IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

ROY ERNEST YOUNG	)	
	)	
Plaintiff/Appellee,	)	Hardin General Sessions No. 3469
	)	
vs.	)	
	)	
SANDRA LEE (RUPERT) YOUNG	)	Appeal No.
	)	02A01-9506-GS-00133
Defendant/Appellant.	)	

FILED

September 25, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

APPEAL FROM THE GENERAL SESSIONS COURT OF HARDIN COUNTY
AT SAVANNAH, TENNESSEE

THE HONORABLE MAX SEATON, JUDGE

For the Plaintiff/Appellee:	For the Defendant/Appellant:
W. Lee Lackey Savannah, Tennessee	Nan Barlow Savannah, Tennessee

REVERSED AND REMANDED

HOLLY KIRBY LILLARD, J.

CONCUR:

W. FRANK CRAWFORD, P.J., W.S.

DAVID R. FARMER, J.

OPINION

This is an action to set aside a divorce decree. Defendant Sandra Young appeals the trial court's denial of her Amended Motion to Set Aside Final Decree of Divorce. Because Roy Young failed to take appropriate measures to give SandraYoung notice of the divorce proceedings, we reverse the trial court, vacate the divorce decree and the award of custody, and remand the case to the trial court.

Sandra Young (Wife) and Roy Young (Husband) were married in 1979 and have a son, Matthew. They lived in Maryland until April 10, 1994, at which time they moved to Olive Hill in Hardin County, Tennessee. Their marriage was a troubled one, and Wife had left Husband on at least one previous occasion. On June 21, 1994, Husband obtained a restraining order forbidding Wife to remove Matthew from Hardin County, Tennessee. Husband told Wife about the restraining order that evening but did not show her a copy of the order. The order was not filed with the court until the following day. On the evening of June 21, Husband also told Wife he was filing for divorce, which he did the next day, June 22. On the morning of June 22, Wife picked up Matthew from his babysitter and left the state, returning to Maryland, where she resumed her old job and moved in with her parents.

Early the next month Husband filed an Amended Complaint in which he alleged that Wife had left the state and that, as a nonresident, process should be served by publication. Notice was published for four consecutive weeks, pursuant to Tenn. Code Ann. § 21-1-204, in a local paper in Hardin County. No other attempts at service of process were made. Husband knew the address and phone number of Wife's parents, but it is undisputed that he made no attempt to contact them to let his wife know of the impending divorce proceedings. Husband alleges that the failure to contact Wife's parents was because, when Wife left him in the past, her parents would not tell him her whereabouts. Husband knew the address and telephone number of Wife's former employer in Maryland but did not contact him. Husband stated this was because he thought Wife had retired and he did not know she had only taken a leave of absence. Default judgment was entered against Wife on September 8, 1994. The divorce decree gave custody of Matthew to Husband, required Wife to pay child support to Husband, awarded the marital property to Husband except for Wife's car, and required Wife to pay all the marital debts.

Later that month Husband, allegedly having learned Wife's whereabouts through Matthew's school records, went to Maryland to pick up his son. At this time Wife learned that a divorce had been granted and that custody of Matthew had been awarded to Husband. Wife filed a Motion to Set Aside Final Decree of Divorce and an Amended Motion to Set Aside Final Decree of Divorce, claiming that both her federal and state due process rights had been violated because service was only by publication, that the court had no jurisdiction over her, that the final judgment was void and should be set aside pursuant to Tenn. R. Civ. P. 60.02, and that the custody order should be vacated because, under Tenn. Code Ann. § 36-6-203, the trial court did not have jurisdiction over Matthew to determine custody. The motion was filed more than thirty days after the divorce decree was issued. The trial court denied the amended motion, from which decision Wife appeals.

Since this case was tried by the court sitting without a jury, we review the case ***de novo*** upon the record with a presumption of correctness of the findings of fact by the trial court. Tenn. R. App. P. 13(d).

In seeking relief from the divorce decree, Wife relies on Tenn. R. Civ. P. 60.02, which provides in part:

> On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order or proceeding for the following reasons: . . . (3) the judgment is void . . . .

Wife argues that the divorce decree is void because the method of serving process upon her, publication in a Hardin County newspaper, violated her rights to due process under both the federal and state constitutions.

Process was served upon Wife by publication pursuant to Tenn. Code Ann. § 21-1-203, which provides in part:

> (a) Personal service of process on the defendant in a court of chancery is dispensed with in the following cases:
> (1) When the defendant is a nonresident of this state;
> (2) When, upon inquiry at the defendant's usual place of abode, the defendant cannot be found, so as to be served with process, and there is just ground to believe that the defendant is gone beyond the limits of the state . . . .

