

**IN THE SUPREME COURT OF OHIO**

|                                  |   |   |
|----------------------------------|---|---|
| THE STATE OF OHIO, EX REL. N.G., | ) |   |
|                                  | ) | CASE NO. 2015-0363                          |
| Relator/Appellee,                | ) |   |
|                                  | ) |   |
| v.                               | ) | On Appeal from the Cuyahoga Court of        |
|                                  | ) | Appeals, Eighth Appellate District Case No. |
| CUYAHOGA COUNTY COURT OF         | ) | CA-14-101425                                |
| COMMON PLEAS                     | ) |   |
| JUVENILE DIVISION, ET AL.,       | ) |   |
|                                  | ) |   |
| Respondents/Appellees            | ) |   |
|                                  | ) |   |
| -And-                            | ) |   |
|                                  | ) |   |
| S.F.,                            | ) |   |
|                                  | ) |   |
| Would-be Intervening             | ) |   |
| Respondent/Appellant             | ) |   |

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**MERIT BRIEF OF APPELLEE**  
**THE STATE OF OHIO ex. rel. N.G.**

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## STATEMENT OF THE FACTS

This is an appeal of right from judgments entered on January 14, 2015, in which the Eighth District Court of Appeals denied Appellant's Motion to Intervene and Emergency Motion for Relief from Order (Appellants Supp. 13-118) (Appellant's App. 4). Appellant sought postjudgment intervention in Relator-Appellee, N.G.'s ("N.G." or "Appellee") original action in prohibition.

### **A. The Underlying Juvenile Court Proceeding and Virginia Court Proceeding.**

The Ohio litigation had its genesis in the Court of Common Pleas, Cuyahoga County, Juvenile Division. Appellant filed a Complaint to Establish Parent-Child Relationship in Cuyahoga County on February 27, 2012 (Appellant's Supplement 1-2). Said matters were assigned to the Hon. Judge Alison Floyd. Appellee filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction on March 30, 2012 (Appellant's Supp. 11-12).<sup>1</sup> N.G. filed a Petition for Custody in Arlington, Virginia on March 20th, 2012 (Appellant's Supp 3). On May 25, 2012 Judge Floyd, after consulting with the Virginia court, granted N.G.'s Motion to Dismiss (Appellant's Appendix 5-8). S.F. filed her own Motion to Dismiss in Virginia on or about April 16, 2014. S.F.'s motion to dismiss was denied. The Virginia court reasoned, and Judge Floyd agreed, that Virginia was the more convenient forum under the circumstances of the case (Appellants App. 10-12). A hearing, with evidence and cross-examination, was held in Virginia on the issue of custody on June 5, 2012. As a result of this Virginia hearing, the Virginia Court entered an order awarding joint custody to the parents with N.G. being the primary residential

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<sup>1</sup> N.G. attached an affidavit to his Motion to Dismiss that, although correct to the best of his recollection at the time, proved to have an incorrect date as to when the children lived in Ohio during a period of absence from Virginia. This error was acknowledged in Judge Floyd's room and incorrect dates were never argued in either Ohio or Virginia. Contrary to S.F.'s assertions, it is unknown whether these dates had any bearing on Virginia's decision to assert jurisdiction.

parent and S.F. having limited, delineated contact. Said order is dated June 5, 2012 (Appellant's App. 10-12).

S.F. appealed the June 5, 2012 order in Virginia. Additionally, during the pendency of the appeal of the June 5<sup>th</sup>, 2012 order, an interim visitation schedule was reached on February 20, 2013, whereby S.F. would have scheduled time with the children (Appellant App. 13-20). On May 23, 2014, S.F. dismissed her appeal (Appellant App 38-39), leaving the June 5<sup>th</sup>, 2012 order in effect. The effect of the dismissal of the appeal was that the interim visitation order was also dismissed as it was reached during the appeal process.<sup>2</sup>

The May 23, 2014 dismissal of the appeal of the June 5, 2012 custody order DID NOT affect the underlying Virginia order of June 5, 2012 granting primary physical custody to N.G.. At NO point did Virginia Courts concede jurisdiction to Ohio, as S.F. falsely claims. In fact, N.G. sought to enforce the June 5<sup>th</sup>, 2012 Virginia order and filed an Emergency Motion to Enforce on August 21, 2014. After a hearing, the Virginia court granted N.G.'s Emergency Motion to Enforce and on September 9, 2013 (App-2) enforced the June 5, 2012 order and entered an Order requiring S.F. to return the children to Ohio forthwith.

