removed Melody from Mother's care because she had previously failed to protect another child from abuse.

Mother, her husband, and a John Doe.

¶4 On January 2, 2015, Mother reached out to Father for the first time since October 2014 and told him that her husband was Melody's father. Skeptical, Father called Mother's husband, who informed him Melody was in DCS's custody. On January 3, 2015, Father called the assigned DCS case manager, Lucero Garcia, explaining that he believed he was Melody's father and requested a paternity test. The case manager told him that the judge would have to award him a paternity test.

The Dependency Action

¶5 DCS amended the dependency petition to include Father. After alleging that Father was not married to Mother and had not established paternity, the amended petition read:

5. Father is unable to parent due to neglect. Father is unable to provide his child with the basic necessities of life, including, food, clothing, shelter and support.
6. Father has abandoned his child. Father has failed to maintain a normal parental relationship without just cause. Father has failed to send cards, gifts, letters or child support since the child's birth.

The case manager signed the verification, swearing to the veracity of the petition's contents. In the amended petition, DCS requested the court issue a judgment of paternity, but it only included Mother's assertion that her husband was Melody's father and did not mention that Father had contacted DCS believing he was Melody's father.

¶6 On March 9, 2015, the court held Father's initial dependency hearing, where he denied the unfitness allegations in the petition. At the hearing, the court ordered DCS to conduct a paternity test and scheduled a dependency hearing for May. The results of the paternity test, dated April 15, 2015, confirmed Father was Melody's father. Immediately following receipt of the test results, Father, to show the court that he cared about his child and wanted custody of Melody, enrolled in a thirteen-week parenting class, which he completed in August 2015.

¶7 Although the child had been in DCS custody from birth, after the dependency hearing the court found "[Melody] is dependent as to

[Father] based on inability to parent due to neglect and abandonment.” The court set the case plan as “family reunification concurrent with severance and adoption.” DCS stated that once Father was on the birth certificate, it would submit an ICPC.² On May 27, 2015, DCS filed its notice of lodging the order of paternity, which the court issued two weeks later. By this time, Melody was seven months old.

¶8 Sometime in the summer of 2015, DCS initiated an ICPC with California. In November 2015, the court held a review hearing, where it addressed the pending ICPC, directed DCS to provide a written transition plan to move Melody to California with Father, and found Melody continued to be dependent. The ICPC report, dated December 2015, was favorable to placement with Father. The ICPC social worker in California interviewed Father in his home, then separately interviewed his ex-wife, children, and a friend. The report noted that Father’s ex-wife stated: “[he] was a good father, who cares and provides for his children.” After interviewing Father’s children at their school, the social worker further noted that “[i]t is obvious that [the children] feel loved and cared for by their father and that he is very involved in their lives.” The ICPC concluded:

[Father] had good references and all stated that [he] is an excellent parent to his children. From observation it appears that he has a positive relationship with his children and they look to him for attention and affection. [Father] was the non

² The purpose and policy of the Interstate Compact on the Placement of Children is to create a system by which states “cooperate with each other in the interstate placement of children.” A.R.S. § 8-548; ICPC Regulation 2(5)(d), 7(6)(a) (the receiving state conducts an investigation of the proposed placement, including a background check and home study and renders a placement decision). The Association of Administrators of the Interstate Compact on the Placement of Children (“AAICPC”) is comprised of a Compact Administrator from each state and is authorized by Article VII of the ICPC to promulgate regulations (“ICPC Regulation”). A.R.S. § 8-548, art. VII. The American Public Human Services Agency (“APHSA”) acts as the AAICPC’s Secretariat and administers the ICPC. The ICPC Regulations cited throughout can be found at https://aphsa.org/OE/AAICPC/ICPC_Regulations.aspx. Although Arizona has codified some ICPC Regulations, “[the Arizona] regulations supplement those authorities and must be read in conjunction with them.” Ariz. Admin. Code (“A.A.C.”) R21-5-102.

offending parent and has been diligent in seeking custody from the court in Arizona.

* * *

Placement of the child, [Melody], with [Father], is approved. Please send a [Form] 100(B), confirming the ICPC placement of the child with the father. Please include any additional requests for services from Sacramento County, including courtesy supervision.

¶9 Early in the dependency, Father asked DCS for the foster placement's contact information because he wanted to check on Melody. DCS refused and did not allow Father to have contact with the foster mother until Melody was almost one year old. DCS then gave Father the foster mother's email address, and the two began communicating weekly with updates and exchanging pictures of Melody. In January 2016, DCS finally allowed Father to have contact with Melody, and he began sending "Glide videos."³ Father recorded and sent the video messages to the foster mother's phone. She showed the videos to Melody and recorded messages from Melody to send back to Father. Father and the foster mother established a routine of exchanging Glide videos several times a day, which they continued throughout the dependency proceedings.

¶10 Although California sent DCS the ICPC approval letter in December 2015, during the February 2016 review hearing, the case manager stated incorrectly that the ICPC had only been "verbally approved." Again, the juvenile court found Melody continued to be dependent. Father attended the February 2016 hearing and anticipated visiting Melody for the first time in person while in Arizona. Because DCS failed to communicate with Father regarding a visit before the hearing, no visit was scheduled. However, Father was able to see Melody for one hour at a fast-food restaurant with the foster mother.

³ Glide is an instant video messaging platform for mobile devices. The app enables a user to send a brief video clip, up to five minutes, in a similar manner as sending a text message. Recipients can watch and respond to the video instantly or later. *Glide (software)*, Wikipedia, [https://en.wikipedia.org/wiki/Glide_\(software\)](https://en.wikipedia.org/wiki/Glide_(software)) (last visited May 16, 2019).

¶11 In April 2016, the case manager finally emailed Father a transition plan:

Just to reiterate our conversation from today. You will try to come out twice a month if possible to Arizona to visit Melody as much as you can. You will also begin calling Melody every Monday, Wednesday, Fridays [sic] and Sunday at 630pm. The phone call should be about 5–10 minutes. This way Melody gets to know your voice and also recognize it. Lastly, you will notify me at least two weeks in advance when you plan to visit Melody so that I can submit a case aide request.

Father began calling Melody as directed. In addition, he continued to exchange the Glide videos, and he rented a car and drove his mother, father, and son to Arizona for a weekend visit to meet Melody. In the June 2016 DCS Report, while still reporting that “[Father] will need to be further assessed to determine appropriate services,” the case manager stated:

[I have] attempted to coordinate with [Father] to set up a transition plan for [Melody] to be moved into his care, however he has failed to follow through with the transition plan. [DCS] no longer believes that it is in the child’s best interest to place her in the care of his [sic] father as he does not appear to be committed in the reunification process.

¶12 On July 12, 2016, DCS moved to terminate Father’s rights based on abandonment and fifteen months’ time-in-care. At the time of the motion, Melody was 19 months old, and DCS was still making efforts to locate an adoptive placement. Despite DCS moving for termination, Father continued to visit Melody when he was financially able and consistently communicated with her through Glide videos.

¶13 When reviewing the case plan in September 2016, the Foster Care Review Board expressed its concern with the case manager’s lack of communication. It reported that she was not present for the review; attempts to contact the case manager and her supervisor were unsuccessful; and she failed to provide a current case plan document for review. The Board determined “there are significant service gaps or system problems” and it was “unable to conduct a thorough review” because it had “inadequate information.”

¶14 By October 2016, DCS closed the ICPC because there had “not been any progress made toward transitioning Melody to [Father].” The October 2016 DCS Report stated that because Father had only visited

Melody twice, he “[did] not appear to be interested in reunifying with his daughter.” In April 2017, when Melody was two and a half years old, the juvenile court ordered Father to complete a Bonding/Best Interest Evaluation (“Bonding Assessment”), which was conducted by Dr. Mary Oakley on June 6, 2017.

July 2017 Termination Hearing

¶15 The court heard evidence on DCS’s termination motion in July 2017 (“2017 Hearing”). At the hearing, the case manager testified that DCS wanted once-a-month visits at first, then intended to increase the number of required visits before reunification even though Father “had indicated that he had money issues, financially, and he wasn’t able to complete” once-a-month visitation.

¶16 At the hearing, the case manager was asked why DCS had not sent Melody to California to visit Father. She stated: “Because we just can’t send the child out there. We know – that’s not the process. We normally increase contact with the parents.” The court questioned whether DCS had a program to offer financial assistance to out-of-state parents. The case manager responded: “Not that I know of, no.” When asked if DCS could have moved Melody into a California placement to be closer to Father, she responded: “I don’t believe so.”

¶17 After hearing the evidence, the court stated:

I’m sad to hear that this case has been going on for all this period of time But I don’t think . . . if you’re [in] a long-distance situation, [and] you could only afford to come once a month or once every two months, [too] bad, we’re going to sever your child from you. I don’t think that was what was intended [under the time-in-care statute].

The court concluded it could not “sever rights, because people are poor” and denied DCS’s motion for termination. The court then ordered DCS to (1) “staff with the unit psychologist regarding all factors in this matter including father’s financial status to develop a transition plan”; (2) provide transportation for Father’s visits, including airfare and transportation to and from the airport and the visitation center to see Melody; and (3) have the visits occur once a month, pending the opinion of the unit psychologist and the transition plan.

¶18 DCS objected to paying for Father’s airfare, stating it “is the most expensive way” and that DCS does not have “unlimited resources.”

However, the court determined, “as [the case manager] stated, it’s a long drive from Sacramento,” and flying was the most reasonable option. The court held that the “option needs to at least be tried” because “I cannot, in good conscience, say . . . you’re too poor, so we’re going to sever you.”

¶19 DCS booked and paid for Father’s visit in September 2017, which he attended. But DCS failed to produce the court-ordered transition plan. The October 2017 DCS Report stated:

[The case manager] has also consulted with the unit consultant to come up with a transition plan to transition [Melody] into father’s care, however the unit psychologist indicated that this needed to be done with the assigned evaluator that completed the [Bonding Assessment] as she had more knowledge as to the relationship between the father and child.

Before Father’s October 2017 visit, the court held a review hearing and ordered Father to increase his visits to weekly, six hours on Saturday and six hours on Sunday. DCS again objected to purchasing Father’s airfare, and the court modified the order to allow DCS to reimburse Father upon arrival. Accordingly, Father purchased the airfare for the last weekend of October 2017 and the first weekend in November 2017.

¶20 When Father arrived for his October visit, DCS did not immediately reimburse him as the court ordered it to do. Instead, on November 1, 2017, DCS moved to modify the court’s order, this time requesting permission to reimburse Father within three weeks of receiving his claim to allow for approval and processing. Father arrived for his November 6, 2017 visit before the court ruled on DCS’s motion. Again, DCS did not reimburse Father on arrival. On November 21, 2017, the court granted DCS’s motion, vacated the October order, and ordered DCS to reimburse Father “for his travel expenses up to three weeks after [DCS] receives a receipt for the purchase of travel.”

¶21 DCS failed to reimburse Father within the three weeks per the court order. Because of the out-of-pocket expense and reimbursement delay, Father was no longer able to afford to travel to Arizona for the weekly visits, and he canceled the visits scheduled for the remainder of November. In the DCS Report dated January 26, 2018, the case manager acknowledged that “[Father] also reported that he was waiting to get the flight refunds from DCS so that he could book another flight.” She testified that she did not know how long it took for Father to receive reimbursement

checks, and there had been a “lack of communication” that caused “an issue.” In February 2018, DCS again moved to terminate the parent-child relationship based on fifteen months’ out-of-home placement. By then, Melody was a little over three years old.

July 2018 Termination Hearing

¶22 The juvenile court held a second termination trial in July 2018 (“2018 Hearing”). The termination motion cited Father’s “unstable employment,” which it stated “ha[d] been a frequent problem since the beginning of this case,” that Father “ha[d] been unable to demonstrate an ability to parent the child,” and that “Father ha[d] failed to establish and maintain a normal parental relationship with his child.”

¶23 The court found that Father’s “substantial failure to engage in visitation” was the circumstance that was currently causing Melody to remain in out-of-home placement, and that, despite DCS’s reimbursement of Father’s travel expenses, he had not been able to remedy the circumstance. The court additionally found that termination was in Melody’s best interests, and granted DCS’s motion to terminate the parent-child relationship. Melody was three and a half years old.

¶24 Father timely appealed, and we have jurisdiction under A.R.S. § 8-235(A) and Arizona Rule of Procedure for the Juvenile Court 103(A).

DISCUSSION

¶25 The juvenile court terminated the parent-child relationship under A.R.S. § 8-533(B)(8)(c), which requires DCS to establish by clear and convincing evidence that: (1) Melody had been in court-ordered out-of-home placement for at least fifteen months; (2) DCS made a “diligent effort to provide appropriate reunification services”; but despite that effort, (3) Father had been unable to remedy the circumstance causing Melody to be in court-ordered out-of-home care; and (4) there was “a substantial likelihood that [Father would] not be capable of exercising proper and effective parental care and control in the near future.” *See Roberto F. v. ADES*, 232 Ariz. 45, 56, ¶ 51 (App. 2013); *Jordan C. v. ADES*, 223 Ariz. 86, 93, ¶ 17 (App. 2009). “When the statutory grounds for termination are challenged, we will affirm a termination order unless we must say as a matter of law that no one could reasonably find the evidence supporting statutory grounds for termination to be clear and convincing.” *Jordan C.*, 223 Ariz. at 93, ¶ 18 (quotation omitted).

¶26 Here, the court erred by failing to consider the totality of the circumstances surrounding Melody’s time in care. Because the court did not identify the “circumstance” causing the out-of-home placement, *both the origin and any cause arising during the dependency*, the court was unable to properly conclude that: DCS had made a diligent effort to provide appropriate reunification services (“diligent efforts”); Father was unable to remedy the circumstance; and Father was unlikely to be able to parent effectively in the near future. After reviewing Father’s and DCS’s actions throughout the three and a half years Melody was in DCS’s custody, we hold that no one could reasonably find the evidence supporting the statutory grounds for termination to be clear and convincing.

A. The Court-Ordered Out-of-Home Placement Was Based on a Factually Deficient Dependency Petition and Insufficient Evidence.

¶27 The first issue that must be reviewed under A.R.S. § 8-533(B)(8) is the “circumstance” causing out-of-home placement. Because the substantive statutory grounds are “synonymous with unfitness,” as “[t]hey address the most serious instances of parental abuse, neglect, or incapacity,” the reason causing out-of-home placement must be one that indicates parental unfitness. *Alma S. v. DCS*, 245 Ariz. 146, 150, ¶¶ 9–10 (2018). The juvenile court has the authority to place a *dependent* child in out-of-home care only if placing the child “with the child’s parents is contrary to the child’s welfare.” A.R.S. § 8-845(A). A dependent child is defined by A.R.S. § 8-201(15). Generally, a dependent child lacks a parent willing and able to exercise proper and effective parental care and control, or in other words, lacks a fit parent. A.R.S. § 8-201(15)(a)(i). Nothing in the record supports a finding that Melody is, or has ever been, dependent as to Father.

1. The Court Ordered Out-of-Home Placement Was Based on a Factually Deficient and Unsupportable Petition.

¶28 Relating to Father, the primary cause of Melody’s out-of-home care was the court’s dependency finding in May 2015. At that time, no evidence showed that Father was an unfit parent, or that living with Father was contrary to Melody’s welfare. Melody had been in DCS’s custody since birth. Father contacted DCS when Melody was less than one month old. Nevertheless, without *any* investigation, DCS filed a petition alleging that Melody was dependent due to abuse or neglect as to Father. DCS claimed that “Father is unable to parent due to neglect. Father is unable to provide his child with the basic necessities of life, including, food,

clothing, shelter and support,” and “Father has abandoned his child. Father has failed to maintain a normal parental relationship without just cause. Father has failed to send cards, gifts, letters or child support since the child’s birth.” The petition did not state any facts supporting these conclusions. *See* A.R.S. § 8-841(B)(3) (the dependency petition must include “[a] concise statement of the facts to support the conclusion that the child is dependent”).

¶29 Under A.R.S. § 8-201(25)(a), “neglect” is defined as

[t]he inability or unwillingness of a parent . . . 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[.]

And under A.R.S. § 8-201(1), “abandoned” means

the failure of the parent to provide reasonable support and to maintain regular contact with the child, including providing normal supervision. Abandoned includes a judicial finding that a parent has made only minimal efforts to support and communicate with the child. Failure to maintain a normal parental relationship with the child without just cause for a period of six months constitutes prima facie evidence of abandonment.

See also Pima County Juv. Action No. S-114487, 179 Ariz. 86, 96 (1994) (“What constitutes reasonable support, regular contact, and normal supervision varies from case to case. It is often difficult . . . for the unwed father to provide support or supervision, or to even maintain contact. Nonetheless, the father must take concrete steps to establish the legal or emotional bonds linking parent and child.”). The petition’s generic assertions failed to support the conclusion that an out-of-state parent—seeking to establish paternity of a less than one-month-old child, who has been in DCS custody since birth—abused, neglected, or abandoned the child. *See* A.R.S. § 8-841(B)(3) (the dependency petition must include “[a] concise statement of the facts to support the conclusion that the child is dependent”).

