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State of Utah, in the interest of A.H., S.H., A.H., persons under eighteen years of age v. T.H. : Reply Brief

Utah Court of Appeals

Philip J. Danielson; Danielson Silva; Attorneys at Law PC; Attorney for Appellant; Martha Pierce; Office of Guardian Ad Litem.
John M. Peterson; Assistant Attorney General; Attorneys for Appellees.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, In the Interest of A.H. (01/30/98) S.H. (02/22/99) A.H. (02/22/99) Persons under eighteen (18) years of age. Appellant, Travis Huebner	**Appellate Court No.** 20030160-CA Appeal from Fourth District Juvenile Court, Provo Department Civil Nos. 139442, 139444, 139445 The Honorable Jeril Wilson

REPLY BRIEF OF APPELLANT

Philip J. Danielson (#8639)
Danielson Silva
Attorneys at Law, PC
1987 N. 550 East
Provo, Utah 84604
Telephone: (801) 371-0200
Facsimile: (801) 377-0373

Attorney for Appellant

Martha Pierce
Office of the Guardian ad Litem
450 South State St., W-22
Salt Lake City, UT 84114-0403

John M. Peterson
Assistant Attorneys General
160 East 300 South, 6th Floor
PO Box 140833
Salt Lake City, UT 84114-0833

Attorneys for Appellees

ORAL ARGUMENT AND PUBLISHED OPINION REQUESTED

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Philip J. Danielson (#8639)
Danielson Silva
Attorneys at Law, PC
1987 N. 550 East
Provo, Utah 84604
Telephone: (801) 371-0200
Facsimile: (801) 377-0373

Attorney for Appellant

Martha Pierce
Office of the Guardian ad Litem
450 South State St., W-22
Salt Lake City, UT 84114-0403

John M. Peterson
Assistant Attorneys General
160 East 300 South, 6th Floor
PO Box 140833
Salt Lake City, UT 84114-0833

Attorneys for Appellees

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LEGAL ANALYSIS AND REBUTTAL

Opening Note: Briefs by Appellees misrepresent the evidence in the record and rely on evidence not relied upon by the juvenile court in terminating Mr. H's parental rights.

The Appellees—the State and the Guardian ad Litem (GAL)—misrepresent the evidence as found in the record. While most likely unintentional, such a practice is extremely prejudicial to the appellate process and destroys the integrity of appellate review.

The Appellees misstate and mischaracterize critical evidence in this case as well as the findings of fact of the trial court. Furthermore, the Appellees rely upon evidence that, while in the record, goes beyond the findings of fact of the trial court. These are no trivial points because the evidence is the heart of this appeal—whether it was sufficient to terminate Mr. H's parental rights and whether Mr. H had notice to satisfy statutory requirements and constitutional due process. Mr. H objects to the Appellees' material misrepresentations of the record and argues that the misrepresentations prejudice this appeal and his attendant grounds for relief.

While the purpose of the reply brief is not to engage in a lengthy exposition of these misrepresentations, the following are five important examples:

1. The State claims that Mr. H visited his children "only once in person, and only once by phone in the course of almost two years."[1]

   This statement is clearly erroneous when referenced to the "source" of the facts. The State took these facts from the trial court's findings of

[1] Appellee State's brief at 14.

fact—attached as an addendum to its brief. While the findings of fact say that indeed Mr. H had visited his children during Easter 2001 and had talked to them by telephone on October 31, 2003,[2] there is absolutely no statement in the court's findings that conclude that these were the only or exclusive contacts Mr. H had with the children during the period in question. Indeed, the record is replete with other substantial, undisputed contacts Mr. H had with his children, namely frequent and regular telephone contact.[3]

2. The State claims that "the Division did take actions which assured that Appellant had actual knowledge of the proceedings [involving his children]."[4]

This statement is wholly unsupported by the facts of the record and the trial court's findings of fact. First, no where in the record was testimony even introduced claiming that the State had personally informed Mr. H of the proceedings. Second, while testimony was introduced at trial claiming that DCFS made some undocumented telephone calls to a phone number and some messages were left with a third person[5], no evidence was ever introduced that Mr. H had knowledge of these proceedings through the

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[2] R. 430-31.
[3] 1 Tr. 114-116
[4] Appellee State's brief at 15.
[5] 1 Tr. 25, 59-62

third person. That link in the chain of notice is wholly lacking, although even if it did exist, it would be insufficeint.

Furthermore, the testimony of A.C. at trial, who testified that she spoke to Mr. H and informed him of a court proceeding some five months after the children were removed from the custody of their mother, did so at her own volition and not at the request of the State.[6]

Thus, the State did nothing that provided any actual or legal notice of the hearings to Mr. H, and the State's assertion here is false.

3. The GAL claims that "[i]n April 2001, the case worker left messages telling the Father the Children were in state's custody. She continued to call him and leave messages during the next two months, yet [Mr. H] did nothing to help them or involve himself in the process. 1 Tr. 28. R 431."

The GAL misrepresents the facts here in at least two ways.

First, the cited reference to the transcript clearly shows that the caseworker openly admitted that she did not begin attempting to contact Mr. H about the children's removal until May or June 2001, in violation of statutory notice requirements.[7] This is significant because it illustrates the lackadaisical attitude that DCFS and the Attorney General's office have had about Mr. H and notifying him of the State's action regarding the children. Even if the caseworker had been able to contact him in May or June 2001—

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[6] 1 Tr. 84-85.

[7] 1 Tr. 29-30, U.C.A. §§ 62A-4a-202.2 - 202.3; 78-3a-306 – 307, 309

at least one full month after the shelter hearing—it would have been too late to intervene and assert custody at the shelter hearing or even appeal the order from that shelter hearing.

Second, the caseworker explicitly said that she never left messages when she called the telephone number she had for Mr. H.[8]

4. The GAL similarly claims that "the case worker made numerous telephone calls to the Father, leaving messages to the effect that the Children had been removed. R.431 She kept up the telephone calls for the next two months."[9]

Again, the GAL misrepresents the record here on two accounts.

First, the record is crystal clear that the caseworker never left any messages with a third party that the children were removed. The caseworker's own testimony was that four or five times in October 2001 she called a telephone number given to her by the children's mother and left a message with a female person who answered.[10] The substance of the message was that she was the caseworker for the children and asked that Mr. H call her back. Contrary to the misrepresentation of the Guardian ad Litem, the message the caseworker left did not tell Mr. H that the children had been removed from the care of their mother.[11] This is an important

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[8] 1 Tr. 25-26.
[9] Appellee Guardian ad Litem at 4.
[10] 1 Tr. 59-60.
[11] 1 Tr. 59-60.

distinction because a central issue to this appeal is how much Mr. H knew about the proceedings involving his children. Even if he had received the messages—which was never shown at trial, Mr. H would have never known from this message that the children had been removed by the State from their mother's custody. The caseworker never said that the children had been removed; only that she was the caseworker for the children.[12]

Second, the GAL misrepresents the truth about the frequency of the calls and messages. The initial caseworker testified that she received a telephone number from the children's mother that was reportedly for the residence of Mr. H and made "at least five" phone calls to the telephone number over two months (May – June 2001).[13] This caseworker never left a message and never spoke to anybody.[14] The second caseworker made a four or five telephone calls purportedly to the residence of Mr. H in October 2001 and left the messages as described above. Those phone calls were all made within a week's time.

Therefore, there was no caseworker that left a series of messages over several months saying that the children had been removed. That is a fiction.

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[12] 1 Tr. 59-60.
[13] 1 Tr. 25
[14] 1 Tr. 25.

5. The GAL claims that "[t]he family told [the caseworker] that the Father was hiding from the Division because he, [Mr. H] didn't want to be responsible for the children."[15]

Again, this is a fiction, unsupported by the record. Reviewing the GAL's citation for this "fact," it is entirely unclear about who told her that Mr. H did not want to be responsible for his children's welfare—it could have been DCFS gossip for all we know.

The record reads: "I visit the home. I asked the family contact. What I was told was that they hadn't heard from him, he hadn't been paying child support, he was hiding from them because he didn't want to be responsible for the children."[16] But the caseworker could not have meant that she had talked to Mr. H's family because a few seconds later, the caseworker admitted that she had never visited Mr. H's home or reached Mr. H's family by telephone.[17]

Therefore, again, the assertion that Mr. H's family had told the caseworker that Mr. H was trying to evade responsibility for his children is unfounded and unsupported by fact.

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[15] Appellee GAL's brief at 4.
[16] 1 Tr. 37.
[17] 1 Tr. 25-26, 37.

There are numerous other facts that the Appellees misrepresent, such as whether Mr. H paid money toward the care of his children[18], whether Mr. H ever had contact information for his children's caseworkers when the caseworkers either never left messages or it was never proven that he did receive any alleged messages, whether Mr. H inquired about the children, sent them letters, cards, gifts or money,[19] whether Mr. H was notified about the visit with the children that the mother had allegedly arranged with DCFS[20], and that the main sources of information about Mr. H were the mother and the maternal grandmother of the children—who were clearly adverse parties—and intentionally deceived Mr. H about the whereabouts and welfare of the children.[21]

All of these misrepresentations—and there are more—are prejudicial to Mr. H's claims and arguments in this appeal. The misrepresentations, moreover, are not trivial, but go to the heart of Mr. H's case and thus create confusion over facts that are not reasonably in dispute. On these "facts" that Appellees have misrepresented, reasonable minds are not likely to differ as to their interpretation because their meanings are clear when viewed in their context and chronology. Such material misrepresentations cannot be glossed over and calls into question the reliability and accuracy of Appellees' entire briefs. Thus, Appellees' factual analysis and arguments are fundamentally tainted and flawed.

