

ORIGINAL

IN THE SUPREME COURT OF OHIO

T.M.)	Case No. 2011-0517
Plaintiff/Appellant)	On Appeal from the Lucas County Court of Appeals, Sixth Appellate District
vs.)	
J.H.)	Court of Appeals Case Nos.: L 10-1014 and L-10-1034
Defendant/Appellee)	

APPELLEE'S MEMORANDUM IN RESPONSE

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EXPLANATION OF WHY THIS CASE DOES NOT INVOLVE
A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS
NOT A CASE OF GREAT PUBLIC OR GENERAL INTEREST.

Pursuant to this Court's Practice Rule 3, the Appellants must persuade this court that this case has a substantial constitutional question and is of great public or general interest.

Appellants fail to persuasively argue this standard.

The Appellants fail to state exactly what constitutional rights were allegedly denied to the mother of the minor child. This is a private custody case where the father has been named the residential, custodial parent of the minor child. The trial court properly considered the dictates of R.C. 3109.04 and found that it was in the best interests of the minor child that the father be given custodial possession of the child. The Appellants have never argued that the court failed to consider these guidelines.

The facts and issues in this case do not rise to the level of great public or general interest. The Appellants argue, and have argued throughout this case, that the issue of jurisdiction is significant to the operation and administration of justice by all Ohio courts, making this case of great public and/or general interest. The Appellants further argue that the Juvenile Court does not have jurisdiction and asserts that all unwed mothers are at risk of losing their children because the Appellee allegedly did not title his motion for possession of the minor child as a "complaint". Appellants fail to advise the court that Appellee father filed a counterclaim to the petition for child support filed on behalf of the mother in addition to filing a motion for adjudication of parental rights and custody. In addition, throughout these proceedings, Appellants have argued that only one Ohio statute applies to a request for custody. The courts have pointed out that the statute continuously cited by the Appellants applies to visitation, not

custody. There is no danger of unwed mothers losing their children for the failure to follow the statute cited by Appellants.

The Appellants further state that the Appellant, an unwed mother, was not represented by counsel and was not a party. The record in this case verifies that the Appellant was involved from the very beginning of this case and appeared at every hearing. See trial docket sheet. Appellant only appeared without counsel in the first two months of this litigation. Appellant mother hired her own counsel, has had at least 6 private attorneys (see docket sheet, 6/26/08 - attorney Tonya Robinson; 3/5/09 - attorney Thomas Goodwin; 4/23/09 - Attorney Daniel Ellis; 5/27/09 - attorney Frederick Kalmbach; 7/17/09 - attorney Marjan Neceski; and 4/15/09, 4/20/09 and 5/27/09 - attorney Stephen Mosier), and filed her own motion to be named the custodial parent of the minor child. (See docket sheet, 7/23/08). It was not until Appellant mother hired her third or fourth counsel, which included her father and co-Appellant as co-counsel, that the question of jurisdiction was made an issue in this case.

The jurisdictional question consistently raised by the Appellants has been decided by the trial, appellate, and this court prior to these motions being filed by the Appellants. Appellants' argument that she was unrepresented and therefore at a disadvantage is not verified by the record in this case. Furthermore, Appellants' argument that the mother was not served in this case is also contradicted by the record. See docket sheet entries of 5/22/08, 6/5/08 (waiver of service signed), 7/11/08, 7/15/08, and Magistrate's Decision of 11/4/09. Therefore, Appellants cannot argue that these proceedings took place without service of process upon the Appellant mother, and therefore, no constitutional right was violated, there is no constitutional question, and there is no great public or general interest as to this issue since Appellant was indeed served with all

necessary pleadings, motions and memoranda.

PRELIMINARY STATEMENT AS TO FACTS

Appellee feels that he must bring to this court's attention certain misstatements of fact as relayed by the Appellants in their memoranda. First, throughout the Juvenile Court proceeding and now continuing in this court, Ms. Mosier states that the father "abandoned" the minor child. The testimony at trial established that this is simply not true. Mr. Haaser was living with Ms. Mosier when the child was born, and the parties continued to live together for approximately nine months, until August, 2007. Ms. Mosier then resided with her mother. The Juvenile Court Magistrate found that the "Mother permitted only limited contact by the father" while living with her mother. The father initiated the proceedings to pay child support and contacted the LCCSEA on May 5, 2008, approximately eight months after the parties separated. When father was notified that the mother was moving to Arizona, he filed his motion for allocation of parental rights on May 9, 2008. See Magistrate's Decision dated November 4, 2009. Because of the mother's behavior in limiting his visitation with his daughter, Mr. Haaser initiated the child support proceedings himself and retained counsel to establish parental rights. This is hardly the behavior of a father who had "abandoned" his child.

