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INTRODUCTION

On September 26, 2012, this Court issued its decision in this matter, holding that a juvenile court has authority pursuant to Juv.R. 13 to issue temporary visitation orders that are in the best interest of the minor child during the course of litigation initiated within the juvenile court's jurisdiction pursuant to R.C. 2151.23(A)(2). It is important to note that the scope of this appeal is very narrow, and is limited to the juvenile court's authority to manage cases during the pendency of litigation. The determination of the underlying custody dispute on the merits was decided by the juvenile court on August 27, 2012, and is now the subject of Appellee's appeal to the Tenth District Court of Appeals in Case No. 12AP-000802.

For the reasons set forth in this memorandum, the Appellant, Julie Rose Rowell, respectfully urges this Court to deny Appellee Julie Ann Smith's Amended Motion for Reconsideration.

MEMORANDUM IN OPPOSITION TO RECONSIDERATION

In her Response to Appellant's Memorandum in Support of Jurisdiction, Appellee Smith argued that this appeal did not present a case of public or great general interest. Now that this Court has ruled against her, Appellant seeks in her Amended Motion for Reconsideration¹ to have this Court not only rethink its analysis on the issue upon which the Court accepted jurisdiction, but to go further, expand the issues that were accepted for appeal, and re-argue the expanded appeal. Had Appellee Smith desired to have the Court expand the issues for consideration on appeal, she might have filed a Motion to Reconsider the Court's acceptance of jurisdiction limited to Appellant's first assignment of error, but she did not do so. Her request to expand the scope of the appeal, now that the Court's decision has been issued, is another attempt to divert attention from the limited issue on which the Court did grant jurisdiction, in hopes of escaping the consequences of refusing, repeatedly, to comply with court orders.

¹ Counsel for Appellee Smith filed a Motion for Reconsideration on October 5, 2012, then on October 9, 2012, filed a Notice of Appearance and Amended Motion for Reconsideration. A comparison of the Motion and Amended Motion shows that they are substantially equivalent; we have concluded that the Amended Motion for Reconsideration may have been filed to enable Attorney Einstein to file her Notice of Appearance before the first pleading she filed in the appeal on behalf of Appellee Smith, as required by S.Ct. Prac. R. 1.1(B), possibly out of concern that the first Motion for Reconsideration might have been stricken for failure to comply with that rule. See S.Ct. Prac.R. 1.1(C).

Notably, although Attorney Einstein now represents Appellee Smith, she formerly appeared along with David R. Langdon and Bradley M. Peppo as Counsel for Amici Curiae Marlin and Jennifer Herrick in a brief they filed on February 16, 2012. That said, Attorney Einstein in her Notice of Appearance, Motion for Reconsideration, and Amended Motion for Reconsideration fails to serve Amici Curiae, although Mr. Langdon and Mr. Peppo have apparently not filed a Notice of Withdrawal. Attorney Einstein's cover no longer lists Amici Curiae at all, and doesn't clarify whether she continues to represent Amici Curiae in addition to Appellee Smith. For that matter, Appellee Smith's former counsel, Gary J. Gottfried and Eric M. Brown have also failed to withdraw, making it unclear in the record whether Attorney Einstein's Notice of Appearance is in substitution for or in addition to Ms. Smith's earlier counsel.

This Court's decision on the appeal was not made in error; rather, an examination of the Amended Motion for Reconsideration reveals that Appellee reargues positions previously taken and already considered by the Court, or initiates new arguments that are outside the scope of the issues accepted for appeal. Some of Appellee's arguments relate to earlier temporary orders, or other attempted contempt sanctions sought against Appellee, or even unsubstantiated claims she urged upon the Court when she earlier sought a Writ of Prohibition. Many of Appellee's arguments are simply not a part of this appeal.

