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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

MARIA U., *Appellant*,

v.

DEPARTMENT OF CHILD SAFETY, S.U., *Appellees*.

No. 1 CA-JV 15-0411
1 CA-JV 16-0050
(Consolidated)
FILED 7-26-2016

Appeal from the Superior Court in Maricopa County
No. JD527521
The Honorable Karen L. O'Connor, Judge

AFFIRMED

COUNSEL

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

Arizona Attorney General's Office, Phoenix
By Nicholas Chapman-Hushek
Counsel for Appellee DCS

MEMORANDUM DECISION

Presiding Judge Diane M. Johnsen delivered the decision of the Court, in which Judge Lawrence F. Winthrop and Judge Randall M. Howe joined.

J O H N S E N, Judge:

¶1 Maria U. ("Mother") appeals the superior court's orders denying her "Motion to Set Aside the Default Severance" and terminating her parental rights to her child. For the following reasons, we affirm the court's orders.

FACTS AND PROCEDURAL BACKGROUND

¶2 Mother and Scott U. ("Father") are the parents of a child born in 2013 in Washington.¹ Because the child was born substance-exposed, Washington Child Protective Services opened a case for him a few days after his birth. Washington authorities closed the case, however, when the child left Washington to live with his grandparents in Arizona in January 2014. The Arizona Department of Child Safety ("DCS") took the child into custody in March 2014 because of the prior allegations of substance abuse and neglect.² The superior court found the child dependent as to Mother in July 2014. Because Mother lives in Washington, the court ordered referrals and services be provided for her there. DCS provided Mother with a variety of services, including parenting education and supervised visitation, drug assessment and treatment, random drug testing through TASC, and psychological consultations and evaluations.

¶3 After Mother failed to consistently participate in services, the superior court changed the case plan to severance and adoption. The guardian ad litem ("GAL") for the child moved to terminate Mother's parental rights in March 2015, and DCS filed a substituted motion to terminate in September 2015. Mother appeared by telephone at the initial severance hearing, at which the court warned her that failure to appear at

¹ Father is not a party to this appeal.

² Pursuant to S.B. 1001, Section 157, 51st Leg., 2d Spec. Sess. (Ariz. 2014) (enacted), the Department of Child Safety is substituted for the Arizona Department of Economic Security in this matter. *See* ARCAP 27.

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scheduled pretrial conferences could result in an adjudication of severance. Mother appeared by telephone at the August 2015 pretrial conference, and the court set another pretrial conference for September 2015. Mother failed to appear at the September 2015 pretrial conference, at which the court set another pretrial conference for November 2015.

¶4 Mother again failed to appear (either in person or by calling in) at the November pretrial conference. The court noted Mother had failed to appear at the September conference without showing good cause and asked Mother's counsel about Mother's whereabouts. After Mother's counsel was unable to provide an explanation for Mother's absence, the court found Mother had again failed to show good cause for her nonappearance and invited DCS to put on its evidence in support of severance. About 20 minutes later, while DCS was presenting evidence, Mother telephoned the courtroom, and Mother's counsel asked the court to allow Mother to appear telephonically. The court denied the request, proceeded with the severance trial, and terminated Mother's parental rights on the grounds of nine months' time-in-care and 15 months' time-in-care under Arizona Revised Statutes ("A.R.S.") section 8-533(B)(8)(a), (c) (2016).³

¶5 Mother filed a "Motion to Set Aside the Default Severance," then filed a notice of appeal a day later. After this court stayed the appeal and revested jurisdiction in the superior court, the superior court denied Mother's motion. Mother timely appealed.

¶6 We have jurisdiction pursuant to A.R.S. §§ 8-235(A) (2016), 12-120.21(A)(1) (2016) and -2101(A)(1) (2016).

DISCUSSION

¶7 Mother argues the superior court should not have proceeded in her absence to terminate her parental rights to her child. She contends she had good cause for her absence from the November 2015 pretrial conference because a power outage prevented her from charging her telephone.⁴

³ Absent material revision after the relevant date, we cite a statute's current version.

⁴ It appears from the transcript that when Mother telephoned in late for the November conference, the court did not allow her to remain on the line. On appeal, Mother does not argue the court's apparent refusal to

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¶8 We review the superior court's finding regarding a parent's good cause for failure to appear for an abuse of discretion and will reverse only if the "court's exercise of that discretion was manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Adrian E. v. Ariz. Dep't of Econ. Sec.*, 215 Ariz. 96, 101, ¶ 15 (App. 2007) (quotation omitted). To demonstrate good cause, the parent must show that her failure to appear was due to mistake, inadvertence, surprise or excusable neglect, and also must show a meritorious defense to the severance claim. *Christy A. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 299, 304, ¶ 16 (App. 2007). "Excusable neglect exists if the neglect or inadvertence 'is such as might be the act of a reasonably prudent person in the same circumstances.'" *Id.* (quoting *Ulibarri v. Gerstenberger*, 178 Ariz. 151, 163 (App. 1993)).

