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**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III**

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

In re the Marriage of

MELODY HAYNES,

PETITIONER/RESPONDENT

V.

GORDON SECCO,

RESPONDENT/APPELLANT

**(SUPERIOR COURT MATTER NO. 14-3-00278-3
HONORABLE RAYMOND CLARY SUPERIOR COURT JUDGE)**

APPELLATE CAUSE NO. 340503

RESPONSIVE BRIEF OF MELODY HAYNES

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I. FACTS

On or about the date of February 4, 2014 Ms. Secco filed a Petition for Dissolution of Marriage in this county. CP 1-12. Attempts were made to serve Mr. Secco personally without success, even by a Spokane County Sheriff deputy. CP 24-25/33-34. On April 2nd, 2014 Ms. Haynes' attorney Paul Dec (WSBA #47090) signed a Motion and Declaration to allow service by mail on Mr. Secco. CP 13-18. His motion stated in part: Mr. Secco the "nonmoving party has concealed himself/herself to avoid service." Id. At 2.3 of this form he also said, "service has been attempted 7 times by 2 different authorizes and have been unsuccessful." Id. He then stated that efforts were made to locate Mr. Secco by the Spokane Sheriff's department on at least 5 different occasions" and that consistent with the court rule at CR 4, that service by mail is as "likely to provide actual notice as service by publication". See again CP 13-18.

With regard to the parties living situation at the time of filing the Petition for Dissolution, Ms. Haynes indicated that Mr. Secco called the residence on Augusta his primary residence. CP 35-43 & 117-120. Although Mr. Secco claims that Ms. Haynes lived at that residence as well, she also indicated, in a contradictory declaration that she in fact moved out of their home to not only protect herself from him and his threats, she indicated that she thought she could

not live there during the time period he was to be served by mail. See Affidavit of Petitioner in Response to the motion to vacate the default. CP 117-120.

In her declaration, Ms. Haynes states that not only did Mr. Secco threaten to “kill her”, that she also moved out of the family residence where he lived for many other reasons besides the service issues.¹ Id. Therefore, the notion put forth by the Appellant that she was also living there when he was served by mail was and is mainly a sort of “form over substance” argument and makes Ms. Haynes argument that that was his residence too when service was effected.

Ms. Haynes story about the abusiveness of Mr. Secco was corroborated by her daughter who stated that after Mr. Secco became abusive her mother moved out of the Augusta house to get away from him. See 9-24-15 declaration of Kaily Wilson, CP 127-129. Ms. Wilson also indicated that Mr. Secco in her experience, would never answer the door if someone knocked on it. Id.

Mr. Secco was the consistent resident, during the time of the various attempted services, including the mail service, to live at Augusta house full time. CP 117-129. Ms. Haynes also explained that she never picked up the mail at the Augusta address even

¹ Ms. Haynes had also obtained a restraining order against Mr. Secco on the date of 8/25/14 (cause no. 14-2-03334-1) therefore, she could not be around him or the restraining orders may become moot. Those particular restraints also ordered

when she lived there, instead always came home from work after 5pm and Mr. Secco would have already obtained the mail himself. CP 117-120.

Given the service problems, on or about the date of April 2nd, 2016 Ms. Haynes applied for and was granted the right to serve Mr. Gecco by mail. CP 19-20.

A hearing was held in Exparte Court to get the order to serve by mail signed. Commissioner Rachel Anderson, the assigned family law commissioner signed the order on the date of April 7, 2014. CP 19-20. On April 8th, 2014 Ms. Secco's attorney served Mr. Secco by mail. See affidavit of service by mail at his last known address on Augusta. CP 33-34/62.

Having no response from the Respondent/Appellant to the mailed Summons and Petition, on the date of July 9, 2014 Ms. Haynes' counsel filed a Motion for Default against Mr. Secco. CP 26-29. The motion for default indicated in the return of service that Mr. Secco was served at the former family residence at 8010 E. Augusta Ave, Spokane Valley, WA. Id. A default order was entered accordingly. CP 30-32.

On or about the date of October 13, 2014 Ms. Haynes obtained a new attorney, and Ms. Costello set a presentment of the final divorce decree for October 27, 2014 (CP 44-45 & 46-60). However, by October 2014 Mr. Secco was incarcerated at Geiger

Correctional on Spotted Rd in Spokane, for allegedly committing domestic violence on Ms. Haynes, and so she mailed notice of this presentment to Geiger Correctional, his new address, on October 16, 2014. CP 61-62. This notice included the date and time of the presentment and a copy of the proposed final orders in the matter. Id.

