

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

IN RE: :
A.A.J. : CASE NO. CA2014-10-130
: OPINION
: 6/8/2015
:
:

APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
JUVENILE DIVISION
Case No. 12-C001412

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E.L.

J. J., 7310 Blue Ash Road, Cincinnati, Ohio 45236, appellant, pro se

PIPER, P.J.

{¶ 1} Respondent-appellant, J.J. (Father), appeals a decision of the Warren County Court of Common Pleas, Juvenile Division, finding him in contempt.

{¶ 2} Father and petitioner-appellee, E.L. (Mother), were never married, but had one child, A.A.J., who was born in 2003. In late 2012, Mother and Father entered into an agreed entry regarding parenting of the child. Mother was designated the residential parent and legal custodian, and Father received parenting time according to the Warren County Juvenile

Court Standard Order of Parenting Time amounting to visitation on Wednesday evenings and every other weekend.

{¶ 3} When the child was three years old, she began participating in gymnastics. The child's participation did not cause any issues between Mother and Father. The child's participation in gymnastics continued until she turned ten, when she expressed her desire to play softball instead. In the fall of 2012, Mother registered the child for softball, and no issues arose between Mother and Father regarding the child playing softball. Father attended the games, and facilitated the child's participation. The child, who enjoyed playing softball, asked Mother to play again in spring 2013, and Mother once again registered the child. No issues occurred between Mother and Father, and Father continued to facilitate the child's participation.

{¶ 4} However, in fall 2013, Father decided that he would no longer take the child to softball practice or games during his parenting time. Father had since married, and had a child who experienced health concerns upon his birth, including a cleft lip and palate, as well as tracheal-esophageal fistula. The baby remained in the hospital for approximately a month, and Father suspended his visitation with A.A.J. during that time.

{¶ 5} Once Father resumed visitation, he decided not to allow the child to participate in softball during his visitation time. Father informed the child's softball coach of his decision, though he did not tell Mother. The coach later told Mother about Father's decision, and Mother contacted Father in an attempt to reach alternative plans to allow the child to continue participating in softball. When Father refused to communicate with Mother, Mother filed a contempt motion, asking the court to find Father in contempt for violating the terms set forth in the court order regarding extracurricular activities and the parties' duty to facilitate the child's participation

{¶ 6} A magistrate held a hearing on Mother's motion and found Father in contempt.

The magistrate ordered Father to pay Mother \$500 in attorney fees, and also sentenced him to three days in jail and a \$500 fine, suspended on the condition that Father not prohibit the child's participation of future extracurricular activities. Father filed objections to the magistrate's decision, which were overruled by the juvenile court. Father now appeals the juvenile court's decision, raising the following assignments of error. For ease of discussion, and because they are interrelated, we will address Father's first two assignments of error together.

{¶ 7} Assignment of Error No. 1:

{¶ 8} THE TRIAL COURT ERRED TO THE EXTENT OF AN ABUSE OF DISCRETION WHEN IT OVERRULED APPELLANT'S OBJECTION TO THE MAGISTRATE'S DECISION.

{¶ 9} Assignment of Error No. 2:

{¶ 10} THE TRIAL COURT ABUSED ITS DISCRETION BY FINDING APPELLANT IN CONTEMPT WHEN HE DID NOT EXPRESSLY DISOBEY THE AGREEMENT OR CAUSE THE APPELLEE HARM.

{¶ 11} Father argues in his first two assignments of error that the juvenile court abused its discretion by finding him in contempt.

{¶ 12} "Disobedience to court orders may be punished by contempt." *Cottrell v. Cottrell*, 12th Dist. Warren No. CA2012-10-105, 2013-Ohio-2397, ¶ 11; R.C. 2705.02(A). To support a contempt finding, the moving party must establish by clear and convincing evidence that a valid court order exists, that the offending party had knowledge of the order, and that the offending party violated such order. *Hetterick v. Hetterick*, 12th Dist. Brown No. CA2012-02-002, 2013-Ohio-15, ¶ 35. A trial court "is in the best position to determine how to fairly administer and enforce its own orders." *Cottrell*, 2013-Ohio-2397 at ¶ 27.

