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Supreme Court of Texas.
In the Interest of E.R., et al., Children Lamia Raibon, Petitioners
v.
Department of Family Protective Services.
No. 11-0282.

February 28, 2012.

Appearances:

Jeremy C. Martin, Malouf & Nockels, LLP, Dallas, TX, for the Petitioners.

Kimberly Duncan, Office of the District Attorney, Dallas, TX, for the respondent.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

CONTENTS
ORAL ARGUMENT OF JEREMY MARTIN ON BEHALF OF THE PETITIONER
ORAL ARGUMENT OF KIMBERLY DUNCAN ON BEHALF OF THE RESPONDENT
REBUTTAL ARGUMENT OF JEREMY MARTIN ON BEHALF OF PETITIONER

CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in the first matter, 11-0282 In the Interest of E.R.

MARSHAL: May it please the Court, Mr. Martin will present argument for Petitioners. Petitioners have reserved five minutes for rebuttal.

ORAL ARGUMENT OF JEREMY MARTIN ON BEHALF OF THE PETITIONER

ATTORNEY JEREMY MARTIN: May it please the Court, I respectfully submit to the Court that this is really a two-issue case. One issue is a fairly narrow issue of personal jurisdiction regarding the sufficiency of service by publication. The other issue presented in this case is a broader issue regarding subject matter jurisdiction and specifically whether Section 161.211(d) of the Texas Family Code is more akin to a mandatory statutory requirement or whether it's, in fact, instead a jurisdictional requirement such that after the expiration of six months, a court cannot review an order terminating parents' parental rights. What I'd like to do is go through a very brief timeline for the Court, a very, very short discussion of the procedural history and then, depending on where we are, I'd like to discuss the state's arguments regarding the importance of finality in the context of termination as a whole. On November 16, 2006, the trial court entered temporary orders appointing the Department of Family Protective Services temporary managing conservators of Ms. Raibon's children. Four months later on March 20, 2007, the caseworker who had been assigned to the case spoke with Ms. Raibon regarding her address. A little over two months later on May 25, 2007, the Department filed a petition to terminate Ms. Raibon's parental rights. Three months later on August 20, 2007, three things happened. The first was that ap-

parently the DA or I think we now understand is the district attorney, contacted the caseworker who was in charge of this case and told her that he had been unable, he or she had been unable to serve Ms. Raibon at the address that they had been given. Number two, the children's aunt contacted the caseworker and let the caseworker know that the children's mother had contacted the aunt regarding the children. And then, thirdly, the caseworker, spoke directly with Ms. Raibon on the telephone regarding her address and, at that point, Ms. Raibon responded to the caseworker that she did not have a permanent address, was in the process of moving and this is a little bit of a controversial issue because in the motion for the trial stage, which I will get to shortly, Ms. Raibon filed an affidavit clarifying saying, no, I didn't tell the caseworker that I didn't have an address. I just told the caseworker that I didn't have an address other than my mother's address where I had been staying while I was in the process of moving and finding a more permanent address. This address is the Barclay B-a-r-c-l-a-y address that was given. On four days later on August 24, an affidavit in support of service by publication was prepared. The affidavit relied on hearsay. The affidavit reflected on its face a lack of personal knowledge of the affiant, the caseworker.

JUSTICE EVA M. GUZMAN: Was someone appointed to find Ms. Raibon?

ATTORNEY JEREMY MARTIN: To find Ms. Raibon?

JUSTICE EVA M. GUZMAN: To locate her before they proceeded with this?

ATTORNEY JEREMY MARTIN: The record doesn't reflect that there was anyone specifically retained to find Ms. Raibon. The only attempts that are in the record are the ones that are reflected in the affidavit in support of the motion for service by publication. There was also a series of attempts to locate Ms. Raibon on various public websites that record peoples' addresses and that sort of thing, but nothing in terms of picking up the phone and calling her.

JUSTICE EVA M. GUZMAN: Her mother, for example.

ATTORNEY JEREMY MARTIN: Her mother, for example, yes, ma'am, exactly, Your Honor. This next date is really important. It was either sometime in August, 2007 or September 4, 2007. It could be both. It could be either. The record isn't clear, but at some point during that previous time, Ms. Raibon actually came to a prescheduled meeting at the Department of Family Protective Services' offices and met with the caseworker that had been assigned to her children for over an hour. Ms. Raibon brought her brother, who was a veteran who had returned from Iraq and they sat across the table from the caseworker for over an hour and discussed the children, discussed the situation with the children. Obviously, at no time did the Department try to serve her with personal process, personal service at that meeting and, in fact, during that meeting, Ms. Raibon had no idea that the Department was in the process at that moment of publishing citation in a newspaper. She had no idea, no clue.

JUSTICE NATHAN L. HECHT: She did know about the case.

