DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Matter of the Adoption of:	1 CA-CV 11-0405
	DEPARTMENT A
MATTHEW J. HERNANDEZ, ANGELO R. HERNANDEZ,	**MEMORANDUM DECISION**
Minor Children.	(Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)
ARLENE FITZGERALD,	
Petitioner/Appellee,	
v.	
MATTHEW R. HERNANDEZ,	
Respondent/Appellant.	

Appeal from the Superior Court in Mohave County

Cause No. S8015CV201100495

The Honorable Richard Weiss, Judge

REVERSED AND REMANDED

Law Offices of Keith S. Knochel PC — Bullhead City
by Keith S. Knochel
Attorneys for Respondent/Appellant

P O R T L E Y, Judge

¶1 We are asked to determine whether the superior court erred by denying the biological father's request to unseal

adoption records of his two minor children so he can challenge their adoption. Because we find that his request for access to the records establishes a compelling need for the information, we reverse the denial of the petition to unseal and remand the matter for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Matthew Hernandez ("Hernandez") and Arlene Fitzgerald ("Mother") are the unmarried parents of two children. Hernandez sought parenting time with his children, who live in California, and learned during the 2008 California proceeding that his parental rights had been terminated when Mother told the court that her husband had adopted the children four years earlier. She also admitted that she intentionally served Hernandez by publication in Mohave County even though she knew where he lived.[1]

[1] The following exchange took place:

> The Court: At the time that you apparently served Mr. Hernandez by publication. [sic] Did you know his address?
>
> Mother: I did.
>
> . . .
>
> The Court: Then why did you serve him by publication instead of personal service?
>
> Mother: Because that's what my attorney advised me at the time, because I was living in Arizona.

¶3 Hernandez subsequently filed a Verified Petition to Unseal Adoption Case and to Vacate/Void Adoption, in which he alleged he was not properly notified of the adoption proceeding pursuant to Arizona Revised Statutes ("A.R.S.") section 8-106(G) (West 2012).[2] He requested access to the adoption records because he had reason to believe that Mother's misrepresentations induced improper service and, as a result, deprived the court of jurisdiction. The court denied his request because more than one year had passed since the adoption had been finalized. He filed this appeal after he unsuccessfully moved for reconsideration.[3]

DISCUSSION

¶4 We review a ruling on a motion to unseal adoption records for an abuse of discretion. *See* A.R.S. § 8-121(D) (West 2012) ("If a compelling need for disclosure of information is established, the court may decide what information, if any, should be disclosed and to whom and under what conditions disclosure may be made."); *see also Perry v. Brown*, 667 F.3d 1078, 1084 (9th Cir. 2012) (applying abuse of discretion

[2] We cite the current version of the applicable statute if no revisions material to this decision have since occurred.

[3] Mother did not file an answering brief. Although we could treat her failure to answer as a confession of error, *Chaplin v. Snyder*, 220 Ariz. 413, 423 n.7, ¶ 40, 207 P.3d 666, 676 n.7 (App. 2008) (citation omitted), we address the merits of the appeal because of its importance. *See In re Guardianship of Cruz*, 154 Ariz. 184, 185, 741 P.2d 317, 318 (App. 1987).

standard to ruling on motion to unseal). We independently interpret relevant statutes, however, and decide other legal issues de novo. *Scottsdale Unified Sch. Dist. No. 48 of Maricopa Cnty. v. KPNX Broad. Co.*, 191 Ariz. 297, 302, ¶ 20, 955 P.2d 534, 539 (1998) (citation omitted). We will affirm the court's decision unless the ruling lacks substantial evidentiary support or is contrary to the law. *Files v. Bernal*, 200 Ariz. 64, 65-66, ¶ 2, 22 P.3d 57, 58-59 (App. 2001) (citations omitted).

