McLACHLAN, J. dissenting. The pivotal issue in this appeal is whether the lodging of process in a gate more than 200 feet[1] from the home of the defendants[2] constituted proper abode service pursuant to General Statutes § 52-57 (a). The majority concludes that leaving the process at the gate was effective abode service and was reasonably likely to achieve personal notice, and it reverses the judgment of the trial court. I disagree and respectfully dissent from the majority opinion.

"Proper service of process is not some mere technicality. Proper service of process gives a court power to render a judgment which will satisfy due process under the 14th amendment of the federal constitution and equivalent provisions of the Connecticut constitution and which will be entitled to recognition under the full faith and credit clause of the federal constitution." (Internal quotation marks omitted.) *Hibner* v. *Bruening*, 78 Conn. App. 456, 458, 828 A.2d 150 (2003). "It is black letter law that the Superior Court . . . may exercise jurisdiction over a person only if that person has been properly served with process, has consented to the jurisdiction of the court or has waived any objection to the court's exercise of personal jurisdiction. . . .

"In *Collins* v. *Scholz*, 34 Conn. Sup. 501, 502, 373 A.2d 200 (1976), the Appellate Session of the Superior Court stated that [w]hether a particular place is the usual place of abode of a defendant is a question of fact. Although the sheriff's return is prima facie evidence of the facts stated therein, it may be contradicted and facts may be introduced to show otherwise." (Internal quotation marks omitted.) *Tax Collector* v. *Stettinger*, 79 Conn. App. 823, 825, 832 A.2d 75 (2003).

In this case, the defendants filed a motion to dismiss the action against them, claiming that the court lacked personal jurisdiction over them due to insufficient service of process. At the hearing on that motion, the state marshal testified that she attempted service three times during the afternoon of September 14, 2004. Each time, she found that the front gate across the driveway was locked and that no one responded to her calls from the call box located to the left of the gate. At that point, she affixed the process to the locked front gate.

During cross-examination, the marshal admitted that some of her statements in her sworn affidavit, submitted in opposition to the defendants' motion to dismiss, were inaccurate. For example, the defendants' property was not surrounded by a high gate, there were only two cars in the driveway when she attempted service, and there was no evidence to support her signed statement that she believed someone was at home and was attempting to evade service of process. The marshal

also testified that she (1) did not try to contact the defendants by telephone, (2) did not see anyone walking about the property, (3) did not telephone the attorney for the plaintiff, Fine Homebuilders, Inc., to inform him of the situation and (4) left no messages on the defendants' answering machine indicating that she left process at their home. According to the marshal's testimony, she wrapped the papers in a clear plastic wrapper and affixed the wrapper to the gate with rubber bands. Although she served process on the defendants on September 14, 2004, she admitted that she legally could have made service on September 15, 2004.

Richard Perrone also was a witness at the evidentiary hearing. He testified that he and his wife had been out of the country on September 14, 2004; they returned the evening of September 15, 2004. A copy of his passport with the stamped date of reentry to the United States was submitted into evidence. He further testified that (1) there had been only one car in their driveway while they were away, (2) he discovered the process in the gate on the morning of September 16, 2004, (3) the papers were rolled up in a bundle, without rubber bands or a plastic wrapper, and (4) the house is accessible by means other than the gate across the driveway.

At the conclusion of the evidence, the court gave counsel the opportunity to make closing arguments. During the exchange of comments among counsel and the court, the court made the following statements about the credibility of witnesses: "[L]et me just say this. I am a judge that you may find a little different. [Richard Perrone] seemed like an okay guy, a credible guy that went out of the country, that came back, and he sees some papers in his fence and, you know, he gets them on [September 16]. I don't, you know, find his testimony to not be credible. On the other hand, the marshal, there is some—I am not saying that she is lying, no, but I don't know how persuasive, given some of the issues that were brought out regarding the testimony."

