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STATE OF WASHINGTON

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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

SHANE R. MAIERS, RESPONDENT

v.

MENEDEL R. MAIERS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable James Orlando

No. 08-3-02894-1

BRIEF OF APPELLANT

TUELL & YOUNG, P.S.

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A. APPELLANT'S ASSIGNMENTS OF ERROR.

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2. The trial court erred when it found there were email exchanges prior to the marriage and communication between the parties after Ms. Maiers departed Washington but no evidence that Ms. Maiers ever provided her address.
3. The trial court erred when it found the service attempted by Mr. Maiers in obtaining an order to serve by mail was reasonably calculated to give Ms. Maiers notice.
4. The trial court erred when it found Ms. Maiers has alleged domestic violence but there are no domestic violence protection orders and the facts in her declaration do not rise to the level of domestic violence.
5. The trial court erred when it found Ms. Maiers is attempting to use this marriage to apply for citizenship in the United States.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is an order to serve by mail warranted when there is no evidence the Ms. Maiers left the state before the lawsuit was filed and therefore could not have had the intent to avoid service?

(Assignment of Error 1, 2, and 3).

2. Is an order to serve by mail warranted when the Mr. Maiers failed to contact Immigration, Ms. Maiers' aunt in New Jersey, send an email to Ms. Maiers requesting her address, or engage in any meaningful investigation to locate Ms. Maiers' whereabouts and therefore failed to exercise due diligence in attempting to

locate Ms. Maiers? (Assignment of Error 1, 2 and 3).

3. Is an order of default and subsequent decree of invalidity valid when personal jurisdiction over Ms. Maiers was never established due to an improperly issued order to serve by mail?

(Assignment of Error 1, 2 and 3).

4. Is the presence or absence of domestic violence relevant to the application of RCW 4.28.100 to the affidavit before the Court?

(Assignment of Error 4).

5. Is Ms. Maiers' intent in entering the marriage relevant to the application of RCW 4.28.100 to the affidavit before the Court?

(Assignment of Error 5).

C. STATEMENT OF THE CASE.

1. Facts

Menedel Maiers met Shane Maiers in an online dating community in 2006. CP 26. At that time, Ms. Maiers lived in the Philippines and Mr. Maiers lived in Washington State. Id. They spoke on the phone nearly every day. Id.

In March of 2007, Mr. Maiers flew to the Philippines to meet Ms. Maiers in person. Id. Mr. Maiers brought a ring with him and proposed to Ms. Maiers during this visit. Id. Mr. Maiers stayed in the Philippines for one week. Id. Upon his return to the United States, he filed for a fiancée VISA for Ms. Maiers. Id. The VISA was approved and Ms. Maiers met with U.S. Embassy officials in February 2008. Id. Ms. Maiers arrived in the United States March 10, 2008. Id.

Over the next several weeks, Mr. Maiers introduced Ms. Maiers to his friends and family and took care of applying for a marriage license. Id. They were married April 19, 2008. CP 27. Only a few weeks passed when Mr. Maiers and Ms. Maiers began to fight. Id. Mr. Maiers was very moody and his behavior was unpredictable. Id. Ms. Maiers was afraid of Mr. Maiers. Id.

Ms. Maiers learned that Mr. Maiers is bi-polar and was on medication in an attempt to combat the illness. Id. Mr. Maiers was not

supposed to drink while taking these medications, but did so anyway. Id.

By May 2008, the environment became so intolerable, that Mendel decided to leave immediately. CP 28. A friend took Ms. Maiers to the airport and Ms. Maiers flew to New Jersey where she had an aunt and a cousin. Id. By the time Ms. Maiers landed in New Jersey, her cell phone voicemail was full of messages from Mr. Maiers. Id. Ms. Maiers spoke with Mr. Maiers and told him she was in New Jersey and they would talk later. Id.

Once Ms. Maiers arrived at her aunt's house, she and Mr. Maiers talked at length. Id. They discussed marriage counseling. Id. Mr. Maiers even spoke to Ms. Maiers' aunt in an attempt to get her to send Ms. Maiers back to Washington State. Id. Mr. Maiers called every day. Id. His statements varied between telling Mendel that he wanted her to come back to Washington and that he wanted to send her back to the Philippines. Id. One minute he would tell Ms. Maiers that he loved her, the next he would tell her he didn't care if she stayed in New Jersey. CP 28-29.

