

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

CHERI SMITH,)	
Plaintiff,)	
)	
v.)	Chancery No. 53360
)	
WESLEY C. SMITH,)	
Defendant)	

#58 – MOTION TO DISMISS DUE TO LACK OF SERVICE

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COMES NOW the Defendant, Wesley C. Smith, and states that he was never served with the Bill Of Complaint as required by statute, thus this court does not have either personal nor subject-matter jurisdiction and must dismiss the case and declare as void all its orders. In support of his MOTION the Defendant states as follows:

1. The Defendant was **never served** with the Plaintiff’s Bill Of Complaint.
2. The Notice Of Transmittal and Table Of Contents signed by Deputy Clerk Woods on December 28, 2004 confirms that the Defendant was not served. It indicates the Bill Of Complaint was filed 06/11/03, Subpoena In Chancery on 06/16/03, and Proof Of Service On J. Whitbeck, Jr. on 07/01/03 but **does not contain proof of service of the Bill Of Complaint or Subpoena In Chancery on the Defendant.**

3. There is nothing in the record of this case to indicate the Defendant was served process of the Bill Of Complaint and Subpoena In Chancery by **any means at any time**, let alone in the manner specified by and within the time set by law.

4. § 20-99.2. Service in divorce and annulment cases states: “A. In any suit for divorce or annulment or affirmation of a marriage, process may be served in any manner authorized under § 8.01-296.”

5. Service upon John Whitbeck, an attorney hired by the Defendant to handle a different prior case, is not one of the prescribed methods listed in § 8.01-296 for service on the Defendant.

6. It should also be noted that § 8.01-314 sets conditions allowing for service on an attorney only “...**after** entry of general appearance by such attorney”. Given the service in question was to start the case it was impossible for Mr. Whitbeck to have entered a general appearance in this case until AFTER the Plaintiff was required to serve process on the Defendant.

7. Accordingly, the service on John Whitbeck was invalid and was insufficient to subject the Defendant to the trial court's jurisdiction.

8. The legislature has made clear its intention that compliance with laws and rules relating to service of

process are to be strictly followed in divorce cases and prohibits the court from waving the requirement if the Defendant received service in a way other than that prescribed by statute. The legislature made clear its intent that divorce cases be commenced ONLY by service of process as prescribed by statute:

§ 8.01-288. Process received in time good though neither served nor accepted. **Except for process commencing actions for divorce** or annulment of marriage or other actions wherein **service of process is specifically prescribed by statute**, process which has reached the person to whom it is directed within the time prescribed by law, if any, shall be sufficient although not served or accepted as provided in this chapter.

9. The language of Code § 8.01-288 evidences a legislative intent to exclude services of process from its saving provision only in certain limited instances. Such intent is clearly established with respect to suits for divorce, which are expressly excluded from the statute's saving provision.

10. Compliance with the Code sections at issue here, relating to procedures for instituting a divorce case, is mandatory and jurisdictional. The Plaintiff did not comply with them, therefore, this court did not acquire jurisdiction of any kind, neither personal nor subject-matter jurisdiction.

"A court acquires no jurisdiction over the person of a defendant until process is served in the manner provided by statute, and a judgment entered by a court which lacks [personal] jurisdiction over a defendant is void as against that defendant." *Slaughter v. Commonwealth*, 222 Va. 787, 791, 284 S.E.2d 824, 826 (1981).

"Process to commence an action is normally an order (summons) to a court official (sheriff) to notify (summon) a defendant to answer the plaintiff's complaint at a time and place mentioned in the order." *Kent Sinclair & Leigh B. Middleditch, Jr., Virginia Civil Procedure* _ 7.1, at 333 (3d ed. 1998). When following the equity procedures incorporated by Rule 2A:4, process would be the subpoena in chancery. See *id.* The clerk of the issuing court would attach process, the subpoena in chancery, to a copy of the bill of complaint and direct it to the sheriff of the bailiwick for service. See *id.* _ 7.3, at 335. Under Rule 2A:4, the clerk would attach the subpoena in chancery to a copy of the petition for appeal and direct it to the sheriff for service.

Although the court may have believed it acquired personal jurisdiction based on father's execution of the Consent to Adoption form, the **acquisition of personal jurisdiction is based on the receipt of notice which complies with the Due Process Clause**. See *Price v. Price*, 17 Va. App. 105, 112, 435 S.E.2d 652, 657 (1993) (citing *Kulko v. Superior Ct.*, 436 U.S. 84, 91, 98 S. Ct. 1690, 1696, 56 L. Ed. 2d 132 (1978)).

In this class of cases, the question of the jurisdiction of the court usually resolves itself into one of whether or not there has been "due process," whether the process has been served in the time and **manner required by law**, or service has been waived. Of course, the defendant must be properly brought before the court, else there will be no jurisdiction over him and a judgment against him will be void. *Shelton v. Sydnor*, 126 Va. 625, 630, 102 S.E. 83, 85 (1920).