ATTORNEY JEREMY MARTIN: That's an interesting question. What she knew was that there were some sort of proceedings going on with regard to her children.

JUSTICE NATHAN L. HECHT: She didn't have them.

ATTORNEY JEREMY MARTIN: That is correct, Your Honor. The children were no longer in her possession.

JUSTICE NATHAN L. HECHT: They had been in temporary, they had been in the Department's custody since November of 2006?

JUSTICE NATHAN L. HECHT: Yes, Your Honor. Yes, Your Honor. To kind of follow up on that though, I don't think the record is clear as to what Ms. Raibon really understood the full import to be of these proceed-

ings. There's nothing in the record that reflects that.

JUSTICE EVA M. GUZMAN: What does the record show about her educational level or what she might have been capable of understanding?

ATTORNEY JEREMY MARTIN: I don't believe the record speaks to that, Your Honor. I think as an officer of the court, I can say that I think her education level would probably be commiserate with what the Court might expect in this situation.

JUSTICE PHIL JOHNSON: Her educational level was what?

ATTORNEY JEREMY MARTIN: Might be what the Court might expect in such a situation where the mother doesn't have a permanent address. The mother is moving. The mother obviously has had some issues to the point where the children have been taken from her.

JUSTICE PHIL JOHNSON: Does that really make a difference in so far as the validity of the service though?

ATTORNEY JEREMY MARTIN: Absolutely not, Your Honor. That's exactly right. And I think that's very important because the State argues over and over again about those merits-based issues and I think it's important at this point to step back and say, yes, I understand that those arguments are there, but we aren't there yet. We don't get to the merits. We don't get to talk about what person, what kind of mother she is until we have personal jurisdiction over her and we don't have personal jurisdiction over her.

JUSTICE EVA M. GUZMAN: There's an allegation of notice and the question is whether she understood what was going on, that her rights would be terminated at some point, that the Department was going to move forward. They were no longer going to have these meetings and call her over. They were going to move forward to terminate her rights and there's a question about whether she did have notice that this was going forward. So to that extent, there's some relevance on what she might have understood because that's an assertion in the breach, right?

ATTORNEY JEREMY MARTIN: If I understand what the Court is asking, the Court is referring to the [inaudible] of actual notice, actual knowledge of the proceedings. I don't think I'm overstepping to say that probably 100 years of Texas and federal case law have held that actual notice does not substitute for proper service of process and does not give a court personal jurisdiction over an individual who has not been served with strict compliance of the service of process rules. So while on one hand I think the record does reflect that there was some actual knowledge of something, number one, we're not sure what that is, what the actually knowledge actually was and, number two, actual knowledge is not sufficient to establish personal jurisdiction. With regard to the hearing on the termination, that was held on October 25, 2007. Then we have the order terminating Ms. Raibon's parental rights on November 14, 2007 and now we have the procedural history after that. Ms. Raibon filed a motion for new trial more than six months after the order terminating parental rights.

CHIEF JUSTICE WALLACE B. JEFFERSON: When did she realize that there was an order terminating parental rights?

ATTORNEY JEREMY MARTIN: I wish I could answer that question, Your Honor. I don't know the answer to that.

CHIEF JUSTICE WALLACE B. JEFFERSON: Was it before that six-month period after the order was signed or after or do you know that?

ATTORNEY JEREMY MARTIN: The record doesn't reflect as an officer of the court. If it would be helpful to the Court, I think I can explain that I don't know whether Ms. Raibon did. I know that her mother, whose name

is Patricia Pippin and she appears in the record, she did know.

CHIEF JUSTICE WALLACE B. JEFFERSON: So the children not just the period that Justice Hecht was talking about, but for two years after this order was signed, were not with the mother. What, why did it take two years to file a motion for new trial?

