Preserving the Right To Appeal

By **Joel R. Brandes**

Divorce lawyers are frequently asked: What are my chances of winning an appeal? The answer is never simple. The answer to the question requires counsel to consider (1) whether the trial court committed errors of law, which would be considered reversible error; (2) whether the trial court committed evidentiary errors which were not harmless; (3) whether the trial court abused its substantial discretion in making its financial and custody awards; and (4) whether trial counsel preserved the right to appeal.

While the Appellate Division has jurisdiction to address unpreserved issues in the interest of justice, the general rule is that the Appellate Division will not consider issues not preserved for review by an appropriate motion, objection, or other action. *Merrill v. Albany Med. Ctr. Hosp.*, 71 N.Y.2d 990, 991 (1988). The failure to do so is fatal to an appeal. Nor may it consider matters outside the record, i.e., materials not presented to the trial court. See *Crawford v. Merrill Lynch, Pierce, Fenner & Smith*, 35 N.Y.2d 291 (1974).

Failure To Appeal an Issue

CPLR 5515 provides that an appeal is taken by serving on the adverse party a notice of appeal and filing it in the office where the judgment or order of the court of original instance is entered. The notice of appeal must designate the judgment or order or specific part of the judgment or order appealed from. CPLR 5515. An appeal from "every part" of an order brings up for review every issue determined by the order. If several issues are disposed of by the order and the appeal is not from "every part" of the order, those issues not listed in the notice of appeal will be waived. An appeal from only part of an order constitutes a waiver of the right to appeal from the other parts of the order and an acceptance of the other parts. *Royal v. Brooklyn Union Gas Co.*, 122

A.D.2d 132 (2d Dep't 1986). Consequently, the notice of appeal will limit the scope of the appeal. *Sommers v. Sommers*, 203 A.D.2d 975 (4th Dep't 1994).

Where a party fails to cross-appeal from a judgment or order, his or her arguments on appeal requesting modification or reversal are not properly before the Appellate Division and will not be heard. *Brenner v. Brenner*, 52 A.D.3d 322 (1st Dep't 2008).

Acceptance of Benefits

Acceptance of the benefits conferred by an order constitutes a waiver of the right to appeal from that order. However, a party who is aggrieved by an intermediate order which is reviewable does not, merely by participating in the proceedings thereafter culminating in a final judgment, *waive* his right to appeal. *Cohen v. Cohen*, 3 N.Y.2d 339 (1957).

Failure To Preserve Issues by Failing To Request or Object to Relief

As a general rule, points which were not raised at trial may not be considered for the first time on appeal. An issue may not be raised for the first time on appeal, where it "could have been obviated or cured by factual showings or legal countersteps" in the trial court. However, contentions that could not have been obviated or cured below may be raised on appeal for the first time. There are some exceptions to this rule, which include concessions made by counsel, new questions on motions for reargument and most constitutional questions. *Telaro v. Telaro*, 25 N.Y.2d 433, 439 (1969).

An appellant may waive the right to appeal from an order granting a motion if he or she fails to properly preserve his opposition for review. For example, he may do so by failing to oppose his adversary's requests for relief on a motion. See *Schlosberg v. Schlosberg*, 130 A.D.2d 735 (2d Dep't 1987).

Similarly, the failure of a party to request certain relief or raise issues at trial relating to one of the statutory factors that the court is required to consider in equitable distribution

cases, and the failure of a party to provide proof to the trial court to enable it to determine those issues, has been held to constitute a failure to preserve the issue for appellate review. *Zacharek v. Zacharek*, 116 A.D.2d 1004 (4th Dep't 1986).

A husband's claim on appeal that the Supreme Court erred in failing to grant him credit for overpayments of pendente lite maintenance against the wife's award of arrears was not properly before the court for review, since the husband did not request such relief in the Supreme Court. *Fascaldi v. Fascaldi*, 209 A.D.2d 576, 578 (2d Dep't 1994).
In *Hildreth-Henry v. Henry*, 27 A.D.3d 419 (2d Dep't 2006), the defendant's contention that the Supreme Court erred in failing to grant him credit for his contributions to the mortgage payments of the marital residence, which the parties stipulated was the plaintiff's separate property, was not properly before the court, since the defendant did not request such relief in the Supreme Court, and it declined to review the issue in the exercise of discretion.

The Court of Appeals has observed that the general rule concerning questions not raised at the trial nor previous stages of appeal is far less restrictive than some case language would indicate. It has said: "If a conclusive question is presented on appeal, it does not matter that the question is a new one not previously suggested. No party should prevail on appeal, given an unimpeachable showing that he had no case in the trial court." Of course, where new contentions could have been obviated or cured by factual showings or legal countersteps, they may not be raised on appeal. But contentions that could not have been so obviated or cured below may be raised on appeal for the first time. There are some exceptions to this rule. They include concessions made by counsel, new questions on motions for reargument, and most constitutional questions. *Telaro*, supra.