¶30 Moreover, the record is devoid of *any* evidence supporting the unfitness allegations in the petition, a fact DCS acknowledged at oral argument before this court. Mother had lived with Father in Sacramento, where the couple conceived Melody. Mother decided to move to Arizona. Even so, Father proactively maintained contact with Mother and told her he wanted to be involved in parenting the child. Mother ended the

communication with Father once she married. Despite Mother's deception in telling Father that he was not Melody's father, he called Mother's husband, found out Melody was in DCS's care, and immediately contacted DCS requesting a paternity test. The case manager told Father to contact the juvenile court, which he did. Father diligently complied with the ordered paternity test, appeared for the hearings, participated in parenting classes, and contested the allegations in the dependency petition. No evidence supported a dependency finding that Father failed to take concrete steps to establish a legal and emotional bond with Melody, or that Father neglected or abused Melody. Thus, DCS lacked a factual basis to allege that Melody was a dependent child.⁴

2. The Court Ordered Out-of-Home Placement Was Based on an Unsupported Dependency Finding.

¶31 Notwithstanding the baseless dependency petition, the juvenile court had an independent obligation to make findings "based upon the record and evidence presented" to "[d]etermine whether a factual basis exists to support a finding of dependency." Ariz. R.P. Juv. Ct. 55(D)(1)(c) (court must determine whether a factual basis exists even when the parent admits or does not contest); Ariz. R.P. Juv. Ct. 55(D)(2) (the petitioner must satisfy the burden of proof based upon the record and present evidence even when the parent fails to appear); *see also Pima County Juv. Action No. 86192*, 151 Ariz. 359, 361 (App. 1986) (an allegation contained in the dependency petition is not itself evidence; Rule 55 "implies without question that evidence from which the court may make findings must be presented").

⁴ The lack of factual support for the allegations in the petition relating to Father's unfitness creates significant concerns about the ethical propriety of filing the dependency petition claiming Father abused or neglected and abandoned Melody. *See* Ariz. R. Sup. Ct. 42, ER 3.3(a)(1) ("A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer . . ."); Ariz. R. Sup. Ct. 42, ER 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a good faith basis in law and fact for doing so that is not frivolous . . ."); *In re Alexander*, 232 Ariz. 1, 5-7, ¶¶ 12-21 (2013) (ER 3.1 requires an attorney to be sufficiently informed "about the applicable facts and law to make good faith and nonfrivolous arguments" when filing and maintaining an action).

¶32 If the juvenile court does not find by a preponderance of the evidence that the allegations contained in the petition are true, “the court shall dismiss the petition” and must “return the child to the parent.” A.R.S. § 8-844(C)(2); Ariz. R.P. Juv. Ct. 55(E)(2). On the other hand, if the court determines the petitioner has met its burden, the court is required to “[s]et forth specific findings of fact in support of” the dependency finding in the form of a signed order or minute entry. Ariz. R.P. Juv. Ct. 55(E)(3).

¶33 The juvenile court held the contested dependency hearing in May 2015. Father “den[ied] the allegations in the petition, but submit[ted] the issue of dependency to the Court for determination.” The court admitted a DCS Report dated April 21, 2015, into evidence. The court considered “the information in [the DCS Report] as well as the allegations in the petition,” and concluded:

first of all, the allegations of the petition [are] true by a preponderance of the evidence. This child is dependent as to [Father], based on inability to parent due to neglect and abandonment.

The *only* information in the report relevant to Father was that “[the paternity test] determined that [Father] cannot be excluded as the biological father of [Melody]. [Father] reports that he wants his child to be placed in his care and an ICPC will soon be submitted for him” “to determine if he is able to care for [Melody].” The report noted that “[Father] will need to be further assessed to determine appropriate services.”

¶34 Nothing in the April 2015 DCS Report supported DCS’s allegations against Father of abuse, neglect, or abandonment, nor did it establish that Melody lacked a parent who was willing or able to exercise proper and effective care and control. Instead, the April 2015 DCS Report demonstrated that Father was Melody’s parent, he wanted custody of her, and DCS lacked any knowledge to support its contention that Father could not care for Melody. Father’s attorney did not appeal the dependency order, and the erroneous dependency finding was not recognized throughout the subsequent hearings. Nor was this complete lack of evidence considered – more than three years later – at the termination hearing.

3. The Court Erred By Continuing Out-of-Home Care to Allow DCS Time to Investigate Father’s Fitness to Parent.

¶35 The court’s dependency finding enabled DCS to extend Melody’s time in out-of-home care to investigate whether she was

dependent. But DCS's lack of knowledge concerning Father's fitness is not a basis to keep a child in out-of-home placement.

¶36 Father has an "inalienable right" to parent his child "without obstruction or interference from this state," A.R.S. § 1-602(A), (D); *see also Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 24 (2005) ("Parents possess a fundamental liberty interest in the care, custody, and management of their children." (citing *Santosky v. Kramer*, 455 U.S. 745, 753 (1982))). DCS has not provided—nor have we found—statutory authority permitting DCS to withhold custody of a child from its parent while DCS investigates the parent without *some* evidence of unfitness. *See Ariz. State Dep't of Pub. Welfare v. Barlow*, 80 Ariz. 249, 252 (1956) ("Because the child has attained a favored, beneficent status in our social and legal systems does not detract from the well-settled rule that the right of parents to the custody of minor children is both a natural and a legal right.").

¶37 The court made the dependency finding and allowed DCS to initiate an ICPC. Father's attorney did not appeal whether the ICPC was appropriate under these circumstances. Therefore, we assume without deciding that the court properly allowed the ICPC. However, because of the delay it caused, and because DCS continues to argue both in its briefing and in oral argument that "DCS cannot place [Melody] out of state without an approved ICPC evaluation," we find it necessary to address the applicability of an ICPC with an out-of-state parent.

4. The Lack of an ICPC Cannot be the Cause for Maintaining a Child in DCS Care; Rather it Has to be Based on Parental Unfitness Found by a Court.

¶38 An ICPC is not required when evidence does not support a dependency as to the out-of-state parent. *See In re Emoni W.*, 48 A.3d 1, 6 (Conn. 2012) (ICPC does not apply to out-of-state non-custodial parent); *accord In re C.B.*, 116 Cal. Rptr. 3d 294, 302 (Cal. Ct. App. 2010); *In re Alexis O.*, 959 A.2d 176, 182 (N.H. 2008). An ICPC is intended for out-of-state *placement* of a *dependent* child. A.R.S. § 8-548, art. II(d) ("'Placement' means the arrangement for the care of a child in a family free or boarding home or in a child-caring agency . . ."); A.R.S. § 8-548, art. III(a) ("No sending agency shall send, bring, or cause to be sent or brought into any other party state any child *for placement in foster care or as a preliminary to a possible adoption* [without complying with the ICPC]." (emphasis added)).

¶39 Previously, this court held in *ADES v. Leonardo* that "[i]t is not contrary to the description of 'placement' . . . to find that the description

includes placement of a child who is the subject of a protective action and in the legal custody of the state in a home with an out-of-state parent whose rights have been ‘diminished or severed by the action or order of any Court.’” 200 Ariz. 74, 80, ¶ 17 (App. 2001) (quoting ICPC Regulation 3(3) (2001)). The court applied the requirement of the ICPC to a nonoffending parent who did not have “full custodial rights” after a dissolution preceding. In doing so, the court reasoned that, although not having full custodial rights did not make a parent presumably unfit, “he or she must be investigated to ensure that the child would be safe if placed with that parent.” *Id.* at 81, ¶ 20.

¶40 However, *Leonardo* failed to identify authority allowing for continued state custody of a child in the absence of evidence that an out-of-state parent is unfit. *See Barlow*, 80 Ariz. at 252 (“The best of intentions and the greatest zeal to care for neglected, dependent, or delinquent children do not justify the violation of the constitutional provisions as to due process that are involved in removing a child from the custody of its parent.” (quoting *In re Godden*, 63 N.W.2d 151, 156 (Neb. 1954))). Moreover, ICPC evaluations are based on subjective criteria, unlike dependency and termination, and if the regulations are read too broadly, the denial of an ICPC could effectively terminate the relationship between a child and a fit parent.

[A]gency caseworkers have the power to effectively terminate the parent’s relationship with the child by finding that the placement would be contrary to the child’s interest, a wholly subjective standard. The ICPC denies courts the ability to make the ultimate decision, and the parent is not given an adequate opportunity to appeal the caseworker’s determination in either an administrative or judicial proceeding.

Vivek S. Sankaran, *Out of State and Out of Luck: The Treatment of Non-Custodial Parents Under the Interstate Compact on the Placement of Children*, 25 Yale L. & Pol’y Rev. 63, 80 (2006). Because of the parent’s fundamental right to parent his or her child, the use of an ICPC to deny a parent custody of a child must constitute a “fundamentally fair procedure.” *See Santosky*, 455 U.S. at 754–55. Therefore, a court must oversee the ICPC process to ensure the parent’s rights are adequately protected.

¶41 To ameliorate the problem presented in *Leonardo*, the AAICPC amended ICPC Regulation 3 in 2011. *See also In re Emoni W.*, 48 A.3d at 7, n.8 (declining to take a position regarding the propriety of the

court's analysis in *Leonardo*, recognizing that the regulations in effect at the time of the decision had changed). Arizona codified the amended ICPC Regulation 3(b), *see* A.A.C. R21-5-105(B)(3) (effective January 2, 2016), which states:

[T]he ICPC does not apply . . . [w]hen a sending court or agency seeks an independent (not ICPC related) courtesy check for placement with a parent from whom the child was not removed, the responsibility for credentials and quality of the courtesy check rests directly with the sending court or agency and the person or party in the receiving state who agrees to conduct the courtesy check without invoking the protection of the ICPC home study process. This does not prohibit a sending state from requesting an ICPC.

Thus, when DCS discovers that a child in its care has an out-of-state parent, the regulation allows it—in addition to the conventional mechanisms it employs to investigate a parent—to request a courtesy check from the parent's home state. *Accord In re Emoni W.*, 48 A.3d at 11 (an agency can investigate an out-of-state parent without an ICPC). The ability to request a courtesy check, however, does not authorize DCS to hold a child in its care for an indeterminant amount of time simply because it lacks an ICPC approval. Unless DCS has a reasonable basis for believing the out-of-state parent is unfit, it *must* turn over the child to the parent.

¶42 If sufficient evidence supports a dependency concerning the out-of-state parent, the regulation does not prevent the court from ordering an ICPC, or a priority placement ICPC, when appropriate. *See* ICPC Regulation 7 (“The intent of [Regulation 7] is to expedite ICPC approval or denial by a receiving state for the placement of a child with a parent, . . . and to . . . [h]elp protect the safety of children while minimizing the potential trauma to children caused by interim or multiple placements while ICPC approval to place with a parent or relative is being sought through a more comprehensive home study process.”). A denied ICPC alone does not preclude a parent from gaining custody of the child. The court must determine if the parent is unfit based on the evidence, which may include the results from a home study or a denied ICPC.

¶43 Here, the juvenile court ordered that DCS initiate a new ICPC in July 2017 after denying DCS's first motion for termination. Without evidence of parental unfitness, however, DCS had no authority to delay moving Melody to Father's care pending out-of-state approval. The results of the subsequent ICPC could not prohibit Father from obtaining custody

of Melody so long as the results did not establish sufficient evidence for the court to find Melody dependent as to Father.

5. The Court Erred By Continuing the Dependency, Causing Melody to Remain in Out-of-Home Placement.

¶44 California approved the original ICPC in December 2015. *See* DCS: Policy and Procedure Manual (“DCS Pol’y & Proc.”), Referral to ICPC, Ch. 5, § 40 (“If the placement is approved, the DCS Specialist may at that time place the child in the receiving state.”).⁵ However, by this time DCS was concerned that Melody had been in DCS’s care for almost one year. Therefore, it wanted to set up a plan with Father to ensure that Melody transitioned smoothly into Father’s care. Although a transition plan may be ideal, DCS’s authority is governed by statute. DCS, again, has not provided this court with any authority that allows it to withhold a child from a fit parent until it creates and institutes a transition plan. It is undisputed that in December 2015, Melody had a parent willing and able to provide the necessary care. Thus, at that point, Melody was not dependent, and the court lacked authority to continue Melody’s out-of-home dependency for DCS’s transition plan.

B. DCS Failed to Make a Diligent Effort to Provide Appropriate Services.

¶45 As stated, based on our review of the record, the evidence does not support a cause for Melody to be in DCS care related to Father. Assuming, without deciding, that Father’s failure to appeal the original dependency finding could be cause for Melody to be in DCS’s care, we must determine whether, at the time of the termination hearing, reasonable evidence supported the juvenile court’s finding that despite DCS’s diligent efforts, Father had been unable to remedy the circumstances causing Melody to be in court-ordered out-of-home placement. A.R.S. § 8-533(B)(8)(c); *see also* *Jordan C.*, 223 Ariz. at 96, ¶ 31, n.14.

¶46 As the agency responsible for Melody’s care, DCS had a constitutional obligation to attempt to unite her with her father. *Jordan C.*, 223 Ariz. at 93, ¶ 19. As DCS recognizes, its duty necessitates that it “make reasonable efforts to preserve the family.” *Marina P. v. ADES*, 214 Ariz. 326, 333, ¶ 37 (App. 2007); *see Santosky*, 455 U.S. at 753–54 (“When the State

⁵ Citations to DCS’s Policy and Procedure Manual can be found at <https://extranet.azdcs.gov/DCSPolicy/>.

moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.”). A “reasonable effort” requires DCS “to undertake measures with a reasonable prospect of success.” *Mary Ellen C. v. ADES*, 193 Ariz. 185, 192, ¶ 34 (App. 1999).

¶47 Unlike DCS’s constitutional duty to make reasonable efforts, when moving to terminate a parent-child relationship under one of the time-in-care grounds, DCS must show that its efforts were not only reasonable but also *diligent*. A.R.S. § 8-533(B)(8); see *Mary Ellen C.*, 193 Ariz. at 191, ¶¶ 30–32 (discussing the difference between “reasonable efforts” and “diligent efforts”). Diligence ensures that a parent’s liberty interest in raising his or her child, and the desire to correct the circumstances that are causing parental unfitness, is balanced with the effect that the passage of time without stability and permanency has on the child.

¶48 When a parent substantially neglects or willfully refuses diligent efforts, the court may terminate the parent-child relationship at nine months. A.R.S. § 8-533(B)(8)(a); see also A.R.S. § 8-533(B)(8)(b) (six-months’ time-in-care for a child under three years old). But when the parent tries to preserve the parent-child relationship, the State must additionally prove that “there is a substantial likelihood that the parent will not be capable of exercising proper and effective parental care and control in the near future.” A.R.S. § 8-533(B)(8)(c). Until a parent is deemed unfit and unable to correct the problem, it remains in the child’s best interests to unite the child with the parent. See *Santosky*, 455 U.S. at 760 (“[T]he child and his parents share a vital interest in preventing erroneous termination of their natural relationship.”). This case highlights the importance of such a requirement. The passage of time not only exacerbated the circumstances but also served as the basis the court ultimately found for terminating the parent-child relationship.

¶49 Termination under A.R.S. § 8-533(B)(8)(c) requires the child to be in court-ordered out-of-home placement for a “cumulative” total of fifteen months, and DCS must make diligent efforts for the entire time the case plan is reunification. *Jordan C.*, 223 Ariz. at 96, ¶ 30. But the court must also consider the totality of the circumstances when determining whether DCS has made diligent efforts. Intermittent efforts by DCS cannot be regarded as diligent when they undermine the parent. DCS is obliged to work with the parent toward a shared goal of reunification throughout the statutory period.

¶50 Although what constitutes a diligent effort will vary by case based on the family’s unique circumstances, a diligent effort requires—at

the least—DCS to identify the conditions causing the child’s out-of-home placement, provide services that have a reasonable prospect of success to remedy the circumstances *as they arise throughout the time-in-care period*, maintain consistent contact with the parent, and make reasonable efforts to assist the parent in areas where compliance proves difficult. *See Jordan C.*, 223 Ariz. at 96, ¶ 30. Diligence on DCS’s part ensures the time a child spends in out-of-home placement does not unnecessarily damage the parent-child relationship.

1. DCS Failed to Offer Appropriate Services to Remedy the Circumstances Causing the Out-of-Home Placement Before Moving for Termination.

¶51 DCS’s lack of diligence at the onset created the circumstance—the absence of a bond—that DCS relied on to maintain Melody in out-of-home placement. DCS then demanded Father remedy the condition by imposing unreasonable requirements on him, which undermined his efforts and needlessly prolonged the dependency.

a. DCS Contributed to the Circumstances By Conducting an Eight-Month Investigation into Father’s Ability to Parent Without Any Evidence of Parental Unfitness.

¶52 The only circumstance that caused Melody to remain in out-of-home care after Father established legal parentage was DCS’s uncertainty concerning Father’s fitness. DCS had no evidence that Father was unfit and failed to act before pursuing a dependency to resolve its unfounded concern. *See In re Emoni W.*, 48 A.3d at 11. Rather than making diligent efforts to transition Melody to Father’s care, DCS chose to undertake an eight-month investigation into whether Father was fit.

¶53 The April 2015 DCS Report stated that DCS would submit an ICPC. In the May 2015 hearing, the court asked DCS whether the ICPC was underway. DCS said that the ICPC would be sent after Father was placed on Melody’s birth certificate. Yet, DCS did not lodge the order of paternity for nearly two months after paternity was presumed—which was four months after Father requested a paternity test. The case manager testified that she “believed” she had submitted the ICPC in the summer of 2015. Because of Melody’s age—and because Father is Melody’s parent—Father was eligible for a priority placement ICPC, requiring the receiving agency to complete the request within 20 business days. *See ICPC Regulation 7(9)(e); DCS Pol’y & Proc., Overview of ICPC, Ch. 5, § 39* (DCS may request the court order a priority ICPC when the child is under four years old). DCS

did not request a priority placement ICPC and unnecessarily delayed its investigation of Father.

b. DCS Failed to Make a Diligent Effort By Instituting a Transition Plan That Had No Likelihood of Success.

¶54 The approved ICPC did not result in immediate unification. The case manager testified at the 2018 Termination Hearing that “[California] wanted us to do a transition process for Melody but that never got completed, so then [the ICPC] ultimately was denied.” Without any factual basis, DCS blamed Father’s “lack of commitment to Melody,” for the unsuccessful unification.

