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The Changing Landscape of Joint Custody

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CPLR 5511: Aggrievement Following A *Successful* Child Custody Award Continued; Is A Child A "Full Party"

Elliott Scheinberg

A fundamental tenet of appellate jurisprudence is that only an aggrieved party may appeal.[1] Aggrievement requires, inter alia, an adjudication against rights, persons, or property,[2] which arises when a party has petitioned for relief that is denied in whole or in part.[3] CPLR 5511 requires that an aggrieved appellant be a "party or a person substituted for him." But who is aggrieved in the event of an improper custody award? Case law acknowledges that a child may be aggrieved by a custody order,[4] which should come as no surprise because the consequences to the child is the axis about which the custody trial rotates.

While the child is not a captioned party to the action, an improper custody award means that the court has not fulfilled its charge of *parens patriae* to secure the child's best interests, with the child enduring the consequences across a lifetime extending long beyond childhood.[5] In

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[1] CPLR 5511.

[2] *DiMare v O'Rourke*, 35 A.D.3d 346 [2nd Dept 2006].

[3] *Mixon v. TBV, Inc.*, 76 A.D.3d 144 [2nd Dept 2010].

[4] *In re Zanna E.*, 77 AD3d 1364 [4th Dept 2010]:
[E]ven assuming, arguendo, that the daughter is aggrieved by the determination, we conclude that she is not entitled to seek affirmative relief inasmuch as her attorney did not take an appeal from the order.

Angel D. v Nieza S., 131 AD3d 874 [1st Dept 2015]:
Respondent-mother has not appealed from the order denying her request to relocate. To the extent the appellant child is aggrieved by the order .... the court's determination that relocation would not be in the child's best interests has a sound and substantial basis in the record.

Also: *Baxter v Borden*, 122 AD3d 1417 [4th Dept 2014] lv to appeal denied, 24 NY3d 915 [2015] ("Assuming, arguendo, that the children are aggrieved by the issue raised on appeal by the Attorney for the Children .."); *Simonds v Kirkland*, 67 AD3d 1481 [4th Dept 2009].

[5] *Havell v Islam*, 186 Misc 2d 726 [Sup.Ct. 2000]:
A review of literature on the topic of domestic violence reveals that domestic violence produces physical and psychological ramifications in women victims, often causing women to develop "battered woman's syndrome." Walker, Lenore E., The Battered Woman Syndrome (1984). *It is also well established that*

S.L. v J.R., 27 NY3d 558 [2016], the Court of Appeals addressed "the substantial interest, shared by the State, the children, and the parents, in ensuring that custody proceedings generate a just and *enduring result* that, above all else, serves the best interest of a child."

This article addresses the question of the appealability of a child custody judgment or order where the court has granted the prevailing party, assume the mother, custody of the child precisely as she demanded in her complaint or petition. However, now distanced in time from the furor of the trial, the mother realizes that, based on the evidence and the testimony, the child's best interests will not be best or fully served by the relief that she had requested and been granted.

By way of example, during trial, the evidence might have revealed: the depth of the father's troubled psychiatric history possibly complicated by drug abuse; an arrest for DUI while the child was a passenger; infliction of self injuries; suicidal ideations, or attempted suicide. She believes that the court should have granted her greater custodial authority beyond her demand, such as, supervised visitation for the noncustodial parent.

While this evidence would undoubtedly have warranted granting the mother leave midtrial to amend the relief demanded by conforming the pleadings to the proof, the mother, irrespective of the reason, did not so move. Assume that she has only filed a notice of appeal without having moved for reconsideration or modification of the order or the judgment; perhaps the trial court informally indicated that such a motion would be unsuccessful.

