IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

GERALD M.,
Appellant,

v.

DEPARTMENT OF CHILD SAFETY, M.M., AND E.M.,
Appellees.

No. 2 CA-JV 2015-0130
Filed May 4, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f);
Ariz. R. P. Juv. Ct. 103(G).

Appeal from the Superior Court in Pima County
No. JD20150208
The Honorable Geoffrey L. Ferlan, Judge Pro Tempore

VACATED AND REMANDED

COUNSEL

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By Jeanne Shirly
Counsel for Appellant

Mark Brnovich, Arizona Attorney General
By Laura J. Huff, Assistant Attorney General, Tucson
Counsel for Appellee Department of Child Safety

MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Judge Kelly[1] concurred and Judge Howard dissented.

V Á S Q U E Z, Presiding Judge:

¶1 Gerald M. appeals from the juvenile court's July 2015 minute entry adjudicating his two daughters, M.M., born in September 2011, and E.M., born in October 2013, dependent as to him.[2] He maintains evidence of his medical use of marijuana, as a cardholder under the Arizona Medical Marijuana Act (AMMA), *see* A.R.S. § 36-2801(2), and his previous unauthorized cultivation of the plant, is insufficient to support the dependency adjudication when "[t]he record is without any evidence that the children were being harmed or neglected." For the following reasons, we vacate the court's adjudication of dependency and remand the case for a redetermination of dependency that includes the court's consideration of the AMMA.

Background

¶2 Sometime after midnight on March 10, 2015, Department of Child Safety (DCS) received a report that police officers responding to the family's home had discovered marijuana plants "being grown for personal consumption" in one of the bedrooms. Police verified that Gerald had "a medical marijuana

[1]The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and the supreme court.

[2]The court also found the children dependent with respect to their mother, who is not a party to this appeal. Because the dependency was a closed proceeding, we refer to the children's mother by the pseudonym of "Charlotte" to help protect the family's privacy.

card for consumption" but was no longer authorized to cultivate the plants.[3] According to DCS, the police reported that the children had "appear[ed] clean, healthy and well cared for" with "no known mental health [issues] or special needs."

¶3 At four a.m. that day, DCS took temporary custody of the children and placed them with their paternal grandparents, where Gerald and his wife, Charlotte, visited the children nearly every day.[4] After hair-test reports for both children showed positive results for THC[5] and a THC metabolite, DCS filed a petition alleging the children are dependent as to Gerald because he: (1) "places the children at risk for neglect by engaging in criminal activity in the home," specifically by "growing twelve plants of marijuana" when neither parent is licensed to do so; (2) "uses medical marijuana," reportedly "every hour," and "fails to perceive how marijuana may impair his ability to parent due to marijuana's sedating effect"; and (3) "neglects the children by exposing them to marijuana," as evinced by hair-test results.

¶4 At the dependency hearing, Gerald testified he has an Arizona medical marijuana card. He said he uses the drug to manage musculoskeletal back pain he has suffered since an automobile accident seven years ago. He denied saying he had used marijuana hourly, but he acknowledged he had been using it five to six times a day when the children were removed. Gerald reported he now uses it only in the morning and at night. He said marijuana is more effective in relieving his back pain than other remedies he

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[3]Gerald previously had an AMMA card that authorized him to cultivate twelve marijuana plants, but he lost that authorization after a dispensary opened near his home. *See* A.R.S. §§ 36-2801(1)(a)(ii), 36-2804.02(A)(3)(f).

[4]In December 2015, the week before oral argument in this court, the children were returned to their parents' care subject to an in-home dependency. *See* A.R.S. § 8-891.

[5]Tetrahydrocannabinol—the active component in marijuana. *State v. Lucero*, 207 Ariz. 301, ¶ 4, 85 P.3d 1059, 1060-61 (App. 2004).

had tried—including injections, opiates, physical therapy, and chiropractic care—and it alleviates both his skeletal and muscular pain. Gerald asserted the children always have had plenty of food and appropriate supervision, housing, clothing, and medical care.

¶5 Charlotte was the only witness DCS called to testify at the contested dependency hearing. She stated that the girls appeared developmentally on-target and that she and Gerald "always made sure they had everything that they needed and wanted and more." She responded affirmatively when asked whether Gerald could safely parent the children "while he's under the influence" of marijuana, even if that circumstance is not "ideal." She answered "[n]o" when asked if she had ever seen Gerald do anything unsafe or "miss any cues" related to the children's needs or possible sources of danger after he had used marijuana.

¶6 With respect to the marijuana plants that prompted the children's removal, Charlotte testified the children never had access to the plants, which were kept behind closed doors, or to usable marijuana, which generally was kept in a safe. Both parents stated that they have not cultivated marijuana plants since the children's removal and have no intention of doing so. Neither has been charged criminally for the marijuana plants removed from the home in March. Gerald estimates his marijuana, now purchased from a medical marijuana dispensary, costs $100 per month, and both parents testified they are able to budget for that amount.

¶7 According to the parents, they never had intended to expose their daughters to marijuana smoke. In relation to the children's positive hair-test results, Charlotte testified Gerald had smoked marijuana only in the laundry room or in a bedroom that was "away from the girls' room and from the living room." With respect to protecting the children from such exposure in the future, both testified that Gerald now smokes marijuana only in "the farthest point of the backyard," which is approximately "100 feet from the home."[6]

[6]Gerald testified that he previously had smoked marijuana inside his home only because he had been instructed to do so by

¶8 Apart from the parents' testimony, the only other evidence consisted of DCS's exhibits—the preliminary protective hearing (PPH) report prepared by DCS and drug-test reports for Gerald, Charlotte, and the children—all of which were admitted without objection. According to the PPH report, the children appeared "well cared for" and "on pace developmentally." The March 2015 "Hair 5 Drug Panel" test reports indicated hair samples for Gerald, Charlotte, M.M., and E.M. had been "positive" for THC without quantification. Levels of an unidentified "THC Metabolite" in the samples were reported as follows: Gerald, 202.96 pg/mg; Charlotte, 13.57 pg/mg; M.M., .55 pg/mg; and E.M., 1.06 pg/mg. The reports did not include any interpretation of these results.[7]

¶9 At the close of evidence, DCS argued the children were dependent as to Gerald because he "still would be under the influence while caring for the children while [Charlotte is] at work." According to DCS, although Gerald has a medical marijuana card, "marijuana, unlike alcohol or prescription drugs, is illegal and . . . [c]learly, . . . the parents, by using marijuana, have neglected their children."

