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Civil Procedure: You've Been Served . . . Or Have You?—Jaeger v. Palladium Holdings

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CIVIL PROCEDURE: YOU'VE BEEN SERVED . . . OR HAVE YOU?—*JAEGER V. PALLADIUM HOLDINGS*

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I. INTRODUCTION

In *Jaeger v. Palladium*,[1] the Minnesota Supreme Court adopted a plain meaning construction of the "then residing therein"[2] requirement for substitute service at an individual's usual place of abode,[3] rejecting the nexus test originally advanced by the Minnesota Court of Appeals in *O'Sell v. Peterson*.[4] Under this strict application, a person accepting service on behalf of another must have "lived in the named recipient's place of abode permanently or for an extended period at the time when the process server attempt[ed] service."[5] Additionally, the court struck down the "actual notice exception" to strict compliance with Minnesota Rules of Civil Procedure 4.03(a), holding that substantial compliance with the rule was not sufficient to effectuate service.[6] Accordingly, the court held that a substitute service recipient must be an individual "residing" in the home, even when the intended recipient received prompt actual notice of an action.[7] Utilizing this approach, the court concluded in *Jaeger* that substitute service on a defendant's adult son—who had never lived at the defendant's place of abode—was ineffective.[8]

1. 884 N.W.2d 601 (Minn. 2016).
2. MINN. R. CIV. P. 4.03(a).
3. *See Jaeger*, 884 N.W.2d at 605–06.
4. *Id.* at 606; *see also* O'Sell v. Peterson, 595 N.W.2d 870, 872 (Minn. Ct. App. 1999) ("[T]here must be a nexus between the individual and the defendant that establishes some reasonable assurance that notice would reach the defendant.").
5. *Jaeger*, 884 N.W.2d at 605.
6. *See id.* at 610–11.
7. *See id.* It was unclear whether the court intended for *Jaeger*'s residency requirement to apply to all service rules. *See infra* note 191 and accompanying text.
8. *See Jaeger*, 884 N.W.2d at 608.

This Note begins with a description of rulemaking authority at the federal and state levels.[9] Next, the discussion pivots to an analysis of Due Process and the states' authority to prescribe their own rules of procedure.[10] This Note then introduces service rules under the Minnesota Rules of Civil Procedure,[11] followed by an overview of substitute service[12] and the actual notice exception.[13] The *Jaeger* facts, procedural history, and decision follow.[14] Next, the Note analyzes the *Jaeger* decision, which limited Rule 4 to its plain meaning[15] and rejected the lower courts' use of the actual notice exception.[16] Finally, the Note concludes by proposing an amendment to Minnesota Rule of Civil Procedure 4.03(a) to better meet the Rules' primary goal of securing the "just, speedy, and inexpensive determination of every action."[17]

While supportive of the holding in *Jaeger*, the author is not insensitive to cases in which employing exceptions to the rules may secure a more equitable result. Well-intentioned courts have explicably invoked the actual notice exception while proclaiming a preference for resolving disputes on their merits, as opposed to a mere formality. With that same goal in mind, this Note proposes the addition of a "substantial dominion" provision to Rule 4.03(a) to generate just results without sacrificing a fair and consistent reading of the rules.[18]

9. *See infra* Part II.A.
10. *See infra* Part II.B.
11. *See infra* Part II.C.
12. *See infra* Part II.D.
13. *See infra* Part II.E.
14. *See infra* Part III.
15. *See infra* Part IV.A.
16. *See infra* Part IV.B.
17. *See infra* Part IV.C.
18. *See infra* Part IV.C.

II. HISTORY OF RELEVANT LAW

A. *Separation of Powers: Rulemaking Authority at the Federal & State Levels*

1. Federal Rulemaking

Though the United States Constitution is silent on the issue,[19] Congress has traditionally retained the power to prescribe and regulate rules of federal procedure.[20] The United States Supreme Court has declared this authority to derive from the Necessary and Proper Clause,[21] coupled with Congress's power to establish the lower federal courts.[22] Dating back to the Judiciary Act of 1789, Congress has delegated judicial rulemaking authority to the Supreme Court.[23] This remains true today under the ambit of the Rules Enabling Act.[24] Judicial Conference committees propose and approve new rules and amendments,[25] then transmit the final changes to the Supreme Court.[26] If the Supreme Court returns the amended rules to Congress, the rules take effect on December 1 of

19. 4 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & ADAM STEINMAN, FEDERAL PRACTICE AND PROCEDURE § 1001 (4th ed. 2017); *see* U.S. CONST.

20. WRIGHT, MILLER, & STEINMAN, *supra* note 19.

21. *See* WRIGHT, MILLER, & STEINMAN, *supra* note 19. ("With regard to the national courts, the weight of authority in this country supports the right of Congress to prescribe rules of judicial procedure for the federal courts." (citing U.S. CONST. art. I, § 8, cl. 18 (providing Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States"))).

22. *See* U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); Willy v. Coastal Corp., 503 U.S. 131, 136 (1992).

23. Act of September 24, 1789, ch. 20, § 17, 1 Stat. 73, 83 ("[C]ourts of the United States shall have . . . power to make and establish all necessary rules for the orderly conducting of business in the said courts, provided such rules are not repugnant to the laws of the United States.").

24. *See* 28 U.S.C. § 2072(a) (1990). As amended, the Act provided that "[t]he Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . and courts of appeals." *Id.*

25. 28 U.S.C. § 2073(a)(2) (1994).

26. *See* 28 U.S.C. § 2074(a) (1988).

the same year, unless Congress exercises its veto power.[27] In addition to vetoing proposed rule amendments, Congress may create exceptions to a rule, either by direct amendment or by passing laws to override the rule.[28] For the most part, however, Congress defers judicial rulemaking decisions, often referring proposed changes to the Court or an Advisory Committee.[29]

2. *Minnesota Rulemaking*

The Minnesota legislature has shown its judicial branch a similar amount of deference in relinquishing judicial rulemaking authority. Minnesota's first constitution provided that "[l]egal pleadings and proceedings in the Courts . . . shall be under the direction of the Legislature."[30] In 1947, largely in response to the congressionally enacted Rules Enabling Act,[31] the Minnesota legislature passed its own enabling act, allowing the Minnesota Supreme Court to promulgate rules of civil procedure.[32] Shortly thereafter, the court formed its first advisory rule-drafting committee.[33] Notably, Minnesota's enabling act reserved the legislature's ability to "enact, modify, or repeal any statute or modify or repeal any rule of the supreme court adopted pursuant thereto."[34] The first Rules of Procedure were adopted by the Minnesota Supreme Court in 1951, and took effect on January 1, 1952.[35] In

27. *Id.*

28. *See* Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 559 U.S. 393, 400 (2010) ("Congress . . . has ultimate authority over the Federal Rules of Civil Procedure; it can create exceptions to an individual rule as it sees fit—either by directly amending the rule or by enacting a separate statute overriding it in certain instances.").

29. WRIGHT, MILLER, & STEINMAN, *supra* note 19. *But see* Federal Rules of Civil Procedure Amendments Act of 1982, Pub. L. No. 97-462, § 5, 96 Stat. 2527, 2530 (1983) (amending the Federal Rules of Civil Procedure with respect to service).

30. MINN. CONST. art. VI, § 14 (1857) (repealed 1957).

31. *See supra* note 24 and accompanying text; *see also* Maynard E. Pirsig & Randall M. Tietjen, *Court Procedure and the Separation of Powers in Minnesota*, 15 WM. MITCHELL L. REV. 141, 153 (1989) ("When state courts have undertaken to adopt rules of procedure they have followed the example set on the federal level [by the Enabling Act]. For instance, the Minnesota Legislature passed a similar act in 1947.")

32. 1947 Minn. Laws, ch. 498, §§ 1–8 (approved April 23, 1947); Pirsig & Tietjen, *supra* note 31 at 163.

33. Pirsig & Tietjen, *supra* note 31, at 164.

34. 1947 Minn. Laws, ch. 498, § 8.

35. 1 DAVID F. HERR & ROGER S. HAYDOCK, MINNESOTA PRACTICE, Preface (6th

1957, the Minnesota constitutional provision vesting the legislature with control over "[l]egal pleadings and proceedings" was repealed, leaving the constitution silent on the matter. Because this repeal could evidence an intent to transfer rulemaking power to the judiciary,[36] considerable debate has arisen regarding rulemaking authority and the separation of powers in Minnesota.[37]

Although the Minnesota Supreme Court maintains the power to formulate judicial rules as prescribed by legislative enactment,[38] the court has continually suggested that judicial rulemaking authority is inherent in the Minnesota Constitution.[39] The court has gone so far as to state that "[a]lthough legislative enactments have addressed procedural issues, we have permitted legislative interference with procedural matters *only as a matter of comity*."[40] However, the court has also declared its duty to "exercise great restraint" in analyzing procedural statutes, "particularly when the consideration involves what is a legislative function and what is a

ed. 2017).

36. *But see* Pirsig & Tietjen, *supra* note 31, at 165–66. Notably, the Judiciary Committee had included a rulemaking provision in their drafted revisions of the judiciary article, but it was "mysteriously omitted" from the final report. *Id.* at 166. The Committee's final report then recommended rules be made "as provided by law." REPORT OF THE CONSTITUTIONAL COMMISSION OF MINNESOTA 9 (1948). *But cf.* Pirsig & Tietjen, *supra* note 31, at 166 (noting that the proposed amendment failed to garner support from the legislature and was never submitted to voters).

37. *See* Pirsig & Tietjen, *supra* note 31, at 143 ("[I]t is not settled in Minnesota whether court procedural rulemaking is a power of the judicial or legislative branch, or some combination of the two."); State v. Johnson, 514 N.W.2d 551, 554 (Minn. 1994) (explaining that after the 1956 amendment to the Judiciary Article of the Minnesota Constitution, the legislature no longer has authority to regulate court procedure).

38. MINN. STAT. § 480.051 (2017) ("The Supreme Court of this state shall have the power to regulate the pleadings, practice, procedure, and the forms thereof in civil actions in all courts of this state, including the probate court, by rules promulgated by it from time to time.").

39. *See* Sanchez v. State, 816 N.W.2d 550, 566 (Minn. 2012) ("Minnesota's Constitution grants [the court] inherent authority over the procedures *within* Minnesota's courts." (citing State v. Losh, 721 N.W.2d 886, 891 (Minn. 2006))); *Johnson*, 514 N.W.2d at 554 ("Determination of procedural matters is a judicial function."); State v. Willis, 332 N.W.2d 180, 184 (Minn. 1983) ("[T]he judicial function constitutionally empowers the courts to make their own rules of procedure . . . and this prerogative of the courts to formulate and alter rules of evidence ought not to be doubted.").

40. State v. Lemmer, 736 N.W.2d 650, 657 (Minn. 2007) (emphasis added).

judicial function."[41] The debate is further muddied by the court's willingness to acquiesce to legislative action on rulemaking. For example, in 1987, the legislature passed a bill that altered the order of final arguments in criminal trials.[42] Rather than resisting the statutory amendment, the supreme court modified its rule to comport with the adopted legislation.[43]

Ultimately, the issue regarding which branch of government possesses constitutional authority to promulgate rules of procedure in Minnesota is far from settled. This Note will further analyze the likely outcome of possible amendments to service rules.[44]

B. Service Rules: Comporting with Due Process

Before examining service rules in Minnesota, it is useful to address the concepts of due process[45] and personal jurisdiction,[46] and the role each plays in a state's authority to formulate rules of procedure and methods of service of process.

Due process of law is afforded by the Fifth[47] and Fourteenth[48] Amendments of the United States Constitution. The Due Process Clauses provide the fundamental right to receive adequate notice of an action and the opportunity for an appropriate hearing prior to deprivation of life, liberty, or property.[49] Modern due process law imposes two requirements for personal jurisdiction: (1) a party must

41. *Johnson*, 514 N.W.2d at 554 (citing *Willis*, 332 N.W.2d at 184). *See also* State v. Shattuck, 704 N.W.2d 131, 148 (Minn. 2005) (providing that the legislature has the authority to fix levels of punishment for criminal acts, but that the judiciary authorizes the imposition of a sentence).

42. *See* MINN. STAT. § 631.07 (2017) (granting the prosecution the right to a surrebuttal during closing arguments).

43. *See* MINN. R. CRIM. P. 26.03(11) (1988).

44. *See infra* Part IV.A.2.

45. *See* U.S. CONST. amend. XIV, § 1 ("[N]or shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.").

46. *See generally* CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 1069 (4th ed. 2017) (providing a comprehensive overview and jurisprudential history of personal jurisdiction).

47. *See* U.S. CONST. amend. V (providing protections against deprivations by the federal government).

48. *See* U.S. CONST. amend. XIV, § 1 (expressly prohibiting states from depriving citizens of the right to due process).

49. *E.g.*, Mullane v. Central Hannover Bank & Trust Co., 339 U.S. 306, 313 (1950).

receive adequate notice and be granted an opportunity to be heard, and (2) a sufficient relationship must exist between the party and the forum state.[50] Thus, service of process not only provides advance notice to an individual, but also allows courts to assert personal jurisdiction over a party.[51] Accordingly, when service in a given action is held to be deficient, the case must ordinarily be dismissed for lack of personal jurisdiction.[52] Thus, the adequacy of various prescribed methods of service are central to the issue of due process as it relates to the rules of civil procedure.

The United States Supreme Court declared in *Mullane v. Central Hannover Bank & Trust* that for notice of an action to comport with due process, it must be given in a manner "reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[53] This standard serves as a constitutional minimum resting on the Due Process Clause of the Fourteenth Amendment.[54] The Court has utilized the *Mullane* standard to resolve debates revolving around whether the steps taken or methods prescribed were reasonable.[55]

50. 1 STEVEN S. GENSLER, FEDERAL RULES OF CIVIL PROCEDURE, RULES AND COMMENTARY, Rule 4 (2017); *see also* Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp., 326 U.S. 310, 316 (1945) (setting forth the "minimum contacts" test for personal jurisdiction).

51. *See* Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd., 484 U.S. 97, 104, 108 (1987).

