

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

NOV 13 2012

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

JASON R.,	)	2 CA-JV 2012-0048
	)	DEPARTMENT A
Appellant,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 28, Rules of Civil
ARIZONA DEPARTMENT OF	)	Appellate Procedure
ECONOMIC SECURITY and JASON R.,	)	
	)	
Appellees.	)	
_____	)	

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. JD201000161

Honorable Kevin D. White, Judge

AFFIRMED

Harriette P. Levitt

Tucson  
Attorney for Appellant

Thomas C. Horne, Arizona Attorney General  
By Laura J. Huff

Tucson  
Attorneys for Appellee

ECKERSTROM, Presiding Judge.

¶1 Jason R., the father of Jason R., (referred to hereafter as the child for purposes of clarity) appeals from the juvenile court’s order granting the motion to terminate his parental rights to the child filed by the Arizona Department of Economic Security (ADES) on the ground of length of time in care, pursuant to A.R.S. § 8-533(B)(8)(a). Jason contends the court erred by treating as a default his failure to appear for a hearing he characterizes as a pre-protective hearing and terminating his rights without evidence or testimony having been submitted. He also contends his counsel rendered ineffective assistance. We affirm for the reasons stated below.

¶2 Section 8-537(C), A.R.S., provides that “[i]f a parent does not appear at the pretrial conference, status conference or termination adjudication hearing, the court, after determining that the parent has” received notice of the hearing and the consequences of failing to appear, including termination of 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 then may terminate that parent’s rights “based on the record and evidence presented.” *Id.* 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 or conference 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 Jason appeared at the initial severance hearing in this matter on October 17, 2011. After he entered a denial to the allegations in

ADES's motion, the court set a contested severance hearing for December 6, 2011, and a pretrial conference for November 28, 2011. The minute entry reflects that Jason's counsel asked the court if Jason could waive his appearance at the pretrial conference, but the court denied the request and provided Jason with a "Form 3—Notice to Parent in Termination Action." Jason signed the document, which was filed with the court; it reflects he had notice of the hearing and conference dates and had been informed of the consequences of failing to appear at either.

¶4 Jason appeared at the pretrial conference on November 28, at which time the juvenile court addressed the mother's motion to continue the severance hearing. Jason did not object and the court vacated the pretrial conference and termination hearing, and set the contested severance hearing for January 20, 2012. The court also set three hearings for December 5, 2011: a pretrial conference in the severance, a preliminary protective hearing on an amended dependency petition that added two other children to the dependency proceeding (Yanaha and Jayla), and what the court referred to as a "pre-protective conference."<sup>1</sup> By that, the court most likely was referring to a pre-hearing conference, which immediately precedes a preliminary protective hearing and is designed to "facilitate the resolution of issues in a non-adversarial manner concerning custody, placement, visitation and the provision of services" in dependency proceedings. Ariz. R. P. Juv. Ct. 49 (A), (D). Again the court provided Jason with a Form 3 Notice;

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<sup>1</sup>The juvenile court ultimately adjudicated Yanaha R. and Jayla R. dependent after dependency hearings in January and February 2012; this court affirmed that order on appeal. *Jason R. v. Ariz. Dep't of Econ. Sec.*, No. 2 CA-JV 2012-0047, ¶ 11 (memorandum decision filed Sept. 14, 2012).

the signed form, which was filed with the court, reflects the new hearing dates, Jason's acknowledgment that he was required to appear at the combined pretrial conference and preliminary protective hearing on December 5, 2011, and the consequences of failing to do so.

¶5 Jason did not appear at the December 5 hearing, which he refers to as a "pre-protective hearing." But, although the minute entry order from the morning portion of the December 5 hearing is entitled pre-protective hearing, the minute entry from the afternoon hearing, which consisted of the pretrial conference in the severance proceeding only, correctly describes that portion of the December 5 proceedings as a pretrial conference. More importantly, the transcript from the December 5 hearing makes clear that the juvenile court held a combined hearing consisting of the pre-protective conference and preliminary protective hearing, which related to the dependency petition for Yanaha and Jayla filed on December 1, 2011, and the pretrial conference on the severance motion.