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[18] 1 Tr. 27.
[19] 2 Tr. 43.
[20] 1 Tr. 62-64.
[21] 1 Tr. 112-116.

Furthermore, in its brief, the State uses and relies upon evidence not relied upon in the juvenile court's findings. The State does this to bolster its claim that the facts are sufficient to support the termination order in question.

The State dredges up facts that far predate the removal of the children in April of 2001.[22] The facts the State raises deal with Mr. H's knowledge of the mother's alleged drug use, etc. before the children were removed by the State. While these facts may be part of the record—they were introduced at trial by witness' testimony, the juvenile court overtly disregarded these "facts" as a basis for terminating Mr. H's parental rights. A question before this Court is whether the evidence before the juvenile court and its factual findings were sufficient to justify terminating Mr. H's parental rights. The juvenile court's findings of fact, then, are at issue here. Those findings make no references to any alleged facts that predate the April 2001 removal of the children from their mother's custody. The State's inquiry into these alleged facts go beyond the questions before this Court and only serve to prejudice Mr. H's position.

On these two grounds—that the GAL and the State misrepresent the facts contained in the record and rely upon allegations not relied upon or supported by the juvenile court's findings of fact—Mr. H objects to the misrepresentations of Appellees. Accordingly, Mr. H requests that this Court appropriately filter the

[22] Appellee State's brief at 2, 3, and 8.

Appellees' Material "Facts" and factual analyses in their argument because the Appellees' factual misrepresentations render these sections inherently tainted and flawed. Mr. H also requests that this Court take whatever further action it feels necessary to remedy this unfortunate situation.

I. The trial court's findings of fact are inconsistent and insufficeint as a matter of law to conclude abandonment, thus warranting vacation of the order.

Neither the State nor the GAL even addresses Mr. H's arguments that the findings of fact[23] are internally inconsistent and that they contradicted the conclusion of abandonment. Therefore, on these arguments, the State and GAL must be "satisfied with the statement provided by the appellant."[24]

The briefs of Appellees focus on the sufficiency of the evidence to conclude abandonment. As already shown, the State and the GAL misrepresent the facts or rely upon facts not relied upon or found by the trial court in their analysis of this issue. This practice goes beyond, and does not even answer, the question before this Court. The issue is whether the trial court's findings were insufficient as a matter of law to conclude abandonment. Therefore, the scope of the issue is limited to those facts as found by the trial court and extraneous facts should not be considered.

Because the State's and GAL's arguments on this issue rely upon extraneous alleged facts and misrepresentations of the facts, and thus do not even

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[23] Findings of fact are required under Rule 52(a), Utah Rules of Civil Procedure, to be made with specificity.

[24] Brown v. Glover, 16 P.3d 540 ¶22 (Utah 2000)

answer the question before this Court, this issue of sufficiency of the evidence should be held in favor of the Appellant, Mr. H.

II. The State's egregious violations of Mr. H's absolute rights to immediate notice of the removal of his children and subsequent hearings, along with the violations of Mr. H's Due Process rights, are inextricably related to the termination proceeding, and the appropriate remedy is vacating the termination order.

While the GAL agrees with Mr. H that the due process and notice violations were egregious, the State argues that it used reasonable efforts and made a good faith attempt to contact and locate Mr. H.

Moreover, the State argues that the proceedings immediately after removal of Mr. H's children—to which he received no notice for nearly a year—"in no way compromised his parental rights."[25]

Finally, both the GAL and the State dispute that vacating the termination order is the appropriate remedy, even if the State violated statutory notice laws and Mr. H's right to due process.

a. The State did not make reasonable efforts to personally contact Mr. H as required by law and thus precluded him from asserting his interests in custody and his right to appeal earlier orders.

In its brief, the State alleges that it made reasonable efforts and a good faith attempt to contact and locate Mr. H. The State cites two "facts" in support of this claim. First, two caseworkers had made phone calls to a telephone number reported to be that of Mr. H. Second, the mother of the children and a foster mother had confirmed to DCFS that Mr. H knew what was going on with the

[25] Brief of Appellee State at 16.

children. While there is significant factual dispute as to these facts—which were not found by the trial court—even if true, either or both of these bases are legally insufficient to satisfy the State's burden of making reasonable efforts and a good faith attempt to locate Mr. H. Moreover, telephone calls are woefully inadequate and are facially insufficient in terms of providing legal notice; thus, it is fallacy to focus on the telephone calls that the State or a third-party allegedly made in this case. Notice by telephone—even if it was made in this case--is insufficient as a matter of law to satisfy statutory requirements, the rules of procedure, and Due Process.

The purpose of notice is to give the opposing party a meaningful opportunity to address the claims made against him and to be meaningfully heard.[26] Thus, the United States Supreme Court has held that proper notice requires "apprais[al] of interested parties of the pendency of the action and afford them an opportunity to present their objections. . . . But when notice is a person's due, process which is a mere gesture is not due process."[27] Thus, "a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it. [Citations omitted]" [28]

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[26] Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313-6 (1950), see also Dairy Product Servs., Inc. v. Wellsville City, 2000 UT 81, ¶ 49, 13 P.3d 581.
[27] Id. See also Richards v. Jefferson County, Ala., 517 U.S. 793, 797-8 (1996):
[28] Richards, 517 U.S. at 804:

Thus, the Rules of Civil Procedure require a search of reasonable diligence in good faith.[29]

In a case that came before the Supreme Court of Utah, the Court held that a reasonable search in this context requires a search reasonably calculated to actually find the parents.[30] In that case, In re Pitts, the State had gained custody of children by alleged abandonment. The State attempted to locate the parents by checking with the post office, utility company, and the telephone book.[31] Not being able to locate the parents through these means, the State published notice in a newspaper.[32] When the parents appeared some six months after the alleged abandonment and the children were already placed for adoption, an appeal ensued on the order of termination of their parental rights.[33] The Court found that checking with a hotel and the utility company, and consulting of a phone book was "not 'diligent inquiry' but the lack of 'diligent inquiry.'"[34] The Court particularly faulted the State with failing to check with relatives that would know the whereabouts of the parents.[35] Because of the lack of a diligent search for the parents, the Court set aside the order terminating the parental rights.[36]

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[29] Downey State Bank v. Major-Blakeney Corp., 545 P.2d 507, 509 (Utah 1976):
[30] In re Pitts, 535 P.2d 1244 (Utah 1975).
[31] Id. at 1245-46.
[32] Id. at 1246.
[33] Id.
[34] Id. at 1246, F2
[35] Id. at 1246.
[36] Id. at 1249.

In view of this similar case, it is clear that in ten or so undocumented telephone calls, the State did not relieve itself of its burden of a reasonable search in good faith.[37] The DCFS caseworker admitted at trial that she failed to consult a phone book[38]—although she knew the approximate whereabouts of Mr. H.[39] The caseworker also admitted that she did not follow DCFS's own policies and procedures in an attempt to locate Mr. H.[40] Furthermore, the caseworkers relied on a telephone number they received from adverse parties—the mother and maternal grandmother.[41] The State made absolutely no efforts to locate or contact Mr. H besides these undocumented telephone calls. If the State was found not to have made a reasonable search in the Pitts case, where the State did more in an effort to locate the parents than in the case at bar, certainly the State did not make a reasonable search for Mr. H.

Furthermore, five critical facts speak to the State's lackadaisical attitude in contacting and locating Mr. H, illustrating that the State was not sincerely interested in locating and notifying Mr. H. First, the DCFS caseworker—in knowing violation of the notice laws[42]—did not attempt to contact Mr. H until a full month or more after the children's shelter hearing.[43] Second, the caseworker

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[37] See also an opinion (not yet published) from California, In re N.S., 2002 WL 31270246 (Cal.App. 5 Dist.)
[38] 1 Tr. 35-41.
[39] R. 11, 1 Tr. 37-38.
[40] 1 Tr. 35-41.
[41] 1 Tr. 25, 59
[42] 1 Tr. 31.
[43] 1 Tr. 25.

testified that she did not feel it was important to contact Mr. H, even though he had a right to notice.[44] Third, the caseworker suggested that it would have been a lot of work for her to place the children out of state with the father.[45] Fourth, a DCFS caseworker, Ms. Covert, testified at trial that she had made a telephone call to a number she believed to be that of Mr. H and a woman answered the phone and allegedly confirmed Mr. H lived at the residence, but the caseworker never asked for the address of the residence in order to serve Mr. H or mail notice to him.[46] And fifth—and perhaps most damning—the State never attempted to file a Motion or Affidavit for Alternative Service, although required by law and the rules of procedure, after a reasonable search had been made.[47]

The State cannot be willfully ignorant of the whereabouts of a known parent of children in the State's custody. The State did nothing to notify Mr. H but rely on information from adverse parties who testified they deceived Mr. H about the situation of the children.[48] The position of the State is tantamount to equating a reasonable search with a caseworker glancing at her desk now and then to see if the parent's contact information has arrived on a silver platter.

In summary, the extent of the State's search to notify and locate Mr. H was about ten phone calls to a number the State received from an adverse party. That

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[44] 1 Tr. 30.
[45] 1 Tr. 50.
[46] 1 Tr. 71.
[47] U. R. Civ. Pro. 4(d), U.C.A. §78-2a-311(3)(b).
[48] 1 Tr. 112-115.

is all. Clearly, this does not satisfy the notice requirements of the Utah Code and the Rules of Civil and Juvenile Procedure.[49]

Furthermore, the State alleges that Mr. H was not victim of any Due Process violation. The State makes the novel and inconsistent argument that the State need not initially attempt to search for a parent, just send notice of a termination proceeding to the parent and hold a hearing.[50] The fallacies here are obvious. First, the State is clearly under a duty, as already established, to make a reasonable, diligent search for the parents immediately after the State takes any action in juvenile court as to children. Second, the State is under the absolute duty to make some kind of service of a petition for termination—personally, or, if unable—after a reasonably diligent search—by publication.