52. *See, e.g.*, Koski v. Johnson, 837 N.W.2d 739, 742 (Minn. Ct. App. 2013) ("Before a . . . court may exercise personal jurisdiction over a defendant, the procedural requirement of service of process must be satisfied [and] [a]bsent proper service of process or a waiver thereof, the district court must dismiss the action." (citation omitted)). *But see* Mercer v. Andersen, 715 N.W.2d 114 (Minn. Ct. App. 2006) (showing an appellate court exercising authority to dismiss the case with prejudice based on the tolling of the statute of limitations despite plaintiff's concession that service of process was insufficient).

53. 339 U.S. 306, 314 (1950).

54. U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property without due process of law."); *see also* Greene v. Lindsey, 456 U.S. 444, 449 (1982).

55. *See* Taylor v. Yee, 136 S. Ct. 929, 929–30 (2016) (holding that California must take reasonably calculated steps to provide notice before escheating property); *see also* Tulsa Prof. Collection Serv., Inc. v. Pope, 485 U.S. 478, 478–79 (1988) (applying the *Mullane* test in holding that Oklahoma's nonclaim statute is not a self-executing statute of limitations, and that the creditor was required to provide notice); Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 799 (1983) (holding that neither publication and posting, nor mailed notice to the property owner, as required by Indiana law, are reasonable means used to notify mortgagee).

Because the Fourteenth Amendment Due Process Clause functions as a constitutional floor,[56] states are free to pass laws that provide greater protection for their citizens.[57] States may prescribe rules of procedure governing service of process, so long as they do not violate the minimum requirements of due process imposed by the Constitution and set forth in *Mullane*.[58] The majority of states, including Minnesota, attempt to mirror the Federal Rules of Civil Procedure.[59] However, plenty of state laws and rules of procedure depart from their federal counterparts—including those authorizing methods of service.[60] These departures are especially significant given the allowance of state-prescribed methods of service in the Federal Rules.[61] Moreover, rather than interpreting a state's service rule or law on their own, federal courts apply the state's highest court's interpretation of the applicable rule.[62] Thus, a state supreme court's administration of service rules carries significant implications for jurisprudence in both state and federal courts.

56. *See Greene*, 456 U.S. at 454–56 (analyzing service methods against the "minimum standards of due process"); *see id.* at 456 (O'Connor, J., dissenting) (addressing what the Fourteenth Amendment requires "[a]t a minimum").

57. *See, e.g.*, Cooper v. California, 386 U.S. 58, 62 (1967) (applying a higher standard for searches and seizures under California law than federal law).

58. *See Greene*, 456 U.S. at 450–51 (providing that states' due process requirements are evaluated against constitutional reasonableness); *Mullane*, 339 U.S. at 312 (noting that requirements "may and do vary from state to state"); *see also* Bloom v. American Exp. Co., 222 Minn. 249, 257, 23 N.W.2d 570, 575 (1946) ("Each state has the right to prescribe by law how its citizens shall be brought into its courts.").

59. *See* 1 DAVID F. HERR & ROGER S. HAYDOCK, MINNESOTA PRACTICE CIVIL RULES ANNOTATED, Rule 1 cmt. § 1.3 (6th ed. 2017) (noting amendments to the Minnesota Rules in 1959, 1968, 1975, and 1985 were made in the wake of similar alterations to the federal rules). *But see id.* (noting that the Minnesota rules departed slightly from the federal rules in the 1990s).

60. *Compare, e.g.*, FED. R. CIV. P. 4, *with* MINN. R. CIV. P. 4.

61. FED. R. CIV. P. 4(e) ("Unless federal law provides otherwise, an individual . . . may be served . . . by . . . following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the court is located or where service is made.").

62. *E.g.*, Hukill v. Okla. Native Am. Domestic Violence Coal., 542 F.3d 794, 797–802 (10th Cir. 2008) (analyzing how the Oklahoma Supreme Court would interpret state law governing mail service); Sommervold v. Wal-Mart, Inc., 709 F.3d 1234, 1236–38 (8th Cir. 2013) (analyzing whether the Supreme Court of South Dakota would extend the substantial compliance doctrine).

C. Minnesota Rules of Civil Procedure

The Minnesota Rules of Civil Procedure are to be "construed and administered to secure the just, speedy, and inexpensive determination of every action."[63] The 1996 amendment of Rule 1 included these goals to conform to its federal counterpart,[64] and applied them to "all aspects of judicial administration."[65] Although the federal courts' interpretations of their own rules are instructive,[66] the Minnesota Supreme Court remains the ultimate authority on the interpretation of the Minnesota Rules.[67] Furthermore, the rules are not to be read in isolation, but "in light of one another . . . according to their purpose."[68] The court has noted at times that unambiguous rules will be interpreted by their plain meaning.[69] Yet, at other times, the court has stated that the rules should be liberally construed to administer justice and to reflect a preference for deciding actions on their merits.[70]

Before examining the specifics of service rules in Minnesota, it is important to note marked differences between the Minnesota and Federal Rules. First, service of process attempted in a manner not prescribed by Minnesota law is typically deemed ineffective.[71] In

63. MINN. R. CIV. P. 1.

64. *Compare id.*, *with* FED. R. CIV. P. 1 (providing that the rules "should be construed, administered, and employed . . . *to secure the just, speedy, and inexpensive determination of every action* and proceeding" (emphasis added)).

65. MINN. R. CIV. P. 1 advisory committee's note to 1996 amendment.

66. T.A. Schifsky & Sons, Inc. v. Bahr Constr., L.L.C., 773 N.W.2d 783, 787 n.3 (Minn. 2009) (citing In re Commodore Hotel Fire & Explosion Case, 318 N.W.2d 244, 246 (Minn. 1982)).

67. *See* MINN. STAT. § 480.051 (2017); Mingen v. Mingen, 679 N.W.2d 724, 727 (Minn. 2004) ("We interpret our rules of civil procedure de novo.").

68. *Mingen*, 679 N.W.2d at 727.

69. Gams v. Houghton, 884 N.W.2d 611, 616 (Minn. 2016); Walsh v. U.S. Bank, N.A., 851 N.W.2d 598, 601 (Minn. 2014); *see also* Rubey v. Vannett, 714 N.W.2d 417, 421 (Minn. 2006).

70. Commandeur, L.L.C. v. Howard Hartry, Inc., 724 N.W.2d 508, 511 (Minn. 2006); Christenson v. Christenson, 281 Minn. 507, 512, 162 N.W.2d 194, 197 (1968).

71. *Compare* Tullis v. Federated Mut. Ins. Co., 570 N.W.2d 309, 311 (Minn. 1997) (holding that attempted service to an occupational therapist of a medical center was improper because the therapist was not a "managing agent" of the center and it was therefore uncertain that the center would receive notice), *with* O'Sell v. Peterson, 595 N.W.2d 870, 872 (Minn. Ct. App. 1999) (finding that service to the stepson of the appellant was proper because the family relationship between the stepson and the appellant established a nexus which created a reasonable assurance the appellant would receive notice).

contrast, federal court service may be completed by following state law in the court where the action is brought, or the state where service is being made.[72] Second, a civil action in Minnesota is commenced (1) when the summons is served upon a defendant; (2) when the defendant acknowledges or consents to alternative means of service; or (3) when the summons is delivered to the county sheriff where a defendant resides.[73] Under the Federal Rules, an action is "commenced by filing [the] complaint with the court."[74] The differences between the two sets of rules can significantly impact procedural issues such as statutes of limitations.[75]

The Minnesota Rules provide several means to effectuate *service on an individual*, which is the primary focus of this Note. The first and most commonly utilized mode of service is called "personal service."[76] Personal service can be completed in one of three ways: (1) by delivering a summons to the individual personally; (2) by leaving a copy at the individual's "usual place of abode" with a "person of suitable age and discretion *then residing therein*" (also referred to as "substituted service");[77] or (3) by serving an agent authorized by statute to accept service on a defendant's behalf.[78] Second, service can be effectuated by mailing a summons and complaint to the defendant, conditioned on the defendant's signing and timely returning the required acknowledgement form.[79] Finally, three weeks' published notice is sufficient as a means of service in

72. FED. R. CIV. P. 4(e)(1).

73. *See* MINN. R. CIV. P. 3.01 (a)–(c).

74. FED. R. CIV. P. 3. Notably, certain statutory procedures in Minnesota provide for commencement upon filing, which are excepted from and take precedent over the rules. *See* MINN. R. CIV. P. app. A.

75. *See* MINN. R. CIV. P. 5.04(a) ("Any action that is not filed with the court within one year of commencement against any party is deemed dismissed with prejudice . . . unless the parties within that year sign a stipulation to extend the filing period.").

76. MINN. R. CIV. P. 4.03.

77. *See, e.g.*, MacLean v. Lasley, 181 Minn. 379, 232 N.W. 632 (1930); *see also* 1 DAVID F. HERR & ROGER S. HAYDOCK, MINNESOTA PRACTICE RULES ANNOTATED, Rule 4.03 cmt. § 4.9 (6th ed. 2017).

78. MINN. R. CIV. P. 4.03(a) (emphasis added). For a list of statutes providing for appointment of an agent for service, see HERR & HAYDOCK, *supra* note 77.

79. MINN. R. CIV. P. 4.05. Unless able to show good cause, a defendant is assessed service costs for failure to timely acknowledge service. *Id.* Cost avoidance provides incentive for a defendant to waive service, though service by mail may be ill-advised when nearing the running of the limitations period. *See* HERR & HAYDOCK, *supra* note 77, Rule 4 cmt. § 4.1.

some circumstances.[80] When publication is permitted, a plaintiff must file an affidavit with the court;[81] but, the Minnesota Supreme Court requires a plaintiff to show "due diligence" in searching for the intended recipient before relying on publication.[82] Moreover, "[b]ecause 'service by publication is in derogation of the common law,' the prescribed requirements for such service 'must be strictly complied with.'"[83] Publication is infrequently used and is a poor method of providing a party with actual notice.[84]

D. Substitute Service

1. Usual Place of Abode

The first requirement for substitute service is that the summons be left at the intended recipient's "usual place of abode."[85] The determination of a person's usual place of abode is a question of fact that is only reversible when clearly erroneous.[86] Additionally, an individual's "usual place of abode" is not necessarily synonymous

80. Rule 4.04(a) of the Minnesota Rules of Civil Procedure provides a list of the five enumerated instances in which publication will be deemed effective with three weeks' published notice.

81. *See id.* ("The affidavit shall state . . . that the affiant believes the defendant is not a resident of the state or cannot be found therein, and either that the affiant has mailed a copy of the summons to the defendant at the defendant's place of residence or that such residence is not known to the affiant.").

82. Van Rhee v. Dysert, 154 Minn. 32, 34–35, 191 N.W. 53, 53–54 (1922); *see* Shamrock Dev., Inc. v. Smith, 737 N.W.2d 372, 377 (Minn. Ct. App. 2007), *rev'd on other grounds* (holding that a search was diligent when a creditor conducted internet and bankruptcy searches, in addition to hiring a private investigator). Notably, this seems to satisfy the federal standard set forth in *Mullane*, which allows publication as a substitute method when it is "not reasonably possible or practicable to give more adequate warning." Mullane v. Central Hannover Bank & Trust Co., 339 U.S. 306, 317 (1950).

83. Shamrock Dev., Inc. v. Smith, 754 N.W.2d 377, 382 (Minn. 2008) (quoting Wilk v. Russell, 173 Minn. 580, 583, 218 N.W. 110, 111 (1928)).

84. 1 DAVID F. HERR & ROGER S. HAYDOCK, MINNESOTA PRACTICE ANNOTATED, Rule 4.04 cmt. § 4.15 (6th ed. 2017); *see* Paul Fling, Note, *Civil Procedure: Notifying Justice: "Reasonable Actual Notice" in Service of Process—DeCook v. Olmstead Medical Center, Inc.*, 43 MITCHELL HAMLINE L. REV. 181, 213–14 (2017) (suggesting that the allowance of electronic methods of publication would more effectively provide notice than traditional publication).

85. MINN. R. CIV. P. 4.03(a).

86. Peterson v. Eishen, 495 N.W.2d 223, 225 (Minn. Ct. App. 1993), *aff'd*, 512 N.W.2d 338 (Minn. 1994).

with the domicile requirement for diversity purposes.[87] Prior to the adoption of the Minnesota Rules of Civil Procedure, a person's usual abode meant one's "fixed place of residence"[88] or "customary dwelling."[89] In *Lovin v. Hicks*, a married man's usual abode was where his wife and family resided.[90] For married men, the *Lovin* standard became the presumption.[91]

In addition to this presumption, the Minnesota Supreme Court considered particular circumstances when determining a person's usual place of abode. In *Murtha v. Olson*, the supreme court reversed the lower court's ruling that a friend's farm, where the defendant kept horses and stayed overnight on occasion, qualified as a "place of usual abode."[92] The Minnesota Supreme Court has continued to employ a similar approach in more recent cases. In *Patterson v. Wu Family Corp.*, service was held ineffective at an individual's parents' home when he had moved to a new permanent residence.[93]

Even so, it is not always clear whether the abode requirement is met. In *Lundgren v. Green*, for example, a defendant had separated from (but not divorced) his wife and purchased a new home, to which he had moved all his individual property.[94] Service was attempted at his wife's house roughly five months after the two separated. The Minnesota Court of Appeals held such service to be

87. *See* Minn. Mining & Mfg. Co. v. Kirkevold, 87 F.R.D. 317, 323–24 (D. Minn. 1980) ("[O]ne's intent to make a state his present and future home . . . is simply a factor of marginal weight in determining whether one's recent former home still amounts to [his] 'usual place of abode' for service of process purposes.").

88. Berryhill v. Sepp, 106 Minn. 458, 459, 119 N.W. 404, 404 (1909). The court went on to note that the term makes "primary reference to the place where the defendant is usually to be found." *Id.* at 459, 119 N.W. at 405. Here, a man's usual abode was not at the residence of his estranged wife and daughter where he had never resided. *Id.* at 460, 119 N.W. at 405.

