

COURT FILE NOS. A06-1171

***STATE OF MINNESOTA
IN COURT OF APPEALS***

Joseph Aaron Weinstock, *Appellant*,

v.

LeAnn Van Den Bosch, *Respondent*

APPELLANT JOSEPH WEINSTOCK'S BRIEF AND APPENDIX

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CONSOLIDATED STATEMENT OF THE CASE AND FACTS

The parties' marriage was dissolved on October 18, 1995. They have three children, two of whom are in their minority and whom live with their mother, the Respondent. They are currently 11 years old and 13 years old, respectively. The parties' oldest child turned eighteen years of age in May 2005, and has graduated from high school. Appellant Dr. Joseph Weinstock (hereinafter "Joseph") works as the Disaster and Emergency Assistance Coordinator for the Asian Development Bank, and has resided in the Philippines since the late 1990s. While there is a lengthy post-trial history in the district court file, this brief will deal only with issues raised since 2004.

On or about December 15, 2004, counsel for the Respondent mailed Joseph a notice of intent to hold a hearing on February 7, 2005. [A 1] The notice was sent by international, United States Mail. The letter did not identify the issues to be raised and did not include a motion.

On January 19, 2005, a mere 19 days prior to the February 7, 2005 hearing date, counsel for the Respondent mailed a motion to Joseph, again by International, United States Mail. [A 3] The motion sought to fix a parenting time schedule, condition parenting time visits on the deposit of Joseph's passport and additional conditions, and sought an award of \$1,200 in attorneys fees. [A 5]

On February 3, 2005, Joseph physically received the motion and sent a letter of protest to the district court, asserting that Respondent's method of service was not effective service.

[A 7]

On February 7, 2005, Respondent and her counsel appeared and proceeded with their motion, which the trial court granted by default. [A 8] The order reflected no appearance by Joseph and did not mention the February 3, 2005, letter. Included in the order was an award of \$1,200 in attorney's fees.

On March 8, 2005, Joseph retained counsel and filed a motion to vacate the February 7, 2005, order. [A 11] Joseph alleged in a memorandum of law that the motion was procedurally defective since he was not properly served and that he was denied due process of law, by not being given sufficient notice and time to prepare for the hearing. [A 17]

On June 27, 2005, the district court issued an order.¹ [A 25] The trial court vacated its prior order; however, because it deemed the parenting order reasonable, it adopted it as set forth in the February 7, 2005, order as a "temporary order," which was to remain in effect for 90 days, unless Respondent brought a motion to make it permanent. The award of attorney's fees was vacated. In a memorandum of law accompanying the order, the trial court held that service of process on an individual residing outside of the United States is governed by Rule 4 of the Minnesota Rules of Civil Procedure. As noted in the memorandum, Rule 4.04(c) provides that service on an individual residing outside the United States may be effected by: (1) an internationally agreed means reasonably calculated to give

¹ Throughout various pleadings submitted by the Respondent the order date is incorrectly referred to as June 28, 2005 and June 29, 2005.

notice (such as those authorized by the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents); or, in the event there is no such agreed means of service, in a manner prescribed by the foreign country for service in that country or, unless prohibited by the law of the foreign country, by any form of mail requiring a signed receipt, to be addressed and dispatched by the court administrator to the party to be served.

The district court noted that the Phillipines is not a signatory country which has agreed to the Convention. The district court went on to recognize that under Subdivisions 2(A) and (C), effective service of process through mail requires service by international registered mail, receipt requested. (*Citing, U.S. Department of State Circular Re: Judicial Assistance - Phillipines.*) The court further noted that as part of that process, a return receipt is required. [A 29]

On August 22, 2005, Respondent's counsel mailed Joseph yet another motion and affidavit, this time for a hearing scheduled to be heard on September 13, 2005.[A 31]Respondent's counsel asserted that the motion was mailed by registered mail, return receipt requested; however, Respondent's counsel could not provide the return receipt and there is no evidence of when pleadings were actually served, if at all.

On September 6, 2005, Joseph, acting *pro se*, submitted a document to the Court entitled, "*Special Appearance of the Respondent by Affidavit.* [A 33] The preamble to that document specifically indicated that Joseph submitted it solely to contest jurisdiction of the court for lack of process. In the notice Joseph alleged that the purported service did not

require return receipt, and that the service was not mailed by the Court Administrator. Joseph asked that the Court not consider the motion for lack of service, which effectively would have restored the parenting plan that was in effect prior to the February 7, 2005, order.

