IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

ROYCE C.,
Appellant,

v.

DEPARTMENT OF CHILD SAFETY AND L.C.,
Appellees.

No. 2 CA-JV 2021-0005
Filed September 2, 2021

Appeal from the Superior Court in Pima County
No. JD20190519
The Honorable Laurie B. San Angelo, Judge

REMANDED

COUNSEL

Joel Feinman, Pima County Public Defender
By David J. Euchner, Assistant Public Defender, Tucson
Counsel for Appellant

Mark Brnovich, Arizona Attorney General
By Autumn Spritzer and Dawn R. Williams, Assistant Attorneys General, Tucson
Counsel for Appellee Department of Child Safety

OPINION

Judge Eckerstrom authored the opinion of the Court, in which Presiding Judge Espinosa and Vice Chief Judge Staring concurred.

E C K E R S T R O M, Judge:

¶1 Appellant Royce C. appeals from the juvenile court's order denying his motion under Rule 46, Ariz. R. P. Juv. Ct., and Rule 60, Ariz. R. Civ. P., seeking to set aside the court's order granting the Department of Child Safety's motion for termination of his parental rights to his daughter, L.C., born in August 2019. He argues the court abused its discretion in terminating his rights "based on missing a single hearing." He contends he "offered a meritorious defense" in his motion to set aside, and asserts he received ineffective assistance of counsel regarding the filing of that motion. He also contends A.R.S. § 8-537(B) and Rule 64(C), Ariz. R. P. Juv. Ct., "are facially unconstitutional." For the reasons that follow, we remand this matter to the juvenile court.

¶2 The Department of Child Safety (DCS) took L.C. into protective custody when she tested positive for heroin at birth. Over the following year, Royce partially complied with his DCS case plan. He "acknowledge[d] that he needs individual therapy," but did not demonstrate he had benefitted from therapy, as exhibited by his "engaging in the intentional destruction of others' property on July 12, 2020." Although he "expresse[d] his desire to reunify with" L.C., he "also reported that he [wa]s too busy for agency supervised visits." Additionally, he was neither forthright nor cooperative with DCS in reporting changes to his employment or contact with law enforcement. He tested positive for opiates in May 2020.

¶3 In September 2020, the juvenile court found that the child's mother was not complying with the case plan and that Royce was only in partial compliance. Accordingly, it modified the case plan from reunification to severance of the parents' rights and adoption. As the court had directed, DCS filed a motion for termination of the parents' rights in October 2020. It alleged Royce had neglected L.C. by being unable or unwilling to provide her with adequate care and by failing to protect her from her mother's substance abuse. *See* A.R.S. § 8-533(B)(2).

¶4 The juvenile court set an initial termination hearing, *see* Ariz. R. P. Juv. Ct. 65, for October 30. Royce was informed of that date during the dependency review hearing he attended on September 16. Nonetheless, he failed to appear at the initial termination hearing. The family's case manager testified that Royce had not protected L.C. from the mother's substance abuse, that he had not participated in individual therapy until the case plan changed to severance, and that even thereafter he had not met any of his treatment goals in therapy. She also testified that Royce was not currently able to provide L.C. with adequate care, food, or shelter. She stated that although Royce had told her he was employed, his employment could not be verified. Likewise, she testified that although Royce had attended some of his required anger management classes, "his consistent attendance ha[d] not been verified." The court determined that Royce's failure to appear constituted an admission to the allegations in the motion to terminate and found that severance was in L.C.'s best interest. The court filed its ruling on November 6.

¶5 That same day, Royce's counsel filed a "Motion for Reconsideration," citing Rules 65(C) and 46(E), Ariz. R. P. Juv. Ct., and *Trisha A. v. Dep't of Child Safety*, 247 Ariz. 84 (2019). She asserted that Royce had informed her "he had started a new job, has been doing all his services, and that he did not properly calendar the initial severance hearing." Counsel therefore asked the juvenile court to "find good cause and a meritorious defense, and set aside the termination." The court ordered Royce to file a new motion by November 20, noting that the original motion did not "conform to the requirements of Rule 60(b)-(d), Ariz. R. Civ. P.," as required by Rule 46(E). Counsel filed a new motion, but merely provided the same account of Royce's absence. The court denied the motion, concluding that Royce had failed to show good cause for failing to appear or to demonstrate a meritorious defense. This appeal followed.

