

SUPREME COURT OF NOVA SCOTIA
(Family Division)

Citation: Dacey v. Dacey, 2018 NSSC 260

Date: 20181115
Docket: SFHPSA 111574
Registry: Halifax

Between:

Russell Dacey

Applicant

and

Amanda Dacey

Respondent

LIBRARY HEADING

Judge: The Honourable Associate Chief Justice Lawrence I. O'Neil

Heard: October 4, 2018 in Halifax, Nova Scotia

Issues: 1. Is delivery by Facebook an acceptable option for substituted service under R.31 in Nova Scotia?
2. If so, have the preconditions for substituted service been established?

Summary: On the facts, the Court declined to authorize service of originating documents by 'Facebook'. The Court reviewed Rule 31(10) and found that the Applicant had not shown that the Respondent (1) could not be located; or (2) was evading service. Nor had it been shown that (3) justice required service in the requested manner.

Keywords: Substituted service; Facebook

Legislation: *Rule 31, Civil Procedure Rules of Nova Scotia Parenting and Support Act, RSNS 1989, c.160*
Ontario's Rules of Civil Procedure
Ontario Superior Court Practice (2018) Archibald, Killeen and Morton – Lexis-Nexis

Cases Considered: *Investor's Group Trust Co. v. Ulan, [1991] NSJ 246, 1991 CanLII 4424 (NSSC)*
CIBC Mortgages Inc., a body Corporate v. Shauna MacLean, 2017 NSSC 106
Jewish Family and Child Service of Greater Toronto v. KB, 2016 ONCJ 259, [2016] OJ No 2377
KH v. ML, 2017 ONCJ 376, [2017] OJ No 2948
Children's Aid Society v. SB, 2018 ONSC 5301, [2018] OJ No 4650
Blois v. Salacki, 2016 ABQB 323, [2016] AJ No 605
Bamford v. Mulyati, 2017 BCSC 945, [2017] BCJ No 1094

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Counsel: Margo Fulmer, Counsel for Russell Dacey
Ex-Parte

By the Court:

Introduction

[1] The relevant Rule of this Court requiring personal service of documents and providing for substituted service of documents is R.31.

[2] Rule 31.03(1) specifies how service is to be effected on thirteen (13) categories of “persons”. Service on an individual must be personal.

[3] Personal service of “Notice and Place of Proceeding” is not always possible. Substituted means of service as an alternative to personal service may be legally acceptable.

[4] This ruling addresses the recurring issue of if and when service on another party by ‘Facebook’ should be found to be service within the meaning of R.31.10.

[5] Rule 31 provides for a method of personal service (R.31.04); and how to prove personal service (R.31.05)

[6] Rules 31.06 – 31.08 provide for a finding that ‘personal’ service has been effected in three specific alternative circumstances that are clearly not personal as that plain language is used: when a lawyer endorses acceptance when so entitled; when a party files a response and when the manner of notice is provided for in a contract. In addition, R.31.3(1)(n) has the general proviso that alternative service may be effected by “following the directions of a Judge for effecting personal service”.

[7] Rule 31.10 provides the basis upon which a Judge may order a substituted method of giving notice of a proceeding. An application for an order authorizing “personal” service by ‘Facebook’ engages the authority of a Judge to authorize “personal” service by substituted means.

[8] One of three preconditions must be met before the Court may consider issuing an order for substituted service (Rule 31.10):

31.10 (1) A judge may order a substituted method of notification if the judge is satisfied that the party cannot be located, the party is evading service, or justice requires a substituted method for another reason. [emphasis added]

[9] Rule 31.10(2) is very helpful in that it provides a non-exhaustive list of seven (7) examples of efforts to locate a party that, if proved may establish that an order for substitute notification on the basis that the party cannot be located:

(2) The following are examples of efforts to locate a party that, if proved, may establish that an order for substitute notification is to be granted on the basis that the party cannot be located:

(a) making inquiries of persons at the other party’s places of recent residence or work;

(b) making inquiries of acquaintances of the other party;

(c) searching the records of the party who makes the motion to locate information about recent residences, places of work, and acquaintances of the party to be notified;

- (d) engaging a trace service;
- (e) performing searches on the internet;
- (f) searching records of other actions against the party to be notified;
- (g) engaging the services of a local process server, lawyer, detective, or other person to advise on locating a party who resides in an unfamiliar place.

