***[Please note: This is a memorandum by a law student intern. It is intended to jump-start your own research. We have not Shepardized the cases or determined that the student’s analysis of the cases or other sources is correct.]***

Memorandum

To: CAFL Appellate Panel Support Unit

From: [Law Student Intern]

Re: Due Process; Adequacy of Efforts to Identify, Locate & Serve Parents Prior to Publication Notice

Date: January 2017

1. **FACTS**

 This memorandum covers three cases in which father clients did not receive in-hand notice of Massachusetts termination of parental rights proceedings, did not see the published notice in the local paper, and did not learn of the proceedings until after their parental rights had been terminated.

The first client (“F1”) is the biological father of Child 1 (“C1”).  C1 and her mother (“M1”) lived together in Boston.  F1 was not involved in C1’s life and didn’t even know of C1’s existence until after a trial at which M1’s parental rights, and the rights of all “known and unknown fathers,” were terminated.  At the start of the case, DCF asked M1 for F1’s identity and location.  M1 and F1 had a history of domestic violence, and (it later came out) M1 told DCF that she didn’t know who C1’s father was because she was afraid that DCF would lead him back to her.  DCF published notice to F1 in the Boston Globe, but he did not read the notice (and was not alerted to it) until two weeks after the trial.  During the case, M1 knew that F1 was living at his sister’s house in Cambridge where he has lived on and off for years.  After the termination trial, F1 appeared at court, and the clerk referred him to us.  We wish to file a motion for new trial based on DCF’s failure to properly serve him with notice, and we need to know if such a motion would have any likelihood of success.

The second client (“F2”) is the biological father of Child 2 (“C2”).  He knew about C2 but had minimal contact with the child during a five-year period.  In that case, the mother (“M2”) told DCF F2’s name and told DCF that he lived in or around Brockton, Massachusetts.  DCF attempted to locate F2 in order to serve him by constable or sheriff by looking him up in the phone book, asking M2 about his whereabouts, asking C2, and asking M2’s relatives for any information on F2 and his whereabouts.  DCF was unsuccessful at locating or personally serving F2, so they sought and received the court’s permission to give notice via publication in the Brockton Enterprise.  F2 did not read the notice, and no one alerted him to it.  Shortly after the trial at which his rights were terminated, F2 appeared at court and asked for counsel.  The clerk referred him to us.  As with F1, we wish to file a motion for new trial based on DCF’s failure to properly serve him with notice, and need to know if such a motion would have any likelihood of success.

The third client (“F3”) is the biological father of Child 3 (“C3”). F3 was aware of C3 but has had minimal contact with the child since his birth. The mother (“M3”) knew the identity and location of F3 and communicated it to DCF. The constable responsible for serving F3 arrived at F3’s house, knocked on the door, and waited for F3 to answer the door. The constable saw F3 through the window and continued to knock on the front door. F3 did not answer the front door. The constable walked around the side of the house, and noticed that the back patio door was open. The constable announced himself loudly to F3 (who was not visible) that he was there to personally serve him. Then, the constable placed the notice inside the back patio door and left. F3 did not appear at trial, at which his rights were terminated. He wants to bring up his lack of notice on appeal and wants a new trial. We need to know if the constable took the necessary steps to effect valid personal service on F3.

1. **QUESTIONS PRESENTED**
	1. What efforts must be made to determine the identity of a non-custodial parent in order to serve him with notice and what efforts should be made if the custodial parent refuses to disclose (or does not know) the identity of the non-custodial parent?
	2. Once the non-custodial parent is identified, what efforts must be made to determine his address in order to personally serve him?
	3. Once the identity and location are determined, what efforts must be made by the sheriff or constable to personally serve that parent by hand before resorting to notice via publication?
2. **BRIEF ANSWERS**
3. DCF must conduct a “diligent effort” to identify the name of a noncustodial parent in order to serve him or her with notice.
4. Similarly, DCF must conduct a “diligent effort” to identify the address and locate the non-custodial parent in order to serve him or her by sheriff or constable. Massachusetts does not clearly define “diligent effort,” but case law from Massachusetts and other states strongly suggests that it consists of at least ordinary and simple inquiries and must be more than “perfunctory.”
5. When personally serving a parent, the constable must make sure that the parent actually knows he or she is being served with process. The parent must give consent for an attorney to accept service.
6. **DISCUSSION**
7. **Introduction**

Parents have a fundamental liberty interest in maintaining a relationship with their children. *Care and Protection of Erin*, 443 Mass. 567, 570 (2005). State action interfering with that liberty interest must comport with due process. *Adoption of Zev*, 73 Mass. App. Ct. 905, 905 (2009). Notice is a fundamental requirement of due process when parental rights are involved. *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965). “When notice is a person’s due, process that is a mere gesture is not due process. The means that are employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. Within the limits of practicality, notice must be such as is reasonably calculated to reach interested parties.” *Adoption of Hugh,* 35 Mass. App. Ct. 346, 350 (1983) (citing *Mullane v. Central Hanover Bank & Trust Co,* 339 U.S. 306, 314 (1950)). Failure to give notice of a pending proceeding to terminate parental rights violates “the most rudimentary demands of due process of law.” *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965).

