

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *State ex rel. M.D. v. Kelsey*, Slip Opinion No. 2023-Ohio-2165.]

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SLIP OPINION NO. 2023-OHIO-2165

**THE STATE EX REL. M.D., APPELLANT, v. KELSEY, JUDGE, ET AL.,
APPELLEES.**

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may be cited as *State ex rel. M.D. v. Kelsey*, Slip Opinion No.
2023-Ohio-2165.]**

*Motion for order to enforce writ of procedendo—Vexatious litigators—
S.Ct.Prac.R. 4.03(B)—Appellant’s motion to enforce denied—Appellant’s
request to declare appellee M.A.D. a vexatious litigator granted.*

(No. 2021-1463—Submitted May 16, 2023—Decided June 30, 2023.)

APPEAL from the Court of Appeals for Cuyahoga County, No. 110720,
2021-Ohio-4171.

ON MOTION FOR ORDER TO ENFORCE THE COURT’S WRIT OF PROCEDENDO OR, IN
THE ALTERNATIVE, TO DECLARE APPELLEE M.A.D. A
VEXATIOUS LITIGATOR.

Per Curiam.

{¶ 1} This case first came to this court as an appeal from an Eighth District Court of Appeals’ judgment denying a writ of procedendo. On July 26, 2022, we unanimously reversed the court of appeals’ judgment and granted appellant, M.D., a writ of procedendo ordering appellee Judge Reeve W. Kelsey to rule on pending motions and to proceed promptly to final hearings in the divorce and domestic-violence-civil-protection-order (“DVCPO”) cases that at that point had been pending for more than five years. 168 Ohio St.3d 679, 2022-Ohio-2556, 200 N.E.3d 1114. We later denied a motion for reconsideration filed by appellee M.A.D., who had intervened as a respondent in the original action. 167 Ohio St.3d 1529, 2022-Ohio-3322, 195 N.E.3d 170.

{¶ 2} M.D. has filed a motion to enforce this court’s writ of procedendo or, alternatively, to declare M.A.D. a vexatious litigator under S.Ct.Prac.R. 4.03(B). According to M.D., the divorce and DVCPO cases have yet to proceed to final hearings despite this court’s issuance of a writ last July. M.D. attributes the delay to frivolous interlocutory appeals by M.A.D. that are designed merely to divest Judge Kelsey of jurisdiction to proceed. We deny M.D.’s motion to enforce but grant his alternative request to declare M.A.D. a vexatious litigator under our rules.

FACTUAL AND PROCEDURAL BACKGROUND

{¶ 3} M.D. is the defendant in a divorce case (Cuyahoga C.P. No. DR-17-367298) and the respondent in a DVCPO case (Cuyahoga C.P. No. DV-17-367300), both of which were filed on May 31, 2017. 168 Ohio St.3d 679, 2022-Ohio-2556, 200 N.E.3d 1114, ¶ 2. In our July 2022 decision, we granted a writ of procedendo ordering Judge Kelsey

to forthwith (1) rule on all pending motions in the DVCPO case and proceed with a full hearing in that case, (2) rule on M.D.’s June 26, 2020 motion to reinstate his parenting time in the divorce case, (3)

rule on M.D.’s July 21, 2020 emergency motion for temporary custody of the minor children, pending trial in the divorce case, and (4) proceed promptly to trial in the divorce case, unless the case otherwise terminates without trial.

Id. at ¶ 14.

{¶ 4} After our judgment granting the writ of procedendo, the trial court began to address the outstanding motions in the cases. The court issued an order reinstating M.D.’s parenting time and an order removing the minor children’s guardian ad litem. But soon after the court ruled on these motions, M.D. alleges, he “was forced to file” a series of show-cause motions because of M.A.D.’s alleged noncompliance with the trial court’s parenting order. The trial court consolidated M.D.’s motions and set them for a hearing to take place on October 12, 2022. It also scheduled a final hearing in the divorce case to commence on October 25, 2022. However, neither case has proceeded to a final hearing.

{¶ 5} M.D. attributes the delay to a series of appeals by M.A.D. from nonfinal orders and other delay tactics. First, M.A.D. appealed the trial court’s entry of a scheduling order, which the court of appeals dismissed for want of a final, appealable order. M.A.D. moved for reconsideration, which the court of appeals denied. M.A.D. then filed a jurisdictional appeal from the dismissal, which this court denied unanimously. *See* 169 Ohio St.3d 1444, 2023-Ohio-554, 203 N.E.3d 740.

{¶ 6} Second, one day after appealing the scheduling order to the court of appeals, M.A.D. filed an affidavit of disqualification, seeking to disqualify Judge Kelsey from the cases due to alleged bias. The chief justice denied the affidavit. *In re Disqualification of Kelsey*, 170 Ohio St.3d 1235, 2022-Ohio-4489, 210 N.E.3d 556.

{¶ 7} Third, M.A.D. appealed Judge Kelsey’s order removing the guardian ad litem.¹ M.A.D. filed separate notices of appeal from the order removing the guardian ad litem (separate appeals in the DVCPO and divorce cases), which the court of appeals consolidated. The court of appeals dismissed the consolidated appeals for lack of a final, appealable order. *M.A.D. v. M.D.*, 8th Dist. Cuyahoga Nos. 111972, 111984, 112012, and 112021 (Oct. 13, 2022). M.A.D. moved for reconsideration, which the court of appeals denied. M.A.D. then filed a jurisdictional appeal to this court, which we denied unanimously on February 28, 2023. *See* 169 Ohio St.3d 1444, 2023-Ohio-554, 203 N.E.3d 741.

