

CPLR 1102: Neither Constitutional Nor Statutory Authority Exists for Court to Order Compensation of Counsel Representing an Indigent Party in a Matrimonial Action

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ARTICLE II — POOR PERSONS

CPLR 1102: Neither constitutional nor statutory authority exists for court to order compensation of counsel representing an indigent party in a matrimonial action.

In *Boddie v. Connecticut*,⁵⁵ the United States Supreme Court held that a state could not deny an indigent plaintiff seeking a divorce decree access to its courts solely because the plaintiff could not pay filing and service of process fees. Such a denial of access is violative of due process, the Court concluded, since the state monopolizes the means of dissolving a marriage.⁵⁶ New York courts have since applied this holding to auxiliary expenses, such as publication costs.⁵⁷ However, the precise application of *Boddie* is uncertain where counsel fees are encountered. More specifically, under CPLR 1102, a court, upon a proper showing of indigency, may appoint counsel to represent a party in a civil action.⁵⁸ Yet, in matrimonial actions, the question remains whether a court has the constitutional or statutory authority to compel a local unit of government to pay the fees of counsel representing an indigent party.

In *Vanderpool v. Vanderpool*,⁵⁹ the Supreme Court, Kings County, directed the City of New York to either provide counsel to an indigent defendant in a divorce action, or pay the fees of counsel selected by the defendant. In so holding, Justice Heller relied upon the due process rationale advanced in both *Boddie* and *Deason v. Deason*,⁶⁰ rather than CPLR 1102.⁶¹ On appeal, the Appellate Division, Second Department,

⁵⁵ 401 U.S. 371 (1971).

⁵⁶ *Id.* at 375. For example, N.Y. Consr. art. I, § 9 provides that divorces may only be granted by "due judicial proceedings."

⁵⁷ See, e.g., *Deason v. Deason*, 32 N.Y.2d 93, 296 N.E.2d 229, 343 N.Y.S.2d 321 (1973); *Jeffreys v. Jeffreys*, 38 App. Div. 2d 431, 330 N.Y.S.2d 550 (2d Dep't 1972); *McCandless v. McCandless*, 38 App. Div. 2d 171, 327 N.Y.S.2d 896 (4th Dep't 1972).

Outside the matrimonial sphere, the First Department, on the authority of *Boddie*, has held that an indigent tenant is entitled to assigned counsel and witness fees in an eviction proceeding. *Hotel Martha Washington Management Co. v. Swinick*, 66 Misc. 2d 833, 322 N.Y.S.2d 139 (App. T. 1st Dep't 1971), discussed in *The Quarterly Survey*, 46 *St. John's L. Rev.* 355, 368 (1971).

⁵⁸ CPLR 1102(a) provides that "[t]he court in its order permitting a person to proceed as a poor person may assign an attorney." Precisely what "may" means in this context remains unresolved. See 2 *WK&M* ¶ 1102.01 (suggesting the appointment of counsel is discretionary). But see 7B *McKINNEY'S CPLR 1102*, commentary at 480 (1963) (suggesting that the validity of an order to proceed as a poor person when the court does not appoint counsel is an open question).

⁵⁹ 74 Misc. 2d 122, 344 N.Y.S.2d 572, *rev'd sub nom.* *Jacox v. Jacox*, 43 App. Div. 2d 716, 350 N.Y.S.2d 435 (2d Dep't 1974) (mem.).

⁶⁰ 32 N.Y.2d 93, 296 N.E.2d 229, 343 N.Y.S.2d 321 (1973).

⁶¹ The court held that the indigent defendant in a matrimonial action "may not be denied the right to counsel because she is without funds." 74 Misc. 2d at 126, 344 N.Y.S.2d at 577. Justice Heller went on to characterize counsel fees as "auxiliary costs" which barred the defendant's access to court. Courts have held that the local or state government must

in *Jacox v. Jacox*,⁶² reversed *Vanderpool*. The court, in a memorandum opinion, concluded that although CPLR 1102 permitted a court to assign an attorney to a poor person, there was neither "constitutional nor statutory authority"⁶³ for a court to order a local government to provide compensated counsel or pay the fee of counsel selected by the indigent party. The Second Department observed that, absent statutory authority for ordering compensation of counsel in matrimonial actions, trial courts must assign members of the bar to provide uncompensated representation for the indigent.⁶⁴

Given the reluctance of the Second Department to permit the court-ordered compensation of counsel representing an indigent person in a matrimonial action, it would appear that the time is appropriate for the Legislature to authorize such procedure.⁶⁵ Not only would legislation in this area remove a financial burden from assigned counsel, but more significantly, such an arrangement would afford an indigent party in a matrimonial action the opportunity to select his own counsel. Consequently, reliance upon the court to make such a selection would be eliminated.

ARTICLE 14 — CONTRIBUTION

CPLR art. 14: New article enacted to deal with contribution in light of Dole v. Dow Chemical Co.

The Legislature has amended the CPLR to bring it into conformity with the Court of Appeals' decision in *Dole v. Dow Chemical Co.*⁶⁶ Newly enacted section 1401⁶⁷ allows a claim for contribution be-

assume the responsibility of paying auxiliary expenses which bar an indigent plaintiff's access to a court in a matrimonial action. See cases cited in note 57 *supra*.

⁶² 43 App. Div. 2d 716, 350 N.Y.S.2d 435 (2d Dep't 1973) (mem.). Consolidated for appeal in *Jacox* were three orders of the Supreme Court, Kings County, directing the City of New York to furnish counsel within a specified time to indigent defendants in matrimonial actions. The lower court had further directed that if these orders were not complied with, the defendant in each action could retain counsel. Thereafter, the court would set the attorneys' fee and direct the city to pay the fee. *Id.* at 717, 350 N.Y.S.2d at 436.

⁶³ *Id.*

⁶⁴ *Id.* at 717, 350 N.Y.S.2d at 437. The court in *Vanderpool* had acknowledged that it lacked a statutory basis for ordering compensation of counsel. 74 Misc. 2d at 123, 344 N.Y.S.2d at 574.

In a recent decision, the Supreme Court, St. Lawrence County, has held that it would be improvident at the present time to impose the expense of compensated counsel upon local government in matrimonial actions. Instead, the court suggested that members of the local bar provide their services without compensation. See *Bartlett v. Kitchin*, 76 Misc. 2d 1087, 352 N.Y.S.2d 110 (Sup. Ct. St. Lawrence County 1973).

⁶⁵ Justice Shea, in *Bartlett v. Kitchin*, 76 Misc. 2d 1087, 352 N.Y.S.2d 110 (Sup. Ct. St. Lawrence County 1973), observed that unless legislative change in this area occurred soon, court-ordered compensation of counsel for indigent parties may be forthcoming.

⁶⁶ 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

⁶⁷ N.Y. SESS. LAWS [1974], ch. 742, § 1 (McKinney).