The court obviously was troubled by the discrepancies in the marshal's affidavit. After further comments by counsel during the closing arguments, the court stated: "Do you want to address that because that bothers me. This isn't a situation where you have defendants that are refusing service. And if I look at the affidavit of the marshal, one of the reasons why she did what she did was because, you know, as she saw it, she couldn't get in. She couldn't get access. But another—if you look at the other part of her affidavit, another reason she says, and I mean, it says what the affidavit says; what it says, they were basically evading service. And that testimony—that testimony did not—and that evidence did not come out that way. That bothers me."

In its memorandum of decision issued June 24, 2005, the court did not mention the credibility of the wit-

nesses. Nor did the court set forth any facts, other than the fact that the marshal left the process lodged in a gate located more than 200 feet from the defendants' home.[3] It concluded, however, that such service was not free from the vagaries of the elements and outside influences and was not likely to ensure notice to the defendants that the action was pending. It therefore concluded that, despite actual notice, the service was not proper abode service and was insufficient as a matter of law.

There is little Connecticut appellate case law to aid in the resolution of the issue on appeal. In *Clover* v. *Urban*, 108 Conn. 13, 142 A. 389 (1928), our Supreme Court stated that the chief purpose of making service of civil process at a defendant's usual place of abode is to "ensure actual notice to the defendant that the action is pending." Id., 16. Although the place of service in *Clover* was an apartment house, the court concluded that the defendant's place of abode "was not reached from the street until one came to the door which led into his own apartment." Id., 17. Similarly, in *Cugno* v. *Kaelin*, 138 Conn. 341, 84 A.2d 576 (1951), overruled in part on other grounds by *Lampson Lumber Co*. v. *Hoer*, 139 Conn. 294, 300, 93 A.2d 143 (1952), our Supreme Court noted that apartments in a particular building were as separate and distinct as though they were under different roofs and that the door of the apartment of each tenant would be his outer door. Service at an apartment other than the defendant's apartment, although located in the same building, was not proper abode service. Id., 343.

Even though *Clover* and *Cugno* addressed service of process at apartments, the common thread, i.e., service at a defendant's door, has carried through to the numerous Superior Court decisions considering the issue. See, e.g., *American Tax Funding, LLC* v. *LeBrun*, Superior Court, judicial district of Tolland, Docket No. CV04-4000951 (June 3, 2005) (39 Conn. L. Rptr. 446) (attaching process to exterior handle of locked screen door not proper abode service); *Fazzino* v. *Niemczak*, Superior Court, judicial district of New Haven at Meriden, Docket No. CV04-0286989 (May 6, 2004) (37 Conn. L. Rptr. 21) (lodging rolled legal notice to quit between doorknob of exterior door and exterior sidewall of door not proper abode service); *Ceci Bros. Inc.* v. *Five Twenty One Corp.*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV96-0150073 (May 17, 1996) (16 Conn. L. Rptr. 595) (affixing process to outside gate probably not sufficient for proper abode service under ordinary circumstances); *Evans* v. *Evans*, Superior Court, judicial district of Middlesex, Docket No. 66311 (November 12, 1992) (7 C.S.C.R. 1312) (sufficient abode service requires that document be placed at least partially within the abode itself); *Pozzi* v. *Harney*, 24 Conn. Sup. 488, 491, 194 A.2d 714 (1963) (pinning, tying or otherwise attaching complaint to outside door generally

not proper abode service). The exceptions to the general rule occur in cases in which the defendants are attempting to evade service of process. See, e.g., *Ceci Bros. Inc.* v. *Five Twenty One Corp.*, supra, 16 Conn. L. Rptr. 595; *Zingarelli* v. *Dinan*, Superior Court, judicial district of Fairfield, Docket No. CV93-0309746 (May 20, 1994) (9 C.S.C.R. 630).

