REL: March 20, 2020

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

2180604, 2180605, and 2180606

C.S.

v.

J.B. a/k/a H.J.B., Jr.

Appeals from Jefferson Probate Court
(17BHM02265, 17BHM02266, and 17BHM02268)

EDWARDS, Judge.

In September 2017, J.B. a/k/a H.J.B., Jr. ("the stepfather"), filed petitions in the Jefferson Probate Court ("the probate court") seeking to adopt his stepchildren, A.J.L.S., O.M.S., and A.E.S.; the actions were assigned case

numbers 17BHM02265, 17BHM02266, and 17BHM02268, respectively.[1] The petitions name C.S. ("the father") as the father of each of the children and contain his address, which is located in Aumsville, Oregon. The records in these cases also contain the notarized consent of S.E.B. ("the mother") to each adoption, see Ala. Code 1975, § 26-10A-7(a)(2) (requiring the consent of the mother of the adoptee), and the notarized consents of A.J.L.S. and O.M.S., who were each at least 14 years of age, to their respective adoptions, see Ala. Code 1975, § 26-10A-7(a)(1) (requiring the consent of an adoptee aged 14 years or older to his or her adoption).

On a date not clear from the records, because none of the filings bear a date stamp, the stepfather filed in each action an identical document entitled "Affidavit of Petitioner

[1]The "docket entry list" contained in each record on appeal indicates that the petition for adoption commencing each action was filed on September 20, 2017. However, the date of the notary jurat on each petition and accompanying filings was September 26, 2017, six days later. We further note that none of the "docket entry lists" reflect any filings by the stepfather after the filing of the adoption petition, nor do they reflect the entry of the interlocutory orders of adoption or the entry of orders authorizing service by publication.

Perfecting Service" ("the service affidavits"). The service affidavits read, in their entirety, as follows:

> "Comes now [the stepfather] and represents unto the court that the whereabouts of the birth father of the adoptee are unknown and that I have exhausted all known means to locate the birth father.
>
> "Further, if an address of the birth father is known to me, I have attempted service, or my attorney has attempted service, by certified mail and regular mail on the father."

The service affidavits bear a jurat, which indicates that the service affidavits were signed on September 26, 2017, the same date that the adoption petitions were signed. Not one of the three records contains an order permitting service upon the father by publication, but each record contains an affidavit from the publisher of the newspaper The Oregonian, indicating that notice of the adoption proceedings was published in that newspaper for four consecutive weeks in the month of December 2017 (i.e., December 4, December 9, December 16, and December 23, 2017) ("the publication affidavits"). The publication affidavits were made by the clerk of the publisher of The Oregonian, were made in the County of Multonomah, Oregon, and describe The Oregonian as "a public newspaper published in the city of Portland, with general circulation in Oregon."

2180604, 2180605, and 2180606

On February 27, 2018, the probate court entered a final adoption judgment in each action. The adoption judgments were each amended on May 17, 2018, to properly reflect the legal name of the stepfather. No appeal was taken from the adoption judgments.

On July 18, 2018, the father filed in each action an almost identical motion under Rule 60(b), Ala. R. Civ. P., seeking relief from each of the adoption judgments. In those motions, which are each supported by an identical affidavit of the father made in Marion County, Oregon, the father asserts that he received no notice of the adoption actions and that, at all times, the mother knew his address in Oregon. The father later amended his Rule 60(b) motions to make more specific allegations relating to the impropriety of the service by publication and to submit copies of additional affidavits from Jessica Richter and from Billy Ricks.

After the hearing on the father's Rule 60(b) motions, which was not transcribed or recorded, the probate court entered an order in each action denying the father's Rule 60(b) motion. In those orders, the probate court indicated that the father had admitted that he lived at the address at

which two separate attempts at service by certified mail had been made by the stepfather. The probate court referred in those orders to "2 certified mailings in the file," indicating, perhaps, that the certified-mail envelopes were submitted to the probate court at some time before the hearing on the father's Rule 60(b) motions. The probate-court records were supplemented to include copies of the returned certified-mail envelopes, which indicated that the post office had attempted delivery of the certified mail on September 30, 2017, October 5, 2017, and October 14, 2017, and again on October 30, 2017, November 3, 2017, and November 13, 2017; however, the envelopes do not bear indicia indicating whether they were made a part of the probate court's record at some time before the entry of the adoption judgments or at the time of the hearing on the father's Rule 60(b) motions. In its orders denying the father's Rule 60(b) motions, the probate court concluded that the stepfather had made two unsuccessful attempts to serve the father by certified mail and that service by publication was proper under Ala. Code 1975, § 26-10A-17(c)(3), which states that "[i]f ... service [by certified mail] cannot be completed after two attempts, the

court shall issue an order providing for service by publication, by posting, or by any other substituted service." The probate court further determined that service by publication was properly made by placement of the notice in The Oregonian, "a public newspaper in the state of Oregon."

