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CPLR 1102: Departments Divided as to Responsibility for Indigents' Publication Costs

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to enforce the alimony and support provisions of a Mexican divorce decree which had been incorporated into the decree from a New York-executed separation agreement. The defendant, a nondomiciliary, had been personally served in New Jersey. The court held that the enforcement proceeding arose "directly out of the activity of the parties in the foreign jurisdiction and only remotely out of the business transacted in New York, i.e., execution of the separation agreement."[43]

The *Carmichael* court stressed the necessity of an immediate nexus between the business transacted in New York and the suit; its decision represents a refusal to loosen the jurisdictional prerequisites as to marital decrees.

ARTICLE 6 — JOINDER OF CLAIMS, CONSOLIDATION AND SEVERANCE

CPLR 603: Law of the case limits the power to sever claims.

Judicial discretion in granting a severance is limited by the doctrine of the law of the case.[44] By refusing severance a court establishes the law of the case and thereby binds other courts of coordinate jurisdiction.[45] Only an intervening new fact would permit another court to decide otherwise.

In *Dain & Dill, Inc. v. Betterton*,[46] the Supreme Court, Putnam County, severed three actions previously consolidated at special term. The Appellate Division, Second Department, reversed, stating that for a court of coordinate jurisdiction to ignore the law of the case was to "arrogate to [itself] powers of appellate review."[47]

ARTICLE 11 — POOR PERSONS

CPLR 1102: Departments divided as to responsibility for indigents' publication costs.

In *Boddie v. Connecticut*,[48] the United States Supreme Court held that due process requires the removal of state monetary bars

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[43] *Id.*, 333 N.Y.S.2d at 812.

[44] "The 'law of the case' ordinarily signifies a proposition of law that has been litigated and is deemed concluded by virtue of a previous *judicial determination* in the same case . . . ." 7 WK&M ¶ 5501.11.

[45] *See* George W. Collins, Inc. v. Olsker-McLain Indus., Inc., 22 App. Div. 2d 485, 257 N.Y.S.2d 201 (4th Dep't 1965), *discussed in The Biannual Survey*, 40 ST. JOHN'S L. REV. 122, 148 (1965). "Setting aside the judicial act of one judge by another of co-ordinate jurisdiction is avoided, wherever possible, as not conducive to the orderly administration of justice." United Press Ass'ns v. Valente, 281 App. Div. 395, 398, 120 N.Y.S.2d 174, 178 (1st Dep't 1953), *aff'd*, 308 N.Y. 71, 123 N.E.2d 888 (1954).

[46] 39 App. Div. 2d 939, 333 N.Y.S.2d 237 (2d Dep't 1972) (mem.).

[47] *Id.*, 333 N.Y.S.2d at 238, *citing* George W. Collins, Inc. v. Olsker-McLain Indus., Inc., 22 App. Div. 2d 485, 489, 257 N.Y.S.2d 201, 205 (4th Dep't 1965).

[48] 401 U.S. 371 (1971), *noted in* 18 CATH. LAW. 67 (1972); 10 DUQUESNE L. REV. 123 (1971); 17 S.D.L. REV. 269 (1972).

to matrimonial relief for the indigent and does not necessitate service by publication in a matrimonial action in which personal service cannot be made. States were offered two alternatives: (1) to provide for the cost of publication of a summons in an indigent's matrimonial action; or (2) to permit service at the defendant's last known address by mail and posted notice, in lieu of personal service.[49]

Since DRL 232 apparently requires service by publication if personal service cannot be made, the departments of the appellate division have had to determine the responsibility for indigents' publication costs. The Third Department's recent decision in *Deason v. Deason*[50] created an even split of authority. The First and Second Departments hold the state responsible;[51] the Third and Fourth Departments hold the counties responsible.[52] The former relied on the absence of statutory authorization for payment by the local governmental units.[53] The latter relied on the clear mandate of *Boddie*.[54]

Albino v. City of New York[55] was the first case to which the state was a party wherein the state was directed to pay publication costs for an indigent. Two First Department judges, in concurring, argued that publication was not the only available method of service and that CPLR 308(5) would allow a court, in lieu of personal service, to prescribe a mode of service reasonably calculated to give the defendant the notice required by DRL 232.[56] In *Prince v. Prince*,[57] the Supreme Court, Richmond County, recently utilized CPLR 308(5) in a divorce action.

The conflict within the appellate division as to the payment of

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49 *Id.* at 382.

50 39 App. Div. 2d 331, 334 N.Y.S.2d 236 (3d Dep't 1972).

51 Albino v. City of New York, 39 App. Div. 2d 853, 333 N.Y.S.2d 156 (1st Dep't 1972) (mem.) (the state is responsible); Jeffreys v. Jeffreys, 38 App. Div. 2d 431, 330 N.Y.S.2d 550 (2d Dep't 1972), *discussed in The Quarterly Survey*, 47 ST. JOHN'S L. REV. 148, 162 (1972) (the state is responsible); Jackson v. Jackson, 37 App. Div. 2d 953, 326 N.Y.S.2d 224 (1st Dep't 1971) (mem.), *discussed in The Quarterly Survey*, 46 ST. JOHN'S L. REV. 768, 779 (1972) (the city is not responsible).

52 McCandless v. McCandless, 38 App. Div. 2d 171, 327 N.Y.S.2d 896 (4th Dep't 1972).

53 The *Jeffreys* court concluded that the state is chargeable with publication costs under article XVII, section 1, of the State Constitution, which provides that the state is responsible for care of the indigent unless the Legislature delegates this obligation to a subdivision of the state. 38 App. Div. 2d at 435, 330 N.Y.S.2d at 555. However, the procedure by which indigents may obtain their proposed disbursements, an action against the state in the Court of Claims, was described as "most cumbersome," and the need for remedial legislative action was deemed urgent. *Id.* at 437, 330 N.Y.S.2d at 556.

