Nebraska's Modern Service of Process Statute

Roger W. Kirst

University of Nebraska College of Law, rkirst@unl.edu

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The 1983 session of the Nebraska Unicameral enacted a statutory overhaul of the service of process statutes that comprehensively modernized this area of civil procedure. The sometimes ambiguous patchwork of sections built up over the past century was replaced with a single statute that establishes a consistent approach and permits the Nebraska courts to exercise fully the judicial power of the state. The new statute will be of primary interest and importance to Nebraska judges and lawyers, but the legislative policy choices reflected by the new statute will also be of interest to other jurisdictions. Therefore, this Article will discuss the important provisions of the statute and explain the policy choices and theoretical structure that established the form of the statute.

A legislature does not have complete freedom to select proce-

* Professor of Law, University of Nebraska; Reporter for Nebraska Supreme Court Committee on Practice and Procedure. The service of process statute was prepared by the committee, but this article reflects only the views of the author.

dures for service of process. The permissible policy choices are constrained in two ways by the due process clause of the fourteenth amendment to the United States Constitution. One due process test is concerned with notice—any state statute must provide sufficient procedures for notifying a defendant of the suit in order to give the defendant an opportunity to contest the merits. The other due process test is concerned with power—a state court cannot assert personal jurisdiction over a defendant unless the defendant has a sufficient connection with the forum. Of course the due process clause only establishes outer boundaries on what the legislature may do, leaving the legislature free to provide for more than the minimum notice or to assert less than all the permitted judicial power.

The original impetus for the new Nebraska statute was the United States Supreme Court opinion in Greene v. Lindsey. Greene created doubt about the constitutionality of the century-old Nebraska statute that had permitted substituted service of process by leaving the summons at the residence of the defendant. The new statute goes beyond the narrow repair of the substituted service section to make all service of process as effective and least costly as possible. The new statute also provides for service by certified mail, eliminates many obsolete requirements for service by publication, reduces the previous wide variety in methods of service, and gives the trial judge more power to fashion specific alternative service methods if normal service is ineffective. Part I of this Article will review the methods of service, including a discussion of Greene, an examination of the due process limits on substituted service, and a review of the Nebraska statute and the policy choices made by the legislature.

The power test of the due process clause involves the familiar issue of long arm jurisdiction and sufficient minimum contacts, an area where the United States Supreme Court has been active during the last few years. Nebraska statutes had been amended during the last several decades in an effort to take advantage of the expanding reach of state judicial power, but the statutes eventually became disorganized and duplicative. Even worse, it was not clear whether the legislature had authorized the Nebraska courts to exercise the full judicial power. The new Nebraska statute clearly provides that the courts may assert personal jurisdiction to the limits permitted by the due process clause; in addition, redun-

2. See generally Restatement (Second) of Conflict of Laws § 79 (1971).
dant sections and the obsolete procedures such as service on a statutory agent have been eliminated. Of course, judicial power bounded only by the due process clause will be used effectively only by keeping up with the ongoing development of the theory of long arm jurisdiction. Part II of this Article will examine modern long arm doctrine and consider what can be accomplished with the new Nebraska statute.

Part III of this Article will examine several topics of Nebraska procedure that were affected by this statute. The statute finally presents a clear answer to the persistent problem of how a party can challenge personal jurisdiction with a special appearance and whether and how a special appearance overruled at the trial level can be preserved for appeal after a trial on the merits. The statute also makes it easier to serve process on some typical defendants, such as the State of Nebraska in original actions and administrative appeals, although the limited scope of this statute means that not all procedural problems of administrative appeals were resolved. Each of these topics will be discussed, in order to facilitate a better understanding of the new statute and effective use of the improved procedures for service of process.

I. METHODS OF SERVICE OF PROCESS: NOTICE

A. Greene v. Lindsey

The most direct and certain method of serving a summons is by personally delivering it to the defendant and telling the defendant that it is a summons. Many American jurisdictions also permit residence service as a substitute for actual service, either by leaving the summons at the defendant's residence or by leaving it there with someone. Residence service has a practical advantage, because it permits the sheriff to make effective service even though the defendant is not present. It also eliminates much of the incentive to hide from the sheriff to avoid service. Until 1983, Nebraska law permitted such substituted service by leaving the summons at the "usual place of residence," a provision that had always been a part of Nebraska law.7

When a court enters a default judgment because the defendant has not answered, there is always the chance the defendant was never notified of the lawsuit. Even requiring actual delivery of the summons to the defendant is not foolproof, as the sheriff may erroneously serve the wrong person, but substituted service by leaving

it at the residence increases the risk of error if the name or address
is incorrect or if the summons disappears before the defendant
sees it. Prior to 1982, each state could either decide that the added
risk of nonreceipt by the defendant was acceptable, given the ben-
efits, or reduce the risk by requiring some additional step to com-
plete the service such as leaving it at the residence with someone
or leaving it at the residence and thereafter mailing a copy of the
summons to the defendant. The state’s choice was a policy matter
not constrained by the due process clause, until the decision in
Greene v. Lindsey.8

The plaintiffs in Greene were challenging a Kentucky statute
that permitted substituted service of process in a forcible entry
and detainer action by posting the summons on the door of the
residence if the process server was unable to make either personal
service or substituted service by leaving the summons with a fam-
ily member over sixteen. The plaintiffs claimed they never re-
ceived a summons posted on their apartment door and that they
did not learn of the eviction proceedings until the writ of posses-
sion, based on a default judgment, was executed, at a time when it
was too late to appeal and apparently too late to reopen the de-
fault. The plaintiffs presented testimony by some process servers
that posted summons were “not infrequently removed” by persons
other than those served.9 Since that testimony was undisputed, it
appeared to form the basis for a factual finding that the posted no-
tice was constitutionally inadequate under the due process clause.

A narrow reading of Greene would limit the opinion to the par-
ticular facts of the case, but the Supreme Court may have intended
a broader effect. The procedural stance of Greene suggests that
the Supreme Court intended to hold that residence service alone
would always be inadequate as a routine method of serving pro-
cess. Greene was filed as a class action for declaratory and injunc-
tive relief under 42 U.S.C. section 1983 against the Louisville
housing authority and several public housing officials, as well as
the county sheriff and sheriff’s deputies. The district court granted
a summary judgment for all defendants, relying on a 1909 Sixth
Circuit opinion that had upheld notice by posting on the door.10
On appeal, the Sixth Circuit overruled the 1909 opinion, holding
that the plaintiffs’ evidence established that “notice by posting ‘is
not reasonably calculated to reach those who could be easily in-
formed by other means at hand,’” and that service by mail was
preferable, and then remanded for further proceedings.11 The

9. Id. at 453.
Supreme Court did not endorse as strongly the use of mail as a substitute for posting on the door, but otherwise affirmed the Sixth Circuit judgment. The actual evidence submitted by plaintiff did not receive prominent mention in the Supreme Court opinion, but was employed more to illustrate the conclusion that posting alone was insufficient.\textsuperscript{12} There did not appear to be any evidence that the summons served on the particular class action plaintiffs had been actually removed, and no evidence that the process server had any reason to suspect the particular summons would be removed before it was seen by the person being served. Even though \textit{Greene} itself only involved a forcible entry and detainer statute, the language of the opinion is not restricted to that kind of case. In short, if the sheriff in Louisville is to be enjoined from residence service by posting on the door in forcible entry and detainer actions on the facts in \textit{Greene}, the breadth of the opinion requires that other states also cease to use such service.\textsuperscript{13}

