

February 2005

## The Fugitive Disentitlement Remedy

### *Applying the Remedy in Custody and Child Support Cases*

By Joel R. Brandes

The Fugitive Disentitlement doctrine is a new remedy in the effort to enforce child support and custody orders. It emanates from the inherent power of courts to enforce their judgments and protect their dignity. It provides that "a fugitive from justice may not seek relief from the judicial system whose authority he or she evades." The doctrine, adopted by the U.S. Supreme Court in *Smith v. U.S.*, 94 U.S. 97 (1876), is based on criminal law and has been applied in cases involving criminal appeals by defendants who have become or remain fugitives from justice. It may not be immediately obvious that the fugitive disentitlement doctrine can be invoked with relation to custody and child support issues, but it can, and it may be useful weapon for the matrimonial attorney in certain fact situations.

#### A Nexus in Criminal Law

Application of the doctrine, which is normally applied in criminal appeals situations, requires that a sufficient connection exist between the defendants' fugitive status and the appellate process so as to make dismissal of his appeal a reasonable sanction. That connection exists where a defendant who has fled the jurisdiction after his conviction seeks to file a criminal appeal while remaining a fugitive from justice. However, if he is no longer a fugitive, the doctrine won't apply. For example, in *Ortega-Rodriguez v. U.S.*, 507 U.S. 234 (1996), the defendant fled the jurisdiction after his conviction, but was returned to custody by the time his appeal was heard. The Supreme Court held that there was an insufficient connection between the defendants' prior fugitive status and the appellate process to warrant barring him access to the courts.

In *Degen v. U.S.*, 116 Sup. Ct. 1777 (1996), however, the Supreme Court applied the doctrine in a case in which a criminal fugitive sought to challenge a related civil matter rather than the criminal charges pending against him. A federal grand jury indicted Degen, who had moved to Switzerland, for distribution of marijuana and other crimes. The government sought the civil forfeiture of his properties that were allegedly used to facilitate his drug sales or were purchased with the proceeds of them. Degen filed an answer in the civil action to contest the forfeiture. The district court granted a government motion to strike Degen's answer, and entered summary judgment against him. It held that Degen "was not entitled to be heard in the civil forfeiture action because he remained outside the country, unamenable to criminal prosecution." The U.S. Court of Appeals for the Ninth Circuit affirmed, but the Supreme Court reversed, recognizing for the first time that the fugitive disentitlement doctrine was applicable in a civil case. However, it held that the doctrine did not permit the district court automatically to enter summary judgment in favor of the government in a civil forfeiture action based on the claimant's criminal fugitive status. Instead, a case-specific analysis had to be undertaken in order to determine whether the invocation of the fugitive disentitlement doctrine was warranted

The Court in *Degen* listed the five reasons for extending disentitlement to a civil case against a criminal fugitive: 1) the risk of delay or frustration in determining the merits of the claim; 2) the unenforceability of the judgment; 3) the compromising of a criminal case, by the use of civil discovery mechanisms; 4) redress of the indignity visited on the court; and 5) deterrence of flight by criminal defendants. In *Degen*, the Court rejected each rationale as inapplicable to the case, and held that the threshold question in all cases is whether dismissal is the only method by which to implement the judicial interests underlying the doctrine.

#### Application of the Doctrine to Civil Cases

*Degen* opened the door for other courts to adopt the fugitive disentitlement doctrine in civil

cases and expanded the concept of who is a fugitive for the purpose of applying the doctrine. It has since been applied to child custody litigants, to interesting effect. In *Prevot v. Prevot*, 59 F.3d 556 (1995), the father, a fugitive from the U.S. criminal justice system, brought an action under the Hague Convention on the Civil Aspects of International Child Abduction and the International Child Abduction Remedies Act (ICARA), seeking to have his children returned to him after his wife left him in France and returned to the United States with the children. The Court of Appeals for the Sixth Circuit held that the father, as a fugitive from justice in the United States, could not maintain an ICARA action in the U.S. courts. It found that he fled to France with his wife and children, in violation of his probation, to escape his criminal conviction in Tennessee for theft, to avoid a substantial income tax liability to the Internal Revenue Service and to evade his obligation to make restitution to the victim of his crime. It was obvious to the court that if he returned to the United States and was imprisoned he could not successfully maintain his ICARA claim. The court found that he had also inhibited the processes of the district court by being inaccessible for psychiatric evaluations, thus making unavailable to it the depth of expert testimony that the court indicated that it needed.

