Appeals from Family Court Orders
By Joel R. Brandes

Many lawyers do not realize that appeals to the Appellate Division from the Family Court are governed by Article 11 of the Family Court Act with its own unique set of rules. This is because CPLR §5702 provides that appeals to the appellate division may be taken from any court of original instance, other than the supreme court or a county court, in accordance with the statute governing practice in that court.

Unlike appeals from Supreme Court, in appeals under the Family Court Act, a printed case on appeal or a printed brief is not required. Family Court Act § 1116. While Family Court Act § 1116 dispenses with the requirement that the record on appeal be printed, it does not excuse compliance with CPLR 5525 (a) which requires the transcription of the record. CPLR 5525 (a) applies to Family Court appeals pursuant to Article 11. Matter of Baiko v Baiko, 141 A.D.2d 635, 530 N.Y.S.2d 7 (2 Dept., 1988).

In addition, the Practice Rules of the Appellate Division, 22 NYCRR Part 1250, specify that in the First, Second and Fourth Judicial Departments, appeals from the Family Court may be perfected upon the original record, including a properly settled transcript of the trial or hearing, if any. 22 NYCRR 1250.5 (e)(1). In addition, the Fourth Department requires the record on an e-filed Family Court appeal to include an appendix. See 22 NYCRR 1000.17 (c)(2).

However, the Local Rules of Practice of the Appellate Division, Third Department provide that where the perfection of a cause by the original record method has been authorized by statute or order of the court, the appellant's brief must contain an appendix which must be printed or reproduced as provided in 22 NYCRR §§1250.6 and

1250.7 of the Practice Rules of the Appellate Division. 22 NYCRR 850.5. This rule appears to be inconsistent with Family Court Act § 1116. The Court of Appeals has held that while the Judiciary Law enables a majority of the Justices in each Department to make rules, this may only be done when “not inconsistent with any statute or rule of civil practice.” Gair v Peck, 6 N.Y.2d 97, 188 N.Y.S.2d 491 (1959).

The provisions of the civil practice law and rules apply to Family Court appeals only “where appropriate” to appeals under Article 11. Family Court Act § 1118. Unlike an appeal under the CPLR, an appeal under Article 11 of the Family Court Act must be taken no later than 30 days after the service by a party or the child's attorney upon the appellant of any order from which the appeal is taken, 30 days from receipt of the order by the appellant in court or 35 days from the mailing of the order to the appellant by the clerk of the court, whichever is earliest. Family Court Act § 1113.

Appeals from Family Court orders are different from appeals of other civil orders which are governed by CPLR 5513 (a) because Family Court Act § 1113 does not state that service of a notice of entry is necessary to start the time to appeal running. Service of the Family Court order alone, without notice of entry, is sufficient to start the appeal time running. Matter of Miller v Mace, 74 A.D.3d 1442, 903 N.Y.S.2d 571 (3 Dept., 2010).

In Matter of Jordan v Horstmeyer, 152 A.D.3d 1097, 60 N.Y.S.3d 549 (3 Dept., 2017) the Appellate Division observed that the CPLR requires that an order determining a motion shall be entered and filed in the office of the clerk of the court where the action is triable and that a notice of appeal must be filed in the office where the appealed from judgment or order is entered. Since appeals from orders that have not been entered are

subject to dismissal. It deemed the filing of the notice the equivalent of entry for purposes of jurisdiction and treated the filing date as the date of entry.

An appeal as of right is taken by filing the original notice of appeal with the clerk of the family court in which the order was made. A notice of appeal must be served on any adverse party as provided CPLR 5515(1) and upon the child's attorney, if any. The appellant must file two copies of the notice, together with proof of service, with the clerk of the family court, and serve on all parties and file the informational statement required by the Practice Rules of the Appellate Divisions. Family Court Act § 1115; 22 NYCRR 1250.3(a).

The Family Court Act contains provisions for appeals which are in addition to the provisions of the CPLR. Counsel needs to be familiar with Family Court Act § 1120 which provides for the appointment or continuation of appointed counsel for the parties and children on appeal, and Family Court Act § 1121 which specifies their special duties in certain cases, such as seeking poor person relief. See also 22 NYCRR. 1250.4(d).

Family Court Act § 1114 contains provisions which are in addition to the stay provisions of CPLR 5519, for obtaining a stay of a support order and a stay of an Article 10 order returning a child to the custody of a respondent. Nevertheless, Family Court Act § 1114, does not preclude a Family Court judge from staying an order under CPLR 5519. See Giraldo v. Giraldo, 85 A.D.2d 164, 447 N.Y.S.2d 466 (1st Dept. 1982). It has been held that the specific language of Family Court Act § 1114(a), that the filing of a notice of appeal from a Family Court order does not give rise to a stay, abrogates the more general automatic stay provision of CPLR 5519(a)(1) providing an automatic stay where the state or a political subdivision, such as DSS, is the appellant. In re John H. 56

A.D.3d 1024, 868 N.Y.S.2d 790 (3 Dept. 2008).

An appeal as of right may be taken from the Family Court to the Appellate Division from any order “of disposition.” Family Court Act §1111. If the order sought to be appealed is not an “order of disposition,” an appeal may be taken only by permission of the Appellate Division. Family Court Act §1112(a). There is an exception to this rule. An appeal may be taken as of right from an intermediate order or decision in a case involving abuse or neglect. Family Court Act §1112(a).