¶55 The record refutes the case manager’s claims that the ICPC approval was conditional, or that California ultimately denied it. Other than the ICPC approval letter, DCS had no communication with California. See DCS Pol’y & Proc., ICPC Placements, Ch. 5, § 41 (all significant verbal communication with the sending or receiving agency should be documented). The language in the letter was conclusive: “Placement of the child . . . is approved. Please send a [Form ICPC-100(B)], confirming the ICPC placement of [Melody] with [Father].” Once the ICPC is approved, “[i]t is up to the *sending entity* . . . to decide if and when to place the child.”⁶ The October 2016 DCS Report stated that the “ICPC packet has now been *closed*.” (Emphasis added.) DCS’s attorney later admitted that California had not denied the 2015 ICPC; instead, DCS allowed it to lapse.

¶56 DCS maintains that the circumstance that caused Melody to remain in out-of-home placement was the perceived lack of a bond between Melody and Father. Because Melody was uneasy around people that she did not know, DCS claimed it “implemented a transition plan that would allow Father to build a relationship with [Melody] in anticipation of her moving to his care.” Why DCS required any transition plan after the initial ICPC is unclear. Melody was not in an adoptive placement, and she could

⁶ See APHSA, ICPC FAQ, https://aphsa.org/AAICPC/AAICPC/icpc_faq_2.aspx (last visited May 16, 2019) (emphasis added); see also ICPC State Pages, California, <http://icpcstatepages.org/california/homestudies/> (last visited May 16, 2019) (in California, an approved home study is valid for two years).

have been removed from the foster mother's care at any time for a variety of reasons.

¶57 DCS expressed concern that Melody and Father lacked a bond in November 2015—even before the results of the ICPC were known—and before it permitted contact between Father and Melody. In response to DCS's concern, the court directed DCS "to provide a written transition plan of Melody to the father" at that time. Five months later, the case manager finally sent Father an email that DCS refers to as the transition plan. The email suggested—but did not require—Father "try to come out twice a month to Arizona to visit Melody as much as [he] can," and to "begin calling Melody" for 5–10 minutes, four times a week for Melody to "get[] to know [Father's] voice and also recognize it." To support Father in completion of the transition, the case manager testified that DCS also offered supervised visitation if he was able to come to Arizona.

¶58 The in-person visitation plan lacked any prospect of success. Father told the case manager that he would only be able to visit "every four months . . . so [he could] save enough money to actually be able to come out . . ." and "make sure that [his] bills [were] taken care of." Father testified that DCS told him "that's going to be a problem," but he did not believe there was "any leeway" and understood DCS's position to be "do this or . . . you don't see your daughter." The case manager confirmed that DCS was aware that "he had money issues . . . and he [wouldn't be] able to complete [the plan]."

¶59 However, DCS did not modify the visitation recommendation, work with Father to establish a plan with which Father could comply, or attempt to send Melody to California to visit Father. The case manager testified that she did not try to secure financial assistance for Father's visits, and she was not aware if DCS offered such services. *See In re Riva M.*, 235 Cal. App. 3d 403, 414 (1991) (an effort to assist where compliance proves difficult may include helping to provide transportation). Father did travel to Arizona to visit Melody twice between March and June 2016.

¶60 Although DCS maintains that Father should have engaged in a calling plan to successfully bond with Melody, other than hearing his voice, it is not clear what DCS hoped to accomplish by requiring him to make several phone calls per week with a child who was only one and a half years old. Even at the time of the 2017 Hearing—when Melody was two and a half years old—the case manager testified that "she kind of

babbles on, because she can't really say a lot of words right now" and admitted that phone calls with an infant were "almost of [no] value."

¶61 In the June 2016 DCS Report – within three months of sending the transition-plan email – DCS stated that it "no longer believe[d] that it [was] in the child's best interest to place her in the care of his [sic] father as he does not appear to be committed in the reunification process" and recommended changing the case plan to severance and adoption. In its subsequent termination motion, DCS falsely claimed that "Father ha[d] failed to keep most of the weekly appointments for telephonic contact with the child."

¶62 The foster mother reported that Father missed only five calls of the fifty days on which Father would have been scheduled to call in that period. More importantly, Father was establishing a relationship with Melody in the best way he could under the circumstances. In addition to the scheduled telephone calls, Father and the foster mother – without the assistance of DCS – developed their routine of sending the Glide videos every morning and night to accommodate both of their schedules. Because of the Glide videos, Melody was able to acknowledge Father's face and voice. Melody responded to Father's Glide videos by saying "hi daddy," "babbling," and sending him kisses.

2. DCS Failed to Make a Diligent Effort By Failing to Communicate With Father When It Perceived that His Efforts Were Deficient.

¶63 DCS's plan lacked justification, and the case manager acknowledged that the requirements were "not feasible" for Father, yet DCS failed to help Father comply. Consequently, the plan was guaranteed to increase Melody's time in the out-of-home placement, which strengthened Melody's attachment to the foster mother, and created a circumstance Father could not remedy effectively.

¶64 Although DCS's July 2016 motion for termination alleged that the lack of a bond precluded Father from being able to care for Melody, DCS did not commission Dr. Oakley to perform the Bonding Assessment until immediately before the July 2017 Hearing, almost one year later. By then, Dr. Oakley observed that Melody had a "strong attachment to [the foster mother]," and concluded that, if removed from the foster mother's care, Melody "may incur long-term negative effects." She opined that although "distance [was] why [Father] ha[d] not spent more time with

[Melody],” “the longer [Melody was] out of [Father’s] home, the harder it [would] be for her to transition from her home with [the foster mother].”

¶65 Based on Dr. Oakley’s assessment, DCS maintained that the lack of a bond—a situation it had effectively created—could be remedied only by frequent in-person visitation. DCS argued that termination was appropriate because “we don’t know whether Father is willing to relocate to establish a relationship. And we don’t know how long that would take as well.” The case manager testified that Glide videos—which Father had been consistently sending daily for over a year and a half—were not interactive like “Skype” and were insufficient for creating and maintaining a “normal parent-child relationship.”

¶66 DCS failed to inform Father of the deficiencies it perceived with his compliance with the case plan and did not allow Father to satisfy its requirements. *See Roberto F.*, 232 Ariz. at 56, ¶ 54 (“fault . . . lies with [DCS], not Father” when DCS fails to inform him that his attempt to satisfy the case plan failed or is deficient). Father testified that he used Glide to communicate because Melody was unable to use the phone on her own, and, although he attempted to use other video chat services, the foster mother was familiar only with Glide and Father was limited to what she knew how to use.

¶67 Even if Glide videos were somehow less effective than a “more interactive chat,” it was DCS’s duty to communicate the purported deficiency to Father and to teach the foster mother how to use alternative methods or arrange for someone to facilitate the type of communication that it would consider acceptable. As it was, without the foster mother’s cooperation with Father, it is uncertain whether DCS would have facilitated any contact for Father and Melody. *See Santosky*, 455 U.S. at 763 (“Indeed, because the child is already in agency custody, the State even has the power to shape the historical events that form the basis for termination.”).

C. The Court Erred By Considering Only DCS’s Efforts in the Final Seven Months of the Time-in-Care, and By Finding that Those Efforts Were Diligent.

¶68 By failing to consider the totality of the circumstances of the dependency, the court erroneously found that because “DCS allowed visitation every weekend and paid for his travel from Sacramento to Arizona,” DCS made a diligent effort; and “[t]he failure of reunification [was] due to Father’s failure to participate, not due to any failure by DCS.” The conclusion was erroneous for two reasons. First, the court abused its

discretion by only considering DCS's efforts in the final seven months of the more than three and a half years Melody was in DCS's custody. Second, the evidence does not support the finding.

1. The Court Erred By Finding DCS Made Diligent Efforts Because It Failed to Consider DCS's Contribution to the Circumstances Existing at the Time of the Hearing.

¶69 The court's order reflects a finding based solely on the services the court ordered following the 2017 Hearing. However, under A.R.S. § 8-533(B)(8), the court was required to examine not only the final months but the entire dependency.

¶70 From the finding of dependency in May 2015 until June 2016, the case plan was reunification. At that point—just 11 months after the dependency finding—DCS moved to change the plan to severance and adoption. After the July 2017 Hearing, the court reinstituted the reunification plan, but DCS again moved to change the plan to severance and adoption in February 2018. Although the case plan was reunification for a cumulative total of fifteen months, DCS failed to diligently provide appropriate services to remedy the circumstances as DCS believed them to be, and its intermittent efforts only undermined Father's efforts and prolonged the dependency. The juvenile court failed to consider these circumstances.

¶71 Examples of DCS's failure to follow the court's orders are numerous. In July 2017, the court ordered DCS to "staff with the unit psychologist regarding all factors in this matter including father's financial status to develop a transition plan." The October 2017 DCS Report states that the unit psychologist recommended Dr. Oakley prepare the transition plan because she was familiar with Father and Melody's relationship. This result was anticipated and addressed in the 2017 Hearing and the court's order. But the two subsequent DCS Reports prepared before the 2018 Hearing made no mention of a transition plan. Nor did the case manager testify that one was created or in place.

¶72 DCS failed to comply with the court's orders regarding providing Father airfare for his visits. Although Father purchased October and November airfare and sent receipts, DCS refused to reimburse Father for that travel upon his arrival in Arizona. Instead, on November 1, 2017, DCS again moved to modify the juvenile court's order, this time requesting that it be permitted to wait three weeks to reimburse Father to allow for approval and processing. Even after the court modified the order on

November 21, 2017 – based on the timeline and procedure DCS outlined in its motion – DCS failed to reimburse Father for the visits consistent with the court order.

¶73 The case manager testified that when Father sent her the receipt, as he was directed, she forwarded it to the resource liaison who was responsible for getting him to fill out the documentation. The additional documentation was not mentioned in the court’s order or DCS’s motion. The case manager admitted that because of a lack of communication there was an issue with the reimbursement, and she did not know “exactly how long it [took]” for Father to receive payments. Father, however, testified reimbursement took between three to six months. He testified that he contacted his attorney and DCS to follow up with the payment, which the January 2018 DCS Report confirmed. Nevertheless, in February 2018, DCS again moved to terminate the parent-child relationship citing *Father’s failure* to visit.

2. The Court Erred By Finding that Father’s Failure to Visit More Frequently Indicated He Lacked Parental Fitness.

¶74 Under A.R.S § 8-533(B)(8)(c), the court found that “the circumstance[] existing now that ha[s] caused the Child to be in an out-of-home placement [is] Father’s substantial failure to engage in visitation.” The court supported its order for termination by finding that DCS’s visitation requirement was reasonable considering Dr. Oakley’s conclusion that Melody was strongly bonded to the foster mother. The court then found that Father had failed to remedy the bonding problem and would be unable to do so in the near future because (1) Father’s visits had decreased since the Bonding Assessment; and (2) Father’s reason “to justify his failure to visit the Child more frequently was financial,” but his “reason lack[ed] credibility given that DCS reimburse[d] Father for his transportation costs.” The record does not support the court’s two findings regarding Father’s alleged shortcomings.

¶75 First, Father’s visits did not decrease after the Bonding Assessment. Neither side disputes that Father made more visits in the eight months following the Bonding Assessment than he did in the first two and a half years of Melody’s life.

¶76 Second, DCS failed to provide evidence establishing timely reimbursement of Father’s travel costs. At the end of the hearing, the court requested reimbursement records because, it “was not really addressed in DCS’s testimony, and [the court] ha[d] no record of reimbursements and

whether they occurred when he arrived.” DCS’s attorney apologized for not producing reimbursement records and stated that the “case manager testified that the reimbursements were made.” However, the case manager did not testify that the reimbursements were made. Of the four documented flights that Father made after the July 2017 court order, the case manager testified that DCS provided “one or two of those flights.” Regarding the remaining flights that Father purchased, she could testify only to what the court ordered, which was for DCS to reimburse within three weeks. She specifically testified that she did not know how long it took to reimburse Father. Father testified that “[he] booked those tickets in advance, and [he] didn’t get a reimbursement until . . . three to six months later,” which is supported by the case manager’s testimony that a lack of communication had caused a delay in processing and the January 2018 DCS Report noting Father had not received payment.

¶77 Ultimately, without evidence showing that DCS was reimbursing Father per the court order, Father’s reason that he could not continue visiting was not a matter of credibility, just pure mathematics. DCS may not have unlimited resources, but Father’s resources are demonstrably more limited. Father’s income was approximately \$2000 a month, he had \$100 in savings, and he was living paycheck to paycheck. When traveling to Arizona, Father was responsible for his hotel, food, and “supplies” for Melody such as snacks and diapers. Had Father completed weekly visits, DCS procedures would have required Father to spend his entire monthly earnings on airfare and then wait for three to six months for reimbursement. Such a process does not consider how Father would be able to maintain his home and care for the other children in his care in California while waiting for the reimbursement.

¶78 The evidence shows, and the case manager admitted, that Father was complying with the court-ordered visitation before the court modified the reimbursement order. Without evidence establishing that DCS was reimbursing Father in a manner that allowed him to travel, the evidence does not support a finding that Father’s failure to visit Melody was due to parental unfitness. *See Maricopa County Juv. Action No. JS-500274*, 167 Ariz. 1, 5 (1990) (“The important consideration here is that there are fundamental constitutional rights involved in severance cases. Such constitutional rights can be overridden only by the combined elements of statutorily defined *improper behavior by the parent* and the child’s best interests.” (emphasis added)).

D. The Court Erred By Finding That Father Was Not Able to Exercise Proper Care and Control.

¶79 Finally, the court was required to find by clear and convincing evidence that “there [was] a substantial likelihood that [Father would] not be capable of exercising proper and effective parental care and control in the near future.” A.R.S. § 8-533(B)(8)(c). Again, the record lacks evidence that Father has *ever* been incapable of parenting Melody.

¶80 The ICPC noted: Father’s ex-wife stated “[he] was a good father, who cares and provides for his children”; it was “obvious that [his children] feel loved and cared for by their father and that he is very involved in their lives”; Father’s references “all stated that [he] is an excellent parent to his children”; and the ICPC caseworker observed “it appears that he has a positive relationship with his children and they look to him for attention and affection.” The case manager testified that “[Melody] does do well during scheduled visits with Father.” Dr. Oakley reported that she saw no “obvious risks” with his parenting, Father likely had the skills to be an adequate parent, he appeared to care for Melody, he was appropriate with her, and Father seemed to be bonded to her.

¶81 Moreover, under the circumstances, Father’s inability to replicate the foster mother’s bond with Melody does not show that he was “not capable of exercising proper and effective parental care and control.”

In any severance proceeding, the material issue facing the court is whether a parent has the ability to properly parent his/her child; it is irrelevant whether a child has a stronger attachment to their foster parents, whether foster parents are more “nurturing,” or whether foster parents might be more capable or better parents than a natural parent.

Roberto F., 232 Ariz. at 54, ¶ 42. The severance statute does not permit termination of a parent-child relationship based on the lack of a bond. As previously discussed, any perceived lack of a bond between Melody and Father was not because of Father’s lack of effort, but because of DCS’s delay, contact restrictions, and substantial failure to try to unify Melody with Father.

CONCLUSION

¶82 Accordingly, because we find a complete absence of evidence in the record to support the juvenile court's findings and conclusions supporting the termination of Father and Melody's parent-child relationship, we vacate the order.



AMY M. WOOD • Clerk of the Court
FILED: AA

In Re Juv. No. J-2255, (126 Ariz 144)



Matter of Juvenile No. J-2255

126 Ariz. 144 (Ariz. Ct. App. 1980) · 613 P.2d 304
Decided Jul 1, 1980

No. 1 CA-CIV 4503.

April 24, 1980. Rehearing Denied May 29, 1980.
Review Denied July 1, 1980.

Appeal from the Superior Court, Maricopa
County, Cause No. J-2255, C. Kimball Rose, J.

145 *145

O'Connor, Cavanagh, Anderson, Westover,
Killingsworth Beshears by Richard J. Woods,
Phoenix, for appellant.

Tupper, Schlosser Schulz, P.A., by Reed P. Schulz,
Phoenix, for appellees.

OPINION

OGG, Chief Judge.

This appeal challenges the sufficiency of the evidence to support an order and judgment terminating appellant's parent-child relationship with his daughter.¹ Because we find the evidence was sufficient, we affirm the order and judgment.

¹ Although the juvenile court has exclusive original jurisdiction over petitions to terminate the parent-child relationship, [A.R.S. § 8-532](#), in this appeal the parties have followed the Rules of Civil Appellate Procedure, 17A A.R.S., not the Rules of Procedure for the Juvenile Court. *See* Arizona Appellate Handbook § 6.1 (Supp. 1979) (citing *In re the Appeal in Pima County, Adoption of B-6355 and H-533*, [118 Ariz. 111](#), [575 P.2d 310](#) (1978)).

Appellant is the child's natural father. Appellees are her natural mother and stepfather, respectively. The child is legitimate.

Appellees initiated two petitions to terminate appellant's relationship with his daughter. The first, alleging an abandonment as grounds for termination, was denied. *See generally* [A.R.S. § 8-533\(1\)](#) (1974). This denial specifically permitted appellees to re-petition to terminate on the grounds of appellant's felony convictions. *See generally* [A.R.S. § 8-533\(4\)](#) (1974). The second, alleging the felony convictions as grounds for termination, was granted.

The evidence supporting the order and judgment is as follows: in November 1967, appellant was convicted for molesting a 12-year-old girl, who was the daughter of the woman with whom he had been living at the time. In 1969, when appellee Roberta J. Sommerfield married him, she knew he was on probation for this conviction, but ¹⁴⁶ she believed his explanation that he was falsely accused. At that time, she had custody of her two minor daughters by her former husband.

