[Cite as *Harness v. Harness*, 2001-Ohio-2433.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

TAMISHA L. HARNESS (EBERST),	:	
Plaintiff-Appellant,	:	CASE NO. 00CA2570
v.	:	
JAMES M. HARNESS,	:	
Defendant-Appellee,	:	DECISION AND JUDGMENT ENTRY
and	:	**RELEASED 6/4/01**
CYNTHIA A. HARNESS,	:	
Plaintiff,	:	
v.	:	
JAMES M. HARNESS,	:	
Defendant-Appellee.	:	

APPEARANCES:

COUNSEL FOR APPELLANT: Tamisha L. Harness n/k/a Eberst	Katherine Hine 736 East Main Street Chillicothe, Ohio 45601
COUNSEL FOR APPELLEE: James M. Harness	Stephen Gussler 126 South Court Street Circleville, Ohio 43113
COUNSEL FOR APPELLEES: Daniel R. Harness, Jr., and Martha Jane Harness[1]	Michael M. Ater 72 North Paint Street Chillicothe, Ohio 45601

[1] The styles of the cases on the August 4, 1999, and September 7, 1999 judgments do not reflect that Daniel R. Harness and Martha Jane Harness were joined as parties in both Tamisha L. Harness v. James M. Harness (Aug. 7, 1992), Ross Cty. C.P. No.

92 DR 220, unreported, and Cynthia A. Harness v. James M. Harness, Ross Cty. C.P. No. 98 DR 313.

PER CURIAM:

Appellant, Tamisha L. Harness n/k/a Eberst, filed an appeal from the August 4, 1999 Journal Entry that: (1) denies her motion to strike the Child Protection Clinic [CPC] reports; (2) grants the Ross County Prosecutor's motion to quash appellant's motion for release of sex offender counseling program records; (3) denies appellant's motion for release of the sex offender counseling program records; (4) appoints Jack Tarpy to administer psychological evaluations of the parties and other concerned individuals; and, (5) vacates the hearing date on the visitation issues. The extent of visitation privileges between Appellee James M. Harness, James' children, and Daniel and Martha Jane Harness, the children's paternal grandparents, is the crux of the dispute in this case. Appellant also appeals the September 7, 2000 Order Clarifying Journal Entry that denies appellant's and Cynthia's joint motion for mental examinations. The September 7th order states that plaintiffs will not be permitted to select an evaluator to perform the psychological examinations and clarifies that the sex offender treatment records are privileged and will not be made available to any mental health professional.[2]

A summary of the relevant facts is in order to clarify the status of the parties and how the underlying issues in the trial court led to the case *sub judice*. The marriage of Tamisha and James

[2] Cynthia A. Harness did not appeal the August 4th Journal Entry and has not participated in this appeal.

Harness was terminated by the August 2, 1992 decree of dissolution. Appellant was designated as the residential parent and legal custodian of their minor child, Allen Michael. James was granted companionship visitation rights to accommodate his work schedule.

On July 14, 1995, the first of many motions was filed concerning visitation. Since that time, the parties have never reached a satisfactory resolution to their visitation issues. The last round of disputes was initiated by appellant's September 24, 1999 "Motion to Terminate Shared Parenting & All Companionship." On November 1, 1999, the trial court granted Daniel and Martha Jane Harness' "Motion to Join the Paternal Grandparents as Parties."

The trial court's rulings on appellant's and Cynthia's March 24, 2000 "Joint Motion for Mental Examinations of Defendant & Paternal Grandparent Intervenors & for Release of Sex Offender Counseling Program Records" lead directly to this appeal. The proposals filed by James and his parents concerning the examinations contend that both appellant and Cynthia should be examined. James' proposal alleges that either appellant and/or Cynthia has a medical history involving treatment for psychiatric disorders. Appellant is adamantly opposed to being subjected to a mental examination.

