

2009

## Miles v. Miles : Brief of Appellant

Utah Court of Appeals

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IN THE  
UTAH STATE COURT OF APPEALS

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NO. 20090873

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BALDEMAR MILES

Respondent-Appellant

vs.

LARUE MILES

Petitioner-Appellee

---

Appeal from the Seventh Judicial  
District Court of Utah

---

**BRIEF FOR APPELLANT**

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## STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to UTAH CODE ANN. § 78A-4-103(2)(h).

## STATEMENT OF ISSUES & STANDARD OF REVIEW

### Issue No. 1

Whether the Seventh Judicial district court incorrectly denied Baldemar Miles' Rule 60(b) motion to vacate the default judgment by finding that the service of process was adequate when the failure to serve was fatal to the jurisdiction of the court.

### Standard of Review

This Court reviews questions of whether service of process was proper under the correction-of-error standard. *Bonneville Billing v. Whatley*, 949 P.2d 768 (Utah Ct. App. 1997). A denial of a motion to vacate a judgment under rule 60(b) is ordinarily reversed only for an abuse of discretion. However, when a motion to vacate a judgment is based on a claim of lack of jurisdiction, the district court has no discretion. If jurisdiction is lacking, the judgment cannot stand without denying due process to the person against whom it runs.

Rule 4 governs service of process. *See* Utah R. Civ. P. 4. Whether service of process was proper is a jurisdictional issue. *See Garcia v. Garcia*, 712 P.2d 288, 290 n.4 (Utah 1986) (per curiam) ("The requirements of Rule 4 relating to the service of process are jurisdictional.") Under the correction-of-error standard the appropriateness of the jurisdictional determination is a question of law upon which the Court does not defer to the district court. *State Dep't of Soc. Servs. v. Vijil*, 784 P.2d 1130, 1132 (Utah 1989)

(citations omitted); cf. *Workman v. Nagle Constr., Inc.*, 802 P.2d 749, 754 n.11 (Utah Ct. App. 1990) (“Generally the district court has some discretion in ruling on a rule 60(b) motion. However, if the judgment is determined to be void, the court has no discretion, and the judgment must be set aside.”).

Although jurisdictional questions present issues of law, the burden of demonstrating a lack of jurisdiction lies on the party challenging jurisdiction. “When a judgment, including a default judgment, has been entered by a court of general jurisdiction the law presumes that jurisdiction exists, and the burden is on the party attacking jurisdiction to prove its absence.” *Vijil*, 784 P.2d at 1133.

## **Issue No. 2**

Whether the Seventh Judicial district Court erred and abused its discretion in awarding Appellee attorney fees in the amount of \$1,000 for Appellant’s attorney’s failure to appear at a previous hearing.

### **STANDARD OF REVIEW**

“An award of attorney fees in divorce actions rests within the sound discretion of the trial court, which [the court] will not disturb absent an abuse of discretion.” *Wells v. Wells*, 871 P.2d 1036, 1038 (Utah Ct. App. 1994).

### **STATEMENT OF CASE**

**Course of Proceedings and Disposition in the Seventh Judicial District Court of Utah**

In 2008, Appellee, Larue Miles (“Larue”) filed for divorce. Appellant, Baldemar (“Baldemar”) Miles, was never served with notice of said filing. On June 24, 2008 The Seventh Judicial District Court (“district court”) signed a Restraining Order & Temporary Order of Support. On July 11, 2008, the Larue Miles received notice of a failure of service of process. On July 28, 2008, Larue filed a Motion to Allow Service of Process of Process by Alternative Means, and district court issued an order allowing alternative service of process on August 1, 2008.

On August 1, 2008 Larue sent notice via certified mail to the four addresses approved in order allowing alternative service of process. The mail was returned to Larue on September 17, 2008 as undeliverable. On September 17, 2008, Larue filed an Ex Parte Motion for Order Shortening 90-day Waiting Period for an Entry of Divorce.

On October, 15, 2010, the district court entered the Decree of Divorce. On November 4, 2008 The Qualified Domestic Relations Order (QDRO) was entered. On February 17, 2009 Baldemar filed a motion to set aside the judgment and the final order of the district court denying the motion was entered on September 22, 2009. This appeal is from the final order of the district court in which the Appellant’s *Motion to Set Aside Judgment and Decree of Divorce* was denied. The notice of appeal was filed on or about October 21, 2009.

