

Orders for Protection: Methods of Service of Process

Minnesota's Domestic Abuse Act enables battered women to petition for Orders for Protection (OFPs). MN § 518B.01. OFPs can be valuable tools for battered women in escaping domestic violence, but they are only as valuable as their enforceability. An important issue in determining whether an OFP is valid and enforceable is service of process. Service of process (service) is when a party in a court proceeding is given written notice of court hearings, court orders, and other court proceedings that will impact that person. When a battered woman petitions for an OFP, the petition and notice of hearing must be served on the batterer/respondent. Additionally, the temporary ex parte and final orders are also served on the respondent.

In the context of OFPs, service of process is important for several reasons. First, the respondent has a constitutional right to due process when any of his constitutional rights may be infringed or limited. Adequate notice of the OFP, notice of a hearing requested by petitioner, and a right for the respondent to request a hearing helps to ensure the OFP is valid and enforceable by giving the respondent his due process. Second, to prove a violation of an order for protection, the prosecutor must show that respondent *knew* that the OFP existed when he violated it. Personal service, by the sheriff or a process server (*not the petitioner*), of the OFP on the respondent provides proof that the respondent knew of the OFP when he violated it. Finally, actual notice of a domestic violence restraining order (OFP in Minnesota) is required for federal firearms restrictions in the Violence Against Women Act.

The Domestic Abuse Act stresses that personal service is required for OFPs, but alternative service or service by publication may be acceptable in certain circumstances. This Technical Assistance Packet examines the service requirements for OFPs and gives practical suggestions for addressing this issue.

Compiled June 1998.

Attachments: Sample Affidavit and Petitions Requesting Service By Publication or Alternative Service.

SERVICE FOR ORDERS FOR PROTECTIONS

I. SERVICE UNDER MINNESOTA'S DOMESTIC ABUSE ACT

Minnesota's Domestic Abuse Act requires that an Order for Protection be personally served on the batterer/respondent. MN § 518B.01 subds. 5(a) and 8(a). The petitioner will need to take the papers to the sheriff and give him/her all the information she can about where to find the respondent. For personal service, the sheriff or other licensed officers* in Minnesota will take a copy of the petition, notice of hearing, and the temporary or permanent order to the respondent and give it to him in person. *Personal service does not mean the petitioner serves the respondent herself.*

*** Effective August 1, 1998, service of an Order for Protection may be carried out by other licensed officers in Minnesota, including probation officers, court services officers, parole officers, and employees of jails or correctional facilities. (MN § 518B.01 Subd. 9a).**

Once the sheriff or other process server has served the respondent, s/he then writes an affidavit stating that s/he personally handed the documents over to the respondent. Personal service is important because it is more difficult for the respondent to deny that he received the documents.

There are exceptions to requiring personal service for OFPs. The Domestic Abuse Act states that "service by alternate means" or "service by publication" may be acceptable under special circumstances if the court allows it. MN § 518B.01 subds. 5(b) and 8(c). Special circumstances where alternate service or service by publication may be allowed include:

- When personal service cannot be made because the respondent is avoiding personal service by concealment or otherwise; *or*
- When the respondent cannot be found or his location is unknown, making personal service impossible.

The petitioner should call the sheriff at least **two days before the hearing** date to find out whether the respondent has been served. If the respondent has not been served or you have not filled out an affidavit requesting service by publication **within 14 days of issuance of the Ex Parte OFP, the order expires**. Requesting alternate service does not extend the Ex Parte OFP. Only service by publication does. If service is not made by the sheriff or by alternate means **within 28 days of the issuance of the Ex Parte OFP, the order expires**.

If the respondent requests a hearing, the notice will be mailed to the petitioner. Since the notice is being mailed to the petitioner, she may fail to get the notice and her OFP may be dismissed for not appearing in court. Therefore, the petitioner should call the court clerk to verify whether the respondent has requested a hearing.