Ms. Maiers wanted very much to fix her marriage and would have returned to Washington if Mr. Maiers had agreed to take anger management and allow her to stay with friends while they worked on their marriage. CP 49. Mr. Maiers did not want Ms. Maiers to stay with friends; He wanted her to stay with him. Id.

The phone Mr. Maiers called Ms. Maiers on was a cell phone that was connected to his cell phone account. CP 29. Several weeks after Ms.

Maiers arrived in New Jersey, Mr. Maiers turned off the phone. Id. There was no further contact after that between Mr. Maiers and Ms. Maiers. Id. However, in September of 2008, Mr. Maiers' mother mailed Ms. Maiers a letter. Id. The letter acknowledged having received correspondence from Ms. Maiers and was mailed to Ms. Maiers' address in the Philippines. CP 29, 38. The letter also mentions that other common acquaintances were keeping in touch with Ms. Maiers after she left Mr. Maiers. CP 40. Mr. Maiers also had Ms. Maiers' email address. CP 29.

Ms. Maiers attempted to start a dissolution proceeding in June 2009 and learned that Mr. Maiers had filed for and been granted an annulment. CP 29, 49, 51. Ms. Maiers had no idea. CP 29. The address where Mr. Maiers served her by mail was the address where Mr. Maiers' friend Don resided. Id. Ms. Maiers and Mr. Maiers had lived there temporarily. CP 29. Mr. Maiers knew that Ms. Maiers was not saying with Don. CP 48-49.

2. Procedure

On August 20, 2008, through counsel, Mr. Maiers filed a petition for declaration concerning validity. CP 1-4. He alleged the marriage should be declared invalid:

Because a party was induced to enter into the marriage by force or duress, or by fraud involving the essentials of marriage, and because the parties have not ratified their marriage by voluntarily cohabitating after cessation of the force or duress or discovery of the fraud.

Id. On September 23, 2008, Mr. Maiers filed a motion to serve Ms. Maiers by mail. CP 5-7. His attorney, Spencer Bergstedt, filed a declaration to support the motion. Id. Mr. Bergstedt alleged that service by mail should be permitted because: 1) Ms. Maiers could not be found in this state; 2) Mr. Maiers had been unable to locate or serve Ms. Maiers because she had departed Washington to avoid service of summons; and 3) that Mr. Maiers had been unable to locate or serve Ms. Maiers because she was concealing herself to avoid service. Id.

Attached to his Motion to Serve by Mail, Mr. Maiers filed a “Declaration of Diligence.” CP 7. This document was prepared by David A. Partlow of Northwest Legal Support. Id. In relevant part, the declaration provides:

On September 10, 2008 at 7:45PM I David A. Partlow spoke to a Caucasian female resident at 20901 94th ST SE Bonney Lake, WA 98391. The female resident stated that she had ever heard of the defendant Menedel Roslyn Maiers before.

Id.

In support of his motion to serve Ms. Maiers by Mail, Mr. Bergstedt referred to the declaration of diligence filed by Mr. Partlow. Mr. Bergstedt adds that Mr. Maiers and Ms. Maiers lived together at the address listed and that Mr. Maiers had since moved away. CP 6. He states that either Ms. Maiers still lives there and is avoiding service, or moved away and is avoiding service. Id.

Additionally, Mr. Bergstedt states that the following efforts were made to locate the non-moving party for personal service: “investigation by Northwest Legal Support” and “attempting contacting Respondent’s relative’s (sic) in New Jersey. No response was received.” Id.

Mr. Bergstedt states that mail should be sent to 20901 94th St SE Bonney Lake, WA 98391 as this is the last known address of the nonmoving party.

On January 6, 2009, Mr. Maiers filed a motion and declaration for default along with an affidavit of mailing stating that the necessary documents had been mailed to Ms. Maiers. CP 10-14. This affidavit did not state the address where the documents were mailed. CP 11. The court signed the order on default as well as a declaration concerning invalidity. CP 15-16, CP 21-24.

