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
FILED: 09/06/2012
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JENNIFER B.,	)	No. 1 CA-JV 12-0002
	)	
Appellant,	)	DEPARTMENT A (AUGUST)
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
JEFFREY B., BAILEY B.,	)	103(G) Ariz. R.P. Juv. Ct.;
Appellees.	)	Rule 28 ARCAP)
	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. JS506930

The Honorable Raymond P. Lee, Retired Judge

REVERSED AND REMANDED

Robert D. Rosanelli — Phoenix
Attorney for Appellant

Robert A. Dodell — Scottsdale
Attorney for Appellee Jeffrey B.

Bernard P. Lopez — Phoenix
Attorney for Appellee Child, Bailey B.

S W A N N, Judge

¶1 Jennifer B. ("Mother") appeals from the juvenile court's order denying her motion to set aside its order terminating her parental rights to Bailey B. ("Child").

Mother contends that the termination order, entered as a result of her failure to appear at an initial hearing on the petition to terminate, is void for lack of personal jurisdiction due to improper service of process. We agree, and therefore reverse and remand.

FACTS AND PROCEDURAL HISTORY

¶2 Child was born to Mother and Jeffrey B. ("Father") in 1997. In August 2011, when Child was thirteen years old, Father filed a petition to terminate Mother's relationship with Child, alleging that Mother had abandoned Child and that termination was in Child's best interests. The court set an initial hearing on the petition for October 12, entered a notice of hearing, and appointed counsel to represent Mother. The notice of hearing included a warning that Mother's failure to appear at the hearing could result in: a finding that she waived her rights and admitted the petition's allegations; an in absentia hearing; and a termination order.

¶3 Before the date of the hearing, Father filed two documents related to his efforts to serve the petition and notice of hearing on Mother: a certificate of service and an affidavit of service by publication.

¶4 In the certificate of service, Father's process server claimed that service had been accomplished on September 1 at an Oceanside, California address "[b]y leaving copies at the

dwelling house or usual place of abode of the person being served, with a member of the household 14 or older and explaining the general nature of the papers." The process server declared:

> I served [Mother] by serving Petition to Terminate Parent Child Relationship and Notice of Hearing by leaving documents with Linda Nordeck who resides at address given for [Mother]. Per Linda Nordeck, [Mother] moved out 3 months ago but still receives mail at this address. She called [Mother] in my presence and left a message that documents had been delivered for her.

¶5 The affidavit of service by publication described service by publication commencing September 9, 2011, in Maricopa County, and it was accompanied by a private investigator's report describing efforts to identify Mother's current address. The private investigator's report, dated August 31, referenced an unsuccessful service attempt (of unspecified date) at the Oceanside address and declared that during that attempt the process server was told by a neighbor that Mother "is unknown there and that the unit attempted is in fact inhabited by an Hispanic family."

¶6 Mother did not appear at the October 12 initial hearing. The court found that Mother had been properly served both personally and by publication, and Mother's appointed counsel (who had not had any contact with Mother) agreed that service was proper. Finding no reasonable explanation for

Mother's failure to appear, the court proceeded "by way of default" and heard testimony from Father and Child. Father's testimony included a description of the service efforts as set forth in the certificate of service and affidavit of service by publication. He also testified that a certified mailing sent to Mother was returned as undeliverable with no forwarding address. Father, and then Child, next offered testimony concerning the petition's allegations. Based on that testimony, the court found that Mother had abandoned Child and termination was in Child's best interests. The court entered a written order terminating Mother's parental rights that day.

¶7 Soon thereafter, counsel became aware that the court's file included an ex parte letter from Mother to the court. The letter, dated about a month before the hearing, had been file-stamped during the hearing, but the judge had not seen it. In the letter, Mother provided her telephone number and current address in Huntington Beach, California, and asserted that Father was well aware of her whereabouts. Mother stated that the property at the Oceanside address was her "old rental unit," currently occupied by a "stranger" who Mother "luck[ily] . . . somewhat knew" and who "by chance had [Mother's] email address" and e-mailed Mother copies of the documents left by the process server. Mother then discussed the merits of the termination petition, requested that the hearing

be reset, and indicated that she would appear as requested if resetting the hearing was not possible.

¶8 Once he became aware of the letter, Mother's appointed counsel made contact with Mother and filed a motion to set aside the termination order. The motion argued, *inter alia*, that the termination order should be set aside "[g]iven that personal service was not proper."

¶9 The court denied the motion to set aside. The court reasoned that Mother's letter showed she received "actual notice" of the proceedings through the current occupant of her former residence. Despite that notice, Mother "failed to appear, contest or contact her lawyer" and "sat on her rights, knowing that her failure to appear could result in termination of parental rights."

¶10 Mother appeals.[1] We have jurisdiction under A.R.S. § 8-235(A).

