

# Service of Process by Certified Mail

by Robert C. Casad

On January 1, 1991, a wholly new method of service of process will be available to Kansas lawyers. The law, which appears as Chapter 202 of the 1990 Session Laws, authorizes the service of both summons and subpoenas by certified mail in Chapter 60 actions as well as in Chapter 61 actions, both inside the state and outside the state. The new provision should greatly simplify the procedure for initiating a lawsuit in Kansas in most kinds of cases.

Before the enactment of these new provisions, Kansas law recognized the service by mail in two different sections of Article 3 of Chapter 60. Service by mail could be made in accordance with §60-307 as an alternative to service by publication in the kinds of cases enumerated in §60-307(a). Such service would not provide personal jurisdiction, however, even if the defendant had contacts with Kansas sufficient to support personal jurisdiction. Service by mail could also be made in accordance with §60-314. Such service could result in personal jurisdiction over a defendant who was a Kansas resident or who had sufficient contacts with Kansas to come under the provisions of the long-arm statute, §60-308(b). However, the "service" by mail under §60-314 was not effective unless the defendant executed a form acknowledging receipt of the summons and petition. If the defendant failed to execute the acknowledgment form, the plaintiff had to serve the defendant by some other means. To encourage defendants to execute and return the acknowledgment, §60-314(b) provided that a defendant who failed to do so, thus necessitating resort to other means of service, should be assessed the costs of the alternate service. The service provisions in §60-314 were borrowed from Federal Rule 4(c) (2) (C) (ii), but unlike the Federal Rule, they could be used outside the state as well as in (§60-308(a) (2) (B) ).

The existence of these two different types of mail service was a source of some confusion. It was the thought of alleviating this confusion as well as generally improving the procedure for serving process that led the Civil Code Advisory Committee of the Kansas Judicial Council to propose the adoption of service by certified mail as an alter-

native form of service for most kinds of actions. Although the law that has resulted differs in some ways from the Advisory Committee's original proposal, its basic structure was retained.

The principal changes brought in by the new law will be seen mainly in §60-303, 304, and 308(e). Section 60-303 is completely rewritten. That section describes the methods of service within the state, other than publication service, which is covered in §60-307. The methods are service by certified mail (§60-303(b)), personal, and residence service (§60-303(c)). Certified mail is the preferred method of service. Personal or residence service is available only on specific written request. The provisions in §60-307 for mail service as an alternative to publication are now eliminated, as is the mail service provision in §60-314.

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Section 60-303 also identifies the persons authorized to effect service under the new law. Since 1986, Kansas law has provided that process can be served by attorneys or specially appointed process servers as well as by sheriffs or their deputies. The new law continues that practice with respect to personal or residence service. With respect to service by certified mail, the Advisory Committee and the Judicial Council recommended providing simply that the attorney for the party seeking service, or the party if not represented by an attorney, should cause a copy of the process and petition to be sent by certified mail, return receipt requested. However, the legislature, for reasons that are not at all clear, saw fit also to empower the sheriff to effect such service, and in so doing added language to the Judicial Council's proposal that is quite confusing, but seems to suggest that service by the sheriff is the preferred method of service by certified mail.

The new §60-303, in pertinent part, reads as follows:

(a) Methods of service of process within this state, except service by publication as provided in K.S.A. 60-307, and amendments thereto, are described in this section. Methods of out-of-state service of process are described in K.S.A. 60-308, and amendments thereto.

