

Standards of Appellate Review in Matrimonial Actions

By Joel R. Brandes

The Appellate Division is a branch of the Supreme Court. ¹ It has co-equal powers with it and possesses all of its original jurisdiction.² Its authority "is as broad as that of the trial court." ³ When reviewing a trial court's judgment or order the Appellate Division reviews the law and the facts ⁴ as determined by the Supreme Court, as well as its exercise of discretion. In this article we will discuss the standards of review applied by the Appellate Division in appeals from matrimonial judgments and orders.

General Rules

There are certain standards which have been established with regard to the review of all matters by the Appellate Division. Where the findings of fact "rest in large measure on considerations relating to the credibility of witnesses" deference is owed to the trial court's credibility determinations,⁵ which will be accorded great weight.⁶ It's resolution of credibility issues is entitled to great deference on appeal, ⁷ and will only be disturbed when clearly unsupported by the record. ⁸ Moreover, the determination of the trial court after a nonjury trial will not be disturbed on appeal unless the court's conclusions could not have been reached on a fair interpretation of the evidence.⁹

The domestic relations law vests the trial court with substantial discretion in

¹ First Nat. Bank of Glens Falls v Reoux, 11 AD2d 876, 877, 203 NYS2d 25, 26 [3d Dept., 1960]

² NY Const Art 6 §§4 and 7.

³ Kobylack v Kobylack, 62 NY2d 399, 465 NE2d 829 [1984].

⁴ CPLR 5712 (c)

⁵ Praitnath v Torres, 59 AD3d 419, 419-20, 873 NYS2d 133, 133-34 [2d Dept., 2009]

⁶ Czaban v Czaban, 44 A.D.3d 894, 844 N.Y.S.2d 383 (2d Dept., 2007)

⁷ Canzona v Canzona, 142 AD3d 1030, 1032, 38 NYS3d 42 [2d Dept., 2016]

⁸ Hass & Gottlieb v. Sook Hi Lee, 866 N.Y.S.2d 72, 73, 55 A.D.3d 433, 433 (1 Dept., 2008)

⁹ Thoreson v. Penthouse Intl., 80 N.Y.2d 490, 495, 591 N.Y.S.2d 978 (1992)

making its determinations. The “discretion” which matrimonial judges “exercise” is vaguely defined. The Court of Appeals has said that “Judicial discretion is a phrase of great latitude; but it never means the arbitrary will of the judge. It is always (as Chief Justice Marshall defined it) ‘a legal discretion to be exercised in discerning the course prescribed by law; when that is discerned, it is the duty of courts to follow it.’”¹⁰

The Appellate Division has virtually unlimited “discretion” when reviewing orders and judgments of the Supreme Court.¹¹ It may exercise this discretion in the same manner as Supreme Court.¹² If there is an improvident exercise or abuse of the discretion by the Supreme Court, the Appellate Division can vacate or modify the order. It can then: (a) make the order that should have been made in the first place where the record is sufficient for it to make a determination;¹³ or (b) refer the case to the Supreme Court for a new determination,¹⁴ where the record is insufficient for it to make a determination.¹⁵

Pendente lite awards

Appeals from pendente lite awards are not encouraged.¹⁶ The general rule is that an appellate court should rarely modify a pendente lite award, and then only under exigent circumstances, such as where a party is unable to meet his or her financial obligations, or justice otherwise requires.¹⁷ Where the facts necessitate consideration, the Appellate Division will modify the award.¹⁸

¹⁰ Tripp v Cook, 26 Wend. 143 [Ct App 1841].

¹¹ Id.

¹² Judson v Cent. Vermont R. Co., 158 NY 597, 600-01, 53 NE 514 [1899]; NY Const Art. 6, § 5 (a); NY Const Art. 6, § 4(k) NY Const Art. 6, § 7(a).

¹³ Feinberg v. Feinberg, 46 A.D.2d 871, 362 N.Y.S.2d 13 (1st Dep't., 1974); Polley v. Polley, 62 A.D.2d 986, 403 N.Y.S.2d 321 (2d Dep't., 1978).

