

ORIGINAL

IN THE SUPREME COURT OF OHIO

14-2181

In re A.G. : On Appeal from the Lucas
 : County Court of Appeals,
 : Sixth Appellate District
 :
 : Court of Appeals
 : Case No. L-14-1079

MEMORANDUM IN SUPPORT OF JURISDICTION
 OF APPELLANT PATSY GRANT

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TABLE OF CONTENTS

	<u>Page</u>
EXPLANATION OF WHY THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST.....	1
STATEMENT OF THE CASE AND FACTS	3
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW.....	7

Proposition of Law No. I: A parent’s due process rights are violated when a juvenile court insists on proceeding with trial when doing so would be fundamentally unfair to the parent.

CONCLUSION.....	14
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APPENDIX

Appx. Page

Opinion of the Lucas County Court of Appeals (Nov. 3, 2014).....	1
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THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This case presents the substantial constitutional question of whether a parent's constitutional right to due process is violated by a trial court's preemptive declaration of its intent to proceed with a permanent custody trial to comply with an inapplicable deadline, where counsel for the parent is appointed with only twenty calendar days/fourteen court days before trial due to an unwaivable conflict of interest created by that counsel, leaving newly appointed counsel with insufficient time to prepare for trial.

The trial court denied Appellant her constitutional right to due process and a fundamentally fair trial protected by the constitutions of the United States and of Ohio in proceeding with the permanent custody trial without affording Appellant and Appellant's newly appointed counsel sufficient time to prepare for trial. It is well established in Ohio that the permanent termination of parental rights is "the family law equivalent of the death penalty in a criminal case," and therefore, parents must be afforded every procedural and substantive protection the law allows. *In re M.M.*, 4th Dist. Meigs No. 14CA6, 2014-Ohio-5111, ¶ 43.

Parents have a constitutionally protected fundamental interest in the care, custody, and management of their children. *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *Troxel v. Granville*, 530 U.S. 57, 66, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). When the state intervenes to terminate the parent/child relationship, "it must provide the parents with fundamentally fair procedures." *Santosky*, 455 U.S. at 753-54. Ohio courts have emphasized that when the right to parent one's own child is being contested by the state, parents "must be afforded every procedural and substantive protection the law allows." *In re Hayes*, 79 Ohio St. 3d 46, 48, 679 N.E.2d 680 (1997) (quoting *In re Smith*, 77 Ohio App. 3d 1, 16, 601 N.E.2d 45 (1991)). In *Ungar v. Sarafite*, the United States Supreme Court recognized that, although "not

every denial of a request for more time . . . violates due process[,] . . . a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend . . . an empty formality.” 376 U.S. 575, 589, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964). “[D]ue process encompasses ‘fundamental fairness,’ a requirement whose meaning can be as opaque as its importance is lofty.” *Hutchinson v. Hutchinson*, 2nd Dist. Montgomery No. 26221, 2014-Ohio-4604, ¶ 26 (citing *In re Hoffman*, 97 Ohio St. 3d 46, 2002-Ohio-5368, 776 N.E.2d 485, ¶ 17).

The action of the trial court and the affirmation by the court of appeals sets a precedent that a court may force a case to trial involving the permanent termination of parental rights even when doing so is fundamentally unfair to the parent because of circumstances beyond her control. This precedent is contrary to the stated purpose of the relevant juvenile statutes, which are intended to protect the constitutional rights of Appellant and her children. Chapter 2151 of the Revised Code “shall be liberally interpreted and construed . . . to provide judicial procedures through which Chapters 2151. and 2152. of the Revised Code are executed and enforced, and **in which the parties are assured of a fair hearing, and their constitutional and other legal rights are recognized and enforced.**” R.C. 2151.01 (emphasis added).

This case is of public or great general interest because of the very nature of the proceeding. The permanent termination of parental rights and responsibilities is severe. It is “the family law equivalent of the death penalty in a criminal case.” *In re M.M.* at ¶ 43. Parents in such a situation must be provided all of the procedural and substantive protections the law allows. *Id.* If a juvenile court, in even one case, is allowed to shortcut these protections, then the process is flawed and must be addressed by this Court. All parents whose parental rights are at risk of being terminated have an interest in ensuring that the procedure is fair. If a parent loses a

fundamental liberty interest, the public has an interest in ensuring that it is because of the merits and not because she was procedurally short-changed.

Additionally, the “sunset” provisions of R.C. 2151.353(G) and R.C. 2151.415(D), which the trial court misconstrued as divesting the court of jurisdiction, is applicable to all temporary and permanent custody proceedings. In all such proceedings, it is imperative that the proper procedure is followed and the court does not improperly truncate the parent’s right to a fair trial to comply with a deadline that this Court has held does not divest the trial court of jurisdiction.

In preemptively refusing to entertain a continuance of the trial, which was necessary to give Appellant and Appellant’s newly appointed counsel sufficient time to prepare for trial, the trial court denied Appellant of her constitutional right to due process and a fundamentally fair trial. The public has an interest in protecting the sanctity of the process in cases involving the termination of parental rights and responsibilities. To preserve the integrity of the process and fairness in juvenile permanent custody cases, this Court must grant jurisdiction to hear this case and review the decision of the court of appeals.

STATEMENT OF THE CASE AND FACTS

This case arises from the termination of Appellant’s parental rights and responsibilities of her minor daughter, A.G. (DOB: 2/5/2010) and awarding of custody to Lucas County Children Services (“LCCS”) after Appellant’s privately-retained counsel created a conflict of interest by his last-minute representation of Appellant’s aunt and uncle in a competing motion for custody. The conflict of interest was determined to be unwaivable and resulted in the appointment of new trial counsel for Appellant less than twenty calendar days/fourteen court days before the trial. Yet, the trial court preemptively declared its intent to proceed with the permanent custody trial in

what was a complex case, both procedurally and substantively, due to the trial court's misapplication of the two year sunset provisions of R.C. 2151.353(G) and R.C. 2151.415(D)(4).

Although the substantive and procedural history of the case is complex, in short, Appellant's four minor children, including A.G., were removed from Appellant's custody on March 22, 2012. A.G. was placed in foster care for approximately three months, after which time she lived with Appellant's aunt and uncle, Lola Guillermo and James Clark, until being removed to foster care one year later.

