

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

OCT -6 2011

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

ASHAH M.,	)	2 CA-JV 2011-0068
	)	DEPARTMENT A
	)	
Appellant,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 28, Rules of Civil
ARIZONA DEPARTMENT OF ECONOMIC	)	Appellate Procedure
SECURITY, DAE'ZHREANA M., and	)	
DAIDRIAN M.,	)	
	)	
	)	
Appellees.	)	
_____	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. JD19024300

Honorable Peter Hochuli, Judge Pro Tempore

AFFIRMED

Sanders & Sanders, P.C.  
By Ken Sanders

Tucson  
Attorneys for Appellant

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

Tucson  
Attorneys for Appellee Arizona  
Department of Economic Security

ECKERSTROM, Presiding Judge.

¶1 Appellant Ashah M., mother of Dae'Zhreana M. and Daidrian M., appeals from the juvenile court's denial of her motion to reconsider the denial of her motion to set aside the court's order terminating her parental rights to the children after she failed to appear for the termination hearing. For the reasons that follow, we affirm.

¶2 The Arizona Department of Economic Security (ADES) took temporary custody of the children in March 2009 and the juvenile court adjudicated them dependent in May 2009. At a May 2010 permanency hearing, the court directed ADES to file a motion to terminate Ashah's parental rights. Ashah was present with her attorney at the hearing when the court set the initial severance hearing for June 2, 2010, at 11:30 a.m., and admonished Ashah that her failure to appear for future hearings could result in a waiver of her trial rights and that the termination hearing could proceed in her absence. The court also provided Ashah with the Notice to Parent in Termination Action, which Ashah signed and thereby acknowledged she understood. The relevant portion of the form provided:

You are required to appear for all termination hearings. If you cannot attend a court hearing, you must prove to the court that you did not appear for good cause. If you fail to appear without good cause for an Initial hearing, a Pretrial Conference, a Status Conference or Termination Adjudication, the court may determine that you have waived legal rights, and, that you have admitted the allegations in the motion for termination, and may terminate your parental rights to your child based on the record and evidence.

The court will presume that you understand the contents of this notice unless you tell the court at today's hearing that you do not understand.

After ADES filed the motion for termination of Ashah's parental rights, the court issued a notice of hearing, once again advising Ashah of the initial severance hearing at 11:30

a.m. on June 2, 2010. Ashah's attorney, Bernice Little, appeared at the initial severance hearing without Ashah, the hearing proceeded in her absence, and the court terminated her parental rights to the children by minute entry order filed on June 7, 2010. *See* Ariz. R. P. Juv. Ct. 65(C)(6)(c), 66(D)(2).

¶3 On June 23, 2010, Little filed a motion to continue the due date for filing a notice of appeal. The juvenile court denied the motion and noted, "The Mother failed to appear at the initial hearing and a judgment was entered against her in her absence. If the Mother is aggrieved by this ruling, then her remedy is to file a motion to set aside the entry of judgment, not an appeal." Little filed a notice of appeal from that ruling, which this court dismissed in July 2010. In December 2010, Ashah filed a motion, in propria persona, asking the juvenile court to set aside the judgment terminating her parental rights pursuant to Rule 60(C), Ariz. R. Civ. P. In that motion, Ashah asserted that, based on a "miscommunication" when she had called the juvenile court at 8:05 a.m. on the morning of June 2nd to confirm the initial severance hearing, she was "given false information" by a court receptionist who told her the hearing was on June 23, rather than June 2. At a hearing on January 11, 2011, the court found good cause did not exist for Ashah's failure to appear at the initial severance hearing, and denied Ashah's motion.

¶4 Ashah appealed from that ruling. A new attorney, Ken Sanders, was appointed to represent Ashah, after which this court dismissed the appeal in April 2011 because it was taken from an unsigned order. Also in April 2011, Sanders filed a motion asking the juvenile court to reconsider its previous order denying Ashah's motion to set aside the June 2010 severance order. In the motion to reconsider, which the juvenile court essentially treated as a motion to set aside, Ashah asserted court personnel had misinformed her about the date of the initial severance hearing and that, based on other

hearings and visits with the children that had been cancelled or rescheduled, it was reasonable for her to have called the juvenile court to confirm the hearing date. Ashah further asserted that her reliance on the information she received from the juvenile court's receptionist constituted excusable neglect.

