

2005 WL 1609295 (S.C.A.G.)

Office of the Attorney General
State of South Carolina

*1 June 30, 2005

The Honorable Murrell Smith

Dear Representative Smith:

By letter, you seek an opinion regarding whether a particular publication meets the requirements of a legal notice. In your letter, you explain that the Sumter County Clerk of Court has authorized and has been utilizing a publication known as the “Gamecock City Trading Post” as an instrument for service by publication. You argue that the publication is not a newspaper of general interest and circulation because it contains very few if any newsworthy articles and because it is primarily comprised of advertisements. You have provided copies of the “Gamecock City Trading Post” for our review. We advise that the “Gamecock City Trading Post” does not meet the requirements of a newspaper of general circulation and is therefore not sufficient for purposes of service by publication.

Law/Analysis

[S. C. Code Ann. Section 15-39-650](#) provides as follows:

The sheriff of every county in this State shall, before he exposes any lands or tenements which he may be directed to sell by virtue of any execution or mortgage, *publicly advertise* the lands or tenements three weeks immediately previous to the sale day or days on which he means to expose them for sale.

(emphasis added)

Section 15-39-660 further states:

The sheriff shall specify in the advertisement the property to be sold, the time and place of sale, the name of the owner of the property and the party at whose suit the sale is to be made and shall publish the advertisement at three public places in the county, once of which shall be at the courthouse door, *and publication shall also be made in some gazette*, as provided in [§ 15-39-650](#), before the day of sale, if the sale is to be made in a county in which a newspaper may be printed.

(emphasis added)

Service by publication is generally governed by §§ 15-9-710 *et seq.* Our Supreme Court has ruled that certain of the service by publication statutes may be applied not only to actions *in rem*, but actions *in personam* so long as the due process minimum contacts requirement is satisfied.” [Hendrix v. Hendrix](#), 296 S.C. 200, 371 S.E.2d 528 (1988), citing [International Shoe Co. v. Washington](#), 326 U.S. 310 (1945) [approving *in personam* jurisdiction over nonresidents who maintain minimum contacts within the forum state]. Moreover, any service of process must be “‘reasonably calculated to reach interested parties.’” [Aetna Cas. and Surety Co. v. Jenkins](#), 282 S.C. 107, 112, 317 S.E.2d 460, 464 (Ct. App. 1984), quoting [Mullane v. Central Hanover Bank & Trust Co.](#), 339

U.S. 306 (1950). Section 15-9-740 sets forth the requirements for service by publication and provides in pertinent part as follows:

The order of publication shall direct the publication to be made in *one newspaper*, to be designated by the officer before whom the application is made, *most likely to give notice to the person to be served* and for such length of time as may be deemed reasonable not less that once a week for three weeks.

*2 (emphasis added).

The cardinal rule of statutory interpretation is to ascertain and effectuate the legislative intent whenever possible. *State v. Morgan*, 352 S.C. 359, 574 S.E.2d 203 (Ct.App.2002) (citing *State v. Baucom*, 340 S.C. 339, 531 S.E.2d 922 (2000)). All rules of statutory interpretation are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute. *State v. Hudson*, 336 S.C. 237, 519 S.E.2d 577 (Ct.App.1999).

In addition, the legislature's intent should be ascertained primarily from the plain language of the statute. *Morgan, supra*. Words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limits or expands the statute's operation. *Id.* When faced with an undefined statutory term, the term must be interpreted in accordance with its usual and customary meaning. *Id.* In any construction of a statute, the word and its meaning should be considered in conjunction with the purpose of the whole statute and the policy of the law. *Whitmer v. State*, 328 S.C. 1, 492 S.E.2d 777 (1997). The words must be construed in context and their meaning determined by examination of other terms used in the statute. *Hudson, supra*.

Finally, if a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation. A court has no right to look for or impose another meaning. *City of Camden v. Brassell*, 326 S.C. 556, 486 S.E.2d 492 (Ct.App.1997). The statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. *Id.* Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law. *Id.*; *City of Sumter Police Dep't v. One (1) 1992 Blue Mazda Truck*, 330 S.C. 371, 498 S.E.2d 894 (Ct.App.1998).

