

NO. 72517-3-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

PEGGI NORTHWICK,

Respondent,

vs.

ANDREW LONG,

Appellant.

APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Laura C. Inveen, Judge

BRIEF OF APPELLANT

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I. NATURE OF THE CASE

Northwick sued Long for injuries from an automobile accident. However, she served the summons and complaint at an address where Long no longer lived. The statute of limitations expired. Long moved to dismiss for failure to establish proper substitute service. The trial court denied Long's motion, basing its decision largely on hearsay testimony from the process server. The trial court then denied Long's motion for reconsideration and request for an evidentiary hearing. This Court granted discretion review.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by denying Long's motion to dismiss where Northwick was unable to establish proper service of process. (CP 147-48)

2. The trial court erred by denying Long's motion for reconsideration and refusing to conduct an evidentiary hearing on the service of process issue. (CP 160-70)

III. ISSUES PRESENTED

1. Did the trial court make a reversible error by denying Long's motion to dismiss where substitute service was not accomplished because the summons and complaint were not served at Long's "usual abode"? (Pertaining to Assignment of Error No. 1)

2. Did the trial court improperly rely on hearsay testimony to discredit the statement of Long's father and determine that substitute service was accomplished? (Pertaining to Assignment of Error No. 1)

3. Did the trial court abuse its discretion by failing to conduct an evidentiary hearing to determine whether service was proper where the court weighed the credibility of conflicting statements? (Pertaining to Assignment of Error No. 2)

IV. STATEMENT OF THE CASE

Peggi Northwick and Andrew Long were involved in a car accident on March 20, 2011. (CP 2) On March 6, 2014, two weeks before the three-year statute of limitations expired, Northwick filed a complaint against Long in King County Superior Court alleging negligence and seeking damages for her injuries. (CP 1-6) On March 8, 2014, a process server hired by Northwick attempted to serve Long. (CP 10) The declaration of service filed on March 24, 2014, memorializes the service attempt as follows:

That on **03/08/2014** at **8:28 PM**, at the address of **9517 210th Street SE, Snohomish**, within **Snohomish** County, **WA**, the undersigned duly served the following document(s): **Summons; Complaint; Order Setting Civil Case Schedule** in the above entitled action upon **Andrew Long and Jane Doe Long**, by then and there, at the residence and usual place of abode of said person(s) personally delivering 2 true and correct copy(ies) of the above documents into the hands of and leaving same with

Hoeun Long, Father and Co-Resident to Andrew Long,
being a person of suitable age and discretion, who is a
resident therein.

(CP 10) (emphasis in original).

In fact, Andrew Long did not reside at 9517 210th Street SE (“the Snohomish address”) at the time of the service attempt. (CP 23-24) The process server simply left the summons and complaint with Long’s father (Hoeun Long) who did live there. (*Id.*) Long had not lived at the Snohomish address since some time before December 25, 2013. (*Id.*) Long worked, went to school, and resided in Texas. (*Id.*) He did not receive mail at the Snohomish address, and he had no plans to return there in the near future. (*Id.*) Long’s father did not forward the documents to him. (*Id.*)

Long filed a motion to dismiss on June 18, 2014. (CP 11-17)¹ In support of the motion, Long filed a declaration from his father. (CP 23-24) Before responding to the motion, Northwick conducted the deposition of her process server, Randy Bennett, on July 21, 2014. Mr. Bennett testified that Hoeun Long told him that Long lived at the house where Mr. Bennett attempted service. (CP 52, 61-62) Northwick filed her opposition to the motion which was supported by Mr. Bennett’s deposition transcript

¹ The original court filing was missing two pages, so Long later filed a praecipe with the entire motion. (CP 25-36)

and reports indicating that the Snohomish address was on file for Long with the Post Office and the Department of Licensing. (CP 37-115) Long filed a motion to strike the hearsay statements by Mr. Bennett and request that the court not consider them in determining the motion to dismiss. (CP 116-22) The court denied that motion, but noted that any objection should be made in the reply brief. (CP 144-45) Long filed a reply brief, which included an objection to the hearsay statements. (CP 138-43) After oral argument, the trial court denied the motion to dismiss. (RP 147-48)

