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Article 15

N.Y. Const., Art. VI, § 7(c): Court of Appeals Clarifies Breadth of Supreme Courts' Jurisdiction

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the court cannot confer; only the defendant can authorize another to appear in his behalf.

CPLR 316: Mailing requirement interpreted.

In *Gross v. Gross*,[31] a divorce action, plaintiff-wife sought support and maintenance. Unable to effectuate personal service, she was granted an order to serve defendant by publication pursuant to the procedures of CPLR 316. The court first concluded that it was proper to assert in personam jurisdiction over the defendant as a resident of New York since the parties were married here and made their residence here. Although the defendant could not be found, no evidence was submitted that he was a non-resident and thus, a presumption of his residence continued.[32] The court then met a challenge that due process had not been fulfilled by substituted service, concluding that publication afforded defendant reasonable notice and a fair opportunity to be heard.[33]

This case may provide one of the few interpretations of 316's mailing requirement. Under 316, where service is by publication in a matrimonial action, a copy of the summons must be mailed to the defendant. The standard by which such a mailing's effectiveness is to be judged can possibly be gleaned from the provision under which such mailing may be dispensed with by the court. The section states that such mailing must be made "unless a place where such person *probably would* receive mail cannot with due diligence be ascertained." [34] This would seem to suggest that such mailing as establishes a probability that it will reach the defendant is sufficient. Here, the mailing of the summons to the husband in care of his father was held to be satisfactory.

N.Y. Const. art. VI, § 7(c): Court of Appeals clarifies breadth of supreme court's jurisdiction.

As a court of general original jurisdiction, the supreme court, in the past, has been held to have subject matter jurisdiction over all common-law actions [35] and all statutorily-established actions unless the Legislature in creating the latter specifically negatives this result.[36] The 1962 amendment to section 7 of the judiciary article of the New York Constitution has prompted recent review of the

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[31] 56 Misc. 2d 286, 288 N.Y.S.2d 674 (Sup. Ct. King's County 1968).
[32] Harris v. Harris, 83 App. Div. 123, 82 N.Y.S. 568 (2d Dep't 1903).
[33] McDonald v. Mabee, 243 U.S. 90 (1917); Rawstorne v. Maguire, 265 N.Y. 204, 192 N.E. 294 (1934).
[34] CPLR 316(b) (emphasis added).
[35] *In re* Steinway, 159 N.Y. 250, 255-58, 53 N.E. 1103, 1104-05 (1899).
[36] Thrasher v. United States Liab. Ins. Co., 19 N.Y.2d 159, 166, 225 N.E.2d 503, 506, 278 N.Y.S.2d 793, 798 (1967).

breadth of the supreme court's jurisdiction. The amendment provides, in pertinent part,

> [i]f the legislature shall create *new classes* of actions and proceedings, the supreme court shall have jurisdiction over such classes of actions and proceedings, but the legislature may provide that another court or courts shall also have jurisdiction and that actions and proceedings of such classes may be originated in such other court or courts.[37]

The first opportunity to construe the amended section 7 came in *Seitz v. Drogheo*,[38] with an attack on the constitutionality of a new legislatively created action, namely, the modification and enforcement of support provisions of foreign decrees of divorce, whether or not based on grounds for divorce recognized by New York.[39] The Court upheld the constitutionality of this cause of action, holding that section 7 authorized its creation and permitted the family court to grant such support, provided concurrent jurisdiction was given to the supreme court.

Since this form of proceeding was created in 1965, it would have been sufficient here for the Court to construe the constitutional provision to apply to any proceeding established after 1962, the date of the amendment to the judiciary article. But, the Court went further in its rationale, and stated that section 7 referred to all forms of action unknown to the common law.

In a second case, *Kagen v. Kagen*,[40] this sweeping statement was applied to a form of proceeding created long before the amendment to section 7, namely, an action for support brought independently of any marital action. In a four-to-three decision the Court held that the supreme court had jurisdiction over any statutorily-created form of action.

The Court recognized that this interpretation was not the only possible reading of the amendment, but based its decision on the concept that the supreme court's original jurisdiction should be unlimited.[41] A single exception was carefully noted: the exclusive jurisdiction of the Court of Claims over suits against New York State. This distinction was drawn because the exclusive jurisdiction of that court is based not on the form of actions it handles, but rather on the limits the state has imposed on its waiver of immunity.[42]

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[37] N.Y. CONST. art. VI, § 7(b) (emphasis added).

[38] 21 N.Y.2d 181, 234 N.E.2d 209, 287 N.Y.S.2d 29 (1967).

[39] N.Y. DOM. REL. LAW § 466. The attack was based on the lack of specific authority for this type of action in the constitutional provision for the family court, N.Y. CONST. art. VI, § 13(c).

[40] 21 N.Y.2d 532, 236 N.E.2d 475, 289 N.Y.S.2d 195 (1968).

[41] De Hart v. Hatch, 3 Hun 375 (1st Dep't 1875).

[42] The Court depended for this distinction on People *ex rel.* Swift v. Luce, 204 N.Y. 478, 97 N.E. 850 (1912). This case is dubious authority

The dissent, speaking through Judge Jasen, warned of the danger of forum-shopping, which the majority had found unlikely because of the eased transfer provisions of the amended judiciary article.[43] Another point emphasized by the minority was that the majority's interpretation usurped the Legislature's function to decide whether or not to deprive specialized courts of their exclusive jurisdiction.

N.Y. Const. art. VI, § 19(a): Consent of parties not needed to effect transfer to lower court.

The possibility of transfer of an action to a court with lower monetary jurisdiction is a valuable factor in discouraging plaintiffs from overstating their claims for damages, CPLR 325(c) provides for removal on consent to a court of limited jurisdiction.

> Where it appears that the amount of damages sustained are less than demanded, and a lower court would have had jurisdiction of the action but for the amount of damages demanded, the court in which an action is pending may remove it to the lower court upon reduction of the amount of damages demanded to a sum within the jurisdictional limits of the lower court and upon consent of all parties to the action other than a defendant who has interposed no counterclaim and over whom the lower court would have had jurisdiction if the action had originally been commenced there. . . .

However, section 19(a) of the amended judiciary article of the New York Constitution makes no mention of either the requirement of showing excessive damages claimed, or the method of transfer by consent of parties. The only requirement of the constitutional transfer provision is that the lower court have "jurisdiction over the classes of persons named as parties." [44] A recent case, *Hesse v. Hrubsa*,[45] discussed the question raised by the second change, *i.e.*, whether consent of the parties remains a valid method of obtaining transfer.

Two transfers were involved—one from the supreme court to the county court, and one from the county court to the district court. The defendant, a non-resident of Suffolk County, had been served outside of that county, preventing either the county or district court from taking jurisdiction.[46] However, when the transfers were actually made, the defendant appeared without protest and

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for such a distinction since it is based on the premise that the Legislature cannot withdraw any form of action, even if statutorily created, from the jurisdiction of the supreme court.

[43] N.Y. CONST. art. VI, § 19.

[44] N.Y. CONST. art. VI, § 19(a).

[45] 55 Misc. 2d 610, 286 N.Y.S.2d 183 (Dist. Ct. Suffolk County 1968).

[46] N.Y. JUDICIARY LAW § 190(3).