

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.** See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

**FILED BY CLERK**  
**OCT 17 2008**  
COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

JONAS P.,	)	
	)	
	)	2 CA-JV 2008-0035
Appellant,	)	DEPARTMENT B
	)	
v.	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
KATHRYN R. and BRANDON R.,	)	Rule 28, Rules of Civil
	)	Appellate Procedure
Appellees.	)	
_____	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 16184800

Honorable Stephen M. Rubin, Judge Pro Tempore

AFFIRMED

Law Office of David J. Polan  
By David J. Polan

Tucson  
Attorney for Appellant

Jacqueline Rohr

Tucson  
Attorney for Appellee Kathryn R.

M. Valentine Schaffer

Tucson  
Attorney for Appellee Brandon R.

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

¶1 Appellant Jonas P. challenges the juvenile court's April 2008 order adjudicating his son Brandon, born February 13, 1999, dependent. Jonas asserts that there was insufficient evidence to support the order and it was based primarily upon the court's own opinions, rather than evidence. For the reasons stated below, we affirm.

¶2 To support an order adjudicating a child dependent, the evidence must establish by a preponderance that the child is dependent as defined in A.R.S. § 8-201(13). *See* A.R.S. § 8-844(C)(1); *see also In re Cochise County Juv. Action No. 5666-J*, 133 Ariz. 157, 159, 650 P.2d 459, 461 (1982). A dependent child includes one “[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 “[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.” § 8-201(13)(a)(i), (iii). In reviewing the juvenile court's order, we view the evidence in the light most favorable to sustaining the factual findings upon which the order is based. *Willie G. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 231, ¶ 21, 119 P.3d 1034, 1038 (App. 2005). As long as reasonable evidence supports the court's factual findings, we will not disturb them. *Id.*

¶3 Brandon and his twin sister Brianna were adjudicated dependent in an earlier proceeding, which was dismissed. But, in July 2007, the Arizona Department of Economic Security (ADES) filed a dependency petition alleging that Brianna, who had been living with Jonas, his wife Jessica, and Brandon, was a dependent child. ADES alleged Brianna was dependent as to her mother, appellee Kathryn R., whose history of substance abuse had

resulted in Brianna's dependency in September 2002 and the award of full legal and physical custody of Brianna to Jonas. The petition alleged Kathryn had abandoned Brianna by having failed to see her in seven months and had failed to protect Brianna from neglect and abuse by Jonas and his wife. Jonas admitted the following allegations set forth in an amended dependency petition: Brianna had been isolated from the rest of the family and kept in her room where meals were delivered to her, and she was only given one bottle of water each day; Brianna had been afraid to ask permission to leave the room and therefore urinated in the room; Brianna had been diagnosed with post-traumatic stress disorder, depression, and the effects of child abuse and neglect; Jonas had stopped her therapy because he believed Brianna was lying and not benefitting from treatment; and Jonas could not care for Brianna because of her mental health issues.

¶4 In September 2007, Kathryn filed a private dependency petition alleging Brandon was dependent as to Jonas, with whom Brandon was living; she and Jonas had joint legal custody of Brandon; and she was "a fit and proper person to care for the child." Kathryn requested that she be awarded physical custody. She further alleged Jonas "has admitted to a dependency on the minor's twin sister. Brandon has witnessed the abuse of his sister. The mother was unable to locate the minor child and has been unable to enforce visitation orders or to gain physical custody." She also alleged Brandon was "traumatized" by having observed the abuse of Brianna. At an initial dependency hearing on Kathryn's petition, ADES made clear it was not seeking to be substituted as the petitioner. The juvenile court consolidated the dependency proceedings of the siblings and gave ADES discretion to

allow Brandon to remain in the home with Jonas and Jessica, “with the appropriate, previously voluntary services in place.” Pursuant to the court’s order, ADES in October filed a substituted dependency petition as to Brandon, alleging he was dependent as to both parents. In December, Kathryn filed a petition for custody of the children.

