For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

SHAKIMA ALICEA Appellant/Defendant, v. **RAYMOND MEYERS** Appellee/Plaintiff.	**S. Ct. Civ. No. 2019-0097** Re: Super. Ct. CS. No. 16/2001 (STX)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Croix
Superior Court Judge: Hon. Denise A. Hinds Roach

Argued: June 8, 2021
Filed: November 17, 2021

Cite as 2021 VI 21

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

APPEARANCES:

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Attorney for Appellant,

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OPINION OF THE COURT

HODGE, Chief Justice.

¶ 1 Appellant Shakima Alicea appeals from the Superior Court's March 25, 2019 opinion and order, which awarded custody of her minor child, R.K.M., to his father, Raymond Meyers. For the reasons that follow, we affirm.

I. BACKGROUND

¶ 2 Alicea and Meyers began a relationship in 2010, with Alicea giving birth to R.K.M. on January 22, 2013. After R.K.M.'s birth, the couple and their child initially lived together in Meyers's home along with Alicea's children from a prior relationship, but shortly thereafter moved into Alicea's home. Alicea and Meyers shared parenting responsibilities, including taking turns picking up or dropping off R.K.M. at daycare or at the home of Meyers's mother, who served as a caregiver.

¶ 3 The relationship began to deteriorate in 2014, when Meyers removed all his belongings from Alicea's home, and acrimony between the parents escalated in 2015. Ultimately, Meyers filed a petition with the Superior Court in January 2016 seeking physical custody of R.K.M. The Superior Court held three hearings, where it heard testimony from both parents and considered other evidence, including the results of a home study conducted by the Department of Human Services. During closing arguments at the final hearing, held on February 27, 2019, Alicea asked that the Superior Court interview R.K.M. *in camera*, but the Superior Court did not issue a ruling on that request.

¶ 4 On March 13, 2019, the Superior Court issued an opinion and order awarding physical custody of R.K.M. to Meyers, and subsequently issued an amended opinion and order on March 25, 2019, to correct a technical error. Alicea filed a document, captioned as a "Motion for Reconsideration," on April 12, 2019, which alleged that the Superior Court erred in its custody determination and further when it declined to interview R.K.M. *in camera* and failed to *sua sponte* appoint a guardian *ad litem* to represent his interests. The Superior Court did not issue a ruling on this motion until November 20, 2019, when it purported to deny it. Alicea filed a notice of appeal with this Court on December 17, 2019.

II. DISCUSSION

A. Jurisdiction and Standard of Review

¶ 5 "The Supreme Court [has] jurisdiction over all appeals arising from final judgments, final decrees or final orders of the Superior Court." 4 V.I.C. § 32(a); *see also* 48 U.S.C. § 1613a(d). "In custody proceedings, this means that a custody order is final . . . if it comes after a full adversarial hearing on the matter . . . and if it disposed of all the issues then presented to the trial court." *Malek v. Romano*, 70 V.I. 1033, 1041 (V.I. 2019). Because the Superior Court's March 25, 2019 opinion and order awarding custody to Mr. Meyers is a final order under section 32(a), this Court may exercise jurisdiction over this appeal.

¶ 6 This Court reviews a child custody award only for abuse of discretion. *Tutein v. Arteaga*, 60 V.I. 709, 721 (V.I. 2014). In applying this standard, we exercise plenary review over the Superior Court's legal holdings but review its findings of fact only for clear error. *Id.* (citing *Madir v. Daniel*, 53 V.I. 623, 634 (V.I. 2010)). Under a clear error review, this Court defers to the Superior Court "unless [its] determination either (1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supportive evidentiary data." *Bradford v. Cramer*, 54 V.I. 669, 673 (V.I. 2011) (quoting *St. Thomas–St. John Bd. of Elections v. Daniel*, 49 V.I. 322, 329 (V.I. 2007)).

