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CPLR 1102(a): Indigent Litigant in a Divorce Action Has No Constitutional Right to Assigned Counsel

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ARTICLE 11 — POOR PERSONS

CPLR 1102(a): Indigent litigant in a divorce action has no constitutional right to assigned counsel.

In a recent 4-3 decision, *In re Smiley*,[49] the New York Court of Appeals held that an indigent wife, as plaintiff or defendant in a divorce action, is not constitutionally entitled to court-appointed counsel.[50] Further, the Court refused to order retained counsel compensated from public funds.[51] Standing alone, this decision is significant for its refusal to extend further the rights of indigent civil litigants[52] and its declaration that CPLR 1102(a), allowing the assignment of an attorney for a poor person by court order,[53] is discretionary rather than mandatory.[54] Considered in light of *Menin v. Menin*,[55] an earlier decision by the Supreme Court, Westchester County, *Smiley* apparently relegates to a highly restricted "privilege"[56] that which many contended was a fundamental right to counsel.[57]

Menin was akin to *Smiley* in that it involved petitions by a defendant and potential plaintiffs seeking assignment of uncompensated counsel in actual and proposed divorce actions. But the *Menin* court, in addition to holding that "the Due Process Clause does not require appointment of counsel,"[58] refused to exercise its discretionary au-

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49 36 N.Y.2d 433, 330 N.E.2d 53, 369 N.Y.S.2d 87 (1975).

50 *Id.* at 437, 330 N.E.2d at 55, 369 N.Y.S.2d at 90.

51 *Id.* at 437, 439, 330 N.E.2d at 55, 57, 369 N.Y.S.2d at 90, 92.

The Court of Appeals affirmed the holding of the Appellate Division, Third Department, which reversed the order of the Supreme Court, Tompkins County, directing the county to provide counsel and compensation therefor. Smiley v. Smiley, 45 App. Div. 2d 785, 356 N.Y.S.2d 733 (3d Dep't 1975) (mem.). The Appellate Division based its decision on the lack of judicial authority to direct the expenditure of public funds absent enabling legislation. *Id.* at 785, 356 N.Y.S.2d at 734. *Accord*, Jacox v. Jacox, 43 App. Div. 2d 716, 350 N.Y.S.2d 435 (2d Dep't 1973) (mem.), *discussed in The Survey*, 49 ST. JOHN'S L. REV. 170, 183 (1974) (there is neither "constitutional nor statutory authority" for such an order).

52 *See* notes 57, 61-62, 64-69 and accompanying text *infra*.

53 *See* note 56 *infra*.

54 *Compare* 7B MCKINNEY'S CPLR 1102, commentary at 150 (Supp. 1974) ("counsel must be furnished") *with* 2 WK&M ¶ 1102.01 ("this section changes the former law by leaving it within the court's discretion whether to assign an attorney"). *Smiley* confirms the latter view by holding that "there is no absolute right to assigned counsel; whether in a particular case counsel shall be assigned lies instead in the discretion of the court." 36 N.Y.2d at 438, 330 N.E.2d at 56, 369 N.Y.S.2d at 91.

55 79 Misc. 2d 285, 359 N.Y.S.2d 721 (Sup. Ct. Westchester County 1974), *aff'd on other grounds*, 48 App. Div. 2d 904, — N.Y.S.2d — (2d Dep't 1975) (mem.).

56 CPLR 1102(a) creates a "privilege" in favor of a poor person which permits a court in its discretion to assign him an attorney. *See generally* 2 WK&M ¶ 1102.01.

57 *See, e.g.*, Brickman, *Of Arterial Passageways Through the Legal Process: The Right of Universal Access to Courts and Lawyering Services*, 48 N.Y.U.L. REV. 595, 596-97, 617-24 (1973) [hereinafter cited as Brickman]; Comment, *Access to the Civil Courts: The Need for Continuing Reform*, 37 ALBANY L. REV. 135, 144-45, 147-48 & n.92, 153 (1972); Note, *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322 (1966).

