

Tulsa Law Review

Volume 20 | Number 2

Winter 1984

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Recommended Citation

Charles W. Adams, *Service of Process under the Oklahoma Pleading Code*, 20 Tulsa L. J. 137 (1984).

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TULSA LAW JOURNAL

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SERVICE OF PROCESS UNDER THE OKLAHOMA PLEADING CODE

Charles W. Adams*

The new Oklahoma Pleading Code has greatly altered a number of procedures for civil actions. This Article is an in-depth examination of the revisions of the service of process procedure in Oklahoma. Professor Adams has written on the subject in order to provide insight into the legislative intent of the Code.

I. INTRODUCTION

The Oklahoma Pleading Code went into effect on November 1, 1984.¹ It is a major revision of pretrial procedure in Oklahoma courts and follows up on such other recent major reforms in Oklahoma law as the Oklahoma Evidence Code² enacted in 1978, and the Oklahoma Discovery Code³ enacted in 1982. The Oklahoma Pleading Code is

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I am indebted to Dona K. Broyles for the fine work she did in assisting me in the drafting of the text and commentary to the service of process provisions in the Oklahoma Pleading Code. I am also grateful for the financial support generously provided by the Oklahoma Bar Foundation for the preparation of the Oklahoma Pleading Code.

1. OKLAHOMA PLEADING CODE, 1984 Okla. Sess. Laws 588, 628 (West) (to be codified at 12 OKLA. STAT. tit. 12, §§ 2001-2027) [hereinafter cited as OKLA. PLEADING CODE].

2. OKLA. STAT. tit. 12, §§ 2101-3103 (1981).

3. OKLA. STAT. tit. 12, §§ 3201-3215 (Supp. 1984).

based on rules 1 through 25 of the Federal Rules of Civil Procedure⁴ and replaces approximately 200 separate statutes⁵ dealing with pretrial procedure. The Code substantially changes three principal areas of Oklahoma procedure: service of process, joinder of claims and parties, and pleading and motion practice.

This Article concerns the changes made to the procedures for service of process. The provisions for service of process are now concentrated in section 2004 of title 12 of the Oklahoma Statutes.⁶ Not only does the Code consolidate into a single statute many of the provisions regulating service of process formerly scattered in numerous parts of the Oklahoma Statutes,⁷ it also makes a number of changes designed to simplify the procedures for accomplishing service.

In drafting section 2004, the Civil Procedure Committee⁸ was concerned with satisfying the requirements of due process. The due process clause of the fourteenth amendment to the United States Constitution places the following two restrictions on service procedures: 1) defendants must be given reasonable notice of the lawsuit and an opportunity to be heard;⁹ and 2) defendants must have certain minimum contacts with the state before its courts can exercise jurisdiction over them.¹⁰

In addition to the restrictions imposed by due process, the statutes regulating service of process can themselves impose certain restrictions. For example, these statutes might attempt to prevent so-called "sewer service"¹¹ by providing that only sheriffs can serve process,¹² or pro-

4. FED. R. CIV. P. 1-25.

5. See OKLA. PLEADING CODE, *supra* note 1, § 32, at 628.

6. OKLA. STAT. tit. 12, § 2004 (Supp. 1984).

7. See, e.g., OKLA. STAT. tit. 12, §§ 151-190, 1701.01-1706.04; tit. 47, §§ 391-403; tit. 52, §§ 501-503 (1981). Many of these statutes were repealed in 1984.

8. The members of the Civil Procedure Committee of the Oklahoma Bar Association during 1983 were David L. Field, Chairman; Ed Abel, Vice-Chairman; Charles W. Adams; Martin B. Bernert; Hon. John L. Clifton; George D. Davis, Jr.; Roy J. Davis; George B. Fraser, Jr.; James M. Hays, III; Hon. Robert H. Henry; Craig W. Hoster; Larry A. Tawwater; and Thomas A. Wallace.

9. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). See also *infra* notes 42-70 and accompanying text.

10. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). See also *infra* notes 165-186 and accompanying text.

11. "Sewer service" has been defined as the fraudulent service of a summons and complaint usually either by destroying it, by leaving it under a door or a mailbox, or by leaving it with a person known not to be the defendant, and then executing an affidavit stating that the summons was personally delivered to and left with the defendant.

Public Hearing, Abuses in the Service of Process, Before Louis J. Lefkowitz, Attorney General of the State of New York 2 (1966) (statement of Frank Pannizzo, Asst. Atty. Gen'l of the State of New

vide, through the state long arm statute, that jurisdiction over nonresident defendants is limited to claims arising out of their activities within Oklahoma.¹³ While these additional restrictions might further a legitimate state interest, they are not required by the Constitution, and they would also make it more difficult to accomplish effective service or limit the power of Oklahoma state courts to decide cases brought against out-of-state defendants. In general, the service of process provisions in the Oklahoma Pleading Code are designed to promote flexible and economical use by the courts and practitioners, and to give Oklahoma courts as much authority over out-of-state defendants as possible. Hence, section 2004 of the Oklahoma Pleading Code attempts to keep the restrictions on service of process, other than those

York), *quoted in* Comment, *Abuse of Process: Sewer Service*, 3 COLUM. J.L. & SOC. PROBS. 17, n.2 (1967). *See generally* Comment, *Sewer Service and Confessed Judgments: New Protection for Low-Income Consumers*, 6 HARV. C.R.-C.L. L. REV. 414 (1971); Comment, *Civil Procedure—A Possible Solution to the Problem of “Sewer Service” in Consumer Credit Actions*, 51 N.C.L. REV. 1517 (1973).

12. Before 1976, a summons from an Oklahoma state court could be served by personal delivery only by a sheriff or a person specially appointed by the sheriff or the court. *See* OKLA. STAT. tit. 12, § 158 (1981) (repealed 1984). Service by mail was performed by the court clerk. *Id.* § 153.1 (repealed 1984). Section 158.1 was enacted in 1976 to authorize service by private process servers. *Id.* § 158.1. To protect against sewer service, *supra* note 11, or other fraudulent conduct, § 158.1 requires private process servers to be licensed by the presiding judge of the court and provides for the filing of protests against process servers and revocation of licenses by the court. *Id.*

Until 1980, the Federal Rules of Civil Procedure authorized service of process only by United States marshals, deputy marshals, and persons specially appointed by the court. *See* FED. R. CIV. P. 4, 28 U.S.C. app. at 395 (1976). Rule 4 was amended in 1980 to permit service of process by persons allowed to serve process in state courts of general jurisdiction. In 1983, Rule 4 was again amended to authorize service of process by any person over 18 years old who is not a party. *See generally* *Changes in Federal Summons Service Under Amended Rule 4 of the Federal Rules of Civil Procedure*, 96 F.R.D. 81 (1983) (text of amended FED. R. CIV. P. 4); Siegel, *Practice Commentary on Amendment of Federal Rule 4 (Eff. Feb. 26, 1983) With Special Statute of Limitations Precautions*, 96 F.R.D. 88 (1983) (discussion of changes in who may serve process); Recent Development, *Procedure—Service of Process—Proposed Amendment to Rule 4(c) Criticized*, 1979 WASH. U.L.Q. 303 (criticizes amendment for eliminating judicial discretion by forcing them to adhere to state laws and for reducing the reliability of service).

13. Several of Oklahoma's previous long arm statutes were expressly limited to claims arising from the defendant's activities within the state. *See, e.g.*, OKLA. STAT. tit. 12, §§ 187(a), 1701.03 (1981) (repealed 1984); tit. 47, § 391 (1981) (repealed 1984); tit. 52, § 501 (1981) (repealed 1984). Consequently, a foreign corporation that carried on extensive activities within Oklahoma would not have been subject to suit on claims not arising from those activities. *E.g.*, *George v. Strick Corp.*, 496 F.2d 10 (10th Cir. 1974) (jurisdiction over trailer manufacturer was denied because, although the company sold trailers in Oklahoma, the accident giving rise to the cause of action occurred in New Mexico; Oklahoma would only exercise *in personam* jurisdiction if the action arose within Oklahoma); *see generally* Comment, *In Personam Jurisdiction Over Foreign Corporations: The “Arising From” Requirement*, 30 OKLA. L. REV. 602, 614-16 (1977) (if a foreign corporation enjoys the benefits offered by Oklahoma, the foreign corporation should be subject to Oklahoma's jurisdiction for certain causes of action that arise outside of Oklahoma).

required by the Constitution,¹⁴ to a minimum.

This Article will survey the service of process provisions that are found in section 2004 of the Code. First, the form and contents of the summons are briefly examined along with the procedures for having summons issued by the clerk of the court or, where necessary, amended by order of the court.¹⁵ Second, the procedures for accomplishing service of process on persons or entities within the State of Oklahoma are discussed at length, beginning with an analysis of the requirements of procedural due process as enunciated in a line of United States Supreme Court cases.¹⁶ The three main methods of accomplishing service in Oklahoma—delivery, mail, and publication—are then surveyed, including a description of procedures for serving individuals, corporations, unincorporated associations, and governmental entities as well as the time limits for effecting service on these various entities. The subject of service of process outside of Oklahoma, addressed next, begins with an historical analysis of the development of long arm statutes, and extends to a discussion of the present due process limitations on the power of state courts to assert jurisdiction over nonresidents by analyzing recent federal cases.¹⁷ The procedures for serving defendants outside of Oklahoma are also considered briefly. The procedures for serving subpoenas are then examined,¹⁸ especially the major change made by the Code extending the range of subpoenas for trial to the state boundaries.¹⁹ The Article ends with an analysis of the procedure for recording *lis pendens* notices to give constructive notice of a lawsuit involving real property.²⁰

II. SERVICE OF THE SUMMONS

A. *Preliminary Matters*

Section 2003²¹ designates the filing of the plaintiff's petition as the point of commencement of a civil action. When the petition is filed, the

14. *See supra* notes 9-10 and accompanying text.

15. *See infra* notes 21-41 and accompanying text.

16. *See infra* notes 42-164 and accompanying text.

17. *See infra* notes 165-195 and accompanying text. These limitations are especially important under the Code because section 2004(F) extends the jurisdiction of Oklahoma state courts over nonresidents to the maximum extent permitted by the United States and Oklahoma Constitutions. *See infra* notes 116-120 and accompanying text.

18. *See infra* notes 198-221 and accompanying text.

19. OKLA. STAT. tit. 12, § 2004(N) (Supp. 1984).

20. *See infra* notes 222-229 and accompanying text.

21. OKLA. STAT. tit. 12, § 2003 (Supp. 1984) provides: "Commencement of Action: A civil action is commenced by filing a petition with the court."

plaintiff's attorney should present to the court clerk one or more summonses so that the clerk may sign them, affix the seal of the court, and issue the summonses to the plaintiff's attorney.²² The form of the summons is prescribed by section 2004(B).²³ An example of a summons that satisfies the requirements of section 2004(B) is provided in Form 1²⁴ in section 2027. In addition to the name of the court, the names of the parties, and the name and address of the plaintiff's attorney, the summons must also state when an answer is due and that a default judgment will be taken if an answer is not timely served.

In contrast to prior Oklahoma law,²⁵ the summons should not specify a return date or an answer date. Under section 2012(A)²⁶ the answer is due twenty days after service of the summons if the summons is personally delivered. If service is by mail, the answer is due twenty-three days after mailing.²⁷ To enable the defendant's attorney to determine the date the response is due, the copy of the summons furnished to the defendant must state the date of service if service is made by personal delivery, or the date of mailing if service is by mail. Under

22. *Id.* § 2004(A) provides:

A. SUMMONS: ISSUANCE. Upon filing of the petition the clerk shall forthwith issue a summons and deliver it to the plaintiff or the plaintiff's attorney, who shall be responsible for prompt service of the summons and a copy of the petition. Upon request of the plaintiff separate or additional summons shall issue against any defendants.

23. *Id.* § 2004(B) provides:

B. SUMMONS: FORM. The summons shall be signed by the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise, the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the petition.

The person serving a summons shall state on the copy that is left with the party served the date that service is made. Where service is to be made by mail, the person mailing the summons shall state on the copy that is mailed to the party to be served the date of mailing. These provisions are not jurisdictional, but if the failure to comply with them prejudices the party served, the court may extend the time to answer.

A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment with costs. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

Subsection B is based on FED. R. CIV. P. 4(b) and 54(c), although "[t]he last sentence of Federal Rule of Civil Procedure 4(b) is deleted to provide consistency in the form of summons required within and without the state." OKLA. STAT. ANN. tit. 12, § 2004, Committee Comment to Section 2004 (West Supp. 1984).

24. See *infra* Form 1, set out in the Appendix to this Article.

25. OKLA. STAT. tit. 12, § 153 (1981) (repealed 1984). ("The summons must be directed to the defendant and inform said defendant that he . . . must answer the petition on or before a date stated therein.")

26. OKLA. STAT. tit. 12, § 2012(A) (Supp. 1984).

27. See OKLA. STAT. tit. 12, §§ 2006(D), 2012(A) (Supp. 1984).

prior Oklahoma law the plaintiff had to estimate the length of time before service could be made in order to determine a return and answer date.²⁸ If the summons was not served before the return date, then an alias summons had to be issued with a new return date.²⁹ Section 2012(A) simplifies the service procedure by removing the need for the plaintiff's attorney to verify that the summons and petition are served before a return date, and eliminates the need for an alias summons.

Generally, errors in the form of the summons will be harmless and can be corrected by amending the summons.³⁰ For example, the court in *Great Plains Crop Management, Inc. v. Tryco Manufacturing Co.*³¹ permitted the plaintiff to amend a summons that was defective because it did not indicate the time the answer to the complaint was due.³² Some errors, though, cannot be corrected by amendment.³³ Thus, the court in *Gianna Enterprises v. Miss World (Jersey) Ltd.*³⁴ did not allow amendment of a summons which was neither signed by the court clerk nor under the seal of the court.

An error in the form³⁵ or method of service³⁶ may also be cor-

28. See OKLA. STAT. tit. 12, § 155 (1981) (repealed 1984).

29. See, e.g., *Fleming v. Hall*, 638 P.2d 1115, 1115 (Okla. 1981) (eight successive alias summonses were issued before the defendant was served).

30. OKLA. STAT. tit. 12, § 2004(H) (Supp. 1984) provides:

H. AMENDMENT. At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

31. 554 F. Supp. 1025 (D. Mont. 1983).

32. *Id.* at 1028. The court in *Great Plains* first noted that the defendant had conceded that it had not been prejudiced by the defect, and then applied FED. R. CIV. P. 4(h) which permits a plaintiff to amend its summons. *Id.* See also *Newman v. Prior*, 518 F.2d 97, 99 (4th Cir. 1975) (amendment of summons was allowed where, instead of stating the name of the defendant, it merely incorporated the caption of the complaint by reference); *United States v. A.H. Fischer Lumber Co.*, 162 F.2d 872, 874-75 (4th Cir. 1947) (misnomer of corporate defendant could be corrected by amendment of summons).

