ORIGINAL

IN THE SUPREME COURT OF OHIO

11-1299

SARAH WYATT MACKOWIAK,
Appellant,

On Appeal from the Fayette County Court of Appeals, Twelfth Appellate District

Court of Appeals
Case No. CA 2010 04 009

-vs-

BRADY LEE MACKOWIAK,
Appellee.

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT SARAH WYATT MACKOWIAK

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EXPLANATION OF WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST.

The appellate court utilized a new standard for whether a motion for contempt alleging a failure to pay support must comply with R.C. 2705.031(C). The appellate court herein held that the test is whether the alleged contemnor was prejudiced by the court's failure to serve him/her with the summons as required by R.C. 2705.031(C). The appellate court found that Appellant was not prejudiced as to the second contempt since she was aware of the nature and substance of the charges underlying the motion and was afforded an opportunity to defend against the same and relied upon Sansom v. Sansom, (2006) 2006 Ohio 3909. The appellate court's reliance on Sansom, *supra* was misplaced. The contempt in Sansom, *supra* involved the failure of the contemnor to appear in court per court order, and the contemnor specifically waived, in open court, any claimed defects in service. The summons requirement of R.C. 2705.031(C) applies to the failure to pay support and afford parenting times and as such, the issue of the mandatory summons was not before the court in Sansom, *supra*. The appellate court's holding herein is in direct conflict with other courts presented with this factual pattern as cited in the Memorandum herein. Appellant submits that the payment of uncovered medical expenses incurred for the child are in the nature of support and as such, falls within the mandates of R.C. 2705.031(C). The failure to serve a party alleged to be in contempt for a failure to pay support or afford visitation with the required summons is a *per se* denial of due process and prejudicial and cannot be cured by an evidentiary hearing afforded the contemnor. Wolford v. Wolford, (2009) 184 Ohio App. 3d 363; In re Yeauger, (1992) 83 Ohio App. 3d 493. This court has not specifically addressed the mandate of R.C. 2705.031(C) and whether the failure to include the required summons is *per se* prejudicial and violative of due process. It is imperative, especially, in light of the appellate court's decision herein, that this Court rule on this issue. The failure of this Court to accept this

case would render R.C. 2705.031(C) meaningless as once a motion is served, and a hearing conducted, a contemnor would have no recourse for the court's failure to serve him with a summons as there would be no prejudice as found by the appellate court herein, even in cases such as that presented wherein the trial court never advised the alleged contemnor of the possible penalties for a contempt.

Further, although raised in her brief, the appellate court failed to specifically address whether a Motion for Contempt must be served on the alleged contemnor. Since the appellate court overruled all issues raised and not specifically addressed, it must be assumed that it found that a Motion for Contempt allegedly served on counsel is sufficient service of process. This holding is contrary to Wolford v. Wolford, (2009) 184 Ohio App. 3d 363 and Hamad v. Hamad, (2008) 2008 Ohio 4111. Even though the appellate court reversed the contempt of November, 2008, the service and summons inquiries for the initial contempt filing should not have ended there since it was upon this Motion that the change in custody was premised. If service was not properly effected, then the court's authority to modify custody was not properly invoked and therefore not properly before the court. See also: Juv. R. 35, Juv. R. 16

The appellate court's decision conflicts with the Rules of Juvenile Procedure and the general rules of pleading and practice. It is clear from a reading of the Juvenile Rules of Procedure that a Motion must specifically state the basis and relief requested especially when custody is sought and further that the same must be properly served to invoke the court's continuing jurisdiction. R. 10(E), Juv. R. 35. In the case presented, there was only an oral motion for an emergency temporary custody order made at the time of the contempt hearing, and a catchall phrase in a Motion for Contempt requesting "any further orders deemed to be in the child's best interest." The decision of the appellate court opens the floodgates and leads to the destruction of

the general rules of pleading and practice. It allows for the filing of motions that give no clear indication of the relief sought and permits the court to modify custody on a moment's notice by an oral motion.

The appellate court's decision encourages "bad behavior" and the demise of the rules of pleading and practice, where, as here, the basis for all the actions of the trial court were premised on the Motion for Contempt initially filed which was not served on Appellant, did not contain the required summons and did not contain a specific request for custody and clearly prejudiced Appellant.

Over the years, "private" filings in juvenile courts throughout the state have increased. The juvenile courts are dealing more with paternity actions and the allocation of parental rights and responsibilities arising therefrom. This court has never ruled upon the applicability of Juvenile R. 14 to private filings wherein a public agency is not involved. The trial court modified its prior order of custody by awarding temporary custody to Appellee upon an oral motion made when Appellant appeared for a contempt hearing for which she was served only with an order to appear hours earlier. The child was immediately whisked away to Idaho and the court decided it would not review that temporary order for at least nine months. Since a "temporary order", Appellant was denied the right to appeal the same. In In re Murray, (1990) 52 Ohio St. 3d 155, this Court recognized the prejudice that arises when a temporary order is filed relating to custody of a child. Unlike a temporary order filed in a neglect, dependency, etc, case, Appellant, under the facts presented herein was not afforded any of the safeguards as one charged with abuse, neglect etc. under Chapter 21 of the Ohio Revised Code. The trial court effectively modified custody without applying the factors of R.C. 3109.04 to the prejudice of Appellant. The rationale for limiting temporary custody orders is no less critical under the facts presented herein than that of a filing by

a public agency and Juvenile R. 14 should apply herein contrary to the holding of the appellate court.

This Court needs to decide whether a motion for temporary custody and /or legal custody can be made orally with no advance notice and whether a catch all phrase in a contempt motion suffices as a motion for a change of custody. A determination by this court will clearly define the importance of proper pleading. Further, whether a temporary custody order made in the absence of the involvement of a public agency extends beyond one (1) and whether the court has any jurisdiction after the expiration of the same, in the absence of a written motion for legal custody.

In determining whether to modify custody, the trial court primarily concerned itself with how the child had adjusted after the temporary order was issued. It applied the factors of R.C. 3109.04 to the child's then situation rather than considering his adjustment prior to the temporary order. Primary consideration of the child's circumstances after a temporary order effectively shifts the burden of proof to the residential parent. The burden of proof should remain with the non-residential parent. This court needs to enunciate a standard for modification of custody under circumstances as that presented herein.

The trial court denied Appellant's request to cross examine the Guardian ad Litem regarding her report filed after the hearing. Lower courts have been conflicted as to when a party has the right to cross examine the guardian ad litem after a report is submitted to the trial court in custody proceedings. Guidelines need to be established so all the courts are consistent.

The appellate court's decision effectively holds that whenever a trial court is determining custody, R.C. 3109.051(D) is impliedly considered as well. The appellate court's ruling renders this statute meaningless and contrary to the intent of the legislature that parenting times be

considered separately by the trial court and this court needs to clarify the standard.

In this case Appellee was originally in arrears and thus processing charges sent to Appellant. Once caught up, the agency still failed to withhold the charges. This court should determine whether processing charges constitute "overpaid" child support when paid to the obligee by the agency.

STATEMENT OF CASE AND FACTS

The parties met in Ohio. Upon learning that Appellant was pregnant, the parties married and Appellant moved to Idaho where Appellee had been living. While pregnant, the parties divorced and with the consent of Appellee, Appellant returned to Ohio. MM was born December 30, 1998. Pursuant to a Motion filed by Appellant in Fayette County, in 2000, Appellant was designated the residential parent and Appellee was granted limited phone contact and companionship with MM to occur in Ohio. On July 6, 2007, Appellee's parenting times were increased to include prolonged times during the summer and holidays in Idaho. Appellee did have his parenting times in the summer of 2007, Christmas, 2007, and the summer of 2008.

A Motion for Contempt was filed October 17, 2008 requesting that Appellant deliver the parties' minor child forthwith and further that Appellant immediately appear before the court to respond to a contempt allegation and "any further orders deemed to be in the child's best interest." The certificate of service alleged that a copy was sent via facsimile to opposing counsel that morning. Appellant was served **only** with an Entry advising her that a Motion for Contempt had been filed for her failure to have the child at the Visitation Center on October, 16, 2010 and that she was to immediately deliver the child to the center and then report to the court that day to answer the contempt charges. (Appendix p. 26)

At the hearing which occurred that same day, counsel for Appellee made an oral motion

for "emergency temporary custody" of the parties' minor child (Appendix p. 3). The trial court denied Appellant's request for additional time to prepare for the hearing, to obtain or call witnesses, or obtain documentation on her behalf. After the hearing held on October 17, 2008, the trial court stated "I think you had the child for nine years. I think it's time for the father to have the child for eight or nine years." The trial court awarded temporary custody of the child to Appellee who was to immediately accompany Appellee to Idaho, and ordered that a review of its temporary order be scheduled in approximately nine (9) months. (Appendix p.3). Appellant was also found to be in contempt but no sanctions were imposed at that time. The entry was filed November 5, 2008. Sanctions for the contempt were not imposed until March 24, 2010. Appellant sought to appeal the November, 2008 order which was dismissed by the appellate court after if found that the same was not a final appealable order. The court of appeals on June 20, 2011 reversed the contempt as to the October 17, 2008 Motion finding that Appellant had not been served with a summons as required by R.C. 2705.031(C) and further that she was denied due process by being required to defend against the contempt charges with only a few hours notice thereof. (Appendix p. 4-6)

