Not For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

MARIA RUIZ,	)	**S. Ct. Civ. No. 2008-035**
	)	
Appellant/Respondent,	)	Re: Super. Ct. Fam. No. 017/2005
	)	
v.	)	
	)	
TODD P. JUNG,	)	
	)	
Appellee/Petitioner.	)	
	)	

On Appeal from the Superior Court of the Virgin Islands
Considered: May 22, 2009
Filed: October 19, 2009

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and **IVE ARLINGTON SWAN**, Associate Justice.

APPEARANCES:

Eszart A. Wynter, Sr., Esq.
Law Offices of Eszart A. Wynter, Sr., P.C.
St. Croix, U.S.V.I.
Attorney for Appellant

H.A. Curt Otto, Esq.
H.A. Curt Otto, P.C.
St. Croix, U.S.V.I.
Attorney for Appellee

OPINION OF THE COURT

Hodge, Chief Justice.

Appellant, Maria Ruiz ("Ruiz"), challenges three orders entered by the Family Division of the Superior Court which denied her motion for a temporary restraining order ("TRO"), denied her motion to modify custody, and denied her motion for reconsideration of the two prior orders. For the reasons which follow, we will affirm the Superior Court's denial of the motion

for reconsideration, but we will dismiss for lack of jurisdiction the appeals from the orders denying the motion for a TRO and the motion to modify custody.

I. FACTUAL AND PROCEDURAL BACKGROUND

On November 3, 2003, Ruiz and Todd Jung ("Jung") had a daughter ("the minor"). After their relationship ended, Ruiz filed a domestic violence action against Jung, seeking a TRO and temporary physical custody of the minor. The family court granted this TRO on February 2, 2005, and entered a permanent restraining order on February 8, 2005, which granted custody of the minor to Ruiz with visitation rights to Jung.

Several months later, on June 16, 2005, Jung filed a petition for custody, alleging that Ruiz used drugs and had engaged in various criminal acts, including forgery. The parties reached a Mediated Settlement Agreement on February 13, 2006, and the family court adopted the agreement as an order of the court on February 28, 2006. The agreement provided, *inter alia*, that Ruiz and Jung would have joint legal custody and that they would have joint physical custody until the minor turns four, at which time either parent could move to modify if a change of custody would be in the minor's best interests. On September 28, 2006, the court, having retained jurisdiction to address the issue of visitation during the holidays, clarified the holiday schedule. Numerous motions followed, concerning disputes over issues such as the school the minor would attend and whether Jung was permitted to travel overseas with the minor.

On December 7, 2007, a detective contacted Jung and informed him that Ruiz had alleged that Jung sexually abused the minor. Jung told the detective that the sexual abuse allegations were prompted by his December 3, 2007 letter to Ruiz denying her permission to travel with the minor over the holiday. On December 14, 2007, Jung filed an Emergency Motion for Temporary Custody, and Ruiz filed a motion to modify custody on the same day. Four days later, Ruiz also

filed a Motion for Temporary Restraining Order and Emergency Relief. The family court denied both of Ruiz's motions by separate orders entered on December 21, 2007. The order denying Ruiz's motion for a TRO stated that the court had contacted the Department of Human Services and was advised that a medical doctor had examined the minor in the presence of the detective and had "failed to find any evidence of trauma or sexual abuse." (J.A. at 31.) Additionally, on December 19, 2007, the court denied Jung's Motion for Temporary Custody, finding that "there has been no showing that there has been a change in Ms. Ruiz' circumstances to the point where the best interest of the child required a change of custody." (J.A. at 108.)

