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UNDER ARIZ. R. SUP. CT. 111(c), THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
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IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

KIMBRIA S., *Appellant*,

v.

ARIZONA DEPARTMENT ECONOMIC SECURITY, D.S., *Appellees*.

No. 1 CA-JV 13-0189

FILED 12-12-2013

Appeal from the Superior Court in Maricopa County

No. JD21256

The Honorable Joan Sinclair, Judge

AFFIRMED

COUNSEL

Jennifer Perkowski, Mesa

Counsel for Appellant

Arizona Attorney General's Office, Phoenix

By Michael F. Valenzuela

Counsel for Appellee Arizona Department of Economic Security

MEMORANDUM DECISION

Presiding Judge Lawrence F. Winthrop delivered the decision of the Court, in which Judge Margaret H. Downie and Judge Jon W. Thompson joined.

WINTHROP, Presiding Judge:

¶1 Kimbria S. (“Mother”) appeals the decision of the juvenile court to terminate her parental rights to D.S. (“Child”) following a hearing on the merits after she failed to appear at a pre-trial conference. Mother argues that the court abused its discretion by refusing to find good cause for her failure to appear. Mother also contends that she received inadequate assistance of counsel before the juvenile court. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Child was removed at nine months of age from Mother’s care in December 2011 after a report to the Child Protective Services (“CPS”) Hotline stated that Mother’s erratic behavior placed Child in jeopardy, and after Mother made comments that she would harm herself and Child. Following the filing of a dependency petition, the Arizona Department of Economic Security (“ADES”) offered Mother the following reunification services: (1) parent aide services, (2) psychological consultation, (3) trauma therapy through a private practitioner, (4) medication monitoring services, (5) initial substance abuse testing, and (6) transportation. Mother inconsistently participated in services for the first year following Child’s removal.

¶3 In February 2012, Child was found dependent as to Mother.¹ ADES filed a motion for termination of parental rights in April 2013, pursuant to Arizona Revised Statutes (“A.R.S.”) section 8-533(B)(8)(c) (providing termination of parental rights where child is in out-of-home placement fifteen months or longer, ADES provides adequate reunification services, and parent fails to remedy circumstances that cause

¹ Father’s case is on a separate procedural track and is not the subject of this appeal.

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child's out-of-home placement). Mother attended the initial termination hearing on May 9, 2013. At the May 9 hearing, the court set the pre-trial conference for June 4, and Mother received a copy of Form 3 (Notice to Parent in Termination Action) warning that failure to attend the pre-trial conference may result in waiver of her rights.

¶4 Mother failed to appear at the pre-trial conference. In light of Mother's failure to appear without good cause, the juvenile court accelerated the pre-trial conference to a termination adjudication hearing. The court then heard testimony from the CPS case manager regarding Mother's lack of participation in services and the best interest of Child, and received additional evidence from ADES consisting of the case manager's written report. Mother's counsel was present at the hearing and had the opportunity to cross-examine the case manager and oppose the introduction of evidence. The juvenile court found that ADES proved the necessary elements of the statutory ground for termination and that termination of parental rights was in the best interest of Child; accordingly, the court ordered the termination of Mother's parental rights.

¶5 After the juvenile court filed the termination order in late June, Mother filed a motion to reconsider and to set aside the order, claiming that Mother had good cause for failing to appear at the pre-trial conference because she had not been reminded about the court date and had to attend supervised visitation with Child at the same time. The juvenile court denied this motion.

¶6 Mother then untimely appealed from the juvenile court's order, which the juvenile court excused based on the pendency of the motion to reconsider. We have jurisdiction under the Arizona Constitution, Article 6, Section 9 and A.R.S. §§ 8-235, 12-120.21(A)(1), and 12-2101(A)(1).²

DISCUSSION

¶7 Mother argues that the juvenile court erred when it terminated her parental rights following a hearing on the merits after Mother failed to appear for a pre-trial conference. Mother argues that she had good cause for missing the proceeding because trial counsel did not remind her of the pre-trial conference and because she was engaged in a

² We cite the current version of the applicable statutes where no changes material to our decision have since occurred.

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visitation with Child during the hearing. Mother also argues that trial counsel provided ineffective assistance of counsel by failing to remind Mother about her court date.

I. Procedural claim

¶8 Mother argues that the juvenile court abused its discretion when it proceeded with the June 4 hearing in her absence and later denied a motion to reconsider after finding that Mother lacked good cause for her failure to appear. We review the juvenile court’s finding regarding lack of good cause and its decision to proceed for an abuse of discretion. See *Adrian E. v. Ariz. Dep’t of Econ. Sec.*, 215 Ariz. 96, 101, ¶ 15, 158 P.3d 225, 230 (App. 2007); *Lindsey M. v. Ariz. Dep’t of Econ. Sec.*, 212 Ariz. 43, 46, ¶ 13, 127 P.3d 59, 62 (App. 2006).

¶9 Termination cases involve “[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child.” *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). These parental rights are not absolute, however. *Michael J. v. Ariz. Dep’t of Econ. Sec.*, 196 Ariz. 246, 248, ¶ 12, 995 P.2d 682, 684 (2000). “A court may order severance of parental rights under certain circumstances, so long as the parents whose rights are to be severed are provided with ‘fundamentally fair procedures’ that satisfy due process requirements.” *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 24, 110 P.3d 1013, 1018 (2005) (quoting *Santosky*, 455 U.S. at 754). Among these requirements are notice and the opportunity to be heard. See *Huck v. Haralambie*, 122 Ariz. 63, 65, 593 P.2d 286, 288 (1979).

