

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 CU 0353

ASAHEL DEBOND FOSTER

VERSUS

DAVID PAUL FOSTER, SR.

consolidated with

NO. 2010 CU 0354

DAVID P. FOSTER

VERSUS

ASAHEL FOSTER

Judgment Rendered: June 11, 2010.

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On Appeal from the  
21st Judicial District Court,  
In and for the Parish of Tangipahoa,  
State of Louisiana

Trial Court No. 2009-0001780 c/w 2009-0001962

The Honorable Brenda Bedsole Ricks, Judge Presiding

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and  
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David Paul Foster, Sr.

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BEFORE: CARTER, C.J., GUIDRY AND PETTIGREW, JJ.

*J. Pettigrew, J. Dissents and Assigns Reasons  
Guidry, J. Concurs and Assigns Reasons*

**CARTER, C. J.**

This is an appeal of a judgment denying a motion to vacate a judgment for nullity.

**FACTS AND PROCEDURAL HISTORY**

This appeal arises from two consolidated suits between David and Asahel Foster. David and Asahel were married in 1995 and have three children. On May 19, 2009, Asahel filed a petition for protection from abuse. The court issued a temporary restraining order and set a hearing for May 28, 2009, which was continued to June 18, 2009, over David's objection.

On June 2, 2009, David filed a petition for divorce, which was docketed as a new suit. David did not request service on Asahel, but included the instruction "Please hold service – waiver to follow." The same instruction was included on the court's order issuing a preliminary injunction and temporary restraining order, and setting incidental matters for hearing on July 6, 2009. On June 29, 2009, in the same suit record as David's divorce petition, Erica D. Williams filed a motion to withdraw as counsel of record for Asahel. Therein, Ms. Williams indicated she signed an acceptance of service on behalf of Asahel on June 12, 2009, that Asahel terminated her representation on June 26, 2009, and that she had advised Asahel of the rule to show cause set for July 6, 2009. A copy of a letter from Asahel to Ms. Williams terminating Ms. Williams' legal representation was attached.

On June 30, 2009, in the same suit record as her petition for protection from abuse, Asahel filed her own petition for divorce through her new counsel. Service was requested on David at his place of employment.

On July 6, 2009, a hearing was held on matters incidental to David's divorce petition, as well as Ms. Williams' motion to withdraw as counsel of record for Asahel. The minutes of court reflect that David, his counsel, and Ms. Williams were present in court, but Asahel was not. Ms. Williams informed the court of her motion to withdraw, which was signed, then further informed the court that Asahel knew of the court date. A hearing was held and judgment was rendered, which, among other things, awarded the parties joint custody of the children, awarded David use of two vehicles, and awarded Asahel use of the family home. Thereafter, on July 15, 2009, Ms. Williams filed into the record her own affidavit that was notarized on June 12, 2009, in which she attested that she had been retained by Asahel to represent her in the matters contained in the petition, and that she accepted service and waived issuance and service of citation, and formal service of process. A judgment in conformity with that rendered in open court was signed by the court on July 27, 2009. Notice was mailed to Asahel at her residence.

Days later, in the record of her petition from abuse and petition for divorce, Asahel (through her new counsel) filed a motion to immediately vacate the judgment rendered on July 6, 2009, in the suit record of David's petition. Asahel alleged that staff of the Tangipahoa Parish Clerk of Court's office advised that a waiver of service was never executed and that Asahel was never served with the petition or order. Asahel contended that the judgment should be annulled, vacated, and set aside since neither personal nor domiciliary service of process was effected on her. Asahel also made allegations regarding the actions of Ms. Williams (her former attorney) and David's attorney, including that they failed to advise the court that her new

counsel filed a petition for divorce, that the two attorneys had a conflict of interest, and that Ms. Williams misadvised the court that Asahel had knowledge of the hearing and allowed a judgment to be rendered against her. David opposed the motion, arguing that Asahel was properly served through waiver signed by her former counsel. Thereafter, the two suits were consolidated.

After a hearing, the trial court denied the motion to vacate. In written reasons, the trial court stated that the issue presented was whether an attorney could execute a written waiver of service on behalf of her client. The trial court opined that it is advisable for a party to execute such waiver herself, with her attorney serving as notary. However, the trial court could find no prohibition against the attorney executing such waiver on behalf of her client. Considering the written waiver executed on Asahel's behalf, the trial court denied the motion to vacate the judgment. This appeal followed.

#### DISCUSSION

Proper citation is the foundation of all actions. **Naquin v. Titan Indemnity Co.**, 00-1585 (La. 2/21/01), 779 So.2d 704, 710. A final judgment shall be annulled if it is rendered against a defendant who has not been served with process as required by law and who has not waived objection to jurisdiction, or against whom a valid judgment by default has not been taken. LSA-C.C.P. art. 2002A(2).