¹⁴ See Ferlo v. Ferlo, 152 A.D.2d 980, 544 N.Y.S.2d 254 (4th Dep't., 1989)

¹⁵ Hughes v. Hughes, 84 A.D.3d 1745, 922 N.Y.S.2d 839 (4th Dep't., 2011),

¹⁶ Warshaw v Warshaw, 173 AD3d 582 [1st Dept.,2019]; Tzu Ching Kao v. Bonalle, 145 A.D.3d 703, 43 N.Y.S.3d 431 (2d Dep't., 2016)

¹⁷ Weinberg v. Weinberg, 123 A.D.3d 697, 998 N.Y.S.2d 423 (2d Dep't 2014); Rouis v Rouis, 56 A.D.3d 1198, 67 N.Y.S.3d 680 (3d Dept., 2017)

¹⁸ Weinberg v. Weinberg, supra.

Grounds determinations

The trial court possesses wide discretion to determine the issue of cruel and inhuman treatment, and its determinations will not lightly be overturned on appeal, absent an abuse of discretion.¹⁹ Nor will a trial court's determination that a plaintiff proved his entitlement to a divorce on the ground of constructive abandonment.²⁰

Maintenance and Child Support

As a general rule, the amount and duration of maintenance are matters committed to the sound discretion of the trial court. Where the record establishes that Supreme Court gave appropriate consideration to the factors enumerated in Domestic Relations Law §236(B)(6)(a), the Appellate Division will not disturb the maintenance determination, absent an abuse of discretion.²¹

Where Supreme Court's findings in awarding maintenance do not explicitly identify the factors it considered in making the award the Appellate Division may overlook this shortcoming where the findings and record are sufficient to permit the Court to make an informed review and confirm that appropriate factors were considered.²² If there is a palpable abuse of discretion it will vacate or modify the judgment.²³

The Child Support Standards Act,²⁴ includes a numeric formula for calculating the award of child support. The court must articulate a reason for its award of child support on parental income exceeding the income cap when it chooses to apply the statutory percentage. Where combined parental income is less than the income cap the statute directs that the court apply the formula percentages. Where that amount would be “unjust or inappropriate” the Act requires the court to set forth reasons. As to combined parental income over the income cap, the court may disregard the formula if “unjust or inappropriate” but in that event, must give its reasons in a formal written order.²⁵ Given that the statute explicitly vests discretion in the court and the exercise of

¹⁹ Brady v. Brady, 64 N.Y.2d 339, 486 N.Y.S.2d 891 (1985); Hessen v. Hessen, 33 N.Y.2d 406, 353 N.Y.S.2d 421 (1974)

²⁰ Kalinich v. Kalinich, 205 A.D.2d 736, 614 N.Y.S.2d 907 (2d Dep't., 1994)

²¹ Ferraro v. Ferraro, 257 A.D.2d 596, 684 N.Y.S.2d 274 (2d Dep't., 1999)

²² Wojewodzic v. Wojewodzic, 300 A.D.2d 985, 753 N.Y.S.2d 160 (3d Dep't., 2002).

²³ See Bragdon v. Bragdon, 23 A.D.3d 203, 803 N.Y.S.2d 523 (1st Dep't., 2005)

²⁴ DRL § 240 (1-b); FCA § 413[1][a]

²⁵ Cassano v Cassano, 85 N.Y.2d 649, 652–55, 628 N.Y.S.2d 10, 12–14, (1995)

discretion is subject to review for abuse, record articulation of the reasons for the court's choice to apply the percentage is necessary to facilitate review. The stated basis for an exercise of discretion to apply the formula to income over the income cap must reflect that the court carefully considered the parties' circumstances and found no reason why there should be a departure from the prescribed percentage.²⁶ Where the findings are insufficient, judgment will be reversed and the matter remitted to Supreme Court for a new determination. Where Supreme Court's findings in awarding child support do not identify the factors, it considered in making the award, the Appellate Division may overlook this shortcoming if the findings and record are sufficient to permit the Court to make an informed review.²⁷

A court is required to make its child support award pursuant to the CSSA's provisions.²⁸ The Appellate Division reviews a child support award to determine whether the Court properly applied the statutory formula;²⁹ and whether the Court abused or improvidently abused its discretion.³⁰

Equitable distribution and Property Determinations

Whether marital property shall be distributed or a distributive award shall be made are matters committed by Domestic Relations Law § 236 (part B, subd 5) to the discretion of the trial Judge.³¹ Equitable distribution presents matter of fact to be resolved by the trial court. Its distribution of the parties' marital property will not be disturbed unless it can be shown that the court improvidently exercised its discretion,³² or failed to consider the requisite statutory factors.³³

Where it does not clearly appear how the statutory factors involved in equitable distribution were weighed in making the distribution and the record reveals sufficient

²⁶ *Id.*

²⁷ *McCoy v. McCoy* 107 A.D.3d 857, 967 N.Y.S.2d 137 (2 Dept., 2013); *Lauzonis v. Lauzonis* 105 A.D.3d 1351, 964 N.Y.S.2d 796 (4 Dept., 2013)

²⁸ *Rubin v Salla*, 964 N.Y.S.2d 41, 47 (1st Dept., 2013)

²⁹ *Holterman v Holterman*, *supra*.

