

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



DIVISION ONE
FILED: 10/02/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

EDNA S.,) No. 1 CA-JV 12-0042
)
Appellant,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ARIZONA DEPARTMENT OF ECONOMIC) Rule 103(G) Ariz. R.P.
SECURITY, I.T.,) Juv. Ct.; Rule 28 ARCAP)
)
Appellees.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. JD19558

The Honorable Jay Ryan Adleman, Judge *Pro Tempore*

AFFIRMED

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By Michael F. Valenzuela, Assistant Attorney General
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B R O W N, Judge

¶1 Edna S. ("Edna") appeals the juvenile court's order denying her motion for change of physical custody of her grandson ("the child").¹ She argues the court's order was based on an erroneous finding of fact and therefore constitutes an abuse of discretion. Because we do not reweigh the evidence on appeal, we affirm.

BACKGROUND

¶2 The child was born in September 2010 to Edna's daughter, who was incarcerated at the time. Child Protective Services ("CPS") removed the child the following day and placed him in a foster home approved by the Arizona Department of Economic Security ("ADES"). On September 16, ADES filed a dependency petition requesting that the juvenile court find the child to be "a temporary ward of the Court, placed in the care, custody, and control of ADES[.]" The mother contested the petition, but after mediation, the court found the child dependent. On February 11, 2011, ADES moved for severance of parental rights, which the mother did not contest. The court granted the motion in March. The court also terminated the rights of "John Doe," as the unknown father, in April 2011.

¶3 Edna did not become aware of the child's birth until March 2011, when she was contacted by her niece. Edna promptly

¹ On the court's own motion, it is hereby ordered amending the caption to protect the identity of the minor child.

contacted CPS and expressed her interest in adopting the child. Southwest Human Development conducted an investigation and recommended adoptive placement with Edna, and ADES filed a motion for change in physical custody placing the child with Edna. The child was placed with Edna on May 20, 2011.

¶4 On July 11, 2011, three CPS case aides visiting Edna's home reported to their supervisor that they smelled a strong odor of marijuana outside and inside the apartment, and in close proximity to the child. Based on that report, the supervisor requested Edna to undergo a drug test. Edna denied using marijuana, insisting the only thing she smoked that day was a "clove" cigarette given to her by her neighbor. Edna provided a urine sample at the TASC laboratory on July 13. The test result was "negative/diluted". After receiving the results of the first test, the supervisor requested that Edna take another drug test. On July 18, Edna went to the same facility, where she provided another urine sample and a hair sample. The hair follicle test was "negative," but the urine test was "positive for marijuana."

¶5 As a result of the positive urinalysis test, on July 21, 2011, CPS removed the child from Edna for safety reasons and placed him in foster care. On August 2, ADES filed a motion for change of physical custody to return the child to the physical custody of ADES. The court granted the motion on August 4. On

August 15, Edna filed a hand-written letter with the court requesting a hearing and appointed counsel. The court denied both requests, noting that Edna was not entitled to a hearing under Arizona Revised Statutes ("A.R.S.") section 8-113(A) (Supp. 2011) and that only a parent or guardian is entitled to appointed counsel.

¶16 On October 4, 2011, after retaining her own counsel, Edna moved to intervene in the dependency proceedings. ADES opposed the motion, citing concerns for the health and safety of the child based on Edna's positive drug test. On November 1, Edna filed a motion requesting a change of physical custody to her care and in the meantime, visitation. The court permitted Edna to intervene "solely for the purpose of determining pending custody and visitation matters" and set an evidentiary hearing for January 25, 2012, for Edna's motion for change in physical custody and visitation.

¶17 On February 22, after conducting the evidentiary hearing, the juvenile court issued its ruling denying Edna's motion. The court's order contained a thorough factual background reflecting the history of the child's placement and many concerns about placement with Edna. With respect to the alleged marijuana use, the court noted that the CPS case aides had smelled the marijuana at Edna's apartment, that Edna had tested positive for marijuana, and that it was "highly unlikely

that [Edna] had obtained a positive test by mere secondhand exposure to marijuana." The court also found Edna's testimony refuting the drug use "incredible" given the testimony of the CPS aides and the results of the drug test. The court ultimately determined, based on the evidence, that "[the child] was properly removed from his grandmother's care in July 2011, due to the evidence of her drug use in the home." The court also concluded that, pursuant to A.R.S. § 8-106(A)(7), continued placement with the foster parents would be in the child's best interests. This timely appeal followed.

