For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

SHEENA JAMES, Appellant/Defendant, v. **GEORGE G. O'REILLY III,** Appellee/Plaintiff.	))))))))	**S. Ct. Civ. No. 2018-0001** Re: Super. Ct. Civ. No. 009/2016 (STX)

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

Argued: March 12, 2019
Filed: May 1, 2019

Cite as: 2019 VI 14

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

APPEARANCES:

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OPINION OF THE COURT

HODGE, **Chief Justice**.

¶ 1 Sheena James appeals from the Superior Court's December 29, 2017 order granting interim custody of her minor son to George G. O'Reilly III, as well as its January 31, 2018 order denying her motions for change of venue and judicial recusal and directing her to pay O'Reilly's attorney's

fees. For the reasons below, we vacate those orders, as well as all other orders entered on or after June 16, 2016.

I. BACKGROUND

¶ 2 On March 23, 2016, O'Reilly petitioned for visitation of his minor child in the St. Croix District of the Superior Court of the Virgin Islands. Although the matter was initially assigned to Judge Denise Hinds-Roach in the Family Division of St. Croix District, Judge Hinds-Roach (hereafter the "St. Croix Family Judge") entered an April 4, 2016 order recusing herself from the case pursuant to 4 V.I.C. § 284(4) because O'Reilly was employed as a Superior Court Marshal in the District of St. Croix.

¶ 3 After the St. Croix Family Judge recused herself, the case was transferred to the District of St. Thomas & St. John in accordance with Superior Court Rule 17 and it was assigned to Judge Debra Watlington (hereafter the "St. Thomas Family Judge"). However, before any substantive action occurred, O'Reilly filed a letter on June 13, 2016, which stated that he had resigned his position as a marshal and requested that the matter be re-transferred to the District of St. Croix. Construing the letter as a motion, the St. Thomas Family Judge signed a June 16, 2016 order granting the motion and re-transferring the case to St. Croix. Notwithstanding her recusal, the matter was reassigned to the St. Croix Family Judge, who shortly thereafter began to issue orders and schedule hearings in the case.

¶ 4 On July 19, 2016, the Superior Court entered an order legally establishing O'Reilly's paternity of the minor son. Although the court scheduled a hearing on the visitation petition for January 10, 2017, when O'Reilly failed to appear, it continued the matter until February 14, 2017. After the February 14, 2017 hearing, O'Reilly moved for the St. Croix Family Judge to again recuse herself. On February 21, 2017, the St. Croix Family Judge entered an initial visitation order,

and on February 24, 2017 entered an order holding him in contempt for failing to appear at the February 14, 2017 hearing and denying his motion for her recusal. A further order was entered on August 14, 2017, which specified further visitation procedures and ordered that "if either parent travels off-island with the minor child the non-traveling parent shall be notified in advance." (J.A. 8.)

¶ 5 In September 2017, Hurricanes Irma and Maria made landfall in the Virgin Islands as category-5 hurricanes, resulting in significant damage to the Territory and the declaration of a prolonged state of emergency. On October 26, 2017, O'Reilly filed a motion stating that James had violated the visitation order by sending their minor son to live with a non-family member in Maryland without his knowledge or consent and requesting that the Superior Court effectuate the return of the minor son to St. Croix and award him temporary custody. Shortly thereafter, on October 30, 2017, the Superior Court issued an order that directed James to respond to the motion and set a hearing for November 27, 2017.

¶ 6 The St. Croix Family Judge presided over the November 27, 2017 hearing, in which James appeared *pro se* while O'Reilly appeared with counsel. At the start of the hearing, the St. Croix Family Judge stated that "[t]his matter is a show cause hearing." (J.A. 112.) After hearing testimony from both parties, the St. Croix Family Judge found that James had violated the visitation order and ordered that the child return to the Virgin Islands. The St. Croix Family Judge further stated that although "I was of the mind to hold you, Ms. James, in contempt," she would instead "hold [James] responsible for the attorney's fees generated . . . in order to prepare for and to actually have this hearing take place." (J.A. 237.) The St. Croix Family Judge subsequently memorialized these rulings in writing in a December 4, 2017 order.

