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



DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

MATTHEW J. ,) No. 1 CA-JV 09-0213
)
Appellant,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
)
ARIZONA DEPARTMENT OF ECONOMIC) (Not for Publication -
SECURITY, ERA J. ,) Ariz. R.P. Juv. Ct. 103(G);
) ARCAP 28)
Appellees.)
)

Appeal from the Superior Court in Mohave County

Cause No. JD20070016

The Honorable Richard Weiss, Judge

AFFIRMED

Jill L. Evans, Appellate Defender Kingman
By Diane S. McCoy, Deputy Appellate Defender
Attorneys for Appellant

Terry Goddard, Arizona Attorney General Phoenix
By Amanda Holguin, Assistant Attorney General
Attorneys for Appellee
Arizona Department of Economic Security

J O H N S E N, Judge

¶1 Matthew J. ("Father") appeals the superior court's order terminating his parental rights to his daughter. For the following reasons, we affirm the superior court's order.

FACTUAL AND PROCEDURAL HISTORY

¶2 Father's daughter was born in May 2008. The minor child was removed from the child's mother ("Mother") in September 2008. At the time, Father had not established paternity, and there was no order granting him custody. The child was adjudicated dependent as to Father in September 2008 and paternity was established in December 2008.

¶3 Father was present at the preliminary protective hearing/temporary custody hearing on September 11, 2008. On October 10, 2008, he attended an evidentiary hearing, and on November 19, 2008, he attended a report and review hearing. He did not, however, attend the report and review hearing held on February 18, 2009. On March 10, 2009, the Child Protective Services ("CPS") case manager reported to the Foster Care Review Board that Father had "participated in minimal services" and "no longer reside[d] with [his parents]." Father did not attend the permanency hearing on April 8, 2009, at which the superior court accepted the case plan of severance and adoption by a relative. Father's attorney appeared on his behalf at all hearings.

¶4 The Arizona Department of Economic Security ("ADES") filed a Motion for Termination of Parent-Child Relationship on

April 17, 2009 and served on Father's attorney a Notice of Initial Hearing on ADES's Motion for Termination of Parent Child Relationship. The notice informed Father the initial hearing on the motion to terminate would be held on May 6, 2009, and admonished him of the consequences if he should fail to appear.

¶15 Father did not attend the May 6 hearing. The court entered a default against him and allowed ADES to put on evidence through a CPS caseworker. Father's attorney was permitted to cross-examine the caseworker. The court's minute entry order found that Father "has been properly served" and that "proper notice" had been provided to Father. The court found ADES proved by clear and convincing evidence two grounds for severance, neglect and six months in care, pursuant to Arizona Revised Statutes ("A.R.S.") sections 8-533(B)(2) (Supp. 2009) and -533(B)(8)(b), respectively. The court also found severance would be in the child's best interest. The court terminated Father's parental rights and ordered ADES to lodge "an appropriate order." Finally, the court granted Father's attorney's request to withdraw.

¶16 The court held a trial on ADES's motion to sever Mother's rights on September 29, 2009. The minute entry the court issued on that date states that the court "has received a letter from [Father] . . . requesting to participate in services," and that Father was present at the trial. According

to the minute entry, the court notified Father that it already had granted the motion to terminate his rights, but noted that it had yet to enter a signed order to that effect.

¶7 It was not until October 21, 2009, that ADES lodged proposed findings of fact and conclusions of law. The court signed the findings of fact and conclusions of law, which were filed on October 27, 2009. Father timely appealed. We have jurisdiction pursuant to A.R.S. § 8-235 (2007).

DISCUSSION

¶8 Father argues he was not properly admonished regarding the consequences of his failure to appear at the initial termination hearing and the court erred by failing to find he had been so admonished. He also argues his due process rights were violated when the court ruled on termination in his absence. We address each in turn.