A. Alternate Service for Notice of Hearing and Ex Parte Orders

If personal service cannot be obtained for the notice of the hearing or the Ex Parte Order, the petitioner may request service by publication. MN § 581B.01 subd. 5(b). Service by publication is when a notice is published in a magazine whose purpose is to publish notices of legal proceedings when personal service is either impracticable or impossible. Notice by publication is typically a formality and is not usually expected to convey actual notice to the party attempting to be reached because few people actually look at this magazine or even know it exists. Therefore, the petitioner must file an affidavit with the court stating:

- That an attempt at personal service was unsuccessful because the respondent is avoiding service; *and*
- That a copy of the petition and notice of the hearing (if requested by petitioner) has been mailed to the respondent's residence or has not been mailed because the respondent's residence is unknown.

If the papers are not served before the court hearing date, the petitioner still must appear in court and the court will issue a new hearing date. The court should issue a new Ex Parte OFP to last until the next hearing.

B. Alternate Service of the Petition and Final OFP

If personal service cannot be obtained for the petition or any subsequent orders, the petitioner must apply to the court for alternate service. This application for alternate service must include:

“the last known location of the respondent; the petitioner's most recent contacts with the respondent; the last known location of the respondent's employment; the names and locations of the respondent's parents, siblings, children, and other close relatives; the names and locations of other persons who are likely to know the respondent's whereabouts; and a description of efforts to locate those persons.” MN § 518B.01 subd. 8(c).

When considering whether to allow alternate, rather than personal service, a court will consider the following factors:

“the length of time the respondent's location has been unknown, the likelihood that the respondent's location will become known, the nature of the relief sought, and the nature of efforts made to locate the respondent.” MN § 518B.01 subd. 8(c).

Alternate service described in this portion of the statute is either by first class mail “to any addresses where there is a reasonable possibility that mail or information will be forwarded or

communicated to the respondent” or by publication “only if it might reasonably succeed in notifying the respondent of the proceeding.”

Another alternative that a court may consider, which is not stated in the statute, is service by certified mail. Certified mail requires that the person receiving the mail sign a return receipt which is proof that they accepted the mail. The return receipt is sent back to the sender, in this case the court or the petitioner, when the mail is received by the batterer/respondent. If the mail is refused the return receipt and mail are returned unsigned. Mail can be further restricted by sending it *return receipt restricted delivery*. Restricted delivery means that the mail can only be accepted by the person it is addressed to. This further ensures that the appropriate party receives the mail because a roommate, or someone else, cannot sign for and accept the mail. When requesting alternate service, a woman should request that service be by certified mail or return receipt restricted delivery. These methods of service by mail are more reliable than service by publication or by first class mail alone.

C. Indian Reservations and Service Issues

On some reservations in Minnesota, criminal and state laws apply. Therefore, any person living on such reservations can be personally served. However, on the reservations that do not recognize state law, no one can be personally served unless the action began in tribal court. Therefore, these reservations may not provide service of process for state actions. However, to determine whether a tribal court would allow service of a state court action, you should call the tribal court administrator or tribal police commander.

If service of MN OFPs is allowed on tribal land, it means that the order is enforceable on state land, but it may not be enforceable on tribal land if state laws are not recognized by that particular reservation. However, violations of OFPs granted by tribal courts are now enforceable by state lands:

***Effective August 1, 1998, violations of Orders for Protections granted in the District of Columbia, tribal lands, or the United States territories now receive the same enforcement and consequences for violations as protective orders issued from any other court in the United States. (MN § 518B.01 Subd. 14)**

D. Who Pays for the OFP Process?

Under the Domestic Abuse Act, filing fees and service of process for OFPs are waived for all petitioners. MN § 518B.01 subd. 3(a). If the sheriff or other service process server is unable or unavailable for service or if service is made by publication, the court shall not require the petitioner to pay for such costs. The court may direct the respondent to pay for the filing fees and cost of service of process. Despite what the law states, some counties or courts may be requiring the petitioner to pay for service, especially if service is outside the county or state issuing the OFP.

