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Article 14

# CPLR 3117(a)(3)(v): Provisions of the CPLR Used To Approximate Proceeding Under the Uniform Support of Dependents Law

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Department's interest in secrecy outweighed the benefits of prompt and full disclosure.

Privileges which allow the state to avoid disclosure ought to be narrowly construed so as to prevent unnecessary prejudice to the private litigant.[83] In *Nunziata,* the court made no specific finding that the information was either privileged matter under CPLR 3101(b) or material prepared for litigation under CPLR 3101(d).[84] Discovery was denied without inquiry into how the release of the information which led the police to conclude that the detective's death was suicide would hamper the investigation of the stolen narcotics. While there is little doubt that upon inquiry a connection could reasonably be drawn, caution must be exercised where one of the investigating bodies is a party to the action in which disclosure is sought.[85] In such cases, the mere recital that the matter is the subject of a confidential investigation should not be sufficient to defeat discovery.[86]

*CPLR 3117(a)(3)(v): Provisions of the CPLR used to approximate proceeding under the Uniform Support of Dependents Law.*

A party entitled to support from an ex-spouse is subject to serious hardship if recovery of periodic support payments cannot be accomplished without travel to a distant jurisdiction. To remedy this problem, the fifty states, the District of Columbia, Puerto Rico, and the Virgin Islands have enacted uniform support acts[87] substantially similar to New York's Uniform Support of Dependents Law.[88] These laws permit a verified petition to be filed in a court in the jurisdiction wherein the petitioner seeking support resides.[89] The petition is then

N.Y. 147, 98 N.E. 467 (1912); Kruger v. County of Nassau, 53 Misc. 2d 166, 278 N.Y.S.2d 28 (Sup. Ct. Nassau County 1967).

83 *See* 3A WK&M ¶ 3101.41.

84 CPLR 3101(d) provides that "material prepared for litigation" is qualifiedly privileged. *See* Jansen v. State of New York, 53 Misc. 2d 1005, 280 N.Y.S.2d 445 (Ct. Cl. 1967) (permitting discovery of photographs and reports made by the Bureau of Criminal Investigation Division of the Department of State Police where these materials did not qualify as material prepared for litigation and no contention was made that disclosure would hamper any prosecution).

85 Where the government itself is a party, reliance on the [governmental privilege to withhold confidential information] may require a finding against the government on a disputed issue or fact which might have been disproved had the evidence been available.

3A WK&M ¶ 3101.41, *citing* People v. Ramistella, 306 N.Y. 379, 118 N.E.2d 566 (1954); United States v. Cotton Valley Operators Committee, 9 F.R.D. 719, 721 (W.D. La. 1949), *aff'd mem.,* 339 U.S. 940 (1950).

86 *See* Scott v. County of Nassau, 43 Misc. 2d 648, 252 N.Y.S.2d 135 (Sup. Ct. Nassau County 1964).

87 *See* 12 J. ZETT, M. EDMONDS, M. BUTTREY & M. KAUFMAN, NEW YORK CIVIL PRACTICE at 12-3 (Matthew Bender 1972).

88 DRL art. 3-A.

89 *See* DRL 37(1).

forwarded to a court capable of obtaining personal jurisdiction over the respondent.[90] If the respondent contests liability upon being compelled to appear, the initiating court in the petitioner's jurisdiction may take the petitioner's testimony on controverted issues and forward the transcript to the court exercising jurisdiction over the respondent, where the proceeding is ultimately determined.[91] The petitioner is thereby spared the hardship of travel to a distant jurisdiction. This procedure is only available, however, when both the respondent's and the petitioner's jurisdictions have enacted uniform support laws. Fortunately, when the uniform support procedure is unavailable, the provisions of the CPLR may allow a foreign petitioner to recover support payments from a New York respondent without having to travel to New York. A recent case illustrates how this can be accomplished.

In *Ratner v. Ratner*,[92] the Family Court, New York County, allowed a mother living in Israel with a dependent child to substantiate her claim for child support against a New York resident father with her own deposition taken in Israel. This enabled her to prosecute the action without appearing personally. The court relied on CPLR 3117(a)(3)(v), which allows a party to use the deposition of "any person" as evidence in chief if the court finds "that such exceptional circumstances exist as to make its use desirable [and] in the interest of justice. . . ." The court construed the word "person" to include a party.[93] "Exceptional circumstances" were held to be present because the father's ability to make future support payments was questionable. The court reasoned that the petitioner should not be saddled with burdensome travel expenses in return for a possibly uncollectible judgment. Also deemed important was the limited scope of the testimony necessary to the petitioner's case. Since the respondent conceded his paternity and his failure to make past support payments, the petitioner's testimony was only needed to establish the child's needs. The respondent was given the choice of either requiring the petitioner to

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90 *See* DRL 37(3).