¶10 During his closing argument, Gerald moved to dismiss the dependency petition, arguing there was no evidence to support a finding that the children were adversely affected by his cultivation or use of marijuana. Noting undisputed evidence that the children "were properly cared for and . . . developmentally appropriate," he argued evidence of his marijuana use, standing alone, was insufficient to support a finding of dependency and DCS had failed to show that his marijuana use adversely affected the children.

"law enforcement." *See* A.R.S. § 36-2802(C)(2) (AMMA does not authorize, and does not immunize qualified patients from penalty for, "[s]moking marijuana . . . [i]n any public place").

[7]The reports each referred to "1.5 inches (3.81 cm)–Head Hair" and provided only that "[a] positive result indicates that the drug was identified at a level equal to or greater than the listed cutoff and was confirmed by GC/MS/MS."

Specifically, he argued DCS failed to offer any evidence to show the relevance of the hair tests to the issue of neglect.

¶11 Similarly, Gerald challenged the sufficiency of the evidence to prove he places the children "at risk for neglect" because he had been "engaging in criminal activity in the home" by cultivating marijuana. He maintained it would be "speculative" to find an "unreasonable risk of harm to the child[ren]'s welfare" based on the possibility that a parent might be arrested, leaving the children "without a caregiver," citing undisputed evidence that neither parent has been charged for the cultivation discovered in March and that neither has cultivated marijuana since that time.

¶12 Children's counsel stated, "[t]here's no real dispute" that "the parents were very solid caregivers," noting "[t]he kids are developmentally doing very well [and are] happy and healthy." Nonetheless, he supported the dependency, citing "the consequences that come" from "inebriated caregivers" and the "issue . . . of safety moving forward and the commitment to sobriety."

¶13 The juvenile court granted DCS's petition from the bench, expressing various concerns about Gerald's ability to parent the children and finding DCS had met its burden of proving the allegations in the dependency petition, referring to "what has been shown by a preponderance of the evidence." In its signed minute entry, the court incorporated "its considerations [as stated] on the record" in support of its determination.

¶14 The juvenile court appears to have found that Gerald was purchasing marijuana in compliance with the AMMA at the time of adjudication, but counsel did not raise, and the court apparently did not consider, application of the discrimination prohibitions in the AMMA, which provide, in relevant part, that "[n]o person may be denied custody of . . . a minor, and there is no presumption of neglect or child endangerment for conduct allowed under [the AMMA], unless the person's behavior creates an unreasonable danger to the safety of the minor as established by clear and convincing evidence." A.R.S. § 36-2813(D).

¶15 We recognize that Gerald had violated the AMMA before the children were removed by cultivating marijuana without authorization. We remand the case for the juvenile court to expressly determine whether, at the time of the dependency determination, Gerald was using marijuana in compliance with the AMMA. If so, the court must give consideration to provisions of the AMMA in determining whether the evidence was sufficient to find the children dependent as to Gerald. For the benefit of the court's review on remand, we also address Gerald's arguments with respect to the allegations in the petition, as well as some of the considerations identified by the court in support of its ruling.

Discussion

¶16 "'[T]he right of parents to the custody of minor children is both a natural and legal right'" and a fundamental one. *In re Cochise Cty. Juv. Action No. 5666-J*, 133 Ariz. 157, 161, 650 P.2d 459, 463 (1982), *quoting Ariz. State Dep't of Pub. Welfare v. Barlow*, 80 Ariz. 249, 252, 296 P.2d 298, 300 (1956). But "if the welfare of the child is seriously jeopardized . . . the state may act and invade the rights of the parent and the family." *Id.* Thus, a dependency proceeding involves a "balancing process." *Id.* Although the "paramount interest" in such a proceeding "is always the best interest of the child," *id.*, "[t]he parent's interest" in custody "is protected and may not be changed by the state without due process of law and strict compliance with the statutes involved," *In re Maricopa Cty. Juv. Action No. JD-561*, 131 Ariz. 25, 27, 638 P.2d 692, 694 (1981).

¶17 Those statutes define a dependent child, in relevant part, as one "[i]n need of proper and effective parental care and control and who has no parent . . . willing to exercise or capable of exercising such care and control" or one "whose home is unfit by reason of abuse, neglect, cruelty or depravity by a parent." A.R.S. § 8-201(14)(a)(i), (iii). Neglect is defined, in relevant part, as "[t]he inability or unwillingness of a parent . . . of a child to provide that child with supervision, food, clothing, shelter or medical care if that inability or unwillingness causes unreasonable risk of harm to the child's health or welfare." § 8-201(24)(a).

¶18 As DCS suggests, quoting *In re Santa Cruz County Juvenile Action Nos. JD-89-006 & JD-89-007*, 167 Ariz. 98, 102, 804 P.2d 827, 831 (App. 1990), "[t]he focus of the dependency statutes is 'not on the conduct of the parents but rather the status of the child.'" Thus, in defining a dependent child as one who has no parent willing and able to parent effectively, *see* § 8-201(14)(a)(i), the statute "'does not proscribe any parental conduct or omission but is concerned only with the welfare of children and whether or not their essential needs are being met'"; "'the only inquiry is whether a child is in need of care which for any reason is not being provided.'" *Santa Cruz Cty. Nos. JD-89-006 & JD-89-007*, 167 Ariz. at 102, 804 P.2d at 831, *quoting In re Daniel, Deborah & Leslie H.*, 591 P.2d 1175, 1177 (Okla. 1979).

