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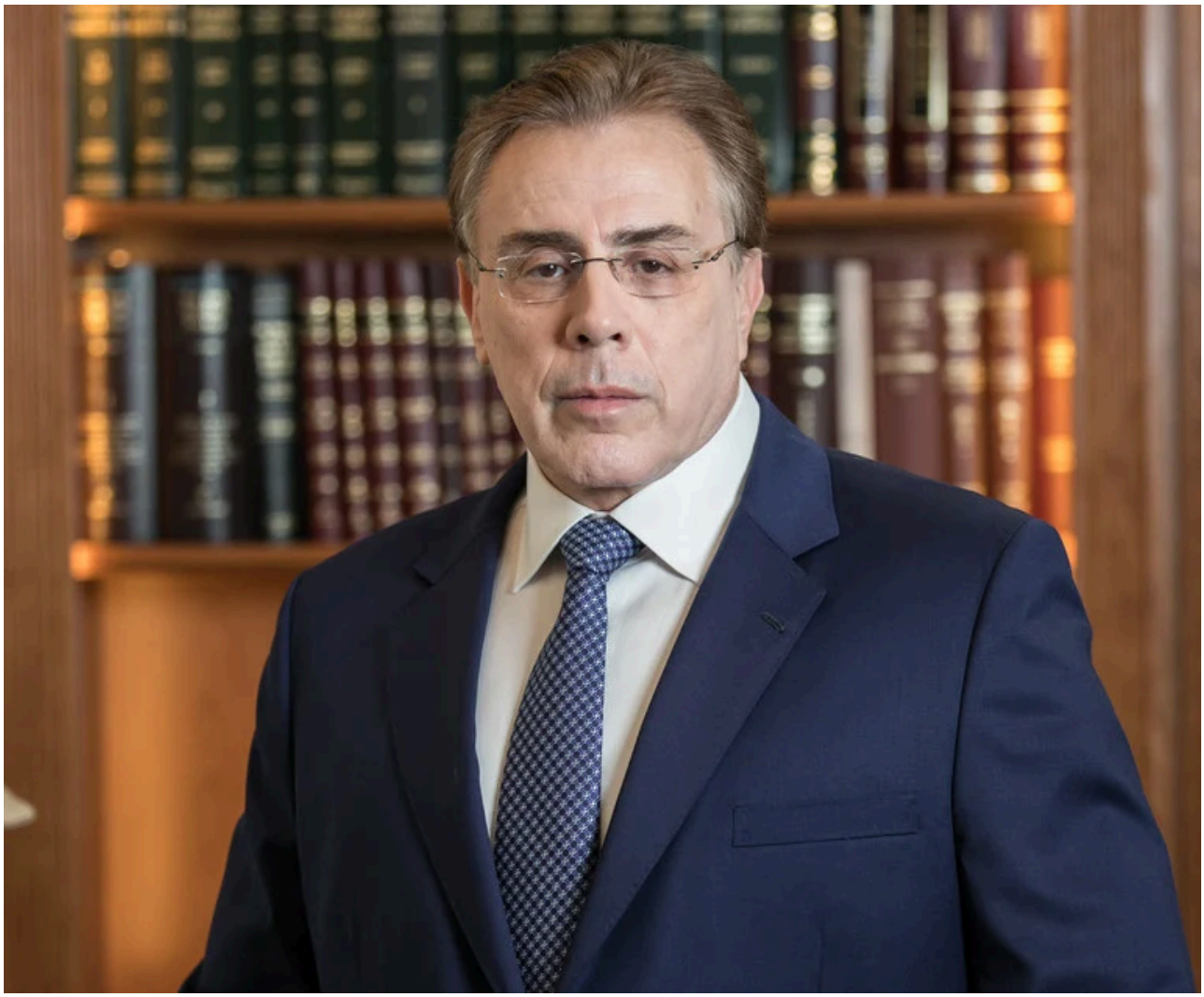

Elliott Scheinberg. Courtesy photo

Appealability of Prejudgment Orders: CPLR 5512, Court of Appeals, Legislative Intent

This article discusses the appealability of prejudgment orders.

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Family Law

By Elliott Scheinberg

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). This article examines the word "order" in CPLR 5512(a) and its limitations in the second department when occurring in the context of a prejudgment "decision and order" following a trial in an action commenced by summons and complaint. In a previous article, CPLR 5512(a): "hallmarks", "essential requirements", "substance", other indicia of an "drder," NYLJ, March 27, 2026, this column treated additional interesting treatments of CPLR 5512(a) including appeals from letter orders.