Concurrently with the above proceedings, S.F. appealed to the Eighth District Court of Appeals Judge Floyd's dismissal of her Application for Determination of Parental Rights and Responsibilities arguing that Judge Floyd failed to hold a proper hearing. This Court granted S.F.'s appeal and directed Judge Floyd to hold an evidentiary hearing on the issue of home state. Upon remand, rather than conducting such analysis, and in direct disregard for the directive of the court of appeals as well as the findings of the Virginia court, Judge Floyd incorrectly ruled

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<sup>2</sup> It is this May 23, 2014 order dismissing the appeal that S.F. falsely argues as the basis for her Merit Brief. S.F. incorrectly argues that the dismissal of her appeal somehow vacates the June 5, 2012 order. Not even the Virginia court follows this line of reasoning. Further, any claim regarding the validity of the June 5, 2012 order should be addressed in Virginia.

that paternity had not been established and therefore any time the children spent in Virginia was not relevant as S.F., an unmarried mother, had somehow not relinquished custody. Accordingly, in direct contravention of the Virginia order, Judge Floyd ruled that the children should be returned to Ohio.<sup>3</sup>

### **B. Additional Background on The Proceedings in Virginia.**

On March 20, 2012 N.G. filed a Petition for Custody in Arlington, Virginia (Appellant's Supp 3). On June 5, 2012 the Virginia Court entered an order awarding joint custody to the parents with N.G. being the primary residential parent and S.F. having delineated contact (Appellant's App. 10-12). The order clearly states: "All provisions of the Juvenile and Domestic Relations District Court Law have been duly complied with in assuming jurisdiction over the child, and all determinations have been made in accordance with the standards set forth in Virginia Code § 16.1- 278.4, §16.1 – 278.5, §16.1 – 278.6or §16.1 – 278.8 or §16.1 – 278.15 and §20-127.1 through 20-127.10" (Appellant's App. 10) It further states that the Judges in the case "decided that Virginia is the **home state** and the more convenient forum under the circumstances of the case" (Appellant's App. 12) (emphasis added). There is no doubt that the Virginia court properly exercised jurisdiction.

S.F. appealed the June 5, 2012 order on June 13, 2012. On February 20, 2013, the parties agreed to a visitation schedule whereby S.F. would have scheduled time with the children (Appellant App 13-20). On May 23, 2014, S.F. dismissed her appeal (Appellant App 38-39).

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<sup>3</sup> It is disturbing that S.F., in her Merit Brief, seems to indicate that Judge Floyd even considered the dates presented in N.G.'s initial affidavit in making her decision. Such a statement is clearly contrary to the order they attached (Appellant's App. 34-37).

On August 21, 2014, N.G. filed an emergency motion requesting the court to enforce the June 5<sup>th</sup>, 2012 Virginia order. The Virginia court granted N.G.'s Motion to Enforce and, on September 9, 2013, entered an order requiring S.F. to return the children to Ohio forthwith.

### **C. The Prohibition Action.**

Even though Virginia exercised jurisdiction and issued custody orders that remain in effect, Judge Floyd unlawfully continued to attempt to exercise jurisdiction. Left with no other recourse, on May 22, 2014, N.G. initiated an original action in prohibition in the Eight District Court of Appeals seeking the Court to prevent Judge Floyd from doing so. The Eighth District Court of Appeals issued its ruling on the Complaint for Writ of Prohibition on September 30, 2014, granting same. Thereafter, S.F. filed a postjudgment Motion to Intervene and Emergency Motion for Relief from Order (Appellants Supp. 13-118) on October 23, 2014. N.G. filed a Response to Intervening Respondent's Combined Motion to Intervene and Emergency Motion for Relief from Order and a Motion for Sanctions due to S.F.'s various false statements of fact and law. On January 14, 2015, the Eighth District Court of Appeals denied both of S.F.'s motions, as well as N.G.'s Motion for Sanctions (Appellant's App. 4). The Court correctly reasoned that the June 5, 2012 Virginia order exercising jurisdiction and granting N.G. primary custody and subsequent September 9, 2014 order enforcing same were entitled to full faith and credit.

Despite claiming otherwise, S.F. became aware of the Complaint for Writ of Prohibition no later than May 23, 2014 as such was discussed on the record in the Virginia proceedings. S.F. was also made aware of the Complaint for Writ of Prohibition in Virginia as the Complaint for Writ of Prohibition was mentioned in N.G.'s Emergency Motion To Enforce Custody filed in Virginia on August 21, 2014.

On January 14, 2015, the Eighth District denied both of S.F.'s motions as well as N.G.'s Motion for Sanctions (Appellant's App. 4). In denying S.F.'s motions, the Court correctly reasoned that the June 5, 2012 Virginia order exercising jurisdiction and granting N.G. primary custody, and subsequent September 9, 2014 order enforcing same, were entitled to full faith and credit unless otherwise vacated. S.F. initiated this appeal of that ruling on March 2, 2015 (Appellant's App. 2-3).

**D. Proceedings In This Court.**

On March 2, 2015, S.F. filed a Notice of Appeal. S.F. failed to name all parties and perfect service on all parties. S.F. filed her merit brief on May 5, 2015. N.G. filed a motion to dismiss and a motion to strike on May 29, 2015.