33. See RESTATEMENT (SECOND) OF JUDGMENTS § 2 comment d (1980) ("Some element of formality in the notice is necessary, however. A person should not be bound to respond to a rumor that he is being sued.").

34. 551 F. Supp. 1348, 1358-59 (S.D.N.Y. 1982). Whether the summons could be amended was significant in the *Gianna* case because the defendant resided in Great Britain, making service somewhat difficult.

35. See, e.g., *Myers v. John Deere Ltd.*, 683 F.2d 270, 272 (8th Cir. 1982) (subsequent service of summons with complaint cured earlier service of complaint without summons); *Smith v. Boyer*, 442 F. Supp. 62, 63-64 (W.D.N.Y. 1977) (dictum) (defendants were served with order to show cause, complaint, and affidavit, but no summons; plaintiffs were allowed to "amend process" by obtaining issuance of a new summons that could be served on the defendant).

36. See, e.g., *Vorhees v. Fischer & Krecke*, 697 F.2d 574, 576 (4th Cir. 1983) (service on a West German defendant failed to comply with service of process requirements set out by the Hague Convention; plaintiff was given "a reasonable opportunity" to effect service); *Jim Fox Enters., Inc. v. Air France*, 664 F.2d 63, 64 (5th Cir. 1981) (service under FED. R. CIV. P. 4(e) and

rected by the plaintiff's obtaining a new summons pursuant to section 2004(A) and re-serving the defendant. Thus, if a plaintiff, in attempting service on a defendant corporation, serves the wrong corporation, he may have an additional summons issued so that he can then serve the proper corporation.³⁷ In actions involving more than one defendant, section 2004(A) permits the plaintiff to employ either a separate summons for each defendant or multiple copies of a single joint summons naming all the defendants.³⁸

The relief sought in the petition is limited by the last paragraph of section 2004(B), which is identical to rule 54(c) of the Federal Rules of Civil Procedure.³⁹ Thus, if a default judgment is obtained, the relief is limited to the amount sought in the petition.⁴⁰ If, however, the action is contested, the parties can be awarded the relief to which they are entitled, irrespective of the relief demanded in the pleadings.⁴¹

B. *In-State Service*

1. Procedural Due Process

The United States Supreme Court held in the landmark case of

under Texas' long-arm statute was insufficient; plaintiff permitted to re-serve under "purely federal means" in accord with FED. R. CIV. P. 4(d)(3)); *Donnell v. National Guard Bureau*, 568 F. Supp. 93, 95 (D.D.C. 1983) (original service by certified mail was sent to the wrong address); *Kovalesky v. A.M.C. Associated Merchandising Corp.*, 551 F. Supp. 544, 546 (S.D.N.Y. 1982) (service was made by throwing the papers in the defendant's lobby in front of a receptionist who was not authorized to receive service; plaintiff permitted to re-serve the defendant corporation because this could readily be done).

37. *See, e.g.*, *Hunt v. Broce Constr., Inc.*, 674 F.2d 834, 836 (10th Cir. 1982) ("[N]othing in law or logic suggests that because a plaintiff's first service of process for a complaint naming a nonexistent defendant reaches an existing entity, he cannot have issued an additional summons directed to reach the party he should have served.").

38. *See, e.g.*, *Kramer v. Scientific Control Corp.*, 365 F. Supp. 780, 788 (E.D. Pa. 1973) (service with a photographic copy of the summons was sufficient service on a co-defendant).

39. FED. R. CIV. P. 54(c) provides:

A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

40. *See, e.g.*, *Ferguson v. Bartels Brewing Co.*, 26 F.R.D. 612, 614 (S.D.N.Y. 1960), *appeal dismissed*, 284 F.2d 855 (2d Cir. 1960) (because the complaint sought damages as well as an accounting, a default judgment could be entered for the amount of the damages with an allowance for interest thereon).

41. *See, e.g.*, *Equity Capital Co. v. Sponder*, 414 F.2d 317, 319 n.1 (5th Cir. 1969) ("Except for a default judgment, the prayer of the complaint is irrelevant."); *Ring v. Spina*, 148 F.2d 647, 653 (2d Cir. 1945) ("But Plaintiff is entitled to state his claims in detail if he chooses, and rely upon the court to award him such judgment as his case deserves; and at trial he will not be bound by his prayers").

Mullane v. Central Hanover Bank & Trust Co.,⁴² that “[a]n elementary and fundamental requirement of due process . . . 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.”⁴³ It is important to note that it is not necessary for a court to assure itself that actual notice is received by a defendant in order for the defendant to be bound by a decision of the court.⁴⁴ For a court to positively insure that a defendant actually received notice, the judge would probably have to insist that the defendant personally appear in court and state that notice was had. This would impose an onerous burden on litigants and courts, and defendants would be able to avoid adverse court determinations simply by absenting themselves from the court. Out of necessity, courts and legislatures have permitted other means to establish the giving of notice.

One common method is personal delivery by a sheriff. Because the sheriff is a public official, a certificate of service from a sheriff usually provides a court great assurance that a defendant received actual notice.⁴⁵ Nevertheless, the sheriff’s certificate of service cannot give the court absolute assurance that receipt of actual notice has occurred. The sheriff may not have correctly determined the identity of the person to whom he delivered the summons, or he may not have actually served the summons at all.⁴⁶ Due process, however, does not require that a court have absolute assurance the defendant received actual notice of an action in order to enter a binding default judgment against him, but does require a procedure that is “reasonably calculated” under the circumstances to give the defendant notice of the proceeding.⁴⁷ Requiring a certificate of service from the sheriff stating that he has delivered the

42. 339 U.S. 306 (1950). Both in-state and out-of-state beneficiaries of a common trust fund in the state of New York were given notice, by publication in a newspaper, of an action by the trustee to settle its account. *Id.* at 309-310. Service was sufficient only as to those beneficiaries whose whereabouts could not be ascertained with due diligence. *Id.* at 317. *See also infra* notes 53-60 and accompanying text.

43. *Id.* at 314.

44. RESTATEMENT (SECOND) OF JUDGMENTS § 2 comment c (1980).

45. *See Wilson v. Upton*, 373 P.2d 229, 231 (Okla. 1962) (strong and convincing proof is required to overcome a sheriff’s return showing service); Recent Development, *supra* note 12, at 307-08.

46. *See generally* Tuerkheimer, *Service of Process in New York City: A Proposed End to Unregulated Criminality*, 72 COLUM. L. REV. 847 (1972) (discussion of the “breakdown” of the system of service of process in New York City which was resulting in large numbers of default judgments); Comment, *Civil Procedure—A Possible Solution to the Problem of “Sewer Service” in Consumer Credit Actions*, 51 N.C.L. REV. 1517, 1519 (1973) (sewer service is particularly prevalent in consumer credit actions).

47. *See, e.g., Call Carl, Inc. v. BP Oil Corp.*, 391 F. Supp. 367, 379 (D. Md. 1975), *cert.*

summons and petition to the defendant as a precondition to entry of a default judgment meets this standard.⁴⁸ Depending on the circumstances, other methods of service, such as delivery by licensed process servers,⁴⁹ substituted service on an adult member of the defendant's household,⁵⁰ or an agent authorized to receive service of process,⁵¹ or service by mail, publication, or posting in a public place may also comply with due process, provided that these methods are reasonably calculated to give the defendant notice of the action.⁵²

Notice by publication was the form of notice scrutinized by the United States Supreme Court in the *Mullane* case⁵³. *Mullane* dealt with a procedure for judicial settlement of accounts by a trustee of a common trust fund based on New York legislation authorizing the pooling of smaller trust funds into common trust funds to enable banks to diversify portfolios and to achieve economies of scale in the administration of such funds.⁵⁴ The legislation further provided a mechanism for trustees to protect themselves from open-ended liability by periodically obtaining a judicial settlement of accounts.⁵⁵ Once the court approved the administration of the trust funds for a particular period, the beneficiaries were foreclosed from challenging it later.⁵⁶ The New York legislation authorized notice to the trust beneficiaries to be given by publication in a newspaper designated by the court.⁵⁷ The United

denied, 434 U.S. 923 (1977) (service was sufficient against a parent corporation when made on the attorney for the subsidiary corporation).

48. See *Wilson v. Upton*, 373 P.2d 229 (Okla. 1962), in which the court, in determining a motion to quash service of summons, stated:

[A] sheriff's return on a summons showing service, while not conclusive, is prima facie evidence of its truthfulness, and strong and convincing proof is required to overcome it.

• • • •

Another general rule is that the sheriff's recital of service cannot be contradicted or impeached by the uncorroborated testimony of the party shown to have been served.

Id. at 231. See also *Couch v. International Brotherhood of Teamsters*, 302 P.2d 117, 120 (Okla. 1956) (sheriff's return stating that service was made on a member of the defendant association was prima facie evidence).

49. See OKLA. STAT. tit. 12, § 158.1 (Supp. 1984).

50. For a discussion of prior Oklahoma law on this type of substituted service, see *infra* note 87 and accompanying text.

51. See, e.g., *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315 (1964). Service was sufficient against lessees of certain equipment when service was made on an individual designated in the lease agreement as "the agent for the purpose of accepting service of any process within the State of New York." *Id.* at 313.

52. See *supra* note 43 and accompanying text.

53. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

54. *Id.* at 307.

55. *Id.* at 309.

56. *Id.*

57. *Id.*

States Supreme Court held that due process required a form of notice "such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."⁵⁸ The Court recognized that it was difficult for the trustee to keep track of the large numbers of beneficiaries of the pooled trust funds and that it would be impractical for the common trust fund legislation to require personal service on each individual beneficiary.⁵⁹ However, as to those beneficiaries whose identities and addresses could be ascertained by the trustee through reasonable effort, due process mandated, at the least, notice by ordinary mail sent to the addresses found in the trustee's records.⁶⁰

The constitutionality of notice by publication was analyzed by the Oklahoma Supreme Court in the context of a quiet title action involving mineral leases in the leading case of *Bomford v. Socony Mobil Oil Co.*⁶¹ The plaintiffs in *Bomford* challenged an earlier quiet title proceeding in which notice had been given by publication.⁶² The Oklahoma Supreme Court questioned whether the notice by publication procedure followed in the earlier action actually complied with the due process requirements announced in *Mullane*.⁶³ The court found that the procedure made it possible for a plaintiff to obtain a default judgment in a quiet title action solely on the basis of conclusory declarations without any factual showing of due diligence in attempting to notify interested parties.⁶⁴ Following *Mullane*, the *Bomford* court held that due process required a plaintiff to make a diligent effort to locate absent defendants before resorting to notice by publication. Facts showing that the plaintiff has made a diligent search to locate absent

58. *Id.* at 315. The court continued:

The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, . . . or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice other than of the feasible and customary substitutes.

Id.

59. *Id.* at 316-317.

60. *Id.* at 318. The court concluded:

As to known present beneficiaries of known place of residence, however, notice by publication stands on a different footing. Exceptions in the name of necessity do not sweep away the rule that, within the limits of practicability, notice must be such as is reasonably calculated to reach interested parties. Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency.

Id.

61. 440 P.2d 713 (Okla. 1968).

62. *Id.* at 716.

63. *Id.* at 717.

64. *Id.* at 718.

defendants must be proved to the court at a hearing, and the trial court should not approve notice by publication unless it is satisfied that the required diligence has been shown.⁶⁵

Recently, the United States Supreme Court again dealt with the requirements of due process in two separate cases. In *Greene v. Lindsey*,⁶⁶ the Court relied on *Mullane* to hold that posting a summons on a tenant's door in a forcible entry action was not adequate notice unless the summons was also mailed to the tenant.⁶⁷ In *Mennonite Board of Missions v. Adams*,⁶⁸ the Court again followed *Mullane* in holding that the fourteenth amendment required notice of a tax sale of real property to be given either by personal service or by mail to mortgagees of the property whose names and addresses could be readily found in the county recorder's office.⁶⁹

In summary, determining whether a method of notice satisfies due process involves assessing the probable effectiveness of the method in providing actual notice and balancing this against the feasibility of alternative methods that may enhance the likelihood of imparting actual notice to the defendant. If another method of service is likely to be more effective and is practicable, due process requires its use, although a defendant will be bound by a court's decision even if he did not receive actual notice of the proceeding as long as the method of notice complied with the requirements of due process.⁷⁰

65. *Id.* at 720. In order to avoid upsetting settled land titles, the *Bomford* court ruled that its decision would be given prospective effect only. *Id.* at 721.

66. 456 U.S. 444 (1982).

67. *Id.* at 455. The court noted that "[i]n determining the constitutionality of a procedure established by the State to provide notice in a particular class of cases, 'its effect must be judged in the light of its practical application to the affairs of men as they are ordinarily conducted.'" *Id.* at 451 (quoting *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1925)). OKLA. STAT. tit. 12, § 1148.5A (1981), authorizes service in forcible entry and detainer actions by posting in conjunction with sending the summons by registered or certified mail if service by delivery cannot be made on the tenant or a person over 15 years of age residing at the tenant's residence.

68. 103 S. Ct. 2706 (1983).

69. *Id.* at 2712. *See also* *Walker v. City of Hutchinson*, 352 U.S. 112 (1956) (notice of condemnation proceeding published in a local newspaper was an inadequate means of informing a landowner whose name was known to the city and was on the official records); *Schroeder v. City of N.Y.*, 371 U.S. 208 (1962) (publication in a newspaper and posted notices were inadequate to apprise a property owner of condemnation proceedings when his name and address were readily ascertainable from both deed records and tax rolls).

70. *Dana P. v. State*, 656 P.2d 253, 255 (Okla. 1982) (service by publication); *Williams v. Egan*, 308 P.2d 273, 276-77 (Okla. 1957) (service by mail to last known address); *Smith v. Kincaid*, 249 F.2d 243, 245 (6th Cir. 1957) (substituted service on defendant's landlady). *See also* *Insurance Co. of N. Am. v. S/S "Hellenic Challenger"*, 88 F.R.D. 545, 547 (S.D.N.Y. 1980) (service papers mislaid by employee).

2. Service by Delivery of the Summons

While due process establishes the minimal standards a method of service must satisfy, the legislature may impose additional standards or requirements. Section 2004(C)(1)⁷¹ of the Oklahoma Pleading Code authorizes sheriffs, deputy sheriffs, and licensed process servers to serve summonses and petitions by personal delivery. Limitations are placed on the persons permitted to serve process in order to prevent sewer service⁷² or other fraud on the court. Moreover, while licensed process servers may serve summonses and petitions, only sheriffs are authorized to serve writs of attachment and of execution.⁷³

Section 2004(D)⁷⁴ requires the summons and petition to be served

71. OKLA. STAT. tit. 12, § 2004(C)(1) (Supp. 1984) provides:

C. BY WHOM SERVED.

1. Process, other than a subpoena, if served in the manner provided in subsection D of this section, shall be served by a sheriff or deputy sheriff, a person licensed to make service of process in civil cases, or a person specially appointed for that purpose. When process has been served and return thereof is filed in the office of the court clerk, a copy of the return shall be sent by the court clerk to the plaintiff's attorney within three (3) days after the return is filed. Process, other than a subpoena, shall not be served by a party's attorney except as provided in paragraph 2 of this subsection. The court shall freely make special appointments to serve all process, other than a subpoena, under this paragraph.

