

Do Interim 'So-Ordered' Stipulations Survive Signing of Divorce Judgment?

THURSDAY, JUNE 24, 2010

During your representation of a spouse in a matrimonial action, the parties enter into a written stipulation. This stipulation may pertain to temporary child support or temporary custody or any other issue pendente lite. This stipulation is ultimately "so-ordered" by the court and states that the parties' agreement shall be effective until further written agreement of the parties or until further order of the court. The parties ultimately go to trial on all issues and the court issues a trial decision which is then memorialized in a judgment of divorce.

If the parties' So Ordered stipulation is either incorporated by reference in the judgment of divorce or if it merges into the judgment, the stipulation will be enforceable after the signing of the judgment; in the first instance, it will survive the signing of the judgment, or in the latter instance, it will become a part of the judgment itself.

However, what happens to a So Ordered, interim agreement that is not mentioned in the divorce judgment in any way, shape or form? Is it vacated, or does it survive?

The answer to this issue requires a two step analysis.

Step One

The first step is to determine whether or not a So Ordered stipulation is considered to be an order of the court or simply a stipulation/agreement of the parties. Put another way, does the fact that the judge signs the agreement of the parties have the effect of converting the parties' stipulation into an order? As discussed below, the answer appears to be yes.¹

If it is considered to be merely an agreement of the parties, logic and case law dictates that it would be analogous to a contract which would survive the signing of a judgment of divorce and the finaliza-



By
**Russell I.
Marnell**



And
**Scott R.
Schwartz**

tion of the divorce action, even if the judgment was silent on the issue of merger or survival.² The inquiry would then end, and the parties' interim agreement would likely survive, although one possible impediment to that would be if the agreement was not executed in compliance with DRL §236B such as if it were not notarized or filed with the county clerk's office.³

On the other hand, if it is consid-

What happens to a So Ordered, interim agreement that is not mentioned in the divorce judgment in any way, shape or form?

ered to be an order of the court, the second step would be to determine whether or not interim orders of the court are deemed to be vacated upon the signing of the parties' judgment of divorce.

Support for the determination that a So Ordered stipulation is in fact considered to be an order of the court is found in case law which has held that settlement agreements that have been so ordered by the court have the same effect as though the Court itself had rendered a decision in the matter.⁴

Furthermore, as it is well established that a wilful violation of a So Ordered stipulation subjects the violating party to potentially being held in contempt of court,⁵ it naturally follows that a So Ordered stipulation is considered to be akin to a court order. This is the case, as in order to prevail on a motion to hold another in civil contempt, the movant must demonstrate that the party charged violated a clear and unequivocal court order.⁶ Therefore, if violation of a court order is a

prerequisite for a finding of civil contempt, and one can be held in civil contempt for violating a So Ordered stipulation, it naturally follows that a So Ordered stipulation is considered to be an order of the court.

Step Two

After determining that a So Ordered stipulation is an order of the court, the next step is to ascertain whether the So Ordered stipulation will be deemed vacated upon the court's signing of the parties' judgment of divorce when the judgment fails to reference the So Ordered stipulation.

It is black letter law in New York that an interim or temporary order in a matrimonial action is superseded by the final judgment.⁷ This is a rule well grounded in logic.⁸ An order awarding pendente lite relief is only designed to provide temporary relief pending disposition of the matter in a final judgment,⁹ and once a final judgment is entered, it stands to reason that the interim order is no longer effective.¹⁰

It also stands to reason that the So Ordered stipulation would become void and deemed to be vacated upon the signing of the judgment of divorce given that the So Ordered stipulation provides that it will be effective until further order of the court or until further written agreement of the parties. As the judgment of divorce is a further order of the court, and it failed to expressly make reference to the So Ordered stipulation, it naturally follows that the So Ordered stipulation would be vacated by the signing of the judgment by the court.

This same logic prevails in cases when the divorce action is discontinued, rather than concluded via the signing of a divorce judgment.¹¹ Thus, it is well established that when an action is discontinued, it is as if it had never been, and everything in the action is annulled and all prior orders in the case are nullified.¹² It has therefore been held that the filing of a stipulation of discontinuance would have the effect of making the parties' So Ordered stipulation a nullity, and that neither a contempt proceeding » Page 6

RUSSELL I. MARNELL is lead counsel at the Law Offices of Russell I. Marnell, and a Fellow of the American Academy of Matrimonial Lawyers. SCOTT R. SCHWARTZ is an associate at the firm.