In 1973, when their daughter was 1 1/2 years old, appellee Roberta J. Sommerfield discovered appellant had molested his stepdaughters. She reported the offenses, he was arrested and prosecuted, and ultimately he pled guilty to one count of child molestation. In May 1973, he was sentenced to the Arizona State Prison for four to ten years.

In June 1976, appellant was released from prison with permission to return to his native state, Arkansas, for parole supervision. Since his return, his parole status has been good, he has held a steady job, and he has remarried. He has never been treated for his deviant sexual behavior.

Since his arrest in 1973, because of appellees' objections, appellant has had no contact with his daughter. When the parents divorced in 1974, the decree reserved for future resolution appellant's support obligations and visitation rights. Appellant never initiated proceedings to define his duties or establish his rights. The appellee Ami Sommerfield has known the child since 1973. The child regards him as her father. He intends to adopt her.²

² In the answering brief, appellees affirm that the stepfather petitioned for adoption and that the petition was granted by an order dated June 21, 1978. This order is not of record in this appeal. We, therefore, do not consider it in determining the validity of the June 2, 1978 termination order and judgment. See *West v. Baker*, 109 Ariz. 415, 510 P.2d 731 (1973).

In 1977, when appellees petitioned to terminate, A.R.S. § 8-533(4), the subsection applicable to felony convictions, provided for termination of the parent-child relationship under the following conditions:

[T]he parent is deprived of his civil liberties due to the conviction of a felony if the felony of which such parent was convicted is of such nature as to prove the unfitness of such parent to have future custody and control of the child, or if the sentence of such parent is of such length that the child will be deprived of a normal home for a period of years.

A.R.S. § 8-533(4) (1974).

We have not discovered any Arizona authority interpreting this subsection. Our analysis, therefore, is of first impression. Two general rules, however, govern our review. First, the juvenile court's order and judgment must be based upon a preponderance of the evidence. See A.R.S. § 8-537(B). Second, we must accept the juvenile court's findings unless they are clearly erroneous. See *In re Appeal in Maricopa County, Juvenile Action No. JS-378*, 21 Ariz. App. 202, 517 P.2d 1095 (1974).

To satisfy A.R.S. § 8-533(4), in all cases the parent must be deprived of his civil liberties because of a felony conviction. In addition, one of the two specified conditions must obtain: *either* the felony committed proves the parent is unfit to have future custody and control of the child, *or* the length of the sentence imposed will deprive the child of a normal home for a period of years.

Appellant concedes that he has been deprived of his civil liberties because of his felony conviction. Furthermore, because he was released from prison before appellees sought termination, the second of the alternative conditions is inapplicable. The order and judgment terminating appellant's relationship with his daughter, therefore, depend on satisfaction of the first of the alternative conditions.

Appellant's first contention is that a felony conviction proves the parent's unfitness only if the victim of the felony is the child. See *The Arizona Supreme Court, 1970-71, Public and Family Law, Adoption, Do Bad Checks Make A Mother Unfit?*, 13 Arizona Law Rev. 317, 327 (1971). We disagree. The statute requires the felony to be of a nature to prove unfitness. A felony proves unfitness if its commission permits a rational inference of unfitness. It would be difficult to identify any felony violation that would more clearly indicate the unfitness of the appellant as a parent to his young daughter. We agree with the

juvenile court that the appellant's prior convictions
 147 *147 for molesting young girls provided a rational
 inference of his unfitness as a parent.

Appellant's second contention is that the parent's fitness is to be tested as of the time of the hearing. On this analysis, to satisfy their production burden, appellees had to supplement the evidence as to appellant's felony convictions with evidence of his present unfitness. We disagree. Although the statute requires unfitness to have *future* custody and control of the child, it is the *nature* of the felony that must prove this unfitness. Appellees, therefore, satisfied their burden by producing evidence of felony convictions of that nature. The juvenile court could properly conclude that these felonious acts of child molestation are of a nature to prove appellant's unfitness to have future custody and control of the child.

The statute requires the juvenile court to assess the parent's future fitness on the basis of a past act. Because termination of their relationship is vitally important to both parent and child, see Laws 1970, Ch. 153, § 1, and the parent's rights are constitutionally protected, see *Quilloin v. Walcott*, 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978), and *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), we believe the parent may rebut the assessment of unfitness based on a past act by showing actual fitness at the time of the hearing.

At the hearings, the juvenile court permitted appellant to testify as to his present condition. Although appellant has complied with parole conditions, has held a steady job, and has remarried, he has not attempted to seek treatment for the underlying behavioral abnormality. The juvenile court did not err in concluding that appellant had failed to rebut the assessment of unfitness to have future custody and control of the child.

Appellant's final contention is that termination is inappropriate because in this case the natural parent who has custody and control of the child is attempting to prevent the other natural parent from visiting the child. Because visitation rights were reserved in the divorce decree, he argues that the superior court has jurisdiction to determine appellant's visitation rights. We disagree. Different considerations apply in divorce child custody cases than in termination of parental rights cases. If [A.R.S. § 8-533\(4\)](#) is satisfied and a termination order and judgment is entered, appellant obviously also loses his right to visit the child.

For the foregoing reasons, the order and judgment are affirmed.

CONTRERAS, P.J., Department C, and JACOBSON, J., concur.

**Michael J.
v.
Arizona Dept of
Economic Security,
(194 Ariz 231)**



Michael J. v. Arizona Department of Economic Security

194 Ariz. 231 (Ariz. Ct. App. 1999) · 979 P.2d 1024 · 289 Ariz. Adv. Rep. 7
Decided Feb 23, 1999

1 CA-JV 98-0024

Filed February 23, 1999 Review Granted May 25, 1999.

Appeal from the Superior Court of Maricopa County, Cause No. JS-9293.

The Honorable Robert A. Hertzberg, Judge

REVERSED

Janet A. Napolitano, The Attorney General by
Susan J. Gebhard, Assistant Attorney General,
Attorneys for Appellees, Phoenix.

Gary Sheets, Attorney for Appellant, Phoenix.

232 *232

Michael D. Hintze Associates, Ltd. by Michael D.
Hintze, Attorneys for Minor Child, Phoenix.

OPINION

THOMPSON, Judge

¶ 1 This appeal arises out of a severance of parental rights under Ariz. Rev. Stat. Ann. (A.R.S.) § 8-533. We reverse.

FACTUAL AND PROCEDURAL HISTORY

¶ 2 On September 6, 1995, appellant Michael J. (father), in custody since July 17, 1995, pled guilty to aggravated assault and misconduct involving a weapon. On November 30, 1995, he was sentenced to 3.5 years in prison. One month

later, on December 25, 1995, his son Zachariah J. (child) was born. Father's prison term expires on January 12, 1999.¹

¹ Father insists that he was scheduled for release in August 1998. ADES disputes this assertion. The record is unclear, except to note that father's sentence terminates in January 1999. [A.R.S. §§ 13-701 and 13-702](#) eliminate all early releases except pursuant to [A.R.S. § 41-1604.07](#), which makes certain prisoners eligible for earned release credits. Finding no evidence in the record of father's earned release credits, we must presume that he will be released in January 1999.

¶ 3 In January 1996, father was served with Notice of Dependency proceedings regarding his child. The Arizona Department of Economic Security (ADES) notified father that the child was in their custody. On February 23, 1996, father wrote a letter to ADES requesting visitation with his child. ADES elected not to schedule visitation between father and child, apparently because father was in prison. ADES did not inform father of the child's subsequent custody with a maternal relative. The child has lived with this relative since June 1996.

¶ 4 On January 27, 1997, ADES filed a petition to terminate father's parental rights. At the pre-trial conference, father notified the trial court that he would contest the severance. The severance trial occurred on December 3, 1997. The trial court heard testimony from both the assigned caseworker and father.

¶ 5 On December 10, 1997, the trial court severed father's parental rights pursuant to [A.R.S. § 8-533](#). First, the court found that father "is deprived of civil liberties due to the conviction of a felony . . . [and] that the sentence is of such length that his child will be deprived of a normal home for a period of years." [A.R.S. § 8-533\(B\)\(4\)](#) (Supp. 1997). Second, the court found that father's convictions were of "such nature as to prove [his] unfitness . . . to have future custody and control of the child." *Id.* Third, the court ruled that father "has abandoned the child." [A.R.S. § 8-533\(B\)\(1\)](#) (Supp. 1997). Finally, the court found severance to be in the best interests of the child.

¶ 6 Father timely appealed. We have jurisdiction under [A.R.S. §§ 12-120.21\(A\)\(1\)](#) and [12-2101\(B\)](#).

DISCUSSION

¶ 7 We will reverse a juvenile court's ruling if its findings of fact are clearly erroneous. See *Maricopa County Juvenile Action No. JS-501568*, [177 Ariz. 571, 576, 869 P.2d 1224, 1229](#) (App. 1994). In a proceeding to sever parental rights, the standard of proof is clear and convincing evidence. See *Santosky v. Kramer*, [455 U.S. 745, 769-70](#) (1982). Moreover, the United States Supreme Court has recognized that the right to control and custody of one's children is fundamental. See *Stanley v. Illinois*, [405 U.S. 645, 651](#) (1972). For the following reasons, we believe that the trial court's findings were not supported by clear and convincing evidence.

1. Length of Sentence

¶ 8 The trial court held that father's sentence due to his felony conviction "is of such length that the child will be deprived of a normal home for a period of years." [A.R.S. § 8-533\(B\)\(4\)](#) (Supp. 1997). That holding was clearly erroneous.

¶ 9 Severances based on the length of sentence
233 clause of [§ 8-533\(B\)\(4\)](#) typically *233 have involved long sentences and severe circumstances. For example, in *Pima County Juvenile Action No. S-1147*, [135 Ariz. 184, 185, 659 P.2d 1329, 1330](#)

(App. 1983), Division Two of this court affirmed a severance based on the length of sentence clause of [§ 8-533\(B\)\(4\)](#). In that case, father was serving a life sentence for second degree murder. See *id.*

¶ 10 In *Maricopa County Juvenile Action No. JS-7499*, [163 Ariz. 153, 155, 786 P.2d 1004, 1006](#) (App. 1989), the length of sentence was one of several grounds to sever the father's parental rights. In that instance, father was serving a twenty-five year sentence for the rape and sodomy of his seven-year-old daughter. See *id.* at 154, [786 P.2d 1005](#).

¶ 11 We are not persuaded by this court's reasoning in *Maricopa County Juvenile Action No. JS-9104*, [183 Ariz. 455, 904 P.2d 1279](#) (App. 1995). In that case, father was serving a 5.25 year sentence for a drug conviction. See *id.* at 457, [904 P.2d at 1281](#). Acknowledging that a severing court must find both a statutory ground plus the best interests of the child, this court upheld the severance of father's parental rights, relying on the length of father's prison sentence as the sole enumerated, statutory ground. See *id.* at 461, [904 P.2d at 1285](#). This is inconsistent with prior severances based on the length of sentence clause of [§ 8-533\(B\)\(4\)](#). The dissent noted that, "[n]o prior Arizona case comes close to holding that parental rights can be severed because of a 5.25-year sentence" *Id.* at 462, [904 P.2d at 1286](#) (Noyes, J., dissenting). Severance was deemed proper in cases involving "far longer sentences and far more aggravated factors." *Id.* In those cases, the sentences were so lengthy as to preclude a meaningful parent-child relationship. In this case, father's sentence is shorter than the sentence in *JS-9104*, as is the time left to be served at the commencement of the severance trial.² Notwithstanding that this case is distinguishable, we do not follow the rationale in *JS-9104*.

² This court has refused to consider the possibility of an early release date in a "length of sentence" analysis pursuant to [§ 8-533\(B\)\(4\)](#). "[W]hether [father] may or

may not make parole is irrelevant and does not control the language of [A.R.S. § 8-533\(A\)](#) and (B)(4)." *Maricopa County Juvenile Action No. JS-5609*, 149 Ariz. 573, 575, 720 P.2d 548, 550 (App. 1986). Under the current "truth in sentencing" regime, this may no longer be a sensible approach. See [A.R.S. §§ 13-1019\(7\)](#), [13-701](#), and [13-702](#).

¶ 12 It is hazardous to take the comprehensive approach utilized in JS-9104. There, the majority viewed [§ 8-533\(B\)\(4\)](#) in the context of the child's best interests:

[A.R.S. section 8-533\(B\)\(4\)](#) has been properly construed by the juvenile court given the facts presented in this particular case. Given the transitional age of the child at the time (from child to teenager); the evidence of a broken parent-child bond; the child's self-initiated desire to be adopted by her stepfather; the mental and emotional make-up of the child; and the stepfather's eagerness to adopt and parent the child and thus create an intact family for the child during her most difficult years compels us to hold that the juvenile court did not abuse its discretion in granting severance in this case. Adoptability of the child is one factor in considering the child's best interests. *Maricopa County Juvenile Action No. JS-501904*, 180 Ariz. 348, 352, 884 P.2d 234, 238 (App. 1994). We do not hold or believe that a natural parent's prison sentence of 5.25 years would necessarily mandate such a result in every case. We only hold that the result was correct given the totality of the evidence in this case.

Id. at 461, 904 P.2d 1285.

¶ 13 This approach illustrates the unfortunate conflation of [§ 8-533\(B\)\(4\)](#) with the separate and distinct analysis of the child's best interests. See [A.R.S. § 8-533\(B\)](#) (Supp. 1997). The dissent in

JS-9104 recognized this problem, noting that the juvenile court wrongly focused on adoption issues and the suitability of the "new family unit." 183 Ariz. at 462, 904 P.2d at 1286. Visitation and custody-related issues "should have been resolved in domestic relations court, not by severing father's parental rights." *Id.* In the present case, the child currently thrives in an amiable environment. [Section 8-533](#) does not, however, allow the government's concerns as to a child's best interests, however *234 justified, to inspire a severance on the putative basis of a 3.5 year sentence. See *id.* "Arizona law does not give judges free rein to consider as paramount the best interests of the child when termination of the parental relationship is at stake." *Pima County Juvenile Action No. S-120171*, 183 Ariz. 546, 549, 905 P.2d 555, 558 (App. 1995) (Espinosa, J., concurring). Indeed, severance "is a serious matter and courts should bend over backwards, if possible, to maintain the natural ties of birth." *Maricopa County Juvenile Action No. JS-500274*, 167 Ariz. 1, 5, 804 P.2d 730, 734 (1990) (citing *Anonymous v. Anonymous*, 25 Ariz. App. 10, 11, 540 P.2d 741, 742 (1975)).

¶ 14 When a parent is incarcerated for most, if not all of the child's formative years, it is clear "that the child will be deprived of a normal home for a period of years." [A.R.S. § 8-533\(B\)\(4\)](#) (Supp. 1997). The present case is quite different. Here, father is only serving a 3.5 year sentence. At the time of the severance hearing, he had only one year left on his sentence. A severance based on this short duration is tantamount to denying felons their parental rights as a matter of law. [Section 8-533](#) does not warrant such an outcome. We hold that there must be some showing, beyond the mere fact of a prison term, that the sentence is of such length that it will significantly and detrimentally impact the child's home life so that we should negate the parent's fundamental interest in raising the child. ADES has made no such showing in this case.

2. Unfitness

¶ 15 The trial court also erred in holding that father's conviction "is of such nature as to prove the unfitness of such parent to have future custody and control of the child." [A.R.S. § 8-533\(B\)\(4\)](#) (Supp. 1997). Father was convicted of aggravated assault and misconduct involving a weapon. Although these are serious offenses, the case law does not suggest that they are inherently indicative of parental unfitness. In general, the case law has indicated that the nature of a crime illustrates unfitness where the crime is sex-related or is a crime against the child or other family members.

¶ 16 First, in JS-7499, this court affirmed a severance for several reasons, including unfitness. [163 Ariz. 153, 786 P.2d 1004](#). In that case, father had raped and sodomized his daughter. See *id.* at 154, [786 P.2d at 1005](#).

¶ 17 Second, in Pima County Juvenile [Action No. S-949, 134 Ariz. 442, 657 P.2d 430](#) (App. 1982), Division Two of this court affirmed another severance of parental rights. In that case, father was also convicted of attempted sexual assault, sexual abuse, and attempted kidnapping. See *id.* at 443, [657 P.2d at 431](#). These crimes included misconduct involving his twelve-year-old sister-in-law. See *id.* The court noted that the child easily could "be subjected to sexual abuse" by her father. *Id.* at 444, [657 P.2d at 432](#).

¶ 18 Third, in Pima County Juvenile [Action No. S-983, 133 Ariz. 182, 185, 650 P.2d 484, 487](#) (App. 1982), Division Two of this court affirmed a severance on the grounds of unfitness. There, father was serving a sentence for sexual assault and kidnapping. See *id.* at 183, [650 P.2d at 485](#). The court noted that those crimes could "support a rational inference of parental unfitness and proof of the conviction of such crimes creates a rebuttable presumption that the father is unfit to parent children." *Id.* at 185, [650 P.2d at 487](#).

¶ 19 We hold that, to prove unfitness pursuant to [§ 8-533\(B\)\(4\)](#), the felony must directly demonstrate the individual's substantial unfitness to parent, as opposed to the general character defects reflected

by the commission of any felony. Here, father was convicted of aggravated assault for threatening to shoot another adult with whom he had a minor traffic accident. Additionally, he was convicted of misconduct involving a weapon for illegally possessing a sawed-off shotgun. Without a doubt, these crimes indicate serious character defects. The commission of a violent felony may, in some other context, support severance under [§ 8-533\(B\)\(4\)](#). In this case, however, father's crimes do not directly reflect a substantial unfitness to parent.

