

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

CHRISTOPHER H., *Appellant*,

v.

DEPARTMENT OF CHILD SAFETY, S.H., C.H., *Appellees*.

No. 1 CA-JV 20-0305
FILED 5-11-2021

Appeal from the Superior Court in Yuma County
No. S1400JD20190439 and S1400JD20190440
The Honorable Kathryn E. Stocking-Tate, Judge *Retired*

APPEAL DISMISSED

COUNSEL

Law Offices of Harriette P. Levitt, Tucson
By Harriette P. Levitt
Counsel for Appellant

Arizona Attorney General's Office, Mesa
By Thomas Jose
Counsel for Appellee Department of Child Safety

MEMORANDUM DECISION

Presiding Judge Kent E. Cattani delivered the decision of the Court, in which Judge Samuel A. Thumma and Judge Brian Y. Furuya joined.

C A T T A N I, Judge:

¶1 Counsel for Christopher H. (“Father”) has filed an appeal of the superior court’s order finding two minor children (C.H. and S.H.) dependent as to Father, alleging that Father was never properly served. But Father’s counsel has been unable to locate or speak with Father and has thus been unable to avow that Father has authorized the appeal, as required under Rule 104(B) of the Arizona Rules of Procedure for the Juvenile Court. Accordingly, and for reasons that follow, we dismiss the appeal.

FACTS AND PROCEDURAL BACKGROUND

¶2 C.H. and S.H.’s maternal grandmother was appointed their legal guardian by a California court order in 2015. In violation of that order, she moved with the children to Yuma, Arizona. In 2019, Yuma County Sheriff’s deputies responded to a domestic disturbance between S.H. and Grandmother. The Department of Child Safety (“DCS”) became involved and discovered that the home was dirty, the children were “filthy and unkempt,” and there was little food in the home, leaving the children to seek food from local restaurant customers and staff. DCS took the children into care and placed them in separate foster homes. DCS then filed a dependency petition, naming maternal grandmother, the children’s mother, and Father. Father appeared on the birth certificate for S.H., and DCS alleged that Father (although not listed on the birth certificate for C.H.) was C.H.’s biological father. Although Father had not been located and had never appeared, the court appointed counsel to represent him.

¶3 After California ceded jurisdiction to Arizona, the superior court held an initial dependency hearing in September 2019. Father was not served in advance of that hearing and did not appear (and the record indicates Father has never appeared in this matter). At DCS’s request, the court continued the hearing until December 2019 to allow service on Father.

¶4 Over four consecutive weeks in October 2019, DCS published notice of the dependency hearing in the Yuma Daily Sun. In December

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2019, DCS filed an affidavit stating that it had conducted a diligent search to find Father, including searching state and federal jail and prison records in Arizona and California and searching on social media (locating, then sending a message to what appeared to be Father's account), and that DCS had found a last known address for Father. DCS conceded that there had been no attempt to serve Father personally and asked that the court postpone the initial dependency hearing for another 60 days. With no objection from Father's counsel, the court granted the request.

¶5 At a March 2020 hearing, DCS asserted that in addition to the efforts described in the December affidavit, it had sent a process server to Father's last known address in California, but the process server found only a 2017 eviction notice and was unable to effectuate service. DCS also sent the petition by certified mail to Father's last known address (which yielded an "undeliverable" result). DCS thus asked that the court find that Father had been served by publication. The court nevertheless concluded that DCS should take additional steps to locate Father and republish after doing so.

¶6 In July 2020, DCS detailed the steps it had taken to locate Father, then urged the court to find service by publication based on the October 2019 publication. DCS recounted the following efforts to locate Father: (1) a search of prison records in California, Arizona, and Oregon (Grandmother had suggested to DCS that Father could be in that state); (2) an attempt to serve Father personally at his last known address in California earlier in 2020; and (3) a certified letter sent to his last known address that came back as undeliverable in early 2020. Father's counsel objected, arguing that these were the same steps that the court indicated were insufficient before and that these efforts were still insufficient. Father's counsel also pointed out that there were other potential ways to get into contact with Father, including by social media (which allegedly had recent posts from Father) and by searching for a new address for Father. The court continued the hearing for two days to allow DCS to again attempt to reach Father.

¶7 At the continued hearing, DCS stated that it tried to reach Father by sending a Facebook Message to an account believed to belong to him, but there was no response to the message. Although Father's counsel argued that DCS was attempting to circumvent the rules and that diligent efforts to find Father must occur first before publication, counsel acknowledged that she too had been unable to locate or speak with Father.

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¶8 The superior court found that DCS had notified Father of the hearing because the Facebook Message from DCS should have let Father know “something’s up.” The court ruled that service was complete as a result of DCS’s efforts to find Father and the October publication, and found C.H. and S.H. dependent as to Father. Father’s counsel timely filed a notice of appeal.

DISCUSSION

I. Jurisdiction.

¶9 We have an independent obligation to assess our jurisdiction. *Jessicah C. v. Dep’t of Child Safety*, 248 Ariz. 203, 205, ¶ 8 (App. 2020). As a jurisdictional prerequisite, Rule 104(B) requires Father’s counsel to avow that she has communicated with Father and received his permission to file the appeal. Here, Father’s counsel stated that she has *not* communicated with Father and as of the date of filing briefing in this matter, Father still has not been located. Therefore, we dismiss the appeal.

II. Special Action.

¶10 Despite Father’s counsel’s inability to communicate with Father and meet our jurisdictional prerequisite, we may exercise special action jurisdiction to review the merits of a superior court’s ruling when there is “no equally plain, speedy, and adequate remedy by appeal.” See *Dep’t of Child Safety v. Stocking-Tate*, 247 Ariz. 108, 112, ¶ 7 (App. 2019); see also A.R.S. § 12-120.21(A)(4). Notwithstanding our discretionary authority to sua sponte treat Father’s appeal as a special action, we decline to do so.

¶11 Father’s brief (through counsel) challenges the adequacy of DCS’s efforts to locate Father, and further challenges the efficacy of serving Father by publication before having diligently attempted to locate him. Like DCS, Father’s appointed counsel (both in superior court and on appeal) have not been able to locate him or confer with him. Although Rule 104(B) technically is limited to appeals, it would be anomalous to suggest that an attorney who could not pursue an appeal because a jurisdictional prerequisite was lacking could pursue a special action addressing the same issue.

¶12 Moreover, the Rule 104(B) requirement that counsel avow that Father has authorized the appeal is not a hyper-technical roadblock denying Father his day in court. Given that Father has apparently made no effort to contact his children or anyone who has been caring for them, his appellate counsel is left with the dubious argument that someone who has

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not had any involvement with his children since at least 2015, and who counsel has been unable to contact, has not been given adequate notice of the dependency proceedings merely because notice by publication occurred before, rather than after, DCS's diligent efforts to locate Father.

¶13 Under these circumstances, we decline to exercise our discretionary authority to treat this matter as a request for special action relief.

CONCLUSION

¶14 We dismiss the appeal.



AMY M. WOOD • Clerk of the Court
FILED: AA