¶19 "On review of an adjudication of dependency, we view the evidence in the light most favorable to sustaining the juvenile court's findings." *Willie G. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 231, ¶ 21, 119 P.3d 1034, 1038 (App. 2005). But a determination of dependency may be based only on the allegations raised in a dependency petition, *Carolina H. v. Ariz. Dep't of Econ. Sec.*, 232 Ariz. 569, ¶ 12, 307 P.3d 996, 999 (App. 2013), and a finding that those circumstances have been proven to exist at the time of the adjudication hearing, rather than when the dependency petition was filed, *Shella H. v. Dep't of Child Safety*, 239 Ariz. 47, ¶ 1, 366 P.3d 106, 107 (App. 2016). We review de novo issues of law, including the court's interpretation and application of relevant statutes. *See Meryl R. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 24, ¶¶ 4, 10, 992 P.2d 616, 617-18 (App. 1999) (concluding juvenile court properly dismissed petition that failed to allege statutory elements of dependency).

Evidentiary Standard

¶20 Claims of insufficient evidence require us to review the record in the context of the applicable evidentiary standard. *Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, ¶ 6, 210 P.3d 1263, 1265 (App. 2009). As a general matter, "the preponderance of the evidence standard is the proper standard of proof in dependency proceedings." *Cochise Cty. No. 5666-J*, 133 Ariz. at 158-59, 650 P.2d at

460-61; *see also* A.R.S. § 8-844(C). Although there was no dispute that Gerald is a qualifying patient under the AMMA, and although much of his testimony and argument pertained to his medical use of marijuana pursuant to those statutes, counsel did not address the "clear and convincing" evidentiary standard included in the "Discrimination prohibited" portion of the AMMA. § 36-2813(D); *see supra* ¶ 14. Nor did Gerald raise this provision of the AMMA in his appeal.[8]

¶21 Ordinarily, any issue first raised in oral argument before this court would be deemed waived. *Mitchell v. Gamble*, 207 Ariz. 364, ¶ 16, 86 P.3d 944, 949-50 (App. 2004). "This rule, however, is a prudential one, and 'we have made exceptions to consider questions that are of great public importance or likely to recur.'" *Estate of DeSela v. Prescott Unified Sch. Dist. No. 1*, 226 Ariz. 387, ¶ 8, 249 P.3d 767, 769 (2011), *quoting In re Leon G.*, 200 Ariz. 298, ¶ 8, 26 P.3d 481, 484 (2001), *vacated on other grounds, Glick v. Arizona*, 535 U.S. 982 (2002); *see also Am. Family Mut. Ins. Co. v. Cont'l Cas. Co.*, 200 Ariz. 119, n.1, 23 P.3d 664, 667 n.1 (App. 2001) ("[W]hen we consider the interpretation and application of statutes, we cannot be limited to arguments made in the trial court if that would cause us to reach an incorrect result."); *State v. Mohajerin*, 226 Ariz. 103, ¶ 18, 244 P.3d 107, 112 (App. 2010) ("When a trial court predicates its decision on an incorrect legal standard, . . . it commits an error of law and thereby abuses its discretion.").

¶22 In *Gila River Indian Community v. Department of Child Safety*, we declined to apply waiver to the question of DCS's evidentiary burden in establishing "good cause" to deviate from placement preferences under the Indian Child Welfare Act, even though the issue had not been raised below or on appeal, and we remanded the case for reconsideration under the "clear and convincing evidence standard." 238 Ariz. 531, ¶¶ 1, 9, 363 P.3d 148, 149, 151 (App. 2015). We stated, "'In a case where the placement of a

[8]The parties did have an opportunity to address § 36-2813(D) at oral argument, however, having been advised, through a released draft decision, of the provision.

young child is at issue, allocation of the burden of proof in the trial court's assessment of good cause is an issue of vital importance and sufficient magnitude to warrant relaxation of the rule of [waiver].'" *Id.* ¶ 9, *quoting In re Alexandria P.*, 176 Cal. Rptr. 3d 468, 489 (Ct. App. 2014) (alteration in *Gila River*).

¶23 As in that case, the failure to consider the application of § 36-2813(D) to a dependency adjudication "affects important rights." *Gila River*, 238 Ariz. 531, ¶ 9, 363 P.3d at 151; *cf. Reed-Kaliher v. Hoggatt*, 237 Ariz. 119, ¶ 5, 347 P.3d 136, 138 (2015) (finding "the scope of immunity under AMMA is a question of statewide importance"). Accordingly, we exercise our discretion to address the issue, and we remand the case for the juvenile court's redetermination of dependency, as of the July 2015 adjudication, in light of § 36-2813(D).

The AMMA

¶24 "Medical marijuana use pursuant to AMMA is lawful under Arizona law," and, when possible, courts must harmonize the AMMA's provisions with pre-existing statutes. *Reed-Kaliher*, 237 Ariz. 119, ¶¶ 17, 25, 347 P.3d at 140, 142 (holding "AMMA bars courts from imposing a probation condition prohibiting the use of medical marijuana pursuant to AMMA"). In *Reed-Kaliher*, our supreme court explained, "Because marijuana possession and use are otherwise illegal in Arizona, the drafters sought to ensure that those using marijuana pursuant to AMMA would not be penalized for such use," and "[t]hey therefore included an immunity provision that protects users from being 'subject to arrest, prosecution or penalty in any manner, or denial of any right or privilege' as long as their use or possession complies with the terms of AMMA." *Id.* ¶ 7 (internal citation omitted), *quoting* A.R.S. § 36-2811(B).

¶25 In construing A.R.S. § 13-3408(G), which prohibits probationers convicted of certain drug crimes from using marijuana or other specified drugs "except as lawfully administered by a health care practitioner," the supreme court reasoned that "the legislature intended to distinguish between illicit use and lawful medicinal use of such drugs" and that the AMMA applied to afford

probationers, "even those convicted of violent crimes or drug offenses[,] . . . access to medical marijuana if it could alleviate severe or chronic pain or debilitating medical conditions." *Reed-Kaliher*, 237 Ariz. 119, ¶¶ 9, 17, 347 P.3d at 139-40. The "Findings" section of the AMMA, passed by voters as Proposition 203, reflects a similar intent, providing that "[s]tate law should make a distinction between the medical and nonmedical uses of marijuana" and stating that "the purpose of this act is to protect patients with debilitating medical conditions, as well as their physicians and providers, . . . if such patients engage in the medical use of marijuana." Initiative Measure, Prop. 203, § 2(G) (2010).[9]

¶26 This case presents the unusual circumstance in which DCS called only the children's mother to testify and its own evidence established that the children were "clean, healthy and well cared for." In this particular case involving Gerald's use of marijuana under the AMMA, we conclude some consideration of the AMMA is required.

