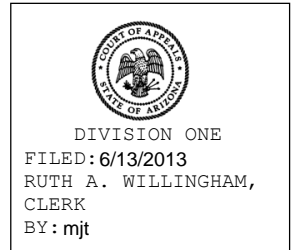


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DENILLA S.,) 1 CA-JV 13-0005
)
Appellant,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ARIZONA DEPARTMENT OF ECONOMIC) Rule 28, Arizona Rules
SECURITY, A.S.,) of Civil Appellate
) Procedure)
Appellees.)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. JD509056

The Honorable Helene F. Abrams, Judge

AFFIRMED

Gillespie, Shields & Durrant, P.L.C. Phoenix
By DeeAn Gillespie Strub
Attorneys for Appellant

Thomas C. Horne, Arizona Attorney General Mesa
By Amanda Holguin, Assistant Attorney General
Attorneys for Appellees

K E S S L E R, Judge

¶1 Denilla S. ("Mother") appeals the juvenile court's denial of her motion to set aside the severance of her parental rights to her son A.S.¹ For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 In January 2011, the Arizona Department of Economic Security ("ADES") filed a dependency petition alleging Mother was unable to parent A.S. due to neglect and substance abuse. A.S. was placed in temporary foster care. In March 2011, the juvenile court found A.S. to be dependent and set the case plan to family reunification.

¶3 At the disposition hearing, the juvenile court ordered that Mother should be provided with urinalysis testing, substance abuse assessment, and parent aide services. The January, July, and September 2011 progress reports, however, state that despite several attempts, ADES could not locate Mother and, accordingly, could not provide her services. The January 2011 report also states that prior to A.S.'s removal from Mother's care, Mother admitted to being diagnosed as bipolar and not taking her medication.

¶4 In September 2011, ADES moved to change the case plan to severance and adoption, and in October 2011, moved to

¹ The caption has been amended to safeguard the identity of the juvenile pursuant to Administrative Order 2013-0001.

terminate Mother's parental rights based on abandonment. The September 2011 report notes that A.S.'s maternal aunt in Ohio was willing to adopt A.S. if family reunification was not possible. Mother was initially served by publication and later found at Banner Good Samaritan Hospital.

¶5 The juvenile court held a severance hearing in December 2011.² Mother appeared telephonically and advised the court that she was not contesting the motion for termination of parental rights. The minute entry indicates that the court had discussions with Mother's counsel and Mother's guardian ad litem ("GAL") about her appearance and Mother was read and understood the "Notice to Parent in a Termination Action." Five minutes after she telephonically appeared, Mother was disconnected from the courtroom, although her counsel and GAL remained. The court then heard evidence from ADES and granted the motion.

¶6 In January 2012, the juvenile court terminated Mother's parental rights on the grounds of abandonment, explaining:

[Mother's] last contact with [A.S.] was 1/14/2011 when [A.S.] was removed. Mother was invited to the [Team Decision Making] meeting, the initial meeting, and did not appear. Another meeting was set for 1/18/2011 and again [Mother] did not appear. Mother knows [A.S.] is in care and that [ADES] would provide services for her.

² A transcript of the hearing has not been provided to this Court on appeal.

Letters and phone calls were made to advise [M]other of the services available as well as parent locators. Mother has not provided any reasonable support to [A.S.], has not sent any cards, gifts or letters to [A.S.] or to the foster family. Again, [M]other does know how to make contact and she has failed to maintain a normal parental relationship with [A.S.] for a period of over six (6) months. There are no other efforts that could be utilized to engage [M]other in the services.

¶7 Thereafter, in a January 2012 report, the Foster Care Review Board ("the Board") expressed concern over the length of time the maternal aunt's home study would take as this would result in A.S.'s continued bonding with his foster parents. The Board further noted that A.S. had not established a relationship with his maternal aunt, and according to his foster placement A.S. was thriving in their home. As a result, the Board recommended conducting a bonding assessment prior to deciding where A.S. should be permanently placed.