On September 12, 2013, attorney Dennis Strong, who was privately retained by Appellant, filed a notice of substitution of counsel naming him counsel of record in lieu of Appellant's previous court-appointed counsel. On December 16, 2013, Guillermo and Clark filed a *pro se* motion for legal custody and to intervene. On January 29, 2014, LCCS filed a motion for permanent custody of A.G. and the trial was scheduled to begin March 18, 2014. On February 3, 2013, attorney Strong filed a new motion for custody and to intervene on behalf of Guillermo and Clark, thereby making his appearance as their counsel of record in addition to already having made an appearance as counsel for Appellant.

Faced with the conflict of interest created by attorney Strong's representation of both Appellant and Guillermo and Clark, at a pretrial hearing on February 26, 2014, attorney Strong represented to the court that he had previously represented Appellant in proceedings in front of the assigned magistrate¹ but at that time he did not represent Guillermo and Clark, that he no longer represented Appellant, and that he now represented only Guillermo and Clark. Strong

¹ Attorney Strong inexplicably represented to the trial court that he had not entered an appearance of counsel for Appellant, attempting to distinguish his representation of Appellant in proceedings before the Magistrate (in which he states he did represent Appellant) versus proceedings before the Judge (in which he states he did not represent Appellant), even though all proceedings were under the same case number in the same matter. Appellant has a grievance complaint pending against attorney Strong.

then presented to the trial court a waiver of conflict signed by both Appellant and Guillermo and Clark. The trial court appropriately ruled that the conflict of interest could not be waived because the representation involved using information from one client against another. The trial court disqualified Strong from representing Guillermo and Clark, appointed new counsel for Appellant, and directed Guillermo and Clark that they could find new counsel or proceed *pro se*.

Importantly, the trial court *sua sponte* and preemptively stated that it was up against the two-year deadline imposed on permanent custody proceedings, and despite the drastic changes announced in court that day, indicated that it could not extend the trial date. The trial court's basis was the mistaken belief that it would lose jurisdiction. "So the two years is up. And we cannot extend this trial date without – if we did, we would have to dismiss the case because I don't have jurisdiction after two years on a case like this." (Pretrial Tr., Feb. 26, 2014, at 3-4). "[W]e have to start this before the two-year deadline **or we lose jurisdiction.**" *Id.* at 7.

Appellant's newly-appointed attorney, Ann Baronas, made her appearance on the record on March 4, 2014, when she filed a motion for discovery. She appeared at a final pretrial hearing on March 7, 2014, during which time she expressed to the court her discomfort with proceeding after only having been appointed one week previously:

COURT: As you know you've been involved with this case for quite some time, and I've been looking at it for about the last hour. I need to get up to speed.²

MS. BARONAS: Oh, not so much, Judge. You're not the only one that needs to get up to speed.

COURT: That needs to get up to speed?

MS. BARONAS: Indeed. Let us share with you. . . .

² The sitting judge for the trial and the March 7, 2014 pretrial hearing was appointed by the Supreme Court following the February 26, 2014 pretrial hearing because the assigned judge was unavailable for the scheduled trial dates.

MS. BARONAS: Your honor, I represent the mother in this case, Patsy Grant. It's Ann Baronas, counsel for the mother. And, Judge, I was only appointed a week ago.

(Pretrial Tr., Mar. 7, 2014, at 14-15). The trial thereafter commenced on March 18, 2014, and continued on March 19, 20, and 24, 2014. Appellant's counsel had insufficient time to prepare for trial, was unfamiliar with the facts and procedural history of the case, failed to call any witnesses on Appellant's behalf, and was essentially rendered ineffective.

The trial court issued its Judgment Entry on April 9, 2014, terminating Appellant's parental rights and responsibilities of A.G. and awarding permanent custody of A.G. to LCCS for adoptive placement and planning. Appellant timely appealed the trial court's Judgment Entry. On November 3, 2011, the judgment was affirmed by the Lucas County Court of Appeals, Sixth Appellate District. The court of appeals found that Appellant was not prejudiced by the last-minute appointment of new counsel or her inability to prepare for trial. With regard to the trial court's preemptive refusal to consider a continuance of the case, the court of appeals found that because Appellant's newly-appointed trial counsel did not request a continuance, the court cannot be certain whether it would have been granted, and that even if counsel should have made the request, there was no indication of how Appellant's counsel would have been better prepared for trial if a continuance had been granted. The court of appeals erred by not finding that Appellant was prejudiced by the last-minute appointment of new counsel and the trial court's preemptive declaration of its intent to proceed, without modification of the schedule, with a permanent custody trial due to an inapplicable deadline.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: A parent's due process rights are violated when a juvenile court insists on proceeding with trial when doing so would be fundamentally unfair to the parent.

The Supreme Court of the United States and this Court have recognized that denial of a continuance can violate a party's due process rights. *Sarafite* at 589; *State v. Unger*, 67 Ohio St.2d 65, 67-68, 423 N.E.2d 1078 (1981). "In considering whether a trial court abused its discretion in denying a motion for continuance, a reviewing court considers the length of the requested delay, prior continuances requested and received, the presence or absence of legitimate reasons for the requested delay, appellant's [movant's] participation or contribution to the circumstances giving rise to the request for a continuance, and any other relevant factors." *Unger* at 67-68. "While these factors provide basic guidance, we are mindful that '(t)here are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.'" *Id.* at 67 (quoting *Sarafite*, 376 U.S. at 589); *In re B.D.*, 11th Dist. Lake Nos. 2009-L-003, 2009-L-007, 2009-Ohio-2299, ¶ 21-22. Although "not every denial of a request for more time . . . violates due process[,] . . . a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend . . . an empty formality." *Sarafite*, 376 U.S. at 589.

Parents have a constitutionally protected fundamental interest in the care, custody, and management of their children. *Santosky*, 455 U.S. at 753; *Troxel*, 530 U.S. at 66. If the state intervenes to terminate the relationship between a parent and child, "it must provide the parents with fundamentally fair procedures." *Santosky* at 753-54. Ohio courts have emphasized that, if the right to parent one's own child is being contested by the state, parents "must be afforded every procedural and substantive protection the law allows." *In re Hayes*, 79 Ohio St. 3d at

48 (quoting *In re Smith*, 77 Ohio App. 3d 1, 16, 601 N.E.2d 45 (6th Dist. 1991)). As observed by the United States Supreme Court, “the Constitution recognizes higher values than speed and efficiency.” *Stanley v. Illinois*, 405 U.S. 645, 656, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972).

