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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 05/24/2011  
RUTH A. WILLINGHAM,  
CLERK  
BY: GH

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

BARRY W., BRENDA W., ) 1 CA-JV 10-0213  
)  
Appellants, ) DEPARTMENT A  
)  
v. ) **MEMORANDUM DECISION**  
)  
ARIZONA DEPARTMENT OF ECONOMIC ) (Not for Publication -  
SECURITY, DIAMOND M., ) Ariz. R. P. Juv. Ct.  
) 103(G); ARCAP 28)  
Appellees. )  
)  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. JD16149

The Honorable Christopher A. Coury, Judge

**AFFIRMED**

Thomas C. Horne, Attorney General Phoenix  
By David M. Osterfeld, Assistant Attorney General  
Attorneys for Appellee  
Arizona Department of Economic Security

Popilek & Jones, P.A. Scottsdale  
By John L. Popilek  
Attorneys for Appellants

**T H O M P S O N**, Judge

¶1 Brenda W. and Barry W. appeal the juvenile court's order denying their motion for change of physical custody of Diamond M., a minor. For the following reasons, we affirm.

#### I. FACTUAL AND PROCEDURAL HISTORY

¶2 Amber M. (mother) is the biological mother of Diamond, born September 23, 2005. Appellant Brenda W. is Diamond's maternal grandmother, and appellant Barry W. is Diamond's maternal step-grandfather (collectively grandparents). In November 2007, grandparents filed a private dependency petition, alleging that mother neglected Diamond and Diamond's sister. The Arizona Department of Economic Security (ADES) removed the children and placed them with grandparents for a few days. Ultimately, ADES did not agree with grandparents' petition and would not substitute in as the petitioner. Grandparents moved to dismiss their dependency petition, and the juvenile court granted the motion.

¶3 Approximately one year later, grandparents filed a second private dependency petition, alleging, inter alia, that Diamond and her siblings were dependent as to mother because mother failed to seek medical attention for Diamond's infected foot, failed to secure Diamond's seat belt, slapped Diamond, and left her children in the care of an individual who associated with drug users and child predators. Grandparents were awarded temporary custody of Diamond. One day later, ADES removed the children upon discovering

that grandparents were involved in a domestic violence incident in May 2008, resulting in Barry's arrest for disorderly conduct. Specifically, Brenda had been drinking alcohol, and Brenda and Barry pushed each other around their home, putting a hole in the bedroom wall. Diamond, her siblings, and mother were all present at the home during grandparents' fight.

¶14 ADES was also concerned that Barry had a history of substance abuse and was convicted for possession of marijuana in 1998. He was also convicted in 2002 for possession of methamphetamines and cocaine and misconduct involving weapons. Additionally, ADES reported that Brenda has a history of domestic violence and was arrested in 2000 for assault committed upon a minor who had allegedly attacked her daughter.

¶15 In May 2009, ADES filed a motion for change in physical custody of Diamond to her maternal aunt and uncle. The court ordered the change of placement, but Diamond was placed back in the custody of ADES just one month later.

¶16 On January 19, 2010, Brenda enrolled in the Northwest Organization for Voluntary Alternatives (NOVA) substance-abuse treatment program. The same day, grandparents sought physical custody of Diamond because they learned ADES was seeking a change in mother's case plan from family reunification to severance and adoption. Grandparents notified the court that they had recently

sought counseling and would continue with it if deemed necessary by the court.

¶17 The juvenile court denied grandparents' motion to change physical custody. In May 2010, ADES issued its assessment of whether grandparents qualified as kinship foster-care placement for Diamond. The assessment discouraged Diamond's placement with grandparents based upon Brenda's "extensive" history of domestic violence and alcohol abuse in her marriages, Barry's criminal history, and the concern that the services that grandparents were participating in were only recently implemented.

¶18 Grandparents filed a motion asking the court to review ADES' denial of kinship placement. The juvenile court held an evidentiary hearing to consider grandparents' arguments. Barry testified that he had been alcohol-free since 2002 and out of jail since January 2004. Barry further testified that he had taken three parenting classes three weeks prior to the hearing and that those classes constituted his entire experience with raising a child.

¶19 Brenda testified that she and Barry did not begin to better themselves through marriage counseling, parenting classes, and substance-abuse classes until January 2010, after the juvenile court denied their second request to have Diamond placed in their care. Brenda further testified that she and Barry had lived in six

different residences over the course of the case.

¶10 The juvenile court took the matter under advisement and ordered ADES to conduct a best-interests assessment, specifically addressing the child's placement and wishes in living with grandparents and considering grandparents as possible placements. The court noted that although grandparents' criminal histories "are factors the Court will consider in assessing placement, they are not dispositive."

