

ARIZONA COURT OF APPEALS

DIVISION TWO

DIANA H.,

Petitioner,

v.

HON. STEPHEN M. RUBIN,
Judge of the SUPERIOR COURT OF
THE STATE OF ARIZONA, in and for
the County of PIMA,

Respondent,

and

ARIZONA DEPARTMENT OF
ECONOMIC SECURITY
and [REDACTED]

Real Parties in Interest.

2 CA-SA 2007-0085

Pima County Juvenile Court
No. J18180900

**ARIZONA DEPARTMENT
OF ECONOMIC SECURITY'S
RESPONSE TO PETITION
FOR SPECIAL ACTION**

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TABLE OF CONTENTS

INTRODUCTION1

STATEMENT OF THE ISSUE.....1

STATEMENT OF MATERIAL FACTS2

JURISDICTIONAL STATEMENT4

ARGUMENT7

 A.R.S. § 8-512 Authorizes ADES to Provide Immunizations to Children
 in Foster Care, and the Residual Parental Rights Retained by a Parent of a
 Dependent Child Do Not Include the Right to Prevent the Child from
 Receiving Medical Care Based on the Parent’s Religious Objection.
 Respondent Therefore Did Not Abuse His Discretion When He Granted
 ADES's Motion to Authorize Immunizations..7

CONCLUSION17

CERTIFICATE OF COMPLIANCE.....18

CERTIFICATE OF SERVICE19

INTRODUCTION

¶ 1 Petitioner, Diana H., seeks review of the order of Respondent Judge Stephen Rubin authorizing the legal custodian of Petitioner’s dependent, eight-month-old daughter to have the child immunized against several communicable diseases. (*See* Petition for Special Action [“Petition”].) Real Party in Interest the Arizona Department of Economic Security (“ADES” or “the Department”) is the child’s legal custodian. (ADES’s Appendix [“App.”] A.) Petitioner claims that Respondent unlawfully authorized the Department to immunize the child in violation of her constitutional right to religious freedom and in violation of state statutes providing exemptions to immunization requirements. (Petition at 2.) No such constitutional or statutory violations occurred, and there is no ambiguity in state law on the issue presented. For these and additional reasons more fully discussed below, this Court should either decline jurisdiction or accept jurisdiction but deny relief.

STATEMENT OF THE ISSUE

¶ 2 A.R.S. § 8-512 compels the Department to provide comprehensive medical care to each child placed in a foster home and states that this care may include, but is not limited to, a program of regular immunizations. No statute or related regulation limits this statutory discretion and authority. Did Respondent abuse his discretion by authorizing the Department to immunize Petitioner’s

daughter, a dependent foster child, over Petitioner's religious or personal objection?

STATEMENT OF MATERIAL FACTS

¶ 3 Real Party in Interest [REDACTED] (born [REDACTED]) was adjudicated dependent by the juvenile court on May 30, 2007, after Petitioner pled no contest to allegations that [REDACTED] was a dependent child as defined by A.R.S. § 8-201(13). (App. A, B.) Petitioner had claimed that [REDACTED] was exempt from receiving immunizations based on Petitioner's religious beliefs (App. C at 4) and apparently had provided the Department with a "request for exemption from immunization requirements" during a preliminary protective hearing in April 2007. (App. D at 2; App. E) As a result, the Department moved for a court order providing it discretion to consent to immunizations for the child (App. D at 3).

¶ 4 In support of its motion, ADES presented the testimony of Child Protective Services case manager Richard Maldonado and that of [REDACTED]'s pediatrician, Mimi Peterson. (App. H at 6, 13.) Dr. Peterson opined that immunizations were medically necessary because of the "significant risk to the health and sometimes the life of [a] child" who does not receive them. (*Id.* at 15.) At the time of the hearing, [REDACTED] was overdue for fifteen immunizations that would inoculate her against hepatitis B, haemophilus influenza B (HIB), tetanus, diphtheria, pertussis, rotavirus, polio, and pneumococcus. (*Id.* at 14.)

¶ 5 Peterson testified that the highest risk “right now” for children in the local community was probably pertussis, commonly referred to as “whooping cough” (*id.* at 15), and that she had seen several dozen cases of pertussis in her pediatric practice last winter in children older than ██████████ (*id.* at 18, 22). She further testified that although pertussis did not pose a high risk to teens or adults, the associated risks of pertussis to a baby were high, and a baby could contract the illness merely through exposure to the general population. (*Id.* at 18, 22.)

