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Rowell v. Smith, Slip Opinion No. 2012-Ohio-4313

FORMAL APOLOGY OF JULIE A. SMITH

To the Honorable Chief Justice and Justices of the Ohio Supreme Court:

I, Julie Ann Smith, Registration No. 0056171, as an officer of the court, do hereby formally and solemnly offer my sincerest apologies for my failure to follow the Orders of this Court.

I remain in full compliance with the Orders issued by the trial court after the Decision on the Merits was issued February 27, 2012.



Julie A. Smith

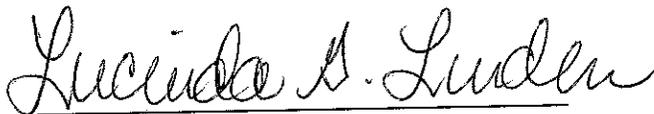
10/4/12

Date

State of Ohio:

County of Franklin:

Subscribed, sworn to and acknowledged before me, Julie A. Smith personally appeared before more on this 4th day of October, 2012.



Lucinda G. Linden

My commission expires on: 5-5, 2014



LUCINDA G LINDEN
Notary Public
In and for the State of Ohio
My Commission Expires
May 5, 2014

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INTRODUCTION

On September 26, 2012, this Court issued its decision in the *Rowell v. Smith* case, Slip Opinion No. 2012-Ohio-4313, holding that a juvenile court may issue temporary visitation orders that are in the best interest of the minor child during litigation when it exercises its jurisdiction, pursuant to R.C. 2151.23(A)(2) and Juv. R. 13(B)(1). See decision attached hereto as Exhibit A. Appellee-Mother Julie Smith is filing this Motion, asking this Court to reconsider that decision.

S.Ct. Prac. R. 11.2 allows, or requires, the Court to "correct decisions which, upon reflection, are deemed to have been made in error." *Cuyahoga Falls*, 82 Ohio St.3d 539, 541, 697 N.E.2d 181 (1998), quoting *State ex re. Huebner v. W. Jefferson Village Council*, 75 Ohio St.3d 381, 383, 662 N.E.2d 339 (1995); *State ex rel. Shemo v. Mayfield Hts.*, 96 Ohio St.3d 379, 2002-Ohio-4905, 775 N.E.2d 493, ¶ 5. It is also appropriate to grant a motion for reconsideration that raises an issue that was either *not considered at all*, or *not fully considered*, when it should have been. *Mathews v. Mathews*, 5 Ohio App.3d 140, 143, 450 N.E.2d 278 (1981) and *In re Bonfield* 97 Ohio St.3d 387, 2002-Ohio-6660. Further, S.Ct. Prac. R. 11.2 (B)(1) permits a reconsideration motion when there is a substantial constitutional right at issue. Finally, pursuant to S.Ct. Prac.R. 9.2(A), Appellee (the Mother or Smith) respectfully requests an oral argument on this matter.

This case implicates far more than just a statutory jurisdictional issue. At its very core, this case is about a fit parent's constitutionally-guaranteed right to be the exclusive decision-maker with respect to the care, custody, and control of her child, a right which the United States Supreme Court has characterized as "perhaps the oldest of the fundamental liberty interests

recognized by this Court.”¹ Also, as this Court recognized in *In re Bonfield*: “custody proceedings between a parent and non parent, unlike those between two parents, pose the possibility of terminating a parent’s rights in favor of one who is not a parent *citing In re Perales*.”² Since the fundamental constitutional rights of all fit parents and the possibility of a court terminating those rights is at stake in this action, the Mother respectfully requests this Court to reconsider its September 26, 2012 decision. Accordingly, we ask this Court to reconsider its decision interpreting R.C. 2151.23 and Juv. R. 13 so as to ensure this Mother’s and all of Ohio’s fit parents’ rights under the Ohio and United States Constitutions are honored and protected.

The Mother also respectfully draws this Court’s attention to the rulings that gave rise to this appeal. In particular, in less than 24 hours after the submission of Smith’s 15 supplemental affidavits in opposition to the non-parent’s request for a Temporary Order in this matter, Magistrate Hosafros signed an order designating the Mother and Rowell “temporary shared custodians of M.R.S.”³ The Order reads in pertinent part: “The Magistrate has received and considered affidavits from both parties. Upon consideration of the matter, it is ORDERED: Julie Rowell and Julie Smith are temporary shared custodians of the minor child, [M.R.S.]”⁴

As such, the Mother was immediately stripped of her parental status without a hearing or finding as to her suitability and to this day has not regained it. Also, it is important for this Court to know that there was *no analysis and/or finding as to the child’s best interest in any temporary order issued by this court*. Further, there was no reference let alone special weight given to the

¹ *Troxel v. Granville* (2000), 530 U.S. 57, 65.

² *In Re Bonfield*, 96 Ohio St.3d 218 ¶ 43 (*emphasis added*)

³ Magistrate Rexanne Hosafros issued the first forced shared custody order on November 5, 2008. Since her unexpected retirement from the bench in 2011, Ms. Hosafros has been associated with the firm of Massucci and Kline which represents Rowell in this matter.

