

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 19th day of June, 2012, the following order was made and entered:

RE: Request for Comment on Proposed Amendments to Rules of Practice and Procedure for Domestic Violence Civil Proceedings, Rules 4 and 11

On this day the Court considered proposed amendments to Rule 4 and Rule 11 of the Rules of Practice and Procedure for Domestic Violence Civil Proceedings. This matter is before the Court pursuant to House Bill 2521, which amended W.Va. Code §48-27-311, relating to service of process of protective orders, and W.Va. Code §48-27-701, relating to payment of the fee authorized by Rule 4 of the Rules of Practice and Procedure for Domestic Violence Civil Proceedings to any law enforcement agency that serves the pleadings or orders. In principle part, the amended statute amends the method for service of domestic violence orders when personal service cannot be completed. The amended statute eliminates the requirement for certified or registered mail to the respondent and provides for constructive service of such orders through publication and first class mail. In addition, the amended statute permits any law enforcement agency that serves domestic violence pleadings or orders to receive the fee for this service.

Upon consideration of the proposed amendments, the Court is of the opinion that the proposed amendments should be published for comment for a period of sixty days. Accordingly it is hereby ordered that the proposed amendments be subject to a period of public comment to conclude on Monday, August 20, 2012, with comments to be filed in writing with the Clerk of this Court. Additions to the rules are indicated by underlining, deletions are indicated by strikethrough, as follows:

Rule 4. Fees.

*****(f) Assessment of other costs and fees.** The following fees shall be assessed by the Court when pleadings and orders have been served by ~~the sheriff~~ a law enforcement agency and/or the circuit clerk. For service of process by ~~the sheriff~~ law enforcement the sum of \$25.00 as provided in W. Va. Code §59-1-14. For service of process by the circuit clerk, by certified mail, restricted delivery, return receipt requested, the sum of \$20.00 as provided in Rule 4(d)(1) of the Rules of Civil Procedure.***

Rule 11. Service.

(a) Service of the petition and emergency protective orders or temporary emergency protective order. If the respondent is present at the emergency hearing, the order and petition shall be served by the magistrate or magistrate designee upon the respondent at the conclusion of the hearing. If the respondent is not present at the hearing, the petition and emergency protective order or temporary emergency protective order shall be immediately served by law enforcement. The law enforcement agency shall file the return of service with the circuit clerk within five (5) days of service. If the court finds that personal service by law enforcement has been unsuccessful and continues the scheduled final hearing, the court shall instruct the circuit clerk in the order of continuance to serve the respondent by certified mail, restricted delivery, return receipt requested, to the ~~last~~ most current known address of the respondent. If return of service is not received by the clerk within thirty (30) days or service by mail is unsuccessful, then the court shall continue the final hearing and instruct the circuit clerk to serve the respondent through publication in the ~~last~~ most current known county of residence in accordance with W. Va. Code §48-27-311. Provided however, in the discretion of the court, the respondent may be served by certified mail, restricted delivery, return receipt requested to the most current known address of the respondent and publication simultaneously to expedite the proceeding.

(b) Service of domestic violence protective order. If a party is present at the family court hearing where a domestic violence protective order has been entered, the domestic violence protective order shall be served by the family court judge or the judge's designee upon the party at the conclusion of the final hearing. If a party is not present at the final hearing, then the domestic violence protective order shall be immediately served by law enforcement upon the party who was not present and in the discretion of the circuit clerk, the clerk may serve the respondent by ~~certified~~ first class mail to the most current known address simultaneously to expedite service. The law enforcement agency shall file the return of service with the circuit clerk within five (5) days of service. If the clerk does not receive the return of service from law enforcement within five (5) days of the entry of the order by the court, then personal service of the domestic violence protective order upon a party has been unsuccessful. The party shall be served by the circuit clerk by ~~certified first class mail, and restricted delivery, return receipt requested, to the last known address of the party. If the return of service is not received by the clerk within thirty (30) days or service by mail is unsuccessful, then a party shall be served by the circuit clerk in the last~~ most current known county of residence through publication in accordance with W. Va. Code, §48-27-311.

