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DRL § 211: Conflict Over Applications for Temporary Alimony Continues

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court immediately recognized that the legal services rendered were necessaries performed on the infant's behalf since a habeas corpus proceeding of this nature is a determination solely for the child's best interests and welfare. Furthermore, the court held that DRL sections 237 and 240 did not provide the exclusive remedy for recovery of the costs of necessaries. DRL section 81 provides support for the proposition that a mother may be liable for a child's necessaries in the same manner a father is. Other factors peculiar to this case also necessitated this result: the father earned little more than $5,000 per year as a barber; the mother, however, received investment income in excess of $12,000 per year and stood to receive more if Mr. Manville's will was admitted to probate; the separation agreement evidenced a recognition on the mother's part that she, rather than her ex-husband, was liable for most of the child's support, and the plaintiff had relied upon this when he consented to represent the child in the habeas corpus proceeding.

Although the plaintiff would normally have been entitled to recover from both parents, his judgment was limited to the mother since she was the only one he had served in the action. Nevertheless, the mother was entitled to contribution of five-seventeenths of the judgment from her ex-husband, an amount determined by the ratio of his annual income to the annual income of both parents.

With this decision the court has arrived at an equitable solution to a unique set of circumstances for which the legislature purposefully chose not to provide.[233]

DRL § 211: Conflict over applications for temporary alimony continues.

The "cooling-off" statute of the DRL, section 211, has permitted plaintiffs to serve a petition to the court for temporary alimony and counsel fees in conjunction with a summons since 1968. This seemingly innocuous provision has generated some sharp conflict among the lower courts in the state. Since DRL section 215-e permits a party to a conciliation proceeding to apply directly to the conciliation commissioner for temporary alimony, the courts have divided on the question of which section should normally be controlling. In short, if a court

[233] 1961 N.Y. LEG. DOC. No. 19 at 83-84:

While the bill treats primarily of wives and their rights against husbands for the awards described, it is also of moment what should be done with reference to the husband who is without funds or support or who appears better qualified to care for children, particularly in those cases where there is a wide disparity in personal wealth in favor of the wife. For the time, however, if we consider that wives still are considered the natural custodian of minor children, particularly girls, there is virtue in the presently proposed bill.

receives such an application, should it refer it to the assigned conciliation commissioner?

In *Marrison v. Marrison*,[234] the Supreme Court, Queens County, held that applications for temporary alimony and counsel fees should be made to the court even though conciliation proceedings are pending. In *Krakower v. Krakower*,[235] however, the Supreme Court, New York County, held that such applications must properly be made to the conciliation commissioner.

The Supreme Court, Onondaga County, in *Loccke v. Loccke*,[236] offers the most recent pronouncement on the dispute. Adopting the *Marrison* view, and in reliance upon the wording of section 211, the court denied plaintiff's motion for temporary alimony and counsel fees instead of referring the case to a commissioner for determination. Although the two courts have now independently reached the same determination, it appears that *Krakower* suggests the more favorable procedure.

Before section 211 was amended, it was held that petitions of this nature should only be made to the conciliation commissioner.[237] The theory supporting this procedure under present law suggests that to do otherwise would subject any chance of reconciliation to an increased risk of failure because the hearing on the motion is conducted in an adversary setting.[238] Furthermore, the history of DRL article 11-B (the 1967 Conciliation Bureau provisions) indicates that the legislature believed the courts would and should encourage the parties to petition the conciliation commissioner in these instances.[239]

As suggested previously,[240] it appears that the express procedure set forth by DRL section 215-e was not meant to be affected by the 1968 amendment to DRL section 211 since the latter merely permits a party to serve a petition for temporary alimony and counsel fees with a summons and complaint, and the former expressly provides that "[s]uch application *shall* be made to the conciliation commissioner. . . ." In view of the continuing conflict over the correct pro-

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[234] 160 N.Y.L.J. 18, Sept. 17, 1968, at 18, col. 8 (Sup. Ct. Queens County).

[235] 58 Misc. 2d 345, 295 N.Y.S.2d 298 (Sup. Ct. N.Y. County 1968).

[236] 60 Misc. 2d 281, 302 N.Y.S.2d 699 (Sup. Ct. Onondaga County 1969).

[237] Capitella v. Capitella, 55 Misc. 2d 632, 286 N.Y.S.2d 75 (Sup. Ct. Kings County 1968).

[238] *See* Krakower v. Krakower, 58 Misc. 2d 345, 295 N.Y.S.2d 298 (Sup. Ct. N.Y. County 1968).

[239] *Cf.* Tortorice v. Tortorice, 55 Misc. 2d 649, 650, 286 N.Y.S.2d 198, 200 (Sup. Ct. Kings County 1968); N.Y. Sess. Laws 1968, Leg. Mem. at 2309.

[240] *See The Quarterly Survey*, 43 ST. JOHN'S L. REV. 686, 707 (1969).

cedure, however, an authoritative appellate decision to this effect is necessary.

NEW YORK CITY CIVIL COURT ACT

CCA § 1804: "Substantial justice" in small-claims case.

CCA section 1804 directs the court to

> [c]onduct hearings upon small claims in such manner as to do substantial justice between the parties according to rules of substantive law and shall not be bound by statutory provisions or rules of practice, procedure, pleading or evidence. . . .[241]

Bierman v. City of New York[242] demonstrates the usefulness and practicality of this section. The plaintiff's basement had been damaged when a water main ruptured in front of her home. She filed a claim for the property damage against the city who denied any liability for the damage. Moreover, the city informed her that since Consolidated Edison had been working on the main her claim should properly be brought against them. Plaintiff thereupon sued both the city and Consolidated Edison for $300, the maximum judgment obtainable in a small-claims action.[243] Upon the conclusion of plaintiff's case, both defendants moved to dismiss the complaint on the ground she had failed to produce any evidence of negligence.

Judge Younger, referring to the previously mentioned section 1804, indicated that small-claims proceedings were intended to accomplish substantial justice between the parties according to the rules of substantive law. However, he expressed the view that in small-claims cases the greater emphasis must be placed upon an effort to do substantial justice as opposed to an attempt to comply with substantive law. It would not be economically feasible for one in the plaintiff's position to bear the burden of proving negligence on the defendants' part in an action seeking so small a judgment. Accordingly, Judge Younger concluded that the plaintiff need not shoulder that burden; substantial justice here required application of a rule of strict liability.

The result in small-claims cases such as *Bierman* is fair and equitable. The defendants, by virtue of their control, have the knowledge and ability to safeguard against occurrences of this nature. If that is impossible they may recoup any losses incurred in the manner suggested

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241 CCA § 1804.
242 60 Misc. 2d 497, 302 N.Y.S.2d 696 (N.Y.C. Civ. Ct. N.Y. County 1969).
243 CCA § 1801.