As set forth below, publication notice is permissible under certain circumstances. But the Supreme Court has acknowledged that it is a poor form of notice. “One thing is clear: service by publication should be a last resort, not an expedient replacement for personal service. Because “[n]otice by publication is a poor and sometimes a hopeless substitute for actual service of notice[,] . . .[i]ts justification is difficult at best.” *City of New York v. N.Y., New Haven & Hartford R.R. Co.*, 344 U.S. 293, 296 (1953); *see* *also* [Walk*er v. City of Hutchinson*, 352 U.S. 112, 117 (1956)](https://advance.lexis.com/search/?pdmfid=1000516&crid=0c1cc760-80e1-4e76-9319-43b8d48712c7&pdstartin=hlct%3A1%3A1&pdtypeofsearch=searchboxclick&pdsearchterms=2012+Tex+Lexis+582&pdsearchtype=SearchBox&pdqttype=and&pdpsf=jur%3A1%3A68&ecomp=4Jyfk&earg=pdpsf&prid=15e95a9a-cd8b-49f9-94f9-9173482cdbd3) (“In too any instances notice by publication is no notice at all.”).

Notice to parents in care and protection proceedings is required by G.L. c. 119, § 24 and by Juvenile Court Rule 3. That notice should be by personal service upon the parent, but if the parent cannot be found after diligent efforts, then notice may be served by publication once in each of three successive weeks in any newspaper that the court may order. G.L. c. 119, §24; *Adoption of Holly,* 432 Mass. 680, 685-87 (2000) (finding publication of notice proper since DCF made diligent efforts to locate the father who, at the time, did not want to be found due to an outstanding warrant). Section 24 does not specify the efforts DCF must make to identify and locate a parent to serve him or her with notice, or the efforts a constable should make in order to serve a parent in hand.

The Rules of Civil Procedure, specifically Rule 4 which governs service of process, are not applicable to proceedings in the Juvenile Court, but they are “accepted as a cogent standard.” *Care & Protection of Zelda*, 26 Mass. App. Ct. 869, 871 (1989). Mass. R. Civ. P 4(d)(1) states that service shall be made

“upon an individual by delivering a copy of the summons and of the complaint to him personally; or by leaving copies thereof at his last and usual place of abode; or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by statute to receive service of process, provided that any further notice required by such statute be given. If the personal authorized to serve process makes return that after diligent search he can find neither the defendant, nor the defendant’s last and usual abode, nor any agent upon whom service may be made in compliance with this defendant, the court may on application of the plaintiff issue an order of notice in the manner and form prescribed by law.”

Neither G.L. 119, §24, Judicial Court Rule 3, nor Mass. R. Civ. P 4(d)(1) contains a definition of “diligent.”

But case law in Massachusetts and other states suggests that a diligent effort or inquiry must be made to identify, locate, and serve the parent in hand before publication.

1. **DCF must conduct a “diligent effort or inquiry” to identify a parent in order to serve him or her with notice.**

Section 24 of G.L. c. 119 does not what efforts DCF must make to identify a parent in order to serve him or her with notice. Massachusetts child welfare decisions do not address this issue either. Mass. Juv. Ct. Rule 3(e) provides that, “if the identity of a parent is not known, service shall be accomplished on that parent by publication in accordance with subsection (g) which addresses service by publication in care and protection cases.”

One case in Tennessee addresses what must be done if a non-custodial parent’s name is not known. In *Adoption Place, Inc. v. John Doe*, 273 S.W.3d 142 (Tenn. 2007), the unknown father challenged the service by publication because the notice published in the newspaper did not contain the birth mother’s name and it was published in a county without any evidence presented to the Court that the county was the place of conception. *Id.* at 145. However, the Court decided that the real issue was whether there could have been better service and whether diligent inquiry was attempted to determine the unknown father’s name and residence. *Id.* at 147-148. The Adoption Place was aware that, although the birth mother did not know the identity of the child, she knew that the conception occurred while she was at a party in Jackson, Tennessee. *Id.* The court held that the Adoption Place did not carry its burden of demonstrating a “diligent inquiry” since one could assume that a diligent inquiry would consist of inquiring as to “the location of the party, the name of the host of the party, the names of attendees of the party, and the type of vehicle in which the child was conceived.” *Id.* at 145.

