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express terms, the court has opened the door to a more liberal reading of the statute of limitations which could hinder, rather than advance, its purposes.²⁸

Jean Townley Nichols

CPLR § 302(b): Jurisdiction over a nonresident in an equitable distribution action following a foreign divorce will be controlled by the matrimonial "long-arm" statute

CPLR 302(b) permits the courts of New York to exercise personal jurisdiction over a nonresident defendant in certain matri-

²⁸ Parties have already begun to utilize CPLR 203(e) in ways not contemplated by the statute, nor by the court of appeals in *Duffy*. See, e.g., *Leibman v. Schlossberg's Atlas Boiler and Welding Co.*, 57 App. Div. 2d 820, 820, 395 N.Y.S.2d 23, 24 (1st Dep't 1977); *T.R. America Chems. Inc., v. Seaboard Sur. Co.*, 116 Misc. 2d 874, 456 N.Y.S.2d 608 (Sup. Ct. N.Y. County 1982). In *T.R. America*, the court held that CPLR 203(e) could be used by the third-party defendant to amend his third-party answer to assert a cause of action in defamation against the original plaintiff beyond the one year statute of limitations, since the claim arose out of the same transactions upon which plaintiff's claim was based. See *T.R. America*, at 887, 456 N.Y.S.2d at 617. Since the amendment was sought against the plaintiff, the court held that the amendment related back to the date that the plaintiff instituted a suit against the defendant, not the time when the answer to the third-party complaint was interposed. See *id.* at 886, 456 N.Y.S.2d at 616.

In *Leibman*, the court held that where a plaintiff attempted to serve its amended complaint before expiration of the statutory period, but after the 20 days allowed by CPLR 1009 to amend of right without leave of the court, and the proper amended complaint was not served until after the three year statute of limitations had expired, the proper amended complaint related back. See *Liebman*, at 820, 395 N.Y.S.2d at 24. The court stated that since all of the relevant information was exchanged before the limitation had expired, to hold any differently would be "an exaltation of form over substance." *Id.* at 820, 395 N.Y.S.2d at 24. Cf. *Tri-City Elec. Co. v. People*, 96 App. Div. 2d 146, 151, 468 N.Y.S.2d 283, 287 (4th Dep't 1983) (amendment relates back even though class action suit was not proper posture in which to bring suit), *aff'd*, 63 N.Y.2d 969, 473 N.E.2d 240, 483 N.Y.S.2d 990 (1984).

The Appellate Division, Second Department, has distinguished between a situation where the plaintiff is aware of the third-party's involvement and lets the statute of limitations expire without bringing him into the suit, and a case where the third-party knows that his involvement was not manifest to the plaintiff, and therefore it would not be reasonable to conclude that the plaintiff has made a conscious choice not to sue. See *Brock v. Bua*, 83 App. Div. 2d 61, 70-71, 443 N.Y.S.2d 407, 413 (2d Dep't 1981).

At least one federal court has construed Rule 15(c) to allow relation back in a third party action, even if the third-party complaint was not served within the statutory period. See *Meredith v. United Air Lines*, 41 F.R.D. 34, 37 (D.C. Cal. 1966); *supra* note 1 (discussing Rule 15(c) as model for CPLR 203(e)).

monial actions.¹ Although the statute was designed to facilitate "long-arm jurisdiction" in claims arising from certain marital disputes,² courts and commentators have struggled to define its scope and applicability.³ Equally ambiguous is the impact of certain for-

¹ CPLR 302(b) provides:

A court in any matrimonial action or family court proceeding involving a demand for support, alimony, maintenance, distributive awards or special relief in matrimonial actions may exercise personal jurisdiction over the respondent or defendant notwithstanding the fact that he or she no longer is a resident or domiciliary of this state . . . if the party seeking support is a resident of or domiciled in this state at the time such demand is made, provided that this state was the matrimonial domicile of the parties before their separation, or the defendant abandoned the plaintiff in this state, or the claim for support, alimony, maintenance, distributive awards or special relief in matrimonial actions accrued under the laws of this state or under an agreement executed in this state.

