[Cite as *Christian v. Johnson*, 2009-Ohio-3863.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

CAROLYN C. CHRISTIAN	C.A. No. 24327
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
LARRY D. JOHNSON	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. DR 2005-11-4095

DECISION AND JOURNAL ENTRY

Dated: August 5, 2009

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} Carolyn Christian and Larry Johnson were once married and had two sons together. Ms. Christian now lives in Ohio with both boys, while Mr. Johnson lives in California, but has visitation rights. Ms. Christian and Mr. Johnson cannot seem to cooperate with each other in following trial court orders regarding visitation. When Mr. Johnson appeared pro se and unprepared to proceed to trial on the slew of contempt, custody, and visitation motions both parties had filed, the trial court modified the visitation schedule and denied all pending motions. This Court reverses and remands because, although the trial court did not err by denying Mr. Johnson's request for a continuance, it incorrectly modified his visitation rights without considering Section 3109.05.1(D) of the Ohio Revised Code.

BACKGROUND

{¶2} In 2004, a court in St. Louis County, Missouri, granted Mr. Johnson and Ms. Christian a divorce and joint legal custody of their two sons. The court placed the boys in the sole physical custody of Ms. Christian and established a parenting plan for Mr. Johnson. Before that proceeding was complete, Ms. Christian moved to Hudson, Ohio, with the parties' two children, where they have lived since 2003. Mr. Johnson later moved to California.

{¶3} In late 2005, Ms. Christian moved the Domestic Relations Division of the Summit County Common Pleas Court to register the Missouri decree and assume jurisdiction over all parenting matters. On March 16, 2006, on Ms. Christian's motion, the Summit County court designated Ms. Christian the residential parent and legal custodian of both of the parties' sons. The court established a visitation schedule for Mr. Johnson, granting him five holiday weekends, one weekend in April, spring break, two weeks in June, one three-day weekend in July, two weeks in August, Thanksgiving, and winter break. The order also granted him one weekend a month to be spent "in the city in which [Ms. Christian] resides." Since December of 2006, the parties have consistently had problems with how the other parent has handled court-ordered visitation.

{¶4} After both parties had filed various motions regarding custody and visitation issues, the court held an evidentiary hearing in June 2007. Despite a July 13, 2007, praecipe, the record does not contain a transcript of that proceeding. On June 26, 2007, the magistrate issued an order giving Mr. Johnson the remainder of summer 2007 for visitation with the two children.

{¶5} The court held a review hearing when the children returned from California in August 2007. Following that hearing, the magistrate issued a "PROVISIONAL INTERIM ORDER" on August 28, 2007. The magistrate determined "it [wa]s appropriate to immediately

refer th[e] case to [mediation] . . . prior to issuing a Magistrate's Decision." The magistrate modified the existing visitation schedule "[i]n the interim" by ordering a specific schedule for Thanksgiving and Christmas breaks and giving Mr. Johnson the right to exercise weekend visitation whenever he is in Ohio, provided he notify Ms. Christian in writing three days in advance. The magistrate appointed a guardian ad litem and ordered both parties to undergo a psychological evaluation and a home study.

{¶6} The flurry of motions from both sides continued. In addition to moving four times for a contempt finding against her, Mr. Johnson moved the court for a psychological evaluation of Ms. Christian and for immediate removal of the children from her home. On January 28, 2008, Mr. Johnson moved the court for an "emergency" order establishing a specific parenting time schedule for 2008. Meanwhile, on four separate occasions, Ms. Christian moved the court for a contempt finding against Mr. Johnson, as well as for a home study and termination of visitation.

{¶7} In early 2008, a visiting judge was appointed to hear the case. After a March hearing attended by attorneys for both parties, the court issued an order scheduling a settlement conference for June 10, 2008, with trial set to begin June 13. Mr. Johnson's lawyer withdrew from the case immediately after the March hearing. The court consolidated Ms. Christian's four pending motions to show cause and scheduled them for hearing on the morning of trial, June 13, 2008. At that time, Mr. Johnson also had four pending motions to show cause against Ms. Christian, as well as various emergency motions for modification of the parenting schedule and for change of custody.

