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SCPA Articles 2 and 3: Comparison with Prior Law

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DOMESTIC RELATIONS LAW

Dom. Rel. Law § 240: Support pendente lite for a child held available in action to determine the validity of a foreign divorce decree.

The Court of Appeals, in *Langerman v. Langerman*,⁷⁶ declared that the supreme court was without jurisdiction under the New York State Constitution to award support pendente lite unless there was specific statutory authorization granting such power. The present DRL § 240 authorizes the awarding of support pendente lite for a child in only four actions: (1) annulment or declaration of nullity of a void marriage; (2) separation; (3) divorce; or (4) writ of habeas corpus or petition and order to show cause to obtain custody of, or visitation rights with, the child. In *Gontaryk v. Gontaryk*,⁷⁷ the appellate division, first department, held that the supreme court was without jurisdiction to award support pendente lite to a child in an action to determine the validity of a foreign divorce decree, citing *Langerman* and noting the absence of this type of action in DRL § 240 as authority for its decision.

Recently, however, in *Vazquez v. Vazquez*,⁷⁸ the appellate division, second department, ruled that the supreme court, under its inherent equity powers, had jurisdiction to award support pendente lite to a child in an action to declare a foreign divorce decree invalid. The court distinguished *Langerman* on the ground that that case was decided before the amendment of the New York State Constitution.⁷⁹

It would seem that, if the child requires it, support pendente lite should be available in the same court in which the matrimonial action is pending since, by forcing another proceeding to be brought in another court, a great deal of time and expense would be incurred that could be detrimental to the child's welfare. Nonetheless, the fact remains that under DRL § 240 no provision is made for the award of support in an action to determine the validity of a foreign divorce decree. However, it is submitted that the welfare of the child is the underlying purpose behind DRL § 240, and that this intention can best be served by affirming the *Vazquez* decision.

SURROGATE'S COURT PROCEDURE ACT

SCPA Articles 2 and 3: Comparison with prior law.

The Temporary State Commission on the Law of Estates was established to study the various sections of the Real Property

⁷⁶ 303 N.Y. 465, 104 N.E.2d 857 (1952).

⁷⁷ 20 App. Div. 2d 633, 246 N.Y.S.2d 270 (1st Dep't 1964).

⁷⁸ 26 App. Div. 2d 701, 273 N.Y.S.2d 12 (2d Dep't 1966).

⁷⁹ N.Y. CONST. art. 6, §§ 7(a), (c).

Law, the Personal Property Law, the Decedent Estate Law, the Surrogate's Court Act [hereinafter cited as "SCA"] and the Consolidated Laws in order to divide them into procedural and substantive provisions relating to surrogate's proceedings. The result of this study was the Estates, Powers and Trusts Law [hereinafter cited as "EPTL"] encompassing the substantive provisions and the Surrogate's Court Procedure Act [hereinafter cited as "SCPA"] containing the procedural aspects.

The intention of the Commission in drafting the SCPA was to codify the law and simplify surrogate's court practice as far as practicable. In furtherance of this objective, frequent references have been made to the CPLR and many new sections have been modeled after CPLR provisions. A special attempt was made to update the provisions relating to jurisdiction in order to provide for complete disposition of all matters related to the estates of decedents and to avoid multiplicity of suits. Similarly, the provisions relating to service of process have been modernized in order to facilitate the court's exercise of that jurisdiction.

It is the purpose of this *Survey* note to examine the scope of jurisdiction (contained in article 2) and the methods of service (contained in article 3) under the SCPA.

Article 2 — Jurisdiction

Sections 210 and 211 of the SCPA are intended to increase the scope of the in personam jurisdiction of the surrogate's court.⁸⁰ Subdivision 1 of section 210 provides that "the court shall exercise jurisdiction over persons and property as heretofore or hereafter permitted. . . ."⁸¹ While the term "heretofore" embodies all the presently effective principles concerning the jurisdictional predicate,⁸² "hereafter" provides a springboard for the expansion of jurisdiction provided in subdivision 2.

The second subdivision of section 210, labeled "additional bases," furnishes long-arm jurisdiction to a greater extent than has been previously granted to any court by an American legislature.⁸³ Section 210(2)(a) empowers the court to "exercise

⁸⁰ MCKINNEY'S SCPA § 210, Revisers' Notes.

