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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
FILED: 06/23/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

VICTOR P.,) No. 1 CA-JV 11-0024
)
Appellant,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
)
ARIZONA DEPARTMENT OF ECONOMIC) (Not for Publication -
SECURITY, VICTOR P., JR.,) Ariz. R.P. Juv. Ct. 103(G);
) ARCAP 28)
Appellees.)
)

Appeal from the Superior Court in Maricopa County

Cause No. JD-16967

The Honorable Aimee L. Anderson, Judge

AFFIRMED

Robert D. Rosanelli Phoenix
Attorney for Appellant

Thomas C. Horne, Arizona Attorney General Phoenix
By Kent Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section

and
David M. Osterfeld, Assistant Attorney General
Attorneys for Appellee

H A L L, Judge

¶1 Victor P. (Father) appeals from the juvenile court's order severing his parental rights to Victor P. (Victor). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Father is the biological father of Victor, born December 15, 2008. At the time Victor was born, Child Protective Services (CPS) had already received numerous reports that Monique D. (Mother) neglected and physically abused her three older children (Father is not the biological parent of Mother's three older children) and had a case open with the family. On April 15, 2009, Mother called her CPS case manager from a domestic violence shelter and reported a "violent altercation" with Father. Soon thereafter, Father was arrested pursuant to an outstanding arrest warrant. While Father was incarcerated, Victor was placed in foster care due to Mother's noncompliance with substance abuse testing and reports that she was living with "known methamphetamine dealers and users."

¶3 On May 7, 2009, the Arizona Department of Economic Security (ADES) filed a petition alleging Victor is dependent to Father and Mother. On November 24, 2009, following a contested dependency hearing, the juvenile court found Victor dependent to

Father.¹ On September 17, 2010, ADES filed a motion to terminate Mother and Father's parental rights to Victor. The motion to terminate alleged that: (1) Victor has been in an out-of-home placement for a cumulative total period of nine months or longer, pursuant to court order, and Mother and Father have substantially neglected or willfully refused to remedy the circumstances causing the out-of-home placement, and (2) Victor has been in an out-of-home placement for a cumulative total period of fifteen months or longer, pursuant to court order, and Mother and Father have been unable to remedy the circumstances causing the out-of-home placement and there is a substantial likelihood that the parents will be incapable of exercising proper care in the near future.

¶4 At the initial hearing on the motion to terminate, the juvenile court read Father "Form 3," advising him that the hearing on the motion to terminate could proceed in his absence. The "Form 3" notice also stated that Father's mediation and pre-trial conferences were both scheduled for November 4, 2010. Father signed the form, acknowledging that he had received the notice.

¶5 On November 4, 2010, Father failed to appear for his mediation and pre-trial conferences. In the absence of any claim of good cause for Father's failure to appear, the juvenile

¹ The Court had previously found Victor dependent to Mother.

court held that Father had waived his right to contest the termination and proceeded with trial in his absence.

¶16 The caseworker testified that CPS offered Father numerous services, including parent-aide classes, substance abuse treatment, urinalysis testing, counseling, and a psychological evaluation. Father consistently participated in parent-aide sessions and scheduled visitations and completed a substance abuse program. He did not participate in counseling, however, and failed to submit to a psychological evaluation. The case manager also testified that Father had no housing stability and no proof of employment. Based on her observation of Father's supervised visits with Victor, the caseworker testified that Father has an "astonish[ing] [] inability to connect with [his] child." She explained that he did not "engage" with Victor and seemed unaware of Victor's basic needs. Finally, the caseworker testified that Victor is adoptable and his foster parents would like to adopt him. While answering questions during cross-examination, the caseworker testified that the parent aide also expressed concerns that Father demonstrated an inability to nurture Victor.

¶17 Based on the evidence presented, the juvenile court found that the State had proven both bases for termination, that the State had made a diligent effort to provide reunification services, and that termination of parental rights was in the

child's best interest. On November 8, 2010, Father filed a motion to set aside the juvenile court's termination order, asserting that "he had confused the dates" of his hearing and had intended to appear. On December 3, 2010, the juvenile court granted Father's unopposed motion.

¶18 On December 9, 2010, Father again failed to appear at his hearing and Father's attorney informed the court that he had been unable to maintain contact with Father. The juvenile court then rescheduled the hearing for January.

¶19 On January 20, 2011, Father again failed to appear for his hearing on the motion for termination. Father's attorney avowed to the court that he had told Father "it was imperative" that Father attend the hearing. In addition, Father's attorney informed the court that he had unsuccessfully attempted to contact Father on numerous occasions. The juvenile court then noted for the record that staff members had scanned the court hallways and were unable to locate Father.

