Back to the Future; Traps for the Unwary

By Vesselin Mitev

A new form in Family Court has stirred up controversy among practitioners, as it presents a hidden-in-plain-sight trap for the unwary, and appears to be directly against established precedent.

Under CPLR 4301, court-attorney referees possess "all the powers of a court" except they lack the ability to hold someone in contempt, unless that person is a "witness before [them]."

Via an "order of reference" that can only be made upon the parties' consent, referees are either there to "hear and report" or "hear and determine" an action or an issue (CPLR 4311, CPLR 4320); in the former circumstance, either party then has to move to either "confirm" or "reject" the report within 15 or 30 days, depending on who you represent.

In Family Court, since there is no "order of reference," the typical practice is that certain court-attorney referees are automatically assigned to hear visitation and family offense petitions, wherein the parties are presented, at the first appearance, with a "consent form" that they are, in effect, told to sign so that the referee may hear *and determine* their case.

Although the standard language used by each court varies, to the extent that they must advise the parties that they are not a judge, but will be acting as a judge upon the parties' consent, the parties are then immediately presented with a consent form to sign, a pen to do so with, and the cumulative effect of the proceeding is to leave little room for a party to decline to sign the consent form (and then be subject to possible adverse consequences, by dint of the ephemeral effects of human nature); and this is especially true when a litigant is unrepresented.

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For a practitioner, whether or not to agree to let a certain referee hear and determine the case is, of course, an important part of trial strategy that's equal parts experience, gut feeling, and pure rolling the dice, with the sour benefit of knowledge that sometimes the very act of declining to have your case heard before a certain referee may have known and unknown consequences for you and your client down the road; i.e., the devil you know, etc.

The new "consent to referee" form provides that the parties agree (if they sign) that the referee "shall hear and determine the above captioned matter *and all future matters filed by the parties herein*, unless otherwise limited by Rule 4301 of the [CPLR]." (my emphasis).

To be sure, CPLR 4301 itself absolutely does not provide for "all future matters" to be heard by the same referee (practically, because future matters necessarily have not yet happened, and are thus premature); but the very existence of that phrase should be a red flag.

To use the absurd to illustrate the obvious, agreeing to this would mean that if the referee demonstrated extreme bias/prejudice against one party, and was reversed on appeal, the matter could not be remanded to a different referee (as is the case where orders are reversed because of judicial bias/prejudice/abuse of discretion) but would go back in front of that same referee.

Ditto for parties who are embroiled in litigation for years (a large contingent of Family Court litigants) who, say, settled a custody dispute in the past, and now one party seeks to modify it; or for parties bringing or defending orders of protection petitions.

The real trap here, of course, is for the unwary lawyer, who agrees to this *ad infinitum* clause on behalf of his or her client, either out of fear of not rocking the boat, or simply not paying attention, and is later hit with a malpractice suit, because of the dearth of authority construing the CPLR referee provisions very narrowly and to the point: absent an order of reference, on consent, *for each case or action*, a referee lacks the jurisdiction to hear and determine a matter, see *Matter of Stewart v Mosley*, 85 AD3d 931 [2011]; *Fernald v Vinci*, 302 AD2d at 355; *McCormack v McCormack*, 174 AD2d 612 [1991]).

What to do, then? If you don't wish to decline to have a referee hear your case, simply strike the part of the form wherein it says, "all future matters," sign it, and hand it back to the court. The form itself is a stipulation, and not an order, and therefore is a contract strictly between the parties, not the court. If the referee balks at this, that's respectfully not your problem.

In the off-chance you run into some roadblocks as a result of this, say, getting DFLd, remember that the aggravation now is well worth the raised insurance premiums later, when you get sued for malpractice for blindly signing a stipulation, binding your client to having "all future matters" determined by the same referee.

Note: Vesselin Mitev is a partner at Ray, Mitev & Associates, LLP, a litigation boutique with offices in Manhattan and on Long Island. His practice is 100% devoted to litigation, including trial, of all matters including criminal, matrimonial/family law, Article 78 proceedings and appeals.