

ORIGINAL

IN THE SUPREME COURT OF OHIO

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|-------------------------------------|---|---------------------------------------------|
| CRAIG A. JAMES, | : | 11-1983 |
| Plaintiff-Appellee | : | |
| | : | |
| vs. | : | On Appeal from the |
| | : | Court of Appeals for Delaware County |
| | : | Fifth Appellate District |
| | : | |
| K. QWENSANTA LIBERTY VAILE : | : | Court of Appeals |
| FKA KRISTIN Q. L. JAMES, : | : | Case No. 11CAF030027 |
| Defendant-Appellant : | : | |

**MEMORANDUM IN SUPPORT OF JURISDICTION OF
APPELLANT K. QWENSANTA LIBERTY VAILE**

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TABLE OF CONTENTS

| | Page |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------|
| EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION | 1 |
| STATEMENT OF THE CASE AND FACTS..... | 3 |
| ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW..... | 6 |
| Proposition of Law No. I: A Guardian ad Litem does not have standing as a party to an action such that he or she is permitted to file a Motion for a Show Cause Order against a Defendant or Plaintiff in the matter for the purpose of collecting his or her professional fees..... | 6 |
| Proposition of Law II. A Motion for a Show Cause Order that seeks a citation in contempt and a "sentence of incarceration" in a civil action as that term is defined in <i>Article I, Section 15 of the Constitution of the State of Ohio</i> is improper and must be dismissed absent a claim and showing of fraud..... | 9 |
| Proposition of Law III: Ohio Revised Code Sections cannot be employed to counter or render ineffective <i>Article I, Section 15 of the Constitution of the State of Ohio</i> | 11 |
| Proposition of Law IV: Terminating the hearing in the court below by rendering a decision and not permitting the Appellant to offer testimony and evidence was a denial of due process as guaranteed by the <i>Constitution of the State of Ohio</i> and the <i>United States Constitution</i> | 12 |
| CONCLUSION | 15 |
| CERTIFICATE OF SERVICE | 16 |
| APPENDIX | Appx. Page |
| Opinion of the Court of Appeals, Delaware County, Ohio , Fifth Appellate District | 1 |
| Judgment Entry of the Court of Appeals, Delaware County, Ohio, Fifth Appellate District | 9 |

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

This case presents several issues that affect the rights of all Ohioans who are involved in support matters in any Domestic Relations Division of any Court of Common Pleas in any of Ohio's eighty-eight counties. Over the years a huge section of the citizens of this state have had contact with this division of government. Protecting their rights and guaranteeing that they are treated fairly and allowed due process is a primary goal of all persons who work in our judicial system including the attorneys and other professionals who have regular contact with the courts.

The **first issue** presented here deals with the use of the court's contempt powers to force a party who is a primary litigant to pay costs awarded in a Domestic Relations case to a non-party (a person who is neither one of the primary litigants [parties] or a child of the primary litigants) or face the possibility of being imprisoned due to said primary litigant's inability to pay. This use of the contempt power in this matter is in direct conflict with the protections provided by *Article I, Section 15 of the Constitution of the State of Ohio* which states: "No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud." Absent a showing of fraud the contempt power cannot be used as it was in the court below.

The court of appeals avoids any discussion involving the application of *Article I, Section 15 of the Constitution of the State of Ohio* on the basis that there was no finding of contempt. The argument suggests that the decision of a court can overcome a constitutional error in the filing of an action. In effect, the end result - the decision - justifies the ignoring of a legitimate objection.

A **second issue** raised in this case is whether or not the Guardian ad Litem has standing as a party in an action before the Domestic Relations Division and can initiate a collection action within the original domestic relations case simply because the Guardian ad Litem is appointed by the lower court in due course. Also involved here is a question as to whether the Guardian ad

Litem has authority to seek a finding of contempt against a party based on with ORC Section 2705.031(B)(1) which states: "Any party who has a legal claim to any support ordered for a child, spouse, or former spouse may initiate a contempt action for failure to pay the support."

The position of the Appellant is that the Movant was not a party in this matter and that if the Guardian ad Litem desired to pursue her claim for fees she must follow the prescribed procedure that every other creditor must follow under Ohio law.

The **third issue** addressed in this case deals with the priority of Ohio law. Appellant maintains that the Ohio Revised Code cannot trump the protections guaranteed to the people by the *Constitution of the State of Ohio*. As near as Appellant can determine, this issue was not addressed by the opinion of the court of appeals, but will be discussed in the Argument below.

The **fourth issue** of Constitutional import is that of the basic right of a defendant to due process. In the case at bar the Appellant had a right to, but was not given the opportunity to present any evidence on her behalf in the hearing before the Magistrate prior to the Magistrate rendering a decision. This is a blatant denial of due process.

