

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
*See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

MAY 25 2012

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

KENDRA J.,	)	2 CA-JV 2011-0135
	)	DEPARTMENT B
Appellant,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 28, Rules of Civil
ARIZONA DEPARTMENT OF ECONOMIC	)	Appellate Procedure
SECURITY, DAKOTA J., and DALLAS J.,	)	
	)	
Appellees.	)	
_____	)	

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100JD201000159

Honorable Kevin D. White, Judge

AFFIRMED

Ritter Law Group, L.L.C.  
By Matthew Ritter

Florence  
Attorney for Appellant

Thomas C. Horne, Arizona Attorney General  
By Michelle R. Nimmo

Tucson  
Attorneys for Appellee Arizona  
Department of Economic Security

ESPINOSA, Judge.

¶1 Kendra J. appeals from the juvenile court's order terminating her parental rights to Dakota J. and Dallas J. on the grounds of abandonment and the length of time in

court-ordered, out-of-home care (nine months or longer). *See* A.R.S. § 8-533(B)(1), (8)(a). Kendra contends on appeal the court erred when it regarded her failure to personally appear at a pretrial conference as a default, arguing she did not have the financial means to personally attend and was available telephonically. We affirm for the reasons stated below.

¶2 Section 8-537(C), A.R.S., provides “[i]f a parent does not appear at the pretrial conference, status conference or termination adjudication hearing, the court, after determining that the parent” received the requisite notice of the hearing and the consequences of failing to appear, including termination of the parental rights, “may find that the parent has waived the parent’s legal rights and is deemed to have admitted the allegations of the petition by the failure to appear.” The statute further provides the court may then terminate that parent’s rights “based on the record and evidence presented.” § 8-537(C). The juvenile rules of procedure similarly permit the court to proceed when a parent does not appear absent good cause and to terminate that parent’s rights if the parent has received the requisite notice of the hearing and has been “admonished regarding the consequences of failure to appear.” *Ariz. R. P. Juv. Ct. 65(C)(6)(c); see also Ariz. R. P. Juv. Ct. 64(C), 66(D)(2).*

¶3 The record establishes that at the end of June 2011, the Arizona Department of Economic Security (ADES) filed a motion to terminate Kendra’s parental rights, serving her with a copy of the motion and notice by certified mail in Illinois where she resides, that there would be an initial hearing on July 6, 2011. The notice of hearing warned Kendra that “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.” The notice further admonished Kendra that a hearing could proceed in her absence and her rights could be terminated, based on the record before the juvenile court. Although Kendra received the notice, she did not appear for the initial severance hearing. But her counsel appeared, and the court continued the hearing to September 14, 2011.

¶4 ADES subsequently amended the severance motion, adding the length of time in care as a ground for terminating her rights. ADES served Kendra with the amended motion and notice of the September 14 hearing. The notice of hearing contained the same warning of the consequences of Kendra’s failure to appear. Kendra’s attorney appeared at the September 14 initial severance hearing but Kendra did not. According to the minute entry from that hearing, counsel explained to the juvenile court that Kendra lived in Illinois and asked if Kendra could attend the hearing telephonically. The court denied the request, because “a Motion was not properly filed.” The court set the case for a pretrial conference on October 3, 2011, before a different judge than the judge who was to preside over the severance hearing, and ordered Kendra “to personally appear at the pretrial conference and/or the trial,” warning that the court would “proceed in her absence.”<sup>1</sup>

---

<sup>1</sup>As ADES points out, when the court set the hearing, it referred to it as a pretrial conference but the hearing conducted on October 3, 2011, was characterized as an initial severance hearing. We agree with ADES the distinction is not material to the outcome of this case; whether it was a continuation of the previous initial severance hearing or a

¶5 Kendra did not personally attend the October 3 hearing and did not file a motion either to waive her appearance or to appear telephonically. Counsel for ADES noted at the beginning of the hearing that the previous judge had ordered Kendra to appear personally at the October 3 hearing. The court found she had failed to do so and no good cause had been shown for that failure. The court stated it would “treat her failure to appear as her default in this matter.” Kendra’s attorney asked to be heard on that matter and explained that Kendra could not afford to attend “due to finances,” but was available to appear telephonically. Counsel added, “She is aware that the judge gave her more time to get here; but, either way, she could not come up with the appropriate funds to get here.” The court responded, “Well, this is an extremely important matter. The court will have to make an important decision. And in making that decision it’s absolutely essential that the Court have key witnesses present so the Court can judge the demeanor of the witnesses along with their testimony.” The court added,

There may be documents that the witness needs . . . to review and for very good reason [the prior judge] has required that she be here in person. Ample time has been provided [to] her to make arrangements to do that and she’s not here today, so I will stand with my finding that she’s defaulted by not appearing.

