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DRL 210: Time Limit Is Merely a Statute of Limitations

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ARTICLE 75 — ARBITRATION

CPLR 7503(a): Party can stay action without initiating arbitration.

Under CPLR 7503, a party aggrieved by another's failure to arbitrate can move, either in a pending action or in an independent special proceeding, to compel arbitration. Under CPA 1451, another remedy — a motion to stay the action — was provided for expressly, but the present statute merely states that granting a motion to compel arbitration automatically stays a pending suit. Did the revision in the law eliminate the remedy previously available to a party who wishes to stay an action without initiating arbitration proceedings?[228]

In *Board of Education v. Delle Cese*,[229] the Supreme Court, Oneida County, concluded that the stay is still available to such a party. Plaintiff had served his complaint after expiration of the time in which arbitration could have been instituted. Defendant S'Doia moved for summary judgment, on the ground that a stay was not available, and later for a stay. The court held that S'Doia was entitled to a stay but not to summary judgment.[230] It reasoned that the power to stay is either inherent in CPLR 7503[231] or available under CPLR 2201, which authorizes a court to "grant a stay of proceedings in a proper case . . . ." A mutual agreement to arbitrate, the court reasoned, is a proper case.[232]

DOMESTIC RELATIONS LAW

DRL 210: Time limit is merely a statute of limitations.

Prior to the Divorce Reform Act of 1966, a plaintiff could obtain a divorce in New York solely on the ground of adultery, if he commenced his action within five years from the date of discovery of the adultery.[233] This five-year requirement was held to be a statute of limitations.[234] However, under another provision[235] a plaintiff was obligated to disprove certain possible defenses, of which the elapse of five years from discovery was one, in the event the defendant de-

228 *See* 7B MCKINNEY'S CPLR 7503, supp. commentary at 136 (1965).

229 65 Misc. 2d 473, 318 N.Y.S.2d 46 (Sup. Ct. Oneida County 1971).

230 *See* 8 WK&M ¶ 7503.19. Under CPA 1451, summary judgment was improper, because a stay was the exclusive remedy. *E.g.*, American Reserve Ins. Co. v. China Ins. Co., 297 N.Y. 322, 79 N.E.2d 425 (1948).

231 65 Misc. 2d at 478, 318 N.Y.S.2d at 51, *citing* Adelphi Enterprises, Inc. v. Mirpa, Inc., 33 App. Div. 2d 1019, 307 N.Y.S.2d 978 (2d Dep't 1970), *discussed in The Quarterly Survey*, 45 ST. JOHN'S L. REV. 145, 172 (1970).

232 *Id.* at 478, 318 N.Y.S.2d at 51-52.

233 DRL 171(3).

234 Ackerman v. Ackerman, 200 N.Y. 72, 93 N.E. 192 (1910).

235 DRL 174, *repealed*, L. 1966, ch. 254, § 4.

faulted.[236] Presently, DRL 211 requires satisfactory proof of the ground for divorce without mentioning negation of possible defense in default cases. However, DRL 210, with certain exceptions herein inapplicable, prohibits the maintenance of a divorce action based upon a ground which arose more than five years before institution of the action. Is the time limit in DRL 210 an inherent part of the cause of action or merely a statute of limitations?

The Supreme Court, Queens County, in *Figueroa v. Figueroa*,[237] held that said time limit is a statute of limitations which must be pleaded affirmatively. Therein, plaintiff sought a divorce on the basis of acts which occurred some twenty years before commencement of the action and defendant defaulted.[238] The general rule in determining the status of a time limit is:

> If a statute creates a cause of action and attaches a time limit to its commencement, the time is an ingredient of the cause. If the cause was cognizable at common law or by other statute law, a statutory time limit is commonly taken as one of limitations and must be asserted by way of defense.[239]

While divorce in New York is purely statutory,[240] the court concluded that the Legislature intended to retain the five-year statute of limitations governing divorce actions.[241]

The court's conclusion is consistent with the policy underlying the new divorce law:

> Implicit in the statutory scheme is the legislative recognition that it is socially and morally undesirable to compel couples to a dead marriage to retain an illusory and deceptive status and that the best interest not only of the parties but of society itself will be furthered by enabling them to extricate themselves from a perpetual state of marital limbo.[242]

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236 McCarthy v. McCarthy, 143 N.Y. 235, 38 N.E. 288 (1894).