58 79 Misc. 2d at 287, 359 N.Y.S.2d at 724.

thority to appoint private attorneys on the basis that such counsel "have the constitutional right to demand payment or reject the assignment."[59] Thus, according to *Menin*, assignment of uncompensated counsel for an indigent civil[60] litigant will be limited to those cases where members of the bar voluntarily accept court appointment.

The *Menin* court explicitly recognized that its position fails to conform with the virtually unanimous declarations of the New York courts.[61] The *Smiley* majority, in dictum, restated the rule presented by these earlier decisions as follows:

> Inherent in the courts and historically associated with *the duty of the Bar to provide uncompensated services* for the indigent has been the discretionary power of the courts to assign counsel in a proper case to represent private indigent litigants. Such counsel serve without compensation. Statutes codify the inherent power of the courts . . . . The obligation of the Bar to respond is expressed in the Code of Professional Responsibility . . . .[62]

This language would appear to be a rejection by the Court of Appeals of the *Menin* proposition. Subsequent dictum in *Smiley*, however, specifically referring to *Menin*, can be interpreted as at least tacitly approving that decision: "[T]he undue burden which may be placed on the private Bar by assignments under CPLR 1102, may also become intolerable and some might say rank as a violation of the constitutional rights of lawyers . . . ."[63]

It is not surprising that this question arose in the context of a

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[59] *Id.* at 293, 359 N.Y.S.2d at 729.

[60] Criminal matters present a different question since there the defendant's constitutional right to counsel is well established. Argersinger v. Hamlin, 407 U.S. 25 (1972); United States v. Wade, 388 U.S. 218 (1967); Miranda v. Arizona, 384 U.S. 436 (1966); Gideon v. Wainwright, 372 U.S. 335 (1963). Further, in New York the Criminal Procedure Law provides statutory authority which assures the defendant's right to free counsel. N.Y. CRIM. PRO. LAW § 210.15(2)(a) (McKinney 1971). This is further supplemented by article 18-B of the County Law. N.Y. COUNTY LAW art. 18-B (McKinney 1972). More significantly, the constitutional infirmity found by the *Menin* court is eliminated by § 722-b of the County Law which provides for reasonable compensation to appointed counsel. *Id.* § 722-b.

[61] "In New York the cases are legion in stating the proposition that the court has inherent power to assign counsel without compensation . . . ." 79 Misc. 2d at 291, 359 N.Y.S.2d at 727-28 (citations omitted). *See, e.g.*, Jacox v. Jacox, 43 App. Div. 2d 716, 717, 350 N.Y.S.2d 435, 436 (2d Dep't 1974) (mem.) ("counsel must be provided by the Bar through the personal obligation of its members"); People *ex rel.* Whedon v. Board of Supervisors, 192 App. Div. 705, 706, 183 N.Y.S. 438 (3d Dep't 1920) (mem.) ("An attorney is an officer of the court, and service . . . , for which no compensation is permitted by law, is not depriving him of a constitutional right").

[62] 36 N.Y.2d at 438, 330 N.E.2d at 55, 369 N.Y.S.2d at 91 (emphasis added) (citations omitted).

[63] *Id.* at 441, 330 N.E.2d at 57, 369 N.Y.S.2d at 93 (citations omitted). The Court properly recognized that logically "[t]he horizon does not stop at matrimonial or any other species of private litigation." *Id.*

matrimonial dispute wherein an indigent's right to assigned counsel would appear to flow naturally from the United States Supreme Court's decision in *Boddie v. Connecticut*[64] and the New York Court of Appeals' decision in *Deason v. Deason*.[65] In *Boddie* the Supreme Court struck down filing fees in divorce actions as violative of due process.[66] *Deason* extended *Boddie* by requiring that the local governmental unit, rather than the indigent litigant, pay certain publication costs associated with the matrimonial action.[67] Since both Courts held that a contrary result would have had the effect of denying the indigent access to the courts, many commentators argued that failure to provide counsel also would be an unconstitutional denial of access.[68] Even prior to and quite possibly forming the foundation for these decisions existed a substantial volume of scholarly commentary forcefully calling for a total abolition of all financial barriers, including the cost of counsel, which denied or limited access to the civil courts.[69]

