

ORIGINAL

IN THE SUPREME COURT OF OHIO

THE STATE EX REL., MEGAN SHAHAN- BECK,	:	Case No: 2013-1734
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	:	
APPELLEE,	:	On Appeal from the Hamilton County
	:	Court of Appeals, First Appellate District
v.	:	
	:	Court of Appeals Case No. 13-00504
JUDGE TRACIE M. HUNTER,	:	
	:	Case Originated in the Court of Appeals
APPELLANT.	:	

MERIT BRIEF OF RESPONDENT TRACIE M. HUNTER, JUDGE

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FILED
 JAN 06 2014
 CLERK OF COURT
 SUPREME COURT OF OHIO

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STATEMENT OF FACTS

Relator is the guardian ad litem for four children in a custody case that has been pending since 2006. Relator sought a writ to order Judge Hunter to issue a decision on pending objections to a magistrate's decision. The magistrate made four rulings on the four children. Two parties filed objections on April 25, 2012 and two other parties filed objections on May 4, 2012. On July 23, 2012 two of the objections were withdrawn. Oral arguments were scheduled for that same day but had to be continued twice, until November 20, 2012 so the transcripts could be completed. In all, 1,414 pages of transcripts were submitted to Judge Hunter to review. Oral arguments were held November 20, 2012. However, before the court could rule Hamilton County Jobs and Family Services ("HCJFS") filed a motion to re-open the case to submit additional evidence. The motion was filed June 12, 2013. A hearing was scheduled for August 13, 2013. Relator, the guardian ad litem, agreed to the hearing. Supplement F and G.

The day before the hearing, on August 12, 2013, Relator filed this original action in the court of appeals seeking a writ of procedendo against Judge Hunter to rule on the objections that were still pending. At the time Relator filed her complaint she knew that HCJFS had filed a motion to re-open the case to submit additional evidence and that a hearing was scheduled on that motion for the next day. Relator did not object to HCJFS's motion nor did Relator object to the hearing. Relator did not inform the court of appeals of these facts when she filed her complaint.

Despite the fact that the writ complaint was prematurely filed, the writ complaint proceeded to judgment. Respondent was represented by counsel appointed by the Hamilton County Court of Common Pleas; however, no pleadings were filed on Respondent's behalf. On September 18, 2013, the First District Court of Appeals issued an entry granting the writ. On

October 16, 2013 Judge Hunter issued a decision on the objections and remanded the case to the magistrate.

Respondent, having not been represented by her counsel in the court of appeals, timely filed a notice of appeal in this court on November 4, 2013. Respondent Judge Hunter is representing herself pro se in her official capacity. Relator filed a motion to dismiss the appeal, stating that Judge Hunter's decision on October 16, 2013 rendered this appeal moot. On December 2, 2013, Respondent opposed the motion to dismiss. The motion to dismiss remains pending.

ARGUMENT

Proposition of Law No. 1

A writ of procedendo shall not issue against Hamilton County Juvenile Court Judge Hunter where there exists a systemic backlog in the Hamilton County Juvenile Court, where there is a lack of clarity about when a judge must rule on objections to a magistrate's decision, where Judge Hunter was not defended in the court below or given an opportunity to present evidence or briefs, and where Judge Hunter did not unduly delay her decision.

A writ of procedendo is "issued by a court of superior jurisdiction ordering a lower court to proceed to judgment in a case." *See Sherrills v. Common Pleas*, 72 Ohio St.3d 461, 462, 650 N.E.2d. 899 (1995). A writ of procedendo is a "high prerogative writ of an extraordinary nature which will not be granted unless there is a clear legal right to such relief." *State ex rel. Smith v. Friedman*, 22 Ohio St. 2d 25, 26, 257 N.E.2d 386 (1970). Procedendo is warranted where the petitioner can demonstrate "a clear legal right to require the court to proceed, a clear legal duty on the part of the court to proceed, and the lack of an adequate remedy in the ordinary course of the law." *Culgan v. Collier*, 135 Ohio St. 3d 436, 437, 2013-Ohio-1762, 988 N.E.2d 564 (citing *Sherrills*, 72 Ohio St.3d at 462). Such relief as appropriate where "a court has refused to enter

judgment or has unnecessarily delayed proceeding to judgment.” *Id.* (citing *Crandall, Pheils & Wisniewski v. DeCessna*, 73 Ohio St.3d 180, 184, 652 N.E.2d 742 (1995)). *Procedendo* does not lie to interfere with ordinary court procedure or process. *State ex rel. Cochran v. Quillin*, 20 Ohio St.2d 6, 49 O.O.2d 53, 251 N.E.2d 607 (1969). Nor does this court use *procedendo* to order a court to render its decisions promptly in a mandamus action. *State ex rel. Tillimon v. Weiher*, 65 Ohio St. 3d 468, 470, 1992-Ohio-83, 605 N.E.2d 35 (1992).

For the reasons discussed below, Relator had no clear legal right to a writ of *procedendo* given the systemic backlog at the Hamilton County Juvenile Court, the lack of clarity as to what deadline, if any, applied to ruling on objections to a magistrate’s decision, the court of appeals failure to request evidence and briefing, and the facts in the public record that show there were mitigating factors in this case that would not support a finding of undue delay. Thus, the judgment issuing the writ of *procedendo* against Respondent Judge Hunter should be reversed.

A. A systemic backlog of cases caused by a heavy caseload in the Hamilton County Juvenile Court precludes the court of appeals from issuing a writ of *procedendo*.