The court of appeals in rejecting the argument of the Appellant suggested that 1) because the Appellant's counsel mentioned in argument that the Appellant was "willing to set up a payment arrangement" and the court below did just that, and 2) since there was no finding of contempt, the Defendant could not have suffered a violation of her right to due process. The appeals court cited no law or statute on which they based their determination that a court can disregard due process and waive the right of a party to testify in their defense when a Defendant (Appellant here) in a hearing is given "exactly what appellant asked for." To that extent it would seem that the Court of Appeals believes that this is an axiom that needs no explanation.

The right of a defendant to be heard and offer testimony in any judicial proceeding is a cornerstone of the concept of due process. Not having a right to be heard is akin to being judged by a Star Chamber tribunal or "kangaroo court." How can due process have been honored when a defendant is not allowed to speak or present evidence on his or her behalf.

This too, is a Constitutional issue that brings into play both the *Constitution of the State of Ohio* and the guarantees provided by the *Fifth Amendment to the Constitution of the United States of America*. As such this issue is of paramount importance to every resident of this state.

STATEMENT OF THE CASE AND FACTS

This case arises from an attempt by a Guardian ad Litem, who is the actual Appellee in this matter, to hold the Appellant in contempt of court for not paying her fee. The Appellant objected to the procedure employed by the Appellee as contrary to Ohio law and Constitutional protections pursuant to the *Constitution of the State of Ohio* and the *US Constitution*.

On **6 October 2010** the Appellee filed a "**Motion of Guardian ad Litem for a Show Cause Order Against Defendant Qwensanta Liberty Vaile**" with a one paragraph Memorandum in Support that attacked both the character and integrity of the Appellant and sought an "...order herein that all fees previously ordered be paid, in full, and other sanctions provided by law, including contempt of court and a reasonable sentence of incarceration..."

On **28 October 2010** the Appellant filed a *pro se* response indicating,, *inter alia*, that the filing was inappropriate and that the Appellant had never received an itemized bill from the Appellee, although she had asked for an itemized bill on several occasions including the last time Appellant saw Appellee in court. Appellant concluded her Response with the following:

Wherefore, Defendant asks that the Motion of the Guardian ad Litem be dismissed as inappropriate and that she be required to provide appropriate documentation concerning her time and expenses to the Defendant.

On **2 November 2010** the Guardian ad Litem (Appellee here) filed an "**Objection to Qwensanta Liberty Vaile's Response to Motion in Contempt**" in which she asserted that she had attempted to contact the Appellant by phone and that the Appellant did not return her call. This statement is contrary to Movant-Appellee's sworn statement in open court.

On **5 January 2011**, a relatively short **hearing** was had in this matter before Magistrate Marcia Blackburn. Appellant was represented by counsel. In the middle of Movant-Appellee's cross-examination by counsel for the Appellant, the Magistrate announced her decision in the matter and the hearing terminated. The Movant-Appellee had not rested at that point in time and the Appellant had not been given an opportunity to present any testimony or evidence at all.

On **10 January 2011** the Magistrate issued a "**Magistrate's Decision** " which included a "Findings of Fact and Conclusions of Law" wherein the Magistrate referred specifically to the fees of the Guardian ad Litem as "costs."

On **19 January 2011** Defendant-Appellant filed an Objection to the Magistrate's Decision which made three primary points. Appellant first objected to the proceeding as contrary to *Article I, Section 15 of The Constitution of the State of Ohio*. Appellant then asked that the original motion of the Movant-Appellee filed on 6 October 2010 be dismissed because the Movant-Appellee was not a party to the action and did not have standing to bring the action. Finally, Appellant claimed that she had been denied due process of law at the hearing on the matter before Magistrate Blackburn because she had not been given an opportunity to present testimony and or evidence at the hearing before it was terminated.

On **26 January 2011** the Movant-Appellee filed a Response to Appellant's Objection in which she disagreed with each point put forth by the Appellant.

On **11 February 2011** the Appellant filed a Reply to Appellee's Response. Appellant argued 1) that the "civil action" described in Rule 2 of the Ohio Rules of Civil Procedure was the same "civil action" described in *Article I, Section 15 of the Ohio Constitution*, that 2) ORC Section 2075.031(B)(1) was not applicable in that the Movant-Appellee was not a party to the within action and that while the fees of the Guardian ad Litem may be in the nature of support, they are not actual "support ordered for a child, spouse or former spouse" as stated in the code, and are not subject to contempt actions, that 3) her motion to dismiss for lack of standing was proper, and 4) that the failure of a court to permit a defendant to testify violates due process.

On **28 February 2011** the Delaware County Common Pleas Court below speaking through Judge Everett H. Krueger filed its "**Judgment Entry Approving the Magistrate's Decision of January 10, 2011 Overruling Defendant's objections.**"

In the Judgment Entry the court overruled Defendant-Appellant's objection under *Article I, Section 15 of The Constitution of the State of Ohio* based solely on Section 2705.02 and Section 2705.09(A)(1)-(3) of the Ohio Revised Code, stating that "...this action is not contrary to the right guaranteed by the Ohio Constitution and is permitted pursuant to Ohio Rev. Code Section 2705.02 and Section 2705.05(A)(1)-(3)." (Judgment Entry at Page 2 of 4.)

