IN THE SUPREME COURT OF OHIO

STATE OF OHIO ex rel. TAMALIE W. GARRETT 3415 Zeta Street P.O. Box 2231 Weirton, WV 26062	:	Original Action for Writ of Prohibition and Mandamus
Relator,	:	Case No. 2017-0801
v. HON. JUDGE J. MARK COSTINE Belmont County Probate Court 101 West Main Street St. Clairsville, OH 43950	:	EXPEDITED: ADOPTION OF MINOR CHILD INVOLVED
Respondent.	:	

RESPONDENT'S MOTION TO DISMISS

David K. Liberati (0010553)
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(740)695-4412 - fax

Attorney for Respondent,
Hon. Judge J. Mark Costine

MOTION TO DISMISS

Now comes Respondent, by and through Daniel P. Fry, Prosecuting Attorney for Belmont County, Ohio, and moves this Honorable Court for an Order dismissing the Complaint The grounds for the motion are set forth in the memorandum below.

RESPECTFULLY SUBMITTED

DANIEL P. FRY

By: _____

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Attorney for Respondent,
Hon. Judge J. Mark Costine

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Relator filed this action requesting a Writ of Mandamus and a Writ of Prohibition. In order for a Writ of Mandamus to be granted, Relator must prove that she lacks an adequate remedy at law. Indeed, Ohio Revised Code §2731.05 provides:

> "The Writ of Mandamus must not be issued when there is a plain and adequate remedy in the ordinary course of the law."

In addition to the Complaint filed in This Court, Relator has also filed in the Probate Court of Belmont County, Ohio, a Motion for Relief from Judgment and Motion for Declaratory Judgment. A copy of that Motion is attached hereto as Exhibit A. Also attached as Exhibit B is a Motion filed in opposition to Relator's Motion on May 25, 2017. The matter was briefly referred to mediation, but the mediation was unsuccessful. Thereafter, the Probate Court of

Belmont County issued a Judgment Entry setting these matters for hearing on July 14, 2017 at 10:00 a.m. A copy of that Judgment Entry is attached hereto as Exhibit C.

Clearly, Relator has sought relief from the judgment and the Belmont County Probate Court is in the process of hearing and deciding that Motion. Should Relator's Motion be granted, this action in Mandamus would become moot.

Therefore, Relator has an adequate remedy at law, and in fact, is pursuing that remedy. The relief requested in Mandamus is not ripe for adjudication.

Plaintiff's allegations with respect to a Writ of Prohibition are also without merit. The pleadings and judgment entries in the adoption proceedings in the Probate Court of Belmont County, Ohio, clearly indicated that the Relator was a resident of Ohio, and that the adopted child was placed in the home of the Relator for at least six months as required by law. The proceedings in the Probate Court were proper and the Court clearly had jurisdiction to issue its Order.

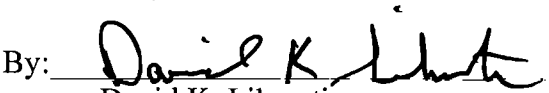
Relator argues that her rights to grandparent visitation have been terminated as a result of the actions of the Probate Court in granting this adoption.

This Court has previously held *In Re: Adoption of Ridenour* (1991), 61 Ohio St. 3d 319, that a grandparent has no standing to contest an adoption, even if they have previously established court-ordered visitation with the child and granting the adoption would terminate the visitation. While this result may be harsh, This Court has held

> "The purpose of the adoption proceeding is not to protect grandparents' rights. The purpose is to determine, on the basis of the best interests of the child, whether to grant or deny the adoption petitions. Certainly, if a trial court requires testimony from the grandparents so as to determine a child's best interests, the trial court may obtain it. However, unless the grandparents are themselves seeking to adopt, they do not have an interest in the adoption proceeding per se sufficient to give them standing to intervene." Headnote 17.

For the reasons set forth above, Realtor's Complaint must be dismissed.

