

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

JOSUE A., *Appellant*,

v.

DEPARTMENT OF CHILD SAFETY, I.A., X.A., *Appellees*.

No. 1 CA-JV 20-0096
FILED 9-3-2020

Appeal from the Superior Court in Maricopa County
No. JS519331
JD531348
The Honorable Jeffrey A. Rueter, Judge

AFFIRMED

COUNSEL

The Stavris Law Firm, PLLC, Scottsdale
By Alison Stavris
Counsel for Appellant

Arizona Attorney General's Office, Tucson
By Autumn Spritzer
Counsel for Appellee Department of Child Safety

MEMORANDUM DECISION

Judge Paul J. McMurdie delivered the decision of the Court, in which Presiding Judge James B. Morse Jr. and Judge Maria Elena Cruz joined.

M c M U R D I E, Judge:

¶1 Josue A. (“Father”) appeals the juvenile court’s judgment terminating his parental rights to his two children. For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 In 2017, the children and their older half-brother, J.W., lived together with their biological mother, Tiffany W. (“Mother”).¹ Father was not living with the children. In December 2017, the Department of Child Safety (“DCS”) received a call from J.W.’s school alleging J.W., who had a history of mental-health issues, stated J.W. needed to be hospitalized. After interviewing Mother and J.W., DCS learned J.W. had suicidal ideations. DCS removed J.W. from Mother’s care and initiated a dependency proceeding against her. While the dependency proceeding was ongoing, Mother participated in drug testing and tested positive for methamphetamine. J.W. disclosed that Mother used methamphetamine and, at times, used the drug with him. When Mother refused to engage in further drug testing, DCS filed a second dependency petition against Mother and removed the children from her care in February 2018.

¶3 DCS was unable to locate or serve Father until April 2018. After he received service, Father failed to personally appear at any dependency-related hearings for nearly five months. When he began to participate in the proceedings, Father successfully engaged with services, culminating in the return of one of the children to his physical custody in January 2019.

¶4 But the child was removed from Father’s care in April 2019 after DCS found substantial bruising on the child’s back, buttocks, and leg. During a forensic interview, the child disclosed that Father caused much of

¹ Mother is not a party to this appeal.

JOSUE A. v. DCS et al.
Decision of the Court

the bruising by punching him and hitting him with a shoe. He stated that Father's wife had also caused some of the bruising by hitting him with a bar. Two months later, DCS filed a petition to terminate Father's parental rights concerning both children under the neglect, willful abuse, and nine months' time-in-care statutory grounds, Ariz. Rev. Stat. ("A.R.S.") § 8-533(B)(2), (8)(a). According to Arizona Rule of Procedure for the Juvenile Court ("Rule") 64, DCS provided Father with a notice of the initial termination hearing along with the petition that contained the following bolded warning:

You have a right to appear as a party in this proceeding. You are advised that your failure to personally appear in court at the initial hearing, pretrial conference, status conference or termination adjudication, without good cause shown, may result in a finding that you have waived your legal rights and have admitted to the allegations in the Petition. In addition, if you fail to appear without good cause, the hearing may go forward in your absence and may result in termination of your parental rights based upon the record and evidence presented to the Court.

The juvenile court also provided a notice of the initial termination hearing that contained a substantively identical warning.

¶5 In September 2019, the court held the initial termination hearing on the petition, which Father attended telephonically. At the hearing, the court confirmed Father had been appropriately served and intended to contest the petition. But the court failed—as required by the rule—to advise Father in open court of the requirement that he appear for all termination-related hearings and of the consequences if he failed to appear at subsequent proceedings. *See* Ariz. R.P. Juv. Ct. 65(D)(3). The court also did not provide or read to Father the contents of Form 3 of the Rules. *See* Ariz. R.P. Juv. Ct. 65(D)(3) ("The court may provide the parent . . . with a copy of Form 3, request that the parent . . . sign and return a copy of the Form, and note on the record that the Form was provided . . ."); Ariz. R.P. Juv. Ct. Form 3. Father's counsel did not object to the court's failure to comply with the rule. After the hearing, the court scheduled a pretrial conference for November 2019.

¶6 Father failed to appear at the November 2019 pretrial conference. At DCS's request, the court preserved Father's failure to appear but continued the pretrial conference to January 2020. At the January 2020 pretrial conference, Father again failed to appear. When the court asked

JOSUE A. v. DCS et al.
Decision of the Court

Father's counsel whether Father had good cause for his absences, he responded:

Your honor, he did reach out to my office a couple weeks ago, asked for dates. I didn't get them to him until last night. But I haven't heard a response back on that email that I sent out last night. So . . . if anything it might have been my fault for not getting that to him quickly. But I . . . don't know why he's not here today other than that.

The court then requested assistance "to confirm that [Father] . . . was notified of this hearing and had Form [3] read to him at some point." After discussing these issues with the parties and hearing argument, the court found Form 3 had not been read to Father but concluded the error did not prevent it from finding he had waived his legal rights and going forward with the termination adjudication hearing *in absentia*. The court also found Father had received actual notice of the date and time of the January 2020 pretrial conference.

¶7 Father's counsel objected, asserting Father had not received actual notice of the January 2020 pretrial conference. The juvenile court overruled the objection and went forward with the termination adjudication hearing. During the hearing, DCS called the case manager overseeing Father's case to testify about the allegations in the termination petition. Father's counsel cross-examined the case manager and successfully challenged the admission of all but one of the case reports. After the hearing, the juvenile court found DCS had proven each of the grounds alleged in the petition by clear and convincing evidence and that termination of Father's parental rights was in the children's best interests.