¶8 In November 2012, ten months after the entry of the order terminating her parental rights, Mother filed a motion for relief from judgment pursuant to Arizona Rule of Civil Procedure ("Civil Rule") 60(c)(6). Mother alleged that: (1) ADES intentionally failed to inform the juvenile court of the maternal aunt and uncle's imminent adoption of A.S., (2) a best interest study revealed that A.S. would do equally well with his maternal aunt and uncle as with his foster placement, (3) ADES

failed to follow its own case plan and public policy in allowing A.S. to be adopted by his biological family, (4) Mother was institutionalized and on medications for acute mental illness at the time of the severance hearing and lacked capacity to consent to the termination of her parental rights, (5) Mother was not provided any assistance prior to and during the severance hearing, and (6) the severance was not in A.S.'s best interest. The juvenile court denied Mother's motion, finding it was filed outside of the six-month time limit set by Rule of Procedure for the Juvenile Court ("Juvenile Rule") 46(E).

¶9 Mother timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 8-235(A) (2007), 12-120.21(A)(1) (2003), -2101(A)(1) (Supp. 2012), and -2101(A)(5)(a).

ISSUES AND STANDARD OF REVIEW

¶10 Mother argues that: (1) the juvenile court erred in failing to toll the limitations period of Juvenile Rule 46(E) due to Mother's mental illness, (2) the juvenile court erred in failing to set aside the severance given the overwhelming evidence that the severance was obtained fraudulently and was not in A.S.'s best interest, (3) the juvenile court erred in failing to find Mother's motion was filed within a reasonable time pursuant to Civil Rule 60(c)(6), and (4) a violation of

Mother's fundamental right to due process transcends the limitation period set in Juvenile Rule 46(E),.

¶11 We review the interpretation of statutes and rules *de novo*. *Pima County v. Pima Cnty. Law Enforcement Merit Sys. Council*, 211 Ariz. 224, 227, ¶ 13, 119 P.3d 1027, 1030 (2005). We review the juvenile court's denial of a motion to set aside a judgment pursuant to Juvenile Rule 46(E) for an abuse of discretion. See *R.A.J. v. L.B.V.*, 169 Ariz. 92, 94, 817 P.2d 37, 39 (App. 1991). "[A]n abuse of discretion 'is discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *Lashonda M. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 77, 83, ¶ 19, 107 P.3d 923, 929 (App. 2005) (quoting *Quigley v. Tucson City Court*, 132 Ariz. 35, 37, 643 P.2d 738, 740 (1982)). "The scope of an appeal from a denial of a [motion to set aside a judgment] is restricted to the questions raised by the motion . . . and does not extend to a review of whether the trial court was substantively correct in entering the judgment from which relief was sought." *Hirsch v. Nat'l Van Lines, Inc.*, 136 Ariz. 304, 311, 666 P.2d 49, 56 (1983). "We view the facts and reasonable inferences therefrom in the light most favorable to affirming the juvenile court's findings." *Andrew R. v. Ariz. Dep't of Econ. Sec.*, 223 Ariz. 453, 454 n.1, ¶ 1, 224 P.3d 950, 951 n.1 (App. 2010).

DISCUSSION

A. Mother's motion for relief from judgment was untimely.

¶12 Juvenile Rule 46(E) provides that "[a] motion to set aside a judgment rendered by the court shall conform to the requirements of [Civil] Rule 60(c)^[3] . . . except that the motion shall be filed within six (6) months of the final judgment, order or proceeding unless the moving party alleges grounds pursuant to [Civil] Rule 60(c)(1)(2) or (3), in which case the motion shall be filed within three (3) months of the final judgment." Mother's motion to set aside the severance relied on Civil Rule 60(c)(6), which allows a court to relieve a party from a judgment for any reason justifying relief. Pursuant to Juvenile Rule 46(E), Mother had six months to file her Civil Rule 60(c)(6) motion with the juvenile court. Because

³ Civil Rule 60(c) provides the following reasons to set aside judgment:

(1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(d); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment on which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Mother did not file her motion until approximately ten months after the juvenile court's ruling terminating her parental rights, Mother's motion was untimely.

