

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

REPLY BRIEF OF APPELLANT JULIE ROSE ROWELL
TO BRIEF OF APPELLEE, JULIE ANN SMITH and to BRIEF OF AMICI CURIAE
MARLIN and JENNIFER HERRICK

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	b
STATEMENT OF CASE, UPDATED	1
ARGUMENT IN REPLY	2
Appellant’s Proposition of Law No. I: Within the exercise of its exclusive, original jurisdiction under R.C. 2151.23 to determine the custody of any child not a ward of another court of this state, a juvenile court has authority under the Rules of Juvenile Procedure to issue and enforce temporary orders that, in the discretion of the court, are reasonably designed to serve the best interests of the minor child during the period of litigation and to maintain the relationships already established with the child prior to the onset of litigation.	2
<u>Reply to Appellee’s Legal Argument I:</u> Jurisdiction vested in the juvenile court pursuant to R.C. 2151.23 includes authority to determine all aspects of a custody dispute between a parent and non-parent.....	2
<u>Reply to Appellee’s Legal Argument II:</u> The jurisdiction granted to the juvenile court pursuant to R.C. 2151.23, along with rules adopted by the Supreme Court of Ohio pursuant to the Ohio Constitution and local rules adopted consistent therewith by the Franklin County Juvenile Court, may be utilized to consider an award of custody to a non-parent, and may be used to maintain the child’s existing relationship with a non-parent pending outcome of trial.	4
<u>Reply to Appellee’s Legal Argument III:</u> The juvenile court’s application of rules of court to establish temporary orders are a permissible and necessary intrusion upon the rights of parents in order to maintain the status quo and protect the best interests of children pending litigation to determine their custody.	7
<u>Reply to Amici Curiae:</u> The Juvenile Court’s award of temporary visitation followed a process that was fundamentally fair to Appellee, and did not violate the 14 th Amendment of the Constitution of the United States.	10
CONCLUSION	13
PROOF OF SERVICE	15

TABLE OF AUTHORITIES

CASES

<i>Harrold v. Collier</i> , 107 Ohio St.3d 44 (2005)	9
<i>Clark v. Bayer</i> , 32 Ohio St. 299 (1877)	10, 11
<i>In re Bonfield</i> (2002), 97 Ohio St. 3d 387, 2002-Ohio 6660	11, 13
<i>In re Gibson</i> (1991), 61 Ohio St. 3d 168	5, 6
<i>In re Mullen</i> (2011), 129 Ohio St.3d 538	11, 13
<i>In re Perales</i> (1977), 52 Ohio St.2d 89	11
<i>Parham v. J.R.</i> , 442 U.S. 584 (1979)	12
<i>Troxel v. Granville</i> , 530 U.S. 57 (2000).....	10, 11
<i>Ziegler v. Zeigler</i> , 98 CA 54 (Licking, Fifth Dist. 1998)	3

CONSTITUTIONAL PROVISIONS AND STATUTES

Article 4, Section 5(B), Constitution of the State of Ohio	4
U.S. Constitution, Fourteenth Amendment	10
R.C. 2151.21(B)(32)	7
R.C. 2301.03	2, 3, 4, 13
R.C. 2151.23	2, 4, 5, 6, 9, 11, 13
Juv. R. 13	4, 5, 6, 9, 11
Juv. R. 47	9

STATEMENT OF THE CASE, UPDATED

A. Clarification. A review of Appellee's Brief suggests that the temporary orders at issue in the case at bar were issued shortly after Appellant initiated the underlying action to establish shared custody of the minor child. Although an earlier temporary order was issued after the Magistrate's consideration of the initial submission of affidavits by both parties, that initial temporary order was set aside and a somewhat expanded temporary order was issued by the Judge as the result of Appellee's own motion to set the initial temporary order aside.

Thereafter, new counsel for Appellee and Counsel for Appellant met with the Judge to consider Appellee's request for a stay pending appeal, but with the agreement of counsel, the Judge modified the temporary order pursuant to Civ.R. 60(A) to change the initial temporary award of shared custody to one giving Appellee sole custody and Appellant visitation, again on a temporary basis. Shortly thereafter, Appellee retained new counsel who appealed the agreed upon temporary order of visitation as improperly entered under Civ.R. 60(A).