R.C. 2151.353 and 2151.415 detail the dispositions that may be made and the procedure regarding the disposition of a child after she is adjudicated abused, neglected, or dependent. Relevant to this case, R.C. 2151.353(A) provides that a court may commit the child to the temporary custody of a public children services agency. This temporary placement expires one year after the earlier of the date the complaint was filed or the child was placed in shelter care. R.C. 2151.353(G). Prior to the expiration of the one year limitation of temporary custody, a party can request that temporary custody extend for an additional six months. R.C. 2151.415(A)(6). In the event the court extends the temporary custody, a party may request a second six month extension. R.C. 2151.415(D)(2). Prior to the expiration of, at the latest, the second six month extension, the court is to conduct a hearing regarding the final disposition of the child and make an order pursuant to R.C. 2151.415(A)(1) to (5), which includes an order permanently terminating parental rights. R.C. 2151.415(D)(3). **In the event a motion is filed pursuant to R.C. 2151.415(A), R.C. 2151.353(G) provides that the temporary custody order continues and does not terminate until the dispositional order is made**, but that the court shall not order temporary custody to continue beyond two years. Consistently, R.C. 2151.415(D)(4) also provides that a court cannot grant more than two extensions of temporary custody, and that a temporary custody order cannot continue beyond two years.

Specifically, R.C. 2141.353(G) and R.C. 2151.415(D)(4)—the sunset provisions the trial court presumably relies upon when stating that it could not continue the trial because of the mistaken belief that the court would lose jurisdiction—provide that a juvenile court “shall not

order an existing temporary custody order to continue beyond two years after the date on which the complaint was filed or the child was first placed into shelter care, whichever date is earlier, regardless of whether any extensions have been previously ordered”

In *In re Young Children*, this Court addressed the issue of “whether a juvenile court loses jurisdiction to enter dispositional orders upon expiration of the statutory time period (the ‘sunset date’) pursuant to R.C. 2151.353(F).”³ 76 Ohio St. 3d 632, 669, N.E.2d 1140 (1996). This Court held that “[t]he passing of the statutory time period (‘sunset date’) pursuant to R.C. 2151.353(F)⁴ **does not divest juvenile courts of jurisdiction to enter dispositional orders.**” *Id.* at syllabus (emphasis added). The temporary custody of the child continues beyond the sunset date when a motion is timely filed pursuant to R.C. 2151.415(A), which includes a motion for permanent custody. *Id.* at 638; *In re A.J.*, 10th Dist. Franklin Nos. 13AP-864, 13AP-865, 2014-Ohio-2734. The analysis supporting the decision was based upon: (1) the language of R.C. 2151.353(G), which provides that upon the filing of a motion pursuant to R.C. 2151.415, “the temporary custody order shall continue and not terminate until the court issues a dispositional order pursuant to that section;” and (2) R.C. 2151.01(A), which provides that Chapter 2151 of the Revised Code is to be “liberally interpreted and construed so as to effectuate . . . the care, protection, and mental and physical development of children subject to Chapter 2151. of the Revised Code.” *In re Young Children*, at 636-37. R.C. 2151.01(A) further states that Chapter 2151 of the Revised Code “shall be liberally interpreted and construed . . . to provide judicial procedures through which Chapters 2151. and 2152. of the Revised Code are executed and enforced, and **in which the parties are assured of a fair hearing, and their constitutional and other legal rights are recognized and enforced.**” (emphasis added).

³ Now R.C. 2151.353(G), eff. Sept. 17, 2014.

⁴ Now R.C. 2151.353(G), eff. Sept. 17, 2014.

In *In re A.J.*, the tenth district court of appeals addressed a case that is procedurally similar. Children's services filed a motion pursuant to R.C. 2151.415(A)(2) to terminate its temporary custody and obtain an order of protective supervision; the motion was filed prior to the expiration of the two year "sunset provision." Subsequently, children's services filed a motion seeking an award of permanent custody. This motion was filed on November 17, 2008, eighteen days after the two-year 'sunset provision' expired on October 30, 2008.⁵ *In re A.J.*, at ¶ 6-7. Because the motion for protective supervision, filed pursuant to R.C. 2151.415(A)(2), was filed before the expiration of the two year sunset provision/expiration of the temporary custody order, the order of temporary custody was continued until the court made its dispositional order, which in this case was a ruling on the subsequent motion for permanent custody, even though the trial on the motion for permanent custody was held after the expiration of the two year timeframe. *Id.* at ¶12-13. The court cited R.C. 2151.353(F),⁶ stating that the motion to terminate temporary custody and obtain an order of protective supervision is "one of the specifically enumerated motions in R.C. 2151.415(A) that continues the [children's services'] order of temporary custody until a disposition is made." *Id.* at ¶ 11. The court held that temporary custody was continued pending disposition of the motion, and that the court could consider the motion for permanent custody. *Id.* at ¶ 13.

In the case *sub judice*, the trial court refused to entertain the option of a continuance of the permanent custody hearing. The trial court based its position upon its mistaken belief that it would lose jurisdiction, announcing at a pretrial hearing that the scheduled trial date would not be altered even though the court announced that it was appointing new counsel for Appellant due

⁵ Pursuant to R.C. 2151.353(G) and R.C. 2151.415(D)(4), the two year sunset date was October 30, 2008, which is two years after children's services filed its complaint on October 30, 2006.

⁶ Now R.C. 2151.353(G), eff. Sept. 17, 2014.

to a conflict of interest her previous counsel created, and which was outside Appellant's control. The court's refusal to entertain a continuance, coupled with the new appointment of counsel for Appellant, left Appellant's counsel with only twenty calendar days/fourteen court days to prepare for the trial in a case with a complex substantive and procedural history. The trial court's refusal to continue the case was *inherently* prejudicial to Appellant given the circumstances.