¶13 Mother contends that the juvenile court should have tolled the limitations period due to her mental illness, claiming Juvenile Rule 46(E)'s time limit should be treated similarly to statutes of limitations, which are tolled during incapacity resulting from mental illness. See A.R.S. § 12-502 (2003) ("If a person entitled to bring an action . . . is at the time the cause of action accrues . . . of unsound mind, the period of such disability shall not be deemed a portion of the period limited for commencement of the action. Such person shall have the same time after removal of the disability which is allowed to others.").

¶14 We disagree. This Court has already ruled that because Civil Rule 60 is procedural in nature it is not a statute of limitations, and as a result, we will not treat it as such. *In re Estate of Travers*, 192 Ariz. 333, 336, ¶ 22, 965 P.2d 67, 70 (App. 1998) ("Because Rule 60 is procedural, we hold that Rule 60 is not a 'statute of limitations.'" (citation omitted)).

¶15 Moreover, Civil Rule 6(b) provides that the court "may not extend the time for taking any action under Rule[] . . . 60(c)." Thus based on the plain language of the rules, and in

the interest of providing permanency after severance has been granted and serving the best interests of the child, see Juvenile Rule 36, the time limitation in Juvenile Rule 46(E) should be strictly adhered to, and the juvenile court did not abuse its discretion in finding Mother's motion to be untimely.

¶16 Mother also argues that the juvenile court erred in failing to set aside the severance, which she claims was obtained fraudulently and against the best interests of A.S. We note that "a Rule 60(c)(6) motion cannot be premised on a ground provided for by the first five subsections of the rule." *Andrew R.*, 223 Ariz. at 459, ¶ 21, 224 P.3d at 956 (citation and internal quotation marks omitted). Therefore, accepting Mother's alternative theory, her Civil Rule 60(c)(6) motion is actually a Civil Rule 60(c)(3) motion based on fraud, misrepresentation, or the misconduct of an adverse party. Because a Civil Rule 60(c)(3) motion must be filed within three months of the final judgment pursuant to Juvenile Rule 46(E), Mother's motion to set aside the judgment on this ground was also untimely.

¶17 Mother also contends that the juvenile court erred in failing to find her motion was filed within a reasonable time pursuant to Civil Rule 60(c). See Ariz. R. Civ. P. 60(c) ("The motion shall be filed within a reasonable time, and for reasons (1), (2) and (3) not more than six months after the judgment or

order was entered or proceeding was taken.”). However, because Rule 46(E) expressly provides that a Rule 60(c)(6) motion should be filed with the juvenile court within six months, we find this argument to be irrelevant.

B. The juvenile court did not violate Mother’s procedural and substantive due process rights.

¶18 Mother argues that the claimed violation of her procedural and substantive due process rights transcends any rule that limits her ability to overturn the severance judgment. Mother specifically argues that: (1) because of Mother’s mental illness, the failure of the GAL and Mother’s attorney to protect Mother’s interests violated her constitutional rights; and (2) the juvenile court erroneously proceeded with the severance despite Mother’s alleged incapacity, including failing to ensure Mother understood what rights she was waiving at the severance hearing.

¶19 Mother’s claim that her attorney and GAL failed to adequately protect her interests is unpersuasive. From the record, Mother’s limited contact with her attorney and GAL prior to the severance hearing is due to her own failure to communicate and keep in touch, and as a result, does not render the representation ineffective. *See Hackin v. First Nat. Bank of Ariz.*, 5 Ariz. App. 379, 385, 427 P.2d 360, 366 (1967) (“We recognize that where a client willfully or negligently fails to

keep in touch with an attorney so that the attorney cannot properly inform him as to the pending litigation that he cannot complain because he does not realize the date of the trial.”). Mother is bound by what her attorney and GAL did, provided they were acting within the scope of their duties. See *Panzino v. City of Phoenix*, 196 Ariz. 442, 447, ¶¶ 16-17, 999 P.2d 198, 203 (2000).