Despite acknowledging receipt of the *Special Appearance* notice, the trial court nevertheless again proceeded by default and awarded Petitioner attorneys fees of \$500. [A 37]

On November 2, 2005, Joseph served a motion to *vacate* the September 26, 2005, order for lack of jurisdiction. Joseph argued that Respondent had not complied with the Court's service directive in its June 27, 2005, order, or the law. [A 40]

Due to court conflicts, and conflicts with the Respondent's counsel's schedule, the motion to vacate was not heard until March 21, 2006. In response to the motion Respondent sought an additional award of \$1,000 in attorney's fees. In his affidavit, Respondent's attorney pointed to an affidavit of service that he had filed wherein his employee alleged that she had served the pleadings by registered, international mail, return receipt requested; however, as noted above, there was no explanation for the lack of a registered mail receipt. [A 49]

During arguments, Joseph's counsel noted that Respondent had failed to properly serve her prior motion, as required by the June 27, 2005, order. [T2 2]² He also argued that

² "T1" refers to the transcript from the September 13, 2005, hearing and "T2" refers to the transcript from the March 21, 2006, hearing.

by not requiring adherence to the 14-day notice requirement of Rule 303.03 of the General Rules of Practice for Family Court, Joseph's due process had been violated.

As part of Joseph's motion, he had sought attorney's fees for bad faith. In response to that request, Respondent's counsel orally mentioned the fact that \$500 in attorney's fees that had been ordered in the Court's June 27, 2005, order had not been paid. [T2 5]

The Court denied the request to vacate the September 26, 2005, order (which was incorrectly referenced as a request for reconsideration). The trial court denied the requests for attorney's fees in conjunction with the motion to vacate. The trial court went on to add,

" * * the previous order did require Mr. Weinstock pay \$500 of attorneys fees from a previous matter and that, I believe, has not been paid and that order stands."* [T2 9] (Emp. added).

The trial court asked Respondent's counsel to draft an order. An order was drafted and executed by the Court on April 11, 2006. The order denied the motion to vacate the September 26, 2005, order and directed immediate payment of the \$500 in attorneys fees. Judgment for the attorneys fees that were previously ordered on September 26, 2005, was reduced to judgment on April 13, 2006. [A 54]

Joseph filed his appeal herein on June 21, 2006. In an order dated August 1, 2006, the Court of Appeals requested memorandums of law pertaining to whether the appeal was timely, in light of the fact that a judgment had been entered on April 11, 2006, for \$500 in attorney's fees, and the appeal was filed more than 60 days thereafter. [A 56]

On August 18, 2006, the Court of Appeals issued an order that extending the briefing

to fifteen days after the issuance of the pending order. [A 59]

The Court of Appeals issued an order on September 5, 2006. The order deemed the appeal to have been timely filed and that the appeal would be construed to be from the September 26, 2005 and April 11, 2006 orders. [A 61] The last day to file briefs was September 20, 2006.

STANDARD OF REVIEW

In determining whether personal jurisdiction exists, the reviewing court is not bound by the ultimate legal conclusions of the trial court. *Mahoney v. Mahoney*, 433 N.W.2d 115, 117 (Minn.App.1988), *pet. for rev. denied* (Minn. Feb. 10, 1989). The determination of whether service of process was proper is a question of law, to be reviewed *de novo* by the Court of Appeals. *Abu-Dalbouh v. Abu-Dalbouh*, 547 N.W.2d 700, 703 (Minn.App. 1996).

SUMMARY ARGUMENT

A challenge to the sufficiency of service of process involves an issue of jurisdiction. *Semiconductor Automation, Inc. v. Lloyds of London*, 543 N.W.2d 123 (Minn.App. 1996), *citing*, *Amdahl v. Stonewall Ins. Co.*, 484 N.W.2d 811, 814 (Minn.App.1992), *review denied* (Minn. July 16, 1992). The appropriate way in which to challenge the lack of personal jurisdiction is by motion. *Mesenbourg v. Mesenbourg*, 538 N.W.2d 489, 492 (Minn.App. 1995). A motion to vacate for lack of jurisdiction under Rule 60 involves no question of discretion and must be granted if service is not proper. *Peterson v. Eischen*, 495 N.W.2d 223, 224 (Minn.App. 1993).

