CLOSING THE GAP IN CHAINS OF TITLE
AND
WHAT CONSTITUTES A DILIGENT SEARCH FOR A DEFENDANT WHOSE LOCATION OR IDENTITY IS NOT KNOWN?

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Introduction: This presentation will consist of two parts, as indicated by the above title. The first part being practical tips and guidelines in constructing a chain of title for property in the course of an oil and gas title examination. The second review is a legal review of judicial precedents establishing requirements for making a diligent search to identify and/or locate defendants in litigation related to unknown or unlocated heirs or other interest owners in a judicial proceeding, such as an action to quiet title, action in partition or in a Dormant Mineral Act or Dormant Oil and Gas Act proceeding.

PART I
CLOSING THE GAP

The first step in conducting a mineral or oil and gas title examination is establishing a chain (or chains) of title for the property being examined. At times, this is easily accomplished by determining the current deed through tax mapping and tax assessment records and following the chain of title backwards through time utilizing recitals contained within each link in the chain of title. (The links could be deeds, wills or other estate records, tax deeds, Sheriff's deeds or other instruments of record.)

However, life in the title world is not always so easy. There will be occasions where you will encounter a gap in the chain of title. For example, you may establish a chain of title from the current owner back to 1930 when property containing 100 acres is conveyed by William Smith to Thomas Jones without any recital in the deed concerning the source of title into William Smith.

Of course, the first step would be to examine the grantee indices for the purpose of examining any or all deeds conveying property into William Smith. For purpose of further instruction, we will assume that there are no deeds of record into William Smith. In examining grantee indices, it should be noted that some counties might maintain separate grantee indices for Sheriff's deeds and/or tax deeds, which should also be examined.

A second possible step would be to review the tax assessment books (if available) for the early 1930's and the late 1920's. In some cases, the first years assessment to William Smith may contain a notation concerning the source of title or previous assessed owner. If this is not the case, the prior year (or years) assessment books may permit you to identify the previously assessed owner through the tax parcel number or through the acreage and property description.

If the prior assessed owner is identified, often the missing link in the chain of title will be a will or other estate record. The estate and will indices should then be examined in the hope of finding an estate record for the previously assessed owner. At this point, assuming no estate record, the grantor indices should be examined to determine if there is a deed out of the grantor conveying title to the subject property. You might find a deed into William Smith that was not properly indexed in the grantee indices. You might also find a deed into some other third party which would require a repeat of the prior step (review of estate records and then review of grantor indices). In reviewing the grantor indices, it should be noted that some counties might maintain separate grantee indices for Sheriff's deeds and/or tax sales.

Once again, for purpose of further discussion, the gap remains unclosed. At this point, a review of the property on the tax map vis-a-vis adjoining properties should be conducted. It may be apparent (or perhaps likely) that the 100 acre tract was part of a larger tract which was subdivided at some prior point in time. I would then suggest identifying an adjoining tract, being part of the potential larger tract, to review the chain of title for that parcel. If reviewing the chain established that the 100 acre tract was part of a larger tract, perhaps 200 acres, including the adjoining tract, a deed in the chain of title for the adjoining tract may provide a recital concerning the missing link. If not, you have at least established some point in time where the larger tract includes your 200 acre tract – let us assume in the year 1890. At this point in time, you could conduct an examination of the grantor indices against the 200 acre owner in hopes of identifying a deed conveying the 100 acre tract (or some larger tract including the 100 acre tract). If no such deed is found, you could consult the will and estate records for the 200 acre owner to identify a possible passage of title through his estate. Failing that, you should conduct an examination of the early tax assessment books to identify a change of assessment for the 200 acres – you may even find the 100 acre tract being separately assessed as the residue of the original 200 acre tract. Again, you would check subsequent tax assessment records looking for a change in that assessment.

Let us assume that you have reviewed the chain of title for the adjoining tract and have determined that the adjoining tract does not include a common chain of title, in common with the 100 acre tract. However, property descriptions in the chain of title for the adjoining tract may include a recital of the adjoinder which is the 100 acre tract. (For example, "bounded on the East by Henry Zimmerman" or "North 5° East 100 perches along property of Henry

Zimmerman".) In this case, you could once again pursue an examination of Henry Zimmerman – grantor indices, estate indices, assessment records, etc.

Another avenue of approach would be to consult coal tax maps in those counties which maintain coal tax maps. You may be able to identify the 100 acre tract as being conveyed by a prior coal deed, or included within a larger tract subject to a prior coal deed. If you are able to identify that the coal was conveyed by an 1899 deed by Henry Zimmerman, once again you could try to establish the chain of title forward from Henry Zimmerman through grantor indices, estate records, assessment records, etc.

Although time consuming, you could establish a chain of title from the initial warrant, patent or land grant. This would require that you first establish the location of your 100 acre tract within an original warrant, patent or land grant – perhaps in the late 1700's or 1800's. You could then attempt to establish a chain of title forward, once again through grantor indices, estate records, tax records, etc.

Let us assume that you have been able to establish title into Henry Zimmerman but have still failed to establish the link in the chain of title between Henry Zimmerman and William Smith. There is a likelihood that title passed either by virtue of an unrecorded deed or unprobated estate or possibly by an estate raised in some other jurisdiction. An internet search could be conducted in the hope of finding an obituary or some other heirship information concerning Henry Zimmerman. In examining records indexed against Henry Zimmerman, or assessments records, you may be able to establish that Henry Zimmerman was a resident of some other county. Possibly an examination of the estate records in that county would establish the heir or heirs of Henry Zimmerman.

Finally, you may reach the point of no return where there is no closing the final link in the chain of title. In this case, you are left with a title defect resulting from the missing link which would then require a curative requirement to an action to quiet title against the last known owner or his heirs which would then bring us to Part II of this presentation.

<u>Additional Suggestions</u>:

1. Tax sales may not be indexed, you may have to go through a painstaking review of tax sale records. Tax sales assessed against some other property assessed as "Unknown Owner" or assessed only in the warrant name.

2. Review judicial proceedings. Title may have been acquired through action to quiet title, action in partition or some other proceeding.

3. Grantee the owners in chain of title (not just William Smith). It is possible that there may be a separate chain of title into one of the subsequent owners, perhaps conveying an outstanding heirship interest, which will resolve the gap.

4. In conducting examinations of the grantor/grantee indices, you need to search these indices to date. It is possible that a 1925 deed may not have been recorded until 1946, for example.

5. If the deed for the adjoining owner does not include any recital indicating its adjoinder, you could check to see if that adjoining owner has executed oil and gas leases that might indicate the adjoinder (for example, bounded on the East by Henry Zimmerman).

6. In some counties, there may be old atlas maps that can be reviewed that might show you the owner of your property in 1870 or 1910, for example.

7. If the name is not such a common name as "Smith", you could check estate records for that last name (A through Z, first name) in the hope of finding an estate record passing title to the property.

8. If title is being conveyed by William Smith and Mary Smith, it should be noted that record title may have been conveyed to Mary Smith and her name should be examined. Furthermore, marriage license records should be reviewed to determine her maiden name and that name should also be examined. It should further be noted that marriage license records often indicate the names of the parents of both the husband and wife, which may give you further information on names to examine.

PART II
WHAT CONSTITUTES A DILIGENT SEARCH FOR A DEFENDANT WHOSE LOCATION OR IDENTITY IS NOT KNOWN?

I. OHIO

A. Statutes/Rules

1. Ohio R. Civ. P. 4.4 "Process: Service by Publication"

Rule 4.4 provides, in relevant part, as follows:

(A) Residence unknown

> (1) Except in an action governed by division (A)(2) of this rule, if the residence of a defendant is unknown, service shall be made by publication in actions where such service is authorized by law. Before service by publication can be made, an affidavit of a party or his counsel shall be filed with the court. The affidavit shall aver that service of summons cannot be made because the residence of the defendant is unknown to the affiant, all of the efforts made on behalf of the party to ascertain the residence of the defendant, *and that the residence of the defendant cannot be ascertained with reasonable diligence*.