The prejudice to Appellant arose when the court announced its decision that it would not entertain the option of continuing the trial, even though there were only twenty calendar days/fourteen court days until the trial commenced, and the court had just announced its intent to appoint new counsel for Appellant. The court of appeals found relevant the fact that Appellant's counsel did not request a continuance and therefore there was no certainty that it would not have been granted, and there is no indication of how Appellant's counsel would have been better prepared for trial if a continuance had been granted. However, a formal request by Appellant's counsel for a continuance would have been futile given the court's adamancy in proceeding as scheduled due to its mistaken belief that it would lose jurisdiction. Further, this is not the type of case where Appellant's newly-appointed trial counsel could have proffered evidence; she did not know what she didn't know. Further, there is nothing to lose if a continuance had been granted. The child had already been removed from the home, and a continuance would have only maintained the status quo for a short period of time. Because the prejudice was inherent, the only evidence of the failure of due process is that Appellant's parental rights were terminated. The motion for discovery filed by Appellant's newly appointed counsel on March 4, 2014, is indicative of her need for information beyond that which was in the file and provided to her by Appellant's disqualified counsel. The court, in protecting the integrity of the process by

disqualifying Appellant's counsel due to a conflict of interest, unintentionally violated Appellant's right to due process. The appointment of counsel without sufficient time to prepare is an empty formality—Appellant was given a tool, but not permitted to sharpen it.

The inherent prejudice to Appellant is further evidenced by the fact that the trial court recognized there was a need for a continuance and addressed the matter *sua sponte* at the pretrial conference. The trial court's preemptive refusal to consider a continuance provides a strong inference that the trial court knew that what was happening procedurally was fundamentally unfair to Appellant, yet it insisted on moving forward with the trial date as scheduled due to its mistaken belief that a failure to do so would divest the court of jurisdiction. According to this Court's decision in *In re Young Children*, this was not true. The expiration of the two year sunset provision does not divest a juvenile court of jurisdiction to issue a dispositional order. *In re Young Children*, at syllabus. The temporary custody of A.G. would have continued beyond the sunset date because LCCS had timely filed a motion for permanent custody pursuant to R.C. 2151.415(A). *Id.* at 638; *In re A.J.* at ¶ 12-13.

Because the trial court made a *de facto* denial of a continuance, the appellate court should have analyzed the factors outlined in *State v. Unger*, 67 Ohio St. 2d at 67-68, to reach the decision that the trial court's refusal to entertain a continuance was not proper. The *Unger* factors are: (1) the length of the requested delay (here, while no continuance was specifically requested by Appellant or her new counsel, the matter was *sua sponte* and preemptively addressed by the court, and as described above, the necessity of the continuance was apparent given the circumstances and a formal request would have been futile); (2) prior continuances requested and received (here, there had been no prior continuances. On February 26, 2014, the trial was set for March 21, 24, and 25th. On March 7, 2014, the trial dates were actually moved-up to March 18,

19, and 24th.); (3) the presence or absence of legitimate reasons for the requested delay (here, there could not be a more legitimate reason than to protect Appellant's constitutional right to a fair trial in the permanent custody proceeding—the result of which has been described as the family law equivalent of a death penalty. Appellant's counsel had insufficient time to prepare for the trial which the court mandated proceed in 20 calendar days/14 court days from the date of counsel's appointment. As observed by the United States Supreme Court, "the Constitution recognizes higher values than speed and efficiency." *Stanley v. Illinois*, at 656); (4) Appellant's participation or contribution to the circumstances giving rise to the request for a continuance (here, the circumstances giving rise to the conflict and resulting appointment of new counsel on Appellant's behalf were outside of Appellant's control. She was blindsided by her attorney undertaking representation of Guillermo and Clark in a motion to intervene that took a position in direct opposition to that asserted by Appellant. The unwaivable conflict of interest resulted in the trial court ordering the new appointment of counsel for Appellant and disqualifying attorney Strong from representing Guillermo and Clark, thereby forcing the couple to proceed *pro se* even though they had demonstrated their intent to retain and proceed with counsel); and (5) any other relevant factors (here, at the eleventh-hour, the cards were re-shuffled: LCCS filed a motion for permanent custody of A.G. thereby transitioning the case where the main goal is reunification of Appellant and A.G. to one of a contested nature, the court granted a motion to intervene that was filed by Guillermo and Clark, the court determined that Appellant's counsel had an unwaivable conflict of interest, and the court appointed Appellant new counsel. Yet, the court insisted that the trial proceed as scheduled to comport with a fictional deadline. The court's insistence in proceeding with the trial despite the eleventh-hour chaos was ritualistic and not founded in law or appropriate given the facts of the case).

The trial court failed to correctly apply the law as it applies to the continuing jurisdiction of the court in permanent custody proceedings. The appellate court erred in failing to analyze the *Unger* factors regarding the propriety of granting a continuance, resulting in an injustice to Appellant. Appellant has no remedy available to her for the trial court's failure to understand the applicable law regarding jurisdiction and otherwise protect Appellant's constitutional rights and the integrity of the process. There is no amount of money that can make Appellant whole. Even a successful malpractice action will not result in the return of her children.

In this case, procedure based upon a fictional deadline stemming from a misapplication of the law trumped substance and, as a result, Appellant permanently lost her child. It is incumbent on the trial court to intercede and prevent such injustice from occurring in the first place. However, in this case, the court created the situation based upon its adherence to a fictional/non-existent deadline. In a court of equity, it is the court's obligation to ensure the integrity of the process and protect Appellant's constitutional right to due process and a fair trial. This was not done in this case. There is no person who is associated with or familiar with the process of a trial and the rigors involved, including attorneys, court personnel, and the court itself, who would tolerate a case to proceed involving their children or grandchildren when the attorney only has 20 calendar days/14 court days to prepare. There is too much involved in the preparation for trial and too much at stake to be lost.