ATTORNEY JEREMY MARTIN: And, Your Honor, that's the 800-pound gorilla in the room and the court of appeals asked the same question. I wish that I had more helpful answer to the Court. The most helpful answer I can give is that my client's personal situation was such that this motion for new trial was filed as quickly as it could be in light of her situation and I wish that I could expand on that, but I just can't. Nonetheless, the motion for new trial was filed within the two-year requirements of Rule 329 as the Court knows Texas Rule of Civil Procedure 329 permits a party who is challenging an order that has been rendered on service and processed by publication to challenge that order by motion for a new trial for up to two years, which is exactly what happened in this case. In the motion for new trial, Ms. Raibon contended that the citation by publication had been procured by extrinsic fraud and also challenged the sufficiency of the evidence to support citation by publication, again the problems in the affidavit, and also pointed out the fact that there was in the record no order permitting service by publication, which I think is another problem. In response, the State argued that there was no extrinsic fraud. The State did not raise Section 161.211(b). That's undisputed. There was a hearing. After the hearing, the court denied the motion for new trial and the motion for new trial denial was appealed. In the appellate court, Ms. Raibon's principal brief argued again extrinsic fraud, raised the same evidentiary challenges. Incidentally, the trial court refused to rule on the evidentiary challenges and Ms. Raibon objected to the refusal to rule. Once we were in the appellate court, in Ms. Raibon's principal brief, she argued extrinsic fraud, the evidentiary problems and in addition dropped a footnote and said just in all candor, I want to let the court know there is this section of the Family Code out there, Section 161.211(b), which says you have six months. The three courts that have addressed the statute have all held that it's a statute of limitations, that it's subject to waiver. The State did not raise it in response to the motion for new trial, didn't talk about it at the hearing and so it's been waived, but just so the Court is clear, yes, that statute is out there. Yes, we're aware of it, but it was waived. The State's appellee's brief did not discuss Section 161.211. The reply brief was filed and then shortly before oral argument after the briefing was closed, the State requested permission to file an amended brief, raising for the first time the issue of 161.211 and arguing it was matter of first impression as matter of first impression that the statute is jurisdictional. The jurisdictional bar, six months, no matter what happens, it's not [inaudible].

CHIEF JUSTICE WALLACE B. JEFFERSON: Well let's assume that they didn't waive the argument and it's jurisdictional. What's the relationship between that statute and a person who is not served properly with citation? Would it be, is it void notwithstanding Rule 329 because the court never acquired jurisdiction or so it has no effect? What is your strongest argument for rebutting the effect of 161?

ATTORNEY JEREMY MARTIN: The strongest argument, Your Honor, is the analysis in the dissenting opinion In re E.R., Justice Murphy, I think just a fantastic discussion. Her conclusion is that Section 161.211(b) does not apply in this case because 166.211(b) applies when an individual has been served by a process by publication and Justice Murphy's analysis of the statute concludes that the statute must at least imply valid service by citation by publication because otherwise the statute is unconstitutional. You would never have personal jurisdiction over the individual and, as a result, because in this particular case we have the extrinsic fraud. We have the failure to strictly comply with the rules for service by citation by publication because they knew Ms. Raibon's whereabouts, but therefore Section 161.211(b) does not even apply. That was her conclusion. The majority opinion doesn't really address that issue. The majority opinion all goes to whether it's jurisdiction or whether it's a statute of limitations and of course it comes out with the conclusion that it's jurisdictional. The dissenting opinion by Justice Murphy really doesn't go there. It just sort of stops at you didn't have personal jurisdiction, the statute doesn't apply and that's the end of the analysis.

JUSTICE PHIL JOHNSON: And so we just examine that as a matter of law?

ATTORNEY JEREMY MARTIN: You would, well, of course, you had the standard review for a motion for the denial of motion retrial, which is abuse of the discretion, but I think in this particular case when you're looking at whether service by publication, whether service by publication was rightfully procured, I think that is unquestionably a question of law.

CHIEF JUSTICE WALLACE B. JEFFERSON: What's the policy behind 161 would you say?

ATTORNEY JEREMY MARTIN: 161.211, the policy as the State and as the majority have been touting is finality. It's important that we have a final resolution once a child is placed, once a child's relationship with his or her parent is terminated, then we need to have a final resolution so that the child can get on with his or her life.

CHIEF JUSTICE WALLACE B. JEFFERSON: Right so the children, for example, who have been now three years, four years without their mother, where are they now?

ATTORNEY JEREMY MARTIN: Your Honor, I wish I knew and I actually before coming here did everything I could to find out. There is some confidentiality concerns and actually some channels that I pursued with folks who I expected would be able to find out that information were unable to, but I think what's important in this case-

JUSTICE NATHAN L. HECHT: They're no longer in the Department's custody? They're placed somewhere.

ATTORNEY JEREMY MARTIN: I wish that I could answer that, Your Honor. I just don't know. I did try to find out, but I think at the end of the day, what's important to remember in this situation is if the Court in granting the petition reverses the judgment, that does not mean that these children on the next day are being returned to Ms. Raibon. They're not. We just have to go back and actually have a trial on the merits in which my client participates with regard to defending her parental rights and trying to re-establish a relationship with her children.

JUSTICE PHIL JOHNSON: Under your position, it wouldn't matter whether it's six months or two years or five years or 10 years later. Since she was not properly served is your position that she should come back in and attack the termination.

ATTORNEY JEREMY MARTIN: That's exactly right, Your Honor. Yes, Your Honor. I am seeing that my time has expired. If the Court has any questions, obviously I will be happy to answer them [inaudible].

CHIEF JUSTICE WALLACE B. JEFFERSON: We'll hear from you on rebuttal. Thank you, Counsel. The Court is ready to hear argument from the Respondent.