¶5 In December 2007, on the first day of the scheduled dependency hearing, ADES moved to withdraw the substituted petition it had filed as to Brandon. The juvenile court directed ADES to file a written motion and continued the hearing. ADES subsequently filed a notice of voluntary dismissal, stating that it could not prove certain of the allegations of the petition and the remaining allegations did not support a finding of dependency. At the subsequent dependency hearing, after argument of counsel, the court permitted ADES to withdraw and granted Kathryn leave to proceed on her private petition. The dependency hearing as to both children continued on four separate days held over the next three months.

¶6 Following the hearing, the juvenile court adjudicated Brianna dependent as to Kathryn. With respect to Brandon, the court ruled as follows:

The minor child, Brandon R[.], is the twin brother of Brianna R[.] The father has admitted to a dependency as to Brianna.

The minor child Brandon witnessed the abuse and neglect of Brianna. Although some of the testimony indicates that Brandon appears to be doing fine, there is other testimony to show that is, in fact, not the case. The court believes that, although the father and the stepmother are willing to parent Brandon, they each possess serious parenting deficiencies that resulted in the abuse of Brianna and are presently unable to safely parent Brandon without serious therapeutic intervention by the State.

The court adjudicated Brandon dependent as to Jonas but continued Brandon's placement with his father and stepmother. This appeal followed.

¶7 Jonas contends Kathryn did not sustain her burden of establishing by a preponderance of the evidence the allegations in her dependency petition. He asserts the juvenile court "erred in finding Brandon dependent and abused [its] discretion in doing so." Although he concedes argument by counsel is not evidence, he notes that ADES withdrew its substituted petition and that its counsel stated she did not believe the evidence would support a finding of dependency. He also notes that Brandon's attorney stated "she could not advance a powerful legal reason for a dependency." Based on the testimony of the various experts, Jonas contends, there was insufficient evidence Brandon is dependent.

¶8 Jonas notes in particular the testimony of Sara Case, the Child Protective Services (CPS) investigative caseworker; Sara Moody, the ongoing CPS caseworker; and Dr. Lorraine Rollins, the psychologist who evaluated Brianna and Brandon. He asserts their testimony establishes Brandon has not been abused or neglected; Jonas and Jessica are caring for him appropriately; and Brandon is well-adjusted and unaffected by the abuse, neglect, and removal of Brianna. He also points to the testimony of Juliet Fortino, Brianna's therapist, noting "she had no information from any source that Brandon had in any way been affected by Brianna's removal from the home." And, Jonas contends, psychologist Robert Palazzolo, who provided in-home services for a six-month period, "testified that Brandon had no negative reaction to Brianna's removal" from the home, was not concerned about Brandon's being in the home with Jonas and Jessica, and did not believe Brandon required therapy.

Jonas asserts the court prejudged the case and based its ruling on its view of the circumstances rather than evidence.

¶9 The evidence established Brianna was removed from the home in July 2007, after Case investigated a report that she had been bruised by a spanking. After Case's in-home visit in May, Jessica had called Case and told her she could no longer "parent" Brianna. Brianna's pediatrician had reported to CPS that Brianna did not make eye contact, was more open with him when Jessica was not there, and had told him she was "getting spanked and hit on an almost daily basis." Case testified Brandon was "very happy" when Case visited the home in May and demonstrated no signs of abuse or neglect. She stated that, at that time, "[i]t was decided among the supervisors who had all of the information," not to file a temporary custody petition as to Brandon because he "was not in danger of being abused or neglected." Her only concern about Brandon was "he didn't have a really strong relationship with his sister, who's a twin, and, you know, usually twins are very bonded and close and he didn't have that with her but that wasn't, you know, an allegation of abuse or neglect." She agreed with Jonas's counsel "there was absolutely nothing there indicating that in the belief of the Department Brandon could be a dependent child."

¶10 When Case had first visited the family, eight-year-old Brianna was in her room; it was a Friday, and she had been there since Tuesday. Brianna was given her meals in the room because, according to Jessica and Jonas, she did not want to come out to eat. Although the door was not locked, Brianna had been required to stay in the room because she had lied to a doctor. Although Brianna had been receiving psychological services, the parents had

reportedly stopped those services because Brianna “had been lying and . . . it wasn’t being beneficial.” Case concluded Brianna was a “targeted child,” the one who was always “getting in trouble,” and Case was concerned Brianna was being abused. Kathryn’s counsel asked Case “what kind of impact” she thought this “would have on Brandon.” Case responded, “He saw it as she was getting in trouble. He—the emotional part of it he did not, he doesn’t quite grasp.” When counsel asked Case whether she had thought it would be beneficial to provide Brandon with services, Case responded that was the reason she had recommended in-home services, believing “it would be helpful for the whole family.”

