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ture has made it quite clear that paternity proceedings are designed to promote the welfare of illegitimate children,²⁵ the issue of support is considered not an ancillary matter, but one of primary significance. Hence, those jurisdictions which regard failure to support as breach of a legal duty comport more closely with New York's statutory scheme, and, therefore, it is suggested that CPLR 302(a)(2) be applied to the nonresident putative father.²⁶

Anthony Fischetti

INSURANCE LAW

Ins. Law § 167(1): Child's infancy will not excuse requirement of timely notice to insurer in intrafamily claim

Liability insurance contracts generally provide that an insured must timely notify his insurer of a claim in order to invoke the insurer's obligation to defend and indemnify such claim.²⁷ Addi-

S.W.2d 106, 108 (Tenn. 1975).

²⁵ See note 2 *supra*.

²⁶ If the exercise of jurisdiction is not to be had by resort to CPLR 302(a)(2) or 302(b), it is hoped that the legislature will provide a clear basis for jurisdiction in the paternity context. Long-arm statutes aimed specifically at exercising jurisdiction over nonresident putative fathers have been enacted in at least two states. See GA. CODE ANN. § 74-302(a) (1981); KAN. CIV. PRO. CODE ANN. § 60-308(b)(10) (Vernon 1965 & Supp. 1981-1982). In addition, eight other states have enacted versions of the Uniform Parentage Act which permits the assertion of in personam jurisdiction over any person whose act of sexual intercourse within the state causes a child to be conceived. See UNIFORM PARENTAGE ACT § 8(b). It is clear that statutes which base in personam jurisdiction upon the act of sexual intercourse within the state satisfy the minimum contacts test of due process. *E.g.*, *Bebeau v. Berger*, 22 Ariz. App. 522, 523, 529 P.2d 234, 235 (Ct. App. 1975); *Bell v. Arnold*, 248 Ga. 9, 9-10, 279 S.E.2d 449, 450 (1981); *Neil v. Ridner*, 153 Ind. App. 149, 154, 286 N.E.2d 427, 429 (Ct. App. 1972); *Larsen v. Scholl*, 296 N.W.2d 785, 790 (Iowa 1980); *Howells v. McKibben*, 281 N.W.2d 154, 157 (Minn. 1979); *State ex rel. Larimore v. Snyder*, 206 Neb. 64, 69, 291 N.W.2d 241, 245 (1980); *Poindexter v. Willis*, 23 Ohio Misc. 199, 210, 256 N.E.2d 254, 260 (1970); *State ex rel. McKenna v. Bennett*, 28 Or. App. 155, 558 P.2d 1281, 1283 (Ct. App. 1977).

²⁷ See generally 8 J.A. APPLEMAN & J. APPLEMAN, *INSURANCE LAW AND PRACTICE* § 4732 (1981). The purpose of the notice requirement in a liability insurance policy is to afford an insurance company an opportunity to investigate claims. *Fidelity & Cas. Co. of New York v. Maryland Cas. Co.*, 51 Misc. 2d 116, 122, 273 N.Y.S.2d 112, 120 (Sup. Ct. Onondaga County 1966), *rev'd on other grounds*, 28 App. Div. 2d 815, 281 N.Y.S.2d 452 (4th Dep't 1967); 8 J.A. APPLEMAN & J. APPLEMAN, *supra*, § 4731, at 2; Note, *Liability Insurance Policy Defenses and the Duty to Defend*, 68 HARV. L. REV. 1436, 1436-37 (1955). Indeed, an insurance company in receipt of prompt notice is better able to prepare defenses because it can ob-

tionally, pursuant to section 167(1) of the New York Insurance Law, the *injured* party may provide the required notice,²⁸ and it will be valid if given "as soon as was reasonably possible."²⁹ Al-

