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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CV-17-877

OPINION DELIVERED: FEBRUARY 14, 2018

TIFFANY HOWELL APPELLEE V. ARKANSAS DEPARMENT OF HUMAN SERVICE AND MINOR CHILDREN APPELLEES	APPEAL FROM THE CLAY COUNTY CIRCUIT COURT, EASTERN DISTRICT [NO. 11EJV-16-7] HONORABLE MELISSA BRISTOW RICHARDSON, JUDGE REVERSED

ROBERT J. GLADWIN, Judge

Tiffany Howell appeals the Clay County Circuit Court's order terminating parental rights to her two children, arguing that the trial court erred by failing to grant her motion for continuance and by finding that it was in her children's best interest to grant the petition to terminate.[1] We reverse, relying on *Brown v. Arkansas Department of Human Services*, 2013 Ark. App. 201, and hold that the Arkansas Department of Human Services (DHS) did not properly serve the petition to terminate parental rights as required under the governing statute, Arkansas Code Annotated section 9-27-341(b)(2)(A) (Supp. 2017).

[1]The legal father of S.H. and B.H. is not the subject of this appeal. The minor A.B. is not included in the appeal because he was placed in the custody of his father by the permanency-planning order and not included in DHS's petition for termination of parental rights.

I. *Procedural History*

DHS filed a petition for emergency custody and dependency-neglect alleging that it took S.H. (born December 20, 2010), B.H. (born November 25, 2013), and A.B. (born April 27, 2015) into custody because their mother, Tiffany, was arrested when she fled after police tried to initiate a traffic stop, and she was charged with multiple offenses.

After an ex parte order granting DHS emergency custody on March 8, 2016, a probable-cause order was filed on March 10, 2016, reflecting that Tiffany had been personally served with notice of the hearing on March 8, 2016. She appeared at the probable-cause hearing and was represented by counsel. The trial court ordered that the children remain in DHS custody and that the parents follow specific requirements as set forth in the order.

An adjudication order filed August 25, 2016, reflects that Tiffany appeared with her attorney, and the trial court found the children dependent-neglected based on the allegations set forth in the petition. The goal of the case was reunification with a concurrent plan for adoption. A March 1, 2017 permanency-planning order states that Tiffany appeared by telephone on that date, and her attorney appeared in person. The trial court ordered DHS to retain custody, and the goal of the case was changed to adoption.[2] DHS was authorized to file a petition for termination of parental rights. The trial court found that Tiffany was not in compliance with the case plan and orders of the court because she was still

[2]A.B. was placed in his father's custody by a separate order, so the plan for adoption applied only to S.H. and B.H.

incarcerated and had not provided proof of working her case plan or following orders. A termination hearing was set for May 11, 2017.

DHS filed a petition for termination of parental rights on March 7, 2017. It claimed that termination of parental rights was in the best interest of the two children, and three statutory grounds were alleged as to Tiffany.[3] DHS also alleged that Tiffany had been represented by counsel from the beginning of the case, had been served pursuant to Arkansas Rule of Civil Procedure 4 (2017) at the initiation of the proceedings, and the case had been initiated less than two years prior. *See* Ark. Code Ann. § 9-27-341(b)(2)(A) (requiring that the petition to terminate parental rights may be served under Ark. R. Civ. P. 5 (2017) if the parent was served under Rule 4 at the initiation of the proceeding). Further, DHS alleged that Tiffany would be served in accordance with Rule 5, "specifically service to be effectuated on her counsel, Terry Jones." The certificate of service states that the petition for termination of parental rights was served on Jones by email and lists the email address.

At the termination hearing held June 27, 2017, Tiffany's attorney moved for a continuance stating,

> My client was not served with a petition for the termination while she was in prison and I am asking for a continuance at this time to give me an opportunity to go over this with my client. She is getting out of prison next week and this would also give me additional opportunity to discuss the matter with her. I also never received a copy of the petition.

[3]Ark. Code Ann. § 9-27-341(b)(3)(B)(i)*(a)* (dependent-neglected children out of the custody of parent for twelve months, and despite meaningful effort by DHS, parent failed to correct conditions that caused removal); Ark. Code Ann. § 9-27-341(b)(3)(B)(vi)*(a)* (children found dependent-neglected as a result of neglect by the parent that could endanger the life of the child); and Ark. Code Ann. § 9-27-341(b)(3)(B)(vii)*(a)* (other factors arose subsequent to filing original petition that parent has failed to remedy and prevents placement of children with the parent).

DHS opposed the continuance motion, arguing that Rule 5 service was appropriate and that an email was sent. Further, DHS noted that the termination hearing had been originally set for May 11, and Tiffany did not argue at that time that she had not been served with the petition. DHS claimed that the request for continuance was late, and the attorney ad litem also objected to the continuance.

The trial court denied the motion for continuance, noting its agreement that Rule 5 service was authorized. The court stated that counsel for Tiffany did not dispute that notice was sent but claimed that it was never received by email. The trial court also stated that the case had originally been set on May 11, and on that date, it was agreed that the hearing would be held on June 27, and Tiffany was present at the June 27 hearing, having been transported from ADC.