⁸¹ SCPA § 210(1).

⁸² See I WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 301.10 (1965). The law regarding jurisdiction of persons under the Surrogate's Court Act is found in SCA § 41.

⁸³ This section was drawn in very broad terms. However, in commenting on section 210, the Commission simply stated, "in personam jurisdiction is enlarged to conform with CPLR 301." Temporary State Commission on Estates, Memorandum to Members of the New York State Legislature, Subject: Proposed New Surrogate's Court Procedure Act 3 (1966). Yet, section 210 is far broader than the sections of the CPLR dealing with jurisdiction over persons.

personal jurisdiction over any non-domiciliary, or his fiduciary, as to any matter within the subject matter jurisdiction of the court arising from any act or omission of the non-domiciliary within the state, either in person or through an agent." (Emphasis added.)

This section is much broader than its CPLR counterpart. CPLR 302, except with regard to certain tortious acts, allows the court to exercise in personam jurisdiction only on the basis of the commission of an act *within* the state which results in a cause of action. Also, CPLR 302 limits such acts to business transactions, tortious acts or the ownership or use of real property. The SCPA greatly extends the reach of its long-arm statute by broadening its application to include *any* act or omission pertaining to a matter within the subject matter jurisdiction of the surrogate's court. The broad language of the new statute manifests an apparent legislative intent to have section 210 extend to the constitutional limits of long-arm jurisdiction.⁸⁴ The courts, therefore, are faced with the task of framing the due process limits of this new provision.

Section 211 gives the surrogate's court all the long-arm jurisdiction afforded the supreme court. Since Section 210 of the SCPA is broader than CPLR 302, it would appear that section 211 serves no meaningful purpose. Any "act or omission" falling within the purview of CPLR 302 will also fall within the broader scope of SCPA Section 210. Perhaps the revisers feared that a possible judicial decision rendering section 210 unconstitutional would leave the surrogate's court without long-arm jurisdiction if section 211 were not available to fill the void. However, an unconstitutional application of the provision would not indicate that the provision itself was unconstitutional, but merely that a court had erred in going beyond the permissible limits of jurisdiction.

The applicability of section 210 remains speculative. However, an example might help illustrate its possible operative effects. Under Section 18 of the Decedent Estate Law,⁸⁵ a surviving spouse has a limited personal right to elect against the decedent's will and thereby take the share he or she would be entitled to in intestacy. Section 18-a(a)⁸⁶ provides that this election shall

⁸⁴ When faced with the more complex provisions of CPLR 302, as originally enacted, the New York Court of Appeals restricted that statute's effectiveness by holding that a "tortious act within the state" does not include the mere consequences of a tort in this state. *Feathers v. McLucas*, 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965). See *The Biannual Survey of New York Practice*, 40 ST. JOHN'S L. REV. 122, 134-38 (1965). Apparently, SCPA § 210 was drafted in simple, broad terms to indicate that it was intended to reach the constitutional limit.

⁸⁵ This section is now included in EPTL § 5-1.1.

⁸⁶ EPTL § 5-1.1(b)(1)(A).

extend to gifts causa mortis made after marriage.⁸⁷ Assume that the dying husband, while in New York, makes a gift causa mortis of valuable jewelry to an Illinois domiciliary. The husband then dies and the recipient of the gift returns to Illinois. Subsequently, the widow elects to take her intestate share. However, the executor finds that in order to accomplish this result it will be necessary to reclaim the jewelry now in Illinois. By applying section 210(2)(a), the surrogate's court may exercise personal jurisdiction over the recipient of the gift, since the action involves a matter within its subject matter jurisdiction arising from an act of a non-domiciliary within the state.

This example also illustrates the possible unconstitutionality of certain applications of section 210. It is questionable whether the forum contacts in the hypothetical case are sufficient to make "it reasonable, in the context of our federal system of government, to require . . . [defendant] to defend the particular suit brought"⁸⁸ in New York.

A further constitutional question may arise under section 210(2)(b). Subparagraph (b) provides that a non-domiciliary who accepts property, distributed in the administration of an estate, submits to in personam jurisdiction in the court having jurisdiction over the estate, as to any matter concerning that distribution, including a proceeding to recover the property. This provision appears to give the court personal jurisdiction in situations wherein only quasi in rem jurisdiction would otherwise exist.

