

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

*COA# 383993-11* 2008 MAY 30 P 2:58  
No. 81081-8

BY RONALD R. CARPENTER

THE SUPREME COURT

CLERK

OF THE STATE OF WASHINGTON

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*In re the Marriage of:*

Thomas Travis Young,

*Petitioner/Appellant*

and

Marianne Remy,

*Respondent*

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OPENING BRIEF

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Thomas Travis Young, Petitioner/Appellant

10708 So. A St. # 207

Parkland WA 98444

760-786-2326

**ORIGINAL**

**FILED**  
MAY 30 2008  
CLERK OF SUPREME COURT  
STATE OF WASHINGTON

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**A. Assignments of Error**

Error # 1: - The court commissioner erred when by entering a default order against Petitioner/Appellant on 8 May 2006.

Error # 2: - The court commissioner erred by refusing to vacate the default order and default judgment as a matter of law.

Error # 3: - The superior court judge erred by refusing to vacate the default order and default judgment.

Error # 4: - The superior court judge erred by failing to make formal findings of fact and conclusions of law regarding jurisdiction.

**B. Issues Pertaining to Assignments of Error**

Issue # 1: - Based on the record, does mailing a petition for modification of child support to a post office box in Washington comply with the Washington statutes for service? Does mailing a summons and petition for modification to a post office box provide proper notice of the pending action, thus fulfilling due process requirements?

Issue # 2: - Does a trial court abuse its discretion when it refuses to vacate a default child support order and judgment when the default order and judgment is premised on findings which are unsupported by the evidence and/or when the evidence is statutorily insufficient?

Issue # 3: - Does a trial court abuse its discretion when it refuses to vacate a default child support order and judgment when the default order and judgment provides relief that is either different in nature from the pleadings or provides relief in excess of the pleadings?

**C. Statement of the Case**

On 20 March 2006, Respondent Marianne Remy initiated an action for modification of child support. [CP 3-26]. On 27 April 2006, a return of service was filed [CP 32-33]. On 8 May 2006, the court commissioner signed and entered final documents by default. [CP 36-58]. On 8 May 2007, Petitioner/Appellant Thomas Young filed a motion to show cause why the default should not be vacated and a motion to vacate the default order and judgment. [CP 59-69]. Petitioner/Appellant supported his motion to vacate with several declarations. [CP 70-74; 80-83; 88-92]. Respondent filed a response. [CP 94-96]. The motion was denied on 25 October 2007. [CP 100]. On 2 November 2007, Petitioner/Appellant filed a motion for reconsideration. [CP 123-125]. The motion was denied on 6 December 2007. [CP 126-128].<sup>1</sup>

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<sup>1</sup> The court commissioner "transferred" the motion to a superior court judge for resolution. The judge scheduled live testimony but the record is silent regarding the purpose of this live testimony or any factual dispute to be resolved. In any event, the issues for review are legal, not factual.

**D. Summary of Argument**

This appeal boils down to a single obvious truth – a person cannot reside (nor be domiciled) in a post office box. Though this would seem to be what is commonly called a “no brainer,” the actual decision in this case is based on drawing the opposite conclusion.

As the argument herein will show, the trial court refused to vacate an improperly taken default judgment. Even if the post office box argument fails, the default order and judgment were substantially altered from the pleadings and the relief granted via default was also in excess of the pleadings. And if all those arguments fail, the relief granted is not supported by the evidence.

The trial court decision must be reversed.

**E. Argument**

**Defaults are disfavored in Washington.**

The case which provides the strongest explanation of default law states:

In examining the propriety of the trial court's vacation of the default judgment against petitioner, it is appropriate to put into perspective default judgments and the judicial attitude thereto.

Default judgments are not favored in the law. [cites omitted]. A default judgment has been described as one of the most drastic actions a court may take to punish disobedience to its commands. [cites omitted]. The reason for this view is that "[i]t is the policy of the law that controversies be determined on the merits rather than by default." [cite omitted].

Balanced against that principle is the necessity of having a responsive and responsible system which mandates compliance with judicial summons, that is, a structured, orderly system not dependent upon the whims of those who participate therein, whether by choice or by the coercion of a summons and complaint.

A proceeding to vacate a default judgment is equitable in character and relief is to be afforded in accordance with equitable principles. [cite omitted]. The trial court should exercise its authority "liberally, as well as equitably, to the end that substantial rights be preserved and justice between the parties be fairly and judiciously done." [cite omitted].