Although \textit{Greene} makes it clear that residence service by posting provides inadequate notice, the opinion is less clear regarding permissible alternatives that will satisfy the due process clause. The Sixth Circuit opinion implied that the alternative should be first class mail,\textsuperscript{14} a position to which the dissenting Justices on the Supreme Court reacted most strongly by arguing that no evidence in the record established that first class mail is empirically more likely to reach a defendant than posting.\textsuperscript{15} The Sixth Circuit opinion also followed its statement about mailed notice with a reference to the New York practice, which requires that service by posting be followed by sending a copy by registered or certified mail.\textsuperscript{16} Justice Brennan’s opinion first disclaimed any effort to establish an alternative, but did observe that “posted service accompanied by mail service is constitutionally preferable to posted service alone.”\textsuperscript{17} These alternatives, posting and mailing or mailing instead of posting, do not exhaust the list of alternatives. Another widely used form of substituted service is leaving it at the

\begin{itemize}
\item \textsuperscript{12} 456 U.S. at 455 n.9.
\item \textsuperscript{13} Justice O’Connor’s dissent listed 11 states which permitted residence service by posting alone. \textit{Id.} at 458 n.1. Two other states have also amended their statutes to provide for more effective substituted service. \textit{Colo. Rev. Stat.} § 13-40-112(2), (3) (1973) (amended by S. B. 80, May 26, 1983) (post and send by first class mail in forcible entry and detainer actions); \textit{Fla. Stat.} § 48.183 (1973) (amended by H. B. 498, May 19, 1983) (post and send by first class mail after two unsuccessful attempts at personal service in actions for possession of residential premises). \textit{See also State ex rel. Thomas v. Neal}, 299 S.E.2d 23 (W. Va. 1982).
\item \textsuperscript{14} 649 F.2d at 428.
\item \textsuperscript{15} 456 U.S. at 456.
\item \textsuperscript{16} 649 F.2d at 428.
\item \textsuperscript{17} 456 U.S. at 455, n.9.
\end{itemize}
defendant's residence with someone other than the defendant.\textsuperscript{18} For each method there is a different balance of risks and advantages. The major risks created by permitting substituted service are that the summons will be left at the wrong place, or it will be left at the right place but will be removed before defendant gets it, or it will not be delivered to the defendant by the person with whom the sheriff left it. The major advantages of substituted service are the efficiency gained if the sheriff can avoid the need to return if the defendant is not home, and the ability to complete effective service on at least some defendants who may be actively trying to avoid the sheriff.

Service by first class mail alone, with no receipt, is an alternative method of substituted service, but it hardly seems likely to comply with the due process clause, notwithstanding the Sixth Circuit's possible endorsement of it in Greene.\textsuperscript{19} The Sixth Circuit clearly had no empirical data to show that the rate of pilferage from mailboxes in public housing projects was less than the rate of removal of summons from doors. The chance that the summons will be mailed or delivered to the wrong address must be at least as high, if not higher, as the chance it will be posted on the wrong door. With ordinary mail there is no sheriff's return of service to provide some assurance that the summons was actually posted and when it was posted; in entering a default, the court can rely only on post office routine to deliver mail promptly and return undeliverable mail. Although the Supreme Court upheld the use of first class mail service in Mullane \textit{v. Central Hanover Bank \\& Trust Co.},\textsuperscript{20} it was in the context of an action more like class litigation than individual litigation.\textsuperscript{21} Given these defects in service by ordinary mail, the wise course is to consider the caveat in Greene as a warning not to use ordinary mail as a routine method of substituted service.

Substituted service by posting at the residence and mailing a copy by first class mail to the defendant increases the chance that

\textsuperscript{18} The Greene opinion had no reason to discuss residence service by leaving the summons with someone. That method of service was the preferred alternative under the Kentucky statute but had not been used because no one was home. \textit{Id.} at 446.

\textsuperscript{19} 649 F.2d at 428. Other jurisdictions that permit service by first class mail require that the defendant sign and return an acknowledgement of service in order to have effective service; the sanction for refusing to return the acknowledgment is liability for costs of personal service. \textit{See, e.g.}, FED. R. CIV. P. 4(c)(2)(C)(ii); \textit{CAL. CODE CIV. P. § 415.30.}

\textsuperscript{20} 339 U.S. 306 (1950).

\textsuperscript{21} In Mullane, the parties served by first class mail were trust beneficiaries; the action was a judicial settlement of the account of a trustee of the common trust fund. The Supreme Court held that notice would not have to reach all beneficiaries because of the class nature of the litigation. 339 U.S. at 319.
the defendant will receive the summons because it is more unlikely that both the summons will be torn off the door and the mailbox will be rifled. On the other hand, certain risks are not significantly reduced, such as the possibility that the address is incorrect, the defendant is out of town for a few weeks, or someone is actively trying to keep the defendant from learning of the suit. For that reason, substituted service by leaving the summons with someone at the defendant's residence is the preferable alternative to reduce the risk that the defendant will not get timely notice of the lawsuit. The sheriff will be more likely to learn of the wrong address if required to find someone at the residence, and the person with whom the summons is left may be able to tell an absent defendant about the service. Not all risks are eliminated, and more risks of nondelivery could be eliminated by combining the methods to require that it be left with someone and mailed to the defendant, but such overkill loses sight of the original goal of allowing a reasonable method of substituted service.

Even requiring that substituted service be made by leaving it with someone at defendant's residence can cause practical problems in serving process, as there is no guarantee that a fellow resident will be home if the defendant is not. A defendant attempting to evade service can do so more easily by disappearing when the sheriff appears or just not answering the door. These were exactly the problems that were avoided by posting the summons on the door under the old law, but Greene v. Lindsey now requires that the state strike a different balance that increases the chance of actual notice to the defendant.

B. Service Under the New Nebraska Statute

1. Residence Service

The basic method of substituted service permitted under the new Nebraska statute is "by leaving the summons at the usual place of residence of the individual to be served, with some person of suitable age and discretion residing therein." This method has been labeled "residence service" in the new statute to clearly distinguish it from personal service; the later specific service sections in the statute state whether both personal or residence service may be used or if only personal service is permitted. Careful consideration of the wording of the statute provides further gui-

22. This is the service method under Federal Rule of Civil Procedure 4(d)(1) and in several states. See, e.g., Ariz. R. Civ. P. 4(d)(1); Me. R. Civ. P. 4(d)(1); Minn. R. Civ. P. 4.03(a).
24. For example, in an ordinary civil action an individual can be served by personal, residence, or certified mail service, but in a divorce action only per-
dance. The requirement that the service be at the residence obviously eliminates service by leaving it at an office or place of employment.\(^\text{25}\) The requirement that the summons be left with a person of “suitable age and discretion” imposes primary responsibility and discretion on the process server to judge the reliability of the person given the summons. This is a reasonable requirement since the process is typically served by a sheriff or a deputy sheriff, and not by a private process server. While some other jurisdictions have defined a specific minimum age,\(^\text{26}\) that approach is unnecessarily arbitrary and capable of invalidating an otherwise valid service. The requirement that the person handed the summons be “residing therein” means that the process server must make some inquiry about the relationship of the person to the residence.\(^\text{27}\)

