ORIGINAL

IN THE SUPREME COURT OF OHIO

JULIE ROSE ROWELL	:	Case No. 11-1053
Appellant,	:	Appeal from the Franklin County Court of Appeals,
v.	:	Tenth Appellate District
JULIE ANN SMITH	:	Court of Appeals Case Nos. 10AP-675 and 10AP-708
Appellee.	:	

MOTION OF APPELLEE, JULIE SMITH, TO DISMISS APPELLANT'S MOTION FOR STAY AND, IN THE ALTERNATIVE, MEMORANDUM CONTRA APPELLANT'S MOTION FOR STAY

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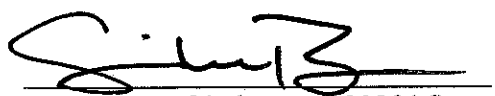
MOTION OF APPELLEE, JULIE SMITH, TO DISMISS APPELLANT'S MOTION FOR STAY AND, IN THE ALTERNATIVE, MEMORANDUM CONTRA APPELLANT'S MOTION FOR STAY

Now comes Appellee, Julie Smith, by and through Counsel of Record, Gary J. Gottfried, and hereby requests that Appellant's Motion for Stay filed on June 22, 2011, be dismissed. In the alternative, Appellee respectfully requests that this Court deny Appellant's request for the reasons set forth in the attached Memorandum in Support. Finally, Appellee requests that this Court hold its determination of jurisdiction on this appeal and request for a stay pursuant to Rule 3.6(A)(3) of the Supreme Court of Ohio Rules of Practice pending the outcome of *In re Lucy Kathleen Mullen*, Case No. 2010-0276.

Respectfully submitted,

GARY J. GOTTFRIED CO., L.P.A.



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MEMORANDUM IN SUPPORT

This case is about Appellee, the single mother and sole parent of a minor child, who for her child's entire life meticulously avoided taking any action that would potentially jeopardize her constitutional right to the exclusive care, custody, and control of her daughter. The Appellee's rights were challenged in a shared custody petition brought by Appellant as an unrelated third party and legal stranger to the child, and who lacks any basis for such an action. Nevertheless, without holding a hearing on the merits, the trial court agreed to hear Appellant's

petition and ordered the mother, during the pendency of the action, to yield her exclusive custodial rights to this legal stranger, even before the court made any finding as to the mother's suitability as a parent.

Through a series of unprecedented and unlawful orders, the trial court imposed a shared custody and/or companionship arrangement on the mother. The orders were contrary to the laws and procedures that were specifically designed to protect the constitutional rights of parents and the trial court assumed jurisdiction well beyond that conferred upon it by the General Assembly.

The orders included interim orders that granted companionship time to Appellant with the minor child. When Appellee refused to comply with the interim order for the reasons that she believed them to be invalid and not in her daughter's best interest, the trial court found her in contempt of the interim orders. The trial court sentenced Appellee to a term of incarceration and issued other sanctions against her. The Appellee appealed the contempt findings and the Tenth District Court of Appeals issued its decision on June 9, 2011. The decision reversed the contempt finding against Appellee and, most importantly, restored Appellee's paramount and constitutionally protected right to the exclusive custody of her minor daughter.

Indeed, Appellant's efforts to restore her rights to exclusive custody of her child have been tireless. After nearly three years of repeated motions and appeals, the June 9, 2011 Tenth District Court of Appeals decision finally *restored* Appellee's constitutionally protected exclusive custodial rights to her daughter. Notwithstanding that decision, Appellant again seeks judicial intervention to interfere with the constitutionally protected mother-child relationship by asking this Court to restore the invalid interim orders *without any evidentiary hearing on the merits* for the additional "months or years" it may take to arrive at a final resolution of the baseless petition for shared custody.

