

This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2012).

**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1478**

In the Matter of:
Candace Marie Hensley,
individually and obo Caden Robert Hall, petitioner,
Respondent,

vs.

Derek Wyatt Hall,
Appellant.

**Filed June 9, 2014
Vacated
Kirk, Judge**

Redwood County District Court
File No. 64-FA-13-198

Justin M. Alderman, Younger & Walton, PLLC, Olivia, Minnesota (for respondent)

Douglas J. Mentis, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Stauber, Judge; and Kirk,
Judge.

UNPUBLISHED OPINION

KIRK, Judge

On appeal from the district court's grant of an order for protection (OFP), appellant argues that the district court lacked jurisdiction to issue the order due to inadequate service of process. We agree and vacate the OFP.

FACTS

In 2009, appellant Derek Wyatt Hall and respondent Candace Marie Hensley married and had a child together. The marriage was apparently troubled: respondent first petitioned for an OFP in June 2012, in Yellow Medicine County, while living in Granite Falls. The Yellow Medicine County district court granted an emergency ex parte OFP followed by a Harassment Restraining Order (HRO), which was later dismissed at respondent's request. In September 2012, appellant left Minnesota to work in the U.S. Virgin Islands. The parties' marriage was dissolved in November 2012.

On March 14, 2013, while living in Clements, Minnesota, respondent petitioned for an OFP on her and her child's behalf, using a preprinted form provided by the district court. Filling in blanks on the form, respondent provided a street address for appellant in the U.S. Virgin Islands. Respondent listed three previous legal proceedings involving both parties: the 2012 HRO, their marriage dissolution, and a pending child-support action. The district court issued an emergency ex parte OFP and scheduled a hearing for March 28.

The record does not show that a hearing occurred on March 28. Instead, respondent filed an affidavit seeking an order for service by publication in which she claimed to have attempted personal service and provided the same Virgin Islands street address as appellant's last known location. Respondent described attempts at service including a call to law enforcement in the Virgin Islands and telling appellant about the ex parte OFP on two occasions, apparently over the telephone. Respondent gave a Granite Falls address for appellant's mother, and the name and location (not including a

street address) of appellant's employer in the Virgin Islands. The district court ordered service by publication under Minn. Stat. §§ 645.11 and 518B.01, subd. 5(f), and rescheduled the hearing to April 23. Notice of the hearing was published in the *Wabasso Standard* and the *Redwood Gazette* (both in Redwood County) on April 3 and 4 respectively.

Respondent appeared at the April 23 hearing; appellant did not. Following the hearing, the district court issued an OFP for a term of two years. The order specified, in relevant part, that respondent would have exclusive custody of the child, and appellant must have no contact with respondent or the child, stay at least 500 feet from respondent, and stay five miles away from respondent's home. The order provided no parenting time for appellant except as might be later determined by a guardian ad litem. Notice of the OFP was published in the *Redwood Gazette*.

On June 7, 2013, appellant returned to Minnesota from the Virgin Islands and made arrangements with respondent for a visit with the child. The parties met in Redwood Falls, and the child stayed with appellant for the next few days. On June 10, appellant and respondent had an argument over the telephone and respondent demanded that appellant immediately return the child. Respondent called police and reported that appellant was in violation of the OFP. Appellant was charged with violating the OFP in a separate proceeding, but that charge was later dismissed.

Appellant moved to modify or vacate the OFP on June 27. The hearing occurred on July 10, and both parties appeared pro se. Appellant argued that the district court erred by granting the OFP because he was not properly served. Appellant also alleged a

pattern of dishonestly and misconduct by respondent, asserted that the addresses she had provided were incorrect, and suggested that she had knowingly misstated them. The district court declined to consider those allegations and limited appellant’s arguments to the service-of-process issue.

On July 18, the district court issued its decision—in the form of a new OFP—ordering that the April OFP “shall remain in full force and effect” for its original two-year term, but that respondent “shall have visitation with [the child] through a visitation expeditor.” This appeal follows.

D E C I S I O N

We review de novo whether service of process was effective and whether personal jurisdiction therefore exists. *Shamrock Dev., Inc. v. Smith*, 754 N.W.2d 377, 382 (Minn. 2008). “[I]n conducting this review, we must apply the facts as found by the district court unless those factual findings are clearly erroneous.” *Id.* A judgment is void if the issuing court lacked personal jurisdiction over a party as the result of defective service, provided that the defect has not been waived. *Ayala v. Ayala*, 749 N.W.2d 817, 820 (Minn. App. 2008).

As a threshold matter, we address respondent’s argument that appellant waived the issue of defective service by failing to raise it before the district court. Appellate courts generally do not review issues not presented to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Respondent asserts that “[a]lthough [a]ppellant argued [before the district court] that service was improper, he did not specifically address the argument of improper service *by publication*. . . . Because

[a]ppellant did not raise the specific issue of improper service *by publication* below, it is not properly before this [c]ourt and should not be considered.” (Emphases added.)