The dissenters in *Smiley* were to a great measure in accord with these views. Judge Jones quoted an earlier Court of Appeals' decision stating that "the right to be heard would be 'of little avail if it did not comprehend the right to be heard by counsel.' "[70] Indicated by way of footnote but quite significant is the fact that Judge Jones limited his dissent solely to matrimonial actions.[71]

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64 401 U.S. 371 (1971), *discussed in* Comment, *The Right of Access to Civil Courts by Indigents: A Prognosis*, 24 AM. U.L. REV. 129, 135-40 (1974); Comment, Boddie *and Beyond: Rights of the Indigent Civil Litigant*, 18 CATH. LAW. 67 (1972); *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 18-21, 104-13 (1971).

65 32 N.Y.2d 93, 296 N.E.2d 229, 343 N.Y.S.2d 321 (1973). *See generally* 7B MCKINNEY'S CPLR 1102, commentary at 150 (Supp. 1974).

66 401 U.S. at 374-81.

67 32 N.Y.2d at 95, 296 N.E.2d at 230, 343 N.Y.S.2d at 322-23.

68 *See, e.g.*, Brickman, *supra* note 57, at 603-12, 617-37, 668; Comment, *Indigent's Access to Civil Court*, 4 COLUM. HUMAN RIGHTS L. REV. 267, 295-97 (1972); Note, *A First Amendment Right of Access to the Courts for Indigents*, 82 YALE L.J. 1055, 1063-64, 1066-67 (1973).

The general theory is that a layman is not competent or knowledgeable enough in the law to adequately represent himself. Therefore, where the party lacks sufficient funds to retain counsel, the state in failing to provide such counsel is imposing a burden which is functionally equivalent to a denial of access. *Cf.* text accompanying note 72 *infra*.

69 *See, e.g.*, Goodpaster, *The Integration of Equal Protection, Due Process Standards, and the Indigent's Right of Free Access to the Courts*, 56 IOWA L. REV. 223 (1970); Willging, *Financial Barriers and the Access of Indigents to the Courts*, 57 GEO. L.J. 253 (1968); Note, *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322 (1966); Note, *Litigation Costs: The Hidden Barrier to the Indigent*, 56 GEO. L.J. 516 (1968); Note, *Discriminations Against the Poor and the Fourteenth Amendment*, 81 HARV. L. REV. 435 (1967); Note, *The Indigent's Right to Counsel in Civil Cases*, 76 YALE L.J. 545 (1967).

70 36 N.Y.2d at 443-44, 330 N.E.2d at 59, 369 N.Y.S.2d at 96 (Jones, J., dissenting), *quoting* People *ex rel.* Menechino v. Warden, 27 N.Y.2d 376, 382, 267 N.E.2d 238, 241, 318 N.Y.S.2d 449, 454 (1971).

71 Judge Jones stated:

I would distinguish between the right of indigents to be represented by counsel

In his dissent Judge Fuchsberg took a broader view. He concluded that the denial of counsel to indigent matrimonial litigants is constitutionally infirm

> whenever counsel is essential to the effective exercise of their right of access to the court. This right should attach whenever the court finds that indigent parties are incapable of preparing and presenting matrimonial actions *pro se*, including all divorce actions in which the dissolution is contested or in which property, support and custody issues cannot readily be resolved through mediation.[72]

Moreover, he rejected the concept that such constitutional rights are limited to divorce actions alone, stating that his position "has obvious implications for other types of civil judicial proceedings"[73] as well.

The Court was, however, unanimous on one point; the majority[74] and both dissents[75] agreed that the courts lack the power to compel either the state or local governmental units to provide counsel or the funds therefor. This issue ostensibly was the central one facing the Court since the Appellate Division, Third Department, had based its decision on the inability of the court to direct payment.[76] The various opinions in the Court of Appeals' decision went far beyond the question of funding, however, in reaching their respective conclusions.