Where one parent lies about not knowing the name of the other parent, and the court (or the agency) publishes insufficient notice as a result, that fraud may violate the unnamed parent’s due process rights. In *In re C.L.S.*, 252 P.3d 556, 559 (Colo. Ct. App. 2011) (“[B]ecause mother knew father’s identity, her fraudulent failure to disclose this information to the court resulted in the termination of his parental rights without due process, and therefore the judgment terminating his rights by default is void.”); see also *M.C. v. Adoption Choices of Colo., Inc.*, 2014 COA 161, 2014 Colo. App. LEXIS 1952 (Colo. App. Ct. 2014) (where birth mother who signed relinquishment listed father’s first name but falsely claimed not to know his last name or address, father’s due process rights were violated and termination and adoption decrees were vacated as void).

As applied to F1, Adoption Place suggests that DCF did not make “diligent efforts” to determine F1’s name, since they could have asked other people besides M1 for his identity and location, such as M1’s neighbors at the time or her friends.

1. **DCF must conduct a “diligent effort or inquiry” to identify the location of the parent in order to serve him or her with notice by making at least ordinary and simple inquiries and efforts that are more than perfunctory.**

Section 24 of G.L. c. 119 states: “Notice shall be by personal service upon the parent. If the identity or whereabouts of a parent is unknown, the petitioner shall cause notice in a form prescribed by the court to be served upon such parent by publication once in each of 3 successive weeks in any newspaper as the court may order.” Mass. Juv. Ct. Rule 3(d) states:

If the place of residence or whereabouts of a parent cannot be found after diligent efforts, on a written motion of the petitioner setting forth the diligent efforts made to ascertain said place of residence or whereabouts, the court may order that service shall be accomplished on that parent, either within or without the Commonwealth, by: (i) certified or registered mail, return receipt requested, to the last known place of residence of the parent, the mailing to be at least twenty-one days before the date of the pretrial conference, unless the court otherwise orders, and (ii) publication in accordance with subsection (g).

 In particular circumstances, there is a duty to go further and consult public records or make other ordinary, simple inquiries. In *Adoption of Hugh,* 35 Mass. App. Ct. 346, 350 (1993), the court held that publication notice was insufficient where where a more diligent effort of locating the father would have revealed that he was living at his mother’s residence in a town that he had been a resident of all most of his life. His former wife knew of his address at all times; a 51A report contained a notation of his actual residence; and the Department of Public Welfare had been able to locate him previously. Accordingly, resort to publication was premature. In addition, the court held that publication was inadequate since the father could not read. In *Hugh*, the court quoted *Boston v. James*, 26 Mass. App. Ct. 625, 628-629 (1988) (a tax foreclosure case): “there was surely a duty to pursue any suggestive source or piece of information disclosed in the papers the city had immediately in hand. The cases, indeed, suggest a duty according to particular circumstances to go further and consult public records or make other ordinary, simple inquiries.” That the same duty applied to *Hugh*.

In *Adoption of Holly*, the court held that a father was not deprived of his constitutional right to notice of the termination proceedings where the department in fact made “diligent efforts” to locate him and additional efforts would have been futile. 432 Mass. 680, 685-686 (2000). The department had made numerous attempts to locate the father by repeatedly asking the mother about his whereabouts or information that might lead to locating him, to which she stated she did not know the father’s address or even what State he was currently residing in. The department also made inquiries about the father’s whereabouts to the court-appointed investigator, the father’s mother, the children’s foster families, and the children’s day care provider, but none of the sources could provide any information other than his mother. However, other efforts by the department, had they been made, would have been futile because the father was trying to hide during that time period due to an outstanding warrant. *Id.* at 686-687.

A “diligent inquiry” to locate a party should be one as full as circumstances permit and be more than perfunctory. *Bell Federal Savings & Loan Ass’n v. Horton,* 59 Ill. App. 3d 923, 927 (1978*)*. A “perfunctory inquiry” is insufficient; “[a]n honest and well directed effort must be made to ascertain the names and addresses of unknown parties.” *Graham v. O’Connor*, 350 Ill. 36, 41 (1932) (efforts insufficient where the deed holder failed to consult public records for necessary parties before commencing notice by publication). To count as a diligent inquiry, “something more than want of knowledge and lack of information concerning a person’s whereabouts should be shown.” *Bell,* 59 Ill. App. 3d at 927.