[10] Rule 31.10(3) provides the following five (5) examples of evidence that may establish a party is evading service:

(3) The following are examples of evidence that may establish that an order for substitute notification is to be granted on the basis that the party is evading service:

- (a) evidence of places the party is likely to be found, such as a place of residence or work, and efforts to locate the party;
- (b) evidence the party is likely at a place when service is attempted;
- (c) attempts to effect service at the party's likely place of residence, place of work, or otherwise;
- (d) efforts to identify persons in communication with the party;
- (e) attempts to communicate with acquaintances to arrange personal service.

[11] Finally, Rule 31.10(4) suggests terms that may be included in an order for substitute notification on the basis that the party cannot be located. These include terms for advertising; service of a certified copy of the order and the originating document on a person who might communicate with the party, delivery or mailing of an order and document to a place where it may be received by the party.

[12] The suggestion of terms for an order for substitute notification on the basis that the party is evading service is simply that a certified copy of an order and the originating document may be left for the party with persons and at places associated with the party (Rule 31.10(5)).

[13] Justice Goodfellow provided a long list of efforts one can make to locate a party. In *Investor's Group Trust Co. v. Ulan*, [1991] NSJ 246, 1991 CanLII 4424 (NSSC):

(1) Telephone

Whenever there is a telephone number in any way associated with the defendant, be it residence, letterhead or business number, then an attempt should be made by trying whatever number or numbers are available. In addition, inquiries should be made to see whether there is a new listing in the name of the defendant, and if the defendant's spouse's name is known a similar inquiry with respect to the spouse's name should be made.

(2) Neighbours

The process server, in attempting service, should make inquiries of neighbours which may well shed light on whether or not the defendant is still residing in the area, and such inquiries should provide assistance as to any knowledge of relatives, employers, etc.

(3) Credit Report

If the plaintiff is a financial institution with access to a credit report than such an avenue should be explored. Credit reports often provide information that could lead to the whereabouts of the defendant.

(4) Accident Report

In a recent application for substituted service arising out of a motor vehicle accident counsel for the plaintiff had made no effort to obtain a copy of the accident report. In that particular file the plaintiff qualified for access to the report under section 98(7) of the Motor Vehicle Act. Included in the information available is 98(7)(c) "the name and address of any parties to, or involved in, the accident; (d) the names and address of witnesses to the accident;". In that particular case the statement of claim indicated the owner was a passenger in the vehicle being operated by the other defendant, and substituted service was sought on both parties without having explored the information available through the accident report.

(5) Insurance Company

Every mortgage contains a provision requiring the mortgagors to keep in force insurance terms on the property to cover the mortgagee's interest. It would seem reasonable that an inquiry should be made of the insurance agent as to the whereabouts of the defendant. The insurance agent will, in some cases, have issued a homeowners package insuring not only the mortgaged property but quite probably the motor vehicles and any other assets owned by the mortgagor(s). Frequently, the insurance agent is a friend, neighbour or someone who knows the insured and there is a possibility that the defendant has been or will be in contact with her/his insurance agent.

(6) Post Office

I would assume that in almost every case a letter of demand has gone forth and yet rarely does the affidavit, filed with the court, confirm that fact and whether or not such mail was returned. If no attempt to communicate by mail has been made then such should take place if at all possible. I understand the post office will not release any address or any address change but that they will indicate whether or not a particular person has filed a change of address card. That fact may well be relevant in a particular case.

(7) Sheriff's Office

It is not unusual that a person who gets into difficulty will have claims by a number of creditors, and this shows up with frequency in foreclosure actions. It is often the case, as well, in actions by financial institutions, financial agencies, etc. It seems to me that it is appropriate and worthwhile to check with the sheriff and see whether or not there are any other process outstanding against the same defendant and also whether or not any one in the sheriff's office has had occasion to look for or serve the defendant in the reasonable past. I have seen a file where substituted service was granted in a foreclosure action and subsequently the abstract of title indicated a substantial number of judgments and other process against the defendant. Undoubtedly, in many of those cases, personal service had been effected. In one case, I checked a file myself and ascertained an address for the defendant where the same mortgage company, seeking substituted service, and the solicitor for the mortgage company, in that occasion, was not made aware of the address used by the same mortgage company in a fairly recent application.