(b) Service by certified mail. Except if the attorney for the party or the party, if the party is not represented by an attorney, requests personal or residence service pursuant to subsection (c); if the attorney or the party requesting service elects to serve process by certified mail pursuant to this subsection; as provided in K.S.A. 60-903, 90-906 or 60-1304, and amendments thereto; or as otherwise provided by law, the sheriff shall serve any process by certified mail, evidenced by return receipt signed by any person or by restricted delivery, unless otherwise permitted by this article. The sheriff, attorney for the party seeking service or the party, if the party is not represented by an attorney, shall cause a copy of the process and petition or other document to be placed in an envelope addressed to the person to be served in accordance with K.S.A. 60-304, and amendments thereto, adequate postage to be affixed and the sealed envelope to be placed in the United States mail as certified mail return receipt requested with instructions to the delivering postal employee to show to whom delivered, date of delivery, and address where delivered. The sheriff, party's attorney or the party, if the party is not represented by an attorney, shall execute a return on service stating the nature of the process, the date on which the process was mailed, and the name and address on the envelope containing the process mailed as certified mail return receipt requested. The sheriff, party or the party's attorney shall file the return on service and the return receipt or return envelope in the records of the action. Service of process shall be considered obtained under K.S.A. 60-203, and amendments thereto, upon the delivery of the certified mail envelope. If the certified mail envelope is returned with an endorsement showing refusal of delivery, the sheriff, serving party or the party's attorney shall send a copy of the process and petition or other document to be served to the defendant by ordinary, first-class mail. The mailing shall be evidenced by a certificate of mailing which shall be filed with the clerk. Service shall be considered obtained upon the mailing by ordinary, first-class mail. Failure to claim certified mail service is not refusal of service within the meaning of this subsection.

(c) Personal and residence service. (1) When the plaintiff files a written request with the clerk for service other than by certified mail, service of process shall be made by personal or residence service. . . .

The opening sentence of §60-303(b) is quite confusing. The confusion stems from mixing together in one sentence authorization for and limitations on service by the sheriff and authorization and limitations on service by certified mail. Apparently what the sentence means could be paraphrased in these words:

"The sheriff shall serve any process that is to be served by certified mail unless:

- (a) The attorney for the party or the party elect to serve it by certified mail themselves;
- (b) the attorney (or party) requests personal or residence service in accordance with §60-303 (c);
- (c) certified mail service is not permitted (as it is not in the instances referred to in §60-903, 906 and 3104); or
- (d) some other law prevents service by the sheriff or service by certified mail."

Why an attorney or party would want to have the sheriff rather than an employee of the law firm take the process to the post office and mail it is far from clear. If the attorney

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ney does it, he or she can be assured that the proper steps are taken and that the mail was properly addressed. That control is lacking if the task is turned over to the sheriff. It will make no difference to the defendant if a uniformed sheriff or deputy rather than a law clerk takes the process to the post office. In either case, it is the uniformed postman that actually makes the delivery of the process to the defendant. Accordingly, it seems highly unlikely that the option of having the sheriff mail the process, added to the Judicial Council's proposed bill with such confusing effect, will be used very much in practice.

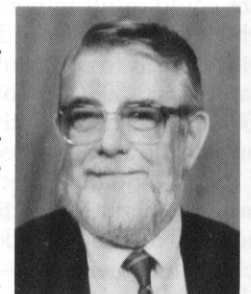
The person effecting the service by certified mail must execute and file a "return on (sic) service" stating the nature of the process, the date on which it was mailed, and the name and address on the envelope containing the process. A form for the return is added in the appendix of forms following §60-269.

Although the certified mail service must be addressed to the defendant, the return receipt does not have to be signed

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by the defendant to make the service effective. The service by certified mail is effective upon delivery of the envelope to the person who signs the return receipt. The return receipt must show to whom the process was delivered, the date of delivery, and the address where delivered. The return receipt is then filed as proof of service. If the return receipt shows that the delivery of the certified mail envelope was refused, the statute authorizes service by sending a copy of the process and petition by ordinary first-class mail. The service in this form will be effective upon mailing. Proof of mailing must be made by a certificate of mailing filed with the clerk of court. A form for the certificate is provided in the appendix of forms.

The statute declares that failure to claim certified mail service is not "refusal of service" such as to permit resort to service by ordinary first-class mail. The original proposal of the Advisory Committee would have authorized service by ordinary first-class mail if the certified mail was either refused or was unclaimed. The Judicial Council, however, eliminated the provision for service by first-class mail after the certified mail has been returned unclaimed. The Council's idea apparently was to require service by some other means, i.e. personal or residence service, if the certified mail is unclaimed. The legislature, however, made another provision for service when certified mail service addressed to the individual's home is unclaimed. In §60-304(a) the following was added to the bill as proposed by the Council.

