IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR LANE COUNTY

In the Matter of Marriage of: KEVIN LAURANCE HUMPHREYS, Petitioner, and KIMBERLY MARIE HUMPHREYS, Respondent.	Case No. 15-05-22333 OPINION AND ORDER

This matter having come before the court upon Respondent's Amended Motion to Set Aside Order of Default and General Judgment (OJIN 22), and the court having heard the arguments of counsel, reviewed the file, taken said matter under advisement, and now being fully advised rules as follows.

SUMMARY

Respondent's motion unsuccessfully rests on inadequate service of process as grounds for relief. The court's general judgment was not void under ORCP 71B(1)(d) on such grounds. Respondent was subject to valid substituted service under ORCP 7D(2)(b). Alternatively, even if substituted service was invalid, adequate service was still effected under the reasonable-notice standard of ORCP 7D(1).

DISCUSSION

I. Factual and Procedural Background

Pursuant to ORCP 71B,[1] Respondent moves to set aside the Order of Default and General Judgment entered by this court on December 21, 2005. This default judgment dissolved the parties' marriage. Respondent did not appear in the dissolution proceeding and now seeks relief from the default judgment because of its child-custody provisions.

[1] Respondent's motion relies on ORCP 71B(1)(c): "On motion and upon such terms as are just, the court may relieve a party or such party's legal representative from a judgment for the following reasons: . . . (c) fraud, misrepresentation, or other misconduct of an adverse party." The court questions the applicability of this provision because evidence of "fraud, misrepresentation, or other misconduct" does not appear in the record. Instead, the court's analysis is based on ORCP 71B(1)(d), which provides relief from a prior judgment that is void. The court examines this ground for relief on its own initiative because adequacy of service raises a jurisdictional issue.

The sole material issue here is whether adequate service of process was effected on Respondent in the dissolution proceeding. On November 9, 2005, a process server personally delivered copies of the summons and petition addressed to Respondent to Jeremy Stucky at his residence in Noti, Oregon. This delivery was followed by a mailing of these documents to Mr. Stucky's residence by Respondent's counsel. This follow-up mailing was returned to Respondent's counsel as "not deliverable as addressed" due to "insufficient address." On December 9, 2005, Respondent received portions of the petition from her mother, which had been given by Mr. Stucky. Respondent contacted Petitioner's counsel that same day and provided her alleged "legal residential address" in Veneta, Oregon. Petitioner's counsel promptly mailed a second copy of the summons and petition to that address, which Respondent received on December 15, 2005.

The parties dispute whether Mr. Stucky's residence was Respondent's "dwelling house" or "usual place of abode" within the meaning of ORCP 7D(2)(b). As described below, this issue partially controls whether Respondent was adequately served so as to give this court personal jurisdiction over this matter under ORCP 4.

Petitioner alleges the following to argue that Mr. Stucky's residence was Respondent's "dwelling house" or "usual place of abode":

(1) Respondent listed Mr. Stucky's address as her residential address on a DMV form transferring title of an automobile to Respondent;
(2) Petitioner visited Respondent at Mr. Stucky's residence—while accompanied by Respondent's mother, Vicky Conner—in order to have certain paperwork signed;
(3) Respondent informed Petitioner to contact her at Mr. Stucky's residence if he or their children needed to reach her;
(4) Mr. Stucky told the process server, Bill Lioio, that Respondent lived at the Stucky residence at the time of service.

In response, Respondent alleges the following to argue that Mr. Stucky's residence was not her "dwelling house" or "usual place of abode":

(1) Petitioner listed the Stucky residence as Respondent's on the foregoing DMV form, and Respondent signed the form solely because of Petitioner's threats to report the vehicle as stolen if she did not do so;
(2) Respondent and Mr. Stucky are "personal friends" and see one another "regularly," but Respondent has never resided with Mr. Stucky nor authorized him to accept service on her behalf;
(3) Mr. Stucky accepted process from the server solely out of fear that Respondent would be in "legal trouble" if he did not do so;
(4) Mr. Stucky did not tell the process server that Respondent resided at his residence.

Additional facts that the court considers relevant on this motion are:

(1) Services for Children and Families was involved in the parties' separation because Respondent had been using methamphetamines;
(2) Respondent is currently pregnant; Mr. Stucky is the father of the unborn child.

II. Legal Analysis[2]

The supreme court established a two-part analysis for determining adequacy of service in *Baker v. Foy*.[3] ORCP 7D(1) states the reasonable-notice standard that governs that analysis: Service must be effected "in any manner reasonably calculated, under all the circumstances, to apprise the defendant of the existence and pendency of the action and to afford a reasonable opportunity to appear and defend."[4] Step one of the analysis inquires whether service was made by one of the methods listed in ORCP 7D(2). If the answer is "yes," then service presumptively satisfies the reasonable-notice standard and is adequate. If the answer is "no," or if there is evidence to overcome the foregoing presumption, then the second question arises: Did the party satisfy the reasonable-notice standard despite the failure of the method of service?

Because the adequacy of service raises a jurisdictional issue, the party alleging valid service bears the burden of proof.[5] Thus, under the *Baker* analysis, Petitioner must prove that the reasonable-notice standard of ORCP 7D(1) was satisfied here either by valid substituted service or other "reasonably calculated" means.

