

1997

Laura W Caldwell, personally, and Nelda F Wall on
behalf of the Estate of Hal E. Wall v. Steven D.
Caldwell : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF

STEVEN D. CALDWELL,

APPELLANT,

vs.

Docket No. 970239 - CA

LAUREL W. CALDWELL AND
NELDA WALL,

APPELLEES.

BRIEF OF APPELLEES

Appeal from the Third Judicial District Court

Honorable Frank G. Noel, District Judge

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The parties to this appeal are the appellant Stephen D. Caldwell and the appellees Laurel W. Caldwell and Nelda Wall. Appellant has argued that the plaintiff Laura W. Caldwell is not a party to this appeal because the lower court dismissed a judgment for child support in her favor as duplicitous of a judgment in the divorce action and she has not taken an appeal. However, Mrs. Caldwell is an interested party in the judgment that is the subject matter of this appeal as is admitted by the appellant. The judgment could well have been renewed in her name and should be so renewed should the Court find the judgment is inappropriately issued in the name of Nelda Wall.

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Notes:

Appellees file no appendix but rely upon the Appendix filed by the Appellant and the Record on Appeal.

Appellant is designated for reference sometimes as “Appl”.

The record on appeal (from trial court) is designated for reference sometimes as “Dkt”

TABLE OF AUTHORITIES

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STATEMENT OF JURISDICTION

Jurisdiction of this Court is granted pursuant to the provision of Section 78-2a-3(2)(j), Utah Code and the order of the Supreme Court dated April 8, 1997 which transferred the case to this Court.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the Summons and Complaint were duly served by leaving them with his wife at his usual place of abode and whether the Court has jurisdiction to entertain appellant's motion to vacate the default judgment.

2. Whether the issuance of the default judgment in the name of Nelda Wall, the surviving spouse of Hal E. Wall, was inappropriate.

STATEMENT OF THE CASE

The plaintiff, Laurel W. Caldwell was divorced from the defendant Stephen D. Caldwell in January 1993. The decree ordered the defendant to pay a portion of a second mortgage in the name of Hal E. Wall in the amount of \$10,069.00. The defendant (appellant here) moved out of state sometime after the divorce. The defendant has not paid anything toward the judgment of \$10,069. The defendant Hal E. Wall was deceased at the time the plaintiff Laurel Caldwell brought an action to renew the judgment. The action included the estate of Hal E. Wall as a party plaintiff. Service of the Summons and Complaint were affected upon the defendant by serving them upon defendant's wife, Nikki Caldwell at defendant's residence and place of abode in Appleton Missouri by a deputy sheriff of the county. Default judgment was taken against the defendant in February 1993 and notice of default was mailed to the defendant at his Appleton Missouri, residence.

In 1996 the defendant was found employed in the State of Utah and a garnishment was issued to collect on the judgment. The defendant filed a motion to dismiss to dismiss the default judgment which was denied below.

Appellant Steven D. Caldwell seeks to overturn the decision of the district court denying his motion to vacate or set aside the default judgment which renews the judgment in the Decree of Divorce that he pay a portion of the second mortgage on the parties' home in the amount of \$10,069.00.

SUMMARY OF ARGUMENTS

1. The defendant was duly served with the Summons and Complaint at his usual place of abode in Appleton Missouri by having a deputy sheriff of the county serve them upon his wife. The defendant's argument that he was residing in away from the home at the time for employment in Amarillo Texas is unavailing. The appellant continually ignored the process of the Court in the underlying divorce case and misled the Court and the plaintiff with regard to their ownership interests in the family residence at the time of the divorce. His claim that he did not receive notice of the action by the service upon his wife is self serving and should be given no credence in view lack of veracity and his previous history of bad faith in not responding to the Court's notices and orders. The defendant lived with his wife prior to going out of state for temporary employment. He returned to live with his wife and family during breaks in his employment for at least five days in each three week period. His temporary absence for employment did not change his usual place of abode and the service was proper. *Grant v. Lawrence*, 37 Utah 450, 108 Pac. 931 (1910).