### **STATEMENT OF FACTS**

On October 21, 1993 Larue and Baldemar were married in Provo, Utah. Aff. Of Resp. para. 1 Jan, 12, 2008. In 2008, Larue filed for divorce. Ver. Pet. for Divorc. June 24, 2008. Baldemar was never served with notice of the said filing. Aff. Of Resp. p 2,



¶11, Jan 13, 2009. They had been married for approximately fifteen years when they decided to separate. On June 12, 2008, the day of their separation they were involved in a domestic dispute in which the police were called to assist. After this altercation Baldemar moved to Florida.

Moving swiftly, on June 18, 2008, Larue performed a nationwide person locator in order to discover the location of Baldemar. The search provided four different addresses for Baldemar, including two different addresses in Florida. Larue never informed Baldemar's parents that she was intending to file for divorce or asked if they knew of a way to get in touch with him. Aff. of Resp.'s Mother Mary W. Miles, p. 1, ¶4, Jan 13, 2009.

Larue argues that she was never able to locate Baldemar or to find his proper address before the decree of divorce was entered. On August 11, Larue was able to change the address on Baldemar's retirement account to the address in Florida where he was living. Aff. of Resp. p. 3, ¶14, & attached as Exhibit D, Jan 12, 2009. No court documents were ever sent to this address. Additionally, on September 10, 2008, Larue hand wrote Baldemar's proper address on a dental bill, requesting that the dental bill be forwarded to the address where he was living. This was not an address listed on the nationwide person locator. Aff. of Resp. p 3, ¶ 13, & attached as Exhibit C, Jan 12, 2009.

On August 14, 2009 the district court held oral arguments on the issue of setting aside the default decree and the adequacy of the service of process. When the court questioned the Appellee about sending the dental bill and the changing the retirement account to the Baldemar's proper address the Appellee stated that they learned of the

proper address from the retirement administrators after the Court entered the order and allowed for the QDRO. Trans. Mot. To Set Aside the Judg. Aug 14, 2010, pg 10, ln 9-11. The QDRO was not entered by the district court until November 4, 2008, nearly three months after Larue discovered Baldemar's address.

When Larue filed the Motion Requesting the Shortening of time, she was aware of his proper address and failed to send him any notice. The Order authorizing the shortening of time was entered on September 17, 2010. She forwarded the dental bill on September 10, 2010.

### **SUMMARY OF ARGUMENT**

The failure to properly serve notice to the Appellant violated his constitutional due process rights and as a result the district court did not have jurisdiction over Baldemar Miles when the default judgment was entered. "For a court to acquire jurisdiction, there must be a proper issuance and service of summons," to preserve the individual's constitutional right to due process. *Jackson Constr. Co. v. Marrs*, 100 P.3d 1211, 1214 (Utah 2004); *see also, Skanchy v. Calcados Ortope SA*, 952 P.2d 1071, 1075 (Utah 1998); *Murdock v. Blake*, 484 P.2d 164, 167 (Utah 1971). According to the Utah Supreme Court, when there is defective service, a court will not have jurisdiction over the case to enter a decree of divorce; and judgments entered without jurisdiction are void and "fatally defective." *Garcia v. Garcia*, 712 P.2d 288, 290-91 (Utah 1986)

She violated the Appellant's due process rights when she continued to send court documents to the improper addresses after discovering his proper address. At a

minimum the Ex Parte Order Shortening Time, the Decree of Divorce, and the QDRO, and all documents relating to those items should have been sent to the Appellant as all of those were filed with the court after the Appellee discovered his location. Instead, they continued to send the documents to the improper address. And as a result, the Appellant did not even discover that he was divorced until the period to the appeal the decision had passed.

## **ARGUMENT**

**ISSUE 1:** Whether the Seventh Judicial district court incorrectly denied Baldemar Miles' Rule 60(b) motion to vacate the default judgment by holding that the district court properly granted alternative service based upon the affidavit and record before it.