89. Lovin v. Hicks, 116 Minn. 179, 181, 133 N.W. 575, 576 (1911).

90. *Id.*

91. *Berryhill*, 106 Minn. at 460, 119 N.W. at 405; *see also* Holtberg v. Bommersbach, 236 Minn. 335, 338, 52 N.W.2d 766, 769 (1952) (stating that such a "presumption . . . may be overcome by facts showing the contrary").

92. Murtha v. Olson, 221 Minn. 240, 245, 21 N.W.2d 607, 610 (1946) (holding the evidence insufficient to establish defendant's usual place of abode).

93. 594 N.W.2d 540 (Minn. Ct. App. 1999), *rev'd on other grounds*, 608 N.W.2d 863 (Minn. 2000); *cf.* Walker Emp't Serv. Inc. v. Swanson, 278 Minn. 368, 154 N.W.2d 823 (Minn. 1967) (holding that service was proper when delivered to defendant's wife at a jointly owned home while defendant had left to complete moving arrangements with no intent of returning).

94. 592 N.W.2d 888, 891 (Minn. Ct. App. 1999).

ineffective.[95] The court stated that "most importantly, [the defendant] had no intent to return to live at his wife's house."[96] On the other hand, in *Walker Employment Services, Inc. v. Swanson*, the defendant had moved from the home he shared with his wife in preparation for starting a new job out of state.[97] His wife had stayed behind to complete certain moving arrangements.[98] Though the defendant had no intention to return—as evidenced by his taking all of his personal belongings with him—his former residence remained his "usual place of abode" for purposes of substitute service.[99]

2. Suitable Age and Discretion

The second requirement for substitute service is that the summons be left with a resident of the abode who is of "suitable age and discretion."[100] Satisfaction of this requirement is a question of fact.[101] Prior to the promulgation of the Minnesota Rules of Civil Procedure, attaining fourteen years of age was prima facie evidence of meeting the age and discretion requirements.[102] However, this standard did not provide a *minimum*-age requirement. For example, in *Holmen v. Miller*, the court rejected the notion that a thirteen-year-old was not suitable to accept substitute service as a matter of law, holding that such service was effective.[103] The *Holmen* court distinguished between cases in which a child was the intended

95. *Id.*

96. *Id.*; *accord* Holtberg v. Bommersbach, 236 Minn. 335, 338, 52 N.W.2d 766, 769 (1952). The court did suggest that a person's temporary absence from his or her usual place of abode would not necessarily terminate its designation as such if the person contemplated returning. *Lundgren*, 592 N.W.2d at 891.

97. 278 Minn. 368, 368–69, 154 N.W.2d 823, 824 (1967).

98. *Id.* at 369, 154 N.W.2d at 824.

99. *Id.*

100. MINN. R. CIV. P. 4.03(a).

101. Am. Fed. Sav. Bank v. Peterson, No. C3-88-138, 1988 WL 88534, at *1 (Minn. Ct. App. Aug. 30, 1988).

102. *Compare* Temple v. Norris, 53 Minn. 286, 286, 55 N.W. 133, 133 (1893) (using age as criteria to determine sufficiency of service), *with* Holmen v. Miller, 296 Minn. 99, 105, 206 N.W.2d 916, 920 (1973) (holding that the mere fact that the individual with whom the document was left was only age thirteen as insufficient to render service ineffective); *see also* Van Note v. 2007 Pontiac, 787 N.W.2d 214, 219 (Minn. Ct. App. 2010) ("Absent evidence to the contrary, a person is presumed to be 'as well informed, and as capable' as an ordinary individual of the same age." (quoting *Temple*, 53 Minn. at 288–89, 55 N.W. at 134)).

103. 296 Minn. 99, 105, 206 N.W.2d 916, 920.

recipient of process versus the person with whom process is left on behalf of the intended recipient, noting,

> In the first example, the 13-year-old defendant has a responsibility to read and understand the process and to take appropriate action such as retaining counsel and responding to the process . . . . In the second example, the 13-year-old is merely acting as a conduit for the process . . . [and] does not have to respond personally in any way.[104]

Thus, the court found that it was not necessary for an individual to understand the nature or legal meaning of the process to effectively accept substitute service.[105] The Minnesota judiciary has taken an approach similar to that of the federal courts in its apparent avoidance of imposing a bright line age requirement.[106] Finally, it is important to note that once a plaintiff has submitted evidence of effective service, it is the defendant's burden to demonstrate that the recipient is not of suitable age and discretion.[107]

3. "Then Residing Therein"

The third and final requirement for effective substitute service under Rule 4.03(a) of the Minnesota Rules of Civil Procedure is for the recipient to be "then residing therein."[108] Like the aforementioned requirements, Minnesota courts have treated the residency requirement as a question of fact.[109] In one instance, the Minnesota Court of Appeals held that a person's mere presence at a

104. *Id.* at 104, 206 N.W.2d at 919.

105. *Id.*; *accord* Peterson v. W. Davis & Sons, 216 Minn. 60, 66, 11 N.W.2d 800, 804 (1943) ("It is not necessary that the person upon whom substituted service is made shall understand the legal import of the papers." (citation omitted)).

106. *See, e.g.,* Republic Bank v. Mejia, No. 1:13–CV–150, 2014 WL 3671880, at *2–3 (D. Utah July 23, 2014) (allowing substitute service to be effective if made upon an individual at least fifteen years of age); Perkins v. Johnson, No. 06–cv–01503–REB–PAC, 2008 WL 275768, at *3 (D. Colo. Jan. 29, 2008) (authorizing service on a thirteen-year-old).

107. DeCook v. Olmstead Med. Ctr., Inc., 875 N.W.2d 263, 271 (Minn. 2016); Holmen v. Miller, 296 Minn. 99, 105, 206 N.W.2d 916, 920 (1973); *Am. Fed. Savings Bank*, 1988 WL 88534, at *1.

108. MINN. R. CIV. P. 4.03(a).

109. *See* Shamrock Dev., Inc. v. Smith, 754 N.W.2d 377, 382 (Minn. 2008) (stating that, for purposes of review, factual findings of the district court must be applied unless clearly erroneous); *see also* Walsh v. U.S. Bank, N.A., 851 N.W.2d 598, 607 (Minn. 2014) (noting that the residency requirement was within the "factual assertions" required for substitute service).

property was insufficient for him to be considered a resident; thus, residence was something more than mere presence, but something less than domicile.[110] However, in *O'Sell v. Peterson*, the Minnesota Court of Appeals found a defendant's stepson was residing in the defendant's usual place of abode during a planned, non-custodial visitation.[111] In *O'Sell*, the court looked for "a nexus between the individual and the defendant that establishe[d] some reasonable assurance that notice would reach the defendant."[112] Relying primarily on cases from other jurisdictions, the appellate court noted that a nexus could be established by a variety of factors, such as a relationship of confidence between the parties,[113] the duration and frequency of an individual's presence,[114] and an individual's intent to return to the abode.[115]

Yet, in 2010, the court of appeals rejected the *O'Sell* nexus test for purposes of service in a criminal matter.[116] Though the relevant text of the criminal rule was nearly identical,[117] the court required the substitute service recipient to actually "reside[] in the same abode as the intended party."[118] In its 2014 decision in *Walsh v. U.S. Bank*, the Minnesota Supreme Court remained silent on the appropriateness of the nexus test.[119] Although the court specifically pointed out that residency only requires something more than

110. *Walsh*, 851 N.W.2d at 606; O'Sell v. Peterson, 595 N.W.2d 870, 872 (Minn. Ct. App. 1999) (citing BLACK'S LAW DICTIONARY 1308–09 (6th ed. 1990)).

111. *O'Sell*, 596 N.W.2d at 874.

112. *Id.* at 872.

113. *Id.* (citing Nowell v. Nowell, 384 F.2d 951, 953 (5th Cir. 1967); Plushner v. Mills, 429 A.2d 444, 446 (R.I. 1981); Thompson v. Butler, 243 N.W. 164, 167 (1932)).

114. *O'Sell*, 595 N.W.2d at 873 (citing Sangmeister v. McElnea, 278 So. 2d 675, 676–77 (Fla. Dist. Ct. App. 1973)).

115. *Id.* (citing Holtberg v. Bommersbach, 236 Minn. 335, 338, 52 N.W.2d 766, 768 (1952)).

116. State v. Briard, 784 N.W.2d 421, 430–431 (Minn. Ct. App. 2010).

117. *Compare* MINN. R. CRIM. P. 22.03 (stating that a subpoena may be left with a person "who resides there"), *with* MINN. R. CIV. P. 4.03(a) (stating that summons may be left with a person "then residing therein").

118. *Briard*, 784 N.W.2d at 430. Notably, the court also relied on Minnesota Supreme Court precedent governing residency in a civil case. *See id.* at 431 (citing Heffner v. Gunz, 29 Minn. 108, 109–10, 12 N.W. 342, 342 (1882)).

119. 851 N.W.2d 598, 608 (Minn. 2014) (Gildea, C.J., concurring).

"mere physical presence,"[120] the court twice emphasized that the recipient must be "residing" at the owner's usual place of abode.[121]

Moreover, when the requirements for substitute service are met, the intended recipient need not actually receive the summons for the service to be effective.[122] Accordingly, this lack of an actual service requirement does not guarantee effective service. Therefore, the question remains: What is the appropriate resolution of a case in which a defendant has received prompt actual notice of an action, but the plaintiff has not strictly complied with the necessary service requirements?

E. The Actual Notice Exception

A weighty issue surrounding substitute service in Minnesota centers on whether an exception to strict compliance with service rules exists when a party receives actual notice of an action. The purported exception stems from a 1980 case from the federal district court in Minnesota applying state law, *Minnesota Mining & Manufacturing Co. v. Kirkevold*.[123] There, the court noted that rules governing service should be liberally construed where a defendant has received "prompt actual notice."[124] Though the actual notice exception was not uncommon in other jurisdictions,[125] this case first introduced the exception under the Minnesota Rules.

The court of appeals subsequently adopted the exception in a 1986 decision, *Larson v. Hendrickson*.[126] The Minnesota Supreme Court then stated in a 1988 decision, *Thiele v. Stich*, that "[a]ctual

120. *Id.* at 606.

121. *Id.* (quoting MINN. R. CIV. P. 4.03(a)).

122. *See, e.g.*, MacLean v. Lasley, 181 Minn. 379, 379, 232 N.W. 632, 632 (1930).

123. 87 F.R.D. 317 (D. Minn. 1980).

124. *Id.* at 323.

125. *See* Karlsson v. Rabinowitz, 318 F.2d 666, 668 (4th Cir. 1963) (applying the Federal Rules of Civil Procedure to find that leaving a copy of the summons and complaint at a home in which the defendant's wife still resided, even though the defendant never planned to return, satisfied abode service); Bernier v. Schaefer, 144 N.E.2d 577, 579 (Ill. 1957) (stating that a mailed affidavit lacking details such as place of mailing complied substantially with the rule governing mail notice of certain notices); Liberty Realty, Inc. v. Kenneth Co., 69 A.2d 784, 785 (Md. 1949) (holding that notice substantially complied with the statute despite not following the statute's language).

126. 394 N.W.2d 524, 526 (Minn. Ct. App. 1986) (liberally construing the abode requirement (citing Minn. Mining & Mfg. Co. v. Kirkevold, 87 F.R.D. 317, 323 (D. Minn. 1980))).

notice will not subject defendants to personal jurisdiction absent substantial compliance with Rule 4."[127] *Thiele* became an oft-cited decision for cases concerning substitute service in the Minnesota state courts.[128] Thus, if a plaintiff had demonstrated actual notice and substantially complied with Rule 4, courts would find that the service was effective.[129]

In a recent decision, *Walsh v. U.S. Bank, N.A.*, the Minnesota Supreme Court seemed to embrace a stricter application of Rule 4.[130] The defendant, who had received actual notice, alleged that the recipient who accepted service on his behalf was not a resident of the property, but an occupant.[131] The court declared this averment an adequate challenge to substitute service.[132] The court did not mention substantial compliance, but only noted that "mere physical presence" was insufficient to establish residency.[133] Still, this opinion left the supreme court's stance on the actual notice exception unclear. A recent Minnesota Supreme Court decision, *Jaeger v. Palladium Holdings, LLC*, dispensed with any lingering uncertainties.

III. *JAEGER* DECISION

A. Facts & Procedural History

In August 1997, Stephen Jaeger ("Jaeger") purchased a townhome in the Skyehill Townhomes Association ("Skyehill")

127. 425 N.W.2d 580, 584 (Minn. 1988). The court also noted that this exception is limited to substitute service at a defendant's residence. *Id.*

128. *See* In re Disciplinary Action Against Coleman, 793 N.W.2d 296, 302 (Minn. 2011); Tullis v. Federated Mut. Ins. Co., 570 N.W.2d 309, 311 (Minn. 1997); Koski v. Johnson, 837 N.W.2d 739, 743 (Minn. Ct. App. 2013).

129. *Compare* Smith v. Flotterud, 716 N.W.2d 378 (Minn. Ct. App. 2006) (leaving notice with the defendant's neighbor, who passed it on to the defendant's granddaughter, who then gave it to her mother, who then gave it to the defendant, was not in substantial compliance with service requirements), *with* Van Note v. 2007 Pontiac, 787 N.W.2d 214 (Minn. Ct. App. 2010) (leaving notice at the intended recipient's home with an adult who said she would give it to the intended recipient was substantial compliance).

130. 851 N.W.2d 598 (Minn. 2014).

131. *Id.* at 606–07.

132. *Id.* at 607.

