ORIGINAL

IN THE SUPREME COURT OF OHIO

JULIE R. ROWELL	:	Case No. 12-1904
Petitioner- Appellee,	:	Appeal from the Franklin County Court of Appeals, Tenth Appellate District
v.	:	
JULIE A. SMITH	:	Court of Appeals Case No. 12-AP-262
Respondent-Appellant.	:	

APPELLANT, JULIE SMITH'S MEMORANDUM IN SUPPORT OF JURISDICTION

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THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND HAS BECOME A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This case presents a long and protracted procedural history. This appeal, however, arises out of rulings that, if permitted to stand, have effectively destroyed the primacy of parental rights in the state of Ohio. Specifically, the law of the case of *Rowell v. Smith* allows *any* person to challenge the exclusive custodial rights of *any* fit parent at *any* time. That fit parent is then forced to not only defend her exclusive rights in costly litigation initiated by any and all third parties, but may also be forced to "temporarily[1]" surrender her children, over an unrelenting objection, during months or even years of pending litigation. In Ohio, as it stands today, a juvenile court judge may supplant a fit parent's judgment and make childrearing decisions, including but not limited to, with whom and to what extent that fit parent's child may associate, simply because the judge believes a "better" decision could be made. In this case, a juvenile judge made parenting decisions based solely on sworn but false affidavits submitted by Appellee, a legal stranger, with every motivation to mislead the court in order to obtain "temporary" orders of visitation and/or custody, and no consequences for such false statements and/or the harm caused to both the child and her mother.

In addition, even though there is no express statutory authority or defined limits to this judicial intrusion, *Rowell v. Smith* also stands for the proposition that a fit parent may not question such an infringement or challenge the "temporary" loss of her child because a temporary order of custody or visitation is not a final appealable order[2]. Further, in such actions, even though requested, a fit parent is not entitled to findings of facts and conclusions of law with

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[1] This case was initiated by a legal stranger to Appellant's child over 4 years ago and as a result of these rulings, Appellant, the sole parent of the child has been judicially forced to surrender her child to the legal stranger for more than the daily equivalent of one full year, before receiving a trial on the merits, and has spent hundreds of thousands of dollars in legal fees in an effort to reclaim her exclusive custodial rights.

[2] See *Rowell vs. Smith,* 10th Dis. No. 09AP-147, March 23, 2009, dismissed for lack of a final appealable order, Appendix B

regard to the trial court's rationale in ordering forced shared custody and/or visitation[3]. Moreover, a fit parent cannot seek immediate assistance or guidance from a court of higher authority.[4]

Rowell v. Smith also stands for the proposition that if a fit parent refuses to cede her fundamental, substantive parental rights and instead demands due process in order to protect her child, then the fit parent is subjected to the contempt process. And while the contempt process will afford the fit parent the *only* avenue in which to immediately challenge the intrusion upon her constitutional rights in the hopes of minimizing the damage to her child; upon a finding of contempt, the fit parent is then faced with the no-win situation of either purging the contempt by ceding her rights and her child, thereby rendering her appeal of the temporary orders moot, or preserve her appeal and protect her child in exchange for thirty (30) days in jail and financial sanctions[5]. This is an unconscionable result particularly when the U.S. Supreme Court has repeatedly recognized "the liberty interest of parents in the care, custody and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this court".[6] Further, this is a patently unlawful intrusion in light of the U.S. Supreme Court's finding "[i]t is cardinal with us that custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder...It is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter."[7]

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[3] *Magistrate Decision* March 16, 2010 and *Decision and Judgment Entry* June 30, 2010, Appendices C and D
[4] *See State of Ohio ex. Rel. Julie Smith vs. Elizabeth Gill et.al* 2010-0679, dismissed June 23, 2010 Appendix E
[5] See *Rowell vs. Smith,* 10th Dis. No 09AP-671, January 28, 2010 overturning first finding of contempt because interim visitation order invalid Appendix F; *Rowell vs. Smith, 2011-Ohio-2809, June 9, 2011,* second finding of contempt overturned because second interim visitation order invalid Appendix G and *Rowell v. Smith,* 2012-Ohio-4667.
[6] *Troxel v. Granville,* (2000) 530 U.S. 57
[7] *Prince v. Commonwealth of Massachusetts,* (1944) 321 U.S. 158.

