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Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 03/13/2012
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

RAYONDA W.,) No. 1 CA-JV 11-0204
)
Appellant,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
)
LESLIE J., PARIS W., ANAIYA W.,) (Not for Publication -
) 103(G) Ariz.R.P. Juv. Ct.;
Appellees.) Rule 28 ARCAP
)
)

Appeal from the Superior Court in Maricopa County

Cause No. JS11618

The Honorable Joan M. Sinclair, Judge

AFFIRMED

John L. Popilek, P.C.	Scottsdale
By John L. Popilek	
Attorneys for Appellant	
Knapp & Roberts, P.C.	Phoenix
By David L. Abney	
And	
Law Office of Burguan & Clarke PLLC	Phoenix
By Amie S. Clarke	
Co-Counsel for Appellees	

G E M M I L L, Judge

¶1 Rayonda W. ("Mother") appeals from the order terminating her parental rights to her two children, Paris W.

and Anaiya W. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶12 Paris W. was born in Michigan in 1996 to Mother, who was fifteen, and Father, who was nineteen. Paris W. was in and out of her paternal grandmother's (appellee Leslie J.'s) care for the first few years of her life until 1999, when Child Protection Services in Texas reportedly removed Paris W. from her parents' care due to abuse and neglect, and placed her back in the care of Leslie J.

¶13 Anaiya W. was born in Texas in 2003 to Mother and Father. Anaiya W. has been in Leslie J.'s care since infancy, with either one or both of her biological parents residing in Leslie J.'s home off and on until 2006.

¶14 Both children had been residing continuously with Leslie J. in Texas from 1999 to 2005. In March 2005, when the girls were eight and two, the parents took the children to live with them in Detroit, Michigan. In June 2005, Leslie J. retrieved the children from Detroit after being contacted by an acquaintance of Mother with whom Mother had left the children. Both children have consistently remained in Leslie J.'s care since that time.

¶15 In December 2005, Leslie J. moved to Arizona with both children and filed for permanent guardianship of the children; the petition was granted on June 15, 2006 and has been renewed

yearly. Mother contested neither the initial permanent guardianship nor any of the annual renewals. Additionally, Mother has made no efforts toward remedying the factors that rendered her unable to provide safe and appropriate parental care to her children.

¶16 Throughout the children's lives, Mother has disappeared for several weeks at a time with no contact. With the exception of brief periods during Paris W.'s primary years, and a period of two to three months in 2005, Mother has not attempted to parent either child. Mother has not supported them or provided for them in any manner. Mother has continued to reside in Detroit and contacts the children sporadically (but only with Leslie J.'s mediation and facilitation); the last such contact, according to our record, took place in July 2011. Mother last visited the children in May 2010.

¶17 The Social Study to Accompany Petition to Terminate Parent-Child Relationship Pursuant to Arizona Revised Statutes ("A.R.S.") 8-536 (2007) dated 7/21/11 and completed by Arizona Adoption and Foster Care (AAFC) concluded that the best interests of the children would be served by the increased stability and security resulting from severance of Mother's parental rights. Mother did not object to the admission of this report as evidence at the severance trial.

¶18 On September 22, 2010, Leslie J. filed a termination

petition alleging Mother had abandoned the children. The initial severance hearing was set for November 17, 2010. On November 9, 2010, the juvenile court received a telephone call from Mother wherein Mother expressed her intent to contest the severance petition, requested counsel, and informed the court that she was residing in Detroit and unable to physically attend the initial severance hearing. The juvenile court ordered counsel to be appointed for Mother and granted Mother permission to appear telephonically at the initial severance hearing.

