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DIVISION II

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STATE OF WASHINGTON
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Case Number 40571-7-II

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

MENEDEL R. MAIERS, Appellant

vs.

SHANE R. MAIERS, Respondent

BRIEF OF RESPONDENT

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COURT RULES

RAP 18.1

I. ASSIGNMENTS OF ERROR

Assignment of Error No. 1

The trial court erred on March 19, 2010 by entering an order denying a motion to vacate the judgment of January 6, 2009, to wit, Findings of Fact and Decree of Invalidity of Marriage.

Issues Pertaining to Assignment of Error No 1

Whether the trial court abused its discretion in denying the motion to vacate the Findings of Fact and Decree of Invalidity of Marriage

Whether the trial court erred in finding that Ms. Maiers failed to provide her address to Mr. Maiers and that she left the state before the lawsuit was filed.

Whether the trial court erred in vacating the Decree of Invalidity by finding that Mr. Maiers efforts to give notice were reasonable, despite the fact that Mr, Maiers failed to contact Immigration, Ms. Maiers aunt in New Jersey, or send an email to her requesting her address.

Whether the trial court erred in vacating the Decree of Invalidity based on a lack of personal jurisdiction over Ms. Maiers. Further whether the court lacked jurisdiction over Ms. Maiers because the order to serve by mail was improper.

Whether the trial court's failure to make findings on all ultimate facts and material issues requires reversal.

Assignment of Error No. 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.

Issue Pertaining to Assignment of Error No 2

Whether the trial court abused its discretion in denying the motion to vacate the Findings of Fact and Decree of Invalidity of Marriage

Whether the trial court erred in finding that Ms. Maiers failed to provide her address to Mr. Maiers and that she left the state before the lawsuit was filed.

Whether the trial court erred in vacating the Decree of Invalidity by finding that Mr. Maiers efforts to give notice were reasonable, despite the fact that Mr, Maiers failed to contact Immigration, Ms. Maiers aunt in New Jersey, or send an email to her requesting her address.

Whether the trial court erred in vacating the Decree of Invalidity based on a lack of personal jurisdiction over Ms. Maiers. Further whether the court lacked jurisdiction over Ms. Maiers because the order to serve by mail was improper.

Whether the trial court's failure to make findings on all ultimate facts and material issues requires reversal.

Assignment of Error No. 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.

Issues Pertaining to Assignment of Error No 3

Whether the trial court abused its discretion in denying the motion to vacate the Findings of Fact and Decree of Invalidity of Marriage

Whether the trial court erred in finding that Ms. Maiers failed to provide her address to Mr. Maiers and that she left the state before the lawsuit was filed.

Whether the trial court erred in vacating the Decree of Invalidity by finding that Mr. Maiers efforts to give notice were reasonable, despite the fact that Mr, Maiers failed to contact Immigration, Ms. Maiers aunt in New Jersey, or send an email to her requesting her address.

Whether the trial court erred in vacating the Decree of Invalidity based on a lack of personal jurisdiction over Ms. Maiers. Further whether the court lacked jurisdiction over Ms. Maiers because the order to serve by mail was improper.

Whether the trial court's failure to make findings on all ultimate facts and material issues requires reversal.

Assignment of Error No. 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.

Issues Pertaining to Assignment of Error No. 4

Whether the trial court abused its discretion in denying the motion to vacate the Findings of Fact and Decree of Invalidity of Marriage

Whether the trial court erred in conducting an analysis of domestic violence when applying RCW 4.28.100 on the issue of service by publication.

Whether the trial court's failure to make findings on all ultimate facts and material issues requires reversal.

Assignment of Error No. 5

The trial court erred when it found Ms. Maiers is attempting to use this marriage to apply for citizenship in the United States.

Issues Pertaining to Assignment of Error No. 5

Whether the trial court erred in conducting an analysis of Ms. Maiers intent in entering into the marriage when applying RCW 4.28.100 on the issue of service by publication.

