

# CPLR 314(1): Absent Minimum Contacts, Jurisdiction Lacking Over Nonresident Second Wife of Deceased Husband in Action by Domiciliary First Wife to Adjudicate Validity of First Marriage

William J. Cople III

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tionally relied upon and, under other circumstances, may represent a tenuous premise for asserting that existing constitutional standards have been met.<sup>51</sup> Since CPLR 302 was designed as a limited jurisdictional statute,<sup>52</sup> it seems that the Court may have promulgated judicial legislation rather than judicial interpretation.

It is submitted that legislative amendment should precede the broad application of CPLR 302(a)(3)(ii) to the commercial tort setting where the "injury" is merely perceived and not realized. Nevertheless, in light of the careful examination of the facts made by the *Sybron* Court,<sup>53</sup> it appears that the application of CPLR 302(a)(3)(ii) jurisdiction to commercial cases will be restricted to those situations where there is substantial evidence that an intentional tort committed without the state may result in considerable direct economic injury within.

*Sharon M. Heim*

*CPLR 314(1): Absent minimum contacts, jurisdiction lacking over nonresident second wife of deceased husband in action by domiciliary first wife to adjudicate validity of first marriage*

CPLR 314(1) permits the exercise of in rem jurisdiction in a matrimonial action for the limited purpose of affecting the marital status.<sup>54</sup> The jurisdictional basis is the presence of a fictional mari-

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<sup>51</sup> See note 49 *supra*. The *Sybron* opinion is devoid of any reference to whether the defendant had "minimum contacts" with the forum state, apparently assuming that satisfaction of the requirements of the long-arm statute would be sufficient to insure that assertion of jurisdiction was constitutional.

<sup>52</sup> See note 48 *supra*.

<sup>53</sup> In addition to the extensive consideration given by the Court of Appeals, Special Term conducted a two-day hearing to examine the issues of fact in that case. 46 N.Y.2d at 202, 385 N.E.2d at 1057, 413 N.Y.S.2d at 129. Since the ultimate liability of the defendant need not be determined, *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, 15 N.Y.2d 443, 460, 209 N.E. 2d 68, 77, 261 N.Y.S.2d 8, 21 (1966), it is only necessary to establish that "the defendant was the author of acts without the State and that the complaint adequately frames a cause of action in tort arising from those acts." *Evans v. Planned Parenthood, Inc.*, 43 App. Div. 2d 996, 997, 352 N.Y.S.2d 257, 259 (3d Dep't 1974). Such allegations, of course, are viewed "in a light most favorable to [the] plaintiff." *Johnson v. City of Newburgh*, 46 App. Div. 2d 663, 663, 359 N.Y.S.2d 840, 842 (2d Dep't 1974); see 66 COLUM. L. REV. 199, 204-05 (1966). See generally D. SEGEL, *NEW YORK PRACTICE* § 92 (1978).

<sup>54</sup> *Reschofsky v. Reschofsky*, 272 App. Div. 694, 74 N.Y.S.2d 636 (1st Dep't 1947) (construing predecessor to CPLR 314). CPLR 314(1) (1972) authorizes the service of process outside New York in the same manner as it is served inside the state "in a matrimonial action." Such extraterritorial service vests the court with in rem jurisdiction. CPLR 314, commentary at 307 (McKinney 1972). In rem jurisdiction empowers the court to adjudicate the parties' marital status. 1 WK&M ¶ 313.02, at 3-275 to 3-276 (citing *Usher v. Usher*, 41

tal res within the state,<sup>55</sup> effected by the New York domicile of at least one of the parties to the marriage. Recently, however, in *Carr v. Carr*,<sup>56</sup> the Court of Appeals refused to countenance this jurisdic-