### **A. THE FAILURE TO PROPERLY SERVE NOTICE TO THE APPELLANT VIOLATED HIS CONSTITUTIONAL DUE PROCESS RIGHTS.**

The district court did not have jurisdiction over Baldemar Miles when the default judgment was entered because service of process was not proper. For a court to acquire jurisdiction, there must be a proper issuance and service of summons. *Murdock v. Blake*, 26 Utah 2d 22, 484 P.2d 164, 167 (Utah 1971). The requirement ensures that an individual will not be deprived of "life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1; Utah Const. art. I, § 7. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under the circumstances, to apprise interested parties of the

pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 94 L. Ed. 865, 70 S. Ct. 652 (1950); *see also Carlson v. Bos*, 740 P.2d 1269, 1271 (Utah 1987) (“Service of process implements the procedural due process requirement that a defendant be informed of pending legal action and be provided with an opportunity to defend against the action.”). According to the Utah Supreme Court, when there is defective service, a court will not have jurisdiction over the case to enter a decree of divorce; and judgments entered without jurisdiction are void and “fatally defective.” *Garcia v. Garcia*, 712 P.2d 288, 290-91 (Utah 1986).

In *Garcia*, the Utah Supreme Court determined that the district court lacked jurisdiction over a divorce decree when the service was delivered to a prison guard rather than the inmate. *Id.* at 290. Utah R. Civ. P. 4(d), which governs service of process expressly required delivery to a person living within the home; however the Prison guard worked rather than resided within the prison and at the time there was no statutory carveout to permit delivery in this manner. *Id.* at 291 Alternative service of process in Utah is proper if “reasonable diligence” is used in attempting to locate the petitioner. Utah R. Civ. Proc. 4(d)(4)(A). At a minimum, the Appellee was required to begin sending court documents to the Appellant at his proper address as soon as she learned of it.

Likewise, the Appellee’s service of summons was equally defective. The service in *Garcia* was ruled void for imprecise delivery. Here the Appellee’s service was even

more defective. The Appellant never received any form of notice, despite the Appellee's awareness of his current address. In the late summer and fall of 2009 the Appellant was living at 68 Elizabeth Street, Crawfordville, FL 32327. The Appellee was aware that this was his address. On August 11, 2009 the address on his retirement account was changed to the 68 Elizabeth Street address. The Appellee was the only person that had the information required in order to make this change. In addition, she hand wrote a forwarding address on a dental bill which she sent to him at the 68 Elizabeth Street address, dated September 10<sup>th</sup>.

In denying the Motion to Set Aside the Decree, the district court relied on a statement by the Appellee that they discovered the proper address after the QDRO. This statement was false. The QDRO was entered on November 4, 2008, nearly two months after the Appellee forwarded a dental bill to the Appellant. At least three different court proceedings occurred after the Appellee learned of the Appellant's current address, including the Decree of Divorce. None of the documents relating to those proceedings were sent to the proper address. Instead the Appellee continued to send them to an address where she knew they would be returned as undeliverable.

**B. DUE PROCESS REQUIRES THAT APPELLEE EXERCISE  
REASONABLE DILIGENCE IN ATTEMPTING TO LOCATE AND  
SERVE A DEFENDANT.**

In Utah, rule 4 of the Utah R. of Civ. Proc. Governs service of process. With respect to service by alternative means the rule provides:

Where the identity or whereabouts of the person to be served are unknown and cannot be ascertained through reasonable diligence, where service upon all of the individual parties is impracticable under the circumstances, or where there exists good cause to believe that the person to be served is avoiding service of process, the party seeking service of process may file a motion supported by affidavit requesting an order allowing service by publication or by some other means. The supporting affidavit shall set forth the efforts made to identify, locate or serve the party to be served, or the circumstances which make it impracticable to serve all of the individual parties. Utah R. Civ. Proc. 4(d)(4)(A).

The requirement that the plaintiff submit an affidavit with the appropriate averments has been called the “diligence requirement.” *See Carlson v. Bos*, 740 P.2d 1269, 1277 (Utah 1987). Because the Due Process Clause of the United States Constitution requires that “a plaintiff must act diligently and take such steps in attempting to give the defendant actual notice of the proceeding as are reasonably practicable,” *id.* at 1275. It follows that if a plaintiff falsely avers or intentionally misleads a court to believe that he or she has exercised such diligence when he or she has not done so, the court, although at the time appearing to have jurisdiction, never had jurisdiction because the plaintiff never met the constitutional mandate.