The court overruled Appellant's Second Objection that the GAL did not have standing based on language in **Jackson v. Herron**, 2005 Oho App. LEXIS 3695, 2005 Ohio 4039 (August 5, 2005), **In re Lever**, (N.D. Ohio 1991) 174 B.R.936, and the Fifth Appellate District Court of Appeals' ruling in **Raleigh v. Hardy**, 5th Dist. No. 08-CA-0140, 2009-Ohio-4829 pgs. 38-43.

Appellant's Fourth Objection of denial of due process was overruled because her attorney "questioned Ms. Brammer, and Attorney Vaile presented his client's position."

On 29 March 2011 the Appellant filed a **Notice of Appeal** in this matter. In due course an oral argument was presented by Appellant before a three judge panel of the Court of Appeals for the Fifth Appellate District sitting in Delaware County. On **10 October 2011** the Court of Appeals issued their opinion, which affirmed the decision of the trial court.

Appellant notes that she forth her claims of violation of her Constitutional rights under the terms of both *Article I, Section 15 of The Constitution of the State of Ohio* and the *Fifth and Fourteenth Amendments to the U S Constitution* in her Objection to the Magistrate's Decision.

ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: A Guardian ad Litem does not have standing as a party to an action such that he or she is permitted to file a Motion for a Show Cause Order against a Defendant or Plaintiff in the matter for the purpose of collecting his or her professional fees.

The Appellee, who is the Guardian ad Litem in this matter, is not a party to this action and to that extent the Appellee does not have standing to file a Motion for a Show Cause Order for the purpose of collecting fees owed to her personally as part of a Domestic Relations case.

Appellee has the right to file a motion on behalf of the children of the parties, who are themselves parties, if the Guardian ad Litem believes that such action is appropriate and necessary. In that instance she would be doing so in furtherance of her duty to work for the best interests of the children. However, in the instant matter the Appellee filed a motion against the Appellant that had to do with a personal claim of hers as an attorney or representative of a party in this matter. The Appellee herself is not a party. Clearly she has the same right as anyone else to initiate a civil action and file a claim against the Appellant in accordance with *Rule 3 (A)* of the Ohio Rules of Civil Procedure. Her position as the Guardian ad Litem in a case does not, and should not, give her special privileges that are not enjoyed by any other person in society or, the other legal representatives of other party's in the case.

The court of appeals decision in overruling the Appellant's proposition employed a three step approach. Every step was flawed and uses reasoning not supported by their references.

The first step of the court of appeals was to point out that "the trial court appointed appellee as the guardian ad litem..." (Opinion of Court of Appeals at Paragraph 12). Here the Court of Appeals assumes that because the Guardian ad Litem was appointed by the trial court, the Guardian ad Litem is a **party**. If this reasoning is correct then one must ask why are not the attorneys for the parents in these matters also considered **parties**? While they may not be appointed to represent a party, they are accepted by the court to represent a party.

The second step was to point out that that the lower court said that the "Guardian ad Litem fees are in the nature of child support for the purposes of dischargeability in bankruptcy." (Ibid at Paragraph 12.) The Court of Appeals assumes that since the Federal Bankruptcy Court has ruled that Guardian ad Litem fees are "in the nature of support" for the purposes of dischargeability in bankruptcy, then it must follow that they are actually support in Ohio Domestic Relations cases as well. The court's reasoning jumps from the proposition to the conclusion that the fees are support, based exclusively on a statement by the lower court referencing a quote dealing with dischargeability in bankruptcy proceedings.

Step three in their approach involved citing Ohio Revised Code Section 2705.031(B)(1), for the proposition that "any party" may pursue a contempt action for failure to pay support. (Ibid at Paragraph 13.) Since Ohio Revised Code Section 2705.031(B) states that any party may pursue a contempt action for failure to pay support, the Court of Appeals assumes that it follows that the Guardian ad Litem, who is a party, may initiate a contempt action to collect her fees, which the court of appeals equates to child support. The Court of Appeals is mistaken in

all three assumptions, and the conclusions that are drawn from this approach beg the primary questions and are not supported by either Ohio law or the Rules of this Court.

To begin with, the appointment of a Guardian ad Litem in a Domestic Relations matter permits the Guardian ad Litem to perform certain duties and gives the Guardian ad Litem certain responsibilities in relation to the representation of the best interests of the minor children of the parties in accordance with Superintendence Rule 48. However, nowhere in Rule 48 does it suggest that appointing a person as a Guardian ad Litem makes that person a party to the action.

Next, while it may be true that the Federal Bankruptcy Court has determined that GAL fees are in the **nature of support** for the purposes of dischargeability in bankruptcy, it does not follow that those fees are actual **support** in Ohio Domestic Relations cases as well. This case is an Ohio Domestic Relations case, not a bankruptcy case. The bankruptcy laws deal with Federal rules and laws in the Federal Court System. The case before the Court is under the jurisdiction and rules of the Ohio Court System. The two are separate and distinct. Federal Courts do not handle state Domestic Relations cases, and state courts do not handle Federal Bankruptcy cases.