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App. Div. 2d 368, 343 N.Y.S.2d 212 (3d Dep't 1973)). Due process, however, precludes the court from determining personal rights and liabilities arising from the marital relationship, absent personal jurisdiction over the defendant. *Kulko v. Superior Ct. of Cal.*, 436 U.S. 84 (1978); *Matthews v. Matthews*, 247 N.Y. 32, 159 N.E. 713 (1928). Conversely, due process does permit a domiciliary's court to adjudicate his status because of the state's overriding concern in protecting the interests of its domiciliaries. See *Estin v. Estin*, 334 U.S. 541, 546-47 (1948). See generally 2 J. BISHOP, NEW COMMENTARIES ON MARRIAGE, DIVORCE, AND SEPARATION §§ 23, 32, 43-44 (1891). The constitutional basis for the exercise of in rem jurisdiction in a status adjudication has been determined to be the domicile of one of the marital partners, see *Bell v. Bell*, 181 U.S. 175 (1901); DRL § 230(5) (1977), even where the other spouse is not subject to in personam jurisdiction of the forum state. *Williams v. North Carolina (I)*, 317 U.S. 287, 298-99 (1942) (*Williams I*), discussed in *Williams v. North Carolina (II)*, 325 U.S. 226, 229-31 (1945). But see *Williams I*, 317 U.S. at 316-18 (Jackson, J., dissenting). Such adjudication of the marital status is protected by the Full Faith and Credit clause. *Estin v. Estin*, 334 U.S. 541 (1948); see U.S. CONST. art. IV, § 1. A decree rendered without jurisdiction other than that predicated on one party's domicile, however, is not entitled to full faith and credit with respect to any adjudication of such derivative incidents of the marriage as financial support, *id.*, and custody. *May v. Anderson*, 345 U.S. 528 (1953). This incidental relief requires in personam jurisdiction over the defendant. See *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957); *Estin v. Estin*, 334 U.S. 541 (1948). See generally D. SIEGEL, NEW YORK PRACTICE § 90 (1978).

Matrimonial actions comprise actions for divorce, separation, annulment, and dissolution of marriage as well as actions to declare a marriage or foreign divorce valid or void and actions to declare the nullity of a void marriage. CPLR 105(o) (Supp. 1978-1979). See generally D. SIEGEL, *supra*, at § 102. Actions to adjudicate status have been characterized as "actions which are substantially in rem," *Geary v. Geary*, 272 N.Y. 390, 399, 6 N.E.2d 67, 71 (1936), since, unlike the true in rem action, the entire world is not privy to a matrimonial action. See 11 J. ZETT, M. EDMONDS & S. SCHWARTZ, NEW YORK CIVIL PRACTICE §§ 3.03[2], .04[2] (1978) (quoting *Williams v. North Carolina (II)*, 325 U.S. at 226 (1945)) [hereinafter cited as J. ZETT].

<sup>55</sup> *Williams v. North Carolina (I)*, 317 U.S. 287, 287 (1942); see *Williams v. North Carolina (II)*, 325 U.S. 226, 229-30 (1945); *Geary v. Geary*, 272 N.Y. 390, 6 N.E.2d 67 (1936); *Gray-Lewis v. Gray-Lewis*, 5 App. Div. 2d 238, 171 N.Y.S.2d 364 (1st Dep't 1958); *Weiner v. Weiner*, 19 Misc. 2d 470, 471, 191 N.Y.S.2d 280, 282 (Sup. Ct. N.Y. County 1959); D. SIEGEL, *supra* note 54, at § 102. The concept of the marital res is a legal fiction conceived to embody the intangible marriage in order to conceptualize a jurisdictional basis upon which a state may effectuate its attenuated concern in the matrimonial status of its citizens. See 2 J. BISHOP, NEW COMMENTARIES ON MARRIAGE, DIVORCE, AND SEPARATION §§ 32, 43, 45 (1891). The inherent power of the state to render a binding judgment on persons domiciled within its territorial borders, see *Pennoyer v. Neff*, 95 U.S. 714 (1878), extends its theoretical premise to embrace the power to affect the marital status of a domiciliary present within its boundaries. Thus, provided that at least one spouse is domiciled within the forum state, the concomitant presence of the res has been held to be a constitutionally viable jurisdictional predicate to render even an *ex parte* status adjudication. *Williams v. North Carolina (I)*, 317 U.S. at 298-99. Further, once jurisdiction over the res is obtained, the court will retain continuing jurisdiction to modify the original judgment without the necessity of obtaining a new jurisdictional predicate. See *Joffe v. Spector*, 27 App. Div. 2d 406, 279 N.Y.S.2d 905 (4th Dep't 1967); RESTATEMENT (SECOND) CONFLICT OF LAWS §§ 26, 38 (1971). See also *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957).