1. Hamilton County Juvenile Court has the heaviest caseload of any juvenile court in Ohio.

It is public knowledge that the Hamilton County Juvenile Court has the heaviest caseload of any juvenile court in Ohio. Hamilton County has a population of 802,374. *See* Supplement A at pp. 126-27, The Ohio Supreme Court, *2012 Ohio Courts Statistical Report, Courts of Common Pleas Juvenile Division*, (“Statistical Report”). Of juvenile courts with exclusive juvenile jurisdiction, Hamilton County has the highest caseload per judge at 14,055 cases. Summit County is next with 7,831 cases per judge (Summit only has one judge). Cuyahoga County, the only county with a larger population than Hamilton (1,280,122 people), has six judges, so its caseload is only 4,371 per judge. *Id.*

More concerning is the number of case terminations in Hamilton County. In juvenile jurisdiction-only counties, the average number of case terminations is 5,590 per judge, but in Hamilton County, it is 14,382 per judge. *See id.* Excluding Hamilton County in this calculation, the average cases terminated per judge in juvenile jurisdiction-only counties is only 4,710. *Id.* Thus, the two Hamilton County Juvenile Court judges handle three times the average number of cases per judge than comparable judges.

This heavy caseload is not unique to Judge Hunter. This Court requires common pleas court judges to keep track of case data to, among other reasons, help the judges and the administrative staff know which and how many cases need decisions. Commentary to Sup. R. 40, Appendix C at p. 6. Much of this data is recorded on “Form D,” which records the number and types of cases that are pending beyond a specified time guideline after assignment to a judge. Notably, Juvenile Court Judge John Williams has more cases pending beyond time guidelines than Respondent Judge Hunter, yet no procedendo petitions have been filed against him, which allows him to decide his cases in an orderly fashion.

Form D – Number of Cases Pending Beyond Guidelines

Month (2013)	Judge Hunter	Judge Williams
January	95	122
February	74	71
March	68	82
April	67	91
May	73	82
June	83	77
July	90	85
August	79	103
September	77	92

See Supplement D, Form Ds for Hamilton County Juvenile Court for January to September 2013 (“Form Ds”).

The backlog of cases pre-dates Judge Hunter. In April 2013, this court issued its annual report on the caseload management and operation of the Hamilton County Juvenile Court. See Supplement E, The Supreme Court of Ohio, Judicial and Court Services Division, Case Management Section, *Hamilton County Court of Common Pleas, Juvenile Division Caseload Management and Operational Review Findings and Recommendations*, April 2013 (“Caseload Report”). Twenty five percent of court users surveyed responded that they felt business was not done in a reasonable time. See *id.* at pp. 6-7. The Caseload Report highlighted the Juvenile Court’s worst inefficiencies. For example, the Hamilton County Juvenile Court has a long-term and continuing (2007-2012) inability to timely manage custody and abuse, neglect, or dependency cases. See *id.* at pp. 33-34, Table 17. The Juvenile Court’s average monthly overage rate for such cases almost doubled from 8percent in 2007 to 15 percent in 2012.¹ *Id.* The average monthly overage rate for custody and visitation cases was 17 percent in 2007 and had risen to 26 percent in 2012. *Id.*

Another systemic problem in the Hamilton County Juvenile Court is its inability to monitor itself. The court’s administration has not been creating reports that would help alert a judge to delays. Judges appear not to have access to a “report that would permit each judge to be able to routinely monitor their assigned caseload in which objections and motions to set aside remain pending.” Supplement E, Caseload Report at pp. 48-49. For example, the Caseload Report recommended the court administrator create a number of reports and run them weekly for use by the judges:

¹ The data in this table was collected for 2007, 2008, 2009, 2010, 2011, and through August 2012. Judge Hunter did not take the bench until the end of May 2012.

- Use a “Pending List” to monitor and ensure faster disposition of objections to magistrate rulings.
- Cases submitted for determination pending decision.
- Pending caseload.
- Cases pending beyond time guidelines.
- Number of months cases are pending beyond time guidelines.
- Time to disposition (CourTools Measure 3).
- Age of active pending caseload (CourTools Measure 4).
- Backlog rates.
- Pending motions lists.
- Review of objections to magistrates’ decisions.

See id. at pp. 11-12. In addition, the administrative judge needs to monitor cases for compliance with time standards, review caseloads, adjust scheduling of cases, and adjust placement of resources to ensure timely processing of cases. *Id.* at p. 17. Judges need a system for knowing which cases are pending the longest:

While this report presumably is a useful tool for tracking these activities, the court might consider establishing an alternative or additional report that would permit each judge to be able to routinely monitor their assigned caseload in which objections and motions to set aside remain pending. Although historical timeliness performance is important to measure, from a daily case management operations standpoint, that information is not of immediate importance. Rather, a simple listing of cases in which objections or motions to set aside are pending would be sufficient.

Id. at pp. 48-53. Finally, dozens of other inefficiencies and delays identified by the Caseflow Report need to be addressed in Hamilton County to ensure fewer delays. *See generally id.* at pp. 1-19.

The purpose of the reporting requirements is to help the judges manage their workload and prioritize their work. It can also alert them to the need to request additional resources from the administrative judge. Judge Hunter informed this court's Case Management Division that she had requested from Administrative Judge Williams additional resources but he denied her requests. *See* Supplement B, Letter of Judge Hunter to Ohio Supreme Court Case Management Division Director of Court Services Stephanie Hess ("Letter to Hess"), at p. 4. For example, Judge Hunter reported that she requested assistance from the Chief Magistrate to help with her backlog in the same manner the Chief Magistrate assisted Judge Williams. When Judge Williams denied Judge Hunter's request, Judge Hunter assigned a magistrate to assist her during the magistrate's free, or reserve, time. However, Judge Williams informed Judge Hunter the magistrate could only assist her after hours. *Id.* As a result, Judge Hunter works without assistance from any magistrate.

