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



DIVISION ONE  
FILED: 07/10/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: sls

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

LARRY L. ) 1 CA-JV 11-0220  
)  
Appellant, ) DEPARTMENT E  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
ARIZONA DEPARTMENT OF ECONOMIC ) 103(G), Ariz. R.P. Juv. Ct. ;  
SECURITY, ELLIAJAH M., EMMANUEL ) Rule 28, ARCAP)  
M., MAKEA M., ISSAH M., JANAYE W. )  
)  
Appellees. )  
)  
)  
)

Appeal from the Superior Court in Mohave County

Cause No. S8015JD201000038

The Honorable Richard Weiss, Judge

**REVERSED AND REMANDED**

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P O R T L E Y, Judge

¶1 Larry L. ("Father") appeals the order terminating his parental rights to his son. For the following reasons, we reverse the severance order and remand for a new hearing.

**FACTUAL AND PROCEDURAL BACKGROUND**

¶2 After his son had been dependent for about a year, the Arizona Department of Economic Security ("ADES") filed a motion to terminate Father's parental rights in June 2011.<sup>1</sup> ADES alleged that he had abandoned and neglected his son. Ariz. Rev. Stat. ("A.R.S.") § 8-533(B)(1)-(2) (West 2012).<sup>2</sup> Father denied the allegations and a hearing was set.

¶3 Father, a Washington State resident, filed a motion requesting that ADES pay for a round trip bus ticket so that he could attend the hearing. The motion was denied, but the court allowed him to participate in the severance hearing telephonically.<sup>3</sup>

¶4 At the start of the hearing, ADES asked the court to find that Father failed to appear because he had been jailed, and to proceed by default. Father's lawyer confirmed that he

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<sup>1</sup> ADES's motion also sought to terminate the mother's parental rights to the boy. She is not a party to this appeal.

<sup>2</sup> We cite the current version of the applicable statute because no revisions material to this decision have since occurred.

<sup>3</sup> Arizona Rule of Procedure for the Juvenile Court 42 provides that a "court may permit telephonic testimony or argument or video conferencing in any dependency, guardianship or termination of parental rights hearings."

was in jail in Yakima County, Washington. She indicated that she had just spoken to him, and to the jail employee who was in charge of the jail's phone system. She also told the court that the jail employee did not know if the jail would allow Father to appear telephonically, but that it was not "completely out of the question." In response to questions from the court, Father's lawyer explained that Father had been in jail for about five days for "a domestic violence incident."

¶15 The court then found Father in default, proceeded with the hearing, and subsequently found that Father had abandoned his child and that termination was in the child's best interests.

#### DISCUSSION

¶16 "Parents possess a fundamental liberty interest in the care, custody, and management of their children." *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 24, 110 P.3d 1013, 1018 (2005) (citations omitted). Although the right to parent is fundamental, it is not absolute. *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 248-49, ¶ 12, 995 P.2d 682, 684-85 (2000) (citation omitted). The right can be severed if the court finds at least one of the statutory grounds listed in § 8-533(B), and that termination is in the child's best interests. A.R.S. § 8-533(B); see also A.R.S. § 8-537(B) (West 2012) (ground for termination must be proven by clear and convincing

evidence); *Kent K.*, 210 Ariz. at 284, ¶ 22, 110 P.3d at 1018 (best interests of the child must be demonstrated by preponderance of the evidence).

¶7 Father argues that the juvenile court erred by finding that he was voluntarily absent and by failing to consider whether there was good cause to excuse his absence, as required by Arizona Rule of Procedure for the Juvenile Court ("Rule") 66(D)(2). We review the interpretation of a juvenile court rule or an applicable statute de novo, recognizing that a court has broad discretion to decide what constitutes good cause for a party's failure to appear. *Adrian E. v. Ariz. Dep't of Econ. Sec.*, 215 Ariz. 96, 99, 101, ¶¶ 9, 15, 158 P.3d 225, 228, 230 (App. 2007) (citations omitted). Consequently, we will affirm the court's good cause determination unless we conclude that the court exercised its discretion in a patently unreasonable manner, "on untenable grounds, or for untenable reasons." *Id.* at 101, ¶ 15, 158 P.3d at 230 (citation and internal quotation marks omitted).

