good cause shown not limited by the CPLR Sec. 5015(a) list. *Siegel*, Sec. 426, pp. 566–67. The Advisory Committee stressed this. See, 3d Rep.Leg.Doc. No. 17, p. 204 (1959).

New York case law reaches the same conclusion. *See, Ladd v. Stevenson*, 112 N.Y. 325, 19 N.E. 842 (1889). Courts have control over their own proceedings and, in its exercise, may open their own judgments for sufficient reason. *Voccola v. Shilling*, 88 Misc.2d 103, 388 N.Y.S.2d 71, aff'd. 57 A.D.2d 931, 394 N.Y.S.2d 577 (2d Dept. 1977).

There is further support in the court's finding after searching Section 439(e) and determining that the statute does not mandate a specific procedure to be followed. Section 165(a) of the Family Court Act states that "Where the method of procedure in any proceeding in which the Family Court has jurisdiction is not prescribed, the provisions of the CPLR apply, to the extent they are appropriate to the proceedings involved."

Family Court Act, Sec. 439(e) states:

"The determination of a hearing examiner *shall* include findings of fact and a final order which *shall* be entered and transmitted to the parties. Specific written objections to such order *may* be submitted to a judge within thirty days after entry of the order, upon notice to the opposing party, who *shall* have eight days to serve and file a written rebuttal to such objections." (emphasis added)

In the construction of statutory provisions, the legislative intent is the great and controlling principle. *Matter of Petterson v. Daystrom Corp.*, 17 N.Y.2d 32, 268 N.Y.S.2d 1, 215 N.E.2d 329, same being sought first in the words of the statute under consideration. *Albano v. Kirby*, 36 N.Y.2d 526, 530, 369 N.Y.S.2d 655, at 658, 330 N.E.2d 615, at 618 (2nd Dept.1975), citing *Department of Welfare of the City of New York v. Siebel*, 6 N.Y.2d 536, 545, 190 N.Y.S.2d 633, at 690, 161 N.E.2d 1, at 6; *Matter of Bowne v. S.W. Bowne Co.*, 221 N.Y. 28, 31, 116 N.E. 364, 365.

[4,5] The language in Sec. 439(e) employs both the word "shall" in several places and the word "may" in one place. The terms "shall" and "may" have opposite meanings; the former mandatory, the latter discretionary. When different terms are used in various parts of a statute or rule, it is reasonable to assume that a distinction between them is intended. McKinney's Consol.Laws of N.Y., Book 1, Statutes, Sec. 236, at 403; *Albano v. Kirby*, supra, 369 N.Y.S.2d at 530, 330 N.E.2d at 619, citing *Waddell v. Elmendorf*, 10 N.Y. 170, 177.

It has been the long recognized rule of construction in the courts of this state that words be construed in accordance with their usual, common and ordinary meaning. (See, McKinney's Consol.Laws of N.Y., Book 1, Statutes, Sec. 232; *Riegert Apartments Corp. v. Planning Board of the Town of Clarkstown*, 78 A.D.2d 595, 432 N.Y.S.2d 40, aff'd. 57 N.Y.2d 206, 455 N.Y.S.2d 558, 441 N.E.2d 1076 (2nd Dept.1982). The plain and ordinary meaning of the word "shall" denotes command, whereas "may" denotes permissiveness.

Generally, it is presumed that the use of the word "shall" when used in a statute is mandatory, while the word "may" when used in a statute is permissive only and operates to confer discretion, especially where the word "shall" appears in close juxtaposition in other parts of the same statute. *Metro Burak, Inc. v. Rosenthal & Rosenthal, Inc.*, 51 A.D.2d 1003, 380 N.Y.S.2d 758 (2nd Dept.1976); 82 C.J.S. Statutes, Sec. 380. The deliberate use of the word "may" shows a settled legislative intent not to impose a positive duty. "... If the language of a statute is plain and unambiguous, there is neither need nor warrant to look elsewhere for its meaning." *Matter of Roosevelt Raceway v. Monaghan*, 9 N.Y.2d 293, 304, 213 N.Y.S.2d 729, 735, 174 N.E.2d 71, 75. A reading of Sec. 439(e) clearly indicates that the remedy was intended to be optional, and, thus this Court concludes that current legislation does not expressly foreclose the use of CPLR remedies. Further, this Court will not appropriate the function of the legislature and prohibit a party from seeking CPLR remedies.