Significantly, Appellant acknowledges in her motion that "it must be noted that to-date, no court has determined the facts of this case." See Appellant's Motion for Stay at 1, FN1. While Appellant also acknowledges that "the parties understandably continue to have widely divergent views of the facts," (see Appellant's Motion for Stay at 1, FN1), she neglects to inform this Court that there are numerous *undisputed* facts. The only facts *not* in dispute are as follows: (1) Appellee is the biological mother and sole parent of the minor child; (2) Appellant is not biologically related to Appellee's daughter in any way; (3) Appellant and Appellee did not enter into a written shared custody or temporary shared parenting agreement as it pertains to Appellee's daughter; (4) Appellee has not been determined an unsuitable parent as required by Ohio law; and (5) an evidentiary hearing has not been held on Appellant's yet unsubstantiated claims that Appellee somehow impliedly, unknowingly and permanently relinquished some, but not all, of her exclusive custodial rights in favor of Appellant. Further, a hearing has not yet been held on Appellant's fitness as a shared custodian or whether such arrangement is in the best interest of Appellee's daughter.

This specific proceeding is derived from Appellant's appeal and request for stay of the decision issued by the Tenth District Court of Appeals on June 9, 2011. The Appellee respectfully submits that this Court should deny jurisdiction of this matter, deny the request for stay, adhere to the parental deference that is required by centuries of U.S and Ohio constitutional, statutory and case law and allow the case to proceed to a long overdue hearing on the merits at the trial court level.

Legal Argument

1. **This Court should deny Appellant's Motion for Stay on its face as it fails to satisfy the procedural requirements of Rule 14.4(A) of the Supreme Court of Ohio Rules of Practice.**

As an initial matter, Appellee contends that Appellant's Motion for Stay is procedurally deficient and should therefore be dismissed. Specifically, Rule 14.4(A) of the Supreme Court of Ohio Rules of Practice mandates that the moving party address the issue of bond when filing a Motion for Stay. The Appellant failed to address the issue of bond in her original filing rendering the pleading procedurally deficient. Accordingly, the Motion for Stay pending before this Court should be dismissed on its face and Appellee requests that the Court issue an order accordingly.

2. **This Court should deny Appellant's Motion for Stay and hold its determination of jurisdiction pursuant to Rule 3.6(A)(3) pending the outcome of a case that may involve a dispositive issue that is currently before this Court.**

Furthermore, Appellee submits that the matter of *In re Lucy Kathleen Mullen*, Case No. 2010-0276, pending before this Court involves a dispositive issue that could be determinative of this case. Specifically, this Court is currently considering whether a non-relative can seek judicial intervention and thereby force by judicial fiat a common law adoption on a parent who specifically refused to enter into a consensual shared custody agreement. Indeed, this Appellant ultimately seeks to strip Appellee of her exclusive custodial rights to her daughter, just as the Appellant in *In re Lucy Kathleen Mullen.* Therefore, this Court's opinion in *In re Lucy Kathleen Mullen* may be determinative of the underlying action giving rise to this appeal and current motion.

Moreover, this Court's decision in *In re Lucy Kathleen Mullen* will likely provide guidance on how to evaluate the legal theory being advanced by Appellant in this case and the likelihood

of success. Accordingly, Appellee respectfully requests that the Court reserve judgment in this matter before imposing additional judicial intervention on Appellee's family, which was only just recently restored to its lawful status pursuant to centuries of U.S. and Ohio constitutional, statutory and case law precedent. Therefore, in accordance with Rule 3.6(A)(3) of the Supreme Court of Ohio Rules of Practice, Appellee requests this Court to "hold its determination of jurisdiction on this discretionary appeal and stay" pending the outcome of *In re Lucy Kathleen Mullen.*

3. This Court should deny Appellant's Motion for Stay for the reason that the Tenth District Court of Appeals properly determined that no statute confers upon a juvenile court the authority to grant visitation to a non-relative in the absence of a divorce, dissolution, legal separation, annulment or child support proceeding.