The issue is, assuming that the Attorney for the Child (AFTC) declines to pursue an appeal for reasons unrelated to the child, perhaps because of health or family related issues, being overwhelmed by a burgeoning stressful case load or just being "burnt out" from the intense protracted litigation and constant applications from the same warring parents, eagerness to move on to the next custody case, may the mother, although technically not aggrieved, having been granted the full relief that she sought, appeal and argue, for the first time, that the court erred in

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> *domestic violence poses a significant threat to children, and that exposure to violence affects a child's emotional stability, future outlook, and ability to function at school.* Division of Developmental and Behavioral Pediatrics, Silent Victims: Children Who Witness Violence, 269 JAMA 262, 262 (1993). *Children who witness domestic abuse are particularly vulnerable to emotional and developmental problems. Clinical data now indicates that children who witness family violence will perpetuate the abuse as adults: Boys will use violence to resolve conflicts, and girls will see abuse as an integral part of a close relationship.*

In re A.M., 44 Misc 3d 514, 520 [Fam.Ct. 2014], the court underscored: "The petitioner has proven the allegations of neglect [] in that Mr. M.'s repeated acts of domestic violence in front of the subject children had a direct and demonstrable harmful affect on them."

failing to have further narrowed its award to the noncustodial parent; the foundation of her argument being that, by not having looked deeper into and beyond her demand, the court did not fully exercise its role of *parens patriae* on behalf of the child?

Because of the implications across the child's life, this issue ought not to be circumscribed or even influenced by the skill or lack thereof of an AFTC who, unlike the mother, is disinterested in the outcome and not vested in the child's future, who was foisted upon the child from a roster of varying legal talent only to have failed to timely preserve critical objections or meet insurmountable jurisdictional deadlines all of which are now binding upon the child post trial.

The case law is, nevertheless, clear that preservation is, in fact, AFTC driven and binding upon the child.[6]

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[6] *In re Zanna E.*, 77 AD3d 1364 [4th Dept 2010]:
[E]ven assuming, arguendo, that the daughter is aggrieved by the determination, we conclude that she is not entitled to seek affirmative relief inasmuch as her attorney did not take an appeal from the order.

Baxter v Borden, 122 AD3d 1417 [4th Dept 2014] lv to appeal denied, 24 NY3d 915 [2015]:
Assuming, arguendo, that the children are aggrieved by the issue raised on appeal by the Attorney for the Children ... the issue is not before us in either appeal because the Attorney for the Children did not file a notice of appeal from either order ...

In re Yorimar K.M., 309 AD2d 1148 [4th Dept 2003]:
The Law Guardian for the neglected child failed to file a notice of appeal, and thus the issues raised by that Law Guardian are beyond our review.

Matter of Zena O., 212 AD2d 712 [2d Dept 1995]:
[T]he Legal Aid Society, as Zena's Law Guardian, did not file a notice of appeal from the order [] and therefore may not seek to have that order reversed ...

Simonds v Kirkland, 67 AD3d 1481 [4th Dept 2009]:
[E]ven assuming, arguendo, that the child was aggrieved when the court denied the mother's request that the court recuse itself [] the Law Guardian did not take a cross appeal from the order and thus may not seek affirmative relief with respect to the denial of the mother's request.

In re Brittni K., 297 AD2d 236 [1st Dept 2002]:
Indeed, it is fundamental that issues may be raised in a proceeding only by an aggrieved party ... Even assuming standing, the law guardian did not object at the

It is the premise herein that several theories, individually and jointly, permit such an appeal notwithstanding the rigidly unyielding, jurisdictional time frame to appeal set forth in CPLR 5513(a).[7]

Child Custody, Aggrievement

The bedrock of the answer requires an understanding of what custody is and that the mother is not asserting her rights but those of the child, the sole intended beneficiary of the custody determination.

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hearing when the court denied Nilda's request for counsel. Thus, the law guardian has not preserved the issue for appellate review (CPLR 5501[a][3]). Finally, the law guardian failed to raise before the Family Court the additional unsupported claim, raised for the first time on appeal, that Brittni was denied her constitutional right to have custody determined in her best interests by virtue of the court's failure to appoint counsel for Nilda.

Simonds v Kirkland, 67 AD3d 1481 [4th Dept 2009]:
[E]ven assuming, arguendo, that the child was aggrieved when the court denied the mother's request that the court recuse itself, we conclude that the Law Guardian did not take a cross appeal from the order and thus may not seek affirmative relief with respect to the denial of the mother's request.

[7] *Cappiello v. Cappiello*, 66 N.Y.2d 107 [1985]:
The failure timely to serve a notice of appeal goes to jurisdiction over the subject matter, which may be raised at any time.

