

feature

# CHILD VISITATION: EXTRAORDINARY CIRCUMSTANCES

## HOW OHIO LAW DEFINES EXTRAORDINARY CIRCUMSTANCES...OR DOES IT?

by Jennifer Himmelein

“A nonresidential parent’s right to visitation with his or her child is a fundamental right, which should not be terminated absent extraordinary circumstances.” My first thought when I heard this repeatedly-cited maxim led me to the obvious question: What is an extraordinary circumstance?

As a relatively new lawyer in the domestic relations field, I have heard the term “extraordinary circumstances” used quite frequently in connection with child custody and visitation issues and encountered it as I began my very first Guardian ad Litem appointment. I have had enough experience in family law to know one thing for sure: the standards and rules of law dealing with children (other than support) are rarely defined, are typically subjective, are left to the court’s discretion, and each case is judged on an individual, case-by-case basis. To some extent, the loose standards can be positive. They allow for room to maneuver and fashion appropriate orders dealing with the various lifestyles, peculiarities and cultural norms of a variety of litigants with various socioeconomic backgrounds. But they leave

lawyers — especially newer lawyers — unsure as to how to advise their clients, unable to predict likely outcomes in many cases, and unsure how to devise a sound legal strategy for the best result in a case.

So how does Ohio law define extra ordinary circumstances? As I began my review of the Ohio cases discussing visitation issues, unsurprisingly, I found that the trial court is given great latitude and discretion in determining or modifying parental rights. The legislature gives the courts guidance through a set of factors identified in Ohio Rev. Code Ann. §3109.051(D). The factors to be considered include: (1) the child’s relationship with parents, siblings, and other related persons; (2) geographic location of the parents’ residences; (3) parents’ employment schedules and child’s school and activities schedules; (4) age of the child; (5) health and safety of the child; (6) mental and physical health of the parties; (7) cooperation between parents regarding visitation schedule and (8) criminal history of the parents. This list is very subjective and provides no insight as to how the various factors should be utilized or weighted in conjunction with one another or in light of the “best interests of the child” standard governing all decisions concerning custody, visitation and support of minor children in the state of Ohio.

A cursory review of many Ohio cases dealing with the R.C. 3109.051 factors provides little further guidance. Most courts merely list the factors, reference two broad categories of extraordinary circumstances — unfitness of nonresidential parent and/or whether visitation would cause harm to the child(ren) — and then make a decision. Some courts detail the proof scheme required when analyzing visitation issues. First, the court must determine if an extraordinary circumstance exists. If an

extraordinary circumstance is found to exist, visitation must then be analyzed using the best interests of the child standard. The burden of proof is on the party contesting visitation privileges. Other courts point out that permanent termination of parental rights has been called the “family law equivalent to the death penalty in a criminal case.” *In re Hayes* (1997), 79 Ohio St.3d 46, 48, 679 N.E.2d 680. Therefore, a parent “must be afforded every procedural and substantive protection that the law allows” and “parental rights [must] receive more stringent protection under Ohio law than the constitution requires.” *Id.*; *State ex rel. Asberry v. Payne* (1998), 82 Ohio St.3d 44, 46, 1998-Ohio-596, 693 N.E.2d 794. Finally, Ohio courts recognize that if a decision to terminate parental rights is made, the court must make a finding that there was clear and convincing evidence justifying the termination. *Dubec v. Venuto*, 7th Dist. No. 09-MA-6, 2010-Ohio-1293, ¶ 31.

As I suspected, after all this research, I still did not have an answer to my question of how Ohio law defines extraordinary circumstances. Going a step further, I began examining as many cases as I could to find specific examples of situations wherein the court determined that there existed extraordinary circumstances — such that visitation was suspended, limited, supervised or terminated altogether — and/or cases where the court found that a particular set of facts or circumstances were not extraordinary. What I found was fairly interesting. Some findings of extraordinary circumstances seemed to be “no-brainers,” but others were more shades of gray that I felt could have gone another direction:

1. Extraordinary circumstance exists where nonresidential parent has been convicted of sexual battery. *Hoppel v. Hoppel*, 7th Dist. No. 03 CO 56, 2004-Ohio-1574.