¶10 A parent facing termination of her parental rights is required to appear at all termination proceedings. See A.R.S. § 8-537(C) (requiring parent to appear at termination adjudication hearing); Ariz. R.P. Juv. 64(C) (extending requirement to all termination proceedings); cf. *Adrian E.*, 215 Ariz. at 100, ¶ 12, 158 P.3d at 229 (“Rule 64(C) implicitly authorizes the juvenile court . . . to terminate the parental rights of a parent who . . . fails to appear without good cause for a status conference on a pending motion for termination.”). Pursuant to Arizona Rule of Procedure for the Juvenile Courts 64(C), a juvenile court must provide a parent with a “notice of hearing” advising her that the “failure to appear at the initial hearing, pretrial conference, status conference or termination adjudication hearing, without good cause, may result in a finding that [she] . . . has waived legal rights, and is deemed to have admitted the allegations in the motion or petition for termination.”

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¶11 Good cause for failing to appear includes “(1) mistake, inadvertence, surprise or excusable neglect” and “(2) a meritorious defense to the claims.” *Christy A. v. Ariz. Dep’t of Econ. Sec.*, 217 Ariz. 299, 304, ¶ 16, 173 P.3d 463, 468 (App. 2007). The basis for determining whether excusable neglect exists is the presumed conduct of a “reasonably prudent person in the same circumstances.” *See id.* (citing *Ulibarri v. Gerstenberger*, 178 Ariz. 151, 163, 871 P.2d 698, 710 (App. 1993)). “A meritorious defense must be established by facts and cannot be established through conclusions, assumptions or affidavits based on other than personal knowledge.” *Richas v. Superior Court*, 133 Ariz. 512, 517, 652 P.2d 1035, 1040 (1982).

¶12 We agree with the juvenile court that Mother lacked good cause for her failure to appear. As a threshold matter, at the May 9 initial termination hearing, Mother received the Form 3 written notice of her required appearance at the June pre-trial conference, and was also orally advised in open court as to the potential consequences of her failure to appear. To establish “mistake, inadvertence, surprise or excusable neglect” under the first prong of the *Christy A.* test, Mother offers two justifications for missing the pre-trial conference. First, Mother blames trial counsel for failing to remind her of her court date; however, Mother has not identified any authority holding that her absence was excusable because no one furnished her with a fresh reminder about her scheduled day in court. Good cause for failing to appear requires more than mere forgetfulness. *Cf. Coconino Pulp & Paper Co. v. Marvin*, 83 Ariz. 117, 120, 317 P.2d 550, 552 (1957) (“If a [default] judgment is acquired because of a party’s mere . . . forgetfulness without any reasonable excuse thereof, the judgment will not be disturbed . . .”).

¶13 Second, Mother argues that she could not attend the pre-trial conference because she had to attend supervised visitation with Child at the same time. Mother similarly points to no authority holding that attending visitation with Child trumps her duty to appear at a scheduled court proceeding. Mother made no showing that the visit was mandatory, or that it could not have been rescheduled, or that it otherwise took greater priority than the pre-trial conference.

¶14 Further, under the second prong of the *Christy A.* test, Mother has not established a meritorious defense to the severance motion. On appeal, Mother only offers the bald assertion, unsupported by citations to the record, “that termination . . . was not in the best interests of the child[.]” Mother claims that she could not further develop this argument because of the juvenile court’s decision to proceed in her

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absence. Contrary to this argument, Mother had the opportunity to be heard at the accelerated termination adjudication hearing through counsel. See *Christy A.*, 217 Ariz. at 307, ¶ 25, 173 P.3d 471 (“In the . . . scenario where the parent fails to appear but is still represented by counsel, the court may proceed in that parent’s absence because his or her rights will be protected by the presence and participation of counsel.”). Mother also could have made a proper showing of a meritorious defense in her motion to reconsider, but failed to do so. Accordingly, we affirm the decision of the juvenile court.

II. Ineffective assistance of counsel claim

¶15 Mother also raises a claim for ineffective assistance of counsel because trial counsel failed to remind her to appear in court for the pre-trial conference. Assuming that Arizona recognizes a separate claim for ineffective assistance of counsel in parental rights matters, “a party must show both that counsel’s representation fell below prevailing professional norms and that a reasonable probability exists that, but for counsel’s errors, the result of the proceeding would have been different.” *John M. v. Ariz. Dep’t of Econ. Sec.*, 217 Ariz. 320, 323, ¶ 8, 173 P.3d 1021, 1024 (App. 2007) (citing *Strickland v. Washington*, 466 U.S. 668, 690, 694 (1984)).

¶16 Because Mother does not show any prejudice resulting from counsel’s performance, see *John M.*, 217 Ariz. at 325, ¶ 18, 173 P.3d at 1026 (citation omitted), we affirm the judgment of the juvenile court without addressing whether counsel’s representation fell below the prevailing professional norms.

CONCLUSION

¶17 For the foregoing reasons, we affirm.



Ruth A. Willingham · Clerk of the Court
FILED: mjt