Retta v. 160 Water Street Associates, L.P., 94 A.D.3d 623 [1st Dept 2012]:
The time for filing a notice of appeal is nonwaivable and jurisdictional (Matter of Haverstraw Park v. Runcible Props. Corp., 33 N.Y.2d 637, 347 N.Y.S.2d 585 [1973]); Jones Sledzik Garneau & Nardone, LLP v. Schloss, 37 A.D.3d 417, 829 N.Y.S.2d 230 [2007]).

Mileski v MSC Indus. Direct Co., Inc., 138 AD3d 797 [2d Dept 2016]:
"An appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry" (CPLR 5513[a]). "The time period for filing a notice of appeal is nonwaivable and jurisdictional" ...

France v. State, 204 A.D.2d 1066 [4th Dept 1994]:
Motion for extension of time to file and serve notice of appeal and for other relief denied. Memorandum: The time in which to take an appeal is jurisdictional and cannot be extended unless authorized by statute ... see also, CPLR 5513, 5514, 5520).

Child custody is defined as "[t]he care, control, and maintenance of a child awarded by a court to a responsible adult. Custody involves legal custody (decision-making authority) and physical custody (caregiving authority)."[8] Children are not chattels;[9] there is nothing proprietary[10] in a custody award and neither parent has a "prima facie right to the custody of the child."[11] In sum, while a parent is statutorily charged with child support irrespective of custodial status, a custody award does no more than grant a parent the authority to be the child's caregiver, a modifiable stewardship. Therefore, a custody award is arguably removed from the traditional category of aggrievement which requires that the adjudication have been against rights, person, or property.[12]

Unlike equitable distribution, where the assignment of assets is final and immutable, custody proceeds along a nonfinite continuum that remains permanently subject to judicial review and modification because courts sit in the role of *parens patriae* over children[13] ever mindful of their best interests as the claims of parents are always subordinate to the welfare of child.[14]

A child's rights are superior to the rights of the parties to a stipulation and an order approving a stipulation.[15] Standard custody disputes are not usually subject to res judicata because the best interests of children are more important than any of the benefits of closure.[16] The law does not recognize an irrevocable arrangement regarding the custody of infants.

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[8] Black's Law Dictionary [10th ed].

[9] *Tropea v Tropea*, 87 NY2d 727 [1996]; *Berlin v Berlin*, 21 NY2d 371 [1967]; also *Bachman v Mejias*, 1 NY2d 575, 582 [1956] ("A child is not a chattel which may be used as a consideration for an agreement of compromise. The child's rights are superior to the rights of the parties to a stipulation and an order approving a stipulation.").

[10] *Ex parte Livingston*, 151 AD 1 [2nd Dept 1912].

[11] DRL § 240(1)(a).

[12] *DiMare v O'Rourke*, 35 A.D.3d 346 [2nd Dept 2006].

[13] *Finlay v Finlay*, 240 NY 429 [1925].

[14] *Ex parte Vzga*, 200 Misc 732 [Sup.Ct. Columbia Co. 1951]; *People ex rel. Walters v Davies*, 143 Misc 759 [Sup.Ct. Fulton Co. 1932].

[15] *Bachman v Mejias*, 1 NY2d 575 [1956].

[16] *Gloria R. v Alfred R.*, 166 Misc 2d 141 [Sup.Ct. 1995] affirmed, 227 AD2d 207 [1st Dept 1996].

Whether the arrangement be the culmination of agreement between the parties or stipulation by the court, it is susceptible to change if the good of the infant impels a change. The supreme consideration is the interests of the children; whatever is best for them the court will decree.[17] As captured by the Court of Appeals, "[t]he only absolute in the law governing custody of children is that there are no absolutes."[18]

Child custody thus occupies a unique pedestal in law.

Doctrine of Preservation

An appellate court should not, and will not, consider different theories or new questions, if proof might have been offered to refute or overcome them had they been presented at the trial.[19] In *Telaro v. Telaro*,[20] the Court of Appeals held:

> [T]he general rule concerning questions raised neither at the trial nor at previous stages of appeal is far less restrictive than some case language would indicate. Thus, it has been said: 'if a conclusive question is presented on appeal, it does not matter that the question is a new one not previously suggested. No party should prevail on appeal, given an unimpeachable showing that he had no case in the trial court.' ...
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> Of course, where new contentions could have been obviated or cured by factual showings or legal countersteps, they may not be raised on appeal. But contentions which could not have been so obviated or cured below may be raised on appeal for the first time.

