

Legislation Report

REPORT NO. 3

January 31, 2001

S. 77

By: Senator Skelos
Senate Committee: Codes
Effective Date: Immediately

AN ACT to amend the civil practice law and rules, in relation to commencement of special proceedings

LAW AND SECTION REFERRED TO: CPLR §§304; 306-a(a); 306-b

THIS BILL IS APPROVED

Effective January 1, 1993, all special proceedings are to be commenced pursuant to CPLR 304 by the filing of a notice of petition or order to show cause together with the petition. The notice of petition or the order to show cause must include a return date for the determination of the petition. CPLR 403(a). The absence of an appropriate return date is a jurisdictional defect. *Travis v. New York State Dept. of Environmental Conservation*, 185 App.Div.2d 714 (4th Dept. 1992); *Matter of Civil Service Employees Association v. Albrecht*, 180 App.Div.2d 183 (3d Dept. 1992), *leave denied*, 80 N.Y.2d 761 (1992). In addition, the papers served upon the respondent must be identical to the papers which are filed. *William Court-White Hill Road Homeowners Association, Inc. v. New York State Commissioner of Mental Retardation and Developmental Disabilities*, 161 Misc.2d 552, 613 N.Y.S.2d 322 (Sup.Ct. Westchester Co. 1994).

The procedure for the determination of the appropriate return date entails the assignment of the IAS judge. The return date of a special proceeding is to be selected in the same manner as the return date for a motion. Where there has been an assignment, the return date must be before the assigned judge, presumably on a day regularly scheduled for the judge's motions. '202.9 and 202.8 do provide procedure for motions in unassigned cases or special proceedings, but the procedure is cumbersome, and will require additional notice to the respondents once the case has become assigned. If the respondents have not yet appeared in the action, notice to them cannot be made under CPLR 2103.

As a result, the commencement of a proceeding presents a logistical problem. Since the notice of petition or the order to show cause must have an appropriate return date, the petitioner is faced with the choice of picking a return date, which may later be changed to accommodate the assigned judge's schedule, or filing an RJI in order to garner an assignment to a judge prior to the filing of the notice of petition and petition, so as to pick an appropriate return date for the judge assigned. If the petitioner is nearing the end of the limitations period, commencing the proceeding in an expedited manner will be essential, and in some counties, awaiting the assignment of a judge may take too long. If the petition is to be accompanied by an order to show cause instead of a notice of petition, the process becomes more difficult since the order to show cause must be signed, with appropriate return date inserted, before the order to show cause and petition are filed. This will require, in most counties, the filing of an RJI prior to the filing of the order to show cause and petition. To further exacerbate the problem, there is anecdotal evidence that in some counties, an index number cannot be purchased without the filing of something more than an RJI, e.g. the petition and notice of petition.

These problems, inherent in commencing a special proceeding, have resulted in a myriad of attempts by attorneys to avoid the logistical problems. There have been unsuccessful attempts to commence the proceeding by the filing of an unsigned order to show cause. *William Court-White Hill Road Homeowners Association, Inc. v. New York State Commissioner of Mental Retardation and Developmental Disabilities*, 161 Misc.2d 552, 613 N.Y.S.2d 322 (Sup.Ct. Westchester Co. 1994). Even where there is a presentation of the order to show cause for signature at the time of filing the unsigned order to show cause with the petition, and a subsequent signing of the order to show cause and refileing of it with the petition, commencement will not relate back to the earlier filing and presentment of order. *Fry v. Village of Tarrytown*, 89 N.Y.2d 714, 658 N.Y.S.2d 205 (1997). There have also been failures to properly commence an action where after filing a notice of petition and petition without a return date, the petitioner filed a new notice of petition and petition with a return date under the same index number without paying an additional fee. *Vetrone v. Mackin*, 216 App.Div.2d 839, 628 N.Y.S.2d 866 (3d Dept.), *cf. Allens Creek v. County of Monroe*, ___ Misc.2d ___ (Sup.Ct. Monroe Co. 3/12/98, Index No. 98/767).

The difficulty stems from the requirement that the notice of petition or order to show cause be filed with the petition in order to commence the proceeding, and that the notice of petition or order to show cause have an appropriate return date. The necessity of the appropriate return date in the notice of petition or order to show cause is primarily for notice to the respondent and the cases which found a jurisdictional defect in its absence date back to before commencement by filing. *ee, e.g., Matter of Civil Service Employees Association v. Albrecht*, 180 App.Div.2d 183 (3d Dept. 1992), *leave denied*, 80 N.Y.2d 761 (1992). The elimination of the requirement of **filing** the order to show cause or notice of petition with the petition in order to commence the proceeding, while still requiring the **service** of the order to show cause or notice of petition with the petition in order to give proper notice to the respondents will cure the logistical problems currently experienced in the commencement of a special proceeding, without changing the quality and quantity of notice given to the respondent. For these reasons, it is proposed to amend CPLR 304 and 306-a to delete reference to the notice of petition or order to show cause, and to amend

CPLR 306-b to add the requirement of service of the notice of petition or order to show cause together with the petition.

There is considerable case law and a conflict between the appellate departments regarding the method and timing of service for special proceedings brought under the Election Law. It is not intended that the proposed amendment to CPLR 306-b affect this case law. An amendment to this bill has been made to make clear this intention.

Based on the foregoing reasons, this bill, which is a proposal of the New York State Bar Association, is **APPROVED**.

Opinions expressed are those of the Committee preparing this report and do not represent those of the New York State Bar Association unless and until they have been adopted by its House of Delegates or Executive Committee.