

# CPLR 1102: Local Governments Must Pay Indigent Matrimonial Plaintiffs' Publication Costs

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held.<sup>25</sup> A difficulty arises, however, in the case of one variety of special proceeding — the summary proceeding.<sup>26</sup> How can the expediency of a summary proceeding be preserved in the lengthy procedural context of an action when the two are consolidated?

In *McCarthy v. Lewin*,<sup>27</sup> the vendors of real property brought a contract action and a separate summary proceeding against their vendees who had taken possession of the property sold.<sup>28</sup> Reversing a lower court order, the Appellate Division, Second Department, unanimously granted the defendants' motion to consolidate on the ground that the action and the proceeding involved the same issues of fact and law. To preserve the vendors' right to a speedy adjudication in the summary proceeding, the court recommended that a motion by either party for a trial preference be granted, and that noticing for trial not be delayed by pretrial proceedings.<sup>29</sup>

The court's decision prevents duplication of proceedings while, to some extent, preserving the summary nature of the proceeding which the plaintiffs were entitled to bring.

#### ARTICLE 11 — POOR PERSONS

*CPLR 1102: Local governments must pay indigent matrimonial plaintiffs' publication costs.*

While CPLR 1102 does not expressly provide for public payment of indigents' publication costs in matrimonial actions,<sup>30</sup> the United

of law or fact. CPLR 105(b) states that "[t]he word 'action' includes a 'special proceeding.'" Consolidation is facilitated by CPLR 103(b), which makes the procedure in special proceedings the same as the procedure in actions except where otherwise prescribed by law.

<sup>25</sup> *Elias v. Artistic Paper Box Co.*, 29 App. Div. 2d 118, 286 N.Y.S.2d 371 (2d Dep't 1967); *Schuster v. 490 West End Corp.*, 26 App. Div. 2d 535, 271 N.Y.S.2d 171 (1st Dep't 1966) (mem.); *Street of Shops, Inc. v. Clifford*, 20 App. Div. 2d 622, 244 N.Y.S.2d 858 (4th Dep't 1963) (mem.); cf. *In re Houston's Trust*, 30 App. Div. 2d 999, 294 N.Y.S.2d 225 (3d Dep't 1968) (mem.). *Contra*, *Hanft v. Hanft*, 46 Misc. 2d 548, 260 N.Y.S.2d 104 (Sup. Ct. Bronx County 1965).

<sup>26</sup> RPAPL 701(1) refers to a summary proceeding to recover real property as a "special proceeding."

<sup>27</sup> 41 App. Div. 2d 657, 340 N.Y.S.2d 668 (2d Dep't 1973) (mem.).

<sup>28</sup> RPAPL 713(9) allows a vendor, in certain circumstances, to bring a summary proceeding against a defaulting vendee.

<sup>29</sup> *Accord*, *Street of Shops, Inc. v. Clifford*, 20 App. Div. 2d 622, 244 N.Y.S.2d 858 (4th Dep't 1963) (mem.).

<sup>30</sup> CPLR 1102(d) exempts a poor person from liability for "costs and fees" except when he recovers in the action. Courts have reached opposite conclusions as to whether the statute covers publication costs in matrimonial actions. See *Brown v. Wyman*, 59 Misc. 2d 740, 300 N.Y.S.2d 254 (Sup. Ct. Onondaga County 1969) (statute sanctions payment of publication costs by county); *Jeffreys v. Jeffreys*, 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), *rev'd on other grounds*, 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) (statute does not authorize payment of publication costs).

States Supreme Court's decision in *Boddie v. Connecticut*<sup>31</sup> mandates that no person be denied the opportunity to seek a divorce because of his indigency. Accordingly, New York courts have ordered public payment of these costs for indigent litigants when personal service could not be made.<sup>32</sup> A division arose over the question as to whether these costs are a state or local responsibility.<sup>33</sup> The Court of Appeals recently settled the issue in *Deason v. Deason*,<sup>34</sup> unanimously holding that *Boddie* requires payment of an indigent divorce plaintiff's publication costs<sup>35</sup> and that these costs are a local responsibility in the absence of legislation.<sup>36</sup> The Court's decision was without prejudice to an application by the parties for a determination whether expedient service under CPLR 308(5) is available in lieu of service by publication.<sup>37</sup>

The Court of Appeals' decision in *Deason* aids the indigent litigant by giving final recognition to the broad mandate of the *Boddie* case and by fixing the responsibility for fulfilling it on the local governments. Additionally, the Court's invitation to use CPLR 308(5) in matrimonial actions would provide a means to avoid the onerous costs of publication while increasing the likelihood that the defendant will receive notice of the action.<sup>38</sup>

<sup>31</sup> 401 U.S. 371 (1971).

<sup>32</sup> See, e.g., *Dorsey v. City of New York*, 66 Misc. 2d 464, 321 N.Y.S.2d 129 (Sup. Ct. N.Y. County 1971), discussed in *The Quarterly Survey*, 46 ST. JOHN'S L. REV. 147, 157 (1971).

<sup>33</sup> See *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); *Deason v. Deason*, 39 App. Div. 2d 331, 334 N.Y.S.2d 236 (3d Dep't 1972), discussed in *The Quarterly Survey*, 47 ST. JOHN'S L. REV. 530, 539 (1973) (the county 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); *McCandless v. McCandless*, 38 App. Div. 2d 171, 327 N.Y.S.2d 896 (4th Dep't 1972) (the county 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).

<sup>34</sup> 32 N.Y.2d 93, 296 N.E.2d 229, 343 N.Y.S.2d 321 (1973), *aff'g* 39 App. Div. 2d 331, 334 N.Y.S.2d 236 (3d Dep't 1972).

<sup>35</sup> While *Boddie* involved the payment of costs and fees to public officers, the Court of Appeals in *Deason* reasoned that its holding should apply equally to "auxiliary" costs paid to nonofficial persons which can block access to the courts.

<sup>36</sup> The Court held that the costs would be paid by the county governments or, in New York City, by the city government.

<sup>37</sup> DRL 232 appears to require service by publication in matrimonial actions when personal service is not possible. Some courts have disagreed, however. See *Albino v. City of New York*, 39 App. Div. 2d 853, 333 N.Y.S.2d 156 (1st Dep't 1972) (mem.) (concurring opinion); *Prince v. Prince*, 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). Such a unique mandate would appear to be vulnerable to constitutional attack under *Schroeder v. City of New York*, 371 U.S. 208 (1962), and *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

<sup>38</sup> The Supreme Court has characterized service by publication as the method of service least calculated to give a defendant notice of an action. *Boddie v. Connecticut*, 401 U.S. 371, 382 (1971).