DIVISION ONE
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RUTH WILLINGHAM, ACTING CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

BRENT P.,	)	1 CA-JV 10-0090
	)	
Appellant,	)	DEPARTMENT E
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
ARIZONA DEPARTMENT OF ECONOMIC SECURITY, MIKALAH P.	)	Ariz.R.P.Juv.Ct. 103(G); ARCAP 28)
Appellees.	)	
	)	
	)	

Appeal from the Superior Court in Mohave County

Cause No. JD-2009-7005

The Honorable Richard Weiss, Judge

AFFIRMED

Jill L. Evans, Mohave County Appellate Defender's Office Kingman
By Diane S. McCoy, Deputy Appellate Defender
Attorneys for Appellant

Terry Goddard, Attorney General Mesa
By Amanda Holguin, Assistant Attorney General
Attorneys for Appellees

I R V I N E, Judge

¶1 Brent P. ("Father") timely appeals from the trial court's order severing his parental rights to Mikalah P. ("the daughter"). For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Father is the biological parent of the daughter, who was born in March 2001. The parents never married, and the daughter did not live with Father until 2006, after the mother died in a car accident.

¶3 In January 2009, Father was charged with sexual abuse of a child under the age of fifteen, a class 3 felony; indecent exposure, a class 6 felony; and two counts of furnishing obscene or harmful items to minors, class 4 felonies. The victim was an unrelated fourteen-year-old girl. The daughter was taken into custody and placed with close family friends, where she has remained. By stipulation, the child was found dependent as to Father.

¶4 In April 2009, Father pled guilty to a reduced charge of child abuse, a class 4 felony for intentionally or knowingly touching the breast of a child less than fifteen years old. In return, the State dropped the remaining charges. Father was sentenced to four years' supervised probation with sex-offender special conditions, but not required to register as a sex offender.

¶5 During and immediately after Father's incarceration, the Arizona Department of Economic Security ("ADES") provided him contact with the daughter with the goal of reunifying them. In October 2009, however, the daughter disclosed to her

therapist "many disturbing incidents of sexual misconduct, physical maltreatment and neglect." The daughter said she did not want to live with Father because she is "deathly afraid of him." Despite ADES's efforts to provide even written contact, the daughter refused. Supervised visitation was suspended after two telephone visits in October.

¶6 In December 2009, Father planned to move out of the county for work and sought a one-time supervised visit with the child. The Guardian Ad Litem ("GAL") opposed the motion, arguing the one-time visit would emotionally damage the daughter, and such a visit would "not further the goal of reunification if forced on the child at this time." Father's motion was denied.

¶7 In January 2010, ADES reported to the juvenile court that supervised visitation could not take place because the child refused to participate, saying, "If my dad apologized for what he has done to me[,] I would like that and I would feel better[,] but it would not change anything. I would give him a high 5[,] but I still would not want to talk to him, or see him or live with him again[,] because I would still not trust him. I'm afraid he will hurt me again." ADES reported that Father tested positive for methamphetamines, and he never attended parenting classes. ADES recommended that reunification services should not continue because it "could possibly cause serious anxiety and social dysfunction behaviors for [the daughter]. The

threats and/or risks can not [sic] be managed by an in-home dependency and in-home safety plan." At a foster review hearing in January, the board recommended the case plan be changed to adoption.

¶8 Later that month, the GAL filed a petition to terminate Father's parental rights to the daughter on grounds of: (1) willful abuse or neglect; (2) chronic abuse of dangerous drugs, (3) unfitness to parent due to a felony conviction, and (4) cumulative out-of-home placement. At an initial hearing, Father denied the allegations. The trial court granted Father's motion for a trial and set mediation and a pretrial conference for March 23, 2010. On that date, however, Father failed to appear, and his counsel could not explain Father's absence. Upon the GAL's motion, the juvenile court proceeded with a severance hearing in absentia.