Under the above facts, additional factual countersteps would neither add nor refute anything as all the requisite evidence had already been exhaustively laid out, which precludes an

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[17] *People ex rel. Spreckels v De Ruyter*, 150 Misc 323 [Sup.Ct. 1934]; *La Porte v La Porte*, 85 Misc 2d 1009 [Sup.Ct. 1976] (Regardless of the agreement between the parties, the court is never relieved from the responsibility of protecting the rights of innocent children, even against the wishes of their parents, for children are not chattels whose rights can be bargained away by parents. (Matter of Bachman v. Mejias, 1 N.Y.2d 575.) Rather, it is the duty of the court to subject such an agreement to very close scrutiny. (Van Dyke v. Van Dyke, 278 App.Div. 446.))

[18] *Friederwitzer v Friederwitzer*, 55 NY2d 89 [1982].

[19] *Rentways, Inc. v. O'Neill Milk & Cream Co.*, 308 N.Y. 342 [1955].

[20] 25 N.Y.2d 433 (1969); *Bingham v. New York City Transit Authority*, 99 N.Y.2d 355 [2003] (A new issue, even a pure law issue, may be reached on appeal only if it could not have been avoided by factual showings or legal countersteps had it been raised below).

argument of changed circumstances. The issue of the proper child-centric relief based on that existing evidence is a question of law – the findings of the court upon the trial state what is material as to the facts upon which the action is based, while the conclusions of law discuss the applicable law to the relief ordered.[21] The conclusion, the question of law, therefore, withstands the doctrine of preservation and is reviewable for the first time on appeal.

Parens Patriae

The state, succeeding to the prerogative of the crown, acts as *parens patriae*. Sometimes the power is exercised legislatively sometimes constitutionally (N.Y.Const. art. VI, s 32), but usually by the court.[22] *Finlay v Finlay*,[23] defined "parens patriae":

> The chancellor in exercising his jurisdiction [] does not proceed upon the theory that the petitioner, whether father or mother, has a cause of action against the other or indeed against any one. He acts as parents patriae to do what is best for the interest of the child. He is to put himself in the position of a 'wise, affectionate, and careful parent' ... and make provision for the child accordingly. ... He is not adjudicating a controversy between adversary parties, to compose their private differences ...
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> He is not determining rights "as between a parent and a child," or as between one parent and another ... He "interferes for the protection of infants, qua infants, by virtue of the prerogative which belongs to the Crown as parens patriae" ...

Unlike property rights, which spouses and affianced parties are contractually free to allocate as they wish, contractual provisions concerning custody and visitation are subject to judicial review and modification because courts sit in the role of *parens patriae* to enforce the public policy of ensuring a child's well-being and, as such, are not bound by any agreements, even as between the parents;[24] a court cannot be bound by an agreement regarding custody and visitation and simultaneously act as *parens patriae* on behalf of the child – courts alone may undertake the task."[25]

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[21] *Schuyler v Curtis*, 147 NY 434 [1895]; *Brooks v Curtis*, 50 NY 639 [1873]; *Forty-Second St., M. & St. N. Ave. R. Co. v Cantor*, 104 AD 476 [1st Dept 1905].

[22] *Agur v Agur*, 32 AD2d 16 [2nd Dept 1969].

[23] 240 NY 429 [1925].

[24] *Schechter v. Schechter*, 63 A.D.3d 817 [2nd Dept 2009]; *Glauber*, above.

[25] *Glauber,* at 94; see *Finlay*, id.

Matter of Michael B.