¶9 The superior court did not abuse its discretion by denying Mother's motion. Mother had been warned that if she failed to appear for a proceeding, the court might decide to proceed with a severance hearing without her. At the initial severance hearing in April 2015, the court read the Form III notice to Mother and provided a copy to her through counsel.⁵ Although Mother did not attend the September conference, at which the November pretrial conference was set, she does not dispute that she had notice of the conference. The day before the November conference, Mother's counsel provided her with the court's phone number so she could call in for it.

¶10 In her motion to set aside, Mother asserted there had been a severe storm the night before the November 2015 conference that had caused her home to lose power. She could not charge her cellular phone from an outlet in her home, and ultimately telephoned the court only after she was able to charge her phone from her car. But in the affidavit she filed with her motion, she said she did not begin to look for a way to charge her telephone until the time the hearing was scheduled to begin. The superior court found that because Mother gave "no good reason why she waited until the time of the hearing to figure out how she was going to charge her

allow her to be present constituted a due-process violation. *See Christy A. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 299, 306, ¶ 24 (App. 2007).

⁵ Form III is a template appended to the Arizona Rules of Procedure for the Juvenile Court; it informs parents in a termination proceeding that failure to attend a scheduled court hearing or conference could result in the court proceeding with the termination. Ariz. R.P. Juv. Ct. Form III.

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phone," she failed to demonstrate good cause. Because Mother knew the date and time of the conference but failed to provide a satisfactory explanation for why she waited until the time of the conference to find a way to charge her telephone, the court acted within its discretion in finding Mother did not have good cause for her nonappearance.⁶

¶11 Although Mother does not cite facts or legal authorities on appeal to support a defense to the severance motion, sufficient evidence supported termination under A.R.S. § 8-533(B)(8)(a), which allows a court to terminate a parent's rights when the child has been in an out-of-home placement for nine months or longer and the parent has "substantially neglected or wilfully refused to remedy the circumstances that cause the child to be in an out-of-home placement." Section 8-533(B)(8) also requires DCS to make "a diligent effort to provide appropriate reunification services," and that the court consider the best interests of the child before severance.

¶12 The child has been in DCS custody since March 2014 because of Mother and Father's substance abuse and neglect. As part of its reunification services, DCS provided Mother with a case aide to facilitate visits, a psychological evaluation, drug treatment and monitoring services. Although she participated in several parenting classes and a few drug tests, Mother was generally noncompliant with substance-abuse treatment and drug testing. Mother was closed out from two referrals for out-of-state services for her refusal to submit to drug testing. DCS also submitted a referral for Mother pursuant to the Interstate Compact on the Placement of Children, but the State of Washington would not accept it due to Mother's

⁶ DCS contends Mother's arguments concerning her failure to appear at the November 2015 pretrial conference are moot because the superior court found Mother failed to appear at the September 2015 pretrial conference without good cause and "preserved" the issue. Contrary to DCS's contention, however, Mother's arguments are not moot. The court did not rule at the September conference that Mother had waived her right to contest severance, and there is no indication in the record that the court would not have allowed Mother to participate in the November conference had she appeared. Likewise, there is no indication in the record that the court commenced the November proceeding intending to take evidence on the severance motion. Moreover, in its order denying Mother's motion to set aside, the court did not deny her motion outright for failing to explain her absence from the September conference, but instead addressed the merits of Mother's arguments as to why she failed to appear at the November conference.

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lack of participation in services. The case manager testified DCS made diligent efforts to provide Mother with services. Moreover, the child is adoptable and is placed with a foster placement willing to adopt him. See *Audra T. v. Ariz. Dep't of Econ. Sec.*, 194 Ariz. 376, 377, ¶ 5 (App. 1998) (in determining best interests of child, the court may consider immediate availability of an adoptive placement). Thus, the record supports termination based on the nine months' time-in-care ground.

CONCLUSION

¶13 For the foregoing reasons, we affirm the superior court's orders terminating Mother's parental rights and denying Mother's "Motion to Set Aside the Default Severance."



Ruth A. Willingham · Clerk of the Court
FILED : AA