Appellee bases her Amended Motion for Reconsideration on the premise that S.Ct. Prac.R 11.2 requires the Court to correct decisions that upon reflection are deemed to have been made in error, and suggests that reconsideration is appropriate in this case because the Court failed to consider an issue on this appeal when it should have been considered. Appellee claims that this Court failed to sufficiently consider Appellee's constitutional rights in reaching the Court's decision that a juvenile court has authority pursuant to Juvenile Rule 13 and R.C. 2151.23(A)(2) to issue temporary visitation orders that are in the best interest of the minor child.

On the contrary, in this Court's Slip Opinion at page 7, the Court acknowledged Appellee's constitutional claims, analyzed them, and disagreed with Appellee's argument. It is important to note that none of the authorities cited by Appellee, including *Troxel v. Granville* (2000), 530 U.S. 57, either in earlier pleadings or in her Amended Motion for Reconsideration, involve a mere temporary order of visitation issued by a juvenile court to an individual non-parent, much less a temporary order of visitation while a complaint for custody is pending. Also, the Ohio Constitution, Article IV, Section 4(B), specifically gives courts of common pleas original jurisdiction over all justiciable matters as may be provided by law (such as R.C. 2151.23(A)(2)). The authorities that Appellee has relied upon throughout this appeal either involve final orders of visitation or final orders of custody, and are inapposite to this case.

In addition, the Rules of Juvenile Procedure were adopted by the Supreme Court of Ohio pursuant to its constitutional authority under Article IV, Section 5(B). This Court's decision that the temporary order issued by the juvenile court in this case passes constitutional muster is considered, clear, and correct, and should not be reconsidered as Appellee requests. Appellee is simply not correct when she states at page 2 of her Amended Motion that this Court's interpretation of R.C. 2151.23(A)(2) coupled with Juv. R. 13(B) "would allow *any* person to petition for custody of *any* child at *any* time and be awarded that remedy without a trial on the merits...". The decision of this Court, and the facts of the dispute that raise the issue on this appeal, are limited to the relatively narrow situation in which a party first files a complaint for custody of a child, and in that context seeks to maintain contact and relationship with the child during the pendency of the litigation. This Court's decision simply confirms that juvenile courts may issue temporary orders during litigation that the court in its discretion deems to be in the best interest of the minor child; the court makes such orders only after considering affidavits filed by the parties for that purpose, or sworn testimony, as the court may determine.

Further, this Court's decision is not in conflict with Juv.R. 1(C), which states that the Rules of Juvenile Procedure do not apply in "proceedings to determine parent-child relationships." The only proceedings in Ohio in which a parent-child relationship may be determined are adoptions and parentage actions. The proceedings included within R.C. 2151.23 involve only custody and, although they assuredly may impact parents, they do not, and cannot, determine the legal relationship between any parent and his or her child. Certainly, a juvenile court's temporary award of limited visitation rights to a non-parent during the time period of litigation pending a determination of custody instituted pursuant to R.C. 2151.23(A)(2) does not "determine" the legal relationship between the minor child and her parent.

Appellant's assertion at page 2 of her Amended Motion for Reconsideration that "this Court has [referencing *In re Bonfield*, 97 Ohio St.3d 44, 2005-Ohio-5334] already acknowledged that a custody action initiated pursuant to R.C. 2151(A)(2) is an intrusive action intended to terminate a parent's rights" is intentionally misleading and blatantly false. Interestingly, in *Bonfield*, this Court rejected the parties' request for shared parenting, and then proceeded to analyze the parties' claim in what the court referred to as a broader custody context, not reliant on whether a party is a "parent".² More importantly for purposes of Appellee's Amended Motion for Reconsideration, even the underlying request for determination of shared custody is not before the court on this appeal. Rather, the only court action before the Court is the juvenile court's attempt to enforce its limited order of temporary visitation issued during and for the pendency of the litigation, and Appellee's request for reconsideration should be denied.