{¶ 13} "Proof of purposeful, willing or intentional violation of a court order is not a

prerequisite to a finding of contempt." *Pugh v. Pugh*, 15 Ohio St. 3d 136 (1984), paragraph one of the syllabus. Instead, "it is irrelevant that the transgressing party does not intend to violate the court order. If the dictates of the judicial decree are not followed, a contempt violation will result." *Id.* at 140. Once the movant establishes this prima facie case of contempt, the burden then shifts to the contemnor to prove his inability to comply with the court order. *Dewsnap v. Dewsnap*, 12th Dist. Clermont No. CA2007-09-094, 2008-Ohio-4433. The inability that excuses compliance cannot be self-imposed, fraudulent, or due to an intentional evasion of the order. *Id.*

{¶ 14} In reviewing a trial court's finding of contempt, an appellate court will not reverse such a finding absent an abuse of discretion. *Grow v. Grow*, 12th Dist. Butler Nos. CA2010-08-209, CA2010-08-218, and CA2010-11-301, 2012-Ohio-1680, ¶ 73. An abuse of discretion means more than an error of judgment; it implies that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 15} Father essentially argues that he should not be held in contempt because he did not consent to the child playing softball for the fall 2013 season, and that he denied the child's participation in softball so that she could bond with her new half-brother. Despite Father's reasons for his disobedience, the record supports the trial court's finding of contempt.

{¶ 16} First, the record is undisputed that a valid court order existed. Mother and Father entered into an agreed entry whereby Mother was designated as the child's residential parent and legal custodian. Father was then granted parenting time according to the Warren County Juvenile Court Standard Order of Parenting time, Basic Schedule I, which was attached and incorporated into the agreed entry.

{¶ 17} According to Section 9 of the Warren County Standard Order,

Scheduled periods of parenting time shall not be delayed or denied because a child has other activities (with friends, work, lessons, sports, etc.). It is the responsibility of the parents to discuss extra-curricular activities of the child(ren) in advance, including time, dates and transportation needs, so that the child(ren) are not deprived of activities and maintaining friends.¹ Each parent shall provide the other with copies of any written material (i.e. activity schedules, maps, instructions) that are distributed in connection with the child(ren)'s activities. The parent who has the child(ren) during the time of scheduled activities is responsible for transportation, attendance and/or other arrangements. Both parents are encouraged to attend all their child(ren)'s activities.

{¶ 18} The juvenile court noted that the above-quoted provision "furthers the Court's goal of a child being able to maintain their own activities and friendships while being raised in two different homes." The juvenile court also found that the agreed entry required Mother and Father to communicate, be flexible, and recognize the importance of extra-curricular activities to the child. The juvenile court further determined that its order required Father to have the child attend her extracurricular activities during his parenting time, as well as to have open communication between the parents in order to avoid the child being deprived of attending her activities. The juvenile court was certainly in the best position to determine the meaning of its orders, and the record is clear that Father never once requested clarification of the orders before he made his decision to deny the child's participation.

{¶ 19} Father argues that the juvenile court's order forces him to "forgo everything else for a sporting event." However, the order does not force Father to do anything other than facilitate his child's participation in extracurricular activities to his child's benefit. The record does not indicate, and Father never asserted, that softball practice or games filled every

1. Father argues in his brief that Mother should be held accountable for not obtaining his permission prior to registering the child for softball. While this issue will be somewhat addressed in regard to Father's violation of the court order, we note that Father's actions are the focus of the contempt motion, not Mother's. No contempt motion has been filed against Mother regarding her actions in registering the child for softball, and what Mother did in regard to the order is not before this court.

moment of his visitation times on his nights or weekends with the child, or that he was forced to forego other aspects of his ability to spend quality time with the child before, during, or after the practices or games. The circumstances herein do not present an "either/or" situation wherein Father can either have parenting time or the child can participate. Both can happen.

{¶ 20} Father further asserts that the order permitted him to deny the child's participation because the order states that extracurricular activities could not delay or deny his visitation rights. However, there is nothing in the record that indicates that the child playing softball delayed or denied Father's visitation rights. Instead, the record is clear that for the two seasons prior to fall 2013, Father enjoyed his visitation time with the child while attending softball-related events with her, including practice and games. Taking the child to practices or a game for a portion of Father's visitation time did not deny him parenting time, especially where Father, during his parenting time with her, had the chance to support and recognize the child's participation in an activity she enjoyed.