serve the appearance of an accident site before physical changes occur. *Id.* at 1437-38. Additionally, timely notice allows an insurer to investigate witnesses while they are readily available and while the event is still fresh in their memories. *See, e.g.,* Liberty Mut. Ins. Co. v. Haecker Indus., Inc., 326 F. Supp. 489, 491 (E.D. Pa. 1971); Western Freight Ass'n v. Aetna Cas. & Sur. Co., 255 F. Supp. 858, 862 (W.D. Pa. 1966), *aff'd*, 371 F.2d 541 (3d Cir. 1967); Merchants Mut. Ins. Co. v. Anziano, 59 Misc. 2d 673, 676, 300 N.Y.S.2d 187, 191 (Sup. Ct. Nassau County 1969). Prompt investigation also facilitates detection of overstated or fraudulent claims. *Wendel v. Swanberg*, 384 Mich. 468, 477, 185 N.W.2d 348, 352 (1971); *Stonewall Ins. Co. v. Moorby*, 130 Vt. 562, 567, 298 A.2d 826, 829 (1972); *cf. Shafer v. Utica Mut. Ins. Co.*, 248 App. Div. 279, 284, 289 N.Y.S. 577, 582 (4th Dep't 1936) (quoting *Coleman v. New Amsterdam Cas. Co.*, 247 N.Y. 271, 276, 160 N.E. 367, 369 (1928)) (cooperation clause in insurance policy requires honest disclosure of information so that the insurer can "determine whether there is a genuine defense").

²⁸ N.Y. INS. LAW § 167(1)(c) (McKinney 1966). Subsection 1(c) of the Insurance Law provides in part:

No policy or contract insuring against liability for injury to person shall be used or delivered in this state, unless it contains in substance the following provisions.

. . . .

A provision that notice given by or on behalf of the insured, or written notice by or on behalf of the injured person or any other claimant, to any licensed agent of the insurer in this state shall be deemed notice to the insurer.

Id. At common law, an injured party could not enforce an unsatisfied judgment directly against an insured's liability insurer. Comment, *An Overlooked String on a Plaintiff's Bow: New York Insurance Law Section 167(1)*, 44 CORNELL L.Q. 396, 396 (1959). The basis for this rule was a lack of privity of contract between an injured party and an insurer. *See Jackson v. Citizens Cas. Co.*, 277 N.Y. 385, 389, 14 N.E.2d 446, 447 (1938). Under a strict indemnity theory, when an injured person could not collect a judgment from the insured because of the latter's insolvency, the insured was considered to have suffered no damage for which the insurer would be liable to indemnify. *Id.* The New York Legislature sought to rectify this inequity by enacting the predecessor to section 167, former section 109 of the Insurance Law, ch. 524, § 1, [1917] N.Y. Laws 1550 (current version at N.Y. INS. LAW § 167 (McKinney 1966 & Supp. 1981-1982)), which allowed a direct action by a claimant against an insurer when the insured was judgment proof. Insurers continued to disclaim liability to claimants, however, when the insured breached any condition of the policy, including the notice requirement. *See Lauritano v. American Fidelity Fire Ins. Co.*, 3 App. Div. 2d 564, 567, 162 N.Y.S.2d 553, 556 (1st Dep't 1957), *aff'd*, 4 N.Y.2d 1028, 152 N.E.2d 546, 177 N.Y.S.2d 530 (1958); Comment, *supra*, at 397-98. Thus, in section 167(1)(c), the legislature has allowed an injured party to give such notice himself. *See Bazar v. Great Am. Indem. Co.*, 306 N.Y. 481, 487-88, 119 N.E.2d 346, 349-50 (1954); *Lauritano v. American Fidelity Fire Ins. Co.*, 3 App. Div. 2d 564, 567, 162 N.Y.S.2d 553, 556 (1st Dep't 1957), *aff'd*, 4 N.Y.2d 1028, 152 N.E.2d 546, 177 N.Y.S.2d 530 (1958). "With respect to notice, [section 167(1)] takes the liability contract out of the class of ordinary indemnity contracts, and gives it the aspect of a third party beneficiary contract under which the injured party is treated like the beneficiary." 19 ALB. L. REV. 304, 309 (1955).

²⁹ N.Y. INS. LAW § 167(1)(d) (McKinney 1966). Subdivision 1(d) requires that liability insurance policies contain

[a] provision that failure to give any notice required to be given by such policy

though some trial courts have considered the infancy of the injured party in determining whether notice was given within a reasonable time,³⁰ the Appellate Division, First Department, has held that infancy will not extend the time period for giving notice.³¹ Recently,

within the time prescribed therein shall not invalidate any claim made by the insured or by any other claimant thereunder if it shall be shown not to have been reasonably possible to give such notice within the prescribed time and that notice was given as soon as was reasonably possible.

