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H.B. 248: Service to Persons outside of Ohio in Divorce, Annulment, and Alimony Actions

Stephen A. Watring
University of Dayton

H.B. 248: SERVICE TO PERSONS OUTSIDE OF OHIO IN DIVORCE, ANNULMENT, AND ALIMONY ACTIONS

I. INTRODUCTION

House Bill 248 amended Ohio Revised Code section 3105.06[1] to permit service by publication in a divorce, annulment, or alimony action where the defendant "is not a resident of this state or is a resident of this state but absent from the state."[2] Under previous law there was no authorization, either in the Ohio Revised Code or the Ohio Rules of Civil Procedure, to allow such service. Furthermore, there was no expressed authorization for any kind of service on such defendants in divorce and annulment actions.[3] The Family Law Committee of the Ohio State Bar Association recommended that section 3105.06 be amended to remedy this statutory infirmity.[4] This recommendation formed the basis of H.B. 248,[5] which became law on June 7, 1979.

II. ANALYSIS

A. Background: The Problem and Its Origin

Before the enactment of H.B. 248, a unique situation existed in Ohio law relating to service of process in divorce and annulment actions. On the face of the law there was no conceivable means for obtaining effective service in these actions upon defendants outside the state. This predicament can be traced to the 1968 Modern Courts Amendment to the Ohio Constitution.[6] The amendment granted authority to the Ohio Supreme Court to prescribe rules of procedure.[7] Any rules promulgated pursuant to this authority take priority over

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1. Amended House Bill 248, 113th General Assembly (1979), codified at OHIO REV. CODE ANN. § 3105.06 (Page Supp. 1979). In its amended form the section reads:
> If the residence of a defendant in an action for divorce, annulment, or alimony is unknown, or if the defendant is not a resident of this state or is a resident of this state but absent from the state, notice of the pendency of the action shall be given by publication as provided by the rules of civil procedure.

2. *Id.*

3. *See* OHIO R. CIV. P. 4.3(A)(8).

4. *Report of the Family Law Committee*, 51 OHIO ST. B.A. REP. 386 (1978).

5. H.B. 248, with a few minor exceptions, was a word for word adoption of the committee's recommendation. Among the changes made that were not in the recommendation was the change of the word "must" to "shall." This apparently is to clarify that service by publication is not mandated. Section 3 of the bill was also added, declaring the act to be an emergency provision.

6. *See* OHIO CONST. art. IV, § 5.

7. *See* Mulligan & Pohlman, *The 1968 Modern Courts Amendment to the Ohio Constitution*, 29 OHIO ST. L. J. 811, 829 (1968).

any law conflicting with them.[8] Through the enactment of this amendment, it was hoped that the disorganization previously existing in this area would be remedied.[9]

In accordance with the 1968 amendment, the Ohio Rules of Civil Procedure were promulgated. Upon the adoption of these rules in 1970, the General Assembly passed H.B. 1201 in order to remove from the books all laws in conflict with the new civil rules.[10] Although technically unnecessary,[11] the enactment was intended to aid in the elimination of confusion.[12] While H.B. 1201 may have been a step toward this goal, it nevertheless generated certain problems of its own. Even though hundreds of sections were deleted from the code, the mass repeal left standing some potentially conflicting sections.[13] More significantly, many provisions which were repealed by H.B. 1201 should have been left standing.[14] Among those sections indiscriminately repealed was the former Ohio Revised Code section 3105.06.[15] The latter portion of that section, dealing with the technical requirements of service by publication, could not stand consistently with the rules.[16] But the first segment of section 3105.06, concerned only with authorizing service by publication, was probably consistent with the new procedural guidelines.[17]

The necessary implication of repealing section 3105.06 was that there could be no service by publication in any divorce, annulment, or alimony action.[18] The error was soon recognized[19] and, in response,

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8. OHIO CONST. art. IV, § 5.

