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Supreme Court scraps custody-order precedent

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SPRINGFIELD — A modified Illinois Supreme Court opinion has sparked differing takes on whether divorcing parents will begin appealing temporary custody orders entered before their case ends in trial court.

When Catherine and Raymond Eckersall couldn't agree on a visitation schedule during divorce proceedings in 2013, a Cook County judge issued a temporary "custody/visitation injunction order" that dictated what each parent could and couldn't do on days they had their three children.

Among the 11 terms of the order, the parents couldn't harm the children, speak negatively about each other to the children or talk to the children about the children's preferences about custody and visitation.

Catherine appealed the order, alleging it infringed on her rights to parent her children and violated her rights of due process because it was entered without an evidentiary hearing.

At issue on appeal was the effect and wording of the order — and whether it could even be appealed. Temporary orders can be appealed if they are injunctive in nature, so that's the basis on which the 1st District Appellate Court accepted Catherine's interlocutory appeal. However, the appellate court dismissed her case because it ruled the order wasn't an injunction despite that word being in its title.

In its majority opinion authored by Justice Michael B. Hyman, the appellate court ruled that the order's ultimate aim was not to settle a legal matter — it was to outline unacceptable conduct during the parents' visits.

"The order regulates an aspect of the pretrial proceeding, namely, the parties' custody and visitation," Hyman wrote. "The order does not purport to adjudicate any substantive issues, but, rather, precludes the parents from engaging in specified conduct that could be detrimental to the welfare of the children."

Cook County Associate Judge William Boyd finalized the divorce in June 2014 about two weeks after the appellate court issued its decision.

Catherine then appealed to the Supreme Court, which accepted the case but didn't address the debate about whether the order was an injunction.

Benton Hutul Page, an associate at Davis, Friedman LLP who represents Catherine, said the goal in petitioning to the high court was to vacate the appellate opinion.

He said the appellate opinion created bad law that didn't offer future parents any recourse if judges restricted them from talking to their children about "virtually anything" during a divorce.

Justice Charles E. Freeman authored the unanimous opinion in which the justices agreed they rashly accepted her appeal, declared the case moot and didn't address the appellate ruling.

Page said there was no question when they filed the petition that the case was moot because the final circuit judgment had already come down. Despite its mootness, he said, he argued the case should still be heard on the public interest exception to the mootness doctrine.

Applying the exception relies on three

Not only should the presented question be important for the public and require an authoritative decision to guide public officers in the future, but it must also be likely that such a question will arise in the future.

Catherine relied on the court's 1989 decision in *In re A Minor* to contend "issues involving minors or constitutional concerns are considered important public concerns worthy of the application of the public interest exception."

Raymond argued the exception shouldn't apply because the case didn't meet all three factors.

The high court agreed with Raymond, saying the types of orders Catherine appealed are typically only filed in Cook County divorce cases when parties can't agree on child-visitation conditions. It also held the case didn't require an authoritative decision, and a lack of past litigation regarding the issue indicates it wouldn't come up again.

"We kind of assumed, based on the fact that they granted the petition for

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leave to appeal, they agreed with us," Page said. "So it was a bit of a shock to everyone involved when they ultimately dismissed and mooted the appeal."

The court held the order Catherine appealed is unlike those in *In re A Minor* and 1997's *In re R.V.* because those cases dealt with public procedure. The order issued in Catherine's case, the court held, had a limited application and wouldn't have posed any significant effect on the public.

"Issues that arise in dissolution of marriage proceedings tend to be very fact-specific and do not have broad-reaching implications beyond the particular dissolution of marriage proceedings," Freeman wrote.

Page said his petition for rehearing was more of a second shot at getting the high court to vacate the appellate opinion. He achieved that goal last week when the justices cited 2007's *Felzak v. Hruby* to vacate the ruling so it can't serve as precedent in the future.

The 2007 decision regarded a DuPage County grandmother who, in 2005, successfully sought enforcement of a grandparental visitation order 10 years after it had been issued.The circuit court refused the parents' motion to dismiss the case and held the parents in indirect civil contempt for failing to obey the 1995 order. The 3rd District Appellate Court affirmed that ruling.

However, the minor turned 18 by the time the case reached the Supreme Court. Because of that, the justices ruled it moot, vacated the lower court rulings and held the mootness doctrine's public interest exception wasn't clearly established.

Paul L. Feinstein, the owner of Paul L. Feinstein Ltd. who co-wrote a friend-of-the-court brief for Catherine on behalf of the Illinois chapter of the American Academy of Matrimonial Lawyers, said the high court's decision to vacate the appellate opinion in *Eckersall* is significant for future litigation because it opens the door for parties to appeal the types of orders Catherine challenged.

Now that the appellate opinion is vacated, he said, parents have another chance to try to get the relief Catherine sought.

"Possibly another panel of the appellate court would get the case, and they may feel differently. Or there might be different facts that might be more compelling to an appellate court," Feinstein said.

Page said he doesn't believe the vacated appellate opinion will substantially impact law practices because parties don't typically appeal temporary orders. He said although the appellate decision was vacated, an and they may feel differently. Or there might be different facts that might be more compelling to an appellate court," Feinstein said.

Page said he doesn't believe the vacated appellate opinion will substantially impact law practices because parties don't typically appeal temporary orders. He said although the appellate decision was vacated, anappellate court could still reach the same conclusion later.

"At least, theoretically, when a parent does appeal it again, the 1st District Appellate Court could again say the exact same thing they did before," he said.

Tracy M. Rizzo, the owner of Law Offices of Tracy M. Rizzo P.C. who represents Raymond in the case, said she doesn't think the Supreme Court's modified ruling will change how litigants or judges will operate in divorce cases.

She said she doesn't recall one instance in her 19 years of practice in which a temporary custody order was appealed, and she has heard the same from attorneys who have been practicing even longer.

"Even though technically (the modified opinion is) affecting (the courts) to where that precedent is gone now, I don't think that's going to change how the judges use these orders," she said.

Howard P. Rosenberg, the owner of Law Offices of Howard P. Rosenberg LLC in Northbrook who represents the children, couldn't be reached for comment.

The case is *In re Marriage of Eckersall*, No. 117922.