Appellate Review of Non-final Orders in Matrimonial Actions
By Joel R. Brandes

An attorney who handles contested matrimonial cases spends a considerable amount of time on motion practice. At the outset, it may become necessary to obtain a pre-commencement sequestration order or an order for an alternative method of service of process. Motions to amend the pleadings and discovery motions are frequently necessary in divorce actions. “Pendente lite” motions for temporary maintenance, child support, counsel and expert fees, and exclusive occupancy of the marital residence are an everyday occurrence. Where custody is contested motions for temporary custody and visitation are often made.

An attorney whose client is dissatisfied with an order determining one of these motions has the right to appeal to the Appellate Division where the motion it decided, among other things, “involves some part of the merits” or “affects a substantial right.” (CPLR 5701(a)(2) (iv) and (v).

Many of these appeals from nonfinal orders must be promptly perfected because a nonfinal order is merged in and does not survive the entry of the final judgment. However, the nonfinal order may be reviewed on appeal from the final judgment if it "necessarily affects" the final judgment and meets the other requirements of CPLR §5501(a)(1). (Matter of Aho, 39 NY2d 241, 383 NYS2d 285 (1976)).

CPLR §5501 provides that an appeal from a final judgment brings up for review any non-final judgment or order which has not been previously reviewed by the Court to which the appeal is taken and which "necessarily affects" the final judgment and which, if reversed, would entitle the appellant to prevail in whole or in part on the appeal. (CPLR §5501(a)(1)). Where review is available under CPLR §5501(a)(1) a separate notice of appeal does not have to be filed. (Perelusha v. City of New York, 60 A.D.2d 226, 400 N.Y.S.2d 818 (1st Dep't 1977)).

The most important prongs of CPLR §5501(a)(1) that must be satisfied to obtain appellate review of a nonfinal order are that the order must “necessarily affect” the final judgment, and if the order is reversed it must entitle the appellant to at least prevail in part on the appeal.

A nonfinal order necessarily affects a final judgment **“**if the result of reversing that order would be, inevitably and mechanically, to require a reversal or modification of the final determination,**”** (Buffalo Elec. Co. v. State, 14 N.Y.2d 453, 253 N.Y.S.2d 537 (1964)) or if a reversal of the nonfinal order **“**would strike at the foundation on which the final judgment was predicated.**”** (Matter of Aho, 39 N.Y.2d 241, 383 N.Y.S.2d 285 (1976)).

In Matter of Aho, (39 N.Y.2d 241, 383 N.Y.S.2d 285 (1976)), the Court of Appeals held that an intermediate order denying a motion for change of venue

necessarily affected the final judgment. It said that reversal of an order denying a motion for change of venue in any proceeding to determine competency would strike at the foundation on which the final judgment was predicated. In this case, any reversal would inescapably have led to a vacatur of the judgment declaring Mrs. Aho incompetent and to the submission of the issue of incompetency to a court where the venue might then properly be laid.

It has been held by the Court of Appeals that a nonfinal order 'necessarily affects" the final judgment if the nonfinal order **"**vitally influenced**"** the final judgment. In Long v Forest-Fehlhaber, (55 N.Y.2d 154 448 N.Y.S.2d 132 (1982)) the alleged charge error at the first trial presented a law of the case issue whose determination for the appellant would eliminate a defense, which, as a practical matter, would not need to be addressed at a new trial. The prior nonfinal order was said to have been one which "necessarily affected" or, "vitally influenced" the judgment within the compass of CPLR 5601(d).

In Siegmund Strauss, Inc. v. East 149th Realty Corp., (20 N.Y.3d 37, 956 N.Y.S.2d 435 (2012)) the Court of Appeals observed that [Arthur] Karger put forth a definition that is helpful in resolving many cases. According to Karger, a non-final order **"**necessarily affects**"** a final judgment **"**if the result of reversing that order would necessarily be to require a reversal or modification of the final [judgment]**"** and **"**there shall have been no further opportunity during the litigation to raise again the questions decided by the [non-final] order**."**

Several kinds of intermediate orders in matrimonial actions do not "necessarily affect" the final judgment. An order granting temporary maintenance, or child support does not affect the final judgment and cannot be reviewed on an appeal from the final judgment because if reversed or modified it would not render the judgment and the trial invalid or affect the foundation of the judgment of divorce. (Sawdon v Sawdon, 39 A.D.2d 883, 883, 333 N.Y.S.2d 611 (1 Dept., 1972); Badwal v. Badwal**,** 126 A.D.3d 736, 5 N.Y.S.3d 487 (2d Dept.,2015). The right to separately appeal from a temporary custody or visitation order is extinguished with the entry of the final judgment awarding custody and visitation and does not do "necessarily affect" the final judgment. (Diaz v. Diaz, 103 A.D.3d 588, 959 N.Y.S.2d 910 (1st Dep't 2013)).

However, nonfinal orders such as those addressing the sufficiency of the pleadings, granting, or denying a motion to dismiss the complaint or summary judgment, granting or denying a discovery order, or fixing a valuation date for marital property may necessarily affect the final judgment, and will "necessarily affect" it. If counsel files a notice of appeal from a nonfinal order which will necessarily affect the final judgment and does not perfect it or withdraw it without prejudice**,** and it is dismissed for failure to prosecute, the dismissal for want of prosecution generally acts as a bar on a subsequent appeal as to all questions that would have been presented on the earlier unperfected appeal. The dismissal of an appeal for want of prosecution is on the merits of all claims which could have been litigated had the appeal been timely argued or submitted. (Bray v. Cox, 38 N.Y.2d 350, 379 N.Y.S.2d 803 (1976)).