¶20 Moreover, Mother has failed to provide this Court with a transcript of the severance hearing. “A party is responsible for making certain the record on appeal contains all transcripts or other documents necessary for us to consider the issues raised on appeal. When a party fails to include necessary items, we assume they would support the court’s findings and conclusions.” *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995); see ARCAP 11(b). As a result, we assume the missing record supports the juvenile court’s ruling. See *Kohler v. Kohler*, 211 Ariz. 106, 108 n.1, ¶ 8, 118 P.3d 621, 623 n.1 (App. 2005); *Johnson v. Elson*, 192 Ariz. 486, 489, ¶ 11, 967 P.2d 1022, 1025 (App. 1998).⁴

⁴ In her reply brief, Mother asserts that the transcript is not necessary because the juvenile court’s minute entry details what happened in the courtroom. The minute entry, however, only has a general discussion of what transpired. For all we know from the minute entry, Mother’s attorney and GAL were actively involved in defending her interests. Indeed, the minute entry states that a discussion was held regarding Mother’s appearance.

¶21 In addition, even if Mother was mentally ill during the time of the dependency proceeding, the juvenile court did not err in proceeding with the severance hearing in light of the fact that the court severed her parental rights based on abandonment. See *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 249, ¶ 12, 995 P.2d 682, 685 (2000) (stating to justify the severance of a parental relationship only one of the statutory grounds provided in A.R.S. § 8-533(B) (Supp. 2012) must be found by clear and convincing evidence). Mother's failure to alert her attorney, GAL, or the court of her whereabouts and to have any contact with ADES during her hospitalization excuses neither the untimely nature of her Rule 60(c) motion nor her failure to try to stay in contact with A.S.

¶22 Finally, Mother argues that the juvenile court failed to determine whether her consent to termination was voluntarily, knowingly, and intelligently made because the court did not have a report from the GAL and the court did not observe Mother in person on the day of the severance hearing. We disagree for several reasons.

¶23 Initially, any such alleged error does not excuse why Mother did not file a timely Rule 60(c) motion. Additionally, even if Mother could show she was incapacitated at and after the hearing, which she has not, without a transcript, we presume her attorney and GAL adequately represented her interests at the

severance hearing and afterwards. This is supported by the fact that the court had a discussion with counsel at the hearing about Mother's telephonic appearance. Finally, we do not understand Mother to be arguing that the necessary colloquy did not take place, since the court read Mother the "Notice to Parent in Termination Action," which included the effect of a waiver. See Ariz. R.P. Juv. Ct. Form 3. Rather, she appears to argue that the court could not determine if the waiver was voluntary, knowing, and intelligent without actually seeing Mother in court. See Ariz. R.P. Juv. Ct. 66(D)(1)(b) ("In accepting an admission or plea of no contest, the court shall . . . [d]etermine whether the admission or plea of no contest is knowingly, intelligently and voluntarily made."); cf. *State v. Baker*, 217 Ariz. 118, 121, ¶ 15, 170 P.3d 727, 730 (App. 2007) (determining minute entry's finding of waiver of right to a jury trial not supported by transcript in which the court did not have a personal colloquy with the defendant or inform him of his right). It is undisputed that the court explained what rights Mother was waiving by conceding the petition and found that the waiver was effective. Because Mother has failed to provide this Court with the transcript of that hearing or other record evidence to the contrary, we assume the court had sufficient facts from the conference with counsel and her GAL, and Mother's telephonic appearance, to determine if she voluntarily,

knowingly, and intelligently waived her right to contest the severance. See *Kohler*, 211 Ariz. at 108 n.1, ¶ 8, 118 P.3d at 623 n.1; *Johnson*, 192 Ariz. at 489, ¶ 11, 967 P.2d at 1025.⁵

CONCLUSION

¶24 For the foregoing reasons, we affirm the juvenile court's order denying Mother's motion.

/s/

DONN KESSLER, Judge

CONCURRING:

/s/

MAURICE PORTLEY, Presiding Judge

/s/

SAMUEL A. THUMMA, Judge

⁵ Given our holding, we need not address Mother's argument that the placement of A.S. with the foster parents and not Mother's relatives violated Arizona's statutory preference to place children with relatives and was not in A.S.'s best interest. The only issue before us is the denial of Mother's Juvenile Rule 46(E) motion, not the placement of A.S.