IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Marriage of SHANE R. MAIERS, Respondent, and MENEDEL ROSLYN MAIERS, Appellant.	No. 40571-7-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — Menedel Maiers appeals the trial court's denial of her motion to vacate a default judgment invalidating her marriage to Shane Maiers, arguing that the judgment is void for lack of jurisdiction. Because we agree that Shane[1] did not comply with the statutory requirements for effecting service by mail, we reverse.

Facts

Menedel met Shane through an online dating site in 2006, and they soon spoke by phone almost daily. Menedel lived in the Philippines and Shane lived in Washington.

In March 2007, Shane flew to the Philippines to meet Menedel in person. During his one-week stay, he proposed marriage and she accepted. When he returned, he obtained a fiancée visa for Menedel, and she arrived in Washington on March 10, 2008.

The couple was married on April 19, 2008. Soon after, they began to argue. According to Menedel, Shane was moody and unpredictable, and she became afraid of him. When the

[1] We refer to the parties by their first names for the sake of clarity.

couple fought, Menedel had nowhere to hide in their trailer. Menedel left Shane in late May and flew to New Jersey, where she has an aunt and a cousin. Once at her aunt's house, she spoke to Shane daily until, a few weeks later, he cut off her cell phone service.

On August 20, 2008, Shane filed a petition to invalidate his marriage to Menedel, alleging that he had been induced by fraud to enter into the marriage. In September, Shane moved for an order allowing him to serve the summons and petition by mail to Menedel's last known address in Washington. Shane alleged that he had not been able to personally serve Menedel because she had left Washington and concealed herself to avoid service. As factual support for these allegations, Shane explained, "Petitioner and Respondent lived together at the address listed and Petitioner has since moved away. Respondent either still lives at this residence or has concealed herself to avoid service." Clerk's Papers (CP) at 6. Shane also described the process server's efforts to locate Menedel for personal service: "Attempting contacting Respondent's relative's in New Jersey. No response was received." CP at 6. The attached "declaration of diligence" added that the process server had been unable to find Menedel in Washington after going to her last known address, where the current resident said she had never heard of Menedel.

The court commissioner authorized service by mail and on January 6, 2009, granted Shane's motion for a default order declaring the marriage invalid. The commissioner found that "[t]he marriage was entered into fraudulently as the wife only sought to gain immigration status in the US and upon receipt of same, abandoned husband." CP at 18. The commissioner distributed the parties' property and liabilities in addition to invalidating the marriage.

When Menedel attempted to start a dissolution proceeding in New Jersey in June 2009, she learned that Shane had been granted an annulment. She moved to vacate, arguing that Shane

did not comply with the statutory requirements for service of process by mail. She showed that Shane's mother and others had communicated with her after she left and that a letter Shane's mother sent to her parents' address in the Philippines had been forwarded to her in New Jersey. Menedel stated that Shane had both her e-mail address and her parents' address, and that he sent the summons and petition to the couple's last Washington address even though he knew she was not there. She explained that the address was to Don Herman's property, where she and Shane had lived in a trailer. Menedel's aunt stated in a declaration that Shane had her New Jersey phone number.

Shane responded that he did not know whether Menedel was in Seattle or New Jersey, and that she had said she was moving back to the Herman house, so he sent the documents there. He said he contacted immigration authorities for information and learned that his was "a textbook case of marriage fraud." CP at 79. He added that Menedel was trying to stay in the United States by claiming that she was a victim of domestic violence who did not know anything about the divorce. Menedel, in turn, responded that Shane knew she was not going to stay with the Hermans because he wanted her to stay with him and had prevented other arrangements. She denied knowing about the annulment before she filed for divorce, and she denied that she would seek immigration relief as a domestic violence victim.

During argument, Menedel's attorney referred briefly to the allegations of domestic violence in Menedel's declarations. The superior court denied the motion to vacate and entered findings of fact stating that the parties were married for a month and a half before Menedel left; that there was communication between the parties afterward but no evidence that Menedel gave Shane her new address; that service by mail was reasonably calculated to give Menedel notice;

that although she had alleged domestic violence, there were no protection orders or facts sufficient to establish such violence; and that Menedel was attempting to use the marriage to apply for citizenship in the United States.