DISCUSSION

¶11 Mother contends that the juvenile court erred by denying her motion to set aside the termination order. She

[1] The juvenile court did not sign its minute entry denying Mother's motion for new trial. The ruling was not a final, appealable order when Mother filed her notice of appeal. *See* Ariz. R.P. Juv. Ct. 104(A). We suspended the appeal and revested jurisdiction in the juvenile court for the entry of a signed, appealable order. Such an order was entered on July 23, 2012, and the appeal was automatically reinstated.

contends that the termination order is void for lack of personal jurisdiction due to improper service of process. Child[2] disputes this contention.

¶12 We review de novo the denial of a motion to set aside a judgment as void. *Ezell v. Quon*, 224 Ariz. 532, 536, ¶ 15, 233 P.3d 645, 649 (App. 2010). We have no choice but to set aside a judgment that is void for lack of jurisdiction. *Preston v. Denkins*, 94 Ariz. 214, 219, 382 P.2d 686, 689 (1963).

I. APPOINTED COUNSEL'S REMARKS AT THE INITIAL HEARING DID NOT WAIVE THE JURISDICTION DEFENSE.

¶13 As an initial matter, we must determine whether Mother has waived the jurisdiction defense. Mother's appointed counsel appeared at the initial hearing, made no objection to jurisdiction, and in fact affirmatively stated that he believed service was proper: "[J]ust for the record, I have reviewed the service documents from [Father's counsel] on behalf of [Mother] and they do appear to be appropriate and in order. It does look like diligent efforts of service were made. And publication does look effective."

---

[2] Father died before filing an answering brief. After Father's death, Child's trial counsel successfully moved the juvenile court to appoint appellate counsel to allow Child to participate in the appeal. Child then filed an answering brief arguing that we should affirm. A child has a legitimate interest in his own welfare and may petition for termination of a parent's rights. *In re Pima Cnty. Juvenile Severance Action No. S-113432*, 178 Ariz. 288, 291, 872 P.2d 1240, 1243 (App. 1993). It is appropriate that we consider Child's answering brief here.

¶14 Counsel's remarks could not, however, constitute waiver of Mother's right to challenge the service. The record shows that Mother was unaware that counsel had been appointed to represent her, and she never had any contact with counsel until after the hearing. Absent communication with his client, counsel lacked authority to waive her rights. And given counsel's lack of knowledge of the facts surrounding service, the court erred by accepting an affirmative concession that effectively determined the outcome of the case. *Cf. In re Maricopa Cnty. Juvenile Action No. JS-5860*, 169 Ariz. 288, 291, 818 P.2d 723, 726 (App. 1991) (appointed counsel of whom respondent was unaware and with whom respondent had never had contact did not have authority to accept service of process on respondent's behalf).

II. THE JUVENILE COURT LACKED JURISDICTION TO ENTER THE TERMINATION ORDER BECAUSE MOTHER WAS NOT PROPERLY SERVED.

¶15 In the absence of proper service of a petition to terminate parental rights and a notice of initial hearing, the juvenile court lacks jurisdiction to enter a judgment adverse to the respondent parent.[3] *JS-5860*, 169 Ariz. at 290-91, 818 P.2d at 725-26. Proper service is service that conforms to the

[3] Indeed, unlike in civil actions, proper service is the *only* requirement for jurisdiction in termination proceedings. *In re Appeal in Maricopa Cnty., Juvenile Action No. JS-734*, 25 Ariz. App. 333, 336-38, 543 P.2d 454, 457-59 (1975) (*in personam* jurisdiction over respondent mother not required where mother was properly served).

requirements of Ariz. R. Civ. P. ("Rule") 4.1 or 4.2. A.R.S. § 8-535(A); Ariz. R.P. Juv. Ct. 64(D)(3).

A. Service at the Oceanside Property Was Inadequate.

¶16 Rule 4.1(d) provides that service of process may be accomplished by "leaving copies [of the process] at that individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the pleading to an agent authorized by appointment or by law to receive service of process." Pursuant to Rule 4.2(b), this method of service is effective on out-of-state as well as in-state parties.