¶8 Shortly thereafter, the court issued findings of fact and conclusions of law detailing its rulings, including its findings that Father failed to appear, had actual notice of the January 2020 pretrial conference based upon his counsel's message to him the night before the hearing, and had been previously warned of the consequences of failing to appear. Father appealed, and we have jurisdiction under A.R.S. § 8-235(A) and Rule 103(A).

DISCUSSION

¶9 On appeal, Father does not challenge the sufficiency of the evidence supporting the grounds for the termination of his parental rights, or that termination was in the children's best interests. Nor does he assert

JOSUE A. v. DCS et al.
Decision of the Court

good cause for his failure to appear at the January 2020 pretrial conference.² Instead, he contends the juvenile court erred by failing to comply with Rule 65(D)(3), which requires the court to admonish a parent in open court of his or her rights and the consequences of failing to appear at the termination proceedings. Specifically, Father argues the court failed to follow Rule 65(D)(3) by: (1) not advising him in open court as described above; and (2) not providing him with a copy of a Form 3. Father concludes the court's noncompliance with the rules requires reversal. We disagree.

¶10 “Parents possess a fundamental liberty interest in the care, custody, and management of their children.” *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 24 (2005). But these rights are not absolute. *Id.* “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.” *Id.* (quoting *Santosky v. Kramer*, 455 U.S. 745, 754 (1982)). “In termination proceedings, [d]ue process requires notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections.” *Monica C. v. ADES*, 211 Ariz. 89, 92, ¶ 16 (App. 2005) (alteration in original) (quoting *Maricopa County Juv. Action No. JS-501904*, 180 Ariz. 348, 355 (App. 1994)).

¶11 But the “[f]ailure to comply with the [Rules] does not necessarily require a reversal,” even when that noncompliance raises due-process concerns. *Monica C.*, 211 Ariz. at 94, ¶ 22. “Instead, noncompliance with the rules falls under either the harmless error (if an objection was made) or fundamental error (if no objection was made) framework.” *Id.*; see also *State v. Henderson*, 210 Ariz. 561, 567, ¶¶ 18–19 (2005).

¶12 Because Father's counsel did not object to the court's noncompliance with Rule 65(D)(3), we apply a fundamental-error review in this case. “To prevail under this standard of review, [Father] must establish both that fundamental error exists and that the error in his case caused him prejudice.” *Henderson*, 210 Ariz. at 567, ¶ 20; see also *Brenda D.*

² Citing our supreme court's decision in *Trisha A. v. DCS*, 247 Ariz. 84, 89, ¶ 19 (2019), DCS argues that Father's failure to assert good cause is fatal to his appeal, regardless of the court's failure to comply with Rule 65(D)(3). However, because we have concluded the error asserted here was harmless, we need not address this argument.

JOSUE A. v. DCS et al.
Decision of the Court

v. DCS, 243 Ariz. 437, 447–48, ¶¶ 37–38 (2018); *Monica C.*, 211 Ariz. at 94, ¶¶ 24–25. Both inquiries are fact-intensive and require the reviewing court to view the alleged error considering the entire record. *Henderson*, 210 Ariz. at 568, ¶ 26; *see also State v. Escalante*, 245 Ariz. 135, 142, ¶ 21 (2018).

¶13 Applying a fundamental-error review here, we agree with Father that the court erred by failing to comply with Rule 65(D)(3). But Father has made no showing of how this error prejudiced him. Rule 64(C) does not require the court to find that it complied with Rule 65(D)(3)'s advisement provision or to provide a parent with Form 3 before going forward *in absentia* with termination proceedings. It instead requires the court to notify the parent that if he or she: (1) fails to appear without good cause; (2) had notice of the date and time of the relevant hearing or conference; and (3) has previously been advised of the consequences of failing to appear, the hearing may go forward *in absentia*. Ariz. R.P. Juv. Ct. 64(C); *see also Brenda D.*, 243 Ariz. at 443, ¶ 20 (Under Rule 66(D)(2), which is substantively identical to Rule 64(C), “a juvenile court may invoke the substantive effects [of a parent’s failure to appear], including proceeding with the hearing in the parent’s absence, only after finding that the procedural prerequisites have been met”).

¶14 The juvenile court found Father had been previously provided notice both of the potential consequences of failing to appear at the termination proceeding and of the actual date and time of the January 2020 pretrial conference. As detailed above, these findings are supported by the record. And although the court did not make an express written finding that Father failed to appear without good cause, that finding is implicit in its decision to accelerate the proceedings after providing Father’s counsel an opportunity to assert good cause. *See Mary Lou C. v. ADES*, 207 Ariz. 43, 50, ¶ 17 (App. 2004) (“[W]e will presume that the juvenile court made every finding necessary to support the severance order if reasonable evidence supports the order.”). Thus, the juvenile court was within its discretion to conclude that Father had knowingly, voluntarily, and intelligently waived his right to attend the termination proceedings and go forward with a termination adjudication hearing in his absence, regardless of the Rule 65(D)(3) error. *See Ariz. R.P. Juv. Ct. 64(C)*.

¶15 Moreover, there is no indication that Father lacked knowledge of any of the rights listed in Form 3. *See Monica C.*, 211 Ariz. at 95, ¶ 29 (no fundamental error by failure to provide Form 3 when a parent “was aware of, and took advantage of, the rights set forth in Form [3]”). Indeed, Father’s due-process rights were exercised by his counsel, who was present at the January 2020 pretrial conference, presented argument,

JOSUE A. v. DCS et al.
Decision of the Court

cross-examined witnesses, and challenged the admission of evidence during the termination adjudication hearing. Accordingly, the court's failure to follow Rule 65(D)(3), although error, was harmless.

CONCLUSION

¶16 We affirm the juvenile court's judgment terminating Father's parental rights.



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