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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

RONALD S., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY and A.S., Appellees.	2 CA-JV 2013-0074 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. J196542

Honorable Geoffrey Ferlan, Judge Pro Tempore

AFFIRMED

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H O W A R D, Chief Judge.

¶1 Ronald S. appeals from the juvenile court's June 2013 order adjudicating his daughter A.S. a dependent child. For the following reasons, we affirm the order.

Background

¶2 In March 2013, when A.S. was thirteen-months old, Ronald was living with A.S.'s mother, Sharla H., and her three older daughters. Child Protective Services (CPS), a division of the Arizona Department of Economic Security (ADES), investigated a report that Sharla had struck her oldest child, a fifteen-year-old daughter, with her hands and a belt, causing bruises that were noticed at the child's school. Sharla admitted having had an "altercation" with her oldest daughter, but she initially denied that she had struck her with a belt or caused her injuries. She told a CPS investigator that Ronald and her other children had been home during the altercation. According to the investigator, Ronald had been aware of the escalating conflict and had done nothing "to intervene or protect the children," but had taken A.S. to another part of the house. Sharla also admitted to using alcohol in combination with Ambien, a prescription medication that had not been prescribed for her.

¶3 ADES filed a dependency petition alleging A.S. and her half-sisters were dependent as to Sharla and their respective fathers, and Sharla's oldest child was removed from the home. ADES alleged Ronald lacked an order granting him custody of A.S., had failed to protect her from exposure to Sharla's physical abuse, and had failed to protect her from Sharla's substance abuse. At a facilitated settlement conference held on May 6, 2013, which Ronald was permitted to attend telephonically to accommodate his work schedule, Sharla pleaded no contest to the allegations of dependency, and allegations

against Ronald were scheduled to be tried in a contested dependency hearing on June 11, 12, and 19.

¶4 On June 3, Ronald, through counsel, filed a motion asking "to appear telephonically for the contested dependency adjudication on June 11 and June 12, 2013" because he would "be working out of state from June 8 through June 15, 2013." When the hearing commenced on June 11, the juvenile court had not yet ruled on the motion.[1] According to Ronald's counsel, Ronald had notified him on June 3 "that he had to work out of town and thought he was going to be back in time," but that it "[t]urn[ed] out he wasn't." The court first stated it was inclined to grant the request, finding there appeared to be "good cause, based upon the motion." But when the court telephoned Ronald, it learned he was not absent from the state on business, but was in San Diego with his family, on a vacation planned before the dependency adjudication hearing had been scheduled. The court then denied Ronald's motion for telephonic appearance and found his absence from the hearing was voluntary, without good cause shown. The court further found Ronald had been advised and had acknowledged "the consequences of failing to attend court hearings" and specifically had been admonished "that his failure to appear could result in the court deeming the allegations in the dependency petition to be admitted" and "that the dependency adjudication could be entered against him in his absence."

[1]It is unclear whether responses to Ronald's motion would have been due on June 10 or June 17, because the affidavit of service does not specify whether the motion was mailed or delivered to opposing counsel. *See* Ariz. R. P. Juv. Ct. 43, 46(C); Ariz. R. Civ. P. 6(a).

¶5 The juvenile court then proceeded with the hearing in Ronald's absence. Ronald was permitted to listen to the proceedings telephonically, and his attorney participated in the hearing, challenging the admission of certain evidence and arguing against an adjudication of dependency. At the close of the adjudication hearing, the court found A.S. dependent as to Ronald, based on evidence admitted at the hearing and allegations in the dependency petition that were deemed admitted by Ronald's failure to appear.

Discussion

¶6 On appeal, Ronald argues the juvenile court erred in finding he had failed to appear for his contested dependency adjudication hearing "when he was, in fact, present by telephone." He contends he "had never received notice that failure to personally appear, as opposed to appearing by telephone" could constitute a waiver of his rights and the court's contrary findings denied him due process. He also maintains there was insufficient evidence to support the court's adjudication of dependency.

¶7 We review an adjudication of dependency for an abuse of discretion, and we will affirm an adjudication order supported by reasonable evidence, as viewed in the light most favorable to sustaining the juvenile court's findings. *Willie G. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 231, ¶ 21, 119 P.3d 1034, 1038 (App. 2005). We review de novo questions of law, including the interpretation of court rules and alleged constitutional violations. *Lisa K. v. Ariz. Dep't of Econ. Sec.*, 230 Ariz. 173, ¶ 9, 281 P.3d 1041, 1045 (App. 2012); *Adrian E. v. Ariz. Dep't of Econ. Sec.*, 215 Ariz. 96, ¶ 9, 158 P.3d 225, 228 (App. 2007).

Waiver of Rights Pursuant to Rule 55(d)(2), Ariz. R. P. Juv. Ct.

¶8 Rule 55(d)(2), Ariz. R. P. Juv. Ct., provides as follows:

> If the parent . . . fails to appear at the dependency adjudication hearing without good cause shown and the court finds the parent . . . had notice of the hearing, was properly served pursuant to Rule 48 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 dependency petition, the court may adjudicate the child dependent based upon the record and evidence presented if the petitioner has proven grounds upon which to adjudicate the child dependent.