DISCUSSION

¶18 Edna's only argument on appeal is that the juvenile court erroneously concluded that she used marijuana on July 11, 2011.² In cases concerning placement orders, we review the juvenile court's resolution for an abuse of discretion. See *Antonio P. v. Ariz. Dep't. of Econ. Sec.*, 218 Ariz. 402, 404, ¶ 8, 187 P.3d 1115, 1117 (App. 2008). Where, as here, the issue on appeal concerns a juvenile court's findings of fact, we look to whether those findings were "clearly erroneous, i.e., there

² In her reply brief, Edna asserts that the denial of her motion for change of physical custody amounted to a denial of justice. Because Edna failed to raise that argument in her opening brief, we do not address it. See *State v. Cohen*, 191 Ariz. 471, 474, 957 P.2d 1014, 1017 (App. 1998) (noting that "[a]n appellate court can disregard substantive issues raised for the first time in the reply brief." (internal quotations and citations omitted)).

is no reasonable evidence to support them." *Matter of Appeal in Maricopa County Juvenile Action No. JV-132905*, 186 Ariz. 607, 609, 925 P.2d 748, 750 (App. 1996). In making that assessment, we begin with the presumption that "[t]he juvenile court is in the best position to measure the credibility of witnesses." *Id.* Additionally, we will not reweigh the evidence, but instead will "only look to determine if there is evidence to sustain the juvenile court's ruling." *Id.*

¶19 Edna argues the trial court erred in concluding she used marijuana because "[t]he proof of actual marijuana use was scant to the vanishing point." Furthermore, Edna claims the positive drug test was "either the result of someone slipping marijuana or a marijuana extract into the clove cigarette that Edna smoked . . . or was a false positive." In support of those arguments, Edna urges us to ignore the factual determinations of the trial court, to reweigh evidence, and to consider facts not presented below. We refuse to do so.

¶10 The record in this case provides sufficient evidence to support the juvenile court's finding. At the evidentiary hearing, ADES presented testimony from two case aides, both of whom were present at Edna's apartment on July 11, 2011, and detected a strong odor of marijuana in and near Edna's apartment. ADES also provided a lab report indicating that Edna had tested positive for marijuana on July 18, 2011. Jamie

Anderson, the technical supervisor at the TASC laboratory, testified about her involvement with Edna's drug tests. Anderson testified (1) to the general procedures used by the lab in performing urinalysis testing; (2) that, based on the results of Edna's July 13 urinalysis, it was impossible that Edna had not smoked marijuana; and (3) the negative hair follicle test indicated Edna was not a chronic drug user but did not definitively rule out the possibility that Edna had used marijuana on July 11, 2011.

¶11 Based on the testimony and exhibits presented at trial, the court found that Edna used marijuana "in her home and within the immediate vicinity of her grandson." Because the record supports this finding, it is not clearly erroneous. See *JV-132905*, 186 Ariz. at 609, 925 P.2d at 750. Although Edna now cites to scholarly articles about the possibility of false positives, those articles do not change our conclusion. Even if there was a scientific possibility of a false positive, there was reasonable evidence in this case to support the trial court's finding that Edna did use marijuana on the day the CPS workers arrived. Therefore, because the trial court's decision was based on reasonable evidence in the record, we find that it was not an abuse of discretion.

CONCLUSION

¶12 Based on the foregoing, we conclude the juvenile court's order denying Edna's request for change of physical custody is reasonably supported by the record on appeal. Thus, we affirm the court's order.

/s/

MICHAEL J. BROWN, Presiding Judge

CONCURRING:

/s/

ANDREW W. GOULD, Judge

/s/

DONN KESSLER, Judge