Provisions for the licensing of process servers can be found in OKLA. STAT. tit. 12, § 158.1 (Supp. 1984).

72. See *supra* note 11 and accompanying text.

73. OKLA. STAT. ANN. tit. 12, § 2004, Committee Comment to Section 2004 (West Supp. 1984); 10 Okla. Op. Att'y Gen. 34 (1977).

74. OKLA. STAT. tit. 12, § 2004(D) (Supp. 1984) provides:

D. SUMMONS AND PETITION: Person to be Served. The summons and petition shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. The failure to serve a copy of the petition with the summons is not a ground for dismissal for insufficiency of service of process, but on motion of the party served, the court may extend the time to answer or otherwise plead. Service shall be made as follows:

1. Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the petition to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person then residing therein who is fifteen (15) years of age or older or by delivering a copy of the summons and of the petition to an agent authorized by appointment or by law to receive service of process;

2. Upon an infant who is less than fifteen (15) years of age, by serving the summons and petition upon him personally and upon either of his parents or his guardian, or if they cannot be found, then upon the person having the care or control of the infant or with whom he lives; and upon an incompetent person by serving the summons and petition upon him personally and upon his guardian;

3. Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the petition to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant;

4. Upon the United States or an officer or agency thereof, by delivering a copy of

together, and section 2004(B) requires the process server to write the date of service on the copy of the summons that is served on the defendant.⁷⁵ If service is by mail, the date of mailing should be written on the copy of the summons that is mailed to the defendant. Although failure to satisfy these requirements will not be grounds for dismissal of the action,⁷⁶ the court may grant additional time for the defendant to respond to the petition.⁷⁷

Proper service by personal delivery normally entails handing the summons and petition to the defendant.⁷⁸ If the defendant refuses to accept delivery of the summons and petition, however, the process server may effect service by leaving them near the defendant.⁷⁹ Thus, service has been upheld where, after the defendant refused to accept

the summons and of the petition to an officer, agency, or employee designated by and in the manner specified by Federal Rule of Civil Procedure 4; and

5. Upon a state, county, school district, public trust or municipal corporation or other governmental organization thereof subject to suit, by delivering a copy of the summons and of the petition to the officer or individual designated by specific statute; however, if there is no statute, then upon the chief executive officer or a clerk, secretary, or other official whose duty it is to maintain the official records of the organization.

75. See *supra* note 23.

76. The Oklahoma Supreme Court has held:

A mere defect in formal style or nomenclature will not invalidate service of process unless it actually resulted in failure to give notice, as can be discerned from the excerpts from *Mullane* which demonstrate the inquiry is centered on what steps are necessary to impart actual notice, and not formalistic ritual service of process.

Union Tex. Petroleum v. Corporation Comm'n, 651 P.2d 652, 658 (Okla. 1981), *cert. denied*, 459 U.S. 837 (1982). See also *Young v. Seaway Pipeline, Inc.*, 576 P.2d 1144, 1147 (Okla. 1977) ("mere irregularities" will not void defective service if the defendant is apprised of "the nature of the case, the court in which it is filed, and his interest therein"). *Accord* OKLA. STAT. tit. 12, § 154.2 (1981) (repealed 1984) ("Defects in the form of the return of a summons do not constitute grounds for quashing the summons or its service.").

77. See OKLA. STAT. ANN. tit. 12, § 2004, Legislative Note to Section 2004 (West Supp. 1984):

Subsection B of Section 2004 was amended by the Senate Judiciary Committee to provide that the person serving a summons shall state the date of service on the copy left with the party served. Where service is by mail, the person mailing the summons shall state the date of mailing on the copy mailed to the defendant. These changes in Section 2004(B) are not jurisdictional, and failure to comply with them will not invalidate the service of process. If the defendant is prejudiced because the date of service did not appear on the summons, the court may extend the time to answer. Specifying the date of service or mailing on the face of the summons is intended to facilitate the defendant's computation of the time to respond to the petition. An enlargement of time to respond may be given for cause shown as provided in subsections B of Section 2006.

78. See BLACK'S LAW DICTIONARY 1227 (5th ed. 1979); see also *Clemmons v. State*, 5 Okla. Crim. 119, 121, 113 P. 238, 239 (1911) ("The word 'service' itself, as used with reference to summonses, writs, subpoenas, notice and other legal processes, means the reading of the same to the person to be served, or the delivery to such person of the original or a copy thereof.").

79. See, e.g., *Novak v. World Bank*, 703 F.2d 1305, 1310 n.14 (D.C. Cir. 1983) (dictum) ("When a person refuses to accept service, service may be effected by leaving the papers at a location, such as on a table or on the floor, near that person." (citing *Errion v. Connell*, 236 F.2d 447, 457 (9th Cir. 1956); *Heritage House Frame & Moulding Co. v. Boyce Highlands Furniture*

service of process, the service papers were pitched through a screendoor of the defendant's apartment,⁸⁰ placed nearby the defendant's managing agent,⁸¹ left on the seat of a vehicle that the defendant was standing near,⁸² left in the door jamb of the front door of the defendant's house,⁸³ or left on the defendant's doorstep.⁸⁴

Section 2004(G)⁸⁵ provides that, after properly serving the defendant, the process server should then file a return of service with the court within twenty days after the service. Failure to file a return of service,

Co., 88 F.R.D. 172, 174 (E.D.N.Y. 1980); 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1095, at 362 (1969)).

In some cases a process server may get carried away in attempting to serve an evasive defendant and use tactics to effect service that may be considered harassment. *See* Bockian v. Esanu Katsky Korins & Siger, 124 Misc. 2d 607, 610, 476 N.Y.S.2d 1009, 1011 (N.Y. Sup. Ct. 1984) (process server allegedly harassed defendant). Naturally an attorney should not condone or participate in vexatious tactics to accomplish service, and an attorney who did so could be found liable to the defendant for abuse of process or other intentional torts.

80. *E.g.*, Errion v. Connell, 236 F.2d 447, 457 (9th Cir. 1956). The court did place emphasis on testimony which, although contradicted, showed that the sheriff, when pitching the papers through a hole in the screendoor, saw the defendant and spoke to her. *Id.*

81. *E.g.*, Heritage House Frame & Moulding Co. v. Boyce Highlands Furniture Co., 88 F.R.D. 172, 174 (E.D.N.Y. 1980). The court noted that in making personal service, the process server "merely has to 'tender' the summons to the appropriate individual." *Id.* Since the process server had announced he had a summons and, upon the person's refusal to accept it, placed the summons "nearby," service was sufficient. *Id.*

82. *E.g.*, Roth v. W.T. Cowan, Inc., 97 F. Supp. 675, 676-77 (E.D.N.Y. 1951). The court implied that when the defendant refused to identify himself, the marshal had no choice but to leave the summons on the seat of the defendant's cab. *Id.*

83. *E.g.*, Business & Professional Adjustment Co. v. Baker, 62 Or. App. 237, —, 659 P.2d 1025, 1027 (1983) (after defendant, who was behind the front door, told the sheriff "to go away," the sheriff was proper in announcing he had a summons and leaving it in the door).

84. *E.g.*, Haney v. Olin Corp., 245 So. 2d 671, 673-74 (Fla. Dist. Ct. App. 1971). When no one would open the door, the deputy read the summons in "a loud voice" and left it on the doorstep. This was sufficient when the defendant was on the premises and could have received the summons by opening the door upon request. *Id.* *See also* International Controls Corp. v. Vesco, 593 F.2d 166, 176-78, 181-82 (2d Cir.), *cert. denied*, 442 U.S. 941 (1979) (chronicles the daring service effected on Robert Vesco in the Bahamas); Trujillo v. Trujillo, 71 Cal. App. 2d 257, —, 162 P.2d 640, 641 (1945) (after defendant locked himself in a parked automobile and rolled up the windows, process server left papers under the windshield wipers); Ex Parte Ball, 2 Cal. App. 2d 578, —, 38 P.2d 411 (1934) (process server tossed papers at defendant from 12 feet as defendant was walking away); Martin v. Raffin, 21 N.Y.S. 1043 (1893) (defendant attempted to avoid service by hiding under wife's petticoats).

85. OKLA. STAT. tit. 12, § 2004(G) (Supp. 1984) provides:

G. RETURN. The person serving the process shall make proof of service thereof to the court promptly and in any event within the time during which the person served must respond to the process. If service is made by a person other than a sheriff or deputy sheriff, such person shall make affidavit thereof. If service was by mail, the person serving process shall show in his proof of service the date and place of mailing and attach a copy of the return receipt or returned envelope, if and when received by him, showing whether the mailing was accepted, refused, or otherwise returned. If the mailing was refused, the return shall also make proof of any further service mailed pursuant to paragraph 2 of subsection C of this section. Failure to make proof of service does not affect the validity of the service.

though, will not affect the validity of the service. Within three days of the filing of the return by the process server, the court clerk should send a copy of the return to the plaintiff's attorney in order that he can then determine the response date.⁸⁶

In addition to service by personal delivery, section 2004(D)(1) permits substituted service on a defendant by leaving a copy of the summons and petition at the defendant's residence with a person who lives there and is at least fifteen years of age. In contrast to prior Oklahoma law,⁸⁷ the person receiving the papers does not have to be a member of the defendant's family; the recipient is required only to be a full-time resident in the defendant's home. Thus, leaving service papers with the defendant's landlady,⁸⁸ a live-in maid,⁸⁹ or a relative⁹⁰ has been held to be effective service, while leaving them with a janitor,⁹¹ ranch employee,⁹² or part-time housekeeper⁹³ has been held ineffective. Additionally, to constitute effective substituted service, a copy of the summons and complaint must be left at the defendant's residence rather than his place of business.⁹⁴

Substituted service is also allowed under section 2004(D)(1) upon

86. OKLA. STAT. tit. 12, § 2004(C)(1) (Supp. 1984).

87. See OKLA. STAT. tit. 12, § 159 (1981) (repealed 1984), which provided: "The service shall be made by delivering a copy of the summons to the defendant personally or by leaving one at his usual place of residence with some member of his family over fifteen years of age, at any time before the return day."

88. See, e.g., *Nowell v. Nowell*, 384 F.2d 951, 952-53 (5th Cir.), (process left with apartment complex manager who resided in a different building than the defendant), *cert. denied*, 390 U.S. 956 (1967); *Smith v. Kincaid*, 249 F.2d 243, 245 (6th Cir. 1957) (summons left with defendant's landlady at an address where the defendant resided).

89. See, e.g., *Barclays Bank v. Goldman*, 517 F. Supp. 403, 413 (S.D.N.Y. 1981) (affidavits established that the maid resided with defendant, was an adult, spoke English, and exercised sufficient discretion to deliver the papers); *Lewis v. West Side Trust & Sav. Bank*, 286 Ill. App. 130, —, 2 N.E.2d 976, 978 (1936) ("A maidservant is a member of the family.").

90. See, e.g., *M. Lowenstein & Sons, Inc. v. Austin*, 430 F. Supp. 844, 845 (S.D.N.Y. 1977) (service on 21-year-old daughter visiting home from college was valid). Cf. *Williams v. Capital Transit Co.*, 215 F.2d 487, 489-91 (D.C. Cir. 1954) (service on wife from whom defendant was separated was held invalid).

91. See, e.g., *Zuckerman v. McCulley*, 7 F.R.D. 739, 742 (E.D. Mo. 1948) (attempted service by leaving summons with a janitor who did not reside in defendant's home was not effective).

92. See, e.g., *Geldermann & Co., Inc. v. Dussault*, 384 F. Supp. 566, 569 (N.D. Ill. 1974) (service attempted on defendant's foreman who did not reside with the defendant).

93. See, e.g., *Franklin Am., Inc. v. Franklin Cast Prods., Inc.*, 94 F.R.D. 645, 647 (E.D. Mich. 1982) (part-time housekeeper did not reside in defendant's house).

94. See, e.g., *Betlyon v. Shy*, 573 F. Supp. 1402, 1405 (D. Del. 1983) (summons and complaint served on defendant's supervisor while defendant was vacationing in another state); *Thompson v. Kerr*, 555 F. Supp. 1090, 1093 (S.D. Ohio 1982) (service of process at bank's corporate offices was insufficient to effect service on members of bank's board of directors); *Tart v. Hudgins*, 58 F.R.D. 116, 117 (M.D.N.C. 1972) (service on wife at defendant's place of business was invalid).

an agent authorized by appointment or by law⁹⁵ to accept service of process on behalf of the defendant. Generally courts have required an actual appointment for the specific purpose of receiving process in order to validate substituted service on an agent.⁹⁶ The United States Supreme Court has upheld service on such an agent even when appointed pursuant to a form contract, as long as the service agent promptly notified the defendant of the service.⁹⁷ While an attorney is the agent of his client for many purposes, substituted service on an attorney will not be effective unless the client has specifically appointed him as his agent for service of process.⁹⁸ Once process has been properly served on the defendant, section 2005(B)⁹⁹ permits subsequent papers to be served by mailing them to the defendant's attorney.

Section 2004(D)(2) governs service on persons less than fifteen years of age and on incompetents.¹⁰⁰ Like others, these persons must

95. Examples of agents authorized by law to receive service of process on behalf of specific types of defendants are found at OKLA. STAT. tit. 2, § 3-82(f) (1981) (Secretary of State Board of Agriculture is agent for nonresident commercial aerial applicators of pesticides); *id.* tit. 36, § 1425(I)(2)(b) (Supp. 1984) (State Insurance Commissioner is agent for licensed nonresident insurance agents); *id.* tit. 59, § 1504(c) (1981) (Administrator of Consumer Affairs is agent for pawnbrokers); *id.* tit. 69, § 312 (Secretary of State is agent for nonresident contractors doing business with the State Highway Commission); and *id.* tit. 71, § 413(h) (Securities Administrator is agent for persons violating the Oklahoma Securities Act).

96. *E.g.*, Lamont v. Haig, 539 F. Supp. 552, 557 (D.S.D. 1982) (secretaries were not agents for service of process); Gipson v. Township of Bass River, 82 F.R.D. 122, 125 (D.N.J. 1979) (township clerk was not authorized agent of members of a Zoning Board of Adjustment).

97. National Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 316-18 (1964) (agent was designated to receive service in an equipment lease agreement). *But see* Budget Mktg., Inc. v. Toback, 88 F.R.D. 705, 707 (S.D. Iowa 1981), in which service was agreed to be made on the plaintiff corporation for actions against the defendant, a franchisee of the plaintiff corporation. The court held the service "invalid *ab initio*" because the agent authorized by appointment was the plaintiff, and, thus, the agent had a pecuniary interest in the subject matter of the litigation. These factors, the court concluded, distinguished the case from *National Equip. Rental*. *Id.* at 707-08.