MOTION TO ENFORCE

{¶ 8} As a mechanism for enforcing the writ of procedendo, M.D. asks us to “issue an order to the trial court directing that, until final judgment is entered in both the DVCPO and [divorce] cases, the filing by M.A.D. of additional interlocutory appeals will not automatically divest the trial court of jurisdiction” to proceed in the cases. We deny this relief because M.D. is essentially asking us to issue an advisory opinion that future interlocutory appeals will not divest the trial court of jurisdiction. M.D.’s motion does not account for the possibility that there could be an order that *is* an appealable “final order” under R.C. 2505.02. Granting M.D.’s requested relief would thus allow the trial court to proceed despite an appeal from a final, appealable order. This would be contrary to the settled rule that an appeal divests the trial court of jurisdiction when its proceedings would be inconsistent with the reviewing court’s jurisdiction to reverse, modify, or affirm the judgment. *See State ex rel. Electronic Classroom of Tomorrow v. Cuyahoga Cty. Court of Common Pleas*, 129 Ohio St.3d 30, 2011-Ohio-626, 950 N.E.2d 149, ¶ 13.

1. Judge Kelsey removed the guardian ad litem because she had also been appointed as the children’s attorney; effective January 1, 2021, Sup.R. 48.02(E) prohibits such a joint appointment in cases involving the allocation of parental rights and responsibilities. 159 Ohio St.3d CLXII, CLXIII.

VEXATIOUS-LITGATOR REQUEST

{¶ 9} In the alternative, M.D. asks for an order declaring M.A.D. to be a vexatious litigator under S.Ct.Prac.R. 4.03(B). We grant this request. M.A.D. has used this court to engage in frivolous conduct for the purpose of delaying the proceedings before Judge Kelsey and thwarting the effect of the writ of procedendo.

{¶ 10} S.Ct.Prac.R. 4.03(B) provides:

If a party habitually, persistently, and without reasonable cause engages in frivolous conduct under division (A) of this rule, the Supreme Court may, sua sponte or on motion by a party, find the party to be a vexatious litigator. If the Supreme Court determines that a party is a vexatious litigator under division (A) of this rule, the court may impose filing restrictions on the party. The restrictions may include prohibiting the party from continuing or instituting legal proceedings in the Supreme Court without first obtaining leave, prohibiting the filing of actions in the Supreme Court without the filing fee or security for costs required by S.Ct.Prac.R. 3.04 and 3.05, or any other restriction the Supreme Court considers just.

Under our rules, an appeal or other action is frivolous “if it is not reasonably well-grounded in fact or warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law.” S.Ct.Prac.R. 4.03(A).

{¶ 11} M.A.D.’s actions in this court since we issued the writ of procedendo have been frivolous. M.A.D.’s appeals of nonfinal orders all the way to this court appear to be nothing more than a tactic to prevent Judge Kelsey from proceeding to final hearings in the cases before him, which we ordered him to do when we granted the writ of procedendo. The appeals M.A.D. brought here were not

reasonably grounded in fact or law and appear to have been prosecuted simply for delay. M.A.D.'s affidavit of disqualification against Judge Kelsey was also groundless and appears to have been employed simply to delay the proceedings. Taken as a whole, M.A.D.'s filings here were calculated attempts to prevent Judge Kelsey's compliance with the writ of procedendo we issued last year.

{¶ 12} Accordingly, we declare M.A.D. to be a vexatious litigator under S.Ct.Prac.R. 4.03(B) and hereby impose filing restrictions on M.A.D. Specifically, we prohibit M.A.D. from continuing or instituting legal proceedings in this court without first obtaining leave to do so. Further, under our authority in S.Ct.Prac.R. 4.03(B) to impose "any other restriction the Supreme Court considers just," we order M.A.D. to give notice of this decision to the Eighth District Court of Appeals in any matter currently pending or in any appeal or other action instituted in that court by M.A.D. If the Eighth District determines that M.A.D. has made a frivolous filing in a proceeding before it, the Eighth District should consider whether to declare M.A.D. a vexatious litigator in that court.

CONCLUSION

{¶ 13} We deny M.D.'s motion to enforce. However, because M.A.D. has persistently engaged in frivolous conduct in this court without reasonable cause, we grant M.D.'s request to declare M.A.D. a vexatious litigator under S.Ct.Prac.R. 4.03(B). We prohibit M.A.D. from continuing or instituting legal proceedings in this court without first obtaining leave to do so. We further order M.A.D. to give notice of this decision to the Eighth District Court of Appeals in any matter currently pending or in any appeal or other action instituted in that court by M.A.D.

Judgment accordingly.

KENNEDY, C.J., and FISCHER, DEWINE, DONNELLY, STEWART, and DETERS, JJ., concur.

BRUNNER, J., concurs in part and dissents in part and would deny appellant's request to declare appellee M.A.D. a vexatious litigator.

Zukerman, Lear & Murray Co., L.P.A., Larry W. Zukerman, and Brian A. Murray; and Baker & Hostetler, L.L.P., Suzanne M. Jambe, and Patrick T. Lewis, for appellant.

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Nora E. Poore, Assistant Prosecuting Attorney, for appellee Judge Reeve W. Kelsey.

Stafford Law Co., L.P.A., Joseph G. Stafford, and Nicole A. Cruz, for appellee M.A.D.