However, setting aside the clear notice violations and lack of a diligent search for Mr. H in good faith, the State clearly violated Mr. H's constitutional rights to Due Process[51] under the same facts.

"Due Process is flexible and calls for such procedural protections as the particular situation demands."[52] The Utah Supreme Court has held that "the deprivation of parental rights is a drastic action which must be handled through in

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[49] Including, but not limited to U. R. Civ. Pro. 4(d), 5(a); U. R. Juv. Pro. 13(b), 18(b)(5); U.C.A. §§62-4a-202.2-3, 78-3a-306-307, 309, 311, 314, 407, and 408.
[50] Appellee State's brief at 18, allegedly quoting State ex rel. J.R.T. v. Timperly, 750 P.2d 1234, 1236 (Utah 1988).
[51] U.S. Const. Amend. XIV, § 1: No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.
[52] Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 848-9 (1977). (as quoted in In re S.A., 37 P. 3d 1166, par 11 (Utah 2001))

persounum procedures. Children are not realty, and rights pertaining to them must be handled with care and proper procedure."[53] The Court has suggested that a "high standard of care and diligence [is] necessary in seeking out parents."[54]

In this case, there can be no doubt that Mr. H's right to Due Process was violated by the State's refusal to make a search for him, serve him pleadings and notices, and afford him an opportunity to be heard early in the proceedings. The State and the GAL are correct in stating that time is of paramount importance in this kind of a case. Thus it is just as important for the parents to receive timely notice of proceedings and be appraised of the nature of those proceedings by the opposing party—not through a third party, even though the State wants to shift the burden in this case on the mother, foster parent, etc., to have given notice to Mr. H.

Due Process, the Rules of Procedure, and the Utah Code squarely burden the State and DCFS to notify parents of proceedings involving their children. Parents have an absolute right to such notice. Mr. H is not arguing that "the State has some sort of absolute responsibility to track him down and drag him into court."[55] Mr. H merely argues that the State must employ reasonable efforts to locate him and strictly follow the notification requirements as established by law.

Arguably, had the State complied with the law, observed the notice requirements and their own procedures for locating a parent whose whereabouts

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[53] In re Pitts at 1248.
[54] Id.
[55] Appellee State's brief at 15.

are unknown, and made a reasonably diligent search for Mr. H, this case would have turned out differently. Mr. H could have asserted his interests in custody to the children, appeared in court early on, complied with reunification services if necessary, and appealed any adverse orders. But because of the State's complete failure to notify and respect Mr. H's Due Process rights, Mr. H has been absolutely precluded from asserting these rights except to attack a termination proceeding based upon abandonment and the subsequent termination order. Mr. H argues that the basis for abandonment—if it even existed, which he disputes—was direct result of the State's failure to comply with notice and service of process requirements.

This is the heart of this case. The State violated the notification and Due Process rights of an absent party.

b. The proceedings to which Mr. H never received notice directly compromised Mr. H's parental rights.

The State further argues that the Petition to Terminate Mr. H's parental rights was properly served, so earlier violations of notice requirements and due process are not equitable grounds to attack the order terminating his parental rights. In support of this position, the State points out that the termination proceeding is separate and distinct from the other proceedings (shelter, permanency, adjudication, etc.).

First, by definition and their very nature, the previous juvenile court proceedings dealt with custody of Mr. H's children, child support, visitation, and

other issues that directly compromised Mr. H's parental rights. Thus it is completely disingenuous and inaccurate to assert that the prior proceedings "in no way" compromised Mr. H's parental rights.

Second, while termination of parental rights is a separate proceeding in juvenile court, it is virtually married to the other dependency proceedings. If there is no evidence of abandonment prior to removal of the children by the State, as was found by the trial court in this case, a parent's lack of involvement or participation in those proceedings, at the very least, sets the groundwork for a finding of abandonment by that same court—it sets the wheel in motion. Therefore, in the context of termination on the grounds of abandonment, the Utah Supreme Court has referred to a termination proceeding as the "default" judgment in child dependency matters.[56] In other words, the failure of the parents to come forward and be involved in the court's proceedings, (or if there is sufficient evidence of abandonment prior to the proceedings), may cause the State will petition for termination of the parent's rights on the basis of abandonment.

Thus the analogy becomes clear. Proper service of a notice of a default judgment would certainly not cure an initial failure of a plaintiff to serve the summons and complaint upon the opposing party. Similarly, the proper service of a petition to terminate parental rights cannot cure the petitioner's complete failure to make a reasonable search for the parent and properly serve the parent with notice and documents of previous proceedings.

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[56] In re Pitts, at 1246.

c. Vacating the order terminating Mr. H's parental rights is the appropriate remedy.

The State and the GAL argue at length that vacating the order terminating Mr. H's parental rights is not the appropriate remedy in this case. On the contrary, vacating the order is indeed the *only* remedy for egregious violations of statutory notice requirements and due process rights.

In In re Pitts, the Utah Supreme Court set aside the order terminating parental rights when the State had failed to make a reasonable initial search for the parents.

Indeed because the juvenile courts are courts of limited jurisdiction and necessarily confined by the express limited authority granted by the legislature, the Utah Supreme Court has held that "if the Juvenile Court does not comply specifically with the provisions of [applicable statutes] in a termination proceeding, any decree entered is in excess of its jurisdiction, is void, and subject to direct attack in a proceeding to vacate."[57] Because the juvenile court did not comply, or order compliance, with due process and notice requirements designed to protect the interests of absent parties, the order terminating Mr. H's parental rights is beyond the court's jurisdiction and therefore void.

Recognizing that juvenile proceedings are set in a civil context, the remedy is even clearer. A plaintiff's failure to serve process initially, or at any significant time during the proceedings, is nearly *per se* grounds to have a subsequent default

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[57] In re Baby Girl Marie, 561 P.2d 1046, 1047 (Utah 1977).

judgment set aside under Rule 60(b) of the Utah Rules of Civil Procedure. An entire litany of cases supports this view.[58]

The GAL argues that Mr. H "slumbered" and "sat on" his rights by not getting involved in the court proceedings when he allegedly knew that there were proceedings involving his children.[59] However this conclusion lies on a critical assumption that makes the conclusion a fallacy. The unspoken assumption is that Mr. H *knew* that his rights were at issue. As a matter of law, his supposed knowledge is irrelevant until Mr. H is properly served. Any alleged "notice" that Mr. H had received through the grapevine was little more than gossip—and a complete red herring. Mr. H did not receive legal notice via actual service or alternative service if so ordered.

But what is clear is this—that if the State had duly and appropriately complied with its duty to notify and serve Mr. H, he would have known that his parental rights were at issue from the beginning. This underscores the reasons and policy for personal notice—to apprise the opposing party of not only proceedings, but also the nature, substance, and issues involved in the proceedings. While at best Mr. H might have known that there were proceedings in Utah involving his children, there is absolutely no evidence showing that Mr. H knew that the

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[58] For example, see Walker v. Carlson, 740 P.2d 1372 (Utah Ct.App. 1987); Westinghouse Elec. Supply Co. v. Paul W. Larsen Contractor, 544 P.2d 876 (Utah 1975); Bish's Sheet Metal Co. v. Luras, 11 Utah 2d 357, 359 P.2d 21 (1961); Utah Sand & Gravel Prods. Corp. v. Tolbert, 16 Utah 2d 407, 402 P.2d 703 (1965); Cooke v. Cooke, 2001 UT App 110, 22 P.3d 1249; Woody v. Rhodes, 23 Utah 2d 249, 461 P.2d 465 (1969); Garcia v. Garcia, 712 P.2d 288 (Utah 1986).

[59] Appellee GAL's brief at 16.

proceedings involved his parental rights. Proper notice from the beginning would have cured this problem. Mr. H had an absolute right to such notice, but never received it.

III. The policy and effects of the State's position with regards to notice is intolerable and severely dilutes Due Process rights.

It may go without saying, but it is critical to recognize the effects of the State's position in this matter. The State's position is that a few phone calls to a telephone number received from an adverse party are a sufficient basis to satisfy due process and reasonable search requirements.

This is a devastating policy that would almost completely absolve the State from any duty to attempt to locate out-of-state, non-custodial parents in a timely and proper manner.

In this context, notice and Due Process requirements are substantively meant to protect the rights of absent, non-custodial parents and their children. Adopting the State's position in this case takes away any real teeth in enforcing notice requirements—effectively allowing the plaintiff to serve the notice of a hearing on default before the defendant is ever properly served the summons and complaint.

CONCLUSION

Because of Appellees' misrepresentations to this Court as to the facts of this case and failure to respond, The Appellees State and GAL failed to

substantively attack Mr. H's arguments that trial court's findings of fact were insufficeint as a matter of law.

The State did not make reasonable efforts in good faith to search out, locate, and contact Mr. H. A few phone calls does not a reasonable search make. The State violated numerous statutory notice laws and Mr. H's right to Due Process. The proceedings prior to termination, to which Mr. H never received proper notice or service, and the termination proceeding itself are inherently related, much like a hearing on default is with a civil complaint. The utter failure of the State to serve him properly for eleven months created the circumstances of a fictitious "default" because Mr. H did not involve himself in proceedings to which he was never properly invited.

Vacating the order terminating Mr. H's parental rights is the only proper remedy in this case because the order was beyond the jurisdiction of the juvenile court and therefore void. Furthermore, vacating the termination order is customary in a substantiated attack on the sufficiency of initial service, including proceedings in the juvenile court.

