

FILED

JUL 25 2011  
CLERK OF COURT  
SUPREME COURT OF OHIO

The Supreme Court of Ohio

Cincinnati Bar Association,  
Relator,  
v.  
Robert Neil Trainor,  
Respondent.



Case No. 2010-1894

ORDER TO SHOW CAUSE

It is ordered by the court, sua sponte, that respondent show cause on or before 20 days from the date of this order, why respondent should not be found in contempt for failure to fully comply with this court's order of June 7, 2011, to wit: failure to file an affidavit of compliance on or before July 7, 2011.

A handwritten signature in black ink, appearing to read "Maureen O'Connor", written over a horizontal line.

Maureen O'Connor  
Chief Justice



Case: 2011 1109  
Docket: 691376  
Date Filed: 07/25/11  
Description: Motion to dismiss

**Clerk's Office  
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**In the Supreme Court of Ohio**

**BEN ANDERSON,**

**Relator,**

v.

**DONALD MORGAN,**

**Respondent.**

: **CASE NO. 2011-1109**  
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:  
: **ORIGINAL ACTION IN MANDAMUS**  
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**RESPONDENT DONALD MORGAN'S  
MOTION TO DISMISS**

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BEN ANDERSON  
S.O. #501-259  
Ohio State Penitentiary  
878 Coitsville-Hubbard Road  
Youngstown, Ohio 44505

*Relator, Pro se*

MICHAEL DeWINE (0009181)  
Ohio Attorney General

PETER L. JAMISON (0086539)  
Assistant Attorney General  
*Counsel of Record*  
150 East Gay Street, 16th Floor  
Columbus, Ohio 43215  
(614) 644-0735  
(877) 381-1737 fax  
peter.jamison@ohioattorneygeneral.gov

*Counsel for Respondent Donald Morgan*

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**BEN ANDERSON,**

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**CASE NO. 2011-1109**

**ORIGINAL ACTION IN MANDAMUS**

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**RESPONDENT DONALD MORGAN'S  
MOTION TO DISMISS**

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Respondent Donald Morgan, Warden of Southern Ohio Correctional Facility, moves this Court to dismiss the Relator's petition for failure to state a claim pursuant to Civ. R. 12(B)(6). Relator Ben Anderson has an adequate remedy at law. A memorandum in support is attached.

Respectfully submitted,

MICHAEL DEWINE  
Ohio Attorney General



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PETER L. JAMISON (0086539)  
Assistant Attorney General  
Criminal Justice Section  
150 East Gay Street, 16th Floor  
Columbus, Ohio 43215  
Phone: (614) 644-0735  
Fax: (877) 381-1737  
peter.jamison@ohioattorneygeneral.gov

*Counsel for Respondent Donald Morgan*

## MEMORANDUM

### **I. INTRODUCTION**

Relator Ben Anderson (“Relator” or “Anderson”) filed a petition with this Court raising a number of issues related to his incarceration at the Southern Ohio Correctional Facility (SOCF). Relator questions the way evidence was used in Rules Infraction Board (RIB) hearings. Relator also questions SOCF’s implementation of policies dealing with inmate hunger strikes and inmate classifications and transfers and asserts that these subject an inmate to cruel and unusual punishment. Relator asks for various forms of intervention by the Court, none of which this Court has the jurisdiction to order.

Relator’s claims are not appropriately brought before this Court. To compel the issuance of either a writ of mandamus or prohibition, a petitioner must show the court that they have no other adequate remedy at law. Here, Relator is challenging his conditions of confinement. This Court has previously ruled that a 42 U.S.C. § 1983 action is an adequate remedy at law to challenge such conditions. Furthermore, Relator also makes claims for another inmate whose name appears on the case caption, but he did not sign the Petition. Because Relator is representing himself pro se and is not a licensed attorney, he is not permitted to represent a third party and has no standing on his own to challenge policies that have not effected him.

Realtors’ petition should be dismissed for failure to state a claim.

### **II. LAW AND ARGUMENT**

#### **A. Standard of Review—Ohio Civ. R. 12(b)(6)**

~~A motion to dismiss for failure to state a claim upon which relief can be granted is~~ procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545, 548, 605 N.E.2d 378. In order for a trial court to grant a

motion to dismiss for failure to state a claim upon which relief may be granted, "it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 327 N.E.2d 753, syllabus. In construing the complaint upon a Civ.R. 12(B)(6) motion, a court must presume all factual allegations contained in the complaint to be true and make all reasonable inferences in favor of the non-moving party. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192, 532 N.E.2d 753. In addressing a Civ.R. 12(B)(6) motion, a trial court may only consider the statements and facts contained in the complaint and may not consider or rely on evidence outside the complaint. *Estate of Sherman v. Millhon* (1995), 104 Ohio App.3d 614, 617, 662 N.E.2d 1098

#### **B. Writs of Mandamus and Prohibition<sup>1</sup>**

In order to grant a writ of mandamus, a court must find that the relator has a clear legal right to the relief prayed for, that the respondent is under a clear legal duty to perform the requested act, and that the relator has no plain and adequate remedy at law. *State ex rel. Evans v. Industrial Com. of Ohio* (1992), 64 Ohio St.3d 236, 238, 594 N.E.2d 609, 611; *State ex rel. Fant v. Clerk of Courts* (1992), 62 Ohio St.3d 530, 531, 584 N.E.2d 721, 722; *State ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28, 29, 451 N.E.2d 225, 226. A failure to show any one of these prerequisites requires the court to deny the petition or complaint. *State ex rel. Karmasu v. Tate* (1992), 83 Ohio App.3d 199, 614 N.E.2d 827.

For a writ of prohibition to be granted, the relator must prove that (1) the lower court is ~~about to exercise judicial power, (2) the exercise of power is unauthorized by law, and (3) the~~

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<sup>1</sup>The caption of Relator's Petition also asks for a Writ of Quo Warranto. Because Relator is not challenging the legitimacy of an elected official's office, Respondent will not address the elements of that particular writ.

relator possesses no other adequate remedy of law. *State ex re. Tollis v. Cuyahoga Cty. Court of Appeals* (1988), 40 Ohio St.3d 145, 147, 532 N.E.2d 727, 729.

**C. Writs of Mandamus or Prohibition Are Inappropriate Because Relator Has Another Adequate Remedy at Law.**

While the writs of mandamus and prohibition are different in that one is intended to prompt action while the other is to prohibit it, they share the common requirement that a petitioner must show they have no other remedy at law before a court will issue either writ. See *Evans*, 64 Ohio St.3d at 238; *Tollis*, 40 Ohio St.3d at 147, supra. The issues Relator raises, RIB hearing procedures and SOCF's implementation of policies regarding inmate transfers are related to his conditions of confinement. "[A 42 U.S.C. § 1983 action] constitutes an adequate legal remedy which precludes extraordinary relief where state prisoners challenge the conditions of their confinement and their claims are limited to alleged violation of their federal constitutional and statutory rights." *State ex rel. Peeples v. Anderson*, 73 Ohio St. 3d 559, 560, 653 N.E.2d 371 (Ohio 1995). The fact that there are adequate legal remedies precludes the issuance of either writ.

Additionally, the only Respondent served by the Court was Donald Morgan, the Warden of the SOCF. Relator's Petition does not argue that Respondent has a clear legal duty to perform any particular act. Respondent Morgan is not even named in the Petition except for on its cover page. The bulk of the Petition asks the Court to order the reversal of his RIB sentence, but he does not state or imply who the Court should order or why they have duty to do so. Further, so far as the other issues raised by Relator, he asks the Court itself to undertake an investigation.

**D. Relator Lacks Standing to Raise Issues for a Fellow Inmate.**

Relator has also asked this Court to intervene in the outcome of an RIB hearing he was not a party to, as well as SOCF's execution of a policy that did not affect him. Relator Ben

Anderson submitted a Petition to this Court naming himself and another inmate, Kevin Alsup, as the Relators. Only Anderson's signature is on the Petition. The Petition also avers that at the time the Petition was drafted,<sup>2</sup> Alsup was segregated in another cell block as part of the hunger strike policy the petitioners wish to challenge.

While both Anderson and Alsup are free to file causes of action pro se, either jointly or individually, neither of them may represent the other. “[Ohio Statutes] recognize that a person has the inherent right to proceed pro se in any court. But [they] also prohibit a person from representing another by commencing, conducting, or defending any action or proceeding in which the person is not a party.” *Fravel v. Stark County Bd. of Revision* (2000), 88 Ohio St.3d 574, 575, 728 N.E.2d 393. “The law recognizes that a person has the inherent right to proceed pro se in any court, but that right pertains only to that person.” *State v. Block* (2007), 2007 Ohio 1979, P4, 2007 Ohio App. LEXIS 1830.

Anderson is not a licensed attorney and may not represent Alsup's interests before this Court. Furthermore, because Anderson may not speak for Alsup, he does not have standing to challenge SOCF's implementation of the “hunger strike” policy.