¶110 After Father failed to appear more than an hour after the hearing was scheduled to commence, the juvenile court reinstated its November 4, 2010 findings that Victor had been in a court-ordered out-of-home placement for a cumulative total period of fifteen months or longer and Father had substantially neglected and willfully refused to remedy the circumstances causing the out-of-home placement. The juvenile court also

found that the State had provided appropriate reunification services and that termination was in the child's best interest.

¶11 After the juvenile court entered its ruling, Father's attorney requested to be excused, which the court permitted. Several minutes later, after the juvenile court had proceeded with addressing matters involving Mother's older children, Father's attorney reentered the courtroom with Father and requested that the court set aside its termination order. Father's attorney explained that Father had missed his bus and arrived at the courthouse late. The juvenile court found no good cause for setting aside its order and denied Father's request.

¶12 Father timely appealed. The juvenile court's order is appealable under Rule 103(A) of the Arizona Rules of Procedure for the Juvenile Court. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) section 8-235(A) (2007).

DISCUSSION

¶13 On appeal, Father first argues that the juvenile court erred by denying his motion to set aside its order terminating his parental rights. He contends that, because he appeared in court on the day of his scheduled hearing, albeit after the conclusion of the hearing, his failure to timely appear should

not be deemed a waiver of his parental rights and an admission of the petition's allegations.

¶14 We review a juvenile court's denial of a motion to set aside judgment for an abuse of discretion. *Adrian E. v. Ariz. Dep't of Econ. Sec.*, 215 Ariz. 96, 101, ¶ 15, 158 P.3d 225, 230 (App. 2007). The juvenile court abuses its discretion when its decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Id.* (quoting *Lashonda M. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 77, 83, ¶ 19, 107 P.3d 923, 929 (App. 2005)) (internal quotation omitted). In reviewing a denial of a motion to set aside judgment, the scope of our review is "restricted to the questions raised by the motion to set aside and does not extend to a review of whether the [juvenile] court was substantively correct in entering the judgment from which relief was sought." *Hirsch v. Nat'l Van Lines, Inc.*, 136 Ariz. 304, 311, 666 P.2d 49, 56 (1983).

¶15 When a parent fails to appear at an initial termination hearing, the juvenile court may proceed in his absence and terminate his parental rights "based upon the record and evidence presented" if the parent failed to appear "without good cause," had adequate notice of the hearing, and was admonished that his failure to appear could constitute a waiver of his parental rights and an admission of the allegations in the petition. A.R.S. § 8-863(B), (C) (2007); see also Ariz.

R.P. Juv. Ct. 65(C). To show good cause, the parent must demonstrate that "(1) mistake, inadvertence, surprise or excusable neglect exists and (2) a meritorious defense to the claims exists." *Christy A. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 299, 304, ¶ 16, 173 P.3d 463, 468 (App. 2007). Excusable negligence exists if a reasonable, prudent person would have acted similarly in like circumstances. *Id.*

¶16 We conclude the record supports the juvenile court's implicit finding that Father did not act as a reasonable, prudent person under these circumstances. Father does not dispute that he was notified of the time for his scheduled hearing and advised of the consequences if he failed to appear. Instead, his only proffered reason for failing to appear for his hearing was that he missed his bus. We conclude Father's failure to adequately plan for his transportation to the hearing, especially in light of his failure to appear at two prior hearings, falls considerably short of the reasonable person standard. Moreover, Father has not presented any evidence, or even asserted, that a meritorious defense to the petition's allegations exists. Therefore, the juvenile court did not abuse its discretion by denying Father's motion to set aside the judgment.

¶17 Next, Father argues that the juvenile court violated his right to due process by terminating his parental rights

without holding an evidentiary hearing that allowed his attorney to cross-examine witnesses and present evidence.

¶18 The juvenile court held precisely such a hearing on November 4, 2010, in which Father's attorney cross-examined the State's witness and declined the court's invitation to present evidence. Father has not argued that the circumstances of this case materially changed between the first hearing held November 4, 2010 and the second hearing held January 20, 2011. Absent evidence that the circumstances of the case materially changed during that time period, we cannot say that the juvenile court in any way infringed on Father's due process rights to be heard and confront witnesses by relying on the evidence presented at the November 4, 2010 hearing to make its factual findings.

CONCLUSION

¶19 For the foregoing reasons, we affirm the juvenile court's denial of Father's motion to set aside the judgment.

_ / s /
PHILIP HALL, Judge

CONCURRING:

_ / s /
PATRICK IRVINE, Presiding Judge

_ / s /
JOHN C. GEMMILL, Judge