IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA CIVIL ACTION

R. A. C.,
Petitioner & husband,

vs. **Case No. 00 DR 0000 N**
M. F.-C.,
Respondent & wife,

ORDER DENYING THE HUSBAND'S MOTION FOR ENTRY OF JUDGMENT

This matter having come before the court on 9/12/2011 on the husband's "Motion for Entry of Final Judgment" filed 7/11/2011, it is ordered:

1. Findings

The husband filed the initial petition on 3/2/2011. His sworn petition avers that the parties do not have any minor children. He had the clerk issue a summons. A photocopy of the summons was filed on 5/4/2011 along with an "Affidavit of Service" by a "Process Server, Albert Desmarais" who says he resides in Rockville, Maryland. The authority of "Albert Desmarais" to serve process in Maryland does not appear in the affidavit or otherwise in the record, so it is not proven in this file that he is an "officer authorized to serve process in the state" of Maryland, quoting F.S. §48.194(1).

The "Affidavit of Service" shows personal service of some documents, among them a copy of the initial petition, on the respondent wife on 4/8/2011 in Silver Spring, Maryland. Neither the original summons nor the copy of the summons with the clerk's raised or stamped seal has been returned to the court file with the "Affidavit of Service", and the "Affidavit of Service" does not aver that either of these were personally served on the respondent.

The wife filed a "Motion to Quash Process and Service of Process" on 4/25/2011. At a hearing on 6/13/2011 the court orally granted this motion, and a written order reflecting this oral ruling was entered on 6/24/2011. The husband filed a motion to reconsider that ruling on 7/11/2011, but that motion has never been noticed for a hearing.

The subject motion was filed on 7/11/2011. It asks the court to summarily enter a final judgment of dissolution of marriage, with no trial being conducted and no trial order being entered. It says that the husband seeks only a dissolution of the marriage and that he is not asking the court to adjudicate any "alimony or property rights."

"Special Interrogatories" were filed by the husband at the hearing on 9/12/2011, which are questions and sworn answers that are allowed by some of the family judges in some of the counties in this circuit in cases in which the parties have reached a settlement agreement and in

which they also agree to waive a trial, a trial order, and all time periods and they both ask the court to forthwith enter a final judgment that incorporates their settlement agreement. This procedure is unique to this circuit and then not in all counties in this circuit.

The husband's driver's license, in evidence on 6/15/2011 and a copy of which was filed on 6/15/2011, shows that it was issued on 6/2/2008, so this is *prima facie* proof that the husband is a Florida resident for six months before the petition was filed.

There is no trial order rendered by the court under Rules 12.440 and 1.440. The wife has not made a general appearance in this case. She has not submitted herself to the jurisdiction of the court.

2. Ruling

2.1 Service under §48.194(1), Florida Statutes, is not proven In this case, personal service of process in Maryland was attempted under §48.194, entitled "Personal service outside state," but the "Affidavit of Service" filed 5/4/2011 does not demonstrate compliance with subsection (1) of that statute.

Although the "Affidavit of Service" states the date, time and place of service, and although it states exactly the documents that were delivered and served on the respondent wife, that is, "a true copy of the Summons, Petition for Dissolution of Marriage, ..." it does not prove (A) that "Albert Desmarais" is an "officer authorized to serve process in the state where the person is served," as required by that subsection, and the record does not otherwise indicate that person's authority in Maryland to serve process in that state; and (B) it also does not aver that either the original summons or the copy of the summons issued by the clerk with the clerk's raised or stamped seal were personally delivered to the respondent. A "true" copy of the summons is not either of those.

2.2 The original summons has not been returned to the court file

This case is a civil lawsuit under Chapter 61, so "original process" means the original summons issued by the clerk together with the copy of the summons issued by the clerk with the clerk's raised or stamped seal. *See, e.g.,* §48.031(1)(a).

Although there are exceptions, *see, e.g., Klosenski, infra,* generally speaking, for personal service to be validly made under Chapter 48, Florida Statutes, the clerk's copy of the summons with the clerk's seal on it along with a photocopy of the initial pleading must be personally delivered or served on a respondent. Personal service must then be proven in the court file, usually by an affidavit of service indicating those documents were personally delivered to the respondent by a person who is authorized by law to serve process, which affidavit should be filed along with the original summons. The original summons and the affidavit of service are the "return" to the court file.