Standing is defined at its most basic as a party's right to make a legal claim or seek judicial enforcement of a duty or right. Before an Ohio court can consider the merits of a legal claim, the person or entity seeking relief must establish standing to sue. The question of standing depends upon whether the party has alleged such a personal stake in the outcome of the controversy as to ensure that the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.

*Ohio Pyro, Inc. v. Ohio Dep't of Commerce* (2007), 115 Ohio St.3d 375, 381, 875 N.E.2d 550.

~~The Petition does not aver that Anderson ever went on a hunger strike or was subjected to any~~

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<sup>2</sup>Relator's Petition was filed with the Court on June 23, 2011, but Anderson's signature is dated May 15, 2011, which suggests there was a lag in time between the drafting of the petition and filing it with the Court.

hardship as a result of the related policy. He has no personal stake in that issue. Because he was subjected to the same RIB procedures as Alsup, Anderson does have a personal stake in that issue. However, while he is free to raise that controversy on his own behalf, he may not raise it for Alsup. Relator Anderson cannot petition the Court for redress over a controversy he is not a party to.

### III. CONCLUSION

For the foregoing reasons, Respondent Donald Morgan moves the Court to dismiss Relator Ben Anderson's petition for failure to state a claim upon which relief can be granted.

Respectfully submitted,

MICHAEL DEWINE  
Ohio Attorney General



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PETER L. JAMISON (0086539)  
Assistant Attorney General  
Criminal Justice Section  
150 East Gay Street, 16th Floor  
Columbus, Ohio 43215  
Phone: (614) 644-0735  
Fax: (877) 381-1737  
peter.jamison@ohioattorneygeneral.gov

*Counsel for Respondent Donald Morgan*

**CERTIFICATE OF SERVICE**

I certify that on July 25, 2011, a copy of the foregoing *Respondent's Motion to Dismiss* was sent via regular US mail to:

Bennie Anderson (#A501-259)  
Ohio State Penitentiary  
878 Coitsville-Hubbard Road  
Youngstown, Ohio 44505



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PETER L. JAMISON  
Assistant Attorney General



Case: 2011 1053  
Docket: 691369  
Date Filed: 07/25/11  
Description: Memorandum in support of jurisdiction

**Clerk's Office  
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IN THE SUPREME COURT OF OHIO

JULIE ROSE ROWELL	:	
Appellant,	:	Case No. 2011-1053
	:	
v.	:	On Appeal from the Franklin
	:	County Court of Appeals,
JULIE ANN SMITH	:	Tenth Appellate District
Appellee.	:	
	:	Court of Appeals Case Nos.
	:	10AP—675 and 10AP-708

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MEMORANDUM IN SUPPORT OF JURISDICTION

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Carol Ann Fey (22876) (Counsel of Record)  
 Attorney & Counselor at Law  
 PO Box 9124  
 Bexley, Ohio 43209  
 Telephone: (614) 232-9100  
 Facsimile: (614) 569-0251  
[CarolFey@CarolFeyLaw.com](mailto:CarolFey@CarolFeyLaw.com)

LeeAnn Massucci (75916)  
 Massucci & Kline LLC  
 630 Civic Center Drive, Suite 630  
 Columbus, Ohio 43215  
 Telephone: (614) 484-0177  
 Facsimile: (614) 484-0181  
[lmkfamilylaw.com](mailto:lmkfamilylaw.com)

*Attorneys for Appellant Julie Rose Rowell*

Gary J. Gottfried (2916)  
 Eric M. Brown (82160)  
 Gary J. Gottfried Co., LPA  
 608 Office Parkway, Suite B  
 Westerville, Ohio 43082  
 Telephone: (614) 297-1211  
 Facsimile: (614) 297-6387 fax  
[gjglaw@aol.com](mailto:gjglaw@aol.com)  
*Attorneys for Appellee Julie Ann Smith*

Meredith A. Snyder (64793)  
 572 E. Rich Street  
 Columbus, Ohio 43215  
 Telephone: (614) 228-6107  
 Facsimile: (614) 228-7907  
[snydercoby@yahoo.com](mailto:snydercoby@yahoo.com)  
*Guardian ad Litem*

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WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND  
INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This cause presents a critical issue for children of unmarried parents in Ohio: whether, in the context of a custody dispute between a parent and a non-relative of the child, the juvenile court has authority, further detailed in the Ohio Rules of Juvenile Procedure, to impose and enforce temporary orders of court during the pendency of the litigation, designed in the discretion of the court to manage or regulate the conduct of the parties on an interim basis so as to maintain the pre-litigation relationships that made up the child's particular family structure, while the court has an opportunity to reach a final determination relative to custody of the minor child.

In this case, the court of appeals, while acknowledging that R.C. 2105.03 invests our juvenile courts with subject matter jurisdiction and statutory authority to determine the custody of a child that is not the ward of some other court, whether that determination is invoked by a relative or non-relative of the child, incongruously went on to hold that although the juvenile court has authority to impose and enforce temporary orders of visitation during the period of the litigation for litigants who are related to the child, *but that the juvenile court lacks that authority to impose and enforce temporary orders when one party is not a relative of the child.* In so ruling, the court of appeals unreasonably limited the application of Juvenile Rule 13(B)(1), which provides:

“(B) Temporary orders. (1) Pending hearing on a complaint, the judge or magistrate may issue temporary orders with respect to the relations and conduct of other persons toward a child who is the subject of the complaint as the child's interest and welfare may require.”

This rule, adopted by the Supreme Court of Ohio in order to “prescribe the procedure to be followed in all juvenile courts of this state in all proceedings coming within the

jurisdiction of such courts”<sup>1</sup> specifically authorizes juvenile courts to issue temporary orders, and until the decision below, has routinely been used for that purpose.

Temporary orders are issued to manage the rights, responsibilities, and behaviors of parties during the limited time in which litigation is pending; they represent the juvenile court’s best effort to maintain the “status quo” for children whose custody at issue. The court’s ability, in its reasonable discretion, to issue and enforce temporary orders, helps to shield the child from undue emotional stress and disruption that otherwise can easily result from the conflict between the parties, while the court has an opportunity to resolve the dispute.<sup>2</sup>

The decision below unreasonably divides litigants into two classes for purposes of the issuance of temporary orders, and places the best interests of the minor child in jeopardy during the period of litigation. To decline a statutory interpretation that permits the issuance of temporary orders as the juvenile court determines to be appropriate under the circumstances of each case, threatens the emotional well-being of minor children of countless unmarried parents and other intentionally created family structures by enabling the legal parent in the dispute to abruptly sever relationships that the parent earlier created and fostered with the child.

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<sup>1</sup> Ohio Rules of Juvenile Procedure, Rule 1(A), Applicability.

<sup>2</sup> Of course, the presence of any harm or imminent danger that is perceived to result from the maintenance of the child’s established relationships would routinely be disclosed in the content of the affidavits submitted to the court and would inform the court in determining whether to issue such orders and what the content of such orders would be; such orders are also generally modifiable to the extent that circumstances change during the pendency of the litigation.

This appeal presents a case of first impression for the Court. Counsel for Appellant has been unable to find any reported Ohio case that has reached the same conclusion; rather, other courts of Ohio have routinely reached the opposite conclusion, or have simply issued and enforced temporary orders involving non-relatives during the pendency of litigation as routine without further analysis, and the issuance of such orders has routinely gone unquestioned by litigants. Ohio juvenile courts clearly need guidance from this Court on this issue. See, for example, *In re LaPaina*, 8<sup>th</sup> Dist. No. 93691, 2010-Ohio-3606 where, in response to the same argument made herein in the Tenth District Court of Appeals, the Eighth District Court of Appeals reached the opposite conclusion and found that it did have jurisdiction to issue temporary visitation orders to a non-relative, relying in part upon this Court's dismissal of a Writ of Prohibition sought by Appellee Smith in *State ex rel. Smith v. Gill (2010)*, 125 Ohio St.3d 1459, 2010 Ohio 2753.

See also, *In re Mullen (1<sup>st</sup> Dist. Ct. App. 2011)*, 185 Ohio App.3d 457, in which the First District Court of Appeals considered another shared custody claim. In that case, the Hamilton County Juvenile Court had issued a temporary order of visitation to Michele Hobbs, the non-relative then seeking to establish shared custody with her former lesbian partner. Upon final disposition of the appeal, the First District Court of Appeals referred to and vacated that temporary order. However, when that case was granted discretionary jurisdiction,<sup>3</sup> by Entry filed March 10, 2010, the interim order of temporary visitation previously awarded to Michele Hobbs, non-relative, was reinstated by then Chief Justice Thomas Moyer. See Entry, Appendix C.

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<sup>3</sup> *In re Lucy Katheen Mullen (2011)*, Ohio Supreme Court Case No. 10-0276

Similarly, in this very appeal, this Honorable Court has issued an Entry staying the decision of the court of appeals below and reinstating the temporary order, despite Appellant Rowell's status as a non-relative. See Entry attached hereto as Appendix D. Clearly, this Court very much understands the important role that the use of temporary orders plays in custody litigation.