MARSHAL: May it please the Court, Ms. Duncan will present argument for Respondent.

ORAL ARGUMENT OF KIMBERLY DUNCAN ON BEHALF OF THE RESPONDENT

ATTORNEY KIMBERLY DUNCAN: May it please the Court, in cases involving the termination of parental rights, judicial economy is not just a policy, it's a statutory mandate. The Texas Family Code is replete with provisions evidencing the legislature's overriding intent that cases involving the termination of parental rights be expeditiously resolved. To that end, Section 161.211 was enacted in which the Legislature expressly limited the time to collaterally or directly attack and order the validity of a termination order to the six months following the entry of the order.

JUSTICE DAVID M. MEDINA: But as Justice Murphy said in her dissent, doesn't that presume that service was correct or do you just gloss over that?

ATTORNEY KIMBERLY DUNCAN: Your Honor, the plain language of this statute, Your Honor, does not address that. It expressly applies to the validity to all challenges to the validity of a termination order and as the Austin and First Court of Appeals in Houston have recognized with regards to the corresponding provision regarding adoption orders, the statute does not provide any exceptions, not even on grounds that the order is purportedly void and I would argue that that same analysis applies to this provision.

JUSTICE DAVID M. MEDINA: Which are you comparing an adoption to termination of parental rights?

ATTORNEY KIMBERLY DUNCAN: In 1997, the Legislature amended the provision in Section 162.0012, which governs direct and collateral attacks to adoption orders. Previously, that provision had allowed two years to challenge the validity of an adoption order. In 1997, the legislature expressly limited that from two years to six months and at the same time, the Legislature enacted the provision at issue in this case regarding termination orders. This statutes provide the same language their reciprocal provisions regarding adoption orders and termination orders.

JUSTICE DAVID M. MEDINA: So what's the purpose of having someone served properly then? Can we just gloss over that?

ATTORNEY KIMBERLY DUNCAN: No, Your Honor, my position is not to gloss over that point. She did have an opportunity to challenge the termination order on the grounds that it is void. She had the six months following the entry of the order to challenge the order and Petitioner has not shown any reason or why or presented any argument that couldn't have been presented within that six-month time period.

JUSTICE PHIL JOHNSON: Do you agree with Opposing Counsel that I believe he used the terms 100 years or so of Texas jurisprudence says if you don't have proper service, you don't have jurisdiction? Do you agree with him or do you disagree with him?

ATTORNEY KIMBERLY DUNCAN: My review of the case law does say that an order rendered in the absence of jurisdiction is void. However, as the case that I was referring to out of the Austin and Houston, First Court of Appeals in Houston have referred with regard to the adoption statute that this statute would apply even in an instance where the order was void.

JUSTICE PHIL JOHNSON: So in your situation, if we have an invalid service of citation, if you have a judgment against a defendant who was improperly served and the judgment's for $500, then that would be void and could be collaterally attacked forever is that correct?

ATTORNEY KIMBERLY DUNCAN: For whatever time period the Legislature had set.

JUSTICE PHIL JOHNSON: Well, if it's void, if it's void, what limitation would there be on attacking that $500 judgment?

ATTORNEY KIMBERLY DUNCAN: The Legislature can set time limits for attacks on any order. The Legislature has set many time limits and it's not for courts to decide whether the time limits that are enacted are-

JUSTICE PHIL JOHNSON: Even on an order, when the trial court does not have jurisdiction over someone?

ATTORNEY KIMBERLY DUNCAN: I think that even the issue of jurisdiction in a situation in this situation can be waived by a failure to attack it within the prescribed time period, Your Honor.

JUSTICE DON R. WILLETT: This is water under the bridge, but why didn't the DFPS personally serve her when she met with her caseworker?

ATTORNEY KIMBERLY DUNCAN: Your Honor, the caseworker, that is also a good question, but the caseworker is not herself a process server. The record reflects that Petitioner's participation with visitation scheduled hearings was sporadic at best. She would, the motion for new trial transcript reflects that the Petitioner would sometimes miss three visitations in a row. She would show up an hour late and when she would show up, she was generally late, often so late the hearings had already happened. The two instances she did show up for prior proceedings and even on the occasion that in August or September that Petitioner's counsel is referring to, she appeared over an hour late for her two-hour visitation so even if someone had-

JUSTICE DON R. WILLETT: Well let me ask you this.

ATTORNEY KIMBERLY DUNCAN: Yes, I'm sorry, Your Honor.

JUSTICE DON R. WILLETT: If we determine the six-month's limitation is merely mandatory and not jurisdictional, is there still a path to victory for you? Do you have a nonjurisdictional argument that limitation defense cannot be waived?

ATTORNEY KIMBERLY DUNCAN: Yes, Your Honor, that she was properly served with citation by publication, yes.