98. *See, e.g.*, Ranson v. Brennan, 437 F.2d 513, 518-19 (5th Cir.) (attorney upon whom service was made had never been appointed for that purpose; he was merely the former attorney of the decedent in an action against the executrix), *cert. denied*, 403 U.S. 904 (1971); Miree v. United States, 490 F. Supp. 768, 775 (N.D. Ga. 1980) (in action against a county, service on county's attorney was invalid); *In re Four Seasons Sec. Law Litig.*, 63 F.R.D. 115, 122 (W.D. Okla. 1974) (mailing of copies of complaint to counsel of newly-added defendants was improper service). *But see* Durbine Paper Stock Co. v. Hossain, 97 F.R.D. 639, 640 (S.D. Fla. 1982) (service on attorney who was defendant's business agent was valid).

99. OKLA. STAT. tit. 12, § 2005(B) (Supp. 1984).

100. The Oklahoma Pleading Code presently makes no explicit provisions for service on infants who are fifteen years old or older. Nevertheless, the Code should not be interpreted to immunize these infants from service of process in civil actions because such an interpretation would be absurd. If possible, a statutory construction leading to an absurdity should be avoided. *See* Grand River Dam Auth. v. State, 645 P.2d 1011, 1018-19 (Okla. 1982); AMF Tubescope v. Hatchel, 547 P.2d 374, 379 (Okla. 1976). Accordingly, § 2004(D)(1) should be construed to govern service on individuals other than those infants and incompetents whose service is governed by § 2004(D)(2). Thus, infants who are fifteen years of age or older may be served by any of the methods provided in § 2004(D)(1) or by mail, while infants who are less than fifteen years of age

themselves be served with process in order to be bound by a court's determination.¹⁰¹ In addition, though, service must be made on an infant's parents or guardian, and on an incompetent's guardian.¹⁰²

Service on corporations, partnerships, and other unincorporated associations by delivery of a copy of the summons and petition is regulated by section 2004(D)(3). These entities can act only through authorized agents and can only be served through service on their authorized agents. Section 2004(D)(3), which is identical to Federal Rule of Civil Procedure 4(d)(3), provides for service on one of these entities by delivery of a copy of the summons and petition to an officer, a managing or general agent, or an agent authorized by appointment or by law to accept service of process on behalf of the entity. Federal courts have generally construed Federal Rule 4(d)(3) liberally and have not restricted the employees of organizations who may receive service as officers or managing or general agents to a narrow class of persons with official titles.¹⁰³ To be effective, service must be made on a person who is "so integrated with the organization that he will know what to do with the papers" and "who stands in such a position as to render it fair, reasonable and just to imply the authority" to accept service of process.¹⁰⁴ As a result, delivery of papers to a receptionist generally

should be served in accordance with § 2004(D)(2). This interpretation conforms to the intent of the Civil Procedure Committee of the Oklahoma Bar Association in drafting the provisions relating to service on infants and to former Oklahoma law. *Accord* OKLA. STAT. tit. 12, § 169 (1981) (repealed 1984) ("[I]f the minor be more than fourteen years of age, service on him alone will be sufficient.").

101. *See* *Frost v. Blockwood*, 408 P.2d 300, 305 (Okla. 1965) (service on infant's guardian alone was not effective).

102. *See* *Covey v. Town of Somers*, 351 U.S. 141, 146 (1956) ("Notice to a person known to be an incompetent who is without the protection of a guardian does not measure up to [the] requirement [of due process]."); *Dale v. Hahn*, 486 F.2d 76, 78-79 (2d Cir. 1973) (service on incompetent alone did not give adequate notice and violated procedural due process), *cert. denied*, 419 U.S. 826 (1974).

103. *See, e.g.,* *Gottlieb v. Sandia Am. Corp.*, 452 F.2d 510 (3d Cir.), *cert. denied*, 404 U.S. 938 (1971), in which the court, in discussing which persons could receive service on a corporation, held:

The determination whether an individual is "a managing or general agent" depends on a factual analysis of that person's authority within the organization. . . . One occupying this position typically will perform duties which are "sufficiently necessary" to the corporation's operations. . . . He should be a "responsible party in charge of any substantial phase" of the corporation's activity. . . . In brief, it is reasonable to expect that such an agent will have broad executive responsibilities and that his relationship will reflect a degree of continuity. . . . Authority to act as agent sporadically or in a single transaction ordinarily does not satisfy this provision of the Rule.

Id. at 513 [citations omitted].

104. *Insurance Co. of N. Am. v. S/S "Hellenic Challenger"*, 88 F.R.D. 545, 547-48 (S.D.N.Y. 1980) (service by delivery to claims adjuster upheld) (quoting *Top Form Mills, Inc. v. Sociedad Nazionale Industria Applicazioni Viscosa*, 428 F. Supp. 1237, 1251 (S.D.N.Y. 1977)). *Cf.* *Barclays*

will not be sufficient, even if the receptionist later hands the papers to a corporate officer.¹⁰⁵

Instead of attempting to locate an officer, or managing or general agent of a corporation, the corporation's registered agent should be the most convenient entity to serve. In addition to being more convenient, service on a registered agent will usually be a more reliable method of serving a corporation because the often difficult issues as to who may accept service as a managing or general agent of the corporation would be avoided. Article IX, section 43 of the Oklahoma Constitution requires every foreign corporation that is licensed to do business in Oklahoma to designate an agent to receive service of process,¹⁰⁶ and section 1.17 of title 18 of the Oklahoma Statutes¹⁰⁷ requires that every corporation have a registered agent for service of process. If a corporation does not appoint a registered agent, service of process may be

Bank of N.Y. v. Goldman, 517 F. Supp. 403, 407-08, 413 (S.D.N.Y. 1981) (service on the maid of an officer and controlling shareholder of the defendant corporation was effective as to the individual, but not as to the corporation). See also *Jim Fox Enters., Inc. v. Air France*, 664 F.2d 63, 64-65 (5th Cir. 1981) (service on airline ticket agent); *Gottlieb v. Sandia Am. Corp.*, 452 F.2d 510, 513-15 (3d Cir.) (personal service on majority shareholder who was not shown to be a managing or general agent was not binding on the corporation), *cert. denied*, 404 U.S. 938 (1971).

105. See, e.g., *Free State Receivables v. Claims Processing Corp.*, 76 F.R.D. 85, 87 (D. Md. 1977) (service may have been sufficient if the marshal had waited in the office while the receptionist delivered the summons); see also *Kovalesky v. A.M.C. Associated Merchandising Corp.*, 551 F. Supp. 544, 546 (S.D.N.Y. 1982) (service papers thrown in front of receptionist in corporation's lobby). But see *Union Asbestos & Rubber Co. v. Evans Prods. Co.*, 328 F.2d 949, 952-53 (7th Cir. 1964) (service on secretary of local sales manager was valid where notice was communicated to the corporation's home office).

106. OKLA. CONST. art. IX, § 43 provides:

Every foreign corporation shall, before being licensed to do business in the State, designate an agent residing in the State; and service of summons or legal notice may be had on such designated agent and such other agents as now are or may hereafter be provided for by law. Suit may be maintained against a foreign corporation in the county where an agent of such corporation may be found, or in the county of the residence of plaintiff, or in the county where the cause of action may arise.

See generally Vliet, *The Oklahoma Business Corporation Act II. A Survey (Concluded)*, 3 OKLA. L. REV. 400, 414-20 (1950) (venue and service of process actions against foreign corporations).

107. OKLA. STAT. tit. 18, § 1.17 (1981), provides in part:

a. Every corporation shall have and continuously maintain in this state a registered agent, on whom service of summons may be had. In the case of a domestic corporation, such agent may be either an individual, resident of this state, whose business office is identical with the registered office, or a domestic corporation, having a business office identical with the registered office, and in the case of a foreign or domesticated corporation, such registered agent shall be the Secretary of State. A foreign or domesticated corporation may in addition designate as a service agent an individual, resident of the capital city or of the county of the principal place of business of the corporation in Oklahoma, or a domestic corporation, having a business office in the capital city identical with the registered office. Provided that if such additional registered agent is designated, service of process shall be on such agent and not the Secretary of State.

b. Such registered agent shall be an agent of such corporation upon whom may be served any process, notice, or demand required or permitted under the laws of this state to be served upon a corporation.

made on the Secretary of State.¹⁰⁸ If the Secretary of State is served, within three days of service, the Secretary must send copies of the summons and petition to the last known address of the corporation by registered or certified mail with return receipt requested.¹⁰⁹

Although service on a partnership may be made under section 2004(D)(3) by serving a general agent such as a single general partner, to maximize the plaintiff's recovery, it is usually desirable to serve as many general partners as possible. Although sections 150 and 215 of title 54 of the Oklahoma Statutes¹¹⁰ provide that general partners are jointly liable for the debts of a general or limited partnership,¹¹¹ title 12, section 178 of the Oklahoma Statutes¹¹² limits the property out of which a judgment may be satisfied to partnership property plus the separate property of the partners who have been served.¹¹³

Service on governmental entities is provided for in section 2004(D)(4) and (5). State and municipal organizations must be served in accordance with the provisions of any specific statutes regulating their service.¹¹⁴ In the absence of such a specific statute, service may be accomplished by serving either the chief executive officer of the governmental organization, or a clerk, secretary or other official whose duties include maintaining the official records of the organization. Service on the United States or a federal agency or employee is made in the same way as in federal courts: in the manner specified by Federal Rule of

108. See OKLA. STAT. tit. 12, § 170.10 (Supp. 1984), for the procedure for making service on the Secretary of State.

109. *Id.* § 170.10(c). See also *ABC Drilling Co. v. Hughes Group*, 609 P.2d 763, 768 (Okla. 1980) (due process requires mailing notice of the action to the defendant foreign corporation in addition to service on the Secretary of State); *Rose v. K.K. Masutoku Toy Factory Co.*, 597 F.2d 215, 219-20 (10th Cir. 1979). See generally Comment, *Substituted Service of Process on Foreign Corporations in Oklahoma: Notice and Due Process*, 12 TULSA L.J. 181 (1976) (analysis of the constitutionality of substituted service of process on foreign corporations). Special rules govern service of process on insurance companies. Insurance companies in Oklahoma are served in the same way as other corporations; all other companies can be served only by serving the Insurance Commissioner of the State of Oklahoma. OKLA. STAT. tit. 36, § 621 (1981).

110. OKLA. STAT. tit. 54, §§ 150, 215 (1981).

111. See, e.g., *Fidelity Bank, N.A. v. Garland*, 463 F. Supp. 37, 39 (W.D. Okla. 1978) (when all individual partners are joined as parties defendant, it is not necessary to join the partnership itself when the partnership is in the process of dissolution); *In re Fowler*, 407 F. Supp. 799, 806 (W.D. Okla. 1975).

112. OKLA. STAT. tit. 12, § 178 (1981).

113. See *Southard v. Oil Equip. Corp.*, 296 P.2d 780, 784 (Okla. 1956) ("[T]he individual property of the member or members served or who appeared and defended in the action against the partnership, thereby waiving service, may be reached for the purpose of satisfying [the judgment] in the event that the partnership property is insufficient."); *Taylor v. Quinnett*, 109 Okla. 241, 243, 235 P. 214, 216 (1925).

114. Such statutes include OKLA. STAT. tit. 11, § 22-103 (Supp. 1984) (service on municipalities), and OKLA. STAT. tit. 19, § 5 (1981) (service on counties).

Civil Procedure 4(d)(4) and (5).¹¹⁵

3. Service by Mail

Section 2004(C)(2)¹¹⁶ authorizes service by mail as a simple, economical alternative to service of process by personal delivery. Service by mail has generally been available in Oklahoma state courts since 1968 with the enactment of section 153.1 of title 12 of the Oklahoma Statutes¹¹⁷ and, in particular categories of actions, for an even longer

115. FED. R. CIV. P. 4(d)(4) and (5) provide

(d) **Summons and Complaint: Person to be Served.** The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

.....

(4) Upon the United States, by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court and by sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to such officer or agency.

(5) Upon an officer or agency of the United States, by serving the United States and by sending a copy of the summons and of the complaint by registered mail or certified mail to such officer or agency. If the agency is a corporation, the copy shall be delivered as provided in paragraph (3) of this rule.

116. OKLA. STAT. tit. 12, § 2004(C)(2) (Supp. 1984) provides:

2. A summons and petition may be served by mail by the plaintiff's attorney, or any person authorized to serve process pursuant to paragraph 1 of this subsection upon a defendant of any class referred to in paragraph 1, 3, or 5 of subsection D of this section. Service by mail may be accomplished by mailing a copy of the summons and petition by certified mail, return receipt requested and delivery restricted to the addressee. Service pursuant to this paragraph shall not be the basis for the entry of a default or a judgment by default unless the record contains a return receipt showing acceptance by the defendant or a returned envelope showing refusal of the process by the defendant. In the case of an entity described in paragraph 3 of subsection D of this section, acceptance or refusal by any officer or by any employee of the registered office or principal place of business who is authorized to or who regularly receives certified mail shall constitute acceptance or refusal by the party addressed. In the case of a state municipal corporation, or other governmental organization thereof subject to suit, acceptance or refusal by an employee of the office of the officials specified in paragraph 5 of subsection D of this section who is authorized to or who regularly receives certified mail shall constitute acceptance or refusal by the party addressed. If delivery of the process is refused, upon the receipt of notice of such refusal and at least ten (10) days before applying for entry of default, the person serving the process shall mail to the defendant by first-class mail a copy of the summons and petition and a notice that despite such refusal the case will proceed and that judgment by default will be rendered against him unless he appears to defend the suit. Any such default or judgment by default shall be set aside upon motion of the defendant if the defendant demonstrates to the court that the return receipt was signed or delivery was refused by an unauthorized person. Such motion shall be filed within one (1) year after the defendant has notice of the default or judgment by default but in no event more than two (2) years after the judgment.

117. OKLA. STAT. tit. 12, § 153.1 (1981) (repealed 1984).

period.¹¹⁸ Experience has shown that service by mail is normally the cheapest method to serve process¹¹⁹ and that its availability has not resulted in large numbers of invalid default judgments.¹²⁰ The United States Supreme Court held in *Hess v. Pawloski*¹²¹ that service by mail on nonresident motorists complied with due process,¹²² and nearly all states now permit service by mail on nonresident motorists.¹²³ Recently, the United States Supreme Court has held that due process requires service by mail to be used in conjunction with service by publication and posting in cases where a defendant's address is known.¹²⁴ Accordingly, the constitutionality of service by mail is well established.

