

CPLR 1102: Indigent Defendant Has Constitutional Right to Counsel in Matrimonial Action

St. John's Law Review

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

Recommended Citation

St. John's Law Review (1974) "CPLR 1102: Indigent Defendant Has Constitutional Right to Counsel in Matrimonial Action," *St. John's Law Review*: Vol. 48 : No. 3 , Article 17.
Available at: <https://scholarship.law.stjohns.edu/lawreview/vol48/iss3/17>

This Recent Development in New York Law is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact lasalar@stjohns.edu.

It is urged that the Legislature respond to the difficulties presented by the diverse and complex nature of unincorporated associations. Those associations that function as major forces in society should be subject to those obligations imposed on corporate bodies. Labor unions in particular should be treated as entities for substantive as well as procedural purposes. Unincorporated associations should possess the capacity to sue or be sued in their own name, and the association's treasury must be available to satisfy a judgment resulting from the activities of its members in areas germane to the organization's normal purposes or functions. An examination of this area of the law is long overdue.

ARTICLE 11 — POOR PERSONS

CPLR 1102: Indigent defendant has constitutional right to counsel in matrimonial action.

In *Boddie v. Connecticut*,⁷² the United States Supreme Court held that a state's refusal to allow an indigent divorce plaintiff access to its courts without first paying fees for filing and service of process violates his due process rights. The New York courts have applied this holding to auxiliary expenses such as publication costs.⁷³

Boddie recently received a broad construction by the Supreme Court, Kings County. In *Vanderpool v. Vanderpool*,⁷⁴ the court held that the defendant-wife in a divorce action was constitutionally entitled to counsel where her indigency and her husband's inability to pay⁷⁵ are undisputed. Relying on the due process clause of the fourteenth amendment, the court found that while CPLR 1102⁷⁶ gives the court discretion to assign counsel to poor persons, it confers no authority to direct payment of counsel fees. However, the court reasoned that without counsel a defendant has no meaningful opportunity to be heard, and the mere fact that he is in the action as a defendant does not constitute access since "*presence is distinguishable from access. . .*"⁷⁷

⁷² 401 U.S. 371 (1971).

⁷³ 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).

⁷⁴ 74 Misc. 2d 122, 344 N.Y.S.2d 572 (Sup. Ct. Kings County 1973) (mem.).

⁷⁵ DRL 237 provides that generally the husband can be compelled to pay the wife's counsel fees if she is unable to do so.

⁷⁶ CPLR 1102(a) provides that "[t]he court in its order permitting a person to proceed as a poor person may assign an attorney." The meaning of "may" in this context is unsettled. See 2 WK&M ¶ 1102.01 (suggesting that 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).

⁷⁷ 74 Misc. 2d at 125, 344 N.Y.S.2d at 576 (emphasis in original), citing *Gideon v. Wainwright*, 372 U.S. 335 (1963).

Thus, under the authority of *Deason v. Deason*,⁷⁸ Justice Heller directed the City of New York to provide counsel or, in lieu of that, to pay the fees of counsel selected by the defendant. He further recommended the amendment of the County Law,⁷⁹ which now provides for the assignment and compensation of counsel in criminal cases, to encompass indigent matrimonial defendants.

Much of the language of *Vanderpool* could be applied with equal force to an indigent plaintiff in a matrimonial action. It remains to be seen to what extent the courts will apply *Boddie* in this area as well as in non-matrimonial civil litigation.⁸⁰

ARTICLE 31 — DISCLOSURE

CPLR 3101(a): Appellate departments adopt a strict approach to discovery and inspection of insurance policy limits.

In the absence of a definitive ruling by the Court of Appeals, New York case law remains uncertain on the issue of whether a plaintiff in an automobile accident case can compel disclosure of a defendant's automobile liability insurance policy limits.⁸¹ Lower court cases arriving at conflicting results have differed in their interpretation of *Allen v. Crowell-Collier Publishing Co.*,⁸² wherein the Court of Appeals adopted a liberal construction of CPLR 3101(a) so as to mandate "disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity."⁸³ Despite the broad scope of this test, the Second and Third Departments have recently refused to require disclosure of insurance coverage.

⁷⁸ 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).

⁷⁹ N.Y. COUNTY LAW art. 18-B (McKinney 1973).

⁸⁰ The First Department, relying on *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).

⁸¹ Compare *Shutt v. Pooley*, 43 App. Div. 2d 59, 349 N.Y.S.2d 839 (3d Dep't 1973) (discovery disallowed); *Mosca v. Pinsky*, 42 App. Div. 2d 708, 345 N.Y.S.2d 606 (2d Dep't 1973) (mem.) (discovery disallowed); *Fierman v. Cirillo*, 40 App. Div. 2d 976, 338 N.Y.S.2d 285 (2d Dep't 1972) (mem.) (discovery disallowed); *Sashin v. Santelli Constr. Co.*, 69 Misc. 2d 695, 330 N.Y.S.2d 522 (Sup. Ct. Ulster County 1972) (discovery disallowed); *Gold v. Jacobi*, 52 Misc. 2d 491, 276 N.Y.S.2d 309 (Sup. Ct. N.Y. County 1966) (discovery disallowed), with *Allen v. Crowell-Collier Publishing Co.*, 21 N.Y.2d 403, 235 N.E.2d 430, 288 N.Y.S.2d 449 (1968), discussed in *The Quarterly Survey*, 43 ST. JOHN'S L. REV. 302, 324 (1968) (very liberal disclosure policy enunciated); *State Nat'l Bank v. Gregorio*, 68 Misc. 2d 926, 328 N.Y.S.2d 799 (Sup. Ct. Albany County 1971), discussed in *The Quarterly Survey*, 47 ST. JOHN'S L. REV. 148, 170 (1973) (discovery allowed).

⁸² 21 N.Y.2d 403, 235 N.E.2d 430, 288 N.Y.S.2d 449 (1968).

⁸³ *Id.* at 406, 235 N.E.2d at 432, 288 N.Y.S.2d at 452.