¶19 On November 17, 2010, the juvenile court held the initial severance hearing, but Mother failed to appear telephonically. The juvenile court appointed counsel for Mother, postponed the initial severance hearing to January 14, 2011, issued a Form 3¹ for Mother, and granted Mother permission to appear telephonically at the postponed initial severance

¹ Complying with the warning requirement of Arizona Rule of Procedure for the Juvenile Court ("Rule") 66(D)(2), Form 3 ("Notice to Parent in Termination Action") includes the following admonishment: "You are required to attend all termination hearings. If you cannot attend a court hearing, you must prove to the Court that you had good cause for not attending. If you fail to attend the Initial Termination Hearing, Termination Pre-trial Conference, Status Conference, or Termination Adjudication Hearing without good cause, the Court may determine that you have waived your legal rights and admitted the grounds alleged in the motion/petition for termination. The Court may go forward with the Termination Adjudication Hearing in your absence and may terminate your parental rights to your child based on the record and evidence presented." Ariz. R.P. Juv. Ct. Form 3.

hearing.

¶10 On January 14, 2011, the juvenile court held the continued initial severance hearing, and Mother successfully appeared telephonically. At this hearing, the juvenile court set mediation for February 11, 2011, ordered that Mother attend the mediation, and granted permission for Mother to attend the mediation telephonically. The juvenile court also set a pre-trial conference for February 25, 2011, granted permission for Mother to attend the pre-trial conference telephonically, and gave notice that "[i]f [Mother] fails to appear for the Pretrial Conference, the failure to appear may be deemed as an admission to all the facts in the petition and the [juvenile c]ourt may proceed to an adjudication of the ultimate issues." Additionally, the juvenile court issued another Form 3 to Mother (via counsel) regarding the upcoming mediation and pre-trial conference dates.

¶11 On February 11, 2011, Mother, without providing prior notice or explanation, failed to appear telephonically for the mediation, and it did not proceed. On February 25, 2011, the juvenile court held the pre-trial conference; Mother successfully appeared telephonically. Because Appellant (Mother) has not provided a transcript of the February 25, 2011 pre-trial conference, we must rely solely on the court's minute entry as the only available record. The juvenile court set a

one-half day trial – a contested severance hearing – for April 28, 2011, ordered that Mother appear at the contested severance hearing *in person*, and further ordered that “absent good cause shown, the failure of [M]other to physically appear . . . may result in sanctions . . . which may include the entry of default, the issuance of a civil arrest warrant, and/or such other sanctions that are fair, just, and in the best interests of the minor child(ren).” The minute entry is silent on whether or not an additional Form 3 was issued for Mother on February 25 reflecting the date of the contested severance hearing.

¶12 Mother appeared neither in person nor telephonically for the hearing on April 28, 2011. The juvenile court reset the contested severance hearing to two half-days at 1:30 p.m. on August 8 and 9, 2011. Upon continuing the hearing, the juvenile court stated that the parties “need to be prepared to go forward [on August 8], because [the juvenile court is] not going to keep continuing the severance matter.” The juvenile court issued a new Form 3 for Mother reflecting the new August 8 and 9 dates.

¶13 At approximately 9:16 a.m. on the morning of August 8, 2011, Mother called her attorney’s office. At 11:30 a.m., Mother’s attorney telephonically spoke with Mother and Mother reportedly claimed that she could not physically attend the contested severance hearing scheduled for that afternoon because Mother “didn’t have the funds [to travel]” and “couldn’t take

time off of work." Mother reportedly supplied no other information. Mother's attorney instructed Mother to call the juvenile court and ask permission to appear telephonically, which Mother did at approximately 1 p.m. The juvenile court, through its staff, advised Mother that her physical presence was required in accordance with the previous court order. Mother did not provide any information concerning her current circumstances, nor did the juvenile court's staff inquire further.

¶14 At 1:45 p.m. on August 8, 2011, the juvenile court commenced the contested severance hearing; Mother did not appear in person. The juvenile court asked Mother's attorney where Mother was and Mother's attorney indicated that, prior to that morning, Mother had not provided any notice or information so that Mother's attorney could file a motion on Mother's behalf. Mother's attorney claimed that she had mailed the "minute entries and letters . . . discussing that [Mother] needed to appear in person," which presumably included the various Form 3s. Mother's attorney relayed Mother's claim that Mother lacked the funds and the ability to take time off work to travel to the termination hearing. The juvenile court then found that [Mother] was served appropriately, was aware of the hearing, and was aware of the penalties for failing to appear; thus Mother's failure to appear constituted "default."