The court noted in its written order that its ruling was “pursuant to the reasons set out in the court’s oral ruling.” (CP 147) The trial court based its ruling on the fact that it found Mr. Bennett to be more credible than Long’s father. (RP 26-30) “[T]o the extent that there is any inconsistency [between the deposition testimony of Bennett and the declaration of Long’s father], Mr. Bennett is to be believed.” (RP 27-28) The trial court acknowledged that it relied on Mr. Bennett’s recounting of Hoeun Long’s alleged statement in determining that the declaration of Long’s father “is of questionable veracity.” (RP 28) The court insisted that the testimony was properly used to determine credibility. (*Id.*)

Long filed a motion for reconsideration (with a supporting declaration from counsel) requesting dismissal of the lawsuit, or in the alternative, an evidentiary hearing. (CP 149-68) The court denied this

motion on September 2, 2014, without further explanation. (CP 169-70) Long filed a Notice of Discretionary Review with this Court on September 25, 2014. (CP 176-83) This Court granted discretionary review on December 29, 2014.

V. ARGUMENT

A. STANDARD OF REVIEW.

Appellate courts review de novo whether service of process was proper. *Scanlan v. Townsend*, 181 Wn.2d 838, 847, 336 P.3d 1155 (2014). This Court should conduct a de novo review of the attempted service and determine whether proper substitute service was accomplished on Long. As part of this analysis, the Court should determine whether the hearsay testimony of Mr. Bennett can properly be used to deny dismissal.

Whether or not a trial court erred in refusing to hold an evidentiary hearing is reviewed for an abuse of discretion. *Woodruff v. Spence*, 76 Wn. App. 207, 210, 883 P.2d 936 (1994). This Court should review the trial court's denial of an evidentiary hearing – despite its acknowledged reliance on credibility determinations – for an abuse of discretion.

B. THERE WAS NO VALID SERVICE OF PROCESS.

1. Substitute Service Must Take Place at Defendant's "Usual Abode."

"Basic to litigation is jurisdiction, and first to jurisdiction is service of process." *Rodriguez v. James-Jackson*, 127 Wn. App. 139, 143, 111

P.3d 271 (2005). Service must be both constitutionally adequate *and* in compliance with statutory requirements. *Woodruff v. Spence*, 88 Wn. App. 565, 571, 945 P.2d 745 (1997), *rev. denied*, 135 Wn.2d 1010 (1998). The summons and complaint must be properly served in order to invoke personal jurisdiction. *Scanlan v. Townsend*, 181 Wn.2d 838, 847, 336 P.3d 1155 (2014).

RCW 4.28.080 describes how a summons may be served on a defendant. The statute generally requires personal service of a summons on the defendant, but it also permits substitute personal service on the defendant “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.” RCW 4.28.080(15). Thus, RCW 4.28.080(15) articulates three requirements for a valid substitute service of process: (1) the summons must be left at the defendant’s “house of his or her usual abode”; (2) the summons must be left with a “person of suitable age and discretion”; and, (3) the person with whom the summons is left must be “then resident therein.” *Salts v. Estes*, 133 Wn.2d 160, 161, 943 P.2d 275 (1997) (substitute service was not effective on person who was monitoring house while defendant was on vacation).

The Supreme Court has determined that the “‘house of [defendant’s] usual abode’ in RCW 4.28.080(15) is to be liberally

construed to effectuate service and uphold jurisdiction of the court.” *Sheldon v. Fetting*, 129 Wn.2d 601, 609, 919 P.2d 1209 (1996). However, as the Supreme Court later acknowledged in *Salts v. Estes*, the *Sheldon* case marks the outer boundaries of RCW 4.28.080(15). 133 Wn.2d at 166. No Washington jurisprudence permits a wholesale disregard of the language of a statute. In fact, the *Salts* Court specifically recognized and followed the established rules of statutory construction. The Court stated:

Our duty is to effectuate the intent of the Legislature in enacting a statute. If a statute is unambiguous, as is RCW 4.28.080(15), we are obliged to apply the language as the Legislature wrote it, rather than amend it by judicial construction. *GESA Fed. Credit Union v. Mutual Life Ins. Co.*, 105 Wn.2d 248, 252, 713 P.2d 728 (1986). We must provide consistency and predictability to the law so the people of Washington may conform their behavior accordingly. The language of RCW 4.28.080(15) sets forth the standards for substituted service of process. We best accomplish the purpose of establishing predictable standards by not stretching the meaning of those standards beyond their plain boundaries.