JUSTICE DEBRA H. LEHRMANN: Did she have actual notice of this hearing?

ATTORNEY KIMBERLY DUNCAN: I think from the record, the record is not clear on that, but the case worker did testify at the motion for new trial that each time she spoke with Petitioner, she gave her information regarding upcoming court hearings so it does appear that she had actual notice. You could infer from the record that she had actual notice of the proceeding. The Dallas Court of Appeals correctly concluded that the language of this section leaves no room for a construction other than a requirement that any collateral or direct attack on the termination of parental rights, including a motion for new trial, be filed no more than six months after the termination order is signed. The statute does not include any exceptions. There is no provision for waiver in the statute and nothing indicating that it is a statute of limitations or affirmative defense.

CHIEF JUSTICE WALLACE B. JEFFERSON: But this is kind of an odd statute because this really isn't a collateral, if the Opposing Counsel is right, this really isn't a collateral attack upon an order. It is an argument that there was no order. The trial court never had jurisdiction over the mother and had no authority to proceed. The paper that he or she signed is worthless and, therefore, she, the mother, has a right to argue for retaining her children. It's not really, what she is saying is it's not really an order at all.

ATTORNEY KIMBERLY DUNCAN: That's, Petitioner has in previous-

CHIEF JUSTICE WALLACE B. JEFFERSON: It would be like, it would be as if some non-lawyer, non-judge signed that same default judgment. Well that person never elected as a judge. Doesn't have a law license. Who cares what they sign? It is irrelevant.

ATTORNEY KIMBERLY DUNCAN: Respectfully, Your Honor, Counsel for Petitioner has previously acknowledged that a motion for new trial is a direct attack on the termination order in the briefing and the termination order itself, which was in this case signed by the judge having jurisdiction over the subject matter at issue, the termination of parental rights in the family court in Dallas, did sign an order stating that all persons served entitled to citation were served and the order does, it is an order in this case. There is a termination order at issue and that is being attacked.

JUSTICE EVA M. GUZMAN: Did the mother have an attorney ad litem appointed to locate her before the citation by publication was, usually, I mean, that's what I recall when I was on the bench.

ATTORNEY KIMBERLY DUNCAN: Yes, Your Honor, there was an attorney ad litem appointed in this case and as the Family Code provides, the responsibilities of an attorney ad litem include confidentiality and loyalty to the client.

CHIEF JUSTICE WALLACE B. JEFFERSON: But do you look at the record of this attorney ad litem that was appointed for the mother and she really didn't, there was no defense. There was no argument that service was improper. It looked like, it was about two paragraphs at most that says I looked through the record. The publication occurred on this date and there has been no answer. Thank you, Your Honor, and she sat down. It seems like what's the purpose of that attorney? Isn't the attorney ad litem appointed to represent the absent parent at these hearings?

ATTORNEY KIMBERLY DUNCAN: Yes, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: And did that occur in this case?

ATTORNEY KIMBERLY DUNCAN: All that I know about the attorney ad litem's participation is that that's shown in the record. She recognized that the publication was right and then the caseworker testified as to her [inaudible].

JUSTICE DEBRA H. LEHRMANN: Well let me ask you, typically when trial court's appoint attorneys ad litem for absent litigants, the purpose of the appointment is to find the person. So in this situation, the purpose of the attorney ad litem would be to find the mother rather than to represent the mother. Isn't that correct?

ATTORNEY KIMBERLY DUNCAN: I think that's correct, Your Honor, yes.

JUSTICE DEBRA H. LEHRMANN: And so, typically, it's my understanding and certainly my years on the bench typically if the party was found, typically that attorney ad litem would get out of the case because there's a potential conflict because of having talked to all these different people and so the purpose of the appointment is not to represent the interest of that client and so in this situation, do you know? Was the purpose of the appointment to find the mother or to represent the mother?

ATTORNEY KIMBERLY DUNCAN: Your Honor, I'm not sure. I'm sorry. I'm not sure. All I know about the appointment and the appearance of the attorney ad litem is what is shown in the record after she was served by publication.

JUSTICE DALE WAINWRIGHT: So there's nothing in the record indicating the attorney ad litem's findings in the search or his search to try to find the mother?

ATTORNEY KIMBERLY DUNCAN: No, nothing beyond the fact that the attorney ad litem recognized that the publication was right and there's nothing beyond that in the record.

JUSTICE NATHAN L. HECHT: Who makes the decision to serve by publication? Is it the Department or?

ATTORNEY KIMBERLY DUNCAN: Yes, the caseworker after service by, in this case, after an attempt at service, personal service at Petitioner's last known address failed--

JUSTICE EVA M. GUZMAN: That was her mother's house?

