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LEGISLATIVE DEVELOPMENTS

DOES VIRGINIA DENY INDIGENTS THE RIGHT TO DIVORCE?

The United States Supreme Court in *Boddie v. Connecticut*¹ held that a state denies due process of law to indigent persons by refusing to permit them to bring divorce actions except on payment of court fees and service-of-process costs. Virginia allows a waiver of court fees by its *in forma pauperis* statute, Va. Code Ann. § 14.1-183 (Repl. Vol. 1977), but the Commonwealth continues to require indigents to serve by newspaper publication any non-resident defendant who otherwise cannot be served.² Newspaper publication costs in the city of Richmond approximate \$150.³ This practice directly confronts the *Boddie* mandate that “. . . a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, preempt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so.”⁴ *Boddie* suggests “reliable alternatives . . . to service of process . . . if the state is unwilling to assume the cost of . . . service by publication which is the method least calculated to bring to a potential defendant’s attention the pendency of judicial proceedings . . . [S]ervice at defendant’s last known address by mail and posted notice is equally effective as publication in a newspaper.”⁵

The Legal Aid Societies throughout Virginia have been battling this problem with little success. In a pre-*Boddie* decision, *Payne v. Payne*, Chancery No. 2390-71, the Circuit Court for the City of Roanoke, Va. (1971), denied a petition of the Legal Aid Society of Roanoke Valley requesting service other than by newspaper publication. The Virginia Supreme Court refused to hear an appeal on the grounds that the order appealed from was not final. Subsequent to *Boddie*, a writ of mandamus was filed with the Virginia Supreme Court to compel the Circuit Court of Roanoke to grant Mrs. Payne’s petition. This petition was denied without comment. The following appeal to the United States Supreme Court was summarily dismissed.⁶

1. 401 U.S. 371 (1971).

2. Va. Code Ann. § 20-104 (Repl. Vol. 1977); Va. Code Ann. §§ 8.01-316-317 (Repl. Vol. 1977).

3. Letter from Robert C. Metcalf, Dir. Metropolitan Richmond Legal Aid Society, Inc., and David Karp, Staff Attorney, Neighborhood Legal Aid Society, Inc., to all other Va. Legal Aid Societies, dated January 27, 1978.

4. *Boddie v. Connecticut*, 401 U.S. 371, 383 (1971).

5. 401 U.S. at 382.

6. *Payne v. Fox*, 414 U.S. 1139 (1974).

Roanoke Legal Aid did not give up, and in 1974 suit was filed on behalf of Patricia Brown Nelson against the Honorable Robert J. Rogers, Judge of the Circuit Court, Twenty-Third Judicial Circuit of Virginia, seeking an injunction to restrain the judge from applying the newspaper publication statutes to Mrs. Nelson. This case was partially heard on its merits by Chief Judge James C. Turk, United States District Court.⁷ Judge Turk indicated his sympathy towards plaintiff's case and recognized the constitutional issue raised by *Boddie*. A three-judge district court was convened to consider the complaint.⁸ The opinion of the three-judge court quoted strongly from plaintiff's brief but abstained from further action until the state courts had been given a chance to act. The case then became moot when the defendant died, and the Honorable Lawrence L. Koontz, Jr., Judge of the Circuit Court, Twenty-Third Judicial Circuit of Virginia, entered DECREE #3902 on April 11, 1977, waiving the notice of publication requirement for Mrs. Payne and allowing substituted service by posting on the courthouse door and mailing to her husband's last-known address.

Judge Koontz and the other Judges of the Twenty-Third Judicial Circuit of Virginia⁹ subsequently decided to handle similar cases on a case-by-case basis, with a "hope that the legislature will respond to this particular problem"¹⁰ The 1978 General Assembly of Virginia was given two opportunities to conform to *Boddie* and failed to do so on both occasions.

