

2009

Miles v. Miles : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

BALDEMAR MILES

Respondent/Appellant,

v.

LARUE MILES

Petitioner/Appellee.

Case No. 20090873

Appeal from the Seventh Judicial
District Court of Utah

Brief for Appellee

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. § 78A-4-103(2)(h).

ISSUES AND STANDARDS OF REVIEW

Issue No. 1

Whether the trial court correctly denied Baldemar Miles Rule 60(b)(4) and (6) motion to set aside the default Decree of Divorce by holding that the trial court properly granted alternative service based upon the affidavit and record before it.

Standard of Review

Rule 4(d)(4) of the Utah Rules of Civil Procedure states the requirements for alternative service. *See* Utah R. Civ. P. 4(d)(4). When a motion to vacate judgment is based on a claim of lack of jurisdiction, the decision not to vacate becomes a question of law, the district court has no discretion, and no deference is given to the district court. *See State Department of Social Services v. Vijil*, 784 P.2d 1130, 1132 (Utah 1989).

“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.” *State Department of Social Services v. Vijil*, 784 P.2d 1130, 1133 (Utah 1989).

Issue No. 2

Whether the trial court abused its discretion in awarding to Larue Miles \$1,000.00 in attorney's fees for preparation and travel time when Baldemar Miles attorney failed to appear at the first hearing on his Motion to Set Aside Judgment, which resulted in a continuance and subsequent 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 (Utah Ct. App. 1994).

CONSTITUTIONAL & STATUTORY PROVISIONS

Utah Rule of Civil Procedure 4

Utah Code Ann. § 78A-4-103(2)(h)

STATEMENT OF THE CASE

A. Nature of the Case.

This case is regarding a Divorce Proceeding and Disposition in the Seventh District Court of Utah.

B. Course of Proceedings and Disposition Below.

On June 24, 2008, Appellee Larue Miles, filed for divorce from Appellant, Baldemar Miles. Also on June 24, 2008, Larue Miles filed and received a Restraining Order and Temporary Order of Support including a temporary QDRO.

Larue Miles sent the Summons and Petition to a process server in Florida to the last known address of Baldemar Miles for service. The process server was unable to serve Mr. Miles. After being unable to locate him for service, Ms. Miles filed a Motion to Allow Service of Process by Alternative Means and the court granted the motion and issued an order allowing alternative service of process on August 1, 2008 (R. 19-17).

On August 4th, 2008, Larue Miles sent the Summons, Petition and Order to Baldemar Miles at all addresses listed on the Order for Service of Process by Alternative Means. With one exception all of the mailings were returned to Ms. Miles as undeliverable. The notice sent via certified mail to the address of 6631 NW 20th Street, Margate, FL 33063, was never returned to Ms. Miles. Larue Miles filed a certificate of service on August 7, 2008 (R. 18).

On August 28, 2008, Ms. Miles filed a Motion for Temporary Domestic Relations Restraining Order along with a Memorandum and Affidavit which was granted and signed on September 3, 2008.

On October 15, 2008, the district court entered a Decree of Divorce. On November 4, 2008, the court entered the Qualified Domestic Relations Order (QDRO).

On January 13, 2009, Baldemar Miles filed a Motion to Set Aside Judgment. Larue Miles filed an objection to the Motion to Set Aside Judgment on February

17, 2009. A hearing was scheduled by the court on Mr. Miles Motion for July 27, 2009, Ms. Miles attorney appeared at the hearing and Mr. Miles attorney did not appear, however the parties agreed to a continuance. At the same time, the issue of attorney fees for Ms. Miles attorney was reserved for the next hearing which was scheduled for August 14, 2009. At the August 14, 2009, hearing on the Motion to Set Aside Judgment the Court denied the Motion and Larue Miles was awarded attorney fees for time and preparation associated with the previous hearing. The final order on the Motion was entered on September 22, 2009(R. 20).

