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UNDER ARIZ. R. SUP. CT. 111(c), THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

TASHA A., *Appellant*,

v.

ARIZONA DEPARTMENT OF ECONOMIC SECURITY, R.M., *Appellees*.

No. 1 CA-JV 13-0183
FILED 12-10-2013

Appeal from the Superior Court in Maricopa County
No. JD504816
The Honorable Brian Ishikawa, Judge

AFFIRMED

COUNSEL

Maricopa County Public Advocate's Office, Phoenix
By Suzanne W. Sanchez

Counsel for Appellant

Arizona Attorney General's Office, Phoenix
By Cathleen E. Fuller

Counsel for Appellee Arizona Department of Economic Security

MEMORANDUM DECISION

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge Maurice Portley and Judge John C. Gemmill joined.

C A T T A N I, Judge:

¶1 Tasha A. (“Mother”) appeals the juvenile court’s order terminating her parental rights to R.M. For reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 R.M., Mother’s biological child, was born in July 2012.¹ The Arizona Department of Economic Security (“ADES”) took temporary custody of R.M. one day after birth, alleging Mother was unable to parent R.M. due to substance abuse and neglect. The court found R.M. was dependent as to Mother and ordered that R.M. remain in ADES custody.

¶3 ADES offered Mother various reunification services, including psychological evaluation, substance abuse treatment, random urinalysis drug testing, parent aide services, and supervised visitation with R.M. Mother was compliant with parent aide services and regularly attended her visitation appointments, only missing a few appointments over the course of nine months. But Mother did not submit to a psychological evaluation, and she did not participate in substance abuse treatment. Nor did she submit to drug testing after September 2012. Accordingly, in April 2013, ADES sought to terminate Mother’s parental rights on the statutory ground of six months or more in out-of-home care after initiation of dependency proceedings.

¶4 On the day of the termination hearing, Mother failed to appear at the scheduled start time of 1:30 p.m. At 1:44 p.m., the court began the hearing without Mother. Mother’s attorney was not able to provide an explanation for Mother’s absence. After verifying that Mother had been served through counsel, the superior court found that Mother

¹ The parental rights of R.M.’s biological father have been terminated and are not at issue on appeal.

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had been properly served notice and failed to appear without showing good cause.² The court allowed ADES to proceed with the hearing. After considering progress and placement reports from August 2012 to April 2013 and the testimony of the case manager on direct and cross-examination, the superior court found that R.M. was less than three years old and had been in out-of-home placement for more than six months, Mother had substantially neglected or willfully refused to remedy the circumstances that caused the placement, and that termination was in R.M.'s best interests. On that basis, the court terminated Mother's parental rights as to R.M. and adjourned at 1:58 p.m.

¶5 Several minutes later, the court reconvened with Mother and her attorney present. Mother's attorney explained that a flat tire prevented Mother from arriving on time. In statements to the court, Mother said her phone was dead, but she later indicated that her phone worked, but would only allow her to send text messages. She stated that she was using a friend's phone after she had the flat tire, and that her friend's phone had died right after calling someone to pick her up. The court allowed Mother to file a written motion to set aside its oral termination decision.

¶6 Before the superior court entered a written termination order, Mother filed a motion to set aside the termination decision. At an evidentiary hearing on the motion, Mother submitted a handwritten letter offering an explanation for her late arrival at the termination hearing. The letter explained that she had a flat tire on the way to court and, after someone came to get her, they drove straight to the courthouse. The letter stated that Mother could not call the court because, after she made her call to get a ride, the phone had died and she "had no service and [t]he phone was dead." The court denied the motion. The court then entered a final written judgment, setting forth the requisite findings of fact and conclusions of law and terminating the parent-child relationship between Mother and R.M.

² At the first dependency hearing, the court had advised Mother that she needed to arrive early to all hearings and that if she were to be late or fail to appear, the court could proceed without her. Mother also received on at least four separate occasions standardized forms stating that her attendance was required at all court hearings and advising her that absence without good cause could result in waiver of legal rights and could be deemed to be an admission of ADES's allegations. *See* Ariz. R.P. Juv. Ct., Forms 1 & 3.