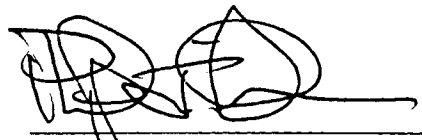
Finally, this Court should reject the State's position that notice and due process requirements were complied with in this case. Such a position effectively dilutes those rights into oblivion and absolves the State of any duty to locate absent, non-custodial parties in juvenile proceedings.

A decision of this Court in favor of Mr. H would only affect juvenile cases in a very narrow set of circumstances—when termination of parental rights is

based upon alleged abandonment that occurred (1) after the State removed the children and (2) before proper and legal service to the parent. Under these narrow circumstances, the order of termination ought to be void and vacated as a matter of law.

For these reasons, Appellant Mr. H requests that this Court vacate the lower court's order terminating his parental rights.

DATED and EXECUTED this 30th day of October, 2003.



Philip J. Danielson
Attorney for Mr. H

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of October, 2003, I caused a true and correct copy of the foregoing Reply Brief of the Appellant to be sent, via U.S. Postal Service, postage prepaid, or hand-delivered, to the following:

Martha Pierce
Office of the Guardian Ad Litem
450 South State St., W-22
Salt Lake City, UT 84114-0403

Carol L. C. Verdoia
John M. Peterson
Assistant Attorneys General
160 East 300 South, 6th Floor
PO Box 140833
Salt Lake City, UT 84114-0833

Utah Court of Appeals
450 South State Street
PO Box 140230
Salt Lake City, UT 84114-0230

C

Supreme Court of Utah.

STATE of Utah, In the Interest of PITTS, Erika R. and Pitts, Vallarey L., persons under 18 years of age, Gloria Gandy, Appellant.

No. 13882.

May 14, 1975.

The Juvenile Court District No. 2, Salt Lake County, Judith F. Whitmer, J., entered order permanently depriving parents of custody and terminating all parental relationship of and to their two minor infant girls and placed girls with agency for adoption, and the mother appealed. The Supreme Court, Henriod, C.J., held that a child should not be taken from its parents save by clear and convincing evidence of intention to give up parental rights, something almost akin to proof beyond a reasonable doubt, and that there was want of diligent inquiry in attempt to locate parents where, among other things, no attempt was made to contact the maternal grandmother, the State did not inquire of paternal grandmother as to the father's whereabouts and notice of publication of petition for termination was made only in a weekly newspaper having comparatively small circulation in the county.

Order set aside.

Crockett, J., concurred separately and filed opinion.

West Headnotes

[1] **Infants** 178
211k178 Most Cited Cases
(Formerly 211k16.8)

A child should not be taken from its parents save by clear and convincing evidence of intention to give up parental rights, something almost akin to proof beyond a reasonable doubt.

[2] **Infants** 198
211k198 Most Cited Cases
(Formerly 211k16.7)

There was no diligent inquiry to locate the parents prior to permanently terminating parental rights where, among other things, there was no evidence of any effort to locate father except for alleged telephone check with post office, power company and a hotel, there was no inquiry of any persons or relatives or anything else with respect to the father, publication of notice of deprivation of parental rights was made in small weekly newspaper having circulation of about one percent of that of the largest metropolitan daily paper and no effort was made to contact the children's maternal grandmother.

***1245** Gordon F. Esplin, of Salt Lake County Bar Legal Service, Salt Lake City, for appellant.

Vernon B. Romney, Atty. Gen., Frank V. Nelson, Asst. Atty. Gen., Salt Lake City, for the State.

HENRIOD, Chief Justice:

Appeal from the denial of a motion to vacate a juvenile court order permanently depriving the parents of custody and terminating all parental relationship of and to their two minor infant girl children, and placing them with an agency for adoption. It is adjudged that said order (July 16, 1974) be vacated as prayed.

This case is here solely on the record before us having to do only with the motion to vacate, the evidence adduced at the hearing thereon, the order denying it, October 17, 1974, and the order of permanent deprivation, July 16, 1974. The two orders above followed the delivery of the children by the paternal grandmother, Hattie Pitts, to a Welfare Department 'shelter' on or about November 9, 1973, (because, as the record reflects, she was financially incapable of supporting them).

One Carlson, an employee of the State Division of Family Services, testified that he filed a petition on November 30, 1973 (which is not in the record before us), which contained allegations that the children had been left with an acquaintance at a Baywood Hotel, where some days later the room caught fire, and the children thereupon were delivered to Hattie;[FN1] that the whereabouts of the parents were unknown, and that the parents had failed to provide adequate support and supervision for the children. This petition was heard on January 8, 1974. Prior thereto, said Carlson, he had 1) 'checked with the post-office to see if the father or mother were listed as receiving mail in the Salt Lake Valley,' receiving a 'No' answer. He then checked the Baywood Hotel (after the fire that apparently caused a transfer of the children to Hattie), to see if the parents were getting mail there, then checked with the local power company to see if

they were customers, being told they were not, after which he filed in the clerk's office, the petition with an affidavit for publication ***1246** of notice thereof,--and that's all he did.

FN1. Who, as stated above, delivered them to the shelter.

One Meyers, who is completely unidentified in the record, said he did two things after Carlson had made inquiries, which were done in January or February, so that they were done long after the petition was filed on November 30, 1974, and hence of no probative value whatever in connection with 'due diligence' in locating the parents.[FN2]

FN2. We list his efforts here, for informational purposes only and to show not 'diligent inquiry' but the lack of 'diligent inquiry,' and to show that even though he may have made the effort before the petition was filed, in no way would it have been the kind of diligence required to strip away from a mother and father all parental rights. He went to Hattie's home, and was told that she did not know where Gloria, the mother of the children, was, but there is no evidence whatever, to indicate that be bothered to ask where Hattie's own son, the father of the children, was. Then he looked in the phone book to see if he could locate Clara Gandy, the maternal grandmother. He said 'I found four Gandys listed, none of which were Mrs. Gandy.' There is nothing in the record to indicate he called any of those listed, but it is highly significant that he said one was a wrecking company. Two of the three numbers of persons listed represented the same phone, and the same address, and referred to a husband and wife. A bit of 'diligent inquiry' would have shown this fact, had he looked in Polks 1974 Salt Lake City Suburban Directory on page 312. Such bit of 'diligent inquiry' would have revealed in the same directory on the same page, the listing of a Mrs. Clara Gandy,--the name of the very person he was seeking.

A Mrs. Lu Jean Smith, D.F.S. worker, testified that she knew Hattie when the latter brought the children to the shelter and said she didn't know where the parents were. She checked with the baby sitter who had been at the Baywood Hotel, who didn't know where they were either.

Betty Mattson, another D.F.S. employee, knew the children's mother. This employee said she filed a Petition for Permanent Deprivation of the parental rights on May 9, 1974, since 'the parents had not made contact' with the children 'since November 9, 1973 . . . a period of more than six months' [FN3] and 'it appeared to me that neither parent was going to return at that point.' She also said she signed an Affidavit for Publication of Notice. Finally, after the July 16, 1974, hearing and order of Permanent Deprivation, Miss Mattson had contact with the mother between August 5 and 10, 1974, when the latter, after returning to Salt Lake, had called upon the former inquiring as to the whereabouts of her children,--when Mattson told the mother in no uncertain terms that 'she had been permanently deprived' of the children and that 'the children were being placed for adoption, and that she could not see them,'--nor would Mattson 'tell her the foster home at which they were placed' and that she (the mother) seemed upset.

FN3. It was six months to the day, which suggests an unwarranted and premature effort to place these children out for adoption before the parents' return (which the petition she filed called for), and the resulting default judgment of July 16, 1974, ordered placement of the children with D.F.S. 'for placement in a suitable adoptive home.'

Based on the evidence as recited above, the juvenile court made a finding of fact that 'The efforts of the . . . Division of Family Services to locate an address for the parents were diligent pursuant to Section 55--10--88, Utah Code Annotated 1953.'

[1][2] It is suggested that the evidence recited above clearly indicates that there was no 'diligent inquiry' made and that this matter is dispositive in favor of the mother and father of these children, if, for no other reason than that there is no evidence whatsoever, of any effort to locate the father except for an alleged telephone check with the postoffice, power company, and a hotel where there is no evidence that either parent resided, and a doubtful Publication of Notice, so far as this record is concerned, there having been no inquiry of any persons or relatives or anything else with respect to the children's father. In ***1247** addition to and a further weakening of such weakness

of inquiry, the following uncontradicted facts are reflected in the record to enhance the ridiculosity of permanently stripping parents of their parental rights,--which means forever, gentle reader:

Gloria Gandy, is the mother of the children, Lawrence Pitts is the father, and his mother, Hittie Pitts, is the paternal grandmother. Clara Gandy is the maternal grandmother.

In October or November, 1973, Gloria saw Hattie to see if she would take care of the children for awhile, while she (Gloria) was gone. She did not leave them at that time with Hattie for some undisclosed reason, but left them with Wanda Brown, a friend, who was happy to have them and wanted to keep them until she got back. Gloria told her to keep them a few days, then take them to Hattie. She went to Tampa, Florida, was there with the children's father until the following July, during which time she tried to make contact with the children. She called her mother several times and wrote to Hattie, with no reply. She got in touch with her mother, through her sister, who answered the phone, about April or May, near her birthday. She gave her sister her address and asked who the kids were. She kept writing to Hattie, with no response. When she came back she called on Hattie but was told the latter had moved. Then she saw her mother who told her the children were up for adoption. She called Betty Mattson who told her she couldn't see the children nor would she be told where they were. At this juncture she hired a lawyer; she volunteered that: 'I love my children very much and really do care for them. . . . I just had to leave town but was planning to send for them. I didn't think anything like this would happen. No one contacted me about the proceedings with the Court.' She talked to her mother the end of July or in August, 1974. On cross-examination she said she went to Tampa because she 'was in trouble with the law.' No reason therefor was requested and none was volunteered. She said she didn't expect Hattie to take care of the children, but knew she would manage, and that she didn't think she'd be gone away so long. Asked if the postoffice returned any letters she sent to Hattie, she said 'no, why should they?'--which makes sense.

