

**IN THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
PORTAGE COUNTY, OHIO**

SHAUN K. CLARK,	:	<b>O P I N I O N</b>
Plaintiff-Appellee,	:	
- vs -	:	<b>CASE NO. 2009-P-0096</b>
CATHRYN R. CLARK,	:	
Defendant-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Juvenile Division, Case No. 2004 JPI 00003.

Judgment: Affirmed.

*Jennifer L. Lawther*, 27730 Euclid Avenue, Cleveland, OH 44132 (For Plaintiff-Appellee).

*Andrew J. Simon*, 380 Freedom Square II, 60000 Freedom Square Drive, Independence, OH 44131 (For Defendant-Appellant).

MARY JANE TRAPP, P.J.

{¶1} Ms. Cathryn R. Clark appeals the judgment of the Portage County Court of Common Pleas, Juvenile Division, which denied her motion to modify the shared parenting plan she shared with appellee, Shaun K. Clark, and granted Mr. Clark compensatory time for visitation that Ms. Clark prevented.

**{¶2} Substantive and Procedural Facts**

{¶3} The parties have been embroiled in litigation regarding their son, A.C., since February of 2004. This case arose upon the third contempt motion directed

against Ms. Clark, Mr. Clark's motion for compensatory visitation, and Ms. Clark's motion to modify the parties' joint shared parenting plan.

{¶4} The magistrate dismissed Mr. Clark's first motion to find Ms. Clark in contempt because the parties' shared parenting plan lacked a specific visitation schedule. The magistrate ordered the parties to mediation to clarify the schedule, and, in August of 2005, adopted the plan with some modification because the parties could not agree on a drop-off/pick-up point for visitations, and who would have visitation if A.C. fell ill.

{¶5} One month later, on September 14, 2005, Mr. Clark filed a second motion to hold Ms. Clark in contempt. At the hearing on February 14, 2006, Ms. Clark admitted to failing to adhere to the visitation schedule, and accordingly, was found to be in contempt. The magistrate gave Ms. Clark the opportunity to purge herself of the contempt by following the court-ordered make-up visitation dates. The court affirmed the magistrate's order over Ms. Clark's pro se objections on March 20, 2006.

{¶6} On June 20, 2006, Ms. Clark filed a motion for a determination that she had purged herself of the contempt. Both parties appeared before the court without counsel and both agreed that Ms. Clark had purged herself of the contempt. Accordingly, the magistrate vacated the contempt order.

{¶7} On August 13, 2008, Mr. Clark filed a third motion to hold Ms. Clark in contempt. The magistrate found Ms. Clark in contempt on December 17, 2008, and sentenced her to serve 30 days in the Portage County Jail. Once again, the magistrate gave Ms. Clark the opportunity to purge the contempt and have the jail time suspended, provided she "remain[s] reasonably compliant with the visitation schedule, for a period

of one-year.” The magistrate also set the hearing on the execution of her sentence to occur in 60 days. Objections and a hearing on the objections followed, and on March 2, 2009, the court filed its entry, which overruled the objections, affirmed the contempt order, and stated that it had referred the matter to the magistrate for sentencing on February 23, 2009.

{¶8} Following the hearing, the magistrate sentenced Ms. Clark to 30 days in the county jail, which the court suspended, providing her with the opportunity to purge herself of the contempt by remaining reasonably compliant with the visitation schedule for a period of one year.

{¶9} Mr. Clark filed objections to the magistrate’s decision citing a failure to grant compensatory time, which the court overruled on April 10, 2009. The court suggested that the appropriate procedural vehicle to seek make-up visitation was a motion for compensatory visitation, which would allow the magistrate to hear testimony on whether such visitation was in A.C.’s best interest.

{¶10} Mr. Clark followed the court’s suggestion, and in the interim, Ms. Clark filed a motion to modify the shared parenting plan. On August 19, 2009, a hearing was held on the parties’ motions, as well as a previous finding that Ms. Clark was in contempt for failing to pay attorney fees pursuant to a former court order. At the hearing, the magistrate found that rather than giving Mr. Clark a check for \$500 so he could pay his attorney fees, Ms. Clark instead wrote a personal check to Mr. Clark’s child support account. The magistrate further found that compensatory visitation for the six months Ms. Clark deprived Mr. Clark of visitation and parenting time with their son was appropriate and in A.C.’s best interest. The magistrate found no evidence that

would justify modifying the shared parenting plan or that Ms. Clark's modified plan was in A.C.'s best interest.