The matter was scheduled for a review of the temporary order in July, 2010. In the interim, an affidavit seeking disqualification of the Judge was filed. On May 18, 2009, Appellant filed a Motion to Terminate the Temporary Custody Order and restore custody to her alleging, *inter alia*, that no motion was pending before the court and that the temporary order would expire by October 17, 2009. No responsive pleading nor a Motion to Modify was filed by Appellee. As late as August 20, 2009 there was still a question as to whether the scheduled hearing was to determine whether the temporary order would continue or whether the trial court was proceeding to modify legal custody on a permanent basis. The matter came back for hearing on August 20,

November 5, and November 6, 2009. Appellant filed a timely request for Findings of Fact and Conclusions of Law. In an entry filed March 24, 2010, the trial court awarded Appellee custody of MM; and scheduled financial and other matters to be heard on June 22, 2010. In its Decision modifying custody, the trial court focused primarily on MM's adjustment to Idaho and made no references to his adjustment in Ohio where he had resided since birth in the same home with Appellant and her parents. (Appendix p. 27) Appellant raised many issues as to the trial court's findings and evidentiary rulings which, due to the page limitation herein cannot be specifically raised in this Memorandum.

At all times, Appellant objected to the court proceeding on the grounds that a Motion to Modify had not been filed, that the Motion filed October 17, 2008 had not been properly served, did not contain the proper summons and that in the absence thereof, the trial court had no authority to proceed. The appellate court held that the statement in the contempt motion ie; "any further orders deemed to be in the child's best interest" coupled with the oral motion for emergency temporary custody was adequate to meet the dictates of due process, and further that Juvenile R. 14 was not applicable to the instant case (Appendix p. 13-14). The trial court did not address specifically the Juvenile Rules of Procedure on pleadings and practice raised by Appellant.

Guardian ad Litem #2 was appointed on the first day of hearings. In light of the fact that she had only recently been appointed, she was to conduct further investigation and submit a supplemental report after the hearings concluded. It was agreed that either party would have the right, at a subsequent hearing, to cross examine her about the contents of her report. One week after her report was filed, Appellant filed a Motion to Cross Examine Guardian ad Litem #2 or for Leave to Take a Trial Deposition which was overruled by the trial court. The Guardian ad Litem

recommended that Appellant be maintained as the residential parent. The trial court did not adopt the recommendation of the Guardian ad Litem but referred to the one negative comment she made about Appellant in her report. The appellate court held that Appellant was not prejudiced by the denial of the trial court to cross examine the Guardian ad Litem since the Report was favorable to Appellant and the trial court did not place much reliance on the same. (Appendix p. 15-17)

Even though a Request for Findings of Fact and Conclusions of Law was filed, the trial court made no reference to R.C. 3109.051(D) nor did it relate any of the facts considered to the factors contained therein and merely granted Appellant the parenting times previously awarded Appellee. The appellate held that the primary focus of the trial court was on custody and as such it was unnecessary for the court to specifically apply those facts to R.C. 3109.051(D) (Appendix p. 20-21)

On June 24, 2009 Appellee filed a six branch motion for contempt. On July 1, 2010, Appellant was found in contempt for her failure to pay one half the uncovered medical expenses of the minor child, and provide a password for insurance access. Appellant was fined, ordered to pay attorney fees and the court imposed a 10 day prison sentence. Prior to the commencement of the contempt hearing, Appellant objected and raised the issue of the failure of the court to serve her with a summons as required by O.R.C. 2705.031(C). The trial court overruled her objection. The appellate court upheld the contempt, finding that although Appellant was not served with the required summons, there was no prejudice to her, but reversed the sanctions imposed upon Appellant for other reasons. (Appendix p. 7-8).

Appellee had previously been ordered to pay child support. The orders provided that he pay a sum certain in child support and the 2% processing charges mandated by R.C. 3119.27. The child support enforcement agency, however, failed to retain the processing charges and sent the

same to Appellant. When the agency conducted an audit, after custody was modified, it only utilized the amount of child support and did not include the processing fees when calculating amounts ordered to be paid by Appellee. As a result, their audit reflected an overpayment to Appellant. Shortly before the hearing, the agency issued an affidavit stating they would not pursue Appellant for the processing fees due them. The court of appeals reversed the order requiring Appellant to pay the processing charges in lump sum to Appellee (Appendix p. 10-12), however, failed to specifically address whether, payment of the processing charges was an overpayment in child support requiring reimbursement to Appellee. (Appendix p. 22)

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: To invoke the continuing jurisdiction of the court, a motion seeking to have a party held in contempt for failing to pay support or provide visitation must be directly served on the alleged contemnor and contain the summons as required by R.C. 2705.031(C).

Contempt proceedings are separate, distinct, independent actions requiring that the alleged contemnor be directly served. Hamad v. Hamad, (2008) 2008 Ohio 4111. Appellate court granted habeas and held that participation of husband's counsel did not endow the trial court with jurisdiction over husband and service on counsel insufficient. Also See: Wolford v. Wolford, (2009) 184 Ohio App. 3d 363 held service on the attorney improper; Thompson v Houser, (6/25/91), Greene App. 90-CA-53, 1991 Ohio App. Lexis 3057, service on husband's attorney was improper even though husband had filed motion first and husband's attorney had been served greater than seven (7) days before the scheduled hearing. Since the original contempt motion filed on October 17, 2008 was not properly served, the trial court did not have the authority to consider the original contempt, the oral motion for emergency temporary custody nor "any further orders deemed to be in the child's best interest."

Service of a summons containing the requisites summons recited in R.C. 2705.031(C) is

mandatory when a denial of support and/or parenting time is alleged; required to initiate contempt proceedings and required by due process. See: In re Yeauger, (1992) 83 Ohio App. 3d 493, failure to include the required statutory notices denied the husband of due process even though husband's attorney participated in hearing. Also See: Nunn v. Nunn, (11/2/98) Delaware Cty. No. 97CA-F-12-057, 1998 Ohio App. Lexis 5745.

In Wolford v. Wolford, *supra*,it was held that R.C. 2705.031 mandates the procedure for service of an action for contempt involving child support; rejected wife's argument that failure to serve summons was harmless as husband appeared for contempt hearing and held that the failure to comply with the same constituted a denial of due process. R.C. 2705.031(B) makes it clear that R.C. 2705.031(C) applies equally for a denial of visitation. Also see: Ohler v. Ohler, (9/16/94) Fulton Cty. App. No. 93FU00014, 1994 Ohio App. Lexis 4053, court of appeals rejected the argument that the requisite due process protections had been met since the contemnor appeared at the hearing and participated therein; Stigger v. Hight, (8/4/94) Licking App. No. 94-CA-5, 1994 Ohio App. Lexis 3870, finding of contempt reversed as failure to comply with procedural mandates of R.C. 2705.031 held to be prejudicial error even though the contemnor participated in the hearing; Kosovich v. Kosovich, (12/20/91) Lake App. No. 90-L-15-086, 1991 Ohio App. Lexis 6255; Francis v Francis (8/8/90)Lawrence App. No. 1925, 1990 Ohio App. Lexis 3412, Martin v. Martin (6/30/00) Jefferson App. No. 97-JE-11, 2000 Ohio App. Lexis 2976. Failure to serve Appellant with a summons requires reversal of the finding of contempt on the second contempt motion. Further, since the contempt motion filed in June, 2009 was premised on the orders of the court filed in November, 2008 and March, 2009. Appellant submits as argued below, that the court was without authority to render such orders and as such the orders in questions are void and Appellant cannot be found guilty of contempt for violations thereof.

Proposition of Law No. 2: A motion for contempt which seeks inter alia, "Any further/additional orders the court may find to be in the child's best interest" does not constitute a motion for modification of custody nor does an oral motion for emergency temporary custody under the Juvenile Rules of Procedure.

The reallocation of the residential parent status may not be made as a sanction for a contempt and motions for contempt do not confer authority on the trial court to modify custody. Andrulis v. Andrulis , (1985) 26 Ohio App. 3d 164, 498 N.E. 2d 1380, 1382; Meadows v.Rohrbaugh, (8/6/90) Meigs Cty. Appeal No. 297, 1990 Ohio App. Lexis 10075 Truitt v Truitt, (1989) 65 Ohio App. 3d 126, 583 N.E. 2d 33; In re Surdel, (5/12/99) Lorain App. No. 98 CA0007172, 1999 Ohio App. Lexis 2164; In Whitman v Whitman, (8/20/07) Hancock Cty. Appeal No. 5-05-36, 2007 Ohio 4231 "Any other relief the Court deems appropriate and in their best interest of the minor children" in motion for contempt did not confer authority on the trial court to modify parental rights and responsibilities; Scassa v Scassa, (3/16/04)Carroll App. No. 03-CA-788, 2004 Ohio 1536; Fry v Fry, (1989) 64 Ohio App. 3d 519, 582 N.E. 2d 11; Bourne v Bourne, (6/2/00) Darke App. No. 1508, 2000 Ohio App. Lexis 2317; Martin, *supra.*

In In re L.T. (2006) 165 Ohio App. 3d 7, 844 N.E. 2d 914, the appellate court reversed an order awarding legal custody to grandparents when no written motion for legal custody had been filed. The court stressed that to insure orderly procedures for the court and to insure that the litigants are guaranteed due process, the juvenile rules of procedure must be strictly followed. Also see: In the Matter of Sauers, (7/2/07) Seneca Cty. No. 13-07-04, 2007 Ohio 3342 custody award to father pursuant to unruly complaint overturned as father filed no motion for custody.