The public's interest in the protection of minor children and respect for their best interests will be profoundly and negatively impacted if the court of appeals' holding that temporary orders routinely issued pursuant to Juvenile Rule 13, which are the only tools available to regulate and protect the best interests of the minor child during litigation, are not to be made available to provide such protection to the child during the period of litigation where one of the litigants is not a relative of the minor child. The court of appeals' focus upon and creation of a distinction in the identity of the litigants, rather than on the interests of the minor child during litigation, is ill advised, is not required by the statutory language, runs contrary to the legitimate and best interests of minor children, and should not be permitted by this court.

Finally, this case touches upon a substantial constitutional question. While there is undeniably much appropriate deference to legal parents to control their children's lives and associations, that deference is not without limits already set forth in Ohio law. See *In re Perales*, (1977), 52 Ohio St.2d 89, and *In re Bonfield*, (2002), 97 Ohio St.3d 387, 2002-Ohio 6660, cases in which this Court has explored the appropriate boundaries of intrusions into parental authority as the result of the voluntary actions of the child's parent(s). Interestingly, and as noted in the dissenting opinion below in the case at bar, this Court in *In re Gibson* explicitly acknowledged that it was not there expressing any

opinion regarding a juvenile court's authority to order visitation while a complaint seeking a determination of custody is pending, which is the precise issue posed in this appeal.<sup>4</sup>

This case presents a classic example of the critical role that temporary orders must play in the management of custody litigation. In this case, the parties have only recently begun trial after nearly three years of litigation, and additional scheduled trial dates now stretch into October, 2011. Over the past three years, Appellee Smith has worked tirelessly to avoid most compliance with the four temporary orders of court when in force, filing several motions to dismiss and other dispositive motions in the trial court including another filed within recent weeks. She has pursued several appeals, including at least two that lacked final appealable orders, and one that set aside an earlier temporary order on technical grounds because it had been modified pursuant to Civil Rule 60(A) rather than 60(B). Ms. Smith sought a writ of prohibition from this Court.<sup>5</sup>

It would stretch the imagination of an objective observer to review the procedural posture of this case and the experiences of the child and parties relative to visitation between the minor child who was age 5 at the onset of this litigation nearly 3 years ago, and fail to conclude that in the absence of valid and enforceable temporary orders, Appellee has consistently terminated all contact between the child and Appellant.<sup>6</sup>

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<sup>4</sup> *In re Gibson*, 61 Ohio St. 3d 168, at page \_\_\_

<sup>5</sup> *State ex rel. Smith v. Gill*, 125 Ohio St.3d 1459, 2010-Ohio-2753

<sup>6</sup> Consider the following most recent example. Three days before this filing, on July 22, 2011, Appellee Smith filed a motion in this Court requesting dismissal of Appellant Rowell's Motion to Clarify this Court's Entry staying the decision below and reinstating the temporary order during the pendency of this appeal. In her memorandum in support of that motion, at page 3, Appellee Smith claims that Counsel of Record in this Appeal "misled this court regarding the Mother's compliance with the underlying 'visitation' order following her two weeks of

As this Court has repeatedly made clear, in *In re Bonfield*, *In re Perales*, and related cases, and even most recently in *In Re Mullen*, all *supra*, custody determinations such as the one between the parties to this appeal depend upon the particular facts of each case and cannot generally be determined short of trial. To hamstring our juvenile courts by interpreting R.C. 2151.23 and Juvenile Rule 13 as did the court of appeals below to deny our juvenile courts the discretionary authority to issue and enforce temporary orders will have the effect of *de facto* endorsing and, as a practical matter, encouraging these kinds of disruptive behaviors that run counter to the best interests of the child. The limitation and distinction imposed by the court of appeals below would detrimentally impact countless Ohio children: it cannot be the law of Ohio, this Court should accept jurisdiction over and should not be tolerated by this Honorable Court.

#### STATEMENT OF THE CASE AND FACTS

Petitioner - Appellant, Julie Rose Rowell ("Ms. Rowell"), appeals from the Tenth District Court of Appeals' determination that the juvenile court lacks authority to issue temporary orders during the pendency of litigation over Ms. Rowell's claim to establish a custodial or shared custodial relationship with the minor child, solely because Ms. Rowell is not a relative of the minor child.

The Court of Appeals determination resulted from their review of two judgments of the Franklin County Court of Common Pleas, Division of Domestic Relations,

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uninterrupted vacation time. That same day, at 6:00 p.m., Appellant Rowell was scheduled to begin a week of visitation with the minor child pursuant to the reinstated order, but Appellee Smith failed to make the child available for that scheduled visitation, and as a result, on July 25, the same day that this Memorandum in Support of Jurisdiction is filed with this Court, Appellant Rowell is also filing a Motion to Show Cause in the trial court, seeking to enforce the temporary order as reinstated by this Court.

Juvenile Branch. By way of a judgment rendered on June 30, 2010, the trial court overruled objections to the magistrate's decision filed by Appellant herein, Julie Ann Smith ("Ms. Smith"), and found Ms. Smith in contempt of court. In its July 27, 2010 judgment, the trial court denied Ms. Smith's motion for stay, granted the motion to enforce jail time filed by Ms. Rowell, and ordered Ms. Smith to pay \$2,500 to Ms. Rowell for attorney fees.

The page limitations placed upon memoranda in support of jurisdiction require that some of the complicated facts and procedural history that has made up the three years in this case that has only now begun trial require some summary. For the most part the recitation of facts herein repeat those set forth in the court of appeals' decision below; there, as here, it is important to acknowledge that the facts of this case remain in dispute as the parties remain in trial before the juvenile court at this time. Very few facts are uncontested, and to be honest, the parties disagree as to which are uncontested.

On September 9, 2003, Ms. Smith gave birth to a daughter as the result of artificial insemination with the sperm of an unknown donor, a process in which Ms. Rowell played a role, the extent of which is disputed. The parties agree that at the time of the child's conception and birth, Ms. Smith and Ms. Rowell were involved in a same-sex relationship with each other, and that Ms. Smith ended her relationship with Ms. Rowell sometime during the period of August to October 2008.

On October 14, 2008, Ms. Rowell filed a petition for shared custody of the minor child and a motion for temporary orders. Ms. Smith filed a motion to dismiss and a motion for judgment on the pleadings. On November 12, 2008, upon affidavits filed by the parties, a magistrate issued the first temporary order, which designated the parties as

"temporary shared custodians." On November 17, 2008, Ms. Smith filed a motion to set aside the order and sought a stay of the order. On December 16, 2008, the trial court denied Ms. Smith's motion for stay and took Ms. Smith's motion to set aside and motion to dismiss under advisement. On January 15, 2009, the trial court issued two decisions: in the first decision, the court denied Ms. Smith's motion to dismiss and motion for judgment on the pleadings; in the second decision, the trial court granted Ms. Smith's motion to set aside the November 12, 2008 magistrate's order and in its place, the trial court issued a second temporary order, again designating the parties as "temporary shared custodians", while expanding the provisions for Appellant Rowell's exercise of visitation beyond the schedule originally ordered by the magistrate.

At this point, Ms. Smith ended her first attorney's representation and retained new counsel who, in preparation for filing the first notice of appeal and request for stay in the court of appeals, first needed to approach Judge Gill to request the stay. Counsel for Ms. Rowell joined Ms. Smith's second attorney and together they approached Judge Gill to discuss Ms. Smith's request for stay pending appeal. In that discussion, new Counsel for Ms. Smith made clear that the crux of Ms. Smith's objection and appeal was the designation of the parties in the temporary order as temporary shared custodians, whereas a simple award of visitation would not result in an appeal. In response, on January 26, 2009, Judge Gill promptly issued a modified order, the third temporary order, citing Civ.R. 60(A) as the basis for the modification of the January 15, 2009 order. This third temporary order classified Ms. Smith as the "named legal custodian and residential parent" of the minor child, and granted Ms. Rowell the same specific scheduled visitation rights as had been awarded in the second temporary order; thereafter, Ms. Smith's second

attorney withdrew the notice of appeal from the second temporary order. Soon following, Ms. Smith terminated the services of her second attorney and retained her third attorney, who remains her counsel today; on February 11, 2009, new counsel for Ms. Smith filed an appeal of the third temporary order along with and a motion in that court to stay both the original and modified orders. The appeal was assigned case No. 09AP- 147. On March 23, 2009, the Court of Appeals dismissed that appeal for lack of a final, appealable order.