¶ 7 A follow-up hearing was then set for December 8, 2017. James retained counsel on

December 5, 2017. The next day, James, through her counsel, moved for a continuance of the December 8, 2017 hearing so that her counsel would have adequate time to obtain and review the transcript of the November 27, 2017 hearing. However, the court denied the motion in a December 7, 2017 order.

¶ 8 The St. Croix Family Judge again presided over the December 8, 2017 hearing. When the hearing began, James's counsel announced that she had filed a motion for recusal and change of venue earlier that morning. She also stated that she objected to the procedure employed at the November 27, 2017 hearing, in that the matter came on for a hearing due to a motion for temporary custody and no prior notice had been provided that the court was contemplating imposing sanctions. The St. Croix Family Judge orally denied this motion, and also denied James's renewed motion to continue the hearing. Ultimately, the St. Croix Family Judge ordered that O'Reilly receive temporary custody of the child pending the outcome of a third hearing to take place on December 20, 2017, on the issue of "interim custody." (J.A. 258.)

¶ 9 After the December 8, 2017 hearing, James moved to set aside the November 27, 2017 hearing and vacate all related matters, again on the grounds that she was never put on notice that she would have to show cause or could potentially be subject to sanctions. However, the St. Croix Family Judge did not rule on this motion before the third hearing occurred on December 20, 2017. After hearing testimony from the parties and multiple witnesses, the court took the matter under advisement, and the St. Croix Family Judge subsequently issued a December 29, 2017 order granting "interim custody" of the minor child to O'Reilly. (J.A. 74.) On January 31, 2017, the St. Croix Family Judge issued a written order that denied all of James's pending motions, including the motions for recusal, change of venue, and to set aside the November 27, 2017 hearing. James timely filed a notice of appeal of the December 29, 2017 order on January 4, 2018 and filed a

second notice of appeal of the January 31, 2018 order on February 8, 2018. *See* V.I. R. APP. P. 5(a)(1).

II. DISCUSSION

A. Jurisdiction

¶ 10 "Ordinarily, this Court may only hear an appeal from a final judgment, which is 'one that ends the litigation on the merits and leaves nothing to do but execute the judgment.'" *In re Holcombe*, 63 V.I. 800, 815 (V.I. 2015) (quoting *Rojas v. Two/Morrow Ideas Enters., Inc.*, 53 V.I. 684, 691 (V.I. 2010)); *see also* 4 V.I.C. § 32 (a) ("The Supreme Court shall have jurisdiction over all appeals arising from final judgments, final decrees or final orders of the Superior Court, or as otherwise provided by law."). The final judgment rule requires litigants to save all their claims of error and raise them in a single appeal after the Superior Court issues a final judgment. *See Enrietto v. Rogers Townsend & Thomas PC*, 49 V.I. 311, 315 (V.I. 2007). In her appellate brief, James identifies the December 29, 2017 custody order as a final judgment. However, O'Reilly argues that a final judgment does not exist in this case because the matters addressed in the January 31, 2018 order are normally non-appealable absent a final judgment, and the Superior Court styled its December 29, 2017 order as an award of "interim" custody and the matters resolved.

¶ 11 We conclude that we have jurisdiction over this appeal. O'Reilly is correct that this Court has previously characterized orders awarding temporary or interim custody as interlocutory, non-appealable orders. *See Ali v. Hay*, 2019 VI 1, ¶ ¶ 9-11; *Bryant v. People* 53 V.I. 395, 406 (V.I. 2010). But, more importantly, this Court has also held that "[t]he determination of whether a particular order is appealable rests on its content and substance, not its form or title." *Simpson v. Board of Directors of Sapphire Bay Condominiums West* 62 V.I. 728, 730 (V.I. 2015) (citing *In re People*, 51 V.I. 374, 383 (V.I. 2009)); *accord, Island Tile & Marble, LLC v. Bertrand*, 57 V.I. 596,

611-612 (V.I. 2012) ("[T]his Court has repeatedly held "that the substance of a motion, and not its caption, shall determine under which rule that motion is construed."). Significantly, a temporary or interim custody order may transform into a final order if certain indicia of finality are present, such as the order remaining in place for a significant period with no attempt to adjudicate the issue of permanent custody. *Ali*, 2019 VI 1 at ¶11; *Bryant,* 53 V.I. at 405; *see also Brewer v. Brewer*, 533 S.E.2d 541, 546 (N.C. App. 2000) ("The trial court's mere designation of an order as 'temporary' is not sufficient to make the order interlocutory and nonappealable.").