¶5 Ashah also argued in both her motion for reconsideration and at the June 2011 evidentiary hearing on the motion that she promptly had asked Little to file a motion to set aside, and that Little had rendered ineffective assistance by failing to do so. At the evidentiary hearing, the juvenile court found that even though Little "did act inappropriately" by failing to file the motion to set aside judgment on Ashah's behalf, "the only issue that I see . . . is whether or not there's good cause for mother's failure to appear [at the initial severance hearing]." The court denied the motion for reconsideration for the following reasons:

The Court finds that the mother was present at . . . the permanency hearing on May 4, 2010, when Judge Escher set the initial severance hearing for June 2, 2010, at 11:30 a.m.

That on that date the mother signed the Notice to Parent in Termination Action . . . , which indicates the initial termination hearing was on June 2, 2010, at 11:30.

. . . .

The Court[ i]s unwilling to set a preceden[t] that a parent can come in after a hearing and indicate that they called and spoke to an unnamed person at the courthouse and provided them with information and were told that the hearing had been moved or was not on the specific date at the specific time that was previously indicated.

That if, in fact, the mother did call the court and was given that information, that, at a minimum, she should have verified with her attorney that . . . , in fact, was true. The mother did not do so.

That the hearing was scheduled at 11:30 and that the mother indicated that she had contacted the court at approximately 8:05 a.m. that morning, such that she had sufficient time to verify with her attorney, one way or another, whether the hearing was held.

....

The Court cannot find that the mother acted appropriately; that she chose not to appear; and that there was no good cause for her failure to appear.

¶6 The juvenile court also found that Ashah had acted promptly to attempt to set aside the severance order, and that Little had “failed to act in a professional manner and provided ineffective assistance.” The court further noted, however, that although it otherwise would have granted Ashah’s motion to set aside, thereby deferring to Ashah that she had established a meritorious defense to ADES’s motion to sever, it could not do so because Ashah had not shown good cause for her failure to appear at the severance hearing.

¶7 On appeal, Ashah argues the juvenile court erred in denying her Rule 60(c) motion to set aside the default judgment terminating her parental rights on the ground she did not have good cause for failing to appear at the severance hearing, and that Little rendered ineffective assistance of counsel. However, we note at the outset that, because Ashah’s motion to set aside the judgment was untimely, the court should not have considered it in the first instance. But, we will affirm the trial court when it reaches the correct result, even if it does so for the wrong reason. *State v. Saiers*, 196 Ariz. 20, ¶ 15, 992 P.2d 612, 616 (App. 1999).

¶8 We review de novo the interpretation of statutes and rules. *Pima Cnty. v. Pima Cnty. Law Enforcement Merit Sys. Council*, 211 Ariz. 224, ¶ 13, 119 P.3d 1027,

1030 (2005). Ashah’s motion to set aside the juvenile court’s termination order relied on Rule 60(c)(1), which allows a court to relieve a party from a final judgment for specific reasons, including mistake, inadvertence, surprise, or excusable neglect, the ground alleged by Ashah here. Under Rule 60(c), a motion to set aside based on this ground must be filed “not more than six months after the judgment or order was entered.” Additionally, Rule 46(E), Ariz. R. P. Juv. Ct., provides that “[a] motion to set aside a judgment rendered by the court shall conform to the requirements of Rule 60(c), Ariz. R. Civ. P.” Rule 46(E) further provides that “the motion shall be filed within six (6) months of the final judgment . . . unless the moving party alleges grounds pursuant to Rule 60(c)(1)(2) or (3), in which case the motion shall be filed within three (3) months of the final judgment.” Moreover, Rule 6(b), Ariz. R. Civ. P., prohibits extending the time for filing a Rule 60(c) motion, except under certain conditions which do not apply here. *See also In re Estate of Travers*, 192 Ariz. 333, ¶ 22, 965 P.2d 67, 70 (App. 1998) (recognizing that Rule 6(b) “expressly bars the extension of time for filing a Rule 60(c)(3) motion”).

¶9 Here, Ashah’s motion to set aside, which relied on Rule 60(c)(1), was not timely because it was filed on December 2, 2010, more than three months after the court rendered its final severance ruling on June 7, 2010. *See State v. McCarrell*, 80 Ariz. 240, 243, 295 P.2d 1086, 1088 (1956) (because motion to set aside default judgment was not made until more than eight months after entry of judgment, trial court lacked jurisdiction to enter any order except denial thereof); *see also Andrew R. v. Ariz. Dep’t of Econ. Sec.*, 223 Ariz. 453, ¶ 25, 224 P.3d 950, 957-58 (App. 2010) (juvenile court erred in considering and granting mother’s untimely Rule 60(c) motion from judgment of paternity); *Fry v. Garcia*, 213 Ariz. 70, ¶ 13, 138 P.3d 1197, 1200 (App. 2006) (trial

court correctly denied portion of Rule 60(c) motion as time-barred because appellant did not file it within six months from court's granting of challenged order).