In failing to entertain a modification of the trial date because of a misapplication of the statutory language of the relevant sunset provisions, Appellant's newly appointed counsel had insufficient time to prepare for trial, was unfamiliar with the facts and procedural history of the case, failed to call any witnesses on Appellant's behalf, and was essentially rendered ineffective. While the State of Ohio has an interest in timely resolution of juvenile custody proceedings, it

can not be at the expense of fairness and due process rights afforded Appellant to protect her fundamental liberty interest in the care, custody, and management of her child. The appellate court erred in affirming the trial court's decision and not holding that the trial court was incorrect on insisting that the trial proceed in a timeframe that was prejudicial to Appellant because of the trial court's misapplication of the two-year time limitation as it relates to jurisdiction over the matter.

CONCLUSION

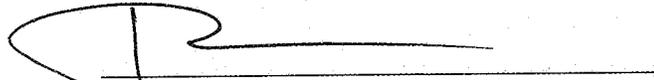
The trial court denied Appellant her constitutional right to due process and a fundamentally fair trial protected by the constitutions of the United States and of Ohio in insisting that the trial proceed as scheduled to comply with an inapplicable deadline based upon the court's mistaken belief that it would lose jurisdiction. As a result, Appellant's newly appointed counsel had grossly insufficient time to prepare for trial, and Appellant's parental rights over A.G. were permanently terminated and custody awarded to LCCS. All parents whose parental rights are at risk of being terminated—the family law equivalent of the death penalty—have an interest in ensuring that the procedure is fair. If a parent loses a fundamental liberty interest, the public has an interest in ensuring that it is because of the merits and not because she was procedurally short-changed. Appellant requests that this Court accept jurisdiction in this case so that the issues presented will be reviewed on the merits.

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and accurate copy of the foregoing *Memorandum In Support of Jurisdiction* of Appellant Patsy Grant has been mailed, postage prepaid, to the following on this 18th day of December, 2014:

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Philip M. Collins

APPENDIX

1. Opinion of the Lucas County Court of Appeals (Nov. 3, 2014).

FILED
COURT OF APPEALS

2014 NOV -3 P 1:01

COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

In re A.G.

Court of Appeals No. L-14-1079

Trial Court No. JC 12222552

DECISION AND JUDGMENT

Decided: **NOV 03 2014**

* * * * *

Tim A. Dugan, for appellant.

Bradley W. King, for appellee.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant, mother, appeals the April 9, 2014 judgment of the Lucas County Court of Common Pleas, Juvenile Division, which terminated her parental rights with respect to A.G. and awarded permanent custody to Lucas County Children Services (“LCCS”). The father has not appealed the trial court judgment. For the reasons set forth herein, we affirm.

E-JOURNALIZED

1.

NOV 03 2014

{¶ 2} A.G. was born in 2006, and has five older half-siblings. The father of A.G. is T.W., and the father of her half-siblings is C.A. LCCS had been involved with the family for several years. In March 2012, appellant was hospitalized due to severe migraines and mental health concerns. LCCS filed a complaint in dependency and neglect and motion for a shelter care hearing for appellant's five minor children due to its belief that the children were left with an inappropriate caregiver, their maternal great-grandmother. The complaint further chronicled LCCS' prior involvement with the family which included issues with supervision, discipline, and domestic violence. At the time the complaint was filed, fathers C.A. and T.W. were incarcerated.

{¶ 3} Four minor children were placed in foster care (the 17 year old was placed with relatives) and a case plan was filed with the court detailing the various services for the family and listing a goal of reunification. In June 2012, A.G. and her sister were placed in their great-aunt, L.G., and uncle, J.C.'s home.

{¶ 4} In June 2013, the children were removed and A.G.'s sibling went to live with C.A., her father. A.G. was placed in foster care. On July 29, 2013, C.A. filed a motion for legal custody of his three minor children and of A.G. Later, C.A. withdrew his motion as to A.G. A hearing was held on the motion over several days and on January 24, 2014, legal custody of the three minor children was awarded to C.A.

{¶ 5} On January 29, 2014, LCCS filed a motion for permanent custody of A.G. The motion stated that A.G. had been in temporary custody of the agency for 12 or more

of the last 22 months, that reasonable efforts were made to reunify her with appellant, and that it was in her best interest to terminate appellant's parental rights.

{¶ 6} On February 3, 2014, A.G.'s great-aunt and uncle filed a motion to intervene in the action and for legal custody of A.G. The two were represented by appellant's attorney although, at the time of the permanency proceedings, the attorney claimed that he no longer represented the mother. The court granted the motion. On February 26, 2014, prior to the commencement of trial, a discussion was held regarding the attorney's conflict of interest as appellant's former counsel in representing the great-aunt and uncle. Despite claims that the conflict was waived by the parties, the court concluded that because the great-aunt and uncle would have to use information the attorney got from the mother against her, the conflict could not be waived. At that point, the court found that the attorney could not represent the interveners and appointed new counsel for appellant. The court informed the great-aunt and uncle that they either needed to find new counsel or proceed pro se.

{¶ 7} The case proceeded to trial on March 18 and 19, 2014, and March 20 and 24, 2014, and the following evidence was presented. The family's caseworker, Keely Gray, testified. Gray described appellant's case plan as requiring that she participate in parenting classes, domestic violence counseling, and mental health services. There was also counseling services for the children. Gray testified that appellant completed the case plan services but that she had not progressed. Specifically, Gray stated that appellant had completed parenting classes "a few times" but was still making "inappropriate" decisions.

Gray cited examples including appellant's belief that her mother could care for the children despite her own mental health issues and appellant's desire to file for guardianship over her; also, her involvement with a man with a history of domestic violence. When further questioned about services, Gray testified that even though appellant completed the parent-child interactive program ("PCIT"), they requested that she go through it again. Appellant refused.

{¶ 8} Gray then testified about the progression of appellant's visitation with the children following their removal from her custody. Appellant initially had level one, or the most restrictive, supervised visitations which take place at the agency. Level two visitation, also at the agency but in a more intimate, less restrictive setting, began in November 2012. Gray testified that appellant proceeded to level three visits, or visits at her home, and stayed there until June 2013, when one of her children ran away. According to Gray, appellant failed to properly monitor the child and then, once she realized he was missing, failed to properly respond. The child was returned a few hours later by two unknown men in a vehicle appellant recognized; she did not question the men or get the license plate of the vehicle.

