NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

WILLIAM M.,	)	1 CA-JV 12-0011
Appellant,	)	DEPARTMENT A
v.	)	**MEMORANDUM DECISION**
MARY M., CARSON M.,	)	(Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)
Appellees.	)	

Appeal from the Superior Court in Maricopa County

Cause No. JS506812

The Honorable Brian K. Ishikawa, Judge

VACATED AND REMANDED

Fromm Smith & Gadow, P.C. — Phoenix
By Stephen Roy Smith and James L. Cork, II
Attorneys for Appellant

The Law Office of Sylvina Daly Cotto, P.C. — Scottsdale
By Sylvina D. Cotto
Attorneys for Appellee Mary M.

K E S S L E R, Judge

¶1 William M. ("Father") appeals from the trial court's denial of his motion for relief from an order terminating his parental rights. For the following reasons, we vacate the

judgment and remand for further proceedings consistent with this decision.

FACTUAL AND PROCEDURAL HISTORY

¶2 In February 2011, Mary M. ("Mother") filed a petition to terminate Father's relationship with their minor child, Carson M. ("Child"), based on abandonment. The trial court appointed a Guardian Ad Litem ("GAL") to represent Child.

¶3 In June 2011, Mother's counsel filed an affidavit of due diligence and a notice of filing of affidavit of publication. Mother's counsel's affidavit of due diligence avowed counsel had: (1) mailed copies of the petition to Father's last known address, but all correspondence had been returned to her as "unable to forward"; (2) contacted Father's previous counsel, but was unable to obtain a more current address; (3) learned according to a newspaper article, Father closed his restaurant in Texas for Thanksgiving 2010, but never returned and did not leave a telephone number on file with the landlord; (4) attempted to locate Father by searching online phone directories; and (5) attempted to locate Father by searching county corporation directories and social network websites.

¶4 The trial court held an initial severance hearing. The court found that Father was properly served by publication and failed to appear without good cause shown. The court then

proceeded with the termination hearing. Mother and Child's GAL[1] testified that: (1) Father had not had in-person contact with Child for approximately two years and two months; (2) Father called and left a message for Child on his birthday in 2010, but referred to Child by the wrong name; (3) Father had not sent Child any birthday or Christmas cards over the last two years; (4) Father's return would have a negative impact on Child, and (5) termination would be in Child's best interest. In her response brief, Mother states she also testified "that [Father] had not paid his child support obligation in the (undetermined) past but that he had just paid it." The transcript, however, appears to refer only to the month of June 2011.[2] The trial court granted Mother's petition to terminate Father's relationship with Child based on abandonment and found that termination was in Child's best interests.

¶5 In September 2011, Father successfully moved to unseal the case file to determine if Mother misstated facts to the court that would entitle him to move for relief from the judgment under Arizona Rule of Civil Procedure 60(c) ("Rule

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[1] The GAL's testimony was based on "information that [she] gathered from both [Mother] and [Child]."

[2] The transcript provides the following testimony:

> Q: And did [Father] pay child support in the month of June 2011?
>
> A: He just paid it. He hadn't paid it and so he just paid it. And so, it's a little late, but --

60(c)”). In November 2011, Father moved for relief from the July order terminating his parental rights.[3] Father claimed Mother misrepresented the facts and purposefully lied to sever his relationship with Child. Father stated that he provided reasonable support for Child in the form of monthly child support payments, and any efforts made by Father or his family to contact Child were rebuffed by Mother. Father provided phone records to support his claim that his own mother tried to contact Mother to discuss Father’s relationship with Child. Father’s mother even spoke with Mother after the petition was filed, but the termination proceeding was never mentioned.[4] Father further claimed that Mother failed to exercise due diligence in providing him with notice of the proceeding.

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[3] Father’s motion did not include any supporting affidavits. Although the use of affidavits is considered the better practice, Rule 60(c) does not expressly require them. *Ursel v. Pizzo*, 126 Ariz. 316, 319, 614 P.2d 858, 861 (App. 1980) (“[C]ousel’s signature on the motion to reinstate was a sufficient certification of the facts alleged therein to properly put those facts before the trial court even though he did not file a separate affidavit or verification.”).

[4] Father attached his mother’s phone records from February 4, 2011, to March 3, 2011, around the time Mother filed her petition to terminate Father’s parental rights. He stated the document showed that Father’s family tried to call Child three times on February 20, and twice on March 2. The second phone call on March 2 lasted for 38 minutes. Father claimed that during part of that conversation, his mother attempted to convince Mother to allow Father to have a relationship with Child, “but was met with no offers of compromise or cooperation.” Mother asserted that she was the one who called Child’s paternal grandmother, and admitted that Father’s whereabouts were never discussed.

