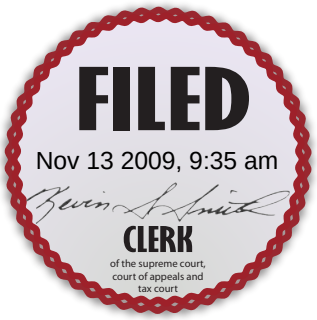

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IN THE
COURT OF APPEALS OF INDIANA

D. K.,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 73A01-0902-CV-78
	)	
M. P.,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE SHELBY SUPERIOR COURT
The Honorable Russell J. Sanders, Judge
Cause No. 73D02-0806-AD-2

November 13, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

D.K. appeals the trial court's decree granting M.P.'s petition to adopt D.K.'s biological child, A.G.K. D.K. presents four issues for review, which we consolidate and restate as whether the notice of adoption given to D.K. comported with the notice required by the adoption statutes and the Due Process Clause of the Fourteenth Amendment.[1]

We affirm.

FACTS AND PROCEDURAL HISTORY

D.K. ("Biological Father') and M.K. ("Mother") were married on September 29, 2000, and their child, A.G.K. ("the child"), was born on October 19, 2001. Biological Father and Mother began living separately on November 1, 2003, and their marriage was dissolved by a decree entered August 24, 2007. In that decree, the dissolution court awarded full legal custody of A.G.K. to Mother. The court further ordered that Biological Father "shall not pay child support and he shall not have visitation until further order of [the dissolution court] or by agreement of the parties." Appellant's App. at 92.

Mother married M.P. ("Stepfather") on October 21, 2007. On June 17, 2008, Stepfather filed a petition to adopt the child. Stepfather attempted to serve notice of the adoption proceedings on Biological Father through the Clerk of the Shelby County Court at Biological Father's two addresses: the residence where Biological Father had lived at the time the dissolution decree was entered, at 1787 West County Road 900 South in

[1] In his argument regarding the violation of due process rights, D.K. does not cite to the particular due process clause on which he relies. Based on his citation to case law, we presume D.K. raises his due process argument under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Westport ("Westport Residence"), and at the residence of Biological Father's mother D.M., at 4484 South 100 West in Anderson ("Grandmother's Residence").[2] On June 24, the letter that was sent to Grandmother's Residence was returned "attempted—not known" and "unable to forward." Id. at 16. On July 9, the letter that was sent to the Westport Residence was returned as "unclaimed" and "unable to forward." Id. at 17. It was later discovered that the Clerk's office had addressed both letters to Stepfather at those addresses instead of to Biological Father.[3]

On September 2, Stepfather filed a praecipe for service of the adoption notice on Biological Father by publication, a Notice of Adoption ("Notice"), Stepfather's Affidavit Upon Diligent Inquiry of Whereabouts Unknown, and Mother's Affidavit Upon Diligent Inquiry of Whereabouts Unknown. Both affidavits provide that "the present address and residence of [Biological Father], the natural father of [the child], is unknown and that diligent search and inquiry has been made to learn his whereabouts, but same was not discovered." Id. at 21-22. The Notice was published on September 5, 12, and 19, 2008, in the Greensburg Daily News, the local newspaper for Westport, which was Biological Father's last known residence. The publisher's affidavit was filed October 10.

On September 23, Grandmother filed a motion to intervene in the adoption proceeding. Stepfather filed an objection to Grandmother's motion, and the court set the

[2] Before Biological Father had hired an attorney in the dissolution proceedings, Grandmother had accepted certified mail to Biological Father at her residence.

[3] The parties do not state when this error was discovered, but we note that the error is apparent upon examination of the Chronological Case Summary.

matter for hearing on November 21.[4] On October 14, Stepfather attempted to effect alias service on Biological Father by mailing the Notice to him again at the Westport Residence and at Grandmother's Residence. The letter sent to the Westport Residence was returned unclaimed. But, on October 27, Grandmother accepted service of the letter sent to her residence, signing the return receipt as "Addressee." Id. at 42. Also on October 27, Biological Father was arrested and incarcerated in the Madison County Jail.

On November 13, Biological Father wrote a letter to Mother, stating his objection to the adoption and that he would be there for the "court date[.]" Appellant's App. at 89. The court set the final hearing for December 18. Biological Father appeared at the hearing, pro se, and stated his objection to the adoption. Stepfather orally moved for a finding that Biological Father had impliedly consented to the adoption. The judge pro tempore presiding over the hearing recused herself because her firm had represented Biological Father in criminal matters, and the final hearing was reset for December 30 before the superior court judge.

