

**IN THE SUPREME COURT OF OHIO**

STATE OF OHIO EX REL. N.G., )  
)  
Relator/Appellee, )  
)  
vs. ) CASE NO. 15-0363  
)  
CUYAHOGA COUNTY COURT OF )  
COMMON PLEAS, JUVENILE ) On Appeal from the Cuyahoga County  
DIVISION, et al. ) Court of Appeals, Eighth Appellate District  
) Case No. CA-14- 101425  
Respondents/Appellees, )  
)  
-and- )  
S.F., )  
Intervening Respondent/ )  
Appellant. )

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**REPLY BRIEF OF APPELLANT SENAYT FEKADU**

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## ARGUMENT

### **I. Appellant Fekadu Timely Moved for Intervention Post-Judgment and was Entitled to Intervene in the Writ of Prohibition Proceedings.**

Appellant Senayt Fekadu (“Ms. Fekadu” or “Appellant Fekadu”) timely moved for intervention in the writ of prohibition proceedings (“Writ Proceedings”) in the Eighth District, and law and equity support intervention in this case. Ms. Fekadu filed both a motion to intervene and a motion under Civ.R. 60(B) for relief from judgment (hereinafter the “Combined Motion”) on October 23, 2014. Whether a Civ.R. 24 motion to intervene is timely depends on the facts and circumstances of the particular case. *State ex. rel. First Shiloh Baptist Church v. Meagher*, 82 Ohio St. 3d 501, 503, 696 N.E.2d 1058, (1998). Ohio courts hold that Civ. R. 24(A)(2) must be *liberally* construed in favor of intervention. *State ex rel. LTV Steel Co. v. Gwin*, 594 N.E.2d 616, 619, 64 Ohio St.3d 245 (1992) (emphasis added). Finally, under an abuse of discretion standard, a lower court’s decision regarding intervention must be overturned if it is unreasonable, arbitrary, or implies an unconscionable attitude. *First Shiloh Baptist Church* at 502. The facts and circumstances of this case demonstrate that it was unreasonable, arbitrary, or unconscionable for the Eighth District to prohibit Ms. Fekadu from intervening.

Although factually distinguishable from the instant case<sup>1</sup>, the case of *First Shiloh Baptist Church* provides the underlying framework by which this Court should determine whether Appellant Fekadu’s motion to intervene was timely. “The following factors are considered 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

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<sup>1</sup> In *First Shiloh Baptist Church* the intervenors were aware that the case in which they sought to intervene was pending. The *First Shiloh Baptist Church* intervenors incorrectly claimed they could not have intervened prior to the entry of the judgment. Here, Ms. Fekadu was unaware of the Writ until after it was entered. She did not intentionally wait, like the intervenors in *First Shiloh Baptist Church*.

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 reasonably should have known of his interest in the case to apply promptly for intervention; and (5) the existence of unusual circumstances militating against or in favor of intervention.” *First Shiloh Baptist Church, supra.* at 503 (quoting *Triax Co. v. TRW, Inc.* 724 F.2d 1224, 1228 (6th Cir. 1984)). Each of the enumerated factors weighs in favor of allowing Ms. Fekadu to intervene in the Writ Proceedings.

**A. Appellant Fekadu Should Have Been Allowed to Intervene Post-Judgment.**

Ms. Fekadu timely filed her Combined Motion merely one week after learning of the Writ. Because she acted quickly upon learning of the Writ, Ms. Fekadu should have been allowed to intervene in the Writ Proceedings, even though she filed her Combined Motion after the Writ was granted. *See, for example also NAACP v. New York*, 413 U.S. 345, 365-366, 93 S.Ct. 2591, 37 L. Ed.2d 648 (1973)(“Although the point to which the suit has progressed is one factor in the determination of timeliness, it is not solely dispositive. Timeliness is to be determined from all the circumstances.”). Questions of timeliness are based on the circumstances of the case. “In determining whether to permit a **post-judgment intervention**, the courts have considered the following: the purpose for which intervention was sought; the necessity for intervention as a means of preserving the applicant's rights; and the probability of prejudice to those parties already in the case.” *Wizards of Plastic Recycling, LLC v. Recycling*, 9th Dist. No. 25951, 2012-Ohio-3672, ¶23. (quoting *Norton v. Sanders*, 62 Ohio App.3d 39, 574 N.E.2d 552, (9th Dist. 1989)(emphasis added) (citing Annotation, Timeliness of Application for Intervention As of Right Under Rule 24(a) of Federal Rules of Civil Procedure (1982), 57 A.L.R. Fed. 150, 205)). Further, “[W]hile intervention after a final judgment has been entered is rare, it is

permissible where the intervenor has acted quickly in light of all the circumstances and the trial court has considered certain factors.” *Id.* at ¶23.