Father claimed that: (1) if Mother's counsel had provided Father's previous counsel with the reason she was looking for a more current address, Father's counsel could have used available resources to locate him; and (2) Mother had access to Father's current telephone number on file with the superior court, but failed to use it.

¶6 Mother responded that Father's last attempt to contact Child was in February 2010, and argued Father's family's attempts to contact Child were irrelevant. On the issue of due diligence, Mother's counsel claimed she had no obligation to tell Father's counsel of the reason she was seeking Father's current address. Mother's counsel did not deny she had Father's phone number but argued she had "no doubt" Father would not have answered or returned a phone call.

¶7 Father replied, stating that severance based on abandonment requires two findings: (1) a failure to provide reasonable support; and (2) a failure to maintain regular contact. Father argued that because he continued to make regular child support payments there was no abandonment. He also argued that his failure to maintain regular contact was the result of Mother's attempts to frustrate his relationship with Child. Father further argued that although Mother's counsel was not obligated to inform Father's counsel of why she was seeking Father's current address, such information would have increased

Father's chances of receiving notice of the pending action. He also stated that Mother's claim that Father would not have taken or returned a phone call was a baseless assumption.

¶8 The court denied Father's motion for relief from judgment and Father appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 8-235(A) (2007), 12-120.21(A)(1) (2003), and 12-2101(A)(1) (Supp. 2011).

ISSUES AND STANDARD OF REVIEW

¶9 Father argues that the court abused its discretion in denying his motion for relief from judgment. Father claims that the facts presented in his motion showed that Mother made misrepresentations regarding her exercise of due diligence in providing notice and Father's abandonment, and that the court erred in denying his motion for relief from judgment.

¶10 We review the trial court's denial of a motion to set aside a judgment for an abuse of discretion. *City of Phoenix v. Geyler*, 144 Ariz. 323, 328, 697 P.2d 1073, 1078 (1985). "A court abuses its discretion if it commits an error of law in reaching a discretionary conclusion, it reaches a conclusion without considering the evidence, it commits some other substantial error of law, or 'the record fails to provide substantial evidence to support the trial court's finding.'" *Flying Diamond Airpark, L.L.C. v. Meienberg*, 215 Ariz. 44, 50, ¶

27, 156 P.3d 1149, 1155 (App. 2007) (quoting *Grant v. Ariz. Pub. Serv. Co.*, 133 Ariz. 434, 456, 652 P.2d 507, 529 (1982)).

¶11 In reviewing default judgments, we favor resolution on the merits and resolve all doubts in favor of the moving party provided there is some legal justification for vacating the default and some substantial evidence to support such a ruling. *Richas v. Superior Court*, 133 Ariz. 512, 514, 652 P.2d 1035, 1037 (1982).[5]

DISCUSSION

¶12 The trial court erred in denying Father's motion to vacate the judgment because Mother's counsel omitted facts in support of her publication notice. A party is entitled to

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[5] While the court took evidence as to the termination, this still represented a default judgment because Father had not responded to the petition and did not appear. *See* Ariz. R.P. Juv. Ct. 66(D)(2) ("If the court finds the parent . . . failed to appear at the termination adjudication hearing without good cause shown, had notice of the hearing, was properly served . . . and had been previously admonished regarding the consequences of failure to appear . . . the court may terminate parental rights based upon the record and evidence presented . . . .") Although the term "default" does not specifically appear in the Arizona Rules of Procedure for the Juvenile Court, "it is apparent that, in practice, the juvenile court has engrafted the concept of 'default' from Rule 55 of the Arizona Rules of Civil Procedure ("ARCP") into the juvenile court rules, or at least, is utilizing the 'default' terminology when a parent fails to appear." *Christy A. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 299, 304, ¶ 14, 173 P.3d 463, 468 (App. 2007). Therefore, "[a]lthough not completely analogous in parental cases, we find the general case law concerning defaults in civil cases, particularly as it relates to finding a waiver of rights, to be instructive. A trial court may set aside an entry of default if there is 'good cause shown.'" *Id.* (citing Ariz. R. Civ. P. 55(c)).

relief from judgment pursuant to Rule 60(c) if the party can show that the judgment was void or was obtained by "misconduct" of the adverse party, including in some situations innocent omissions or misstatements of the adverse party. *See Estate of Page v. Litzenburg*, 177 Ariz. 84, 93, 865 P.2d 128, 137 (App. 1993). Those standards are incorporated into Arizona Rule of Procedure for the Juvenile Court 46(E).[6]

¶13 "To obtain relief under [Rule 60(c)(3)], the movant must (1) have a meritorious defense, (2) that he was prevented from fully presenting before judgment, (3) because of the adverse party's fraud, misrepresentation, or misconduct." *Estate of Page*, 177 Ariz. at 93, 865 P.2d at 137 (interpreting

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[6] "A motion to set aside a judgment rendered by the court shall conform to the requirements of Rule 60(c) . . . except that the motion shall be filed within six (6) months of the final judgment, order or proceeding unless the moving party alleges grounds pursuant to Rule 60(c)(1)(2) or (3), in which case the motion shall be filed within three (3) months of the final judgment." Ariz. R.P. Juv. Ct. 46(E).