On December 30, the court heard evidence on whether Biological Father had impliedly consented to the adoption by failing to timely file an objection. Biological Father claimed that he had not received proper service of the Notice, that he had not subjected himself to the court's jurisdiction until he appeared at the December 18 hearing, and that, therefore, the time had not run for him to file an objection. On January 12, 2009, the court entered an order finding that Biological Father had not timely filed his objection to the adoption, finding in part as follows:

[4] Grandmother and Stepfather later agreed to vacate the November 21 hearing date on her motion to intervene, and they filed an agreed entry on November 24.

1. I.C. 31-19-9-18(a)(1) directs that a person's consent to an adoption is irrevocably implied unless that person files a motion to contest the adoption within thirty (30) days after service of notice.

2. [Biological] Father claims that the above noted statute does not apply here because either he did not receive notice or he was not under the personal jurisdiction of this Court until he appeared at a hearing in this matter on December 18, 2008.

3. [Stepfather] claims that notice was sent by both publication pursuant to Trial Rule 4.13 and by certified mail[] (See Trial Rule 4.11).

4. [Biological] Father does not deny that notice was sent, but asserts that the service by publication was insufficient because it was:

a. Not published in the county of his last known address;

b. His address was or should have been known to [Stepfather];

c. Was in improper form because there is no summons signed by the clerk; or,

d. There was no court order authorizing the service by publication.

5. [Biological] Father acknowledges that service by certified mail was sent to his mother's Anderson address and signed for by his mother, [Grandmother], on October 27, 2008, but [he] is vague about seeing the actual notice or learning about it on any specific date. He claims that because he did not personally sign for the certified mail that the service was inadequate.

6. The following facts are uncontroverted:

a. Since his separation from [Mother, Biological Father] has lived in the following locations:

i. 1787 W. CR. 900 S, Westport, Indiana 47283, (Westport address), which is in Decatur County for which the county seat is Greensburg.

ii. 4484 S 100 W, Anderson, Indiana 46013, (Anderson address), which is his mother's address in Madison County, Indiana.

iii. Madison County Jail, from at least 10/27/08 to 11/13/08.

iv. Various other locations depending upon his occupation.

b. [Biological] Father's mother, [Grandmother], signed for the notice of adoption herein on October 27, 2008, and sometime thereafter advised [him] of the pending adoption by either sending or taking the documents to him.

c. [Biological] Father's mother, [Grandmother], had known of the adoption sometime during the month of September[] 2008 when she had consulted with her own attorney relative to grandparent issues.

d. [Biological] Father lived with his mother at unspecified times in September[] 2008.

e. Notices were sent to both the Westport and Anderson addresses.

f. Publication of the notice of adoption was made in the Greensburg Dailey [sic] News on September 5, 12[,] and 19, 2008.

g. [Biological Father] sent a letter to [Mother] on November 13, 2008[,] that clearly acknowledges the existence of the Petition for Adoption and the fact that [Stepfather] is the petitioner.

h. No Motion to Contest the Petition for Adoption was filed as of December 30, 2008.

i. December 30, 2008 is more than thirty (30) days from November 13, 2008.

> 7. Notwithstanding the technical objections to the Notice by Publication or even the divergent evidence related to [Biological Father's] residence over the past several months it is clear that the Alias Notice of Service filed October 14, 2008[,] and sent to the Anderson address was reasonably calculated to inform [Biological Father] of the pending petition. [See Trial Rule 4.15(F)). [Biological Father] lived with his mother during this period, he was in contact with her and she knew that he was in jail in the same city. [Grandmother] was under a legal obligation to notify her son[] (see Trial Rule 4.16(B)), and there is no evidence that she failed to do so, and [Grandmother] had known about the proceedings even before receiving and signing for the adoption. It is highly likely that [Biological Father] knew of these proceedings well before the October 14th notice was even sent. Finally, and most persuasively, based upon [Biological Father's] letter dated November 13, 2008[,] he was well aware of the proceedings. The Court finds that said service was sufficient to start the tolling of the limits under I.C. 31-19-9-18.
>
> 8. Based upon the foregoing, the Court determines that pursuant to the cited statute [Biological Father] consents to the adoption of [A.G.K.] by [Stepfather].

Id. at 97-100. On January 22, 2009, the court entered the Decree of Adoption, granting Stepfather's petition. Biological Father now appeals.