¶ 12 In contrast to the temporary custody orders found non-appealable in *Ali* and *Bryant*, the Superior Court's December 29, 2017 order in this case does bear significant indicia of finality. Unlike the temporary custody orders at issue in *Ali* and *Bryant*, the December 29, 2017 order does not provide for an expiration date or set a date for a future hearing, and the Superior Court has in fact not taken any action in the underlying matter for more than one year.[1] *See Brewer*, 533 S.E.2d at 546 (holding that a "temporary" custody order that remains in place for a year with no further judicial action constituted a final judgment). Moreover, unlike the circumstances presented in *Ali*, the December 29, 2017 order in the present matter was not entered after an *ex parte* hearing or other proceeding that by its very nature contemplates a future hearing, but after a full evidentiary hearing occurring more than a year after the matter was first initiated, a hearing in which all parties were represented by counsel and were able to present evidence and had an opportunity to be heard. Looking at the context, therefore, the December 29, 2017 order resembles—in every way other

[1] The record reflects that O'Reilly sued James for full custody on December 5, 2017, in a separate case docketed as Super. Ct. CS. No. 01/2017. That O'Reilly apparently elected to pursue full custody as part of a different case may explain why no further custody hearings occurred in this case and is a further indication that the December 29, 2017 and January 31, 2018 orders serve as final orders.

than the "interim" designation—"a complete resolution of the custody claims pending between the parties." Kurtis A. Kemper, Annotation, *Appealability of Interlocutory or Pendente Lite Order for Temporary Child Custody* 82 A.L.R. 5th 389, §2(b) (2000). That the Superior Court further ordered James to pay O'Reilly's attorney's fees as part of its January 31, 2018 order pursuant to 5 V.I.C. § 541(b)—a statute that by its own terms only authorizes "the prevailing party in the judgment" to receive such an award—further demonstrates that the Superior Court intended for its December 29, 2017 order to completely resolve the issue of custody in this action. Consequently, we determine that we possess jurisdiction over this appeal.

B. Change of Venue

¶ 13 Pursuant to statute, "[a]ll civil actions shall be initiated in the judicial division where the defendant resides or where the cause of action arose or where the defendant may be served with process." 4 V.I.C. § 78(a). Because James resided in St. Croix, venue was proper in the District of St. Croix at the time O'Reilly filed his petition. However, venue is not immutable, for the venue statute further provides that the Superior Court may "transfer any action or proceeding pending in one judicial division to the other judicial division for hearing and determination" if "[f]or the convenience or parties and witnesses" or "in the interest of justice." 4 V.I.C. § 78(b).

¶ 14 In accordance with the "interest of justice" provision of section 78(b), Superior Court Rule 17 states that "[i]n any case in which a judge or Court employee from one judicial district is a party, a judge from the other district may be assigned to hear and determine the matter, except in uncontested matters."[2] The clear purpose of Superior Court Rule 17 is to implement the provisions

[2] Although section 78(b) refers to a transfer from a judicial "division" while Superior Court Rule 17 refers to transfers from one judicial "district," it appears that the terms "division" and "district" are being used synonymously in this context.

of Rule 2.11 of the Virgin Islands Code of Judicial Conduct and its predecessor—requiring recusal or disqualification[3] "in any proceeding in which the judge's impartiality might reasonably be questioned"—and the judicial disqualification statute, which provides that a judge shall not preside over a matter "[w]hen it is made to appear probable that, by reason of bias or prejudice of such judge, a fair and impartial trial cannot be had before him." 4 V.I.C. § 284(4). In effect, Superior Court Rule 17 presupposes that one may reasonably perceive that a judge may favor a co-worker, and that the interests of justice are therefore served by re-assigning the case to the other judicial district.[4] *See Taylor v. State*, 789 So.2d 787, 798 (Miss. 2001) (characterizing the prospect of a judge presiding over a matter in which a court employee testified as a witness as "troubling"); *In re Nugent*, 546 N.E.2d 927, 927 (Ohio 1987) (ordering disqualification of all judges in a county court when victim's uncle, father, and mother are court employees "to avoid even the appearance of any prejudice or partiality and to insure the public's confidence in the integrity of the judicial system").