The 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

The parties were married on October 21, 1993, in Utah County, State of Utah. In 2008, Baldermar Miles engaged in an extra marital affair and extended disparaging remarks as well as threats of physical harm to Larue Miles, resulting in a protective order and consequently irreconcilable differences between the parties, making it impossible for the marital relationship to continue.

Baldermar Miles left the marital home on or about June 12, 2008, to pursue an extra martial relationship with his paramour in Florida following an incident of a domestic dispute in which the police were called to assist. Larue Miles did not

know of the whereabouts of Baldemar Miles. Mr. Miles did not provide any information to Ms. Miles regarding his whereabouts. He did not notify the US Postal Service to forward his mail or notify the Postal Service regarding the location of his new address in Florida. Concurrently, he closed all joint savings and checking accounts, leaving Ms. Miles without any means to provide for herself. (R. 9-8)

Mr. Miles did not make any arrangements or attempts to pay the mortgage on the marital home after his departure in June 2008, nor did he inform the mortgage company where he could be located. The marital home went into foreclosure and Larue Miles began to receive letters from collection companies for various bills. At the end of June 2008, Larue Miles received a call from Ford informing her that they were attempting to contact Baldemar Miles to find out why he had dropped off the truck he had been leasing at the dealership, as the lease was not up and he had provided no contact information upon dropping the truck off. (R. 8)

In June, 2008, Larue Miles attempted to locate Mr. Miles by calling family members, including his mother and father. Everyone contacted claimed that they did not know where he was residing except for the fact that he was somewhere in Florida. Mr. Miles Father signed an affidavit dated June 18, 2008, indicating that "Upon information and belief my son is currently residing in Florida," in support

of Larue Miles Motion for Temporary Orders and Supporting Memorandum. (R. 10)

In June 2008, Larue Miles counsel performed multiple person locator searches for Baldemar Miles. Based upon the results, Larue Miles counsel caused to be served upon Baldemar Miles via process server a copy of the Summons and Petition at the address in Florida where he and his paramour had last been known to reside located at 6631 NW 20th Street, Margate, FL 33063. Upon the attempt of service Larue Miles counsel was informed that the address was an address of a relative of Mr. Miles paramour and she informed the server that she did not know where Baldemar Miles or his paramour were residing at the time but indicated they had previously stayed at the residence. (R. 19-18)

On or about July 28, 2008, Larue Miles counsel submitted an Ex Parte Motion to Allow Service by Alternate Means. Said Motion was granted and on August 4th, 2008, the Summons, Petition and a copy of the Order were sent to Baldemar Miles pursuant to the Order allowing alternative service. (R. 10)

Subsequently, Ms. Miles received a dental bill from Baldemar Miles dental office postmarked September 10th, 2008. This date does not reflect the date upon which Ms. Miles forwarded the letter, rather it represents the date the letter was mailed to her. Upon receiving the bill, Ms. Miles placed the bill in a basket with other bills where it remained for approximately five weeks. Ms. Miles continued

to receive collection calls for the mail she had been forwarding to the last known Florida address she had for Mr. Miles. On or about the middle of October 2008, Ms. Miles received documents from Mr. Miles former employer Savage Companies that contained an additional previously unidentified Florida address for Mr. Miles, she then forwarded the Dental Bill onto him at the address they had listed. Ms. Miles did not know whether or not this new Florida address was Mr. Miles current address. This additional address was received by Ms. Miles at approximately the same time the Decree was entered and nearly 2 and ½ months after the Motion for Alternative Service was filed.

SUMMARY OF ARGUMENT

The Appellant correctly contends that a failure to properly serve notice results in a violation of constitutional due process rights and consequently adversely effects jurisdiction. "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).

Therefore, if service was proper then the Seventh District Court appropriately had Jurisdiction over the matter in question and furthermore had authority to enter all of the subsequent orders and discretion to deny the Motion to

Set Aside the Judgment or Divorce Decree. The only issue in regards to service in this matter is whether or not the Seventh District Court properly granted the Appellee's Motion for Alternative Service.