2. The appellant's failure to respond to the Summons and Complaint and actively litigate the issues as well as prosecute a timely appeal deprives the Court of jurisdiction to entertain his

motion to vacate the judgment. The default judgment is res judicata.

3. Whether or not the Court affirms or reverses the denial by the trial Court to set aside the default judgment, there is a lack of jurisdiction to further entertain the other arguments raised by the appellant in his brief on appeal. Nevertheless, the issuance of a judgment in the name of Nelda Wall, the surviving spouse of Hal E. Wall, is not so substantively defective as to warrant a reversal of the lower Court's order. The defendant cannot come to the Court seeking equity when he has so blatantly ignored the processes of the Court and avoided the affect of its orders for so many years. The time for the defendant to prevent any defects in either the pleadings or the renewal of the judgment is long past. The practicalities of the situation do not offend either equity or due process. Had the judgment been renewed in the name of the plaintiff, Laurel W. Caldwell, she could have assigned it to Nelda Wall and the affect would have been the same.

FACTS

1. The facts and issues in this appeal are simple. The Decree of Divorce between the appellant and his former spouse, Laurel W. Caldwell, one of the appellees here, adjudged that he should pay a portion of the second mortgage on the parties home to his father-in law, Hal E. Wall in the amount of \$10,069.00 and ordered him to do so. Some time after the divorce, the appellant moved from the State of Utah. (Appl. Appendix D) He took full advantage of his being out of the state to avoid further process in the divorce action. He paid child support only when his employment out of the state was discovered by his former spouse or the State office of Recovery Services and the support was withheld from his wages. (Dkt Pg. 123-128) He never at any time notified the his former spouse of his changes of address or employment. Although he was required to keep the court below informed of his changes of address he never did so.

2. All attempts by Mrs. Caldwell to obtain process through the divorce court for contempt for failure to pay child support and to have support arrearages and unpaid medical expenses reduced to judgment and to discover his current income, were frustrated and fraught with delay. (The lower court was referred to the earlier proceedings in the Divorce Action, *Caldwell v. Caldwell*, C82-1586; See Dkt page 219). He simply refused to appear at several hearings scheduled by the divorce court and to respond to discovery ordered. He never paid a penny toward the \$10,069.00 he was ordered to pay in the Decree.

3. In 1990, just prior to the expiration of the eight year statute of limitations on judgments, an action was filed to renew the judgments for child support and the payment of the \$10,069.00 portion of the second mortgage. (See Appl. Admission Brf. Page 7) Service of process was never obtained upon Mr. Caldwell within the required 120 days and the case was dismissed in June of 1991. A new action to renew the judgment was filed in June of 1992, prior to the running of the one year statute of limitations. (Dkt page 1). Mr. Caldwell was duly served with process at his residence in Appleton, Missouri by serving his spouse, Nikki Caldwell in September 1992. (Dkt page 6). The return of service filed with the court below shows that the date and time of service as well as the name of the deputy sheriff serving them upon the appellant's wife all in accordance with Rule 4 of the Utah Rules of Civil Procedure. *Id.* True to his form and practice of ignoring appearances and other process in the divorce action because he was out side of the state, he ignored the service of process and did not respond to the summons or answer the complaint. And a default judgment was taken. (Dkt. Page 13) Notice of the default judgment was served upon him by mail to his residence in Appleton, Missouri which he also ignored. (Dkt page 15). He did not respond until he was caught in the State of Utah in the

summer of 1996 and his wages were garnished to partially satisfy the judgment. (Dkt. Page 17-26) He then responded with the self serving claim that he was not served with the summons and the complaint and had no notice of the action. (Dkt page 27). He further attacked the judgment on several other grounds which he should have raised by a timely defense in the action, some of which he raises in this appeal. The trial judge below denied his motion to ruled that he was duly served with the summons and complaint, that he failed to respond and denied his motion to vacate or set aside the default judgment.