Furthermore, Ohio Revised Code Section 2705.031(B)(1), states that "(a)ny party who has a legal claim to any support ordered for a child, spouse, or former spouse may initiate a contempt action for failure to pay the support." In this case Appellant maintains that Appellee is not a party as that term is used in ORC 2705.031(B)(1), and that Guardian ad Litem fees are not "support" in this or any other matter simply because they are not dischargeable in bankruptcy.

Lastly, the Magistrate's Decision below referring to the GAL fees states as follows:

"The Court retained jurisdiction to allocate the **above costs** along with **all costs** of the proceedings, at the conclusion of the case." (Magistrate's Decision Page 1. Emphasis added.)

Similarly, in the 28 February 2011 Judgment Entry, the lower court echoed the words of the Magistrate almost verbatim when it said in reference to the Guardian ad Litem's fees:

"Finally, the Court retained jurisdiction to reallocate the **above costs** along with **all costs** of the proceedings, at the conclusion of the case." (Judgment Entry at Page 2 of 4. Emphasis added.)

Both quotes refer to Guardian ad Litem fees as "costs." It is difficult to reason that they are to be considered anything but costs.

Proposition of Law II. A Motion for a Show Cause Order that seeks a citation in contempt and a "sentence of incarceration" in a civil action as that term is defined in Article I, Section 15 of the Constitution of the State of Ohio is improper and must be dismissed absent a claim and showing of fraud.

Article I, Section 15 of The Constitution of the State of Ohio states as follows: "No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud." This particular Article of the *Ohio Constitution* is the *Bill of Rights* and the rights enumerated therein are enjoyed by each and every citizen of this State, including the Appellant..

Article I, Section 15 of the Ohio Constitution effectively eliminates debtor's prison or the threat of debtor's prison in all civil actions. The action in the court below is a civil action as that term is used in *Article I, Section 15* above and in *Rule 2 of the Ohio Rules of Civil Procedure*.

The one exception to the right of all persons enumerated in *Article I, Section 15 of the Ohio Constitution* is "in cases of fraud." In the matter in the Court below there was no claim of fraud, no proof of fraud either in conformance with or contrary to the pleadings, and no finding of fraud. Ergo, absent a claim and showing of fraud, the court must allow the Appellant the rights guaranteed to her by *Article I, Section 15 of the Ohio Constitution*. The facts of the case below do not permit the Court to ignore this right of the Appellant

Other courts of appeals in the State of Ohio besides the Fifth Appellate District have acknowledged that parties in similar cases have this right and they have protected it. *In Re:*

Danielle Bailey is a case that was heard in the Court of Appeals of Ohio, First Appellate District, Hamilton County. (2007 Ohio 4192, 2007 Ohio App. LEXIS 3799.)

In *Bailey*, the Hamilton County Juvenile Court held the parties in contempt for failing to pay fees for the services of a Guardian ad Litem. As a part of the contempt finding, the Baileys were sentenced to 30 days in jail and ordered to pay \$1,100 each to purge the contempt.

The First District Court of Appeals reversed the contempt sentencing of the lower court based on *Article I, Section 15*. In doing so the Appellate Court stated as follows:

"Section 15, Article I, of the Ohio Constitution prohibits imprisonment for debt in civil actions. In Strattman v. Studt, (1969), 20 Ohio St. 2d 95, 253 N.E.2d 749, paragraphs six and seven of the syllabus}, the Supreme Court of Ohio held that the duty to pay court costs is a civil obligation that arises from an implied contract with the court, and that the obligation to pay costs is therefore a debt that falls within the ambit of Section 15, Article I.

Accordingly, courts have held that a jail sentence may not be imposed for the nonpayment of court costs. (*Id.* See, also, *State v. Myers*, 3rd Dist. Nos. 6-03-02 and 6-03-03, 2003 Ohio 3585, at P6; *Strongsville v. Waiwood* (1989), 62 Ohio App.3d 521, 526, 577 N.E.2d 63; *State v. Arundell* (Jan. 14, 1987), 2nd Dist. No. CA 9739, 1987 Ohio App LEXIS 5552.). Instead, court costs may be recouped only through the methods available for the collection of civil judgments (*Strattman, supra*, at 103, 253 N.E.2d 749)."

As pointed out above the lower court twice referenced to fees here as "costs."

Additionally, there is no exception in *Article I, Section 15 of the Constitution of the State of Ohio* which permits a court to ignore the protection against debtor's prison given to the citizens of Ohio simply because the debt is for support, absent a showing of fraud. Nor is there any logical reason to suggest that a failure to pay support is *per se* a fraud as opposed to a simple inability to pay due to a number of very ordinary and common circumstances.

