

## ***Brenda D. v. Department of Child Safety***

**Citation:** 410 P. 3d 419 (Ariz. 2018).

**Date Filed:** Feb. 9, 2018

**Author:** Vice Chief Justice Pelander

**Joined by:** Chief Justice Bales, Justices Brutinel, Gould, and Lopez.

**Concurrence-in-part and dissent-in-part:** Justice Timmer, joined by Justice Bolick.

**Facts:** The Arizona Department of Child Safety (“DCS”) took custody of Brenda D.’s special-needs child in July 2014. The juvenile court declared the child dependent—lacking effective parental care<sup>1</sup>—because of neglect. DCS reported that Brenda did not fully participate in reunification and rehabilitation services.

**Procedural history:** The Arizona Supreme Court presented this opinion. In October 2015, DCS filed to terminate parental rights. In the juvenile court, DCS cited the child’s placement outside of Brenda’s home and Brenda’s history of substance abuse as reasons for severance. Brenda attended an initial hearing in November 2015, and she was warned about the risk of waiving her parental rights and the termination of her parent-child relationship if she failed to attend her termination adjudication hearing June 15–16, 2016. Brenda failed to attend June 15, citing back pain. The court continued the hearing to June 16 and ordered medical records of her pain.

Brenda was late for the hearing the next day, and the court voided her right to contest because she did not have good cause. The judge ordered Brenda’s counsel not to contest the evidence’s admissibility, only its weight. Her counsel did not object. After both sides examined the DCS case manager, Brenda arrived twenty-four minutes late. The court found the state had met its burden and shown that termination of parental rights was in the child’s best interest, as Brenda interjected, “No, it’s not” and “I’m a good mom.”<sup>2</sup> The court denied her request to speak. The court told Brenda that if she provided documentation of her back pain, she could move for reconsideration on the finding of lack of good cause. Brenda did not produce documents or challenge the finding of no good cause.

The Arizona Court of Appeals agreed that Brenda had no good cause for “failure to appear at the start of the termination hearing.”<sup>3</sup> But it found that her tardiness did not constitute failure to appear for the hearing under rules on parents forfeiting their legal rights.<sup>4</sup> The appeals court also held that the refusal to allow Brenda to testify and the restriction on her counsel’s efforts violated Brenda’s constitutional rights and constituted fundamental error.

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<sup>1</sup> LAW LIBRARY RES. CTR., ARIZ. SUPERIOR COURT, DEPENDENCY VS. GUARDIANSHIP 1, <https://www.superiorcourt.maricopa.gov/sscDocs/packets/jvd1fiz.pdf>.

<sup>2</sup> *Brenda D. v. Dep’t of Child Safety (Brenda D. II)*, 410 P.3d 419, 423 (Ariz. 2018).

<sup>3</sup> *Brenda D. v. Dep’t of Child Safety (Brenda D. I)*, 393 P.3d 930, 933, 934, n.3 (Ariz. Ct. App. 2017).

<sup>4</sup> ARIZ. REV. STAT. § 8–863(C) (2017); ARIZ. R. JUV. P. 66(D)(2).

**Issue:** Under Arizona law, if a parent fails to appear for a hearing to terminate parental rights, the court may find that the parent has waived legal rights and admitted allegations. The court may also terminate the relationship. When a parent is late for the hearing without an excuse, does the parent meet a statute's definition of "failure to appear," which enables the court to take such action?

**Holding:** Yes, lateness constitutes "failure to appear," so the court may consider the allegations admitted. However, if it chooses to proceed in the parent's absence:

- The parent restores his or her waived rights upon arrival but may not force the court to examine witnesses or reopen evidence.
- The absent parent's counsel may participate in the hearing.
- Even if a parent waives legal rights, the state still must satisfy its burden of proof.

**Disposition:** The juvenile court's severance of parental rights is affirmed, and the court of appeals' opinion is vacated.

