



Assistant Prosecutors:

Juvenile Division

Kevin S. Talebi

Civil Division

Jack W. Whitesell, Jr.

Victim/Witness Division

Peggy L. Baker

Legal Secretary

Liz Stocksdale

Juvenile Diversion Division

Susan J. Lantz

NICK A. SELVAGGIO

Prosecuting Attorney of Champaign County

Champaign County Courthouse

200 North Main Street

Urbana, Ohio 43078

Phone: (937) 652-1555

Fax: (937) 652-2681

June 28, 2001

Michael A. Galluzzo

P.O. Box 710

St. Paris OH 43072

Dear Mr. Galluzzo:

Re: Conference of Parties and Discovery Plan Required by Federal Rule of Civil Procedure 26(f); Court's Notice of Pre-Trial Conference

You will have received a Notice of Preliminary Pre-Trial Conference from the federal district court on about June 12. That is when we received our notice. We are to be available at our telephones to discuss the case with Magistrate Judge Michael R. Merz at 8:45 a.m. on Thursday, July 19, 2001.

We have been instructed to have completed our "Conference of Parties" and "Discovery Plan." In the notice, it stated that the report was to be submitted to the Court "in the form attached hereto." In our copy of the notice, no form was attached. I do not know if they attached a copy to your notice. I have called the court's secretary and she has promised that a form will be mailed tomorrow. We will need this form in time to report within fourteen days of today.

We were supposed to have had our conference no later than today. However, I have been unable to reach you and I am unaware of any attempts to reach me or anyone else in this office. I hope that by the time you receive this letter, you will have returned my call and we have had our conference or set up a time to have it. If not, let me tell you what I believe we need to discuss. I am sending you this so that by the time we talk you will already know what I am thinking. This will save time, as I can then listen to your views of each of the subjects covered by Rule 26(f). Then, perhaps, we can agree on a report to the court or at least agree on what we do not agree on.

The following is set forth, not to argue the issues, but to identify what we believe they are, so that we can tell the court the answers to the other questions in the rule. Rule 26(f) of the federal district courts (the new version effective Dec. 1, 2000) requires that we confer --

- (1) to consider the nature and basis of your claims and our defenses -
 - (a) I understand the nature of your claim to be that Ohio Rule of Civil Procedure 75(N) and Ohio Revised Code § 3109.04, interpreted together, are unconstitutional;
 - (b) The basis for your claim is that parents are denied due process in the procedures followed to allocate child custody in divorces and dissolutions
 - (c) The nature of the common pleas court's defenses are
 - 1) that the federal district court is required to abstain from the case
 - 2) that the common pleas court is absolutely immune
 - 3) that the common pleas court is qualifiedly immune
 - 4) that you have not had your rights as a parent terminated and therefore your claim does not rise to the constitutional level
 - 5) that you currently have cases pending in state courts before which your issues can be raised and determined
 - 6) that you failed to raise these issues at the time custody rights and responsibilities were adjudicated and therefore waived your right to raise these issues at such a late date
 - 7) that you were accorded all the rights to which you were constitutionally entitled
 - (d) The bases for these defenses are:
 - 1) the principles of federal court abstention stated in those United States Supreme Court cases titled *Younger v. Harris*, 401 U.S. 37 (1971) and *Middlesex County Ethics Commission v. Garden State Bar Association*, 457 U.S. 423 (1982), as applied in a case in the Sixth Circuit Court of Appeals, that is virtually identical with yours entitled *Evans v. Yarbrough*, No. 00-3588, slip opinion dated Dec. 13, 2000).
 - 2) the court was acting fully within its functions as a court and is not the proper party in which to make the claim – the proper party would be your ex-wife – and the proper remedy would be an appeal of the decision to the Ohio Court of Appeals and through the state courts to the United States Supreme Court of Common Pleas
 - 3) same reasoning as number 2
 - 4) it will be our position that the federal court cases involving rights of parents rise to a constitutional level only when parental rights are permanently terminated or custody is so restricted as to amount to a total termination of parental rights – the facts in this case do not even come close to such a characterization

- 5) first, your case is ongoing and your right to request reallocation of custody still is subject to change if the facts and the law warrant the change; second, you have always had the right to appeal each decision on the merits of the custody orders and the right to raise the federal constitutional issues before the state appeals court; third, you currently have pending an appeals case in which can fully litigate the constitutional issues
- 6) the time to litigate the still-standing permanent custody order in the common pleas court case was by appeal within 30 days after it was originally decided on June 29, 1994; not only has the time to appeal the original order passed, but by waiting to do so, you have passed any applicable federal statute of limitations for any claim that your rights were denied at that time
- 7) finally, before the permanent custody order was issued, the court held a full hearing and issued findings of fact and conclusions of law that comported with the law as it existed at that time, accounting for the rights of all parties involved, especially that of the child, which is recognized as paramount both in state and federal law – therefore you received all of your due process rights. The subsequent hearings were on motions to modify, which operate by a different standard, relating to why the original order should be modified, at each one of which you received a full hearing;

