New York Law Journal

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The Fugitive Disentitlement Doctrine in Civil and Family Law Appeals

This article explores a doctrine that has also been applied by appellate courts in criminal cases to dismiss an appeal by defendant who is a fugitive from justice during the pendency of his or her appeal.

By **Elliott Scheinberg** | June 17, 2021

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"For well over a century," the "fugitive disentitlement doctrine" or, as it is also known, "the unavailable to obey the mandate of the court doctrine," a doctrine anchored in equity which has been extended to civil cases, *Skiff-Murray v. Murray*, 305 A.D.2d 751, 752 (3d Dep't 2003) and *Wechsler v. Wechsler*, 45 A.D.3d 470, 472 (1st Dep't 2007), has been applied by appellate courts in criminal cases to "dismiss an appeal of a defendant who is a fugitive from justice during the pendency of [his/her] appeal … . [The doctrine] is based upon the inherent power of the courts to enforce their judgments, and has long been applied to those who evade the law while simultaneously seeking its protection [U.S. Supreme Court cites omitted]." *Allain v. Allain*, 123 A.D.3d 138, 142 (2d Dep't 2014); *Wechsler*, 45 A.D.3d at 472; *Matter of Joshua M. v. Dimari N.*, 9 A.D.3d 617, 619 (3d Dep't 2004).

"[C]ourts have consistently held that application of the doctrine is appropriate where the appellant has willfully made himself or herself unavailable to obey a court's mandate in the event of affirmance. '[I]t is the flight or refusal to return in the face of judicial action that is the critical predicate to fugitive disentitlement.'" *Allain*, 123 A.D.3d at 146; also *In re Tradale CC.*, 52 A.D.3d 900 (3d Dep't 2008). "An appellant's escape 'disentitles him to call upon the resources of the Court for determination of his claims.'" *Empire Blue Cross and Blue Shield v. Finkelstein*, 111 F.3d 278, 280 (2d Cir. 1997), citing *Degen v. United States*, 517 U.S. 820 (1996). "[Precedent authority] make[s] clear that it would be inequitable to permit a party to benefit from an order or judgment in its favor when it has deliberately frustrated appellate review of that determination." *Ruskin v. Safir*, 257 A.D.2d 268, 274 (1st Dep't 1999); *Gem Holdco v. Changing World Tech., L.P.*, 164 A.D.3d 1132 (1st Dep't 2018).

As written in *S.W. v. R.D.*, 24 Misc.3d 1244(A) (N.Y. Fam. Ct. 2009):

> It is axiomatic that […] every court—has a responsibility to protect the fairness of its litigation process, the integrity of its judgments and orders and to remedy affronts to the respect due the judicial branch … quoting *Degen v. U.S.*, 517 U.S. 820 (1996) [… "we acknowledge disquiet at the spectacle of a criminal defendant reposing … beyond the reach of our criminal courts, while at the same time mailing papers to the court in a related civil action and expecting them to be honored…"]. Indeed, this power has been found to be inherent in a court's right to manage its proceedings in an efficient and equitable manner.
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> As a means of effectuating this inherent power … This doctrine ensures that a court will not have to render judgment in a matter where there is no expectation that there will be compliance with the court's mandate if it is averse to the fugitive appellant.

One court characterized the doctrine "as a relative to the 'clean hands doctrine,' the doctrine holds that a person is not entitled to seek the court's assistance in the same cause from which he or she is a fugitive." *Peppin v. Lewis*, 194 Misc.2d 151 (N.Y. Fam. Ct. 2002).

Applicable Situations

Gem presents situations that trigger the doctrine (164 A.D.3d at 1132-33):

> The doctrine applies where the fugitive is a former New York resident who changed residency or otherwise fled to another state in a willful and deliberate effort to avoid the jurisdiction of the New York courts; was a resident of another state present in New York when an arrest warrant was issued who fled the state in order to avoid an arrest warrant; or, as in *Wechsler v. Wechsler*, 45 A.D.3d 470, 847 N.Y.S.2d 26 (1st Dep't 2007), was wanted in New York pursuant to a warrant and refused to return to the state for fear of being arrested in defiance of a separate court order directing the fugitive to appear in court.