The Court of Appeals refused to rule on the matter because there was no finding in contempt by the trial court, ignoring the fact that Appellant had made a motion in her *pro se* Response requesting that the motion of the Appellee be dismissed as contrary to Ohio law.

Because the Guardian ad Litem fees were costs in this matter, or alternatively a debt in a civil action, the lower court should not have permitted this matter to proceed as a motion in contempt with the threat of a possible jail sentence for the Appellant's alleged failure to pay a civil obligation. This violated the Defendant-Appellant's right guaranteed by the language of *Article I, Section 15 of the Constitution of the State of Ohio*.

Proposition of Law III: Ohio Revised Code Sections cannot be employed to counter or render ineffective *Article I, Section 15 of the Constitution of the State of Ohio*.

The decision of the lower court cited *Ohio Revised Code Sections 2705.02 and 2705.05 (A)(1)-(3)* as a basis for its decision and failure to apply the protections of *Article I, Section 15 of the Constitution of the State of Ohio*. These sections set forth the basis for contempt and the punishments therefore respectively. Appellant acknowledges the existence of the sections cited, but disagrees with the implied suggestion by the court below that any part of the Ohio Revised Code, including the cited sections, are higher law and superior to *The Constitution of the State of Ohio* when there is a conflict in the application and/or interpretation of the law.

If the Ohio Revised Code sections cited by the Court below even suggested that the personal guarantee granted by *Article I, Section 15 of The Constitution of the State of Ohio* was to be ignored by the court for any reason, then those Ohio Revised Code sections should have been declared null and void long ago. The validity of Ohio Revised Code Sections are judged against *The Constitution of the State of Ohio*. *The Constitution of the State of Ohio* is not judged against sections of the Ohio Revised Code. *The Constitution of the State of Ohio* is superior to all sections of the Ohio Revised Code. The code sections cited by the court below cannot justify ignoring the language and application of *Article I, Section 15 of the Ohio Constitution*.

The court of appeals did not address this issue, presumably based on their position that since there was no finding in contempt then it didn't matter if the lower court suggested that the cited ORC Sections were superior to protections of the *Constitution of the State of Ohio*.

Appellant disagrees. The protections of *Article I, Section 15 of the Constitution of the State of Ohio* are to prevent citizens of this State from being subject to improper judicial process with all of it's time, expense and very real personal concerns and trepidations. The threat of incarceration is a very heavy, serious threat to virtually all of the people of this state. It is the ultimate punishment for those persons in our society, who defraud, steal, maim, rape, abuse and even murder others who are weaker or more vulnerable than themselves. The only people who line up to get into jail are those that are visiting. Virtually no one is anxious to acquire these accommodations on a permanent basis. Thus, when a court treats lightly a claim of one party against another wherein the claimant seeks to have an alleged debtor imprisoned contrary to the protections of *Article I, Section 15 of the Constitution of the State of Ohio*, that court is failing in its duty to its citizens and causing unreasonable abuse to the accused in the form of significant mental anguish and concern that should not have been felt or experienced in the first place. It was, after all, this very threat and condition of despair and hopelessness that *Article I, Section 15* was designed to protect its citizens from having to endure. To now say that what happened in this matter was in effect no big deal simply because there was, in the final analysis, no finding of contempt, is to sanction the continued abuse of Ohio citizens by placing a judicial stamp of approval on inappropriate and frivolous actions that can cause a high level of consternation to those persons in a situation similar to that of the Appellant, who should have been protected.

Proposition of Law IV: Terminating the hearing in the court below by rendering a decision and not permitting the Appellant to offer testimony was a denial of due process as guaranteed by the *Constitutisn of the State of Ohio* and the *United States Constitutio*.

Appellant's counsel was in the middle of the cross-examination of Movant-Appellee at the time that the Magistrate interrupted the process and summarily rendered her decision. (See Transcript at p 14, ll 23 to 25.) At that point in the hearing, not only had the Appellant not been given an opportunity to testify, the Appellee, who filed the original motion, had not even rested.

It can certainly be argued that Appellant's counsel could have objected to the action of the Magistrate after she announced her decision. But when an error is so obvious as to fail to permit even Movant-Appellee to complete her case coupled with the failure to permit the Appellant, who was the Defendant below, to present any evidence whatsoever before a decision is rendered, it seems obvious that the decision maker in this matter had already determined what her ruling would be and that further discussion or protestations would be futile.

It is noted that the Magistrate had indicated several minutes prior to rendering her decision that "...this (matter) is something the court retains jurisdiction over **to make sure the Guardian ad Litem gets paid.** Otherwise, there will no longer be Guardians ad Litem." (Transcript at page 10, lines 14 to 17. Emphasis added.) This quote strongly suggests that the Magistrate believed that it was the duty of the court in this proceeding to protect the Guardian ad Litem at all costs and to make sure that the Guardian ad Litem was paid. This belief appears to have been so strong and paramount that no consideration was given to the right of the Appellant to present her side of the story or provide any testimony. This position and the resultant action of the Magistrate suggests bias on the part of the hearing officer that is a classic example of the lack of impartiality from a court that epitomizes a lack of due process.

