
LAW AND THE FAMILY

AUTHORITY OF JUDICIAL HEARING OFFICERS

Joel R. Brandes

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JUDICIAL HEARING Officers are frequently appointed in matrimonial actions to "hear and determine" the issues. The authority of a Judicial Hearing Officer to hear and determine an issue in a "matrimonial action" [FN1] or family court proceeding [FN2] is limited to the extent that the parties consent. For this reason, the wording of the stipulation or order of referral is critical, as it defines the jurisdiction of the Judicial Hearing Officer to act.

Counsel should be wary of an order of referral to hear and determine "all issues" in the action, unless the issues are defined in the order. Otherwise the right to have unrelated motions unrelated determined by the IAS justice may be unwittingly waived and the Judicial Hearing Officer may be empowered by the parties to determine issues that counsel would have preferred to be determined by a justice of the court. Once the equitable distribution portion of divorce action is referred to a Judicial Hearing Officer, on consent, "to hear and determine all issues in this matter" he has no power to return the case to the judge who had heard the divorce portion for further substantive or adjective decisions. [FN3]

Background

Prior to 1962, New York had Official Referees and nonofficial Referees. Official Referees were retired Judges [FN4]. Only an Official Referee could be designated by a court to determine an issue in a matrimonial action [FN5]. The purpose of this rule was to prevent collusion in divorce actions where the parties would nominate a "friendly" Referee in order to circumvent our strict divorce laws [FN6]. In addition to references on consent, Judiciary Law former 116 permitted the reference of any issue in a matrimonial action to an Official Referee for determination without the consent of the parties [FN7].

In 1962, the Office of the Official Referee was abolished [FN8] and the statutory authorization for compulsory references to determine matrimonial actions was eliminated. However, existing Official Referees could continue in office for the remainder of the terms [FN9]. When the CPLR became effective in 1963, it provided that those who still held the office of Official Referee had authority to act in matrimonial actions [FN10].

In 1983, Article 22 was added to the Judiciary Law to provide for the designation of Judicial Hearing Officers, and the CPLR was amended to incorporate Judicial Hearing Officers in all of the provisions relating to Referees and to substitute the term Judicial Hearing Officer for "official referee." CPLR 4301 was amended to provide that "[f]or the purposes of this article, the term referee shall be deemed to include judicial hearing officer." However, the Legislature did not enact legislation empowering Judicial Hearing Officers to hear and determine issues in matrimonial actions without the parties' consent.

CPLR 4317(a) provides in part that the parties may stipulate that any issue shall be determined by a referee. However, leave of court and designation by it of the referee is required for references in matrimonial actions. Subdivision (b) provides that on motion of any party or on its own initiative, the court may order a reference to determine a cause of action or an issue where the trial will require the examination of a long account. CPLR 4312 (2) also provides, inter alia, "[i]n matrimonial actions, only a judicial hearing officer or a special referee appointed by the chief administrator of the courts may be designated to determine an issue."

A referee to determine an issue has all of the powers of the court in performing a like function. However, he has no power to relieve himself of his duties, appoint a successor or to adjudge any person except a witness before him guilty of contempt. [FN11]

In *Shanback v. Shanback*, [FN12] despite the parties' refusal to consent, the Administrative Judge directed that the economic aspects of the divorce action be heard and determined by a Judicial Hearing Officer based upon CPLR 4317 (b) which provides that on its initiative the Court may order a referee to determine a cause of action or issue where the trial will examine the examination of a "long account." The plaintiff's counsel objected to the court's ruling on the basis that the equitable distribution case did not constitute a "long account" under CPLR 4317

(b). The plaintiff's counsel also argued that the statute, as construed, was unconstitutional.

The Second Department held that the Judicial Hearing Officer should not have determined the issues, because a matrimonial action is not an examination of a "long account" within the meaning of CPLR 4317(b). However, it held that because there were exceptional conditions within the meaning of CPLR 4212, the reference would be deemed one to hear and report.

The Appellate Division held that the exercise of discretion required in the resolution of the issues involved in equitable distribution actions far exceeds the bounds of an "examination of a long account." CPLR 4317 [b] has been traditionally limited basically to matters concerning mathematical calculations, i.e., debits, credits, receipts and payments. The impropriety of referring these matters to a Judicial Hearing Officer for resolution over the parties' objection was underscored by the importance of the issues to the parties involved, particularly in the absence of statutory authority. Absent statutory authority to the contrary or the consent of the litigants, the parties in these actions have a right to have a Supreme Court Justice resolve these equitable distribution issues irrespective of the fact that their resolution may require lengthy and detailed testimony and evidence and consume a great deal of the court's time. Since equitable distribution actions cannot be reasonably characterized as "examination[s] of a long account" and no specific statutory authority exists to permit a Judicial Hearing Officer to hear and determine these actions over the parties' objections, the compulsory reference was inappropriate.

Equitable Distribution Issues

The court noted that a Judicial Hearing Officer can hear and determine equitable distribution issues if the parties consent to such a reference and, if "exceptional" conditions exist, a court may, in its discretion, refer an issue of fact in an equitable distribution action to a Judicial Hearing Officer to hear and report to the court on the particular issue, without the parties' consent, pursuant to CPLR 4212. It concluded that while the use of a compulsory reference to a Judicial Hearing Officer to hear and determine issues in an equitable distribution action may be

administratively attractive in helping to alleviate the delays and calendar congestion in the State's trial courts, no statutory authority currently exists to permit its utilization.

The determination that the compulsory reference was inappropriate did not require a new trial. The court was satisfied that "exceptional" conditions existed which would have justified the reference to a Judicial Hearing Officer to hear and report with or without the parties' consent pursuant to CPLR 4212. In the absence of authorization to determine, the court held that the reference would be deemed as one to hear and report.