¶ 15 But while Superior Court Rule 17 authorizes such a re-assignment when a court employee

[3] "While in modern practice 'disqualification' and 'recusal' are frequently viewed as synonyms, and employed interchangeably, they are different," for "[r]ecusal refers to a judge or justice deciding to 'stand down voluntarily,' while disqualification refers to instances 'involving the statutorily or constitutionally mandated removal of a judge [or justice] upon the request of a moving party or its counsel." *People v. de Jongh*, 64 V.I. 53, 68 (V.I. Super. Ct. 2016) (quoting Flamm, *Judicial Disqualification* § 1.1). Nevertheless, as a practical matter in this case, this is a distinction without significance, since the ultimate legal standard remains the same.

[4] Although Superior Court Rule 17 only provides for the assignment of a judge from the other judicial district—which could theoretically be accomplished without changing the venue of the case—the April 4, 2016 notice of re-assignment entered after the St. Croix Family Judge recused herself states that the case is being "transferred" to the District of St. Thomas-St. John, (J.A. 18), and the June 15, 2016 order signed by the St. Thomas Family Judge which granted O'Reilly's June 13, 2016 motion ordered "that the above captioned matter be transferred back to the Division of St. Croix." (J.A. 23.)

is a party to a case, there is no statute or court rule that permits or requires that venue be changed back to the original judicial district if the party resigns his employment with the court. The omission of such a statute or rule is not surprising. To the extent it is permissible to presume—as Superior Court Rule 17 does—that all the judges assigned to a judicial district may be perceived to treat a co-worker who appears before them differently than another litigant, the resignation of the employee during the pendency of that proceeding would not necessarily negate the potential appearance of bias, since it is apparent that the termination of employment, standing alone, will not necessarily eliminate the perception of bias or prejudice involving a former co-worker. *See, e.g., United States v. Hollister*, 746 F.2d 420, 425 (8th Cir. 1984) ("We do, however, endorse the principle that a certain insulation period should pass before a judge sits on a case in which his or her former law clerk acts as counsel"); V.I. CODE OF JUD. COND. 2.11(A)(6)(a) (requiring judicial recusal if the judge "was associated with a lawyer who participated substantially as a lawyer in the matter during such association," even if the judge did not serve as a lawyer in the matter). And even if the relationship between the now-former employee and the judges of the judicial district would not rise to the level of recusal or disqualification, the fact that the matter was already transferred and assigned to a judge in the other judicial district implicates Rule 2.7 of the Virgin Islands Code of Judicial Conduct, which requires a judge to hear and decide all matters assigned to him or her except when disqualification is required.

¶ 16 This does not mean that a case can never be re-transferred after it has already been transferred pursuant to Superior Court Rule 17. Rather, where venue has been transferred from one judicial district to another pursuant to Superior Court Rule 17, and a party then seeks to re-transfer the case back to the original judicial district, the court must proceed in accordance with the change of venue statute. That is, the court may re-transfer the matter to the original judicial

district "[f]or the convenience or parties and witnesses" or "in the interest of justice." 4 V.I.C. § 78(b).

¶ 17 In this case, the St. Thomas Family Judge did not follow this procedure when she granted O'Reilly's motion. The record reflects that O'Reilly filed his motion for change of venue on June 13, 2016, and the St. Thomas Family Judge granted the motion and ordered the transfer of the case to the District of St. Croix three days later, on June 16, 2016. But pursuant to the procedural rules applicable to the Superior Court at the time, James was entitled to fourteen days in which to file an opposition to O'Reilly's motion.[5] This Court has repeatedly and consistently held that the right to due process encompasses the right to be heard, which includes the right to present an objection within the full time permitted by law. *See, e.g.*, *Miller v. Sorenson*, 67 V.I. 861, 869 (V.I. 2017); *Mustafa v. Camacho*, 59 V.I. 566, 571 n.3 (V.I. 2013); *Browne v. Gore*, 57 V.I. 445, 452-53 (V.I. 2012); *Mendez v. Gov't of the V.I.*, 56 V.I. 194, 205 (V.I. 2012); *Henry v. Dennery*, 55 V.I. 986 (V.I. 2011); *Gore v. Tilden*, 50 V.I. 233, 239 (V.I. 2008). By ruling on O'Reilly's motion for change of venue three days after it was filed—without the benefit of a response from James or waiting for the time to respond to expire—the Superior Court violated James's due process rights, which in and of itself is reversible error.[6]