At the outset, we recognize that the parties herein as well as the trial court have referred to the document executed by Asahel's former attorney as a *waiver of service*. In fact, by way of the document, Asahel's former attorney, Ms. Williams, *accepted service* and *waived citation*. Importantly,

Asahel does not deny that Ms. Williams was her attorney and legal representative.

Louisiana Code of Civil Procedure article 1201B provides that “[t]he defendant may expressly waive citation and service thereof by any written waiver made part of the record.” Ms. Williams executed an acceptance of service and waiver of citation, which was made part of the record. We agree with the trial court that it may have been preferable for Asahel to execute the waiver herself. However, the relationship of attorney and client is one of principal and agent and the acts of the attorney are binding upon the client. **Smart Document Solutions, LLC v. Miller**, 07-670 (La. App. 3 Cir. 10/31/07), 970 So.2d 49, 51-52, writ denied, 08-0210 (La. 3/28/08), 978 So.2d 308, citing **Judd & Detweiler v. Gittings**, 43 App.D.C. 304, 310-311 (1915); **MacFayden v. Lee**, 601 So.2d 24, 26 (La. App. 1 Cir.), writ denied, 606 So.2d 544 (La. 1992); see also, e.g., **Dixie Electric Membership Corp. v. Fontenot**, 428 So.2d 1035, 1036-1037 (La. App. 1 Cir.), writ denied, 433 So.2d 162 (La. 1983). And, the acceptance of service and waiver of citation by an attorney on behalf of the client has been recognized in Louisiana jurisprudence. See, e.g., **Futrell v. Cook**, 00-2531 (La. App. 4 Cir. 12/19/01), 805 So.2d 325, 327; **Lusk v. Lusk**, 536 So.2d 468, 469-470 (La. App. 1 Cir. 1988); **Dixie Elec. Membership Corp.**, 428 So.2d at 1036; **Vining v. Vining**, 389 So.2d 886, 888 (La. App. 4 Cir. 1980).

We stress that in this case, the defendant’s attorney accepted service and waived citation. The plaintiff did not attempt service on Asahel’s attorney, as in **Richardson v. O’Neal**, 30,599 (La. App. 2 Cir. 5/13/98), 716 So.2d 26, 28, and **West v. Melancon**, 02-1335 (La. App. 4 Cir. 3/19/03), 843 So.2d 485, 487. Thus, articles 1312 and 1314 of the Code of Civil

Procedure and their bar against service of the original petition on the defendant's attorney are not invoked herein.

After careful review, we find that the acceptance of service and waiver of citation executed by Asahel's attorney, Ms. Williams, was effective and binding on Asahel. Accordingly, the motion to vacate the judgment for nullity due to want of service was properly denied.<sup>1</sup>

### **CONCLUSION**

For the foregoing reasons, the judgment of the trial court denying the motion to vacate is affirmed. Costs of this appeal are assessed to Asahel Foster.

**AFFIRMED.**

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<sup>1</sup> We note that many of the assertions made by Asahel relate to allegations of fraud on the part of her attorney and/or David's attorney. As those issues are not before the court at this time, we make no judgment thereon.

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BEFORE: CARTER, C.J., GUIDRY AND PETTIGREW, JJ.

PETTIGREW, J., DISSENTS, AND ASSIGNS REASONS.

 I respectfully dissent from the majority for the following reasons.

A final judgment shall be annulled if it is rendered against a defendant who has not been served with process as required by law and who has not waived objection to jurisdiction, or against whom a valid judgment by default has not been taken. La. Code Civ. P. art. 2002A(2).

For a court to have proper jurisdiction over a person or party in an action or proceeding, there must be service of process on that person or party or on his agent for the service of process. La. Code Civ. P. art. 6.

Louisiana Code of Civil Procedure article 5251(2) defines "agent for the service of process" as "the agent designated by a person or by law to receive service of process in actions and proceedings brought against him in the courts in this state." After reviewing the record of this proceeding, I do not find anything that designates Erica Williams as the agent for service of process of Asahel Foster. Hiring an attorney to represent you legally does not necessarily make that attorney your agent for service of process for the initial pleadings. Pursuant to La. Code Civ. P. art. 1201B, "[t]he defendant may expressly waive citation and service thereof by any written waiver made part of the record." That article does not say the attorney can waive citation. It says the defendant may waive citation. Certainly, if the defendant has given the power of attorney and designated someone their agent for service of process, then that designated agent can waive service of citation. There is nothing in this record that

indicates Ms. Williams was designated the agent for service of process for Asahel Foster.

Further, La. Civ. Code arts. 1312 and 1314 imply that the original pleading must be served on the defendant and or its agent for service of process.

For the above reasons I would reverse the judgment of the trial court.



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 **GUIDRY, J., concurs and assigns reasons.**

**GUIDRY, J., concurring.**

For the following reasons and based on the *particular* facts of this case discussed below, I concur in the result reached.