Peterson also testified that until approximately one year ago, “Pima County was considered high risk for Pertussis,” and that this risk had prompted a “change” in local immunization policies. (*Id.* at 24.) Peterson further opined that the second greatest risk to ██████████ was haemophilus influenza, the bacterial cause of meningitis, followed by pneumococcus, rotavirus, and tetanus. (*Id.* at 24-25.)

¶ 6 Maldonado testified that ██████████ currently attended day care at a facility at which her foster parent was also employed, allowing contact with her during the day that Maldonado found to be in ██████████’s best interests. (*Id.* at 8-9) However, absent proof that she had received standard immunizations, ██████████ was at risk of being expelled from the facility. (*Id.* at 7.)

¶ 7 Petitioner presented no evidence to the juvenile court about her claimed religious beliefs. (*Id.* at 28-29.) Although ADES stated at the hearing that it “[did not] have any evidence suggesting that [Petitioner’s] religio[us] belief [was

not] sincere,” and the trial court determined that it would therefore not hear testimony on that issue, Petitioner’s informal offer of proof suggested only that she would “present an ex-husband who [could] talk about for 15 years [Petitioner]’s been exempting her children from immunizations.” (*Id.* at 29.)

¶ 8 Respondent took the matter under advisement and issued the challenged order, finding that “immunizations are in the child’s best interest and are necessary for the child’s safety” and granting ADES’s motion to authorize immunizations for ██████████. (Petition, Ex. A.) This special action followed.

JURISDICTIONAL STATEMENT

¶ 9 This Court should not accept jurisdiction. As more fully set forth below, unambiguous provisions of Arizona law specifically authorize the Department to consent to the immunization of dependent children in foster care for the following diseases, “*as minimums*”: mumps, rubella, smallpox and polio. *See* A.R.S. § 8-512(A) and (B) (emphasis added); Ariz. Admin. Code R6-5-6005. Although regulations promulgated by the Department under A.R.S. § 8-512 require it to obtain a court order before consenting to certain types of medical services, immunizations are not among them. *See* Ariz. Admin. Code R6-5-6012 (ADES shall secure a court order and, “if possible,” consent of a parent or guardian for surgery, general anesthesia, blood transfusion, or pelvic examination of a child). Petitioner has cited no Arizona law that limits the Department’s authority to

consent to and obtain additional immunizations for children in foster care. Nor has Petitioner even argued, let alone established, that the authority conferred upon ADES by § 8-512 impinges on her religious freedom. Because the Legislature has afforded ADES with the very authority that the challenged order granted, and because Petitioner has not challenged the Legislature's ability to do so, Petitioner is incorrect that a matter of first impression is presented here. (Petition at 2.) The statutory and regulatory schemes dispose of the issue, and no further clarification by this Court is required. Accordingly, it should decline to accept jurisdiction.

¶ 10 Likewise, this Court should reject Petitioner's claims that special action jurisdiction is warranted because she lacks any equally plain, speedy, and adequate remedy by appeal. (Petition at 2-3.) Although ADES agrees that speed is of the essence because ██████ remains at an avoidable risk of contracting serious illnesses until this Court's stay of Respondent's order is lifted and she receives immunizations against them, it does not concede that Petitioner has no equally plain, speedy, and adequate remedy by appeal. In a dependency action, "[a]ny aggrieved party . . . may appeal from a final order of the juvenile court to the court of appeals in the manner provided in the Arizona rules of procedure for the juvenile court as adopted or approved by the Arizona supreme court." A.R.S. § 8-235(A); *see also* Ariz. R. P. Juv. Ct. 88(A). "A final order shall be in writing and signed by the judge before an appeal can be taken. The final order shall be by

minute entry or separate written order.” Ariz. R. P. Juv. Ct. 89(A). The challenged order meets these requirements.

¶ 11 In addition, a dependency disposition order entered under A.R.S. § 8-845, is a final, appealable order. *See Lindsey M. v. Ariz. Dep’t of Econ. Sec.*, 212 Ariz. 43, ¶ 12, 127 P.3d 59, 62 (App. 2006). The order challenged here was essentially dispositional in nature. Indeed, at the time of the combined adjudication of dependency and disposition hearing, the immunization issue was deferred for hearing only because Petitioner had objected to it and the parties had agreed to bring the matter before the court at an evidentiary hearing. (ADES’s App. A.)

¶ 12 Thus, the order was appealable. Because this Court expedites its resolution of juvenile appeals pursuant to its statutory mandate to give such appeals precedence over all other actions except extraordinary writs or special actions, A.R.S. § 8-235(C), special action jurisdiction may not have been necessary to achieve a reasonably swift resolution of the issue. Accordingly, this Court need not accept jurisdiction on the basis that Petitioner lacked an equally plain, speedy, or adequate remedy by appeal.