B. Timeliness of Notice of Appeal

¶ 7 Although not raised by the parties, we acknowledge that Alicea failed to file a timely notice of appeal. Pursuant to Rule 5(a) of the Virgin Islands Rules of Appellate Procedure, a party must file the notice of appeal in a civil case "within 30 days after the date of entry of the judgment or order appealed from." V.I. R. APP. P. 5(a)(1). However, the rule further provides that

> If any party timely files in the Superior Court a motion for judgment as a matter of law; to amend findings or make additional findings; for a new trial; to alter or amend the judgment or order; or (if filed within 28 days) for relief from the judgment or order, the time for filing the notice of appeal for all parties is extended until 30 days after entry of an order disposing of the last such motion; provided, however, that the failure to dispose of any motion by order entered upon the record within 120 days after the date the motion was filed shall constitute a denial of the motion for purposes of appeal.

V.I. R. APP. P. 5(a)(4).

¶ 8 In this case, the Superior Court issued its final judgment on March 25, 2019. While Alicea filed a document captioned as a "Motion for Reconsideration" on April 12, 2019, a motion for reconsideration is not one of the motions identified in Appellate Rule 5(a)(4) as tolling the time to file a notice of appeal. *See Ruiz v. Jung*, S. Ct. Civ. No. 2008–0035, 2009 V.I. Supreme LEXIS 43, at *6 (V.I. Oct. 19, 2009) (unpublished) (declining to review underlying order denying motion to modify custody because filing of motion for reconsideration did not toll time to appeal those orders); *Lucan Corp., Inc. v. Robert L. Merwin & Co.*, S. Ct. Civ. No. 2007–0015, 2008 V.I. Supreme LEXIS 19, at *9 (V.I. Jan. 3, 2008) (unpublished) (dismissing appeal from underlying order because motion for reconsideration did not properly toll time to appeal). Nevertheless, while captioned as a "Motion for Reconsideration," Alicea's motion bears all the trappings of a motion for relief from the judgment arising under Rule 59(e) of the Virgin Islands Rules of Civil Procedure, which can toll the time for filing a notice of appeal. *See Joseph v. Bureau of Corrections*, 54 V.I. 644, 648 n.2 (V.I. 2011) ("[T]he substance of a motion, and not its caption, shall determine under which rule that motion is construed."). Therefore, Alicea's April 12, 2019 motion tolled the time for filing a notice of appeal from the March 25, 2019 opinion and order pursuant to Appellate Rule 5(a)(4).

¶ 9 Nevertheless, the timely filing of one of the motions identified in Appellate Rule 5(a)(4) only tolls the time for filing an appeal until 30 days after that motion is denied. Importantly, Appellate Rule 5(a)(4) expressly provides that such a motion shall be deemed denied for purposes of appeal if the Superior Court fails to dispose of it within 120 days of its filing. Because Alicea filed her motion on April 12, 2019, the Superior Court was required to issue its ruling on or before August 12, 2019,[1] failing which the motion would be deemed denied for purposes of appeal. Therefore, Alicea was required to file her notice of appeal on or before September 11, 2019, representing 30 days after the date her motion was deemed denied for purposes of appeal on August 12, 2019. *See Companion Assurance Co v. Smith*, 66 V.I. 562, 568 (V.I. 2017). Alicea, however, did not file her notice of appeal until more than three months after this deadline, on December 17, 2019. While Alicea filed her notice of appeal within 30 days of the Superior Court's November 20, 2019 order denying her motion, under this Court's precedents that order "was a nullity because the court did not have jurisdiction to rule after the 120-day tolling period had passed," and therefore its issuance could not resurrect or reinstate the time for Alicea to file a notice of appeal when that deadline had already long since passed. *Id.* at 570-71.