Thereafter, Ruiz filed a January 10, 2008 motion to reconsider both of the court's December 21, 2007 orders. As an exhibit to the motion to reconsider, Ruiz filed an unsworn letter written by Dianne E. Brinker, Ph.D., ("Dr. Brinker"), addressed to Ruiz's counsel, in which the licensed clinical social worker stated that she interviewed the minor the day after the court denied Ruiz's motions and that she has no reason to disbelieve the minor when the minor told her that Jung had touched her private area. The social worker also stated that "[i]t must be considered that just because there is no physical evidence does not prove that no type of molestation took place." (J.A. at 36.) Jung filed his opposition to the motion to reconsider on February 6, 2008 and attached a sworn and notarized letter, addressed to the family judge, from Catherine L. Giraud, Ph.D., in which the licensed counselor stated that she had evaluated the minor twice and found her to be talkative, friendly, quite relaxed and showed no fear or distress in her father's presence. The letter also indicated that when the counselor asked the minor who told her that Jung had touched her private area, the minor said, "My mommy told me." (J.A. at 46.) The letter concludes that in the counselor's opinion, based on her previous experience with sexual abuse cases, the minor has not exhibited any of the characteristic behaviors of sexually

abused young females. On February 8, 2008, the court summarily denied Ruiz's motion for reconsideration.

On February 28, 2008, Ruiz filed her notice of appeal from the two December 21, 2007 orders and the February 8, 2008 order.

II. DISCUSSION

A. Jurisdiction and Standards of Review

"The Supreme Court [has] jurisdiction over all appeals arising from final judgments, final decrees [and] final orders of the Superior Court . . . ." V.I. CODE ANN. tit. 4 § 32(a) (1997). Pursuant to Supreme Court Rule 5(a)(1), a notice of appeal in a civil case must be filed within thirty days of the date of entry of the Superior Court's final order. Because the order denying Ruiz's motion for reconsideration was entered on February 8, 2008 and the notice of appeal was filed on February 28, 2008, the appeal from the family court's denial of the motion to reconsider was timely.

In addition to appealing from the motion to reconsider, Ruiz purports to appeal from the order denying Ruiz's motion to modify custody and the order denying Ruiz's motion for a TRO. Thus, it is necessary to determine whether Ruiz's motion to reconsider tolled the time to appeal from the two underlying orders. Supreme Court Rule 5(a)(4) provides that a motion for reconsideration under Federal Rule of Civil Procedure 60 or Superior Court Rule 50 tolls the time for appealing the underlying final judgment or order if that motion is filed within ten days after entry of the underlying final judgment or order. Because the two earlier orders were entered on December 21, 2007, and the motion for reconsideration was filed on January 10, 2008, Ruiz's motion to reconsider did not toll the time to appeal the two earlier orders. To toll the appeal of the two orders, the motion to reconsider should have been filed on January 9, 2008,

one day earlier.[1] Accordingly, this Court lacks jurisdiction over Ruiz's appeal from the order denying her motion to modify custody and the order denying her motion for a TRO, and her appeal from those orders will be dismissed. *See Lucan Corp., Inc. v. Robert L. Merwin & Co., Inc.*, Civ. No. 2007-15, 2008 WL 901492, at *3 (V.I. Jan. 3, 2008) (unpublished) (dismissing appeal from underlying order because motion for reconsideration did not properly toll time to appeal).

In considering the denial of Ruiz's motion for reconsideration, the trial court's application of law is afforded plenary review, while findings of fact are reviewed only for clear error. *St. Thomas-St. John Bd. of Elections v. Daniel*, 49 V.I. 322, 329 (V.I. 2007). "The trial court's denial of [a] motion for reconsideration is generally subject to review for an abuse of discretion, except to the extent that the ruling was based on an interpretation and application of a legal precept, in which case our review is plenary." *In re Infant Sherman*, 49 V.I. 452, 456 (V.I. 2008); *see also Lucan Corp., Inc.*, 2008 WL 901492, at *2.

B. The Denial of the Motion for Reconsideration Was Not an Abuse of Discretion

On appeal, Ruiz argues that the court's failure to conduct a hearing before ruling upon her motion for a TRO and her motion to modify custody constitutes an error of law that warranted reconsideration of the two underlying orders. In particular, Ruiz argues in this Court that title 16, section 97(a) of the Virgin Islands Code mandates a hearing when allegations of sexual abuse by a relative are raised.