Although being served with this notice of the presentment Mr. Secco now had another chance to contest the divorce papers, however, as before, Mr. Secco made no attempt to hire counsel, send a letter to the court notifying them of his incarceration, or even place a call to the judge's assistant to note the file that he could not be there. He also made no effort to try and get a transport to the court to deal with this matter. CP 183-186 containing the Commissioner's findings at the CR 60 hearing to vacate the default.

Final Dissolution orders were entered on October 27th, 2014, providing for a distribution of property. CP 63-72. Although it is true that the distribution was in favor of Ms. Haynes, it was not outside the realm of possible decisions available to her, and was uncontested given the fact that Mr. Secco received a copy of what was going to be presented long before they were signed. CP 44-60.

Sometime after Mr. Secco got out of jail, he filed his initial CR60 motion to vacate their Decree. CP 74-116. His motion was

heard by Commissioner Anderson on the date of October 30, 2015, and was denied because there was “no compelling reason” to vacate the ruling. CP 166. Subsequently, the Respondent filed a motion for revision of yhr Commissioner’s ruling. (CP 202-205). That revision request was denied by Judge Clary. CP 205.

Almost a year later Mr. Secco filed another CR 60 motion based on alleged fraud by Ms. Haynes, but not until after filing this first appeal. CP 280-283. That motion was also denied by Judge Clary as well. CP 290. A second appeal was filed on the last Revision order and the two appeals were consolidated. CP 284-289.

Mr. Secco has filed this appeal claiming many reasons for overturning the denials of his CR 60 motions, and seems to focus on what Commissioner Anderson said in her ruling in his opening brief. Most of his arguments revolve around CR 4(d)(4) and that the court had no jurisdiction. Mr. Secco makes little argument about Judge Clary’s revision denial even though that is of greater procedural importance in this appeal, in this writer’s opinion. This then is Ms. Haynes’ response to this appeal.

II. Law & Argument

- A. Ms. Haynes could not have served Mr. Secco the initial summons and Petition, therefore the notion that she too lived at the Augusta residence as well is irrelevant to whether he made himself available to the process servers.

The case law in this state is clear, a party may not serve the

other party with any initial pleadings that require personal service of process. CR 4(c) specifically indicates that a party to an action cannot serve the non-moving party with any action, or court papers that require personal service on the other party. See also, *Crouch v. Friedman*, 51 Wash.App. 731, 754 P.2d 1299 (1988); *Columbia Vly. Credit Exch., Inc. v. Lampson*, 12 Wash.App. 952, 533 P.2d 152, review denied, 85 Wash.2d 1018 (1975).

Regardless of Mr. Secco's argument as to the validity of the mail service order, his counsel clearly knows Ms. Haynes could not serve Mr. Secco with any papers in their home. Therefore, it did not matter that at one time or another she was residing in their family home. However, to insure there was no argument that she was in the house and therefore, could have received his mail, she moved out during the time the order allowing service by mail was in effect, until he was served. His argument then that somehow her being a resident of the family home does nothing to the fact that Mr. Secco also lived there and was available to receive his mail there.

B. Spokane Superior Court had jurisdiction to enter a default against Mr. Secco given the CR 4(d)(4) declaration provided by Petitioner's attorney, and the case law interpreting this court rule's application.

One of Mr. Secco's first and most vehement arguments is that the Superior Court had no jurisdiction to enter a default judgment because CR 4(d)(4) was not properly followed. And

since CR 4(d)(4) is to be strictly followed, that there could not be any jurisdiction because Ms. Haynes somehow knew Mr. Secco could be found because she also lived at his residence. Ipso facto her attorney could not say he could not be found in the state. (See Appellant's Opening Brief)

The case of *Ashley v. Superior Court In and For Pierce County*, 83 Wn.2d 630, 521 P.2d 711 (1974) is the seminal case on service by publication or mail. As a result of *Ashley* our Supreme Court ordered a new court rule codifying that case in what is now known as CR4(d)(4). CR 4(d)(4) states,

(4)Alternative to Service by Publication. 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, the court may order that service be made by any person over 18 years of age, who is competent to be a witness, other than a party, by mailing copies of the summons and other process to the party to be served at the party's last known address or any other address determined by the court to be appropriate. Two copies shall be mailed, postage prepaid, one by ordinary first class mail and the other by a form of mail requiring a signed receipt showing when and to whom it was delivered. The envelopes must bear the return address of the sender. The summons shall contain the date it was deposited in the mail and shall require the defendant to appear and answer the complaint within 90 days from the date of mailing. Service under this subsection has the same jurisdictional effect as service by publication.