Although In re L.T., *supra* was a permanent custody filing, the holding was premised on the failure to comply with various provisions of the Juvenile Rules of Procedure . The Juvenile Rules make it clear that Motions must be specific, and that Motions for custody must so

specifically state. Juv. R. 10(E). Further service of Motions must be in conformance with the Civil Rules. Juv. R. 16, Juv. R. 35. Nowhere in the motion for contempt was there a request for change of custody, temporary custody, nor a request for emergency temporary custody. It is clear that motions for custody by a party are not permitted to be made orally. A motion for legal custody in a permanent commitment hearing is no greater a loss than that to change custody of a child in a domestic situation especially where, as here, the child is removed to another state. The same guarantees of due process should apply. The trial court had no authority to conduct a hearing on October 17, 2008 nor award temporary custody, change of custody nor support.

Proposition of Law No. 3: Juvenile Rule 14 applies to private custody proceedings and in the absence of a motion for legal custody made within the one year, the trial court lacks authority to make any additional custody orders.

Even if this court were to find that the trial court could award temporary custody on an oral motion, the court was still without authority to make any further orders. Juv. R. 14 provides, that **absent a motion by a public or private agency**, an award of temporary custody **must be** terminated within one year after the Motion was filed. Therefore, since the only Motion filed was on October 17, 2008, and no public or private agency was involved, and no complaint for neglect, dependency nor abuse had been filed and no such finding ever made, the temporary custody order terminated on October 17, 2009 and without the filing of a motion to modify parental rights and responsibilities, the trial court had no authority to proceed. See: In the Matter of Rutan, (8/2/04) Union App. No. 140352, 2004 Ohio 4022, held that domestic court which granted dissolution had jurisdiction over custody as the temporary order of custody by the Juvenile Court had expired in per Juv. R. 14 and no further motions had been filed in the Juvenile Court. This was not an abuse, dependency nor neglect action as no complaint had been filed for the same. Such an action would have been required to be filed separately from the instant action. Riley v. Liston, (11/6/06) Fayette

App. No. Ca 2005-12-032, 2006 Ohio 5846. In light thereof, the order of March 24, 2010 awarding custody to Appellee should be reversed and vacated, as well as the July 1, 2010 entry incorporating the same.

Proposition of Law No. 4: The factors enunciated in R.C. 3109.04 (e) and (f) when determining whether to modify a custody order must be considered as they relate to the residential parent.

In order for the court to modify the designation of the residential parent, the trial court must first find that a change of circumstances of the child or the residential parent has occurred since the prior order or of which the court was unaware at the time of the order. R.C. 3109.04 (E)(1)(a). The change must have a substantial, continuous and materially adverse effect. Davis v. Flickinger, (1997) 77 Ohio St. 3d 415, 674 N.E. 2d 1159. The modification must be in the child's best interest , See: R.C. 3109.04 (F)(1), and, in this case, the harm likely to be caused by the change of environment is outweighed by the advantages of the change of environment to the child. R.C. 3109.04 (E)(1)(a)(iii). The test is not whether the non residential parent can afford the child a better environment. Wyss v Wyss, (1982 3 Ohio App. 3d 412, 445 N.E. 2d 1153.

The trial court primarily focused its consideration as to MM's adjustment in Idaho and ignored many of the facts as applied to his situation in Ohio. By way of example, although the trial court considered the relationship MM had with Appellee and his siblings, the trial court failed to consider his ties and his adjustment to his home, school and community in Ohio although he had lived at the same residence since birth. In Idaho, he resided in three different homes, and attended three different schools. The moves were significant as the second move was almost across the state. In Ohio, MM had a well established ongoing relationship for all of his life with the maternal family, friends, neighbors, teachers, teammates from his organized activities and the change to another state removed him from that well established supportive network of

family, friends and professionals. While in Ohio, MM was actively involved in organized team activities, yet while in Idaho, he was not enrolled in any such activities. In Ohio, all the teachers knew MM as he attended the same school for years. He was doing well in school, had made significant educational progress while he was here and according to his teachers he was well adjusted. The court further indicated that MM's health had improved in Idaho. The evidence established that MM was on the road to recovery while in Ohio. He had been losing weight, had been tapered off allergy medicines with further tapering expected. The trial court stated that MM's speech had improved after residing with Appellee, however, the testimony indicated that MM had made great strides in his speech before leaving for Idaho, and his IEP in Idaho included speech. The court never considered any of these factors and although raised by Appellant, the appellate court never addressed this issue of the trial court's failure to consider all the factors of R.C. 3109.04 as they related to the residential parent. The failure to consider these factors in totality constituted and abuse of discretion and should be reversed.

In Martin, *supra*, it was held that R.C. 3109.04(E) likely harm, requires greater scrutiny than that contemplated by the best interest test and requires an additional analysis as the presumption that the retention of the custodial parent serves the child's best interest. Although there is a presumption of likely harm, the trial court herein does not even make a passing reference to the same in its entry.

Proposition of Law No. 5: A trial court's decision must affirmatively demonstrate that it considered the factors of R.C. 3109.051(d) .

The trial court must look to R.C. 3109.051 in determining a parenting schedule which is in the child's best interest. R.C. 3109.04 and 3109.051 are not identical nor interchangeable and each contains factors not present in the other and visitation and custody are separate and distinct concepts. Flynn v. Flynn, (3/6/03) Fkln. App. No. 02 AP-801, 2004 Ohio 3881. Braatz v. Braatz,

(1999) 85 Ohio St. 3d 40 The consideration by the trial court of the factors enunciated in R.C. 3109.051(D) is mandatory and the court's decision must reflect its consideration..

Proposition of Law No. 6: Parties in a custody proceeding have the right, upon request, to cross examine the guardian ad litem on a report submitted after the hearing.

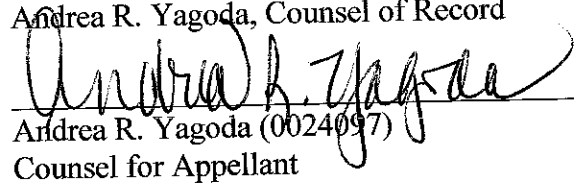
R.C. 3109.04 (C) provides that if an investigation is conducted per court order, the preparer shall be subject to cross examination by the parties. A denial of the right to cross examine constitutes a denial of due process and the right of confrontation. In re Hoffman, (2002) 97 Ohio St. 3d 92, 2002 Ohio 5368. Courts in Ohio have applied this holding beyond permanent commitment hearings to custody hearings between parents. See: Schill v Schill, (9/24/04) Geauga Cty. Case No. 2002-G-2465, 2004 Ohio 5114; Webb v. Lane, (3/15/00), Athens Cty. No. 99 CA12, 2000 WL 290383.

Proposition of Law No. 7: Processing charges required by R.C. 3119.27 inadvertently sent to the obligee, do not constitute overpaid child support.

R.C. 3119.27 mandates imposition of processing charges. Appellee, paid as ordered by the court and even though the agency chose to waive its right to recover from Appellant the processing charges due it, the monies are not owed to Appellee as to do so would retroactively modify the court's prior orders in contravention of R.C. 3119.84.

CONCLUSION: For the reasons discussed herein, this case is one of public and great general interest. Appellant requests that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully Submitted,
Andrea R. Yagoda, Counsel of Record



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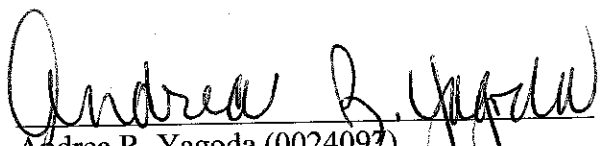
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing has been served upon Diane Kappeler DePascale, Attorney for Defendant, 120 W. Second St, Ste. 1406, Dayton, Ohio 45402 and Renae Zabloudi, Attorney for MM , 58 East High St., Ste. B, London, Ohio 43140 and Mary E. King, Guardian ad Litem, 153 East Court Street, Washington, Courthouse, Ohio 43160 by ordinary US mail this 1st day of August, 2011.



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APPENDIX

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IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

FAYETTE COUNTY

SARAH WYATT MACKOWIAK,	:	
Plaintiff-Appellant,	:	CASE NO. CA2010-04-009
	:	OPINION 6/20/2011
- vs -	:	
BRADY LEE MACKOWIAK,	:	
Defendant-Appellee.	:	

CIVIL APPEAL FROM FAYETTE COUNTY COURT OF COMMON PLEAS
JUVENILE DIVISION
Case No. G20004088

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POWELL, P.J.