¶10 Despite the untimeliness of Ashah's Rule 60(c) motion, we nonetheless address her claim of ineffective assistance of counsel. We do so in order to clarify that, even if Little had filed a Rule 60(c) motion on Ashah's behalf, timely or not, the outcome would not have changed. On appeal, Ashah asserts Little failed to file a Rule 60(c) motion, delayed in so advising her, and filed a motion to file a delayed appeal, even after the juvenile court directed her to file a Rule 60(c) motion instead. Although the law governing ineffective assistance claims in proceedings to terminate parental rights is not fully developed in Arizona, we previously have recognized a due process right to the effective assistance of counsel to the extent necessary to ensure severance proceedings are fundamentally fair and the results of those proceedings are reliable. *See John M. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 320, ¶ 14, 173 P.3d 1021, 1025 (App. 2007). As we did in *John M.*, we look for guidance to the two-part standard established in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), for demonstrating ineffective assistance by criminal defense counsel. *John M.*, 217 Ariz. 320, ¶ 17, 173 P.3d at 1026. By analogy, we assume a parent claiming ineffective assistance in a severance proceeding must likewise establish both substandard performance by counsel and resulting prejudice. *Id.*

¶11 And, in order to determine whether the outcome would have been different had Little filed a Rule 60(c) motion, as Ashah claims she should have done, we must first determine whether such a motion would have been successful. In order to do so, we review the juvenile court's denial of the Rule 60(c) motion and the motion to reconsider that ruling for an abuse of discretion, *see Adrian E. v. Ariz. Dep't of Econ. Sec.*, 215 Ariz. 96, ¶ 5, 158 P.3d 225, 230 (App. 2007), noting that Ashah has not suggested any

additional arguments Little could have proffered on her behalf. To show good cause to set aside an entry of default under Rule 55(c), Ariz. R. Civ. P., the moving party must demonstrate that “(1) mistake, inadvertence, surprise or excusable neglect exists and (2) a meritorious defense to the claims exists.” *Christy A. v. Ariz. Dep’t of Econ. Sec.*, 217 Ariz. 299, ¶ 16, 173 P.3d 463, 468 (App. 2007). Excusable neglect exists if a reasonable, prudent person would have acted similarly in like circumstances. *Id.* “The test of good cause is the same for an entry or judgment of default.” *Webb v. Erickson*, 134 Ariz. 182, 185-86, 655 P.2d 6, 9-10 (1982).

¶12 The juvenile court found that Ashah had failed to establish good cause or excusable neglect for her failure to appear at the initial severance hearing. As set forth above, Ashah was notified several times, both in writing and orally, of the date and time of the hearing, and she was admonished of the consequences of failing to appear. Ashah does not assert she did not know the date and time of the hearing, or that she was mistaken as to that information. Rather, in the affidavit she attached to her motion to reconsider and in her brief on appeal, she asserts that, because other hearings and visits had been cancelled in the past, she called the juvenile court on the day of the severance hearing to confirm the hearing. Even assuming the receptionist at the juvenile court misinformed Ashah at 8:05 a.m., as she asserts, she did not contact Little in the remaining time before the hearing to confirm this information, despite repeated admonitions that her rights could be severed in her absence.

¶13 The juvenile court’s denial of Ashah’s motion was based on “disputed questions of fact or credibility” to which we defer, *see City of Phx. v. Geyler*, 144 Ariz. 323, 329, 697 P.2d 1073, 1079 (1985), and its findings are supported by the record. Therefore, because we do not find the court abused its discretion by concluding Ashah



failed to present sufficient credible evidence to establish that she did not appear at the initial severance hearing for good cause, we find no abuse of discretion in the court's denying the motion to reconsider its denial of the Rule 60(c) motion. For this reason, we conclude Ashah was not prejudiced by Little's failure to file a motion that would not have been successful in any event. Accordingly, any claim of ineffective assistance of counsel based on Little's conduct after the severance hearing, the only conduct Ashah has challenged, is without merit. *See John M.*, 217 Ariz. 320, ¶ 18, 173 P.3d at 1026.

¶14 For all of the aforementioned reasons, we affirm the juvenile court's denial of Ashah's motion to set aside the order terminating her parental rights to the children.

/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