ENTRY ORDER

SUPREME COURT DOCKET NO. 2010-032

DECEMBER TERM, 2010

Paula Pahnke (Office of Child Support, Appellee)	}	APPEALED FROM:
v.	}	Chittenden Family Court
Jonathan Pahnke	}	DOCKET NO. F622-8-00 Cndm Trial Judge: M. Patricia Zimmerman

In the above-entitled cause, the Clerk will enter:

Father appeals pro se from a child support order. On appeal, father argues that: (1) he did not have proper notice of the child support hearing, and therefore there was no jurisdiction over him; (2) the magistrate erred in refusing to hold a hearing on father's motion to set aside the order on the ground that father was not present at the child support hearing; and (3) the family court erred in denying his motion to reconsider. We conclude that husband was not properly served and reverse.

The parties were divorced in October 1997 in Michigan. They had four children, three of whom were under the age of majority at the relevant times for this case. Father was awarded custody of the children. Mother was ordered to pay forty-eight dollars per week in child support.

Mother moved to Vermont, and father followed in 1998. Thereafter, father left the children in the care of mother. In August 2000, mother sought to modify parental rights and responsibilities. Vermont assumed jurisdiction over the matter and granted mother sole parental rights and responsibilities over the children.

In September 2008, the Office of Child Support (OCS) filed a motion to modify child support on mother's behalf. Two hearings were cancelled due to insufficient service of father. OCS then filed a motion to allow service by a so-called "tack order," which involves leaving a copy of the petition and hearing notice at a party's dwelling. See V.R.C.P. 4(d)(1) (explaining that following party's motion, court, "upon a showing that service as prescribed above cannot be made with due diligence, may order service to be made by leaving a copy of the summons and of the complaint at the defendant's dwelling house or usual place of abode"). Attached to the motion was an affidavit, wherein the Deputy Sheriff averred that he had attempted to serve father on five occasions at his last known residence without success. The court granted the motion. Thereafter, the Sheriff affixed a copy of the motion to modify and notice of the hearing to what OCS believed to be father's residence in Shelburne, Vermont.

At the hearing on the motion to modify, mother was present, but father did not appear. The court issued a modified child support order on February 23, 2009, retroactive to the time the request was filed on September 16, 2008. The order explained that mother had appeared at the modification hearing, but father did not appear, "despite having been served with notice of hearing by tack order on January 12, 2009." The court found that mother had attempted to locate father and to serve him with the modification paperwork. The court found, based on mother's testimony, that father is supported by his mother, who gives him approximately $70,000 per year. Using this income figure, the court calculated a child support payment of $1063.31 per month. The court also ordered husband to pay an additional monthly payment for the arrearage due from retroactive application of the child support to the date the motion was filed. This default child support order was also served on father by tack order at the same residence as the hearing notice.

Father did not appeal the ruling and made no payment on his support obligation. In August 2009, father filed a motion for emergency relief, arguing that he had not received notice of the modification hearing or of the default judgment because it was given at an address where he was not living at the time. As to the merits, father argued that he was unemployed and the estimate of his income—based on prior gifts from his mother—was inaccurate and exaggerated. The magistrate denied the motion. In November 2009, father filed a motion for reconsideration with the family court. Without a hearing, the family court denied this motion. Father appeals.

Father argues that the court erred in denying his motion for relief from judgment because he did not receive adequate notice of the child support hearing. The trial court has discretion in assessing a Rule 60(b) motion for relief from judgment. Cliche v. Cliche, 143 Vt. 301, 306-07 (1983). In exercising its discretion, the trial court should examine all of the circumstances and bear in mind "that Rule 60(b) is to be given liberal construction." Id. at 307. Especially when a party seeks to reopen a judgment entered by default "a court ought to be indulgent." Brady v. Brauer, 148 Vt. 40, 44 (1987). "A default judgment issued without the opportunity to be heard is not favored over one rendered after full hearing, and relief ought not to be denied for insufficient reasons." Id. For this reason, we have stated that where dismissal is granted by default, "the court deciding the Rule 60(b) motion must hold a hearing to allow oral argument and, if necessary, the taking of evidence." Goshy v. Morey, 149 Vt. 93, 99 (1987).

In this case, we conclude that the trial court abused its discretion in denying father's Rule 60(b) motion for relief from judgment given that a default judgment was entered without proper service upon father. While there was no evidentiary hearing on husband's Rule 60(b) motion, no such hearing is necessary because the relevant facts are not disputed by OCS. On appeal, OCS concedes that husband did not receive sufficient notice of the modification hearing or the default order. Despite this concession, OCS contends that there is personal jurisdiction because it gave notice by posting in good faith and in accordance with the rules of civil procedure based on the information available at that time. We do not question the sincerity of OCS's actions, but cannot ignore OCS's admission that father was not properly served because OCS posted the documents at a place that was not husband's "dwelling house or usual place of abode." V.R.C.P. 4(d)(1).

It was the obligation of mother and OCS to ensure proper service of process of father. See V.R.C.P. 4(i) ("The plaintiff's attorney shall, within the time during which the person served must respond to the process, file the proof of service with the court."). While OCS contends that

father must have had some indicia that proceedings where pending, OCS offers no evidence that father had actual or constructive notice of the hearing. Therefore, we reverse the denial, vacate the default child support order and remand for a consideration of the issue on the merits. We decline to consider whether OCS has properly demonstrated jurisdiction over the father. That issue should be presented to the trial court.

The order denying relief under V.R.C.P. 60(b) is reversed. The child support default judgment is stricken and the case is remanded for further proceedings consistent with this decision.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice