New York Law Journal

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'Dinunzio v. Zylinski': The Right To Waive Counsel as the Subject of Contest

This article examines 'Dinunzio v. Zylinski', wherein a sharply divided court reviewed the applicability of subject of contest to the process by which a court granted a party's unopposed application to waive the right to counsel and proceed pro se, to wit, that the application was timely, knowing, intelligent, and voluntary.

By **Elliott Scheinberg** | November 27, 2019

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This article examines *Dinunzio v. Zylinski*, 175 A.D.3d 1079 (4th Dept. 2019), wherein a sharply divided court (3-2) reviewed the applicability of subject of contest to the process by which a court granted a party's unopposed application to waive the right to counsel and proceed pro se, to wit, that the application was timely, knowing, intelligent, and voluntary. While a previous two-part article studied aggrievement in depth (E. Scheinberg, "CPLR 5511, The Pitfalls of Aggrievement, Beyond the Basics," NYLJ (Part I (https://www.law.com/newyorklawjournal/2018/08/30/cplr-5511-the-pitfalls-of-aggrievement-beyond-the-basics-part-i/), Aug. 30, 2018 and Part II (https://www.law.com/newyorklawjournal/2018/08/31/cplr-5511-the-pitfalls-of-aggrievement-beyond-the-basics-part-ii/), Aug. 31, 2018), this article here maps out the fundamental principles of aggrievement required to understand *Dinunzio*, and then delves into an analysis of the decision.

An appellant must satisfy three jurisdictional predicates before the Appellate Division may entertain the merits of the appeal: aggrievement (CPLR 5511); appealable paper (CPLR 5512) and timeliness (CPLR 5513). CPLR 5511 states, in pertinent part: "An aggrieved party or a person substituted for him may appeal from any appealable judgment or order *except one entered upon the default of the aggrieved party*."

The root of appellate jurisdiction is by way of an aggrieved person. *Burmester v. O'Brien*, 166 A.D. 932 (2d Dept. 1915). Aggrievement is jurisdictional and subject to the court's threshold review, even sua sponte first time on appeal. *Klinge v. Ithaca College*, 235 A.D.2d 724 (3d Dept. 1997); *Glickman v. Sami*, 146 A.D.2d 671 (2d Dept. 1989).

Aggrievement requires, inter alia, an adjudication *against* rights, persons, or property (*DiMare v. O'Rourke*, 35 A.D.3d 346 (2d Dept. 2006)), which arises when: (1) a party has petitioned for relief that is denied in whole or in part; or (2) when someone asks for relief against him or her, which the person opposes, and the relief is granted in whole or in part. *Mixon v. TBV, Inc.*, 76 A.D.3d 144 (2d Dept. 2010). A party is not aggrieved by an order that does not grant relief the party did not request. *Calverton Manor v. Town of Riverhead*, 160 A.D.3d 838 (2d Dept. 2018).

A party may not take a direct appeal from an order entered upon default; the proper procedure is to move to vacate the default and, if necessary, appeal from the denial

of that motion. *Shabazz v. Blackmon*, 274 A.D.2d 770, 771 (3d Dept. 2000), lv. dismissed 95 N.Y.2d 945 (2000).

Subject of Contest

A default by the appealing party notwithstanding, an appeal from a judgment brings up for review those "matters which were the subject of contest." *Bank of New York Mellon Tr. Co., N.A. v. Sukhu*, 163 A.D.3d 748 (2d Dept. 2018). Footnote 3 in *James v. Powell*, 19 N.Y.2d 249, 256 n. 3 (1967), is universally cited as the provenance of the doctrine.

Facts in 'James'. The facts in *James* are instructive. Therein the Court of Appeals reviewed an award of damages to the plaintiff against the defendant, Adam Clayton Powell, and his wife, Yvette, based upon the charge that they had transferred real property to unspecified "family members" in order to frustrate collection of a libel judgment against them. The "family members" further encumbered the property with two additional "bearer" mortgages "in the hands of unknown persons." All efforts to examine the defendants with respect to the conveyance and the mortgages were to no avail.

Supreme Court denied the Powells' motion to dismiss the complaint. The Appellate Division, two justices dissenting, affirmed the order. While that appeal was pending, the Powells failed to appear, in response to a court order, to have their depositions taken, which resulted in an order, pursuant to CPLR 3126(3), striking their answers and directing an inquest to fix the amount of the plaintiff's damages.