Appellee's description of "the rulings that gave rise to this appeal" as described at page 3 of her Amended Motion for Reconsideration describe and complain of rulings that are clearly and unambiguously *not* a part of this appeal. Further, contrary to Appellee's statement in that same paragraph, the Order at issue on this appeal most certainly *did not order* that Julie Rowell and Julie Smith would be "temporary shared custodians."³ This appeal results only from the

² The Court in *Bonfield* did recognize that a custody proceeding between a parent and a nonparent *may* "pose the possibility of terminating a parent's rights in favor of one who is not a parent", *Id.*, at 395; however, in the case at bar there is even in the underlying litigation no request to terminate Appellee's parenthood or custody, but rather a request to establish shared custody between the parties pursuant to Appellee's voluntary participation in and encouragement of the parties' mutual course of conduct, sharing responsibilities for the minor child over a period of several years prior to the litigation, thereby establishing a relinquishment of sole custody as contemplated within *In re Perales* (1977) 52 Ohio St.2d 89, *Masitto v. Masitto* (1986), 22 Ohio St.3d 63, and similar cases.

³ Whether a juvenile court has authority to issue a temporary order of shared custody is currently at issue before the Tenth District Court of Appeals in *Warnes v. Cipriani*, (12AP-450). In response to the decision below that a juvenile court could not order temporary visitation, the juvenile court instead awarded temporary shared custody, finding that method of continuing the children's relationship with both parties during litigation to be in the children's best interest.

contempt and enforcement actions that resulted from Appellee's non-compliance with the fourth temporary order issued by the Court on February 18, 2010, sixteen months after the complaint for shared custody was filed. In this fourth temporary order, the magistrate designated Appellee Smith as the sole temporary custodian and awarded Appellant Rowell temporary visitation rights with the minor child. This fourth temporary order was issued well after the initial action was filed, and indeed after Ms. Smith's violation of and appeal of sanctions resulting from three prior temporary orders issued by the court. It is obviously not appropriate to reconsider this Court's ruling in order to address Appellee Smith's concerns regarding earlier court orders that simply are not a part of the appeal presently before the Court.

At page 9 of her Amended Motion for Reconsideration, Appellee Smith draws attention to her 2010 Writ of Prohibition, *State of Ohio ex rel Smith v. Gill* (2010), Case No. 2010-0679, and raises unsubstantiated claims that she made in that proceeding and that have no legitimate place in this appeal. Not only is that Writ and the facts alleged therein by Ms. Smith not a part of this appeal, but this Court on June 23, 2010, dismissed the Writ.

The balance of Appellee Smith's Amended Motion for Reconsideration either urges arguments inapplicable to a temporary order of visitation as opposed to a permanent outcome, or reargues points of law that she has already strenuously argued in the course of this appeal. None presents a compelling reason for this Court to reconsider its current decision. Rather, now that Appellee Smith is appealing the trial court's final award of shared custody to Appellant Rowell, Appellee Smith will undoubtedly find places to reargue these issues as her appeal from that decision proceeds through the appeals process and, perhaps, even reaches this Court.

Appellee Smith's representation at page 4 of her Amended Motion for Reconsideration that she complied with various temporary orders of the juvenile court for nearly 280 days is not only patently false, it is also irrelevant to the issue in this appeal. First of all, the only time

period relevant to Appellee Smith's compliance with temporary orders or lack thereof is as to her compliance with the fourth temporary order. As for that temporary order, as was noted by Justice McGee Brown in her concurrence, during the contempt hearing in March 2010 (that resulted in the enforcement hearing leading to this appeal), "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." Slip Opinion at 16. Indeed, Justice Brown, in recognition that Appellee Smith is an attorney licensed in Ohio and an officer of the court, indicated that she would have gone further than the majority and required Appellee 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." Slip Opinion, at 9.