133. *Id.* Notably, the concurrence explicitly called for a restrictive, plain meaning approach to substitute service; *see id.* at 607–09 (Gildea, C.J., concurring) (noting that if Jane Doe was not a roommate of defendant, then service would have been ineffective).

development in St. Louis Park, Minnesota.[134] In 2011, Jaeger began managing a car dealership in Wisconsin.[135] As a result, Jaeger rarely stayed at the property.[136] Jaeger authorized his adult son, J.C., to care for the property in his absence.[137] J.C. visited the townhome approximately twenty to thirty times per year, but had stayed overnight on no more than a few occasions.[138] As caretaker, J.C. could access the property at his pleasure.[139] Additionally, J.C. could receive mail at the property, though this occurred only once.[140] After visiting the townhome, J.C. would contact Jaeger to notify him that the property was in good condition.[141]

In May 2010, Jaeger became delinquent on his dues to Skyehill.[142] Skyehill obtained a lien on the property, and subsequently foreclosed by advertisement.[143] Upon purchasing the property at the foreclosure sale, Skyehill assigned the Certificate of Sale to Franklin Financial, LLC ("Franklin").[144] Jaeger failed to redeem the property within six months, and Franklin transferred the property to Palladium Holdings, LLC ("Palladium").[145] Eviction proceedings concluded in February 2013.[146]

Jaeger then brought an action for declaratory judgment, asserting that the foreclosure was void for ineffective service.[147] The record demonstrated that a process server had attempted to serve

134. Jaeger v. Palladium Holdings, L.L.C., 884 N.W.2d 601, 603 (Minn. 2016).

135. *Id.*

136. Jaeger v. Palladium Holdings, L.L.C., No. A14-0803, 2015 WL 1513982, at *1 (Minn. Ct. App. Apr. 6, 2015), *aff'd as modified*, 884 N.W.2d 601 (Minn. 2016). According to Jaeger, he visited the Twin Cities twice per month and stayed at the townhome fewer than twenty times over a span of three years. *Id.* at 601.

137. *See Jaeger*, 884 N.W.2d at 603. J.C.'s caretaking duties included activating the home's heating and air-conditioning systems, running the water, and various other maintenance jobs. *Id.*

138. *Id.*

139. *See id.* (noting that J.C. had a garage-door opener and could "visit the property at anytime").

140. *Id.* (stating that J.C. once received a motor-vehicle registration at the property for a vehicle jointly registered under J.C.'s and Jaeger's names).

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*; *see also* MINN. STAT. § 580.03 (2014) (mandating that service as required in a civil action must occur at least four weeks prior to sale).

J.C. at the townhome.[148] The district court determined the attempted service to be ineffective.[149] The court adopted a strict interpretation of Minnesota Rule of Civil Procedure 4.03(a) based on its finding that Jaeger had not received actual notice of the foreclosure.[150] Under this application, J.C. was not "residing" on Jaeger's property[151]—a requirement for substitute service.[152] The district court ruled that the foreclosure sale was thereby void and awarded the property to Jaeger.[153]

The Minnesota Court of Appeals affirmed the district court's ruling in a two to one decision.[154] Because a defendant's receipt of actual notice suggested the fulfillment of due process, the appellate court noted that substantial compliance with the rules governing substitute service was sufficient.[155] However, the appellate court confirmed the finding that Jaeger did not receive actual notice, meaning that strict compliance was required.[156] The court stated that actual notice was "the determinative factor regarding whether the rule requires strict or substantial compliance."[157]

Conversely, the dissent argued for the application of a "functional" approach to substitute service, whereby service need only give a "reasonable assurance" of notice reaching the intended recipient.[158] Instead of strictly construing the residency requirement, the dissent would have inquired if a "sufficient nexus" existed

148. *Jaeger*, 884 N.W.2d at 603. The individual who accepted service signed "J.C. Jaeger," and the process server's standard practice was to ask whoever answers the door whether they live in the residence. *Id.*

149. *Id.* at 604. The district court determined that service to Jaeger's son did not constitute a valid method of substitute service. *Id.*

150. *Id.* The court empaneled an advisory jury to resolve the factual dispute regarding whether Jaeger had indeed received actual notice. *Id.* at 603.

151. *Id.* (quoting MINN. R. CIV. P. 4.03(a)).

152. *See* MINN. R. CIV. P. 4.03(a) (requiring an individual to be served either personally or by "leaving a copy at the individual's usual place of abode with some person . . . then residing therein").

153. *Jaeger*, 884 N.W.2d at 603.

154. *See* Jaeger v. Palladium Holdings, L.L.C., No. A14-0803, 2015 WL 1513982 (Minn. Ct. App. Apr. 6, 2015).

155. *Id.* at *1–2 (citing O'Sell v. Peterson, 595 N.W.2d 870, 873 (Minn. Ct. App. 1999)).

156. *Id.* at *3.

157. *Id.* (citing Koski v. Johnson, 837 N.W.2d 739, 743 (Minn. Ct. App. 2013); *see also* Van Note v. 2007 Pontiac, 787 N.W.2d 214, 219 (Minn. Ct. App. 2010); Larson v. Hendrickson, 394 N.W.2d 524, 526 (Minn. Ct. App. 2010)).

158. *Id.* at *5 (Connolly, J., dissenting) (citing *O'Sell*, 595 N.W.2d at 872).

between the intended recipient and individual who was served on their behalf.[159] Here, the dissent felt that J.C's caretaking responsibilities at the property and his frequent contacts with Jaeger demonstrated a "nexus."[160] Despite advocating for a less stringent service standard, the dissent seemed to oppose an actual notice exception to the residency requirement.[161]

B. Minnesota Supreme Court's Decision

On appeal, the Minnesota Supreme Court affirmed the lower courts' decisions.[162] The court noted two statutory notice requirements in foreclosure-by-advertisement proceedings: (1) "publication of the foreclosure sale at least [six] weeks" prior to its occurrence; and (2) service of the published noticed in the manner required in a civil action "upon the person in possession of the mortgaged premises."[163] Jaeger did not dispute that Skyehill met the publication requirement.[164] Rather, Jaeger maintained that Skyehill had failed to comply with Rule 4.03(a) of the Minnesota Rules of Civil Procedure.[165] Jaeger asserted that J.C. was not "then residing" at the property.[166] Central to the court's analysis were (1) the construction and application of the residency requirement and (2) the court's position on the purported actual notice exception.[167]

First, the court employed a plain meaning approach in determining that "then residing therein" required a person accepting service to "have lived in the named recipient's place of abode . . . for an extended period at the time when the process server attempted service."[168] The court noted that although no definitive test for residency existed, "a person's mere physical presence at the owner's usual place of abode" was insufficient for a party to accept

159. *Id.*

160. *Id.* at *6.

161. *Id.* ("[T]he effectiveness of substitute service is not, and cannot be, based on what the resident chooses to do with the document . . . actual notice is neither necessary to nor dispositive of the effectiveness of substitute service.").

162. Jaeger v. Palladium Holdings, L.L.C., 884 N.W.2d 601, 611 (Minn. 2016).

163. *Id.* at 604 (citing MINN. STAT. § 580.03 (2010)).

164. *Id.*

165. *Id.*; *see* MINN. R. CIV. P. 4.03(a).

166. *See Jaeger*, 884 N.W.2d at 604–05 (quoting MINN. R. CIV. P. 4.03(a)).

167. *See id.* at 606.

168. *Id.* at 605.

substitute service.[169] In adopting this approach, the court struck down the "functional" definition of residency—argued for by the appellate court's dissent[170] and originally advanced in *O'Sell v. Peterson*.[171] The court refuted *O'Sell* as disregarding the principle that due process provides a "constitutional floor" that states may exceed by adopting their own rules of procedure.[172]

Next, the court turned to the adequacy of Skyehill's substitute service on J.C.[173] The court found insufficient evidence that the district court's finding that J.C. was not "then residing" at the property was clearly erroneous.[174] Though J.C. was "more than just physically present at the townhome," there was no evidence that he had ever lived there.[175] Thus, the attempted substitute service was held ineffective under the adopted standard.[176]

Finally, the most significant piece of the court's opinion came in dicta.[177] Though the court of appeals' decision was affirmed, the supreme court disagreed with the appellate court's emphasis on whether Jaeger received actual notice of the foreclosure.[178] The court stated that actual notice was immaterial for purposes of rule

169. *Id.* at 605–06 (quoting Walsh v. U.S. Bank, N.A., 851 N.W.2d 598, 606 (Minn. 2014)).

170. *Id.* at 604 (citing Jaeger v. Palladium Holdings, L.L.C., No. A14–0803, 2015 WL 1513982, at *5 (Minn. Ct. App. Apr. 6, 2015) (Connolly, J., dissenting)).

171. 595 N.W.2d 870, 872 (Minn. Ct. App. 1999). In discussing whether an individual is "then residing therein" as required by Rule 4.03(a), the *O'Sell* court reasoned that "there must be a nexus between the individual and the defendant," establishing a "reasonable assurance" that the defendant will receive the notice. *Id.* Factors demonstrating a nexus include the parties' relationship, the duration and frequency of the served individual's presence, and an intent to return to the property. *Id* at 872–73.

172. *See Jaeger*, 884 N.W.2d at 606 (explaining that the starting point for the analysis is the text of Rule 4.03(a), as opposed to the constitutional question of due process that *O'Sell* analyzed).

173. *See id.* Whether service was effective is a question of law, while an individual's residency presents a question of fact. *Id.* at 606–07.

174. *Id.* at 607.

175. *Id.* Notably, Palladium conceded that J.C. lived roughly a mile down the road at oral argument. *Id.* at 608.

176. *Id.*

177. *See id.* (stating that Jaeger did not receive actual notice, so the exception was immaterial).

178. *Id.*; *see* Jaeger v. Palladium Holdings, L.L.C., No. A14–0803, 2015 WL 1513982, at *3 (Minn. Ct. App. Apr. 6, 2015); Van Note v. 2007 Pontiac, 787 N.W.2d 214, 219 (Minn. Ct. App. 2010) ("[S]ubstantial compliance with rule 4 is sufficient to effect service of process whe[n] the intended recipient has actual notice.").

compliance.[179] Rather, courts interpret service rules by their plain language, regardless of actual notice,[180] and statutory service requirements must be strictly followed.[181]

The court bolstered its position with a construction argument, noting that "[b]y using the word 'shall' to describe its requirements, Rule 4.03 mandates strict compliance with its terms."[182] The court did acknowledge *Thiele*, which suggested that substantial compliance was sufficient when a party received actual notice.[183] However, the court rejected such an application of *Thiele*, noting that the relevant language was dicta and therefore descriptive, rather than prescriptive, in nature.[184] Furthermore, whether there was strict or substantial compliance was immaterial to *Thiele*'s outcome, and, therefore, nonbinding.[185] Instead, the court indicated that its 1930 holding, *MacLean v. Lasley*,[186] was controlling in its decision.[187] The court noted that *MacLean* predated the Minnesota Rules of Civil Procedure, but found this distinction to be unimportant.[188] Accordingly, the court stated that "substitute service is subject to strict compliance regardless of the circumstances."[189]

179. *Jaeger*, 884 N.W.2d at 609 (citing MacLean v. Lasley, 181 Minn. 379, 380, 232 N.W. 632, 632 (1930)).

180. *Id.* (citing Melillo v. Heitland, 880 N.W.2d 862, 864 (Minn. 2016); Shamrock Dev., Inc. v. Smith, 754 N.W.2d 377, 383 (Minn. 2008)).

181. *Id.* (citing Berryhill v. Sepp, 106 Minn. 458, 460, 119 N.W. 404, 405 (1909); In re Skyline Materials, Ltd., 835 N.W.2d 472, 477 (Minn. 2013)).

182. *Id.* (quoting MINN. R. CIV. P. 4.03).

183. *Id.* at 610; *see* Thiele v. Stich, 425 N.W.2d 580, 584 (Minn. 1980) ("Actual notice will not subject defendants to personal jurisdiction absent substantial compliance with Rule 4.").

184. *Jaeger*, 884 N.W.2d at 610 ("By using words such as 'may' and 'recognized' to describe the exception, we were . . . not determining that such an exception actually existed.") (quoting *Thiele*, 425 N.W.2d at 584)).

185. *See id.* at 610–11 ("In [*Thiele*], it made no difference whether we evaluated the service for strict or substantial compliance because, under either approach, the service was ineffective." (citing *Thiele*, 425 N.W.2d at 584)).

186. 181 Minn. 379, 380, 232 N.W. 632, 632 (1930).

187. *See Jaeger*, 884 N.W.2d at 609 ("[T]here is no reason to treat substitute service under Rule 4.03(a) any differently than we did in *MacLean*."); *MacLean*, 181 Minn. at 380, 232 N.W. at 632 ("In making such substituted service there must be a strict compliance with the statute. The necessity of the statutory service is not dispensed with by the mere fact that defendant may in some way learn of the existence of the papers and an attempted service.").

188. *Jaeger*, 884 N.W.2d at 609.

189. *Id.*

It is not precisely clear how broad the court intended its ruling; namely, if the decision applies to all rules of service.[190] However, *Jaeger* unequivocally required a strict compliance with Rule 4.03(a) of the Minnesota Rules of Civil Procedure, thus rejecting the actual notice exception.

IV. ANALYSIS

A. Jaeger's *Limitation of Minnesota Rules of Civil Procedure 4.03(a) Comports with Plain Meaning*

Minnesota Rules of Civil Procedure 4.03(a) states that service of a summons may be completed "[u]pon an individual by delivering a copy to the individual personally or by leaving a copy at the individual's usual place of abode with some person of suitable age and discretion *then residing therein*."[191] The Minnesota Supreme Court appropriately limited the application of Rule 4.03(a) to its plain meaning by requiring actual residency for substitute service.[192] Because the Minnesota Supreme Court possesses the power to regulate rules of procedure,[193] the court can amend the rules to achieve desired practical results, as opposed to departing from their plain meaning. Moreover, restricting Rule 4.03(a) to its plain meaning best comports with jurisprudence surrounding its federal counterpart.[194]

190. *Compare id.* ("[W]e have interpreted *service rules* in accordance with their plain language regardless of whether the intended recipient has received actual notice of the action . . . . [W]e have also long held that '*service* must accord strictly with statutory requirements.'" (emphasis added) (quoting Berryhill v. Sepp, 106 Minn. 458, 459, 119 N.W. 404, 404 (1909))), *with id.* ("Accordingly, because *substitute service* is subject to strict compliance regardless of the circumstances, it is irrelevant whether the intended recipient receives actual notice of the action." (emphasis added)).