¶27 On appeal, Gerald argues "[n]one of the subsections of the statute defining 'dependent child' apply to E.M. and M.M.," and he maintains "[n]o evidence presented at the adjudication hearing indicated how the health or welfare of the children was being adversely affected by the behavior of the parents." He challenges the juvenile court's reliance on § 8-201(24)(c)—which defines neglect to include "[a] determination by a health professional that a newborn infant was exposed prenatally to a drug or substance listed in [A.R.S. §] 13-3401," unless the exposure resulted from "medical treatment administered . . . by a health professional"—to find that "both children did test positive for marijuana, albeit at low levels"

[9]Although the court in *Reed-Kaliher* addressed the AMMA in the context of criminal law, the statutes apply in civil contexts as well, including specific, qualified discrimination prohibitions relevant in the areas of employment, school enrollment, landlord-tenant relations, medical care, and, as noted above, child-custody issues—including those involving allegations of neglect or endangerment. § 36-2813.

and that "any [marijuana] exposure to a three- or one-year-old presumptively is harmful." He further maintains the parents' "violat[ion of] the law by growing marijuana in their home, . . . in and of itself[,]" is an insufficient basis for an adjudication of dependency.

Marijuana Use

¶28 As Gerald suggested during oral argument, many of the juvenile court's statements in support of its finding of dependency reflect its concern that Gerald would be unable to safely supervise his children while "under the influence" of marijuana. Regarding Gerald's marijuana use, the juvenile court stated:

> I think it's pretty clear that [he] has a high level of marijuana usage. Often he's the only parent in the home with the children. He doesn't have a driver's license. And there's certainly some concerns around his ability to keep the children from an unreasonable risk of harm when children are in his care due to those factors; and due to the testimony that intimated that he continues to be under the influence of marijuana, even as he testified here in court today.

¶29 The juvenile court also expressed concerns about whether a "significant portion" of the family's "low level of income" would be used to purchase marijuana, adding, "It's just not clear . . . that [Gerald] has . . . sufficiently explored [other] pain management options." The court expressed its concern that, "if his back is really in a condition that's as serious as he described it, that he has to use marijuana daily over the course of seven years," it would seem "beneficial . . . to see a medical professional . . . and determine what other options might be available," such as a "surgical option."

¶30 The juvenile court acknowledged that, at the time of the dependency adjudication, Gerald was purchasing marijuana legally.

And there was no evidence that he was using marijuana for a purpose other than relieving chronic pain.

¶31 In addition, the juvenile court's statements, and DCS's arguments, appear to conflate concepts of drug use, drug impairment, being "under the influence," and drug abuse. For example, although the court cited "testimony that intimated that [Gerald] continue[d] to be under the influence of marijuana" while in court that day, that testimony did not pertain to the issue of impairment; Gerald said only that "[i]f pain management is being under the influence, then yes," he was.

¶32 We appreciate that a court properly may be concerned about a parent's use of a substance that may impair his faculties. Such substances, even if used legally, may be abused, and substance abuse may result in an inability to parent. *See* A.R.S. § 8-819(1) (providing "consideration shall be given to" a parent's "drug or alcohol abuse" when "determining if a child is neglected"). Evidence of an inability to parent, due to impairment from marijuana use, continues to be relevant under the AMMA. But we are aware of no Arizona authority suggesting evidence of a parent's legal use of a substance, standing alone, is sufficient to support a determination that his child is dependent. *See In re Pima Cty. Juv. Action No. J-31853*, 18 Ariz. App. 219, 222-23, 501 P.2d 395, 398-99 (1972) (dependency must be based on evidence that a "child's well-being [is] being endangered," rather than "an opinion of what an ideal home atmosphere *should* consist of"); *In re Am. V.*, 833 A.2d 493, 499 (D.C. 2003) ("'Generally, the mere existence of a parent's alcoholism or substance abuse does not constitute grounds for a [finding of neglect] unless the parent demonstrates an unwillingness or inability to properly care for the child.'"), *quoting* 1 Ann M. Haralambie, Handling Child Custody, Abuse, and Adoption Cases § 11.13, at 591 (1993) (alteration in *Am. V.*).

¶33 Thus, to prove dependency based on a parent-caregiver's being "under the influence" of marijuana, DCS was required to establish that his marijuana use renders him so impaired that he cannot safely parent his children. Although the juvenile court was not required to accept the parents' undisputed testimony

that they were able to care for their children safely, DCS still was required to present some evidence that they could not. *See City of Tucson v. Apache Motors*, 74 Ariz. 98, 107-08, 245 P.2d 255, 261 (1952) (although "court or jury is not bound by the uncontradicted evidence of an interested party," factfinder "not authorized to return verdicts which had no evidence to support them"); *cf. In re J.E.H.*, 384 S.W.3d 864, 868, 871 (Tex. Ct. App. 2012) (where hearing testimony limited to father and witness on his behalf, no competent evidence supported termination on ground that father "used a controlled substance in a manner that endangered [his child]").

¶34 We are unable to discern from the record the basis for the juvenile court's conclusion that Gerald's marijuana use was "high" and how Gerald's use related to his ability to parent his children.[10] Based on the evidence presented, including the hair-test results, the court reasonably could infer Gerald had marijuana in his system. But the test results provided no interpretive basis to conclude he exhibited a "high" level of use, particularly in the context of a qualifying patient's use of marijuana pursuant to the AMMA. Without evidence of impairment showing he could not discharge his parental responsibilities, *see* § 8-533(B)(3), or suggesting such impairment "pose[d] an imminent risk of injury or harm" to the children, *In re Pima Cty. Juv. Action No. 96290*, 162 Ariz. 601, 604, 785 P.2d 121, 124 (App. 1990), the court was not entitled to draw conclusions about his level of use or any associated

[10]We reject DCS's suggestion that the juvenile court could rely on "common sense" to determine Gerald could not safely parent his children due to his marijuana use. *See State ex rel. Montgomery v. Harris*, 234 Ariz. 343, ¶ 22, 322 P.3d 160, 164 (2014) (in context of driving under the influence prohibitions, "unlike alcohol, there is no generally applicable concentration that can be identified as an indicator of impairment for illegal drugs"). Nor are we persuaded by DCS's suggestion, based on isolated responses in their testimony, that Gerald and Charlotte "admitted that parents under the influence of marijuana would not be able to properly care for their children." When considered in context, and in the context of the record as a whole, the testimony cited does not support this characterization.

impairment. The court will have an opportunity to consider the record, and the limitations of the evidence presented by DCS, on remand.