In *Rothman v. Rothman* [FN13] the parties consented to all issues being heard and determined by a referee "to hear and determine." After the Referee rendered his decision, the plaintiff husband moved to vacate the appointment of the referee, to void his decision and to restore the action to the contested matrimonial calendar. The grounds urged in support of the motion were that the court lacked power to designate a referee to hear and determine the issues in a matrimonial action, such power of designation being vested solely in the Appellate Division. The court held that a Justice of the Supreme Court may, where the parties consent, grant leave and designate a referee to determine the issues in a matrimonial action. Where the parties do not consent, the court may direct that the issues in a matrimonial action be determined by a special referee designated by the Appellate Division. The court found authority for its determination in CPLR 4317, which provides that the parties may stipulate that any issue shall be determined by a referee. In the case at bar, the parties so stipulated, and the court designated the referee, after granting leave as provided in CPLR 4317(a).

More Case Law

In *Haibi v. Haibi* [FN14], the Appellate Division affirmed an order of the Supreme Court that rejected certain findings of a Judicial Hearing Officer and determined that the husband was in arrears with respect to his child support payments. It held that the Supreme Court was not bound by its original reference directing the Judicial Hearing Officer to hear and determine, because the husband refused to consent to have the Judicial Hearing Officer determine the matter. It

held that an order of reference to hear and determine may only be made upon the consent of the parties.

A Judicial Hearing Officer who attempts to determine matters not referred to him by the order of reference acts beyond and in excess of his jurisdiction. In *McCormack v. McCormack*, [FN15] the parties appeared before a Judicial Hearing Officer, and a Stipulation of Settlement was dictated onto the record. The court conducted an inquest and granted a divorce judgment to the wife. Prior to the entry of the divorce judgment the husband died, and the wife moved to vacate the divorce judgment and to set aside the Stipulation. The Supreme Court granted the wife's motion. The Appellate Division affirmed. It held that the Judicial Hearing Officer was without authority to rule that the parties' Stipulation was voluntary or to enter the divorce judgment. A Judicial Hearing Officer who attempts to determine matters not referred to him by the order of reference acts beyond and in excess of his jurisdiction. In this case, the parties did not stipulate to a reference in the manner prescribed by CPLR 2104 nor was there any indication that there was an order of reference designating the Judicial Hearing Officer.

In *Colodner v. Colodner*, [FN16] a matrimonial action was referred to a Judicial Hearing Officer, by stipulation, to hear and determine. He rendered his decision and prior to the entry of an order or judgment a motion to reargue was made. The Supreme Court referred the motion back to the Judicial Hearing Officer. It held that if it were to consider the motion it would be in the nature of a review of the determination, which may only be done by the Appellate Division, and under CPLR 2222 the motion should go to the Judicial Hearing Officer. Since the statute gives the Judicial Hearing Officer "all the powers of a court" (with exception), there is little difference between him and an acting justice of the Supreme Court and consequently his authority continues after he has made and filed his decision.

'Lipton v. Lipton'

In the same vein, in *Lipton v. Lipton* [FN17] the Second Department affirmed an order made by a Judicial Hearing Officer, which, after a hearing, set aside a stipulation of settlement that had been entered into during the proceedings before

the Judicial Hearing Officer. The court held that the Judicial Hearing Officer acted within his authority in conducting a hearing to determine whether or not the stipulation of settlement should have been set aside and in thereafter directing a trial of the divorce action. The court held that he did not exceed his authority, because the action in which the stipulation of settlement had been entered into had not been terminated by the entry of judgment at the time the hearing was held.

Joel R. Brandes has law offices in Garden City and New York City. He co-authored the nine-volume Law and the Family New York 2nd Ed. and Law and the Family New York Forms (both published by West Group).

FN(1) CPLR 105 (p) provides that the term "matrimonial action" includes actions for a separation, for an annulment or dissolution of a marriage, for a divorce, for a declaration of the nullity of a void marriage, for a declaration of the validity or nullity of a foreign judgment of divorce and for a declaration of the validity or nullity of a marriage. DRL 236[B][2] adds to this list proceedings to obtain maintenance or a distribution of marital property following a foreign judgment of divorce.

FN(2) There is no authority for a Judicial Hearing Officer to hear and determine issues of paternity or child support in family court. Myndi O., 180 Misc 2d 608, 690 NYS2d 409 (Fam. Ct.,1999).

FN(3) Harris v. Harris (1988) 140 Misc 2d 275, 531 NYS2d 77.

FN(4) see, Judiciary Law former 116

FN(5) see, former Civ Prac Act 1174

FN(6) See, Cunningham and Sullivan, Practice Commentary, McKinney's Cons Laws of NY, Book 7B, CPLR 4312, at 184)

FN(7) See, Matter of Brock, 245 App Div 5; Gossin v. Gossin, 188 Misc 1

FN(8) see, NY Const, art VI, 35

FN(9) 1962, ch 704, 2

FN(10) CPLR former 4312 [2]; Judiciary Law 117; see also, CPLR former 4313, 4315

FN(11) CPLR 4301

FN(12) Schanback v. Schanback (1987, 2d Dept) 130 App Div 2d 332, 519
NYS2d 819

FN(13) NYLJ, 9-30-82 (Sup Ct, Richmond Co.) (Rubin, J.)

FN(14) (1991, 2d Dept) 171 App Div 2d 842, 567 NYS2d 778

FN(15) (1991, 2d Dept) 174 App Div 2d 612, 571 NYS2d 498

FN(16) (1987) 138 Misc 2d 66, 523 NYS2d 939

N(17) (1986, 2d Dept) 119 App Div 2d 809, 501 NYS2d 437.

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