Id. Policy provisions requiring notice "as soon as practicable," or "immediately," consistently have been construed to mean notice given within a reasonable time. *See, e.g.,* *Mighty Midgets, Inc. v. Centennial Ins. Co.*, 47 N.Y.2d 12, 19, 389 N.E.2d 1080, 1083, 416 N.Y.S.2d 559, 563 (1979); *Hartford Fire Ins. Co. v. Masternak*, 55 App. Div. 2d 472, 474, 390 N.Y.S.2d 949, 951 (4th Dep't 1977); *Keegan v. Excess Ins. Co. of Am.*, 202 Misc. 126, 128, 116 N.Y.S.2d 687, 689 (Sup. Ct. Columbia County 1952); *Alsam Holding Co. v. Consolidated Taxpayers' Mut. Ins. Co.*, 167 Misc. 732, 736-37, 4 N.Y.S.2d 498, 505 (N.Y.C. Mun. Ct. Bronx County 1938). Whether reasonable notice was given is decided in light of the circumstances confronting the person giving the notice. *See, e.g.,* *Allen v. Allstate Ins. Co.*, 237 N.Y.S.2d 918, 918-19 (1st Dep't 1962), *rev'd on other grounds*, 20 App. Div. 2d 763, 247 N.Y.S.2d 489 (Sup. Ct. App. T. 1st Dep't 1964); *Lauritano v. American Fidelity Fire Ins. Co.*, 3 App. Div. 2d 564, 568, 162 N.Y.S.2d 553, 557 (1st Dep't 1957), *aff'd*, 4 N.Y.2d 1028, 152 N.E.2d 546, 177 N.Y.S.2d 530 (1958). In *Lauritano*, the seminal case interpreting subsections (c) and (d), the plaintiff was injured when the car in which he was a passenger was struck by a tractor trailer. 3 App. Div. 2d at 566, 162 N.Y.S.2d at 555. Due to the truck owner's refusal to divulge the identity of his insurers, the plaintiff did not give notice of the accident for 13 months. *Id.* at 569, 162 N.Y.S.2d at 557-58. After stating that the insured party's delay in giving notice would no longer be imputed to the claimant, *id.* at 568, 162 N.Y.S.2d at 557, the first department held that, under subdivision (d), the reasonableness of the injured person's delay must be decided in light of the opportunities available to him to give such notice and not those available to the insured. *Id.*

³⁰ *See* *Government Employees Ins. Co. v. Wilson*, 69 Misc. 2d 1020, 1022, 332 N.Y.S.2d 338, 341 (Sup. Ct. Erie County 1972); *Ferguson v. Nationwide Mut. Ins. Co.*, 61 Misc. 2d 912, 914-15, 307 N.Y.S.2d 347, 349-50 (N.Y.C. Civ. Ct. N.Y. County 1970). *Ferguson* involved a 13-year-old who was struck by a car. *Id.* at 913, 307 N.Y.S.2d at 348. The trial court stated that, since the child's mother did not notify the insurance carrier until 28 months after the accident, she could not enforce a derivative judgment against the carrier. *Id.* at 914, 307 N.Y.S.2d at 349. The court held, however, that the injured child did give notice as soon as was "reasonably possible" since he could not be expected to do so until his mother retained counsel. *Id.* at 914-15, 307 N.Y.S.2d at 350. The trial judge stated, "I fail to see that the absence of the word 'infancy' from section 167[(1)(d)] requires us to ignore the fact of infancy. If by virtue of infancy—or any other disability—it is not 'reasonably possible to give such notice within the prescribed time,' the claim is not invalidated." *Id.* at 914, 307 N.Y.S.2d at 350.

In *Wilson*, 69 Misc. 2d 1020, 332 N.Y.S.2d 338 (Sup. Ct. Erie County 1972), the court indicated that it was unreasonable to charge an injured 4-year-old with knowledge of the terms of his parents' policy, and thus held that his parents' failure to give timely notice of an accident would not excuse the insurance carrier from defending them in a negligence suit. 69 Misc. 2d at 1022, 332 N.Y.S.2d at 341.