In a case involving a statutory precursor to Rule 4(d), the supreme court of Utah set aside a default judgment against a defendant when the plaintiff filed an affidavit, which falsely averred that the plaintiff had no knowledge of the defendant's address or location. *Liebhart v. Lawrence*, 40 Utah 243, 120 P. 215, 219 (Utah 1912). The court held that, although the statement in the affidavit may have been technically true, the affiant falsely averred because "he had ready and convenient means of knowledge" but failed to either disclose the means or discover the information he claimed he did not know. *Id.* Hence, the court found that a technically correct but intentionally misleading statement in the affidavit was false. *Id.*

To satisfy the diligence requirement the appellee needed to establish that a diligent attempt was made to obtain the appellant's current address. Here, the procedure used by the Appellee fell short of the reasonable diligence standard which resulted in a violation of the appellant's Constitutional due process rights. Even if they did not know his current address when they filed the motion for alternative service of process, the Appellee still had a duty to begin sending service to the current address as soon as they learned of the current address. The failure to send service to his proper after discovering it was fatal. The district court did not have jurisdiction over the appellant at the time the divorce decree was entered because the information was not sent to the Appellant's current address, despite the fact that the Appellee knew of that address at that time.

**C. THE APPELLEE’S AFFIDAVIT SUPPORTING ALTERNATIVE  
SERVICE OF PROCESS FELL SHORT OF THE REASONABLE  
DILIGENCE STANDARD.**

Even assuming that the affidavit was not false, the trial court erred when it decided that the plaintiff had met the due diligence requirement. The trial court should have known at the time of the motion for alternative service that Larue Miles had not exercised due diligence. The affidavit used by the appellee to support the application for alternative process on its face does not show sufficient diligence in investigating. The effort that one must exercise to satisfy the due diligence requirement has been clearly explained.

The reasonable diligence standard does not require a plaintiff to “exhaust all possibilities” to locate and serve a defendant. *Downey State Bank v. Major-Blankeney Corp.*, 545 P.2d 507, 509 (Utah 1976), *overruled in part on other grounds by Mgmt Servs. v. Dev. Assocs.*, 617 P.2d 406 (Utah 1980). It does however, require more than perfunctory performance. “When notice is a person’s due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.” *Mullane*, 339 U.S. at 315.

Quoting Justice Wolfe’s concurrence in *Parker*, the court in *Jackson Construction* adopted the following definition of reasonable diligence: “[Reasonable diligence] is that diligence which is appropriate to accomplish the end sought and which is reasonably calculated to do so. If the end sought is the address of an out-of-state defendant it



encompasses those steps most likely, under the circumstances, to accomplish that result. *quoting*, 217 P.2d at 379 (Wolfe, J., concurring). The court articulated the standard further stating, “[t]o meet the reasonable diligence requirement, plaintiff who focuses on only one or two sources, while turning a blind eye to the existence of other available sources, falls short of this standard. *Id.* at P20.

In finding that Jackson Construction failed to demonstrate that it made reasonably diligent attempts to notify Douglas and Robert of its suit, the court suggested that in cases involving out-of-state defendants, “a plaintiff might attempt to locate the defendants by checking telephone directories and public records, contacting former neighbors, or engaging in other actions suggested by the particular circumstances of the case.” *Id.* In this instance, it would have been simple, inexpensive, and likely to produce a current address if the appellee had questioned the appellant’s parents if they knew of a way to contact the appellant. This simple step was ignored. In addition, the Appellee’s ability to change the Appellant’s address on retirement accounts only eleven (11) days after the affidavit demonstrates the feasibility of locating the appellant.

At a minimum the reasonable diligence standard required that the Appellee begin to send court documents to the Appellant as soon as she learned of his location. Instead, she forwarded bills and demands for payment to his proper location, and court documents to the incorrect address. At least three different court proceedings occurred, including the Decree of Divorce, after the Appellee learned of the Appellant’s proper address. None of the documents relating to those proceedings were sent to the proper address. Instead the

Appellee continued to send them to an address where she knew they would be returned as undeliverable.

**D. THE SEVENTH JUDICIAL DISTRICT COURT INCORRECTLY DENIED BALDEMAR MILES' RULE 60(B) MOTION TO VACATE THE DEFAULT JUDGMENT BY HOLDING THAT THE DISTRICT COURT PROPERLY GRANTED ALTERNATIVE SERVICE BASED UPON THE AFFIDAVIT AND RECORD BEFORE IT.**

On the Rule 60(b) motion, the district court below apparently concluded that the Appellee had exercised due diligence because it had contacted all of the addresses discovered after performing a nationwide person locator search. Due diligence requires more than attempting to contact addresses from one source. Due diligence is not “diligence which stops just short of the place where if it were continued might reasonably be expected to uncover an address...of the person on whom service is sought,” and “must be tailored to fit the circumstances of each case.” *Parker v. Ross*, 117 Utah 417, 217 P.2d 373, 379 (Utah 1950) (Wolfe, J., concurring specially).

