

NO. 40571-7

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COURT OF APPEALS  
DIVISION II

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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

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

No. 08-3-02894-1

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**REPLY BRIEF OF APPELLANT**

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TUELL & YOUNG, P.S.

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A.	<u>APPELLANT'S ISSUES IN REPLY.</u> .....	1
1.	The trial court does not have the authority to enter an order of default without service authorized by Washington court rules and/or statute even if one spouse is domiciled in Washington. ....	1
2.	Ms. Maiers was deprived of her constitutional right to due process.....	1
3.	Efforts made by Mr. Maiers to serve Ms. Maiers were not reasonably calculated to give Ms. Maiers notice of the proceeding.....	1
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. ....	1
5.	Attorney fees are not warranted pursuant to RAP 18.1. ....	1
B.	<u>ARGUMENT.</u> .....	2
1.	PERSONAL JURISDICTION WAS REQUIRED.....	2
2.	MS. MAIERS WAS DEPRIVED OF HER CONSTITUTIONAL RIGHT TO DUE PROCESS.....	3
3.	THE TRIAL COURTS FINDINGS WERE ERRONEOUS. .	6
4.	ATTORNEY FEES ARE NOT WARRANTED.....	6
C.	<u>CONCLUSION.</u> .....	7

## Table of Authorities

### State Cases

<u>Am. Legion Post No. 32 v. City of Walla Walla</u> , 116 Wn.2d 1, 7, 802 P.2d 784 (1991).....	6
<u>Ghebreghiorghis v. Dep't of Labor &amp; Indus.</u> , 92 Wn.App. 567, 573-74, 962 P.2d 829 (1998).....	2
<u>Holland v. City of Tacoma</u> , 90 Wn.App. 533, 538, 954 P.2d 290, <u>review denied</u> , 136 Wn.2d 1015 (1998) .....	6
<u>Hudson v. Hudson</u> , 35 Wn.App. 822, 833-34, 670 P.2d 287 (1983).....	2
<u>In re Marriage of Johnston</u> , 33 Wn.App. 178, 179-80, 653 P.2d 1329 (1982).....	3
<u>In re Marriage of Logg</u> , 74 Wn.App. 781, 784, 875 P.2d 647 (1994).....	4
<u>In re Marriage of McLean</u> , 132 Wn.2d 301, 308, 937 P.2d 602 (1997)..	3
<u>In re Marriage of Peck</u> , 82 Wn.App. 809, 815-18, 920 P.2d 236 (1996)	2
<u>In the Marriage of Himes</u> , 136 Wn2d 707, 935 P.2d 1087 (1998).....	5
<u>Pascua v. Heil</u> , 126 Wn.App. 520, 528, 108 P.3d 1253 (2005).....	3

### Federal Cases

<u>Kulko v. Superior Court of Cal.</u> , 436 U.S. 84, 98 S.Ct. 1690, 56 L.Ed.2d 132 (1978).....	2
<u>Mullane v. Cent. Hanover Bank &amp; Trust Co.</u> , 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950).....	3

**Statutes**

RCW 4.28.080 (16)..... 4  
RCW 4.28.100 ..... 4, 5

**Rules**

RAP 18.1..... 6

**Treatises**

20 Kenneth W. Weber, *Washington Practice: Family & Community  
Property Law* § 30.5, at 20 (1997)..... 3

A. APPELLANT'S ISSUES IN REPLY.

1. The trial court does not have the authority to enter an order of default without service authorized by Washington court rules and/or statute even if one spouse is domiciled in Washington.

2. Ms. Maiers was deprived of her constitutional right to due process.

3. Efforts made by Mr. Maiers to serve Ms. Maiers were not reasonably calculated to give Ms. Maiers notice of the proceeding.

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. Attorney fees are not warranted pursuant to RAP 18.1.

B. ARGUMENT.

1. PERSONAL JURISDICTION WAS REQUIRED.

A proceeding dissolving marital bonds is a proceeding in rem. Where one party is domiciled in the state, the court has jurisdiction over the marriage and may dissolve it, even though the court is unable to obtain in personam jurisdiction over the nonresident spouse. Hudson v. Hudson, 35 Wn.App. 822, 833-34, 670 P.2d 287 (1983); Ghebreghiorghis v. Dep't of Labor & Indus., 92 Wn.App. 567, 573-74, 962 P.2d 829 (1998). By contrast, child support *and property dispositions* both require in personam jurisdiction over the affected person. In re Marriage of Peck, 82 Wn.App. 809, 815-18, 920 P.2d 236 (1996) (emphasis added) (citing Kulko v. Superior Court of Cal., 436 U.S. 84, 98 S.Ct. 1690, 56 L.Ed.2d 132 (1978)).

Here, Mr. Maiers concedes that both the status of the marriage *and property* were before the court. See Br. Of Appellant at 19. Further, the court entered a Decree of Invalidity that distributed property. CP 21-24. Thus, contrary to Mr. Maiers' assertion, personal jurisdiction *was required*. Because personal jurisdiction was never accomplished, the judgment is void and should be vacated by this Court.

2. MS. MAIERS WAS DEPRIVED OF HER  
CONSTITUTIONAL RIGHT TO DUE PROCESS.

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). Because substitute and constructive service are not the ideal methods of providing such notice, an order authorizing such service must not be based on conclusory statements *which the plaintiff assumes can be filled in later*; the authorizing judge must closely scrutinize the facts provided, rather than merely serving as a rubber-stamp, to ensure that substitute or constructive service is being used only as a last resort. Pascua v. Heil, 126 Wn.App. 520, 528, 108 P.3d 1253 (2005) (emphasis added).