¶8 Rule 66(D)(2) provides:

If the court finds the parent . . . failed to appear at the termination adjudication hearing *without good cause shown*, had notice of the hearing, was properly served pursuant to Rule 64 and had been previously admonished regarding the consequences of failure to appear, including a warning that the hearing could go forward in the absence of the parent . . . and that failure to

*appear may constitute a waiver of rights, and an admission to the allegation contained in the motion or petition for termination, the court may terminate parental rights based upon the record and evidence presented . . . .*

(Emphasis added.)<sup>4</sup>

¶9 Here, after being advised that Father was in jail, the court summarily declared that Father's voluntary act caused his failure to appear and entered a default ruling granting the severance. The court did not ask questions to determine whether there was good cause for Father's absence, or whether Father could still participate telephonically.

¶10 We have provided guidance for the court to use when considering whether to find an absent parent in default. See *Christy A. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 299, 304, ¶ 14, 173 P.3d 463, 468 (App. 2007). As we stated in *Christy A.*,

*it is apparent that, in practice, the juvenile court has engrafted the concept of "default" from Rule 55 of the Arizona Rules of Civil Procedure ("ARCP") into the juvenile court rules or, at least, is utilizing the "default" terminology when a parent fails to appear. We think the better course would be for the juvenile court to instead consider whether the parent can show "good cause" as to why they failed to*

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<sup>4</sup> The Rule tracks A.R.S. § 8-537(C), which provides that if a parent does not appear at a termination adjudication hearing, the court "may find that the parent has waived [his or her] legal rights and is deemed to have admitted the allegations of the petition by the failure to appear." When the Arizona Supreme Court promulgated Rule 66, however, it added the good cause requirement.

*personally appear, and whether, under the circumstances, such failure should constitute a "waiver of rights."*

*Id.* (emphasis added). Consequently, before proceeding with the hearing despite a parent's absence, the court must determine whether good cause exists for the parent's failure to appear.

¶11 The issue here was not Father's absence from the hearing, because the court entered an order which allowed him to participate telephonically. Instead, the issue was whether Father had good cause not to call in at the scheduled time. Although the court found that Father's absence was voluntary after learning that he was in jail, the court did not explore whether he was in pre-trial confinement or serving a sentence. If he was in pre-trial confinement, Father was entitled to the presumption of innocence, A.R.S. § 13-115(A) (West 2012), and his arrest and detention would be considered involuntary. *See, e.g., State v. Chavez-Inzunza*, 145 Ariz. 362, 365, 701 P.2d 858, 861 (App. 1985) (defendant's trial erroneously held in absentia because his incarceration in another jurisdiction did not constitute a voluntary absence from trial); *State v. Sainz*, 186 Ariz. 470, 473 n.1, 924 P.2d 474, 477 n.1 (App. 1996) (citing *Chavez-Inzunza*, 145 Ariz. at 365, 701 P.2d at 861) ("[A]n absence because one is arrested is 'involuntary.'").

¶12 If Father had been serving a jail sentence, then the court could have treated his detention as voluntary. The court,

however, needed to ascertain whether the jail would have allowed him to participate telephonically, because a jail employee had advised Father's lawyer that a telephone call was not "completely out of the question." *Cf. State v. Rocha*, 117 Ariz. 294, 296-97, 572 P.2d 122, 124-25 (App. 1977) (citations omitted) (defendant's failure to surrender to Arizona authorities after his conviction was affirmed on appeal was not excused even though he had been detained by federal authorities, because defendant's own misconduct, during pendency of appeal, led to federal detention and incarceration). The court did not ask whether the jail would allow Father to participate at that time, whether there might be a slight delay, or what, if anything, the jail needed in order to allow Father to appear telephonically.

¶13 In termination adjudications, "as in criminal cases, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *John M. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 320, 324, ¶ 14, 173 P.3d 1021, 1025 (App. 2007) (quoting *Strickland v. Washington*, 466 U.S. 668, 696 (1984)) (citations and internal quotation marks omitted). In fact, our supreme court has stated that a parent must be afforded "'fundamentally fair procedures' that satisfy due process requirements." *Kent K.*, 210 Ariz. at 284, ¶ 24, 110 P.3d at 1018 (citation omitted).

¶14 In this case, the court's failure to inquire about the circumstances surrounding Father's incarceration and whether he could participate telephonically then or after a brief delay was an abuse of discretion and deprived him of fundamental fairness.<sup>5</sup>

**CONCLUSION**

¶15 Based on the foregoing, we reverse the order terminating Father's parental rights and remand the matter for a new trial.

/s/

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MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/

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PHILIP HALL, Judge

/s/

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DIANE M. JOHNSEN, Judge

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<sup>5</sup> Because we reverse the termination order, we find it unnecessary to address the other issues raised in the opening brief.