Stare Decisis, Precedent and Dicta
By Joel R. Brandes

Lawyers and judges regularly treat dicta like a case holding. [1] In this article we attempt to distinguish a holding which is precedent from dicta.

"Stare decisis et non quieta movere" means to stand by things decided and not to disturb settled points.[2] The doctrine of stare decisis provides that once a court has decided a legal issue, subsequent cases presenting similar facts should be decided in conformity with the earlier decision. [3] Stare decisis is the doctrine of precedent, the "rule that precedents must be followed when similar circumstances arise. "[4]

Stare Decisis requires that the decisions of the Court of Appeals which have not been invalidated by changes in statute, decisional law, or constitutional requirements must be followed by all lower appellate courts, such as the appellate division and the appellate term,[5] and by all courts of original jurisdiction. [6] The doctrine of stare decisis requires trial courts in one department to follow precedents set by the Appellate Division of another department until the Court of Appeals or the Appellate Division in that Department pronounces a contrary rule. These considerations do not apply to the Appellate Division. While an Appellate Division should accept the decisions of sister departments as persuasive it is free to reach a contrary result.[7] Trial courts within a Department must follow the determination of the Appellate Division in another Department until such time as the Appellate Division of their own Department or the Court of Appeals passes on the question.

Where a question has not yet been decided by an Appellate Division, inferior courts in that Department must follow the determinations of the Appellate Division in any other Department until such time as their own Appellate Division or the Court of Appeals passes upon the question.[8] Where there is no applicable decision from the Court of Appeals or from the Appellate Division in the trial court's Department and the decisions from other Appellate Divisions are conflicting, the trial court is left to fashion its own decision, giving appropriate weight and consideration to the views expressed by the Justices of the Appellate Divisions and, where statutory interpretation is involved, developing a view which is consistent with the overall objective of the statute.[9] A judgment of a trial court will not receive stare decisis treatment by an appellate court.[10]

Findings are a determination by a judge, or jury, of a fact supported by the evidence in the record.[11] A holding is a court's determination of a matter of law pivotal to its decision; a principle drawn from a decision. It is also a ruling on evidence or other questions presented at trial.[12] A precedent is a holding that must be followed when similar circumstances arise. [13]

Dicta are opinions of a judge which do not embody the determination of the court; opinions which are not on the point in question. [14] Statements made that are not essential to a decision on the questions presented, are the dicta, and not the decision of

the court. A judicial opinion “is only binding so far as it is relevant; and, when it wanders from the point at issue, it no longer has force as an official utterance.” [15]

In Matter of Fay, [16] the Court of Appeals wrote, with regard to the question of what is precedent, “it cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the …consideration of the cause, something else was found …which disposed of the whole matter.”

In 40 West 67th Street Corp. v Pullman,[17] defendant was a shareholder-tenant in the plaintiff cooperative building. At a special meeting called by the shareholders, the shareholders in attendance passed a resolution declaring defendant's conduct “objectionable” and directing the Board to terminate his proprietary lease and cancel his shares. The cooperative terminated defendant's tenancy in accordance with a provision in the lease that authorized it to do so based on a tenant's “objectionable” conduct.” Defendant remained in the apartment, prompting the cooperative to bring this suit for, inter alia, possession and ejectment. Defendant challenged the cooperative's action and asserted, that his tenancy could be terminated only upon a court's independent evaluation of the reasonableness of the cooperative's action. The primary issue in the Court of Appeals was the proper standard of review to be applied when a cooperative exercises its agreed-upon right to terminate a tenancy based on a shareholder-tenant's objectionable conduct.

The Court of Appeals held that the proper standard of review to be applied was the business judgment rule. The rule could be applied consistently with RPAPL 711 (1), which applied to this termination and required competent evidence to show that a tenant was objectionable. Under the business judgment rule, a court should defer to a cooperative board's determination so long as the board acts for the purposes of the cooperative, within the scope of its authority, and in good faith. Here, plaintiff was under a fiduciary duty to further the collective interests of the cooperative, whose shareholders overwhelmingly voted in favor of terminating defendant's tenancy, and it followed the procedures contained in the lease for doing so. There was no evidence of any bad faith by plaintiff's which would trigger further judicial scrutiny.

