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CPLR 5511: Aggrievement Following a Successful Child Custody Award

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A fundamental tenet of appellate jurisprudence is that only an aggrieved party may appeal.[1] Aggrievement requires, inter alia, an adjudication against rights, person, 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? The answer is that, 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.

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 received.

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 have undoubtedly 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,[4] 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 failing to have further narrowed its award to the noncustodial parent; the foundation of her argument being that, by not having looked beyond her demand, the court did not fully exercise its role of parens patriae on behalf of the child?

It is the premise herein that several theories, individually and jointly, should permit such an appeal. 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 order. 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.

Child Custody, Aggrievement

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)."[5] Children are not chattels[6]; there is nothing proprietary[7] in a custody award, and neither parent has a "prima facie right to the custody of the child."[8] Therefore, a custody award arguably is removed from the traditional category of aggrievement which requires that the adjudication have been against rights, person, or property.[9]

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,[10] ever mindful of their best interests as the claims of parents are always subordinate to the welfare of the child.[11]

A child's rights are superior to the rights of the parties to a stipulation and an order approving a stipulation.[12] 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.[13] The law does not recognize an irrevocable arrangement regarding the custody of infants. Whether the arrangement be the culmination of agreements 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.[14] As captured by the Court of Appeals, "[t]he only absolute in the law governing custody of children is that there are no absolutes."[15]

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.[16] In *Telaro v. Telaro*,[17] 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.'...
>
> 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 argument of a change of 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.[18] The conclusion, the question of law, therefore, withstands the doctrine of preservation and is reviewable for the first time on appeal.

Public Policy

Issues that impact public policy fall into another category under which an appellate court may review an issue raised for the first time on appeal.[19] Public policy concerns abound in matrimonial cases.[20] Child custody is a matter of public policy.[21] Accordingly, by way of example, the prohibition against agreements between parents to arbitrate custody and visitation may be raised because "disputes concerning child custody and visitation are not subject to arbitration as 'the court's role as parens patriae must not be usurped.'"[22]

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.[23]*Finlay v. Finlay*,[24] 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...
>
> 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;[25] a court cannot be bound by an agreement regarding custody and visitation and simultaneously act as parens patriae on behalf of the child— "the courts alone must undertake the task."[26]

'Matter of Michael B.'

In *Matter of Michael B.*,[27] 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 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 override sacred rules of appellate practice even at the highest level.

CPLR 3025(c)

In *Kimso Apartments v. Gandhi*,[28] 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...'" (emphasis provided). A post judgment motion under 3025(c) requires a prior motion to vacate the existing judgment.[29]

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."[30] "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.'"[31]

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 conform to the evidence.[32] 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."[33] 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* and *Winters v. Winters*, 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."[34] The Second Department, in *Maddox*, similarly held: "the Hearing Examiner was not bound by the amount of support requested in the petition."[35]

The Fourth Department 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.[36]

Conclusion

Under the facts and procedural setting posited in 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 the court is charged with protecting. Her argument may and should be heard for the first time on appeal.

That the attorney for the child (AFTC) is not inclined to appeal the order is of no moment because, in the final analysis, upon the conclusion of the trial, the AFTC exits the courtroom stage and marches off into the child's horizon awaiting his or her next assignment; only a parent is awarded custody to care for the child. Clearly, this avenue of relief should be available only in the atypically compelling case.[37]

Endnotes:

1. CPLR 5511.

2. *DiMare v. O'Rourke*, 35 AD3d 346 (2d Dept. 2006).

3. *Mixon v. TBV*, 76 AD3d 144 (2d Dept. 2010).

4. *Velez v. Alvarez*, 129 AD3d 1096 (2d Dept. 2015).

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

6. *Tropea v. Tropea*, 87 NY2d 727 (1996).

7. *Ex parte Livingston*, 151 AD 1 (2d Dept. 1912).

8. DRL §240(1)(a).

9. *DiMare v. O'Rourke*, 35 AD3d 346 (2d Dept. 2006).

10. *Finlay v. Finlay*, 240 NY 429 (1925).

11. *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).

12. *Bachman v. Mejias*, 1 NY2d 575 (1956).

13. *Gloria R. v. Alfred R.*, 166 Misc.2d 141 (Sup. Ct. N,Y. Co. 1995) affd, 227 AD2d 207 (1st Dept. 1996).

14. *People ex rel. Spreckels v. De Ruyter*, 150 Misc. 323 (Sup. Ct. N.Y. Co. 1934); *La Porte v. La Porte*, 85 Misc.2d 1009 (Sup. Ct. Special Term, Queens Co. 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 NY2d 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.))

15. *Friederwitzer v. Friederwitzer*, 55 NY2d 89 (1982).

16. *Rentways v. O'Neill Milk & Cream*, 308 NY 342 (1955).

17. 25 N.Y.2d 433 (1969); *Bingham v. New York City Transit Authority*, 99 NY2d 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).

18. *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).

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

20. *Hirsch v. Hirsch*, 37 NY2d 312 (1975); see *DeCicco v. Schweizer*, 221 NY 431 (1917).

21. *Merrill Lynch, Pierce, Fenner & Smith v. Benjamin*, 1 AD3d 39 (1st Dept. 2003).

22. *Goldberg v. Goldberg*, 124 AD3d 779 (2d Dept. 2015), quoting *Glauber v. Glauber*, 192 AD2d 94 (2d Dept. 1993).

23. *Agur v. Agur*, 32 AD2d 16 (2d Dept. 1969).

24. 240 NY 429 (1925).

25. *Schechter v. Schechter*, 63 AD3d 817 (2d Dept. 2009); *Glauber*, above.

26. *Glauber*, at 94; see *Finlay*, id.

27. 80 NY2d 299 (1992); also *Leval B. v. Kiona E.*, 115 AD3d 665 (2d Dept. 2014); *Bosque v. Blazejewski-D'Amato*, 123 AD3d 704 (2d Dept. 2014); *Chow v. Holmes*, 63 AD3d 925 (2d Dept. 2009); *Gatke v. Johnson*, 50 AD3d 798 (2d Dept. 2008).

28. 24 NY3d 403 (2014); see *Cave v. Kollar*, 2 AD3d 386 (2d Dept. 2003); *In re Denton*, 6 AD3d 531 (2d Dept. 2004).

29. *F&C Gen. Contractors Corp. v. Atl. Mut. Mortg. Corp.*, 268 AD2d 556 (2d Dept. 2000).

30. David Siegel, Practice Commentaries, C5015:3.

31. *Lovelace v. RPM Ecosystems Ithaca*, 14 NYS3d 815 (3d Dept. 2015), citing *Woodson v. Mendon Leasing*, 100 NY2d 62 (2003).

32. *Cave v. Kollar*, 2 AD3d 386 (2d Dept. 2003); *Cartwright Van Lines 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*, 33 AD3d 380 (1st Dept. 2006).

33. *Kimso Apartments v. Gandhi*, 24 NY3d 403 (2014); *Loomis v. Civetta Corinno Const. Corp.*, 54 NY2d 18 (1981).

34. *Winters v. Winters*, 154 AD2d 884 (4th Dept. 1989).

35. *Maddox v. Doty*, 186 AD2d 135 (2d Dept. 1992).

36. *Matter of Hertz Corporation, v. Holmes*, 127 AD3d 1193 (2d Dept. 2015); *Neiss v. Fried*, 127 AD3d 1044 (2d Dept. 2015).

37. Stuart M. Cohen, an attorney in Rensselaer, and David Paul Horowitz, of Geringer, McNamara & Horowitz, were my "moot court" in the preparation of this article.

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