¶ 13 Alternatively, should this Court determine that it must accept jurisdiction, it should nevertheless deny relief. As more fully discussed below, in entering the challenged order, Respondent made factual findings that are supported

by the record and reached a legally correct conclusion of law. Accordingly, Respondent did not abuse his discretion, as Petitioner claims.

ARGUMENT

A.R.S. § 8-512 Authorizes ADES to Provide Immunizations to Children in Foster Care, and the Residual Parental Rights Retained by a Parent of a Dependent Child Do Not Include the Right to Prevent the Child from Receiving Medical Care Based on the Parent's Religious Objection. Respondent Therefore Did Not Abuse His Discretion When He Granted ADES's Motion to Authorize Immunizations.

¶ 14 Petitioner's challenge to Respondent's order, which consists primarily of her insistence that the "order ignored the legislature's statutory framework which respects the religious beliefs of parents and puts the [juvenile] court in the position of mandating immunization" (Petition at 4-5), is factually and legally incorrect on its face. Nowhere in the order does the court "mandate" that any particular immunizations be given. (*See* Petition, Ex. A.) Instead, Respondent's order grants ADES's motion, in which it sought "discretion to consent to immunizations for the child," noting that ██████'s "immunization is required for her enrollment in child care" as one reason weighing in favor of obtaining immunizations for ██████. (ADES's App. D at 2-3.)

¶ 15 But ADES's duty to provide comprehensive medical care for dependent children in foster care, including its authority to provide immunizations, is established by A.R.S. § 8-512 without regard to whether such children are enrolled in day care. By contrast, the statutes upon which Petitioner's argument

relies regulate the actions only of schools and child-care centers, not those of ADES. *See* A.R.S. §§ 15-871 to -874, 36-883 (Petition at 4.) Accordingly, none of the authorities Petitioner cites establishes that Respondent committed any legal error or abuse of discretion.

¶ 16 To the contrary, Arizona law *requires* ADES to “provide comprehensive medical and dental care, as prescribed by rules of the department, for each child . . . [p]laced in a foster home.” A.R.S. § 8-512(A)(1). “The goal of the Comprehensive Medical/Dental Program for Foster Children is to provide . . . full coverage for those medical and dental services which are necessary to the achievement and maintenance of an optimal level of physical and mental health for children in foster care.” Ariz. Admin. Code R6-5-6001. “The care may include, but is *not limited* to . . . [a] program of regular health examinations and *immunizations* including as *minimums* . . . (a) [v]accinations to prevent mumps, rubella, smallpox and polio.” § 8-512(B)(1) (emphasis added). Here, the juvenile court found that receiving immunizations was in ██████████’s best interests and was “necessary for [her] safety.” (Petition, Ex. A.) Petitioner has not challenged these

findings and both Maldonado’s and Peterson’s testimony support them. (App. H at 7-10, 13-17, 21-22, 24-25, 27-28.)¹

¶ 17 Petitioner is correct that Arizona law offers exemptions to immunization requirements for enrolling children in schools or day-care centers, including exemptions for religious or personal beliefs. *See* A.R.S. §§ 15-873(A)(1) (documentary proof of immunization not required for *school* admission if parent does not consent “due to personal beliefs”); 36-883(A) and (C) (requiring Department of Health Services to promulgate rules for *day care centers* and providing only religious exemptions from immunization requirements); Ariz. Admin. Code R9-6-705(D)(2) (child care administrator to determine that child is in compliance with immunization requirements if “responsible person” submits appropriate documentation of exemption).

¶ 18 However, none of these exemptions is relevant here. First, Petitioner’s reliance on A.R.S. § 15-873 is wholly misplaced because that statute applies only to a student’s admission to “school.” The statutory definition of “school” specifically excludes “day care facilities regulated pursuant to title 36,

1. A reviewing court “will not ‘disturb the exercise of discretion of the trial court if it is supported by any reasonable evidence.’” *Lohmeier v. Hammer*, 214 Ariz. 57, ¶ 7, 148 P.3d 101, 105 (App. 2006), *quoting Peters v. M & O Constr., Inc.*, 119 Ariz. 34, 36, 579 P.2d 1021, 1031 (App. 1997). This Court does not reweigh the evidence. *Maricopa County Juvenile Action No. JS-8441*, 175 Ariz. 463, 465, 857 P.2d 1317, 1319 (App. 1993), *abrogated on other grounds by Kent K. v. Bobby M.*, 210 Ariz. 279, 110 P.3d 1013 (2005).

chapter 7.1.” A.R.S. § 15-871(11). [REDACTED], who is a dependent child of less than one year of age, may enroll in a day-care facility, if anywhere, but not a “school.” Accordingly, the “personal beliefs” exemption afforded to parents of school-age children under § 15-873 is inapplicable here, and the juvenile court therefore could not have violated that statute.

