

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

SAIRA AHMAD,
Petitioner below, Appellant

vs.) No. 35741 (Putnam County 08-D-230)

SAED AFTAB AHMAD,
Respondent below, Appellee

FILED
May 13, 2011
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

The petitioner below and appellant herein, Saira Ahmad (“Mrs. Ahmad”), appeals an adverse ruling by the Circuit Court of Putnam County entered April 16, 2010, which reversed, in part, and affirmed, in part, the order entered by the Family Court of Putnam County. On appeal to this Court, Mrs. Ahmad argues that the circuit court erred in its determination that she did not achieve sufficient service of process on the respondent below and appellee herein, Saed Aftab Ahmad (“Dr. Ahmad”), and, therefore, erred in further finding that the family court did not have personal jurisdiction over him. Based upon the parties’ arguments, the record designated for our consideration, and the pertinent authorities, we agree with the circuit court’s determination that service of process on Dr. Ahmad had not been perfected, and we hereby affirm such ruling. However, service has since been effectuated pursuant to the timeline set forth in the circuit court’s order; therefore, we remand this case to the circuit court with directions to enter an order remanding the case to the family court for a determination of the merits of the case. Because this case presents no new or significant questions of law, it will be disposed of through a memorandum decision as contemplated under Rule 21 of the Revised Rules of Appellate Procedure.

Dr. and Mrs. Ahmad were married in Pakistan in 2000. They last lived together in Putnam County, West Virginia, where their two children were born and raised. In April 2008, Dr. Ahmad, without notice, liquidated certain assets and left his children and wife. Mrs. Ahmad, on May 19, 2008, filed a pro se petition for divorce, along with an affidavit of non-residency or unknown residency for Dr. Ahmad. On that same date, an order of publication was set to be released on two upcoming dates. Further, an emergency hearing was held and an order entered, awarding temporary custody and child support to Mrs. Ahmad, and prohibiting Dr. Ahmad from removing the children from the country.

On May 23, 2008, Mrs. Ahmad sent a copy of the order and the petition for divorce to an address in New Martinsville, West Virginia,¹ and received a return receipt signed by Richard Wright. Dr. Ahmad sent a letter to the circuit clerk dated June 11, 2008, which requested case information and provided an address in Lahore, Pakistan.

The family court entered a temporary order on October 21, 2008, granting Mrs. Ahmad spousal support in the amount of \$10,000 per month based on an attributed income of \$550,000 per year. Further, monthly child support in the amount of \$7,825 was ordered to be paid to Mrs. Ahmad for the parties' two children. The family court found that Dr. Ahmad had received notice of the hearing by mail and email. On December 17, 2008, Dr. Ahmad sent a letter to the family court judge, discussing several issues in the temporary order, including the fact that he was a current resident of Pakistan, and contesting the family court's jurisdiction over his marriage.

On June 10, 2009, a final hearing was held in the family court. The order upheld the previous child support award and the previous spousal support award. The family court further liquidated certain of the parties' assets and applied the value to pay household expenses. Moreover, the family court suspended the medical board license of Dr. Ahmad because of his failure to pay child support. Dr. Ahmad appealed to the circuit court.

In his appeal to the circuit court, Dr. Ahmad alleged that the family court lacked personal jurisdiction over him because notice of the proceedings was effectuated solely through publication and email notice. The circuit court found that the "Family Court had subject-matter jurisdiction over the divorce under the 'divisible divorce' doctrine[.]"² Therefore, the circuit court found that the family court had jurisdiction to sever the bonds of marriage; however, the circuit court further found that the family court lacked in personam jurisdiction such that it could not make decisions regarding Dr. Ahmad's personal property interests through the award of child support and/or alimony.

The circuit court found that personal jurisdiction can be effectuated on Dr. Ahmad only through use of the long-arm statute,³ which, in this case, would require service through the Secretary of State. Pursuant to West Virginia Rule of Civil Procedure 4(j), the circuit court granted time for Mrs. Ahmad to serve the petition for divorce upon Dr. Ahmad through

¹The address was obtained as a result of the circuit court's order mandating that the postal service provide any and all forwarding address information to Mrs. Ahmad.

²See *infra* note 5.

³See W. Va. Code § 56-3-33 (2008) (Supp. 2010).

the Secretary of State's office. Mrs. Ahmad was granted thirty days in which to perfect service. Thereafter, Dr. Ahmad was granted sixty days following service to respond to the family court's prior orders in the case. Mrs. Ahmad accomplished service through the Secretary of State's office and filed the instant appeal to this Court. Dr. Ahmad, however, has failed to file any responsive pleadings pursuant to the sixty-day time frame set forth in the circuit court's order. Dr. Ahmad did, however, file a brief with this Court.