ARGUMENT

I. Preliminary Statement.

To prevail in this appeal the appellant must overcome a giant hurdle which he did not overcome below: the establishing that he was not duly and personally served with the summons and complaint. If Mr. Wall was duly served with process he did no invoke the powers of the court in a timely manner. The default judgment was final judgment from which he failed to file a timely appeal and it is now res judicata. The court lacks jurisdiction to entertain his motion to dismiss.

Wisden v. Bangerter, ___ P.2d ___, 260 Utah Adv. Rep. 31, (1995) Absent unusual and circumstances requiring the entertainment in the interests of substantial justice of his motion under Rule 60(b)(7) of the Rules of procedure there is no remedy available to him.

Certainly if the equities in the case are considered he cannot claim that he has come to court with clean hands after dodging the judgment and ignoring the processes of the court in the underlying divorce proceeding for nearly 15 years as well ignoring the service of process in this action. Conversely if appellant's argument is correct and he was not duly served with service of

process, the remainder of his arguments are superfluous. If the judgment is void for want of service of process the court lacks jurisdiction and there is no need for further argument of the subject.

This is really and simply a case of Mr. Caldwell being caught within the state where the plaintiffs could practicably and economically force him to face the process and poser of the court.

II. Mr. Caldwell Was Duly and Personally Served With Process.

a. Standard of Review

This Court ordinarily reviews a denial of the court below to set aside a default judgment for abuse of discretion. Where the issue is lack of jurisdiction the trial court has no discretion and its ruling is reviewed for correctness. *State v. Vijil*, 784 P.2d 1130 (Utah 1989) However, findings of fact are reviewed under a clearly erroneous standard. The trial court is given no deference to its conclusions of law which are reviewed for correctness. *Eskelsen v. Perry*, 819 P.2d 770 (Utah 1991) The determination or conclusion of the trial court below that the plaintiffs properly complied with the requirements of Rule 4 in serving the defendant may be reviewed for correctness, but underlying and implicit in that ruling and determination is a factual finding that the summons and complaint were left at Mr. Caldwell's usual place of abode with a person of suitable age and discretion, his wife Nikki Caldwell. To overturn the lower court's finding the appellant must show the finding was clearly erroneous.

b. Process Was Served Upon the Appellant at His Dwelling House or Usual Place of Abode.

The service of the summons and complaint upon the defendant by having a deputy sheriff of the county in leave them at his residence with a person of suitable age and discretion, his wife,

fully complies with the requirements of Rule 4(e)(1) of the Utah Rules of Civil Procedure and is defined in the Rule as personal service. Mr. Caldwell's own self serving denial that he never received them is unavailing. If the courts were to accept such denials the service of process in thousands of cases would be for naught and the provision in the Rule that personal service may be effected by leaving the summons and complaint at the residence of the defendant with a person of suitable age and discretion would mean nothing. This is particularly so as in this case where the defendant has the ability to bring forth evidence and the statement of his wife to corroborate his statement and fails to do so. He alone is in possession and control of the facts of what happened after the service of process. His self serving statement that he did not receive notice is not enough particularly in view of his previous record for ignoring the processes of the divorce court and his demonstrated lack of veracity therein.

Mr. Caldwell argues that he was working on a job in Amarillo, Texas at the time and only returning to his home about every three weeks for five days. He thus argues that his residence in Appleton, Missouri was not his usual place of abode and Service upon his wife at that place was not valid service upon him. Even absent its self serving nature, his affidavit does not overcome the facts that he was permanently living and residing at his home in Missouri and that it was residence and his usual place of abode. Further, Mr. Caldwell did not bring submit any other evidence, such as a sworn statement of his wife, to corroborate his story. He does not say how temporary the job in Amarillo was or how long the job lasted. People frequently work away from their home and reside near their work on a temporary basis. Their permanent home is considered to be their residence and usual place of abode at the time. It is the one place where they have stability. Moreover, Since he is the person who is in possession of the facts and married to the

person with whom process was left, the court could well infer that if it would not have been favorable to him or he would have done so.

