

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO. 91-493

VIRGINIA L. BOSSE

v.

WILLIAM BOSSE & ANOTHER

ORDER

Pursuant to G. L. c. 211, § 3, the plaintiff appeals from the decisions of the District Court, South Boston Division (Concannon, J.) denying her motions to: (1) extend a temporary protective order issued under G. L. c. 209A (1990 ed. & 1991 Supp.) to a permanent one; and (2) serve the defendant notice of plaintiff's motion for a permanent restraining order by publication, rather than by personal service. There was argument by counsel for plaintiff. The defendant and Judge Concannon, a nominal defendant for purposes of this appeal, did not appear for argument. It is ORDERED that the District Court, South Boston Division, consider plaintiff's motion under G. L. c. 209A, § 3, for a permanent order without requiring prior notice by personal service upon defendant. It is further ORDERED that notice by publication and by mail to last known address shall be sufficient for the prior notice required under G. L. c. 209A, § 3 (c), and for post facto notice required by G. L. c. 209A, § 7.

On February 16, 1989, the police served defendant by hand with the first temporary protective order issued by the District Court. On March 15, 1989, while in court defendant received a

copy of the continuation of the protective order, with an expiration date of October 20, 1989, noted on the order. Defendant did not appear at the October 20, 1989 hearing, nor at subsequent hearings held October 19, 1990, October 21, 1991, November 4, 1991, and November 19, 1991. Defendant has disappeared and may be out of state. There has been no personal service upon defendant since March 15, 1989.

Chapter 209A provides for different types of notice corresponding to the stage of the proceedings. Under § 4, when a plaintiff, "[u]pon the filing of a complaint under [c. 209A]," initially seeks a temporary protective order, "the court may enter such temporary relief orders without notice . . . and shall immediately thereafter notify the defendant that the temporary orders have been issued." Section 4 requires that the defendant receive this notice of the initial order pursuant to § 7, which governs post facto notice of all protective orders. Section 7 provides that "the appropriate law enforcement agency . . . unless otherwise ordered by the court . . . shall serve one copy of each order upon the defendant together with a copy of the complaint"

When a defendant receives this initial order by personal service he is automatically put on notice of the next hearing in the case. This occurs because "[e]very order shall on its face state the time and date the order is to expire and shall include the date and time that the matter will again be heard." G. L. c. 209A, § 3. This prior notice, provided by personal service of

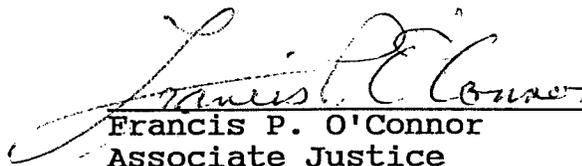
the initial temporary order issued under § 4, satisfies the notice requirements of the due process clauses of the U. S. Constitution, fifth and fourteenth amendments, and of the Massachusetts Constitution, Declaration of Rights, art. twelve. Upon personal service of the initial order, a defendant has the burden of notifying the court that he wishes to contest an existing order or a possible extension of an order. This shifting of the notice burden is consistent with § 3's provision that "[t]he court may modify its order at any subsequent time upon motion by either party" (emphasis added). Thus, in the present case, the initial personal service upon defendant on February 16, 1989, pursuant to § 4, satisfied constitutional due process notice requirements.

Section 3 allows, following the initial temporary order, extensions of orders or entry of permanent orders. It requires prior "notice to the defendant," G. L. c. 209A, § 3 (c), before such action, but does not define the character of this notice. I rule that, where in-hand service is not reasonably possible, prior notice by mail to last known address and by publication satisfies § 3 (c).

If a court enters a permanent order or extends a temporary order pursuant to § 3, only then are the § 7 post facto notice requirements triggered. Section 7 requires personal service by the police, "unless otherwise ordered by the court" I rule that, where in-hand service is not reasonably possible, post

facto notice by mail to last known address and by publication is consistent with § 7.

Today I order the District Court to consider plaintiff's motion for entry of a permanent protective order. I order that prior notice required by § 3 (c) and the post facto notice required by § 7 shall be by mail to last known address, or by a similar form of alternative service, and by publication. This last order is necessary because requiring prior notice under § 3 or post facto notice under § 7 by personal service would defeat the purpose of G. L. c. 209A, the protection of victims of domestic violence. Mandating personal service where the defendant has, by disappearing, made personal service impossible would enable defendants, the perpetrators of abuse, to deny their victims the protection of our courts under G. L. c. 209A.


Francis P. O'Connor
Associate Justice

December 10, 1991