

ORIGINAL

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

NOTICE OF SUBSTITUTION OF EXHIBITS A and B to MEMORANDUM IN
SUPPORT OF JURISDICTION

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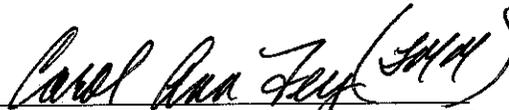
NOTICE OF SUBSTITUTION OF EXHIBITS A and B to
MEMORANDUM IN SUPPORT OF JURISDICTION

Rule 3.1 of the Supreme Court Rules of Practice requires that a date stamped copy of the court of appeals' opinion and judgment entry being appealed from be attached to Appellant's Memorandum in Support of Jurisdiction.

Upon review of Appellant's Memorandum in Support of Jurisdiction as filed with the Court on July 25, 2011, Counsel for Appellant noticed that the court of appeals opinion that was attached as Exhibit A was not time-stamped, and that Exhibit B, the judgment entry being appealed from, was inadvertently omitted in the printing process.

Accordingly, Appellant hereby substitutes the attached Exhibits A and B, date stamped copies of the court of appeals' opinion and judgment entry, respectively, for the Exhibits A and B attached to the initial Memorandum in Support of Jurisdiction.

Respectfully submitted,



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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 NOTICE OF SUBSTITUTION OF EXHIBITS A and B to 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 27, 2011.



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77 - P22

IN THE COURT OF APPEALS OF OHIO

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TENTH APPELLATE DISTRICT 2011 JUN -9 PM 12:40

CLERK OF COURTS

Julie Rose Rowell,

Petitioner-Appellee,

v.

Julie Ann Smith,

Respondent-Appellant.

Nos. 10AP-675
and 10AP-708
(C.P.C. No. 08JU-10-13850)

(ACCELERATED CALENDAR)

D E C I S I O N

Rendered on June 9, 2011

*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.*

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.

{¶6} 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.

{¶7} 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.

{¶8} 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.

{¶9} 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. Com 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 *Cames 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

Nos. 10AP-675 and 10AP-708

8

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.

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

Nos. 10AP-675 and 10AP-708

10

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

Nos. 10AP-675 and 10AP-708

13

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.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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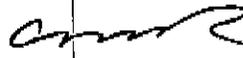
Nos. 10AP-675
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(C.P.C. No. 08JU-10-13850)

(ACCELERATED CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on June 9, 2011, we sustain appellant's first and second assignments of error, and deny appellee's motion for attorney fees. Therefore, we reverse the judgments of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, and remand this matter for further proceedings in accordance with law and consistent with this decision. Costs assessed against appellee.

CONNOR, BROWN, and CUNNINGHAM, JJ.



Judge John A. Connor

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