As can be seen this court rule can appear somewhat complicated but spells out what is needed for publication or mail service on a non-moving party. The court in the case of *In re Marriage of Logg*, 74 Wn.App. 781, 875 P.2d 647 (Div. 3 1994) analyzed the application of CR 4(d)(4) and indicated that a summons for publication and ipso facto, an order for mailed service, is allowed only if the following requirements are met:

1. *The defendant cannot be found in the state ...*
2. *Plaintiff, his agent, or attorney file an affidavit stating that he believes the defendant cannot be found in the state.*
3. *A copy of the summons has been mailed if the residence is known. [Obviously only necessary for publication, sic]*
4. *There is a statement in the affidavit that the defendant, being a resident of this state, has departed therefrom with intent to defraud his creditors, **or the Respondent/Defendant, to avoid the service of a summons, keeps himself concealed therein with like intent.** (Emphasis added) (Citing *Dobbins v. Beal*, 4 Wash.App. 616, 619, 483 P.2d 874, review denied, 79 Wash.2d 1007 (1971)).*

The *Logg* court also indicated that a “bare recitation of these factors is insufficient. The conclusions are required, but so are the facts supporting the conclusions. Citing *Brennan v. Hurt*, 59 Wash.App. 315, 317, 796 P.2d 786 (1990), review denied, 116 Wash.2d 1002, 803 P.2d 1310 (1991).

In the *Logg* the affidavit did not recite that the Defendant could not be found in the state; it only stated that he was on the road frequently and was difficult to locate at any given time. The

summons was not mailed to any of the three addresses the defendant provided, although counsel apparently thought one of the addresses was current, at least for purposes of mailing. There was also “no averment that Mr. Logg left the state *for purposes of avoiding service*, let alone a statement of supporting facts.” (Emphasis added) See *Lepeska v. Farley*, 67 Wash.App. 548, 554, 833 P.2d 437 (1992). Finally, there was also no allegation that the defendant *concealed himself within the state to avoid service*.

As further stated in *Logg*, publication requirements (thus mailed service requirements) are strictly construed. See *Kent v. Lee*, 52 Wash.App. 576, 579-80, 762 P.2d 24 (1988). Cf., *Jones v. Stebbins*, 122 Wash.2d 471, 481-82, 860 P.2d 1009 (1993), as also cited in *Logg*. “At least one of the eight factual scenarios enumerated in RCW 4.28.100 to which publication applies must be recited in the affidavit. *Kent*, 52 Wash.App. at 579, 762 P.2d 24.” The *Logg* court also said, “An affidavit that omits the essential statutory elements is as good as no affidavit at all.” *Kent*, at 579, 762 P.2d 24.

The eight factual scenarios cited in RCW 4.28.100 are as follows:

- (1) When the defendant is a foreign corporation, and has property within the state;
- (2) When the defendant, being a resident of this state, has departed therefrom with intent to defraud his or her creditors, or to avoid the service of a summons, or keeps himself or herself concealed therein with like intent; (Emphasis added)

- (3) When the defendant is not a resident of the state, but has property therein and the court has jurisdiction of the subject of the action;
- (4) When the action is for (a) establishment or modification of a parenting plan or residential schedule; or (b) dissolution of marriage, legal separation, or declaration of invalidity, in the cases prescribed by law;
- (5) When the action is for nonparental custody under chapter 26.10 RCW and the child is in the physical custody of the petitioner;
- (6) When the subject of the action is real or personal property in this state, and the defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly, or partly, in excluding the defendant from any interest or lien therein;
- (7) When the action is to foreclose, satisfy, or redeem from a mortgage, or to enforce a lien of any kind on real estate in the county where the action is brought, or satisfy or redeem from the same;
- (8) When the action is against any corporation, whether private or municipal, organized under the laws of the state, and the proper officers on whom to make service do not exist or cannot be found;

In this case, Ms. Haynes attorney specifically plead #(2), that Mr. Secco *keeps himself concealed to avoid service*, in her attorney Mr. Dec's declaration in support of service by mail, therefore, this requirement was met to establish jurisdiction as well as specifically following CR 4(d)(4)'s instructions.

C. The Appellant claims that the reason why the Commissioner denied his original motion to vacate, was because he was not timely in filing his motion; however, timeliness of filing was not the only basis the Commissioner enumerated in support of a denial of Mr. Secco's motion to vacate the default decree.

The Appellant states in his brief that his original motion to vacate was primarily focused on his theory that the default decree was void for lack of jurisdiction, citing CR 60(b)(5), and states that

instead the “Trial Court” (who was Commissioner Anderson according to his Clerk’s Papers designation) focused primarily on the timeliness of his motion, rather than the more important issue of “voidness”. [See p. 17 of Appellant’s Opening Brief. He then refers to CP 185 as the source of this argument.]

