

LEGAL PERSPECTIVE

LITIGATION



Appealing a Collateral Order? Fresh Guidance on Rule 313

Pennsylvania Rule of Appellate Procedure 313 provides for appeals as of right from a collateral order of a trial court. 210 Pa.Code Rule 313(b) defines an appealable collateral order as “an order separable from and collateral to the main cause of action where the right involved is too important to be denied review and the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost.” The following is a summary of recent appellate decisions on the collateral order doctrine.

First, the Commonwealth Court, in *Bethke v. City of Philadelphia*, No. 406 CD 2022, 2023 WL 3295555 (Pa. Cmwlth., May 8, 2023) (memorandum), considered the collateral-order doctrine in a matter involving an untimely response to a Pennsylvania Right-to-Know Law (RTKL) request. After the City did not respond to the request, resulting in a deemed denial, the requester appealed to the Pennsylvania Office of Open Records (OOR), which held that there were no applicable exceptions under the RTKL and ordered the City to produce the records. *Id.* at 1. After failing to timely appeal the OOR’s decision to the Court of Common Pleas, the City produced redacted documents; the requester then filed an action in mandamus seeking the unredacted records. *Id.* Of note, the trial court ordered the City to file a motion *nunc pro tunc* to appeal retroactively the OOR’s determination, which order the requester appealed to the Commonwealth Court. *Id.* at 1-2. On appeal, the Commonwealth Court held that the matter was immediately appealable as a collateral order and that the trial court lacked jurisdiction over an untimely appeal of the OOR’s determination, which could not be remedied by *nunc pro tunc* relief.

Practice Point: Trial court orders attempting to grant *nunc pro tunc* relief can be appealed under the collateral order doctrine.

In *Chilutti v. Uber Technologies, Inc.*, 2023 PA Super. 126 (Pa. Super., July 19, 2023), the Superior Court considered the appealability of an order compelling arbitration based on the terms of a browse wrap agreement, in a negligence action against a ride-sharing company. Judge McCaffery, writing for the majority, first stated the three-part test for determining a collateral order’s appealability: (1) the order is separable from and collateral to the main cause of action; (2) the right involved is too important to be denied review; and (3) if review is postponed until final judgment, the right will be irreparably lost. *Id.* at 7, citing *Cmwlth. v. Wells*, 719 A.2d 729, 739 (Pa. 1998). The Court’s analysis focused on the third prong, that an order compelling arbitration is appealable because postponing review would result in irreparable loss of the claim that the arbitration provision was unenforceable. *Chilutti*, slip op. at 8. “We disagree that the collateral order doctrine as applied to arbitration agreements is impenetrable. We reiterate there are times when a party is forced out of court because the arbitration provision either failed to meet basic contract principles or violated a party’s constitutional right to a jury trial... and where the arbitration award is deemed fair, and therefore unreviewable, even

NOVEMBER 10, 2023

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if there was no agreement to arbitrate between the parties, which would result in the irreparable loss to the party.” *Id.* at 12. Judge Stabile’s dissent disagreed, stating that an arbitrator’s decision to assert jurisdiction over objection, as opposed to an arbitration award itself, is subject to much broader judicial review than an award on the merits. *Id.* at 41.

Practice Point: An order compelling arbitration may be appealable under the collateral order doctrine if the arbitration provision in question fails to meet basic contract principles or violates the right to a jury trial.

In *Rivas v. Villegas*, 2023 PA Super. 135 (Pa. Super., July 27, 2023), the Superior Court considered whether, in a child custody action, a grandmother could appeal an order denying her petition for special relief, which petition sought specific fact-findings that would permit her grandchild to seek special immigrant juvenile status under the Immigration and Nationality Act. Relying on *Orozco v. Tecu*, 284 A.3d 474, 476 (Pa. Super. 2022), the Court held that the order was appealable because: (1) it was separate and apart from the grandmother’s custody action; (2) it involved a right that was too important to be denied review, since deportation proceedings were pending against the child; and (3) the grandmother’s right to pursue special immigrant juvenile status for the child would be lost forever if relief were not granted. *Rivas*, slip at 19.

Practice Point: Orders in custody actions involving the child’s immigration status are immediately appealable collateral orders.