Counsel for the Powells appeared at the inquest where they again challenged the sufficiency of the complaint and further argued against punitive damages. The plaintiff was awarded compensatory damages against both defendants in the sum of $75,000, inclusive of the costs of the litigation and attorney's fees, plus punitive damages of $500,000 against the Adam Clayton Powell and of $25,000 against his wife.

Appeal to the Appellate Division. The Appellate Division unanimously affirmed the order striking the Powells' answers but modified the final judgment by reducing the award of compensatory damages against both defendants to slightly less than $56,000 and the award of punitive damages against Adam Clayton Powell to $100,000

and by entirely eliminating the punitive damages assessed against his wife.

The Powells' appeals to the Court of Appeals. The Powells took two appeals to the Court of Appeals: one from the affirmance of the order striking their answers and directing the inquest and the other from the final determination of the Appellate Division affirming, as modified, the trial court's judgment awarding damages against them on that inquest. The latter appeal brought up for review (CPLR 5501(a)(1)) the intermediate order denying the defendants' motion to dismiss the complaint and the questions relating to the award of damages on the inquest, followed by the now famous "FN3." The footnote, repeated herein in its entirety, applied precedent authority to their case:

> The appeal [to the Court of Appeals] from the affirmance of the order striking the defendants' answers and directing the inquest must be dismissed since the order does not finally determine the action within the meaning of the Constitution (N.Y.Const., art. VI, s 3, subd. b, par. (1)). The other appeal—from the order modifying the final judgment—is, however, properly before us, notwithstanding that such judgment *was based in part* on what was, in effect, a default by the defendants.
>
> The provision of CPLR 5511 that an aggrieved party may appeal from an appealable judgment or order 'except one entered upon the default of (such) aggrieved party' does not bar the defendants in this case since they ask us to review only matters which were the subject of contest below, (1) the sufficiency of the complaint, (2) the measure of compensatory damages and (3) the availability of any punitive damages at all.
>
> It is clear under our decisions that, *on an appeal from a final determination based in part on a default*, review may be had of the proceedings on a contested inquest (see, e.g., McClelland v. Climax Hosiery Mills, 252 N.Y. 347, 353-354 ...) as well as of an intermediate order 'necessarily affecting' the final determination, such as the one before us, affirming the denial of the defendants' motion to dismiss the complaint.

Instances of Subject of Contest

Subject of contest contemplates anything that has been contested below. Some

instances include: (1) denial of a motion to appear by either mail or telephone (*In re Sacks v. Abraham*, 114 A.D.3d 799 (2d Dept. 2014)); (2) whether Family Court had personal jurisdiction over the personal representatives of the decedent's estate (*Constance P. v. Avraam G.,* 27 A.D.3d 754 (2d Dept. 2006)); (3) failure to state a cause of action (*Smith v. Howard*, 113 A.D.3d 781 (2d Dept. 2014)); (4) a motion to withdraw as counsel (*Sarlo-Pinzur v. Pinzur*, 59 A.D.3d 607 (2d Dept. 2009)); and (5) waiver of the right to counsel (*Graham v. Rawley*, 140 A.D.3d 765 (2d Dept. 2016)).

See also *Feldman v. Teitelbaum*, 160 A.D.2d 832 (2d Dept. 1990) (the appellant defaulted in answering the complaint but, during the litigation, moved to dismiss the complaint, that motion was the subject of contest and hence appealable); *Matter of Heavenly A.*, 173 A.D.3d 1621 (4th Dept. 2019) ("because [the respondent] failed to appear at the fact-finding hearing and his attorney, although present, did not participate in the hearing, the order was entered upon his default. Nevertheless, respondent's appeal from the order brings up for review 'matters which were the subject of contest' before the court, respondent's motion to dismiss."); *Tun v. Aw*, 10 A.D.3d 651 (2d Dept. 2004) (counsel appeared at a hearing without the client but refused to participate. Counsel's request for an adjournment was denied. The client defaulted but the application for an adjournment was held to be the subject of contest.); *In re Trevlon*, 113 A.D.3d 867 (2d Dept. 2014) (In an adoption proceeding pursuant to Domestic Relations Law (DRL) article 7, the adoptive parents moved to confirm a report of a Judicial Hearing Officer (JHO) which, after a hearing, recommended a determination that the father of the child is not a person whose consent to adoption is required under DRL §111. The father did not oppose the motion of the adoptive parents, and did not cross-move to reject the report. The father thereby waived his contentions that his consent was required for the adoption and that the JHO exceeded his authority under the order of reference, which were raised on appeal in the context of objections to the JHO's report.); *O'Donnell v. O'Donnell*, 80 A.D.3d 586 (2d Dept. 2011) (Plaintiff moved to confirm the referee's report. Defendant neither moved to reject the report (CPLR 4403) nor did he oppose the motion to confirm. The Supreme Court confirmed the report. Defendant could appeal from portions of the judgment since the underlying issues were the "subject of contest" at the hearing. On appeal, defendant could not raise the same issues in the context of objections to the referee's report. By not challenging the referee's errors in

the report before Supreme Court, he waived his right to raise those objections on appeal.).