³¹ *See* *Insurance Co. of Greater New York v. 156 Hamilton Realty Corp.*, 72 App. Div. 2d 403, 406-07, 424 N.Y.S.2d 683, 684-86 (1st Dep't 1980). In *Hamilton*, a 1½-year-old child ingested lead paint chips allegedly as a result of the landlord's negligence. *Id.* at 404, 424 N.Y.S.2d at 683. Neither the child's parent nor the landlord gave notice to the landlord's

however, in *Allstate Insurance Co. v. Furman*,³² the Appellate Division, Second Department, adopted a narrower rule, holding that when the suit is between an infant and his parents under such circumstances that the parents' insurer is the real defendant, the parents may not use their child's infancy to extend the time period for notifying their insurer of a claim.³³

In *Furman*, Daniel Furman, then 4½ years old, seriously injured his hand while playing in his parents' basement.³⁴ Daniel's mother telephoned her insurer to report the accident, but was informed that there would be no coverage under the Furmans' Allstate homeowner's insurance policy.³⁵ The Furmans made no further attempt to notify Allstate of the accident.³⁶ Six years later, the infant's grandfather, having been appointed guardian ad litem, brought a negligence action against the child's parents.³⁷ When informed of the suit, Allstate disclaimed liability because of late notice.³⁸ The instant actions were later instituted by Daniel's guardian to compel Allstate to defend the Furmans and indemnify them if necessary³⁹ and by Allstate seeking a declaration that it had no liability relating to the accident.⁴⁰ The Supreme Court, Trial Term, upon ordering Allstate to defend, and, if necessary, indem-

insurer for 4½ years. *Id.* The court, in holding that this notice was not given "as soon as was reasonably possible," refused to read infancy into subsection (1)(d), stating that to do so would result in a tolling of the notice requirement which the legislature had not intended. *Id.* at 404-05, 424 N.Y.S.2d at 684. In support of such conclusion, the *Hamilton* court observed that the legislature had expressly provided time extensions for notification of claims against municipal corporations, see GML § 50-e (McKinney 1977 & Supp. 1981-1982), and against the Motor Vehicle Accident Indemnification Corporation (MVAIC), see N.Y. INS. LAW § 608(c) (McKinney Supp. 1981-1982), but had not so provided in section 167(1). 72 App. Div. 2d at 405-07, 424 N.Y.S.2d at 684-86.

³² 84 App. Div. 2d 29, 445 N.Y.S.2d 236 (2d Dep't 1981).

³³ *Id.* at 33-34, 445 N.Y.S.2d at 239.

³⁴ *Id.* at 29, 445 N.Y.S.2d at 237. The child's hand was injured permanently when a metal anvil fell off of a tree stump which the Furmans kept in their basement. *Id.* at 30, 445 N.Y.S.2d at 237.

³⁵ *Id.* The reason given by the insurer for lack of coverage under the policy was that the injured party was a member of the household. *Id.* The policy contained a provision that "written notice shall be given by or on behalf of the insured to Allstate or any of its authorized agents as soon as practicable." *Id.* at 31, 445 N.Y.S.2d at 238.

³⁶ *Id.* at 30, 445 N.Y.S.2d at 237.

³⁷ *Id.* The suit, brought on behalf of Daniel against his parents, alleged that the Furmans' "negligent, reckless, and careless supervision" was the cause of Daniel's injury. *Id.*

³⁸ *Id.* The insurer stated that it was disclaiming liability because of late notice and "other reasons," but the court's opinion did not disclose the other reasons. See *id.*

³⁹ *Id.*

⁴⁰ *Id.* The two actions were consolidated at trial term and were heard without a jury. *Id.*

nify the Furmans, held that an infant plaintiff would not be barred from serving late notice upon an insurer.⁴¹

On appeal, the Appellate Division, Second Department, reversed, declaring that Allstate was not obligated to defend or indemnify the Furmans in an action based upon the accident.⁴² Writing for a unanimous court,⁴³ Justice Weinstein stated that Mrs. Furman's initial attempt to notify her insurer was insufficient because it was not in writing.⁴⁴ The court then held the subsequent notice invalid since it was not given "as soon as practicable."⁴⁵ In reaching the latter determination, Justice Weinstein focused initially upon an insurance company's fundamental right to notice,⁴⁶ and noted that an insured's failure to give such notice allows an insurer to disclaim liability without showing prejudice.⁴⁷ The *Furman* court conceded that under some circumstances a claimant's infancy may excuse his delay in giving notice.⁴⁸ The court reasoned, however, that although the instant action technically was a suit by a child against his parents,⁴⁹ it was, in reality, an action by Daniel's parents to collect a judgment from Allstate.⁵⁰ Thus, the court concluded that the Furmans would not be allowed to use their son's infancy to avoid the consequences of their own failure