{¶ 9} Gray testified that for just under one year, appellant's aunt and uncle had custody of A.G. and a sibling. There were concerns about the couple's ability to get the children to counseling and other appointments due to their work schedules. They gave up temporary custody in June 2013. Appellant had also complained that the children were being physically disciplined in the home. According to Gray, once A.G. was placed in

foster care she was toilet trained within days, began talking more, and her overall behavior and health improved.

{¶ 10} Gray stated that in the fall of 2013, while appellant was on level one visitation, the visits were very chaotic. The children were loud and disruptive and Gray stated that she received several complaints from family visit coaches and supervisors. More concerning was that LCCS employees continued to hear her discussing details of the case with the children. Gray testified that she believes that it is in A.G.'s best interest to award custody to LCCS.

{¶ 11} During cross-examination, Gray was questioned about the fact that appellant had successfully completed all of her case plan services and that she is in ongoing mental health and domestic violence services. Gray was further questioned about appellant's reluctance to attend PCIT; she acknowledged that appellant did, in fact, attend a PCIT class in February 2014. It was discussed that a prior PCIT class involved appellant's older children, not A.G. The February classes were discontinued due to LCCS' pursuit of permanent custody.

{¶ 12} LCCS employee, Michelle Penn, testified that she was the visit coach caseworker for appellant from August 2012 through July 2013. Penn testified that during visits with her five children, appellant would often speak negatively about the older children's father. Appellant would also speak negatively about the foster parent. Penn acknowledged that appellant met the children's needs but that, despite her repeated attempts, appellant was not able to filter her conversations with the children. During

cross-examination, Penn acknowledged that appellant was open to her instruction and that she did improve during the course of their work together.

{¶ 13} Annette Schlegel, an LCCS family visit monitor, testified that she supervised appellant's level one and two visitations. Schlegel stated that she had to redirect appellant when appellant spoke negatively about the children's father. LCCS security officer, Courtney Mowery, testified that she supervised level one visitation. Mowery stated that she has supervised over 20 of appellant's visitations. Mowery testified that on two occasions appellant, against the visitation rules, attempted to tape record a visitation.

{¶ 14} A.G.'s foster mother, B.C., testified next. B.C. stated that when A.G. arrived at her home, at age three, she was not toilet trained and that, after about one week she was using the toilet. After one month she was dry overnight. Regarding her speech, B.C. stated that A.G. was "unintelligible" when she arrived at her home but that after a few weeks her speech improved dramatically. B.C. surmised that the improvement was largely due to being around other children. B.C. testified that she observed appellant involving A.G. in what she believed to be "adult" conversation regarding the LCCS case. During cross-examination, B.C. acknowledged that some children take longer to toilet train than others.

{¶ 15} LCCS supervisor, Holly Mangus, testified that appellant's family was first brought to her attention in 2010 regarding alleged sexual abuse of a younger child perpetrated by an older child. The alleged perpetrator was placed outside the home and

case plan services were offered. The case was reopened in August 2011, and remained an open, noncustody case until March 2012, when the children were removed. Mangus testified that the children were removed because appellant had been admitted to the hospital and the children were left in the care of an older child and maternal grandmother. Mangus stated that the older child had gotten into a physical altercation with a younger child and that the grandmother had “significant” mental health issues. In fact, appellant had been looking into filing for guardianship over her mother.

{¶ 16} Mangus testified that once the children were placed in foster care their health and behavior improved. Mangus stated that she felt that the improvements were due to the removal of the “environmental stressors” in their lives and placement in structured and secure environments. Mangus stated that A.G. was in foster care while the three older siblings had been placed with their father.

{¶ 17} Mangus, too, testified about the PCIT program. Mangus stated that the program was proposed for appellant and A.G. in September 2013, but that appellant refused to participate. Mangus acknowledged that appellant had participated with a different child but stated that the program was focused on one child at a time. As testified to previously, appellant went from level three visitation down to level one due to her son running away while in her care, her inappropriate conversations with her children, and the recording devices found on her during visits.

{¶ 18} Mangus stated that appellant had participated in “several” services through LCCS but that she has failed to make any significant progress. She testified that the

agency had made extensive efforts to reunify the family. Finally, Mangus stated that the agency was recommending permanent custody to LCCS for A.G. in the hopes of her being adopted.

{¶ 19} C.A., father of A.G.'s half-siblings, testified next. C.A. testified that he withdrew his motion for custody of A.G., not his biological child, due to harassment by appellant. C.A. testified that during the summer of 2013, when he had visits with the children in his home, appellant would continually drive by the house and call the police and say that he was abusing the children. C.A. stated that this happened 16 to 20 times. C.A. testified that he was awarded legal custody of the three minor children in January 2014.

{¶ 20} C.A. stated that he had concerns about the past history of the children, the "negativity," manipulation, and lying. He testified that initially when the children came home from visitation with appellant they were upset and acting out. C.A. testified that the children figured out that appellant was not telling the truth and became more relaxed. C.A. stated that he did not feel that appellant should parent A.G.

{¶ 21} C.A. was cross-examined about his criminal history. C.A. admitted that he was in prison for drug trafficking when the LCCS case began. He also admitted that he had been in prison three times. C.A. stated that he and appellant have five children together ranging in age from 20 to 7. C.A. testified that for 10 of the 20 years he had known appellant, he was in prison.

{¶ 22} LCCS called A.G.'s great-uncle, J.C., to testify. He stated that he and his wife, L.G., had custody of A.G. from June 2012 through June 2013. J.C. testified that he and his wife would want to adopt A.G. if appellant's parental rights were terminated. J.C. stated that he saw no reason why A.G. should not be returned to appellant because she completed the required programs. J.C. was then questioned about his affidavit made in connection with his motion to intervene for legal custody of A.G. where it stated that appellant was an unfit parent. J.C. stated that he failed to read the affidavit before signing it and did not remember that statement.

{¶ 23} During cross-examination, J.C. denied that they requested that A.G. and her sister be removed from the home. J.C. stated that he only requested respite care when they were unable to take the girls on a planned vacation. J.C. also clarified that he and L.G. are not legally married, but he believes they are common law spouses and have been together for 29 years.

