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CPLR 7501: Court Refuses To Enforce Inadequate Arbitration Agreement in Child Custody Dispute

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litigation was chargeable with knowledge of the dispute. The purpose of the rule was to prevent any conveyance of the disputed property during the pendency of the action which would destroy the value of a judgment in favor of the plaintiff.[153] In a similar manner, article 65 of the CPLR requires that a notice of pendency be filed in any action which would affect the title, possession, use or enjoyment of real property before constructive notice of the litigation is attributed to a purchaser or encumbrancer.

CPLR 6515 enables a defendant to cancel the notice of pendency.[154] Such cancellation will release the property from the constructive notice effect of article 65 and allow the defendant to deal freely with it during the proceedings.[155] In order to obtain such a cancellation, the defendant must appeal to the court's discretion and give an adequate undertaking to secure the plaintiff.

John H. Dair Building Construction Co. v. Mayer[156] affords an example of the foregoing procedure. Plaintiff instituted an action to recover monies alleged to have been wrongfully taken by one defendant and used for the purchase of the real estate which was the subject of the notice of pendency. The lower court granted defendants' motion to cancel the notice of pendency on the condition that defendants file a surety undertaking in the amount of $31,500. The defendants complied with the order, settled a mechanic's lien on the property, and sold it for an amount in excess of $41,000. The appellate division modified the order by requiring a surety bond in the amount of $42,000 on the grounds that the bond would serve as a substitute for the property, and plaintiff, if successful, should be entitled to an amount equal to the net proceeds realizable after a bona fide sale of the property.

ARTICLE 75 — ARBITRATION

CPLR 7501: Court refuses to enforce inadequate arbitration agreement in child custody dispute.

It has been suggested that under CPLR 7501 a court is primarily concerned with three questions in determining whether or not to

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153 7A WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 6501.01 (1968). For a discussion of the doctrine of *lis pendens*, see Hailey v. Ano, 136 N.Y. 569, 32 N.E. 1068 (1893).

154 It should be noted that not only the defendant but any "person aggrieved" can secure cancellation of a notice of pendency. The movant must have an interest in the realty that will be adversely affected by the judgment. *See generally* 7A WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 6515.06 (1968).

155 However, CPLR 6515 does not apply in three instances: (1) an action to foreclose a mortgage; (2) an action for partition; and (3) an action for dower.

156 31 App. Div. 2d 835, 298 N.Y.S.2d 122 (2d Dep't 1969).

compel arbitration: (1) have the parties made an agreement to arbitrate? (2) has a dispute arisen? and (3) has there been a refusal to arbitrate?[157] Agreements between husbands and wives, like other contractual agreements, fall within the realm of 7501. However, the courts have never felt compelled to send all types of family disputes to arbitration, even where the parties have expressly provided for that remedy.[158]

In *Sheets v. Sheets*,[159] the court clarified the New York view on "family arbitrations," noting that disputes between parents regarding rights of visitation and custody of children were arbitrable as long as the welfare and best interests of the child were not adversely affected.[160] *Sheets* recommended use of a two-stage procedure wherein the issue of custody could initially be decided by arbitration, subject however to the supervisory power of the court.[161]

In *Agur v. Agur*,[162] the Appellate Division, Second Department, recently expressed "grave doubt whether such a two-stage procedure would have wide application."[163] The court reasoned that arbitration would not be compelled under CPLR 7501 where those nominated as arbitrators were not fully qualified to review all matters relating to the granting of custody, since such arbitrators would not serve the court in "discharging its duties as *parens patriae*."[164] Because the arbitrators in *Agur* (rabbis, well versed in Jewish religious law) had but limited qualifications, their scope of concern in arbitration was not sufficiently broad to satisfy the court.

The court realized that it must examine other factors beyond those concerned with the child's religious faith. Recognizing the judicial process to be "more broadly gauged and better suited" to award custody,[165] it pointed out that the lack of legal expertise in many arbitrators led to the duplication of work once judicial review was sought. Also noted were the "narrowly limited grounds" for review

157 *See* 8 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 7501.20 (1968).

158 *Id.* at ¶ 7501.16.

159 22 App. Div. 2d 176, 254 N.Y.S.2d 320 (1st Dep't 1964). For a discussion of *Sheets v. Sheets* see 33 FORDHAM L. REV. 726 (1965).

160 *Sheets* overturned Michelman v. Michelman, 5 Misc. 2d 570, 135 N.Y.S.2d 608 (Sup. Ct. N.Y. County 1954) (dealing with visitation rights), and Hill v. Hill, 199 Misc. 1035, 104 N.Y.S.2d 755 (Sup. Ct. N.Y. County 1951) (concerned with non-arbitrability of both custody and visitation disputes).

161 Historically, the state and its courts act as *parens patriae*, having the final responsibility governing the custody of infants. *See* Finlay v. Finlay, 240 N.Y. 429, 148 N.E. 624 (1925).

162 32 App. Div. 2d 16, 298 N.Y.S.2d 772 (2d Dep't 1969).

163 *Id.* at 21, 298 N.Y.S.2d at 778.

164 *Id.* at 22, 298 N.Y.S.2d at 779.

165 *Id.* at 20, 298 N.Y.S.2d at 777.

in such decisions,[166] and the effect upon the infant who must wait through both an arbitration and a court proceeding, when the arbitration may be of questionable value.

In short, *Agur* signifies the judiciary's reluctance to compel arbitration in child custody disputes where it finds arbitration to be a less than adequate solution. The value and desirability of arbitration are for the court to determine in each situation, especially when it is concerned with the more weighty problems of custody. If the arbitration agreement of the parties is not an adequate remedy, the court will not enforce it. However, the well-drafted document, which provides for a qualified, mutually acceptable panel of arbitrators, should continue to be honored and enforced by the courts.

CPLR 7501: Consolidations of arbitrations permissible unless prejudice would thereby result.

In *Met Food Corp. v. M. Eisenberg & Brothers, Inc.*[167] a general contractor, The Heyward-Robinson Company, Inc. [hereinafter Heyward], and an electrical contractor M. Eisenberg & Brothers, Inc. [hereinafter Eisenberg], had each provided for arbitration clauses in their separate construction contracts with Met Food Corporation [hereinafter Met]. Under the terms of the arbitration clauses, each party was to appoint one arbitrator, with a third to be chosen by the two already appointed. The agreements also contained a provision with respect to Met's right to indemnification for any claims asserted against it by one contractor for damages caused by any other contractor employed by Met.

Eisenberg subsequently served a notice to arbitrate on Met. Pursuant to their agreements, each party appointed an arbitrator, and a third member of the panel was duly chosen. However, Met then sought to enjoin the arbitration pending the joinder of Heyward as a party, asserting that it had subsequently learned that many of Eisenberg's claims were "predicated upon 'omissions and misdeeds' of Heyward."[168]

The court reasoned that even under the CPA, pursuant to which joinders and consolidations were unquestionably proper in light of the fact that arbitration was then itself a special proceeding, consolidation could not be ordered in a situation such as the present one. Unless either Eisenberg or Heyward waived its right to participate in the

166 *See* CPLR 7511(b).
167 59 Misc. 2d 498, 299 N.Y.S.2d 696 (Sup. Ct. Suffolk County 1969).
168 *Id.* at 500, 299 N.Y.S.2d at 698.