Gloria's mother, Clara Gandy, said the Division of Family Services did not contact her at any time. She didn't contact Gloria until July or August. She said Gloria contacted her other daughter by phone, that she, Clara, tried unsuccessfully to contact Hattie until August and was told that she took the children to he Welfare. She said no one contacted her by mail, phone or personally to ask where Gloria was. There is no evidence that the other daughter ever was contacted. She said her daughter gave her Gloria's address around March or April, 'after the kids' birthday.' Counsel for the court, at some length, and in a somewhat uncavalier manner, elicited an answer from Hattie to the effect she didn't really know and was confused. Gloria, on the sideline, volunteered 'Mom, I called you in March. It was right after my birthday.' Counsel for the court responded by saying, 'Will you shut up and let her answer the question?' evincing some sort of inverted saintly effort to get at the truth, it would seem. The judge backed him up with an admonishment.

The only substantial or effective impeachment as to the facts were on cross- examination of the grandma, Clara, who not only confessed her confusion as to what appeared to be a rather immaterial fact, but who obviously displayed considerable affection for her daughter and grandchildren.

The facts abstracted above presented by Gloria are uncontroverted save as mentioned above. The state presented only facts relating to time Gloria was absent, ***1248** and what some aides of the Division of Family Service did that was claimed to constitute 'diligent inquiry.'

It is significant that the children's grandmother, Clara Gandy, was a resident, knew Gloria's address, as did Gloria's sister. More significant is what the State did not do. It did not do anything showing any diligent inquiry with respect to the children's father,--and so far as this record is concerned apparently did not even inquire of his own mother where he was. It did not contact Clara, made no phone calls to any of what amounted to only two Gandys in the phone book, did not bother to examine the 1974 directory that presumably had all the names and addresses of all the residents in the Salt Lake area, and if it did examine such directory it failed to find the name and address of Mrs. Clara Gandy plainly printed therein. The weekly newspaper in which it published notice of hearing, had a comparatively small circulation in Salt Lake County, which likely may not have had as wide a potential for notification and which, in a case like this, along with other claimed acts of diligence, would seem not to constitute reasonable diligence in alerting someone, nor the most 'diligent' means of notice, since it is fairly common knowledge that its circulation is about one per cent of that of the largest metropolitan daily paper published in Utah, where the chance of reaching the parents here, or interested relatives who might be alerted, is one hundred to one. If the people involved in this case had shown as much compassion for the parent-child relationship, and less for split-second speed in procedure designed

to accommodate the baby market that flourishes in this country, whether black, gray, red or statutory, the State, with its facilities, certainly could have used better and faster means for finding the whereabouts of this mother.

This writer is impressed with a concession made by counsel for respondent, nonetheless, to the effect that:

> Respondent cannot help but agree with appellant's contention that the deprivation of parental rights is a drastic action which must be handled through in persounum procedures. Children are not realty, and rights pertaining to them must be handled with care and proper procedure. Appellant, however, wants this Court to believe that such is an absolute standard which has very few exceptions, if at all.

We believe such language comes close to our thinking to the effect that a child should not be taken from its parents save by clear and convincing evidence of intention to give up parental rights,--something almost akin to proof beyond a reasonable doubt. The respondent, having made the quoted pronouncement must have difficulty,--particularly with that part about realty,--when it cites Redwood v. Kimball,[FN4] to support the chopping off of parents' rights, since that was a suit to quiet title to realty. This provokes some interesting language of the U.S. Supreme Court in Walker v. Hutchinson City:[FN5]

FN4. 20 Utah 2d 113, 433 P.2d 1010 (1967).

FN5. 352 U.S. 112, at 116--17, 77 S.Ct. 200, at 202--203, 1 L.Ed.2d 178.

> 'It is common knowledge that mere newspaper publication rarely informs the landowner of proceedings against the property,' and 'In too many instances notice by publication is no notice at all.'

Certainly this language is quite apt in this case where a paper's circulation is so small as to be about one per cent of that which would be provided in a paper whose circulation is a hundred times as great in circulation,--all for a very few dollars more.

Respondent's citing of Lloyd v. Third District Court,[FN6] also has its differences between the instant case, since it is a divorce action with so-called marital res extant in this state. It is quite understandable *1249 that married people who have no other kinship, and who are adults, should be amenable to service by publication,--a lot more and perhaps with a little less 'diligent inquiry' than where a blood relationship is involved,-- not the case two adults, a man and wife,--but between and adult and a minor. Some social service workers in their zeal, may be naturally the victims of some sort of biological myopia, or are unenlightened or calloused as to the depth of motherly affection, sometimes forgetting that blood is thicker than printer's ink, that absence makes the heart grow fonder, and that instinct itself waters down the oft-repeated, but as often trited aphorism that the welfare of the child is the only concern of the judiciary. They sometimes forget that even though a mother disciplines her child by administering a spanking, the one spanked almost always seeks asylum and confort in the very arms that administered the discipline.

FN6. 27 Utah 2d 322, 495 P.2d 1262 (1972).

We believe that the evidence in this case is almost a complete stranger to and hardly equates with that high standard of care and diligence necessary in seeking out parents when troubled human waters brew. Any fracture of such relationship should be condoned only by clear evidence of the highest quality.

We are of the opinion and hold that the proof here does violence to the far reaching order of permanent deprivation of parental rights,--amounting to forever, which is a long, long time.

ELLETT, TUCKETT and MAUGHAN, JJ., concur.

CROCKETT, Justice (concurring separately).

In view of the fact that that majority of the court are of the opinion that the order should be set aside, I voice no objection thereto. This, because I assume that opens the way for proceedings on the merits as to what should be done about these children. I realize that the requirement of diligent search for a parent in such situations is not without difficulties. Nevertheless there are circumstances where the duly authorized publication 'in a newspaper having general circulation in the county in which the action is pending' serves a necessary and useful purpose. It is authorized by our Rule 4(f)(1), U.R.C.P., and had since time immemorial been recognized as valid by our statutory, (see former Section 104--5--12,

U.C.A.1943), had by our decisional law, see Ricks v. Wade, 97 Utah 402, 93 P.2d 479; and 126 A.L.R. 664.

It is worthy of comment here that Rule 4(f)(1), just referred to, was amended on June 26, 1972, to provide that if '. . . the court determines that service by mail is just as likely to give actual notice as service by publication, the court may order that service . . .' may be made by mail.

535 P.2d 1244

END OF DOCUMENT

(Cite as: 2002 WL 31270246 (Cal.App. 5 Dist.))

Court of Appeal, Fifth District, California.

In re N.S., a Person Coming Under the Juvenile Court Law.
FRESNO COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent,
v.
BRENT S., Defendant and Appellant.

No. F039957.
(Super.Ct.No. 96902-2).

Oct. 10, 2002.

County department of children and family services sought termination of father's parental rights. The Superior Court, Fresno County, No. 96902-2, Martin C. Suits, J., terminated parental rights. Father appealed. The Court of Appeal held that: (1) father was a presumed father, not an alleged father, and was entitled to reunification services; (2) department failed to exercise due diligence to locate him; and (3) termination of his parental rights prejudiced him and violated due process.

Reversed and remanded.

West Headnotes

[1] **Constitutional Law** 274(5)
92k274(5) Most Cited Cases

[1] **Infants** 198
211k198 Most Cited Cases

County department of children and family services failed to exercise due diligence to locate presumed **father**, and, thus, **termination** of his **parental rights** prejudiced him and violated due process; nothing indicated department's inquiries of mother about the **father** and his relatives, mother knew how to reach **father's** grandmother, department never followed up on indications that **father** was in Washington state, and the district attorney located the **father**. U.S.C.A. Const.Amend. 14.

[2] **Infants** 155
211k155 Most Cited Cases

[2] **Infants** 172
211k172 Most Cited Cases

Putative father was a "presumed **father**," not an "alleged **father**," in dependency case and was entitled to reunification services, even though he did not formally initiate a parentage proceeding to establish paternity by blood test or sign a voluntary declaration of paternity, took child into his home for only three months, and allowed the mother to take child despite his prior concerns about drug abuse and lack of adequate care; the father openly held out the child as his natural child, never disputed the mother's decision to name him on the birth certificate, belatedly participated in the proceedings, and volunteered for blood test. West's Ann.Cal.Fam. Code § 7611, subd. (d); Welf. & Inst. Code § 316.2.

APPEAL from a judgment of the Superior Court of Fresno County. Martin C. Suits, Judge.

David M. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant.

Phillip S. Cronin, County Counsel, and Nannette J. Stomberg, Deputy County Counsel, for Plaintiff and Respondent.

OPINION

THE COURT. [FN*]

FN* Before Vartabedian, Acting P.J., Cornell, J., and Gomes, J.