**LAW AND ARGUMENT**

**Summary of Argument.**

S.F.'s merit brief raises three assignments of error:

1. **PROPOSITION OF LAW NO. I**

*A NONPARTY PARENT HAS A DUE PROCESS RIGHT TO INTERVENE IN A WRIT OF PROHIBITION MATTER SEEKING TO RELINQUISH JURISDICTION*

2. **PROPOSITION OF LAW NO. II**

*IN THE ABSENCE OF FACTS SUPPORTING JURISDICTION OF ANOTHER STATE, SUCH STATE'S CUSTODY ORDERS ARE NOT ENTITLED TO FULL FAITH AND CREDIT.*

3. **PROPOSITION OF LAW NO. III**

*AN INTERVENING PARTY IS ENTITLED TO RELIEF FROM A WRIT OF PROHIBITION WHERE THE PARTY HAS SHOWN THAT THE WRIT WAS GRANTED AS A RESULT OF FRAUD*

As more fully set forth below, S.F. lacks standing to raise her second and third assignments of error, as she is not a party to the prohibition action. Additionally, as more fully set forth below, S.F. failed to join all parties in her Notice of Appeal thus rendering her Notice defective warranting dismissal of her appeal.

Lastly, S.F.'s first assignment of error challenging the denial of her Motion to Intervene lacks merit as the Court of Appeals did not abuse its discretion in denying her postjudgment Motion to Intervene.

**Requirements of a Motion to Intervene.**

Civ. R. 24(A)(2) states in pertinent part:

Upon *timely* application anyone shall be permitted to intervene in an action: (...) (2) **when the applicant claims an interest** relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is **adequately represented by existing parties** (emphasis added).

Therefore, in order for intervention to have been proper, Appellant needed to establish:

(1) that her Motion was timely, (2) the disposition of the matter may impair or impede her ability to protect an interest(s) she had in the transaction, and (3) that such interest(s) was/were not adequately represented by existing parties.

**Standard of Review for Denial of a Motion to Intervene.**

This Court reviews the denial of a motion to intervene under an abuse of discretion standard. *The State ex. rel. First Shiloh Baptist Church v. Meagher*, 82 Ohio St.3d 501, 696 N.E.2d 1058, 1998-Ohio-192, FN1 (...Ohio courts have applied an abuse of discretion standard for all of the Civ.R. 24(A)(2) intervention of right requirements). An abuse of discretion implies an unreasonable, arbitrary or unconscionable attitude. *State ex. rel. Crabtree v. Franklin Cty Bd. Of Health* (1997) , 77 Ohio St.3d 247, 249, 637 N.E.2d 1281, 1283.

Therefore, Appellant's appeal of the denial of her motion to intervene must be denied if there is any possible justification supporting the denial.

### **Standard for Postjudgment Motions to Intervene**

Postjudgment motions for intervention are not usually granted. *The State ex. rel. First Shiloh Baptist Church v. Meagher*, 82 Ohio St.3d 501 at 503-504, 696 N.E.2d 1058, 1998-Ohio-192 (Intervention after final judgment has been granted is unusual and ordinarily will not be granted.) *State ex rel. Gray Road Fill, Inc. v. Wray* (1996), 109 Ohio App. 3d 81.

### **PROPOSITION OF LAW NO. 1 (responsive to S.F.'s Proposition I)**

**A motion to intervene pursuant to Civ. R. 24 is properly denied when the would-be intervenor seeks intervention postjudgment and fails to demonstrate that the motion was filed timely.**

The court of appeals did not abuse its discretion in denying Appellant's motion to intervene as said motion was not timely filed.

Whether a Civ.R. 24 motion to intervene is timely depends on the facts and circumstances of the case. *The State ex. rel. First Shiloh Baptist Church v. Meagher*, 82 Ohio

St.3d 501, 503, 696 N.E.2d 1058, 1998-Ohio-192. There this Court applied four factors in determining timeliness: (1) the point to which the suit had progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenor knew or reasonably should have known of his interest in the case; (4) the prejudice to the original parties due to the proposed intervenor's failure after he knew or reasonable should have known of his interest in the case to apply promptly for intervention; and (5) the existence of unusual circumstances mitigating against or in favor if intervention. *First Shiloh Baptist Church*, at 503.

*First Shiloh Baptist Church* is a prohibition case from this Court that bears great similarity to the case hand. There a would-be intervenor sought intervention in the court of appeals postjudgment and was denied. In *First Shiloh Baptist Church*, the would-be intervenors claimed that the court of appeals abused its discretion by denying their motion to intervene. This Court was quick to point out that their assertion was meritless and that the court of appeals could have reasonably found that that appellant's motion to intervene was untimely for four reasons:

First, the prohibition action had already proceeded to judgment and intervention after final judgment ordinarily will not be granted;

Second, the purpose of the intervention was not compelling because it would probably result only in consideration of claims already made;

Third, appellants knew or should have known of their interest in the prohibition action prior to judgment; and

Fourth, appellants failed to advance any viable reason necessitating postjudgment intervention .

The case at hand is in line with *First Shiloh Baptist Church*.