'Dinunzio v. Zylinski'

In this sharply divided decision (3-2), the majority dismissed the mother's appeals except for her challenges to the validity of her waiver of the right to counsel based on the rationale that it had been the subject of contest.

Both dissenters challenged the majority's broad reading of "a mere footnote" in *James v. Powell*, 19 N.Y.2d 249, 256 n. 3 (1967), which they found inapplicable. Under prevailing law, they asserted, the mother would not have had any issue to appeal because she had received the relief she had petitioned for, the right to proceed pro se. *Parochial Bus Sys. v. Bd. of Educ. of City of New York*, 60 N.Y.2d 539 (1983).

Facts. *Dinunzio* involved a child custody dispute in Family Court. The mother had been represented "by a succession of attorneys." During the hearing, she discharged her final attorney and proceeded pro se. She "would only agree to representation if she 'had a lawyer representing [her] properly.'" 175 A.D.3d at 1086.

Later in the hearing, the mother did not return to the courtroom following a recess and did not appear for the remainder of the hearing. Although not cited in *Dinunzio*, walking out of a hearing or not attending the remainder of a hearing constitutes "a knowing and willing default." *Bottini v. Bottini*, 164 A.D.3d 556 (2d Dept. 2018); *Anita L. v. Damon N.*, 54 A.D.3d 630 (1st Dept. 2008).

The majority rejected the mother's contention that Family Court erred in not granting her an adjournment after she did not return, instead notifying the court by email that "she was attending to an unspecified emergency." The mother's email also stated "that she no longer wanted to participate in the 'illegal' and '[u]nlawful' proceeding, express[ing] an anticipation that the hearing would proceed in her absence." 175 A.D.3d at 1083.

As pertains to this article, in appeal No. 1, the mother appealed from the order entered upon her default granting the father sole custody of the child. In appeal Nos. 2-5, she appealed from orders, entered upon her default, dismissing her petitions. The mother contended in appeal Nos. 1-5 that Family Court erred in failing to ensure,

in response to her request to proceed pro se, that her waiver of the right to counsel was knowing, intelligent, and voluntary.

The majority held that the validity of the mother's waiver of her right to counsel constituted a matter that was the subject of contest before the court. The Appellate Division reviewed the facts and affirmed the waiver.

The constitutional right to counsel in child custody cases. The majority reviewed governing law regarding the constitutional right to counsel in child custody proceedings, citing Family Court Act §261: "Persons involved in certain family court proceedings may face the infringements of fundamental interests and rights, including the loss of a child's society and the possibility of criminal charges, and therefore have a constitutional right to counsel in such proceedings," which includes "any person seeking custody of his or her child or 'contesting the substantial infringement of his or her right to custody of such child' (Family Ct. Act §262[a][v])." 175 A.D.3d at 1081; see also *Graham v. Rawley*, 140 A.D.3d 765 (2d Dept. 2016).

Waiver of constitutional rights. Constitutional rights may be waived because, generally, implicit in the exercise of a right, even a constitutional right, is the concomitant right to forgo its advantages. *People v. Arroyo*, 98 N.Y.2d 101 (2002). It has long been recognized that constitutional protection is no bar to waiver—parties may stipulate away and renounce statutory, and even constitutional rights (*People v. Gajadhar*, 38 A.D.3d 127 (1st Dept. 2007), aff'd, 9 N.Y.3d 438 (2007)), including due process rights to notice and hearing prior to a civil judgment (*D.H. Overmyer Co. Inc., of Ohio v. Frick Co.*, 405 U.S. 174 (1972); *Boddie v. Connecticut*, 401 U.S. 371 (1971)), and the Sixth Amendment right to counsel in criminal cases (*Gajadhar*).

