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CPLR 302(b): Appellate Division, Third Department Holds that It Is Inappropriate for the Judiciary to Provide a Time Limitation Beyond That Which the Legislature Has Included in the Statute

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CPLR 302(b): Appellate Division, Third Department holds that it is inappropriate for the judiciary to provide a time limitation beyond that which the legislature has included in the statute

CPLR 302 was amended in 1974 to create an additional basis for the assertion of personal jurisdiction over a non-domiciliary in matrimonial actions and family court proceedings.¹ Pursuant to the amendment, a non-domiciliary is subject to jurisdiction in such a proceeding initiated by a New York resident or domiciliary, provided that New York State “was the matrimonial domicile of the parties before the separation.”² The Appellate Division’s interpretation of this provision as regards the recency of the New York marital domicile, however, has been problematic.³ In *Lieb v. Lieb*,

¹ See Memorandum of Assemblyman Albert H. Blumenthal, reprinted in [1974] N.Y. LEGIS. ANN. 41-42. The amendment added subsection (b) which provides:

A court in any matrimonial action or family court proceeding involving a demand for support [or] alimony may exercise personal jurisdiction over the respondent or defendant notwithstanding the fact that he or she is no longer a resident or domiciliary of this state, . . . if the party seeking support is a resident or domiciled in this state at time such demand is made, provided that this state was the matrimonial domicile of the parties before their separation

CPLR 302 (McKinney 1974) (emphasis added).

The constitutionality of CPLR 302(b) was upheld in 1976 in *Browne v. Browne*, 53 A.D.2d 134, 385 N.Y.S.2d 983 (4th Dep’t 1976); see also *Crofton v. Crofton*, 106 Misc. 2d 546, 434 N.Y.S.2d 116 (Sup. Ct. Nassau County 1980). In *Crofton*, Justice Niehoff, discussing *Kulko v. California Superior Court*, 436 U.S. 84 (1978), found a significant connection between the defendant and the forum state such that the defendant could be constitutionally required to defend himself in New York. *Crofton*, 106 Misc. 2d at 548, 434 N.Y.S. at 118. Furthermore, the court held that submitting this defendant to personal jurisdiction “[did] not offend the traditional notion of fair play and substantial justice.” *Id.* (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

² CPLR 302(b) (McKinney 1990). The other bases for conferring jurisdiction over a non-domiciliary when the action is brought by a resident or domiciliary are (1) “if the defendant abandoned the plaintiff in this state,” (2) “if the claim for support [or] alimony . . . accrued under the laws of this state,” or (3) if there was an “agreement executed by the parties in this state.” *Id.*

³ Compare *Lieb v. Lieb*, 53 A.D.2d 67, 72, 385 N.Y.S.2d 569, 572 (2d Dep’t 1976) (holding that “before the separation” implies “within the recent past”) and *Klette v. Klette*, 167 A.D.2d 197, 198, 561 N.Y.S.2d 580, 582 (1st Dep’t 1990) (same) with *Paparella v. Paparella*, 74 A.D.2d 106, 107, 426 N.Y.S.2d 610, 611 (4th Dep’t 1980) (Moule, J., concurring) (holding statute is limited only by constitutional due process) and *Levy v. Levy*, 185 A.D.2d 15, 18, 592 N.Y.S.2d 480, 482 (3d Dep’t 1993) (same); see also *infra* notes 4-5 and accompanying text. In his practice commentary to the CPLR, Judge Joseph C. McLaughlin observed that the statute is “unclear” regarding the issue of recency, specifically whether the parties must have been domiciled in

the Second Department placed a gloss on the word "before," holding that "before the separation" implied "within the recent past."⁴ Following *Lieb*, the First Department in *Klette v. Klette*, reversed the denial of a motion to dismiss, basing its decision in part on the fact that New York was not the marital domicile of the parties "within the recent past."⁵ The Fourth Department, in *Paparella v. Paparella*, declined to follow the interpretation in *Lieb*, and exerted jurisdiction over a non-domiciliary due to the presence of a strong state interest.⁶ Recently, in *Levy v. Levy*, the Appellate Di-

New York at the time of the separation or whether a New York domicile at any time during the marriage would satisfy the statute. CPLR 302 commentary at 117-18 (McKinney 1990); see also *Lieb*, 53 A.D.2d at 71, 385 N.Y.S.2d at 572 ("McLaughlin very presciently posed [the issue].").

