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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 1/10/2013  
RUTH A. WILLINGHAM,  
CLERK  
BY: mjt

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

TINA L., VERNON H., ) 1 CA-JV 12-0187  
)  
Appellants, ) DEPARTMENT B  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
ARIZONA DEPARTMENT OF ECONOMIC ) 103(G) Ariz.R.P.Juv.  
SECURITY, ZY'IRE H., ) Ct.; Rule 28 ARCAP)  
)  
Appellees. )  
)  
)

Appeal from the Superior Court in Maricopa County

Cause No. JD20806

The Honorable Joan M. Sinclair, Judge

**AFFIRMED**

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Thomas C. Horne, Attorney General Phoenix  
By Michael F. Valenzuela, Assistant Attorney General  
Attorneys for Appellees

John L. Popilek, PC Scottsdale  
By John L. Popilek  
Attorneys for Appellant Tina L.

Christina Phillis, Maricopa County Public Advocate Mesa  
By Suzanne W. Sanchez, Deputy Public Advocate  
Attorneys for Appellant Vernon H.

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O R O Z C O, Judge

¶1 Tina L. (Mother) and Vernon H. (Father) appeal the Juvenile Court's order terminating their parent-child relationships with Zy'ire H. (Z.H.). For the following reasons, we affirm.

#### **FACTUAL AND PROCEDURAL HISTORY**

¶2 On August 29, 2011, the Arizona Department of Economic Security (ADES) received a report that Mother tested positive for marijuana, cocaine and PCP when she was admitted to the hospital to deliver Z.H. The report also stated that Mother tested positive for marijuana, cocaine and PCP during a prenatal visit in May. On August 26, 2011, Z.H. was born premature and tested positive for marijuana. Father tested positive for cocaine and marijuana in late September. Both parents admitted to a history of chronic drug use and domestic violence.

¶3 ADES filed a dependency petition, alleging Z.H. was dependent due to Mother and Father's abuse or neglect, and the court subsequently found Z.H. dependent.

¶4 ADES then filed a motion to terminate Mother and Father's parental rights on the grounds of chronic substance abuse pursuant to Arizona Revised Statutes (A.R.S.) section 8-533.B.3 (Supp. 2012), out-of-home placement of Z.H. for a cumulative period of time of six months or longer, and Mother and Father's refusal to participate in reunification services offered by ADES under § 8-533.B.8(b). ADES further alleged that the best

interests of Z.H. would be served by a termination of the parent-child relationship.

¶15 The initial termination hearing was held on May 3, 2012. Mother was present at the hearing, but Father was not. The court found that Father's failure to appear constituted a waiver of his rights. The court then provided the Form 3 Notice to Parent in Termination Action (Form 3) to Mother personally and to counsel for Father. Ariz. R.P. Juv. Ct. Form 3. The court set the next pretrial hearing for June 25. Before that hearing, the Juvenile Court vacated that date and reset the hearing for July 9, 2012. Attorneys for both parents were sent copies of the minute entry changing the date of the severance hearing.

¶16 Neither parent attended the pretrial hearing held on July 9, 2012; however, both parents were represented by counsel. The court found that Mother was absent from the hearing and thus, waived her rights. The court also confirmed Father's waiver as a result of his failure to appear at the previous hearing. An ADES case manager testified regarding the history of the case, including Mother's and Father's substance abuse, their failure to maintain contact with Z.H., and their refusal to attend the treatment programs offered. The case manager also testified that both Mother and Father had substantially neglected Z.H. and willfully refused to remedy the circumstances that caused Z.H. to be removed from Mother and Father and placed in out of home care.

In their absence, counsel for Mother and Father participated in the hearing and cross-examined ADES's witness.

¶7 At the conclusion of the hearing, the Juvenile Court found that ADES had proven by clear and convincing evidence all grounds alleged in its severance motion and, by a preponderance of the evidence, that severance and adoption was in Z.H.'s best interest.

¶8 Mother and Father both timely appealed. We have jurisdiction pursuant to A.R.S. §§ 8-235.A (2007), 12-120.21.A.1 (2003) and -2101.A.1 (Supp. 2012).

