

[Cite as *Donoghue v. Donoghue*, 2009-Ohio-3834.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JUDY DONOGHUE

Petitioner-Appellee

-vs-

KEVIN DONOGHUE

Respondent-Appellant

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. John W. Wise, J.

Hon. Julie A. Edwards, J.

Case No. 08-CA-82

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Fairfield County Court of
Common Pleas, Domestic Relations
Division Case No. 2008 DR 330

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

July 23, 2009

APPEARANCES:

For Petitioner-Appellee

For Respondent-Appellant

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Hoffman, P.J.

{¶1} Respondent-appellant Kevin Donoghue appeals the October 30, 2008 Entry entered by the Fairfield County Court of Common Pleas, Domestic Relations Division, overruling his objections to the Magistrate's September 23, 2008 Decision, which denied his motion to dismiss a civil protection order. Petitioner-Appellee is Judy Donoghue.

STATEMENT OF THE CASE¹

{¶2} On June 20, 2008, Appellee filed a petition for a domestic violence civil protection order. The trial court issued an ex parte order the same day, granting Appellee's petition, and scheduled a hearing for July 2, 2008. Appellant was personally served with a copy of the order on June 20, 2008.

{¶3} The matter came on for hearing on July 2, 2008. Appellant did not appear at the hearing as he was incarcerated in the Fairfield County Jail. Following the hearing, the trial court issued a domestic violence civil protection order. Appellant was personally served with a copy of the order on July 2, 2008. Appellant subsequently retained counsel. On July 25, 2008, Appellant filed a motion to reset the hearing. The trial court denied the motion via Entry filed July 28, 2008. Appellant filed a Motion to Dismiss the Protection Order on August 8, 2008. The magistrate conducted a non-oral hearing on the motion to dismiss. The magistrate issued her decision on September 23, 2008, denying Appellant's motion to dismiss. The magistrate found the fact the trial court held a full hearing on the petition on the eighth court day following the issuance of

¹ A Statement of the Facts is not necessary to our disposition of this appeal.

the ex parte civil protection order did not affect the validity of the domestic violence civil protection order issued July 2, 2008. Appellant filed timely objections to the magistrate's decision. Via Entry filed October 30, 2008, the trial court overruled Appellant's objections.

{¶4} It is from this entry Appellant appeals, raising the following assignment of error:

{¶5} "I. THE TRIAL COURT ERRED IN OVERRULING KEVIN DONOGHUE'S MOTION TO DISMISS THE CIVIL PROTECTION ORDER."

I.

{¶6} In his sole assignment of error, Appellant contends the trial court erred in overruling his motion to dismiss the civil protection order as the trial court failed to conduct a full hearing within seven court days as required by in R.C. 3113.31(D).

{¶7} R.C. 3113.31(D) sets forth the time limit for a trial court to conduct a full hearing on a petition for a domestic violence civil protection order after the granting of an ex parte order. The statute provides:

{¶8} "(2)(a) If the court, after an ex parte hearing, issues an order described in division (E)(1)(b) or (c) of this section, the court shall schedule a full hearing for a date that is within seven court days after the ex parte hearing. If any other type of protection order that is authorized under division (E) of this section is issued by the court after an ex parte hearing, the court shall schedule a full hearing for a date that is within ten court days after the ex parte hearing. The court shall give the respondent notice of, and opportunity to be heard at, the full hearing. The court shall hold the full hearing on the

date scheduled under this division unless the court grants a continuance of the hearing in accordance with this division. * * *

{¶9} Appellant argues the seven-day time frame in which the trial court is to conduct the full hearing is mandatory and the trial court's failure to comply with such renders the five year order of protection void. We disagree.

{¶10} Where a statute contains the word "shall", the provision will generally be construed as mandatory. *Dorrian v. Scioto Conservancy Dist.* (1971) 72 Ohio St.2d 102, paragraph 1 of the syllabus. "A mandatory statute may be defined as one where noncompliance * * * will render the proceedings to which it relates illegal and void." *State Ex. Rel Jones v. Farrar* (1946), 146 Ohio St.467, 471-472.

{¶11} Nonetheless, even with "shall" as the operative verb, a statutory time provision may be directory. "As a general rule, a statute providing a time for the performance of an official duty will be construed as directory as far as time for performance is concerned, especially where the statute fixes the time simply for convenience or orderly procedure." *Id.* at paragraph three of the syllabus. This rule applies "unless the object or purpose of a statutory provision requiring some act to be performed within a specified period of time is discernible from the language employed." *Id.* Therefore, where a statutory time requirement evinces an object or purpose to limit a court's authority, the requirement will be considered jurisdictional. For example, R.C. 2941.401 involving speedy trial rights for untried indictments provides if the action is not brought within the required time, "no court any longer has jurisdiction thereof, the indictment * * * is void, and the court shall enter an order dismissing the action with prejudice."

{¶12} The time restriction set forth in R.C. 3113.31(D) is a time restriction on the performance of an official duty. The statute does not include any expression of intent to restrict the jurisdiction of the trial court for untimeliness. Once the trial court's subject matter jurisdiction is properly invoked the trial court's failure to follow time constraints renders the judgment subject to attack on direct appeal as an improper exercise of such jurisdiction. Such failure by the trial court does not render the judgment void.

{¶13} The trial court issued a five-year order of protection on July 2, 2008. Appellant was required to appeal from that entry in order to assert any error in the trial court's conducting the hearing outside the seven-day time frame. Having failed to file a timely appeal from the July 2, 2008 Order, Appellant may not now collaterally attack that Order by appeal from the trial court's denial of his Motion to Dismiss the Protection Order.

{¶14} Appellant's sole assignment of error is overruled.

{¶15} The judgment of the Fairfield County Court of Common Pleas, Domestic Relations Division, is affirmed.

By: Hoffman, P.J.

Wise, J. and

Edwards, J. concur

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

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

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

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

JUDY DONOGHUE

Petitioner-Appellee

-vs-

KEVIN DONOGHUE

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JUDGMENT ENTRY

Case No. 08-CA-82

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Fairfield County Court of Common Pleas, Domestic Relations Division, is affirmed. Costs assessed to Appellant.

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

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

s/ Julie A. Edwards
HON. JULIE A. EDWARDS