Stipulations

«Continued from page 4

nor a modification application would be viable.¹³

In addition, once a final judgment has been entered, the order granting interim relief is no longer effective and thus no longer appealable.¹⁴ Thus, while the CPLR provides that an appeal from a final judgment brings up for review any non-final judgment or order which necessarily affects the final judgment,¹⁵ it has been held that appeals from intermediate orders

may be dismissed because the right of direct appeal therefrom terminated with the entry of judgment in the action.¹⁶

Conclusion

If an attorney wants a So Ordered stipulation to continue after the signing of the divorce judgment, he or she must be sure to expressly provide in the stipulation that it is to be incorporated by reference in the judgment and that it will survive, or that it will merge into and become a part of the judgment.

Reference should then be made to the So Ordered stipulation in the judgment as well. Absent this express language, it is apparent that the So Ordered stipulation will be deemed vacated upon the court's signing of the judgment of divorce.



1. See *Joseph v. Nationwide Insurance Co.*, 2002 NY Slip Op 50473U, 2002 N.Y. Misc. LEXIS 1554 (Civil Ct. NY City 2002); *Vujovic v. Vujovic*, 16 A.D.3d 490, 791 N.Y.S.2d 648 (2d Dept. 2005); *David E. v. Donna E.*, 17 Misc.3d 1138A, 856 N.Y.S.2d 23 (Sup. Ct. Nassau Cty. 2007); *MRI Management Inc. v. Greenfield Imaging Associates*, 11 Misc. 3d

1062A, 816 N.Y.S.2d 702 (Sup. Ct. Nassau Cty. 2006).

2. See *Von Schaaf v. Von Schaaf*, 257 A.D.2d 296, 683 N.Y.S.2d 315 (3d Dept. 1999); *Ventura v. Leong*, 68 A.D.3d 1318, 890 N.Y.S.2d 687 (3d Dept. 2009), which determined that where the judgment of divorce is silent on the issue of merger, the court will look to the parties' agreement to attempt to ascertain their intentions, and unless the agreement clearly indicates an intention to merge, the agreement will be deemed to have survived the signing of the divorce judgment.

3. See D.R.L. §236B.3.
4. *Joseph v. Nationwide Insurance Co.*, 2002 NY Slip Op 50473U, 2002 N.Y. Misc. LEXIS 1554 (Civil Ct. NY City 2002).

5. *Vujovic v. Vujovic*, 16 A.D.3d 490, 791 N.Y.S.2d 648 (2d Dept. 2005); *MRI Management Inc. v. Greenfield Imaging Associates*,

11 Misc. 3d 1062A, 816 N.Y.S.2d 702 (Sup. Ct. Nassau Cty. 2006); *David E. v. Donna E.*, 17 Misc.3d 1138A, 856 N.Y.S.2d 23 (Sup. Ct. Nassau Cty. 2007).

6. *Vujovic v. Vujovic*, 16 A.D.3d 490, 791 N.Y.S.2d 648 (2d Dept. 2005); *MRI Management Inc. v. Greenfield Imaging Associates*, 11 Misc.3d 1062A, 816 N.Y.S.2d 702 (Sup. Ct. Nassau Cty. 2006).

7. *Flynn v. Flynn*, 128 A.D.2d 583, 512 N.Y.S.2d 847 (2d Dept. 1987); *Prasinos v. Prasinos*, 283 A.D.2d 913, 725 N.Y.S.2d 258 (4th Dept. 2001).

8. *Flynn v. Flynn*, 128 A.D.2d 583, 512 N.Y.S.2d 847 (2d Dept. 1987).

9. *Id.*

10. *Id.*

11. *John G. v. Lois G.*, 11 Misc.3d 1060A, 815 N.Y.S.2d 494 (Sup. Ct. Nassau Cty. 2006); *David E. v. Donna E.*, 17 Misc.3d 1138A, 856 N.Y.S.2d 23 (Sup. Ct. Nassau Cty. 2007).

12. *John G. v. Lois G.*, 11 Misc.3d 1060A,

815 N.Y.S.2d 494 (Sup. Ct. Nassau Cty. 2006.)

13. *David E. v. Donna E.*, 17 Misc.3d 1138A, 856 N.Y.S.2d 23 (Sup. Ct. Nassau Cty. 2007).

14. *Flynn v. Flynn*, 128 A.D.2d 583, 512 N.Y.S.2d 847 (2d Dept. 1987).

15. CPLR §5501.

16. *Matter of Aho*, 39 N.Y.2d 241, 383 N.Y.S.2d 285 (Ct. App. 1976); *Wagner v. Dietz*, 299 A.D.2d 347, 749 N.Y.S.2d 545 (2d Dept. 2002.)