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¶7 Mother timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes (“A.R.S.”) sections 8-235 and 12-120.21(A)(1).³

DISCUSSION

¶8 On appeal from an order terminating parental rights, we view the evidence in the light most favorable to sustaining the superior court’s findings. *Manuel M. v. Ariz. Dep’t of Econ. Sec.*, 218 Ariz. 205, 207, ¶ 2, 181 P.3d 1126, 1128 (App. 2008).

I. Jurisdiction.

¶9 ADES argues we lack jurisdiction to review the superior court’s denial of Mother’s motion to set aside the initial termination decision because Mother filed her notice of appeal only “regarding the court’s final order and the Finding of Facts, Conclusions of Law, signed on July 12, 2012” and not from the denial of her motion to set aside. We disagree. Although the superior court had orally announced its termination decision at the severance hearing, that decision had not yet been reduced to a final signed, written order. *See Ariz. R.P. Juv. Ct. 66(F)* (requiring signed, written termination order); *see also Ariz. R.P. Juv. Ct. 104(A)* (“A final order shall be in writing and signed by the judge before an appeal can be taken.”). Mother filed and the court considered the motion to set aside before judgment was entered, allowing Mother an opportunity to moot the in-absentia decision if she were able to show good cause for her absence. Under these circumstances, the court’s ruling on Mother’s motion to set aside was an interlocutory order preparatory to the later-entered final termination judgment. *See Rita J. v. Ariz. Dep’t of Econ. Sec.*, 196 Ariz. 512, 515, ¶ 8, 1 P.3d 155, 158 (App. 2000) (defining an interlocutory order as one preparatory to the final decision in the case, “contemplate[ing] further proceedings that will determine the ultimate outcome of the case”). Accordingly, Mother’s appeal from the final termination order was sufficient to challenge the interlocutory ruling on her motion to set aside as well.

II. Waiver of Rights.

¶10 Mother argues that the trial court should have re-opened the hearing that was conducted in her absence, arguing that there was good

³ Absent material revisions after the relevant date, statutes cited refer to the current version unless otherwise indicated.

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cause for her absence. “A parent is entitled to a hearing before the parental rights are severed.” *Maricopa County Juv. Action No. JS-4942*, 142 Ariz. 240, 242, 689 P.2d 183, 185 (App. 1984). The hearing may proceed in the parent’s absence if the parent, having notice of the proceeding and having been warned of the consequences of nonappearance, fails to appear without good cause. A.R.S. § 8-537(C); Ariz. R.P. Juv. Ct. 65(C)(6)(c). We review the denial of a motion to set aside for an abuse of discretion, *i.e.*, discretion exercised in a manifestly unreasonable way, on untenable grounds, or for untenable reasons. *Adrian E. v. Ariz. Dep’t of Econ. Sec.*, 215 Ariz. 96, 101, ¶ 15, 158 P.3d 225, 230 (App. 2007).

¶11 Mother does not argue that she lacked notice of the initial termination hearing or that she had not been warned of the consequences of nonappearance. She argues only that she established good cause for failing to appear, and that the court, therefore, abused its discretion by denying her motion to set aside the termination order.

¶12 “In order to show good cause, the moving party must show that (1) mistake, inadvertence, surprise or excusable neglect exists and (2) a meritorious defense to the claims exists.” *Christy A. v. Ariz. Dep’t of Econ. Sec.*, 217 Ariz. 299, 304, ¶ 16, 173 P.3d 463, 468 (App. 2007) (citing *Richas v. Superior Court*, 133 Ariz. 512, 514, 652 P.2d 1035, 1037 (1982)). “Neglect is excusable when it . . . might be the act of a reasonably prudent person in the same circumstances.” *Ulibarri v. Gerstenberger*, 178 Ariz. 151, 163, 871 P.2d 698, 710 (App. 1993). For these purposes, “[a] meritorious defense must be established by facts” not through “conclusions, assumptions or affidavits based on other than personal knowledge.” *Richas*, 133 Ariz. at 517, 652 P.2d at 1040.

