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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 11-18-2010
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

NICOLE M. ,) 1 CA-JV 10-0172
)
Appellant,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ARIZONA DEPARTMENT OF ECONOMIC) Ariz. R.P. Juv. Ct. 103(G);
SECURITY, SONNY G.,) ARCAP 28)
)
Appellees.)
)

Appeal from the Superior Court in Maricopa County

Cause No. JD508518

The Honorable Bernard C. Owens, Judge *Pro Tem*

VACATED AND REMANDED

The Stavris Law Firm, P.L.L.C.
By Alison Stavris
Attorney for Appellant

Scottsdale

Terry Goddard, Attorney General
By David M. Osterfeld, Assistant Attorney General
Attorneys for Appellee Arizona Department of Economic Security

Phoenix

W I N T H R O P, Presiding Judge

¶1 Nicole M. ("Mother") appeals from the juvenile court's
August 9, 2010 minute entry order finding her biological child

("the child") dependent as to her.¹ Mother argues that the court violated her due process rights because it failed to provide her with counsel to represent her interests at the dependency adjudication hearing. Because we agree, we vacate that portion of the order finding the child dependent as to Mother and remand for further proceedings consistent with this decision.

FACTS AND PROCEDURAL HISTORY

¶2 The parties do not dispute the underlying facts. In late March 2010,² Child Protective Services ("CPS") received a report alleging the child had been neglected and was at risk of further neglect and physical abuse. The Arizona Department of Economic Security ("ADES") obtained a court order allowing the child to be taken into temporary custody, and on April 21, CPS took the child into custody. On April 23, ADES filed a dependency petition, alleging that the child was dependent as to Mother and Father.

¶3 Mother completed a financial affidavit to determine her eligibility for a court-ordered attorney, and the juvenile court appointed Jeffrey Kolbe of the Office of the Legal Defender as Mother's counsel. At the April 29 preliminary protective hearing, Mother contested the allegations of the

¹ The court also found the child dependent as to his biological father ("Father"). Father's appeal has since been dismissed.

² All events related to this appeal occurred in 2010.

dependency petition, and the court read and provided her with a copy of a Form I Notice to Parent in Dependency Action ("Form I").³ Mother indicated that she understood the admonition provided in the Form I. At the May 27 pretrial conference, the court scheduled a dependency adjudication hearing for August 9.

¶4 On June 8, Mr. Kolbe moved for appointment of new counsel, alleging that Mother was unable to establish sufficient confidence that he would represent her interests. On July 2, the juvenile court granted the motion and appointed the Office of Public Defense Services ("OPDS") to represent Mother; OPDS appointed Sara Priestly as Mother's counsel on July 16. On August 4, Ms. Priestly filed a motion to withdraw as Mother's counsel, indicating that Mother "rejects me as her attorney" and did not want a continuance of the August 9 dependency adjudication hearing. The court granted the motion on August 5, but did not appoint new counsel to represent Mother.

¶5 The August 9 dependency adjudication hearing had been scheduled for 9:00 a.m., and at 9:26 a.m. that day, the juvenile court convened the hearing. Neither Mother nor Father was present at the beginning of the hearing, and counsel for ADES

³ A "Form I" informs a parent of his or her rights, including the right to counsel. It also notifies a parent that if he or she fails to appear at specified hearings without good cause, the court may determine that the parent has waived his or her rights and admitted the allegations of the dependency petition, and the court may rule that the child is dependent based on the record and evidence presented. See Ariz. R.P. Juv. Ct. Form I.

requested that the court proceed in their absence. After Father's counsel confirmed Father had been aware of the hearing, the guardian ad litem agreed the hearing should proceed and noted that Mother's previous counsel, Ms. Priestly, had indicated Mother was aware of the hearing and did not seek a continuance. The court reviewed Ms. Priestly's motion to withdraw and concluded that "it's clear from the motion that [Mother] had notice of today's hearing." After finding "no good cause" had been shown for Mother's and Father's non-appearance, the court concluded they had "waived their appearance, and waived their rights, and have -- and by doing so, have admitted the allegations in the dependency petition."

¶6 Although no counsel was present to represent Mother's interests, the court proceeded with the hearing and admitted into evidence nine of the eleven exhibits introduced by counsel for ADES. As the court began to make findings, Mother and Father appeared in the courtroom. The hearing was recessed, and Father conferred with his counsel for approximately thirty to forty minutes. When the hearing reconvened, counsel informed the court that in the interim, Mother had voluntarily left the courthouse, but before doing so, she had filed a notice of appeal.⁴

⁴ Both parents were included on the notice of appeal. After learning that Mother had left, Father also left the courthouse.

