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'Steeno': Was a Family Court Order Final and Directly Appealable?

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CPLR 5512(a), which provides, in pertinent part that "an initial appeal shall be taken from the *judgment or order* of the court of original instance," is jurisdictional (*Clemons v. Schindler El.*, 87 A.D.3d 452, 453-54 (1st Dept. 2011); *Citibank (S. Dakota) N.A. v. Morrissey*, 276 A.D.2d 963 (3d Dept. 2000)), and may be examined sua sponte.

Unlike CPLR 5701(a)(1), (2), which broadly allows appeals "to the Appellate Division as of right" "from *any* final or interlocutory judgment," with certain exceptions not relevant here, the Family Court Act is more limited. Family Court Act §1112(a) provides, as relevant: "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).

This month's column examines *Steeno v. Szydlowski*, 2020 NY Slip Op 01808 (4th Dept. 2020), wherein the majority and the dissent were in disagreement over whether the order on appeal constituted a final disposition and, as such, appealable as of right.

That finality is not always clear is not novel; even the Court of Appeals has struggled to define it: "The concept of finality is a complex one that cannot be exhaustively defined in a single phrase, sentence or writing." *Burke v. Crosson*, 85 N.Y.2d 10, 15 (1995). *Burke* offered no more than "*a fair working definition* of the concept []: a 'final' order or judgment is one that disposes of all of the causes of action between the parties in the action or proceeding and leaves nothing for further judicial action apart from mere ministerial matters."

'Steeno'

Steeno, a split decision (4-1), follows a strained course with no easy solutions and unanswered questions. The dissent is indispensable. The majority and the dissent disputed whether the order on appeal was a final disposition; the majority deemed it final and appealable and, as backup measure, made it appealable by sua sponte "deem[ing] the notice of appeal an application for leave to appeal from the 'non-final' order and, in the exercise of discretion, granting leave to appeal." This certainly suggests that the majority saw a need for urgent appellate intervention.

The anticlimactic irony behind the majority's ostensible urgency to make the order appealable, by right or by leave, is captured in the final paragraph of the majority's opinion wherein, it "concluded" that it could not conduct "proper appellate review" of the order because Family Court had not prepared "the required findings" to support its custody award (see CPLR 4213). Without offering any reason, the majority declined to exercise its power to review the record and make its own findings rather choosing to hold the case in abeyance, reserve decision, and remit the matter to Family Court to set forth its findings.

Furthermore, there was a subsequent order, not addressed by the majority, which the dissent argues was, in fact, the final order.

The Facts

The mother appealed from an order that awarded joint custody of the child to the father and the child's maternal grandmother, along with parenting access for the appellant-mother "as the parties agree or stipulate and if there is no such agreement, then [Family Court] [sic] w[ould][sic] make a determination of same after a hearing."

"'It is well established that as between parent and nonparent the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances;" moreover, "the nonparent has the burden of proving that *extraordinary circumstances* exist, and until such circumstances are shown, the court does not reach the issue of the best interests of the child.'" *Matter of Wolfford v. Stephens*, 145 A.D.3d 1569, 1569-70 (4th Dept. 2016); *Bennett v. Jefrreys*, 40 N.Y.2d 543 (1976).

The Dissent

Justice John Curran dissented, voting to dismiss the appeal as the order was not appealable as of right under FCA §1112(a): (1) the order, by its own terms, "expressly reserved a non-ministerial issue, i.e. the mother's visitation, to a future stipulation or order of Family Court"; and (2) during the pendency of the appeal, Family Court entered another order that resolved issues concerning the mother's visitation, which order was, therefore, the final order.

Point One: The order on appeal did not resolve the issue of visitation/parenting access, which is an element of custody (*Shanley v. Brush*, 94 Misc.2d 434, 436 (Fam. Ct. 1978), citing *Juan R. v. Necta V.*, 55 A.D.2d 33, 35 (2d Dept. 1976)): "In the history of domestic relations law, 'visitation' has oft been described as a form of 'quasi' or 'limited' custody ... [I]t appears only proper that we construe the 'greater' term (custody) as encompassing the 'lesser' term (visitation)."