For example, assume a non-domiciliary receives a specific bequest of valuable property. The statute provides that if the court had jurisdiction over the property at one time, it would have jurisdiction over the recipient years later in a proceeding to recover it. Quasi in rem jurisdiction would result from the power of the state over the res, presuming that the property is within the control of the court. However, it is questionable whether the acceptance of that property by a non-domiciliary gives the court jurisdiction over that person as to any matter concerning the property received.

The addition of long-arm jurisdiction to the powers of the surrogate's court is desirable since it allows the court to fully dispose of all matters before it. Despite the possible problems created by the broad provisions of the new statute, the effort was well directed for it expands the power of the court in this area to its constitutional limits, thereby increasing its usefulness.

⁸⁷ See Note, *Recent Reforms in the Law of Estates, Wills and Trusts*, 40 ST. JOHN'S L. REV. 230, 244-47 (1966).

⁸⁸ *International Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945).

Article 3—Service of Process

It is generally agreed that the method of service best calculated to give notice to a person over whom jurisdiction is sought is personal service. For this reason, it is the primary method of service both within and without the state under the SCA and the SCPA.⁸⁹ The SCA, however, limits such service outside the jurisdiction to strictly defined situations.⁹⁰ No such limitation is presented by Section 307(1) of the SCPA which permits personal service outside the state without a court order. However, this method of service is tempered by SCPA § 310(2) which allows such service only when accomplished by one of the persons designated in CPLR 313. This limitation on parties performing personal service outside the state must be contrasted with personal service within the state which can be accomplished by any person over the age of eighteen years, even though that person is a party to the action.⁹¹

The most significant contrast between the SCA and the SCPA is found in the provisions for substituted service. Under the SCA, if "proper and diligent effort" fails to accomplish personal service, the surrogate can order substituted service as defined in section 55, provided that the conditions therein are met. Thus, substituted service upon a resident may be made if it appears that he cannot be served anywhere in the state within a reasonable time, or if it appears that he is evading service.⁹² The method of substituted service to be used is specifically set out in the statute, *i.e.*, by leaving a copy of the citation and a copy of the surrogate's order at the residence of the respondent with a person of suitable age, or if no such person is available, by affixing both copies to the door of the residence *and* by mailing additional copies to the respondent at the residence.⁹³ Thus, the court is limited to only one manner of substituted service upon a resident who

⁸⁹ SCA § 55; SCPA § 307(1).

⁹⁰ A New York resident can be personally served outside the state pursuant to a court order issued under SCA § 56(2) when that resident cannot be served by substituted service within the state pursuant to section 55 or "where in the surrogate's discretion a person who is a resident of the state but is absent therefrom should be served . . . personally or by publication." Section 58-a provides further for personal service outside the state without a court order, but, in such a case, the citation must be served by one of a particular group of persons.

⁹¹ SCPA § 310(1).

⁹² SCA § 55. In order for substituted service to be ordered against a person domiciled outside New York it is necessary that, at the time service is attempted, he have a bona fide residence within the state. 1 BUTLER, NEW YORK SURROGATE LAW AND PRACTICE § 409 (1950).

⁹³ SCA § 55. In the case of a corporation, substituted service can be ordered by leaving a copy with a suitable person at the respondent's principal office or place of business or by the "nail and mail" method at that location.

cannot be personally served. However, upon a showing that no such residence can be found, the court may use its discretion in choosing a suitable method of service. Some provision is made for service by publication outside the jurisdiction upon the court's order, but the situations in which such an order can be given are specifically enumerated.⁹⁴

In contrast, under Section 307(2) of the SCPA, the surrogate is given a great deal of discretion in the choice of methods of service. He may devise a method of service for domiciliary natural persons upon whom personal service cannot be effected after due diligence and for non-domiciliary respondents. Service by court order may be provided for, as an "alternative" to personal service within or without the state.⁹⁵ The use of the word "alternative" seems to indicate that, except in the one instance specifically mentioned, *i.e.*, a domiciliary natural person, the petitioner need not make any attempt to accomplish personal service upon the respondent. Thus, it would seem that even though the petitioner might know that a non-domiciliary is within the state at the time service is sought, he may still serve him by a substituted, court-ordered method. Such a situation could not arise under the SCA since its provisions related to "residents" while the SCPA makes use of the term "domiciliary."⁹⁶ Within this context, a question seems to arise as to whether the employment of substituted service without first attempting personal service would be reasonably calculated to apprise the respondent of the pending action and give him an opportunity to be heard.

