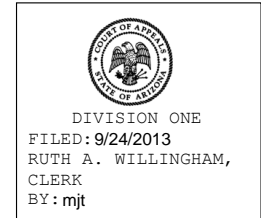


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

CINDY A., ) 1 CA-JV 13-0076  
)  
Appellant, ) DEPARTMENT E  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
ARIZONA DEPARTMENT OF ECONOMIC ) Ariz. R.P. Juv. Ct.  
SECURITY, I.A., ) 103(G); ARCAP 28 )  
)  
Appellees. )  
)

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Appeal from the Superior Court in Maricopa County

Cause No. JD22246

The Honorable Aimee L. Anderson, Judge

**AFFIRMED**

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Law Office of David M. Osterfeld, L.L.C.  
By David M. Osterfeld  
Attorneys for Appellant

Buckeye

Thomas C. Horne, Attorney General  
By Michael F. Valenzuela, Assistant Attorney General  
Attorneys for Appellee Arizona Department of Economic Security

Phoenix

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W I N T H R O P, Presiding Judge

¶1 Cindy A. ("Mother") appeals the juvenile court's order terminating her parental rights to I.A. ("Child"). Mother

argues that the juvenile court abused its discretion when it proceeded with a hearing in her absence, and violated her right to due process when her failure to appear led the juvenile court to convert the scheduled pretrial hearing to a termination adjudication hearing. Mother also argues that reasonable evidence does not support the statutory ground for termination and that termination was not in the best interest of Child. For the following reasons, we affirm.

#### **FACTS AND PROCEDURAL HISTORY**

¶2 In early July 2012, Child was born to Mother in Maricopa County.<sup>1</sup> On July 19, Child Protective Services ("CPS") took Child into temporary physical custody upon his release from the hospital after hospital staff reported that Mother was unable to care for Child.<sup>2</sup> Five days later, the Arizona Department of Economic Security ("ADES") filed a dependency petition in juvenile court. On July 31, at the preliminary protective hearing, Mother denied the allegations in ADES's dependency petition. Mother and ADES reached a partial agreement regarding remedial services on August 31. On September 26, the juvenile court found Child dependent as to

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<sup>1</sup> The biological father is listed in court proceedings as "John Doe" and is not a party to this appeal.

<sup>2</sup> Child was born with bilateral hip dysplasia, a condition affecting the development of the hip, and requiring Child to wear a Pavlik harness to correct the condition. As a result of his medical condition, Child had difficulty feeding.

Mother. The juvenile court also ratified a family reunification case plan, concurrent with an alternative case plan of severance and adoption.

¶3 Under the case plan, the juvenile court ordered Mother to attend a minimum of two supervised visits with Child per week. Additionally, Mother was offered the following services: (1) parent aide services during the scheduled twice-weekly visits with Child, (2) parenting classes, (3) counseling for domestic violence, (4) an initial substance abuse screening, (5) transportation passes, and (6) self-referral to Magellan Health Services for behavioral health.

¶4 After passing the initial drug screening and beginning remedial services, Mother's attendance flagged at parent aide services and visitation. Mother did not participate in October and November 2012. At the December 3 permanency planning and report and review hearing, the juvenile court ordered the case plan changed to only severance and adoption.

¶5 On January 7, 2013, ADES moved to terminate the parent-child relationship pursuant to Arizona Revised Statutes ("A.R.S.") section 8-533(B)(8)(b) (West 2013).<sup>3</sup> On January 8, the juvenile court held a contested initial termination hearing.

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<sup>3</sup> We cite the current Westlaw versions of the applicable statutes unless changes material to our analysis have since occurred.

At that hearing, the juvenile court set mediation regarding Mother for February 14.<sup>4</sup> The court also set a report and review hearing and the pretrial conference regarding Mother for February 19. At the conclusion of the January 8 hearing, the juvenile court read aloud, and Mother acknowledged and signed, a copy of "Form 3" providing notice that Mother could risk waiving her rights by failing to appear at future court proceedings. To accommodate Mother's hearing impairment, the juvenile court had Mother utilize special headphones when reading Form 3.