¶9 ADES presented exhibits and testimony from the case manager. The court took judicial notice of Father's criminal record for the felony child abuse. The GAL then informed the court that the family friends sought to adopt the child. Based on this evidence, the court found that the State proved by clear and convincing evidence all four alleged grounds for termination, and that severance was in the child's best

interest. It ordered that Father's parental rights to the daughter be terminated. Father timely appealed.[1]

¶10 Three months later, Father filed a motion to set aside the termination order, claiming he had a medical reason for failing to appear at mediation and the pretrial conference. We stayed the appeal and re-vested jurisdiction in the juvenile court so that it could decide the pending motion. In September 2010, the juvenile court issued an unsigned minute entry denying the motion to set aside. Father did not file a separate notice of appeal from that order.

DISCUSSION

1. Motion to Set Aside

¶11 As an initial matter, Father argues the trial court erred in denying his motion to set aside the termination order because his failure to appear at the mediation and pretrial conference should be excused under Arizona Rule of Civil Procedure ("Rule") 60(c). He has not, however, appealed from that decision. Where, as here, a party appeals before a ruling has been made on a motion to set aside judgment and does not file another notice of appeal after the trial court issues its decision, we lack jurisdiction to address whether the court

[1] Because Father has not appealed the determination that severance was in the daughter's best interest, we accept that finding and do not address the issue further.

erred in denying that motion. *Navajo Nation v. MacDonald*, 180 Ariz. 539, 547, 885 P.2d 1104, 1112 (App. 1994).

¶12 Even if properly before us, we discern no error in the trial court's denial of the motion to set aside judgment. We review a denial of a motion to set aside for an abuse of discretion and 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. v. Ariz. Dep't of Econ. Sec.*, 215 Ariz. 96, 101, ¶ 15, 158 P.3d 225, 230 (App. 2007) (citations omitted). Whether neglect or inadvertence constitutes good cause to set aside the judgment is determined from a reasonably prudent person standard. *See Walker v. Kendig*, 107 Ariz. 510, 512, 489 P.2d 849, 851 (1971). In addition, the moving party must show that a meritorious defense to termination existed. *See Christy A. v. Ariz. Dep't of Econ. Sec*., 217 Ariz. 299, 304, ¶ 16, 173 P.3d 463, 468 (App. 2007).

¶13 Father did not act as a reasonably prudent person under the circumstances. Father was properly served with the severance motion and the notice of initial hearing, which admonished him of the consequences for failure to appear at further proceedings. Father was present at the initial hearing when the court set mediation and a pretrial conference for March 23, 2010, at 4:00 and 4:30 p.m., and again admonished him about the consequences of not appearing. Nonetheless, Father scheduled

a medical appointment from 1:00 to 4:00 p.m. on that same day. Although he claims he tried to contact his attorney two weeks earlier about "problems [he] had with the pre-trial conference court date," his attorney explained to the court:

> I have been out of the state for the past week. I checked my voice mail earlier this morning. I did not have any voice mail from [Father].
>
> I do object to us proceeding in absentia for severance, but I just wanted to make the record that I've had no contact with [Father] and I don't have a reason why he's not here today.

Father does not explain why he left no message for his attorney. He made no effort to inform the court and fails to explain why he did not reschedule the medical appointment.

¶14 Nor was Father's absence reasonable due to sudden illness. "While verified *sudden* illness usually presents exceptional circumstances under which a reasonably prudent [person] could be 'excused' . . . any lesser illness or disability must be evaluated in an ad hoc manner." *Walker,* 107 Ariz. at 512, 489 P.2d at 851 (emphasis added). This record shows that Father's circumstances were not sudden or exceptional. Father received treatment for a back injury that dates back to 1991. Father's affidavit shows that, at least two weeks before the hearing, he knew that the medical procedure would cause "problems" with the hearing. Moreover, Father does

not assert that the medical procedure was necessary or even urgent on that date. While Father described the procedure as "out- patient [sic] surgery," the doctor's note attached to his affidavit shows that Father actually received a CT scan, during which he was "consciously sedated," but "awake and alert."