The new form of residence service will mean that the summons will not be served in some cases as quickly as was possible before, or will not be served by the sheriff at all, even though it could have been under prior law. On the other hand, the statute was not intended to, and does not, provide a haven for the defendant attempting to evade service, as it requires only that personal service be made by “leaving the summons with the individual to be served.”\(^\text{28}\) The defendant does not need to accept the summons, sign for the summons, acknowledge receipt of the summons, or even touch the summons, to be properly served. The old concern in some states with antiquated formality of service is not a part of the Nebraska statute. Personal service will be proper if the defendant is present, aware of the officer's presence and purpose, and could have in-hand service “by the simple expedient of opening the door in response to the officer's request.”\(^\text{29}\)

\(^{25}\) Prior law had also required such service only at the residence. § 25-508, Neb. Rev. Stat. (repealed 1983).

\(^{26}\) See, e.g., Ark. R. Civ. P. 4(d)(1) (at least 14); Ill. Practice Act § 13.2(1) (13 or upwards); Iowa R. Civ. P. 56.1(a) (at least 18); Mo. R. Civ. P. 54.13(a)(1) (over 15).

\(^{27}\) The officer will also need to learn the name of the person with whom the summons is left in order to complete the return. See Neb. Rev. Stat. § 25-507.01 (Supp. 1983).


\(^{29}\) Haney v. Olin Corp., 245 So. 2d 671, 674 (Fla. Dist. Ct. App. 1971) (When sheriff identified himself, defendant ran into house and refused to open door, “[a]n officer's reasonable attempt to effect personal service . . . cannot be frustrated by . . . closing the front door . . . and willfully refusing to accept service of process, very much as a child playing a game of tag might gain instantaneous immunity by calling 'King's X'.” Id. at 673.) See also Liberman v. Commercial Nat'l Bank, 256 So. 2d 63 (Fla. Dist. Ct. App. 1971) (proper personal service when process server left papers in mailbox after seeing de-
2. Certified Mail Service

A major benefit of the new statute should be the provision for routine use of certified mail service, a less expensive alternative to personal service by the sheriff. Although service by mail was available prior to 1983 in a few specific statutes, it has only now been made available for ordinary civil actions at the election of the plaintiff. Routine use of certified mail service should be encouraged in most cases, unless there is some reason to think that the defendant will refuse to accept the mail. If the defendant does refuse to accept it, the plaintiff can always have the sheriff attempt service with a second summons. Even if it is close to the statute of limitations, service by certified mail can still be used because plaintiff has six months to complete service after commencement of the action.

Certified mail service may be either actual service on the defendant or substituted service, as the statute does not require that the defendant sign the receipt. If the defendant personally signs the receipt, there will, of course, be actual service, but the language of the statute also permits the receipt to be signed by someone else at the address. This increases the chance that the summons will be delivered promptly, and should avoid the need for some defendants to make an extra trip to the post office to claim the certified mail. This substituted service provision is not as restricted as for residence service, since certified mail does not have to be sent only to defendant's residence. The certified mail service may be made to an office, or even a post office box, and the person signing the receipt does not have to reside at the address either.

This form of substituted service by certified mail appears to satisfy both the letter and the spirit of the Supreme Court's opinion in

32. Id. § 25-217 (1979).
33. There must be a "return receipt requested" and the "signed receipt" must be filed. Neb. Rev. Stat. § 25-505.01(3) (Supp. 1983). This language was purposely used to permit the receipt to be signed by someone other than the defendant.
Certified mail is not just left in the mailbox unattended, but is given the added attention that comes from having a signed receipt. The receipt, showing to whom and where delivered, provides some record of delivery and a check on the accuracy of the defendant's address. There is always the risk that even certified mail will not be delivered correctly, but that risk appears to be relatively slight and acceptable to achieve the goal of reducing the cost of serving process and providing an effective substitute for the old residence service.

3. Other Forms of Service

If the defendant cannot be served by one of the three primary methods of service—personal service, residence service, or certified mail service—the new statute authorizes the court to order an alternative method of service for the particular case. The failure to serve with the primary methods must be shown by an affidavit that “service cannot be made with reasonable diligence by any other method provided by statute,” and the record should typically show that service was tried unsuccessfully. However, the statute does not require that all methods be tried without success. Lack of success is not what is critical, but rather the reason for the lack of success. Therefore, the affidavit must demonstrate why reasonable diligence has not been sufficient to accomplish effective service. Avoiding the mail carrier or refusing the certified mail would not show that the sheriff could not make personal service. Living alone and not being home when the sheriff came to the house would not show that the sheriff could not make personal service at another time or place. In such cases, the alternative service would not be proper. On the other hand, if the plaintiff has made a diligent inquiry of defendant's family, friends, or co-workers and cannot locate the defendant at all, or if the defendant appears to be actively attempting to avoid the sheriff, then a court can properly permit some alternative form of service.

The first possible alternative form of service listed in the statute is “leaving the process at the defendant's usual place of residence and mailing a copy by first-class mail to the defendant's last known

34. Similar language is used in Ohio Rule of Civil Procedure 4.1(1). The Supreme Court of Ohio has upheld such a provision. Samson Sales, Inc. v. Honeywell, Inc., 66 Ohio St. 2d 290, 421 N.E.2d 522 (1981) (certified mail addressed to corporation); Mitchell v. Mitchell, 64 Ohio St. 2d 48, 413 N.E.2d 1182 (1980) (certified mail receipt signed by another person at defendant's address).

35. NEB. REV. STAT. § 25-517.02 (Supp. 1983).

36. Plaintiff should instead provide the sheriff with better information about where to make personal service, and have an alias summons issued, if necessary.
address . . . .

This is necessary only if the sheriff cannot find someone at the residence with whom to leave the summons for residence service and the defendant did not claim or refused certified mail. It is possible only if the plaintiff can locate the defendant’s residence and last-known address. Therefore, this method is primarily aimed at the defendant who is avoiding the sheriff in order to prevent personal service of the summons, or the defendant who keeps such a random schedule that no one can track him down. This method, leaving it at the residence and mailing, was mentioned favorably in Greene, and even though it may not be the best method of substituted service, it is a good second best alternative for certain defendants who have a known residence.

For defendants who have no known residence, leaving the process at the residence and mailing it will not work, and the court will have to provide some other method of service. Traditionally, such defendants have been served by publication; the new statute continues that possibility, but also permits the judge to customize a method of service that may be more reliable and less expensive. Creative methods of serving process can be suggested by parties and approved by the court, because the statutory test goes no farther than stating the constitutional minimum that the service be "reasonably calculated under the circumstances to provide the party with actual notice of the proceedings and an opportunity to be heard." Since "the circumstances" necessarily includes the failure of the normal service methods to reach the defendant after the plaintiff has employed reasonable diligence, an alternative method of service might be authorized that would have violated the due process clause if used in the first instance. For example, service on an insured driver who has since disappeared and cannot be found might be made on the insurance company which issued the liability policy.