¶6 Mother failed to appear for mediation on February 14. Later that day, Mother filed a motion to appear telephonically at the February 19 hearing because she was "stuck in California where her money was stolen" and was "unable to travel back to Arizona." On the morning of February 19, Mother called the juvenile court's chambers to explain that, although she was back in Arizona, she could not appear in person at the hearing because she was ill. At that morning's hearing, the juvenile court denied Mother's motion to appear telephonically and found no good cause for her failure to appear due to illness. Over counsel's objection, the juvenile court then converted the pretrial conference to a termination adjudication hearing, and proceeded in Mother's absence.

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<sup>4</sup> Because of service of process issues, the case concerning Father's parental rights was on a separate procedural track.

¶7 At the termination adjudication hearing, the State presented multiple exhibits and the testimony of the ADES case manager regarding the case plan, Mother's level of participation, and the best interest of the child. Though Mother was absent, Mother's counsel had an opportunity to fully cross-examine the witness. After considering the evidence and the arguments of counsel, the juvenile court found that Mother "has substantially neglected or wilfully refused to remedy the circumstances which caused this child to be in an out of home placement including but not limited to her refusal to participate in reunification services," that ADES "has made reasonable efforts of reunification," and that "termination is clearly in this baby's best interest and welfare." The juvenile court then terminated the parent-child relationship between Mother and Child.

¶8 On March 6, 2013, Mother filed a motion with the juvenile court to "Reconsider Court's Finding of Severance on 2/19/13," and she later provided documentation of her hospital emergency room visit the morning of the February 19 hearing. On March 13, meanwhile, the juvenile court filed its signed order terminating Mother's parental rights to Child. Mother filed a timely appeal on March 28, 2013. Mother then filed a motion with this court to stay the appeal and re-vest jurisdiction in the juvenile court so the motion to reconsider could be heard at

the report and review hearing scheduled for April 19. This court granted Mother's motion to stay and reconstitute jurisdiction, and the juvenile court heard argument on the motion to reconsider on April 19. At that hearing, the juvenile court denied the motion, and the appeal was reinstated. We have appellate jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, A.R.S. § 8-235(A), and Rule 103(A) of the Arizona Rules of Procedure for the Juvenile Court.

### **ANALYSIS**

¶9 On appeal, Mother argues that the juvenile court erred when it: (1) proceeded with the February 19 hearing in her absence and converted the scheduled pretrial conference into a termination adjudication hearing in violation of her right to due process, (2) found statutory grounds for termination, and (3) found that severance was in Child's best interest.

#### **I. Procedural Claims**

¶10 Mother argues that the juvenile court abused its discretion when it proceeded with the February 19 hearing in her absence after finding that Mother lacked good cause for her failure to appear. We review the juvenile court's finding regarding good cause and its decision to proceed for an abuse of discretion. See *Adrian E. v. Ariz. Dep't of Econ. Sec.*, 215 Ariz. 96, 101, ¶ 15, 158 P.3d 225, 230 (App. 2007); *Lindsey M. v. Ariz. Dep't of Econ. Sec.*, 212 Ariz. 43, 46, ¶ 13, 127 P.3d

59, 62 (App. 2006). Good cause for failing to appear includes "mistake, inadvertence, surprise or excusable neglect" and "a meritorious defense to the claims." *Christy A. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 299, 304, ¶ 16, 173 P.3d 463, 468 (App. 2007).