9. Mulligan & Pohlman, *supra* note 7.

10. Amended House Bill 1201, 108th General Assembly (1971) repealed approximately 350 sections of the Ohio Revised Code. *See* OHIO R. CIV. P. appendix A (Page 1971); Pucket, *Effect of the Ohio Rules of Civil Procedure on Existing Statutes*, 29 OHIO ST. B.A. REP. 835, 838 (1970). Although section 3 of H.B. 1201 contained a savings clause whereby a court could revive a repealed section, this clause has been used sparingly. *See generally* Brown, *Civil Rule 1 and the Principle of Primacy—A Guide to the Resolution of Conflicts Between Statutes and the Civil Rules*, 5 OHIO N.U.L. REV. 363 (1978).

11. *See* notes 7-8 and accompanying text *supra*. *See also* Lasher, *The Ohio Rules of Civil Procedure and Their Effect on Real Property Titles*, 4 AKRON L. REV. 47 (1971).

12. *See* Lasher, *supra* note 11.

13. *Id.* at 49.

14. *Id.*

15. *Id. See* OHIO REV. CODE ANN. § 3105.06 (Baldwin 1964).

16. Under that law, when the address of the defendant was reasonably ascertainable, along with publication a summons had to be mailed to his last known address. Rule 4.4 dispenses with the dual service requirement.

17. Because H.B. 248 essentially reenacts that portion, a view to the contrary would necessarily mean that H.B. 248 is also inconsistent with the rules.

18. This is true because, under rule 4.4, any service by publication must be "authorized by law."

19. *See* Lasher, *The Ohio Rules of Civil Procedure and Their Effect on Real*

the General Assembly reenacted section 3105.06 in part.[20] On its face, however, the reenacted version of section 3105.06 sanctioned service by publication only where the defendant's address was unknown.[21] Under a literal interpretation of the section in conjunction with the civil rules, service by publication could never be achieved in divorce, annulment, or alimony actions upon an out-of-state defendant, so long as his address was known. This is because rule 4.4 authorizes service by publication only when authorized by law. Because section 3105.06 did not authorize service by publication when the address of the defendant was known, such service could not be utilized under the language of rule 4.4.[22]

More significantly, there was no apparent authorization, either in the statutes or in the Ohio Rules of Civil Procedure, for any type of service on out-of-state defendants in divorce and annulment actions. Rule 4.3(A), which enumerates the actions in which Ohio courts are vested with long arm jurisdiction, makes no mention of divorce or annulment actions.[23] The exclusion of divorce and annulment actions from this enumeration indicates, by negative implication, that Ohio courts have no long arm jurisdiction in such actions absent some independent jurisdictional basis.[24] Despite this lack of authorization in the statutory scheme, out-of-state defendants continued to be served, both by the methods prescribed in rule 4.3(B) and rule 4.6, and by publication.[25]

B. H.B. 248: Correction of the Problem

H.B. 248 basically represents an attempt to conform the statutory

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Property Titles, 4 AKRON L. REV. 47, 73 n.73 (1971).

20. House Bill 602, 109th General Assembly (1971).

21. *See* OHIO REV. CODE ANN. § 3105.06 (Page 1972).

22. *Report of the Family Law Committee, supra* note 4.

23. Rule 4.3(A)(8) deals with actions arising out of living in the marital relationship within the state. Although it allows service in actions involving alimony, custody, child support, or property settlements, it does not authorize it for divorce or annulment actions in general.

24. *See Report of the Family Law Committee, supra* note 4. At least one commentator, however, saw rule 4.3(A)(8) as an expansion of Ohio's long arm jurisdiction to a broader range of cases. *See* Wilson, *Service of Process*, 39 U. CIN. L. REV. 487 (1970). But any suggestion that there is some common law authority for service in divorce actions is somewhat flawed. "Divorce, of course, is entirely a statutory matter." Haun v. Hoffman, 145 Ohio St. 31, 32, 60 N.E.2d 657, 658 (1945).