A. Standard of Review.

¶9 We review the superior court's interpretation of a statute *de novo*. *In re Paul M.*, 198 Ariz. 122, 123, ¶ 1, 7 P.3d 131, 132 (App. 2000). "We view the facts in a light most favorable to affirming the trial court's findings." *Matter of Maricopa County, Juvenile Action No. JS-8490*, 179 Ariz. 102, 106, 876 P.2d 1137, 1141 (1994). We will affirm an order terminating a parent-child relationship "unless it is clearly

erroneous." *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 4, 53 P.3d 203, 205 (App. 2002).

B. The Notice Complied With the Rules of Procedure.

¶10 A parent must be served with a motion for termination at least ten days before the initial termination hearing. A.R.S. § 8-863(A) (2007). Rule 64(C) of the Rules of Procedure for the Juvenile Court ("Juvenile Court Rules") provides that "[a] notice of hearing shall accompany the motion or petition for termination." In addition to setting out "the location, date and time of the initial termination hearing," the notice of hearing

shall advise the parent . . . that failure to appear at the initial hearing, . . . without good cause, may result in a finding that the parent . . . has waived legal rights, and is deemed to have admitted the allegations in the motion or petition for termination. The notice shall advise the parent . . . that the hearing[] may go forward in the absence of the parent . . . and may result in the termination of parental rights based upon the record and evidence presented.

Ariz. R.P. Juv. Ct. 64(C).

¶11 Juvenile Court Rule 65, in turn, provides that if a parent fails to appear at the initial termination hearing

without good cause shown and the court finds the parent . . . 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 allegations contained in the termination motion or petition, the court may proceed with the adjudication of termination based upon the record and evidence presented if the moving party or petitioner has proven grounds upon which to terminate parental rights.

Ariz. R.P. Juv. Ct. 65(C)(6)(c).

¶12 Juvenile Court Rule 64(D)(2) provides that notice of a hearing shall be served pursuant to Arizona Rule of Civil Procedure 5(c). Pursuant to Rule 5(c)(1), service may be effected on a represented party by serving the party's attorney. See *Mara M. v. Ariz. Dep't of Econ. Sec.*, 201 Ariz. 503, 507, ¶ 25, 38 P.3d 41, 45 (App. 2002). In *Mara M.*, the court held service upon a mother's attorney was sufficient when the attorney had not been in contact with the mother for months and CPS could find her only when she was in jail. *Id.* at 508, ¶ 28, 38 P.3d at 46. Under these circumstances, the court concluded, "[r]ealistically, service of process on counsel in a case such as this may not in fact apprise a parent . . . of the pendency of termination proceedings, but, nonetheless, it is a means reasonably calculated under the circumstances to notify the parent and to protect her rights as opposed to attempted service on a person who has disappeared or service by publication." *Id.*

¶13 The situation here is not unlike that in *Mara M.* Father was not present at the permanency hearing at which the

court adopted a case plan of severance and adoption, and the Notice of Initial Hearing on ADES's Motion for Termination of Parent-Child Relationship was served on him through his attorney. When Father did not appear at the initial hearing, Father's attorney stated he had not been in contact with Father for several months. The attorney told the court he had spoken to Father's mother the night before the initial hearing and that she said Father was "no longer interested in the case and would not be here."

¶14 Father seems to argue that the only admonition he received was that "termination could result if he failed to participate in services." Although Father's brief includes no citation to the record for that assertion, we presume he refers to an admonition he received at some point prior to the notice of initial termination hearing. In any event, Father's argument disregards the authorities cited above that state that a notice of hearing, and the admonition it contains, is properly served on a parent by service on the parent's attorney. We conclude that pursuant to Juvenile Court Rule 64(D)(1) and Arizona Civil Procedure Rule 5(c)(1), the Notice of Initial Hearing was properly served on Father through his attorney.

¶15 Moreover, the notice served on Father through his attorney contained the required admonition. It stated:

You are advised that your failure to personally appear in court at the initial hearing, pretrial conference, status conference or termination adjudication, without good cause shown, may result in a finding that you have waived your legal rights and have admitted the allegations in the Motion. In addition, if you fail to appear, without good cause, the hearing may go forward in your absence and may result in termination of your parental rights based upon the record and the evidence presented to the court.