ATTORNEY KIMBERLY DUNCAN: That was her mother's address, yes, Your Honor. After that attempt failed and the district attorney's office notified the caseworker that that attempt had been unsuccessful, the caseworker then spoke to Petitioner in an effort to get an address directly from her and when she did not give an

address, the caseworker then searched state databases as well as various internet sources to try to obtain an address for personal service before resorting to service by citation by publication as provided for by the Family Code and the Rules of Civil Procedure.

JUSTICE NATHAN L. HECHT: But I'm wondering if the record indicates or if you know was it the caseworker's decision to pursue service by publication?

ATTORNEY KIMBERLY DUNCAN: It does appear that it was the caseworker who then sought citation by publication after--

JUSTICE NATHAN L. HECHT: Not the district attorney or?

ATTORNEY KIMBERLY DUNCAN: The district attorney notified her, the caseworker, that citation, that personal service by the constables had failed at the last known address and at that point, the caseworker who was the one in contact with Petitioner tried to ascertain an address form her and then filed the affidavit of citation by publication.

JUSTICE NATHAN L. HECHT: I guess it wouldn't anticipate that caseworkers would ordinarily know much about service by publication. Looks like that's something that a lawyer would have to tell you.

ATTORNEY KIMBERLY DUNCAN: In this case, I think the affidavit was most appropriately filed by the caseworker since she was the individual with acting on the behalf of the Department, she was the individual who had made the efforts and was the one in position to file the affidavit of citation by publication, which was required by publication.

JUSTICE NATHAN L. HECHT: Is there any question that the Department could have found the lady if they had tried?

ATTORNEY KIMBERLY DUNCAN: I think that the record shoes due diligence in searching for her.

JUSTICE NATHAN L. HECHT: I know, but is there any question that she didn't flee to hide herself. There's no indication of that. She was around. She came to these meetings and if she was suspected of murder, they could have found her in 24 hours couldn't they have?

ATTORNEY KIMBERLY DUNCAN: I'm not sure that that's true. She said that her last address was her mother's address and you look at the record regarding the motion for new trial that the mother actually filed a month after the termination order was signed and in that motion, the mother attached an affidavit, Petitioner's own mother who Petitioner claimed to have been living with and the Petitioner's mother states that she's not on good terms with Petitioner. She does not let Petitioner bring drugs into her house and that the Petitioner didn't do anything that the caseworker said she did. So even Petitioner's own mother was not having luck communicating with her regarding these proceedings.

JUSTICE PHIL JOHNSON: That seems a little strange if the mother says I don't let her bring drugs into the house to say she wasn't having contact with her and to say that the Department couldn't find her when they called her and said what's your address and I think it's a little, we kind of meet ourselves coming and going on that it seems like.

ATTORNEY KIMBERLY DUNCAN: Having a telephone, respectfully, Your Honor, having a telephone number for someone doesn't mean you know where they are.

JUSTICE EVA M. GUZMAN: Well let me ask you this. The dissent points to the meeting in 2007 between the caseworker and Ms. Raibon and questions why she wasn't served at that meeting. Was the petition for termina-

tion already on file and if so, it's difficult to say you couldn't serve her because sometimes people will serve you right in the courtroom. They know you're showing up for something and they serve you right there. Why couldn't they serve her? I mean what's in this record to support that she couldn't have been served there?

ATTORNEY KIMBERLY DUNCAN: As far as actual service, there's no indication that she didn't receive notice or even a copy of the petition for termination at that proceeding.

JUSTICE EVA M. GUZMAN: And I apologize, that was a lot of statements in one question. The petition for termination was on file.

ATTORNEY KIMBERLY DUNCAN: That's correct.

JUSTICE EVA M. GUZMAN: At the time of that meeting.

ATTORNEY KIMBERLY DUNCAN: Yes, Your Honor.

JUSTICE EVA M. GUZMAN: And service could have been requested for delivery for process at that meeting? It could have.

ATTORNEY KIMBERLY DUNCAN: Theoretically, yes, Your Honor.

JUSTICE EVA M. GUZMAN: But it was not.

ATTORNEY KIMBERLY DUNCAN: But it was not.

JUSTICE EVA M. GUZMAN: Okay.

ATTORNEY KIMBERLY DUNCAN: Because the record does also show that Petitioner's appearance for her prescheduled visitation was very sporadic and if the Department would have had someone waiting at each of the meetings to serve her, someone would have been sitting at the Department's office holding a citation for her on any number of occasions prior to this as well, but she just simply didn't show up for.

JUSTICE DEBRA H. LEHRMANN: Let's say even if let's say Child Protective Services was very inappropriate in the way they handled this situation and, in fact, service was not proper, isn't it true that the purpose of this statute is to protect the child with regard to the child's relation to the adopted family regardless of whether CPS did or didn't do what was correct and so given that that's the policy behind the statute to begin with, then can you point to the language of the statute to support your position?

