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NO. 63136-5-I

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

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DANIEL KROLOW,

Appellant,

v.

LILY KDEP and "JOHN DOE" KDEP, wife and husband, and the marital  
community comprised thereof.

Respondents.

FILED  
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JULIA M. HARRIS

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**BRIEF OF RESPONDENTS**

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**STATUTES**

RCW 4.28.080(15) .....	1, 4, 5, 6, 7, 8, 9, 10, 11
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**A. RESPONSE TO ASSIGNMENTS OF ERROR.**

1. The trial court appropriately granted Respondents Lily and “John Doe”<sup>1</sup> Kdep’s (“the Kdeps”) motion for summary judgment for insufficient service of process based on an inadequate attempt at substitute service upon the Kdeps’ non-resident niece babysitter.

2. The trial court appropriately denied Appellant Daniel Krolow’s (“Krolow”) motion for reconsideration of the ruling on summary judgment dismissing Krolow’s lawsuit due to insufficient service of process.

***Response to Issue Pertaining to Assignment of Error***

Krolow overstates the issue presented on appeal by asking this Court to decide whether *Wichert v. Cardwell* has been overruled by *Salts v. Estes*. This case is clearly distinguishable from *Wichert*, in which the defendants’ adult daughter had actually been living in the home as sole occupant, even if only for a brief period, and as such was found to be qualified to accept substituted service under RCW 4.28.080(15). Rather, the issue on appeal is whether an adult babysitter temporarily at the defendants’ home is qualified to accept service by virtue of the existence of a secondary familial relationship. The trial court correctly applied existing law to find that the adult niece babysitter was not a “resident” of

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<sup>1</sup> Mr. Kdep’s actual first name is “Kevin.”

the defendants' home within the meaning of RCW 4.28.080(15) when substitute service was attempted upon her.

**B. COUNTERSTATEMENT OF THE CASE.**

The Kdeps submit the following supplement to Krolow's Statement of the Case.

Krolow acknowledges that service of process was attempted when a professional process server, Rich Marlow, left the summons and complaint with the Kdeps' 30 year old adult niece Chumno Kdep who was present at the Kdep residence to babysit. Although Krolow states that Mr. Marlow followed his "standard professional procedure" in ensuring that Chumno Kdep was a resident there, the procedures followed by Mr. Marlow are not described, other than the statement that Chumno Kdep "claimed to reside at the location with Lily Kdep." *Id.*, p.3 ln. 6-8. There is *no* information in the record suggesting that Mr. Marlow asked to see Chumno Kdep's driver's license, other personal identification, or took *any* steps to confirm her place of residence at the time of service.

Chumno Kdep's declaration explains that she is the 30 year old niece of Kevin Kdep and was present at the Kdep home in Federal Way to babysit the Kdeps' child when service of process was attempted. Chumno Kdep states that she did not claim to be a resident or state that she was living at the house. Rather, Chumno Kdep lived in Tacoma at the time.

Chumno Kdep took the papers from the process server and left them on a table. She did not personally deliver any papers to Kevin or Lily Kdep or inform the Kdeps that legal papers had been left at the house. She did not spend the night, but rather returned to her own home later that day. She later told Lily Kdep where the legal papers came from after Lily called her on the phone to ask her about it. CP 13-14

Lily Kdep's declaration states that on the day service was attempted, Chumno Kdep was present at the Kdep residence for a portion of that day only to babysit and that Chumno maintained her own home in Tacoma. Lily found the summons and complaint on a table after Chumno left the residence. CP 15-16.

In spite of the conflicting accounts by Mr. Marlow and Chumno Kdep regarding Chumno's statements at the time substitute service was attempted, Krolow concedes that Chumno Kdep did not reside with the Kdeps at the time of service and instead lived elsewhere in her own home. Appellant's brief at p.3, ln. 6-8. There is no dispute on appeal as to whether Chumno Kdep lived in Tacoma and was only present at the Kdep residence as a babysitter when service was attempted.

### **C. SUMMARY OF ARGUMENT**

Krolow relies heavily on the analysis and holding of *Wichert v. Cardwell*, 117 Wn.2d 148, 812 P.2d 858 (1991), but even the most

favorable view of the record on appeal cannot bring this case within its ambit. Rather, this case is like *Salts v. Estes*, 133 Wn.2d 160, 943 P.2d 275 (1997), where the Court found that substituted service cannot be accomplished by leaving legal papers with a person who is only temporarily in control of the defendant's residence. Because Chumno Kdep was neither a "close" family member (unlike the defendants' daughter in *Wichert*) and did not have sole possession and control of the residence on an overnight basis (again unlike *Wichert*), the trial court correctly concluded that Chumno Kdep was not a person qualified to accept substituted service under RCW 4.28.080(15).