133 Wn.2d at 170.

If a defendant does not actually reside at an address, the address is not his “usual abode.” As Tegland has explained:

The papers must be left at the defendant’s place of abode; *i.e.*, at the defendant’s place of residence. ***Delivery to a location where the defendant does not reside*** (for example, a house owned but not occupied by defendant) ***is insufficient.***

14 K. Tegland, WASHINGTON PRACTICE CIVIL PROCEDURE § 8.6, at 202 (2003) (emphasis added).

Washington courts have repeatedly dismissed cases in which a defendant no longer lived at a particular residence, even though he still had some family connection to that residence. For example, in *Gross v. Evert-Rosenberg*, 85 Wn. App. 539, 541-43, 933 P.2d 439, *rev. denied*, 133 Wn.2d 1004 (1997), the court held that substitute service was invalid when the process server left a copy of the summons and complaint at a house where the defendant no longer lived but still owned. Similarly, in *Lepeska v. Farley*, 67 Wn. App. 548, 551, 833 P.2d 437 (1992), the court held that substitute service on a son at his parents' home was not proper when the son maintained his own separate residence within the jurisdiction. In *Mid-City Materials, Inc. v. Heater Beaters Custom Fireplaces*, 36 Wn. App. 480, 483-84, 674 P.2d 1271 (1984), the court held that substitute service was not accomplished when the plaintiff attempted to serve the defendants at their son's house even though they lived elsewhere in the jurisdiction. In Washington, substitute service must be accomplished where the defendant actually resides.

2. Northwick Must Prove She Obtained Valid Substitute Service.

Northwick bears the burden of proof to show that she obtained valid service upon Long. *Scanlan*, 181 Wn.2d at 856. When service of process is challenged, the plaintiff has the initial burden of proof to establish a prima facie case of sufficient service. *Gross v. Sunding*, 139 Wn. App. 54, 60, 161 P.3d 380 (2007). While an affidavit of service of process is presumptively valid on its face, a party challenging service of process can show the service was actually improper and irregular by clear and convincing evidence.² *Woodruff*, 76 Wn. App. at 209-10. Plaintiff still carries the ultimate burden of proving that service was proper and remains responsible for any failure to comply with the requirements for valid service of process. *Scanlan*, 181 Wn.2d at 856.

3. Northwick Did Not Attempt Service at Long's Usual Abode.

There is no question in this case that Northwick did not personally serve Long. The question is whether Northwick achieved substitute service. Long did not challenge that his father was a resident at the Snohomish address or that his father was of suitable age to accept service.

² "Clear and convincing" evidence is described as being "more substantial" than a preponderance, and the fact at issue must be shown by the evidence to be "highly probable." *In re LaBelle*, 107 Wn.2d 196, 209, 728 P.2d 138 (1986).

RCW 4.28.080(15). The trial court was only tasked with determining whether the Snohomish address constituted Long's "usual abode."

Mr. Bennett's declaration of service satisfied Northwick's initial prima facie burden because it appeared valid on its face. Specifically, it alleged that the Snohomish address was Long's usual abode. However, Hoeun Long's declaration clearly established that Long did not, in fact, live with him at the time service was attempted. Because the declaration from Long's father (the actual resident at the Snohomish address) demonstrated that it was "highly probable" that Long did not reside at the Snohomish address, Long rebutted any presumption created by the declaration of service. *In re LaBelle*, 107 Wn.2d at 209. The burden shifted back to Northwick to ultimately demonstrate by a preponderance of the evidence that service was proper, and specifically that Long resided at the Snohomish address. *Scanlan*, 181 Wn.2d at 856.