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in litigation seeking the dissolution of a marriage and other types of litigation. In the former, in the language of Boddie, there is a "state monopolization of the means for dissolving the marriage relationship" . . . . In other instances recourse to judicial machinery for dispute settlement, while perhaps useful and desirable, is not mandated by the State.

36 N.Y.2d at 444 n.1, 330 N.E.2d at 59 n.1, 369 N.Y.S.2d at 96 n.1 (Jones, J., dissenting) (citations omitted).

[72] *Id.* at 452, 330 N.E.2d at 65, 369 N.Y.S.2d at 103-04 (Fuchsberg, J., dissenting).

[73] *Id.*, 330 N.E.2d at 65, 369 N.Y.S.2d at 104. On this point the majority appeared to agree with Judge Fuchsberg. *See* note 63 *supra*.

[74] Chief Judge Breitel writing for the majority commented that

> the relief must be provided by the Legislature. The fundamental is that the courts constitute but one branch of government. The absence of appropriated funds and legislation to raise taxes under our state constitutional system, as in the rest of the Union, is not a judicially-fillable gap.

Id. at 441-42, 330 N.E.2d at 94, 369 N.Y.S.2d at 94.

[75] In his dissent Judge Jones stated that

> the determination of how the required legal services shall be made available (and here I agree with the majority) is one . . . to be addressed and to be resolved by the Legislature. . . . [which] is . . . the proper source of authorization for expenditure of funds . . . .

Id. at 444-45, 330 N.E.2d at 60, 369 N.Y.S.2d at 97 (Jones, J., dissenting).

Judge Fuchsberg's agreement can also be implied:

> It does not necessarily follow from the existence of the right to be provided with counsel that proper implementation of that right requires directing a county to pay for counsel. . . . Charging any level of government, where funds have not been appropriated by the Legislature, should be regarded as a relatively drastic step . . . .

Id. at 452-53, 330 N.E.2d at 65, 369 N.Y.S.2d at 104 (Fuchsberg, J., dissenting).

[76] Smiley v. Smiley, 45 App. Div. 2d 785, 356 N.Y.S.2d 733, 734 (3d Dep't 1975) (mem.). *See* note 51 *supra*.

Smiley clearly dictates a retreat from the position previously taken by lower courts that CPLR 1102(a) embodies a public policy virtually commanding the assignment of counsel where permission to proceed as a poor person has been granted.[77] The underlying motivation for this decision not only refusing to extend further the indigent civil litigant's rights but also limiting rights formerly granted freely may well lie in concern over the increasing burden on the private bar.

Similarly, the *Menin* court's decision permitting assigned counsel to refuse an uncompensated appointment illustrates what is best characterized as a "blacklash" resulting from the expanding right to counsel of the indigent in both criminal and civil matters.[78] This phenomenon has expressed itself as a slowly developing judicial activism aimed at the reform of the uncompensated counsel system[79] and is not without

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77 *See* Emerson v. Emerson, 33 App. Div. 2d 1022, 308 N.Y.S.2d 69 (2d Dep't 1970) (mem.); Bartlett v. Kitchin, 76 Misc. 2d 1087, 352 N.Y.S.2d 110 (Sup. Ct. St. Lawrence County 1973); 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). *See also* 7B MCKINNEY'S CPLR 1102, commentary at 150 (Supp. 1974) ("counsel must be furnished").

78 *See generally* Brickman, *supra* note 57; Note, *The Right to Counsel: A Comparative Analysis of the United States and Great Britain*, 50 NOTRE DAME LAW. 117 (1974); Note, *A First Amendment Right of Access to the Courts for Indigents*, 82 YALE L.J. 1055 (1973).

