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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA12-1020

JACOB BROWN APPELLANT V. ARKANSAS DEPARTMENT OF HUMAN SERVICES and T.B., D.A., and L.A., MINORS APPELLEES	**Opinion Delivered** March 27, 2013 APPEAL FROM THE CARROLL COUNTY CIRCUIT COURT, EASTERN DISTRICT, [NO. J2010-45-DA] HONORABLE JAY T. FINCH, JUDGE REVERSED

BRANDON J. HARRISON, Judge

In August 2012, the circuit court terminated Jacob Brown's parental rights to his children T.B., D.A., and L.A. Brown is the biological father of T.B and D.A.; he is the legal father of L.A. Brown appeals the decision to terminate his rights. We reverse the court's termination order because the Arkansas Department of Human Services (DHS) did not properly serve Brown or his lawyer with a petition to terminate as required under the governing statute, Ark. Code Ann. § 9-27-341(b)(2)(A) (Supp. 2012).

Some background puts the service issue into context. DHS removed the children from their mother's custody in July 2010 after they were left without a caregiver following a domestic-violence incident involving the mother and a man other than Brown. The circuit court ordered DHS to serve Brown—a non-offending parent who was imprisoned in Idaho

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when the disturbance occurred—with notice of the dependency-neglect hearings scheduled in Arkansas. The court appointed counsel for Brown in October 2010.

While still living in Idaho, Brown drove to Berryville, Arkansas to attend an October review hearing in the dependency-neglect case. He again traveled to Arkansas in January 2012 to participate in the second review hearing; Brown at that time gave DHS written notice of his current Idaho address.

In March 2012, DHS filed a petition to terminate Brown's parental rights. DHS attempted to serve the petition on Brown personally through the U.S. Postal Service by sending it to him at an Idaho address using certified mail, restricted-delivery. The termination petition's certificate of service states that a copy of the petition was sent on 9 March 2012 "by U.S. Mail and/or fax and/or email" to Brown's attorney, at 104 Public Square, Berryville, Arkansas, 72616. In late May 2012, the circuit court held a third review hearing and scheduled the case for a termination hearing. Brown attended the May hearing with his lawyer.

The hearing on DHS's petition to terminate was held in late August 2012. When the hearing started, Brown's lawyer said, "I want to make a record that I'm objecting to service of the petition to terminate my client's parental rights." Counsel said that Brown did not sign the certified-mail receipt (green card) that DHS had filed with the circuit clerk as part of its affidavit of service. DHS did not dispute that Brown himself had not signed the green card. DHS also admitted that, in March 2012, it had tried to serve Brown one time at 1637

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Penninger Drive—Brown's parents' house in Idaho. This point is important because the address Brown gave DHS in January 2012 was not the Penninger Drive address.

Brown's lawyer then told the court that he himself had never received a copy of the petition. Counsel admitted that he and Brown appeared at the May review hearing knowing that the termination petition had already been filed but decided not to raise improper service yet. The court asked Brown's lawyer if his client was "legally, technically . . . placed on notice that [the termination hearing] was going to occur." Brown objected that DHS had not provided proper legal notice. DHS countered that Brown had waived, under Arkansas Rule of Civil Procedure 12, an objection to proper service because he had appeared at the May hearing and failed to raise insufficient service.

The court overruled Brown's objection and held the hearing, which ended when the court ruled from the bench that it was terminating Brown's parental rights. Brown appeals, challenging the termination decision on the merits and the service defect. DHS asks us to affirm. On the service issue, DHS argues that service was proper because Brown was represented by counsel, the termination petition's service certificate states that Brown's lawyer was served, and Brown's lawyer admitted that he retrieved a copy of the petition from the courthouse file months before the termination hearing began. DHS also contends that any service-related defect was harmless, so the court's decision to proceed with the termination hearing was not reversible error.

Arkansas Code Annotated section 9-27-341(b)(2)(A) requires that a parent like Brown (or his lawyer) be served with a petition to terminate

> (2)(A) The petitioner shall serve the petition to terminate parental rights as required under Rule 5 of the Arkansas Rules of Civil Procedure, except:

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> (i) Service shall be made as required under Rule 4 of the Arkansas Rules of Civil Procedure if the:
> *(a)* Parent was not served under Rule 4 of the Arkansas Rules of Civil Procedure at the initiation of the proceeding;
> *(b)* Parent is not represented by an attorney; or
> *(c)* Initiation of the proceeding was more than two (2) years ago[.]