In *Matter of Michael B.*,[26] the Court of Appeals had learned that, during the pendency of the appeal, the appellant had been charged with and admitted neglect of children in his custody (not Michael), which children had been removed from his home and returned to the Commissioner of the Social Services. The Court examined facts dehors the record:

> Appellant's request that we ignore these new developments and simply grant him custody, because matters outside the record cannot be considered by an appellate court, would exalt the procedural rule—important though it is—to a point of absurdity, and "reflect no credit on the judicial process." (Cohen and Karger, Powers of the New York Court of Appeals § 168, at 640.) Indeed, changed circumstances may have particular significance in child custody matters ... This Court would therefore take notice of the new facts and allegations to the extent they indicate that the record before us is no longer sufficient for determining appellant's fitness and right to custody of Michael, and remit the matter to Family Court for a new hearing and determination of those issues.

Critically, although the Court remanded the matter to Family Court, it simultaneously made an interim order: "Pending the hearing, Michael should physically remain with his current foster parents, but legal custody should be returned to the foster care agency." Clearly, the best interests of the child overrides sacred rules of appellate practice even at the highest level.

Public Policy

An appellate court may review issues for the first time on appeal where the issues impact public policy.[27] The Court of Appeals has underscored that public policy concerns abound in matrimonial cases.[28] Child custody is a matter of public policy.[29] Accordingly, by way of example, the prohibition against agreements between parents to arbitrate custody and visitation may be raised for the first time on appeal because "disputes concerning child custody and visitation are not subject to arbitration as 'the court's role as parens patriae must not be

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[26] 80 N.Y.2d 299 [1992]; also *Leval B. v. Kiona E.*, 115 A.D.3d 665 [2nd Dept 2014]; *Bosque v. Blazejewski-D'Amato*, 123 A.D.3d 704 [2nd Dept 2014]; *Chow v. Holmes*, 63 A.D.3d 925 [2nd Dept 2009]; *Gatke v. Johnson*, 50 A.D.3d 798 [2nd Dept 2008].

[27] *Niagara Wheatfield Adm'rs Ass'n v Niagara Wheatfield Cent. School Dist.*, 44 NY2d 68 [1978]; *Aurora Sportswear Group Limited. v Eng*, 29 AD3d 445 [1st Dept 2006].

[28] *Hirsch v. Hirsch*, 37 N.Y.2d 312 [1975]; see *DeCicco v. Schweizer*, 221 N.Y. 431 [1917].

[29] *Merrill Lynch, Pierce, Fenner & Smith, Inc. v Benjamin*, 1 AD3d 39 [1st Dept 2003].

usurped.' "[30] The child custody public policy concern thus also brings to the forefront the point that an AFTC's procedural missteps to either meet jurisdictional deadlines or timely preserve objections should not be held against an innocent child – that, per *Michael B.*, above, "procedur[e] —important though it is" not be "exalted to a point of absurdity, and reflect no credit on the judicial process."

CPLR 3025(c)

In *Kimso Apartments, LLC v Gandhi*,[31] the Court of Appeals repeated that "[u]nder CPLR 3025[b], a party may amend a pleading '*at any time by leave of court*' [] '*before or after judgment to conform [the pleading] to the evidence*' (CPLR 3025[c]) ... leave 'shall be freely given upon such terms as may be just ...' " "Such an amendment is permissible 'even if the amendment substantially alters the theory of recovery.' "[32]
A post judgment motion under 3025(c) requires a prior motion to vacate the existing judgment.[33]

One difficulty with a CPLR 3025(c) application is that, while CPLR 3025(b) states that the motion may be made "at any time", a CPLR 5015(a) motion, with the exception of 5015(a)(1), "ha[s] no stated time limits; [t]he revisors' notes indicate that under paragraphs 2, 3, and 5, a reasonable time is implied."[34] "At any time" and "reasonable time" will rarely, if ever, be congruous in custody cases but also none of the five elements in 5015(a) likely applies to a custody case. Significantly, "the grounds set forth in CPLR 5015(a) are not exclusive; Supreme Court ha[s] 'inherent discretionary power' to vacate its judgment 'for sufficient reason and in the interest[ ] of substantial justice.' "[35]

Furthermore, in the absence of prejudice, an appellate court may, sua sponte, exercise its discretion to relieve a party's failure to amend its pleading by deeming the answer amended to

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[30] *Goldberg v Goldberg*, 124 AD3d 779 [2d Dept 2015], quoting *Glauber v. Glauber*, 192 A.D.2d 94 [2nd Dept 1993].

