

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



DIVISION ONE
FILED: 05/20/10
PHILIP G. URRY, CLERK
BY: JT

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**

IN RE THE MATTER OF:) 1 CA-CV 09-0429
)
TOMIE JUSTINE JORDAN,) DEPARTMENT C
)
Petitioner/Appellant,) **MEMORANDUM DECISION**
) (Not for Publication -
v.) Rule 28, Arizona Rules
) of Civil Appellate
VICTOR LOUIS MUDRACK,) Procedure)
)
Respondent/Appellee.)
)

Appeal from the Superior Court in Maricopa County

Cause No. FC2005-051120

The Honorable Carey Snyder Hyatt, Judge

AFFIRMED

Tomie Justine Jordan Phoenix
Petitioner/Appellant Pro Per

Victor Louis Mudrack Phoenix
Respondent/Appellee Pro Per

I R V I N E, Presiding Judge

¶1 Tomie Justine Jordan ("Mother") appeals from the family court's order denying her petition to modify child custody. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Mother and Victor Louis Mudrack ("Father") were married in 2001 and had one child. Mother petitioned for divorce and the marriage was officially dissolved in December 2005. The decree awarded joint custody with Mother serving as the primary residential parent. In May 2006, Father filed a petition to modify custody due to Mother's alleged alcohol and drug abuse. After a hearing on the motion, the court found that Father established "a substantial and continuing change that justifies a change of custody and parenting time" and awarded him sole legal custody. The court noted that it "hopes that Mother's continued progress with her rehabilitation will permit her to demonstrate in the future that an additional parenting time modification may be appropriate." The court ordered that "Mother shall be entitled to unsupervised parenting time . . . so long as" she installs an ignition interlock device on any vehicle she drives, wears an effective SCRAM bracelet, and submits to a hair follicle drug test every ninety days.¹

¶3 From 2006 to 2008, Mother and Father filed multiple letters, motions, and petitions with the court. On November 20, 2009, the court held an evidentiary hearing to review parenting

¹ In a subsequent minute entry, the court stated that "Mother has consistently misled the Court regarding ordered alcohol testing, has failed to test as ordered and has been suspected of tampering with alcohol monitoring devices."

time and child support issues. At the hearing, the court adopted the recommendation of the appointed Best Interests Attorney and affirmed sole custody to Father. The court ordered supervised parenting time for Mother and stated: "Mother may earn unsupervised parenting time and some overnights at Father's discretion if she provides proof to Father and the Court of three (3) months of random twice weekly negative, non-diluted tests at TASC with no failures to test along with proof of three (3) months participation in the substance abuse treatment program." The court also stated that Mother must file proof that she has completed twelve consecutive months of a substance abuse program before filing any future petitions to modify custody.

¶4 Mother timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes section 12-2101(C) (2003).

DISCUSSION

¶5 Mother argues that the family court's order, affirming its previous custody determination, constituted cruel and unusual punishment. "The United States Supreme Court has clearly proclaimed that the Eighth Amendment does not apply to civil proceedings: An examination of the history of the Eighth Amendment and the decisions of this Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes." *Olson v. Walker*, 162 Ariz. 174, 182-83, 781 P.2d 1015, 1023-24 (App.

1989) (citing *Ingraham v. Wright*, 430 U.S. 651, 665 (1977)). Therefore, Mother's argument fails because the family court's order granting Father sole custody was not a criminal sanction.

¶6 Because we have not been provided the transcript or recording of the evidentiary hearing, we presume that the evidence presented at the hearing supported the court's findings. See *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995). Here, the record reflects multiple occasions when Mother did not submit to drug testing as ordered by the court. The family court consistently noted its desire to extend Mother's parenting time once she addresses her substance abuse issues.² The court, however, never guaranteed an expansion or modification in parenting time. On the record before us, we conclude that the family court did not abuse its discretion in affirming its previous child custody determination. *Owen v. Blackhawk*, 206 Ariz. 418, 420, ¶ 7, 79 P.3d 667, 669 (App. 2003) ("We review the [family] court's decision regarding child custody for an abuse of discretion.").

² Throughout 2008, Mother's parenting time varied between supervised and unsupervised. In one instance, the court permitted Father to grant more parenting time in his discretion due to Mother's negative, non-diluted alcohol tests; however, due to Mother's refusal to test at TASC, the court ordered supervised parenting time.

CONCLUSION

¶7 For the foregoing reasons, we affirm.

/s/

PATRICK IRVINE, Presiding Judge

CONCURRING:

/s/

MICHAEL J. BROWN, Judge

/s/

DONN KESSLER, Judge