CPLR 5512(a) provides, as pertains here: "An initial appeal shall be taken from the judgment or *order* of the court of original instance." It is an absolute that "[n]o appeal lies from a decision." *Sims v Coughlin*, 86 NY2d 776 [1995]; *Gunn v Palmieri*, 86 NY2d 830 [1995]. "A decision is not an appealable paper." *Howell v. State*, 169 A.D.3d 1208, n. 1 [3d Dept 2019]; *BNG Properties, LLC v. Sanborn*, 153 A.D.3d 1221 [2d Dept 2017].

Critically, the statute clearly states, with no limitations or qualifications, that an "order," irrespective of the procedural circumstances along the litigation continuum in which it may have arisen, is appealable as of right; the term "order" is not circumscribed by any encumbering conditions. A prejudgment order or decision and order following a trial in a plenary

proceeding initiated by a summons and complaint *should*, therefore, be undisputedly appealable as of right in all four departments – but it is not in the second department.

The Second Department does not permit a direct appeal from a "decision and order" following a trial where judgment has not yet been entered

Initially, In *Matter of Aho*, 39 N.Y.2d 241, 248 [1976], the Court of Appeals held that an appeal from an order, that was appealed as of right, must be dismissed once final judgment is entered because the right of direct appeal therefrom terminated with the entry of a judgment in the action; the issues raised on the appeal from the order are not lost but rather are brought up for review and are considered on the appeal from the judgment provided they necessarily affect the final judgment or order CPLR 5501(a). Otherwise stated, "[W]ith the entry of a final judgment, an appeal from an intermediate order must fall, and the order can only be reviewed on an appeal from the final judgment if it affects the final judgment (CPLR 5501, subd. [a], par. 1 ...) ... Matter of Aho, 39 N.Y.2d 241, 248 ...). *Dietz Intern. Pub. Adjusters, Inc. v Frankart Distributors, Inc.*, 157 AD2d 625 [1st Dept 1990].

The second department, however, does not consider a posttrial "decision and order," that precedes the final judgment appealable as of right where the proceeding was initiated by summons and complaint; it considers it a decision (*Schicchi v. J.A. Green Const. Corp.*, 100 A.D.2d 509 [2d Dept 1984] and thus not appealable as of right. Such a decision and order is not even deemed an interlocutory order, which is as of right. There is no case law in the second department that so holds, it is an internal unarticulated policy that surprises even many a seasoned practitioner. Accordingly, the final judgment is the only appealable document. The second department reasons that, pursuant to the CPLR, a motion is followed by an order and an action by a judgment. *Slater v. Am. Min. Spirits Co.*, 33 N.Y.2d 443, 446-47 [1974] has noted this distinction and without inserting appellate implications or consequences:

A motion is defined as 'an application for an order'. (CPLR 2211.) A motion terminates in an order whereas both an action and a special proceeding terminate in a judgment (CPLR 411, 5011 . . .); and

Bannon v. Bannon, 270 N.Y. 484 (1936) ("The issues in an action can be determined only by a final judgment.")

In the second department, a party at the short end of a "decision and order" before entry of judgment faces enforcement and contempt without access to direct appellate relief (as of right). Relief may, however, be petitioned pursuant to CPLR §§ 5701(c), 5520(c). CPLR 5520(c) provides, in pertinent part, "Where a notice of appeal is *premature* ... the appellate court, in its discretion, when the interests of justice so demand, may treat such a notice as valid." A party with good fortune may, therefore, be successful in winning such a discretionary interests-of-

justice stay. In *Maki v. Bassett Healthcare*, 85 A.D.3d 1366, n.1 [3d Dep 2011], the third department held:
Plaintiff's appeal from the separate paper titled "decision," also entered November 18, 2010, that "ordered" that plaintiff's motion for disqualification was denied, will be treated as an appeal from an order (CPLR 5512(a); Hammerstein v. Henry Mtn. Corp., 11 A.D.3d 836, 837–838, 784 N.Y.S.2d 657 (2004)).

Decisional authority from the Court of Appeals and all appellate courts focus on the substance of the document and not on its nomenclature in determining its appealability

In *Reynolds v. Dustman*, 1 N.Y.3d 559, 560–61 [2003], the petitioner commenced an Article 78 proceeding challenging the respondents' jail time credit determination. The Supreme Court dismissed the petition on the merits in a paper which, although labeled a "decision," ended with a sentence stating that "[t]his decision shall constitute the order of the court." The paper was also neither stamped with a date and place of entry, nor signed by the clerk.

The Court of Appeals held: "Although the Supreme Court paper respondents served identifies itself as both a decision and order, it can be treated as a judgment determining the proceeding, an appealable paper (CPLR 411; 5512(a))." Significantly, other than "speed, economy, and efficiency" an Article 78 proceeding is "like an action in that it ends in a judgment"; CPLR 411 ("The court shall direct that a judgment be entered determining the rights of the parties to the special proceeding.") *Reynolds,* clearly thus applies to actions that end in final judgments.

