

## **The Fugitive Disentitlement Doctrine: What is it, and Can it be Applied in Family Law Matters?**

*by Daniel H. Brown*

The fugitive disentitlement doctrine was first adopted by the Supreme Court of the United States in *Molinaro v. New Jersey*.<sup>1</sup> Pursuant to this doctrine, “a fugitive from justice may not seek relief from the judicial system whose authority he or she evades.”<sup>2</sup> Although this principle was originally invoked in a criminal case, it has since been held applicable to civil matters.

In *Degen v. United States*,<sup>3</sup> the Supreme Court held the doctrine applicable where a criminal fugitive sought not to challenge the criminal charges pending against him, but to contest a related civil matter. The Court set forth a list of five factors to consider when determining whether to extend disentitlement to a civil case against a criminal fugitive:

- 1) risk of delay or frustration in determining the merits of the claim;
- 2) unenforceability of the judgment;
- 3) the compromising of a criminal case by the use of civil discovery mechanisms;
- 4) redressing the indignity visited on the court; and
- 5) deterring flight by criminal defendants.<sup>4</sup>

In *Degen*, the Supreme Court declined to extend the doctrine to the facts of the case and held that disentitlement would be an “excessive response.”<sup>5</sup> Since that time, the recurrent question in cases dealing with the issue of disentitlement has been whether a less harsh approach is available under the specific set of circumstances.

More recently, the New Jersey courts have made clear that the fugitive disentitlement doctrine is also applicable to family matters. Specifically, the New Jersey Supreme Court in 2002 dealt with this issue as a matter of first impression in *Matsumoto v. Matsumoto*.<sup>6</sup>

In *Matsumoto*, after a vacation to Japan, the husband and his mother refused to allow the parties’ child to leave Japan with the wife. The husband remained in Japan with the parties’ son while the wife returned to New Jersey. The husband and his mother refused to return the boy to the wife’s custody, even after the issuance of orders by the trial court in Essex County compelling the boy’s return and the imposition of sanctions of \$1,000 per day, although the husband did ultimately return the child to the wife in accordance with the trial court’s order.<sup>7</sup>

Criminal indictments were issued against the husband and his mother for conspiracy to interfere with child custody, interference with child custody, and child endangerment. Bench warrants were issued for the arrest of the husband and his mother for failure to appear at the arraignment.<sup>8</sup> Prior to the issuance of the warrants, the husband returned to the United States briefly, only to liquidate all of the parties’ bank accounts, sell their cars, and ship all their furniture to Japan.<sup>9</sup>

The trial court entered a judgment of divorce awarding the wife the marital residence, permanent alimony, retroactive alimony, and sole custody of the child along with child support. The court also imposed compensatory and punitive damages against the husband and his mother, and awarded the wife counsel fees.<sup>10</sup>

The husband and his mother appealed all of the judgments against them. The Appellate Division held, in relevant part, that the refusal of the husband and his mother to comply with court orders prevented consideration of their appeals based on the fugitive disentitlement doctrine.<sup>11</sup> The New Jersey Supreme Court, in its analysis of whether the fugitive disentitlement doctrine applied to the circumstances before it, set forth a four-pronged test to determine whether disentitlement is an appropriate remedy:

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- 1) the party against whom the doctrine is to be invoked must be a fugitive in a civil or criminal proceeding;
- 2) his or her fugitive status must have a significant connection to the issue with respect to which the doctrine is sought to be invoked;
- 3) invocation of the doctrine must be necessary to enforce the judgment of the court or to avoid prejudice to the other party caused by the adversary's fugitive status; and
- 4) invocation of the doctrine cannot be an excessive response.

