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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 1/3/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

LAURIE R.,) No. 1 CA-JV 12-0179
Appellant,)
) DEPARTMENT A
v.)
) **MEMORANDUM DECISION**
ARIZONA DEPARTMENT OF ECONOMIC)
SECURITY, ROMEO M.,) (Not for Publication -
Appellees.) 103(G) Ariz.R.P. Juv. Ct.;
) Rule 28 ARCAP
)
)

Appeal from the Superior Court in Maricopa County

Cause No. JD21058

The Honorable Mina E. Mendez, Commissioner

AFFIRMED

Robert D. Rosanelli
Attorney for Laurie R., Appellant

Phoenix

Thomas C. Horne, Attorney General
By Nicholas Chapman-Hushek, Assistant Attorney General
Attorneys for Arizona Department of Economic Security

Phoenix

G E M M I L L, Judge

¶1 Laurie R. ("Mother") appeals the juvenile court's order adjudicating her son Romeo dependent based on Mother's stipulation to his dependency. Mother argues on appeal that her stipulation was not made knowingly, intelligently, and

voluntarily. For the reasons that follow, we affirm the court's finding of dependency.

FACTS AND PROCDUDURAL HISTORY

¶12 On November 9, 2011, CPS took Romeo into temporary custody. At the time, Romeo was facing delinquency charges in juvenile court for criminal damage, disorderly conduct, and aggravated assault. Prior to Romeo's court date, Mother had requested that CPS remove Romeo from the home because she was overwhelmed with Romeo's behavior. On November 16, 2011, the Arizona Department of Economic Security ("ADES") filed a petition alleging Romeo was a dependent child. ADES alleged that Mother was unable or unwilling to control Romeo's behaviors. Furthermore, ADES alleged that Mother had "minimized the child's behaviors," and "neglected the child's mental and behavioral health needs." In addition to Romeo's pending delinquency charges, ADES alleged Romeo had sexually molested his nephew, and had demonstrated other "sexualized behaviors." ADES proposed an initial case plan of family reunification.

¶13 Mother denied the allegations of the dependency petition. At the pretrial conference, Mother received and signed a "Form 1" notifying her of her rights as a parent in a dependency case. ADES reported at the pretrial conference that it would agree to a stipulation of dependency based solely on Romeo's behavior. Mother continued to dispute the allegations

and the matter was set for trial. During the interim, the court appointed a guardian ad litem for Mother.

¶14 At the dependency adjudication hearing, the court asked the parties if a settlement was still possible. ADES stated it would agree to delete the unwilling-to-parent and neglect allegations in return for Mother's stipulation to dependency. The court advised Mother that a stipulation would avoid adverse findings against her and allow Romeo continued access to services. The court instructed Mother and her counsel to discuss whether to stipulate to dependency:

[The court] want[s] to get a sense of whether this is something that can be resolved through a stipulation, so that maybe that would make you feel more comfortable than, at the conclusion of the trial, my reviewing the evidence and having to make specific findings with respect to the dependency.

. . .

These are your choices. If you decide that it would be better for you and for Romeo for you to do it by way of stipulation and we'll come up with language that you're comfortable with and he's made a dependent child that way, I'm happy to let you do that if you want to do it that way and you think it's the right thing to do. If you don't, there's no discussion. We're just going to do the trial. I'm going to review all the exhibits and then I'm going to make specific findings about whether or not there's a dependency in this case.

¶15 After Mother consulted with her attorney, the attorney

reported that Mother was "in agreement with the stipulation." Following the court's request for clarification, Mother's counsel again stated that "Mother [is] still fine with the stipulation." Later in the hearing, Mother clarified her understanding of the stipulation:

[Mother]: So if I wanted to actually have my trial, have my opportunity to present my side of the evidence and my witnesses and all of that, then that negates the opportunity - then I don't get - so then I - I have to stipulate, I have to give that up. I have to give up being able to show my side of it to stipulate to this watered down dependency that they're offering today. That's the only way I can get it. It wouldn't be still available if I present my evidence and my side, and try to show you that there is no case of dependency and I would like it to be dismissed or found not ... dependent?

[Court]: Stipulation ... means that the two sides are agreeing to the language that I use that goes in the minute entry as the finding. So it is true if there's - if we're doing it with a trial and there's not a stipulation, I'm going to look at all of the exhibits and I'm going to make the dependency finding, if there is a dependency finding to be made, based on the record.

Mother's guardian ad litem also reported that she had "no concerns with [Mother's] stipulation," and that she believed Mother had the full mental capacity to make the stipulation. She also confirmed that in her opinion the stipulation served Mother's best interests.

