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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

SUZANNE S., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY and BRITTANY S., Appellees.	2 CA-JV 2006-0047 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 17457600

Honorable Paul E. Tang, Judge

VACATED AND REMANDED

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Attorneys for Appellee Arizona Department of Economic Security

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E C K E R S T R O M, Presiding Judge.

¶1 Suzanne S., the mother of Brittany S., born June 26, 1998, challenges the juvenile court's August 17, 2006 order adjudicating Brittany dependent.[1] Suzanne contends

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[1]The Arizona Department of Economic Security (ADES) alleged in its petition that Brittany was dependent as to both parents. On the second day of the dependency hearing,

the juvenile court erroneously based its ruling on whether there was sufficient evidence Brittany was dependent in May 2006, when the Arizona Department of Economic Security (ADES) filed its petition rather than whether Brittany was dependent at the time of the dependency hearing in August 2006. Suzanne contends that, in any event, the evidence was insufficient because it failed to establish Brittany was dependent, as defined by A.R.S. § 8-201(13)(a). Because we agree with Suzanne's first argument, we vacate the order adjudicating Brittany dependent.

¶2 In October 2004, the Pima County Superior Court appointed Elizabeth F., Brittany's maternal grandmother, as Brittany's guardian pursuant to Suzanne's consent. In April 2006, Elizabeth filed a private dependency petition seeking to continue the guardianship, apparently anticipating Suzanne would seek to revoke her consent to the guardianship, which Suzanne did in May. Elizabeth alleged Brittany was dependent because Suzanne had been homeless, had neglected the child, and had abused drugs. Also in May, ADES filed a dependency petition after the juvenile court substituted it as the petitioner in place of Elizabeth. As ADES alleged in its petition, Suzanne's other child, Casey L., born February 12, 2005, had already been adjudicated dependent. Suzanne had pled no contest to the allegations of an amended dependency petition filed in August 2005 as to Casey, and ADES incorporated those allegations in the petition it filed as to Brittany.

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the father admitted the allegation, and Brittany was adjudicated dependent as to him.

¶3 Evidence presented at the contested dependency hearing in August 2006 established that Suzanne had a history of methamphetamine use, homelessness, and unemployment. But Ilene Stern, program specialist and investigative caseworker for Child Protective Services (CPS), testified that at the time she was assigned to the case, around the time Elizabeth filed her petition in April, those allegations were "old" and had already been investigated by CPS because of Casey's dependency. Stern testified, *inter alia*, that Suzanne was no longer using illegal drugs by the time Stern had begun her investigation. And, she stated, because of conflicts between Elizabeth and Suzanne, Stern concluded CPS had to become involved "to assist with reunification services and to assist [Suzanne] in working towards having the child back in her home." Stern agreed that CPS's involvement in the case was more as a "referee" to "help [Elizabeth and Suzanne] resolve issues." Stern stated that Suzanne's problems, specifically, her previous periods of homelessness, illegal drug use, and unemployment, no longer existed at the time of the hearing, and she agreed they did not prevent Suzanne from "safely parenting a child today."

¶4 Chris Mautner, the case manager for both children, testified Suzanne was not using illegal drugs, but Brittany was dependent because a dependency existed as to Casey. He had been managing Casey's dependency since July 2005. Mautner stated that at the time of the hearing Suzanne was fully compliant with the case plan requirements and added, "[I]n the next week or so I plan to have Casey returned . . . permanently to her mother's home." Mautner added that Suzanne had been having unsupervised visits with Brittany, which Mautner characterized as "loving, appropriate, and safe." Mautner stated the case plan was

for reunifying Brittany with her mother, adding, "[T]here's only a few little things that need to be taken care of." He agreed that Brittany needed counseling before she could be returned to Suzanne's custody, an additional reason he regarded the child as still dependent. On cross-examination, Mautner testified he believed Suzanne could safely parent Brittany.