ATTORNEY KIMBERLY DUNCAN: Yes, Your Honor, that's an excellent point. We shouldn't reach the question of whether the service was proper. The language of the statute expressly provides that notwithstanding the rules of civil procedure, the validity of Rule 329 of the Texas Rules of Civil Procedure, the validity of an order terminating the parental rights of a person who's served with citation by publication is not subject to collateral or direct attack after the six month, after the date the order was signed.

JUSTICE EVA M. GUZMAN: Shouldn't we presume the Legislature intended to comply with the constitution and therefore valid service was presumed in that statute. Why wouldn't they intend to comply with the Texas and the US Constitution?

ATTORNEY KIMBERLY DUNCAN: I don't think that this interpretation conflicts with the US Constitution. The legislature can set limits for time to file anything in a case, including a motion for new trial. You do not have a constitutional right to file a motion for new trial.

JUSTICE NATHAN L. HECHT: You've got a constitutional right to notice.

ATTORNEY KIMBERLY DUNCAN: Yes, Your Honor. You do have a constitutional right to notice. She was entitled to due process and the statute sets an appropriate process. She was given six months to challenge that order based on the validity of the order for any reason, whether it was valid for lack of service or for any other ground that she would have wanted to challenge it. The Legislature has set six months and in interpreting the statute, we should presume that the Legislature intended the statute to be effective as well and that we should avoid an interpretation that would render all or part of the statute meaningless and any interpretation other than that given by the Dallas Court of Appeals would render this provision meaningless and does not affect the legislature's intent to provide stability for children.

JUSTICE DALE WAINWRIGHT: If the six-month provision in this statute always governs regardless of service, why would the DA ever serve? Just send a letter saying you've got a hearing and if six months passes, you win without ever serving the person. Why would you ever serve if the service in this statute is irrelevant?

ATTORNEY KIMBERLY DUNCAN: Because, I don't mean to argue that service is irrelevant, the procedures for service should still be followed. Petitioner had the six-month time period to which to challenge the service and Petitioner's-

JUSTICE DALE WAINWRIGHT: Well not to challenge the service.

ATTORNEY KIMBERLY DUNCAN: To challenge the order rendered on the service, yes.

JUSTICE DALE WAINWRIGHT: So why ever serve then if, I mean if six months is sufficient time to satisfy the constitutional concerns that you were asked about, then why ever serve?

ATTORNEY KIMBERLY DUNCAN: Because service is required under the Family Code and under the constitution and the steps are in place by the Legislature and constitutional requirement for personal jurisdiction. These are requirements the Department takes very seriously and tries to comply with and in this case, the record shows that they did try. We did try to serve Petitioner.

JUSTICE DALE WAINWRIGHT: Well then you do acknowledge that under this Statute 161.211, there are requirements in the Family Code and the constitution to serve the person.

ATTORNEY KIMBERLY DUNCAN: And the record in this case shows service.

JUSTICE DALE WAINWRIGHT: So the answer is yes?

ATTORNEY KIMBERLY DUNCAN: Yes, Your Honor. The statute does refer to service by publication and, in this case, the record shows service by publication. The order, in fact, expressly states that it was, the persons entitled to citation were served and-

JUSTICE DON R. WILLETT: When we're looking for a clear evidence of intent to overcome the presumption against for a requirement being jurisdictional, does that clear evidence in your view have to be sort of within the language of the statute itself or can we sort of infer it from a more kind of broad purpose of a statute?

ATTORNEY KIMBERLY DUNCAN: Yes, Your Honor, I would argue. My I answer? My time is about to expire?

CHIEF JUSTICE WALLACE B. JEFFERSON: You may.

ATTORNEY KIMBERLY DUNCAN: I would argue that it can be inferred from this statute even though this

Court has generally declined in recent years to hold statutory time and requirements as jurisdictional, the Court consistently recognizes that some requirements nonetheless remain jurisdictional, such as the requirement of a timely notice of appeal. This is a requirement like that requirement that without the rules of appellate procedure regarding to when a notice of appeal should be filed in this case under Rule 26.1, for accelerated appeals, doesn't expressly say this is jurisdictional, but that's implied by the rules and my argument is that this is much like the rule regarding notice of appeal. This is jurisdictional even without those expressed words being contained in the statute. Unless there are any further questions, I would-

CHIEF JUSTICE WALLACE B. JEFFERSON: It appears there are none. Thank you, Ms. Duncan. The Court will hear rebuttal.