¶5 We start from the premise that a parent's fundamental right to manage and care for his or her child, while not absolute, is a constitutionally protected liberty interest. *M.L.B. v. S.L.J.*, 519 U.S. 102, 119 (1996) ("[T]he interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment." (citation and internal quotation marks omitted)); *Woodrum v. Woodward Cnty., Okl.*, 866 F.2d 1121, 1125 (9th Cir. 1989) (citations omitted); *Lee v. Superior Court in & for Pima Cnty.*, 25 Ariz. App. 55, 58, 540 P.2d 1274, 1277 (1975) (citation omitted). The right to parent nevertheless may be terminated for cause or by consent. *See* A.R.S. §§ 8-106, -533(B) (West 2012). When another adult, such as a stepparent, adopts the child, the relationship between the biological parent and child

"is completely severed and all the legal rights, privileges, duties, obligations and other legal consequences of the relationship cease to exist . . . ." A.R.S. § 8-117(B) (West 2012).[4] Accordingly, statutes terminating a parent's rights must be strictly construed in favor of preserving the parent-child relationship. *Lee*, 25 Ariz. App. at 58, 540 P.2d at 1277 (citation omitted).

¶6 In the absence of a termination for cause pursuant to § 8-533(B), a court cannot grant an adoption unless the biological parent's consent has been obtained and filed with the court. A.R.S. § 8-106(A). Even if an unwed father has not established paternity, he is still entitled to notice of the adoption, his right to establish paternity, his right to seek custody, and his right to consent or withhold consent. A.R.S. § 8-106(G). And, "consent or its procedural equivalent, notice, are jurisdictional." *Lee*, 25 Ariz. App. at 58, 540 P.2d at 1277 (citation omitted).

¶7 Section 8-106(G) mandates that "[n]otice shall be served on each potential father as provided for the service of process in civil actions." We therefore turn to the Arizona Rules of Civil Procedure that govern process. These rules are designed to actually apprise a party of the proceeding. *Marks*

[4] The biological parent married to the adopting stepparent maintains all parental rights. A.R.S. § 8-117(C).

v. LaBerge, 146 Ariz. 12, 15, 703 P.2d 559, 562 (citation omitted).

¶8 Under Rule 4.1(d), Ariz. R. Civ. P., "[s]ervice upon an individual . . . shall be effected by delivering a copy of the summons and of the pleading to that individual personally or by leaving copies thereof at that individual's dwelling house or usual place of abode" or with an authorized agent. Thus, if a party knows the other party's address, direct service of process is mandatory. *See* Ariz. R. Civ. P. 4.1(m) (A court cannot authorize alternative service other than publication unless direct service "proves impracticable. . . . Service by publication may be employed only under the circumstances, and in accordance with the procedures, specified in . . . these [r]ules."). Any rule that permits a court to obtain jurisdiction by a method "other than personal service [of process] must be strictly construed." *Llamas v. Superior Court in & for Pima Cnty.*, 13 Ariz. App. 100, 101, 474 P.2d 459, 460 (1970) (citation omitted).

¶9 A court may not authorize service by publication unless it finds that

> the person to be served is one whose residence is unknown to the party seeking service but whose last known residence address was within the state, or has avoided service of process, and service by publication is the best means practicable

> under the circumstances for providing notice . . . .

Ariz. R. Civ. P. 4.1(n). To satisfy the statute, however, the party seeking constructive service cannot merely assert that the other party's address is unknown and incapable of being ascertained. *Sprang v. Petersen Lumber, Inc.*, 165 Ariz. 257, 261, 798 P.2d 395, 399 (App. 1990) (citations omitted); *Llamas*, 13 Ariz. App. at 101, 474 P.2d at 460 (citation omitted). To use service by publication, a party is required to file an affidavit that contains probative facts demonstrating "it made a due diligent effort to locate an opposing party to effect personal service."[5] *Sprang*, 165 Ariz. at 261, 798 P.2d at 399 (citations omitted).

