

[Cite as *In re E.R.*, 2010-Ohio-2361.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 94363**

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**IN RE: E.R., II**

**DERYKKA R. R.**

PLAINTIFF-APPELLEE

vs.

**ERIC R.**

DEFENDANT-APPELLANT

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**JUDGMENT:**  
REVERSED AND REMANDED

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Appeal from the Cuyahoga County Court  
of Common Pleas, Juvenile Division  
Case No. SU 97772324

**BEFORE:** Sweeney, J., Kilbane, P.J., and Cooney, J.

**RELEASED:** May 27, 2010

**JOURNALIZED:**  
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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

**JAMES J. SWEENEY, J.:**

{¶ 1} Defendant-appellant, Eric R.<sup>1</sup> appeals from the judgment of the Common Pleas Court, Juvenile Division that dismissed his motion to modify allocation of parental proceedings, termination of residential parent appointment on the following grounds: (1) service of process was not complete within six months from the date of the filing “as required by the Civil Rules of Procedure”; and (2) “service of process on all necessary parties was not requested by the filing parties.” For the reasons that follow, we reverse and remand for further proceedings.

{¶ 2} Eric and Derykka are the parents of E.R. Prior to the parties’ 1998 divorce, the Juvenile Court adjudicated child support and custody matters with respect to these parties.

{¶ 3} Sometime after the divorce, Derykka moved out of Ohio with the child. In 2008, however, she requested Eric to take custody of their son in Ohio. Derykka executed an affidavit on August 4, 2008, granting Eric authority to take their son back to Cleveland and granting him authority to become the residential parent.

{¶ 4} On October 30, 2008, Eric filed a motion to modify allocation of parenting proceedings, termination of residential parent appointment and motion for immediate stay of distribution of funds (“motion to modify”) in the Juvenile Court.<sup>2</sup>

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<sup>1</sup>The parties are referred to herein by their initials in accordance with this Court’s established policy.

<sup>2</sup>Eric had previously filed the motion in the Domestic Relations Division of Cuyahoga County Common Pleas Court, which ultimately dismissed it for want of jurisdiction because it determined that the parties “had litigated parenting issues, including child support in the Cuyahoga County Juvenile Court” and, therefore, “jurisdiction lies with the Cuyahoga County Juvenile Court.” R. 31, Ex. B.

He attached the above referenced affidavit to the motion to modify. Also attached was a certificate of service, where Eric's attorney indicated he had served Derykka with the motion by certified mail at a Georgia address on October 27, 2008.

{¶ 5} On November 14, 2008, the court issued hearing notices to the parties, including Derykka at the Georgia address. On January 13, 2009, both Eric and his attorney appeared for a hearing.

{¶ 6} A magistrate's order dated January 13, 2009, included findings that Derykka was properly served with a summons and a copy of the motion by ordinary mail issued on October 27, 2008, and that hearing notices were issued to all parties. The magistrate further stayed the disbursement of child support based on his finding that the child had been in Eric's possession since August 4, 2008.

{¶ 7} Hearing notices were issued to the parties on January 13, 2009, including one to Derykka at the Georgia address. On May 28, 2009, Derykka filed a motion to continue child support issues because she was suffering from complications of pregnancy and lived out of state.

{¶ 8} The record reflects that several persons attended the June 5, 2009 hearing, including, among others, "party involved," Eric, and his attorney. Once again, the magistrate's order found that Derykka was properly served by mail. The order further noted Derykka's motion to continue. The stay of child support payments was continued, and the matter was continued for further disposition.

{¶ 9} Derykka's attorney filed his notice of appearance on September 30, 2009. On October 13, 2009, Derykka filed a motion to appear by telephone for health

reasons, and because she was living in Georgia. She submitted an affidavit in support together with correspondence from a physician's assistant.

{¶ 10} The magistrate's order from this hearing reflected that Derykka "was properly served with a summons and copy of the motion by ordinary mail issued on June 5, 2009. Hearing notices were issued to all parties by regular mail on November 14, 2008." (R. 60.) It further noted that Eric had filed a motion for continuance and the matter was continued "for further disposition regarding the child support issues \* \* \* [and] transferred to the appropriate custody magistrate for the purpose of hearing the pending motion to modify allocation of parenting proceedings and termination of residential parent appointment." Id.

{¶ 11} On October 21, 2009, another magistrate dismissed the motion for failure to complete service of process within six months and because Eric had not requested service of process on all necessary parties.

{¶ 12} On October 29, 2009, Derykka filed a motion to end the child support stay. On November 3, 2009, Eric filed objections to the October 21, 2009 magistrate's decision. The court affirmed and adopted the magistrate's decision by order dated November 5, 2009, which was journalized on November 10, 2009. On November 10, 2009, Derykka filed her response to Eric's objection to the magistrate's decision.<sup>3</sup> On November 18, 2009, Derykka filed another brief in support of her motion to release child support money.

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<sup>3</sup>Her sole contention was that the objections were not timely filed. However, Eric filed his objections on November 3, 2009, which was within 14 days of the October 21,

{¶ 13} On December 9, 2009, Eric timely filed his notice of appeal from the trial court's decision that was journalized on November 10, 2009. Eric raises two assignments of error for our review, which both concern service of process and will be addressed together for ease of discussion.

{¶ 14} "I. The Juvenile Court abused its discretion and erred as a matter of law in dismissing appellant's motion for reallocation of parental rights and responsibilities between consenting parents, which negates service of notice.