Further, Appellants in their memoranda state that the Magistrate signed the name of the judge on certain orders. There is absolutely no evidence, either testimonial or documentary, corroborating that statement. Indeed, the Appellants fail to cite to any reference in the record in support of this statement or any of the facts alleged in their Briefs. The Appellants have accused the Magistrate of masterminding a plot to issue orders that the judge did not approve. This is pure fiction. The trial court has a procedure where the Magistrate will initial the approved order

of the judge indicating that the Magistrate has seen and/or reviewed the order. Almost all of the orders in this case have the Magistrate's initials. For the Appellants to twist this procedure into accusing the Magistrate of signing the judge's name is shameful behavior on the part of the Appellants especially in light of the fact that these allegations bear no relevance to any argument raised and argued by the Appellants. The Appellants are slinging mud hoping that some sticks and this court alter its opinion of the court personnel and parties in this case. If the Appellants had any proof of these allegations, they would have been obligated and required to report this abuse of process by the Magistrate to the Bar Association. The Appellants have failed to do so.

ARGUMENT

This matter has previously been before this court on Appellants' appeal of a mandamus action requesting relief from the Sixth District Court of Appeals requesting an order requiring the Juvenile Court to stop proceedings and void its orders due to a lack of jurisdiction. The Sixth District denied this mandamus request and the Appellants appealed to this court in case number 2009-2175, The State ex rel. Mosier v. Fornof, 126 Ohio St.3d 47, 930 N.E.2d 305, 2010-Ohio-2516. This court found that the juvenile court, judges and magistrate have jurisdiction to decide this custody matter. This court further found that the Appellants' reliance on R.C. 3109.12 was erroneous because that statute relates to the "procedure that a father of a child born to an unmarried woman must use when requesting reasonable parenting time rather than legal custody". Id. at 48. This court found that the father sought custody through his counterclaim and motion. Id. at 49.

Two individuals, Appellant mother and Appellant Steven Mosier, have both filed memoranda in support of jurisdiction. A reading of Mr. Mosier's memorandum appears to be

almost identical to the arguments of Appellant mother. The Sixth District Court of Appeals ruled that Mr. Mosier was without standing to argue on behalf of his daughter, and ordered him to refrain from arguing her issues and limited him to those issues relevant to his claims, that of grandparent visitation and sanctions ordered against his firm. See order of the Sixth District Court of Appeals dated January 13, 2011, p. 4. Appellee requests that Mr. Mosier's memorandum be stricken and/or denied. In the alternative, Appellee states that this brief is submitted in opposition to both memoranda of Appellants.

PROPOSITION OF LAW NO. 1 OF APPELLANTS:

THE COURT OF APPEALS HAS JURISDICTION TO REMAND AND
SPECIFY PARTICULAR TERMS OF A FINAL JUDGMENT.

The appellate court issued an order staying the proceedings and remanding this matter to the trial court to prepare and file a final judgment entry. This was required because the trial court, having a new judge in this case, issued an order nunc pro tunc that did not include certain issues, including the payment of child support. The nunc pro tunc order was appealed by all parties in this case. Upon the stay and remand, the appeals concerning the nunc pro tunc order were dismissed by the Court of Appeals.

The appellate court did not void the final order January 12, 2010 as stated by the Appellants, but only found that the order did not qualify as a final appealable order under Rule 57. Therefore, the court of appeals remanded the case for a short period of time instructing the trial court to be more specific in its order to make it a final appealable order.

Appellate Rule 27 states, "A court of appeals may remand its final decrees, judgments, or orders, in cases brought before it on appeal, to the court or agency below for specific or general

execution thereof, or to the court below for further proceedings therein.”

In order to preserve judicial economy in this case, the Court of Appeals stayed the appellate proceeding and remanded the case to the trial court requiring the trial court to issue a final, appealable order. When that order was filed, this court dismissed the appeal concerning the nunc pro tunc order. The Appellants argue, even though they have not suffered any damage or prejudice by the court’s remand, that the appellate court should have dismissed the appeal for lack of jurisdiction because there was no final, appealable order.