¶5 Suzanne's counsel asked Mautner the following: "The allegations that are in the petition include periods of homelessness and unemployment and instability. Do any of those issues prohibit my client from parenting her child Brittany today?" Mautner responded, "No." When recalled to testify the following day, Mautner testified that Brittany would not be exposed to neglect, cruelty, or depravity if returned to Suzanne, that he had no concerns about domestic violence that would prohibit Suzanne from safely parenting Brittany, and that Suzanne could safely parent and exercise proper parental care and control over Brittany at that time. He conceded that Brittany needed further counseling but saw no reason why Suzanne could not be trusted to take Brittany to the therapist and make sure the child obtained any other services she needed.

¶6 Suzanne admitted having had problems with illegal drug use, homelessness, instability, and unemployment. She conceded these problems had been harmful to Brittany but agreed she had made changes in her life and did not believe "[her] life-style today pose[d] any danger to" Brittany.

¶7 At the close of evidence after the two-day hearing, the juvenile court stated: "Let me ask this of everyone, as you move on through your respective comments. I take it from your questioning of Mr. Mautner that the dependency, in our view, is dated from . . .

the time of the filing of the petition as opposed to what we have today?" Counsel for ADES did not actually answer the court's question but responded, "I think, Your Honor, the dependency existed at that time and exists also today." Counsel for Brittany stated she "concurr[ed] as to the legal timing of the dependency. I agree with the statements by the State." She noted the progress Suzanne had made, intimating the problems alleged in the petition were in the past, but expressed concern that Suzanne was still "in the process of stabilizing herself."

¶8 The court then permitted Suzanne's attorney to comment. He argued there were inconsistencies between ADES's "getting ready to return Casey to her mother" and insisting Brittany was dependent. The court interjected, "How about the time of filing of the petition?" Counsel then addressed the evidence that related to the circumstances that existed at the time of the filing of the petition. After a brief recess, the court made extensive comments before finding Brittany dependent.

¶9 First, the court noted "the interplay between Casey's case" and Brittany's, stating it would consider the record in both. Then, the court said,

> Let me make some preliminary comments, first, . . . I think everyone is pretty much in agreement . . . . First of all, that the time by which the court is to consider with respect to whether or not Brittany was a dependent child comes from the date in which the maternal grandmother filed her petition. That's April 21st, 2006. Any dispute about that? It is what it is; right?

But Suzanne's counsel would not concede this, stating he had previously disputed this when he had argued that "there's no dependency then and there is none now."

¶10 The court responded,

> The time from the filing of the petition, by which I'm supposed to guide by in terms of when the dependency exists, took place April 21. I did not hear any response from you about whether or not you felt there was a petition different. [sic]. I'm not asking for argument again. I'm just stating that's pretty much what I'm taking from what everybody said.

Suzanne's counsel responded, "If I did say that, Judge, I want to correct myself. I don't know that's necessarily the case." The court made additional comments about Suzanne's admissions with respect to Casey and her progress since Casey had been adjudicated dependent, noting the evidence in this regard was essentially undisputed, as was the fact that Suzanne was in complete compliance with the case plan requirements as to Casey. Again, the court articulated what it viewed as the focus of its decision.

> The question . . . that's presented to the court is whether the mom's progress in her case plan, at least as it pertains to Casey's case, does that mean that Brittany ultimately was not a dependent child at the time of the filing of Brittany's petition. Or rephrasing, has the Department proven by a preponderance the allegations in its amended petition to show that Brittany was dependent given . . . the mom's progress on Casey's case plan.

¶11 Noting the intertwining nature of the proceedings involving the two children, the court explained that, if Brittany had not been the subject of a voluntary guardianship at the time Casey was found to be dependent, Brittany would also have been found to be dependent. The court added, presumably referring to the time the petition was filed by

ADES,[2] that "eight months later Casey wasn't ready to be returned to the mom, so as well Brittany wouldn't have been prepared to be returned. There was no doubt in the court's view that the allegations ha[d] been proven by a preponderance of the evidence." Commending Suzanne on her efforts and for "doing everything she can in terms of meeting with the Department's expectations for complying with each task," including completing substance abuse treatment, the court stated:

> I hope that the mom understands that I'm being asked to make a determination at the time of the filing of the petition and that's what this court's doing. That doesn't mean to me, necessarily, that the mom isn't going to get or secure the return of either of these children at all. It just means there's a little bit more work to be done.