¶ 19 Next, Petitioner cites A.R.S. § 36-883. (Petition at 4.) That statute requires the Department of Health Services (“DHS”) to “prescribe reasonable rules regarding the health, safety and well-being of the children to be cared for in a child care facility.” § 36-883(A). It further specifies that “[a]ny rule that relates to . . . medical treatment or immunization shall include appropriate exemptions for children whose parents object on the ground that it conflicts with the tenets and practices of a recognized church or religious denomination of which the parent or child is an adherent or member.” § 36-883(C). But this statute applies only to a parent who is enrolling his or her child in day care.

¶ 20 Petitioner cannot enroll [REDACTED] in day care, however, because she has lost legal custody of [REDACTED] to the state. (ADES’s App. A.) Because Petitioner is not [REDACTED]’s legal custodian, she likewise could not obtain an exemption under § 36-883, even if it had any bearing on whether ADES may consent to and provide immunizations to a dependent child in foster care, as § 8-512 expressly authorizes it to do.

¶ 21 This position finds further support in Arizona’s Administrative Code (“Administrative Code” or “the Code”). Section 36-883(B) directs the promulgation of rules, which are embodied in the Code. Administrative Code provision R9-6-706 governs exemptions from immunizations. It specifies that “[f]or a child attending a child care, a *responsible person* shall submit to the child care a written statement of exemption from immunization on a form provided by the Department [of Health Services].” Ariz. Admin. Code R9-6-706(F) (emphasis added).

¶ 22 The term “[r]esponsible person’ has the same meaning as ‘parent’ in R9-5-101.” See Ariz. Admin. Code R9-6-701(42). “Parent,” however, is defined as, “[a] natural or adoptive mother or father,” “[a] legal guardian appointed by a court of competent jurisdiction,” or “[a] ‘custodian’ as defined in A.R.S. § 8-201.” See Ariz. Admin. Code R9-5-101(79). Although Petitioner is ██████████’s natural parent, her authority to act as a responsible person under R9-6-706(F) ceased when ██████████ acquired, instead, a legal guardian appointed by the juvenile court (the Department) or a “[c]ustodian” as defined by § 8-201(8). “Custodian” is defined by statute as “a person, other than a parent or legal guardian, who stands in loco parentis to the child or a person to whom legal custody of the child has been given

by order of the juvenile court.”² (App. A [adjudicating ██████████ dependent and awarding legal custody to ADES in May 2007]; App. G at 2, 4-5 [awarding temporary legal and physical custody of ██████████ to ADES in March 2007, ordering ADES to consent to and provide medical services, and authorizing foster parents to consent to “routine medical . . . treatments and procedures”].)

¶ 23 Nothing in § 36-883 or R9-6-706(F) suggests that a natural parent who has lost legal custody of his or her child due to an adjudication of dependency or any other court action retains a right not only to seek an exemption for the child, but to *prevent* the legal custodian in whose care a court of competent jurisdiction has entrusted the child from obtaining immunizations, regardless of whether the legal custodian enrolls the child in day care. By contrast, without regard to whether a child will be cared for in a day-care facility, Arizona law *mandates*

2. A.R.S. § 1-215(29) defines “[p]erson” to include:
a corporation, company, partnership, firm, association or society, as well as a natural person. When the word “person” is used to designate the party whose property may be the subject of a criminal or public offense, the term includes the United States, this state, or any territory, state or country, or any political subdivision of this state that may lawfully own any property, or a public or private corporation, or partnership or association. When the word “person” is used to designate the violator or offender of any law, it includes corporation, partnership or any association of persons.

ADES to provide comprehensive medical care to dependent foster children, specifically permitting such care to include immunizations. A.R.S. § 8-512(A)(1).

¶ 24 This is so notwithstanding Petitioner’s claimed religious beliefs. As the Arizona Supreme Court “understand[s] the meaning of legal custody” in a dependency action, ADES may “come into the home at any time, monitor any and all activities of the children, *veto any actions of the natural parent*, prescribe behaviors, food, clothing, and administer discipline, etc.” *Cochise County Juvenile Action No. 5666-J*, 133 Ariz. 157, 162, 650 P.2d 459, 464 (1982) (emphasis added).

