IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

MARIA V. GHIRAWOO, **Plaintiff,** **v.** **PETER GHIRAWOO,** **Defendant.**	**SX-09-DV-221** **ACTION FOR DOMESTIC VIOLENCE**

MEMORANDUM OPINION

THIS MATTER is before the Court in accordance with the Rules implemented by the Superior Court in Misc. Order 29/2009 and Misc. Order 30/2009 and pursuant to the rotational assignment of trial judges to review Magistrate decisions.

FACTS

On July 14, 2009, this matter came before the Magistrate Court on a Motion for a Permanent Restraining Order filed by Plaintiff against Defendant. Both Plaintiff and Defendant appeared without counsel. Plaintiff and Defendant each shared his and her side of the story. Defendant indicated that he was prepared to have his two children, ages 18 and 20 years old, who were living in the house and prepared to testify on his behalf. The children were not allowed to testify. After hearing the testimony of the parties, the Court found Defendant guilty of an act of domestic violence against Plaintiff, to wit: rape, and a Permanent Restraining Order was issued against him, entered on July 20, 2009. On August 24, 2009, Defendant filed a Notice of Appeal and a Motion to Allow Late Filing of Appeal. On December 15, 2009, the Supreme Court of the Virgin Islands issued an Order that dismissed and remanded said appeal to the Superior Court of the Virgin Islands for further proceedings.

Pursuant to 4 V.I.C. § 125, "[a]ll appeals from the Magistrate Division, except as otherwise provided for in this chapter, must be filed in the Superior Court or to the Supreme Court, if appealable to the Supreme Court as provided by law." In the Supreme Court's recent opinion in *H&H Avionics, Inc. v. V. I. Port Authority*, it expressly held that "except for dispositive orders entered by magistrates in civil matters tried with the consent of the parties and the Presiding Judge pursuant to 4 V.I.C. § 123(d), orders entered by magistrates that have not been appealed to and reviewed by a Superior Court judge do not constitute final, appealable orders." 2009 WL 4981900, at *2 (V.I., 2009). Consequently, the Supreme Court held that, except as provided by 4 V.I.C. § 123(d), "a litigant does not possess the right to directly appeal a magistrate's order to this Court without first filing an appeal with a Superior Court judge." *Id.* Moreover, the Supreme Court held that,

> [w]hile the Superior Court has not promulgated its own rules governing Superior Court review of a magistrate's orders, these matters are expressly addressed by Federal Rule of Civil Procedure 72 and Local Rules of Civil Procedure 72.2 and 72.3, which collectively authorize a party to request that a judge review dispositive and non-dispositive orders entered by a magistrate in civil cases other than those tried by a magistrate with the consent of the parties by filing written objections to the magistrate's decision within fourteen days together with any pertinent hearing transcripts.[1] *Id,* at *3.

The Supreme Court dismissed the appeal and remanded it to the Superior Court. An Order was issued by the Supreme Court on December 15, 2009. On January 7, 2010, Defendant filed an Amendment of Notice of Appeal to request that the Appeal be heard in accordance with Fed. R. Civ. P. 72, LRCi 72.2 and 72.3, and seeks review by a Superior Court judge of the Permanent Restraining Order issued against him.

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[1] Prior to December 1, 2009, Fed. R. Civ. P. 72 allowed for ten (10) days to appeal a magistrate's decision. Effective since December 1, 2009, Fed. R. Civ. P. 72 now allows for fourteen (14) days to appeal to a magistrate's decision.

DISCUSSION

Review of a Magistrate's Order

Fed. R. Civ. P. 72 and LRCi 72.2 and 72.3[2] collectively provides that the objecting party of either a nondispositive or dispositive order entered by a magistrate in civil cases[3] may serve and file specific written objections to the proposed findings and recommendations within ten (10) days with pertinent hearing transcripts.[4] *See also H&H Avionics, Inc.* at *7. According to the Superior Court Misc. Order 30/2009, "[d]ecisions of magistrates pursuant to their original jurisdiction, as provided by 4 V.I.C. § 123(a), are reviewable by judges of the Superior Court of the Virgin Islands. Such matters include: Domestic Violence." The Superior Court Misc. Order 30/2009 further provides that, "[p]etitions for review under this section must be filed with the Clerk of the Court within ten (10) days after entry of the order sought to be reviewed and a copy served on the opposing party." And pursuant to 4 V.I.C. § 125, "[a]ll appeals from the Magistrate Division, except as otherwise provided for in this chapter, must be filed in the Superior Court or to the Supreme Court, if appealable to the Supreme Court as provided by law." 4 V.I.C. 33(a) further provides that "[a]ppealable judgments and orders to the Supreme Court shall be available only upon the entry of final judgment in the Superior Court from which appeal or application for review is taken." *See also* V.I. S. Ct. R. 5(a)(2) ("To be appealable as of right,