¶35 We further conclude some of the juvenile court's considerations—that Gerald did not possess a driver's license and had not "sufficiently explored" alternative treatments—are not probative of a determination of dependency in this case. *See* § 36-2801(18) (physician's certification, required for registration of medical marijuana card pursuant to A.R.S. § 36-2804.02(A), need only include opinion that qualifying patient is "likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate" listed medical condition or associated symptoms). Similarly, the court's concern that Gerald's purchase of marijuana unreasonably burdens the family's "low level of income" is not relevant, absent allegations or evidence that the children have become "[d]estitute" or deprived of "the necessities of life." § 8-201(14)(a)(ii).

Cultivation of Marijuana

¶36 In contrast, there was clear support in the evidence for the juvenile court to find "a pattern of illegal activity" related to Gerald's cultivation of marijuana. Certain illegal activities are relevant to a dependency proceeding to the extent they deprive a child of needed supervision or expose her to an unreasonable risk of harm. We agree with Gerald, however, that the possibility that a parent may be arrested for illegal conduct, standing alone, is too attenuated to support a finding of an unreasonable risk of harm. *See Cochise Cty. No. 5666-J*, 133 Ariz. at 162, 650 P.2d at 464 (dependency not warranted "where the state seeks to take legal custody of presumably healthy children from their parents" on the basis that "if the children become ill sometime in the future, medical attention will not be provided").

¶37 Again, the proper frame of reference is the time of the adjudication hearing. *Shella H.*, 239 Ariz. 47, ¶ 1, 366 P.3d at 107. Although a parent's past conduct may be relevant in determining whether a child continues to be exposed to an unreasonable risk of

harm, or whether there exists a "substantiated and unresolved threat" of such harm, *id.* ¶ 16, a parent's remedial efforts, as well as changed circumstances, must be considered. In light of the juvenile court's acknowledgment that Gerald is now purchasing marijuana legally, we question the evidentiary basis for finding DCS had proven its allegation that Gerald presently "places the children at risk for neglect by engaging in criminal activity in the home" by cultivating marijuana.

Hair-Test Reports

¶38 Finding "both children did test positive for marijuana, albeit at low levels," the juvenile court considered § 8-201(24)(c), which permits a finding of neglect based on a child's in utero exposure to drugs under certain circumstances, as the legislature's expression of "concern[] about marijuana exposure, certainly in the context of children testing positive for marijuana and any other substance therein." The court also found "any [marijuana] exposure to a three- or one-year-old presumptively is harmful."

¶39 The juvenile court clearly did not abuse its discretion in considering evidence that the children had been exposed to marijuana based on their hair-test results and the parents' testimony. But Gerald argues the court erred in presuming harm from those reports when "no witness, expert or otherwise, testified about what the particular result[s] of the [hair] test[s] meant" or whether the results suggested the children suffered any "negative impact" from Gerald's use of marijuana.

¶40 When the hair tests were offered into evidence, Gerald did not object to their admission, notwithstanding the absence of supporting testimony. Rule 45(D), Ariz. R. P. Juv. Ct., provides:

> Prior to any dependency hearing, a report of any . . . substance abuse or similar evaluation of any party or participant, or any person with whom a child is or may be residing shall be admitted into evidence if the report has been disclosed to the parties

> pursuant to Rule 44(B)(1)[, Ariz. R. P. Juv. Ct.,] and the author of the report is available for cross-examination.

¶41 Gerald thus waived his right to challenge the foundation for the conclusions expressed in the test reports, and any reasonable inferences drawn from them, through cross-examination. *Cf. Pulliam v. Pulliam*, 139 Ariz. 343, 345-46, 678 P.2d 528, 530-31 (App. 1984) (stipulation to admit report without supporting testimony binding on appeal). Additionally, he waived any objection about how the tests were performed, the thresholds used, or the reliability of the reports' conclusions that THC and a THC metabolite were found in the children's hair samples in the amounts indicated.

¶42 Nonetheless, although he waived any challenge to the conclusions expressed in the reports, he did not waive his argument regarding their full probative value. *Cf. State v. Kuhs*, 223 Ariz. 376, ¶ 16, 224 P.3d 192, 196 (2010) (stipulation to admission of doctor's report in proceeding under Rule 11, Ariz. R. Crim. P., did not constitute stipulation to defendant's competency). He argued below that, although "we can all guess . . . [that] kids shouldn't be exposed to marijuana," DCS provided no evidence of "what these hair test levels mean in terms of [the girls'] level of exposure. These are just guesses that the Court would have to make."

¶43 Thus, he questions whether the juvenile court was justified in presuming, based on § 8-201(24)(c), that "any [marijuana] exposure to a three- or one-year-old presumptively is harmful." We agree with the court that § 8-201(24)(c) suggests legislative intent that "courts need to be concerned about marijuana exposure" in young children. And, although § 8-201(24)(c) requires a determination of in utero drug exposure "by a health professional," which was not supplied by the hair-test reports here, Gerald waived any challenge to the reliability of the hair-test reports by failing to object to their admission, and he did not contest their sufficiency to establish that the children had been exposed to second-hand marijuana smoke.