First, S.F. filed her motion for intervention postjudgment. On that basis alone, the appeals court could have reasonably found that the motion was not timely. S.F. has failed to demonstrate how such a finding was unreasonable, arbitrary or capricious.

Second, the purpose for which S.F. sought intervention was not compelling. The appeals court could have reasonably found that the writ was properly granted despite the protestations of S.F. In her motions to the appeals court, S.F. contended that the June 5, 2012 order from Virginia was vacated and that this fact was never brought to the court's attention by the parties in the prohibition action. However, this argument can only be described, charitably, as not grounded in law or fact. There was ample evidence from which the court of appeals could conclude that the June 5, 2012 Virginia order granting N.G. primary custody remains in effect.<sup>4</sup>

Third, S.F. knew, or should have known, about her interest (if any) in the prohibition action.<sup>5</sup> While N.G. disputes that S.F. has a right in the prohibition litigation, there was ample evidence from which the appellate could have concluded that S.F. knew or should have known about the prohibition action. S.F. was made aware of these proceedings no later than May 23, 2014 when N.G.'s Virginia counsel handed a copy of the Complaint for Writ of Prohibition to S.F.'s Virginia Counsel during the May 23, 2014 hearing in Virginia (Supp. 1)

On August 21, 2014, N.G. filed an Emergency Motion to Enforce Final Custody order in Virginia, and paragraph 8 of the Motion states in part "The Father has sought a writ of prohibition from the appellate court in Ohio for this exercise of jurisdiction by the Ohio trial court outside of the framework for remand set forth in the Ohio appellate court's opinion" (Supp.

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<sup>4</sup> S.F. had filed an appeal of the June 5, 2012 order. She then dismissed that appeal. It is, apparently, the dismissal of her appeal that S.F. is arguing constituted a complete dismissal of the Virginia case. However, evidence was presented that demonstrated that the June 5, 2012 order remained in effect. Notably among this evidence was a Motion by N.G. to enforce the order and an order from Virginia granting this motion and enforcing the order.

<sup>5</sup> While S.F. contends that she is seeking to protect a parenting right, such a right is not present in the prohibition action. Jurisdiction and full faith and credit are the issues in the prohibition action. Her parenting rights are protected in Virginia.

5), which, at a minimum, provided S.F. with constructive notice of the existence of the action. S.F. was further informed of the existence of the Complaint for a Writ of Prohibition during the September 9, 2014 hearing in Virginia when N.G.'s Virginia Counsel again discussed it with the Virginia Court as well as S.F.'s Virginia Counsel on the record (Supp. 43, 49). It should be noted that on the transcript at page 26 (Supp. 52), Virginia counsel for S.F. indicates that Ohio counsel for S.F. (Attorney Dubyak) says that he has never seen it (the complaint for writ of prohibition) nor is he aware of it. This obviously means that Virginia counsel and Ohio counsel discussed the complaint for writ of prohibition at some time prior to the hearing.

It is indisputable from the evidence that Intervening S.F. and her counsel knew of the existence of the Complaint for Writ of Prohibition prior to October 16, 2014, and could have intervened at any time. Clearly, S.F. chose not to intervene and is only attempting to do so now because the Writ was granted and she must continue to litigate the case in Virginia, where she has received an adverse ruling.

Fourth, there was ample evidence from which the court of appeals could reasonably conclude that S.F. failed to advance any viable reason for postjudgment intervention. The court of appeals could reasonably conclude that S.F.'s purpose in intervening was to have the order granting the writ of prohibition vacated. The court of appeals concluded that the writ was properly granted and could have reasonably concluded that none of the "evidence" suggested by S.F. would have altered that decision.

Given the above, the court of appeals could have reasonably concluded that S.F.'s motion to intervene was untimely. Accordingly, the denial of said motion was not an abuse of discretion.

**PROPOSITION OF LAW NO. 2** (responsive to S.F.'s Proposition I)

**A motion to intervene pursuant to Civ. R. 24 is properly denied when the would-be intervenor seeks intervention postjudgment and fails to demonstrate that intervention would, in any way, protect a right that was not already adequately represented.**

N.G. does not dispute the fundamental assertion that a parent has a due process right to make decisions concerning the care, custody and control of their children. *Troxel v. Granville* 530 U.S. 57, 66, 120 S. Ct. 2054, 147 L.Ed.2d 49 (2000). However, this right is simply not applicable to this case. The complaint for a writ of prohibition was filed due to the unlawful exercise of jurisdiction by the Cuyahoga Court of Common Pleas Juvenile Division. This original action did not address custody in any way and did not deprive S.F. of any parenting rights. It only sought to prevent the Juvenile Court from unlawfully exercising jurisdiction. The parenting case had already been litigated and adjudicated in Virginia and the case should continue to be heard in its proper venue, the Commonwealth of Virginia. S.F.'s due process rights have not been violated as she has a venue in which to enforce her constitutional rights. The mere fact that she just does not want to litigate the case in Virginia does not give rise to a constitutional violation.

