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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.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

DEPARTMENT OF CHILD SAFETY, *Petitioner*,

v.

THE HONORABLE ARTHUR T. ANDERSON, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, *Respondent Judge,*

BRADLY W., BRITANEE C., and B.W., *Real Parties in Interest.*

No. 1 CA-SA 18-0243
FILED 11-20-19

Petition for Special Action from the Superior Court in Maricopa County
No. JD528087
The Honorable Arthur T. Anderson, Judge

JURISDICTION ACCEPTED; RELIEF GRANTED

COUNSEL

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By Dawn R. Williams
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MEMORANDUM DECISION

Chief Judge Samuel A. Thumma delivered the decision of the Court, in which Judge Michael J. Brown and Judge James B. Morse Jr. joined.

T H U M M A, Chief Judge:

¶1 The issue in this special action is whether, in October 2018, the superior court erred in refusing to set a trial for a motion to terminate parental rights filed by the Department of Child Safety (DCS) in May 2016. Because the court made no finding of extraordinary circumstances and set forth no factual basis for the indefinite continuance, this court accepts special action jurisdiction and grants relief.

BACKGROUND

¶2 In September 2014, DCS filed a petition alleging that B.W. (a newborn) was dependent. The basis for the dependency was that Bradly W. (Father) was the primary suspect in the death of B.W.'s brother, who was reported to have died from head trauma when he was two months old. In February 2015, B.W. was found dependent as to both Father and Britanee C. (Mother) and, for a time, the case plan was family reunification.

¶3 In 2015, Father was charged with first degree murder of B.W.'s brother. Those charges remain pending and the trial date in that criminal matter has been continued several times. In May 2016, the juvenile court changed the case plan to severance and adoption and DCS filed a motion to terminate later that month. No adjudication has been conducted on that May 2016 motion to terminate and, at present, no trial date is set on that motion.

¶4 In October 2016, without objection, the juvenile court set an April 2017 trial on the motion to terminate. In January 2017, Father unsuccessfully moved to continue the April 2017 trial, noting his criminal

trial had been continued so that it would be held after that date; the court later reaffirmed the April 2017 termination trial date.

¶5 On the first day of the April 2017 trial, without apparent objection, the juvenile court reset trial for October 2017. In September 2017, at Mother's request and over DCS' objection, the court reset trial for April 2018. In January 2018, again over DCS' objection, the court reset trial for August 2018. In late July 2018, Father moved to continue the August 2018 trial, because, "[m]ost likely, the criminal trial will not be set until November." DCS again objected, noting that the termination trial should have been "held within ninety (90) days of the permanency hearing;" that the motion shall only be granted upon a "finding of extraordinary circumstances;" that the motion did not assert extraordinary circumstances and that the motion was not "filed within five (5) days of the discovery that the extraordinary circumstances exist." Accordingly, DCS argued that the motion did not comply with Ariz. R.P. Juv. Ct. 66(B)(2018).[1] In early August 2018, noting "good cause appearing" but with no other findings, the juvenile court granted Father's motion and vacated the August 2018 trial. In September 2018, the court summarily denied DCS' motion to reconsider that ruling.

¶6 At an October 2018 status conference, the juvenile court denied DCS' request for "a trial setting as soon as possible," noted it "will not set a trial date at this time" and set a review hearing for January 2019. DCS' special action petition followed.

DISCUSSION

I. Special Action Jurisdiction.

¶7 Special action jurisdiction is appropriate where petitioner has no "equally plain, speedy, and adequate remedy by appeal." Ariz. R.P. Spec. Act. 1(a). Special action jurisdiction is appropriate to address pure legal issues of first impression that are of statewide importance and likely to arise again. *Dep't of Child Safety v. Beene*, 235 Ariz. 300, 303 ¶ 6 (App. 2014) (citing authority). "Although 'highly discretionary,' accepting special action jurisdiction is particularly appropriate where the welfare of children is involved and the harm complained of can only be prevented by resolution before an appeal." *Id.* (citing cases).

[1] Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

¶8 This matter involves a young child who has been in care for all but a few days of her life, starting more than four years ago. DCS' May 2016 motion to terminate has been pending for nearly two and a half years and, at present, no trial date is set on the motion. The special action petition seeks review of an October 2018 order refusing to set a trial date, which (1) is not a final appealable order, *see* Ariz. R.P. Juv. Ct. 103(A); (2) implicates the best interests of the child and (3) involves a legal issue of statewide importance that may arise again. Moreover, given the issue raised, there is no equally plain, speedy and adequate remedy by appeal. Accordingly, in exercising its discretion, this court accepts special action jurisdiction. *Beene*, 235 Ariz. at 303 ¶¶ 6-7.