On January 28, 2010, the Court of Appeals agreed, and vacated that temporary order, remanding the case to the trial court for further proceedings. Thereafter, on February 18, 2010, on remand, the Magistrate issued the temporary order that is the subject of this appeal.

B. Update. On November 22, 2011, the Magistrate in the underlying case at bar concluded its 16 day trial of Appellant's request to establish shared custody, and on February 27, 2012, the trial court issued its judgment entry adopting the magistrate's decision awarding shared custody to Appellant herein, along with specific companionship schedule and other related terms.

Despite that outcome, Appellant asks that the Court not treat this appeal related to the temporary orders herein as moot, because of the great public interest raised by this appeal. In similar cases now at the trial level, other parents situated similarly to Appellee Smith are

carefully following the procedure adopted by Appellee herein, by steadfastly refusing to permit time to non-parents despite the provisions of temporary orders. Some of these parents have specifically represented that they plan to accept charges of contempt and orders of incarceration to enable them, just like Appellee herein, to delay the eventual outcome of trial while arguing on appeal the same issues involved in this appeal. Accordingly, in the interest of justice, Appellee asks that the Court resolve this appeal on its merits.

**ARGUMENT IN SUPPORT OF PROPOSITION OF LAW AND IN REPLY TO THE
LEGAL ARGUMENT OF APPELLEE AND AMICI CURIAE**

Appellant's Proposition of Law No. I

Within the exercise of its exclusive, original jurisdiction under R.C. 2151.23 to determine the custody of any child not a ward of another court of this state, a juvenile court has authority under the Rules of Juvenile Procedure to issue and enforce temporary orders that, in the discretion of the court, are reasonably designed to serve the best interests of the minor child during the period of litigation and to maintain the relationships already established with the child prior to the onset of litigation.

Reply to Appellee's Legal Argument I:

R.C. 2151.23 conveys exclusive jurisdiction in the juvenile court to determine all aspects of a custody dispute between a parent and non-parent. This jurisdiction is not limited in the manner argued by Appellee.

R.C. 2301.03 provides: " In Franklin County, the judges of the courts of common pleas [whose terms begin on certain dates – i.e, domestic / juvenile court judges] shall have the same qualifications, exercise the same powers and jurisdiction, and receive the same compensation as other judges of the court of common pleas of Franklin county and shall be elected and designated as judges of the court of common pleas, division of domestic relations. They shall have all the powers relating to juvenile courts, and all cases under Chapter 2152. of the Revised Code, all parentage proceedings under Chapter 3111. of the Revised Code over which the juvenile court

has jurisdiction, and all divorce, dissolution of marriage, legal separation, and annulment cases shall be assigned to them. ...”

Although R.C. 2301.03 conveys jurisdiction to the juvenile court only to determine specified kinds of cases, the judges of the juvenile court have the same discretion to manage and determine their cases pursuant to the Juvenile Rules promulgated by the Supreme Court of Ohio and approved by the General Assembly of Ohio as do other courts of common pleas of Ohio.

By analogy, in *Ziegler v. Zeigler*, 98 CA 54 (Licking, Fifth Dist. 1998), Appellant corporation sued Appellee dance studio in breach of contract following the principal parties’ divorce. Although Appellant’s corporation had been joined as a party for purposes of preserving assets in the divorce, the Court of Appeals of the Fifth District Court of Appeals permitted the later contract claim, on the basis that the corporation was not required to assert its breach of contract claim in the divorce action. The Fifth District Court of Appeals affirmed.

The *Zeigler* court described courts of domestic relations as courts of “limited” jurisdiction, using that term to indicate that domestic courts have jurisdiction only over matters that are “primarily” domestic relations matters. Similarly, the jurisdiction of Ohio’s juvenile courts are also “limited” in the sense that they have jurisdiction over cases involving juveniles and, as to custody, only over juveniles whose parents are not married to each other. This does not limit the authority of the juvenile court in the exercise of its jurisdiction to manage and decide juvenile matters, any more than the authority of domestic relations courts are limited in their management and decision-making regarding domestic relations matters, or courts of common pleas as to civil matters or criminal matters as the case may be.