¶12 Suzanne contends the juvenile court erred by determining Brittany was dependent as alleged in ADES's petition and at the time the petition was filed. Suzanne argues the court did not consider, as it was required to do, whether Brittany was dependent at the time of the dependency hearing. The court's above comments support Suzanne's contention. And, the court's factual findings strongly suggest the court did not believe the situation at the time of the hearing was at all the same as it had been when the petition was filed. Assuming this to be the case, we must determine whether this was a correct application of § 8-201(13).

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[2]The court clarified upon questioning by Suzanne's counsel that it was basing its findings on ADES's petition, which was filed in May 2006, not Elizabeth's, which was filed in April.

¶13 "When construing statutes our first duty is to ascertain and give effect to the legislature's intent. While seeking the intent of the legislature, we first look at the plain wording of the statute." *Linda V. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 76, ¶ 8, 117 P.3d 795, 797 (App. 2005) (citation omitted). If the statute's language is unambiguous, "'we apply it without using other means of statutory construction.'" *Id., quoting Aros v. Beneficial Ariz., Inc.*, 194 Ariz. 62, 66, 977 P.2d 784, 788 (1999). This court addresses questions regarding the interpretation of a statute *de novo*. *Mara M. v. Ariz. Dep't of Econ. Sec.*, 201 Ariz. 503, ¶ 15, 38 P.3d 41, 43 (App. 2002).

¶14 In relevant part, § 8-201(13)(a)(i) and (iii) provide that a dependent child is one adjudicated to be "[i]n need of proper and effective parental care and control and 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" or "[a] child whose home is unfit by reason of abuse, neglect, cruelty or depravity by a parent, a guardian or any other person having custody or care of the child." The statute is cast in the present tense, implicitly requiring that the status of dependency exist at the time of the dependency hearing. We do not think the statute is ambiguous.

¶15 We find Division One's decision in *In re Maricopa County Juvenile Action No. JS-8441*, 175 Ariz. 463, 857 P.2d 1317 (App. 1993), instructive on the issue before us. There, a father whose parental rights had been severed based on one-year and two-year, out-of-home placement pursuant to a court order under former A.R.S. § 8-533(B)(6)(a) and (b), since renumbered as (8)(a) and (b), 2002 Ariz. Sess. Laws, ch. 173, § 4, argued the juvenile

court had erred by considering the circumstances that existed at the time of the severance hearing. 175 Ariz. at 465-67, 857 P.2d at 1319-21. The child's condition since the filing of the dependency petition had changed, and different services were required than the services initially required. *Id*. at 467, 857 P.2d at 1321. The father argued the court could not consider this evidence in deciding whether he had remedied the circumstances that had caused the child to be placed out of the home pursuant to court order. *Id*. Rejecting that argument, the court first noted, as we have with respect to the dependency statute, that the severance statute is couched in terms of the present situation. *Id*. Specifically, the court pointed out that the statute "refers to circumstances that 'cause,' not 'caused,' the out-of-home placement." *Id*. Because the evidence established the father could not meet the child's special needs that existed at the time of the severance hearing, the court concluded, severance was warranted. *Id*. at 468, 857 P.2d at 1322.

¶16 The court explained that "even if the juvenile court had found that the father had succeeded in remedying the specific circumstances that existed at the time the dependency petition was filed, there was no evidence that the father was now capable of exercising effective parental care and control." *Id*. at 467, 857 P.2d at 1321. The court added, "Taking the father's argument to its logical extreme, [A]DES would need to file a new dependency petition every time the child's medical condition worsened, and begin the running of the two-year placement anew." *Id*. The court concluded this would be inconsistent with the legislature's intent to expedite the resolution of dependency cases.

