IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 9/19/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

JAMES P.,	)	1 CA-JV 13-0067
	)	
Appellant,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
REBECCA V., T.P.,	)	103(G) Ariz.R.P. Juv.
	)	Ct.; Rule 28 ARCAP)
Appellees.	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. JS12239

The Honorable Roland J. Steinle, Judge

VACATED AND REMANDED

Lopez & Associates PLLC — Phoenix
By Bernard P. Lopez
Attorneys for Appellant

Rebecca V., Appellee — Avondale
In Propria Persona

G O U L D, Judge

¶1 James P. ("Father") appeals the juvenile court's judgment terminating his parental rights to his minor child, T.P. For the following reasons, we vacate the judgment terminating

Father's parental rights and remand for further proceedings consistent with this decision.

Facts and Procedural Background

¶2 On October 12, 2012, Rebecca V., mother of minor child T.P. ("Mother"), filed a petition for termination of parent-child relationship in Maricopa County Juvenile Court against Father.[1] Pursuant to A.R.S. § 8-535(A), the juvenile court issued an order setting an initial hearing on Mother's petition for December 19, 2012. The order directed Mother to serve Father with notice of the date, time and location of the initial hearing.

¶3 Father did not appear at the initial hearing. When the juvenile court asked Mother if she had served Father, Mother stated her efforts to serve Father had been unsuccessful. Based on Mother's statements, which were not under oath, the court granted Mother permission to serve Father by publication.

¶4 On February 27, 2013, Mother filed an affidavit of publication, stating that she had published notice of the initial hearing in *The Record Reporter*, a publication that is circulated only in Maricopa and Pima Counties. *The Record Reporter* is not published outside of Arizona.

¶5 On February 27, 2013, the court held a hearing regarding severance and Mother's service by publication. Based

[1] Mother filed her petition as a private severance action pursuant to Arizona Revised Statutes ("A.R.S.") section 8-533(A).

on Mother's affidavit of publication, the court found that Father had been properly served, and entered a default judgment against Father terminating his parental rights. On March 4, 2013, a final judgment was filed terminating Father's parental rights.

¶6 On March 19, 2013, Father filed a notice of appeal from the court's judgment and a motion to set aside judgment. The court denied Father's motion to set aside the judgment on April 15, 2013; Father, however, has never filed a notice of appeal from this order.[2] We have jurisdiction pursuant to A.R.S. §§ 8-235(a) and 12-2101(A)(1).

Discussion

¶7 Father argues that the juvenile court lacked personal jurisdiction to terminate his parental rights because he was not properly served. We agree. Mother's failure to provide an affidavit containing evidence of a due diligence effort to personally serve Father rendered the judgment of the juvenile court void for lack of personal jurisdiction.

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[2] Given that Father's notice of appeal was filed before the court ruled on his motion to set aside the judgment, we lack jurisdiction to consider whether the court abused its discretion in denying this motion. *See Lindsey v. Dempsey*, 153 Ariz. 230, 235, 735 P.2d 840, 845 (App. 1987) ("Since the ruling of which Lindsey complains occurred after the entry of judgment and the filing of the notice of appeal, we do not have jurisdiction to address it."). Thus, for purposes of this appeal, we have not considered the facts alleged in Father's motion to set aside the judgment.

¶8 Arizona Rule of Procedure for the Juvenile Court 64(D)(3) mandates service in a severance case be conducted in compliance with Rules 4.1 or 4.2 of the Arizona Rules of Civil Procedure. Arizona Rule of Civil Procedure 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." Rule 4.2(f) mandates that a party conducting service by publication "file an affidavit showing . . . the circumstances warranting utilization of [service by publication] which shall be prima facie evidence of compliance." *Id.*

¶9 An affidavit filed pursuant to Rule 4.2(f) must provide sufficient "facts indicating . . . a due diligent effort to locate an opposing party to effect personal service." *Sprang v. Petersen Lumber, Inc.*, 165 Ariz. 257, 261, 798 P.2d 395, 399 (App. 1990) (citations omitted). "[I]f the affidavit fails to indicate that due diligence was exercised to locate the defendant, the default judgment is void on its face for lack of jurisdiction." *Id.* at 262, 798 P.2d at 400. In *Sprang*, we held that a "'due diligent effort' requires such pointed measures as an examination of telephone company records, utility company records, and records maintained by the county treasurer, county recorder, or similar record keepers." 165 Ariz. at 261, 798 P.2d

at 399; *see also Preston v. Denkins*, 94 Ariz. 214, 222-23, 382 P.2d 686, 691-92 (1963) (court lacked jurisdiction to enter default judgment following service by publication based on alleged lack of knowledge of defendants' residences when simple inquiry would have revealed information); *Roberts v. Robert*, 215 Ariz. 176, 181, ¶ 24, 158 P.3d 899, 905 (App. 2007) ("[Although] the lienholders suggest they properly served Roberts . . . by publication, the record contains no evidence of what steps, if any, [they] took to identify and locate [him] before attempting service by publication. Therefore, we reverse").