{¶8} Mr. Johnson appeared without counsel at the June 10, 2008, pretrial hearing and requested a continuance of the trial scheduled for three days later. He told the court that he

would be unable to attend due to a job interview in California. He requested an open-ended continuance so that he could get a job, "get [his] financial situation back in order," and hire an attorney. Ms. Christian objected to a continuance. The trial court denied a continuance, but dismissed all pending motions without prejudice, promising to "schedule another [t]rial date" "when [the parties] file a new motion." The court ordered that, "[u]ntil [Mr. Johnson] completes the parenting evaluation . . . and . . . the California home study, [Mr. Johnson's] parenting time shall take place in Summit County." It also ordered that all prior child support and parenting orders not inconsistent with the current order "shall remain in full force and effect."

FINAL, APPEALABLE ORDER

{¶9} Although the parties have not mentioned it, a threshold jurisdictional question must be addressed before reaching the merits of this appeal. This Court's jurisdiction over trial court judgments extends only to final orders. Ohio Const. Art. IV, § 3(B)(2). Section 2505.02(B)(2) defines "a final order that may be reviewed, affirmed, modified, or reversed" as one that "affects a substantial right made in a special proceeding . . . ." Divorce and ancillary custody proceedings did not exist at common law, but were created by statute, and are special proceedings within the meaning of Section 2505.02 of the Ohio Revised Code. *State ex rel. Papp v. James*, 69 Ohio St. 3d 373, 379 (1994); R.C. 2505.02(A)(2). "An order affects a substantial right if, in the absence of an immediate appeal, one of the parties would be foreclosed from appropriate relief in the future." *Koroshazi v. Koroshazi*, 110 Ohio App. 3d 637, 640 (1996) (citing *Bell v. Mt. Sinai Med. Ctr.*, 67 Ohio St. 3d 60, 63 (1993)). "The entire concept of 'final orders' is based upon the rationale that the court making an order which is not final is thereby retaining jurisdiction for further proceedings. A final order, therefore, is one disposing

of the whole case or some separate and distinct branch thereof." *Noble v. Colwell*, 44 Ohio St. 3d 92, 94 (1989) (quoting *Lantsberry v. Tilley Lamp Co.*, 27 Ohio St. 2d 303, 306 (1971)).

{¶10} The trial court modified the visitation schedule and denied all pending motions at the same time. The June 20, 2008, order was not an interim visitation order subject to review by the trial court in future related proceedings. See *Hissa v. Hissa*, 8th Dist. No. 90612, 2008-Ohio-4872, at ¶3 (("A judgment that leaves issues unresolved and contemplates further action is not a final appealable order.") (citing *Circelli v. Keenan Constr*., 165 Ohio App. 3d 494, 2006-Ohio-949, at ¶14)). In view of the fact that the trial court denied all pending motions, its restriction of Mr. Johnson's visitation time with his children to Summit County, Ohio, affected his substantial right to parent his children. Under the circumstances, the order restricting Mr. Johnson's visitation rights was final and appealable.

DENIAL OF CONTINUANCE

{¶11} Mr. Johnson's first assignment of error is that the trial court abused its discretion by denying his request for a continuance of trial on the many pending motions to show cause and for reallocation of parental rights and responsibilities. He has argued the denial of a continuance "was unreasonable under the circumstances." Whether to grant a requested continuance is within a trial court's discretion. *State v. Unger*, 67 Ohio St. 2d 65, 67 (1981). A trial court abuses its discretion if its "attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St. 3d 217, 219 (1983).