¶11 At the February 19 hearing, the juvenile court denied mother's motion to appear telephonically.<sup>5</sup> The court also found that Mother had no good cause for failing to appear at the hearing after calling the court's chambers that morning and claiming to be sick. After the hearing, Mother filed a motion with the juvenile court to "Reconsider Court's Finding of Severance on 2/19/13" on the basis of Mother's documented illness. The juvenile court heard oral argument on that motion on April 19 and denied it.<sup>6</sup> Because Mother did not move or

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<sup>5</sup> We note that Mother's subsequent return to the state by February 19 moots the issue whether the juvenile court abused its discretion by denying her motion to appear telephonically.

<sup>6</sup> The State argues that we lack jurisdiction to consider Mother's argument for good cause, because Mother did not appeal the juvenile court's order denying her motion to reconsider or otherwise amend the notice of appeal to include this issue. We disagree. The State had notice that the good cause issue, and the concomitant due process claim, would be raised by Mother on appeal because, on the facts of this case, this line of argument is inextricably linked to the merits of the appeal. See *City of Phoenix v. Bellamy*, 153 Ariz. 363, 367, 736 P.2d 1175, 1179 (App. 1987) ("The test of sufficiency of a notice of appeal is whether sufficient notice of the appeal is conveyed without misleading or prejudicing the other party."). Furthermore, this court suspended the appeal and revested jurisdiction in the juvenile court for the express purpose of deciding the motion

otherwise attempt to supplement the record with a transcript of the April 19 hearing, we presume that the record supports the juvenile court's finding that Mother lacked good cause for her failure to appear. See *Ariz. Dep't of Econ. Sec. v. Valentine*, 190 Ariz. 107, 110, 945 P.2d 828, 831 (App. 1997); *Maricopa County Juv. Action No. J-74449A*, 20 Ariz. App. 249, 251, 511 P.2d 693, 695 (App. 1973). Therefore, the juvenile court's decision to proceed in absentia is affirmed.

¶12 Mother also argues that the juvenile court's decision to convert the pretrial conference to a termination adjudication hearing violated Mother's right to due process. We review alleged constitutional violations *de novo*. See *State v. McGill*, 213 Ariz. 147, 159, ¶ 53, 140 P.3d 930, 942 (2006). Termination cases involve "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). These parental rights are not absolute, however. *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 248, ¶ 12, 995 P.2d 682, 684 (2000). "A court may order severance of parental rights under certain circumstances, so long as the parents whose rights are to be severed are provided with 'fundamentally fair procedures' that satisfy due process requirements." *Kent K. v. Bobby M.*, 210

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before revesting jurisdiction in this court. See *Ariz. R.P. Juv. Ct. 103(C)*.



Ariz. 279, 284, ¶ 24, 110 P.3d 1013, 1018 (2005) (quoting *Santosky*, 455 U.S. at 754). Among these requirements are notice and the opportunity to be heard. See *Huck v. Haralambie*, 122 Ariz. 63, 65, 593 P.2d 286, 288 (1979).

¶13 By statute, rule, and signed form, Mother had explicit notice that her rights could be waived if she failed to attend the February 19 hearing without demonstrating good cause. See, e.g., A.R.S. § 8-535(E) ("At the initial [termination] hearing, the court shall: . . . [i]nstruct the parent that the failure to appear at the pretrial conference . . . may result in an adjudication terminating the parent-child relationship as to a parent who does not appear."). Specifically, the version of Form 3 of the Arizona Rules of Procedure for the Juvenile Court used by the juvenile court states,

If you fail to attend the . . . Pre-Trial Conference . . . without good cause, the Court may determine that you have waived your legal rights and admitted the allegations in the motion or petition for termination. The hearings may go forward in your absence, and the Court may terminate your parental rights to your child based on the record and evidence presented.

At the hearing on January 8, Mother read and signed a copy of Form 3.<sup>7</sup> Furthermore, the juvenile court proceeded to termination on the basis of established case law. See *Manuel M. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 205, 209 n.5, ¶ 14, 181

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<sup>7</sup> The juvenile court provided Mother special headphones to accommodate her hearing impairment so the court could properly advise Mother of her rights.

