

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

GRACE M.,
Appellant,

v.

DEPARTMENT OF CHILD SAFETY AND K.F.-M.,
Appellees.

No. 2 CA-JV 2020-0090
Filed December 15, 2020

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NOT FOR PUBLICATION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. JD20200161
The Honorable Joan L. Wagener, Judge

AFFIRMED

COUNSEL

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Counsel for Appellant

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By Cathleen E. Fuller, Assistant Attorney General, Tucson
Counsel for Appellee Department of Child Safety

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MEMORANDUM DECISION

Presiding Judge Staring authored the decision of the Court, in which Chief Judge Vásquez and Judge Brearcliffe concurred.

STARING, Presiding Judge:

¶1 Grace M. appeals the juvenile court's August 2020 order adjudicating her daughter, K.F.-M., born in February 2020, dependent on the grounds of substance use.¹ She challenges the sufficiency of the evidence to support the dependency finding. She also contends the court applied the wrong burden of proof under A.R.S. § 36-2813(D) because she was a registered qualifying patient under the Arizona Medical Marijuana Act (AMMA). For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to affirming the juvenile court's findings. *See Louis C. v. Dep't of Child Safety*, 237 Ariz. 484, ¶ 2 (App. 2015). In July 2019, while pregnant, Grace tested positive for methamphetamine, opiates, and marijuana. Four months later, she admitted to regular use of heroin and methamphetamine. In February 2020, the Department of Child Safety (DCS) received a report that K.F.-M. was born "substance exposed" to a variety of illegal drugs, including heroin, methamphetamine, and amphetamine. Grace did not have stable housing and relied on G.P. and her husband, P.P., whom Grace considers to be her adoptive parents, for support. Grace had lived with G.P. and P.P. off-and-on for years, but they did not want her living with them if she was using illegal drugs.

¶3 In March 2020, DCS filed a dependency petition, alleging K.F.-M. was dependent as to Grace due to abuse or neglect. The petition chronicled Grace's drug use and asserted she was unable to meet K.F.-M.'s basic needs. K.F.-M. was placed with G.P. and P.P., and Grace was allowed to stay in their home, but she was limited to supervised contact with K.F.-M. In the months that followed, Grace participated in random drug tests, all of

¹The juvenile court also adjudicated K.F.-M. dependent as to her father, but he is not a party to this appeal.

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which were negative. However, she missed a few tests “due to transportation reasons.” Grace also participated in a methadone program, but she failed to complete individual therapy, substance abuse education and relapse prevention, and parenting classes.

¶4 The juvenile court held a four-part contested dependency hearing in June, July, and August 2020. G.P. testified that the plan was for Grace and K.F.-M. to continue residing with them, regardless of DCS’s involvement, and that Grace was “doing in [her] mind everything that she needs to be doing” in terms of caring for K.F.-M. By contrast, the DCS case manager testified that Grace had “taken the first step” in making a change but that he was not yet comfortable placing K.F.-M. with Grace based on her substance abuse and failure to complete her classes. After closing arguments, DCS made an oral motion to re-open the evidence. The parties then stipulated that the new evidence was that Grace had tested positive for THC on August 4, 5, and 12, 2020, and that she had become a registered qualifying patient under the AMMA on July 29, 2020. The court found DCS had proven by a preponderance of the evidence that K.F.-M. was dependent based on Grace’s “substance use.” The court noted, in part, that DCS had not had “an opportunity to safely plan around” Grace’s newly acquired AMMA status. This appeal followed.

Sufficiency of the Evidence

¶5 Grace argues that the juvenile court erred in finding K.F.-M. dependent when Grace had “remedied [the] issues in the dependency petition and proved at trial that she was stabilized in sobriety and had the ability and resources to parent.” We review a dependency adjudication for an abuse of discretion, “deferring to the juvenile court’s ability to weigh and analyze the evidence.” *Shella H. v. Dep’t of Child Safety*, 239 Ariz. 47, ¶ 13 (App. 2016). Accordingly, “[w]e will only disturb a dependency adjudication if no reasonable evidence supports it.” *Id.*

¶6 As defined in A.R.S. § 8-201(15)(a), a dependent child includes one:

- (i) In need of proper and effective parental care and control and who has no parent or guardian, or one who has no parent or guardian willing to exercise or capable of exercising such care and control.