<sup>56</sup> 46 N.Y.2d 270, 385 N.E.2d 1234, 413 N.Y.S.2d 305 (1978), *rev'g* 60 App. Div. 2d 63,

tional predicate, holding that, absent minimum contacts, jurisdiction is lacking over a "non-resident second wife of a deceased husband" where a New York domiciliary seeks to declare invalid a divorce obtained by her deceased husband.<sup>57</sup>

In *Carr*, the plaintiff wife married the decedent husband in Nevada in 1956. After the couple resided together overseas, the plaintiff left the marital residence in 1965, citing cruel treatment she received from her husband, and established a separate domicile in New York.<sup>58</sup> The husband subsequently secured an *ex parte* divorce abroad and, in 1974, married the defendant second wife in Nevada.<sup>59</sup> After the husband's death in 1975, the defendant, a California resident since 1962, applied for federal survivor benefits as the lawful surviving spouse. In response, the plaintiff sought declaratory relief to invalidate the *ex parte* divorce and adjudge her the surviving spouse.<sup>60</sup> On the defendant's motion, special term dismissed for lack of jurisdiction.<sup>61</sup> The Appellate Division, Second Department, reversed, finding that adequate minimum contacts existed between the litigants, the controversy and the forum.<sup>62</sup>

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400 N.Y.S.2d 105 (2d Dep't 1977).

<sup>57</sup> 46 N.Y.2d at 271, 385 N.E.2d at 1235, 413 N.Y.S.2d at 306.

<sup>58</sup> *Id.* at 272, 385 N.E.2d at 1235, 413 N.Y.S.2d at 306. The plaintiff first wife, Ann Carr, accompanied her husband, Paul Carr, and established various marital residences overseas while he was employed by the United States Foreign Service.

<sup>59</sup> *Id.* The ground set forth by the husband in securing the Honduran divorce was wrongful abandonment. *Id.*

<sup>60</sup> *Id.* The plaintiff's first wife sought declaratory relief under CPLR 3001 (1974) to protect the rights she claimed as the "lawful surviving spouse." *Id.* See also *Sorrentino v. Mierzwa*, 25 N.Y.2d 59, 250 N.E.2d 58, 302 N.Y.S.2d 565 (1969). Such declaratory relief is available in matrimonial litigation. CPLR 3001 & commentary at 360-61 (McKinney 1974). Unlike the matrimonial action itself, see note 54 *supra*, there are no residency requirements for declaratory relief, and it lies within the discretion of the court to entertain the action. See *Engel v. Engel*, 275 App. Div. 14, 16, 87 N.Y.S.2d 1, 4 (1st Dep't 1949); *Grutman v. Grutman*, 7 Misc. 2d 236, 237, 166 N.Y.S.2d 315, 317 (Sup. Ct. Bronx County 1957); *The Survey*, 51 ST. JOHN'S L. REV. 632, 667 (1977). As to the efficacy of a declaration of marital status, it has been stated that "[i]f the chaos born of foreign divorce and later remarriage is reduced to however small a degree by a declaratory judgment, the judgment is both useful and in the public interest." *Grutman v. Grutman*, 7 Misc. 2d 236, 238, 166 N.Y.S.2d 315, 318 (Sup. Ct. Bronx County 1957).

<sup>61</sup> 46 N.Y.2d at 272, 385 N.E.2d at 1235, 413 N.Y.S.2d at 306.