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The Court further held that “it is the flight or refusal to return in the face of judicial action that is the critical predicate to fugitive disentitlement.”<sup>12</sup>

In its application of the test to the facts of *Matsumoto*, the Court held that the husband and his mother were, in fact, fugitives as defined by other jurisdictions and *Black's Law Dictionary*.<sup>13</sup> It further held that there was a sufficient connection between the husband's fugitive status and the disposition of the matrimonial estate and the alimony award, as it was the husband's dissipation of all of the marital funds, and the resulting lack of fear of losing any marital assets in the divorce action, that permitted him to remain in Japan and withhold the parties' son from the wife. Furthermore, the Court declared the husband a civil fugitive in the very appeal that was pending, since he was ordered to return the marital assets and he failed to do so.<sup>14</sup>

The Court then turned to whether application of the fugitive disentitlement doctrine was “necessary” to enforce the judgment of the lower court and whether disentitlement would be an “excessive response.” The Court held that since the husband dissipated the entire marital estate, he had no assets remaining in New Jersey to satisfy any judgment entered against him. Disentitlement and dismissal of his appeal would, therefore, be the only way to ensure enforcement.<sup>15</sup>

However, the Court proposed a less harsh alternative: It permitted the husband, if he wished to appeal the lower court's judgment, to “post a bond in the full amount of the judgments pending against him to assure the enforceability thereof and to avoid prejudice to [wife].”<sup>16</sup> It further stated that “[i]f [husband] chooses not to post such a bond, the fugitive disentitlement doctrine will be applied to continue the dismissal of his appeal.”<sup>17</sup>

Although the Court dismissed the husband's appeal as it related to monetary issues, it allowed the husband to proceed with his appeal as it related to the issue of child custody. The Court held that “a parent's right to the custody and companionship of his or her child is a fundamental one,” and that “[s]uch a right cannot be extinguished or limited because of litigation misbehavior.”<sup>18</sup> The Supreme Court stated it would only impose the fugitive disentitlement doctrine to issues of child custody in cases where the fugitive parent removed or hid the child.<sup>19</sup>

In a later case, the Appellate Division applied the principles established in *Matsumoto* in a 2008 unpublished opinion.<sup>20</sup> In *Jonas v. Jonas*, the trial court applied the fugitive disentitlement

doctrine after the husband deliberately defied numerous court orders, purposely evaded the enforcement of those orders, and failed to appear in court despite warrants issued for his arrest.<sup>21</sup> As a result of his findings, the judge disregarded the husband's responding papers to the motion filed by the wife and dismissed his cross-motion without prejudice "for further consideration if defendant personally appeared before the court and posted a surety bond to cover all outstanding judgments."<sup>22</sup>

The Appellate Division, citing *Matsumoto*, affirmed the decision of the lower court and dismissed the husband's appeal because the trial court's decision afforded him the opportunity to post a bond to cover all the judgments against him in order to avoid disentitlement.<sup>23</sup>

In 2011, the Appellate Division addressed this issue once again in an unpublished opinion.<sup>24</sup> In *Durrani v. Durrani*, the trial court found the husband to be a significant flight risk and ordered him to surrender his passport.<sup>25</sup> The Appellate Division granted the husband leave to appeal. However, shortly thereafter the husband managed to leave the country using a temporary travel document.<sup>26</sup> As a result, the Appellate Division, using *Matsumoto*'s four-pronged test, dismissed the husband's appeal of the order requiring him to surrender his passport on the grounds that "defendant has violated that order by leaving the country and has not returned."<sup>27</sup>

The Court noted, however, that its decision "does not affect defendant's ultimate appeal rights nor preclude him from presenting himself to the trial court and urging whatever relief he believes appropriate."<sup>28</sup>

By contrast, in the unpublished opinion *Ort v. Ort*, the Appellate Division affirmed the trial court's refusal to invoke the fugitive disentitlement doctrine in a post-judgment matrimonial matter.<sup>29</sup> In *Ort*, the husband failed to comply with the arbitration final judgment, including failing to pay his child support obligation (there were 13 children born of the marriage, and one child remained unemancipated as of the time of appeal). A bench warrant was issued for the husband's arrest in 2008 as a result of his non-payment of support. The husband's child support arrears were set at \$561,595 as of April 2012. The bench warrant could not be effectuated because the husband apparently left the country.

