

The Procedural and Financial Implications of References in Matrimonial Actions

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In the context of matrimonial trials, the CPLR recognizes two specific types of references: 1) the reference to hear and report; and 2) the reference to hear and determine. CPLR §§ 4317, 4319, and 4320. Practitioners must be aware of the differences and advise their clients of the pitfalls of each.

A reference to “hear and determine” vests the referee or Judicial Hearing Officer with authority equivalent to that of the Supreme Court for the issue(s) referred. Notably, under CPLR § 4317, except in cases of a “long account,” the consent of the parties is a prerequisite for a referral to hear and determine a matter. See *Corr v. Corr*, 46 A.D.3d 736, 739 (2d Dept. 2007); see also Law & The Family N.Y. Forms § 111:1 (2d ed.). Pursuant to CPLR § 4319, upon reference to hear and determine, the “decision of a referee shall comply with the requirements for a decision by the court and shall stand as the decision of a court.” The referee’s determination is therefore *binding*, and no subsequent motion to confirm or reject is required. In essence, upon issuance of the determination, the trial-level fact-finding component of the case is complete.

By contrast, the reference to “hear and report” establishes “the referee [as] a kind of assistant to the court. The referee conducts a hearing and reports her findings and conclusions back to the court, which can accept or reject them. The report of a referee to report, in other words, is only a recommendation, while the decision of a referee to determine is binding, like the decision of a judge.” Siegel, New York Practice § 379 (6th ed.).

In instances of a hear and report, under 22 NYCRR § 202.44(a), within 15 days of the referee filing the report, the Plaintiff “must move on notice to confirm or reject all or part of the report.” “If the Plaintiff fails to do

so, the Defendant must so move within thirty days.” *Id.* If both parties fail to do so, “the court, on its own motion, shall issue its determination.” 22 NYCRR § 202.44(b). Most importantly, in deciding such a motion, the Court retains jurisdiction to decide the matter as if the Court had itself conducted the trial. Specifically, the Court is empowered to “make new findings with or without taking additional testimony; and may order a new trial or hearing.” CPLR § 4403.

The choice between a reference to hear and determine and a reference to hear and report also carries significant financial consequences. After trial in a reference to determine, the attorneys’ work in the fact-finding component of the case is essentially done. Production of the transcript is not required by statute and, therefore, the parties need not incur that financial cost. Conversely, in a reference to hear and report, the referee *must* file a transcript of the testimony together with the exhibits with the report. CPLR § 4320(b). The mandatory transcript requirement carries substantial cost implications, as the filing obligation ensures a reviewable record for the Court’s independent assessment, and, ultimately, for appellate review. The cost of the transcripts is, of course, borne by the parties. Furthermore, the financial burden of the confirmation process itself falls upon the parties. In addition to transcript costs, counsel must prepare and submit post-trial applications addressing the propriety of the referee’s report and urging either acceptance or rejection.

Perhaps most importantly, those who may believe that the application to reject the referee’s report is likely to yield a meaningful bite at the proverbial apple should be cautioned otherwise. As the Appellate Division, Second Department held, “the report of a Referee should be confirmed whenever the findings are substantially supported by the

record, and the Referee has clearly defined the issues and resolved matters of credibility.” *Thomas v. Thomas*, 21 A.D.3d 949, 949 (2d Dept. 2005). While this holding is not codified in statute, it is logical and well-established. This standard recognizes that judicial economy does not permit indiscriminate relitigation of issues fully and fairly heard.

In sum, the reference to hear and determine culminates in a binding decision that stands as the decision of the Court, requiring no motion to confirm and imposing no mandatory transcript-filing obligation upon the referee. The reference to hear and report, by contrast, produces only a recommendation; it necessitates a mandatory transcript filing, a formal motion to confirm or reject, and independent judicial review of the record. Practitioners in matrimonial actions must appreciate these distinctions, for the nature of the reference dictates not only the procedural trajectory of the case but also the financial exposure of the litigants and the standard of review that will govern the Court’s disposition. 🚫



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