⁴¹ *Id.* at 30, 445 N.Y.S.2d at 237-38. While acknowledging that the Furmans had not given timely written notice as required by the policy, the trial court relied upon *Government Employees Ins. Co. v. Wilson*, 69 Misc. 2d 1020, 1022, 332 N.Y.S.2d 338, 341 (Sup. Ct. Erie County 1972) and *Ferguson v. Nationwide Mut. Ins. Co.*, 61 Misc. 2d 912, 914, 307 N.Y.S.2d 247, 249-50 (N.Y.C. Civ. Ct. N.Y. County 1970), *see note 36 supra*, in holding that the parents' delay in giving notice would not be used to bar notice by the child. *See* 84 App. Div. 2d at 30, 445 N.Y.S.2d at 237-38.

⁴² *Id.* at 30-31, 445 N.Y.S.2d at 238.

⁴³ The panel consisted of Presiding Justice Mollen and Justices Hopkins, Titone, and Weinstein.

⁴⁴ *Id.* at 31, 445 N.Y.S.2d at 238.

⁴⁵ *Id.* The *Furman* court recited the first department's holding in *Insurance Co. of Greater New York v. 156 Hamilton Realty Corp.*, 72 App. Div. 2d 403, 424 N.Y.S.2d 683 (1st Dep't 1980), *see note 31 supra*, yet stated that although the same result would be reached if the *Hamilton* reasoning were applied, it would base its decision on "narrower" grounds. *See* 84 App. Div. 2d at 32, 445 N.Y.S.2d at 238-39.

⁴⁶ 84 App. Div. 2d at 32-33, 445 N.Y.S.2d at 239.

⁴⁷ *Id.* at 33, 445 N.Y.S.2d at 239.

⁴⁸ *Id.*

⁴⁹ *Id.* The court acknowledged that, pursuant to *Gelbman v. Gelbman*, 23 N.Y.2d 434, 425 N.E.2d 192, 297 N.Y.S.2d 529 (1969), the underlying suit by Daniel against his parents was perfectly legitimate. 84 App. Div. 2d at 33, 445 N.Y.S.2d at 239.

⁵⁰ 84 App. Div. 2d at 33, 445 N.Y.S.2d at 239. Justice Weinstein referred to the underlying suit as "an effort by the Furmans to collect money from Allstate by litigation, when they were rebuffed in their efforts to collect through a direct claim." *Id.*

to give timely notice.⁵¹

Because the narrow circumstances involved in *Furman* are distinguishable from analogous notice areas wherein the time for giving notice may be extended due to an injured party's infancy, it is submitted that the *Furman* court's holding was proper. Section 608(c) of the New York Insurance Law,⁵² for example, allows an extension of the Motor Vehicle Accident Indemnification Corporation notice of claim requirement in the case of an infant.⁵³ This provision, however, contemplates a situation in which a known third party is involved, or a prompt accident report has been filed with the police.⁵⁴ Thus, the insurance corporation is assured of having an independent witness or police report available from which to ascertain the facts surrounding an incident.⁵⁵ Similarly, with regard to claims against public corporations, section 50-e of the General Municipal Law⁵⁶ permits a court to extend the time for serving notice based on several considerations, including a claimant's age and whether the corporation's insurer had "actual knowledge of the facts" involved.⁵⁷ When an accident involving an infant occurs exclusively within a family setting, however, it is submitted that unless an affirmative duty is placed upon the parents to give timely notice to their insurer on behalf of the child, insurance carriers will be put in the position of receiving notice of an

⁵¹ *Id.* at 33-34, 445 N.Y.S.2d at 239.

⁵² N.Y. INS. LAW § 608(c) (McKinney 1966 & Supp. 1981-1982).

⁵³ *Id.* Section 608(c) provides in part:

[w]here the qualified person is an infant or is mentally or physically incapacitated or is deceased, and by reason of such disability or death is prevented from filing . . . within the applicable period specified . . . (1) the corporation may accept the filing of the affidavit after the expiration of said applicable period if . . . it was not reasonably possible to file such affidavit within said applicable period and [it] was filed as soon as was reasonably possible.