Respondent’s argument lacks merit because the record shows that appellant raised the service-of-process issue before the district court at the July hearing. The thrust of appellant’s written motion was that he was deprived of a chance to oppose respondent’s OFP petition because he had no notice of the hearing. At the hearing, appellant began by expressly addressing “improper service.” Because service of the ex parte OFP was attempted by publication, and because the record provides no evidence of service by any other method, appellant’s defective-service arguments necessarily related to service “by publication,” even though appellant did not use that modifying phrase. We conclude that appellant did not waive the issue of defective service.

The Minnesota Domestic Abuse Act provides “extensive procedural protections that guard against erroneous deprivation of a parent’s rights.” *Halverson ex rel. Halverson v. Taflin*, 617 N.W.2d 448, 451 (Minn. App. 2000) (quotation omitted). The risk of erroneous deprivation exists when a court issues even a temporary OFP. *Id.* Under the Act, a party seeking an OFP must file a petition alleging conduct amounting to domestic abuse and submit an affidavit stating specific facts and circumstances supporting that allegation. Minn. Stat. § 518B.01, subds. 4(a)-(b) (2012). The district courts “shall provide simplified forms and clerical assistance to help with the writing and filing of a petition.” Subd. 4(e) (2012). Upon receipt of a petition alleging “immediate and present danger,” the district court may issue an ex parte OFP and grant such relief as the court deems proper. Subd. 7(a) (2012). A district court issuing an ex parte OFP must

hold a hearing if the petitioner seeks additional relief. Subd. 5(c) (2012). Under these circumstances, the party against whom protection is sought receives notice of the hearing by personal service of the ex parte OFP. Subd. 7(c) (2012). If personal service cannot be accomplished within 14 days, the ex parte OFP expires automatically unless the petitioner has filed an affidavit for service by publication. Subd. 7(d) (2012).

Particularly relevant to this case are the Act's provisions for service by publication. The district court may permit service by publication

provided the petitioner files with the court an affidavit stating that an attempt at personal service made by a sheriff or other law enforcement or corrections officer was unsuccessful because the respondent is avoiding service by concealment or otherwise, and that a copy of the petition and notice of hearing has been mailed to the respondent at the respondent's residence or that the residence is not known to the petitioner.

Subd. 5(f) (2012).

Here, respondent sought service by publication and filed an affidavit stating that she attempted personal service from "3/14/2013–3/28/2013," that she called law enforcement in the Virgin Islands on an unspecified date, and that she told appellant about the ex parte OFP on two occasions, apparently by telephone. Respondent's affidavit did not allege that service was attempted by law enforcement and thwarted by appellant, or that the paperwork was mailed to appellant, or that respondent did not know appellant's address. In fact, respondent asserted that she *did* know appellant's address.

In *Ayala*, a woman obtained an ex parte OFP against her former husband and petitioned for service by publication, alleging on a court-provided form that she did not know his address. 749 N.W.2d at 819. Law-enforcement personnel had not attempted

service, and the petitioner did not assert that personal service had been attempted, or that service was unsuccessful because her former husband had concealed himself, or that the papers had been mailed to his last known address. *Id.* The district court ordered service by publication, held a hearing following published notice, and granted an OFP against the former husband, who appealed to this court. *Id.* We reversed, and vacated the OFP, holding that the statutory prerequisites for service by publication were not met, and the district court therefore lacked personal jurisdiction over the former husband. *Id.* at 822.

In *Ayala*, the petition form asked petitioners to check a box indicating which factual requirements for service by publication were satisfied, and the petitioner failed to check the appropriate box. 749 N.W.2d at 820. Here, the affidavit for service by publication requires a petitioner to check a box choosing one of the two following options:

- An attempt at personal service made by the sheriff or other law enforcement or corrections officer was unsuccessful because [the party to be served] is avoiding service by concealment or otherwise, and a copy of the [required paperwork] has been mailed to [the party].

OR

- An attempt at personal service made by the sheriff or other law enforcement or corrections officer was unsuccessful because [the party to be served] is avoiding service by concealment or otherwise, and I do not know the [party's] current address.

Respondent did not check either box. Acting pro se at the time, respondent may not have understood that failing to check either box would leave her petition fatally flawed. Many pro se OFP petitioners benefit from the assistance of an advocate familiar with the

procedural and statutory requirements who provides support beyond the clerical assistance provided by the district court. The record does not show whether an advocate was involved in this case, but we note that the statutory requirements for a valid OFP petition do not vary depending on whether a petitioner is pro se, represented by counsel, or assisted by a non-attorney advocate.

We conclude that respondent's affidavit for service by publication does not satisfy the statutory prerequisites for service by publication under Minn. Stat. § 518B.01, subd. 5(f), and that service of the ex parte OFP by publication was therefore ineffective. Because service by publication was ineffective, the OFP the district court issued in April is void for lack of personal jurisdiction. *See Ayala*, 749 N.W.2d at 820 (stating that a judgment is void if the issuing court lacked personal jurisdiction over a party as the result of defective service, provided that the defect has not been waived). The jurisdictional validity of the July OFP depends on the validity of the April OFP. Because we conclude that the April OFP is void for lack of jurisdiction, the July OFP is also void. We therefore vacate both orders and return the parties to the parenting-time conditions that existed prior to respondent's March 2013 OFP petition.

Vacated.