The Texas Supreme Court explained what a “diligent inquiry” means in the context of termination cases. In *In re E.R.*, 385 S.W.3d 552 (2012), the court held that “[a] diligent search must include inquiries that someone who really wants to find the defendant would make and diligence is measured not by the quantity of the search but by its quality.” *Id*. at 565. In *E.R.*, the agency social worker “neglected ‘obvious inquiries’ a prudent investigator would have made” in her efforts to locate the mother. *Id*. She did not contact the mother’s own mother, she did not attempt service by mail in order to obtain a forwarding address, she did not leave service with the mother’s mother. “Sending a few faxes, checking websites, and making three phone calls – none of which were to [the mother] or her family members – is not the type of diligent inquiry required before the Department may dispense with actual service in a case like this.” *Id*. at 565-66; *see* *also* *In re Dar C.*, 957 N.E.2d 898, 912 (Ill. 2011) (“relying on a computerized database search of a parent’s name while ignoring, or otherwise not investigating, other potentially useful information does not constitute a diligent inquiry” under Illinois law).

When trying to locate a parent, DCF should at least make inquiry among the parent’s former neighbors or of the other parent, if available, to determine the parents’ whereabouts. *See e.g.*, *In re T.B.,* 65 Ill. App. 3d 903, 904 (1978). In *T.B.*, the clerk of the court attempted to serve the mother with a summons by sending it to her former Peru, IL address by certified mail. Two days later the summons was returned and marked “Moved, Left no Address,” and notice by publication was issued without ever sending a copy of the notice to the mother’s last known address at the time. The court ruled that DCF did not exercise due diligence in trying to find the address of the parent. Instead, DCF should have pursued any leads, such as the former neighbors or the father of the child if available. *Id*.; *see* *also* *In re S.P.*, 672 N.W.2d 842, 848 (Iowa 2003) (vacating termination decree; while an investigator from the county attorney's office checked with various governmental agencies, private databases, and city directories, and visited addresses where he thought the father might live, he failed to include "the obvious inquiries a reasonable person would make under the circumstances,” such as talking to the children, their caretaker, or their mother, or mailing notices to last known addresses in order to find a forwarding address.).

Similarly, in *In re Leslie P.*, 604 N.W.2d 853 (Neb. Ct. App. 2000), the court vacated a step-parent adoption decree when the petitioner-mother failed to make diligent efforts to locate the birth father. The petitioner knew that the father’s relatives knew where he lived, but she did not contact them to ask for the information (although she had spoken to them). According to the court, “a search which makes no effort to determine where the subject of the search was last known to be and which makes no effort to check whether the subject is still there cannot be considered reasonably diligent.” *Id*. at 959 (citing [*In re Interest of A.W.*, 224 Neb. 764, 768, 401 N.W.2d 477, 480](https://advance.lexis.com/search/practicepagesearch/?pdmfid=1000516&crid=15e95a9a-cd8b-49f9-94f9-9173482cdbd3&pdstartin=hlct%3A1%3A1&pdtypeofsearch=searchboxclick&pdsearchterms=604+nw2d+853&pdsearchtype=SearchBox&pdqttype=and&pdpsf=jur%3A1%3A50&ecomp=ht5hk&earg=pdpsf&prid=e4703ff2-dd36-41fc-85ed-f5b83585997e) (1987)). Assuming that the petitioner did not know where the father was, “there were so many leads she did not follow that we do not hesitate to hold as a matter of law that [petitioner’s] affidavit was inadequate and violated [the father’s] fundamental due process rights.” Id.

Some states, such as Utah, require the social services agency to search through databases and other agency files. *In re A.H.* (*T.H. v. State),* 86 P.3d 745, 749 n.4 (Ut. 2004). In *A.H.*, the court reversed a termination decree because DCFS failed to provide notice to the father. According to the court, DCFS should have searched for the non-custodial father through the national parent locator database. In addition, the agency in charge of child support had sent a notice to the father’s mother in Nevada, but DCFS failed to contact the agency. *Id*. at 750. DCFS also failed to ask the mother, the mother’s family, or the foster parents – all of whom knew the father’s whereabouts – where he was. *Id*.; *see also In re Adoption of L.D.*, 938 N.E. 2d 666, 669-71 (Ind. 2010) (reversing decree because grandparent’s seeking to adopt child “made only the most obtuse and ambiguous attempt” to determine mother’s whereabouts before resorting to notice by publication); *In re DeJohn B.*, 84 Cal. App. 4th 100, 108-09 (2000) (termination decree vacated; “The juvenile court’s remarks about mother’s lack of diligence in searching for her children . . . are more aptly applied to [the agency’s] lack of diligence in searching for mother. To wit, [the agency] apparently ‘never did the obvious’: It never asked father about relatives or friends who might know how to contact mother. Nor did [the agency] explain why the grandmother, who did have the necessary information, could not have been identified earlier.”).