This case is about a single mother, the sole legal parent of a minor child, who for her child's entire life, meticulously avoided taking any action that would even potentially jeopardize her constitutional right to the exclusive care, custody, and control of her daughter, to include refusing to enter into a voluntary shared custody contract. Nevertheless, a scorned ex-companion and legal stranger to the child challenged this mother's substantive rights in a never-before-imagined ***forced shared*** custody petition. The juvenile court not only agreed to hear the novel forced shared custody petition, but went even further in that the court repeatedly ordered the mother, during the pendency of the action, to yield her exclusive custodial rights to the ex-companion without explanation, ***before*** the court had made any finding as to the best interest of the child, the mother's suitability as a parent and/or whether the mother purposefully and permanently relinquished the right to the exclusive custody of her child[8]. Instead, through a series of extraordinary and unprecedented Orders, the juvenile court judicially imposed a shared custody and/or companionship arrangement on the mother, the precise remedy sought by the ex-companion, in just twenty one (21) days over the fit parent's unrelenting objection and without due process of law. Specifically, by judicial fiat, the court initially ordered the Mother and Appellee "temporary shared custodians of M.R.S."[9] 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.]". Mother has been fighting to have her rights restored ever since.

It is also concerning that the "temporary" custody orders were issued based upon sworn affidavits of the ex-companion and oral and written representations made by Appellee's counsel

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[8] See *Magistrate Order,* November 12, 2008 Appendix H; *Order and Modified Temporary Order, January 26, 2009,* Appendix I and *Magistrate's Order* February 18, 2010 Appendix J

[9] 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.

which were later proven to be false. In so doing, the trial court did not offer even a semblance of due process and instead disregarded long-held constitutional laws, procedures and principles that were designed to protect the paramount and basic rights of parents and as a result, has guaranteed future attacks on the fundamental rights of unsuspecting parents.

This all transpired notwithstanding the fact that parents have a fundamental right to autonomy in child-rearing decisions. The U.S. Supreme Court has long recognized parents' constitutionally protected interest to raise their children without state interference.[10] Where a fundamental right is involved, state interference is justified ***only*** if the state can show that it has a compelling interest and such interference is narrowly drawn to meet the compelling state interest involved.[11]

This Court has also addressed parental rights countless times and offers a long line of case law consistently recognizing that "the Constitutions of both United States and the state of Ohio afford parents a fundamental right to the custody of their children."[12] In *In re Hockstock,* this Court set forth the law that must be applied in cases involving custody disputes between a parent and non-parent as follows:

> the overriding principle in custody cases between a parent and non-parent is that the natural parents have a fundamental liberty interest in the care, custody, and management of their children. This interest is protected by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and by Section 16, Article I of the Ohio Constitution. Since parents have constitutional custodial rights, *any action that affects this parental right,* such as granting custody of a child to a nonparent, must be conducted pursuant to procedures that are fundamentally fair. Ohio courts have sought to effectuate the fundamental rights of parents by *severely limiting* the circumstances under which the state may deny parents the

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[10] *See Meyer vs. Nebraska* (1923), 262 U.S. 390, 399 (the liberty interest guaranteed by the Fourteenth Amendment includes freedom "to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children."); *Santosky v. Kramer* (1982), 455 U.S. 745, 753 ("historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment.").

[11] *Washington v. Glucksburg* (1997), 521 U.S. 702.

[12] *In Re Brayden James* (2007), 113 Ohio St.3d 420, *In re K.H et al.,* (2008) 119 Ohio St. 3d 538 and *In re Murray et al.* (1990), 52 Ohio St.3d 155, 157.

custody of their children.[13]

In addition, this Court has been unwilling to expand the definition of a "parent" to include same sex partners, which the trial court completely ignored in this case, thereby holding that same sex partners are *not* entitled to the same statutory protections, privileges, duties and responsibilities as natural parents.[14] In this case, however, the juvenile court refused to recognize the deference due fit parents and stripped this mother of her constitutional rights by declaring her to be nothing more than a temporary custodian of her own child while simultaneously elevating a third party stranger to the status of parent. The court then ordered the mother to *temporarily* forfeit her child for days and weeks at a time all to the benefit of the third party stranger. When this Mother refused to cede her child and constitutional rights without due process of law, she was repeatedly punished and publicly criticized for doing what arguably any fit natural parent would do – protect her child and defend her right to do so.

Despite the scorned ex-companion's repeated attempts to assassinate the character of this Mother and admonishing her behavior by calling for sanctions "in a meaningful and public way," this Mother respectfully maintains that her behavior, which Appellee characterizes as "reprehensible and contumacious," was behavior of the *absolute last resort* and indisputably consistent with her behavior throughout the child's entire life. This Mother adamantly refused to consent to a parental relationship between Appellee and the child during the parties' relationship (a fact that has yet to be disputed by any reliable, probative evidence) and, in the interest of consistency, stability, security and the best interest of her daughter, is refusing to acquiesce to such a relationship now. For nearly four years, this Mother endured ruling after ruling, which prioritized and elevated an *alleged* relationship with a third party, not yet proven or protected by law, over that of this Mother's constitutionally and statutorily-protected relationship with her

[13] *In re Hockstock,* 98 Ohio St.3d 238, 2002-Ohio-7208, 781 N.E.2d 971 at ¶¶16-17, (emphasis added).
[14] See *In Re Bonfield,* 97 Ohio St 3d 287 (2002) and *In re Mullen,* 129 Ohio St.3d 417, 2011-Ohio-3361.

daughter and all along, just as *any* mother would do, she refused to accept the same by exhausting *every* possible legal remedy available to her. This fit mother now faces thirty days in jail for defending her child, her fundamental rights and right to due process of law. No fit parent should ever be forced to go to such lengths, against all odds, to protect her child and maintain her constitutionally protected right to raise her child without state interference. In fact, the law and our constitutions demand the reverse -- a fit parent should enjoy the freedom and protection the law provides against intrusion at the behest of legal strangers.