To satisfy due process, service of process must be performed with sufficient diligence to provide notice and opportunity to be heard. 20 Kenneth W. Weber, Washington Practice: Family & Community Property Law § 30.5, at 20 (1997). The constitutional requirement is that notice must be “‘reasonably calculated, under all the circumstances’” to reach the intended person. In re Marriage of McLean, 132 Wn.2d 301, 308, 937 P.2d 602 (1997) (quoting Mullane, 339 U.S. at 314, 70 S.Ct. 652). The due process requirements of notice and opportunity to be heard apply regardless of whether the asserted jurisdiction is classified as in personam or in rem. 20 Weber, *supra*, at 20; In re Marriage of Johnston, 33 Wn.App. 178, 179-80, 653 P.2d 1329 (1982). Additionally, notice must be given in

the manner prescribed by Washington's court rules and statutes. In re Marriage of Logg, 74 Wn.App. 781, 784, 875 P.2d 647 (1994).

Mr. Maiers contends that service was accomplished pursuant to RCW 4.28.080 (16). Br. Of Appellant at 21. RCW 4.28.100 (16) provides:

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). There is no evidence in the record that RCW 4.28.080 (16) was the basis for service and there is no proof that *in addition* to mailing the petition and summons that a copy was left at Ms. Maiers "usual mailing address." See CP 5-7. If this is the basis for service and notice to Ms. Maiers, then the statute was not complied with and the order should be vacated.

If one reviews the the motion and affidavit in support of the motion to serve by mail, it is clear Mr. Maiers was seeking permission to *publish* notice, but tells the court that serving Ms. Maiers by mail at her last known address is just as likely to provide her notice as publishing notice.

CP 5-7. The motion provided to the court relies on the statutory factors of RCW 4.28.100, not RCW 4.28.080. Thus, the case law interpreting RCW 4.28.080 appropriately applies to the facts before the Court.

In In the Marriage of Himes, 136 Wn2d 707, 935 P.2d 1087 (1998), the husband filed a “do it yourself” form affidavit of service for summons by publication. Id. at 711. His affidavit stated that he could not locate his wife. Id. The husband subsequently remarried, then died. Id. at 718. It was later revealed through affidavits that Ms. Himes had resided in the same location for over twenty years, had contact with the husband’s sister and with their mutual children. Id. at 715. On appeal, Ms. Himes argued that the dissolution was void due to denial of her constitutionally protected right to due process when she was not provided notice of the dissolution proceeding. Id. at 730. Mr. Himes new wife argued that the decree was voidable, not void and that the court had *in rem* jurisdiction to grant the dissolution based on proper service by publication. Id. at 731.

Our Supreme Court reasoned that because the affidavit before them was false, it did not comply with RCW 4.28.100 and therefore notice was constitutionally defective. Here, Mr. Maiers alleged that Ms. Maiers had departed Washington to avoid service and/or concealed herself in Washington to avoid service. This information was false because Mr. Maiers and his counsel knew Ms. Maiers was in New Jersey as evidenced

by the affidavit in support of his motion to publish provided to the court. CP 5-7. Further, Mr. Maiers cannot cure a defective affidavit after the fact by adding additional facts, as the statute is to be strictly construed. Accordingly, the notice provided based on a defective affidavit could not have been reasonably calculated to give Ms. Maiers notice of the proceedings depriving her of her constitutional right to due process.

3. THE TRIAL COURTS FINDINGS WERE ERRONEOUS.

The trial court's findings regarding immigration status and domestic violence are irrelevant under the standards presented above and are issues for trial on the underlying action. The court improperly relied on these facts to reach the conclusion that Mr. Maiers notice was reasonably calculated to apprise Ms. Maiers of the action.

4. ATTORNEY FEES ARE NOT WARRANTED.

Mr. Maiers has requested attorney fees pursuant to RAP 18.1, but failed to provide any argument regarding the basis for awarding fees. In the absence of argument and citation to authority, an issue raised on appeal will not be considered Am. Legion Post No. 32 v. City of Walla Walla, 116 Wn.2d 1, 7, 802 P.2d 784 (1991). Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration. Holland v. City of Tacoma, 90 Wn.App. 533, 538, 954 P.2d 290, review denied, 136 Wn.2d 1015 (1998). Because Mr. Maiers failed to provide

anything other than passing treatment to this issue, the Court should deny his request for attorney fees.

C. CONCLUSION.

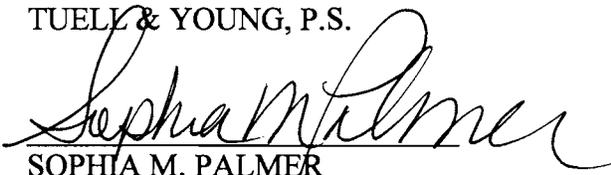
Personal jurisdiction was required. Proper service is required to establish personal jurisdiction. A default judgment entered without personal jurisdiction is void. Thus, this Court has a nondiscretionary duty to vacate the void judgment entered in this case.

Further, Ms. Maiers was deprived of her constitutional right to due process when Mr. Maiers provided a defective affidavit in support of his motion to serve by mail.

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.

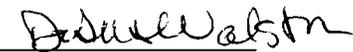
DATED: December 22, 2010

TUELL & YOUNG, P.S.

  
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.

12/22/10   
Date Signature

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