¶15 Father alternatively argues that the juvenile court should have set aside the termination order for "any other reason justifying relief" under Rule 60(c)(6). In order to prevail under Rule 60(c)(6), the reason to set aside cannot be one of the reasons set forth in the five preceding sections, and the other reason advanced must be one which justifies relief. *Edsall v. Fenton*, 143 Ariz. 240, 243, 693 P.2d 895, 898 (1984) (citation omitted).

¶16 Father asserts that he was "hospitalized at the time of his hearing and nothing would be hurt by affording him a more meaningful hearing, given the fundamental right at stake." The first part of this reason is the same medical excuse that falls within the purview of Rule 60(c)(1); thus, it cannot be the basis for relief under Rule 60(c)(6). As to the second part, this case is unlike *Ariz. Dep't of Econ. Sec. v. Mahoney,* 24 Ariz. App. 534, 535-36, 540 P.2d 153, 154-55 (1975), where we affirmed the grant of a motion to set aside a termination order because, due to "a combination of unusual circumstances," the mother did not understand the enormity of severing parental ties

or the consequences of the severance proceedings. Here, in contrast, Father does not argue that he did not understand the enormity of the severance proceedings. Father was adequately informed through his attorney of the termination petition, and he was properly admonished on several occasions about the consequences for his failure to appear.

¶17 Even assuming that Father had good cause not to appear under Rule 60(c), Father has not established a meritorious defense to termination. *Christy A.*, 217 Ariz. at 304, ¶ 16, 173 P.3d at 468. A meritorious defense requires a showing by affidavit, deposition or testimony of some facts which, if proved at trial, would constitute a defense. *United Imps. & Exps., Inc. v. Superior Court (Peterson)*, 134 Ariz. 43, 46, 653 P.2d 691, 694 (1982) (citation omitted). The mere conclusion that such a defense exists carries no weight and is insufficient to establish a meritorious defense. *Id.*

¶18 Father's affidavit stated only his reasons for not appearing at the hearing. It neither asserts a meritorious defense to the severance petition, nor presents any facts to support that such a defense exists. Absent this showing, Father was not entitled to relief.

2. Termination Based on A.R.S. § 8-533(B)(4)

¶19 Next, we turn to Father's contention that the juvenile court lacked sufficient evidence to terminate his parental

rights based on the four alleged grounds. Termination is permitted if the court finds by clear and convincing evidence at least one statutory ground for termination. A.R.S. §§ 8-533(B) (Supp. 2010), -537(B) (2007). On appeal, we will accept the juvenile court's factual findings unless no reasonable evidence exists to support them, and we will affirm the ruling unless it is clearly erroneous. *Jennifer B. v. Ariz. Dep't of Econ. Sec.*, 189 Ariz. 553, 555, 944 P.2d 68, 70 (App. 1997). If clear and convincing evidence supports one ground for termination, we need not reach the other grounds. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 280, ¶ 3, 53 P.3d 203, 205 (App. 2002).

¶20 The juvenile court terminated Father's parental rights based, in part, on A.R.S. § 8-533(B)(4), which permits termination if sufficient evidence shows:

> That the parent is deprived of civil liberties due to the conviction of a felony if the felony of which that parent was convicted is of such nature as to prove the unfitness of that parent to have future custody and control of the child, including murder of another child of the parent, manslaughter of another child of the parent or aiding or abetting or attempting, conspiring or soliciting to commit murder or manslaughter of another child of the parent, or if the sentence of that parent is of such length that the child will be deprived of a normal home for a period of years.

Father does not dispute that his civil liberties were deprived. He argues, however, that A.R.S. § 8-533(B)(4) does not apply

because his felony does not prove he was unfit to parent, and the victim was neither his child nor stepchild. This court rejected a similar argument in *In re Juv. No. J-2255 v. Morris*, 126 Ariz. 144, 613 P.2d 304 (1980).