Ohio R. Civ. P. 4.4(A)(1) (emphasis added).

2. Ohio Rev. Code Ann. § 2703.14

enumerating causes of action in which service by publication is specifically authorized

3. Ohio Rev. Code Ann. § 2703.24

authorizing service by publication where name and residence of necessary party is unknown to plaintiff

4. Ohio Rev. Code Ann. § 2323.04

service by publication authorized, in a proceeding to determine heirship, with respect to resident defendants and defendants whose names or locations are known

B. Cases Where There Was Insufficient Diligence To Locate Defendant

Sizemore v. Smith, 6 Ohio St. 3d 330, 331, 453 N.E.2d 632, 634 (1983) (issue in case was whether service of process by publication was proper pursuant to Rule 4.4(A) and § 2703.14(L); "From the plain and unambiguous language of Civ.R. 4.4(A) it is axiomatic that a plaintiff must exercise reasonable diligence in his attempt to locate a defendant before he is entitled to service by publication."); *id.* at 332, 453 N.E.2d at 635 ("'Reasonable diligence' was defined as "'[a] fair, proper and due degree of care and activity, measured with reference to the particular circumstances; such diligence, care, or attention as might be expected from a man of ordinary prudence and activity.'" (quoting *Black's Law Dictionary* 412 (5th ed. 1979))); *id.* ("[Under Rule 4.4(A),] [r]easonable diligence requires taking steps which an individual of ordinary prudence would reasonably expect to be successful in locating a defendant's address."; reasonable diligence requires counsel to use common and readily available sources in his search, such as a check of the telephone book, county records such as the automobile title department, or the board of elections, calls to the telephone company, or an inquiry of former neighbors; court held that, in the case before it, the attempts to locate the defendant's address, which consisted of (1) contacting the post office, where he was

unable to secure a forwarding address, and (2) the plaintiff's attorney contacting his own client, did *not* constitute reasonable diligence for purposes of service by publication)

First Bank of Marietta v. Cline, 12 Ohio St. 3d 317, 466 N.E.2d 567 (1984) (in bank's action to recover on business loans, service of process by publication was not proper; bank did not use reasonable diligence in attempting to locate the defendant by asking other parties to the action and an attorney concerning his whereabouts)

Kraus v. Maurer, 138 Ohio App. 3d 163, 740 N.E.2d 722 (2000) (in automobile accident case, plaintiff failed to make showing that he used reasonable diligence to locate defendant, where after several unsuccessful attempts of service via certified mail, the plaintiff sought the intervention of a court, seeking to compel the defendant's insurer to turn over his entire claims file so as to ascertain defendant's whereabouts)

Chartier v. Hedges, 3d Dist. No. 3-03-01, 2003-Ohio-2686, 2003 WL 21211943 (held that plaintiffs failed to make showing that reasonably diligent attempts were made to locate defendants' addresses so as to allow service by publication, where (1) plaintiffs attempted certified mail and were unable to secure current addresses, and (2) they contacted one defendant's insurance carrier)

Helms v. Nationwide Ins. Co. of Am., No. 1:11-cv-410, 2012 WL 481642, at *10 (S.D. Ohio Feb. 14, 2012) (court held that the plaintiff's affidavit was "patently invalid" to support service by publication under Rule 4.4; that Rule required the supporting affidavit to set forth in some detail the efforts made to ascertain the residence of the defendant in order to show that the plaintiff could effect service "with reasonable diligence"; the court noted, in this breach-of-contract and bad-faith case, that the plaintiff's affidavit contained

no information concerning "attempts to achieve personal service through inquiries to former neighbors, or searches of . . . city and county records such as the telephone book, city directory, credit bureau, auto title department or board of elections, or basic internet searches")

Anstaett v. Benjamin, 1st Dist. No. C-010396, 2002-Ohio-7339, 2002 WL 31894866 (affidavit of service by publication required by Rule 4.4(A) was defective, so as to render default judgment against defendant void, where such affidavit did not set forth the specific efforts made to locate the defendant)

In re Montasser, 6th Dist. No. L-92-018, 1992 WL 348236, at *3 (Ohio Ct. App. Nov. 20, 1992) (county children's services board failed to meet its burden to demonstrate that it exercised reasonable diligence to locate child's father, so as to support service by publication; county board's evidence established that its investigators sought to locate the father using various misspellings of his name and, because the county board did not indicate how its investigators determined the spelling of the father's name, there was no evidence for the trial court to conclude that the county board "did everything that a reasonable person would have done under the circumstances")

Channel v. Hall, 5th Dist. No. CA-3640, 1991 WL 262081 (Ohio Ct. App. Nov. 12, 1991) (pursuant to *Sizemore*, plaintiff in a personal injury action did not exercise the requisite reasonable diligence to locate the defendant by merely consulting with the latter's insurance adjuster and opposing counsel)

Beacham v. Guss, 7th Dist. No. 93 C.A. 163, 1994 WL 672967 (Ohio Ct. App. Nov. 28, 1994) (reasonable diligence was lacking in automobile accident action where the

plaintiff sought unsuccessfully to effect personal service on the defendant using an address mistakenly recorded by a police officer on an accident report, and in which ordinary mail follow-up service was returned marked "No such number," and where a look in the telephone book would have given the defendant's correct address and telephone number)

Oureshi v. Gepetto's Pizza & Ribs Franchise, 8th Dist. No. 78672, 2001 WL 741495 (Ohio Ct. App. June 21, 2001) (in action for breach of contract, tortious interference, and fraud, plaintiff did not use reasonable diligence where the only effort consisted of a request to the Ohio Secretary of State for the identity and address of the defendant's statutory agent and an inquiry to telephone directory assistance as to whether the defendant had a listed number)

In re Randolph, 11th Dist. Nos. 2003-T-0017, -0018, 2005-Ohio-414, 2005 WL 280832 (in ex-wife's action to change children's surname, she did not exercise the requisite diligence to locate her ex-husband; court noted that the ex-husband's mother and sister were readily available sources that the ex-wife failed to consult, although a prudent person would have, in order to locate the ex-husband)

B. Cases Where There Was Sufficient Diligence To Locate Defendant

Brooks v. Rollins, 9 Ohio St. 3d 8, 457 N.E.2d 1158 (1984) (in personal injury action arising out of motor vehicle accident, plaintiff satisfied requirements for service by publication under Rule 4.4(A) and § 2703.14; plaintiff was determined to have exercised reasonable diligence to ascertain defendant's residence where she (1) attempted certified mail service on the defendant at the address she had given the police officers at the time of the accident, which service was returned "not deliverable as addressed, unable to forward," (2) obtained a different address for the defendant from the Bureau of Motor Vehicles, again attempted certified mail service, which service was returned "Moved—Left no address," and (3) searched the Akron and vicinity telephone book and checked with the telephone operators but was unable to find a current address or telephone number for the defendant)

In re Thompkins, 115 Ohio St. 3d 409, 2007-Ohio-5238, 875 N.E.2d 582 (county children's services board brought action for permanent custody of child; board exercised reasonable diligence in attempting to locate and serve the child's father, so as to justify service by publication under Rule 4.4(A), where it failed to effectuate personal service at a first address for the father and, with respect to a second address, the board attempted service by certified mail, which was returned marked "Attempted Not Known," even though it did not follow that up with any attempt at service by ordinary mail)