191. MINN. R. CIV. P. 4.03(a) (emphasis added).

192. *See Jaeger*, 884 N.W.2d at 605 (citing State v. Brown, 792 N.W.2d 815, 822 (Minn. 2011)).

193. MINN. STAT. § 480.051 (2017); *see, e.g.*, State v. Willis, 332 N.W.2d 180, 184 (Minn. 1983) (explaining that the legislature has acknowledged the Supreme Court's authority to regulate evidentiary matters). *But see* REPORT OF THE CONSTITUTIONAL COMMISSION OF MINNESOTA, *supra* note 36 and accompanying text.

194. *See, e.g.*, Waldner v. N. Am. Truck & Trailer, Inc., 277 F.R.D. 401, 416 n.3 (D.S.D. 2011) (finding service upon a cleaning person at a defendant's property was improper because she did not reside there).

1. The Minnesota Supreme Court has the Authority to Amend Rules of Procedure, and Should Therefore Restrict Service Rules to Their Plain Meaning

First, just as the legislature may repeal or amend laws, the Minnesota Supreme Court possesses the power to amend its rules.[195] Therefore, no compelling reasons exist why a rule governing substitute service—free from ambiguity—should be interpreted differently than a statute, which is interpreted by its plain meaning.[196] There are few Minnesota Supreme Court cases definitively ruling on rule construction. *Vandenheuvel v. Wagner*, however, stated that rules should be interpreted like "statute[s] . . . taken and construed in the sense in which they were understood and intended at the time the rule was promulgated."[197] On the other hand, the court has instructed that the rules be liberally construed to effectuate their purpose of "secur[ing] the just, speedy, and inexpensive determination of every action."[198]

In light of its authority over the rules, the court has even greater reason to adhere to plain meaning when interpreting the rules than when tasked with statutory interpretation. For example, when interpreting a statute, the court might occasionally be faced with two options: (1) interpreting a statute by its plain meaning, thereby applying the statute in an unjust manner; or (2) finding some legitimate means to depart from the plain meaning to avoid a miscarriage of justice.[199] If the court selected the first option, it would have no assurance that the legislature would later repeal or amend the statute to remedy its defects. Moreover, the court's interpretation of the statute could potentially carry greater consequences than it had originally anticipated. Thus, a pragmatic court might choose the second option, construing a statute in a

195. *See* § 480.051 (providing that the supreme court has "the power to regulate . . . civil actions . . . by rules promulgated by it from time to time").

196. *See, e.g.*, Am. Tower, L.P. v. City of Grant, 636 N.W.2d 309, 312 (Minn. 2001).

197. Vandenheuvel v. Wagner, 690 N.W.2d 753, 755 (Minn. 2005) (quoting House v. Hanson, 245 Minn. 466, 473, 72 N.W.2d 874, 878 (1955)).

198. Kornberg v. Kornberg, 542 N.W.2d 379, 384 (Minn. 1996) (quoting MINN. R. CIV. P. 1); Christenson v. Christenson, 281 Minn. 507, 512, 162 N.W.2d 194, 197 (1968) (quoting MINN. R. CIV. P. 1)).

199. *See, e.g.*, State v. Vill. of Pierz, 241 Minn. 37, 41–43, 62 N.W.2d 498, 501–02 (1954) (inferring legislative intent and departing from a revised statute's plain meaning because the statute was "not so unambiguous that there [was] no room for judicial construction").

manner that may appear to circumvent its plain meaning. Of course, the legislature may then attempt to paper over the court's decision. However, a new bill or repeal must garner the requisite political support for enactment,[200] and little assurance exists of successful passage through both houses.[201] A court could thus be particularly motivated to depart from statutory plain meaning to eschew continued or future injustice.[202]

Conversely, when interpreting its rules of procedure, the Minnesota Supreme Court has far less reason to depart from plain meaning. While the court may be faced with an undesirable application of its rules in some instances, the court is not without the tools to later remedy that which it considers unjust.[203] The court need not consider the potential action or inaction of a coordinate governmental branch when attempting to administer a fair and just interpretation of its rules.[204] Instead, given its authority to both prescribe and interpret rules of procedure, the court should grant compliance an even greater weight when deciding what is a "just . . . determination."[205] Additionally, instead of departing from a rule's clear and ordinary meaning,[206] the court should strive to remedy defective rules through the amendment process, thereby giving

200. *See* MINN. CONST. art. IV, §§ 22–23 (requiring a majority approval from each house for passage, subject to executive veto, upon which two-thirds approval would be needed for passage).

201. *See Number of Bills Introduced and Laws Passed in the Minnesota Legislature, 1849–Present*, MINN. LEGISLATIVE REFERENCE LIBRARY, https://www.leg.state.mn.us/lrl/history/bills (last visited Oct. 3, 2017). For example, among the 1653 house and 1415 senate measures introduced during the eighty-ninth legislative session (2016), just 107 laws were enacted. *Id.*

202. Am. Family Ins. Grp. v. Schroedl, 616 N.W.2d 273, 278 (Minn. 2000) ("[C]ourts should construe a statute to avoid absurd results and unjust consequences."); Erickson v. Sunset Mem'l Park Ass'n, 259 Minn. 532, 543, 108 N.W.2d 434, 441 (1961) ("The general terms of a statute are subject to implied exceptions founded on rules of public policy and the maxims of natural justice so as to avoid absurd and unjust consequences.").

203. *See* MINN. STAT. § 480.051 (2017).

204. *But cf. id.* (statutory authorization of rulemaking power to the Minnesota Supreme Court could allow for an inference that the legislative branch possesses rulemaking authority). Of course, this point is far from settled. *See* discussion *supra* Part II(A)(2). In any event, the state legislature has shown substantial deference to the supreme court regarding its interpretation of Rule 4. *See* discussion *infra* Part IV.A.3.

205. MINN. R. CIV. P. 1.

206. *See* discussion *infra* Part IV.A.2. (recounting the federal courts' amorphous construction of the Rule 4 residency requirement).

parties fair and clear notice of correct procedure. Proactive measures to provide such clarity—such as conveying the court's intended application in the plain meaning of the rules—would facilitate justice, a guiding principle of "all aspects of judicial administration."[207]

2. *Federal Jurisprudence Governing Substitute Service Supports a Plain Meaning Interpretation of Minnesota Rules of Civil Procedure 4.03(a)*

Next, the plain meaning of residency—as opposed to a nexus test[208]—is supported by the federal courts' treatment of substitute service requirements. As noted in *Patterson v. Wu Family Corp.*, "[w]here [Minnesota] rules of procedure parallel the federal rules, 'federal cases interpreting the federal rule are helpful and instructive but not necessarily controlling' on . . . interpretation of the state counterpart."[209] The federal rule governing abode service is nearly identical to Minnesota's rule.[210] Thus, the federal courts' interpretation of "resides there" is helpful in assessing the appropriate interpretation of Minnesota Rules of Civil Procedure 4.03(a).[211]

Federal courts' general attitude toward Rule 4's construction is accurately reflected by an excerpt from the Fifth Circuit's opinion in *Nowell v. Nowell*:

> [Rule 4(d)(1)] should be broadly construed where the defendant, as in this case, received notice of the suit. This rule of construction is, of course subject to the limitation that the construction of the statute's language must be a natural rather than an artificial one . . . . [T]he

207. MINN. R. CIV. P. 1 advisory committee's note to 1996 amendment.

208. *See* cases cited *supra* notes 111–16.

209. 608 N.W.2d 863, 867 n.4 (Minn. 2000) (citing Johnson v. Soo Line R.R. Co., 463 N.W.2d 894, 899 n.7 (Minn. 1990)).

210. *Compare* FED. R. CIV. P. 4(e)(2)(B) (authorizing service on an individual "of suitable age and discretion *who resides there*" (emphasis added)), *with* MINN. R. CIV. P. 4.03(a) (authorizing service on individual "of suitable age and discretion *then residing therein*" (emphasis added)).

211. *See* 4A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & ADAM N. STEINMAN, FEDERAL PRACTICE AND CIVIL PROCEDURE § 1096, n.33 (4th ed. 2017) (noting that prior to a 2007 restyling revision, Rule 4(2)(B) also used the language "then residing therein"); FED. R. CIV. P. 4 advisory committee's note to 2007 amendment (disclosing that the amendments were "intended to be stylistic only").

> practicalities of the particular fact situation determine whether service meets the requirements.[212]

This approach has led to a muddled history of jurisprudence governing the residency requirement set forth by Federal Rule of Civil Procedure 4. Still, analysis of the relevant decisional law is helpful. Notably, federal district courts have overwhelmingly held that attempted substitute service is ineffective when made on cleaning persons and housekeepers who do not *actually reside* at a property.[213]

Conversely, support exists for the sufficiency of substitute service made on maids or cleaning persons who *do* live at a defendant's abode,[214] thus lending great weight to *Jaeger*'s emphasis on actual residency.[215] Still, federal courts have taken varied approaches when faced with different scenarios. For example, a property manager, living in a separate building within the same apartment complex as the defendant, was held to be residing at the defendant's abode.[216] Such an application would seemingly fail under the *Jaeger* standard. Conversely, another federal court found abode service to be ineffective when made on a defendant's adult daughter who lived in the same apartment building.[217]

More perplexing still, some federal courts have found doormen of apartment complexes to qualify as residing at a defendant's abode

212. 384 F.2d 951, 953 (5th Cir. 1967).

213. *See* Waldner v. N. Am. Truck & Trailer, Inc., 277 F.R.D. 401, 416 n.3 (D.S.D. 2011) (finding service upon a cleaning person at a defendant's property was improper because she did not reside there); Klopas v. Fieldsheer Team Sports, Inc., No. 98 C 7427, 1999 WL 519299, at *2 (N.D. Ill. July 16, 1999) (holding that a part-time housekeeper working in a defendant's home was not residing therein); Polo Fashions Inc. v. B. Bowman & Co., 102 F.R.D. 905, 907–08 (S.D.N.Y. 1984) (holding a housekeeper not living at the property was not residing therein); Franklin Am., Inc. v. Franklin Cast Prods., Inc., 94 F.R.D. 645, 647 (E.D. Mich. 1982) ("[A] part-time housekeeper who did not live in the [defendant's] home . . . cannot be deemed to have been 'residing therein' without placing an artificial construction on the language of the rule.").

214. *See, e.g.*, Smith v. Kincaid, 249 F.2d 243 (6th Cir. 1957); Barclays Bank of N.Y. v. Goldman, 517 F. Supp. 403 (S.D.N.Y. 1981).

215. *See* Jaeger v. Palladium Holdings, L.L.C., 884 N.W.2d 601, 606–08 (Minn. 2016) (spending a considerable amount of time confirming that the son lived about a mile away and did not live at his father's property).

216. *Nowell*, 384 F.2d at 953–54.

217. *See* Di Leo v. Shin Shu, 30 F.R.D. 56, 58 (S.D.N.Y. 1961) ("[A]partments in a multiple dwelling are, in a sense, as separate and distinct as individual buildings under separate roofs.").

for substitute service.[218] The doorman application certainly conflicts with the *Jaeger* standard. Finally, proponents of a more inclusive residency standard might find support from *M. Lowenstein & Sons, Inc. v. Austin*.[219] There, a defendant's twenty-one-year-old daughter was home from college to stay "at least overnight."[220] The court held that she fell within Rule 4's "then residing" requirement.[221] However, the court's decision was influenced by the fact that the daughter was "returning" to a home at which she had previously resided.[222] Thus, given the likelihood that she had no other permanent residence, a case could be made that *Lowenstein* comports with the *Jaeger* plain meaning standard for residency.[223]

It is important to recall that the federal courts' decisions regarding the residency requirement are only instructive on the *Jaeger* standard. Moreover, given the federal courts' varied approaches, there may be no definitive answer to whether federal jurisprudence supports the *Jaeger* standard. Still, given that J.C. was serving as a caretaker and living at least a mile away from his father's townhome,[224] his situation is most analogous to those cases involving service on cleaning persons or maids who did not actually live at a property.[225] In fact, J.C. was present at the property with far less regularity than the typical housekeeper.[226] Thus, holding that J.C.

218. *See* Hartford Fire Ins. Co. v. Perinovic, 152 F.R.D. 128, 131 (N.D. Ill. 1993); Three Crown Ltd. P'ship v. Caxton Corp., 817 F. Supp. 1033, 1051 (S.D.N.Y. 1993); *see also* 4A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & ADAM N. STEINMAN, FEDERAL PRACTICE AND CIVIL PROCEDURE § 1096 (4th ed. 2017) (suggesting such support stems from the obligation of doormen, cleaning persons, and property managers to relay information).

219. 430 F. Supp. 844, 845 (S.D.N.Y. 1977).

220. *Id.*

221. *Id.*

222. *Id.* ("Rule 4(d)(1) is broad enough to include a student *returning* home from college." (emphasis added)).

223. *Compare id.* (noting the federal rule accounts for a "student returning home from college [who] stay[s] *at least overnight* at her parents' residence" (emphasis added)), *with* Jaeger v. Palladium Holdings, L.L.C., 884 N.W.2d 601, 608 ("The plain and ordinary meaning of the word 'reside,' of which 'residing' is a form, is '[t]o live in a place *permanently or for an extended period*.'" (quoting THE AM. HERITAGE DICTIONARY OF THE ENGLISH LANG. 1493 (5th ed. 2011) (emphasis added))).

224. *See Jaeger*, 884 N.W.2d at 608.

225. *See* cases cited *supra* note 213 (providing examples of cases in which service was ineffective).

226. *See Jaeger*, 884 N.W.2d at 603 (noting that J.C. visited the property "an estimated 20 to 30 times per year").

was not "then residing therein"[227] comports with the interpretation adopted by the federal courts in decisions most analogous to *Jaeger*.

