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Motion For Publication of Summons In Quiet Title Proceedings

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AUTHOR'S NOTE: In writing this article, the forms of motions used by Edwin J. Whittelshofer, L. H. Drath, Fairfield & Woods, Albert S. Isbill, and Percy S. Morris were studied. The assistance of these title experts is gratefully acknowledged.

Too many motions for the publication of summons in quiet title proceedings in Colorado do not comply with the requirements of Rules 4 (g) (2)¹ and 4(h)² of the Colorado Rules of Civil Procedure and result in substituted service which does not confer jurisdiction upon the court and, consequently, in quiet title decrees which are void and subject to collateral attack.

Changes in the law make every lawyer's basic knowledge of substantive law and his procedural tools constantly subject to obsolescence, equally subject to improvement. The fact that the provisions of the Colorado Code permitting substituted service of process affecting actions in rem have been changed is known to all practicing attorneys; unfortunately, however, this change resulted in making obsolete the forms which lawyers, for years, had been using to secure substituted service. To an extent, many lawyers have

¹ Rule 4:

(g) Other service. Service by mail or publication shall be allowed only in cases affecting specific property or status or in other proceedings in rem . . .

(2) Service by publication may be had on the following parties:

(i) Unknown persons.

(ii) Domestic corporations. When such corporation cannot be served because no person can be found upon whom such service can be made.

(iii) Foreign corporations. When such corporation has not appointed a statutory agent for process, or when the agent appointed cannot be found at the address stated in such appointment.

(iv) Nonresidents of the state; persons who have departed from the state without intention of returning; persons who conceal themselves to avoid service of process; or persons whose whereabouts are unknown and who cannot be served by personal service in the state.

² Rule 4 (h): Publication. The party desiring service of process by publication shall file a motion verified by the oath of such party or of someone in his behalf for an order of publication. It shall state the facts authorizing such service, and shall show the efforts, if any, that have been made to obtain personal service within this state and shall give the address, or last known address, of each person to be served or shall state that the same is unknown. The court shall hear the motion ex parte and, if satisfied that due diligence has been used to obtain personal service within this state, or that efforts to obtain the same would have been to no avail, shall order publication of the process in a newspaper published in the county in which the action is pending. Such publication shall be made for four weeks. Within 10 days after the order the clerk shall mail a copy of the process to each person whose address has been stated in the motion. Service shall be complete on the day of the last publication. If no newspaper be published in the county, the court shall designate one in some adjoining county. (Effective 12/28/44 plus 60 days.)

been reluctant to accept this obsolescence and to revise their office forms to comply with the new rules.

Recognizing that in many quiet title actions there may be certain factual peculiarities which should properly be included in a verified motion for publication and that a form will not fit every situation, there are certain statements which *must* be made in each such motion under Rule 4, and certain statements considered essential under the old code which are no longer necessary. The omission of any of the requirements under the new rules is fatal;³ the inclusion of the former requirements is no longer good practice, but is probably harmless, except that such inclusion may result in a motion which is too long and wordy, accomplishes no good purpose, and tends to perpetuate the evil.

It has been consistently held that in order to give the court jurisdiction by substituted service through publication of summons, the statutory requirements must be strictly complied with, and that nothing excuses omissions or insufficient statements.⁴ Service by publication of summons is in derogation of the common law,⁵ and, if the provisions of the Rules of Civil Procedure are not complied with, the court is without jurisdiction;⁶ any decree in such cause is a nullity⁷ and may be collaterally attacked.⁸ A recitation in the decree is not conclusive if the record discloses lack of jurisdiction.⁹

The Requirements Under the Rules

Under Rule 4(h), the motion for publication:

- (1) must state the facts authorizing substituted service;¹⁰
- (2) must show the efforts that have been made to obtain personal service within the State of Colorado;¹¹
- (3) must give the address, or last known address, of each person to be served by publication, if the same may be ascertained;¹²
- (4) must state that the address, and last known address, of the persons to be served are unknown, if such is the fact;¹³ and
- (5) must be verified by the party desiring such substituted service or by someone in his behalf.¹⁴

³ 24 CA 514; 24 CA 517.

