

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

Aune Robinson,	:	Case No. 16CA18
Plaintiff-Appellant,	:	
v.	:	<u>ENTRY</u>
Andrew Robinson,	:	
Defendant-Appellee.	:	RELEASED: 1/31/17

HARSHA, A.J.,

{¶1} After reviewing the notice of appeal filed in this matter, we issued an order directing Appellant Aune Robinson to file a memorandum addressing whether the entry appealed from is a final appealable order. Robinson has filed a memorandum arguing that the trial court’s entry dismissing her divorce complaint without prejudice for failing to pay court costs is a final appealable order under R.C. 2505.02(B)(2). She argues that divorce proceedings are “special proceedings” and the dismissal, even though without prejudice, affects a substantial right because she is indigent and unable to pay court costs. Thus, the court’s ruling deprives her of her due process rights to access the court for a divorce. After reviewing the memoranda and the relevant law, we find that the entry appealed from is a final, appealable order made in a special proceeding under R.C. 2505.02(B)(2).

I.

{¶2} Aune Robinson filed a divorce complaint on April 7, 2016 and included an Affidavit of Inability to Pay Court Costs, Affidavit of Property, and Affidavit of Income and Expenses as required by Loc.R. 24.01(F) and Loc.R. 24.02. The Meigs County Clerk of Courts Rule 2.03 requires a \$270.00 advance deposit for a divorce complaint, but Loc.R.

24.01(F) allows a party to ask the court to waive prepayment of the deposit by presenting an Affidavit of Inability to Pay Court Costs. In Robinson's Affidavit of Inability to Pay Court Costs she stated that she was unable to give security or a cash deposit to pay court costs, could not afford an attorney to represent her, and owned no liquid assets or property of any substantial value to prepay court costs. On April 11, 2016, the court issued an Entry Regarding Costs ordering Robinson to pay court costs in full by making monthly payments of \$50.00. The court ordered Robinson to begin payments on May 1, 2016 and stated, "All costs shall be paid in full on or before the date of the final hearing." Entry Regarding Costs, April 11, 2016. Robinson did not make any payments on court costs. Neither party made any additional filings. On October 27, 2016, the court dismissed the case without prejudice:

Now comes the Court, upon review of the file, and FINDS that the Court, by entry of April 11, 2016, ordered Plaintiff to pay the sum of fifty dollars (\$50.00) per month toward said costs until paid in full. It appearing to the Court that the Plaintiff has failed to do so and that no further pleadings have been filed. Upon review of this matter this case should be, and hereby, is DISMISSED without prejudice. Court costs incurred to date are ORDERED to be paid by Plaintiff. Plaintiff shall contact the Meigs County Clerk of Courts * * * for the balance of court costs. IT IS SO ORDERED.

Journal Entry, October 27, 2016.

{¶3} Robinson appealed. We must now determine if a trial court order dismissing a divorce case without prejudice for failure of an indigent plaintiff to pay court costs is a final, appealable order. We conclude that it is and allow this appeal to proceed.

II.

{¶4} It is well established that an order must be final before it can be reviewed by an appellate court. See Section 3(B)(2), Article IV of the Ohio Constitution. See, also, *General Acc. Ins. Co. v. Insurance Co. of North American*, 44 Ohio St.3d 17, 20, 540

N.E.2d 266 (1989). If an order is not final and appealable, then an appellate court has no jurisdiction to review the matter and must dismiss the appeal. *Lisath v. Cochran*, 4th Dist. No. 92CA25, 1993 WL 120627 (Apr. 15, 1993); *In re Christian*, 4th Dist. No. 1507, 1992 WL 174718 (July 22, 1992). The relevant section of R.C. 2505.02 defines a final order as “[a]n order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment.” R.C. 2505.02(B)(2). A “substantial right” is “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). A “special proceeding” is “an action or proceeding this 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).

{¶5} In *Polikoff v. Adam*, 67 Ohio St.3d 100, 616 N.E.2d 213 (1993), the Supreme Court of Ohio considered the issue of whether a particular order was entered in a special proceeding and affected a substantial right, and therefore constituted a final order. It determined that “[o]rders that are entered in actions that were recognized at common law or in equity and were not specially created by statute are not orders entered in special proceedings pursuant to R.C. 2505.02[(B)(2)].” *Id.* at syllabus. The Supreme Court later clarified that “it is the underlying action that must be examined to determine whether an order was entered in a special proceeding.” *Walters v. Enrichment Ctr. of Wishing Well, Inc.*, 78 Ohio St.3d 118, 121–22, 676 N.E.2d 890 (1997) (“The determining factor of *Polikoff* is whether the ‘action’ was recognized at common law or in equity and not whether the ‘order’ was so recognized. In making the determination courts need look only at the underlying action. The type of order being considered is immaterial.”).