3. Bottom Line: Residency

While the *O'Sell* nexus test[228] may seem practical, it does not comport with the plain meaning of "then residing therein."[229] In *Jaeger*, the facts could not characterize J.C. as dwelling continuously at the townhome at the time of attempted service because he had only stayed at the property a few times in three years.[230] If a literal residency requirement was not the intended effect of Rule 4.03(a), the Minnesota Supreme Court possesses the power to amend it accordingly. The court could omit the words "then residing therein"[231] or make exceptions for classes of people entrusted with a certain level of responsibility at a defendant's abode. However, the court did not do so. Moreover, the legislature arguably possesses authority to prescribe procedural laws that supersede Minnesota Rules of Civil Procedure.[232] But the legislative branch has remained silent on the residency requirement, giving no sign of an intent to allow substitute service upon those not actually "residing" at a defendant's property. In fact, some procedural statutes expressly defer to the Minnesota Rules for civil service.[233] Thus, *Jaeger* properly restricted the residency requirement of Rule 4.03(a) to its plain meaning.

227. MINN. R. CIV. P. 4.03(a).

228. *See* O'Sell v. Peterson, 595 N.W.2d 870, 872–73 (Minn. Ct. App. 1999) (noting that a nexus can be established by factors like a relationship of confidence, duration and frequency of visits, and intent to return).

229. MINN. R. CIV. P. 4.03(a); *see* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1060, 1295 (11th ed. 2003) (noting that "residing" is a present participle of "reside," which means to "dwell permanently or continuously," and defining "then" as "at that time").

230. *Jaeger*, 884 N.W.2d at 603.

231. MINN. R. CIV. P. 4.03(a).

232. *See* MINN. STAT. § 480.051 (2016).

233. *E.g.*, MINN. STAT. § 580.03 (2016) ("[N]otice shall be served in like manner as a summons in a civil action in the district court.").

B. Jaeger *Properly Rejected the Actual Notice Exception to Substitute Service*

In *Jaeger*, the Minnesota Supreme Court rejected the actual notice exception advanced by both the district court[234] and court of appeals.[235] Under the purported exception, "substantial compliance" with substitute service requirements is sufficient when a party receives actual notice of the action.[236] However, both precedent and practical application support the court's rejection of the actual notice exception under the current rule.

1. The Minnesota Supreme Court Adhered to Stare Decisis in Rejecting an Actual Notice Exception

First, despite conflicting commentary,[237] the supreme court adhered to principles of stare decisis by requiring strict compliance with Minnesota Rule of Civil Procedure 4.03(a). While the Minnesota Court of Appeals has voiced its approval of a substantial compliance requirement with Rule 4.03(a) when there is actual notice, only three times—at least arguably—has the exception controlled in decisions involving substitute service.[238] While not binding on the supreme court, examining the jurisprudence of each decision merits consideration.

The actual notice exception was first introduced by the Minnesota Court of Appeals in *Larson v. Hendrickson*.[239] There, process was served on the tenant of a house owned by the defendant.

234. Jaeger v. Palladium Holdings, L.L.C., No. 27CV133083, 2014 WL 1660395, at *2, *4 (Minn. Dist. Ct. Apr. 1, 2014) (citing O'Sell v. Peterson, 595 N.W.2d 870, 872 (Minn. Ct. App. 1999)).

235. Jaeger v. Palladium Holdings, L.L.C., No. A14–0803, 2015 WL 1513982, at *3 (Minn. Ct. App. Apr. 6, 2015) (citing Thiele v. Stich, 425 N.W.2d 580, 584 (Minn. 1988); Koski v. Johnson, 837 N.W.2d 739, 743 (Minn. Ct. App. 2013); Van Note v. 2007 Pontiac, 787 N.W.2d 214, 219 (Minn. Ct. App. 2010))).

236. *Jaeger*, 2015 WL 1513982, at *1 (citing *Thiele*, 425 N.W.2d at 584).

237. *See* HERR & HAYDOCK, *supra* note 77, § 4.9 ("Substantial compliance with . . . [Rule 4.03(a)] is sufficient . . . if the intended recipient has actual notice of the service.").

238. *See* O'Sell v. Peterson, 595 N.W.2d 870, 872 (Minn. Ct. App. 1999); Pederson v. Clarkson Lindley Trust, 519 N.W.2d 234, 235 (Minn. Ct. App. 1994); Larson v. Hendrickson, 394 N.W.2d 524, 526 (Minn. Ct. App. 1986).

239. *Larson*, 394 N.W.2d at 526 ("When actual notice of the action is received by the intended recipient, 'the rules governing such service should be liberally construed.'" (quoting Minn. Mining & Mfg. v. Kirkevold, 87 F.R.D. 317, 323 (D. Minn. 1980))).

The defendant had resided in the house for eight years, but moved to a motel in Florida two months prior to service.[240] The defendant intended to remain in Florida, where he had obtained employment.[241] Additionally, he received mail and opened a checking account in Florida.[242] On the other hand, the defendant had yet to obtain permanent residence in Florida, stored business equipment in Minnesota, renewed his teaching license in Minnesota, and even moved back to the house in Minnesota for several months after service took place.[243] Employing the actual notice exception, the court held that substitute service was effective under a liberal construction of the abode requirement.[244]

In *Pederson v. Clarkson Lindley Trust*, plaintiffs served a trust by leaving a summons with a co-trustee's wife at the trustee's abode pursuant to Minnesota Rules of Civil Procedure 4.03(a).[245] The defendants challenged the effectiveness of the service, given that Rule 4.03(a) was silent regarding personal service on trusts.[246] However, grounding its decision in the actual notice exception and the underlying goals of the rules, the court of appeals held that substitute service was effective.[247] The court reasoned that it was fair and equitable to treat the trust as an individual because the trust operated out of the co-trustee's home, was not listed in any telephone directory, maintained no public identity or activity, and functioned exclusively through the co-trustees.[248]

Finally, in *O'Sell v. Peterson*, the court of appeals was tasked with determining the sufficiency of substitute service upon a defendant's fourteen-year-old stepson during the child's six-day, non-custodial

240. *Id.*

241. *Id.* at 525.

242. *Id.*

243. *Id.* at 526. The defendant did, however, sell the house shortly after his return. *Id.* at 525.

244. *Id.* Examination of the opinion indicates the possibility that the court's analysis of the abode requirement may have been diluted with doctrines like domicile or residency. *See id.* at 526 ("[Defendant]'s usual place of abode was *Minnesota* for the purpose of service of process." (emphasis added)).

245. 519 N.W.2d 234, 235 (Minn. Ct. App. 1994).

246. *Id.*

247. *Id.* (quoting Indep. Sch. Dist. No. 273 v. Gross, 291 Minn. 158, 165, 190 N.W.2d 651, 656 (1971)); MINN. R. CIV. P. 1 ("[The rules] shall be construed . . . to secure the just, speedy, and inexpensive determination of every action.").

248. *Pederson*, 519 N.W.2d at 235–36. The court noted that the co-trustee did "virtually nothing to apprise the public that the . . . Trust operates in any way other than through him out of his home." *Id.* at 235.

visitation.[249] The child's visits were planned and occurred weekly. Furthermore, the child sometimes slept and ate at the defendant's abode for as long as two weeks consecutively.[250] Thus, although the court relied on a "nexus test,"[251] service would very likely have been found compliant under the *Jaeger* standard.

In any event, the appellate court's occasional application of the actual notice exception was nonbinding on the Minnesota Supreme Court. In fact, the rarity of the exception's application amid its continued recognition may denote its unworkability.[252] The appellate court's proclamation of the actual notice exception to substitute service has repeatedly come in dicta, or, when noted, is not actually applied for any numbers of reasons.[253] The exception has been applied in appellate decisions involving other methods of service, though only those involving technical defects of service *form*. In *Times Square Shopping Center v. Tobacco City*, for example, a plaintiff failed to comply with a statutory provision requiring that an eviction summons "shall state that the . . . original [complaint] has been filed with the district court."[254] Personal service was held effective despite the technical error, as actual notice had been provided. The court

249. 595 N.W.2d 870, 872 (Minn. Ct. App. 1999).

250. *Id.* at 873.

251. *See* cases cited *supra* notes 111–16. The referenced cases discuss the nexus test and its qualifying relationships, such as relationships of confidence and familial relationships.

252. *See infra* Part IV.B.2. (discussing the demonstrable unworkability of the actual notice exception in other jurisdictions).

253. *See* Van Note v. 2007 Pontiac, 787 N.W.2d 214, 219 (Minn. Ct. App. 2010) (noting that an officer's testimony that a third party lived with the intended recipient was "undisputed"); Sitek v. Sitek, No. A09-2339, 2010 WL 2900344, at *3 (Minn. Ct. App. July 27, 2010) (holding that because the wife did not receive actual notice, she was not served); Smith v. Flotterud, 716 N.W.2d 378, 382–83 (Minn. Ct. App. 2006) (holding that service upon an unrelated third party living at the defendant's nursing home did not substantially comply with Minn. R. Civ. P. 4.03); Niesznner v. St. Paul Sch. Dist. No. 625, 643 N.W.2d 645, 649 (Minn. Ct. App. 2002) (holding the substantial compliance exception inapplicable because "appellant did not attempt to serve respondent in accordance with either rule 4.03 or rule 4.05"); Patterson v. Wu Family Corp., 594 N.W.2d 540, 547–48 (Minn. Ct. App. 1999) ("Because service was not made at [the defendant]'s usual place of abode, the actual notice exception does not apply in this case."); Lundgren v. Green, 592 N.W.2d 888, 892 (Minn. Ct. App. 1999) ("Because the attempted substitute service was not at [defendant]'s 'usual place of abode,' there was no substantial compliance with the requirements of Rule 4.03(a). Thus, the actual notice exception does not apply.").

254. 585 N.W.2d 791, 792 (Minn. Ct. App. 1998) (quoting MINN. STAT. § 566.05(a) (1998)).

reasoned that substantial compliance was sufficient because a court date could not be scheduled without prior filing, and because the summons included an initialed date stamp and handwritten case number.[255] Thus, although not explicitly mentioned in the affidavit, the recipient nonetheless had notice of the filing.

Relying on *Times Square*, the court of appeals took a similar approach in an unpublished opinion, *Central Internal Medicine Association, P.A. v. Chilgren*.[256] Under the relevant statute, the plaintiff or plaintiff's attorney was required to sign and file an affidavit stating that a copy of the summons was mailed to the defendant's last known address.[257] The defendants conceded that the summons was mailed, but challenged the failure to state as much in the filed affidavit.[258] In allowing substantial compliance, the court made an important distinction between form and personal service, finding that, "[s]imilar to the challenge to the form of the summons in *Times Square*, the [defendants] are objecting *only to the form* of the affidavit sent to the district court and not to the service of the summons itself."[259] In any event, both *Times Square* and *Chilgren* were later abrogated by the court of appeals.[260]

More importantly, the Minnesota Supreme Court has intimated its support for an actual notice exception to substitute service only twice.[261] As the court noted in *Jaeger*,[262] however, its support in *Thiele* was dicta[263] and therefore nonbinding. In *Coleman*, the court did proclaim the exception in holding substitute service effective.[264] However, the court deferred to the disciplinary referee's factual findings under clear error review.[265] It is unclear whether the

255. *Id.*

256. No. C2-00-36, 2000 WL 987858, at *2–3 (Minn. Ct. App. July 18, 2000).

257. *Id.*; *see* MINN. STAT. § 504B.331(d)(2)(ii).

258. Central Internal Med. Ass'n, P.A, 2000 WL 987858, at *2.

259. *Id.* at *3 (emphasis added).

260. *See* Koski v. Johnson, 837 N.W.2d 739 (Minn. Ct. App. 2013).

261. Thiele v. Stich, 425 N.W.2d 580, 584 (Minn. 1988) ("Actual notice will not subject defendants to personal jurisdiction absent substantial compliance with Rule 4."); In re Disciplinary Action Against Coleman, 793 N.W.2d 296, 302 (Minn. 2011) (quoting *Thiele*, 425 N.W.2d at 584).

262. Jaeger v. Palladium Holdings, L.L.C., 884 N.W.2d 601, 610 (Minn. 2016).

263. *See Thiele*, 425 N.W.2d at 584 ("As Stich was not effectively served within six years . . . the claim was time-barred.").

264. *See Coleman*, 793 N.W.2d at 302–03. Notably, *Jaeger* erroneously stated that *Coleman* did not involve substitute service. *See* Jaeger, 884 N.W.2d at 611 n.4 ("Like *Thiele*, none of these cases involved substitute service.").

265. *Coleman*, 793 N.W.2d at 302–03.

exception was a controlling factor in the decision, though the court's failure to explicitly address the challenged residency requirement suggests that it was.

> The referee found that [defendant] had actual notice of the petition, and [defendant] concedes that the Director served the petition upon a person of suitable age and discretion. The referee's finding is not clearly erroneous and supports the conclusion that the Director substantially complied with Minn. R. Civ. P. 4.03.[266]

Thus, it is possible—likely even—that the court employed the actual notice exception.

However, subsequent Minnesota Supreme Court decisions evince a swift deviation from the outlying *Coleman*. In *Walsh v. U.S. Bank*, a defendant's assertion that the service recipient was only an "occupant" of his property, as opposed to a resident, was expressly declared a valid challenge to Minnesota Rules of Civil Procedure 4.03(a).[267] Though this case presented the ideal setting to allow substantial compliance,[268] the court was silent on the actual notice exception. Additionally, the court stated that "[w]here the language is plain and unambiguous, that plain language must be followed."[269] Additionally, the opinion twice emphasized the word "residing" when discussing the requirements of Rule 4.03.[270] Decisions subsequent to *Walsh* and preceding *Jaeger* continued to declare a plain meaning interpretation of the rules.[271] Moreover, an examination of *Thiele* suggests that any proclamation of an actual notice exception allowing for substantial compliance was probably limited to the "usual place of abode" requirement.[272]

> This "actual notice" exception, however, has been recognized only in cases involving substitute service at

266. *Id.* Still, it is unclear whether the referee made an express finding as to the residency issue.

267. 851 N.W.2d 598, 607 (Minn. 2014).