The only admissible evidence cited by Northwick supporting her theory that Long lived with his father at the Snohomish address were reports (obtained after Long filed his motion to dismiss) showing, at most, that Long did not promptly update his contact information with the Post Office and State Department of Licensing after he moved in 2013. (CP 111, 113) However, these reports failed to sufficiently demonstrate that

Long was actually living at the Snohomish address when service was attempted on March 8, 2014.

Washington caselaw is clear that evidence of this nature is insufficient to establish that a particular home is defendant's abode. See *Gross v. Evert-Rosenberg*, 85 Wn. App. 539, 933 P.2d 439, *rev. denied*, 133 Wn.2d 1004 (1997); *Vukich v. Anderson*, 97 Wn. App. 684, 690, 985 P.2d 952 (1999); and *Streeter-Dybdahl v. Huynh*, 157 Wn. App. 408, 236 P.3d 986 (2010), *rev. denied*, 170 Wn.2d 1026 (2011). A plaintiff must put forth evidence that demonstrates that the defendant actually lived at the dwelling in question. As the court in *Streeter-Dybdahl* noted, "the use of a particular address for a limited purpose [such as registration with the DOL] is not a critical factor in determining a center of domestic activity." 157 Wn. App. at 414. Likewise, the *Vukich* Court recognized that receiving mail at an address, and having one's car registered at the address are not sufficient to show that a home is a center of domestic activity. 97 Wn. App. at 686, 691. And, although Mr. Bennett's statements about what he was told by Hoeun Long are inadmissible hearsay, the fact that a person at the home claims the defendant lives there does not establish substitute service either. *Gross*, 85 Wn. App. at 541. The scant evidence put forth by Northwick fell well short of meeting her ultimate burden of establishing that the Snohomish address was the center of Long's domestic

activity, and thus his usual abode (particularly in light of the declaration of Long's father indicating Long lived in Texas).

4. The Trial Court Relied on Inadmissible Hearsay.

In denying Long's motion, the trial court relied heavily on the process server's deposition testimony. (RP 26-30) The trial court noted that Mr. Bennett was more credible than Hoeun Long. (RP 27-28) The court indicated in its oral ruling that it was not relying on the hearsay testimony attributed to Hoeun Long for the truth it asserted, but rather for making credibility determinations. (RP 28) However, in making credibility determinations, the trial court necessarily had to rely on the truth of the hearsay statement. In other words, the trial court needed to accept that Hoeun Long told Mr. Bennett that his son lived at the Snohomish address in order to give more credibility to Mr. Bennett's version of the service attempt. The only way the trial court could have determined that Bennett was more credible than Hoeun Long was to accept that Hoeun Long had, in fact, said to Mr. Bennett that his son lived at the Snohomish address. This is classic hearsay.³

According to Tegland, in Washington, the "to prove the truth of the matter asserted" rule is:

³ "Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c).

sometimes phrased in terms of relevance. Thus, an out-of-court statement is hearsay if it is the content of the statement that is relevant in the case at hand. In this situation, the relevance of the statement hinges on the credibility of the out-of-court declarant (the statement is relevant only if true), thus triggering the restrictions of the hearsay rule.

5D Karl B. Tegland, WASHINGTON PRACTICE: COURTROOM HANDBOOK ON WASHINGTON EVIDENCE ER 801(a)-(c) author's cmt. (6), at 391 (2009-10 ed.). Here, Mr. Bennett's restatements of what Hoeun Long allegedly said were hearsay because it was the content of these statements that was relevant to the issue before the trial court, and the relevance rested on Hoeun Long's credibility. See *Ensley v. Mollmann*, 155 Wn. App. 744, 230 P.3d 599, rev. denied, 170 Wn.2d 1002 (2010). The trial court articulated the justification for its decision as follows:

And so when you're looking at the competing declaration or declaration of Mr. Long versus what Mr. Bennett says, I find Mr. Bennett's to be credible and that his facts are the one that there is – to the extent that there is any inconsistency, Mr. Bennett is to be believed.

(RP 27-28) (emphasis added). In fact, the only "inconsistency" between Mr. Bennett and Long's father was whether or not the father told Mr. Bennett that Long lived there.

