New Jersey Law Journal

VOL. CLXXVIII – NO. 16 – INDEX 312 OCTOBER 18, 2004 ESTABLISHED 1878

If a Square Peg Won't Fit, Try a Round One

The rationale for a rule may support you though the words do not

By Kenneth F. Oettle

Don't give up on a statute or rule that seems to bar the relief your client seeks until you have explored the applicable legislative or judicial rationale, especially if your sense of right and wrong suggests that a literal reading of the stricture would be unfair. Suppose, for example, that you represent the husband in a divorce action where the final judgment covers alimony, custody and equitable distribution. Only the custody ruling is on appeal.

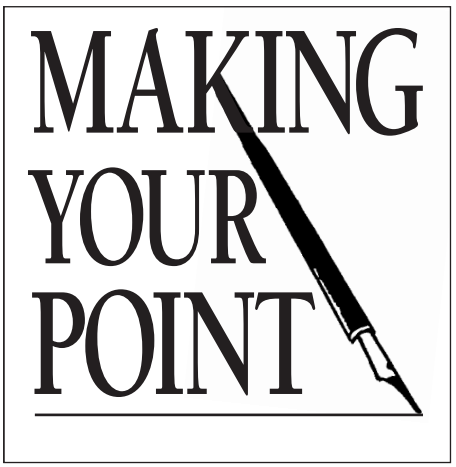
Shortly after the trial, the husband quit his job as a securities analyst and became a math teacher. As a result, his annual income decreased by 75 percent. In response to your application to the trial court for a downward adjustment of alimony, the wife's counsel contends that you can't make such an application while the divorce action is on appeal.

Counsel cites the rule of court that once an appeal is noticed, the case is under the supervision of the Appellate Division, leaving the trial court only with "continuing jurisdiction to enforce judgments and orders," as the rule states. Counsel argues that you aren't looking to enforce the final judgment; you are looking to change it.

The author is a partner and co-chair of the Appellate Group and writing and mentor programs at Sills Cummis Epstein & Gross. He invites questions and suggestions for future columns to koettle@sillscummis.com. "Making Your Point" appears every other week.

You cannot believe your client would be denied access to the trial court to seek equitable relief for the duration of the appeal, which could take a year or more. Yet the rule says that litigants can return to the trial court during the appeal only to "enforce" a judgment, not to change it.

Your first instinct is to try to fit your client's situation within the terms of the rule, in other words, to say that



in seeking to modify alimony, the husband seeks only to enforce the judgment, not to change it — to enforce alimony, as it were, only less of it. You are also inclined (if not programmed) to say the opposite of whatever the adversary says, fearing that any point you fail to challenge may come back to bite you. Both tendencies may lead you to argue that by seeking a reduction of alimony, you are looking only to enforce the judgment, not to change it.

That, of course, is a stretch. Counsel for the wife is correct. You aren't looking to enforce the judgment; you are looking to change it. And because you are looking to change it, the words of the rule seem to bar your application.

Opposing counsel will illustrate what the rule permits by pointing out that if the wife sought to compel your client to pay alimony, she would be asking the trial court to enforce the judgment. The court has that sort of power while the case is on appeal.

In short, the words of the rule are a barrier, and you have to look elsewhere.

Case law shows the rule to have a prophylactic purpose — to preserve the subject matter on appeal so the appellate court doesn't rule on facts that have changed. In line with this purpose, cases interpreting the rule say that matters "collateral" to the issues on appeal can be addressed by the trial court while the case is on appeal.

This is an opening. You can argue that the issue you are asking the trial court to address — reduction of alimony — is collateral to the issues on appeal because only custody is on appeal. This is a better approach than the awkward argument that you wish only to enforce the judgment.

Some might apply the cliche "thinking outside the box" to this advice. That is too generous. When contesting the boundaries of a statute, administrative rule or rule of court, you should always look to the rationale.

Lawyers who cannot resist the urge to say the opposite of what the adversary says will make both arguments. They will contend first that they aren't looking to change the judgment, and thus they aren't seeking relief that is facially inconsistent with

the rule. Then they will argue that even if they are looking to change the judgment, the change would be collateral to the issue on appeal and thus permissible under the case law interpreting the rule. They will figure that if they lose the first argument (as they will), they can still win the second.

I would not make both arguments. If you are asking the court to change the judgment, don't pretend you aren't. Not only will you lose that argument, but in the process, you will lose credibility. The court will wonder how strong your "collateral issue" argument is if you have to precede it with a weak alternative.

Puzzler

Assuming you retain all the words in the following sentences, which version do you prefer — A, B, C or D:

Version A: I declare pursuant to the laws of the State of X that the foregoing statements are true under penalty of perjury.

Version B: I declare that the foregoing statements are true under penalty of perjury pursuant to the laws of the State of X.

Version C: Pursuant to the laws of the State of X, I declare under penalty of perjury that the foregoing statements are true.

Version D: I declare under penalty of perjury pursuant to the laws of the State of X that the foregoing statements are true.

I would not say that something is "true under penalty of perjury." It suggests that the statement might not otherwise be true (Versions A and B). I prefer to have affiants "declare under penalty of perjury" (Versions C and D), as the law requires.

I favor Versions C and D for the additional reason that "true" is the key word from the perspective of the authority demanding the swearing. I like to place key words in a position of prominence at the end of a sentence.

Because the laws of the state aren't merely threatening perjury but requiring the affiant to swear, I would begin with the laws of the state (Version C). In Version D, the connection between the declaration and the laws of the state is diluted by distance.

Preferred version: Pursuant to the laws of the State of X, I declare under penalty of perjury that the foregoing statements are true. ■