

# CPLR 1102(d): Payment of Publication Expenses Arising from Indigent's Divorce Action Required by Equal Protection Clause

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able time, the action may be dismissed as to the party for whom substitution should have been made."

In *De Rijdt v. Robert Straile Co.*,<sup>10</sup> the defendant moved for dismissal for failure to substitute the plaintiff's executor or administrator in his stead, contending that the two years which had elapsed since the plaintiff's death was an unreasonable length of time. The court, in concluding that the determination of "reasonable time" is a matter properly left to its discretion,<sup>11</sup> held:

A dismissal against a deceased plaintiff under CPLR 1021, *if at all permissible*, should be saved for a situation in which the court has before it the decedent's side as well as his adversary's and where the court can factually determine that the delay in substitution has indeed been unreasonable.<sup>12</sup>

In so holding, the court dismissed the defendant's motion without prejudice to reintroduce it upon the appearance of the decedent's representative to provide the factual setting.

The court, in delineating the sinews of discretion in *De Rijdt*, avoided the jurisdictional problem in a situation where there exists no one upon whom to serve notice of the motion. Furthermore, the court avoided the necessity of declaring an exception under CPLR 5016(d), viz., "no verdict or decision shall be rendered against a deceased party."

#### ARTICLE 11 — POOR PERSONS

*CPLR 1102(d): Payment of publication expenses arising from indigent's divorce action required by equal protection clause.*

In *Jeffreys v. Jeffreys*,<sup>13</sup> the court held that CPLR 1102(d), which provides in part that "a poor person shall not be liable for the payment of any costs and fees," does not afford relief from the expense of service of summons by publication, but that the plaintiff had been denied the equal protection of the law guaranteed by the state and Federal Constitutions.

The conclusion reached by the court in *Jeffreys* resulted from a reappraisal of an earlier determination, wherein the court, upon consent of the City, entered an order directing that the expense of publication be paid by the City.<sup>14</sup> On relitigation, however, the court decided

<sup>10</sup> 58 Misc. 2d 543, 296 N.Y.S.2d 601 (Sup. Ct. Queens County 1968).

<sup>11</sup> See generally 5 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶¶ 1021.09-10 (1968).

<sup>12</sup> 58 Misc. 2d at 547, 296 N.Y.S.2d at 605.

<sup>13</sup> 58 Misc. 2d 1045, 296 N.Y.S.2d 74 (Sup. Ct. Kings County 1968).

<sup>14</sup> 57 Misc. 2d 416, 292 N.Y.S.2d 767 (Sup. Ct. Kings County 1968). See also *The Quarterly Survey of New York Practice*, 43 ST. JOHN'S L. REV. 498, 510 (1969).

that the expense of publication, an "auxiliary expense" (*i.e.*, payable by litigants to third persons other than public officers) was not contemplated by New York's comprehensive poor persons statutes.

In asserting that equal access to the civil courts was among the fourteenth amendment's primary objectives, the court asserted that the principles enunciated in *Griffin v. Illinois*<sup>15</sup> have equal validity in civil cases:

[B]ecause the establishment of civil courts for enforcing claims and vindicating legal rights is so fundamental, the State cannot close the system to any person because of poverty.<sup>16</sup>

In Mrs. Jeffreys' situation, her very access to the courts for divorce upon the grounds of abandonment was predicated upon her service of summons by publication. Furthermore, since a marriage cannot be dissolved except by "due judicial proceeding,"<sup>17</sup> the courts provided the only forum wherein relief might be obtained. The court therefore required that the City of New York pay her publication costs so as to afford her the access to the courts demanded by equal protection.

Consistent with its earlier opinion, the court indicated that applications for leave to serve a summons by publication under the poor persons statutes must be made by notice to the City Treasurer within New York City, and to the County Attorney outside the City.<sup>18</sup>

#### ARTICLE 31 — DISCLOSURE

*CPLR 3101(d): Identity of witnesses learned subsequent to happening of occurrence held to be material prepared for litigation.*

In *Hartley v. Ring*,<sup>19</sup> the court took a major step in effectuating the policy set forth in *Allen v. Crowell-Collier Publishing Co.*<sup>20</sup> by enunciating the following rule:

A party should disclose upon an examination before trial the names of all witnesses observed by the party to be present at the scene of the occurrence out of which the lawsuit arose or whose identity was supplied to the party at the said scene.<sup>21</sup>

<sup>15</sup> 351 U.S. 12 (1956). *Griffin*, after conviction, sought but was denied a free transcript essential to access to the appellate courts. "Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." *Id.* at 19.

<sup>16</sup> 58 Misc. 2d at 1053, 296 N.Y.S.2d at 87.

<sup>17</sup> N.Y. CONST. art. I, § 9 (1954).

<sup>18</sup> See *Jeffreys v. Jeffreys*, 57 Misc. 2d 416, 292 N.Y.S.2d 767 (Sup. Ct. Kings County 1968).

<sup>19</sup> 58 Misc. 2d 618, 296 N.Y.S.2d 394 (Sup. Ct. Queens County 1969).

<sup>20</sup> 21 N.Y.2d 403, 235 N.E.2d 430, 288 N.Y.S.2d 449 (1968). See also *The Quarterly Survey of New York Practice*, 43 ST. JOHN'S L. REV. 302, 324-25 (1968).

<sup>21</sup> 58 Misc. 2d at 623, 296 N.Y.S.2d at 399.