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(iii) A child whose home is unfit by reason of abuse, neglect, cruelty or depravity by a parent, a guardian or any other person having custody or care of the child.

Neglect means “[t]he inability or unwillingness of a parent, guardian or custodian 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(25)(a).

¶7 Grace maintains, “[T]he evidence produced at trial showed that [she] had established and maintained sobriety, that she was an adequate parent, and that she had medical care, housing and support resources.” She contends that her “negative drug test results show that her past substance use is not now an issue” and therefore “does not support a finding of dependency.” She also relies on G.P.’s testimony about her ability to safely parent, while discounting the “vague concerns” of the DCS case manager.

¶8 As DCS points out, however, Grace’s arguments largely amount to a request that we reweigh the evidence. That is not our function. *See Ariz. Dep’t of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 14 (App. 2004). Instead, we defer to the juvenile court’s ability to “weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts.” *Id.* ¶ 4.

¶9 Grace has a long history of drug abuse. She had been using heroin since she was seventeen years old. She also used methamphetamine and opiates, and had unlawfully used marijuana. Grace admitted to regularly using methamphetamine and heroin while pregnant and to using “substances” a day or two before giving birth to K.F.-M. Although Grace provided negative drug tests in the months after K.F.-M. was born, she had not completed substance abuse education and relapse prevention classes. She missed two drug tests, and also minimized her drug use and did not seem to understand how it affected K.F.-M. And, Grace failed to promptly advise DCS that she had obtained a medical marijuana prescription. The juvenile court’s dependency adjudication is therefore supported by reasonable evidence. *See Shella H.*, 239 Ariz. 47, ¶ 13.

Burden of Proof

¶10 Grace next argues the juvenile court inappropriately applied the preponderance of the evidence standard in adjudicating K.F.-M.

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dependent. She maintains that, because she was a registered qualifying patient under the AMMA, § 36-2813(D) “requires findings by clear and convincing evidence.” We review questions of law de novo. *Willie G. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 231, ¶ 8 (App. 2005).

¶11 Pursuant to § 36-2813(D),

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.

By contrast, A.R.S. § 8-844(C) provides that the allegations in a dependency petition must be proven by a preponderance of the evidence.

¶12 As a preliminary matter, we agree with DCS that Grace has waived any argument based on § 36-2813(D) by failing to raise the issue below. *See Logan B. v. Dep't of Child Safety*, 244 Ariz. 532, ¶ 9 (App. 2018); *see also Trantor v. Fredrikson*, 179 Ariz. 299, 300 (1994) (“[A]bsent extraordinary circumstances, errors not raised in the trial court cannot be raised on appeal.”). We have, however, applied fundamental error review to an argument first asserted before this court by a parent challenging a dependency adjudication. *See Louis C.*, 237 Ariz. 484, ¶ 19.

¶13 Even assuming fundamental error review applies, however, we find no error, fundamental or otherwise, in the juvenile court’s dependency adjudication based on a preponderance of the evidence, pursuant to § 8-844(C). Although the court noted that DCS needed “an opportunity to safely plan around” Grace’s newly acquired AMMA status, the dependency finding was not based on her use of marijuana under the AMMA. Instead, the court’s finding was based on Grace’s “substance use,” which included a history of heroin, methamphetamine, and opiates, as well as unlawful use of marijuana. Section 36-2813(D) therefore does not apply here.

Disposition

¶14 For the foregoing reasons, we affirm the juvenile court’s order adjudicating K.F.-M. dependent as to Grace.