Adherence to a rule of juvenile procedure, taken out of context, cannot be the compelling state interest permitting even a "temporary" intrusion of a parent's fundamental rights. Nor can the intrusion be excused as merely "temporary" when dealing with the irreparable consequences of diminishing a fit parent's role in the rearing of her child, much less for three and one half years. The alleged "best interest of the child" cannot be a sufficient standard to challenge a child-rearing decision of a fit parent.[15] To do so would bestow the role of "super parent" onto the court and permit it to ignore not only the wishes and desires of a fit parent but more importantly, centuries of law and protections the Constitutions of the United States and State of Ohio provide.

This very case illustrates the unconscionable destruction to the parent-child relationship that occurs when a court haphazardly but "temporarily" creates and imposes a "relationship" upon a family without due process of law. Temporary orders can actually *become* the status quo irrespective of the true nature of the parties' relationship because of the length of time it takes for these cases to maneuver through the judicial process. Once a court "temporarily" forces a shared custodial arrangement on a child of tender years, that same court, as in this case, will be more likely to favor continuing the relationship in the eventual custodial determination, counselor and *Guardian ad Litem* opinions notwithstanding, regardless of the true nature of the relationships

[15]See *Troxel v. Granville* (2000), 530 U.S. 57.

prior to the litigation because it is now the "status quo." This places parents, who are supposed to be the constitutionally-protected litigants entitled to complete deference, in the untenable position of having to overcome an insurmountable burden to now prove to ***that very same court*** that its judicially-imposed relationship is not in the best interest of that parent's child. Further, a child, this child in particular, has been deprived of the stability, consistent care and nurturing of her only parent, an indisputably fit parent, during the months and years of litigation.

This appeal is a matter of great public or general interest and in fact, it can be argued that there is ***no*** matter of greater public interest than the well-being and stability of Ohio's children. The state of the law today, because of *Rowell v. Smith*, has exposed Ohio's families, parents and children to innumerable and inconceivable challenges to their families and has guaranteed inconsistency and instability for our children who will now be thrust into these custody battles for the extensive life of litigation. Ohio courts are now permitted to ignore the constitutional and statutory safeguards designed to protect the fundamental rights of parents and supplant their judgment for the judgment of fit parents without first finding parental unsuitability or harm to the child. Ohio courts are now permitted to ignore the prior decisions of this honorable court and the United States Supreme Court, designed to preserve the deference and procedural safeguards owed fit parents and may now issue *any* temporary orders the court may see fit. This cannot be the law in Ohio. This honorable court must accept this appeal and restore the primacy of parental rights in Ohio.

STATEMENT OF THE CASE AND FACTS

The facts of this case are simple. The Appellant ("Mother") is the single mother and sole parent of a minor child, whose rights were challenged by a petition to force shared custody brought by Appellee ("ex-companion") an unrelated third party and legal stranger to the child. Without holding a hearing on the merits, the trial court agreed to hear the ex-companion's

petition and ordered Mother, to yield *significant* exclusive custodial and companionship rights[16] to this legal stranger ***before*** the court made any finding as to the best interest of the child,[17] the suitability of the mother, the suitability of the ex-companion and whether Mother purposefully and permanently relinquished any of her rights as a parent by entering into a legally enforceable contract with the ex-companion. Since October 2008, therefore, the juvenile court has literally imposed a shared custody arrangement on this Mother, while calling it "temporary," through a series of unprecedented custody and "visitation" orders, thereby summarily stripping this Mother of her exclusive custodial rights to her daughter. Indeed, the juvenile court's actions have forced this Mother, unwilling to cede her exclusive rights to her daughter even temporarily in spite of continuous persecution, the threat of indefinite incarceration, job loss, loss of her daughter, professional discipline and financial devastation, to pursue relief by filing countless motions and appeals. While the Tenth District Court of Appeals heard, acknowledged and validated this Mother's pleas and restored her constitutional rights to their rightful paramount status[18], the ex-companion appealed the decision and this honorable court "reinstated" the invalid visitation orders. The trial court subsequently held Mother in contempt of court for not complying with the "reinstated" but then invalid temporary visitation orders.