**D. ARGUMENT.**

**A. Standard of Review.**

An appeal taken from an order granting a motion for summary judgment is reviewed *de novo*. *Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 92, 993 P.2d 259 (2000). The record on review will be considered in the light most favorable to the non-moving party. *Marincovich v. Tarabochia*, 114 Wn.2d 271, 274, 787 P.2d 562 (1990). The trial court's order on summary judgment dismissing Krolow's lawsuit may be affirmed on any correct grounds within the record, regardless of the basis for the trial court's decision. *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986).

**B. Chumno Kdep Was Not Qualified to Accept Substituted Service of Process Under RCW 4.28.080(15).**

First and foremost, this case involves the interpretation and application of a statute, RCW 4.28.080(15). “Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.” *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (quoting *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999)). The Kdeps and Krolow agree that the validity of substituted service on Chumno Kdep while she was babysitting at the Kdep residence for part of the day depends on whether she was “then resident therein” within the meaning of RCW 4.28.0080(15).<sup>2</sup>

Krolow argues that this requirement is met under *Wichert* by virtue of the fact that Chumno Kdep was “a close family member in the defendant’s residence” at the time of service as attempted. Appellant’s

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<sup>2</sup> The pertinent statutory language is as follows:

**RCW 4.28.080  
Summons, how served.**

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.

brief p. 1, ln. 10-12. That is not a correct application of *Wichert* to the facts of this case.

In *Wichert v. Cardwell, supra*, substituted service of process was attempted at the defendants' home while they were gone from the state. Although the defendants' 26 year old daughter maintained an apartment elsewhere, she had a key to the residence and had spent at least one night there before service was made by leaving the summons and complaint with her the following day. The daughter also had at least occasionally stayed over at her parents' home at other times. 117 Wn.2d at 150.

The *Wichert* Court explained that the term "then resident therein" should be interpreted consistent with the purposes of RCW 4.28.080(15). Citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), the Court stated that the due process test for adequacy of substituted service is whether the method employed was one that a plaintiff "desirous of actually informing the absentee might reasonably adopt to accomplish it." Finding the statutory requirements met, the Court stated as follows:

Service on a defendant's adult child who is an overnight resident in the house of defendant's usual abode, and then the sole occupant thereof, is reasonably calculated to accomplish notice to the defendant. When the defendant is absent, the person in possession of the house of usual abode is likely to present the papers to the defendant, particularly when that person is a family member.

117 Wn.2d at 152. The Court relied on this reasoning to conclude that the defendants' daughter was a person "then resident therein" at the defendants' home at time of service.

*Wichert* does not provide a basis for upholding substituted service on Chumno Kdep because (1) Chumno is not the defendants' daughter or a member of their immediate family, but rather is a secondary relative, (2) Chumno did not have sole custody or possession of defendants' home or spend the night there, but rather was present for only part of a day to supervise the Kdeps' child. Moreover, the Court has since pronounced that *Wichert* marks the "outer boundaries" of RCW 48.28.080(15). *Salts v. Estes*, 133 Wn.2d 160, 166, 953 P.2d 275 (1997).

In *Salts v. Estes, supra*, a process server was met at the front door of the defendant's residence by Mary Terhorst, who was inside the home but neither married nor related to the defendant. Nonetheless, the process server left a summons and complaint with Terhorst and later stated in a declaration that she had claimed to be a resident there. It was later determined that Terhorst was a friend of the defendant who had been taking care of the his home and dog for a two week period while he was out of town. She did not live at the defendant's home and had not spent the night there. 133 Wn.2d at 163-164.

The Supreme Court acknowledged in *Salts* that in *Wichert* it had relied on the boundaries of due process rather than interpretation of the word “resident” as used in RCW 4.28.080(15). Nonetheless, the *Salts* Court rejected a pure due process test, as follows:

We decline to interpret RCW 4.28.080(15) so that mere presence in the defendant’s home or ‘possession’ of the premises is sufficient to satisfy the statutory residency requirement. Under such a view, service on just about any person present at the defendant's home, regardless of the person's real connection with the defendant, will be proper. A housekeeper, a baby-sitter, a repair person or a visitor at the defendant's home could be served. Such a relaxed approach toward service of process renders the words of the statute a nullity and does not comport with the principles of due process that underlie service of process statutes.

133 Wn.2d at 169-170. Finding itself constrained to apply the statutory language as written, as opposed to amendment by judicial construction, the Court held as follows:

We hold for purposes of RCW 4.28.080(15) that "resident" must be given its ordinary meaning -- a person is resident if the person is actually living in the particular home. . . . We decline to transform "resident" into "present" by judicial construction. The Legislature is free to amend the statute; we are not.

133 Wn.2d at 169-170. The trial court’s summary judgment dismissal of the lawsuit for insufficient service of process was affirmed.

Here, Chumno Kdep is more like the friend temporarily in possession of the defendants' residence in *Salts v. Estes*, rather than the daughter in *Wichert* who stayed at least overnight at her parents' home while they were out of the state and had her own key. Chumno Kdep was at the Kdep residence for a portion of the day only for the purpose of babysitting and falls squarely in the category of persons specifically identified in *Salts* as *not* being appropriate recipients of substituted service under RCW 4.28.080(15). *Salts, supra*, 133 Wn.2d at 170 ("possession" of defendant's home by babysitter is insufficient basis for service). Chumno Kdep was not "actually living in the particular home" at time of service as required by *Salts*.