25. *See* OHIO LEGAL CENTER INSTITUTE, REFERENCE MANUAL FOR CONTINUING LEGAL EDUCATION PROGRAM 81, DOMESTIC RELATIONS PRACTICE UNDER THE CIVIL RULES, 4.09 (1973). This manual is used as a guide in the clerk's office of the Common Pleas Court of Montgomery County, Domestic Relations Division. The fact that in practice service was nonetheless made on out-of-state defendants was confirmed by Don Bolsinger, who is chairman of the Family Law Committee of the Ohio State Bar Association. Telephone interview with Don Bolsinger (December 19, 1979).

scheme to the dominant practice and to correct the error made by the General Assembly eight years ago.[26] Superficially, the new law authorizes service by publication on out-of-state defendants in divorce, annulment, and alimony actions. This appears consistent with the civil rules, in that rule 4.4(B) empowers the legislature to determine when service by publication is "authorized by law."[27] But, again, the implications of H.B. 248 are of greater significance than what may be gleaned from the language of the statute.

The plaintiff who, by virtue of section 3105.06, falls within the purview of rule 4.4(B) is bound procedurally to initially utilize the other methods of service provided for in that rule before he may resort to service by publication.[28] Thus, when service is to be effected on a nonresident, or on a resident absent from the state,[29] rules 4.3(B) and 4.6(C)(D) must be utilized before service by publication is permissible. Consequently, service by certified mail and ordinary mail, which had not previously been expressly sanctioned under rule 4.3(A),[30] are now authorized by the new section 3105.06, in conjunction with rule 4.4(B). This is true even though there is no mention of these process options in the new law itself, nor any indication in rule 4.3 that Ohio's long arm jurisdiction can be extended in this manner.

C. Procedure Under the New Law

The enactment of section 3105.06 may prove confusing to the legal community for a variety of reasons. First, because H.B. 248 is intended to conform the written law to the dominant practice, it may confuse those in the legal community who had proceeded under the old law as though out-of-state service in divorce and annulment actions were sanctioned by the statute.[31] Thus, for the majority of the legal community, there is no obligation to alter their practice, even though the written law has changed. Others, being unfamiliar with the peculiarities of Ohio law, may fail to comprehend the critical interrela-

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26. *See* notes 10-15 and accompanying text *supra*.

27. OHIO R. CIV. P. 4.4(B).

28. *Id.*

29. Rule 4.4(B)(1) speaks in terms of "residents" while rule 4.4(B)(2) deals with the category of nonresidents. Although residents absent from the state may appear to fall under rule (B)(1), it is more consistent with other rules to view them the same as nonresidents. This is true because rule 4.3 treats nonresidents and residents absent from the state as falling within the same category.

30. This may in some cases also be true for personal service. *See* OHIO R. CIV. P. 4.3(B)(2).

31. Representative Terry Tranter, the chief sponsor of the bill, indicated that the Act has already created a great deal of confusion and misunderstanding. Telephone conversation with representative Terry Tranter (November 13, 1979).

tionship between section 3105.06 and the Ohio Rules of Civil Procedure. The attorney who views section 3105.06 in isolation will attempt to effect service by publication without first complying with the prerequisites set out in rule 4.4(B). This will result in invalid service. Conversely, an attorney viewing the civil rules without making the necessary cross-reference to section 3105.06 may mistakenly determine that the defendant cannot validly be served.

By way of illustration, consider the plaintiff's counsel who wishes to obtain service of process on his client's nonresident spouse. He will first seek service by certified mail under the long arm jurisdiction of rule 4.3. In most situations, paragraph (A)(8) will be the only portion of rule 4.3 relevant in determining the validity of this option.[32] Two apparent circumstances will prevent the plaintiff from proceeding under this rule. First, if the claim did not arise from the parties living in the marital relationship within Ohio, there can be no service under rule 4.3(A)(8). Second, if there is no issue of "alimony, custody, child support or property settlement," rule 4.3(A)(8) provides no long arm jurisdiction.[33]

In the event that one of the above circumstances exists, the plaintiff will have encountered his first procedural obstacle. This, however, does not constitute an insurmountable roadblock, despite the conspicuous absence of any language in rule 4.3(A) suggesting other circumstances in which the procedures in rule 4.3(B) might be employed.