The fundamental guiding principle has been thus stated:

[T]he overriding reason should be whether or not justice is

being done. Justice will not be done if hurried defaults are allowed any more than if continuing delays are permitted. But justice might, at times, require a default or a delay. What is just and proper must be determined by the facts of each case, not by a hard and fast rule applicable to all situations regardless of the outcome.

Widicus v. Southwestern Elec. Coop., Inc., supra at 109.

Several other elements are to be considered. The motion to vacate is addressed to the sound discretion of the trial court and this court, on appellate review, will not disturb the trial court's disposition unless it clearly appears that that discretion has been abused. Abuse of discretion is less likely to be found if the default judgment is set aside. [emphasis added].

**Griggs v. Averback Realty, 92 Wn.2d 576, 581-582, 599 P.2d 1289 (1979).**

It must be clearly noted at the outset that this appeal is from a motion to vacate a default *modification* judgment. The trial court had jurisdiction over the subject matter of the action and Petitioner/Appellant makes no contrary claim. Likewise, the trial court had personal jurisdiction over both parties to the extent that it had personal jurisdiction over them when it entered the original decree of dissolution. Thus, any motion to modify that decree is subject to the continuing authority of a trial court over its own judgments.

Having said that, it is important to note that the purpose of a summons in a modification proceeding is different than the purpose of a general summons. Since the court retains personal jurisdiction over the parties even after the decree is entered, the primary purpose (and possibly the only purpose) is to provide notice and opportunity to be heard in a form which is fairly easy to recognize as compelling a response by the person served.

For the purposes of this review, Petitioner/Appellant's position is that a summons is a constitutionally adequate method of providing legal notice in modification actions.

**The law on modifications of child support must comport with all other related statutes.**

It is an accepted and established part of statutory construction that the construction of multiple statutes on a subject must have two components at a minimum: (1) they must all be read harmoniously:

[S]tatutes must be read together to determine legislative purpose to achieve a 'harmonious total statutory scheme . . . which maintains the integrity of the respective statutes'.

**Employco Personnel Servs., Inc. v. Seattle, 117 Wn.2d 606, 614, 817 P.2d 1373 (1991).**

and (2) they must not be read in a manner that yields absurd results:

Moreover, we do not give a hypertechnical reading of a statute so as to yield an absurd result.

**Pudmaroff v. Allen, 138 Wn.2d 55, 65, 977 P.2d 574 (1999).**

Thus, it stands to reason that the reading of child support modification service statutes must be done in a manner that is consistent with the overall scheme devised by the Legislature for providing constitutionally sufficient notice of a pending court action to the affected party.

***The lead case on notice requirements of modification of child support does not support the instant trial court decision.***

The requirements of proper service by mail for modification proceedings, as determined by the Supreme Court, are not what the instant trial court followed:

[T]he state has an extremely important interest in the welfare of children and a significant interest in a method of proof of notice which is efficient and inexpensive for the petitioning parent to use. If certified mail is unclaimed, proof of actual notice, if required, would entail a far greater burden. . . . [D]ue process does not require actual receipt of mailed notice of the modification proceedings . . . where modification of child support is sought.

Moreover, an additional factor supports this conclusion where a child support modification proceeding is involved. *A child modification proceeding is a continuation of the original dissolution proceeding.* Unlike the initial service of process when a dissolution is sought, service of the pleadings in a modification action come as no surprise to a parent who knows that the terms of the dissolution decree regarding children are always subject to modification. . . . Proceedings to modify child support should be expected from time to time.

*We conclude that under all the circumstances, there is a reasonable probability that if a petitioning parent mails pleadings in child support modification proceedings to a valid address the nonpetitioning parent will receive them.* [emphasis added]

**In re the Marriage of McLean, 132 Wn.2d 301, 312-313, 937 P.2d 602 (1997).**

The entire argument of Petitioner/Appellant rests on the meaning of the word “valid” as used in **McLean**. This word must be read as having been intended in the original meaning of the statutory language authorizing service by certified mail:

The rule established by this court is that where a statute has been construed by the highest court of the state, the court's construction is deemed to be what the statute has meant since its enactment. In other words, there is no question of retroactivity.

**State v. Moen, 129 Wn.2d 535, 538, 919 P.2d 69 (1996).**

The **McLean** holding comports with due process requirements *only* if the legal documents were mailed to a valid address. Any other reading leads to a prohibited absurd result, contrary to the holding of **Pudmaroff**.