DANIEL P. FRY

By: 

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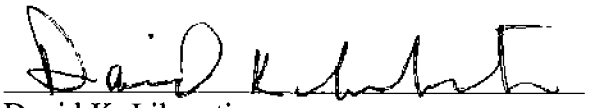
CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served this 26th day of June, 2017, via regular U.S. mail, postage prepaid upon the following:

Erik L. Smith
62 West Weber Road
Columbus, OH 43202



David K. Liberati

Attorney for Respondent,
Hon. Judge J. Mark Costine

PROBATE COURT OF BELMONT COUNTY, OHIO

IN THE MATTER OF THE ADOPTION OF GRACIE ELISABETH GARRETT

CASE NO. 16 AD 23

MOTION FOR RELIEF FROM JUDGMENT AND MOTION FOR DECLARATORY JUDGMENT OF GRANDMOTHER, TAMALIE GARRETT

Tamalie Garrett, Gracie's maternal grandmother, asks the Court to vacate the final adoption decree under Civ.R. 60(B)(1), (3) or (5). Relief is justified under Civ.R. 60(B)(5) because this Court lacked jurisdiction to proceed under the Parental Kidnapping Prevention Act, 28 U.S.C. 1738A. Relief is justified under Civ.R. 60(B)(1) and (3) because Movant received no notice of the adoption proceeding despite having a protectable interest in being heard in it. Alternatively, R.C. 3107.15 is unconstitutional as applied to Movant under the due process and full faith and credit clauses of the Ohio and United States Constitutions. Movant explains the bases for her motion in more detail in the memorandum below.

Respectfully submitted,

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Attorney for Grandmother, Tamalie Garrett

MEMORANDUM IN SUPPORT

BACKGROUND

Gracie Garrett, the minor child, was born on June 29, 2011. (Exh. A. at 1) On December 14, 2011, the Family Court of Hancock County, West Virginia granted Gracie's aunt, Elizabeth Garrett, guardianship of Gracie and awarded Tamalie Garrett, Gracie's maternal grandmother, visitation with her. (Exh. A.) In 2016, Elisabeth, petitioned this Court to adopt Gracie. The Court issued a final decree of adoption on December 15, 2016. Tamalie Garrett now asks the Court to vacate the adoption decree under Civ.R. 60(B)(1), (3), or (5).

Tamalie Garrett has resided in Weirton, West Virginia continuously since 2000. Gracie's aunt, Elisabeth Garrett, resided in West Virginia at all relevant times until August of 2012. From Gracie's birth on June 29, 2011 to December 14, 2011, Gracie lived alternately with Elisabeth and Tamalie. Both women cared for and supported Gracie in their homes. Tamalie also had possession of two of Gracie's close relatives, Jessica, now three years old, and Christian, now seven years old. They still live with Tamalie, have strong relationships with Gracie, and often ask Tamalie when they will see Gracie again.

Gracie's mother, Amanda Garrett, had an unstable lifestyle and history of drug abuse. Thus, on December 14, 2011, Amanda, Elizabeth, and Tamalie agreed to an order of guardianship for Elizabeth and visitation for Tamalie regarding Gracie. (Exh. A.) In August 2012, Elizabeth moved with Gracie to Ohio, eventually settling in St. Clairsville in the summer of 2015. Amanda was reportedly living in Ohio at that time.

In 2016, Tamalie brought contempt motions against Elizabeth in the Hancock County Family Court to enforce the visitation order. Before those proceedings concluded, Elizabeth petitioned in this Court to adopt Gracie without giving Tamalie notice of it. Meanwhile, Amanda moved back to West Virginia to cohabitate with a man named Jeremy Goryab [sp?] on Eoff Street in Wheeling. Amanda resided there from at least May 1 to mid-November 2016. Tamalie and Gracie's great grandmother, Roberta Garrett, often visited Amanda at her Wheeling apartment. They also shopped for apartment items with Amanda, brought food to her, and picked her up for errands. Tamalie knew Amanda was receiving food stamps through West Virginia. A week before Thanksgiving, Roberta brought food to Amanda at her Wheeling apartment. Sometime later, Amanda reportedly moved to Bellaire, Ohio.

On or about December 15, 2016, Tamalie received a text message from Elizabeth informing her of the adoption decree. That was Tamalie's first knowledge, actual or constructive, of the adoption proceeding.

The Hancock County family Court learned of the adoption decree and held a hearing on January 17, 2017. (Exh. B..) The Hancock County Court stayed the contempt proceedings, stating it would give the adoption full faith and credit if it was not vacated. (Exh. B at 2.) In early April 2017, Tamalie saw a Facebook page indicating that Amanda was now residing in Pennsboro, West Virginia.