¶17 Service at a party's "usual place of abode" is service "at the place where the [party] normally actually resides so that service will be 'substantially . . . likely to bring home notice' to the party affected." *Bowen v. Graham*, 140 Ariz. 593, 597, 684 P.2d 165, 169 (App. 1984). Whether a property qualifies as an "abode" is a fact-intensive inquiry. *French v. Angelic*, 137 Ariz. 244, 246, 669 P.2d 1021, 1023 (App. 1983). In civil actions, the definition is liberally construed where actual notice has been received. *Scott v. G.A.C. Fin. Corp.*, 107 Ariz. 304, 305-06, 486 P.2d 786, 787-88 (1971). Locations other than a party's home therefore may qualify in some circumstances where actual notice results. *See id.* (service effective where process left with defendant's estranged wife at

formerly shared residence, and wife gave copies to defendant well before entry of judgment); *Liberty Mut. Ins. Co. v. Rapton*, 140 Ariz. 60, 680 P.2d 196 (App. 1984) (service effective where process left with defendant's live-in fiancée at defendant's business on same tract as residence, and fiancée gave copies to defendant same day); *Marks v. LaBerge*, 146 Ariz. 12, 703 P.2d 559 (App. 1985) (service effective where process left with defendant's ex-fiancée at residence owned by defendant, and ex-fiancée gave copies to defendant). But even a liberal construction and actual notice cannot cure all defects in service. *See Melton v. Superior Court (Duber)*, 154 Ariz. 40, 739 P.2d 1357 (App. 1987) ("The fact that petitioner received actual notice in this case does not validate service of process upon his employer at a place which may not, even under the most liberal construction, be construed as petitioner's 'dwelling house or usual place of abode.'"); *Endischee v. Endischee*, 141 Ariz. 77, 79, 685 P.2d 142, 144 (App. 1984) (rejecting argument that "*any* manner of purported service will suffice so long as it gives the party actual knowledge of the pendency of the action").

¶18 Here, the certificate of service shows that Father's process server left copies of the petition and the notice of hearing with a third party, Nordeck, at the Oceanside address after Nordeck informed him that Mother "moved out 3 months ago."

There is no evidence in the record that Nordeck represented that Mother continued to inhabit or use the property in any manner, and Nordeck's statement that Mother "still receive[d] mail" there after having moved out was ambiguous at best. Though Mother's mail may have continued to arrive at her former address, there is nothing in the record to support the counterintuitive proposition that Mother used her former address as her mailing address. There is also no evidence in the record that Nordeck had (or represented herself as having) any special relationship with Mother or that she previously lived at the property together with Mother. In short, there was no evidence that the Oceanside property was anything other than Mother's former residence, or that Nordeck was anyone other than a successor tenant with knowledge of Mother's identity and her telephone number and e-mail address.

¶19 Mother did receive actual notice through Nordeck's e-mail. But here, the juvenile court's reliance on that notice was misplaced. This was a termination action. The consequence of "default" was not mere civil liability, but loss of parental rights. A.R.S. § 8-535(D). The right to manage and care for one's child is a fundamental right. *M.L.B. v. S.L.J.*, 519 U.S. 102, 119 (1996). Where that right is at stake, we must construe the applicable laws strictly. *See Lee v. Superior Court (Hoenninger)*, 25 Ariz. App. 55, 58, 540 P.2d 1274, 1277 (1975);

In re Pima Cnty. Juv. Severance Action No. S-120171, 183 Ariz. 546, 548, 905 P.2d 555, 557 (App. 1995). We conclude that the relaxed interpretation of Rule 4.1(d)'s requirements in civil actions cannot apply when fundamental liberty rights are at stake. And we doubt that even the most liberal construction could transform service on a successor tenant with no relationship to the interested party into valid service.

¶20 At the time of the purported service, the Oceanside property was not Mother's "dwelling house or usual place of abode." Mother's actual notice does not alter this conclusion. The service at the Oceanside property was therefore inadequate and ineffective.

B. Service by Publication Was Inappropriate.

¶21 Rule 4.2(f) provides that

> [w]here the person to be served is one whose present residence is unknown but whose last known residence was outside the state, or has avoided service of process, and service by publication is the best means practicable under the circumstances for providing notice of institution of the action, then service may be made by publication in accordance with the requirements of this subpart.

Service by publication is inappropriate in the absence of the serving party's "due diligent effort to locate [the] opposing party to effect personal service." *Sprang v. Peterson Lumber, Inc.*, 165 Ariz. 257, 261, 798 P.2d 395, 399 (App. 1990).

¶22 Here, Father's investigator made efforts to search for Mother's address. Then, Father's process server went to the Oceanside property and spoke to Nordeck, who telephoned Mother in the process server's presence. There is no evidence in the record that Father asked Nordeck for the telephone number or used it to try to locate Mother. Instead, Father commenced publication procedures. His failure to follow up on the telephone number before serving by publication defeats any assertion of due diligence. Service by publication was inappropriate on this ground alone.

CONCLUSION

¶23 Mother was not properly served. The order terminating her parental rights to Child therefore is void for lack of jurisdiction. We reverse the juvenile court's order denying Mother's motion to set aside the termination order and remand for proceedings consistent with this decision.

/s/
_____
PETER B. SWANN, Presiding Judge

CONCURRING:

/s/
_____
PATRICIA A. OROZCO, Judge

/s/
_____
MARGARET H. DOWNIE, Judge