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[5] At the time O'Reilly filed his motion, the time for a party to respond to a motion was governed by United States District Court Local Rule of Civil Procedure 7.1(e)(1), which was made applicable to proceedings in the Superior Court through then-Superior Court Rule 7. That rule provided that "[a] party shall file a response within fourteen (14) days after service of the motion." LRCi 7.1(e)(1). Although Superior Court Rule 7 has since been repealed, this Court applies on appeal the procedural rules that existed at the time the matter was pending in the Superior Court. *See Blyden v. People*, 53 V.I. 637, 659 n.15 (V.I. 2010).

[6] Because the St. Thomas Family Judge ruled on O'Reilly's motion three days after it was filed, without providing James with the full time to which she was entitled to respond, we reject O'Reilly's claim that James waived the change of venue through her failure to object. Moreover, James was under no obligation to file a motion to reconsider the change of venue decision in order

¶ 18 But even if we were to overlook that the Superior Court's precipitous granting of James's motion without providing O'Reilly with a right to be heard on the matter, the Superior Court still committed error. As noted above, section 78(b) authorizes a change of venue only "[f]or the convenience of parties and witnesses" or if it is "in the interest of justice." But the June 16, 2016 order does not discuss—or even mention—either of these factors. Rather, the order simply states that O'Reilly had requested a transfer because he is no longer a court employee, and then proceeds to grant the motion and order the transfer without any further analysis. *See Daley-Jeffers v. Graham*, ___ V.I. ___, S. Ct. Civ. 2017-0011, 2018 WL 6047703, at *3 (V.I. 2018) ("We have consistently held that when a Superior Court order fails to provide sufficient analysis from which this Court may engage in meaningful appellate review, we should automatically reverse."); *see also In re Q.G.*, 60 V.I. 654, 664 (V.I. 2014). In other words, rather than performing the analysis section 78(b) requires, it appears the Superior Court may have erroneously believed that a Superior Court Rule 17 transfer could simply be undone.[7] But as explained above, the resignation of the employee during the pendency of that proceeding will not necessarily negate the potential

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to preserve this issue for review. *See Algodonera De Las Cabezas, S.A. v. American Suisse Capital, Inc.*, 432 F.3d 1343, 1345 (11th Cir. 2005) ("While the district court opined that Algodonera's motion for reconsideration gave it the opportunity to present its position on venue, that opportunity came only after the district court had dismissed the case [for improper venue] and ordered the clerk of court to close it. This does not satisfy [the] command that the parties be given an opportunity to present their views . . . .").

[7] We note that section 78(b) requires that the transfer of an action from one judicial division to another must be done "with the approval of the presiding judge of such court." This is consistent with title 4, section 72b of the Virgin Islands Code, which vests the Presiding Judge of the Superior Court with responsibility for dividing the caseloads of the judges of that court. 4 V.I.C. § 72b(a). Although the record does not reflect that the Presiding Judge approved the June 16, 2016 transfer order, we presume—absent evidence to the contrary—that the Office of the Clerk of the Superior Court, in effectuating the re-assignment, is acting pursuant to case assignment policies adopted by the Presiding Judge. *See Vanterpool v. Gov't of the V.I.*, 63 V.I. 563, 574 n. 4 (V.I. 2015).

appearance of bias that Superior Court Rule 17 was adopted to mitigate against; in other words, while current employment with the court may justify a change of venue under Superior Court Rule 17, there is no legal authority to support the opposite. Therefore, the Superior Court erred when it granted O'Reilly's motion for change of venue, and we therefore vacate the June 16, 2016 order, as well as all subsequent orders entered in the case, and remand the matter for the St. Thomas Family Judge to preside over the case. Because the vacated orders include the February 21, 2017 visitation order, the August 14, 2017 visitation order, and the December 29, 2017 order granting O'Reilly interim custody, we direct that the St. Thomas Family Judge immediately enter a new interim order to address both visitation and child custody after providing both parties with the right to be heard on those issues. To the extent O'Reilly wishes to move for a re-transfer of venue back to St. Croix, he shall file a renewed motion, which the St. Thomas Family Judge shall consider under the correct legal standard after providing James with the opportunity to oppose the motion.[8]

