

IN THE SUPREME COURT OF OHIO

SARAH WYATT MACKOWIAK,
Appellant,

Case No. 11-1299

-VS-

BRADY LEE MACKOWIAK,
Appellee.

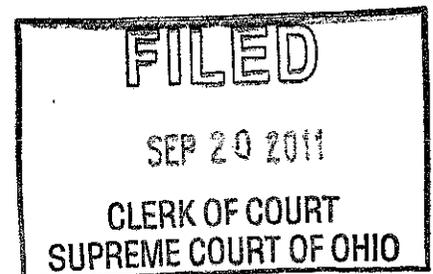
MOTION TO STAY OF APPELLANT SARAH WYATT MACKOWIAK

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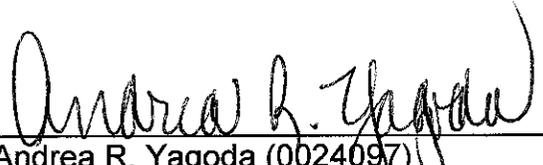
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GUARDIAN AD LITEM FOR MM



Now comes Appellant, through counsel, and moves the court, pursuant to App. R. 7, to stay the order filed March 24, 2010 designating Appellee the residential parent and legal custodian of the parties' minor child. Appellant further requests that the court stay the imposition of sanctions, award of attorney fees and payment of arrears and overpayments as ordered by the trial court on July 1, 2010. Memoranda have been filed by both parties hereto.

Respectfully Submitted,


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MEMORANDUM IN SUPPORT

Contempt

Although the appellate court upheld the finding of contempt against Appellant for failure to provide a password and pay \$127.14 to Appellee for her portion of the uncovered medical expenses, the appellate court reversed the sanctions imposed by the trial Court. A copy of the appellate court's decision is attached hereto. This finding of contempt has been raised in the appeal filed herein. The trial court has recently scheduled this matter for a pretrial. A stay is sought since, if paid, the contempt finding will be moot.

Overpayment of Monies Paid to Appellant

During the time that Appellant was the residential parent and legal custodian of the parties' minor child, Appellee was ordered to pay child support. The orders provided that he pay a sum certain in child support and then the trial court ordered that he pay the 2% processing charges mandated by R.C. 3119.27. The child support agency caseworker testified that all the orders did contain a processing charge. The Fayette County Child Support Enforcement Agency, however, failed to retain the processing charges and sent the same to Appellee. When the agency conducted an audit after custody was modified they only utilized the amount of child support not processing fees when calculating the amount ordered to be paid. As a result, their audit reflected an overpayment to Appellant.¹ Only days before the hearing, the child support agency issued an affidavit stating they would not pursue Appellant for the processing fees due them which were inadvertently paid to her. Appellant and counsel first saw the affidavit on the date of the hearing on June 22, 2010. The child support agency's caseworker testified that no child support had been received from Appellee since the October 17, 2008 hearing. The March 18, 2009 entry provided on page 2:

1. Defendant Brady Mackowiak fully paid his child support obligation pursuant to prior Orders of this Court. His obligation to pay child support for Matthew Mackowiak was terminated effective October 17, 2008. The CSEA shall correct its records accordingly.

2. The CSEA shall calculate the sum of child support paid by Defendant Brady Mackowiak (if any) for any time period after Oct. 17, 2008; and, CSEA shall inform both parties of that sum. The Plaintiff shall promptly return

¹ In reality, when processing charges are added to the amounts which should have been paid, Appellee underpaid. The total child support owed according to Ct. Exh. 1 was \$53,400.18 processing charges would be \$1,068.00 totaling \$54,468.128. Appellee paid \$54,033.88.

that sum to the Defendant.

Appellee withdrew his Motion that Appellant be held in contempt although demanding that the amount be paid in full. The appellate court reversed the trial court's order that Appellant pay this amount in lump sum as part of a purge order on an unrelated finding of contempt. The appellate court, however, failed to specifically address the assignment of error raised by Appellant that this was not an overpayment.

Appellant contends that Appellee had, in fact, not overpaid child support, that he paid as ordered by the court and that if the agency chose to waive its right to recover the sums 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. This issue has been raised in the appeal filed with this court. The trial court has recently scheduled this issue for a pretrial.

Custody

The parties hereto met in Ohio while Appellee was hereon a religious "mission" from Idaho. The parties were married in Idaho after learning that Appellant was pregnant. Before the child was born the parties were divorced in Idaho. With the consent of Appellee, Appellant returned to Ohio. The parties son, MM was born on December 30, 1998.

Towards the end of 2000, Appellee was determined to be the legal father of the minor child by the Fayette County Court of Common Pleas. Juvenile Division. The Juvenile Court awarded custody of the minor child and granted parenting time to the Father. The parenting times were originally ordered to occur in Ohio and were to be supervised. Parenting times were gradually increased.

On July 6, 2007 the Fayette County Court of Common Pleas. Juvenile Division, granted the Appellee unsupervised parenting time with the minor child in Appellee's home in the State of Idaho for Christmas and Summer school vacation periods.

On July 2, 2008, the trial court awarded Appellee three weekends from Friday until Sunday to occur by August 30, 2008. The parties were to agree on the weekends and submit an entry to the court. On September 16, 2008 the trial court filed an Entry granting Appellee unsupervised parenting time on three (3) weekends including the weekend of October 16 through October 19, 2008. The weekends had been extended to include Thursday and/or a Monday.

On October 17, 2008 the Appellee filed a Motion in the trial court, requesting that the Court find Appellant in contempt of court for violating the Court's Order of September 16, 2008 alleging that the child had not been delivered on Thursday, October 16, 2008. The Motion was faxed to "counsel for Plaintiff".