**Rule:** When a parent who has been served and warned waives due process rights but arrives late to a hearing on termination of parental rights in progress, the court should:

- Keep considering evidence or continue the hearing if the parent can show good cause; or
- Disregard parental rights up to the time the parent arrived and refuse to repeat evidence if the parent cannot show good cause. But the court should usually allow a tardy parent to testify and present additional evidence.

### **Reasoning:**

- **Failure to Appear Rules and Safeguards:** The Arizona Supreme Court began its discussion with the provisions of an Arizona statute and rule pertaining to failure to appear at a hearing on parental rights termination. It included the safeguards they provide: a requirement that parents be served the motion and warnings about the potential for the hearing to go on in their absence, waiver of legal rights, admission of allegations, and termination of parental rights.<sup>5</sup> It analyzed the appeals court's contention that the rules do not require a timely appearance, so only failure to appear at all can result in waiver of parents' legal rights.<sup>6</sup> DCS argued that the court found Brenda must have waived her rights because proceeding in her absence would otherwise violate her rights.<sup>7</sup> Brenda argued that she waived no rights because merely being tardy did not warrant consequences A.R.S. § 8-863 and Juvenile Procedure Rule 66(D)(2) listed. The Arizona Supreme Court agreed with DCS, finding that § 8-863 and Rule 66(D)(2) were premised on parents being notified of a start time and implicitly required a timely appearance. The rule, moreover, states that Rule

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<sup>5</sup> A.R.S. § 8-863(C); ARIZ. R. JUV. P. 66(D)(2).

<sup>6</sup> *Brenda D. I*, 393 P.3d at 935.

<sup>7</sup> *Brenda D. II*, 410 P.3d at 425.

66(D)(2) only allows hearings to advance without the parent if the parent has failed to appear. It dismissed Brenda's argument. It reasoned that if a parent only "fails to appear" for the purposes of the rules for failure to attend a hearing at all, then a warning that it can go on without her presence would be meaningless. The hearing would always be over in that scenario and could not go on without her. The court determined that Brenda's argument would violate its rule against interpreting statutes in a way that renders provisions meaningless. By contrast, the court found that reading the statute as including tardiness in its definition of "fails to appear" brought § 8-863 and Rule 66(D)(2) into harmony. The court also mentioned a case in which the Arizona Court of Appeals found that a parent lacked good cause for failing to appear in a timely manner after arriving late.<sup>8</sup>

- **Waiver of Legal Rights:** The analysis turned to consequences, noting that § 8-863 and Rule 66(D)(2) provide courts with discretion on whether to void a parent's legal rights. The court also cited a case showing that a parent may knowingly and voluntarily waive those rights.<sup>9</sup> The majority opinion stated that a failure to appear can constitute constructive waiver if the parent is informed of the consequences. The majority then noted due process concerns of allowing proceedings to advance when parents have not waived rights, citing a case in which allowing jury selection without a finding that the defendant waived a right to be present violated those rights.<sup>10</sup> Proceeding with a parental rights termination hearing without finding a waiver of rights including cross-examination and being present is impermissible. Thus, the opinion stated that the statute does not permit finding a waiver of those rights after a hearing has already taken place.
- **Scope of the Waivers:** The court then discussed the admission of allegations that results from a failure to appear at all for a parental rights termination hearing. The court found that late appearances only render rights waived for the part of the hearing the tardy parent missed. The court also stated that irrevocably eliminating a parent's right to contest allegations threatened due process. Still, courts need not restart hearings or enable tardy parents to examine witnesses who testified in their absence.
- **Countering the Dissenting Opinion:** The court then turned to its response to Justice Timmer's partial dissent. The majority said the dissent's assertions mischaracterized the court's opinion as creating grave consequences for slight tardiness and diminishing the state's burden of proof. The majority stated that interpreting § 8-863 and Rule 66(D)(2) as it applied them to tardy parents does not rewrite the plain text. The majority asserted that its interpretation comported with the language while avoiding constitutional difficulties and providing reasonable rules for juvenile courts. The court emphasized that the plain text also failed to support the dissent's interpretation that legal rights may be waived from the close of evidence and beyond

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<sup>8</sup> Bob H. v. Ariz. Dep't of Econ. Sec., 237 P.3d 632, 635 (Ariz. Ct. App. 2010).