{¶ 24} The children's guardian ad litem ("GAL"), Joan Crosser, testified that when the case was opened, she had concerns about appellant's mental health. Though never diagnosed, Crosser also felt that the mother had the characteristics of Munchausen by Proxy, the psychological condition where a caregiver fabricates or induces health problems in those in their care. Crosser's concern stemmed from the fact that each child had multiple diagnoses and the conditions that were identified were based, largely, on subjective histories. These concerns were also raised by a treating pediatrician. Once the children were placed in foster care nearly all of the conditions resolved. Crosser also

expressed concern that appellant had Munchausen Syndrome based on her own excess of medications and medical treatment. As to appellant's general mental health, Crosser stated that she had a history of sexual abuse and physical traumas.

{¶ 25} Crosser testified regarding the steps taken by LCCS to reunify appellant with her children. Crosser stated that appellant advanced in her services, but that she had trouble setting and remaining in the proper mother and child roles. Specifically, appellant had a "significant" inability to converse in an age-appropriate manner with her children. Crosser then chronicled the progression and regression of appellant's visitation. Crosser stated that she does not feel that appellant is able to protect A.G. and that it is in her best interests that LCCS be awarded permanent custody.

{¶ 26} On April 9, 2014, the trial court granted LCCS' motion for permanent custody finding that appellant failed to remedy the conditions which caused the removal of the children, has chronic mental illness, lost custody of three of her children, and that A.G. had been in custody of LCCS for 12 or more months of a consecutive 22-month period. The trial court also terminated the father's parental rights and denied the great-aunt and uncle's motion for legal custody. This appeal followed.

{¶ 27} Appellant now raises five assignments of error for our review:

- 1) Appellant received ineffective assistance of counsel.
- 2) Appellant was forced to go to trial without her privately retained counsel who was never withdrawn by the trial court.

3) The cumulative effect of the errors committed at trial prevent[ed] appellant from having a fair trial.

4) The decision to terminate appellant's parental rights fell against the manifest weight of the evidence.

5) LCCS failed to demonstrate reasonable efforts to prevent the continued removal of A.G.

{¶ 28} In her first assignment of error, appellant argues that her prior counsel's ineffectiveness created a conflict of interest and prevented her from having proper representation at trial. Specifically, her prior counsel's act of representing the intervening great-aunt and uncle caused the appointment of new counsel too close to trial. Appellant also contends that counsel was ineffective by failing to request a continuance.

{¶ 29} The right to counsel guaranteed in juvenile proceedings by R.C. 2151.352 and Juv.R. 4, includes the right to the effective assistance of counsel. *In re. Heston*, 129 Ohio App.3d 825, 827, 719 N.E.2d 93 (1st Dist.1998); *Jones v. Lucas Cty. Children Servs. Bd.*, 46 Ohio App.3d 85, 546 N.E.2d 471 (6th Dist.1988). "Where the proceeding contemplates the loss of parents' 'essential' and 'basic' civil rights to raise their children, * * * the test for ineffective assistance of counsel used in criminal cases is equally applicable to actions seeking to force the permanent, involuntary termination of parental custody." *Heston* at 827. Thus, to prevail on a claim of ineffective assistance of counsel the appellant must show that counsel's performance fell below an objective standard of reasonableness and that prejudice arose from such performance. *State v. Reynolds*, 80

Ohio St.3d 670, 674, 687 N.E.2d 1358 (1998), citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶ 30} Carefully reviewing the court proceedings, we agree with the trial court's action to remove prior counsel from the proceedings due to the nonwaivable conflict of interest. We cannot say, however, that appellant was prejudiced by the appointment of new counsel or her ability to prepare for trial. Counsel vigorously cross-examined witnesses, made several objections, requested discovery and subpoenaed multiple witnesses. After conferring with appellant, counsel ultimately decided not to call the witnesses.

{¶ 31} Regarding counsel's failure to request a continuance, at the February 26, 2014 pretrial, the court did state that it could not extend the trial date because the case had been pending since March 2012, and it would lose jurisdiction. Appellant's prior attorney indicated that he would make certain that new counsel was prepped as to the case specifics in order to be prepared for trial. Appellant's new trial counsel was not at this pretrial.

{¶ 32} At the March 7, 2014 pretrial, counsel indicated to the court that she had been appointed one week ago. She did not request a continuance. She also set forth her witnesses list which included appellant's therapist and her doctor, various clinicians who had worked with appellant, and three family friends. At that time counsel also raised an issue regarding appellant's visitation with the three children in C.A.'s custody. Counsel

also questioned the LCCS attorney in order to identify employees who had been assigned to appellant's case.

{¶ 33} Juv.R. 23 provides that “[c]ontinuances shall be granted only when imperative to secure fair treatment for the parties.” Further, “[t]he grant or denial of a continuance is a matter which is entrusted to the broad, sound discretion of the trial judge.” *State v. Unger*, 67 Ohio St.2d 65, 423 N.E.2d 1078 (1981), syllabus. Counsel did not request a continuance at that time thus, we cannot be certain whether the court would have granted it or not. Even assuming that counsel should have made the request, there is no indication of how counsel would have been better prepared for trial. As stated above, counsel thoroughly cross-examined the parties and subpoenaed witnesses which, after consulting with appellant, she decided not to call.

{¶ 34} Accordingly, we cannot say that counsel was ineffective by failing to request a continuance. Appellant's first assignment of error is not well-taken.

{¶ 35} In appellant's second assignment of error, she argues that she was prejudiced by proceeding to trial without her privately retained counsel. As noted by both parties, counsel created a conflict of interest by representing intervenors, J.C. and L.G., in support of their motion for custody of A.G. Appellant claims no prejudice caused by the removal of former counsel, only that the fact was not journalized. Appellant's second assignment of error is not well-taken.

{¶ 36} In her third assignment of error, appellant contends that the cumulative errors set forth in her first and second assignments of error prevented her from receiving

a fair trial. The only conceivable error set forth above was prior counsel's attempt to represent A.G.'s great-aunt and uncle at the permanent custody hearing. Thus, because there were no multiple errors, there can be no cumulative error. *See State v. Hemsley*, 6th Dist. Williams No. WM-02-010, 2003-Ohio-5192, ¶ 32, citing *State v. DeMarco*, 31 Ohio St.3d 191, 509 N.E.2d 1256 (1987), paragraph two of the syllabus. Appellant's third assignment of error is not well-taken.