As conceded by the trial court and opposing counsel, Rule 4.04 of the Minnesota Rules of Civil Procedure pertains to service of process on individuals outside the United States. Subd. (c) provides as follows:

“Unless otherwise provided by law, service upon an individual, other than an infant or an incompetent person, may be effected in a place not within the state:

(1) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; or

(2) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:

(A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or

(B) as directed by the foreign authority in response to a letter rogatory or letter of request; or

(C) unless prohibited by the law of the foreign country, by

(i) delivery to the individual personally of a copy of the summons and the complaint; or

(ii) any form of mail requiring a signed receipt, to be addressed and dispatched by the court administrator to the party to be served; or

(3) by other means not prohibited by international agreement as may be directed by the court.”

The trial court held that the Phillipines is not a signatory country regarding the *Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents*. [A 28] That finding was not contested LeAnn. The trial court held that Subds. 2(A) and (C), required that service on Joseph be accomplished by international registered mail, receipt requested. Finally, the trial court held and directed that as part of the process, a return receipt was

required.

LeAnn's counsel claimed that he served the motion on Joseph by international registered mail, return receipt requested, on August 22, 2005; [T2 4] however, he provided no proof that the pleadings were served in that manner (other than an affidavit of service that was not accompanied by the return receipt). In an affidavit submitted by Joseph contesting jurisdiction, he noted,

"[Service by mail] was not service requiring return receipt requested, and it was not mailed by the court administrator in and for Olmsted County as required by the order of this court entered on June 29, 2005."

During arguments to vacate the order resulting, Joseph's counsel argued that: (1) service did not comport to the court's prior order; (2) service did not comport with the rules of civil procedure (in that there was no return receipt requested or provided); and, (3) that service by international mail should still comply with Rule 303.03 of the General Rules of Practice, to-wit: a litigant should be given at least 14 days notice of a hearing.³ The trial court rejected those arguments and refused to vacate the order. [A 53] The trial court's decision was not only contrary to law, it was contrary to the trial court's own prior ruling of June 27, 2005.

³ Arguably, a litigant residing in a foreign country, on another continent, should be afforded even more than 14 days notice since he is not in position to simply sit down and meet with an attorney.

ISSUES

1. **DID THE RESPONDENT FAILED TO COMPLY WITH THE COURT'S JUNE 27, 2005, ORDER, DIRECTING HOW SERVICE SHOULD BE ACCOMPLISHED?** The trial court held that he complied even though there was no return receipt.

Apposite Authority:

Minn.R.Civ.P. 4.04;

GEN PRAC RULE 303.03;

State v. Larose, 673 N.W.2d 157, 159 (Minn.App. 2003);

2. **DID THE RESPONDENT FAIL TO COMPLY WITH MINN.R.CIV.P. 4.04?** The trial court held that he complied even though there was no return receipt.

Apposite Authority:

Minn.R.Civ.P. 4.04

3. **EVEN IF THE RESPONDENT HAD COMPLIED WITH RULE 4.04, DID THE FAILURE TO PROVIDE THE PLEADINGS AT LEAST 14 DAYS PRIOR TO THE HEARING VIOLATED MINNESOTA LAW AND DUE PROCESS.** The trial court held that it was not a violation of the Rule or due process.

Apposite Authority:

GEN PRAC RULE 303.03;

Minn.R.Civ.P. 4.04;

Har-Ned Lumber Co. v. Amigineers, Inc. 436 N.W.2d 811, 815 (Minn.App. 1989)

ARGUMENT

1. THE RESPONDENT FAILED TO COMPLY WITH THE COURT'S JUNE 27, 2005, ORDER, DIRECTING HOW SERVICE SHOULD BE ACCOMPLISHED.

The trial court, in its June 27, 2005, order, gave LeAnn two means of service on Joseph:

- (1) service by international registered mail, return receipt requested;⁴
Minn.R.Civ.P. 4.04(c)(3).
- (2) by mail requiring a signed receipt, to be addressed and dispatched by the court administrator to the party to be served. Minn.R.Civ.P. 4.04(c)(ii)

It is not disputed that the court administrator did not “*address and dispatch*” the documents to Joseph. The only other acceptable means cited by the trial court was service by international registered mail, with evidence of a return receipt.