The First Department

In *In re Samantha F.,* 169 A.D.3d 549 [1st Dept 2019], the first department looked beyond the nomenclature "decision," focusing rather on the substance of the order, and held that an appeal had been properly taken: "Although denominated a decision, the paper bears the standard

language advising that any appeal from the 'order' must be taken within 30 days (Family Ct Act § 1113), and is, *in substance, an order* finding that the children have been abused/neglected (Family Ct Act § 1051(a)), which is appealable as of right (Family Ct Act § 1112(a))." See, *Spectrum News NY1 v. New York City Police Dept.*, 179 A.D.3d 578 [1st Dept 2020] ("[T]his Court has deemed a paper denominated as a 'decision' to nonetheless be appealable because it contained all the hallmarks of an order (e.g. Matter of Samantha F. (Edwin F), 169 A.D.3d 549, 549, 95 N.Y.S.3d 31 [1st Dep 2019], dismissed 33 N.Y.3d 1042 (2019)) ...)."

The Third Department

The Third Department also allows a direct appeal from a prejudgment "decision and order":

- *Bellizzi v. Bellizzi*, 82 A.D.3d 1541 [3d Dept 2011]:

Initially, we are unpersuaded by the husband's assertion that the August 2009 document issued by Supreme Court does not constitute appealable paper and, thus, the wife's appeal should be dismissed. "An appealable paper is an order or judgment of the court of original instance" . . . (CPLR 5512(a)). Here, while the Supreme Court document entered in August 2009 is labeled a "decision," the language contained at the foot of the document—"so ordered"—clarifies that it is an appealable paper.

- *Hammerstein v. Henry Mountain Corp.*, 11 A.D.3d 836 [3d Dept 2004]:

Defendant initially contends that this appeal should be dismissed because plaintiff appealed from an unappealable decision rather than from a judgment or order (CPLR 5512(a). . .). Regardless of the label employed by Supreme Court. . . we deem the paper a mixed decision and order. This order "affect[ed] a substantial right" of the parties, making

it appealable (CPLR 5701(a)(2)(v). . .). Thus, we will not dismiss the appeal, and will instead address its merits.

The Fourth Department, where the decision "meets the essential requirements of an order"

In *In re Samantha F.*, above, the First Department, referenced the Fourth Department's policy to hear appeals from a prejudgment "Decision and Order": "Although not articulated in any case law or in court rules, the Fourth Department allows an appeal as of right from such a 'Decision and Order' because of the consequences that potentially flow, affecting substantial rights of the aggrieved party, enforcement and contempt."

In *Nicol v Nicol*, 179 A.D.3d 1472 [4th Dept 2020], the plaintiff "*appealed from a decision* denying his motion [for] a downward modification of his child support obligation, enforcement of certain terms of the parties' separation and settlement agreement, and attorney's fees." "Although not raised by the parties and although '[n]o appeal lies from a mere decision' ", the majority opinion in the Fourth Department, in reliance on *Matter of Louka v. Shehatou*, 67 A.D.3d 1476 [4th Dept 2009], "concluded that *the paper appealed from meets the essential requirements of an order*, *and we therefore treat it as such.*" The appellate court modified the order and, inter alia, remanded the matter to Supreme Court for further proceedings in accordance with the memorandum.

Legislative intent is the sine qua non throughout the scheme of statutory construction; the primary goal of the courts is to ascertain and give effect to the intention of the Legislature

"Legislative intent is the primary consideration ... [l]n all cases the legislative intent is to be effectuated; not frustrated." NY Statutes § 92. The statute underscores:

The legislative intent is said to be the "fundamental rule," "the great principle which is to control," "the cardinal rule" and "the grand central light in which all statutes must be read." So it is the duty of courts to adopt a construction of a statute that will bring it into harmony with the

constitution and with legislative intent, and no narrow construction of a statute may thwart the legislative design.
The intent of the legislature is controlling and must be given force and effect, regardless of the circumstance that inconvenience, hardship, or injustice may result. Indeed, the legislature's intent must be ascertained and effectuated whatever may be the opinion of the judiciary as to the wisdom, expediency, or policy of the statute, and whatever excesses or omissions may be found in the statute. The courts do not sit in review of the discretion of the legislature and may not substitute their judgment for that of the lawmaking body.

NY Statutes § 76, "Statutes too clear for construction," states:

Where words of a statute are free from ambiguity and express plainly, clearly and distinctly the legislative intent, resort may not be had to other means of interpretation.

Some statutes are framed in language so plain that an attempt to construe them is superfluous. The function of the courts is to enforce statutes, not to usurp the power of legislation, and to interpret a statute where there is no need for interpretation, to conjecture about or to add to or to subtract from words having a definite meaning, or to engraft exceptions where none exist are trespasses by a court upon the legislative domain.