II. INTRODUCTION

This case arises out of the Appellant's December 23, 2009 Motion to Vacate the Decree of Invalidity of Marriage of Mr. Shane Maiers and Mrs. Menedel Maiers. CP46.

The Respondent herein, Shane Maiers, petitioned for a finding of invalidity of Marriage from Ms. Menedel Maiers on August 20, 2008 in Pierce County Superior Court under Case Number 08-3-02894-1. CP1. The parties married on April 19, 2008, and separated a few weeks later when Mrs. Maiers apparently left the State of Washington. CP2. Ms. Maiers, although talking to Mr. Maiers periodically did not divulge where she was living. CP57,79-80. Other persons related to her also did not reveal where she was living. CP80. Mr. Maiers filed a motion to serve Mrs. Maiers by mail on September 23, 2008, which was granted on September 24, 2008. CP8. He obtained an order on default on January 6, 2009. CP15.

Mrs. Maiers filed a petition for Dissolution in New York on June 19, 2009. CP29. The documents were mailed to Mr. Maiers by her attorney. CP51.

In a letter dated July 28, 2009 Mr. Maiers attorney informed Mrs. Maiers attorney that the Decree of Invalidity had been entered and the parties were not married. CP51. Mrs. Maiers hired a local attorney who filed the Motion to Vacate the Decree of Invalidity. CP49. That Motion was denied by The Honorable Judge Orlando on March 19, 2010. CP53. Notice of appeal was filed on April, 16, 2010. CP56. The parties have no children at issue and Mr. Maiers has taken all of the debt associated with the marriage except Mrs. Maiers Bank of America card. CP21-24. There are no other issues at hand, except the status of the "marriage". CP46. It was disputed by the parties below whether there should be a declaration of invalidity or a decree of dissolution. CP46. Mrs. Maiers is not a citizen of the United States and Mr. Maiers was her sponsor, until July 3, 2008 when Mr. Maiers withdrew his immigration petition. CP79.

The continuing issue has been whether the Appellant was served properly and whether the court erred in denying the Motion to Vacate. The underlying issue is as to the status of the parties' "marriage".

III. STATEMENT OF THE CASE

Appellant is the respondent in the dissolution action under Pierce County Superior Court Case Number 08-3-02894-1. CP1. Ms. Maiers is the

Respondent in this Appeal and the Petitioner in the Pierce County action.
CP55.

Mr. Shane Maiers met Mrs. Mendel Maiers on a Filipino dating site in late December 2006 or early January of 2007. CP77. According to his declaration, it seemed like a dream come true, she was passionate, considerate, and hardworking and they had a lot in common. CP77. After brief discussions on the internet the two began to communicate via telephone. CP 78.

On March 1, 2007, Mr. Maiers flew to the Philippines to meet Mendel in person. CP78 He asked her to marry him and she said yes. CP77. Mr. Maiers came back to Seattle on March 6th 2007 and began the process of applying for Mendel's fiancée visa. Mr. Maiers had to borrow the money for Mendel's visa and airline ticket CP78.

Mendel arrived on March 10, 2008. CP78. Just a few days after she arrived, it began to snow. Id. Mendel had never seen snow before and she was completely amazed. Id. She would open the door and stare at the snow outside. Id. Mr. Maiers reminded her that with the door open, it would increase the heating bill. Id. She seemed to not understand that when she left the door and windows open in allowed heat to escape and created an increased heating bill. Id. After several attempts telling her Mr. Maiers

indicates he became frustrated and snapped at her about keeping the door and windows open. Id. At no time did he ever shut off the heat to the home. Id.

As time went on, Mr. Maiers began to have suspicions about Mendel's true motive to marry him. CP78. On May 26, 2008 they had an argument after he discovered that Mendel had been planning to move to Seattle. Id. She denied that she was making the move, but because she had lied about other things he did not believe her. Id. They went to sleep in separate rooms that night. Id. When Mr. Maiers awoke the next morning, Mendel was gone with her belongings. Id.