Although the juvenile rules require a motion under Rule 60(c) to be filed within three or six months of the judgment, time limitations do not apply if the judgment is void. *Springfield Credit Union v. Johnson*, 123 Ariz. 319, 322, 599 P.2d 772, 775 (1979) ("The reasonable time requirement of Rule 60(c) does not apply, however, when a judgment is attacked as void."); *see also State v. Romero*, 415 P.2d 837, 840 (N.M. 1966) (stating "there is no limitation of time within which a motion must be filed under the provisions of Rule 60(b)(4)" when the judgment is void). "If a judgment or order is void, the trial court has no discretion but to vacate it." *Martin v. Martin*, 182 Ariz. 11, 14, 893 P.2d 11, 14 (App. 1994). "A judgment or order is 'void' if the court entering it lacked jurisdiction: (1) over the subject matter, (2) over the person involved, or (3) to render the particular judgment or order entered." *Id.* at 15, 893 P.2d at 15.

Federal Rule of Civil Procedure 60(b)(3) which is substantially the same as Rule 60(c)). However, if a judgment is void, a defendant need not show a meritorious defense. *Int'l Glass & Mirror, Inc. v. Banco Ganadero y Agricola, S.A.*, 25 Ariz. App. 604, 605, 545 P.2d 452, 453 (1976). In this context, "misconduct" can include innocent misstatements or omissions of facts.[7] *Estate of Page*, 177 Ariz. at 93, 865 P.2d at 137 ("'Misconduct' within the rule need not amount to fraud or misrepresentation, but may include even accidental omissions."); *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 923 (1st Cir. 1988) ("[D]epending on the circumstances, relief on the ground of misconduct may be justified 'whether there was evil, innocent or careless, purpose.'" (citation omitted)). "Accidents——at least avoidable ones——should not be immune from the reach of the rule." *Anderson*, 862 F.2d at 923. The movant must show "misconduct" by clear and convincing evidence and show either that the conduct "substantially interfered with [his] ability fully and fairly to prepare for, and proceed at, trial" or "that the nondisclosure worked some substantial interference with the full and fair preparation or presentation of the case." *Id.* at 926. Alternatively, if the misstatements or omissions were

[7] We will rely on interpretations of Federal Rule of Civil Procedure 60 because it is essentially identical to Arizona Rule of Civil Procedure 60. *Estate of Page*, 177 Ariz. at 93, 865 P.2d at 137.

deliberate or knowing, we presume the misconduct substantially interfered with the movant's ability to proceed at trial. *Id.*

¶14 In turn, a judgment is void if the court lacks jurisdiction of the defendant because of lack of service of the petition. *See supra* footnote 6. "Due process requires notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections." *Monica C. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 89, 92, ¶ 16, 118 P.3d 37, 40 (App. 2005) (quoting *Maricopa Cnty. Juv. Action No. JS-501904*, 180 Ariz. 348, 355, 884 P.2d 234, 241 (App. 1994)). Service of the petition to terminate parental rights must be accomplished by either personal service as required by Arizona Rule of Civil Procedure 4.1 or by publication under Arizona Rule of Civil Procedure 4.2(f). *See* Ariz. R.P. Juv. Ct. 64(D)(3). Rule 4.2(f) permits service by publication when "the person to be served is one whose present residence is unknown but whose last known residence was outside the state . . . and service by publication is the best means practicable under the circumstances for providing notice of institution of the action . . . ." To authorize valid service by publication, the party seeking to publish service must "file an affidavit showing . . . the circumstances warranting utilization of the procedure authorized by this [rule] which shall be prima facie evidence of

compliance." Ariz. R. Civ. P. 4.2(f). In addition, service by publication must also satisfy due process minimums. *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950).

¶15 After a plaintiff files an affidavit sufficiently showing that a due diligence search has been performed, it is presumed the defendant has an unknown address; this presumption can be rebutted by showing the address was actually knowable. *See Preston v. Denkins*, 94 Ariz. 214, 222, 382 P.2d 686, 691 (1963) ("It is not the *allegation* that the residence is unknown which confers jurisdiction upon service by publication but the *existence of the jurisdictional fact* that the residence is unknown.").