⁴ Magistrate’s Order signed Nov. 5, 2008

Mother's wishes relative to the request for shared custody, visitation, companionship—temporary and/or permanent. *In fact, in every Decision and Order since the one signed on November 5, 2008 through the Orders at issue in this appeal, the trial court failed to reference and/or make a finding relative to the fit Mother's wishes and offered no analysis relative to her fundamental constitutional parental rights.*⁵ Furthermore, it is critical for this Court to know, during the time the temporary orders were pending and on appeal, the Mother did permit visitation by turning over M.R.S. to Rowell nearly 280 days even though she did not believe it was in her daughter's best interest. Since this litigation has been instituted, therefore, the Mother has been forced to turn over her child to Ms. Rowell approximately 400 days or well over a year.

To be sure, without strict guidance and limits from this Court, trial courts throughout Ohio will follow the lead of this case and summarily substitute their judgment for that of Ohio's parents when any person asserts an interest in a fit parent's child. This Court asked the essential question during Oral Argument: what limits or boundaries are in place to ensure not just any person can seek and receive temporary orders relative to a fit parent's child? The answer from Appellant's Counsel: "best interest of the child." Respectfully, the answer of "best interest of the child" does not withstand constitutional muster under the Ohio Constitution and the United States Constitution because this is the precise issue the United States Supreme Court addressed in *Troxel v. Granville* (2000), 530 U.S. 57.

⁵Magistrate's Order issued Nov. 12, 2008, Trial Court Order Jan. 15, 2009, Modified Trial Court Order January 26, 2009, Magistrate's Order February 28, 2010, Trial Court Contempt Order June 23, 2009, Magistrate's Contempt Order March 16, 2010, Trial Court Contempt Order June 30, 2010, Enforcement Order July 27, 2010, Magistrate's Contempt Order Jan. 17, 2012 and Trial Court's Contempt Order March 6, 2012.

ARGUMENT

I. The juvenile court's orders awarding temporary shared custody and then "visitation" to a non parent were invalid because the statute and rule, as applied by the court, violate Article 5 Section 5(B) of the Ohio Constitution and the Mother's Fourteenth Amendment rights.

The current interpretation of the statute and rule at issue in this case violates Article 4 Section 5(B) of the Constitution of the State of Ohio. Specifically, Article 4 Section 5(B) of the Ohio Constitution is the enabling authority underlying the Juvenile Rules. This article of the Ohio Constitution specifically states "[t]he 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.*" (*Emphasis added*). This Mother's (and all parents') parental rights are paramount, fundamental and substantive. It matters not that this Mother is a lesbian, for she is still a legally-recognized parent with constitutionally-guaranteed rights. The impact of this Court's recent decision, from which Smith files this Motion for Reconsideration, is to endorse the non-parent's position that she, a person who has no legally recognized substantive rights relative to the Mother's child, can use a rule of procedure to confer jurisdiction on the juvenile court in order to "abridge or modify," the Mother's constitutionally-protected parental *substantive* rights. This is contrary to the Ohio Constitution. This interpretation essentially turns Ohio's constitution on its head in that it vastly enlarges the *alleged* "rights" of legal strangers to the detriment of Ohio's parents whose substantive rights are dramatically abridged as a result.

Further, this interpretation of the statute and rule violates the Mother's (and all fit parents') Fourteenth Amendment due process rights. On their face, the statute and rule contain none of the safeguards necessary for nonparent visitation statutes to comport with the United States and Ohio Constitutions.

II. Parents have fundamental due process rights to the exclusive care, custody, and control of their children; therefore, when challenged by a legal stranger, strict limits must be in place to ensure constitutional protections are observed before state intervention is authorized.

More than a decade ago in *Troxel v. Granville* (2000), 530 U.S. 57, the United States Supreme Court again reaffirmed the timeless truth that parents have an inalienable right to make decisions concerning the care, custody, and management of their child.⁶ This is a right not granted by government, but *acknowledged and protected* by it.⁷

In *Troxel*, the Court struck down a Washington State statute that afforded any person the right to seek visitation rights in court at any time and under any circumstances if the court believed it would serve the child's best interest. More specifically, the Washington State statute provided:

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.⁸

The Court held that this "breathtakingly broad" statute "effectively permits any third party seeking visitation to subject any decision by a parent concerning visitation of the parent's children to state-court review."⁹ Once before the court, "a parent's decision that visitation would not be in the child's best interest is accorded no deference" or "presumption of validity or any weight whatsoever. Instead, the Washington statute places the best-interest determination solely in the hand of the judge," and if the judge disagrees with the parent, "the judge's view

⁶ *Id.* at 65-66

⁷ *Id.*; see, also, *Palko v. Connecticut* (1937), 302 U.S. 319, 325 (the inalienable rights with which we have been endowed by our Creator include all those rights that are "implicit in the concept of ordered liberty" and are therefore protected by the Due Process Clause of the Fourteenth Amendment).

⁸ *Id.* at 61, citing Wash. Rev. Code 26.10.160(3).