⁴ 25 CA 129, 131.

⁵ 15 Colo. 189.

⁶ 109 Colo. 567.

⁷ 23 CA 53; *Sine v. Stout*, decided 1/31/49.

⁸ 22 CA 603; 23 CA 220; 48 Colo. 419.

⁹ 48 Colo. 419; 22 CA 612.

¹⁰ *Sine v. Stout*, decided 1/31/49.

¹¹ 67 Colo. 189.

¹² 22 CA 603; 22 CA 389; 146 So. 241 (Fla.); 91 ALR 212; 52 Colo. 512.

¹³ 22 CA 389; 23 CA 206; 23 CA 344; 25 CA 129, all decided under the code, to the effect that, if addresses are not given, it must be stated that all of the requirements are unknown.

¹⁴ Rule 4(h).

The verified motion which contains all of the necessary elements in as few words as possible eases the burden of the subsequent title examiner in his search of the record and makes the proceedings themselves less subject to criticism.

The lead paragraph of the motion could read as follows:

<p>A. B., et al., Plaintiff, vs. C. D., et al., Defendant ¹⁵</p>	}	<p>Motion for Publication</p>
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Come(s) now the plaintiff(s) herein (by his attorney), and moves for an order of service by publication in accordance with the Colorado Rules of Civil Procedure (upon all of the defendants not otherwise served with process),¹⁶ and states:

Under the old code,¹⁷ the affidavit could be made by the plaintiff or by the plaintiff's attorney if the plaintiff did not reside in the county or was absent from the county wherein the action was brought. Accordingly, no other person could properly make the necessary affidavit,¹⁸ and when it was made by the attorney, reason had to be shown why the plaintiff himself did not make it.¹⁹ The present rule changed this, however, by providing that the motion shall be filed by the party desiring service by publication and *verified* by the oath of such party or by *someone in his behalf*. The rule places importance on the fact that the statements are being *verified* by or *in behalf* of the party desiring the substituted summons; the reasons why the party himself is not making or verifying the motion are immaterial, if such be the fact.

Rule 4(g) should be closely followed in stating the facts authorizing the service. A paragraph including this requirement might be briefly stated as follows:

(1) *That such service is authorized because:*

This is an action affecting specific property (as described in the complaint)²⁰ and is a proceeding in rem;²¹

The defendants to be served by publication are unknown persons, (or are domestic corporations which cannot be served) because no per-

¹⁶ Rule 10(a) provides that in pleadings other than the complaint, it is sufficient to state the first party on each side with an appropriate indication of other parties.

¹⁷ May be omitted for brevity.

¹⁸ Code, Sec. 45.

¹⁹ 22 CA 605, 127 P. 123.

²⁰ 4 CA 482; 25 CA 391.

²¹ May be used by the fastidious lawyer who feels that a reference to the property must be made in *each* pleading; it, however, seems unnecessary in the motion for publication under the present rules.

²² The phrase, "known as an action in rem," is not used in the rules of procedure, but appears in the code.

son can be found upon whom service can be made,)²² (or are foreign corporations which have not appointed an agent for process who can be found at the address stated in such appointment,)²² (or are non-residents of the State of Colorado,)²² (or have departed from the State without intention of returning,)²² or are persons whose whereabouts are unknown and who cannot be served by personal service in the State of Colorado.²³

A common error is to presume that the statement that the whereabouts of the defendant are unknown and that he cannot be served by personal service in the state will apply to corporations; it has been held, however, that a domestic corporation cannot be absent from the state, nor can it conceal itself to avoid service of process.²⁴ Likewise, the provisions of Rule 4(g)(2)(iii), applying to foreign corporations, should be closely followed in applicable instances.

Grounds For Service By Publication

Although grounds for service by publication may be stated in the disjunctive,²⁵ the attorney should use care to state all applicable grounds.

