

[Cite as *In re J.S.*, 2010-Ohio-3426.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94841

**IN RE: J.S.
A Minor Child**

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. CU 09100919

BEFORE: Jones, J., Rocco, P.J., and Cooney, J.

RELEASED: July 22, 2010

JOURNALIZED:

ATTORNEYS FOR APPELLANT

Patrick J. Ebner
William D. Brown
Steuer, Escovar, Berk & Brown Co., LPA
55 Public Square
Suite 1475
Cleveland, Ohio 44113-1977

ATTORNEY FOR APPELLEE

Ronald Sears
P.O. Box 23071
Chagrin Falls, Ohio 44023

LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, D.S. (“Mother”), appeals the trial court’s denial of her motion to vacate custody order. Having reviewed the arguments of the parties and the pertinent law, we hereby affirm the judgment of the lower court.

STATEMENT OF THE CASE

{¶ 2} This case involves the allocation of parental rights and responsibilities as they pertain to the custody of J.S.¹ On December 16, 2009, appellee, T.W. (“Father”) filed a motion to modify custody. Mother violated the

¹The juvenile is referred to herein by his initials in accordance with this court’s established policy regarding nondisclosure of juveniles in all juvenile cases.

terms of the shared custody agreement when she failed to notify Father of her whereabouts. On February 8, 2010, the magistrate granted Father's motion. The juvenile court judge adopted the magistrate's decision and the journal entry of the custody order was entered on February 23, 2010. The order stated that Father would become the residential parent and legal custodian of J.S. Currently, per the trial court's order, J.S. is living with Father.

{¶ 3} Mother filed a motion to vacate on March 11, 2010. The motion was denied. Mother then filed her notice of appeal with this court on March 16, 2010.

STATEMENT OF THE FACTS

{¶ 4} J.S. is the biological son of Mother and Father. J.S. was born on March 4, 2006 and is currently four years old. J.S. had lived with Mother from the time he was born until the court recently ordered that he be placed with Father.

ASSIGNMENTS OF ERROR

{¶ 5} Mother assigns one assignment of error for our review:

{¶ 6} "[1.] The trial court did not have proper service or jurisdiction."

LEGAL ANALYSIS

{¶ 7} Mother argues that Father failed to provide proper service, and the lower court therefore lacked jurisdiction. We disagree.

{¶ 8} Civ.R. 4.1(A) requires that service of process shall be by certified mail or express mail and the clerk shall enter the fact of mailing on the docket and

make a similar entry when the return receipt is received. Civ.R. 4.1(A). Service by ordinary mail can be made only if the certified letter is refused or returned as unclaimed. In each of these circumstances, the clerk must notify the attorney of record or the serving party. The attorney or serving party must then file a written request for ordinary mail. Civ.R. 4.6(C) and (D). If these two methods are unsuccessful, service by publication may be attempted. Civ.R. 4.4.

{¶ 9} Civ.R. 4.4, Process: service by publication, subsection (A)(1) provides in pertinent part:

“(A) Residence unknown”

“(1) Except in an action governed by division (A)(2) of this rule, *if the residence of a defendant is unknown*, service shall be made by publication in actions where such service is authorized by law. Before service by publication can be made, an affidavit of a party or his counsel shall be filed with the court. The affidavit shall aver that service of summons cannot be made *because the residence of the defendant is unknown to the affiant, all of the efforts made on behalf of the party to ascertain the residence of the defendant, and that the residence of the defendant cannot be ascertained with reasonable diligence.*” (Emphasis added.)

{¶ 10} To take advantage of the provisions permitting service by publication, plaintiff’s counsel must first establish “reasonable diligence” in attempting to learn a defendant’s address, which requires taking steps that an individual of ordinary prudence would reasonably expect to be successful in locating a defendant’s address and requires counsel to use common and readily available sources in the search, such as a check of the telephone book or a call to the telephone company, checking the city directory, a credit bureau, county

records such as auto title department or board of elections, or inquiry of former neighbors. *Kraus v. Maurer* (2000), 138 Ohio App.3d 163, 740 N.E.2d 722; see, also, Civ.R. 4.4(A).

{¶ 11} Father first attempted to serve Mother at her last known address. J.S.'s maternal grandmother informed him that Mother no longer lived there and she did not know where Mother currently lived. Review of the evidence clearly shows that Father went through significant steps in order to try and locate Mother.

Specifically, Father drove by Mother's house almost daily. In addition, Father engaged in many searches on the internet and even went as far as hiring a private investigator in order to try and locate Mother's out-of-state whereabouts. Father also contacted other individuals who knew Mother, both in her neighborhood and elsewhere, as to the whereabouts of Mother. Unfortunately, Father was still unable to obtain any information regarding Mother's current address.

{¶ 12} Father filed a subpoena with the trial court for the appearance of the maternal grandmother at a hearing in November 2009, and she told the court that Mother no longer lived with her and she did not know where Mother was. The fact that the maternal grandmother did not know where Mother was demonstrates some of the difficulties Father had to overcome in order to try to locate Mother. The record in this case shows clearly that Father went well beyond reasonable diligence in trying to determine Mother's current address.

{¶ 13} Further review reveals conflict with the clean hands doctrine on the part of Mother when she left the jurisdiction with J.S. and did not bother to leave a forwarding address or notify the court of her new location. Mother was well aware of the ongoing legal proceedings and the seriousness of the situation, yet she felt it appropriate to leave no information regarding her whereabouts with her mother, the court, or Father. Mother's claims concerning improper service appear disingenuous at best.

{¶ 14} We find the actions of the lower court to be proper. Review of the evidence in this case demonstrates Mother received proper service. This court hereby affirms the judgment of the lower court.

{¶ 15} Mother's sole assignment of error is overruled.

It is ordered that appellee recover from appellant costs herein taxed.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LARRY A. JONES, JUDGE

KENNETH A. ROCCO, P.J., CONCURS;
COLLEEN CONWAY COONEY, J., CONCURS IN JUDGMENT
ONLY