Consistent with Juvenile Court Rule 65(C)(6)(c), the notice properly informed Father that if he failed to appear at the initial termination hearing without good cause, the hearing could go forward without him and that the court might "proceed with the adjudication of termination based upon the record and evidence presented."

C. The Court Made the Required Findings.

¶16 Father argues the superior court erred by failing to find that he had been properly admonished of the consequences of failing to appear at the initial termination hearing. See Ariz. R.P. Juv. Ct. 65(C)(6)(c) ("court may proceed" to adjudicate termination petition if it "finds the parent . . . had notice of the hearing, was properly served pursuant to Rule 64 and had been previously admonished regarding the consequences of failure to appear").

¶17 The unsigned minute entry issued after the May 6 hearing does not contain the findings required by Juvenile Court

Rule 65, nor did the court make the findings on the record. The Findings of Fact and Conclusions of Law issued on October 27, however, state:

Father received oral admonition in open court at initial hearing on September 11, 2008, and written admonition in the Notice of Initial Hearing on Motion for Termination of Parent-Child Relationship, notifying him of the need to attend all court hearings and that the failure to appear could result in a finding that the parent has waived his legal rights, admitted the allegations in the motion and that the Court could proceed with termination of his parental rights based upon the record presented.

Therefore, the requirements of Juvenile Court Rule 65 were met.

D. Father's Due Process Arguments.

¶18 Father next argues the court erred by moving to the merits of the motion to terminate without first considering whether he could show good cause for his failure to appear and whether, under the circumstances, his absence constituted a waiver of his rights. In support of this contention, he cites *Christy A. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 299, 304, ¶ 14, 173 P.3d 463, 468 (App. 2007). While we observed in *Christy* that the "better course" would be to consider the issue of good cause for a parent's absence before moving on to issues of

termination, our decision in that case does not require a court to proceed in that fashion.¹

¶19 Finally, Father argues his due process rights were violated when the court proceeded in the absence of "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections." Without citation to the record, Father argues he lacked actual notice of the initial termination hearing because his lawyer did not send him the notice and did not "tell him about his court date until the night before."

¶20 Because parents have a fundamental interest in the care, custody and control of their children, the State must provide fair procedures before terminating a parent-child relationship. *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982). "Due process requires notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections." *Matter of Appeal in Maricopa County Juvenile*

¹ Father also argues that his "notice and due process rights" were violated because the court permitted his attorney to withdraw at the conclusion of the May 6 hearing, so that as a result, Father did not learn his parental rights had been severed until he appeared at the September 29 hearing. We will not consider this argument, however, because Father does not assert he was prejudiced by the delay.

Action No. JS-501904, 180 Ariz. 348, 355, 884 P.2d 234, 241 (App. 1994) (internal quotation omitted).

¶21 In *Mara M.*, the court concluded that service on the mother's attorney complied with due process in the circumstances presented there. 201 Ariz. at 508, ¶ 28, 38 P.3d at 46. We decline to address whether service on Father's attorney complied with due process in this case. The *Mara M.* court noted that the mother "has neither alleged that she lacked actual notice of the possibility that her parental rights would be terminated nor claimed prejudice." *Id.* at 507, ¶ 26, 38 P.3d at 45. In this case, although Father argues "he had no notice" of the initial termination hearing, he offers no facts to support that contention, nor did he present any such facts to the superior court. Father also fails to offer facts to support the conclusion that he would have appeared at the hearing had he received actual and timely notice. As noted, Father failed to attend the two hearings prior to the initial termination hearing, his attorney stated that he had not been in contact with him and the case manager reported Father was only minimally engaged in services.²

² Father never attempted to set aside the default, either pursuant to Arizona Rule of Civil Procedure Rule 55(c) or Juvenile Court Rule 46(E). Instead, Father waited more than four months after the May 6 hearing to appear and sent a letter to the judge asking for services.

CONCLUSION

¶22 For the foregoing reasons, we affirm the superior court's order severing Father's parental rights.

/s/_____
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/_____
PATRICK IRVINE, Judge

/s/_____
PHILIP HALL, Judge