In *Ensley*, plaintiff sued a bar alleging that it over-served a drunk patron who subsequently crashed her car into plaintiff's car. 155 Wn. App. at 747-48. The bar moved for summary judgment, and it presented

evidence that there were no obvious signs the patron was intoxicated. *Id.* at 748. Plaintiff sought to defeat the motion through a witness's testimony that the bartender told him that the patron had glassy eyes and should not be served. *Id.* at 748-49. Plaintiff argued that the statements were not to prove the matter asserted, but the court (citing to Tegland) determined that the testimony was inadmissible hearsay. *Id.* at 753-55.

Likewise in this case, the statement attributed to Hoeun Long was relevant only if true, and thus it was hearsay, even for making "credibility" determinations. The self-serving hearsay statements attributable to Hoeun Long as recounted by Mr. Bennett cannot be used for any purpose relevant to determining if the house was defendant's place of usual abode (just as the self-serving statements of the bartender in *Ensley* could not be used for purposes of demonstrating that the bar knew the patron was drunk). Without the hearsay testimony, the trial court had no other admissible evidence to determine that Hoeun Long was not credible.⁴

⁴ The trial judge also erroneously discredited the declaration of Long's father based on her own experience with kids coming home from college. (RP 15, 29) Her assumptions about and reliance upon such a scenario were improper because they were not grounded in the evidence of this case. *See In re Estate of Hayes*, ___ Wn. App. ___, 342 P.3d 1161, 1177-78 (2015) (although judges do not leave their experiences at the courtroom door, parties deserve a decision based on presented evidence and not personal experiences or preconceptions of the judge).

5. Northwick’s Evidence Fails to Establish Proper Service.

Mr. Bennett’s original declaration only satisfied Northwick’s prima facie case by providing a rebuttable presumption of service. Once Long rebutted that presumption with his father’s sworn declaration that Long did not live there, Northwick needed to provide additional evidence to demonstrate that service was actually proper to meet her burden of proof. Other than proffering the addresses on file with two government agencies, Northwick offered no evidence to refute the basic truth that Long moved to Texas in 2013 and permanently resided there at the time of the service attempt.

It is not clear why Northwick chose to depose her own process server instead of pursuing other discovery that might be able to establish that Long made his father’s house his abode, similar to the defendant in *Sheldon v. Fettig*, 129 Wn.2d at 609. Because there is no “reasonable efforts” component to substitute service, Mr. Bennett’s efforts and subjective beliefs about whether service was proper were irrelevant to the key issue of determining Long’s residence.⁵ Instead, Northwick should have focused her discovery efforts on demonstrating that the Snohomish

⁵ For example, if this case presented an issue involving service by publication or service with the Secretary of State, then whether Mr. Bennett made reasonable efforts to locate and serve defendant might be relevant to the analysis. *See* RCW 4.28.100; 4.28.180.

address actually did serve as Long's usual abode or center of his domestic activity. The evidence related to changing his address with the Post Office and Department of Licensing was potentially relevant to that inquiry, but it was insufficient as a matter of law to establish an abode. *See Vukich* and *Streeter-Dybdahl, infra*.

Northwick needed more evidence of this nature, whether from searches of public records or obtaining testimony from Long, his father, or other witnesses such as neighbors or friends. In the *Streeter-Dybdahl* case, for example, the plaintiff deposed the individual who lived at the address in question. 157 Wn. App. at 412. Discovery efforts focused on the process server are misguided once defendant has demonstrated that the service was improper. It was irrelevant what Mr. Bennett did or knew; only facts related to Long's domestic activity should have been relevant to the court's inquiry.⁶

6. Northwick Had Time to Perfect Service.

The Court also noted its concern during the oral ruling that there was nothing further that Northwick could have done to achieve or confirm service because the statute of limitations had expired. (RP 25) First,

⁶ Conceivably, a process server could testify about observations that would weigh on the issue of the defendant residing there – perhaps if he observed defendant's clothing, possessions, or mail on the premises. That is not the case here.

whether or not Northwick had time to confirm service is not relevant to whether service was achieved, and RCW 4.28.080 provides no allowance for a plaintiff to “do the best she can” to achieve service if presented with limited time. Second, Northwick created her own problem by waiting until the eleventh hour to file and serve the lawsuit. Third, Northwick actually did have ample time to confirm service or reattempt it. The lawsuit was filed on March 6, 2014, and the lone service attempt was made two days later. Pursuant to RCW 4.16.170, the statute of limitations was tolled for 90 days after filing.