DISCUSSION AND DECISION

The decision of whether to set aside a judgment is usually given substantial deference on appeal. H.R. v. R.C. (In re D.C.), 887 N.E.2d 950, 955 (Ind. Ct. App. 2008). Personal jurisdiction, however, is a question of law. Id. (citing LinkAmerica Corp. v. Albert, 857 N.E.2d 961, 965 (Ind. 2006)). As with other questions of law, a determination of the existence of personal jurisdiction is entitled to de novo review by appellate courts. Id. This court does not defer to the trial court's legal conclusion as to whether personal jurisdiction exists. Id. However, personal jurisdiction turns on facts, and findings of fact by the trial court are reviewed for clear error. Id. Clear error exists where the record does not offer facts or inferences to support the trial court's findings or

conclusions of law. Id. (citing Rogers v. Rogers, 876 N.E.2d 1121, 1126 (Ind. Ct. App. 2007), trans. denied).

We initially observe that Biological Father argues that the Notice does not comply with Indiana Code Section 31-19-4.5-3. But that statute applies to the form, not the service, of a notice of adoption. To the extent Biological Father intended to make any argument under Section 31-19-4.5-3, that argument is waived for failure to support it with cogent argument regarding the form of the notice of adoption. See Ind. Appellate Rule 46(A)(8)(a). Biological Father's arguments, as well as the law cited in support, regard service of process, not the format of the notice. Indiana Code Section 31-19-4.5-2 prescribes how notice of a petition to adopt shall be served where, as here, consent is not required. Therefore, we will consider Biological Father's arguments under Section 31-19-4.5-2.

Biological Father contends that he did not receive service of the Notice of Adoption in compliance with Indiana Code Section 31-19-4.5-2 or the Due Process Clause to the Fourteenth Amendment. Ineffective service of process prohibits a trial court from having personal jurisdiction over a respondent. In re D.C., 887 N.E.2d at 955 (citation omitted). A judgment rendered without personal jurisdiction over a defendant violates due process and is void. Id. (citation omitted). Thus, we must determine whether the trial court had personal jurisdiction over Biological Father.

Biological Father first contends that he was not served the notice of adoption in compliance with Indiana Code Section 31-19-4.5-2. That statute provides:

> Except as provided in IC 31-19-2.5-4, if a petition for adoption alleges that consent to adoption is not required under IC 31-19-9-8, notice of the

> adoption must be given to the person from whom consent is allegedly not required under IC 31-19-9-8. Notice shall be given:
>
> > (1) in the same manner as a summons and complaint are served under Rule 4.1 of the Indiana Rules of Trial Procedure if the person's name and address are known; or
> >
> > (2) in the same manner as a summons is served by publication under Rule 4.13 of the Indiana Rules of Trial Procedure if the name or address of the person is not known;
>
> to a petitioner for adoption.

The consent of a person who is served with notice under Indiana Code Chapter 31-19-4.5 to adoption is irrevocably implied without further court action if the person "fails to file a motion to contest the adoption as required under IC 31-19-10 not later than thirty (30) days after service of notice under IC 31-19-4.5[.]" Ind. Code § 31-19-9-18.

Stepfather attempted to serve the notice of adoption by personal service, under Trial Rule 4.1, and by publication, under Trial Rule 4.13. Indiana Trial Rule 4.1 provides:

> (A) In general Service may be made upon an individual, or an individual acting in a representative capacity, by:
>
> > (1) Sending a copy of the summons and complaint by registered or certified mail or other public means by which a written acknowledgment or receipt may be requested and obtained to his residence, place of business or employment with return receipt requested and returned showing receipt of the letter; or
> >
> > (2) Delivering a copy of the summons and complaint to him personally; or
> >
> > (3) Leaving a copy of the summons and complaint at his dwelling house or usual place of abode; or

> (4) Serving his agent as provided by rule, statute or valid agreement.
>
> (B) Copy service to be followed with mail. Whenever service is made under subsection (3) or (4) of subdivision (A), the person making the service also shall send by first class mail, a copy of the summons without the complaint to the last known address of the person being served, and this fact shall be shown upon the return.

But Trial Rule 4.15(F) provides that "[n]o summons or the service thereof shall be set aside or be adjudged insufficient when either is reasonably calculated to inform the person to be served that an action has been instituted against him, the name of the court, and the time within which he is required to respond."

Here, the clerk of the court attempted to serve the notice of adoption on Biological Father in June by certified mail at his last known address, the Westport Residence, and at Grandmother's Residence. Both letters were returned with the notation "unable to forward," with the latest having a return date of July. Appellant's App. at 16-17. Sometime thereafter, it was discovered that the clerk's office had addressed the letters to Stepfather instead of to Biological Father. Biological Father was not served with the Notice through these mailings.