¶13 At the initial termination hearing, Mother offered different versions of facts attempting to explain why she contacted someone for a ride but was not able to contact her attorney. At the evidentiary hearing, Mother offered as evidence her own handwritten letter explaining why she arrived late at the initial termination hearing, but she did not provide other witnesses or evidence in support of her motion. Evaluating the credibility of witnesses is left to the sound discretion of the trial court, *see Haas v. Morrow*, 54 Ariz. 455, 456, 97 P.2d 204, 204 (1939), and we conclude that the court did not abuse its discretion by finding unpersuasive Mother’s explanations regarding her diligence in trying to attend the

severance hearing, and thus finding Mother did not establish excusable neglect for her failure to timely appear at the hearing.⁴

III. Termination of Parental Rights.

¶14 The superior court may terminate a parent-child relationship upon a finding that clear and convincing evidence supports at least one statutory ground for severance and that a preponderance of the evidence shows severance to be in the child's best interests. A.R.S. § 8-533(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 22, 110 P.3d 1013, 1018 (2005). Severance is authorized based on the child's time in care pursuant to A.R.S. § 8-533(B)(8)(b) if: (1) the child is under three years old, (2) the child has been in an out-of-home placement for at least six months, (3) ADES "has made a diligent effort to provide appropriate reunification services," and (4) "the parent has substantially neglected or willfully refused to remedy the circumstances that cause the child to be in an out-of-home placement." We review the termination order for an abuse of discretion and accept the court's factual findings unless clearly erroneous. *Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, 47, ¶ 8, 83 P.3d 43, 47 (App. 2004).

¶15 Although Mother did not establish good cause for failing to appear, "a parent's failure to appear does not relieve the juvenile court of its obligation to assess the 'record and evidence' presented and to determine whether the state has proven a statutory ground for termination by clear and convincing evidence." *Manuel M.*, 218 Ariz. at 212, ¶ 23, 181 P.3d at 1133. If a parent fails to appear at the initial termination hearing without good cause, the parent is deemed to have admitted the allegations of the severance petition. A.R.S. § 8-535(D); Ariz. R.P. Juv. Ct. 65(C)(6)(c). This deemed admission extends only to the factual allegations and "does not [] concede that those factual allegations sustain the quantum of evidence required to establish the legal grounds for terminating a parent's rights." *Manuel M.*, 218 Ariz. at 214, ¶ 28, 181 P.3d at 1135; *see also Christy A.*, 217 Ariz. at 306, ¶ 24, 173 P.3d at 470 (holding that parents who waive their rights at termination hearings still

⁴ We note that a parent's failure to attend a severance hearing does not preclude the parent's counsel from contesting the statutory bases for termination and presenting evidence or otherwise challenging the State's case. *Manuel M.*, 218 Ariz. at 213-14, ¶¶ 28-31, 181 P.3d at 1134-35. Here, Mother's counsel was present at the hearing and challenged the State's case, including by cross-examining the ADES case manager.

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retain a right to participate, including through cross-examination of witnesses).

¶16 After finding that Mother had waived her rights by nonappearance, the court nevertheless considered the testimony by the case manager on direct and cross-examination and considered the reports describing R.M.'s out-of-home placement. The case manager opined that termination and adoption was in R.M.'s best interests because Mother had failed to address her substance abuse and mental health issues. The ADES reports detailed ADES's efforts to encourage Mother to participate in services; Mother ultimately failed to take advantage of these services, claiming there was "no point" in completing them. The reports stated that Mother does not have stable housing or employment and that her history of drug abuse and lack of financial stability present a substantial risk of harm to R.M. The reports also indicated that R.M.'s current foster parents are willing to adopt her, have a significant bond with the child, and have provided a safe and stable home. Accordingly, the record supports the court's conclusion that Mother has substantially neglected or willfully refused to remedy the circumstances that caused R.M. to be in out-of-home placement and that severance is in R.M.'s best interests. We therefore affirm the judgment terminating Mother's parental rights as to R.M.

CONCLUSION

¶17 For the foregoing reasons, we affirm.



Ruth A. Willingham · Clerk of the Court
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