{¶1} A mother appeals the decisions of the Fayette County Juvenile Court twice finding her in contempt and granting custody of her son to the boy's father living in Idaho.

We uphold the custody decision based on a change of circumstances and the best interests of the child. We reverse the first contempt finding. The second contempt finding is affirmed in part, reversed in part, and remanded for further proceedings related to the sanctions imposed.

{¶2} Sarah Wyatt Mackowiak and Brady Lee Mackowiak were divorced in Idaho in 1998, while mother was pregnant. Their son, M.M., was born December 30, 1998 in Ohio. Paternity was established in Idaho; custody matters were transferred from Idaho to Fayette County Juvenile Court; mother was named legal custodian and residential parent.

{¶3} Since that time, it appears from the voluminous record that the parties have been able to resolve few issues without legal intervention. In May 2008, the then sitting judge hearing juvenile matters in Fayette County recused herself, and a visiting judge was assigned to the case.

{¶4} The issues of this appeal center on events surrounding an October 2008 planned weekend parenting time by father, who traveled to Ohio from Idaho for the visit. The record indicates that father's parenting time was slated to start after school on Thursday, October 16. Instead, mother, who was called to the child's school because the child was upset, took the child to the emergency department of Children's Hospital in Cincinnati and another facility. Father moved for contempt on Friday, the next day, alleging that mother failed to deliver the child to the visitation center on Thursday as outlined in a September 16, 2008 "corrected" order of the juvenile court.

{¶5} Father's motion also requested "[a]ny further/additional Orders the Court may find to be in the child's best interest." Father's attorney certified that she faxed the motion to mother's counsel and the child's guardian ad litem (GAL).

{¶6} The court issued an entry on Friday morning. The entry ordered mother to "immediately" deliver the child to the visitation center and "immediately" appear in court to

answer father's motion that she be held in contempt for violating the court's order to bring the child to the visitation center on Thursday. The juvenile court's order, which was prepared by father's counsel, did not include the request for any further or additional orders in the child's best interest. The sheriff's return indicates that mother was personally served with the order on Friday, October 17.

{¶7} According to the record, mother delivered the child to the visitation center and appeared with counsel in juvenile court. The hearing transcript reveals that father opened the proceedings by requesting a contempt finding and telling the court that the parties agreed to extend the weekend visit through Monday to make up for the loss of Thursday. Father also asked the court for "an order of emergency temporary custody of this child due to what we allege is mother's repeated pattern of mental, emotional, and psychological abuse of this child * * *."

{¶8} The juvenile court heard testimony from mother, father, mother's sister, and the director of the visitation center. The court found mother in contempt on the weekend visitation issue, and stated that it would "stay any sentence at this time." The juvenile court also granted father temporary custody. The entry reflecting this decision was filed November 5. 2008.

{¶9} In its November 5 entry, the juvenile court granted mother the parenting time previously awarded to father and made provisions for health insurance, terminated father's child support obligation, and ordered the parties to provide the necessary information to determine mother's child support obligation, such obligation to be effective October 17, 2008. The court stated it would set the issues for review for a time after Father's Day at the end of the school year.

{¶10} The record indicates that additional entries were filed subsequent to that hearing that determined such issues as child support and the child's health insurance

coverage. Motions were filed by the parties, including additional contempt motions.

{¶11} The current GAL became the child's attorney when it was determined that a conflict existed between the wishes of the child and the GAL's recommendations. A new GAL was appointed for the child. An attempt to have the visiting judge disqualified was unsuccessful. Further evidentiary hearings on custody were held in 2009. By entry filed March 24, 2010, the juvenile court found a change of circumstances justified placing M.M. in his father's custody and named father legal custodian and residential parent and granted mother parenting time. The juvenile court again indicated that mother was in contempt for the denial of visitation from October 16, 2008, and finally imposed the sanction—a fine of $100 and costs, suspending the fine.

{¶12} Mother filed this appeal, presenting five assignments of error for our review. We will address the assignments of error out of order so that we can review the issues related to contempt before the custody issues.

{¶13} Assignment of Error No. 1:

{¶14} "THE TRIAL COURT ERRED AS A MATTER OF LAW IN DENYING APPELLANT HER SUBSTANTIVE DUE PROCESS RIGHTS IN FINDING HER IN CONTEMPT ON NOVEMBER 5, 2008 AND ON MARCH 24, 2010."

{¶15} Mother argues that she was denied due process of law for the October 2008 contempt finding and March 24, 2010 sanction on that finding because a summons required by R.C. 2705.031 was not filed and served on her, and she was not afforded adequate notice and reasonable time to prepare her defense.

{¶16} Procedural due process is guaranteed in contempt proceedings and where shared parenting plans are terminated, parental rights are modified, and child support payments are ordered. *Whitman v. Whitman*, Hancock App. No. 5-05-36, 2007-Ohio-4231, ¶16.

{¶17} R.C. 2705.031(B)(1) states, in part, that: "Any party who has a legal claim to any support ordered for a child, spouse, or former spouse may initiate a contempt action for failure to pay the support."

{¶18} R.C. 2705.031(B)(2), as applicable here, states: "Any parent who is granted parenting time rights under a parenting time order or decree * * * or any other person who is subject to any parenting time or visitation order or decree, may initiate a contempt action for a failure to comply with, or an interference with, the order or decree."

{¶19} According to R.C. 2705.031(C): "In any contempt action initiated pursuant to division (B) of this section, the accused shall appear upon the summons and order to appear that is issued by the court. The summons shall include all of the following:

{¶20} "(1) Notice that failure to appear may result in the issuance of an order of arrest, and in cases involving alleged failure to pay support, the issuance of an order for the payment of support by withholding an amount from the personal earnings of the accused or by withholding or deducting an amount from some other asset of the accused;

{¶21} "(2) Notice that the accused has a right to counsel, and that if indigent, the accused must apply for a public defender or court appointed counsel within three business days after receipt of the summons;

{¶22} "(3) Notice that the court may refuse to grant a continuance at the time of the hearing for the purpose of the accused obtaining counsel, if the accused fails to make a good faith effort to retain counsel or to obtain a public defender;

{¶23} "(4) Notice of the potential penalties that could be imposed upon the accused, if the accused is found guilty of contempt for failure to pay support or for a failure to comply with, or an interference with, a parenting time or visitation order or decree."

{¶24} Courts have determined that the failure of the trial court to follow the mandate of the procedural statute is prejudicial error. *In re Yeauger* (1992), 83 Ohio

App.3d 493, 498-499; see, also *Benjamin v. Benjamin* (Dec. 30, 1997), Franklin App. No. 97APF07-875, 1997 WL 799471. When the legislature mandates specific notice requirements, the courts are required to substantially comply with the statute. *In re Yeauger* at 498-499 [citations omitted]. Additionally, even if no penalty was imposed for the finding of contempt, the finding itself has prejudicial collateral consequences as R.C. 2705.05 imposes enhanced fines and potentially longer jail terms for subsequent contempt convictions. *Martin v. Martin* (June 30, 2000), Jefferson App. No. 97-JE-11, 2000 WL 875392.

{¶25} In the instant case, mother's trial counsel did not contest the absence of a summons, but focused her inability to fully defend against a motion filed that same day. According to the record, mother's counsel told the court that they were prepared to provide mother's testimony "as far as what happened yesterday but we would certainly ask that this --- we are unable to bring in other witnesses at this time regarding what happened based on the short notice of this hearing, and certainly other witnesses that would support mother's testimony regarding what happened yesterday. But based upon the necessity for this hearing at this time we will certainly go forward with what we have."

{¶26} It is clear that no summons purporting to provide the notification contained in R.C. 2705.031 is found in the record. Under the specific facts of this case, we find the absence of the summons, coupled with the order compelling mother to respond to and defend the contempt motion on the same day it was served, was prejudicial error. The October 17, 2008 contempt finding and the sanction issued for this finding on March 24, 2010 is reversed. See *Poptic v. Poptic*, Butler App. No. CA2005-06-145, 2006-Ohio-2713, ¶3-11; see, also, R.C. Chapter 2705.

{¶27} Mother's first assignment of error is sustained.

{¶28} Assignment of Error No. 2:

{¶29} "THE CONTEMPT FINDING OF NOVEMBER 5, 2008 AND MARCH 24, 2010 WAS AN ABUSE OF DISCRETION, AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND CONTRARY TO LAW."

{¶30} Based upon our determination under mother's first assignment of error, this assignment of error is rendered moot.

{¶31} Assignment of Error No. 5:

{¶32} "THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING APPELLANT IN CONTEMPT ON JULY 1, 2010 AND THE PURGE ORDER WAS AN ABUSE OF DISCRETION, AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND THE FINDING THAT APPELLEE OVERPAID SUPPORT WAS CONTRARY TO LAW AND ABUSE OF DISCRETION." [SIC]

{¶33} The record indicates that father filed a contempt motion against mother in July 2009 and mother moved for a contempt finding against father in October 2009. The juvenile court told the parties that the contempt motions would be heard separately from the custody evidentiary hearings that were held in 2009. The hearing on the contempt motions was held June 22, 2010.