On September 26, 2012, this Court reversed the Tenth District stating "in exercising its jurisdiction pursuant to R.C. 2151.23(A)(2), a juvenile court may issue temporary visitation orders that are in the best interest of the child during the litigation." *Rowell v. Smith,* Slip Opinion 2012-Ohio-4313 (citing Juvenile Rule 13(B)(1)).[19] Relying upon this decision, the

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[16] The temporary orders at issue in this case do not merely allow Appellee to *visit* the child; the temporary orders represent an ***expanded*** version of Local Rule 22 – Model *Parenting* Schedule in addition to the right to unfettered access to school and medical records as well as the right to make emergency medical decisions.

[17] None of the temporary orders contain any analysis or finding as to "best interest of the child:" Magistrate's Temporary Order issued Nov. 12, 2008, Appendix H; Modified Trial Court Order January 26, 2009, Appendix I; Magistrate's Order February 28, 2010, Appendix J

[18] *Rowell vs. Smith,* 2011-Ohio-2809

[19] An Amended Motion for Reconsideration of this Decision was filed by Appellant on October 9, 2012.

Tenth District Court of appeals upheld the subsequent finding of contempt on the reinstated order holding, "we are bound by the Supreme Court of Ohio's resolution of these issues and overrule Appellant's assignments of error. With due sympathy to the dilemma described, we must acknowledge here that the Supreme Court expressly reinstated the underlying orders that gave rise to the current contempt finding."[20] It is this decision that gives rise to this appeal.

It is absolutely critical to provide context to the extraordinary authority and power now bestowed upon juvenile courts and the destructive impact of this unlimited and undefined power. Specifically, in this case, it is undisputed that Mother initiated the process of having the minor child through artificial insemination ***prior*** to meeting the ex-companion. The Mother and ex-companion never entered into or executed a written custody agreement. Mother and ex-companion never entered into or executed a life partnership agreement or had a "commitment ceremony." The Mother never executed: (1) revocable durable or healthcare powers of attorney relative to ex-companion; (2) revocable guardianship papers relative to ex-companion; (3) revocable last will in testament relative to ex-companion; or (4) revocable living will relative to ex-companion. Further, Mother's name is the only name that appears on the child's *only* birth certificate, birth announcement and baptismal certificate. The Mother was the sole payor and obligor as it pertained to the child's expenses. The Mother specifically refused to enter into a voluntary shared custody agreement with ex-companion and deliberately did not transfer *any* custodial rights or decision-making authority, even temporarily or in the event of an emergency. Furthermore, the ex-companion has presented no evidence of purposeful and permanent relinquishment in the form of a knowing, voluntary and intelligent waiver and/or a contract between she and Mother as required by law, but rather, maintained by vague, ambiguous and conclusory statements, "it was just understood that we would co-parent." If that was in fact the

[20] *Rowell v. Smith*, 2012-Ohio-4667, Appendix A.

case, Appellee, has been unable to explain why she did not accept any of the "co-parenting" responsibilities such as designating the child or mother as a beneficiary on her life insurance or her pension; why she did not contribute to the child's education plan, life insurance or medical insurance, why she did not inform her employer or medical providers of her "family" in the event of an emergency and/or why she was not involved in the financial plan and life goals document developed by mother and mother's financial planner.

Notwithstanding, through a series of unprecedented orders, the trial court violated Mother's constitutionally protected rights and literally imposed a "temporary" shared custody and/or companionship arrangement on Mother for a period of three and one half years. Since mother took ***NO*** steps to legally or permanently intertwine her life, and thereby the life of her daughter, with ex-companion during their relationship, it is hard to imagine a set of facts where a similar fate would not be granted *any* petitioner who challenges the parental rights of another. Such unbridled power has seriously compromised parental rights in this state and has placed parents, fit parents, in a calamitous situation.

ARGUMENT

Appellant's Proposition of Law No. 1: R.C. 2151.23(A)(2) empowers a juvenile court to entertain a custody determination action; however, R.C. 2151.23(F)(1) is the statutory trigger to invoke R.C. 2151.23(A)(2) jurisdiction. A juvenile court, therefore, shall exercise its jurisdiction in child custody matters only in accordance with R.C. sections 3109.04, 3109.21 to 3109.36 and 5103.20 to 5103.28.