The statute's essence is that DHS must have served Brown under Rule 4, or his lawyer under Rule 5, depending on the circumstances. Our supreme court has stated that compliance with "[s]tatutory service requirements" and "service requirements imposed by court rules" must be "exact." *Carruth v. Design Interiors, Inc.*, 324 Ark. 373, 374–75, 921 S.W.2d 944, 945 (1996). "Our service rules place an extremely heavy burden *on the plaintiff* to demonstrate that compliance with those rules has been had." *Dobbs v. Discover Bank*, 2012 Ark. App. 678, at 8 (emphasis original) (quotations omitted).

Regarding DHS's Rule 4 service attempt, subsections 4(e)(3) and 4(d)(8) authorize service on an out-of-state defendant like Brown by mail. Ark. R. Civ. P. 4(d)(8) and 4(e)(3) (2012). Subsection 4(d)(8) says that service may be made

> by any form of mail addressed to the person to be served with a return receipt requested and delivery restricted to the addressee or the agent of the addressee. The addressee must be a natural person specified by name, and the agent of the addressee must be authorized in accordance with U.S. Postal Service regulations.

DHS sent a copy of the petition to Brown's parents' house in Idaho, but no one established whether a proper agent for service signed the green card. All we know is that Brown did not sign it and that he had given DHS an updated address in January 2012, which was well before DHS filed the petition and sent it to his parents' house on Penninger Drive. Service was never attempted at Brown's updated address. To validate its effort under Rule 4, DHS had to establish that whoever signed the green card at the Penninger Drive address was Brown's

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authorized agent for service. DHS presented no such evidence. Its service attempt thus fell short of Rule 4's and the Arkansas Code's requirements.

Now for Rule 5. DHS may serve a petition to terminate on a parent's attorney of record—by mail, fax, or email under Rule 5's plain terms—if the parent was initially served under Rule 4 at the "initiation of the proceeding." Ark. Code Ann. § 9-27-341(b)(2)(A). DHS presented no proof that Brown was served under Rule 4 when this case first began or when it entered the termination phase. If we assume DHS could have served the petition to terminate on Brown's lawyer under Rule 5, it did not establish service under that rule either. Rule 5 partly states

> Service by mail is presumptively complete upon mailing . . . . When service is permitted upon an attorney, such service may be effected by electronic transmission, including e-mail, provided that the attorney being served has facilities within his or her office to receive and reproduce verbatim electronic transmissions. Service is complete upon transmission but is not effective if it does not reach the person to be served.

Ark. R. Civ. P. 5(b)(2) (2012).

Brown's lawyer told the circuit court that he had looked in his files and emails and could not find any proof that he had received the petition. The burden then shifted to DHS to establish effective service. DHS, as petitioner, did not carry its heavy burden to establish the statutorily-mandated service requirement. Assuming that Rule 5 service was available to DHS under the statute, DHS did not state by what method Brown's lawyer was served with a petition; it did not produce any testimonial or documentary proof to support its contention that service on Brown's lawyer was actually attempted in the first place—whether by mail, fax, or email. Instead, DHS argued that Brown had waived a service objection. Brown did

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not waive his insufficient-service objection because he raised it when the hearing on the petition to terminate began, and the circuit court ruled on the issue.

DHS's argument that Brown's attorney knew about the termination petition for months does not make a legal difference because his awareness of this case cannot cure a service defect. *Carruth*, 324 Ark. at 375, 921 S.W.2d at 945. DHS also contends that any service-related error was harmless. We disagree. Proper service of legal process is required to vest the circuit court with the power to decide the dispute in the first place; a mistaken exercise of this power is never harmless.

Jacob Brown was not properly served with the petition to terminate his parental rights; we therefore reverse the circuit court's decision to terminate his rights.

Reversed.

GLADWIN, C.J., and WHITEAKER, J., agree.

Janet Lawrence, for appellant.

Tabitha B. McNulty, Office of Chief Counsel, for appellee.

Chrestman Group, PLLC, by: *Keith L. Chrestman*, attorney ad litem for minor children.