CPLR 1209: Permission for Submitting Infant's Claim to Arbitration May Be Obtained at Any Time Prior to Commencement of Arbitration Hearings

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quire an immediate legislative response, but limiting the right to counsel to matrimonial actions would only produce another "patch" in the already inadequate and disorganized legislative schema.

A true reform would more likely result from a combination of Judge Fuchsberg's dissent and the Menin decision. If the Court of Appeals were to declare that attorneys had a constitutional right to adequate compensation for their services and that indigents in all proceedings, criminal, civil, and administrative, had a right to be represented by counsel, the legislature would be forced to develop an organized, comprehensive program insuring that all litigants—without regard to financial status—would have their claims effectively presented. A bold step towards creating true "equal justice under law," this solution would enhance the probability of a decision based on the merits of the claim, rather than on the financial resources of the claimant.

**ARTICLE 12 — INFANTS AND INCOMPETENTS**

**CPLR 1209:** Permission for submitting infant’s claim to arbitration may be obtained at any time prior to commencement of arbitration hearings.

CPLR 1209 provides that when a controversy involves an infant a court order must be obtained by the infant's representative before that controversy can be submitted to arbitration. The Court of Appeals, in *Aetna Life & Casualty Co. v. Stekardis*, has allowed an infant's representative greater flexibility in complying with the provisions of that statute.

Stekardis involved a motor vehicle accident claim against Aetna, holder of the liability insurance policy on the Stekardis car. Claims

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86 See note 71 supra.
87 Section 2365 of the Code of Civil Procedure expressly forbade the submission to arbitration of any controversy involving an infant party. Ch. 178, § 2365, [1880] N.Y. Laws 298. When this section was later incorporated into the CPA, its character as an absolute prohibition was preserved. Ch. 925, § 1410, [1920] N.Y. Laws 473-74 (renumbered § 1448 by Ch. 199, § 14, [1921] N.Y. Laws 801-02). In 1937, the legislature amended CPA 1448 to allow the guardian of an infant party to petition the court for permission to submit the controversy to arbitration. Ch. 341, § 1448, [1937] N.Y. Laws 203. The amended CPA 1448 eventually became what is presently CPLR 1209. Ch. 308, § 1209, [1962] N.Y. Laws 650.
89 Id. at 184, 313 N.E.2d at 53, 356 N.Y.S.2d at 588. An unidentified truck collided with an automobile in front of the Stekardis car, causing a piece of furniture to fall from the truck. In the confusion, the Stekardis car struck another vehicle. On the theory that the truck had caused the accident, the claimants sought recovery under the "uninsured motorist" endorsement contained in the Stekardis policy. The New York Insurance Law mandates that every motor vehicle insurance policy contain such a provision, protecting the insured in the event he suffers damages as a result of an accident with an uninsured or unidentified motor vehicle. N.Y. Ins. Law § 167(2-a) (McKinney 1960).
were brought by the driver-owner of the car and his three passengers, two of whom were infants. All the claimants demanded arbitration. Aetna moved to stay the arbitration, asserting, as one of several reasons, the failure of the infants' representatives to obtain a court order in compliance with CPLR 1209. The lower courts denied Aetna's motion and appeal was taken.

In a unanimous decision, the Court of Appeals affirmed the denial of the motion to stay arbitration, holding that the representatives' failure to obtain the requisite court permission prior to demanding arbitration was "not fatal" to their cause of action. Rather, the Court permitted the arbitration to proceed, requiring only that the infants' representatives comply with CPLR 1209 before the actual arbitration hearings begin.

Stekardis marks a significant departure from earlier New York case law. Prior to that decision it was generally thought that "[u]nder CPLR 1209 . . . a court order must be obtained before a controversy involving an infant . . . can be submitted to arbitration." In cases decided under

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90 Pursuant to the authority conferred on it by § 606(b) of the Insurance Law, the Motor Vehicle Accident Indemnification Corporation (MVAIC) has promulgated regulations which provide that each "uninsured motorist" endorsement, see note 91 supra, must contain a specific clause requiring arbitration either between the insurer and the insured or between MVAIC and a claimant if the parties fail to agree either as to the right to recover or as to damages. See generally 11 N.Y.C.R.R. 60 (1961).