Tenn. Code Ann. § 21-1-203(a)(1)-(2) (1994). The Order of Publication gave the reason for publication as being that Wife was not a resident of the state, but Husband argues that publication would have also been appropriate under Tenn. Code Ann. § 21-1-203(a)(2). Wife

contends that publication was not appropriate as her address in Maryland was easily ascertainable by contacting her parents or her Maryland employer. Wife also notes that Husband knew she was in Maryland because he alleged that fact in his Amended Complaint. She argues that it was highly unlikely anyone seeing the published notice in Hardin County would attempt to contact her because she had lived there such a short time. Consequently, the failure to serve her personally violated her due process rights.

The classic statement regarding the due process requirements of any method of serving notice was made by the United States Supreme Court in ***Mullane v. Central Hanover Bank & Trust Co.***, 339 U.S. 306, 70 S. Ct. 652 (1950), where the Court stated:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance.

Id. at 314, 70 S. Ct. at 657 (citations omitted). In addition, the Court noted:

> [W]hen 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. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.

Id. at 315, 70 S. Ct. at 657-58 (citations omitted). In a later case, the Supreme Court summarized the holding in ***Mullane***: "The general rule that emerges from the Mullane case is that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question." ***Schroeder v. City of New York***, 371 U.S. 208, 212-13, 83 S. Ct. 279, 282 (1962).

The seminal case on the adequacy of process in Tennessee is ***Baggett v. Baggett***, 541 S.W.2d 407 (Tenn. 1976). In ***Baggett***, the question before the Court was whether or not it was a due process violation for a husband suing a nonresident wife for divorce to rely solely on publication as a means of serving process, without mailing her a notice of the filing of the divorce petition at her last known address. ***Id.*** at 408. The trial court found that the husband knew or could have easily ascertained the wife's mailing address. However, the trial court found no violation in that the husband followed the procedures of Tenn. Code Ann. § 21-218. The

Court of Appeals reversed and vacated the divorce decree. ***Id.*** at 408-09. The Supreme Court, relying on ***Schroeder***, affirmed the Court of Appeals and held that it was a due process violation not to send the wife a notice of the pending action at her last known mailing address because her husband either knew that address or could have easily discovered it. ***Id***. at 410-11. The Court declared Tenn. Code Ann. § 21-218 unconstitutional and void to the extent that it "[could have been] considered to relieve the Court of the obligation to give such notice to a non-resident defendant whose last known place of residence is known or can be ascertained upon inquiry." ***Id.*** at 411.

In a subsequent decision, this Court has stated: "It is clear that notice by publication is not sufficient to comply with due process when the person's name or address is known or is very easily ascertainable. Failure to give notice surely fails the dictates of due process." ***Love v. First Nat'l Bank***, 646 S.W.2d 163, 165 (Tenn. App. 1982).

Under Tenn. Code Ann. § 21-1-205, the successor to the statute found unconstitutional in ***Baggett***, the trial court and the clerk of the court have some obligation to ascertain if a defendant served by publication received actual notice and, if not, to consider further action to give the defendant notice. From the record in this case, it appears that there was no effort to determine Wife's whereabouts or determine if she received actual notice. Husband knew her parents' address and telephone number and could have called them in an attempt to give actual notice. Regardless of his subjective belief that this act would have been futile, he was obligated to do so. Husband never contacted Wife's former employer in Maryland, even though this would have been a logical step to find her. No measures were taken to serve notice beyond the act of publication.

Husband argues that he gave his wife notice when he ***told*** her he was filing for divorce and that he had obtained a restraining order against her. Despite the fact that Wife was never served with papers, Husband asserts that his verbal statement to her was enough to put her on inquiry notice to determine whether divorce pleadings had been filed, citing ***Blevins v. Johnson County***, 746 S.W.2d 678 (Tenn. 1988). Wife asserts that Husband only told her that he wanted a divorce, not that a divorce had been filed. She concedes that Husband told her of a restraining order but states that Husband in the past had told her many things that were untrue and that she did not believe him.

The ***Blevins*** Court notes that inquiry notice in Tennessee is considered a variant of actual notice:

> "The words 'actual notice' do not always mean in law what in metaphysical strictness they import; they more often mean knowledge of facts and circumstances sufficiently pertinent in character to enable reasonably cautious and prudent persons to investigate and ascertain as to the ultimate facts."

Blevins, 746 S.W.2d at 683 (quoting ***Texas Co. v. Aycock***, 190 Tenn. 16, 27, 227 S.W.2d 41, 46 (1950) (citation omitted)). Indeed, once facts have been given to put one on inquiry notice, "[e]ven a good faith failure to undertake the inquiry is no defense." ***Id***. The issue of inquiry notice must be evaluated considering the circumstances as a whole. ***Id***. at 684. These circumstances include the extent and reliability of the information known by the defendant, the plaintiff's obligation to give actual notice, and the interests at stake in the litigation.

