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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: 2/28/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

GABRIEL J.,) No. 1 CA-JV 12-0233
)
Appellant,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
)
ARIZONA DEPARTMENT OF ECONOMIC) (Not for Publication -
SECURITY, GABRIEL J., JR., and) Ariz. R.P. Juv. Ct. 103(G);
GIANA J.,) ARCAP 28)
)
Appellees.)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. JD-21275

The Honorable Joan Sinclair, Judge

AFFIRMED

David W. Bell
Attorney for Appellant

Mesa

Thomas C. Horne, Arizona Attorney General Phoenix
By Nicholas Chapman-Hushek, Assistant Attorney General
Attorneys for Appellees

H A L L, Judge

¶1 Gabriel J. (Father), appeals the juvenile court's
order denying his oral motion to return his two minor children

to his custody pursuant to the Rules of Procedure for the Juvenile Court (Rule) 59. For the following reasons, we affirm.

FACTUAL¹ AND PROCEDURAL BACKGROUND

¶12 On January 6, 2012, the Arizona Department of Economic Security (ADES) filed a petition that alleged the children were dependent as to Father and the children's mother, Nicole Kristine Rosner (Mother). The petition alleged Father was neglecting the children and unable to parent due to substance abuse. On March 7, 2012, the juvenile court found the children dependent as to Father and Mother. The juvenile court further found that out-of-home care was "necessary to protect the children's welfare," but ordered that Father could visit the children "at the home of grandparents." The children were placed in the custody of maternal grandmother.

¶13 At a report and review hearing held on August 17, 2012, Father's attorney orally requested that the children be returned to Father's custody pursuant to Rule 59. On October 4, 2012, the juvenile court held a hearing on Father's motion. The following evidence was presented.

¹ We review the evidence and draw all reasonable inferences in the light most favorable to upholding the juvenile court's factual findings. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 282, ¶ 13, 53 P.3d 203, 207 (App. 2002).

¶14 Father is twenty-six years old and began using illegal drugs when he was thirteen. On November 11, 2011, Father was arrested for driving under the influence (DUI) and tested positive for methamphetamines, morphine, and codeine. Shortly thereafter, Father enrolled in an inpatient substance abuse treatment program called Teen Challenge. Father testified that he enjoyed the program and the "positive" environment.

¶15 In January 2012, Child Protective Services (CPS) opened a formal case for the children. Because Father submitted random urinalysis (UA) at Teen Challenge, CPS did not require him to participate in drug testing at TASC. On May 22, 2012, after participating in Teen Challenge for several months, Father was expelled from the program because he submitted two UAs that tested positive for opiates. The same day, Father voluntarily submitted a UA to TASC, which tested negative. The next day, Father voluntarily provided a hair sample at Southwest Laboratories that also tested negative. Father testified that the Teen Challenge UAs were false positives, as demonstrated by the negative UAs submitted to TASC on the same day and Southwest Laboratories the following day.

¶16 Father acknowledged that, after he was removed from the Teen Challenge program and required to submit UAs to TASC, he failed to do so on at least three occasions. Father explained that "nobody's perfect." Father also acknowledged

that, following his expulsion, Teen Challenge sent him a letter welcoming him to return to the program and start anew, and he chose not to re-enter the program. Father testified that he has not used drugs since November 11, 2011, the date of his DUI arrest.

¶7 When questioned about his relationship with the children, Father admitted that he missed a visit with his children because he chose to go on a hunting trip during a scheduled visit. He also admitted that he is only purchasing items for the children "one or two times a month" and that he has not provided the items maternal grandmother has requested.

¶8 The case manager assigned to the case, Delores Floyd, testified that Father was dismissed from his inpatient substance abuse treatment program at Teen Challenge because he submitted to two UAs that tested positive for opiates. Floyd acknowledged that Father did not submit any positive UAs to TASC, but noted that Father did fail to provide mandatory UAs on at least three occasions, which are deemed "positive" tests by ADES. Floyd also opined that a person with "a substantial history of substance abuse" needs to demonstrate sobriety for at least twelve to fifteen months before children can be safely returned to his care. Accordingly, Floyd testified that she believes Father's "short-lived sobriety" is insufficient to remove the

substantial risk to the children presented by his extensive history of drug abuse.