2. The incarceration of a nonresidential parent is an extraordinary circumstance that can in itself justify denial of visitation rights because transporting a child to a prison on a consistent basis gives rise to an inference of harm to the child and, therefore, is not in the best interests of the child. *Calhoun v. Calhoun* (June 10, 1996), 12th Dist. No. CA-95-11-024, 1996 Ohio App. LEXIS 2384.
3. Visitation rights of a nonresidential parent were terminated where there was the extraordinary circumstances of sexual abuse by the nonresidential parent and emotional danger to the child. *Darnell P. v. Sheila W.* (Mar. 7, 1997), 6th Dist. No. F-96-014, 1997 Ohio App. LEXIS 760, at \*8.
4. No extraordinary circumstance exists where nonresidential parent's mother was investigated 40 years ago for child neglect and her home was recently cited for repairs by the county health department. *Cremeans v. Cheadle*, 5th Dist. No. 07-CA-25, 2008-Ohio-2148, ¶ 30.
5. The fact that father and daughter were estranged and had no real relationship was considered an extraordinary circumstance, such that the court restrained the nonresidential parent from contacting his daughter. *In re Durr* (Nov. 10, 1999), 9th Dist. No. 98CA007243, 1999 Ohio App. LEXIS 5286, at \*10-11.
6. A trial court found extraordinary circumstances existed and permanently suspended nonresidential parent's visitation rights after 16-year-old son made allegations against his father of physical abuse, drinking and driving, bad language, threats to child's mother, and child further requested no relationship with his father. *Jannetti v. Nichol* (May 12, 2000), 7th Dist. No. 97-CA-239, 2000 Ohio App. LEXIS 2116, at \*8-11.
7. Refusal to submit to court-ordered drug testing constitutes an extraordinary circumstance wherein the court can temporarily suspend visitation rights. *Raney v. Raney* (Feb. 1, 1999), CA98-07-084, 1999 Ohio App. LEXIS 231.
8. Where the court was presented with evidence of the detrimental effect on the children, the homosexuality of a nonresidential parent can lead to the termination of visitation until the child(ren) are old enough so that he or she will not be adversely affected by that lifestyle. *Roberts v.*

# Legal Malpractice

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- Roberts* (10th Dist. 1985), 22 Ohio App. 3d 127, 489 N.E.2d 1067.
9. Where the evidence established that the nonresidential parent demonstrated a complete inability to co-parent his child to an extent that his visitation was psychologically damaging to the child, the court found that an extraordinary circumstance existed such that it warranted indefinite suspension of visitation rights. *In re: B.J.*, 11th Dist. No. 2009-G-2933, 2010-Ohio-2284.
10. An extraordinary circumstance exists and warrants supervised visitation where a nonresidential parent's partner sexually abused one of the nonresidential parent's children. *Antoine v. Lannom*, 2d Dist. No. 04-CA-0086, 2006-Ohio-2354.
11. No extraordinary circumstance exists sufficient to limit, suspend or terminate visitation where nonresidential parent had only two bedrooms and five children and two adults live there during visitation periods. *In re: C.P.*, 12th Dist. No. CA2004-10-259, 2005-Ohio-3888.
12. Extraordinary circumstances existed, warranting suspension of nonresidential parent's visitation rights, where nonresidential parent violated court order by missing three or more scheduled visits within a three-month period, was unemployed, not current in her child support, and she failed to comply with a court-ordered drug and alcohol assessment. *Shackelford v. Balderson*, 3rd Dist. No. 13-04-50, 2005-Ohio-2778.
13. The court found that an extraordinary circumstance did not exist in order to suspend or limit visitation where the only evidence presented is that the nonresiden-

tial parent verbally abused the residential parent on two occasions. *Sabur v. El-Zant* (Aug. 26, 1999), 8th Dist. No. 74525, 1999 Ohio App. LEXIS 3962.

While these are just a few examples of how Ohio courts have handled this issue, it is clear that in most jurisdictions, extraordinary circumstances can be generally characterized as situations or circumstances that are more extreme or severe in nature or outside that particular area's societal or cultural norms. In every jurisdiction, physical, emotional and/or sexual abuse are most definitely extraordinary circumstances. Incarceration is also an extraordinary circumstance that usually will result in at least the temporary suspension of visitation rights while the noncustodial parent is incarcerated. In some courts, violations of court orders constitute extraordinary circumstances.

There may be no succinct "definition" of the term extraordinary circumstance, but a complete review of the statutes and case law paints a broad picture from which a lawyer can craft many clever arguments as to what constitutes an extraordinary circumstance, especially given a case's particular facts in conjunction with the norms and backgrounds of the people in that particular court and/or geographic location. ☛



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