(c) Service of an order continuing an emergency protective order, an extension of a protective order, an order of contempt of a protective order, an order of modification of a protective order, a petition for the contempt of a protective order, or an order to show cause. An order of contempt of a protective order or order of modification of a protective order shall be served by the family court judge or the judge's designee upon the party at the conclusion of the final hearing. If a party is not present at the final hearing, then the order shall be served by law enforcement as provided herein. An order continuing an emergency protective order, an order extending a protective order for an additional ninety days, and a petition for the contempt or an order to show cause shall be served immediately by law enforcement. The law enforcement agency shall file the return of service with the circuit clerk within five (5) days of service. If the court finds that personal service by law enforcement has been unsuccessful and continues the scheduled hearing, the court shall instruct the circuit clerk to serve the respondent by certified first class mail to the most current known address, ~~restricted delivery, return receipt requested to the last known address of respondent~~. If the return of service is not received by the clerk within thirty (30) days or personal service is unsuccessful by mail, the court shall continue the hearing and instruct the circuit clerk to serve the respondent through publication in accordance with W. Va. Code §48-27-311. Provided however, in the discretion of the court, the respondent may also be served by certified mail, restricted delivery, return receipt requested to the most current known address of the respondent and publication simultaneously to expedite the proceeding.

(d) Service of order terminating protective order or denying a protective order. The order terminating or denying a protective order shall be served on the parties in person by the judge or the judge's designee or by first class mail by the circuit clerk if the parties are not present at the hearing.

(e) Service of notice of automatic extension of protective order. A notice of automatic extension of a protective order shall be served in person by the circuit clerk or the clerk's designee. If a party cannot be served in person by the clerk, then the notice of automatic extension of protective order shall be served immediately by law enforcement and in the discretion of the circuit clerk, the clerk may serve the respondent by certified first class mail to the most current known address simultaneously to expedite service. The law enforcement agency shall file the return of service with the circuit clerk within five (5) days of service. If the clerk has not received the return of service from law enforcement within five (5) days of issuance, the clerk shall serve the respondent by certified first class mail, and restricted delivery, return receipt requested, to the last known address of the respondent. ~~If the return of service is not received by the clerk within thirty (30) days; service by mail is unsuccessful; or the clerk has not received the return of service from law enforcement, the respondent shall be served by the clerk through publication in accordance with W. Va. Code §48-27-311.~~

(f) Service of other documents. Every document other than as provided in this rule shall be served upon each party as follows: if a party is represented by an attorney, service shall be made upon the attorney pursuant to Rule 5(b) of the West Virginia Rules of Civil Procedure. Otherwise, service shall be made by mailing a copy by first class mail to the party's ~~last~~ most current known address.

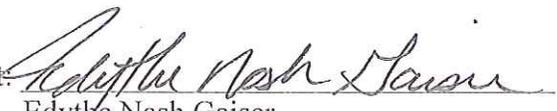
(g) Service by respondent when petitioner's identifying information has been sealed in the file. When the petitioner's address and other identifying information have been sealed in the file pursuant to these rules, and the respondent needs to make service on the petitioner, the respondent shall file any pleadings with the circuit clerk and direct the circuit clerk to make service upon the petitioner. Service shall be made by the circuit clerk if the petitioner's identifying information is sealed in the case file. No court employee shall reveal to anyone other than a court official or law enforcement officer the petitioner's address or other identifying information.

(h) Service allowing direct contact between the parties is strictly prohibited.

(i) Service by law enforcement may properly be accomplished by a process server employed by a sheriff's office, or by a process server employed by a law enforcement agency, both of whom shall provide returns on forms to be provided by the Supreme Court of Appeals and filed with the clerk's office within five (5) days of service.

(j) Out-of-state service is permissible in accordance with Rule 4 of the Rules of Civil Procedure. Provided however, the issuing court shall attempt to obtain personal service on the respondent by contacting the out-of-state law enforcement agency located in the most current known county of residence of the respondent and shall provide the petition and order issued by the court to said out-of-state law enforcement agency for service. If the court finds that personal service by law enforcement has been unsuccessful and continues the scheduled final hearing, the court shall instruct the circuit clerk to serve the respondent by first class mail to the most current known address of the respondent and by publication in the most current known county of residence in accordance with W. Va. Code §48-27-311. Provided however, in the discretion of the court, the respondent may also be served by certified mail, restricted delivery, return receipt requested, to the most current known address of the respondent.

A True Copy

Attest: 
Edythe Nash Gaiser,
Deputy Clerk of Court