In Pullman the shareholders acted to terminate the defendant’s tenancy – not the Board. Were the Court of Appeals’ statements about granting business-judgment deference to board votes directly related to the issue before the Court? Were they dicta? Does Matter of Fay support the conclusion that the statements were not dicta?[18]

Matter of McDermott v Bale, [19] was a Family Court custody proceeding, where the Attorney for the Children (AFC) appealed from an order which incorporated the terms of a written stipulation executed by the parties granting the parties joint custody of their two children, with primary physical residence to the mother and visitation to the father. The AFC refused to join in the stipulation, which Family Court approved over his objection. The Appellate Division affirmed.

The opinion in McDermott stated, in relevant part: “We reject the AFC's contention that the court erred in approving the stipulation. Although we agree with the AFC that he “ ‘must be afforded the *same opportunity as any other party to fully participate in* [*the*] *proceeding*’ ” …, and that the court may not “relegate the [AFC] to a meaningless role” …, the children represented by the AFC are not permitted to “veto” a proposed settlement reached by their parents and thereby force a trial….” “We cannot agree with the AFC that children in custody cases should be given full-party status such that their consent is necessary to effectuate a settlement. The purpose of an attorney for the children is “to help protect their interests and to help them express their wishes to the court” (Family Ct Act § 241). There is a significant difference between allowing children to express their wishes to the court and allowing their wishes to scuttle a proposed settlement. We note that the court is not required to appoint an attorney for the children in contested custody proceedings, although that is no doubt the preferred practice ... Thus, there is no support for the AFC's contention that children in a custody proceeding have the same legal status as their parents, inasmuch as it is well settled that parents have the right to the assistance of counsel in such proceedings….[20]

In sum, we conclude that, where the court in a custody case appoints an attorney for the children, he or she has the right to be heard with respect to a proposed settlement and to object to the settlement but not the right to preclude the court from approving the settlement in the event that the court determines that the terms of the settlement are in the children's best interests. …”[21]

What was the holding? What was precedent? What was dicta? It appears to us that the holdings were (1) that when an AFC is appointed in a custody case, he has the right to object to a settlement but not to preclude the court from approving it and (2) children do not have full party status in a custody case. [22] These holdings are precedent in the Fourth Department. Everything else was dicta. No other portion of this brief opinion was “necessary to the result.”

In Matter of Newton v McFarlane,[23] the Family Court held a hearing, without first determining if there had been a change of circumstances, and then modified the custody order to give the mother sole custody of the child. Its three-line decision stated its conclusions that there were changed circumstances and awarding her custody was in the best interest of the child, but did not state any findings or its reasoning. The Second Department reversed the order and dismissed the petition, for the reasons stated in the opening paragraphs of its opinion. There, it stated:” This appeal raises several important issues pertinent to child custody determinations. We conclude that: (a) the attorney for the child has the authority to pursue an appeal on behalf of the child from an order determining the custody of the child; (b) the child is aggrieved, for appellate purposes, by an order determining custody; (c) the Family Court should not have held a full custody hearing without first determining whether the mother had alleged and established a sufficient change in circumstances to warrant an inquiry into whether the child's best interests were served by the existing custodial arrangement; and (d) the Family Court erred in failing to give due consideration to the expressed preferences of the child, who is a teenager.”

There can be no doubt the paragraph quoted above contains the four holdings of the Appellate Division, which it denominated as its conclusions. Are these holdings precedent or just limited to the facts of this case? Did the Court hold that the attorney for "a child" or "the child" has the authority to pursue an appeal on behalf of the child from an order determining the custody of the child? Did it hold that "a child" or "the child" is aggrieved by an order determining custody? Did it reverse and dismiss the petition because there were no findings, and no demonstration of a change of circumstances, or because the wishes of the child were not considered?

Not all cases are precedents. A close reading of the opinion will make it clear that the Court was referring to this child and this set of circumstances. It held that the attorney for "the child" had the authority to pursue the appeal on behalf of the child from the order determining the custody of the child. It also held that "the child" was aggrieved by the order determining custody.

