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Setting the Record Straight as to Interlocutory Appellate Practice

This article examines foundational principles of appellate procedure both generally and as applicable in child custody cases.

By **Elliott Scheinberg** | January 17, 2020

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A great value to subscribers of the New York Law Journal is the daily expert analyses on pages three and four that delve into complex issues of evolving law. The authors of these articles are highly knowledgeable, citing accurate supporting statutory

authority, case law and underlying foundational principles. Attorneys archive these articles as reliable, authoritative references for litigation strategy, future court submissions and advice to clients.

In a recent article, however, *Filing Interlocutory Appeals in Child Custody Cases* (Dec. 18, 2019), the authors misstate foundational appellate procedure, citing case law from foreign jurisdictions that is antithetical to New York law.

This column is a comprehensive critique of the aforementioned article. It examines foundational principles of appellate procedure both generally and as applicable in child custody cases.

The article begins: "Throughout a case, a court may enter interim orders. Unlike final orders, which are appealable as of right, interim orders are generally not appealable." This is wholly wrong; CPLR 5701(a)(1), (2) provides:

> *Appeals as of right*. An appeal may be taken to the appellate division *as of right* in an action, originating in the supreme court or a county court: 1. *from* any final *or interlocutory judgment* except one entered subsequent to an order of the appellate division which disposes of all the issues in the action; (2) from an order not specified in subdivision (b), where the motion it decided was made upon notice [The statute sets forth eight categories that are appealable as of right].

The late Professor David Siegel, the dean of civil practice and procedure, stated: (1) "[CPLR 5701(a)] rules and accounts for the *unusually generous appealability* one finds in New York"; and (2) "A perusal of CPLR 5701(a)[(2)] reveals why the appealability of nonfinal (or intermediate or interlocutory, etc.) orders is so broad in New York." [Practice Commentaries, C5701:4. The Paragraph 2 List of Appealable Orders]. Prof. Siegel further noted that CPLR 5701(b) "lists just a few orders for which permission is specifically required for an appeal, and statistically they are insignificant."

Interlocutory orders from the Family Court Act (FCA) are treated differently pursuant to statute. FCA §1112(a) provides, in pertinent part: "An appeal may be taken as of right from any order of disposition and, in the discretion of the appropriate appellate division, from any other order under this act. An appeal from an intermediate or final order in a case involving abuse or neglect may be taken as of right to the appellate

division of the supreme court." "Order of disposition is synonymous with a final order or judgment," *Matter of Yamoussa M.*, 220 A.D.2d 138 (1st Dept. 1996); *Freihofer v. Freihofer*, 104 A.D.2d 92 (3d Dept. 1984). While "no appeal as of right (FCA §1112)" is allowed from a disposition other than a final order or judgment, *In re Melissa M.*, 290 A.D.2d 219 (1st Dept. 2002), §1112 authorizes motions for leave to appeal from nonfinal orders or judgments.

The article continues: "An appeal of an interim, or, interlocutory appeal, is often referred to as an *emergent appeal* and can be filed during litigation where it meets certain stringent standards." A search on Westlaw confirms that the concept of "emergent appeal" does not exist in New York.

Moreover, except for the Family Court Act, interlocutory orders from the Supreme Court and County Courts require no "stringent standards", they are appealable as of right via legislative fiat, CPLR 5701(a)(1), (2), above.

The writers' further representations regarding "emergent appeals" offend New York law:

> Before an interlocutory appeal is filed it is often required that the attorney file a Motion for a Stay of the offensive order in the trial court where it was entered, thereby creating the emergency need for appeal.

Under no circumstances does New York appellate procedure *ever* require "an attorney to file a Motion for a Stay of the offensive order in the trial court [to] creat[e] the *emergency need for appeal*."