³⁰ See *Beroza v Hendler*, 970 N.Y.S.2d 313 (2 Dept., 2013)

³¹ *Majauskas v Majauskas*, 61 N.Y.2d 481, 493–94, 474 N.Y.S.2d 699 (1984).

³² *Fields v Fields*, 882 N.Y.S.2d 67, 72 (1st Dept., 2009)

³³ *Johnson v Johnson*, 172 A.D.3d 1654, 101 N.Y.S.3d 497 (3d Dept., 2019)

evidence to afford adequate review the decision can be reviewed and modified by the Appellate Division.³⁴

Counsel Fees

The determination of what constitutes reasonable counsel fees is within the court's discretion.³⁵ The issue of attorney's fees is controlled by the circumstances of each particular case. The trial court must consider the relative financial circumstances of the parties, the relative merit of their positions, and the tactics of a party which delays the proceedings or results in unnecessary litigation.³⁶

The Appellate Division will review the decision to determine if the Supreme Court properly weighed the circumstances of the case. If so, its determination will not be disturbed.³⁷ Where it improvidently exercises its discretion, it will be modified or reversed.³⁸

Custody

Ordinarily the trial court's determination as to custody will be sustained upon appeal unless there is a clear abuse of discretion.³⁹ Where the trial court has conducted a full evidentiary hearing, its findings are to be accorded great weight and the greatest respect, and will not lightly to be set aside.⁴⁰

Custody determination will be affirmed on appeal if they have a "sound and substantial" basis in the record, and are not contrary to the weight of the credible evidence.⁴¹ However, an appellate court will not allow a custody determination to

³⁴ *Sementilli v. Sementilli*, 102 A.D.2d 78, 477 N.Y.S.2d 626 (1st Dept., 1984)

³⁵ *DeCabrera v. Cabrera–Rosete*, 70 N.Y.2d 879, 881, 524 N.Y.S.2d 176 (1987).

³⁶ *O'Shea v. O'Shea*, 93 N.Y.2d 187, 190, 689 N.Y.S.2d 8 (1999)

³⁷ *Kaplan v Kaplan*, 857 N.Y.S.2d 677, 679, 2008 WL 1990094 (2 Dept., 2008)

³⁸ *Holterman v. Holterman*, 3 N.Y.3d 1, 781 N.Y.S.2d 458 (2004).

³⁹ *In re T.*, 28 N.Y.2d 391, 322 N.Y.S.2d 231 (1971)

⁴⁰ *Matter of Irene O.*, 38 N.Y.2d 776, 381 N.Y.S.2d 865 (1975); *Eschbach v. Eschbach*, 56 N.Y.2d 167, 451 N.Y.S.2d 658 (1982)

⁴¹ *Parsons v. Parsons*, 101 A.D.2d 1017, 476 N.Y.S.2d 708 (4th Dep't 1984)

stand where the custody determination lacks a sound and substantial basis in the record.⁴²

Conclusion

As we have seen, divorce, financial and custody determinations rest largely upon the courts' exercise of its "sound discretion", yet New York has no standards for review of this discretion. In contrast, the Second Circuit has enunciated standards for abuse of discretion review. It has held that "[a] district court "abuses" or "exceeds" the discretion accorded to it when (1) its decision rests on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding, or (2) its decision—though not necessarily the product of a legal error or a clearly erroneous factual finding—cannot be located within the range of permissible decisions.⁴³ Although not binding, until New York adopts such standards, the Second Circuit opinion provides some for guidance for appellate counsel.

⁴² Gloria S. v Richard B., 80 A.D.2d 72, 76, 437 N.Y.S.2d 411 (2d Dept.,1981)

⁴³ See Zervos v. Verizon New York, Inc., 252 F.3d 163, 168–69 (2d Cir.,2001)