One typical example of the need for alternative service on a defendant with an unknown address is a divorce action. Prior to 1983, the plaintiff had to either make personal service or proceed by

publication. Under the new statute, the summons must be served either by personal service or under the provision authorizing alternative service, which no longer limits the alternatives to publication. Other methods should be considered, since publication in a legal newspaper is expensive, and in many cases simply wasteful given the exceedingly slight chance it will be seen. In divorce actions, one court has approved an alternative of mailing to a last known address and posting at three public places in the county. Other methods, such as leaving a copy of the summons and petition with a close relative and posting in a public place, or even just posting it in two or three public places, should be adequate notice to satisfy the due process requirement if diligent inquiry fails to find any useful mailing address or location.

Constructive service of a nonresident defendant to obtain long arm jurisdiction has hopefully disappeared from practice. While service in the state, by publication, was once the only way to proceed because the summons could not be sent across the state line, modern long arm theory has eliminated that. Any defendant with sufficient contacts to support personal jurisdiction can be served directly under the new long arm statute without the need for any publication at all. That will leave service by publication for those cases where it is elsewhere required, such as in probate cases, and those cases where court and counsel cannot create an equally effective method of serving the unfound defendant. It has long been accepted that service by publication alone is insufficient to satisfy due process requirements if better notice can be given, and the Nebraska statute, therefore, requires that notice by mail be sent in addition to the publication, if the address is known. That, in effect, treats the publication as a very weak substitute for actual notice and the mailed notice as the actual notice, so it would be better to stop publishing altogether and focus on the best method of providing actual notice.

Any method of constructive notice may fail occasionally to reach a defendant in time to permit a defense on the merits. How-

42. NEB. REV. STAT. § 42-355 (repealed 1983).
44. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed.
45. Dungan v. Dungan, 579 S.W.2d 183 (Tenn. 1979) (alternative notice in lieu of publication for divorce petitioners proceeding in forma pauperis).
47. NEB. REV. STAT. § 25-520.01 (1979).
ever, if the procedure is proper, due process is satisfied and a resulting judgment is not open to attack for denial of due process, even if defendant had no actual notice. If a default is entered because a proper method still does not reach the defendant, the defendant's recourse is to reopen the default, by demonstrating sufficient grounds to vacate the judgment.

II. LONG ARM JURISDICTION: POWER
A. The Test of Minimum Contacts

The most significant change in the law governing service of process during the last century has been the ability to serve a summons outside the state, under what is called long arm jurisdiction. The theory of long arm jurisdiction developed slowly over decades, and during that period of slow development, Nebraska adopted several long arm statutes of varying reach. The 1983 statute repealed the older and now obsolete long arm statutes and amended the general long arm statute to remove previously existing ambiguity and clearly show that the legislature intends the Nebraska courts to exercise long arm jurisdiction to the fullest extent possible, limited only by the due process clause.

Certain nonresident defendants are clearly subject to personal jurisdiction when sued in a Nebraska court. For example, the nonresident motorist who causes an accident in Nebraska and the nonresident manufacturer who markets a defective product in Nebraska can both be served with a summons from a Nebraska court. Such cases fall well within the limits of the judicial power of the state under the long arm doctrine. What is more difficult to predict is the outer reach of the state's jurisdiction, for two reasons. First, long arm jurisdiction has grown, so that the outer limits keep expanding. Second, current United States Supreme Court doctrine is unclear, and unstable; the doctrine is likely to change, but the direction of change is hard to predict. Therefore, the history and current doctrine of long arm jurisdiction will be reviewed briefly, because both history and current doctrine are necessary to understand what may happen in the next few years.

51. This article will not present a full discussion of long arm jurisdiction because that topic has been more than adequately discussed elsewhere. Among some of the better recent articles are Braveman, Interstate Federalism and Personal Jurisdiction, 33 Syracuse L. Rev. 533 (1982); Clermont, Restating Territorial Jurisdiction and Venue for State and Federal Courts, 66 Cornell L.
The basic principles of long arm jurisdiction, and the historical development of long arm theory, should be familiar. The United States Supreme Court, in 1877, in *Pennoyer v. Neff*, held that process could not be sent to a defendant outside the borders of the issuing jurisdiction, because it would infringe the sovereignty of the defendant's state if the defendant could be forced to leave and go to the issuing state to defend the suit. The Court also held that it would be a violation of the due process clause of the fourteenth amendment for any state to enter a judgment against a defendant without some form of valid, in-state service of process. In the next century, the realities of interstate travel and trade led the Court to retreat from *Pennoyer* and to permit some alternative methods of service of process that effectively allowed the summons to reach outside the state where it was issued.

The landmark opinion that established the modern rules for long arm jurisdiction was *International Shoe Co. v. Washington* in 1945. In *International Shoe*, the Court held that a nonresident defendant could be served outside the state, if the defendant had sufficient contacts with the state to meet the tests of due process. After *International Shoe*, the major question was how few contacts is enough, or how minimal can the contacts be and still meet the minimum contacts test.

In *Hanson v. Denckla*, the Court established some general rules of long arm jurisdiction; and more importantly, in the debate between the majority and dissenters, outlined a basic dispute. The facts of *Hanson* were unique and not important; the doctrinal dispute still continues. The majority, in an opinion by Chief Justice Warren, held that a state could not exercise long arm jurisdiction over an absent defendant unless there was "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Thus, the majority opinion justified the exercise of long arm jurisdiction on a quid pro quo theory, so that a defendant would be subject to personal jurisdiction only if the...
defendant first got something from the state, and got it purposefully. The opinion did not fully explain why the test should be so focused on the defendant's contact with the forum. The dissenting opinion by Justice Black, joined by Justices Burton and Brennan, employed an entirely different test:

Where a transaction has as much relationship to a State as [in this case,] its courts ought to have power to adjudicate controversies arising out of that transaction, unless litigation there would impose such a heavy and disproportionate burden on a nonresident defendant that it would offend what this Court has referred to as "traditional notions of fair play and substantial justice."56

Justice Black emphasized the transaction; since the defendant had willingly participated in a transaction that involved some activity in the forum state, there should be jurisdiction in the forum state even if the defendant's own participation did not directly involve the forum state.

The Hanson majority and Justice Black also disagreed about the best approach to guard against the danger that litigation in another forum would be unfairly burdensome. Implicit in the majority quid pro quo test is some notion of fairness; that it would be unfair to allow the "unilateral activity" of another to force a defendant to be willing to defend in another forum. The majority assumed that some defendants would be burdened or prejudiced if required to defend in another state with which they had no direct contact, and therefore established a narrower test for personal jurisdiction. Justice Black's broader test would increase the risk of burdensome litigation in a distant forum, but would allow a defendant who could show an actual burden to defeat jurisdiction. Thus, Hanson established a defendant-oriented, one-step test while Justice Black argued for a transaction-oriented, two-step test.