On December 23, 2009, Ms. Maiers filed a Motion to Vacate the Decree and Order of Default as well as a declaration in support of her motion. CP 46-47, CP 25-41. The matter was heard before the Honorable James Orlando on March 19, 2010. The court denied Ms. Maier’s motion to vacate and made the following findings of fact:

1. The parties were married for approximately a month and a half before Ms. Maiers departed. CP 54.
2. There were email exchanges prior to the marriage and communication between the parties after Ms. Maiers departed Washington but no evidence that Ms. Maiers ever

provided her address. Id.

3. The service attempted by Mr. Maiers in obtaining an order to serve by mail was reasonably calculated to give Ms. Maiers notice. Id.
4. Ms. Maiers has alleged domestic violence but there are no domestic violence protection orders and the facts in her declaration do not rise to the level of domestic violence. Id.
5. Ms. Maiers is attempting to use this marriage to apply for citizenship in the United States. Id.

Ms. Maiers timely filed a notice of appeal. CP 15-16.

D. ARGUMENT.

1. THE JUDGMENT IS VOID.

A trial court's decision to grant or deny a motion to vacate a default judgment is generally reviewed for an abuse of discretion. Leen v. Demopolis, 62 Wn.App. 473, 478, 815 P.2d 269 (1991), rev. denied, 118 Wn.2d 1022, 827 P.2d 1393 (1992). However, **a court has a nondiscretionary duty to vacate a void judgment.** Leen, 62 Wn.App. at 478, 815 P.2d 269; In re Marriage of Markowski, 50 Wn.App. 633, 635, 749 P.2d 754 (1988); Mid-City Materials, Inc. v. Heater Beaters Custom Fireplaces, 36 Wn.App. 480, 486, 674 P.2d 1271 (1984) (analyzing a trial court's refusal to vacate a judgment under CR 60(b)(5) without entering into an analysis of the trial court's discretion and thereby implicitly

adopting an “error of law” test). (emphasis added).

From a policy standpoint, default judgments are not favored as they prevent controversies from being determined on the merits. Griggs v. Averbeck Realty, Inc., 92 Wn.2d 576, 581, 599 P.2d 1289 (1979).

RCW 4.28.100 (2) authorizes service by publication when the defendant cannot be found in the state, and, with the intent to avoid service of a summons, he either conceals himself within the state or leaves the state. Before service by publication can be authorized, the plaintiff must have made reasonably diligent efforts to personally serve the defendant. Charboneau Excavating, Inc. v. Turnipseed, 118 Wn.App. 358, 362, 75 P.3d 1011 (2003). A party claiming jurisdiction pursuant to RCW 4.28.100 must show that service by publication was proper. *Id.* at 362. *A conclusory recitation of the requirements of the statute is not enough to make that showing. Id.* (emphasis added). The conclusions are required, but so are the facts supporting the conclusions.” In re Marriage of Logg, 74 Wn.App 781, 785, 875 P.2d 647 (1994). Such facts must show (1) that his efforts to personally serve the defendant were reasonably diligent, *and* (2) that the defendant either (a) left the state with intent to defraud creditors or avoid service, or (b) concealed himself within the state with intent to defraud creditors or avoid service. Brenner v. Port of Bellingham, 53 Wn.App. 182, 188, 765 P.2d 1333 (1989); Bruff v. Main, 87 Wn.App.

609, 612, 943 P.2d 295; see also Kent v. Lee, 52 Wn.App. 576, 579-80, 762 P.2d 24 (1988) (must set forth facts showing a reasonably diligent search and that RCW 4.28.100 elements are satisfied)(emphasis added).

The statute does not authorize alternative service simply because the defendant cannot be found. Kent, 52 Wn.App. at 579, 762 P.2d 24.