¶6 Royce first argues the juvenile court erred because it "required an affidavit to support the allegation of a meritorious defense" and "resolved the facts in favor of DCS without holding a trial." In its ruling, the court stated, "There is no affidavit from the father or verification from him accompanying the Amended Motion." But the court elaborated that Royce had failed to show he had started a job, failed to show he "had to work on that day," and failed to explain "how he realized he had missed the hearing." It further stated that Royce had not "provide[d] case law or evidence that shows that mis-calendaring a hearing or starting a new job rise to the level of mistake or excusable neglect to justify relief under Rule 60(b)." Thus, the court did not deny the motion solely on the grounds that

it lacked an affidavit.[1] Rather, it concluded that Royce's reasons for failing to appear were simply insufficient to meet the Rule 60 standard. Royce has not explained how that conclusion was incorrect.

¶7 Likewise, we reject Royce's claim that the juvenile court erred in concluding he had not established a meritorious defense. As our supreme court has explained, "A parent must show a meritorious defense under Rule 46(E) because the motion to set aside seeks to overcome the presumptively valid judgment's finality." *Trisha A.*, 247 Ariz. 84, ¶ 22. This is so because "a child who has been abused or neglected requires permanency and stability, and a severance judgment should not be disturbed without a legitimate basis." *Id.* A parent need "demonstrate no more than a substantial, facially meritorious defense to the proven severance ground," *id.* ¶ 29, but "[a] meritorious defense must be established by facts and cannot be established through conclusions, assumptions or affidavits based on other than personal knowledge," *Christy A. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 299, ¶ 16 (App. 2007) (quoting *Richas v. Superior Court*, 133 Ariz. 512, 517 (1982)). On the record before us, we cannot say the court abused its discretion in concluding that the bare assertions in Royce's motion failed to meet that standard. *See Trisha A.*, 247 Ariz. 84, ¶ 32 (juvenile court did not abuse its discretion in ruling on Rule 46 motion).

¶8 Royce further contends he received ineffective assistance of trial counsel based on counsel's failure to file a "proper motion to set aside the judgment." As noted above, after counsel filed an initial motion for reconsideration, the juvenile court ordered her to file a new motion that "conforms to the requirements of Rule 60(b)-(d), Ariz. R. Civ. P." Counsel failed to do so, filing a new motion that only added citations to Rule 46(E), Ariz. R. P. Juv. Ct., and Rule 60, Ariz. R. Civ. P., and a sentence stating, "Given the fundamental rights at stake, and the serious nature of the proceedings the father is requesting that the Court find that his absence was the product of a mistake or excusable neglect and not a waiver of his right to a trial."

¶9 On appeal, Royce makes several claims with more detail regarding the allegations in the motion to terminate his parental rights, including that he had participated in anger management programming and individual counseling, that he was employed, and that L.C.'s placement

[1]Because the juvenile court did not rely solely on the lack of an affidavit, we do not resolve Royce's claim on that basis.

had "ceased cooperating with Royce on visitation." He also asserts that "[h]is trial attorney did not request that he execute an affidavit . . . explaining why he missed court or what defense . . . he could make at trial."

¶10 Section 8-221(B), A.R.S., provides, in relevant part, that "[i]f a . . . parent . . . is found to be indigent and entitled to counsel, the juvenile court shall appoint an attorney to represent the person or persons" unless counsel is properly waived. Our courts have determined that, in the context of severance proceedings, this statute "implements a due process right." *Daniel Y. v. Ariz. Dep't of Econ. Sec.*, 206 Ariz. 257, ¶ 15 (App. 2003); *see also Brenda D. v. Dep't of Child Safety*, 243 Ariz. 437, ¶ 30 (2018); *Christy A.*, 217 Ariz. 299, ¶ 28.