{¶34} First, we note that mother raised objections to service of the contempt motion, arguing that she received the motion, but did not receive the summons. The juvenile court overruled her objections finding that the certified mail service was completed, according to the clerk. We note that the record appears to indicate that neither mother nor father received the other parties' summons sent to them, as both were returned to the court in their certified mail envelopes after unsuccessful service attempts in 2009.

{¶35} Contempt motions in this case have certainly proven procedurally

problematic. Both parties appeared to be aware of the nature and substance of the 2009 contempt motions and were given an opportunity to prepare and defend in 2010. Therefore, we find that mother was not prejudiced by any notice deficiencies for the contempt findings at issue in this assignment of error. Cf. *Sansom v. Sansom*, Franklin App. No. 05AP-645, 2006-Ohio-3909, ¶31 (record fails to demonstrate that the insufficient notice prejudiced defendant).

{¶36} The contempt motion against father concerned his payment of his portion of the child's uncovered medical expenses; father's contempt allegations against mother alleged violation of court orders pertaining to support, medical bills and insurance, and an order that the parties communicate with each other to attempt to resolve parenting time issues.

{¶37} While contempt can be direct or indirect, this matter clearly concerns indirect contempt, which is defined as behavior that occurs outside the presence of the court and demonstrates a lack of respect for the court or its lawful orders. *Sansom* at ¶23.

{¶38} Although punishment is inherent in contempt, courts will categorize the penalty as either civil or criminal. *In re J.M.*, Warren App. No. CA2008-01-004, 2008-Ohio-6763, ¶47. The distinction between civil and criminal contempt depends upon the character and purpose of the sanctions imposed. Id.; *State ex rel. Johnson v. Perry Cty. Court* (1986), 25 Ohio St.3d 53, 55, superseded on other grounds (never been a clear demarcation between criminal and civil contempt).

{¶39} If the sanctions are primarily for reasons benefiting the complainant and are remedial and coercive in nature, the contempt is civil in nature. *Devonchek v. Bd. of Trumbull Cty. Commrs.* (1988), 36 Ohio St.3d 14, 16. In the context of a civil contempt proceeding, prison sentences are conditionally imposed. Id. The "contemnor is said to carry the keys of his prison in his own pocket," and the sentence will be suspended or

terminated if the contemnor complies with the court's order. *In re J.M.* at ¶47; see also *McComb v. Jacksonville Paper Co.* (1949), 336 U.S. 187, 191, 69 S.Ct. 497 (civil contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained because of noncompliance).

{¶40} A key aspect of a civil contempt as opposed to one that is purely criminal, is the opportunity for the contemnor to purge herself of the contempt sanction, and the discontinuation of the sanction once compliance is achieved. *In re Purola* (1991), 73 Ohio App.3d 306, 311-312. Whereas criminal contempt is usually characterized by unconditional fines or prison sentences, one found guilty of civil contempt must be allowed to purge herself of the contempt by showing compliance with the court's order she is charged with violating. Id.; see, also, *Edminister v. Edminister*, Summit App. No. 25428, 2011-Ohio-1899, ¶9.

{¶41} R.C. 2705.05(A) states, in pertinent part, that: "In all contempt proceedings, the court shall conduct a hearing. At the hearing, the court shall investigate the charge and hear any answer or testimony that the accused makes or offers and shall determine whether the accused is guilty of the contempt charge. If the accused is found guilty, the court may impose any of the following penalties:

{¶42} "(1) For a first offense, a fine of not more than two hundred fifty dollars, a definite term of imprisonment of not more than thirty days in jail, or both;

{¶43} "(2) For a second offense, a fine of not more than five hundred dollars, a definite term of imprisonment of not more than sixty days in jail, or both;

{¶44} "(3) For a third or subsequent offense, a fine of not more than one thousand dollars, a definite term of imprisonment of not more than ninety days in jail, or both."

{¶45} When reviewing a finding of contempt, including a trial court's imposition of penalties, an appellate court applies an abuse of discretion standard. *Fidler v. Fidler*,

Franklin App. No. 08AP-284, 2008-Ohio-4688, ¶12.

{¶46} Father withdrew his allegation that mother was in contempt for failing to repay an amount of child support he alleged he overpaid. Father argued that he overpaid the support when the child was in mother's custody because the Fayette County Child Support Enforcement Agency (CSEA) collected processing fees on the support order but forwarded that amount to mother with the support. Instead of including the "overpayment" as a contempt issue, father asked the court to order mother to pay him the "overpayment." The juvenile court ordered mother to pay father $633.70 within 30 days of the filing of the entry.

{¶47} The juvenile court made no contempt finding against father on mother's motion. The court found mother in contempt for failing to give father the password to access the child's health insurance so father could communicate with the insurance company. The court imposed a $100 fine, costs, and ten days in jail. The jail time was "stayed," fine and costs to be paid within 30 days of the filing of the entry. Mother was also found in contempt for failing to pay 50 percent of uncovered medical expenses for the child. The sanction was a $100 fine, costs, and ten days in jail.

{¶48} The court said mother could purge herself of contempt for the uncovered medical expenses by paying directly to father $127.14, which was her 50 percent share of the uncovered medicals, "$677.70" [sic] to reimburse father for his "over-payment" of child support when CSEA did not retain the processing fees, and $1,134, which was the entire amount of child support arrearage mother owed "by July 30, 2010." The court stated that "[u]pon plaintiff filing proof of the above payments with the Court the 10 days in jail will be automatically stayed indefinitely." [sic]

{¶49} We cannot say the juvenile court abused its discretion when it found mother in contempt for failing to provide the password and for failure to pay her portion of the

child's uncovered medical expenses. See *Rapp v. Pride*, Butler App. No. CA2009-12-311, 2010-Ohio-3138, ¶17 (court must make civil contempt finding based on clear and convincing evidence). However, as we will discuss more fully below, most of the sanctions or punishments imposed cannot stand.

{¶50} Prison sentences are conditional in cases of civil contempt and because a civil contempt sanction is coercive in nature, the contemnor must be afforded the opportunity to purge his contempt. *U.S. Bank Natl. Assn. v. Golf Course Mgt., Inc.*, Clermont App. No. CA2008-08-078, 2009-Ohio-2807, ¶16.

{¶51} A trial court abuses its discretion when it orders conditions for purging that are unreasonable or impossible for the contemnor to meet. *Pavlic v. Barium & Chemicals, Inc.*, Jefferson App. No. 02 JE 33, 2004-Ohio-1726, ¶71. The determination of whether a particular purge condition is unreasonable or impossible varies on a case-by-case basis and the contemnor must present sufficient evidence at the contempt hearing that the trial court's purge conditions are unreasonable or impossible for the contemnor to meet. Id.

{¶52} We find no abuse of discretion with the purge condition that mother pay $127.14, which the court determined was her share of the child's uncovered medical expenses. Mother was found in contempt for failing to pay this amount.

{¶53} However, we find unreasonable the purge conditions that accelerated payment of the support arrearage and imposed a similar 30-day deadline on mother for payment of father's "overpayment" of support, which mother was not previously ordered to pay.

{¶54} The arrearage accumulated from the time the juvenile court ordered mother to support the child at the change of custody until the support order was filed. According to the record, mother was paying on the child support arrearage. Father wanted the arrearage payments accelerated. The juvenile court stated in its decision that it would

order the arrearages paid within 30 days of the order based on the "refunds received by plaintiff." We assume the "refunds" to which the juvenile court is referring is the $4,596.94 it mentioned mother received from a medical provider once father's insurance company processed and paid its portion of the medical claims for the child.

{¶55} Mother said she paid the medical bills mostly by credit card. The $4,596.94 reimburses mother for the payments, i.e., the debt incurred by her. This is not a windfall from which the arrearage could be accelerated. In addition, mother was not found in contempt on this issue. This purge condition is not reasonable and not directly related to the contempt finding. Cf. *Offenberg v. Offenberg*, Cuyahoga App. Nos. 78885, 78886, 79425, 79426, 2003-Ohio-269, ¶78 (appeals court upheld purge order, finding it was directly related to the contempt and clearly directed toward compelling appellant to obey the court order).

{¶56} We further find that the juvenile court abused its discretion in ordering mother to pay father's overpayment of support (when CSEA did not keep the processing fee it collected) as a purge condition. First, portions of the juvenile court's decision and the exhibits admitted at the hearing indicate that the "overpayment" was $633.70, not $677.70. As previously noted, mother was not ordered to pay these funds to father before the contempt hearing. Mother was not found in contempt on this issue. This attempts to regulate future conduct. Orders that purport to regulate future conduct do not provide the party with a true opportunity to purge and can have no effect because any effort to punish a future violation would require a new notice, hearing, and determination. See *Ryder v. Ryder*, Stark App. No. 2001CA00190, 2002-Ohio-765; cf. *Offenberg* at ¶78.