Before we determine whether the family court abused its discretion in denying Ruiz's

[1] Pursuant to Supreme Court Rule 16(b), intermediate holidays and weekends are not counted when a period of time is less than eleven days. However, administrative leave days, such as St. Croix's J'ouvert and Children's Parade Day, are not excluded from the computation of time. *See Clarke v. GERS*, Civ. No. 2008-001, 2008 WL 5432283, at *1 (V.I. Dec. 30, 2008); *see also* 1 V.I.C. § 171 (1995).

motion to reconsider, we must first establish the standard that governs the family court's consideration of Ruiz's motion to reconsider. Notably, the family court's order summarily denied the motion to reconsider without explanation. Thus, the basis for the family court's denial is wholly unclear, as is the standard which influenced the court's denial of the motion. Additionally, Ruiz's motion was not expressly brought pursuant to any rule of procedure nor does any language therein indicate the legal basis upon which the motion should be granted. We note, however, that even if Ruiz's motion had invoked a specific rule, the family court would not have been bound by such a label because "'[t]he function of the motion, not the caption, dictates which rule applies.'" *Lucan Corp., Inc.*, 2008 WL 901492, at *2 (quoting *Smith v. Evans*, 853 F.2d 155, 158 (3d Cir. 1988)).

In determining the appropriate standard that should have governed the family court's consideration of the motion to reconsider, we turn first to Superior Court Rule 50, which provides:

> For good cause shown, the court, upon application and notice to the adverse party, may set aside an entry of default, judgment by default or judgment after trial or hearing. *Rules 59 to 61, inclusive, of the Federal Rules of Civil Procedure shall govern such applications.*

Super. Ct. R. 50 (emphasis added); *see also Chavayez v. Buhler*, Civ. No. 2007-060, 2009 WL 1810914, at *2 (June 25, 2009) (unpublished). Thus, Superior Court Rule 50 explicitly incorporates Federal Rule of Civil Procedure 59(e), which governs motions to alter or amend a judgment, and Federal Rule of Civil Procedure 60(b), which governs motions for relief from a final judgment or order.

If a motion for reconsideration is brought within ten days of the order to be reconsidered, the motion is to be treated as a Federal Rule 59(e) motion to alter or amend judgment. If the

motion is brought after ten days, however, the trial court should consider the motion to reconsider as one brought pursuant to Federal Rule 60(b). *Compare Chavayez*, 2009 WL 1810914, at *2 (motion for reconsideration filed within ten days of entry of judgment considered a Rule 59(e) motion), *with Lucan Corp., Inc.*, 2008 WL 901492, at *3 (because motion for reconsideration filed sixteen days after entry of judgment, trial court should have considered it a Rule 60(b) motion). *Accord Ahmed v. Dragovich*, 297 F.3d 201, 209 (3d Cir. 2002) ("Where . . . the motion is filed outside of the ten days provided for under Rule 59(e) but within the year permitted under Rule 60(b), and the motion may be read to include grounds cognizable under the latter rule, we will consider it to have been filed as a Rule 60(b) motion.").

As explained above, Ruiz's motion to reconsider was not filed within ten days of entry of the two orders to be reconsidered. As a result, Ruiz's motion will be considered as a Rule 60(b) motion for relief from a final judgment or order if it "may be read to include grounds cognizable under [Rule 60(b).]" *See id.* While Ruiz appears to argue *on appeal* that the family court erred in failing to conduct a hearing as required by 16 V.I.C. §97(a) before denying her underlying motions, Ruiz failed to argue in her motion to reconsider that the family judge erred in failing to hold a hearing, nor did she reference 16 V.I.C. § 97(a)'s hearing provision or any other error of law. Instead, the motion to reconsider contains several clauses which recount the procedural history of the case, including that Ruiz's two underlying motions were denied by the family court and that the motion for a TRO in particular was denied because a medical examination of the minor did not reveal any evidence of sexual abuse. Two additional clauses assert that a social worker engaged by Ruiz examined the minor and "indicated [in an unsworn letter attached to the motion to reconsider] that because there is no physical evidence of molestation does not mean that it did not take place." (J.A. at 34-35.) Finally, the motion states that the family court must

consider the best interests of the minor. Thus, a review of the motion illustrates that Ruiz's motion to reconsider does not expressly raise the family court's failure to hold a hearing before denying her underlying motions. Importantly, it is a "well-established rule that absent compelling circumstances an appellate court will not consider issues that are raised for the first time on appeal." *Patterson v. Cuyler*, 729 F.2d 925, 929 (3d Cir. 1984).