79 Including New York under the rule laid down in *Menin*, there are at least 10 jurisdictions which have to varying degrees recognized the attorneys' right to compensation for services rendered to indigents. *See* Luke v. County of Los Angeles, 269 Cal. App. 2d 495, 74 Cal. Rptr. 771 (1969) (county charged with costs) (relying on public policy in favor of compensation); Knox County Council v. State *ex rel.* McCormick, 217 Ind. 493, 29 N.E.2d 405 (1940) (under state constitution, the state has no right to assign counsel without compensation); Hall v. Washington County, 2 Greene 473 (Iowa 1850) (under Federal Constitution, local government must compensate counsel); Bradshaw v. Ball, 487 S.W.2d 294 (Ky. 1972) (appointment without compensation unconstitutional under federal and state constitutions); Abodeely v. County of Worcester, 352 Mass. 719, 227 N.E.2d 486 (1967) (courts authorized to make payments to criminal defense counsel under a state statute authorizing courts to use county treasuries to meet court operating expenses); State v. Green, 470 S.W.2d 571 (Mo. 1971) (court will not compel attorneys to bear alone a burden which the state has a duty to provide under the state constitution); State v. Rush, 46 N.J. 399, 217 A.2d 441 (1966) (court has power to order compensation pursuant to its power to regulate the practice of law); Menin v. Menin, 79 Misc. 2d 285, 359 N.Y.S.2d 721 (Sup. Ct. Westchester County 1974) *aff'd on other grounds*, 48 App. Div. 2d 904, — N.Y.S.2d — (2d Dep't 1975) (mem.) (attorneys have a right to reject assignment without compensation under the federal and state constitutions); Bedford v. Salt Lake County, 22 Utah 2d 12, 447 P.2d 193 (1968) (assignment without compensation in civil actions constitutes involuntary servitude under the Federal Constitution); Honore v. Washington State Bd. of Prison Terms & Paroles, 77 Wash. 2d 660, 466 P.2d 485 (1970) (attorney entitled to compensation for prosecuting an appeal from a denial of a writ of habeas corpus according to public policy as reflected in state statutes which provide compensation in other criminal proceedings).

It must be noted that the foregoing cases are cited not to demonstrate settled or even present law in these jurisdictions, but rather to illustrate how courts, when they deem it necessary or desirable, have justified compensating appointed counsel.

scholarly support.[80] Such reform is typically established by declaring uncompensated appointment to be unconstitutional or by ordering state or local governments to bear the costs.

Attacks on constitutional grounds are generally based on the fifth or fourteenth amendments. Such attacks postulate that the attorney's services are to be considered his property, and thus assignment without compensation results in a constitutionally impermissible "taking."[81] Less frequently advanced is the contention that assignment without compensation constitutes involuntary servitude and is thereby violative of the thirteenth amendment.[82] The above theories, however, represent the minority view and run against well-established legal thought[83] which justifies the failure to compensate counsel on two grounds: (1) that the attorney has a duty as an officer of the court to provide gratuitous service when the court appoints him; and (2) that the attorney consents to this obligation as a condition to being licensed.[84]

Whether focusing on the indigent's right to counsel or the attorney's right to compensation or both, there appears to be sufficient authority to justify any result reached. It is submitted that the factors controlling the widely disparate majority and dissenting opinions in *Smiley* and *Menin* were public policy concern over resolution of pressing social problems combined with either judicial activism or restraint in terms of usurping the legislative function. Since the New York courts obviously lack the power to provide funds to compensate assigned counsel, ultimate reform of the present patchwork system[85] must rest with the legislature.

The *Smiley* majority, by resisting the trend towards increasing the rights of indigents, has in effect given the legislature more time to act, but failed to mandate such action. Judge Jones' dissent would re-

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80 *See, e.g.*, Williams & Bost, *The Assigned Counsel System: An Exercise of Servitude?*, 42 Miss. L.J. 32 (1971); Comment, *The Uncompensated Appointed Counsel System: A Constitutional and Social Transgression*, 60 Ky. L.J. 710 (1972) [hereinafter cited as *Uncompensated Counsel*].