A trial court's obligation regarding a waiver of a right to counsel. A waiver of the right to counsel occurs "if a timely and unequivocal request has been asserted, at which time the trial court is obligated to conduct a *'searching inquiry'* to ensure that the defendant's waiver is knowing, intelligent, and voluntary." *In re Kathleen K.*, 17 N.Y.3d 380, 385 (2011). "Such a request to waive the right to counsel and proceed pro se, as the mother made here, places in issue whether the court fulfilled its obligation to ensure a valid waiver." *Dinunzio*, 175 A.D.3d at 1081.

Although "the record must demonstrate that the party was aware of the dangers and

disadvantages of proceeding without counsel," "there is no rigid formula to be followed in a [searching] inquiry, and the approach is flexible." *Matter of Pitkanen v. Huscher*, 167 A.D.3d 901, 902 (2d Dept. 2018); *Kathleen K.*, 17 N.Y.3d at 386.

The majority found that the record supported the conclusion that the validity of the mother's waiver had been contested and affirmed the waiver: "[T]he day after the court allowed the mother to proceed pro se, the father's attorney questioned whether [s]he should be representing herself, and the court—making a record of its prior consideration of that issue—determined that it had appropriately warned the mother and that, despite the warning, the mother knowingly opted for self-representation."

Dissent—Justices Curran and Carni. Justices John Curran and Edward Carni filed separate dissents regarding the appealability of the validity of the waiver: The mother was not aggrieved because the court granted her unopposed request to proceed pro se, "she got what she wanted." Both Justices did, however, vote with the majority to dismiss the mother's other five appeals because all the orders had been entered upon her default.

A key element of Justice Curran's dissent was that the majority circumvented the mother's default: Because the majority could not reach the issue of the mother's waiver of counsel through the proper channels, i.e., its review of the order denying her motion to vacate, "it was forced to argue that the issue was the subject of contest under *James*." 175 A.D.3d at 1086. "The majority [thus] relied on a purported exception that permits this Court to review issues that *were the subject of contest before the appealing party's default*." Id. at 1084.

The dissenters rejected the notion that "*James* created, via a mere footnote, such a broad exception to the aggrievement requirement, and [there is] nothing in [*James*] to suggest otherwise. [T]he footnote in *James* did nothing more than appropriately apply the aggrievement requirement to the facts of that case" (id. at 1086):

> Although the relevant footnote in *James* uses the words 'notwithstanding that such judgment was based in part on what was, in effect, a default' to describe the posture of the case (*James*, 19 N.Y.2d at 256 n. 3, 279 N.Y.S.2d 10,), *James* makes clear that an inquest on damages—the key issue on appeal—was fully contested

> by the defendant, who appeared by counsel, and the determination as to damages was therefore appealable under CPLR 5511 (*James*, at 255).
>
> * * *
>
> [T]he footnote [] does nothing more than recount the existing law permitting appellate review of contested damages inquests and of intermediate orders (e.g. *McClelland v. Climax Hosiery Mills*, 252 N.Y. 347, 353–354, 169 N.E. 605 [1930]; *Jay-Washington Realty Corp. v. Koondel*, 268 App.Div. 116, 120, 49 N.Y.S.2d 306 [1st Dept. 1944]).

Justice Carni asserted that "the Court of Appeals in *James* recognized, in its footnote, that, although CPLR 5511 would typically bar the subject appeal, it did not bar defendants' appeal in that case 'since they ask[ed] [the court] to review only matters which were the subject of contest below'. The court then explained, based on its prior decisions, that a matter becomes the 'subject of contest' where the final determination is based '*in part* on a default' and the review sought regards either a 'contested inquest' or an 'intermediate order necessarily affecting the final determination.'" 175 A.D.3d at 1090.

The dissent and Family Court Act §261, constitutional right to counsel in child custody matters. Although Family Court Act §261, above, underscores that matters pertaining to child custody generate the constitutional right to counsel, Justice Curran stated: "'[T]he concept of aggrievement is about whether relief was granted or withheld, and not about the reasons therefor', I would add that, in civil matters like this case, *which do not involve an issue of constitutional proportion*, the aggrievement concept is relational in the sense that the contest must exist between or among the parties—not as the majority appears to perceive, between the court and a party ... In recognition of this concept, the legislature has provided for vacatur as the means by which a party may obtain review of an order or judgment entered on default." Id. at 1085. Justice Curran further observed that, although the mother had moved to vacate her default order and the denial of that motion (the basis for appeal No. 6), she did not raise "any perceived inadequacy in the court's colloquy concerning her waiver of the right to counsel." Id. at 1085.

