IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

ALFREDO M., *Appellant*,

v.

DEPARTMENT OF CHILD SAFETY, N.R., *Appellees*.

No. 1 CA-JV 17-0473
FILED 5-22-2018

Appeal from the Superior Court in Maricopa County
No. JD29973, JS18797
The Honorable John R. Ditsworth, Judge *Retired*

AFFIRMED

COUNSEL

Czop Law Firm, P.L.L.C., Higley
By Steven Czop
Counsel for Appellant

Arizona Attorney General's Office, Tucson
By Cathleen E. Fuller
Counsel for Appellee Department of Child Safety

MEMORANDUM DECISION

Presiding Judge Kenton D. Jones delivered the decision of the Court, in which Judge Michael J. Brown and Judge Jon W. Thompson joined.

J O N E S, Judge:

¶1 Alfredo M. (Father) appeals the termination of his parental rights to N.R. (Child). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In February 2015, the Department of Child Safety (DCS) received a report that Child, then only eighteen months old, had ingested methamphetamine while in his parent's care.[1] Both Child's mother (Mother) and Father admitted using methamphetamine. Child and his three half-siblings[2] were adjudicated dependent while their parents participated in services designed to address substance abuse and domestic violence. In January 2016, DCS reported significant progress, and the dependency was dismissed without objection.

¶3 Six months later, Father was arrested for possession of methamphetamine. Then, in October 2016, law enforcement officers conducting a routine check on hotel occupants arrested both Father and Mother on outstanding warrants. At the same time, methamphetamine and drug paraphernalia were found in the bathroom of the hotel room where Child was living.

¶4 DCS immediately filed two petitions, one alleging Child was dependent as to Father on the ground of neglect, and another seeking

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[1] We view the evidence in the light most favorable to upholding the juvenile court's order terminating parental rights. *Yvonne L. v. Ariz. Dep't of Econ. Sec.*, 227 Ariz. 415, 422, ¶ 27 (App. 2011) (citing *Maricopa Cty. Juv. Action No. JD-5312*, 178 Ariz. 372, 376 (App. 1994)).

[2] Child's siblings have no biological relationship with Father and are not parties to this appeal.

termination of his parental rights on the ground of substance abuse.[3] *See* Ariz. Rev. Stat. (A.R.S.) § 8-533(B)(3).[4] Father denied the allegations of the petition but failed to attend the pretrial conference in January 2017. In Father's absence, the juvenile court adjudicated Child dependent as to Father.

¶5 Meanwhile, Father was referred for substance abuse treatment and testing, parent aide services, and supervised visitation. He was also asked to self-refer for individual counseling to address concerns regarding domestic violence and anger management. Father attended two visits with Child but did not participate in any other services and ceased contact with DCS.

¶6 By the time of the September 2017 trial, Father was incarcerated for possession of a dangerous drug with an anticipated release date of May 2018. The juvenile court allowed DCS to amend its petition to include the length of time Child was in out-of-home care as a ground for termination, *see* A.R.S. § 8-533(B)(8)(a), and ordered the Maricopa County Sheriff's Office (MCSO) to transport Father to the severance adjudication.

¶7 When Father did not appear for the severance adjudication, Father's counsel advised he was "out of prison on work furlough." The juvenile court determined Father lacked good cause for his failure to appear, treated his non-appearance as an admission to the allegations of the petition, and proceeded in his absence. *See* A.R.S. § 8-863(C); Ariz. R.P. Juv. Ct. 66(D)(2). During the proceeding, the DCS caseworker testified Child was in a safe, stable, and substance-free home with a relative who was meeting his needs and willing to adopt him.

¶8 After considering the evidence and testimony presented, the juvenile court found DCS proved the statutory grounds for severance by clear and convincing evidence and that severance was in Child's best interests by a preponderance of the evidence. The court then entered an order terminating Father's parental rights. Two weeks later, Father moved

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[3] DCS also alleged Child was dependent as to Mother on the grounds of neglect and substance abuse. Child was adjudicated dependent as to Mother in March 2017, and her parental rights were terminated the following September. Mother's appeal of that order was dismissed, and she is not a party to this appeal.

[4] Absent material changes from the relevant date, we cite a statute's current version.

to set aside the order, alleging he had good cause for his failure to appear at trial. Father explained that although he was scheduled to begin his work furlough the day of the termination hearing, he spent the day "attending multiple matters of preparation" and was never actually released from custody. Then, rather than transport Father as ordered, MCSO advised it was Father's responsibility "to find his way to Court."

¶9 The juvenile court declined to set aside its prior orders, and Father timely appealed. We have jurisdiction pursuant to A.R.S. §§ 8-235(A), 12-120.21(A)(1), -2101(A)(1), and Arizona Rule of Procedure for the Juvenile Court 103(A).

DISCUSSION

¶10 Father argues the juvenile court erred in concluding he lacked good cause for his failure to appear at the termination hearing and denying his motion to set aside. We review both the denial of the motion and concordant factual finding for an abuse of discretion. *Christy A. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 299, 305, ¶ 19 (App. 2007) (motion to set aside) (citing *Richas v. Superior Court*, 133 Ariz. 512, 514 (1982)); *Adrian E. v. Ariz. Dep't of Econ. Sec.*, 215 Ariz. 96, 101, ¶ 15 (App. 2007) (finding of good cause). We will reverse only if "the juvenile court's exercise of that discretion was 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *Adrian E.*, 215 Ariz. at 101, ¶ 15 (quoting *Lashonda M. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 77, 83, ¶ 19 (App. 2005)).

