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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MARY S., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY and DOUGLAS S., Appellees.	2 CA-JV 2009-0061 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. MD2008-005

Honorable Robert Duber II, Judge

VACATED AND REMANDED

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B R A M M E R, Judge.

¶1 Appellant Mary S. challenges the juvenile court's May 27, 2009 order terminating her parental rights to Douglas S., born in March 2001, based on abandonment, mental illness or history of chronic substance abuse, and the length of time Douglas had spent in a court-ordered, out-of-home placement. *See* A.R.S. § 8-533(B)(1), (3), and (8)(a). For the following reasons, we vacate the severance order and remand for further proceedings.

¶2 In December 2007, Child Protective Services became involved with the family due to allegations that the parents were not caring adequately for Douglas and his sister, Katherine S., and were using illegal substances.[1] In May 2008, following an unsuccessful in-home intervention, the Arizona Department of Economic Security (ADES) filed a dependency petition as to both children. Although Mary did not appear at the dependency hearings in May and June 2008, she asked her attorney, Michael Freeman, to request that a new attorney be appointed to represent her; Freeman also requested permission to withdraw. When Mary failed to appear at the August 2008 dependency review hearing, the juvenile court granted Freeman's request to withdraw. Mary did not appear at the permanency hearing in September 2008 or participate in reunification services. In January 2009, the court ordered ADES to file a motion to terminate the parents' rights to Douglas and to serve Mary by publication.

[1]Neither the father, Kevin C., who relinquished his parental rights to Douglas, nor Katherine, is a party to this appeal.

¶3 Mary did not appear at the dependency review hearing/initial publication hearing in March 2009, although Freeman, who apparently had been reappointed to represent her, appeared telephonically on her behalf. The juvenile court granted Freeman's renewed request to withdraw and continued the publication hearing to April 7, 2009. At the April hearing, the court noted that it would make a "finding" that ADES had served Mary properly by publication only after ADES submitted the missing portion of the affidavit of diligent search. Although ADES submitted the requested document one week later, the court apparently never made any finding that Mary had been served properly before it conducted the severance hearing in May 2009. Instead, in the "Findings of Fact, Conclusions of Law, and Order," signed by the court on June 9, 2009, well after the May 22 severance hearing, the court found, apparently for the first time, that Mary had "received proper legal notice of these proceedings as required by law."

¶4 To further confuse matters, although the record shows that Mary was served personally with the "Notice of Trial on Motion of Termination of Parent-Child Relationship" and "ADES's Motion for Termination of Parent-Child Relationship" on April 28, 2009, ADES did not file its affidavit confirming service of these documents until June 9, 2009, well after the May 22 severance hearing. In addition, the record does not appear to contain a document called "Notice of Trial on Motion of Termination of Parent-Child Relationship." However, the "Acceptance and Waiver of Timely Service of Process," the document in

which Mary acknowledged having been served on April 28, nonetheless notified her that a hearing "regarding the above-named child/ren in this case" had been set for May 22, 2009.

¶5 Mary appeared at the May 22 hearing without an attorney, a proceeding the court acknowledged was "a contested hearing with regard to [Kevin] and his challenge only with regard to Douglas." After ADES reminded the court that it had never entered a default[2] against Mary, the court nonetheless concluded that a "default ha[d] been entered," notably, without having found that Mary had been served properly. *See* Ariz. R. P. Juv. Ct. 65(C)(6)(c) ("default" cannot be entered against parent at initial termination hearing absent proper notification of proceeding); Ariz. R. P. Juv. Ct. 66(D)(2) (same for termination adjudication hearing). The court told Mary, "since you're now here, I don't have counsel for you because counsel has been relieved in the past, but this is the date for the hearing, and if you wish to present any witnesses or participate, you can." The court also advised Mary to "listen" as it explained Kevin's rights to him "because I want you to understand these rights."

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[2]We note the juvenile court and the parties use the term "default." But as Division One of this court pointed out in *Christy A. v. Arizona Department of Economic Security*, 217 Ariz. 299, ¶ 14, 173 P.3d 463, 468 (App. 2007), that term does not appear in the relevant rules or statutes. *See*, *e.g.*, Ariz. R. P. Juv. Ct. 65(C)(6)(c), 66(D)(2); A.R.S. § 8-863(C). Rather, if a parent fails to appear at certain hearings without good cause, the parent is deemed to have waived his or her rights and admitted the allegations of the motion to terminate parental rights. *Christy A.*, 217 Ariz. 299, ¶ 14, 173 P.3d at 468. "[I]t is apparent that, in practice, the juvenile court has engrafted the concept of 'default' from Rule 55 of the Arizona Rules of Civil Procedure . . . into the juvenile court rules or, at least, is utilizing the 'default' terminology when a parent fails to appear." *Id*.

