

## **PENDENTE LITE ATTORNEYS' FEE ORDERS IN FAMILY LAW CASES**

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The Connecticut Supreme Court has never expressly considered whether a *pendente lite* order of attorneys' fees is immediately appealable and, if so, whether the automatic stay applies pending appeal. However, in an unpublished order in a recent matter, the Appellate Court granted a spouse's motion to dismiss her husband's appeal from such an order. The Supreme Court granted certification on the question whether the Appellate Court properly dismissed the appeal, but the case settled shortly thereafter. Accordingly, the law remains unsettled with respect to the appealability of *pendente lite* orders of attorneys' fees. Similarly unsettled is the applicability of the automatic stay to such orders. This appellate NewsBrief considers these questions.

### **I.**

*Pendente lite* orders concerning support, alimony, custody, visitation, and other issues are common in family matters. Because *pendente lite* orders are temporary by definition, they do not constitute final judgments for the purposes of appeal.

Nevertheless, in a line of cases dating back more than 50 years, the Connecticut Supreme Court has held that certain types of *pendente lite* orders so conclusively resolve the rights of the parties that further proceedings cannot affect them. Therefore, such orders qualify for immediate appeal under the standard set forth in *State v. Curcio*, 191 Conn. 27 (1983). *See, e.g., Sweeney v. Sweeney*, 271 Conn. 193 (2004) (*pendente lite* order directing that a minor child attend parochial school over one parent's objection was immediately appealable); *Taff v. Bettcher*, 243 Conn.

380 (1997) (order imposing one year ban on filing of custody and visitation motions was final judgment); *Madigan v. Madigan*, 224 Conn. 749, 756-58 (1993) (order of temporary physical custody); *Litvaitis v. Litvaitis*, 162 Conn. 540, 548 (1972) (temporary order of child support); *Hiss v. Hiss*, 135 Conn. 333, 336 (1949) (temporary order of support in equitable action).

The Supreme Court has remarked that *pendente lite* orders in family matters enjoy a somewhat unique status among temporary orders in general. "On balance, we have been more persuaded by the rationale for allowing an immediate appeal of . . . temporary . . . orders in family matters than by the traditional reasons of judicial economy that might otherwise have precluded their review." *Sweeney*, 271 Conn. at 209 (quoting *Taff v. Bettcher*, 243 Conn. at 386) (internal quotations and brackets omitted). For example, in *Madigan v. Madigan*, the Supreme Court held that a temporary order of physical custody was immediately appealable because it "affected the irreplaceable time and relationship shared between parent and child," and an immediate appeal was "the only reasonable method of ensuring that the important rights surrounding the parent-child relationship are adequately protected." 224 Conn. at 757.

However, *pendente lite* orders requiring the payment of attorneys' fees rest upon an entirely different rationale. "[T]he basis of the allowance [for attorneys' fees] is that [a spouse] should not be deprived of her rights because she lacks funds which may be supplied from her property in which as a wife she has a real interest but which is usually within the control of her husband." *Steinmann v. Steinmann*, 121 Conn. 498, 505 (1936). A similar rationale underlies *pendente lite* support orders. "[T]he purpose of an order that a husband make payments for the support of his wife *pendente lite* is to afford her as a means of livelihood while she is living apart from

him pending the determination of the question whether she has the right to separate maintenance.” *Litvaitis*, 162 Conn. at 548.

## II.

As noted, case law establishes that *pendente lite* orders of support, alimony, custody, and visitation are immediately appealable. Arguably, *pendente lite* orders awarding attorneys’ fees are akin to such orders for support and alimony and, therefore, should be immediately appealable as well. But, the vitality of the rationale for allowing immediate appeals from such orders is questionable in light of amendments to the Practice Book in 1986, which exempted certain *pendente lite* orders in family matters from the automatic stay. See Prac. Bk. § 61-11(b).

The historic rationale for immediate appealability appears to be that a spouse who is ordered to pay money while a matter is pending would be unable to seek reimbursement if the order were reversed on appeal after the conclusion of the case. *Litvaitis*, 162 Conn. at 548-49 (citing *Hiss*, 135 Conn. at 336). Ergo, the order should be immediately appealable and, perhaps more importantly, stayed pending appeal. Indeed, from the time of the *Hiss* decision until 1986, such orders were automatically stayed pending appeal.

However, by exempting *pendente lite* orders of support and alimony from the automatic stay, the 1986 Practice Book amendments also undercut the rationale for immediate appealability. Plainly, an appeal from a *pendente lite* order requiring the payment of money would be futile if an appellant spouse, who was successful on appeal, did not have a legal right to reimbursement of monies paid while the appeal was pending. Because the law does not contemplate futile appeals, an argument can be made that a spouse who

successfully challenges a *pendente lite* order on appeal should be entitled to reimbursement. If that is so, the rationale for an immediate appeal disappears because any issues regarding the *pendente lite* order can be resolved in an appeal from a final judgment at the end of the case.

Notwithstanding the above, if *pendente lite* orders of attorneys’ fees are immediately appealable because they are in the nature of orders for support and alimony, it follows that they should also be exempt from the automatic stay. Although Practice Book § 61-11(b) does not expressly mention *pendente lite* attorneys’ fees orders, the purpose of such orders, coupled with the argument in favor of immediate appealability based on their functional equivalence to support and alimony orders, suggests that they warrant similar treatment under § 61-11(b).

## Conclusion

Whether a *pendente lite* attorneys’ fee order is immediately appealable and, if so, whether such an order is subject to the automatic stay, are questions the Supreme Court has yet to address. The Court’s recent grant of certification suggests that it is interested in resolving these questions. The authors hope that this NewsBrief will assist family law practitioners in addressing these questions.

This NewsBrief is a publication of the Pepe & Hazard LLP Appellate Project Team. For questions about this or other legal matters involving appellate issues, please contact Richard F. Wareing or Daniel J. Klau at 860.522.5175. For weekly updates on decisions of the Connecticut Supreme Court, please visit the Project Team’s website at [www.top25ct.com](http://www.top25ct.com). Copies of this publication are also available on the website.