In January 2017, Tamalie retained an attorney in Weirton, West Virginia who was also licensed in Ohio. The attorney eventually determined that Tamalie should find counsel closer to Belmont County and preferably one experienced in adoption law. Tamalie's search for local counsel was unsuccessful and in mid- March 2017 she

contacted this counsel, Erik L. Smith, of Columbus, Ohio who also advised her to find local counsel. Tamalie was still unsuccessful in finding counsel, however, and, on about April 11, 2017, Smith agreed to represent Tamalie on the advice that she still try to secure local counsel.

LAW AND ARGUMENT

Civil Rule 60(B)(1) and (3) let a court relieve a party or her legal representative from a final order on the basis of "mistake, inadvertence, surprise, or excusable neglect," or for fraud. Civ.R. 60(B)(5) allows the same relief for "any other reason justifying relief from the judgment."

PKPA

Tamalie is entitled to relief under subsection (B)(5) because this Court lacked jurisdiction under the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. 1738A. The PKPA sets out the jurisdictional criteria that govern all interstate child custody disputes. *Bergman v. McCullough*, 218 Ga.App. 353, 461 S.E.2d 544, 546 (Ga. Ct. App. 1995. Under the PKPA, a state "shall enforce according to its terms, and shall not modify except as provided in subsections (f), (g), and (h) of [the PKPA], any custody determination or visitation determination made consistently with [the PKPA] by a court of another state." 28 U.S.C. 1738A(a).

The PKPA defines "visitation determination" as any "order of a court providing for the visitation of a child and includes permanent and temporary orders and initial orders and modifications." 28 U.S.C. 1738A(b)(9). "Modify" means a "custody or visitation determination which modifies, replaces, supersedes, or otherwise is made subsequent to, a prior custody or visitation determination concerning the same child, whether made

by the same court or not." 28 U.S.C. 1738A(b)(5). Nevertheless, subsection (h) of the PKPA lets a state modify another state's visitation determination if the other state "no longer has jurisdiction to modify such determination or has declined to exercise jurisdiction to modify such determination." To be consistent with the PKPA, the state that made the visitation determination must first have had initial jurisdiction to do so. 28 U.S.C. 1738A(c)(2)(A).

West Virginia's Initial Jurisdiction

West Virginia had initial jurisdiction to make the visitation determination because West Virginia was Gracie's home state when the guardianship was sought. A state has initial jurisdiction to make a custody or visitation determination if the state was the child's home state when the custody or visitation proceeding began. 28 U.S.C. 1738A(c)(2)(A). "Home State" means the state in which, "immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as a parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any of such persons." 28 U.S.C. 1738A(b)(4).

When the guardianship proceeding began, Gracie had been living alternately with Elisabeth and Tamalie in West Virginia since her birth. Elisabeth and Tamalie were "acting as parents" during that time because they had "actual possession and control" of Gracie when she lived with them. See 28 U.S.C. 1738A(b)(1), (6), and (7). Thus, the Hancock County Family Court had initial jurisdiction to make the guardianship and visitation determinations.

The Ohio adoption decree "modified" the visitation determination because, under R.C. 3107.15, adoption by a relative terminates grandparent visitation rights if the child's parent is still living. The Ohio adoption decree, therefore, "superseded" the West Virginia court's visitation determination, thus modifying it. 28 U.S.C. 1738A(b)(5). *See e.g., L.N.S. v. S.W.S.*, 854 N.W.2d 699, 704 (Iowa App.2013) (Grandmother's visitation rights being cut off with the termination of the father's parental rights constituted a modification of the other state's grandparent visitation order under the PKPA.) This Court therefore lacked jurisdiction to modify the visitation determination unless the Hancock County Court had declined to exercise jurisdiction or lost jurisdiction to modify it under subsection (h) of the PKPA.