The father appeals the order denying his Rule 60(b) motion in each adoption action. He contends that service by publication was improper for several reasons. He challenges the service affidavits filed in support of service by publication, which were, as noted above, notarized on September 26, 2017, as being false, because, the father contends, as of that date, the stepfather had not yet attempted to serve the father via certified mail. He also points out that the service affidavits failed to assert that the stepfather had made two attempts to serve the father by certified mail, which, as stated in § 26-10A-17(c)(3), is required before service by publication can be ordered by the court. The father makes additional arguments attacking the service by publication, including arguments relating to the stepfather's diligence in locating the father and to the lack of proof that the father was avoiding service of process, as

is required under Rule 4.3(d)(1), Ala. R. Civ. P. The father further contends that the publication of notice in The Oregonian does not satisfy Rule 4.3(d)(2) because the record does not reflect that that newspaper is "a newspaper of general circulation in the county of [the father's] last known location or residence within the United States." Based on those several arguments, the father urges this court to conclude that the attempt to serve him by publication was improper, that he was therefore not properly served, and that the adoption judgments are, as a result, void. See Image Auto, Inc. v. Mike Kelley Enters., Inc., 823 So. 2d 655, 657 (Ala. 2001) ("It is settled law that failure to effect proper service under Rule 4, Ala. R. Civ. P., deprives the court of jurisdiction and renders a default judgment void.").

We begin by observing that the father's motions, because they challenge service of process and seek a determination that the adoption judgments are void for lack of proper service of process, are motions filed pursuant to Rule 60(b)(4).

> "'A trial court's ruling on a Rule 60(b)(4) motion is subject to de novo review. Bank of America Corp. v. Edwards,

881 So. 2d 403 (Ala. 2003). In Bank of America, supra, our supreme court stated:

> "'"'"The standard of review on appeal from the denial of relief under Rule 60(b)(4) is not whether there has been an abuse of discretion. When the grant or denial of relief turns on the validity of the judgment, as under Rule 60(b)(4), discretion has no place. If the judgment is valid, it must stand; if it is void, it must be set aside. A judgment is void only if the court rendering it lacked jurisdiction of the subject matter or of the parties, or if it acted in a manner inconsistent with due process. Satterfield v. Winston Industries, Inc., 553 So. 2d 61 (Ala. 1989)."'"

"'881 So. 2d at 405, quoting Image Auto, Inc. v. Mike Kelley Enters., Inc., 823 So. 2d 655, 657 (Ala. 2001), quoting in turn Insurance Mgmt. & Admin., Inc. v. Palomar Ins. Corp., 590 So. 2d 209, 212 (Ala. 1991). See also Northbrook Indem. Co. v. Westgate, Ltd., 769 So. 2d 890, 893 (Ala. 2000).

> "'The failure to effect proper service under Rule 4, Ala. R. Civ. P., deprives the trial court of personal jurisdiction over the defendant and renders a default judgment void. Cameron v. Tillis, 952 So. 2d 352 (Ala. 2006); Image Auto, Inc. v. Mike Kelley Enters., Inc., supra. In Bank of America, supra, our supreme court also stated:
>
> > "'"'One of the requisites of personal jurisdiction over a defendant is "perfected service of process giving notice to the defendant of the suit being brought." Ex parte Volkswagenwerk Aktiengesellschaft, 443 So. 2d 880, 884 (Ala. 1983). "When the service of process on the defendant is contested as being improper or invalid, the burden of proof is on the plaintiff to prove that service of process was performed correctly and legally." Id. A judgment rendered against a defendant in the absence of personal jurisdiction over that defendant is void. Satterfield v. Winston Industries, Inc., 553 So. 2d 61 (Ala. 1989).'"
>
> "'881 So. 2d at 405, quoting Horizons 2000, Inc. v. Smith, 620 So. 2d 606, 607 (Ala. 1993).'"

