

COURT OF APPEALS
GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF:	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
S. H.	:	Hon. Sheila G. Farmer, J.
	:	Hon. Patricia A. Delaney, J.
A Minor Child	:	
	:	Case No. 10CA000023
	:	
	:	<u>OPINION</u>

CHARACTER OF PROCEEDING:	Appeal from the Guernsey County Court of Common Pleas, Juvenile Division, Case No. 09-JG-00564
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JUDGMENT:	DISMISSED
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DATE OF JUDGMENT ENTRY:	November 22, 2010
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APPEARANCES:

For Appellant- John Holyak

KENT D. BIEGLER
139 West 8th Street
P. O. BOX 640
Cambridge, OH 43725

For Brian Bookman

ALBERT DAVIES, III
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For Tammy Holyak

MICHAEL SHAHEEN
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Delaney, J.

{¶1} Appellant, John Holyak, appeals the April 14, 2010 decision of the Guernsey County Court of Common Pleas, Juvenile Division, to deny Appellant's Motion to Dismiss.

STATEMENT OF THE FACTS AND CASE

{¶2} On December 31, 2006, S.H. was born to Tammy Holyak while she was married to Appellant. S.H. resided with Tammy Holyak and Appellant, until the parties separated and Tammy Holyak filed a complaint for divorce in Belmont County in 2009.

{¶3} On June 22, 2009, the Guernsey County Child Support Enforcement Agency issued a CSEA Administrative Order Establishment of Paternity under Case No. 7074748943. The Administrative Order stated that the results of the genetic testing performed on S.H., Tammy Holyak, and Brian Bookman, indicated that there was a probability of 99.99% that Brian Bookman was the father of S.H. Pursuant to R.C. 3111.46, the Administrative Officer found that Brian Bookman was the natural father of S.H.

{¶4} In the Belmont County divorce proceeding, the trial court established parenting time for Appellant. Appellant filed a motion for contempt for Tammy Holyak's failure to comply with the parenting time schedule. On September 18, 2009, Tammy Holyak dismissed her complaint for divorce.

{¶5} On September 18, 2009, Brian Bookman filed a Petition to Establish Parental Rights and Responsibilities with the Guernsey County Court of Common Pleas, Juvenile Division. Brain Bookman alleged that he was the biological father of S.H. Within his Petition, Bookman submitted the CSEA Administrative Order as

prepared by the Guernsey County Child Support Enforcement Agency. He stated that at the time of the filing of the Petition, there existed no other pending custody actions in the State involving the determination of custody and support of S.H. Bookman requested temporary and permanent custody of S.H.

{¶6} Tammy Holyak waived service of the summons and consented to the trial court's jurisdiction. She stated in an affidavit submitted with the Petition that, "[s]he has no objection to this Court's issuing an order which designates her and Brian L. Bookman as the residential parents of [S.H]."

{¶7} The Petition requested certified mail service on Appellant. Service by certified mail failed on Appellant and it was returned to the Clerk of Courts as unclaimed on November 17, 2009. Bookman requested service of the summons to Appellant by ordinary mail. The Clerk of Courts filed a certificate of mailing on November 17, 2009.

{¶8} On September 21, 2009, Bookman and Tammy Holyak filed an agreed judgment entry finding that Bookman and Tammy Holyak were residing together with S.H. Temporary custody was granted to Bookman and Tammy Holyak, naming them the residential parents of S.H. until further order of the trial court. Finally, the matter was set for a full evidentiary hearing on the Petition.

{¶9} On October 9, 2009, Appellant filed a complaint for divorce against Tammy Holyak in Belmont County. Appellant states that Tammy Holyak was served with the complaint for divorce on October 9, 2009.

{¶10} On December 29, 2009, Appellant filed a Motion to Dismiss Bookman's Petition with the Guernsey County Court of Common Pleas, Juvenile Division. Appellant argued that the Petition should be dismissed for lack of jurisdiction because of

the pending divorce action in Belmont County. Appellant stated that under R.C. 3113.03, he is presumed to be the father of S.H. because the child was born during his marriage to Tammy Holyak. Because Appellant obtained service of his divorce complaint on Tammy Holyak on October 9, 2009, and Bookman did not obtain service of the Petition on Appellant until November 17, 2009, Appellant argued the Belmont County divorce action had jurisdictional precedence over the action in Guernsey County juvenile court.

{¶11} On April 14, 2010, the trial court denied Appellant's Motion to Dismiss. The trial court stated that it had assumed jurisdiction over the matter and while it was not controlling, Appellant had failed to raise any evidence to support his claim that he was the father of S.H., in light of the results of the genetic testing sponsored by the Guernsey County Child Support Enforcement Agency.

{¶12} The trial court endorsed the April 14, 2010 judgment entry with the Civ.R. 54(B) language, designating it a final, appealable order.

{¶13} It is from this judgment entry Appellant now appeals.

{¶14} Appellant raises two Assignments of Error:

{¶15} "I. THE TRIAL COURT ERRED BY DENYING JOHN HOLYAK'S MOTION TO DISMISS BASED UPON JURISDICTIONAL ISSUES.

{¶16} "II. IN THE EVENT THAT THE GUERNSEY COUNTY JUVENILE COURT DID HAVE JURISDICTION TO PROCEED IT ERRED BY INDICATING THAT JOHN HOLYAK WOULD NOT BE ABLE TO REHABILITATE HIS STATUTORY PRESUMPTIONS IN THE FACE OF FATHER'S EVIDENCE OF DNA TESTING."

{¶17} We first note that neither Bookman nor Tammy Holyak filed a brief in this matter. Pursuant to App.R. 18(C), in determining the appeal, we may accept Appellant's statement of the facts and issues as correct, and reverse the judgment if appellant's brief reasonably appears to sustain such action. See *State v. Rohrig* (Apr. 2, 2001), Fairfield App. No. 00 CA 39, and *Chowdhury v. Fitzgerald* (Mar. 27, 1997), Guernsey App. No. 96 CA 43. Therefore, we presume the validity of Appellant's statement of facts and issues.

{¶18} Before we address Appellant's Assignments of Error, we must first determine whether we have jurisdiction to consider Appellant's appeal. Appellant is appealing the trial court's denial of his Motion to Dismiss the Petition to Establish Parental Rights and Responsibilities.

{¶19} It is well settled that an order denying a motion to dismiss is not a final order under R.C. 2505.02(B)(1) because it does not determine the action and prevent a judgment. *Matteo v. Principe*, Cuyahoga App. No. 92894, 2010-Ohio-1204, ¶19. We stated in *Baldrige v. Napier*, Delaware App. No. 05CAF090063, 2006-Ohio-3141, ¶13, that "[g]enerally, a denial of a motion to dismiss in a criminal or civil case is not considered a final appealable order because the case will proceed to trial. If an adverse judgment is rendered, the denial of the motion to dismiss may be an assignment of error on appeal. *Lakewood v. Pfeifer* (1992), 83 Ohio App.3d 47, 50, citing *State v. Eberhardt* (1978), 56 Ohio App.2d 193, 197-98.

{¶20} In this case, the trial court included the Civ.R. 54(B) language on the order stating that it was a final, appealable order. However, "the mere incantation of the

required language does not turn an otherwise non-final order into a final appealable order.” *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 96, 540 N.E.2d 1381.

{¶21} Applying the above standard in the present case, we find that a final, appealable order has not been presented for our review. We therefore do not have jurisdiction to consider the appeal.

{¶22} Appellant’s appeal is hereby dismissed.

By Delaney, J.

Gwin, P.J. and

Farmer, J. concur.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. SHEILA G. FARMER

