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DRL 234: Judgment Granting Exclusive Possession Cannot Be Circumvented by Partition Under RPAPL 901

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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.

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).

Concurrently, in a matrimonial action, a court is empowered under DRL 234 to determine questions concerning title to property and to make appropriate directions concerning possession. This raises an important question: When one party is awarded in a divorce decree exclusive possession of realty previously held by both as tenants by the entirety, is the other party precluded from obtaining partition?

Prior decisions on this point are in conflict. The Supreme Court, Nassau County, held, in *Pechstein v. Pechstein*,²⁴⁹ that an award of exclusive possession does not bar an action for partition.²⁵⁰ In *Ripp v. Ripp*,²⁵¹ however, the same court adopted the contrary view.²⁵²

In *Davies v. Davies*,²⁵³ the Supreme Court, Monroe County, followed the *Ripp* case. The court viewed the property rights of the former husband as subject to the divorce decree, under which the former wife received exclusive possession of the real property which plaintiff sought to partition, and reasoned that allowance of an action for partition would "defeat" that part of the decree which granted exclusive possession to the former wife.²⁵⁴ Hence, it refused to circumvent the decree rendered under DRL 234.²⁵⁵

The decisions in *Davies* and in *Ripp* are consistent with the broad discretionary power conferred upon the courts in DRL 234 and with the literal interpretation of RPAPL 901(1). The latter section permits partition at the instance of a tenant in common in possession. If one former spouse is granted exclusive possession of certain real property, the other cannot be a tenant in common in possession of said property.

NEW YORK CITY CIVIL COURT ACT

CCA 202: Civil court can enforce foreign decree of support.

Under section 466(c) of the Family Court Act, the family court and the supreme court are expressly granted original jurisdiction over actions to enforce or to modify decrees by foreign courts of competent jurisdiction granting support or alimony. There is no mention that this jurisdiction is exclusive, however, so the following issue has been raised: Does section 466(c) deprive the civil court of jurisdiction under CCA 202 to enforce a foreign decree of support?

²⁴⁹ 64 Misc. 2d 969, 316 N.Y.S.2d 4 (Sup. Ct. Nassau County 1970).

²⁵⁰ *Id.* at 970, 316 N.Y.S.2d at 5; see *Rosensteil v. Rosensteil*, 20 App. Div. 2d 71, 78, 245 N.Y.S.2d 395, 402 (1st Dep't 1963).

²⁵¹ 64 Misc. 2d 323, 314 N.Y.S.2d 461 (Sup. Ct. Nassau County 1970).

²⁵² *Id.* at 324-25, 314 N.Y.S.2d at 463.

²⁵³ 65 Misc. 2d 480, 318 N.Y.S.2d 97 (Sup. Ct. Monroe County 1971).

²⁵⁴ *Id.* at 482, 318 N.Y.S.2d at 99.

²⁵⁵ *Id.*