CPLR 302(b) (McKinney Supp. 1986)

Section 302(b) satisfies constitutional muster because it "capitalizes upon the minimum contacts theory of jurisdiction." CPLR 302, commentary at 57 (Supp. 1986). Therefore, the assertion of *in personam* jurisdiction pursuant to section 302(b) will not offend the due process requirements of "minimum contacts" espoused in *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), where the parties' matrimonial history satisfies the qualifications of the statute. See *Browne v. Browne*, 53 App. Div. 2d 134, 136-37, 385 N.Y.S.2d 983, 985 (4th Dep't 1976); see also *Glick v. Glick*, 112 App. Div. 2d 17, 17, 490 N.Y.S.2d 379, 380 (4th Dep't 1985) (minimum contacts required to invoke CPLR 302(b) in action to enforce prenuptial agreement). Cf. *Abbott v. Abbott*, 125 Misc. 2d 837, 840, 480 N.Y.S.2d 185, 188 (Sup. Ct. Richmond County 1984) (minimum contacts established by over one year of residence and birth of child within forum state).

² See generally 11 J. ZETT, M. EDMONDS & S. SCHWARTZ, *NEW YORK CIVIL PRACTICE* § 4:03 (1984) (CPLR 302(b) designed to expand long-arm jurisdiction). Prior to the enactment of CPLR 302(b), New York courts could exercise jurisdiction to grant an *ex parte* divorce, entitled to full faith and credit, to a New York resident despite the absence of the resident's spouse. See 1 WK&M ¶ 302.19. This adjudication was predicated upon *in rem* jurisdiction because the "marital res" remained in New York by virtue of the plaintiff's residency within the forum state. See *Renaudin v. Renaudin*, 37 App. Div. 2d 183, 185, 323 N.Y.S.2d 145, 147 (1st Dep't 1971). However, jurisdiction over the "marital res" did not confer upon the court the power to render an *in personam* judgment for alimony support or maintenance against an absentee spouse. *Id.* at 147, 323 N.Y.S.2d at 148.

The exercise of long-arm jurisdiction over a nonresident spouse may be analogized to other circumstances in which public policy compels the exercise of such jurisdiction over absentee defendants. See *Foster & Freed, Law and the Family: Thumbs Up for Long-Arm Amendment*, N.Y.L.J., May 26, 1972, at 1, col.1. One commentator suggested that it would be "fair and equitable" to allow a spouse to maintain an action for support or maintenance within the state rather than subjecting her to the turmoil inherent in tracking down a fugitive spouse. *Id.* at 6, col. 2. The nonresident defendant who may be forced to defend such a claim in a foreign jurisdiction will be protected from undue inconvenience by the doctrine of *forum non conveniens*. *Id.* The compelling state interest in litigating matrimonial issues, because of their profound effect on the family unit within the forum state's borders, further justifies the exercise of jurisdiction. *Id.*

³ See SIEGEL § 90, at 107. The statutory language of section 302(b) contains some ambiguities and therefore needs case law refinement. *Id.* The "matrimonial domicile" requirement, for example, has been criticized as needing judicial clarification. *Id. Compare Lieb v.*

eign divorce judgments on the parties' abilities to invoke jurisdiction pursuant to CPLR 302(b) in actions seeking equitable distribution of marital and separate property held in New York.⁴ Recently, in *McCasland v. McCasland*,⁵ the Appellate Division, Third Department, held that because CPLR 302(b) provided the exclusive source of jurisdiction in an action that sought equitable distribution of New York property following a foreign divorce, personal jurisdiction over the defendant spouse could not be obtained

Lieb, 53 App. Div. 2d 67, 72, 385 N.Y.S.2d 569, 572 (2d Dep't 1976) ("matrimonial domicile" language requires that New York be parties' home when last together) with *Paparella v. Paparella*, 74 App. Div. 2d 106, 111-112, 426 N.Y.S.2d 610, 614 (4th Dep't 1980) (Moule, J., concurring) ("matrimonial domicile" language requires merely that parties made matrimonial residence in New York at some time prior to separation, subject to constitutional due process requirements).