In re Cowling, 72 Ohio App. 3d 499, 595 N.E.2d 470 (1991) (service by publication held proper in action by county children's services board seeking permanent custody of mother's children; court held that board exercised reasonable diligence in

attempting to locate mother where the board made unsuccessful efforts to establish her address, the mother was a transient, numerous notices were sent to various addresses throughout the period of temporary custody that were returned because she no longer resided at the addresses, and the mother had approximately 10 different addresses during a one-year period; court concluded that the mother's history of sporadic contact coupled with her inability to obtain stable housing or provide the board with an address to send notices to made it extremely impractical, if not impossible, to serve the mother in any other manner than by publication)

In re J.S., 8th Dist. No. 94841, 2010-Ohio-3426, 2010 WL 2862459 (father established reasonable diligence to locate mother, as required to permit service by publication, where (1) he drove past mother's last known address almost daily, (2) engaged in many searches on the Internet, (3) hired a private investigator to try and locate the mother's out-of-state whereabouts, and (4) contacted other individuals who knew mother, both in her neighborhood and elsewhere, as to her whereabouts)

II. PENNSYLVANIA

A. Rule

1. Pa. R. Civ. P. 430 "Service Pursuant to Special Order of Court Publication"

Rule 430 provides, in relevant part, as follows:

> (a) If service cannot be made under the applicable rule the plaintiff may move the court for a special order directing the method of service. The motion shall be accompanied by an affidavit stating the nature and extent of the investigation which has been made to determine the whereabouts of the defendant and the reasons why service cannot be made.

Pa. R. Civ. P. 430(a).

2. Note To Rule

> An illustration of *a good faith effort to locate the defendant includes* (1) inquiries of postal authorities including inquiries pursuant to the Freedom of Information Act, 39 C.F.R. Part 265, (2) inquiries of relatives, neighbors, friends, and employers of the defendant, and (3) examinations of local telephone directories, voter registration records, local tax records, and motor vehicle records.

Id. 430 n. (emphasis added).

B. Cases Where Court Found No Good-Faith Effort To Locate Defendant

Deer Park Lumber, Inc. v. Major, 384 Pa. Super. 625, 633, 559 A.2d 941, 946 (1989) (plaintiff obtained default judgment in quiet title action against heirs of record owner of property where trial court entered order permitting substitute service by publication pursuant to Rule 430; superior court reversed and held, inter alia, that plaintiff's underlying investigation, which consisted of mere paper search in county in which property was located, and did not extend to adjoining county in which last recorded

property owners had resided, was insufficient to support service of process by publication under Rule 430; in so holding court observed that the illustration of good-faith effort to locate a defendant set forth in the note accompanying Rule 430(a), "[w]hile by no means exhaustive," provided in essence that more than a mere paper search was required; here, the plaintiff's effort to locate the heirs of the last recorded owner amounted to an investigation of situs county deed books, will books, and the voters' registration list; pursuant to the foregoing investigation, the plaintiff discovered an 1889 deed which, on its face, listed an address for the last recorded owner of the subject property in neighboring Luzerne County; plaintiff made no effort to extend its investigation into Luzerne County; superior court concluded that an investigation in Luzerne County was warranted, and the fact that no inquiry was made outside the situs county compelled its conclusion that the plaintiff did *not* conduct an adequate good-faith investigation designed to locate any potential heirs to the property)

Barbosa v. Dana Capital Group, Inc., Civil Action No. 07-cv-1724, 2009 WL 902339, at *4 (E.D. Pa. Mar. 31, 2009) (court noted that, in addition to the illustrative examples of good-faith efforts to locate in the note accompanying Rule 430(a), a good-faith effort to locate and serve the defendant may also include searching the Internet, calling telephone directory assistance, and hiring private investigators or skip tracer services; court further observed that although a plaintiff is not required to utilize all of these methods to satisfy the good-faith effort requirement, when a plaintiff "fails to utilize most of these methods he will not be able to show that regular service cannot be made"; here, where there was nothing in the record to indicate that plaintiff took any of these

steps or did anything to locate defendant, he clearly failed to make the required good-faith effort to locate him)

Thrivent Fin. for Lutherans v. Savercool, Civil Action No. 4:04-CV-02403, 2008 WL 5412095 (M.D. Pa. Dec. 29, 2008) (plaintiff instituted interpleader action to pay a portion of the proceeds of an annuity into court until liability to the beneficiaries was determined; the court concluded that the plaintiff did not make the requisite good-faith effort to locate Nelson Swartz, one of the named beneficiaries; as set forth in the plaintiff's affidavits, it attempted to locate Swartz by (1) contacting the other beneficiary, Savercool, (2) contacted the agent who sold the policy to the annuitant, and (3) hired an investigator who unsuccessfully sought to locate Swartz by searching listings in New Cumberland, Pennsylvania, spoke with the annuitant's pastor in Shiremanstown, Pennsylvania, searched a Juniata County database, and conducted an Internet search; although plaintiff was aware that Swartz's last known address was in Milton, Pennsylvania, a borough of Northumberland County, its effort to locate Swartz did not encompass a search of records in either Milton or Northumberland County; the court stated that making inquiries of the other annuitant, who stood to gain if Swartz was not found, along with a records search in a city and county, neither of which were the last known residence of Swartz, did not constitute a good-faith effort; court further stated that a good-faith effort to locate Swartz would have begun with a records search in Milton and Northumberland County, pursuant to which he could have been successfully located; court also noted that a search of Pennsylvania's Department of Transportation driver's license records would have also successfully located Swartz)

Grove v. Guilfoyle, 222 F.R.D. 255 (E.D. Pa. 2004) (plaintiff in personal injury action arising out of motor vehicle accident was not entitled to service by publication where he failed to make good-faith effort to locate the defendant; plaintiff's effort to locate/serve defendant consisted of (1) sending copies of the summons and complaint via regular mail, which was not returned, and via certified mail, which the U.S. Postal Service returned as "attempted, not known," (2) contacting counsel for the defendant's employer, and (3) submitting to U.S. Postal Service a Request for Change of Address regarding defendant; court suggested that a good-faith effort to locate the defendant might include (1) examining voter registration records, local tax records, motor vehicle records, and other public documents, (2) making inquiries to the defendant's former neighbors at his last known address or inquiries to his former coworkers, (3) reviewing a police report of the underlying motor vehicle accident, and (4) examining local telephone directories)

First Pa. Bank, N.A. v. Drucker, Civ. A. No. 91-842, 1991 WL 24739 (E.D. Pa. Feb. 22, 1991) (plaintiff did not make good-faith effort to locate defendant under Rule 430(a) where his "investigation" consisted of a phone call to an attorney who represented the defendant in a related case, and who stated that the defendant was traveling in Hungary)

Penn v. Raynor, CIV. A. No. 89-553, 1989 WL 126282 (E.D. Pa. Oct. 19, 1989) (no good-faith effort to locate defendant established by affidavit of plaintiff's attorney, which (1) stated that he had contacted "the telephone company" without specifying which telephone company, (2) stated that he consulted "several" telephone directories, without specifying which telephone directories, and (3) affirmed that he "checked for an address

listing for the Defendant," but did not specify which records were checked or how thoroughly; the court specifically noted that there was no indication that (1) the plaintiff had checked voter registration records, tax records, or motor vehicle records, either in Connecticut (the state of his last known address) or Florida (where it had been discovered that the defendant had moved and left a forwarding address at a post office box in the city of Naples, or (2) that inquiries had been made of the defendant's relatives, neighbors, friends, or employers)