"Due diligence" requires that the plaintiff make "honest and reasonable efforts to locate the defendant." Martin v. Meier, 111 Wn.2d 471, 482, 760 P.2d 925 (1988) (defining "due diligence" under nonresident motorist statute). While reasonable diligence does not require the plaintiff to employ all conceivable means to locate the defendant, it does require the plaintiff to follow up on any information processed that might reasonably assist in determining the defendant's whereabouts. Carson v. Northstar Dev. Co., 62 Wn.App. 310, 316, 814 P.2d 217 (1991). "Washington courts have held that where a plaintiff possesses information that might reasonably assist in determining a defendant's whereabouts, but fails to follow up on that information, the plaintiff has not made the honest and reasonable effort necessary to allow for service by publication." Brenner, 53 Wn.App. at 187. Strict compliance with the statute is required for jurisdiction to attach when a summons is served by publication. Kent, 52 Wn.App. at 579.

CR 60(b) permits relief from a final order upon showing: "(5) [t]he

judgment is void.” 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.” Markowski, 50 Wn.App. at 635-36, 749 P.2d 754; see also Mid-City Materials, 36 Wn.App. at 486. Due process requires notice reasonably calculated, under all the circumstances, to apprise interested parties of a pending action. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

In Charboneau, Mr. Charboneau sued Mr. Turnipseed for breach of contract. 118 Wn.App at 360. Mr. Charboneau attempted to have Mr. Turnipseed served at an establishment where Mr. Turnipseed was known to frequent. Id. Mr. Charboneau also checked postal records, Pierce County Voter records and Social Security records. Id. Mr. Charboneau also tried to have Mr. Turnipseed served at an address that turned out to be incorrect. Id. Mr. Charboneau did not contact Mr. Turnipseed’s wife, or his adult daughter. Id.

The record on appeal did not show that Mr. Turnipseed had left the state, thus, this Court asked the following questions: (1) Does the record show that Mr. Charboneau acted with reasonable diligence while attempting to serve Mr. Turnipseed? (2) Does the record show that Mr. Turnipseed concealed himself within the state with intent to defraud creditors or to avoid service? This Court answered “No” to both questions. Id. at 364-365.

In finding that service by publication was not warranted, this Court reasoned that Mr. Charboneau failed to exercise due diligence by failing to follow up on information in his possession that would have likely led to Mr. Turnipseed's current address. Id. at 364. This information included contacting Mr. Turnipseed's wife and owner of the establishment where Mr. Turnipseed was known to frequent, failing to review assessor records for Mr. Turnipseed's address and spending only \$36.00 on process server fees. Id.

In Bruff, the Bruffs' filed a personal injury claim against Mr. Main. 87 Wn.App. at 296. The trial court dismissed the action, ruling that the Bruffs' attempt to perfect service by publication was invalid and that the statute of limitation had therefore expired. Id. On appeal, Division I affirmed the trial court finding that the Bruffs' affidavits failed to raise an inference that Main was concealing himself with the intent to defraud creditors or avoid process. Id.

On August 26, 1992, the Bruffs were injured in a collision with a car driven by David Main. Id. The Bruffs filed a complaint for damages against Main. Id. After unsuccessfully attempting to serve Main personally, counsel for the Bruffs filed an affidavit in support of service by publication, alleging her belief that Main had either left the State of Washington or was concealing himself in Washington with the intent of avoiding service of summons. Id. Counsel averred that an investigation had failed to locate Main in the greater Seattle area and that Main's father,

who lived in Canada, did not know Main's whereabouts. Id. Referring to the affidavit provided in support of the motion for service by publication the court ruled that, "[s]uch conclusory allegations, which did not identify the steps undertaken to serve Main personally, are insufficient to support service by publication." Id. (citing Lepeska v. Farley, 67 Wn.App. 548, 554, 833 P.2d 439 (1992)).

Here, Mr. Maiers provided the court an affidavit in support of his motion for an order to serve by mail. The affidavit stated that Ms. Maiers had either departed Washington State or was concealing herself within Washington State to avoid service of summons in this matter. CP 5. However, Ms. Maiers left Washington State in May 2008, more than three months before Mr. Maiers filed this action. CP 28; (See Kennedy v. Korth, 35 Wn.App. 622, 624, 668 P.2d 614, rev. denied, 100 Wn.2d 1026 (1983) (fact that defendant moved to Germany prior to filing of lawsuit negates assertion that he left Washington to avoid service of process). Thus, her traveling to New Jersey could not have been to avoid service. Because avoidance of service is necessary prerequisite to an order permitting service by mail, and strict compliance is necessary, an order permitting service by mail was improper. The court never had personal jurisdiction over Ms. Maiers and therefore had no authority to enter an order of default and subsequent decree of invalidity.