Mr. Miles contends that the Motion for Alternative Service was not proper because Ms. Miles did not exercise reasonable diligence in attempting to locate him, specifically claiming that if she had contacted his parents the correct address for Mr. Miles could have easily been ascertained. However, Ms. Miles was in contact with Mr. Miles parents and had requested said information. In response, she was told that Baldemar Miles was in Florida, but they did not know where (*See Appellant Brief pg. 15*). Appellant's father David H. Miles filed an affidavit in support of Larue Miles Motion for Temporary Orders acknowledging that "upon information and belief his son was residing in Florida." Subsequently, Mary Miles, Appellant's mother indicated by affidavit in Baldemar Miles Motion to Set Aside Judgment that Larue Miles had asked where Baldemar Miles was residing and she told her "some place in Florida." Ms. Miles had performed the one specific act identified by the Appellant as the difference in what would have qualified reasonable diligence in attempting to locate Mr. Miles (R. 19-17).

Baldemar Miles also contends that Larue Miles mislead the Court in the Motion for Alternative Service by claiming that she actually knew where he was residing, but represented to the Court that she did not know. As support for this

claim Mr. Miles identifies a dental bill which was forwarded to a Florida address by Ms. Miles with a date stamp of Sept 10, 2010. The motion for alternative service was filed on July 31, 2008. Said letter was received by the Appellant on or about Sept 10, 2010. On or about the middle of October 2008, Ms. Miles received documents from Mr. Miles former employer Savage Companies that contained an additional previously unidentified Florida address for Mr. Miles. She then forwarded the Dental Bill to him at the address they had listed. Ms. Miles did not know whether or not this new Florida address among the other possible Florida addresses was Appellant's correct Florida address. Furthermore, Ms. Miles did not become aware of said additional Florida address until 2 1/2 months after the Motion for Alternative Service was filed.

As further support of the claim that Ms. Miles mislead the District Court, Mr. Miles asserts that the address identified in his retirement plan was changed to his correct Florida address and the only way this could have possibly happened was by and through Ms. Miles. However, Mr. Miles offers no affirmative allegation as to how or why Ms. Miles is the one that caused the change other than the fact that the address changed. At the same time, Baldemar Miles acknowledges in his affidavit in Support of the Motion to Set Aside Judgment, that any such change would require a signature and his social security number. Ms. Miles did not cause a change in address, nor was she capable of causing said change in

address even if she desired to do so. Furthermore, Ms. Miles would have had no incentive, reason, or purpose in attempting to change said address. It is much more likely that Mr. Miles himself or his employer effectuated the change.

ARGUMENT

Issue No. 1: Whether the trial court correctly denied the Appellant's Rule 60(b)(4) and (6) motion to set aside the default Decree of Divorce by holding that the trial court properly granted alternative service based upon the affidavit and record before it.

A. THERE WAS A PROPER ISSUANCE AND SERVICE OF SUMMONS AND DIVORCE PETITION IN THIS MATTER PURSANT TO THE ORDER ALLOWING SERVICE OF PROCESS BY ALTERNATIVE MEANS.

On August 1, 2008, the Seventh District Court filed an Order Allowing Service of Process by Alternative Means. The Order stated that service of the Summons and Verified Petition for Divorce were to be served upon Baldemar Miles by certified mail from LaRue Miles' counsel to the four different addresses provided by Ms. Miles' counsel and service would be complete upon the earlier of (a) the date of receipt of said mailing (as evidenced by the United States Postal Service Return Receipt) or (b) within five (5) days after such mailing. Pursuant to

the Summons, Baldemar Miles was required to file an Answer within thirty (30) days of the date of the service of the Summons and Petition.