However, the court suggests that legislative review may be in order to determine whether statutory provisions should provide more stringent procedures when objections are made to an order of a hearing examiner regarding support brought under Article 4. This would be in keeping with the objectives, spirit and purpose of the enactors of Part 3, Article four. The intent and purpose of the enactment of Sec. 439 of the Family Court Act was to relieve some of the burden which has been placed upon Family Court by increased volume of cases. (*See, Weiner v. Weiner*, 97 Misc.2d 920, 925–926, 412 N.Y.S.2d 776, at 779 (Fam.Ct.Monroe County 1979).

The question arises in the instant case as to whether the court should refer the matter back to the hearing examiner who made the finding or should the motion be decided by a judge of this court?

[6] The nature and effect of respondent's motion is for vacatur of the paternity order. This court finds that the determining and granting of any relief with respect to issues of contested paternity is beyond the jurisdiction of a hearing examiner. Relief from such orders has always been governed by Rule 5015 of the C.P.L.R. (See, *Lascaris o/b/o Holl v. Hinman*, supra), and motions to vacate orders are historically referred to judges.

The enforcement of support proceeding brought in this case under Article 4 in no way changes the character of the paternity proceeding brought under Article 5. Family Court Act, Sec. 439(b) specifically enjoins a hearing examiner from hearing and granting any relief from issues of contested paternity. Also, see, *In the Matter of the Paternity Petition of Richardson, o/b/o Willis v. Clark*, 132 Misc.2d 986, 506 N.Y.S.2d 257 (Fam.Ct.Monroe Co.1986).

In the *Richardson* case, supra, objections to an order of a hearing examiner were made to a judge. The Family Court, Monroe County, Anthony F. Bonadio, J., sua sponte, vacated the hearing examiner's order dismissing the paternity proceeding with prejudice, and pursuant to F.C.A. Sec. 439(e)(ii) made its own order granting respondent's motion to dismiss.

While the court found that authority is granted to a hearing examiner to sit "as a judge" in support and paternity cases and to hear, determine and grant any relief within the powers of the court (22 NYCRR 205.3(a)) during the course of those hearings, those powers are limited to cases *properly* before the examiner and powers not specifically enjoined by statute. Id. 132 Misc.2d at 988, 506 N.Y.S.2d 259 (emphasis added).

In the *Richardson* case, the court found that the hearing examiner exceeded her jurisdiction because F.C.A. Sec. 439(a) specifically enjoins hearing examiners from hearing, determining and granting any relief with respect to issues of contested paternity. The granting of respondent's motion to dismiss by the hearing examiner based on his blood test exclusion is a determination of the issue of paternity and the hearing examiner should have transferred the proceeding to a judge for a ruling on that motion.

The motion to vacate the order of the hearing examiner is properly before a judge of this court.

The Court now turns to the merits of respondent's arguments in support of his motion to vacate the order of the hearing examiner.

[7] Respondent argues that he was not represented by an attorney. He further states that because he proceeded without an attorney he was prejudiced because he gave an admission without being aware of the support obligations that could arise as a result of that admission.

The Court finds no merit in those arguments. Respondent appeared twice in court and was twice advised of his right to have an attorney prior to his admission. He was given an adjournment in order that he might consult with counsel. He chose, however, to appear without counsel and make an admission of the allegations in the petition. (See, *In the Matter of Mary B. v. George T.*, 58 A.D.2d 832, 396 N.Y.S.2d 460 (2d Dept.1977)).