¶9 After taking the matter under advisement, the juvenile court denied Father's Rule 59 motion, stating in relevant part:

The Court believes the children are still at risk for abuse or neglect due to father's longstanding substance abuse problem if returned to him at this time. He needs to complete a substance abuse program and continue to demonstrate sobriety.

¶10 Father timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 8-235 (2007) and Rule 103(A) of the Arizona Rules of Procedure for the Juvenile Court.

DISCUSSION

¶11 Juvenile courts have "substantial discretion" when placing a dependent child because the court's primary consideration is the child's best interest. See *Antonio P. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 402, 404, ¶ 8, 187 P.3d 1115, 1117 (App. 2008). This court therefore reviews the juvenile court's placement order for a dependent child for an abuse of discretion. *Antonio P.*, 218 Ariz. at 404, ¶ 8, 187 P.3d at 1117.

¶12 The juvenile court is "in the best position to weigh the evidence, judge the credibility of the parties, observe the parties, and make factual findings." *Pima County Dependency Action No. 93511*, 154 Ariz. 543, 546, 744 P.2d 455, 458 (App.

1987). Therefore, we do not reweigh the evidence, but look only to determine if there is evidence to support the juvenile court's ruling. *Maricopa County Juv. Action No. JV-132905*, 186 Ariz. 607, 609, 925 P.2d 748, 750 (App. 1996). We will uphold the juvenile court's ruling "absent an abuse of discretion or unless the court's findings of fact were clearly erroneous, i.e., there is no reasonable evidence to support them." *Id.*

¶13 Pursuant to A.R.S. § 8-514(B) (2007), a child "shall" be placed "in the least restrictive type of placement available, consistent with the needs of the child." As set forth in subsections 1-3, the order of placement "preference" is: (1) with a parent, (2) with a grandparent, (3) with another member of the child's extended family. A.R.S. § 8-514(B). "The statute clearly states that the order of placement is a preference, not a mandate." *Antonio P.*, 218 Ariz. at 405, ¶ 12, 187 P.3d at 1118. "Section 8-514(B) provides the juvenile court with the legislature's preference for where or with whom a child is placed but it does not mandate that the order of preference be strictly followed when a placement is not consistent with the needs of the child." *Id.* Instead, "[t]he statute requires only that the court include placement preference in its analysis of what is in the child's best interest." *Id.*

¶14 As set forth in Rule 59, a parent "may file a motion with the court requesting return of the child to the custody of

the parent[.]” Upon the filing of such a request, “[t]he court shall set a hearing to determine whether return of the child would create a substantial risk of harm to the child’s physical, mental or emotional health or safety.” Ariz. R.P. Juv. Ct. 59(A). The court shall return the child to the parent “if the court finds, by a preponderance of the evidence that return of the child would not create a substantial risk of harm to the child’s physical, mental or emotional health or safety[.]” Ariz. R.P. Juv. Ct. 59(E).

¶15 Here, Father testified that he used illegal drugs for thirteen years, half of his life. He presented evidence demonstrating that he has made efforts to achieve sobriety by participating in a drug abuse treatment program. He was removed from that program, however, after submitting two UAs that tested positive for opiates. Although Father contends that the two Teen Challenge UAs were false positives, and he introduced evidence of two negative drug tests taken the same day and the day following the Teen Challenge positive UAs, it was for the juvenile court, as the fact-finder, to determine the weight and credibility of the evidence. Moreover, Father acknowledged that he chose not to re-enter the Teen Challenge program and he has not completed any other drug abuse treatment program. Father also failed to submit three required UAs to TASC, which are deemed positive tests, and missed numerous mandatory telephone

calls to TASC to determine whether testing was required. We therefore conclude there was ample reasonable evidence to support the juvenile court's finding that the "children are still at risk for abuse or neglect" if returned to Father's custody at this time and the court did not abuse its discretion by denying Father's Rule 59 motion.

CONCLUSION

¶16 For the foregoing reasons, we affirm the juvenile court.

 /s/
PHILIP HALL, Judge

CONCURRING:

 /s/
MARGARET H. DOWNIE, Presiding Judge

 /s/
MAURICE PORTLEY, Judge