¶11 Nearly fourteen years ago this court observed that, although the due process standard for appointment of counsel had been determined, "[f]ew Arizona cases have considered[,] . . . and none has squarely addressed" whether "ineffective assistance of counsel justif[ies] reversal of a juvenile court's order terminating parental rights and, if so, under what circumstances." *John M. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 320, ¶¶ 11-12 (App. 2007). Since that time, we have acknowledged the possibility that, given the parent's right to representation, ineffective assistance of counsel might give rise to reversal of an order terminating the parent's rights. *See, e.g.*, *Bob H. v. Ariz. Dep't of Econ. Sec.*, 225 Ariz. 279, ¶ 10 (App. 2010). But we have observed that if such a claim were to exist, the parent challenging a termination order would only be entitled to relief if the parent could satisfy, at minimum, the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), for claims of ineffective assistance of counsel in criminal proceedings.[2] *Bob H.*, 225 Ariz. 279, ¶ 10. On occasion, our courts have stayed an appeal and remanded the matter to the juvenile court in order to allow that court to conduct further proceedings, including an evidentiary hearing, on a claim of ineffective assistance of counsel that we could not "adequately evaluate" on appeal. *Tina R. v. Dep't of Child Safety*, No. 2 CA-

[2] This court has reached a similar conclusion in multiple memorandum decisions as well. *See, e.g.*, *Emily B. v. Dep't of Child Safety*, No. 1 CA-JV 19-0150 (Ariz. App. June 2, 2020) (mem. decision); *Theresia F. v. Dep't of Child Safety*, No. 2 CA-JV 2019-0088 (Ariz. App. Nov. 21, 2019) (mem. decision); *Shawn N. v. Dep't of Child Safety*, No. 1 CA-JV 15-0361 (Ariz. App. July 14, 2016) (mem. decision); *Jaime O. v. Ariz. Dep't of Econ. Sec.*, No. 2 CA-JV 2012-0023 (Ariz. App. Sept. 14, 2012) (mem. decision).

JV 2014-0164, ¶ 7 (Ariz. App. Aug. 3, 2016) (mem. decision); *see also In re Maricopa Cnty. Juv. Action No. JS-4942*, 142 Ariz. 240, 242 (App. 1984).

¶12 This scattered approach, without a well-defined standard or analytical framework, fails to provide guidance to the courts of this state or to litigants and their counsel, inviting inconsistencies in the resolution of these claims and unpredictability. Indeed, both parties at oral argument urged this court to set forth an appropriate test. The time has come to squarely address these questions.

¶13 In 1981, our supreme court reversed an order terminating parental rights, based in part on counsel's ineffectiveness. *In re Gila Cnty. Juv. Action No. J-3824*, 130 Ariz. 530, 536 (1981), *overruled on other grounds by In re Pima Cnty. Juv. Action No. S-919*, 132 Ariz. 377 (1982), and *superseded by statute on other grounds as recognized in Kelly R. v. Ariz. Dep't of Econ. Sec.*, 213 Ariz. 17, ¶¶ 21-22 (App. 2006). The court concluded the mother had "received ineffectual assistance of counsel in the Superior Court," *id.* at 533, and further determined that despite a legislative mandate to do so, the court had not appointed her a guardian ad litem, *id.* at 531-32. Further, while discussing the then-existing standard of proof required in termination proceedings, our supreme court, citing the United States Supreme Court's decision in *Lassiter v. Dep't of Social Services*, 452 U.S. 18 (1981), explained, "In deciding what due process requires in the context of a particular proceeding, we must evaluate the private interests at stake, the state's interests, and the risk that the procedures used will lead to erroneous decisions." *Gila Cnty. No. J-3824*, 130 Ariz. at 533. This same standard had led the Court in *Lassiter* to determine that when the state seeks to terminate parental rights, due process could require parents to be represented by counsel, on a case-by-case basis. 452 U.S. at 31-32.

¶14 The Court observed in *Lassiter* that the right to appointed counsel had been presumed to apply only when a person could be deprived of physical liberty. *Id.* at 25-27. It therefore measured "all the other elements in the due process decision" against this presumption. *Id.* at 27. Relying on *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Court set forth those elements: "the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions." *Lassiter*, 452 U.S. at 27. The Court determined that, in proceedings for termination of parental rights, "the parent's interest is an extremely important one," the state has somewhat mixed interests, and "the complexity of the proceeding and the incapacity of the uncounseled parent could be, but would not always be, great enough to make the risk of an erroneous deprivation of the parent's rights insupportably high." *Id.* at 31. Thus, when a "parent's

interests were at their strongest, the State's interests were at their weakest, and the risks of error were at their peak" in a given case, counsel could be required. *Id.*

¶15 In keeping with the analysis set forth in *Lassiter* and *J-3824*, we conclude the appropriate test for determining whether a termination ruling may be reversed based on counsel's conduct must focus on whether the parent's due process rights have been violated. *Cf. State v. Melendez*, 172 Ariz. 68, 71, 73 (1992) (reversing conviction when admission of testimony was "fundamentally unfair" and violated due process rights).

