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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

KRISTEN M., DANIEL L., *Appellants,*

v.

DEPARTMENT OF CHILD SAFETY, D.L., S.L., A.L., *Appellees.*

No. 1 CA-JV 17-0153
FILED 11-7-2017

Appeal from the Superior Court in Coconino County
No. S0300JD201600034
The Honorable Margaret A. McCullough, Judge

AFFIRMED

COUNSEL

Coconino County Public Defender's Office, Flagstaff
By Sandra L.J. Diehl
Counsel for Appellant Father

Harris & Winger, P.C., Flagstaff
By Chad J. Winger
Counsel for Appellant Mother

Arizona Attorney General's Office, Mesa
By Nicholas Chapman-Hushek
Counsel for Appellee Department of Child Safety

MEMORANDUM DECISION

Presiding Judge Paul J. McMurdie delivered the decision of the Court, in which Judge Peter B. Swann and Judge Patricia A. Orozco¹ joined.

M c M U R D I E, Judge:

¶1 Kristen M. (“Mother”) and Daniel L. (“Father”) (collectively “the Parents”) appeal the superior court’s order adjudicating their children, D.L., S.L., and A.L. (“the Children”) dependent. For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 A.L. was born on August 13, 2016. Shortly after birth, A.L. tested positive for methamphetamine, amphetamine, and marijuana. After learning A.L. tested positive for drugs, the Department of Child Safety (“DCS”) initially sought to have the Parents provide urinalysis tests and to schedule a meeting with the family to determine further services. However, DCS was unable to locate or contact the Parents, and on August 24, 2016, DCS took the Children into temporary physical custody. DCS then petitioned for dependency.

¶3 The dependency petition alleged each child was dependent as to Mother due to neglect because of substance abuse and domestic violence. A urinalysis test and three meconium tests performed on A.L. tested positive for drugs, but Mother denied substance abuse. Mother has also had several arrests for domestic violence involving other adults, including one six days after A.L. was born. The petition alleged each child was dependent as to Father due to neglect for (1) failure to protect the Children when he knew about Mother’s substance abuse; (2) failure to supervise the Children as he allowed Mother to care for the Children when he knew Mother was abusing methamphetamine; and (3) inability or unwillingness to parent the Children. Father denied he was aware Mother used illegal drugs.

¹ The Honorable Patricia A. Orozco, retired Judge of the Court of Appeals, Division One, has been authorized to sit in this matter pursuant to Article VI, Section 3, of the Arizona Constitution.

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¶4 At the hearing on DCS’s temporary custody of the Children, a DCS investigation supervisor testified DCS had concerns about Mother’s substance abuse and domestic violence, the Parents’ ability to comply with court rules, and about returning the Children to the home. After DCS took the children into temporary physical custody, the Parents inconsistently submitted to urinalysis and irregularly participated in services offered by DCS. The Parents also missed or cancelled visits with the Children. After the hearing, the superior court found “continued custody of the children is clearly necessary to prevent abuse or neglect.” This Court affirmed the superior court’s order after Father appealed. *Daniel L. v. DCS*, 1 CA-JV 16-0488, 2017 WL 1505912 (App. Apr. 27, 2017) (mem. decision).

¶5 A dependency adjudication was scheduled for November 30, 2016. The Parents were informed of the adjudication’s date and time at least six times. Both Mother and Father signed a “Form 1: Notice to Parent in Dependency Action,” which stated the dependency adjudication date and time. However, the Parents failed to appear. DCS admitted one report as evidence and rested its case. Mother and Father’s attorneys did not make any arguments, objections, or present evidence. The superior court found the Parents were advised of the consequences of failing to appear, their absences were voluntary, and they “waived their legal rights or [were] deemed to have admitted the allegations.” The superior court then found the Children dependent.

¶6 Mother and Father moved to vacate the superior court’s dependency findings. After a hearing, the superior court denied the motions to vacate. The superior court then signed an order adjudicating the Children dependent as to each parent. Mother and Father timely appealed and we have jurisdiction pursuant to Arizona Revised Statutes (“A.R.S.”) sections 8-235(A), 12-120.21(A)(1), -2101(A)(1), and Arizona Rule of Procedure for the Juvenile Court 103(A).