Krolow summarily concludes that Chumno Kdep is a "close" relative of the Kdeps, when in fact she is only a niece. The relationship between a parent and adult child is *not* the same as the relationship with secondary relatives like nieces and nephews. Krolow has not cited any case law where service on a niece babysitter was held to be sufficient. The due process analysis of *Wichert v. Cardwell* does not lead to the same result in this case because the facts are different. Moreover, *Wichert* is the Court's self-pronounced "outer boundar[y]" of RCW 48.28.080(15) in any event and clearly does not apply to the record on appeal.

Krolow asserts that his attorney's office did not attempt to reserve the Kdeps because it took reasonable steps to confirm with the process server that Chumno Kdep was an appropriate person to accept service. There is no due diligence exception to the requirements of RCW 4.28.080(15) under either the statutory language or Washington case law.

Krolow argues that *Gerean v. Martin-Joven*, 108 Wn. App. 963, 968, 33 P.3d 427 (2001), *review denied*, 146 Wn.2d 1013 (2002), agrees that *Wichert* is not overruled by *Salts*, but in *Gerean* the issue was whether the place of service was the defendant's "usual place of abode" and not whether the person accepting service was a resident there. The Court of Appeals affirmed summary judgment dismissal in *Gerean* based on insufficient service, even though the defendant had promptly received the summons and complaint from his father.

Finally, Krolow's argument that service on Chumno Kdep was reasonably calculated to provide notice to the defendants is not supported by the record, which establishes that Chumno Kdep neither delivered the summons and complaint to the Kdeps (who instead found the legal papers on a table) nor told them about the attempted service until Lily Kdep later called her to ask about it. The Kdeps' notice of suit (or lack thereof) was essentially left to happenstance.

**E. CONCLUSION.**

RCW 48.28.080(15) requires service at the defendants' usual place of abode upon a person "then resident therein." In *Wichert v. Cardwell* this requirement was found to have been met when the defendants' adult daughter is living in the residence on at least an overnight basis at the time of service while the defendants are out of the state. The Supreme Court has since stated that this holding represents the "outer boundaries" of substituted service under RCW 4.28.080(15).

In this case the defendants were not out of state and did not turn their home over to a family member for short term use as a residence. Rather, the defendants were gone for a portion of the day and left an adult niece in possession of their home while babysitting their child. Although the niece took the summons and complaint from the process server, she neither delivered the legal papers to the defendants, nor told them that a process server had come to the residence until she was later asked about it after the papers were found on a table.

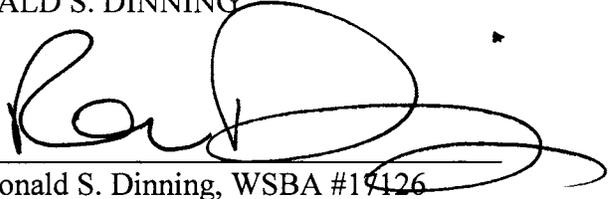
In *Salts v. Estes* the Supreme Court stated that service on a babysitter temporarily in possession of the defendants' residence is not sufficient to comply with the residency requirements of RCW 4.28.080(15). The additional fact in this case is that the babysitter is the defendants' niece. That is not enough to bring the case within the

subsequently narrowly defined holding of *Wichert*. The trial court correctly granted the Kdeps' motion for summary judgment of dismissal and denied Krolow's motion for reconsideration.

DATED this 24 day of August, 2009.

Respectfully submitted,

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DANIEL KROLOW,

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**CERTIFICATE OF SERVICE BY MAILING**

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THIS IS TO CERTIFY that a copy of Brief of Respondents and this Certificate of Service by Mailing were deposited in the U.S. Postal Service mail, first class postage prepaid on August 24, directed to the following individuals:

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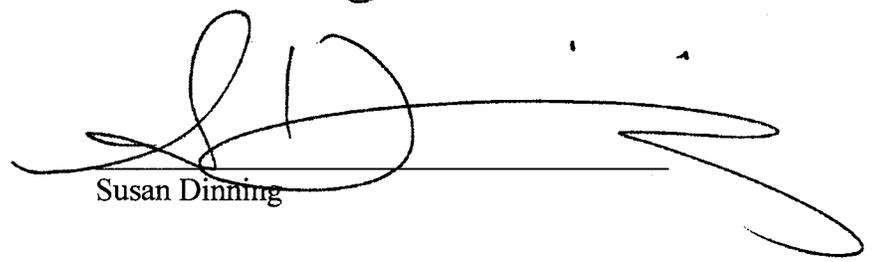
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STATE OF WASHINGTON

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED this 24 day of August, 2009, at  
Seattle, Washington.



Susan Dinning