¶44 Absent the juvenile court's inference based on § 8-201(24)(c), we question whether DCS's submission of the children's hair-test reports alone, with the bare findings that THC and a THC metabolite were present in a child's hair sample, would be sufficient to establish their harmful exposure to marijuana. No evidence was presented addressing the interpretation of the children's hair-test results. Moreover, in a case involving a qualified patient under the AMMA, a presumption of harm based on a child's hair-test results alone, by analogy to the statutory presumption in § 8-201(24)(c), may be problematic. *See* § 36-2813(D); *compare* § 8-201(24)(c) (exception to presumption of harm for in utero exposure resulting from "medical treatment administered . . . by a health professional"), *with* § 13-3408(G) (exception to prohibition against probationer's use of drugs if "lawfully administered by a health care practitioner"), *and Reed-Kaliher*, 237 Ariz. 119, ¶ 17, 347 P.3d at 140 (exception in § 13-3408(G) encompassed medical marijuana use under AMMA).

¶45 We do not suggest expert testimony always would be required to establish children are being harmed by incidental exposure to marijuana. For example, a parent who regularly smokes marijuana in the presence of his children might well be found unable or unwilling to protect them from an unreasonable risk of harm from second-hand exposure, even under a heightened evidentiary standard. But that is not the evidence in this case.

¶46 The juvenile court will have an opportunity to consider these matters more fully on remand, including whether DCS had proven its allegation that, as of the time of the adjudication hearing, Gerald would continue to "neglect[] the children by exposing them to marijuana," notwithstanding testimony that he no longer smoked marijuana inside the home. *See Shella H.*, 239 Ariz. 47, ¶ 1, 366 P.3d at 107.

The Dissent

¶47 Although we appreciate our dissenting colleague's concern about the deference owed findings made by the juvenile court, many of the facts identified in the dissent, although supported by the record, were not mentioned by the court and do not appear relevant to the dependency petition's allegations as to Gerald. *Cf. Miller v. Bd. of Supervisors of Pinal Cty.*, 175 Ariz. 296, 299, 855 P.2d 1357, 1360 (1993) (when findings of fact required, "[a]n appellate court must be able to discern more than a permissible interpretation of the trial court's analysis"). The petition alleged only that he "places the children at risk for neglect by engaging in criminal activity in the home" by cultivating marijuana; that he "uses medical marijuana" and "fails to perceive how marijuana may impair his ability to parent due to marijuana's sedating effect"; and that he "neglects the children by exposing them to marijuana," based on the results of the hair-follicle test. DCS was required to prove those allegations as of the time of the dependency adjudication, *see Shella H.*, 239 Ariz. 47, ¶ 1, 366 P.3d at 107, and by the applicable statutory burden of proof, *see Denise R.*, 221 Ariz. 92, ¶ 6, 210 P.3d at 1265. Charlotte's testimony about her own past use of marijuana was not relevant to the allegations because DCS did not allege Gerald had failed to protect the children from Charlotte's conduct. Nor do we address whether such evidence proves Charlotte "is unable to parent due to substance abuse," because that issue is not before us on appeal.

Disposition

¶48 "A parent has a constitutional right to raise his or her child without government intervention," and "[t]he government may not interfere with that fundamental right unless a court finds . . . the parent is unable to parent the child for any reason defined by statute." *Carolina H.*, 232 Ariz. 569, ¶ 6, 307 P.3d at 998. For the reasons stated, we vacate the adjudication of dependency and remand the case for the juvenile court to determine whether, at the time of adjudication, Gerald was using marijuana in compliance with the AMMA and, if so, to give consideration to provisions of the

AMMA in determining whether the evidence supported a finding of dependency.

H O W A R D, Judge, dissenting:

¶49 Gerald illegally grew marijuana in a room accessible to his one- and three-year old children, exposed his children to second-hand marijuana smoke as shown by hair tests, and lacked insight into how marijuana usage affected his parenting as the primary caregiver. Therefore, I must respectfully dissent.

¶50 The majority relies on § 36-2813(D) to reach its conclusion and vacate the trial court's judgment. But Gerald did not raise this statute in the trial court. His failure prevented DCS from bringing forth evidence bearing on the issue and developing arguments on the issue. Accordingly, Gerald waived any argument based on this provision. *See Louis C. v. Dep't of Child Safety*, 237 Ariz. 484, ¶ 20, 353 P.3d 364, 369 (App. 2015); *see also Evans Withycombe, Inc. v. W. Innovations, Inc.*, 215 Ariz. 237, ¶ 15, 159 P.3d 547, 550 (App. 2006) (issues not timely raised deprive opposing side "opportunity to fairly respond"); *Trantor v. Fredrikson,* 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994) ("[A]bsent extraordinary circumstances, errors not raised in the trial court cannot be raised on appeal.").

¶51 Furthermore, Gerald did not rely on this statute here, or even cite to it in his opening brief. He has therefore waived any argument based on the AMMA provision on this separate ground as well. *See City of Tucson v. Clear Channel Outdoor, Inc.,* 218 Ariz. 172, ¶ 88, 181 P.3d 219, 242 (App. 2008) (appellate court will not address issues or arguments waived by party's failure to develop them adequately); *see also* Ariz. R. Civ. App. P. 13(a)(7) ("'argument' . . . must contain . . . Appellant's contentions concerning each issue presented for review, with supporting reasons for each contention, and with citations of legal authorities and appropriate references to the portions of the record on which the appellant relies"). And, at oral argument, when addressing the draft decision's footnote pointing out that Gerald had failed to raise this provision, he stated he did not believe it was applicable because "it was the combination

of all" the facts presented below that provided the basis for the dependency, and not solely his marijuana use.

¶52 Nevertheless, the majority has chosen to ignore the rules of waiver and rely entirely on a statute which it has injected into the case for the first time.[11] Similarly, the majority's analysis concerning whether waiver should apply comes solely from the majority, not from the parties. This court should be neutral and not advocate for one side or the other. *See Beaudett v. City of Hampton,* 775 F.2d 1274, 1278 (4th Cir. 1985) (courts are not advocates and not required to address claims not squarely presented to them); *see also Weisenburger v. City of St. Joseph,* 51 S.W.3d 119, 125 (Mo. Ct. App. 2001) ("'The function of the appellate court is to examine asserted trial-court error, not to serve as advocate for any party on appeal.'"), *quoting Mace v. Daye*, 17 S.W.3d 154, 156 (Mo. Ct. App. 2000); *Milam v. Milam*, 101 Ariz. 323, 326, 419 P.2d 502, 505 (1966) ("The members of this Court are not advocates and their obligation is to pass upon specific questions upon which counsel for the opposing party has had an opportunity to speak."); *Ramsey v. Review Bd. of Indiana Dep't of Workforce Dev.*, 789 N.E.2d 486, 487 (Ind. Ct. App. 2003) ("We will not become an advocate for a party, nor will we address arguments which are either inappropriate, too poorly developed or improperly expressed to be understood."), *quoting Terpstra v. Farmers and*