91 34 N.Y.2d at 184, 313 N.E.2d at 53-54, 356 N.Y.S.2d at 588. Two other grounds for staying arbitration were asserted by Aetna. First, it claimed that the notice it received concerning arbitration was defective since the respondents did not list the addresses of all adult claimants. Second, Aetna argued that the asserted claims did not fall within the policy coverage. Id.

92 Special Term denied the motion on the ground that all of the plaintiffs' claims were covered by the insurance policy, while the Appellate Division, First Department, based its denial solely on the ground that Aetna had failed to make a timely motion to stay arbitration under CPLR 7503(c). 43 App. Div. 2d 682, 350 N.Y.S.2d 149, 150 (1st Dep't 1973). The First Department made no mention of the failure of the infants' representatives to obtain a court order approving the submission of the infants' claims to arbitration. Id. In his dissent, however, Justice McGivern noted the absence of such a court order from the record. Id. at 683, 350 N.Y.S.2d at 151 (McGivern, J., dissenting).

93 34 N.Y.2d at 186-87, 313 N.E.2d at 55, 356 N.Y.S.2d at 590. The Court based its decision primarily on the fact that Aetna, which had failed to make a timely motion to stay arbitration under CPLR 7503(c), could not obtain the relief afforded by the statute via a tardy motion. Id. at 185-86, 313 N.E.2d at 54-55, 356 N.Y.S.2d at 589-90. CPLR 7503(c), which had required that the motion be made within 10 days of receipt of the notice of intention to arbitrate, has since been amended to afford a party 20 days in which to make such motion. CPLR 7503(c), as amended, (McKinney Supp. 1974).

94 34 N.Y.2d at 186, 313 N.E.2d at 55, 356 N.Y.S.2d at 590.

95 Id.

96 2 W.K&M ¶ 1209.01 (emphasis added). The legislative history of CPLR 1209 is not inconsistent with this view. See note 87 supra. The New York Legislature's initial reluctance to permit arbitration of infants' claims appears to support, if anything, a strict interpretation of the requirement that court approval be obtained before any steps towards arbitration are taken.
both CPLR 1209\textsuperscript{97} and its predecessor provision in the CPA,\textsuperscript{98} the courts adopted a literal interpretation of the statute, construing the statutory provision as a requirement to be satisfied before any steps towards arbitration could be taken. Accordingly, these courts readily granted motions to stay an order of arbitration on the ground that the infant-plaintiffs' representatives had failed to secure a court order permitting arbitration of the claim.

By its decision in \textit{Stekardis}, the Court of Appeals has altered the impact of CPLR 1209 on arbitration proceedings involving an infant. No longer a prerequisite to the commencement of arbitration, CPLR 1209 has become merely a condition to be satisfied at any time before the actual hearings begin. As a result, an infant-plaintiff's representative now has the option of either obtaining a court order under CPLR 1209 before arbitration is commenced or serving notice of intention to arbitrate before any permission of the court is sought. He can proceed in the manner he deems most expeditious and advantageous.

The Court of Appeals, in the \textit{Stekardis} decision, did not express dissatisfaction with the provisions of CPLR 1209. Yet, in refusing to give the statute a literal reading, the Court intimated that compliance with CPLR 1209 is little more than a technicality. The danger inherent in this interpretation is that it may lead courts to neglect their duty, as guardians, to protect the infant's best interests. Judicial scrutiny of the propriety of submitting an infant's claim to arbitration should not

\textsuperscript{97} See Coughlin v. MVAIC, 45 Misc. 2d 672, 257 N.Y.S.2d 549, 551 (Sup. Ct. N.Y. County 1965), where the court granted a motion for an order to stay arbitration in light of the infant-claimants' failure to obtain court permission prior to submission of the claims to arbitration. See also Frame v. MVAIC, 31 App. Div. 2d 872, 297 N.Y.S.2d 247 (3d Dep't) (mem.), modified, 32 App. Div. 2d 572, 300 N.Y.S.2d 542 (3d Dep't 1969) (mem.), overruled on other grounds, 34 N.Y.2d 182, 313 N.E.2d 53, 356 N.Y.S.2d 587 (1974). The main issue in \textit{Frame} was whether the insurer was precluded from raising objections concerning the insured's coverage because he had failed to make a timely motion to stay arbitration pursuant to CPLR 7503(c). 31 App. Div. 2d at 873, 297 N.Y.S.2d at 249. In reversing the order directing the parties to proceed to arbitration, the court held that the insurer was not precluded from raising such objections. \textit{Id.} The court noted that an additional reason for its decision was "an issue not raised by any of the parties," \textit{viz}, the absence from the record of a court order permitting the infant's representative to submit the claim to arbitration. \textit{Id.} at 873, 297 N.Y.S.2d at 249-50. In a third case, Klein v. MVAIC, 48 Misc. 2d 82, 264 N.Y.S.2d 268 (Sup. Ct. N.Y. County 1965), the court granted defendant's motion to stay arbitration on the ground that the case involved certain issues of fact which had to be tried in court. \textit{Id.} at 84, 264 N.Y.S.2d at 270. The court noted that should these issues be decided in plaintiff's favor, plaintiff-parents would still have to apply for a court order pursuant to CPLR 1209 prior to submission of the plaintiff-infants' claims to arbitration. \textit{Id.}