Meanwhile, Ms. Smith refused to comply with the second or third temporary order, and on May 18, 2009, Ms. Rowell filed a motion requiring Ms. Smith to show cause; in response, Ms. Smith moved the court to dismiss Ms. Rowell's motions for contempt against Ms. Smith. On June 23, 2009, the trial court issued its decision holding that the January 30, 2009 motion was moot because it was based on the January 15, 2009 order (the second temporary order) that the court modified on January 26, 2009. As for the February 5, 2009 motion for contempt, the trial court held that Ms. Smith had violated the January 26, 2009 order, found her in contempt, and gave her an opportunity to purge. Ms. Smith appealed, and in *Rowell v. Smith*, 186 Ohio App.3d 717, 2010- Ohio-260, the Tenth District Court of Appeals reversed the trial court's finding of contempt with regard to the January 26, 2009 order after concluding that the trial court's use of Civ.R. 60(A) had been improper because the change of designation as temporary shared custodians to designating Ms. Smith as residential parent and awarding Ms. Rowell temporary visitation, was substantive and not clerical.

In response, on February 2, 2010, Ms. Rowell filed another motion for temporary orders, seeking visitation and/or shared custody, and on February 18, 2010, the magistrate

issued a new, fourth temporary order designating Ms. Smith temporary custodian and granting Ms. Rowell temporary visitation with the minor child. Ms. Smith's motion to set aside the fourth temporary order was denied by the trial court on March 9, 2010.

Ms. Smith also refused visitation ordered by the fourth temporary order, and on March 2, 2010, Ms. Rowell filed a motion for contempt based upon appellant's failure to comply with that order. On March 16, 2010, following a hearing, the magistrate issued a decision finding Ms. Smith guilty of contempt, sentenced her to three days in jail, and suspended upon purging herself of contempt by allowing specified visitation; the magistrate also ordered Ms. Smith to pay \$2,500 to appellee for attorney fees and costs. Ms. Smith failed to comply with the terms of the opportunity to purge the contempt, and on June 28, 2010, Ms. Rowell filed a motion for enforcement of the jail sentence previously imposed on Ms. Smith for her contempt of court; Ms. Smith filed objections to the decision. On June 30, 2010, the trial court issued a judgment overruling Ms. Smith's objections. Ms. Smith appealed the trial court's judgment, and that case became the decision from which the current appeal is based.

Initially the Tenth District Court of Appeals stayed the trial court's imposition of the three-day jail sentence pending appeal, but in doing so, stated: "The trial court orders in regard to visitation with the minor child are not stayed by virtue of this entry. This court will revisit the matter of this stay in the event that [Ms. Smith] continues to violate orders of court".<sup>7</sup> Ms. Smith refused to provide visitation, and the Tenth District Court of Appeals released its stay, directing Ms. Rowell to apply to trial court for enforcement.<sup>8</sup> Upon request of Ms. Rowell, the trial court moved toward enforcement of the jail

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<sup>7</sup> Rowell v. Smith, Journal Entry in Court of Appeals, Appendix E.

<sup>8</sup> Rowell v. Smith, Journal Entry in Court of Appeals, Appendix F

sentence. However, in lieu of immediate imposition of the jail sentence, however, and in the interest of accomplishing visitation with the minor child, Ms. Rowell offered to delay imposition of the jail time in exchange for Ms. Smith's immediate and ongoing compliance with the terms of the temporary order through the outcome of Ms. Smith's appeal; to facilitate that agreement, the trial court also agreed to maintain a bi-weekly schedule of hearings to occur generally on the first court day following each bi-weekly weekend visitation scheduled to occur with Ms. Rowell, so that in the event that Ms. Smith did not permit that rotation of visitation, the parties would promptly be heard on enforcement of the jail sentence.<sup>9</sup> Thereafter, Ms. Smith permitted regular visitation between Ms. Rowell and the minor child until the decision below decision was released; from the moment she was not forcibly required to provide visitation for the child with Ms. Rowell, Ms. Smith reinstated her former pattern of denial of visitation that continues to the day of this writing, despite the fact that this Court has imposed a stay upon the decision of the court of appeals and reinstated the terms of visitation in the fourth temporary order pending resolution of this appeal.

#### ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

**Proposition of Law No. I: Within the exercise of its exclusive, original jurisdiction under R.C. 2151.23 to determine the custody of any child not a ward of another court of this state, a juvenile court has authority under the Rules of Juvenile Procedure to issue and enforce temporary orders of custody, shared custody, and/or visitation that, in the discretion of the court based upon the affidavits of the parties and such evidence as may otherwise be presented to the court, are reasonably designed to serve the best interests of the minor child during the period of litigation and to maintain the relationships already established with the child prior to the onset of litigation.**

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<sup>9</sup> See Agreement, Appendix G.

R.C. 2151.23 provides exclusive, original jurisdiction to Ohio juvenile courts to determine the custody of any child that is not a ward of another court of Ohio. It is well established that R.C. 2151.23 permits a juvenile court to award shared custody of a minor child to same gender adults who engage in a pattern of intentionally sharing the parenting rights and responsibilities of a child during a period in which the adults resided together with the minor child. The case at bar, however, raises the question whether, during the course of the litigation during which the juvenile court comes to its determination regarding the terms of custodial rights and responsibilities that are appropriate under the facts and circumstances of that particular child, the juvenile court has authority to issue and enforce temporary orders based upon sworn affidavits of the parties, designed to regulate the conduct of parties during trial, thereby permitting the child to enjoy as nearly as possible a continuation of the status quo that was established by the parties relative to the child prior to the onset of litigation until the court determines a final decision based upon the complete facts eventually shared at trial. Appellant herein asks this honorable Court to hold that such authority is inherent in the nature of the exclusive, original jurisdiction enjoyed by the juvenile court by virtue of R.C. 2151.02, and that such authority may be exercised by the juvenile court during the pendency of litigation pursuant to the Rules of Juvenile Procedure, regardless of whether the parties are both relatives of the child whose custody is placed at issue.

The court of appeals, while noting that “a review of Ohio case law reveals the confusion and the difficulties with respect to the legal issues presented herein”,<sup>10</sup> held that the determination of who is eligible to receive temporary orders of court pursuant to

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<sup>10</sup> *Rowell v. Smith*, Tenth Dist. 2011, 2011-Ohio-2809, page 7

Juvenile Rule 13 depends first on the identity of the parties to the litigation. That is, the court of appeals' decision deprives temporary orders of court to any party that is not a relative of the minor child. This holding would appear to be unique among reported cases in Ohio, and, if permitted to stand, would undermine the juvenile court's interest in managing the behavior of the parties during the litigation in a way that minimizes the "gamesmanship" that, in the absence of enforceable temporary orders, can and often does unfortunately undermine the best interests of the minor child by encouraging the biological parent to sever and undermine the relationships that biological parent had earlier intentionally created and promoted and encouraged the minor child to rely upon, in hopes that such a period of interruption of those intentional relationships might lead the court not to enforce a continuation of the relationships in the eventual custodial determination.

It bears mention that the description above summarizing the difficulties encountered by Ms. Rowell in attempting to obtaining Ms. Smith's compliance with the four temporary orders issued by the trial court in this case, perhaps more than anything else, highlights the need for juvenile courts to have the authority to issue and enforce such orders during the often lengthy period of time during which parties to a custody dispute go through the trial and appeals process. The spectre of permitting a party with an interest in disrupting the child's pre-litigation relationships to accomplish that disruption without limitation during an extended trial process, and/or to interpose time consuming and expensive procedural practice in the hope of discouraging the other party from pursuing the original claim out of sheer exhaustion or eventual depletion of all financial

resources, is horrifying indeed.<sup>11</sup> It is, then crucial that this Court accept jurisdiction to provide guidance and re-insert reason into juvenile custody trial practice.

**Proposition of Law No. II: During litigation brought pursuant to R.C. 2151.23 to determine whether a parent has contractually relinquished sole custody of a child in favor of custody or shared custody with another adult that is not a relative of the child, the juvenile court's imposition of temporary orders to regulate the conduct of the parties and provide for temporary shared custody or temporary visitation or other similar orders in the discretion of the court, during the pendency of the litigation, is a permissible intrusion into the constitutional protection otherwise afforded to parents regarding the exercise of care and control over children.**

The discussion that runs throughout this Memorandum in Support of Jurisdiction also supports the importance of permitting a juvenile court to exercise its judgment to issue temporary orders to manage the conduct of the litigants during the period of trial. In the various cases cited elsewhere in this Memorandum, this Court has on many occasions permitted limitations upon a parent's constitutional exercise of authority over a child's actions and relationships. We ask this Court, in the context of this appeal, to interpret R.C. 2151.23 and Rule 13 of the Rules of Juvenile Procedure so as to authorize juvenile courts to impose temporary orders designed to maintain the pre-litigation status quo for a minor child whose custody is placed at issue, so as to minimize the potential that the child be harmed during the course of the litigation period by the actions of the

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<sup>11</sup> Although there have unquestionably been delays in the process toward trial that have other explanations, the primary reasons that the case at bar has only reached trial during the past two weeks is undoubtedly the series of delays that have resulted from Ms. Smith's pursuit of repeated appeals without final appealable order, appeals for technical reasons such as the use of Civil Rule 60(A) rather than 60(B) despite the agreement of her then attorney to work out an expedient resolution and avoid the time and expense of appeal, Ms. Smith's filing of a Writ of Prohibition to this Court in an attempt to avoid the trial court's exercise of subject matter jurisdiction, and the like. All of these appeals led to necessary delays while the juvenile court awaited the outcome in order to proceed.

litigants taken to prematurely, and often inappropriately, interfere with and interrupt those relationships that have been established with the minor child.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional question. The appellant, Julie Rowell, requests that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits and this Honorable Court will have an opportunity to confirm to the juvenile courts of Ohio that Ohio law authorizes them to use temporary orders, the basic tools necessary to enable the courts to manage the behavior of the parties and serve the best interests of minor children during the process of litigation, without distinction related to the relationship of the parties toward the child.