CP 185 is the transcript of the hearing and ruling by Commissioner Anderson. That transcript is “dicta” and is not incorporated in the Order of October 30, 2015. The actual Order states in the findings that, “After reviewing the case record to date, and the basis for the motion, the court finds that service was properly effectuated and Respondent failed to present a compelling reason as to why the matter should be vacated.” CP 166.

It is understood that the Appellate Court may look to oral findings to interpret the written findings of fact, if necessary. *State v. Hescok*, 98 Wn.App. 600, 606, 989 P.2d 1251 (1999). When we look at the transcript of Commissioner Anderson’s ruling she did not deny the CR 60 motion simply because the Appellant took a long time to file it. She made it clear that there were several reasons for denying the motion. The Commissioner’s reasons for denying the motion were as follows:

1. The motion to allow service by mail was proper. CP 183-184;

2. There were multiple attempts to serve Mr. Secco without success. CP 183;
3. Mr. Secco's incarceration was really not an excuse for not even sending the court a letter about the default and presentment; Mr. Secco did nothing. CP 184-185;
4. It was unreasonable to rely on the fact that Ms. Haynes also lived in the same house as a reason why Mr. Secco should not answer the door to allow deputies to serve him. CP 183-186;
5. That Ms. Haynes had stopped living at the joint residence with the Appellant when he was to be served by mail; therefore, he was the only one to get the mail during that time. CP 184;
6. Mr. Secco offered no explanation why he would not have received the mail service of the summons at the Augusta residence, where he lived. CP 183-186;
7. Mr. Secco never, from review of the transcript, attempted to respond properly to the summons. CP 183-186;

The Commissioner specifically found many reasons for not granting the motion. It was not just the timeliness of Mr. Secco's motion that was the problem.

- D. The Court Commissioner did consider appropriate equitable factor of Mr. Secco being incarcerated as an alleged impediment to his responding to the Petition, before making its ruling on the Appellant's CR 60 motion.

The Appellant alleges that the trial court failed to consider CR 60 factor (b)(9), his unavoidable misfortune of being incarcerated in deciding to deny his motion to vacate the default, and that this was error. However, Commissioner Anderson specifically showed that she in fact did consider his incarceration in this matter. She said:

“. . . there is proof in this court file that, as Ms. Costello indicates, not only did they provide Mr. Secco notice of presentment on final documents while he was incarcerated, but there was also notice of these [sic] are the proposed final orders that are being proffered to the Court. And Mr. Secco did not make an attempt. [Sic] there are avenues a person, even representing yourself, could put some sort of correspondence in the court file. We see it all the time that we get mail from the jail, Nothing appeared in this court file,” and the default orders were entered. CP 185.

Commissioner Anderson specifically showed she considered at least 7 different factors in this decision to deny the motion to vacate, and specifically also dealt with the fact that Mr. Secco was incarcerated. And also, dealt with the fact that Ms. Haynes lived there with him from time to time. CP 182-186. She and the Revision Judge considered each fact in this matter individually; there was not simple “denial” ruling. Each argument was considered individually and clearly, far in a way satisfying the *Calhoun v. Merritt*, 46 Wn.App 616, 731 P.2d 1094 (1986) case standard. Again, Mr. Secco’s incarceration did not in any

way hamper him from at least sending a letter to the court file asking for some leeway in avoiding the entry of the final default orders. Instead he did nothing, apparently passively avoiding anything that would help him avoid the effect of the original default; which also was in no way Ms. Haynes' fault.

E. Although Mr. Secco claimed that Ms. Haynes somehow committed fraud by allowing her attorney to state that the Appellant was "out of state" to obtain the order allowing service by mail; he fails to show how that was fraud, when all that is needed to obtain the order is to show that Mr. Secco was intentionally avoiding service, as an alternative part of a CR4(d)(4) declaration.

Again, a careful reading of CR 4(d)(4) indicates that there are two bases for obtaining an order to serve someone by mail. You can either show that they are not in the state, or that they are avoiding service. In this case, Spokane County uses a standard form for a motion for service by mail. That form asks some questions about where the respondent may be living and why mail service is appropriate. Ms. Haynes attorney did not know why Mr. Secco would not come to his door where he lived, other than that was his last known address. When the Spokane Sheriff's department were unable to serve him on several occasions, that triggered the court rule allowing service by mail as long as the affiant indicated that he was hiding from service of process. There was no fraud involved because the court rule allows the party seeking mail service to cite to either option of living outside

the state or avoiding service as a basis for this kind of service.
See *Logg*, supra.