\textsuperscript{98} See Chernick v. Hartford Accident & Indem. Co., 8 App. Div. 2d 264, 187 N.Y.S.2d 534 (3d Dep't 1959), aff'd, 8 N.Y.2d 756, 168 N.E.2d 110, 201 N.Y.S.2d 774 (1960), an early landmark case holding that the requirements of CPA 1448 (now CPLR 1209) must be met before an infant can arbitrate his claim.
be discouraged, especially since an arbitrator's award is not subject to judicial review on the merits\(^9\) and the arbitration agreement may provide for a ceiling on the amount recoverable which is unrelated to the damages sustained.\(^{10}\) It is only hoped that Stekardis' liberalization of CPLR 1209 will not encourage courts, impressed with the time and energy already expended in preparation for arbitration, to more readily grant orders permitting arbitration without fully investigating to determine whether this avenue is truly the best method of settling the infant's claim.

**ARTICLE 30 — REMEDIES AND PLEADINGS**

*CPLR 3022 & 3026: Remedy for defectively verified pleading is to treat it as a nullity; plaintiff State not prejudiced where prosecution for perjury is precluded.*

According to CPLR 3022, a defectively verified pleading may be treated as a nullity provided notice with due diligence\(^{10}\) is given to the adverse party. Such notice must specify the reasons for which the pleading is returned.\(^{10}\)

In *State v. McMahon,\(^{10}\)* New York State sought to recover, in a civil action, money which had been fraudulently procured by the defendant.\(^{10}\) By verified complaint, plaintiff alleged that defendant entered into a conspiracy to, and did, forge and cash two lottery tickets in the amount of $55,000, $41,700 of which had already been recouped by plaintiff State. Defendant served an unverified answer, asserting his privilege against self-incrimination as the basis therefor.\(^{10}\) By an order

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\(^{10}\) Coughlin v. MVIAC, 45 Misc. 2d 672, 674, 257 N.Y.S.2d 549, 552 (Sup. Ct. N.Y. County 1965) (dictum).

\(^{10}\) See Westchester Life, Inc. v. Westchester Magazine Co., 85 N.Y.S.2d 34 (Sup. Ct. N.Y. County 1948) where due diligence was held to require, *inter alia*, notice within 24 hours. Notice must be issued before trial, in any event, to permit cure of the defect by amendment. 3 WK&M § 3022.03.

\(^{10}\) Westchester Life, Inc. v. Westchester Magazine Co., 85 N.Y.S.2d 34 (Sup. Ct. N.Y. County 1948). "It is well settled that a notice accompanying an answer returned for improper verification or lack of verification must state the defects relied upon specifically, and that a general statement is not enough." *Id.* Where insufficient notice is given to the adverse party, it is as if the pleading had not been returned at all. *Id.; see 7B McKinney's CPLR 3022, commentary at 397 (1974); 3 WK&M § 3022.03 ("[A] statement that the pleading failed to meet the statutory requirements is insufficient.")."

\(^{10}\) 78 Misc. 2d 388, 356 N.Y.S.2d 933 (Sup. Ct. Albany County 1974).

\(^{10}\) Defendant and others were indicted for the forgery and cashing of two lottery tickets in the amount of $55,000. Defendant pleaded guilty to forgery in the second degree in satisfaction of the indictment. *Id.* at 388, 356 N.Y.S.2d at 935.

\(^{10}\) CPLR 3020(a) states that "where a pleading is verified, each subsequent pleading [with certain exceptions] shall also be verified." One exemption from the burden of verification is as to matter to "which the party would be privileged from testifying as a