Further, the "Formal Apology of Julie A. Smith" submitted at page ii of Appellee's Amended Motion for Reconsideration simply must be addressed. Ms. Smith's "sincerest apologies" cannot be seen as anything other than a "Hail Mary" pass, offered with the hope that it may mitigate the Court's characterization of her behavior in its current decision, and perhaps assuage the criticism aimed at her especially in Justice Brown's concurrence. We note what the apology is not. It is not an apology to Ms. Rowell, who has had to bear the misery of extended deprivation of contact with the child she'd raised since birth, even though the trial court issued orders that she have regular time with the child. The "apology" makes no acknowledgment of the impact of her behavior on her own child, who was placed in a more contentious, confusing, and eventually, psychologically damaging situation as the result of Ms. Smith's actions. Ms. Smith's "apology" is limited to this Court; she makes no attempt to express regret to the Judge and Magistrates who were forced to expend significant judicial resources in repeated, failed attempts to secure Ms. Smith's compliance with their orders. Ms. Smith has not even proffered payment of the relatively small amount of attorney fees ordered for her contempt and that remain

unpaid – attorney fees that now pale in comparison to the actual fees and expenses involved in attempting to secure Ms. Smith’s compliance in the court system that she repeatedly and consistently defied.

All in all, Ms. Smith’s “apology” can be viewed fairly as an offensive, too-little-too-late attempt to dodge this Court’s critique of her contumacious behavior, now that she may finally be starting to come to grips with the possibility that her choices may bear poisonous fruit, and that her behavior in flagrant and intentional violation of court orders may have real consequences.

From the standpoint of those of us who have participated professionally in experiencing and attempting to deal with Ms. Smith’s disrespect for the court and all of us associated with it, Ms. Smith’s “apology” can only be considered offensive at the very best. We believe that this Court should strike the apology, sua sponte.

To be frank, by her filing of this very request for reconsideration, Smith continues to disrespect this Court, complaining now that this Court erred by not accepting jurisdiction over broader issues, and has not properly considered the constitutional implications of her position. It should come as no surprise to this Court that other litigants, similarly situated to Appellee Smith, have followed her lead and are themselves flagrantly disobeying temporary orders of the juvenile court. See, for example, *Warnes v. Cipriani*, currently on appeal to the Tenth District Court of Appeals (12AP-450) and awaiting that court’s decision. The defendant in that case, Ms. Cipriani, is now permitting visitation only after the issuance of this Court’s decision in the case at bar, and only as the result of an agreed court order by which the trial court maintains a calendar of bi-weekly hearing opportunities to press the contempt motion in the event that her cooperation lapses. *Warnes v. Cipriani*, Franklin County Juvenile Court No. 11JU-11919.

In the humble opinion of undersigned counsel, this kind of disregard of temporary court orders in the midst of custody disputes in juvenile courts between parents and non-parents will continue and likely even expand until and unless someone like Attorney Smith is eventually sanctioned in a meaningful and public way for, as Justice Brown phrased it in her concurrence, “brazenly and continuously” defying court orders. For Appellee Smith to so publicly defy court orders, as an attorney and officer of the court, advertised to litigants throughout the State of Ohio that she believed she could act as she pleased, and could escape meaningful sanction, even as to orders reinstated by the Supreme Court of Ohio.⁴

The disciplinary cases cited by Justice Brown demonstrate that an attorney who violates court orders risks disciplinary action. See, e.g., *Stark Cty. Bar Assn. v. Ake*, 111 Ohio St.3d 266, 2006-Ohio-5704, and *Disciplinary Counsel v. Hiltbrand*, 110 Ohio St. 3d 214, 2006 -Ohio-4250. Interestingly, in *Ake*, the attorney received disciplinary sanctions even though the attorney eventually paid the financial obligation he’d refused to pay and the Judge purged the criminal contempt sanctions as part of the overall settlement of his litigation. Mr. Ake’s law license was suspended for six months, stayed on condition that he commit no further acts of professional misconduct. In *Hiltbrand*, the attorney’s conduct was characterized as “prejudicial to the administration of justice”, and determined to adversely reflect on the lawyer’s fitness to practice law, even though the acts that subjected Ms. Hiltbrand to discipline were not committed in the