In another case, *Pesin v. Rodriguez*, 244 F.3d 1250 (11th Cir. 2001), a proceeding under the Hague Convention on the Aspects of International Child Abduction, Pesin sought the return of his two children to Venezuela from the United States, where they were being held by the mother. The federal district court issued a warrant for the mother's arrest when she failed to appear in court and return the children to Venezuela after the petition was granted. The mother appealed and the Court of Appeals for the Eleventh Circuit held: "[The mother] has repeatedly defied the court orders and ignored contempt sanctions and has continued to evade arrest. Her behavior to date leaves little doubt that she would defy an adverse ruling. Moreover, it would be inequitable to allow [the mother] to use the resources of the courts only if the outcome is a benefit to her. We cannot permit [the mother] to reap the benefits of a judicial system the orders of which she has continued to flout."

In *Matsumoto v. Matsumoto*, 171 N.J. 110 (2002), the New Jersey Supreme Court held that the doctrine could be employed to bar a civil appeal. *Matsumoto* involved a Japanese father and grandmother who wrongfully kept the subject child in Japan and away from the mother in violation of civil and criminal mandates from the New Jersey courts. The defendants offered to consent to the personal jurisdiction of New Jersey and return from Japan with the child if the court vacated the arrest warrants and money sanctions and dismissed the indictments. The New Jersey Supreme Court dismissed the father's and grandmother's appeals, holding that it would not be held hostage to the appellants' demands. To do so would actually grant fugitives a benefit and encourage other litigants to become fugitives. The New Jersey Supreme Court held that the fugitive disentitlement doctrine could be invoked in a criminal or civil case so long as the party's fugitive status was sufficiently connected to the litigation in which the doctrine was sought to be invoked and so long as nothing less than dismissal would suffice.

### The Basics

What is crucial in these cases is the inquiry into whether an alternative short of dismissal will render enforcement of the underlying judgment certain and remove the risk of prejudice to the fugitive's adversary. It is the flight or refusal to return in the face of judicial action that is the critical predicate to fugitive disentitlement. The New Jersey Supreme Court adopted as a guide the following standards : 1) the party against whom the doctrine is to be invoked must be a fugitive in a civil or criminal proceeding; 2) his or her fugitive status must have a significant connection to the issue with respect to which the doctrine is sought to be invoked; 3) invocation of the doctrine must be necessary to enforce the judgment of the court or to avoid prejudice to the other party caused by the adversary's fugitive status; and 4) invocation of the doctrine cannot be an excessive response.

The Family Court, Albany County, was the first New York trial court to apply the doctrine in a civil case. In *Peppin v Lewis*, 194 Misc.2d 151 (2002), a custody case, the court found that the mother, who absconded with her child, had no right to seek relief from an order awarding temporary custody of the child to the putative father, a man the woman now claimed raped her. The mother had persistently frustrated the court's attempt to address paternity and custody issues, her location was unclear and there was an outstanding warrant for her arrest.

The Appellate Division, Third Department, became the first New York appellate court to specifically recognize and apply the doctrine in a divorce case involving child support. In *Skiff-Murray v. Murray*, 3 A.D.3d 610 (3d Dept. 2004), an action for divorce, the Family Court imputed income to the respondent-father aggregating \$93,000 and calculated his total child support obligation at \$1875 per month. On the parties' cross-appeals, he moved to strike documents placed in an addendum to the mother's appellate brief, which contained subsequent findings and orders in the proceeding indicating that he refused to attend trial in the divorce action, voluntarily departed the state, and willfully disobeyed a child support order resulting in a bench warrant and order of commitment. The mother moved to dismiss the father's appeal on the ground that his status as a fugitive from the jurisdiction of the trial courts invoked the fugitive disentitlement doctrine.

The Third Department pointed out that the fugitive disentitlement doctrine permits a court to "dismiss an appeal ... if the party seeking relief is a fugitive while the matter is pending." It pointed out that some federal and state courts have extended this equitable doctrine in order to dismiss appeals in civil cases as long as there is a nexus between the appellant's fugitive status and the appellate proceedings. It noted that although no New York appellate court had adopted the fugitive disentitlement doctrine by name, the Appellate Division in each department and the Court of Appeals have dismissed fugitives' appeals in criminal proceedings on the comparable ground that "the appellant is not presently available to obey the mandate of the Court in the event of an affirmance." It also indicated that the Court of Appeals and the First Department have used this "unavailable to obey" ground to dismiss appeals in civil proceedings where the appellant was a fugitive who could not be compelled to obey the underlying court mandate because it was being both appealed and evaded at the same time. It explained that in each of these New York cases, the doctrine's requirement for a sufficient nexus between the appeal and the appellant's fugitive status was satisfied because the appellant's absence frustrated the civil judgment.

