

NOTICE: NOT FOR OFFICIAL PUBLICATION.  
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  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

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ELESHA C., NICHOLAS D., *Appellants,*

*v.*

DEPARTMENT OF CHILD SAFETY, R.S., O.D., M.D., *Appellees.*

No. 1 CA-JV 17-0245  
FILED 3-13-2018

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Appeal from the Superior Court in Maricopa County  
No. JD528500  
No. JS518339  
The Honorable David J. Palmer, Judge

**AFFIRMED**

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COUNSEL

Robert D. Rosanelli Attorney at Law, Phoenix  
By Robert D. Rosanelli  
*Counsel for Appellant Elesha C.*

John L. Popilek PC, Scottsdale  
By John L. Popilek  
*Counsel for Appellant Nicholas D.*

Arizona Attorney General's Office, Mesa  
By Amanda Adams  
*Counsel for Appellee Department of Child Safety*

**MEMORANDUM DECISION**

Judge Randall M. Howe delivered the decision of the Court, in which Presiding Judge James P. Beene and Judge Kent E. Cattani joined.

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**H O W E**, Judge:

¶1 Elesha C. (“Mother”) and Nicholas D. (“Father”) (collectively “Parents”) appeal the juvenile court’s order terminating their parental rights. For the following reasons, we affirm.

**FACTS AND PROCEDURAL HISTORY**

¶2 Mother and Father are the biological parents of O.D. and M.D., born January and October 2015, respectively, and Mother is the biological parent of R.S. born in May 2009.<sup>1</sup> The Department of Child Safety first became involved with Mother in 2007 and had subsequent contacts with her regarding R.S. in 2009 and 2014.

¶3 In January 2015, the Department received a report that O.D. was born prematurely at 25 weeks and that Mother tested positive for methamphetamine. The Department took R.S. into temporary custody in February 2015 and petitioned for dependency, alleging that R.S. was dependent as to Mother. Later that month, the juvenile court found R.S. dependent, and the Department offered Parents services.

¶4 At birth, O.D. weighed only one pound nine ounces and required hospitalization in the neonatal intensive care unit until April 2015. When the hospital released O.D., the Department took temporary custody and petitioned for dependency, alleging Parents’ neglect of O.D., substance abuse, mental illness, and the open dependency of R.S. against Mother. The juvenile court found O.D. dependent as to Mother in May 2015, and as to Father the following month.

¶5 Parents agreed to engage in services but they continually failed to comply. Unbeknownst to the Department, Parents moved to Colorado and then failed to appear for a court hearing in August 2015. In

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<sup>1</sup> The court terminated R.S.’s biological father’s parental rights, and he is not a party to this appeal.

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October 2015, the Department received a report that Mother had given birth to M.D., who was born prematurely and polysubstance exposed. In November 2015, after Colorado determined that Arizona had jurisdiction over M.D., the hospital discharged M.D. to the Department's care. The Department then petitioned for dependency, alleging neglect, substance abuse, and the open dependency against Parents.

¶6 Although Mother had sporadic telephonic contact with R.S., Parents had no contact with O.D. and M.D. after the hospitals discharged the children to the Department's care. Parents neglected to communicate with the Department and were non-compliant with their service providers. As a result, Parents' referrals with the service providers expired. When Parents again failed to appear for a court hearing in November 2015, the juvenile court changed the case plan to severance and adoption, and the Department moved terminate Parents' parental rights to O.D. and Mother's parental rights to R.S., alleging abandonment, substance abuse, and time in an out-of-home placement under A.R.S. §§ 8-533(B)(1), (3), and (8).

¶7 Parents failed to appear for a court hearing scheduled in January 2016, but appeared telephonically for an initial dependency and termination hearing in February after they reported moving to Florida. At the hearing, the juvenile court read Parents the Form 3 notice that informed them that if they failed to appear at any single future hearing, their parental rights could be terminated. Parents proceeded to appear telephonically for the next five hearings with the court's apparent permission. At the October 2016 pretrial conference, the court set the matter for a contested termination and dependency hearing in March 2017 and ordered Parents to be present in person.