Volcano Enters., Inc. v. Rush, 155 So. 3d 213, 217–18 (Ala. 2014) (quoting Nichols v. Pate, 992 So. 2d 734, 736 (Ala. Civ. App. 2008)).

As noted previously, the Rule 60(b) hearing was not recorded or transcribed. Thus, the record of what transpired at that hearing is confined to the statement of the evidence approved by the probate court as permitted by Rule 10(d), Ala. R. App. P. The statement of the evidence indicates that only two persons testified at the Rule 60(b) hearing -- the father and Richter, who is the father's girlfriend. The statement of the evidence does not indicate whether the witnesses were called by the father or the stepfather.

The father testified that he had not received notice of the adoption actions brought by the stepfather. He stated that the mother knew his address, that she had had him served at that address previously in actions relating to child custody and child support, and that the mother had his telephone number and had sent him a text message on November 17, 2017, when he attended one of the children's sporting events in Alabama. He further testified that he had been working in another state on a majority of the dates that delivery of the certified mail had been attempted. In addition, the father testified that his house sitter, Ricks, and Richter had checked on his mail during the time he was

away from his home and that neither had received notice of a certified letter.[2] He denied that he had been advised of or had received any notice of any attempt to deliver a certified letter. The father also complained that the mother had had several other methods by which to contact him to apprise him of the pendency of the adoption proceedings, including direct communication to him, communication through the children, communication through several of his relatives, with whom the mother had periodic contact, or through his previous attorneys in both Alabama and Oregon. Finally, the father testified that the town in Oregon in which he lived, Aumsville, is "very small" and that The Oregonian is not in circulation in the area in which he lives; he indicated that the more appropriate newspaper for the publication of the notice would have been The Stayton Mail, which the father said could be found in several locations in Aumsville.

Richter testified that she is the father's girlfriend and that, at the time of the hearing, she had known him for nine years. She said that she was a resident of Marion County,

[2]In support of his amended Rule 60(b) motions, the father had presented affidavits from Ricks and Richter, which contained statements to a similar effect.

Oregon. According to Richter, she would check on the father's pets and mail when he was out of town and had done so during September and October 2017, when the father was working in Florida, despite the fact that the father had Ricks house sit for him during his absence. She said that Ricks would leave the mail on the kitchen table and that she would review the father's mail with him by telephone. She testified specifically that she had visited the father's house on September 30, 2017, and on October 2 or 3 and 9, 2017. She said that she had never seen a certified-mail notice in any of the mail she had seen at the father's residence during his absences.

Richter also stated that she had entered the father's house through the front door on multiple occasions during the father's absences and that she had never seen a certified-mail notice affixed to the door. She recalled having arrived at the father's house on October 14, 2017, a date upon which attempted delivery of the certified mail was to have taken place, after retrieving him from the airport that afternoon. Richter said that she knew that no certified-mail notice had been affixed to the front door on that date because she had

taken a video of the father's dog greeting the father at the front door upon his arrival home, which, she said, did not reveal a notice on the door.

According to Richter, the father first left Oregon on September 26, 2017, and he returned to Oregon on October 14, 2017. She said that he left Oregon for a second time on October 20, 2017, and that he returned home on or about October 30, 2017. Richter testified that the father had been in Oregon for most of the month of November except for those days he traveled to Alabama to watch one of the children's sporting events, which days were November 9, 2017, through November 11, 2017, and November 16 or 17, 2017, through November 18, 2017.

Like the father, Richter testified that The Oregonian was not widely read in the Aumsville area. She also said that The Oregonian is not sold in Aumsville. According to Richter, The Oregonian is "mostly sold and read" in the Portland area. She opined that either The Stayton Mail or The Statesman Journal would have been the best newspaper in which to publish the notice.

We find the father's argument regarding the publication of notice in The Oregonian dispositive of these appeals.[3] The father correctly argues that Rule 4.3(d)(2) requires that service by publication be made in a newspaper of general circulation in the county of the father's last known residence. Rule 4.3(d)(2) reads, in its entirety:

> "Upon the filing of the affidavit [alleging a basis for service by publication] the clerk shall direct that service of notice be made by publication in a newspaper of general circulation in the county in which the complaint is filed; and, when publication is authorized under subdivision 4.3(c), also in the county of the defendant's last known location or residence within the United States. If no newspaper of general circulation is published in the county, then publication shall be in a newspaper of general circulation published in an adjoining county."