{¶ 15} "II. The Juvenile Court committed error of law in finding lack of service within six (6) months as the basis for dismissal as this requirement has no application to out-of-state service. The court is, therefore, estopped from denying proper service."

{¶ 16} Although Derykka maintains that the Juvenile Court's dismissal of the motion was proper on various alternative grounds, the court based the dismissal solely on the reasons that service was not completed within six months and Eric had not requested service of process on all necessary parties.

{¶ 17} Pursuant to R.C. 3111.16, the Juvenile Court "has continuing jurisdiction to modify or revoke a judgment or order issued under sections 3111.01 to 3111.18 of the Revised Code to provide for future education and support and a judgment or order issued with respect to matters listed in divisions (C) and (D) of section 3111.13 and division (B) of section 3111.15 of the Revised Code \* \* \*."

{¶ 18} Juv.R. 35(A) provides: “[t]he continuing jurisdiction of the court shall be invoked by motion filed in the original proceeding, notice of which shall be served in the manner provided for the service of process.” And, Juv.R. 16(A) instructs that “[e]xcept as otherwise provided in these rules, summons shall be served as provided in Civil Rules 4(A), (C) and (D), 4.1, 4.2, 4.3, 4.5 and 4.6.”

{¶ 19} To the extent that the trial court dismissed the motion for failure to complete service within six months, which provision is contained in Civ.R. 4(E), Civ.R. 4(E) does not apply in this case, which involves out-of-state service. Juv.R. 16(A) does not provide for service pursuant to that division of Civ.R. 4 and Civ.R. 4(E) clearly states that it “shall not apply to out-of-state service pursuant to Rule 4.3.”

{¶ 20} Civ.R. 4.3(B)(1) governs the methods for out-of-state service as follows:

{¶ 21} “(1) Service by certified or express mail.

{¶ 22} “Evidenced by return receipt signed by any person, service of any process shall be by certified or express mail unless otherwise permitted by these rules. The clerk shall place a copy of the process and complaint or other document to be served in an envelope. The clerk shall address the envelope to the person to be served at the address set forth in the caption or at the address set forth in written instructions furnished to the clerk with instructions to forward. The clerk shall affix adequate postage and place the sealed envelope in the United States mail as certified or express mail return receipt requested with instructions to the delivering postal employee to show to whom delivered, date of delivery, and address where delivered.

{¶ 23} “The clerk shall forthwith enter the fact of mailing on the appearance docket and make a similar entry when the return receipt is received. If the envelope is returned with an endorsement showing failure of delivery, the clerk shall forthwith notify, by mail, the attorney of record or, if there is no attorney of record, the party at whose instance process was issued and enter the fact of notification on the appearance docket. The clerk shall file the return receipt or returned envelope in the records of the action. If the envelope is returned with an endorsement showing failure of delivery, service is complete when the attorney or serving party, after notification by the clerk, files with the clerk an affidavit setting forth facts indicating the reasonable diligence utilized to ascertain the whereabouts of the party to be served.”

{¶ 24} The record indicates that Eric’s attorney, rather than the clerk, served the motion to Derykka by certified mail sent to a Georgia address on October 27, 2008. There are no entries by the clerk concerning service to Derykka as required by Civ.R. 4.3(B)(1). Notwithstanding, a party may waive the affirmative defense of insufficiency of service of process by voluntarily submitting to a court’s jurisdiction. *Glozzo v. Univ. Urologists of Cleveland, Inc.*, 114 Ohio St.3d 141, 2007-Ohio-3762, 870 N.E.2d 714, ¶13.

{¶ 25} In *Glozzo*, the Ohio Supreme Court noted, “[i]n some instances, a party who voluntarily submits to the court’s jurisdiction may waive available defenses, such as insufficiency of service of process or lack of personal jurisdiction. The only way in

which a party can voluntarily submit to a court's jurisdiction, however, is by failing to raise the defense of insufficiency of service of process in a responsive pleading or by filing certain motions before any pleading. Only when a party submits to jurisdiction in one of these manners will the submission constitute a waiver of the defense." *Id.*, internal citations omitted.

{¶ 26} This Court has previously determined that "Juv.R. 22 and Civ.R. 12 govern the raising and waiver of defenses. Because Juv.R. 22 does not expressly govern waiver; however, Juv.R. 45(B) permits us to resort to Civ.R. 12(H). Civ.R. 12(H) provides that a party waives certain defenses, such as insufficiency of service of process or lack of jurisdiction over the person, by failing to timely raise them by motion or answer. A party properly raises these defenses, and does not appear or voluntarily submit to a court's jurisdiction, by asserting them in a motion to dismiss at the outset of the case \* \* \*." *Lucas v. Green* (Oct. 21, 1999), Cuyahoga App. Nos. 74295, 74913, and 74914, citing *Maryhew v. Yova* (1984), 11 Ohio St.3d 154, 156-157, 464 N.E.2d 538.

{¶ 27} In this case, Derykka filed numerous motions, appeared at hearings, participated in the proceedings and, inter alia, petitioned the court to lift the child support stay, never raising the affirmative defense of insufficiency of service of process. Consequently, she waived the defense and the trial court erred by dismissing the motion for that reason.

{¶ 28} Assignments of Error I and II are sustained.

Judgment reversed and the matter is remanded for further proceedings.

It is ordered that appellant recover from appellee his costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas, Juvenile Division 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.

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JAMES J. SWEENEY, JUDGE

MARY EILEEN KILBANE, P.J., and  
COLLEEN CONWAY COONEY, J., CONCUR