Under the Oklahoma Pleading Code service by mail is effected by mailing a copy of the summons and petition to the defendant by certified mail with return receipt requested and delivery restricted to the addressee.¹²⁵ The date of mailing should be noted on the copy of the summons sent to the defendant, and the defendant's response will be due twenty-three days later.¹²⁶ In contrast to prior Oklahoma law,¹²⁷ court clerks will not be involved in serving process by mail. Generally the plaintiff's attorney will make service by mail, although the persons authorized to make service of process by delivery (sheriffs, deputy sheriffs, licensed process servers, and persons specially appointed by the court) are additionally authorized to serve process by mail.¹²⁸ Restrictions are placed on the persons authorized to serve process by mail in

118. For a listing of a number of statutes authorizing service by mail in Oklahoma, see Comment, *Constitutional Law: The Validity of Service of Process by Mail When There Is No Return Receipt: The Outer Limits of Due Process*, 25 OKLA. L. REV. 566, 566 nn.4 & 5 (1972).

119. *See id.* at 566.

120. This conclusion is inferred from the dearth of reported decisions invalidating default judgments following service by mail. *See* OKLA. STAT. ANN. tit. 12, § 153.1 (West Supp. 1984) (repealed 1984).

121. 274 U.S. 352 (1927).

122. *Id.* at 356. The court placed great emphasis on the public interest of the state in protecting its citizens in automobile accidents. As a result, a nonresident motorist "impliedly consented" to proceedings growing out of "accidents or collisions on a highway." *Id.*

123. *See Jox, Non-Resident Motorists Service of Process Acts*, 33 F.R.D. 151, 153 n.5 (1963).

124. *See Mennonite Bd. of Missions v. Adams*, 103 S. Ct. 2706 (1983); *Greene v. Lindsey*, 456 U.S. 444 (1982). *See also infra* notes 152-159 and accompanying text for a discussion of service by publication.

125. OKLA. STAT. tit. 12, § 2004(C)(2) (Supp. 1984).

126. *Id.* § 2004(B), 2012(A).

127. OKLA. STAT. tit. 12, § 153.1 (1981) (repealed 1984). The court clerk delivered the summons to be served by the sheriff to the sheriff and would mail those summonses to be served by mail.

128. OKLA. STAT. tit. 12, § 2004(C)(2) (Supp. 1984).

order to prevent sewer service.¹²⁹

The post office will furnish the person serving process by mail with a receipt at the time of mailing.¹³⁰ If the defendant to be served is an individual, delivery should be restricted to the addressee, so that the process papers will be delivered only to the addressee or an agent specifically authorized in writing by the addressee to receive his mail.¹³¹ This restricted delivery is available only if the addressee is an individual.¹³²

If the defendant to be served is an entity other than an individual, the summons and petition should be mailed to that entity and may be received at the registered office, principal place of business, or governmental office by any officer or employee who is authorized to or regularly receives certified mail for the entity.¹³³ To facilitate delivery to the proper person within an organization, the plaintiff's attorney may wish to address the summons and petition to that person's attention. Once service by mail is effectuated on the entity, the members of the organization will be responsible for ensuring that the summons and petition are delivered to the appropriate persons in the organization.¹³⁴

After delivery to the defendant, the Postal Service will route a return receipt signed by the addressee to the person serving process by

129. See *supra* note 11. Cf. Proposed Okla. Pleading Code § 2004(C)(2), in 54 OKLA. B.J. 2120, 2122 (1983), with OKLA. STAT. tit. 12, § 2004(C)(2). The original version of Section 2004(C)(2) provided that service by mail could be made by the plaintiff as well as by the plaintiff's attorney and by the persons authorized to make service by personal delivery. See Proposed Oklahoma Pleading Code, 54 OKLA. B.J. 2113, 2122, 2127 (1983). During a discussion of the Proposed Oklahoma Pleading Code at the Oklahoma Judicial Conference on November 3, 1983, the Honorable Leamon Freeman, District Judge, Oklahoma County, and a number of other judges, objected to allowing plaintiffs to serve process by mail or otherwise. They argued that vexatious plaintiffs might fraudulently represent to the court that service by mail was made in order to obtain default judgments, which they could then use to harass innocent defendants by creating invalid judgment liens and initiating garnishment proceedings. The members of the Civil Procedure Committee of the Oklahoma Bar Association responded to the objections of the judges by removing plaintiffs from the list of persons who are authorized to make service of process by mail. See OKLA. STAT. tit. 12, § 2004(C)(2) (Supp. 1984). Since attorneys are officers of the court, see OKLA. STAT. tit. 5, §§ 2-3 (1981), the danger of their making fraudulent representations to a court in connection with service of process is much less than the danger that interested parties might abuse the procedures for service of process.

130. U.S. POSTAL SERV., DOMESTIC MAIL MANUAL 912.1 (1979). "No record is kept at the office at which certified mail is mailed. It will be dispatched and handled in transit as ordinary mail. No insurance coverage is provided." *Id.*

131. See *id.* 933.1. Restricted delivery service is "available only for articles addressed to natural persons specified by name." *Id.*

132. *Id.*

133. OKLA. STAT. tit. 12, § 2004(C)(2) (Supp. 1984).

134. See, e.g., *Insurance Co. of N. Am. v. S/S "Hellenic Challenger"*, 88 F.R.D. 545, 547-48 (S.D.N.Y. 1980) (delivery to claims adjuster).

mail,¹³⁵ which should then be filed with the court.¹³⁶

If the summons and petition are presented by the Postal Service to a defendant, and he refuses to accept them, as occasionally happens, the service may nevertheless be valid. Presumably a defendant who refuses the certified mail is well aware of its contents, and there is no reason to permit him to evade service in this manner.¹³⁷ Section 2004(C)(2) authorizes the person serving the process to send a copy of the summons and petition by ordinary mail, along with a notice to the defendant, stating that despite his refusal of service, the case against him will proceed and a default judgment against him will be rendered unless he appears and defends the lawsuit. This notice must be sent to the defendant at least ten days before the plaintiff applies for entry of the default.

A default judgment should not be entered unless delivery of the summons and petition was either accepted or refused by the defendant.¹³⁸ If the postal carrier cannot locate the defendant, he will leave a Delivery Notice or Receipt at the defendant's address and bring the summons and petition back to the post office, where they will be held for the defendant. If they are not picked up within five days, a second notice, a Delivery Reminder or Receipt, will be sent to the defendant. After fifteen days the summons and petition will be returned to the sender if the defendant does not call for them and the sender does not request redelivery.¹³⁹ Failure of a restricted addressee to respond to notice of attempted delivery is not the same as refusal of delivery, and accordingly, a default judgment should not be rendered if the summons and petition are returned as unclaimed.¹⁴⁰ Moreover, a default judgment should not be rendered if the defendant cannot be found at the

135. U.S. POSTAL SERV., *supra* note 130, at 932.1.

136. OKLA. STAT. tit. 12, § 2004(G) (Supp. 1984).

137. *See generally* Note, *Service of Process by Mail*, 74 MICH. L. REV. 381, 388 (1975) ("A defendant who has refused service by mail has acted with extreme culpability in frustrating the plaintiff's legitimate attempt to obtain a signed return receipt; denial of jurisdiction would render service by mail a meaningless gesture, voidable with impunity by any well-informed defendant."); Comment, *supra* note 118, at 568-69 ("If the defendant chooses to flout the notice and refuses to accept it, he will not be permitted to say in the next breath that he has not been served.")

138. OKLA. STAT. tit. 12, § 2004(C)(2) (Supp. 1984) provides in part: "Service [by mail] shall not be the basis for the entry of a default or a judgment by default unless the record contains a return receipt showing acceptance by the defendant or a return envelope showing refusal of the process by the defendant."

139. U.S. POSTAL SERV., *supra* note 130, at 912.5.

140. *Snyder v. Southwestern Bell Tel. Co.*, 548 P.2d 218, 220 (Okla. 1976) (service agent had no duty to aid service).

address,¹⁴¹ the return receipt is signed by an improper person,¹⁴² or if the signature is not legible.¹⁴³ If a judgment is void because of improper service, it may be set aside at any time.¹⁴⁴ In addition, a defendant may have a default judgment set aside on the grounds that a return receipt was signed or delivery was refused by an unauthorized person. The motion must be filed within one year after the defendant had notice of the judgment and within two years after it was rendered.¹⁴⁵

Finally, while service by mail is permitted under the Oklahoma Pleading Code against most defendants, it is not authorized against infants or incompetents.¹⁴⁶ In addition, in actions against the United States and federal agencies and officers, service by mail may be used only to the extent permitted by Federal Rule 4(d)(4) and (5).¹⁴⁷

4. Other Methods of Service

The Oklahoma Pleading Code authorizes other methods of service in addition to personal delivery and mail. Under section 2012, objections to service are waived if the defendant files an appearance as pro-

141. Since the service will probably be sent by restricted delivery, only the defendant or an authorized agent can accept service. See *supra* notes 131-32 and accompanying text. It logically follows that if the defendant was not found at the address and, therefore, could not sign for the delivery, service would be invalid.

142. OKLA. STAT. tit. 12, § 2004(C)(2) (Supp. 1984) (defendant must show that the return receipt was accepted or refused by "an authorized person").

143. OKLA. STAT. tit. 12, § 2004(C)(2) (Supp. 1984); see also Siegel, *Practice Commentaries on FRCP Rule 4*, 28 U.S.C.A. 18, 36 (West Supp. 1984) in which the author states:

The plaintiff does have to be at least a bit wary. He must be satisfied that the signature on the returned acknowledgment form is the defendant's. It might be illegible. The plaintiff can help protect himself from that prospect by including on the form a line, under the signature line, for the defendant to print his name.

144. See *Tammie v. Rodriguez*, 570 P.2d 332 (Okla. 1977); OKLA. STAT. tit. 12, § 1038 (1981).

145. OKLA. STAT. tit. 12, § 2004(C)(2) (Supp. 1984) provides in part:

Any such default or judgment by default shall be set aside upon motion of the defendant if the defendant demonstrates to the court that the return receipt was signed or delivery was refused by an unauthorized person. Such motion shall be filed within one (1) year after the defendant has notice of default or judgment by default but in no event more than two (2) years after the judgment.

If a judgment is set aside under this provision, OKLA. STAT. tit. 12, § 774 (1981), protects the title of purchasers of real property that has been sold in satisfaction of a judgment by permitting the defendant to recover from the judgment creditors the money for which the real property was sold plus interest from the date of sale. Section 774 protects the title only of third party purchasers at execution sales, though, and has been held not to protect the title of a judgment creditor who purchases at an execution sale or a grantee of a judgment creditor. *Morgan v. City of Ardmore*, 182 Okla. 542, 544, 78 P.2d 785, 788 (1938), *overruled on other grounds*, *City of Bristow v. Groom*, 194 Okla. 384, 386-87, 151 P.2d 936, 939 (1944).

146. See OKLA. STAT. tit. 12, § 2004(C)(2) (Supp. 1984), which restricts the use of service by mail to those defendants described in § 2004(D)(1), (3), and (5). Service on infants and incompetents is dealt with in § 2004(D)(2).

147. See *supra* note 115 for the text of FED. R. CIV. P. 4(d)(4) and (5).

vided in section 2012(A) or files an answer or pre-answer motion that does not raise an objection to service.¹⁴⁸ Also, service is effected if the defendant acknowledges receipt of a copy of the summons and petition on the back of the summons.¹⁴⁹

If a plaintiff demonstrates that service cannot be accomplished by delivery or mail, the court may order alternative methods of service as long as they comply with due process by being reasonably calculated to give the defendant actual notice of the action.¹⁵⁰ Depending on the circumstances, such alternative methods of service made pursuant to court order might include posting, service by ordinary mail, substituted service on a friend, relative, business associate, employer, or insurer of the defendant, or some combination of these methods.¹⁵¹

When service cannot be made by any other method, service by publication is available under section 2004(C)(3).¹⁵² Although service

148. OKLA. STAT. tit. 12, § 2012(A), (E), (F)(1) (Supp. 1984).

149. *Id.* § 2004(C)(4) provides: "An acknowledgment on the back of the summons or the voluntary appearance of a defendant is equivalent to service." This provision is identical to former OKLA. STAT. tit. 12, § 162 (1981) (repealed 1984).

150. OKLA. STAT. tit. 12, § 2004(C)(5) (Supp. 1984) provides:

If service cannot be made by personal delivery or by mail, a defendant of any class referred to in paragraph 1 or 3 of subsection D of this section may be served as provided by court order in any manner which is reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard.

151. See generally Kirst, *Nebraska's Modern Service of Process Statute*, 63 NEB. L. REV. 1, 10-12 (1983) (alternative methods of service of process under Nebraska law are explained); Annot., 17 A.L.R.4th 918 (1982) (service of process on liability insurer of the defendant).

152. OKLA. STAT. tit. 12, § 2004(C)(3) (Supp. 1984) provides:

- a. Service of summons upon a named defendant may be made by publication when it is stated in the petition, verified by the plaintiff or his attorney, or in a separate affidavit by the plaintiff or his attorney filed with the court, that with due diligence service cannot be made upon the defendant by any other method.
- b. Service of summons upon the unknown successors of a named defendant, a named decedent, or a dissolved partnership, corporation, or other association, may be made by publication when it is stated in a petition, verified by the plaintiff or his attorney, or in a separate affidavit by the plaintiff or his attorney filed with the court, that the person who verified the petition or the affiant does not know and with due diligence cannot ascertain the following:
 - (1) whether a person named as defendant is living or dead, and, if dead, the names or whereabouts of his successors, if any,
 - (2) the names or whereabouts of the unknown successors, if any, of a named decedent,
 - (3) whether a partnership, corporation, or other association named as a defendant continues to have legal existence or not; or the names or whereabouts of its officers or successors,
 - (4) whether any person designated in a record as a trustee continues to be the trustee; or the names or whereabouts of the successors of the trustee, or
 - (5) the names or whereabouts of the owners or holders of special assessment or improvement bonds, or any other bonds, sewer warrants or tax bills.
- c. Service pursuant to this subsection shall be made by publication of a notice, signed by the court clerk, one (1) day a week for three (3) consecutive weeks in a newspaper authorized by law to publish legal notices which is published in the county where the

by publication is unlikely to impart actual notice to a defendant, its use

petition is filed. If no newspaper authorized by law to publish legal notices is published in such county, the notice shall be published in some such newspaper of general circulation which is published in an adjoining county. All named parties and their unknown successors who may be served by publication may be included in one notice. The notice shall state the court in which the petition is filed and the names of the parties, and shall designate the parties whose unknown successors are being served. The notice shall also state that the named defendants and their unknown successors have been sued and must answer the petition on or before a time to be stated (which shall not be less than forty-one (41) days from the date of the first publication), or judgment, the nature of which shall be stated, will be rendered accordingly. If jurisdiction of the court is based on property, any real property subject to the jurisdiction of the court and any property or debts to be attached or garnished must be described in the notice.