⁹ *Troxel* at 67.

necessarily prevails.”¹⁰ As a consequence, “in the State of Washington a court can disregard and overturn *any* decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based on solely on the judge’s determination of the child’s best interests.”¹¹

This, according to the Court, violated the parents’ fundamental liberty interest in the care, custody, and control of their children. In reaching this conclusion, the Court emphasized the importance of the presumption that must be applied to the decisions of fit parents—the presumption that they act in the best interests of their children. The *Troxel* Court stated: “so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.”¹²

Addressing the trial court’s application of the Washington statute, the U.S. Supreme Court found no evidence in the trial court’s “slender findings” that the court had accorded any “special weight” to the mother’s determination of her child’s best interests.¹³ However, the trial court gave special weight to its own determination (*i.e.*, it presumed) that grandparent visitation was in the best interests of the child, a presumption which could only be rebutted if the mother could demonstrate some kind of harm that would result. In other words, the trial court had in effect reversed the burden of proof, “directly contraven[ing] the traditional presumption that a fit parent will act in the best interest of his or her child.”¹⁴ Consequently, the U.S. Supreme Court in *Troxel* held that the trial court had failed to provide adequate protection for the mother’s

¹⁰ *Id.*

¹¹ *Id.* (emphasis in original).

¹² *Id.* at 68

¹³ *Id.* at 72

¹⁴ *Id.* at 69.

fundamental constitutional right to make decisions concerning the rearing of her child and thus, as applied to her, Washington's nonparent visitation statute was unconstitutional.¹⁵

In its decision, this Honorable Court found that the *Troxel* presumption is not "irrebuttable." The Mother respectfully asks this Court to reconsider its decision because in this case, whether the *Troxel* presumption is "irrebuttable" or not, here, the trial court failed to ask for, defer to or make *any* finding regarding the Mother's wishes, and as a result, it did not give the Mother's wishes any special weight. Additionally, it is absolutely critical for this Court to know that the trial court failed to even mention "best interest of the child" until the June 23, 2009, Contempt Decision when it stated: 1) "where a child has been placed by his or her parent in a living situation wherein the child develops a relationship with a non-parent," visitation is "more likely than not" in the child's best interest and 2) the child suffered no "abuse or neglect at the hands of the nonparent."¹⁶ First, the trial court's standard of "best interest" has certainly and significantly whittled down the word "best." Applying this trial court's standard of "best interest" means that the natural parent has not presented any evidence of "abuse or neglect" at the hands of the legal stranger.

Second, "more likely than not" even further degrades "best interest" to essentially this: unless this Mother (or any fit parent) presents evidence of "abuse or neglect" at the hands a legal stranger, irrespective of the parent's wishes, the juvenile court will grant temporary orders of visitation and/or custody when a legal stranger has lived with a minor child and developed a relationship, because it is "more likely than not," in that child's best interest. In fact, the trial court found that "it is in the child's best interest for [Rowell] to maintain a relationship with the minor child by means of visitation during the pendency of this matter . . . [because] there is no

¹⁵ *Id.* at 70

¹⁶ Decision and Judgment Entry, June 23, 2009, at 15-16

evidence of abuse or neglect at the hands of the non-parent.”¹⁷ This Mother, (and all parents) seeks far more certainty when it comes to the “best interest of the child” than “more likely than not” and “in the absence of abuse or neglect” provides. Further, this begs the questions: what is “abuse or neglect?” On April 19, 2010, Ms. Smith filed a *Writ of Prohibition* with this Court detailing actions that, to her, rose to the level of “abuse or neglect.” To wit: Rowell was sleeping with and sharing a twin bed with the M.R.S., bathing with/taking baths with M.R.S., and took M.R.S. for 15 days without notice when M.R.S. was just five years old.¹⁸ For these reasons, this Mother respectfully requests reconsideration of this Court’s decision.

III. The court’s interpretation of the statute and rule violated the Mother’s constitutional rights by failing to apply the restrictions of R.C. 2151.23(F)(1).

As established above, the juvenile court in this case awarded shared custodian status and then substantial visitation to a nonparent without asking for or showing any deference to the Mother’s own determination that visitation with a legal stranger (as well as other parental rights) was not in her child’s best interests.¹⁹ The statute²⁰ and rule²¹ which purport to supply the juvenile court with general jurisdiction to issue visitation orders states: “The juvenile court has exclusive original jurisdiction under the Revised Code *** to determine the custody of any child not a ward of another court of this state.” R.C. 2151.23(A). But while R.C. 2151.23(A)(2) does provide a juvenile court with exclusive original jurisdiction to “determine the custody of any child not a ward of another court of this state,” this statutory authority is not without justified

¹⁷ Decision and Order, June 23, 2009 at 15 – 16.

¹⁸ Complaint for *Writ of Prohibition*, April 19, 2010, Paragraphs 55-57

¹⁹ Magistrate’s Order issued Nov. 12, 2008, Trial Court Order Jan. 15, 2009, Modified Trial Court Order January 26, 2009, Magistrate’s Order February 28, 2010, Trial Court Contempt Order June 23, 2009, Magistrate’s Contempt Order March 16, 2010, Trial Court Contempt Order June 30, 2010, Enforcement Order July 27, 2010, Magistrate’s Contempt Order Jan. 17, 2012 and Trial Court’s Contempt Order March 6, 2012.

²⁰ R.C. 2151.23(A)(2)

²¹ Juv. R. 13

restraint intended to preserve the sanctity of the parent-child relationship. As such, it must be read in conjunction with R.C. 2151.23(F)(1).