In *Skiff-Murray*, the mother asserted on her cross motion to dismiss, without contradiction, that the father had willfully and deliberately removed himself from the jurisdiction of the New York courts by transferring his assets, leaving the state and failing to appear in proceedings to enforce a support order against him. The Appellate Division took judicial notice of the subsequent orders submitted by the mother to the extent that they established the father's absence and default in the Family Court proceedings involving the very order from which he sought relief on appeal. It found that the father had willfully made himself unavailable to obey the mandate of the Family Court in the event of an affirmance, and granted the mother's motion for dismissal of his appeal on the basis of the fugitive disentitlement doctrine.

Recently, in *Joshua M. v. Dimari N.*, 9 A.D.3d 617 (3d Dept. 2004), the Third Department adopted the doctrine in a paternity case. There, the petitioner commenced proceedings to establish paternity of a child born to the respondent in August 2001, and for a determination of custody and/or visitation. At a hearing held in April 2002, the petitioner testified that he had a sexual relationship with the respondent, who was not married, from September 1997 to November 2000. He indicated that 1 week after the child was born, the respondent admitted that he was the father of the child. He stated that he supported the child by purchasing diapers, clothing and formula until he lost his job, and that he visited the child on many occasions. The respondent offered testimony also, but it failed significantly to contradict the petitioner's allegations.

Prior to the hearing, Family Court had directed the parties and the child to submit to blood draws for DNA analysis. By the time of the hearing, the petitioner had complied, but the respondent and the child had not. The case was adjourned to complete the blood testing and review the DNA results. At the adjourned date, the respondent, who had not submitted to blood testing, requested that she and the child be permitted to have blood drawn in New Jersey, where she allegedly resided. In granting her request, the court indicated that if she did not complete the testing, the hearing would continue and the court would strike the testimony offered on her behalf, making a decision only on the proof presented by petitioner. The respondent stated that she understood and agreed to those conditions. However, she failed to appear for blood draws in New Jersey. In September 2002, Family Court issued a warrant for her arrest. The respondent failed to appear for the continuation of the hearing at the end of September and the Family Court proceeded with the hearing, determining the petitioner to be the father. It issued a temporary order of protection that granted the petitioner temporary custody, suspended the respondent's visitation and directed the petitioner to set up a DNA blood draw with the court. The respondent, pro se,

appealed both default orders (which were not appealable) and, by new counsel, applied for an order to show cause, which, among other things, would require the court to vacate the temporary order of protection and the arrest warrant upon the completion of the DNA sampling process. Family Court declined to sign that application, finding that the respondent was prohibited from seeking affirmative relief while a fugitive from justice.

The Third Department affirmed the order of the Family Court, finding that the court properly invoked the fugitive disentitlement doctrine and declined to sign the order to show cause. It held that when applied at the appellate level, "[t]he fugitive disentitlement doctrine permits a court to dismiss an appeal if the party seeking relief is a fugitive while the matter is pending." The doctrine extends to appeals in civil cases as long as there is a nexus between the appellant's fugitive status and the appellate proceedings. The court in *Joshua M. v. Dimari N.* found that by her default and absence, the respondent was evading the very orders from which she sought appellate relief and had willfully made herself unavailable to obey the mandate of Family Court in the event of an affirmance. In its view, the fugitive disentitlement doctrine provided a further basis for dismissal of her appeals.

#### **Conclusion**

A court's adoption of the fugitive disentitlement doctrine sends a message, loud and clear, to parents who defy support and custody orders that they cannot continue to obtain relief from New York's courts while disobeying their mandates. It has not been adopted in all jurisdictions, but, hopefully, all the Judicial Departments will soon utilize this approach to enforcing the orders and judgments rendered in child support and custody proceedings. Such would serve the dual purposes of encouraging parents to obey court orders and rendering the outcomes of judicial proceedings more certain.

---

Joel R. Brandes, a member of this newsletter's Board of Editors, is the President of Joel R. Brandes Consulting Services, Inc. in Jersey City, NJ ([www.nysdivorce.com](http://www.nysdivorce.com)) and Ft. Lauderdale, FL ([www.fldivorce.com](http://www.fldivorce.com)). He authored "Law and the Family New York," Second Edition, Revised (nine volumes, West Group) and co-authored "Law and the Family New York Forms" (four volumes, 1995, West Group). ©2005. Joel R. Brandes. All rights reserved.