In the instant case, the trial court was presented with a motion to vacate which claimed, *inter alia*, that it was not valid to use a post office box to serve by mail and also that the Return of Service falsely stated that the residence of the party being served was in Grant County Washington when the party being served actually resided in Oregon.<sup>2</sup>

Pursuant to **Moen**, RCW 26.09.175 must be read harmoniously with the general statutes on service. RCW 4.28.080 reads in pertinent part:

Service made in the modes provided in this section shall be taken and held to be personal service. The summons shall be served by delivering a copy thereof, as follows:

...

(15) In all other cases, to the defendant personally, or by leaving a copy of the summons at the house of his or her usual abode with some person of suitable age and discretion then resident therein.

(16) In lieu of service under subsection (15) of this section, where the person cannot with reasonable diligence be served as described, the summons may be served as provided in this subsection, and shall be deemed complete on the tenth day after the required mailing: By leaving a copy at his or her usual mailing address with a person of suitable age and discretion who is a resident, proprietor, or agent thereof, and by thereafter mailing a copy by first class mail, postage prepaid, to the person to be served at his or her usual mailing address. For the purposes of this subsection, "usual mailing address" shall not include a United States postal service post office box or the person's place of employment. [emphasis added]

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<sup>2</sup> CP 66-68.

The emphasized portion of subsection (16) above was ignored by Respondent when she undertook to mail the documents, irrespective of the address she used. An order of court is generally required in order to serve by mail. See **RCW 4.28.100**. Even if this omission could be viewed as merely a procedural irregularity, the complete lack of an affirmative declaration of the qualifying conditions enumerated in RCW 4.28.100 cannot be ignored by the trial court. Yet the trial court did exactly that – it ignored the requirements of the statutory language of .080 and .100 for service by mail.

As a final point, the last sentence of subsection (16) prohibits the method of service that was used herein (service by mail to a post office box). Even if the post office box was one leased to Mr. Young, subsection (16) flatly prohibits its use as a service-of-summons-by-mail address. Therefore, compliance with the statutory requirements was not made. This is fatal to a claim of proper service:

"Substantial compliance has been defined as actual compliance in respect to the substance essential to every reasonable objective of [a] statute." [cite omitted]. In the cases where substantial compliance has been found, there has been actual compliance with the statute, albeit procedurally faulty.

**Seattle v. PERC, 116 Wn.2d 923, 928, 809 P.2d 1377 (1991).**

Substantial compliance with regard to service cannot be had where there is a total absence of performance of a statutory requirement:

In the present case, the process server did not leave the summons with anyone. It was left on an outside windowsill. The summons was not left with either the Respondent or a person of suitable age and discretion, such as Glemp's secretary who came to the door. That is non-compliance with the statute, not significant compliance combined with a merely technical deficiency. Moreover, even if we were to apply the doctrine of substantial compliance to the service of process statute, an essential objective of the statute is the requirement that process be actually delivered to a responsible person. [emphasis added].

**Weiss v. Glemp, 127 Wn.2d 726, 732, 903 P.2d 455 (1995).**

There is a very good reason that a rational Legislature (which is the presumption) would decide that a post office box was not a valid address for service of process – it is unreasonable to assume that the mailed documents would actually be delivered to the intended recipient when mailed to a post office box. Many post office boxes are abandoned

or the box lease is otherwise terminated and the boxes are subsequently re-rented to new patrons. The new patron cannot be reasonably expected to know what to do with the notice of certified mail nor does the new patron have a duty to notify anyone of receipt of such a notice in what is presently "his" box. This is obviously not a method designed to notify the intended party of an action pending in court, which is the most logical reason why the Legislature excluded this practice from being used. Therefore, non-compliance with the statute simply cannot be stretched into substantial compliance.

McLean supports the view that service in this manner is insufficient as a matter of law. The holding of McLean is that the modification petition and the summons be sent via certified mail (return receipt requested) to a "valid" address of the person to be served in order for the mailing to be taken as legal substituted service. Subsection (16) clearly and unambiguously renders a post office box to be an invalid and unsuitable address.

Thus, McLean shows that no legal service was made on Petitioner/Appellant under the laws of this State.

**Because service has not been made, RCW 4.16.170 controls.**

As of the time of this submission, it appears to be a matter of first impression whether RCW 4.16.170 applies to a modification of an existing judgment or decree. Based on the argument which follows, Petitioner/Appellant urges this court to rule that it does apply to the instant situation and that the failure to make legal service according to the statutory requirements means that this action must be dismissed upon remand.