2. Hamilton County Juvenile Court in general, and Judge Hunter in particular, have a large number of objections filed.

The heavy caseload causes the Hamilton County Juvenile Court to delegate more than double the number of cases to magistrates of any other Ohio county. *See* Supplement A, Statistical Report at pp. 128-29. Litigants before a magistrate have the right to move to set aside any order by a magistrate, or object to any decision by a magistrate. *See* Ohio R. Juv. P. 40(D). From May 25, 2012, to August 31, 2013, the Hamilton County Juvenile Court reported 499 objection motions filed. Of these, 296 were in cases assigned to Respondent Judge Hunter (Z cases), while only 203 were assigned to the other judge in the court, Judge John Williams (X cases). *See* Supplement B, Letter to Hess, at pp. 6-13; Exhibit D, List of Objections and Motions Pending in the Hamilton County Juvenile Court May 25, 2012, through August 31, 2013

(“Objections List”). This means that Judge Hunter had 93 more objections to rule on than Judge Williams.

One example of the delays at the Juvenile Court involves the Judges’ rulings on objections to magistrate decisions. The Caseflow Report discussed a snapshot list of pending cases where objections and motions to set aside magistrate decisions had been filed.² *See* Supplement E at p. 48. The snapshot date was November 26, 2012.³ On that day 133 objections and motions to set aside were reported. Of those, 41 were resolved without judicial action (e.g., withdrawn or dismissed), 48 were resolved with judicial action, and 44 remained pending. The judges took from 2 to 167 days to resolve the 48 objections, with the mean time being 86 days. The 44 pending cases had been pending for 62 to 209 days, with 132 days being the mean. *Id.* Based on this snapshot, the 44 pending cases had a mean number of days pending of 132 days, which was already well beyond the 120-day measure the report utilized. This problem pre-dated Judge Hunter, who at the time the snapshot was taken, had been on the bench for only six months. The Caseflow Report noted that the Juvenile Court is showing a “lower level of performance in timely managing its abuse, neglect, or dependency cases as well as its custody and visitation cases.” *Id.* at p. 33. The Caseflow Report expressed concern that the multi-year trend showed that “the court’s ability to manage these cases is continuing to slip.”⁴ *Id.* at pp. 33-34.

² The pending list did not distinguish between the two. *See* Supplement E at p. 48.

³ Judge Hunter was still relatively new to the bench, having started less than six months earlier at the end of May 2012.

⁴ The Caseflow Report states that 26 percent of abuse, neglect, or dependency cases were over the time guidelines, but the sentence is an error. The 26 percent figure is for the custody/visitation cases. *See id.* at p. 34, Table 17.

Some of the overage rates may be attributable to inefficiencies in the Juvenile Court. The Caseflow Report noted that, for example, permanent custody decisions are handled inefficiently in Hamilton County. Magistrates hear the trials, write decisions, and the losing party/parties file objections. *See* Juv. R. 40(D)(3)(a-b). This system builds in several delays. Some custody trials before magistrates “are tried over separate discontinuous days during the course of several months or even years.” *See* Supplement E, Caseflow Report, at p. 6. Some magistrates reported “that there is little time to write decisions and as such, they will work through lunch, in the evenings, and on the weekends to complete the work in a timely fashion.” *Id.* at p. 5. Magistrates have to take additional time to draft findings of fact and conclusions of law if a party requests them. *See* Juv. R. 40(D)(2)(b)(ii).

Additionally, once the objections are filed, they must be supported by a transcript which must be filed within 30 days. *See* Juv. R. 40(D)(3)(b)(iii). However, the fact that objecting parties are not requesting transcripts within 30 days is such a problem in Hamilton County Juvenile Court that the Caseflow Report recommended amending its local rules to require it, even though the Juvenile Rules already require it. Supplement E at p. 13. When a transcript is filed after the objections are filed, which is routine in Hamilton County, a party may then supplement his or her objections. *Id.* The objections are then assigned to a judge for an “independent review” to “ascertain that the magistrate has properly determined the factual issues and appropriately applied the law.” Juv. R. 40(D)(4)(d). The judge may hear additional evidence or return the matter to the magistrate. Juv. R. 40(D)(4)(b). The judge may adopt or reject the magistrate’s decision in whole or in part, with or without modification. *Id.*

Because of all the delays involved in the objection process, the Caseflow Report recommended that cases involving termination of parental rights be handled by the judges and

not by the magistrates. *See* Caseflow Report at p. 5. This would alleviate much of the delay.

These systemic delays during the objection process identified in the Caseflow Report are evident in the case at bar.

3. The Juvenile Court's case backlog and heavy objections caseload preclude a writ of procedendo because there is no undue delay.

The analysis and data made public by this court shows that Respondent Judge Hunter is one of the most overburdened juvenile court judges in Ohio: she presides in a court that has twice as many cases per judge than any other court; that has twice as many cases pending before magistrates, and who has pending before her 60 percent of all objections to magistrate decisions filed in the court since she has been on the bench.

A writ of procedendo is extraordinary relief that is only appropriate where a court has unnecessarily delayed proceeding to judgment. *Culgan v. Collier*, 135 Ohio St. 3d 436, 437, 2013-Ohio-1762, 988 N.E.2d 564. Procedendo exists to prevent "undue delay" by a judge. A judge overburdened by an enormous caseload cannot be said to be unduly delaying the resolution of cases. Over a fifteen-month period, 296 objections were filed in cases assigned to Respondent Judge Hunter, 93 more than were assigned to Judge Williams. *See* Supplement B, Letter to Hess, at pp. 6-13; Exhibit D, Objections List. Despite this burden, Judge Hunter was able to drop her other work and issue decisions in seven of the cases for which petitions for procedendo were sought. As a result of re-prioritizing her caseload, the Hamilton County Public Defenders' Office voluntarily dismissed seven writ cases before the court of appeals ruled.⁵ This method of