Rule 48(c) and (d), Ariz. R. P. Juv. Ct., provides, in turn, that the petitioner serve the parent at the preliminary protective hearing with the petition and a notice of hearing that includes the required admonitions. Ronald does not dispute that ADES served him with a notice of hearing that specifically stated, in bold-faced type, these consequences for his failure to "personally appear" at listed proceedings, including the dependency adjudication hearing. The record also includes his signed acknowledgment of receipt of similar written warnings issued by the juvenile court, and the order issued after the settlement conference confirmed the dates set for his contested dependency hearing and further admonished him of these consequences if he failed "to attend" the hearing. Although Ronald argues that neither the juvenile court rules nor the court's written warning required his "personal[]" appearance or "physical presen[ce]" at the hearing, the required notice provided by ADES correctly stated the law under this court's decision in *Willie G. See Willie G.*, 211 Ariz. 231, ¶ 14, 119 P.3d at 1037 (under Rule 42, Ariz. R. P.

Juv. Ct., juvenile court has "authority, but not an obligation, to allow the parents to appear [at a dependency adjudication] by telephone rather than in person").[2]

¶9 Ronald nonetheless contends *Willie G.* "was wrongly decided as it misapplied Rule 42 . . . to appearing in court." He argues Rule 42 "deals explicitly and exclusively" with the court's discretion to permit "'telephonic testimony or argument or video conferencing,' [and] it has nothing to do with whether or not a party 'appears' without 'physically being there.'" First, we conclude this distinction has little relevance because, as ADES points out, Ronald was on notice that ADES intended to call him as a witness at the hearing; even if Rule 42 only required leave of court to provide "telephonic testimony," Ronald had not obtained that permission.

¶10 Moreover, when interpreting court rules, we give effect to their plain language unless doing so would create an absurd result. *Xavier R. v. Joseph R.*, 230 Ariz. 96, ¶ 3, 280 P.3d 640, 642 (App. 2012). *Willie G.* would support a construction of Rule 42's mention of "telephonic testimony or argument or video conferencing" as illustrative of the court's authority, rather than as a limitation of it. 211 Ariz. 231, ¶¶ 14-17, 119 P.3d at 1037-38. But if Rule 42 were limited in application, as Ronald argues, the rule of *expressio unius est exclusio alterius*[3] would counsel a limitation on what the court "may

[2]Rule 42 provides: "Upon the court's own motion or motion by a party, the court may permit telephonic testimony or argument or video conferencing in any dependency, guardianship or termination of parental rights hearings. The motion shall be in writing pursuant to Rule 46, unless otherwise authorized by the court."

[3]"The principle of [e]xpressio unius est exclusio alterius as used in statutory and administrative rule construction means that the expression of one or more items of a class and the exclusion of other items of the same class implies the legislative intent to exclude

permit"; such a reading would preclude the court from ever granting leave "to appear" telephonically. Certainly Ronald's alternative construction of these rules is untenable; he seems to argue a parent who, like him, has been warned of the consequences of failing to "appear" or "attend" court hearings, may avoid those consequences by simply phoning in an appearance, without leave of the court. We decline to revisit *Willie G.* on the basis of Ronald's argument.

¶11 We are also unpersuaded by Ronald's assertion that he had "appeared" at the hearing, despite the juvenile court's denial of leave to appear telephonically, because he was permitted to remain on the telephone line and listen in. The court's allowance in this regard was consistent with this court's decision in another case in which a parent waived her rights by failing to appear in juvenile court proceedings. *See Christy A. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 299, ¶ 24, 173 P.3d 463, 470 (App. 2007) (parent should be given "opportunity to remain in the courtroom" after finding of waiver of rights in termination proceeding). It did not alter the court's finding that Ronald had failed to appear without good cause.[4]

¶12 As in *Willie G.*, Ronald's waiver of his rights was "an unfortunate but easily foreseeable consequence" of his failure to attend the dependency adjudication

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those items not so included." *Sw. Iron & Steel Indus., Inc. v. State*, 123 Ariz. 78, 79, 597 P.2d 981, 982 (1979).

[4]Ronald argues only that the juvenile court erred because he "'appear[ed]' [in court] without 'physically being there,'"; he does not dispute the court's finding that he had not shown good cause for his physical absence.

without having leave to appear telephonically. 211 Ariz. 231, ¶ 19, 119 P.3d at 1038. He was not denied due process. *Id.* ¶ 18.

Sufficiency of the Evidence

¶13 Ronald maintains the evidence was insufficient to establish, by a preponderance of the evidence, that A.S. was a dependent child. He argues she was "neither abused nor neglected" and there was no evidence that she "was in need of care which was not being provided." Under A.R.S. § 8-201(13)(a)(i), a "[d]ependent child" is defined as one who is "[i]n need of proper and effective parental care and control and who has . . . no parent or guardian willing to exercise or capable of exercising such care and control." A dependent child is also defined as one "whose home is unfit by reason of abuse, neglect, cruelty or depravity by a parent, a guardian or any other person having custody or care of the child." § 8-201(13)(a)(iii). "Neglect" is defined, in relevant part, as "[t]he inability or unwillingness of a parent, guardian or custodian of a child to provide that child with supervision . . . if that inability or unwillingness causes unreasonable risk of harm to the child's health or welfare . . . . " § 8-201(22)(a).

¶14 We agree with ADES and A.S.'s counsel that reasonable evidence in the record supports the adjudication of dependency based on Ronald's failure to provide adequate supervision. Sharla was consuming non-prescribed, prescription medication with alcohol, and her oldest child had reported that Sharla regularly relied on physical punishment as a means of discipline. The court reasonably could have inferred that while Ronald was working, A.S. was left inappropriately supervised in Sharla's care.

CONCLUSION

¶15 For the foregoing reasons, we affirm the juvenile court's adjudication order.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Michael Miller
MICHAEL MILLER, Judge