Accu-Tech Corp. v. Network Techs. Group, Inc., No. Civ.A. 05-1923, 2005 WL 1459543, at *2 (E.D. Pa. June 17, 2005) (requisite "good faith" investigation, under Rule 430, *not* established where (1) plaintiff attempted service six times at defendant's current home address listed in Westlaw's "people finder historic tracker record," (2) on the seventh such attempt, the defendant's father answered the door and refused to provide the defendant's current address, (3) plaintiff ran an Internet search on Accurint.com, but came up with the same incorrect address, and (4) unsuccessfully sought to locate the defendant through directory assistance or through searching the Google Internet search engine; despite describing the plaintiff's efforts as "commendable," the court specifically noted the absence of any indication that the plaintiff had attempted to examine voter registration records, local tax records, or motor vehicle records "as suggested by the note to Rule 430(a)")

C. Cases Where Court Found "Good-Faith" Effort To Locate Defendant

City of Phila. Water Rev. Bur. v. Towanda Props., 976 A.2d 1244 (Pa. Commw. Ct. 2009) (city water revenue bureau brought action against property owner for unpaid water and sewer services, using alternative service of process, pursuant to Rule 430(a), after four unsuccessful attempts to personally serve the complaint on the proper owner at the subject property; court concluded that the plaintiff water bureau conducted a good-faith investigation into the defendant property owner's whereabouts, including (1) an examination of the defendant's corporate filings with the Commonwealth, (2) an examination of information on file with the City of Philadelphia Board of Revision of Taxes, and (3) Internet research, including Internet telephone directories)

Posey v. Searcy, Civil Action No. 07-4281, 2008 WL 5382692 (E.D. Pa. Dec. 24, 2008) (insured motorist made a good-faith effort to serve and locate the driver of truck, who allegedly caused her injuries, thus entitling the plaintiff to service by publication, pursuant to Rule 430; plaintiff's good-faith attempt to locate the defendant was established by the following: (1) she inquired of postal authorities, pursuant to Freedom of Information Act, to determine if they knew of any change of address, (2) she retained an investigator to track the defendant, using his date of birth and Social Security number, which produced an additional three possible addresses, and (3) that she attempted service of process at the numerous addresses related to the defendant)

Calabro v. Leiner, 464 F. Supp. 2d 470 (E.D. Pa. 2006) (former employer who brought action against former employer, alleging denial of benefits, undertook sufficient good-faith effort to locate defendant by (1) obtaining a Freedom of Information Act Statement from the U.S. Postal Service, and (2) conducting an Internet search of address

records at accurint.com; both avenues produced an address at which personal service was unsuccessfully attempted)

Accu-Tech Corp. v. Network Techs. Group, Inc., No. Civ.A. 05-1923, 2005 WL 1459543 (E.D. Pa. June 17, 2005) (one of two plaintiffs in a breach-of-contract action made good-faith efforts, as envisioned by Rule 430, to locate and serve the defendant, albeit unsuccessfully; plaintiff's good-faith effort was shown by (1) her attempt to serve defendant at the location from which it had done business with her, which location was listed by Dun & Bradstreet as the defendant's place of business, but which was found to have been abandoned, (2) plaintiff's counsel obtained a telephone number for the defendant from directory assistance that had been "temporarily disconnected at the customer's request," with no forwarding number provided, and (3) an alternate address for the defendant was found in Westlaw's "business tracker record search," which turned out to be the former home address of the defendant's former president, but not a correct address for the defendant)

Long v. Polidori, No. 03-CV-1439, 2003 WL 21278868 (E.D. Pa. May 29, 2003) (plaintiffs, who brought action for personal injuries sustained as the result of an automobile accident, engaged in a good-faith effort to locate defendant and were therefore entitled to service by publication; plaintiffs' good-faith investigation established where (1) a first attempt was made to serve defendant at an address which he provided to them, and where their process server was told by defendant's mother that he moved to Louisiana one year earlier, that she had not seen or heard from him since he moved and did not know his current address, (2) that plaintiffs then looked in several telephone

directories for Bucks County, Montgomery County, Doyleston, and Philadelphia, and searched four Internet websites for the defendant's address, which yielded no results, and (3) plaintiffs consulted an independent investigative agency that located an address for defendant in Louisiana at which service was attempted by certified mail, but the materials were returned to plaintiffs with a stamp on the envelope informing them that the defendant had moved and did not leave a forwarding address)

Olympic Steels, Inc. v. Pan Metal & Processing, LLC, Civil Action No. 11-cv-6938, 2012 WL 682381 (E.D. Pa. Mar. 2, 2012) (plaintiff "undoubtedly" made a good-faith effort to locate both the defendant corporation and the individual who was its sole organizer; plaintiff's extensive search included (1) asking the U.S. Postal Service for the current addresses for both the corporation and the individual, (2) requesting information from the Division of Motor Vehicles, (3) performing Internet research, (4) searching accurint.com and Dun & Bradstreet databases for the defendant corporation, and (5) obtaining documentation from the Burlington County Board of Taxation showing that the individual sole organizer of the defendant still owned property, the address at which plaintiff tried to serve him twice previously; based on the foregoing search, plaintiff had determined that the defendant corporation had moved from its previous location in Philadelphia without leaving a forwarding address)

Gray ex rel. DiDomenicus v. Power, Civil Action No. 94-5076, 1996 WL 30475 (E.D. Pa. Jan. 18, 1996) (plaintiff in wrongful death action made good-faith effort to locate defendant, as required by Rule 430; plaintiff's good-faith effort to locate defendant consisted of (1) address inquiries to postal authorities, (2) personal interviews with

defendant's brother, his last known employer, and his former neighbors at a known former address, (3) obtaining all records pertaining to the defendant in the possession of his former employer, (4) inquiries to the Pennsylvania Department of Motor Vehicles, and (5) the use of a "skip tracer" service)

Khanyile v. Broscius, No. CIV. A. 93-843, 1993 WL 224721 (E.D. Pa. June 24, 1993) (plaintiff in § 1983 civil rights action made requisite good-faith effort to locate defendant police officer, so that service by publication pursuant to Rule 430 was proper; plaintiff's good-faith effort encompassed (1) a search by plaintiff's attorney of the Northampton County computer system which revealed 11 cases in which the defendant or his wife were parties and revealed the same residential address, (2) contact by plaintiff's counsel with the county sheriff's office and a polling of deputies which revealed that no one knew the defendant's current address, (3) inquiries made to three attorneys connected with some of the cases discovered through the computer search, (4) inquiries made to the sheriff's department of Bradford County where the defendant had formerly been employed for a brief time, (5) an examination of local telephone directories, (6) an inquiry of postal authorities, and (7) inquiries to the criminal division and district attorney's office in Northampton County where the defendant had been the subject of criminal charges; the court also noted that even though the plaintiff did not pursue every method listed in the note to Rule 430(a), he had pursued other methods not listed)

Kitanning Coal Co. v. Int'l Mining Co., 551 F. Supp. 834 (W.D. Pa. 1982) (plaintiffs who brought action under the RICO Act made good-faith effort to locate a defendant pursuant to Rule 430, supporting service by publication; plaintiffs' good-faith

efforts to locate the defendant in question were summarized as follows: (1) forwarded service by certified mail to the defendant's last known address in Florida, which mailings were returned by postal authorities stamped with the notation that the forwarding address had expired; (2) obtained form the Assistant District Attorney, West Palm Beach, Florida, a more recent business address for the defendant in Florida; service of process sent to that address by certified mail was returned with a notation that it was not forwardable, and (3) contacted telephone directory assistance for the Florida cities where these addresses were located, and no one by the defendant's name was found)

III. NEW YORK

A. Statutes

1. N.Y. CPLR 315

> The court, upon motion without notice, shall order service of a summons by publication in an action described in section 314 if service cannot be made by another prescribed method *with due diligence*.

N.Y. C.P.L.R. 315 (emphasis added).

