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Filing Objections to the Final Order of a Support Magistrate

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Family Court Act § 439(e) provides that the final order of a Support Magistrate — after objections and the rebuttal, if any, have been reviewed by a judge — may be appealed pursuant to article eleven of the Family Court Act. But, note to litigators! Extreme care must be taken to follow all the rules during the objection process.

Navigating the Objection

What are some of these rules you must follow in order to promote a good client outcome?

If objections are not properly submitted to the Family Court judge for review, the right to appeal from the final order of the Support Magistrate will be lost forever. *Holliday v. Holliday*, 35 AD3d 468 (2d Dept. 2006); *Fenical v. Fenical*, 26 AD3d 436, (2d Dept. 2006); *Chukwuogo v. Chukwuogo*, 46 AD3d 558 (2d Dep't 2007). However, where the Family Court makes an error in calculating the time to file objections and dismisses the objections, the Appellate Division will correct the error on appeal. *Burke v. Burke*, 45 AD3d 591 (2d Dept. 2007).

A determination of a Support Magistrate must include findings of fact and a final order that is entered and transmitted to the parties. The Uniform Rules for the Family Court provide that findings of fact must be in writing and include, where applicable, the income and expenses of each party, the basis for liability for support and an assessment of the needs of the children. A copy of the findings of fact must accompany the order of support. 22 NYCRR 205.36 (a). The rules also provide that at the time of the entry of the order of support, the clerk of the family court must have a copy of the findings of fact and order of support served on the parties or their attorneys, either in person or by mail. 22 NYCRR 205.36 (b).

Family Court Act § 439 provides that specific written objections to a Support Magistrate's order may be filed. Thus, the objections to the order of the Support Magistrate must be "specific" and if they are not specific they will be denied. *White v. Knapp*, 66 AD3d 1358 (4th Dept. 2009).

These written objections to the Support Magistrate's final order may be filed by either party with the court within 30 days after receipt of the order in court or by personal service, but if the objecting party did not receive the order in court or by personal service, he or she is allowed 35 days after the mailing of the order to file objections. Family Court Act § 439. The party filing objections must serve a copy on the opposing party, who then gets 13 days to file a written rebuttal. (Proof of service on the opposing party must also be filed with the court at the time the objections and rebuttal are filed. *Id*.

Within 15 days after the rebuttal is filed, or the time to file such rebuttal has expired (whichever is applicable), the judge, based on a review of the objections and the rebuttal, if any, must: 1) remand one or more issues of fact to the Support Magistrate; 2) make, with or without holding a new hearing, his or her own findings of fact and order; or 3) deny the objections. *Id*.

Pending review of the objections and the rebuttal, if any, the order of the Support Magistrate remains in full force and effect and no stay of such order may be granted. In the event a new order is issued, payments made by the respondent in excess of the new order must be applied as a credit to future support obligations. *Id*. The final order of a Support Magistrate, after objections and the rebuttal, if any, have been reviewed by a judge, may be appealed pursuant to Article Eleven of the Family Court Act. *Id*. An "order of disposition" is synonymous with a final order or judgment. *Firestone v. Firestone*, 44 AD2d 671 (1st Dept. 1974); *Taylor v. Taylor*, 23 AD2d 747 (1st Dept. 1965).

On the issue of evidence, the Second Department has held that it is improper to submit new evidence along with objections. *Williams v. Williams*, 37 AD3d 843 (2d Dept. 2007); *Rzemieniewska-Bugnacki v. Bugnacki*, 51 AD3d 1029 (2d Dept. 2008). However, the Third Department has held that the court may consider new documents or arguments filed with the objections. *Regan v. Zalucky*, 56 AD3d 825 (3d Dept. 2008).

It is also important to know that it has been deemed improper for the Family Court to review an issue *sua sponte* where no specific objection is filed with regard to that issue. *Matter of Renee XX. v John ZZ.*, 51 AD3d 1090 (3d Dept. 2008); *Hammill v. Mayer*, 66 AD3d 1196 (3d Dept. 2009).

What About Interlocutory Appeals?

Family Court Act § 439 (e) provides for the service and filing of objections from a "final order" of a Support Magistrate. Thus, some Family Courts hold that objections may not be filed as of right from an interlocutory order of the Support Magistrate because it is not a final order. As such, with certain exceptions, an interlocutory order is not appealable. *Dunbar v. Hunter*, 131 Misc. 2d 706 (Fam. Ct., Monroe Cty. 1986); *Burry v. Raisbeck*, 159 Misc.2d 488 (Fam. Ct. Onondaga Cty. 1993.); *Bonnie Lee A. v. Robert A.*, 149 Misc. 2d 368 (Fam.Ct., Broome Cty. 1991); *Gertzulin v. Gertzulin*, 27 AD3d 562 (2d Dept. 2006).

However, other Family Courts rule that objections may be filed from an interlocutory order of a Support Magistrate in a case where the denial of a right to file objections could lead to irreparable harm (*see, e.g., McGrath v. McGrath*, 166 Misc.2d 512 (Fam. Ct. Erie Co. 1995)); where denial of the right to file objections could prevent the children from receiving adequate support during the pendency of the action (*see, e.g., Heinlein v. Heinlein*, 165 Misc.2d 357 (Fam. Ct. Monroe Co. 1995); and where the order sought to be reviewed "affects a substantial right" of the respondent, such as the right to be represented by counsel of her own choice (*see, e.g., Matter of J.P.M. v. P.A.M.*, 5 Misc.3d 1003 (Fam. Ct. Nassau Co., 2004)).