It is not disputed that LaRue Miles and her counsel followed the Order Allowing Service of Process by Alternative Means filed by the Seventh District Court on August 1, 2008, and accomplished that service by filing a Certificate of Service with said court on August 7, 2008. Therefore, the only remaining issue in regards to service in this matter is whether or not the Seventh District Court properly granted the Appellee's Motion for Alternative Service. If the Court of Appeals finds that the Seventh District Court properly granted LaRue Miles' Motion for Alternative Service then service of the Summons and Petition in this matter was proper under Rule 4 of the Utah Rules of Civil Procedure.

B. THE SEVENTH DISTRICT COURT PROPERLY GRANTED LARUE MILES' MOTION FOR ALTERNATIVE SERVICE PURSUANT TO RULE 4(d)(4) OF THE UTAH RULES OF CIVIL PROCEDURE.

The Appellee, LaRue Miles, filed a Verified Petition for Divorce in the Seventh District Court on June 24, 2008. Ms. Miles attempted to serve the Appellant, Baldemar Miles, through Premiere Investigation Services in the State of Florida at the only known address she had for Mr. Miles. Premiere Investigation Services tried to serve Baldemar Miles at the address provided but was unable to do so and returned to Ms. Miles an Affidavit of Non-Service.

Upon the receipt of the Affidavit of Non-Service from Premiere Investigation Services in the State of Florida, both Ms. Miles and her counsel attempted to find another address to serve Mr. Miles the Verified Petition for Divorce. The attempts of both Ms. Miles and her counsel to effectuate service and find an address for Baldemar were unsuccessful, so on July 31, 2008, Ms. Miles filed a Motion for Alternative Service of Process and Memorandum in Support thereof, and a supporting affidavit detailing the attempts at service. Ms. Miles provided the court with the results of a nationwide person locator search and the four different addresses the search produced.

Rule 4 of the Utah Rules of Civil Procedure Governs service of process. As to the issue of 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 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). It does however, require more than perfunctory performance. “The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.” *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 94 L Ed. 865, 70 S. Ct. 652 (1950). 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).

In the case at hand, Mr. Miles did not notify the US Postal Service to forward his mail or the location of his new address in Florida. It is undisputed that Mr. Miles himself made no effort to provide Ms. Miles with current address and contact information. It is also undisputed that Ms. Miles address and contact information has remained unchanged. Commensurate with his departure from the

State of Utah, Mr. Miles closed all joint savings and checking accounts, leaving Ms. Miles without any means to provide for herself (R. 19-17).

Baldemar Miles did not make any attempts to pay the mortgage on the marital home or pay any marital bills after his departure in June 2008, despite the fact that Ms. Miles was unemployed during the entire marriage and had no means of support. Mr. Miles did not inform the mortgage company where he could be located. The marital home went into foreclosure and Larue Miles began to receive letters from collection companies for various bills. At the end of June, 2008, Ms. Miles received a call from Ford informing her that they were attempting to contact Mr. Miles to find out why he had dropped off the truck he had been leasing at the dealership, as the lease was not up and he had given no forwarding contact information upon dropping the truck off at the dealership (R. 19-17, 14).

In June, 2008, Ms. Miles attempted to locate Mr. Miles by calling family members, including Mr. Miles mother and father. Everyone contacted claimed that they did not know where he was residing except for the fact that he was somewhere in Florida. Appellant's father David H. Miles filed an affidavit in support of Larue Miles Motion for Temporary Orders acknowledging that "upon information and belief his son was residing in Florida." Subsequently, Mary Miles, Appellant's mother indicated by affidavit in Mr. Miles Motion to Set Aside

Judgment that Larue Miles had asked where Baldemar Miles was residing and she told her “some place in Florida.”

Ms. Miles hired counsel to perform electronic database searches and attempted Service at the one known Florida address.