Juvenile courts are courts of limited jurisdiction whose powers are created solely by statute.[21] As this Court also held in *In re Gibson,* a "juvenile court possesses only the jurisdiction that the General Assembly has expressly conferred upon it."[22] Thus, in the absence of a specific

[21] *Carnes v. Kemp,* 104 Ohio St.3d 629, 2004-Ohio-7107
[22] *In re Gibson,* (1991), 61 Ohio St.3d 168, 172, 573 N.E.2d 1074, citing Ohio Const., Art. IV, *§ 4(B).*

statute conferring jurisdiction, the juvenile court "cannot go beyond the statutes and find jurisdiction on some other basis."[23]

This last statement from *Gibson* forecloses the possibility that a juvenile court could base its jurisdiction to grant visitation rights on a procedural rule. Fundamentally, courts cannot grant themselves jurisdiction by procedural rule nor can they grant themselves jurisdiction to issue temporary orders. To the contrary, under *Gibson,* if there is no specific statute that "expressly" confers upon juvenile courts the jurisdiction to grant visitation rights to nonparents in a particular circumstance, such jurisdiction does not exist. Therefore, *Gibson* also must mean that jurisdiction to determine *custody* does not by itself confer jurisdiction to determine *visitation.*

Furthermore, in the landmark *Bonfield* case, Justices Cook and Lundberg Stratton rendered a separate concurring opinion that expressly identified the discord between interpreting R.C. 2151.23(A)(2) without restraint as follows:

> "This statutory provision [R.C. 2151.23(A)(2)] merely *empowers* a juvenile court to entertain custody determination action; it does not however, provide the *enabling* mechanism by which such actions come before the juvenile court. Instead, R.C. 2151.23(F)(1) dictates *how* a party invokes the juvenile court's R.C. 3151.23(A)(2) jurisdiction: [']The juvenile court shall exercise its jurisdiction in child custody matters in accordance with sections 3109.04, 3109.21 to 3109.36 and 5103.20 to 5103.28 of the Revised Code.['] * * * By legislative choice, there must be a statutory trigger to invoke R.C. 2151.23(A)(2) jurisdiction."[24]

As the Justices correctly pointed out, to allow otherwise would allow *anyone* to file for custody of *any* child simply by filing a petition to ***force*** shared custody using R.C. 2151.23(A)(2) which is contrary to the United States Supreme Court landmark case of *Troxel vs. Granville*[25]. In addition, this concept is precisely what the Twelfth Dist. Court of Appeals referenced in its October 29, 2012 decision when it stated: "R.C. 2151.23 sets forth the original jurisdiction of juvenile courts, and states that [']the juvenile court shall exercise its jurisdiction in child custody

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[23] *Id.* at 172-73.
[24] *In re Bonfield*, 96 Ohio St.3d 218, 2002-Ohio-4182, Paragraphs 51-53 (emphasis in original).
[25] *Troxel vs. Granville* (2000), 530 U.S. 57

matters in accordance with [R.C.] sections 3109.04 and 3127.01 to 3127.53.['] R. C. 2151.23(F)(1)."[26]

Further, as this Court previously stated in *State vs. Collier* (1991), 62 Ohio St.3d 267, "all legislative enactments must be afforded a strong presumption of constitutionality." This Court has also stated, "***in reviewing a statute, we are obligated to give effect to the words used and not to insert words not used.***"[27] The statute upon which the ex-companion relies in instituting this action, R.C. 2151.23(A)(2), does not confer upon the juvenile court the jurisdiction to grant visitation rights and in fact, none of the statutes which expressly grant juvenile courts jurisdiction to order visitation rights, apply to this case.

Proposition of Law No. 2: Parents have a fundamental right to the exclusive care, custody and control of their children and the state may not interfere with the parent-child relationship unless it has a compelling state interest. An undefined notion of "best interest of the child" does not constitute a compelling state interest warranting intrusion upon the parent-child relationship.

Allowing juvenile courts to grant visitation under R.C. 2151.23(A)(2), even temporarily, without first requiring a showing of parental unsuitability violates parents' constitutional rights to the exclusive care, custody, and control of their children and runs afoul of this Court's recent ruling in *In re Mullen*. In *Mullen*, this Court correctly held that a parent cannot be deprived of the care custody and control of her child unless a preponderance of the evidence reveals a *contract*, a purposeful and permanent relinquishment by the parent in favor of the non parent.[28] Similarly, in *Perales,* this Court held that a juvenile court has no jurisdiction to deprive a parent of her custodial rights in favor of a nonparent unless the court first finds the parent to be unsuitable.[29] Because a court cannot order visitation to a nonparent without, at the same time, depriving a

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[26] *In re L.A.B.*, 2012-Ohio-5010 Para. 13.
[27] *State ex rel. Richard v. Bd. Of Trustees of the Police and Firemen's Disability and Pension Fund* (1994), 69 Ohio St.3d 409, citing *State v. S.R.* (1992), 63 Ohio St.3d 590, (emphasis added).
[28] *In re Mullen*, 2011-Ohio-3361, ¶ 6.
[29] *In re Perales,* (1977), 52 Ohio St.2d 89, at the syllabus.

parent of exclusive custody to her child, *Perales* also prohibits a visitation award to a nonparent without such a finding.[30]