House Bill No. 857, drafted by two Legal Aid attorneys in Richmond¹¹ was patroned by Henrico Delegate Ralph L. Axselle, Jr. This bill (Appendix I) amended § 20-104 of the Code of Virginia to allow the court to dispense with the requirement of publication for an indigent when service could not be obtained at the defendant's last-known address and newspaper publication was unlikely to give him notice.

House Bill No. 943, drafted by the Attorney General's office for Roanoke Delegate C. Richard Cranwell,¹² was a direct result of judicial pressure on Delegate Cranwell for legislative guidance on this issue. This bill was broader than H.B. 857 in that it amended §§ 8.01-317, 14.1-183, and 20-104 to provide for "waiver of publication in a newspaper for indigents"

7. *Nelson v. Rogers*, 389 F. Supp. 1148, 1150 (W.D. Va. 1974).

8. *Id.*

9. The Honorable Fred Hoback; The Honorable Ernest Ballou; and the Honorable Jack Coulter.

10. Letter from Judge Lawrence L. Koontz, Jr. to Henry L. Woodward, Esq., Legal Aid Society of Roanoke Valley dated June 17, 1977.

11. Robert C. Metcalf and David Karp.

12. Letter from Kenneth W. Thorson, Asst. Attorney General to Claude M. Lauck, Attorney, the Legal Aid Society of Roanoke Valley, dated February 1, 1978.

in all cases brought by indigents and . . . not [just] limited to divorce actions."¹³

Both bills were referred to the House Committee for Courts of Justice where they met with less than favorable response. The bills were referred to Suffolk Delegate J. Samuel Glassock's subcommittee, and both were eventually carried over until next year. Despite persuasive arguments and several subcommittee negotiation sessions by the proponents,¹⁴ the Committee members seemed to feel these bills showed favoritism to indigents in violation of the equal protection clause of the fourteenth amendment. This argument "is spurious since it was because of the equal protection clause and the government's monopoly over granting divorces that *Boddie v. Connecticut* was decided."¹⁵

On the other side of the General Assembly, Senator J. Harry Michael, Jr., from Charlottesville introduced Senate Bill No. 449 which adds § 20-105.1 relating to orders of publication in divorce proceedings. This bill reads as follows: "§ 20-105.1. Alternative procedures. The provisions of Title 8.01 for orders of publication shall be construed as alternatives to the procedures set forth in the preceding three sections and not in conflict therewith." This bill passed both Houses and was signed by Governor Dalton on March 9, 1978, to become effective on July 1, 1978. This bill could remove the barrier indigents face in getting a divorce, but it probably is so vague that it will only leave the situation status quo. Va. Code Ann. § 8.01-317 (Repl. Vol. 1977) already provides "the court may, in any case where deemed proper, dispense with such publication in a newspaper." There was a similar provision in the old Title 8¹⁶ which was deemed not applicable by the Virginia courts in the *Payne* and *Nelson* cases. The General Assembly has failed to set forth any guidelines for determining when publication should be waived.

It is this author's prediction that the unfulfillment of Judge Koontz's "hope that the legislature will respond to this particular problem"¹⁷ will result in either a rash of circuit court litigation by the Legal Aid attorneys throughout Virginia or just an acceptance by indigents to a refusal of "access to the only avenue open for dissolving their allegedly untenable

13. *Id.*

14. Committee arguments were made by Edward G. Kidd, Robert C. Metcalf, and Kenneth W. Thorson.

15. Letter from Robert C. Metcalf, Dir., Metropolitan Richmond Legal Aid Society, Inc., to Delegate Ralph L. Axselle, Jr., on February 28, 1978.

16. Va. Code Ann. § 8-72 (Repl. Vol. 1957) ". . . but the court, or the judge thereof in vacation, may, in any case, if deemed proper, dispense with such publication in a newspaper."

17. *Supra*, n. 10.

marriages.”¹⁸ Hopefully, the 1979 General Assembly will pick up either House Bill 857 or House Bill 943 from its carry-over status and adopt one of them as law in our Commonwealth.

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18. 401 U.S. at 381.