¶6 The juvenile court appears to have begun the hearing with the pre-protective conference and immediately proceeded to the preliminary protective hearing on the December 1 dependency petition. It then conducted the pretrial conference on ADES's motion to terminate both parents' rights. ADES began the pretrial conference by noting Jason had signed Form 3 at the previous hearing and asking the court proceed in his absence. The court found Jason had not shown good cause for failing to appear,<sup>2</sup>

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<sup>2</sup>Although the juvenile court stated Jason had failed to appear for the pretrial conference on the "dependency petition," when considered in context, the court clearly

adding that it was “preserv[ing] his failure to appear.” Having insufficient time for the presentation of evidence in its morning calendar, the court continued the hearing to the afternoon, giving Jason’s counsel until then to show good cause for Jason’s absence in order to avoid a default. When the hearing resumed that afternoon, Jason still had not appeared, although his counsel admitted he had not had time to try calling him. Again the court noted Jason had signed Form 3 and found there was no good cause for his failure to appear.

¶7 In support of its motion to terminate Jason’s parental rights to the child, ADES then introduced various exhibits and presented the testimony of case manager supervisor Marybeth McGann, who was cross-examined by Jason’s counsel. At the end of the hearing the juvenile court found on the record and in its minute entry that Jason had received notice of the pretrial conference but had failed to appear, thereby admitting ADES’s allegations in its motion to terminate his parental rights. The court stated that, given those admissions and based on the evidence presented, ADES had proved the allegations of the motion by clear and convincing evidence. The court further found termination of Jason’s parental rights was in the child’s best interest. In the minute entry, the court ordered ADES to submit a formal order within ten days, but subsequently gave Jason until January 6, 2012, to file a motion to set aside the “judgment” if he could establish good cause for failing to appear at the pretrial conference. None was filed. The

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misspoke; it had just completed the dependency-related portion of the proceedings and had moved on to the severance motion. It was finding Jason had failed to appear for the pretrial conference and immediately asked ADES if it was ready to proceed with the testimony on that motion.

court did not enter a final order on the severance as to Jason until May 2, 2012. In that order the court terminated the mother's rights as well, having conducted a severance hearing as to her on January 20, 2012 and February 02, 2012.

¶8 Jason asserts on appeal that the juvenile court abused its discretion when it found he had not established good cause for failing to attend the pretrial conference on December 5. He argues the December 5 "preprotective hearing" was the only hearing he missed, suggesting this somehow negates a finding that he did not have good cause to be absent on that day. He also points out he was late to the January 20, 2012, hearing, the combined severance hearing as to the mother and the pretrial conference on the dependency petition relating to Yanaha and Jayla, asserting the court "apparently accepted" his explanation for his tardiness, which was that he is disabled and "it takes him longer to get around than it does other people." Jason does not state this was the reason he failed to appear on December 5. And assuming he is asking us to speculate the reasons are the same, we decline that invitation.

¶9 Additionally, the record shows Jason's assertion that the juvenile court never gave him the opportunity to establish good cause is erroneous. It is not the court's burden to explore the possible reasons a parent fails to appear at a required hearing in an effort to establish good cause for the parent's absence. And Jason's counsel presumably gave no reason for Jason's absence because he knew of none. The court even gave Jason more time to appear at the pretrial conference by continuing it to the afternoon. Additionally, as we noted above, the court also gave him until January 6 to file a motion to set aside the termination order, in which he could have set forth his alleged good cause

for failing to appear, but no motion was filed. The court was provided no explanation for Jason's nonappearance; therefore, it did not abuse its discretion in finding Jason had not established good cause for his absence.

¶10 The record also belies Jason's contention that his rights were terminated because he failed to attend a pre-planning or pre-protective hearing. He did not appear at a pretrial conference after he received verbal and written notice of the date of the pretrial conference and the consequences of failing to attend. The record, including the December 5, 2011 minute entry from the afternoon during which the pretrial conference was conducted and the transcript from that date, also belies Jason's argument that the court "proceeded with severance by default without taking evidence, as required by Rule 65," Ariz. R. P. Juv. Ct. Similarly, the record belies his assertions that "no evidence was taken at the December 5, 2011, hearing, nor was the court presented with any documents or records."<sup>3</sup>

¶11 Jason contends that, "[o]ddly, when [he] and his counsel appeared for the January 20, 2012, termination hearing, the court dismissed them both, stating that [Jason's] rights had already been terminated," and did not give his counsel the opportunity to cross-examine witnesses presented at the hearing. Relying on *Christy A. v.*

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<sup>3</sup>We note that on July 18, 2012, Jason filed a motion to expand the record to include, inter alia, the transcript from the hearings held on December 5, 2011, which this court granted on July 23. Nevertheless, before the transcript was filed, Jason filed his opening brief on July 23, 2012. The transcript was filed on September 4, 2012, and establishes unequivocally ADES introduced exhibits and presented testimony in support of its motion. ADES filed its answering brief on September 26. Yet Jason did not request to withdraw his clearly incorrect opening brief, nor did he file a reply to ADES's answering brief, filing instead a notice that he elected not to file a reply brief.