Having failed to obtain long arm jurisdiction through rule 4.3(A), counsel for plaintiff should attempt to proceed under one of the other civil rules. Rule 4.6 authorizes service by ordinary mail, but only when personal, residential,[34] or certified mail service has been refused,[35] or when certified mail has been unclaimed by the defendant.[36] These options, however, are of no avail at this juncture because the conditions precedent cannot be fulfilled.[37]

While scrutinizing rule 4.6, counsel may find some indication that his resources have not yet been exhausted. Rule 4.6(A), dealing with limits of service of process, provides that service outside the state may

32. The other paragraphs of rule 4.3(A) in most situations will have no application. There may, however, be exceptions, such as if the ground for divorce is some tortious act. *See* OHIO R. CIV. P. 4.3(A)(3).

33. *But see* note 24 *supra*.

34. Residential service is a method that can be utilized inside the state. OHIO R. CIV. P. 4.1. Under rule 4.3, however, it has no application as to out-of-state service.

35. OHIO R. CIV. P. 4.6(C).

36. OHIO R. CIV. P. 4.6(D).

37. Because certified mail could not be attempted above, it could not be refused or unclaimed within the language of rule 4.6.

be authorized either by the rules or by law. This puts plaintiff's counsel on notice that he must search both the civil rules and the Ohio Revised Code to ascertain the limits of service of process in Ohio. If counsel refers to rule 4.4 to determine the viability of service by publication as an alternative, he will encounter further reference to the statute. Under rule 4.4(B), service by publication can only be effected when it is authorized by law. Having exhausted all other options under the Ohio Rules of Civil Procedure, plaintiff is now relegated to the statutes to determine if the General Assembly has exercised its authority in the area. Upon consulting the Ohio Revised Code, plaintiff's counsel will find several sections relating to service by publication.[38] Among these is section 3105.06, dealing with such service in divorce, annulment, and alimony actions.

Under section 3105.06, as amended by H.B. 248, plaintiff is authorized to serve defendant by publication, as provided in rule 4.4(B). Rule 4.4(B), however, requires that other forms of service be attempted before service by publication may be utilized. Rule 4.4(B)(2) mandates that in the case of a nonresident, service must first be attempted under rule 4.3(B), and then under rule 4.6(C) or (D). Thus, section 3105.06, rather than merely permitting service by publication, further operates to open up the other service alternatives provided for by the rules. The plaintiff may now proceed under rule 4.3(B). If he is unsuccessful, he may proceed under the appropriate subsection of rule 4.6. If this fails, he may then effect service by publication.

D. Consistency of H.B. 248 with the Civil Rules

There is little doubt that the procedure illustrated above was contemplated by the proponents in H.B. 248.[39] There may be some question, however, whether H.B. 248 can stand consistently with rule 4.3. It could be argued that rule 4.3(A) provides the only situations in which service of process may be resorted to under rule 4.3(B). As stated above,[40] the authority to promulgate rules of procedure rests with the Ohio Supreme Court. Any statutes conflicting with the rules are automatically superseded.[41] By promulgating rule 4.3(A) the Ohio Supreme Court intended to "set out the minimum contacts sufficient to vest Ohio courts with long arm jurisdiction over nonresident defendants."[42] It would logically follow that, absent some authorization in

38. *See, e.g.*, OHIO REV. CODE ANN. §§ 2703.14, 2733.11 (Page 1954); OHIO REV. CODE ANN. § 3111.22 (Page 1972); OHIO REV. CODE ANN. § 2703.24 (Page Supp. 1979).

39. *See Report of the Family Law Committee, supra* note 4.

40. *See* notes 7-8 and accompanying text *supra*.