Ohio courts have held that post-judgment intervention is appropriate in many cases. For example in *Pfeiffer v. State Auto. Mut. Ins. Co.*, 1st Dist. No. C-050683, 2006-Ohio-5074, ¶24-25, a passenger was allowed to intervene after declaratory judgment was issued where he demonstrated he had an interest in the litigation, his interests were not adequately represented by the existing parties, and he timely filed his motion to intervene. Similarly, in *Southern Ohio Coal Co. v. Paul Kidney, Chief, Division of Mines, et al.*, 100 Ohio App. 3d 661, 654 N.E.2d 1017 (4th Dist. 1995), a union’s motion to intervene was properly granted post-judgment, as the union’s interest was no longer adequately represented by the existing parties. Under *Pfeiffer* and *Southern Ohio Coal Co.*, a post-judgment motion to intervene should be granted where a party can demonstrate an interest in the litigation that is not protected by the existing parties to the action. Indeed, courts have determined that post-judgment intervention may be allowed where it is “the only way to protect the intervenor’s rights.” *Star-Ex, Inc. v. Higgs*, 189 Ohio App.3d 172, 2010-Ohio-3332, ¶24 (2nd Dist.) Here, Appellant Fekadu’s rights are not sufficiently represented or protected by any party to the underlying action and intervention is necessary and proper.

**B. Appellant Fekadu Had a Valid Purpose for Intervening, Which Was Not Adequately Represented By the Original Parties to the Writ of Prohibition Action.**

Ms. Fekadu is the children’s mother, and the underlying case in which she is seeking to intervene will determine issues critical to the custody of her children. It is inconceivable to suggest that Ms. Fekadu does not have an interest in a case involving the custody of her children. Under both the second factor in the analysis of timeliness of a motion to intervene under *First Shiloh Baptist Church* (“the purpose for which intervention is sought”) and the first two factors

of the analysis for the propriety of post-judgment intervention (“the purpose for which intervention is sought” and “the necessity for intervention as a means of preserving the applicant's rights”), a court faced with a motion to intervene should assess the interests of the party requesting intervention and whether those interests are currently represented by the existing parties in the proceedings. *See First Shiloh Baptist Church*, 82 Ohio St. 3d 501, 503, 696 N.E.2d 1058, (1998), *see also Wizards of Plastic Recycling* at ¶23. Ms. Fekadu presented a compelling and fundamental interest to intervene, which was not represented by either of the existing parties to the Writ Proceedings.

In addition to her obvious interest in the Writ Proceedings as the children’s mother, Ms. Fekadu’s interests related to intervention are many. Ms. Fekadu’s primary interest in the custody litigation as a whole is the best interest of her children, and her interest in parenting them. As an Ohio resident and historically the children’s primary caretaker, Ms. Fekadu has an undeniable interest in gaining full-custody of her children *in Ohio*. A review of the record makes clear that Ms. Fekadu has fought at every step of this case, in both Ohio and in Virginia, to have Ohio deemed the children’s home state. It would be very difficult for Ms. Fekadu to gain full-custody of her children in Ohio, if the children’s home state is deemed to be Virginia. Accordingly, Ms. Fekadu’s interest with respect to the current controversy is Ohio’s designation as the children’s home state. This interest entails Ohio’s proper exercise of jurisdiction, and whether the June 5, 2012 custody order entered by the Arlington County Juvenile and Domestic Relations Court (“Arlington Domestic Relations Court”) is entitled to full faith and credit. Contrary to Appellee N.G.’s position, Ms. Fekadu’s interests in Ohio maintaining jurisdiction cannot be so wholly detached from her interest in parenting her children in her place of domicile.

Further, Cuyahoga County Court of Common Pleas Judge Floyd (“Judge Floyd”) did not adequately represent Ms. Fekadu’s interests in the Writ Proceedings. Indeed, Ms. Fekadu is uniquely situated to represent her interests, due to her familiarity with the facts and complex circumstances involved in the underlying custody dispute. The litigation in this matter was exceptional in that it spanned three (3) years and two (2) states. Judge Floyd was privy only to the facts that were on the record in her courtroom. Ms. Fekadu is privy to the details of the litigation happening in both states.

Ms. Fekadu’s familiarity with the facts and circumstances of the litigation is needed to combat Appellee N.G.’s manipulation of the record in his favor. For example, Appellee N.G. never introduced to the Eighth District in the Writ Proceedings a copy of the May 23, 2014 Dismissal Order (“Dismissal Order”) entered by the Circuit Court of Arlington County, which unequivocally recognized Ohio as the children’s home state and dismissed all on-going litigation in Virginia. (S.F. App. 38-39) This Dismissal Order should have been dispositive to the Eighth District’s consideration of the case, as it showed that the highest court in Virginia to consider the issue of jurisdiction determined that **Virginia did not have jurisdiction over the case**, and in doing so, dismissed all litigation in Virginia. Instead of abiding by this determination, Appellee N.G. used the lack of communication and transparency between the Virginia and Ohio courts to take another bite at the apple in Ohio.