Reply to Appellee's Legal Argument II:

The jurisdiction granted to the juvenile court pursuant to R.C. 2151.23, along with rules adopted by the Supreme Court of Ohio pursuant to the Ohio Constitution and local rules adopted consistent therewith by the Franklin County Juvenile Court, may be utilized to consider an award of custody to a non-parent, and may be used to maintain the child's existing relationship with a non-parent pending outcome of trial.

Article IV, Section 5(B) of the Constitution of the State of Ohio vests the Supreme Court of Ohio with rule making authority for the rules of practice and procedure in Ohio courts:

(B) The Supreme Court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the General Assembly during a regular session thereof, and amendments to any such proposed rules may be so filed not later than the first day of May in that session. Such rules shall take effect on the following first day of July, unless prior to such day the General Assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Courts may adopt additional rules concerning local practice in their respective courts which are not inconsistent with the rules promulgated by the supreme court. ...”

Exercising this constitutional power, in 1972, the Supreme Court of Ohio established the Rules of Juvenile Procedure, including Juv. R. 13, the application of which is at issue in the case at bar. Similarly, the Franklin County Court of Common Pleas, Domestic Relations Division, Juvenile Branch, adopted Local Rules, including Local Rule 5, which provides, in pertinent part:

(D) The Judge or Magistrate may require motions for temporary orders to be submitted and determined without oral hearing upon affidavits in support or opposition.

As asserted in Appellant's first proposition of law, pursuant to R.C. 2301.03, a juvenile court has jurisdiction to issue and enforce temporary orders to maintain relationships already established with a child prior to the onset of litigation.

This appeal does not consider the extent of the underlying jurisdiction of the trial court to hear and determine disputes between parents and non-parents regarding shared custody. The only issue in this appeal is whether during the course of the litigation related to that underlying dispute, the trial court may exercise any control over the parties through the issuance of temporary orders as contemplated by Juv.R. 13 and, in this specific case, Franklin County Juvenile Court's Local Rule 5(D). *Notably, Appellee has cited no case whatsoever, other than the decision below, in which any court in Ohio or elsewhere has ruled that a juvenile court is without jurisdiction to control the actions or relationships of a juvenile through the use of temporary orders pending the outcome of the primary case.*

This is precisely the issue left open for determination in *In re Gibson* (1991), 61 Ohio St.3d 168. *Gibson* involved a grandparent's filing of a complaint for visitation rights with his grandchild, alleging that he should be granted visitation pursuant to R.C. 3109.05(B). Initially, the trial court granted temporary visitation upon the grandparent's motion for same; however, when the trial court determined that the grandparent had not alleged that the grandchild's parent's marriage or their care for the child had been disrupted, the trial court dismissed the complaint for visitation and, with it, dismissed the temporary visitation order.

On appeal, the grandparent changed course and alleged that even without a disruptive precipitating event such as a divorce, he should be permitted to seek visitation pursuant to R.C. 2151.23(A)(2), which provides that the juvenile court has exclusive original jurisdiction "to determine the custody of any child not a ward of another court of this state." The grandparent asked that the court apply 2151.23(F) (not applicable to the case at bar), on the theory that his claim solely for visitation was a child custody matter.

In *Gibson*, this Court instructed that “visitation” and “custody” are related but distinct legal concepts. Custody resides in the party or parties who have the right to ultimate legal and physical control of a child, whereas visitation resides in a noncustodial party and encompasses that party’s right to visit the child. Thus, the Court concluded, a grandparent could not predicate an action seeking solely visitation upon the statutory jurisdiction permitting the court to determine custody. Notably, the *Gibson* court stated, at footnote 3: “We express no opinion regarding the juvenile court’s authority to order visitation when it is ruling on a complaint seeking a determination of custody.” That is precisely the issue posed by the case at bar.

This is not an action for visitation, but rather is an action to establish shared custody pursuant to R.C. 2151.23. The only visitation granted by the trial court was temporary visitation authorized by following Juv.R. 13, a procedural rule authorizing the trial court to manage the conduct of the parties during trial. The availability of visitation during litigation of custody disputes is especially important because of the protracted length of time that the child may otherwise be deprived of contact with the non-parent. In the case at bar, for example, the minor child had resided with appellant and the child for nearly five years, a period during which appellant acted in much the same way as if a second parent. Upon learning of Appellant’s filing of a custody action, the child was promptly withheld from further contact with Appellant for most of the three years it took to complete litigation.