⁵ *See State ex rel. J.H. v. Hunter*, Case No. C1300497 (filed Aug. 12, 2013); *State ex rel. Z.F. v. Hunter*, Case No. C1300498 (filed Aug. 12, 2013); *State ex rel. Q.O. v. Hunter*, Case No. C1300499 (filed Aug. 12, 2013); *State ex rel. Klarysa Bengé v. Hunter*, Case No. C1300500 (filed Aug. 12, 2013); *State ex rel. Klarysa Bengé v. Hunter*, Case No. C1300501 (filed Aug. 12,

piecemeal resolution prejudices litigants who are the victims of systematic court delays but whose cases are passed over for decision in order to rule on a case where a complaint for a writ of procedendo has been filed. Respondent has been forced to deprioritize cases which have been pending for longer periods or which have more pressing issues in order to focus on cases in which the Hamilton County Public Defender has filed procedendo petitions. The Hamilton County Public Defender's Office has filed 18 complaints for writs of procedendo.⁶ Filing 18 complaints in an effort to re-prioritize Relator's work is not a proper use of the procedendo process, which is not to be used to interfere with ordinary court procedure or process. *State ex rel. Cochran v. Quillin*, 20 Ohio St.2d 6, 49 O.O.2d 53, 251 N.E.2d 607 (1969).

Since both Hamilton County Juvenile Court Judges have such a heavy caseload and overage cases, and Respondent Judge Hunter has a much larger objections caseload, these facts alone explain any delay in ruling on the objections at issue in this case. The backlog of cases Judge Hunter inherited and now presides over reflects a systemic problem at the Hamilton County Juvenile Court. The Hamilton County Juvenile Court is among the most overburdened in the state, and Respondent the most overburdened in that court. This problem is properly addressed by the Ohio Supreme Court Case Management Section, not by the court of appeals issuing extraordinary writs on an ad hoc basis. As a result, this court's Case Management Section has taken steps to address the systemic problem. This court has appointed retired Hamilton County Juvenile Court Judge Thomas Lipps to preside over "all cases in which Objections to Magistrates' Decision are pending past the 120-day time guideline as of October 15, 2013 * * * ." See Supplement C, The Supreme Court of Ohio's Appointment of Judge Lipps

2013); *State ex rel. Renee Kreisa v. Hunter*, Case No. C1300503 (filed Aug. 12, 2013); and *State ex rel. Susan Zillizk v. Hunter*, Case No. C1300508 (filed Aug. 12, 2013).

⁶ See cases cited in previous footnote, plus the eleven currently on appeal to this court.

to the Hamilton County Juvenile Court. This Court's order applies to cases pending before *both* Judge Williams and Judge Hunter. Improved case management is the proper remedy, not a writ of procedendo. Thus, the court of appeals erred in issuing the writ because due to the systemic problems at the Hamilton County Juvenile Court, Relator did not have a clear right to a writ of procedendo.

B. The lack of clarity of the deadline a judge has to rule on objections to a magistrate's decision precludes issuing a writ of procedendo against Judge Hunter.

The court of appeals ruled that the Relator had demonstrated a clear legal right to procedendo without explanation or an opinion. Appendix B. The complaint and affidavit filed by the Relator are clear that the parties only filed objections to the magistrate's decision. No party filed a motion to set aside the magistrate's decision. Relator's complained that it had been eight months since the oral arguments were heard on the objections without a ruling from Judge Hunter and this "clearly constitutes an undue delay * * * ." Complaint ¶ 4. Relator goes on to allege that Ohio Rule of Superintendence 40(A)(3) states that all motions shall be ruled on within 120 days from the date the motion was filed, except as otherwise noted on the report forms. Complaint ¶ 6. Relator alleges that Sup. R. 40(A)(3) serves as a guide to the court of appeals in determining whether a trial court has unduly delayed ruling on a motion. *Id.* Relator summarized two cases where a two-month delay in ruling on a motion to appoint a court reporter was not an undue delay, but a twelve-month delay in ruling on a motion for post-conviction relief was. *Id.*

While Respondent agrees that Sup. R. 40(A)(3) is a guide to help the court of appeals determine an undue delay, it is only a guide in a case involving a motion. Since this case involves ruling on objections, which requires the judge to do much more than when ruling on a

mere motion, Sup. R. 40(A)(3) does not offer the court guidance. In ruling on objections to a magistrate's decision, the judge is required to "undertake an independent review as to [any] objected matters." See Juv. R. 40(D)(4)(d). This rule requires the judge to read the transcripts of the hearings or trials before the magistrate, read the exhibits, read the briefs, listen to oral argument if it is scheduled, and conduct legal research if applicable. Sup. R. 40(A)(3) offers no guidance on how long a judge should take to rule on objections. In fact, no rule does.

Even if this were a case involving a motion, instead of an objection, there is an exception to the 120-day guideline: "except as otherwise noted on the report forms." Sup. R. 40(A)(3). The reporting form the Supreme Court of Ohio requires is Form D. See Supplement D, Form Ds. The Form D Hamilton County Juvenile Court uses states that for a delinquency case, the guideline is six months. It is unclear if the Form D six-month guideline applies instead of the 120-day guideline. The other reporting form Hamilton County uses is a "Pending list" of motions. See Supplement B, Letter to Hess, Exhibit D attached thereto at pp. 6-13. However, that report does not offer any guideline for deadlines for ruling on objections or on motions. The authors of the Caseflow Report reviewed a Hamilton County "Pending List" and acknowledged that "the Rules of Superintendence for the Courts of Ohio do not specifically address the timeframe in which a judge should rule on objections to a magistrate's decision * * * ." Supplement E, Caseflow Report p. 12. The Caseflow Report went on to explain that Sup. R. 40(A)(3) would be used to analyze the data since the "Pending List" included both motions and objections. It is unclear what the proper time guideline is for ruling on objections. What is clear is that Sup. R. 40(A)(3) does *not* apply.