Upon review of the Magistrate's Decision by the court below the court set up a straw man argument in an attempt to demonstrate that due process was not violated. The court stated:

"Attorney Vaile stated that Defendant-Appellant was not permitted to present any evidence with regard to the need of a Guardian ad Litem being appointed.

However, pursuant to Ohio Rev. Code Section 3109.04(B)(2)(a), the court at its discretion, may appoint a Guardian ad Litem for the children." (A p 4, ll 3 to 6.)

In point of fact, what Appellant's counsel stated on behalf of the Appellant in Defendant's Objection to the Magistrates Decision was the following:

"The Defendant (Appellant herein) was not permitted to provide this court with evidence of the pattern of events that took place in this matter which prevented her from having any input into **the need for the appointment of a Guardian ad Litem**, the work of the Guardian ad Litem, the charges of the Guardian ad Litem, the Guardian ad Litem's failure to provide her with an itemized statement and the Defendant's financial situation which should have been of paramount importance to the hearing officer in this matter once it was apparently determined by the Magistrate that the Movant had a right to file the motion that she filed. The Defendant was not permitted to present her defense to the Motion and the Magistrate made a ruling that effectively and preemptively cut off all discussion and the right of the Defendant to be heard. Defendant was not given an opportunity to demonstrate that any alleged failure of the Defendant to pay any amount to the Movant was by no means contemptuous in nature." (Emphasis added.)

The reference quoted by the court below is out of context and misconstrues the totality of what Appellant claimed was denied her by the action of the Magistrate in terminating the proceeding. There had been no statement in Defendant's Objection to the Magistrate's Decision that even suggested that the Court below lacked the right to appoint a Guardian ad Litem.

Furthermore, the Judgment Entry of February 28, 2011 states that "Attorney Vaile presented his client's position" (at page 4 of 4, line 2.) as if to suggest that the Appellant had actually been permitted to testify and present her position. While counsel for Appellant did make a number of statements concerning his client's position, an attorney's statement in a courtroom is not evidence and does not carry the weight of evidence. It is only argument. It is not fair or just to suggest that an attorney's statement(s) can be substituted for the right of a defendant to present testimony and evidence on her behalf. The actions of the Magistrate in failing to permit the Appellant to testify are a violation of due process as guaranteed by *the*

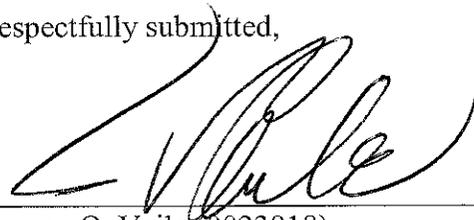
Constitution of the State of Ohio and the Fifth Amendment to the U S Constitution as applied to the states through the Fourteenth Amendment to the U S Constitution.

The court of appeals determined that because there was no finding of contempt and a payment arrangement was "exactly what appellant asked for" during the hearing, then there was no violation of Appellant's constitutional rights. (See Paragraph 21 of the Opinion of the Court of Appeals.) Ergo, notwithstanding the fact that the Appellant did not have an opportunity to testify and did, in fact, not testify, the court of appeals believes that her right to due process was not abridged simply because she was given "exactly what Appellant asked for" even though Appellant did not have an opportunity and was not given an opportunity to utter one single word in her defense. How could anyone know what was in the mind of the Appellant or "exactly what Appellant asked for" when she had no opportunity to express herself or defend herself in a hearing involving the potential of incarceration? And how does the fact that she was not put in jail equate to no violation of her right to be heard and her right to offer evidence in her defense?

CONCLUSION

For the reasons presented hereinabove, the Appellant believes that this case involves matters of public and great general interest and that it presents substantial constitutional questions. The Appellant therefore requests that this court accept jurisdiction in this matter in order that the important issues presented may be reviewed on their merits.

Respectfully submitted,

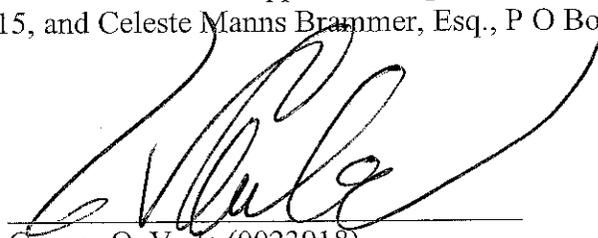


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CERTIFICATE OF SERVICE

The Undersigned hereby certifies that a true and exact copy of the foregoing MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT K. QWENSANTA LIBERTY VAILE and any attachments has been sent via U.S. Mail on the 28th day of November 2011 to David J. Gordon, Esq., Attorney of record for Plaintiff-Appellee Craig A. James, 40 North Sandusky Street, Delaware, Ohio 43015, and Celeste Manns Brammer, Esq., P O Box 2451, Westerville, Ohio 43086.