¶16 To comply with constitutional due process requirements, "[a]ll that is necessary is that the procedures be tailored, in light of the decision to be made, to 'the capacities and circumstances of those who are to be heard,' to insure that they are given a meaningful opportunity to present their case." *Mathews*, 424 U.S. at 349 (quoting *Goldberg v. Kelly*, 397 U.S. 254, 268-269 (1970)). In view of counsel's role in helping present the parent's case, counsel's conduct might result in the denial of a parent's due process right to a meaningful opportunity to be heard.

¶17 This is not to say, however, that a parent is entitled to the same protections as a defendant facing the loss of physical liberty. *See Lassiter*, 452 U.S. at 25-27; *see also John M.*, 217 Ariz. 320, ¶ 15. Not only does a criminal defendant have due process rights to a "fundamentally fair trial" under the Fourteenth Amendment, *R.S. v. Thompson*, 251 Ariz. 111, ¶ 13 (2021), but the Sixth Amendment to the United States Constitution gives the defendant the right to counsel. And, our courts have specifically determined that "a parent's right to counsel in severance proceedings is not co-extensive with a criminal defendant's right to counsel under the Sixth Amendment." *Daniel Y.*, 206 Ariz. 257, ¶ 14 (citing *Denise H. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 257, ¶¶ 5-7 (App. 1998) (parent in severance proceeding not entitled to review pursuant to *Anders v. California*, 386 U.S. 738 (1967), because right to counsel arises from statute and Due Process Clause, not Sixth Amendment)).

¶18 This necessarily distinguishes the nature and extent of a parent's claim of ineffective assistance of counsel. A criminal defendant's claim of ineffective assistance under *Strickland* is closely tied to the defendant's Sixth Amendment right to counsel. *See State v. Mata*, 185 Ariz. 319, 336 (1996). Indeed, in discussing the first part of the test for ineffective assistance, the *Strickland* Court explained that a defendant must show "that counsel made errors so serious that counsel was not functioning as the

'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 687.

¶19 Thus, although we need not "disregard the Supreme Court's analysis in *Strickland*," *John M.*, 217 Ariz. 320, ¶ 14, we must be mindful that the Sixth Amendment right to counsel is not implicated in severance proceedings. The *Strickland* standard as applied in the criminal context is therefore not strictly appropriate. In the absence of a Sixth Amendment guarantee, which focuses on whether counsel was ineffective in the sense that counsel's conduct was deficient, a due process guarantee focuses on the "fundamental fairness of the proceeding," *id.* (quoting *Strickland*, 466 U.S. at 696), and whether counsel could "have made a determinative difference," *Lassiter*, 452 U.S. at 33.

¶20 Thus, we do not look first to whether counsel's conduct fell below professional norms or evaluate counsel's "ineffectiveness" in terms of fulfilling the right to counsel. Rather, we look first to the proceeding itself and, employing the long-standing rules of due process, we consider whether counsel's conduct was such that it undermined the fundamental fairness of the proceeding and cast doubt on the proceeding's "protection of the individual against arbitrary action of government." *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)).

¶21 "'[U]nlike some legal rules,' . . . due process 'is not a technical conception with a fixed content unrelated to time, place and circumstances.'" *Lassiter*, 452 U.S. at 24 (first alteration in *Lassiter*) (quoting *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 895 (1961)). Rather, courts "must discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake." *Id.* at 25. "Generally speaking, the denial of due process is a denial of 'fundamental fairness, shocking to the universal sense of justice.'" *Oshrin v. Coulter*, 142 Ariz. 109, 111 (1984) (quoting *Crouch v. Justice of Peace Court*, 7 Ariz. App. 460, 466 (1968)); *see also Rochin v. California*, 342 U.S. 165, 172 (1952) (due process violation occurs when means used to obtain evidence and conviction "shock[] the conscience"). "To determine whether a parent received a fundamentally fair proceeding, we consider and balance the parent's affected interest, the risk of erroneous deprivation of the parent's interest, and the state's interest." *Trisha A.*, 247 Ariz. 84, ¶ 25; *see also Lassiter*, 452 U.S. at 31-32.