Specifically, the General Assembly expressly restricted the juvenile court's jurisdiction in matters to "determine the custody of any child" in R.C. 2151.23 (F)(1) which states that juvenile courts "***shall exercise its jurisdiction in child custody matters*** in accordance with [R.C.] sections 3109.04 and 3127.01 to 3127.53. . .and, as applicable, [R.C.] sections 5103.20 to 5103.22 or 5103.23 to 5103.237." This section properly explains that R.C. 2151.23 does not stand alone, but rather, limits Ohio's juvenile courts' jurisdiction in custody matters initiated by those parties with standing under the provisions expressly delineated in R.C. 2151.23(F)(1)²² The Legislature referenced specific statutory sections because it never intended R.C. 2151.23 to be self-executing because to do so would allow *any* person to file a claim for custody at *any* time which violates not only a fit parent's Ohio constitutional rights, but also the U.S. Supreme Court ruling in *Troxel*. Finally, had the Legislature intended for "any person to be able to file an action for custody of any child," it would not have enacted R.C. 2151.23(F)(1) to restrict the courts' jurisdiction in child custody matters to only those sections set forth.

Given the absence of any limitations in the statute and rule, a juvenile court could grant visitation to not just one legal stranger (as it did in this case), but to any number of people who purport to have an interest in the child's well being. These could include, for example, Rowell's parents (and other relatives), her sexual partners, her sexual partners' parents (and other relatives), and the list goes on. While it may be unlikely that a juvenile court would go this far,

²²While it is true that the Bonfield Court held that "the juvenile court had jurisdiction to determine the custody of the Bonfield children pursuant to R.C. 2151.23(A)(2) without reference to R.C. 3109.04," it expressly limited that holding to the ***Bonfield children*** presumably because the mother initiated the action to waive her exclusive custodial rights in favor of her partner via a consensual shared custody agreement pursuant to R.C. 3109.04 under which she had standing.

that is beside the point. The point is that it is not a determination that the juvenile court should be making in the first place, which is why the U.S. Supreme Court struck down the statute in *Troxel*. Simply because some person (whether relative, friend, or stranger, it matters not) has filed a complaint seeking custody of a child should not give the juvenile court (*i.e.*, the State) the authority to replace the parents as the exclusive decision-makers concerning their child.

Further, the question also arises whether a parent, who is “any person,” can also file a petition to force a legal stranger, to “visit” with that parent’s child because the parent believes it to be in the child’s best interest to maintain a relationship with the legal stranger irrespective of that legal stranger’s wishes. As such, this Mother asks this Court to reconsider its decision so that appropriate limits can be established in the interpretation and application of this statute and rule.

IV. This Court’s decision in *Harrold v. Collier* compels the Court to establish constitutional limits and strictures; failing to do so summarily renders irrelevant whole sections of the Ohio Revised Code.

As this court referenced, this is not the first time this Court has been confronted with a constitutional challenge to a nonparent visitation statute. In *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, 836 N.E.2d 1165, the Court rejected a parent’s as-applied constitutional challenge to R.C. 3109.11 and R.C. 3109.12, Ohio’s nonparent-visitation statutes. These statutes narrowly limit the right of grandparents or other nonparent family members to petition for visitation in specific circumstances when a parent is deceased (R.C. 3109.11) or when a child is born to an unwed mother and a legally acknowledged father (R.C. 3109.12). These limiting factors alone render the statutes substantially different from the “breathhtakingly broad” statute at issue in *Troxel*, and the statute and rule at issue in this case.

Moreover, because the nonparent visitation statutes in *Harrold* both incorporate by reference R.C. 3109.051(D), the court is required to examine certain specified factors in

determining whether visitation is in the child's best interests. Among the factors the court is required to consider is the "wishes and concerns of the child's parent's, as expressed by them to the court."²³ Again, unlike these statutes, the statute and rule at issue in this case imposes no similar requirement on the juvenile court to consider the "wishes and concerns" of the parent, let alone to accord them "special weight" as required under *Troxel*. Further, even though the statutes imposed no requirement on the court to accord special weight to the parents' wishes and concerns, the Court authoritatively construed the statutes to impose this requirement on Ohio courts. *Id.* at 12.

Finally, in evaluating whether the juvenile court had applied the proper standard in deference to the parent's constitutional rights, the *Harrold* Court noted that the juvenile court had in fact specifically weighed the father's opposition to visitation, as the statute required it to do and, before determining that it was in the child's best interest to grant the motion for grandparent visitation, had given due deference to the father's wishes and concerns. *Id.* at 45.

Without limits, any person will opt to file a petition under R.C. 2151.23(A) rather than R.C. 3109.11 or *any and all other statutes* because all he/she needs to assert is that visitation will be in the "child's best interest." As a result, entire sections of the Ohio Revised Code that heretofore have governed familial relationships will be irrelevant because R.C. 2151.23 in conjunction with Juv. R. 13 provides the catch-all that authorizes any and all persons who wish to maintain a relationship with a child standing in order to seek visitation and/or custody as long the court believes it is in the "child's best interest." Accordingly, the Mother respectfully asks this Court to reconsider its decision.

²³ R.C. 3109.051(D)(15)

CONCLUSION

For the foregoing reasons, Ms. Smith respectfully asks this Court to reconsider its decision.