{¶ 37} In appellant's fourth assignment of error, she argues that the trial court's decision to terminate her parental rights was not supported by clear and convincing evidence. In order to award permanent custody to a public children's services agency, a court must find under R.C. 2151.414(B)(1)(a), where the child is not orphaned or abandoned, that the child "cannot be placed with either of the child's parents within a reasonable time or should not be placed with the child's parents." Alternatively, under R.C. 2151.414(B)(1)(d), the court must find that the child has been in the temporary custody of a public children services agency for "twelve or more months of a consecutive twenty-two-month period * * *." The trial court must also determine that an award of permanent custody to the agency is in the child's best interests. R.C. 2151.414(B)(1).

{¶ 38} R.C. 2151.414(E)(1)-(16) lists factors setting forth specific parameters under which a trial court may terminate parental rights. *In re William S.*, 75 Ohio St.3d 95, 99, 661 N.E.2d 738 (1996). Under R.C. 2151.414(E), if the court determines by clear and convincing evidence that 1 of the 16 factors exists as to both parents, the court "shall enter a finding that the child cannot be placed with either parent within a reasonable time

or should not be placed with either parent.” R.C. 2151.414(D) lists relevant factors to be considered by the court in determining whether an award of permanent custody to a public children’s services agency is in the best interests of the child.

{¶ 39} As to appellant, the trial court based its decision to terminate parental rights on findings, by clear and convincing evidence, of the existence of three factors under R.C. 2151.414(E). The court found the existence of factors R.C. 2151.414(E)(1), (2), and (16). The court also found that an award of permanent custody to LCCS was in the best interest of the child under R.C. 2151.414(D).

{¶ 40} Appellant argues that the evidence does not support the trial court’s finding that A.G. could not be placed with her in a reasonable time. Appellant states that she had been progressing with mental health counseling, was compliant with her case plan services, and was meeting the needs of her children. Appellant argues that mere “inappropriate conversations” with her children about her ex-spouse was insufficient to terminate her parental rights.

{¶ 41} In its judgment, the court found that A.G. could not be placed with appellant because despite years of therapy and medication management, appellant had made no real progress in improving her mental health or the behaviors which caused the removal of the children. R.C. 2151.414(E)(1). Specifically, the court found that appellant continued to have inappropriate conversations and interrogations with her children despite intervention by the caseworker, the supervisor, the GAL, and two visit coaches. The court further found that the chaotic interactions between appellant and her

child were detrimental. The court noted that appellant refused to participate in the PCIT program with A.G. until after LCCS filed its motion for permanent custody. Finally, the court found that appellant violated the visitation rules on two occasions.

{¶ 42} Under R.C. 2151.414(E)(2), the court found that appellant's mental illness was so severe that she was not able to provide a home for A.G. at the time of the hearing or within one year of the hearing. The court noted appellant's diagnoses of post-traumatic stress disorder and major depressive disorder. The court stated that the children had multiple health conditions while in appellant's care and improved significantly when removed from the home.

{¶ 43} Under R.C. 2151.414(E)(16), the court found that appellant lost legal custody of three of A.G.'s siblings approximately one month prior to the permanent custody motion being filed.

{¶ 44} Finally, under R.C. 2151.414(D)(1)(c)(d), the court found that A.G. had been in temporary custody of LCCS for 12 of a consecutive 22-month period and that she needs legally secure placement. The court noted that both the caseworker and the GAL testified that A.G. should be allowed to grow up in a house free of chaos, manipulation and negativity. The GAL recommended that a permanent custody award to LCCS was in A.G.'s best interest.

{¶ 45} The court then noted that LCCS exercised reasonable efforts to avoid the removal and continued removal of A.G. from appellant's home and that it exhausted the

case plan services available to appellant. Despite this, appellant failed to show significant progress.

{¶ 46} Upon our independent review of the record, we agree that clear and convincing evidence exists supporting the court's finding of the above factors. Appellant's fourth assignment of error is not well-taken.

{¶ 47} Appellant's fifth and final assignment of error argues that LCCS failed to make reasonable efforts to prevent the continued removal of A.G. from the home. In a reasonable efforts determination, the issue is not whether the agency could have done more, but whether it did enough to satisfy the reasonableness standard under the statute. *In re Savannah J.*, 6th Dist. Lucas No. L-08-1123, 2008-Ohio-5217, ¶ 40, citing *In re Myers*, 4th Dist. Athens No. 02CA50, 2003-Ohio-2776, ¶ 18. A "reasonable effort" is an "honest, purposeful effort, free of malice and the design to defraud or to seek an unconscionable advantage." *In re Weaver*, 79 Ohio App.3d 59, 63, 606 N.E.2d 1011 (12th Dist.1992).

{¶ 48} Reviewing the trial testimony, multiple LCCS employees testified to the services provided to appellant and the case plans filed with the court provide further evidence. LCCS supervisor, Holly Mangus, testified as to the extensive services provided to appellant and that there were no other referrals that they could have made. Thus, we find that the record supports a finding that the agency made reasonable efforts. Appellant's fifth assignment of error is not well-taken.

{¶ 49} On consideration whereof, we find that appellant was not prejudiced or prevented from having a fair trial and the judgment of the Lucas County Court of Common Pleas, Juvenile Division, is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

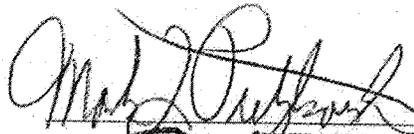
A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See also 6th Dist.Loc.App.R. 4.

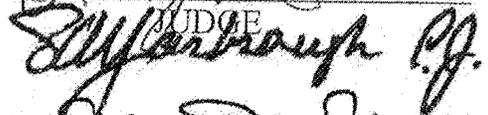
Mark L. Pietrykowski, J.

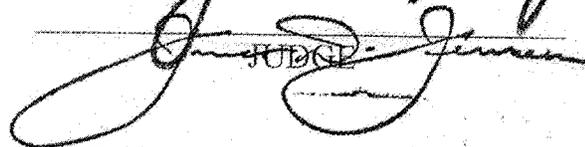
Stephen A. Yarbrough, P.J.

James D. Jensen, J.

CONCUR.



JUDGE


JUDGE


JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.