DISCUSSION

¶7 A dependent child is a child who is in “need of proper and effective parental care and control and who has no parent or guardian . . . willing to exercise or capable of exercising such care and control,” or whose “home is unfit by reason of . . . neglect . . . by a parent.” A.R.S. § 8-201(15)(a)(i), (iii). The petitioner must prove his or her allegations by a preponderance of the evidence. A.R.S. § 8-844(C)(1); Ariz. R.P. Juv. Ct. 55(A). When reviewing a superior court’s dependency adjudication, “we view the evidence in the light most favorable to sustaining the juvenile court’s findings,” and will uphold the dependency adjudication “unless no

reasonable evidence supports it.” *Willie G. v. ADES*, 211 Ariz. 231, 235, ¶ 21 (App. 2005).

A. Mother and Father Failed to Appear at the Dependency Adjudication without Good Cause.

¶8 Mother argues she did not fail to appear at the dependency adjudication, but rather “untimely appeared,” and that the superior court violated her due process rights by not setting aside its finding of waiver of parental rights when the court learned Mother appeared 60 minutes late for the dependency adjudication without good cause.

¶9 Under A.R.S. § 8-844(F) and Rule 55(D)(2), the superior court may find a parent has waived his or her legal rights if they fail to appear at the dependency adjudication hearing:

If the parent . . . fails to appear at the dependency adjudication hearing without good cause shown and the court finds the parent . . . had notice of the hearing, was properly served . . . and had been previously admonished regarding the consequences of failure to appear, including a warning that the hearing could go forward in the absence of the parent . . . and that failure to appear may constitute a waiver of rights and an admission to the allegations contained in the dependency petition, the court may adjudicate the child dependent based upon the record and evidence presented if the petitioner has proven grounds upon which to adjudicate the child dependent.

Ariz. R.P. Juv. Ct. 55(D)(2).

¶10 In the analogous area of severance hearings under Rule 66(D)(2)², this court has held a *late* appearance at the hearing is not necessarily a “failure to appear” and that “only if a parent has failed to appear by the time both parties have fully presented their case, may the court treat the parent’s absence as a waiver of the parent’s legal rights and deem the parent to have admitted the well-pled factual allegations of the petition.” *Brenda D. v. DCS*, 242 Ariz. 150, 156, ¶ 18 (App. 2017). Here, the dependency adjudication began at 10:01 A.M., and the Parents were not present. The superior court inquired about the Parents’ whereabouts and,

² Rule 66(D)(2) and Rule 55(D)(2) contain almost identical language allowing the superior court to terminate parental rights or find a child dependent if a parent fails to appear at a hearing.

after the Parents' attorneys stated they did not know why the Parents were not present, the court asked the State if they had witnesses. The State then moved to admit its sole exhibit, a court report by a DCS employee dated August 31, 2016, and rested. The Parents' attorneys did not object to the exhibit or offer any evidence. The superior court then found the Parents failed to appear, were deemed to have admitted the allegations, and found the Children dependent. The hearing concluded at 10:12 A.M.

¶11 We agree with the superior court that the Parents failed to appear at the dependency adjudication. While the Parents did appear at the courtroom at 11:00 A.M., the hearing had concluded by that time. Therefore, the Parents failed to appear.

¶12 Mother further argues the superior court erred by finding she lacked good cause for her failure to appear. "A finding of good cause for a failure to appear is largely discretionary." *Adrian E. v. ADES*, 215 Ariz. 96, 101, ¶ 15 (App. 2007). We therefore review a superior court's finding on whether good cause for failure to appear exists for abuse of discretion and will only reverse if the court's exercise of discretion was "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Id.*

¶13 Mother argues a mistake in a signed order implied the adjudication hearing was at 11:00 A.M. and that her reliance on the court's mistake "constitute[s] a mistake justifying a determination of good cause." The order, dated October 18, 2016, read "[t]he court affirms the Mediation on November 4, 2016 at the hour of 10:00 am and the Pre-Trial Conference on November 4, 2016 at 11:00 a.m. as well as the Dependency Adjudication on November 30, 2016" No time was listed for the dependency adjudication. However, the Parents were informed at least six other times that the dependency adjudication was going to be held on November 30, 2016 at 10:00 A.M, including at the pre-trial conference held on November 4, 2016. Mother also signed a "Form 1: Notice to Parent in a Dependency Action" on November 4, 2016, that correctly stated the adjudication date and time. Therefore, we hold the superior court did not abuse its discretion when it found Mother lacked good cause for failing to appear.

