Understanding the Support Magistrate Objection Process
By Joel R. Brandes

Family Court Act §439(e) governs the filing of objections to an order of a Support Magistrate. It provides, in part, that the final order of a Support Magistrate, after objections and the rebuttal, if any, have been reviewed by a judge, can be appealed pursuant to article eleven of the family court act. However, no appeal lies from an order of a Support Magistrate where the appellant has not submitted proper objections to the order to a Family Court Judge for review. An attorney representing a client in a Family Court support matter must have a thorough understanding of the sometimes confusing objection process to prevent the dismissal of his clients' objections and preserve her right to appeal.

At the time of the entry of the support order, the clerk of the court is required to cause a copy of the findings of fact and order of support to be served, either in person or by mail, upon the parties to the proceeding, or their attorneys. (22 NYCRR 205.36(b)) Specific written objections to the order may be filed by either party with the court within 30 days after receipt of the order in court or by personal service. If the objecting party did not receive the order in court or by personal service, the objections may be filed 35 days after the mailing of the order to the party. The failure to timely file objections will result in their rejection by the court. (FCA §439(e); Hamilton v. Hamilton, 112 A.D.3d 715, 976 N.Y.S.2d 218 (2d Dep't 2013)).

It is not proper to file objections from an order entered upon default. In the event of a default, the proper procedure is to move to vacate the default and, if necessary, an appeal from the denial of that motion. (Garland v. Garland, 28 A.D.3d 481, 811 N.Y.S.2d 581 (2d Dep't 2006)).

The objections to the order of the Support Magistrate must be properly and timely served to be reviewed by the Family Court judge. The party filing the objections must serve a copy of the objections upon the opposing party, who has thirteen days from service to serve and file a written rebuttal to the objections. Proof of service upon the opposing party must be filed with the court at the time of filing of objections and any rebuttal. (Girgenti v. Gress, 85 A.D.3d 1166, 925 N.Y.S.2d 886 (2d Dep't 2011)).

The time to file objections does not begin to run until the final order is served with notice of entry. (Commissioner of Social Services on Behalf of Obremski v. Dietrich, 208 A.D.2d 474, 617 N.Y.S.2d 723 (1st Dep't 1994)). The objections to an order of a Support Magistrate which are served by mail must be filed within 35 days after the mailing of the order with notice of entry to the aggrieved party. (Belolipskaia v. Guerrand, 65 A.D.3d 932, 885 N.Y.S.2d 484 (1st Dep't 2009)).

The Court of Appeals has held that if a party is represented by an attorney when the order is served by mail the time requirements for serving objections to a support

magistrate's final order do not begin to run until the order is mailed to the attorney. (Matter of Odunbaku v Odunbaku, 28 N.Y.3d 223, 66 N.E.3d 669 (2016))

Where the support order is served by mail no additional time to file objections is added to the time to file objections. (Krieger v. Krieger, 205 A.D.2d 975, 613 N.Y.S.2d 781 (3d Dep't 1994)). The time to file objections does not start to run and does not bar the subsequent filing of objections if the court fails to serve the order on all parties. (Stone v. Schlegal, 132 Misc. 2d 808, 505 N.Y.S.2d 549 (Fam. Ct. 1986))

The objections to the order of the Support Magistrate are deemed filed when they are received and "date stamped" by the Family Court (Bruckstein v. Bruckstein, 78 A.D.3d 694, 909 N.Y.S.2d 923 (2d Dep't 2010)), not when they are mailed to the court. (Rosenkranz v. Rosenkranz, 198 A.D.2d 592, 603 N.Y.S.2d 237 (3d Dep't 1993)).

The Appellate Divisions disagree on the question of whether the time limitations in Family Court Act §439 (e) must be strictly enforced. The Second Department has adhered to a policy of strict enforcement. However, it has carved out an exception to the rule that untimely or inadequate objections will be dismissed, where the opposing party files a rebuttal. It appears that the Second Department considers the filing of a rebuttal as a waiver of the untimely or defective serve by the opposing party.(Hamilton v. Hamilton, 112 A.D.3d 715, 976 N.Y.S.2d 218 (2d Dep't 2013)).

The First, Third, and Fourth Departments have construed the time limitations in Family Court Act §439(e) liberally, indicating that the time periods for the filing of objections are not jurisdictional like the time limitations for filing a notice of appeal. ((Judith S. v. Howard S., 46 A.D.3d 318, 847 N.Y.S.2d 529 (1st Dep't 2007); Hobbs v. Wansley, 143 A.D.3d 1138, 39 N.Y.S.3d 298 (3d Dep't 2016)); Onondaga County Com'r of Social Services on Behalf of Chakamda G. v. Joe W.C., 233 A.D.2d 908, 649 N.Y.S.2d 620 (4th Dep't 1996)).

The Second and Third Departments have held that the provisions of CPLR 2004, which allow the court to extend the time fixed by any statute, rule, or order for doing any act, upon such terms as may be just and upon good cause shown, do not apply to objections. (Powers v. Foley, 25 A.D.2d 525, 267 N.Y.S.2d 459 (2d Dep't 1966); Monahan v. Hartka, 17 A.D.3d 758, 793 N.Y.S.2d 552 (3d Dep't 2005)). However, the Second Department has allowed an extension of the time to file objections under CPLR 2001, which allows a mistake, defect, or irregularity to be corrected or disregarded. (Worner v. Gavin, 112 A.D.3d 956, 978 N.Y.S.2d 88 (2d Dep't 2013))

Family Court Act §439(e) provides that "specific written objections" to the order may be filed. The party challenging the Support Magistrate's order is required to file specific objections to preserve his challenges, and if they are not specific, they will be denied. (Worner v. Gavin, supra).