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[2] The Federal Rules of Civil Procedure and Federal Rules of Evidence are applicable to the Virgin Islands through the V. I. Super. Ct. R. 7. V.I. Super. Ct. R. 7 provides:

> The practice and procedure in the Superior Court shall be governed by the Rules of the Superior Court and, to the extent not inconsistent therewith, by the Rules of the District Court, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure and the Federal Rules of Evidence.

[3] Aside from cases tried by a magistrate with the consent of the parties and the Presiding Judge.

[4] Prior to December 1, 2009, Fed. R. Civ. P. 72 allowed for ten (10) days to appeal a magistrate's decision. Effective since December 1, 2009, Fed. R. Civ. P. 72 now allows for fourteen (14) days to appeal to a magistrate's decision. Since this appeal was filed prior to December 1, 2009, the new amendment to fourteen (14) days does not apply here.

an order of the Superior Court must either be final or must be classified within the categories of interlocutory orders specified in 4 V.I.C. § 33(b) and § 33(c).").

In *Estate of George v. George*, the Supreme Court stated that "[t]he general rule is that a decision is considered final when it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" 2008 WL 4250348, at *3 (V.I., 2008) (quoting *Berke v. Bloch*, 242 F.3d 131, 134 (3d Cir. 2001)). The Supreme Court agreed with the federal courts and held that orders entered by magistrates that have not been appealed to and reviewed by a Superior Court judge, except for dispositive orders entered by magistrates in civil matters tried with the consent of the parties and the Presiding Judge pursuant to 4 V.I.C. § 123(d), do not constitute final, appealable orders.

More recently in *H&H Avionics, Inc.*, the Supreme Court concluded that it lacks jurisdiction to hear the appeal because neither 4 V.I.C. § 33 nor any other statute authorizes H&H to appeal the magistrate's judgment without first obtaining review of that judgment by a Superior Court judge. 2009 WL 4981900, at *4. Accordingly, H&H's appeal was dismissed. The Supreme Court stated that,

> Notably, every federal appellate court has held that orders entered by magistrates are not final because a trial court's decision-making power is ultimately vested in its judges and thus, when an order---even a dispositive one--- is entered by magistrate instead of a judge, a final order from the trial court does not exist.[5] ...[m]oreover, because Federal Rule of Civil Procedure 72 and Local Rules of Civil Procedure 72.2 and 72.3 provide a process through which H&H may appeal a magistrate's decision to a Superior Court judge, this Court is satisfied that an adequate means of obtaining Superior Court review of the magistrate's September 19, 2009 judgment was available to H&H. *Id.*, at *2 and *4.

[5] An exception exists, however, when a magistrate enters a dispositive order in a civil case in which the parties have clearly and unambiguously consented to have the matter tried before a magistrate instead of a judge.

In this case, the Clerk of the Superior Court transmitted the Notice of Appeal to the Supreme Court, but upon review of the record, the Supreme Court found that Defendant did not expressly request appellate review by the Supreme Court specifically. Defendant merely invoked its right to appeal without specifying any particular court. In its December 15, 2009 Order, the Supreme Court points out that,

> [t]he record does not reflect that the Superior Court attempted to resolve any ambiguities with respect to any appellant's intended appellate tribunal prior to transmitting the matters to this Court. Notably, the magistrate orders appealed from were not entered in civil matters tried by a magistrate with the consent of the parties and the Presiding Judge. Order at 5, *Peter Ghirawoo v. Maria Ghirawoo,* S.Ct. Civ. No. 2009-081 (V.I. Dec. 15, 2009).

Furthermore, according to 4 V.I.C. 33(a), "[a]ppealable judgments and orders to the Supreme Court shall be available only upon the entry of final judgment in the Superior Court from which appeal or application for review is taken." As mentioned above, the Supreme Court ruled in *H&H Avionics, Inc.* that when an order is entered by a magistrate instead of a judge, a final order from the trial court does not exist. 2009 WL 4981900, at *2. Therefore, as of right now, no final, appealable order from the Superior Court exists for this case. Accordingly, Defendant's appeal is appropriately in front of this Court for review.