¶22 "Parents possess a fundamental liberty interest in the care, custody, and management of their children." *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 24 (2005) (citing *Santosky v. Kramer*, 455 U.S. 745, 753 (1982)); *see also Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, ¶ 11 (2000). As the Court acknowledged in *Lassiter*, the state has varying interests in these cases. 452 U.S. at 27-28. Foremost among them is the state's interest in the children's well-being and best interest. *See Dep't of Child Safety v. Beene*, 235 Ariz. 300, ¶ 13 (App. 2014); *see also Lassiter*, 452 U.S. at 27. "The child's interests in stability, safety, security, and a normal family home are also at stake, as well as the 'prompt finality that protects' those interests." *John M.*, 217 Ariz. 320, ¶ 15 (citation omitted) (quoting *In re Pima Cnty. Juv. Action No. S–114487*, 179 Ariz. 86, 97, 101 (1994)). But the state also "shares the parent's interest in an accurate and just decision" and has a pecuniary interest in judicial efficiency. *Lassiter*, 452 U.S. at 27-28.

¶23 The risk of erroneously depriving parents of their parental rights is non-trivial in severance proceedings. Parents usually face state agencies in these proceedings, agencies with substantially greater resources and experienced attorneys to represent them. Likewise, "[e]xpert medical and psychiatric testimony, which few parents are equipped to understand and fewer still to confute, is sometimes presented." *Id.* at 30. In this context, effective counsel substantially reduces the risk of an erroneous judgment. *See Mathews*, 424 U.S. at 335 (court should consider "probable value, if any, of additional or substitute procedural safeguards").

¶24 As this overview suggests, the due process test will vary across cases. We therefore conclude, as did the Court in *Lassiter*, that the best approach is a flexible one. 452 U.S. at 31-32. However, although the nature and extent of counsel's deficiency may be unique to each case, the impact on the proceedings must be sufficiently profound to create fundamental unfairness. Indeed, the bar for establishing a successful claim must logically be higher than the standard our courts have set forth in criminal cases. *See State v. Nunez-Diaz*, 247 Ariz. 1, ¶ 10 (2019) ("To demonstrate that counsel's assistance was so deficient as to require reversal of a conviction, a defendant must show both that 'counsel's representation fell below an objective standard of reasonableness' and 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'"(quoting *Strickland*, 466 U.S. at 688 & 694)).

¶25 As the Supreme Court has observed, the entitlement to counsel, and the need for counsel, have a more established basis in the criminal law. *See Lassiter*, 452 U.S. at 25-27. As stated above, unlike parents

facing severance proceedings, criminal defendants have a constitutionally explicit Sixth Amendment right to counsel. Furthermore, criminal defendants face the potential loss of their liberty: an interest the Court has deemed to be more weighty than the potential loss of parental rights. *See id.* For this reason, the level of evidentiary certainty required in severance cases—while far from relaxed—is markedly lower than in criminal proceedings. *See Kent K.*, 210 Ariz. 279, ¶¶ 32, 41 (severance ground need be proven by clear and convincing evidence rather than proof beyond reasonable doubt, and child's best interest need be proven only by preponderance). This further suggests that the comparative effectiveness of counsel will usually play a more modest role in the outcome. We thus conclude that, to establish that counsel's deficiencies violated due process, the attorney's conduct must be such that it denies the parent fundamental fairness or shocks the conscience. *See Oshrin*, 142 Ariz. at 111; *see also Rochin*, 342 U.S. at 172.

¶26 Therefore, relief for ineffective assistance of counsel in a severance case should be applied as an extraordinary remedy, unavailable in all but the most egregious cases. In most cases, the evidence in support of the alleged grounds for termination will be overwhelming, such that the state's interest in protecting the child will vastly outweigh the competing interests of the parents. In some cases, however, counsel's acts or omissions may be such that the risk of an erroneous judgment will be very high, shocking the conscience and outweighing the state's interest in permanency and the child's alleged best interest. Ultimately, the juvenile court must weigh these interests in a fact-specific way and determine whether counsel's conduct undermined the "fundamental fairness" of the proceeding and whether counsel having done or failed to do the thing alleged "could . . . have made a determinative difference." *Lassiter*, 452 U.S. at 24-25, 33.

