

## CPLR 2001: Action Commenced Solely in Name of Deceased Person Constitutes Mere Irregularity, Subject to Correction

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to secure the adequate representation of his opponent.<sup>70</sup> If he fails to do so, he risks the possibility that any judgment he obtains will be declared invalid.<sup>71</sup> 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.<sup>72</sup> 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,<sup>73</sup> 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.<sup>74</sup>

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.<sup>75</sup> 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*,<sup>76</sup> the appellate division, second depart-

<sup>70</sup>2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 1201.05 (1965).

<sup>71</sup>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).

<sup>72</sup>See 2 WEINSTEIN, KORN & MILLER, *op. cit. supra* note 70.

<sup>73</sup>*Wurster v. Armfield*, 175 N.Y. 256, 262, 67 N.E. 584, 585 (1903).

<sup>74</sup>*Abrons v. Abrons*, 24 App. Div. 2d 970, 265 N.Y.S.2d 381, 382 (1st Dep't 1965).

<sup>75</sup>*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).

<sup>76</sup>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 *Grippio 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

ment, guided by CPA precedent, held void a summons and complaint naming only a deceased person as plaintiff. Formerly, the name of the executor or administrator was required to be included.<sup>77</sup> The rationale behind the rule was that since a deceased person could not institute an action, the court, in such a situation, obtained no jurisdiction over the defendant. The Court of Appeals, however, unanimously reversed this decision,<sup>78</sup> holding that such a defect constituted nothing more than an irregularity, subject to correction under CPLR 2001.<sup>79</sup>

CPLR 2001 (formerly CPA § 105) is the general provision authorizing the courts to ignore or correct non-prejudicial defects or irregularities in procedure. There are, in addition, many specific remedial provisions in the CPLR designed to correct particular defects.<sup>80</sup> These provisions abrogate the strict approach to procedural irregularities which dictated the decision of the appellate division in the *Rosenberg* case.

Although correction of a defect or irregularity may not be expressly provided for, practitioners should urge the courts to analyze defects in light of the liberal policy of the CPLR. The practitioner should demonstrate to the court, by analogy, that the defect in question comes within the purview of the CPLR's general corrective provision.

#### ARTICLE 30 — REMEDIES AND PLEADING

*CPLR 3012(b): Action dismissed for failure to serve a complaint.*

In *Friedman v. Guthrie*,<sup>81</sup> the action was commenced in February, 1963, two days before it would have been barred by the statute of limitations. The defendant appeared promptly but was not served with a complaint. Approximately one year thereafter, defendant made a motion to dismiss for failure to prosecute which

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limitations. In *Grippio*, had the summons been declared a nullity the statute of limitations would have prevented the executor from commencing a subsequent action.

<sup>77</sup> *Lawson v. L. R. Mack, Inc.*, 246 App. Div. 622, 284 N.Y. Supp. 381 (2d Dep't 1935).

<sup>78</sup> *Rosenberg v. Caban*, 16 N.Y.2d 905, 212 N.E.2d 151, 264 N.Y.S.2d 697 (1965).

<sup>79</sup> CPLR 2001 permits the correction of non-prejudicial irregularities at any stage of the proceeding, upon such terms as may be just.

<sup>80</sup> See, e.g., CPLR 103(c)—no dismissal where civil proceeding brought in improper form; CPLR 203(e)—saves action from bar of statute of limitations when mistake in pleading requires claim to be asserted in an amended pleading; CPLR 305(c)—permits correction of non-prejudicial defects in process of proof of service; CPLR 325(a) and (b)—provides for transfer of action when commenced in wrong court.

<sup>81</sup> 24 App. Div. 2d 966, 265 N.Y.S.2d 315 (1st Dep't 1965).