For two decades after Hanson, the Supreme Court was silent on long arm jurisdiction, leaving application or adaptation of the Hanson test to the state supreme courts and the federal circuit courts. In form, the Hanson test was applied, but in the result the test was adapted to support long arm jurisdiction in an ever-increasing number of areas, and with a shrinking number of minimum contacts. For example, in product liability litigation, the Illinois Supreme Court quickly showed how a state could assert all the long arm jurisdiction necessary to reach an out-of-state manufacturer.57 The Gray opinion's language followed the Hanson test of

56. Id. at 258.
57. Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d at 432, 176 N.W.2d 761 (1961). In Gray, the defective product had been manufactured in Ohio, incorporated into another product in Pennsylvania; it somehow got to Illinois where it injured the plaintiff. There was no evidence in the record to
purposeful affiliation, but the result more easily fits the minority argument of Justice Black.

The United States Supreme Court finally returned to the long arm cases in the late 1970's. After establishing in *Shaffer v. Heitner*,\(^{58}\) in 1977, that all personal jurisdiction had to meet the minimum contacts test of *International Shoe*, the Court finally addressed some of the key issues of long arm jurisdiction in *World-Wide Volkswagen Corp. v. Woodson*, in 1980.\(^{59}\) The facts of *World-Wide Volkswagen* were those of a typical product liability action. Plaintiffs bought an Audi in New York from a New York retailer. The car had been manufactured in Germany by Audi, imported to the United States by Volkswagen, and distributed to the retailer through a regional distributor responsible for New York, New Jersey, and Connecticut. The Audi was struck from the rear in Oklahoma, causing a fire which severely burned the plaintiffs. Plaintiffs sued in Oklahoma, joining as defendants Audi, Volkswagen, the regional distributor, and the retailer. Audi and Volkswagen conceded that they were subject to the personal jurisdiction of the Oklahoma courts. The regional distributor and retailer objected to personal jurisdiction. The objection was unsuccessful in the trial court and Oklahoma Supreme Court,\(^{60}\) but finally successful in the United States Supreme Court.

Justice White's opinion in *World-Wide Volkswagen* clearly followed the *Hanson* rule that a defendant can be subjected to personal jurisdiction by the forum only if it "purposefully avails itself of the privilege of conducting activities within the forum State."\(^{61}\) Plaintiffs had argued that the distributor and retailer were within that test because it was foreseeable that a mobile product, such as the Audi, might cause injury outside New York where it had been sold. Justice White distinguished between foreseeability in the sense of likelihood or possibility and foreseeability as a result of the efforts of the defendant to directly or indirectly enter the market of a particular state. Since the two local parties had not attempted to enter the Oklahoma market, they did not have minimum contacts with the forum, and the "unilateral activity" of the buyer in driving to Oklahoma was not enough to create personal jurisdiction.

The three dissenting judges in *World-Wide Volkswagen* show that the Ohio defendant had done any business in Illinois. The Illinois Supreme Court upheld long arm jurisdiction because the defendant had placed its product in the stream of commerce, and it was a reasonable inference that its products were sold in Illinois.

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60. 585 P.2d 351 (Okla. 1978).
61. 444 U.S. at 297.
that Justice Black's two-step, transactional approach to personal jurisdiction is still viable as an alternative competing theory. Justices Brennan, Marshall, and Blackmun argued that the focus on the contacts between the forum and defendant was too narrow. They would have found jurisdiction over the two local defendants because the sale of new motor vehicles is a nationwide transaction in which both were purposefully involved, and there had been no showing that the defense of the litigation would be unfair or burdensome. These dissents alone show the persistence of the two-step, transactional approach to long arm jurisdiction. That persistence indicates that there may yet be more changes in the long arm doctrine.

There is a second reason to expect more changes in long arm doctrine. In World-Wide Volkswagen, Justice White sought to defend his position by suggesting two reasons why the narrower, defendant-oriented test was required:

The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system. The latter, interstate federalism argument, was given unusual prominence, as if the Court simply could not permit the states to employ the transactional test:

Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.

This emphasis on federalism was analyzed and strongly questioned by several commentators. Very quickly Justice White reached out in a later case to abandon any reliance on the federalism argument. Justice White did not suggest that the actual holding in World-Wide Volkswagen was wrong, but this partial

62. Id. at 299 (Brennan, J., dissenting); id. at 313 (Marshall, J., dissenting); id. at 317 (Blackmun, J., dissenting).
63. 444 U.S. at 291.
64. Id. at 294.
65. See Braveman, supra note 51; Lewis, supra note 51; Redish, supra note 51.
67. Justice White commented on the federalism argument in this manner:

It is true that we have stated that the requirement of personal jurisdiction, as applied to state courts, reflects an element of federalism and the character of state sovereignty vis-a-vis other States . . . . Contrary to the suggestion of Justice Powell, [dissenting], our hold-
abandonment of the most recent leading case suggests that the doctrine of long arm jurisdiction will continue to change as the Supreme Court tries to establish a stable doctrine.68

The primary concern left from *World-Wide Volkswagen*, after federalism is removed, is not fairness of litigation but fairness of choice of law. That is a concern that a nonresident defendant brought into the forum under the long arm statute, although able to litigate there, may want to avoid the substantive law of the forum because it is critically different on a key issue from the substantive law elsewhere.69 Traditionally, the choice of what substantive law to apply to a multi-state transaction has been a conflicts question, and a defendant could be protected from an unfair application of the forum's substantive law through the conflicts doctrine. However, now that seems unlikely to happen, since recently the Supreme Court effectively removed most constitutional

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68. Justice Powell's dissent suggests that Justice White's footnote might have a substantial effect on long arm jurisdiction:

Before today, of course, our cases had linked minimum contacts and fair play as jointly defining the "sovereign" limits on state assertions of personal jurisdiction over unconsenting defendants. . . . The Court appears to abandon the rationale of these cases in a footnote . . . . But it does not address the implications of its actions. By eschewing reliance on the concept of minimum contacts as a "sovereign" limitation on the power of State—for, again, it is the State's long-arm statute that is invoked to obtain personal jurisdiction in the District Court—the Court today effects a potentially substantial change of law. For the first time it defines fair play. And, astonishingly to me, it does so in a case in which this rationale for decision was neither argued nor briefed by the parties.

*Id.* at 714. *See* Lewis, *supra* note 51.

limits on choice of law in such cases. As a result, the Supreme Court, in World-Wide Volkswagen, formulated a narrower long arm jurisdiction test as an apparent partial solution to a potential conflicts problem, even though it did not appear there was any actual conflicts problem in the case.

The issue still remains framed as a choice between the one-step defendant-oriented test and the two-step transaction-oriented test. The reaffirmation of the defendant-oriented test in World-Wide Volkswagen is unlikely to settle the issue for long, given the now apparent weakness of a primary argument for it. A single factor test does not accommodate multiple concerns very effectively, and the focus in current doctrine on the defendant's purposeful affiliation with the forum leaves little room to consider the relative convenience or fairness of the forum. If the Supreme Court does not address the issue for several years, the historical pattern suggests that many of the state supreme courts will continue the trend toward expansion of long arm jurisdiction, especially in those cases involving multiple parties resident in many different states. The World-Wide Volkswagen test will be satisfied in form, even if bent in substance, as was the Hanson v. Denckla test. If the Supreme Court does address the issue soon, the strict defendant orientation may be modified or even abandoned. It could then be replaced by either the two-step transaction-oriented test or by a broader trans- action test with a forum non conveniens doctrine to protect defendants actually burdened unfairly by distant litigation. Until there is further guidance from the United States Supreme Court, Nebraska courts will have some freedom to interpret the limits of the new statute, guided by precedent from the other state and federal courts.