¶16 Mother's counsel filed an affidavit indicating that she exercised due diligence to locate Father. Based on this affidavit, it was presumed that Father had an unknown address. However, in his motion for relief from judgment, Father presented undisputed evidence to rebut the presumption by showing his address was known or actually knowable.

¶17 First, it is undisputed that Mother's counsel omitted facts in her affidavit for service by publication relating to her having Father's phone number. In response to the Rule 60 motion and on appeal, Mother's counsel does not contend that she did not have Father's current telephone number at the time she attempted to serve him by publication. At oral argument on

appeal, Mother's counsel admitted it was an accidental oversight, and we assume that it was. However, even accidental oversights can be a basis for relief from a judgment, when, as here, they substantially interfere with the full and fair preparation or presentation of the case. Although Mother's counsel argues that she "knew full well that [Father] would not take her call and give her his current address," this was simply based on an assumption. She could have simply called the number, and, if Father did not answer or there was no recording to leave a message about the petition, she could have and should have so informed the court to permit service by publication. Use of the last known phone number would have been a reasonable means employed by someone desirous of informing the absentee of the proceedings. *See Mullane*, 339 U.S. at 315.

¶18 Second, Mother or her counsel also omitted facts regarding Mother's ability to locate Father through third-party relatives. In the affidavit of due diligence, Mother's counsel did not reveal that Mother had talked to Father's mother shortly after filing the petition to terminate Father's parental rights and that she did not tell his mother about that petition or ask for his whereabouts. At the severance hearing, when asked whether she had attempted to track down Father through another relative, Mother only claimed to have minimal contact with

Father's current father-in-law.[8] "Reasonable diligence requires contacting known third parties who may have knowledge of the defendant's whereabouts." *Pascua v. Heil*, 108 P.3d 1253, 1258 (Wash. Ct. App. 2005); *Cf. Roberts v. Robert*, 215 Ariz. 176, 180, ¶ 19, 158 P.3d 899, 903 (App. 2007) ("A diligent search and inquiry for heirs is all that is required, similar to the type of diligence required to justify and effect service of process by publication. Thus, depending on the circumstances, a tax lien holder may need to examine public records or court records, or may need to ask relatives, friends, or neighbors of a decedent property owner about the existence of heirs."). Mother did not dispute that she talked to Father's mother shortly after filing the petition. Mother could and should have asked

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[8] The transcript provides the following testimony:

> Q: And did you attempt to track down [Father] through, was it, another relative?
>
> A: [Father]'s father-in-law, current father-in-law, yes. I have tried to——there was a falling out apparently. And so, they were in business together and there was a falling out. And so, we had some contact.
>
> And I received an anonymous letter from somebody in Texas and it led me to calling him to find out what was going on. And there was a falling out between them. And so, he would give me information here and there.
>
> And he——the last I had heard, he had said that he heard they were moving back here. But that's been probably seven months ago, so——that we've had any contact or anything.

Father’s mother for information on his location to fulfill the due diligence required to justify service by publication. Alternatively, she could have simply informed Father’s mother of the petition and so informed the court of such fact.

¶19 Finally, when Mother’s counsel contacted Father’s previous counsel to get a more current address, she failed to provide the reason for her inquiry. Although there is no authority which requires Mother’s counsel to divulge the reason for seeking Father’s address, if Father’s counsel knew a petition had been filed, he could have used available resources to locate him. Mother’s counsel may have been acting in good faith, but speaking briefly with previous counsel’s staff without explaining the reason for the phone call does not constitute a reasonable means employed by someone desirous of informing the absentee of the proceedings. *See Mullane*, 339 U.S. at 315.

¶20 Service by publication is appropriate only when it “is the best means practicable under the circumstances for providing notice of institution of [an] action.” Ariz. R. Civ. P. 4.2(f).

> It would be idle to pretend that publication alone . . . is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local

> newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed.

Mullane, 339 U.S. at 315. Here, although Mother's counsel's affidavit and later testimony focused on searching for Father's address, she failed to either call the working phone number she actually had, ask Father's mother about his known whereabouts, or communicate to Father's previous counsel the reason she was looking for Father's contact information. Because Father presented undisputed evidence to rebut the presumption that his address was unknown, the court erred in denying his motion for relief from the order terminating his parental rights. In light of our decision, we do not address whether relief was additionally warranted in light of Mother's alleged misrepresentations of facts concerning abandonment.

CONCLUSION

¶21 Because Father successfully rebutted the Rule 4.2(f) affidavit demonstrating due diligence, and because Mother's service by publication did not meet due process requirements,

the judgment is void for lack of personal jurisdiction. We vacate the judgment and remand for further proceedings consistent with this decision.

/s/

DONN KESSLER, Judge

CONCURRING:

/s/

ANN A. SCOTT TIMMER, Presiding Judge

/s/

PATRICIA K. NORRIS, Judge