¶ 25 In *Cochise County Juvenile Action No. 5666-J*, our supreme court drew upon the definition of “legal custody” set forth in A.R.S. § 8-531 for guidance on the Legislature’s intended meaning of the term in a dependency action. *See id.* at 162 n.8, 650 P.2d at 464 n.8. Section 8-531(5)(c) currently defines “legal custody,” in relevant part, to mean “a status embodying . . . [t]he responsibility to provide the child with adequate . . . medical care, provided that such rights and responsibilities shall be exercised . . . subject to the residual parental rights and responsibilities if they have not been terminated by judicial decree.” In Arizona, the phrase “residual parental rights and responsibilities” is not statutorily defined, but in several states the term has been consistently codified to refer to a parent’s rights and duties to support, visit, consent to adoption, and determine the religious

affiliation of a child. *See, e.g.*, Ala. Code 1975 § 12-15-1(24) (Alabama); C.R.S.A. § 19-1-103(93) (Colorado); R.C. § 2151.011(A)(46) (Ohio); Va. Code Ann. § 16.1-228 (Virginia).

¶ 26 But a parent’s right to determine a child’s religious affiliation does not encompass a right to withhold medical care where a child’s best interests, as here, require it. The Supreme Court of Iowa, for example, when faced with an analogous situation in which the father of two dependent children refused to consent to surgical procedures for religious reasons, affirmed an order permitting the surgery to go forward, reasoning:

The State has a duty to see children receive proper care and treatment. This means parents have no right to deprive their children of proper medical care. The legal custodian’s statutory duty to provide ordinary medical care presupposes a right to do so in appropriate circumstances over parental objection even in absence of immediate risk to life or limb.

In re Karwath, 199 N.W.2d 147, 150 (Iowa 1972) (citations omitted). The court went on to hold, “[w]hen the best interests and welfare of children are involved even parental preference based upon asserted religious belief may be required to give way.” *Id.*, citing *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S. Ct. 438, 442 (1944).

¶ 27 In *Prince*, the United States Supreme Court recognized that

neither the rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth’s well being, the state as *parens patriae* may restrict the parent’s control . . . in . . .

many ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. [*Jacobson v. Massachusetts*, 197 U.S. 11, 25 S.Ct. 358 (1905)] The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.

321 U.S. at 166, 64 S. Ct. at 442 (citations and footnotes omitted). Our own state supreme court has also recognized that “[i]f there is a direct collision of a child’s right to good health and a parent’s religious beliefs, the parent’s rights must give way.” *No. 5666-J*, 133 Ariz. at 163, 650 P.2d at 465.

¶ 28 In *No. 5666-J*, the Arizona Supreme Court affirmed the dismissal of a dependency because it had been based solely on ADES’s desire to “monitor” the health of the children in the absence of any known medical danger where providing medical care was contrary to the parent’s religious belief. *Id.* at 158, 650 P.2d at 460. It is of critical distinction, however, that the issue in *No. 5666-J* involved weighing an otherwise *fit* parent’s right to *custody* of a child against religious freedom, whereas the issue here involves the right and duty of the legal custodian to provide appropriate *care* to a dependent child notwithstanding an otherwise *legally unfit* parent’s incantation of religious objection.

¶ 29 Religious “[b]eliefs are absolutely protected,” but religious “practices are not absolutely protected.” *Id.* at 163, 650 P.2d at 465. “Parents may be free to become martyrs themselves. But it does not follow they are free, in identical

circumstances, to make martyrs of their children before they have reached the age of full and legal discretions when they can make that choice for themselves.” *Prince*, 321 U.S. at 170, 64 S. Ct. at 444. This principle is no less true in situations in which a parent has already demonstrated an unwillingness or inability to provide proper and effective care and control of a child, failed to provide a child with the necessities of life, or failed in some other way to provide a fit home. *See* A.R.S. § 8-201(13). To hold otherwise would render the mere expression of “religious objections” by any parent of a dependent child—even that of an actively psychotic parent—to thwart ADES’s efforts to obtain routine medical care, including immunizations, despite the Legislature’s clear directives and enabling authority to do so. *See* A.R.S. § 8-512.

¶ 30 Having been ordered to assume responsibility for ██████████’s care, ADES sought in its motion to protect her from well-known, potentially deadly diseases by the common and wide-spread practice of immunization. (App. A, D, G; App. H at 15.) In accordance with a statutory mandate to “consider the health and safety of the child as a paramount concern,” Respondent granted ADES’s motion to authorize such immunizations. A.R.S. § 8-845(B). Petitioner has failed to demonstrate this factually and legally correct action was an abuse of discretion. Accordingly, if this Court accepts jurisdiction, it must also deny relief.