¶11 In September 2010, the juvenile court held a pretrial conference on ADES' motion for appointment of a permanent guardian and on grandparents' motion for change in physical custody. The court told the parties it had considered the evaluations of grandparents and the best-interests assessment, and that many hours were spent reviewing all of the evidence. The court explained that it had recently ordered services for grandparents in July 2010 to "give effect to the [statutory] placement preferences" and to allow them to prove that they could "be the immediate primary parents and care for Diamond."

¶12 Ultimately, the juvenile court denied grandparents' motion for change of physical custody, finding that placing her with grandparents would not serve Diamond's best interests. The court reasoned that it did not believe that grandparents could then, or in the immediate foreseeable future, safely provide

Diamond the permanency and stability that she needed. The court noted that grandparents required more time to allay the risks associated with a child in their care, and there is "no guarantee that lingering concerns ever would be resolved." Because Diamond had been in out-of-home care for more than fifteen months, the trial court determined that she deserved immediate permanency and stability.

¶13 Appellants filed a timely notice of appeal. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) §§ 8-235 (2007), 12-120.21(A)(1) (2003), and -2101(B) (2003).

## II. DISCUSSION

¶14 We review placement orders of dependent children for an abuse of discretion. *Antonio P. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 402, 404, ¶ 8, 187 P.3d 1115, 1117 (App. 2008). An abuse of discretion is "discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Quigley v. City Court of City of Tucson*, 132 Ariz. 35, 37, 643 P.2d 738, 740 (App. 1982).

¶15 Grandparents argue that the juvenile court abused its discretion by continuing Diamond's placement with individuals having no biological relationship to her. Section 8-514(B) requires ADES to "place a child in the least restrictive type of placement available, consistent with the needs of the child" and

provides an "order for placement preference" as follows:

1. With a parent.
2. With a grandparent.
3. In kinship care with another member of the child's extended family, including a person who has a significant relationship with the child.
4. In licensed family foster care.

Section 8-845(A)(2) states that the juvenile court may award a dependent child to a grandparent "unless the court has determined that such placement is not in the child's best interests."

¶16 Grandparents contend that the juvenile court "disqualified them from any sort of consideration whatsoever, based primarily on a single, non-injurious incident of a marital spat." We find no support for grandparents' contention in the extensive record before us. The trial court noted the domestic violence incident of May 2008, but specifically highlighted the circumstances that "have changed" since the incident:

- Grandparents attended marriage counseling and made "notable progress";
- An additional 18 months passed without any additional incidents of domestic violence, and with "uncontested representations" that grandparents are living a drug-free and alcohol-free life;
- Diamond requested to live with her mother and grandparents; and,
- Brenda completed a parent education program, and Barry was enrolled in the

same.

Furthermore, in denying grandparents' motion for change in physical custody, it stated that the bond between grandparents and Diamond is important, and advised ADES that it should be "mindful that the Court will have difficulty finding termination to be in the juvenile's best interests unless the rights to continued visitation with [grandparent] is specifically preserved on an ongoing basis."

¶17 As we stated in *Antonio P.*, "the order of placement is a preference, not a mandate," and the order of preference is not to be strictly followed if a placement is not consistent with the child's needs. 218 Ariz. at 405, ¶ 12, 187 P.3d at 1118. The juvenile court "is not obligated to find that a placement with a grandparent is *not* in the child's best interest before placing the child" with another person. *Id.*

¶18 The juvenile court in this case properly considered the best interests of Diamond in conducting an evidentiary hearing to review ADES' denial of kinship placement, ordering a best interests assessment, ordering services for grandparents, and specifically considering grandparents as a placement for Diamond to "give effect to the [statutory] placement preferences." Juvenile courts have substantial discretion in making child placement determinations because the court's primary concern is the child's best interests. A.R.S. § 8-845(A)(2) (2007); *Willie G. v. Ariz. Dep't of Econ.*

Sec., 211 Ariz. 231, 235, ¶ 21, 119 P.3d 1034, 1038 (App. 2005) (the juvenile court has "a great deal of discretion" because the child's best interests is always the primary concern in dependency cases). We hold the trial court did not abuse its discretion in denying grandparents' motion for change in physical custody of Diamond and finding that her placement with grandparents was not in her best interests.

**III. CONCLUSION**

¶19 For the foregoing reasons, we affirm.

/s/

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JON W. THOMPSON, Judge

CONCURRING:

/s/

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PHILIP HALL, Presiding Judge

/s/

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LAWRENCE F. WINTHROP, Judge