In deciding this case, this Court will apply our well-settled standard of review. *See* Syl. pt 1, *Staton v. Staton*, 218 W. Va. 201, 624 S.E.2d 548 (2005) (“‘In reviewing a final order entered by a circuit judge upon a review of, or upon a refusal to review, a final order of a family court judge, we review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. We review questions of law *de novo*.’ Syllabus, *Carr v. Hancock*, 216 W. Va. 474, 607 S.E.2d 803 (2004).”).

On appeal to this Court, Mrs. Ahmad contends that the circuit court erred in its determination that she did not achieve sufficient service of process upon Dr. Ahmad, and, therefore, further erred in finding that the family court did not have personal jurisdiction over him. In response, Dr. Ahmad avers that the issue is now moot because Mrs. Ahmad complied with the directive of the circuit court to perfect service through the Secretary of State's office.⁴ Further, Dr. Ahmad argues that the long-arm statute was the only method by which Mrs. Ahmad could perfect service; therefore, Dr. Ahmad contends that the circuit court was correct in finding that it did not have personal jurisdiction over him.⁵

At issue herein is whether the lower courts acquired personal jurisdiction over Dr. Ahmad through Mrs. Ahmad's attempts to serve him with process. Applicable to the present case, Rule 4(e) of the West Virginia Rules of Civil Procedure delineates ways in which a party may obtain constructive service of process. However, under *Leslie Equipment Co. v.*

⁴We disagree with Dr. Ahmad's characterization of this argument as moot. While we agree that the merits of the case will not be reviewed at this time, the reason is because the question before us does not necessitate a review of the merits. This Court's current review is properly restrained to the issue of whether personal jurisdiction was effectively achieved over Dr. Ahmad in the underlying proceedings when the substantive issues were decided.

⁵The parties concede that Mrs. Ahmad properly obtained a divorce from marriage and received custody of the parties' children under the divisible divorce doctrine. *See generally Burnett v. Burnett*, 208 W. Va. 748, 542 S.E.2d 911 (2000). Thus, the only issue on appeal centers around whether personal jurisdiction was properly achieved so as to allow the lower courts to adjudicate Dr. Ahmad's property interests.

Wood Resources Co., 224 W. Va. 530, 687 S.E.2d 109 (2009), service of process obtained through Rule 4(e)'s constructive service component is not sufficient to confer personal jurisdiction on a nonresident defendant. See Syl. pt. 4, *Leslie*, *id.* (“In contrast to the legislative schema of West Virginia Code § 56-3-33 (Supp. 2009), Rule 4 of the West Virginia Rules of Civil Procedure does not provide that constructive service on a nonresident defendant has the same force of law as personal service effected in state. As a result, *in personam* jurisdiction does not arise by operation of law when a nonresident defendant is constructively served with process pursuant to the provisions of Rule 4 of the West Virginia Rules of Civil Procedure.”). To effectuate service, “[u]nder West Virginia Code § 56-3-33 (Supp.2009), the acceptance by the Secretary of State of service of process as the attorney-in-fact for a nonresident defendant who has committed one of the enumerated statutory acts^[6] is the legal equivalent of personally serving that nonresident within this state.” Syl. pt. 3, *Leslie*, *id.* (footnote added).

For the foregoing reasons, the circuit court's finding of lack of personal jurisdiction is affirmed. However, because service was later perfected through the Secretary of State's office pursuant to the circuit court's directives in its order, the case is remanded to the circuit court with directions to enter an order remanding the case to the family court for consideration of the merits of the case.

Affirmed and Remanded.

ISSUED: May 13, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Menis E. Ketchum

Justice Thomas E. McHugh

⁶One act enumerated in the statute is a nonresident “causing tortious injury by an act or omission in this state.” This Court has previously recognized that failure to pay child support constitutes a tortious act such that personal jurisdiction can be obtained. Syl. pt. 1, *Lozinski v. Lozinski*, 185 W. Va. 558, 408 S.E.2d 310 (1991) (“A parent's failure to support his children constitutes a tortious act for purposes of the West Virginia long-arm statute, W. Va. Code § 56-3-33 (Supp. 1991).”); Syl. pt. 2, *Lozinski*, *id.* (“When an individual commits a tort by failing to support his children, personal jurisdiction may be obtained over that individual pursuant to the West Virginia long-arm statute provided that the statutory requirements for asserting jurisdiction have been met.”).