LAW AND THE FAMILY

## "Costs and Sanctions for Frivolous Actions"

Joel R. Brandes and Carole L. Weidman

[New York Law Journal](http://www.nylj.com/)

April 22, 1997

**IN LARGE PART, because of strong court rules like 22 NYCRR Part 130, attorneys and parties who engage in frivolous litigation have more to lose than ever before. Those who flagrantly disregard their legal duties and ethical obligations, make frivolous motions and engage in underhanded litigation tactics or use the court improperly as a forum to air their personal grievances without regard to the underlying law or facts may well face steep costs and sanctions. [FN1] Under a regime now more sensitive to frivolity, lawyers have more to fear and consider than just their consciences if they are to avoid suffering costly lessons.**

**A provision of 22 NYCRR 130-1.1 (a) is that the court, in its discretion, may award to any party or attorney in any civil action except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct. [FN2] In the quest to maintain the sanctity of our system, the court may impose financial sanctions on any party or attorney in a civil action who engages in frivolous conduct in addition to or in lieu of awarding costs. The rule excepts proceedings in town or village courts, small claims parts and proceedings in the Family Court under Articles 3, 7, 8 or 10 of the Family Court Act.**

**Recent amendments provide for the imposition of sanctions or costs upon an attorney for an "unjustified failure to attend a scheduled court appearance in a proceeding in Family Court." [FN3]**

**An award of costs or the imposition of sanctions generally begins upon motion in compliance with Civil Practice Law and Rules s2214. CPLR s2215 also authorizes costs and sanctions upon the court's own initiative, after a reasonable opportunity to be heard. The form of the hearing is driven by the nature of the conduct and the circumstances of the case. [FN4]**

**Notice That Relief Was Considered**

**In Dellafiora v. Dellafiora, [FN5] the Appellate Division affirmed a judgment that granted the husband's motion to impose costs and sanctions and awarded his counsel $1,000, representing counsel fees generated in preparing papers and opposing a frivolous motion by the wife to vacate a Stipulation of Settlement. It held that the husband's express request for the imposition of attorney's fees and sanctions furnished the wife with adequate notice that such relief would be considered and rendered a formal hearing unnecessary.**

**Not without its concern for Due Process, failure to provide adequate notice of the relief sought will prove fatal. Such was the case in Frohman v. Frohman. [FN6] The Appellate Division reversed a judgment directing the husband's attorney to pay the wife a $1,500 sanction, imposed by the Supreme Court, on its own initiative. Little wonder the court's failure to follow the mandate of 22 NYCRR 130-1.1(d) caused a reversal. Counsel never having been put on notice by the defendant or by the court that any such sanction was being sought or contemplated rendered the imposition of such relief erroneous.**

**The court, in awarding costs or imposing sanctions, has a good deal of homework. It must detail its analysis in a written decision setting forth the conduct on which the award or imposition is based. The court, in its reasoning, must note why it found the conduct to be frivolous and the basis for finding the amount awarded or imposed appropriate. An award of costs or the imposition of sanctions is entered as a judgment of the court. The total amount of costs awarded and sanctions may not exceed $10,000. [FN7]**

**The rule defines conduct as "frivolous" if: (i) it is completely without merit in law or fact and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; or (ii) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another. [FN8] Frivolous conduct includes the making of a frivolous motion for costs or sanctions.**

**Indeed, forging through the burdensome task of determining if conduct is frivolous, the key elements to the court's consideration, among other issues, are (1) the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct; and (2) whether or not the conduct was continued when its lack of legal or factual basis was apparent or should have been apparent to counsel. [FN9]**

**Force v. Merit**

**The Williams case portends much trouble for those seeking victory by sheer force with little, if any, concern for merit. In Williams v. Williams, [FN10] the Appellate Division affirmed an order of the Family Court that imposed sanctions on respondents attorney for frivolous conduct. The husband commenced a proceeding for joint custody of the parties' child. A second petition was filed by the legal custodian of another child of the petitioner seeking to return custody of that child to petitioner. At the ensuing hearing all of the parties appeared pro se.**

**Although Family Court recognized that two separate petitions were before it, it was not made clear to it that the petitions involved different children. The parties informed the court that they agreed that the father should have sole custody of the child. As a result the Family Court entered an order awarding the father custody of his and the wife's child based on the parties' consent. The wife subsequently filed a petition to modify Family Court's order alleging that she had misunderstood which child was at issue in the custody hearing and thought she had consented to the father having custody of another child. The wire then contacted an attorney to represent her, who was the wife's attorney in her pending divorce action.**

**After speaking with Family Court, the attorney submitted an ex parte application to vacate the custody order on the ground that the pending divorce action divested the Family Court of jurisdiction over custody and the wife was confused as to which child was at issue when she appeared before the Family Court. The Family Court denied the application noting that the matrimonial action had been automatically dismissed for failure to file proof of service within the 120-day period required by CPLR s306-b. Family Court concluded that the attorney should have known that the action had been dismissed and directed her to appear before the court to determine whether her ex parte application constituted frivolous conduct warranting the imposition of sanctions. After a hearing it found the conduct to be frivolous because the matrimonial action had been dismissed. It also pointed out that an attorney is ethically prohibited from having ex parte communications with a court involving the merits of a case. It then imposed a sanction of $750 on the attorney.**

**The Appellate Division validated the Family Court decision concluding that the attorney's conduct was frivolous. The attorney knew or should have known that she had not complied with the filing requirements of CPLR s306-b and that the matrimonial action was no longer pending. Her ex parte application was devoid of any conceivable merit. The attorney's actions served to delay or prolong resolution of the dispute.**