The Appellee again draws the Court's attention to the fact that this matter, which has been pending for approximately 1,000 days, has not yet had a trial on the merits. As a result, Appellant, a legal stranger to Appellee's daughter, has not yet met her burden of proof. Notwithstanding, for 1,000 days, Appellee – the mother and sole parent – was stripped of her constitutional right to the exclusive custody of her child, during her child's most formative years by way of the trial court's interim orders. Now, Appellant asks this Court for a stay of the Tenth District decision that finally *restores* the sanctity of the constitutionally-protected relationship of mother and daughter on grounds that Appellant's court-compelled relationship should be reestablished and, indeed, *prioritized* to the detriment of the mother-daughter relationship while the hearing on the merits finally takes place that could take "possibly even years * * *." See Appellant's Motion for Stay at 2. In support of this request, Appellant argues that the judicial holdings in *In re LaPiana*, 8th Dist. Nos. 93691 and 93692, 2010-Ohio-3606 and *In re Mullen* support the proposition, or at a minimum, create a conflict, that a juvenile court has the statutory

authority to issue visitation orders. The Appellant further argues that a stay of the Tenth District's decision should be issued until such point that this Court may resolve the conflict. This argument is fatally flawed as these cases are factually distinguishable for purposes of the issue at bar.

In *both* of the cited cases, a hearing on the merits of the underlying petition for shared custody had already been held and the trial court had already issued a decision on said petition. Further, in *In re LaPiana*, the mother and the non-relative had executed a consensual written agreement. Moreover, as the Tenth District Court of Appeals pointed out, the court-ordered visitation in *both* of those cases went unchallenged.

In this case, the Tenth District Court of Appeals correctly followed Ohio law and ruled that juvenile courts "are courts of limited jurisdiction whose powers are created by statute." *Carnes v. Kemp*, 104 Ohio St.3d 629, 2004-Ohio-7107, 821 N.E.2d 180, at ¶25. More particularly, as this Court has held, a "juvenile court possesses only the jurisdiction that the General Assembly has expressly conferred upon it." *In re Gibson* (1991), 61 Ohio St.3d 168, 172, 573 N.E.2d 1074, citing Section 4(B), Article IV, Ohio Constitution; *Seventh Urban, Inc. v. University Circle Property Dev.* (1981), 67 Ohio St.2d 19, 22, 21 O.O.3d 12, 423 N.E.2d 1070. Thus, in the absence of a specific statute conferring jurisdiction, the juvenile court "cannot go beyond the statutes and find jurisdiction on some other basis." *In re Gibson* at 172-73, citing *In re Fore* (1958), 168 Ohio St. 363, 370, 155 N.E.2d 194.

If it were not already self-evident, this last statement from *In re Gibson* forecloses the possibility that a juvenile court could base its jurisdiction to grant visitation rights on its own local rule. Indeed, pursuant to *In re Gibson*, if there is no specific statute that "expressly" confers

upon juvenile courts the jurisdiction to grant visitation rights to non-parents in a particular circumstance, such jurisdiction does not exist. *Id.* at 172-73.

The Appellant's petition for shared custody in the underlying case was brought under R.C. §2151.23(A)(2), which confers upon juvenile courts the jurisdiction "to determine the custody of any child not a ward of another court of this state." This statute has been broadly interpreted to apply to all custody disputes between parents and non-parents, no matter what the basis of the non-parent's claim. See *In re Perales* (1977), 52 Ohio St.2d 89, 369 N.E.2d 1047. It does not, however, expressly or implicitly give the juvenile court jurisdiction to grant visitation rights. In fact, this is exactly what the Tenth District Court of Appeals expressed when it found, "we do not believe a juvenile court has the implied authority to issue temporary orders that it cannot grant on a permanent basis." *Rowell v. Smith*, 10th Dist. Nos. 10AP-675 and 10AP-708, 2011-Ohio 2809, at ¶21.

In sum, *In re Gibson* and its progeny stand for the proposition that jurisdiction to determine *custody* does not by itself confer jurisdiction to determine *visitation*. Rather, a juvenile court will have jurisdiction to order a parent to allow visitation by a non-parent in a custody case if – and only if – the statute(s) governing that particular kind of case also include a distinct and express basis for that additional jurisdiction. Here, R.C. §2151.23(A)(2), as the underlying statute relied upon for jurisdiction by Appellee in her petition, contains no such basis for jurisdiction to order visitation.