<sup>62</sup> 60 App. Div. 2d at 65, 400 N.Y.S.2d at 106-07. Whether the appellate division relied on the existence of in rem jurisdiction or, in the alternative, in personam jurisdiction in reversing special term, was unclear. 46 N.Y.2d at 272, 385 N.E. 2d at 1235, 413 N.Y.S.2d at 306. The appellate division considered New York, California and the District of Columbia to constitute the three possible jurisdictional forums and concluded that the relative convenience afforded by the forums was equally balanced. 60 App. Div. 2d at 68-69, 400 N.Y.S.2d at 107-08. In determining that New York had jurisdiction over the parties, the court therefore relied on New York's "continuing interest in the determination of its domiciliary's rights in

A divided Court of Appeals reversed the appellate division, holding that the absence of minimum contacts with the forum state was fatal to the assertion of jurisdiction over the nonresident second wife of the deceased husband.<sup>63</sup> Writing for the majority,<sup>64</sup> Judge Cooke initially noted the "unique place" that status adjudications enjoy in our jurisprudence and that the use of the marital res as a jurisdictional predicate to determine status is beyond dispute.<sup>65</sup> Once there is a death of a party to the marriage, however, the Court declared that the marital res lacks any continued "vitality or legal substance."<sup>66</sup> Accordingly, it was found that the spouse's New York domiciliary status alone was insufficient to support an in rem judgment purporting to bind a third party to the status adjudication.<sup>67</sup>

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the controversy over survivor's benefits to entertain the action and to exercise jurisdiction over the parties." *Id.* at 69, 400 N.Y.S.2d at 109.

<sup>63</sup> 46 N.Y.2d at 271, 385 N.E.2d at 1235, 413 N.Y.S.2d at 306.

<sup>64</sup> The *Carr* majority included Judges Jasen, Gabrielli, Jones, Fuchsberg and Cooke. *Id.*

<sup>65</sup> *Id.* at 272-73, 385 N.E.2d at 1236, 413 N.Y.S.2d at 306-07. The *Carr* majority acknowledged that in some instances in personam jurisdiction would be a constitutionally viable predicate to enable the courts to adjudicate marital status. *Id.* at 273, 385 N.E.2d at 1236, 413 N.Y.S.2d at 307 (citing *Wheaton v. Wheaton*, 67 Cal. 2d 656, 63 Cal. Rptr. 291, 432 P.2d 979 (1967)). This dictum, however, apparently deviates from the traditional reliance on domicile as the sole jurisdictional basis available for a status adjudication. See note 55 *supra*. Since the United States Supreme Court has yet to address the question whether, in the absence of domicile, a status adjudication based on in personam jurisdiction of the parties would be constitutionally valid, compare *Alton v. Alton*, 207 F.2d 667, 676-77 (3d Cir. 1953), vacated as moot, 347 U.S. 610 (1954) with *Rosenstiel v. Rosenstiel*, 368 F. Supp. 51, 57 (S.D.N.Y. 1973) (dictum), *aff'd mem.*, 503 F.2d 1397 (2d Cir. 1974), it is not apodictic that the presence of the marital res within the forum state is always a necessary prerequisite for the assertion of jurisdiction in a status adjudication. See *Williams v. North Carolina (II)*, 325 U.S. at 255, 260 n.16 (Rutledge, J., dissenting). One court has suggested that the presence of the marital res should not be viewed as the exclusive basis for jurisdiction over a status adjudication where the very existence of the res is the matter in controversy. See *Wheaton v. Wheaton*, 67 Cal. 2d 656, 432 P.2d 979, 63 Cal. Rptr. 291 (1967) (in personam jurisdiction sufficient to adjudicate annulment). See generally H. GOODRICH, CONFLICT OF LAWS § 127, at 397 (3d ed. 1949); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 76 (1971).