268. An adult female was served at the defendant's abode, and the defendant received actual notice. *See id.* The defendant only challenged the residency requirement. *See id.* at 600, 607, 608.

269. *Id.* at 601 (quoting State v. Dahlin, 753 N.W.2d 300, 305 (Minn. 2008)).

270. *Id.* at 606–07. *But see id.* at 608 (Gildea, J., concurring) (referencing a potential "nexus" between the recipient and the property).

271. *See, e.g.,* Melillo v. Heitland, 880 N.W.2d 862, 864 (Minn. 2016); State v. Vang, 881 N.W.2d 551, 555 (Minn. 2016); Contractors Edge, Inc. v. Mankato, 863 N.W.2d 765, 768 (Minn. 2015).

272. MINN. R. CIV. P. 4.03(a).

> defendant's residence. One reason for this approach is that there may be no place significantly more desirable for the papers to be left. *Rule 4 is otherwise taken literally*, and cannot be satisfied by service on defendant's place of work or business.[273]

The factual setting of *Jaeger* posed a desirable scenario for service on a defendant.[274] Given Jaeger's extended absence from Minnesota to manage a car dealership in Wisconsin,[275] as well as his continued ownership of the St. Louis Park townhome,[276] he presumably had an abode in Wisconsin. He could have been served personally under Minnesota Rules of Civil Procedure 4.04[277] or, if truly untraceable, with three weeks' published notice.[278] While doubts about the effectiveness of publication methods are rightfully raised, it still serves as a tool to combat a defendant who actively avoids more reasonable methods of notice. Thus, the reasons offered by *Thiele* as warranting substantial compliance with the abode requirement are not present for purposes of the residency requirement in *Jaeger*.

In 1930, the Minnesota Supreme Court declared that substitute service required strict compliance with the statute, and that it was "immaterial whether a defendant . . . had actual notice thereof."[279] Though the exception made its way into the Minnesota courts, the supreme court has not definitively departed from this stance.[280]

273. *Thiele*, 425 N.W.2d at 584 (emphasis added) (internal citations omitted).

274. *See* Jaeger v. Palladium Holdings, L.L.C., No. 27CV133083, 2014 WL 1660395, at *1 (Minn. Dist. Ct. Apr. 1, 2014) (noting that Jaeger works and spends weeks at a time in Wisconsin).

275. Jaeger v. Palladium Holdings, L.L.C., 884 N.W.2d 601, 603 (Minn. 2016).

276. *See* Jaeger v. Palladium Holdings, L.L.C., No. 27CV133083, 2014 WL 1660395, at *1 (Minn. Dist. Ct. Apr. 1, 2014).

277. *See* MINN. R. CIV. P. 4.04(b); *see also* MINN. STAT. § 543.19, subdiv. 1(1) (2008) (providing for personal service on defendants located out of state who own real property in Minnesota).

278. *See* MINN. R. CIV. P. 4.04(a) (authorizing publication upon defendants when they are located out of state at a residence which is unknown).

279. MacLean v. Lasley, 181 Minn. 379, 379, 232 N.W. 632, 632 (1930).

280. *See, e.g.*, Walsh v. U.S. Bank, N.A., 851 N.W.2d 598 (Minn. 2014) (holding that substitute service at an individual's place of abode was ineffective when served on an individual who did not reside therein). *But cf.* In re Disciplinary Action Against Coleman, 793 N.W.2d 296, 302 (Minn. 2011) ("[In] cases involving substitute service at a defendant's residence, the rules governing service are 'liberally construed when the intended recipient had actual notice of the lawsuit.'" (quoting *Thiele*, 425 N.W.2d at 584)).

Thus, *Jaeger* best comports with precedent. In any event, the rejection of the actual notice exception promotes a uniform and workable framework for providing notice.

2. *Rejecting the Actual Notice Exception Under the Current Rule Promotes the Most Practical Service Standard*

Next, the actual notice exception should be rejected for purposes of workability and practical application. The Supreme Court has held that unambiguous rules of procedure will be read in accordance with their plain meaning.[281] While rules of procedure may be liberally construed to effectuate their purpose,[282] it remains arduous to liberally construe unambiguous language. Liberal construction has often led to disagreements on the bench over whether a provision is susceptible to more than one meaning.[283]

The authorization of substantial compliance with a rule enhances this debate. Rather than analyzing whether the provisional language is plain, courts analyze whether a party's conduct is *substantially compliant* with a rule's plain meaning.[284] Of course, this approach leads to inconsistent applications of the rules. Because different jurisdictions employ varied standards,[285] effectiveness often

281. *Walsh*, 851 N.W.2d at 601. *But see* Shamrock Dev., Inc. v. Smith, 754 N.W.2d 377, 382 (Minn. 2008) (explaining that the rules of procedure are to be interpreted "according to their purpose" (quoting Mingen v. Mingen, 679 N.W.2d 724, 727 (Minn. 2004))).

282. *Shamrock*, 754 N.W.2d at 382 (citing Mingen v. Mingen, 679 N.W.2d 724, 727 (Minn. 2004)); Derrick v. Drolson Co., 244 Minn. 144, 69 N.W.2d 124 (1955).

283. *Compare, e.g.*, Kratzer v. Welsh Companies, LLC, 771 N.W.2d 14, 21 (Minn. 2009) (holding unambiguous a provision requiring that "parties must have knowledge of and consent to a broker's 'act[ion] on behalf of more than one party to a transaction'" (quoting MINN. R. 2805.2000(1)(A) (repealed))), *with id.* at 27 (Meyer, J., dissenting) ("[E]ach party asserts a reasonable interpretation of the plain meaning of the rule—making the rule far from 'clear and unambiguous.'").

284. *E.g.*, Larson v. Hendrickson, 394 N.W.2d 524, 526 (Minn. Ct. App. 1986).

285. *Compare* Graham v. United States, 79 F. App'x 992, 993 (9th Cir. 2003) ("In order for the sufficient notice exception to apply, there must be a justifiable excuse for the defect."), *with* Bernstein v. Bd. of Trustees of Teachers' Pension & Annuity Fund, 376 A.2d 563, 566 (N.J. Super. Ct. App. Div. 1977) ("A canvass of the cases dealing with the application of the equitable doctrine of substantial compliance indicate the following considerations: (1) the lack of prejudice to the defending party; (2) a series of steps taken to comply with the statute involved; (3) a general compliance with the purpose of the statute; (4) a reasonable notice of petitioner's claim; and (5) a reasonable explanation why there was not a strict compliance with the statute." (internal citation omitted)), *and* Gregory v. Saldana, CO73988, 2015

becomes fact-intensive.[286] Thus, substantial compliance remains an amorphous standard that leaves parties uncertain about the exact requirements for service. To deviate from the plain meaning of the residency requirement and allow substantial compliance has proved unworkable in Minnesota, as substantiated by courts' continued recognition of the exception without its actual application.[287]

Providing further support for the proposed unworkability is a brief analysis of jurisprudence from the two states that have most frequently declared the actual notice exception: Kansas and South Dakota. In Kansas, the actual notice exception—more commonly referred to there as "substantial compliance"—is presently derived, not from common law, but from express statutory authority.[288] Though the actual notice exception was originally prescribed in 1963, the modern statute was restyled in 2010.[289] Section 60-204 of the Kansas Statutes Annotated provides in relevant part:

> Substantial compliance with any method of serving process effects valid service of process if the court finds that, notwithstanding some irregularity or omission, the party served was made aware that an action or proceeding was pending in a specified court that might affect the party or the party's status or property.[290]

WL 1933158, at *4 (Cal. Dist. Ct. App. Apr. 29, 2015) ("[S]ubstantial compliance requires three preconditions. One, there must have been *some* degree of *compliance* with the offended statutory requirements. Two, the objective nature and consequences of the attempted service must have made it highly probable that it would impart the same notice as full compliance. And three, it must in fact have imparted such notice, or at least sufficient notice to put the defendant on his defense." (emphasis added) (internal quotations omitted)).

286. Wagner v. Truesdell, 574 N.W.2d 627, 629 (S.D. 1998) ("What constitutes substantial compliance with a statute is a matter depending on the facts of each particular case." (citing State v. Bunnell, 324 N.W.2d 418, 420 (S.D. 1982))).

287. *See supra* note 251. *But see* In re Disciplinary Action Against Coleman, 793 N.W.2d 296, 302 (Minn. 2011) (holding that rules governing service are liberally construed when substitute service is completed at a party's place of abode).

288. *See* KAN. STAT. ANN. § 60-204 (2016). However, the doctrine of substantial compliance preceded codification of the exception, as substantial compliance was employed by the Kansas Supreme Court dating back to the nineteenth century. *See* Sexton v. Rock Island Lumber & Mfg. Co., 30 P. 164, 165 (Kan. 1892) (considering whether abode service was in "substantial compliance with the statute").

289. 4 SPENCER A. GARD ET AL., KANSAS LAW & PRACTICE § 60-204 (5th ed. 2016). The changes were intended to be stylistic only, so prior interpretations "should remain authoritative." *Id.*

290. KAN. STAT. ANN. § 60-204 (2016).

An examination of Kansas's case law subsequent to the exception's codification reveals an inability to set forth a workable application. In *Briscoe v. Getto*, a "case of first impression" for the Kansas Supreme Court, service on a defendant's secretary at his place of business did not substantially comply with conventional methods of personal service.[291] Elsewhere, the court held that substantial compliance was inapplicable to the statute of limitations for commencement of an action, as doing so would "nullify the express provisions of [Kan. Stat. Ann. § 60-203] by extending the time for obtaining service of process beyond the ninety (90) day period provided."[292] While these cases may seem routine, they still leave open the question: What is substantial compliance? While some cases have set forth helpful rules,[293] there remains no cognizable framework. At a minimum, it is apparent that a party must substantially comply with "some statutory method of service before the provisions of . . . 60-204 have any validating effect."[294]

In what has become a seminal case on the issue, the Kansas Supreme Court held that serving notice on a county counselor did not substantially comply with a rule requiring notice to be filed with the clerk or governing board of the municipality.[295] This ruling was issued despite the county not only receiving actual notice, but also

291. 462 P.2d 127, 129–30 (Kan. 1969). *See generally* KAN. STAT. ANN. § 60-304(a) (1967) (listing on whom and how personal service must be made).

292. Bray v. Bayles, 618 P.2d 807, 811 (Kan. 1980).

293. For example, one rule articulated by common law is the notion that a defendant's knowledge of the suit must derive directly from the attempted service under section 60-204 of the Kansas Statutes Annotated. State Bd. of Regents, Univ. of Kan. Med. Ctr. v. Skinner, 987 P.2d 1096, 1099 (Kan. 1999); Cook v. Cook, 83 P.3d 1243, 1246–47 (Kan. Ct. App. 2003).

294. Fisher v. DeCarvalho, 260 P.3d 1218, 1227 (Kan. Ct. App. 2011); *accord* Haley v. Hershberger, 485 P.2d 1321, 1325 (Kan. 1971) (*superseded by statute* on other grounds). Still, the majority of cases—some involving far more colorable attempts at substantial compliance—hold service ineffective. For instance, the Kansas Court of Appeals reversed a trial court's ruling that mailing the petition, interrogatories, and requests for production constituted substantial compliance with the requirement to serve the summons. *Cook*, 83 P.3d at 1246–48. The appellate court also ruled that service by certified mail is not substantially compliant with a restricted mail requirement. *Id.* The court reasoned that certified mail, in contrast to restricted mail, "does not require the endorsements 'return receipt requested showing address where delivered' and 'deliver to addressee only.'" *Id.* (quoting KAN. STAT. ANN. 61-1803(b) (repealed 2001)).

295. Myers v. Bd. of City. Comm'rs, 127 P.3d 319, 325 (Kan. 2006).

having occasion to investigate and deny the claim.[296] The court expounded:

> If the statutory requirements are not met, the court cannot acquire jurisdiction over the municipality. Allowing a claimant to serve notice on a county counselor or anyone else who is not the "clerk or governing body of the municipality" as specified in [Kan. Stat. Ann. 2004 Supp. 12-105b(d)] would violate the clear language . . . . The "substantial compliance" language does not authorize the court to create new methods of serving notice of claim.[297]

Herein lies the impasse of the actual notice exception. Where substantial compliance is conceivable, it is typically synonymous with what could otherwise be characterized as a method of service not prescribed by the rules.

The *Myers* court also reasoned that "[i]t is a longstanding rule that filing a proper notice of a claim is a prerequisite to filing an action with the district court against a county or other municipality."[298] Thus, the court seemingly adopts an approach that is incongruent to the statute itself. The court declared that substantial compliance was "compliance in respect to the essential matters necessary to assure every reasonable objective of the statute,"[299] while simultaneously proclaiming the objective of the pertinent statute to be "advis[ing] the proper municipality . . . of the time and place of the injury and giv[ing] the municipality an opportunity to ascertain the character and extent of the injury sustained."[300] The *Myers* facts met both of these objectives.[301] Thus, codification of the actual notice exception in Kansas has done little to remedy its patent unworkability.

Similar to Minnesota, the actual notice exception in South Dakota is rooted in common law.[302] Although the South Dakota rule

296. *Id.* at 321.

297. *Id.* at 325.

298. *Id.*

299. *Id.* at 323 (quoting Orr. v. Heiman, 12 P.3d 387, 389 (Kan. 2000)).

300. *Id.* (quoting Bell v. Kansas City, Kan. Hous. Auth., 922 P.2d 1233, 1235 (Kan. 1999)).

301. A federal district court applying Kansas law later reached a similar result in ruling that service on a vice president and general counsel of a state college was ineffective where a plaintiff was required to serve the president of a state college, the attorney general, or the assistant attorney general. Taher v. Wichita State Univ., No. 06–2132–KHV, 2007 WL 852364, at *2–3 (D. Kan. Mar. 19, 2007).