P.3d 1126, 1130 n.5 (App. 2008) (acknowledging the conversion of a pretrial conference to a termination hearing because of the parent's failure to appear); *cf. Adrian E.*, 215 Ariz. at 100, ¶ 12, 158 P.3d at 229 ("Rule 64(C) implicitly authorizes the juvenile court . . . to terminate the parental rights of a parent who . . . fails to appear without good cause for a status conference on a pending motion for termination."). Mother also had the opportunity to be heard through counsel. *See Christy A.*, 217 Ariz. at 307, ¶ 25, 173 P.3d 463 ("In the . . . scenario where the parent fails to appear but is still represented by counsel, the court may proceed in that parent's absence because his or her rights will be protected by the presence and participation of counsel."). Accordingly, we affirm the decision of the juvenile court to convert the pretrial conference to a termination adjudication hearing after Mother failed to appear for the February 19 hearing.

## **II. Terminating Parental Rights**

¶14 Mother argues that the juvenile court erred when it terminated her parental rights to Child. We will not disturb the juvenile court's order severing parental rights unless its findings are clearly erroneous, meaning no reasonable evidence supports them. *Audra T. v. Ariz. Dep't of Econ. Sec.*, 194 Ariz. 376, 377, ¶ 2, 982 P.2d 1290, 1291 (App. 1998). To terminate parental rights pursuant to A.R.S. § 8-533(B)(8)(b), a juvenile

court must find, by clear and convincing evidence, that a parent substantially neglected or wilfully refused to remedy the circumstances that caused the out-of-home placement greater than six months for a child less than three years old and that ADES has made a diligent effort to provide appropriate reunification services. See *Marina P. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 326, 329, ¶ 18, 152 P.3d 1209, 1212 (App. 2007). The court also must find, by a preponderance of the evidence, that termination is in the best interest of the child. *Id.*

**A. Termination Pursuant to A.R.S. § 8-533(B)(8)(b)**

¶15 Mother argues that the juvenile court erred because reasonable evidence does not support the finding that Mother had substantially neglected or wilfully refused to remedy the circumstances that caused Child's out-of-home placement for more than six months. Mother also appears to argue that ADES did not make a diligent effort to provide reunification services.

¶16 To terminate parental rights pursuant to A.R.S. § 8-533(B)(8)(b), the State must have provided sufficient evidence at the termination adjudication hearing that a child under three years of age has been in an out-of-home placement for six months or more pursuant to a court order,<sup>8</sup> that ADES "has made a diligent effort to provide appropriate reunification services,"

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<sup>8</sup> Mother does not contest that Child has been in a foster home for longer than six months pursuant to a court order.

and that the parent has "substantially neglected or wilfully refused to remedy the circumstances that cause the child to be in an out-of-home placement, including refusal to participate in reunification services offered by" ADES. A.R.S. § 8-533(B)(8)(b).

¶17 At the February 19 hearing, the State provided evidence that ADES offered Mother the following services: (1) three urinalyses to screen for drugs, (2) parent aide services in the form of twice-weekly one-on-one sessions for parenting skills at the same time as Mother's scheduled visits with Child, (3) a psychological consultation and evaluation, (4) domestic violence counseling, (5) transportation, and (6) behavioral health services. ADES also offered to arrange for Mother to attend Child's medical appointments.

¶18 Nonetheless, Mother appears to contend that the reunification services were deficient because ADES did not provide her with specialized medical training to help her take care of Child's medical problems or unidentified additional services to compensate for her hearing problem. "Although [ADES] need not provide 'every conceivable service,' it must provide a parent with the time and opportunity to participate in programs designed to improve the parent's ability to care for the child." *Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, 192, ¶ 37, 971 P.2d 1046, 1053 (App. 1999) (quoting

*Maricopa County Juv. Action No. JS-501904*, 180 Ariz. 348, 353, 884 P.2d 234, 239 (App. 1994)). At the February 19 hearing, the State provided evidence that the parent aide assigned to Mother had training to meet Child's medical needs. The ADES case manager also testified that Mother's hearing impairment did not affect the nature or level of her participation. Given this testimony, coupled with the evidence of the services provided, we conclude that reasonable evidence supports the juvenile court's finding that ADES made a diligent effort to provide reunification services.