The methods of service which the court can order under SCPA § 307(2) are limited only by the minimum standards of due process and the ingenuity of courts and attorneys. Five possible methods are set out, but the section clearly states that they "shall not . . . be exclusive." The practitioner should note, however, that the courts will probably be cautious in granting an order for any other method than those specifically set out in the statute. This is supported by the fact that the Revisers' Notes seem to express the belief that the sample methods are exclusive.⁹⁷ However, the language of the statute would seem to support any method, so long as it satisfied the constitutional due process requirements.⁹⁸

⁹⁴ SCA § 56.

⁹⁵ SCPA § 307(2).

⁹⁶ SCPA § 103(15) defines domicile as "a fixed, permanent and principal home to which a person wherever temporarily located always intends to return."

⁹⁷ MCKINNEY'S SCPA § 307, Revisers' Notes. The revisers stated that "the methods of service by order are five in number. . . ."

⁹⁸ The freedom given to the surrogate's court to create methods of service bears a close resemblance to the powers given the courts under CPLR 308(4).

In considering service of process provisions it is well to keep in mind the requirements of due process. The method of service used must be reasonably calculated to give notice to an interested party and to give him an opportunity to protect his interests. Actual notice, however, is not mandatory.⁹⁹ The sufficiency of notice is, at least in part, dependent upon the type of action being instituted by the petitioner. Thus, if the petitioner's action is to obtain a personal judgment against the respondent, the notice requirements are more strict than where the petitioner institutes an in rem action. If the petitioner's action is in rem, attachment, plus subsequent notification, usually accomplished by publication, is sufficient notice, since property is always deemed to be in the possession of the owner or his agent. Thus, when the court devises a method of service other than personal service, it must keep these factors in mind so as to meet the requirements of due process.

SCPA § 307(3), providing for service upon an infant, has remained substantially the same as the provisions of SCA § 55.

Service upon incompetents and other than natural persons has been covered by reference to the various CPLR provisions applicable to these categories of respondents.¹⁰⁰ It is notable, however, that the provision relating to incompetents (CPLR 309(b)) refers only to *judicially declared* incompetents. That provision requires service upon the committee appointed to handle the incompetent's affairs and upon the incompetent, but the court "may" dispense with service upon the incompetent. No special provisions are made for service upon a non-judicially declared incompetent. Under SCA § 60, however, the surrogate has discretionary power to appoint a person to receive a copy of the citation in the interests of a person incapable of protecting his rights. Since the new act does not contain a similar provision, it is possible that due process problems will arise if service is made upon a person incapable of protecting his own interests. If there is no one appointed to act in his behalf, it is possible that service upon the incompetent alone will be insufficient to satisfy the demands of due process.

The final provision of the SCPA service of process section provides for service upon twenty-five or more creditors.¹⁰¹ Under

It is likely that the surrogates will look to decisions rendered under that statute for possible new methods of service. It would seem imperative, therefore, that the surrogate's court practitioner keep abreast of the developing case law of CPLR 308(4).

⁹⁹ 1 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 308.01 (1965). For a treatment of the federal due process requirements see *Milliken v. Meyer*, 311 U.S. 457 (1940).

¹⁰⁰ SCPA § 307(4).

¹⁰¹ SCPA § 307(5).

SCA § 55, service upon such a group can be accomplished by publication in newspapers for a length of time designated by the surrogate *and* by mailing a copy to each creditor. The new act provides for service without the requirement of obtaining a court order and no longer necessitates publication. Process can be served on such creditors whether or not they are natural domiciliaries, by simply mailing a copy of the process to each of them.

The provisions of the new act make the task of the petitioner's attorney somewhat simpler than under the SCA. In surrogate's court actions the attorney is often faced with the task of serving a great number of persons within and without the state. With the great amount of power now resting in the court to devise methods of service, the attorney can present the court with one affidavit setting forth the facts as to each respondent and leave it to the court to devise the best method of service for each. The new service of process provisions also seem to be of great benefit to the efficiency of surrogate's court proceedings. Since it is now much easier to accomplish service, petitioner will be better able to unite all interested parties in an action and thus settle the matter under litigation.