Mr. Maiers tried to call her and her phone was either off or she was simply refusing to answer his calls. CP79. It immediately occurred to Mr. Maiers that he had just mailed in her final immigration paperwork 5 to 7 days earlier. Id. He had no idea where Mendel was and he could not reach her by phone. Id.

On May 27, 2008 Mr. Maiers contacted the United States Citizenship and Immigration Service to get information. CP79. He was informed that what had happened to him was a textbook case of marriage fraud and that it had happened to thousands of men across the country with other women. Id. Mr. Maiers gave the UCSIS office all of Mendel's information and withdrew

his affidavit of support for her. Id.

He went to the bank to put a stop payment on a cashier's check that he used to pay for Mendel's green card. CP79. Unfortunately, the USCIS withdrew the funds from his account anyway. Id. Later that same day, Mendel called Mr. Maiers and told him she was at Sea-tac Airport on her way to New Jersey and she did not know when she would be back. Id. Mr. Maiers believed that she had planned the whole marriage as a way to get into the US legally. Id. After he went to bed on the night of the argument, Mendel had apparently contacted two friends to help her pack her things and leave the home. CP79. As the days went by Mr. Maiers continued to try to locate Mendel's address by calling her repeatedly. Id. Mendel kept telling him that she would give him her address later. Mendel never gave him any address where she may be residing. Id. Mr. Maiers did not know if she was in New Jersey or if she was still in the Seattle Area. Id.

About the first week of July, Mendel told Mr. Maiers that she would be moving back and would be living with Don and Jennifer Herman. CP80.

On June 25, 2008 Mr. Maiers met with Spencer Bergstedt who assisted him in obtaining the decree of invalidity. CP 80. Mr. Maiers called Mendel and told her that he wanted a divorce and gave her Mr. Bergstedts telephone number. Id.

Mr. Maiers did not have a physical address for Mendel and she refused to tell him where she was residing. CP 80. She had lived with the Herman's briefly before and she told Mr. Maiers that she was moving back there. Id. This was the last known address for Mendel and the divorce documents were sent there. Id. In addition, Mendel had frequent contact with Jennifer Herman, the Herman's daughter, and knew very well the documents had arrived.

Mendel is required by US Immigration law to report her new address with the USCIS within 10 days of her move. CP 80,82. She did not update her address because she was concealing her whereabouts from me and the USCIS. CP80. They did not have information on where to serve her. Please see instructions from USCIS Website ad. CP82.. Mr. Maiers concluded that Mendel was trying to do was stay in the US by claiming she was a victim of domestic violence and that she did not know anything about the divorce. CP80. Generally, when a couple separates so soon after the immigrant arriving in the US, the immigrant will lose her permanent residence status. Id. However, if the immigrant can make a claim that she was a victim of domestic violence, she can petition the USCIS to stay in the Country indefinitely. CP85.

"The Violence Against Women Act (VAWA) was passed in 1994 (VAWA II in 2000) allowing abused immigrant women and children to seek Legal

Permanent Residency/LPR ("Green Card" status), independently of their abusers' support (petition). [Note: Married men also can qualify to file under VAWA.]

The married spouse of a U.S. Citizen and LPR ("green card" holder) can petition for the I-485 Adjustment of Status by establishing "extreme cruelty" with documents such as police reports, medical reports, and documents from counselors and social service specialists. Emphasis is placed on documenting and explaining how the abuser's conduct impacted on the quality of life of the married spouse or her/his ability to function. Therefore, it is important to detail not only what the abuser did, but how the spouse felt as a result of the abuser's actions and behavior.

The applicant is also no longer required to establish "extreme hardship," and can apply from outside the U.S. if she can demonstrate that she/he was the victim of domestic violence in the United States."

