

CPLR 1102: City Is Not Responsible for Costs or Publication in Matrimonial Action

St. John's Law Review

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Recommended Citation

St. John's Law Review (1972) "CPLR 1102: City Is Not Responsible for Costs or Publication in Matrimonial Action," *St. John's Law Review*: Vol. 46 : No. 4 , Article 13.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol46/iss4/13>

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county need not be proper in fact. In *Reliable Displays Corp. v. Maro Industries, Inc.*,⁵⁶ the Supreme Court, Westchester County, rejected this interpretation of the statute.⁵⁷ It held that the county specified by the defendant must also in fact be a proper one. The court added that the only proper place of venue was Queens County, but inasmuch as the defendant made no attempt to transfer the case there, the court declined to so order.⁵⁸

The decision of the court is clearly correct. If a plaintiff chooses an improper venue, the defendant should not be permitted to change the venue to an equally improper county. The defendant's remedy should be limited to transferring the case to a proper county.

ARTICLE 11 — POOR PERSONS

CPLR 1102: City is not responsible for costs of publication in matrimonial action.

The costs involved in civil proceedings can operate as an effective bar to an indigent seeking judicial relief. The Legislature has attempted to meet this problem through the passage of in forma pauperis legislation. These statutes are usually limited in scope. In recent years, however, the courts have expanded the effect of these statutes by construing them liberally and have provided additional protection for the poor by similar construction of the Constitution. The courts have allowed an indigent to proceed with his action on the grounds of due process and equal protection. The costs are usually borne by the public treasury.

While the indigent's right of access to the courts has been definitively acknowledged, less than clear-cut guidelines have been promulgated for the resolution of some of the practical problems which have been created in the process. A recent Appellate Division, First Department, decision underscores this problem. In *Jackson v. Jackson*,⁵⁹ a divorce action, the trial court had "direct[ed] the Treasurer of the City of New York to pay the costs and expenses of service by publication. . . ."⁶⁰ The appellate division reversed, declaring that

[n]o provision of the law has been called to our attention which authorizes the City to make such payment in a matrimonial action in behalf of an indigent plaintiff.⁶¹

Prior to this decision, it had become evident that "the burden of

⁵⁶ 67 Misc. 2d 747, 325 N.Y.S.2d 616 (Sup. Ct. Westchester County 1971).

⁵⁷ *Id.* at 748, 325 N.Y.S.2d at 618.

⁵⁸ *Id.* See 7B MCKINNEY'S CPLR 509, commentary at 42 (1963).

⁵⁹ 37 App. Div. 2d 953, 326 N.Y.S.2d 224 (1st Dep't 1971).

⁶⁰ *Id.* at —, 326 N.Y.S.2d at 225.

⁶¹ *Id.* An argument to the contrary can be made. CPLR 1102(b) provides that:

the required publication expenses [was] being transferred to the public."⁶² *Dorsey v. City of New York*⁶³ and *Jeffreys v. Jeffreys*⁶⁴ clearly indicated so. In both of these cases the court directed the city to pay the cost of publication "because otherwise the plaintiff's right to equal protection [and due process] would be violated."⁶⁵

The United States Supreme Court, in *Boddie v. Connecticut*,⁶⁶ has also considered the problem of publication fees in divorce actions. That Court did not mandate that publication fees should be paid by the state, but rather offered the alternative methods of "service at defendant's last known address by mail and posted notice" if the state failed to arrange for publication.⁶⁷ It must be noted that the court in *Jackson* did not maintain that the indigent plaintiff was not entitled to payment of the publication fees.⁶⁸ It simply contended that if they are to be paid, the state should bear the expense absent legislation to the contrary.⁶⁹

The idea that the state and not the city should bear the costs of publication is an appealing one. The contract of marriage is a tripartite agreement among the husband, the wife and the state. Why then should the local government be required to finance the action for indigents when rescission of this contract is sought? This expense should be borne by the state as the other party to the agreement. Indeed, the mandate of the Supreme Court in *Boddie* was directed to the state.

Lastly, the reimbursement section, CPLR 1102(d), merely states that the city should be reimbursed for any money expended under subdivision (b), which deals with stenographic costs.

A poor person shall not be liable for the payment of any costs or fees unless a recovery by judgment or by settlement is had in his favor. . . . The court's conclusion that this section does not include publication fees is not evident from the language. It could conceivably be construed to include them.

⁶² *The Quarterly Survey*, 46 ST. JOHN'S L. REV. 147, 158 (1971).