¶21 In *J-2255,* the father had prior convictions for molesting his stepdaughters and another girl, who was the twelve-year-old daughter of a woman he lived with before marriage. *Id.* at 145-46, 613 P.2d at 305-06. He argued that these prior felonies could not prove his unfitness as a parent under A.R.S. § 8-533(B)(4) because his daughter was not a victim. *Id.* This Court rejected his argument, stating, "It would be difficult to identify any felony violation that would more clearly indicate the unfitness of the appellant as a parent to his young daughter." *Id.* We held that the father's "prior convictions for molesting young girls provided a rational inference of his unfitness as a parent." *Id.* at 146, 613 P.2d at 306. Because the father did not attempt to seek treatment for his underlying behavioral abnormality, he failed to rebut the presumption created by the felony that he was unfit to parent. *Id.* at 147, 613 P.2d at 307.

¶22 We are not convinced by Father's attempts to distinguish this case from *J-2255*. First, he incorrectly asserts that the only victims in *J-2255* were stepdaughters. One victim in *J-2255,* however, was unrelated to the father. *Id.* at 145, 613

P.2d at 305. Therefore, the inference that the father was unfit in *J-2255* arose from the fact that the victims were all young girls like his own daughter, not because of their relationship to the father. *Id.* at 145-46, 613 P.2d at 305-06. In this case, both the victim and the daughter were also young girls.

¶23 Second, the nature of Father's child abuse felony gives rise to a rational inference that he was unfit to parent his own daughter, because it demonstrates the same sexually deviant behavior toward young girls as the sexual molestation that occurred in *J-2255*. Here, Father pled guilty to "intentionally or knowingly abus[ing] . . . a child less than fifteen years of age, by touching the breast of [the child]." A.R.S. § 13-3623 (2010). Although he points out that he was not required to register as a sex offender, he ignores the fact that the court imposed special sex offender conditions on his probation. Given the sexual nature of the underlying conduct and the young age of Father's victim, it was rational to infer that Father was unfit to parent his own young daughter.

¶24 The record also does not indicate anything to rebut the trial court's assessment that Father was unfit to parent the daughter. Instead of seeking treatment for his sexual behavior, Father continued to deny culpability and blame the victim. The presentence report stated Father "laughed and did not appear to have concern or remorse for his actions." Father's sex-offender

psychological evaluation, which was completed the month before the termination hearing, shows:

> [Father] denied the statement in the Juvenile Court report that '[he] admitted to intentionally [and] knowingly abusing the victim, a child under age 15 by groping the victim's breast[.'] When asked if all the above parties (police, daughter, daughter's uncle, victims, caseworker) were lying, he stated they were.

The evaluation concluded Father "voices no degree of culpability for sexual assault behaviors. He blames the victim." It further stated:

> He denies molesting a child or exposing himself & any associated sexual thoughts. However, he admits some type of sexual offense was committed but uses excuses to defend himself. He acknowledges engaging in some level of inappropriate sexual behavior but does not take accountability for it. "With respect to the allegations made against him, he maintain[s] they have been exaggerated, it was an accident, he did not plan it, made a mistake which he regrets & feels victimized by the charges against him[."] He reports the victim was responsible.

In his reply brief, Father continues to blame his victim.

¶25 Moreover, the presentence investigation reported that a detective believed Father "acted as if the [criminal] investigation were a joke," and the detective described Father as "someone who is attracted to adolescents, thus is a high risk for re-offending," and "should be supervised with as much accountability as possible, preferably via sex offender

conditions of probation, excluding registering as a sex offender." Father's sex-offender psychological evaluation showed he tested "in the high risk of sexual recidivism range," and concluded, Father's "actuarial scores indicate a moderate-high risk of sexual offense recidivism." Although the evaluation stated "a more lenient approach may be justified in reference to maintaining his parental rights & potential visitation with his daughter," it made such approaches contingent on further treatment:

> At this time, it does not appear to be in the best interests of his daughter to allow any contact. The allegations in this case regarding him exposing his daughter to a sexualized environment/pornography must be clarified & resolved first.