⁴ The use of the term “advertise” is not a stretch, as Appellee Smith has throughout the litigation made her position very public. She appeared on talk shows, submitted letters to legislators and newspapers, and gave interviews. She made a tape of her daughter crying as she told her she would be going to jail, despite the Judge’s admonition that the child not be told, then provided that tape to Fox news to play on air. She even maintained a public website known as www.bringmaddiehome.com, in which she posted many of the court’s orders, and often celebrated her defiance of them. As of the writing of this Memorandum, that website remains online, although it appears that Ms. Smith has not fully updated the legal history on the site to reflect her loss at trial, or this Court’s ruling, or the decision issued by the Court of Appeals on the next contempt filed for new violations that occurred after this Court reinstated the trial court’s temporary visitation orders. See Tenth District Court of Appeals in *Rowell v. Smith*, 12AP-262, issued October 9, 2012.

context of her representation of a client. It is hard to see Ms. Smith's actions in defiance of the several orders issued by the juvenile court, much less in response to the order specifically reinstated by the Supreme Court of Ohio, as substantively different from the acts of the attorneys sanctioned in those two cases.

We cannot yet know whether Ms. Smith will ever actually serve a day in court for her refusal to follow court orders, but we do know that she hasn't done so yet, and she hasn't paid a dime of the \$5,000.00 in attorney fees ordered so far - \$2,500.00 for this contempt and another \$2,500.00 for the contempt just upheld by the Court of Appeals. We know that Ms. Smith has managed to tangle up the juvenile court over a period of more than three years, permitting time between Appellant and the minor child only when and to the extent that she elected, and honestly, only when her feet were held to the proverbial fire on the way to the jailhouse door. Finally, once the juvenile court ruled on the merits in favor of Appellant Rowell following a sixteen-day trial on the merits and more than three years after the filing of the complaint, Ms. Smith began her current course of compliance, a fact that she now touts in her apology as if somehow it balances out all of her behavior over the prior three years.

During the three years of litigation, she caused the legal expense of the Appellant to skyrocket far beyond even the usual expense of custody litigation⁵, diverted the resources of counsel and our courts to repeatedly address her noncompliance, and significantly delayed the onset of the eventual trial. When Ms. Smith testified at the hearing on the motion for contempt, she testified that she understood the consequences of her refusal to comply with court orders. She specifically testified that she understood the possible consequences to her even as a licensed attorney at law, and advised the court that she would accept those risks.

⁵ Meanwhile, Attorney Smith, although also certainly expending substantial resources in attorney fees, was able to help manage the extent of her fees by preparing much of the legal work on her own behalf, to be presented over the signature of her formal attorneys.

So far, however, Ms. Smith has experienced no actual negative consequences. Not a day in jail, not a pending complaint against her law license that we know of. Today, Ms. Smith continues to stand up to this Court, still to this very day asking this Court to reconsider its decision against her, claiming still the legal right to violate every temporary order of court ever issued in this case. If Ms. Smith can behave this way as an attorney without real and immediate consequence, certainly non-attorneys can only interpret this as a license to do as they choose, regardless of orders issued in an attempt to manage the behaviors of the parties and to protect the best interest of children during the course of litigation. If our courtrooms are to function as intended, the blatant disregard of temporary court orders cannot be tolerated during litigation, regardless of the parties' hopes as to the eventual outcome of the dispute.

CONCLUSION

We respectfully request that this Court deny Appellee Smith's Amended Motion for Reconsideration, and further respectfully ask that the Court give further consideration to initiating an Order to Show Cause or other significant sanctions upon Ms. Smith, as an attorney at law, for her refusal to comply even with this Court's own order reinstating the trial court's temporary visitation orders.

Respectfully submitted,



Carol Ann Fey (22876) (Counsel of Record)
Attorney & Counselor at Law
PO Box 9124
Bexley, Ohio 432099

LeeAnn M. Massucci (75916)
Massucci & Kline LLC
250 Civic Center Drive, Suite 630
Columbus, Ohio 43215
Counsel for Appellant Julie Rose Rowell

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Memorandum Opposing Amended Motion for Reconsideration was sent by ordinary U.S. mail to counsel for Appellee Dianne Einstein, 5940 Wilcox Place, Suite F, Dublin, Ohio 43016, 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 October 19, 2012.



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