¶7 After determining that any prior findings had been “rescinded” by the recess, the court again proceeded to make findings. With respect to Mother, the court found that she had proper legal notice of the hearing, left the courtroom voluntarily, had shown no good cause for her “non-appearance,” and had therefore waived her right to contest the allegations contained in the dependency petition. The court found a factual basis for dependency as to Mother based on mental illness, substance abuse, and inability to maintain stable housing.⁵

ANALYSIS⁶

¶8 Mother argues that the juvenile court violated her due process rights by failing to appoint new counsel to represent her at the dependency hearing. The State agrees, and so do we.

¶9 We review *de novo* questions of law and constitutional claims. See *Hobson v. Mid-Century Ins. Co.*, 199 Ariz. 525, 528, ¶ 6, 19 P.3d 1241, 1244 (App. 2001). In a dependency proceeding, if a parent is found to be indigent and entitled to counsel, the juvenile court “shall” appoint an attorney to

⁵ The court also ordered that counsel and a guardian ad litem be appointed for Mother for future proceedings. On August 16, Mother was appointed counsel and a guardian ad litem to represent her.

⁶ Although Mother filed her notice of appeal prematurely, we nonetheless have appellate jurisdiction pursuant to Arizona Revised Statutes (“A.R.S.”) section 8-235(A) (2007) and Rule 103(A), Ariz. R.P. Juv. Ct. See *Comeau v. Ariz. State Bd. of Dental Exam’rs*, 196 Ariz. 102, 106, ¶ 16, 993 P.2d 1066, 1070 (App. 1999).

represent the parent. See A.R.S. § 8-221(B) (Supp. 2010). Section 8-221(B) "is legislative recognition that due process requires appointment of counsel in a dependency proceeding where the parent faces losing custody of a child." *Pima County Juv. Action No. J-64016*, 127 Ariz. 296, 298, 619 P.2d 1073, 1075 (App. 1980). Further, "[b]ecause the juvenile court considers essentially the same evidence at a 'default' evidentiary hearing as at a typical 'contested' severance adjudication hearing, a parent, even though in 'default,' should also have a right to have counsel present and participate." *Christy A. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 299, 307, ¶ 28, 173 P.3d 463, 471 (App. 2007).

¶10 Although a parent may waive her right to counsel, we will find that the parent has done so only if the waiver is knowing, voluntary, and intelligent. *Manuel M. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 205, 211, ¶ 20, 181 P.3d 1126, 1132 (App. 2008). Further, we will not presume waiver from a silent record. See *Daniel Y. v. Ariz. Dep't of Econ. Sec.*, 206 Ariz. 257, 261, ¶ 18, 77 P.3d 55, 59 (App. 2003) (citation omitted). Consequently, a parent's failure to attend a hearing cannot constitute a constructive waiver of any rights that the parent has not been specifically informed she could lose by failing to appear. *Manuel M.*, 218 Ariz. at 211, ¶ 20, 181 P.3d at 1132.

¶11 Even if a parent's conduct creates an irreconcilable difference with her counsel, the juvenile court cannot find that she has waived her right to counsel unless first advising her of "the dangers of self-representation, and the difficulties involved in defending oneself without formal legal training." *Daniel Y.*, 206 Ariz. at 261, ¶ 15, 77 P.3d at 59 (citation omitted). The denial of the right to effective participation of counsel constitutes a denial of due process of law. *Ariz. State Dep't of Pub. Welfare v. Barlow*, 80 Ariz. 249, 253, 296 P.2d 298, 300 (1956).

¶12 In this case, Mother reportedly twice "rejected" her attorney, and she indicated she did not want a continuance of the August 9 hearing before the juvenile court granted her second court-appointed counsel's motion to withdraw. She also appeared late for the hearing and left early on her own initiative, despite having been advised that the court could find she had waived her "rights" if she failed to attend.

¶13 Nonetheless, the State does not contest that Mother is indigent, and the juvenile court determined that she is entitled to an attorney. Further, the record does not indicate that the court ever specifically advised Mother that her "non-appearance" could be construed as a waiver of the right to counsel, or advised her of the dangers of self-representation and the difficulties involved in defending herself without formal legal

training. The record also does not show that the court determined that Mother knowingly, intelligently, and voluntarily waived her right to counsel. We must therefore conclude that Mother had not waived her right to counsel, and the court, by proceeding with the dependency adjudication hearing despite Mother's lack of representation by counsel, deprived Mother of due process. As a consequence, that portion of the court's order finding the child dependent as to Mother must be vacated.

CONCLUSION

¶14 We vacate the portion of the juvenile court's August 9, 2010 minute entry order finding the child dependent as to Mother and remand for further proceedings consistent with this decision.

_____/S/_____
LAWRENCE F. WINTHROP, Presiding Judge

CONCURRING:

_____/S/_____
PATRICIA K. NORRIS, Judge

_____/S/_____
PATRICK IRVINE, Judge