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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

PATRICIA B.,) No. 1 CA-JV 10-0037
)
Appellant,) DEPARTMENT A
)
v.)
) **MEMORANDUM DECISION**
) (Not for Publication -
ARIZONA DEPARTMENT OF ECONOMIC) 103(G) Ariz. R.P. Juv.
SECURITY, OSCAR L.,) Ct.; Rule 28 ARCAP)
)
Appellees.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. JD 16018

The Honorable Samuel A. Thumma, Judge

AFFIRMED

Robert D. Rosanelli,
Attorney for Appellant

Phoenix

Terry Goddard, Arizona Attorney General
By Eric Devany, Assistant Attorney General
Attorneys for Appellee Arizona Department of
Economic Security

Mesa

D O W N I E, Judge

¶1 Patricia B. ("Mother") appeals the juvenile court's order terminating her parental rights to her son ("the child"). For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In August 2007, the Arizona Department of Economic Services ("ADES") learned that Mother had given birth and that both she and her son tested positive for methamphetamine, cocaine, and marijuana. Mother admitted using illegal substances up to three times a week throughout her pregnancy. After Mother was discharged, she did not return to see the child, who remained hospitalized another twelve days. Because Mother could not be located, the child was placed with ADES.

¶3 Soon thereafter, Mother was arrested for a drug-related violation of probation. ADES filed a dependency petition, alleging Mother was unable to parent due to substance abuse and mental illness. Mother ultimately submitted the issue of dependency to the court, and the child was found dependant as to her on January 4, 2008.

¶4 At a September 2008 hearing, the juvenile court affirmed the case plan of family reunification. Mother was released from prison on October 16, 2008. She was initially compliant with the case plan, including urinalysis testing, counseling, substance abuse programming, and parent aide services, including supervised visits with the child. Mother

last visited the child on January 13, 2009. By February 2009, she had ceased contact with all service providers.

¶15 On April 15, 2009, Mother was arrested for selling crack cocaine. The case plan was changed to severance and adoption. On May 27, 2009, Mother pleaded guilty to possession of narcotic drugs and was sentenced to two-and-a-half years in prison. That same day, ADES filed a motion to terminate Mother's parental rights.

¶16 At a hearing on September 17, 2009, both parents appeared telephonically and were represented by counsel. The court was advised that neither parent wished to contest the severance. Mother explained her decision as follows:

I don't want to keep fighting this because it's too hard on me. I need to move on with my life. I need to -- I have kids that need me out there still. And I can't keep on putting myself through this pain. It's too much for me. And I love my son and I love his daddy, but I can't do this. I'm too weak to do it.

¶17 Thereafter, the court read the following rights to the parents:

As a parent, your legal rights include the right to counsel. The right to trial by the Court on the allegations and the motion to terminate. The right to cross-examine witnesses who are called to testify against you. The right to use the process of this court to compel the attend to witnesses. [sic] And the right to request that any hearing be closed to the public. You are required to appear for all termination

hearings. If you cannot attend a hearing, you must prove to the Court that you did not appear for good cause. If you fail to attend a hearing without good cause, the Court may find that you waived your legal rights. The Court also may find that you admitted the allegations in the motion for termination. The hearing may go forward in your absence. And the Court terminate [sic] your parental rights to your child based on the record and evidence presented. It will presumed [sic] that you understand the contents of this notice unless you tell the Court today that you do not understand those rights.

¶18 The court then posed specific questions to Mother. It confirmed, *inter alia*, that she was not under the influence of any substance that would affect her "ability to make this decision" and that she had had ample opportunity to speak with her attorney. When it became apparent that Mother did not fully understand she was not guaranteed to receive pictures of her son after severance, the court declared a recess so she could speak further with her lawyer. After the recess, Mother acknowledged she had discussed the issue with her counsel, understood there was no guarantee of pictures, and that her "decision could result in no further contact of any sort with [her] child." The court and Mother had the following colloquy:

THE COURT: By your decision, you'll be giving up the following rights: to a trial on the allegations in the motion to terminate, to have your attorney confront and question people who might testify against you, to call people to testify on your own behalf and use the Court's power to

bring them to court to testify even if they didn't want to, to request that any termination hearing be closed to the public. Do you understand that by your decision, there will be no trial as to you on the motion to terminate and you'll be giving up those rights?

[MOTHER]: Yes.

THE COURT: Your decision likely will result in termination of your parental rights. Do you understand that?