The departments have all addressed the issue of determining the meaning of the phrase "this state was the marital domicile before the separation" under CPLR 302(b). The issue centers on the recency of the parties' marital domicile. Not only has 302(b) been applied inconsistently among the departments, but it has also resulted in inconsistency within the Second Department. After the *Lieb* decision, the Second Department was faced with the issue again and this time relied on the Fourth Department's holding in *Paparella*, 74 A.D.2d at 106, 426 N.Y.S.2d at 610, finding that the defendant was not subject to jurisdiction. *Sovansky v. Sovansky*, 139 A.D.2d 724, 725, 527 N.Y.S.2d 475, 476 (2d Dep't 1988). The court gave a great deal of weight to the fact that the parties, although married in New York, moved to Michigan less than ten months after their marriage. *Id.* The court in *Sovansky* did not rely on their own interpretation of "before the separation" established in *Lieb*, but chose to follow the Fourth Department's interpretation that the state interest was sufficient to exercise jurisdiction over the defendant. *Id.*

⁴ *Lieb*, 53 A.D.2d at 72, 385 N.Y.S.2d at 572. The decision to apply this limitation was based in part on an article by professors Henry J. Foster, Jr. and Doris J. Freed praising the amendment when it was introduced into the legislature. *Id.* at 70-71, 385 N.Y.S.2d at 571. See generally Henry J. Foster, Jr. & Doris J. Freed, *Thumbs Up for Long Arm Amendment*, N.Y. L.J., May 26, 1972, at 1, col. 1. The Second Department subsequently applied the definition established in *Lieb* in 1977. In *Richardson v. Richardson*, 58 A.D.2d 861, 396 N.Y.S.2d 689 (2d Dep't 1977), the court declined to extend personal jurisdiction over the defendant because the last marital domicile was Texas, not New York. *Id.* at 861, 396 N.Y.S.2d at 690. In effect, the court interpreted "within the recent past" to mean "last," notwithstanding the legislature's failure to add the word "last" into the statute in 1976. See *infra* note 18 and accompanying text.

⁵ 167 A.D.2d 197, 198, 561 N.Y.S.2d 580, 582 (1st Dep't 1990). New York ceased to be the marital domicile of the parties in 1973 when they moved to Connecticut. *Id.* In *Klette*, the parties were married in New York and resided there until 1973. *Id.* at 197, 561 N.Y.S.2d at 581. They then moved out of the state, and after separating in 1981, Margaret Klette moved back to New York with her children. *Id.* The court held that the eight year period that had elapsed since New York was the marital domicile was not "within the recent past" within the *Lieb* meaning of 302(b). *Id.* at 198, 561 N.Y.S.2d at 582. The court also expressed doubts about whether the court could constitutionally exercise jurisdiction over this defendant. *Id.*

⁶ 74 A.D.2d at 107, 426 N.Y.S.2d at 611. In *Paparella*, the court held in a *per curiam* decision that there was a sufficient basis for subjecting the defendant to personal jurisdiction under CPLR 302(b). *Id.* In a concurring opinion, Justice Moule rea-

vision, Third Department, addressed the provision finding that it should be given "an expansive interpretation."⁷ Consequently, the court held it was proper to exercise jurisdiction over the defendant based on the parties' former marital domicile in New York.