{¶12} The trial court began the pretrial hearing on June 10 by asking Mr. Johnson whether he had complied with the court's orders to provide certain documents to his ex-wife, complete a home study, and submit to a parenting evaluation. Mr. Johnson responded that he had not done any of those things. The trial court asked how his telephone contact with his sons

had been progressing and learned that, for various reasons that each parent blamed on the other, Mr. Johnson had not been in regular communication with his sons.

{¶13} The trial court did not wish to proceed with the trial without Mr. Johnson's participation and did not want to interfere with his job search. Ms. Christian, however, strenuously objected to a continuance. She argued that a continuance would merely reward Mr. Johnson for refusing to comply with the court's orders. According to her, a continuance was unnecessary because Mr. Johnson had known about the trial date "for months." She also argued that a further delay would be burdensome for her because she had subpoenaed "a whole list of witnesses" for trial and her lawyers were ready to proceed. The trial court's decision in this case was not unreasonable, arbitrary, or unconscionable. The trial court did not abuse its discretion in denying Mr. Johnson's request for a continuance. Mr. Johnson's first assignment of error is overruled.

MODIFICATION OF VISITATION

{¶14} Mr. Johnson's second assignment of error is that the trial court incorrectly modified his visitation time sua sponte and without reason. He has specifically objected to the court's order of June 20, 2008, requiring that all visitation occur in Summit County, Ohio. Mr. Johnson has argued that, because he lives so far away from Ohio, the court essentially "eliminated [his] visitation and companionship time with his children" by restricting it to Summit County.

{¶15} Contrary to Mr. Johnson's argument, the topic of visitation was properly before the court. Mr. Johnson had invoked the continuing jurisdiction of the court by moving for a modification of visitation and custody, in addition to moving on four separate occasions for Ms. Christian to be held in contempt. See Civ. R. 75(J); *Morrow v. Becker*, 9th Dist. No. 07CA0054-

M, 2008-Ohio-155, at ¶9. By requiring Mr. Johnson to visit with his children only in Summit County, Ohio, the court substantially altered his visitation rights, but it did not raise the visitation issue sua sponte, as Mr. Johnson has claimed.

{¶16} Section 3109.05.1(D) of the Ohio Revised Code governs decisions regarding modification of parental visitation rights. *Braatz v. Braatz*, 85 Ohio St. 3d 40, 44 (1999). Prior to modifying visitation orders, trial courts are required to consider the factors found in Section 3109.05.1(D) and determine whether a change in visitation is in the best interest of the children. *Id*. at 45. The statute requires a consideration of, among other things, the distance between the parents' homes, the time available for visitation considering the school and work schedules of those involved, and each parent's willingness to facilitate the other's visitation time. R.C. 3109.05.1(D)(2), (3), (10).

{¶17} In this case, there is no evidence in the record regarding any of the statutory factors. Not only does the court's June 20, 2008, order not refer to Section 3109.05.1 or any of the issues raised by the factors found in subpart D, but the trial court conducted a settlement conference, not a hearing on the many pending motions. It did not receive any evidence related to any of the statutory factors. Therefore, the trial court incorrectly modified Mr. Johnson's visitation rights without consideration of Section 3109.05.1(D) and the best interest of the children. See *Braatz v. Braatz*, 85 Ohio St. 3d 40, 44-45 (1999). Mr. Johnson's second assignment of error is sustained.

CONCLUSION

{¶18} The trial court did not err by denying Mr. Johnson's motion for a continuance, but it incorrectly modified his visitation rights without considering the factors of Section 3109.05.1(D). The judgment of the Domestic Relations Division of the Summit County

Common Pleas Court modifying Mr. Johnson's visitation rights is reversed and the cause is remanded for proceedings consistent with this opinion.

Reversed and remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellee.

CLAIR E. DICKINSON
FOR THE COURT

WHITMORE, J.
BELFANCE, J.
CONCUR

APPEARANCES:

CHRISTOPHER R. SNYDER, attorney at law, for appellant.

JEFFREY V. HAWKINS, attorney at law, for appellee.