Additionally, in *Troxel, supra*, the U.S. Supreme Court affirmed the Washington Supreme Court's nullification of a state statute which allowed juvenile courts to grant visitation rights to nonparents without: 1) requiring any factual findings regarding harm or potential harm to the child, 2) requiring any showing of unfitness on the part of the parent, and 3) giving any deference to the parent's determination of her child's best interests with respect to visitation. *Id.* The Court stated, "The liberty interest at issue in this case-the interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court."[31] The Court further explained that, ***because the nonparental visitation statute required nothing more than the judge's belief that a visitation decision better than the parent's decision could be made, and because the statute placed "no limits on either the persons who may petition for visitation or the circumstances in which such a petition may be granted," the statute infringed upon these fundamental parental rights.***[32]

As a "visitation" statute, R.C. 2151.23(A)(2) suffers from even more deficiencies than the statute in *Troxel.* R.C. 2151.23(A)(2) fails to even mention visitation; nor does it place any limits or restrictions on the persons who may petition for visitation or the circumstances in which such a petition may be granted. Moreover, Ohio courts, including this Court, have used the *Troxel* opinion as a guide when reviewing other non-parent visitation and custody situations. In

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[30] Appellant acknowledges this Court's previous ruling in *Rowell v. Smith, supra* which states, "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," citing Juv.R. 13(B)(1). Appellant has filed a *Motion for Reconsideration* arguing that such an interpretation of the statute and rule at issue is contrary to the Article 4 Section 5(B) of the Ohio Constitution; is contrary to prior holdings of this Honorable Court; does not adequately provide for the constitutional safeguards guaranteed by the Fourteenth Amendment of the United States Constitution and is contrary to the U.S. Supreme Court decision *Troxel vs. Granville* (2000), 530 U.S. 57.

[31] *Troxel vs. Granville* (2000), 530 U.S. 57, 65.

[32] *Id* at 73. (emphasis added)

Esch v. Esch (Feb. 23, 2001), Montgomery App. No. 18489, *unreported*, the court found that R.C. 3109.04(D)(2) is unconstitutionally broad in that it applies a best interest of the child standard rather than "unfitness" or "unsuitability" of the parents standards and thereby infringes upon a parent's fundamental right to raise his child. Specifically, the *Esch* court held, "In *Troxel*, the U.S. Supreme Court stressed that since a parent has a fundamental right to raise his child, the best interests of the child standard is insufficient to challenge a child-rearing decision of a parent as it pertains to a non-parent.[33] In both *Esch* and *Vance*, relying on *Troxel* and *In re Perales*, the Ohio courts denied a third party's request for custody of a child based upon the best interest test in R.C. 3109.04 holding instead that in custody disputes between a parent and non-parent, a finding of parental unsuitability must be made before taking custody away from a parent.

This Court also was called upon to review the constitutionality of a non-parent visitation statute, post *Troxel*, in *Harold vs. Collier*, 2004-Ohio-4331. In reviewing Ohio's Grandparent visitation statute, this Court specifically stated:

> The Supreme Court of Ohio has observed that grandparents had no legal right of access to their grandchildren at common law. (citation omitted). Additionally, the Supreme Court has held that "grandparents have no constitutional right of association with their grandchildren." Furthermore, this Court has proclaimed that grandparental visitation rights can only be conferred by statute. Ohio statutes allow grandparental visitation only if it is in the grandchild's best interest. *Id.*

This Court ultimately held that *because* Ohio's grandparent visitation statute was ***not*** overly broad in that it specifically protected the constitutional rights afforded parents by limiting the persons who may petition for visitation, delineating the circumstances and enumerating multiple factors for the court to consider, including the wishes of the parents, it withstood constitutional muster and the benchmark established by *Troxel*.

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[33] *Esch,* at 7, *see also Vance vs. Vance,* 151 Ohio App.3d 391, 2003-Ohio-310.

In comparing the *Harold* rationale to this case, ex-companions have no legal right to access children who are not their natural or adoptive children in common law and similarly, ex-companions have no constitutional right of association with children who are not their children. As such, following *the Harold* rationale of this court, visitation rights can only be conferred ***by statute*** and to this day, the General Assembly has not seen fit to grant standing or visitation rights to third party ex-companions. To now find that a rule of juvenile procedure can do what a statute has not done and with no defined limits, defies centuries of Ohio and United States law and seriously infringes upon the fundamental constitutional rights of all parents to raise their children without state intrusion. In addition, assuming, *arguendo,* that best interest of the child is the appropriate standard, which it clearly is not, in this case, the trial court made ***NO*** finding and provided no analysis of the best interest of the child prior to issuing the temporary orders that gave rise to this appeal.[34]

CONCLUSION

The current state of the law of *Rowell v. Smith* has eradicated the fundamental rights and primacy of parents. An award of visitation, forcing a suitable parent to relinquish exclusive control of her child, for however long, to a person with no legal relationship to the child, solely because that person has filed a forced shared custody petition is not permitted by statute and is a serious infringement upon a parent's constitutionally-guaranteed exclusive custodial rights. As such, Appellant respectfully requests that this Honorable Court accept jurisdiction of this appeal and restore the primacy of parental rights in Ohio.