A question of law appearing on the face of the record may be raised for the first time on appeal if it could not have been avoided by the opposing party if

brought to that party's attention in a timely manner. *Przydatek v. New York State Office of Children and Family Services*, 13 A.D.3d 1102 (4th Dep't 2004).

However, an appellate court will not consider different theories or new questions if proof might have been offered to refute or overcome them had those theories or questions been presented at the trial. *Rentways v. O'Neill Milk & Cream Co.*, 308 N.Y. 342 (1955).

Participation in Proceedings Without Objecting

An appellant may be precluded from raising an issue for appellate review if the appellant fails to request or oppose requests for relief. *Schlosberg v. Schlosberg*, 130 A.D.2d 735 (2d Dep't 1967).

CPLR 4017 provides that at the time a ruling or order of the court is requested or made a party is required to make known the action which he requests the court to take or if he has not already indicated it, his objection to the action of the court. The failure to make known objections, as prescribed in CPLR §4017 or in CPLR §4110-b, may restrict review upon appeal in accordance with CPLR 5501(a) 3 and 4. CPLR 5501 provides that an appeal from a final judgment or order brings up for review any ruling to which the appellant objected or had no opportunity to object or which was a refusal or failure to act as requested by the appellant, and any charge to the jury, or failure or refusal to charge as requested by the appellant, to which he objected; and any remark made by the judge to which the appellant objected. When a timely objection is not made, testimony offered at trial is presumed to have been unobjectionable and any alleged error is considered waived. *Horton v. Smith*, 51 N.Y.2d 798 (1980)). Legal arguments not raised or preserved by proper objections at the trial level are outside of the scope of appellate review. *Bray v. Bray*, 118 A.D.3d 1074 (3d Dep't 2014).

A contention that the trial court committed reversible error by failing to recuse itself is rendered unpreserved for appellate review by the failure to move in the trial court for the trial court's recusal. *People v. Stephenson*, 45 A.D.3d 968 (3d Dep't 2007).

Otherwise, appealable issues may not be preserved for review by a party's participation in the proceedings without objection to how the court is proceeding. CPLR 4017. For example, where the record indicated that the defendant and his counsel consented to the appointment of a particular referee and proceeded without raising any argument concerning his qualifications, the Appellate Division held the defendant waived any challenge to the referee's authority. *Kapchan v. Kapchan*, 128 A.D.2d 504 (2d Dep't 1987).

Where neither party served motion papers, but the order appealed from recited that the review undertaken by the court was requested by the parties, the Appellate Division affirmed an order which denied the plaintiff certain relief. Since counsel for both parties had voluntarily appeared and argued the request for relief and the plaintiff did not contend that her attorney was not authorized to act on her behalf, the plaintiff was deemed to have waived any claim of error arising from the informal nature of the proceedings. *Osterling v. Osterling*, 126 A.D.2d 965 (4th Dep't 1987).

However, no objection is necessary to preserve for appellate review a deprivation of a fundamental constitutional right. *People v. McLucas*, 15 N.Y.2d 167 (1965).

Issues Which Could Have Been Raised on Prior Appeal

Generally, the Appellate Division does not consider an issue on a subsequent appeal that was raised or could have been raised in an earlier appeal which was dismissed for lack of prosecution, although the court has the inherent jurisdiction to do so. See *Gorelik v. Gorelik*, 85 A.D.3d 856 (2d Dep't 2011).

Issues or Arguments Raised for the First Time in Reply or Reply Brief

Issues that are raised for the first time in a reply or a reply brief may not be considered on an appeal. See *Gorelik v. Gorelik*, 85 A.D.3d 856 (2d Dep't 2011).

Failure To Address Issues in Brief

A party's failure to address issues in a brief on appeal is tantamount to an abandonment of those issues on appeal. *Miedema v. Miedema*, 144 A.D.3d 803 (2d Dep't 2016).

Failure To Provide an Adequate Record

The appellant must assemble a proper record on appeal, which must include any relevant transcripts of proceedings before the Supreme Court, including the relevant documents that were before the court. An appeal that is not based upon a complete and proper record must be dismissed. *Fernald v. Vinci*, 13 A.D.3d 333, 334 (2d Dep't 2004).

A party's failure to provide an adequate record to enable the appellate court to review the issues raised on appeal will be held to be an abandonment of those issues on appeal. *Pratt v. Anthony*, 30 A.D.3d 708 (3d Dep't 2006); *Roberts v. Roberts*, 159 A.D.3d 932 (2d Dep't 2018).

Conclusion

Objections made during a sidebar conference, or in chambers, where no court reporter is present, do not preserve an issue for appellate review. Objections must be made on the record. When in doubt as to whether or not to object, the safer course is to make your objections known. You have nothing to lose, and everything to gain.

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