The Hancock County Family Court did not decline to exercise jurisdiction regarding the guardianship or visitation before the final decree of adoption. In addition, the Hancock County Family Court had not lost jurisdiction to modify the visitation order because West Virginia was the resident state of a "contestant" (i.e. a "grandparent who claims a right to custody or visitation of a child.) 28 U.S.C. 1738A(b)(2). West Virginia also had continuing jurisdiction under its own laws as required by 28 U.S.C. 1738A)(c)(1) and (d). A West Virginia court retains continuing jurisdiction over a custody determination until:

> "(1) A court of [West Virginia] determines that neither the child, the child and one parent, nor the child and a person acting as a parent have a significant connection with [West Virginia] and that substantial evidence is no longer available in [West Virginia] concerning the child's care, protection, training and personal relationships; or
>
> (2) A court of [any] state determines that the child, the child's parents *and* any person acting as a parent do not presently reside in [West Virginia]." (Emphasis added.)

W.Va.Code 48-20-202(a),

No West Virginia court has determined that Gracie, Amanda, and Elizabeth lacked a significant connection with West Virginia and that substantial evidence was no longer available in West Virginia about Gracie's care, protection, training, and relationships. In fact, substantial evidence about those factors exists via Gracie's long-term relationship with Tamalie, Roberta, and her other relatives in West Virginia.

In turn, any determinations made by this Court or by the Hancock County Family Court that Amanda resided in Ohio at a particular point during the adoption proceeding were likely erroneous because Amanda spent most, if not all, of that time in Wheeling. The Ohio address the Hancock County Court used for service on Amanda was old. Tamalie, in turn, had no reason to concern herself about the outdated address on the Hancock County Court's documents because Amanda lacked direct interest in the contempt proceeding. Thus, any determination by this Court about the residence of the "child's parents" being in Ohio during the adoption proceeding was likely incorrect.

Mistake/Fraud

Tamalie is also entitled to relief under Civ.R. 60(B)(1) and (3) for mistake or fraud because Elizabeth likely knew of Amanda's residence in Wheeling given that Tamalie and Roberta knew about it and Amanda told Tamalie that Elisabeth visited her there. Thus, Elizabeth or Amanda withheld information from the Courts that was material to deciding this Court's jurisdiction, which the Courts relied on to Tamalie's detriment, constituting fraud or mistake.

Excusable Neglect/Surprise

Tamalie's delay in challenging the decree or the adoption petition is excusable because she lacked knowledge of the adoption proceeding. When Tamalie learned of the adoption decree, her difficulty in finding counsel contributed greatly to her being unable to seek relief until now. Thus, the timing of Tamalie's motion and of her appearance resulted from surprise, and any neglect was excusable.

This Court should therefore let Tamalie appear in the adoption because she has vital evidence to present about Gracie's best interest. As a grandmother who had a relationship with Gracie and possessed a visitation order, her evidence would be special and unique. This Court can hear and consider that evidence in an adoption proceeding. See *In re Adoption of Ridenour* (1991), 61 Ohio St.3d 319, 330, 574 N.E.2d 1055 ("Certainly, if the trial judge requires testimony from the grandparents so as to determine the child's best interests, the judge may obtain it.") The evidence will also show that Gracie had healthy relationships with Tamalie and other relatives in West Virginia and that Amanda resided in West Virginia during most, if not all, of the adoption case. Thus, if this Court does not vacate the adoption decree outright, it should grant relief from the judgment to hear that evidence and reconsider the adoption petition.

MOTION FOR DECLARATORY JUDGMENT

Due Process/Full Faith and Credit

Alternatively, this Court should vacate the adoption decree because R.C. 3107.15 violates the due process and full faith and credit clauses of the Ohio and United States Constitutions as applied to Tamalie. Tamalie had a protectable interest, entitling her to be heard in the adoption because, unlike in Ohio, adoptions by relatives in West

Virginia do not terminate grandparent visitation. W.Va.Code 48-10-902; R.C. 3107.15. Given that Amanda agreed to the adoption, and an adoption in West Virginia would have left Tamalie unaffected, the adoption in Ohio, as opposed to an adoption in West Virginia, served only to eliminate Tamalie and the rest of the family from Gracie's life.