¶15 The juvenile court then conducted the contested severance hearing in Mother's absence but with the participation of Mother's attorney. Mother's counsel was invited to object to the admission of evidence and to cross-examine the witness called by Petitioner Leslie J. Mother's counsel did not call any witnesses or attempt to admit any evidence. We also note that Mother filed neither a witness nor an exhibit list prior to the hearing, thereby suggesting that Mother had not intended to offer evidence or call witnesses, except perhaps herself.

¶16 After hearing, considering, and weighing all of the testimony, admitted exhibits, arguments of counsel, and written submissions of the parties, the juvenile court found that severance was warranted as to Mother based on clear and convincing evidence that Mother had abandoned the children and failed to maintain a normal parental relationship without just cause under A.R.S. § 8-533(B)(1) (Supp. 2011).² Additionally, the juvenile court found that, by a preponderance of the evidence, severance of the parent-child relationship would be in the best interests of the children.

¶17 Mother timely appealed. This Court has jurisdiction pursuant to A.R.S. §§ 8-235 (2007), 12-120.21(A)(1) (2003), and 12-2101(A)(1) (Supp. 2011).

² We cite to the current version of the applicable statute because no revisions material to this decision have since occurred.

ANALYSIS

I. *Standard of Review*

¶18 Mother argues that because “fundamental principles of liberty” and due process are at issue, this Court should review the juvenile court’s “initial entry of default” *de novo*. We review the juvenile court’s order for an abuse of discretion, however, and we will affirm if the order is supported by sufficient evidence in the record. See *Christy C. v. Ariz. Dep’t of Econ. Sec.*, 214 Ariz. 445, 451-52, ¶ 19, 153 P.3d 1074, 1080-81 (App. 2007). We review the evidence and draw all reasonable inferences in the light most favorable to upholding the juvenile court’s factual findings. *Jesus M. v. Ariz. Dep’t of Econ. Sec.*, 203 Ariz. 278, 282, ¶ 13, 53 P.3d 203, 207 (App. 2002).

II. *Good Cause and “Default”*³

¶19 On appeal, Mother argues that the juvenile court abused its discretion in not finding good cause for Mother’s failure to appear in person at the contested severance hearing and subsequently “default[ing]” her despite her attempt to appear telephonically.

³ When a parent fails to appear without good cause for certain hearings in a termination action, the juvenile court may proceed in the parent’s absence. The term “default,” although not optimal or precise, has frequently been used to describe the status of the non-appearing parent. See *Adrian E. v. Ariz. Dep’t of Econ. Sec.*, 215 Ariz. 96, 98 n.3, ¶ 5, 158 P.3d 225, 227 n.3 (App. 2007).

A. Telephonic Participation

¶20 First, Mother argues that the juvenile court's refusal to allow Mother to participate at the hearing telephonically constituted legal error. We disagree.

¶21 For hearings on the termination of parental rights, "the court *may permit* telephonic testimony or argument." Ariz. R.P. Juv. Ct. 42 (emphasis added). "The juvenile court thus [has] the authority, but not an obligation, to allow the parents to appear by telephone rather than in person." *Willie G. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 231, 234, ¶ 14, 119 P.3d 1034, 1037 (App. 2005). "We review a juvenile court's ruling on a discretionary matter for a clear abuse of the court's discretion." *Id.* at ¶ 13; See *In re Stephanie B.*, 204 Ariz. 466, 468, ¶ 8, 65 P.3d 114, 116 (App. 2003) (determination of a restitution award); *William Z. v. Ariz. Dep't of Econ. Sec.*, 192 Ariz. 385, 387, ¶ 9, 965 P.2d 1224, 1226 (App. 1998) (ruling on timeliness of motion to intervene); *Pima County Severance Action No. S-2248*, 159 Ariz. 302, 305, 767 P.2d 25, 28 (App. 1988) (rulings on requests for psychological examination of child and for consolidation of one sibling's termination hearing with another's dependency hearing).

