IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

SHELLY S.,
Appellant,

v.

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

No. 2 CA-JV 2017-0081
Filed August 18, 2017

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f);
Ariz. R. P. Juv. Ct. 103(G).

Appeal from the Superior Court in Pinal County
No. S1100JD201600005
The Honorable DeLana J. Fuller, Judge Pro Tempore

VACATED

COUNSEL

Mark Brnovich, Arizona Attorney General
By Cathleen E. Fuller, Assistant Attorney General, Tucson
Counsel for Appellee Department of Child Safety

The Stavris Law Firm, PLLC, Scottsdale
By Christopher Stavris
Counsel for Appellant

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Vásquez and Judge Howard[1] concurred.

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

¶1 Shelly S. appeals from the juvenile court's order terminating her parental rights to her son, C.A., born November 2001 on neglect, abuse, and abandonment grounds. Shelly asserts, and the Department of Child Safety (DCS) concedes, that she was not properly served with the petition to terminate her rights. We agree, and therefore vacate the court's order.

¶2 DCS filed a dependency petition in January 2016, alleging C.A. was dependent as to Shelly and his father. However, that petition was dismissed just days later because the court had awarded custody to C.A.'s father in an ongoing domestic case. After his father died in April 2016, C.A. filed a new dependency petition asserting he was dependent as to Shelly due to her substance abuse and mental health issues, as well as to physical abuse.

¶3 Shelly did not appear at the preliminary protective hearing or two subsequent dependency hearings; at the second dependency hearing in August 2016, the juvenile court found Shelly had "failed to appear this date without good cause," entered a default against her, and found C.A. dependent. In September, the court changed the case plan to severance and adoption, and DCS filed a motion to terminate Shelly's parental rights on abuse grounds. DCS

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[1]The Hon. Joseph W. Howard, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

requested permission to serve Shelly by publication, and the court set a publication hearing for December.

¶4 Shelly appeared at the publication hearing and denied the allegations in the termination motion. Her attorney was permitted to withdraw, and new counsel was appointed. The juvenile court advised her the date and time of the next hearing and that, should she fail to appear, the court could find she had waived her rights and her parental rights could be terminated. Shelly appeared at the subsequent hearing and moved to set aside the default dependency, alleging she had been in custody at the time. The court continued the hearing, ordering Shelly to provide evidence to support her claim.

¶5 At that hearing, held February 28, the juvenile court found Shelly had proven she had been "incarcerated on the date of default" and, over DCS's objection, vacated the default. However, it also "grant[ed] [DCS] leave to file a Motion for Termination" and set an initial severance hearing for March 28, again advising Shelly it could find C.A. dependent and terminate her parental rights by default should she fail to appear. On March 15, DCS filed a "Petition for Termination of Parent-Child Relationship," alleging termination was warranted on the grounds of neglect, abuse, and abandonment.

¶6 Shelly did not appear at the March 28 hearing. Her counsel advised the court Shelly had been unable to obtain transportation, requested she be permitted to appear telephonically, and objected to the hearing proceeding in her absence. The juvenile court denied Shelly's request to appear telephonically, finding she lacked good cause for her failure to appear and had "waived her legal rights and admits to the allegations in the pending Petition." It found C.A. dependent as to Shelly, found DCS had proven the allegations in the "Motion for Termination of Parent/Child Relationship" by clear and convincing evidence, and granted that motion. It directed DCS to submit findings of fact and conclusions of law.

¶7 DCS's proposed order included findings that Shelly had been served by publication of the "Motion for Termination of Parent-Child Relationship" on October 2, 2016, October 27, 2016, and

November 3, 2016, and that she had been advised of the need to attend all court hearings and the consequences of failing to appear. The order further stated that termination was warranted on abuse, neglect, and abandonment grounds and was in C.A.'s best interest. The juvenile court entered the proposed order, and this appeal followed.

¶8 On appeal, Shelly asserts the juvenile court lacked jurisdiction to terminate her parental rights because she was not properly served with the state's termination petition. She asserts service was "untimely" because the petition was filed fewer than ten days before the initial severance hearing and was, in any event, ineffective because it was "served through counsel" instead of personally. DCS concedes error. "The question of whether the juvenile court had jurisdiction is a legal question, which we review de novo." *David S. v. Audilio S.*, 201 Ariz. 134, ¶ 4, 32 P.3d 417, 419 (App. 2001).

¶9 "Our juvenile statutes provide for two separate procedural mechanisms by which a termination of parental rights may be obtained." *Kimu P. v. Ariz. Dep't Econ. Sec.*, 218 Ariz. 39, ¶ 14, 178 P.3d 511, 515 (App. 2008). A person or entity authorized by statute may file a petition pursuant to A.R.S. § 8-533(A). Alternatively, after a child has been found dependent and if, after a permanency hearing, the court decides termination is in the child's best interests, it may order a party to file a termination motion. *See* A.R.S. § 8-862(A), (B)(1), (D)(1); *Kimu P.*, 218 Ariz. 39, ¶ 17, 178 P.3d at 515.

¶10 Section 8-535(A), A.R.S., requires a party filing a petition to terminate a parent's rights to give the parent "[n]otice of the initial hearing and a copy of the petition . . . as provided for service of process in civil actions." Rule 64(D)(3), Ariz. R. P. Juv. Ct., requires such service to made "in the manner provided for in Rules 4.1 or 4.2, Ariz. R. Civ. P." Pursuant to Rule 4.1(d)(1), (3), (l), Ariz. R. Civ. P., service may be accomplished within Arizona by, inter alia, personal service, publication, or "delivering a copy . . . to an agent authorized by appointment or by law to receive service of process."