Respectfully submitted,

  
\_\_\_\_\_  
Carol Ann Fey (0022876) (Counsel of Record)  
LeeAnn Massucci (0075916)  
*Attorneys for Appellant Julie Rose Rowell*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail to counsel for Appellee, Gary J. Gottfried and Eric M. Brown, 608 Office Parkway, Suite B, Westerville, Ohio 43082, and to Meredith A. Snyder, Guardian ad Litem, 572 East Rich Street, Columbus, Ohio 43215, on July 25, 2011.

  
\_\_\_\_\_  
LeeAnn Massucci (0075916)  
Counsel for Appellant Julie Rose Rowell

[Cite as *Rowell v. Smith*, 2011-Ohio-2809.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Julie Rose Rowell,	:	
	:	
Petitioner-Appellee,	:	
v.	:	Nos. 10AP-675
	:	and 10AP-708
Julie Ann Smith,	:	(C.P.C. No. 08JU-10-13850)
	:	
Respondent-Appellant.	:	(ACCELERATED CALENDAR)

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D E C I S I O N

Rendered on June 9, 2011

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*Fey Law Offices, and Carol Ann Fey, Massucci & Kline, LLP, and LeeAnn Massucci, for appellee.*

*Gary J. Gottfried Co., LPA, and Gary J. Gottfried, for appellant.*

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APPEALS from the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch.

CONNOR, J.

{¶1} Respondent-appellant, Julie Ann Smith ("appellant"), appeals from two judgments of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch. By way of a judgment rendered on June 30, 2010, the trial court overruled appellant's objections to the magistrate's decision and found appellant in contempt of court. In its July 27, 2010 judgment, the trial court denied appellant's motion for stay, granted the motion to enforce jail time filed by petitioner-appellee, Julie Rose

Rowell ("appellee"), and ordered appellant to pay \$2,500 to appellee for attorney fees. Appellee has also filed a motion for award of attorney fees in this court.

{¶2} On September 9, 2003, appellant gave birth to a daughter via artificial insemination. At the time, appellant and appellee were involved in a same-sex relationship. Appellant is the biological mother of the child, while appellee has no biological relationship to the child. The parties' relationship ended sometime during the period of August to October 2008.

{¶3} On October 14, 2008, appellee filed a motion for temporary orders and a petition for shared custody of the minor child. On November 4, 2008, appellant filed a motion to dismiss and a motion for judgment on the pleadings. On November 12, 2008, a magistrate issued an order designating the parties as "temporary shared custodians." Appellant then filed a motion to set aside the order and a motion for stay of the order on November 17, 2008. On December 16, 2008, the trial court denied appellant's motion for stay and took appellant's motion to set aside and motion to dismiss under advisement.

{¶4} On January 15, 2009, the trial court issued two decisions, the first of which denied appellant's motion to dismiss and motion for judgment on the pleadings. In the second decision, the trial court granted appellant's motion to set aside the magistrate's order and again designated appellant and appellee as "temporary shared custodians."

{¶5} On January 26, 2009, the trial court issued a modified order, citing Civ.R. 60(A) as the basis for the modification. In the order, the trial court modified the January 15, 2009 order, classifying appellant as the "named legal custodian and residential parent" of the minor child and granting appellee visitation rights.

{¶16} On January 30, 2009, appellee filed a motion for contempt based upon appellant's failure to comply with the January 15, 2009 order. On February 5, 2009, appellee filed a second motion for contempt based upon appellant's failure to comply with the January 26, 2009 modified order.

{¶17} On February 11, 2009, appellant filed an appeal and a motion to stay execution of the original and modified orders. The appeal was assigned case No. 09AP-147. On March 23, 2009, this court dismissed case No. 09AP-147 because it lacked a final, appealable order.

{¶18} On May 18, 2009, appellant filed a motion to dismiss appellee's motions for contempt. On June 23, 2009, the trial court issued its decision. With regard to appellee's January 30, 2009 motion for contempt, the trial court held that the motion was moot because it was based on the January 15, 2009 order, which the court modified on January 26, 2009. With regard to the February 5, 2009 motion for contempt, the trial court held that appellant violated the January 26, 2009 order.

{¶19} Appellant appealed, and in *Rowell v. Smith*, 186 Ohio App.3d 717, 2010-Ohio-260, we reversed the trial court's finding of contempt with regard to the January 26, 2009 order after concluding that the trial court's use of Civ.R. 60(A) was improper because the change made was substantive and not clerical.

{¶10} On February 2, 2010, appellee filed another motion for temporary orders, seeking visitation and shared custody. On February 18, 2010, the magistrate issued an order designating appellant temporary custodian and granting appellee temporary visitation and custodial rights. Appellant filed a motion to set aside the magistrate's order, which the trial court denied on March 9, 2010.

{¶11} On March 2, 2010, appellee filed a motion for contempt based upon appellant's failure to comply with the visitation ordered in the magistrate's February 18, 2010 order. On March 16, 2010, the magistrate issued a decision, finding appellant guilty of contempt, sentencing her to three days in jail, suspended upon purging herself of contempt by allowing additional visitation and paying \$2,500 to appellee for attorney fees and costs.

{¶12} On June 28, 2010, appellee filed a motion for enforcement of the punishment previously imposed on appellant for her contempt of court.

{¶13} Appellant filed objections to the magistrate's March 16, 2010 decision. On June 30, 2010, the trial court issued a judgment overruling appellant's objections to the magistrate's decision. Appellant has appealed the trial court's judgment, which has been assigned as case No. 10AP-675.

{¶14} On July 27, 2010, the trial court issued a judgment granting appellee's motion for enforcement and denying appellant's request for stay of enforcement on the contempt finding. The trial court also ordered visitation and ordered appellant to pay appellee \$2,500. Appellant has appealed this judgment, which has been assigned as case No. 10AP-708. Case Nos. 10AP-675 and 10AP-708 have been consolidated, and this court has stayed the trial court's imposition of the three-day jail sentence and visitation pending the outcome of this appeal.

{¶15} In her appeals, appellant asserts the following assignments of error:

[I.] The Trial Court erred and abused its discretion of [sic] finding Smith in contempt of an invalid order.

[II.] The Trial Court erred and abused its discretion when it expanded the contempt sanctions following the enforcement hearing.

{¶16} Appellant argues in her first assignment of error, that the trial court erred when it found her in contempt of an invalid order. Specifically, appellant contends the trial court was without subject-matter jurisdiction to enter the underlying temporary order because it did not have the requisite statutory authority to issue visitation to appellee, who is a non-relative. We first note that, although a temporary order is generally not appealable, "[w]here a non-appealable interlocutory order results in a judgment of contempt, including fine or imprisonment, such a judgment is a final and appealable order and presents to the appellate court for review the propriety of the interlocutory order which is the underlying basis for the contempt adjudication." *Smith v. Chester Twp. Bd. of Trustees* (1979), 60 Ohio St.2d 13, paragraph one of the syllabus.

{¶17} Contempt is a disobedience or disregard of a court order or command. *State ex rel. Corn v. Russo*, 90 Ohio St.3d 551, 554, 2001-Ohio-15. A prerequisite to a finding of contempt for disobeying a court order is the existence of a valid underlying order or judgment of the court. *Januzzi v. Hickman* (1991), 61 Ohio St.3d 40, 44. If subject-matter jurisdiction to enter the contempt judgments is lacking, the judgments are void. *Patton v. Diemer* (1988), 35 Ohio St.3d 68, paragraph three of the syllabus. A challenge to a court's subject-matter jurisdiction can be raised at any stage of the proceedings. *In re Byard*, 74 Ohio St.3d 294, 296, 1996-Ohio-163. Subject-matter jurisdiction of a court connotes the power to hear and decide a case upon its merits and defines the competency of a court to render a valid judgment in a particular action. *Cheap Escape Co., Inc. v. Haddox, LLC*, 120 Ohio St.3d 493, 2008-Ohio-6323, ¶16. Subject-matter jurisdiction relates to the proper forum for an entire class of cases, not the particular facts of an individual case. *State v. Swiger* (1998), 125 Ohio App.3d 456, 462.