On May 8, 2000, appellant filed two separate motions to hold James in contempt and a third motion to hold Daniel Harness in contempt. On May 16, 2000, the trial court found that the children's best interests would be served by requiring James,

his parents, appellant, Cynthia, and the children to submit to mental examinations. On May 23, 2000, James moved the court for an order granting him companionship with Allen Michael and Logan[3] pending a final hearing on the custody and contempt issues, or in the alternative, an order of companionship under the supervision of Daniel and Martha Jane Harness.

On May 30, 2000, the Ross County Prosecutor, on behalf of the Ross County Probation Department, filed its objection to appellant's subpoena for production of records pertaining to James Harness' probation in State v. Harness (Oct. 22, 1999), Ross Cty. C.P. No. 99 CR 182, and to his treatment in the Probation Department's sex offender counseling program. The acrimony continued as Daniel and Martha Jane Harness filed their May 30, 2000 motion to hold appellant and her attorney in contempt for filing the May 8th motion against Daniel for contempt. On June 2, 2000, appellant filed her motion to strike from the record all reports and observation notes emanating from the Child Protection Center, which was the site chosen by the Court for the supervised companionship between the children and all the Harnesses.

On July 31, 2000, the magistrate's rulings on appellant's contempt motions were approved by the trial court. James and Daniel were both found not in contempt of the companionship

[3] Logan is the child of James and Cynthia Harness.

order. James was found in contempt for failure to pay medical expenses and was allowed to purge himself by paying $214.32 to appellant by August 31, 2000. The record does not reflect whether James purged himself of contempt. Likewise, no ruling was issued on Daniel's and Martha Jane's motion to hold appellant and her attorney in contempt. The court ordered James' companionship to remain supervised at the Child Protection Center and stated that Daniel and Martha Jane were permitted to be present during the visitations. On August 4, 1999, the trial court filed the "Journal Entry" that was clarified in the September 7, 1999 order. This appeal ensued.

We have considered the jurisdictional arguments filed by the parties concerning the issue of whether the August 4, 2000 "Journal Entry" and the September 7, 2000 "Order Clarifying Journal Entry" are final appealable orders. Appellate courts in Ohio have jurisdiction to review the final orders or judgments of lower courts within their districts. See Section 3(B)(2), Article IV, Ohio Constitution; R.C. 2501.02; Prod. Credit Assn. v. Hedges (1993), 87 Ohio App.3d 207, 210, 621 N.E.2d 1360, 1362, fn. 2; Kouns v. Pemberton (1992), 84 Ohio App.3d 499, 501, 617 N.E.2d 701, 702. If an order is not final and appealable pursuant to R.C. 2505.02, a court of appeals does not have jurisdiction to consider the matter.

Appellant contends that the August 4th and September 7th orders constitute final orders under R.C. 2505.02(B)(2) because

they were made in a special proceeding and affect her and Allen Michael's substantial rights. R.C. 2505.02(B) provides, in relevant part:

> (B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:
>
> ***
>
> (2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;
>
> ***

A special proceeding is defined as "an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity." R.C. 2505.02(A)(2). See Polikoff v. Adam (1993), 67 Ohio St.3d 100, 616 N.E.2d 213. Divorce is a special statutory proceeding as are the ancillary claims such as change of custody. See Koroshazi v. Koroshazi (1996), 110 Ohio App.3d 637, 640, 674 N.E.2d 1266, 1268; State *ex rel*. Papp v. James (1994), 69 Ohio St.3d 373, 632 N.E.2d 889. The case *sub judice* originated in a divorce action and currently involves the issues of custody and visitation, thus, the orders being appealed were made in a special proceeding.[4]

[4] Likewise, the unresolved contempt proceedings are also special proceedings. See Riley v. Riley (May 11, 2000), Jackson App. No. 99CA851, unreported.

However, an order made in a special proceeding is final only if it affects a substantial right. See R.C. 2505.02(B)(2). A substantial right is defined as "a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect." R.C. 2505.02(A)(1). "An order which affects a substantial right has been perceived to be one which, if not immediately appealable, would foreclose appropriate relief in the future." Bell v. Mt. Sinai Med. Ctr. (1993), 67 Ohio St.3d 60, 63, 616 N.E.2d 181, 184.