Further, Appellee N.G.’s characterization of the Dismissal Order to this Court is another striking example of his repeated mischaracterization of the facts in his favor. Appellee N.G.’s merit brief claims that the Dismissal Order was the result of Ms. Fekadu voluntarily dismissing her appeal of the June 5, 2012 custody order. Nothing could be further from the truth. Ms. Fekadu appealed the June 5, 2012 custody order shortly after it was entered. On July 15, 2013,

the Circuit Court of Arlington County entered a visitation order and stayed the appeal on the custody issue until Ohio made a determination on whether Virginia or Ohio was the home state. After the Ohio Juvenile Court held that Ohio was the children's home state on April 21, 2014, Ms. Fekadu filed a motion to dismiss the entire custody case from Virginia for lack of jurisdiction. On May 23, 2014, the Virginia Circuit Court granted Ms. Fekadu's motion to dismiss, holding that Ohio was the children's home state and Virginia did not have jurisdiction in the custody matter. (S.F. App. 38-39) It is inaccurate to characterize this as a voluntary dismissal of Ms. Fekadu's appeal; rather, the Circuit Court of Arlington County dismissed the entire case from Virginia for lack of subject matter jurisdiction.<sup>2</sup>

To be sure, the Dismissal Order was clearly a contested order. Even N.G.'s Virginia counsel objected to the entry of the Dismissal Order in handwritten notes as follows:

“Objected to as to denial of Plaintiff's [N.G.] motion and dismissal of appeals. Also objected to as to characterization of OH 4/21/2014 decision as having decided home state of the children.”

(S.F. App. 38-39)

Any outlandish theories regarding the Dismissal Order that Appellee N.G. has concocted for his benefit in these proceedings are controverted by his Virginia counsel's objections to the Dismissal Order. It is outrageous to suggest the Dismissal Order is the result of Ms. Fekadu voluntarily dismissing her appeals in Virginia, when N.G.'s counsel objected to the Dismissal Order and specifically objected to the Arlington Circuit Court's determination that Ohio was the

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<sup>2</sup> The Virginia case cited by Appellee N.G., *Hasty v. Hasty*, 1993 Va. App. LEXIS 431 (1993) is inapposite to the current matter for the same reason. The mother in *Hasty* appealed the decision of the Virginia Circuit Court granting her motion for nonsuit but holding that the underlying custody orders issued by the juvenile and domestic relations district court remained in effect. Here, Ms. Fekadu did not file a motion for nonsuit, rather she filed a motion to dismiss based on the fact that Virginia did not have subject matter jurisdiction to make a custody determination and the Arlington Circuit Court agreed as evidence by the Dismissal Order.

children's home state. The document speaks for itself, without Appellee N.G's false characterization of the facts.

Additionally, while Ms. Fekadu and Judge Floyd may have shared an interest in the Eighth District upholding Ohio's jurisdiction, Ms. Fekadu's interests diverged from Judge Floyd's on the issue of appeal. Ohio courts have held that an intervening party has a compelling interest in protecting appeal rights. For example, in *Norton v. Sanders*, 62 Ohio App.3d 39, 42-43 574 N.E.2d 552, 554-555 (1989), the Ninth District upheld an order allowing the intervention of a group of citizens post-judgment. The city of Norton adopted a new zoning ordinance, and the council placed an initiative before the voters. When the new ordinance failed, the city of Norton filed a declaratory judgment action seeking a determination on whether the old ordinance was revived by the failure of the new ordinance. The court determined the old ordinance was not revived. When the city of Norton failed to appeal the declaratory judgment, the citizens were allowed to intervene to protect their appeal rights. *See also Triax Co. v. TRW, Inc.*, 724 F.2d 1224 (6th Cir. 1984)(Sixth Circuit reversed a decision denying intervention to a person who moved to intervene only after the original plaintiff decided not to appeal.); *Southern Ohio Coal Co.*, 100 Ohio App. 3d 661, 675, 654 N.E.2d 1017 (4th Dist. 1995)(union miners were allowed to intervene after it appeared that the chief administrator of the Division of Mines no longer adequately represented their interests after he entered into a consent judgment against the miners' interests. The miners intervened and appealed the consent judgment).