¶27 This test will also often be a fact-intensive one. In some cases, the record will be sufficiently developed and the juvenile court will have made all necessary factual findings for this court to reach a legal conclusion as to whether the test has been met. In others, however, when a claim is raised on appeal, questions will remain that must be "answered in the first instance by the [juvenile] court, subject, of course, to appellate review," *id.* at 32, as this court is not able to receive evidence or make factual findings, *Rodriquez v. Williams*, 104 Ariz. 280, 282 (1969); *see also S. Pac. Transp. Co. v. Lueck*, 111 Ariz. 560, 576 (1975).

¶28 Unfortunately, the current rules of procedure in the juvenile court do not provide a mechanism for a parent to raise a claim regarding

counsel's conduct in the juvenile court. And, as noted, this court is precluded from receiving and considering new evidence, that is, evidence that is not part of the existing appellate record. This court does, however, "have inherent power to make any orders necessary to carry out" its appellate function. *Rodriquez*, 104 Ariz. at 282. Pursuant to that power, this court may remand matters to the superior court in order to reconstruct missing portions of a record, *see id.* at 282-83, or allow an appellant to move for a new trial based on newly discovered evidence, *see State v. Noriega*, 5 Ariz. App. 572, 574 (1967).

¶29 We conclude that, until a procedural rule is developed by our supreme court, a similar use of our inherent power is appropriate in this context. When a parent raises a claim regarding counsel's conduct in an opening brief on appeal and relies on facts not apparent in the record, this court "cannot accept the unsupported statement of plaintiff or his counsel as to the facts." *Regan v. O'Steen*, 47 Ariz. 87, 90-91 (1936) (rejecting appellant's claims as to how much money court clerk had obtained in regard to garnishment when facts stated only in brief); *see also State v. Griswold*, 8 Ariz. App. 361, 363 (1968) ("statements made by counsel in their briefs as to what occurred, or what might have occurred had the situation been different, will not be considered"). Thus, when raising a claim regarding counsel's conduct in an opening brief, absent clear evidence in the record supporting the claim as a matter of law, a party should simultaneously file in this court a motion to suspend the appeal and remand the matter to, and revest jurisdiction in, the juvenile court, "supported by an affidavit, declaration or other satisfactory evidence." Ariz. R. Civ. App. P. 6(a)(3); Ariz. R. P. Juv. Ct. 103(G). This court will consider those purported facts only to the extent necessary to determine whether fundamental fairness requires that the appeal be suspended and the case remanded to the juvenile court so that it may permit the parties to develop an additional record and determine if the test set forth above has been met. *Cf. Rodriquez*, 104 Ariz. at 283 (verified statement should be filed with motion seeking to suspend appeal for reconstruction of record). This procedure will protect the due process rights of parents while also ensuring the important interests of children in timely permanency.[3] *See Rita J. v. Ariz.*

[3] In order to further protect these important interests, and acknowledging the tension between those interests and the state's interest in expediting juvenile appeals to attain permanency for children, we suggest the Arizona Supreme Court consider the addition of rules to provide a uniform procedure for raising claims of ineffective assistance of counsel in juvenile proceedings.

Dep't of Econ. Sec., 196 Ariz. 512, ¶ 5 (App. 2000) (A.R.S. § 8-862 adopted to enable timely permanency proceedings); *see also Lisa K. v. Ariz. Dep't of Econ. Sec.*, 230 Ariz. 173, n.5 (App. 2012) (noting that "timely permanency proceedings and affording parents the full due process to which they are entitled" are not incompatible goals).

¶30 Applying these standards in this case, we conclude it is appropriate to remand this matter to the juvenile court for further proceedings.[4] As detailed above, the juvenile court directed counsel to amend her motion for reconsideration to satisfy the requirements of Rule 60, Ariz. R. Civ. P., and she failed to do so. Counsel simply reasserted Royce's reasons for failing to attend the hearing, without explaining how they amounted to mistake or excusable neglect, and without asserting facts supporting a finding of good cause and meritorious defense. It is possible no additional facts existed to support the motion, but counsel did not so state. If, however, additional facts did exist, as Royce has asserted on appeal,[5] and it is clear that counsel's failure to present them might have made a determinative difference in the ruling on the motion, fundamental fairness would require that he be allowed to present a motion containing such facts for consideration.