The existence of the trial court's subject-matter jurisdiction is a question of law that we review de novo. *Yazdani-Isfehani v. Yazdani-Isfehani*, 170 Ohio App.3d 1, 2006-Ohio-7105, ¶20.

{¶18} The focus of this matter regards the authority of a juvenile court to order visitation to a non-relative. Indeed, appellant challenges the contempt order on the basis that the juvenile court had no authority to order visitation based upon the circumstances of this case. As a result, appellant argues that the visitation order was invalid, such that her admitted refusal to comply with it cannot serve as the basis for a contempt order. The determinative issue therefore regards whether the juvenile court had the authority to grant visitation to appellee.

{¶19} Being a court of limited jurisdiction, a juvenile court possesses only those powers that the Ohio General Assembly has conferred upon it. *In re Gibson* (1991), 61 Ohio St.3d 168, 172, citing Section 4(B), Article IV of the Ohio Constitution; see also *Carnes v. Kemp*, 104 Ohio St.3d 629, 2004-Ohio-7107, ¶25. Moreover, when construing a statute, a court's primary concern regards the intent of the Ohio General Assembly. *Fisher v. Hasenjager*, 116 Ohio St.3d 53, 2007-Ohio-5589, ¶20, quoting *State ex rel. Watkins v. Eighth Dist. Court of Appeals*, 82 Ohio St.3d 532, 535, 1998-Ohio-190.

{¶20} Under R.C. 2151.23(A)(2), a juvenile court has jurisdiction "to determine the custody of any child not a ward of another court of this state[.]" However, custody and visitation are two distinct concepts. " 'Custody' resides in the party or parties who have the right to ultimate legal and physical control of a child. 'Visitation' resides in a noncustodial party and encompasses that party's right to visit the child." *In re Gibson* at 171, citing former R.C. 3109.05(B).

{¶21} A juvenile court may order visitation to a non-relative in cases involving a "divorce, dissolution of marriage, legal separation, annulment, or child support proceeding[.]" R.C. 3109.051(B)(1). Importantly, nowhere does a statute confer upon a juvenile court the authority to grant visitation to a non-relative in the absence of one of these precipitating events. As a result, we believe the Ohio General Assembly intended to restrict the judicial authority of a juvenile court with respect to when it may grant visitation to a non-relative. See *Fisher* at ¶35. Furthermore, we do not believe a juvenile court has the implied authority to issue temporary orders that it cannot grant on a permanent basis. If the Ohio General Assembly intends otherwise, then it should fashion a remedy accordingly.

{¶22} A review of Ohio case law reveals the confusion and the difficulties with respect to the legal issues presented herein. Indeed, appellate courts fall upon a wide spectrum in interpreting the authority of juvenile courts on issues pertaining to custody and visitation for non-relatives and non-parents. See *In re Gibson*; *In re Bonfield*, 97 Ohio St.3d 387, 2002-Ohio-6660; *Parr v. Winner* (June 30, 1993), 11th Dist. No. 92-A-1759; *In the Matter of Young* (Nov. 20, 1998), 5th Dist. No. 98 CA 48; *In re LaPiana*, 8th Dist. No. 93691, 2010-Ohio-3606; *In re Mullen*, 185 Ohio App.3d 457, 2009-Ohio-6934; and *In re Jones*, 2d Dist. No. 2000 CA 56, 2002-Ohio-2279. Importantly, the validity of the orders granting temporary visitation to non-parents went unchallenged in *In re Mullen* and *In re Jones*.

{¶23} Because the Ohio General Assembly has not conferred upon juvenile courts the authority to order visitation to a non-relative absent some precipitating event, and we refuse to acknowledge the implied authority to do so, we find that the juvenile

court exceeded its authority when it granted appellee visitation in this matter. As a result, the temporary visitation order underlying the contempt order was invalid, and the contempt order cannot stand. Accordingly, we sustain appellant's first assignment of error.

{¶24} Because we have found error in the juvenile court's issuance of the contempt order, we similarly find error in the sanctions imposed as a result of the contempt order. In this regard, we sustain appellant's second assignment of error.

{¶25} With respect to appellee's motion for attorney fees, we deny the motion, as appellant's arguments were not so devoid of merit as to warrant such an additional fee award. See, e.g., *Hamed v. Delmatto*, 10th Dist. No. 09AP-1020, 2010-Ohio-2478, ¶18. Therefore, the motion for attorney fees is denied.

{¶26} Based upon the foregoing, we sustain appellant's first and second assignments of error, deny appellee's motion for attorney fees, and reverse and remand the judgments of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, for further proceedings in accordance with law and consistent with this decision.

*Judgments reversed;  
motion for attorney fees denied.*

CUNNINGHAM, J., concurs.  
BROWN, J., dissents.

CUNNINGHAM, J., of the First Appellate District, sitting by  
assignment in the Tenth Appellate District.

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BROWN, J., dissenting.

{¶27} Because I would overrule both of the assignments of Julie Ann Smith, respondent-appellant, I respectfully dissent. With regard to the first assignment of error, appellee asserts that subject-matter jurisdiction was conferred upon the juvenile court in the present case by R.C. 2151.23(A)(2). Although appellant acknowledges that R.C. 2151.23(A)(2) confers upon juvenile courts jurisdiction over all "custody" disputes between parents and non-parents regardless of the basis of the non-parents' claim, appellant contends the statute does not give the juvenile court the authority to grant temporary visitation rights during the pendency of a custody dispute, as the trial court did in the present case. Appellant asserts that custody and visitation are distinct legal concepts, and a juvenile court does not have jurisdiction to order only visitation to a non-parent under R.C. 2151.23(A)(2), citing *In re Gibson* (1991), 61 Ohio St.3d 168, a case in which the Supreme Court of Ohio found visitation for a grandparent seeking only visitation with a grandchild may not be determined by the juvenile court pursuant to its authority to determine the custody of children under R.C. 2151.23(A)(2). Appellant also cites *Parr v. Winner* (June 30, 1993), 11th Dist. No. 92-A-1759, and *In re Young* (Nov. 20, 1998), 5th Dist. No. 98 CA 48, for the proposition that, even when the non-parents are seeking both visitation and custody, R.C. 2151.23(A)(2) does not confer jurisdiction on the court to grant visitation to the non-parents.

{¶28} A few weeks before appellant filed her appellate brief in the present matter, the Eighth District Court of Appeals issued a decision in *In re LaPiana*, 8th Dist. No. 93691, 2010-Ohio-3606, which also involved a partner in a lesbian relationship who had two children via artificial insemination. The court of appeals concluded the juvenile court

had jurisdiction under R.C. 2151.23 to determine whether it would be in the children's best interest to have visitation with the non-natural mother, relying upon *In re Bonfield*, 97 Ohio St.3d 387, 2002-Ohio-6660, in which the Supreme Court found that a juvenile court had jurisdiction under R.C. 2151.23(A)(2) to hear and determine a petition for shared custody filed by a lesbian couple. The court in *LaPiana* found that the Supreme Court in *In re Bonfield* gave persons like the non-natural mother in *LaPiana* access to the juvenile system through R.C. 2151.23 despite not being able to legally marry her partner or be a parent under R.C. 3109.04(G). The court in *LaPiana* then discussed the Supreme Court's ruling on a writ of prohibition filed by appellant in the present case in *State ex rel. Smith v. Gill*, 125 Ohio St.3d 1459, 2010-Ohio-2753, noting that, because the Supreme Court did not grant the writ of prohibition, it must have recognized that the juvenile court had jurisdiction.

{¶29} I find *LaPiana* and *Bonfield* persuasive and find *Gibson* distinguishable. *Gibson* is clearly distinguishable because, in that case, the non-parents were seeking visitation only. In the present case, petitioner-appellee, Julie Rose Rowell filed a petition seeking shared custody, and she sought visitation via temporary orders while the petition was pending. The court in *Gibson* explicitly acknowledged it was not expressing any opinion regarding a juvenile court's authority to order visitation while a complaint seeking a determination of custody is pending. Thus, the ultimate holding in *Gibson* has no bearing on the controversy at issue.

{¶30} Also important is that, unlike *Gibson*, visitation in the present case has been granted only on a temporary basis pursuant to temporary orders to maintain the status quo until a custody determination has been made. Appellant, as well as the majority,

focuses on the trial court's eventual, ultimate authority to order sole visitation on a permanent basis, while the issue in the present appeal is whether the trial court has subject-matter jurisdiction over the class of cases that include the one at hand. Once it is established that the trial court has subject-matter jurisdiction over types of cases like the present one, the issue would then be whether the trial court had the authority to issue temporary orders, including one regarding visitation.

{¶31} On the issue of subject-matter jurisdiction, the Supreme Court's decision in *Bonfield* and the Eighth District's decision in *LaPiana* both stand for the proposition that a juvenile court has general subject-matter jurisdiction, pursuant to R.C. 2151.23(A)(2), to determine cases between a parent and non-parent in which the non-parent seeks custody and visitation rights. Therefore, based upon these cases and R.C. 2151.23(A)(2), I would find the trial court here had general subject-matter jurisdiction over the shared custody petition filed by appellee.