{¶57} Further, the sanction for this contempt must also be addressed by the juvenile court under the authority of *Pugh v. Pugh* (1984), 15 Ohio St.3d 136. In *Pugh*, the Ohio Supreme Court stated that when two or more violations are brought in a single

contempt action and during one hearing, the person found guilty of contempt cannot be punished for each violation. Id. at 142-143; *O'Neill v. Bowers* (Nov. 29 1990), Franklin App. No. 90AP-130, 1990 WL 189897. Therefore, mother could only receive one sentence for the July 1, 2010 contempt finding. The first finding in the July 1, 2010 entry regarding the failure to provide the health insurance password contained no purge order. The second finding concerning the unpaid medical expenses contained unreasonable purge orders. This matter must be reversed and remanded to the juvenile court for further proceedings.

{¶58} Mother also challenges the juvenile court's award of $750 in attorney fees to father. We have reviewed the record with regard to the award of attorney fees and cannot say the court abused its discretion in that regard. See R.C. 2151.23; see, also, R.C. 3109.051; see *Tener v. Tener-Tucker*, Warren App. No. CA2004-05-061, 2005-Ohio-3892, ¶37.

{¶59} Mother's fifth assignment of error is overruled in part and sustained in part.

{¶60} Assignment of Error No. 3:

{¶61} "THE TRIAL COURT ERRED AS A MATTER OF LAW BY MODIFYING THE RESIDENTIAL PARENT WHEN APPELLEE HAD FAILED TO COMPLY WITH THE MANDATORY PROCEDURAL REQUIREMENTS OF THE JUVENILE RULES OF PROCEDURE." [SIC]

{¶62} Mother argues that father failed to file a motion to modify the child's residential parent, and his temporary custody expired after one year when father did not file a custody motion. She also avers that the decision by the juvenile court to give father temporary custody in 2008 was punishment for the contempt finding against mother.

{¶63} As we previously noted, a party must have notice of the hearing and an opportunity to be heard to satisfy due process. *Whitman*, 2007-Ohio-4231 at ¶16. Father

states that mother received sufficient notice of the custody matters and an opportunity to be heard when father's October 17, 2008 motion asked for any other order deemed in the best interest of the child, father made an oral motion for temporary custody at the beginning of the October 17 hearing, and evidentiary hearings were held with mother's participation.

{¶64} While we are uneasy with the manner in which custody was originally awarded to father in October 2008, the record of the entire custody proceedings in juvenile court indicates that mother was not denied her due process rights. Further, a review of the record does not support the assertion that custody was used as a contempt sanction or that Juv.R. 14, regarding the expiration of temporary custody, was applicable in this case.

{¶65} Mother's third assignment of error is overruled.

{¶66} Assignment of Error No. 4:

{¶67} "THE TRIAL COURT DENIED APPELLANT A FAIR TRIAL, ABUSED ITS DISCRETION IN EVIDENTIARY RULINGS, AND THE MODIFICATION OF CUSTODY WAS AN ABUSE OF DISCRETION, CONTRARY TO LAW AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE." [SIC]

{¶68} Mother asserts that the juvenile court committed close to 20 separate errors with regard to the custody determination. Some of these errors include issues related to depositions, the admission of hearsay and privileged testimony, alleged coaching of witnesses, and having the subpoena of mother's previous trial counsel quashed.

{¶69} The juvenile court has broad discretion in the admission and exclusion of evidence and unless it has clearly abused its discretion and the appellant has been materially prejudiced thereby, the appeals court should be slow to interfere. See *State v. Hymore* (1967), 9 Ohio St.2d 122, 128.

{¶70} We have reviewed the record before this court in consideration of all of the evidentiary issues offered by mother. We find either no error occurred or no error prejudicial to mother that would warrant reversal. See Evid. R. 103; Evid. R. 802; Evid. R. 803; Evid. R. 901; R.C. 2317.02; see *In re Jones*, 99 Ohio St.3d 203, 2003-Ohio-3182; see *State v Strickland*, 183 Ohio App.3d 602, 2009-Ohio-3906.

{¶71} Mother also argues error in the juvenile court's limitation on the second GAL and the failure to allow cross-examination of the second GAL after she submitted her report.

{¶72} According to the record, the second GAL submitted a report for the November 2009 evidentiary hearings, but told the court she needed additional time to investigate matters and supplemented the report in January 2010. Mother requested the opportunity to cross-examine the GAL either at a hearing or by deposition. The juvenile court implicitly denied the request in its March 24, 2010 decision. The court said in its decision that it had spent a lot of time hearing the testimony and "[t]he Court will decide from the evidence what to believe not from the statements of the GAL in the supplemental report which states her belief as to the factors required by the Ohio Revised Code 3109.04" [sic] * * * "The Court is of the opinion that there is enough in the record to make a decision and to grant additional hearings would only be to delay this matter further."

{¶73} It does not appear from the record that the juvenile court limited the GAL's investigation to mother's prejudice. We note that the two GALs presented dissimilar recommendations to the juvenile court. The original GAL recommended custody to father. Now as the child's attorney, the original GAL indicated that her client wanted to live with his mother. The second GAL recommended that the child reside with mother.

{¶74} The second GAL told the juvenile court in her reports that: father had not followed the recommendations of the child's psychiatrist and hadn't enrolled the child in

counseling; father moved "several times since the change of custody; father works long hours, leaving the child in the care of the stepmother; she believed father changed the child's school in Idaho because he disagreed with the individualized education program (IEP) from the previous Idaho school.

{¶75} The GAL noted that mother "seems to antagonize [the child] and encourages his bad behavior," and neither parent facilitates visitations nor can they agree about the child's medical and educational needs. However, both parties are actively involved in M.M.'s life and neither parent, according the GAL, is "a harm to the child."

{¶76} The Ohio Supreme Court case of *In re Hoffman*, 97 Ohio St.3d 92, 2002-Ohio-5368, stated in its syllabus that in "a permanent custody proceeding in which the guardian ad litem's report will be a factor in the trial court's decision, parties to the proceeding have the right to cross-examine the guardian ad litem concerning the contents of the report and the basis for a custody recommendation."

{¶77} We are aware that the Eleventh District in *Allen v. Allen*, Trumbull App. No. 2009-T-0070, 2010-Ohio-475, ¶34-40, stated that *Hoffman* should be applied to cases that do not pertain to permanent custody, noting that it was a due process issue to "be given the opportunity to cross-examine persons who prepare investigative reports for the court's consideration." Id., citing *Hoffman*.

{¶78} However, the record in the case at bar indicates that while the juvenile court noted portions of the GAL report, it appeared to rely very little on the GAL's recommendations. We cannot say that the juvenile court's failure to permit mother to cross-examine the GAL was prejudicial to mother because the reports were more favorable to mother and the juvenile court appeared to consider the GAL's report as one factor of many it should consider in the custody determination. See *Marsh v. Marsh* (July 30, 2001), Butler App. No. CA2000-07-138, 2001 WL 848171; see *In re Sydney J.* (Sept.

30, 1999), Ottawa App. No. OT-99-026, 1999 WL 769571 (it is the trial court's responsibility to determine the GAL's credibility and the weight to be given to the report).

{¶79} We turn now to the custody decision itself. Mother argues that the decision to change custody was an abuse of discretion, contrary to law, and against the manifest weight of the evidence.

{¶80} According to the version of R.C. 3109.04 (B)(1) applicable to this case, * * * "in any proceeding for modification of a prior order of the court making the allocation of parental rights and responsibilities, the court shall take into account that which would be in the best interest of the children. In determining the child's best interest for purposes of resolving any issues related to the making of that allocation, the court, in its discretion, may and, upon the request of either party, shall interview in chambers any or all of the involved children regarding their wishes and concerns with respect to the allocation."

{¶81} The applicable portions of R.C. 3109.04(E)(1)(a) states that a court shall not modify a prior decree allocating parental rights and responsibilities for the care of children unless it finds, based on facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child or the child's residential parent, or either of the parents subject to a shared parenting decree, and that the modification is necessary to serve the best interest of the child. The court shall retain the residential parent designated by the prior decree unless a modification is in the best interest of the child and one of the following applies:

{¶82} "* * * (iii) The harm likely to be caused by a change of environment is outweighed by the advantages of the change of environment to the child."

{¶83} According to R.C. 3109.04(F)(1): "In determining the best interest of a child pursuant to this section, * * * the court shall consider all relevant factors, including, but not

limited to:

{¶84} "(a) The wishes of the child's parents regarding the child's care;

{¶85} "(b) If the court has interviewed the child in chambers * * *, the wishes and concerns of the child, as expressed to the court;

{¶86} "(c) The child's interaction and interrelationship with the child's parents, siblings, and any other person who may significantly affect the child's best interest;

{¶87} "(d) The child's adjustment to the child's home, school, and community;

{¶88} "(e) The mental and physical health of all persons involved in the situation;

{¶89} "(f) The parent more likely to honor and facilitate court-approved parenting time rights or visitation and companionship rights;

{¶90} "(g) Whether either parent has failed to make all child support payments, including all arrearages, * * *;

{¶91} "(h) Whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child * * *;

{¶92} "(i) Whether the residential parent * * * has continuously and willfully denied the other parent's right to parenting time in accordance with an order of the court;

{¶93} "(j) Whether either parent has established a residence, or is planning to establish a residence, outside this state."

