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CPLR 5501 and Interim Support Awards, Orders in Post-Trial Decisions

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M*addaloni v. Maddaloni*, 2016 WL 4443707 [2d Dept. 2016], is important to the appellate bar as a matter of first impression: It is the first published decision, wherein the Second Department articulates its firm position that orders embedded in post-trial decisions which have not yet been reduced to judgment are neither appealable nor enforceable.

Furthermore, although not an issue in *Maddaloni*, its discussion of CPLR 5501 invites to the forefront an appellate concern that is unique to matrimonial practice: the intersection between the inviolable rule that, under CPLR 5501(a), pendente lite spousal maintenance orders, like other interim/provisional orders, are not reviewable following judgment because a modification or reversal will not "necessarily affect" the judgment, and now-settled law which allows courts to remedy excessive interim spousal maintenance payments by means of a "property distribution credit," which, by its very nature, requires the redetermination of the correctness of the nonfinal order. It can also impact prejudgment interest. Accordingly, a redetermination would "necessarily affect" the judgment.

Although *Maddaloni* merits discussion regarding its treatment of the parties' prenuptial agreement on manifest unfairness and unconscionability, space considerations limit this article to the above topics.

Facts in 'Maddaloni'

Maddaloni involved an appeal from four orders. The first order granted the plaintiff interim maintenance. The second order granted the plaintiff interim counsel fees. The third order granted the plaintiff additional counsel fees. The final order granted the plaintiff's motion to hold the defendant in civil contempt and awarded the plaintiff counsel fees pursuant to Domestic Relations Law §237(c).

The appeals from the first three orders were dismissed because the right of direct appeal therefrom terminated with the entry of the judgment of divorce (*Matter of Aho*, 39 NY2d 241

[1976]). The orders were also held not reviewable on the appeal from the judgment of divorce, under CPLR 5501, because, if reversed or modified, they would not necessarily affect the judgment. This is the correct ruling when a "property distribution credit" is not at issue. However, if a payor-spouse asserts such a claim then the issue becomes reviewable under CPLR 5501(a).

Interim, Provisional Remedies

CPLR 5501(a)(1) provides, in pertinent part: "An appeal from a final judgment brings up for review...any non-final judgment or order which necessarily affects the final judgment..."

According to the court in *Two Guys From Harrison v. S.F.R. Realty*"a provisional remedy [e.g., a preliminary injunction] designed to retain the status quo while the action was pending, does not 'necessarily affect' the final judgment, and thus the appeal does not bring it up for review."[1] Such orders are "incidental order[s] which do[] 'not have any impact on the final judgment' [and are] not subject to review."[2] Interim spousal maintenance awards fall under this rubric:

- "The propriety of the pendente lite order may not be reviewed on the appeal from the judgment of divorce."[3]

- "[A]n order granting temporary alimony does not affect the final judgment and cannot be reviewed on an appeal from the final judgment."[4]

- "[A] temporary order in a matrimonial action is superseded by the final judgment...This is a rule well grounded in logic. An order awarding pendente lite relief is only designed to provide temporary relief pending disposition of the matter in a final judgment. Once a final judgment has been entered, it stands to reason that the order granting pendente lite relief is no longer effective, and thus no longer appealable."[5]

Professor David Siegel equates a temporary order of spousal support to an ordinary provisional remedy, such as a temporary injunction during the pendency of an action which is intended to preserve the status quo, for which reason it is not appealable:[6]

An example of an excluded (i.e., nonreviewable) order under this provision [CPLR 5501(a)] is one that grants or denies a motion for a preliminary injunction under Article 63 of the CPLR. Whether the final relief granted in the judgment, even including a permanent injunction, is or is not proper is not dictated by whether or not a preliminary injunction was proper. The preliminary injunction is a provisional remedy designed to retain the status quo while an action pends. It is concerned with the pendency of the action, while the final judgment is concerned only with the period following. Hence, appeal from the final judgment will not necessarily bring the preliminary injunction, or its denial, up for review. See *Cinerama v. Equitable Life Assur. Soc.*, 38 A.D.2d 698 (1st Dept. 1972).