Nevertheless, in Feb. 2013, the husband moved to modify his child support obligation and to vacate the bench warrant. The wife opposed the application and requested that the court "not entertain or grant the defendant [husband] any affirmative relief until he personally appears before this tribunal and satisfies the condition to purge the bench warrant for his arrest."

The trial court in *Ort* reduced the husband's purge amount in an effort to encourage payment and declined to invoke the fugitive disentitlement doctrine. Not only did the court choose not to involve the fugitive disentitlement doctrine, but it did not require the husband to post a bond in order to assure the enforceability of his obligations and to avoid prejudice to the wife as a condition to allowing him to litigate, as was suggested in *Matsumoto*. The Appellate Division affirmed the trial court decision, finding the trial court acted within the considerable discretion it is afforded.

Thus, what is clear is that the fugitive disentitlement doctrine is a remedy that can be invoked in family law matters. What is also clear, however, is that it is within the discretion of the trial court whether or not to invoke that doctrine. More specifically, the trial court has broad discretion to determine if invocation of the doctrine is 'necessary' to enforce existing orders and to determine if invocation of the doctrine is 'excessive.' Based on the limited precedent in New Jersey, it is clear the doctrine will be invoked sparingly.

Thus, under what circumstances can the family law practitioner seek to invoke the fugitive disentitlement doctrine with the best chance of success? It appears the answer hinges on whether there are financial issues in dispute or custody issues in dispute.

With respect to custody issues, *Matsumoto* appears to set a bright line rule that the fugitive disentitlement doctrine will not be invoked by the courts in a custody case unless the fugitive parent has removed or hidden the child. But see the recently reported case of *Matison v. Lisnyansky* that appears to perhaps to expand the application in cases involving custody issues.<sup>30</sup>

With respect to financial issues, there is no such bright line rule. However, it appears the practitioner would have the best chance of success by seeking invocation as alternative relief; in other words, request the defaulting party post a bond or pledge some other form of security in the full amount of his or her outstanding obligations prior to the court considering any of the defaulting parties' requests for relief. Then, request in the alternative that the court invoke the fugitive disentitlement doctrine if the defaulting party fails to post the bond or similar form of security.

The *Ort* decision makes clear that seeking invocation of the fugitive disentitlement doctrine as alternative relief does not guarantee success, but it certainly appears to be the best way of enhancing one's chances of success.

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## Endnotes

1. *Molinaro v. New Jersey*, 396 U.S. 365 (1970).
2. *Id.* at 366.
3. *Degen v. United States*, 517 U.S. 820 (1996).
4. *Id.* at 824-28.
5. *Id.* at 829.
6. *Matsumoto v. Matsumoto*, 171 N.J. 110 (2002).
7. *Id.*
8. *Id.* at 115-16.
9. *Id.* at 115.
10. *Id.* at 118.
11. *Matsumoto v. Matsumoto*, 335 N.J. Super. 174 (App. Div. 2000).
12. *Matsumoto*, 171 N.J. at 118.
13. *See id.* at 121 (citing *Empire Blue Cross & Blue Shield v. Finkelstein*, 111 F.3d 278, 281 (2d Cir. 1997) (holding that a fugitive is a "person who, having committed a crime, flees from [the] jurisdiction of [the] court where [a] crime was committed or departs from his usual place of abode and conceals himself within the district").
14. *See Matsumoto*, 171 N.J. at 130-31.
15. *Id.* at 131.
16. *Id.*
17. *Id.*
18. *Id.* at 133.
19. *Id.*
20. *See Jonas v. Jonas*, 2008 WL 239069 (App. Div. 2008).
21. *Id.* at 1.

22. *Id.*
23. *Id.* at 2.
24. *See Durrani v. Durrani*, 2011 WL 1404874 (App. Div. 2011).
25. *Id.* at 2.
26. *Id.*
27. *Id.* at 3.
28. *Id.*
29. *Ort v. Ort*, A-5406-12T1, (App. Div. 2015).
30. *Matison v. Lisnyansky*, A-5656-13T2 , (App. Div. Jan. 13, 2016).