...if a statute provides for constructive service, the terms of the statute authorizing it must be strictly followed or the service will be invalid....“ *Khatchi v. Landmark Rest. Assoc.*, 237 Va. 139, 142, 375 S.E.2d 743, 745 (1989) (citations omitted).

11. The courts have in fact frowned upon any bypassing of the formal rules/laws of service.

The formality of process serves a legitimate purpose. Process is official notice which informs the opposing party of the litigation and instructs the party when and where it must respond. Without this official notice, the recipient knows neither if the action was filed nor when it was filed. The

party would not know when critical time limits expire. **Without process a party would need to resort to other means to obtain essential information.** The practical solution is to telephone the clerk of court to ask if and when the action was filed. However, **a party relies on the informal information received over the telephone at its own risk.** If the information is incorrect, it acted at its own peril. "But one who takes the shortcut of asking the clerk's employees to examine the record for him relies on the response at his peril." *School Bd. v. Caudill Rowlett Scott, Inc.*, 237 Va. 550, 556, 379 S.E.2d 319, 322 (1989).

12. It is not clear at what point the Defendant eventually received a copy of the Bill of Complaint, but what is clear is that at the 9/10/2003 hearing, the Defendant was not aware that temporary custody would be awarded, as confirmed by his not presenting any evidence at that hearing (see clerk notes and List Of Exhibits & Transcripts) when the Defendant had numerous documents to present as evidence and that had been previously presented at the JD&R trial, the lack of presentation at this hearing being directly related to lack of notice.

13. Without proper legal service upon the Defendant the court does not have personal (in personam) jurisdiction over the Defendant and thus is without jurisdiction to proceed with the case.

14. An absence of personal jurisdiction may be said to destroy 'all jurisdiction' because the requirements of subject matter and personal jurisdiction are conjunctive. Both must be met before a court has authority to adjudicate the rights of parties to a dispute. If a court lacks jurisdiction over a party, then it lacks 'all jurisdiction' to adjudicate the party's rights, whether or not the subject matter is properly before it. See, e.g. *Kulko v. Superior Court*, 436 U.S. 84, 98 S.Ct. 1690, 1696 (1978)

15. § 8.01-328.1 covers when personal jurisdiction over person may be exercised;

A. A court may exercise personal jurisdiction over a person... 9. Having maintained within this Commonwealth a matrimonial domicile at the time of separation of the parties upon which grounds for divorce or separate maintenance is based... Jurisdiction in subdivision 9 is valid **only upon proof of service of process pursuant to § 8.01-296...**

16. Subject-matter Jurisdiction in a divorce case is by statute, failure to comply with the statutes results in a failure of subject-matter jurisdiction.

"Jurisdiction in a divorce suit is purely statutory, *Watkins v. Watkins*, 220 Va. 1051, 1054, 265 S.E.2d 750, 752 (1980), and does not encompass broad equitable powers not conferred by statute." 2 Va. App. at 19, 340 S.E.2d at 580.

17. When the circuit court's power to act is controlled by statute, the circuit court is governed by the rules of **limited jurisdiction** and must proceed within the statute's strictures. Any action taken by the circuit court that exceeds its jurisdiction is void and may be attacked at any time.

"Though a court be one of general jurisdiction, when its power to act on a particular matter is controlled by statute, the court is governed by the rules of limited jurisdiction."); *In re M.M.*, 156 Ill.2d 53, 619 N.E.2d 702 (1993)

("Special statutory jurisdiction is limited to the language of the act conferring it, and the court has no powers from any other source. ... [T]he authority of the court to make any order must be found

in the statute. *Levy v. Industrial Comm'n* (1931), 346 Ill. 49, 51, 178 N.E. 370, 371."); *Skilling v. Skilling*, 104 Ill.App.3d 213, 482 N.E.2d 881 (1st Dist. 1982)

"When a legislative enactment limits the manner in which something may be done, the enactment also evinces the intent that it shall not be done another way." *Grigg v. Commonwealth*, 224 Va. 356, 364, 297 S.E.2d 799, 803 (1982). See also *Commonwealth v. Brown*, 259 Va. 697, 704-05, 529 S.E.2d 96, 100 (2000).

"the legislature prescribes that a court's jurisdiction to hear and determine controversies involving a statutory right is limited in that certain facts must exist before a court can act in any particular case."); *Keal v. Rhydderick*, 317 Ill. 231 (1925)

18. The many limitations, both in respect to jurisdiction and procedure, placed upon divorce suits by the statute, differentiate the divorce case from ordinary suits in equity and render it a chancery case *sui generis*.

"It is an undoubted general principle of the law of divorce in this country that the courts either of law or equity, possess no powers except such as are conferred by statute; and that, **to justify any act or proceeding in a case of divorce, whether it be such as pertains to the ground or cause of action itself, to the process, pleadings or practice in it, or to the mode of enforcing the judgment or decree, authority must be found in the statute, and cannot be looked for elsewhere**, or otherwise asserted or exercised." *McCotter v. Carle*, 149 Va. 584, 593-94, 140 S.E. 670, 673-74 (1927) (citation omitted).