Respectfully submitted,



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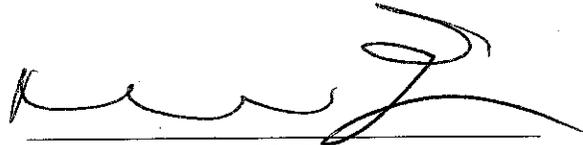
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Reconsideration was served by regular U.S. mail, postage prepaid, this 5th day of October, 2012, upon the following counsel of record:

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[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Rowell v. Smith*, Slip Opinion No. 2012-Ohio-4313.]

NOTICE

This slip opinion is subject to formal revision before it is published in an advance sheet of the Ohio Official Reports. Readers are requested to promptly notify the Reporter of Decisions, Supreme Court of Ohio, 65 South Front Street, Columbus, Ohio 43215, of any typographical or other formal errors in the opinion, in order that corrections may be made before the opinion is published.

SLIP OPINION NO. 2012-OHIO-4313

ROWELL, APPELLANT, v. SMITH, APPELLEE.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Rowell v. Smith*, Slip Opinion No. 2012-Ohio-4313.]

In exercising its jurisdiction under R.C. 2151.23(A)(2), a juvenile court may issue temporary visitation orders that are in the best interest of the minor child during the litigation—Juv.R. 13(B)(1).

(No. 2011-1053—Submitted May 8, 2012—Decided September 26, 2012.)

Appeal from the Court of Appeals for Franklin County,

Nos. 10AP-675 and 10AP-708, 2011-Ohio-2809.

SYLLABUS OF THE COURT

In exercising its jurisdiction under R.C. 2151.23(A)(2), a juvenile court may issue temporary visitation orders that are in the best interest of the minor child during the litigation. Juv.R. 13(B)(1).

LUNDBERG STRATTON, J.

{¶ 1} We must determine whether a juvenile court may issue temporary visitation orders in a pending case for custody under R.C. 2151.23(A)(2) between

SUPREME COURT OF OHIO

a parent and nonparent. For the reasons that follow, we hold that in exercising its jurisdiction under R.C. 2151.23(A)(2), a juvenile court may issue temporary visitation orders that are in the best interest of the minor child during the litigation.

{¶ 2} Consequently, we reverse the judgment of the court of appeals and reinstate the trial court's orders of June 30, 2010, and July 27, 2010.

Facts and Procedural History

{¶ 3} On September 9, 2003, appellee, Julie Ann Smith, gave birth to a daughter as the result of artificial insemination with sperm from an unknown donor. At the time, Smith was involved in a relationship with appellant, Julie Rose Rowell. Several years later, when Smith and Rowell's relationship ended, Rowell filed a petition in juvenile court pursuant to R.C. 2151.23(A)(2) seeking an order for shared custody of the minor child and simultaneously requesting a temporary order granting her companionship time with the child.

{¶ 4} A magistrate issued a temporary order granting Rowell and Smith shared custody of the child. Smith moved to set aside the order. On January 15, 2009, the juvenile court granted Smith's motion to set aside the magistrate's temporary order, but issued another temporary order that again granted Rowell and Smith shared custody. On January 26, 2009, the court modified its previous order per Civ.R. 60(A) and issued another temporary order, this time designating Smith as the child's legal custodian and residential parent and granting Rowell visitation rights.

{¶ 5} Soon thereafter, Rowell filed a motion for contempt for Smith's failure to comply with the court's orders. Smith opposed Rowell's motion, arguing that the court had not had jurisdiction to award visitation rights to Rowell, so it also did not have the power to enforce the visitation order through contempt. On June 23, 2009, the trial court issued a decision and judgment entry finding Smith in contempt of its order of January 26, 2009. The court held that it had

authority to issue temporary orders under Juv.R. 13(B)(1) and Loc.R. 5(D) of the Court of Common Pleas of Franklin County, Juvenile Division, allowing nonparent visitation and that Smith had violated the January 26, 2009 order and was in contempt. Smith filed a notice of appeal.

{¶ 6} The court of appeals reversed the finding of contempt, holding that the juvenile court had improperly used Civ.R. 60(A) to make a substantive change to the January 26, 2009 order on which the contempt finding was based. 186 Ohio App.3d 717, 2010-Ohio-260, 930 N.E.2d 360.

{¶ 7} On February 18, 2010, a magistrate again issued an order that designated Smith as the child's temporary custodian and granted Rowell temporary visitation. When Smith failed to comply with the February 18 order, Rowell filed another motion for an order finding Smith in contempt. On March 22, 2010, a magistrate found Smith guilty of contempt and sentenced her to three days in jail, suspending the sentence if within 30 days of the order, Smith purged herself of contempt by allowing visitation and paying Rowell \$2,500 for attorney fees and costs associated with prosecuting the motion for contempt. Rowell failed to comply with the order giving her the terms of the opportunity to purge the contempt, and on June 28, 2010, Rowell moved for enforcement of the March 22 order. Smith filed objections to the magistrate's March 22 decision.

{¶ 8} On June 30, 2010, the trial court overruled Smith's objections to the magistrate's decision and issued a decision and judgment entry of contempt. Smith appealed this decision to the Franklin County Court of Appeals in case No. 10AP-675.

{¶ 9} Initially, the court of appeals stayed the trial court's imposition of the three-day jail sentence pending appeal, but in doing so, it stated: "The trial court orders in regard to visitation with the minor child are not stayed by virtue of this entry. This court will revisit the matter of this stay in the event [Smith] continues to violate orders of court." Smith continued to disobey the court's

order, so the appellate court released its stay and directed Rowell to apply to the trial court for enforcement orders.

