

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAMIAN AARON BAKER, ¹	§
	§
Respondent Below-	§ No. 133, 2012
Appellant,	§
	§
v.	§ Court Below—Family Court
	§ of the State of Delaware, in and
STEPHANIE ROMAN-STEWART,	§ for New Castle County
	§ File No. CN95-10271
Petitioner Below-	§ Pet. No. 11-15623
Appellee.	§

Submitted: April 17, 2012

Decided: April 25, 2012

Before **BERGER, JACOBS** and **RIDGELY**, Justices.

ORDER

This 25th day of April 2012, it appears to the Court that:

(1) On March 16, 2012, the Court received a notice of appeal from Damian Baker seeking to appeal from an order of a Family Court Commissioner dated February 3, 2012. The February 3 order denied Baker's motion to reopen a Protection from Abuse order (PFA).

(2) The Senior Court Clerk issued a notice directing Baker to show cause why the appeal should not be dismissed for this Court's lack of jurisdiction to consider an appeal directly from a decision of a

¹ The Court assigned pseudonyms to the parties pursuant to Supreme Court Rule 7(d).

Commissioner.² Baker filed a response to the notice to show cause on April 17, 2012. He asserts that he sought to appeal the Commissioner's order to a judge of the Family Court but that his appeal papers were rejected for being untimely. Neither Baker's appeal papers nor the Family Court's rejection appear on the Family Court docket. Upon further investigation, it was discovered that Baker did file a notice of appeal of the Commissioner's order, which was dated March 7, 2012. A clerk in the Family Court rejected the filing on March 9, 2012 because it was untimely.

(3) The Court is concerned that neither Baker's notice of appeal of the Commissioner's order nor the Family Court's rejection of his appeal were properly docketed and made a part of the Family Court record.³ More troubling is the Family Court clerk's refusal to docket Baker's notice of appeal without review by a Family Court judge. As this Court previously has noted, it is not the function of the clerk of a court "to pass on the sufficiency of a notice of appeal which is tendered to [the clerk] for filing."⁴

No notice of appeal should ever be refused by a clerk for filing if the

²Del. Fam. Ct. Civ. R. 53.1 (2012) (providing a right to appeal a Commissioner's order to a judge of the Family Court).

³ See Del. Supr. Ct. Admin. Dir. No. 92 (Dec. 21, 1993).

⁴ *Kostyshyn v. State*, 2010 WL 3398943 (Del. Aug. 30, 2010) (quoting *Graves v. General Insur. Corp.*, 381 F.2d 517, 519 (10th Cir. 1967)). Thus, a court clerk may not refuse to docket a notice of appeal as a preliminary matter. To the extent there are defects in the filing, the clerk should first docket the filing, then notify the party of the defects and give the party an opportunity to respond. A judge may then rule on the sufficiency of the filing and enter an appropriate order. See, e.g., Del. Supr. Ct. R. 29(b) (2012).

intention to appeal is clear from the document filed. Ultimately, whether a notice of appeal is legally sufficient to invoke a court's jurisdiction is a question of law to be determined by a judge after notice to the appellant and an opportunity to be heard.⁵

(4) Under the circumstances, we find that this matter must be remanded to the Chief Judge of the Family Court to: (i) review generally the Family Court Clerk's docketing policies to ensure that filings are properly docketed and made part of the court's official record; and (ii) review Baker's notice of appeal from the Commissioner's order in this case, and determine whether the notice of appeal was legally sufficient to invoke a right of further review by a Family Court judge. If Baker's notice of appeal is deemed to be legally sufficient, the Chief Judge shall assign the case for review on the merits. If Baker's notice of appeal from the Commissioner's order is deemed to be untimely, then the Chief Judge shall enter an order to that effect. Once the Family Court has issued a final order, Baker has the right to appeal to this Court, if he chooses.⁶ To the extent that Baker paid a filing fee in conjunction with the present appeal, that fee may be transferred to any later filed appeal resulting from this remand.

⁵ *United States v. Neal*, 774 F.2d 1022, 1023 (10th Cir. 1985).

⁶ If it determined that Baker failed to timely request review of the Commissioner's order, Baker will not have the right to seek further review of the merits of that order..

NOW, THEREFORE, IT IS ORDERED that the within appeal is REMANDED to the Chief Judge of the Family Court for further proceedings consistent with this Order. Jurisdiction is not retained.

BY THE COURT:

Jack B. Jacobs
Justice