¶14 Mother also argues the superior court's "conduct at the good cause hearing constitutes an abuse of discretion" because the court did not receive evidence or make factual findings based upon the evidence. Mother contends the superior court "first . . . [argued] with counsel about whether a mistake is legally sufficient to demonstrate good cause without clearly

ruling on the issue” and then “instantly pivot[ed] into discussing the parents’ participation in services.”

¶15 At the hearing, counsel explained why their clients were absent at the dependency adjudication, and counsel for the Children and for the State responded. The judge then provided a detailed explanation of her review of the record and why she could not find the Parents had good cause for failing to appear. Therefore, we hold the superior court’s conduct at the good cause hearing does not constitute an abuse of discretion.

¶16 The Parents both argue the superior court was not required to find good cause.³ At the hearing, the superior court stated, “[w]hat the law requires is good cause for non-appearance,” that mistake of time is not good cause, and “[s]o from a legal perspective, no I can’t do it.” The Parents argue this was a legal error by the superior court and a further abuse of discretion.

¶17 Under Rule 55(D)(2), if a parent “fails to appear at the dependency adjudication hearing *without good cause shown* . . . that failure to appear may constitute a waiver of rights . . .” (emphasis added). While superior courts have “full discretion” to determine “what constitutes good cause for failure to appear,” *Brenda D.*, 242 Ariz. at 156, ¶ 18, considering whether good cause does exist is proper. *See Christy A. v. ADES*, 217 Ariz. 299, 304, ¶ 14 (App. 2007) (rather than using “default” terminology, juvenile courts should “consider whether the parent can show ‘good cause’ as to why they failed to personally appear”). Therefore, the superior court did not err when it stated the law required good cause for failure to appear, or when it found none existed.

B. DCS Met its Burden of Proving the Children Dependent.

¶18 We note first that Father contends the superior court failed to make specific findings of fact and set forth grounds for the dependency. Father argues the superior court’s order adjudicating the Children dependent is deficient because it merely reiterates the dependency allegations in DCS’s original dependency petition. Father argues Rule 55(E) requires the superior court to make specific findings of fact and that here the superior court’s findings were “inaccurate because the evidence upon which they were based failed to take into account any of the testimony and evidence presented” during the temporary custody hearing. Father failed

³ Father does not contest the superior court’s finding that he failed to appear without good cause. His sole argument related to his failure to appear is that the superior court was not required to find good cause.

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to raise this issue below, and therefore, we do not consider it on appeal. *Christy C. v. ADES*, 214 Ariz. 445, 452, ¶ 21 (App. 2007) (“We generally do not consider objections raised for the first time on appeal. This is particularly so as it relates to the alleged lack of detail in the juvenile court’s findings.”) (citation omitted). Moreover, as discussed below, the superior court did make sufficient findings of fact to support its order adjudicating the Children dependent as to Father.

¶19 Father and Mother both argue the superior court erred by finding the Children dependent based upon a single DCS report prepared in August 2016. The Parents argue DCS did not meet its burden of proving the Children dependent *at the time of* the dependency adjudication, as required. *See Shella H. v. DCS*, 239 Ariz. 47, 50, ¶ 12 (App. 2016).

¶20 The Parents failed to raise the argument below that the superior court erred by relying solely on the DCS report. Neither Father nor Mother objected to the exhibit at the dependency adjudication. When the court asked if there was an objection to the exhibit, Father’s counsel asked if the author was present and then took “no position” when her presence was confirmed. Mother’s counsel stated she also took no position. The Parents also did not raise the issue in their respective motions to vacate the dependency finding. Instead, the Parents argue now it was a “fundamental error” for the superior court to rely solely on the DCS report.