Courts in Ohio have remanded cases to the trial court to correct an error in the final judgment entry, Planey v. Planey, (7 Dist. 1997)1997 WL 598072, or for merit determinations. Taylor v. Taylor (Ohio App. 1982), 2 Ohio App.3d 79, 440 N.E.2d 823. In addition, appellate courts have remanded cases for the trial court to fully set forth the basis of its decision. Mochko v. Mochko (8 Dist. 1994), 1994 WL 66168. This court was within its rights and saved the court and the parties time and money by remanding the case to the trial court for issuance of a corrected final appealable order, with no damages incurred by any party.

In addition, the Appellant’s argument appears to be counter-productive to the Appellant’s goals in this case. If the Court of Appeals had dismissed the appeal, the case would have remanded to the trial court with all of its orders intact. All arguments of Appellants would be for naught, and the rulings of the trial court would still apply to the parties and custody proceedings in this case. The Appellants would gain nothing by a dismissal of the appeal, only accomplishing an incredible, intentional financial burden upon Appellee Haaser, who will still have custody of the minor child. It was not until the trial court’s filing of its nunc pro tunc order that any argument was raised as to the validity of the final order in this case. The court remedied that

situation by ordering a stay of the proceedings and remanding the case to the trial court for the issuance of a corrected, final, appealable order. This saved all parties and the courts time and expense in requiring the parties to re-appeal and reargue the decision of the trial court.

Because the court of appeals' actions abided by the terms of Rule 27 and case law, the Appellants suffered no damages, and no constitutional right was violated. Nor is this issue of great public or general interest.

PROPOSITION OF LAW NO. II:

THE COURT OF APPEALS HAD JURISDICTION OF ISSUE
A DECISION AND JUDGMENT ON THE MERITS FROM A
CUSTODY ORDER PREVIOUSLY DETERMINED TO BE A
NON-FINAL ORDER.

Appellee reasserts and reargues herein his argument set forth in the section above.

PROPOSITION OF LAW NO. III

THE COURT OF APPEALS HAS JURISDICTION TO DECIDE
THE MERITS OF AN APPEAL FROM A NON-FINAL ORDER,
WHEN A SEPARATE SUBSEQUENTLY FILED APPEAL
OF THE ACTUAL FINAL JUDGMENT REMAINS PENDING
WITHOUT DECISION.

Appellee reasserts and reargues herein his argument set forth in section one above.

Furthermore, Appellee states that the second appeal referred to by the Appellants appeals the final judgment entry that was ordered by the Court of Appeals upon remand. The Appellants decided that even though the order was issued pursuant to the order of remand, that the final

order should be separately appealed. The Court of Appeals issued its decision in this case on the same final judgment entry filed pursuant to its order on remand. The Appellants have asked and been granted a stay of the second appeal until after this court has decided whether to accept this case for determination, or if this court accepts this case, after the conclusion of the appeal. There is no conflict inasmuch as the second appeal has been stayed. Therefore, there is no prejudice to the Appellants, and no constitutional issue, and no great general or public interest in this issue.

PROPOSITION OF LAW NO. IV:

THE COURT OF APPEALS CAN PROPERLY DECIDE AN APPEAL
ON THE MERITS IN THIS CASE SINCE IT HAD DETERMINED
ITS OWN AND/OR TRIAL COURT'S JURISDICTION.

Appellants' argument reasserts their arguments that the Juvenile Court did not have jurisdiction to determine custody in this case. The issue of jurisdiction has been addressed many times by the trial court, appellate court, and as stated above, this court in the mandamus action. The Appellant argues that the trial court did not have jurisdiction of the custody issue in this case by claiming that the word "motion" and not "complaint" was in the heading of Appellee's pleading, and/or by asserting that the juvenile court should have required a complaint with a new case number after the issue of child support was determined. The Appellant has argued this jurisdictional issue previously in her mandamus action filed with the appellate court, case number L-09-1192 wherein it determined and affirmed by this court that "Pursuant to R.C. 2151.23(A), a juvenile court has original jurisdiction to determine the custody of any child not the ward of another state. In the matter before us, it is not alleged that A.H. is the ward of any other court of this state." Therefore, the jurisdictional issue has been decided by the Court of

Appeals and this Court and is the rule of law in this case.