Here, Ms. Fekadu intervened, as soon as practicable, which was only after the Writ had been granted. At the same time, she filed a motion under Civ. R. 60(B) for relief from judgment. It was clear from the record that Ms. Fekadu was opposing the Eighth District's entry of the Writ. Judge Floyd never opposed the Writ after it was granted. At the time when the Eighth

District denied Ms. Fekadu's Combined Motion on January 14, 2015, one hundred six (106) days had passed since the entry of the Writ, which is well beyond the forty-five (45) day time limit for Judge Floyd to file a notice of appeal challenging the Writ. Thus, when the Eighth District denied Ms. Fekadu's Combined Motion it was clear that Judge Floyd was not protecting Ms. Fekadu's interest in appealing the Writ. If there was any question whether Judge Floyd was representing Ms. Fekadu's interest in appealing the Writ previously, it is now clear that she was not, as Counsel for Cuyahoga County Court of Common Pleas, Juvenile Division and Judge Floyd has taken the position in this appeal that the Writ was appropriate. *See* Merit Brief of Appellees Cuyahoga County Court of Common Pleas, Juvenile Division, and the Hon. Alison L. Floyd (hereinafter Ohio Juvenile Court's Merit Brief) at p. 21. Accordingly, Ms. Fekadu advanced a compelling interest to intervene, which was distinct from that asserted by Judge Floyd.

**C. Appellant Timely Filed her Combined Motion.**

Ms. Fekadu filed her Combined Motion to intervene and vacate the Writ a mere week after she learned that the Writ was granted. In *Pfeiffer*, the court held a motion to intervene was timely when it was filed nearly two (2) months following a judgment. *See Pfeiffer*, 1st Dist. No. C-050683, 2006-Ohio-5074, at ¶24. Appellee N.G.'s suggestion that Ms. Fekadu was aware of the Writ long before she moved to intervene is false. It is true that Virginia counsel for Appellee N.G. represented to the Arlington Domestic Relations Court in August 2014 that N.G. had filed a complaint seeking the Writ in Ohio, and that Ms. Fekadu's Virginia counsel had conferred with her Ohio counsel regarding the matter, and her Ohio counsel was unaware of the Writ Proceedings. (N.G. Merit Brief p. 10). The explanation for Ms. Fekadu's decision to intervene in October 2014 is simple. That was the first time she, or her Ohio counsel, had evidence of the

Writ Proceedings. The Writ Proceedings were captioned in a way that disguised the parties to the action, such that a party searching for the proceedings would not find them on the Eighth District's docket. Further, as discussed more fully below, it is suspect that neither N.G. nor his counsel notified Ms. Fekadu's Ohio counsel of the action in the Eighth District, despite the fact that the parties had been long engaged in litigating the issue of home state. Thus, there was no way for Ms. Fekadu to have reasonably known that the Writ Proceedings were ongoing, and intervened at any point sooner than when she did in October 2014. Even if this Court determines that Ms. Fekadu should have known of the Writ Proceedings in August 2014, which all facts suggest she had no way of reasonably knowing, she still timely intervened in the action in October 2014, only a week after learning of the Writ.

**D. No Party to the Writ Proceedings Would Suffer Prejudice as a Result of Appellant Fekadu Intervening.**

There was no probability of prejudice to N.G. or Judge Floyd had the Eighth District allowed Ms. Fekadu's intervention. Ms. Fekadu brought to the attention of the Eighth District material facts and information that the Eighth District did not have prior to making its determination. Moreover, N.G. should have reasonably expected Ms. Fekadu to take immediate action once she discovered the Writ Proceedings, given the parties' litigious past. Likewise, as is the case with any adverse proceeding, N.G. should have expected an appeal if the Writ was granted. There can be no prejudice to N.G. if Ms. Fekadu were allowed to intervene, because he should have expected that the Writ would be appealed. *See Southern Ohio Coal Co.*, 100 Ohio App. 3d 661, 674, 654 N.E.2d 1017 (4th Dist. 1995) ("As in *Triax*, it cannot be said that the defendants in this case would be prejudiced by allowing appellants to intervene since the defendants should have expected Norton [the original party] to appeal."). It is telling that Appellee N.G. offered no theories under which he was prejudiced by Ms. Fekadu's intervention.

As N.G. has not alleged prejudice and the facts do not support that N.G. would be prejudiced were Ms. Fekadu allowed to intervene, there can be no finding that N.G. was prejudiced at the time when Ms. Fekadu motioned for intervention..

Further, Ms. Fekadu's appeal in this matter should not be dismissed because she inadvertently failed to include the Court of Common Pleas of Cuyahoga County, Juvenile Division and the Hon. Alison Floyd (hereinafter the "Ohio Juvenile Court") on her Notice of Appeal. Neither Appellee N.G. nor the Ohio Juvenile Court was prejudiced by Ms. Fekadu's unintentional service defect. Upon learning of the mistake, Ms. Fekadu immediately remedied the service by forwarding a copy of the appeal documents, including Appellant's Merit Brief, to Cuyahoga County Prosecutor Charles E. Hannan, Counsel of Record for the Ohio Juvenile Court. As this Court's docket reflects, Prosecutor Hannan entered his appearance in this case when he filed a Stipulated Extension of Time to File Merit Brief of Appellees Cuyahoga County Court of Common Pleas, Juvenile Division and the Hon. Alison Floyd ("Stipulated Extension"). *See* Docket Entry for Case No. 2015-0363 dated May 22, 2015. Accordingly, any surprise or prejudice that resulted from the inadvertent failure to serve the Ohio Juvenile Court was nullified when Prosecutor Hannan took an extension of time.