The Tennessee Supreme Court recently discussed the issue of notice in ***Estate of Jenkins v. Guyton***, 912 S.W.2d 134 (Tenn. 1995). In ***Guyton***, a creditor failed to file a claim against an estate within the six-month statutory period, but both the probate court and the appellate court allowed the claim, prompting an appeal to the Tennessee Supreme Court by the estate. ***Id.*** at 134-35. The estate asserted that it had notified the creditor's attorney of the decedent's death and that the will was being probated in Davidson County. The Court had to determine if this communication constituted actual notice to the creditor. ***Id.***

The estate argued that under Tennessee law actual notice is "anything that serves to put a reasonably prudent person on inquiry as to the legal consequences of a particular set of facts." ***Id.*** at 137. The Court recognized that this definition might well be valid in other areas of Tennessee law but then found that it was unduly restrictive in the context of the case before it and would put at risk the constitutionality of the state's notice provisions. ***Id.*** The Court quoted a bankruptcy case decided by the United States Supreme Court which discussed notice:

> "Nor can the bar order against New York be sustained because of the city's knowledge that reorganization of the railroad was taking place in the court. The argument is that such knowledge puts a duty on creditors to inquire for themselves about possible court orders limiting the time for filing claims. But even creditors who have knowledge of a reorganization have a right to assume that the statutory 'reasonable notice' will be given them before their claims are forever barred. When the judge ordered notice by mail to be given the appearing creditors, New York City acted reasonably in waiting to receive the same treatment.
>
> The statutory command for notice embodies a basic principle of justice--that a reasonable opportunity to be heard must precede judicial denial of a party's claimed rights. New York City has not been accorded that kind of notice."

Id. at 138 (quoting ***City of New York v. New York, N.H. & H.R. Co.***, 344 U.S. 293, 297, 73 S. Ct. 299, 301 (1953)). The Tennessee Supreme Court concluded that

> while the term "actual notice" in § 30-2-307(a)(1) may be something other than an exact copy of the published ***Notice to Creditors*** outlined in § 30-2-306(c), such notice must, at a minimum, include information regarding the commencement of probate proceedings and the time period within which claims must be filed with the probate court.

Id.

The principles in ***Guyton*** may be applied to this case. In ***Guyton***, as in this case, the applicable statutes provided for publication but also contained requirements designed to give actual notice. ***Guyton***, 912 S.W.2d at 135-37. Under the facts of this case, in which Husband verbally informed Wife that he had obtained a restraining order and was going to file for divorce, in the context of a relationship in which there was active mistrust between the parties, the verbal statement was not sufficient to relieve Husband of his obligation to make a reasonable effort to ascertain Wife's whereabouts and serve notice on her. Moreover, considering the interests at stake in the litigation, the trial court's decision to award the custody of a child by default under these circumstances is clearly unacceptable.

Therefore, the trial court's denial of Wife's Rule 60.02 motion to set aside the final decree of divorce is reversed, and the divorce decree is void. The award of custody of Matthew is void as well. The original Complaint, of course, is still before the trial court. Wife apparently has filed suit in Maryland seeking a custody determination. From the record, it is unclear with whom Matthew now resides, and there is not enough information for us to determine the appropriate forum for custody proceedings. Under Tennessee law, the first step in determining the appropriate forum for custody proceedings involves deciding which is the "home state" of the minor child. Tenn. Code Ann. § 36-6-203 (1991); Tenn. Code Ann. § 36-6-202(5) (1991); ***Brown v. Brown***, 847 S.W.2d 496 (Tenn. 1993); ***State ex rel. Cooper v. Hamilton***, 688 S.W.2d 821 (Tenn. 1985); ***Culp v. Culp***, 917 S.W.2d 233 (Tenn. App. 1995); ***Gutzke v. Gutzke***, 908 S.W.2d 198 (Tenn. App. 1995). We remand this case to the trial court to consider the divorce and the appropriate forum for custody determination. If the court finds that Tennessee is the appropriate forum to decide custody, then it shall hold an expedited hearing for interim placement of the child, with full opportunity for both parties to appear and be heard.

We reverse the trial court, set aside the divorce decree and the award of custody of

Matthew, and remand for further proceedings consistent with this Opinion. Costs on appeal are taxed to the Appellee, for which execution may issue if necessary.

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HOLLY KIRBY LILLARD, J.

CONCUR:

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W. FRANK CRAWFORD, P. J., W.S.

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DAVID R. FARMER, J.