Furthermore, even if the timeframe is 120 days, 6 months, or some other time measurement, it is not clear what date triggers the counting. For a motion, Sup. R. 40(A)(3)

requires the counting start from the date the motion was filed. This makes sense for a motion but not for objections. The judge is not ready to rule the date objections are filed because so many more events will occur: filing of transcripts, filing of supplemental objections, opposing memoranda by one or more parties, oral argument, and additional briefing after oral argument. Other events may occur to slow down the decision making process even more: interlocutory appeals, intervening parties or complaints, and attempts to settle the underlying dispute. For these reasons, the date the objections are submitted to the judge is a logical trigger date for a superior court to use when determining whether a judge unduly delayed.

In fact, which date begins the counting of time to determine whether a ruling on objections is timely was unclear to the Hamilton County Juvenile Court Judges themselves. In Judge Hunter's letter to this court's Case Management Division, Judge Hunter explained that Judge Williams was using the date of oral argument as the trigger date while she had been using the date the objections were filed. Judge Williams was using the 120 day measure, whereas Judge Hunter was using the Form D time measure. Supplement B, Hunter letter at p. 4.

Since neither the measure, nor the trigger date are clear, it was error for the court of appeals to conclude that Relator had demonstrated "a clear legal right" to a writ of procedendo based on the mere allegation in the Complaint that Judge Hunter had not ruled 120 days from the day the objections were filed.

C. Respondent was not defended below or given the opportunity to present evidence or argument in the court of appeals which should have precluded the court of appeals from issuing a writ of procedendo.

Respondent, the Honorable Tracie M. Hunter, was not defended in the proceedings below. As a result, no defense was raised to relator's complaint. Respondent took it upon herself to file a notice of appeal in the case file pro se. Respondent is representing herself on

appeal pro se in her official capacity. Undersigned counsel is representing Judge Hunter in her personal or individual capacity only. In the proceedings below, the Hamilton County Court of Common Pleas, pursuant to R.C. 305.14 appointed two special counsel to represent Judge Hunter in her official capacity. *See* Entry dated August 30, 2013. However, the appointed special counsel did not answer the complaint, nor have they appeared in this appeal.

Judge Hunter was not able to represent herself below, nor was she able to hire private counsel to defend her. In a prior media access case seeking a writ of mandamus, Judge Hunter engaged private counsel to defend her. The First District Court of Appeals struck her private, pro bono, counsels' notices of appearance and all their filings. *State ex rel. Scripps Media, Inc. v. Hunter*, Case No. 12-0241, Entry dated May 10, 2013. In the next media access case filed against her seeking a writ of mandamus, Judge Hunter filed a notice of appearance and answer to the complaint in an attempt to defend herself pro se. In that case, *State ex rel. The Cincinnati Enquirer*, Case No. C-130072, the First District sua sponte struck Judge Hunter's notice of appearance and answer to the complaint. (See Entry dated June 3, 2013). The First District reasoned that since Judge Hunter was sued in her official capacity, both R.C. 309.09(A) and R.C. 305.14(A) prohibited her from representing herself. In its decision, the court of appeals stated Judge Hunter could not defend herself, nor could she hire private counsel. Being duly warned, Judge Hunter did not file a notice of appearance in this case to represent herself pro se, fearing that she would be accused of contempt after the First District struck her appearance in the earlier case.

Thus, since no answer was filed in the First District by either appointed special counsel, and Judge Hunter could not personally defend the allegations against her, the court of appeals treated Respondent's inability to answer the complaint as a default. This was error. The court of

appeals should have instead issued an alternative writ and issued a schedule for evidence and briefs. *State ex rel. Rodak v. Betleski*, 2004-Ohio-6567, 104 Ohio St. 3d 345, 347, 819 N.E.2d 703, 705 (2004), citing, *Tatman v. Fairfield Cty. Bd. of Elections*, 102 Ohio St.3d 425, 2004-Ohio-3701, 811 N.E.2d 1130, ¶ 13. For these reasons alone, this court should reverse the issuance of the writ of procedendo.

D. Had the First District Court of Appeals considered the mitigating factors in this case, Relator would not have been entitled to a writ of procedendo.

In, *Culgan v. Collier*, this court used Sup. R. 40(A)(3) only as a “guide” to determine whether there was an undue delay. 135 Ohio St. 3d 436, 2013-Ohio-1762, 988 N.E.2d 564. In *Culgan*, the petitioner moved for relief in the trial court, claiming that an error related to his 2009 sentencing justified his release from post-release control. *Id.* The trial court judge did not rule on the motion within 120 days. The petitioner sought writs of mandamus and procedendo in the court of appeals, which dismissed, stating that the petitioner had an adequate remedy by appeal. *Id.* The petitioner appealed to the Ohio Supreme Court, which held that Sup. R. 40(A)(3), which the petitioner relied on for the 120-day standard, did not create a cause of action, but that “procedendo and mandamus will lie when a trial court has refused to render, or unduly delayed rendering, a judgment.” *Id.* at 437-38 (quoting *Reynolds v. Basinger*, 99 Ohio St.3d 303, 2003-Ohio-3631, 791 N.E.2d 459).

This court used Sup. R. 40(A)(3) only to “guide” it in determining whether decision on a motion was unduly delayed. *Id.* at 438. Instead of endorsing a flat 120-day rule, this court named several other factors that would inform its determination of undue delay:

For example, a judge may require longer than 120 days to rule on a motion for summary judgment in a complex case. Other factors that might delay a ruling are the need for further discovery, the possibility of settlement, and other motions pending in the case. *See State ex rel. Duncan v. DeWeese*, 5th Dist. No. 2011-

CA-67, 2011-Ohio-5194, 2011 WL 4625370, ¶ 4. This is not an exhaustive list; we cannot anticipate all the factors that might allow a court, acting within its proper discretion, to delay ruling on a motion past the 120 days commanded by the rule.