It noted, however, that "[Father] clearly stated that all counseling is a waste of his time & that he does not need it/it does not help him."

¶26 On this record, we cannot say the juvenile court clearly erred in finding that the sexual nature of Father's child abuse offense proved that he was unfit to parent his young daughter, and that Father did not rebut that presumption. Because we affirm the termination order on the felony conviction ground under A.R.S. § 8-533(B)(4), we need not address the other three alleged grounds. *Jesus M.,* 203 Ariz. at 280, ¶ 3, 53 P.3d at 205.

3. Reunification Efforts

¶27 Father argues that there is insufficient evidence to show that ADES provided diligent or reasonable efforts to reunify him with the daughter. We disagree.

¶28 There is no statutory requirement to provide reunification services under A.R.S. § 8-533(B)(4). *James H. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 1, 2, ¶ 6, 106 P.3d 327, 328 (App. 2005) (stating that deletion of the requirement to provide reunification services in the 1998 amendment "can be read as an affirmative legislative decision that reunification services are not required in the context of a subsection (B)(4) severance."). Despite this lack of an express statutory duty, we recognize a general obligation to engage in reunification efforts, defining it "on constitutional grounds as a necessary element of any state attempt to overcome . . . the fundamental liberty interest of the natural parents in the care, custody and management of their child." *Mary Ellen C.*, 193 Ariz. at 192, ¶ 32, 971 P.2d at 1053 (internal quotation omitted). Under this general duty, however, ADES is obligated to "undertake reunification only in cases where there is a reasonable prospect of success." *James H.*, 210 Ariz. at 2, ¶ 8, 106 P.3d at 328. "[T]here is no constitutional mandate to undertake reunification efforts that are futile." *Id*.

¶29 While Father was incarcerated, ADES arranged for telephonic visitation, case management, transportation, and written communication through post cards. After his release, ADES provided: case management, transportation, parenting classes, drug testing, substance abuse treatment, individual counseling, group counseling for domestic violence and anger management, and the facilitation of further services with providers. ADES also continued to offer weekly telephone visitation. Despite these efforts, a foster care review in January 2010 found that Father's attitude was preventing progress and Father "is not participating in services." ADES suspended visitation upon the recommendation of the daughter's therapist, and only after the daughter refused to contact the Father, talk to him, or be reunited. Reasonable evidence thus supports that ADES provided reasonable reunification efforts, and that any further services would have either been futile or had no reasonable prospect of success.

4. Ineffective Assistance of Counsel

¶30 Lastly, Father raises an ineffective assistance of counsel claim, arguing his attorney failed to object to the admission of certain "hearsay" evidence concerning his substance abuse and the neglect of his daughter. For the purposes of this appeal, we assume that this issue is properly before us even though it was not raised in the trial court. *See John M. v.*

Ariz. Dep't of Econ. Sec., 217 Ariz. 320, 325, ¶ 17, 173 P.3d 1021, 1026 (2007).

¶31 In order to prevail on an ineffective assistance of counsel claim, a parent must show that counsel's performance was both incompetent and prejudicial to the outcome of the case. *See id.* at ¶¶ 17-18. ("No reversal of a termination order is justified by inadequacy of counsel unless, at a minimum, a parent can demonstrate that counsel's alleged errors were sufficient to 'undermine confidence in the outcome' of the severance proceeding and give rise to a reasonable probability that, but for counsel's errors, the result would have been different.").

¶32 We need not reach whether counsel's performance was inadequate because Father cannot show prejudice. Because we affirm based on the finding that Father was unfit to parent due to the nature of his felony, the exclusion of any hearsay evidence of his substance abuse, or of the abuse and neglect of his daughter would not have changed the result. In the absence of prejudice, Father has not established an ineffective assistance of counsel claim.

CONCLUSION

¶33 For the reasons stated, we affirm.

/s/
PATRICK IRVINE, Judge

CONCURRING:

/s/
PETER B. SWANN, Presiding Judge

/s/
MAURICE PORTLEY, Judge