3. Abandonment

¶ 20 The trial court also found that father had
235 "abandoned the child" pursuant to [A.R.S. § 8-533\(B\)\(1\)](#). This ruling was clearly erroneous.

¶ 21 Abandonment is defined in [A.R.S. § 8-531\(1\)](#) as follows:

"Abandonment" means the failure of a parent to provide reasonable support and to maintain regular contact with the child, including providing normal supervision. Abandonment includes a judicial finding that a parent has made only minimal efforts to support and communicate with the child. Failure to maintain a normal parental relationship with the child without just cause for a period of six months constitutes prima facie evidence of abandonment.

¶ 22 For abandonment to be found, there must be "conduct on the part of the parent which implies a conscious disregard of the obligations owed by a parent to the child, leading to the destruction of the parent-child relationship." Anonymous, [25 Ariz. App. at 12, 540 P.2d at 743](#) (citing *D.M. v. State*, [515 P.2d 1234, 1237](#) (Alaska 1973)). Moreover, the conduct "must be intentional and must show a settled purpose to relinquish all parental rights in the child." *Id.* (quoting *Sernaker v. Ehrlich*, [468 P.2d 5, 7](#) (Nev. 1970)).

¶ 23 ADES argues that the new statutory definition of abandonment does not consider a parent's intent. We disagree. Intent is crucial to the issue of abandonment. ADES correctly points out that "the new legislation deletes the intent language from the abandonment definition." Pima County Juvenile [Action No. S-114487](#), 179 Ariz. 86, 97 n. 14, 876 P.2d 1121, 1132 n. 14 (1994). However, conduct and intent are not mutually exclusive. Although our supreme court in S-114487 considered the abandonment issue under its previous definition, the court described the relationship between conduct and intent under the new statutory language, insisting that, "the message, put simply, is this: do something, because conduct speaks louder than words or subjective intent." *Id.* The court concluded that, "the importance we place on the father's conduct accords with the new law's terms." *Id.* at n. 14. Conduct is the manifestation and best indication of intent. The definition of abandonment in § 8-531(1) does not alter that truth.

¶ 24 In S-114487, the court severed father's parental rights. See *id.* at 101, 876 P.2d at 1136. There, both parents lived in Texas. See *id.* at 90, 876 P.2d at 1125. When the mother became pregnant, her parents sent her to live with an aunt in Tucson. See *id.* Father remained in Texas. See *id.* The mother placed the child for adoption without the father's knowledge. See *id.* The adoptive parents subsequently moved to sever father's rights. See *id.* at 91, 876 P.2d at 1126. The court noted that, although he was free to do so, father "assumed no parental duties." *Id.* at 96, 876 P.2d at 1131. The court reasoned that "the father must take concrete steps to establish the legal or emotional bonds linking parent and child." *Id.* His failure to act illustrated an objective intent to abandon his child. See *id.*

¶ 25 The present case is distinguishable from S-114487. Unlike the father in S-114487, this father was incarcerated before the child's birth and remains so. Obviously, father's relationship with his infant child is severely hindered by his incarceration. His conduct, therefore, must be viewed in that context. Moreover, father's conduct illustrates his intent to have a relationship with his child. He requested visitation with the child less than two months after the child was born. His request was denied without explanation. In addition, father persevered in discovering the whereabouts of his child in spite of the fact that ADES did not provide him with that information. Father has not abandoned his child pursuant to § 8-533(B)(1).

¶ 26 The trial court's finding of clear and convincing evidence of abandonment was clearly erroneous.

CONCLUSION

¶ 27 For the foregoing reasons, we conclude that the trial court was clearly erroneous in its application of [A.R.S. § 8-533\(B\)](#). We reverse the judgment of the trial court.

JON W.
THOMPSON, Judge

CONCURRING:

NOEL
FIDEL, Presiding Judge

SUSAN
A. EHRLICH, Judge

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Timothy B. v. Department of Child Safety, (252 Ariz 470)



Timothy B. v. Dep't of Child Safety

505 P.3d 263 (Ariz. 2022) · 65 Arizona Cases Digest 21
Decided Mar 7, 2022

No. CV-20-0318-PR

03-07-2022

TIMOTHY B., Appellant, v. DEPARTMENT OF CHILD SAFETY, H.B., Appellees.

David W. Bell, Law Office of David W. Bell, Mesa; Steven Czop (argued), Czop Law Firm, PLLC, Higley, Attorneys for Timothy B. Mark Brnovich, Arizona Attorney General, Drew C. Ensign, Section Chief, Civil Appeals, Dawn R. Williams (argued), Autumn Spritzer, Assistant Attorneys General, Tucson, Attorneys for Department of Child Safety

VICE CHIEF JUSTICE TIMMER, opinion of the Court

David W. Bell, Law Office of David W. Bell, Mesa; Steven Czop (argued), Czop Law Firm, PLLC, Higley, Attorneys for Timothy B.

Mark Brnovich, Arizona Attorney General, Drew C. Ensign, Section Chief, Civil Appeals, Dawn R. Williams (argued), Autumn Spritzer, Assistant Attorneys General, Tucson, Attorneys for Department of Child Safety

VICE CHIEF JUSTICE TIMMER authored the opinion of the Court, in which JUSTICES LOPEZ, BEENE, and KING joined. JUSTICE BOLICK concurred in the result.*

* Chief Justice Brutinel and Justice Montgomery are recused from this matter.

VICE CHIEF JUSTICE TIMMER, opinion of the Court:

¶1 The juvenile court can terminate the parent-child relationship if at least one ground listed in [A.R.S. § 8-533\(B\)](#) exists, and termination is in the child's best interests. *See Alma S. v. Dep't of Child Safety*, 245 Ariz. 146, 149–50 ¶ 8, [425 P.3d 1089](#) (2018). The length-of-sentence ground for termination is proven if an incarcerated parent's sentence is so lengthy that "the child will be deprived of a normal home for a period of years." [§ 8-533\(B\)\(4\)](#). What is a "normal home"? That is the primary question before us.

BACKGROUND

¶2 H.B. was born in September 2012 and initially lived with her father, Timothy B., her mother, Jaliece J., and her half-siblings. When H.B. was two-and-one-half years old, Timothy was convicted of several felony charges, including kidnapping, attempted sexual assault, unlawful flight from law enforcement, and aggravated assault. The superior court sentenced him to 12.5 years in prison and imposed lifetime probation upon his release, which will occur in 2024 when H.B. is eleven years old.

¶3 After Timothy was incarcerated, H.B. lived with her paternal grandmother and paternal aunt for the next few years. During that time, they facilitated extensive contact between Timothy and H.B. Timothy frequently spoke with his daughter by telephone, wrote to her often, and had regular in-person visits with her. Neither the grandmother nor the aunt established a legal responsibility to care for H.B. through a guardianship. *See* [A.R.S. § 8-871\(A\)](#) (authorizing permanent guardianships).

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also spent time with Jaliece, who lived with H.B.'s half-siblings and another man. The Arizona Department of Child Safety ("DCS") became involved in January 2017 when Jaliece was arrested while H.B. was visiting. After an investigation revealed child neglect and other issues, DCS removed the children, including H.B., from Jaliece's custody.

¶5 The juvenile court found H.B. and her half-siblings dependent as to Jaliece and their respective fathers. H.B.'s paternal aunt asked that H.B. be placed with her, but that request was denied because the aunt lived with the paternal grandmother, who did not pass a background check. Instead, the court granted DCS's request that H.B. be placed with Jaliece's friend, who had known H.B. since birth. During H.B.'s lengthy dependency, she spoke with Timothy weekly and visited him monthly.

¶6 DCS was unable to successfully reunify Jaliece with her children after two years of providing services, and the court approved a change in case plan to severance and adoption. DCS sought to terminate Timothy's parental rights pursuant to the length-of-sentence ground listed in § 8-533(B)(4). After a multiple-day evidentiary hearing held over a few months in 2019, the court found that DCS had proved this ground and that termination was in H.B.'s best interests.¹ It therefore terminated Timothy's parental rights to H.B.

¹ In the same ruling, the court terminated Jaliece's rights to H.B. Jaliece did not appeal, and therefore the propriety of the court's termination of her rights is not before us.

¶7 In considering the length-of-sentence ground, the court relied on *In re Appeal in Maricopa County Juvenile Action No. JS-5609*, 149 Ariz. 573, 575, 720 P.2d 548, 550 (App. 1986), which found that "[t]he 'normal home' referred to in the statute relates to [an incarcerated parent's] obligation to provide a normal home, a home in which the [incarcerated parent] has a presence,

and it does not refer to a 'normal home' environment created by [others]." The court also considered non-exclusive factors set forth in *Michael J. v. Arizona Department of Economic Security*, 196 Ariz. 246, 251–52 ¶ 29, 995 P.2d 682, 687–88 (2000) :

(1) the length and strength of any parent-child relationship existing when incarceration begins, (2) the degree to which the parent-child relationship can be continued and nurtured during the incarceration, (3) the age of the child and the relationship between the child's age and the likelihood that incarceration will deprive the child of a normal home, (4) the length of the sentence, (5) the availability of another parent to provide a normal home life, and (6) the effect of the deprivation of a parental presence on the child at issue.

In applying these factors, the court found that on the one hand, Timothy and H.B. enjoy a "fairly strong relationship" and that "[Timothy] has done all he can to maintain and nurture his relationship with [H.B.]." The court remarked on their "strong bond"; "frequent telephone contact"; regular visits, which included helping H.B. with homework; and exchanges of cards, gifts, letters, poetry, and drawings. According to the court, Timothy clearly loves his daughter, is "kind and attentive," and both H.B. and Timothy enjoy visitation.

¶8 On the other hand, the court found that Timothy's love and care is insufficient to meet H.B.'s needs. The court observed that "[H.B.] has no parent available to walk her to school, to teach her how to ride a bicycle, go to school functions, and help with homework on a regular basis" and that Timothy "has been and remains unavailable for [H.B.'s] daily care and for milestone events." It also found that the nature of Timothy's convictions made it unlikely he would be able to parent

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immediately following release from custody, and that he could be reincarcerated if he violates probation.

¶9 The court concluded that while Timothy's efforts have been "extraordinary and laudable," his incarceration has and will continue to deprive H.B. "of her father's everyday guidance, care and support" for over half her childhood, meaning she is deprived of a normal home for a period of years, thereby *267 demonstrating the length-of-sentence ground for termination under § 8-533(B)(4).

¶10 Turning to H.B.'s best interests, the court focused "solely" on her interests under "the totality of the circumstances." It found that H.B. is happy in an adoptive placement with a younger half-sister, and the placement meets all her needs; the placement will ensure that H.B. regularly visits her other half-siblings; and absent termination, H.B. would "languish further awaiting for [her] father to be released from custody with a hope that [he] may be ready to safely parent [her]."

¶11 The court of appeals vacated the juvenile court's termination order as it relates to Timothy and remanded for reconsideration, citing two errors. *See Timothy B. v. Dep't of Child Safety*, 250 Ariz. 139, 141 ¶ 1, 476 P.3d 319, 321 (App. 2020). First, it concluded the juvenile court mistakenly relied on the definition of "normal home" announced in *JS-5609*, characterizing that definition as overly rigid by failing to recognize "that a 'normal home' may include a parent with a non-traditional presence." *See Timothy B.*, 250 Ariz. at 144 ¶ 18, 476 P.3d at 324. Second, it found that the juvenile court had erred by using a best-interests inquiry focusing "*solely* on the children's best interest" rather than "balanc[ing] the interests of *both* the child and the parent." *Id.* at 145–46 ¶ 21, 476 P.3d at 325–26.

¶12 We granted DCS's petition for review to provide guidance on what constitutes a "normal home" under § 8-533(B)(4) and to clarify the best-interests inquiry, both recurring issues of statewide importance.

DISCUSSION

I.

¶13 The juvenile court conducts a two-step inquiry in determining whether to terminate the parent-child relationship. *See Alma S.*, 245 Ariz. at 149–50 ¶ 8, 425 P.3d at 1092–93. First, the court must decide whether clear and convincing evidence demonstrates at least one ground listed in § 8-533(B). *Id.* at 149 ¶ 8, 425 P.3d at 1092. The grounds listed establish parental unfitness by showing a parent's inability to properly parent, a voluntary relinquishment of parental rights, or actions that forfeit a parent's right to contest severance. *Id.* at 150 ¶¶ 9–10, 425 P.3d at 1093. Second, assuming a § 8-533(B) ground exists, the court must decide whether a preponderance of evidence supports a finding that termination is in the child's best interests. *Id.* at 149–50 ¶ 8, 425 P.3d at 1092–93.

¶14 We will affirm a termination order unless the juvenile court abuses its discretion or the court's findings are not supported by reasonable evidence. *Jessie D. v. Dep't of Child Safety*, 251 Ariz. 574, 579 ¶ 10, 495 P.3d 914, 919 (2021). A court abuses its discretion by misapplying the law. *State v. Miles*, 243 Ariz. 511, 513 ¶ 7, 414 P.3d 680, 682 (2018).

A.

¶15 The length-of-sentence ground for termination provides, in relevant part, that termination is justified when "the parent is deprived of civil liberties due to the conviction of a felony ... [and] the sentence of that parent is of such length that the child will be deprived of a normal home for a period of years." § 8-533(B)(4). DCS argues the court of appeals misinterpreted "normal home" as possibly including a home where the incarcerated parent has a non-traditional presence. It asserts the court conflated the *Michael J.* factors and "improperly magnifie[d] the importance of the child's need to maintain a relationship with his or

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abandoned parent while ignoring the importance of the child's other needs" that an in-home parent typically addresses.

¶16 We review the meaning of § 8-533(B) de novo. *See Rasor v. Nw. Hosp., LLC*, 243 Ariz. 160, 163 ¶ 11, 403 P.3d 572, 575 (2017). Our primary goal is effectuating the legislature's intent. *Id.* at 164 ¶ 20, 403 P.3d at 576. If the statutory language has only one reasonable interpretation when read in context, we apply that interpretation without further analysis. *Id.* Where more than one reasonable interpretation exists, we employ secondary interpretive principles, such as examining legislative history, any statutes relating to the same subject or general purpose, the effects and consequences of differing interpretations, and the spirit and purpose of the statute. *See id.*; *268 *Stambaugh v. Killian*, 242 Ariz. 508, 509 ¶ 7, 398 P.3d 574, 575 (2017).

¶17 "Normal home" as used in § 8-533(B)(4) has more than one reasonable interpretation. The legislature did not define the term, and what constitutes a "normal home"—whether referring to a physical structure or the environment created by its inhabitants—is not plainly evident in our diverse society. *See Normal*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/normal> (last visited Feb. 3, 2022) (defining "normal" in part as "conforming to a type, standard, or regular pattern" or "characterized by that which is considered usual, typical, or routine"); *Home*, Merriam-Webster, <https://www.merriamwebster.com/dictionary/home> (last visited Feb. 3, 2022) (defining "home" in part as "the house or apartment where a person lives" or "a family living together"). Indeed, underscoring this lack of plain meaning, neither the parties nor the court of appeals identifies the meaning of "normal home." And although the court of appeals in *JS-5609* defined "normal home," it did so without any analysis. *See JS-5609*, 149 Ariz. at 575, 720 P.2d at 550.

¶18 Applying secondary interpretive principles reveals the legislature's intended meaning of "normal home." We start by examining § 8-533's legislative history and the legislature's stated purpose in enacting the statutes governing termination of the parent-child relationship. *See Rasor*, 243 Ariz. at 164 ¶ 20, 403 P.3d at 576; *Special Fund Div. v. Indus. Comm'n of Ariz.*, 191 Ariz. 149, 153 ¶ 10, 953 P.2d 541, 545 (1998) (considering legislative purpose to interpret statute).

¶19 Before 1970, Arizona did not have a separate statutory scheme for terminating the parent-child relationship. Instead, termination occurred in the context of adoption, with or without the "natural" parent's consent.² *See, e.g.*, A.R.S. Part IV § 17-1193 (1913) (excepting the requirement that the natural parent must consent before the court may enter an adoption order if "the court determines that the interest of the child will be promoted thereby"); A.R.S. § 8-104 (1956) (same), -108(A) (1956) (providing that "the child shall no longer be the child or heir of the natural parents" upon entry of the adoption order). Outside the adoption context, the state department of health licensed public and private child welfare agencies to care for neglected children or place them in a "family home" or an institution, *see* A.R.S. §§ 8-501, -506 (1956), and also certified foster homes to care for such children, *see* A.R.S. §§ 8-513 to -515 (1956). Parental rights were not terminated when children were placed in family homes, institutions, or foster homes. *See* §§ 8-501 to -518 (1956).

² The legislature required consent from the parent or a statutory equivalent from 1933 to 1952. *See Westerlund v. Croaff*, 68 Ariz. 36, 41, 198 P.2d 842, 847 (1948); 1952 Ariz. Sess. Laws ch. 96, § 3 (2nd Reg. Sess.).

¶20 In 1970, the legislature ended the practice of maintaining the parent-child relationship during long-term institutional or foster care by prescribing termination procedures. *See* 1970

2012 Ariz. Sess. Laws ch. 153, § 1 (2nd Reg. Sess.).

These procedures were designed to "safeguard the rights and interests of all parties concerned and promote their welfare and that of the state." *Id.* The act reflected a "philosophy that, wherever possible, family life should be strengthened and preserved" and acknowledged that the termination issue was so vitally important that "a judicial determination [should be made] in place of attempts at severance by contractual arrangements, express or implied, for the surrender or relinquishment of children." *Id.*

¶21 The 1970 act authorized termination of a parent-child relationship if any one of several grounds existed. *See* A.R.S. § 8-533 (1970). This original version of § 8-533 included a length-of-sentence ground as a basis for termination that is substantively identical to present-day § 8-533(B)(4). *See* § 8-533(4) (1970) (authorizing termination when "the parent is deprived of his civil liberties due to the conviction of a felony ... if the sentence of such parent is of such length that the child will be deprived of a normal home for a period of years"). Contrary to today's requirement, termination could be ordered without separately considering the child's best interests. *See* A.R.S. § 8-538(B) (1970).

