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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: 11/03/2011
RUTH A. WILLINGHAM,
CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

CATHERINE F.,) No. 1 CA-JV 11-0085
)
Appellant,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ARIZONA DEPARTMENT OF ECONOMIC) 103(G) Ariz. R.P. Juv. Ct.;
SECURITY, LAURYN R.,) Rule 28 ARCAP)
)
Appellees.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. JD19913

The Honorable Benjamin R. Norris, Judge

AFFIRMED

Robert D. Rosanelli
Attorney for Appellant

Phoenix

Thomas C. Horne, Arizona Attorney General
By David M. Osterfeld, Assistant Attorney General
Attorneys for Appellee ADES

Phoenix

S W A N N, Judge

¶1 Catherine F. ("Appellant") did not appear at a dependency hearing, notice of which was served by publication. At that hearing, the court found that Appellant's daughter was

dependent as to her.¹ Appellant argues on appeal that the juvenile court lacked jurisdiction to make the dependency finding because the Child's whereabouts were unknown. She also argues that the published notice contained defects that violated her right to due process. We hold that Arizona was the Child's home state and that the juvenile court had jurisdiction. We also hold that Appellant's right to due process was not violated. We therefore affirm.

FACTS AND PROCEDURAL HISTORY

¶2 On January 12, 2011, the Child's guardian ad litem ("GAL") filed a dependency petition. The petition alleged that the Child should be found dependent pursuant to A.R.S. § 8-201(13) because she had no parent or guardian willing or able to exercise proper care and control. The petition alleged that the Child was molested in May 2010 by Appellant's boyfriend while Appellant was away from home, that Appellant told the County Attorney that the criminal charges against the boyfriend were not true, and that "jail calls" proved that Appellant had not ended her relationship with the boyfriend. It also alleged that by violating an order to bring the Child to meet with the GAL and a Victim Advocate, Appellant was the subject of a Civil

¹ The court also found that the Child was dependent as to her natural father. Because no issues are raised on appeal either by the father or on his behalf, we omit him from our review and discussion.

Arrest Warrant. The petition was accompanied by supporting documents, including a police report and minute entries.

¶13 The court set a preliminary protective hearing and conference for January 24, 2011. Appellant did not attend that hearing. In fact, much of that hearing was spent discussing what to do as a consequence of Appellant having "absconded with the child." The GAL testified that on January 20 a process server had tried to serve Appellant at the hospital where she worked, but the hospital told the server that Appellant had not been on its work schedule for two weeks. The GAL pointed out that this claim was doubtful since Child Protective Services ("CPS") had spoken with Appellant at the hospital on January 13. The hearing ended with the trial court ordering the sheriff to serve the arrest warrant on Appellant,² vacating the Initial Dependency Hearing that had been set for February 3, 2010, and resetting it for February 10. Appellant did not appear at the February 10 hearing.

¶14 The GAL informed the court that when the sheriff's deputies tried to serve Appellant at the hospital, they were told that she was on a leave of absence. Although the GAL's

² It was urgent that the court learn the Child's whereabouts and confirm her safety, because the state presented evidence that Appellant's boyfriend might still "be having contact" with the Child.

process server looked "all over town" to find Appellant, she was never found. The GAL insisted: "But she is here, she's around."

¶15 Information then emerged suggesting that the Child was in North Carolina.³ Another judge, presiding over the criminal case for Appellant's boyfriend, ordered Appellant to have the child brought back to Arizona. When CPS went with two deputies to pick up the Child at the airport, she was not on the airplane. After hearing these facts, the court ordered CPS to serve Appellant by publication and set a Publication Hearing and a Continued Initial Dependency Hearing for April 18, 2011.

¶16 Over four consecutive weeks in March, the Arizona Department of Economic Security ("ADES") published in *The Record Reporter*, a newspaper of general circulation, a Notice of Publication addressed to Appellant. The notice declared that (1) the dependency hearing was set for April 18; (2) Appellant was entitled to appear with counsel, either chosen by her or appointed by the court; and (3) Appellant's failure to appear without good cause could result in an adjudication of the Child's dependency.

¶17 When the dependency hearing was held on April 18, Appellant did not appear. The court, after reviewing the

³ CPS in Greensboro, North Carolina, checked the address where the Child was supposed to be staying and reported it "vacant." The address CPS checked came from the GAL, who got it from the criminal court, who received it from Appellant.

published notice and the relevant affidavits,⁴ found that Appellant had been served by publication. It also entered an order of default against Appellant, and an attorney from the Office of the Legal Defender was appointed as Appellant's counsel.