¶11 CPS case aide JoAnn Watts testified she had supervised both Kathryn’s and Jonas’s visits with the children. She described the various visits, stating some had gone well while others had not gone so well. During one visit, she testified, Brandon told Kathryn that, although he was not punished with spankings like Brianna had been, Jonas and Jessica would force him to do “squats” for “about 10 minutes or so,” and, if he did not eat his food fast enough, they blended his food and made him drink it. Kathryn’s counsel then asked Watts whether she had developed any concerns about Brandon over the recent visits. She responded, “I feel that probably Brandon should be in a foster home, you know, that’s how I feel.” She related observations she had made that caused her to question Jessica and Jonas’s judgment in their parenting of Brandon. Brandon had appeared at one visit with jet black hair and explained Jessica had dyed it. And, Watts testified, Brandon had been listening to music that Kathryn believed was inappropriate for an eight-year-old boy. Although this testimony was admitted, the juvenile court subsequently sustained Jonas’s

objection to Watts's additional testimony that, in her opinion, Brandon should be in foster care.

¶12 Sara Moody, CPS Unit Supervisor and case manager for Brianna, had succeeded Case. Moody testified Jonas and Jessica were receiving services, including in-home parenting and family therapeutic services, designed to reunify Brianna with them. Because they could not care for Brianna, she had been placed in a therapeutic foster home. Moody had concerns about placing Brianna with either Kathryn or Jonas. But she did not see any basis for removing Brandon from the home; did not believe Brandon was a dependent child; and did not believe he was getting inappropriate care in the home or was in any physical, emotional, or educational danger. On cross-examination by Kathryn's counsel, however, Moody agreed that, based on Jonas's comments during his psychological evaluation, he appeared to be blaming Kathryn for all of the problems with Brianna. And Moody agreed this gave her "some concerns over what kind of stress Brandon was living under at the time Brianna was in the home." Moody agreed, too, that the evaluations of Brandon suggested he "needed . . . some therapeutic focus on the issue of . . . perceiving Brianna as the cause" and some of the information Jonas and Jessica shared with Brandon "[m]ay not have been" accurate. She also agreed that, since being placed in a therapeutic foster home, Brianna had gained twenty-two pounds and, although still slender, "looks good." She acknowledged Brianna had been treated as a scapegoat.

¶13 The juvenile court was not required to accept the expert testimony that Brandon was not a dependent child or at risk. Rather, as the trier of fact, the court had the discretion

to weigh the evidence and determine the credit, if any, to which the testimony was entitled. See *In re Gen. Adjud. of All Rights to Use Water in the Gila River Sys. and Source*, 198 Ariz. 330, ¶ 25, 9 P.3d 1069, 1079 (2000); see also *In re Coconino County Juv. Action No. J-10359*, 157 Ariz. 81, 89-90, 754 P.2d 1356, 1364-65 (App. 1987) (finding “[t]estimony that attempts to predict human behavior over a definite period of time” to be of “limited usefulness” and noting juvenile court “not bound by psychological recommendations” and “not required to accept expert testimony”). Whether Brandon was a dependent child as defined by § 8-201(13) was for the court to determine after it weighed the evidence. And it was entirely appropriate for the court to consider, as it clearly did, the evidence relating to Jonas’s parenting of Brianna.

