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IN THE SUPREME COURT OF OHIO

JAMES FLYNN	:	SUPREME COURT CASE NO. 2006 0843
	:	
Appellee	:	
	:	On Appeal from the Summit County
-vs-	:	Court of Appeals, Ninth Appellate District
	:	
DANIELLE & DOUGLAS BIMBER	:	Court of Appeals
	:	Case No. CA-22709
	:	
Appellants	:	

SUPPLEMENT OF ADDITIONAL AUTHORITY OF DEFENDANTS-APPELLANTS,
DANIELLE & DOUGLAS BIMBER, PURSUANT TO S.C.T. VI SECTION 8

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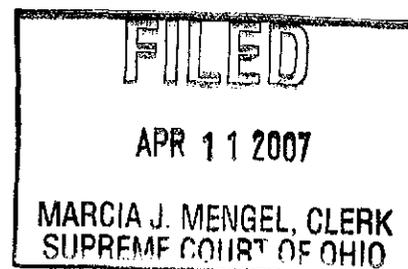
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In support of Proposition of Law No. 1, Defendants-Appellants submit the opinion from the Court of Common Pleas of Erie County, Pennsylvania, issued on March 27, 2007, denying James Flynn's motion for reimbursement of child support he paid. A copy of the opinion is attached and will supplement the appendix of Appellants Merit Brief for page nos. 147 through 152 as APPX.000147 through 000152.



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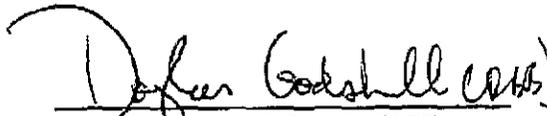
CERTIFICATE OF SERVICE

I certify that a copy of this *Supplement of Appellants, Danielle and Douglas Bimber*, Pursuant to SCT VI §8 has been mailed via facsimile and by ordinary U. S. Mail, on this 10th day of April, 2007, to:

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would not be "fit parents" and, on November 27th, 2003, Hamot Hospital discharged the triplets to Gestational Carrier. *Id.* at 1269, 1276. Gestational Carrier took the triplets to her home, without Father's consent and against his wishes. *Id.* at 1276.

On December 4, 2003, Father filed a Complaint for Custody against Gestational Carrier. The Court promptly entered a consent order granting Gestational Carrier temporary legal and physical custody of the children, with father receiving visitation.²

Gestational Carrier, on February 2, 2004, filed for child support. Upon stipulation of the parties, the Honorable Shad Connelly entered a September 17, 2004 Order requiring Father to pay \$1750.00 a month for child support.

On January 7, 2005, Judge Connelly granted Gestational Carrier primary physical custody of the triplets, with Father having partial custody. At the same time, Judge Connelly ordered that the issues of standing, child support and custody may be taken up on appeal together. Father filed a timely appeal.

The Superior Court listed the issues for its consideration as:

- 1) Whether the trial court erred in determining that gestational carrier had standing to challenge the natural father's custody of the triplets based on
 - a) her *in loco parentis* status, and/or
 - b) her status as the legal mother of the babies; and
- 2) Whether the trial court erred in granting primary physical custody to gestational carrier.

J.F. v. D.B., 897 A.2d at 1273. Upon determining that Gestational Carrier lacked standing to pursue custody, the Superior Court, on April 21, 2006, vacated Judge

² The Order preserved Father's right to challenge Gestational Carrier's standing to pursue custody of the triplets. On April 2, 2004, Judge Connelly entered an Order finding that Gestational Carrier had standing to pursue custody and child support.

Connelly's custody and support orders.³ Despite vacating the child support order, the Superior Court did not address the support issue in its Opinion.

Father, on May 24, 2006, filed a Complaint for Support seeking recovery of all child support paid. The parties agree that Father paid \$48,309.53 in support during the course of the legal proceedings.

DISCUSSION

A. Impact of Vacating the Support Order

First, Father relies upon *Fitzpatrick v. Fitzpatrick*, 811 A.2d 1043 (Pa. Super. 2002) for the proposition that the Superior Court, by *vacating* the trial court's orders, negated Gestational Carrier's support rights and left Father paying support pursuant to an order that was void for lack of jurisdiction.

Fitzpatrick provides: "where a judgment is vacated or set aside (or stricken from the record) by valid order or judgment, it is entirely destroyed and the rights of the parties are left as though no such judgment had ever been entered." *Fitzpatrick*, 811 A.2d at 1045 quoting *Rufo v. Bastian-Blessing Co.*, 420 Pa. 416, 218 A.2d 333, 334 (Pa. 1966) (quoting *In re Higbee Estate*, 372 Pa. 233, 93 A.2d 467, 469 (Pa. 1953)). Similarly, the Pennsylvania Rules of Civil Procedure governing Actions for Support define "vacate" as declaring a support order "null and void, as if it were never entered." P.R.C.P. 1910.1(c).

There is no question that vacating an order destroys it. The destruction, however, can only be applied prospectively. As the case law upon which *Fitzpatrick* finds its support explains, a vacated judgment has "no more *future* effect than if [it] had never existed." *In re Higbee Estate*, 93 A.2d 467, 469 (Pa. 1953) (emphasis added).

