

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

St. John's Law Review

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the constitutional provision applies only to intra-departmental transfers.<sup>55</sup>

#### 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.<sup>56</sup> When the latter procedure is chosen, it has been held that failure to follow the designated method of service is a jurisdictional defect.<sup>57</sup> 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*,<sup>58</sup> 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.<sup>59</sup> Therefore, the trial court directed service of the order to show cause by what seemed the only feasible method,<sup>60</sup> *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.<sup>61</sup> 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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<sup>55</sup> 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.

<sup>56</sup> CPLR 304, 403(c), (d).

<sup>57</sup> *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).

<sup>58</sup> 29 App. Div. 2d 937, 289 N.Y.S.2d 709 (1st Dep't 1968).

<sup>59</sup> 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.

<sup>60</sup> "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.

<sup>61</sup> CPLR 313.