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Is it a claim or a new action? Characterization of post-judgment petitions in family law cases affects appealability

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Every good lawyer must know what types of orders will vest jurisdiction in the appellate court. How post-judgment dissolution of marriage petitions are characterized affects their appealability. Appealability of post-judgment orders is often a vexing question in family law because the typical case is comprised of many claims: mother seeks an increase in child support; father seeks an increase in visitation; mother seeks proof of insurance coverage; father seeks a change in child custody, ad infinitum. There is a continuing dispute among the appellate districts whether such petitions are claims (therefore requiring a Supreme Court Rule 304(a) finding to gain admission to the appellate court if other or competing petitions remain pending) or independent actions, each one requiring its own notice of appeal to be filed within the time limits of Supreme Court Rules 301 and 303. A recent opinion from the Second District Appellate Court, *In re Marriage of Duggan*, No. 2-06-0061 (October 16, 2007), 2007 WL 3051995, illustrates the continuing debate and suggests to this author that the Illinois Supreme Court will be asked to resolve the dispute in an appropriate case.

Let's review the basics of Rule 304(a). This rule, when properly applied, makes an order which resolves fewer than all claims independently appealable. A Rule 304(a) finding must be requested in the trial court and written in a precise manner, colloquially known as the "magic words." The "magic words" are: "that there is no just reason for delaying either enforcement or appeal or both." First, ask yourself this question: Is this a pre-judgment or post-judgment dissolution of marriage case? It is rare to obtain a Rule 304(a) finding in a pre-judgment dissolution of marriage case. This is because of the decades-old *Leopando* doctrine. *In re Marriage of Leopando*, 96 Ill. 2d 114, 119 (1983) holds that a petition for dissolution of marriage presents one claim (for dissolution of the marriage) with multiple issues (such as child custody, visitation, distribution of property, attorneys fees, etc.). As a way to prevent piece-meal appeals and to promote appellate economy, *Leopando* prohibits the use of a Rule 304(a) finding to appeal any issues prior to the entry of final judgment.

That sounds straightforward. Does this mean that you can never appeal a pre-judgment order in a dissolution of marriage case? Never say never. Although beyond the scope of this brief article, the good lawyer will see if the order fits into some of the other, narrowly prescribed Supreme Court rules which permit appeals, either by petition or as a matter of right, of certain kinds of orders prior to the entry of a final judgment. See, for example, Rule 304(b)(5) (which permits an appeal from an order finding a person or entity in contempt of court which imposes a monetary or other penalty and does not require a Rule 304(a) finding); Rule 306(a)(5) (appeals from interlocutory orders affecting the care and custody of unemancipated minors); Rule 306(a)(7) (appeals from an order granting a motion to disqualify the attorney for any party; Rule 306A governing expedited appeals in child custody cases (still, by petition); Rule 308 governing interlocutory appeals of interlocutory orders not otherwise appealable after the trial court finds that the order involves a question of law as to which there is substantial ground for difference of opinion (not an easy finding to obtain in the trial court and not an easy petition to have granted in the appellate court); Rule 307(a)(1), as a matter of right from an order granting, modifying, refusing, dissolving or refusing to dissolve or modify an injunction; and Rule 307(a)(6), as a matter of right from

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an order terminating parental rights or granting, denying or revoking temporary commitment in adoption cases.

Let's focus now on post-judgment dissolution of marriage cases which do not fit into any of the slots found in Rules 306, 306A, 307 or 308. Because the Illinois Supreme Court ruled in *In re Custody of Purdy*, 112 Ill.2d 1 (1986) that Leopando's bar does not apply to post-judgment petitions, you may run into a Supreme Court Rule 304(a) problem in post-judgment litigation. Returning to the scenario described in the beginning of this article, your client's marriage was dissolved several years ago. You now represent the mother in various post-judgment petitions (or claims) and your esteemed opponent represents the father who has answered your petitions and filed a few of his own. In an ideal world, the trial court would resolve all post-judgment petitions at the same time. Indeed, if that were true, there would be no need to write this article because there would be only one final order or judgment which resolves all of the competing claims. The parties' respective appeal rights would then be governed by the straightforward timing requirements of Rules 301 and 303. It cannot be overemphasized that trial lawyers and trial judges should strive to wrap up competing post-judgment petitions with one final order to avoid the complications described here.

