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CPLR 3121: Blood grouping tests held constitutional.

In *Mesticelli v. Mesticelli*,²¹⁶ a matrimonial action, the husband moved²¹⁷ pursuant to CPLR 3121²¹⁸ for an order directing his wife and her child to submit to a blood grouping test to establish his non-paternity, and hence her adultery. The court, in summarily dismissing the allegation that extraction of blood is violative of the constitutional privilege against self incrimination²¹⁹ noted that "historically . . . protection has been limited to oral testimonial compulsion or the compulsory production of documents or other articles."²²⁰

Although not violative of the privilege against self incrimination, the extraction of bodily fluids may violate the due process clause where the extraction is performed under circumstances that shock the judicial conscience.²²¹ However, the United States Supreme Court has held this objection inapplicable to a blood test performed by a physician.²²² Hence, CPLR 3121 is constitutional.

Protective orders—effect of CPLR 3103(a) upon five-day limitation of CPLR 3122.

CPLR 3122 provides: "Within five days of a notice under rule 3120 or section 3121, a party may serve a notice of motion for a protective order. . . ." (Emphasis added.) CPLR 3103(a) provides: "The court may at any time on its own initiative, or on motion . . . make a protective order. . . ." (Emphasis added.) The important question is whether a protective order may be had under 3103(a) after the five days specified in 3122 have elapsed.

In *Farone v. Korey Motors, Inc.*,²²³ the court commented that CPLR 3122 should be read in conjunction with CPLR 3103(a)

²¹⁶ 44 Misc. 2d 707, 255 N.Y.S.2d 185 (Sup. Ct. 1964).

²¹⁷ It should be noted that the proper procedure under CPLR 3121 is to serve notice on the other party, not to proceed by motion.

²¹⁸ "After commencement of an action in which . . . the blood relationship of a party . . . is in controversy, any party may serve notice on any other party to submit to a . . . blood examination. . . ."

²¹⁹ *Breithaupt v. Abram*, 352 U.S. 432, 434 (1957).

²²⁰ *Mesticelli v. Mesticelli*, *supra* note 216, at 708, 255 N.Y.S.2d at 187.

²²¹ See *Rochin v. California*, 342 U.S. 165 (1952).

²²² *Breithaupt v. Abram*, *supra* note 219, at 435. In certain situations there may be a religious objection to extracting body fluids. In such cases there will be a close question which may turn upon whether the objection is bona fide. It is suggested that cases concerning vaccination against contagious disease will not be useful since these cases involved a balance between the individual's belief and public health. CPLR 3121 does not purport to protect the health of the community. Thus, no balancing can exist.

²²³ 44 Misc. 2d 565, 254 N.Y.S.2d 209 (Sup. Ct. 1964).