4. This Court should deny Appellant's Motion for Stay for the reason that granting such, even temporarily, would again violate Appellee's paramount constitutional right to the exclusive care, custody and control of her daughter.

For centuries, United States and Ohio law have held the parent-child relationship to be sacrosanct by affording the parental relationship all the protections and deference provided by the law. This principle was squarely highlighted in the United States Supreme Court case of *Troxel v. Granville* (2000), 530 U.S. 57 in the visitation context. In *Troxel*, the Court affirmed the Washington Supreme Court's nullification of a state statute that allowed juvenile courts broad and unfettered discretion to grant visitation rights to non-parents without any factual findings regarding the harm or potential harm to the child, without requiring any showing of parental unfitness, and without giving deference to the parent's determination of her child's best interest with respect to visitation. The United States Supreme Court found that "[t]he liberty interest at issue in this case - the interest of parents in the care, custody, and control of their children - is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel* at 65. The Court explained that, because the non-parental visitation statute required nothing more than the judge's belief that a visitation decision better than the parent's decision could be made, and because the statute placed "no limits on either the persons who may petition for visitation or the circumstances in which such a petition may be granted," the statute infringed upon fundamental parental rights. *Id.* at 73.

In Ohio, this Court in *In re Hayes* (1997), 79 Ohio St. 3d 46, 679 N.E.2d 680, and more recently in *In re K.G.*, 9th Dist. Nos. 03CA0066, 03CA0067 and 03CA0068, 2004-Ohio-1421 and *In re C.W.*, 104 Ohio St.3d 1963, 2004-Ohio-6411 made it clear that parents must be afforded every procedural and substantive protection the law allows "because the parent-child relationship is deeply shrouded in fundamental constitutional rights." Further, just days ago,

this Court further reaffirmed that, "a parent does have a substantial right in the custody of his or her child * * * [and] parents who are suitable persons have a permanent right to the custody of their minor children * * *." *In re C.B.,* Slip Opinion No. 2011-Ohio-2899, at ¶ 43, citing *In re Murray* (1990), 52 Ohio St.3d 155, 157, 556 N.E.2d 1169. Moreover, as the 1877 *Clark v. Brayer* Court ruled in the syllabus, the rights of Appellee, the child's only mother, *are paramount to all others*, even the father and certainly this unrelated Appellant, to protect and raise her young child. *Clark v. Brayer* (1877), 32 Ohio St. 299

Therefore, the overriding principle in custody cases between a parent and non-parent is that natural parents have a fundamental liberty interest in the care, custody and management of their children. *Santosky v. Kramer* (1982), 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599. Since suitable parents have constitutionally-protected custodial rights, any action by the state that affects this parental right, such as granting custody [and/or visitation] of a child to a non-parent, must be conducted pursuant to procedures that are fundamentally fair. *Santosky* at at 754; *In re Adoption of Mays* (1986), 30 Ohio App.3d 195, 198, 30 Ohio B. 338, 507 N.E.2d 453. This Court sought to protect the fundamental rights of parents by severely limiting the circumstances under which the state may deny parents the custody of their children. See *Perales* at syllabus. Accordingly, in *In re Hockstock*, 98 Ohio St.3d 238, 2002-Ohio-7208, this Court held that in a child custody proceeding between a parent and non-parent, a court may not award custody to the non-parent "without *first* determining that a preponderance of the evidence shows that the parent abandoned the child; contractually relinquished custody of the child; that the parent has become totally incapable of supporting or caring for the child; or that an award of custody to the parent would be detrimental to the child." (Emphasis added.) *Id.* If a court concludes that any one of these circumstances describes the conduct of a parent, the parent may be adjudged unsuitable,

and the state may infringe upon the fundamental parental liberty interest of child custody, *but not before such a finding.*

As a result, a finding of parental unsuitability has been repeatedly recognized by this Court as a necessary *first step* in child custody proceedings between a natural parent and non-parent. In this case, however, the trial court stripped Appellee of her constitutional protection by judicially forcing her to share her child with Appellant, a legal stranger, for nearly three (3) years and still, the court has yet to hold any hearing on Appellee's suitability. The Tenth District Court of Appeals' decision, thus, correctly restored the constitutional shroud over Appellee's relationship with her daughter until such a hearing on the merits is held.