Following the hearing, the trial court granted the termination petition. The order states, "The mother was served pursuant to Rule 5, specifically the mother was served by her counsel Terry Jones[.]" The court found that DHS proved by clear and convincing evidence all the statutory grounds alleged in its petition, and the court considered the likelihood that the children would be adopted and the potential harm to the children's health and safety if they were returned to their parents.

II. *Applicable Law*

The controlling statute requires that the petitioner, DHS, shall serve the petition to terminate parental rights as required under Rule 5 of the Arkansas Rules of Civil Procedure so long as the parent, Tiffany, was personally served at the initiation of the proceeding. Ark. Code Ann. § 9-27-341(b)(2)(A)(i)*(a)*. The parties do not dispute that Tiffany was personally

served with the original petition, and this was found in the circuit court's probable cause order of March 10, 2016. The question then becomes whether Tiffany was properly served through her attorney pursuant to Rule 5.

> Statutory service requirements, being in derogation of common law rights, must be strictly construed and compliance with them must be exact. *Wilburn v. Keenan Cos.*, 298 Ark. 461, 768 S.W.2d 531 (1989); *Edmonson v. Farris*, 263 Ark. 505, 565 S.W.2d 617 (1978). The same reasoning applies to service requirements imposed by court rules. Proceedings conducted where the attempted service was invalid render judgments arising therefrom void ab initio. *Halliman v. Stiles*, 250 Ark. 249, 464 S.W.2d 573 (1971); *Edmonson*, [*supra*]. Actual knowledge of a proceeding does not validate defective process. *Tucker v. Johnson*, 275 Ark. 61, 628 S.W.2d 281 (1982).

Carruth v. Design Interiors, Inc., 324 Ark. 373, 374–75, 921 S.W.2d 944, 945 (1996).

Rule 5 of the Arkansas Rules of Civil Procedure provides in pertinent part:

> (a) Service: When Required. Except as otherwise provided in these rules, every pleading and every other paper, including all written communications with the court, filed subsequent to the complaint . . . shall be served upon each of the parties . . . .Any pleading asserting new or additional claims for relief against any party who has appeared shall be served in accordance with subdivision (b) of this rule.
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> . . . .
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> (b) Service: How Made.
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> > (1) Whenever under this rule or any statute service is required or permitted to be made upon a party represented by an attorney, the service shall be upon the attorney . . . .
> >
> > (2) Except as provided in paragraph (3) of this subdivision, service upon the attorney or upon the party shall be made by delivering a copy to him or by sending it to him by regular mail or commercial delivery company at his last known address or, if no address is known, by leaving it with the clerk of the court. . . . 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.

In *Brown*, 2013 Ark. App. 201, at 3–4, this court analyzed whether the appellant had been properly served with a petition to terminate his parental rights under the governing statute. After determining that DHS's attempt to serve Brown by mail at his parents' address in Idaho was not sufficient under Rule 4, we analyzed DHS's service of the petition to terminate on Brown's attorney under Rule 5 as follows:

> Rule 5 partly states,
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> > 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.
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> Ark. R. Civ. P. 5(b)(2) (2012).
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> 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 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.
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> 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.

Brown, 2013 Ark. App. 201, at 5–6.

III. *Discussion*

Tiffany argues that she moved to continue the case because neither she nor her attorney had received the petition for termination of parental rights. She argues that she did not contest that DHS showed that they had emailed it to her attorney, but she disputes that it was received. She claims that she would have been eligible for parole within a short time after the hearing, and had the continuance been granted, she would have been able to show the court an accepted parole plan. She also contends that while the date of the hearing had been agreed on, her counsel disputed that the petition had actually been served, and the burden of proof was on DHS to show that it had been received by the attorney.

She cites Rule 5's provision that "service is complete upon transmission" by email, "but is not effective if it does not reach the person to be served." She claims that DHS's argument that she and her counsel knew about the termination proceeding did not overcome improper service. She argues that DHS did not show that the transmission had been received by her counsel and, as such, the continuance should have been granted.

We agree and hold that DHS failed to carry its burden of proving that the petition to terminate parental rights was effectively served. We do not accept DHS's argument that *Brown*, *supra*, is inapplicable because Tiffany failed to argue that service was defective under Rule 5. Rule 5 was the basis of Tiffany's argument, and the trial court relied on Rule 5 when it found that Tiffany was served through her attorney. Similarly, we disagree with DHS's argument that the petition for termination of parental rights was no surprise to Tiffany and therefore she had no basis to seek a continuance. As stated in *Brown*, awareness of the case cannot cure a service defect. Because DHS failed to prove that it procured

effective service of the petition to terminate parental rights, we reverse the trial court's decision to terminate parental rights. Accordingly, we do not address Tiffany's second point for reversal.

Reversed.

WHITEAKER and BROWN, JJ., agree.

Terry Goodwin Jones, for appellant.

Andrew Firth, Office of Chief Counsel, for appellee.

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