302. *See* S.D. CODIFIED LAWS § 15-6-4 (2017) (listing process and service rules

for abode service involves a textual departure from its Minnesota counterpart, it invokes a very similar meaning. The South Dakota rule states, in relevant part, that "[i]f the defendant cannot be found conveniently, service may be made by leaving a copy at the defendant's dwelling with someone over the age of fourteen years who resides there."[303] Originally, the South Dakota Supreme Court required strict compliance with section 15-6-4(e), including the dwelling requirement.[304] The actual notice exception was later introduced by reference to none other than *Thiele v. Stich*.[305] In 1998, *Wagner v. Truesdell* declared that the exception was "the law of [South Dakota]" in a case involving personal service.[306]

Similar to Minnesota and Kansas, however, subsequent South Dakota Supreme Court decisions declared the doctrine in various contexts, but failed to actually apply the exception. In *R.B.O. v. Priests of Sacred Heart*, the court noted that "[t]he statutory list of parties that are authorized to receive service . . . is exhaustive and compliance with the statute is not discretionary."[307] Again, this type of strict compliance reasoning leaves one to wonder how substantial compliance can ever be effected. Even the federal courts applying South Dakota state law have failed to employ the exception. For instance, in *Sommerveld v. Wal-Mart, Inc.*, service on an assistant manager was not substantially compliant with the requirement that a plaintiff serve "'the person in charge'" at a place of business.[308] Ultimately, the exception was summarily rejected by the South

without a statutorily provided actual notice exception). South Dakota's service rules are more typical than the Kansas equivalent, especially in the absence of a substantial compliance provision. *Id.*

303. *Id.* § 15-6-4(e).

304. Johnson v. Bruflat, 186 N.W. 877, 879 (S.D. 1922); Massillon Engine & Thresher Co. v. Hubbard, 77 N.W. 588, 589 (S.D. 1898) ("The law is well settled that a statute authorizing substituted service must be strictly followed.").

305. Wagner v. Truesdell, 574 N.W.2d 627, 629 (S.D. 1998) ("We agree with the Minnesota Supreme Court that actual notice coupled with substantial compliance is sufficient to satisfy personal service of process requirements and we hereby adopt that holding as the law of our state." (citing Thiele v. Stich, 425 N.W.2d 580, 584 (Minn. 1988))).

306. *Id.* The holding did not come without vigorous dissent. *See id.* at 631 (Henderson and Amundson, JJ., dissenting) ("Moreover, adoption of the doctrine provides no guidance to the bench and bar as to what constitutes substantial compliance with personal service requirements.").

307. 807 N.W.2d 808, 811 (S.D. 2011).

308. 709 F.3d 1234, 1237–38 (8th Cir. 2013) (quoting S.D. CODIFIED LAWS § 15-6-4(d)(1) (2005)); *accord* Marshall v. Warwick, 155 F.3d 1027 (8th Cir. 1998).

Dakota Supreme Court in cases involving substitute service.[309] The court has noted, "[s]trict compliance is required for substitute service to reduce the inherent risk that a defendant not receive notice of the lawsuit."[310] Despite its introduction and frequent declaration, the actual notice exception has proved unworkable in South Dakota.

C. Substantial Dominion: A Reasonable Alternative to an Actual Notice Exception

The Minnesota Supreme Court appropriately rejected the actual notice exception. While the exception has proved unworkable in practice, it is also unnecessary. While some courts have—for good reason—stressed the importance of a party having its day in court,[311] Rule 4 provides a roadmap for parties to accomplish this objective. A plaintiff who is unable to serve a defendant personally is not foreclosed from effectuating service, and publication can serve as a combatant against evasive defendants.[312]

But not all untraceable defendants have intentionally avoided service. Thus, a total reliance on publication is not currently equitable, as newspaper readership continues to plummet and the odds of actual notice being apprised are diminutive.[313] Certainly the greatest remedy for deficiencies in the provision of notice by publication is in its expansion to include electronic forms of

309. *See, e.g.*, Upell v. Dewey City. Comm'n, 880 N.W.2d 69, 75–76 (S.D. 2016); Carmon v. Rose, 797 N.W.2d 336, 338 (S.D. 2011); Lekanidis v. Bendetti, 613 N.W.2d 542, 546–47 (S.D. 2000).

310. *Carmon*, 797 N.W.2d at 338 (citing Edsill v. Schultz, 643 N.W.2d 760, 763 (S.D. 2002)). Fittingly, one justice repeatedly voiced his concern regarding the court's ineffective declaration of the exception: "[A]bsent the following of service requirements created by our rules of civil procedure . . . I cannot join the majority opinion as it continues to adhere to the doctrine of substantial compliance . . . . [A]n advocacy of the doctrine of substantial compliance finds absolutely no support in our statutes concerning service of process." White Eagle v. Fort Pierre, 606 N.W.2d 926, 930 (S.D. 2000) (Gilbertson, J., concurring).

311. State v. Flotterud, 716 N.W.2d 378, 382 (Minn. Ct. App. 2006); Pederson v. Clarkson Lindley Tr., 519 N.W.2d 234, 235 (Minn. Ct. App. 1994).

312. *See* MINN. R. CIV. P. 4.04(a).

313. William Wagner & Joshua R. Castillo, *Friending Due Process: Facebook as a Fair Method of Alternative Service*, 19 WIDENER L. REV. 259, 273–74 (2013); Jennifer L. Case, Note, *Extra! Read All About It: Why Notice by Newspaper Publication Fails to Meet Mullane's Desire-to-Inform Standard and How Modern Technology Provides a Viable Alternative*, 45 GA. L. REV. 1095, 1097–98, 1114–1120 (2011).

service.[314] In focusing on abode service, however, this Note proposes an amendment to better align Rule 4.03 with the goal of securing just determinations: the expansion of abode service to include persons entrusted with *substantial dominion* over a defendant's abode.

The Minnesota Rules of Civil Procedure should be interpreted in accordance with their plain meaning. Thus, to effectuate justice, this Note proposes the amendment of Rule 4.03[315] read in relevant part:

> Service of summons within the state shall be as follows:
> (a) Upon an Individual. Upon an individual by delivering a copy to the defendant personally or by leaving a copy at the individual's usual place of abode with a person of suitable age and discretion who is then:
> (1) residing therein; or
> (2) authorized by the defendant to exercise substantial dominion therein.

The common dictionary definition of the word "dominion" is "a supremacy in determining and directing the actions of others" or "preponderant or overriding influence."[316] Black's Law Dictionary defines "dominion" using words like control, possession, and sovereignty.[317] The Black's Law Dictionary meaning of the adjective "substantial" is "[c]onsiderable in amount or value."[318]

Under a plain meaning interpretation, an individual entrusted with "substantial dominion" over an abode must have a considerable amount of control or influence over the defendant's property at the time of service. The abode and age requirements would remain as qualifiers under the proposed rule. The class of people considered to exercise substantial dominion could include caretakers, nannies, babysitters, home health aides, house sitters, family members staying for extended periods, and persons employed by a resident to spend a substantial amount of time at their abode.

However, this list is not exhaustive. Accordingly, the amendment would allow for flexibility in unique circumstances to minimize mere technical deficiencies. Factors to consider in

314. *See* Fling, *supra* note 84, at 212–16; Wagner & Castillo, *supra* note 313, at 279; Case, *supra* note 313, at 1120–25.

315. *Cf.* MINN. R. CIV. P. 4.03(a).

316. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1931, 672 (Merriam-Webster, Inc., ed. 1993).

317. *Dominion*, BLACK'S LAW DICTIONARY (10th ed., 2014).

318. *Substantial*, BLACK'S LAW DICTIONARY (10th ed., 2014).

establishing substantial dominion could include: the regularity and quantity of time the person spends at the property; the person's ability to freely access the property; the duration of the person's relationship with the intended recipient; and the person's level of responsibility and resulting duty to those residing therein. Additionally, a defendant's extended absence or incapacity might infer that a third party is acting with substantial dominion. Examples of persons excluded from the substantial dominion category might include landlords,[319] doormen, and cleaning persons, as well as other classes of people who spend a minimal amount of time at an abode. Thus, compliance with the substantial dominion provision would comport with due process.[320]

One potential issue under the proposed amendment concerns the ability of process servers to effectively provide service. In other words, how would a process server determine if a third party qualified under the substantial dominion provision? Servers would likely face instances in which such a determination would be difficult to make. However, a proclamation of the considerable factors by the supreme court or its advisory committee, as well as the development of substantial dominion doctrine via common law, would provide a framework for relevant inquiries at the time of service.[321] Thus, substantial dominion would furnish a far more workable solution than the actual notice exception for those serving process. Under the latter, a process server would be tasked with assessing whether service would "substantially comply" with the rules of service. Furthermore, uncertainty regarding whether notice will ever be received is inherent in the actual notice exception. This uncertainty would be eliminated by the proposed substantial dominion provision because actual notice would no longer be required.

Finally, a review of decisions employing the actual notice exception reveals the potential utility of the substantial dominion provision. Courts have applied the actual notice exception to

319. Though typically holding title to a property, landlords' possessory rights are limited in a fashion that would fittingly deprive them of accepting service under the substantial dominion provision. *See generally* RESTATEMENT (SECOND) OF PROP. § 1.2 (2007) ("A landlord-tenant relationship exists only if the landlord transfers the right to possession of the leased property.").

320. *See supra* Part II.B.

321. Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.").

circumvent plain meaning when faced with possible injustice or absurdity—often where mere technicality would otherwise deprive a party of a case on the merits.[322] The proposed provision would have rendered service effective in many of these cases, alleviating the court's need to read-in an exception not provided in the rules. For example, in *Wagner v. Truesdell*, the court effectuated abode service on the caretaker of a mentally incompetent defendant.[323] The court noted that a strict reading of the service requirements would lead to "an absurdity."[324] Substantial dominion would have provided a legitimate means for finding service effective, likely preventing the actual notice exception's fruitless introduction into South Dakota.

Additionally, the substantial dominion provision would account for many of the reasons compelling courts to apply a nexus test in cases of actual notice. In *O'Sell v. Peterson*, service was effective on a non-custodial stepson during his regular, planned visit to the defendant's residence.[325] The court cited the need for a nexus between the recipient and defendant that would "establish[] some reasonable assurance" of actual notice.[326] The court considered factors like a relationship of confidence, the duration and frequency of an individual's presence, and intent to return to the property.[327] Suitably, these factors are enveloped in the underpinnings of substantial dominion, which is similarly grounded in a fair assurance of notice. The substantial dominion approach would compensate for

322. *See* Nowell v. Nowell, 384 F.2d 951, 953 (5th Cir. 1967) ("[N]o hard and fast rule can be fashioned to determine what is or is not a party's 'dwelling house or usual place of abode' within the rule's meaning; rather the practicalities of the particular fact situation determine whether service meets the [rule's] requirements."); Minn. Mining & Mfg. Co. v. Kirkevold, 87 F.R.D. 317, 323 (D. Minn. 1980) (explaining that if the method of service employed by a plaintiff is "reasonably calculated to provide actual notice" to defendant, it should be upheld); O'Sell v. Peterson, 595 N.W.2d 870, 873 (Minn. Ct. App. 1999) (explaining that evidence of service of process actually reaching the intended person strongly supported a conclusion the substitute service was valid, because due process was afforded); Plushner v. Mills, 429 A.2d 444, 446 (R.I. 1981) (holding that the "person of suitable age and discretion residing therein" rule properly allowed service to the defendant's daughter at the defendant's household); Wagner v. Truesdell, 574 N.W.2d 627, 630 (S.D. 1998) (affirming the validity of abode service on the caretaker of a mentally incompetent defendant).

323. 574 N.W.2d 627, 630.

324. *Id.*

325. O'Sell v. Peterson, 595 N.W.2d 870, 872 (Minn. Ct. App. 1999).

326. *Id.*

327. *Id.* at 872–73.

the inflexible residency standard that has left courts failing to provide parties with a consistent interpretation.[328] In any event, the substantial dominion provision would alleviate many of the issues compelling courts to sporadically employ the actual notice exception.

J.C. Jaeger, though apparently failing to forward notice, was entrusted with substantial dominion over his father's property. He could access the property at his pleasure, and was the lone caretaker in his father's extended absence.[329] Had the district court found actual notice, it likely would have resorted to an unworkable exception in order to find service effective.[330] Under the proposed substantial dominion provision, however, courts would be less inclined to bend the rules to effectuate justice. While providing a fix to only one rule out of many, the proposed provision could demonstrate the benefits of procedural reform of existing service methods.

V. CONCLUSION

The *Jaeger* decision dispensed with any uncertainties regarding whether parties must strictly comply with requirements for substitute service under Minnesota Rule of Civil Procedure 4.03(a). Given that the judicial branch is charged with governing rules of procedure in Minnesota,[331] it is unlikely that *Jaeger* will be negated by amendment. Notably, the court's express rejection of the actual notice exception came in dicta,[332] and is technically nonbinding. Still, the unanimous decision suggests the court will not depart from the *Jaeger* ruling in future decisions.[333] Furthermore, the United States Supreme Court is not likely to overturn *Jaeger* on constitutional grounds, because states are free to exceed the constitutional floor prescribed by the Fourteenth Amendment Due Process Clause.[334]

A plain meaning interpretation is critical to maintaining uniform, workable guidelines for service of process in Minnesota.

328. *See supra* Part IV.A.2.

329. *See supra* notes 136–140 and accompanying text.

330. Jaeger v. Palladium Holdings, LLC, 884 N.W.2d 601, 608 (Minn. 2016) (noting that Jaeger did not receive actual notice).

331. MINN. STAT. § 480.051 (2017); *see supra* Part II.A.2.

332. *Jaeger*, 884 N.W.2d at 608.

333. *See id*. At 611.

334. *See* Greene v. Lindsey, 456 U.S. 444, 449 (1982); Bloom v. American Exp. Co., 222 Minn. 249, 257, 23 N.W.2d 570, 575 (1946).

Moreover, mandating strict compliance gives parties fair notice of procedural requirements. Rather than accepting shortcomings under the current rules, however, the Minnesota Supreme Court should consider taking a more active approach in exercising its rule making authority. Expanding substitute service recipients to include persons entrusted with substantial dominion would facilitate just outcomes on the merits, and would provide a more workable solution than an actual notice exception.