Further, after the entry of the default judgment, counsel for the plaintiff on February 20, 1993, mailed a Notice of Entry Of Judgment to Mr. Caldwell at his permanent address in Appleton, Missouri. Mr. Caldwell did nothing after the Notice was mailed.

Mr. Caldwell argues that the appellees did nothing to overcome his statement that he was living away from home at the time. To the contrary, Mrs. Laurel Caldwell, his former spouse, stated in her affidavit in opposition to his motion to vacate that she had numerous communications with him in and around time the summons and complaint were served upon him and had knowledge that he was residing at the Appleton, Missouri address at the time he was served. In addition to this sworn statement Mrs. Caldwell provided detail of a visit to Missouri with her children In May of 1992, just a few months before the service was made. She observed him at that address having a barbeque with his children and friends. She was invited by him to attend the family function (barbeque) which she declined. (File p. 123, ¶¶ 3, 5-8)

Mrs. Caldwell further provided detailed sworn statements of his dishonesty in the divorce proceedings where he allowed the divorce court and her to erroneously believe that he and the plaintiff owned their home and allocate the equity and indebtedness thereon when in fact he knew of two civil actions against them for collection of business debts which he kept from the plaintiff. He knew at the time of the divorce that their interests in the home had been sold at a sheriff's sale and that they legally owned no interest in the home at all at the time. (Id. ¶¶ 11-12, there are two ¶s designated 11; Dec. 13, 1996 Hg transcript p 8, Dkt p 219) Mr. Caldwell submitted nothing to rebut the statements in her affidavit, but argued only that they were irrelevant. (Transcript of Dec.

13, 1996 Hearing on Motion to Vacate, pp 5-6, Docket pp 216-217)

She further pointed out to the Court his lack of cooperation and his indifference to the processes of the court in the underlying divorce action of which the trial judge could take judicial notice. He never advised the court of his changes of address as he was obligated to do. He did not appear at several hearings relative to orders to show cause and a petition to modify the decree and did not respond to discovery requests of the plaintiff and the order of the divorce court compelling discovery. (Affidavit, ¶ 10, Docket p 125) He took full advantage of his absence from the State of Utah to avoid paying child support, medical expenses and only did so when Mrs. Caldwell and Recovery Services tracked him down and had support withheld from his pay. He totally ignored and refused to pay anything on the judgment of \$10,069.00 in the Decree of Divorce. His temporary absences from his family and home for work in varying locations did not change his usual place of abode. Counsel's argument that he is working out of state for weeks at a time is an admission that his out of state work is temporary. (Dec. 13. 1996 Hg Transcript, p 6, Dkt p 217)

Whether or not the service under rule 4 was good does not depend upon absolute proof that the defendant actually received the summons and complaint. Rule 4 only requires that the moving party follow the requirements of the Rule and make reasonable efforts to serve process upon the defendant, not that it exhaust all possibilities. The burden of showing he was not properly served then shifts to the defendant. (*In re Schwenke*, 227 Utah Adv. Rep. 21, 23 (1993)) The *Schwenke* case involved service of a summons and complaint for disciplinary proceedings by the Utah State Bar. The respondent did not file an answer and default judgment was entered against him. The respondent later claimed not to have received service which was sent to him at

the address of his office where he was known to be doing business. Several months later the Bar gave the respondent notice of a disciplinary hearing and eventually caused a new summons and the complaint to be served upon him. On appeal from a default judgment issued as a result of not filing a timely answer to the second summons and complaint the Utah Supreme Court addressed the validity of service of first complaint. The Supreme Court, citing *Downey State Bank v.*

Major-Blakeney Corp., 545 P.2d 507, 509 (Utah 1976) stated:

We have previously observed that under the more stringent requirements of service of process under Utah Rule of Civil Procedure 4, it is not required that a plaintiff exhaust all possibilities as a means of finding and serving a defendant, only that the plaintiff exercise reasonable diligence in good faith.