This court should take judicial notice of the date of statutory emancipation of the minor child of the parties. The date of her birth was 13 July 1988.

CR 60 states that there is a one-year time limit for any application which is based on subsections (b)(1) through (3). This flatly precludes using CR 60 to modify the child support order in the instant case since it is undisputed that the decree was entered more than one year prior to the date of filing of the modification action by Respondent. Indeed,

the decree modification was pleaded to be brought pursuant to RCW 26.09.260 and .270.

However, CR 60(e)(3) is instructive as far as what action is required when a party desires to re-open a final judgment. It states:

The motion, affidavit, and the order to show cause shall be served upon all parties affected in the same manner as in the case of summons in a civil action at such time before the date fixed for the hearing as the order shall provide; but in case such service cannot be made, the order shall be published in the manner and for such time as may be ordered by the court, and in such case a copy of the motion, affidavit, and order shall be mailed to such parties at their last known post office address and a copy thereof served upon the attorneys of record of such parties in such action or proceeding such time prior to the hearing as the court may direct. [emphasis added]

It is not disputed that the trial court retains personal jurisdiction over the parties during the entire period that the judgment has prospective effect. As previously argued herein, Petitioner/Appellant makes no claim that service of a *modification* summons is required in order to *confer* jurisdiction over him – rather he asserts that its purpose is primarily to provide due process notice. See Boddie v Connecticut, 401 U.S. 371, 28 L.Ed.2d 113, 91 S.Ct. 780 (1971) (At a minimum, a party is entitled to notice and an opportunity to be heard).

The emphasized language of CR 60 (quoted above) clearly places the initiation of a motion to vacate under the purview of the service statutes and court rules of service. “In the same manner” can only mean that when serving the affected parties, the documents must be treated exactly as if they were a summons and complaint. This necessarily includes RCW 4.16.170, if it is applicable by the facts.

As previously argued, service was legally insufficient and thus was not made. Petitioner/Appellant also denied receiving the documents. See CP 74. RCW 4.16.170 states:

For the purpose of tolling any statute of limitations an action shall be deemed commenced when the complaint is filed or summons is served whichever occurs first. If service has not been had on the defendant prior to the filing of the complaint, the plaintiff shall cause one or more of the defendants to be served personally, or commence service by publication within ninety days from the date of filing the complaint. If the action is commenced by service on one or more of the defendants or by publication, the plaintiff shall file the summons and complaint within ninety days from the date of service. If following service, the complaint is not so filed, or following filing, service is not so made, the

action shall be deemed to not have been commenced for purposes of tolling the statute of limitations. [emphasis added]

Because the statute of limitations has passed, the lack of service means that the action of modification was never properly commenced:

The rule requires that the filing of the complaint and the service of the summons must occur within the statutory period before the statute of limitations is tolled. [cites omitted]. In this case both the summons and the complaint were filed within the 3-year period for commencing such an action, albeit the last day. RCW 4.16.080(2). Thus, the action was tentatively commenced, and the statute of limitations was tolled, pending service upon the defendants within 90 days of the filing. If within the next 90 days the defendants had been served, either personally or through the Secretary of State (RCW 46.64.040), the action would have been properly commenced and the statute of limitations would have been tolled. The action was not properly commenced since both the 90-day period and the statute of limitations had run before the defendants were served. [emphasis added]

**Fox v. Groff, 16 Wn. App. 893, 895, 559 P.2d 1376 (1977).**

The only proper method of viewing the instant situation is succinctly stated a few pages later in **Fox, at 897-898:**

Therefore, we conclude that the trial court was correct in dismissing this action. The plaintiff had 90 days after filing his action, which did toll the running of the statute of limitations for that period of time, to serve the Secretary of State pursuant to RCW 46.64.040 or to obtain personal service upon the defendants. Having done neither, the statute continued to run. By the time the matter was presented to the trial court, the statute of limitations served as a bar to the continuation of the action. [emphasis added]

This court must reverse and order dismissal of the trial court action because there is no language in RCW 4.16.170 which differentiates or limits a modification action from the application of the statute. The child support modification statutes clearly require commencement of a modification action to occur prior to the child's eighteenth birthday. **See RCW 26.09.170(3).** Because the requirements of RCW 4.16.170 were not fulfilled, the statute of limitations was not tolled. Since the minor child is now emancipated, the trial court currently lacks subject matter jurisdiction to modify the decree/order because the 20 March 2006 filing of the summons and petition is a nullity by operation of law.