[34] See footnote 9 above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Memorandum in Support of Jurisdiction was served upon the following counsel by ~~regular U.S. mail~~ email this 9th day of November, 2012:

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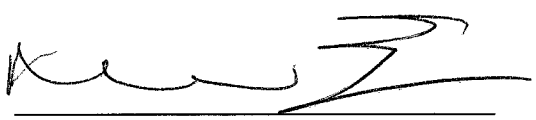

Dianne D. Einstein (0067779)

[Cite as *Rowell v. Smith*, 2012-Ohio-4667.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Julie R. Rowell,	:	
Petitioner-Appellee,	:	
v.	:	No. 12AP-262 (C.P.C. No. 08JU-10-13850)
Julie A. Smith,	:	(REGULAR CALENDAR)
Respondent-Appellant.	:	

D E C I S I O N

Rendered on October 9, 2012

Fey Law Offices, and *Carol Ann Fey; Massucci & Kline, LLP*, and *LeeAnn Massucci*, for appellee.

Julie A. Smith, pro se.

APPEAL from the Franklin County Court of Common Pleas, Division of Domestic Relation, Juvenile Branch

CONNOR, J.

{¶ 1} Respondent-appellant, Julie A. Smith ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, awarding sanctions in a contempt proceeding.

{¶ 2} This child-custody action between appellant and petitioner-appellee, Julie R. Rowell ("appellee"), former same-sex partners, presents a lengthy and active litigation history, which will be recounted here only to the extent necessary to address the issues specifically before the court in this appeal. The parties were involved in a relationship when appellant gave birth to a daughter in 2003. Appellee has no biological relation to the child, who was conceived through artificial insemination. After cohabiting and raising the child together for an extended period, the parties ended their relationship

STATE LEGAL® EXHIBIT A

in 2008. Appellee then filed a motion for shared custody and an accompanying motion for temporary orders. The trial court eventually designated appellant as the legal custodian and residential parent of the child, pending a final determination of custody, and granted visitation rights to appellee.

{¶ 3} Appellant refused to comply with appellee's visitation rights under the trial court's various orders in the case. This lead to multiple contempt filings by appellee. During these proceedings before the trial court, two initial appeals reached this court: *Rowell v. Smith*, 10th Dist. No. 09AP-147 (Mar. 23, 2009) (dismissed for lack of a final appealable order), and *Rowell v. Smith*, 186 Ohio App.3d 717, 2010-Ohio-260 (10th Dist.) (reversing contempt finding based upon trial court's improper modification of previous order).

{¶ 4} Two subsequent contempt orders concern us here: on March 2, 2010, appellee filed a motion for contempt based upon appellant's continued failure to comply with visitation orders. The trial court imposed a sanction upon appellant of three days in jail and $2,500 for attorney fees and costs incurred by appellee in attempting to enforce visitation rights. We reversed that contempt finding in *Rowell v. Smith*, 10th Dist. No. 10AP-675, 2011-Ohio-2809, based upon our determination that the trial court lacked jurisdiction to enter and enforce temporary visitation orders in the matter. The Supreme Court of Ohio has now reversed our decision in that case. *Rowell v. Smith*, 2012-Ohio-4313 (slip opinion), decided September 26, 2012. Pending its determination in that appeal, the Supreme Court granted a motion by appellee that reinstated the terms of the trial court's temporary visitation orders pending resolution of the appeal in the Supreme Court.

{¶ 5} Appellee filed a new motion for contempt on August 17, 2011, asserting continued non-compliance with the visitation orders as reinstated by the Supreme Court. This is the order at issue in the case before us. On January 17, 2012, a magistrate issued an order finding appellant again in contempt. By decision and judgment entry on March 6, 2012, the court overruled appellant's objections to the magistrate's decision and maintained the contempt finding. This appeal ensued.

{¶ 6} Appellant brings the following three assignments of error for our review:

> 1. The trial court erred and abused its discretion in once again finding Appellant guilty of contempt of an invalid temporary visitation order.
>
> 2. The trial court erred and abused its discretion in finding Appellant in contempt of an invalid temporary visitation order in violation of Appellant's paramount parental rights as guaranteed by the U.S. and Ohio Constitutions and the U.S. Supreme Court case of *Troxel v. Granville.*
>
> 3. The trial court erred and abused its discretion in finding Appellant guilty of contempt of an invalid order on appeal, the effect of which would render the issues on appeal moot, should Appellant purge or serve the underlying sanctions.

