IN THE

# ARIZONA COURT OF APPEALS

DIVISION TWO

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IN RE TERMINATION OF PARENTAL RIGHTS AS TO L.C.,

No. 2 CA-JV 2022-0041
Filed August 15, 2022

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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NOT FOR PUBLICATION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. 602(i)(17).

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

**AFFIRMED**

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COUNSEL

Domingo DeGrazia, Tucson
*Counsel for Appellant*

Mark Brnovich, Arizona Attorney General
By Autumn Spritzer, Assistant Attorney General, Tucson
*Counsel for Appellee Department of Child Safety*

**MEMORANDUM DECISION**

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

E P P I C H, Presiding Judge:

**¶1** Royce C. appeals from the juvenile court's order denying his motion to set aside the previous order terminating his parental rights to his daughter, L.C., born August 2019. We affirm.

**¶2** The juvenile court terminated Royce's parental rights to L.C. on the ground of neglect under A.R.S. § 8-533(B)(2). *Royce C. v. Dep't of Child Safety*, 252 Ariz. 129, ¶¶ 3-4 (App. 2021). Royce had failed to appear for his initial termination hearing, and the court found he had admitted the allegations in the termination motion pursuant to A.R.S. § 8-537(C) and Rule 352(f), Ariz. R. P. Juv. Ct.[1] *Id.* ¶ 4. The court further found the Department of Child Safety (DCS) had proven, by clear and convincing evidence, that termination was warranted and, by a preponderance of the evidence, that termination was in L.C.'s best interests.

**¶3** Royce filed a motion for reconsideration asserting he had good cause for his nonappearance and a meritorious defense. *Id.* ¶ 5. The juvenile court declined to rule on that motion, instead directing Royce to file a motion conforming with Rule 60, Ariz. R. Civ. P., as required by Rule 318(c), Ariz. R. P. Juv. Ct., governing motions to set aside a final order. *Id.* Royce filed a new motion, but "merely provided the same account of [his] absence." *Id.* The court denied the motion, and Royce appealed. *Id.*

**¶4** On appeal, we determined Royce had not shown the juvenile court erred in rejecting his motion to set aside. *Id.* ¶ 7. However, Royce had additionally asserted on appeal that his counsel had been ineffective in failing to adequately develop arguments and factual support for his motion to set aside. *Id.* ¶¶ 8-9. Following an extensive discussion clarifying

[1]The juvenile rules were revised and renumbered effective July 1, 2022, after the proceedings in the juvenile court had concluded. Ariz. Sup. Ct. Order R-20-0044 (Dec. 8, 2021). As the rules applicable to this matter have not materially changed, however, we refer to the rules now in effect.

Arizona law governing the ineffective assistance of counsel in cases involving the termination of parental rights, *see id.* ¶¶ 10-29, we remanded the case to the juvenile court for further proceedings, *id.* ¶ 30, specifically, "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," *id.* ¶ 34.

**¶5** After a status hearing following remand, the juvenile court determined our decision on appeal entitled Royce to file a motion under Rule 318(c) to include "additional facts that were not contained in the motion that was filed at the trial level and from which an appeal was taken." Royce then filed a new motion to set aside in which he acknowledged he had been told the initial termination hearing's date and time by the court, but he asserted he had not received notification in writing. He argued his counsel had been ineffective "throughout the case" and in failing to adequately support his initial motions to set aside the court's order and his failure to appear resulted from excusable neglect. He further argued he had a meritorious defense to the termination motion, namely that he was in partial compliance with the case plan and could provide for his daughter. Finally, he argued that § 8-537(C) and its accompanying rule, Rule 352(f), are unconstitutional because they allow for "defaulting" a parent in a termination proceeding.[2]

**¶6** After an evidentiary hearing, the juvenile court denied the motion to set aside. The court found Royce's testimony not credible, he "was aware of the hearing date," and he had been properly admonished of the consequences of failing to appear. The court thus concluded Royce had not shown "that trial counsel's conduct in doing or failing to" maintain adequate contact with Royce "made a determinative difference." Additionally, the court rejected Royce's claim that his failure to appear constituted excusable neglect, again noting that Royce had notice of the hearing and was familiar with the procedures for appearing telephonically. The court, then, concluded Royce's "actions are not those of a reasonably prudent person in the same circumstances." Last, the court seemingly

[2]In his filings below and on appeal, Royce refers to § 8-537(B), but that provision governs the burden of proof. It appears he is challenging the provisions in subsection (C), which address a parent's failure to appear. Similarly, although he cites former Rule 64(C), Ariz. R. P. Juv. Ct., now Rule 351, Ariz. R. P. Juv. Ct., we understand his argument to be directed at the consequences for failure to appear described in former Rule 65, now Rule 352.

rejected Royce's claim he had demonstrated a meritorious defense. This appeal followed.

**¶7** On appeal, Royce claims the juvenile court erred by rejecting his motion to set aside and repeats his argument that § 8-537(C) and Rule 352(f) are unconstitutional. Relevant here, § 8-537(C) provides that, if a parent fails to appear at a termination hearing, and the parent has been adequately advised of the consequences of failing to appear, a court "may find that the parent has waived the parent's legal rights and is deemed to have admitted the allegations of the petition by the failure to appear." Rule 352(f) governs the procedure implementing that provision.

**¶8** A juvenile court may grant a motion to set aside if a parent shows good cause for non-appearance and a meritorious defense to the severance allegations. *See Trisha A. v. Dep't of Child Safety*, 247 Ariz. 84, ¶ 19 (2019); *see also* Ariz. R. P. Juv. Ct. 318(c); Ariz. R. Civ. P. 60(b)(1). We will not disturb a juvenile court's ruling on a motion to set aside unless a parent demonstrates the court abused its discretion. *Trisha A.*, 247 Ariz. 84, ¶ 27.