ADES proceeded to present evidence and at the end of the hearing the court found ADES had sustained its burden of proving the allegations of its motion and terminated Kendra’s parental rights.

---

pretrial conference, Kendra was required to attend personally and the consequences of failing to do so are the same.

¶6 On appeal, Kendra contends her financial inability to travel to Tucson from Illinois to appear personally constituted good cause for her failure to appear and that the court therefore erred when it proceeded in her absence and terminated her parental rights. In articulating this court’s standard of review, she states: “A juvenile court’s denial of a motion to vacate for failure to appear is reviewed for an abuse of discretion.” And, she relies on *Christy A. v. Arizona Department of Economic Security*, 217 Ariz. 299, ¶ 16, 173 P.3d 463, 468 (App. 2007), for the principle that good cause for excusing a parent’s failure to attend exists when a parent shows mistake, inadvertence, surprise or excusable neglect and a meritorious defense. But Kendra, unlike the mother in *Christy A.*, did not file a motion to set aside the termination order. *Id.* ¶ 15; *see also* Ariz. R. P. Juv. Ct. 46(E) (providing motion to set aside judgment “shall conform to the requirements of Rule 60(c), Ariz. R. Civ. P.).

¶7 Nevertheless, we review the juvenile court’s decision to proceed in Kendra’s absence and its rejection of her implicit offer, through counsel, to appear telephonically for an abuse of discretion. Rule 42, Ariz. R. P. Juv. Ct., gives the court “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, ¶ 14, 119 P.3d 1034, 1037 (App. 2005). And such a discretionary matter is reviewed by this court “for an abuse of discretion.” *In re Stephanie B.*, 204 Ariz. 466, ¶ 8, 65 P.3d 114, 116 (App. 2003).

¶8 As already noted, Kendra did not file a written motion seeking the court’s leave to appear telephonically before either the September 14 or October 3 hearings.

Indeed, at the September 14 hearing, the court denied counsel's oral request for Kendra to appear telephonically and expressly told her Kendra must appear personally at the October 3 hearing. At the October 3 hearing, the court explained why it believed it was important for Kendra to attend, emphasizing that the court needed to observe her demeanor in order to assess her credibility. This reasoning is sound. *See Ariz. Dept. of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 4, 100 P.3d 943, 945 (App. 2004) (juvenile court must decide, after judging witnesses' credibility and weighing evidence presented, whether clear and convincing evidence establishes ground for terminating parental rights). Given the record before us and the circumstances that existed at the time of the October 3 hearing, we cannot say the court abused its discretion in denying Kendra's oral request, through counsel, to appear telephonically at the October 3 hearing. Nor is it a due process violation to refuse an absent parent's request to testify telephonically. *Willie G.*, 211 Ariz. 231, ¶ 18, 119 P.3d at 1038.

¶9 Additionally, Kendra has not persuaded us the juvenile court abused its discretion by finding good cause did not exist to excuse her failure to personally appear despite her financial inability to do so, insisting it constitutes good cause. *Adrian E. v. Ariz. Dep't of Econ. Sec.*, 215 Ariz. 96, ¶ 15, 158 P.3d 225, 230 (App. 2007) (juvenile court's determination of what constitutes good cause for failure to appear discretionary and will not be disturbed unless exercise of discretion “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons”), *quoting Lashonda M. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 77, ¶ 19, 107 P.3d 923, 929 (App. 2005); *see also Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002) (if

reasonable evidence exists to support juvenile court's finding of fact, appellate court will not disturb it). Here, despite the fact that Kendra was forewarned she was required to attend the October 3 hearing, she did not provide the court with information or an affidavit, either before or at the hearing, establishing she could not afford to travel to Florence. That her financial situation prevented her appearance was simply a general assertion made through counsel. Nor did counsel make a specific offer of proof in this regard at the hearing.

¶10 We also reject Kendra's suggestion her fundamental rights were violated when the juvenile court permitted the case to proceed. Her counsel participated in the hearing and had the opportunity to cross-examine ADES's witness and make objections. We see no basis for disturbing the court's ruling.

¶11 The juvenile court's order terminating Kendra's parental rights to her children Dakota J. and Dallas J. is affirmed.

/s/ Philip G. Espinosa  
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez  
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly  
VIRGINIA C. KELLY, Judge