¶22 Here, the statutory grounds for termination alleged by the Petitioner included abandonment based upon, *inter alia*, an allegation that Mother had last seen the children in May 2010.

Mother, without notifying or later explaining to the juvenile court and despite being aware of the dates of the proceedings, the importance of her attendance,⁴ and being given permission from the juvenile court to appear telephonically, failed to appear at two of the four proceedings prior to the August 8, 2011 contested severance hearing (including the February 11, 2011 mediation).

¶23 Then, at the February 25, 2011 pre-trial conference, the juvenile court explicitly ordered Mother appear in person, and not telephonically, for the contested severance hearing (originally scheduled for April 28, 2011, but later continued to August 8, 2011 at 1:30 p.m.). Mother's attorney argued unsuccessfully on February 25 that Mother be allowed to appear telephonically at the severance hearing.

¶24 Prior to the morning of the August 8, 2011 contested severance hearing, Mother made no motion - written or oral - to appear telephonically and did not provide her attorney with any new information on which to base a motion on her behalf. Approximately thirty minutes prior to the start of the contested severance hearing, Mother called the juvenile court requesting it grant Mother permission to appear telephonically for that

⁴ Mother was provided with Form 3s indicating both the dates of these proceedings and the importance of her presence. Mother has not alleged that she failed to receive these or any other materials, including the minute entries, mailed to her by her attorney.

day's hearing. Mother's explanation was that she did not have the funds to travel from Detroit, Michigan, and could not take time off work. These reasons were apparently the same reasons previously argued by Mother's attorney at the February 25, 2011 pre-trial conference. Through its staff, the juvenile court denied Mother's request and reiterated that she had been ordered to appear at the contested severance hearing in person.

¶125 In her appeal, Mother claims that the juvenile court abused its discretion in denying her last minute request to appear telephonically because, "[g]iven her distance and resources," appearing telephonically was all that was reasonable for Mother to do under the circumstances. Mother has not, however, alleged that the juvenile court abused its discretion in its initial order requiring Mother to appear in person nor has she provided the transcript of that February 25, 2011 hearing for our review. On this record, and especially given Mother's sporadic attendance via telephone at the prior proceedings, we do not perceive an abuse of the juvenile court's discretion in ordering and requiring her to appear in person.

B. Good Cause

¶126 Second, Mother argues that the juvenile court abused its discretion in not finding good cause for Mother's failure to appear in person. We disagree.

¶127 The juvenile court's determination of what constitutes

good cause for failure to appear is discretionary and will not be set aside unless the court's exercise of its discretion was "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Adrian E.*, 215 Ariz. at 101, ¶ 15, 158 P.3d at 230 (App. 2007) (quoting *Lashonda M. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 77, 83, ¶ 19, 107 P.3d 923, 929 (App. 2005)). To show good cause, the parent must show that "mistake, inadvertence, surprise or excusable neglect exists." *Christy A. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 299, 304, ¶ 16, 173 P.3d 463, 468 (App. 2007). "Excusable neglect" exists when the act "is such as might be the act of a reasonably prudent person in the same circumstances." *Id.* (quoting *Ulibarri v. Gerstenberger*, 178 Ariz. 151, 163, 871 P.2d 698, 710 (App. 1993)).

¶28 Mother has not alleged her failure to appear was caused by mistake, inadvertence, surprise, or excusable neglect. Instead, Mother contends she established good cause because she lives and works in Detroit, Michigan, did not have sufficient funds to travel, and could not take time off of work. Even if true, these circumstances do not explain why Mother waited until approximately four hours prior to the hearing to call her attorney and thirty minutes prior to contact the court.