⁶³ 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, 158 (1971).

⁶⁴ 58 Misc. 2d 1045, 296 N.Y.S.2d 74 (Sup. Ct. Kings County 1968), discussed in *The Quarterly Survey*, 43 ST. JOHN'S L. REV. 498, 510 (1969). See also *The Quarterly Survey*, 46 ST. JOHN'S L. REV. 147, 158 (1971).

⁶⁵ Note, *Boddie and Beyond: Rights of the Indigent Civil Litigant*, 18 CATH. LAW. NO. 1 (1972).

⁶⁶ 401 U.S. 371 (1971).

⁶⁷ *Id.* at 382; see La France, *Constitutional Law Reform for the Poor: Boddie v. Connecticut*, 1971 DUKE L.J. 487, 532.

⁶⁸ The court noted that CPLR 1102 does not apply to publication fees. This was also the opinion of the court in the *Jeffreys* case, where it was declared that "the poor person's statute (CPLR 1102) does not authorize the payment of the expense of publication." 58 Misc. 2d at 1050, 296 N.Y.S.2d at 81.

⁶⁹ *But see* McCandless v. McCandless, 38 App. Div. 2d 171, 327 N.Y.S.2d 896 (4th Dep't 1972), where the Fourth Department ordered a county to pay the costs of publication and asserted that "the absence of specific provision of law relating to the source of payment of publication costs for indigents does not permit our negating the mandate of *Boddie*." *Id.* at 173, 327 N.Y.S.2d at 898.

The decision in *Jackson* in effect overrules in part the *Dorsey* case.⁷⁰ It does not, however, undermine the basic constitutional argument stated therein.

Scrutiny of the New York service statutes in relation to matrimonial actions indicates possible constitutional deficiencies. CPLR 308 provides for personal service in matrimonial actions; CPLR 315 provides that if personal service cannot be accomplished, service can be made by publication. Should personal service and publication constitute the only available alternatives in this area?

The Supreme Court in *Boddie* envisioned a middle ground. The Court maintained that "service at defendant's last known address by mail and posted notice is equally effective as publication in a newspaper."⁷¹ It is a basic tenet of due process that a "defendant must be given a 'reasonable' form of notice"⁷² and that "publication alone is the weakest form of notice and may not meet constitutional standards. . . ."⁷³ Why then, in a matrimonial action, should a plaintiff unable to effect personal service be forced to bear the expense of publication? It may be argued that CPLR 308 is not constitutionally deficient due to subdivision (5), which gives the court power to allow service in any manner "if service is impractical under [paragraphs] one,"⁷⁴ Nevertheless, it is evident that legislative reconsideration of service in matrimonial actions is necessary.

ARTICLE 12 — INFANTS AND INCOMPETENTS

CPLR 1201: Protecting the adult incompetent.

It has long been held that no judgment may be entered against an infant defendant for whom no guardian ad litem has been appointed.⁷⁵ Clearly, justice requires that this same rule be applied with respect to adult incompetents.⁷⁶ In *Oneida National Bank & Trust*

⁷⁰ The court in *Dorsey* concluded:

Petitioner's poverty justifies a direction that the City of New York must pay for the cost of publication so that she can avail herself of her constitutional right to access to the court.

66 Misc. 2d at 466, 321 N.Y.S.2d at 131.

⁷¹ 401 U.S. at 382.

⁷² 7B MCKINNEY'S CPLR 308, commentary at 213 (1972).

⁷³ 7B MCKINNEY'S CPLR 315, commentary at 329 (1972). See *Schroeder v. City of New York*, 371 U.S. 208 (1962), where it was held that notice by publication and posting prior to a condemnation proceeding was violative of due process. See also *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

⁷⁴ CPLR 308(5).

⁷⁵ See *Ingersoll v. Mangam*, 84 N.Y. 622 (1881); *State Bank of Albany v. Murray*, 27 App. Div. 2d 627, 275 N.Y.S.2d 985 (3d Dep't 1966) (mem.). See also 2 WK&M ¶ 309.01.

⁷⁶ *Oneida Nat'l Bank & Trust Co. v. Unczur*, 37 App. Div. 2d 480, 326 N.Y.S.2d 458 (4th Dep't 1971), citing *Rakiecki v. Ferenc*, 21 App. Div. 2d 741, 250 N.Y.S.2d 102 (4th Dep't 1964) (mem.) (wherein the court's failure to provide a guardian ad litem for the