A handwritten signature in black ink, appearing to read 'G. Vaile', is written over a horizontal line.

George Q. Vaile (0023918)
Attorney for Appellant

APPENDIX

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, OHIO

CASE NO: 11 CAF 03 0027

CRAIG A JAMES
PLAINTIFF / APPELLEE
VS

KRISTEN QWENSANTA L VAILE
AKA KRISTIN Q LIBERTY JAMES
DEFENDANT / APPELLANT

CLERK'S CERTIFICATE OF MAILING BY ORDINARY MAIL
(RULE 4.6 (D), OHIO CIVIL RULES)

I hereby certify that, pursuant to written instructions received by this Office from the attorney for Plaintiff/Defendant, I complied with said written instructions and mailed the documents requested to be served to the following named person/persons at the address/addresses indicated, by ORDINARY UNITED STATES MAIL on this date: October 10, 2011

Document(s) mailed: **OPINION/JUDGMENT ENTRY FROM 5TH DISTRICT APPEALS COURT**

ATTN: GEORGE Q VAILE
776 WORTHINGTON NEW HAVEN ROAD
MARENGO, OHIO 43334

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DELAWARE COUNTY COMMON PLEAS
COURT JUDGE AND COURT MAGISTRATE
(HAND DELIVERED)

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FILED
2011 OCT 10 AM 11:07
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COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CRAIG A. JAMES

Plaintiff-Appellee

-vs-

QWENSANTA LIBERTY VAILE,
FKA KRISTIN Q. LIBERTY JAMES

Defendant-Appellant

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. Sheila G. Farmer, J.

Hon. John W. Wise, J.

Case No. 11CAF030027

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Court of Common
Pleas, Case No. 01DRA07259

JUDGMENT:

Affirmed

DATE OF JUDGMENT:

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FILED
2011 OCT 10 AM 10:40
JAN ANTONOPLOS
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APPEARANCES:

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**Court of Appeals
Delaware Co., Ohio**

I hereby certify the within be a true
and correct copy as the same is on file in this office.

Deputy Clerk of Courts

Farmer, J.

{¶1} This case arose from a divorce proceeding between Craig James and appellant, Qwensanta Vaile. On August 19, 2009, Mr. James filed a motion to reappoint appellee, Celeste Brammer, as guardian ad litem for the children. By entry filed August 25, 2009, the trial court granted the motion and appointed appellee as guardian ad litem.

{¶2} A hearing before a magistrate was held on March 5, 2010. The parties entered into a memorandum of agreement which was filed on March 8, 2010, to be memorialized as an agreed judgment entry at a later date.

{¶3} Appellee submitted her guardian ad litem fees to be included in the agreed judgment entry. On April 22, 2010, the agreed judgment entry was filed which included the guardian ad litem fees to be paid by Mr. James in the amount of \$1,393.75 and appellant in the amount of \$1,768.75.

{¶4} On October 6, 2010, appellee filed a motion for a show cause order against appellant for her failure to pay her share of the guardian ad litem fees. A hearing before a magistrate was held on January 5, 2011. By decision filed January 10, 2011, the magistrate ordered appellant to pay appellee \$50.00 per month until the debt was paid. Appellant filed objections. By judgment entry filed February 28, 2011, the trial court overruled the objections and approved and adopted the magistrate's decision.

{¶5} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶6} "THE COURT BELOW ERRED IN PERMITTING THE NON-PARTY GUARDIAN *AD LITEM* TO FILE A MOTION FOR A SHOW CAUSE ORDER AGAINST THE DEFENDANT-APPELLANT FOR THE PURPOSES OF COLLECTING HER ATTORNEY FEES AS THE GUARDIAN *AD LITEM* DOES NOT HAVE STANDING IN THIS MATTER."

II

{¶7} "THE COURT ERRED IN PERMITTING THE ACTION TO GO FORWARD BASED ON A MOTION FOR A SHOW CAUSE ORDER THAT SOUGHT A CITATION OF CONTEMPT AND A 'SENTENCE ON INCARCERATION' BECAUSE THIS IS A CIVIL ACTION AS THAT TERM IS DEFINED IN *ARTICLE I SECTION 15 OF THE CONSTITUTION OF THE STATE OF OHIO* AND IT IS NOT PROPER TO HOLD THE THREAT OF JAIL OVER THE HEAD OF THE DEFENDANT-APPELLANT IN AN ATTEMPT TO COLLECT A CIVIL DEBT ABSENT A CLAIM AND SHOWING OF FRAUD."

III

{¶8} "THE COURT BELOW ERRED IN CITING OHIO REVISED CODE SECTIONS AS A REASON FOR FAILING TO APPLY *ARTICLE I, SECTION 15 OF THE CONSTITUTION OF THE STATE OF OHIO* TO THIS CASE."