{¶ 10} On July 27, 2010, the court granted Rowell's motion to enforce the contempt order. Smith appealed this decision to the Franklin County Court of Appeals in case No. 10AP-708.

{¶ 11} The court of appeals consolidated the appeals and stayed the trial court's orders pending the outcome of the appeal. In a split decision, the court of appeals held that the juvenile court lacked authority to order visitation in an R.C. 2151.23(A)(2) custody case; thus, the court held, the underlying temporary order of February 18, 2010, was invalid and Smith could not be in contempt of an invalid order. The appellate court reversed the judgments and remanded the cause for further proceedings.

{¶ 12} The cause is before this court upon our acceptance of a discretionary appeal. 130 Ohio St.3d 1415, 2011-Ohio-5605, 956 N.E.2d 308.

Analysis

{¶ 13} A juvenile court may exercise jurisdiction only if expressly granted the authority to do so by statute. *See* Ohio Constitution, Article IV, Section 4(B); R.C. 2301.03(A); *In re Gibson*, 61 Ohio St.3d 168, 172, 573 N.E.2d 1074 (1991). The term "jurisdiction" encompasses both subject-matter jurisdiction, i.e., the court's power to adjudicate the merits of a case, and the exercise of that jurisdiction. "Once a tribunal has jurisdiction over both the subject matter of an action and the parties to it, " * * * the right to hear and determine is perfect; and the decision of every question thereafter arising is but the exercise of the jurisdiction thus conferred * * * ." *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992, ¶ 12, quoting *State ex rel. Pizza v. Rayford*, 62 Ohio St.3d 382, 384, 582 N.E.2d 992 (1992), quoting *Sheldon's Lessee v. Newton*, 3 Ohio St. 494, 499 (1854).

{¶ 14} In this case, Rowell filed her petition for shared custody under R.C. 2151.23(A)(2), which grants juvenile courts exclusive original jurisdiction “to determine the custody of any child not a ward of another court of this state.” This includes “custodial claims brought by the persons considered nonparents at law.” *In re Bonfield*, 97 Ohio St.3d 387, 2002-Ohio-6660, 780 N.E.2d 241, ¶ 43. Having acquired subject-matter jurisdiction, the juvenile court then issued temporary orders to permit visitation between Rowell and the minor child who is the subject of the complaint while the case was pending, citing as authority Juv.R. 13(B)(1) and Loc.R. 5(D) of the Court of Common Pleas of Franklin County, Juvenile Division.¹ Under Juv.R. 13(B)(1), a “judge or magistrate may 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.”

{¶ 15} On appeal to the court of appeals, Smith argued that a court must have statutory authority to act and that R.C. 2151.23(A)(2) confers jurisdiction to determine only custody but does not authorize a court to grant visitation rights. Smith cited *In re Gibson*, 61 Ohio St.3d 168, 573 N.E.2d 1074, in support of this argument. Thus, according to Smith, the juvenile court lacked authority to issue the underlying order for visitation. The court of appeals agreed and reversed the order of contempt.

{¶ 16} *In re Gibson* involved a grandparent who filed a complaint seeking visitation rights with a grandchild who was in the custody of his parents. The grandparent alleged that R.C. 2151.23(A)(2), among other statutes, conferred jurisdiction upon the juvenile court to award visitation rights because custody

¹ Loc.R. 5(D) of the Court of Common Pleas of Franklin County, Juvenile Division, provides that “[t]he Judge or Magistrate may require motions for temporary orders to be submitted and determined without oral hearing upon affidavits in support or opposition.”

includes visitation. But his complaint did not seek an order of custody under R.C. 2151.23(A)(2).

{¶ 17} The court in *Gibson* reasoned that custody and visitation, although related, are two distinct legal concepts. “In asking for visitation only, [the grandfather] was not asking the juvenile court to determine or award him ‘custody.’” *Id.* at 171. Thus, we held that a complaint for custody filed under R.C. 2151.23(A)(2) does not confer jurisdiction on the juvenile court to determine “[t]he complaint of a grandparent *seeking only visitation* with a grandchild.” (Emphasis added.) *Id.* at syllabus. The court expressly reserved its opinion regarding a juvenile court’s authority to order visitation when ruling on a complaint seeking a determination of custody—exactly the situation here. *Id.* at 172, fn. 3. Thus, *Gibson* is inapposite.

{¶ 18} The dissenting judge in the court of appeals in this case found persuasive an opinion by the Eighth District Court of Appeals that affirmed a juvenile court’s order granting temporary visitation rights under circumstances similar to the facts in this case. In the Eighth District case, Rita Goodman sought custody of and/or companionship rights with two children after her long-time relationship with the children’s biological mother ended. *In re LaPiana*, 8th Dist. Nos. 93691 and 93692, 2010-Ohio-3606. The court reasoned that per *In re Bonfield*, Goodman had a legal right to seek shared custody under R.C. 2151.23 and that in such cases, it is the responsibility of the court to act in the best interest of the child. *Id.*, ¶ 20-21. Thus, the court concluded, the juvenile court had jurisdiction to determine not only the issue of custody of the children but also whether it was in the children’s best interest to have companionship with the nonparent. *Id.*, ¶ 27.²

² The *LaPiana* court also relied, in part, on our dismissal of a petition for a writ of prohibition in *State ex rel. Smith v. Gill*, 125 Ohio St.3d 1459, 2010-Ohio-2753, 928 N.E.2d 735. In that case, Smith alleged that the juvenile court patently and unambiguously lacked jurisdiction to issue the

{¶ 19} Here, the juvenile court relied on Juv.R. 13(B)(1) in granting Rowell visitation rights with the minor who was the subject of the pending R.C. 2151.23 custody case. Construing the juvenile rules liberally, as we must, *see* Juv.R. 1(B), we hold that a juvenile court may issue temporary visitation orders in cases within its jurisdiction under R.C. 2151.23 if it is in the child's best interest.