Based on the cases, DCF likely made “diligent efforts” to locate F2. DCF looked F2 up in the phone book and asked M2, M2’s relatives, and C2 about his whereabouts. These efforts were sufficient under the cases set forth above.

1. **When serving a parent with notice, a constable must make the parent aware that he or she is in fact being served with process.**

Section 24 of G.L. c. 119 requires that personal service be made on a parent, Juv. Ct. Rule 3 governs the method of personal service within the Commonwealth in care and protection cases. Juv. Ct. Rule 3(A)(1) states, “Following the commencement of the case, the petitioner shall cause a summons or order of notice and a copy of the petition to be served by a court officer, constable, deputy sheriff, sheriff, police officer, or other person approved by the court on each of the parents of the subject child.” However, Rule 3(A)(1) does not specify the efforts a constable or sheriff must make when personally serving a parent.

A defendant must be made aware that he or she is, in fact, being served with process. *Coyne v. Besser*, 154 A.D.2d 503, 504 (N.Y. 1989) (service not valid when process left on chair in reception area of doctor’s office after process server called out doctor’s name as he walked through waiting room to his inner office, but did not inform doctor, or otherwise put him on notice, that he had process to serve). However, a summons can be left on the floor of an entryway to a defendant’s residence if the parent is made aware of the service. *Flex Credit v. Winkowitsch*, 428 N.W. 2d 236, 239 (N.D. 1988) (service valid where a deputy sheriff left two copies of the summons inside the residence since the door was open, told the defendants that the papers were being left and defendants observed him doing so from inside the house, even though they refused to come to the door). This is typically the case when a defendant refuses service. *Novak v. World Bank*, 703 F.2d 1305, 1310 (D.C. 1983), notes that, “when a person refuses to accept service, service may be effected by leaving the papers at a location, such as on a table or on the floor near that person.” For instance, in *Errion v. Connell,* 236 F.2d 447, 457 (Wash. 1956), service was found to have been proper when the process server threw the papers through a hole in the screen door to the defendant’s apartment, saw the defendant, spoke to her, and told her brother that he was making service on her when she ducked behind a door. Additionally, in *Nielsen v. Braland,* 264 Minn. 481, 482-484 (1963), service was proper when the process server touched the defendant with the summons and then laid the summons in a place easily accessible to defendant, even though defendant refused to pick up the process or accept service.

1. **An attorney cannot accept service for the client without that client’s permission.**

Sometimes someone other than the defendant can be personally served as a substitute for the defendant, such as the defendant’s attorney. An attorney is not authorized to accept service of process solely by virtue of the attorney’s status as counsel. Additionally, a plaintiff cannot serve initial process on an attorney for a party unless the attorney agrees to accept service after being authorized to do so by the client. *City, Hayes, Meagher & Dissette P.C. v. Rotcajg*, 97-5277-E, 1998 Mass. Super. LEXIS 340, at \*1-10 (Feb. 23, 1998) (service improper where a constable tried to serve a defendant in hand, mistakenly gave the summons to an attorney affiliated with the City instead of the defendant, and at no time told the defendant who was standing next to the attorney that he was attempting to serve process upon him).

As applied to F3, the process served on him was probably valid because the constable loudly announced himself and his purpose for being there to the parent. Unless the parent did not hear the constable announce himself and that he was there to serve him, the service should be valid.

1. **CONCLUSION**

F1 would most likely succeed in his motion for a new trial because DCF likely did not make diligent efforts to identify F1. DCF stopped searching for the identity of F1 after M1 refused to disclose it. DCF failed to ask anyone else who may know the identity of F1, such as other family members of M1 or past neighbors of M1.

F2 would most likely not succeed in his motion for a new trial. DCF took measures to locate F2 that were more than perfunctory and went beyond ordinary and simple inquiries. A court will probably view DCF’s attempts to locate F2 as a sufficiently diligent inquiry.

F3 would most likely not succeed in his appeal. The constable made it clear to F3 that he was there to personally serve F3 with process when he left it inside the door. Service is not merely improper because a defendant refuses to accept it, so long as he knows he is being served.