Mendel entered into the marriage with Mr. Maiers fraudulently, with the goal of remaining in the US legally. She left their home just 5 to 7 days after the final paperwork had been sent in to process her green card. CP79. She deliberately withheld her address so Mr. Maiers could not serve her with divorce documents. CP57,79,81. Mr. Maiers obtained a decree invalidating the marriage, which Menedel now seeks to vacate and have changed into a divorce, all the while falsely claiming that she is a victim of domestic violence. CP57. Mendel was never a victim of domestic violence. CP57.

Procedure –

The Respondent herein, Shane Maiers, petitioned for a finding of invalidity of Marriage from Ms. Menedel Maiers on August 20, 2008 in Pierce County Superior Court under Case Number 08-3-02894-1. CP2. On September 23, 2009 Mr. Maiers filed a motion to serve Mrs. Maiers by

mail. CP5. Mr. Bergstedt, Mr. Maiers attorney, filed a declaration in support of the motion. Id. Attached to that motion was a declaration of diligence signed by David Andrew Partlow, who attempted to serve Menedel Maiers on August 7, 2008 at 20901 94th St. SE, Boney Lake, WA 98391. CP7. This was the last known address of Mrs. Menedel Maiers. CP6,79-80. It was unclear at the time, based on her own comments whether she was in New Jersey, the Philippines, or returning to Washington. Cp79-80. During the first week of July Mrs. Maiers had previously resided at that address and expressed an intent to return there. CP79. She was in frequent contact with the Herman family who lived there. CP80. The motion to allow service by mail was granted by Commissioner Mark Gelman on September 24, 2008. CP8. Mrs. Maiers was served by mail on September 29, 2008, effective three days later, on the 2nd day of October 2008. CP15.

On January 6, 2009 Mr. Maiers filed a motion for default including an Affidavit of Mailing. CP10. The Affidavit itself did not state the address mailed to, but the attached copy of the envelope and the certified copy "return receipt requested" displayed the address 20901 94th St. SE Bonney Lake, WA 98391. CP8. The court granted the Order on Default on January 6, 2009. CP15.

Mrs. Maiers filed an Action for Dissolution in New York on June 19, 2009. CP29. The documents were mailed to Mr. Maiers by her attorney. CP51. In a letter dated July 28, 2009 Mr. Maiers attorney informed Mrs. Maiers attorney that the Decree of Invalidity had been entered and the parties were not married. CP51.

Mrs. Maiers hired a local attorney who filed the Motion to Vacate the Decree of Invalidity on December 23, 2009. CP69. There were several delays of the Show Cause hearing for administrative reasons. CP69-72. The parties filed declarations and legal memorandum in support of the motion, a portion of which are designated in the clerk's papers. CP60,73. Mr. Maiers declaration of March 15, 2010 is attached as an exhibit for the court's convenience. CP77. The Motion was ultimately denied by The Honorable Judge Orlando on March 19, 2010. CP53. The court made the following findings:

- (1) The parties were married for approximately a month and a half before Ms. Maiers departed. Id.
- (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.

Notice of appeal was filed on April, 16, 2010. CP55.

IV. ARGUMENT

1. THE ORDER DENYING THE MOTION TO VACATE THE DECREE IS VALID. THERE IS NO REQUIREMENT FOR PERSONAL JURISDICTION IN A DISSOLUTION PROCEEDING.

A decision to grant or deny a motion to vacate a default judgment is within the sound discretion of the trial court. White v. Holm, 73 Wn2d. 348, 351, 438 P.2d 581 (1968) The decision will not be disturbed on appeal unless it is manifestly unreasonable, based on untenable grounds, or based on untenable reasons. Cordero v. Panganiban, 126 Wash.App 1047, (2005). (Court denies Motion to Vacate Decree of Invalidity of Marriage obtained by Default)

Appellant argues that the court has a nondiscretionary duty to vacate void judgments. Leen v. Demopolis, 62 Wn.App. 478, 815 P.2d 269 (1991), rev. denied, 118 Wn.2d 1022, 827 P.2d 1393 (1992); In re Marriage of Markowski, 50 Wn.App. 633, 635, 749 P.2d. 754 (1988). However, Appellant fails to establish that the judgment is void for lack of personal jurisdiction.