¶17 A child's dependent status is necessarily fluid. Indeed, the very purpose of offering a parent services is to address the problems that cause a parent to be unable to parent the child so the family may be reunified. *See generally* Ariz. R. P. Juv. Ct. 47.1(A) and (B); 51(B) and (D); 55(C); 57, 17B A.R.S. Dependency review hearings are required to be held every six months "in order 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). It makes little sense to urge a parent to cooperate with ADES and avail himself or herself of the services provided but to find that the parent's efforts and progress after the petition was filed cannot be considered in determining whether the child is dependent.

¶18 Our dissenting colleague contends that we have based our holding on nothing more than a "few ambiguous remarks at the close of a lengthy hearing." But we may only resort to the court's words to divine the basis for its ruling—and we disagree that the remarks were either isolated or ambiguous. The court suggested no fewer than four times that it intended to assess Brittany's dependency as to Suzanne as of the time the petition was filed—rather than as of the time of the hearing. And, neither the content of those remarks, nor counsel's response to them, allows us to entertain the hypothesis, suggested by the dissent, that the court was merely seeking to clarify "which petition the dependency should date from." Notwithstanding the dissent's correct observation that the juvenile court had evidence from which it could have concluded that Brittany was dependent as to Suzanne at the time of the hearing, it also received evidence from which it could have drawn the

opposite conclusion. Because it is not our role to weigh evidence or determine issues of fact, *see In re Pima County Juvenile Action No. 93511*, 154 Ariz. 543, 546, 744 P.2d 455, 458 (App. 1987), we decline the dissent's implicit invitation to conclude the evidence established by a preponderance that Brittany was dependent at the time of the dependency hearing. Instead, we remand this matter to the juvenile court so it may reconsider the evidence in a manner consistent with this decision.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

E S P I N O S A, Judge, dissenting.

¶19 I respectfully disagree with the majority's conclusion because, just as in *Allen v. Chon-Lopez*, 497 Ariz. Adv. Rep. 27 (Feb. 8, 2007) (Espinosa, J., dissenting), there is ample evidence in the record supporting the juvenile court's ruling—evidence we would normally look to in upholding a discretionary finding of fact, as in this case. *See Leslie C. v. Maricopa County Juvenile Court*, 193 Ariz. 134, 135, 971 P.2d 181, 182 (App. 1997) (we will uphold juvenile court's decision if any evidence in record supports it). In my view, we are not required to abandon this principle merely because of a few ambiguous remarks at the close of a lengthy hearing.

¶20 The evidence of Brittany's dependency, *at the time of the hearing*, is abundant and includes the CPS caseworker's testimony that, *at that time*, Suzanne's housing was inadequate to have both children placed with her; that Brittany had been out of Suzanne's care since late 2004, more than eighteen months; and that Brittany required transitional counseling and other services, preferably beginning prior to her placement with Suzanne. Equally important, Brittany's counsel expressed concern that Suzanne was still "stabilizing herself" after significant periods of domestic violence and homelessness. Suzanne also had a substantial history of serious drug addiction.[3] The caseworker who had conducted CPS's initial investigation as to Brittany in late April testified that "at that point, it had taken quite a while for [Suzanne] to engage in services" and "she had just started . . . taking the case plan seriously."[4] Thus, as of the hearing date, Suzanne had only been performing well in the existing dependency proceeding for approximately four months.[5]

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[3]The CPS caseworker testified that Suzanne had admitted to a four- or five-year methamphetamine addiction, but was not abusing drugs at the time of the hearing. Suzanne testified she had often used methamphetamine on a daily basis and admitted her license to work as a licensed practical nurse had been suspended for five years over "a drug issue" related to "missing pills." Suzanne also testified she did not attend Narcotics Anonymous meetings, participate in aftercare or follow-up treatment, and had no plan to maintain her long-term sobriety.

[4]Suzanne testified she had not begun drug testing until January 2006. Because CPS considers a missed test a positive one, Suzanne may have been drug free for less than six months at the time of the hearing.

[5]The parties stipulated to the court's considering the record in Casey's dependency proceeding. Thus, Suzanne's entire parenting history, including her care of her other children not at issue, was before the court in this adjudication as to Brittany.