Furthermore, it is evident that Ruiz's motion to reconsider cannot be read to include grounds cognizable under Federal Rule of Civil Procedure 60(b). Pursuant to Rule 60(b),

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
> (4) the judgment is void;
> (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
> (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b). To the extent that Ruiz's attached letter from Dr. Brinker might be construed as an attempt to seek reconsideration under Rule 60(b)(2), we fail to see how the social worker's statement or opinion could be considered newly discovered evidence. Nor can we discern any reason why Dr. Brinker's statement could not have been brought to the family court's attention at an earlier point in the proceedings through the exercise of reasonable diligence.

Additionally, some courts have held that a judge's legal error is grounds for reconsideration under Rule 60(b)(1)'s mistake provision under limited circumstances. *See, e.g.*, *Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 577 (10th Cir. 1996) ((“Rule 60(b) is not intended

to be a substitute for a direct appeal. Thus, as a general proposition, the 'mistake' provision in Rule 60(b)(1) provides for the reconsideration of judgments only where: (1) a party has made an excusable litigation mistake or an attorney in the litigation has acted without authority from a party, or (2) where the judge has made a substantive mistake of law or fact in the final judgment or order."); *U.S. v. Reyes*, 307 F.3d 451, 455 (6th Cir. 2002) ("[A] Rule 60(b)(1) motion is intended to provide relief in only two situations: (1) when a party has made an excusable mistake or an attorney has acted without authority, or (2) when the judge has made a substantive mistake of law or fact in the final judgment or order."). *But see Talano v. Nw. Med. Faculty Found., Inc.*, 273 F.3d 757, 762 (7th Cir. 2001 (holding that trial court's alleged mistakes of law were not grounds for Rule 60(b) relief).

Assuming without deciding that a judge's mistake of law may be grounds for reconsideration, we conclude that Rule 60(b)(1) could not provide relief in this case. Ruiz's motion to reconsider is exceptionally unclear as to which underlying motion Dr. Brinker's statement regarding the lack of physical evidence of molestation was meant to apply. Moreover, as stated above, Ruiz argues *in this Court* that title 16, section 97(a) required the family judge to conduct a hearing on her motion for a TRO, but Ruiz did not make such an argument *in the Superior Court* in her motion to reconsider nor does the motion even refer to title 16, section 97(a)'s hearing provision. Therefore, the motion to reconsider simply cannot be read to argue that the family judge committed any error of law in denying the underlying motions.

Finally, Rule 60(b)(6) similarly fails to provides cognizable grounds for relief in this case. In *Pridgen v. Shannon*, 380 F.3d 721, 728 (3d Cir. 2004), the Third Circuit Court of Appeals stated that:

> [l]egal error does not by itself warrant the application of Rule 60(b). . . . Since legal error can usually be corrected on appeal, that factor without more does not justify the granting of relief under Rule 60(b)(6). . . . [O]nly extraordinary, and special circumstances justify relief under Rule 60(b)(6).

(internal quotations omitted). First, as stated above, Ruiz's motion to reconsider does not argue that the family judge committed an error of law. Second, we do not discern, nor does Ruiz allege, any extraordinary or special circumstances that would have justified granting her relief under Rule 60(b)(6). Accordingly, as Ruiz's motion to reconsider cannot be read to include grounds cognizable under any of Rule 60(b)'s provisions, we hold that the family court's denial of the motion to reconsider was not an abuse of discretion.

III. CONCLUSION

Because Ruiz failed to toll the time to appeal from the family court's orders denying her motion for a TRO and her motion to modify custody, this Court lacks jurisdiction to consider Ruiz's appeal from those orders. Additionally, because Ruiz's motion to reconsider does not raise grounds cognizable under Federal Rule of Civil Procedure 60(b), the denial of the motion to reconsider was not an abuse of discretion. Accordingly, we dismiss Ruiz's appeal from the two December 21, 2007 orders, and we affirm the family court's February 8, 2008 order denying Ruiz's motion to reconsider.

Dated this 19th day of October, 2009.

FOR THE COURT:
_____/s/_____
RHYS S. HODGE
Chief Justice

ATTEST:
VERONICA J. HANDY, ESQ.
Clerk of the Court