#### DISCUSSION

##### **Mother**

¶9 Mother contends her due process rights were violated because the court did not inquire into "what efforts had been made to advise Mother of the hearing date or confirm her attendance, or even determine why she had not appeared" before it found she had waived her rights by not appearing at the severance trial on July 9.<sup>1</sup>

¶10 Parents have "a fundamental liberty interest in the care, custody, and management of their children"; thus, a court may not sever parental rights without "fundamentally fair

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<sup>1</sup> Mother does not contest severance based on the grounds of substance abuse, length of time Z.H. was in out-of-home care or the finding that severance was in the best interests of Z.H. We, therefore, do not address these issues.

procedures" that satisfy due process requirements. *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 24, 110 P.3d 1013, 1018 (2005) (citing *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982)). "Due process requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner." *Huck v. Haralambie*, 122 Ariz. 63, 65, 593 P.2d 286, 288 (1979). We review the court's decision to proceed against a party in absentia for an abuse of discretion. *Lindsey M. v. Ariz. Dep't of Econ. Sec.*, 212 Ariz. 43, 46, ¶ 13, 127 P.3d 59, 62 (App. 2006). However, we review constitutional claims de novo. *Lisa K. v. Ariz. Dep't of Econ. Sec.*, 230 Ariz. 173, 177, ¶ 9, 281 P.3d 1041, 1045 (App. 2012).

¶11 Mother claims that she was not provided proper notice of the July 9 severance hearing when it was moved from its initial date of June 25 to July 9, 2012. "A notice of hearing shall accompany the motion or petition for termination of parental rights and shall advise the parent . . . of the location, date and time of the initial termination hearing." Ariz. R.P. Juv. Ct. 64.C. "If a party is represented by an attorney, service . . . must be made on the attorney unless the court orders service on the party." Ariz. R. Civ. P. 5(c)(1).

¶12 The record indicates that the court issued a minute entry on June 21 indicating the change in date. Mother's attorney was listed on the order and appeared at the July 9

hearing, indicating that she had received notice of the change. In prior hearings, both the Juvenile Court and ADES advised Mother directly and through her counsel that her failure to appear at hearings could result in termination of her parental rights. See *Mara M. v. Ariz. Dep't of Econ. Sec.*, 201 Ariz. 503, 507, ¶ 26, 38 P.3d 41, 45 (App. 2002) (stating that warnings regarding the consequences of failing to comply with the juvenile court's directions were important factors in determining whether the mother had notice that her rights were in jeopardy).

¶13 In addition, Mother attended the initial severance hearing on May 3 when the court provided Form 3 to Mother and Father's counsel consistent with Rules 64.C and 66.D.2 of the Arizona Rules of Procedure for the Juvenile Court. Form 3 provides

[y]ou are required to attend all termination hearings. If you cannot attend a court hearing, you must prove to the Court that you had good cause for not attending. If you fail to attend the Initial Termination Hearing, Termination Pre-trial Conference, Status Conference, or Termination Adjudication Hearing without good cause, the Court may determine that you have waived your legal rights and admitted the grounds alleged in the motion/petition for termination. The Court may go forward with the Termination Adjudication Hearing in your absence and may terminate your parental rights to your child based on the record and evidence presented.

Ariz. R.P. Juv. Ct. Form 3.

¶14 In juvenile cases, a court may proceed in a parent's absence as long as that parent is represented by counsel because counsel's presence and participation protect the absent parent's rights.<sup>2</sup> *Christy A. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 299, 307, ¶ 25, 173 P.3d 463, 471 (App. 2007). Mother's counsel's participation in the proceedings satisfied due process requirements. See *id.* at ¶ 28. (holding that a parent deemed to have waived his or her right to contest the severance retains the right to have counsel present and participate).

¶15 Mother's claim that her absence was due to lack of notice fails. Mother's counsel was served with notice of the hearing time change and appeared on her behalf. Also, Mother had been previously admonished of the consequences if she failed to appear at a hearing without good cause. Mother alleges that she may have had good cause for her absence; however, she has not indicated what that good cause might be. We find that the court did not abuse its discretion in finding that Mother's failure to appear waived her rights in these proceedings.

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<sup>2</sup> There is no indication in the record that the court asked counsel whether counsel had forwarded the notice to Mother directly or by some other means. Although not fatal, it would be a "best practice" for the juvenile court to inquire on the record whether the attorney for the parent had made contact with the parent to determine whether the parent had good cause for the absence.

## **Father**

¶16 Father contends that he did not have proper notice of the May 3 and July 9 hearings, and therefore, the court's finding that he waived his rights and lacked good cause for his absence was erroneous. He also argues that termination is not in the best interests of Z.H.

