

## CPLR 302(a)(1): Placement of Children with an Adoption Agency Deemed "Transaction of Business"

St. John's Law Review

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were interposed, provided the original pleading gives notice of the transactions or occurrences to be proved pursuant to the amended pleading. The crucial issue is notice, since the purpose of the statute is to prevent surprise. If the complaint in the declaratory judgment action gives notice of the accident and pertinent facts relating thereto, it can be argued that sufficient notice is given to sustain any cause of action arising out of the accident. Consequently, the *Raggins* court could have found that the statute of limitations was satisfied when the original complaint was issued, and that the amended pleading relating to personal injuries was proper, even though a negligence action was never commenced. It would be ingenuous to argue that in a case such as *Raggins* the policyholder and the insurance company would be surprised, and thereby prejudiced, by a subsequent pleading of personal injuries, since the complaint in the initial action, even though for a declaratory judgment, gives sufficient notice of a probable suit for negligence.

*Raggins* follows precedent insofar as it upholds the distinction between a negligence action and a declaratory judgment action. Under CPLR 203(e), however, the court could have allowed amendment of the complaint to include a cause of action in negligence, without prejudice to the defendant.

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

*CPLR 302(a)(1): Placement of children with an adoption agency deemed "transaction of business."*

*In re Guardianship of Ellick*<sup>25</sup> is a recent family court decision which applied CPLR 302 to an adoption proceeding. The petitioner adoption agency sought guardianship and custody<sup>26</sup> of three brothers who had been abandoned by the respondent, their mother, a non-domiciliary of New York who had been personally served pursuant to CPLR 313.

Rejecting her jurisdictional objections, the court found that the respondent's placement of her children under the care and support of the New York agency constituted a "transaction" which subjected her to personal jurisdiction in the proceeding. CPLR 302 was cited to support this holding, and it is obvious that the "transacting business" sub-

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<sup>25</sup> 69 Misc. 2d 175, 328 N.Y.S.2d 587 (Fam. Ct. N.Y. County 1972).

<sup>26</sup> The action was brought pursuant to Section 384(5) of the New York Social Services Law, which deals with the power of the family court judge in matters of guardianship and custody of abandoned children.

section, CPLR 302(a)(1), was being applied. The court also held that jurisdiction was obtainable under CPLR 301, which incorporated existing bases of jurisdiction, since it was settled that the courts of this state may act as *parens patriae* to determine the custody of children within its borders regardless of the domicile of the parents.<sup>27</sup>

The "transacting business" provision of 302(a)(1) has generally been utilized in the area of commercial activity, but some decisions involving separation agreements have indicated that there is no such limitation,<sup>28</sup> and another recent family court opinion has flatly stated that the long-arm statute is available to litigants in that tribunal.<sup>29</sup>

The *Ellick* opinion did not explicitly state that the long-arm provision applies to non-commercial transactions. Indeed, some of its language indicates that the respondent's conduct was considered to have had commercial ramifications: "[H]er children have continuously received support and care in New York, and she has been relieved of the obligation of their support."<sup>30</sup> The court was satisfied to state that the "minimum contacts" test<sup>31</sup> established by the United States Supreme Court for exercising personal jurisdiction had been satisfied.

This decision is a laudable exercise of long-arm jurisdiction.

#### *CPLR 302(a)(2): Expansion of tortious act jurisdiction.*

In *Francis I. duPont & Co. v. Chelednik*,<sup>32</sup> the Appellate Term, First Department, exercised jurisdiction over a New Jersey resident who traded on the New York Stock Exchange through the New York plaintiff-stock brokerage firm. The plaintiff alleged that although the defendant knew that certain securities were erroneously placed in his account, he instructed it to sell these securities and remit the proceeds to him. After the mistake was discovered and the defendant refused to

<sup>27</sup> See *Finlay v. Finlay*, 240 N.Y. 429, 148 N.E. 624 (1925). The other cases cited by the court to buttress its argument involved custody jurisdiction incidental to marital actions. Evidently, the adoption proceeding was deemed a kind of custody proceeding, thus making the traditional *parens patriae* view applicable.

<sup>28</sup> See *Kochenthal v. Kochenthal*, 28 App. Div. 2d 117, 282 N.Y.S.2d 36 (2d Dep't 1967), discussed in *The Quarterly Survey*, 42 ST. JOHN'S L. REV. 128, 132 (1967); *Raschitore v. Fountain*, 52 Misc. 2d 402, 275 N.Y.S.2d 709 (Sup. Ct. Monroe County 1966) (dictum). *Contra*, *Whitaker v. Whitaker*, 56 Misc. 2d 265, 289 N.Y.S.2d 465 (Sup. Ct. Ulster County 1968), *aff'd mem.*, 32 App. Div. 2d 595, 299 N.Y.S.2d 482 (3rd Dep't 1969); *Willis v. Willis*, 42 Misc. 2d 473, 248 N.Y.S.2d 260 (Sup. Ct. N.Y. County 1964).

Dean McLaughlin states that separation agreements have been accepted as transactions of business because of the "commercial earmarks" generally incorporated into them. 7B MCKINNEY'S CPLR 302, commentary at 83 (1972).

<sup>29</sup> See *Lawrenz v. Lawrenz*, 65 Misc. 2d 627, 318 N.Y.S.2d 610 (Fam. Ct. Westchester County 1971).

<sup>30</sup> 69 Misc. 2d at 177, 328 N.Y.S.2d at 589.

<sup>31</sup> *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

<sup>32</sup> 69 Misc. 2d 362, 330 N.Y.S.2d 149 (App. T. 1st Dep't 1971) (per curiam).