41. *Id.*

42. Schatel v. Weitz, 40 Ohio App. 2d 95, 97, 318 N.E.2d 172, 174 (1974).

the rules, any attempt by the legislature to further extend long arm jurisdiction is contrary to that intent. Rule 4.3 contains no such language delegating authority to the General Assembly. It might also be contended that rule 4.3(A) operates as a restriction on rule 4.4(B), thereby mandating that any out-of-state service "authorized by law" must also be authorized by 4.3(A). Furthermore, to allow a statutory extension of the long arm jurisdiction conferred by rule 4.3(A) frustrates the purpose of the 1968 Ohio Modern Courts Amendment in eliminating the confusion which existed in prior law by vesting rulemaking authority in one body.[43]

If a court of law were to find the above arguments persuasive, the validity of H.B. 248 would be in serious doubt. Such an interpretation would import that rule 4.3(A) would serve as the sole means of attaining long arm jurisdiction under rule 4.3(B). The authorization clauses of rules 4.4 and 4.6 could not operate as an alternative route. Because H.B. 248 draws its authority from these clauses, this would initially mean that no out-of-state service by certified mail could be utilized under rule 4.3(B). This would, in turn, prevent use of ordinary mail under rule 4.6(C) and (D). The end result would be the legal impossibility of compliance with the language of rule 4.4(B), which restricts the use of service by publication to instances where service cannot be effected by other methods.[44] Furthermore, sanctioning service by publication, without first requiring use of other methods, would run afoul of due process guarantees.[45] The fourteenth amendment in effect mandates that the method of service utilized be that which, among those methods reasonably practicable under the circumstances, is most likely to reach the defendant.[46] Service by publication is generally viewed as the least satisfactory method.[47]

In all probability, however, section 3105.06 will be viewed as consistent with the civil rules. While there is no authorization in rule 4.3 itself for the legislature to provide for other situations in which out-of-state service may be authorized, the authorization clauses of rules 4.4(B) and 4.6(A) appear to be broad enough to legitimize H.B. 248. It is also important to note that the reference in rule 4.4(B) is specifically to rule 4.3(B), rather than to rule 4.3 in general.[48] This indicates that

43. *See* notes 7-9 and accompanying text *supra*.

44. Rule 4.4(B) makes the use of other forms of service a condition precedent to any use of service by publication. If no other type of service were authorized, that condition precedent could not be met.

45. U.S. CONST. amend. XIV.

46. *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

47. M. GREEN, BASIC CIVIL PROCEDURE 56 (2d ed. 1979).

48. By contrast, the reference to rule 4.1 in rule 4.4(B)(1) is not to a specific section of that rule. If the authors of the rules intended rule 4.3(A) to operate as a restric-

service is to be made by the method provided in rule 4.3(B), without reference being made to rule 4.3(A). By this approach, there are two distinct routes to qualify for service under rule 4.3(B); one being rule 4.3(A) and the other being rule 4.4(B).

This approach is supported further by rule 4.6(A), which provides that "when authorized by law or these rules" a defendant may be served outside the state.[49] Thus, it is clear that the rules were not intended to prohibit the legislature from authorizing service outside the state. Furthermore, the existence of other statutes allowing service by publication in other areas indicates that the procedure utilized by H.B. 248 is proper.[50] It should also be noted that prior to the enactment of H.B. 248 out-of-state service was commonly used on defendants in divorce, annulment, and alimony actions. In light of this consideration, the codification of this customary practice should not generate any measurable criticism from within the legal community.[51]

III. CONCLUSION

Before the enactment of H.B. 248, there was no statutory support for the common practice of serving out-of-state defendants in divorce and annulment actions. While H.B. 248 resolves this inconsistency, it may consequentially cause confusion in its own right. Not only may the less experienced practitioner be perplexed by the confusing interrelationship between section 3105.06 and the civil rules, but even the veteran domestic relations attorney may have difficulty understanding that while the written law has changed, he is under no concomitant obligation to alter his previous practices. Despite these expected problems, the enactment of H.B. 248 was necessary to erase a legislative mistake made by the General Assembly nearly a decade ago and to conform the written law with generally accepted practices for effecting service of process.

Stephen A. Watring

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tion on rule 4.4(B), they certainly could have more clearly indicated that intent through use of a more general reference.

49. OHIO R. CIV. P. 4.6(A).

50. *See* OHIO REV. CODE ANN. § 2703.14 (Page 1954). Many of the actions enumerated in this section are not directly within the scope of rule 4.3(A). *See, e.g.*, OHIO REV. CODE ANN. § 2703.14(A), (E)-(G) (Page 1954).

51. *See* note 25 and accompanying text *supra*.