91 *See* DRL 37(7).

92 73 Misc. 2d 374, 342 N.Y.S.2d 58 (Family Ct. N.Y. County 1973).

93 A similar construction was adopted in Wojtas v. Fifth Ave. Coach Corp., 23 App. Div. 2d 685, 257 N.Y.S.2d 404 (2d Dep't 1965) (mem.) (applying CPLR 3117(a)(3)(iii)). *Cf.* Jobse v. Connolly, 60 Misc. 2d 69, 302 N.Y.S.2d 35 (N.Y.C. Civ. Ct. Bronx County 1969). Under CPA 303 and 304, a party was permitted to have his own deposition read in evidence if taken by an adverse party or on stipulation whether or not he was present when the deposition was read at trial. *See* Hill v. Hudson View Gardens, Inc., 13 App. Div. 2d 730, 214 N.Y.S.2d 477 (1st Dep't 1961); National Fire Ins. Co. v. Shearman, 233 App. Div. 127, 227 N.Y.S. 522 (4th Dep't 1928); Musellam v. Flowers, 30 Misc. 2d 34, 211 N.Y.S.2d 87 (Sup. Ct. Erie County 1961). Under the CPLR a party's use of his own deposition is apparently limited to the situations enumerated in CPLR 3117(a)(3). *See* WK&M ¶ 3117.04.

answer written interrogatories[94] or examining her by open commission in Israel at his own expense. Both procedures are authorized by CPLR 3108.

It can be seen that by utilizing provisions of the CPLR, the court in *Ratner* was able to offer the petitioner most of the advantages of a proceeding under the Uniform Support of Dependents Law. When the latter is unavailable, the procedure adopted in *Ratner* allows a court to hear and enforce a meritorious support claim which might otherwise go unsatisfied.

### ARTICLE 32 — ACCELERATED JUDGMENT

*CPLR 3211(c): Amendment allows the court to treat a motion under 3211(a) or (b) as one for summary judgment before joinder of issue.*

CPLR 3211(c) has been revised by the Judicial Conference[95] to settle case law conflict[96] as to whether a motion under 3211(a) or (b) may be treated as one for summary judgment before issue has been joined. The section now specifically allows this. The rule was further amended to require the court to give the parties adequate notice of its intention to treat the motion as one for summary judgment. The Judicial Conference's stated purpose in adding this requirement was to ensure "that an appropriate record and submission of the facts and law may be made by the parties. . . ."[97] Lastly, the rule was amended to provide that immediate trial of the issues raised on the motion can be ordered "when appropriate for the expeditious disposition of the controversy." The quoted clause was added to avoid *sub rosa* preferences.[98]

*CPLR 3212(c): Rule now authorizes immediate trial on motion for summary judgment where the motion is based on any of the grounds enumerated in CPLR 3211(a).*

CPLR 3212(c) has been changed to authorize an immediate trial of issues of fact where a motion for summary judgment is based on any

94 Written questions were used similarly in Zilken v. Leader, 23 App. Div. 2d 644, 257 N.Y.S.2d 185 (1st Dep't 1965) (mem.) and Ascona Cie., Anstalt v. Horn, 32 App. Div. 2d 755, 301 N.Y.S.2d 414 (1st Dep't 1969) (mem.), where depositions were taken in foreign countries.

95 JUDICIAL CONFERENCE OF THE STATE OF NEW YORK, REPORT TO THE 1973 LEGISLATURE IN RELATION TO THE CIVIL PRACTICE LAW AND RULES AND PROPOSED AMENDMENTS ADOPTED PURSUANT TO SECTION 229 OF THE JUDICIARY LAW 81 (1973) [hereinafter JUDICIAL CONFERENCE REPORT].

96 *See* 4 WK&M ¶ 3211.50a.

97 JUDICIAL CONFERENCE REPORT 82, *citing* Mareno v. Kibbe, 32 App. Div. 2d 825, 302 N.Y.S.2d 324 (2d Dep't 1969), *modifying* 56 Misc. 2d 451, 289 N.Y.S.2d 6 (Sup. Ct. Westchester County 1968), *discussed in The Quarterly Survey*, 44 ST. JOHN'S L. REV. 532, 560 (1970).

98 JUDICIAL CONFERENCE REPORT 82.