(8) Prothonotary's Office

A search of the prothonotary's office may reveal other process outstanding and, if so, will give you the name of another solicitor who can be contacted, which may well lead to an exchange of information or information that will permit you to effect personal service or a better mode of substituted service. It may also permit a less expensive mode of substituted service than say advertisement in a newspaper. Should you discover recent files in the prothonotary's office then they should be examined, particularly to see whether any orders for substituted service were necessary and, if so, on what basis.

(9) Banking - Financial Institutions

In this case the plaintiff was made aware, by the defendant, of the banking institution used by the defendant and an inquiry ought to have been made of the banking institution. Often the defendant and mortgagor, in a foreclosure action, will have filed an application for the mortgage in the first place and that application would normally provide information such as where the mortgagor does her/his banking, insurance agent, etc.

(10) Children

If there are children of the defendant, then certain inquiries should normally flow such as checking with the local school, church or whatever.

(11) City Directory

In law offices that have a city directory, or where the client has access to one, it is a good idea to check the city directory as it may give an address on where the defendant presently resides or previously resided, and it normally gives the name of the spouse and any other occupants of such premises so that additional inquiries may flow from this basic information. Often a relative is the best person to serve by way of substituted service.

(12) Personal Service

There should almost always be an attempt at personal service and if there is any indication that the person is employed then there should be an attempt or attempts outside of any known employment hours. If no specifics are known then there should be attempts made at varying times. If you know the defendant is employed on a nine to five job or that that is the defendant's normal work habit, then it is hardly a reasonable attempt to send the sheriff out, no matter how many times, to try and serve at 2:00 o'clock in the afternoon when such a high probability exists that that person will not be there at that time.

(13) Employer

Quite often a credit report or the banking information given on an application for credit discloses the employment particulars of the defendant and often her/his spouse. It is reasonable to make inquiries if you have any lead as to employment. If the person is known to be a member of a particular union then it would be appropriate to make an inquiry of that union office, etc., etc., etc.

[14] Justice Moir considered the service requirement when the Court is called upon to consider a motion for assessment of a deficiency motion after a foreclosure sale (*CIBC Mortgages Inc., a body Corporate v. Shauna MacLean*, 2017 NSSC 106). The plaintiff sought an order validating as sufficient service delivery of the motion documents to an email address and to a Facebook account (paragraph 6).

[15] Rule 72.12(2) requires notice in accordance with Rule 31. Justice Moir was satisfied Ms. MacLean could not be located.

[16] He accepted the described delivery by Facebook as service and observed as follows:

[9] The phrase “unless a judge orders otherwise” allows a judge to override the Rule 31-Notice provisions for personal service and substitute service.

[10] What is required for an exception to personal and substituted service under Rule 72.12(2)? The description is expressed as broadly as can be. In my opinion, the discretion should be exercised in at least three kinds of situations:

1. When substituted service would be ordered and the plaintiff has used reasonable substitutes as a judge would order;
2. When the defendant’s use of social media with a private message component or of an email address is so well established and current that the court is confident documents sent there will be received by the defendant; and,
3. When the defendant provides a method of delivery and states a preference for that kind of delivery over personal service.

[11] If the plaintiff establishes the same findings as would support an order for substituted service, why require two motions and separate appearances? What needs to be established has been codified in Rule 31.10 and it provides examples of the efforts that need to be made to support the motion. That Rule supersedes *Investors Group Trust Company v. Ulan*, [1991] N.S. J. 246 (Goodfellow, J.) in several ways

[12] The Rule provides modern examples of efforts that may underlay a finding that the defendant cannot be located for personal service or a finding of evasion, and it treats those two situations distinctly.