But we don't practice law in an ideal world and trial judges often rule in a piecemeal fashion. This is when appellate jurisdiction becomes complicated, because, depending upon whether the order is entered as part of a whole (therefore requiring a Rule 304(a) finding) or a stand alone matter, you may lose your right to appeal altogether by filing a notice of appeal too late. And you don't want to be on the receiving end of an order from the appellate court which dismisses your client's appeal for lack of jurisdiction.

What's so interesting about *In re Marriage of Duggan*, then? It examines the continuing debate whether competing post-judgment petitions present claims in one post-dissolution action (which require 304(a) language) or whether those competing petitions present independent actions which do not require Rule 304(a) language for their judgments to be separately appealable. In *In re Marriage of Duggan*, No. 2-06-0061 (October 16, 2007), 2007 WL 3051995, the appellate court was faced with the situation where the mother filed a petition to modify child support, the parties having been divorced for three years. It was ruled upon and the father moved to vacate it within 30 days. During that time period, the father also filed his own petition to establish specific visitation times, which was pending when the trial court denied the father's motion to vacate the child support order on December 21, 2005. On January 18, 2006, Father filed a notice of appeal from the order denying his motion to vacate the child support order; his visitation petition remained pending. Father did not obtain a Rule 304(a) finding when he sought to appeal the child support order. Father's visitation petition was not ruled upon until five months later, on May 23, 2006. Was the father's January 18, 2006 notice of appeal premature and of no effect because there was no 304(a) finding that there was no just reason for delaying either enforcement or appeal or both of the mother's order to increase child support? Would it have been correct for father to have waited until after the disposition of his visitation petition (in May, 2006) to appeal the mother's child support order (entered in December, 2005)?

The majority opinion in *In re Marriage of Duggan* held that the competing petitions were separate claims and that a Rule 304(a) finding would have been required, but under amended Rule 303(a), the father's prematurely filed notice of appeal was "saved" until May 23, 2006, the date the father's visitation petition was ruled upon. When the father moved to vacate the December, 2005 child support order, that motion rendered it unappealable pursuant to Rule 303. As amended, Rule 303(a) "acts to save appeals that would otherwise be premature by providing that, when a timely post-judgment motion has been filed, a notice of appeal filed before the 'final disposition of any separate claim' does not become effective until the order disposing of the separate claim is entered." *In re Marriage of Duggan*, No. 2-06-0061, slip. op. at 3; Official Reports Advance Sheet No. 8, (April 11, 2007).

Both the majority and special concurrence opinions in *In re Marriage of Duggan* take a scholarly approach to the debate about the characterization of post-judgment petitions. The majority opinion not only discusses the Illinois Supreme Court opinions *In re Marriage of Leopando*, 96 Ill. 2d 114 (1983), *In re Custody of Purdy*, 112 Ill.2d 1 (1986), *In re Marriage of Kozloff*, 101 Ill.2d 526 (1984), but also its own body of law, *In re Marriage of Alyassir,* 335 Ill.App.3d 998 (2003), *In re Marriage of Ruchala*, 208 Ill.App.3d 971 (1991), *In re Marriage of Merrick*, 183 Ill. App.3d 843 (1989), *In re Marriage of Piccione*, 158 Ill.App.3d 995 (1987), *In re Marriage of Sassano*, 337 Ill. App.3d 186 (2003) as well as the contrary views of the First Appellate district beginning with *In re Marriage of Carr*, 323 Ill.App.3d 481 (2001), *Shermach v. Brunory,* 333 Ill.App.3d 313 (2002), *In re Marriage of Ehgartner-Shachter,* 366 Ill.App.3d 278 (2006) and *In re Marriage of Carillo*, 372 Ill.App.3d 803 (2007). Mention is made that conflicting guidance is offered by the Third and Fourth appellate districts in *In re Custody of Santos*, 97 Ill.App.3d 629 (1981) and *In re Marriage of Gaudio*, 368 Ill.App.3d 153 (2006).