Practice Commentaries to section 315 states, in part, as follows:

> CPLR 315's authorization for service of process by publication applies, by its terms, in the actions described in CPLR 314—matrimonial actions and actions in which the basis of jurisdiction is in rem or quasi in rem. . . .
>
> Service of process by publication is usually no more than constructive notice of an action. The drafters of the CPLR were well aware that "[p]ublication is not a method of service calculated to give actual notice." N.Y. Adv. Comm. on Prac. & Proc., Second Prelim. Rep., Legis. Doc. No.13, p.167 (1958) [hereinafter cited as Second Prelim. Rep.]. . . .
>
> Accordingly, CPLR 315 was "designed to discourage service by publication." Second Prelim. Rep., supra, at p.167. The statute achieves this purpose by requiring a court order as a prerequisite to service by publication. As a condition to granting such order, the court must find that "service cannot be made by another prescribed method with due diligence." The plaintiff, in other words, must first diligently attempt service by one of the conventional methods specified in CPLR 308. *See also* CPLR 310, 311, etc. The due diligence prerequisite of CPLR 315 has properly been interpreted as imposing an obligation on the plaintiff to exhaust all of the potential methods of service under CPLR 308, including the seeking of a court order pursuant to CPLR 308(5) for expedient service. See Practice Commentaries on CPLR 308, at C308:6, supra. Service by publication is a jurisdictional defect when an improvised method under CPLR 308(5) would have been more likely, in the particular circumstances, to convey actual notice to the defendant. *See, e.g., Serrano v. Serrano*, 1992, 186 A.D.2d 912, 589 N.Y.S.2d 203 (3d Dep't); *Iroff v. Iroff*, 1986, 125 A.D.2d 197, 509 N.Y.S.2d 316 (1st Dep't).

Id. § 315 practice cmt.; *see also* David D. Siegel, *New York Practice* § 107 (5th ed. Westlaw current through Dec. 2011 update) ("With CPLR 308(5) on the books as the ultimate alternative—authorizing the court to invent a method of service if nothing else works—the need for publication even in the in rem case should be reduced to near the vanishing point.")

2. N.Y. Surr. Ct. Proc. Act § 2225 "Determination of distributees, devisees, legatees, beneficiaries and distributive and beneficial shares"

> In any proceeding where the court is required to determine the distributees entitled to share in the estate under EPTL 4-1.1, or where a devisee, legatee or a beneficiary of a will or trust subject to the jurisdiction of the court is entitled to money or property upon the occurrence of a specified event, the petition may request the court as incidental thereto to adjudge that (a) a person who might otherwise be a distributee, devisee, legatee or beneficiary is dead or (b) that no distributees, devisees, legatees or beneficiaries other than those stated in the record exists. Citation shall issue to the person named and to unknown distributees or to unknown devisees, legatees or beneficiaries, if any. For the purposes of this section, a "specified event" shall be the time specified in the will or lifetime trust for the determination of the identity of the devisee, legatee, beneficiary or members of a class thereof entitled to share in the estate or trust property.
>
> > (a) If it is established to the satisfaction of the court that a person who would be a distributee, or a devisee, legatee or beneficiary upon the occurrence of a specified event, has not been heard from for a period of at least three years since the death of the decedent, or since the occurrence of such event, as the case may be, *that a diligent search has been made to discover evidence that such person is still living, and that no such evidence has been found*, the court may make a determination that such person is presumed dead and that he or she predeceased the decedent without issue or that such devisee, legatee or beneficiary is presumed to have died prior to the occurrence of such event and that such person died prior thereto without issue other than those issues stated in the record.

> (b) *If it appears to the satisfaction of the court that diligent and exhaustive efforts have been made from all available sources to ascertain the existence of distributees, or members of a class of devisees, legatees or beneficiaries*, that at least three years have elapsed since the death of the decedent, or since the occurrence of the specified event upon which such class is finally determined, as the case may be, that the parties before the court know of no distributees of the decedent, or of such legatees, devisees or beneficiaries, other than those stated in the record, and that no claim to a share in the estate or trust has been made by any person whose relationship or existence has not been established in the record, the court may make a determination that no distributee of the decedent or class of distributees exists, or that no such devisee, legatee or beneficiary, or members of a class of legatees, devisees or beneficiaries exists, other than those whose status is established in the record before the court.
>
> (c) Upon making the findings under subdivision (a) or (b) of this section, the court may direct distribution of the assets to those distributees or to those devisees, legatees and beneficiaries whose relationship or present existence has been established in the record before the court.

N.Y. Surr. Ct. Proc. Act § 2225 (emphasis added).

> The Practice Commentaries to section 2225 state in part, that
>
> Under subdivision (a), the court can presume the death without issue of a known distributee who has not been heard from, despite a diligent search, for three years. Under the more stringent subdivision (b), the court can make a determination that there are no distributees, other than those before the court, upon the passage of three years and proof of diligent and exhaustive efforts to locate such distributees.

Id. § 2225 practice cmts. (main vol. 1997).

B. Cases—General

Benefield v. City of N.Y., 14 Misc. 3d 603, 610, 824 N.Y.S.2d 889, 894 (Sup. Ct. 2006) (proceeding in which an attorney sought to withdraw from his representation of a client whose whereabouts were uncertain; service of process at an address where the client obviously no longer resided was insufficient to provide client with notice of the proceeding on the attorney's motion to withdraw; in the course of the proceedings, the court instructed the attorney that if, after diligent efforts had been made, the client could not be located, an alternative means of service (e.g., publication and/or service on a close relative) would be permitted; in a section of the decision headed "Requirements of a Diligent Search for a Missing Person," the court observed that in conducting a diligent search to locate a person "[a]t the least, public sources such as the post office, Board of Elections, and Department of Motor Vehicles should be contacted"); *id.* at 605, 824 N.Y.S.2d at 891 (annexed to the end of this decision as Appendix A were materials that the court described as "written guidelines to the requirements of a 'due diligence' search of Internet and public resources").

The following is Appendix A to the *Benefield* decision:

Suggested Methodology for Conducting a Search for a Missing Person(s)

> Counsel should describe the efforts made to locate missing persons in an affidavit by the person(s) conducting the search, setting forth with specificity the actions taken and persons and agencies contacted. The following sources may be checked for information in a particular case, depending on the facts presented:
>
> Relatives;
>
> Friends, neighbors;

Inquiry to present occupants of former addresses;

Post Office (for forwarding address);

Churches or other community groups;

Department of Motor Vehicles;

Surrogate's Court records;

Social Security Administration (see attached instructions);

Obituary notices or death certificates;

Professional or trade organizations;

Internet searches;

Board of Elections records;

Correction Departments: Federal, State, and City;

N.Y.C. Department of Probation/N.Y.S. Division of Parole;

State and local Departments of Social Services;

N.Y.C. Medical Examiner;

Department of Defense Website, which provides addresses to contact in the different branches of the military (http://www.defenselink.mil/faq/pis/PC04MLTR.html).

Id. at 612, 824 N.Y.S.2d at 896.

Letter Forwarding—Social Security Administration

The Social Security Administration (SSA) will attempt to forward a letter to a missing person under circumstances involving a matter of great importance, such as death or serious illness in the missing person's immediate family. The circumstances must concern a matter about which the missing person is unaware and would undoubtedly want to be informed. Generally, when a son, daughter, brother, sister, or parent wishes contact,

the SSA will write to the missing person, rather than forwarding a letter from the relative.

There is no charge for forwarding letters that have a humanitarian purpose. However, a fee of $25 is charged when the letter is to inform the missing person of money or property due him or her. The fee is nonrefundable. The fee should be paid by check and made payable to the Social Security Administration.