Jane and Harold Levy were married in New York in 1970 and lived there for four years.⁸ After a five year absence from the state,⁹ they returned to New York, remaining until 1981.¹⁰ The Levys next moved to California, where they remained until the parties separated in 1982. Upon separation, the defendant remained in California, while the plaintiff moved back to New York, where she resided at time of trial.¹¹ In 1987, prior to the initiation of divorce proceedings, the defendant returned to New York, remaining for one year before moving to New Jersey and then Washington.¹² During this time in New York, he frequently visited the plaintiff and their daughters, and the parties often presented themselves to the community as a family.¹³ The defendant, who at the commencement of the action was a resident of Washington, claimed that he was not subject to personal jurisdiction under CPLR 302. However, the trial court disagreed and denied the defendant's motion to dismiss.¹⁴

The Appellate Division, Third Department, affirming the order of the supreme court, expressly rejected the time limitation on 302(b) adopted by the Second Department.¹⁵ Writing for the court in a unanimous decision, Justice Mikoll first canvassed the decisions reached in the other departments.¹⁶ Unimpressed with the

soned that since the parties failed to establish a domicile after leaving New York, New York continued to be the marital domicile of the parties. *Id.* at 109-10, 426 N.Y.S.2d at 613. He further noted that the defendant had maintained bank accounts and other contacts with New York and treated the parties' house in Florida as a vacation home as opposed to a permanent home. *Id.* at 108-09, 426 N.Y.S.2d at 612-13.

⁷ 185 A.D.2d 15, 16, 592 N.Y.S.2d 480, 481 (3d Dep't 1993).

⁸ *Id.*

⁹ *Id.* They lived in New York for four years and moved to Massachusetts in 1974. *Id.* They remained there until 1976, when they moved to Texas. *Id.*

¹⁰ *Id.* In 1981, the defendant informed the plaintiff that he was a homosexual, but not active. *Id.* They moved to California and remained together with the understanding that he would not engage in homosexual relationships. *Id.* Plaintiff moved back to New York upon learning that the defendant had not kept his promise. *Id.*

¹¹ *Id.* at 16-17, 592 N.Y.S.2d at 481.

¹² *Levy*, 185 A.D.2d at 17, 592 N.Y.S.2d at 481.

¹³ *Id.*

¹⁴ *Id.* at 16, 592 N.Y.S.2d at 480.

¹⁵ *Id.* at 18, 592 N.Y.S.2d at 481-82.

¹⁶ *Id.* at 17, 592 N.Y.S.2d at 481. The court found the Second Department's interpretation "unnecessarily restrictive." *Id.* at 18, 592 N.Y.S.2d at 481-82. They likewise

existing interpretations,¹⁷ the court examined the legislative history of 302(b) and concluded that the legislature intended an expansive interpretation.¹⁸ The court reasoned that it was improper to consider the recency of the marital domicile in determining jurisdiction and therefore held that the defendant was subject to personal jurisdiction in New York.¹⁹ Additionally, the court found that the defendant had purposefully availed himself of New York through his frequent contacts with the state, and thus, the exercise of jurisdiction complied with constitutional due process concerns.²⁰

Although the Third Department properly left the revision of the statute to the legislature, as a practical matter, the statute as it is presently constituted is subject to conflicting interpretations.²¹ In those departments which read it broadly, the limitations of due process will exert an inhibiting influence on the exer-

declined to restrict the application of the statute, deferring to the power of the legislature, and concluded that since "the legislature declined to fix a specific time limit within which the parties must have been domiciled in New York before the separation despite the opportunity to do so, it would be inappropriate for the judiciary to fix such a limit." *Id.*

¹⁷ See, e.g., *Levy*, 185 A.D.2d at 18, 592 N.Y.S.2d at 481-82. By their interpretation, the Second Department attempted for the first time to clarify the scope of CPLR 302(b). In doing so, the court set forth a definition which is no clearer than the statute itself. See *infra* note 21 and accompanying text.

¹⁸ *Id.* at 17, 592 N.Y.S.2d at 481. The legislature considered and rejected an amendment which would have changed the existing provision to read the *last* marital domicile of the parties before the separation. *Id.*; Gary Spencer, *Third Department Widens State Divorce Jurisdiction; Breaks Ranks on Reach of Long-Arm Law*, N.Y. L.J., Jan. 11, 1993, at 1, col. 5. There is no legislative history as to the reasons for the failure of this amendment to CPLR 302(b). See *infra* note 37 and accompanying text.

¹⁹ *Levy*, 185 A.D.2d at 18, 592 N.Y.S.2d at 481-82.

²⁰ *Id.* at 18, 592 N.Y.S.2d at 482.

