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N.Y. Const., Art. VI, § 19(a): Consent of Surrogate Not Needed To Effect Transfer

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defended on the merits in the district court. He attacked the transfers only after losing the case there.

The court found that the constitutional provision superseded the CPLR requirement, and did eliminate the method of transfer by consent. In spite of the fact that the original service would not have conferred jurisdiction on the lower courts, it was held that since the defendant appeared and defended without objection, he became one of the classes of persons over whom the court had personal jurisdiction.[47]

N.Y. Const. art. VI, § 19(a): Consent of surrogate not needed to effect transfer.

Under the CPLR,[48] the supreme court may transfer an action pending before it to the surrogate's court if the case involves a decedent's estate within the latter court's jurisdiction. A prerequisite for this transfer has been the consent of the surrogate to receive the action. Although this consent was usually obtainable, when the facilitation of litigation[49] or the prevention of calendar delays in the supreme court[50] warranted transfer, it remained discretionary with the surrogate.[51]

Recently, the appellate division, first department, in *Garland v. Raunhein*,[52] indicated that the general transfer provision of the amended judiciary article of the Constitution[53] has, by failure to mention consent as a requirement, eliminated it. After stating that the CPLR transfer section had been superseded by the constitutional provision, the court ordered the transfer of a partition action brought in the supreme court to the surrogate's court without any mention of requesting or obtaining the surrogate's consent.

Although this decision seems warranted by the language of the amendment, in a few instances the consent of the surrogate has been sought on a voluntary basis.[54] Moreover, consent of the surrogate is still needed for the transfer of cases from the supreme court in one department to a surrogate's court in another, since

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[47] Martin v. Farrell, 47 Misc. 2d 126, 261 N.Y.S.2d 820 (County Ct. Essex County 1965).

[48] CPLR 325(d). Parallel provisions appear in SCPA § 209 and § 501.

[49] Shearn v. Lord, 16 Misc. 2d 224, 156 N.Y.S.2d 32 (Sup. Ct. N.Y. County 1956), *aff'd*, 3 App. Div. 2d 823, 161 N.Y.S.2d 22 (1st Dep't 1957).

[50] *See In re* Mayer, 158 N.Y.L.J. 13 (Surr. Ct. Westchester County July 18, 1967).

[51] *In re* Laedke, 28 Misc. 2d 651, 216 N.Y.S.2d 180 (Surr. Ct. Nassau County 1961).

[52] 29 App. Div. 2d 383, 288 N.Y.S.2d 417 (1st Dep't 1968).

[53] N.Y. CONST. art. VI, § 19(a). This result was predicted by the commentator in 58A MCKINNEY'S SCPA § 209, commentary 210-11 (1967).

[54] *In re* Suchoff, 55 Misc. 2d 284, 285 N.Y.S.2d 134 (Surr. Ct. Nassau County 1967); *In re* Breen, 45 Misc. 2d 374, 256 N.Y.S.2d 770 (Surr. Ct. Richmond County 1965).

the constitutional provision applies only to intra-departmental transfers.[55]

ARTICLE 4 — SPECIAL PROCEEDINGS

CPLR 403: Service of order to show cause in specified manner does not create jurisdictional predicate.

A special proceeding may be instituted either by service of a notice of petition, in the same manner as a summons, or by an order to show cause, which is served in any manner specified by the court.[56] When the latter procedure is chosen, it has been held that failure to follow the designated method of service is a jurisdictional defect.[57] However, this does not mean that service of the order in the specified manner will of itself give jurisdiction over the defendant.

Application of Kay,[58] a proceeding to determine the custody of children of a divorced couple illustrates this proposition. The children were living with the defendant-wife, in Belgium, at the time of the proceeding's commencement.[59] Therefore, the trial court directed service of the order to show cause by what seemed the only feasible method,[60] *i.e.*, service by mail on the defendant in Belgium, and personal service on her attorneys.

The appellate division, first department, held that literal compliance with these instructions could not, *per se*, confer personal jurisdiction over the defendant.[61] Unless a hearing shows that the defendant maintained a New York residence at the time the proceeding commenced, no jurisdictional basis exists, and the mere service of the order to show cause does not create one.

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[55] This discrepancy in the treatment of inter- and intra-departmental transfers could be eliminated if the Legislature passed the law authorized by § 19(g) of the Judiciary Article, extending the constitutional transfer power to transfers between departments.

[56] CPLR 304, 403(c), (d).

[57] *In re* Graffagnino, 48 Misc. 2d 441, 264 N.Y.S.2d 483 (Sup. Ct. N.Y. County 1965). For a discussion of this case see *The Quarterly Survey of New York Practice*, 41 ST. JOHN'S L. REV. 121, 133-34 (1966).

[58] 29 App. Div. 2d 937, 289 N.Y.S.2d 709 (1st Dep't 1968).

[59] There was no continuing jurisdiction predicated on a New York divorce, such as was found in Schneidman v. Schneidman, 188 Misc. 765, 65 N.Y.S.2d 876 (Sup. Ct. Kings County 1946), since the parties were divorced in Mexico.

[60] "An order to show cause permits the court to make provisions for special problems that may arise as to time, service and parties . . . ." THIRD REP. 157.

[61] CPLR 313.