

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

ANGELICA G.,
Appellant,

v.

DEPARTMENT OF CHILD SAFETY AND J.B.,
Appellees.

No. 2 CA-JV 2017-0148
Filed December 12, 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NOT FOR PUBLICATION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. S1100JD201000052RSUPP
The Honorable DeLana J. Fuller, Judge Pro Tempore

AFFIRMED

COUNSEL

Rosemary Gordon Pánuco, Tucson
Counsel for Appellant

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

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Staring and Judge Brearcliffe concurred.

ESPINOSA, Judge:

¶1 Appellant Angelica G. challenges the juvenile court's order of August 9, 2017, terminating her parental rights to her son, J.B., born in February 2015, after granting a default judgment against her and finding the Department of Child Safety (DCS) had established the statutory grounds for severance, including chronic drug abuse and Angelica's inability to remedy the circumstances causing J.B. to remain in a court-ordered, out-of-home placement for longer than six months. *See* A.R.S. § 8-533(B)(3), (B)(8)(b). On appeal, Angelica challenges the entry of a default judgment, arguing the court violated her due process rights. We affirm.

¶2 We view the evidence in the light most favorable to upholding the juvenile court's order. *Manuel M. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 205, ¶ 2 (App. 2008). DCS received a report in July 2016 that Angelica was using methamphetamine and failing to properly care for J.B. The child was placed with a maternal aunt, who had previously adopted two other of Angelica's children. After Angelica admitted the allegations in a dependency petition, J.B. was adjudicated dependent in February 2017. The juvenile court expressly warned Angelica that her failure to appear at future hearings could result in a waiver of her rights and ultimately termination, and she signed a "Notice to Parent in Dependency Action" form to that effect.

¶3 In a March 2017 report, Angelica's caseworker indicated she "continue[d] to struggle with substance abuse issues," was not drug testing as required, did not have stable housing or employment, and otherwise had "minimal participation in services." At a permanency planning hearing that month, which Angelica attended, the juvenile court affirmed the case plan of family reunification, but set "a concurrent case plan of severance and adoption." The court advised Angelica: "Failure to attend future hearings without good cause shown may result in a finding that [you] have waived [your] legal rights and [are] deemed to have admitted the

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allegations” made by the state. The court also noted “[f]ailure to appear in court or to participate in reunification services may result in the termination of [your] parental rights.” Angelica again signed a form notice to that effect.

¶4 The next permanency planning hearing was set for April 2017. Angelica did not appear at that hearing, although counsel was present. The juvenile court changed the case plan to severance, ordered the state to file a motion to terminate, and set an initial severance hearing for May 16 at 8:30 a.m.

¶5 By 8:51 a.m. on May 16 Angelica had not arrived. Her attorney indicated he had not been in contact with her since the March hearing except for a call the night before. He stated “she was apprised of the date today,” but could not confirm that personally as he had not spoken to her when she had called. The juvenile court noted that Angelica had been present at the March hearing and stated that she had signed a “Notice to Parent in Termination Action” form (“Form 3”). The court found her in default and indicated the state should proceed. The case manager testified, and, at 8:59 a.m., as it began to make findings, including that mother had been “present at the last hearing,” the court was informed that Angelica might have appeared. The state noted it was 9:01 a.m., and the court continued its ruling.

¶6 Angelica arrived during the juvenile court’s recitation, and the court questioned her about her late arrival. She stated she had come at 8:30, but the doors had been locked, so she had gone outside to smoke a cigarette. But, apparently contradicting herself, she also mentioned having seen only one man in the courtroom when she had arrived. The court questioned others in the courtroom about their ability to enter, and determined that “many people” had been able to enter the courtroom at 8:30 a.m. It affirmed its previous ruling that Angelica was in default and found the state had proven the grounds for termination by clear and convincing evidence. Angelica asked to speak and reminded the court that she had not been present at the April hearing, but the one in March. And she indicated she had not spoken to her case manager or case aide. The court closed the discussion, pointing out that being “aware of when your Court’s dates are” was Angelica’s responsibility.