¶19 Mother also argues that she did participate in the offered services, particularly the initial urinalysis screening and visitation and parental aide services immediately after Child's removal. Although the parent who makes "appreciable, good faith efforts to comply with remedial programs outlined by ADES" generally will not have her rights terminated, the parent who "disappears for months at a time and makes only sporadic, aborted attempts to remedy" the circumstances of the child's out-of-home placement may face termination of her rights. *Maricopa County Juv. Action No. JS-501568*, 177 Ariz. 571, 576, 869 P.2d 1224, 1229 (App. 1994). "Termination is not limited to those who have *completely* neglected or willfully refused to remedy such circumstances." *Id.*

¶20 At the February 19 hearing, the State presented evidence regarding Mother's level of participation in reunification services. The ADES case manager testified that Mother completed the initial drug screening. The case manager also testified that in October and November 2012, and from January 24 to the February 19 hearing, Mother did not participate in the parent aide services and twice-weekly visits with Child; however, Mother did participate in those services in December 2012. The case manager further testified that she did not know if Mother participated in the scheduled February 5 psychological evaluation, and that although ADES offered Mother domestic violence counseling, at the time of the February 19 hearing those services had not started. Although ADES did not verify Mother's attendance at the psychological evaluation or begin domestic violence counseling, reasonable evidence of Mother's nearly three-month absence from visitation and parent aide services supports the finding that Mother had substantially neglected or wilfully refused to remedy the circumstances that caused Child's out-of-home placement. Therefore, we will not disturb the findings of the juvenile court.

**B. Best Interest**

¶21 Mother argues that severing her parental rights is not in the best interest of Child. To effectuate severance, the court must find, by a preponderance of the evidence, that

termination is in the child's best interest. A.R.S. § 8-533(B); *Kent K.*, 210 Ariz. at 284, ¶ 22, 110 P.3d at 1018. "[A] determination of the child's best interest must include a finding as to how the child would benefit from a severance or be harmed by the continuation of the relationship." *Maricopa County Juv. Action No. JS-500274*, 167 Ariz. 1, 5, 804 P.2d 730, 734 (1990). "Factors considered are whether: 1) an adoptive placement is immediately available; 2) the existing placement is meeting the needs of the child; and 3) the [child is] adoptable." *Raymond F. v. Ariz. Dep't of Econ. Sec.*, 224 Ariz. 373, 379, ¶ 30, 231 P.3d 377, 383 (App. 2010) (citations omitted).

¶22 At the February 19 hearing, the ADES case manager testified that Mother had not learned to meet either Child's basic needs or Child's specific medical needs. The ADES case manager further testified that Child was in a foster home for medically fragile children and that the foster parents were willing and able to adopt him, even though Child has special medical needs. As a result, the juvenile court found that "[t]he child is adoptable and adoption will provide [him] with permanency and stability. A termination of these parental rights would further the plan of adoption." The juvenile court found that the State had proven by a preponderance of the evidence that termination of the parent-child relationship was

in the best interest of Child. Because reasonable evidence supports the juvenile court's findings, we will not disturb the findings of the juvenile court.

**CONCLUSION**

¶23 We affirm the decision of the juvenile court to terminate Mother's parental rights.

\_\_\_\_\_/S/\_\_\_\_\_  
LAWRENCE F. WINTHROP, Presiding Judge

CONCURRING:

\_\_\_\_\_/S/\_\_\_\_\_  
MARGARET H. DOWNIE, Judge

\_\_\_\_\_/S/\_\_\_\_\_  
JON W. THOMPSON, Judge