{¶ 7} The present matter involves a civil contempt proceeding. The purpose of civil contempt proceedings is to encourage or coerce a party in violation of active court orders to comply with those orders for the benefit of the other party. *Pugh v. Pugh*, 15 Ohio St.3d 136, 139 (1984); *State v. Kilbane*, 61 Ohio St.2d 201, 204-05 (1980). The Supreme Court of Ohio has defined contempt as " 'conduct which brings the administration of justice into disrespect, or which tends to embarrass, impede or obstruct a court in the performance of its functions.' " *Denovchek v. Bd. of Trumbull Cty. Commissioners*, 36 Ohio St.3d 14, 15 (1988), quoting *Windham Bank v. Tomaszczyk*, 27 Ohio St.2d 55 (1975), paragraph one of the syllabus. A court has both inherent and statutory authority to punish contempt. *Howell v. Howell*, 10th Dist. No. 04AP-436, 2005-Ohio-2798, ¶ 19. A sanction for civil contempt must allow the contemnor the opportunity to purge herself of the contempt prior to imposition of any punishment. *Burchett v. Miller*, 123 Ohio App.3d 550, 552 (6th Dist.1997). Upon appeal, our review is limited to a determination of whether the trial court abused its discretion in its discretionary and factual determinations in the civil contempt proceeding. *Williamson v. Cooke*, 10th Dist. No. 05AP-936, 2007-Ohio-493.

{¶ 8} As a preliminary issue, we note that there is some debate between the parties as to whether the present appeal has been rendered moot by appellant's subsequent compliance with visitation orders and the Supreme Court of Ohio's recent disposition of the case. We find that the present appeal is not moot. "An appeal from a contempt charge is moot when a defendant has made payment or otherwise purged the

contempt." *Farley v. Farley*, 10th Dist. No. 02AP-1046, 2003-Ohio-3185, ¶ 62. Appellant does not assert on appeal that she has purged the current round of sanctions for contempt. The sanctions remain ripe for ultimate enforcement by the trial court, and in fact, the record indicates that the trial court has now scheduled an enforcement hearing for contempt sanctions in the matter. There is nothing moot about the case as it is now postured.

{¶ 9} Appellant's first two assignments of error will be addressed together. In these, appellant asserts that the trial court abused it discretion in making the contempt finding, both because the underlying visitation order was invalid for the reasons given in our June 9, 2011 decision, and because the grant of visitation rights to a non-parent violates appellant's fundamental rights as a parent under the United States and Ohio Constitutions. The Supreme Court of Ohio's decision in *Rowell*, 2012-Ohio-4313, extensively discusses and explicitly rejects all the arguments raised by appellant in this context. In particular, that decision rejects appellant's assertion that the United States Supreme Court's plurality decision in *Troxel v. Granville*, 530 U.S. 57 (2000) supports the premise that appellee's fundamental constitutional rights as a parent are of such paramount nature that the state cannot impose visitation with a non-parent against her wishes: "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.*" *Rowell*, 2012-Ohio-4313, at ¶ 21. We are therefore bound by the Supreme Court of Ohio's resolution of these issues and overrule appellant's first and second assignments of error.

{¶ 10} Appellant's third assignment of error raises a more complicated corollary issue. Appellant asserts that enforcement through contempt of a court order whose validity is contemporaneously attacked on appeal places her on the horns of a fundamentally unjust dilemma that deprives her of due process of law: she must either comply with a visitation order that, as she believes, violates her fundamental constitutional rights and will be invalidated by the higher court on that basis, or incur

contempt findings that she dare not purge lest she moot out the very appeal that challenges the validity of the orders. Under these conditions, she argues, the contempt order is flawed because it offers no meaningful opportunity to purge, which is required for a valid civil contempt finding. *See Burchett.*

{¶ 11} With due sympathy for the dilemma described, we must acknowledge here that the Supreme Court expressly reinstated the underlying orders that gave rise to the current contempt finding. We must presume that the Supreme Court did not reinstate the orders with the understanding that they could then be freely disregarded by the parties. Appellant does not contest in this appeal that she did not comply with the orders during the period covered by the contempt finding, nor does appellant dispute that she did not take the opportunity to purge the contempt and avoid sanctions in the manner offered by the court's order. Adoption of appellant's logic regarding the enforcement of orders pending appeal would strip a domestic relations court of any ability to manage the proceedings before it. The domestic relations court, by the nature of such proceedings, inevitably must often rely on contempt proceedings to compel compliance with orders issued by the court and currently in force. Due to the reinstatement of the visitation orders by the Supreme Court, the trial court was not deprived of jurisdiction, and had the authority to pursue any proceedings to coerce compliance by appellant even pending an appeal that might eventually vacate those orders. Appellant's third assignment of error is accordingly overruled.

{¶ 12} In summary, we find that the trial court did not abuse its discretion in its contempt finding in this matter, and appellant's three assignments of error are overruled. The judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, is affirmed and the matter is remanded for further proceedings.

Judgment affirmed;
cause remanded.

KLATT and DORRIAN, JJ., concur.