It follows, as a rule of general application, that if the legislative intent is clear no attempt at construction should or will be made, and that rules of construction for a statute are to be invoked only where its language leaves its purpose and intent uncertain.

Section 76 is reenforced by NY Statutes § 191: "The intention of the Legislature, which is the primary consideration in the construction of amendments, is determined from the language of the statute or from extrinsic aid." There are no extrinsic aids that justify a departure from the plain language in CPLR 5512.

Conclusion

As a practical matter, it is, for several reasons, improbable for this issue to ever be determined by the Court of Appeals thereby consigning it to the Legislature, which would hopefully be guided by the Court of Appeals precedent *Reynolds v. Dustman*, 1 N.Y.3d 559, 560–61 [2003].

Elliott Scheinberg *is a member of NYSBA Committee on Courts of Appellate Jurisdiction.*

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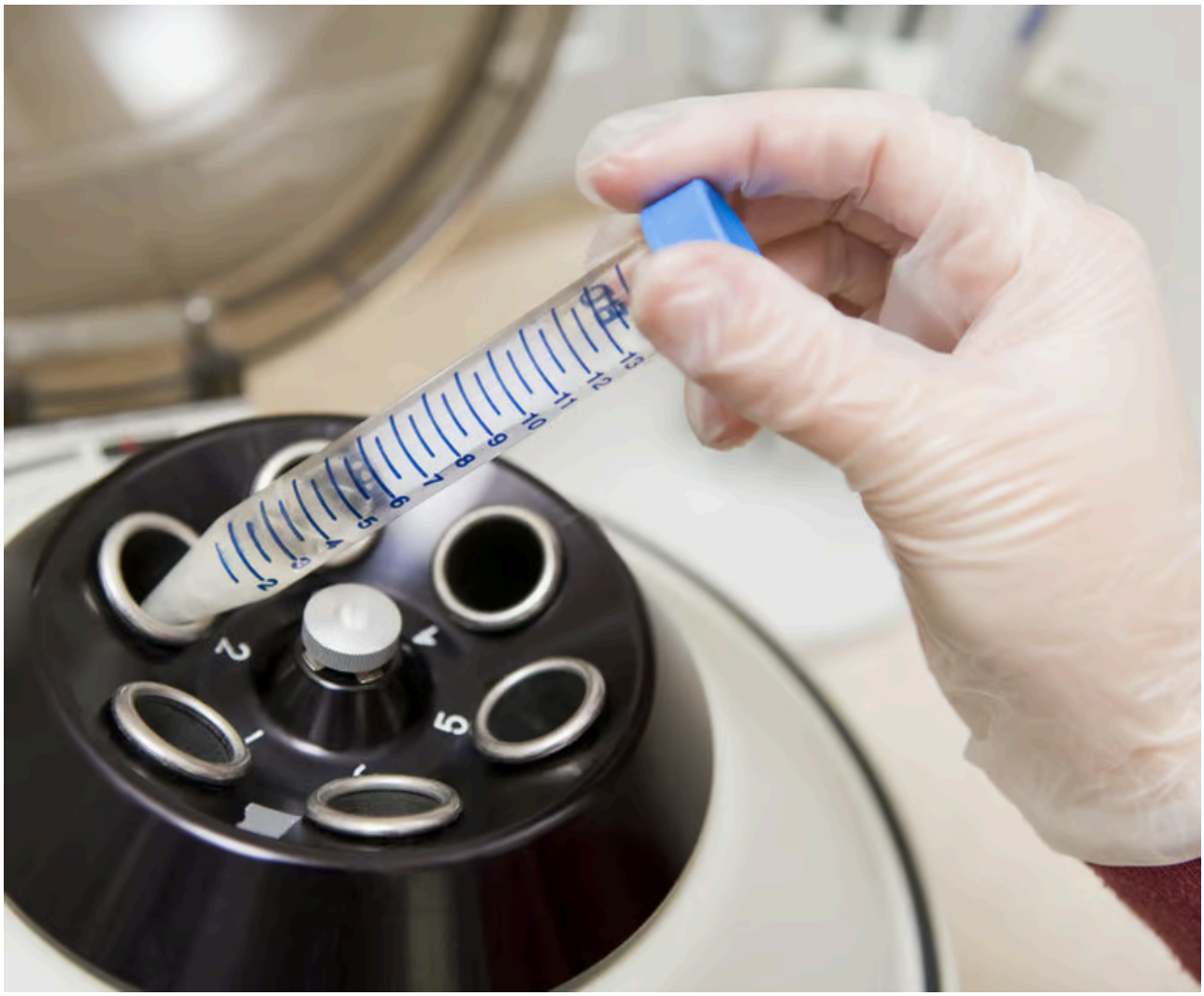

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