

Evidence in support of applications for substituted service in bankruptcy proceedings

Notice to Practitioners – Melbourne Registry only

Nature of Application

1. Practitioners are reminded that, although transcripts of communications in eCourtroom may be accessed by persons online, a substituted service application by eCourtroom is heard *ex parte*. As such, practitioners are expected to make full and frank disclosure of all material facts to the Court. This includes providing relevant information to the Court that may not be in the interests of the Applicant.
2. Substituted service applications are not appropriate where service in the ordinary course is merely inconvenient or less efficient. Rather, substituted service is appropriate where:
 - a. Personal service is impracticable; and
 - b. The proposed alternative means of service will, in all reasonable probability, be effective in bringing the documents to the attention of the Respondent.
3. Evidence relied on in support of an application for substituted service should address these two key elements. Both elements need to be satisfied before an order for substituted service can be made.

Evidence in Support of Application

4. Some applications for substituted service in bankruptcy proceedings are refused or adjourned because they are made without appropriate evidence in support or because the evidence relied on is stale. Applications for substituted service of Bankruptcy Notices and Creditor's Petitions should be supported by evidence of:
 - a. The Respondent's last known residential address (and / or place of employment);
 - b. Previous attempts to serve the Respondent, including direct evidence of actual conversations with residents, neighbours or work colleagues;
 - c. The Respondent's responses to attempts to serve or contact him/her; and
 - d. Investigations made to locate the Respondent, including independent documentary evidence to suggest a nexus between the Respondent and the address in question.
5. By way of example (with respect to point d above), investigations may include searches or inquiries made of the following authorities or registers:
 - Australian Electoral Office;
 - Australian Securities and Investment Commission;
 - Victorian Consumer & Business Centre (part of Consumer Affairs Victoria);

- Registers for professional groups or organisations;
 - Telephone listings (such as White Pages Online);
 - Local Council land rates enquiries; and
 - Land title searches (with the search result clearly showing the link between the street address and the volume / folio number of the property in question).
6. Evidence establishing a nexus between the Respondent and the address at which it is suggested documents should be served should include evidence obtained as recently as possible.
7. In certain circumstances, the Court may consider making an order for substituted service which includes contact being made with the Respondent via email or mobile phone (SMS). If practitioners wish to include such a method of service in an Application they should provide details of:
- The email address or mobile phone number;
 - Evidence that the relevant email or mobile phone accounts are owned by or regularly used by the Respondent (including evidence of what contact has previously been made with the Respondent via either of these means); and
 - Evidence of whether the relevant accounts remain current (i.e.: whether a 'disconnected message' has been received, a voicemail message confirms ownership of a mobile phone number, or email messages have been returned without delivery by a provider);

Procedural Matters

8. Registrars will endeavour to respond to eCourtroom applications for substituted service within 10 working days, although this will depend on the particular workload of the Registrar presiding over the application. Practitioners are expected to respond reasonably promptly to any message posted by a Registrar in eCourtroom. Applicants risk the possible dismissal of their application if they do not diligently prosecute the application by failing to respond to messages or deadlines for the filing of material.
9. With respect to substituted service applications concerning Creditor's Petitions, practitioners should consider the return date on the Petition prior to making the application. Practitioners may need to attend the Registry with all copies of the Petition and seek to have the return date extended to allow for:
- a. The 10 working day anticipated response period by the Registrar; and
 - b. The proper hearing of the application (including possible adjournments for the provision of further evidence); and
 - c. A 4 week timeframe for any substituted service order to be carried out and to take effect; and

- d. Rule 4.05 of the Federal Magistrates Court (Bankruptcy) Rules which requires service of the Petition (and other documents) at least 5 days before the first return of the Petition.

Daniel Caporale
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