Justice O'Malley's special concurrence in *Duggan* highlights that there is a difference of opinion within the Second District itself on the question. Justice O'Malley wrote that the First District's opinion in *In re Marriage of Carr* and its progeny made more sense than the majority's position. Justice O'Malley would have treated the father's notice of appeal as timely, since it was filed within 30 days of the final ruling on the mother's petition which, like *In re Marriage of Carr,* was a new action, not a new claim, and therefore no Rule 304(a) finding was required.

Given the continued dispute about whether post-judgment petitions are new claims or new actions, it might be a prudent idea to obtain a Rule 304(a) finding and file a notice of appeal as to each order one wants to appeal, alert the appellate court by way of motion that other claims or petitions are pending in the trial court and later, move to consolidate appeals filed along the way. Alternatively, trial lawyers and trial judges should be mindful that piecemeal rulings on post-judgment petitions cause appellate jurisdiction traps for the unwary. They should strive to wrap up their competing post-judgment petitions with one comprehensive order. Then it won't matter whether it's a new claim or a new petition—there will be one final judgment which starts the appellate clock ticking under Rules 301 and 303, bypassing the Rule 304(a) quagmire altogether.

It's not nice to fool with Orders to Withhold Income

By David N. Schaffer

By playing really cute with the provisions of a child support withholding notice, an employer was hit with a $1.1M judgment for penalties. *In re Marriage of Miller*, N.E.2d-WL 4200819 (Ill. 2007). *Miller* should be required reading for anyone who advises anyone who may be served with a notice to withhold income.

In *Miller,* husband, Harold Miller and wife, Lenora Miller, get divorced. Lenora Miller gets custody of their only child. Harold Miller is ordered to pay $82 per week child support. Lenora Miller, properly serves a Notice to Withhold Income on Harold Miller's employer. The notice includes the usual caveat regarding the potential for a $100/day penalty, against any ''payor'' (the words ''employer'' and ''employee'' are nowhere to be found in the statute—thus a payor paying an independent contractor is also subject to penalties) served with a withholding notice for failing to timely withhold or pay the child support to the State Disbursement Unit. The crucial portions of the Withholding Act are as follows:

> The payor shall pay the amount withheld to the State Disbursement Unit within 7 business days after the date the amount would (but for the duty to withhold income) have been paid or credited to the obligor. If the payor knowingly fails to withhold the amount designated in the income withholding notice or to pay any amount withheld to the State Disbursement Unit within 7 business days after the date the amount would have been paid or credited to the obligor, then the payor shall pay a penalty of $100 for each day that the amount designated in the income withholding notice (whether or not withheld by the payor) is not paid to the State Disbursement Unit after the period of 7 business days has expired. The failure of a payor, on more than one occasion, to pay amounts withheld to the State Disbursement Unit within 7 business days after the date the amount would have been paid or credited to the obligor creates a presumption that the payor knowingly failed to pay over the amounts.

(Emphasis added and meant to scare employers into compliance) 750 ILCS 28/35(a).

By the way, Harold Miller works for his father H.E. Miller, an architect (although a similar result was had with unrelated entities in the 2d District Appellate Court case of *In re Marriage of Chen*, 354 Ill.App.3d 1004, 820 N.E.2d 1136, 290 Ill.Dec. 69 (Ill. App.2d 2004)). In a nutshell, while H.E. Miller did withhold child support from Harold Miller's weekly pay, H.E. Miller also withheld it from the SDU. After arrears amounted to more than $1,500, Lenora Miller made written request to H.E. Miller to pay over the support, indicating that, at this point, she was not seeking any penalties. H.E. Miller came clean with the $1,500, but then he reverted back to withholding from the SDU.

After H.E. Miller accrued more than $2,000 in fresh money owed, Lenora Miller had him joined as a third party to the divorce case and sued him for past due support and statutory penalties. H.E. Miller ignored the summons he was served with and defaulted. The day set for prove-up on damages, H.E. Miller is given 30 days to file an appearance. Like support, he withholds his answer. Almost three months later, he is given another 30 days to file an answer and is also ordered to ''remain current in his child support withholding.'' He does neither. Lenora Miller then files for a rule to show cause against H.E. Miller

In his answer, H.E. Miller admits that, from the very beginning, he fell behind in sending the withheld support to the SDU. H.E. Miller asserts two affirmative defenses, laches (because his former daughter-in-law said in her letter that she was not seeking penalties at

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that time) and that the Withholding Act violated an employer's substantive due process rights.

