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CPLR 302(a)(1): Section Held Applicable to Non-Commercial Transactions of Business

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this possibility occurs only when the law of another state is unsettled, the practitioner is advised to refrain from bringing suit in New York until the issues of retroactivity and tolling are resolved in a foreign suit.

ARTICLE 3 — JURISDICTION AND SERVICE, APPEARANCE AND CHOICE OF COURT

CPLR 302(a)(1): Section held applicable to non-commercial transactions of business.

A distinct conflict has developed as to whether the transaction of business of a non-commercial character lies within the ambit of CPLR 302(a)(1). In *Willis v. Willis*,[8] the supreme court, New York County, held that as a matter of legislative intent the execution of a separation agreement in New York did not confer jurisdiction on the courts of this state under CPLR 302(a)(1). The court construed the word "business" in the statute to apply solely to "commercial" transactions.

The supreme court, Nassau County, has not acceded to this view of the statute. In *Todd v. Todd*,[9] the court, while holding service under CPLR 308 invalid, indicated by way of dictum that "there may well be a basis for maintaining the action in New York, for the separation agreement was apparently entered into in New York. . . ." [10] In a more recent case, *Kochenthal v. Kochenthal*,[11] the court directly confronted this issue and refused to adhere to the *Willis* decision. The court stated that it did "not hold to the belief that the statute . . . must be so narrowly construed as to be applicable only to pecuniary transactions of a commercial nature." [12]

The court in *Kochenthal* attempted to distinguish *Willis* on the basis of the fact that the defendant in *Kochenthal* was a resident of New York at the time of the execution and negotiation of the agreement and had subsequently left the state, whereas *Willis*

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[8] 42 Misc. 2d 473, 248 N.Y.S.2d 260 (Sup. Ct. N.Y. County 1964).

[9] 51 Misc. 2d 94, 272 N.Y.S.2d 455 (Sup. Ct. Nassau County 1966). See also *The Quarterly Survey of New York Practice*, 41 ST. JOHN'S L. REV. 644, 646 (1967).

[10] Todd v. Todd, 51 Misc. 2d 94, 96, 272 N.Y.S.2d 455, 456 (Sup. Ct. Nassau County 1966). The supreme court, Monroe County, while dismissing a suit based on a separation agreement for failure to state a cause of action, has also stated in dictum that it is not convinced of the validity of the *Willis* decision. Raschitore v. Fountain, 52 Misc. 2d 402, 275 N.Y.S.2d 709 (Sup. Ct. Monroe County 1966).

[11] 52 Misc. 2d 437, 275 N.Y.S.2d 951 (Sup. Ct. Nassau County 1966).

[12] *Id.* at 441, 275 N.Y.S.2d at 954.

involved a defendant who was a nonresident at the time of execution. It then proceeded to enumerate certain factual circumstances which tended to indicate a sufficient contact with the state to support the assumption of jurisdiction.[13] However, the issue in *Kochenthal* was not whether there were sufficient contacts to constitutionally support jurisdiction, but whether CPLR 302(a)(1) authorized the assumption of jurisdiction by the courts in cases involving non-commercial transactions of business.

It would seem that, absent a clear declaration of legislative intent, there is little reason to assume that the word "business" in the statute was meant to preclude non-commercial transactions. Substantial negotiations, both financial and otherwise, culminating in a separation agreement would appear to be transactions of business within the scope of 302(a)(1).

CPLR 308(3): Interpretation of "usual place of abode."

In *Rich Prods. Corp. v. Diamond,*[14] service of process was made pursuant to CPLR 308(3) by mailing a copy of the summons, with return receipt requested, and affixing a copy to the main entrance of defendant's residence in Buffalo, New York. Defendant moved to vacate service on the ground that he had changed his domicile to the state of Michigan two days prior to the first attempt at service, and had not been physically present in New York since that date. The supreme court, Erie County, held that the defendant had failed to meet his burden of proof on the issue of change of domicile as he had not shown that the out-of-state facilities he had rented were "complete, adequate, furnished or occupied by him." [15]

Defendant relied principally on the fact that he had rented an apartment on a one-year lease in Michigan which he intended to make his home; that he had filed a certificate of incorporation in Michigan; and that he had registered his automobile in that state. In the face of these allegations, plaintiff's affidavit noted that defendant was a registered voter in Erie County; that he was the owner of record of a residence in New York worth approximately $56,000 which was apparently in use at the time of service; that he was currently listed in the city's directory; that he was being billed for a telephone at that address; and that he maintained a checking account at a local bank. It was further indicated that the defendant had not moved his personalty from New York to Michigan on the alleged date of his change of domicile, nor had he done so at any other time.

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[13] *Id.* at 443, 275 N.Y.S.2d at 956.
[14] 51 Misc. 2d 675, 273 N.Y.S.2d 687 (Sup. Ct. Erie County 1966).
[15] *Id.* at 678, 273 N.Y.S.2d at 690.