Assuming the opinion was not limited to this child, the Newton opinion indicates that the Court based its conclusion that the attorney for the child has the authority to pursue an appeal on behalf of the child from an order determining the custody of the child on the language of Family Court Act §1120 (b). It provides that whenever an attorney has been appointed by the Family Court to represent a child, the appointment continues where the attorney files a notice of appeal on behalf of the child or where one of the parties files a notice of appeal. Because there is no requirement in the Domestic Relations Law or Family Court Act that the court to appoint an attorney for the child in a custody case, the holding must be limited to a case where an AFC is appointed, and would not precedent in the Second Department beyond its holding.

Conclusion

It is not easy to distinguish dicta from precedent in an opinion. The easiest way to determine what is dicta is by the process of elimination. Work backwards from the holding or holding(s) of the court, which are usually prefaced by the words 'We hold "or "We conclude." Everything that is not necessary for the court to reach the holding is dicta. Remember, that not all holdings are precedent.

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[1] see Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 Brook. L. Rev. 219 (2010).

[2] People v Taylor, 9 NY3d 129, 878 NE2d 969 [2007].

[3] People v Bing, 76 NY2d 331, 337-38, 558 NE2d 1011 [1990]

[4] Doctrine of Precedent, Black's Law Dictionary (11th ed. 2019)

[5] Warnock v Duello, 30 AD3d 818, 816 NYS2d 595 [3d Dept 2006]

[6] Battle v State, 257 AD2d 745, 682 NYS2d 726 [3d Dept 1999].

[7] Mtn. View Coach Lines, Inc. v Storms, 102 AD2d 663, 476 NYS2d 918 [2d Dept 1984].

[8] Stewart v. Volkswagen of America, Inc., 181 A.D.2d 4, 584 N.Y.S.2d 886 (2d Dep't 1992), order rev'd on other grounds, 81 N.Y.2d 203, 597 N.Y.S.2d 612 (1993).

[9] Summit Const. Services Group, Inc. v. Act Abatement, LLC, 935 N.Y.S.2d 499 (Sup 2011).

[10] Matter of Bull, 235 A.D.2d 722, 652 N.Y.S.2d 809, (3d Dept.,1997); Samuels v. High Braes Refuge, Inc., 8 A.D.3d 1110, 778 N.Y.S.2d 640 (4th Dept., 2004).

[11] Finding of Fact, Black's Law Dictionary (11th ed. 2019)

[12] Holding, Black's Law Dictionary (11th ed. 2019)

[13] See Doctrine of Precedent, Black's Law Dictionary (11th ed. 2019)

[14] See Rohrbach v Germania Fire Ins. Co., 62 N.Y. 47 (1875)

[15] See Colonial City Traction Co. v. Kingston City R.R. Co*.,* 154 N.Y. 493, 495, 48 N.E. 900 (1897)

[16] In re Fay, 291 N.Y. 198, 52 N.E.2d 97 (1943)

[17] 100 N.Y.2d 147, 149–50, 760 N.Y.S.2d 745, 747 (2003)

[18] In London Terrace Towers v Davis, 6 Misc. 3d 600, 612–13, 790 N.Y.S.2d 813, 822–24, (N.Y. City Civ.Ct., 2004) the Court held that the additional statement was dicta.

[19] 94 A.D.3d 1542, 943 N.Y.S.2d 708 (4th Dept., 2012)

[20] Id. Citations omitted

[21] Citations omitted

[22] See also Matter of Kessler v. Fancher, 112 A.D.3d 1323, 978 N.Y.S.2d 501 (4th Dept., 2017); Matter of Lawrence v Lawrence, 151 A.D.3d 187, 54 N.Y.S.3d 358 (4th Dept., 2017); and Matter of Kanya J v. Christopher K, 2019 WL 3475277 (3d Dept.,2019) each holding that a child in a custody matter does not have full party status.

[23] 174 AD3d 67, 2019 WL 2363541 (2d Dept., 2019)