{¶ 21} The order only states that the extracurricular activity could not deny or delay visitation. However, the order does not provide that Father would have the unilateral right to schedule every moment of the child's visitation with him. In fact, and when the first sentence of the order is read in context with the rest of the paragraph, the court's order is clear that the child was not to be "deprived of activities and maintaining friends," and even more, that Father was "responsible for transportation, attendance and/or other arrangements" so that the child could participate during her time with Father. The order further, and expressly, provided that "both parents are encouraged to attend all their child(ren)'s activities." When read in full context, and as a whole, the order clearly required Father to facilitate the child's participation in her extracurricular activities.

{¶ 22} Second, the record is undisputed that Father had knowledge of the order.

Father signed the agreed entry, within which, Section 9 appears. Father also testified that he knew of the agreed entry and that he had agreed to the standard orders for visitation when the parties entered the agreement in 2012. In fact, Father never denied that he knew of the order, he only denied that he agreed to allow the child to participate in softball during the fall 2013 season.

{¶ 23} Third, and despite Father's argument to the contrary, the record is clear that Father failed to obey the court order regarding the child's ability to participate in extracurricular activities. The record is undisputed that the child was involved in gymnastics since she was three, and when she was older, she wanted to play softball. She began playing softball in fall 2012 and played the following season, spring 2013, as well. Mother registered the child for the fall 2013 season, just as Mother had done in the past, which was the child's third season of playing softball.

{¶ 24} Father argues that he did not give his consent to register the child for softball, thus he is not in violation of the court order regarding her ability to participate in extracurricular activities. However, and despite Father's argument that Mother should not have registered the child for softball without his permission so that 'two wrongs make a right,' Mother was the residential parent and only facilitated the child's activities, in a limited way and according to past practices. Father could have challenged Mother's actions regarding the child's participation if he believed Mother was not in accord with their previous agreement or the child's participation was not in A.A.J.'s best interest. However, he did not.

{¶ 25} Mother abided by the court order by providing Father with the information regarding softball before the season started, and the record is clear that Father was well-aware that the child would be playing softball in fall 2013 just as she had done for two prior seasons. Although Mother did not expressly discuss registering the child for softball with Father, the record indicates that the parents had become accustomed to the child's

participation in activities, whether it was gymnastics or softball.

{¶ 26} At the time of the agreed entry, Mother had already registered the child for her first season of softball. When asked whether Mother informed Father the first time she registered the child for the fall 2012 season, Mother responded, "I did not because I didn't think it would have been relevant at the time since she had already been playing some kind of sport. Mother later testified on cross-examination, "she'd already been in sports and it was never an issue in the past. So I really didn't think that, that would be a big issue and for the fall of 2012 it wasn't." The undisputed testimony therefore indicates that the normal course was that Mother would register the child without discussing the registration with Father, the child would participate, and Father would facilitate A.A.J.'s participation during his parenting time with the child.

{¶ 27} Father's suggestion that he did not approve or have knowledge that the child was playing softball in fall 2013 is disingenuous. As stated above, Father knew the child had played in the previous two seasons, and as stated by the juvenile court, "It should not have been a surprise that the child was involved in softball again." Moreover, Father continued to receive emails from the child's coach regarding the fall 2013 season, and cannot claim that he did not know she was playing.

{¶ 28} Despite his argument to the contrary, the record is clear that Father received a schedule for the fall 2013 season *before it began*, and had knowledge that the child was registered for the fall 2013 season. Mother testified that she gave Father a schedule, and that Father was on the softball coach's email list so that he would have received a schedule that way. Mother testified that Father "gets the e-mails as well as I do from the coaches," and later confirmed that an email was sent for the fall 2013 season specifically. Mother was later asked if she received a schedule for fall 2013, and she responded, "yes." Mother was then asked what she did with the schedule, and Mother responded, "which I handed to him."

Mother further testified that Father acknowledged his receipt of the schedule, and that he stated that his wife had the schedule. Moreover, Father admitted on cross-examination that he had the schedule before the fall 2013 season started, and therefore had knowledge of the child's registration. The following exchange occurred during Father's cross-examination,

[Q] is it true that [Mother] provided you with [the child's] softball schedule *before the start of the fall of 2013 season?*

[A] Um, whether it was her directly, or, or um, you the know the coach I, *I was provided with it either way.* I don't I, I can't tell you for sure that it was her that did it but I can't, I don't know that it wasn't.

(Emphasis added.)

