

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

DAVID A.,
Appellant,

v.

ARIZONA DEPARTMENT OF ECONOMIC SECURITY AND K.A.,
Appellees.

No. 2 CA-JV 2013-0148
Filed June 12, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Civ. App. P. 28(c); Ariz. R. P. Juv. Ct. 103(G).

Appeal from the Superior Court in Pima County
No. JD203140
The Honorable Christopher P. Staring, Judge

AFFIRMED

COUNSEL

Sarah Michèle Martin
Counsel for Appellant

DAVID A. v. ARIZ. DEPT OF ECON. SEC.
Decision of the Court

Thomas C. Horne, Arizona Attorney General
By Laura J. Huff, Assistant Attorney General, Tucson
Counsel for Appellee Arizona Department of Economic Security

Pima County Office of Children's Counsel
By Sara E. Goldfarb, Tucson
Counsel for Appellee K.A.

MEMORANDUM DECISION

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

H O W A R D, Chief Judge:

¶1 Appellant David A. challenges the juvenile court's order of December 11, 2013, adjudicating his daughter, K.A., dependent after a contested dependency hearing. On appeal, David maintains insufficient evidence supports the adjudication. Finding no error, we affirm.

¶2 As defined in A.R.S. § 8-201(13)(a), a dependent child includes one adjudicated to be "[i]n need of proper and effective parental care and control and . . . who has no parent or guardian willing to exercise or capable of exercising such care and control" or whose "home is unfit by reason of abuse, neglect, cruelty or depravity by a parent." The burden of proof in a dependency action is a preponderance of the evidence. See A.R.S. § 8-844(C)(1). On appeal, we view the evidence in the light most favorable to sustaining the juvenile court's findings, *In re Maricopa Cnty. Juv. Action No. JD-5312*, 178 Ariz. 372, 376, 873 P.2d 710, 714 (App. 1994), and will not disturb a dependency adjudication unless no reasonable evidence supports it, *In re Maricopa Cnty. Juv. Action No. JD-500200*, 163 Ariz. 457, 461, 788 P.2d 1208, 1212 (App. 1989).

¶3 In November 2012, K.A.'s adult half-sister and her husband filed a private dependency action alleging K.A. was

DAVID A. v. ARIZ. DEPT OF ECON. SEC.
Decision of the Court

dependent as to her parents. In January 2013, K.A., her parents, and her sister agreed that the sister and her husband would be made K.A.'s Title 14 guardians until at least June 2013. But, in March 2013, David filed an emergency request to terminate the guardianship, and it was revoked.

¶4 K.A.'s sister and her husband filed another private dependency petition and the Arizona Department of Economic Security (ADES) moved to be substituted as the petitioner. ADES filed a substitute petition in May 2013, alleging K.A. had been living with her sister for over a year and did not want to return to her parents' care because she was fearful of her mother. Her mother had threatened to kill herself if K.A. did not return; had on one occasion when K.A. was approximately nine years old, locked K.A. out of the house, forcing her to spend the night in a doghouse; and had said to her, inter alia, "I hate you," "I wish you were never born," "die in hell," "you're a piece of s***," and "I never want to see you again." The petition noted that K.A. suffered from "depression, anxiety, and suicidal ideation regarding her relationship with her parents."¹

¶5 David contested the petition, and a dependency adjudication hearing was held. David contends that "[t]here was ample evidence presented at trial that [he] is both willing and capable of parenting his daughter" and thus K.A. was not dependent under § 8-201(13)(a)(i). In support of his position he cites his testimony at the dependency hearing that he was planning to divorce his wife, K.A.'s mother, because Child Protective Services (CPS), a division of ADES, had essentially demanded that as a condition of seeing K.A. He testified K.A. was "number one. She's priority number one."

¶6 But, this argument amounts to a request that this court reweigh the evidence presented at the hearing. In addition to David's testimony, the juvenile court heard testimony from the CPS

¹K.A.'s mother waived her right to a dependency trial and entered an admission to the amended petition.

DAVID A. v. ARIZ. DEPT OF ECON. SEC.
Decision of the Court

investigator who testified David did not appreciate the risk K.A.'s mother's behavior posed to her. She testified that although at the time the first dependency was filed David had said he was separating from K.A.'s mother to reunify with K.A., by the time of the second proceeding, he had not followed through and was then claiming that K.A.'s sister was "lying about everything." She further testified that after K.A.'s mother had threatened to kill herself if K.A. did not return home, David told K.A. she should not have taken her mother's statement literally and minimized it.

¶7 Further, K.A.'s psychologist, Dr. Michelle Ellis testified K.A. had reported feeling unsafe at home, in part because David did not intervene when her mother was screaming and cursing at her. And indeed, David testified that he did not feel he needed to protect K.A. from her mother. He also admitted that despite both his and K.A.'s mother's statements that the mother would be living in Oregon, she had returned to Arizona and was living with him. He continued to deny or minimize the risk K.A.'s mother posed to her.

¶8 David maintains, however, that a demand that he divorce K.A.'s mother violated his "fundamental rights under the United States Constitution," particularly in light of his testimony that he and K.A.'s mother intended to live apart until such time as reunification was "advocated or promoted therapeutically." In its ruling the juvenile court adopted the CPS investigator's conclusion that David could not "safely protect and parent" K.A. if he was living "together as a couple" with her mother. But, as the state points out, David did not raise this argument below. *Cf. Monica C. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 89, ¶¶ 22-23, 118 P.3d 37, 42 (App. 2005) (applying fundamental error doctrine to termination of parental rights); *but see Bradshaw v. State Farm Mut. Auto. Ins. Co.*, 157 Ariz. 411, 420, 758 P.2d 1313, 1322 (1988) (review for fundamental error "sparingly applied in civil cases and may be limited to situations . . . [that] deprive[] a party of a constitutional right"). Even if this issue were not waived by his failure to raise it below, however, it is without merit. Although the court adopted the conclusion that David could not currently parent K.A. while living with her mother, David testified at trial that his wife had determined that it was untrue that CPS had demanded that they divorce. And

DAVID A. v. ARIZ. DEP'T OF ECON. SEC.
Decision of the Court

nothing in the record before us or the court's ruling expressly demands that either.

¶9 David also maintains insufficient evidence established that K.A.'s home was "unfit by reason of abuse" and the juvenile court therefore erred in adjudicating her dependent on that basis. But because we conclude the court properly determined that K.A. was dependent based on the above ground, we need not address the other ground for dependency. *Cf. Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, ¶ 14, 83 P.3d 43, 49 (App. 2004) (when one ground for severance properly established, alternative grounds need not be addressed on appeal).

¶10 Therefore, we affirm the juvenile court's order adjudicating K.A. dependent as to David.