[31] 24 NY3d 403 [2014]; see *Cave v Kollar*, 2 AD3d 386 [2d Dept 2003]; *In re Denton*, 6 AD3d 531 [2d Dept 2004].

[32] *Kimso Apartments, LLC v Gandhi*, 24 NY3d 403, 411 [2014]; *Dittmar Explosives v. A.E. Ottaviano, Inc.*, 20 N.Y.2d 498, 502–503 [1967], *DiSario v Rynston*, 138 AD3d 672, 674 [2d Dept 2016].

[33] *F & C Gen. Contractors Corp. v Atl. Mut. Mortg. Corp.*, 268 AD2d 556 [2d Dept 2000].

[34] Prof. David Siegel, Practice Commentaries, C5015:3.

[35] *Lovelace v RPM Ecosystems Ithaca, LLC*, 14 NYS3d 815 [3d Dept 2015], citing *Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d 62 [2003].

conform to the evidence.[36] Prejudice means more than "the mere exposure of the [party] to greater liability;" rather, "there must be some indication that the [party] has been hindered in the preparation of [the party's] case or has been prevented from taking some measure in support of [its] position."[37] Concern over prejudice is inapplicable in the facts discussed herein.

Winters, Maddox

The Second and Fourth Departments offer guidance from decisions relating to child support, *Maddox v. Doty*[38] and *Winters v. Winters*,[39] respectively. In *Winters*, the Fourth Department held: "Family Court was not bound by the amount of support requested in the petition, but was free to award an amount appropriate to the proof adduced at the hearing." The Second Department, in *Maddox*, similarly held: "the Hearing Examiner was not bound by the amount of support requested in the petition."

Winters explained that this is so because of "the rebuttable presumption that application of the [statutory c]hild [s]upport guidelines yielded a correct amount of child support." Inherent in this explanation is that child related issues, which are matters of public policy, obligate a court, in executing its duties, to look beyond the relief requested by a parent.

Although *Winters* and *Maddox* addressed prejudgment determinations, by parity of reasoning, the Appellate Division may render the judgment it finds warranted by the facts, since its power is as broad as that of the hearing court in its review of a determination following a nonjury trial.[40]

Does Child Have Full-Party Status

The Fourth Department has held that "a child in a custody matter does not have full-party status." In *Lawrence v Lawrence*,[41] the AFTC, appealed from an order dismissing the mother's petition to modify a custody order. The Fourth Department, citing its own precedent case law,

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[36] *Cave v Kollar*, 2 AD3d 386 [2d Dept 2003]; *Cartwright Van Lines, Inc. v Barclays Bank of New York,* 120 AD2d 478 [2d Dept 1986]; *In re Denton*, 6 AD3d 531 [2d Dept 2004]; *Kennelly v Mobius Realty Holdings LLC*, 33 AD3d 380 [1st Dept 2006].

[37] *Kimso Apartments, LLC v Gandhi*, 24 NY3d 403 [2014]; *Loomis v Civetta Corinno Const. Corp.*, 54 NY2d 18 [1981].

[38] *Maddox v Doty*, 186 AD2d 135 [2d Dept 1992].

[39] *Winters v. Winters*, 154 A.D.2d 884 [4th Dept 1989].

[40] *Matter of Hertz Corporation, v. Holmes*, 127 A.D.3d 1193 [2nd Dept 2015]; *Neiss v Fried*, 127 AD3d 1044 [2nd Dept 2015].

[41] 151 A.D.3d 1879, 54 N.Y.S.3d 358 [4th Dept 2017].

Kessler v Fancher,[42] and *McDermott v Bale,*[43] held that a child in a custody matter does not enjoy full-party status:

> "Inasmuch as 'the mother has not taken an appeal from that order[, the] child [ ], while dissatisfied with the order, cannot force the mother to litigate a petition that she has since abandoned." A child in a custody matter does not have "full-party status", and we decline to permit the child's desires "to chart the course of litigation."

In *Kessler*, the Fourth Department, citing *McDermott*, denied the children an appeal, by way of their AFTC, from an order that dismissed the mother's petition for modification of custody where the mother had abandoned her appeal.