- (1) When the recovery of money is sought, it is not necessary for the publication notice to state the separate items involved, but the total amount that is claimed must be stated. When interest is claimed, it is not necessary to state the rate of interest, the date from which interest is claimed, or that interest is claimed until the obligation is paid.
 - (2) It is not necessary for the publication notice to state that the judgment will include recovery of costs in order for a judgment following the publication notice to include costs of suit.
 - (3) In an action to quiet title to real property, it is not necessary for the publication notice to state the nature of the claim or interest of either party, and in describing the nature of the judgment that will be rendered should the defendant fail to answer, it is sufficient to state that a decree quieting plaintiff's title to the described property will be entered. It is not necessary to state that a decree forever barring the defendant from asserting any interest in or to the property is sought or will be entered if the defendant does not answer.
 - (4) In an action to foreclose a mortgage, it is sufficient that the publication notice state that if the defendant does not answer, the defendant's interest in the property will be foreclosed. It is not necessary to state that a judgment forever barring the defendant from all right, title, interest, estate, property and equity of redemption in or to said property or any part thereof is requested or will be entered if the defendant does not answer.
- d. Service by publication is complete when made in the manner and for the time prescribed in subparagraph c of paragraph 3 of subsection C of this section. Service by publication shall be proved by the affidavit of any person having knowledge of the publication. No default judgment may be entered on such service until proof of service by publication is filed with and approved by the court.
- e. Before entry of a default judgment or order against a party who has been served solely by publication under this subsection, the court shall conduct an inquiry to determine whether the plaintiff, or someone acting in his behalf, made a distinct and meaningful search of all reasonably available sources to ascertain the whereabouts of any named parties who have been served solely by publication under this subsection. Before entry of a default judgment or order against the unknown successors of a named defendant, a named decedent, or a dissolved partnership, corporation or association, the court shall conduct an inquiry to ascertain whether the requirements described in subparagraph b or paragraph 3 of subsection C of this section have been satisfied.
- f. A party against whom a default judgment or order has been rendered, without other service than by publication in a newspaper, may, at any time within three (3) years after the date of the judgment or order, have the judgment or order opened and be let in to defend. Before the judgment or order is opened, the applicant shall notify the adverse party of his intention to make such an application and shall file a full answer to the petition, pay all costs if the court requires them to be paid, and satisfy the court by affidavit or other evidence that during the pendency of the action he had no actual notice thereof in time to appear in court and make his defense. The title to any property which is the subject of and which passes to a purchaser in good faith by or

has been approved by the courts when no other method of service could be used to provide actual notice.¹⁵³ Section 2004(C)(3), which addresses service by publication,¹⁵⁴ is derived from a number of prior Oklahoma provisions.¹⁵⁵ Service by publication is initiated by filing with the court a statement that, despite due diligence, service cannot be made by any other method. The statement must be made by the plaintiff or his attorney in either a verified petition or a separate affidavit. A notice signed by the court clerk is then published one day a week for three consecutive weeks in a newspaper authorized to publish legal notices in the county where the action is filed or in an adjoining county.¹⁵⁶ The notice must set forth the name of the court, the names of the parties, the nature of the relief sought, and the time when the answer to the petition is due. The time to answer must be not less than forty-one days after the date of the first publication. Service by publication is completed when the notice has been published as described above, and must be proved by the affidavit of any person having knowledge of the publication.¹⁵⁷

Before entering a default judgment against a defendant who has

in consequence of the judgment or order to be opened shall not be affected by any proceedings under this subparagraph. Nor shall proceedings under this subparagraph affect the title of any property sold before judgment under an attachment. The adverse party, on the hearing of an application to open a judgment or other as provided by this subparagraph, shall be allowed to present evidence to show that during the pendency of the action the applicant had notice thereof in time to appear in court and make his defense.

- g. The term "successors" includes all heirs, executors, administrators, devisees, trustees, and assigns, immediate and remote, of a named individual, partnership, corporation, or association.
- h. Service outside of the state does not give the court in personam jurisdiction over a defendant who is not subject to the jurisdiction of the courts of this state or who has not, either in person or through an agent, submitted himself to the jurisdiction of the courts of this state.

153. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315-17 (1950); for a discussion of *Mullane*, see *supra* notes 42-43 and 53-60 and accompanying text. See also *Bomford v. Socony Mobil Oil Co.*, 440 P.2d 713 (Okla. 1968), an action by successors in interest of an Indian allottee against the successor of a tax deed grantee, whose title to fee had been quieted to him in a prior quiet title action, to cancel mineral deeds of record and to quiet title to the mineral estate. Service was by publication. *Id.* at 716. The court held that "before a plaintiff may resort to publication process he must make a diligent search of all available sources at hand to ascertain the whereabouts or post-office addresses of his adversaries." *Id.* at 720 (emphasis in the original). This diligence had to be proved at a pre-judgment hearing. *Id.*

154. See *supra* note 152.

155. See OKLA. STAT. tit. 12, §§ 170.6, 170.7, 173, 174, 176 (1981) (repealed 1984), and OKLA. DIST. CT. R. 16.

156. For discussions of the conditions a newspaper must satisfy in order to be authorized to publish legal notices, see *In re Piedmont Publishing Co.*, 628 P.2d 1163, 1164-65 (Okla. 1981); *Ruble v. Redden*, 517 P.2d 1124, 1126-27 (Okla. 1973).

157. OKLA. STAT. tit. 12, § 2004(C)(3)(d) (Supp. 1984).

been served by publication, the court must make sure that the requirements of due process have been satisfied.¹⁵⁸ Section 2004(C)(3)(e) requires the court to conduct an inquiry to determine whether the plaintiff has made a diligent search to locate the defendant in an effort to provide him with actual notice of the action. A defendant who has been served by publication is given additional protection by section 2004(C)(3)(f), which provides for the setting aside of a default judgment at any time within three years after it was rendered. To have the judgment set aside, the defendant must file an answer to the plaintiff's petition and prove that he did not receive actual notice of the action before the judgment was entered.¹⁵⁹

5. Time Limits for Effecting Service

Section 2004(A) places the responsibility for prompt service of the summons and petition on the plaintiff and his attorney. The sanction for failure to make prompt service is dismissal of the action without prejudice.¹⁶⁰ Section 2004(I) provides for dismissal of an action without prejudice upon motion by the defendant or on the court's own initiative if service is not made within 120 days of the filing of the petition, unless the plaintiff can show good cause why service was not made or that the defendant is in a foreign country.¹⁶¹ A plaintiff nearing the

158. See *Bomford v. Socony Mobil Oil Co.*, 440 P.2d 713, 719 (Okla. 1968). For the facts in *Bomford* see *supra* note 153. The court held:

When constitutionally protected rights are at stake, the court's determination of the validity of its process must be made, at the latest, when the judgment is rendered and before it is sought to be enforced or vacated. Due process is violated by the mere act of exercising judicial power upon process not reasonably calculated to apprise the defendant of the pendency of the action.

Id.

159. See, e.g., *Tate v. Robertson*, 472 P.2d 905, 908 (Okla. 1970) (answer need not allege that the plaintiff has no valid cause of action, but only that there was no justification for the court's judgment or order); *Gann v. Gann*, 459 P.2d 605, 608 (Okla. 1969) (default judgment upheld because defendant failed to allege that he had no actual notice or knowledge of the pendency of the action).

160. OKLA. STAT. tit. 12, § 2004(I) (Supp. 1984) provides:

SUMMONS: TIME LIMIT FOR SERVICE. If service of process is not made upon a defendant within one hundred twenty (120) days after the filing of the petition and the plaintiff cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to the plaintiff or upon motion. If service of process is not made upon a defendant within one hundred eighty (180) days after the filing of the petition, the action shall be deemed to have been dismissed without prejudice as to that defendant. This subsection shall not apply to service in a foreign country.

161. Subsection I is based on FED. R. CIV. P. 4(j). OKLA. STAT. ANN. tit. 12, § 2004, Committee Comment to Section 2004 (West Supp. 1984). If the action is dismissed under this subsection, the action may be refiled within one (1) year pursuant to OKLA. STAT. tit. 12, § 100 (1981). *Id.* See *infra* note 163 for text of § 100.

120-day time limit can, and should, request an enlargement of time for making service pursuant to section 2006(B).¹⁶² Failure to make service within 180 days will result in a mandatory dismissal of the action without prejudice unless the defendant is in a foreign country. Section 2004(I) should be read in conjunction with title 12, section 100 of the Oklahoma Statutes,¹⁶³ which overrides intervening statutes of limitations and gives a plaintiff one year to file a second action after a dismissal other than on the merits. A plaintiff may take advantage of section 100 only once, however, and thus will not be permitted to bring more than one additional action after the statute of limitations has expired.¹⁶⁴

C. *Out-of-State Service*

1. Constitutional Limits of Territorial Jurisdiction

At one time it was believed that the fourteenth amendment required that "[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established."¹⁶⁵ While the courts of a state could exercise authority over persons and property within the state's territorial limits, state courts could not exercise authority outside of the state's territorial limits.¹⁶⁶ As modern means of

162. See *Sanders v. Marshall*, 100 F.R.D. 480, 483 (W.D. Pa. 1984) (construing FED. R. CIV. P. 4(j) from which § 2004(I) was derived); *Coleman v. Greyhound Lines, Inc.*, 100 F.R.D. 476, 477-78 (N.D. Ill. 1984).

163. OKLA. STAT. tit. 12, § 100 (1981), provides:

If any action is commenced within due time, and a judgment thereon for the plaintiff is reversed, or if the plaintiff fail in such action otherwise than upon the merits, the plaintiff . . . may commence a new action within one year after the reversal or failure although the time limit for commencing the action shall have expired before the new action is filed.

For cases construing this section, see *C & C Tile Co. v. Independent School Dist. No. 7*, 503 P.2d 554, 558-59 (Okla. 1972) (section applies to dismissal for lack of venue); *Holder v. Rising Bros., Inc.*, 619 P.2d 1278, 1279 (Okla. Ct. App. 1980) (legislature intended to extend limitations statute regardless of whether any time remained before the running of the limitations) (released for publication by order of Ct. App.); *Citizens' Action for Safe Energy, Inc. v. Okla. Water Resources Bd.*, 598 P.2d 271, 273 (Okla. Ct. App. 1979) (section has no application to mandatory special proceedings under the Administrative Procedures Act) (released for publication by order of Ct. App.).

164. See, e.g., *Fishencord v. Peterson*, 185 Okla. 542, 543, 94 P.2d 910, 911 (1939) (third petition dismissed when demurrer to first petition was sustained on ground of misjoinder of parties, and a demurrer to a second petition was also sustained when that petition set up the same cause of action as in the previous petition).

165. *Pennoyer v. Neff*, 95 U.S. 714, 720 (1877). For a discussion of the historical trend of territorial jurisdiction since *Pennoyer*, see Seidelson, *Recasting World-Wide Volkswagen as a Source of Longer Jurisdictional Reach*, 19 TULSA L.J. 1, 5-10 (1983).

166. *Pennoyer*, 95 U.S. at 722. The Supreme Court explained:

The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory,

transportation and communication stimulated greater interaction between persons in different parts of the United States, this restrictive view of territorial jurisdiction proved increasingly inadequate, particularly as to certain types of defendants.¹⁶⁷ Accordingly, the legal fiction of consent to jurisdiction was relied on for the assertion of jurisdiction over nonresident motorists and foreign corporations.¹⁶⁸

In 1945, the United States Supreme Court adopted a new philosophy of territorial jurisdiction and greatly expanded the authority of state courts over nonresidents in *International Shoe Co. v. Washington*.¹⁶⁹ The Court held that due process required only that a nonresident defendant have certain minimum contacts with a state to subject him to the jurisdiction of the courts of the state.¹⁷⁰ Whether a defendant's activities in a state permit a court to exercise jurisdiction over him depends upon if the defendant's activities in the state were continuous and systematic, and if these activities gave rise to the plaintiff's claim.¹⁷¹ Conversely, if the defendant's activities in the state are isolated or sporadic, the courts of the state may not assert jurisdiction over him on claims that do not arise out of those activities;¹⁷² however, if a defendant's activities in a state are sufficiently continuous and system-

except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions.

Id.

167. See *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The court noted that jurisdiction based on the ability of the sheriff to take the defendant and bring him before the court (a writ of *causas ad respondendum*) was essentially obsolete because of the use of service of process. *Id.* See also Seidelson, *supra* note 165, at 6-9 (the writ of *causas* had become an "anachronism").

168. See, e.g., OKLA. CONST. art. IX, § 43 (foreign corporations must designate agent for service of process before being licensed to do business in state); OKLA. STAT. tit. 47, §§ 391-403 (1981) (§§ 391-394 amended 1984 and repealed 1984; §§ 395, 397-403 repealed 1984; § 396 repealed 1957) (nonresident motorists consent to appointment of Secretary of State as agent for service of process); *id.* tit. 18, § 1.204a (1971) (repealed 1980) (service authorized on Secretary of State if foreign corporation has no agent for service of process).

169. 326 U.S. 310 (1945).

170. *Id.* at 316.

[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

Id. (citing *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

171. *Id.* at 320.

172. See, e.g., *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 104 S. Ct. 1868, 1872-73 (1984). The plaintiff brought suit in Texas against a Columbian corporation on a claim arising out of a helicopter crash in Peru. The defendant did not have a place of business in Texas and was never licensed to do business there. The contacts consisted of sending its executive officer to Houston to negotiate; accepting checks drawn on a bank in Houston; purchasing helicopters and equipment from a business in Texas; and sending personnel to Texas for training. *Id.* at 1873.

atic, the courts of the state may constitutionally assert jurisdiction over the defendant as to claims not arising from the defendant's activities.¹⁷³ Moreover, even if a defendant's activities within the state are only isolated or sporadic, the courts of the state may exercise jurisdiction over him as to claims arising from those activities.¹⁷⁴ Finally, due process allows the courts of a state to exercise jurisdiction over a defendant who has never performed any activities within the state if his activities outside of the state caused injury within the state.¹⁷⁵

Whether a defendant may be subjected to the jurisdiction of a state court hinges on the relationship between the defendant, the state, and the claims being asserted by the plaintiff.¹⁷⁶ The unilateral activity of others who claim a relationship with a nonresident defendant who has only isolated contacts with a state is not sufficient to subject him to the jurisdiction of its courts;¹⁷⁷ what is needed is some act by which the defendant purposefully availed himself of the privilege of conducting activities within the state.¹⁷⁸ Even if it is foreseeable that a defendant's activities might cause injury in a state, the state's courts will not assert jurisdiction over him unless the defendant's activities in and connections with the state "are such that he should reasonably anticipate being haled into court there."¹⁷⁹

173. *See, e.g.*, *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 445-47 (1952). General manager of a corporation with mines in the Philippines conducted the affairs of the corporation during WWII from Ohio. This activity established sufficient minimum contacts. *Id.* at 448. The plaintiff stockholder was, as a result, permitted to bring, in Ohio, an action for dividends even though the cause of action did not arise in Ohio or relate to the corporation's activities there. *Id.* at 438, 448.