B. Nebraska Long Arm Jurisdiction

Nebraska adopted its first general long arm statute in 1967,


\[71. \text{It appears that World-Wide Volkswagen was really a dispute about choice of forum. The action was filed by a New York plaintiff in Oklahoma state court; as long as the retailer and distributor were parties, the action was not removable because they were also New Yorkers. If they had been dismissed for lack of personal jurisdiction, the other two defendants could then remove to federal court.}\]


\[73. \text{The Supreme Court did accept one recent case that would have provided further guidance on long arm jurisdiction, but subsequently dismissed for lack of jurisdiction. Gillette Co. v. Miner, 102 S. Ct. 1767, cert. dismissed, 103 S. Ct. 484 (1982).}\]

substantially adopting the Uniform Interstate and International Procedure Act. The key section established that long arm jurisdiction could be exercised over a defendant who fit within one of six categories, such as transacting business in the state or causing tortious injury in the state. Although the statute, when adopted, presented a clear list of the kinds of activity that would certainly meet the due process test for long arm jurisdiction, it was not clear that it exhaustively described the judicial power of the state. As a result, there were interpretative questions as to the scope of the statute, with one Nebraska Supreme Court opinion suggesting that the section should be interpreted to show legislative intent to permit the courts to assert as much long arm jurisdiction as permitted by the due process clause, while another opinion by the same author held that only the enumerated categories provided a basis for long arm jurisdiction. The new Nebraska statute has eliminated the interpretation questions, by providing that the courts may exercise personal jurisdiction over any person "who has any other contact with or maintains any other relation to this state to afford a basis for the exercise of personal jurisdiction consistent with the Constitution of the United States." This clearly establishes that the only limit on long arm jurisdiction is the due process clause. It is somewhat duplicative to have both the original

75. Jurisdiction over a person. (1) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person’s:
   (a) Transacting any business in this state;
   (b) Contracting to supply services or things in this state;
   (c) Causing tortious injury by an act or omission in this state;
   (d) Causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state;
   (e) Having an interest in, using, or possessing real property in this state;
   (f) Contracting to insure any person, property, or risk located within this state at the time of contracting.


77. Larimore v. Snyder, 206 Neb. 64, 291 N.W.2d 241 (1980). This decision should not be considered as controlling under the amended statute. It held that there was no long arm jurisdiction in a paternity case, because the act of fathering a child in Nebraska was not enumerated in the statute. Now that the statute has eliminated the need to fit within one of the enumerated categories of § 25-536, the only issue is that of due process. Eight states have adopted the Uniform Parentage Act § 8(b), 9A U.L.A. 598 (1979), which expressly establishes long arm jurisdiction in such paternity cases; this assertion of long arm jurisdiction should be within the due process limits.

six specific sections and the broad due process section, but that duplication was done deliberately to emphasize the expansion of
long arm jurisdiction.

For many cases the reach of long arm jurisdiction is clear, as some examples should demonstrate. Assume that a resident of
state $A$ drives to Nebraska, collides with a Nebraska resident in
Nebraska, and then returns to state $A$. Long arm jurisdiction will
reach the resident of state $A$.79 Assume that a seller in state $B$
manufactures a product and sends it to a Nebraska retailer; after
the product is sold to a Nebraska resident it malfunctions and
causes personal injury to the Nebraska resident. Again long arm
jurisdiction will reach the seller in state $B$.80 Assume that a seller
in state $C$ sends a sales representative to call on a buyer in Ne-
braska; after the buyer and sales representative sign a contract in
Nebraska for goods to be delivered in Nebraska, the seller
breaches the contract. Once again the long arm jurisdiction will
reach the seller in state $C$.81 In each case the action can be filed in
a Nebraska court, and a summons can be served outside the state,
wherever the defendant may be found.

Not all cases are so clearly within long arm jurisdiction, as some
other examples will illustrate. Assume that a doctor in neighbor-
ing state $D$ treats a Nebraska resident at the doctor's office in state
$D$, and subsequently the Nebraska resident is hospitalized in Ne-
braska; complications ensue and the Nebraska resident wants to
sue both the Nebraska hospital and the state $D$ doctor for medical
malpractice. Will long arm jurisdiction reach the doctor in state
$D$?82 Assume that a Nebraska resident contracts by telephone or
mail to sell goods to a buyer in state $E$, and sends the goods to the
buyer in state $E$ but is never paid and wants to sue. Will long arm
jurisdiction reach the buyer in state $E$?83 Assume that a manufac-

79. This well-established use of long arm jurisdiction was upheld under an older
81. Taubler v. Giraud, 655 F.2d 991 (9th Cir. 1981); General Leisure Products
82. Compare Lemke v. St. Margaret Hosp., 552 F. Supp. 833 (N.D. Ill. 1982) (sub-
tect to personal jurisdiction), with Walters v. St. Elizabeth Hosp. Medical
Center, 543 F. Supp. 559 (W.D. Pa. 1982) (no personal jurisdiction), and
83. Compare Electro Craft Corp. v. Maxwell Electronics Corp., 417 F.2d 365 (8th
Cir. 1969) (upholding jurisdiction), with Lakeside Bridge & Steel Co. v. Moun-
tain States Const Co., 597 F.2d 596 (7th Cir. 1979), cert. denied, 445 U.S. 907
(1980) (no jurisdiction). Justice Powell’s dissent in Lakeside argued that
there was a substantial conflict among the federal and state courts that the
Supreme Court should resolve. 445 U.S. at 909-11.
turer in state $F$ sells its product to a retailer in state $G$, who sells the product to a Nebraska resident; the Nebraska resident returns to Nebraska with the product and is injured at home when the product malfunctions. Will long arm jurisdiction reach both the manufacturer in state $F$ and the retailer in state $G$?\footnote{84} Assume an airline crash in Nebraska on a flight from state $H$ to a Nebraska city, in which the airline is from state $I$, the plane was manufactured and sold in state $J$, the engine was from state $K$, the critical part was from state $L$, and the part was repaired in state $M$. Will long arm jurisdiction reach all five parties in states $I, J, K, L$ and $M$?\footnote{85}

A critical factor in determining whether the Nebraska judicial power will reach far enough to sustain long arm jurisdiction in each of these difficult cases will be whether the statute is interpreted expansively or narrowly. In making the choice necessitated by the conflicting precedent and the weakness of current Supreme Court doctrine, the most persuasive argument is that the Nebraska statute should be interpreted expansively. The purpose should not be to keep judicial business in Nebraska courts or to simply favor Nebraska plaintiffs. Rather, an expansive interpretation of long arm jurisdiction, if coupled with use of the forum non conveniens doctrine, will best ensure that Nebraska courts hear all cases where it is most fair and efficient to try them in Nebraska.\footnote{86}