Menedel appeals, arguing that the default judgment was void for lack of jurisdiction.

Discussion

A decision to grant or deny a motion to vacate a default judgment is generally within the sound discretion of the trial court. *Leen v. Demopolis*, 62 Wn. App. 473, 478, 815 P.2d 269 (1991), *review denied*, 118 Wn.2d 1022 (1992). Courts have a nondiscretionary duty, however, to vacate void judgments. *Leen*, 62 Wn. App. at 478.

A judgment is void when the court lacks personal jurisdiction. *In re Marriage of Himes*, 136 Wn.2d 707, 737 n.81, 965 P.2d 1087 (1998). Proper service of the summons and complaint is essential to invoke personal jurisdiction over a party, and a default judgment entered without proper jurisdiction is void. *In re Marriage of Markowski*, 50 Wn. App. 633, 635-36, 749 P.2d 754 (1988). A default judgment entered without valid service may be vacated when the lack of jurisdiction is established, regardless of the passage of time. *Brenner v. Port of Bellingham*, 53 Wn. App. 182, 188, 765 P.2d 1333 (1989).

As Shane argues, personal jurisdiction over both parties is not necessary to invalidate a marriage in Washington. *In re Marriage of Peck*, 82 Wn. App. 809, 812, 920 P.2d 236 (1996) (citing RCW 26.09.010(2), .030). The court must have personal jurisdiction over the absent party, however, to adjudicate personal claims or obligations. *In re Marriage of Powell*, 84 Wn. App. 432, 437, 927 P.2d 1154 (1996). Here, the court divided the couple's assets and liabilities in addition to annulling their marriage and therefore needed personal jurisdiction over Menedel for

the entire proceeding.

Shane sought permission to serve Menedel by mail, which the commissioner granted under CR 4(d)(4).[2] Service by mail must be authorized by court order on a case-by-case basis. 15A Karl B. Tegland & Douglas J. Ende, Washington Practice: Washington Handbook on Civil Procedure, §17.1 at 232 (2010) (citing CR 4(d)(4)). CR 4(d)(4) allows service by mail in circumstances justifying service by publication "if the serving party files an affidavit stating facts from which the court determines that service by mail is just as likely to give actual notice as service by publication." RCW 4.28.100 sets forth the circumstances that justify service by publication if the defendant cannot be found within the state or is believed to be a resident of another state.

RCW 4.28.100 describes two sets of potentially relevant circumstances. One allows service by publication when the action is for dissolution of marriage, legal separation, or declaration of invalidity. RCW 4.28.100(4). This subsection allows service by publication to achieve dissolution but not to distribute property; RCW 4.28.100(4) will not secure personal jurisdiction. *In re Marriage of Logg*, 74 Wn. App. 781, 786, 875 P.2d 647 (1994). But personal jurisdiction may be secured "[w]hen the defendant, being a resident of this state, has departed therefrom with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with like intent." RCW 4.28.100(2); *Powell*, 84 Wn. App. at 436.

To satisfy RCW 4.28.100(2), an affidavit must set forth facts establishing that a plaintiff's efforts to personally serve the defendant were reasonably diligent and that the defendant either left

[2] On appeal, Shane makes the conflicting assertions that his service by mail was governed by RCW 4.28.080(15) and (16) and that CR 4 and RCW 4.28.100 serve as the controlling authority. The commissioner authorized service by mail under CR 4, so we examine Shane's service under that rule.

the state with intent to defraud creditors or avoid service, or concealed herself within the state with the same intent. *Charboneau Excavating, Inc. v. Turnipseed*, 118 Wn. App. 358, 362-63, 75 P.3d 1011 (2003), *review denied*, 151 Wn.2d 1020 (2004). A bare recitation of the statutory factors required to obtain jurisdiction is insufficient; the plaintiff must produce specific facts supporting the conclusions the statute requires. *Pascua v. Heil*, 126 Wn. App. 520, 527, 108 P.3d 1253 (2005); *see also Brennan v. Hurt*, 59 Wn. App. 315, 317, 796 P.2d 786 (1990) (strict compliance with statute required for jurisdiction to attach), *review denied*, 116 Wn.2d 1002 (1991). Because service by mail is allowed only when service by publication would be authorized, the plaintiff must make the same showing of due diligence, and the same showing of the defendant's intent, that would be required for service by publication. 14 Karl B. Tegland, Washington Practice: Civil Procedure, § 8:30 at 273-74 (2d ed. 2009); *see also Jones v. Stebbins*, 122 Wn.2d 471, 481, 860 P.2d 1009 (1993) (holding that affidavit in support of service by mail must contain requirements in RCW 4.28.100).

