[Cite as *In re D.B.*, 2009-Ohio-4003.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
IN THE MATTER OF:	:	Sheila G. Farmer, P.J.
	:	W. Scott Gwin, J.
D.B. (D.O.B. 06-02-2008)	:	Julie A. Edwards, J.
	:	
Minor Child(ren)	:	Case No. 2009 CA 00062
	:	
	:	
	:	O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from Stark County Court of Common Pleas, Juvenile Division, Case No. 2008 JCV 00606
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	August 10, 2009
APPEARANCES:	
For Plaintiff-Appellee	For Defendant-Appellant
JAMES B. PHILLIPS, JR. Stark County Department Of Job and Family Services 221 Third Street, S.E. Canton, Ohio 44702	MARY G. WARLOP Stark County Public Defender Office 200 West Tuscarawas Street Suite 101 Canton, Ohio 44702

Edwards, J.

{¶1} Pamela Brown appeals a judgment of the Stark County Common Pleas Court, Juvenile Division, granting permanent custody of her son D.B. to the Stark County Department of Job and Family Services (hereinafter SCDJFS). Appellee is SCDJFS.

STATEMENT OF FACTS AND CASE

{¶2} D.B. was born on June 2, 2008. Appellant is the child's natural mother. Paternity has not been established. On June 4, 2008, SCDJFS filed a complaint alleging dependency and neglect and seeking temporary custody of the child. On August 7, 2008, D.B. was found to be dependent and temporary custody was granted to SCDJFS.

{¶3} Appellant had been found incompetent to stand trial in the Canton Municipal Court and resided at Heartland Behavioral Health Center in June of 2008. She was found by medical professionals to not be mentally restorable. On May 27, 2008, the Stark County Probate Court granted guardianship over appellant to her mother.

{¶4} Appellant visited with the child in August, 2008. A visit was scheduled for November of 2008 at SCDJFS. Appellant did not appear for the visit and her caseworker later learned that she was transient, had been arrested, and again spent time in the Heartland facility. When transient, appellant used street drugs, specifically crack cocaine.

{¶5} On November 20, 2008, SCDJFS filed a motion seeking permanent custody of D.B. The case proceeded to a hearing on January 27, 2009, in the Stark

County Common Pleas Court, Juvenile Division. Appellant's mother was present at the hearing and stipulated to the grounds for permanent custody. Appellant was not present. The evidence at trial reflected that the caseworker had just learned that appellant had been arrested and placed in the Heartland facility for a period of time. She was released from Heartland one week prior to the hearing and her whereabouts were unknown.

{¶6} Following the presentation of evidence, the court found that appellant had severe mental health issues. The court found that she could not meet her own needs, let alone those of her child, and due to her mental health concerns and substance abuse problems, placement of the child with her would place the child at risk now and for the reasonably foreseeable future. The court found that appellant had had no contact with D.B. for more than 90 days and had abandoned the child. The court found that it was in D.B.'s best interest to grant permanent custody to SCDJFS. Appellant assigns a single error:

{¶7} "THE TRIAL COURT VIOLATED APPELLANT'S DUE PROCESS RIGHTS GUARANTEED UNDER THE 5TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND GUARANTEED UNDER SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION, AND ERRED AS A MATTER OF LAW WHEN IT PROCEEDED WITH A PERMANENT CUSTODY TRIAL WHEN MOTHER HAD NOT BEEN PROPERLY SERVED WITH THE MOTION OR NOTICE OF THE HEARING."

{¶8} SCDJFS served appellant with notice of the permanent custody motion and hearing by serving her mother, who was designated as her legal guardian by the Probate Court. Appellant argues that because she was transient, she should have been

served by publication. She also argues that she was committed to the Stark County Jail on November 18, 2008, and subsequently placed in Heartland. She argues that appellee was aware of these facts, yet failed to serve her at the jail or to serve the superintendent of Heartland as required by Civ. R. 4.2(E).

{¶9} Juv. R. 16(A) provides:

{¶10} "Except as otherwise provided in these rules, summons shall be served as provided in Civil Rules 4(A), (C) and (D), 4.1, 4.2, 4.3, 4.5 and 4.6. . . Except as otherwise provided in this rule, when the residence of a party is unknown and cannot be ascertained with reasonable diligence, service shall be made by publication."