F.S. §48.194(1) allows personal service outside of this state. It provides that "service of process on persons outside of this state shall be made in the same manner as service within this state," which means service outside of Florida must be made by one of the methods of service given in Chapter 48, Florida Statutes. F.S. §48.194(1) further provides that "an affidavit of the

officer shall be filed, stating the time, manner, and place of service" and that the service shall be made by " any officer authorized to serve process in the state where the person is served."

F.S. §48.031(1)(a) states how personal service is made within Florida, so this is also how personal service must be made outside of Florida under §48.194(1). Delivery to the respondent of either the original summons or the clerk's copy of the summons with the seal of the clerk and a copy of the petition is indispensable to personal service. The summons informs the person served that if they do not respond in writing to the clerk within the time required the relief sought in the petition will be granted without further notice or hearing. Serving a "true copy" of the summons does not suffice.

So, if personal service is sought by a petitioner, then both the original summons or the clerk's copy of the summons and a copy of the initial petition must be personally delivered or served on the respondent. Chapter 48 defines the due process required under Florida law for personal service, by the various means provided in that chapter. If the statute is not complied with, then the respondent does not have legal notice, and the court does not have personal jurisdiction over the respondent.

In this case, the original summons has not been returned to this court file. However, the loss of the original summons and the loss of the clerk's copy of the summons will not render the service invalid if in fact service was validly made, *see Klosenski v. Flaherty*, 116 So.2d 767 (Fla. 1959), but the record must somehow demonstrate that service of process was in fact validly made.

This record does not reflect *prima facie* that personal service of the original summons or the clerk's copy of the summons was made on the respondent F.- C. However, it does show that she was served with a copy of the initial petition.

The "Affidavit of Service" filed 5/4/2011 states "*a true copy* (*Emphasis supplied*) of the Summons, Petition for Dissolution of Marriage ..." were served on the respondent F. - C. As stated earlier, both of those documents, that is, the summons, either the original or the clerk's copy of it with the clerk's seal on it, and a copy of the petition, must be served on the respondent before personal service of process has been accomplished under §48.031, within this state, or §48.194, outside of this state. An affidavit stating that "*a ... copy*" of the summons was served does not show that either the original summons or clerk's copy with the clerk's seal stamped or raised was served.

And, as stated earlier, under §48.031 or §48.194, the person making the service of process must be authorized by law to make service of process in the jurisdiction where the service is made. *See, e.g.*, §48.021 "Process; by whom served," which allows sheriffs or their deputies to serve process in this state or "special process servers" in this state if appointed by the various sheriffs of this state pursuant to the procedure in §48.021(2)(b). "Albert Desmarais's" authority to serve process in Maryland is not proven.

2.3 Order granting wife's motion to quash process and service of process This motion was granted because the court found merit with the wife's "Motion to Quash Process and Service of Process" filed 4/15/2011. The grounds for that motion were that the wife has never resided in

Florida, even if the husband is a Florida resident, and that his initial petition does not allege long-arm jurisdiction facts that are required under §48.193. The husband does not raise any factual question that the wife has indeed never resided in Florida.

Therefore, the court quashed the service of process under the long-arm statute to the extent that the husband sought *in personam* jurisdiction over the wife for purposes of an alimony claim or equitable distribution. Child support is not an issue because the parties do not have a minor child. *See, e.g., Hurlock v. Hurlock,* 703 So.2d 535 (Fla. 4th DCA 1997); *Hesselton v. Hesselton*, 935 So.2d 80 (Fla. 2d DCA 2006).

Under these cases, however, although the court does not have *in personam* jurisdiction and therefore has no jurisdiction over any monetary or financial issues, the court can acquire *in rem* jurisdiction over the marriage if the wife is validly served under either Chapter 48 or Chapter 49, Florida Statutes, because the husband is a Florida resident. *Hurlock, supra; Hesselton, supra. See also* §49.011(4). Therefore, because the husband is a Florida resident and because this court has subject matter jurisdiction over actions for dissolution of marriage, *see* §61.011 and §26.012(2)(c), if the respondent is validly served so that the court also has *in rem* jurisdiction, then the court can proceed according to law to dissolve the marriage.