<sup>66</sup> 46 N.Y.2d at 273, 385 N.E.2d at 1236, 413 N.Y.S.2d at 307. In holding that the res ceases to exist upon the death of a spouse, the *Carr* Court evidently did not rely on any clear principle. See *id.* at 274, 385 N.E.2d at 1236, 413 N.Y.S.2d at 307. It is conceivable that the Court may have found the res, as a jurisdictional predicate, to have the same personal quality which requires the abatement of matrimonial actions on the death of one of the parties. See D. SIEGEL, *supra* note 54, § 185, at 225-26. There are, however, some exceptions to this abatement rule. See *Cornell v. Cornell*, 7 N.Y.2d 164, 164 N.E.2d 395, 196 N.Y.S.2d 98 (1959) (interlocutory divorce decree not abating before final judgment despite death of husband); DRL § 140(e) (1977) (action for annulment survives on behalf of defrauded party). Notwithstanding the traditional abatement of matrimonial actions, a declaratory judgment of marital status does not appear to be circumscribed by this abatement rule. It is notable that Judge Cooke, in decreeing the dissolution of the res upon the death of one spouse, left open the potential for the res to retain sufficient legal viability "in some unusual case." 46 N.Y.2d at 273, 385 N.E.2d at 1236, 413 N.Y.S.2d at 307.

<sup>67</sup> 46 N.Y.2d at 274, 385 N.E.2d at 1236, 413 N.Y.S.2d at 307.

Furthermore, the majority observed that the lack of minimum contacts between the defendant second wife and the forum state defeated the assertion of in personam jurisdiction. Since both jurisdictional predicates were absent, the Court concluded that New York was prevented from rendering a declaratory judgment concerning the status of the first marriage that would be binding on the second wife.<sup>68</sup>

Writing for the dissent, Chief Judge Breitel agreed with the majority that the courts lacked in personam jurisdiction over the defendant, but maintained that important legal rights arising from the first marriage survived the husband's death.<sup>69</sup> The marital *res*, therefore, remained sufficiently viable to permit the determination of the validity of the former marriage,<sup>70</sup> even though New York lacked a jurisdictional basis to ascertain the status of the second marriage.<sup>71</sup>

The decision in *Carr* underscores the apparent uncertainty surrounding the viability of in rem jurisdiction in the wake of the United States Supreme Court's decision in *Shaffer v. Heitner*.<sup>72</sup>

<sup>68</sup> *Id.* at 273, 385 N.E.2d at 1236, 413 N.Y.S.2d at 307.

<sup>69</sup> *Id.* at 275, 385 N.E.2d at 1237, 413 N.Y.S.2d at 308 (Breitel, C.J., dissenting). Chief Judge Breitel was joined in his dissent by Judge Wachtler.

<sup>70</sup> *Id.* at 274-75, 385 N.E.2d at 1237, 413 N.Y.S.2d at 308 (Breitel, C.J., dissenting). In contrast to the majority, Chief Judge Breitel contended that the marital *res* should not dissolve by reason of the death of a spouse. *Id.* at 275, 385 N.E.2d at 1237, 413 N.Y.S.2d at 308. The dissent reasoned that death does not dissipate the marital relationship in every respect since the surviving spouse retains legal rights arising from the marriage. Thus, the *res* should continue to provide a jurisdictional basis to adjudicate those rights. *Id.* Furthermore, the dissent expressed concern that the *Carr* decision would be construed to foreclose a surviving spouse domiciled in New York from securing a New York judgment to protect her rights in the decedent husband's estate. *Id.*

<sup>71</sup> *Id.* In regard to an action to declare the invalidity of a second marriage, it has been noted that "[a] court of equity should not make a declaration so fundamental and sweeping unless all persons affected thereby have been made parties to the action . . . [and therefore the second wife] must be regarded as a necessary and indispensable party . . ." *Herbert v. Herbert*, 147 N.Y.S.2d 191, 195 (Sup. Ct. N.Y. County 1955); see *DiRusso v. DiRusso*, 55 Misc. 2d 839, 848-49, 287 N.Y.S.2d 171, 182 (Sup. Ct. Nassau County 1968); *Verdone v. Verdone*, 20 Misc. 2d 970, 972, 188 N.Y.S.2d 689, 691 (Sup. Ct. Suffolk County 1959); *Impellizzeri v. Impellizzeri*, 133 N.Y.S.2d 44, 47-48 (Sup. Ct. Kings County 1954).