IV

{¶9} "THE COURT ERRED IN FAILING TO FIND THAT THERE WAS A LACK OF DUE PROCESS AS GUARANTEED BY THE *CONSTITUTION OF THE STATE OF OHIO* AND THE *UNITED STATES CONSTITUTION* IN THE HEARING BEFORE THE

MAGISTRATE WHEN THE DEFENDANT-APPELLANT WAS NOT PERMITTED TO EVEN OFFER ANY EVIDENCE BEFORE THE MAGISTRATE RENDERED HER DECISION."

I, II

{¶10} These assignments challenge appellee's right, as a non-party, to prosecute a contempt action against appellant pursuant to an agreed judgment entry ordering appellant to pay guardian ad litem fees.

{¶11} Pursuant to the agreed judgment entry filed April 22, 2010, appellant agreed to the following: "The Guardian ad Litem, Celeste Brammer, shall be paid the balance of her bill by April 20, 2010. The Plaintiff, Craig A. James owes the GAL, the sum of \$1,393.75 and the Defendant, Qwensanta Vaile owes the GAL the sum of \$1,768.75." There was never a challenge to this agreed entry; therefore, it has full force and effect against appellant.

{¶12} Appellant argues appellee was not a party to the divorce and its supplemental orders. However, on August 25, 2009, the trial court appointed appellee as the guardian ad litem, stating the following: "The Guardian ad Litem fees are in the nature of child support for the purposes of dischargeability in bankruptcy."

{¶13} Pursuant to R.C. 2705.031(B)(1), "any party" may pursue a contempt action for failure to pay support: "Any party who has a legal claim to any support ordered for a child, spouse, or former spouse may initiate a contempt action for failure to pay the support." Further, in *In Re: Contempt of Thomas*, Cuyahoga App. Nos. 86375 and 86939, 2006-Ohio-3324, our brethren from the Eighth District sanctioned a

guardian ad litem's contempt action for fees which were ordered to be paid as child support.

{¶14} We conclude in the enforcement of an unchallenged agreed order wherein guardian ad litem fees are ordered to be paid in the nature of child support, the guardian ad litem has standing to prosecute the failure to obey the order. One might ask, "Who else would bring the action but the guardian ad litem?" By analogy, trial courts permit child support enforcement agencies to pursue non-support orders via contempt proceedings. We find appellee had standing to bring the action sub judice.

{¶15} Appellant also argues guardian ad litem fees are in the nature of a "civil debt" which is barred from contempt proceedings. As we will address in Assignments of Error III and IV, no contempt was actually found by the magistrate or the trial court. The April 22, 2011 original order was by agreement and unchallenged by appellant. The subsequent magistrate's decision and trial court order merely enforced the provisions in the agreed entry and provided for installment payments.

{¶16} Assignments of Error I and II are denied.

III, IV

{¶17} Appellant claims she was denied due process of law and not permitted to present evidence. We disagree.

{¶18} In our review of these assignments, it is necessary to examine the magistrate's decision. Although the matter was brought before the trial court on a show cause motion for failure to pay the court ordered guardian ad litem fees, neither the magistrate nor the trial court found appellant in contempt:

{¶19} "An Agreed Judgment Entry was signed by the parties, Celeste Brammer as Guardian Ad Litem, Magistrate Laughlin and Judge Kruger on April 22, 2010. In that Agreed Judgment Entry it stated that Defendant Qwensanta Vaile owes Guardian Ad Litem Celeste Brammer \$1,768.75. Defendant Qwensanta Vaile had until April 20, 2010 to pay the agreed to fees. To date she has not paid those fees.

{¶20} "Therefore, Defendant Qwensanta Vaile shall pay \$50.00 per month to Celeste Manns Brammer until the remaining guardian ad litem fees of \$1,768.75 are paid to Celeste Manns Brammer." Magistrate's Decision filed January 10, 2011.

{¶21} In its judgment entry filed February 28, 2011, the trial court overruled appellant's objections and approved and adopted the magistrate's decision. There was no finding of contempt, but a mere modification regarding the payment of the guardian ad litem fees as set forth in the agreed judgment entry. In fact, a payment arrangement was exactly what appellant asked for during the magistrate's hearing. January 5, 2011 T. at 11. Therefore, we find appellant's constitutional objections to be without merit.

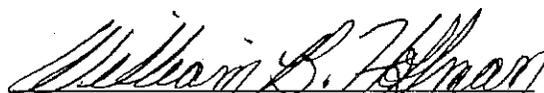
{¶22} Assignments of Error III and IV are denied.

{¶23} The judgment of the Court of Common Pleas of Delaware County, Ohio is hereby affirmed.

By Farmer, J.

Hoffman, P.J. and

Wise, J. concur.



JUDGES

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CRAIG A. JAMES

Plaintiff-Appellee

-vs-

QWENSANTA LIBERTY VAILE,
FKA KRISTIN Q. LIBERTY JAMES

Defendant-Appellant

JUDGMENT ENTRY

CASE NO. 11CAF030027

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Delaware County, Ohio is affirmed. Costs to appellant.

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Robert W. ...
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