81 *See, e.g.*, Bradshaw v. Ball, 487 S.W.2d 294, 298-99 (Ky. 1972); Menin v. Menin, 79 Misc. 2d 285, 292-93, 359 N.Y.S.2d 721, 729-30 (Sup. Ct. Westchester County 1974), *aff'd on other grounds*, 48 App. Div. 2d 904, — N.Y.S.2d — (2d Dep't 1975) (mem.); *Uncompensated Counsel*, *supra* note 80, at 713-15 & nn. 24-26.

82 Williams & Bost, *The Assigned Counsel System: An Exercise of Servitude?*, 42 Miss. L.J. 32 (1971).

83 *See, e.g.*, United States v. Dillon, 346 F.2d 633, 636-38 (9th Cir.), *cert. denied*, 382 U.S. 978 (1965); Jackson v. State, 413 P.2d 488 (Alas. 1966); Scott v. State, 216 Tenn. 375, 392 S.W.2d 681 (1965).

84 *Uncompensated Counsel*, *supra* note 80, at 713. *See also* cases cited *id.* nn. 19-21.

85 Counsel is made available with and without compensation from public funds by statute, voluntary legal aid, charitable organizations, and federally funded programs. *In re* Smiley, 36 N.Y.2d 433, 439, 330 N.E.2d 53, 56, 369 N.Y.S.2d 87, 91-92 (1975).

quire an immediate legislative response, but limiting the right to counsel to matrimonial actions[86] would only produce another "patch" in the already inadequate and disorganized legislative schema.

A true reform would more likely result from a combination of Judge Fuchsberg's dissent and the *Menin* decision. If the Court of Appeals were to declare that attorneys had a constitutional right to adequate compensation for their services and that indigents in all proceedings, criminal, civil, and administrative, had a right to be represented by counsel, the legislature would be forced to develop an organized, comprehensive program insuring that all litigants — without regard to financial status — would have their claims effectively presented. A bold step towards creating true "equal justice under law," this solution would enhance the probability of a decision based on the merits of the claim, rather than on the financial resources of the claimant.

ARTICLE 12 — INFANTS AND INCOMPETENTS

CPLR 1209: Permission for submitting infant's claim to arbitration may be obtained at any time prior to commencement of arbitration hearings.

CPLR 1209 provides that when a controversy involves an infant a court order must be obtained by the infant's representative before that controversy can be submitted to arbitration.[87] The Court of Appeals, in *Aetna Life & Casualty Co. v. Stekardis*,[88] has allowed an infant's representative greater flexibility in complying with the provisions of that statute.

Stekardis involved a motor vehicle accident claim against Aetna, holder of the liability insurance policy on the Stekardis car.[89] Claims

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86 *See* note 71 *supra.*

87 Section 2365 of the Code of Civil Procedure expressly forbade the submission to arbitration of any controversy involving an infant party. Ch. 178, § 2365, [1880] N.Y. Laws 298. When this section was later incorporated into the CPA, its character as an absolute prohibition was preserved. Ch. 925, § 1410, [1920] N.Y. Laws 473-74 (renumbered § 1448 by Ch. 199, § 14, [1921] N.Y. Laws 801-02). In 1937, the legislature amended CPA 1448 to allow the guardian of an infant party to petition the court for permission to submit the controversy to arbitration. Ch. 341, § 1448, [1937] N.Y. Laws 203. The amended CPA 1448 eventually became what is presently CPLR 1209. Ch. 308, § 1209, [1962] N.Y. Laws 650.

88 34 N.Y.2d 182, 313 N.E.2d 53, 356 N.Y.S.2d 587 (1974).

89 *Id.* at 184, 313 N.E.2d at 53, 356 N.Y.S.2d at 588. An unidentified truck collided with an automobile in front of the Stekardis car, causing a piece of furniture to fall from the truck. In the confusion, the Stekardis car struck another vehicle. On the theory that the truck had caused the accident, the claimants sought recovery under the "uninsured motorist" endorsement contained in the Stekardis policy. The New York Insurance Law mandates that every motor vehicle insurance policy contain such a provision, protecting the insured in the event he suffers damages as a result of an accident with an uninsured or unidentified motor vehicle. N.Y. INS. LAW § 167(2-a) (McKinney 1966).