174. *See, e.g.*, *Keeton v. Hustler Magazine, Inc.*, 104 S. Ct. 1473, 1478-79 (1984) (New Hampshire courts had jurisdiction over a defendant engaged in sale of magazines in New Hampshire containing allegedly libelous material); *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957) (California courts had jurisdiction over insurer who issued renewal of life insurance policy to California resident).

175. *See, e.g.*, *Calder v. Jones*, 104 S. Ct. 1482, 1486-87 (1984) (article written in Florida injured plaintiff's reputation in California); *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961) (safety valve manufactured in Ohio caused explosion of water heater in Illinois).

176. *See, e.g.*, *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977) (Court required all assertions of state court jurisdiction to be determined in accordance with the minimum contacts analysis of *International Shoe*).

177. *E.g.*, *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). A trust agreement was executed in Delaware by a trust company incorporated in Delaware, and a settlor domiciled in Pennsylvania. An action was subsequently brought in Florida to determine certain rights to part of the corpus of the trust. The contact with Florida relied upon to bring the action there was that the settlor had become domiciled in Florida, and the trustee remitted trust income to her there. This was an insufficient basis for jurisdiction. *Id.* at 252-53.

178. *Id.* at 253.

179. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (defendant automobile retailer in New York was not subject to suit in Oklahoma, even though it was foreseeable

Two recent cases, which illustrate these principles, involved suits by recent law school graduates who, after failing examinations, sued their examiners. In *Burstein v. State Bar*,¹⁸⁰ a Louisiana resident sued the State Bar of California after she failed the bar examination. For tactical reasons,¹⁸¹ she sued in Louisiana instead of California and alleged that Louisiana courts had jurisdiction over the California Bar because: (1) approximately fifty-three members of the California Bar lived in Louisiana; (2) eighty-nine Louisiana law students took the California bar examination; (3) by applying to the California Bar, plaintiff had allegedly entered into a contract with the California Bar in Louisiana; and (4) plaintiff suffered harm in Louisiana.¹⁸² The court, in dismissing the action, held that the California Bar did not have the minimum contacts sufficient for Louisiana courts to exercise jurisdiction over it because there was no action by the California Bar by which it had purposefully availed itself of the privilege of conducting activities in Louisiana, and the only contacts with California were initiated by Louisiana residents.¹⁸³

A somewhat different conclusion was reached by the court in *Hahn v. Vermont Law School*,¹⁸⁴ a case in which a Massachusetts resident sued a law school and a law professor who had given the plaintiff an "F" in a secured transactions course. The court upheld jurisdiction in Massachusetts over the law school, but not over the professor. The court found that the law school had purposefully availed itself of the privilege of conducting activities in Massachusetts by sending application information and an acceptance letter to the plaintiff in Massachusetts and by engaging in a continuous effort, over a number of years, to

that an automobile sold in New York might cause injury in Oklahoma, because the retailer would not reasonably anticipate being sued there). See also Seidelson, *supra* note 165, for a discussion of the jurisdictional limits resulting from *World-Wide Volkswagen*.

180. 693 F.2d 511 (5th Cir. 1982).

181. These tactical reasons were most probably that the plaintiff felt that she would receive more favorable treatment from a Louisiana court than from a California court of which the judge would himself or herself be a member of the California Bar.

182. *Burstein*, 693 F.2d at 518.

183. *Id.* at 520-523. The court expounded further:

The [California] Bar does not go into Louisiana to seek new members; all its contacts with Louisiana are initiated by Louisianans. This bears more of a resemblance to . . . *Hanson* (Delaware trustee merely received instructions from settlor who had moved to Florida; Florida has no personal jurisdiction over trustee) and *Kulko* (father, a New York resident with custody, permitted daughter to live with mother in California; California had no personal jurisdiction over father) than in those [sic] *McGee* (solicitation of insurance contract; personal jurisdiction over insurer) or *International Shoe* (salesmen soliciting orders; personal jurisdiction over seller).

Id. at 522.

184. 698 F.2d 48 (1st Cir. 1983).

recruit students from Massachusetts.¹⁸⁵ The law professor, however, was not subject to the jurisdiction of a Massachusetts court because he had only taught the course in Vermont and had not engaged in any activities in Massachusetts.¹⁸⁶

2. Oklahoma Statutes Relating to Territorial Jurisdiction

The constitutional limits of a state court's territorial jurisdiction are especially important under the Oklahoma Pleading Code because section 2004(F),¹⁸⁷ the Code's long arm statute, permits Oklahoma state courts to exercise jurisdiction on any basis that is consistent with the United States and Oklahoma Constitutions. Oklahoma's prior¹⁸⁸ long arm statutes, replaced by section 2004(F), did not extend to the full reach permitted by due process because they allowed jurisdiction to be asserted over out-of-state defendants only as to claims arising from the defendants' activities that either occurred in Oklahoma or caused injuries in Oklahoma.¹⁸⁹ On the other hand, where the plaintiff's claim arose out of the defendant's contacts with Oklahoma, the Oklahoma Supreme Court construed section 1701.03 of title 12 of the Oklahoma statutes¹⁹⁰ to extend to the limits of due process permitted under the United States Constitution.¹⁹¹

185. *Id.* at 50. The court placed particular emphasis on the fact that the law school's activities in Massachusetts were not isolated, that the Massachusetts students consistently comprised close to ten percent of the school's first-year class, that at least five Massachusetts colleges were visited for the purpose of recruitment, and that a number of the school's advertisements were placed in Boston newspapers. *Id.* at 52.

186. *Id.*

187. OKLA. STAT. tit. 12, § 2004(F) (Supp. 1984) provides: "A court of this state may exercise jurisdiction on any basis consistent with the Constitution of this state and the Constitution of the United States."

188. OKLA. STAT. tit. 12, §§ 187(a) and (b), 1701.3 (1981) (repealed 1984); *id.* tit. 47, § 391.

189. *See, e.g.*, *Lockett v. Bethlehem Steel Corp.*, 618 F.2d 1373, 1386 (10th Cir. 1980) (dictum) (tort action could not be maintained in Oklahoma against a corporation whose only contact with Oklahoma was certain contract negotiations which took place in the State); *George v. Strick Corp.*, 496 F.2d 10, 12 (10th Cir. 1974) (Pennsylvania trailer manufacturer selling tractors in Oklahoma was not subject to suit in Oklahoma where trailer was purchased in New Mexico and injury occurred in New Mexico); *Roberts v. Jack Richards Aircraft Co.*, 536 P.2d 353, 355 (Okla. 1975) (airlines conducting advertising and having telephone listing in Oklahoma City were not subject to suit in Oklahoma, when acts which allegedly gave rise to their liability occurred outside Oklahoma); *see also* Comment, *In Personam Jurisdiction Over Foreign Corporations: The "Arising From" Requirement*, 30 OKLA. L. REV. 602, 614-16 (1977) (criticizes this limitation in the long arm statutes).

190. OKLA. STAT. tit. 12, § 1701.03 (1981) (repealed 1984).

191. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 290 (1980) (citing *Fields v. Volkswagen of Am., Inc.*, 555 P.2d 48 (Okla. 1976); *Carmack v. Chemical Bank N.Y. Trust Co.*, 536 P.2d 897 (Okla. 1975); *Hines v. Clendenning*, 465 P.2d 460 (Okla. 1970)); *Vemco Plating, Inc. v. Denver Fire Clay Co.*, 496 P.2d 117, 119 (Okla. 1972) (Colorado corporation was subject to suit in Oklahoma on claim arising out of its furnishing materials for a furnace in Oklahoma).

Section 2004(F) extends the reach of Oklahoma's long arm statutes by permitting the exercise of jurisdiction over claims *not* arising out of a nonresident defendant's activities in Oklahoma, where the defendant's activities in Oklahoma are continuous and systematic. By extending the reach of jurisdiction, the Code should simplify the analysis used to determine whether a nonresident defendant is subject to suit in Oklahoma. Formerly, both the requirements of due process and the detailed requirements of Oklahoma's long arm statutes had to be taken into account.¹⁹² Under section 2004(F), though, only the requirements of due process will need to be considered.

The procedures for accomplishing service on defendants who are outside of Oklahoma are found in section 2004(E)¹⁹³ and were taken from title 12, sections 1701.01 to 1702.04 of the Oklahoma Statutes,¹⁹⁴ which were part of the Uniform Interstate and International Procedure

192. *Luckett v. Bethlehem Steel Corp.*, 618 F.2d 1373, 1385-87 (10th Cir. 1980); *see supra* notes 187-89 and accompanying text.

193. OKLA. STAT. tit. 12, § 2004(E) (Supp. 1984) provides:

SUMMONS: TERRITORIAL LIMITS OF EFFECTIVE SERVICE.

1. Service of the summons and petition may be made anywhere within this state in the manner provided by subsections C and D of this section.

2. When the exercise of jurisdiction is authorized by subsection F of this section, service of the summons and petition may be made outside this state:

- a. by personal delivery in the manner prescribed for service within this state,
- b. in the manner prescribed by the law of the place in which the service is made for service in that place in an action in any of its courts of general jurisdiction,
- c. in the manner prescribed by paragraph 2 of subsection C of this section,
- d. as directed by the foreign authority in response to a letter rogatory,
- e. in the manner prescribed by paragraph 3 of subsection C of this section only when permitted by subparagraphs a and b of paragraph 3 of subsection C of this section, or
- f. as directed by the court.

3. Proof of service outside this state may be made in the manner prescribed by subsection G of this section, the order pursuant to which the service is made, or the law of the place in which the service is made for proof of service in an action in any of its courts of general jurisdiction.

4. Service outside this state may be made by an individual permitted to make service of process under the law of this state or under the law of the place in which the service is made or who is designated to make service by a court of this state.

5. When subsection D of this section requires that in order to effect service one or more designated individuals be served, service outside this state under this section must be made upon the designated individual or individuals.

6. a. A court of this state may order service upon any person who is domiciled or can be found within this state of any document issued in connection with a proceeding in a tribunal outside this state. The order may be made upon application of any interested person or in response to a letter rogatory issued by a tribunal outside this state and shall direct the manner of service.

b. Service in connection with a proceeding in a tribunal outside this state may be made within this state without an order of court.

c. Service under this paragraph does not, of itself, require the recognition or enforcement of an order, judgment, or decree rendered outside this state.

194. OKLA. STAT. tit. 12, §§ 1701.01-1702.04 (1981) (repealed 1984).

Act. If section 2004(F) permits an Oklahoma court to assert jurisdiction over an out-of-state defendant, section 2004(E) authorizes service in the manner permitted by the law of the place where the defendant is located, or in any manner (including delivery, mail, publication, or as ordered by the court) permitted under the Oklahoma Pleading Code. If the defendant is in a foreign country, service may have to be made in accordance with a letter rogatory from the foreign government or by some other procedure authorized by international law.¹⁹⁵ Thus, the procedures for service on out-of-state defendants will now be quite flexible.

Although service on out-of-state defendants has been designed to be more simple and effective, a nonresident defendant will not be subject to suit in a state solely on the basis of the activities of other persons in the state. What is required to permit the exercise of jurisdiction over a nonresident defendant is activity on the part of the nonresident that is of such a nature and magnitude that the nonresident could reasonably expect to be subject to suit there. Rooted in traditional notions of fair play and substantial justice, the test for territorial jurisdiction is not "simply mechanical or quantitative."¹⁹⁶ Nevertheless, a fairly workable standard for deciding when due process will allow a court to exercise jurisdiction over a nonresident emerges from the many cases dealing with this subject that have been decided by the Supreme Court and other courts.¹⁹⁷

III. SUBPOENAS

Subpoenas are mandates issued under the authority of a court to compel the attendance of witnesses and the production of documents at

195. See *Vorhees v. Fischer & Krecke*, 697 F.2d 574, 575-76 (4th Cir. 1983) (service on West German defendant under the Hague Convention); *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 287-90 (3d Cir.) (discussion of Hague convention), *cert. denied*, 454 U.S. 1085 (1981); *Harris v. Browning-Ferris Indus. Chem. Servs.*, 100 F.R.D. 775, 776-77 (M.D. La. 1984) (document must be translated and direct mail must not be used in serving a West German defendant under the Hague Convention); Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Convention), opened for signing Nov. 15, 1965, in *Service Abroad of Judicial and Extrajudicial Documents*, 20 U.S.T. 361, T.I.A.S. 6638, 658 U.N.T.S. 163 (entered into force for the United States Feb. 10, 1969). Horlick, *A Practical Guide to Service of United States Process Abroad*, 14 INT'L LAW. 637 (1980), is a useful reference. For an additional discussion of the Hague Convention, see Comment, *The Effect of the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, 2 CORNELL INT'L L.J. 125 (1969).

196. *International Shoe Co. v. Washington*, 326 U.S. at 310, 319 (1945).

197. See *supra* notes 165-186 and accompanying text.

trials and depositions.¹⁹⁸ The provisions dealing with subpoenas in the Oklahoma Pleading Code are found in section 2004 and are based on the provisions of rule 45 of the Federal Rules of Civil Procedure. The form of subpoenas, specified in section 2004(J),¹⁹⁹ requires that the subpoena state the name of the court, the title of the action, and the time and place where the witness is required to attend and give his testimony. The subpoena may also describe any books, papers, documents, or tangible things that the witness is required to produce.²⁰⁰ The clerk of the court is authorized to issue blank subpoena forms under the seal of the court, and a party seeking the attendance of a witness must complete the forms before they are served on the witnesses.²⁰¹

Section 2004(L)²⁰² provides that subpoenas may be served by any

198. BLACK'S LAW DICTIONARY 1279 (5th ed. 1979). Technically, a subpoena duces tecum is the type of subpoena used to produce documents within a witness' possession. *Id.* See generally Minnis, *Civil Discovery in Oklahoma Revisited Under the New Code*, 18 TULSA L.J. 173 (1982).

199. OKLA. STAT. tit. 12, § 2004(J) (Supp. 1984) provides:

SUBPOENA FOR ATTENDANCE OF WITNESSES; FORM; ISSUANCE. Every subpoena shall be issued by the clerk under the seal of the court, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified. The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service.

200. OKLA. STAT. tit. 12, § 2004(K) (Supp. 1984) provides:

SUBPOENA FOR PRODUCTION OF DOCUMENTARY EVIDENCE. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may:

1. Quash or modify the subpoena if it is unreasonable and oppressive; or
2. Condition denial of the motion upon the advancement, by the person in whose behalf the subpoena is issued, of the reasonable cost of producing the books, papers, documents, or tangible things.

201. See OKLA. STAT. tit. 12, § 2004(J) (Supp. 1984). See *supra* note 194 for text of § 2004(J). This section is identical to FED. R. CIV. P. 45(a). Moreover, this section "makes no substantive changes in former Oklahoma law except to add provision for issuance of a blank subpoena for the production of documents." OKLA. STAT. ANN., tit. 12, § 2004, Committee Comment to Section 2004 (West Supp. 1984).