*1 Brent S. appeals from an order terminating his parental rights (Welf. & Inst.Code, § 366.26) to his daughter, N.S. [FN1] Appellant first received notice of the dependency proceedings approximately three months before the originally scheduled section 366.26 hearing. Further complicating matters, since the outset of the case, respondent Fresno County Department of Children and Family Services (the Department) characterized appellant as N.S.'s alleged father. Despite serious questions of whether appellant's due process rights had been violated and whether he was entitled to presumed father status, the court proceeded with its termination order. Appellant places the blame alternatively on N.S.'s mother, the Department, the court, and his trial counsel. On review, we conclude it was error to proceed with the termination hearing and will reverse with directions.

FN1. All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

PROCEDURAL AND FACTUAL HISTORY

In July 2000, the Department detained four-year-old N.S. after her mother was hospitalized on a Penal Code section 5150 hold. The Department in turn petitioned the juvenile court to exercise its dependency jurisdiction (§ 300, subd. (b)) over N.S. based on the mother's mental health and substance abuse problems. On the face of its petition, the Department identified appellant as N.S.'s father, checked a box for address "unknown" and placed a question mark in a box marked "alleged."

Neither at the initial detention hearing nor at any subsequent hearing did the trial court make any inquiry of the mother as to the identity and address of all alleged and presumed fathers as required under section 316.2, subdivision (a). [FN2] There is also nothing in the record to indicate what inquiry the Department made of the mother with regard to appellant.

FN2. Section 316.2, subdivision (a) provides:
"(a) At the detention hearing, or as soon thereafter as practicable, the court shall inquire of the mother and any other appropriate person as to the identity and address of all presumed or alleged fathers. The presence at the hearing of a man claiming to be the father shall not relieve the court of its duty of inquiry. The inquiry shall include at least all of the following, as the court deems appropriate:
"(1) Whether a judgment of paternity already exists.
"(2) Whether the mother was married or believed she was married at the time of conception of the child or at any time thereafter.
"(3) Whether the mother was cohabiting with a man at the time of conception or birth of the child.
"(4) Whether the mother has received support payments or promises of support with respect to the child or in connection with her pregnancy.
"(5) Whether any man has formally or informally acknowledged or declared his possible paternity of the child, including by signing a voluntary declaration of paternity.
"(6) Whether paternity tests have been administered and the results, if any.
"(7) Whether any man otherwise qualifies as a presumed father pursuant to Section 7611, or any other provision, of the Family Code ."

What the record does reveal, however, is that the Department initiated a search for appellant on July 20, 2000. According to a form declaration of search dated August 3, 2000, the following records were searched: "DDS Records, Family Support, Polk Directory, Sheriff Records, County Jail, Prison Locator, Fresno telephone books, Adult Probation, Register of Voters, Personal Property Rolls, SS/SSI Records, and MEDS." Checkmarks indicating "Yes" to the word "Located" were typed in the boxes for Family Support, Sheriff Records and Adult Probation. There was no indication, however, as to what information was located. In addition, the declaration states:
"According to the Family Support Division, a letter was mailed to [a Vancouver, Washington address]. This address has been bad since March 1, 2000. Letters have been mailed to varies [*sic*] agency requesting search of records for Mr. [S.] A letter

has been mailed to the State of Washington Department of Social Health Services [in Olympia]. Another letter was mailed to the State of Washington Children's Administration [in Olympia]. The last letter was mailed to the State of Washington Department of Corrections [in Seattle]. As to [*sic*] the writing of this report, Brent [S.] has not responded to the letter mailed to him by the Department."

***2** As to this last quoted sentence, there is no explanation in the record about the contents of the letter or the address to which the letter was addressed. Also, the declarant left blank the space below pre-printed language that stated "[t]he following attempts were made to locate the party through relatives, friends or others likely to know the present whereabouts of the party."

In its social study for the dispositional hearing, the Department reported the mother was unable to provide information on how to locate appellant. She thought he might be living in Washington. The juvenile court then, in November 2000, adjudged N.S. a dependent child and removed her from parental custody. Although it ordered reunification services for the mother, the court denied appellant services by virtue of his alleged father status (§ 361.5, subd. (a)). The court made no finding at this or any prior hearing that appellant's whereabouts were unknown or that the Department made a diligent search for appellant.

After six months of unsuccessful reunification services, the mother expressed a willingness to forego further efforts to reunify with N.S. She also supported her father's request for N.S.'s placement with him and his wife in their Wyoming home. The Department in the meanwhile initiated a request for an Interstate Compact for Placement of Children (ICPC) evaluation with the State of Wyoming.

At a six-month review hearing conducted in June 2001, the court terminated reunification services and set the case for a section 366 .26 hearing. It also authorized respondent to serve appellant with notice of the section 366.26 hearing by publication. Notably, although its social worker claimed that a "Parent Search" was recently completed and appellant's whereabouts were unknown, the Department did not produce a declaration of search in support of its claim. The social worker also reported there was no identifying information to locate appellant.

Then, on July 13, 2001, a Department social worker received a telephone call from appellant. He reported he had received a letter about N.S. and child support and in the process learned for the first time that she was a juvenile dependent, placed in foster care. The record does not reveal the identity of the letter's author or the contents of the letter. County counsel later argued the family support division apparently of the Fresno County District Attorney's Office sent the letter. The letter was mailed to appellant at his father's house in Washington state.

Appellant acknowledged in the July 13th conversation that he had not seen N.S. " 'for so long,' " since she was about two when she lived with him for approximately three months. According to appellant, N.S.'s mother, whom he described as " 'really weird' [and] 'pretty crazy,' " had run away. She would call and tell him he would never see N.S. again. Claiming that the mother despised him and should have just called him, appellant said he felt "bad that I have to fight for my daughter now."

***3** Having only recently been assigned the case, the social worker promised to call appellant in a week after she reviewed the case. The social worker did inform appellant of the scheduled section 366 .26 hearing. However, she gave him the wrong hearing date. She also advised him to "show up" for the hearing. Appellant gave her his address and phone number in Vancouver, Washington.

Approximately a week later, the social worker had another telephone conversation with appellant. She informed him of when N.S. was detained and the fact that the court did not order services for him because he was an alleged father. Appellant repeatedly stated he was N.S.'s father. According to appellant, his name was on her birth certificate and he would do " 'whatever to prove that.' " He wanted N.S., whom he said he loved, to be placed with him.

The social worker explained to appellant that N.S.'s case was "in the process of [adoption] assessment." She added she needed to consult with N.S.'s therapist about appellant having contact with N.S. since, according to appellant, he had not had a relationship with her since she was about two. Appellant volunteered he " 'should never let her mother get [N.S.]' " and reiterated he was going to fight for his

daughter.

Although the social worker promised to get back to appellant, she did not do so. Instead, in early August appellant once again called the social worker asking when he could call his daughter. The social worker replied she had not heard from the therapist as yet. Appellant became upset, urging he was N.S.'s father and asking why did he not have rights. The social worker reiterated her need to talk to the therapist because N.S. had been having problems after talking to her mother.

Appellant questioned why the Department did not give N.S. to him since he was not "the one that got [her] into the system." As the social worker tried to explain the dependency process to appellant, he became angry "about how we (Dept) didn't look for him until it was too late for him." By this time in early August, respondent had formally served appellant with correct notice of the section 366 .26 hearing. He told the social worker that the mother knew where he was and did not tell the social worker. The social worker responded by trying to explain a parent search to appellant but he again became upset.

Appellant complained he was not given a chance with N.S. while the mother, who in his estimation was mentally disturbed, was. He again complained of how the mother ran away with N.S. and away from him. He added he and N.S.'s grandparents missed her and loved her. He apologized to the social worker for " 'being a jerk' " and thanked her for not hanging up on him. She told him she would contact him when she heard from the therapist.

These three conversations were detailed in social worker narratives and brought to the court's attention at a hearing in late September 2001. Respondent had petitioned to terminate visits between N.S. and her mother. Meanwhile, the court had requested an update on the ICPC process. During the hearing, county counsel asked if appellant had been noticed for the hearing that day. He had not. County counsel and counsel for the mother agreed appellant had been requesting services, placement and contact with N.S. and yet, as county counsel acknowledged:

> ***4** "we're looking at the child [who] is not a permanent placement, we're looking at an ICPC to send the child out of state and we're ignoring this father[.]"

County counsel also admitted the narratives showed that appellant only became aware N.S. was:

> "in the system in July when he was contacted by Family Support and that he's been asking for contact and the social worker apperas [*sic*] to have been putting him off saying that she's going to check with the therapist. I don't see where she ever checked with the therapist or ever got back to him[.]"

Counsel for the mother advised the court that she did not support the father having contact with N.S. and urged the court to place her with the grandfather in Wyoming. The mother did personally admit to the court that appellant's name was on N.S.'s birth certificate. Nevertheless, she was apparently opposed to appellant obtaining presumed father status.

Observing it was not his job to argue whether appellant was a presumed or alleged father, county counsel advocated against relying on the mother's representations and renewed the question of exploring appellant and his standing. The court eventually responded by appointing counsel for appellant, facilitating transportation for him and continuing the matter to the October date set for the section 366.26 hearing.

Appellant appeared for the first time in these proceedings at the October hearing. Because his attorney had not received discovery and was unfamiliar with the record, the court continued the hearing to November 2, 2001. At the continued hearing, substitute counsel sat in for appellant's attorney who was absent. Respondent recommended the court find N.S. **adoptable** based on the grandfather's desire to **adopt** her and **terminate parental rights**. When appellant personally objected claiming "they didn't contact me in time," county counsel urged that "we need something from the **father** indicating what the issues are so we can respond." County counsel was prepared to proceed with a **termination** hearing. After further discussion, the court continued the matter once again, stating it would proceed on the continued date with the **termination** hearing unless counsel for appellant filed a motion to set aside based upon inappropriate notice. In turn, the court ordered a briefing schedule, a statement of contested issues and discovery on the issue of notice.