Id.

Three other cases discuss Sup. R. 40(A)(3) in conjunction with a petition for procedendo. In *Duncan*, which preceded *Culgan*, the petitioner requested the writ to compel a trial court to rule on his motion for resentencing. 2011 WL 4625370 at *1. Like in *Culgan*, the Fifth District in *Duncan* held that Rule 40(A)(3)'s 120-day deadline did not create an enforceable right, and that the presumption of undue delay after 120 days was subject to factors such as “[t]he need for discovery, the issues presented, the possibility of settlement, other motions pending in the case, and even other matters pending before the court * * * .” *Id.* Further, “allowing litigants to enforce such a rigid rule risks depriving other litigants of due process, invites gamesmanship in litigation, and could frustrate the policy of deciding cases on their merits and not on procedural technicalities.” *Id.*

In *Jamison v. Muskingum*, the petitioner sought a writ of mandamus or procedendo compelling a ruling on his motion for a new trial in the trial court. *Jamison v. Muskingum*, 5th Dist. Muskingum No. CT2009-0001, 2009-Ohio-1482, 2009 WL 818957 at *1 (March 25, 2009). The Fifth District found that although more than 120 days had elapsed since the date of the motion, a prior appeal filed by the petitioner had divested the trial court of jurisdiction for several months. *See id.* When the appeal was dismissed, the trial court assumed jurisdiction over the motion, but less than 120 days elapsed before Petitioner sought relief via procedendo. *Id.* at *2. This caused the court to dismiss the petition as premature. *Id.*

Respondent was unable to present the mitigating factors that weighed against issuing a writ to rule on objections from a magistrate. The court of appeals could have taken judicial notice of the juvenile court docket sheet, which in Hamilton County Juvenile Court is called the “Journal Query.” (Supplement F, Redacted Docket Sheet). *See* Evid. R. 201(B); *Indus. Risk Insurers v. Lorenz Equip. Co.*, 69 Ohio St. 3d 576, 1994-Ohio-442, 580, 635 N.E.2d 14, 18 (1994) (a trial court “is not required to suffer from institutional amnesia. It is axiomatic that a trial court may take judicial notice of its own docket.”); *Leatherworks Partnership v. Berk Realty, Inc.*, N.D. Ohio No. 4:04 CV 0784, 2005 WL 3059623, *2 (court takes judicial notice of public court records available on Internet), followed by *State ex rel. Everhart v. McIntosh*, 115 Ohio St. 3d 195, 197, 2007-Ohio-4798, 874 N.E.2d 516, 518 (2007) (holding that the Supreme Court would take judicial notice of an entry contained in the parties’ supplement even though the entry was not in the record from the court of appeals). The docket sheet for this case (Supplement F) and Judge Hunter’s Decision (Supplement G) contain the following information that is relevant to a consideration of mitigating factors.

This custody case began in 2006. On April 23, 2012 the magistrate decided to award permanent custody to the Hamilton County Jobs and Family Services (“HCJFS”). Objections were filed by two parties on April 25, 2012 and by two more parties on May 4, 2012. On July 23, 2012 Judge Hunter held a hearing but it had to be continued to October 29, 2012 in order to have the transcripts prepared. Before the October 29, 2012 eleven transcripts were filed, which totaled 1,069 pages. However, not all the transcripts were prepared in time. The hearing was continued again to November 20, 2012 before which time four additional transcripts were filed. In total, Respondent had to read 15 transcripts, totaling 1,414 pages. Oral argument was held on November 20, 2012. However, before Respondent could rule, HCJFS filed a motion to reopen

the case in order to submit additional evidence. This motion was filed on June 12, 2013. A hearing on the motion was scheduled before Respondent for August 13, 2013. The day before the hearing, Relator filed its complaint for a writ.

All of these delays in ruling are reasonable given HCJFS right to request reopening the case to submit additional evidence, the need to continue the oral argument for several months until all 15 transcripts were completed, and the need to set a hearing on the motion for additional evidence. What the court of appeals did not know when it issued its writ, because Respondent was not represented and because Relator did not inform the court of appeals, is that HCJFS, the party to whom permanent custody was awarded, requested to reopen the case.

Assuming, for the sake of argument, that the Sup. R. 40 (A) (3)'s 120 day guideline applied, there are two dates to apply it to. May 4, 2012, the date the last set of objections were filed or November 20, 2012, the day the case was submitted after oral argument. If the latter date is used, 120 days from November 20, 2012 is March 20, 2013. However, a subsequent act occurred on June 12, 2013 when HCJFS requested to reopen the case and a hearing was set for August 13, 2013. Relator knew both these facts when she filed her writ complaint but failed to include this information in her pleadings. The fact that the case was not ready for decision on August 12, 2013 and an evidentiary hearing was scheduled for the following day establishes that the writ complaint should have been dismissed as prematurely filed.

If the exception in Sup. R. 40 (A) (3) applies, and the exception is based on Hamilton County Juvenile Court's Form D, the Form D time guideline in a permanent custody case is nine months. Nine months had not yet run from the November 20, 2012 oral argument date when Relator filed her complaint on August 12, 2013.

Had the court of appeals allowed evidence and briefs to be submitted, it would have had all the facts before it, including the mitigating factors of: several continuances, none of which Relator objected to; the intervening fact that HCJFS filed a motion to re-open the case; that the hearing on that motion was held August 13, 2013; that the court had to read over 1,100 transcript pages to conduct an independent review; and the systemic problems in the Hamilton County Juvenile Court regarding its large case backlog and inefficient operations.