A representative from SSA must read the letter to ensure that it contains nothing that could prove embarrassing to the missing person if read by a third party. SSA does not believe it would be proper to open a sealed envelope; therefore, a letter that is sent to the SSA for forwarding should be in a plain, unsealed, unstamped envelope showing only the missing person's name. Nothing of value should be enclosed in the envelop.

It is necessary to provide the missing person's Social Security number or identifying information in order for SSA to locate an address in SSA records. Usually, SSA will forward the letter in care of the employer who most recently reported earnings for the missing person, as SSA will only have the home address if the person is receiving Social Security benefits. SSA cannot assure that the letter will be delivered nor can SSA guarantee a reply. SSA is also unable to send a second letter.

A request to have a letter forwarded by the Social Security Administration to a missing person should be sent to: Social Security Administration, Letter Forwarding, P.O. Box 33022, Baltimore, MD 21290-3002.

Id. at 612-13, 824 N.Y.S.2d at 896-97.

B. Cases Where Plaintiff Failed To Exercise Due Diligence To Locate Person

Caban v. Caban, 116 A.D.2d 783, 784, 497 N.Y.S.2d 175, 176 (3d Dep't 1986) (judgment of divorce vacated for lack of jurisdiction; wife who initiated divorce proceedings resorted to service of process by publication while husband was stationed in Germany with the military; husband moved to vacate the judgment of divorce, claiming

that the first notice he received of the divorce action was by letter from the army finance and accounting center enclosing the divorce decree and notifying him that part of his retirement pay would be withheld; court held that wife failed to exercise due diligence to serve husband by other means; wife made no effort to effect personal service or contact husband although she had his address and alleged in only the most conclusory fashion that she had "contacted [her husband's] relatives who had no knowledge of [his] whereabouts")

McGovern v. Christian Bahnsen, Inc., 153 Misc. 224, 274 N.Y.S. 633 (Sup. Ct. 1934) (order of publication vacated where plaintiff's inability to locate a New York office for the defendant in certain directories was insufficient to establish the nonexistence of such an office, and the plaintiff's statement, in his affidavit, that he was "informed" that the defendant had no office in New York for the transaction of business was "pure hearsay")

Iroff v. Iroff, 125 A.D.2d 197, 509 N.Y.S.2d 316 (1st Dep't 1986) (husband did not exercise due diligence to effect personal service on his estranged wife where she could have been located and served by contacting their adult son, who was in touch with both parties, by contacting the wife's sister, whose number was listed in the telephone directory, or by contacting the attorneys who represented her in a separate proceeding involving those parties)

Serrano v. Serrano, 186 A.D.2d 912, 589 N.Y.S.2d 203 (3d Dep't 1992) (although husband's counsel submitted affirmation stating various unsuccessful efforts to locate wife, including checking telephone directories and hiring a private investigator who

checked DMV records in both New York and Texas, the failure to reveal to the court existence of an adult daughter who was in contact with the mother constituted a material omission that negated husband's claim that service of process could not be made with due diligence by any method other than publication)

Contimortg. Corp. v. Isler, 48 A.D.3d 732, 853 N.Y.S.2d 162 (2d Dep't 2008) (in foreclosure action, requisite due diligence to locate and serve junior lienholder was not established; affidavit of process server that (1) he unsuccessfully attempted to serve both the mortgagee and the junior lienholder at the address of the subject property which was vacant; (2) was unable to locate a forwarding address from the local post office; (3) checked the local phone directory; (4) conducted a credit header search; (5) checked the records of the Department of Motor Vehicles and the Surrogate's Court; despite the foregoing affidavit, lack of diligence was shown by the junior lienholder's evidence that (1) he and the mortgagor resided at the same Brooklyn address listed as the mortgagor's address on the docket entry since 1993 and never resided at the subject property; (2) the process server never examined the records of the United States District Court where the junior lienholder's judgment was entered from which address could have been obtained; and (3) there was no evidence of any land that the junior lienholder attempted to evade service)

C. Cases Where Plaintiff Exercised Due Diligence To Locate Person

Dime Sav. Bank of N.Y. v. Mancini, 184 A.D.2d N.Y.S.2d 603 (3d Dep't 1992) (in mortgage foreclosure action, mortgagee exercised due diligence in its attempts to locate

and serve mortgagor where (1) several process servers visited her purported residence at different times and dates to serve her, but could not find her; (2) the mortgagee hired a private investigator to locate the mortgagor; and (3) the affidavit of the private investigator revealed that the mortgagor did not physically reside at the premises where she claimed to reside)

Carpenter v. Weatherwax, 275 A.D. 980, 90 N.Y.S.2d 618 (3d Dep't 1949) (in mortgage foreclosure action, affidavit for service by publication showing that respondent had deserted his family with intent to remain away permanently and that the police had searched for him unsuccessfully in New York was sufficient to establish that he could not be located and served in New York with due diligence)

Smith v. R.B.I. Bldg. Corp., 126 Misc. 826, 215 N.Y.S. 1 (Sup. Ct. 1926) (plaintiff in partition action, who was brother of decedent, made diligent inquiry to ascertain identity of the unknown heirs at law of the decedent where plaintiff had made timely and sufficient inquiry of his and the decedent's surviving brother and sister as to the heirs and widow of the decedent)

Matter of Russo, 91 Misc. 2d 984, 398 N.Y.S.2d 988 (Sur. Ct. 1977) (where (1) named distributee had been heard from only twice in a period of more than 25 years and not at all in the more than five years since decedent's death, (2) members of the family and an investigator employed for the purpose made a diligent search to discover evidence that the named distributee was still living and found no such evidence, and (3) diligent and exhaustive efforts had been made from all available sources to ascertain the existence

of distributees, pursuant to Surr. Ct. Proc. Act § 2225, it would be presumed that the named distributee was dead and that she predeceased the decedent)

Matter of Whelan, 93 A.D.2d 891, 461 N.Y.S.2d 398 (2d Dep't 1983) (finding that, in view of estate's small size, objectants made sufficiently diligent and exhaustive search in an attempt to ascertain and locate any unknown next of kin of equal or nearer degree on decedent's maternal side, so as to satisfy the requirements of subdivision (b) of § 2225)

Matter of Dehn, 94 Misc. 2d 260, 405 N.Y.S.2d 179 (Sur. Ct. 1978) (where person who would be distributee of decedent had not been heard from since approximately the end of World War I and after that all means to communicate with her failed, and where citation was issued to missing distributee and publication of citation was ordered in two foreign language newspapers whose circulation among Latvians and Russians was global, and where claimant to fund requested and obtained open commission to Federal Republic of Germany and presented witnesses who were extensively examined to establish that thorough and exhaustive search had been made for missing distributee, and in view of historical conditions in Russia around 1917 when missing distributee left Latvia for Russia, missing distributee would be presumed to be dead and it would be presumed that she predeceased the decedent and therefore, only distributee of decedent was petitioner and her request for withdrawal of funds on deposit with comptroller of state of New York would be granted)

IV. WEST VIRGINIA

A. Statute/Rule

1. W. Va. Code § 56-3-23 "Service by Publication Generally"

Section 56-3-23 provides as follows:

> *On affidavit that a defendant* is a foreign corporation for which no statutory attorney-in-fact, officer, director or agent is found in this State upon whom service may be had, or is not a resident of this State, *or that diligence has been used by or on behalf of the plaintiff to ascertain in what county he is, without effect*, or that process, directed to the officer of the county in which he resides or is, has twice been delivered to such officer more than ten days before the return day, and been returned without being executed, an order of publication may be entered against such defendant. And in any suit in equity, where the bill states that there are or may be persons interested in the subject to be divided or disposed of, whose names are unknown, and makes such persons defendants by the general description of parties unknown, on affidavit of the fact that such parties are unknown, an order of publication may be entered against such unknown parties. Any order of publication under this section may be entered either in court or by the clerk at any time. In a proceeding by petition, there may be an order of publication in like manner as in a suit in equity.