In *McDermott*, the AFTC appealed from a custody order, which order incorporated the terms of a written stipulation, over the AFTC's objection. The Fourth Department declined to give "children in custody cases [] full-party status such that their consent is necessary to effectuate a settlement." "There is a significant difference," the court stated, "between allowing children to express their wishes to the court and allowing their wishes to scuttle a proposed settlement." *McDemott* amplified the role of the AFTC, whom a "court is not required to appoint ... although that is no doubt the preferred practice":

> Although [] the AFC [] " 'must be afforded the same opportunity as any other party to fully participate in [the] proceeding ' " ... and that the court may not "relegate the [AFC] to a meaningless role" ... the children represented by the AFC are not permitted to 'veto' a proposed settlement reached by their parents and thereby force a trial.
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> The purpose of an attorney for the children is "to help protect their interests and to help them express their wishes to the court" (Family Ct. Act § 241)[44] ... [C]hildren

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[42] 112 AD3d 1323 [4th Dept 2013].

[43] 94 AD3d 1542 [4th Dept 2012].

[44] Cf., *Matter of Marilyn H.*, 100 Misc 2d 402, 403–04 [Fam.Ct. 1979]
A guardian ad litem appointed by the court pursuant to Article 12 of the CPLR performs the function of prosecuting or defending on behalf of an infant who is a party to a suit ... It has been held in a matrimonial action where the court was called upon not only to decide custody and visitation but also to make a "definitive declaration as to the legal status of (a) child", i. e., legitimacy, that due process required that the child be made a party ...

The rationale of these cases is readily applicable here. The ultimate issue in a

> in a custody proceeding [do not] have the same legal status as their parents, inasmuch as it is well settled that parents have the right to the assistance of counsel in such proceedings (§ 262[a][v] ...).
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> [W]here the court [] appoints an attorney for the children, he or she has the right to be heard with respect to a proposed settlement and to object to the settlement but not the right to preclude the court from approving the settlement in the event that the court determines that the terms of the settlement are in the children's best interests. Parents who wish to settle their disputes should not be required to engage in costly and often times embittered litigation merely because their children or the attorney for the children would prefer a different custodial arrangement.

Unlike *Lawrence* and *McDemott*, the mother, in *Kessler*, had also petitioned for an order of protection, presumably because of domestic violence or threats of violence. Nevertheless, the *Kessler* court held that the children were not aggrieved by the orders that dismissed the mother's petition. This raises an eyebrow in light of the uncontrovertible fact that domestic violence has a long term affect on children, as captured, in *Havell v Islam*, 186 Misc 2d 726 [Sup.Ct. 2000].[45]

The error in *McDermott*'s reasoning over "allowing [a child's] wishes to scuttle a proposed settlement" is apparent. Plainly, a child is powerless to unilaterally "scuttle" or otherwise disrupt a settlement. The Appellate Division offered no substantive reason as to why the children's appeals in *Lawrence*, *McDermott*, or *Kessler* were not worthy of review because, in each instance, the merits of the children's appeals had been filtered through their AFTC's considered knowledge and judgment as a predicate to asking the appellate court to scuttle the agreement. An appeal by children neither does violence to the agreement nor to the judicial process because their appeal is no different from any other appeal wherein an appellant seeks review of an agreement. The merits of a child's appeal should be considered and not draw automatic rebuke because the child endures the consequences of a flawed custody agreement and such an agreement violates public policy because it is not in the best interests of the child.

This "non full-party" status that the Fourth Department has created is without meaning in appellate jurisprudence because, as noted above, CPLR 5511 requires that an aggrieved appellant be a "party or a person substituted for him", incomplete status is not recognized. The "non full party" iterations in *Lawrence*, *McDermott*, or *Kessler* are at odds with other iterations from the

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> proceeding to terminate parental rights is whether the subject child should be given a new legal status. All rights may eventually be found to be subordinate to what is in her best interests. The court grants the child status as a party whose interests should be protected by a guardian ad litem.

[45] See footnote 5, above.

same Court which have held that children may be aggrieved from custody orders.[46] Since the Legislature did not create a hybrid status or hybrid aggrievement in CPLR 5511, the child must, therefore, be inherently imbued with full party status.

