

Service by Publication When Defendant is in Another Country

It is increasingly common that domestic relations cases in North Carolina involve defendants who reside outside of the United States. In child custody cases, especially cases that include a request for findings related to [Special Immigrant Juvenile Status](#), it is increasingly common for plaintiff to allege that although she knows defendant lives in another country, she has been unable to find the actual location of defendant in that foreign country. [Rule 4\(j2\)](#) of the Rules of Civil Procedure allows service by publication when after using appropriate due diligence to locate a defendant, plaintiff is unable to find an address to use for personal service. Notice of service must be published in the area where plaintiff believes defendant to be located. If there is no “reliable information” as to defendant’s location, notice can be published in the area where the action is pending.

Does this same rule apply when defendant is known to be in another country?

Service and Due Process

Appropriate service of process is required to give the court personal jurisdiction over a defendant unless the defendant consents to jurisdiction. A judgment entered without personal jurisdiction is void. The United States Supreme Court has stated that:

“An elementary and fundamental requirement of due process in any proceeding ... is notice reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections.”

Mullane v. Central Hanover Bank & Trust, 339 US 306, 314 (1950). The purpose of service is the same for defendants located outside of the United States. [Hammond v. Hammond, 209 N.C. App. 616, 622 \(2011\)](#) (“the purpose and aim of service of the summons [in Japan] are to give notice...”). Statutes authorizing service by publication are in derogation of the common law and should be strictly construed and followed with particularity. *Sink v. Easter*, 284 N.C. 555 (1974).

Service When Defendant is in a Foreign Country: Rule 4(j3)

While [Rule 4 of the Rules of Civil Procedure](#) provides for a variety of relatively familiar methods of service upon defendants located within the United States, those familiar rules do not apply when defendant is located outside of the country. In [Hammond, 209 N.C. App. at 622](#), the court of appeals stated that “when serving a defendant in a foreign country, we begin our inquiry into the validity of service with [Rule 4\(j3\)](#).”

[Rule 4\(j3\) of the Rules of Civil Procedure](#) provides as follows:

“Unless otherwise provided by federal law, service upon a defendant, other than an infant or an incompetent person, may be effected in a place not within the United States:

(1) By any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; or

(2) If there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:

1. In the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction;
2. As directed by the foreign authority in response to a letter rogatory or letter of request; or
3. Unless prohibited by the law of the foreign country, by
4. Delivery to the individual personally of a copy of the summons and the complaint and, upon a corporation, partnership, association or other such entity, by delivery to an officer or a managing or general agent;
5. Any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or

(3) By other means not prohibited by international agreement as may be directed by the court.

This rule does not mention service by publication at all and it specifically requires that any form of service used must be "reasonably calculated to give notice."

International Agreements Control

[Rule 4\(j3\)](#) makes it clear that, in order to determine an appropriate method of service on a defendant who is located outside of the United States, it first must be determined whether defendant is located in a country that is a party to an agreement with the United States regarding service of process. If there is an agreement that applies to the case, the agreement may regulate the manner of service or may prohibit a particular type of service. [Rule 4\(j3\)](#) makes it clear that any form of service used must not violate the terms of any applicable international agreement.

The law regarding international service of process is complex. It is complex primarily because of these international agreements, often called Conventions. Different countries are subject to different agreements, and some countries are signatories to more than one. [Rule 4\(j3\)](#) specifically references the [Hague Service Convention](#) as an example of an international agreement. The Hague Convention has a significant number of signatories including the United States. For a list of countries, see <https://www.hcch.net/en/states/hcch-members>. Another important agreement relating to service of process is the [Inter-American Service Convention](#) signed by the United States

and a number of Latin American countries. For list of signatories, see <http://www.oas.org/juridico/english/signs/B-36.html>. For more information on these conventions and on service in foreign countries generally, see <https://travel.state.gov/content/travel/en/legal-considerations/judicial/service-of-process.html>.

Neither the Hague Convention or the Inter-American Service Convention specifically reference service by publication.

When No Agreement Applies

When there is no international agreement regulating service or when the agreement allows alternative methods of service, [Rule 4\(j\)\(3\)\(2\)](#) allows other specified methods to be used without prior court approval. Publication is not one of the specified methods, unless the law of the country at issue specifically allows for it. [Rule 4\(j\)\(3\)\(2\)\(a\)](#).

[Subsection 3 of Rule 4\(j\)\(3\)](#), however, gives the court broad authority to direct any method of service not prohibited by an international agreement that is ‘reasonably calculated to give notice.’ This provision gives the court the authority to consider ordering the more familiar [Rule 4](#) methods of service applicable to defendants within the United States when these methods do not violate an international agreement.

Is service by publication in North Carolina appropriate when plaintiff knows defendant resides in another country?

Plaintiff has the burden of establishing proper service, so it is up to plaintiff to show the court that service complied with [Rule 4\(j\)\(3\)](#). Assuming there is no international agreement that specifically authorizes or prohibits service by publication in the particular case and no law in the country of service that specifically authorizes service by publication, [Rule 4\(j\)\(3\)](#) allows service by publication only upon order of the court. [Rule 4\(j\)\(3\)\(3\)](#) appears to be broad enough to allow the court to direct service by publication if the court first determines that it is appropriate under the circumstances of the specific case. See *e.g. BP Products v. Dagan*, 236 F.R.D. 270 (E.D. Va. 2006)(appropriate for judge to order publication in Pakistan after plaintiff attempted service by other means but was unable to locate defendant)(interpreting [federal rule of procedure 4\(f\)\(3\)](#) that is substantially similar to our [Rule 4\(j\)\(3\)](#)).

However, even if the court determines service by publication is appropriate, authorizing publication in North Carolina when plaintiff knows defendant resides in another country is more problematic. For service within the United States, [Rule 4\(j\)\(2\)](#) allows publication in the area where the action is pending when there is no reason to believe defendant is in that area only when there is “no reliable information concerning the location of the [defendant].” If plaintiff believes defendant to be in another country, it will be much more difficult for the court to conclude that publication in North Carolina rather than in the other country is appropriate. See [Chen v. Zou, 780 SE2d 571 \(NC App.](#)

[2015](#)(publication in North Carolina was not appropriate when plaintiff had information that defendant lived somewhere in New York city).