On the same date, the trial court issued an Entry ordering the Appellant to deliver the minor child to the Fayette County Visitation Center and further ordered Appellant to immediately appear before the court to answer on the Motion for Contempt that very day. The order provided that the Fayette County Sheriff was to personally deliver the Entry to Appellant. The Sheriff received the Entry at 10:45 AM. and served the Entry only on Appellant.

On October 17, 2008 at 1:00 p.m., the Appellant appeared before the trial court² and attempted to explain the medical and psychiatric emergency her son was facing

² It should be noted that the attorney present with her was not her attorney of record, although from the same firm.

and requested, through counsel, additional time to prepare for a hearing.

The trial court denied Appellant additional time to prepare for the hearing or call witnesses, or obtain documentation on her behalf. The Trial Court Judge ordered the Appellee to proceed on the Motion for Contempt. By the time of the hearing, Appellant had delivered the child, as ordered, to the Fayette County Visitation Center.

At that time, the Appellee made an oral motion for temporary custody of the parties' minor child. The trial judge granted the Motion at that time and denied the Appellant's request for time to prepare a response to this motion to change custody.

Appellant attempted to appeal the ruling in Appeal Case. C A-2008-11 -041 however, the appeal was dismissed after this court found that the order was not final and appealable.

The trial court conducted a hearing in August, and November, 2009. On March 24, 2010, the trial court modified custody and designated Appellee the residential parent and legal custodian of the parties' minor child, over the objections raised by Appellant that there was not a proper motion before the court and that the temporary order had expired.

At the hearing, it was evident that the trial court wanted to limit the evidence to consider only how the child had done while in Appellee's care.

Appellant contends that no Motion for change of custody was ever filed and that the court lacked jurisdiction to proceed with custody issues and continuously objected to the court proceeding on custody matters, but the court proceeded to award temporary custody to Appellee based upon his Motion for Contempt filed October 17, 2008 and further found in its entry filed March 24, 2010 that said Motion conferred

jurisdiction on the court to make a custody determination and that the clause in the Motion relating to the conveyance of the child for his visit with his father which stated "any further/additional Orders the court may find to be in the child's best interest" was sufficient. The appellate court, although troubled by how the action was initiated upheld the modification and further held that Juvenile R. 14 (which provides that temporary orders are only valid for one year) was inapplicable. The appellate court failed to address the issue raised by Appellant that the original Motion being a contempt Motion was not properly served. The Motion was never served on Appellant.

The Guardian ad Litem recommended that custody be restored to Appellant.

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, the temporary custody order terminated on October 17, 2009. Therefore, if a stay is granted then custody, by law should revert to Appellant.

Child Support Arrears

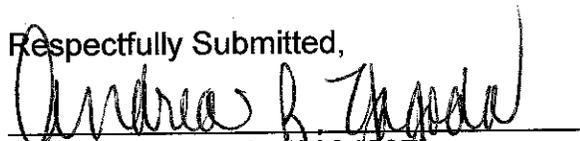
Appellant contends that the trial court never had jurisdiction to modify custody, nor make any child support orders. The Child Support Enforcement Agency has been withholding child support for present support and arrears created by the retroactivity of the child support order. Appellant is requesting that this order be stayed in whole or part or that the monies be impounded pending this court's determination of whether to accept this case and if accepted until a final resolution. This issue has been raised in the appeal herein.

This matter is now on appeal to this court and therefore, the court should

maintain custody with Appellant until such time as this court determines whether to accept this matter and if so until a final resolution by this court.

WHEREFORE, Appellant respectfully requests that the court stay the order of March 24, 2010, order that the child be returned to Ohio and maintain custody with Appellant until this rules on the appeal and that the order of July 1, 2010 also be stayed relating to the contempt, payment of attorney fees, "overpaid" child support and that the child support order for present and arrears be stayed or impounded in full or part.

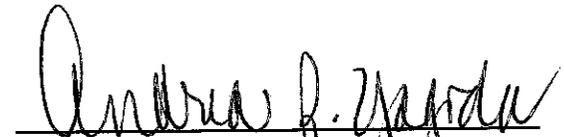
Respectfully Submitted,



Andrea R. Yagoda (0024097)
Attorney for Plaintiff-Appellant
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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 Matthew Mackowiak , 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 29th day of September, 2011.



Andrea R. Yagoda (0024097)
Attorney for Plaintiff-Appellant

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.

{12} 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.

{13} 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.

{14} 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.

{15} 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).

{16} 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 Purolo* (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.

{¶158} 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.

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

{¶160} Assignment of Error No. 3:

{¶161} "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]

{¶162} 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.

{¶163} 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 to 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.

{¶195} 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.

{¶196} 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.

{¶197} 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].

{¶198} 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."

{¶199} 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, ¶18. 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>

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO JUN 20 2011

FAYETTE COUNTY

Cathryn A. Rautzen
CLERK OF COURTS

SARAH WYATT MACKOWIAK, :

Plaintiff-Appellant, :

CASE NO. CA2010-04-009

JUDGMENT ENTRY

- vs -

BRADY LEE MACKOWIAK, :

Defendant-Appellee. :

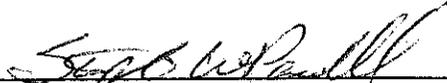
The assignments of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, reversed as to the November 5, 2008 and March 24, 2010 entries finding appellant in contempt; affirmed as to those same 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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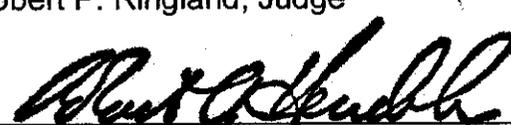
Costs to be taxed 50% to appellant and 50% to appellee.



Stephen W. Powell, Presiding Judge



Robert P. Ringland, Judge



Robert A. Hendrickson, Judge