{¶94} In determining whether a change of circumstances has occurred to warrant a change in custody, a trial judge, as the trier of fact, must be given wide latitude to consider all issues which support such a change. *Davis v. Flickinger*, 77 Ohio St.3d 415, 416, 1997-Ohio-260. The change of circumstances "must be a change of substance, not a slight or inconsequential change." Id. at 418. However, the change need not be "substantial." Id. at 417-418.

{¶95} A highly deferential abuse of discretion standard is particularly appropriate in child custody cases, since the trial judge is in the best position to determine the credibility of the witnesses and there "may be much that is evident in the parties' demeanor and attitude that does not translate well to the record." *Wyatt v. Wyatt*, Portage App. No. 2004-P-0045, 2005-Ohio-2365, at ¶13. In so doing, a reviewing court is not to weigh the evidence, "but must ascertain from the record whether there is some competent evidence to sustain the findings of the trial court." *Clyborn v. Clyborn* (1994), 93 Ohio App.3d 192, 196.

{¶96} The record indicates that the juvenile court was familiar with the circumstances of the child in mother's custody and the extended visits with father. The court found there were distinct differences between mother and father in their interactions with the child and the impact of those interactions on the child's behavior.

{¶97} The court found that the child's health, demeanor, and general presentation had improved while in the father's custody. "The change of environment has benefitted [the child]." The court found that mother was "overly concerned" about everything the child was experiencing during the exchanges between the parents. According to the court, "It is clear that the separation anxiety for which [the child] was being treated was more the mothers own separation anxiety." [sic].

{¶98} The court found father's behavior regarding his son's health was more than adequate. While neither parent is a harm to the child, the court found that mother used doctors, counselors, and other people's advice to medicate or treat the child's bad behavior. "The father seems to handle [the child's] behavior like a normal parent."

{¶99} The juvenile court found that mother "never effectively facilitated visitation by [the child] with his father in the past and there is nothing in the record to indicate that this would change in the future except a bare statement by the mother that in the future

she will do better at encouraging visits."

{¶100} The court, therefore, found that the differences between the parents in relation to the child are "a substantial change of conditions which warranted the change in temporary custody in October 2008, and in changing the legal custodian and residential parent of [the child] now."

{¶101} The court also outlined its findings for the best interest of the child, looking at the wishes of the child, the in-camera interviews with the child, the child's interaction and interrelationships, specifically mentioning those in Idaho, the child's improved language skills with father, that briefly "regressed" after a visit to Ohio, the child's health and demeanor, the child's adjustment to the move to Idaho, and the facilitation of visitation or lack thereof. The court noted that father had always lived in Idaho and had not moved there during the case, and that any child support issues were "a wash" and benefitted neither party.

{¶102} Custody cases present extremely difficult matters to address and this one is certainly no exception. We have carefully reviewed the record and all of the arguments set forth by mother. We cannot say the juvenile court abused its discretion or that the custody decision was contrary to law or against the manifest weight of the evidence.

{¶103} Mother also argues that the juvenile court erred when it failed to consider the factors of R.C. 3109.051(D), in reference to the award of parenting time to mother. The juvenile court stated that mother should have the parenting time father was awarded when mother had custody. Mother argues that she deserved more custody because the child spent the first nine years of his life with her and her family.

{¶104} R.C. 3109.051(D) states, in part, as applicable here, that: "In determining whether to grant parenting time to a parent pursuant to this section or [other sections], * * * in establishing a specific parenting time or visitation schedule, the court shall consider all

of the following factors: prior interrelationships with parents and relatives; the geographical distance between parents; the available time of both the child and parent(s); age of the child; child's adjustment to home, school and community; wishes and concerns of the child; health and safety of the child; child's time with other siblings; mental and physical health of all parties; each parent's willingness to reschedule missed parenting time; whether the residential parent has denied the other parent's rights to parenting time; whether either parent is establishing a residence outside the state; and any other factor in the best interest of the child."

{¶105} This court has previously said that when a trial court is ordering a modification of parenting time or visitation, the court must consider the enumerated factors in R.C. 3109.051(D) as well as any other factor in the child's best interest. *Shafor v. Shafor*, Warren App. No. CA2008-01-015, 2009-Ohio-191, ¶8. While it is always preferable for the trial court to mention R.C. 3109.051 and its factors, the court need not specifically refer to the statute, but the trial court's findings or the record should indicate that the court considered the statute and its factors when it rendered its decision. Id.

{¶106} This case involved a battle over custody and whether custody should be changed; a modification of parenting time or visitation was not first and foremost at issue. The juvenile court considered issues related to many of the factors enumerated in R.C. 3109.051 and focused its determination on the best interests of the child.

{¶107} While the trial court did not explicitly link the considerations to the factors found in R.C. 3109.051(D), it does appear that the trial court contemplated the same underlying concepts, and therefore, the trial court's failure to explicitly cite to the R.C. 3109.051(D) factors does not appear unreasonable, arbitrary, or unconscionable and thus does not constitute an abuse of discretion. See *Evangelista v. Horton*, Mahoning App. No. 08 MA 244, 2011-Ohio-1472, ¶ 47.

{¶108} Mother's fourth assignment of error is overruled.

{¶109} To the extent that appellant has raised other arguments under any of the five assignments of error, we have considered them and find them to be without merit.

{¶110} Mother's December 17, 2010 motion to strike the June 22, 2007 trial transcript from the appellate record is not well taken and denied, but we note that the transcript was not considered by this court for purposes of this appeal.

{¶111} Judgment reversed as to the November 5, 2008 and March 24, 2010 contempt orders against mother.

{¶112} Judgment affirmed as to the award of custody to father.

{¶113} Judgment affirmed in part as to the July 1, 2010 finding that mother was in contempt for failing to provide the password for access to her health insurance for the child and for failing to pay $127.14 as her portion of uncovered medical expenses. The July 1, 2010 contempt judgment is reversed in part as to the imposition of sentence as only one sentence is proper for the contempt and improper purge sanctions were used in reference to ordering mother, within 30 days of the entry, to pay both her child support arrearage of $1,134 and a support overpayment of $633.70 to father, and remanded for further proceedings. In addition to the remand for resentencing on the July 1, 2010 contempt, mother's child support arrearages and payment of $633.70 are also remanded to the juvenile court so that periodic payments of both amounts can be accurately determined as orders of the court.

RINGLAND and HENDRICKSON, JJ., concur.

This opinion or decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/ROD/documents/. Final versions of decisions are also available on the Twelfth District's web site at: http://www.twelfth.courts.state.oh.us/search.asp

FILED
COURT OF APPEALS
FAYETTE CO OHIO
JUN 20 2011
Evelyn A. Pontzer
CLERK OF COURTS

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

FAYETTE COUNTY

SARAH WYATT MACKOWIAK,	:	
Plaintiff-Appellant,	:	CASE NO. CA2010-04-009
	:	JUDGMENT ENTRY
- vs -	:	
BRADY LEE MACKOWIAK,	:	
Defendant-Appellee.	:	

The assignments of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, reversed as to the November 5, 2008 and March 24, 2010 entries finding appellant in contempt; affirmed as to those same entries awarding custody to appellee; affirmed in part as to the July 1, 2010 entry finding that appellant was in contempt for failing to provide the password for access to her health insurance for the child and for failing to pay $127.14 as her portion of uncovered medical expenses; reversed in part as to the July 1, 2010 entry regarding the imposition of sentence as only one sentence is proper for the contempt and improper purge sanctions were used in reference to ordering appellant to pay to appellee, within 30 days of the entry, both her child support arrearage of $1,134 and a support overpayment of $633.70, and remanded for further proceedings. In addition to the remand for resentencing on the July 1, 2010 contempt finding, appellant's child support arrearages and the $633.70 overpayment are also remanded to the juvenile court so that periodic payments of both amounts can be accurately determined as orders of the court.

Appellant's December 17, 2010 motion to strike the transcript from the June 22, 2007 hearing is hereby denied.

It is further ordered that a mandate be sent to the Fayette County Court of Common Pleas, Juvenile Division, for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

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421-422

Costs to be taxed 50% to appellant and 50% to appellee.

Stephen W. Powell, Presiding Judge

Robert P. Ringland, Judge

Robert A. Hendrickson, Judge

FILED
NANCY DRAKE HAMMOND
PROBATE-JUVENILE JUDGE

OCT 17 2008

FAYETTE COUNTY, OHIO

IN THE COURT OF COMMON PLEAS OF FAYETTE COUNTY, OHIO
JUVENILE DIVISION

SARAH WYATT MACKOWIAK, Plaintiff,	•	CASE NO. G 2000 4088
	•	JUDGE HAMMOND
v.		
BRADY LEE MACKOWIAK, Defendant.	•	JUDGMENT ENTRY

Upon Motion of Defendant/Father filed herein on Oct. 17, 2008 and, good cause shown, It is hereby Ordered:

A. Plaintiff shall *immediately* deliver Matthew Mackowiak (to the Fayette County Visitation Center.

B. After Plaintiff has done so, Plaintiff shall *immediately* appear before this Court and, Plaintiff shall respond to Defendant's request: Plaintiff be held in contempt of court for her violation of the Court's "Corrected Judgment Entry" (filed herein Sept. 16, 2008) in which Plaintiff/Mother was Ordered to bring the parties' minor child, Matthew Mackowiak to Fayette County Visitation Center by 5:30 p.m. on Th., Oct. 16, 2008 for a week-end with Defendant/Father who flew in from Idaho to see his son.