{¶32} In its decision, the majority indicates that the trial court had general subject-matter jurisdiction over the shared custody petition filed in the present case. Where our analyses diverge is in the next step. Because the trial court had subject-matter jurisdiction over the shared custody petition, the issue becomes whether the court then had the authority to issue the temporary visitation order. The analysis in the majority decision is that a juvenile court's authority to issue temporary orders must come from a statute enacted by the Ohio General Assembly. I believe that the power to issue temporary orders is procedural in nature and comes from the Ohio Rules of Juvenile Procedure once subject-matter jurisdiction has been established. Juv.R. 1(A) provides that "[t]hese rules prescribe the procedure to be followed in all juvenile courts of this state in all

proceedings coming within the jurisdiction of such courts, with the exceptions stated in subdivision (C)." Thus, pursuant to Juv.R. 1(A), once a proceeding comes within the subject-matter jurisdiction of the juvenile court, the court is required to follow the juvenile rules of procedure, subject to Juv.R. 1(C). Although Juv.R. 1(C)(4) expressly states that the juvenile rules do not govern a proceeding to determine parent-child relationships, they do apply to actions commenced pursuant to R.C. 2151.23(A)(2). *State ex rel. Stanley v. Lawson*, 11th Dist. No. 2009-L-100, 2010-Ohio-320, ¶12. Therefore, I would find that the juvenile court in the present case was required to follow the juvenile rules of procedure once it obtained jurisdiction pursuant to R.C. 2151.23(A)(2).

{¶33} Juv.R. 13 gives the juvenile court the broad authority to issue temporary orders "with respect to the relations and conduct of other persons toward a child who is the subject of the complaint as the child's interest and welfare may require." Juv.R. 13(B)(1). The temporary visitation order at issue in the present case falls within the purview of Juv.R. 13(B)(1). Accordingly, pursuant to Juv.R. 1(A), because the trial court had subject-matter jurisdiction over the class of cases at issue, I believe it clearly had the authority under Juv.R. 13(B)(1) to issue temporary orders, specifically visitation, while the factual and legal issues pertaining to custody and shared parenting were under consideration. Several other courts are in accord. See, e.g., *In re Mullen*, 185 Ohio App.3d 457, 2009-Ohio-6934 (trial court could order temporary visitation to non-biological mother pursuant to Juv.R. 13 while the custody action between her and biological mother was pending); *In re Jones*, 2d Dist. No. 2000 CA 56, 2002-Ohio-2279 (the trial court issued a temporary visitation order in a custody action brought by the non-biological mother against the biological mother pursuant to R.C. 2151.23(A)(2)). To find the juvenile

court here did not have the authority to issue a temporary visitation order pursuant to Juv.R. 13 would necessarily deny that a juvenile court has the authority to follow *any* of the juvenile rules once subject-matter jurisdiction is established under R.C. 2151.23(A)(2). Accordingly, because the temporary visitation order was valid here, I would find the trial court could properly hold appellant in contempt thereof. For these reasons, I would overrule appellant's first assignment of error.

{¶34} As for appellant's second assignment of error, the trial court's enforcement of the contempt order did not improperly expand the original contempt sanction of a three-day imprisonment when it included the purge conditions. In addition, the trial court was required to order the \$2,500 in attorney fees in the contempt proceeding pursuant to R.C. 3109.051(K). For these reasons, I would find the trial court did not err in its order enforcing the contempt sanctions. Therefore, I would overrule appellant's second assignment of error.

{¶35} As for appellee's motion for attorney fees, I would deny the motion, as appellant's arguments were not so devoid of merit as to warrant such an additional fee award.

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# The Supreme Court of Ohio

FILED

MAR 10 2010

CLERK OF COURT  
SUPREME COURT OF OHIO

In re: Lucy Kathleen Mullen

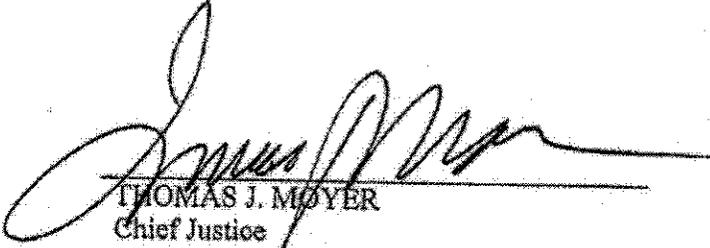
Case No. 2010-0276

## ENTRY

This cause is pending before the Court as a discretionary appeal. Upon consideration of appellant's motion for stay of the court of appeals' decision vacating the stay of the order terminating interim visitation,

It is ordered by the Court that the motion is granted.

(Hamilton County Court of Appeals; Nos. C090285 and C090407)



THOMAS J. MOYER  
Chief Justice

ABC  
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FILED

JUL 07 2011

CLERK OF COURT  
SUPREME COURT OF OHIO

# The Supreme Court of Ohio

Julie Rose Rowell

Case No. 2011-1053

v.

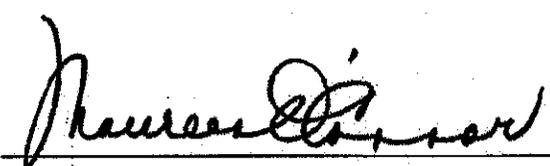
ENTRY

Julie Ann Smith

This cause is pending before the Court as a discretionary appeal.

Upon consideration of appellant's motion for stay of the court of appeals' judgment, it is ordered by the Court that the motion is granted and the terms of the temporary visitation order are reinstated pending resolution of this appeal.

(Franklin County Court of Appeals; Nos. 10AP675 and 10AP708)



Maureen O'Connor  
Chief Justice

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

FILED  
COURT OF APPEALS  
FRANKLIN CO. OHIO

2010 JUL 29 PM 12: 24

CLERK OF COURTS

Julie Rose Rowell,

Petitioner-Appellee,

v.

Julie Ann Smith,

Respondent-Appellant.

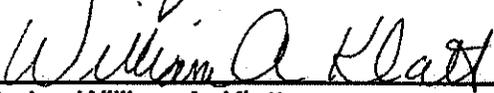
Nos. 10AP-675  
and 10AP-708

(ACCELERATED CALENDAR)

JOURNAL ENTRY

Appellant's July 27, 2010 motion for stay of the trial court's June 30, 2010 judgment and the trial court's July 27, 2010 order is granted, but only to the extent that the three (3) day jail sentence and Guardian *ad Litem* exchange are stayed pending determination of these appeals. The trial court orders in regard to visitation with the minor child are not stayed by virtue of this entry. This court will revisit the matter of this stay in the event appellant continues to violate orders of court.

  
\_\_\_\_\_  
Judge Peggy Bryant

  
\_\_\_\_\_  
Judge William A. Klatt

  
\_\_\_\_\_  
Judge Lisa L. Sadler



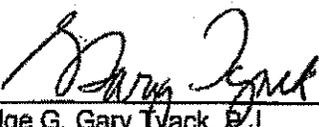
IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

FILED  
COURT OF APPEALS  
FRANKLIN CO. OHIO  
SEP -7 AM 10:47  
CLERK OF COURTS

Julie Rose Rowell, :  
Petitioner-Appellee, :  
v. : Nos. 10AP-675  
Julie Ann Smith, : and 10AP-708  
Respondent-Appellant. : (ACCELERATED CALENDAR)

JOURNAL ENTRY

Appellee's August 31, 2010 motion to vacate this court's July 29, 2010 stay order is hereby granted. This court's July 29, 2010 entry is hereby vacated. Appellee shall apply to the trial court for enforcement orders.

  
\_\_\_\_\_  
Judge G. Gary Tyack, P.J.

  
\_\_\_\_\_  
Judge Lisa L. Sadler

  
\_\_\_\_\_  
Judge Judith L. French

cc: Clerk, Court of Appeals  
Clerk, Juvenile Division



Agreed Visitation Dates under Magistrate's Order of 2/18/2010:

1. Beginning 9/20/10, and continuing until further Court order that specifically modifies this agreement, Ms. Smith will cooperate with all scheduling provisions of the Magistrate's Order issued 2/18/10, which for purposes of enforcement are agreed to be as follows:

A. Ms. Smith will permit Ms. Rowell to pick up Maddie from school at 3:00 or such earlier time as school may dismiss for Maddie on any given date as detailed herein, and to drop off Maddie to school as detailed herein.

B. Ms. Rowell shall be permitted to exercise alternating weekend visitation with Maddie on alternate weekends on the following weekends: Friday 10/1/10 - Monday 10/4/10; Friday 10/15/10 - Monday 10/18/10; Friday 10/29/10 - Monday 11/1/10; Friday 11/12/10 - Monday 11/15/10; and thereafter on an alternating weekend basis until further court order, except as otherwise assigned for holiday visitation schedules herein.

