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CPLR 7804(g): First Department Affirms Findings in an Article 78 Proceeding But Substitutes a "More Appropriate" Penalty

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In *Statewide*, the second department construed the statute strictly in holding that the application for a stay of arbitration must be commenced by a special proceeding requiring service of notice of the application for a stay upon the party and not his attorney since CPLR 7503(c) states that the notice "shall be served in the same manner as a summons or by registered or certified mail, return receipt requested." The court required service on the *party*, even if made by mail, since the manner was to be that of service of a summons.

However, in *Bauer*, the attorney for the claimants sent a demand to arbitrate to MVAIC which, in turn, sent a notice of a stay of arbitration in the prescribed manner to the claimants' attorney within the ten day period of limitation. In reversing the lower court, the fourth department based its decision upon practicality. The court, while admitting that a stay of arbitration calls for a special proceeding, determined that by making the demand for arbitration by means of an attorney, the claimants authorized and in fact designated their attorney to receive process. The court found additional support for its view in CPLR 7506(d) which provides in part that "[i]f a party is represented by an attorney, papers to be served on the party shall be served upon his attorney." Therefore, once a party demands arbitration through an attorney, the attorney becomes the agent to receive process to confer jurisdiction upon the court in a special proceeding.

The court also commented upon the fairness and practicality of this interpretation. The attorney must be notified by the party served with notice anyway, so as to enable him to act quickly and expeditiously, and such prompt action would be further assured by this ruling.

Until the Court of Appeals has resolved the conflict between departments, the cautious practitioner should serve both the party and his attorney or, at least, the adverse party.

Article 78—Proceeding Against Body or Officer

CPLR 7804(g): First department affirms findings in an Article 78 proceeding but substitutes a "more appropriate" penalty.

Ancis v. Lomenzo[112] was an Article 78 proceeding under CPLR 7804(g), which permits appeals from administrative determinations to the appellate division where the appellant raises a question under CPLR 7803.[113]

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112 31 App. Div. 2d 615, 295 N.Y.S.2d 784 (1st Dep't 1969).

113 The questions which may be raised in an Article 78 proceeding under CPLR 7803 are:

1. whether the body . . . failed to perform a duty enjoined upon it by law; or
2. whether the body . . . proceeded, is proceeding or is about to proceed without or

In *Ancis*, the petitioner's real estate broker's license was revoked because of a finding of untrustworthiness, and he sought review on the grounds that the finding was unsupported by substantial evidence. The court held that the finding was supported by substantial evidence of untrustworthiness, but that the penalty suffered was too severe. Accordingly, the court reduced the penalty of revocation of petitioner's license to suspension for three months, deeming the reduced penalty to be "more appropriate."

The *Ancis* decision clearly illustrates the appellate division's authority under CPLR 7804(g) to dispose of all issues in the proceeding before it on appeal or transfer. This procedure allows the petitioner to obtain a review of *all* issues even though the application to the court is based *solely* upon the grounds set forth in CPLR 7803.

DOMESTIC RELATIONS LAW

DRL § 250: Presumption of domicile held not applicable to bilateral Mexican divorce.

Section 250 of the DRL creates the presumption that a person who resides within New York for prescribed periods before and after a divorce action is commenced in a foreign jurisdiction, or who at all times maintains a residence within the state, is a domiciliary of New York when the action is commenced. The legislative intent of this enactment is unknown,[114] but presumably its aim is to aid in the dissolution of foreign divorces on the theory that one domiciled in New York can not be domiciled in the foreign jurisdiction. However, in direct opposition to this presumption is the long established precedent that a divorce decree of a sister-state may only be challenged on jurisdictional grounds when one party had insufficient opportunity to contest the action.[115] This would therefore preclude section 250 from operating on bilateral sister-state divorces. Such decrees must be given full faith and credit by the state of marital domicile and can not be relitigated

in excess of jurisdiction; or
3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion as to the measure or mode of penalty or discipline imposed; or
4. whether a determination made as a result of a hearing held . . . is, on the entire record, supported by substantial evidence.

114 DRL section 250 was not included in the draft bill submitted by the Joint Legislative Committee on Matrimonial and Family Laws, hence there is no committee report indicating the legislative intent. Herzog, *Conflict of Laws*, 18 SYRACUSE L. REV. 157, 177 n.133 (1966).

115 Paulsen, *Divorce Jurisdiction By Consent of the Parties—Developments Since "Sherrer v. Sherrer"*, 26 IND. L.J. 380, 386 (1950-51). *See* Johnson v. Muelberger, 340 U.S. 581 (1951); Sherrer v. Sherrer, 334 U.S. 343 (1948); Williams v. North Carolina, 325 U.S. 226 (1945).