In oral argument, LeAnn’s counsel conceded that Rule 4 applied. [T2 3] While he argued that he had sent the pleadings by international mail, return receipt, he provided no evidence of it being sent by return receipt requested, and did not provide the return receipt.⁵

⁴ In vacating the prior order of the trial court (in its June 27, 2005 order), the trial court noted as reasons that LeAnn’s counsel had failed to send the pleadings by international registered mail *and* had failed to do it return receipt requested.

⁵ As noted in the trial court’s June 27, 2005, Order, “Return receipt for international mail is a pink card that is attached at the point of delivery, and then returned to sender by airmail. *Citing, United States Postal Service International Mail Manual, Special Services 341.* LeAnn does not explain the absence of the return receipt. The only proper conclusion is that the mailing was not done as required.

The only evidence he provided was an affidavit of service (presumably by an employee of his office) that asserted that the motion was served by international registered mail, return receipt requested;⁶ however, as noted, counsel did not provide the return receipt and one does not appear in the court file.

Under the *law-of-the-case doctrine*, issues previously considered and adjudicated in the same case will not be re-examined or re-adjudicated. *Lange v. Nelson-Ryan Flight Serv. Inc.*, 263 Minn. 152, 155, 116 N.W.2d 266, 269 (Minn. 1962). The trial court litigated the issue of appropriate service and that decision (of June 27, 2005) has become the law of the case. *See*, also, *State v. Larose*, 673 N.W.2d 157, 161 (Minn.App. 2003)(once litigated and determined in a case, the issue of jurisdiction cannot be re-litigated). Since LeAnn did not comply with the court's order, jurisdiction did not attach to Joseph and the Order dated September 26, 2005, should be, in all respects, vacated.

2. THE RESPONDENT FAILED TO COMPLY WITH MINN.R.CIV.P. 4.04.

While the trial court established the method by which Joseph was to be served, it is not disputed that the trial court followed Rule 4.04 of the Minnesota Rules of Civil Procedure. The same criteria set forth in the preceding arguments applies to the required procedure to serve someone in the Phillipines, under Minnesota law. Since LeAnn's counsel did not serve by international mail, return receipt; and, did not have the court

⁶ *See*, Affidavit of Steven C. Youngquist dated January 5, 2006, ¶4. [A 48]

administrator serve the pleadings, the trial court lacked jurisdiction to hear the motion and impose its order. The Order dated September 26, 2005, should be, in all respects, vacated.

3. EVEN IF THE RESPONDENT HAD COMPLIED WITH RULE 4.04, THE FAILURE TO PROVIDE THE PLEADINGS AT LEAST 14 DAYS PRIOR TO THE HEARING VIOLATED MINNESOTA LAW AND DUE PROCESS.

In his *Special Appearance of the Respondent by Affidavit* dated September 6, 2005, Joseph argued that he would need time to respond to the motion since he resides in the Philippines and needed to make necessary financial and other arrangements, as well as seek discovery. [A 33] He also indicated that he was attempting to get the papers into the hands of a new attorney. While the affidavit does not identify a time frame when he became aware of the motion, the date of the affidavit is less than 14 days prior to the hearing. [A 36]⁷

During oral arguments to vacate the order, Joseph's counsel argued that the 3-day mailing rule should not apply since the mail was sent internationally, not by United States Mail within the United States. [T2 6-7]⁸ The trial court rejected that argument. In *Holm v. Casino Resources Corp.*, 632 N.W.2d 238, 241 (Minn.App. 2001), the Court of Appeals,

⁷ The first time LeAnn's counsel mailed pleadings (on January 19, 2005) it took fifteen days for Joseph to receive them. *See*, ¶3 on page -1- , *supra*.

⁸ Minn.R.Civ.P. 6.05 provides that, "Whenever a party has a right, or is required to do some act or take some proceedings within the prescribed period after the service of a notice or other paper on the party, and the notice or paper is served upon the party by mail, three days shall be added to the prescribed period. If service is made by any means other than mail and accomplished after 5:00 p.m. local time on the day of service, one additional day shall be added to the prescribed time."

in interpreting statutory language pertaining to an arbitration award, held that the term “service” as used in Rule 6.05 was analogous to the term “delivery” used in Minn.Stat. §572.19. The clear intention of Rule 6.05 is to provide a litigant the full amount of time allowed by statute to respond to a motion. By adding three days to service by United States Mail, it is assumed that the party receiving the documents will have them within the required time for service.