Timeliness of Defendant's Appeal

In his Motion to Allow Late Filing of Appeal, Defendant argues that he was not provided with the most basic information about the necessary procedures for him to preserve his rights.[6]

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[6] Defendant alleges the following in his Motion to Allow Late Filing of Appeal:

- Defendant was not informed in the Order that he had any right of appeal. Nor was he informed of the fact that if he wished to appeal, there must be an appeal filed within thirty (30) days from the date of the entry of the Order.

- Defendant did not receive a copy of the Permanent Restraining Order when the Permanent Restraining Order was issued. Defendant did not receive a copy of the Restraining Order until or about August 10, 2009, when he asked for a copy from the Superior Court of the Virgin Islands.

He argues that, since the parties appeared *pro se*, it would have been appropriate for a deadline to be placed in the Permanent Restraining Order indicating that the parties had a certain number of days to file a timely appeal. Defendant points out that *pro se* litigants are usually not aware of the deadlines that exist for filing paperwork. Defendant thought he was being timely when he sought out counsel to obtain assistance with this matter within ten (10) days of receiving the Permanent Restraining Order. Defendant highlights that the delay is only for two (2) business days and that there is no willfulness or neglect, only a lack of knowledge.

A review of the record reveals that Defendant was not served until August 11, 2009.[7] According to Fed. R. Civ. P. 72, Defendant has ten (10) days within being served with a copy of the recommended disposition to file his objection.[8] The Superior Court Misc. Order 30/2009 provides that, "[p]etitions for review under this section must be filed with the Clerk of the Court within ten (10) days after entry of the order sought to be reviewed and a copy served on the opposing party." This means that Defendant had until August 25, 2009 to file a petition for review.[9] Therefore, Defendant was timely when he filed for an appeal on August 24, 2009.[10] Accordingly, Defendant's appeal was timely filed.

- Defendant was not advised at any point that he had a deadline for filing an appeal.
- Defendant met with his counsel on August 21, 2009. He was then informed of the issue relating to timeliness and indicated he wanted to contest the rape finding.

[7] According to the file, the Return of Service was dated July 23, 2009 but without any signatures. According to eNACT, it shows that the Return of Service was returned on August 11, 2009. See Exhibit A.

[8] Since Defendant filed his appeal prior to December 1, 2009, the amended Fed. R. Civ. P. 72 that allows for fourteen (14) days to appeal to a magistrate's decision does not apply here.

[9] There have been several changes, such as time computation, regarding the protocol of the Fed. R. Civ. P. that became effective December 1, 2009. Under the new amendments, all calendar days are now counted, rather than only weekdays. However, these changes do not apply to this case because Defendant filed for an appeal before December 1, 2009. For this matter, only the weekdays are counted when computing the ten (10) days for Defendant to file his objections.

[10] In Defendant's Motion to Allow Late Filing of Appeal, it incorrectly stated that "[t]he delay is only for two business days."

Reasons for Appeal

At the July 14, 2009 trial in front of Magistrate Miguel Camacho, Defendant had brought along his two children, ages 18 and 20 years old, who were living in the house and were prepared to testify on his behalf. Defendant told Magistrate Camacho that he was prepared to have his two children testify that there was no noise indicating a rape and that their mother, Plaintiff, and Defendant were getting along well on both days following the alleged rapes. Defendant points out that the alleged rapes were not reported to the police and the children would testify that neither Plaintiff nor Defendant showed any emotional distress, anger or discomfort after the alleged rapes.[11] Magistrate Camacho did not allow the children to testify. At the conclusion of the trial, Magistrate Camacho issued a Permanent Restraining Order stating that Defendant was guilty of an act of domestic violence against Plaintiff, to wit: rape.

Fed. R. of Evidence 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. of Evid. 402 provides that, aside from certain circumstances, all relevant evidence is admissible.[12] The federal decisions seem to reflect the modern rule that all relevant and material evidence is admissible unless there is a sound, practical reason for barring it. *U.S. v. 60.14 Acres of Land, More or*

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[11] Defendant attached an affidavit of his child, Benjamin Ghirawoo, to the Motion. Benjamin Ghirawoo stated the following in the affidavit:

- He was at Court on July 14, 2009 to testify on behalf of his father, Defendant. His sister was there too, and also ready to testify on behalf of her father, Defendant.
- He would have testified that on the days after the alleged rapes, his mother, Plaintiff, and Defendant were getting along well, very pleasantly.
- There was no noise indicating any rape or rapes, nor any sign of emotional distress, anger or discomfort.