19. There is no presumption of jurisdiction in a divorce case. Jurisdiction must be shown in the record or the court does not have jurisdiction.

"The law presumes nothing in favor of the jurisdiction of a court exercising special statutory powers, such as those given by statute under which the court acted, (*Chicago and Northwestern Railway Co. v. Galt*, 133 Ill. 657), and **the record must affirmatively show the facts necessary to give jurisdiction**. The record must show that the statute was complied with"); *In re Marriage of Stefiniw*, 253 Ill.App.3d 196, 625 N.E.2d 358 (1st Dist. 1993)

"Whereas a court of general jurisdiction is presumed to have jurisdiction to render any judgment in a case arising under the common law, there is no such presumption of jurisdiction in cases arising under a specific statutory grant of authority. In the later cases the record must reveal the facts which authorize the court to act."); *Zook v. Spannaus*, 34 Ill.2d 612, 217 N.E.2d 789 (1966) ("In the absence of such findings in the record and in the absence of any evidence in the record to support such findings the court was without jurisdiction in this special statutory proceeding to enter an order authorizing the guardian to consent to adoption."); *Fico v. Industrial Com.*, 353 Ill. 74 (1933)

In a court of limited jurisdiction, whenever a party denies that the court has subject-matter jurisdiction, it becomes the duty and the burden of the party claiming that the court has subject-matter jurisdiction to provide evidence from the record of the case that the court holds subject-matter jurisdiction. *Bindell v. City of Harvey*, 212 Ill.App.3d 1042, 571 N.E.2d 1017 (1st Dist. 1991) ("the burden of proving jurisdiction rests upon the party asserting it."); *Loos v. American Energy Savers, Inc.*, 168 Ill.App.3d 558, 522 N.E.2d 841 (1988) ("Where jurisdiction is contested, the burden of establishing it rests upon the plaintiff.").

20. It should also be noted that without the specific findings of jurisdiction by the court in an order or judgment, the order or judgment does not comply with the law and is void. Thus as no order in this case states the court has jurisdiction, all orders previously entered are already void.

The Supreme Court of Virginia has held "it is essential to the validity of a judgment or decree, that the court rendering it shall have jurisdiction of both the subject matter and parties. *Evans v.*

Smyth-Wythe Airport Commission, 255 Va. 69, 73, 495 S.E.2d 825, 828 (1998)

21. Until the Plaintiff submits uncontroverted evidence of subject-matter jurisdiction to the court that the court has subject-matter jurisdiction, this court is proceeding without subject-matter jurisdiction. Should the Plaintiff not provide uncontroverted evidence of subject-matter jurisdiction, all orders or judgments issued by the judge are void ab initio. A judge should not proceed in any action in which the judge does not have subject-matter jurisdiction, since he/she has no lawful authority to act.

22. The law places the duty and the burden upon the Plaintiff. Should the court attempt to place the burden upon the Defendant, the court has acted against the law, violates the Defendant due process rights, and the judge under court decisions has immediately lost subject-matter jurisdiction.

23. Our Supreme Court has ruled that "Because a court does not acquire jurisdiction by a mere recital contrary to what is shown in the record", the record of the case is the determining factor as to whether a court has jurisdiction. *State Bank of Lake Zurich v. Thill*, 113 Ill.2d 294, 497 N.E.2d 1156 (1986).

A judge's allegation that he has subject-matter jurisdiction is only an allegation (*Lombard v. Elmore*, 134 Ill.App.3d 898, 480 N.E.2d 1329 (1st Dist. 1985); *Hill v. Daily*, 28 Ill.App.3d 202, 204, 328 N.E.2d 142 (1975)); inspection of the record of the case has been ruled to be the controlling factor. If the record of the case does not support subject-matter jurisdiction, then the judge has acted without subject-matter jurisdiction. *The People v. Brewer*, 328 Ill. 472, 483 (1928) ("If it could not legally hear the matter upon the jurisdictional paper presented, its finding that it had the power can add nothing to its authority, – it had no authority to make that finding.").

24. As the record does not provide uncontroverted evidence of jurisdiction, the judge hearing this motion has a duty to dismiss this case:

The judge has a duty to continually inspect the record of the case, and if subject-matter jurisdiction does not appear at any time from the record of the case, then he has the duty to dismiss the case as lacking subject-matter jurisdiction, *U.S. v. Will*, 449 U.S. 200, 216, 101 S.Ct. 471, 66 L.Ed.2d 392, 406 (1980); *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 404, 5 L.Ed 257 (1821), and without any judicial authority.

WHEREFORE the Defendant requests the Court admit that it does not have personal jurisdiction nor subject-matter jurisdiction and thus all of its previous orders are void, and to dismiss the case.

**Respectfully Submitted,
Wesley C. Smith**

Wesley C. Smith, Defendant
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing motion was served to Loretta Vardy and Ronald Fahy (GAL) via U.S. mail, this 3rd day of May 2006.

Wesley C. Smith