{¶11} Civ. R. 4.2 governs service of an incompetent person:

{¶12} "Service of process…shall be made as follows:

{¶13} "(C) Upon an incompetent person by serving either the incompetent's guardian or the person designated in division (E) of this rule, but if no guardian has been appointed and the incompetent is not under confinement or commitment, by serving the incompetent;"

{¶14} "(E) Upon an incompetent person who is confined in any institution for the mentally ill or mentally deficient or committed by order of court to the custody of some other institution or person by serving the superintendent or similar official of the institution to which the incompetent is confined or committed or the person to whose custody the incompetent is committed;"

{¶15} The record reflects that appellant was served by serving her mother, who was her legal guardian, in compliance with Civ. R. 4.2(C). The colloquy at the hearing further demonstrates that service was completed on appellant's legal guardian:

{¶16} "ATTY WARLOP: Your Honor, um…as to service on my client, I'm not…I, I believe she was served but I did not have an opportunity to um…check the court docket um…so, I would ask that the Court, just double check and make sure she was served with the motion…

{¶17} "THE COURT: Mr. Phillips, do you want to address service?

{¶18} "ATTY PHILLIPS: Your Honor, I, November 20th, we did do a precipe for se, ah…for service. Ah…we did serve mom at the, I believe the addro, I'm sure the address of ah…her mother, since she is her guardian. I have no failure in the file to indicate that, that service was not complete.

{¶19} "THE COURT: (Looking through the file).

{¶20} "ATTY SMITH: Your Honor, as your (sic) looking, I guess, my client, as guardian did receive paperwork at the residence. Um…and my client indicates that she shared that information with her daughter. Um…

{¶21} "THE COURT: I see that, that your client did in fact and I guess if she is the ah…guardian, I think there's a good argument to (sic) that we have service on mom.

{¶22} "ATTY PHILLIPS: (Agreeing).

{¶23} "THE COURT: Do you disagree, Ms. Warlop?

{¶24} "ATTY WARLOP: I…ah…I'm not sure. I…I really don't know.

{¶25} "FEMALE VOICE: Her social worker did tell me that um…she had discussed those (inaudible) with her. I just don't know is she was actually served with the paperwork.

{¶26} "THE COURT: I understand.

{¶27} "THE COURT: I'm going to indicate that I ah…I do have filed with the Court, of the appointment by the Probate Court. That Ms. Shumate is the guardian ah…over the legal authority of the mother, Pamela Brown and she was served, so I'm going to declare that adequate service. Then the Motion to continue will be denied. You may call your first witness." Tr. 4-6.

{¶28} Appellant's argument that appellee should have been served by publication is without merit. Juv. R. 16(A) provides for service by publication when the residence of a party is unknown and cannot be ascertained with reasonable diligence. However, Civ. R. 4.2(C) specifically provides for service on upon an incompetent person by serving the guardian. Because the address of the guardian was known, and service was completed at that address, appellee was not required to attempt to serve appellant by publication.

{¶29} We also reject appellant's argument that appellee knew she was incarcerated in the Stark County Jail on November 18, 2008, and should have served her at the jail. The caseworker testified that when she attempted to schedule a visit in November, appellant did not make it to the agency for the visit. Tr. 9. She testified, "I just heard that she was re-arrested." Tr. 10. The record does not support appellant's claim that the caseworker knew she was in the Stark County Jail in November of 2008.

{¶30} Appellant's argument that she should have been served at Heartland is also without merit. We first note that the record does not reflect when the caseworker became aware that appellant was at Heartland after her arrest in November, 2008. Further, Civ. R. 4.2(C) specifically allows service on an incompetent person by serving *either* the incompetent's guardian *or* the person designated under division (E), which

governs service on a person confined in an institution for the mentally ill. Therefore, service upon appellant through her guardian was proper pursuant to the Rule, even if she were confined at Heartland at the time.

{¶31} The assignment of error is overruled.

{¶32} The judgment of the Stark County Common Pleas Court, Juvenile Division, is affirmed.

By: Edwards, J.

Farmer, P.J. and

Gwin, J. concur

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JUDGES

JAE/r0724

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IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

IN THE MATTER OF:	:	
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D.B. (D.O.B. 06-02-2008)	:	
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Minor Child(ren)	:	JUDGMENT ENTRY
	:	
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	:	CASE NO. 2009 CA 00062

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Stark County Court of Common Pleas, Juvenile Division, is affirmed. Costs assessed to appellant.

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JUDGES