²¹ Compare *Klette v. Klette*, 167 A.D.2d 197, 198, 561 N.Y.S.2d 580, 582 (1st Dep't 1990) ("[T]he parties must have resided together in New York at some time within the recent past.") with *In re Iland*, 120 Misc. 2d 820, 822, 467 N.Y.S.2d 27, 29 (Family Ct. Rockland County 1983) ("[C]ourts should not add restrictions or limitations to the wording of a statute where none exist."). See also *Richardson v. Richardson*, 58 A.D.2d 861, 861, 396 N.Y.S.2d 689, 689-90 (2d Dep't 1977) (interpreting "within the recent past" to mean "last").

The phrase "within the recent past" is an ambiguous statement subject to interpretation. The existing analyses are vague and have caused confusion in the courts. It is submitted that the Second Department's decision to infer the phrase "within the recent past" does not clarify the statute. This phrase is subject to its own interpretation, which thus shifts the focus of the inquiry from interpreting the words of the statute to interpreting the words supplied by the Second Department. As a result, the potential for misapplication or conflicting interpretations of CPLR 302(b) increases. While the legislature may have intended 302(b) to be interpreted in this manner, absent concrete guidance, the intent of the legislature is difficult to ascertain.

cise of jurisdiction,²² because such courts must not only determine that the state was a prior marital domicile, but must also look for minimum contacts.²³ In *Levy*, the Third Department observed that the defendant's conduct in New York subsequent to the separation rendered him amenable to suit.²⁴ However, one can envision circumstances in which the matrimonial contacts are so attenuated as to render the exertion of jurisdiction violative of due process.²⁵

Even if a case fits within the scope of "recent past" under *Lieb*, it is submitted that there is still potential for misapplication of the statute. Further, the First Department's interpretation confers jurisdiction over a person that has no present contacts whatsoever with the state, rather, the only relationship with the state being residency for a number of years in the past. Assuming the claim did not accrue during this time, it would be unjust to subject this defendant to personal jurisdiction.

An example might clarify the potential for misapplication. Assume a couple was married in New York and remained in New York for two years. They subsequently moved and established a marital domicile in Pennsylvania. One year later, the couple was divorced in Pennsylvania. All matters relating to the separation and divorce were subject to Pennsylvania law. The divorced wife moved back to New York and filed suit for support. The defendant was not otherwise subject to personal jurisdiction in New York. Although the parties resided in New York "within the recent past," it hardly seems just to subject him to suit in New York because he once lived there with his wife. Both the Second and Third Departments would confer jurisdiction over this defendant, but the Fourth Department would not.

Another example delineates the interpretations differently. Assume a couple was married in Colorado and remained there for six years. They moved to New York for one year, New Jersey for eight years, and Connecticut for five years, where they were divorced, subject to Connecticut law. The Third Department is the only court that would confer jurisdiction over this defendant in a subsequent action for alimony. The potential for misapplication is clear and will result in confusion as to which interpretation has authority.

²² See *Browne v. Browne*, 53 A.D.2d 134, 137, 385 N.Y.S.2d 983, 986 (4th Dep't 1976) ("[I]n particular circumstances the application of CPLR 302(b) may well present constitutional problems."); see also *Paparella*, 74 A.D.2d at 114, 426 N.Y.S.2d at 615 (Moule, J., concurring) (observing that CPLR 302(b) is subject to due process constraints).

CPLR 302(b) has withstood numerous facial attacks to its constitutionality. See, e.g., *Gerstein v. Gerstein*, 61 A.D.2d 745, 745, 401 N.Y.S.2d 806, 808 (1st Dep't 1978) (holding exercise of jurisdiction constitutional); *Browne*, 53 A.D.2d at 137, 385 N.Y.S.2d at 986 (finding defendant had minimum contacts with New York State); *Crofton v. Crofton*, 106 Misc. 2d 546, 549, 434 N.Y.S.2d 116, 118 (Sup. Ct. Nassau County 1980) (holding constitutional due process satisfied).