C. Judicial Recusal

¶ 19 Under ordinary circumstances, having concluded that the St. Thomas Family Judge erred in granting the motion to transfer the case back to the District of St. Croix, it would not be necessary for us to reach the issue of whether the St. Croix Family Judge properly denied James's motion for her recusal. However, given the connection of the parties and their minor child to St. Croix, there

[8] Ordinarily, this Court would direct the St. Thomas Family Judge to rule on the original motion for re-transfer that O'Reilly filed on June 13, 2016. However, the sole ground for a transfer to St. Croix given in that *pro se* motion was the fact that O'Reilly had resigned from his position—a ground which this Court has now held was insufficient, standing alone, to warrant a change of venue under section 78(b). Moreover, this Court declines to ignore that O'Reilly had subsequently moved for the matter to be re-re-transferred to St. Thomas, and that he is now represented by counsel rather than proceeding *pro se*. Given these circumstances, the administration of justice would be best served by directing the St. Thomas Family Judge to rule on the issues of visitation and custody presented in O'Reilly's initial March 23, 2016 petition, and to consider the issue of a transfer to St. Croix only if presented with an appropriate motion by one of the parties.

is a high possibility that, on remand, O'Reilly may renew his motion to transfer venue, and the St. Thomas Family Judge may conclude that transferring venue to the Division of St. Croix would be best "[f]or the convenience or parties and witnesses." 4 V.I.C. § 78(b). Therefore, the question of whether our law disqualifies the St. Croix Family Judge from presiding over the matter is one that is highly likely to recur on remand, and accordingly we shall resolve the question. *See Smith v. Turnbull*, 54 V.I. 369, 374 (V.I. 2010).

¶ 20 In the January 31, 2018 order denying James's motion for recusal, the St. Croix Family Judge correctly recognized that James's motion arose under 4 V.I.C. § 284(4), which compels disqualification of a judge "[w]hen it is made to appear probable that, by reason of bias or prejudice of such judge, a fair and impartial trial cannot be had before him." Applying this standard, the St. Croix Family Judge concluded that "there is no risk of perceived nor actual bias" because "O'Reilly is not an employee of this Court," and [d]uring the time that he was an employee of this Court, he had only passing contact with this chamber," "did not then or now have a personal relationship with the Court," and while employed "was never assigned to this Court's chambers." (J.A. 62.)

¶ 21 We have no reason to doubt these factual statements by the St. Croix Family Judge. However, the January 31, 2018 order fails to recognize one very important fact: that the St. Croix Family Judge had already recused herself from this matter through her April 4, 2016 order, which stated, in its entirety, as follows:

> **AND NOW**, it is
>
> **ORDERED** that, pursuant to 4 V.I. CODE ANN § 284(4), the undersigned hereby **RECUSES** herself from the above-captioned matter and returns same to the Clerk of the Court for reassignment, for the reason that petitioner is a Superior Court Marshal – St. Croix Division.

(J.A. 20.) The relevant question in this case, therefore, is not whether the St. Croix Family Judge

was qualified to hear this case, but whether—having already voluntarily chosen to recuse herself on April 4, 2016—she was permitted to "unrecuse" herself after the St. Thomas Family Judge transferred the case back to the Division of St. Croix.