[13] The Rule does not support the requirement that the substitutes are “likely to bring the matter to the attention of the person to be served” or a finding that the substitutes make it “reasonably possible that the proceedings will be brought to the attention of the defendant’s knowledge”, para. 17 of *Ulan*. Rule 31.10(4) about substitutes in cases where the defendant cannot be located and Rule 31.10(5) about evasion are consistent with the words of Justice Jessup quoted at par. 15 of *Ulan*: “...in such manner as presents the best possibility of notice of the proceedings to the respondent.”

[14] The order should provide the best we can for giving notice, but the best will sometimes not meet the thresholds of “likely” or “reasonably possible”. To require that would work an injustice in cases where a remedy is necessary, but the chances of successful notice are remote. Cases for in rem remedies come to mind, but there are others.

[15] On the second kind of situation, Rule 31.10(2)(e) gives as an example of efforts when the defendant cannot be located, “performing searches on the internet”. This example is less than ten years old, but already it is outdated in failing to capture all that is now available for locating a person’s place of communication or their place of residence or employment through efforts on the internet. Also, Rule 31.10(4) says nothing specific on social media as a source for substitutes.

[16] Electronic communications of all sorts provide fertile territory for substitutes. As long as identity, regular use, and current use are proven these substitutes may be nearly as effective as personal service, without the embarrassment.

[17] Rule 31 does not specifically reference substitute service by email or Facebook or social media. However, the generally authority of Rule 31.03(1)(n) confers an authority on a Judge to order service by electronic means. In my view, the guidance of Justices Goodfellow and Moir support such a conclusion:

“the Court will allow an alternate form of service by which it is reasonably likely that the matter will be brought to the person’s attention”.

[18] It must be remembered that the first obligation is to personally serve and only after an explanation as to why that is not possible should an order for substituted service be sought.

[19] It is often helpful to examine how other jurisdictions are responding to the emergence of digital communication including social media as a platform for providing service.

[20] Rule 16 of Ontario’s Rules of Civil Procedure provides a comprehensive code for the service of documents. A concise overview of Rule 16 appears in Ontario Superior Court Practice (2018) Archibald, Killeen and Morton – Lexis-Nexis:

General Principles – The alternatives to personal service provided by the Rules avoid the need for numerous substituted service motions. They are a convenience to P so that a process server need not be used in every case and the Rules recognize the fact that some people will try to avoid personal service. The fundamental question is whether or not D was made aware that a lawsuit had been initiated and had an opportunity to defend. The Rules are less concerned with technical compliance than they are with whether or not the person to be served was actually on notice or would have been on notice had they not been evading service. A party who uses an alternative to personal service takes the risk

that the claim may not actually come to the attention of D. Service by commercial courier is invalid.

[21] Ontario Rule 16.01 and 16.09(6) and (4.1) describe when service by email is acceptable.

[22] There is precedent outside Nova Scotia for ordering substituted service by way of Facebook in family law proceedings.

[23] In *Jewish Family and Child Service of Greater Toronto v KB*, 2016 ONCJ 259, [2016] OJ No 2377, the Court considered the conditions for ordering substituted service through Facebook. The governing rule was Rule 6(15) of the Ontario Family Law Rules, which stated:

6 (15) The court may order that a document be served by substituted service, using a method chosen by the court, if the party making the motion,

(a) provides detailed evidence showing,

(i) what steps have been taken to locate the person to be served, and

(ii) if the person has been located, what steps have been taken to serve the document on that person; and

(b) shows that the method of service could reasonably be expected to bring the document to the person's attention.

[24] The Society had brought a protection motion and sought to dispense with notice to the father. The Court refused to dispense with service but directed that substituted service could be carried out through Facebook. There was evidence that the father actively used his Facebook account. A society worker had contacted him through Facebook, and he had initially responded, then stopped communicating. The Court said:

20 The society has satisfied the criteria to make a substituted service order. It has taken reasonable steps to locate and serve R.G. It conducted searches, without success, to determine where R.G. lives. The court finds that service of the documents through R.G.'s Facebook account can reasonably be expected to bring them to his attention.

21 Service in this manner gives R.G. the best opportunity to participate in this case. It is a much preferable option to dispensing with service.

22 The court recognizes that R.G. may have blocked the society worker from communicating with him by Facebook. It should send the message that will be ordered through a different Facebook account.