237 66 Misc. 2d 257, 320 N.Y.S.2d 113 (Sup. Ct. Queens County 1971).

238 *Id.* at 258, 320 N.Y.S.2d at 114.

239 Romano v. Romano, 19 N.Y.2d 444, 447, 227 N.E.2d 389, 392, 280 N.Y.S.2d 570, 573 (1967).

240 Walker v. Walker, 155 N.Y. 77, 49 N.E. 663 (1898); Bishop v. Bishop, 62 Misc. 2d 436, 308 N.Y.S.2d 998 (Sup. Ct. Nassau County 1970).

241 66 Misc. 2d at 260, 320 N.Y.S.2d at 116. This conclusion is in accord with authorities on domestic relations law. E. BISKIND, BOARDMAN'S NEW YORK FAMILY LAW § 202, at 807 (1964); H. FOSTER & D. FREED, LAW AND THE FAMILY, NEW YORK: DIVORCE, SEPARATION AND ANNULMENT § 7:7 (supp. 1970). *See* Smith v. Smith, 55 Misc. 2d 172, 284 N.Y.S.2d 501 (Sup. Ct. Kings County 1967), *citing* 1966 REPORT OF THE JOINT LEGISLATIVE COMMITTEE OF THE LEGISLATURE 98.

242 Gleason v. Gleason, 26 N.Y.2d 28, 35-36, 256 N.E.2d 513, 517-18, 308 N.Y.S.2d 347, 351-52 (1970), *quoting* Adelman v. Adelman, 58 Misc. 2d 803, 805, 296 N.Y.S.2d 999, 1003 (Sup. Ct. Queens County 1969) and *citing* Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32, 81-87 (1966).

It is most unlikely that the Legislature intended DRL 210 to be a condition precedent to dissolution of a dead marriage. Rather, the section is a statute of limitations which defendant waived in *Figueroa.*[243]

DRL 211: Service of complaint with summons does not void summons.

Service of summons and complaint in a divorce action is governed by DRL 211, under which a complaint cannot be validly served prior to termination of conciliation proceedings.

In *Vander Kamp v. Vander Kamp,*[244] a plaintiff directed service of both summons and complaint upon defendant before termination of conciliation proceedings. The summons lacked the endorsement "Action for a Divorce" required by DRL 232, and service of the complaint before said termination violated DRL 211. After termination, plaintiff served a second copy of the complaint upon defendant. Defendant answered and then moved in the supreme court to dismiss the action, on the ground that service of the complaint with the summons prior to termination invalidated both.[245] The court denied this motion, holding that only service of the complaint was voided under DRL 211.[246] Then it deemed the defective summons amended to include the necessary endorsement, since defendant was fairly advised of the action.[247]

Correction of the formal defect of the complaint by deeming it amended, is clearly appropriate in this case; defendant was not misled by the oversight and dismissal would waste time and money. Similarly, upholding service of the summons is appropriate, for there is no authority to the effect that simultaneous service of summons and complaint vitiates both.

DRL 234: Judgment granting exclusive possession cannot be circumvented by partition under RPAPL 901.

When marriage terminates in divorce, real property previously possessed by the parties as tenants by the entirety automatically becomes realty held by them as tenants in common.[248] This transmutation renders the property amenable to partition. Under section 901 of the RPAPL a tenant in common in possession can obtain partition.

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243 66 Misc. 2d at 117, 320 N.Y.S.2d at 117.

244 65 Misc. 2d 934, 319 N.Y.S.2d 201 (Sup. Ct. Monroe County 1971).

245 *Id.* at 935, 319 N.Y.S.2d at 201.

246 *Id.*

247 *Id.* at 935, 319 N.Y.S.2d at 202, *citing* Apploff v. Apploff, 55 Misc. 2d 781, 287 N.Y.S.2d 486 (Sup. Ct. Kings County 1968).

248 Yax v. Yax, 240 N.Y. 590, 148 N.E. 717 (1925); Stelz v. Schreck, 128 N.Y. 263, 28 N.E. 510 (1891).