Rationale and Nexus Requirement

Wechsler, 45 A.D.3d at 472, adopted *Empire Blue Cross and Blue Shield v. Finkelstein*, 111 F.3d 278, 280 (2d Cir. 1997), wherein the Second Circuit spelled out the principal rationales behind the doctrine adding a "nexus" requirement "between fugitivity and the course of appellate proceedings." As stated in *Empire*, 111 F.3d at 280:

> The nexus requirement is satisfied where the appellant's absence frustrates enforcement of the civil judgment. The principal rationales for the doctrine include: (1) assuring the enforceability of any decision that may be rendered against the fugitive; (2) imposing a penalty for flouting the judicial process; (3) discouraging flights from justice and promoting the efficient operation of the courts; and (4) avoiding prejudice to the non-fugitive party.

Also *In re Tradale CC.*, 52 A.D.3d 900, 900 (3d Dep't 2008) ("... provided that there is a nexus between the appellant's fugitive status and the matter being appealed.")

'Wechsler'

The judgment of divorce, in *Wechsler v. Wechsler*, 45 A.D.3d 470 (1st Dep't 2007), directed the husband to pay the wife a distributive award of $22,770,623 in 60 equal installments plus monthly maintenance of $46,666.66 until he transferred certain assets to her. The husband appealed. The husband did not comply with several orders, following which Supreme Court held him in contempt and ultimately issued a warrant and order for his arrest and incarceration.

The husband moved to enjoin the wife from enforcing the judgment and to reduce the amount he had been ordered to pay. Supreme Court set a return date for a hearing requiring both parties to appear; the court further directed the husband to secure approximately $8.6 million in his attorney's escrow account. The husband neither appeared at the hearing nor did he deposit any money into the escrow account. His counsel stated that "[he] was physically ill and there was an arrest warrant—that even brief incarceration 'would be a grave risk to his life.'" Supreme Court denied the husband's motion and granted the wife's cross motion for a judgment.

Over two months after argument of the appeal from the judgment of divorce, the wife moved to dismiss the husband's appeal because, as a fugitive, he was barred from maintaining the appeal under the fugitive disentitlement doctrine. The First Department reviewed several decisions, the most detailed being its own precedent, *James v. Powell*, 27 A.D.2d 814 (1st Dep't 1967):

> In *James*, the defendant was found, after a trial, to have libeled the plaintiff and a judgment for damages was entered against the defendant. The defendant subsequently failed to obey at least one order of Supreme Court requiring him to appear for an examination in aid of enforcement of the judgment. The defendant was held in contempt and an ex parte order of commitment was issued. The defendant's motion to vacate the ex parte order of commitment was denied, and he appealed.
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> This Court dismissed the appeal without prejudice to renewal of the appeal after the defendant submitted himself to the jurisdiction of the court by complying with the underlying contempt order ... We found that the defendant "willfully remained outside of the State in order to avoid the jurisdiction and authority of our courts. He ... chose [ ] to do so, but the courts will not ... hear [the appeal] intended to review the proceedings against him which have resulted in his present plight." We noted that "[i]f [the defendant] sincerely desires a review by the courts of this State of the previous proceedings the best proof he can make of the fact is to present himself to the officer who holds, and whose duty it is to arrest him on the commitment"

Id. at 814-15.