<sup>72</sup> 433 U.S. 186 (1977); see D. SIEGEL, *supra* note 54, at § 104. In *Shaffer v. Heitner*, 433 U.S. 186 (1977), the Supreme Court declared that all assertions of state court jurisdiction are subject to the "minimum contacts" test. *Id.* at 212. Although a judgment predicated on in rem jurisdiction is limited to the interests in the *res*, see RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 56 (1971), such jurisdiction must be founded on a nexus between the litigants, the forum, and the controversy that would sustain an assertion of jurisdiction over the person. 433 U.S. at 207. In the usual case the mere presence of the property that is the subject of the controversy within the forum state should be sufficient to justify the exercise of in rem jurisdiction. *Id.* at 207-08. Accordingly, at least one court has held that the presence of the marital *res* within the state, without more, constitutes an adequate nexus to justify the

Notwithstanding the *Carr* Court's conclusion that the death of a spouse will dissolve the marital *res* as a basis for in rem jurisdiction, perhaps the crucial question in all circumstances should be whether minimum contacts exist between the defendant, the controversy and the forum,<sup>73</sup> with the presence of the *res* within the forum state one factor to be considered.<sup>74</sup> In the light of *Carr*, this supposition

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assertion of in rem jurisdiction in a status adjudication. *In re* Marriage of Rinderknecht, 367 N.E.2d 1128, 1133-35 (Ct. App. Ind. 1977); see CPLR 314, commentary at 107 (McKinney Supp. 1978-1979). The *Shaffer* Court nevertheless did indicate the necessity for contacts in addition to the presence of the *res* in certain cases. See 433 U.S. at 207-08. Thus, while *Shaffer* does not imply that the traditional bases underlying status determinations violate the due process standards of fairness, *id.* at 208 n.30, in rem jurisdiction appears to be foreclosed where, as in *Carr*, the status adjudication would affect a third party lacking the requisite contacts to be subject to in personam jurisdiction.

In *Kulko v. Superior Ct. of Cal.*, 436 U.S. 84 (1978), the Supreme Court concluded that the minimum contacts test must be used to adjudicate personal relief incidental to a matrimonial action. Although the *Kulko* decision is inapposite to the situation in *Carr*, since the first wife did not accompany the request for status adjudication with a demand for personal relief, the *Kulko* decision demonstrates that the Court looks favorably upon applying the minimum contacts test to matrimonial litigation. It is conceivable, therefore, that the Supreme Court may deem the mere presence of the *res* within the state, without anything further, insufficient to bind a third party to a status adjudication. The *Carr* Court reached a result consistent with this view, finding that the matrimonial *res* lacked any legal presence within the state after the death of a spouse. See 46 N.Y.2d at 273-74, 385 N.E.2d at 1236, 413 N.Y.S.2d at 307. It is submitted, however, that although proper in its conclusion, the *Carr* court merely may have delayed the application of the minimum contacts test in status adjudications.

<sup>73</sup> Several commentators have advocated the abolition of the distinction between in rem, quasi-in-rem and in personam jurisdiction and argue that exercise of all jurisdiction should be premised on the minimum contacts test. Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657 (1959); see Zammit, *Quasi-In-Rem Jurisdiction: Outmoded and Unconstitutional?*, 49 ST. JOHN'S L. REV. 668 (1975). Although the consequences of a judgment *rem*, quasi-in-rem and in personam are distinguishable, the net impact of any judgment is essentially personal in nature. Based on this premise, a status adjudication, which is a "proceeding substantially in rem," *Geary v. Geary*, 272 N.Y. 390, 399, 6 N.E.2d 67, 71 (1936) (citation omitted), should be subject to the same minimum contacts test imposed on a demand for personal relief in a matrimonial action. *Developments in the Law — State-Court Jurisdiction*, 73 HARV. L. REV. 909, 975 (1960); see Traynor, *supra* at 660-62 (1959). *But see* *Shaffer v. Heitner*, 433 U.S. 186, 208 n.30 (1977). See generally SIEGEL, *supra* note 54, at §§ 101-102 (1978). See also *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