{¶ 29} Father informed the child's coach that the child would not participate in softball during his visitation time, yet failed to tell Mother about his unilateral decision. Father testified on cross-examination that he did not inform Mother of his choice to keep the child from participating, and admitted that he only told the coach. Despite learning of Father's decision through the coach, Mother offered alternative visitation to Father so that the child could attend the games and practices. Father declined to work with Mother to reach an alternative visitation schedule during the softball season.

{¶ 30} While Father asserts that Mother never offered to work with him on alternative visitation schedules, the juvenile court found otherwise based on Mother's credible testimony. During Mother's direct testimony, the following exchange occurred.

[Q] [O]kay did you um, try to work out this issue with [Father]?

[A] Uh, I tried to yes.

[Q] And did you offer at any point to change dates with [Father]?

* * *

[A] I tried to see if there was anything I could do like can I pick her up and go? Can she go and you take her another night?"

{¶ 31} Despite Father's assertion that he communicated openly with Mother regarding

softball and that he has caused no harm to Mother or the child by refusing the child's participation, the juvenile court expressly found that "Father failed to attempt to reschedule parenting time or attempt alternatives, showing a lack of flexibility and concern for the child's interest in extracurricular activities." The juvenile court further noted, "Father made the unilateral decision to have [the child] miss her softball games and practices during the 2013 fall season. Father did not communicate with Mother in advance of the season to come up with a solution that allowed him to keep his parenting time and also have [the child] play softball."

{¶ 32} In response to the clear and convincing evidence of Father's disobedience of the court order, Father's suggests that his reason for not allowing the child to participate was that he wanted the child to bond with her half-sibling. However, Father never communicated his desire for the child to bond with her half-sibling to Mother, and instead, only indicated that he had "family plans" scheduled for his visitation time. Father, *for the first time*, explained at the hearing that he wanted the child to spend time with her half-brother rather than attend softball, as the baby had experienced a prolonged hospital stay.

{¶ 33} However, Father never indicated his reasoning to Mother before the hearing, so that Mother was unaware of any reason other than that Father had "family plans."² At the hearing, Mother was asked whether Father ever indicated that the reason he was not taking

2. Father argues in his brief that Mother "knew Father was in the middle of a family crisis and should have expected that he would want his children to finally meet each other." However, Mother testified that she did not know the extent of the baby's medical concerns because Father never told her, and that Father only indicated that he had "family plans" that precluded the child's participation in softball. Father states no reason as to why knowledge of his true reasons should have been imputed to Mother, especially when Father failed to fully communicate such to her. Father further blames Mother for not facilitating visitation between the child and her half-brother because Mother did not permit the child to have an otherwise unnecessary vaccination that was required by the hospital in order to allow the child to visit her half-brother. However, and stated again, Mother's actions are not dispositive of the contempt motion because Father is the party accused of violating the court order, not Mother. Nor does Mother's refusal to vaccinate the child establish that Father had an inability to comply with the court order. Father never filed a contempt motion asking the court to find that Mother's choice not to give her child an extraneous vaccination was in violation of an established court order, and this conduct is not the focus of our appellate review.

the child to softball was because of his son's medical problems. Mother responded, "absolutely not." The juvenile court found Mother's testimony credible, and determined that "the Court is convinced that the refusal to allow [the child] to participate in softball was primarily a response to activities having been scheduled during his parenting time. This is supported by Father's failure to mention the health of his son * * *." The juvenile court further stated, "Father never informed Mother that he wanted [the child] to miss the games to spend time with her newborn brother, he just informed her they had family plans."

{¶ 34} The record indicates that Father's son is doing well, and has recovered from the medical emergencies that required his prolonged hospital stay. Even so, and when asked if he would take the child to practices and games in the future, Father testified that he would not guarantee her participation. During cross-examination, Father was asked whether he would allow the child to participate in softball, and Father answered, "I am but I don't I, I'm not willing if, if the decision is mine to make I'm not willing to stipulate that unilaterally she just automatically goes. Sometimes other things in life take precedent." Given his response, the juvenile court found that Father showed a lack of flexibility and concern for the child's desire to play softball.

{¶ 35} The juvenile court did not find credible Father's assertions that he did not know about the fall 2013 softball season, and that he communicated his desire to use his visitation time so that the child could bond with her half-brother. However, and even if Father did not know about the softball season before it started or truly wanted the child to spend time with her half-brother, these reasons do not justify Father's disobedience of the court order. As previously stated, the inability that excuses compliance with a court order cannot be self-imposed or due to an intentional evasion of the order.