In *Ford-Bey v. Professional Anesthesia Services*, 2023 PA Super. 163 (Pa. Super., September 12, 2023), the co-defendant hospital appealed a discovery order to produce documents of its “root cause analysis” process regarding the plaintiff’s decedent’s decline after surgery, leading to a comatose state then death. The hospital claimed privilege under Pennsylvania’s Medical Care and Reduction of Error Act (MCARE). Noting that appeals of collateral orders raise a jurisdictional issue and a question of law, the Superior Court reiterated that they are given plenary review *de novo*. *Ford-Bey*, slip op. at 6, citing *Calabretta v. Guidi Homes, Inc.*, 241 A.3d 436, 441 (Pa. Super. 2020). The discovery order in *Ford-Bey*, for documents protected by MCARE’s privilege and confidentiality terms, was appealable under Rule 313. *Ford-Bey*, slip op. at 10.

Two days later, in *Betz v. UPMC Pinnacle West Shore Hospital, et al.*, 2023 PA Super. 1166 (Pa. Super., September 14, 2023), the Superior Court considered a comparable issue: a hospital’s appeal of a trial court order in a wrongful death and survival action directing it to identify the author of an anonymous report concerning the care and death of the decedent. The hospital appealed on the basis that identifying the author would violate MCARE’s whistleblower protections. *Betz*, slip op. at 1-2. After the trial court denied the hospital’s request to amend the order to allow an appeal by permission under 42 Pa.C.S. 702(b), the hospital appealed under the collateral order doctrine. *Betz* at 4, n. 2. Quoting *Farrell v. Regola*, 150 A.3d 87, 95 (Pa. Super. 2016), the Court found that “[w]hen a party is ordered to produce materials purportedly subject to a privilege, we have jurisdiction under Pa.R.A.P. 313.” *Betz* at 2, n.1.

Practice Point: Orders to produce privileged material are appealable collateral orders.

Most recently, our Supreme Court, in *J.C.D., III and A.M.D. v. A.L.R. and T.A.D.-R.*, No. 13 MAP 2023 (Pa., October 18, 2023), addressed an order on grandparents’ custody. A couple moved in with the wife’s parents. They had two children, but all four moved out after a family dispute. The grandparents sought shared legal and partial physical custody. The parents preliminarily objected, asserting that the grandparents lacked standing. Slip op. at 1-2. The trial court first agreed, then issued a Standing Order granting the grandparents standing to seek partial physical custody. On the parents’ appeal, the Superior Court issued a rule to show cause why the appeal should not be quashed, where claims remained pending in the trial court. After the parents responded, the Court quashed.

The parents then petitioned for discretionary appeal to the Supreme Court, which that Court granted, limited to the question whether it should grant appeal as of right under Rule 313. *J.C.D.* at 3-4. The Court noted that a party may seek permission to appeal an interlocutory order under Rule 312, *J.C.D.* at 5; it also cited Rule 1311 regarding appeal by permission of orders certified by the trial court under 42 Pa.C.S.A. §702. *J.C.D.* at 15. Here, the parents satisfied the first two prongs of the collateral-order test: the Standing Order was separable from the main cause of action – legal and physical custody – and involved the grandparents’ significant interest, as set forth in several Supreme Court decisions on parents’ and grandparents’ rights in custody matters. *Id.* at 6-8 (citations omitted). However, there was no irreparable harm, where the Standing Order did not indicate that it had to be appealed within 30 days, or that appeal could not be had after a final custody order. *Id.* at 10.

Justice Wecht concurred, stating that the time and cost burdens of custody litigation, while undeniable, did not result in irreparable harm. However, he noted *K.W. v. S.L.*, 157 A.3d 498 (Pa. Super. 2017), where the Superior Court found appealable a collateral order granting standing to prospective adoptive parents. In *K.W.*, the father

did not know of the mother's pregnancy nor her decision to place the child for adoption; he had the "right to be free of custody litigation involving third parties" such as the prospective adopters. (Justice Wecht's concurring opinion discusses several United States Supreme Court and Pennsylvania decisions on parents' and grandparents' rights, and the federal and Commonwealth constitutional provisions applied in those cases.). Chief Justice Todd, joined by Justice Donohue, dissented, finding that the parents' claim would be irreparably lost, citing parents' constitutional right to direct the care, custody and control of their children, adversely affected by the financial and emotional burden, cost and strain of custody litigation, including strain on the children.

Practice Points: (1) All three elements of the collateral-order doctrine must be met; (2) would-be appellants should consider proceeding under Rule 312 and/or Rule 1311 and §702; and (3) in custody matters, counsel should research whether particular facts in the case, as in K.W., support an appealability argument.

If you have any questions about the Pennsylvania Rule of Appellate Procedure 313, please contact Jenn Malik at 412.394.5490 or jmalik@babstcalland.com.

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