The right in this case is whether a party should be free from the onerous situation of being subjected to the rulings of multiple jurisdictions or whether a party should be able to rely on the full faith and credit of a ruling from another state. It is this right that is the subject of a prohibition action and not the right of the underlying custody case. Those custody rights already have a forum for resolution in Virginia and it is in that forum that those rights are protected.

Further, if there was an interest in Ohio exercising jurisdiction, that interest was adequately protected by the parties already in the case. In considering a writ of prohibition,

courts that have permitted intervention have found that intervention may possibly be proper because the “action is directed against a judge who may not have adequate legal representation” *Schucker v. Metcalf*, 10<sup>th</sup> Dist. No. 84AP-548, 1984 W.L. 5986, \*1-2 (Nov. 15, 1984), *rev’d on otr. grds.*, 22 Ohio St.3d 33, 488 N.E.2d 210 (1986). The prohibition issue in the case at bar greatly differs. Judge Floyd has been more than adequately represented by the Cuyahoga Country Prosecutors.

S.F. and Judge Floyd had identical interests with respect to the writ of prohibition. Both S.F. and Judge Floyd wanted Ohio Courts to exercise jurisdiction in this matter. S.F.’s contention that Judge Floyd was a “neutral party” is incorrect. While Judge Floyd is a neutral party with respect to the determination of the custody of the children, she is not neutral in relation to the writ of prohibition.

Therefore, the court of appeals could have reasonably concluded that S.F. failed to demonstrate that it had an interest in the prohibition litigation that was not adequately represented. Accordingly, it was not an abuse of discretion for the court of appeals to deny the motion to intervene.

### **PROPOSITION OF LAW NO. 3 (responsive to S.F.’s Proposition I)**

**A motion to intervene pursuant to Civ. R. 24 is properly denied when the would-be intervenor seeks intervention postjudgment and fails to demonstrate that it claims an interest and that the protection of this interest would be impaired or impeded and that interest was not adequately protected by existing parties.**

S.F.’s claim that the “best interests of her children and her interest in parenting them” (Merit Brief of S.F. p. 6-7) as a purpose to intervene is wholly unfounded and irrelevant to the writ of prohibition. The sole question presented in whether to grant the writ of prohibition in this

matter is where the case should be litigated. It is purely jurisdictional and does not concern the best interests of the children or the S.F.'s rights therein. The Eighth District Court of Appeals in its February 14, 2013 decision in this case, states:

We further note that the trial court here improperly relied on its discussion with the Virginia judge regarding what would be in the children's best interest. As the Ohio Supreme Court explained in *Rosen (Rosen v. Celebrezze*, 117 Ohio St.3d 241, 244, 2008-Ohio-853, 883 N.E.2d 420, ¶2, quoting *In re Palmer*, 12 Ohio St.3d 194, 196, 465 N.E.2d 1312 (1984) the UCCJEA 'eliminates a determination of 'best interests' of a child from the original jurisdictional inquiry.'" *Id* at ¶21.

S.F. sought intervention claiming that her parenting rights were being impeded or impaired. The court of appeals could have reasonably concluded that since the prohibition action concerned jurisdiction, and a forum already existed in Virginia, her parenting rights were not being impeded or impaired. If such a right was somehow present, then there was also ample evidence from which the court of appeals could reasonably conclude that her interests were adequately protected by a party already to the action. The court of appeals could have reasonably concluded that the Respondents, the Court of Common Pleas and the Hon. Alison Floyd, were represented by extremely competent counsel who argued against the granting of the writ and that nothing S.F. provided added anything of substance.

As the Writ of Prohibition action, in which S.F. is trying to intervene, merely deals with original jurisdiction over the children, her argument that she needs to intervene due to the best interests of her children, is meritless. For these reasons the court of appeals could have reasonably concluded that S.F. failed to demonstrate that, even if she had an interest in the prohibition action that was not adequately represented by an

existing party, such an interest was not impeded or impaired. Accordingly, it was not an abuse of discretion for the court of appeals to deny S.F.'s motion to intervene.

**PROPOSITION OF LAW NO. 4** (responsive to S.F.'s Propositions II and III)

**A would-be intervenor who seeks intervention pursuant to Civ. R. 24 and is denied is not a party to the proceeding and lacks standing to appeal the merits of any judgment entered in the proceeding. Accordingly, an unsuccessful would-be intervenor's right to appeal is limited solely to review of the propriety of the order denying intervention and does not extend to the review of the merits of the case. *Sawicki v. Court of Common Pleas of Lucas County, et. Al*, 121 Ohio St.3d 507, 2008-Ohio-1160, ¶18.**

This Court has already addressed this issue and stated:

*It is well-settled that "an appeal from the denial of a motion to intervene is limited solely to the issue of intervention." State ex rel. Montgomery v. Columbus, 10<sup>th</sup> Dist. No 02AP-963, 2003-Ohio-2658, 2003 WL 21196837, ¶ 33; Tomrob, Inc. v. Cuyahoga Metro., Hous. Auth. (Sept. 11, 1997), 8<sup>th</sup> Dist. Nos. 71596 and 71688, 1997 WL 565971, \*3 (appeal from a denial of a motion to intervene "is limited solely to the the issue of intervention, not the merits of the underlying appeal"); Fouche v. Denihan (1990), 66 Ohio App.3d 120, 126, 583 N.E. 2d 457; cf. Southside Community De Corp. v. Levin, 116 Ohio St. 3d 1209, 2007-Ohio-6665, 878 N.E.2d 1048, ¶ 11 ("We hold that a person's assertion that is has a legal right to be a party to the BTA appeal makes it a 'party' for one limited purpose: to see the court's determination of whether the asserted right exists").*

*Sawicki v. Court of Common Pleas of Lucas County, et. Al*, 121 Ohio St.3d 507, 2008-Ohio-1160, ¶18.

In *Sawicki*, Associated, a non-party, was unsuccessful in attempting to intervene in a procendendo case and appealed to this Court seeking to have both the denial of its motion to intervene as well as the underlying judgment on the merits reversed. This Court held that: "[a]s a nonparty, Associated lacks standing to challenge the court of appeals' determination on the merits." *Sawicki* at ¶18. This Court then dismissed that portion of Associated's appeal that challenged the court of appeals' granting of the writ of procendendo. *Sawicki* at ¶19.

S.F. now seeks to do the exact thing that this Court stated was not permissible. S.F.'s second and third propositions of law make it clear that she is appealing the granting of the writ of prohibition. S.F. offers no justification or argues for any modification of existing law that would entitle her to appeal such issues.

As S.F. lacks standing to appeal the granting of the writ, her appeal of this issue must be denied.

**Proposition of Law 5 (responsive to S.F.'s Proposition II)**

**A court need not re-litigate the issue of jurisdiction in order to determine that a court of another state has exercised jurisdiction in substantial conformity with the UCCJEA.**

Even though she lacks standing to appeal the granting of the writ of prohibition, S.F. nonetheless asks this Court to vacate the writ claiming that the court of appeals did not conduct a jurisdictional inquiry pursuant to the UCCJEA. It appears that S.F. is taking the position that the only way the court of appeals could determine whether Virginia exercised jurisdiction in substantial conformity with UCCJEA was to have re-litigated the entire issue of jurisdiction. S.F.'s argument is certainly misplaced as the court of appeals conducted a thorough inquiry which satisfies the UCCJEA requirement.

R.C 3127.33(A) requires that:

“[a] court of this state **shall** recognize and enforce a child custody determination of a court of another state if that state has exercised jurisdiction in substantial conformity with this chapter or the determination was made under factual circumstances meeting the jurisdictional standards of this chapter.”

The court of appeals fulfilled the requirements of R.C. 3127.33(A). It ordered both parties, and the would-be intervenor, to provide the court with a docket of all proceedings held in

Virginia. As the Virginia court does not maintain such a docket, copies of all the rulings from the court were provided to the court of appeals. S.F. fully argued in Virginia all the same points that she then raised with the court of appeals. Comprehensive information was provided to the court of appeals. The court correctly reasoned that the court in Virginia had a factual dispute to resolve. The issue of home state involved many moves to and from Virginia and Ohio. The court of appeals correctly reasoned that the court in Virginia resolved that factual dispute in favor of N.G. and that it need not re-litigate the factual disputes.

Further, S.F. actually appealed this factual determination and order in Virginia and then voluntarily dismissed her appeal. The issue of any irregularity is *res judicata* and the court of appeals was correct in holding that the Virginia order was entitled to full faith and credit.

Additionally, S.F. erroneously claims that the court of appeals should have determined that Virginia's exercise of jurisdiction was not in substantial conformity with the UCCJEA by arguing that the May 23, 2014 Virginia order allowing the voluntary dismissal of her appeal somehow acted to vacate the underlying order of June 5, 2012 (S.F. Merit Brief 12). As more fully argued herein, this is simply untrue.

**Proposition of Law No. 6 (responsive to S.F.'s Propostions I, II and III)**

**A motion to intervene and motion for relief pursuant to Civ.R. 60(B) are properly denied when the asserted facts and law in support of said motions are clearly erroneous.**

Appellant makes several statements of law and fact in support of her appeal which defy logic and explanation.

**A. Appellant Incorrectly States that Virginia Conceded Jurisdiction to Ohio.**

S.F. argues that the May 23, 2014 order by Virginia is somehow evidence that the

Virginia Court conceded jurisdiction in some manner (S.F. Merit Brief 3, 12). Certainly, this is not the case.

On September 9, 2014, the Virginia court actually enforced the June 5, 2012 order. S.F. has appealed this in Virginia. The best S.F. can claim is that she hopes, sometime in the future, the Virginia court would decide that the June 5, 2012 order should be vacated and not be enforced. On October 28, 2014, the Virginia Court stayed S.F.'s appeal of the September 9, 2014 order. However, S.F. must concede, but has failed to do so, that as of now, the Virginia court clearly believes the June 5, 2012 order is valid.