¶22 In 1986, the legislature reenacted § 8-533 and
269 other statutes related to foster care. *269 *See* 1986 Ariz. Sess. Laws ch. 205, § 1 (2nd Reg. Sess.). The act's stated purpose was "to expedite the adoption of numerous children who remain in temporary foster care for indeterminate lengths of time with no hope of being returned to their natural parents and, in so doing, promote a stable and long-term family environment for these children." *Id.* The 1986 act authorized termination if any one ground listed in § 8-533(B) was present, including the length-of-sentence ground existing today. *See* A.R.S. § 8-533(B)(4) (1986). The court was permitted to "also consider the needs of the child" in deciding whether to terminate parental rights. *See* § 8-533(B) (1986).

¶23 The legislature has amended § 8-533 many times since 1986, including adding the best-interests inquiry, but has kept the length-of-sentence ground substantively intact since 1970. We deduce from § 8-533's history and stated purpose that the legislature intended a "normal home" to be "a stable and long-term family environment" outside institutional or foster home care, which had predominantly served as living conditions for neglected children before 1970. Indeed, the legislature's intent to avoid having children linger in foster care echoes throughout other grounds justifying termination in § 8-533(B). *See* § 8-533(B)(3) (mental illness and drug or alcohol issues that render the parent "unable to discharge parental responsibilities" for a prolonged period of time), -533(B)(8) (out-of-home placement for nine or fifteen months or six months for a child under three), -533(B)(11) (in and out of out-of-home placement within eighteen months).

¶24 The "normal home" does not necessarily require the incarcerated parent's physical presence, as the *JS-5609* court concluded. First, the legislature's intent to strengthen and preserve familial bonds, whenever possible, cuts against requiring the incarcerated parent's physical presence in the home if the child is otherwise in a stable and long-term family environment outside foster care. *See* 1970 Ariz. Sess. Laws ch. 153, § 1 (2nd Reg. Sess.); *see also* A.R.S. § 1-601 (recognizing a parent's fundamental liberty interest in raising a child and directing that the state's justified infringement on that right be "narrowly tailored and ... not otherwise served by a less restrictive means"); *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) (recognizing that parents have a fundamental liberty interest in "the care, custody, and management of their child" that "does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State").

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Second, the option for establishing a permanent guardianship for dependent children without terminating parental rights evidences the legislature's intent that the incarcerated parent does not have to be physically present for the child to live in a "normal home." See A.R.S. § 8-862(B)(1) (permitting the court to establish a plan for permanent guardianship at the permanency hearing rather than a plan for termination of parental rights). The court can establish a permanent guardianship under specified conditions, including when "termination of parental rights would not be in the child's best interests." § 8-871(A)(4). A permanent guardianship divests the birth or adoptive parent of legal custody of the child and ends the child's dependency, thereby removing the child from foster care, but "does not terminate the parent's rights." A.R.S. § 8-872(H), (J). The court can tailor the guardianship to the child's unique best interests by ordering visitation with the birth or adoptive parent, siblings, and other relatives, and by entering other directives as fitting. See §§ 8-871(D), -872(I). Because we can assume as a matter of common sense that the legislature would not intend to place a child in an "abnormal home," it follows that a "normal home" can consist of a home in which the child has a permanent guardian, and the birth or adoptive parent is not physically present in the home but has some relationship with the child that serves the child's best interests.

¶26 Third, we are mindful that if the birth or adoptive parent's physical presence is required to make a "normal home," a prison sentence of any "period of years" would necessarily result in termination of parental rights. § 8-533(B)(4). If that was the legislature's intent, it could have simply provided as *270 a ground for termination that the parent is imprisoned for a period of years. The directive to also consider whether the child would be "deprived of a normal home" would have been unnecessary because the deprivation would inherently arise from a multiple-year prison

term. See *id.*; see also *Nicaise v. Sundaram*, 245 Ariz. 566, 568 ¶ 11, 432 P.3d 925, 927 (2019) ("A cardinal principle of statutory interpretation is to give meaning, if possible, to every word and provision so that no word or provision is rendered superfluous.").

¶27 For these reasons, we define "normal home" in § 8-533(B) as a stable and long-term family environment outside a foster care placement, where another parent or a permanent guardian resides and parents the child, and where the incarcerated parent affirmatively acts to maintain a relationship with the child that contributes to rather than detracts from the child's stable, family environment. When another parent is unavailable to provide a normal home for the child for a period of years during which the other parent is incarcerated, the juvenile court should consider whether another person is willing to be the child's permanent guardian and if the grounds for a permanent guardianship exist, including that a guardianship would be in the child's best interests. See § 8-871(A). If so, the court should additionally consider whether the incarcerated parent could contribute to rather than detract from the stable, family environment provided by the permanent guardian during incarceration. In making these decisions, the court should consider the non-exclusive *Michael J.* factors. We modify the fifth factor by adding that the court should consider the availability of a permanent guardian to provide a normal home life if another parent is unavailable. See *Michael J.*, 196 Ariz. at 251–52 ¶ 29, 995 P.2d at 687–88. Considering our definition of "normal home," we disapprove the different definition put forth in *JS-5609*.³

³ In *Jessie D.*, this Court cited *JS-5609*'s definition of "normal home" in describing the length-of-sentence factor. See *Jessie D.*, 251 Ariz. at 579 ¶ 9, 495 P.3d at 919. But what constitutes a "normal home" was not at issue in *Jessie D.*, and the definition did not affect our analysis. To the contrary, and arguably forecasting our decision here, we

concluded that the juvenile court there misapplied the second *Michael J.* factor—whether the parental relationship could be continued and nurtured during incarceration—by finding that an incarcerated father "was unable to interact with the children in more traditional settings (i.e., home, school, and recreational)." *Id.* at 581 ¶ 16, 495 P.3d at 921.

¶28 Turning to this case, we conclude that remand is necessary. The juvenile court applied the definition of "normal home" from *JS-5609* and grounded its ruling on Timothy's inability to be physically present in H.B.'s home. Thus, it did not consider whether a permanent guardianship could provide H.B. with a "normal home" while Timothy maintained his parental rights. Notably, in denying Timothy's motion to change physical custody of H.B. to her paternal aunt, who had previously facilitated visitation between father and daughter, the court acknowledged that H.B. "has a bond with her [p]aternal [a]unt," who is willing to serve as a legal permanent guardian; the aunt's home study "raised no concerns" and the aunt "can fundamentally meet all [H.B.'s] needs"; and a guardianship would "leave[] the door open for [Timothy] to demonstrate changed circumstances." On remand, the court should consider the permanent guardianship option when considering the *Michael J.* factors and any other relevant factors to determine whether H.B. would be deprived of a "normal home" for a period of years by Timothy's incarceration.

B.

¶29 The court of appeals, relying on *Kent K. v. Bobby M.*, 210 Ariz. 279, 286 ¶ 35, 110 P.3d 1013, 1020 (2005), concluded the juvenile court erred in conducting the best-interests inquiry by focusing "solely" on H.B.'s best interests after finding the length-of-sentence ground rather than "balanc[ing] the interests of *both* the child and the parent." *Timothy B.*, 250 Ariz. at 146 ¶ 21, 476 P.3d at 326. DCS argues the court of appeals

misinterpreted *Kent K.* and improperly subordinated H.B.'s interests to Timothy's interests by remanding to the juvenile court to conduct "a proper balancing of H.B.'s and Timothy's respective interests." *See id.* ¶ 22.*271 ¶30 In *Kent K.*, this Court recognized that once the juvenile court finds the parent unfit due to the existence of at least one ground listed in § 8-533(B), the parent's continuing interests in the care and custody of the child become less important than the child's best interests. *See Kent K.*, 210 Ariz. at 286 ¶ 35, 110 P.3d at 1020. Consequently, at this stage, "the court must balance this diluted parental interest against the independent and often adverse interests of the child in a safe and stable home life." *Id.*; *see also Demetrius L. v. Joshlynn F.*, 239 Ariz. 1, 4 ¶ 15, 365 P.3d 353, 356 (2016). The dispute here focuses on what is required in "balancing" these interests.

¶31 The "balancing" performed by the juvenile court during the best-interests inquiry does not pit the parent's interests against the child's best interests to determine which predominate; at this stage, it is a given that the child's best interests predominate. *See Kent K.*, 210 Ariz. at 286 ¶ 35, 110 P.3d at 1020. As this Court has stated several times, the juvenile court's primary concern in the best-interests inquiry is the "child's interest in stability and security." *Alma S.*, 245 Ariz. at 150 ¶ 12, 425 P.3d at 1093 (quoting *Demetrius L.*, 239 Ariz. at 4 ¶ 15, 365 P.3d at 356); *see Kent K.*, 210 Ariz. at 287 ¶ 37, 110 P.3d at 1021; *see also Kent K.*, 210 Ariz. at 286 ¶ 35, 110 P.3d at 1020 ("In a best interests inquiry, however, we can presume that the interests of the parent and child diverge because the court has already found the existence of one of the statutory grounds for termination by clear and convincing evidence."). In deciding what is best for the child, "balancing" requires examining the totality of the circumstances existing at the time of termination, including the parent's interest in maintaining a positive parent-child relationship and the parent's efforts and

to do so. See *Alma S.*, 245 Ariz. at 150–51 ¶ 13, 425 P.3d at 1093–94. Thus, "courts should consider a parent's rehabilitation efforts as part of the best-interests analysis." See *id.* at 151 ¶ 15, 425 P.3d at 1094. For example, here, in examining the totality of the circumstances, the juvenile court should consider Timothy's past and ongoing efforts to parent H.B. from prison and the impact of those efforts on H.B.'s interests in a safe and stable home life in deciding whether H.B.'s best interests are served by termination or maintenance of the parent-child relationship. See *id.* at 150–51 ¶ 13, 425 P.3d at 1093–94; see also *Dominique M. v. Dep't of Child Safety*, 240 Ariz. 96, 98–99 ¶ 12, 376 P.3d 699, 701–02 (App. 2016) (noting that bonding between a child and biological parent is a factor but not dispositive in a best-interests analysis).

¶32 To the extent the court of appeals' opinion suggests that a court must give equal weight to a parent's interest in the custody and care of a child and the child's interests in security and stability and then balance those interests in making the best-interests determination, we disagree. The juvenile court must not "subordinate the interests of the child to those of the parent once a determination of unfitness has been made." *Alma S.*, 245 Ariz. at 151 ¶ 15, 425 P.3d at 1094. The parent's exercise of parental rights must be viewed through a lens focused on the child's best interests.

¶33 The juvenile court here focused "solely" on H.B.'s best interests as distinct from Timothy's interests in making the best-interests determination. It is not clear from the ruling whether the court considered Timothy's efforts to parent H.B. from prison and the strength of the bond between Timothy and H.B. in determining whether termination would serve H.B.'s best interests. We need not decide whether error occurred. If on remand the court finds the existence of the length-of-sentence ground for termination and conducts a best-interests analysis,

it should consider Timothy's past and ongoing efforts to parent H.B. from prison and their impact on H.B.'s interest in a safe and stable home life.

¶34 Finally, we recognize that conducting the best-interests inquiry after finding the length-of-sentence ground for termination may be repetitive. Here, when the court considers the availability of a permanent guardianship in deciding whether Timothy's imprisonment will deprive H.B. of a normal home for a period of years, it may consider as a relevant factor under the guardianship statute whether termination of Timothy's parental 272 rights would be in H.B.'s best interests. See § 8-871(A)(4). Nevertheless, even if the court concludes that a permanent guardianship is not appropriate and finds the existence of the length-of-sentence ground for termination, it must conduct a renewed best-interests inquiry in making the termination decision. See § 8-533(B).

CONCLUSION

¶35 We reverse the juvenile court's judgment and remand for a new determination considering this opinion. We vacate the court of appeals' opinion.

BOLICK, J., concurring in the result:

¶36 I enthusiastically join the result here. Along with the recent decision in *Jessie D. v. Department of Child Safety*, 251 Ariz. 574, 495 P.3d 914 (2021), the Court has taken significant steps to reconcile our jurisprudence with the fundamental rights of parents under the United States Constitution and Arizona law. However, I write separately because the framework within which we decide these cases still falls significantly short of constitutional requirements.

¶37 It is uncontestable, as the Court acknowledges, *supra* ¶ 24, that parents have a fundamental right to the control and upbringing of their children. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). Ordinarily, when the government seeks to divest a

fundamental right, it must demonstrate a compelling purpose and that its means of accomplishing that purpose are narrowly tailored. *See, e.g., Gratz v. Bollinger*, 539 U.S. 244, 270, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003).

¶38 Even more specifically, Arizona law recognizes that "[t]he liberty of parents to direct the upbringing ... of their children is a fundamental right." A.R.S. § 1-601(A). The government "shall not infringe on these rights without demonstrating that the compelling governmental interest as applied to the child involved is of the highest order, is narrowly tailored and is not otherwise served by a less restrictive means." § 1-601(B).

¶39 In this case, the father, Timothy B., gravely jeopardized his rights to and relationship with his daughter by committing very serious crimes. Indeed, A.R.S. § 8-533(B)(4) provides as a basis for termination of parental rights that "the child will be deprived of a normal home for a period of years."

¶40 In *Jessie D.*, we recognized how difficult it is for a person sentenced to incarceration for a period of years to maintain a parental relationship and that the state must take steps to facilitate it. 251 Ariz. at 581 ¶ 17, 495 P.3d at 921. In this case, Timothy's determination, combined with the efforts of both prison officials and his daughter H.B.'s caretakers, has culminated in a deep, loving relationship between father and daughter. Indeed, Timothy testified that prison officials enlisted him to provide classes to other inmates hoping to nurture a parental relationship with their children. Although H.B. clearly desires to maintain her relationship with her dad, DCS determined that permanently terminating that relationship in favor of adoption was in her best interests.

¶41 The opinion today takes two important steps to achieve a just result in this case. First, consistent with statutory intent, it construes "normal home" in § 8-533(B)(4) to encompass a stable home in which the parent does not have an

ongoing physical presence. *Supra* ¶¶ 24–27. To hold otherwise, as the Court recognized in a similar context in *Jessie D.*, "implies that incarcerated parents could never adequately maintain a parent-child relationship with their young children." 251 Ariz. at 581 ¶ 17, 495 P.3d at 921.

¶42 Second, the Court requires the trial court to consider whether a permanent guardianship is possible here as an alternative to termination. A guardianship appointment would protect Timothy's rights, preserve the father-daughter relationship, and achieve the stable home environment that DCS seeks. As such, it is a classic example of a "less restrictive means" that Arizona law commands us to consider. § 1-601(B).

¶43 However, the overall framework the Court applies continues to diverge from constitutional requirements. As the Court observes, *273 in termination cases, it applies a "two-step inquiry." *Supra* ¶ 13. First, it requires proof by clear and convincing evidence that one of the statutory grounds for termination exists under § 8-533(B). *Id.* Second, it requires evidence under the less-demanding preponderance of the evidence standard that the termination is in the child's best interests. *Id.*

¶44 In *Alma S. v. Department of Child Safety*, 245 Ariz. 146, 150 ¶ 10, 425 P.3d 1089, 1093 (2018), the Court held that most grounds for termination in § 8-533(B) —including the length of sentence ground at issue here—are "proxies for parental unfitness." Hence, each operates as essentially an irrebuttable presumption, such that proof of the statutory ground satisfies the government's burden to terminate the parent's fundamental right.

¶45 In *Santosky*, the Supreme Court observed that this first stage of termination proceedings "entails a judicial determination that the parents are unfit to raise their own children." 455 U.S. at 760, 102 S.Ct. 1388. At that stage, "the State cannot presume that a child and his parents are

" *Id.* Such factors as the intensity of the state's efforts to preserve the family, the perseverance of the family relationship, and the parent's rehabilitation efforts should be considered in this first stage of the proceedings, with its higher burden on the state to prove unfitness by clear and convincing evidence. *Id.* at 769–70, 102 S.Ct. 1388. Indeed, this Court recognized in *Jessie D.* that "requiring DCS to provide reunification services to an incarcerated parent ... is a constitutional requirement under *Santosky* ." 251 Ariz. at 582 ¶ 21, 495 P.3d at 922 ; accord *Mary Ellen C. v. Ariz. Dep't of Econ. Sec.* , 193 Ariz. 185, 191 ¶ 28, 971 P.2d 1046, 1052 (App. 1999).

¶46 In *Jessie D.* , the Court stated that the length of sentence inquiry under § 8-533(B)(4) is "individualized and fact specific." 251 Ariz. at 579 ¶ 9, 495 P.3d at 919. But as the Court applies it here, that individualized determination owes not to constitutional requirements, but to the statute's lack of clarity with respect to the undefined term, "normal home." *Supra* ¶ 26 (noting that the legislature could have, but did not, simply "provide[] as a ground for termination that the parent is imprisoned for a period of years").

¶47 Per *Santosky* , all evidence pertaining to the parent's rights, including rehabilitation and efforts to preserve the family, should be considered in the first phase of the parental termination proceedings, where the state bears the greater burden of proof. In many cases, the parent will not contest termination, or the evidence of unfitness will be overwhelming. See *Santosky* , 455 U.S. at 762, 769–70, 102 S.Ct. 1388. But in other cases, like this one, the issue will be greatly contested. I am satisfied that, after *Jessie D.* and this case, a careful, individualized determination will be made in the length of sentence context that takes into account the parent's fundamental rights.