CPLR 302(b) is relevant only to "matrimonial actions," but not all proceedings involving controversies arising from a marriage are considered matrimonial actions within the scope of the CPLR definition. See CPLR 105, commentary at 42 (1972) (commenting on CPLR 105). See, e.g., *Schreiber v. Schreiber*, 34 App. Div. 2d 681, 681, 310 N.Y.S.2d 459, 460 (2d Dep't 1970) (mem.) (action to recover back alimony pursuant to separation agreement in divorce decree not matrimonial action); *Korol v. Korol*, 111 Misc. 2d 650, 652, 444 N.Y.S.2d 816, 818 (Sup. Ct. Nassau County 1981) (plenary action enforcing separation agreement constitutes contract action and not matrimonial action as required by CPLR 105).

Although the commentaries suggest that only those actions enumerated in CPLR 105 may be characterized as matrimonial actions, see CPLR 105, commentary at 42 (1972), CPLR 302(b) was amended to encompass demands for equitable distribution in matrimonial actions. See CPLR 302, commentary at 48 (Supp. 1986) (explaining Ch. 281, § 22, [1980] N.Y. Laws 1236).

⁴ New York's equitable distribution law provides for the "distribution of marital property following a foreign judgment of divorce." See DRL § 236[B](5)(a) (Supp. 1986). The conceptual approach to equitable distribution views marriage as an economic partnership. See Memorandum of Assem. Burrows, reprinted in [1980] N.Y. LEGIS. ANN. 129, 130. Therefore, the mechanism to resolve the economic ramifications of divorce should be flexible in setting the amount because of the variations of "partnership" fact patterns. *Id.* See generally Note, *How Equitable is New York's Equitable Distribution Law?* 14 COLUM. HUM. RTS. L. REV. 433, 445-53 (1982-83) (analysis of statutory factors used to achieve equity in distribution of marital property).

Commentators have suggested that, in DRL § 236[B], the legislature created an "entirely new and untraditional" action by providing for distribution of marital property following a foreign judgment for divorce. See Kalman, *Equitable Distribution in New York: A Preliminary Analysis of Domestic Relations Law Section 236 as Amended and Restructured*, in NEW YORK MATRIMONIAL PRACTICE UNDER EQUITABLE DISTRIBUTION 15 (M. Gershenson & P. Birzon eds. 1980). However, it has been further suggested that this type of action may only be commenced after a foreign *in rem* judgment for divorce. *Id.* A foreign divorce judgment in which the court had *personal* jurisdiction over both parties would instead be *res judicata* on all issues incidental to the proceeding, including distribution of property, if the parties had a full and fair opportunity to raise such issues. *Id.* at 15-16.

⁵ 110 App. Div. 2d 318, 494 N.Y.S.2d 534 (3rd Dep't 1985).

in New York courts under other bases of jurisdiction.⁶

In *McCasland*, the defendant and the plaintiff resided in New York for twenty-nine years as husband and wife, during which time the defendant-husband formed three New York corporations.⁷ In 1979, the couple moved to Florida, where they established residency.⁸ Three years later, a Florida court granted the parties a divorce that incorporated a pre-divorce agreement into the judgment.⁹ The plaintiff then commenced an action in New York pursuant to Domestic Relation Law section 236[B](5)(a), seeking the equitable distribution of marital property and the disposition of separately held property located in New York.¹⁰ However, upon the defendant's motion, the complaint was dismissed at Special Term for lack of personal jurisdiction over the defendant spouse.¹¹

On appeal to the Appellate Division, Third Department, a divided panel affirmed Special Term's dismissal of the complaint.¹² Writing for the majority, Justice Casey held that the relief sought by the plaintiff constituted a matrimonial action, and therefore, jurisdiction over the nonresident defendant-spouse was exclusively governed by CPLR 302(b).¹³ The court concluded, however, that CPLR 302(b) could not supply jurisdiction because, at the time of the plaintiff's demand, she was neither a resident nor a domiciliary

⁶ *Id.* at 320, 494 N.Y.S.2d at 536.