202. OKLA. STAT. tit. 12, § 2004(L) (Supp. 1984) provides:

SERVICE. Service of a subpoena upon a person named therein shall be made by delivering or mailing a copy thereof to such person and by tendering to him the fees for one (1) day's attendance and the mileage allowed by law. Service of a subpoena may be accomplished by any person who is eighteen (18) years of age or older. Service of a subpoena by mail may be accomplished by mailing a copy thereof by certified mail with return receipt requested and delivery restricted to the person named in the subpoena. The person serving the subpoena shall make proof of service thereof to the court promptly and, in any event, before the witness is required to testify at the hearing or trial. If service is made by a person other than a sheriff or deputy sheriff, such person shall make affidavit thereof. If service is by mail, the person serving the subpoena shall show in his proof of service the date and place of mailing and attach a copy of the return receipt showing that the mailing was accepted. Failure to make proof of service does not affect the validity of the service, but service of a subpoena by mail shall not be effective if the mailing was not accepted by the person named in the subpoena. Costs of service shall be allowed whether service is made by the sheriff, his deputy, or any other person.

person who is eighteen years of age or older, either by personal delivery or by certified mail with return receipt requested and delivery restricted to the witness.²⁰³ Unlike service of a summons and petition,²⁰⁴ service of a subpoena by mail is effective only if the witness accepts delivery of the subpoena. When the subpoena is served, it must be accompanied by the witness fees for one day's attendance and mileage, as prescribed in section 81 of title 28 of the Oklahoma Statutes.²⁰⁵ Formerly title 12, section 386 of the Oklahoma Statutes²⁰⁶ placed no age limitation on the person serving the subpoena, and title 12, section 391²⁰⁷ provided for payment of witness fees only if the witness demanded them. Section 2004(L) also provides that proof of service must be filed with the court after service is accomplished and before the witness is required to attend. Proof of service must be by affidavit, unless service was made by a sheriff or deputy sheriff, and must include a copy of the return receipt if service was by mail.

The major change achieved by the Oklahoma Pleading Code which affects subpoenas is found in section 2004(N),²⁰⁸ which extends the range of service of subpoenas for trials to the boundaries of the State of Oklahoma. Previously, the range of subpoenas for Oklahoma state courts was limited to the county of residence of the witness, to an adjoining county, or to the county where he was served unless the subpoena was issued by a state governmental entity.²⁰⁹ If the witness is not a resident of the county where the trial is being held, his testimony may also be presented by deposition.²¹⁰ However, the range of subpoenas for depositions is not affected by the Oklahoma Pleading Code and

When the subpoena is issued on behalf of a state department, board, commission, or legislative committee, fees and mileage shall be paid to the witness at the conclusion of the testimony out of funds appropriated to the state department, board, commission, or legislative committee.

203. *Id.*

204. *See supra* note 137 and accompanying text.

205. OKLA. STAT. tit. 28, § 81 (1981). Currently, section 81 provides for an allowance of \$0.15 per mile and daily witness fees of \$5.00 if the witness is required to travel less than sixty (60) miles to attend the trial or deposition, and daily witness fees of \$12.00 if the distance is greater than sixty (60) miles.

206. OKLA. STAT. tit. 12, § 386 (1981) (repealed 1984).

207. *Id.* § 391.

208. OKLA. STAT. tit. 12, § 2004(N) (Supp. 1984) provides:

SUBPOENA FOR A HEARING OR TRIAL. At the request of any party subpoenas for attendance at a hearing or trial shall be issued by the clerk of the district court for the county in which the hearing or trial is held. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within this state.

209. OKLA. STAT. tit. 12, § 390 (1981) (repealed 1984).

210. *Id.* § 3209(A)(3)(b) (Supp. 1984), permits the testimony of a witness who is not a resident of the county where the trial is to be held to be presented by the witness' deposition.

continues to be restricted to the county of residence of the witness, an adjoining county, or the county where the witness is served with the subpoena.²¹¹

The Oklahoma Pleading Code does not specify any time for service of a subpoena, and conceivably, the subpoena could be served on a witness very shortly before he is required to testify at the trial or deposition.²¹² A reasonable lead time should be given the witness, though, to avoid antagonizing him unnecessarily. Moreover, because there may be difficulties in serving the subpoena, the party calling the witness should allow adequate time to make more than one attempt at service.

Unlike subpoenas for trial, which are issued in blank and may be served without any authorization from the court clerk,²¹³ subpoenas for depositions may be issued by the court clerk only after filing with the clerk a proof of service of a notice to take the deposition.²¹⁴ The notice of deposition must state the name and address of the witness, if known, describe any documents to be produced, and be served on the parties to the action in a sufficient period of time before the date of the deposition

211. *Id.* § 3207(B)(1).

212. *But cf.* former OKLA. STAT. tit. 12, § 389 (1981) (repealed 1984) (required service of a subpoena at least three days before trial or deposition).

213. *See supra* note 201 and accompanying text.

214. OKLA. STAT. tit. 12, § 2004(M) (Supp. 1984) provides:

SUBPOENA FOR TAKING DEPOSITIONS; PLACE OF EXAMINATION.

Proof of service of a notice to take a deposition as provided in subsection C of Section 3207 and subsection A of Section 3208 of Title 12 of the Oklahoma Statutes constitutes a sufficient authorization for the issuance by the clerk of the district court for the county in which the deposition is to be taken of subpoenas for the persons named or described therein. Proof of service of the notice may be made by filing, with the clerk of the district court for the county in which the deposition is to be taken, a copy of the notice together with a statement of the date and manner of service and the names of the persons served, certified by the person who made service. A subpoena must be served in the manner provided in subsection L of this section. The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain matters within the scope of the examination permitted by subsection B of Section 3203 of Title 12 of the Oklahoma Statutes, but in that event the subpoena will be subject to the provisions of subsection C of Section 3203 of Title 12 of the Oklahoma Statutes and subsection K of this section.

The person to whom the subpoena is directed may, within ten (10) days after the service thereof or on or before the time specified in the subpoena for compliance if such time is less than ten (10) days after service, serve upon the attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court from which the subpoena was issued. The party serving the subpoena may, if objection has been made, move upon notice to the deponent for an order at any time before or during the taking of the deposition.

See McDowell Ass'n v. Pennsylvania R.R., 20 F.R.D. 219, 220 (S.D.N.Y. 1957) (subpoena directed to deposed party was quashed because he was not named in the notice to take a deposition).

to allow time for travel plus three days for preparation exclusive of the day of service.²¹⁵ Accordingly, all the parties to the action will generally have notice of the deposition before the witness does.

After being served with a subpoena that requires the production of documents or tangible things, the witness may, under section 2004(K), seek a court order before the trial or deposition either to quash or modify the subpoena if it is unreasonable or oppressive,²¹⁶ or to require the party who served the subpoena to pay the reasonable costs of production as a condition to its enforcement.²¹⁷ The witness, who has the burden of proof on the issue of whether the subpoena is unreasonable or oppressive,²¹⁸ should urge the court to evaluate the reasonableness of a document request in a subpoena in light of factors such as "relevance, the need of the party for the documents, the breadth of the document request, the time period covered by it, the particularity with which the documents are described and the burden imposed."²¹⁹ If a subpoena for deposition requiring the production of documents or tangible things is served on a witness, the witness has the option of objecting to the subpoena under section 2004(M) within ten days after its service (or, if the subpoena is served less than ten days before the deposition, at any time before the deposition). Once the witness makes such an objection, section 2004(M) requires the party serving the subpoena to obtain a court order to secure production of the documents or tangible things. Thus, a party seeking production of numerous documents at a deposition by subpoena directed to a nonparty witness should consider serving the subpoena well in advance of the deposition, so that

215. OKLA. STAT. tit. 12, § 3207(C)(1) (Supp. 1984).

216. See, e.g., *Russ v. Ratliff*, 68 F.R.D. 691, 692 (E.D. Ark. 1975) (it was "obstructive" and "oppressive" to require production of information in FBI files concerning an alleged civil rights violation); *Broome v. Simon*, 255 F. Supp. 434, 437 (W.D. La. 1965) (court can modify or quash a subpoena to protect a witness from "annoyance, embarrassment, or oppression" under FED. R. Civ. P. 30(b), 45(b)).

217. See *Republic Prods., Inc. v. American Fed'n of Musicians*, 30 F.R.D. 159, 162 (S.D.N.Y. 1962) (the payment of expenses and fees was an electable alternative to a protective order). See also *Moore v. George A. Hormel & Co.*, 2 F.R.D. 340, 342 (S.D.N.Y. 1942) (discovering party required to pay expenses of opposing party's attorney to attend deposition, including reasonable attorney's fees).

218. See *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 669 F.2d 620 (10th Cir. 1982), in which the court noted that "[a] party seeking to quash a subpoena duces tecum has a particularly heavy burden as contrasted to a party seeking only limited protection." *Id.* at 623. (Citing *Westinghouse Elec. Corp. v. City of Burlington*, 351 F.2d 762, 766 (D.C. Cir. 1965), and *Horizons Titanium Corp. v. Norton Co.*, 290 F.2d 421, 425 (1st Cir. 1961).) Accord *Iowa Beef Processors, Inc. v. Bagley*, 601 F.2d 949 (8th Cir. 1979), cert. denied, 441 U.S. 907 (1979); *Kiblen v. Retail Credit Co.*, 76 F.R.D. 402 (E.D. Wash. 1977).

219. *United States v. IBM Corp.*, 83 F.R.D. 97, 104 (S.D.N.Y. 1979) (subpoena for deposition of IBM's Chairman of the Board).

the deposing party will have time to obtain a court order, if necessary, before the deposition takes place.

Section 2004(O)²²⁰ prescribes contempt of court as the sanction to compel a witness to comply with a subpoena. As a practical matter, citing a witness who disobeyed a subpoena for contempt of court will not aid the party who was deprived of the testimony of the witness. Nevertheless, the contempt sanction generally operates satisfactorily as an *in terrorem* device to compel attendance. Moreover, it is usually advisable to subpoena even friendly witnesses because a party will generally be allowed a continuance of the trial if a witness fails to appear only if he can show that the witness has been served with a subpoena.²²¹

IV. LIS PENDENS²²²

Section 2004(P)²²³ replaced sections 180 and 180.1 of title 12²²⁴ and provides for the giving of constructive notice of an action affecting

220. OKLA. STAT. tit. 12, § 2004(O) (Supp. 1984) provides: "CONTEMPT. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued."

221. *See* Estate of Katschor, 543 P.2d 560 (Okla. 1975), in which the court, in reversing the denial of a continuance to a party who had attempted to serve a subpoena, held:

A continuance based on the absence of a witness or of evidence expected to be given by him is properly refused where the applicant fails to use due diligence to procure the witness or obtain his testimony by deposition. . . . However, the issuance and service of a subpoena on a non-appearing material witness constitutes a sufficient showing of diligence entitling a party needing such testimony to a continuance until it can be secured.

Id. at 562.

222. "Notice of lis pendens" is a "notice filed on public record for the purpose of warning all persons that the title to certain property is in litigation, and that they are in danger of being bound by an adverse judgment." BLACK'S LAW DICTIONARY 840 (5th ed. 1979).

223. OKLA. STAT. tit. 12, § 2004(P) (Supp. 1984) provides:

P. NOTICE OF PENDENCY OF ACTION. Upon the filing of a petition, the action is pending so as to charge third persons with notice of its pendency. While an action is pending, no third person shall acquire an interest in the subject matter of the suit as against the plaintiff's title; except that:

1. Notice of the pendency of an action shall have no effect unless service of process is made upon the defendant within one hundred twenty (120) days after the filing of the petition; and

2. No action pending in either state or federal court shall constitute notice with respect to any real property until a notice of pendency of the action, identifying the case and the court in which it is pending and giving the legal description of the land affected by the action, is filed of record in the office of the county clerk where the land is situated.

224. OKLA. STAT. tit. 12, §§ 180, 180.1 (1981) (repealed 1984). Section 180 provided that third parties were on notice of the pendency of a suit upon the filing of the petition if service was within sixty (60) days of filing. Section 180.1 provided that notice of a pending suit was ineffective until notice was filed in the office of the county clerk. *See generally* Comment, *Annual Survey of Oklahoma Law: New Pendente Lite Provision—Inchoate Judgment Lien*, 3 OKLA. CITY U.L. REV. 356, 388 (1978) (discussion of the ambiguities in § 180.1).

real property by recording a notice with the land records in the county clerk's office for the county where the real property is located. The notice must identify the parties to the action and the court where the action is filed, and also give a legal description of the real property affected by the action. Once the notice of pendency of the action or lis pendens becomes effective, subsequently acquired interests in the property are subject to the rights of the parties to the action as determined by the court. Although a lis pendens is not a lien on real property,²²⁵ the constructive notice provided by the lis pendens serves to subordinate the rights of subsequent purchasers and lienors to the rights of the parties to the action.²²⁶

If service of summons on the defendant is made within 120 days after the filing of the petition, the lis pendens dates from the time it is recorded even if recordation occurred before service of the summons.²²⁷ If the summons is not served within 120 days after the filing of the petition, the lis pendens is not effective until the later of the date of service or the date of recordation of the lis pendens.²²⁸ In addition, if the summons is not served within 120 days after the filing of the petition, the action is subject to dismissal under section 2004(I).²²⁹

V. CONCLUSION

Service of process is the means the law affords for bringing defendants before the court and compelling the attendance of witnesses and production of documents for trials and depositions. Once process has been served in accordance with statutory and constitutional requirements, a court may render a default judgment against a defendant who fails to respond to a summons and petition, or hold a witness who disobeys a subpoena in contempt of the court. This Article has examined the changes made by the Oklahoma Pleading Code in this fundamental area of civil procedure. These changes are designed to simplify the procedures for making service of process so that actions

225. 11 Okla. Op. Att'y Gen. 423, 424 (1979), states in part: "A judgment for money only does not become a lien on realty of judgment debtor unless and until it is duly entered upon the judgment docket of the county in which the real property is located." *Id.* (citing *Knight v. Armstrong*, 303 P.2d 421 (Okla. 1956)).

226. For a thorough discussion of the history and operation of the lis pendens in Oklahoma, see *Astle, An Analysis of the Evolution of Oklahoma Real Property Law Relating to Lis Pendens and Judgment Liens*, 32 OKLA. L. REV. 812, 812-24 (1979).

227. OKLA. STAT. tit. 12, § 2004(P) (Supp. 1984).

228. See *Thompson v. General Outdoor Advertising Co.*, 194 Okla. 300, 305, 151 P.2d 379, 384 (1944); *Shufeldt v. Jefcoat*, 50 Okla. 790, 795-96, 151 P. 595, 597 (1915).

229. OKLA. STAT. tit. 12, § 2004(I) (Supp. 1984). See *supra* note 160 for text of § 2004(I).

can be tried on their merits instead of being decided on the basis of procedural technicalities and, at the same time, to satisfy the requirements of due process guaranteed by the United States Constitution. As a result they warrant careful study by Oklahoma attorneys and judges.