(2) to consider possibilities for prompt settlement or resolution -

It would appear that this is unlikely, as the we firmly believe that Ohio's laws are fully constitutional and that you received due process. Unless you are willing to drop the lawsuit, there is little likelihood of any resolution, short of a judgment by the federal court;

(3) to make or arrange for any disclosures required by Rule 26(a)(1) -

26(a)(1)(A). It is our belief that there are no individuals not already known to both parties who would have any information relevant to this case; only the parties to the divorce case and witnesses called in that case, all of which you already know. Unless you have someone you believe to have information that we need to know about, in other words, testimony you intend to introduce that we would not be aware of, we do not expect you to have any information that is not part of the court files;

26(A)(1)(B.) It is our belief that you already have copies of all the documents, data, and tangible things that are in the possession of the court relevant to this case, as the only items are pleadings, motions, court orders, and other items filed in the case. While both you and others sometimes wrote letters to the court that were not formally filed, you and they were told that such items are not admissible and would not be considered as a part of the case. Such items are not relevant as they were no part of the

hearings or orders of the court and would not lead to any information that would be relevant, since your sole issue is the constitutionality of the statute and rule and the court files are all that can be relevant to that issue;

26(A)(1)(C) and (D) do not apply to this type of case; and

(4) Discovery plan -

We would propose that there are no documents to discover that are relevant that everyone does not already have. Also that, at most, one set of interrogatories, one set of requests for admissions, and one deposition per party would be the most that might be needed in this case. Interrogatories and requests for admissions can be mailed together and the response time for both is the same. We suggest that Interrogatories and requests for admission can be mailed, if they are to be used at all, within thirty days of the preliminary pre-trial hearing, with responses due the standard thirty days thereafter. With time to review these responses, parties should be able to agree on a time for depositions within the next month after that. If either the judge or the magistrates are to be deposed, we must allow for their court calendars. Most of the judge's and magistrates' time is allocated by deadlines set by state law for speedy trials in criminal cases and most cases are set two months in advance. Therefore, if these people are to be deposed, we may need to allow up to three months to schedule them. Since you do not need to conduct discovery in the same order as we do, you can do what you need in any order. Of course, we must respond to interrogatories or requests for admissions within 30 days of receiving them. Otherwise you can begin to work in depositions as soon as we can arrange them. By my statements above, I am saying we will need at least three months for discovery from our end, and wish you to allow at least three months from your end to accommodate the court's schedule in case you wish to depose the judge or any past or present magistrate.

Based on the above and that we have not yet spoken, in response to Rule 26(f)(1), we need to change the date of the conference to as soon as we can do so. I will be available to speak by telephone between now and about 5:00 p.m., July 3. I will be out of town from then until the morning of July 10. If you wish to call this office and tell the secretary when you are available for a telephone call, including evenings, she can check my calendar and pick a time that I am free from court or other meetings. If we can speak soon, we can still meet the deadline of having our report to the court by July 12. If it looks like we cannot confer before July 11, we may need to call Judge Merz and ask if we can have another day or two. He probably will want the report at least a day or two before the telephone conference on July 19. There are no disclosures to be made under 26(a)(1) from our end that I know of at this time.

In response to Rule 26(f)(2), the subjects of discovery for us will be to determine how you justify claiming that you were not given a full hearing or that the law does not allow parents a full hearing and how, given the complete findings of fact, that you can say the court or the law has deprived you of due process. We will inquire as to whether you

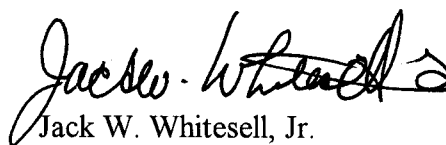
deny the record of the case or whether you were not allowed to present testimony in the hearing on permanent custody. All other issues are legal issues and not subject to discovery. Only facts are subject to discovery. What the law is or says is for the court to decide after each of us has submitted our arguments concerning the law. I believe all discovery can be completed within three or four months from the date of the preliminary pretrial hearing.

In response to Rule 26(f)(3), I see no reason to change the limitations on discovery in the rules. Since all relevant discoverable items are in the record of the court, all of which you should have, I see no issues on documentary evidence. If you have lost or otherwise do not have these records, you can obtain them from the Clerk of Courts at her usual charges for copies. The federal district court can determine if it wants or needs the records of the common pleas court, and can order the Clerk of Courts to provide the district court with the docket and record directly. Neither you nor we need do so separately, unless Judge Merz orders it.

In response to Rule 26(f)(4), I see no need for any other orders to be entered by the court except for setting a deadline for pretrial motions. I would suggest one month after the end of discovery. This will give both parties time to review the results of discovery so as to make motions and responses to motions based on complete information.

Finally, separate from the issues of the pretrial conference on discovery, I will approve having Judge Merz preside over everything, including the trial, if one is necessary. If we wait for an opening on Judge Rice's docket, it could be years before he schedules a trial. I am sure you want these issues resolved sooner than that.

Yours truly,



Jack W. Whitesell, Jr.
Assistant Prosecuting Attorney

cc: Champaign County Court of Common Pleas