¶14 The evidence of Jonas’s treatment of Brianna reflected generally on his judgment as a parent. That evidence included testimony and reports that he had stopped Brianna from receiving further psychological services because he believed she had been lying and was not benefitting from those services, that Brianna was punished by being isolated from the entire family, that Jonas and Jessica “targeted” Brianna, and that Brianna was punished for purportedly lying to a doctor. That this treatment related to Brianna and not to Brandon directly did not render it irrelevant to the issue of Brandon’s dependency. As the juvenile court stated, Jonas’s “actions toward Brianna and the way Brianna was parented or not parented are relevant toward the dependency regarding Brandon.” And, as the court correctly noted, based on the definition of a dependent child, it was permitted to consider “whether the home of the child is unfit by reason of abuse, neglect, cruelty or depravity by

a parent . . . under [§] 8-201(13)([a]) . . . (iii) . . . and I think that’s being alleged by the mother in her dependency petition, and that’s relevant.”

¶15 The juvenile court was well aware that Jonas and Jessica treated Brianna and Brandon differently. The court simply was not convinced Brandon had been unaffected by the treatment of his sister. The court did not find persuasive the testimony and arguments that whatever failings Jonas had as a parent were restricted to Brianna. Nor was the court required to accept Moody’s explanation for why Brianna was at risk in the home but other children were not. Instead, it was within the court’s discretion to find the treatment of Brianna—which included Jessica’s rejection of her because she was a girl, particularly after Jessica had her own baby; Jonas’s failure to protect Brianna from being treated like a family outcast; and his consistent refusal to believe her—demonstrated his poor judgment as a parent generally. Similarly, the court could reject Moody’s contention that Jonas would voluntarily obtain any psychological services Brandon needed without a dependency in place, particularly in light of the evidence that Jonas had discontinued such services to Brianna simply because he had believed she was lying and not benefitting from those services.

¶16 Jonas has placed emphasis on the testimony of Juliet Fortino, Brianna’s therapist. Jonas claims “she had no information from any source that Brandon had in any way been affected by Brianna’s removal from the home.” But, when her testimony is considered in context, Fortino was simply stating she was not the appropriate person to comment on Brandon’s needs. When asked whether she felt she had “enough information to really make any assumptions about this family’s situation,” she said she did not. But, in

answer to certain hypothetical questions posed to her, Fortino expressed concern for the potential emotional abuse to Brandon “that goes along with witnessing what happened to Brianna as well as messages that Brandon may receive from the parents [who] allegedly abused her.” Based on Fortino’s experience working with twins, she testified about the danger that, when one twin is targeted, the other could “become[] the abuser as well.”

¶17 Similarly, Dr. Rollins testified “Brandon . . . seem[ed] to identify Brianna as being the cause of her own problems . . . the reason she wasn’t in the home, that she was lying and she was engaging in bad behavior. So he certainly seemed to have a negative view of her.” She agreed it was possible for the twin who is not targeted to become an abuser. And, she identified that as “a concern” and recommended that it be addressed in a therapeutic intervention.

¶18 Finally, in denying Jonas’s motion for a mistrial made after Fortino testified, the juvenile court denied Jonas’s accusation that it had prejudged the case. The court stated, “I haven’t prejudged anything. I don’t have any information. I am concerned actually at a lack of information, and I’m just trying to get the information . . . .” The court added, “I believe from what I’ve heard so far that the potential effect on Brandon of witnessing the abuse in the home, if he did, is being overlooked. I believe that the potential effect of separating—long-term separation of the siblings is being overlooked.” The court stated further, “It doesn’t mean that I’ve decided the case. It means I believe that those issues are being overlooked. I, as the trier of fact, would like more information about that.” We have no basis for questioning and will not question the court’s sincerity.

¶19 The juvenile court’s extensive, thoughtful comments at the end of the hearing reflect that it carefully considered the evidence presented and recognized the conflicting nature of that evidence as well as the level of contentiousness between Kathryn and Jonas and Jessica. The court acknowledged the entire family’s need for continued services. Taking the matter under advisement, the court stated it needed to review its notes and “look at the evidence again” before ultimately deciding whether Brandon was a dependent child. The evidence contained in the record, together with the reasonable inferences the court could draw from that evidence, sufficiently support the court’s ultimate conclusion that Brandon was, as Kathryn alleged in her petition, a dependent child as to Jonas at that point. We cannot say the court abused its discretion and therefore affirm its order.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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PHILIP G. ESPINOSA, Judge

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GARYE L. VÁSQUEZ, Judge