¶17 Father filed a motion to reconsider and motion to set aside the termination order because he alleged that he did not have notice of the May 3 and July 9 hearings. Although the Juvenile Court never ruled on the motion, it impliedly denied the motion when it signed the final order terminating Father's parental rights.

### *Notice Requirement*

¶18 Father claims that he did not receive proper notice of the hearings "due to a family emergency." When a state acts to terminate parental rights, it must do so by fair procedures, including giving a parent notice reasonably calculated, under all the circumstances, to apprise him of the pendency of any action that could affect his custody. *Mara M.*, 201 Ariz. at 507, ¶ 24, 38 P.3d at 45. "If a party is represented by an attorney, service . . . must be made on the attorney unless the court orders service on the party." Ariz. R. Civ. P. 5(c)(1).

¶19 At the initial severance hearing on May 3, the court noted that Father was absent and by failing to appear, had waived



his rights. However, the court reserved the right for Father to show good cause for his absence and to listen to testimony if he attended the next pretrial conference.

¶20 Father did not appear on July 9, and the court found that he failed to provide any reason to show good cause for his failure to appear at the May 3 hearing. The court also confirmed that Father had waived his rights by failing to appear at the July 9 pretrial conference. The court based the July 9 determination on the fact that Father called the court and told a staff member he was having transportation problems, which demonstrated that he had notice of the July 9 hearing.

¶21 A juvenile court's finding that a party failed to demonstrate good cause for an absence is a discretionary finding that we will reverse only if the court's exercise of that discretion was manifestly unreasonable. *Adrian E. v. Ariz. Dep't of Econ. Sec.*, 215 Ariz. 96, 101, ¶ 15, 158 P.3d 225, 230 (App. 2007). At both the May 3 and July 9 hearings, the court asked counsel about Father's absence, but Father's attorney had no information regarding his client's whereabouts or reason for his nonappearance. Despite Father's absence, his attorney participated by cross-examining witnesses and objecting to ADES exhibits, thus satisfying due process requirements. See *Christy A.*, 217 Ariz. at 307, ¶ 28, 173 P.3d at 471.

¶22 The record before us indicates that Father was given proper notice of the proceedings and failed to demonstrate good cause for his failure to appear. Consequently, the Juvenile Court did not abuse its discretion by finding that Father's failure to appear waived his rights in the proceedings.

*Best Interest*

¶23 Father also argues that the court erred by finding termination of his parental rights to be in Z.H.'s best interests<sup>3</sup> because it relied solely on the likelihood of someone wanting to adopt Z.H. as the criteria. Whether termination of parental rights is in the child's best interest is a factual question for the juvenile court to determine. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 282, ¶ 13, 53 P.3d 203, 207 (App. 2002). "We will not disturb the juvenile court's order severing parental rights unless its factual findings 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, 377, ¶ 2, 982 P.2d 1290, 1291 (App. 1998).

¶24 Termination of parental rights requires the juvenile court to find by a preponderance of the evidence that termination is in the best interest of the child. *Kent K. v. Bobby M.*, 210 Ariz. at 288, ¶ 41, 110 P.3d at 1022. ADES can establish that

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<sup>3</sup> Father does not contest the statutory ground supporting the severance of his parental rights.

termination is in the child's best interest by showing that the child would derive an affirmative benefit from termination or incur a detriment by continuing the relationship. *Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, 334, ¶ 6, 100 P.3d 943, 945 (App. 2004). The best interest requirement can be met if ADES proves that a current adoptive plan exists for the child or that the child is adoptable. *Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, 50, ¶ 19, 83 P.3d 43, 50 (App. 2004). Whether the existing placement is meeting the needs of the child is also considered. *Audra T.*, 194 Ariz. at 377, ¶ 5, 982 P.2d at 1291.

¶25 The court found that ADES had proven by a preponderance of the evidence that severance was in Z.H.'s best interest so "he can be legally freed up for adoption." The case manager testified that Z.H. was currently in an adoptive placement that could provide stability and a drug-free environment and that Z.H. was "highly adoptable." As a result, there was sufficient evidence to support the Juvenile Court's finding that termination was in the child's best interest.

**CONCLUSION**

¶26 For the foregoing reasons, we affirm the Juvenile Court's order terminating Mother and Father's parent-child relationship with Z.H.

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PATRICIA A. OROZCO, Judge

CONCURRING:

/S/

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MAURICE PORTLEY, Presiding Judge

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RANDALL M. HOWE, Judge