This Court might resolve the appeal in either of two ways. The more comprehensive approach would be to recognize that the concept of legal custody encompassed within R.C. 2151.23(A)(2) includes a bundle of rights and responsibilities that includes visitation. This would permit a trial court in appropriate circumstances to determine that while an award of full or shared custody is not warranted by the facts of a particular case, the applicant’s connection

with the child as has been authorized and fostered by the parent over time is so significant as to warrant protection of the ongoing relationship and connection that an award of visitation might satisfy.

In the alternative, even if this Court finds that visitation is not encompassed within an ultimate award of custody or shared custody, nonetheless during the trial of such a dispute, the Supreme Court's establishment of the Juvenile Rules authorizes the trial court manage the conduct of the parties and maintain the relationships already established between the parties and the child in the form of temporary orders during the litigation. That is precisely the outcome anticipated by the clear language of Juv.R. 13

Reply to Appellee's Legal Argument III:

The juvenile court's application of rules of court to establish temporary orders are a permissible and necessary intrusion upon the rights of parents in order to maintain the status quo and protect the best interests of children pending litigation to determine their custody.

From Appellee's argument, one might wrongly conclude that the Franklin County Juvenile Court came up with some novel approach to managing this case as it proceeded toward trial – a temporary order. Nearly all of the Ohio cases cited by Appellee fall into the category of “permanent custody”, i.e., an agency termination of parental rights pursuant to RC 2151.21(B)(32). Unlike the nature of custody sought herein, “permanent custody” means a legal status that vests in a public children services agency or a private child placing agency, all parental rights, duties, and obligations, including the right to consent to adoption, and divests the natural parents or adoptive parents of all parental rights, privileges, and obligations, including all residual rights and obligations.

That is dramatically different from what is involved in this case. Here, Appellant simply sought to obtain and enforce a temporary order of visitation to maintain her five year relationship with the child she helped to conceive and raised from birth cooperatively with the Appellee, during the period of litigation over Appellant's claim to establish shared legal custody.

Juvenile courts in Ohio have issued temporary orders maintaining the relationships previously established by the parent between the child and other parties pending outcome of the litigation at least since the Supreme Court of Ohio's establishment of the Juvenile Rules in 1972, and until this case, *neither Appellant nor Appellee* has been able to find any other case in which a parent has ever argued, successfully or not, that the juvenile court was without power to issue such temporary orders. Although the trial court had ordered temporary visitation to a nonparent in a few of the cases cited by Appellee, except for the case at bar NONE of the nearly thirty other cases cited by Appellee involved a dispute as to authority to issue temporary visitation orders.

Appellee's frustration with the trial court's issuance of temporary orders in this case is quite evident in the several pages of her merit brief in which she describes the issuance of the temporary visitation below as a "selective, implied, and sweeping interpretation" of a rule of juvenile procedure. Appellee's Brief, p. 15. Appellee distrusts an "already overburdened juvenile court system, armed with no more information than affidavits...". Appellee's Brief, p. 16. Although our juvenile court system is indeed busy, Appellant is not so cynical as to conclude that our system is incapable of evaluating the merits of the various disputes submitted to it for resolution.

Parts of Appellee's argument meander away from the issue of temporary orders that is before this Court to describe Appellee's underlying motivations and opposition to Appellant's action to establish shared custody. Of course, the eventual trial decision speaks for itself. But

the striking juxtaposition between Appellee's emotional description of her avoidance of establishing shared custody and the trial court's findings following 3 years of litigation and sixteen days of actual trial stands notably as a prime example of the need for an independent juvenile court assessment and protection of the minor child's separate interests during the context of protracted custody litigation.

Ohio's scheme of statutes and rules surrounding custody disputes between parents and nonparents provides a constitutional balance in which the interests of parents are protected. Juv.R. 47(A) provides, in pertinent part, that the Juvenile Rules "shall take effect on the first day of July, 1972. They govern all proceedings in action brought after they take effect...". Juv.R. 47(K) reflects amendments to various juvenile rules including Juv.R. 13: The amendments to Rules 6, 8, 13, 27, 34, 36, and 27 filed by the Supreme Court with the General Assembly on January 5, 1996 and refilled on April 26, 1996 shall take effect on July 1, 1996. They govern all proceedings in actions brought after they take effect...".