In time for the continued hearing date, respondent filed a supplemental report regarding, in relevant part, its efforts to notify appellant of these

proceedings. It summarized the search it conducted in July 2000. It also reported the social worker "submitted a parent search" which was completed within a matter of days in November 2000 and June 2001. There was no indication in the supplemental report as to what the words "submitted a parent search" entailed in each instance. At most, the Department offered what records are ordinarily searched. Missing were declarations or other evidence of what parent searches were in fact conducted in N.S .'s case. In addition, as had happened in July 2000, the Department again sent letters to multiple agencies in Washington state. In response to the November 2000 letters, the Washington agencies reported having no record of appellant's whereabouts. The June letters, on the other hand, finally led to the Department's acquisition of appellant's address. Notably, however, the Department apparently made no effort to serve him with notice as of the following month when he called the social worker.

***5** Counsel for appellant, meanwhile, did not file either a motion to set aside or a petition for modification under section 388. At the eventual hearing in December 2001, the court permitted some testimony by appellant related to notice and N.S.'s parentage.

On the issue of notice, appellant testified he had lived all his life in the Camas/Vancouver area of Washington state. His employment, first as a carnival worker and for the last two years as a union laborer, kept him on the road much of the time. Nevertheless, he considered the Camas/Vancouver area to be his "home base." For at least the last 12 years, his family, first his grandparents and later his father, owned the same residence. He also considered that residence to be his mailing address. He had taken N.S.'s mother there for Christmas visits and dinner in years past.

N.S.'s mother maintained telephone contact with appellant's grandmother between 1996 and 1999. Even after the grandparents transferred ownership of the family home to appellant's father and moved elsewhere, N.S.'s mother still maintained contact with appellant's grandmother. This was how she reached appellant in 1999 asking for help with N.S. Appellant in turn came to pick up N.S. at the bus station in Fresno and brought her to live with him in his grandmother's home in the Camas/Vancouver area. The mother later took N.S. back, by traveling to the grandparents's home.

On the issue of paternity, appellant testified he and the mother lived together for the year prior to N.S.'s birth. Although appellant was not present at the child's birth, his absence was not of his making. Rather, the mother ran off the month before N.S.'s birth and disappeared. Nevertheless, she named appellant as the child's father on the birth certificate and, two and a half months later when the mother needed help, she contacted appellant to care for her and N.S. He traveled to Imperial, California, near where N.S. was born, and brought the mother and N.S. to Fresno where he was then working in a carnival. Once in Fresno, appellant lived with N.S. and the mother, worked at the carnival to support N.S., and thought he and the mother had reconciled. However, two weeks later, the mother again left appellant and took N.S. to Imperial. Another time, when N.S. was approximately 11 months old, the mother reported to appellant that the person she was living with beat her and she had nowhere to stay. Appellant paid for a bus ticket for the mother and N.S. to travel and stay with the sister of appellant's current girlfriend. Appellant also paid part of the mother's and N.S.'s rent. Once again, at some point, the mother left with N.S. and appellant lost track of them

Then, in the summer of 1999, a year before the Department initially detained N.S., the mother telephoned appellant's grandmother. The mother said she could not take care of N.S. at that time. Apparently, part of the mother's problem then related to drug abuse. When he received word of the mother's predicament, appellant, who wanted to have N.S. with him, traveled to Fresno to pick up the child and bring her to Vancouver. The child then spent two to three months living with appellant in his grandmother's house. At some point in the summer of 1999 while N.S. lived with appellant, she became ill. Appellant sought medical care for her, going so far as to enroll the child with the State of Washington for medical benefits. He even considered going to court in Washington to get a custody order.

***6** However, the mother traveled to Washington to take back N.S. When the mother arrived in the Camas/Vancouver area, she appeared to appellant as though she "wasn't skinny anymore" and "quit doing the dope." Appellant decided not to pursue custody proceedings because he thought the mother loved

N.S. and returning N.S. to the mother's care "would be the right thing to do." He acknowledged that at the time he could not take care of N.S. "that well" although his grandmother offered to help him. Nevertheless, he "figured [N.S.'s mother] was telling the truth" apparently about not using drugs. The mother then returned to Fresno with N.S.

A month or two later, the mother contacted appellant saying she wanted $10,000 and if he did not give her money, N.S. was not going to see him. Appellant refused. Parenthetically, he admitted he never paid child support for N.S. Appellant heard nothing further from the mother following that conversation. He did not know where she was then because the mother told him different stories about where she was going or leaving.

He admitted he did not make many efforts to find N.S. and the mother. At some undisclosed time, he knew acquaintances of his had seen the mother at the Fresno Fair. However, he did not go to Fresno then because he knew he could be arrested. In fact, when appellant first appeared in October 2001 for these proceedings, he was arrested for a probation violation. Apparently, five years earlier, he had committed what he termed "spousal abuse" involving N.S.'s mother. At some point, he pled guilty.

In the midst of appellant's cross-examination, county counsel objected to further testimony. He argued the issues of notice and parentage were irrelevant because counsel did not file any pleadings articulating the disputed issues or citing authority for her position that appellant was entitled to relief. This led to considerable argument amongst the parties and the court. The court, for its part, did not rule on the relevance objection but did appear to agree with county counsel. Appellant's trial counsel reminded the court that she had not been present at the last hearing and was unaware the court had required her to file any pleadings. She argued everyone knew what the issues were: notice and paternity. The notice issue to her mind was "so obvious." The court disagreed. The court subsequently admitted the narratives of the three conversations appellant had with the social worker in July and August. After closing arguments, the court found N.S. **adoptable** and **terminated parental rights**.

DISCUSSION

I. ***Introduction***

Appellant contends the juvenile court, instead of **terminating** his **parental rights**, should have granted him presumed **father** status and reunification services. Alternatively, he claims that his attorney's failure to file a motion to set aside the **termination** hearing or a modification petition amounted to ineffective assistance. Fundamental to both of appellant's arguments is his claim that his due process right to notice was violated.

***7** Ordinarily at a section 366.26 hearing family preservation is no longer the goal of California's juvenile dependency law. Family preservation is of critical importance from the time the minor is removed from parental custody (§ 202, subd. (a)) through the reunification period. However, once reunification efforts cease, the scale tips away from a parent's interest in maintaining family ties and towards the child's interest in permanence and stability. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309-310, 19 Cal.Rptr.2d 544, 851 P.2d 826.) At that point, adoption becomes the preferred permanent plan. (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1344, 63 Cal.Rptr.2d 562.)

By the same token, the interest of a parent in the companionship, care, custody, and management of his children is a compelling one, ranked among the most basic of civil rights. The state, before depriving a parent of this interest, must afford him adequate notice and an opportunity to be heard. (*In re B.G.* (1974) 11 Cal.3d 679, 688-689, 114 Cal.Rptr. 444, 523 P.2d 244.) The means employed to give notice must be such as one, desirous of actually informing the absentee, might reasonably adopt to accomplish it. (*In re Antonio F.* (1978) 78 Cal.App.3d 440, 450, 144 Cal.Rptr. 466.)

II. ***No Due Diligence***

[1] In order for the juvenile court's orders leading up to the section 366.26 hearing to be accorded finality, there is a "fundamental requirement of due process," that 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. (*In re Emily R.* (2000) 80 Cal.App.4th 1344, 1351, 96 Cal.Rptr.2d 285; citing *Mullane v. Central Hanover Tr. Co.* (1950) 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865.)

Where, as in this case, the Department alleged appellant's whereabouts to be unknown, the issue becomes whether due diligence was used to locate him. (*In re Emily R., supra,* 80 Cal.App.4th at p. 1352, 96 Cal.Rptr.2d 285; citing *Mullane v. Central Hanover Tr. Co., supra,* 339 U.S. at pp. 317 & 319.) The term reasonable or due diligence, as used to justify service by publication, denotes a thorough, systematic investigation and inquiry conducted in good faith. [FN3] Where the party conducting the investigation ignores the most likely means of finding the defendant, the service is invalid even if the affidavit of diligence is sufficient. (*In re Arlyne A.* (2000) 85 Cal.App.4th 591, 598, 102 Cal.Rptr.2d 109.)

> FN3. Here it is undisputed there was no resort to publication as a means of serving notice on appellant.

Appellant argues the mother withheld information while the Department blames appellant because he was frequently on the road and therefore his address was not reasonably ascertainable (*In re Emily R., supra,* 80 Cal.App.4th at p. 1353, 96 Cal.Rptr.2d 285). On the record before us, we conclude, as discussed below, the Department failed to show it used due diligence to locate appellant.

Preliminarily, we observe that never once throughout these proceedings did the court make any finding that either appellant's whereabouts were unknown or the Department made a diligent search for appellant. It also never conducted its own inquiry into appellant's identity and location as required by statute (§ 316.2). In fact, the only times before the fall of 2001 that the court even mentioned appellant was at the November 2000 dispositional hearing when it denied services to him based on his alleged father status and in June 2000 when it authorized service by publication even though the Department never offered a declaration of due diligence. We point out these omissions because this is not a case in which prior findings were made and therefore were presumably correct unless appellant could show otherwise.

***8** Particularly troubling, in light of appellant's undisputed testimony, is the lack of evidence regarding what inquiry the Department made of N.S.'s mother about appellant. The record is silent on this point. According to appellant's testimony, the mother knew his family, that they lived in the Camas/Vancouver area, and how to reach appellant's grandmother, if not appellant. The grandmother's telephone number was listed throughout this period. However, there is no indication in the record that the Department ever inquired of N.S.'s mother regarding appellant's relatives or friends, let alone why she thought he might be living in Washington.