Moreover, Appellee N.G.'s arguments with respect to the service defect must be overruled because he does not have standing to challenge the Notice of Appeal. S.Ct.Prac.R. 3.11(E) provides, in relevant part:

- (1) When a party or amicus curiae fails to serve a party or parties to the case in accordance with division (B) of this rule, ***any party adversely affected may file a motion to strike the document that was not served.***
- (2) If the Supreme Court determines that service was not made as required by this rule, it may strike the document or, if the interests of justice warrant, order that the document be served and impose a new deadline for riling any response document. ***If the Supreme Court determines that service was made***

***as required by this rule or that service was not made but the movant was not adversely affected, it may deny the motion to strike.***

See S.Ct.Prac.R. 3.11(E)(emphasis added).

Appellee N.G. was not the appropriate party to bring an action to strike Ms. Fekadu's Notice of Appeal, because he was not adversely affected by the notice defect. Appellee N.G. claimed that he was adversely affected because "he is forced to participate in an appeal that is not properly perfected," yet this is not a cognizable injury and should not be entertained by this Court. See *Appellee N.G.'s Motion to Strike with Memorandum in Support*, p.1, fn.1. Moreover, the Ohio Juvenile Court, the party who would be in the position to challenge the service defect, has not raised the issue of prejudice or otherwise contested the service of the Notice of Appeal in these proceedings. Consequently, no party in the Writ Proceedings suffered prejudice by the inadvertent failure to serve the Ohio Juvenile Court. Because of this, Ms. Fekadu's appeal should not be dismissed.

**E. All Equitable Factors Militate in Favor of Appellant Fekadu's Intervention.**

With respect to the final factor in the *First Shiloh Baptist Church*, the facts of this case militate in favor of allowing Ms. Fekadu to intervene. The Writ was a reaction to Judge Floyd's decision following an evidentiary hearing finding that Ohio was the children's home state. The evidentiary hearing resulted from a prior ruling of the Eighth District in Case No. 98652 wherein the Eighth District determined that the Juvenile Court had improperly dismissed the original custody complaints without holding an evidentiary hearing. See *In re: E.G.*, 8th Dist. No. 98652, 2013-Ohio-495, ¶22. Faced with Judge Floyd's decision that Ohio was the children's home state, N.G. had the option of appealing Judge Floyd's decision to the Eighth District, or alternatively filing an original action for writ of prohibition with the Eighth District. Either avenue would have landed N.G. in front of Eighth District on the issue of whether Ohio had home state

jurisdiction. The critical distinction between the two procedural paths is that Ms. Fekadu was precluded from opposing the Writ without intervention.

As mentioned earlier, one would expect that parties to such a drawn-out custody battle would notify the other when a dispositive issue in the proceedings was challenged. Although Ms. Fekadu was not a party on the Complaint for Writ of Prohibition, she was certainly a party in interest to the custody proceedings in Ohio. It is not farfetched to imagine that as a party in interest, N.G. would have alerted Ms. Fekadu to the Complaint for Writ of Prohibition in Ohio.<sup>3</sup> By concealing the Writ Proceedings from Ms. Fekadu, N.G. was able to obtain the Writ prior to Ms. Fekadu challenging the action. Appellee N.G.'s actions in this regard are akin to winning on a technicality. However, this is not a case where procedural prowess should be rewarded or even condoned. Ultimately this is a custody case. The determination of the validity of the Writ will have lasting effects on where Ms. Fekadu's children live, how often she can see them, and whether Ms. Fekadu will have to move her home and business in order to be closer to her children should Virginia remain the home state. All equitable factors weigh in favor of allowing Ms. Fekadu to intervene in the Writ Proceedings, so that she can challenge the Eighth District's decision.

## **II. Appellant Fekadu Has Standing to Challenge the Eighth District's Decision Granting the Writ of Prohibition**

Ms. Fekadu filed her Combined Motion on October 23, 2014. Upon receiving the Combined Motion, the Court of Appeals of Ohio for the Eighth Appellate District ("Eighth District") stayed the Writ previously entered on September 30, 2014, and seemingly allowed Ms.

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<sup>3</sup> Though the Ohio Rules of Appellate Procedure do not require N.G.'s counsel to serve a copy of the Complaint for Writ of Prohibition to interested parties, Fed.R.App.P 21 requires that **all** parties to the proceeding in the trial court other than the petitioner are "respondents for all purposes." Thus, had this action been federal court, Ms. Fekadu would have been served.