Northwick had three months to send interrogatories, requests for admission, or even regular communication to defense counsel to ascertain that service was not proper. Despite knowledge that personal service was not achieved on Long and that Washington caselaw relating to substitute service can be a treacherous, Northwick took no action until Long filed his motion to dismiss. Northwick should not be rewarded for waiting until the last minute to file, failing to make proper substitute service, and then sitting back for three months when she had an opportunity to confirm service or serve by other means.

C. THE TRIAL COURT ABUSED ITS DISCRETION BY WEIGHING CREDIBILITY WITHOUT AN EVIDENTIARY HEARING.

1. Jurisdiction Is a Legal Question for the Trial Court.

CR 1 mandates that the civil rules “shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.” Further, trial courts are directed to interpret all of the civil rules in a manner “that advances the underlying purpose of the rules, which is to reach a just determination in every action.” *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 498, 933 P.2d 1036 (1997). CR 43(e), which allows the trial court to take evidence on motions in the form of affidavits or oral testimony, must also be read in this spirit. Thus, a trial court should hear oral testimony if it is necessary to reach a just determination. A trial court has discretion to accept evidence any time prior to issuing its final order on summary judgment. *Davies v. Holy Family Hospital*, 144 Wn. App. 483, 499, 183 P.3d 283 (2008).

Jurisdiction is a question of law, and because service of process is required for jurisdiction, sufficiency of service of process is a question of law. *Gross v. Sunding*, 139 Wn. App. at 66-67. Determination of valid service is reserved for the judge to determine, and it cannot be left to the jury based on an allegation that there is a factual dispute. *Id.* at 67. If a court determines there is legitimate conflict in the evidence, the court can

conduct a further evidentiary hearing. *See Woodruff*, 76 Wn. App. at 210; *In re Marriage of Ferree*, 71 Wn. App. 35, 42, n.9, 856 P.2d 706 (1993).

Indeed, where a question of jurisdiction is at issue, trial courts are specifically instructed to conduct fact-finding hearings if necessary to resolve the issue. *Woodruff*, 76 Wn. App. at 210. Not doing so can constitute an abuse of discretion. *Id.* Specifically, declarations may raise issues of witness credibility which can only be resolved by a hearing. *Id.* at 210-11. In such circumstances, a court's failure to hold an evidentiary hearing will likely result in an abuse of discretion. *Id.* at 210; *See also Autera v. Robinson*, 419 F.2d 1197, 1202 (D.C. Cir.1969).

2. The Trial Court's Failure to Conduct an Evidentiary Hearing Is Reversible Error.

In this case, if the trial court determined that it was necessary to make a credibility determination, then it needed to conduct a fact-finding hearing. It was an abuse of discretion for the trial court to simply compare Hoeun Long's written declaration to the transcribed deposition testimony of Mr. Bennett for purposes of determining credibility. Hoeun Long's declaration was understandably succinct. Not knowing that his credibility would be attacked, he kept his declaration statements directed to the relevant issue – his son did not live with him. (CP 23-24) Hoeun Long had no need to articulate his personal background or other information the

Court apparently found important in Bennett's deposition testimony. (RP 27-28) Hoeun Long could not have anticipated the manner in which his declaration would be questioned.

It was particularly unfair for the trial court to determine that Hoeun Long was not credible based on hearsay statements attributed to him by a process server looking to defend his one, insufficient attempt at service. If the trial court was not inclined to dismiss the case outright on the legal bases put forth by Long, then it needed to conduct an evidentiary hearing to provide a basis for its ultimate determination. Any such hearing should necessarily have focused on facts tending to prove or disprove that Long lived with his father at the time of attempted service (i.e., whether the Snohomish address was the center of his domestic activities at the time), and not on the subjective beliefs of the process server. The court, in acting as the fact-finder on the issue of service of process, needed to hear the testimony of the witnesses to properly weigh credibility and resolve disputed facts. *See State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992) (a trier of fact must resolve conflicting testimony, evaluate the credibility of witnesses, and generally weigh the persuasiveness of the evidence), *abrogated in part on other grounds by In re Pers. Restraint of Cross*, 180 Wn.2d 664, 327 P.3d 660 (2014). The trial court did not

adequately avail itself of the testimony needed to weigh the persuasiveness of the evidence.