¶48 However, that confidence is undermined by the Court's assertion that "the parent's interest in maintaining a positive parent-child relationship and the parent's efforts and ability to do so" should be considered in the second stage of the termination proceeding, the child's best interests analysis. *Supra* ¶ 31. Similarly, the Court held in *Alma S.* that "courts should consider a parent's rehabilitation efforts as part of the best-interests analysis." 245 Ariz. at 151 ¶ 15, 425 P.3d at 1094. Those holdings are exactly what *Santosky* expressly rejected, given that in the best interests stage of proceedings the interests of the parent and child are presumed to diverge, the focus is therefore properly on the child's interests, and the inquiry is subject to the preponderance of evidence standard that *Santosky* repudiated in the context of determining the parent's rights. 455 U.S. at 758–70, 102 S.Ct. 1388. The parent's interests should be considered in the unfitness stage, where "the child and his parents share a vital interest in preventing erroneous termination of their natural relationship," *id.* at 760, 102 S.Ct. 1388, a mutual interest that is especially manifest

274 here.⁴ *274 ¶49 This year marks *Santosky* 's fortieth anniversary. Regretfully, that is the latest definitive word from the Supreme Court on the substantive and procedural due process principles that apply to "forced dissolution" of parental rights and "the irretrievable destruction" of family relationships. *Id.* at 753, 102 S.Ct. 1388. Notwithstanding the work that remains in bringing our jurisprudence, statutes, rules, and agency practices into harmony with the Fourteenth Amendment, I applaud my colleagues for a decision that recognizes the precious rights and interests at stake.

⁴ I have set forth my concerns in this regard in greater detail in *Alma S.* , 245 Ariz. at 152–56 ¶¶ 24–39, 425 P.3d at 1095–96 (Bolick, J., concurring in the result).

**Shawanee
v.
Arizona Dept of
Economic Security,
(No. 1 CA–JV 13–0186, 2014)**



Shawanee S. v. Ariz. Dep't of Econ. Sec.

319 P.3d 236 (Ariz. Ct. App. 2014) · 234 Ariz. 174 · 681 Ariz. Adv. Rep. 16
Decided Feb 25, 2014

No. 1 CA-JV 13-0186.

2014-02-25

SHAWANEE S., Appellant v. ARIZONA
DEPARTMENT OF ECONOMIC SECURITY,
E.J., J.J., L.S., K.S., Appellees.

Law Office of Denise L. Carroll by Denise Lynn
Carroll, Scottsdale, Counsel for Appellant.
Arizona Attorney General's Office by Laura J.
Huff, Tucson, Counsel for Appellees.

BROWN

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Law Office of Denise L. Carroll by Denise Lynn
Carroll, Scottsdale, Counsel for Appellant.
Arizona Attorney General's Office by Laura J.
Huff, Tucson, Counsel for Appellees.

**Judge MICHAEL J. BROWN delivered the
Opinion of the Court, in which Presiding Judge
ANDREW W. GOULD and Judge SAMUEL A.
THUMMA joined.**

OPINION

BROWN, Judge.

¶ 1 Shawanee S. (“Mother”) appeals the juvenile court's order terminating her parental rights to her four young daughters (“the children”). She argues the court erred in finding that (1) the Arizona Department of Economic Security (“ADES”) made diligent efforts to provide her with appropriate reunification services, and (2) termination is in the best interests of the children.

Because Mother failed to raise any objection in the juvenile court to the adequacy of the services ADES provided, we conclude she waived the right to challenge the court's finding on appeal. As to the court's best interests determination, we find no error and therefore affirm.

BACKGROUND

¶ 2 In November 2011, Child Protective Services (“CPS”) received a referral alleging that one of Mother's children, age six, was “exhibiting significant sexual acting out” with other children. The referral also alleged that the child was hoarding food and displaying various behavioral issues. CPS's efforts to contact Mother through
238 phone calls and letters*238 to the homeless shelter where she resided were unsuccessful.

¶ 3 In January 2012, CPS was notified that Mother used a knife to cut her boyfriend's arm during an altercation that occurred in the presence of the children. Mother was arrested and the children were immediately taken into CPS custody. The children had numerous medical concerns, which, depending on the child, included ringworm, rashes, malnourishment, staph infection, boils, an ear infection, and severe diaper rash. One of the children disclosed that she had been sexually abused by the brother of Mother's previous boyfriend.

¶ 4 ADES filed a petition alleging the children were dependent as to Mother, based on neglect due to domestic violence and failing to provide the children with the basic necessities of life. Mother denied the allegations but submitted the matter to

the juvenile court, which found the children to be dependent. The court approved a case plan of family reunification and a concurrent case plan of severance and adoption, and also approved and ordered the “services as agreed upon by the parties.” Consistent with this ruling, ADES offered Mother a psychological evaluation and consultation, individual counseling, parent aide services (including parenting education and supervised visitation), and transportation.

¶ 5 In December 2012, the children's guardian ad litem moved to terminate Mother's parental rights, alleging Mother substantially neglected or willfully refused to remedy the circumstances that caused the children to remain in a court-ordered out-of-home placement for nine months or longer pursuant to Arizona Revised Statutes (“A.R.S.”) section 8–533(B)(8)(a). In April 2013, ADES joined in the motion for termination.

¶ 6 The juvenile court held a two-day contested severance hearing in June 2013. Mother acknowledged that she cut her boyfriend with a knife and engaged in other incidents of domestic violence. She admitted she did not contact the police after learning one of her daughters had been sexually abused. Mother also admitted she had recently lived in the same household with the alleged abuser for several months to avoid becoming homeless. Mother testified she completed more than forty hours of individual counseling, but acknowledged she did not complete parent aide services and refused substance abuse treatment even though it was recommended as a result of the psychological evaluation. Mother also acknowledged that at one point she refused to participate in further visits because the children were acting out.

¶ 7 CPS caseworker Chrystal Thomson testified that Mother's participation in services was limited. Mother substantially participated in individual therapy, but missed numerous visits with the children, stating she was “tired” and “had a lot going on.” Mother also missed visits for more than

a month because the children had behaved poorly during prior visits. Although Mother was initially permitted to have in-home visits with the children, that visitation ceased because Mother was teaching the children “erotic” dancing during visits and frequently had a boyfriend present. As a result, all subsequent visits were held at a visitation center. Ultimately, Mother was removed from the parent aide program because she did not maintain contact for more than thirty days and she repeatedly failed to attend scheduled meetings to discuss the children's therapy and treatment.

¶ 8 Following the presentation of evidence and closing arguments, the juvenile court granted the motion for termination, finding that Mother “substantially neglected, and at times, willfully refused to remedy the circumstances that caused each of these children to be in their out-of-home placement.” The court also made detailed findings regarding the reunification services provided by ADES, and Mother's compliance (or lack thereof) with the services offered, concluding that ADES “has made more than diligent efforts to provide appropriate reunification services.” The court also found that termination of Mother's parental rights would be in the children's best interests. The court later confirmed its findings in a signed order and Mother timely appealed.

DISCUSSION

¶ 9 To terminate parental rights, the juvenile court must find by clear and convincing²³⁹ evidence the existence of at least one of the statutory grounds for termination enumerated in [A.R.S. § 8–533\(B\)](#) and must find by a preponderance of the evidence that termination would serve the child's best interests. Ariz. R.P. Juv. Ct. 66(C); *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 249, ¶ 12, 995 P.2d 682, 685 (2000). As applicable here, ADES was required to prove by clear and convincing evidence that (1) the children had been in an out-of-home placement for at least nine months under a court order; (2) the parent had “substantially neglected or willfully refused to

remedy the circumstances causing the out-of-home placement;” and (3) ADES had “made a diligent effort to provide appropriate reunification services.” A.R.S. § 8-533(B)(8)(a).

A. Waiver

¶ 10 Mother challenges the court's finding that ADES had made a diligent effort to provide appropriate reunification services, claiming she was not given the time and services necessary to enable her to reunify with the children. Specifically, she asserts that ADES should have provided her with a second psychological evaluation to assess her progress and determine whether additional services were necessary. Because Mother failed to raise any objection in the juvenile court regarding the adequacy of services provided to her, as a threshold issue, we consider whether she waived that argument on appeal. *See Kimu P. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 39, 44 n. 3, 178 P.3d 511, 516 n. 3 (App.2008) (noting that parent waives an argument by failing to raise it in the juvenile court); *Christy C. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 445, 452, ¶ 21, 153 P.3d 1074, 1081 (App.2007) (concluding that parent waived claim that juvenile court failed to make statutorily required findings by failing to object in the juvenile court); *see also Trantor v. Fredrikson*, 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994) (“[A]bsent extraordinary circumstances, errors not raised in the trial court cannot be raised on appeal” because “a trial court and opposing counsel should be afforded the opportunity to correct any asserted defects[.]”).

¶ 11 There is no Arizona case law resolving this precise issue. In *Christina G. v. Arizona Department of Economic Security*, we noted that a parent may waive the right to challenge on appeal the adequacy of ADES's reunification efforts by failing to raise the issue in the juvenile court proceedings. 227 Ariz. 231, 235 n. 8, ¶ 15, 256 P.3d 628, 632 n. 8 (App.2011). We explained that the mother in that case had not “requested additional services or raised an objection to the

manner in which court-ordered services were being provided, despite multiple opportunities to do so at various stages of the proceedings.” *Id.* We also noted that the mother had failed to object to the juvenile court's explicit findings “that ADES was making reasonable efforts” in providing reunification services. *Id.* We declined to affirm the case based on waiver, however, because ADES did not raise it as an argument on appeal. *Id.* Here, ADES does assert that Mother waived her challenge to the juvenile court's diligent effort finding.

¶ 12 Generally, when a child is removed from the home, ADES is presumptively obligated to make reasonable efforts to “provide services to the child and the child's parent.” *See* A.R.S. § 8-846(A) (requiring the juvenile court to “order the department to make reasonable efforts to provide services to the child and the child's parent,” unless the court finds by clear and convincing evidence that an A.R.S. § 8-846(B) exception applies). When a dependency case plan includes family reunification, ADES is obligated to provide services reasonably geared toward family reunification. *See* Ariz. R.P. Juv. Ct. 56(E)(1) (requiring juvenile court, at disposition after a dependency finding, to “determine the appropriate case plan and ... [e]nter orders concerning appropriate services required to achieve the case plan”). Furthermore, when ADES seeks severance based on length of time in care, ADES must prove that it “has made a diligent effort to provide appropriate reunification services.” A.R.S. § 8-533(B)(8); *see also Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, 192, ¶¶ 32-34, 971 P.2d 1046, 1053 (App.1999) (finding constitutional right to reunification services when ADES sought termination of parental rights based on mental illness). In this case, there is no question that

240 ADES *240 was obligated to make diligent efforts to provide appropriate reunification services to Mother.

¶ 13 ADES's obligation, however, does not free a parent from the need to raise a timely objection if the parent believes services are inadequate. A parent must raise such a challenge in the juvenile court and may do so in one of many ways. At a pre-hearing conference (the first dependency proceeding with all parties present), the participants are to discuss and seek resolution on various issues, including “the provision of services to the child and family.” Ariz. R.P. Juv. Ct. 49(A), (D). At a preliminary protective hearing (often the first court hearing in a dependency), the juvenile court “shall ... [d]etermine whether a proposed case plan for services has been submitted and is appropriate” and “shall enter appropriate orders as to ... the provision of services to the child and family.” Ariz. R.P. Juv. Ct. 50(A), (B)(8), (C)(4). At a disposition hearing following a dependency finding, the juvenile court “shall determine the appropriate case plan and shall ... [e]nter orders concerning appropriate services required to achieve the case plan.” Ariz. R.P. Juv. Ct. 56(E) (1). A parent has a right to be present, to be represented by counsel and to be heard regarding services at each of these proceedings. *See* Ariz. R.P. Juv. Ct. 49(B) (listing participants at pre-hearing conference); Ariz. R.P. Juv. Ct. 50(B)(2) (appointment of counsel).

¶ 14 After services have been identified by the participants and ordered by the juvenile court, a parent dissatisfied with the services actually being provided can raise the issue with the juvenile court in a variety of ways. At periodic review hearings, as well as the permanency planning hearing, a parent can object to the adequacy of services and “[a]t the conclusion of the hearing, the court shall ... [e]nter appropriate orders concerning ... services to be provided to the family.” Ariz. R.P. Juv. Ct. 58(F)(3). A parent may also object to the juvenile court's “reasonable efforts” finding, *see* A.R.S. § 8-846(A), or request an evidentiary hearing by motion to address the adequacy of services. *See* Ariz. R.P. Juv. Ct. 58(D) (noting, in the context of a review hearing, that “[a]ny party seeking an

evidentiary hearing on any issue shall file a motion requesting that the matter be set for a contested hearing”). And, at a termination hearing, a parent can dispute evidence that ADES claims shows a diligent effort to provide appropriate reunification services, including by testifying about the services actually provided. *See* A.R.S. § 8-533(B)(8).

¶ 15 In determining whether the grounds for termination have been satisfied, the juvenile court is in a much better position than this court to evaluate the effectiveness and impact of the services provided, as credibility determinations may be required to weigh the evidence presented. *See Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 282, ¶ 12, 53 P.3d 203, 207 (App.2002). The juvenile court's role in the dependency process is just as critical—the court ensures that all parties receive proper notice of court proceedings and are given meaningful opportunities for input and objection. The court is also tasked with reviewing ADES's case reports, which must include an update as to the services provided to the family. *See* Ariz. R.P. Juv. Ct. 58(C)(2) (requiring ADES to “provide a report to the court and the parties at least fifteen (15) days prior to” a review hearing addressing “[t]he services being provided to the child and family”). The court holds review hearings at least once every six months. A.R.S. § 8-847(A). In doing so, the court necessarily evaluates the reports and related information, the purpose of which is to give the court an opportunity to “review the progress of the parties in achieving the case plan goals and determine whether the child continues to be dependent.” Ariz. R.P. Juv. Ct. 58(A). The court is also authorized to consider “oral or written reports of the parties,” which may implicate credibility assessments, particularly when the participants disagree on what happened or what services were provided. Ariz. R.P. Juv. Ct. 58(E)(1).

¶ 16 This process demands that parents voice their concerns about services to the juvenile court in a timely manner. It serves no one to wait to bring

such concerns to light for the first time on appeal, when months have passed since the severance order was entered. Instead, a parent's failure to assert legitimate complaints in the juvenile court

241 *241 about the adequacy of services needlessly injects uncertainty and potential delay into the proceedings, when important rights and interests are at stake and timeliness is critical. Accordingly, we hold that when the juvenile court record reflects that ADES has been ordered to provide specific services in furtherance of the case plan, and the court finds that ADES has made reasonable efforts to provide such services (including a finding that ADES made a diligent effort to provide appropriate reunification services pursuant to [A.R.S. § 8-533\(B\)\(8\)](#)), a parent who does not object in the juvenile court is precluded from challenging that finding on appeal. *See State v. Georgeoff*, 163 Ariz. 434, 437, 788 P.2d 1185, 1188 (1990) (explaining that “[e]ven constitutional rights may, of course, be waived”); *In re Eddie O.*, 227 Ariz. 99, 103 n. 2, 253 P.3d 296, 300 n. 2 (App.2011) (explaining individuals may forfeit or waive some constitutional rights through their conduct).

¶ 17 Here, the juvenile court conducted six review hearings over the course of a year (April, June, October, and December 2012; and February and May 2013). Six progress reports submitted by CPS to the juvenile court described the services offered to Mother and her progress with such services. Each of the minute entries from the review hearings included the court's finding that ADES had made reasonable efforts to provide appropriate reunification services. The minute entries do not reflect any objections by Mother to the CPS progress reports or the court's findings, nor is there any indication in the record that Mother questioned the appropriateness of the services being provided to her in any way. Finally, at the termination hearing, Mother did not argue that ADES failed to make reasonable efforts to provide appropriate reunification services.

¶ 18 If Mother believed ADES was not making diligent efforts to provide appropriate reunification services at any point, it was incumbent on her to promptly bring those concerns to the attention of the juvenile court, thereby giving that court a reasonable opportunity to address the matter and ensure that ADES was in compliance with its obligation to provide appropriate reunification services as ordered by that court. If Mother had done so, the juvenile court could have addressed Mother's concerns and (1) made additional findings as to why ADES's efforts were sufficient or (2) directed ADES to make appropriate changes to its current offering of services. But in the absence of an objection challenging the type or manner of services, Mother has waived the right to argue for the first time on appeal that ADES failed to offer appropriate reunification services.

B. Best Interests

¶ 19 Mother also argues that the juvenile court erred by finding that termination of her parental rights was in the children's best interests. We disagree.

¶ 20 Termination of the parent-child relationship is in the child's best interest if the child will benefit from the termination or would be harmed if the relationship continued. *Bobby G. v. Ariz. Dep't of Econ. Sec.*, 219 Ariz. 506, 511, ¶ 15, 200 P.3d 1003, 1008 (App.2008). We review the evidence and draw all reasonable inferences in the light most favorable to upholding the juvenile court's factual findings, *Jesus M.*, 203 Ariz. at 282, ¶ 13, 53 P.3d at 207, and we will affirm unless the court abused its discretion by making clearly erroneous factual findings, *Audra T. v. Ariz. Dep't of Econ. Sec.*, 194 Ariz. 376, 377, ¶ 2, 982 P.2d 1290, 1291 (App.1998). Here, the juvenile court found that it would be detrimental to the children to remain with Mother in light of the trauma they had experienced under her care, and that the children would benefit from the permanency and stability that a safe, violence-free home could provide.