Rule 303.03 of the General Rules of Practice ordinarily governs the service of process in family court proceedings. Subd. (a)(1) provides as follows:

*“No motion shall be heard unless the initial moving party * * * serves a copy of the following documents on opposing counsel, and files the original with the court administrator at least 14 days prior to the hearing:*

- (i) Notice of motion in form required by Minn. Gen. R. Prac. 303.01(a);*
- (ii) Motion;*
- (iii) Any relevant affidavits and exhibits; and*
- (iv) Any memorandum of law the party intends to submit.”*

Subd. (4), provides in relevant part,

“Whenever this rule requires documents to be filed with the court administrator within a prescribed period of time before a specific event, filing may be accomplished by mail, subject to the following: (i) 3 days shall be added to the prescribed period; and (ii) filing shall not be considered timely unless the documents are deposited in the mail within the prescribed period. Service of documents on parties by mail is subject to the provisions of Minn. Civ. R. P. 5.02 and 6.05.”

Subd. 5(b), provides in relevant part,

“In the event an initial moving party fails to timely serve and file documents required in this rule, the hearing may be cancelled by the court. If responsive papers are not properly served and filed, the court may deem the initial motion or motion raising new issues unopposed and may issue an order without hearing. The court, in its

discretion, may refuse to permit oral argument by the party not filing the required documents, may consider the matter unopposed, may allow reasonable attorney's fees, or may take other appropriate action.”

Subd 5(c) provides in relevant part,

*“No motion * * * will be heard unless the parties have conferred either in person, or by telephone, or in writing in an attempt to resolve their differences prior to the hearing. The moving party shall initiate such conference. In matters involving post-decree motions, if the parties are unable to resolve their differences in this conference they shall consider the use of an appropriate ADR process under Rule 114 to attempt to accomplish resolution. The moving party shall certify to the court, before the time of the hearing, compliance with this rule or any reasons for not complying, including lack of availability or cooperation of opposing counsel.”⁹*

The Advisory Committee comments indicate that subdivisions (a) - (d) of the rule are intended to make motion practice in family court matters as similar to that in other civil actions as is possible and practical given the particular needs in family court matters.

There are a number of non-family law related statutes that deal with service by “certified mail, return-receipt requested.” For example, Minn.Stat. §144E.19, subd. 3 (2005) pertaining to temporary license suspensions of emergency personnel, dictates that when served by “certified mail” the service is complete upon receipt or refusal to accept. Due process requires that notice be reasonably calculated to reach the person in the anticipated time. In the case of international mail, it cannot be said that it is *reasonable* to expect that someone will receive a mailing within three-days time. In light of the many variables encountered in foreign countries, a reasonable length of time in one country may not be in

⁹ No such attempts or certification was made.

another. Even mailings to Canada and Mexico cannot *reasonably* be expected to reach the intended receiver within three days.

The only reliable means of insuring that a party is properly given notice so as to comply with due process requirements is to require that the 14-day period commence on either the date that the receipt is signed, or the date that the mailing is rejected. Such a practice would dissuade litigants such as LeAnn from eleventh hour service by international mail.

Clearly the intention of Rule 303.03 is that a litigant have fourteen days to respond to a family law motion. Therefore, in the case of service by international mail, return receipt requested, the date of delivery, not the date of mailing, should apply. The trial court can take judicial notice of the fact that a mailing to the Phillipines is not likely to occur within the three days provided for in Rule 6.05. Therefore, the trial court's determination that service occurred three days after the date of the international mailing defeats the purpose of the Rule.

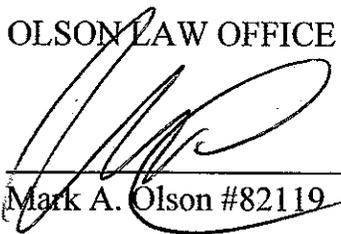
CONCLUSION

The order of the court dated September 27, 2006, should be vacated for lack of proper service of process and jurisdiction.

Respectfully submitted,

Dated: September 19, 2006

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).