In order to address the father's argument more fully, we first consider the principles applicable to the construction of the rules promulgated by our supreme court. We begin by

[3]The father challenges the service affidavits in support of service by publication on multiple grounds. However, because we find the father's argument relating to whether The Oregonian was the proper newspaper in which to publish notice dispositive, we decline to address his other arguments. See, e.g., Miller v. Chapman, 674 So. 2d 71, 75 (Ala. 1995) (declining to consider certain issues because of the dispositive nature of one issue on appeal); Kemp Motor Sales, Inc. v. Lawrenz, 505 So. 2d 377, 378 (Ala. 1987) (same); Casey v. Casey, 142 So. 3d 1174, 1179 n.3 (Ala. Civ. App. 2013) (same).

recognizing that, "'[i]n construing ... rules [of court], this court will attempt to ascertain and to effectuate the intent of the Alabama Supreme Court as set out in the rule.'" Nieto v. State, 842 So. 2d 748, 749 (Ala. Crim. App. 2002) (quoting Dutell v. State, 596 So. 2d 624, 625 (Ala. Crim. App. 1991)). When construing rules of court, our appellate courts "appl[y] the rules of construction applicable to statutes." Ex parte State ex rel. Daw, 786 So. 2d 1134, 1137 (Ala. 2000). "We start with the basic premise that words used in court rules must be given their plain meaning." Nieto v. State, 842 So. 2d at 749. However, "'"[i]n the absence of a manifested legislative intent to the contrary, or other overriding evidence of a different meaning, legal terms in a statute are presumed to have been used in their legal sense."'" Rochester-Mobile, LLC v. C & S Wholesale Grocers, Inc., 239 So. 3d 1139, 1144 (Ala. 2017) (quoting Crowley v. Bass, 445 So. 2d 902, 904 (Ala. 1984), quoting in turn 2A D. Sands, Sutherland Statutory Construction § 47.30 (4th ed. 1973)). Furthermore, "[i]n construing a rule promulgated by [our supreme court], effect must be given to 'each word, phrase, and clause.'" Southeastern Meats of Pelham, Inc. v. City of

Birmingham, 895 So. 2d 909, 913 (Ala. 2004) (quoting State v. Old West Bonding Co., 203 Ariz. 468, 471, 56 P.3d 42, 45 (Ct. App. 2002)).

We reiterate that the stepfather had the burden of establishing that service on the father was properly effected. See Cain v. Cain, 892 So. 2d 952, 956 (Ala. Civ. App. 2004) (quoting Ex parte Volkswagenwerk Aktiengesellschaft, 443 So. 2d 880, 884 (Ala. 1983)) ("'When the service of process on the defendant is contested as being improper or invalid, the burden of proof is on the plaintiff to prove that service of process was performed correctly and legally.'"). Thus, it was incumbent upon the stepfather to establish that service by publication was properly performed in accordance with Rule 4.3(d)(2). As will be explained below, the stepfather failed to meet that burden.

The stepfather states in his brief that the records reflect that The Oregonian is "circulated statewide" in Oregon and that "the father did not deny that The Oregonian is circulated in the county where the ... father resides." Thus, the stepfather argues that publication in The Oregonian complied with Rule 4.3(d)(2). Based on the statements

contained in his brief, the stepfather's understanding of the first sentence of Rule 4.3(d)(2) appears to be that publication may be made in any newspaper that has "general circulation" in the county of the defendant's last known location or residence. However, the phrase "of general circulation" does not refer to the area in which a newspaper is circulated or how widely circulated a newspaper might be in a particular area. See, e.g., Dale R. Agthe, Annotation, What Constitutes Newspaper of "General Circulation" Within Meaning of State Statutes Requiring Publication of Official Notices and the Like in Such Newspaper, 24 A.L.R.4th 822 (1983).

The term "newspaper of general circulation" is a legal one, and it is defined in Black's Law Dictionary 1254 (11th ed. 2019):

> "A newspaper that contains news and information of interest to the general public, rather than to a particular segment, that is available to the public within a certain geographic area, that is circulated mostly to paid subscribers, and that has been continuously serving the same readership area for a specified time."