With just these facts before it, the First District would have been able to apply the mitigating factors and been able to find that there was no undue delay in Judge Hunter's ruling in this case. In fact, a decision to the contrary would not serve justice in a future similar case. A judge should be free to: grant reasonable continuances; to allow parties time to read a transcript before argument; to hear oral argument; to independently review the entire case file, as required by law; and to read the trial transcripts, which may be hundreds or thousands of pages in length, in order to render a fair and just ruling. This flexibility allows the parties to be treated fairly and believe justice was served. To hold otherwise would encourage gamesmanship, potentially giving one party an unfair advantage over another, and overall frustrate the policy of deciding cases on their merits.

CONCLUSION

For all these reasons, the First District Court of Appeals erred in finding that Relator had a clear legal right to a writ of procedendo. The systemic backlog in the Hamilton County Juvenile Court, the lack of clarity of the timeframe a judge has to rule on objections, the inability of Judge Hunter to defend the allegations, and the obvious mitigating factors all show it was error for the First District to issue a writ of procedendo against Judge Hunter. Respondent respectfully requests that the entry granting the writ be reversed.

Respectfully submitted,


Tracie M. Hunter (by J. Branch)

Judge Tracie M. Hunter

Pro Se Respondent Representing Respondent in her
Official Capacity

Hamilton County Court of Common Pleas

Juvenile Division

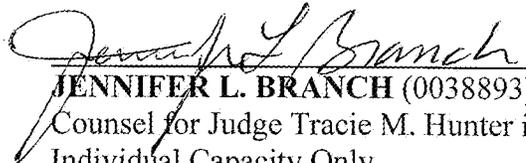
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Jennifer L. Branch

JENNIFER L. BRANCH (0038893)

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Memorandum was sent by regular U.S. Mail, postage prepaid, this 6th day of January, 2014, upon Counsel for Relator:

Nathan Bell (0076027)
Law Office of the Hamilton County
Public Defender
800 Broadway, Third Floor
Cincinnati, Ohio 45202


Jennifer L. Branch

Appendix

A. Notice of Appeal1

B. Judgment from First District Court of Appeals4

C. Rule of Superintendence for the Courts of Ohio 405

IN THE SUPREME COURT OF OHIO

ORIGINAL

STATE OF OHIO ex rel.,
MEGAN SHAHAN-BECK

Appellee,

v.

JUDGE TRACIE M. HUNTER,
Hamilton County Juvenile Court
800 Broadway, 12th Floor
Cincinnati, OH 45202-1332,

Appellant.

13-1734

On Appeal from the Hamilton
County Court of Appeals
First Appellate District

Court of Appeals
Case No. C13-504

NOTICE OF APPEAL OF APPELLANT JUDGE TRACIE M. HUNTER

Judge Tracie M. Hunter
Hamilton County Court of Common Pleas
Juvenile Division
800 Broadway, 12th Floor
Cincinnati, Ohio 45202
(513) 946-9212
Fax No. (513) 513 9216
THunter@juvcourt.hamilton-co.org

Appellant

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Counsel for the Appellee

FILED
NOV 04 2013
CLERK OF COURT
SUPREME COURT OF OHIO

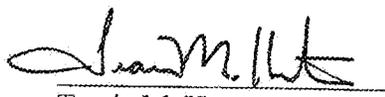
RECEIVED
NOV 04 2013
CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF APPEAL OF APPELLANT JUDGE TRACIE M. HUNTER

Appellant Judge Tracie M. Hunter hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Hamilton County Court of Appeals, First Appellate District, entered in Court of Appeals case No. C13-504 on September 18, 2013.

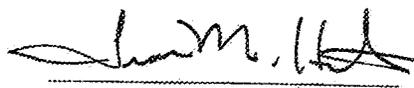
This case originated in the Hamilton County Court of Appeals, First Appellate District and is therefore an Appeal of Right, S.Ct.Prac.R.5.01(A)(3).

Respectfully submitted,
Judge Tracie M. Hunter


Tracie M. Hunter

Certificate of Service

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail to Nathan Bell, Counsel for the Appellee at the Hamilton County Public Defender's Office, Guardian ad Litem Division, 800 Broadway, Third Floor, Cincinnati, Ohio 45202 on October 30, 2013.


Tracie M. Hunter

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

ENTERED
SEP 18 2013

STATE OF OHIO, EX REL.
MEGAN SHAHAN-BECK,

CASE NO. C-130504

Relator,

vs.

ENTRY GRANTING
PEREMPTORY
WRIT OF PROCEDENDO

JUDGE TRACIE M. HUNTER,



Respondent.

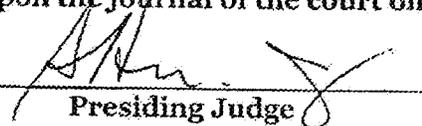
This cause came on to be considered upon the complaint for a writ of procedendo.

The Court finds that the relator has demonstrated a clear legal right to procedendo. The respondent is hereby ordered to proceed to a decision on the relator's objections in Juvenile Court Case No. F06-1277Z and enter it upon the record on or before October 16, 2013.

To the clerk:

Enter upon the journal of the court on SEP 18 2013 per order of the court.

By:


Presiding Judge

(Copies sent to all counsel)

ENTERED
SEP 18 2013

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO, EX REL.
MEGAN SHAHAN-BECK,

CASE NO. C-130504

Relator,

vs.

ENTRY GRANTING
PEREMPTORY
WRIT OF PROCEDENDO

JUDGE TRACIE M. HUNTER,



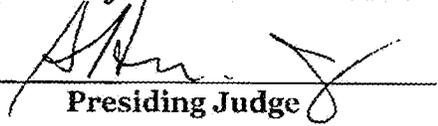
Respondent.

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The Court finds that the relator has demonstrated a clear legal right to procedendo. The respondent is hereby ordered to proceed to a decision on the relator's objections in Juvenile Court Case No. F06-1277Z and enter it upon the record on or before October 16, 2013.