Fekadu's intervention to proceed. In a journal entry dated October 27, 2014, the Eighth District wrote:

“Mother, S.F., has filed a post-motion to intervene and for relief from judgment. For good cause shown, the court stays the writ of prohibition issued on September 30, 2014, pending disposition of the post-judgment motions. The parties shall file responses to mother's post-judgment motions on or before November 10, 2014. No extensions will be granted except for good cause shown. Relator and mother are further ordered to provide the court with certified copies of the official court dockets from all courts that have presided over the custody of the children at issue in this writ action by November 10, 2014. Notice issued.”

*See* Docket Entry in Case No. CA-14-101425 dated October 27, 2014.

Following the above Journal Entry, the parties participated in motion practice through January 2015, when on January 14, 2015, the Eighth District issued a Journal Entry, which stated, “Combined motion to intervene as respondent S.F. and emergency motion for relief from order is denied.” *See* Docket Entry in Case No. CA-14-101425 dated January 14, 2015 (hereinafter the “Appealed Journal Entry”). The Eighth District's Appealed Journal Entry then proceeded to only cite facts pertinent to the denial of Ms. Fekadu's motion for relief from the Writ<sup>4</sup>, rather than to address the issue of intervention. Hence, the Appealed Journal Entry is

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<sup>4</sup> The Journal Entry dated January 14, 2015 provides: Combined motion to intervene as respondent S.F. and emergency motion for relief from order is denied. On September 9, 2014, the Juvenile and Domestic Relations District Court of Arlington County, Virginia issued a final order enforcing its June 5, 2012 custody order, which was the initial custody determination. S.F. has appealed that ruling to the Circuit Court of Arlington County, Virginia. The evidence presented to this court reflects a dispute among the parties as to whether the June 5, 2012 order is in force or was vacated by the Circuit Court's order dated May 23, 2014. This dispute is best resolved by the Circuit Court that issued the May 23, 2014 order. The Circuit Court of Arlington County, Virginia has stayed the appeal but ordered the children to remain in Virginia in physical custody of relator. The custody order was not stayed or modified or expressly vacated. Therefore, the June 5, 2012 custody order and the September 9, 2014 order enforcing it, are entitled to full faith and credit unless vacated, stayed, or modified by a court having jurisdiction to do so. R.C. 3127.43; R.C. 3127.20; *State ex rel. Morenz v. Kerr*, 104 Ohio St.3d 148, 2004-Ohio-6208, 818 N.E.2d 1162. In the event that the Virginia appellate courts vacate, modify or stay the custody orders, that could trigger jurisdiction back in the Ohio juvenile court cases

unclear as to whether the Eighth District intended to deny both the motion for relief from judgment, as well as the motion to intervene, or solely the motion for relief. The Ohio Juvenile Court has suggested that the Eighth District heard and considered Ms. Fekadu's arguments regarding the propriety of the Writ, which is a logical conclusion based on the language in the appealed Journal Entry. *See* Merit Brief of the Ohio Juvenile Court, p. 14. It follows that Ms. Fekadu's appeal should not be limited exclusively to the denial of her motion to intervene, when the Eighth District's Appealed Journal Entry contemplated issues aside from intervention.

Moreover, Ms. Fekadu's appeal is not analogous to that in *Sawicki v. Court of Common Pleas of Lucas County, et. al.* ("*Sawicki*"), 121 Ohio St.3d 507, 20019-Ohio-1523, 905 N.E.2d 1192, ¶18, as alleged by Appellee N.G. Unlike the appellant in *Sawicki*, Ms. Fekadu is not using her motion to intervene as a vehicle to challenge the underlying judgment. Rather, she is directly challenging the Appealed Journal Entry, wherein the Eighth District denied her Combined Motion, and issued findings in support of the Writ. Appellants are permitted to appeal the denial of both a motion to intervene and a motion to vacate a judgment. *See Dep't of Pub. Safety v. Buckley*, 11th Dist. No. 2006-L-101, 2007-Ohio-4628, ¶11 (Eleventh District considered appellants' motion to vacate and motion to intervene simultaneously where the facts relating to each assignment of error were interrelated). Therefore, Ms. Fekadu has standing to appeal the issues raised in the Appealed Journal Entry, including the denial of her Combined Motion.

In the alternative, should this Court be persuaded that Ms. Fekadu is only permitted to challenge the denial of her motion to intervene, Ms. Fekadu's appeal with respect to her First Proposition of Law should proceed to a determination on its merits.

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again. Until such time, the Ohio juvenile court does not have jurisdiction to proceed. Notice issued.

### **III. The Eighth District Should be Required To Comply with R.C. 3127.**

Appellee N.G. suggested that Ms. Fekadu is claiming the Eighth District had to re-litigate the entire issue of jurisdiction in order to enter the Writ. This is not the case. Rather, Appellant has only suggested that the Eighth District was required to follow R.C. 3127.33(A) and determine whether Virginia exercised jurisdiction in accordance with the UCCJEA. R.C. 3127.33(A), which provides:

“[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 jurisdiction standards of this chapter.*”

(S.F. App. 66)

In order to award full faith and credit to the June 5, 2012 custody order entered by the Arlington Domestic Relations Court, the Eighth District was required under R.C. 3127.33(A) to determine whether the Virginia Court exercised jurisdiction “in substantial conformity” with R.C. 3127 (Ohio’s codification of the UCCJEA). As more fully set forth in Appellant’s Merit Brief (p. 10), R.C. 3127.15 governs jurisdiction in Ohio for custody matters and requires a finding that the state exercising jurisdiction is the home state of the child. Importantly, Virginia has never determined that it was the home state of the children.