¶8 In January 2017, the Department petitioned for termination of Parents' parental rights to M.D. alleging abandonment, substance abuse, and time in an out-of-home placement. The Department sent Parents the standard notice of hearing on motion and petition for termination. Later that month, Father appeared telephonically for a report and review hearing and attempted to appear on Mother's behalf. The court told Father that he and Mother were responsible for maintaining contact with their respective attorneys and affirmed the prior order requiring them to appear personally for the contested hearings.

¶9 The juvenile court provided Parents with the Form 3 notice via counsel twice in February regarding M.D.'s case. At the February 2017 continued initial termination hearing for M.D., which neither parent attended in person or telephonically, the Department requested M.D.'s case

be set for a “severance trial on the same date” as the hearing scheduled for R.S. and O.D. The juvenile court set both hearings together and although it did not specify Parents were to attend in person, it did not absolve Parents of the requirement to attend in person on R.S. and O.D.’s case.

¶10 Despite the court’s specific order to personally appear, Parents failed to do so at the March contested termination and dependency adjudication hearing. Neither parent made any written motion to appear telephonically, but they did advise their attorneys that they could not appear in person due to financial hardship and because traveling to Arizona could interfere with the progress in their Florida dependency case.<sup>2</sup> On the day of the hearing, Parents called the court and requested to appear telephonically and Father requested a continuance. The juvenile court found that Parents’ absence was without good cause and that they waived their appearance. The court also denied Father’s motion to continue. The court granted, however, the Department’s prior written motion requesting permission for Parents’ Florida case manager to appear telephonically.

¶11 The juvenile court proceeded to receive testimony, and after considering testimony and other evidence, the court terminated Parents’ parental rights to all three children. Father and Mother each timely appealed. The Department moved to file a consolidated answering brief, which this Court granted. As such, we consider both appeals here.

## DISCUSSION

¶12 Parents argue only that the court abused its discretion by refusing to allow them to appear telephonically, allowing an out-of-state witness to appear telephonically, and denying Father’s motion to continue.<sup>3</sup> These arguments are meritless, however, and no abuse of discretion occurred.

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<sup>2</sup> Mother gave birth to Z.D. in November 2016, and a dependency case was opened in Florida. Z.D. is not a party to this appeal.

<sup>3</sup> Because Parents do not challenge the juvenile court’s statutory grounds or best interests findings, we do not address those requirements. *See State v. Carver*, 160 Ariz. 167, 175 (1989) (claims not raised in an opening brief are usually waived).

### 1. Parents' Verbal Motion to Appear Telephonically

¶13 Although Arizona Rule of Procedure for the Juvenile Court 42 allows the court to authorize telephonic testimony or argument, such participation is not an "appearance" under the Rules unless expressly authorized by the court. See *Willie G. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 231, 234 ¶ 14 (App. 2005). Rule 42 provides that "[u]pon the court's own motion or motion by a party, the court may permit telephonic testimony or argument or video conferencing in any dependency . . . or termination of parental rights hearings." Ariz. R.P. Juv. Ct. 42. Under Rule 46(A), however, the motion must be in *writing*, and in this case, neither parent filed a written motion to appear telephonically. See Ariz. R.P. Juv. Ct. 46(A) (emphasis added). Thus, the juvenile court was not obligated to allow Parents to appear telephonically.

¶14 Arizona Revised Statutes section 8-863(C) provides in pertinent part that "[i]f a parent does not appear at the hearing, the court . . . may find that the parent has waived the parent's legal rights and is deemed to have admitted the allegations of the petition . . . ." A.R.S. § 8-863(C). "The court may terminate the parent-child relationship as to a parent who does not appear based on the record and evidence presented . . . ." A.R.S. § 8-863(C). The supreme court has promulgated Rule 66(D)(2) to give effect to the statutory directives in A.R.S. § 8-863. In relevant part, Rule 66(D)(2) states that if a parent fails to appear at the termination hearing without good cause and "had been previously admonished regarding the consequences of failure to appear . . . the court may terminate parental rights based upon the record and evidence presented" if the moving party has proven the statutory grounds for termination. Ariz. R.P. Juv. Ct. 66(D)(2); see also *Manuel M. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 205, 211 ¶ 19 (App. 2008).