¶11 Based upon the facts presented within his motion to set aside, we agree that Father had no physical ability to present himself at the severance adjudication and therefore was not responsible for his absence. However, to justify setting aside the juvenile court's determination, Father must show both: "(1) mistake, inadvertence, surprise or excusable neglect exists and (2) a meritorious defense to the claims [in the severance petition] exists." *Christy A.*, 217 Ariz. at 304, ¶ 16 (citing *Richas*, 133 Ariz. at 514, and what is now Ariz. R. Civ. P. 60(b)); *accord Marianne N. v. DCS*, 240 Ariz. 470, 474, ¶ 16 (App. 2016) (considering the parent's lack of a meritorious defense in evaluating whether she had good cause for her failure to appear), *vacated in part on other grounds*, 243 Ariz. 53, 59, ¶ 31 (2017). In the context of a severance proceeding, a "meritorious defense" is "a good faith basis upon which to contend that the petitioner cannot prove a statutory basis for termination and/or that termination is not in the best interests of the child." *Christy A.*, 217 Ariz. at 304 n.11, ¶ 15. A meritorious defense must be established "by facts" — not "through conclusions, assumptions or

affidavits based on other than personal knowledge." *Id.* at 304-05, ¶ 16 (quoting *Richas*, 133 Ariz. at 517).

¶12 Father did not allege any meritorious defense to the severance petition within his motion to set aside, and we cannot say the juvenile court abused its discretion in rejecting his request where this essential point was omitted. And even assuming Father did not waive our consideration of his defenses by failing to timely raise them below, *see Kimu P. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 39, 44 n.3, ¶ 19 (App. 2008) (noting a parent waives an argument by failing to raise it in the juvenile court) (citing *Paloma Inv. Ltd. P'ship v. Jenkins*, 194 Ariz. 133, 137, ¶ 17 (App. 1998)); *see also Trantor v. Fredrikson*, 179 Ariz. 299, 300 (1994) ("[A]bsent extraordinary circumstances, errors not raised in the trial court cannot be raised on appeal" because "a trial court and opposing counsel should be afforded the opportunity to correct any asserted defects."), they are wholly unpersuasive.

¶13 Father argues DCS cannot prove termination is warranted based upon substance abuse because the DCS caseworker testified he did not know if Father had used illegal substances since Child was removed. We do not consider DCS's inability to affirmatively prove that Father continued to abuse substances — the dearth of such evidence occasioned by Father's refusal to participate in services — a "good faith basis" to contest the severance. *See Christy A.*, 217 Ariz. at 304 n.11, ¶ 15. Rather, the discovery of methamphetamine in his possession in October 2016 and his refusal to test thereafter support the inference that, after Father used methamphetamine in February 2015, participated in services, and learned his continued substance abuse could lead to the termination of his parental rights to Child, Father continued using methamphetamine up to and through his most recent arrest and incarceration for possession of a dangerous drug. *See State v. Harvill*, 106 Ariz. 386, 391 (1970) ("[T]he law makes no distinction between circumstantial and direct evidence.").

¶14 Father also argues DCS cannot prove he substantially neglected or willfully refused to remedy the circumstances causing Child to be out-of-home for the statutory period because he was incarcerated, and unable to actively participate in services, between March and September 2017. Although termination upon this ground "focuses on the level of the parent's effort to cure the circumstances rather than the parent's success in actually doing so," *Marina P. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 326, 329, ¶ 20 (App. 2007), Father does not offer any facts suggesting he attempted to avail himself of services available through the prison. Nor does he explain his complete failure to participate in substance abuse testing and treatment, individual counseling, or parent aide services for the six months preceding

his most recent incarceration. Where Father cannot establish by facts that he made "appreciable, good faith efforts to comply with remedial programs outlined by [DCS]" to remedy the circumstances that caused the out-of-home placement, *Maricopa Cty. Juv. Action No. JS-501568*, 177 Ariz. 571, 576 (App. 1994), Father fails to assert a meritorious defense to termination based upon the length of time in out-of-home care.

¶15 As a final defense, Father contends he "could have asserted" that termination was not in Child's best interests. The record reflects Father had an opportunity to advance this position at the hearing. Indeed, on cross-examination, the DCS caseworker admitted that Father was an appropriate, loving parent at the few visitations he attended. The juvenile court did not find this uncontested evidence sufficient to overcome Child's interest in stability and permanency. We will not second-guess the court's assessment of the evidence on appeal. *Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, 334, ¶ 4 (App. 2004) (noting "[a] juvenile court as the trier of fact in a termination proceeding is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts") (citing *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 4 (App. 2002)).

¶16 Father also argues the juvenile court deprived him of due process by failing to *sua sponte* hold a hearing on his motion to set aside. Father does not, however, cite any authority suggesting he had a due process right to a hearing on his motion to set aside, particularly where the motion was facially deficient, and he did not request any hearing. *See* Ariz. R.P. Juv. Ct. 66(D)(2) (outlining the procedural process afforded a parent if he fails to appear at the severance adjudication hearing without mention of an evidentiary hearing). Moreover, even accepting the allegations of his motion as true, Father failed to assert any meritorious defense and is therefore not entitled to relief from the termination order, notwithstanding the absence of a hearing. *See supra* ¶¶ 11-15. Accordingly, we find no due process violation arising from the lack of a hearing and no error in the decision to deny Father's motion to set aside.

CONCLUSION

¶17 The juvenile court's order terminating Father's parental rights to Child is affirmed.

AMY M. WOOD • Clerk of the Court
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