¶29 Additionally, Mother argues that when she called the juvenile court, "[a]t the very least, the [juvenile] court

should have solicited additional information from Mother" related to her inability to appear in person. Mother cites no authority suggesting that the juvenile court has an affirmative duty to solicit information regarding good cause for a defendant's failure to appear. The burden is on the parent to demonstrate good cause for a failure to appear. See Ariz. R.P. Juv. Ct. 66(D)(2). Further, the February 25, 2011 pre-trial conference minute entry ("IT IS ORDERED that absent good cause shown, the failure of [M]other to physically appear at the aforesaid Contested Severance Hearing") and the multiple Form 3s ("[i]f you cannot attend a court hearing, you must prove to the Court that you had good cause for not attending." Ariz. R.P. Juv. Ct. Form 3) sent to Mother – the receipt of which Mother does not dispute – lend support to the juvenile court's ruling here. On this record, the juvenile court did not abuse its discretion by finding that Mother did not show good cause for her failure to appear at the contested severance hearing.

C. "Default"

¶30 Third, Mother argues that the juvenile court committed legal error by proceeding against Mother in "default." We disagree with Mother's conclusion that this was a default proceeding and we also conclude that the juvenile court properly followed Rule 66(D)(2).

¶31 Initially, we observe that a "default" judgment at a

contested severance hearing is merely imprecise language actually referring to a "waiver of rights" caused by the defendant's failure to appear absent "good cause" shown. See, e.g., A.R.S. § 8-537(C) (2007); Ariz. R.P. Juv. Ct. 65(C)(6)(c), 66(D)(2); *Christy A.*, 217 Ariz. at 304, ¶ 14, 173 P.3d at 468 (App. 2007) ("[I]t is apparent that, in practice, the juvenile court has engrafted the concept of 'default' from Rule 55 of the Arizona Rules of Civil Procedure . . . into the juvenile court rules or, at least, is utilizing the 'default' terminology when a parent fails to appear.").

¶32 Rule 66(D)(2) permits the juvenile court to proceed with the termination of parental rights based upon the record and evidence presented if the juvenile court finds that the parent failed to show good cause for not appearing at the termination hearing, the parent had notice of the hearing, had been properly served, and had been previously admonished regarding the consequences of failing to appear.

¶33 The juvenile court found each of the four statutory prerequisites. Mother has not contested that she had been properly served and previously admonished regarding the consequences of failing to appear.

¶34 With regard to notice of the hearing, in her opening brief Mother asserts that it was not established that she had received the February 25, 2011 minute entry ordering Mother to

appear in person. This argument, however, ignores the fact that Mother has not claimed that she failed to receive the minute entry or the Form 3 specifying the date and requirement that she appear in person. Insofar as Mother is arguing that the juvenile court did not have sufficient evidence to make the factual determination that Mother had received proper notice of the termination hearing, we also note that Mother called the juvenile court the day of the hearing to express that she would not be attending in person – an implausible action if she had not received proper notice of the requirement that she attend in person.

¶135 Therefore, we conclude that the juvenile court had sufficient evidence to find Mother had notice of the termination hearing and the court did not abuse its discretion in finding Mother failed to show good cause.

¶136 Lastly, Mother relies on this court's decision in *Manuel M. v. Ariz. Dep't of Econ. Sec.* to argue that "default" was inappropriate because Mother attempted to participate in the termination hearing. 218 Ariz. 205, 181 P.3d 1126 (App. 2008) ("[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—actions that could be enhanced by adversarial

participation."). In *Manuel M.*, the juvenile court erred by refusing to allow Father's attorney to participate, including cross-examination of a witness, in the termination hearing because Father failed to appear. *Id.* at 206, 216, ¶¶ 1, 37, 181 P.3d at 1127, 1137. Here, the problem in *Manuel M.* did not exist because the juvenile court allowed Mother's attorney to participate at the termination hearing, explicitly asked whether Mother's attorney had any objections to the evidence presented or cross-examination of the witness called, assessed the record and the evidence presented, and determined whether the petitioner had proven a statutory ground for termination by clear and convincing evidence.