The process for establishing the Juvenile Rules assures that the General Assembly has a substantial opportunity to review them before they take effect and, if the General Assembly objects to any of them, the General Assembly has an opportunity to reject them. By permitting the Juvenile Rules (and specifically, Juvenile Rule 13) to become effective, both initially and following amendment, the General Assembly authorized the application of the rules as written. Thus, although the Juvenile Rules are not *statutory*, they nonetheless hold great *stature*.

Appellant's argument is consistent with this Court's decision in *Harrold v. Collier*, 107 Ohio St.3d 44 (2005). Although that case dealt with specific Ohio visitation statutes that predicate an award of visitation (not a temporary order) on a precipitating event such as divorce or death, similarly the statutes and rules relevant to a determination of contested custody under

R.C. 2151.23, in conjunction with the use of temporary orders issued pursuant to Juv.R. 13 require careful consideration by the Court. Indeed, in the instant case, Franklin County Juvenile Court Local Rule 5(D) requires sworn affidavits detailing the history of the relationship that is requested to be protected by temporary order during the pendency of litigation. Those are specific procedural safeguards of parental rights; this is far from the kind of state intrusion into custody that was at issue in *Troxel*.

For all of these reasons, this Court should reverse the decision of the Tenth District Court of Appeals below and reinstate the temporary order issued by the Magistrate so that the Appellee's knowing, repeated, willful, and steadfast refusal to abide by the terms of the temporary order issued by the Magistrate on February 18, 2010, may finally result in appropriate enforcement under Ohio law. Only this Court can protect children from the kind of emotional traumas inherent in the sudden termination of relationships that children have been taught to rely upon, and the resulting damage to the relationship that the custody action itself seeks to protect.

Reply to Amici Curiae:

The Juvenile Court's award of temporary visitation followed a process that was fundamentally fair to Appellee, and did not violate the 14th Amendment of the Constitution of the United States.

The Fourteenth Amendment to the United States Constitution, Section 1, reads:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appellee correctly states that the Fourteenth Amendment has been interpreted to provide a fundamental parental right to the care, custody, and control of their children. That right has been generally recognized at least since the late nineteenth century. See *Clark v. Bayer*, 32 Ohio St. 299 (1877), in which the Court stated: "[p]arents have a constitutionally protected due process right to make decisions concerning the care, custody, and control of their children, and the parents' right to custody of their children is paramount to any custodial interest in the children asserted by nonparents." That is not to say that parental rights are absolute. Rather, "The father's right is not, however, absolute under all circumstances. He may relinquish it by contract, forfeit it by abandonment, or lose it by being in a condition of total inability to afford his minor children necessary care and support". *Clark v. Bayer*, supra. Indeed, this historic case provides the underpinnings of the contractual relinquishment that is at the heart of modern custody cases including, among others, *In re Perales*, 52 Ohio St.2d 89 (1977), *In re Bonfield*, 97 Ohio St.3d 287 (2002), *In re Mullen*, 129 Ohio St.3d 538 (2011).

Both Appellee and amici curiae rely repeatedly on the decision of the Supreme Court of the United States in *Troxel v. Granville*, 530 U.S. 57 (2000). Unlike the case at bar, however, at issue in *Troxel* was a visitation statute enacted by the State of Washington providing that "Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances." The Court's observation that the statute was "breathhtakingly broad" is easy to understand. Indeed, *Troxel* stands for the proposition that a parent's interest in the care, custody, and control of their children can be limited only where the parent is afforded due process.

Within the context of a shared custody claim brought pursuant to R.C. 2151.23(A)(2), the provisions of Juv.R. 13(B) permits a judge or magistrate 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. This focus on the child's interest and welfare recognizes that despite the general deference required by the constitution, parents do not always act in the best interest of their children. See *Parham v. J.R.*, 442 U.S. 584 (1979), and others cited by Appellee herein. Perhaps nowhere is that more true, and the protection of the children's separate interests more necessary, than in the context of a custody dispute.