The judgment entry of May 23, 2014 states, in relevant part: “**ADJUDGED, ORDERED AND DECREED** that the *custody appeal* in the instant case before this Court be, and it hereby is, dismissed and the *Visitation Order* entered on July 15, 2013, be and it hereby is vacated.” (Emphasis added.)

Nowhere in that order does the Virginia Court state that it is divesting jurisdiction or vacating the June 5, 2012 order. The May 23, 2014 order merely grants S.F.'s unusual request to dismiss her own appeal to the June 5, 2012 order. It does not rule on the June 5, 2012 order at all. The June 5, 2012 order has never been modified or vacated. S.F.'s appeal of the June 5, 2012 order did not suspend or nullify that order.

In addition to staying the Virginia proceedings, the October 28, 2014 Virginia order directs that the passports for the children (in S.F.'s possession) are to be turned over to the court. Additionally, the Order directs that the children shall remain in the possession of N.G. Essentially, this is evidence that Virginia is still exercising jurisdiction and authority over this case and the parties. It is not, as is claimed by S.F., evidence that Virginia conceding jurisdiction.

**B. Appellant Incorrectly States that the Virginia Order of June 5, 2012 Has Been Vacated.**

S.F. erroneously claims that the June 5, 2012 Virginia order granting primary custody to N.G. has been vacated and that the failure of all parties to inform the court of appeals of the alleged vacated status of the order constitutes fraud and a reason to intervene postjudgment (S.F. Merit Brief 3, 12). However, no law or valid supporting rationale is given. Rather, to somehow support this erroneous position, S.F. cites the fact that since she appealed the June 5<sup>th</sup>, 2012 order and then dismissed her appeal, the June 5<sup>th</sup> order is now vacated. It is the Virginia order of May 23, 2014 granting the voluntary dismissal of her appeal that S.F. argues vacates the June 5, 2012 order.

Appealing and then dismissing one's appeal does not operate to vacate the underlying order. As was correctly and successfully argued to the court of appeals, Virginia law speaks very clearly to this point. Virginia Code §16.1-298(A) provides in pertinent part: "Except as provided herein, a petition for the pendency of an appeal or writ of error shall not suspend any judgment, order or decree of the juvenile court..." When an appeal is withdrawn, the juvenile court order remains in full effect, per Va. Code §16.1-298(D) "If an appeal to the circuit court is withdrawn in accordance with §16.1-106.1, the judgment, order or decree rendered by the juvenile court shall have the same legal effect as if no appeal had been noted..." In the Virginia Court of Appeals in *Hasty v. Hasty*, 1993 Va. App. LEXIS 431 (1993), a mother appealed a custody order from the Juvenile and Domestic Relations court to the circuit court. During the pendency of the appeal, she moved for a voluntary non-suit of her appeal, which was granted, but the trial court noted that the Juvenile and Domestic Relations court orders would remain in effect. She appealed this determination to the Court of Appeals, arguing that the appeal eradicated the Juvenile and Domestic Relations order. The Court of Appeals disagreed and held

that the mother's position, that she could appeal the order, non-suit the appeal, and thereby obtain a nullification of the Juvenile and Domestic Relations order would create a judicial void. The Court further held that the effect of an appeal for a trial *de novo* is to restore the original burden of proof as before, e.g., without the need for a showing of a material change of circumstances, but it does not nullify the original order, rather the original order stays in effect until (and if) a superseding order is issued by the Circuit Court.

This is analogous to the current case. S.F. filed an appeal of the June 5, 2012 and voluntarily dismissed it. The Virginia order dismissed that appeal, vacated a temporary visitation order entered in the Circuit Court (not the Juvenile and Domestic Relations Court) and nothing more. The June 5, 2012 order remained in effect.

N.G. filed an Emergency Motion to Enforce the June 5, 2012 order in Virginia and, on September 9, 2014, the Virginia Court enforced the June 5, 2012 order and ordered that the children be returned to N.G. forthwith. It is, therefore, clear that Virginia certainly believes the June 5, 2012 order is still in effect. If S.F. somehow believes that the Virginia court is in error about the validity and enforceability of its own orders, she should take this matter up with the courts in Virginia. How Intervening S.F. can argue that the June 5, 2012 order has been vacated is beyond comprehension.