The Tenth District's decision recognized, as the United State Supreme Court found in *Troxel*, supra, that courts are not free to substitute their own opinion as to the best interest of any child prior to first making a determination, on the record, that the parent has forfeited their right to the exclusive care, control and management of their children or is otherwise unsuitable. After nearly three (3) years and substantial intrusion and interference into the life of Appellee's family, such a finding has not yet been made. The Tenth District's decision properly protects Appellee's constitutional rights and Appellee submits that this Court should not permit another intrusion upon the same by granting Appellant's request for a stay.

5. This Court should deny Appellant's Motion for Stay for the reason that Appellant improperly attempts to argue the best interests of the minor child prior to the issue being ripe for consideration by relying upon an incomplete Guardian ad Litem report.

In support of Appellant's Motion for Stay and her discretionary appeal, Appellant attaches the report of an improperly appointed Guardian ad Litem. It should be noted that Appellee appealed the appointment of the Guardian ad Litem to the Tenth District Court of

Appeals on January 25, 2011. On May 3, 2011, the Tenth District Court of Appeals dismissed Appellee's appeal of the Guardian ad Litem appointment on grounds that it was not a final appealable order. Because Appellant has submitted the procedurally deficient report of the improperly appointed Guardian ad Litem in support of her motions, Appellee requests this Court to strike the report from the record for the reasons below.

On April 24, 2009, the trial court granted Appellant's request to appoint a Guardian ad Litem over the objection of Appellee to "serve and protect the minor child's best interest." On April 29, 2010, the Guardian ad Litem submitted her final report and recommendation as to the purported "best interest" of the minor child just days *before* discovery depositions were scheduled to begin. In fact, the final report and recommendation(s) of the Guardian ad Litem was filed with the trial court *prior to* the completion of discovery, *prior to* depositions being conducted, *prior to* a hearing on the underlying petition and – most importantly – *prior to* a finding as to suitability of Appellee. Yet, Appellant asks this Court to further infringe upon the mother-child relationship again, and stay the decision of the Tenth District based upon the Guardian ad Litem's report that is premature as it should not be considered *prior* to any finding of unsuitability for risk of prejudice.

Just as juvenile courts do not have statutory authority to issue visitation orders to non-parents, juvenile courts lack statutory authority to order a Guardian ad Litem in lawsuits brought by non-parents to strip parents of their constitutional rights *prior to* a finding of parental unsuitability. While R.C. §2151.23 confers upon the juvenile court "exclusive jurisdiction to determine the *custody* of any child not a ward of another court of this state," this statute does not simultaneously confer upon the juvenile court the authority to order a Guardian ad Litem. (Emphasis added.) R.C. §2151.23(A)(2). Instead, one must refer to R.C. §2151.281 for