The Nebraska courts should remain concerned that the exercise of jurisdiction be fair to both parties. A plaintiff has an interest in finding a convenient forum where the defendant can be required to defend. A defendant needs protection against being forced to defend in a forum so distant that the burden of defending destroys the ability to defend. In addition to fairness, the courts should consider efficiency in litigation. Witnesses and evidence may be more conveniently located for a trial in Nebraska than elsewhere. In multiple party cases some parties may be subject to jurisdiction in Nebraska and therefore can be joined if the action is here, but they may not be subject to jurisdiction in any other forum so it will be less efficient to deny jurisdiction and require two lawsuits. All of these concerns can best be addressed if the Ne-

\footnote{84. The Supreme Court implied a negative answer in World-Wide Volkswagen in Justice White's parade of classic horrible examples of foreseeability as the sole test. 444 U.S. at 296. On the other hand, the same opinion favorably cited a case using the "stream of commerce" theory, which would uphold long arm jurisdiction in such a situation. Id. at 298, (citing Gray v. American Radiator and Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961)). See also State ex rel. Hydraulic Servocontrols Corp. v. Dale, 294 Or. 381, 657 P.2d 211 (1982).}

\footnote{85. See Kennelly, supra note 72, at 292-307.}

\footnote{86. See Redish, supra note 51, at 1133-44.}
Nebraska courts are considered as part of a national legal system in which a primary objective is providing a proper forum for every litigated case, no matter how complicated or spread out.87

An important ingredient of the proposal for an expansive reading of the long arm jurisdiction is the forum non conveniens doctrine, first clearly recognized in Nebraska in 1974.88 Under forum non conveniens, Nebraska courts can decline to hear a case, even though it is within the subject matter jurisdiction of the court and even though the defendant is subject to personal jurisdiction, if Nebraska is an inconvenient forum. Jurisdiction is not to be declined lightly, but forum non conveniens can apply if the convenience of the parties and the public interest indicate that the case should be tried elsewhere. Forum non conveniens permits a defendant to show that a trial in Nebraska will be unfairly burdensome, and thus tempers the reach of the long arm jurisdiction.

Forum non conveniens offers two advantages over a narrow interpretation of long arm jurisdiction.89 Since forum non conveniens requires comparing the convenience of Nebraska and some other jurisdiction, it necessarily assumes that there is some other jurisdiction also able to hear the dispute. A narrow interpretation of the long arm jurisdiction could sometimes leave a plaintiff with no alternative forum where all parties could be joined. In addition, forum non conveniens does not require that the action in Nebraska be dismissed outright; the dismissal can be conditional on some action by the defendant or the action can be stayed pending litigation elsewhere.90 In contrast, a lack of personal jurisdiction can only lead to dismissal of the action against the defendant. Thus, forum non conveniens permits better evaluation of the fairness and efficiency of hearing a particular case in Nebraska. World-Wide Volkswagen may have reaffirmed that fairness and efficiency are not the only concerns, but not even Justice White's language can make them completely irrelevant.

In each of the difficult cases set out in the examples,91 there will often be additional facts that create sufficient contact with Nebraska to support long arm jurisdiction. The doctor in the neighboring state may have shown a willingness and interest in serving Nebraska residents, whether by telephone listings in Nebraska directories or accepting referrals from Nebraska doctors. The buyer may have first approached the Nebraska resident, or otherwise

89. See generally Restatement (Second) of Conflicts § 84 (1971); Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).
90. See, e.g., MacLeod v. MacLeod, 383 A.2d 39 (Me. 1978).
91. See supra text accompanying notes 82-85.
taken steps to establish contact with the state. A manufacturer selling to a retailer in a neighboring state may also sell directly to Nebraska retailers, or may directly advertise in Nebraska, or may know and approve of the retailer's cultivation of the Nebraska market. Similarly, the retailer in the neighboring state may have made some efforts to cultivate the Nebraska market. In the airline crash case, each of the parties may have shown a willingness to become involved in a national distribution of its particular product. In each case, the plaintiff will have the burden of finding and demonstrating the additional facts that show a defendant's direct or indirect attempts to benefit from Nebraska, in order to fit within the "purposely avails" test of World-Wide Volkswagen and Hanson v. Denckla.92

C. Obsolete Theory

The century of change in the law of personal jurisdiction saw the development of other theories before reaching modern long arm doctrine. Among the theories were quasi in rem jurisdiction and the statutory agent upon whom service could be made. The demise of these theories should be noted by Nebraska practitioners, as the limited scope of each theory has been encompassed by the overall reach of the long arm doctrine.

Quasi in rem jurisdiction had offered a plaintiff a procedure for obtaining jurisdiction over an absent defendant who had property in the forum; by attaching the property at the start of the litigation over an unrelated cause of action, the plaintiff acquired jurisdiction to the amount of the property.93 Before there was any long arm jurisdiction, quasi in rem jurisdiction sometimes accomplished the same purpose, even if it was fortuitous in some cases that the defendant had property in the forum. The advantage of quasi in rem jurisdiction effectively disappeared in 1977 when the Supreme Court, in Shaffer v. Heitner,94 held that all assertions of jurisdiction, including the quasi in rem jurisdiction asserted there, had to meet the due process test of International Shoe.95 In 1980, an amendment to the attachment statute eliminated any jurisdictional ground for attachment in Nebraska, thus ending the use of quasi in rem jurisdiction.96 However, given a broad long arm statute, a plaintiff can reach a defendant as effectively directly as

95. Id.
through a quasi in rem attachment.97

The statutory agent was a product of the movement toward modern long arm statutes. Corporations and out-of-state motorists were early targets for long arm statutes. The first step was a requirement that such potential defendants actually appoint an agent in the state upon whom service could be made.98 The second step was a statute providing that certain activity in the state, such as driving a motor vehicle,99 or doing business,100 was an automatic appointment of a state official as an agent of the potential defendant upon whom service could be made. The Supreme Court upheld such involuntary appointments, if the statute required the state official to take action to actually notify the out-of-state defendant.101 Such statutes were valuable when first adopted, because they provided a procedure for reaching an out-of-state defendant while maintaining the fiction that the summons was not being sent across the state line. Once such statutes removed the novelty of reaching across state lines, and laid the foundation for modern long arm doctrine, the need for the statutes disappeared. Even though such statutes are inefficient, requiring a two-step procedure to notify a defendant when direct notice will suffice,102 they persist, and even worse, have been adopted in recent statutes where not at all needed.103 The new Nebraska statute has ended the era of the statutory agent,104 because any defendant with sufficient contacts with the state can be reached directly under the long arm statute. However, since the United States Supreme Court has at times commented on whether there was any special state interest in a specific long arm jurisdiction,105 in many statutes only the statutory agent language was repealed while the

97. There was an effort in some states to use quasi in rem attachment of an insurance policy beyond the limits of long arm jurisdiction, but the Supreme Court held that such an approach violated the due process clause. Rush v. Savchuk, 444 U.S. 320 (1980).


