

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
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: 11/29/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

G. H.,) No. 1 CA-JV 11-0109
)
Appellant,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
)
C. F., T. F., A.H.,) (Not for Publication -
) Ariz. R.P. Juv. Ct. 103(G);
) ARCAP 28)
Appellees.)
)

Appeal from the Superior Court in Maricopa County

Cause No. JS506798

The Honorable Raymond P. Lee, Judge

AFFIRMED IN PART; VACATED AND REMANDED IN PART

Thomas A. Vierling Phoenix
Attorney for Appellant

Rita A. Meiser, PLC Phoenix
By Rita A. Meiser
Attorneys for Appellees

J O H N S E N, Judge

¶1 G.H. ("Father") appeals the superior court's judgment terminating his parental rights to his daughter. He also argues the court erred by denying his motion to set aside the judgment.

We affirm the judgment, but because the superior court lacked jurisdiction to rule on the motion to set aside, we vacate the order denying that motion and remand for further proceedings.

FACTS AND PROCEDURAL BACKGROUND

¶12 A.H. was born in 2003, when her mother ("Mother") and Father were married to each other.¹ Mother left Father a few months later. At issue in this appeal is a petition filed by Mother and her current husband to terminate Father's parental rights. The petition alleged Father had abandoned A.H. and that Mother's current husband wants to adopt A.H.

¶13 Father was incarcerated in the Pima County Jail at the time of these proceedings. According to the return of service, the process server delivered copies of the petition and the order setting the initial severance hearing "personally via video" to Father in jail and "informed [Father] of the contents therein." Father did not appear at the initial severance hearing. The court at that time continued the hearing to June 8, 2011, stated that Father could appear telephonically and appointed counsel for Father.

¶14 Father did not telephone the court for the rescheduled initial severance hearing on June 8. At the hearing, Father's

¹ We view the facts and draw all reasonable inferences in the light most favorable to upholding the court's order. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, 282, ¶ 13, 53 P.3d 203, 207 (App. 2002).

counsel said she had sent him a copy of the entire court file and written him a letter informing him of the hearing date and letting him know he could appear at the hearing telephonically. In Father's absence, the court heard testimony from Mother in support of the petition.

¶15 At the conclusion of the hearing, the court found that Father had been properly served but had "failed to appear, to contest, to challenge or otherwise participate in these proceedings." The court found abandonment proven by clear and convincing evidence because Father had had no contact with A.H. for four years and had provided no financial support for seven years, and that A.H. would be exposed to "abuse or neglect or harm" if returned to Father's care. The court finally found by a preponderance of the evidence that termination of Father's parental rights would be in A.H.'s best interest.

¶16 On June 22, 2011, Father filed a Motion to Set Aside the Findings and Order Terminating Parent-Child Relationship Due to Father's Good Cause for Failure to Appear. According to Father's motion, there was a "shakedown" of inmates' cells in the jail the morning of the hearing that precluded him from calling in for the hearing.² Father argued this was good cause for failing to appear and asked the court to set a new hearing. The day after filing his motion to set aside, on June 23, Father

² A "shakedown" is a search of inmates' cells.

filed a notice of appeal from the judgment terminating his rights. After Mother responded to Father's motion to set aside, the superior court denied the motion.

¶7 Father timely appealed from the judgment of termination. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 8-235 (2011).

DISCUSSION

A. The Judgment Terminating Father's Parental Rights.

¶8 Father first argues the superior court abused its discretion by proceeding with the June 8 hearing in his absence.

¶9 We review the superior court's order for an abuse of discretion and will affirm if it is supported by sufficient evidence in the record. See *Christy C. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 445, 452, ¶ 19, 153 P.3d 1074, 1081 (App. 2007). We review *de novo* any issues of law, including the interpretation of a statute. *Kimu P. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 39, 43, ¶ 13, 178 P.3d 511, 515 (App. 2008).

¶10 A parent must be served with a petition for termination of parental rights and notice of the initial termination hearing. Ariz. R.P. Juv. Ct. 64(B)-(D). The notice must advise the parent of "the location, date and time of the initial termination hearing" and also must advise the parent that:

[F]ailure to appear at the initial hearing, . . . without good cause, may result in a finding that the parent . . . has waived legal rights, and is deemed to have admitted the allegations in the motion or petition for termination. The notice shall advise the parent . . . that the hearing[] may go forward in the absence of the parent . . . and may result in the termination of parental rights based upon the record and evidence presented.

Ariz. R.P. Juv. Ct. 64(C). Rule 65(C) goes on to provide that if the parent fails to appear at the initial termination hearing "without good cause shown," and if the court finds that the parent:

[H]ad notice of the hearing, was properly served pursuant to Rule 64 and had been previously admonished regarding the consequences of failure to appear, including a warning that the hearing could go forward in the absence of the parent . . . and that failure to appear may constitute a waiver of rights and an admission to the allegations contained in the termination motion or petition, the court may proceed with the adjudication of termination based upon the record and evidence presented if the moving party or petitioner has proven grounds upon which to terminate parental rights.

Ariz. R.P. Juv. Ct. 65(C)(6)(c).

