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Article 22

CPLR 1201: Plaintiff Must Establish Defendant's Inability to Defend and Nonfeasibility of Instituting Proceedings for the Appointment of a Committee Before a Guardian Ad Litem Will Be Appointed

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ing litigation and decongesting court calendars. The desirability of such procedure notwithstanding, there are several substantial considerations which justify the court's refusal to grant the relief requested in the instant case. These include: (1) the general propriety of allowing lower courts to administer their own litigation; (2) the policy against burdening the supreme court with further administrative duties; and (3) the absence of guidelines to determine under which circumstances consolidation should be granted and to which inferior court the consolidated action should be remanded.

It is submitted that, by a statute directed at the resolution of the aforementioned obstacles, the legislature could expand the availability of consolidation to encompass the situation presented in the instant case. Whether this would be effected by granting such power to the supreme court or, as would seem more appropriate, to the respective departments of the appellate division, it would be a procedural liberalization in accord with the basic purposes of the CPLR.

ARTICLE 12 — INFANTS AND INCOMPETENTS

CPLR 1201: Plaintiff must establish defendant's inability to defend and nonfeasibility of instituting proceedings for the appointment of a committee before a guardian ad litem will be appointed.

In *Abrons v. Abrons*,[67] the trial court granted plaintiff's motion to have a guardian ad litem appointed for the defendant. The appellate division reversed, relying upon plaintiff's failure to serve notice of the motion upon defendant,[68] and upon the additional grounds that plaintiff neither demonstrated defendant's incapacity nor showed that the institution of proceedings for the appointment of a committee was not feasible.

Under the CPA, it was provided that "a person of unsound mind but not judicially declared incompetent may sue and be sued in the same manner as any ordinary member of the community."[69] CPLR 1201, however, provides that "a person shall appear by a guardian ad litem . . . if he is an adult defendant incapable of adequately protecting his rights." By the incorporation of this section in CPLR 321(a), there is a clear burden cast upon plaintiff

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[67] 24 App. Div. 2d 970, 265 N.Y.S.2d 381 (1st Dep't 1965).

[68] Upon a motion for the appointment of a guardian ad litem, notice must "be served upon the person who would be represented if he is more than fourteen years of age and has not been judicially declared to be incompetent." CPLR 1202(b).

[69] Anonymous v. Anonymous, 3 App. Div. 2d 590, 594, 162 N.Y.S.2d 984, 988 (2d Dep't 1957); see CPA § 236.

to secure the adequate representation of his opponent.[70] If he fails to do so, he risks the possibility that any judgment he obtains will be declared invalid.[71] Thus, whenever plaintiff suspects that defendant is an incompetent, it would seem most prudent for him to apply for the appointment of a guardian ad litem.[72] However, the instant case illustrates that the courts are not prone to appoint guardians as a matter of course.

Just as there is a duty placed upon the courts to insure the proper representation of an incompetent,[73] it is also incumbent upon the courts to protect a party's right to choose his own form of representation in litigation. In satisfaction of this responsibility, the present court stated that the defendant should be afforded a full hearing on the issue of his alleged incompetence.

As the court indicated, failure to allow such a hearing would deny the defendant due process of law.[74]

The question of the proper method of representation, *i.e.*, the appointment of a guardian ad litem or of a committee, generally lies in the discretion of the trial court.[75] The instant case makes clear that the question of whether any representative should be appointed for the alleged incompetent is an issue that must be affirmatively resolved by the moving party before an application for the appointment of a guardian ad litem will be considered.

ARTICLE 20 — MISTAKES, DEFECTS, IRREGULARITIES AND EXTENSIONS OF TIME

CPLR 2001: Action commenced solely in name of deceased person constitutes mere irregularity, subject to correction.

In *Rosenberg v. Caban*,[76] the appellate division, second depart-

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[70] 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 1201.05 (1965).

[71] See Rakiecki v. Ferenc, 21 App. Div. 2d 741, 250 N.Y.S.2d 102 (4th Dep't 1964). See also Seton Psychiatric Institute v. Arundel, 31 Misc. 2d 1082, 220 N.Y.S.2d 736 (Erie County Ct. 1961). Upon such a finding, the court, in its discretion, could set aside prior orders or judgments pursuant to CPLR 5015(a).

[72] See 2 WEINSTEIN, KORN & MILLER, *op. cit. supra* note 70.

[73] Wurster v. Armfield, 175 N.Y. 256, 262, 67 N.E. 584, 585 (1903).

[74] Abrons v. Abrons, 24 App. Div. 2d 970, 265 N.Y.S.2d 381, 382 (1st Dep't 1965).

[75] *E.g.*, Sengstack v. Sengstack, 4 N.Y.2d 502, 510, 151 N.E.2d 887, 890, 176 N.Y.S.2d 337, 342 (1958); Leibowitz v. Hunter, 45 Misc. 2d 467, 257 N.Y.S.2d 434 (Sup. Ct. N.Y. County 1965).

[76] 20 App. Div. 2d 909, 248 N.Y.S.2d 917 (2d Dep't 1964). It is interesting to note, in this connection, that in 1959, the second department, in *Grippo v. Di Vito*, 7 App. Div. 2d 913, 182 N.Y.S.2d 846 (2d Dep't 1959), held that this same defect was a mere correctable irregularity. This inconsistent holding, however, may have been precipitated by the presence of the statute of