To understand this issue, it is necessary to survey the procedural history with respect to the custody orders at issue. At the start of these proceedings, after the initial complaints were filed in both Virginia and Ohio, the judges from each state held a telephone conference on the issue of jurisdiction on April 30, 2012. (S.F. App. 12) Shortly thereafter, Judge Floyd dismissed the Ohio litigation. In an order dated May 29, 2012, Judge Floyd held that “Virginia is the home state of the child[ren]; and that this matter may proceed expediently before the Virginia Court,

this court finds that said expediency would serve the *best interest of the child*, child’s sibling, and the family.” (S.F. App. 5, emphasis added). The Virginia judge then entered the June 5, 2012 custody order. (S.F. App. 10).

Ms. Fekadu moved for reconsideration of the Juvenile Court’s order granting N.G.’s motion to dismiss, which was denied, and then appealed the May 29, 2012 Order to the Eighth District. The Eighth District, in part, held that the Juvenile Court “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*, the UCCJEA eliminates a determination of best interests of a child from the original jurisdiction inquiry.” *In re E.G.*, 8th Dist. No. 98652, 2013-Ohio-495 at ¶21 (quoting *Rosen v. Celebrezze*, 117 Ohio St.3d 241, 2008-Ohio-853, 883 N.E.2d 420). The Eighth District further ordered the Juvenile Court to hold an evidentiary hearing to answer specific questions on the children’s residence to determine home state jurisdiction.<sup>5</sup>

As result of the Eighth District’s decision in *In re E.G.*, the Juvenile Court held an evidentiary hearing on March 13, 2014, and thereafter determined that Ohio was the children’s home state by order dated April 21, 2014. While the jurisdictional issue identified by the Eighth District was the focus leading to the April 21, 2014 order, the Juvenile Court Judge failed to specifically identify that issue in her written opinion following the evidentiary hearing. When the Eighth District again considered the issue of jurisdiction in the Writ Proceedings, it simply *assumed* that Virginia exercised appropriate jurisdiction when entering the June 5, 2012 custody

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<sup>5</sup> Specifically the Eighth District held: If the trial court determines, after holding an evidentiary hearing, that the children did, in fact, live in Virginia from April 24, 2011 to November 1, 2011, as father claims they did, then the Cuyahoga County Juvenile Court lacks jurisdiction to determine the action because Virginia would be the children’s ‘home state’ under the UCCJEA \*\*\* if, however, the trial court determines that the children lived in Ohio - with only ‘temporary absences’ from home - then Ohio is the children’s ‘home state’ for purposes of jurisdiction under the UCCJEA. (S.F. App. 31).

order. In Footnote 2 of the opinion in *State of Ohio, Ex. Rel., N.G. v. Cuyahoga County Court of Common Pleas, Juvenile Division, et al.*, 8th Dist. No. 101425, 2014-Ohio-4390, ¶15 n.2, the court wrote,

Presuming regularity, the Virginia court obviously resolved the factual dispute between the parties over where the children had been living in relator's favor and there is no indication that mother ever challenged or appealed that ruling in Virginia.

*Id.* at ¶15 n.2.

It does not follow that the Eighth District would remand the issue of home state jurisdiction for an evidentiary hearing in *In re: E.G.*, the first appeal of this case, but then later in the Writ Proceedings simply *presume* that the courts in Virginia had exercised jurisdiction appropriately. The Eighth District's decision in this respect is especially questionable, if not contradictory, to its decision in *In re: E.G.* and certainly does not comply with R.C. 3127.33. The Eighth District had no basis on the record in Ohio or Virginia to presume that the June 5, 2012 custody order was entitled to full faith and credit. In fact, the reviewing court in Virginia held *on appeal* in July 2013, a full year after the June 5, 2012 custody order was entered, that the issue of jurisdiction was still unresolved. How is it then that the Eighth District can presume the lower court in Virginia had jurisdiction to enter the June 5, 2012 custody order, when the appeals court reviewing said custody order in Virginia determined that jurisdiction remained unresolved?