C. The Fayette County Sheriff is Ordered to serve this Entry upon the Plaintiff at her residence: 831 Washington Ave., Washington CourtHouse, OH 43160 or wherever she may be located and, to promptly notify this Court that she has been served.

So Ordered:

Nancy Drake Hammond
Judge

ENTERED ON JOURNAL

OCT 17 2008

Diane Keppeler DePascale #0016654
Attorney for Defendant / Father
786 Northwest Boulevard
Columbus, OH 43212-3832
Phone: (614) 298-8200

Fax: (614) 298-8201

US91P232

IN THE COURT OF COMMON PLEAS, FAYETTE COUNTY, OHIO

JUVENILE DIVISION

SARAH WYATT MACKOWIAK, CASE NO. G 2008 4088

Plaintiff

FILED
NANCY DRAKE HAMMOND
PROBATE JUVENILE JUDGE

VS.

MAR 2 4 2010

BRADY LEE MACKOWIAK, JUDGMENT ENTRY

FAYETTE COUNTY, OHIO

Defendant

The Court heard testimony on August 20, 2009 but the matter was continued in progress to November 5 & 6, 2009. After testimony and evidence was presented the Court permitted the Guardian ad Litem to supplement her report and the parties to present their closing arguments in writing. The Guardian ad Litem's report was filed on October 28, 2009 and supplemented on January 15, 2010. Motion of Plaintiff to schedule a hearing on contempt motions which involve support was filed on January 22, 2010. Plaintiff filed a motion to examine the new GAL on January 22, 2010 and for extension of time to file closing arguments. Defendant's (father's) closing argument was filed on January 29, 2010 and Plaintiff's (mother's) closing argument was filed on February 1, 2010. A Child's Summary was filed by the child's Attorney (the former GAL) on February 1, 2010.

The Court finds that the Motions for Contempt involve support and have been severed from the hearings for which testimony was presented on Aug 20, Nov 5 and Nov 6, 2009. The Court further finds that the GAL supplemental report involves the child's wishes based upon communication during the Christmas visit, 2009, in Ohio by Matthew. The Court has already determined that the wishes of the child are contradictory just as the new GAL says the parent's wishes are contradictory. The former GAL recommendation was contrary to the child's wishes and that is why we have a new GAL and an Attorney for Matthew. At some point in time the Court has to say that it will not have more hearings so that the parties can again delay a ruling in Matthew's situation.

The Court has spent a lot of time hearing the testimony, and ruling on the objections in the depositions. The Court has examined the evidence presented. The Court is the Trier of the Facts, and the record is filled with facts presented by a host of witnesses and the parties. The Court will decide from the evidence what to believe not from the statements of the GAL in the supplemental report which states her belief as to the factors required by the Ohio Revised Code 3109.04. The Court may believe all of what a witness said, some of what the witness said, or none of what the witness said. The Court is of the opinion that there is enough in the record to make a decision and to grant additional hearings would only be to delay this matter further.

This matter came on for hearing on a motion of the father to enforce a Court ordered visitation. This had not been the first time that a hearing was had to enforce the father's parenting time. On October 17th the Court held a hearing and over the objection of the mother granted temporary custody to the father after the attorney for the father made an oral motion for custody. The Court has ruled and now rules that the law does not require a party to do a useless act. The plaintiff wanted a new written motion filed after the Court had already begun the hearing on the motion before it. The Court believes that this was only a delaying tactic. The written motion heard on October 17, 2008 asked for any other relief to which the movant would be entitled. The Court based upon the record in this case rules that this motions is sufficient to change custody under the fact of this case.

The Court continued the hearing of October 17, 2008 for a full hearing after Father's Day in 2009. The matter was finally heard in August of 2009, but the parties, especially the mother who had changed attorneys, need more time to present their evidence. On November 5 & 6, 2009 the Court finished the testimony in this matter. All of the motions filed since that time are unnecessary or would add nothing new for the Court to consider, are non-prejudicial to either parties position, and are to the Court opinion delaying tactics to prevent the Court from disposing of the issue presented on October 17, 2008 and during the three full days of testimony thereafter.

The Court finds that the wishes of the child seem to be effected by the situation he finds himself in at the time he is asked to pick who he wants to live with. In the first

in-camera interview with Matthew he was very incoherent but adamant that he wanted to stay with his mother. Matthew said that he lied the first time when he said he wanted to stay with his mother. In the second in-camera interview he talked in coherent sentences with good thought order and expressed joy concerning his sisters and extended family in Idaho. There was no resentment as to any discipline he received and although asked three times he offered no resistance to continuing to living with his father. Matthew was happy relating his experiences with his dad and extended family. He smiled during this interview. The fact that during a visit at Christmas he related that he now would like to live with his mother is not determinative or binding on the Court. To grant the desire of the GAL would be to put too much reliance on a single factor required by Ohio Revised Code 3109.04 to the detriment of a balance consideration of all the factors.

The Court finds that the child interaction and interrelationship with his father, extended family and especially his siblings is great and beneficial to Matthew. He dearly loves his sisters as demonstrated by how he plays with them.

The Court finds that although the mother with the advise and help of her sister, a speech therapist, worked on Matthew's speech problems, it wasn't until the father insisted that Matthew use correct language daily that Matthew's language skills markedly improved. This was attested to by the Counselor, Jenise English, and observed by the Court in the in- camera interview with Matthew. Even the Gaurdian's report acknowledges that after the spring break visit with the mother that Matthew's speech regressed but that Matthew corrected himself within a short time on his return to his father's home. The change in environment has benefited Matthew.

The Court finds that Matthew's health, demeanor, and general all round presentation of himself has improved while in the custody of his father. At the last in-camera interview he started to go into the lying problem, but when the Court said that we were not going to discuss that topic, he stopped crying, blew his nose, dried his eyes, and talked about what was happening in his life and how he felt about it.

The Court finds that the move to Idaho and the moves in Idaho have not been a problem for Matthew. The child-father relationship has had a chance to develop and grow and has been beneficial for Matthew.

The Court finds that the mother was overly concerned about everything the child was experiencing during the prior exchanges between the parents. It is clear that the separation anxiety for which Matthew was being treated was more the mothers own separation anxiety. During the mothers testimony she had said that, "we were being treated" when talking about counseling and psychiatric appointments. The father's behavior concerning the health of his son has been more than adequate. He took the child to doctors in Idaho and followed their advice. The Court finds that the father did follow the recommendations of the primary care doctor and the psychiatrist. Even the GAL found that there was no evidence that either parent is a harm to the child. The Court does agree with the GAL that the mother seems to antagonize Matthew and encourage his bad behavior. The difference is, and the Court finds, that she uses doctors, counselors and other people's advice to medicate or treat Matthew's bad behavior. The father seems to handle Matthew's behavior like a normal parent.

The Court finds that the father is the parent that is more likely to facilitate visitation. The Court finds that the mother has never effectively facilitated visitation by Matthew with his father in the past and there is nothing in the record to indicate that this would change in the future except a bare statement by the mother that in the future she will do better at encouraging visits. The Court finds this difference between the parents is a substantial change of conditions which warranted the change in the temporary custody in October of 2008, and in changing the legal custodian and residential parent of Matthew now.

The matter of support is an issue which the Court has severed from the issue of custody. However, with respect to the factors which the Court must consider in hearings on custody, the issue of support is a wash. It neither benefits one party nor the other.

The court finds that the mothers actions on the day of the Court ordered visitation of October 16th, was a willfully denial of the other parent's parenting time and there is no indication in the future that the mother will respect Court orders granting the father parenting time.

The Court finds that the father did not establish a residence outside the State of Ohio for any advantage concerning custody or as a way of punishing the mother. He has lived in the same state during all of the litigation with the mother.

The Court finds that it is in the best interest of Matthew that he remain in the custody of this father.

The Court after due consideration of all the testimony and evident, and after considering all the factors required to be considered by the Court finds that the father, should be determined to be the legal custodian and residential parent of Matthew Mackowiak.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the father, Brady Lee Mackowiak, shall be designated the legal custodian and residential parent of Matthew Mackowiak, and that the mother, Sarah Wyatt Mackowiak, shall have the parenting time that was previously ordered for the father.

IT IS FURTHER ORDERED that the Court finds the mother in Contempt of Court for the denial of visitation on October 16, 2008, imposed a fine of $100.00 and costs, suspends the fine but assesses all cost against the mother.

So Ordered. ENTERED ON JOURNAL

MAR 24 2010

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Ronald S. Dvorachek, Judge by Assignment.

CERTIFICATION

I hereby certify that a time stamped copy of this Judgment Entry was sent by ordinary mail to the Attorneys of record and the parties this 24 day of March 2010.

Colleen Cinochetty

Deputy Clerk