The court returns to *Wechsler*:

> [Wechsler], having been adjudicated in contempt of court and made the subject of an arrest warrant, is a fugitive [...]. That appellant is a resident of Colorado is immaterial; he is wanted in New York pursuant to a warrant and refuses to return to this State. Furthermore, there is a nexus between appellant's fugitive status and the appellate proceedings. Appellant's fugitive status resulted from his failure to comply with an order enforcing the judgment of divorce requiring him to transfer to respondent substantial assets, and his refusal to return to New York. Indeed, appellant's counsel acknowledged to Supreme Court at the hearing on appellant's motion to reduce the amount of money he owed respondent that he did not appear in court as directed because he was afraid of being arrested and incarcerated pursuant to the warrant. Appellant's appeal is from the judgment of divorce, the underlying charter of his financial obligations to respondent, and all postjudgment proceedings before Supreme Court and this Court have revolved around that charter. Appellant's absence from the State owing to his fugitive status has, as evidenced by the multiple motions and applications made before both Supreme Court and this Court, frustrated respondent's enforcement of the judgment of divorce. Moreover, under these circumstances, the principal rationales for the

> doctrine—imposing a penalty for flouting the judicial process, discouraging flights from justice and promoting the efficient operation of the courts, and avoiding prejudice to the nonfugitive party—would be vindicated by dismissing the appeal.
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> At bottom, [Wechsler] has willfully remained outside of New York in order to avoid the jurisdiction and authority of the courts of this State ... and we will not afford him review of the judgment of divorce since he has evaded court mandates.

Notably, although the Appellate Division dismissed Mr. Wechsler's appeal it granted him leave to make a motion to reinstate his appeal on the condition that, within 20 days of service of a copy of the order, he posted an undertaking of $9,151,920.57, representing the amount Supreme Court required him to transfer to his attorney's escrow account plus $500,000 in additional security relating to other amounts owed.

The Doctrine and the Enforcement of Child Support Orders

The doctrine is predictably applicable to child support proceedings. In *Allain v. Allain*, 123 A.D.3d 138 (2d Dep't 2014), the mother was precluded from maintaining her appeal because she was a fugitive having fled New York upon the filing of the violation petition for nonpayment of child support. Family Court denied her application for further adjournment "due to the extensive and protracted history of litigation" and her "repeated attempts to create undue delay of the resolution of this matter." The court further denied her application for leave to appear electronically "due to the nature of the proceedings and the Court's inability to effectuate sentence, given [her] repeated failure to appear, if the Court [did] order [her] to be incarcerated after [a] hearing." A warrant was issued for her arrest, based on her failure to appear, but was stayed in order to provide her with an opportunity to appear for a hearing with respect to the confirmation of the Support Magistrate's findings and recommendation of incarceration; the mother never appeared.

> [T]his Court, like the Court of Appeals and the Appellate Division in each of the other judicial departments, has dismissed appeals by fugitives in criminal proceedings "on the comparable ground that [the] appellant is not presently available to obey the mandate of the Court in the event of an affirmance.' "
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> This Court has also employed the "unavailable-to-obey" paradigm in dismissing an appeal in a juvenile delinquency proceeding, which, in contrast to a criminal prosecution, is civil in nature ... In *Matter of Magdalene N.*, 180 A.D.2d 799, 580 N.Y.S.2d 435, the juvenile appellant had absconded from her placement, and a warrant was issued for her arrest. As noted, this Court concluded that dismissal of the juvenile's appeal was appropriate since she was "unavailable to obey the mandate of the court" ... (id.; *Matter of Skiff-Murray v. Murray*, 305 A.D.2d at 753

> [noting that the Court of Appeals and the Appellate Division, First Department, have also used the "unavailable to obey" paradigm to dismiss fugitives' appeals in civil proceedings]).
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> … More recently, in *Matter of Christie S. v. Marqueo S.* (106 A.D.3d 592), the Appellate Division, First Department, dismissed an appeal from an order confirming a Support Magistrate's finding that the appellant had willfully violated an order of support … [and] was presently a fugitive who was unavailable to obey the Family Court's mandate in the event of an affirmance, and concluded that "his appeal may not be heard."

The Appellate Division found "a nexus between the mother's fugitive status and the appellate proceedings, since her fugitive status related to her failure to comply with the prior [support] orders and her refusal to personally appear before that court." The court emphasized that "by her default and absence," the mother "evad[ed] the orders from which she [sought] appellate relief … Further, the mother's absence from New York frustrated the father's efforts to enforce the prior child support orders."