Appellant first contends that the August 4th and September 7th orders affected both appellant and Allen Michael's substantial rights by denying her access to James' sex offender treatment records. When a psychiatric examination or substance abuse evaluation is ordered by a court, the person to be examined is required to involuntarily submit to the examination, evaluation and treatment. No privilege applies where the psychiatric examination is to assist the court in determining the best course of action. However, when the subject of the examination is also required to undergo treatment, the rationale for applying the physician-patient or psychologist-patient privilege applies. See In re Wieland (2000), 89 Ohio St.3d 535, 733 N.E.2d 1127; In re Miller (1992), 63 Ohio St.3d 99, 585 N.E.2d 396. Thus, the sex offender treatment records are privileged. Appellant has no substantial right to discovery of privileged material.

Appellant's second and third arguments both revolve around Civ.R. 35(A), thus we will address them together. Appellant contends that the trial court denied her the right to an expert pursuant to Civ.R. 35(A), and further contends that the trial court ordered the mental examinations of all the parties and children in this matter without complying with Civ.R. 35(A). Civ.R. 35(A) states:

> [w]hen the mental or physical condition *** of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit himself to a physical or mental examination or to produce for such examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or person by whom it is to be made.

Civ.R. 35(A) requires a motion for good cause and notice to the parties of, among other things, the person who will conduct the examination. However, Civ.R. 35(A) does not provide the party seeking an examination the absolute right to pick the examiner. See The S.S. Kresge Co. v. Trester (1931), 123 Ohio St. 383, 175 N.E. 611. Notwithstanding the fact that appellant's and Cynthia's March 24, 2000 motion for a joint examination was brought pursuant to R.C. 3109.04(C), appellant's memorandum in support of jurisdiction alleges that there are problems with the trial court's appointment of an examiner pursuant to R.C.

3109.04. [5] However, appellant fails to identify the nature of the problems or to elaborate further on the alleged problems she perceives in evaluations ordered pursuant to R.C. 3109.04(C). R.C. 3104.04(C) applies to actions not only prior to trial but also in post-judgment proceedings.

A court making allocation of parental rights and responsibilities shall take into account that which is in the best interest of the children. See R.C. 3109.04(B). The best interest of the children naturally includes the psychological health and stability of the parties. R.C. 3109.04(C) states:

> Prior to trial, the court **may** cause an investigation to be made as to the character, family relations, past conduct, earning ability, and financial worth of each parent and may order the parents and their minor children to submit to medical, psychological, and psychiatric examinations. ***. (Emphasis added.)

The use of the word "may" in the statute clearly indicates that whether or not to order psychological evaluations is up to the discretion of the trial court. See Heyob v. Newman (Dec. 8, 1987), Highland App. No. 638, unreported. We find no authority that holds that a trial court cannot order an evaluation pursuant to R.C. 3109.04 after a party has filed a Civ.R. 35 (A) motion.

[5] Appellant's memorandum in support of jurisdiction is contained on pages five through ten of her November 6, 2000 brief.

The record reflects that appellant and Cynthia raised the issues of the mental conditions of James and of his parents. Whereupon Daniel and Martha Jane Harness moved the trial court to order evaluations of appellant and Cynthia. Shortly thereafter, James filed his response to the joint motion for mental examinations alleging that one or both of his ex-wives has a medical history involving treatment for psychiatric disorders. Consequently, the trial court ordered mental evaluations of all of the parties. Appellant has not established that the trial court's decision to order psychological evaluations of all of the parties, before deciding the specifics of the hotly contested visitation issues, affected her or Allen Michael's substantial rights.

Appellant argues that her substantial rights will be affected if the court does not appoint the expert of her choice to conduct the evaluations. However, she provides no authority to support this contention. R.C. 3109.04(C) does not contain any requirement that good cause be shown for a mental examination ordered under this section. Nor does one seeking a mental evaluation have an absolute right to choose the expert to conduct the evaluation. See Trester, *supra*.