¶11 At the conclusion of the June 8 hearing, the court found Father was "properly served, [and] had notice of [the] proceedings but has failed to appear, to contest, to challenge or otherwise participate in these proceedings." Although the record does not reflect that Father was personally served with

notice of the June 8 hearing, his counsel had notice of the hearing. Notice to Father's counsel constituted notice to Father himself. *Mara M. v. Ariz. Dep't of Econ. Sec.*, 201 Ariz. 503, 507-08, ¶¶ 24-28, 38 P.3d 41, 45-46 (App. 2002) (in juvenile action, parent need not be personally served; service on counsel is sufficient as long as it is "reasonably calculated . . . to apprise" parent of the proceedings). Moreover, the affidavit of service demonstrates Father was warned that if he failed to appear at a hearing, the court could proceed in his absence to grant the petition for termination. See generally *Monica C. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 89, 95, ¶¶ 28-29, 118 P.3d 37, 43 (App. 2005) (rules do not require that parent receive formal version of Form III, particularly when parent is aware of and takes advantage of the rights set forth in Form III).

¶12 On this record, therefore, the court did not err in finding Father had notice of the hearing and in proceeding to consider the merits of the petition for termination in his absence.

B. Ineffective Assistance of Counsel.

¶13 Father also argues we should reverse the judgment severing his parental rights because his trial counsel was ineffective. He argues his counsel was ineffective by not objecting to the termination hearing proceeding in his absence

or asking for a continuance, not requesting a recess so she could call the jail and inquire into Father's status, not entering a denial on Father's behalf so he could contest the severance, not requesting Form III be sent to Father, not speaking with him before the hearing and not requesting an evidentiary hearing to determine if good cause existed for Father's failure to appear.

¶14 Arizona courts have not "squarely addressed" the question of whether a juvenile court's order may be reversed for ineffective assistance of counsel, and if so, what standard applies to such a contention. See *John M. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 320, 323-24, ¶¶ 11-12, 173 P.3d 1021, 1024-25 (App. 2007). We have held, however, that, "at a minimum," a parent must "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." *Id.* at 325, ¶ 18, 173 P.3d at 1026 (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

¶15 As in *John M.*, Father's claim of ineffective assistance is "readily resolved by [his] failure to show any prejudice resulting from his counsel's performance." *Id.* at 325, ¶ 18, 173 P.3d at 1026 (citing *State v. Atwood*, 171 Ariz. 576, 600, 832 P.2d 593, 617 (1992) (in reviewing alleged

ineffectiveness of counsel in criminal case, court need not reach issue of counsel's performance when there is a lack of prejudice)). On appeal, Father advances no defense on the merits to Mother's petition for termination. He points to no evidence he would have presented but for his counsel's alleged ineffective assistance, nor does he even dispute the testimony by Mother on which the court ordered termination. In short, there is no indication in the record before us that, but for counsel's asserted errors, the result of the termination hearing would have been different.

C. Motion to Set Aside.

¶16 Father finally argues the superior court erred in denying his motion to set aside without holding an evidentiary hearing to determine whether there was good cause for his failure to appear at the June 8 hearing. When a parent seeks to vacate a judgment entered after termination proceedings conducted in his absence, the superior court should consider whether the parent has demonstrated "good cause." *Christy A.*, 217 Ariz. at 304, ¶ 14, 173 P.3d at 468. In order to show good cause, the parent must demonstrate "that (1) mistake, inadvertence, surprise or excusable neglect exists and (2) a meritorious defense to the claim[] exists." *Id.* at ¶ 16, 173 P.3d at 468.

¶17 Although Mother has not challenged our jurisdiction to decide the merits of the superior court's order denying Father's motion to set aside, we have an independent duty to consider our jurisdiction. *Sorensen v. Farmers Ins. Co. of Ariz.*, 191 Ariz. 464, 465, 957 P.2d 1007, 1008 (App. 1997). We conclude the superior court lacked jurisdiction to decide Father's motion to set aside. Although Father filed the motion one day before he filed his notice of appeal on June 23, the court ruled on the motion on July 6, while the appeal from the judgment was pending. With the filing of the notice of appeal, the superior court was deprived of jurisdiction to rule on the motion. See *Matter of Condry's Estate*, 117 Ariz. 566, 568, 574 P.2d 54, 56 (App. 1977) (once an appeal is perfected, superior court no longer has jurisdiction to consider a motion to set aside the judgment); *Davis v. Kleindienst*, 64 Ariz. 67, 69, 165 P.2d 995, 996 (1946) (appellant perfects appeal "merely by filing his notice of appeal"). When the superior court lacks jurisdiction to issue an order, this court has no jurisdiction over an appeal from that order other than to dismiss it. *McHazlett v. Otis Eng'g Corp.*, 133 Ariz. 530, 533, 652 P.2d 1377, 1380 (1982).

¶18 Because the superior court lacked jurisdiction to consider the motion to set aside, we vacate and remand the order denying the motion.

CONCLUSION

¶19 For the foregoing reasons, we affirm the superior court's judgment terminating Father's parental rights to A.H. but vacate the order denying his motion to set aside and remand for further proceedings consistent with this decision.³

/s/

DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/

PATRICIA A. OROZCO, Judge

/s/

LAWRENCE F. WINTHROP, Judge

³ We amend the caption in this appeal to refer to the parties solely by their initials.