**C. Appellant Incorrectly States that She Was Not Aware of the Prohibition Proceedings Until After Judgment Had Been Rendered.**

There is ample evidence to contradict S.F.'s clearly false claim that she did not learn of the existence of the prohibition proceedings until October 16, 2014, after judgment had been entered. S.F. was made aware of these proceedings no later than May 23, 2014 when N.G.'s

Virginia counsel handed a copy of the Complaint for Writ of Prohibition to S.F.'s Virginia Counsel during the May 23, 2014 hearing in Virginia (Affidavit of Demian J. McGarry at ¶4-5)

S.F. argues that she was unable to intervene postjudgment as she did not know of the existence of the prohibition proceeding until after judgment. Such is not the case. S.F. was informed of the existence of the Complaint for a Writ of Prohibition during the September 9, 2014 hearing in Virginia when N.G.'s Virginia Counsel again discussed it with the Virginia Court as well as S.F.'s Virginia Counsel on the record (Transcript at 17, 23). It should be noted that, on the transcript of this proceeding at page 26, Virginia counsel for S.F. indicates that Ohio counsel for S.F. (Attorney Dubyak) says that he has never seen it (complaint for writ of prohibition) nor is he aware of it. This obviously means that Virginia counsel and Ohio counsel discussed the complaint for writ of prohibition at some time prior to the hearing.

It is indisputable from the evidence that Intervening S.F. and her counsel knew of the existence of the Complaint for Writ of Prohibition prior to October 16, 2014. S.F. was on notice and could have moved to intervene prior to judgment. It is unconscionable for S.F. to argue otherwise.

**D. S.F. Incorrectly Argues that N.G. Committed Fraud.**

S.F. argues that that N.G. engaged in fraud by presenting a false affidavit in pursuit of the dismissal of the Ohio litigation and by failing to inform the court of the May 23, 2014 Virginia order dismissing her appeal (S.F. Merit Brief 13, 14).

As argued above, the May 23, 2014 Virginia order did not vacate the June 5, 2014 order and has no bearing on this case. Any fraud that existed in this situation was committed by S.F. when she obtained a short, postjudgment, stay of the writ of prohibition. S.F. obtained this stay by filing a motion with the appeals court falsely claiming that the June 5, 2012 order had

been vacated. Upon full briefing, the court of appeals found this not to be true and lifted the stay.

N.G. did not commit fraud by filing an affidavit with incorrect dates. The affidavit attached to his motion to dismiss filed in the Cuyahoga County Juvenile Court contained his best recollection of the dates where the parties lived at the time of signing. There was no intent to mislead the court and no evidence indicating such has been presented. Further, no evidence has been presented that the affidavit was ever considered by the Virginia Court in determining that it had jurisdiction when it issued the June 5, 2012 order. Virginia granted custody after a full hearing subject to cross-examination. If an issue regarding the dates existed, it was addressed at that time. S.F. appealed that decision and then dismissed her appeal. If she had an issue with the dates, that was the time and place to address them.

### **Conclusion**

S.F.'s appeal must be denied. As a would-be intervenor who was denied postjudgment intervention, she lacks standing to appeal the judgment granting the writ. The court of appeals did not abuse its discretion in denying S.F.'s motion to intervene. The motion to intervene was not timely; it failed to establish a right S.F. sought to protect; it failed to establish that even if a right existed, that such right was not protected by a party already in the action; and that even if a right existed that was not protected by a party already in the action, her ability to protect such right was impeded or impaired. Lastly, essential "facts" relied upon by S.F. are not correct.

Accordingly, for these reasons, and for those argued fully above, S.F. is not entitled to the relief requested and her appeal should be denied. The judgment of the Eight District Court of Appeals should be affirmed.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

Pursuant to S.Ct.Prac.R. 3.11(B)(1), a true copy of the foregoing Merit Brief of Appellee The State of Ohio ex. rel. N.G. was served this 3<sup>rd</sup> day of June, 2015 by email upon:

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# APPENDIX

VIRGINIA:

IN THE JUVENILE AND DOMESTIC RELATIONS DISTRICT COURT  
OF ARLINGTON COUNTY

[REDACTED] N.G.  
Petitioner  
v.  
[REDACTED] SF  
Respondent

In re: [REDACTED] E.N.G.  
[REDACTED] Y.N.G.  
CASE NOS.: JJ036863-01-00  
JJ036862-01-00

FINAL ORDER

THIS MATTER came on ~~Wednesday~~, September 9, 2014 at <sup>noon</sup> 11:00 p.m., a date and time certain selected by the Court, upon the Emergency Motion to Enforce Custody Order of the Petitioner, [REDACTED] N.G. against the Respondent, Senayt Fekadu.

AND IT APPEARING to the Court that this Order should issue, it is, hereby

ORDERED as follows:

- (1) The Emergency Motion to Enforce the custody orders is granted.
- (2) The Respondent, [REDACTED] S.F., shall return the children, [REDACTED] E.N.G. and [REDACTED] Y.N.G. to the petitioner, [REDACTED] N.G. forthwith.

ENTERED this 9<sup>th</sup> day of September, 2014.

  
JUDGE

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SEEN AND OBJECTED TO: Virginia did not have  
subject matter jurisdiction over the  
children in this case as of February  
27, 2012 and therefore the JDTR  
court does not have jurisdiction to  
issue this Order - *and for other*  
reasons stated on the record



202 - 331-7522  
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