W. Va. Code § 56-3-23 (emphasis added).

2. W. Va. R. Civ. P. 4 "Summons"

Rule 4 essentially restates the provisions of § 56-3-23 in the following terms:

> (e) Constructive Service.
>
> (1) *Service by Publication.* If the plaintiff files with the court an affidavit:
>
> (A) That the defendant is a foreign corporation or business trust for which no officer, director, trustee, agent, or appointed or statutory agent or attorney in fact is found in the State upon whom service may be had; or

(B) That the defendant is a nonresident of the State for whom no agent, or appointed or statutory agent or attorney in fact is found in the State upon whom service may be had; or

(C) That the plaintiff has used due diligence to ascertain the residence or whereabouts of the defendant, without effect; or

(D) That process, delivered to the sheriff of the county in which the defendant resides or is, has twice been delivered to such officer and has been returned without being executed; or

(E) That there are or may be persons, other than those named in the complaint as plaintiff and defendant, interested in the subject matter of the action, whose names are unknown to the plaintiff and who are made defendants by the general description of unknown defendants;

then the clerk shall enter an order of publication against such named and unknown defendants. Every order of publication shall state the title of the action; the object thereof; the name and address of the plaintiff's attorney, if any; that a copy of the complaint may be obtained from the clerk; and that each named and unknown defendant must appear and defend on or before a date set forth in the order, which shall be not fewer than 30 days after the first publication thereof; otherwise, that judgment by default will be rendered against the defendants at any time thereafter. Every such order of publication shall be published once a week for two successive weeks (or for such period as may be prescribed by statute, whichever period is longer) in a newspaper of general circulation in the county wherein such action is pending. Proof of service by publication is made by filing the publisher's certificate of publication with the court.

W. Va. R. Civ. P. 4(e)(1) (emphasis added).

B. Cases—Generally

Evans v. Hale, 131 W. Va. 808, 50 S.E.2d 682, 685 (1948) ("Strict compliance with [W. Va. Code § 56-3-23] is required to render service by order of publication valid and binding.")

Dierkes v. Dierkes, 165 W. Va. 425, 268 S.E.2d 142 (1980) (court affirmed that provisions of Rule 4(e)(1) must be strictly construed)

C. Cases Where There Was A Lack Of Diligence To Locate Or Ascertain Defendant's Whereabouts

State v. Young, 94 W. Va. 7, 117 S.E. 688, 689 (1923) (suit by commissioner of school lands against numerous parties to sell various parcels of land as forfeited for the nonpayment of taxes; plaintiff obtained constructive service by publication, under the predecessor of § 56-3-23, by filing an affidavit based on the statutory ground that "diligence" had been used by or on behalf of the plaintiff to ascertain in what the county the defendant is, without effect; the Court concluded that such an affidavit should set out the facts tending to show the exercise of diligence by or on behalf of the plaintiff, so that the court can determine whether the required "diligence" has been exercised to ascertain in what county the defendants were, but without effect; in this case, the plaintiff's affidavit stated, in relevant part, as follows: "State of West Virginia, Kanawha County—to wit: P. H. Murphy, being by me first duly sworn, says that process to answer the plaintiff's bill in the chancery cause of *State of West Virginia v. C. P. Young et al.* has been twice delivered to the sheriff of Kanawha county 10 days before the return day

thereof and has been returned by said sheriff without having been executed on the following named persons, and also that diligence has been used on behalf of the plaintiff in said cause to ascertain in what county the following named persons are, without effect: [Here follows a list of some 50-odd parties, including Richmond, Good, and Morrison; then the names of some parties alleged to be nonresidents and others as parties unknown; the affidavit concludes with affiant's signature and the jurat]."); *id.*, 117 S.E. at 692 (court held that the affidavit of diligence was wholly insufficient as a basis for the order of publication because the statement that "diligence has been used on behalf of the plaintiff in said cause to ascertain in what county the following named persons are, without effect" was contradicted by the record; specifically, the record in this case disclosed that the original summons was returned by the sheriff unexecuted as to more than 150 of the defendants for lack of time and he did not return them "No inhabitants"; therefore, the sheriff's "return on the original summons imported that the defendants resided or were in [Kanawha] County")

Wallace v. Cmty. Radiology, Civil Action No. 1:09-0511, 2011 WL 4596694 (S.D. W. Va. Sept. 30, 2011) (plaintiff filed action for medical negligence; the court held inter alia, that the plaintiff failed to satisfy the requirements of constructive service under Rule 4(e)(1) where she failed to demonstrate "due diligence" in ascertaining the residence of a defendant physician; court noted that although the plaintiff hired a process server who was unable to ascertain the defendants' residential address, the process server failed to disclose the means utilized to obtain a correct address)

Cook v. Duncan, 171 W. Va. 747, 751, 301 S.E.2d 837, 841 (1983) (delinquent taxpayer brought action against purchasers at tax sale to have tax deed set aside; the Supreme Court of Appeals of West Virginia held that the county clerk failed to exercise "due diligence" to determine the plaintiff delinquent taxpayer's residence in order for her to be notified of right to redeem property, and thus, she was entitled to have tax deed set aside; W. Va. Code § 11A-3-24 contemplates that notice of the delinquent taxpayer's right to redeem shall be of the same character as service of process upon the commencement of a lawsuit, and required "due diligence" to ascertain the delinquent taxpayer's residence at the same character required of a plaintiff under Rule 4(e)(1)(C); the court noted that "'due diligence' means the exercise of a reasonable effort to locate a person's residence"; here, the county clerk sent the statutorily required notice to redeem to the address of property which had been sold at the tax sale, which was the only address on file for the plaintiff in the county tax and land records; the plaintiff's actual residence was in Frederick, Maryland; the tax sale purchaser's application for a deed to the property listed Cook as a nonresident of West Virginia, but the county clerk failed to make any inquiry about the basis for this assertion; moreover, the plaintiff had twice paid her county taxes with checks which listed her Frederick Maryland, address; finally, the county records identified the plaintiff's lawyer, yet no effort was made to contact him to learn the plaintiff's whereabouts; had the county clerk diligently sought to determine the plaintiff's actual residence, her Maryland address would likely have been revealed and the notice of her right to redeem sent there rather than to the West Virginia address, which everyone knew was not where the plaintiff lived)

D. Cases Where There Was Due Diligence To Ascertain Residence Or Whereabouts Of Defendant

U.S. Foodserv. v. Donahue, 764 F. Supp. 2d 816 (S.D. W. Va. 2011) (plaintiff sued to recover amounts due under a distribution agreement with a restaurant; court rejected the defendant's challenge to the efficacy of the service by publication under Rule 4 (e)(1)(C), where the plaintiff submitted an affidavit signed by its outside counsel, detailing in 15 numbered paragraphs the plaintiff's attempts to locate and serve the defendant; ultimately, the affiant asserted that over a period of two months the process server expended 25.5 hours attempting to locate and effect service on the defendant, amounting to over $1,500 in costs and expenses incurred by the plaintiff)

V. CASES FROM OTHER JURISDICTIONS

A. Cases Where Plaintiff's Search Was Not Diligent

United States v. Rodrigue, 645 F. Supp. 2d 1310 (Ct. Int'l Trade 2009) (Government failed to demonstrate that it conducted "diligent search and inquiry" required as a predicate for service of process by publication; in the course of its long decision enumerating Government's lack of attention to detail and its ineptness, court compiled a useful and long list of methods and sources of information that plaintiffs in other cases have utilized to locate and/or contact missing defendants in order to effect service of process; of particular note in the above-referenced compilation are the numerous Internet-based sources of information that have been utilized to locate persons)

