IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DENESE MAIE MASAYUMPTEWA, Petitioner, Tribal Member, v. THE HONORABLE MARK F. ACETO, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa, Respondent Judge, STATE OF ARIZONA, ARIZONA DEPARTMENT OF ECONOMIC SECURITY Through the Attorney General's Office, Real Party in Interest.	Court of Appeals Division One No. 1 CA-SA 12-0043 Maricopa County Superior Court No. JD-509509 DEPARTMENT B **DECISION ORDER**

The Court, Presiding Judge Diane M. Johnsen and Judges Donn Kessler and Lawrence F. Winthrop, participating, has considered the petition for special action, the response thereto, the reply in support of the petition, and the special action appendices. For the reasons stated below, we accept jurisdiction and grant the petitioner relief. The minute entry order dated January 24, 2012, finding the child dependent as to the petitioner is vacated.

The material facts are relatively undisputed. The Department of Economic Security ("DES") filed a petition alleging that the child, J., was dependent as to both her

mother, Denese Maie Masayumptewa ("Mother"), and her father ("Father").[1] Mother and Father contested the petition. After an October 25, 2011 pretrial conference at which Mother and Father appeared, the court entered a minute entry expressly setting a contested hearing on the dependency as to Mother for February 14, 2012, but continuing the pretrial conference as to Father until January 24, 2012 ("October 25 order"). At the January 24 conference, attorneys for both Mother and Father appeared, but neither Mother nor Father appeared. The court held a default hearing on the dependency petition and issued a minute entry finding J. dependent as to both parents ("January 24 order").

Mother filed a motion to set aside the default judgment. In that motion, Mother contended that she understood that she did not have to attend the January 24 conference and thought the trial scheduled for February 14, 2012, was her next appearance date. Mother's attorney explained in that motion that the attorney had been confused about the next appearance date for Mother because she had not looked at her calendar, and she did not discover her error until she telephoned Mother later to ask why she did not appear at the conference.

The court denied the motion to set aside the default judgment. It indicated that Mother was present in the courtroom

[1] Father is not a party to this special action and we do not address that portion of the January 24, 2012 order finding J. dependent as to Father.

on October 25 and it said that, having viewed a video recording of that hearing, the court had set the January 24 pretrial conference for both Mother and Father. Thus, although the court conceded the October 25 order was erroneous, it found that Mother had notice that she was to appear at the January 24 conference.

Mother then filed this petition for special action, asking this Court to vacate the January 24 order. While the petition was pending, the respondent judge issued a new minute entry ("February 29 order"). The court noted the existence of the special action and set forth additional facts that led it to deny the motion to set aside the default judgment. Included in those facts was that Mother had not presented an affidavit averring she had received the October 25 order or been informed of the order so as to show reliance on it for not appearing at the January 24 pretrial conference.[2]

Mother argues that she meets the requirements for vacating the January 24 order. DES argues that we should decline jurisdiction of Mother's petition for special action because: (1) The January 24 order is appealable and Mother has an equally plain, adequate, and speedy remedy by appeal during which the

[2] Mother contends the respondent judge did not have standing to appear in this special action and that the February 29 order constituted a response to the special action petition. We need not decide that issue because the additional facts found in the February 29 order do not affect our decision.

entire record will be available to this Court. As part of this argument, DES contends there is no evidence of record, but only the arguments of counsel, about why Mother did not attend the January 24 conference; and (2) The trial court still has to hold a hearing in the dependency under the Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963 ("ICWA").

We accept jurisdiction. Even when an order is final and appealable, we may accept jurisdiction of a special action especially when it deals with the custody of a child. *J.A.R. v. Superior Court*, 179 Ariz. 267, 272-73, 877 P.2d 1323, 1328-29 (App. 1994); *see also J.D.S. v. Franks*, 182 Ariz. 81, 84, 893 P.2d 732, 735 (1995). Our discretion to accept jurisdiction is equally important when the constitutional rights of a parent to raise his or her child are at stake. *See Egan v. Fridlund-Horne*, 221 Ariz. 229, 234, ¶ 15, 211 P.3d 1213, 1218 (App. 2009) (discussing fundamental right of parent to raise his or her child). In this case, an appeal from the January 24 order could take an extended time to resolve, during which the child presumably would be forming attachments with her caregivers and DES would be offering family reunification services or seeking to terminate the parent-child relationship. On these facts an appeal is not an equally plain, speedy, and adequate remedy.

We review an order denying a motion to vacate a default judgment for an abuse of discretion. *Gen. Elec. Capital Corp.*

v. Osterkamp, 172 Ariz. 185, 188, 836 P.2d 398, 401 (App. 1992). An abuse of discretion occurs when the trial court's conclusion is not supported by facts or the trial court erred in applying a legal rule in making its decision. *City of Phoenix v. Geyler*, 144 Ariz. 323, 328-29, 697 P.2d 1073, 1078-79 (1985).

We favor rendering decisions on the merits rather than by default. *See Gen. Elec.*, 172 Ariz. at 188, 836 P.2d at 401. When a court enters a default judgment, a party is entitled to have that default vacated if it can show good cause and a meritorious defense. *Christy A. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 299, 304, ¶ 16, 173 P.3d 463, 468 (App. 2007).

The only issue here is whether Mother showed good cause for her failure to appear on January 24. Good cause can be found based on mistake, inadvertence, surprise, or excusable neglect. *Id.* We hold Mother showed good cause to vacate the default judgment.

A party is entitled to reasonable notice of proceedings in which she is involved and an opportunity to be heard. *Willie G. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 231, 235, ¶ 18, 119 P.3d 1034, 1038 (App. 2005). The trial court relied on a recording of the October 25 hearing, based on which it found it told both parents that the continued pretrial conference on January 24 applied to both of them. DES points out that we do not have a copy of the hearing transcript and urges us to assume that the

record supports the court's finding. Although we assume the recording supports the trial court's finding on this point, that does not make a difference. The October 25 order clearly states that the January 24 conference was for Father and that the February 14 contested dependency trial was for Mother. Mother had every right to rely on that order even if the court had orally said something else during the hearing because the court could have changed its mind between the hearing and the issuance of the order.[3] Although the trial court later noted that there was no evidence Mother had knowledge of the October 25 order, that ignores the principle that an attorney's knowledge is imputed to the client. *See Bates & Springer of Ariz., Inc. v. Friermood*, 109 Ariz. 203, 208, 507 P.2d 668, 673 (1973); *cf. Mara M. v. Ariz. Dep't of Econ. Sec.*, 201 Ariz. 503, 507, ¶ 22, 38 P.3d 41, 45 (App. 2002) (stating a "motion to terminate a parent's rights . . . may be served on the parent's attorney").

DES also argues that relief is not appropriate because the trial court must still hold a hearing to comply with ICWA. However, the issues under ICWA are not whether a child is

[3] DES's argument that Mother's attorney attended the January 24 conference and could not explain why Mother was not present is not persuasive. It was undisputed that the October 25 order expressly stated the January 24 pretrial conference was for Father and the trial court candidly conceded that was in error. Regardless of why Mother's attorney appeared at the January 24 hearing, Mother was entitled to rely on the October 25 order that was sent to her attorney.

dependent as to Mother, but the appropriate placement of a child subject to ICWA. If, after a contested dependency hearing as to Mother the court determines J. is not dependent as to Mother, application of ICWA may be moot or at least affected by the absence of a dependency determination as to Mother.

Accordingly, we accept jurisdiction and vacate the January 24 order finding J. dependent as to Mother by default. We remand this matter to the trial court for further proceedings consistent with this decision.

/s/
DONN KESSLER, Judge