¶16 The court determined that Mother had "knowingly,

voluntarily, and intelligently" stipulated to the dependency. The juvenile court filed a signed minute entry accepting the stipulation and finding Romeo dependent as to Mother.

¶7 Mother timely filed a notice of appeal.¹ We have jurisdiction under Arizona Revised Statutes ("A.R.S.") § 8-235 (2007), and Rule 103(A) of the Arizona Rules of Procedure for the Juvenile Court.

ANALYSIS

¶8 Mother argues on appeal the juvenile court failed under A.R.S. § 8-843(C) (2007) to determine that Mother made the stipulation knowingly, intelligently, and voluntarily. Mother argues the juvenile court was required to perform a more thorough inquiry to ensure Mother understood and voluntarily waived her rights.

¶9 Ordinarily, we review an adjudication of dependency for an abuse of discretion. *Willie G. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 231, 235, ¶ 21, 119 P.3d 1034, 1038 (App. 2005) (citation omitted). However, we review the application and interpretation of statutes, court rules, and constitutional claims *de novo* because they are questions of law. *In re John M.*, 201 Ariz. 424, 426, ¶ 7, 36 P.3d 772, 774 (App. 2001);

¹ Romeo's Father is not a party to this appeal. The dependency petition alleged that Father had abandoned and neglected Romeo. Although Father initially denied the dependency petition allegations, he agreed to a finding of dependency against him after mediation.

Adrian E. v. Ariz. Dep't of Econ. Sec., 215 Ariz. 96, 99, ¶9, 158 P.3d 225, 228 (App. 2007) (citation omitted).

¶10 Initially, ADES argues Mother has waived her right to assert that she did not knowingly, intelligently, and voluntarily agree to the dependency stipulation. Because Mother did not raise this argument in juvenile court, the alleged error is waived unless Mother is entitled to appellate review for fundamental, prejudicial error. We will assume, without deciding, that fundamental error review is available for an unpreserved claim of error in a dependency proceeding. *Cf. Monica C. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 89, 94, ¶ 22-23, 118 P.3d 37, 42 (App. 2005) (reviewing for fundamental error an unpreserved objection to ADES's failure to provide a parent notice of her right to a jury trial); *Bradshaw v. State Farm Mut. Auto. Ins. Co.*, 157 Ariz. 411, 420, 758 P.2d 1313, 1322 (1988) (noting review for fundamental error may be appropriate in situations that "deprive[] a party of a constitutional right").

¶11 Even assuming Mother is entitled to the benefit of appellate review for fundamental error, in this case Mother has arguably forfeited such review by not specifically contending in her opening brief on appeal that the juvenile court committed *fundamental, prejudicial error*. We note that Mother neither argues nor otherwise establishes the prejudice required to

support a reversal, even if we were to find a fundamental error. Nonetheless, because we prefer to decide cases on the substantive merits rather than on the basis of waiver, especially when a constitutional claim is asserted, we will analyze the merits of Mother's argument on appeal.

¶12 The right to custody of one's child is "fundamental" but not absolute. *Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, 248, ¶¶ 11-12, 995 P.2d 682, 684 (2000). Although we are addressing an issue of dependency in this appeal, we recognize that a court may sever parental rights under certain circumstances, so long as the procedures are fundamentally fair and satisfy due process requirements. *Santosky v. Kramer*, 455 U.S. 745, 754 (1982).

¶13 The Arizona statutes and rules of juvenile procedure governing dependency are designed to protect a parent's right to due process. Under A.R.S. § 8-843(B):

At the initial dependency hearing, the court shall ensure that the parent or guardian has been advised of the following rights:

1. The right to counsel, including appointed counsel if the parent or guardian is indigent.
2. The right to trial by the court on the allegations of the petition.
3. The right to cross-examine all witnesses that are called to testify against the parent or guardian.

4. The right to use the process of the court to compel the attendance of witnesses.

A parent may waive his or her rights and admit to the allegations in the petition. A.R.S. § 8-843(B), (C). If a parent admits the allegations:

[T]he court shall determine that the parent or guardian understands the rights described in subsection [B] of this section and that the parent or guardian knowingly, intelligently, and voluntarily waives these rights.

A.R.S. § 8-843(C). Similarly, Rule 55(D) of the Arizona Rules of Procedure for the Juvenile Court requires in relevant part:

In accepting an admission or plea of no contest the court shall:

- a. Determine whether the party understands the rights being waived;
- b. Determine whether the admission or plea of no contest is knowingly, intelligently and voluntarily made.

Ariz. R.P. Juv. Ct. 55(D)(1)(a), (b).