¶ 10 This Court has held that "the Court's timelines for filing [a notice of appeal] are case-processing rules and may, therefore, be waived by an opposing party's failure to object." *Gardiner v. Diaz*, 58 V.I. 199, 204 (V.I. 2013). But while Meyers did not move to dismiss this appeal as untimely, that is not the end of the matter, for we have also held that certain claims-processing rules may be invoked by the Court *sua sponte* notwithstanding a party's waiver "if the rule

[1] Although the last day of the 120-day period fell on August 10, 2019, that day was a Saturday, and thus the time for the Superior Court to act was automatically extended until the next business day. *See* V.I. R. APP. P. 16(b).

implicates judicial interests beyond those of the parties." *Simon v. Joseph*, 59 V.I. 611, 629 (V.I. 2013) (internal quotation marks omitted) (quoting *United States v. Mitchell*, 518 F.3d 740, 750 (10th Cir. 2008)).

¶ 11 Certainly, the time for filing of a notice of appeal implicates judicial interests beyond those of the individual parties to a case. This Court certainly has "administrative and institutional interests in enforcing appellate deadlines." *Long v. Atlantic City Police Dept.*, 670 F.3d 436, 445 n.18 (3d Cir. 2012). However, consideration of untimely appeals by this Court adversely affects the interests of the Superior Court—as well as society as a whole—by undermining the finality of Superior Court judgments, creating uncertainty and undue delay. *Mitchell*, 518 F.3d at 750. Therefore, although we reaffirm that the filing of a notice of appeal is not a jurisdictional requirement but a claims-processing rule, this does not preclude this Court from *sua sponte* dismissing an appeal as untimely. *Long*, 670 F.3d at 445 n.18.

¶ 12 Nevertheless, because the time to file a notice of appeal is a non-jurisdictional claims-processing rule, this Court is not mandated to dismiss all untimely appeals, since the timeliness requirement does not limit the authority of this Court to hear the case. *Public Employees Relation Bd. v. United Industrial Workers-Seafarers Int'l Union*, 56 V.I. 429, 434 (V.I. 2012). Rather, *sua sponte* invocation of the rule by this Court remains a pure matter of judicial discretion, which is guided by all relevant factors, including assessing the effect that accepting the untimely appeal would have on judicial resources and the administration of justice. *Mitchell*, 518 F.3d at 750.

¶ 13 Here, we conclude that considering this appeal on the merits would further, rather than undermine, the administration of justice and lead to more efficient use of judicial resources. This case has already been fully briefed and the parties presented oral argument. As such, the effect on this Court by issuing a decision on the merits at this advanced stage of the proceedings is minimal

and dismissing this appeal as untimely now would save little—if any—of this Court's judicial resources.

¶ 14 More significantly, however, is that this appeal is from a decision awarding custody of a child. Unlike ordinary civil cases, where entry of a final judgment terminates the Superior Court's jurisdiction over the case except for certain collateral matters, the Superior Court maintains, with limited exceptions not implicated here, "exclusive, continuing jurisdiction" over child custody determinations. *See* 16 V.I.C. § 128. Consequently, adjudication of this appeal would not adversely impact finality of the Superior Court's March 25, 2019 opinion and order, since nothing precludes Alicea from filing an appropriate motion to modify the custody arrangement.

¶ 15 Perhaps most importantly, the paramount purpose of a child custody proceeding is not to adjudicate and resolve the personal interests of the parents, but to determine the best interests of the child. *Madir*, 53 V.I. at 631-32. Here, the gravamen of Alicea's appeal is that the Superior Court awarded custody to Meyers contrary to the best interests of R.K.M. If Alicea is correct that the Superior Court made a custody determination contrary to the best interests of the child, and this Court were to dismiss the appeal as untimely, the ultimate effect of our decision would be to elevate "relatively less important procedural rules" over "[t]he best interests of the minor child[]." *Times Pub. Co. v. A.J.*, 626 So.2d 1314, 1316 n.5 (Fla. 1993). Thus, as the Texas Court of Appeals explained in a similar case, we agree that

> [T]he ordinary rules . . . should not be applied rigidly in child custody proceedings. In such cases the children are the primary parties in interest . . . . Counsel for the contending parents cannot always be relied upon to protect the interests of the children because the parents often attempt to promote their own interests and vindicate their own asserted rights rather than to protect the children's interests. Consequently, the court's duty to protect the children's interests should not be limited by technical rules.