**Default relief granted in excess of the pleadings is void.**

It is well-established that the relief granted by default cannot be different in kind or amount from that which is requested by the pleadings. The excess relief is void:

It is a well-settled rule that "[o]ne has a right to assume that the relief granted on default will not exceed or substantially differ from that described in the complaint and may safely allow a default to be taken in reliance upon this assumption."

**Columbia Valley Credit v. Lampson, 12 Wn. App. 952, 954, 533 P.2d 152 (1975).**

The principle upon which such a rule rests is that the court is without jurisdiction to grant relief beyond that which the allegations and prayer of the complaint may seek. . . . A judgment entered without notice and opportunity to be heard is void.

**State ex rel. Adams v. Superior Court, 36 Wn.2d 868, 872, 220 P.2d 1081 (1950).**

Irrespective of the previous arguments made herein, a comparison of the "proposed" child support order included with the pleadings [CP 16-26] with the default child support order actually signed and entered [CP 36-46] clearly shows the following differences between them: Page 2, ¶ 3.2 – handwritten dollar amount; Page 4, ¶ 3.6 – handwritten dollar amount; Page 5, ¶ 3.7 – handwritten interlineations added; Page 5, ¶ 3.8 – a box is checked; Page 7, ¶ 3.13 – a different box is checked; Page 8, ¶ 3.14 – a different box is checked and handwritten interlineations added; Page 8, ¶ 3.17 – handwritten interlineations added; Page 9, ¶ 3.19 – handwritten zero is added;

Comparing the child support worksheets submitted with the pleadings [CP 10-15] with the child support worksheets entered with the default judgment [CP 47-51], the changes are stark and even more disturbing:

Pleaded worksheets state that father's income is unknown – default worksheets state father's income is \$5200; Pleaded worksheets combined monthly net income is blank – default worksheets state combined monthly net income is \$8608.82; Pleaded worksheets basic support obligation is blank – default worksheets state combined basic support obligation is \$1218; Pleaded worksheets maximum ordinary monthly health care is blank – default worksheets state maximum ordinary monthly health care is \$60.80;

Pleaded worksheets gross child support obligation is blank – default worksheets state gross child support obligation is \$561.50 for father and \$656.50 for mother; Pleaded worksheets standard calculation presumptive transfer payment is blank for both parents – default worksheets standard calculation presumptive transfer payment state \$561.50 for father and \$656.50 for mother; and Pleaded other considerations is blank – default other considerations states “Father’s income is imputed based on the 2001 Child Support Worksheets adding an increase equal to that of the mother.”

Adding handwritten language at the time of the default hearing is an amendment of the pleadings. Pursuant to State ex rel Adams, without notice to the absent party, the handwritten portions of the order are void ab initio due to lack of jurisdiction. Just to be clear, the record contains no claim of service of the altered documents.

This court should also note that the “other considerations” language added to the default worksheets is *both* unclear *and* done without notice. As such it is void. Because it admits to being the basis for *all* of the worksheet figures, those figures are likewise void for lack of notice.

**G. Conclusion**

A proper and complete motion to vacate a default order and judgment was presented to the superior court by Petitioner/Appellant. The motion was denied. A motion for reconsideration was made but it was also denied.

This was clear error. Petitioner/Appellant was never served. Even if he had been served, the papers would have not provided meaningful notice to him, as demonstrated by the numerous changes and additions to the documents. This court has consistently held that default judgments are disfavored, and that service statutes are to be strictly obeyed, and that no relief can be granted in excess of the pleadings.

Petitioner/Appellant has been hit with violations of all three of these commandments. For over two years, Respondent has been receiving money payments to which she is not entitled. This court must correct this miscarriage of justice by reversing the default judgment and remanding with instructions to dismiss the modification action.

*Respectfully submitted on 30 May 2008:*



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*Thomas Travis Young, Petitioner/Appellant*

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

No. 81081-8

2008 MAY 30 P 2: 58

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

BY RONALD R. CARPENTER

CLERK

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In re the marriage of:	)	
	)	
Thomas Travis Young,	)	<b>DECLARATION OF</b>
Petitioner	)	
and	)	<b>SERVICE BY MAIL</b>
	)	
Marianne Jean Remy	)	
Respondent	)	

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Lawrence Hutt declares as follows:

On May 30, 2008, I served a true copy of

**OPENING BRIEF**

upon the Respondent by mailing it to her at her address of record via USPS, with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated 5/30/08 at Parkland WA

  
Lawrence Hutt, declarant