However, now the court cannot proceed to dissolve the marriage because service of process on the respondent by some means allowed by law for *in rem* jurisdiction, that is, a means under Chapter 48 or Chapter 49, has not been proven in this record.

2.4 A dissolution of marriage petition must proceed to trial by a trial order After a petition for dissolution of marriage is filed, if the parties do not stipulate to waive the trial and to waive a trial order under Rules 12.440 and 1.440, then the dissolution action must be concluded with a trial that is noticed by the entry of a trial order by the court under those rules.

A trial is the final evidentiary hearing at which the parties have an opportunity to present their evidence on a petition. At a trial, testimony and other evidence admissible under Chapter 90 must be submitted by a petitioner to meet the petitioner's burden of proof. Affidavits or "Special Interrogatories" do not suffice. In general, affidavits at any evidentiary hearing or at a trial are hearsay and the affiants cannot be cross examined. An opposing party has the right to cross examine a party's witnesses. So, affidavits are not admissible at a trial or a hearing, generally speaking.

A trial can be held only after the court enters a trial order. Rule 12.440(a) provides:

> "(a) **Setting for Trial.** If the court finds the action is ready to be set for trial, *it shall enter an order setting the action for trial, fixing a date for trial* ... In the event a default has been entered, reasonable notice of not less than 10 days shall be given unless otherwise required by law. ..." (*Emphasis supplied*.)

So, only the court can set a matter for trial and then the court must do it with a trial order. A party cannot "notice" a trial date by a "Notice of Trial" or a "notice of final hearing."

Further, a judgment is void if it was entered following a hearing noticed by a party and not pursuant to a trial order issued by the court pursuant to Rule 12.440(a). A judgment is void for a lack of due process when it is entered at a hearing noticed by a party and not pursuant to a trial order issued by the court pursuant to that Rule.

In *Merrigan v. Merrigan*, 947 So.2d 668 (Fla. 2d DCA 2007), a final judgment was entered after "a hearing" held before the magistrate pursuant to an order entered by the court that referred the wife's petition for dissolution to the magistrate and scheduled "a hearing" before the magistrate. Both parties appeared at that "hearing" on the wife's petition but it turned out to be "an abbreviated trial" on the merits of her petition. No trial order was entered pursuant to Rule 12.440(a) by either the judge or the magistrate. The appellate court ruled that the court's order of referral that noticed a hearing "did not fairly apprise the Husband that the hearing would result in a final judgment. ... This notice also failed to comply with the procedures required by Florida Rule of Family Law Procedure 12.440(a) for setting a trial or final hearing. This alone merits reversal. ... the procedures in this case were clearly insufficient to provide appropriate notice and an opportunity to be heard on the significant contested issues..."

In *Bennett v. Ward*, 667 So.2d 378 (Fla. 1st DCA 1995) the trial judge entered a judgment of foreclosure at a hearing noticed pursuant to a "notice of hearing" served by counsel and not a trial held pursuant to a trial order entered by the judge under Rule 1.440. The appellate court said that "noncompliance with [Rule] 1.440 can be raised ... by motion" pursuant to Florida Rule of Civil Procedure 1.540, and that "[s]trict compliance with Florida Rule of Civil Procedure 1.440 is required and failure to do so is reversible error." (*Citations omitted*.) There, however, the *pro se* appellant appeared at the hearing and admitted the default in the mortgage. On appeal he did not contest the trial court's finding of a default in the mortgage and he did not contest the entry of the judgment. Therefore, the appellate court held that he had waived the court's failure to enter a trial order.

Here, the respondent wife has not made a voluntary appearance. She has not filed any pleading seeking affirmative relief or submitted herself generally to the court's jurisdiction. She made a special appearance through counsel to contest the court's *in personam* jurisdiction. So, she did not waive the requirement that a trial must be ordered as required by Rule 12.440. *See also Bennett v. Continental Chemicals, Inc.*, 492 So.2d 724 (Fla. 1st DCA 1986).

So, even if service of process is proven made hereafter and the court acquires *in rem* jurisdiction, a final judgment of dissolution cannot be granted without a trial that is set by a trial order issued pursuant to Rule 12.440.

For the foregoing reasons, the husband's motion is denied.

Done and ordered in Fort Myers, Lee County, Florida, this _____

R. Thomas Corbin, Circuit Judge

Copies provided to:
, Esq., and , Esq.