McDermott and *Kessler* also perch children who were not fortunate enough to have had a discretionary AFTC appointed in an unfavorable position because of the absence of counsel to rescue objections and jurisdictional deadlines from the extinctive jaws of non preservation of issues – a possible equal protection issue which mitigates in favor of AFTC appointments for all children.

It is noteworthy that non full party status is addressed in Family Court Act § 1035, where the intervenor's rights are statutorily circumscribed and distinguished by case law from those of an intervenor under CPLR 1012, 1013.[47] CPLR 1012(a)(2) can, by parity of reasoning constitute

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[46] See footnote 6, above.

[47]

Matter of Holmes, 134 Misc 2d 278, 279–80 [Fam Ct 1986]:
[T]he non-respondent father, who has been granted intervenor status in this child protective proceeding in which his child's mother is the respondent, *moves, pursuant to Section 1035(d), to be permitted full party status at the fact finding*, including the right to call and cross examine witnesses, present evidence and object to the admission of evidence.

In arguing for full party status, the father relies on the traditional rule that an intervenor, once granted that status, becomes a party for all purposes ... While it is true that an intervenor usually does receive full party status, the legislature, in enacting Section 1035(d), *intended to grant less than full party status to an intervening parent.*

A comparison of Section 1035(d) with Civil Practice Law and Rules Section 1012 (Intervention By Right) and Section 1013 (Intervention By Permission) is instructive. The CPLR speaks of intervention without any limiting language. Section 1035(d), however, specifically limits the intervenor to "seeking temporary and permanent custody of the child." That limitation follows logically from the legislature's statement of its intent to protect the due process rights of respondent parents. (FCA § 1011; Lassiter v. Department of Social Services of Durham County, 452 U.S. 18, 101 S.Ct. 2153; Matter of Hanson, 51 A.D.2d 696, 379 N.Y.S.2d 415.)

A.C. v L.H., 195 Misc 2d 342, 344 [Fam.Ct. 2003]:
[W]hile the father did not formally seek to be permitted full party status under § 1035(d) ...

such a basis for the child:

> (a) Intervention as of right. Upon timely motion, any person shall be permitted to intervene in any action:
>
> (2) when the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment

Significantly, however, on June 28, 2017, in *Noel v. Melle*,[48] the Second Department reversed an order, on an appeal taken only by the child. Supreme Court, without a hearing, granted the father's violation petition that the mother had violated the terms of a custody and visitation order and awarded the father custody of the child notwithstanding that the father had not only not sought a transfer of custody but had also told the court that he did not want custody. The Appellate Division held that the order was "without any apparent consideration of the child's best interests."

The Legislature can easily remedy this dilemma.

Conclusion

Under the facts and procedural setting posited at the beginning of this article, a remittal would be valueless because all of the evidence had already been fully vetted at trial. The mother's failure to amend her demand during trial should not inure against the child, whose best interests she is asserting and which the court is charged with protecting. Her argument may and should be heard for the first time on appeal.

That the AFTC is not inclined to appeal the order ought not be of any moment because, in the final analysis, upon the conclusion of the trial, the disinterested AFTC exits the courtroom stage and marches off into the child's horizon awaiting his or her next assignment; only an interested parent is awarded custody to care for the child, not an AFTC. Clearly, this avenue of

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Matter of Ricky P., 135 Misc 2d 28, 32 [Fam.Ct. 1987]:
FCA § 1035(e) ... delineates intervention in child protective proceedings, rendering inapplicable CPLR § 1013 which controls permissive intervention generally ...

Rockland County Dept. of Social Services on Behalf of Michael McM. v Brian McM., 193 AD2d 121 [2d Dept 1993]:
[T]he right of a nonparty parent to intervene in the fact-finding stage of a child protective proceeding does not include the right to object to the admission of evidence."

[48] 151 A.D.3d 1065 [2nd Dept 2017].

relief should be available only in the atypically compelling case.[49]

[49] I express my gratitude to Stuart M. Cohen, Esq., Rensselaer, NY, and David Paul Horowitz, Esq., Geringer, McNamara, & Horowitz, New York, NY, for being my "moot court" in the preparation of the first article.