¶ 22 Neither the Virgin Islands Code of Judicial Conduct or any pertinent statutes or court rules address this admittedly unique situation. However, the clear majority of courts have held that once a judge recuses herself from a case, she cannot enter any further orders in that case, including an order rescinding the recusal. *See, e.g., Selkridge v. United of Omaha Life Ins. Co.*, 360 F.3d 155, 168 (3d Cir. 2004) ("If it were the case that Judge Moore had recused himself in *Selkridge I* and *Selkridge II* and then unrecused himself, our task would be an easy one."); *Doddy v. Oxy USA, Inc.*, 101 F.3d 448, 458 (5th Cir. 1996) ("We are reluctant to disturb the generally consistent line of cases that have held that a judge may do nothing in a case after recusing himself . . . and carve out a special exception in this matter. Therefore, we believe it was error for Judge Harmon to have vacated her earlier order of recusal."); *El Fenix de Puerto Rico v. M/Y JOHANNY*, 36 F.3d 136, 141 (1st Cir. 1994) (declining to "blur the reasonably clear line" that a judge, once recused, should not take any other action on the case, even though the judge's initial recusal was not warranted); *Moody v. Simmons*, 858 F.2d 137, 143 (3d Cir. 1988) ("Once a judge has disqualified himself, he or she may enter no further orders in the case. His power is limited to performing ministerial duties necessary to transfer the case to another judge."); *Arnold v. Eastern Air Lines, Inc.*, 712 F.2d 899, 904 (4th Cir. 1983) (appellate judge who recused himself from hearing appeal before panel cannot vote to grant *en banc* review or sit on *en banc* panel); *Stringer v. United States*, 233 F.2d 947, 948 (9th Cir. 1956) ("[O]nce having disqualified himself for cause, on his own motion, it was incurable error for the district judge to resume full control and try the case."); *Brzowski v. Brzowski*, 22 N.E.2d 20, (Ill. Ct. App. 2014) (holding it error to re-assign case back to judge who had previously

recused, and vacating all orders entered by that judge); *State v. Clarke*, 857 So.2d 599, 603 (La. Ct. App. 2003) (trial judge lacked authority to rescind his recusal after it had been made, and all action taken by that judge after recusal were therefore "an absolute nullity"). In establishing this bright-line rule, some courts have emphasized the danger of allowing a judge to return to a case even after the cause of the disqualification has been allegedly removed. As the Supreme Court of Florida has explained,

> It would be an unwise provision of law which would contemplate that, when a judge is once disqualified in a cause, the reason for his disqualification could be removed from the record, and thereupon such judge would become qualified to proceed with the disposition of the cause and act as though he had never been disqualified. If this rule were allowed to prevail, designing parties co-operating with a venal judge could remove from the record any evidence of disqualification because of interest or relationship and have the judge who was disqualified because thereof proceed with the disposition of the cause. It is also true that a designing judge could, after certifying his disqualification because of interest, dispose of such interest so that the result of the suit would be no longer material to him and thereby reinstate himself with jurisdiction where it should not be exercised by him. If the judge might actually and in good faith divest himself of interest in a cause so as to become qualified, then it is also possible that he might falsely pretend and wrongfully cause the record to show that he had divested himself of such interest so that he could retain jurisdiction and try his own case. The safe and sound rule is that, when the record once shows that a judge is disqualified in a cause, it becomes his duty to certify such disqualification, transfer the cause to some other qualified judge, and thereafter take no part in the disposition of the cause.

Kells v. Davidson, 136 So. 450, 451 (Fla. 1931). And although some courts have permitted judges to return to a case after initially recusing themselves, the circumstances that gave rise to those decisions are readily distinguishable from the instant case. *See, e.g., Luce v. Cushing*, 868 A.2d 672 (Vt. 2004) (holding that judge could return to the case after he explained to the parties the reason for his decision, provided the parties with an opportunity to object, and none actually objected); *Matthews v. State*, 854 S.W.2d 339, 330 (Ark. 1993) (holding that judge did not have to recuse from the entire case after issuing a partial recusal order from a hearing on a motion for

interim attorney's fees).

¶ 23 Here, Superior Court Rule 17 only authorizes a change of venue in a case where a court employee is a party; it does not call for the recusal of the assigned judge or all the judges in that judicial district. Thus, the St. Croix Family Judge, by entering her April 4, 2016 recusal order pursuant to 4 V.I.C. § 284(4), went far beyond what was required of her by Superior Court Rule 17. Moreover, the April 4, 2016 recusal order did not purport to be a limited or partial recusal but stated that the recusal was with respect to "the above-captioned matter." (J.A. 20.) And after the matter was re-assigned to the St. Croix Family Judge after the St. Thomas Family Judge entered the June 16, 2016 order granting O'Reilly's motion for change of venue, the St. Croix Family Judge did not enter an order rescinding her prior recusal, did not explain to both parties the circumstances that led to her return to the case, and did not provide the parties with an opportunity to object. Instead, the St. Croix Family Judge simply re-entered the case and began to issue orders and scheduling hearings as if she had never recused herself in the first place. In fact, at one point even O'Reilly—the party who had moved for a change of venue back to St. Croix—had requested that the St. Croix Family Judge recuse herself from the matter.[9]