⁷ *See id.* at 319, 494 N.Y.S.2d at 535. The parties were married in Connecticut in 1949. In 1950, they moved to New York where they resided until 1979. *Id.*

⁸ *See id.*

⁹ *Id.* The settlement agreement acknowledged the plaintiff's claims to the defendant's New York based corporations and purported to preserve her right to pursue these claims in "any court(s) of competent jurisdiction which may have jurisdiction over said individuals and/or entities." *Id.* The agreement also provided that, in case of dispute, Florida law would control in matters of enforcement and interpretation of the agreement. *Id.*

¹⁰ *Id.* The plaintiff sought a distribution of the shares of the defendant's closely held New York corporations. *Id.* at 321, 494 N.Y.S.2d at 537 (Kane, J., dissenting).

¹¹ *Id.* at 319, 494 N.Y.S.2d at 535.

¹² *See id.* at 321, 494 N.Y.S.2d at 536.

¹³ *See id.* at 319-20, 494 N.Y.S.2d at 535. Justice Casey looked to DRL § 236[B](5)(a), which delineates the types of matrimonial actions in which distribution of property is available. *Id.* The Domestic Relations Law provides for the disposition of marital or separate property in "proceeding[s] . . . following a foreign judgment of divorce." *See* DRL § 236[B](5)(a) (Supp. 1986). To resolve the jurisdictional issue in this "matrimonial action," the court held that CPLR 302(b) exclusively governs any such inquiry. *See McCasland*, 110 App. Div. 2d at 320, 494 N.Y.S.2d at 535. While the CPLR definition of a matrimonial action does not specifically include an action for equitable distribution, the court nevertheless stated that the CPLR list was not designed to be exclusive. *See id.* at 320 n.1, 494 N.Y.S.2d at 535 n.1. *But see* CPLR 105, commentary at 42 (1972) (definitional list designed to be exclusive).

of New York as required by the statute.¹⁴ In rejecting the plaintiff's alternative contentions that either the traditional long arm jurisdictional basis of "transacting business within the forum state," contained in CPLR 302(a)(i), or *in rem* jurisdiction supplied the requisite personal jurisdiction,¹⁵ the court held that CPLR 302(b) exclusively governed jurisdiction over a nonresident spouse in an action for equitable distribution of marital property pursuant to a foreign judgment of divorce.¹⁶ The plaintiff's final postulate, that the settlement agreement constituted a consent by the defendant-spouse to the exercise of personal jurisdiction in New York, was also dismissed by the court.¹⁷

In a terse dissent, Justice Kane reproved the majority's rejection of *in rem* jurisdiction, arguing that since New York was the "situs" of the defendant's corporation, the court could exercise *in rem* jurisdiction over the disputed interest.¹⁸

The *McCasland* court's preclusive application of CPLR 302(b) has effectively eliminated the assertion of alternative measures of jurisdiction over a nonresident spouse in an equitable distribution action. It is suggested that, although the circumstances in *McCas-*

¹⁴ *McCasland*, 110 App. Div. 2d at 320, 494 N.Y.S.2d at 536. CPLR 302(b) provides that "in any matrimonial action [the court] may exercise personal jurisdiction over the respondent or defendant . . . if the party seeking support is a resident of or domiciled in this state at the time such demand is made. . . ." CPLR 302(b) (Supp. 1986).

In holding that 302(b) was unavailable, the court also relied on *Lieb v. Lieb*, 53 App. Div. 2d 67, 385 N.Y.S.2d 569 (2d Dep't 1976). The *Lieb* court construed the additional requirement contained in CPLR 302(b) that New York be the "matrimonial domicile" of the parties before the separation, *see* 53 App. Div. 2d at 69, 385 N.Y.S.2d at 571, to be satisfied only when New York was the parties' last marital home before the separation. *See id.* at 72, 385 N.Y.S.2d at 572.

¹⁵ *See McCasland*, 110 App. Div. 2d at 320, 494 N.Y.S.2d at 536. The plaintiff asserted that since the defendant remained active in the ownership and operation of his New York corporations, he was indeed transacting business in New York and therefore subject to jurisdiction in New York. *Id.*

¹⁶ *Id.* In dismissing the plaintiff's argument for an alternative jurisdictional basis, the court reasoned that the claim arose from a matrimonial action, and not the transaction of business nor the ownership of property; therefore, CPLR 302(b) controlled the jurisdictional issue. *Id.*

¹⁷ *Id.* at 320-21, 494 N.Y.S.2d at 536.