II. The Merits.

¶9 Given DCS' May 2016 motion to terminate, the court was required to hold an initial hearing and, if the parents contested the motion, "set a date for the trial on termination of parental rights within ninety days after the [May 2016] permanency hearing." Ariz. Rev. Stat. (A.R.S.) § 8-862(D)(2). Absent waiver, the juvenile court

> may continue the hearing beyond the ninety (90) day time limit for a period of thirty (30) days if it finds that the continuance is necessary for the full, fair and proper presentation of evidence, and the best interests of the child would not be adversely affected. ***Any continuance beyond thirty (30) days shall only be granted upon a finding of extraordinary circumstances.*** Extraordinary circumstances include, but are not limited to, acts or omissions that are unforeseen or unavoidable. Any party requesting a continuance shall file a motion for extension of time, setting forth the reasons why extraordinary circumstances exist. The motion shall be filed within five (5) days of the discovery that extraordinary circumstances exist. ***The court's finding of extraordinary circumstances shall be in writing and shall set forth the factual basis for the continuance.***

Ariz. R.P. Juv. Ct. 66(B) (emphasis added); *see also Joshua J. v. Ariz. Dep't Econ. Sec.*, 230 Ariz. 417, 423 ¶ 21 (App. 2012) ("[A]bsent waiver of the parties, the juvenile court is obligated to adhere to the deadlines found

within our dependency statutes in order to comply with the Legislature's intent.") (addressing 90-day time limit for dependency trials set forth in A.R.S. § 8-842(C) and Ariz. R.P. Juv. Ct. 55(B)). Although having waived the protections of these deadlines for a time, beginning in September 2017, DCS consistently objected to any continuance of the trial on the May 2016 motion to terminate. Notwithstanding those objections and the applicable legal standards and requirements:

- The August 2018 order granting Father's July 2018 motion to continue did not find extraordinary circumstances nor set forth the factual basis for the continuance.

- The September 2018 order denying DCS' motion to reconsider the August 2018 order did not find extraordinary circumstances nor set forth the factual basis for the continuance.

- The October 2018 order denying DCS' request for "a trial setting as soon as possible" and refusing to set a trial date did not find extraordinary circumstances, did not set forth the factual basis for an indefinite continuance and did not otherwise address how an indefinite trial continuance on a May 2016 motion to terminate could comply with Rule 66(B).

Father's July 2018 motion to continue, which is the foundation for these orders, failed to mention or claim extraordinary circumstances, did not show extraordinary circumstances and did not suggest that extraordinary circumstances had been discovered within five days of filing the motion, all as required by Rule 66(B). On this record, the court failed to comply with Rule 66(B) in its October 2018 order.

¶10 Parents' briefing in this special action does not excuse these failures. Parents correctly note that the appendix DCS provided does not include a transcript of the October 2018 hearing and assert that relevant off-the-record discussions were not captured. There is, however, no suggestion of any waiver of the protections of Rule 66(B) by DCS leading up to or at the October 2018 hearing. Indeed, the minute entry from the October 2018 hearing states that, although DCS "requests a trial setting as soon as possible," "[t]he Court will not set a trial date at this time." In addition, the

record does not suggest that parents asserted or showed "extraordinary circumstances." The written orders discussed above, on their face, do not find "extraordinary circumstances" or set forth the factual basis for any continuance (or the refusal to set any trial date), all of which is required by Rule 66(B). This same deficiency negates Father's argument that setting the January 2019 status conference was in the superior court's discretion. It is the failure to address extraordinary circumstances in first continuing and then refusing to set a trial date that constitutes error, not the setting of a status conference along the way.

¶11 Father argues that the right of a parent to fair procedures is as fundamental as the need for permanency for the child. There is no question that when, as here, the State seeks termination of paternal rights, the State "must provide the parents with fundamentally fair procedures." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). Father, however, has not shown how setting a trial on a May 2016 motion to terminate, which by statute and rule should have been held long ago, deprives him of his constitutional rights. *See also Beene*, 235 Ariz. at 304 ¶ 9 ("[C]onsideration of the child's best interests permeates dependency and severance proceedings.").

CONCLUSION

¶12 Given the length of time the May 2016 motion to terminate has been pending, DCS' objections to any trial continuance beginning in September 2017, the failure of parents to assert or show extraordinary circumstances and the failure of the court to find extraordinary circumstances or set forth the factual basis for the continuance as required by Rule 66(B), this court accepts special action jurisdiction. This court also grants relief in the form of (1) vacating that portion of the October 2018 order denying DCS' request for "a trial setting as soon as possible" and refusing to set a trial date and (2) remanding for the superior court to set, and then hold, a trial on the May 2016 motion to terminate in an expeditious manner.

AMY M. WOOD • Clerk of the Court
FILED: JT