The rationale behind the requirement of leaving the process inside the door, rather than attached to an exterior surface, is to make it reasonably probable that the defendant receives the notice of the action against him or her. As indicated in those cases, process, if left outside, is subject to a number of outside influences over which the party to be served has no control; such service is not free from "the vagaries of the elements . . . ." *Fazzino* v. *Niemczak*, supra, 37 Conn. L. Rptr. 21. The paper could be removed by any interested or curious individual or blown away by wind or storms. Because so many flyers and other unwanted advertisements often are attached to outside doorknobs or structures, the homeowner may simply discard it without giving the paper any serious attention. See *Sours* v. *State*, 172 Ohio St. 242, 245, 175 N.E.2d 77 (1961). In short, service of process in such a manner would be "so haphazard and uncertain as to fail to meet the requirements of [proper abode service]." *Balkun* v. *DeAnzona*, 5 Conn. Cir. Ct. 580, 582, 258 A.2d 482 (1969).

Because proper abode service is a question of fact, there may be occasions when affixing process to a gate would be appropriate under the circumstances. As previously noted, there may be an exception if the party to receive process is attempting to avoid service. Here, there was nothing to suggest that the defendants were attempting to evade the marshal. Further, testimony at the hearing revealed that the marshal had done nothing more than use the call box near the locked gate at three separate times during the afternoon of September 14, 2004. By her own admission, she did not try to reach the defendants by telephone and did not leave a message that process had been lodged in their gate. She attempted service only on that one afternoon, even though service legally was not required to be made that day. Richard Perrone testified that he and his wife were out of the country on September 14, 2004. He also testified that access to the house was possible without using the entry gate. The court stated that it found Richard Perrone to be a credible witness.

The majority concludes that the service of process was reasonably likely to achieve personal notice because "the front door of the defendants' home was inaccessible . . . the marshal affixed the process to the main entryway of the property . . . and the defendants actually received notice of the action . . . ." It also reasons that state marshals should not have to "scale fences, traverse brush or otherwise potentially

trespass on a defendant's property or adjoining properties to obtain access to a home in order to effectuate abode service." Significantly, the court did not find that the door to the defendants' home was inaccessible. Further, the fact that the defendants actually received notice is a factor to be considered, but it is not determinative. "If . . . substitute service is clearly insufficient as a matter of law, then actual notice does not necessarily save the service." (Internal quotation marks omitted.) *Tsukroff* v. *Fordham*, Superior Court, judicial district of Hartford-New Britain, Housing Session, Docket No. SPH 87791 (September 13, 1996) (18 Conn. L. Rptr. 91); *United States Guarantee Co.* v. *Giarelli*, 14 Conn. Sup. 400 (1947).

With respect to any possible trespass by the state marshal to effectuate service, General Statutes § 6-38a (b) would bar liability. That subsection provides: "Any state marshal, shall, in the performance of execution or service of process functions, have the right of entry on private property and no such person shall be personally liable for damage or injury, not wanton, reckless or malicious, caused by the discharge of such functions."

For those reasons, the court reasonably could conclude, after hearing the testimony and reviewing the exhibits, that abode service was insufficient as a matter of law under the circumstances of this case.[4] I would affirm the judgment of the court granting the defendants' motion to dismiss. Accordingly, I respectfully dissent.

[1] The state marshal who served the process testified that the house was approximately 300 feet from the gate. Richard Perrone testified that the house was approximately 400 feet from the gate.

[2] See footnote 1 of the majority opinion.

[3] The plaintiff filed a motion for articulation of the court's decision, requesting that the court apply the facts adduced at the hearing to the proper legal standard. After the court denied the motion, the plaintiff filed a motion for review with this court. We granted the motion but denied the relief sought therein.

[4] Statutory provisions for substituted service are more liberal in some jurisdictions. In New York, process may be served on a person of suitable age and discretion at the actual dwelling place or usual place of abode of the person to be served. CPLR 308. Federal procedure allows service to be effected under certain circumstances by mail. Fed. R. Civ. P. 4 (d) (2). If public policy weighs in favor of allowing the lodging of process on a locked entry gate, it is within the province of the legislature to enact provisions in our statutes to expand the circumstances under which proper abode service can be made.