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[5] As we explained in *Master Fin., Inc. v. Woodburn*, 208 Ariz. 70, 73-74, ¶ 15, 90 P.3d 1236, 1239-40 (App. 2004), service by publication is appropriate

> if it is the best means of notice under the circumstances and it is reasonably calculated to apprise the interested parties of the pendency of the action. Service by publication is constitutionally sufficient for a defendant who willfully leaves the state to evade service of process . . . [or] for non-resident motorists who cannot be located through due diligence. We hold that service by publication is likewise sufficient when a plaintiff has exercised due diligence to personally serve a resident defendant at a last known address within the state and has complied with the publication procedures of Rule 4.1(n).

(Citations omitted.)

¶10 A search of telephone company, utility company, and municipal records illustrates the type of meaningful investigation required before a court may allow service by publication. *Compare Sprang*, 165 Ariz. at 261, 798 P.2d at 399 (citations omitted) (affidavit devoid of facts in support of due diligence held insufficient) *with Brennan v. W. Sav. & Loan Ass'n*, 22 Ariz. App. 293, 296, 526 P.2d 1248, 1251 (1974) (proof that party checked "a credit bureau, the public utilities, the post office, and Phoenix directory" established due diligence as a matter of law). To ensure compliance with constitutional due process requirements, "[a] finding of due diligence is a jurisdictional prerequisite" to service by publication. *Master Fin., Inc. v. Woodburn*, 208 Ariz. 70, 73, ¶ 11, 90 P.3d 1236, 1239 (App. 2004) (citation and internal quotation marks omitted). Consequently, constructive service that does not satisfy the constitutional standard renders any resulting judgment facially void for lack of jurisdiction. *Sprang*, 165 Ariz. at 262, 798 P.2d at 400 (citations omitted).

¶11 Here, the superior court found that Hernandez had waited for five years before seeking to unseal the adoption records. The court then determined that his request to open the file was precluded by A.R.S. § 8-123 (West 2012), which states that

> [a]fter one year from the date the adoption decree is entered, any irregularity in the proceeding shall be deemed cured and the validity of the decree shall not thereafter be subject to attack on any such ground in any collateral or direct proceeding.

The court's reliance on § 8-123, however, was misplaced because a jurisdictional defect is not an irregularity within the meaning of the statute. *Goclanney v. Desrochers*, 135 Ariz. 240, 242, 660 P.2d 491, 493 (App. 1982) (section 8-123 cannot legitimize an order entered without authority); *see, e.g., Master Fin., Inc.*, 208 Ariz. at 74, ¶ 19, 90 P.3d at 1240 (citations omitted) (motion to vacate void judgment is never untimely, "even in the case of unreasonable delay by the party seeking relief"); *In re Milliman's Estate*, 101 Ariz. 54, 58, 415 P.2d 877, 881 (1966) (citation and internal quotation marks omitted) ("Laches of a party . . . cannot infuse [a void] judgment with life.").

¶12 Here, the court should have considered the evidence that Mother admitted in the California proceeding that she served Hernandez by publication even though she knew his Mohave County address at the time. Based on Mother's statement, she may not have been entitled to serve Hernandez with the § 8-106 notice by publication. As a result — and depending on the information contained in the sealed file regarding the constructive service — the court may have lacked jurisdiction to

terminate Hernandez's parental rights. *See Sprang*, 165 Ariz. at 262, 798 P.2d at 400 (citations omitted); *In re Adoption of Hadtrath*, 121 Ariz. 606, 608, 592 P.2d 1262, 1264 (1979) (citations omitted). If these facts had been taken into account, we believe the court may have ruled differently in order to ensure that the adoption was not void. We therefore conclude that the request to access the adoption records to obtain information about service of process presented good cause to unseal the file.

¶13 In light of the potential jurisdictional defect, the court should have granted the motion to unseal the adoption file, allowed Hernandez limited access to the file to determine whether the affidavit seeking service by publication was legally sufficient and, if necessary, conducted a hearing to resolve the matter. Accordingly, the order denying the motion is reversed.

CONCLUSION

¶14 Based on the foregoing, we reverse the ruling denying the petition to unseal and remand the matter for further proceedings consistent with this decision.

/s/
_____
MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/
_____
ANN A. SCOTT TIMMER, Judge

/s/
_____
ANDREW W. GOULD, Judge