For similar reasons, an order granting temporary alimony in a matrimonial action is not preserved for review upon an appeal from the final judgment in the action, even if the final judgment awards alimony. Notwithstanding that several of the findings on which both

temporary and permanent alimony depend may be the same, the mission of the temporary order is distinct enough from that of the final one to make the temporary one academic when the final one is appealed. If the findings in respect of the permanent award are sustainable, it would not matter that the findings made in conjunction with the temporary award were in error. See *Caplin v. Caplin*, 33 A.D.2d 908 (2d Dept. 1970)."

This body of law regarding the nonreviewability of interim maintenance rulings under CPLR 5501(a) requires a redetermination and the recognition of a new category of exception based on 15-year-old authority, including authority from the Court of Appeals (citing the First, Second, and Third Departments[7]), that an adjustment in property distribution is the corrective remedy "when a pendente lite award of maintenance is found at trial to be excessive or inequitable."[8] This is so, said the high court, because "The Domestic Relations Law provides: '[i]n determining an equitable disposition of property...the court shall consider:...any award of maintenance' (DRL §236[B][5][d][5])."[9]

The "property distribution credit" rule is the portal through which the original pendente lite award passes to become reviewable under the "necessarily affects" rule.

'Necessarily Affects'

The term "necessarily affects," in CPLR 5501(a), has been tested all the way up in the courts and despite withering scholarly analysis it nevertheless remains perched on terra "infirma." The appellate brief of the party aggrieved by the denial of a "property distribution credit" should include the cautionary advice by the Court of Appeals, in *Siegmund Strauss v. East 149th Realty*, 20 NY3d 37, 41 [2012]:"[t]he correctness of a final judgment may turn on the correctness of an intermediate non-final order."[10] In *Oakes v. Patel*, 20 NY3d 633 [2013], the Court of Appeals, again and not since, addressed the meaning of the "necessarily affects" rule in the context of orders granting or denying motions to amend pleadings, which it characterized as "particularly vexing:"[11]

Our opinions have rarely discussed the meaning of the expression "necessarily affects" in CPLR 5501(a)(1). (*Matter of Aho*, 39 N.Y.2d 241, 248, 383 N.Y.S.2d 285 [1976] and *Siegmund Strauss v. East 149th Realty Corp.*, 20 N.Y.3d 37 [2012] are exceptions.) We have never attempted, and we do not now attempt, a generally applicable definition. Various tests have been proposed, but how to apply them to particular cases is not self-evident, and our decisions in this area may not all be consistent (see generally Karger, Powers of the New York Court of Appeals §9:5 at 304–314 [3d ed. rev. 2005]).[12]

The Oakes court noted its own inconsistent rulings on the meaning of "necessarily affects," albeit with respect to amended pleadings, which rulings appeared in undeveloped footnotes.[13] The key message to be garnered from *Oakes* is the elasticity of the "necessarily affects" rule:

We now conclude that we cannot adhere to the rule that the grant or denial of a motion to amend is *always* unreviewable on appeal from a final judgment. There will be times, of which this is one, when such a ruling "necessarily affects" the final judgment under any common

sense understanding of those words. (emphasis provided).

The "property distribution credit" rule is a prime example of how the cautionary reminder in *Siegmund Strauss*, that "the correctness of a final judgment may turn on the correctness of an intermediate non-final order," and CPLR 5501(a) combine to permit review of a nonfinal interim order in matrimonial practice.

Order Following a Trial

Maddaloni is also a decision of first impression where the Second Department stands alone in holding that an order contained in a decision following a trial is nonappealable. The reasoning that drives this theory, which is not stated in the opinion, is linear: A motion ends in an order (CPLR 2211) and a trial ends in a judgment (CPLR 5511), accordingly, notwithstanding CPLR 5512(a), which indistinguishably states: "Appealable paper. An initial appeal shall be taken from the judgment or order of the court of original instance...," the immutable rule in the Second Department is that a post-trial paper, even one that embodies judicial decrees, that precedes the judgment is but a nonappealable decision.

In *Bellizzi v. Bellizzi*, 82 AD3d 1541 [3d Dept. 2011], the Third Department applied the clear meaning of the word "order" as an enforceable judicial directive irrespective of its genesis:

[W]e are unpersuaded by the husband's assertion that the August 2009 document issued by Supreme Court does not constitute appealable paper and, thus, the wife's appeal should be dismissed. "An appealable paper is an order or judgment of the court of original instance" (*Raymond Corp. v. National Union Fire Ins. Co. of Pittsburgh*, 46 A.D.3d 1251, 1252 [2007] [citation omitted]; see CPLR 5512[a]). Here, while the Supreme Court document...is labeled a "decision," the language contained at the foot of the document—"so ordered"—clarifies that it is an appealable paper.