Identifying family or friends who could assist in locating a father is an obvious step in showing due diligence. (See *In re B.G., supra,* 11 Cal.3d at 689, 114 Cal.Rptr. 444, 523 P.2d 244.) Even the Department's declaration of parent search form is testiment to this common sense. As mentioned earlier, the form includes the statement: "[t]he following attempts were made to locate the party through relatives, friends or others likely to know the present whereabouts of the party." That portion of the form was regrettably left blank when the Department's social worker executed the sole declaration used in this case.

While the Department concentrates its argument on the letters it mailed to Washington state agencies to establish its diligence, the first step, that is what inquiry it made of the mother, is utterly lacking. Consequently, it failed to establish that it pursued the most likely means of finding the defendant. (*In re Arlyne A., supra,* 85 Cal.App.4th at p. 598, 102 Cal.Rptr.2d 109.) Whether the mother was forthcoming or would have been so is not properly before us since there is no record to evaluate in this regard.

We also note the record leaves unanswered a number of other questions about the Department's diligence. For instance, appellant testified of his employment over the years, yet the Department, according to its own showing, only checked once in July 2000, in "SS/SSI Records." In addition, the one declaration of parent search in the record refers to checking Fresno County telephone and address directories. However, given the mother's belief that he might be living in Washington, one has to question why the Department did not check directories from Washington state for appellant. Along the same lines, the Department learned early on in the course of its July 2000 parent search that appellant had a recent mailing address in Vancouver, Washington. Yet, there is no showing

that this discovery triggered any further inquiry of the mother or caused the Department to follow up and check records in that particular part of Washington state.

Even in June 2001, once agencies in Washington state supplied the Department with what turned out to be the residential address of appellant's father as well as appellant's mailing address, the Department still took no action to serve appellant with notice until after he contacted the Department. Even then the social worker initially gave appellant the wrong section 366.26 hearing date. The Department's social worker also made no effort to notify appellant of on-going hearings in N.S.'s case. Indeed, as county counsel once candidly admitted, despite appellant's requests for telephone contact or visitation with N.S., the social worker appeared to "have been putting him off."

***9** Perhaps the most damning evidence which precludes a finding of due diligence in this case is the fact that apparently the family support division of the Fresno County District Attorney's Office did locate appellant through his father's residence. It was that agency's correspondence to appellant which led to his appearance in this case. In other words, another agency could locate appellant. Why could the Department not do the same? Again, the record does not offer any answers or explanations.

With particular respect to the Department's effort to shift the blame to appellant, we reject its reliance on this court's decision in *In re Emily R., supra.* In *Emily R., supra,* 80 Cal.App.4th at p. 1353, 96 Cal.Rptr.2d 285, we acknowledged that due process does not require impracticable searches. However, the circumstances in *Emily R.* were factually and legally distinguishable from the present case. In *Emily R.*, an alleged father whose parental rights had been terminated attacked the use of notice by publication. He argued the agency involved failed to exercise due diligence, ignoring the most likely means of finding him. Unlike the situation in this case, the *Emily R.* trial court repeatedly made findings which were presumptively correct that the alleged father's whereabouts were unknown and that reasonable efforts had been made to locate and notify him. (*In re Emily R., supra,* 80 Cal.App.4th at p. 1348-1349, 96 Cal.Rptr.2d 285.) Also, the alleged father in *Emily R* ., unlike appellant here, offered no evidence that the agency could have ascertained his current address.

Given the Department's failure to establish that it exercised due diligence to locate appellant, the juvenile court could not properly proceed with the section 366.26 hearing and **terminate parental rights**. As further discussed below, in light of the undisputed evidence that appellant qualified as a presumed **father**, the court's error was prejudicial.

III. ***Paternity***

[2] Family Code section 7611, subdivision (d) provides that a man is presumed to be a child's **father** if he "receives the child into his home and openly holds out the child as his natural child." There is a significant distinction between presumed and alleged **fathers** in a dependency case. Presumed **fathers** have a right to reunification services; alleged **fathers** do not. (***Adoption*** *of Michael H.* (1995) 10 Cal.4th 1043, 1051, 43 Cal.Rptr.2d 445, 898 P.2d 891; *In re Emily R., supra,* 80 Cal.App.4th at pp. 1354-1355, 96 Cal.Rptr.2d 285.)

Here, the facts presented were sufficient to establish that appellant was N.S.'s presumed father under Family Code section 7611, subdivision (d). (*Glen C. v. Superior Court* (2000) 78 Cal.App.4th 570, 585-586, 93 Cal.Rptr.2d 103.) He received N.S. into his home in the summer of 1999 and also helped provide a home for her on at least two prior occasions. He openly held out N.S. as his natural child, starting shortly after her birth when the mother contacted him and asked for help. He never disputed the mother's decision to name him as N.S.'s father on the birth certificate. Later, he even applied with the State of Washington for medical benefits for N.S. Once he learned of these proceedings and contacted the social worker, he repeatedly referred to himself as the child's father, to N.S. as "my daughter," spoke of his love for her, and his regret over letting the mother take her back in 1999.

***10** Respondent nevertheless contends appellant was nothing more than an alleged father. The Department criticizes appellant because he did not formally initiate a parentage proceeding under section 316.2, seek to establish paternity by blood test, or sign a voluntary declaration of paternity. Respondent also focuses on the evidence that appellant did not financially support N.S., he took her into his home for only three months and at the end of that period allowed the mother take her away despite his prior

concerns that the mother was abusing drugs and not providing N.S. adequate care.

We reject respondent's assumption that the juvenile court either did or could find appellant was only an alleged father. The fact that the father did not formally initiate a parentage proceeding under section 316.2 or sign a voluntary declaration of paternity is irrelevant under the circumstances of this case. Indeed, respondent's argument is disingenuous in this regard. Under section 316.2, subdivision (b), it was either the court's or the Department's duty to give appellant notice of his rights and his ability to admit or deny parentage, by providing him with Judicial Council form JV-505. [FN4] The form which is entitled "STATEMENT REGARDING PATERNITY" includes such options as "I do not know if I am the father of the child and I [blank] consent to [blank] request blood or DNA testing to determine whether or not I am the father[,]" "I believe I am the child's father and request that the court enter a judgment of paternity[,]" and "I have already established paternity of the child by ... A voluntary declaration signed by me...." On the reverse side of the Judicial Council form, there is also notice to an alleged father that "If you wish the court to determine paternity or if you wish to admit that you are the father of the child, complete this form according to your intentions." However, there is no indication in the record that appellant was ever served with such notice. Moreover, appellant's participation in these proceedings, albeit belated, is testament to his willingness to declare his paternity. Indeed, respondent's further criticism of appellant for not seeking to blood test ignores the evidence that he volunteered to blood test.

> FN4. Section 316.2, subd. (b) provides:
> "If, after the court inquiry, one or more men are identified as an alleged **father**, each alleged **father** shall be provided notice at his last and usual place of abode by certified mail return receipt requested alleging that he is or could be the **father** of the child. The notice shall state that the child is the subject of proceedings under Section 300 and that the proceedings could result in the **termination** of **parental rights** and **adoption** of the child. Judicial Council form Paternity-Waiver of Rights (JV-505) shall be included with the notice. Nothing in this section shall preclude a court from **terminating** a **father's parental rights** even if an action has been filed under Section 7630 or 7631 of the Family Code."

Respondent's reliance on appellant's failure to financially support N.S. as well as the fact that he took her into his home for only three months and then allowed the mother to take her away despite his prior concerns is also irrelevant to the issue of presumed father status under Family Code section 7611, subdivision (d). Even appellant acknowledged he should have done more for N.S. Such evidence still does not undercut the undisputed evidence, however, that appellant received her into his home and openly held out N.S. as his natural child.

Respondent's reliance on *In re Ariel H.* (1999) 73 Cal.App.4th 70, 86 Cal.Rptr.2d 125 is also misplaced. *Ariel H., supra,* involved an adoption action which a 15-year-old alleged father sought to prevent. Notably, the alleged father in *Ariel H.* presented no evidence that he was entitled to presumed father status under Family Code section 7611, subdivision (d). In fact, he never saw the child nor did he publicly acknowledge his paternity. He instead tried to excuse his inaction by citing his own minority, an argument which the appellate court rejected. (*In re Ariel H., supra,* 73 Cal.App.4th at p. 74, 86 Cal.Rptr.2d 125.) Unlike the alleged father in *Ariel H.,* appellant "promptly attempt[ed] to assume his parental responsibilities as fully as the mother [would] allow." (*In re Ariel, supra,* 73 Cal.App.4th at 73, 86 Cal.Rptr.2d 125, quoting *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 849, 4 Cal.Rptr.2d 615, 823 P.2d 1216.)

***11** In reviewing this record, we are struck by the fact that in so many instances a finding of presumed father status is supported by a fraction of the evidence presented here. We have no doubt that had the appellant appeared in these proceedings at an earlier stage, no court would have hesitated to grant him presumed father status on the undisputed showing he made. What motivated the court in this case is anyone's guess and frankly irrelevant given that our review extends to the court's actions and not its reasoning (*Mancuso v. Southern Cal. Edison Co.* (1991) 232 Cal.App.3d 88, 95, 283 Cal.Rptr. 300). In any event, we conclude the violation of appellant's due process rights was prejudicial given the

undisputed evidence entitling him to presumed father status under Family Code section 7611, subdivision **(d).**

DISPOSITION

The order terminating parental rights is reversed. The matter is remanded to the trial court with directions to enter an order declaring appellant to be the presumed father of N.S. and conduct further proceedings to resolve appellant's request for placement and, in the alternative, to order reunification services for his and N.S.'s benefit (see § § 361.2 & 361.5).

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