104. Over three dozen such statutes were repealed by the 1983 statute. The only survivor, Neb. Rev. Stat. § 48-175.01 (1978), was not repealed only because of opposition from the Workmen's Compensation Court. However, this section does not extend the jurisdiction of the Workmen's Compensation Court any further than is possible directly under the long arm statute.

statement of the legislature's special interest was retained.\textsuperscript{106}

III. Nebraska Procedure Changes

A. Challenges to Personal Jurisdiction

A defendant may want to challenge the personal jurisdiction of the court either on the ground that the summons was not properly served or on the ground that the defendant is outside the state and not subject to long arm jurisdiction. In Nebraska, this challenge has always been by a special appearance, a nonstatutory procedure developed solely by case law.\textsuperscript{107} The new statute provides a statutory basis for the special appearance and establishes some clear rules about the procedure.\textsuperscript{108} The special appearance must still be made before any other pleading or motion is filed; the statute continues this requirement because any other filing would be a general appearance which would moot the issue of personal jurisdiction. Unlike the Federal Rules of Civil Procedure and many states following that model, the Nebraska statute does not authorize any additional objections in the special appearance.\textsuperscript{109} Defenses such as lack of subject matter jurisdiction, improper venue, improper joinder, or failure to state a cause of action will have to be raised in a later filing.\textsuperscript{110}

The new statute also answers the persistent question about what a defendant can do if the special appearance is overruled by the trial court—Can the special appearance be preserved through a trial on the merits in order to obtain appellate review of the trial judge's ruling?\textsuperscript{111} In most cases the statute gives the defendant a clear choice between either continuing with a trial on the merits and waiving the personal jurisdiction defense or appealing the personal jurisdiction ruling only after defaulting on the merits. If the personal jurisdiction defense relates to the manner or method of service, any further participation by the defendant in the trial


\textsuperscript{107} Crowell v. Galloway, 3 Neb. 215 (1874).


\textsuperscript{109} Cf., e.g., Fed. R. Civ. P. 12(g). Prior case law also required that only the objection to personal jurisdiction be raised in the special appearance. Clark v. Bankers Accident Ins. Co., 96 Neb. 381, 147 N.W. 1118 (1914).


\textsuperscript{111} The defendant did so in Mindt v. Shavers, 214 Neb. 786, — N.W.2d — (1983), but most defendants in recent decades found they had somehow waived the issue by a misstep in the trial court. See, e.g., Kohler v. Ford Motor Co., 187 Neb. 428, 191 N.W.2d 601 (1971). Under the new statute, the defendant in \textit{Mindt v. Shavers} would waive any claim of error in overruling his special appearance by participating in the trial on the merits.
court, as by defending on the merits, waives the objection. Such objections, such as whether the person with whom the summons was left was of "suitable discretion," can well be determined by the trial judge without the need for Supreme Court review; it would certainly be inefficient to reverse the trial court on such an issue after a full trial on the merits. A defendant could still obtain Supreme Court review by defaulting on the merits and appealing only the personal jurisdiction issue, but that is less likely. On the other hand, if the issue is amenability to process rather than the method of service, the issue can be preserved for appeal after a trial on the merits, if the defendant only defends and does not seek affirmative relief. This will typically be a defendant served outside Nebraska; the issue of whether the defendant can be reached under the Nebraska long arm statute is sufficiently important to permit the clear guidance to all trial courts that can be provided by review in the Supreme Court. There is always some risk that a trial on the merits will be wasted if the Supreme Court finally finds there was no long arm jurisdiction, but that should not happen very often. The only alternative would be to permit immediate interlocutory appeal of the jurisdictional issue, but that would open an avenue for delay in too many cases.

All objections, whether to the method or manner of service, or to amenability to service, are waived by the filing of the counterclaim, cross-claim or third-party claim. All such claims for affirmative relief are at the option of the defendant, since there is no compulsory counterclaim rule. It is generally accepted that a defendant should not be permitted to both deny the court's jurisdiction and at the same time ask the court to exercise the jurisdiction to benefit the defendant. The nonresident defendant can fully defend on the merits without waiving the objection to the reach of the long arm jurisdiction, because only the three stated claims waive the objection. Therefore, the objection to the trial court's ruling on the special appearance is not waived by such procedures as a motion to compel discovery, a motion for discovery sanctions, or a motion for summary judgment, as each procedure is part of the defense of the action.

The special appearance statute is an attempt to focus on substance and not form. It is not words, but carefully defined action that results in a waiver of the personal jurisdiction objection. An

114. This rule is followed by the federal courts as well, at least for the permissive claims. C. Wright & A. Miller, Federal Practice § 1397 (1969).
attempt to preserve the objection by restating it will be of no effect if the defendant asserts an affirmative claim or defends on the merits. On the other hand, the nonresident defendant objecting to long arm jurisdiction does not need to preserve the objection by repeating it in every pleading, motion and other paper as such boilerplate form accomplishes nothing.\footnote{115}

B. The State of Nebraska as a Party

The new statute has substantially simplified the method of serving process on the State of Nebraska and state agencies, but the improved procedure could be misleading. The statute provides that all service on the state, state agencies, and state employees, sued in an official capacity, shall be made by serving the Attorney General.\footnote{116} This effectively makes the Attorney General the agent for service, and eliminates any need to serve the Governor, the state agency, or the state employee. However, this does not make the Attorney General a party to the action, and the Attorney General does not have to be a party to the action or counsel to the party for whom served; it only centralizes the service of process in one place.

The new statute has only changed the method of service; it has not changed the definition of the proper parties to any action.\footnote{117} At present, there are many differing procedures for appealing from agency action or otherwise obtaining judicial review.\footnote{118} If a necessary party is the head of an agency in an official capacity, that person must be named as a party even though service on that person will be made by service on the Attorney General.\footnote{119} If the employee is named in a personal capacity, as in an action for damages

\footnote{115} The new statute was not intended to encourage defendants to file special appearances. If anything, the special appearance is overused as a tactic for delay. In addition, the new statute should not be considered the final word on the subject, as there are substantial arguments supporting adoption of a requirement that all matters in abatement be made in a single motion, such as under Federal Rule of Civil Procedure 12. The wisdom of that approach should be independently considered by the bar committee examining the pleading statutes. Section 25-516.01 was only intended to provide clear answers to the specific issues addressed.

\footnote{116} NEB. REV. STAT. § 25-510.02(1) (Supp. 1983).

\footnote{117} See, e.g., Leach v. Department of Motor Vehicles, 213 Neb. 103, 327 N.W.2d 615 (1982) (Director of Department of Motor Vehicles is necessary party in appeal of driver's license revocation).

\footnote{118} See, e.g., NEB. REV. STAT. § 25-1901 to 1908 (1979) (petition in error); id., § 84-917 (1981) (review of action of administrative agency by appeal to district court). A comprehensive modification of the administrative appeal statutes should be introduced during the 1984 session of the Unicameral.

\footnote{119} If more than one agency or employee is a named party, only one summons needs to be served on the Attorney General.
under 42 U.S.C. section 1983, the employee must be served as an individual. If the employee is named in both a personal and individual capacity, both the Attorney General and the employee must be served.

IV. CONCLUSION

The history of personal jurisdiction doctrine and the rules governing service of process makes clear that the doctrine and rules will continue to change. The requirements and limits of the due process clause, as interpreted by the United States Supreme Court, do not remain static. The practical problem always remains the same as the courts try to fashion a method of service that is both effective and inexpensive, while providing clear guidance to the process server in completing the necessary task of delivering papers unwanted by many of those served. The new Nebraska statute clarifies some previously existing ambiguities and provides a coherent base upon which future improvements can be made.