¶10 Aside from the requirements of Rule 4.2(f), a plaintiff seeking service by publication must also satisfy the "due process minimums" required by the Fourteenth Amendment and articulated by the United States Supreme Court in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). *Master Fin., Inc. v. Woodburn*, 208 Ariz. 70, 73, ¶ 15, 90 P.3d 1236, 1239 (App. 2004); *see also* Ariz. R. Civ. P. 4.1 cmt. In *Mullane*, the Court explained "when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." 339 U.S. at 315.

¶11 Here, the record contains no evidence that Mother filed an affidavit showing her due diligence efforts to serve Father. The only affidavit contained in the record is an affidavit of

publication, indicating that Mother published notice in an Arizona newspaper.[3] Otherwise, the record supporting publication consists of Mother's unsworn avowals to the juvenile court at the December 19 hearing that: (1) she had not been able to serve Father at his last known address in Wisconsin, and (2) she had attempted to serve Father by certified mail and a process server, and both efforts had failed.

¶12 Based on the record before us, because Mother failed to file a detailed, sworn affidavit as required under Rule 4.2(f), we conclude the court erred in granting Mother leave to serve Father by publication.

¶13 We also note that a party seeking service by publication must meet both the requirements of Rule 4.2(f) and the requirements of the Due Process Clause of the Fourteenth Amendment, as articulated by the United States Supreme Court in *Mullane*. *Master Fin., Inc.*, 208 Ariz. at 73, ¶ 15, 90 P.3d at 1239. In *Mullane*, the Court emphasized:

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[3] In her answering brief, Mother references an "affidavit" from a process server allegedly detailing "six attempts" to serve Father in Wisconsin. This affidavit may in fact be the "paperwork" the juvenile court reviewed prior to approving service by publication at the December 19 hearing. Nonetheless, there is no such affidavit in the record before this court, and we will not speculate as to whether the juvenile court ever reviewed such an affidavit. Our review is limited to the record provided to us on appeal. *See Rancho Pescado, Inc. v. Nw. Mut. Life Ins., Co.*, 140 Ariz. 174, 189, 680 P.2d 1235, 1250 (App. 1984) (finding that it is the duty of the appealing party to insure that the Court of Appeals receives all necessary evidence).

> 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.

339 U.S. at 315. The general inadequacy of service by publication to acquaint "interested parties of the fact that their rights are before the courts" is assuredly behind Rule 4.2(f)'s language specifying that the person to be served must be 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*." (Emphasis added). Here, although Mother stated that she believed Father's last known address was in Wisconsin, Mother chose to publish in Maricopa and Pima Counties. Although Maricopa County was the "county where the action [was] pending," as required by Rule 4.2(f), it was not "the best means practicable under the circumstances."

¶14 Before 1994, Rule 4.2(f) included an "out-of-state publication requirement." Our supreme court amended the Rule in

1994 to remove this requirement. The court comment to the amended rule explains that the court "acted out of concern for the unnecessary expense in the vast majority of cases in which out-of-state publication is ineffective as a means of providing notice." Rule 4.2(f) cmt. 1994 Amendment. The court also explained, however, that it was "aware that in a small category of cases out-of-state publication might yield the best practicable notice under the circumstances" and emphasized that "[c]ounsel should always consider whether, in a given case, out-of-state publication may nevertheless be indicated." *Id.*

¶15 Here, publication in a newspaper in Wisconsin, in addition to the Maricopa County publication required by the Rule, would have been the "means employed . . . one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane*, 339 U.S. at 315. There is nothing in the record indicating that Mother could have reasonably expected Father to be informed of the proceedings against him through publication in Maricopa County's *The Record Reporter*. Thus, as the Court recognized in *Mullane*, the odds were "large indeed" that out-of-state parties such as Father would come across a legal notice published in an Arizona newspaper. A notice published in a local newspaper in Wisconsin, on the other hand, could be "defended on the ground that it [was] in itself reasonably certain to inform those affected." *Id.* We therefore

conclude that publishing only in Arizona was not "the best means of notice under the circumstances," *Master Fin., Inc.*, 208 Ariz. at 73, ¶ 15, 90 P.3d at 1239, or "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," *Mullane*, U.S. 339 at 314, and thus did not comply with the notice requirements of the Due Process Clause of the Fourteenth Amendment.

Conclusion

¶16 Based on the record before us, we conclude the juvenile court did not have personal jurisdiction over Father because Mother failed to properly serve him. As a result, the default judgment entered by the juvenile court terminating Father's parental rights is void. Accordingly, we vacate the judgment and remand this case to the juvenile court for further proceedings consistent with this decision.

/S/_____
ANDREW W. GOULD, Judge

CONCURRING:

/S/_____
PETER B. SWANN, Presiding Judge

/S/_____
PATRICIA K. NORRIS, Judge