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Article 14

CPLR 1201: Protecting the Adult Incompetent

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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*

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[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

Co. v. Unczur,[77] the Appellate Division, Fourth Department, held that "where the defendant is an adult incapable of adequately protecting his rights. . . ," sections 1201 and 1203 of the CPLR[78] "are to be read together and interpreted as requiring the appointment of a guardian ad litem . . . before a default judgment may be entered against him."[79]

In *Oneida*, the plaintiff-bank had served the incompetent defendant, a patient at a mental hospital, without complying with the rules and regulations applicable to service of process upon patients so confined.[80] Had these rules been complied with, the court "presumably would have arranged for the appointment of a guardian ad litem . . . [or] would have made inquiry to ascertain her mental condition and ability to protect her own interests."[81] In ordering that the default judgment procured against the defendant be vacated, this court has given notice to all plaintiffs

> who [have] notice that a defendant in his action is under mental disability to bring that fact to the court's attention and permit the court to determine whether a guardian ad litem should be appointed to protect such defendant's interests.[82]

In so holding, this court has placed plaintiffs on notice that a failure to so comply will result in vacatur of their judgments if it is shown that guardians ad litem should indeed have been appointed for their adversaries.

ARTICLE 23 — SUBPOENAS, OATHS AND AFFIRMATIONS

CPLR 2303: Payment of required fees to subpoenaed witness must be made at a reasonable time prior to the return date of the subpoena.

Like its predecessor,[83] CPLR 2303[84] provides that subpoenaed witnesses be provided with traveling expenses and one day's witness fees.[85]

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incompetent defendant required the reversal of a judgment against him).

77 37 App. Div. 2d 480, 326 N.Y.S.2d 458 (4th Dep't 1971).

78 CPLR 1201 provides in pertinent part that

> [a] person shall appear by his guardian ad litem . . . if he is an adult incapable of adequately protecting or defending his rights.

CPLR 1203 similarly provides that

> [n]o default judgment may be entered against an adult incapable of adequately protecting his rights for whom a guardian ad litem has been appointed unless twenty days have expired since the appointment.

79 37 App. Div. 2d at 483, 326 N.Y.S.2d at 461.

80 14 N.Y.C.R.R. § 22.1 provides that service of process on patients in mental hospitals shall not be permitted without an order of a judge of a court of record.

81 37 App. Div. 2d at 483, 326 N.Y.S.2d at 461.

82 *Id.* at 484, 326 N.Y.S.2d at 461-62.

83 *See* CPA §§ 404, 783(3).

84 *See* 2A WK&M ¶ 2303.01.

85 The travel fee is eight cents for each mile in both directions. In addition, a fee of two dollars per day for each day of attendance is also required. CPLR 2303. However,