**Although the attorney's ex parte application also sought to vacate the custody order based on the wife's claim that she did not knowingly consent to awarding the husband custody of their child, the wife had already filed a petition making this assertion and the petition had not been withdrawn. It was therefore unnecessary for the attorney to have separately made a motion to vacate the custody order on the basis of the wife's alleged confusion at the custody hearing.**

**Willingness to Sanction**

**The courts are paying considerable attention to testimony at trial with a serious willingness to impose sanctions on those betraying the system by lying and causing unnecessary cost and expense to others. In Sanders v. Copley [FN11] sanctions were imposed for frivolous conduct based on the husband's false testimony at trial as to a material issue. At trial, the husband testified that he had no financial interest in certain real estate in Pennsylvania, that he never contributed to the purchase price of that property and had nothing to do with the ownership of the property. He claimed that he had nowhere else in which to reside or pursue his profession as a sculptor.**

**His trial testimony regarding the property was reiterated in an affidavit submitted in support of his post-trial motion to vacate the trial court's decision awarding title to the home to the wife. In seeking sanctions, the former wife argued, without contradiction, that the husband's testimony and affidavit were false. She argued that she was required to incur legal expenses to oppose his position at trial, as well as his post-trial claim that he had no residence or sculpting facilities in Pennsylvania, and that he should be awarded title to or exclusive possession of the parties' New York premises.**

**The Appellate Division noted that 22 NYCRR s130-1.1 authorizes the award of costs for "frivolous conduct," which is defined as, among other things, "conduct completely without merit in fact." The court held that nothing could be more aptly described as conduct completely without merit in fact than the giving of sworn testimony or providing an affidavit knowing it to be false on a material issue. It remanded for a hearing to determine the expense of defending against the husband's false claims.**

**The Appellate Division will not hesitate to impose sanctions for frivolous conduct before it. In McMurray v. McMurray, [FN12] counsel was sanctioned by the Appellate Division for pursuing "patently frivolous" appeals in an action by the wife to obtain equitable ownership of the marital residence, which had been awarded to her former husband in their prior divorce action. The court characterized counsel's conduct as inexcusable, since, as evidenced by his appellate brief, the plaintiff's position ran counter to all established precedent.**

**We caution attorneys to be aware of the rules of the Appellate Division, Second Department. [FN13] These provide that if an appeal or the underlying proceeding is wholly or partially settled, or if any issues are wholly or partially rendered moot or if any appeal should not be calendared because of bankruptcy or death of a party, inability of counsel to appear, an order or rehabilitation or some other reason the parties or their counsel must immediately notify the court. Sanctions "as the court may direct" may be awarded against any attorney or party who, without good cause shown, fails to comply with this rule. A "Court Note" to this effect appears in the New York Law Journal every day.**

**Recently, in Trank v. Trank [FN14] the appellant's attorney was directed to pay sanctions of $750 for his failure to promptly notify the court that the primary issues raised on appeal had been settled and/or rendered academic. The wife was awarded custody of the parties' two children and exclusive possession of the former marital residence. In his brief on appeal, which was filed in May 1993, the husband raised an extensive challenge to the custody determination and also challenged the award to the wife of exclusive possession.**

**At a hearing before the Appellate Division, the husband's attorney admitted that custody of the children was transferred from the mother to the father, pursuant to stipulation on May 25, 1994. In addition, the wife filed a personal bankruptcy petition in July 1994, and the husband subsequently purchased her interest in the residence, rendering the issue of exclusive possession academic. The attorney did not notify the Court of these events until Nov. 29, 1994, three days before the appeal was scheduled to be heard.**

**Although other issues raised in the brief the attorney submitted on the husband's behalf remained viable, the imposition of a sanction was deemed appropriate because attorneys with appeals in the Second Department are required to notify the court immediately if any case or appeal is wholly or partially settled or if any issues are wholly or partially rendered moot for any reason. Needless to say the husband's attorney was unable to justify or explain his utter failure to comply with the rule.**

**FN1. See, e.g. Minister, Elders & Deacons of Reformed Protestant Dutch Church v. 198 Broadway Inc. (1990) 76 NY2d 411, 559 NYS2d 866, 559 NE2d 429.**

**FN2. Sanctions are paid to the Clients Security Fund, 22 NYCRR 130-1.3; 130- 2.3.**

**FN3. 22 NYCRR Part 130-2.**

**FN4. 22 NYCRR 130-1.1 (d).**

**FN5. (1991, 2d Dept.) 172 App.Div.2d 715.**

**FN6. (1994, 2d Dept.) 203 AD2d 420.**

**FN7. 22 NYCRR 130-1.2.**

**FN8. 22 NYCRR 130-1.1 (c).**

**FN9. 22 NYCRR 130-1.1 (c).**

**FN10. (1995, 3d Dept.) 215 AD2d 980.**

**FN11. (1993, 1st Dept.) 194 App. Div. 2d 85.**

**FN12. 163 AD2d 280 (2d Dept. 1990).**

**FN13. 22 NYCRR 670.2(g).**

**FN14. (1996, 2d Dept.) 212 AD2d 777.**

**Joel R. Brandes and Carole L. Weidman have law offices in New York City and Garden City. They co-authored, with the late Doris Jonas Freed and Henry H. Foster, Law and the Family New York, and co-authored Law and the Family New York Forms (both, Lawyers Cooperative Publishing).**

**4/22/97 NYLJ 3, (col. 1)**

**END OF DOCUMENT**