¶15 The juvenile court was within its discretion to consider Parents' telephonic presence as a failure to appear. The court provided Parents with the Form 3 notice at least three times and the Department's notice of hearing also advised them of the possible consequence of a non-appearance. Further, the court specifically ordered parents to appear personally and affirmed that order at a subsequent hearing. Although counsel did not cross-examine the Department's witnesses, Parents were represented at the hearing. "The essential requirements of procedural due process are reasonable notice and an opportunity to be heard." *Willie G.*, 211 Ariz. at 235 ¶ 18. Parents received both here.

¶16 The juvenile court found that Parents' absence from the hearing was without good cause because of its voluntary nature. Parents argued that they were financially unable to return to Arizona for the hearing, but the court was "entitled to view that as an unfortunate but easily foreseeable consequence of their decision to leave the state and move to [Florida]." *See id.* at ¶ 19. We do not find the court's reasoning arbitrary, capricious, or inappropriate. *See Quigley v. City Court of Tucson*, 132 Ariz. 35, 37 (App. 1982) (stating an abuse of discretion "is discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons[]").

¶17 The burden is on Parents to demonstrate good cause for a failure to appear. *See Ariz. R.P. Juv. Ct. 66(D)(2)*. The pre-trial conference minute entries and the multiple Form 3s provided to Parents – the receipt of which Parents do not dispute – lend support to the juvenile court's ruling here. Even if another court might have ruled differently, *see Toy v. Katz*, 192 Ariz. 73, 83 (App. 1997), on this record, the court did not abuse its discretion by finding that Parents did not show good cause for their failure to appear at the contested termination hearing.

## 2. Telephonic Appearance of a Witness

¶18 Mother claims that the juvenile court abused its discretion by requiring Parents to appear in person despite granting the Department's request to allow Parents' Florida case manager to appear telephonically, but the claim is meritless. As previously discussed, Rule 42 allows the juvenile court to permit telephonic testimony in termination hearings. The court has great discretion in permitting telephonic appearances, and we review this ruling for a clear abuse of discretion. *Willie G.*, 211 Ariz. at 234 ¶ 13. Because termination proceedings are civil in nature, Mother has no rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution. *See Dep't of Child Safety v. Beene*, 235 Ariz. 300, 305-06 ¶ 12 (App. 2014).

¶19 The Department filed a written motion requesting the telephonic appearance of an out-of-state witness in March 2017, and the court granted the request two days before the hearing. The Department ultimately did not call the Florida witness to testify and relied solely on the testimony of Department caseworkers. The court did not abuse its discretion by granting the Department's motion to allow the out-of-state witness to appear by telephone.

### 3. Denial of Father's Motion to Continue

¶20 Father argues that the juvenile court abused its discretion by refusing to grant Father's verbal motion to continue at the time of the termination hearing. We review the court's denial of a motion to continue for an abuse of discretion. *Yavapai Cty. Juv. Action No. J-9365*, 157 Ariz. 497, 499 (App. 1988).

¶21 The record indicates that Father received notice of the termination hearing. In fact, the record shows that Father received repeated warnings about the consequences of not participating in court proceedings or reunification services. *See Mara M. v. Ariz. Dep't of Econ. Sec.*, 201 Ariz. 503, 507 ¶ 26 (App. 2002) (recognizing such warnings as "important factors in considering whether [parent] had notice that her [or his] rights were in jeopardy"). Because the record supports the court's finding that Father received proper notice, was aware of the termination hearing, and was instructed to appear in person, the juvenile court did not abuse its discretion by denying Father's request for a continuance.

### CONCLUSION

¶22 For the foregoing reasons, we affirm.



AMY M. WOOD • Clerk of the Court  
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