In the instant case, perfectly reasonable means were employed. The summons and complaint were personally delivered to the defendant's wife at the address of his current residence in full compliance with *Downey State Bank v. Major-Blakeney Corp.*, 545 P.2d 507, 509 (Utah 1976)

The defendant cites several cases which he argues support his claim that service under URCP 4. His cases are inapposite. In *Garcia v. Garcia*, 712 P.2d 288 (Utah 1986) the court affirmed a setting aside of a decree of divorce for lack of service of process upon the defendant by leaving it with prison authorities where the defendant was at the time of service. However, the reason service was not effective was not because the prison was not the defendant's usual place of abode at the time, but because the person with whom it was left did not reside at the prison as specified in the Rule. Supreme Court explicitly noted:

Service was not made under this provision since the summons was left with a prison officer who clearly did not reside at appellant's usual place of abode. *Garcia v. Garcia*, 712 P.2d 288, 290 (footnote omitted)

It also appears the Court was chagrined because the summons could have easily been left with the defendant himself. Such is not the situation in this case. The appellant was admittedly tempo-

temporarily working out of town.

Service was held to be defective in *Woody v. Rhodes*, 461. P.2d 465 cited by appellant because the return of service was defective. The deputy sheriff left the process with the defendant's wife, but on the return showed the service to have been made on the brother of the defendant who was not a party to the action.

In *Grant v. Lawrence*, 37 Utah 450, 108 Pac. 931 (1910), service left with a wife of the defendant was not effective because the defendant was living in Liverpool, England for two years at the time and the home in which the wife was living had been built by her after the defendant moved to England. The defendant had never lived in the home and it was conceded that the defendant had no knowledge of the judgment at the time it was entered and until over a year later when he returned from England. Appellant here, in lifting language from the *Grant* opinion omits to quote pertinent statements of the Court's:

. . . It may be accepted that as a general rule a man's place of abode, prima facie at least, is presumed to be where his family lives. "This presumption, however, is one of fact and not of law, and may be overcome by evidence showing the facts to be otherwise." *Grant v. Lawrence*, 37 Utah 450,___, 108 Pac. 931, 933 (1910) (citations omitted)

The *Grant Court* further noted:

If the Court had found that at the time respondent went to England he was married to Augusta W., that she at the time was his wife, and that he actually lived with her in Salt Lake City up to the time of his departure it might be inferred that his home continued to be as such place as she made her home in said city. Under the facts as found, and in the absence of other findings to which we have referred, it seems to us that no presumption can be indulged in this case . . . *Id.* 108 Pac 931, 934

Those fact are nothing like the facts in this case. It appears from that language that the Supreme Court would have upheld the service on the facts of the instant case. The defendant

indeed lived in the home in with his wife in Appleton, Missouri before he began working temporarily out of state in Amarillo, Texas and he does not deny he returned to his wife and family at that home during regular breaks in the job. It may and should be logically inferred that he would return to live there when the job was finished. Under these facts the Utah Supreme Court in *Grant* would have upheld the service of process as effective.

c. The Default Judgment Should Not Be Set Aside For Want of Jurisdiction

Appellant takes a giant leap in his argument on page 18 of his brief and argues that from the authorities previously cited in the brief and the facts of this case, the default judgment should be set aside. In view of the previous discussion in this brief, service of process was duly made and the judgment should not be set aside.

Appellant cites *Interstate Excavating, Inc., v. Agla Development Corporation*, 611 P.2d 369 (Utah 1980). The facts of *Interstate Excavating* are vastly different. In that case defendant's attorney, who had withdrawn, failed to give him notice of a hearing. Service of a notice was not even attempted in that case. Compliance with the provisions of URCP 4 for personal service and reasonable efforts to effect such service are not even present as considerations in the *Interstate* case. In the instant case, appellant was not relying on counsel to handle his legal matters for him and cannot argue that counsel failed to notify him of any hearing. Defendant was tending the store himself and cannot rely on the excuse that someone else should have notified him of the pending actions and hearings.