A. Substituted Service

Substituted service of process must comply strictly with statutory requirements to be effective.[6] The trial court must determine whether a particular residence is a party's "dwelling house" or "usual place of abode" based on the total circumstances of the case.[7] In making this determination, the trial court must resolve any factual disputes arising from the parties' representations, including competing affidavits.[8] A party's listing of a particular address on a government document (e.g. DMV registration form) is suggestive, but not conclusive, evidence that the listed address is the party's "dwelling house" or "usual place of abode."[9] Ultimately, as the court of appeals described in

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[2] This opinion focuses exclusively on the adequacy of service under ORCP 7D and does not explore the possibility that valid service may have been effected under the actual-notice provisions of ORCP 7G.
[3] 310 Or 221, 228-29, 797 P2d 349 (1990).
[4] *Id.*
[5] *Burden v. Copco Refrigeration, Inc.*, 192 Or App 378, 384, 86 P3d 59 (2004) ("[T]he party invoking the jurisdiction of the court [] has the burden of alleging and proving such facts as are necessary to establish that the court has jurisdiction to act.").
[6] *Adkins v. Watrous*, 66 Or App 252, 254, 673 P2d 572 (1983).
[7] *See Beckett v. Martinez*, 119 Or App 338, 342-43, 850 P2d 1148 (1993).
[8] *Id.* at 343 ("In determining the adequacy of service on a defendant, it is the trial court's responsibility to resolve any factual dispute as to the circumstances of service.").
[9] *Baker*, 310 Or at 224 (DMV registration form); *Beckett*, 119 Or App at 340 (DMV registration form, driver's license, tax records, employment records, and college records).

Beckett, "the place of service must be the person's *actual* dwelling house or abode" at the time of service.[10]

In *Thoenes v. Tatro*, the supreme court defined "usual place of abode" as follows:

> "[U]sual place of abode must be taken to mean such center of one's domestic activity that service left with a family member is reasonably calculated to come to one's attention within the statutory period for defendant to appear."[11]

The *Thoenes* court relied on this definition to hold that the defendant's usual place of abode was his apartment in Colorado, where he was a full-time student, rather than his parent's home in Portland.[12] The factual distinctions between *Thoenes* and this case makes the foregoing definition of questionable applicability here.

In the court's judgment, Petitioner effected valid substituted service over Respondent. Petitioner's evidence establishes that the Stucky residence was Respondent's usual place of abode under the totality of the circumstances. The DMV form is suggestive evidence that Respondent resided with Mr. Stucky. Respondent's documented use of methamphetamines gives the court reason for caution in accepting her allegation that she signed the DMV form under duress. It is undisputed that Petitioner and Respondent's mother visited Respondent at the Stucky residence in order to have paperwork signed. Likewise, it is undisputed that Respondent told Petitioner to contact her at the Stucky residence as needed for the sake of Petitioner or the parties' children. The court is more inclined to accept the process server's sworn statement that Mr. Stucky indicated Respondent lived at his residence at the time of service because the process server is less interested in this matter than is Mr. Stucky. Finally, the fact that Mr. Stucky is the father of Respondent's unborn child suggests a relationship of close quarters between the two individuals, including the possibility of their being domestic partners.

B. Adequate Service under the Reasonable-Notice Standard Despite Invalid Substituted Service

Even if substituted service was invalid, adequate service was still effected by Petitioner in this case under the reasonable-notice standard of ORCP 7D(1).

The methods of service contained in ORCP 7D(2) are non-exclusive means of providing adequate service under the reasonable-notice standard.[13] The trial court must consider the total circumstances when determining whether, despite invalid substituted service,

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[10] *Id.* at 342 (emphasis in original) (citing *Baker*, 310 Or at 230, and *Jordan v. Wiser*, 302 Or 50, 54, 726 P2d 365 (1986)).
[11] 270 Or 775, 787, 529 P2d 912 (1974).
[12] *Id.* at 787-88.
[13] *Baker*, 310 Or at 225.

adequate service was effected under the standard by other means.[14] In relevant part, the court of appeals has described this inquiry as follows:

> "It is the trial court's responsibility . . . to consider, in the first instance, whether, in light of what the process server knew at the time of service, the manner of service was reasonably calculated to give defendant notice of the action."[15]
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> "Under the general provisions of ORCP 7D(1), where notice is otherwise reasonably calculated to apprise the defendant of the pendency of the action, failure of the defendant to receive actual notice is not dispositive of the question of adequacy. *Rather, the inquiry, under all circumstances, is the reasonableness' of the means used.*"[16]

In *Benavidez*, the court of appeals held that, despite invalid substituted service, adequate service was effected under the reasonable-notice standard based on: (1) the representations of the defendant's father that the defendant lived in the family home where substituted service was attempted, and (2) the defendant's listing of the family home as her address on DMV records.[17] In support of its holding, the court described that, taken together, the two facts "would, in fact, lead any reasonable person to believe that defendant did, in fact, live at the [family home]."

The facts surrounding service of process in the present case favor holding that the reasonable-notice standard was satisfied to an even greater extent than did those in *Benavidez*. Taken together, the inclusion of the Stucky address on Respondent's DMV form; Respondent's giving Stucky's residence as her contact information to Petitioner; Petitioner's accompanied visit to Respondent at Mr. Stucky's residence; and Mr. Stucky's averred statement to the process server that Respondent resided at his home at the time of service all support holding that the reasonable-notice standard was satisfied. Even if substituted service was invalid, these facts denote service of process "in [a] manner reasonably calculated . . . to apprise the defendant of the existence and pendency of the action and to afford a reasonable opportunity to appear and defend." It is unsurprising that under these facts such notice and opportunity actually occurred here.

IT IS HEREBY ORDERED that Respondent's Amended Motion to Set Aside Order of Default and General Judgment is DENIED.

Dated: September 22, 2006.

Karsten H. Rasmussen, Circuit Judge

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[14] *Benavidez v. Benavidez*, 161 Or App 73, 77, 984 P2d 307 (1999).
[15] *Beckett*, 119 Or App at 343.
[16] *Benavidez*, 161 Or App at 79-80 (emphasis added).
[17] *Id.* at 78-79.