In order for a court to have jurisdiction to terminate marital status, the state must have a sufficient nexus with the marriage. Williams v. North Carolina, 317 U.S. 287 (1942); In Re Marriage of Ways, 85 Wn2d. 693, 538 P.2d 1225 (1975). Domicile provides the required nexus. Mr. and Mrs. Maiers were married and resided in Washington during their relationship. About a month and a half after their marriage, Mrs. Maiers departed. Mrs. Maiers now seeks to collaterally attack based on lack of personal jurisdiction. It is important to note that the parties had no children in common. The only issues to be determined were property issues and the status of the marriage.

In personam jurisdiction over both spouses is not required in a divorce action. Williams v. North Carolina, 317 U.S. 287 (1942). If the respondent has received notice and the opportunity to be

heard, the decree is entitled to full faith and credit, so long as one party is domiciled in the decree state. *Id.* It is unclear where Mrs. Maiers was claiming she was domiciled because according to the declaration she filed, she indicated on one occasion that she was returning to Washington, on another occasion that she lived in New Jersey somewhere but would not provide the address to Mr. Maiers, and finally she intimated that she might be residing in the Philippines by virtue of correspondence with Mr. Maier's mother. CP 28,79, and 38-40. A fact Judge Orlando made particular note of in the transcript. CP57. Regardless of where Mrs. Maiers may have been domiciled, Mr. Maiers was a resident of Washington, which is sufficient under the statute to constitute jurisdiction.

2. THE APPELLANT HAD NOTICE AND AN OPPORTUNITY TO BE HEARD VIA SERVICE BY MAIL. THE APPELLANT CONCEALED HERSELF FROM SERVICE OF PROCESS.

The next question then becomes whether there was sufficient notice based on the Order allowing service by mail. It is undisputed that Ms. Maiers did not appear in the action either formally or informally prior to the Order on Default. CP15. It is also undisputed that Mr. Maiers obtained an order allowing service by mail. CP8. The Affidavit of Mailing indicates that the

documents were mailed to 20901 94th St. SE Bonney Lake, WA 98391 on September 29, 2008. CP9.

There is much discussion in Appellant's brief of RCW 4.28.100(2) which deals with service by publication. Such is not the case at bar. Mr. Maiers served Mrs. Maiers by mail, which is dealt with under RCW 4.28.080 (15) and (16).

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

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

(16) In lieu of service under subsection (15) of this section, where the person cannot with reasonable diligence be served as described, the summons may be served as provided in this subsection, and shall be deemed complete on the tenth day after the required mailing: By leaving a copy at his or her usual mailing address with a person of suitable age and discretion who is a resident, proprietor, or agent thereof, and by thereafter mailing a copy by first-class mail, postage prepaid, to the person to be served at his or her usual mailing address. For the purposes of this section, "usual mailing address" shall not include a United States postal service post office box or the person's place of employment.
RCW 4.28.080.

As found by the Honorable Judge Orland, Mr. and Mrs. Maiers had email communication after Ms. Maier's departure from Washington. CP 57. Further, there was no evidence that Mrs.

Maiers disclosed her mailing address. Id. Mr. Maiers declares that he asked her and her aunt to give him the address, but they would not. CP81. She did indicate that she was planning on returning to Washington to live with the Herman's. CP79-80. She also argued at the hearing below that he should have known that she was reachable at an address in the Philippines because his mother sent her a card there. CP38-40. Mr. Maiers filed a Motion to allow service by mail that indicated the last known address as 20901 94th St. SE Bonney Lake, WA 98391, the same address where Ms. Maiers said she would be living with the Herman's and at which she had resided in the past. CP5. Mr. Maiers also knew that she was in continual contact with the Herman's and declares that this was the most likely place for her to get notice. CP80. The court granted the order to serve by mail at that address. CP8.