¹⁸ *Id.* at 321, 494 N.Y.S.2d at 536 (Kane, J., dissenting). Justice Kane's misgivings arose from the Supreme Court's rationale in *Shaffer v. Heitner*, 433 U.S. 186 (1977). The *Shaffer* Court indicated that the mere presence of property within the forum state may create sufficient contacts to justify *in rem* jurisdiction when the claim to that property is the underlying issue of the litigation. *See Shaffer*, 433 U.S. at 207. The Supreme Court stated that the proper nexus to support *in rem* jurisdiction was furnished by the defendant's expectation of protection of his property interest located in the host state, and that state's strong interest in resolving disputes which pertain to property within its borders. *See id.* at 207-08.

land were not contemplated by CPLR 302(b), the Third Department has deviated from the statute's underlying legislative policy by treating 302(b) as the exclusive basis for long arm jurisdiction in a matrimonial action.

The avowed legislative purpose behind CPLR 302(b) was to allow for personal jurisdiction over a nonresident spouse who has evaded his financial obligations to his family.¹⁹ Although the scope of CPLR 302(b) was broadened in 1980 to include demands for distributive awards,²⁰ this amendment must be read within the context of the statute as a whole.²¹ The remedial objectives of 302(b) are not advanced by permitting a plaintiff to gain jurisdiction in New York when the disputed issues have been previously litigated in a foreign court with competent jurisdiction over the parties and the subject matter.²²

¹⁹ See Memorandum of Assem. Blumenthal, reprinted in [1974] N.Y. LEGIS. ANN. 41, 41-42. The number of husbands who deserted the family rather than seek a divorce and face alimony and support responsibilities, was seen by the legislature as an increasing social problem. *Id.* Consequently, the unavailability of financial support from the deserting husband had led many deserted wives to the welfare rolls. *See id.* In reaction to this heightening social ill, as well as the failure of previous statutory devices to compel the fugitive husband to confront his financial responsibilities, the legislature forged CPLR 302(b), a more direct statutory approach by which an abandoned spouse could gain personal jurisdiction over an absentee husband. *See* 1 WK&M ¶ 302.19 at 3-135. *See, e.g.,* *Sciame v. Sciame*, 54 App. Div. 2d 977, 977, 389 N.Y.S.2d 30, 31 (2d Dep't 1976) (mem.) (CPLR 302(b) given retroactive effect to compel nonresident to pay alimony and child support in arrears); *Crofton v. Crofton*, 106 Misc. 2d 546, 549, 434 N.Y.S.2d 116, 118 (Sup. Ct. Nassau County 1980) (CPLR 302(b) used over nonresident in action to determine child support and alimony subsequent to divorce decree); *see also* *Foster & Freed*, *supra* note 2 (explaining remedial purpose of CPLR 302(b)); *Browne v. Browne*, 53 App. Div. 2d 134, 137, 385 N.Y.S.2d 983, 986 (4th Dep't 1976) (minimum contacts combined with repugnancy of defendant's circumvention of family obligations satisfied due process).

²⁰ *See* Ch. 281, § 22, [1980] N.Y. LAWS 1236. *See also* CPLR 302, commentary at 48 (Supp. 1986) (amendment designed to embody equitable distribution law within CPLR 302(b)).

²¹ *See* *Republic Steel Corp. v. Costle*, 581 F.2d 1228, 1232 (6th Cir. 1978) (amendment should be read harmoniously with the original act as part of a whole), *cert. denied*, 440 U.S. 909 (1979). *See also* *Callejas v. McMahon*, 750 F.2d 729, 731 (9th Cir. 1984) (amendment of original act does not necessarily suggest change in law; intent of original act significant to construction of amendatory act); *In re Allied Towing Corp.*, 478 F. Supp. 398, 402 (E.D. Va. 1979) (amendment should be read together with original statute as if originally enacted as one).