contemplation of the appropriate circumstances in which a juvenile court may order a Guardian ad Litem. See also Rule 48(F)(1)(a) of the Rules of Superintendence for the Courts of Ohio. Specifically, a Guardian ad Litem shall be appointed to protect the interest of a child in any proceeding concerning cases of alleged or adjudicated delinquent, unruly, abused, neglected or dependent children. *None* of these enumerated circumstances are alleged or substantiated in this case. Of course, in cases involving divorce, legal separation or annulment between *two similarly situated biological parents* as it pertains to the custody of their children, R.C. §3109.04(B)(2)(a) *specifically* grants the court authority to order a Guardian ad Litem at the court's discretion or upon motion of either *parent*, when determining the allocation of parental rights and responsibilities. This same language is conspicuously absent from R.C. §2151.23(A)(2). This is because R.C. §2151.23(A)(2) typically deals with custody disputes between a parent and a non-parent and as established above, a parent's right to the custody of his or her children is paramount to all others unless and until said parent is deemed unsuitable or unable to care for the child, as in those instances enumerated in R.C. §2151.281. Further, this Court has already determined that a same sex partner of a biological parent is not a "parent" as defined by statute and therefore, is not entitled to an "allocation of parental rights and responsibilities." *In re Bonfield*, 97 Ohio St. 3d 387, 2002-Ohio-6660. Accordingly, the statute and Rule 48(F)(1)(a) *presume* that the best interest of the child is served by leaving that child in the sole and exclusive custody of the suitable parent, thereby rendering a Guardian ad Litem unnecessary under R.C. §2151.23(A)(2).

In this case, Appellant directs the Court to the first line and final paragraph of the Guardian ad Litem report as evidence that appointing a Guardian ad Litem to investigate the best interest of a child *before* the issue is ripe for judicial review has further eroded Appellee's

constitutional rights without due process. The Appellee respectfully submits that the Guardian ad Litem's report is flawed and prejudicial from the outset as it commences with the suggestion that "the issue before the court is the determination of the best interest of the child * * *" and references R.C. §3109.04(F)(1) and R.C. §3109.05.1(D). While the subject of the Guardian ad Litem's investigation is indeed the best interest of the child, such is not yet "an issue before the court" as it does not lawfully become such unless and until Appellant can prove, after a full evidentiary hearing, Appellee's unsuitability. The report is further prejudicial as it refers to Appellant, a legal stranger, as a "parent," thereby allowing the interpretation of the above statutes to apply in this case when they have no application. The trial court's improper appointment of the Guardian ad Litem in this case has caused this Guardian ad Litem to analyze this matter as if she were dealing with two equally situated biological "parents" as opposed to a parent and a legal stranger who is seeking to wrench away a mother's exclusive custodial rights. Similarly, the Guardian ad Litem has frequently been called upon in court proceedings to address the "best interest" of the child with respect to a temporary shared custody/visitation order when a hearing on Appellee's suitability has not yet been held.

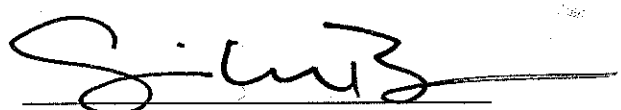
In addition to the above and the premature investigation, the Guardian ad Litem issued the report and recommendation(s) attached to Appellant's motion before discovery was complete, before a hearing on the merits, before a determination of the mother's suitability, before a determination that Appellee contractually relinquished her exclusive custody to her daughter and before a determination of third party suitability. Accordingly, Appellee respectfully requests this Court to strike said report from the record on grounds that it is not ripe for consideration at this stage of the proceedings.

CONCLUSION

In light of the foregoing, Appellee respectfully requests this Court to deny Appellant's request for a stay of the Tenth District Court of Appeals decision that relieved Appellee of the contempt sanctions and restored her constitutionally protected exclusive custodial rights to her daughter. The Appellee further requests that this matter be remanded to the trial court for an immediate hearing as to Appellee's suitability. Finally, Appellee requests that the report of the Guardian ad Litem, which Appellant attached in support of her request for stay, be stricken from the record to ensure Appellee is afforded due process during the suitability hearing.

Respectfully submitted,

GARY J. GOTTFRIED CO., L.P.A.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing *Motion of Appellee to Dismiss Appellant's Motion for Stay* was served upon the following via regular U.S. mail, postage prepaid, this 29th day of June 2011:

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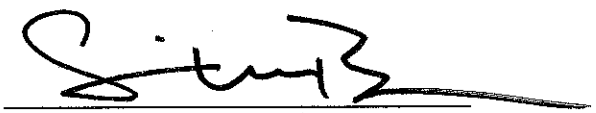

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