{¶6} A divorce proceeding is a “special proceeding.” See *Wilhelm-Kissinger v. Kissinger*, 129 Ohio St.3d 90, 91, 2011-Ohio-2317, 950 N.E.2d 516 (“divorce, a statutory

matter that did not exist at common law, qualifies as a special proceeding”); *State ex rel. Papp v. James*, 69 Ohio St.3d 373, 379, 1994-Ohio-86, 632 N.E.2d 889 (“There was no common-law right of divorce. Divorce is purely a matter of statute. * * * Divorce, therefore has been described as a ‘special statutory proceeding’ ”); *Davis v. Davis*, 4th Dist. Jackson No. 00CA28, 2001-Ohio-2527, *3 (“Divorce is a special statutory proceeding as are the ancillary claims such as a change of custody.”).

{¶7} However, an order made in a special proceeding is final only if it affects a substantial right. R.C. 2505.02(B)(2). “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.* 67 Ohio St.3d 60, 63, 616 N.E.2d 181 (1993). Ordinarily a dismissal without prejudice is not a final, appealable order because in most instances the plaintiff can refile it. *State ex rel. DeDonno v. Mason*, 128 Ohio St.3d 412, 2011-Ohio-1445, 945 N.E.2d 511 (the involuntary dismissal of case under Civ.R. 41(B)(1) for failure to comply with a court order is not a final appealable order because it does not prevent a party from refiling).

{¶8} Courts have recognized some situations in which an involuntary dismissal without prejudice is a final appealable order. See *Smirz v. Smirz*, 2014-Ohio-3869, 18 N.E.3d 868 (9th Dist.) (discussing a number of cases in both divorce and non-divorce context); *Ward v. Summa Health Sys.*, 184 Ohio App.3d 254, 2009-Ohio-4859, 920 N.E.2d 421, ¶ 7 (9th Dist.); *Lippus v. Lippus*, 6th Dist. Erie No. E-07-003, 2007-Ohio-6886 (reinstating the appeal of an involuntary dismissal without prejudice of divorce case after considering that, even if case is refiled, plaintiff will lose her right to collect ordered but unpaid support payments that accumulated during pendency of case). In *Smirz*, the court held that the focus in divorce cases is whether the impact of the dismissal can be rectified

by re-filing or other equitable means:

[T]he impact on a substantial right based on a dismissal without prejudice in a domestic relation case might give rise to a final, appealable order, but only where the effect on the substantial right is both alleged and prejudicial, i.e., where the impact cannot be rectified through equitable considerations in the re-filed cause or motion.

Smirz at ¶ 16.

{¶9} Here the trial court dismissed Robinson's divorce case because she failed to pay court costs even though she submitted uncontroverted affidavits establishing her indigency. Robinson argues that the court violated her due process rights to access the court in a divorce proceeding as established in *Boddie v. Connecticut*, 401 U.S. 371, 374, 91 S.Ct. 780, 28 L.Ed.2d. 113 (1971). She also argues that she is prejudiced because she cannot refile her complaint; she is indigent and unable to pay the court costs associated with refiling the complaint. In *Boddie*, the Court held:

Our conclusion is that, given the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship, due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.

Id.; see also *State ex rel. Blevins v. Mowrey*, 45 Ohio St.3d 20, 543 N.E.2d 99 (1989) (adopting the reasoning of *Boddie* to impose a duty on a judge and court clerk to effect service of process by publication without requiring an indigent divorce litigant to prepay the costs of publication).

{¶10} We hold that in the context of a divorce proceeding, which is a special proceeding, the involuntary dismissal of an indigent party's case without prejudice for failure to pay court costs is a final appealable order under R.C. 2505.02(B)(2). An indigent party's right to access the court for divorce proceedings is a substantial right that the United States Constitution entitles a person to enforce or protect. See R.C. 2505.02(A)(1)

and *Boddie, supra*. We distinguish this case from *State ex rel. DeDonno, supra*, which held that “ordinarily” an order dismissing a case under Civ.R. 41(B) is not a final appealable order because the party may refile. This case falls outside the ordinary: Robinson is prevented from refiling her complaint because she cannot afford to pay court costs. The trial court denied her request to waive court costs and has ordered her to pay the costs in full. See *also* Civ.R. 41(D) (allowing the trial court to stay proceedings in a refiled case that had been previously dismissed without prejudice until the plaintiff has complied with the order); *Burns v. Burns*, 12th Dist. Preble Case Nos. 283, CA 285, 1981 WL 5282 (Dec. 23, 1981) (accepting and deciding an appeal in indigent plaintiffs’ divorce cases from dismissal entries based on failure to pay court costs where plaintiffs had filed poverty affidavits without analyzing whether the entries were final appealable orders and holding that the orders violated the plaintiffs’ constitutional due process rights as established in *Boddie*).

III.

{¶11} We conclude that the trial court’s entry dismissing an indigent’s divorce complaint without prejudice for failing to pay court costs is a final appealable order under R.C. 2505.02(B)(2) and we have jurisdiction to consider this appeal from that entry.

{¶12} The clerk shall serve a copy of this order on all counsel of record at their last known addresses. **IT IS SO ORDERED.**

Abele, J. & Hoover, J.: Concur.

FOR THE COURT

William H. Harsha
Administrative Judge