To the clerk:

Enter upon the journal of the court on SEP 18 2013 per order of the court.

By: 
Presiding Judge

(Copies sent to all counsel)

RULE 40. Review of Cases; Dismissal; Rulings on Motions and Submitted Cases.

(A) Review; dismissal; rulings.

(1) Each trial judge shall review, or cause to be reviewed, all cases assigned to the judge. Cases that have been on the docket for six months without any proceedings taken in the case, except cases awaiting trial assignment, shall be dismissed, after notice to counsel of record, for want of prosecution, unless good cause be shown to the contrary.

(2) All cases submitted for determination after a court trial shall be decided within ninety days from the date the case was submitted.

(3) All motions shall be ruled upon within one hundred twenty days from the date the motion was filed, except as otherwise noted on the report forms.

(4) All child support hearings involving an obligor or obligee called to active military service in the uniformed services, as defined in section 3119.77 of the Revised Code, shall be heard within thirty days from the date the court receives notice that the obligor or obligee has requested a hearing.

(B) Reporting.

(1) Each judge shall report to the administrative judge decisions that have not been ruled upon within the applicable time period. The administrative judge shall confer with the judge who has motions pending beyond the applicable time period and shall determine the reasons for the delay on the rulings. If the administrative judge determines that there is no just cause for the delay, the administrative judge shall seek to rectify the delay within sixty days. If the delay is not rectified within sixty days, the administrative judge shall report the delay to the Case Management Section of the Supreme Court.

(2) In a single-judge court, if the judge has not rectified the delay, the judge shall report the delay in the rulings to the Case Management Section within one hundred eighty days from the date of the filing of the overtime motion or the submission of the case.

(3) All reports submitted to the administrative judge and the Case Management Section under this rule shall be available for public access pursuant to Sup. R. 44 through 47.

(C) Assigned judges. The provisions of this rule apply to judges sitting by assignment of the Chief Justice of the Supreme Court.

Commentary (July 1, 1997)

Rule 40 is identical to former C.P. Sup. R. 6 and M.C. Sup. R. 6.

Rule 40(A) Review; dismissal; rulings

Each trial judge is required to periodically review all cases assigned to the judge. This requirement applies to civil and criminal cases. The dismissal sanction does not apply in criminal cases because it is overridden by Rule 39 and by R.C. 2945.73, which contain specific provisions as to criminal cases. The review may be conducted personally or be done under the direction of the judge.

The purpose of the review of assigned cases is to: (1) identify and dismiss those cases that have been on the docket for six months without any activity or action being taken; (2) dismiss those inactive cases for want of prosecution; and (3) bring to the attention of each judge those matters which are pending and require decision.

“Been on the Docket” as used in the rule means pending, that is, being on the appearance docket. It does not refer to being on the trial docket for six months.

“Except cases awaiting trial assignment” does not refer to cases that are not yet placed on the trial docket by reason of the issues not being made up or that are awaiting the next establishment of the trial docket. It refers to those cases that are ready for trial but have not been tried because of the volume of cases in the court. The exception exists to prevent the dismissal of those cases where the delay is not the responsibility of the parties or their counsel.

“Without any proceedings taken in the case” means a case that has been totally inactive as revealed by the appearance docket and the case file. The absence of appearance docket entries over a six-month period indicates a case either is ready for trial or is an inactive case.

Dismissal is not summary; notice to the parties or counsel is a condition precedent. The notice is not limited to plaintiff’s counsel, but must go to the counsel of record for all parties. Ordinary mail notice suffices under the rule. The return of ordinary mail notice should not be permitted to frustrate the action of the court.

Counsel is required to provide counsel’s address with all pleadings and motions; Civ. R. 11. The address must be kept current so that the notice requirements of the Civil Rules function throughout the litigation. The requirement of notice to counsel is not a requirement for an oral hearing on the matter of dismissal. Such a requirement does not appear in the rule and does not appear in Civ. R. 41(B)(1) (dismissal for failure to prosecute). An oral hearing may be conducted. The notice issued by the court may set a time period within which counsel can show cause as to why the action should not be dismissed.

The control and supervision of the docket is the responsibility of the administrative judge. The administrative judge must rely on the individual judges in implementing this assignment. The review, with its sanction of dismissal, is a powerful tool in keeping cases moving and dockets current.

“For want of prosecution”, as used in the rule, does not limit the dismissal of cases to those situations where the inactivity is directly attributable to the plaintiff. When a defendant fails to take a required step, the plaintiff, under the Civil Rules, has an available remedy. If the plaintiff files a complaint and the defendant does not answer, and the court finds no proceedings taken for six months, the court may dismiss the case for want of prosecution because the plaintiff could have prosecuted the case by seeking a default judgment. The rule is an example of the intent of the rules of superintendence to expedite the disposition of cases.

Each trial judge is required by the rule to review, or cause to be reviewed, all pending motions and cases that have been submitted to the judge for determination following court trial.

As to motions, the applicable time period begins to run on the day the motion is filed or made. As to cases submitted, the ninety days runs from the day the trial is ended or, if applicable, the day all post-trial pleadings have been filed.

Rule 40 (B) Reporting

Each trial judge is required to report to the administrative judge motions and submitted cases pending beyond the applicable time period. If the administrative judge is unable to resolve the delay, or, in a single judge court, the matter is referred to the Case Management Section for reporting to the Chief Justice for corrective action.

Rule 40(C) Assigned judges

Visiting judges and retired judges sitting by assignment of the Chief Justice are subject to the applicable time periods for disposition of motions and submitted cases, and to the reporting requirements of this rule.

Commentary (July 4, 2005)

The 2005 amendment to Rule 40(A) added an expedited process for hearings regarding child support orders for those called to active military service pursuant to Amended Substitute House Bill 149 (eff. 06/02/04).