The PKPA tries to avoid that harmful forum shopping. But the PKPA in this case was thwarted by a guardian taking opportunistic advantage of the transient nature of a non-custodial parent near a state border. Had Elizabeth adopted Gracie in West Virginia, Tamalie would have been unaffected. Thus, Amanda's temporary ventures into Ohio had the same effect as a law that retroactively eliminates a vested substantive right or immunity. Although grandparent visitation is not constitutionally mandated, the vested immunity to adoption Tamalie enjoyed under the West Virginia statute could not be impaired without Tamalie being timely notified and heard. Accordingly, R.C. 3107.15 is unconstitutional as applied to Tamalie and this Court should reconsider the adoption or leave the visitation intact under the decree.

Movant attaches the following exhibits and incorporates them by reference into her motion:

EXHIBIT A: Copy of Family Court of Hancock County, WV; Civil Action No. 11-FIC—1; Agreed Order of December 14, 2011.

EXHIBIT B: Copy of Family Court of Hancock County, WV; Civil Action No. 11-FIC—1; Order of January 12, 2017.

Certified copies of the above exhibits, and an affidavit by Tamalie, will be submitted forthwith.

WHEREFORE, the Court should grant relief from judgment, vacate the adoption decree permanently for being void under the PKPA or declare R.C. 3107.15

unconstitutional as applied to Tamalie Garrett. Alternatively, the Court should grant Tamalie relief from the judgment and let her intervene, or otherwise appear, to show evidence of the PKPA's applicability and/or the child's best interest as it relates to the intended adoption.

Respectfully submitted,

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62 West Weber Road
Columbus, Ohio 43202
(614) 330-2739
edenstore@msn.com

Attorney for Grandmother,
Tamalie Garrett

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing motion was served by regular United States mail to Petitioner, Elisabeth Garret, at c/o SE 68353 Bannock Uniontown Road, St. Clairsville, Ohio 43950 and to the unknown attorney of Elisabeth Garrett at the clerk of the Belmont County Probate Court on April 13, 2017.

Erik L. Smith (0089330)
Attorney for Grandmother,
Tamalie Garrett

EXHIBIT A

FILED
BELMONT COUNTY OHIO

APR 18 2017

J. MARK COSTINE
PROBATE JUDGE

PROBATE COURT OF BELMONT COUNTY, OHIO

IN THE MATTER OF: **Case No. 16 AD 23**

THE ADOPTION OF GRACIE ELIZABETH GARRETT

MOTION TO DISMISS MOTION FOR RELIEF AND DECLARATORY JUDGMENT

Now comes Elizabeth Garrett, by and through her counsel and hereby moves this Court to Dismiss the Motion for Relief from Judgement and for Declaratory Judgment filed by Tamalie Garrett, seeking to vacate the adoption of Gracie Garrett.

The Motion is completely without legal basis or support and must be dismissed outright by this Court pursuant to the controlling decision of the Ohio Supreme Court in *In re Adoption of Ridenour* (1991), 61 Ohio St.3d 319. Tamalie Garrett is not a party to the case, has no standing to move this Court to have the adoption vacated and was not entitled to notice of the adoption, regardless of her prior visitation order. Thus, under *Ridenour,* her Motion must be dismissed.

FILED
BELMONT COUNTY OHIO
MAY 25 2017
J. MARK CUSTINE
PROBATE JUDGE

Respectfully submitted by:

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Telephone No.: (740)738-0237
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Supreme Court Reg. No. 0074822

EXHIBIT
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B

MEMORANDUM OF LAW IN SUPPORT OF MOTION

This case is before the Court upon the Motion for Relief filed by Tamalie Garrett asking the Court to vacate the adoption of Gracie Garrett by Elizabeth Garrett. Ths basis of the Motion appears to be the belief that a prior West Virginia Court Order granting Tamalie Garrett visitation rights with Gracie also entitled her to notice of the pending adoption and also divested this Court of jurisdiction to grant the adoption. Both arguments are fatally flawed and must be disregarded by this Court.

The Ohio Supreme Court's decision in *In re Adoption of Ridenour* (1991), 61 Ohio St.3d 319, 328-330, and its progeny of cases are crystal clear that grandparents or other collateral relatives have absolutely no standing to contest an adoption, **even** if they have previously established court ordered visitation with the child and granting the adoption will terminate this visitation. The reason for this sometimes harsh rule is that a Probate Court must recognize that the purpose of the adoption proceeding is not to protect a grandmother, aunt, uncle or other family member's rights but to determine what is in the best interest of the child. See *In re Adoption of S.R.N.E.*, 2009-Ohio-6959 citing *In re Adoption of Ridenour* (1991), 61 Ohio St.3d 319, 328-330, 574 N.E.2d 1055.