An order directing the parties to play nice and agree amongst themselves is counterintuitive because the parties would not have prepared to call their first witnesses had they been able to agree as late as the eve of trial. An order directing parties to agree is further destructive because it amplifies their senses of justice denied, remaining in the same limbo that brought them to the court, in addition to the looming specter of future litigation costs when lawyers have to, inter alia, become reacquainted with the intricacies of the case. Although appellate courts have acknowledged that such orders leave the doors open to potential mischief by malevolent parents accompanied by future litigation, they have passed on opportunities to mandate that parental access be determined simultaneously with custody awards. In *Kelley v. Fifield*, 159 A.D.3d 1612 (4th Dept. 2018):

> Although "[a court] cannot delegate its authority to determine visitation to either a parent or a child" ... it may order visitation as the parties may mutually agree so long as such an arrangement is not untenable under the circumstances ... we conclude

> that the father adequately alleged a change of circumstances insofar as the visitation arrangement based upon mutual agreement was no longer tenable given that the mother purportedly denied the father any contact with the child."

In *Matter of Moore v. Kazacos*, 89 A.D.3d 1546 (4th Dept. 2011), the Appellate Division rejected the father's contention to remit the matter for a more specific visitation schedule: "If the father is unable to obtain 'open and reasonable parenting time ... as the parties may agree' pursuant to the order, he may file a petition seeking to enforce or modify the order."

In *Matter of Pierce v. Pierce*, 151 A.D.3d 1610 (4th Dept. 2017), Family Court modified a prior custody and visitation order by awarding the father primary physical custody upon stipulation of the parties, and awarding the mother visitation as the parties mutually agree. The Fourth Department held: "The court did not improperly delegate to the parties its authority to schedule visitation, and we thus reject the mother's contention that the matter should be remitted to the court to fashion a more specific visitation schedule." The mother's potential remedy was costly litigation: "If the mother is unable to obtain visitation with the child 'as the parties mutually agree,' she may file a petition seeking to *enforce or modify* the order." Enforce what? Modify what? An order directing parties to agree is meaningless because "enforcement" and "modification" contemplate an existing order; for example, a party cannot be held in contempt for refusing to agree.

Orders directing parties to agree have also been remanded for specific parental access schedules. In *Samuel v. Sowers*, 162 A.D.3d 674, 675 (2d Dept. 2018), the Second Department stated: "Where the record demonstrates animosity between the parties and an inability to cooperate, the best interests of the children generally require that the Family Court set forth a physical access schedule." See also *Hodges v. Lawless*, 162 A.D.3d 1025 (2d Dept. 2018) (Family Court awarded custody of the child to the father, with parental access to the mother "as the parties may agree." Held: The court erred in failing to specify a parenting access schedule); *Thomas R.K. v. Tamara S.K.*, 166 A.D.3d 773 (2d Dept. 2018) (matter remanded to Family Court to, inter alia, designate a parenting access schedule "rather than implicitly delegating the resolution of those issues to the parties"); *Matter of Spencer v. Killoran*, 147 A.D.3d 862 (2d Dept. 2017) ("the order is modified, *on the law*, by deleting the provision thereof directing that the mother's supervised visitation shall be 'as the parties may agree' ... the matter is remitted to the Family Court [] to set a schedule for the mother's supervised visitation.").

Point Two: The Subsequent Order. In Point Two, Justice Curran states:

> review of the order on appeal would have to be predicated on the familiar principles of CPLR 5501(a)(1), made applicable here under Family Court Act §1118, allowing this Court to review on appeal from a final order any non-final orders necessarily affecting the final order ...
>
> [A]lthough the subsequent order was entered upon her default, the mother could have appealed from it and sought review on that appeal of matters that were the 'subject of contest,' including the order resolving the custody dispute."

Irrespective of whether the first (custody) order was final or not, it remained appealable as of right because: (1) the mother timely appealed the first order; (2) if the second order was the final order: (i) the first order necessarily affected the final order (CPLR 5501(a)(1); or (ii) it was the subject of contest, as the second order was entered upon her default. In either event, the mother would need to move to vacate her default from the second order, regarding her parenting access and, in the event her motion to vacate is denied, her appeal would be limited to that denial and she would be precluded from raising the issue of parenting access on that appeal. *Derick B. v. Catherine L.*, 155 A.D.3d 511 (1st Dept. 2017); *Onewest Bank, N.A. v. Mahoney*, 154 A.D.3d 770 (2d Dept. 2017); also *Lai, Doing Bus. as Ultimate Bulldogs, v. Montes*, 2020 NY Slip Op 02134 (3d Dept. 2020) ("Defendants did not timely perfect their appeal from the [first] order denying their motion to vacate the default judgment. However, the [second] order, from which defendants did ultimately timely appeal, is a final order in that it 'dispose[d] of all of the causes of action between the parties in the action ... and [left] nothing for further judicial action' (*Burke v. Crosson*, 85 N.Y.2d 10, 15 (1995) ...). Accordingly, defendants' appeal from the [second] final order brings up for review the prior, nonfinal [first] order denying the motion to vacate the default judgment, which 'necessarily affect[ed] the final [order]' (CPLR 5501[a][1] ...).]"