¶ 21 The record supports these findings. Case manager Thomson opined that termination is in the children's best interests based on Mother's lack of stability and her history of exposing the children to neglect and abuse. After visits with Mother, the children "regressed" and engaged in self-harm and other aggressive behaviors. Thomson testified that the three younger children are in adoptive placements that are meeting their physical, social, and emotional needs. Thomson

242 explained that because the *242 oldest child has unique needs, she is not in an adoptive placement but the present plan is to help her stabilize, which will then permit her to be placed in an adoptive home. Therefore, the juvenile court did not abuse its discretion in determining that termination of the parent-child relationship is in the children's best interests.

CONCLUSION

¶ 22 We affirm the juvenile court's order terminating Mother's parental rights.

Shila H. v Department of Child Safety, (239 Ariz 47)



Shella H. v. Dep't of Child Safety

239 Ariz. 47 (Ariz. Ct. App. 2016) · 366 P.3d 106
Decided Jan 12, 2016

No. 1 CA-JV 15-0140.

01-12-2016

SHELLA H., Appellant, v. DEPARTMENT OF CHILD SAFETY, J.G., G.H., A.H., A.H., I.H., Appellees.

Maricopa County Public Advocate, By David C. Lieb, Mesa, Counsel for Appellant. Arizona Attorney General's Office, By JoAnn Falgout, Phoenix, Counsel for Appellees.

JONES, Judge

106 *106

Maricopa County Public Advocate, By David C. Lieb, Mesa, Counsel for Appellant.*107 Arizona Attorney General's Office, By JoAnn Falgout, Phoenix, Counsel for Appellees.

Presiding Judge KENTON D. JONES delivered the opinion of the Court, in which Judge SAMUEL A. THUMMA and Judge PETER B. SWANN joined.

48 JONES, Judge:*48 ¶ 1 Shella H. (Mother) appeals the juvenile court's order adjudicating J.R.H., G.R.H., A.D.H.H., A.H., and I.H. (the Children) dependent. We hold the juvenile court must consider the circumstances as they exist at the time of the dependency adjudication hearing in determining whether a child is a dependent child. Because the record contains reasonable evidence to support the court's order finding the Children

were dependent as to Mother on the ground of domestic violence at the time of the dependency adjudication hearing, we affirm.

FACTS ¹ AND PROCEDURAL HISTORY

¹ "On review of an adjudication of dependency, we view the evidence in the light most favorable to sustaining the juvenile court's findings." *Willie G. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 231, 235, ¶ 21, 119 P.3d 1034 (App.2005).

¶ 2 In January 2015, Mother left the Children, ages eleven, ten, seven, two, and six months, unsupervised in a hotel room where they were living, while she was passed out in the bathroom after vomiting blood on the floor and sink. When the Children found Mother unresponsive, they contacted a maternal aunt who called emergency services. Mother was admitted to the hospital; subsequent testing revealed her blood alcohol concentration was 0.24. Because the Children were unattended and their father (Father) was incarcerated in California at the time,² the Department of Child Safety (DCS) assumed temporary custody of the Children and placed them in licensed foster homes.

² The Children were adjudicated dependent as to Father on February 12, 2015 on the grounds of neglect, mental health issues, domestic violence, and substance abuse. He did not challenge this determination and is not a party to this appeal.

¶ 3 Subsequent investigation revealed a significant history of domestic violence between Mother and Father. In fact, Father's recent incarceration resulted from an arrest in December 2014 after he choked Mother, punched her in the face four times, and "held her hostage" in the presence of the Children. When admitted at the hospital in January 2015, Mother reported she suffered several broken ribs from the altercation and moved to Arizona to "escape" the abusive relationship. On the same day the Children discovered their Mother unconscious in a pool of blood and vomit,³ Father pled guilty to five counts of child endangerment and was sentenced to probation for two years plus time served. Upon his release, Father immediately attempted to reestablish contact with Mother and the Children.

³ Mother initially testified her sister picked the Children up from school on this day, where they were later removed by DCS, suggesting the Children were never at the hotel with her. This statement is contrary to her later testimony that her children had not attended school since her now-sixth grader went to kindergarten.

¶ 4 Mother told a DCS caseworker that the "domestic violence relationship" with Father had lasted for fifteen years. As a result, both parents had been arrested and both had obtained orders of protection against the other. The three oldest children confirmed regular physical arguments between their parents which had sometimes resulted in physical injury to the Children as well. They also reported Father hit them with belts and other objects and slapped them across the face.

¶ 5 DCS was further concerned about the effect of the family's transient lifestyle on the Children. The parents reported moving every few days from hotels, the family vehicle, and "the woods." At the adjudication hearing, Mother was unable to provide a physical address for any prior

108 residence.⁴ Aside from *49 *108

⁴ Again, Mother testified inconsistently, first asserting she lived in Portland for the past eleven years, and then stating she moved to Arizona when her now seven-year-old son was born.

J.R.H. attending kindergarten for a short time, the Children had never attended school; neither had they received any regular medical care for at least the past six years. The two youngest children, along with a deceased son, were born in hotels. Additionally, Mother had a long history of alcohol abuse, and Father reported using marijuana on a regular basis.

¶ 6 DCS filed a petition alleging the Children were dependent as to Mother as a result of substance abuse, domestic violence, and neglect. At the dependency adjudication hearing held in March 2015, DCS called Mother as its first witness.

¶ 7 Mother testified the Children were removed while she was in the hospital because she was "sick" and throwing up blood but denied her ill health resulted from alcohol consumption. When questioned regarding the domestic violence with Father, Mother stated she "would agree that yes, there's been arguing," but it rose to the level of physical violence on only a single occasion, in December 2014.⁵ She also denied sustaining any injury or seeking medical treatment after the incident, maintaining Father "was not convicted of that," and his child endangerment convictions "w[ere] for yelling in front of them." Mother testified she did obtain an order of protection against Father, but only because she was advised by DCS to do so, and said she had no concern, at any time, for her safety or that of the Children. She further denied making any of the contrary comments that were reflected in reports from medical personnel and the DCS case manager.

⁵ This position is inconsistent with prior documented arrests and reports to child protective service agencies in other states,

as well as Mother's initial request that Father not participate in the team decision-making meeting.

¶ 8 On cross-examination, Mother's counsel focused her presentation upon evidence suggesting out-of-home care was no longer necessary. Mother provided significant evidence and testimony describing her compliance with random urinalysis testing demonstrating she was substance free and her participation in parent aide services, substance abuse treatment, Alcoholics Anonymous meetings, domestic violence counseling, couples counseling, parenting classes, and visitation. Her counsel argued DCS could, and should, continue to provide services while the Children remained in her care and implement a safety plan to address the domestic violence. Mother further argued DCS failed to present any evidence the Children were actually harmed by her religious-based objections to traditional schooling and medical care.

¶ 9 At the conclusion of DCS's presentation, Mother's counsel called the current DCS case manager to testify. Counsel for DCS questioned the relevance of testimony from an individual who did not receive the case until "well over a month after removal," and the juvenile court judge agreed, stating evidence regarding Mother's efforts to remedy "would come after a dependency finding." The judge allowed the testimony, but advised she would only give that evidence the weight she believed it deserved, explicitly noting her understanding that DCS's burden was "to prove the allegations as they existed at the time the dependency was filed ... not whether or not Mother has remedied those." The judge further advised she would not "expand this beyond a dependency adjudication" and cautioned she "may well sustain an objection to going beyond the scope of necessary evidence for the dependency adjudication."

¶ 10 The current DCS case manager confirmed DCS had requested Mother participate in urinalysis testing, substance abuse treatment, and

parent aide services, that these services were initiated quickly after the Children were removed, and Mother had not tested positive for any substances since the removal.

¶ 11 After taking the matter under advisement, the juvenile court issued a ruling finding DCS had proven by a preponderance of the evidence the Children were dependent as to Mother on all three grounds alleged. Mother timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 8-235(A),⁶ 12-120.21(A)(1),

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⁶ Absent material revisions from the relevant date, we cite a statute's current version.

and -2101(A)(1) and Arizona Rules of Procedure for the Juvenile Court 103(A). *See Yavapai Cnty. Juv. Action No. J-8545*, 140 Ariz. 10, 14, 680 P.2d 146 (1984) (holding "orders declaring children dependent ... are final orders subject to appeal by aggrieved parties").

DISCUSSION

¶ 12 Mother argues the juvenile court erred by focusing on whether the Children were dependent at the time they were removed, rather than whether the Children remained dependent at the time of the adjudication. DCS concedes on appeal that the court must determine whether a child is dependent based upon the circumstances existing at the time of the adjudication hearing. *See* A.R.S. § 8-201(14)(a)(i) (defining a dependent child in the present tense as one who "has no parent or guardian, or one who *has* no parent or guardian willing to exercise or capable of exercising such care and control") (emphasis added), (iii) (defining a dependent child in the present tense as one whose "home *is* unfit by reason of abuse, neglect, cruelty or depravity by a parent") (emphasis added); *see also* A.R.S. § 8-844(B) (requiring the court to consider present circumstances that would "eliminate the need for removal of the child"), (C) (1) (directing the court to determine "that the allegations contained in the petition *are* true")

(emphasis added). DCS argues, however, the court's order adjudicating the Children dependent is supported by reasonable evidence establishing Mother remained unable or unwilling to parent at the time of the adjudication hearing as a result of domestic violence, and therefore, we should affirm.⁷

⁷ DCS does not argue on appeal that the order adjudicating the Children dependent should be upheld on the grounds of substance abuse or neglect.

¶ 13 A finding of dependency requires proof by a preponderance of the evidence. [A.R.S. § 8-844\(C\) \(1\)](#). 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. *Louis C. v. Dep't of Child Safety*, [237 Ariz. 484, 488](#), ¶ 12, [353 P.3d 364](#) (App.2015). We will only disturb a dependency adjudication if no reasonable evidence supports it. *Id.* (citing *Willie G.*, [211 Ariz. at 235](#), ¶ 21, [119 P.3d 1034](#)).

¶ 14 A child may be dependent when the parent is unwilling or unable to protect the child from abuse. *See Pima Cnty. Juv. Action No. J-77188*, [139 Ariz. 389, 392, 678 P.2d 970](#) (App.1983) ("Effective parental care clearly implies prevention of sexual as well as other physical abuse."); *see also Pima Cnty. Juv. Dependency Action No. 96290*, [162 Ariz. 601, 605, 785 P.2d 121](#) (App.1990) ("A finding of dependency may be predicated on one parent's failure to prevent abuse by another parent.") (citing *Pima Cnty. Juv. Dependency Action No. 97247*, [158 Ariz. 55, 57, 760 P.2d 1104](#) (App.1988)). In adjudicating the Children dependent as to Mother on the ground of domestic violence, the juvenile court made the following findings:

- Mother admitted she and Father had been in a violent relationship for fifteen years and also identified two instances, one in 2012 and one in 2014, where either Mother or Father had been arrested for domestic violence.

- The Children witnessed Mother and Father engaging in violent altercations many times, which included watching Father choke Mother, and reported that Father is scary during these events.

- A.D.H.H. suffered a broken wrist on one occasion when he attempted to intervene on Mother's behalf during an altercation.

- Mother voluntarily released the order of protection she obtained against Father following the December 2014 altercation after only one day.

¶ 15 Importantly, the juvenile court made a specific finding that "during her own testimony, [M]other attempted to minimize the length, scope, and nature of domestic violence history between [M]other and [F]ather." We will not second-guess the court's assessment of Mother's credibility as a witness. *See Christina G. v. Ariz. Dep't of Econ. Sec.*, [227 Ariz. 231, 234](#), ¶ 13, [256 P.3d 628](#) (App.2011) ("The juvenile court is in the best position to weigh the evidence, observe *51 *110

the parties, judge the credibility of witnesses, and make appropriate findings.") (citing *Jesus M. v. Ariz. Dep't of Econ. Sec.*, [203 Ariz. 278, 280](#), ¶ 4, [53 P.3d 203](#) (App.2002)). Moreover, this finding contradicts Mother's contention that, had she been granted greater opportunity at the adjudication hearing to elicit information, she would have been able to demonstrate that the circumstances giving rise to the removal on the basis of domestic violence had been eliminated. Mother testified first, before any discussion regarding the applicable standard; she had an opportunity to discuss, at length, her sobriety, her housing

situation, and her participation in services including domestic violence counseling.⁸ YET, WHEN GIVEN THE opportunity to establish that the children would be safe in her care, she chose instead to test the court's tolerance with implausible testimony.

⁸ The court sustained only one of DCS's objections to the relevance of the testimony sought to be elicited by Mother's attorney, determining that whether DCS asked Mother to complete domestic violence counseling was not relevant to the dependency adjudication. Mother has not and cannot establish prejudice from preclusion of that information where she had already presented testimony and evidence that she had self-referred and was actively engaged in domestic violence counseling.

¶ 16 And, contrary to Mother's assertion, domestic violence need not be continuous or actively occurring at the time of the adjudication hearing to support a finding of dependency on these grounds; the substantiated and unresolved threat is sufficient. *See* 96290, 162 Ariz. at 604, 785 P.2d 121 (rejecting argument that juvenile court erred in adjudicating a child dependent when he was born after events giving rise to a finding of dependency for his older siblings, and noting instead that "[a]ssuming that the state can prove the conditions creating the dependency as to the older children, and that those conditions pose an imminent risk of harm to the newborn, the statute does not preclude the state from acting to protect the newborn until a specific injury has been inflicted upon him"). This is particularly true where, as here, the parent denies the alleged conduct. As we have previously held:

[This Court] will not hesitate to affirm a finding of dependency as to parents who presently deny that they are responsible for past abuse and neglect for the obvious reason that such denial of responsibility supports a finding that their children do not have parents presently willing to or capable of exercising proper and effective parental care and control. To hold otherwise would permit an abusive or neglectful parent to defeat an allegation of dependency by the mere passage of time.

Id.

¶ 17 Although the juvenile court articulated the wrong moment in time when the dependency must be found to have existed, in its discussions with counsel during the adjudication hearing it ultimately concluded "[M]other is unable to provide for her children due to domestic violence." (Emphasis added). Viewing the evidence in the light most favorable to upholding the court's ruling, we conclude substantial evidence exists to support a finding that domestic violence regularly occurred between Mother and Father, in the presence of the Children and sometimes causing serious physical injury to both Mother and the Children, and at the time of the hearing, Father had been released from jail to serve a term of probation and remained a present and viable threat to the well-being of the Children. Substantial evidence also supports a determination that Mother failed to even acknowledge, let alone address, these concerns through her denial of the issue. This assessment provides an additional basis to find she is presently unable or unwilling to parent and protect the Children. Thus, the court's specific findings are supported by the record and are objectively sufficient to show DCS proved, by a preponderance of the evidence, that the Children were dependent as to Mother on the ground of domestic violence at the time of the adjudication hearing.

CONCLUSION

¶ 18 The order of the juvenile court finding the Children dependent as to Mother is affirmed.



Let's check your knowledge!



<https://quizlet.com/1005155297/juvenile-case-law-flash-cards/?funnelUUID=c663ed83-0447-42eb-ac0a-17dff760e673>



Practice Exam



1. Your client's 6-year-old child was removed from their care because their then-partner was physically abusing the child. Your client has since left the relationship and obtained a restraining order against her ex-partner that prevents them from being near or contacting your client or their child. Your client wants to file a motion to return their child to their care. What do you advise your client?
 - a. Your client needs to wait for the Department of Child Safety to make a motion for their child's return.
 - b. As a parent, your client cannot make a motion for the return of their child to their care.
 - c. Because your client has left their child's abuser, the court will automatically return their child to their care.
 - d. Your client will need to provide the court with proof that the child's return will not pose a risk to their physical, mental, or emotional health or safety.

2. For children who were over 3 years old at the time of removal from their home, the permanency hearing must be held:
 - a. no later than 12 months after the child's removal from the home, unless otherwise permitted by law.
 - b. no later than 14 days after the child's removal from the home, unless otherwise permitted by law.
 - c. no later than 18 months after the child's removal from the home, unless otherwise permitted by law.
 - d. no later than 30 days after the child's removal from the home, unless otherwise permitted by law.

3. Any party requesting a continuance of the initial dependency hearing based on extraordinary circumstances must file a motion that specifies those circumstances no later than:
 - a. 5 days after discovering them.
 - b. 30 days after discovering them.
 - c. 60 days after discovering them.
 - d. 14 days after discovering them.

4. At the preliminary protective hearing, it must be determined that:
 - a. diligent efforts were made to prevent or eliminate the need for removal of a child from the child's home.
 - b. reasonable efforts were made to prevent or eliminate the need for removal of a child from the child's home.
 - c. some efforts were made to prevent or eliminate the need for removal of a child from the child's home.
 - d. every effort was made to prevent or eliminate the need for removal of a child from the child's home.

5. Before a parent-child relationship can be terminated due to their parental rights to another child being terminated for the same cause, the parent must also be currently:
 - a. unable to discharge parental responsibilities due to the same cause.
 - b. unwilling to discharge parental responsibilities due to the same cause.
 - c. unable or unwilling to discharge parental responsibilities due to any cause.
 - d. financially unable to care for the child.

Answer Key:

1. **D** - [A.R.S. Juv.Ct.Rules of Proc., Rule 342](#)
2. **A** - [A.R.S. Juv.Ct.Rules of Proc., Rule 343\(b\)\(3\)](#)
3. **A** - [A.R.S. Juv.Ct.Rules of Proc., Rule 334\(h\)\(2\)](#)
4. **B** - [DCS Program Policy Chapter 3, Section 3](#). In addition to, [ARS 8-825\(D\)](#),
[Rule 332\(c\)\(2\)\(f\)](#), and [341\(c\)\(3\)](#)
5. **A** - [ARS 8-533-B10](#)