¶18 Appellant's counsel objected that the court could not find the Child dependent under A.R.S. § 8-844(C)(1)(a)(i), which requires that a court determining dependency find both personal and subject matter jurisdiction. Counsel argued that the court lacked personal jurisdiction over Appellant because no one was "sure where she's residing" and that the court lacked jurisdiction over the Child because she was "allegedly out of state." CPS replied that the court acquired personal jurisdiction over the mother by virtue of the service by publication. It also pointed out that there was no proof that the Child had actually gone to North Carolina, that the Child had been enrolled in Arizona schools through December 2010, and that Appellant's boyfriend had allegedly molested the Child in Arizona.

⁴ The court had before it a notice of publication with the correct date, time and location; an affidavit of service by publication as to Appellant; an affidavit of publication in the newspaper of general circulation; two affidavits of attempted service on Appellant; and an affidavit of diligent search as to Appellant.

¶9 The court agreed with CPS that it had jurisdiction for the dependency finding. The fact that Arizona was the last state in which the child was actually known to be living gave Arizona a better jurisdictional claim over the child than any other state could put forward. The court reasoned that if it were to find that it lacked jurisdiction because it was unsure whether the Child was in North Carolina or not, a strange logic would govern: "[I]f we had to know where the child was then nobody would have jurisdiction and nobody could look out for the child's interests." The court then found by a preponderance of the evidence that the Child was dependent and ordered ADES to use all available resources to locate her.

¶10 Appellant timely appeals. The first issue she raises is whether there was sufficient evidence regarding the Child's home state and whereabouts to support the juvenile court's jurisdiction. The second is whether the court violated Appellant's right to due process by failing to notify her that the April 18 hearing could deprive her of custodial rights even in her absence.

¶11 We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 8-235(A), and Ariz. R.P. Juv. Ct. 103(A).

STANDARD OF REVIEW

¶12 Whether the juvenile court had jurisdiction is a legal question that we review de novo. *David S. v. Audilio S.*, 201

Ariz. 134, 136, ¶ 4, 32 P.3d 417, 419 (App. 2001). Whether the juvenile court afforded Appellant due process is also a question of law subject to de novo review. *Herman v. City of Tucson*, 197 Ariz. 430, 432, ¶ 5, 4 P.3d 973, 975 (App. 1999). But a juvenile court's decision in dependency proceedings about the weight and effect of evidence will not be disturbed unless it is clearly erroneous. *Maricopa County Juv. Action No. JD-6123*, 191 Ariz. 384, 388, 956 P.2d 511, 515 (App. 1997).

DISCUSSION

I. THE JUVENILE COURT'S JURISDICTION

¶13 The juvenile court's jurisdiction over a child alleged to have multiple residences is determined by the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"). The UCCJEA applies to various child custody proceedings, including proceedings that involve a determination of dependency. A.R.S. § 25-1002(3), (4)(a); *Willie G. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 231, 233-34, ¶ 11, 119 P.3d 1034, 1036-37 (App. 2005).

¶14 Under § 25-1031(A)(1) of the UCCJEA, an Arizona juvenile court has home state jurisdiction to determine dependency in two ways. First, an Arizona court has home state jurisdiction if Arizona was "the home state of the child on the date of the commencement of the proceeding." A.R.S. § 25-1031(A)(1). Alternatively, an Arizona court has home state jurisdiction if it was "the home state of the child within six

months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state." *Id.* See also, *Welch-Doden v. Roberts*, 202 Ariz. 201, 208-09, ¶ 33, 42 P.3d 1166, 1173-74 (App. 2002).

¶15 Appellant argues that the court received no evidence of the child's residence or whereabouts at the April 18 hearing, and it therefore had no basis for the exercise of jurisdiction. We disagree. If we take the first approach in § 25-1031(A)(1), then the evidence in the record establishes the existence of home state jurisdiction even without evidence of the Child's current whereabouts. The dependency petition and attached exhibits made clear that the Child had been living in Arizona for at least seven months, from May 2010, when Appellant's boyfriend allegedly molested her in Appellant's home, through December 2010, when Appellant removed her from school to move to North Carolina. Appellant never provided evidence that North Carolina had actually become the Child's new home state -- indeed, the only evidence in the record showed that the Child could not be found there. The only possible home state on this evidence was Arizona.