**¶9** Royce first argues he has shown good cause for his failure to appear. To show good cause, Royce was required to prove his absence was a result of mistake, inadvertence, surprise, or excusable neglect. *See Christy A. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 299, ¶ 16 (App. 2007). Neglect is excusable if the conduct was that of a reasonably prudent person in the same circumstances. *Id.* Royce asserts his failure to note the termination hearing in his calendar was excusable because "a reasonably prudent person occasionally misses appointments" and parents in dependency or termination cases "are often juggling work, visitation, services, and court hearings." Thus, he concludes, "it is unsurprising that parents sometimes miss hearings."

**¶10** None of those assertions, however, give us any basis to disturb the juvenile court's discretionary determination here. It is undisputed that Royce had been informed of the date and time of his hearing and the consequences of failing to appear. The court concluded, then, that a reasonably prudent person would have noted the date and time of the hearing, which Royce apparently failed to do. The court found incredible Royce's claim that he was confused about the time of the hearing. And Royce ignores the court's finding that his counsel attempted to contact

him just before the hearing. "Carelessness does not equate with excusable neglect."[3] *Ulibarri v. Gerstenberger*, 178 Ariz. 151, 163 (App. 1993).

**¶11** Royce next asserts that his counsel's failure to remind him of the date and time of his hearing deprived him of due process. As we concluded in *Royce C.*, when a parent claims trial counsel was ineffective, we evaluate "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.'" 252 Ariz. 129, ¶ 20 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998)). Relief for ineffective assistance of counsel is "an extraordinary remedy, unavailable in all but the most egregious cases." *Id.* ¶ 26.

**¶12** The heart of Royce's claim seems to be that counsel's conduct undermined the fundamental fairness of his proceeding because, had counsel reminded him of the hearing or given him written notice, he would have attended. It is not clear, however, how counsel's conduct transforms Royce's failure into a violation of his due process rights. The only thing that prevented Royce from attending the hearing was his own neglect. He has not established any basis to conclude that counsel should have believed Royce needed a written or verbal reminder, particularly considering his attendance at previous hearings. And, as we explain below, there was nothing fundamentally unfair about proceeding in Royce's absence. In short, despite Royce's attempt to shift blame to his attorney, he has not shown how counsel's conduct "undermined the fundamental fairness of the proceeding" when he simply could have attended that proceeding.

**¶13** Royce last attacks the constitutionality of § 8-537(C) and Rule 352(f), asserting they "deny due process and violate liberty rights" because they allow a juvenile court "to enter a default judgment terminating parental rights if the parent fails to appear." He argues, without citation, that waiver must instead occur "after an in-court colloquy" and notes that, "[i]n criminal cases, if a defendant misses an initial appearance the court does not deem that the defendant admitted all charges." We review constitutional challenges de novo. *Lisa K. v. Ariz. Dep't of Econ Sec.*, 230 Ariz. 173, ¶ 9 (App. 2012). To prevail, Royce must demonstrate the procedure outlined by these statutes is fundamentally unfair. *See id.* ¶ 10.

[3]Because Royce has not shown the juvenile court erred in concluding he had not shown good cause for his absence, we need not address whether he demonstrated a meritorious defense.

**¶14** Royce's constitutional challenge is unavailing. Although "[p]arents possess a fundamental liberty interest in the care, custody, and management of their children," *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 24 (2005), Royce's comparison with criminal law is not apt. Severance proceedings are civil in nature, *Dep't of Child Safety v. Beene*, 235 Ariz. 300, ¶ 12 (App. 2014), and default proceedings do not violate due process if the defaulting party had adequate notice, *see Sandoval v. Chenoweth*, 102 Ariz. 241, 245 (1967), as Royce did here. Further, he overstates the consequences of failing to appear and ignores the substantial procedural protections in place despite his nonappearance. DCS is still held to its burden of proof, and a parent's non-appearance "does not limit the parent's counsel's right or ability to fully participate in a termination adjudication hearing." *Brenda D. v. Dep't of Child Safety*, 243 Ariz. 437, ¶¶ 31-32 (2018); *Trisha A.*, 247 Ariz. 84, ¶ 14.

**¶15** Royce asserts, however, he is situated differently than the parents in *Brenda D.* and *Trisha A.* because he "could have obtained a different result" had he attended his hearing. But he does not explain how that would alter the constitutional analysis. *See Christina G. v. Ariz. Dep't of Econ. Sec.*, 227 Ariz. 231, n.6 (App. 2011) (litigant waives claim by failing to adequately develop it on review). And, regardless of whether Royce has a meritorious defense to the state's allegations, he must first show good cause for his failure to appear, which he has not done.

**¶16** We affirm the juvenile court's order denying Royce's motion to set aside the order terminating his parental rights to L.C.[4]

[4]The state suggests that Royce and the juvenile court exceeded our mandate by addressing the merits of Royce's second motion to set aside, rather than limiting the matter to whether Royce received ineffective assistance of counsel in litigating his first motion to set aside. Because Royce is not entitled to relief on his second motion to set aside, we need not address this question. And, in any event, now having had a second opportunity to litigate his motion to set aside, his claim of ineffective assistance regarding the first motion is moot. *See ASH, Inc. v. Mesa Unified Sch. Dist. No. 4*, 138 Ariz. 190, 191 (App. 1983) ("'Mootness' requires that opinions not be given concerning issues which no longer exist because of changes in the factual circumstances.").