The trial court selected its own expert, Jack Tarpy, who was not among those experts proposed by any of the parties. Its

August 4th Journal Entry appoints Jack Tarpy to conduct the psychological evaluations of the parties and other concerned individuals and further states that Jack Tarpy shall be considered to be the court's witness. Pursuant to both Civ.R. 35(B) and R.C. 3109.04(C), appellant will have access to Jack Tarpy's reports and he will be subject to cross-examination if his testimony is offered at the hearing on this matter. R.C. 3109.04(C) states:

> ***
> The report of the investigation and examinations shall be made available to either parent or his counsel of record not less than five days before trial, upon written request. The report shall be signed by the investigator, and the investigator shall be subject to cross-examination by either parent concerning the contents of the report. The court may tax as costs all or any part of the expenses for each investigation.

Pursuant to R.C. 3109.04(C), appellant will have the opportunity to review Tarpy's reports well before the hearing as well as to confront and cross-examine him about the contents of the reports at the hearing. Thus, she will have the opportunity to bring to the trial court's attention all of the problems she alleges that exist with this expert and with the results of his examinations.

Appellant relies on Shoff v. Shoff (July 27, 1995), Franklin App. No. 95APF01-8, unreported, as authority for the proposition that in the context of custody proceedings, a trial court's Civ.R. 35 order for a psychological evaluation is final

and appealable. We are not convinced that, under the facts of the case *sub judice*, appellant will suffer harm if the court's expert conducts these psychological evaluations. Further, whatever harm might ensue can be corrected by an appeal from the final order after the trial court resolves all of the issues. See Montecalvo v. Montecalvo (1999), 126 Ohio App.3d 377, 710 N.E.2d 379. Accordingly, appellant has failed to establish that her and her son's substantial rights have been affected by the trial court's August 4th and September 7th orders appointing Jack Tarpy to conduct the examinations.

Appellant further argues that the August 4th and September 7th orders deny her a provisional remedy pursuant to R.C. 2505.02(A)(3). "'Provisional remedy' means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, or suppression of evidence." R.C. 2505.02(B)(3). An order is final when it grants or denies a provisional remedy and to which both of the following apply:

> (a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.
>
> (b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

R.C. 2505.02(B)(4).

We have already found that appellant would be afforded a meaningful and effective remedy by an appeal of the final order in this matter which includes the interlocutory discovery rulings. Thus, the rulings the trial court made denying the parties and the experts access to the sexual offender treatment records do not meet both of the requirements of R.C. 2505.02(B)(4)(b).

Appellant concedes that the August 4th and September 7th orders leave issues unresolved, thus, they appear to be nonfinal. The issues being appealed all concern matters of discovery. Generally, a discovery ruling is an interlocutory order, thus it is not appealable. State *ex rel*. Steckman v. Jackson (1994), 70 Ohio St.3d 420, 639 N.E.2d 83, paragraph seven of the syllabus. Appellant has not established that the discovery orders in the case *sub judice* will foreclose her from appropriate relief in the future if not immediately appealed.

In addition, Daniel Harness' motion to hold appellant and her attorney in contempt is unresolved. Likewise, the record does not reflect that appellant's motion to hold James in contempt for failure to pay medical expenses has been completely resolved. Lastly, all of the visitation questions still remain pending. Accordingly, we find that the August 4th and September 7th orders are not final pursuant to

R.C. 2505.02(B)(2) and (B)(4). Accordingly, this Court lacks jurisdiction to determine the merits of the appeal.

Appeal dismissed.

JUDGMENT ENTRY

It is ordered that the **APPEAL BE DISMISSED** and that appellees recover of appellant costs herein taxed.

The Court finds that there were reasonable grounds for this appeal.

It is further ordered that a special mandate issue out of this Court directing the **ROSS COUNTY COURT OF COMMON PLEAS** to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Abele, P.J., and Harsha, J.: Concur in Judgment Only.

FOR THE COURT

By: _____
David T. Evans, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.