{¶ 20} Smith contends that this interpretation of the Rules of Juvenile Procedure violates her fundamental rights as a parent, which are protected by the United States Constitution. In support of this argument, Smith cites *Troxel v. Granville*, 530 U.S. 57, 66-67, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (plurality opinion) (parents have a fundamental right to make decisions concerning the care, custody, and control of their children that is protected from government interference by the Due Process Clause of the Fourteenth Amendment to the United States Constitution). According to Smith, a court may not grant visitation rights to a nonparent under R.C. 2151.23(A)(2), even temporarily, until the issue of custody is determined; otherwise, the order is an infringement on the parent's fundamental rights.

{¶ 21} We discussed *Troxel* within the realm of Ohio's nonparental-visitation statutes in *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, 836 N.E.2d 1165. We acknowledged that *Troxel* states that there is "a presumption that fit parents act in the best interest of their children." *Id.* at ¶ 44. But that presumption is not irrebuttable. "Moreover, nothing in *Troxel* suggests that a parent's wishes should be placed before a child's best interest." *Id.*

{¶ 22} Here, the juvenile court had subject-matter jurisdiction over the case under R.C. 2151.23, it afforded Smith the opportunity to be heard on the issue of visitation, and it had discretion under Juv.R. 13(B) to issue a temporary

orders of visitation between Rowell and the minor child. The Eighth District reasoned that our dismissal indicated that the Franklin County Juvenile court had jurisdiction; otherwise we would have granted the writ. *LaPiana*, ¶ 26.

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visitation order, so long as it was in the child's best interest. Within these parameters, we find that the court had authority to grant the temporary order and that the temporary order did not violate Smith's fundamental rights.

{¶ 23} Smith argues that if we reverse the appellate court, we are interpreting the law as giving juvenile courts summary power and unfettered discretion to grant visitation to a nonrelative. We disagree. The court's actions must be in the child's best interest. Moreover, Smith's interpretation of the law is illogical. Under her interpretation, the General Assembly granted authority for juvenile courts to determine the custody of a child but cannot determine whether a party to the custody action can visit with the child while the action is pending.

{¶ 24} Smith also emphasizes that she never intended to share custody with Rowell, but that is a question at issue in the custody case that does not need to be answered for purposes of our opinion today.

{¶ 25} In addition, Smith contends that Juv.R. 13(B) did not authorize the visitation order, because Juv.R. 1(C)(4) states that the Rules of Juvenile Procedure do not apply to "proceedings to determine parent-child relationship." But the underlying claim involves a matter of shared custody, not a matter of parentage. Thus, the exception in Juv.R. 1(C) for proceedings to determine parent-child relationships, does not apply here.

Conclusion

{¶ 26} Consequently, we hold that in exercising its jurisdiction under R.C. 2151.23(A)(2), a juvenile court may issue temporary visitation orders that are in the best interest of the minor child during the litigation.

{¶ 27} Accordingly, we reverse the judgment of the court of appeals and reinstate the trial court's orders of June 30, 2010, and July 27, 2010.

Judgment reversed.

O'CONNOR, C.J., and PFEIFER, LANZINGER, and MCGEE BROWN, JJ.,
concur.

O'DONNELL and CUPP, JJ., dissent.

MCGEE BROWN, J., concurring.

{¶ 28} I concur in the majority's reversal of the court of appeals' judgment and its reinstatement of the trial court's June 30, 2010 contempt order and July 27, 2010 order enforcing contempt. However, I write separately because I would order appellee, Julie Ann Smith, to appear and show cause why she should not be held in contempt for her blatant refusal to comply with this court's July 7, 2011 order.

{¶ 29} Smith has effectively denied Rowell contact with the minor child for three years. She has not followed any of the visitation orders that have been issued and has appealed every contempt sanction, resulting in delay and continued denial of visitation. Even this court's July 7, 2011 order reinstating temporary visitation orders pending the resolution of Rowell's appeal before this court was ignored.

{¶ 30} Punishment for contempt may be appropriate when a party is found guilty of "[d]isobedience of, or resistance to, a lawful writ, process, order, rule, judgment, or command of a court or officer." R.C. 2705.02(A). A contemptuous act "brings the administration of justice into disrespect" and "obstruct[s] a court in the performance of its functions." *Windham Bank v. Tomaszczyk*, 27 Ohio St.2d 55, 271 N.E.2d 815 (1971), at paragraph one of the syllabus. "Fundamentally, the law of contempt is intended to uphold and ensure the effective administration of justice. Of equal importance is the need to secure the dignity of the court and to affirm the supremacy of law. For these reasons, a court's order must be obeyed." *Cramer v. Petrie*, 70 Ohio St.3d 131, 133, 637 N.E.2d 882 (1994). It is our duty to ensure that the whims of the individual ultimately bend to the law, rather than allowing the law to bend to the whims of the individual. *Id.* at fn. 1.