The divorce action from which the contested judgment stems was initiated by David Foster under docket number 2009-0001962. The record in that proceeding contains a "Motion to Withdraw" filed by Erica Williams on June 29, 2009, in which she averred to the following:

1. On June 12, 2009, I signed an acceptance of service on behalf of Asahel Foster **in the above-captioned** matter and this was filed into the record.

....

5. A Rule to Show Cause is set for Monday, July 6, 2009, at 9:00 a.m. and I have advised Asahel Foster of this date.

6. I have advised Asahel Foster that an Answer to defendant's Petition for 103.1 Divorce was due to be filed on or about June 27, 2009. [Emphasis added.]

In addition to the above averments, the motion to withdraw also included a certificate of service, whereby Erica Williams certified "that a copy of the above and foregoing Motion and Order to Withdraw has been served via U.S. Mail...to... Ashael [sic] Foster, at her last known mailing address P.O. Box 1076, Albany, Louisiana 70711 on this 29<sup>th</sup> day of June 28 [sic], 2009." Also referred to in the motion to withdraw and attached to the motion as "Exhibit B" is an itemized billing statement dated June 29, 2009, outlining the dates and types of legal services Erica Williams furnished to Asahel Foster. Of particular note, the billing statement indicates that on June 2, 2009, an engagement letter was executed, service was accepted, and a petition was reviewed. On June 12, 2009, the billing statement shows that Eric Williams held a meeting with Asahel Foster and counsel for David Foster.

The record also contains a copy of a document titled "Acceptance of Service and Waiver of Service and All Delays" that was filed under docket number 2009-0001962 on July 15, 2009. Erica Williams recites in the document that she received a copy of the petition for divorce filed on June 2, 2009, "acknowledges receipt thereof, accepts service and further waives the necessity of issuance and service of citation, and formal service of process." She further stated that she had "been retained by Asahel Foster to represent her in the matters contained in the petition [for divorce]." A clause at the end of the document states that the document was sworn to and subscribed before counsel for David Foster on June 12, 2009.

The foregoing evidence clearly demonstrates that Erica Williams was hired to represent Asahel Foster in the divorce proceedings instituted under docket number 2009-0001962 by David Foster. The evidence further demonstrates that

Asahel Foster should have had knowledge, prior to July 6, 2009, of the fact that Erica Williams had accepted service and waived citation of the divorce petition in docket number 2009-0001962 and that a hearing on the petition was scheduled for July 6, 2009, based on the copy of the motion to withdraw mailed to Asahel Foster on June 29, 2009.

Although Louisiana civil procedure clearly provides that service of pleadings on a party's attorney is acceptable, see La. C.C.P. arts. 1235 and 1314, it has been held that an attorney can only accept service on behalf of a client after the attorney has enrolled as counsel of record. See Wadsworth v. Alexius, 234 La. 187, 195, 99 So. 2d 77, 80 (1958); Moody v. Stevenson, 43,144, p. (La. App. 2d Cir. 3/26/08), 980 So. 2d 196, 199; Jinright v. Glass, 06-888, p. 7 (La. App. 5th Cir. 2/27/07), 954 So. 2d 174, 178, writ denied, 07-0570 (La. 5/4/07), 956 So. 2d 618. Moreover, while the Code of Civil Procedure states that a "defendant" or "a party" can waive service, see La. C.C. P. arts. 1201(B) & (C) and 3957(A), it has been held that an attorney can waive service on behalf of a client if the attorney is authorized by the client to do so. See; Futrell v. Cook, 00-2531, pp. 1-3 (La. App. 4th Cir. 12/19/01), 805 So. 2d 325, 326-327; Lusk v. Lusk, 536 So. 2d 468, 469 (La. App. 1st Cir. 1988).

The evidence presented at the hearing on the motion to vacate the July 27, 2010 judgment clearly demonstrates that Asahel Foster had knowledge that David Foster had filed a separate petition for divorce, that Erica Williams had accepted service of that petition and waived citation, and that a hearing was scheduled for July 6, 2009 relative to certain incidental demands David Foster had asserted in the divorce petition. There was no evidence presented to show that Asahel Foster had expressly authorized Erica Williams to accept service and waive citation or to show that Erica Williams had enrolled as counsel of record in docket number 2009-0001962. However, Asahel Foster's failure to timely object to the actions of

her attorney, at or before the July 6, 2009 hearing, implies that she consented to her attorney's actions in accepting service and waiving citation. See Vining v. Vining, 389 So. 2d 886, 888 (La. App. 4th Cir. 1980). Therefore, based on the particular facts of this case and the evidence presented, I respectfully concur in the opinion affirming the trial court's judgment denying Asahel Foster's motion to vacate the July 27, 2009 judgment.