3. The Oral Argument Was Not an Evidentiary Hearing.

The oral argument conducted on August 8, 2014, in no way qualified as an evidentiary hearing. The court heard only legal arguments from counsel. (RP 4-31) The court heard no live testimony and only reviewed the declaration of Hoeun Long and Mr. Bennett's deposition transcript which were provided with the briefing materials. If the trial court felt it needed to delve deeper or make credibility judgments, then a separate evidentiary hearing was needed.

4. A Different Trial Judge Should Conduct the Evidentiary Hearing.

Generally, litigants are entitled to a judge who appears to be and is impartial. *See Magana v. Hyundai Motor Am.*, 141 Wn. App. 495, 523, 170 P.3d 1165 (2007), *rev'd on other grounds*, 167 Wn.2d 570, 220 P.3d 191 (2009). In the interest of the appearance of fairness, a new superior court judge should conduct further proceedings on remand where it appears that a trial court judge will have difficulty setting aside a previously expressed opinion. *See Noordin v. Abdulla (In re Custody of R.)*, 88 Wn. App. 746, 754-55, 762-63, 947 P.2d 745 (1997) (remanding to a different judge where original judge refused continuance to obtain certified copy of foreign decree and told mother in custody case, "I don't

like what you did. You took his son with the intent of never telling him where he was. We don't like that as judges.”), *superseded by statute on other grounds, In re Marriage of Tostado*, 137 Wn. App. 136, 151 P.3d 1060 (2007); *see also In re Marriage of McCausland*, 129 Wn. App. 390, 417, 118 P.3d 944 (2005), *reversed on other grounds*, 159 Wn.2d 607, 152 P.3d 1013 (2007).

In this case, the trial judge’s impugning of Hoeun Long’s credibility, her reliance on hearsay testimony as justification, and the expression of additional extraneous comments about her own experiences with kids coming home from college indicate that she will have a difficult time setting aside those previously expressed opinions. (RP 15, 26-30) In addition, because the discovery process has barely begun, any additional burden to a new trial judge would be minimal. In fact, judicial economy may best be served by remanding to a different judge so that a future potential appeal on the same issue can be avoided. *See State v. Aguilar-Rivera*, 83 Wn. App. 199, 203, 920 P.2d 623 (1996). Under these circumstances and in the interest of the appearance of fairness, this matter should be remanded to a different trial court judge if this Court determines that an evidentiary hearing is appropriate.

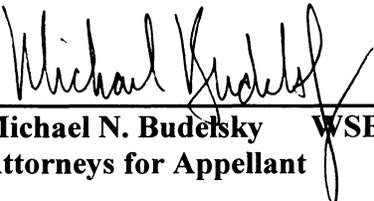
VI. CONCLUSION

Long demonstrated that he did not reside at his father's house when service was attempted. As a matter of law, Northwick was unable to meet her burden and establish that the Snohomish address was the center of Long's domestic activity at that time. The trial court disregarded the applicable case law and improperly relied on the hearsay testimony of the process server to determine he was more credible than Long's father. The court then wrongly denied Long's request for an evidentiary hearing so that credibility – which formed the basis of the court's decision – could be fairly assessed.

Long requests that this Court dismiss the lawsuit against him for improper service of process. In the alternative, Long requests that the Court remand the case for an evidentiary hearing before a different trial court judge to properly weigh any credibility issues, hear evidence related to where Long lives, and determine whether Northwick has met her burden of establishing substitute service.

Dated this 23rd day of April 2015.

REED McCLURE

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DATED this 24th day of April, 2015 at Seattle, Washington.


Katherine McBride

SIGNED AND SWORN to before me on April 24, 2015 by
Katherine McBride





Print Name: REBECCA LEWIS
Notary Public Residing at LYNNWOOD, WA
My appointment expires: 4-9-2018