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Accordingly, a party must not be permitted to ignore a court's order, even when she disagrees with it.

{¶ 31} Smith was instructed to allow Rowell to exercise visitation with the child in orders that came from the trial court, the court of appeals, and this court. Because she believes herself to be the best authority on the legal validity of temporary visitation orders, Smith has thumbed her nose at every level of court in this state, for more than three years.

{¶ 32} Smith first began to flout court-ordered visitation in January 2009 by reducing Rowell's visitation with the child. The trial court found Smith in contempt in June 2009 and ordered Smith to serve three days in jail, but suspended the sentence on the condition that Smith purge the contempt by obeying the visitation order. Soon after the trial court's June 2009 judgment, Smith refused to allow Rowell to have any visitation with the child. After a subsequent temporary visitation order was issued in February 2010, Smith continued to refuse to allow any contact between Rowell and the child. During a March 2010 contempt hearing, Smith admitted under oath that she had not complied with the terms of the visitation order in any respect, that she had no intention of following the order, and that she was fully aware of the possible sanctions for contempt. The trial court found Smith in contempt in June 2010, and ordered Smith to serve three days in jail, but again suspended the sentence on the condition that Smith purge the contempt by paying Rowell's attorney fees and allowing visitation. Smith continued to deny visitation, and in July 2010, the trial court granted Rowell's motion to enforce the court's contempt order.

{¶ 33} Although the Tenth District Court of Appeals stayed the contempt order while Smith's appeal was pending, it ordered Smith to comply with the February 2010 temporary visitation order. Once again, Smith refused to comply. In light of Smith's contumacious behavior, the appellate court vacated its partial

stay in September 2010 and instructed Rowell to apply to the trial court for enforcement orders.

{¶ 34} When the matter came before this court on appeal, we granted Rowell's motion to stay the decision of the Tenth District Court of Appeals and reinstated the trial court's temporary visitation orders. Notwithstanding the order from this court, Smith refused to comply.

{¶ 35} Smith has blatantly disregarded the trial court's authority, the appellate court's authority, and this court's authority, and has shown immense disrespect toward the judicial proceedings. Her disdain for the authority of Ohio's courts is particularly egregious since Smith herself is an attorney. Smith's actions could even be cause for disciplinary action. *See, e.g., Stark Cty. Bar Assn. v. Ake*, 111 Ohio St.3d 266, 2006-Ohio-5704, 855 N.E.2d 1206 (attorney was found to have committed professional misconduct by repeatedly and deliberately ignoring a domestic court's orders in divorce proceedings in which the attorney was a party); *Disciplinary Counsel v. Hiltbrand*, 110 Ohio St.3d 214, 2006-Ohio-4250, 852 N.E.2d 733, ¶ 10 and 11 (attorney was found to have committed professional misconduct by violating a court order in a civil lawsuit in which she was a party).

{¶ 36} The fact that Smith has so far been able to brazenly and continuously defy court orders with impunity sends a dangerous message to Ohio's domestic-relations litigants. Beyond harming the integrity of the courts, Smith's actions have also harmed her child. From her birth in 2003 until 2009, the child had a relationship with Rowell. For three years, Smith has denied Rowell and the child visitation with each other. Although Smith has her reasons for not wanting to be involved with Rowell, the juvenile court found that it was in the child's best interest to have a relationship with Rowell. Smith's disregard of lawful court orders has done harm to this relationship.

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{¶ 37} The integrity of the courts and the enforcement of court orders are critical to our system of justice. For these reasons, I would issue a show-cause order compelling Smith to explain why she should not be held in contempt of this court's order.

PFEIFER, J., concurs in the foregoing opinion.

CUPP, J., dissenting.

{¶ 38} Respectfully, I dissent.

{¶ 39} This litigation arises from two trial court orders. In the first, the trial court found appellee, Julie Smith, to be in contempt of its temporary visitation order and sentenced her to three days in jail, suspending the sentence to allow Smith to purge herself of contempt. In the second order, the trial court found that Smith had failed to purge the contempt and ordered her to serve the three-day jail sentence. However, the behavior underlying the contempt finding and enforcement action has ceased. In February 2012, the trial court issued a judgment entry in which it awarded shared custody of the child to appellant, Julie Rowell, and Smith, along with a specific companionship schedule and other related terms. As of the time of oral argument, no appeal had been taken from this order and there are no allegations that Smith is presently violating the terms of the custody order. From all appearances, the custody arrangements for this child have stabilized. Consequently, this case is moot and there is no actual controversy pertaining to the contempt proceedings presented to this court in this appeal. I would dismiss this appeal as moot.

O'DONNELL, J., concurs in the foregoing opinion.

Massucci & Kline, L.L.C., and LeeAnn Massucci; and Carol Ann Fey, for appellant.

Gary J. Gottfried Co., L.P.A., Gary J. Gottfried, and Eric M. Brown, for appellee.

Einstein & Poling, L.L.C., and Dianne Einstein, urging affirmance for amici curiae, Marlin and Jennifer Herrick.
