

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

JOSEF G., *Appellant*,

v.

DEPARTMENT OF CHILD SAFETY, M.G., *Appellees*.

No. 1 CA-JV 17-0014
FILED 7-11-2017

Appeal from the Superior Court in Maricopa County
No. JD538031
The Honorable Karen L. O'Connor, Judge

VACATED AND REMANDED

COUNSEL

Vierling Law Offices, Phoenix
By Thomas A. Vierling
Counsel for Appellant

Arizona Attorney General's Office, Mesa
By Amanda Adams
Counsel for Appellee Department of Child Safety

MEMORANDUM DECISION

Chief Judge Michael J. Brown delivered the decision of the Court, in which Judge Peter B. Swann and Judge Jon W. Thompson joined.

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B R O W N, Chief Judge:

¶1 Josef G. (“Father”) appeals the juvenile court’s order terminating his parental rights to his child, M.G., born in August 2012. Father argues, in part, that the court violated his due process rights when it denied him the right to be heard at the severance hearing. The Department of Child Safety (“DCS”) concedes this error. For the following reasons, we vacate the court’s order and remand for further proceedings.

¶2 In April 2016, following a two-year dependency, DCS filed a petition to terminate Father’s parental rights to M.G. The juvenile court held an initial severance hearing in May 2016, wherein the court found that, although Father had been notified of the hearing, he failed to appear and did not provide good cause for his non-appearance. At a publication hearing and pretrial conference in September 2016, the court found that Father had again failed to appear without good cause.

¶3 Father did appear, however, at the severance hearing held on December 6, 2016. At the outset of the hearing, the court noted that Father had failed to appear at the previous hearings without good cause and that the court had “preserved” his failures to appear for the severance hearing. Father’s attorney informed the court that Father was contesting the severance and that he desired to be heard, “unless the Court has found [Father] in default.” The court stated it would proceed by default and then heard testimony from the DCS caseworker, including cross-examination by Father’s counsel. At the close of the hearing, the court granted DCS’s severance motion and issued a signed order terminating Father’s parental rights. This timely appeal followed.

¶4 When a parent fails to appear at a termination hearing, the juvenile court “may find that the parent has waived [his] legal rights and is deemed to have admitted” the factual allegations of the petition. Ariz. Rev. Stat. (“A.R.S.”) § 8-863 (C); *Manuel M. v. Dep’t of Econ. Sec.*, 218 Ariz. 205, 213, ¶ 28 (App. 2008) (holding that when a parent fails to appear at a severance hearing, he “admits only the factual contentions contained in the motion”). The court may then terminate that parent’s rights to his child “based on the record and evidence presented.” A.R.S. § 8-863 (C); Ariz. R.P. Juv. Ct. 65 (C)(6)(c). However, if a parent appears at the hearing before completion of the presentation of evidence, the parent’s due process rights are violated if the court restricts his or her participation. *Brenda D. v. Dep’t of Child Safety*, 393 P.3d 930, 936, ¶ 18 (App. 2017). “[O]nly if a parent has failed to appear by the time both parties have fully presented their case, may the court treat the parent’s absence as a waiver of the parent’s legal

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rights and deem the parent to have admitted the well-pled factual allegations of the petition.” *Id.* Therefore, in a case where the parent appears before the “close of the moving party’s case,” the parent must be permitted to contest the facts supporting the statutory basis for termination and to testify regarding the child’s best interests. *See id.* at 937, ¶ 22 (recognizing right of parent’s counsel to call witnesses to challenge the legal grounds for termination of the parent-child relationship); *see also Christy A. v. Ariz. Dep’t of Econ. Sec.*, 217 Ariz. 299, 306, ¶ 24 (App. 2007) (holding that a parent who has failed to appear retains the right to participate and testify regarding best interests).

¶5 Here, Father was present at the hearing, before the State presented its evidence supporting the petition and, through counsel, expressed a desire to speak against the motion for termination of his parental rights. Consistent with *Brenda D.*, 393 P.3d at 936-37, ¶¶ 19-20, Father’s waiver, due to his earlier failure to appear, did not apply until DCS had presented its evidence supporting the petition for termination. Thus, the juvenile court erred when it declined to allow Father the opportunity to testify and otherwise challenge the merits of the petition for termination. We therefore vacate the juvenile court’s order terminating Father’s parental rights to M.G. and remand for further proceedings consistent with this decision.



AMY M. WOOD • Clerk of the Court
FILED: JT