[11] The majority contends that because § 36-2813(D) was addressed in the draft decision distributed to the parties prior to oral argument, the parties were thus given the opportunity to address the provision. *Supra* n.8. The draft decision distributed to the parties, however, only briefly mentioned the clear and convincing evidence standard and, in a footnote, stated it was "unnecessary to consider the effect of § 36-2813(D), the discrimination prohibition section of the AMMA, which was not addressed below by counsel or the juvenile court and was not raised on appeal—although [Charlotte] appears to have alluded to the statute during her testimony." Accordingly, less than three minutes was spent on the provision during oral argument, and was only prompted by the court's own questions.

Merchants Bank, 483 N.E.2d 749, 754 (Ind. Ct. App. 1985). The majority's advocating for Gerald is inappropriate.

¶53 Furthermore, § 36-2813(D) is a red herring. It states: "No person may be denied custody of or visitation or parenting time with a minor, and there is no presumption of neglect or child endangerment for conduct allowed under this chapter, unless the person's behavior creates an unreasonable danger to the safety of the minor as established by clear and convincing evidence." *Id.* Gerald allowing his one- and three-year old children to be contaminated with a narcotic drug through second-hand smoke is not "conduct allowed under this chapter." Additionally, allowing the children access to the marijuana plants which were, notably, being grown in violation of the AMMA is not "conduct allowed under this chapter."

¶54 By way of illustration, the Second Amendment to the United States Constitution protects the right to "keep and bear arms." But that right is "not unlimited," and does not "protect the right of citizens to carry arms for *any sort* of confrontation, just as . . . the First Amendment [does not] protect the right of citizens to speak for *any purpose*." *District of Columbia v. Heller*, 554 U.S. 570, 595, 626 (2008); *State v. Carew*, 47 S.C.L. 498, 547 (S.C. Err. 1866) (J. Aldrich, dissenting) ("The freedom of speech does not mean slander; the freedom of the press does not mean libel; the right to petition does not mean the impertinent interference of the people of one State with the domestic regulations of the people of another State; the right to bear arms does not mean the right to shoot any man who may offend you."). Thus, the right to bear arms is not a defense to aggravated assault if the bearer shoots someone else. In this case, Gerald has the right to use marijuana for medical purposes, but that right does not extend to contaminating small children with second-hand marijuana smoke or exposing them to illegally cultivated marijuana plants.

¶55 Finally, as discussed in greater detail below, if Gerald had argued this statute to the juvenile court, it could have easily found that exposing a one- and three-year old to second-hand marijuana smoke and allowing them access to the plants created "an unreasonable danger to the safety" of the children by clear and

convincing evidence. Thus, not only is any argument based on § 36-2813 waived but, in any event, it is of no benefit to Gerald.

¶56 We "will not disturb a dependency adjudication unless no reasonable evidence supports it." *Willie G.*, 211 Ariz. 231, ¶ 21, 119 P.3d at 1038. The juvenile court is also "in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts." *Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 4, 100 P.3d 943, 945 (App. 2004). "The primary consideration in a dependency case is always the best interest of the child," and therefore the juvenile court "is vested with 'a great deal of discretion.'" *Ariz. Dep't of Econ. Sec. v. Superior Court*, 178 Ariz. 236, 239, 871 P.2d 1172, 1175 (App. 1994), *quoting Cochise Cty. No. 5666–J*, 133 Ariz. at 160, 650 P.2d at 462. The evidence here supports the juvenile court's ruling.

¶57 At the inception of this case, police found and removed twelve marijuana plants which were being illegally grown inside Gerald and Charlotte's bedroom. The bedroom was not locked and therefore was accessible to the children. Although Gerald stated he would not allow the children to go into that room, Charlotte agreed "they could go into that room if they wanted to" because it was not locked. Gerald and Charlotte insisted their children had not been exposed to marijuana, but three-year-old M.M. and one-year-old E.M. tested positive for THC and THC metabolites in hair tests.

¶58 Gerald initially told the DCS investigator that he smoked marijuana every hour, but later said it was only five to six times per day. At the hearing, he claimed he had cut back to smoking marijuana two times per day. He admitted to the DCS investigator he had smoked marijuana prior to their interview in order to stay on "'schedule'" and admitted he had smoked marijuana prior to the initial Team Decision Meeting. He also testified that he continued to illegally cultivate marijuana after his right to do so had been revoked because it was his "medicine," even though he could afford to purchase it from a third-party.

¶59 Gerald cared for the children while Charlotte worked and thus watched the children while under the influence of marijuana. He stated he believed that he was a better parent while

using marijuana than most people are when they are sober. Charlotte similarly believed his marijuana usage did not impact his ability to parent in any way, but agreed it would be preferable that he not be under its influence while watching the children.

¶60 Charlotte did not have an AMMA card. In 2013, she illegally used marijuana during her pregnancy with E.M. up until a few days of her birth. E.M. tested positive for marijuana at birth. During the pendency of this case, Charlotte became pregnant and again continued using marijuana. Although Gerald "disapproved" of this practice, he was either unwilling or unable to prevent Charlotte from doing so. She continued to use marijuana illegally through mid-June 2015, despite her children's removal in March 2015.

¶61 Charlotte testified marijuana was her "medicine" for extreme nausea even though she had not yet obtained an AMMA card authorizing her usage of it. At the July hearing, however, Charlotte testified that she had decided to stop seeking an AMMA card, had not used marijuana in approximately two to three weeks and would not use it again because she "didn't think [DCS was] going to go away if [she] did anything otherwise. And [she] want[ed DCS] to go away."

¶62 Charlotte and Gerald admitted they had allowed the children to be exposed to second-hand smoke and Gerald agreed it was not a healthy thing. Gerald testified he understood both parents "being under the [e]ffects of marijuana could put [his] children at risk" and he and Charlotte had agreed that situation would not happen in the future. He further testified he had smoked marijuana the morning of the hearing and could still feel its effects during his testimony.