. . . If service by certified mail to the individual's dwelling house or usual place of abode is refused or unclaimed, the sheriff, party or party's attorney seeking service may complete service by certified mail, restricted delivery, by serving the individual at a business address after filing a return on service stating the certified mailing to the individual at such individual's dwelling house or usual place of abode has been refused or unclaimed and a business address is known for such individual.

This offers the alternative of service by certified mail, restricted delivery, at a business address, if the first attempt at certified mail service addressed to an individual at the individual's home is unsuccessful either because it was refused or was unclaimed. The reference to refused mail is confusing and raises some ambiguity, since §60-303(b) permits service by ordinary first-class mail when certified mail is refused. Since the alternative in §60-304(a) is not mandatory, presumably it will not be used when certified mail service is refused. It will be a possible alternative to personal or residence service, however, when the certified mail service fails because it was unclaimed.

The main function of §60-304 under the new law is to identify the persons upon whom the service can be made in order to acquire jurisdiction over an individual other than a minor or disabled person, over a minor, over a disabled person, over governmental bodies, over corporations and partnerships, etc. In the case of personal or residence service, it identifies the persons to whom process may be delivered. In the case of service by certified mail, it identifies the persons, officers, or agents to whom the mail should be addressed.

Service can be made by certified mail outside the state as well as in. This is provided by a new section, §60-308(e), which tracks very closely the provision of §60-303(b) for certified mail service in the state. The only real difference

is the elimination in §60-308(e) of the alternative of having the sheriff send the certified mail. If certified mail service out-of-state is refused, service can be completed by ordinary first-class mail as in §60-303(b). If the certified mail service is unclaimed, however, out-of-state service will have to be made as provided in §60-308(a)(2), that is, by some officer authorized to make service in the state where the defendant is served.

The postage fees incurred in attempting service under §60-303 and §60-308 are included among the items taxable as costs in §60-2003.

The same provisions for certified mail service are made applicable to limited actions under Chapter 61 by a wholesale rewriting of §61-1803 and major amendments to §61-1805. Appropriate forms for the various returns and certificates are provided in the appendix of forms following §61-2605. An amendment to §60-245(d) makes the new methods of service available for the service of subpoenas as well as summons.

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The legislature was concerned about making certified mail service available in some kinds of cases, and so some specific prohibitions against certified mail service were included in the law. Certified mail cannot be used to invoke jurisdiction in actions under the Protection From Abuse Act (§60-3104(c)). Service of a temporary restraining order (§60-903) must be by personal service. Orders issued under §60-1607(a)(1) and (2) must also be personally served. These are orders issued in divorce proceedings restraining the parties from interfering with the property rights or privacy rights of the other.

The legislature also made a potentially far-reaching amendment to §60-906, apparently because of some concern related to certified mail service. Section 60-906 deals mainly with the scope of an injunction's binding effect. It is copied almost verbatim from Federal Rule of Civil Procedure 65(d). Federal Rule 65, and presumably §60-906, were originally promulgated to make it clear that persons acting in concert or participation with the defendant named in the injunction could be punished for contempt for violations of the injunction, even if they have not been served with process and brought under the court's *in personam* jurisdiction. When Federal Rule 65(d), and presumably K.S.A. §60-906, declared that the injunctive order was binding "upon those persons who receive actual notice of the order by personal service or otherwise," the intent was to "make[ ] it clear that the amenities of original process need not be followed." (11 Wright and Miller, Federal Practice and Procedure §2956 at p. 558 (1973)). The Kansas legislature has now eliminated the words "or otherwise" following "personal service." The apparent effect of this is to drastically limit the binding effect of injunctions on nonparties who may act in concert with an enjoined defendant. Not only are the "amenities of original process" now required, but only one form of service of original process is authorized: personal service.

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This drastic change in the scope of injunctions was definitely not part of the recommendations of the Advisory Committee or the Judicial Council. It is to be hoped that the legislature will act promptly to restore to the judges the power to punish nonparties who actively and with knowledge participate with parties in disobeying injunctions.

All in all, the new provisions should greatly simplify service of process both inside the state and outside the state in Kansas actions. The new Kansas service provisions can also be used in Kansas federal court actions by virtue of Federal Rule of Civil Procedure 4(c) (2)(C)(i).

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