In Horn v. Horn, 145 A.D.3d 666, 43 N.Y.S.3d 395 (2d Dep't 2016) the Appellate Division held that to the extent that defendant contested the propriety of the pendente lite relief awarded in a 2009 order, review of that issue was barred by the doctrine of Bray v. Cox, supra. It found that defendant could have raised that issue in his prior appeal from that order, which was dismissed by the Court for failure to perfect in accordance with the rules of the Court, and that dismissal constituted an adjudication on the merits with respect to all issues which could have been reviewed on that appeal. It declined to exercise its discretion to determine the propriety of the pendente lite relief awarded in the 2009 order.

Appeals from pendente lite awards are not encouraged. Frequently the Appellate Division will affirm a pendente lite support order appealed from and recite the familiar phrase that any perceived inequities in a pendente lite award can best be remedied by a speedy trial, at which the parties' financial circumstances can be fully explored. (See, for example, Warshaw v. Warshaw, 173 A.D.3d 582, 105 N.Y.S.3d 405 (1st Dep't 2019); Tzu Ching Kao v. Bonalle, 145 A.D.3d 703, 43 N.Y.S.3d 431 (2d Dep't 2016)).

The general rule is that an appellate court should rarely modify a pendente lite award, and then only under exigent circumstances, such as where a party is unable to meet his or her financial obligations, or justice otherwise requires. (Weinberg v. Weinberg, 123 A.D.3d 697, 998 N.Y.S.2d 423 (2d Dep't 2014); Rouis v. Rouis, 156 A.D.3d 1198, 67 N.Y.S.3d 680 (3d Dep't 2017)). The general rule in the Fourth Department is that absent compelling circumstances, parties to a matrimonial action should not seek review of an order for temporary support. (Baxter v. Baxter, 162 A.D.3d 1743, 76 N.Y.S.3d 449 (4th Dep't 2018)).

An appellant may waive the right to appeal from an order granting a pendente lite motion if he or she fails to properly preserve his opposition for review. For example, he may do so by failing to oppose requests for relief on a motion. (See Schlosberg v. Schlosberg, 130 A.D.2d 735, 516 N.Y.S.2d 38 (2d Dep't 1987). Where the Supreme Court awarded a wife pendente lite maintenance of $800 a week plus $1,000 for accountant's fees and exclusive occupancy of the marital residence the Appellate Division held that because the husband did not oppose, in the Court of first instance, the request for an award of pendente lite accountant's fees and temporary exclusive occupancy, he did not preserve those issues for appellate review. (Zeballos v. Zeballos, 104 A.D.2d 1033, 481 N.Y.S.2d 11 (2d Dep't 1984)).

There is a strong public policy against recoupment of payments of pendente lite maintenance and child support if the award is reversed or modified because they are support payments and presumably have been already used for support. (Redgrave v. Redgrave, 25 A.D.3d 973, 974, 808 N.Y.S.2d 489, 490 (3d Dep't 2006); Rader v. Rader, 54 A.D.3d 919, 920, 865 N.Y.S.2d 235, 236-37 (2d Dep't 2008)). Yet, there are exceptions to this general rule. This rule does not apply where an overpayment occurs because the payee spouse affirmatively conceals his or her breach of the conditions which would terminate the payor spouses' obligation to make maintenance payments.

(See Vigliotti v. Vigliotti, 260 A.D.2d 470, 688 N.Y.S.2d 198 (2d Dep't 1999). For example, in Samu v. Samu, 257 A.D.2d 656, 684 N.Y.S.2d 295 (2d Dep't 1999) the husband was given a credit against future payments for overpayments he made. However, there may be restitution of a counsel fee award (Baker v. Baker, 17 A.D.2d 924, 233 N.Y.S.2d 741 (1st Dep't 1962) and for the same reason, a distributive award, because they are not in the nature of a support payment.

Conclusion

A nonfinal order granting or denying temporary maintenance, child support, custody, visitation, counsel and expert fees, exclusive occupancy of the marital home, or a temporary order of protection does not "necessarily affect" the final judgment and cannot be reviewed on an appeal from the final judgment.

Generally, when an appeal from an intermediate order is perfected together with an appeal from a final judgment, the appeal from the intermediate order will be dismissed and any error alleged, to the extent that it affects the final judgment, may be reviewed on the appeal from the final judgment. When an appeal is taken from a nonfinal order and during the pendency of the appeal a final judgment is entered in the same action, the appeal from the order must fall and review may only be had upon appeal from the final judgment. (Chase Manhattan Bank, Nat. Ass'n v Roberts & Roberts, 63 A.D.2d 566, 567, 404 N.Y.S.2d 608, 609 (1 Dept., 1978)).

However, an appeal from every part of a final judgment in a matrimonial action will bring up for review all final determinations in the action that are appealed from, including, among other things, the awards of maintenance, child support, custody, visitation, counsel and expert fees, special relief, and a request for an order of protection. Therefore, when the appellate division calendars are severely backlogged, and an appeal from such a nonfinal order may not be decided before the entry of the judgment, it may be best to heed the admonition that "the best remedy for any perceived inequities in a pendente lite award is a speedy trial."

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