{¶11} After considering the parties' history, the transcript of the proceedings, the statements of counsel, and Ms. Clark's objections, the court adopted the magistrate's decision awarding Mr. Clark compensatory visitation and ordered a modified visitation schedule to include the missed visitation. The court denied Ms. Clark's motion to modify the shared parenting time, finding that her testimony surrounding her request for modification concerned only her personal convenience and was not in the best interest of the child.

{¶12} Ms. Clark now appeals, raising two assignments of error:

{¶13} "[1.] The trial court erred by awarding compensatory parenting time for the withholding of visitation because any such award was [barred] [sic] by res judicata.

{¶14} "[2.] The trial court erred by awarding compensatory parenting time for the withholding of visitation without competent, credible evidence establishing that said compensatory parenting time is in the best interests of the minor child."

**{¶15} Final Appealable Contempt Orders**

{¶16} Ms. Clark first contends that the court erred in granting Mr. Clark's motion for compensatory time because she had already been found guilty of contempt. Thus, she contends any award of compensatory visitation at the hearing on the execution of her sentence was in error since the court's initial finding of contempt was a final appealable order and no appeal was taken from that order. Thus, according to Ms. Clark, Mr. Clark should have filed his motion for compensatory visitation with his contempt motion.

{¶17} Appellate jurisdiction is limited to a review of lower courts' final judgments. Section 3(B)(2), Article IV of the Ohio Constitution. "To be a final appealable order, a judgment entry must meet the requirements of R.C. 2505.02 and, if applicable, Civ.R. 54(B)." *Heckathorn v. Heckathorn*, 5th Dist. No. 2006CA189, 2007-Ohio-5520, ¶8, citing *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86, 88.

{¶18} "[A] ruling on a contempt motion is not a final appealable order unless the trial court has made a specific finding of contempt and has imposed a penalty or sanction." *Kimani v. Nganga*, 11th Dist. No. 2009-L-060, 2009-Ohio-3796, ¶3, citing *Estate of Christine v. Sheehan*, 11th Dist. No. 2007-G-2774, 2007-Ohio-2751, ¶4. See, also, *Chain Bike v. Spoke 'N Wheel, Inc.* (1979), 64 Ohio App.2d 62, 63; *Green v. Green*, 11th Dist. No. 2007-P-0024, 2007-Ohio-3476, ¶4; *Heckathorn* at ¶8. The court's initial finding of contempt was not a final appealable order. "Until a second order is entered by the trial court, the issue of contempt is not ripe for review." *Id.* at ¶4, citing *Welch v. Welch*, 11th Dist. No. 2004-L-178, 2005-Ohio-560, ¶5.

{¶19} Ms. Clark was given the opportunity to purge herself of the contempt by reasonably complying with the visitation schedule for one year. Given Ms. Clark's past contempt, the trial court's sua sponte order of "make-up" visitation as her prior purge opportunity, and her subsequent request to demonstrate to the court that she so complied, the purge of a one-year time frame of visitation compliance is not extreme. It is readily apparent the court fashioned an order that would ensure Ms. Clark remained compliant with visitations as it was in the best interest of A.C. to have parental time with his father, and most fundamentally, for Ms. Clark to follow court orders and the parties' shared parenting plan. Further, the magistrate was clear during the first hearing that

“there will be a *hearing on execution of sentence in sixty (60) days*,” and that the other pending matters would be set for a hearing within that time. Thus, it is evident that the trial court intended to conduct further proceedings before the contempt issue was concluded.

{¶20} As we stated succinctly in *Nganga*, and is directly applicable in this case: “the [judgment] entry contains a reference to a hearing for the imposition of the sentence if the contempt is not purged. Therefore, it is evident that the trial court intends on conducting further proceedings before the contempt issue is concluded. Until a second order is entered by the trial court, the issue of contempt is not ripe for review.” *Id.* at ¶4.

{¶21} Further, while the preferred practice would have been for Mr. Clark to have filed his motion for compensatory visitation contemporaneously with his motion for contempt, nothing mandates the court award compensatory visitation when it makes an initial finding of contempt. In fact, the court sua sponte awarded “make-up” visitation as a part of its earlier contempt order.

{¶22} Pursuant to R.C. 3109.051(K): “[i]f any person is found in contempt of court for failing to comply with or interfering with any order or decree granting parenting time rights \*\*\* the court that makes the finding, \*\*\* may award reasonable compensatory parenting time or visitation to the person whose right of parenting time or visitation was affected by the failure or interference if such compensatory parenting time or visitation is in the best interest of the child. Any compensatory parenting time or visitation awarded under this division shall be included *in an order issued by the court* and, to the extent

possible, shall be governed by the same terms and conditions as was the parenting time or visitation that was affected by the failure or interference.” (Emphasis added.)