On October 14, 2008, Stepfather attempted to effect alias service on Biological Father by mailing the Notice to him at the Westport Residence and at Grandmother's Residence. The letter sent to the Westport Residence was returned unclaimed. But Grandmother accepted service of the letter sent to her residence, signing the return receipt as "Addressee." Id. at 42. We must determine whether Grandmother's acceptance of the

certified mailing at her residence satisfies Trial Rule 4.1 and constitutes service of process on Biological Father.

Biological Father testified that he had lived several different places in 2008, at least in part because his work took him out of town. He also testified that he had never given an address other than Grandmother's Residence as his mailing address. And at the December 30 hearing he stated that he had lived with Grandmother from September through the end of October 2008, although he had been out of town for work several nights each week.

Trial Rule 4.1(A)(1) provides for service on an individual by mailing a copy of the summons and petition for adoption to the respondent's residence. Here, the trial court made no finding as to Biological Father's address on any particular date. However, the evidence shows that Biological Father used Grandmother's Residence as his mailing address throughout October 2008 and that on October 27 Grandmother accepted service of the notice sent to Biological Father at that address. The court found that that notice accepted by Grandmother was "reasonably calculated to inform [Biological Father] of the pending petition." Appellant's App. at 99. We conclude that service of the Notice on Biological Father at his residence, which was also Grandmother's Residence, and for which Grandmother signed a receipt on October 27, satisfies Trial Rule 4.1(a).

Biological Father argues that Grandmother's acceptance of the Notice by signing the certified mail receipt as addressee instead of agent renders service on him ineffective. We cannot agree. That Grandmother signed as addressee the receipt for a letter addressed to Biological Father does not make the service ineffective. We have already

determined that Grandmother's Residence was Biological Father's residence during October 2008. Service was effected at that address by certified mail. Whether Grandmother signed as addressee or agent is irrelevant because, as the trial court found, such service was reasonably calculated to inform him of the petition for adoption. As such, under Trial Rule 4.15(F), Grandmother's erroneous checking of the addressee box on the certified mail receipt does not render the service ineffective.

Biological Father also relies on Ritz v. Area Planning Commission, 698 N.E.2d 386 (Ind. Ct. App. 1998), in support of his argument that Grandmother's acceptance of the Notice by certified mail was ineffective as to him. In Ritz, the planning commission attempted to serve a husband and a wife each with summonses by personally serving both summonses to the husband. The court held that personal service of both summons on the husband did not comply with Trial Rule 4.1:

> [T]hese summons[es] were not delivered to the [husband and wife's] residence; instead, they were served on [the husband] personally. The second summons would have constituted proper service only if it were served on [the wife] personally, delivered to her residence, sent by certified mail to her residence, or properly served on her agent. T.R. 4.1(A). Since it has not been clearly shown that [the husband] acted as an agent or in a representative capacity for his wife, we conclude that [the wife] was not properly served.

Id. at 389. Here, the Notice was sent to Biological Father's residence, which was also Grandmother's Residence. And whether Grandmother or Biological Father signed for it is irrelevant. Ritz is inapposite.

Biological Father also argues that service of the Notice on him at Grandmother's residence does not satisfy the Due Process Clause of the Fourteenth Amendment. But he cites no law in support of this due process argument. As such, the argument is waived.

See App. R. 46(A)(8)(a). And, in any event, we have already determined that Stepfather effected service of process on Biological Father in compliance with Trial Rule 4.1. Due process requires less than actual notice. See Grabowski v. Waters, 901 N.E.2d 560, 565 (Ind. Ct. App. 2009) ("'An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is 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.'"), trans. denied. Moreover, Biological Father's November 13 letter to Mother is additional evidence that he had actual notice of the proceedings. In that letter, Biological Father stated his objection to the adoption and that he would attend an upcoming court date in the adoption proceedings. Biological Father has not shown a due process violation.

In sum, we conclude that the notice of adoption sent to Biological Father at Grandmother's Residence, and for which Grandmother signed a certified mail receipt on October 27, satisfies service under Trial Rule 4.1(A). Because service satisfied Trial Rule 4.1, Biological Father has also not shown any due process violation. As such, the Notice also satisfies Indiana Code Section 31-19-4.5-2, and Biological Father's consent is irrevocably implied. See Ind. Code § 31-19-9-18.

Affirmed.

KIRSCH, J. and BARNES, J., concur.