C. Ms. Rowell shall be permitted to exercise midweek ~~weekend~~ visitation with Maddie by picking up Maddie from Clintonville Academy after school at 3:00 p.m. or such earlier time as school may dismiss for Maddie on every Wednesday beginning Wednesday, 9/22/10 and every Wednesday thereafter until further court order, except as otherwise assigned for holiday visitation schedules herein.

D. Ms. Smith shall not fail to deliver the child to school or remove the child from school on days that Ms. Rowell is entitled to visitation after school. In the event of Maddie's illness or any other reason that Maddie might otherwise be excused from school on a day that Ms. Rowell is entitled to visitation, Ms. Smith shall offer compensatory time to Ms. Rowell.

E. Ms. Smith shall be entitled to have Maddie for Thanksgiving from Wednesday at 6:00 pm (following Ms. Rowell's Wednesday visitation).

F. Ms. Rowell shall be entitled to have Maddie for the first half of her Winter Break, from 6:00 p.m. on the last school day before the break until 1:00 p.m. on December 25, 2010, pursuant to Rule 22.

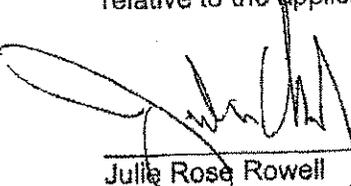
G. Holiday schedule for 2011 shall continue pursuant to Rule 22 with Ms. Smith to have the schedule allocated to mothers and Ms. Rowell to have the schedule provided for fathers.

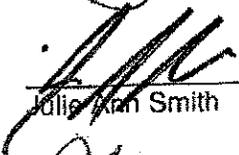
H. No birthdays, holidays, vacations, or out of town travel shall interrupt any visitation time allocated to Ms. Rowell or Ms. Smith pursuant to the list herein, with the exception that Ms. Smith shall be entitled to her two weeks of summertime per Local Rule 22.

2. Telephone contact between the child and Ms. Rowell / Ms. Smith shall occur per local Rule 22, i.e., 3 times per week for not less than 15 minutes each.

3. This agreement shall not be deemed to waive Ms. Smith's objections to the Court's jurisdiction.

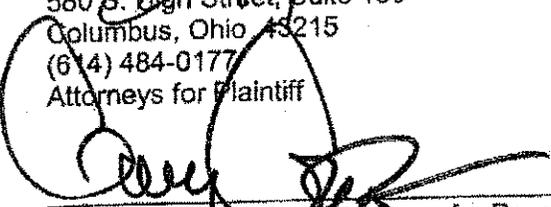
4. This agreement may be submitted to the Court in any enforcement hearing relative to the applicable Magistrate's Order.

  
\_\_\_\_\_  
Julie Rose Rowell

  
\_\_\_\_\_  
Julie Ann Smith

  
\_\_\_\_\_  
Carol Ann Fey #002287  
Attorney & Counselor at Law  
PO Box 9124  
Bexley, Ohio 43209  
(614) 232-9100

  
\_\_\_\_\_  
LeeAnn M. Messucci #0075916  
580 S. High Street, Suite 150  
Columbus, Ohio 43215  
(614) 484-0177  
Attorneys for Plaintiff

  
\_\_\_\_\_  
Gary J. Gottfried, Esq., Attorney for Respondent Smith  
608 Office Parkway, Suite 8  
Westerville, Ohio 43082

  
\_\_\_\_\_  
Meredith Snyder, Guardian Ad Litem  
572 East Rich Street  
Columbus, Ohio 43215



Case: 2011 0950  
Docket: 691377  
Date Filed: 07/25/11  
Description: Memo opposing motion to strike

**Clerk's Office  
Scanning Cover Sheet**

In the  
Supreme Court of Ohio

CHARLES E. DANIEL,	:	Case No. 2011-0950
	:	
Plaintiff-Appellant,	:	On Appeal from the
	:	Franklin County Court of Appeals,
v.	:	Tenth Appellate District
	:	
PAUL D. WILLIAMS,	:	Court of Appeals
	:	Case No. 10AP-797
and	:	
	:	
STEPHEN P. BUEHRER,	:	
ADMINISTRATOR, OHIO BUREAU OF	:	
WORKERS' COMPENSATION,	:	
	:	
Defendants-Appellees.	:	

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**MEMORANDUM OF APPELLEE ADMINISTRATOR,  
OHIO BUREAU OF WORKERS' COMPENSATION, IN RESPONSE TO  
APPELLANT'S MOTION TO STRIKE STATEMENT OF FACTS**

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ADAM H. LEONATTI (0068058)  
Thompson, Meier & Dersom  
929 Harrison Avenue, Suite 205  
Columbus, Ohio 43215  
614-424-6760  
614-424-6768 Fax  
Counsel for Appellant,  
Charles E. Daniel

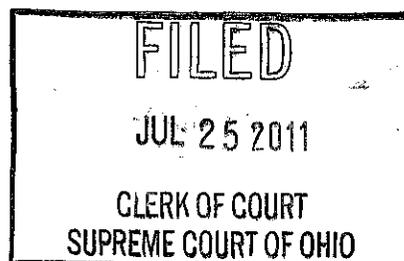
THOMAS TOOTLE (0062385)  
Law Office of Thomas Tootle  
85 East Gay Street, Suite 900  
Columbus, Ohio 43215  
614-228-7747  
614-228-6484 Fax

Counsel for Appellee,  
Paul D. Williams

MICHAEL DEWINE (0009181)  
Ohio Attorney General

KEVIN J. REIS\* (0008669)  
Assistant Attorney General  
*\*Counsel of Record*  
Workers' Compensation Section  
150 East Gay Street, 22nd Floor  
Columbus, Ohio 43215-3130  
614-466-6696  
614-728-9535 Fax  
kevin.reis@ohioattorneygeneral.gov

Counsel for Appellee,  
Administrator, Ohio Bureau of Workers'  
Compensation



## MEMORANDUM IN RESPONSE TO APPELLANT'S MOTION TO STRIKE

The Court should deny the Appellant Charles E. Daniel's ("Daniel") Motion to Strike Appellee Administrator's Statement of Facts. The motion should be denied because it is, in effect, a reply memorandum in support of Daniel's Memorandum in Support of Jurisdiction. S.Ct. Prac. R. 3.3(B) expressly prohibits the appellant's filing of a reply to the appellee's memorandum in response, yet that is precisely what Daniel attempts to do in this motion.

Further, the issue decided in both of the courts below concerned Daniel's attempted administrative appeal of an August 28, 2008, BWC order that denied a claim for an injury he asserts was in the course of his employment on August 11, 2008. The appeal was denied administratively by the Industrial Commission as being untimely in accordance with R.C. 4123.511. Both courts below agreed.

Daniel's motion is pointless. In his motion to strike, Daniel references certain statements made in the Administrator's Memorandum in Opposition, representing that the statements are not supported by the record. The BWC maintains that the statements are correct and supported by the record.

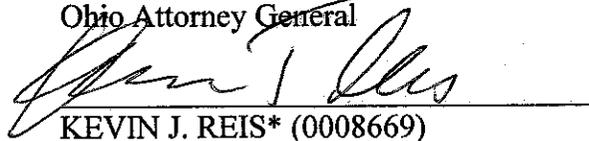
More important, however, the validity of the statements—who filed the workers' compensation claim with the BWC on August 12, 2008, and whether or not Daniel was capable of understanding the BWC's letter denying the claim prior to September 19, 2008—was not significant to the appellate court's decision. Nor is it significant to the Court's decision whether to exercise jurisdiction.

~~Who filed the claim or whether Daniel could have understood the BWC's order before~~ September 19, 2008 are irrelevant to the central issue here: when the order was received and whether his administrative appeal was untimely filed under R.C. 4123.511. The facts complained of are not germane to this threshold issue.

Accordingly, on both procedural and substantive grounds, Daniel's motion should be denied.

Respectfully submitted,

MICHAEL DEWINE  
Ohio Attorney General



KEVIN J. REIS\* (0008669)  
Assistant Attorney General  
*\*Counsel of Record*  
Workers' Compensation Section  
150 East Gay Street, 22nd Floor  
Columbus, Ohio 43215-3130  
614-466-6696  
614-728-9535 Fax  
kevin.reis@ohioattorneygeneral.gov

Counsel for Appellee  
Administrator, Ohio Bureau of Workers'  
Compensation

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Memorandum of Appellee Administrator, Bureau of Workers' Compensation, In Response To Appellant's Motion to Strike Statement of Facts was served by U.S. mail this 25<sup>th</sup> day of July, 2011, upon the following counsel:

ADAM H. LEONATTI  
Thompson, Meier & Dersom  
929 Harrison Avenue, Suite 205  
Columbus, Ohio 43215

THOMAS TOOTLE  
Law Office of Thomas Tootle  
85 East Gay Street, Suite 900  
Columbus, Ohio 43215



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KEVIN J. REIS  
Assistant Attorney General