Both of H.E. Miller's affirmative defenses were stricken save for his laches claim as applied to penalties accrued prior to Lenora Miller's third-party complaint against H.E. Miller.

The parties stipulate to the amount of penalties—$1,172,100 (covering 11,172 separate days of violations of the Act since being sued by Lenora Miller) as well as a detailed spreadsheet, with dates and amounts, supporting the stipulated penalty amount. The circuit court then entered judgment against H.E. Miller on the stipulated amount of $1,172,100 based on his ''knowing failure to forward withheld child support payments.''

H.E. Miller appealed after his post-judgment motions were denied. The appellate court reversed the circuit court, finding the amount of the penalty violative of H.E. Miller's substantive due process rights. Noted was the great disparity between the penalties placed on H.E. Miller and the maximum $25K fine for a parent's willful failure to pay child support (cf. Non-Support Punishment Act 750 ILCS 16/15(d). (The Illinois Supreme Court made short shrift of this disparity argument by noting that the NSPA imposes criminal liability with the fine portion to not exceed $25K and in addition thereto, could include a sentence of imprisonment.)

Believing some lesser penalty was appropriate, the appellate court remanded to the trial court for setting of a more palatable penalty. Lenora Miller appealed. The Supreme Court allowed the Illinois attorney general's office to intervene as well. The Illinois Supreme Court reversed the appellate court and affirmed the trial court's judgment.

Substantive Due Process 101

H.E. Miller having made no argument that Illinois' substantive due process protections were any stronger than federal protections, analysis was based upon federal law. Miller went into depth affirming the state's authority to establish penalties for violation of the Withholding Act.

The Court quoted: ''The power of the State to impose fines and penalties for a violation of its statutory requirements is coeval with government. … [T]he legislature has broad discretion to determine not only what the public interest and welfare require, but to determine the measures needed to secure such interest.''

Under a substantive due process analysis, the rational basis test is used. That is, ''under this test, the statute need only bear a reasonable relationship to a legitimate state interest.'' The Miller opinion states that it ''is difficult to imagine a more compelling state interest than the support of children.''

As for the severity of the fine, the *Miller* opinion notes the following penalties passing muster by the U.S. Supreme Court: a $50-100 penalty plus costs of suit and attorney fees in a 1919 case where the railroad collected $0.66 more than prescribed fare; $500 minimum penalty for each unsolicited advertisement sent by a facsimile; the greater of treble damages or $1,000 per day that a product offered for sale is falsely suggested to be Indian-made.

Miller also shot down an attempt to analyze the penalty herein with excessive punitive damage awards. Unlike punitive damages, however, the penalty is an entity known to the payor as soon as the payor is served with a notice to withhold income.

It also does not escape the *Miller* court's attention that about $700,000 of the fine was amassed after Lenora Miller first sued H.E. Miller for withheld support payments. Nonetheless, H.E. Miller also ''allude[d] to the dire financial consequences to him … but offered no evidence on this in the trial court.'' This would not have mattered to the Supreme Court because as they so wonderfully stated, ''[o]ur lawmakers are under no obligation to make unlawful conduct affordable. Particularly where multiple statutory violations are at issue.''

In addition, of no small significance, the court noted, was the serious harm that befalls a parent who is denied timely financial assistance from the non-custodial parent for which to clothe, feed and shelter their child.

The essence of *Miller* is that H.E. Miller had the absolute ability to avoid any and all penalties by simply following the law and timely tendering to the SDU the withheld support.

Justice Warren D. Wolfson, in his appellate court dissent, alluded to the classic definition of the Yiddish word ''chutzpah,'' and that is: at the sentencing phase for being found guilty of murdering his parents, the defendant asks for mercy from the court because he is an orphan.

H.E. Miller certainly had chutzpah. Now he has a $1.1M judgment accruing 9 percent per annum interest. A copy of the Miller opinion, or at least this article, should be attached to any future notices to withhold.

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