Amici Curiae protest that permitting the trial court to issue temporary orders in the context of a custody dispute could result in our courts' issuance of temporary orders maintaining relationships with any number of "legal strangers", including the nonparent's partners, partners' parents and other relatives. Brief of Amici Curiae, p. 7. Similarly, Appellee herself exclaims that if this court upholds the grant of temporary visitation to non-parents, then "every ex-partner, every babysitter, nanny, teacher, boyfriend, girlfriend, counselor or coach who is convinced he or she has developed a relationship with a minor child with the encouragement of the child's fit parent will have the legal means to disrupt the parent-child relationship, temporarily or not, in order to maintain that alleged relationship to the detriment of the parent-child relationship." Appellee's Merit Brief, p. 15. Such outrage is inappropriate, and is belied by the trial courts findings in these cases. The provisions of Franklin County Juvenile Court Local Rule 5(D) providing for sworn affidavits as the basis for determination of temporary orders safeguards against any realistic concern that a trial court would issue temporary orders in attenuated relationships more distant to the minor child and, of course, did not do so in the case at bar.

Temporary orders are issued to manage the rights, responsibilities, and behaviors of parties while litigation is pending; they represent the juvenile court's best effort to protect the interests of the children whose interests are at stake. The juvenile court's ability, in its reasonable discretion, to issue and enforce temporary orders, helps to shield the child from undue emotional stress and disruption that otherwise can easily result from extended conflict between the parties.

CONCLUSION

R.C. 2301.03 establishes the terms, qualifications, powers, and jurisdiction of the domestic relations, juvenile, and probate courts of Franklin County. In Franklin County, the judges of the domestic relations court have been given "all the powers relating to juvenile courts, and all cases under Chapters 2151 and 2152 of the Revised Code...".

R.C. 2151.23 provides exclusive, original jurisdiction to Ohio juvenile courts to determine the custody of any child that is not a ward of another court of Ohio. It is well established that R.C. 2151.23 permits a juvenile court to award shared custody of a minor child to same gender adults who engage in a pattern of intentionally sharing the parenting rights and responsibilities of a child during a period in which the adults resided together with the minor child. *In re Bonfield* (2002), 97 Ohio St. 3d 387, 2002-Ohio 6660. And in *In re Mullen*, supra, this Court made clear that, although a comprehensive written agreement may be preferable, it is not required in order to establish that a parent has contractually relinquished their right to sole custody in favor of custody or shared custody to a nonparent.

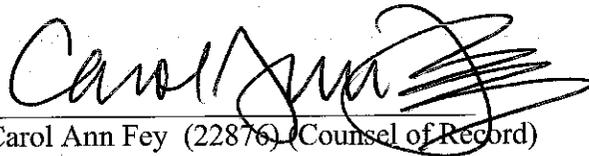
This case raises the narrow but crucially important question whether, during the course of custody litigation, the juvenile court has authority to issue and enforce temporary orders to regulate the conduct of the parties and safeguard the relationships already established with the child. Appellant asks this honorable Court to hold that the authority to award visitation is

inherent in the nature of the exclusive, original jurisdiction bestowed upon the juvenile court pursuant to R.C. 2151.23(A)(2) as further extended by the statutes and rules referred to above, without reference to whether the nonparent who has initiated the custody action is a relative, a restriction imposed by the Court of Appeals below.

At a minimum, in accordance with the Ohio Revised Code and applicable rules, the juvenile court must be empowered to issue temporary orders designed to serve the best interests of the minor child, thus serving the best interests of minor children by authorizing juvenile courts to maintaining the child's earlier-established relationships during the protracted process of custody litigation.

Appellant respectfully requests that this Court reverse the holding of the Tenth District Court of Appeals, reinstate the temporary order issued by the Magistrate on February 18, 2011, and confirm the authority of the Juvenile Court to enforce sanctions for Appellee's refusal to comply with the terms of the temporary order, which refusal resulted in the trial court's holding Appellee in contempt of court and this Appeal.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Merit Brief of Appellant Julie Rose Rowell 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, to Meredith A. Snyder, Guardian ad Litem, 572 East Rich Street, Columbus, Ohio 43215, and to counsel for amici curiae, David R. Langdon and Bradley M. Peppo, 11175 Reading Rd., Ste. 104, Cincinnati, Ohio 45241, and Dianne Einstein, 5940 Wilcox Place, Suite F, Dublin, Ohio 43016, on March 27, 2012.

A handwritten signature in black ink, appearing to read "Carol Ann Fey", written over a horizontal line. The signature is stylized and includes a large, circular flourish at the end.

Carol Ann Fey (22876)
Counsel for Appellant Julie Rose Rowell