¶14 Mother argues that, in order to satisfy the requirements of § 8-843(C) and Rule 55(D)(1), the juvenile court should have engaged in a colloquy with her to determine if her stipulation was made knowingly, intelligently, and voluntarily. Mother claims the procedures required here are equivalent to those required when a trial court accepts admissions of guilt or stipulations during mental health commitments. We disagree.

¶15 In making its determination under § 8-843(C) and Rule

55(D)(1) that a parent's admission was made knowingly, intelligently, and voluntarily, the juvenile court is not required to conduct a formal or prescribed colloquy. Nothing under A.R.S. § 8-843 or Rule 55(D)(1) imposes a duty upon the juvenile court to perform a specific colloquy before accepting a parent's stipulation to dependency. The statute and rule plainly require the juvenile court to determine a parent's admission was intelligently made, but we will not "judicially impose a requirement the legislature has intentionally chosen not to require." *Hart v. Hart*, 220 Ariz. 183, 187, ¶ 17, 204 P.3d 441, 445 (App. 2009) (citation omitted). Nor will we "rewrite the juvenile court rules to compel" such an inquiry. See *In re Amber S.*, 225 Ariz. 364, 368-69, ¶ 15, 238 P.3d 632, 636-67 (App. 2010) (declining to extend the rules to require juvenile court to state its rationale on the record for removal of a child).

¶16 Mother is correct that our supreme court has explicitly directed the superior court to engage in a colloquy before accepting a defendant's guilty plea under Ariz. R. Crim. P. 17.2.² We conclude, however, that had the supreme court

² Arizona Rule of Criminal Procedure 17.2 requires that:

Before accepting a plea of guilty or no contest, the court shall address the defendant personally in open court, informing him or her of and determining that

intended to require a similar inquiry when the juvenile court is accepting a parent's stipulation to dependency, it would have specified such a requirement in the applicable juvenile rules. Furthermore, this juvenile court proceeding is civil in nature and differs intrinsically from a criminal prosecution.

¶17 Although there is no requirement for the juvenile court to perform a colloquy, the court must still determine *from the record* that a parent's stipulation was intelligently made. See A.R.S. § 8-843(C). Depending on the record, the juvenile court may need to engage in a colloquy with a parent to determine this issue. In the context of a criminal proceeding, our supreme court has held that, in a case involving "the surrender of [c]onstitutional rights, it must appear from the record that the waiver was knowingly, intelligently, and voluntarily made." *State v. Avila*, 127 Ariz. 21, 25, 617 P.2d 1137, 1141 (1980). In the mental health context, we confirmed that a court may "determine either through conducting a colloquy with the patient *or by review of the record*, that there is sufficient evidence to conclude that counsel's waiver on behalf of the patient was in fact voluntarily, knowingly, and intelligently made." *In re MH 2007-001275*, 219 Ariz. 216, 221,

he or she understands . . . [t]he constitutional rights which the defendant foregoes by pleading guilty or no contest.

¶ 19, 196 P.3d 819, 824 (App. 2008) (emphasis added) (superseded by statute irrelevant here).

¶18 The juvenile court in this case did engage Mother in a lengthy discussion, including questions by the court and answers by Mother, about her rights and the proposed stipulation, and the record reveals that Mother had been previously advised in writing of her rights. Based on the record as a whole, we conclude the court did not err in determining Mother's stipulation was knowingly, intelligently, and voluntarily made.

¶19 Specifically, the record demonstrates that Mother was represented by counsel at all proceedings. At the pretrial conference hearing, Mother received and signed a "Form 1" which informed Mother of her rights including the right to counsel, the right to a trial on the allegations of the dependency petition, and the right to cross-examine witnesses. At the dependency adjudication hearing, the parties discussed at length the possibility of a stipulation. The court explained that by stipulating, Mother would avoid any finding that she had neglected her son or was unwilling to parent him, but she would have to give up her right to challenge the dependency. The court granted a short recess so that Mother could discuss the stipulation with her counsel. Following the meeting, Mother's counsel reported to the court on two occasions that Mother agreed with the stipulation. Mother's own comments to the court

revealed her understanding of the effect of the stipulation. She stated on the record quite accurately that she would have to give up her opportunity "to show you that there is no case of dependency," in order to receive the "watered down dependency" finding proposed by ADES. Mother has not pointed to any evidence in the record that she was misled, coerced, or confused when she agreed to the stipulation.

¶20 The juvenile court did not err in finding Mother's stipulation was made knowingly, intelligently, and voluntarily.

CONCLUSION

¶21 For the foregoing reasons, we affirm the juvenile court's order adjudicating Romeo as dependent to his Mother.

_____/s/_____
JOHN C. GEMMILL, Presiding Judge

CONCURRING:

_____/s/_____
MARGARET H. DOWNIE, Judge

_____/s/_____
DIANE M. JOHNSEN, Judge