¶31 As noted above, to obtain relief on a motion pursuant to Rule 46(E), Ariz. R. P. Juv. Ct., a parent must satisfy the requirements of Rule 60(b) through (d), Ariz. R. Civ. P., establishing the circumstances warranting relief based on one of the enumerated grounds. "Although Civil Rule 60(b) does not expressly include a meritorious defense requirement, we have interpreted the rule (and its antecedents) since

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[4]This court does not issue interim opinions that do not terminate appeals. We therefore do not suspend this appeal. However, upon eventual completion of the juvenile court proceedings, any party wishing to challenge the resulting order may do so by filing a new, timely notice of appeal.

[5]We consider appellate counsel's statements of fact as to the claim of ineffective assistance in this matter only to determine if fundamental fairness requires us to remand this matter to the juvenile court for further proceedings. We do so here even though Royce did not file a motion and supporting materials seeking to stay this appeal and revest jurisdiction so that he could present this claim to the juvenile court in view of the current lack of procedural rules and counsel's efforts to ascertain the most appropriate way to proceed.

territorial times to require a party seeking to set aside a judgment to also prove a meritorious defense." *Trisha A.*, 247 Ariz. 84, ¶ 18. And, we have "held that a parent who fails to appear at a final severance hearing must show 'good cause' for the nonappearance." *Id.* ¶ 19.

¶32 To show good cause, a parent "must show that . . . mistake, inadvertence, surprise or excusable neglect exists." *Christy A.*, 217 Ariz. 299, ¶ 16. "Excusable neglect exists if the neglect or inadvertence 'is such as might be the act of a reasonably prudent person in the same circumstances.'" *Id.* (quoting *Ulibarri v. Gerstenberger*, 178 Ariz. 151, 163 (App. 1993)). "[P]roving a meritorious defense requires no more than showing a 'substantial defense to the action.'" *Trisha A.*, 247 Ariz. 84, ¶ 26 (quoting *Richas*, 133 Ariz. at 517).

¶33 DCS contends that "none of the alleged facts that Royce has alleged concerning his employment or participation in services would have cured his neglect of [L.C.] or altered the juvenile court's best-interests determination." But the showing required in the Rule 46 context, as in a Rule 60 motion, "is not intended to be a substitute for a trial of the facts. It is enough if there is shown from all the material facts set forth . . . that there is a substantial defense to the action." *Richas*, 133 Ariz. at 517 (quoting *Union Oil Co. of Cal. v. Hudson Oil Co.*, 131 Ariz. 285, 289 (1982)).

¶34 Importantly, this case demonstrates the difficulties regarding the factual record discussed above. On the record before us, we are skeptical that the evidence supports a claim of good cause for failing to appear at the hearing. *See Christy A.*, 217 Ariz. 299, ¶ 16. But we cannot know with certainty whether Royce could establish good cause or a meritorious defense. When ordered to do so, Royce's trial counsel, allegedly due to ineffectiveness, failed to present the juvenile court with any additional evidence. Further, appellate counsel had no available means by which to adequately develop the claim by alleging more facts and presenting additional evidence, which would then become part of the record on appeal. In future cases, evidence on these points will be submitted to this court using the procedure set forth above, but in this case, to determine if fundamental fairness requires that Royce's Rule 46 motion be granted, a remand is necessary. Our remand is not itself a finding of unfairness; rather, it is solely to provide Royce the opportunity for a hearing at which to present evidence in support of his claim that counsel was ineffective regarding the motion. We leave it to the juvenile court to evaluate the merits of Royce's claims in the first instance.

¶35 Finally, Royce also argues that A.R.S. § 8-537(B) and Rule 64(C), Ariz. R. P. Juv. Ct., "are facially unconstitutional." To the extent this argument challenges the underlying termination order, we lack jurisdiction to consider it because Royce did not appeal from that final order. *See* Ariz. R. P. Juv. Ct. 103(A). As to the post-judgment motion, our disposition of his claim regarding counsel's conduct moots this question insofar as Royce may lose standing to assert such a claim. We therefore decline to address the constitutional question, pending the outcome in the juvenile court.

¶36 For these reasons, we remand the matter to the juvenile court for further proceedings consistent with this decision.