C. v. C., 534 S.W.2d 359, 361 (Tex. App. 1976) (internal citations omitted).

¶ 16 For these reasons, we decline to exercise our discretion to dismiss Alicea's appeal as untimely. We caution, however, that our decision to permit this appeal to proceed does not grant the parties in child custody matters an unrestricted license to file a notice of appeal at any time or to otherwise ignore the rules of this Court or the Superior Court. Had Meyers not waived the issue but instead requested that this Court dismiss this appeal as untimely at the first opportunity, this Court would have likely done so, notwithstanding any other considerations. *See Companion Assurance Co.*, 66 V.I. at 567-68. And had this Court recognized at an earlier stage of the proceeding that Alicea filed an untimely notice of appeal, *sua sponte* dismissal of this appeal as untimely may very well have been warranted since the effect on judicial resources would have been far greater. *See Peters v. People*, 60 V.I. 479, 485 (V.I. 2014). Parties, as well as their attorneys, who flout the rules of the courts of the Virgin Islands—even out of ignorance of what the rules require—do so at their own risk.

C. The Custody Award

¶ 17 It is well-established that Virgin Islands law requires that the courts of the Virgin Islands resolve custody disputes according to the best interests of the child. *Madir*, 53 V.I. at 632. In evaluating the best interests of a child,

> the Superior Court must consider, if relevant, at least the following factors: (1) the respective home environments of each parent, including the degree to which relocation between those respective environments will impact the child's best interests; (2) the ability of each parent to nurture the child, including the degree to which each parent has acted as a primary caretaker; (3) any evidence of domestic violence, sexual violence, child abuse, or child neglect; (4) the interaction and interrelationship of the child with his or her parent or parents, his or her siblings, and any other person who may significantly affect his or her best interests; and (5) any recommendation by a court appointed guardian *ad litem*.

James v. Faust, 65 V.I. 349, 361-62 (V.I. 2016) (citations omitted). "[These factors] prioritize the needs and welfare of the child and are also likely to produce results that achieve the greatest fairness between the parents." *Id.* at 361. However, these factors are not exhaustive, and the Superior Court may consider additional factors relevant to the child's best interest in each case before it. *Id.* at 363.

¶ 18 Here, the Superior Court made factual findings with respect to four of these factors: the home environments of each parent, the ability of each parent to nurture the child, evidence of abuse, and the inter-relationship between the parents, the child, and siblings. The Superior Court found both environments adequate, determined that there was no evidence of abuse,[2] and that R.K.M. enjoyed good relationships with both parents and his siblings on both sides. Thus, the Superior Court held that those three factors did not favor either parent. However, the Superior Court held that Meyers had demonstrated a greater ability and willingness to nurture R.K.M., and therefore determined that the factors, when weighed together, favored granting him physical custody. On appeal, Alicea argues that the Superior Court erred when it held that Meyers was more able and willing to nurture R.K.M. and failed to give any weight to the fact that she had been R.K.M.'s primary caretaker before Meyers filed his motion for custody.[3]

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[2] Although Alicea does not challenge the Superior Court's finding of no abuse, we acknowledge that the record reflects that Alicea had filed a police report against Meyers and had testified that Meyers had allegedly raped her two times, but she elected not to file a complaint. We reiterate that "any evidence of domestic violence, sexual violence, child abuse, or child neglect" is a relevant consideration in determining custody of a child. *James*, 65 V.I. at 361-62. Nevertheless, given that Meyers actively disputed these allegations, the complete absence of any corroborating evidence, and that Alicea has effectively abandoned them on appeal, we decline to *sua sponte* determine whether the Superior Court erred in making this factual finding.

