

CPLR 403: Service or Order To Show Cause in Specified Manner Does Not Create Jurisdictional Predicate

St. John's Law Review

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

This Recent Development in New York Law is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

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.

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.