²³ *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

²⁴ *Levy*, 185 A.D.2d at 18, 592 N.Y.S.2d at 482. The court gave considerable weight to the defendant's contacts with the state through his visits with his children and with the plaintiff. *Id.* Since he "purposely availed himself of New York's laws, protections and benefits," it was fair to subject him to jurisdiction in New York. *Id.*

²⁵ See *supra* note 22 and accompanying text (discussing constitutionality of CPLR 302(b)).

It is submitted that the Third Department's reading of the statute is overbroad. Absent ambiguity or contrary legislative intent, statutory language should be given its natural and obvious meaning.²⁶ Applying this general rule of construction, it seems that the phrase "provided this state was the matrimonial domicile of the parties before the separation" requires a narrow reading for several reasons.²⁷ First, the use of the article "the" as opposed to "a" preceding the phrase "marital domicile" literally precludes all but one domicile, namely the last marital domicile.²⁸ Second, it is logical to conclude that the relevant domicile is the one occupied immediately before the separation since it is only possible to occupy one domicile at a time.²⁹ It is asserted that the broad interpretation of the Third Department allows for the consideration of multiple domiciles, which contradicts the legislature's reference to

²⁶ See 1 McKinney's Consolidated Laws of New York: Statutes § 94 (1971) ("The Legislature is presumed to mean what it says, and if there is no ambiguity in the act, it is generally construed according to its plain terms."). *But see id.* § 111 (observing that statute should not be "slavishly followed" when doing so would frustrate legislative intent).

²⁷ CPLR 302(b) (McKinney 1990). It is important to note that at the time of enactment of the amendment, at least six states had similar statutes, all having time restrictions written into them. CAL. CIV. PROC. CODE § 410.10 (1992); IDAHO CODE § 5-514(e) (1990); ILL. REV. STAT. ch. 110, para. 2-209 (1990); KAN. CIV. PROC. CODE ANN. § 60-308(b)(8) (1992); OKLA. STAT. tit. 12, § 1701.03(a)(7) (repealed by Laws 1984, ch. 164 § 32 eff. Nov. 1, 1984) (replaced by tit. 12, § 187 by Laws 1984, ch. 164 § 31 eff. Nov. 1, 1984); WIS. STAT. § 801.05(11) (1977). The New York Legislature did not include a specific time limitation, but the statutory language suggests only one domicile. *See infra* note 28 and accompanying text.

²⁸ See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1, 2368 (1986). The article "the" is defined as "a function word [which] indicates that a following noun or noun equivalent refers to someone or something that is *unique* or *exists as only one at a time*." *Id.* at 2368 (emphasis added). On the other hand, the article "a" is defined as "any [or] each." *Id.* at 1.

²⁹ See *In re Newcomb's Estate*, 192 N.Y. 238, 250, 84 N.E. 950, 954 (1908). Residence is a requirement for a domicile; not its equivalent. *Id.* The key to determining domicile is the party's intention to make the residence "his fixed and permanent home." *Ruderman v. Ruderman*, 193 Misc. 85, 87, 82 N.Y.S.2d 479, 481 (Sup. Ct. New York County 1948) (citing *Newcomb*, 192 N.Y. at 238, 84 N.E. at 950), *aff'd*, 275 A.D. 834, 89 N.Y.S.2d 894 (1st Dep't 1949); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 11(2), 15-19 (1969) (further discussing requirements of establishing domicile).

The Second Department's interpretation would confer jurisdiction over a defendant if the couple maintained marital domicile in New York at any time within the recent past. The Third Department's interpretation confers jurisdiction over a defendant if the parties were domiciled in New York at any time during their marriage, even if they lived in three states since living in New York and were divorced in another state. *See supra* notes 4, 15-19 and accompanying text (discussing holdings of *Lieb* and *Levy*, respectively).

only one prior domicile and may result in inconsistent application by the courts.

Further, since CPLR 302(b) is an amendment to an existing statute, it is helpful to examine the other long-arm provisions within 302(a). It is well established that CPLR 302(a) does not extend as far as is constitutionally permissible,³⁰ because most of its provisions have been narrowly interpreted.³¹ The rationale for interpreting 302(a) conservatively is to prevent clashes with the Constitution.³² Since the Third Department interpreted 302(b) to be as broad as the Constitution permits,³³ its application must be rejected as inapposite the well established scope of 302(a).