Appellant also cites *Westinghouse Electric Supply Co., v. Paul W. Larsen Contractor, Inc.*, 544 P.2d 876 as supporting the setting aside of the judgement. Again the *Westinghouse* case does not apply. It does not involve or construe as service of process. In *Westinghouse*, the

parties engaged in several exchanges of pleadings and discovery. In reversing the dismissal of the trial court on defendant's motion the Supreme Court noted that the defendant had not been as diligent in its discovery responses and moving the case along as it could have been. The court stated that whether there is such a justifiable excuse is to be determined by considering more factors than merely the length of time since the suit was filed. In short the circumstances in that case are nothing like those in this case now before the court. It is not otherwise factually in point either.

Plaintiff recognizes defendant's argument that there is a preference in the law for trying the issues rather than resolving matters on a procedural basis is valid under appropriate facts. However, it does not apply in this case. There is not a preference in the law for giving a party unlimited chances after he has ignored the processes of the court and then of necessity has to answer to the court only when those processes catch up with him.

III. APPELLANT IS NOT PREJUDICED BY ORDER IN FAVOR OF NELDA WALL

Appellant contends that the judgment should be vacated because the order renewing the judgement against him for the second mortgage is issued in the name of Nelda Wall the surviving spouse of Hal E. Wall to whom the mortgage was given. In the first instance if the service of process is valid the appellant has no standing or ground to contest the judgment. His opportunity is past. He did not contest it when he could and should have and he did not appeal within the time for filing an appeal. The Court does not have jurisdiction to entertain his motion. *Wisden v. Bangerter*, ___ P.2d ___, 260 Utah Adv. Rep. 31, (1995)

In the second place, the appellant is not prejudiced or hurt by the order in that form. While it is true that there has been no probate of Hal E. Wall's Estate, it is not true that there is

no estate of Hal E. Wall. Further the defendant did not have the courtesy or the respect of the processes of the Court to appear timely in the action so that his obligation could be transferred appropriately without having to go through probate and incur additional expense to collect that money judgment toward which he had already failed to pay in even the slightest amounts. As a practical matter the Court could have upon stipulation awarded the judgment to Nelda F. Wall, the spouse of Hal E. Wall. Further, the Court could amend the judgment and issue it into the name of the plaintiff Laurel Caldwell who could assign the judgment to the Nelda F. Wall. The practical effect would be the same as the present order. The order does nothing more than implement the practicalities of the situation in an equitable way. Appellees informed the court below that they would no object to the order being amended and issued into the name of Laurel Caldwell (Currently Shields). for whose benefit it was also given in the Decree of Divorce.

Other points raised by the appellant are of little moment in the appeal and do not have merit so as to require attention in this brief.

CONCLUSION

Plaintiff Laurel Caldwell tried unsuccessfully for several years to collect from the defendant. Plaintiff commenced the instant case in June 1992 and served the defendant process in September 1992. She did not seek default until in February 1993. Process was duly served upon the defendant by serving his wife at his residence, his usual place of abode in Apelon Missouri. Temporary absence of the defendant from his residence for employment purposes did not change his usual place of abode particularly where he returned regularly during breaks in the employment. The defendant failed to file an answer and failed to take a timely appeal after being mailed notice

of the entry of the default judgment. The time for filing appeal is long past and the case is res judicata. The Court does not now have jurisdiction to entertain motions of the plaintiff. Defendant has not shown circumstances to justify relief from the judgment under rule 60(b)(7). The Court should affirm.

Respectfully submitted this 11th day of August, 1997.


Delano S. Findlay

CERTIFICATE OF SERVICE

I certify that I ☐ delivered, ☒ mailed first class, postage prepaid, two true and correct copy of the forgoing Brief of Appellees on Appeal to the following this 11th day of August, 1997:

Stephen G. Homer
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