[3] Alicea also argues that the Superior Court failed to acknowledge or evaluate the presence of Meyers's father in his household in evaluating R.K.M.'s relationship with his parents and other family members. While Alicea is correct that the Superior Court did not expressly state that

¶ 19 We conclude that the Superior Court did not abuse its discretion. The Superior Court determined that Meyers possessed a greater ability and willingness to nurture R.K.M. because he had turned down overtime shifts to accommodate R.K.M.'s schedule and otherwise structured his work schedule to maximize his time with R.K.M., had enrolled R.K.M. in extracurricular activities such as baseball, and implemented enrichment activities like vacation travel to the mainland United States. While Alicea contends that Meyers's time sheets reflect that he worked overtime on most days from 2015 to 2018, that Meyers worked some overtime is not inconsistent with the Superior Court's finding that Meyers had turned down overtime shifts to accommodate his son's schedule. In fact, the time sheets themselves show that Meyers decreased his overtime hours during this period. And while Alicea maintains that the Superior Court gave undue weight to the fact that Meyers enrolled R.K.M. in extracurricular and enrichment activities because all those activities occurred after Meyers had filed his custody petition, Alicea ignores that the relevant inquiry is ultimately to ascertain the best interests of R.K.M. *Madir*, 53 V.I. at 632. Every other court to consider the question has recognized that to determine the best interests of a child, a court must take into consideration all evidence, regardless of whether it involves events that occurred before or after the filing of the custody petition. *See, e.g.*, *Kramer v. Kramer*, 738 P.2d 624, 627 n.3 (Utah 1987); *Westrate v. Westrate*, No. 86-0934, 1987 WL 267110, at *1 (Wis. Ct. App. Mar. 24, 1987) (unpublished); *In re Ballard*, 319 S.E.2d 227, 232-33 (N.C. 1984). Therefore, the Superior Court

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R.K.M. possessed a good relationship with Meyers's father, the Superior Court expressly found earlier in its March 25, 2019 opinion that Meyers's father resided in the household with R.K.M. and Meyers, and that the home study report produced by the Department of Human Services reflected that that both parents' homes were suitable environments for R.K.M. Since it is clear that the Superior Court knew that Meyers's father resided with Meyers and R.K.M., and yet nevertheless found Meyers's home environment adequately suited, the Superior Court's failure to expressly state on the record that the presence of Meyers's father in the home did not adversely affect R.K.M. is harmless. *See* V.I. R. APP. P. 4(i).

committed no error when it weighed these factors.

¶ 20 Likewise, the Superior Court did not abuse its discretion by failing to consider, as an additional factor, that Alicea had served as R.K.M.'s primary caregiver. The reason the Superior Court did not do so is clear: the uncontradicted evidence in the record established that Alicea was not R.K.M.'s primary caregiver. While the parties disputed at what point R.K.M. stopped living with Alicea—with Meyers maintaining that this occurred in early 2015, while Alicea contends this occurred in 2016—it is uncontradicted that, at an absolute minimum, R.K.M. lived with Meyers for the three years immediately preceding the Superior Court's custody determination. Moreover, even during the period between 2015 and 2016 where the parties' dispute where R.K.M. resided, the uncontradicted evidence reflects that Meyers had managed many of R.K.M.'s most significant activities without Alicea's assistance or input, including selecting his school without Alicea's input, exclusively helping him with his homework without Alicea's involvement, and taking him to the doctor without Alicea's assistance. Accordingly, the Superior Court committed no error when it failed to credit Alicea as R.K.M.'s primary caregiver, and consequently did not abuse its discretion when it awarded custody to Meyers.[4]

D. Guardian *Ad Litem*

¶ 21 Alicea further argues that the Superior Court erred in not appointing a guardian *ad litem* for R.K.M. Rule 10(b) of the Virgin Islands Rules of Family Division Procedure authorizes the Superior Court, by request of a party or *sua sponte*, to appoint a guardian *ad litem* to represent the

[4] Alicea also contends in her brief that the Superior Court awarded custody to Meyers because he purportedly had not had the opportunity to serve as R.K.M.'s primary caregiver before. *See James*, 65 V.I. at 357-58. However, the record contains absolutely no indication that the Superior Court awarded custody to Meyers on any basis other than what it determined was in the best interests of R.K.M.

interests of the child. Rule 10(b) codifies the inherent authority of the Superior Court to appoint a guardian ad litem to "ensure[] that the court will be able to make its decision based on complete, objective information that may otherwise have been unavailable to the court." *Tutein*, 60 V.I. at 718.