It has been held by the Second and Fourth Departments that it is improper to submit new evidence with objections. (Williams v. Williams, 37 A.D.3d 843, 831 N.Y.S.2d 243 (2d Dep't 2007); Niagara County Dept. of Social Services ex rel. Kearns v. Hueber, 89 A.D.3d 1440, 932 N.Y.S.2d 631 (4th Dep't 2011)). However, the Third Department held that the court may consider new documents or arguments filed with the objections. (Regan v. Zalucky, 56 A.D.3d 825, 867 N.Y.S.2d 229 (3d Dep't 2008)).

The failure to file objections constitutes a waiver of review of the order by a judge of the family court, and of the right to appeal.(Holliday v. Holliday, 35 A.D.3d 468, 828 N.Y.S.2d 96 (2d Dep't 2006)). Failure to file proof of service of a copy of the objections on the opposing party will result in the dismissal of the objections, (Girgenti v. Gress, 85 A.D.3d 1166, 925 N.Y.S.2d 886 (2d Dep't 2011)), as will the failure to file adequate proof of service of a copy of the objections on the other party. Hidary v. Hidary, 79 A.D.3d 880, 912 N.Y.S.2d 435 (2d Dep't 2010); Treistman v. Cayley, 155 A.D.3d 1343, 65 N.Y.S.3d 332 (3d Dep't 2017)0. An unsigned affidavit of service of the objections is tantamount to a complete failure to file proof of service.(Simpson v. Gelin, 48 A.D.3d 693, 850 N.Y.S.2d 913 (2d Dep't 2008); Fifield v. Whiting, 118 A.D.3d 1072, 987 N.Y.S.2d 479 (3d Dep't 2014)). So is filing a deficient proof of service, (Hidary v. Hidary, supra) as well as filing an affidavit of service which does not contain the date of service of the objections on the other party. (Burger v. Brennan, 77 A.D.3d 828, 909 N.Y.S.2d 370 (2d Dep't 2010))

Family Court Act 439(e) provides that after reviewing the objections and rebuttal the Family Court must either (1) remand one or more issues of fact to the support magistrate; or (2) make, with or without holding a new hearing, his or her own findings of fact and order; or (3) deny the objections. The order of the Support Magistrate remains in full force and effect pending review of the objections and the rebuttal, if any. No stay of the order may be granted. The final order of a support magistrate, after objections and the rebuttal, if any, have been reviewed by a judge, may be appealed.

There are also conflicting rules regarding the filing objections in cases where the Support Magistrate finds that a party should be incarcerated for a willful violation of a support order.

The Fourth Department has held that the Family Court may not confirm the findings of fact and order of the Support Magistrate before the final order of the Support Magistrate is entered and transmitted to the parties. (Matter of Geary v Breen, 210 A.D.2d 975, 976, 621 N.Y.S.2d 243 (4 Dept.,1994)) Confirming the order deprives the parties of their statutory right under Family Court Act § 439(e) to file written objections to the final order of the Support Magistrate. Objections may be taken to a final order of a Support Magistrate that a respondent has willfully violated an order of support, and the parties' time to file the objections does not begin to run until the final order of the Support Magistrate is served with notice of entry.

In contrast, the Second Department held that Family Court is under no obligation to wait until the time to file objections under Family Court Act § 439(e) has expired, to confirm a Support Magistrate’s recommendation of incarceration. It has observed that

under Family Court Act § 439(a), the Support Magistrate is required to refer the contempt determination to a Family Court judge for confirmation and the imposition of punishment. Thus, the determination of the Support Magistrate recommending incarceration has no force and effect until confirmed. For orders which do not require confirmation by a Family Court Judge, Family Court Act § 439(e) provides that a party may file objections to such orders, but pending review of the objections the order shall be in full force and effect and no stay of such order shall be granted. It concluded that since a determination of a support magistrate recommending incarceration can have no force and effect until confirmed, and could never constitute a final order, the procedure under Family Court Act § 439(e) concerning the filing of objections does not apply. (Matter of Garuccio v Curcio, 174 A.D.3d 804, 107 N.Y.S.3d 437 (2d Dept.,2019) citing Matter of Roth v Bowman, 245 A.D.2d 521, 522, 666 N.Y.S.2d 695 (2 Dept., 1997)

Once confirmed, the determination of the Support Magistrate recommending incarceration is subject to appellate review on an appeal from the order of the Family Court confirming the determination. (Family Ct Act § 1112)

Conclusion

At the conclusion of the objection process, where there is no order recommending incarceration, the parties have two orders - the final order of the Support Magistrate, and the order of the Family Court judge upon its review of the objections. Which order is the appeal taken from? Family Court Act § 439(e) specifies that after review of objections "the final order of the support magistrate may be appealed." Therefore, the notice of appeal should state that the appeal is taken from the final order of the support magistrate.

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