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CPLR 308(5): Judicially Devised Service Held Permissable in Matrimonial Actions

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In denying the plaintiff's motion, the court relied on cases where personal representatives had sought to assert time-barred wrongful death claims by motions to amend personal injury pleadings.[40] While recognizing that the plaintiff could achieve an identical result by bringing a separate wrongful death action and then seeking a consolidation,[41] the court declared that it could not "on the grounds of expediency, permit an amendment which . . . is conceptually unsound."[42]

The doctrine of relation back is invoked to save a cause of action which would be time-barred if asserted in a separate action. It would appear that when the wrongful death action is timely, there need be no relation back and no resulting conceptual discomfiture. The cause of action may be deemed to have been commenced at the time of the motion to amend. The *Tromblee* holding defies Estates, Powers and Trust Law section 11-3.3(b)(2) and numerous cases which have permitted the amendment upon a showing of a causal relationship between the original personal injury and the death.[43] Additionally, the *Tromblee* decision appears to conflict with CPLR 3025(b). That statute provides that "[a] party may amend a pleading or supplement it by setting forth additional or subsequent transactions or occurrences at any time by leave of the court . . . ." The statute further requires that "[l]eave shall be freely granted." The addition of a cause of action for wrongful death certainly appears to be a supplementation to set forth a subsequent transaction. In light of these statutory requirements, a plaintiff asserting a timely wrongful death claim should not be put to the circuitous procedure of commencing a separate action and then seeking a consolidation.

ARTICLE 3 — JURISDICTION AND SERVICE, APPEARANCE AND CHOICE OF COURT

CPLR 308(5): Judicially devised service held permissible in matrimonial actions.

DRL 232[44] seemingly forbids entry of a default judgment in a

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40 73 Misc. 2d at 88, 341 N.Y.S.2d at 625, *citing* Wilkening v. Fogarty, 40 App. Div. 2d 1031, 338 N.Y.S.2d 985 (2d Dep't 1972) (concurring opinion); Roberson v. First Nat'l City Bank, 63 Misc. 2d 105, 311 N.Y.S.2d 601 (Sup. Ct. N.Y. County), *aff'd mem.*, 34 App. Div. 2d 896, 311 N.Y.S.2d 265 (1st Dep't 1970).

41 Actions involving common questions of law or fact may be consolidated pursuant to CPLR 602.

42 73 Misc. 2d at 89, 341 N.Y.S.2d at 625.

43 *See, e.g.*, Fuller v. Preis, 34 App. Div. 2d 514, 308 N.Y.S.2d 264 (1st Dep't 1970); Nugent v. Downing, 33 App. Div. 2d 1030, 309 N.Y.S.2d 119 (2d Dep't 1970) (mem.); Coleman v. Gelb, 12 App. Div. 2d 915, 211 N.Y.S.2d 229 (1st Dep't 1961) (mem.).

44 DRL 232 provides that when the complaint is not served with the summons in a

matrimonial action unless the defendant is served personally or by publication pursuant to court order.[45] CPLR 308(2) through (4) appear to compliment DRL 232 by expressly proscribing methods of substituted service in matrimonial actions. In requiring a plaintiff to publish the summons when personal service proved impracticable, these statutes were particularly harsh on poor persons unable to bear the high costs of publication. Relief came when the United States Supreme Court held in *Boddie v. Connecticut*[46] that the right of an indigent to seek a divorce may not be denied on the grounds of his inability to pay required costs. The Court of Appeals in *Deason v. Deason*[47] interpreted *Boddie* as mandating public payment of publication costs for indigents. Perhaps of greater significance was the Court's open invitation to the lower court on remand to consider the use of judicially devised service pursuant to CPLR 308(5) in lieu of service by publication.

> Our affirmance is, therefore, without prejudice to the parties, if so advised, to apply for a determination whether, in a matrimonial action, judicially devised service (CPLR 308[5]) is available as an alternative to service by publication.[48]

The use of CPLR 308(5) in matrimonial actions by indigents would relieve local governments of the burdens of publication costs while increasing the likelihood that defendants will receive notice of proceedings against them. Additionally, the requirement that a plaintiff unable to effect personal service must skip immediately to the method of service least likely to give the defendant notice of the proceeding[49] — service by publication — runs counter to due process principles set down by the Supreme Court of the United States.[50] These considerations undoubtedly influenced the Court of Appeals in *Deason*

matrimonial action, the summons must contain a notice stating the nature of the action. The statute further provides:

> A judgment shall not be rendered in favor of the plaintiff upon the defendant's default in appearing or pleading, unless either the summons and a copy of the complaint were personally delivered to the defendant, or the copy of the summons delivered to the defendant, upon personal service of the summons, or delivered to him without the state, or published, pursuant to an order for that purpose, contain [notice of the nature of the action].