Similarly, the Eighth District was not required to honor the June 5, 2012 Custody Order, even if it is determined that Virginia made the initial custody determination in the case. As discussed previously herein and in Ms. Fekadu's Merit Brief, it is not clear that the June 5, 2012 custody order was entered consistent with the provisions of the UCCJEA, Virginia Code, or Ohio law. Assuming *arguendo* that the June 5, 2012 custody order was the initial determination in this matter, Virginia relinquished jurisdiction when the Arlington Circuit Court entered the Dismissal

Order on May 23, 2014. R.C. 3127.17 permits Ohio courts to exercise jurisdiction where the court of the other state “determines that it no longer has exclusive continuing jurisdiction” in the matter. *See* R.C. 3127.17(A)<sup>6</sup>. Virginia determined it no longer had jurisdiction, as Ohio was the children’s home state, when it entered the Dismissal Order. Therefore, after the entry of the Dismissal Order in Virginia, Ohio was no longer required to honor Virginia’s initial exercise of jurisdiction.

By assuming that the June 5, 2012 custody order was entered in accordance with the UCCJEA and entitled to full faith and credit, the Eighth District misapplied R.C. 3127.33 and R.C. 3127.17 to the circumstances and in doing so abused its discretion by issuing the Writ. *See State v. Beechler*, 2nd Dist. No. 09-CA-54, 2010-Ohio-1900, ¶70. (“No court- not a trial court, not an appellate court, nor even a supreme court- has the authority within its discretion, to commit an error of law.”). Appellant is not suggesting that this case be re-litigated; rather, she is asserting that the Eighth District had a duty to correctly apply Ohio law, which it did not.

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<sup>6</sup> R.D. 3127.17 provides as follows:

Except as otherwise provided in section 3127.18 of the Revised Code [applicable to temporary emergency jurisdiction], a court of this state may not modify a child custody determination made by a court of another state unless the court of this state has jurisdiction to make an initial determination under division (A)(1) or (2) of section 3127.15 [applicable to the initial determination of home state jurisdiction] of the Revised Code and one of the following applies:

(A) The court of the other state determines that it no longer has exclusive, continuing jurisdiction under section 3127.16 of the Revised Code or a similar statute of the other state or that a court of this state would be a more convenient forum under section 3127. 21 of the Revised Code or a similar statute of the other state.

(B) The court of this state or court of the other state determines that the child, the child’s parents, and any person acting as a parent do not presently reside in the other state.

**IV. Appellant is Entitled to Relief from Judgment because N.G. Obtained the Writ through Fraud, Misrepresentation or Other Misconduct.**

Appellee N.G. obtained the Writ, in spite of the fact that he misrepresented material facts of this case by failing to introduce the Dismissal Order in the Writ Proceedings. At the time the Dismissal Order was granted, on May 23, 2014, Virginia determined that it lacked jurisdiction in the case thereby deferring to Ohio's determination of home state jurisdiction. (See S.F. App. 38-39). This was certainly relevant to the question of which state appropriately had jurisdiction, and whether the June 5, 2012 custody order was entitled to full faith and credit. By omitting the Dismissal Order in the Writ Proceedings, N.G. was able to obtain the Writ by concealing pertinent information from the Eighth District, and in doing so engaged in fraud, misrepresentation or other misconduct.

Likewise, N.G. also concealed from the Eighth District the fact that false dates were on the record prior to the June 5, 2012 custody order being entered. N.G. maintained the position that the children had lived in Virginia for at least six (6) months from the start of both the Ohio and Virginia litigation through the evidentiary hearing on March 13, 2014, when the mistake finally came to light. The June 5, 2012 custody order was granted at a time when there was nothing on the record to dispute N.G.'s claim that the children remained in Virginia for six (6) months. However, the children were only in Virginia for five and half (5 ½) months. N.G. never disclosed this fact to the Eighth District. This misrepresentation furthered N.G.'s position that the June 5, 2012 order was entitled to full faith and credit. Because N.G. misrepresented this fact to the Eighth District, which resulted in the Writ, Ms. Fekadu is entitled to relief from the Writ under Civ. R. 60(B)(1) through (5).

## CONCLUSION

Ms. Fekadu has demonstrated that her intervention in the Writ Proceedings was timely under the factors set forth in *First Shiloh Baptist Church*, and that she has standing to challenge the Eighth District's Journal Entry from January 14, 2015 in its entirety. Further, Appellee N.G. has continually misrepresented facts in the case to his benefit, thereby entitling Ms. Fekadu to relief from the Writ. Finally, it is clear from the record that the Eighth District abused its discretion by failing to properly apply R.C. 3127 in this case.

Accordingly, for the reasons set forth above, Ms. Fekadu respectfully requests that this Court reverse the Eighth District's decision denying her Combined Motion. In the event that the Court is persuaded by Appellee N.G.'s arguments regarding standing, Appellant Senayt Fekadu respectfully requests that this Court reverse the Eighth District's opinion denying her motion to intervene, and remand the remaining issues to the Eighth District so that Ms. Fekadu has an opportunity to challenge the Writ.

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 **REPLY BRIEF OF APPELLANT SENAYT FEKADU** was served this 14<sup>th</sup> day of July 2015 by e-mail upon:

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