The efforts that have been made to obtain personal service within this state may, in order to avoid extreme verbosity, be stated in general terms inclusive of the attorney's investigations, such as the following:

(2) That search has been made of the County Court and other public records of the.....County,²⁶ State of Colorado, and of the telephone and other available directories of.....County, State of Colorado; various inquiries have been made from persons who might have information concerning defendants' addresses; endeavors have been made to personally serve defendants at any addresses available; but said efforts and further efforts to obtain personal service within this state ²⁷ have been to no avail.

The sheriff's *non est* return is no longer necessary, setting forth the efforts he has made to obtain service and the reason for his failure. This was formerly required by Rule 14a of the Supreme Court Rules but became obsolete with the adoption of the Rules of Civil Procedure.

Probably the most troublesome requirement is that the address, or last known address, of each person to be served shall be given, or the motion shall state that the same is unknown. This requirement is troublesome because:

²² Should be omitted where inapplicable.

²³ Inasmuch as Rule 4(g)(2)(iv) contemplates residence and service within the state, a statement that the defendants cannot be found within the county does not strictly comply therewith.

²⁴ 25 CA 129.

²⁵ 25 CA 129; 67 Colo. 189; 53 Colo. 346.

²⁶ Only the records of the county in which the action is brought need be searched. 84 Colo. 459.

²⁷ Personal service must be made, however, if possible within the state.

(a) In instances where the defendant is possessed of a common name, such as John Johnson (15 shown in the Denver telephone directory, to say nothing of 26 J. Johnsons), it may be very difficult to determine whether or not the defendant can be located;

(b) Sufficient care is not taken, at times, to determine addresses available from recorded title records, from the treasurer's and assessor's records, from the County Court records, from available directories, or from other sources—so that even though it may be stated that the addresses, or last known addresses, are unknown, such is not the fact;²⁸

(c) Many lawyers refuse to accept the obsolescence (and danger) of the allegation, formerly required by the code, that the "addresses, residences, whereabouts, and post office addresses of the defendants are unknown to the affiant."

When the present rule 4(h) was drafted, the provision that the motion ". . . shall give the address, or last known address, of each person to be served or shall state that the same is unknown," added a new requirement: that of the last-known address; and eliminated the necessity of stating the residence and whereabouts.²⁹ Obviously, "address" and "last known address" do not mean the same thing. Webster's dictionary has defined "address": "The directions for delivery of a letter; the name or description of a place of residence, business, etc.. where a person may be found or communicated with."³⁰ Although not necessarily a defendant's residence,³¹ an address, as used in rule 4(h), is a direction at which or through which a person may be *presently* located.³²

The rule then provides, in effect, that if it is not known where the defendant can be located *at that time*, the most recently available direction must be stated; hence, the phrase: last known address. A statement that no "address" is known is a simple allegation that no direction is known through which the defendant may, *at the present time*, be located. It states nothing whatsoever about the last address known (at some time in the past) for the defendant. An allegation that "the residence, address, whereabouts, and post office address" of the defendant are unknown is not a statement, as required, that the last known address is unknown. It must be stated that the address and the last known address are both unknown, if such is the fact.

²⁸ Under former code, sec. 45, it was sufficient if the affidavit stated that the residence, whereabouts, and postoffice address were unknown to the affiant. In construing a requirement similar to ours, however, it was said in *Glenn v. Holub*, 36 F. Supp. 941, 942, that "the plaintiff is required to ascertain at his peril, the last known address of the defendant as a matter of fact." (See also: 154 A 255; 57 NE (2) 819; 211 NW 916, 57 ALR 1218). Any failure to determine a last known address, when one is available, will, accordingly, result in a failure to comply with the rule.

²⁹ If the grounds for the substituted service is that the defendants "cannot be served by personal service in the state," it must be stated that the whereabouts are unknown.

³⁰ 140 P. (2) 990, 992 (Calif. 1943).