Although this writer has not found any decisions from the First and Fourth Departments on this issue, individual justices and the clerks of those courts confirmed their acceptance of direct appeals from post-trial decisions if the decisions contain orders because of the apparent consequences that flow from noncompliance.

Unenforceable Order

After the Supreme Court, in *Maddaloni*, issued its post-trial decision, denominated as an "order," the wife moved to hold the husband in contempt for noncompliance. The husband argued the settled rule of the department, that the paper remained a nonappealable decision and therefore a premature unenforceable order. One day after the judgment of divorce was entered, the Supreme Court held the husband in contempt, finding that the pre-judgment paper was an order.

The appellate court referenced DRL §245, which, in matrimonial actions, grants authority to punish a party for civil contempt pursuant to Judiciary Law §756 where the party defaults "in paying any sum of money" required by a judgment or order. Hornbook law holds that a finding of contempt requires proof, by clear and convincing evidence, that the party charged with

contempt disobeyed a clear and unequivocal court order, of which the offender had knowledge, and that the movant was prejudiced thereby (Judiciary Law §753[A][3]; *El–Dehdan v. El–Dehdan*, 26 NY3d 19 [2015].

Maintaining the symmetry, the Second Department reversed the finding of contempt because since the paper was not appealable it was concomitantly unenforceable; ergo, contempt and penalties could not attach. The departmental differences make this issue rife for determination by the Court of Appeals.

Conclusion

The landscape of reviewability from nonfinal orders under CPLR 5501 must now be expanded to include "the property distribution credit" based on excessive interim spousal maintenance payments because a property distribution modification or reversal will necessarily affect the judgment, and the modification or reversal is the direct function of the appropriateness of the nonfinal order—"the correctness of [the] final judgment" unequivocally "turn[s] on the correctness of an intermediate non-final order" (*Siegmund Strauss*, at 41).

ENDNOTES:

1. *Two Guys From Harrison-NY v. S.F.R. Realty Associates*, 186 AD2d 186 [2d Dept. 1992].

2. *Cicardi v. Cicardi,* 263 AD2d 686 [3d Dept. 1999], citing Siegel, Practice Commentaries, CPLR 5501:4.

3. *Badwal v. Badwal*, 126 AD3d 736 [2d Dept. 2015]; *Tekel v. Martone*, 272 AD2d 228 [1st Dept. 2000].

4. *Sawdon v. Sawdon*, 39 AD2d 883 [1st Dept. 1972].

5. *Flynn v. Flynn*, 128 AD2d 583 [2d Dept. 1987]; *Prasinos v. Prasinos*, 283 AD2d 913 [4th Dept. 2001].

6. Practice Commentaries, C5501:4. Order That "Necessarily Affects" Final Judgment.

7. *Gad v. Gad*, 283 AD2d 200, 201 [1st Dept. 2001] ("Nowadays, if a pendente lite award is found at trial to be excessive, the court can remedy the inequity by appropriate adjustment in the equitable distribution award."); *Pickard v. Pickard*, 33 AD3d 202 [1st Dept. 2006], appeal dismissed 7 NY3d 897 [(2006]; *Bauman v. Bauman*, 132 AD3d 791 [2d Dept. 2015]; *Galvano v. Galvano*, 303 AD2d 206 [2d Dept. 2003]; *Giannuzzi v. Kearney*, 127 AD3d 1350 [3d Dept. 2015]; *Fox v. Fox*, 306 AD2d 583 [3d Dept. 2003], leave to appeal dismissed, 1 NY3d 622 [2004]; The Fourth Department has seemingly not yet weighed in on this issue.

8. *Johnson v. Chapin*, 12 NY3d 461 [2009].

9. *Johnson*, at 465.

10. See. Elliott Scheinberg, "*Siegmund Strauss*: CPLR 5501(a)(1), 'Necessarily Affects,' and CPLR 3019," NYLJ, Jan. 15, 2013.

11. *Oakes*, at 644.

12. *Oakes*, at 644.

13. *Oakes*, at 644; *Maddaloni* noted its awareness of *Oakes*.

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