³ Because of its decision regarding standing, the Superior Court did not reach the issue of whether the trial court erred in granting Gestational Carrier primary physical custody of the triplets. *Id.*

Accordingly, when the Superior Court vacated Judge Connelly's orders, the order of support could not have any *future* impact on the parties' rights. In that respect, the support order was destroyed and, as of April 21, 2006, the rights of the parties were left as though no such judgment had ever been entered.

In re Higbee Estate acknowledges the reality that certain aspects of an order simply cannot be undone. No court can take away the fact that Gestational Carrier had custody of the children from November 27, 2003 until April 21, 2006, a two and one-half year time period which neither Father nor Gestational Carrier is likely to forget. In that respect, this Court is also incapable of taking away the children's right to receive support from their Father during the time that they spent outside of his custodial care.

Accordingly, the Superior Court's order must be applied prospectively.

As a result, when the Superior Court vacated the support order it could not, beyond April 21, 2006, have any impact on the parties' rights.

B. Standing to Pursue Support

Similarly, father asserts that by vacating the orders, the Superior Court negated Gestational Carrier's right to receive support and, therefore, Gestational Carrier never had standing to receive child support.⁴

With regard to standing in a child support action, the Domestic Relations Code provides:

STANDING.-- Any person caring for a child shall have standing to commence or continue an action for support of that child regardless of whether a court order has been issued granting that person custody of the child.

⁴ The Superior Court did not make a specific finding that Bimber lacked standing to pursue the support action. Instead, upon directing that Father be awarded full physical and legal custody of the children, it vacated the support order.

23 Pa.C.S.A. §4341. Moreover, an action for support shall be brought "on behalf of a minor child by a person caring for the child regardless of whether a court order has been issued granting that person custody of the child." Pa.R.C.P. 1910.3(c).

Regardless of the validity of the custody order granting Gestational Carrier a legal right to the children, she was in fact a "person caring for" the children. In this regard, Gestational Carrier had standing to commence and continue the support action on behalf of the children. 23 Pa.C.S.A. §4341; Pa.R.C.P. 1910.3(c). It is irrelevant that the children were in Gestational Carrier's custody contrary to Father's wishes. *See generally Luzerne County C.Y.S. v. Cottam*, 603 A.2d 212 (Pa.Super. 1992) (father was not relieved of duty to support his child even though father objected to CYS' custody of the child).

In seeking reimbursement of the money paid for his children's support, father relies upon *Elkin v. Williams*, 755 A.2d 695 (Pa. Super. 2000). In *Elkin*, the Superior Court directed that a biological mother be reimbursed for child support paid to an individual who lacked standing to file a complaint for support. *Id.* At 699. Specifically, the Court found that when an eighteen-year-old adult decided on his own accord to live with a family friend, the family friend lacked standing to file a complaint for support on behalf of the eighteen-year-old, who was neither a "child" nor a minor for purposes of support. *Id.* In other words, because the eighteen-year-old was not entitled to receive support the family friend was precluded from filing for support on his behalf.

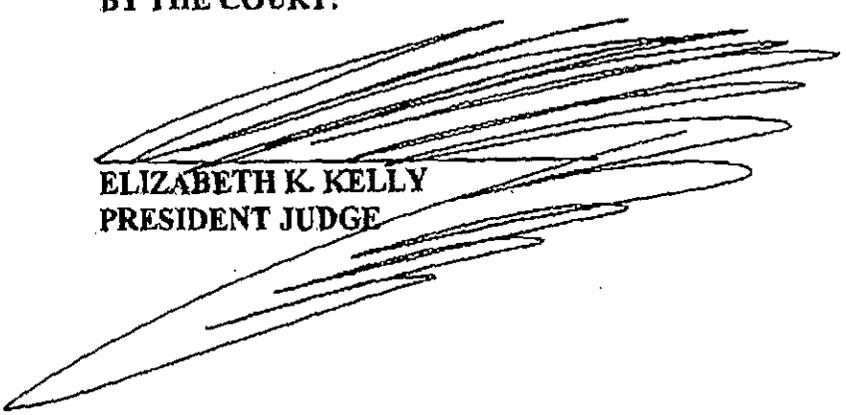
Unlike in *Elkin*, there is no potential argument that the triplets were not entitled to their Father's support. Specifically, parents have an obligation to support minor children in order to promote the best interest of their children. 23 Pa.C.S.A. 4321; *Elkin*, 755 A.2d at 697.

It was not Gestational Carrier's benefit for whom the support order was entered. This was a child support order issued for the benefit of three young boys, who were entitled to the support of their father. It is unimaginable that any parent would ever wish to take away a benefit that parent is fully capable of conferring to his child. Yet, that is precisely the conclusion to which Father's argument leads this Court.

Regardless of the validity of the custody order, the children were outside the primary custodial care of their father and they were entitled to his support.

For the foregoing reasons Father's Complaint for Support, is denied.

BY THE COURT:



**ELIZABETH K. KELLY
PRESIDENT JUDGE**

cc: Melissa Hayes Shirey, Esquire
Joseph P. Martone, Esquire
Support Office