[Cite as *Fritz v. Burch*, 2009-Ohio-4004.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

MARK FRITZ

Plaintiff-Appellee

-vs-

CARRIE BURCH

Defendant-Appellant

JUDGES:
Hon. W. Scott Gwin, P.J.
Hon. William B. Hoffman, J.
Hon. John W. Wise, J.

Case No. 2008CA00286

O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas, Domestic Relations Division, Juvenile Case No. 2008JCV0781
JUDGMENT:	Dismissed
DATE OF JUDGMENT ENTRY:	August 10, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
ROBERT G. ABNEY 116 Cleveland Ave. NW, Suite 500 Canton, Ohio 44702	J. REID YODER 520 S. Main Street Suite 500 Akron, Ohio 44311

Hoffman, J.

{¶1} Defendant-appellant Carrie Burch appeals the November 18, 2008 Judgment Entry of the Stark County Court of Common Pleas, Family Court Division, granting temporary custody of L.B., a minor child, to Plaintiff-appellee Mark Fritz.

STATEMENT OF THE CASE AND FACTS

{¶2} On July 14, 2008, Appellee filed a complaint in the Stark County Court of Common Pleas, Family Court Division, to determine the parentage of L.B, a minor child born September 6, 2006 to Appellant Carrie Burch. Following the child's birth, Appellee enjoyed visitation with the child. At some point, while visiting with the child, Appellee took the child for DNA testing.

{¶3} In conjunction with the complaint to determine parentage, Appellee submitted to the trial court putative DNA results indicating he is likely the biological father of minor child. In addition, Appellee petitioned the trial court to grant him temporary emergency custody of the child.

{¶4} Appellee initially attempted to serve Appellant with the pleadings at her last known address of 1445 School Avenue, N.E., Apartment 14, North Canton, Ohio 44720. However, Appellant had vacated the premises with the child, and did not leave a forwarding address. Subsequently, Appellee searched the court records of the Massillon Municipal Court where Appellant had been charged with DUI. Appellee then served Appellant at her father's home, by certified mail, on July 25, 2008. Appellant's father signed for the certified mail.

{¶5} On September 9, 2008, Appellant moved the trial court to quash service. The trial court magistrate denied the motion to quash service via Magistrate's Decision

of September 15, 2008. The magistrate ordered Appellee present to Stark County CSEA on September 25, 2008 to undergo genetic testing. The magistrate ordered Appellant bring the child to CSEA for testing at the same time, and if Appellant failed to cooperate with the genetic testing, then Appellant would be deemed to have waived any objection to the putative DNA report supplied by Appellant. The magistrate continued Appellee's motion for immediate temporary custody of the minor child until November 10, 2008.

{¶6} On November 13, 2008, Appellant filed a motion to set aside and objections to the Magistrate's Decision.

{¶7} Via Judgment Entry of November 18, 2008, the trial court denied the motion to set aside and Appellant's objections to the Magistrate's Decision. The trial court indicated the Massillon Municipal Court records indicate Appellant's address is 6426 Harborview, her father's address. Therefore, certified mail service to her father's home was valid service upon Appellant. Further, the trial court named Appellee temporary custodian of the minor child, authorizing any law enforcement officer to assist Appellee in obtaining physical possession of the child.

{¶8} Appellant now appeals the November 18, 2008 Judgment Entry assigning as error:

{¶9} "I. THE SERVICE OF PROCESS BY CERTIFIED MAIL AT AN ADDRESS OTHER THAN THAT OF APPELLANT BURCH'S KNOWN RESIDENCE WAS A VIOLATION OF HER RIGHT TO DUE PROCESS.

{¶10} "II. THE COURT DENIED APPELLANT BURCH HER RIGHT TO DUE PROCESS WHEN IT AWARDED APPELLEE TEMPORARY CUSTODY OF [L.B.] WITHOUT FIRST HOLDING A HEARING."

{¶11} Appellee filed a motion to dismiss the within appeal for lack of a final appealable order. This court delayed ruling upon the motion pending oral arguments. We now address Appellee's argument the November 18, 2008 Judgment Entry is not a final appealable order.

{¶12} Ohio law provides appellate courts have jurisdiction to review the final appealable orders from lower courts. See Section 3(B)(2), Article IV, Ohio Constitution; *In re Murray* (1990), 52 Ohio St.3d 155, 156; see, also, R.C. 2505.03. Appellate courts lack jurisdiction to review nonfinal appealable orders and must dismiss matters lacking final appealable orders. *In re J.V.,* Franklin App. No. 04AP-621, 2005-Ohio-4925, at ¶ 24.

{¶13} The definition of "final order" is prescribed in R .C. 2505.02, in pertinent part, as:

{¶14} "(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

{¶15} "(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment * * *."

{¶16} A "substantial right" for purposes of R.C. 2505.02 is a legal right entitled to enforcement and protection by law. *State ex rel. Hughes v. Celeste,* 67 Ohio St.3d 429, 430, 1993-Ohio-214; *In re Murray,* 52 Ohio St.3d at 157 (manifest that parental custody

of a child is an important legal right protected by law and, thus, comes within the purview of a "substantial right" for purposes of applying R.C. 2505.02).

{¶17} Generally, the question of whether an order is final and appealable turns on the effect the order has on the pending action, rather than the name attached to it, or its general nature. *In re Murray,* at 157.

{¶18} "An order which affects a substantial right has also been interpreted to be one which, if not immediately appealable, would foreclose appropriate relief in the future." *State v. Shaffer,* Cuyahoga App. No. 87552, 2006-Ohio-5563, ¶ 20; *Bell v. Mt. Sinai Med. Ctr.* (1993), 67 Ohio St.3d 60, 63; *In the Matter of Kinstle* (Mar. 6, 1998), Logan App. Nos. 8-97-27, 8-97-28, 8-97-29, 8-97-30, 8-97-31, 8-97-32.

{¶19} To establish an order affects a substantial right, the appellant must establish that in the absence of immediate review of the order, he or she will be denied effective relief in the future. *Shaffer,* supra.

{¶20} "Temporary * * * child custody orders have been held not final and appealable because of their interlocutory nature." *Shear v. Shear* (Mar. 31, 1994), 8th Dist. No. 65339, 1994 Ohio App. LEXIS 1382, at 4.; *Williams v. Williams* 2004-Ohio-3992.

{¶21} In the case sub judice, the custody of the minor child was not permanently resolved; rather, Appellee's motion for a final determination of parentage remains pending before the court. By its own terms, the order designating Appellee as custodian is temporary. A temporary order is interlocutory in nature. Because such orders are subject to modification by the trial court, interlocutory orders are not immediately appealable. *Brooks v. Brooks* (1996), 117 Ohio App.3d 19, 21. Therefore,

we find the trial court's November 18, 2008 Judgment Entry awarding Appellee temporary custody of the minor child an interim interlocutory order which is not final and appealable. The within appeal is hereby dismissed for want of jurisdiction.

By: Hoffman, J.

Gwin, P.J. and

Wise, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin
HON. W. SCOTT GWIN

s/ John W. Wise
HON. JOHN W. WISE

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

MARK FRITZ	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
CARRIE BURCH	:	
	:	
Defendant-Appellant	:	Case No. 2008CA00286

For the reason stated in our accompanying Memorandum-Opinion, the within appeal is dismissed for want of jurisdiction. Costs to Appellant.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin
HON. W. SCOTT GWIN

s/ John W. Wise
HON. JOHN W. WISE