¶21 Issues not raised below are generally waived. *Louis C. v. DCS*, 237 Ariz. 484, 489, ¶ 20 (App. 2015). However, this court will review for fundamental error.⁴ *State v. Abdi*, 226 Ariz. 361, 367, ¶ 26 (App. 2011). The party arguing fundamental error has the burden of proving “that error occurred, that the error was fundamental, and that the error caused him prejudice.” *Id.* “Fundamental error is error that goes to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.” *Ruben M. v. ADES*, 230 Ariz. 235, 239, ¶ 16 (App. 2012).

¶22 The superior court must “determine whether a child is dependent based on the circumstances existing at the time of the adjudication hearing.” *Shella H.*, 239 Ariz. at 50, ¶ 12. The DCS report stated,

⁴ Fundamental error review is appropriate in civil cases if the situation may result in the denial of a constitutional right. *Louis C.*, 237 Ariz. at 489, ¶ 20 (fundamental error review in a dependency adjudication); *Ruben M. v. ADES*, 230 Ariz. 236, 239, ¶ 15 (App. 2012) (fundamental error review in a termination proceeding).

inter alia, that (1) the youngest child tested positive for methamphetamine, amphetamine, and marijuana shortly after birth; (2) Mother denied using drugs during the pregnancy; (3) Father was aware of Mother's drug use; (4) Mother was involved in domestic violence incidents; (5) both Parents cancelled or ended visitations early; and (6) Mother had missed at least two required urinalysis tests. Here, the superior court found the Children dependent as to Mother based on Mother's neglect due to substance abuse and domestic violence. The court found the Children dependent as to Father based on neglect for failure to protect and supervise the Children when he knew about Mother's drug abuse and his "inability and or unwillingness to parent" the Children. The Parents presented no evidence that the statements in the DCS report were untrue, or evidence of how the circumstances were different at the time of the hearing. Without such evidence, the Parents cannot show that they were prejudiced by the superior court's reliance on this report. Reasonable evidence supports the superior court's dependency adjudication. *See Willie G.*, 211 Ariz. at 235, ¶ 21. Therefore, the superior court did not err by finding the Children dependent based on the DCS report.

C. The Parents were not Deprived of an Adversarial Hearing.

¶23 Mother and Father both argue they were deprived of an adversarial hearing in the dependency adjudication. A parent who waives his or her right to contest the allegations in a dependency petition by failing to appear retains the right to participate in the hearing through attorney participation. *See Brenda D.*, 242 Ariz. at 157, ¶ 23 ("Parent's counsel . . . has the right, among other things, to call witnesses to challenge DCS in establishing the legal grounds for termination of the parent-child relationship.").

¶24 Mother argues the superior court violated her due process rights because the court "unreasonably ignored a reasonable request for counsel to contact the parents to ascertain the cause for their untimely appearance." At the dependency adjudication, Father's attorney asked the court if she could call her office to make sure Father hadn't "called in." The court responded, "[i]n a minute," and then addressed other matters, and counsel never called her office. However, before the hearing concluded, the superior court asked the attorneys if they had "anything further," and neither Father nor Mother's counsel reiterated the request to contact the attorney's office or offered evidence regarding the allegations in the dependency petition. The superior court did not violate Mother's due process rights by not permitting Father's counsel to contact her office.

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¶25 Father also argues the superior court “failed to allow the right to effective participation of counsel” and denied Father due process when it “did not allow for argument or cross-examination” by his attorney. However, the Parents’ counsel declined to object to DCS’s exhibit, and only discussed scheduling and notice when asked if there was “anything further.” There is nothing in the record to suggest the superior court precluded counsel from presenting evidence, cross-examining witnesses, or otherwise limited their participation in the hearing. *See Brenda D.*, 242 Ariz. at 157-58, ¶¶ 25, 26. The superior court did not violate the Parents’ due process rights or deprive the Parents of an adversarial hearing.

CONCLUSION

¶26 The superior court’s order adjudicating the Children dependent as to Mother and Father is affirmed.



AMY M. WOOD • Clerk of the Court
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