¶7 On appeal, Angelica argues the juvenile court erred because she “did not have Proper Notice” and “did not ‘fail to appear.’” She also contends she received ineffective assistance of counsel. We review a finding of good cause for failure to appear for an abuse of discretion, *Adrian*

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E. v. Ariz. Dep't of Econ. Sec., 215 Ariz. 96, ¶ 15 (App. 2007), but review issues of law relating to statutes and rules de novo, *see Bobby G. v. Ariz. Dep't of Econ. Sec.*, 219 Ariz. 506, ¶ 1 (App. 2008).

¶8 Rule 65, Ariz. R. P. Juv. Ct., provides the procedure for an initial termination hearing, during which the juvenile court is to “determine whether service has been completed” and whether the parent will contest the allegations. Rule 65(C)(6)(c) allows a court to “proceed with the adjudication of termination” if a parent has failed to appear without good cause

and the court finds the parent . . . had 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.

Angelica contends this standard was not met because the record does not contain a “Form 3” or otherwise indicate “she had the admonishments required” by the rule.

¶9 Angelica, however, was properly served under Rule 64. That rule requires a motion or petition for termination to be filed, along with a notice of hearing providing the location, date, and time of the termination hearing, as well as the consequences of failing to appear. Ariz. R. P. Juv. Ct. 64(A)-(C). Pursuant to A.R.S. § 8-863(A), service of such a motion is to be made “as prescribed in rule 5(c),” Ariz. R. Civ. P. Generally, “[i]f a party is represented by an attorney, service under th[at] rule must be made on the attorney.” Ariz. R. Civ. P. 5(c)(1). In this case, DCS filed a motion and a notice that included the date, time, and location of the hearing as well as a warning that if Angelica failed to appear, the hearing could go forward and result in termination “based upon the record.” Angelica does not dispute that her attorney received these filings. *See Mara M. v. Ariz. Dep't of Econ. Sec.*, 201 Ariz. 503, ¶¶ 23-28 (App. 2002).

¶10 Additionally, although we are concerned that the juvenile court mistakenly believed Angelica had attended the previous hearing and had signed a Form 3, the failure to give a parent the form does not require

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us to vacate a default, provided the parent had notice of the hearing and the risks of failing to attend. And, as outlined above, Angelica received such notice. Pursuant to Rule 65(D)(3), at an initial termination hearing, a court may provide the parent with a copy of Form 3, request that the parent sign and return a copy of the form, and note on the record that the form was provided. But there is no requirement that the court supply a Form 3 and follow that procedure. See *Monica C. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 89, ¶ 28 (App. 2005).

¶11 Angelica further contends the juvenile court abused its discretion in determining she had failed to appear. Citing *Brenda D. v. Dep't of Child Safety*, 242 Ariz. 150 (App. 2017), she contends she had not failed to appear, but had simply been untimely, and therefore default was inappropriate. In *Brenda D.*, however, the court held that “if a parent has failed to appear by the time both parties have fully presented their case,” the juvenile court may “treat the parent’s absence as a waiver of the parent’s legal rights.” 242 Ariz. 150, ¶ 18. Angelica did not arrive until the court was already pronouncing its ruling, after the state had presented its evidence and her attorney had cross-examined the state’s witness. Thus, her reliance on *Brenda D.* is misplaced.¹

¶12 Finally, Angelica contends she received ineffective assistance based on counsel’s failure to correct the juvenile court’s misunderstanding of when she had last appeared or to assert that *Brenda D.* applied to the situation. But, as explained above, *Brenda D.* does not apply here and we have concluded that Angelica received sufficient notice; thus she has not established counsel’s performance was deficient. See *John M. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 320, ¶ 18 (App. 2007). And, although counsel arguably might have been held to correcting the court’s mistaken belief about Angelica’s past attendance, Angelica did so after arriving. The court agreed that she had not attended, but pointed out her responsibility to be aware of court dates. Angelica has cited nothing to suggest the court would have responded differently had counsel made the correction, and we therefore cannot say on this record that Angelica has established prejudice arising from any arguable deficiency in counsel’s actions.

¹Although Angelica asserts repeatedly that she arrived “13 minutes after the proceeding had started” and was “13 minutes late to the hearing,” the record shows she appeared at least thirty-one minutes after the scheduled time.

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¶13 For all these reasons, the juvenile court's judgment is affirmed.