State ex rel. Christian v. McCauley, 2008 OK CIV APP 77, 193 P.3d 615 (state filed petition to escheat and quiet title against 161 mineral owners and their unknown successors, heirs, and assigns; although State notified most of the named defendants by personal service, two defendants or their predecessors in interest received notice only by publication; a default judgment of escheat was granted in favor of State; court held that publication notice was constitutionally insufficient to support a default judgment, because State did not first use "due diligence" to locate the defendants or their predecessors-in-interest; court recognized that due diligence entails a good-faith, meaningful pursuit of information and must usually include an examination of relevant public records; here, the court held that the State failed to use due diligence because it did not examine relevant public records, such as county clerk and corporation commission records—had it done so, the defendants would have been located)

Boudreaux v. Kemp, 1080309 (La. 4/6/10); 49 So. 3d 1190 (plaintiffs filed declaratory action alleging the existence of an oral contract with decedent to devise his property to them, naming as defendants the personal representative of the decedent's estate, five named heirs, and any unknown heirs; plaintiffs were permitted to serve the five named heirs and any unknown heirs by publication; plaintiffs did not exercise reasonable diligence in attempting to locate the decedent's heirs; in so holding, the court placed special reliance on the facts that (1) a genealogy report identifying all 15 of the decedent's heirs with their out-of-state addresses had been filed in the probate court before the plaintiffs filed the declaratory judgment action, and (2) the plaintiffs had participated in the probate proceeding by filing a claim against the decedent's estate)

Ryken v. State, 305 N.W.2d 393 (S.D. 1981) (plaintiff in quiet title action did not exercise reasonable diligence to discover interests of defendants, which were noted on a warranty deed and a tax deed, and, therefore, defendants could not be served by publication; court reiterated that the test of the sufficiency of the showing of due diligence is not whether all possible or conceivable means of discovery are used but, rather, it must be shown that all reasonable means have been exhausted in an effort to locate interested parties)

Kintigh v. Elliot, 280 Or. 265, 570 P.2d 659 (1977) (affidavit submitted by plaintiffs in support of their motion for service of summons on defendant by publication in foreclosure action was insufficient; vendors' affidavit stated that the defendant was last seen on property in 1976, that two letters addressed to the defendant were returned with a notation that he had moved and left no address, that it appeared to the affiant that

defendant had left the premises hurriedly, and that sheriff had attempted to serve the defendant at the address in question but was unable to locate the purchaser; in the court's view, the facts set forth in the affidavit did not constitute due diligence where it (1) failed to show that the plaintiffs attempted to determine the defendant's place of work and locate his new address from coworkers, (2) failed to show that the plaintiffs sought to locate the defendant's address from local light, telephone, and water companies, and (3) failed to show any effort to locate neighbors or relatives who might have information concerning the defendant's whereabouts)

Brenner v. Port of Bellingham, 53 Wash. App. 182, 765 P.2d 1333 (1989) (condemning authority did not exercise reasonable diligence in its effort to locate and identify heirs of deceased record landowner, as required for service by publication upon "unknown heirs"; evidence that the condemning authority (1) knew property taxes were still paid, (2) could have found the taxpayer's address by checking the county tax rolls, and (3) initially filed action for condemnation against the record owner's grandson, reasonably suggested that the record owner's heirs might have been found and identified if the condemning authority had diligently followed up on the information it possessed)

Pascva v. Heil, 126 Wash. App. 520, 108 P.3d 1253 (2005) (in action for damages arising out of motor vehicle accident, plaintiff did not use due diligence to locate driver of vehicle, as required for service by publication; court noted that while reasonable diligence does not require the plaintiff to employ all conceivable means to locate the defendant, the plaintiff is required to follow up on any information that might reasonably assist in determining the defendant's whereabouts; therefore, although the plaintiff had attempted

to contact the defendant at the telephone number and address listed on the police report, had conducted searches utilizing a public records index, a telephone directory, and Internet search engines, reasonable diligence required something else that the plaintiff failed to do, i.e., contact the registered owner of the vehicle that the defendant was driving at the time of the accident, whose contact information was contained in the police report, and who shared the same surname)

Forest Oil Corp. v. Corp. Comm'n of Okla., 1990 OK 58, 807 P.2d 774 (Oklahoma Nature Gas ("ONG") sought to serve notice to all mineral owners entitled to share in the production of two wells; as the operator of the wells in question, Forest Oil was responsible to the payment of proceeds therefrom to the mineral owners and required by statute to keep accurate records of the parties with an interest in the wells and to pay the proceeds from the sale of oil and gas therefrom with six months after the first sale; ONG relied upon Forest Oil's records of production payments and a recent title opinion in determining who were the record mineral owners entitled to notice, and did not conduct an independent search of county records; the records provided by Forest Oil did not contain an address for four of the identified owners of an interest in the wells; ONG made no effort to find the addresses of those four parties but, rather, gave notice by publication; no party appeared as a result of the published notice; because Forest Oil did not assert that the interested mineral owners could be ascertained from any source independent of its list of current payees and because it was required by law to keep accurate records of the parties with an interest in production units, the Supreme Court of Oklahoma held that

despite not searching county records, ONG's reliance on the Forest Oil records and the recent title opinion constituted due diligence)

In re Estate of Bovey, 2010 MT 217, 358 Mont. 14, 244 P.3d 716 (trustee brought action to determine distribution of the residue of a testamentary trust; by the terms of Sue Bovey's will, the remaining assets were to be distributed to her then living heirs at law; trustee made a sufficiently diligent search for living heirs prior to serving notice by publication; the requisite diligence to identify and locate living heirs of Sue Bovey was established, as found by the court, where the trustee's attorney (1) reviewed the Bovey family tree, (2) searched the records in the Cascade County Clerk of Court, (3) conducted an Internet search, and (4) searched the telephone books for the Missoula and Great Falls area; in addition, the trustee hired a processor who was also unable to identify and locate any heirs)

Jones v. Wallis, ___ N.C. App. ___, 712 S.E.2d 180 (2011) (lender brought action against debtor and others for payment of sums due under a note; it was held that creditor acted with "due diligence" to locate the debtor prior to service by publication; the actions undertaken which constituted "due diligence" included (1) attempting service at the creditor's last known address, (2) searching public records for a second address where personal service was against attempted, (3) an Internet search for the debtor, (4) a personal visit and interview with the current residents of the debtor's last known address, and (5) sending a copy of the complaint to the debtor's attorney and requesting that he accept service; in responses to the debtor's subsequent contention that "due diligence" required the creditor to do additional things, such as conducting search of DMV records

or use a specific fee-based Internet service to search multiple public databases, the court observed that "a plaintiff is not required to jump through every hoop later suggested by a defendant in order to meet the requirement of due diligence," particularly where there is nothing in the record to suggest that such additional steps would have succeeded in locating and effecting service on the defendant)

Leveraged Land Co. v. Hodges, No. 2 CA-CV 2006-0210, 2007 WL 5556356 (Ariz. Ct. App. 2007) (unpublished) (plaintiff filed a complaint and petition to foreclose defendant's right to redeem a tax lien it held on defendant's real property, and to quiet title to the property; both the trial court and the court of appeals agreed that the plaintiff's unsuccessful efforts to locate and serve the defendant were sufficiently diligent to justify service by publication where, according to the plaintiff's affidavit, (1) an Internet search for an Arizona telephone number in the defendant's name "yielded no results," (2) a certified letter was sent to the defendant at an address obtained from the county assessor's rolls, only to be returned marked undeliverable, and (3) a professional process service company had unsuccessfully attempted to serve the defendant at several locations; in response to the defendant's suggestion that a more wide-ranging Internet search would have ascertained his whereabouts, the court of appeals rejected the idea that due diligence required a particular Internet search)