<sup>74</sup> See note 73 *supra*. Regardless whether both spouses are alive, the exercise of in rem jurisdiction may indirectly affect the legal rights of a third party who lacks the requisite minimum contacts with the forum to sustain the exercise of in personam jurisdiction. In a case such as *Carr*, the surviving wife of a first marriage has a vested interest in determining legal rights accruing prior to the death of her husband, but the marital *res* appears to be an insufficient jurisdictional basis for binding a nonresident second wife who has not "purposefully derive[d] [any] benefit" from the forum state. 46 N.Y.2d at 274, 385 N.E.2d at 1237, 413 N.Y.S.2d at 308 (quoting *Kulko v. Superior Ct. of Cal.*, 436 U.S. 84, 96 (1978)); see *Shaffer v. Heitner*, 433 U.S. 186, 207-12 (1977); *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957); *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945);

would appear to support in rem jurisdiction in the unresolved situation of a New York domiciliary seeking to adjudicate his status only in relation to the deceased spouse's estate, where the decedent lacked any contacts with the forum other than the marital res.<sup>75</sup> In such a case, the absence of impact on a spouse from a subsequent marriage might be sufficient to sustain in rem jurisdiction premised solely on the marital res.<sup>76</sup> The *Carr* Court's conclusion that the fictional res is destroyed upon the non-domiciliary's death, however, apparently precludes jurisdiction in this situation and will require a New York domiciliary to go to another forum to assert his rights against the spouse's estate.

It is suggested that the result reached in *Carr* has foreclosed the unwarranted exercise of jurisdiction over a third party lacking minimum contacts with the forum state.<sup>77</sup> Whether the marital res will serve as a sufficient predicate for the exercise of in rem jurisdiction

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Haddock v. Haddock, 201 U.S. 562, 569 (1906), *overruled in*, Williams v. North Carolina (I), 317 U.S. 287 (1942). See generally SIEGEL, *supra* note 54, at § 84 (1978).

<sup>75</sup> See 46 N.Y.2d at 275, 385 N.E.2d at 1237, 413 N.Y.S.2d at 308 (Breitel, C.J., dissenting).

<sup>76</sup> See 46 N.Y.2d at 274, 385 N.E.2d at 1236, 413 N.Y.S.2d at 307. Although there may be no impact on a third-party spouse in such a situation, a status determination adjudicating a New York domiciliary as the lawful surviving spouse may adversely affect other interested third parties claiming a share of the estate. Notwithstanding this potential impact on third parties, however, it is suggested that restricting in rem jurisdiction predicated solely on the marital res after the death of one spouse to those cases where a third-party spouse is not affected imposes a logical limitation on New York's jurisdictional reach. The proposition advanced by the dissent, that the continued existence of the res would be sufficient to permit in rem jurisdiction to adjudicate the status of the first marriage, although insufficient to affect the status of the second marriage, is unrealistic. Such a conclusion would allow the first wife, under full faith and credit, to indirectly bind a third party who lacked the minimum contacts necessary to sustain in personam jurisdiction. The situation presented in *Carr* is tantamount to a controversy between the respective rights of the surviving spouse of the prior and subsequent marriages of Paul Carr. Barbara and Ann Carr, the real parties to the controversy, should have been accorded due concern regarding their relationship with the forum state, rather than the probable existence of the marital res after the death of Paul Carr.

It is submitted that the dissent's conclusion would fail to comport with the standards enunciated in *Shaffer v. Heitner*, 433 U.S. 186 (1977). The dissent's argument appears to ignore the impact of the Full Faith and Credit clause, U.S. CONST. art. IV, § 1, on sister state judgments. See CPLR 5401 (1978). Under the Full Faith and Credit clause, once the first wife obtains a jurisdictionally valid declaration of the status of the first marriage, *res judicata* would bar the nonresident second wife from contesting the invalidity of the foreign divorce decree. See *Johnson v. Muelberger*, 340 U.S. 581 (1951); *Sherrer v. Sherrer*, 334 U.S. 343 (1948); *Sacks v. Sacks*, 47 Misc. 2d 1050, 263 N.Y.S.2d 891 (Sup. Ct. N.Y. County 1965). The consequence would be an exclusion of the second wife from all benefits otherwise accruing to her by virtue of her legal position as the lawful surviving spouse.