Lastly, the scant legislative history regarding the amendment does not satisfactorily clarify the situation.³⁴ The legislature's stated purpose for adding the provision was as a response to the rise in desertion as a means of avoiding familial responsibilities, and to supplement existing laws which assisted the abandoned spouse in receiving support from the fugitive spouse.³⁵ Any interpretation of 302(b) should reflect the purpose that the legislature intended—a limited extension of the existing long-arm statute. Justice Mikoll, in *Levy*, relied on the failure of a bill that would have further amended 302(b) to require that the state be the last matrimonial domicile of the parties, in order to support the court's position that the statute has no specific time limitation.³⁶ However, it is suggested that this argument is specious. Given the paucity of legislative history on the amendment, it would be un-

³⁰ See SIEGEL § 84.

³¹ See, e.g., *Presidential Realty Corp. v. Michael Square West, Ltd.*, 44 N.Y.2d 672, 673, 376 N.E.2d 198, 405 N.Y.S.2d 37 (1978) (finding long-arm jurisdiction under 302(a)(1) does not attach merely from parties' physical presence in New York for execution of agreement); *Feathers v. McLucas*, 15 N.Y.2d 443, 261 N.Y.S.2d 8 (1965) (asserting personal jurisdiction over non-resident improper because tort did not occur in New York); *In re DES Cases*, 789 F. Supp. 552 (E.D.N.Y. 1992) (construing 302(a) as New York courts would so as to avoid potential conflict with Constitution).

³² See generally CPLR 302 commentary at 71-77 (McKinney 1990) (discussing background and status of New York long-arm jurisdiction).

³³ See *supra* note 18 and accompanying text.

³⁴ See *Levy*, 185 A.D.2d at 15, 592 N.Y.S.2d at 480.

³⁵ See 1974 N.Y. LEGIS. ANN. at 42. Many of the existing laws are limited to spouses, rather than to ex-spouses. Those seeking support for themselves as ex-spouses were often without remedy. The statutes were not intended to be applied in this manner, but this was the practical effect. CPLR 302(b) was enacted to enable the abandoned spouse or ex-spouse to receive support. *Id.*

³⁶ *Levy*, 185 A.D.2d at 17-18, 592 N.Y.S.2d at 481.

wise to speculate as to the reasons for the bill's failure.³⁷ Without affirmative language, interpretation is confined by the words that the legislature employed; therefore, the broad interpretation by the *Levy* court must be rejected.

As a practical matter, the legislature certainly did not intend for the departments to apply different interpretations of the statute. The divergence creates the possibility of forum shopping in order to obtain a favorable interpretation.³⁸ This factor further mitigates in favor of legislative action regarding the statute.

The statute, as written, has withstood constitutional challenge,³⁹ and the facts of *Levy* are such that submitting the defendant to personal jurisdiction in New York "[did] not offend the traditional notions of fair play and substantial justice."⁴⁰ Although the statute was applied constitutionally in *Levy*, a broad interpretation creates the potential for unconstitutional application. All matters of personal jurisdiction are subject to the Due Process Clause of the Constitution, which must be considered regardless of the court's analysis; however, a careless court may simply rely on the broad rule set forth in *Levy*. Until the Court of Appeals or the legislature clarifies the breadth of CPLR 302(b), the application of the statute in a constitutional manner in each case will remain questionable.

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³⁷ See New York Legislative Record and Index 1978 A 854 (Assembly Introductory Record) (statement by Assemblyman Gottfried proposing amendment). The failure of the amendment proposing the insertion of the word "last" is not dispositive of the legislature's intent. There are a multitude of explanations which may or may not reflect the intent of the legislature.

³⁸ CPLR 503(a) requires that "the place of trial shall be in the county in which one of the parties resided when it was commenced . . ." CPLR 503(a) (McKinney 1990). A plaintiff spouse may resort to taking up residence in another county in order to render a defendant amendable to suit. This option, albeit inconvenient, is a legitimate concern.

³⁹ *Crofton v. Crofton*, 106 Misc. 2d 546, 434 N.Y.S.2d 116 (Sup. Ct. Nassau County 1980).

⁴⁰ *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).