[12] Fed. R. of Evid. 402 provides:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Less, in Warren and McKean Counties, State of Pa., 362 F.2d 660, 666 (C.A.Pa., 1966). There are circumstances where relevant evidence may be excluded, such as when the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Fed. R. Evid. 403. "Evidence is unfairly prejudicial only if it has 'an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.' …It is unfairly prejudicial if it 'appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish,' or otherwise 'may cause a jury to base its decision on something other than the established propositions in the case.'" *Carter v. Hewitt*, 617 F.2d 961, 972 (C.A.Pa., 1980). Fed. R. Evid. 403 does not "offer protection against evidence that is merely prejudicial, in the sense of being detrimental to a party's case." *Id.*

According to the transcript of the July 14, 2009 hearing (hereinafter, the "Transcript"), Magistrate Camacho made the following statement to the parties:

> The Court: "Before you begin I have to advise you, you have a right to have an attorney present with you to assist you with these proceedings. **You also have the right to have any witnesses come forward on your behalf to testify on your behalf**. If you wish an attorney present with you then we can continue this matter to another date until you have the opportunity to get an attorney." *Emphasis added.* Transcript of Record at 3, *Maria V. Chirawoo v. Peter Ghirawoo,* Case No. SX-09-DV-221 (July 14, 2009).

Despite alerting the parties to their right to have witnesses to testify on their behalf and Defendant expressing his wish to have his children testify on his behalf, Magistrate Camacho did not allow Defendant to call his children as witnesses. According to the Transcript, the following exchanges took place between Magistrate Camacho and Defendant:

> Defendant: "Okay. Here is an essay that my daughter wrote about our past divorce situation, how it affected her. She just had it first prize through her school."
> The Court: "How is that relevant to the charges?"

> Defendant: "Because it shows clearly that my children, who are the best witnesses, knows that this is not the way my wife said it."
>
> The Court: "Were they there and did they saw what happened?"
>
> Defendant: "That's right. They were in the house. I would tell you how my house is. My wife didn't tell you."
>
> The Court: "Were your children there and saw you doing what you were accused of doing?"
>
> Defendant: "Not seeing, but if my wife was being raped in any way, was being any way affected they would have heard, your Honor. The back door was wide open.
>
> The Court: "Not relevant. How is that letter relevant to those charges?"
>
> Defendant: "I was just trying to - - to show - -
>
> The Court: "Well, if you have something that is pertaining to the charges against you I would be glad to accept it."
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> Transcript of Record at 37-38, *Maria V. Chirawoo v. Peter Ghirawoo,* Case No. SX-09-DV-221 (July 14, 2009).

Magistrate Camacho proceeded to find Defendant guilty of an act of domestic violence against Plaintiff, to wit: rape, and a Permanent Restraining Order was issued against Defendant. The only reason Magistrate Camacho gave for excluding Defendant's children's testimonies was "Not Relevant." Transcript of Record at 38, *Maria V. Chirawoo v. Peter Ghirawoo,* Case No. SX-09-DV-221 (July 14, 2009). In this case, Defendant's children's testimonies are unmistakably relevant. Defendant stated on the record that the children were present at the house and could describe what did or did not happen. This evidence clearly have a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. At such juncture, the Court sees no sound, practical reason for barring it. Therefore, the Court finds that Defendant has a right to have his children testify on his behalf.

CONCLUSION

Except for dispositive orders entered by magistrates in civil matters tried with the consent of the parties and the Presiding Judge, orders entered by magistrates that have not been appealed to and reviewed by a Superior Court judge do not constitute final, appealable orders. In this case, Magistrate Camacho's Order did not constitute a final, appealable order from the Superior Court. Therefore, it is appropriate for this Court to review Defendant's appeal. The Court finds that Defendant had a right to have his children testify on his behalf. Accordingly, the Magistrate Court's finding in the July 14, 2009 hearing is hereby vacated and this matter is remanded to the Magistrate Court for a new hearing consistent with this Court's finding.

DONE and so ORDERED this 17th day of August, 2010.

ATTEST:
Venetia Harvey-Velazquez
Clerk of the Court

By: ______________________
Deputy Clerk

Dated: 8/19/2010

HAROLD W. L. WILLOCKS
Judge of the Superior Court