[MOTHER]: Yes.

. . . .

[THE COURT]: . . . [Y]our decision could result in no further contact of any sort with your child. Do you understand that?

[MOTHER]: Yeah.

[THE COURT]: Okay. Has anyone forced you or threatened you in any way to get you to make this decision?

[MOTHER]: No.

[THE COURT]: Has anyone promised you anything to get you to make this decision?

[MOTHER]: No.

¶19 The court found that Mother had knowingly, intelligently, and voluntarily waived her rights and that she understood the "possible consequences of her decision to not contest the motion to terminate." In keeping with the court's stated custom, it gave Mother and her counsel the choice of remaining or leaving the hearing. Mother's attorney opted to

remain, but Mother chose not to further participate and was excused.

¶10 Thereafter, during a similar colloquy, Father decided to contest the severance. A severance trial as to him was set for October 30, 2009, with the court indicating it would hear evidence regarding both parents at that time. Addressing Mother's counsel, the court stated: "[A]s I read the case law, given that Mother has consented, your presence is not required. If she was defaulted, I would view it very differently. But as I read the case law, the mother's counsel is not required. Do other Counsel view it differently[?]" Counsel for ADES replied, "I think that's right. I think she can be here. But I don't think she's required." Mother's counsel said nothing in response. The court told Mother's counsel, "Happy to have you here. But I'll leave that to you."

¶11 At the October 30 hearing, neither Mother nor her counsel appeared. The court received testimony from the case manager and found grounds for terminating Mother's rights based on "[s]ubstance abuse, nine months time in care, and fifteen months time in care." On November 12, 2009, the court issued a written order terminating Mother's parental rights pursuant to Arizona Revised Statutes ("A.R.S.") sections 8-533(B)(3) and (8)(a), (b) (Supp. 2009).

¶12 Although Mother filed an untimely notice of appeal, the juvenile court found the delay was the result of excusable neglect. We have jurisdiction over this appeal pursuant to A.R.S. §§ 8-235 (2007), 12-120.21 (2003), and -2101(B) (2003).

DISCUSSION

¶13 Mother contends the juvenile court denied her due process "by conducting an evidentiary hearing on the Motion for Termination of Parent-Child Relationship in the absence of [her] counsel." She bases her argument on *Christy A. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 299, 306, ¶ 22, 173 P.3d 463, 470 (App. 2007)--a case we find readily distinguishable.

¶14 In *Christy A.*, a default was entered when the mother failed to appear at a hearing, and her counsel withdrew. *Id.* at 303, ¶ 7, 173 P.3d at 467. At a later hearing, the mother appeared without counsel and sought to set aside the default. *Id.* at ¶ 8. The court denied her counsel for the hearing, ordered the mother to leave the courtroom, and proceeded to hear evidence. *Id.* It thereafter terminated the mother's parental rights. *Id.* We reversed, holding that, although the default precluded the mother from affirmatively presenting evidence, due process mandated that she be given an opportunity to remain in the courtroom and participate, and to have the representation of counsel at that hearing. *Id.* at 306-07, ¶¶ 24, 29, 173 P.3d at 470-71.

¶15 This is not a default case. Mother expressly waived her right to contest termination of her parental rights, to have her counsel cross-examine witnesses, and to compel the attendance of witnesses. Arizona Rule of Procedure for the Juvenile Court 66(D)(1) states that a parent "may waive the right to trial on the allegations contained in the motion or petition for termination of parental rights by admission or not contesting the allegations," provided that the court determines: (1) the parent understands the rights being waived; (2) the decision is knowingly, intelligently, and voluntarily made; and (3) a factual basis exists to support the termination.

¶16 The juvenile court fully complied with Rule 66. It informed Mother of her rights and independently determined that she understood those rights and was waiving them "knowingly, intelligently, and voluntarily." The court did not preclude Mother or her counsel from attending the severance trial. Indeed, Mother concedes the court "gave her counsel the option of attending the evidentiary hearing." Moreover, any arguable error would be harmless. Mother does not challenge the factual bases for the severance order. Nor does she challenge the finding that termination was in the child's best interests.¹

¹ Mother admitted at the September 17 hearing that "the child is in a good adoptive placement and that the adoptive mother really loves the child."

CONCLUSION

¶17 For the reasons stated, we affirm.

/s/
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/
PETER B. SWANN, Presiding Judge

/s/
LAWRENCE F. WINTHROP, Judge