*Ariz. Dep't of Econ. Sec.*, 217 Ariz. 299, 173 P.3d 463 (App. 2007), he argues his right to due process required that he be permitted to participate in that hearing, despite the fact that he had defaulted by failing to attend the pretrial conference. But as the record clearly establishes, the juvenile court had, in fact, already ordered Jason's rights terminated; the hearing on January 20 was the termination hearing as to the mother and a dependency-related hearing as to Yanaha and Jayla. Jason's termination hearing was held on December 5, 2011, after he failed to appear, and his counsel was given the opportunity at that time to object to the introduction of some of the exhibits and cross-examine the case manager supervisor.

¶12 To the extent Jason also challenges the sufficiency of the evidence to support the juvenile court's termination of his rights, he does so cursorily. In any event, we reject this contention summarily. We will affirm an order terminating parental rights unless the juvenile court abused its discretion by making "factual findings [that] are clearly erroneous[;] that is, unless there is no reasonable evidence to support them." *Audra T. v. Ariz. Dep't of Econ. Sec.*, 194 Ariz. 376, ¶ 2, 982 P.2d 1290, 1291 (App. 1998). The admissions Jason made by not appearing coupled with the exhibits and testimony amply support the court's finding that the child had "been in an out-of-home placement for a cumulative total period of nine months or longer, pursuant to court order"; ADES had "made a diligent effort to provide appropriate reunification services," which services the court identified; and Jason had "substantially neglected or willfully refused to remedy the circumstances that cause[d] the child to be in an out-of-home placement," warranting termination of Jason's rights pursuant to § 8-533(B)(8)(a). The



evidence further supported the court's finding that a preponderance of the evidence established it was in the child's best interest to terminate Jason's rights.

¶13 Jason's final argument is that his right to the effective assistance of counsel was violated because counsel did not file a motion to set aside the termination order in which counsel could have argued there existed good cause for Jason's failure to attend the pretrial conference on December 5, 2011. Whether the ineffectiveness of counsel can be a basis for reversing an order terminating a parent's rights has not been established in Arizona. See *John M. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 320, ¶¶ 11-12, 173 P.3d 1021, 1024-25 (App. 2007). But even assuming arguendo a parent could assert such a claim, and assuming, too, as we did in *John M.*, that we would evaluate ineffective assistance claims under the standard established in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), see *John M.*, 217 Ariz. 320, ¶ 17, 173 P.3d at 1026, Jason has not established counsel's performance was deficient or prejudicial.

¶14 Jason has yet to state the reason he failed to attend the pretrial conference. Although he obliquely suggests, based on his explanation to the juvenile court for his tardiness in attending the dependency hearing in February 2012, that perhaps it was because he did not own a car and had transportation issues, he never states that was the case. Thus, he has not established what counsel could have asserted in a motion to set aside the severance order, much less that his reasons constituted good cause.

¶15 We also reject Jason's argument that counsel performed deficiently by permitting Jason's rights to be terminated without the presentation of any evidence and failing to insist that Jason be permitted to participate in the severance hearing that was

held on January 20, 2012. Jason is simply wrong. As we previously noted, ADES did present evidence in support of its motion on December 5. And Jason's attorney did have the opportunity to cross-examine ADES's witness and objected, successfully in some instances, to the introduction of certain exhibits. We fail to see how Jason's counsel could be faulted for not insisting that Jason be permitted to participate in the severance hearing as to the mother on January 20, 2012, as though that were part of the severance proceeding against Jason; clearly it was not. As counsel for ADES pointed out at the mother's severance hearing, the juvenile court already had ordered, on December 5, 2011, that Jason's parental rights be terminated.

¶16 Jason has established no basis for disturbing the juvenile court's order terminating his rights to the child. We therefore affirm that order.

/s/ Peter J. Eckerstrom  
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard  
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.  
J. WILLIAM BRAMMER, JR., Judge\*

\*A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order filed August 15, 2012.