Significantly, the ongoing CPS caseworker reiterated three times that he believed Brittany was a dependent child "as of today" or "at this time" and also confirmed on the second day of the hearings that he believed "it would not be appropriate to have Brittany back in [Suzanne's] custody."

¶21 Suzanne's own testimony provided additional support for the juvenile court's determination that she was not yet ready for the burden of having both children returned to her sole care. She stated she had lost her job at 8:20 a.m. on the day of the hearing and had interviewed for and accepted another, lower-paying position the same day, though she had not yet started that job. She also testified she could not yet obtain an apartment in her own name and was still paying more than $3,500 she owed from two previous evictions.

¶22 The majority focuses on several of the juvenile court's comments referring to the time of the filing of the petition and concludes the court must have only considered whether Brittany was dependent at that time, months before, not at the time of the hearing. I agree with the majority's conclusion that such a procedure would be erroneous. But we are not required to draw that conclusion here. Indeed, it makes little sense to do so, given all the evidence of the intervening time that was presented at the hearing, which provides a reasonable basis to conclude that the juvenile court, with its knowledge of Suzanne's troubled history, the evidence that Suzanne had quite recently begun to make progress in the dependency as to Casey, and the testimony as to Brittany's status at the time of the hearing found Brittany dependent as of that day. After the close of the evidence, the Department and Brittany's counsel concurred, "The mother needs to show a continued

stability, which we believe she will, but today is not the day to return Brittany to her mother, Your Honor. So that being the case, we believe the dependency exists *as of this time*." (Emphasis added.) And, when the court asked about the relevant time period, counsel reiterated: "I think, Your Honor, the dependency existed at that time and exists also today."

¶23 Moreover, at least some of the juvenile court's comments may well have been addressing the issue of which petition the dependency should date from: the original, private petition or the court-ordered, amended petition.[6] Under A.R.S. § 8-862(A)(2), a permanency hearing must be held "within twelve months after the child is removed from the child's home." However, Brittany had never been removed from her mother because Suzanne had voluntarily placed Brittany with Suzanne's mother in late 2004. "Removal" or the event that began the twelve-month countdown to permanency was CPS's interference in the parent-child relationship or when Brittany became a ward of the court, and the juvenile court asked: "I take it from your questioning of [the caseworker] that the dependency, in your view, *is dated from the date* in which the time of the filing of the petition [sic] as opposed to what we have today?" (Emphasis added.)

¶24 It is the juvenile court's duty, not ours, to judge the evidence and credibility of the witnesses before it. *Leslie C.*, 193 Ariz. at 136, 971 P.2d at 183 ("The judge who

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[6]The juvenile court was cognizant that the original, private petition contained old allegations that were not incorporated into the Department's substituted petition and also that allegations Suzanne admitted when Casey was found dependent were by the hearing date nearly one year old. Because the court's ruling referred to specific allegation numbers as proven, it would be particularly important to define which petition and starting times to consider in determining if Brittany was dependent.

hears the evidence is in the best position to evaluate witnesses and weigh their credibility."). In addition, there is a presumption that the court knows the law and follows it. *Malone v. Superior Court*, 181 Ariz. 223, 225, 889 P.2d 16, 18 (App. 1994) (judges presumed to know and apply the law, and appellate court "therefore do[es] not presume that the juvenile court judge acted contrary to [it]"). Accordingly, I am reluctant to interfere with the juvenile court's judgment based on a few ambiguous comments, particularly given the lengthy history of this case, the related dependency of Casey, of which the court was well aware, and the serious issues the mother was grappling with, albeit by most accounts successfully. Contrary to the majority's characterization, I do not "implicit[ly] invit[e]" any reweighing of the evidence on appeal; rather, I expressly urge only that we apply established rules of appellate review when the record supports the lower court's determination.

¶25 In short, I see little reason to conclude the juvenile court misconstrued its responsibility to consider all of the evidence in the case, and I would defer to its assessment, grounded in the best interests of the child.

PHILIP G. ESPINOSA, Judge