¶ 22 In this case, neither Alicea nor Meyers ever requested that the Superior Court appoint a guardian *ad litem* prior to issuance of the March 25, 2019 opinion and order. Rather, Alicea only argued that the Superior Court should have appointed a guardian *ad litem* for the first time in her April 12, 2019 motion for reconsideration. Yet this Court has already held that requests to appoint a guardian *ad litem* which are made for the first time in a post-judgment motion are waived. *In re Sherman*, 49 V.I. 452, 458 (V.I. 2008) (collecting cases). This is because post-judgment motions are not intended to serve as "a second bite of the apple," *id.* at 457, and making such a request for the first time in a post-judgment motion after the Superior Court has already held a full hearing and issued its ruling does not fairly present the issue to the Superior Court. *See* V.I. R. APP. P. 4(h). And while the Superior Court nevertheless retains the discretion to appoint a guardian ad litem *sua sponte*, *see* V.I. R. FAM. P. 10(b), it is certainly not required to do so, particularly in a case such as this one where the Department of Human Services has already conducted a home study and the record contains no specific allegations that either of the parents had placed R.K.M.'s welfare at risk. Therefore, we conclude that this issue has been waived due to Alicea's failure to move for appointment of a guardian *ad litem* at any time prior to her post-judgment motion, and that the Superior Court nevertheless did not abuse its discretion when it failed to appoint a guardian ad litem *sua sponte*.[5]

[5] Although we conclude in this case that the Superior Court did not abuse its considerable discretion when it failed to *sua sponte* appoint a guardian *ad litem* to represent R.K.M., we

E. *In Camera* Interview

¶ 23 Finally, Alicea argues that the Superior Court abused its discretion when it failed to conduct an *in camera* interview of R.K.M. However, the record reflects that Alicea did not request an *in camera* interview before or during the hearing, but did so for the first time during closing arguments. It is well-established that challenges to conduct which occurred at trial, made for the first time at closing arguments, are waived, since raising the issue for the first time only after the close of evidence deprives the court of a meaningful opportunity to address the issue. *See, e.g.*, *Commonwealth v. Auciello*, No. 3507EDA2019, 2020 WL 7233159, at *5 (Pa. Super. Ct. Dec. 8, 2020) (unpublished); *In re Adoption of E.N.R.*, 42 S.W.3d 26, 31 (Tenn. 2001). Consequently, because this issue was never fairly presented to the Superior Court, it has been waived for purposes of appeal. *See* V.I. R. APP. P. 4(h).

III. CONCLUSION

¶ 24 The Superior Court committed no error when, after weighing all relevant factors, it concluded that it was in the best interests of R.K.M. to award physical custody to Meyers. And

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emphasize that it is the better practice—even with the availability of a Department of Human Services home study report—to make such an appointment. As we previously explained,

> a guardian *ad litem* can serve as a buffer against the potentially biased interests of the parents and ensure that the child's best interests receive the appropriate attention. Such a role is particularly helpful to a court when the parents have demonstrated a pattern of adversarial behavior or when there are concerns about whether all relevant information will be brought to the court's attention.

Tutein, 60 V.I. at 718. Moreover, appointment of a guardian *ad litem* to provide the court with disinterested guidance may be especially useful in a case such as this where the parties have taken opposite positions, yet the Superior Court has found that nearly all the factors weigh equally in favor of both parents.

because Alicea failed to fairly present her other claims to the Superior Court, those issues are waived for purposes of appeal. Accordingly, we affirm the Superior Court's March 25, 2019 opinion and order.

Dated this 18th day of November, 2021.

BY THE COURT:

/s/ Rhys S. Hodge
RHYS S. HODGE
Chief Justice

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court

By: /s/ Reisha Corneiro
Deputy Clerk

Dated: November 18, 2021