In *In re Adoption of S.R.N.E.*, the Court was faced with the same situation as case at bar and unequivocally held that a non-parent relative has no standing to challenge an adoption nor are they entitled to receive notice of a pending adoption *even if the adoption will terminate their visitation rights*. There, the maternal great-grandparents filed a petition in the Adams County Probate Division to adopt a child. Appellant, the child's great aunt, filed a motion to intervene and sought to continue her court-ordered visitation with the child after the adoption of the child. The court denied the motion to intervene and granted the petition to adopt. The great aunt subsequently appealed.

The Court of Appeals upheld the Trial Court's decision relying on the Ohio Supreme Court's holding in *Ridenour* opining that the great aunt had no standing to intervene in the

case; that she was not entitled to notice of the adopting proceedings under R.C. 3107.11. The Court of appeals went on to further hold that although the adoption would terminate her visitation rights, the court cannot concern itself with her rights and must focus on those of the child:

> " V.W., as the child's former great aunt by marriage, had no recognized right to participate in the adoption proceedings. The Supreme Court of Ohio previously addressed grandparent intervention in adoption proceedings and held: T]here is no statutory basis for allowing [grandparents] to intervene. * * * In fact, under R.C. 3107.11, the trial court is not even required to give the appellees notice of the adoption proceeding. R.C. 3107.11 does not mention grandparents as persons who must be notified and appellees do not fit the description of any of the parties who are entitled to notification under R.C. 3107.11(A).* * *
> Thus, the only question that remains is whether the juvenile court order granting visitation rights to the biological grandparents gives them a legally protectible interest which would allow them to intervene in the adoption proceeding pursuant to Civ.R. 24(A)(2). * * * We acknowledge that under R.C. 3107.15, the grandparents will lose their visitation rights if the adoptions are granted. However, * * * the purpose of the adoption proceeding is not to protect the grandparents' rights. The purpose is to determine, on the basis of the best interests of the child, whether to grant or deny the adoption petitions. * * * [U]nless the appellees are themselves seeking to adopt, they do not have an interest in the adoption proceeding per se sufficient to give them standing to intervene. Consequently, we conclude that the trial judge erred in permitting the appellees to intervene. In re Adoption of *Ridenour* (1991), 61 Ohio St. 3d 319, 328-330, 574 N.E.2d 1055" Id at ¶ 12.

The holdings of *S.R.N.E* and *Ridenour* are directly applicable to the case at bar and their decisions should also be adopted by this Court in dismissing the Motion for Relief from Judgment. Tamalie Garrett, as biological grandmother of the child, has no standing to have this adoption vacated nor was a requirement for her to be served with notice of the adoption proceedings. The fact that she lost her visitation rights when the court granted the adoption does not entitle her to have the adoption vacated and cannot be considered by the Court. The

Motion for Relief from Judgment is without merit and must be dismissed.

Respectfully submitted by:

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Supreme Court Reg. No. 0074822

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoring was sent via regualr U. S. Mail this May 2, 2017 to Eric Smith Esq. 62 West Webster Road Columbus, Ohio 43202 and Grace Hoffman Esq. 3800 Jefferson Street Bellaire, Ohio 43906.

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PROBATE COURT OF BELMONT COUNTY, OHIO

IN THE MATTER OF THE ADOPTION OF GRACIE ELISABETH GARRETT

CASE NO. 16 AD 23

JUDGMENT ENTRY

Upon Mediation Status Report filed by Harry White, Court Mediator, Motions filed by Attorney Erik L. Smith are hereby assigned for hearing July 14, 2017, at 10:00 o'clock a.m.

June 2, 2017
Date

J. Mark Costine, Probate Judge

cc: Rebbeca L. Bench, Esq.
Erik L. Smith. Esq.

FILED
BELMONT COUNTY OHIO
JUN - 2 2017
J. MARK COSTINE
PROBATE JUDGE

EXHIBIT
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