We have issued several opinions previously regarding the General Assembly's intent with respect to the sufficiency of newspapers and service by publication. It has been our consistent opinion that whether a periodical is sufficient as an instrument of service by publication can only be determined by the particular facts and circumstances, on a case-by-case basis. See, *Ops. S.C. Atty. Gen.*, July 19, 1990; August 19, 1977. In a 1943 opinion, which has been reaffirmed by more recent opinions, this Office generally defined "newspaper" for purposes of the publication statutes. That opinion enunciated certain criteria for what constitutes a "newspaper" for purposes of the publication statutes which consisted of the following:

- (a) The paper must be published regularly at short intervals;
- (b) The paper must contain intelligence of current events and news of general interest;
- (c) The paper must be intended for general circulation; however, circulation may be limited to a specific geographical area;
- *3 (d) The paper must either be sold or distributed gratis.

Moreover, in a 1984 opinion, we elaborated upon our 1943 opinion, and commented generally upon what constitutes a newspaper of general circulation. We also discussed therein the question of whether free newspapers and shopper's guides would qualify as "newspapers" for purposes of the of the publication statutes. There, we noted:

[t]o be a newspaper of general circulation within a community, a newspaper should contain news of general

interest to the community and it must reach a diverse readership. [Moore v. State](#), 553 P.2d 8, 21 (Alaska 1976); see also, 28A Words and Phrases (1983 Cum. Supp.) ‘Newspaper of General Circulation’ at 38. Additionally, a newspaper of general circulation has been defined as one that has a content appealing to the general public and having more than a de minimis number of actual paid subscribers. [Great Southern Media v. McDowell County](#), 304 N.C. 427, 284 S.E.2d 457 (1981). I reiterate that the specific statute controlling the publication would have bearing on whether it is required that the newspaper be of general circulation in a geographic area?

As used in Chapter 29 of Title 15 of the Code, ‘newspaper’ would not include a shopper's guide. See, [Shopper's Guide Publishing Co. v. Woods](#), 547 S.W.2d 561 (Tenn. 1977). Whether a newspaper is sold or distributed free of charge is a consideration; however, it is not controlling. 1943 Opinion of the Attorney General, at 222; but see, [Great Southern Media v. McDowell County](#), *supra*. *The legislative intent, again, in the various statutes dealing with notice by publication in a newspaper is to make use of the publication most likely to give the notice to the intended recipient.*

See, *Op. S.C. Atty. Gen.*, June 27, 1984. (emphasis added).

We have advised that for a newspaper to be qualified to publish legal notices, the newspaper “must contain intelligence of current events and news of general interest.” See 1943 *Op. S.C. Atty. Gen.*, *supra* News of general interest has been described as including, national, state, or county news; editorials; human-interest stories; advice columns and news containing political, religious, commercial, or social affairs. See, [Great Southern Media, Inc. v. McDowell County](#), 304 N.C. 427, 442, 284 S.E.2d 457 (N.C. 1981); see also, 24 A.L.R. 4th, 822, “What Constitutes Newspaper of ‘General Circulation’ Within Meaning of State Statutes Requiring Publication of Official Notices and the Like in Such Newspaper.” Furthermore, we have advised that in selecting a publication, one must consider the newspaper “most likely to give notice to the intended recipient.” *Op. S.C. Atty. Gen.*, June 27, 1984, *supra*. We have also noted that it is important to consider whether the paper contains characteristics of a shopper's guide and whether it is distributed free of charge. *Id.*

There is also the issue of due process. In [Brown v. Malloy](#), 345 S.C. 113, 546 S.E.2d 195 (Ct. App. 2001), the Court of Appeals addressed the question of the sufficiency of notice pursuant to publication in a case involving termination of parental rights and adoption. The Court referenced an Order of Publication and § 15-9-740. The Order of Publication “required that notice be published in a newspaper of general circulation in ‘the county where the minor Defendant was conceived and where the biological father is last know to reside.’” 345 S.C. at 126. However, the Order erroneously designated Los Angeles as the proper county and the defendant alleged “the publication should have been in a newspaper of general circulation in Orange County, where he actually resided and the child was in fact conceived.” *Id.* The Court of Appeals stated the following:

*4 [t]he notice was published in the Daily Commerce, a newspaper which Brown contends is not generally circulated in Orange County. The proof of publication states that the Daily commerce has been adjudged by California courts to be a paper of general circulation in Los Angeles County; however, no evidence was introduced regarding its circulation in Orange County.

Superimposed upon the requirements of the Order of Publication is the mandate of section 15-9-740, which requires publication in a newspaper “most likely to given notice to the person to be served.” See [S.C. Code Ann. § 15-9-740 \(1976\)](#).