{¶23} Mr. Clark was free to file a motion for compensatory visitation after the court’s initial finding of contempt, and the court was free to consider it during the hearing on the execution of Ms. Clark’s sentence for contempt.

{¶24} Ms. Clark’s argument that the court’s initial finding of contempt was a final appealable order that barred the court from awarding compensatory visitation during the execution of her sentence is without merit.

**{¶25} Compensatory Visitation**

{¶26} Ms. Clark next contends that the trial court abused its discretion in awarding Mr. Clark compensatory visitation because there is no competent, credible evidence that make-up visitation is in A.C.’s best interest.

{¶27} We presume the trial court’s visitation decision is correct and reverse only upon a showing of an abuse of discretion. *Utz v. Hatton* (Apr. 9, 1999), 2d Dist. No. 17240, 1999 Ohio App. LEXIS 1566, 15, citing *Roach v. Roach* (1992), 79 Ohio App.3d 194. The term “abuse of discretion” connotes the trial court’s attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶28} Furthermore, “where an award of [visitation] is supported by a substantial amount of credible and competent evidence, such an award will not be reversed by a reviewing court as being against the weight of the evidence.” *Green v. Green*, (Mar. 31, 1998), 11th Dist. No. 96-L-145, 1998 Ohio App. LEXIS 1434, 6-7, citing *Davis v. Flickinger* (1997), 77 Ohio St.3d 415, 418, citing *Bechtol v. Bechtol* (1990), 49 Ohio St.3d 21, syllabus.

{¶29} “R.C. 2109.051(K) permits a court to award ‘reasonable compensatory visitation’ to any parent whose right of visitation is denied or is interfered with by another parent.” *Utz* at 14.

{¶30} Ms. Clark contends that there is no competent, credible evidence to support the court’s finding that compensatory visitation is in A.C.’s best interest. The court, however, was explicit in its judgment that “there is sufficient evidence to support that the granting of compensatory visitation to the Plaintiff, Shaun K. Clark, is in the best interest of the child.”

{¶31} The record reveals that there was more than ample evidence to support the court’s finding as Ms. Clark continually violated the court’s order regarding parenting time, refusing Mr. Clark visitation since the inception of this case, including preventing any visitation for an entire six-month period. She failed to inform Mr. Clark of A.C.’s schedule at school and special “father” holidays and continually thwarted his attempts to visit with the child. A.C. was instructed to call his father “Shaun” when in her home, and A.C.’s constant anxiety over his father’s visitations was no surprise given Ms. Clark’s efforts to make the parties’ encounters volatile.

{¶32} Although the court did not specifically enumerate the factors it considered, the testimony of the parties provides ample evidence to support the court’s finding that compensatory visitation was in the child’s best interest. See *Kager v. Kager*, 5th Dist. No. 2005CA00208, 2006-Ohio-2427, ¶10 (although neither the magistrate nor the trial court referred to any specific factor, the court’s findings certainly corresponded to the factors listed in the statute). As it stood, Ms. Clark was preventing A.C. from forming any sort of familial bond with his father or his half-siblings.



{¶33} Thus, we agree with the trial court that there is more than “sufficient evidence to support the granting of compensatory visitation” to Mr. Clark, and that such visitation is in the best interest of A.C.

{¶34} Ms. Clark’s second assignment of error is without merit.

{¶35} The judgment of the Portage County Court of Common Pleas, Juvenile Division, is affirmed.

DIANE V. GRENDELL, J., concurs,

COLLEEN MARY O’TOOLE, J., dissents with Dissenting Opinion.

---

COLLEEN MARY O’TOOLE, J., dissents with Dissenting Opinion.

{¶36} I respectfully dissent.

{¶37} An order is a final appealable order if it “affects a substantial right in an action that in effect determines the action and prevents a judgment[.]” R.C. 2505.02(B)(1). A “substantial right” is defined as “a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.” R.C. 2505.02(A)(1). “An order affects a substantial right if in the absence of immediate review of the order effective relief will be foreclosed.” *Farshchian v. Glenridge Machine Co.*, 8th Dist. No. 91821, 2009-Ohio-1602, at ¶12, citing *Bell v. Mt. Sinai Med. Ctr.* (1993), 67 Ohio St.3d 60, 63.

{¶38} Upon review, this writer believes that the trial court’s December 2, 2009 judgment entry, denying Ms. Clark’s motion to modify the shared parenting plan she

shared with Mr. Clark, as well as granting Mr. Clark's compensatory time for visitation that Ms. Clark prevented, is not a final appealable order pursuant to R.C. 2505.02, as there may be another remedy available at the trial court level. Thus, I believe this appeal should be dismissed.

{¶39} Based on the foregoing, I dissent.