'Pristine Practice': Justice Curran continues:

> Absent a consistent and predictable means of defining and applying what is an 'order of disposition' under Family Court Act §1112 (a), practitioners face traps for the unwary ... My focus on the procedural aspects of this appeal is not meant to require pristine practice or to ignore the demanding realities of litigation ... I seek only to emphasize my view that provisions such as Family Court Act §1112 exist to preserve fairness and consistency and give the trial court the first chance to resolve the matter.

The dissent's "focus on the procedural aspects of this appeal is not meant to require *pristine* practice or to ignore the demanding realities of litigation" is unclear because appeals are, with the exception of sua sponte grants for leave to appeal, routinely won and lost based on compliance with pristine adherence to procedure, especially jurisdictional procedure. While governing law regarding CPLR 5512 and FCA §1112(a) generally requires no refinement, exceptions appear, as discussed in the March 26th column (https://www.law.com/newyorklawjournal/2020/03/26/cplr-5512a-hallmarks-essential-requirements-substance-and-other-indicia-of-an-order/), where appellate courts found appealability based on the "essential elements," "hallmarks," or indicia of an order, for example, *Matter of Louka v. Shehatou*, 67 A.D.3d 1476 (4th Dept. 2009), wherein the Appellate Division determined that a letter would be treated as an appealable order inasmuch as "the Referee filed the letter with the Family Court Clerk and ... the letter resolved the motion *and advised the father that he had a right to appeal*."

'Traps for the Unwary' vs. The Knowledgeably Uncertain: Justice Curran: "Absent a consistent and predictable means of defining and applying what is an 'order of disposition' under Family Court Act §1112 (a), practitioners face traps for the unwary." As

noted above, with very limited exception, the statute and the case law are clearly honed as to what constitutes an appealable order. No reason to be unwary, all one needs to do ahead of an appeal is to have read the statute and the decisional authority.

Oxford defines "mistake" as "an action or judgment that is *misguided or wrong*." Oxford defines "error" as "the state or condition of being wrong in conduct or judgment." Both hint a reasoning process rather than a blindfolded plunge.

"Unwary" suggests a different level of flaw committed by one who is "not cautious; not aware of possible dangers or problems." Lexico Powered by Oxford. Oxford Learner's Dictionary defines "unwary" as "not aware of the possible dangers or problems of a situation and therefore likely to be harmed in some way." Merriam-Webster includes "not alert". Blindfolded plunges. With all the available legal research, there is no reason for counsel to be "unwary".

Oxford (Lexico) defines "uncertain", inter alia, as "not known or definite." Unlike unawareness, uncertainty suggests studied reflection and considered judgment such as when counsel has studied the case law but the case law offers no precise definitions or specific guidance. Instances of unavailable precise, specific guidance include *Burke v. Crosson*, above, ("The concept of finality is a complex one that cannot be exhaustively defined in a single phrase, sentence or writing."); *Siegmund Strauss v. E. 149th Realty*, 20 N.Y.3d 37 (2012) (regarding CPLR 5501(a)(1): "Although it is difficult to distill a rule of general applicability regarding the 'necessarily affects' [the final judgment] requirement ..."); *Oakes v. Patel*, 20 N.Y.3d 633, 644 (2013) ("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 ... (1976) and *Siegmund Strauss v. East 149th Realty*, 20 N.Y.3d 37 ... (2012) are exceptions.) We have never attempted, and we do not now attempt, a generally applicable definition."). In *Park E. v. Whalen*, 38 N.Y.2d 559 (1976), the Court of Appeals rescued the unwary regarding "the computation of the time to take an alternative method of appeal to begin on the date of the denial or dismissal of the first attempted appeal" under CPLR 5514.

The dilemma for appellate counsel is that, while the Court of Appeals has the luxury of conceding uncertainty, appellate counsel has no such latitude and must manage to accurately guess the court's mind at the client's peril.

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