The article's next misstatements relate to the context of expert opinions in the writers' so-called "emergency appeals":

> [A]n expert opinion that an emergency exists that requires specific action on behalf of a child is essential before filing a potentially successful interlocutory appeal. Presumably, that expert opinion will have been presented to the trial court before the initial filing and for the Stay. If not, after an expert opinion is available, an attorney might consider a Motion for Reconsideration of the initial Motion. However, if the relief is denied by the trial judge when filed with an expert opinion, this expert opinion can be the child's basis of the emergency.

> If an expert opines that a child is at risk in either the unsupervised care of a parent or having any contact with the parent that is deleterious to the child, a court should not ignore that expert opinion. This is true especially if it is based upon the expert's in-person interview.

Unilateral pretrial submissions of expert reports in child custody cases are prohibited under New York law; no exceptions are made for interlocutory appeals. 22 NYCRR 202 202.16(g)(2) provides, in pertinent part:

> Each expert witness whom a party expects to call at the trial shall file with the court a written report, *which shall be exchanged* and filed with the court no later than 60 days before the date set for trial, and reply reports, if any, shall be exchanged and filed no later than 30 days before such date. Failure to file with the court a report in conformance with these requirements may, in the court's discretion, preclude the use of the expert. Except for good cause shown, the reports exchanged between the parties shall be the only reports admissible at trial.

Although 202.16(g) states "except for good cause shown", the undersigned has not found any such case. Moreover, in recognition of the fact that privately retained mental health professionals are "demonstrably hostile towards" the other parent, having "already reached a conclusion favorable to" their own client, the Appellate Division underscored that "Appellate courts have been known to specifically condemn the use of an [privately retained] examining psychiatrist []." *Rosenblitt v. Rosenblitt*, 107 A.D.2d 292, 295 (2d Dept. 1985).

Furthermore, if private mental health experts have been retained, it is likely that the trial court will have already appointed its own impartial forensic expert making access by one parent's private expert to the other parent and the children pretty much impossible: "[W]e conclude that, absent any indication that the investigatory and analytical efforts of the Forensic Division were deficient in any respect, Special Term committed an abuse of discretion in ordering plaintiff to submit to an examination by defendant's privately retained psychiatrist." *Rosenblitt*, 107 A.D.2d at 296; *Sardella v. Sardella*, 125 A.D.2d 384, 385 (2d Dept. 1986).

The next paragraph is incomprehensible in the constellation of child custody disputes

between New York parents:

> Laws are replete with children's rights to safety. Under the Fourteenth Amendment's Equal Protection clause, no state has the right to deprive a citizen of equal protection under the law. Under the Fourth Amendment children have a right to be safe and secure in their homes. Once again, it is up to the court, in its role as parens patriae, to be cognizant of the child's safety.

The writers conclude:

> In the event of an adverse ruling regarding the welfare of a child during a child custody proceeding, the attorney and client should consider *whether the court's order may be appealed prior to the court's final order*, and whether such an appeal is significant enough to justify the expense. As the Texas Supreme Court wrote: "Appellate courts cannot afford to grant interlocutory review of every claim that a trial court has made a pre-trial mistake. But we cannot afford to ignore them all either. Like "instant replay" review now so common in major sports, some calls are so important and so likely to change a contest's outcome that the inevitable delay of interim review is nevertheless worth the wait." *In re McAllen Medical Center*, 275 S.W.3d 458 (Tex. 2008).

The issue in *McAllen* was limited to "negligent credentialing" of a doctor by a hospital in a "health care liability claim," not to "interlocutory appeals in child custody cases." A Westlaw search confirms that *McAllen* has never been cited outside of Texas. Parenthetically, the writers also cited, *Crowe v. De Gioia*, 447 A.2d 173 (1982), a New Jersey decision, which, a Westlaw search confirms, has never been cited in New York.

New York has a very rich body of law regarding appellate procedure. New York state practitioners should not be fed principles of appellate procedure from foreign jurisdictions that are categorically wrong in New York. While the undersigned does not pass on the accuracy of the article's representations regarding other jurisdictions, a disclaimer should have preceded the article to alert New York practitioners that it does not represent New York law.

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