¶63 The DCS investigator, based on his interactions with Gerald and Charlotte, stated he was concerned that the parents had failed to "understand or appreciate that their ability to parent [was] impaired by their illegal substance use." He was further concerned that Gerald was illegally cultivating marijuana in the home and that Charlotte was not able to prevent the illegal activity or protect the children.

¶64 The essence of this case is that Gerald exposed his young children to the illegal cultivation of marijuana plants, exposed his children to second-hand marijuana smoke, and lacked insight into how his marijuana usage affected his ability to be their primary caregiver. The juvenile court correctly found the children dependent and in need of protection.

¶65 Gerald, however, points out that he and Charlotte testified that they had changed their marijuana consumption habits to prevent harming the children in the future and the majority refers to "the parents' undisputed testimony that they were able to care for their children safely." *Supra* ¶ 33. But the juvenile court is the sole judge of credibility and must decide whether to accept their testimony. *See Oscar O.*, 209 Ariz. 332, ¶ 4, 100 P.3d at 945; *see also Apache Motors*, 74 Ariz. at 107, 245 P.2d at 261 (fact finder "not bound by uncontradicted evidence of an interested party" when evidence supports ruling); *Kocher v. Dep't of Revenue*, 206 Ariz. 480, ¶ 10, 80 P.3d 287, 289 (App. 2003) (same).

¶66 Gerald and Charlotte were long-term marijuana users. They had cultivated the plants illegally. Charlotte had continued to use marijuana during her pregnancies and Gerald was either unwilling or unable to stop her. Gerald's testimony shows that he continued, at the time of the hearing, to be unable to assess how his marijuana usage affected his ability to be the primary caregiver to his children. The juvenile court was also able to observe first-hand how marijuana affected Gerald. And the court stated that it "didn't really hear in [Charlotte's] testimony that she[had] committed to an extended period of abstinence based on her demeanor when she testified, and her comments when she testified." We cannot second-guess the juvenile court's assessment of their credibility. *Shella H.*, 239 Ariz. 47, ¶ 15, 366 P.3d at 109. Based on the evidence at the dependency hearing, the court was well-justified in doubting Gerald's and Charlotte's testimony regarding the changes they had made at home.

¶67 The majority improperly has substituted its credibility determinations for that of the trial court to reach its result. Although the trial court must consider the circumstances that existed at the time of the hearing, *id.* ¶ 1, it is not obligated to accept the testimony

of long-term, heavy marijuana users that they were going to permanently reform their actions when they continued to insist they had done nothing wrong in the first place. The trial court alone makes those determinations. *Id.*

¶68 Finally, the majority considers some of the juvenile court's rulings problematic, but also concludes that some of its findings were supported by the record, such as Gerald's "pattern of illegal activity" and "the children['s exposure] to second-hand marijuana smoke." *Supra* ¶¶ 36, 38-39, 43-45. Even if some of the court's "concerns" as expressed in the transcript are problematic, its actual ruling is not dependent on them and is clear and concise: "I do find that the Department proved the factual allegations set forth in the dependency petition as to both the mother and the father. And I do find that both children are dependent with respect to both parents." Thus, the majority's apparent contention that the dependency was based solely on Gerald's marijuana use, *supra* ¶¶ 32-33, is inaccurate and not supported by the record. Even Gerald himself conceded that was not the sole basis for the decision at oral argument.

¶69 "We will affirm the juvenile court for any correct reason supported by the record." *Navajo Nation v. Ariz. Dep't of Econ. Sec.*, 230 Ariz. 339, ¶ 14, 284 P.3d 29, 34 (App. 2012); *see also In re Maricopa Cty. Juv. Action No. JS-8287*, 171 Ariz. 104, 110-11, 828 P.2d 1245, 1251-52 (App. 1991). Because the court's actual ruling goes to the essence of this case and the allegations contained in the petition, it should be affirmed. *See Carolina H.*, 232 Ariz. 569, ¶ 7, 307 P.3d at 998; *see also* A.R.S. § 8-844(C)(2) (court must dismiss dependency petition if allegations contained in petition not proven by preponderance of the evidence).

¶70 The majority complains that I have included facts concerning Charlotte in the dissent, alleging that the trial court did not make findings of fact concerning this and that such facts are outside the issues as tried below. *Supra* ¶ 47. Both of these complaints are incorrect.

¶71 The petition alleged that the children were dependent "due to abuse and/or neglect" as to both parties. Extensive

evidence concerning the mother's illegal drug use was admitted in evidence without objection. In closing, the state noted mother's illegal activity and the slim chances that she would be able to reform her actions overnight as she claimed. The attorneys for the minors, father and mother also commented on the mother's illegal activity.

¶72 Following the hearing, the trial court noticed "a pattern of illegal activity, criminal activity, notwithstanding that there currently are not . . . charges pending against either parent." Further, he focused on the mother: "And the mom's abstinence is very recent. . . . It's very recent, in the last few weeks, and I do have some concern, though, with respect to the mother's level of commitment to maintain that abstinence." He spent two full paragraphs talking solely about the mother and her problems. And he actually found the children dependent as to both parents.

¶73 The trial court's findings concerning the mother's extensive illegal drug use and the unlikelihood of her instant rehabilitation support the facts contained in this dissent concerning the mother. And, as the majority admits, the facts are supported by the record. *Supra* ¶ 47.

¶74 The issue of mother's inability to parent due to substance abuse is not at issue here because the mother has not challenged the trial court's finding that the children are dependent as to her, nor could she do so successfully. But she is a member of the household she and Gerald shared with their children. And her continued illegal drug use was before the court. Evidence of Gerald's parenting in light of Charlotte's illegal activities are relevant to the petition's allegations that the children are dependent as to Gerald due to abuse and neglect, that Gerald places the children at risk by "engaging in criminal activity in the home," and "by exposing them to marijuana." This evidence was appropriate for the trial court and this court to consider. *See* § 8-201(14); *see also* Ariz. R. Evid. 401; Ariz. R. P. Juv. Ct. 45.