Id. The state also provides that a court may grant leave for a party to file late notice if the court is satisfied that MVAIC would not be prejudiced in defending itself. *Id.*

⁵⁴ See N.Y. INS. LAW § 608(a), (b) (McKinney 1966 & Supp. 1981-1982). Section 608 distinguishes between a claim involving an identified uninsured driver and one involving an unidentified driver. See *id.* In the latter case, the claimant is required to report the accident to the police within 24 hours. *Id.* § 608(b).

⁵⁵ Cf. *Sorenson v. Sorenson*, 369 Mass. 350, 365, 339 N.E.2d 907, 915 (1975) ("[r]equirement of prompt reports of accidents to the registry of motor vehicles" makes collusion easy to discover in automobile accident cases).

⁵⁶ GML § 50-e (McKinney 1977 & Supp. 1981-1982).

⁵⁷ *Id.* § 50-e(5). The Court of Appeals has stated that "even when a public body has had no formal alert that a claim in fact will be brought, actual knowledge of the facts . . . makes it unlikely that prejudice will flow from a delay in filing." *Beary v. City of Rye*, 44 N.Y.2d 398, 412-13, 377 N.E.2d 453, 458, 406 N.Y.S.2d 9, 14 (1978).

accident years after it has occurred. Absent timely notice, the insurer, the true defendant in interest, would be denied an opportunity to investigate an incident within a reasonable time after its occurrence.⁵⁸

Notwithstanding the compelling considerations which support the decision in *Furman*, it is submitted that infancy should warrant the extension of the notice requirement in situations not involving strictly intrafamily claims: Surely, in such situations, the presence of a third party, with interests adverse to the plaintiff, lessens the likelihood of undetected collusion between a plaintiff-infant and his defendant-parents.⁵⁹ The potential for prejudice to the insurer, therefore, is diminished. Indeed, it appears that the imposition of a duty upon the parents of an injured child to notify promptly a third party's insurer, when the third party has failed to do so, is unwarranted. Thus, it is suggested that the *Furman* court properly avoided adopting the broad holding promulgated by the first department in *Insurance Co. of Greater New York v. 156 Hamilton Realty Corp.*,⁶⁰ which, theoretically, could operate to preclude consideration of a claimant's infancy even in cases involving an unrelated insured. It is hoped, therefore, that should the Court of Appeals be confronted with a similar issue, it will resolve this split in the departments in favor of the approach taken by the

⁵⁸ See note 27 *supra*.

⁵⁹ Cf. *Bonavisa v. MVAIC*, 21 Misc. 2d 963, 963-64, 198 N.Y.S.2d 332, 333-34 (Sup. Ct. N.Y. County 1960) (unless the claimant has a cause of action against an identified uninsured motorist who can contest the facts to protect against fraud, the claimant must have timely filed an accident report with the police in order to collect from the Motor Vehicle Accident Indemnification Corporation); See also N.Y. Ins. LAW § 608(b)-(c) (McKinney 1966 & Supp. 1981-1982).

⁶⁰ 72 App. Div. 2d 403, 424 N.Y.S.2d 683 (1st Dep't 1980). In *Hamilton*, the court refused to take an injured child's infancy into consideration, and held that the notice given by the child's mother to the third party's insurer was not timely. *Id.* at 407, 424 N.Y.S.2d at 685-86. Thus, the injured party was denied judgment against the insurer due to the insured's failure to comply with the notice provision of this policy. Significantly, this is precisely the result sought to be avoided by subdivisions (c) and (d) of section 167(1). See *Pitts v. Aetna Cas. and Sur. Co.*, 218 F.2d 58, 62 (2d Cir. 1954), *cert. denied*, 348 U.S. 973 (1955); *Lauritano v. American Fidelity Fire Ins. Co.*, 3 App. Div. 2d 564, 568, 162 N.Y.S.2d 553, 557 (1st Dep't 1957), *aff'd*, 4 N.Y.2d 1028, 152 N.E.2d 546, 177 N.Y.S.2d 530 (1958). Moreover, while the *Hamilton* court reasoned that it could not read infancy into the reasonable notice provision of section 167(1)(d), it should be noted that the Court of Appeals has read an infancy extension into municipal notice statutes. See *Russo v. City of New York*, 258 N.Y. 344, 347-48, 179 N.E. 762, 763 (1932); *Murphy v. Village of Fort Edward*, 213 N.Y. 397, 403, 107 N.E. 716, 717 (1915).

second department in *Furman*.