Justice Curran summarized the majority's approach thusly (id. at 1088): "[B]ecause a

court has an affirmative duty to ensure that the waiver of the right to counsel was knowing, intelligent, and voluntary, the issue whether that court actually met its obligation is always the subject of contest, even absent a dispute and even where the party requesting that relief obtained what he or she sought":

> To accept that an issue is contested whenever the court has an affirmative obligation to act invites litigants to successfully obtain an uncontested waiver and then proceed to default—all the while knowing that the matter may still be appealed under the majority's theory.
>
> I note that there is an interesting question whether the majority's approach could be invoked to allow us to reach other issues not involving the waiver of the right to counsel where there has been a default. For example, in the summary judgment context, it appears that a court has the obligation to evaluate whether the movant met his or her initial burden on the motion regardless of whether any opposition was interposed ... Thus, if the opposing party defaults on the motion and submits no opposition, does the majority's approach permit the conclusion that the opposing party is still aggrieved and does not have to move to vacate the default to permit this Court to review whether the movant met his or her initial burden?
>
> Ultimately, I can hardly fathom the floodgates that would be opened by the majority's approach, which would entirely eliminate the need for parties to make use of the vacatur procedure.

Certainly, courts apply extra layers of protection to assure that constitutional rights have not been violated, such as *Gideon v. Wainwright*, 372 U.S. 335 (1963), which involved a right to counsel. The U.S. Supreme Court underscored "[t]he important public policy which underlies this tradition—the right to counsel ..." *Gertz v. Robert Welch*, 418 U.S. 323, 355 (1974). Motions for summary judgment in ordinary civil cases do not routinely involve matters of constitutional protection thus not invoking Justice Curran's concern.

The majority's response to the dissenting opinions. The majority underscored that the mother could obviously not have contended on appeal that Family Court erroneously erred in granting her the relief she requested. Rather, she argued that

the court erred in failing to ensure that her waiver was "knowing, voluntary, and intelligent."

The majority further observed that inherent in the dissent's assertion that the mother was not aggrieved because she was permitted to represent herself, as she had requested, is the assumption that her waiver was "a knowing, voluntary and intelligent choice." But that issue, said the majority, was the subject of contest and, therefore, reviewable on appeal.

Fundamental Errors in Lieu of Subject of Contest

Since the right to counsel in child custody proceedings is a constitutional right (Family Court Act §261) the majority and the dissenters could have drawn a parallel from the doctrine of "mode of proceedings" and have obviated *James v. Powell*, thereby possibly reaching a unanimous outcome.

The doctrine of "mode of proceedings" covers a "narrow" array of issues of "fundamental defects in judicial proceedings" that "are immune from the requirement of preservation." This category includes the violation of the right to counsel. A waiver of the right to counsel in civil matters requires a showing of the same elements as in criminal cases, that the waiver was made knowingly, voluntarily, and intelligently. *People v. Arroyo*, 98 N.Y.2d 101, 103 (2002); *People v. Cucchiara*, 174 A.D.3d 816, 816 (2d Dept. 2019), lv. to appeal denied, 2019 WL 5206172 (2019); *People v. Rodriguez*, 158 A.D.3d 143, 150 (1st Dept. 2018), lv. to appeal denied, 31 N.Y.3d 1017 (2018).

"[C]ertain deviations from mandated procedural, structural and process-oriented standards affect 'the organization of the court or the mode of proceedings prescribed by law' and present a question of law even without a timely objection (*People v. Patterson*, 39 N.Y.2d at 295 ...). Only fundamental defects in judicial proceedings [] fall within this very narrow category of so-called 'mode of proceedings' errors ... Thus, where 'the error complained of goes to the essential validity of the proceedings conducted below' such that 'the entire trial is irreparably tainted,' it need not be preserved to present a question of law reviewable by this Court." *People v. Agramonte*, 87 N.Y.2d 765, 769-70 (1996); *People v. Dreyden*, 15 N.Y.3d 100 (2010).

"Errors within this tightly circumscribed class are immune from the requirement of preservation. Outside the context described by these cases [] we have repeatedly

held that a court's failure to adhere to a statutorily or constitutionally grounded procedural protection does not relieve the defendant of the obligation to protest." *People v. Kelly*, 5 N.Y.3d 116 (2005). "More recently, such errors ... have been held to include violation of the right to counsel (*People v. Kinchen*, 60 N.Y.2d 772, 469 N.Y.S.2d 680, 457 N.E.2d 786 ...)." *People v. Ahmed*, 66 N.Y.2d 307, 310 (1985).

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