¶ 24 Under these circumstances, we conclude that the St. Croix Family Judge, having recused herself from this proceeding, cannot rescind her prior recusal and return to the case.[10] Thus, we

[9] In the January 31, 2018 order, the St. Croix Family Judge appears to imply that the fact that both O'Reilly and James had moved for her recusal at various times during the proceeding somehow demonstrates a lack of bias or prejudice. However, to the extent this should be a relevant consideration at all, the fact that both parties with adverse interests have moved for the recusal of the same judge in the same proceeding would appear to weigh in favor of recusal, rather than against it.

[10] We recognize that the error in this case is not limited to the St. Croix Family Judge alone. Rather, the record reflects that it was the Clerk of the Court who assigned the case to the St. Croix Family Judge after receipt of the St. Thomas Family Judge's June 16, 2016 order returning the case to the

hold that if the St. Thomas Family Judge ultimately grants O'Reilly's motion for change of venue on remand, the case should not be assigned to the St. Croix Family Judge, but instead be referred to the Clerk of Court for assignment to an appropriate judge who sits in the Division of St. Croix.

III. CONCLUSION

¶ 25 Because there is no statute or court rule that authorizes an automatic re-transfer to the original judicial district when a party ceases his or her employment with the Superior Court, the St. Thomas Family Judge erred when she granted O'Reilly's motion to transfer without awaiting a response from James and without determining whether a transfer was warranted under section 78(b). Moreover, even if it was appropriate to transfer venue back to St. Croix, the St. Croix Family Judge erred by presiding over the case after having previously recused herself on April 4, 2016.

¶ 26 Accordingly, we vacate the June 16, 2016 transfer order ruling upon O'Reilly's change of venue motion. On remand the Clerk of the Court shall reassign the matter to the St. Thomas Family Judge, who shall exercise jurisdiction over the matter, including ruling on any renewed motion to retransfer venue to St. Croix, provided that such renewed motion is considered upon the proper legal standard and only after all parties have had an opportunity to be heard. Further, we order that the case not be re-assigned to the St. Croix Family Judge who previously recused herself, in the

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District of St. Croix. This entire controversy might well have been avoided had the Clerk, having already seen that the St. Croix Family Judge had previously recused herself on April 4, 2016, had assigned the matter to a different judge in the St. Croix District that had not already recused from the matter.

We further recognize that, after having been assigned the case by the Clerk, the St. Croix Family Judge, as the judge assigned to the Family Division for the District of St. Croix pursuant to 4 V.I.C. § 171 and truly believing that the circumstances that led to her initial recusal had changed, may have felt a special obligation to sit in order to prevent reassignment of the matter to a judge who may have limited or no experience in the area of family law. However, even if we were to assume without deciding that this is an appropriate consideration, it would not justify the failure to apprise the parties on the record and grant them the opportunity to object prior to issuing substantive orders or otherwise reasserting jurisdiction over the case.

event that the St. Thomas Family Judge grants a renewed motion to transfer on remand, and vacate all orders entered by the St. Croix Family Judge after her April 4, 2016 recusal as nullities having no legal effect. Because this includes the February 21, 2017 visitation order, the August 14, 2017 visitation order, and the December 29, 2017 order granting O'Reilly interim custody, we direct that the St. Thomas Family Judge should immediately enter a new interim order to address both visitation and child custody.[11]

Dated this 1 day of May, 2019.

BY THE COURT:

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

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

[11] We recognize that, having nullified the visitation order and the interim child custody order, custody of the minor son will revert to the pre-February 24, 2017 visitation order. To avoid placing the minor child in limbo, the St. Thomas Family Judge may wish to address the issues of temporary custody and visitation promptly on remand (after providing both parties the right to be heard and considering the best interests of the child).