Whether Shane's service satisfied RCW 4.28.100(2) is an issue for de novo review. *Pascua*, 126 Wn. App. at 527. Although a plaintiff need not exhaust all conceivable means of personal service before service by publication is authorized, he must follow up on information he possesses that might reasonably assist in determining the defendant's whereabouts. *Carson v. Northstar Devel. Co.*, 62 Wn. App. 310, 316, 814 P.2d 217 (1991). In other words, there must have been an honest and reasonable effort to find and personally serve the defendant. *Brenner*, 53 Wn. App. at 186.

Here, the "due diligence" declaration stated that the process server attempted contacting Menedel's relatives in New Jersey but was unsuccessful. This statement lacks key details, as

Menedel pointed out below: "There was no name, no address, there was no phone number, no date, no city, no county." Report of Proceedings at 8. The process server also said he went to Menedel's last known address and was told that the current resident had never heard of her, despite Shane's statement that this was the address of friends who were in frequent contact with Menedel. Shane had Menedel's e-mail address and her aunt's phone number, as well as her parents' address in the Philippines. He does not show that he pursued any of this information in an attempt to locate Menedel, and his efforts to personally serve her appear less than reasonably diligent. *See Pascua*, 126 Wn. App. at 529 (reasonable diligence requires contacting known third parties who may have knowledge of the defendant's whereabouts).

Even more notable is the lack of factual support for the assertion that Menedel concealed herself or left Washington in late May to avoid service. Shane did not seek an annulment until August. This timing simply does not show that Menedel acted with the intent to elude service. *See Kennedy v. Korth*, 35 Wn. App. 622, 624, 668 P.2d 614 (fact that defendant moved to Germany before malpractice actions were filed negates assertion that he left Washington to avoid service of process), *review denied*, 100 Wn.2d 1026 (1983). Simply stating that Menedel left Washington to avoid service is insufficient to satisfy this statutory condition for service by publication. *See Bruff v. Main*, 87 Wn. App. 609, 614, 943 P.2d 295 (1997) (Bruffs's affidavits contained no facts clearly suggesting that Main's change of residence, or any other conduct, was undertaken with the intent required by RCW 4.28.100(2)); *Powell*, 84 Wn. App. at 437 (nothing in affidavit established that defendant was evading service); *but see Jones*, 122 Wn.2d at 482 (affidavit in support of service by mail satisfied RCW 4.28.100 where facts showed defendant was concealing himself to avoid service and plaintiff made reasonably diligent efforts to locate him).

The statute does not authorize alternative service simply because the defendant cannot be found. *Lepeska v. Farley*, 67 Wn. App. 548, 553, 833 P.2d 437 (1992). Nor does it authorize alternative service because a defendant has notice of the pending action. Shane contends that he told Menedel over the phone that he would be seeking a divorce, but notice without proper service is not sufficient to confer jurisdiction. *Logg*, 74 Wn. App. at 784.

Consequently, we reject the trial court's finding that service by mail was reasonably calculated to give Menedel notice, and we agree with Menedel that the findings regarding her allegations of domestic violence and her intent in entering the marriage are irrelevant to the service issue that was before the court. *See* 14 K. Tegland, *supra*, § 9:31 at 328 (party challenging default judgment on jurisdictional grounds need not demonstrate defense on the merits (citing *Schell v. Tri-State Irrigation*, 22 Wn. App. 788, 792, 591 P.2d 1222 (1979))). We reverse the default judgment invalidating the marriage and deny Shane's request for attorney fees on appeal.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

HUNT, J.

PENOYAR, C.J.