[25] The Court went on to set out the exact phrasing to be used in the Facebook communication.

[26] Dealing with the same rule in *KH v ML*, 2017 ONCJ 376, [2017] OJ No 2948, the Court said:

17 Substituted service orders by social media are becoming increasingly common. See: *Jewish Family and Child Services of Greater Toronto v. K.B.* [2016] O.J. No. 2377 (OCJ); *Blois v. Salacki*, 2016 ABQB 323; *Eastview Properties Inc. v. Mohamed* [2014] O.J. No. 4220 (SCJ -- Small Claims Court); *Cash Flow Recoveries Inc. v. Crate*, [2017] O.J. No. 931 (SCJ -- Small Claims Court). These orders reflect the reality of today's methods of communication, which are increasingly electronic. See: *Burke v. Doe*, 2013 BCSC 964.

18 In *K.C.F. v. M.W.*, 2016 ONCJ 689, Justice Victoria Starr set out multiple methods detailing how a party could be located and served through social media, including through Facebook accounts and text messages.

19 The mother has been able to communicate with R.E. through his Facebook account. The mother attached to her affidavit a Facebook message sent to her by R.E. on March 14, 2017. This confirms that it is R.E.'s Facebook account and that the account is likely still active.

20 The mother also attached copies of the Facebook account profiles of M.L. and R.E. and identified their pictures posted on their accounts.

21 The court is satisfied that it can reasonably be expected that the court documents will come to the attention of the respondents M.L. and R.E. if they are notified about them by private message on their Facebook accounts.

22 The mother could not locate an address for N.C., but was able to provide a phone number for him. The court is satisfied that it can reasonably be expected that the court documents will come to N.C.'s attention if he is notified about them by text message on his telephone.

[27] The Court ordered that substituted service could be made by way of social media.

[28] In *Children's Aid Society v SB*, 2018 ONSC 5301, [2018] OJ No 4650, the Court dismissed the mother's application to dispense with service of her motion materials on the father, and for an order removing the respondent father as a party, in a child protection proceeding. The mother alleged that the father had been abusive and that there was a potential for serious harm to her and the children if the father was aware of the proceeding or the evidence and allegations. Finding these concerns to be valid, the Court ordered, inter alia, that the Society serve the application documents on the father by Facebook.

[29] In *Blois v Salacki*, 2016 ABQB 323, [2016] AJ No 605, on an application by the mother to terminate the father's guardianship, the Court ordered substitutional service by serving the respondent's mother and by contact on Facebook.

[30] In *Bamford v Mulyati*, 2017 BCSC 945, [2017] BCJ No 1094, the Court allowed service by Facebook and e-mail in a matrimonial proceeding where the respondent was in Indonesia.

Conclusion

[31] The subject application is for an order for service of originating documents under the *Parenting and Support Act*, RSNS 1989, c.160 by 'Facebook'.

[32] The applicant is the maternal grandfather of a child, D.O.B. June 11, 2015. He seeks sole decision-making responsibility over the child who lives with him.

[33] As discussed, there are three preconditions (Rule 31.06 – 31.08) to the Court issuing an order for substituted service.

[34] One of three preconditions must be met before the Court may consider issuing an order for substituted service (Rule 31.10). I repeat:

31.10 (1) A judge may order a substituted method of notification if the judge is satisfied that the party cannot be located, the party is evading service, or justice requires a substituted method for another reason. [emphasis added]

[35] The applicant filed an affidavit wherein he says his daughter does not visit the children often; that he does not have her telephone number and generally she is

the one who contacts him. He says his other daughter is in more frequent contact with the respondent. He says he can speak to his daughter “through” his other daughter, but the respondent is unreliable in terms of showing up – presumably to meet him.

[36] The applicant asks to serve his daughter via Facebook. He says he knows she regularly uses this account.

[37] I am not satisfied any of the preconditions of Rule 31.10 is met. On the contrary, it appears the respondent can be located and personally served. There is no evidence she is evading personal service. There is no evidence any effort to personally serve the respondent has been made.

[38] The application for an order authorizing substituted service is therefore dismissed.

ACJ