²² *See* 11 C.J. ZETT, M. KAUFMAN & C. KRAUT, NEW YORK CIVIL PRACTICE § 60.13, at 60-27 (1985) (suggests that DRL § 236[B](5)(a) applicable only to defendant in *ex parte* foreign divorce when foreign court lacks personal jurisdiction over defendant). *Compare* *Bennett v. Bennett*, 103 App. Div. 2d 816, 817, 478 N.Y.S.2d 47, 49 (2d Dep't 1984) (mem.) (foreign *ex parte* divorce decree entitled to full faith and credit but does not affect *ex parte* defendant's rights incidental to divorce available in New York) *with* *Greene v. Greene*, 90 App. Div. 2d 533, 533, 455 N.Y.S.2d 35, 36 (2d Dep't 1982) (mem.) (wife's personal appear-

Despite the suggested inapplicability of CPLR 302(b), it is submitted that the *McCasland* court erred in limiting its jurisdictional inquiry to that provision. CPLR 302(b) aims to facilitate jurisdiction in matrimonial actions, albeit in limited circumstances;²³ this policy is thwarted when CPLR 302(b) is treated as the exclusive source of jurisdiction in actions arising from the dissolution of marriage.²⁴ Indeed, CPLR 302(b) and alternative jurisdictional bases are not mutually exclusive,²⁵ and the *McCasland* court might have found the requisite jurisdiction either *in rem*²⁶ or through the

ance in foreign divorce action gave foreign court personal jurisdiction; foreign decree binding on property and economic rights, and New York court powerless to add provisions); *Guccione v. Guccione*, 100 Misc. 2d 212, 217, 417 N.Y.S.2d 633, 637 (Sup. Ct. New York County 1979) (New York lacked jurisdiction under CPLR 302(b) over nonresident in action seeking incorporation of settlement agreement into New Jersey divorce decree). *But see* *Frantz v. Frantz*, 92 App. Div. 2d 950, 951-52, 460 N.Y.S.2d 668, 670-71 (3rd Dep't 1983) (mem.) (plaintiff wife collaterally estopped from relitigating issues raised in California divorce action yet vagueness of property distribution provision presented factual issue for denial of summary judgment); *Kindler v. Kindler*, 60 App. Div. 2d 753, 754, 400 N.Y.S.2d 605, 605 (4th Dep't 1977) (mem.) (foreign divorce decree purporting to convey title to New York real property unenforceable in New York).

²³ See *supra* notes 2 and 20.

²⁴ Cf. *supra* note 18.

²⁵ See, e.g., *Werner v. Werner*, 101 Misc. 2d 414, 418, 423 N.Y.S.2d 780, 782-84 (Sup. Ct. New York County 1979) (court considering both CPLR 302(b) and 302(a)(4); personal jurisdiction over non-domiciliary in action arising out of property situated in New York); *Underwood v. Underwood*, 92 Misc. 2d 359, 362, 399 N.Y.S.2d 967, 969-70 (Sup. Ct. Westchester County 1977) (court considering both CPLR 302(b) and 302(a); nonresident transacting business in New York).

²⁶ Cf. *McCasland*, 110 App. Div. 2d at 321, 494 N.Y.S.2d at 536-37 (Kane, J., dissenting) (*in rem* jurisdiction available). In dispelling the plaintiff's *in rem* argument, the majority relied on the guidance of DRL § 230, commentary at 8 (Supp. 1986). See *McCasland*, 110 App. Div. 2d at 320, 494 N.Y.S.2d at 536. In the practice commentaries, Professor Scheinkman advised that *in rem* jurisdiction over the "marital res" would be insufficient to gain jurisdiction over the economic rights of the spouses flowing from their separation. See DRL § 230, commentary at 8 (Supp. 1986). Professor Scheinkman's commentaries discussed the limited scope of *in rem* jurisdiction over the "marital res," but did not address the impact of *in rem* jurisdiction over tangible property located in New York in a matrimonial action. See *id.* The *McCasland* majority read the Scheinkman commentaries too broadly by failing to distinguish between *in rem* jurisdiction over the marital res and *in rem* jurisdiction over tangible property.

