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MEMORANDUM

TO: Clerks of Superior Court

FROM: Peter E. Powell and Pamela Weaver Best

SUBJECT: Due Diligence Required Before Notice by Publication/Posting

Over time, questions have arisen regarding the validity of publication or posting as a means of service of process in many forms of actions, including foreclosures. The short answer is that service by publication/posting is not allowed unless the plaintiff establishes by sworn affidavit the circumstances justifying substituted service, and details the efforts made to actually locate and serve the defendant—this is referred to as "due diligence." The long answer is set forth below.

Why is due diligence important?

A basic principle of law is that at a minimum a person has a right to know what action is pending and has a right to be heard to challenge the action. In *Mullane v. Central Hanover Bank and Trust Company*, 339 U. S. 306(1950), the United States Supreme Court held " [t]he fundamental requisite of due process of law is the opportunity to be heard. *Grannis v. Ordean, 234 U.S. 385, 394.* This right to be heard has little reality or worth unless one is informed that the matter is pending…" This is often referred to as notice and opportunity to be heard. In civil and special proceeding cases notice is given when the person is served with summons either by the sheriff, certified mail, designated delivery service or acceptance of service.

When service by any of the above means is, for whatever reason, unsuccessful the plaintiff has the right to use 'substituted service', usually publication, to provide notice to the defendant. However, substituted service should only be attempted once other efforts

to locate the defendant have been exhausted. This is in large part due to the fact that many people do not read the notices in the paper to look for cases pending against them.

What acts of due diligence must be shown to permit service by publication?

"A party subject to service of process under N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P. 4(j)(9) may be served by publication whenever the party's address, whereabouts, dwelling house, or usual place of abode is unknown and cannot with due diligence be ascertained, or there has been a diligent but unsuccessful attempt to serve the party…Upon completion of such service there shall be filed with the court an affidavit showing the publication and mailing in accordance with the requirements of N.C. Gen. Stat. § 1-75.10(2) and the **circumstances warranting the use of service by publication.**" *Sink v. Easter*, 284 NC 555 (1974),

In *Barclays American/Mortgage Corp. v. Beca Enterprises*, 116 NC App. 100(1994), the court held that notice by posting in a foreclosure action was invalid where the lender's only attempt at service was mailed to the partnership's business address when the partners residential addresses were readily available from a Certificate of General Partnership on record with the register of deeds, where tax records revealed both residential and other business addresses, as did the local telephone directory. "The 'due diligence' test of Rule 4(j1) requires a party to use all reasonably available resources to accomplish service." See also *Federal Land Bank v. Lackey*, 94 NC App. 553 (1989).

In those instances, such as foreclosure, in which the Clerk is called upon to decide whether a party received notice of a proceeding, it is appropriate for the Clerk to require the serving party to establish what attempts were made to locate the party to be served. A simple statement that defendant could not be located is not sufficient. This information, in the form of an affidavit, is what the Clerk uses to ensure that the party serving by publication /posting used "due diligence" to attempt to locate the other party, and that the circumstances "warrant use of service by publication…" G. S. 1A-1, Rule 4(j2)(3).

Due diligence could include, but is not limited to:

1. Checking phone books
2. Checking tax records
3. Checking DMV and Voter records
4. Checking real estate (Register of Deeds)
5. Searching the plaintiff's own records (For example, a lender should check its own records for change of address information that may be on file)
6. If appropriate, doing an Internet Search

We hope you find this information helpful.