54 The *McCandless* court also argued that the statutory plan of article 11 of the CPLR contemplates that an indigent's charges are to be borne by the local governmental unit. 38 App. Div. 2d at 173, 327 N.Y.S.2d at 898.

55 39 App. Div. 2d 853, 333 N.Y.S.2d 156 (1st Dep't 1972) (mem.).

56 *Id.*, 333 N.Y.S.2d at 157-58.

57 69 Misc. 2d 410, 329 N.Y.S.2d 963 (Sup. Ct. Richmond County 1972), *discussed in The Quarterly Survey*, 47 ST. JOHN'S L. REV. 148, 157 (1972). *But see* Lancer v. Lancer, 70 Misc. 2d 1045, 335 N.Y.S.2d 138 (Sup. Ct. Nassau County 1972).

publication costs for indigents necessitates a definitive Court of Appeals decision or legislation. Moreover, the Legislature should specifically authorize the use of expedient service under CPLR 308(5) in matrimonial actions, so that the onerous costs of service by publication can be avoided. "Why . . . , in a matrimonial action, should a plaintiff unable to effect personal service be forced to bear the expense of publication?"[58]

ARTICLE 21 — PAPERS

CPLR 2104: Oral settlement reached at informal conference in judge's chambers held not made in open court.

CPLR 2104 requires agreements between parties relating to matters in an action to be in writing and subscribed, except when such agreements are made between counsel in "open court." Some courts have held that a stipulation of settlement is not an agreement relating to a matter "in an action" within the meaning of the statute,[59] although the opposite view is more widely held.[60] A second unsettled issue has been whether the term "open court" includes informal proceedings in the judge's chambers.[61] The Court of Appeals, in *In re Dolgin Eldert Corp.*,[62] resolved both issues.

In *Dolgin*, an intrafamily dispute arose over jointly-owned prop-

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58 *The Quarterly Survey*, 46 ST. JOHN'S L. REV. 768, 781 (1972).

59 *See* Langlois v. Langlois, 5 App. Div. 2d 75, 169 N.Y.S.2d 170 (3d Dep't 1957) (per curiam); Lloyd v. R.S.M. Corp., 225 App. Div. 85, 232 N.Y.S. 290 (1st Dep't 1928), *rev'd on other grounds*, 251 N.Y. 318, 167 N.E. 456 (1929); Smith v. Bach, 82 App. Div. 608, 81 N.Y.S. 1057 (2d Dep't 1903); *In re* Estate of Sakel, 31 Misc. 2d 791, 220 N.Y.S.2d 688 (Sur. Ct. N.Y. County 1961); *In re* Gardiner, 204 Misc. 884, 126 N.Y.S.2d 121 (Sur. Ct. N.Y. County 1953); Lee v. Rudd, 120 Misc. 407, 198 N.Y.S. 628 (Sup. Ct. Onondaga County 1923). *See also* 7B MCKINNEY'S CPLR 2104, commentary at 672 (1970).

60 *See* Solins v. Klosky, 8 App. Div. 2d 848, 190 N.Y.S.2d 633 (2d Dep't 1959) (mem.); Anders v. Anders, 6 App. Div. 2d 440, 179 N.Y.S.2d 274 (1st Dep't 1958); Ariel v. Ariel, 5 App. Div. 2d 168, 171 N.Y.S.2d 138 (1st Dep't 1958) (per curiam); Cook v. Bianco, 226 App. Div. 691, 233 N.Y.S. 729 (2d Dep't 1929); Macrina v. Macrina, 78 N.Y.S.2d 244 (Sup. Ct. Herkimer County 1947). *See generally* 2 CARMODY-WAIT 2d, § 7:7, at 13-14 (1965); 2A WK&M ¶ 2104.03.

61 For cases holding that the term "open court" does not include informal proceedings in the judge's chambers, see People *ex rel.* Putziger v. Putziger, 22 App. Div. 2d 821, 254 N.Y.S.2d 916 (2d Dep't 1964) (mem.); Rosen v. Grand, 6 App. Div. 2d 799, 175 N.Y.S.2d 441 (2d Dep't 1958) (mem.); Accarino v. Hirsch, 6 App. Div. 2d 795, 175 N.Y.S.2d 435 (2d Dep't 1958) (mem.); Brozyna v. Andreski, 6 App. Div. 2d 601, 179 N.Y.S.2d 945 (3d Dep't 1958). For the contrary view, see Gass v. Arons, 131 Misc. 502, 227 N.Y.S. 282 (N.Y. City Ct. Bronx County 1928). *Cf.* Golden Arrow Films, Inc. v. Standard Club of Cal., Inc., 38 App. Div. 2d 813, 328 N.Y.S.2d 901 (1st Dep't) (mem.), *motion for leave to appeal granted*, 30 N.Y.2d 486, 286 N.E.2d 926, 335 N.Y.S.2d 1025 (1972), *discussed in The Quarterly Survey*, 47 ST. JOHN'S REV. 148, 164 (1972) (holding that there was substantial compliance with CPLR 2104 when an uncontested settlement was recorded by justice in chambers); Royal Globe Ins. Co. v. Dinan, 42 Misc. 2d 595, 598, 248 N.Y.S.2d 469, 472 (Sup. Ct. Nassau County 1964) (dictum).

62 31 N.Y.2d 1, 286 N.E.2d 228, 334 N.Y.S.2d 833, *rev'g* 38 App. Div. 2d 554, 328 N.Y.S.2d 384 (2d Dep't 1972).