"But a Judgement may be attacked if a party has not been provided with proper notice and an opportunity to be heard." In re Marriage of McLean, 132 Wn.2d 301, 305, 937 P.2d 602 (1997). RCW 4.28.100(2) authorizes service by publication "{w}hen the defendant, being a resident of this state, has departed therefrom with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with like intent{.}" Although RCW 4.28.100 does not mention mail service, it applies

to service by mail through CR 4(d)(4), which expressly requires that the defendant be given 90 days to respond. Accordingly, RCW 4.28.100 and CR 4 control the service of process in this case. However, this is not a case where less than 90 days elapsed between the date of filing and the default. In fact there were almost five months between the date of filing, August 8, 2008 and the date of the default, January 6, 2009.

Appellant further argues that there is no evidence in the record to indicate that (1) Ms. Maiers either (a) left the state with intent to defraud creditors or avoid service, or (b) to conceal herself within the state with the intent to defraud creditors or avoid service.

3. RESPONDENTS ACTIONS WERE REASONBLY CALCULATED TO GIVE APPELLANT NOTICE OF THE PROCEEDINGS. APPELLANT HAD NOTICE OF THE PROCEEDINGS BUT CHOSE NOT TO FOLLOW UP UNTIL HER MOTION TO VACATE THE DEFAULT.

Judge Orland made specific findings that (1) the service attempted by Mr. Maiers in obtaining an order to serve by mail was reasonably calculated to give Ms. Maier's notice, (2) there is no evidence that Ms. Maiers ever provided her address. CP 57.

There is evidence that she gave several stories about where she was, including arguing at the hearing below that Mr. Maiers should have served her in the Philippines because his mother had her relatives address. CP38-40. Had he done that, they would still be

arguing improper service because based on her own declarations she never moved back there. CP 49. Mrs. Maiers was served in accordance with RCW 4.28.080 and personal service was thereby affected.

Appellant also implies that Mr. Maiers did not conduct due diligence in trying to locate Ms. Maiers because he did not contact INS, or pursue greater efforts to find her in New Jersey, or the Philippines. First, Mr. Maiers tells the court in his declaration that he spoke with someone at ICE who told him they did not have an address for her. CP80. Second, he contacted two people in New Jersey, including the Appellant herself, who declined to give her location. Finally, the relative's address in the Philippines from which Mrs. Maier's received the birthday card was admittedly not the address where Appellant was residing. CP48. More importantly Mr. Maiers tells the court the in a phone conversation with Mrs. Maiers he told her he wanted a divorce and gave her the number of his attorney, Spencer Bergstedt. CP80. Due Diligence was accomplished. Personal service was accomplished. Judge Orland made an appropriate ruling when declining to set aside the Default Judgment. There was no abuse of discretion and the ruling should stand.

4. THE FINDINGS ON DOMESTIC VIOLENCE WERE APPROPRIATE CONSIDERATIONS FOR THE TRIAL COURT.

Judge Orlando made a finding that Ms. Maiers has alleged domestic violence but there is no domestic violence protection orders and the facts in her declaration to not rise to the level of domestic violence. CP57. Further, Ms. Maiers is attempting to use this marriage to apply for citizenship in the United States. Id. The findings were appropriate under the circumstances because Ms. Maiers originally brought her motion to vacate based on CR60(b) and CR 55(c). These rules require good cause shown. Mr. Maiers argued that Ms. Maiers failed to come to the court with good cause. Judge Orlando's findings affirm Mr. Maiers position. There is no error.

B. The Appellant Should be Awarded Attorney Fees Pursuant to RAP 18.1.

V. CONCLUSION

The Respondent requests the court find that personal service was affected via an Order allowing Service by Mail. He further requests the court affirm The Honorable Judge Orlando's findings and allow the Order declining to Vacate the Decree of Invalidity to stand. He further requests attorney's fees as the court seems just.