John James Lynch

SURROGATE'S COURT PROCEDURE ACT

Surrogate's Court Procedure Act § 1407: A copy of a missing will may not be admitted to probate unless the independent testimony of at least one witness clearly and distinctively establishes the substantive terms of the will

A lost or unintentionally destroyed will, which has been properly executed⁶¹ but not revoked,⁶² may be admitted to probate only when its substantive provisions have been proved clearly and distinctively either by two witnesses, or by one witness and a true copy of the original document.⁶³ Although the New York courts

⁶¹ The EPTL sets forth several requirements for the proper execution and attestation of most wills. See EPTL § 3-2.1 (1981). Notably, in *In re Allrecht*, N.Y.L.J., Feb. 23, 1973, at 21, col. 3 (Sur. Ct. Westchester County), Surrogate Jaeger refused to admit to probate an executed copy of a will because three witnesses testified against its due execution. Conversely, in *In re Will of Sylvain*, N.Y.L.J., Dec. 11, 1979, at 13, col. 6 (Sur. Ct. Queens County), the court, over the objection of contestants who claimed that the will was not duly executed, admitted the will to probate even though its contents were proved merely by a carbon copy of the original instrument and the testimony of the attorney-draftsman. The surrogate noted, however, that the contestants failed to satisfy their burden of proof that execution was procured through fraudulent or undue means. *Id.* Notwithstanding these instances, a claim against due execution is not commonly raised. See *In re Estate of Utegg*, 91 Misc. 2d 21, 22, 396 N.Y.S.2d 992, 993 (Sur. Ct. Erie County 1977); *In re Estate of Flaszka*, 57 Misc. 2d 347, 348-49, 292 N.Y.S.2d 815, 816-17 (Sur. Ct. Erie County 1968).

⁶² A missing will, previously executed by the testator and known to have been in his possession, is presumed to have been destroyed by the decedent with intent to revoke it. *E.g.*, *Collyer v. Collyer*, 110 N.Y. 481, 486, 18 N.E. 110, 112 (1888); *Schultz v. Schultz*, 35 N.Y. 653, 653 (1866); *In re Estate of Schroter*, N.Y.L.J., Apr. 9, 1979, at 15, col. 1 (Sur. Ct. N.Y. County); see, *e.g.*, *In re Will of Fox*, 9 N.Y.2d 400, 405-10, 174 N.E.2d 499, 502-05, 214 N.Y.S.2d 405, 409-14 (1961); *In re Lee*, N.Y.L.J., Feb. 11, 1977, at 6, col. 6 (Sur. Ct. N.Y. County). In this situation, in order for the will to be admitted to probate, the proponent must overcome this presumption by showing that the will existed at the time of death or was destroyed accidentally, by disaster, intentionally by a third party, or even by the testator, provided of course, that he did not possess an intent to revoke the will. *In re Will of Fox*, 9 N.Y.2d at 407-08, 174 N.E.2d at 504, 214 N.Y.S.2d at 412; *In re Amglio*, N.Y.L.J., Sept. 21, 1979, at 12, col. 5 (Sur. Ct. Kings County); *In re Crea*, N.Y.L.J., Sept. 22, 1970, at 19, col. 5 (Sur. Ct. Bronx County); FIFTH REPORT OF THE TEMPORARY STATE COMMISSION ON THE MODERNIZATION, REVISION AND SIMPLIFICATION OF THE LAW OF ESTATES 466-74 (1966), see, *e.g.*, *In re Will of Moore*, N.Y.L.J., Dec. 13, 1979, at 15, col. 5 (Sur. Ct. Westchester County); *In re Estate of Graeber*, 53 Misc. 2d 640, 641, 279 N.Y.S.2d 429, 430 (Sur. Ct. Erie County 1967).

⁶³ Section 1407 of the Surrogate's Court Procedure Act (SCPA) provides:

A lost or destroyed will may be admitted to probate only if

1. It is established that the will has not been revoked.