In this case, when attempting to serve process at the incorrect address the appellee was informed by the resident of the address that the appellant's girlfriend had lived there once, but no longer did. Aff. In Support of Mot. To Allow Service of Proc. By Alt. Means. ¶ 8. Nowhere in the affidavit does it state that the appellee asked the appellant's parents if they had a current address or an ability to get in touch with the appellant despite having an open and cordial line of communication with the appellant's mother.

The fact that the appellee was able to change the address on a retirement account to the proper address just eleven (11) days after filing the affidavit in support of alternative service further demonstrates the feasibility of the appellee to determine the proper address when diligence is used. Even under a broad interpretation of reasonableness the Appellee's affidavit falls short of the reasonable diligence standard required by the precedent of this state.

In denying the Motion to Set Aside the Decree, the district court relied on a statement by the Appellee that they discovered the proper address after the QDRO. This statement was false. The QDRO was entered on November 4, 2008, nearly two months after the Appellee forwarded a dental bill to the Appellant.

**ISSUE 2:** Whether the Seventh Judicial district Court erred and abused its discretion in awarding Appellee attorney fees in the amount of \$1,000 for Appellant's attorney's failure to appear at a previous hearing.

A hearing was scheduled to be held to address the Appellant's motion to set aside the default judgment on July 27, 2009, however, the Appellant's attorney's car broke down on the way to Emery County. He immediately contacted the court to let know what had happened. The hearing was then and there rescheduled for August 14, 2009. At the rescheduled hearing the judge awarded the Appellee \$1,000.00 in attorneys' fees for his failure to appear at the previous hearing, despite the extraordinary circumstances surrounding his reason for not appearing, and despite the fact that the Appellee has not even motioned for said fees.

“An award of attorney fees in divorce actions rests within the sound discretion of the trial court, which [the court] will not disturb absent an abuse of discretion.” *Wells v. Wells*, 871 P.2d 1036, 1038 (Utah Ct. App. 1994). *See also, Kelley v. Kelley*, 2000 UT App 236, P30, 9 P.3d 171. Still, in awarding attorney fees, the trial court must consider “the receiving spouse’s financial need, the payor spouse’s ability to pay, and the reasonableness of the requested fees.” *Kelley*, 9 P.3d at 171 (quotations and citations omitted). The district court judge, in awarding the attorney fees, failed to consider any factors regarding the receiving spouse’s financial need or the payor spouse’s ability to pay, or the reasonableness of the requested fees. In this instance, the fees were not even requested. There was no motion for attorneys’ fees. In light of the extraordinary circumstances surrounding the failure to attend the hearing, the immediate notice to the court of the automobile problems, and the lack of a motion or request for attorneys’ fees, the award of attorneys’ fees was unreasonable and an abuse of discretion.

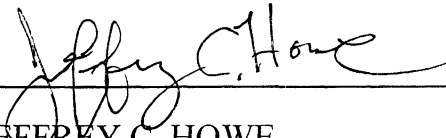
## CONCLUSION

The district court did not have jurisdiction over the Appellant when the divorce decree was entered. The Appellee knew of his actual address but continued to send notice and all court documents to an address where they knew that the mail would be returned as undeliverable. The Appellee forwarded bills and financial notices to the Appellant’s actual address and sent court documents to an improper address. This violated his due process rights and took away his opportunity to attend the divorce

hearing, resulting in a one-sided divorce decree. In addition, this failure of service of process took away his opportunity to appeal the divorce decree. The failure of the service of process was fatal and as a result the district court did not have jurisdiction over the Appellant.

Therefore, the divorce decree should be set aside because the district court did not have jurisdiction over the Appellee when the decree was entered.

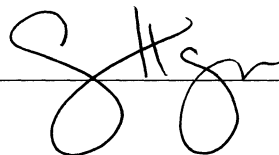
Dated this 9 day of May, 2011

  
\_\_\_\_\_  
JEFFREY C. HOWE

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the **AMENDED BRIEF FOR APPELLANT** was mailed, first-class, postage prepaid, on this 9<sup>th</sup> day of May, 2011, to the following:

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