¶6 Kevin, who was represented by counsel at the termination hearing, relinquished his parental rights to Douglas. The juvenile court then ordered ADES to present its case as to Mary and informed her she could "participate in a best interests determination" and that it would "permit [her] to cross-examine witnesses if she wishe[d], and offer evidence if she wishe[d] with regard to severance." The court asked Mary whether she preferred to relinquish her parental rights, as Kevin had done, and she responded, "I was completely unprepared for this so I really don't know." When Mary told the court, "Your Honor, I'm in no position to proceed with any kind of a trial today," the court responded, "Well, it's unfortunate, but that's what we are going to do today."

¶7 The juvenile court then instructed ADES to make offers of proof with respect to the anticipated testimony of its witnesses and told Mary, "[i]f after hearing all of that you decide you don't want to have [ADES] actually call those witnesses to testify about those things and you agree then to submit to what [ADES] has said to me, you can do that." The court also gave Mary the option of cross-examining each witness "as necessary." ADES then presented offers of proof as to each of its four witnesses. Mary asked one question of just one witness, the only individual who had been placed under oath during the entire proceeding, after which the court instructed Mary, "this is not the time for you to persuade me that [the witness] has testified incorrectly." Mary conducted no other cross-examination; presented no witnesses on her own behalf; and agreed, without objection, to the admission of all fifteen of ADES's exhibits, apparently without having reviewed them. The court then

granted ADES's motion to terminate Mary's parental rights to Douglas on the three grounds ADES had alleged.

¶8 On appeal, Mary challenges the juvenile court's severance order on the following grounds: she was entitled to representation by counsel; the state's unsworn offers of proof and the exhibits, which the court admitted without foundation, constituted insufficient evidence to support the severance order; the court never found she had been served properly with notice of the hearing to terminate her parental rights; and the court failed to set a trial date as to Mary. ADES concedes "the juvenile court did not appoint counsel for [Mary], did not make the requisite findings regarding service or the so-called 'default' against [Mary], and did not provide [Mary] with fair, appropriate procedures at the termination adjudication hearing" and thus urges us to reverse the severance order and remand for further proceedings.

¶9 Parents have a fundamental interest in the care, custody, and control of their children, which interest is protected by the Due Process Clause of the United States Constitution. *Mara M. v. Ariz. Dep't of Econ. Sec.*, 201 Ariz. 503, ¶ 24, 38 P.3d 41, 45 (App. 2002), *citing Santosky v. Kramer*, 455 U.S. 745, 753 (1982). A parent's right to the assistance of counsel in a termination proceeding "is afforded by statute [A.R.S. § 8-221(B)], and the Due Process Clause." *Denise H. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 257, ¶ 6, 972 P.2d 241, 243 (App. 1998); *see* Ariz. R. P. Juv. Ct. 65(C)(2), (5)(a); *Christy A. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 299, ¶ 28, 173 P.3d 463, 471 (App. 2007).

¶10 "Because A.R.S. § 8-221(B) implements a due process right, the standard for waiver of counsel under the statute is not different than it is for any other constitutional right. The waiver of constitutional rights is not easily presumed." *Daniel Y. v. Ariz. Dep't of Econ. Sec.*, 206 Ariz. 257, ¶ 15, 77 P.3d 55, 58 (App. 2003). Even assuming, without deciding, that the juvenile court properly had entered a "default" against Mary, once she appeared at the termination hearing and told the court she was not prepared to proceed, the court could not possibly have inferred she had waived her right to be represented by counsel, nor did the court so find. *See Manuel M. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 205, n.14, 181 P.3d 1126, 1135 n.14 (App. 2008). In addition, "in promulgating Rule 66(D)(2), [Ariz. R. P. Juv. Ct.,] the supreme court did not intend to deprive parents who fail to appear at a termination proceeding of their right to the assistance of counsel at that hearing." *Id.* ¶ 23. In any event, Mary did not "fail to appear" at the termination hearing.

¶11 Despite her protestations that she was not prepared to proceed, the juvenile court did not, at the very least, warn Mary about the potential risks of self-representation nor ask her if she wanted to continue the hearing with the assistance of counsel. *See State v. Dann*, 220 Ariz. 351, ¶ 24, 207 P.3d 604, 613 (2009) (Arizona law requires client be advised of dangers of self-representation before finding waiver of right to counsel). Although Mary did not expressly request counsel, neither did she tell the court she wanted to represent herself. Rather, she clearly stated she was not prepared to go forward. She was nonetheless

left to represent herself, without advance warning, at a termination adjudication hearing intended for Kevin.

¶12 We conclude the juvenile court's termination of Mary's parental rights without appointing an attorney to represent her constituted reversible error. *See Daniel Y.*, 206 Ariz. 257, ¶ 12, 77 P.3d at 58 ("failure to allow counsel to effectively participate in severance proceedings is reversible error"). We therefore vacate the juvenile court's order of May 27, 2009, terminating Mary's parental rights to Douglas and remand for further proceedings consistent with this decision.

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J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

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JOSEPH W. HOWARD, Chief Judge

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PHILIP G. ESPINOSA, Presiding Judge