<sup>77</sup> See 46 N.Y.2d at 273, 385 N.E.2d at 1237, 413 N.Y.S.2d at 308; CPLR 314, commentary at 103-04 (McKinney Supp. 1978-1979); note 70 *supra*.

in any action involving a status determination following the death of one spouse, however, remains unclear.

William J. Cople III

#### ARTICLE 14 — CONTRIBUTION

### *Concurrent tortfeasor in child's wrongful death action entitled to seek contribution from parent who negligently entrusted child with a dangerous instrument*

Following the abandonment of the doctrine of intrafamilial tort immunity<sup>78</sup> in *Gelbman v. Gelbman*,<sup>79</sup> the question arose whether a child could maintain a cause of action for negligent supervision against his parent.<sup>80</sup> In *Holodook v. Spencer*,<sup>81</sup> the Court of Appeals

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<sup>78</sup> The doctrine of intrafamilial immunity first appeared in 1891 when a Mississippi court, citing no prior authority, established the rule with respect to intentional torts based on considerations of public policy. *Hewellette v. George*, 68 Miss. 703, 9 So. 885 (1891). While there appears to be no common-law basis for prohibiting tort actions between parent and child, see *McCurdy, Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1059-63 (1930), the justifications for invoking the doctrine of intrafamilial tort immunity have included: (1) the preservation of domestic tranquility; (2) the foreclosure of fraudulent claims; (3) the prevention of the depletion of family resources; (4) the avoidance of possible parental succession to the child's award; (5) the similarity to the common-law doctrine of interspousal immunity; and (6) the protection of the parents' inherent rights of supervision, discipline and control over their children. *Id.* at 1072-77. This immunity later was extended to nonwillful torts. See 33 ALBANY L. REV. 438 (1969).

The intrafamilial immunity doctrine was first adopted by the New York Court of Appeals in *Sorrentino v. Sorrentino*, 248 N.Y. 626, 162 N.E. 551 (1928), wherein a child's cause of action against his father to recover for injuries caused by the latter's negligent driving was dismissed. *Id.* at 627, 162 N.E. at 551. The rule was reaffirmed in two automobile injury suits by minors against their parents. See *Badigian v. Badigian*, 9 N.Y.2d 472, 174 N.E.2d 718, 215 N.Y.S.2d 35 (1961); *Cannon v. Cannon*, 287 N.Y. 425, 40 N.E.2d 236 (1942). See generally *McCurdy, supra*, at 1066-81.

<sup>79</sup> 23 N.Y.2d 434, 439, 245 N.E.2d 192, 193, 297 N.Y.S.2d 529, 532 (1969), discussed in *Recent Developments*, 44 ST. JOHN'S L. REV. 127, 133 (1969). In *Gelbman*, the Court permitted a mother to bring a tort action against her unemancipated son to recover for injuries sustained in an automobile collision allegedly caused by his negligence, see 23 N.Y.2d at 436, 245 N.E.2d at 193, 297 N.Y.S.2d at 530, thereby overruling its prior contrary decisions. See *Badigian v. Badigian*, 9 N.Y.2d 472, 174 N.E.2d 718, 215 N.Y.S.2d 35 (1961); *Cannon v. Cannon*, 287 N.Y. 425, 40 N.E.2d 236 (1942); *Sorrentino v. Sorrentino*, 248 N.Y. 626, 162 N.E. 551 (1928); note 78 *supra*. It is interesting to note that, although it was apparent that an insurer ultimately would pay any judgment, the *Gelbman* Court did not restrict its holding to those instances where liability insurance was available. See 23 N.Y.2d at 438, 245 N.E.2d at 193-94, 297 N.Y.S.2d at 531; 42 BROOKLYN L. REV. 125, 131 (1975). *But cf.* 44 NOTRE DAME LAW. 1001 (1969) (immunity should be retained in the absence of insurance). See generally 19 CATH. U.L. REV. 113, 118 (1969); 15 N.Y.L.F. 419, 424-25 (1969).

<sup>80</sup> Although the *Gelbman* Court cautioned that, "[b]y abolishing the defense of intra-family tort immunity for nonwillful torts, [they were] not creating liability where none