Finally, to commit fraud the party claiming that the other party committed fraud must satisfy the traditional nine elements of fraud. See e.g. See *Beckendorf v. Beckendorf*, 76 Wash.2d 457, 462, 457 P.2d 603 (1969); *Pedersen v. Bibioff*, 64 Wash.App. 710, 723 n. 10, 828 P.2d 1113 (1992). These cases show that you just can't shout out "fraud" in your argument without analyzing whether the nine elements have been met to claim fraud.

In this case Mr. Secco raises "fraud" as a basis to overturn the default, but does not show that that occurred. Ms. Haynes said she lived at Augusta, but that because of her fear of Mr. Secco did not live there all the time, and specifically stayed away from him during the time for mail service.

Living together in a home is common in the first part of a dissolution; it is rare to find people who are prepared for divorce, let alone moving to new residences. Should Mr. Secco's argument be adopted by the courts, everyone could simply avoid being served divorce papers stating that the other spouse was there, so they really were never served. This would throw the entire service of process into chaos and jam the courts with unrealistic expectations of having to find another residence before anyone could be served. And it would also encourage

passive avoidant spouses to use the shield of a “shared residency” to constantly avoid service; a point made by Commissioner Anderson in her discussion of this factor. CP 183-185. There was no fraud here.

F. Ms. Secco should be awarded her fees and costs for having to respond to this matter, which was caused by the Respondent/Appellant’s intransigence.

Although attorney’s fees in a marital dissolution are most often based on the concept of “need and ability to pay”, case law indicates that when there is clear evidence of intransigence fees can be awarded under RCW 26.09.140 or in equity.

In the case of *In re Matter of Marriage of Greenlee*, 65 Wn.App. 703, 829 P.2d 1120 (Div. 1 1992), the court awarded fees due to the wife’s intransigence in a financial matter under their decree. In that case the husband was forced to bring the wife back to court because she failed to “refinance the home” as ordered to pay an IRS bill. Had he not filed the motion she would not have been forced to refinance the house to pay that important lien. This was a hold harmless case and the ex-husband prevailed in every respect. In addition, the parties were bound by their decree to follow it just as one would be required to follow a contract, especially that section dealing with indemnification for costs. Since Ms. Greelee failed to do what she was ordered to do as found by the court, she was ordered to refinance and pay his

fees/sanctions which were \$1,000.00.

Likewise, in this case, but for the Respondent's intransigence in failing to do anything about being served with notice, especially in jail, Ms. Haynes has now spent tremendous amounts of money on fees to defend against something he alone did that caused himself to be defaulted. It is not fair for her to have to ride along on this legal journey that came about because of his failure to properly respond. He should pay her fees for this intransigence.

III. Conclusion

The Appellant failed to respond to several attempts to be served personally at his residence and was deemed by the court to have hid out, so much so that a request to serve by mail was granted. Mr. Secco was served by mail and did not respond. Subsequently he was defaulted.

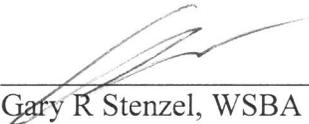
After the default order was entered the wife's new counsel did Mr. Secco a favor and served him while he was in jail with a notice of presentment of the final papers; ostensibly giving him a second chance. Mr. Secco failed to respond in any way to the presentment, frankly ignoring it. Final papers were entered in favor of Ms. Secco.

Many months later Mr. Secco filed a motion to vacate the final orders but was denied that motion. He filed a revision but

that was denied as well. He appealed that denial. He then filed another Motion to Vacate only this was based on alleged fraud. That was also denied by the revision Judge. He appealed and consolidated that appeal with this one.

Mr. Secco was properly served and failed to respond. There was no fraud. The Decree should stand, and Ms. Haynes should receive her fees for having to respond to this Appeal.

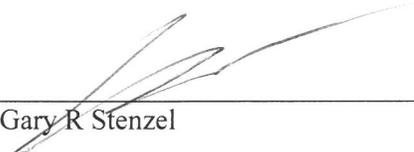
Respectfully submitted this 17th day of April 2017 by,



Gary R Stenzel, WSBA #16974

Declaration of Mailing

I, Gary R Stenzel, declare under penalty of perjury pursuant to the laws of the state of Washington that I am now and all times hereinafter mentioned was a citizen of the United States and a resident of Spokane County, State of Washington, over the age of twenty-one years; that on April 17, 2017, a copy of this Responsive Brief was delivered by mail to the office of Eric^W Schneider, Attorney for Appellant, at 421 W. Riverside #614, Spokane, WA 99201.



Gary R Stenzel