TIP: *To ensure that the county issuing the OFP pays for service, the petitioner may want to request in her petition that the court direct payment of service fees for personal or alternate service according to MN § 518B.01 subd. 3a. If she expects out of county or out of state service, she may also want to request the court to direct the county issuing the OFP to pay for such service.*

II. THREE REASONS PERSONAL SERVICE IS NECESSARY OR DESIREABLE WHEN FILING AN OFP

Even though the Domestic Abuse Act allows for service by mail or publication for OFPs, there are three reasons why personal service should be attempted or sought for OFPs:

- A. Prosecuting violations of OFPs
- B. The Violence Against Women Act requires actual notice of an OFP to enforce some of its provisions.

A. Personal Service Helps with Prosecution of OFP Violations

MN § 518B.01 subd. 14(a) governs violations of OFPs and requires that:

“Whenever an order for protection is granted pursuant to this section, and the respondent or person to be restrained *knows* of the order, violation of the order for protection is a misdemeanor.” (emphasis added).

The key to this provision is that the respondent/batterer must have *actual knowledge* of the OFP in order to *prove* a violation of the OFP.¹ The prosecutor must prove beyond a reasonable doubt that the batterer/respondent *knew* the OFP existed when he violated it. The affidavit by the person who personally served the respondent/batterer is the strongest proof of the batterer/respondent’s knowledge of the OFP.

The practical implication of this is that if a prosecutor is unable to prove that the respondent/batterer had *actual knowledge* of the OFP, then criminal charges for the OFP violation may not be brought, they may be dismissed, or the batterer/respondent may be acquitted of the charge of violating the OFP. The obvious problem with dismissing the charges for OFP violations is that OFPs are largely unenforceable if the batterer/respondent cannot be held criminally responsible for violating the OFP. OFPs only have value to battered women if they can be enforced. Personal service is the best way to demonstrate that the batterer/respondent had actual knowledge of the OFP, thereby helping the prosecutor prove her case for an OFP violation.

TIP: *If criminal charges for violating the OFP are not filed, are dismissed, or result in an acquittal, the OFP may still be enforced through contempt of court proceedings. MN § 518B.01 subd. 14 (c). Under this provision of the law, the batterer/respondent may face fines or other penalties for violating the OFP. To proceed with contempt of court, the petitioner must file a motion for Order to Show Cause.*

¹ State v. Dumas, No. CX-93-1608, 1994 Minn. App. LEXIS 195 (Minn. Ct. App. 1994)(unpublished opinion); State v. Redalen, No. C9-94-945, 1994 Minn. App. LEXIS 1321 (Minn.Ct. App. 1994)(unpublished opinion).

B. Actual Notice of OFP Required for VAWA Firearm and Ammunition Prohibitions

The Violence Against Women Act (VAWA) contains a provision that prohibits batterers who have domestic violence restraining orders (OFPs) against them from possessing firearms and ammunition. (Title 18 U.S.C. sec. 922 (g)(8)) (attached to this packet). To enforce this prohibition, the respondent must have *actual notice* of the OFP. Personal Service is the best way to demonstrate that the respondent has actual notice of the OFP. (see BWLAP Technical Assistance Packet entitled: “*Federal Law Firearms and Ammunition Prohibitions*” for more detailed information about this law).

III. CONCLUSION

The petitioner for an OFP should make every effort to get personal service for all aspects of the OFP. Personal service is preferable for the reasons discussed above. If personal service is impossible or impracticable, then service by certified mail, with restricted delivery, should be attempted. If that fails, then service through first class mail and by publication should be attempted as a last resort. Since service by publication is very unlikely to give the respondent any notice, the petitioner should use this method only as a last resort and she should be aware of the limitations of this method of service. Realistically, if service is by mail or publication there may be due process problems with the OFP and there may be difficulty in proving a violation of an OFP.