¶11 "The [juvenile] court lacks jurisdiction to enter a judgment adverse to a party when there is a lack of proper service on that party." *In re Maricopa Cty. Juv. Action No. JS-5860*, 169 Ariz. 288, 291, 818 P.2d 723, 726 (App. 1991). "Whatever method of service is utilized, it must give notice sufficient to meet the requirements of due process." *Id.* at 290, 818 P.2d at 725. Service to a parent's attorney is insufficient unless the parent has expressly or by implication authorized the attorney to receive service on the parent's behalf. *Id.* at 291, 818 P.2d at 726.

¶12 In contrast, when a party files a motion to terminate a parent's rights, the party must provide notice to the parent as required by Rule 5(c), Ariz. R. Civ. P. A.R.S. § 8-863(A); Ariz. R. P. Juv. Ct. 64(D)(2). Thus, when a parent is represented by counsel, notice is achieved by service upon counsel. Ariz. R. Civ. P. 5(c)(1). No express or implied authority is required.

¶13 The parties agree that Shelly was not served personally or by publication with DCS's March 15, 2017, filing seeking to terminate her parental rights—it was given only to her counsel. They also agree counsel was not authorized to receive service on Shelly's behalf. Had there been no ongoing proceeding, service clearly would have been insufficient. *See Maricopa Cty. Juv. Action No. JS-5860*, 169 Ariz. at 291, 818 P.2d at 726. But, whether service on Shelly's counsel was nonetheless sufficient notice is complicated by the motion to terminate filed by DCS in September 2016. The juvenile court found Shelly had been adequately notified of that motion, and the parties do not assert otherwise.

¶14 We conclude, however, that the juvenile court's decision to vacate the dependency finding effectively dismissed the still-pending September termination motion. A motion to terminate contemplates that a child has been found dependent. *See* A.R.S. § 8-844(D) (allowing court to proceed with permanency hearing after finding of dependency), § 8-862(A), (B)(1), (D)(1) (permitting court to order termination motion upon finding termination in child's best interest); *Valerie M. v. Ariz. Dep't of Econ. Sec.*, 219 Ariz. 155, n.4, 195 P.3d 192, 197 n.4 (App. 2008) ("Section 8–863(B) applies to motions for termination of parental rights that are filed when ordered by a court

at a permanency hearing conducted after a dependency disposition"); *Kimu P.*, 218 Ariz. 39, ¶ 17, 178 P.3d at 515 (Section 8-862(D)(1) allows party to file termination motion "when ordered to do so by the juvenile court at a permanency hearing in the course of a dependency matter.").

¶15 Despite vacating the dependency order, the juvenile court gave DCS leave to file a termination motion governed by § 8-862(D)(1).[2] Had DCS filed that motion, notice to Shelly's attorney arguably would have been sufficient service for the court to proceed. DCS instead filed a petition to terminate Shelly's rights pursuant to § 8-533(A). We recognize, however, that service may nonetheless have been sufficient if the petition did not allege "new or additional claims for relief," thus allowing service pursuant to Rule 5(a), Ariz. R. Civ. P., because the juvenile court had already obtained jurisdiction over Shelly. *See Maricopa Cty. Juv. Action No. JS-5860*, 169 Ariz. at 291, 818 P.2d at 726; *see also Kline v. Kline*, 221 Ariz. 564, ¶ 21, 212 P.3d 902, 908 (App. 2009) ("[S]trict technical compliance with rules governing service may be excused when the court has already acquired jurisdiction over the receiving party and that party receives actual, timely notice of an amended pleading and its contents.").

¶16 Relevant here, "[t]he test to determine whether a new or additional claim is alleged is whether proof of additional facts is required." *Maricopa Cty. Juv. Action No. JS-5860*, 169 Ariz. at 291, 818 P.2d at 726. DCS's September motion sought termination solely on the grounds of abuse. The later petition, however, added the grounds of neglect and abandonment. Thus, the petition plainly required proof of additional facts to prove new claims, and service under Rule 5(c), Ariz. R. Civ. P., was not permitted. *See Maricopa Cty. Juv. Action No. JS-5860*, 169 Ariz. at 291, 818 P.2d at 726.

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[2]Because the juvenile court vacated the dependency order, it may not have been proper for the court to then allow DCS to file a motion to terminate Shelly's parental rights. We need not decide this issue, however, because DCS filed a petition, instead of a motion, to terminate Shelly's rights.

¶17 DCS was therefore required to serve Shelly with the termination petition in compliance with Rule 4.1, Ariz. R. Civ. P.[3] As DCS acknowledges on appeal, it did not do so. Thus, the juvenile court lacked authority to terminate Shelly's parental rights.[4]

¶18 We vacate the juvenile court's order terminating Shelly's parental rights to C.A.

[3] The juvenile court's finding that Shelly had notice of the hearing on the pending termination petition is not relevant to our inquiry. The question is whether she was given adequate notice of the grounds for termination alleged by DCS, not whether she knew a hearing had been scheduled. *See Kline*, 221 Ariz. 564, ¶ 21, 212 P.3d at 908.

[4] We therefore need not address Shelly's argument that the juvenile court lacked authority to terminate her rights because service was untimely.