

Effect of CPLR 3103(a) Upon Five-Day Limitation of CPLR 3122

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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).

and concluded that where good cause is shown for delay a protective order should be issued under CPLR 3103(a). Under this rationale it is incumbent upon movant to excuse his failure to comply with the five-day limitation.

The issue of the five-day limit was presented before the appellate division in *Coffey v. Orbachs, Inc.*²²⁴ In that case Justice Valente stated:

We must make it abundantly clear that the only permissible method for challenging a notice for discovery is to move for a protective order, within the time limitations of CPLR Rule 3122. Any other course would only import into the disclosure practice of the CPLR the abuses against which our courts inveighed under bills of particulars practice under the CPA. . . .²²⁵

While the above quote indicates the restrictive attitude of the first department it should be noted that in *Coffey* "no attempt was made [by the movant] to offer any valid excuse or to show some good cause for not having applied for a protective order within the time limited by CPLR Rule 3122."²²⁶

It is submitted that the *Farone* case has taken the better approach. Where a special circumstance is shown justifying the delay the court should excuse the non-compliance with the five-day requirement. There is explicit authority for such extension in CPLR 2004 which provides that "the court may extend the time fixed by any statute . . . upon such terms as may be just and upon good cause shown. . . ." The application for extension may be made after the time period has expired. Therefore, by utilizing CPLR 2004 in conjunction with CPLR 3122 the same result could be reached as if CPLR 3103(a) alone were applied. There would appear to be no reason for using the circuitous method when the desired result can be directly obtained.

It is submitted that CPLR 3103(a) should be literally construed. The phrase "the court may at any time . . . make a protective order" is unambiguous and clear. It is a mandate that allows the trial court to use its discretion to further the ends of justice. Such mandate should not be destroyed by judicial surgery.²²⁷

²²⁴ 22 App. Div. 2d 317, 254 N.Y.S.2d 596 (1st Dep't 1964).

²²⁵ *Id.* at 320, 254 N.Y.S.2d at 599.

²²⁶ *Id.* at 320, 254 N.Y.S.2d at 598.

²²⁷ See CPLR 317, 5015(a). The discretion reposed in the court under CPLR 3103(a) may be analogized to the discretion allowed a judge to open a default. If a defendant can adequately excuse his default and show that it would be in the interest of justice to open it, the court has the power so to do. Why should not the court have the same power when a party "defaults" by not complying with the five-day limitation of CPLR 3122?