¶37 In accordance with Rule 66(D)(2), the juvenile court appropriately found that Mother should be deemed to have admitted the allegations of the petition to sever and appropriately proceeded in Mother's absence.

III. Ineffective Assistance of Counsel

¶38 Mother next argues that Mother's trial counsel was ineffective for failing to ascertain background facts relating to Mother's inability to appear in person for the hearing. Arizona courts have not "squarely addressed" the question of whether a juvenile court's order may be reversed for ineffective assistance of counsel, and if so, what standard applies to such contention. *See John M. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz.

320, 323-24, ¶¶ 11-12, 173 P.3d 1021, 1024-25 (App. 2007). When weighing the due process rights of a parent against the interests of the child, however, this court has previously held that reversal of a termination order is not justified by inadequacy of counsel unless, "at a minimum," a parent demonstrates that the alleged errors "undermine confidence in the outcome" of the severance proceeding, and there is a "reasonable probability that, but for the counsel's errors, the result would have been different." *Id.* at 325, ¶ 18, 173 P.3d at 1026 (adapting the ineffective assistance of counsel test from *Strickland v. Washington*, 466 U.S. 668 (1984) to Arizona termination of parental rights cases).

¶39 Despite alleging Mother's attorney erred in not inquiring further into Mother's circumstances for not appearing, Mother has not alleged or explained how the result would have been different. Mother has proffered neither what additional information or circumstances she would have relayed through her attorney to demonstrate good cause nor argued that such information would have affected the juvenile court's determination. Additionally, Mother has not suggested what testimony she would have provided to attack the statutory grounds for termination. On this record, Mother cannot demonstrate a reasonable probability that, but for her attorney's alleged errors, her parental rights would not have

been severed.

¶40 Because Mother cannot establish prejudice, we need not determine whether or not Mother has established incompetence. *John M.*, 217 Ariz. at 325, ¶ 17, 173 P.3d at 1026. We must conclude that Mother's allegations of ineffective assistance of counsel do not justify reversal of the termination order.

IV. Due Process

¶41 Insofar as Mother asserts the juvenile court's determination to not allow her to appear telephonically and proceed without her presence violated her due process rights, such a claim is unpersuasive on this record. In its final order terminating Mother's parental rights, the juvenile court stated it had based its decision on the evidence presented and while "being fully advised." See Ariz. R.P. Juv. Ct. 66(D)(2) (authorizing termination based on the record and evidence presented if petitioner has proven grounds to terminate parental rights). Mother does not assert that the evidence was insufficient to support the juvenile court's ruling or that the petition was somehow defective. That Mother was precluded from presenting her own evidence to contradict the factual assertions in the petition, which she was deemed to have admitted, does not violate due process because due process requires that Mother have been given notice and the opportunity to be heard. See *Willie G.*, 211 Ariz. at 235, ¶ 18, 119 P.3d at 1038.

¶42 Mother plainly had adequate notice of the date and time of the hearing and the consequences of failing to appear and, again, the court was not required to permit her to participate telephonically. See *id.* (finding no due process violation when absent parents not permitted to appear telephonically). Moreover, Mother was represented at the hearing by counsel and Mother's attorney was given a meaningful opportunity to participate. *Manuel M.*, 218 Ariz. at 215, ¶ 32, 181 P.3d at 1136 (determining that counsel for a non-appearing parent is "entitled to participate in the termination hearing to the extent that participation fell within the scope of the contested issues at the proceeding"). Consequently, we reject Mother's due process claim.

CONCLUSION

¶43 For the foregoing reasons, we affirm the juvenile court's order terminating Rayonda W.'s parent-child relationships with Paris W. and Anaiya W.

_____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

_____/s/_____
PATRICIA A. OROZCO, Presiding Judge

_____/s/_____
PHILIP HALL, Judge