Further, even if Mr. Maiers had established that Ms. Maiers left Washington with the intent to avoid service, he failed to engage in

reasonably diligent efforts to personally serve Ms. Maiers. The only facts submitted at the time of the application for the order indicate only that a process server went to an address where Ms. Maiers allegedly once lived and that Mr. Maiers' attorney attempted contact with Ms. Maiers' relative in New Jersey. CP 6. The relative's name was not provided, nor was the phone number. CP 6. The effort engaged in by Mr. Maiers in attempting to personally serve Ms. Maiers falls short of what is required, and is far less than the effort found insufficient in Charboneau. Going to an address where Ms. Maiers once lived and calling an unidentified person in New Jersey does not constitute reasonable diligence under the relevant case law. Here, as in Charboneau, Mr. Maiers had information that he failed to follow up on, including Ms. Maiers' email address, Ms. Maiers' phone number and knowledge that Ms. Maiers' was in New Jersey. CP 28-29. Even Mr. Maiers' mother had Ms. Maiers' address in the Philippines and her correspondence indicates that a mutual acquaintance, "Arlene" had been in touch with Ms. Maiers as well. CP 40. Mr. Maiers did not undertake any steps to locate Ms. Maiers' in New Jersey, nor did he contact Immigration to learn her current address. CP 5, 7. Mr. Maiers failed to engage in any honest and reasonable efforts to locate Ms. Maiers.

Further, as in Charboneau, there is no evidence in the record that Ms. Maiers knew of the lawsuit to support a finding that she was concealing herself to avoid service.

Nonetheless, here, the trial court refused to vacate the order on

default and resulting decree of invalidity. CP 53. The trial court found that the notice given was reasonably calculated to give Ms. Maiers' notice of the action. CP 54. Given that Ms. Maiers had left for New Jersey, it cannot be said that notice sent to the address in Renton, Washington was reasonably calculated to give Ms. Maiers notice of the action. Especially when Mr. Maiers knew Ms. Maiers was in New Jersey. Mr. Maiers' telephone call to a relative in New Jersey is evidence that he knew Ms. Maiers was not at the Renton address and therefore he should have undertaken reasonable and honest efforts to locate her in New Jersey. There is no evidence that he followed up with his mother regarding Ms. Maiers whereabouts. The fact that he could not find her is not sufficient basis under RCW 4.28.100 to serve a party by mail.

The court further found that Ms. Maiers was not a victim of domestic violence and that she entered into the marriage fraudulently. CP 54. While Ms. Maiers strongly disagrees with both findings, neither is relevant to the determination¹ before the Court. Even if the Court agrees that Ms. Maiers was not a victim of domestic violence and did enter the marriage for fraudulent purposes, personal jurisdiction over both parties is required before an order on default or subsequent decree of invalidity can

¹ Further, there are public policy implications in holding that the lack of domestic violence in the record indicates there is no such violence and that the lack of such record is a basis to refuse to vacate a void decree. Ms. Maiers had been in the country for just about two months when she fled. CP 26, 28. Her English is not very good. CP 49. It is not an unreasonable inference that she would be unable to access resources that would have established a record of domestic violence that the

be entered.

E. CONCLUSION.

Proper service is required to establish personal jurisdiction. A default judgment entered without personal jurisdiction is void. Thus, this Court has a nondiscretionary duty to vacate the void judgment entered in this case.

For the foregoing reasons, Ms. Maiers respectfully requests this Court reverse Judge Orlando's ruling and vacate the Order of Default and resulting Decree of Invalidity.

DATED: August 9, 2010

TUELL & YOUNG, P.S.
Sophia Palmer
SOPHIA M. PALMER
WSBA, No. 37799

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

8/9/10 *Doreen Walston*
Date Signature

EX-111
STATE OF WASHINGTON
11:11 AM 8/11/10
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trial court placed such importance on.