

CPLR 1102(b): Poor Persons Held Not Entitled to Free Use of a Stenographer for Deposition Before Trial

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counterclaim against all parties, and CPLR 3019(b), which allows defendants to cross-claim against each other with absolute freedom.⁶⁵

ARTICLE 11 — POOR PERSONS

CPLR 1102: The state is responsible for indigents' publication costs in matrimonial actions.

The Appellate Division, First Department, recently held⁶⁶ that New York City was not required to pay the costs of service by publication for an indigent plaintiff in a divorce proceeding. The Appellate Division, Second Department, adopted this holding in *Jeffreys v. Jeffreys*.⁶⁷ It viewed the absence of any statutory authorization for a city to pay such costs as the decisive factor: "The fact that payment by the City for service by publication may fit a logical framework cannot substitute for the required statutory authorization for such payment by the City. . . ."⁶⁸

It is refreshing to note that this long-neglected area of law is beginning to receive appropriate attention. However, the needs of the indigent, not whether the city or the state should pay certain fees, should be the primary concern.

CPLR 1102(b): Poor persons held not entitled to free use of a stenographer for depositions before trial.

In recent years, the legislative and judicial branches of government have become mindful of the differential treatment afforded economic groups under our system of justice. The judiciary has attempted to lessen the problems indigents face in reaching the courts.⁶⁹ However,

⁶⁵ See 7B MCKINNEY'S CPLR 1009, *supp.* commentary at 102 (1964).

⁶⁶ *Jackson v. Jackson*, 37 App. Div. 2d 953, 326 N.Y.S.2d 224 (1st Dep't 1971), *discussed in The Quarterly Survey*, 46 ST. JOHN'S L. REV. 768, 779 (1972). *But see* McCandless v. McCandless, 38 App. Div. 2d 171, 327 N.Y.S.2d 896 (4th Dep't 1972) (directing county to pay indigent's publication costs). *Boddie v. Connecticut*, 401 U.S. 371 (1971), mandated the removal of such monetary bars to matrimonial relief for the indigent.

⁶⁷ 38 App. Div. 2d 431, 330 N.Y.S.2d 550 (2d Dep't 1972), *rev'g* 58 Misc. 2d 1045, 296 N.Y.S.2d 74 (Sup. Ct. Kings County 1968), *discussed in The Quarterly Survey*, 44 ST. JOHN'S L. REV. 135, 139 (1969). *See also The Quarterly Survey*, 46 ST. JOHN'S L. REV. 147, 158 (1971).

⁶⁸ 38 App. Div. 2d at 434, 330 N.Y.S.2d at 554. Citing article XVII, section 1, of the State Constitution, which provides that care of the indigent is the responsibility of the state and such of its subdivisions as the Legislature may determine, the court held further that "[u]ntil the Legislature determines that the aspect of aid to the needy here under consideration shall be provided by the City as a subdivision of the State, the obligation to pay such expenses remains with the State." *Id.* at 435, 330 N.Y.S.2d at 555.

⁶⁹ *See, e.g., Boddie v. Connecticut*, 401 U.S. 371 (1971); *Jeffreys v. Jeffreys*, 38 App. Div. 2d 431, 330 N.Y.S.2d 550 (2d Dep't 1972); *Hotel Martha Washington Management Co. v. Swinick*, 66 Misc. 2d 833, 322 N.Y.S.2d 139 (App. T. 1st Dep't 1971); *Dorsey v. City of New York*, 66 Misc. 2d 464, 321 N.Y.S.2d 129 (Sup. Ct. N.Y. County 1971). *See also The*

despite the legislative mandate for a free stenographic transcript for poor persons on appeal or in other proceedings,⁷⁰ in *Lester v. Lester*,⁷¹ the Supreme Court, Sullivan County, decided that an indigent has no statutory right to a county-paid stenographer during pre-trial examination. The court stated that such an examination was not a "proceeding" which would compel the county to pay for a stenographer. Even if a stenographer's charge were considered a "fee" under the CPLR for which a poor person would not be liable unless he were to recover,⁷² the court did not believe that it had the affirmative right to order a county to pay such an expense.⁷³ In addition, it reasoned that lack of stenographic services does not deny the mandated access to the courts;⁷⁴ it merely limits the effectiveness of litigation.⁷⁵ With reservations, the court did allow the indigent plaintiff to take the defendants' depositions by tape recorder.⁷⁶

ARTICLE 12 — INFANTS AND INCOMPETENTS

CPLR 1209: Statute not applicable where infant plaintiff seeks relief under an uninsured automobile indorsement.

CPLR 1209 provides that an infant or judicially declared incompetent may not seek relief through arbitration unless his authorized representative has procured permission by court order. An existing exception to this seemingly all-inclusive provision was recently reaffirmed in *Lunger v. Hartford Accident & Indemnity Co.*⁷⁷ Therein, the minor plaintiff brought an action based on the New York Automobile Accident Indemnification Endorsement in the insurance policy issued by the defendant to his parents. The defendant moved to stay the action pending arbitration, citing CPLR 1209. The Appellate Divi-

Quarterly Survey, 46 ST. JOHN'S L. REV. 355, 369 (1971); *The Quarterly Survey*, 46 ST. JOHN'S L. REV. 147, 157 (1971); *The Quarterly Survey*, 44 ST. JOHN'S L. REV. 135, 139 (1969).

⁷⁰ CPLR 1102(b) states:

Where a party has been permitted by order to appeal as a poor person, the court clerk . . . shall so notify the court stenographer, who . . . shall make and certify two typewritten transcripts of the stenographic minutes of said trial or hearing. . . . The expense of such transcripts shall be a county charge. . . . A poor person may be furnished with a stenographic transcript without fee by order of the court in proceedings other than appeal, the fee therefor to be paid by the county. . . .

⁷¹ 69 Misc. 2d 528, 330 N.Y.S.2d 190 (Sup. Ct. Sullivan County 1972).

⁷² CPLR 1102(d).

⁷³ 69 Misc. 2d at 530, 330 N.Y.S.2d at 193. The court was careful not to call such an expenditure a "cost or fee" and cited authority to call them "disbursements." See 8 WK&M ¶ 8301.27.

⁷⁴ 69 Misc. 2d at 531, 330 N.Y.S.2d at 194.

⁷⁵ *Id.* at 532, 330 N.Y.S.2d at 194.

⁷⁶ *Id.* 330 N.Y.S.2d at 195.

⁷⁷ 38 App. Div. 2d 857, 330 N.Y.S.2d 123 (2d Dep't 1972) (mem.).