It is improper to file objections from an order entered upon a default in appearing. Here, the remedy is to move to vacate the default pursuant to CPLR 317 or 5015, and file objections from the order denying motion. *Garland v. Garland*, 28 AD3d 481 (2d Dept. 2006); *see also Wideman v. Murley*, 155 AD2d 841 (3d Dept. 1989).

In accordance with Family Court Act § 439(e), objections must be served and filed within 30 days of delivery in court or personal service on the aggrieved party, or within 35 days after mailing of the order to the aggrieved party. Family Court Act § 439(e) is complementary to CPLR 2103(b), and the CPLR provision for service on an opposing party represented by counsel requires service on the attorney, not the party. *Etuk v. Etuk*, 300 AD2d 483 (2d Dept. 2002). However, it has been held that the failure to serve the attorney is a mere irregularity where the objections were obtained by the attorney and the attorney served a rebuttal to them. *Perez v. Villamil*, 19 AD3d 501 (2d Dept. 2005).

The time period under Family Court Act § 439 (e) to file objections does not begin to run until the order is served with notice of entry. *Matter of Commissioner of Social Servs. V. Dietrich*, 208 AD2d 474 (1st Dept. 1994); *Matter of Canfield v Canfield*, 185 AD2d 611 (4th Dept. 1992).

The objections to an order of a Support Magistrate that is 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 AD3d 932 (1st Dept. 2009).

The service of the order need not be by the other party to start the time to file objections running. Service of the order with notice of entry by the clerk of the Family Court, by mail, commences the time to file objections running, and no additional time to file objections is added to the time period to file objections where the order is served by mail. *Krieger v. Krieger*, 205 AD2d 975 (3d Dept. 1994).

The objections are deemed filed when they are received and "date stamped" by the Family Court, not when they are mailed to the court. *Rosenkranz v. Rosenkranz*, 198 AD2d 592 (3d Dept. 1993).

The objections must be filed with proof of service; failure to file proof of service of a copy of the objections on the opposing party will result in the dismissal of the objections, and a waiver of appellate review. *Star v. Frazer*, 232 AD2d 570 (2d Dept. 1996); *Hidary v. Hidary*, 79

AD3d 880 (2d Dept. 2010); *Burger v. Brennan*, 77 AD3d 828 (2d Dept. 2010).

A copy of the final order of the Support Magistrate does not have to be included with the objections. *Puzack v. Friderich*, 74 AD3d 1208 (2d Dept. 2010). It is also unnecessary to file a copy of the hearing transcript with the objections. *Terjesen v. Terjesen*, 29 AD3d 705 (2d Dept. 2006).

An unsigned affidavit of service is tantamount to complete failure to file proof of service (*Simpson v. Gelin*, 48 AD3d 693 (2d Dept. 2008)), as is deficient proof of service (*Hidary*). An affidavit of service that does not contain the date of service of the objections on the other party is also equivalent to complete failure to file proof of service. *Burger v. Brennan*, 77 AD3d 828 (2d Dept. 2010).

Timely or Not?

Where there is a disputed issue as to the timeliness of the objections the court should hold a hearing to determine the issue. But the Appellate Divisions are not in accord on the issue of whether the time limitations in Family Court Act § 439(e) must be strictly enforced. For example, the Second Department generally adheres to a policy of strict enforcement of the time limitations in Family Court Act § 439(e). *Bodouva v. Bodouva*, 53 AD3d 483 (2nd Dept. 2008); Bruckstein v. Bruckstein, 78 AD3d 694 (2d Dept. 2010). However, the Second Department has carved out an exception to the dismissal of untimely or inadequate objections, where the opposing party files a rebuttal. Thus, it appears that the Second Department considers the filing of a rebuttal to be a waiver of untimely or defective service by the opposing party. *Sannuto v. Sannuto*, 21 AD3d 901 (2d Dept. 2005). Conversely, the other appellate departments have construed the time limitations in Family Court § 439(e) liberally, including the First Department (*Matter of Corcoran v. Stuart*, 215 AD2d 340 (1st Dept. 1995); *Judith S. v. Howard S.*, 46 AD3d 318 (1st Dept. 2007)); the Third Department (*Ogborn v. Hilts*, 262 AD2d 857 (3d Dept. 1999); *Latimer v. Cartin*, 57 AD3d 1264 (3d Dept. 2008)); and the Fourth Department (*Onondaga County Com'r of Social Services on Behalf of Chakamda G. v. Joe W.C.*, 233 AD2d 908 (4th Dept. 1996); *Minka v. Minka*, 219 A.D.2d 810, 632 N.Y.S.2d 736 (4 Dept.,1995). Thus, is appears that the time periods for filing objection are not jurisdictional like the time limitations for filing a notice of appeal.

The Second and Third Departments have held that the provisions of CPLR 2004 — which allows 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. *Matter of Powers v. Fole*y, 25 AD2d 525 (2d Dept. 1966); *Monahan v. Hartka*, 17 AD3d 758 (3d Dept. 2005).

Conclusion

As we have seen, specific written objections must be properly served and filed in a timely manner, with sufficient proof of service, as a condition precedent to the taking of an appeal from the final order of the Support Magistrate. The statutory scheme allows the appeal to be taken only after the objections are reviewed by the Family Court; it may, among other things, make its own findings of fact and order, or deny the objections. At the conclusion of the objection process the parties have two orders: the final order of the Support Magistrate and the order of the Family Court judge determining the objections. Thus, the logical question then arises: Which order is the appeal taken from — the final order of the Support Magistrate or from the order of the Family Court denying the objections or making its own findings of fact and order? Until an Appellate Division answers this specific question, the notice of appeal should state that the appeal is taken from both orders.

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Go To Top of Page