The words “order of disposition” are synonymous with the words “final order or judgment.” Taylor v. Taylor, 23 A.D.2d 747, 258 N.Y.S.2d 659 (1st Dep't 1965); Rizzo v. Rizzo, 31 A.D.2d 1001, 298 N.Y.S.2d 118 (3d Dep't 1969); Koch v. Ackerman, 142 A.D.2d 581, 530 N.Y.S.2d 239 (2d Dep't 1988); Staley v. Staley, 134 A.D.2d 911, 522 N.Y.S.2d 67 (4th Dep't 1987)). Thus, an appeal, as of right, may be taken from orders in Family Court proceedings that have resulted in a final order or judgment, but may not be taken from non-dispositional intermediate orders.

Temporary Family Court orders are non-final and not appealable as of right. In Gertzulin v. Gertzulin, 27 A.D.3d 562, 810 N.Y.S.2d 355 (2d Dep't 2006), a child support proceeding, the appeal was dismissed where the order appealed from denied the father's objections to a temporary order of support on the basis that objections cannot be brought to a temporary order of support. As it was not an order of disposition, it was not appealable as of right. No appeal lies as of right from a non-dispositional order.

An order awarding or denying temporary custody of children and temporary exclusive possession of the marital residence is not final and cannot be appealed as of right. Provost v. Provost, 82 A.D.2d 995, 440 N.Y.S.2d 89 (3d Dep't 1981). Nor is a

temporary protective order. Morhaim v. Morhaim, 63 A.D.2d 702, 405 N.Y.S.2d 105 (2d Dep't 1978); Firestone v. Firestone, 44 A.D.2d 671, 354 N.Y.S.2d 645 (1st Dep't 1974).

Other types of Family Court orders which have been held to be non-final include orders pertaining to examinations before trial (Harley v. Harley, 129 A.D.2d 843, 513 N.Y.S.2d 857 (3d Dep't 1987)) and an order denying a request to transfer a support proceeding from one county to another. Young v. Morse, 92 A.D.2d 706, 460 N.Y.S.2d 388 (3d Dep't 1983).

The Court of Appeals has held that although a filiation order is an appealable order of disposition when the paternity proceeding does not seek support, it is not appealable when support is sought in the paternity proceeding, even if a support proceeding is commenced at the same time by a separate petition. (Jane PP v. Paul QQ, 64 N.Y.2d 15, 483 N.Y.S.2d 1007 (1984).

As a general rule, a family court order made after a hearing, containing one of the permissible determinations on the petition, is appealable as of right. Orders of protection, denying protection, awarding or denying support, awarding or denying requests for custody, and an adjudication of juvenile delinquency fall within this category. In re H., 35 A.D.2d 845, 317 N.Y.S.2d 95 (2d Dep't 1970). An order which awarded support, subject to review by the Court at a hearing at a later date, was held to be an order of disposition where it determined the merits and granted the wife the final relief she was entitled to seek in the proceeding. Freihofer v. Freihofer, 104 A.D.2d 92, 481 N.Y.S.2d 823 (3d Dep't 1984).

Family Court Act § 439 (e) provides that the final order of a support magistrate, after objections and the rebuttal, if any, have been reviewed by a judge, may be appealed. Objections must be filed as a predicate to review of the order by a judge of the family court, and the right to appeal from the judge's order. Holliday v. Holliday, 35 A.D.3d 468, 828 N.Y.S.2d 96 (2d Dep't 2006)). A Support Magistrate's finding of willfulness and recommendation of incarceration has no force and effect until confirmed by a Family Court Judge. That determination is subject to appellate review only on an appeal from the order of the Family Court confirming the determination. Matter of Ceballos v Castillo, 85 A.D.3d 1161, 926 N.Y.S.2d 142 (2 Dept.,2011).

Family Court Act §365.1 and Family Court Act §365.2 deal with appeals in juvenile delinquency proceedings. The Respondent may appeal to the appellate division, as of right, from any order of disposition, and in the discretion of the appropriate appellate division from any other order. Family Court Act §365.1(1); Family Court Act §365.2. The presentment agency may appeal to the appellate division, as of right, from the following orders: an order dismissing a petition before the commencement of a fact-finding hearing. Family Court Act §365.1(2)(a); an order of disposition, but only upon the ground that the order was invalid as a matter of law. Family Court Act §365.1(2)(b)); or an order suppressing evidence entered before the commencement of the fact-finding hearing under Family Court Act §330.2, provided that the presentment agency files a statement under Family Court Act §330.2(9). Family Court Act §365.1 (2)(c). The Court of Appeals has held that Family Court Act §§365.1 and 365.2 supersede the general appeals provisions of Family Court Act Article 11 and, by implication, exclusively govern appeals to the Appellate Division in juvenile

delinquency proceedings. Matter of Leon H, 83 N.Y.2d 834, 611 N.Y.S.2d 498 (1994).

Conclusion

Appeals from the Family Court are governed by Article 11 of the Family Court Act, and Family Court Act §§365.1 and 365.2 in juvenile delinquency proceedings. The procedure in the Civil Practice Law and Rules applies only "where appropriate." The Practice Rules of the Appellate Division and the Local Rules of the Appellate Divisions also apply to the extent they are "not inconsistent with any statute or rule of civil practice."

Joel R. Brandes practices matrimonial law in New York City concentrating on appeals. He is the author of the nine-volume treatise, Law and the Family New York, 2d, and Law and the Family New York Forms, 2020 Edition (five volumes), both published by Thomson Reuters, and the New York Matrimonial Trial Handbook (Bookbaby). He can be reached at joel@nysdivorce.com or at his website at www.nysdivorce.com.