REBUTTAL ARGUMENT OF JEREMY MARTIN ON BEHALF OF PETITIONER

ATTORNEY JEREMY MARTIN: May it please the Court, I wanted to refer the Court to a couple of cases that are cited and discussed in Justice Murphy's dissent. These are the Velasco and In re Marriage of Peace cases, Velasco v. Ayala. These are both cases where you had service by publication and the affidavit in support of service by publication on its face recited that the defendant's whereabouts were unknown, but upon further investigation became clear the plaintiff while perhaps did not have a physical address for the defendant's residence had regular contact with the defendant. Knew where the defendant's relatives lived, that sort of thing. In this particular case, we have a situation where there was very clearly continuing contact between the caseworker and Ms. Raibon over the phone. There's no allegation that she tried to call her cell phone and she didn't answer. They spoke on the phone regularly. It is correct that Ms. Raibon was late to meetings, late to hearings, that sort of thing. What I would submit to the Court is is that at this September either August or September meeting, whichever the date actually was, I believe that it would have been worth the resources of the State to have a processor server at that meeting on the outside chance that she showed up seeing as they were in the process of terminating her parental rights.

CHIEF JUSTICE WALLACE B. JEFFERSON: What does the record show about with respect to the attorney ad litem? Does it show that the attorney ad litem sought to find your client or not?

ATTORNEY JEREMY MARTIN: No, Your Honor, it does not.

CHIEF JUSTICE WALLACE B. JEFFERSON: What does it say? What is the substance of the testimony from the attorney ad litem?

ATTORNEY JEREMY MARTIN: To the best of my memory fragment that I have regarding the attorney ad litem, it was a very sort of pro forma rubberstamp, I don't really have much to say, Your Honor. I know I'm representing Ms. Raibon, but it looks good to me, that sort of thing.

JUSTICE DEBRA H. LEHRMANN: Was the attorney appointed to find her or to represent her?

ATTORNEY JEREMY MARTIN: The record isn't clear on that, Your Honor. It does not reflect that she was that the attorney ad litem was appointed to find Ms. Raibon. If I could go a step further with that though, there really wasn't a problem with finding Ms. Raibon. All they had to do was call her.

JUSTICE DEBRA H. LEHRMANN: That's what it sounds like because they're in contact.

ATTORNEY JEREMY MARTIN: Just call her on the phone.

JUSTICE DEBRA H. LEHRMANN: Right.

ATTORNEY JEREMY MARTIN: There's no evidence in the record that they didn't just call on the phone and

say, hey, we're trying to serve you. Where are you right now? Wait there for 15 minutes. We'll have someone there. Never happened. It's something as simple as that could have alleviated this whole situation.

JUSTICE DAVID M. MEDINA: Can't be too simple. You can't find her.

ATTORNEY JEREMY MARTIN: I respectfully don't have the same resources I think that the State might have to find her.

JUSTICE DALE WAINWRIGHT: Got a phone.

ATTORNEY JEREMY MARTIN: What's that, Your Honor?

JUSTICE DALE WAINWRIGHT: You've got a phone.

ATTORNEY JEREMY MARTIN: I do have a phone. I do have a phone. I don't know that I have her current phone number. I think that if I absolutely had to get in touch with her, I could. Without saying too much more about that, I am in contact with the children's great-grandfather and he's the one who I've been corresponding with regularly.

JUSTICE DALE WAINWRIGHT: Now I understand that temporarily she lost custody, at least temporarily in 2006.

ATTORNEY JEREMY MARTIN: Yes, Your Honor.

JUSTICE DALE WAINWRIGHT: Has she had any contact with the children since then?

ATTORNEY JEREMY MARTIN: I wish I could answer that.

JUSTICE DALE WAINWRIGHT: That you know of.

ATTORNEY JEREMY MARTIN: No, Your Honor.

JUSTICE DALE WAINWRIGHT: And we're going on six years.

JUSTICE DALE WAINWRIGHT: If I could go a step further. The children were originally placed with a relative. During the time that the children were placed with a relative, I do believe that my client had contact with them, but I don't know how long the children were with the relative and I don't know the duration and whether they've been placed elsewhere at this point.

JUSTICE NATHAN L. HECHT: Blain was decided 60 years ago. Do you think it's still a good law?

ATTORNEY JEREMY MARTIN: Yes, Your Honor.

JUSTICE NATHAN L. HECHT: People used to read newspapers more in 1950.

ATTORNEY JEREMY MARTIN: They did.

JUSTICE NATHAN L. HECHT: And the point of [inaudible] is to try to act, to do something to get notice to the person. You wonder whether there's much chance service by publication is ever going to reach anybody.

ATTORNEY JEREMY MARTIN: The case law is full of references to this being the service least likely to actually apprise someone, to actually let someone know a lawsuit's been filed as particularly now in our day and

age. Well, that's it and then I will cede my time to the Court. Thank you very much.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Martin. The cause is submitted and the Court will take a brief recess.

MARSHAL: All rise.

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