<sup>9</sup> Manuel M. v. Ariz. Dep't of Econ. Sec., 181 P.3d 1126, 1132 (Ariz. Ct. App. 2008).

<sup>10</sup> State v. Garcia-Contreras, 953 P.2d 536, 538-41 (Ariz. 1998).

to the appeals process. The majority found little practical difference in the opinions, as both would allow courts to go forward with hearings in parents' absence. That would require some waiver of legal rights. Furthermore, the majority stated that the dissent's characterization that a tardy parent only waives rights to participate "at the scheduled time"<sup>11</sup> was not supported. The majority found that when read as a whole Arizona Rule of Juvenile Procedure 64(c)<sup>12</sup> vests juvenile courts with discretion to void a parent's legal rights only after finding the parent failed to appear. The court concluded this segment by stating that the dissent misread a case as allowing hearings to go forward without a finding of failure to attend. It found the case indicated otherwise, stating that hearings may go forward "if the parent fails to attend without good cause."<sup>13</sup>

- **Right to Counsel:** The court next considered the role of counsel for a tardy or absent parent. The parent did not waive right to counsel even if a court finds the parent waived legal rights.<sup>14</sup> The court found that due process requires an absent parent's counsel to be able to fully participate. Moreover, parents admit allegations only when failing to appear for a hearing at all. Thus, the absent parent's counsel may contest allegations throughout the hearing.
- **Burden of Proof:** The state must still meet its burden of proof even if a parent who fails to appear waives legal rights.<sup>15</sup>
- **Rights Violation Questions:** The majority then analyzed the reasoning of the juvenile and appeals courts. It agreed with the juvenile court's finding that Brenda waived legal rights by being late and rejected the appeals court's reversal.<sup>16</sup> The majority endorsed the appeals court's finding that restricting Brenda's counsel's participation violated her rights.<sup>17</sup> The majority contested the appeals court *sua sponte* finding that the juvenile court's refusal to allow Brenda to testify violated her rights.<sup>18</sup> It was unclear that her request to "say something" indicated desire to testify, and she and her counsel failed to object to the denial.
- **Standards of Review:** The majority then addressed whether any of the alleged rights violations constituted reversible error. It declined to apply the reversible error standard of review because that only arises in cases with absent counsel. It instead applied the fundamental error standard of review because Brenda and her counsel failed to object to due process violations at the hearing. That gave her the burden to

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<sup>11</sup> *Brenda D. II*, 410 P.3d at 426.

<sup>12</sup> ARIZ. R. JUV. P. 64(c).

<sup>13</sup> *Marianne N. v. Dep't of Child Safety*, 401 P.3d 1002, 1006–1007 (Ariz. 2017).

<sup>14</sup> *See, e.g.*, A.R.S. § 8-221(B).

<sup>15</sup> *See, e.g.*, A.R.S. § 8-863(C).

<sup>16</sup> *Brenda D. I*, 393 P.3d 930, 933 (2017).

<sup>17</sup> *Id.* at 936–37.

<sup>18</sup> *Id.* at 933.

establish that an error going to the foundation of her case caused her prejudice.<sup>19</sup> She needed to establish that a reasonable judge could rule differently and she needed to prove actual, not speculative, prejudice.<sup>20</sup> Brenda failed to establish that any evidence against her was inadmissible or insufficient, and she did not disclose witnesses or evidence that would counter the state. Mere failure to allow her to speak could not overcome her failings, which led the majority to the conclusion that Brenda would not be able to sway a judge to decide the case differently. It rejected the appeals court's finding of a fundamental error that deprived Brenda of a fair trial.