¶16 Even if we were to entertain the assertion that the Child was in North Carolina, as Appellant told CPS, the second approach in § 25-1031(A)(1) would still give the juvenile court

home state jurisdiction. Arizona was "the home state of the child within six months before the commencement of the proceeding" because the length of time between the Child's withdrawal from her Arizona school and the date of the April 18 hearing was four months. Appellant was "a parent . . . who continue[d] to live in this state."⁵ Therefore, even if the child was in North Carolina and "absent from this state," those facts would suffice for the juvenile court's home state jurisdiction under § 25-1031(A)(1). *Welch-Doden*, 202 Ariz. at 208-09, ¶ 33, 42 P.3d at 1173-74 (holding that the term "home state" has a broad meaning in § 25-1031(A)(1) given the UCCJEA's fundamental purpose of establishing home state jurisdiction).

¶17 Based on our review of the record, we find that the trial court made no clear error when it interpreted the evidence before it. Further, we hold that the trial court correctly concluded as a matter of law that it had jurisdiction over the Child's dependency hearing.

II. THE ADEQUACY OF THE NOTICE

¶18 In her challenge to what she claims was inadequate notice, Appellant cites to cases holding that a parent's fundamental interest in the custody and control of her child is

⁵ At the April 18 hearing, a CPS lawyer informed the court that Appellant told them that the Child "was with relatives in North Carolina." From that claim the court could reasonably infer that the Child was with relatives in North Carolina, and not with Appellant, because Appellant remained in Arizona.

protected by that parent's right to due process. *Mara M. v. Ariz. Dep't Econ. Sec.*, 201 Ariz. 503, 507, ¶ 24, 38 P.3d 41, 45. We acknowledge that when the state acts to limit parental rights, it must do so by fair procedures. *Id.* This includes giving a parent notice reasonably calculated under all the circumstances to apprise her of the pendency of an action that could affect her custody. *Id.*

¶19 The Rules of Procedure for the Juvenile Court prescribe the content of a notice for a dependency hearing. The notice must "advise the parent . . . that failure to appear, without good cause shown, may result in a finding that the parent . . . has waived legal rights and is deemed to have admitted the allegations in the petition." Rule 48(C). The notice must also advise the parent "that the hearings may go forward in the absence of the parent . . . and may result in an adjudication of dependency, the termination of parental rights or the establishment of a permanent guardianship based upon the record and evidence presented." *Id.*

¶20 The Rules also prescribe how that notice may be served. Rule 48(D)(6) permits the parent to be served by publication. And service by publication satisfies due process when the serving party, despite due diligence, cannot locate the party to be served. *See Master Fin., Inc. v. Woodburn*, 208 Ariz. 70, 73, ¶ 15, 90 P.3d 1236, 1239 (App. 2004) (as amended).

¶21 On appeal, Appellant does not argue that publication was an inappropriate means of service. Instead, Appellant argues that the published notice had three flaws that together deprived her of due process. First, the caption on the notice published in *The Record Reporter* identified the April 18 hearing as a "Publication Hearing" and not as an "Initial Hearing" on the Child's dependency. Second, the notice did not state that the April 18 hearing was the type of hearing in which her failure to appear could "result in any negative consequence" for her as a parent. And third, the notice claimed that the April 18 hearing was only "for the purpose of determining whether any parent or guardian named herein is contesting the allegations in the Petition."

¶22 A reasonable reading of the notice, however, supports none of Appellant's alleged due process violations. The caption, which comes in two versions in the record, is not misleading. The first version, which sits atop the column of newsprint reproduced in the affidavit of publication, places **ADES'S NOTICE OF PUBLICATION** at the top, **HEARING ON DEPENDENCY** in the middle, and **PETITION** on the bottom. The second version, found in a copy of the notice filed with the trial court, is captioned **ADES'S NOTICE OF PUBLICATION** above **HEARING ON DEPENDENCY PETITION**.

¶23 Further, the text of the publication adequately notified Appellant that the GAL had "filed a Dependency Petition." Paragraph 1 notified Appellant that the hearing's purpose was to allow her to challenge the dependency petition's allegations. And Paragraph 3 notified Appellant that the hearing could involve more than that. It stated that Appellant's failure to appear at the hearing could lead to her waiver of parental rights and that it was the type of hearing that could "result in an adjudication of dependency, termination of [her] parental rights, or the establishment of a permanent guardianship." In brief, the substance of the notice conformed to the requirements of 48(C) in the Arizona Rules of Juvenile Procedure and satisfied Appellant's right to due process.

CONCLUSION

¶24 Holding that the juvenile court had jurisdiction over the dependency hearing and that the published notice did not violate Appellant's right to due process, we affirm the court's finding of the Child's dependency as to Appellant. Ariz. R.P. Juv. Ct. 106(F)(1).

/s/

PETER B. SWANN, Judge

CONCURRING:

/s/

MARGARET H. DOWNIE, Presiding Judge

/s/

DONN KESSLER, Judge