³¹ 164 P. (2) 274 (Calif., 1945); 52 Colo. 512; 23 CA 344; 22 CA 389; 51 Colo. 115; 23 CA 555.

³² 50 NE (2) 633 (Mass., 1943).

"Address" and "Last Known Address"

The distinction between an "address" and a "last known address" is made in *Curtiss Candy Co. v. Finance Corp.*, 71 SW (2) 833, 838, (Mo., 1934), in which it was said: "There is a material difference between the terms 'known' and 'last known', as applied to addresses. . . ." The Missouri court defines "address" as a place "at which the debtor could be found at the time", and holds that a last known address and an address are terms with entirely different legal meanings.

In *Commissioner of Internal Revenue v. Rosenheim* (1942), 132 F. (2) 677, the Circuit Court of Appeals for the Third Circuit further distinguished "address" from "last known address" by determining that a requirement that a notice of transferee liability must be mailed to the person subject to the tax at his last known address was complied with if the notice was directed to the last address disclosed by the books of the transferor company. The court conceded that this was not the respondent's address and that this fact was evidenced by income tax returns for four years, but held that it would be unreasonable and illogical, when the act specified "last known address", to require the Commissioner to search for a different address from that appearing on the books of the company.

The requirements of the rule can, accordingly, be complied with by the following allegation:

(3) That certain of the defendants may be deceased, but the addressees, or last known addresses, of the following defendants are as hereinafter stated:

* * * * *

and that the address, and last known address, of each person to be served, including unknown parties, is unknown except as herein stated.

Some lawyers deem it wise to add a paragraph similar to the following:

Said addresses are given as the last known addresses based upon inquiries and investigations made by Plaintiffs, and are stated as the last known addresses regardless of other or different addresses which may be shown by the public records.

It may be questioned, however, whether or not this paragraph is of any effect in view of the decisions construing statutes similar to the Colorado rule as placing a burden on the person desiring the substituted service to ascertain, at his peril, the last known address of the defendant as a matter of fact.³³ The rule does not require the last address known to the plaintiff, but simply: the last known address.

³³ See footnote 28.

Verification

The verification of the motion for publication could be as follows:

State of Colorado }
County of } ss

....., being first duly sworn,
upon oath deposes and says: that he is the attorney for and makes
this verification in behalf of the above-named plaintiffs; that he has
read and knows the contents of the foregoing motion; and that the
facts therein stated are true of his own knowledge.³⁴

Subscribed and sworn to before me.....

It has been the purpose of this article to discuss the various statements which should be contained in a motion for publication of summons in actions in rem. Some of the points discussed are controversial; there has been an attempt, however, to compromise any known controversies with statements which seem to satisfy all arguments. It will be noted that the paragraphs in italics above, when executed, will form a Motion for Publication. Some words probably could be eliminated, but it is believed that none of the essential elements have been omitted. Some sign-posts have been placed at points of obvious importance—these probably are unnecessary, but will serve as an aid to the subsequent title examiner.

Judge Murrah To Speak at October Convention

The Honorable Alfred P. Murrah of the Tenth Circuit Court of Appeals has agreed to join his distinguished colleague from the Second Circuit, Judge Charles E. Clark, on the roster of speakers for the 51st annual convention of the Colorado Bar Association in Colorado Springs on October 13, 14 and 15. Judge Murrah will address the Saturday luncheon meeting on October 15. The subject of his speech as yet has not been announced.

Other developments in the rapidly-filling program of the three day convention point to an interesting institute on Friday afternoon, October 14 under the auspices of the American Law Institute. Subject of the institute is "small business organizations." The various forms of business organization and their tax consequences will be discussed. Several lectures will be given on the organization and operation of small business corporations.

Leslie A. Gifford, formerly located in the University Building, has opened an office at 9355 E. Colfax, Aurora.

³⁴ In 25 CA 129, an affidavit for publication which was made on information and belief was held *not* to comply with the requirements of the law for that reason. A verification should, accordingly, be made positively and not on information and belief.