Ms. Miles efforts to locate and positively identify the whereabouts of Mr. Miles certainly qualify as reasonable diligence. Ms. Miles exhausted every resource available to her, including, but not limited to, hiring professionals to locate Mr. Miles. Furthermore, Mr. Miles actions and the facts at hand would support good cause for alternative service based on his avoidance of service of process. The Seventh District Court appropriately granted the Appellee’s Motion for Alternative Service Pursuant to Rule 4 of the Utah Rules of Civil Procedure. The Seventh District Court further appropriately denied the Appellant’s Motion to Set Aside the Judgment, specifically stating that “Mr. Miles made a complete effort to make himself unavailable for Ms. Miles, that he made an effort to hide his address from her.” (R. 19).

Issue No. 2: Whether the Seventh Judicial district Court erred and abused its discretion in awarding Appellee attorney fees in the amount of \$1,000.00 for Appellant’s attorney’s failure to appear at a previous hearing.

A hearing was scheduled to be held on Appellant’s Motion to Set Aside Default Judgment on July 27, 2009. Appellee’s attorney prepared for and appeared

at said hearing along with his client, neither the Appellant nor his attorney appeared at the hearing at the scheduled time, Appellants attorney never contacted or attempted to contact the Appellee's attorney nor the court regarding his failure to appear at the hearing. After Appellants attorney failed to appear, the Court contacted Appellant's attorney at which time he informed the Court that his car had broken down in Utah County on the way from Salt Lake County to Emery County. Appellant's attorney motioned the court to continue the hearing, Appellee's attorney agreed to a continuance based upon the circumstances; however, he asked the court to reserve the issue of Appellee's attorney fees for the next hearing and the court granted the motion for continuance.

If Appellant's attorney had contacted Appellee's attorney and the Court immediately upon having car problems, it is possible Appellee could have avoided the unnecessary cost of having her attorney attend the hearing.

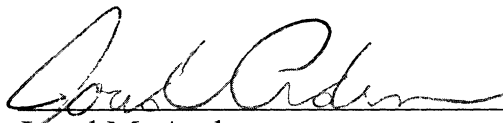
At the rescheduled hearing, the judge awarded the Appellee \$1,000 in attorney fees for Appellants attorney's failure to appear at the previous hearing based upon Appellee's attorney's motion to the court at the previous hearing. Appellee's attorney had to prepare for and attend the same hearing twice due to factors outside of Appellee's control and as such the Appellee incurred attorney fees and charges that she would not normally have incurred in the matter (R. 20).

The court awarded attorney fees based on the oral motion made by Appellee's attorney at the prior hearing requesting that the issue be reserved in conjunction with a stipulation that the matter be continued. The courts award of attorney fees was not unreasonable and was not an abuse of discretion.

CONCLUSION

For the reasons set forth above, Appellee LaRue Miles, respectfully requests that this Court affirm the trial court's determination to deny Appellant's Motion to Set Aside the Judgment or Decree of Divorce and that the Order awarding the Appellee \$1000.00 in attorneys fees was appropriate.

DATED THIS 8 day of April 2011.



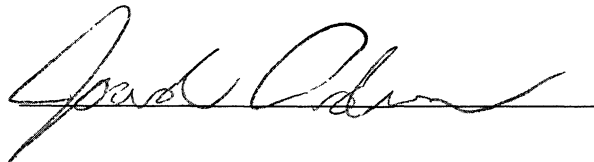
Jared M. Anderson
Attorney for Petitioner/Appellee

CERTIFICATE OF MAILING

I hereby certify that on the 8 day of April 2011, I served eight (8) copies of the foregoing **BRIEF OF APPELLEE** to the Utah Court of Appeals and two (2) copies to Jeffrey C. Howe by depositing copies in the U.S. Mail, postage pre-paid, addressed to:

Utah Court of Appeals
450 South State
P. O. Box 140230
Salt Lake City, UT 84114-0230

Jeffrey C. Howe
2150 South 1300 E, Suite 500
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A handwritten signature in black ink, appearing to read "David A. Adams", written over a horizontal line.