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CPLR 308(4): Court of Appeals Establishes Guidelines for Substituted Service

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as authority. However, the *Willis* holding, that a separation agreement is not sufficiently commercial in nature to constitute the transaction of business, has been seriously undermined by subsequent cases.[20] In addition, New York judgments jurisdictionally based upon separation agreements which were construed to be the transaction of business under 302 have been given full faith and credit in both Maryland[21] and Massachusetts.[22]

Although a separation agreement is arguably not a "commercial transaction," there are normally extensive provisions for division of property, apportionment of income, and the erection of tax structure, which are the result of commercial-like bargaining between the parties. Such arrangements do not affect the marital status and are primarily financial. If there were a separation agreement involved here, or if the court's decision was influenced by the *Willis* "non-transaction" viewpoint, this case might be rethought in view of the more recent cases that have stressed the commercial earmarks of such agreements and held them to be sufficient transactions of business to trigger 302(a)(1). However, if the action was based upon the marital res alone, 302 is inapplicable and the statement as to separation agreements should be regarded as dictum.

CPLR 308(4): Court of Appeals establishes guidelines for substituted service.

After past doubt as to what methods of substituted service will be satisfactory[23] under CPLR 308(4), the Court of Appeals has recently provided three cases which can safely serve as a basis for fashioning court-ordered service.

Dobkin v. Chapman, Sellars v. Raye and *Keller v. Rappoport*[24]

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[20] Kochenthal v. Kochenthal, 52 Misc. 2d 437, 275 N.Y.S.2d 951 (Sup. Ct. Nassau County 1966); Todd v. Todd, 51 Misc. 2d 94, 272 N.Y.S.2d 455 (Sup. Ct. Nassau County 1966) (dictum).

[21] Van Wagenberg v. Van Wagenberg, 241 Md. 154, 215 A.2d 812, *cert. denied*, 385 U.S. 833 (1966).

[22] Spitz v. Spitz, 22 Mass. App. Dec. (16 Legalite 278) 195 (1966).

[23] *See, e.g.*, Sellars v. Raye, 25 App. Div. 2d 757, 269 N.Y.S.2d 7 (2d Dep't 1966); Dobkin v. Chapman, 25 App. Div. 2d 745, 269 N.Y.S.2d 49 (2d Dep't 1966); Deredito v. Winn, 23 App. Div. 2d 849, 259 N.Y.S.2d 200 (2d Dep't 1965); Winterstein v. Pollard, 50 Misc. 2d 354, 270 N.Y.S.2d 525 (Sup. Ct. Nassau County 1966). *See generally The Quarterly Survey of New York Practice*, 42 ST. JOHN'S L. REV. 283, 289 (1967); *The Quarterly Survey of New York Practice*, 41 ST. JOHN'S L. REV. 642, 648-49 (1967); *The Quarterly Survey of New York Practice*, 41 ST. JOHN'S L. REV. 463, 475-76 (1967); *The Quarterly Survey of New York Practice*, 41 ST. JOHN'S L. REV. 279, 296-98 (1966); *A Biannual Survey of New York Practice*, 40 ST. JOHN'S L. REV. 122, 140-42 (1965).

[24] Dobkin v. Chapman, 21 N.Y.2d 490, 236 N.E.2d 451, 289 N.Y.S.2d 161 (1968). The three cases were consolidated for argument before the Court of Appeals.

were actions for personal injuries resulting from automobile accidents in New York. In *Dobkin*, after various attempts to secure service failed, the court ordered that ordinary mail could be used to serve a summons at the address received from the defendants at the scene of the accident. Service was upheld in spite of two strong indications that the defendants no longer lived at the address, that is, certified and registered mail was returned by the Post Office and the Sheriff in the county was unable to locate the defendants.

Sellars and *Keller* evidenced similar indications that the defendants could not be found at the address available to the plaintiffs. In *Sellars* the court ruled that the steps already taken to secure service under the Vehicle and Traffic Law, which had not produced the required proof of delivery, would be sufficient under 308(4), if the summons and order were published in a designated newspaper in the defendant's locale. In *Keller* the court ordered service to be made by mailing a summons and complaint to the defendant's last known address in New York and by delivering a copy of the same to his insurance carrier, recognizing it as the real party in interest.

The Court of Appeals in affirming the cases developed one rationale suitable to support all three. It was noted that subsections 1 to 3 of CPLR 308 were precise directives of the method to be used to obtain personal service, and that sub-section 4 by its wording was meant to cover situations in which the other more exact procedures could not apply. In implementing sub-section 4 the Court found no limitation on its discretion either as a result of the actual language of the statute, which reads without limitations, or from an examination of the legislative history of the section.

The report of the legislative committees [25] indicates that subsection 3, with its specific provisions, was "calculated to insure that actual notice is given to the defendant." However, when this cannot be achieved the court may provide a procedure under subsection 4. The aim of the entire revision of article 3 was "[t]o make it possible . . . to take full advantage of the state's constitutional power over persons and things." [26] From this statutory review the Court concluded that service might occasionally fail to bring actual notice to the defendant, but that the only limitation which necessarily had to control a court-ordered service was the constitutional limit of due process. This requires not actual notice but a *sufficient opportunity* to receive actual notice.

Due process must represent a realistic appraisal of the right of the defendant as well as the right of the plaintiff. The Court recognized that, in certain cases, "even a probably futile means

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[25] FIFTH REP. 266.
[26] SECOND REP. 37.

of notification is all that the situation permits."[27] The primary justification for upholding such "futile" service comes from an examination of the defendant's duties following an accident, and from an examination of the feasible methods for locating the defendant that are left open to the plaintiff.

The Court of Appeals felt that anyone involved in a serious automobile accident is aware that he may be involved in a suit. He, therefore, as a potential defendant, has a duty to keep his whereabouts known by contacting either the other parties involved, his insurance company, or the post office. In concluding, the Court also pointed out how the interplay of CPLR 317 with CPLR 308 may prevent any harsh results by allowing a defendant, who was not personally served, and who did not appear, to be relieved of a default judgment within the proper time and under the proper circumstances.

CPLR 308(4): Designee faced with procedural dilemma.

In *Cosby v. Moyant*,[28] the defendants' attorney was designated to receive process on defendants' behalf, pursuant to court order under CPLR 308(4).[29] The attorney attempted to make a special appearance to object to the designation on the grounds that he was not representing the defendants in the matter in issue.

The Court held, however, that since the enactment of CPLR 320(b) the procedure of making a special appearance to contest jurisdiction has been abandoned[30] and that such challenges can now be asserted only by motion or in a responsive pleading.

It is submitted that, where the court has deemed it appropriate to serve a summons through a designee, that individual should have a simple procedure to challenge whether or not he is in fact a proper designee. There is at present no procedure set forth in the CPLR for such a challenge and the designee is thus faced with a dilemma. He might be left in a position of potential liability to the defendant for not redelivering the service, yet, he might be totally unaware of who the defendant is or how to locate him. Furthermore, if the designee must appear either by motion or by a responsive pleading of the defendant, it must be assumed that the party served is not only the proper designee for service but that he has authority to appear for the defendant. This authority

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[27] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 317 (1950).

[28] 55 Misc. 2d 393, 285 N.Y.S.2d 980 (Sup. Ct. N.Y. County 1967).

[29] Service has been allowed upon someone other than the defendant when it is shown that his relationship to the defendant is such that it is reasonably probable that the defendant will become aware of the action. *See* 7B McKINNEY'S CPLR 308(4), supp. commentary 132 (1966).

[30] *See* 7B McKINNEY'S CPLR 320, commentary 577-78 (1963).