In rem jurisdiction has been used in the adjudication of claims to New York property ancillary to a divorce action. See *Werner v. Werner*, 101 Misc. 2d 414, 418, 423 N.Y.S.2d 780, 783 (Sup. Ct. New York County 1979) (CPLR 302(a)(4) provided jurisdiction over non-domiciliary spouse in action to impose constructive trust on New York real property). In *Werner*, the plaintiff sought both a divorce from his nonresident wife and the imposition of a constructive trust on investment property purchased during their marriage. See *id.* at 417, 423 N.Y.S.2d at 782. Although the court entertained the possibility of jurisdiction under CPLR § 302(b), it nevertheless found jurisdiction over the claim relating to the investment property in New York pursuant to CPLR 302(a)(4) because the nonresident wife possessed

notion of transacting business within New York.²⁷

The irony of the *McCasland* holding is that a statutory expedient (CPLR 302(b)), designed to facilitate jurisdiction in matrimonial actions, has served to confine the plaintiff spouse to a sole jurisdictional basis. This inconsistency, combined with the suggested inapplicability of CPLR 302(b) to the *McCasland* facts, should persuade future courts to consider alternative jurisdictional foundations when confronted with a similar jurisdictional dilemma.

Francis J. Quinn

Addendum: As this article was going to press, *McCasland v. McCasland* was reversed. In a memorandum opinion, the Court of Appeals held that the plaintiff had properly obtained *in rem* jurisdiction over the defendant's stock interests in his closely held New York corporations. 68 N.Y.2d 748, 497 N.E.2d 696, 506 N.Y.S.2d 329 (1986). Implicit in the court's rationale, is that nonresident spouses need not confine themselves to CPLR 302(b) as the sole jurisdictional basis in an equitable distribution action.

real property within the forum state. *See id.* at 418, 423 N.Y.S.2d at 782-83.

²⁷ The negotiation of a separation agreement involving issues of concern to New York may allow a New York court to assert jurisdiction over the parties in the litigation of claims arising from the agreement. *See, e.g.,* *Abbate v. Abbate*, 82 App. Div. 2d 368, 384-85, 441 N.Y.S.2d 506, 515-16 (2d Dep't 1981) (negotiation of divorce decree modifications through spouse's agent constitutes transacting business pursuant to CPLR 302(a)(1)); *Kochenthal v. Kochenthal*, 28 App. Div. 2d 117, 121, 282 N.Y.S.2d 36, 40 (2d Dep't 1967) (execution of separation agreement within New York conferred personal jurisdiction over parties under CPLR 302(a)(1)). *See generally* 11 J. ZERR, M. EDMONDS & S. SCHWARTZ, NEW YORK CIVIL PRACTICE § 4:03 [2] (1981) (discussing applicability of CPLR 302(a) in matrimonial actions). Jurisdiction may be invoked even if New York is not the physical site of the negotiations. *See, e.g.,* *Lynch v. Austin*, 96 App. Div. 2d 196, 198-99, 469 N.Y.S.2d 228, 230 (3rd Dep't 1983) (CPLR 302(a)(1) jurisdiction available in action to enforce separation agreement despite agreement's execution in California). In *Lynch*, subsequent to a California decree of divorce, the parties entered into prolonged negotiations which resulted in a separation agreement. *See id.* at 197, 469 N.Y.S.2d at 229. The defendant conducted the negotiations by telephone and mail through his California counsel and the agreement was eventually executed in California. *See id.* Despite the defendant's lack of physical activities in New York, the court held that he was nevertheless amenable under CPLR 302(a)(1) in a New York action to enforce the separation agreement. *See id.* The court borrowed the logic of *Hanson v. Denckla*, 357 U.S. 235 (1958), in stating that the defendant "purposefully avail[ed]" himself of the benefits and protections of the laws of New York by executing a separation agreement which was "permeated with reciprocal rights and obligations connected with New York." *Lynch*, 96 App. Div. 2d at 198-99, 469 N.Y.S.2d at 230.