45 *See* Root v. Root, 43 Misc. 2d 337, 250 N.Y.S.2d 933 (Sup. Ct. Westchester County 1964) (holding that only the methods of service mentioned in DRL 232 are available in matrimonial actions).

46 401 U.S. 371 (1971).

47 32 N.Y.2d 93, 296 N.E.2d 229, 343 N.Y.S.2d 321 (1973), *discussed in The Quarterly Survey*, 47 ST. JOHN'S L. REV. 725, 731 (1973).

48 32 N.Y.2d at 95, 296 N.E.2d at 230, 343 N.Y.S.2d at 323.

49 The United States Supreme Court in *Boddie* observed that publication "is the method of notice least calculated to bring to a potential defendant's attention the pendency of judicial proceedings." 401 U.S. at 382.

50 *See* Schroeder v. City of New York, 371 U.S. 208 (1962); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

to recommend consideration of judicially devised service by the lower court.

Following the Court of Appeals' suggestion, the Supreme Court, Albany County, on the remand of the *Deason* case,[51] granted an indigent plaintiff's request to serve the defendant pursuant to CPLR 308(5) by mailing him the summons in care of his mother. The court reasoned that the primary purpose of DRL 232 is to prevent fraud by requiring notice of the nature of the action.[52] This provision, the court stated, "should not be allowed to eclipse the primary provisions of law governing permissible *methods* of service."[53] The court noted that CPLR 308(5), unlike CPLR 308(2) through (4), does not expressly exclude matrimonial actions from its application. From this the court concluded that "there is no indication of legislative intent to extend the matrimonial exclusion to subsection 5."[54] The plaintiff would not be allowed to avail herself of judicially devised service, the court held, until she had met the heavy burden of showing that an exhaustive search had been made for the defendant, that other permissible methods of service were impracticable and that the proposed method of service complied with due process. Nonetheless, the plaintiff was held to have met this burden by submitting an affidavit stating that the defendant had not been seen in the area for the past three years. Mailing of the process to a relative was held to be compatible with due process.[55]

The *Deason* solution to the problem of service on absent defendants in indigents' matrimonial actions is clearly preferable to publicly financed publication. It is hoped that it will become the routine practice in these cases.

CPLR 327: Doctrine of forum non conveniens *held inapplicable although the plaintiff's only apparent connection with New York was his residence.*

The *Silver v. Great American Insurance Co.*[56] decision and its codification in CPLR 327 introduced a welcome change in the doctrine of *forum non conveniens*. Under the former rule, the doctrine was

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51 73 Misc. 2d 964, 343 N.Y.S.2d 276 (Sup. Ct. Albany County 1973).

52 The court cited Apploff v. Apploff, 55 Misc. 2d 781, 287 N.Y.S.2d 486 (Sup. Ct. Kings County 1968); Martin v. Martin, 38 Misc. 2d 836, 238 N.Y.S.2d 749 (Sup. Ct. Richmond County 1963); Braham v. Braham, 91 Misc. 151, 154 N.Y.S. 1044 (Sup. Ct. N.Y. County 1915); Rudolph v. Rudolph, 12 N.Y.S. 81 (Super. Ct. of Buffalo 1890).

53 73 Misc. 2d at 968, 343 N.Y.S.2d at 281 (emphasis in original).

54 *Id.* at 967, 343 N.Y.S.2d at 280.

55 *Id.* at 966, 343 N.Y.S.2d at 279, *citing* Boddie v. Connecticut, 401 U.S. 371 (1971); Dobkin v. Chapman, 21 N.Y.2d 490, 236 N.E.2d 451, 289 N.Y.S.2d 161 (1968).

56 29 N.Y.2d 356, 278 N.E.2d 619, 328 N.Y.S.2d 398 (1972), *discussed in The Quarterly Survey*, 47 ST. JOHN'S L. REV. 148, 158 (1972).