'Shehatou v. Louka': The Doctrine, CPLR 5704(a)

In *Shehatou v. Louka*, 118 A.D.3d 1357 (4th Dep't 2014), Family Court issued an order, upon respondent's default, wherein it determined that he was in willful violation of a support order; the court issued a further order committing him to six months of incarceration, and also issued a warrant for his arrest. Family Court refused to sign the respondent's order to show cause to vacate the orders and, in its "order of dismissal," determined that the fugitive disentitlement doctrine applied to him because he had left New York and refused to return while being the subject of an arrest warrant; he was attempting to "evade the law while simultaneously seeking its protection": By respondent's "default and absence, [he] is evading the very orders from which [he] seeks appellate relief and has willfully made [himself] unavailable to obey the mandate of the [court] in the event of an affirmance.'"

As in *Wechsler*, the dismissal notwithstanding, the Appellate Division "grant[ed] leave to respondent to move to reinstate [his appeal] on the condition that, within 60 days of service of a copy of the order of this Court with notice of entry, he posts an undertaking with the court in the amount [] of child support [he] owed at the time the court determined that he willfully violated the prior support order."

Notably absent from the opinion is any mention of CPLR 5704(a), which addresses the procedure for relief when a court has refused to sign an order to show cause. See Elliot Scheinberg, "Appellate Review of Ex Parte and Sua Sponte Orders (https://www.law.com/newyorklawjournal/2019/06/27/appellate-review-of-ex-parte-and-sua-sponte-orders/)," NYLJ (June 28, 2019).

'Skiff-Murray v. Murray'

In *Skiff-Murray v. Murray*, 305 A.D.2d 751 (3d Dep't 2003), Supreme Court referred custody, visitation and support proceedings to Family Court. The father was ordered to pay specified child support. Both parties appealed. The father refused to attend the trial in the divorce action, voluntarily departed from New York, transferred his assets and willfully disobeyed the child support order. His appeal was dismissed because he had willfully made himself unavailable to obey the mandate of Family Court in the event of an affirmance of the child support order.

'Gem Holdco': Doctrine Not Applied

Gem Holdco v. Changing World Tech., 164 A.D.3d 1132 (1st Dep't 2018), presents a situation where the doctrine was not applied because there had been no "clear showing" that an appellant had taken "improper steps to avoid extradition," as "the doctrine does not apply where [an appellant] has never resided in New York, was not present in New York when the arrest warrant was issued, has not appeared in New York to face the arrest warrant, and has not defied a separate order to appear. This more narrow application of the doctrine satisfies all its principal rationales (*Empire Blue Cross & Blue Shield v. Finkelstein*, 111 F.3d 278, 280 (2d Cir.1997))." The court, notably, found "no basis for applying the doctrine to this corporate appellant [presumably the appellant's company]."

'Joshua M. v. Dimari N.': Paternity Litigation

In *Matter of Joshua M. v. Dimari N.*, 9 A.D.3d 617 (3d Dep't 2004), petitioner commenced proceedings to establish his paternity of a child, as well as a determination of custody and/or visitation. At a hearing, he testified that, one week after the child was born, he admitted that he was the father, thereafter visiting the child on many occasions and providing support until he lost his job.

Family Court directed the parties and the child to submit to blood draws for DNA analysis. Although respondent failed to submit to blood testing, the court allowed her to have blood drawn in New Jersey, where she lived. She still did not comply. Family Court issued a warrant for her arrest. After not appearing for the continuation of the hearing, Family Court determined petitioner to be the father and also issued a temporary order of protection which granted him temporary custody and suspended respondent's visitation. Respondent appealed both orders and applied for an order to show cause to vacate the temporary order of protection and the arrest warrant upon the completion of the DNA sampling process. Family Court declined to sign that application as she was prohibited from seeking affirmative relief while a fugitive from justice.

The Appellate Division affirmed holding that the proper course was to move to vacate the default and, if necessary, appeal from the denial of that motion.

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