The statute relied upon by the Appellant, R.C. 3109.12, does not mandate that a complaint be filed. The statute states, as quoted by the Appellant, that “the father **may** file a complaint”. (Emphasis added). This is permissive, not mandatory. In addition, R.C. 3111.13, which also allows a father to request designation as the residential parent and legal custodian of a minor child, state that “the father **may** petition that he be designated the residential parent and legal custodian of the child or for parenting time rights in a proceeding separate from any action to establish paternity.” (Emphasis added). Again, the language in this statute is permissive, not mandatory.

Additionally, the father may invoke the juvenile court’s jurisdiction pursuant to R.C. 3111.13 after the ruling on child support. R.C. 3111.13 states:

(C) Except as otherwise provided in this section, the judgment or order may contain, at the request of a party and if not prohibited under federal law, any other provision directed against the appropriate party to the proceeding, concerning the duty of support, the payment of all or any part of the reasonable expenses of the mother's pregnancy and confinement, the furnishing of bond or other security for the payment of the judgment, **or any other matter in the best interest of the child**. After entry of the judgment or order, the father may petition that he be designated the residential parent and legal custodian of the child or for parenting time rights in a proceeding separate from any action to establish paternity. (Emphasis added)

This statute specifically allows the Appellee to file his motion in the same action as the child support proceeding.

In Pegan v. Crawmer, (1996), 76 Ohio St.3d 97, 1996-Ohio-419, this court held:

R.C. 3111.13[C] ““does not mandate a separate proceeding [to determine visitation]. Instead, it grants permission to the father to petition for visitation in a separate proceeding rather than doing so at the paternity hearing. The trial court may include provisions for visitation [in the paternity judgment] if it is “in the best interest of the child.” ””); West v. Anderson (Mar. 17, 1992), Franklin App.

No. 91AP-1006, unreported, 1992 WL 55440 (“[T]he father may maintain a separate action, but [R.C. 3111.13(C)] does not preclude the parties from agreeing to litigate all issues in one action, including visitation.”).

“The trial court could consider parenting time issues during paternity proceeding; statute regarding the effects of a paternity judgment did not mandate a separate proceeding to determine visitation, rather, it granted permission for a father to petition for visitation in a proceeding separate from the paternity proceeding.” Jefferson County Child Support Enforcement ex rel. Best v. Scheel (Ohio App. 7 Dist., Jefferson, 06-17-2004) No. 03 JE 35, 2004-Ohio-3210, 2004 WL 1379821.

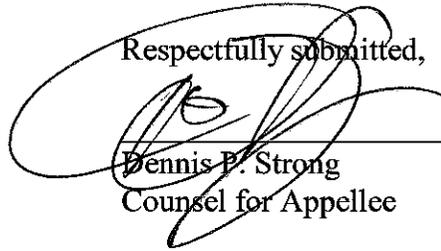
Pursuant to the decision of this court in the previously filed mandamus action, and the reasoning of the trial court, the Lucas County Juvenile Court and appellate court had and have jurisdiction over the issues in this case. There has been no violation of any constitutional right in this matter relating to the jurisdiction issue. In addition, this matter does not present a great public or general interest when the jurisdiction issue has been determined by all courts in this case.

CONCLUSION

None of the issues raised by the Appellants involve a constitutional right and/or question. Nor do the issues present a great public or general interest. This is a private custody case where custody was awarded to the father. The mother was afforded all rights to a trial and counsel. The Appellants do not set forth any specific constitutional right denied the mother. Nor do the Appellants set forth any great public or general interest as to the issues in this case.

Because of the above stated facts and law, the Appellee requests that the Appellants' Memoranda in Support of Jurisdiction be denied.

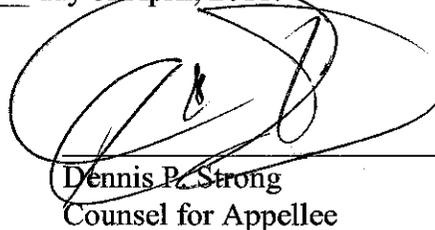
Respectfully submitted,



Dennis P. Strong
Counsel for Appellee

CERTIFICATION

This is to certify that a copy of the foregoing Memorandum was sent by U.S. ordinary mail to Daniel T. Ellis, Counsel for Appellant Tonya Mosier, 4930 Holland-Sylvania Rd., Sylvania, OH 43560, Stephen B. Mosier, Appellant Pro Se, 3450 E. Sunrise Dr., #140, Tucson, AZ 85718, and Charles S. Rowell, Counsel for Guardian Ad Litem, 520 Madison Ave., Suite 955, Toledo, OH 43604, on this the 21st day of April, 2011.



Dennis P. Strong
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