Although these issues were not addressed by the family court, we conclude they are subsumed within the due process analysis, provided the adoptive parents must continue to bear the burden they assumed in their petition for adoption of proving that Brown did not acquire parental rights in accordance with section 20-7-1690. If Brown did acquire parental rights and was thus entitled to full Constitutional protection, then

clearly the “John Doe” notice is insufficient. See *Armstrong*, 380 U.S. at 550, 85 S.Ct. 1187 (“An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”).

On the other hand, if Brown did not acquire parental rights and was not entitled to that protection, then any defect in the publication of the notice is harmless under the circumstances because the purpose of the notice required by section 20-7-1734 will have been fulfilled without shifting the burden of proof to Brown or placing any impermissible limitation on his right to be heard. See *S.C. Code Ann. § 20-7-1734(E) (Supp.2000)* (allowing person or agency thirty days to provide reasons to contest, intervene, or otherwise respond is the purpose of this notice).

Id. at 127. Thus, the Court made clear that, with respect to service by publication, due process requires sufficient notice to apprise a party of an action and the opportunity to be heard thereupon.

The “Gamecock City Trading Post” contains advertisements and, as of recently, a large volume of legal notices. The paper is distributed free of charge and only made available to the public at various local businesses, and does not appear to have any local subscribers. The paper, as described, tends to display characteristics which closely resemble that of a “shopper's guide” rather than a newspaper of “general circulation” containing news of general interest. Furthermore, even if the “Gamecock City Trading Post” were deemed a newspaper containing articles of general interest, it is unlikely that it would meet the general circulation requirement. The fact that the paper is only made available at local businesses is a further indication that it would not provide sufficient notice to the intended recipient as required. Accordingly, we advise that the “Gamecock City Trading Post” lacks the requisite criteria necessary to render it a newspaper of general interest and circulation for purposes of service by publication.

*5 As you note, the Clerk of Court for Sumter County has authorized use of the “Gamecock City Trading Post” as a mechanism for service pursuant to [Section 15-39-650](#). It is apparent that clerks of court are authorized to publish legal advertisements in state newspapers. See, [Section 15-29-80](#). However, the newspaper utilized for service by publication must be the one “most likely to give notice to the person to be served.” [Section 15-9-740](#). This Office has advised that “state and county officers can now consider all newspapers of general circulation, published in the county in determining the newspaper ‘most likely to give notice to the person served.’” See, *Op. S.C. Atty. Gen.*, August 19, 1977; see also *Op. S.C. Atty. Gen.*, July 19, 1990.

Thus, while the clerk of court possesses authority to designate a newspaper for service, his discretion in the exercise of such authority is limited by the requirements that the publication be a newspaper of general circulation and the one most likely to provide notice to the individual being served. As stated above, we believe that, given its content and means of distribution, the “Gamecock City Trading Post” is not a newspaper of general interest and circulation. Accordingly, it is our opinion that the “Gamecock City Trading Post” does not qualify as the most likely publication to provide notice to the individual sought to be served, and thus cannot be designated by the clerk of court as a proper forum for service by publication.

Conclusion

Our courts have concluded that due process of law requires that service of process be “‘reasonably calculated to reach interested parties.’” Such service thus must reasonably supply notice to apprise a party of an action and an opportunity to be heard thereupon.

Service by publication must meet these constitutional requirements. Thus, South Carolina's service by publication statutes, § 15-9-710 *et seq* require a publication reasonably designed to provide notice. Specifically, § 15-9-740 mandates that the order of publication be made in “one newspaper most likely to give notice to the person to be served” Consistent with general authorities, we have concluded that a “newspaper” as that term is used in § 15-9-740 must meet certain specific criteria, including that the publication be one of “general circulation,” and contain intelligence of current events and news of general interest.

It is our opinion that, notwithstanding that the Clerk of Court possesses broad discretion to approve periodicals for the purpose of service of process, the “Gamecock City Trading Post” does not meet the requirements of § 15-9-740 or due process of law. Such periodical, in our view, does not fulfill the criteria long articulated in our opinions to constitute a “newspaper” for purposes of service by publication. It is not a publication of “general circulation” and does not contain intelligence of current events and news of general interest.

Very truly yours,

*6 Robert D. Cook

Assistant Deputy Attorney General

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