"[I]t is generally held that for a publication to be considered a newspaper of general circulation within the meaning of a statutory provision, and therefore to be

qualified to publish legal notices, it must contain items of general interest to the public, such as news of political, religious, commercial, or social affairs." 24 A.L.R.4th at 825. Put another way,

> "[a] newspaper of general circulation is one that circulates among all classes and is not confined to a particular class or calling in the community, and is a term generally applied to a newspaper to which the general public will resort in order to be informed of the news and intelligence of the day, editorial opinion, and advertisements, and thereby to render it probable that the notices or official advertising will be brought to the attention of the general public. A newspaper of 'general circulation' has also been described as one that contains news of general interest to the community and reaches a diverse readership. Moreover, a statute requiring publishing notice in a newspaper of general circulation does not require that the newspaper be the one with the largest circulation. Whether a newspaper is of general circulation is manifestly a matter of substance, and not merely of size."

66 C.J.S. Newspapers § 4 (2009) (footnotes omitted).

Thus, by using the term "newspaper of general circulation" in Rule 4.3(d)(2), our supreme court must have meant that the newspaper in which a notice must appear is a newspaper that is read by the general public and that presents newsworthy articles relating to affairs of interest to the general public. The father has no basis to contest the fact

that The Oregonian is a newspaper of general circulation. However, our inquiry does not end there.

Rule 4.3(d)(2) requires that the notice be published in a newspaper of general circulation either "in the county in which the complaint is filed" or, in certain circumstances, "also in the county of the defendant's last known location or residence within the United States." The Rule further states that "[i]f no newspaper of general circulation is published in the county, then publication shall be in a newspaper of general circulation published in an adjoining county." (Emphasis added.) The father contends that the stepfather failed to establish that The Oregonian qualifies as a newspaper of general circulation published in the county of his last known residence. We agree.

The stepfather reads Rule 4.3(d)(2) to allow publication in any newspaper that might be "circulated" in the father's county of last known residence. That interpretation, however, would prevent operation of the last sentence of the rule. Why would Rule 4.3(d)(2) provide an alternative avenue of service by publication "in a newspaper of general circulation published in an adjoining county" if publication in a

newspaper "circulated statewide" would suffice in the first place? In order to give the second sentence of the rule a field of operation, as we must, see Southeastern Meats of Pelham, 895 So. 2d at 913 (indicating that we must give effect to "'each word, phase, and clause'" of a rule), we must read Rule 4.3(d)(2) to not only require that the publication of notice be made in a newspaper of general circulation, which The Oregonian might be, but also to require that the newspaper of general circulation be published in the county where the notice is to be provided, which, in these particular instances, is the county of the father's last known residence.

Thus, the fact that The Oregonian has a "general circulation" in Oregon is not sufficient to demonstrate that The Oregonian was a proper newspaper in which to publish the notice for purposes of service on the father. The relevant inquiry is whether The Oregonian is published in the county of the father's residence. Although the record reflects that The Oregonian is a newspaper published in the County of Multonomah, Oregon, and that the newspaper is of "general circulation in Oregon," the evidence presented to the probate court, per the Rule 10(d) statement of the evidence, did not

contain evidence indicating (1) that the father's last known county of residence was Multonomah County, Oregon, (2) the county in which the father's last known residence was located, (3) that no newspaper of general circulation was published in the father's last known county of residence, or (4) that Multonomah County might qualify as an adjoining county under the last sentence of Rule 4.3(d)(2), assuming there was proof of its applicability. At best, the probate court could have gleaned from the testimonial and other evidence of record, including the father's affidavit in support of his Rule 60(b) motions and Richter's testimony, that the father might reside in Marion County, Oregon, which would serve only to support a conclusion that The Oregonian was not published in the county of the father's last known residence.

The stepfather had the burden of proving that the father was properly served. See Cain, 892 So. 2d at 956. He failed to meet that burden. Accordingly, we conclude that the evidence does not support the conclusion that the father was properly served by publication, and the adoption judgments are therefore void. See Image Auto, Inc., 823 So. 2d at 657. The probate court's denial of the father's Rule 60(b) motions was

therefore improper, and the orders denying those motions are reversed. The causes are remanded for entry of orders granting the father's Rule 60(b) motions on the ground that the adoption judgments are void.

2180604 -- REVERSED AND REMANDED WITH INSTRUCTIONS.

2180605 -- REVERSED AND REMANDED WITH INSTRUCTIONS.

2180606 -- REVERSED AND REMANDED WITH INSTRUCTIONS.

Thompson, P.J., and Moore, Donaldson, and Hanson, JJ., concur.