**Dissent-in-part and concurrence-in-part (Timmer):** Justice Timmer argued that A.R.S. § 8-863 and Rule 66(D)(2) should be interpreted as imposing consequences only when the parent fails to appear at all. It stated that such an interpretation better preserves constitutional parenting rights.<sup>21</sup>

- **Plain Language:** The opinion began by quoting the statute, which included the phrase “[i]f a parent does not appear . . .”<sup>22</sup> and the rule, which included the phrase “failed to appear.”<sup>23</sup> Justice Timmer stated that Brenda appearing late meant she literally did not fail to appear. The statute and rule do not mention lateness.<sup>24</sup>
- **Legislative Intent:** The dissent then stated that § 8-863 and Rule 66(D)(2) failed to include the word “timely.” Justice Timmer agreed with the appeals court that the word would have been included if the legislature intended to impose consequences for tardy appearances.<sup>25</sup>
- **Constitutional Issues:** The dissent then analyzed constitutional issues. It asserted that parents have fundamental rights to take care of their children. That requires the state to follow fair parental rights termination procedures. It cited the United States Supreme Court case *Mathews v. Eldridge*<sup>26</sup> to identify considerations of the private interests the proceeding affects, the risk of error the procedure creates, and the countervailing government interests. The dissent found it unfair not to specifically warn a parent that late arrival will fully waive legal rights and cause allegations to be accepted. Furthermore, such action would decrease the state's burden of proof because a tardy parent is unable to contest some evidence. No such result would occur if the rules operated at the close of evidence. The dissent also attacked the majority rule's avoidance of due process violations as creating a limited waiver of rights and a circumscribed standard for when allegations are admitted. The dissent found that these measures are unsupported by the text of § 8-863 and unexplained in

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<sup>19</sup> State v. Bearup, 211 P.3d 684, 689 (Ariz. 2009); Monica C. v. Ariz. Dep't of Econ. Sec., 118 P.3d 37, 42 (Ariz. Ct. App. 2005).

<sup>20</sup> State v. Dickinson, 314 P.3d 1282, 1286 (Ariz. Ct. App. 2013).

<sup>21</sup> *Brenda D. II*, 410 P.3d 419, 431 (Ariz. 2018) (Timmer, J., dissenting and concurring).

<sup>22</sup> A.R.S. § 8-863(C).

<sup>23</sup> ARIZ. R. JUV. P. 66(D)(2).

<sup>24</sup> *Brenda D. II*, 410 P.3d at 431.

<sup>25</sup> *Brenda D. I*, 393 P.3d 930, 935-36 (2017).

<sup>26</sup> 424 U.S. 319, 335 (1976).

the court's opinion. The dissent further declared that interpreting termination of legal rights occurring at the end of the hearing can restrict potential appeals. It found that the majority's idea that the termination of rights occurs at the hearing's beginning requires impermissibly rewriting § 8-863 to maintain constitutionality.

- **Juvenile Rule 64(c):** The dissent next analyzed an Arizona rule.<sup>27</sup> It interpreted Rule 64(c) as giving a parent notice that a hearing may “go forward” in his or her absence. That prevents some constitutional problems that the majority tried to avoid with its theory of waiver of rights, the dissent stated. The dissent stated that this means that the court may find the parent waived the right to participate from the start of the scheduled hearing time rather than waiving other rights. The dissent stated that the “go forward” provision operates independently and does not require the court to find a failure to appear before it operates. The dissent supported its interpretation by noting that a criminal procedure rule allows courts to proceed in a party's absence.<sup>28</sup>
- **Concurring with the Termination:** Justice Timmer's opinion concluded by declaring the majority opinion to be constitutionally problematic and unsupported by text. It found that the right to participate from the hearing's beginning was the only right Brenda waived. But the dissent supported the majority's decision to reinstate the severance of parental rights, concurring with the decision to reverse the appeals court.<sup>29</sup> The dissent reasoned that Brenda failed to demonstrate that the court fundamentally erred.

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<sup>27</sup> ARIZ. R. JUV. P. 64(c).

<sup>28</sup> ARIZ. R. CRIM. P. 9.1.

<sup>29</sup> See *Brenda D. I*, 393 P.3d at 938.