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CPLR 309(a): Judicial Power to Appoint a Guardian Ad Litem

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The Court, however, conceded that under the proper conditions a redelivery might be sustained. It distinguished from the instant case, situations where the process server acted reasonably, and with due diligence, by placing the summons within the recalcitrant defendant's grasp or within his general vicinity.[17] The Court also indicated that cases upholding redelivery where it was so close in time and space to the original delivery as to constitute one act could still be sustained.[18]

The most doubtful cases were deemed to be those where delivery is made to an improper person under a reasonable belief that he is the proper person, and the proper person eventually receives the summons.[19] The Court indicated that it regards due diligence on the part of the process server to fulfill the statutory mandate as the most important factor in sustaining or striking down a redelivery case. Such an approach is realistic and at the same time discourages sloppy service.

CPLR 309(a): Judicial power to appoint a guardian ad litem.

In a recent case, *Soto v. Soto*,[20] the appointment of a guardian ad litem was vacated by the appellate division, first department, since that appointment had been made prior to obtaining jurisdiction over the infant defendant. However, in *Matter of Beyer*,[21] a special proceeding under Article 77, the same court has held that the power to appoint a guardian ad litem exists, upon application by the proper parties, when a proposed order to show cause initiating a special proceeding is submitted to the court. This apparent contradiction, may perhaps be clarified by contrasting the prerequisites under the CPLR for the exercise of judicial power in an action and the prerequisites in a special proceeding.

CPLR 304 states that "[a]n action is commenced and jurisdiction acquired by service of summons. A special proceeding is commenced and jurisdiction acquired by service of a notice of petition or order to show cause." In the instant case, therefore, the court merely reasserted the necessity of proper service of a summons as the primary step before the exercise

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[17] *See, e.g.*, Buscher v. Ehrich, 12 App. Div. 2d 887, 209 N.Y.S.2d 941 (4th Dep't 1961); Chernick v. Rodriguez, 2 Misc. 2d 891, 150 N.Y.S.2d 149 (Sup. Ct. Kings County 1956).

[18] *See* Green v. Morningside Heights Housing Corp., 13 Misc. 2d 124, 177 N.Y.S.2d 760, *aff'd mem.*, 7 App. Div. 2d 708, 180 N.Y.S.2d 104 (1st Dep't 1958).

[19] *See* Marcy v. Woodin, 18 App. Div. 2d 944, 237 N.Y.S.2d 402 (3d Dep't 1963). For a general discussion see 7B McKINNEY'S CPLR 308 supp. commentary 174 (1964).

[20] 30 App. Div. 2d 651, 291 N.Y.S.2d 37 (1st Dep't 1968).

[21] 21 App. Div. 2d 152, 249 N.Y.S.2d 320 (1st Dep't 1964).

of judicial power. Since this is the only method of commencing an action under the CPLR, the case was accordingly remanded to special term for proceedings to complete service on the infant in accordance with CPLR 309.[22]

In *Matter of Beyer*, the appointment of a guardian ad litem was made in conjunction with a show cause order.[23] The issue to which the supreme court addressed itself was:

> the power of the court to designate or require the designation of a guardian ad litem in an order to show cause prior to the service thereof.[24]

On review, the appellate division responded that indeed "the court possesses the express discretionary power to appoint, in the first instance, a guardian in an order to show cause. . . ." [25]

The language of CPLR 403(d) clearly allows judicial discretion in a special proceeding that could not be countenanced in an action where there is a strict requirement of service of process. This discretionary leeway permitted in a show cause order appears to offer a palatable reconciliation of the ostensible conflict between the instant case and *Matter of Beyer*.[26]

ARTICLE 6 — JOINDER OF CLAIMS, CONSOLIDATION AND SEVERANCE

CPLR 602: Place where motion for joint trial or consolidation is made.

Barch v. Avco,[27] one of four wrongful death actions arising out of the same airplane crash, was commenced in New York County, while the other three were commenced in Onondaga County. Defendant moved in Onondaga County for a joint trial

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[22] "As in any proceeding, jurisdiction must be established before the court can act. It is sound principle to hold that a court cannot appoint a guardian ad litem for an infant until it acquires jurisdiction over that infant. . . ." 1 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶309.04 (1964).

[23] CPLR 403(d) provides that "[t]he court may grant an order to show cause to be served, in lieu of a notice of petition at a time and in a manner specified therein."

[24] *In re* Beyer, 42 Misc. 2d 113, 247 N.Y.S.2d 358, 359 (Sup. Ct. N.Y. County 1964).

[25] *In re* Beyer, 21 App. Div. 2d 152, 249 N.Y.S.2d 320, 322 (1st Dep't 1964).

[26] "Although the court did not mention the cases holding that a court cannot appoint a guardian ad litem until it has acquired jurisdiction over the person of the ward, its decision and reasoning seem to preclude the invocation of those cases as an obstacle to the use of the procedure outlined by the court in this type of case under the CPLR." 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶1202.02 (1964).

[27] ..... App. Div. 2d ....., 291 N.Y.S.2d 422 (4th Dep't 1968).