{¶ 36} Had Father wanted the order changed, he could have moved the court to do so. He did not. Had Father wanted to work with Mother to change his visitation time to allow the

child's continued participation in softball, he could have worked with Mother to arrange alternative visitation. He did not. This court is in no way diminishing the importance of the child bonding with her half-brother or Father visiting with the child during his parenting time. However, the court order regarding the child's extracurricular activities was in place to ensure that the child could continue her participation in sports and the related socialization with friends despite being raised in separate homes. Despite Father's assertion that he has not caused the child "harm," the order existed to facilitate the child's participation in an activity that she enjoyed and wanted to continue. While we do not read the order to establish that A.A.J. has the ultimate decision-making power, Father's unilateral decision did not take the child's wishes or feelings into consideration and otherwise ignored Mother's decisions as residential parent.

{¶ 37} Mother was required to show by clear and convincing evidence that a valid court order existed, that Father knew of the order, and that Father violated the order. Mother carried her burden, and the juvenile court did not abuse its discretion in finding Father in contempt. As such, Father's first and second assignments of error are overruled.

{¶ 38} Assignment of Error No. 3:

{¶ 39} THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT DID NOT AFFORD APPELLANT AN OPPORTUNITY TO PURGE THE CONTEMPT.

{¶ 40} Father argues in his third assignment of error that the juvenile court committed plain error by not providing him an opportunity to purge his contempt.

{¶ 41} Juv.R. 40(D)(3)(b)(ii) requires a party to object to a magistrate's decision with particularity, and state all grounds for the objection. If a party has not objected to a factual finding or legal conclusion in accordance with Juv.R. 40(D)(3)(b), "[e]xcept for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion." Juv.R. 40(D)(3)(b)(iv).

{¶ 42} Invocation of the plain error doctrine in civil cases is strictly limited to the "extremely rare case involving exceptional circumstances where error * * * seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." *In re D.N.*, 12th Dist. Fayette No. CA2014-07-016, 2014-Ohio-5397, ¶ 16.

{¶ 43} Contempt is classified as civil or criminal depending upon the character and purpose of the punishment. *In re W.F.*, 12th Dist. Fayette No. CA2010-10-029, 2011-Ohio-3012, ¶ 12. Criminal contempt sanctions are punitive in nature, and such sanctions are designed to punish past affronts to the court and to vindicate the authority of the law and the court. *Id.* Criminal contempt is usually characterized by an unconditional prison sentence, and the contemnor is not afforded an opportunity to purge himself or herself of the contempt. *Id.* Conversely, civil contempt renders punishment that is remedial or coercive and for the benefit of the complainant, and prison sentences are conditional. *Id.* A contemnor is said to "carry the keys of his prison in his own pocket" because the contemnor must be afforded the opportunity to purge his civil contempt. *Id.*

{¶ 44} However, when there is no way to purge past violations of a court order, failing to provide a purge mechanism is not an abuse of discretion. *In re Howard*, 12th Dist. Butler Nos. CA2001-11-264, CA2001-12-281, and CA2001-12-282, 2002-Ohio-5451, ¶ 17. By suspending the sentence imposed upon a party found in contempt for a past violation, "the court effectively allows for purging of the contempt." *Caldwell v. Caldwell*, 4th Dist. Gallia No. 02CA17, 2003-Ohio-1752, ¶ 8.

{¶ 45} The juvenile court ordered Father to serve three days in jail and pay a \$500 fine, and then suspended the sentence and fine upon condition that Father not violate the order in the future. While Father argues that the juvenile committed plain error by not ordering a more concrete purge mechanism, there is no way that Father can allow the child

to participate in a season that has already ended.

{¶ 46} The record is clear that Father's violation of the court order related to not taking the child to past games and practices during his parenting time. As Father's contempt consisted of past violations of the court order, the juvenile court did not provide a purge mechanism because there is no way for Father to provide the child with a chance to make up the games or practices. *See Montgomery v. Montgomery*, 4th Dist. Scioto Nos. 03CA2923 and 03CA2925, 2004-Ohio-6926, ¶ 39 (noting that when a party has past violations of an order that cannot be made up, "the only conceivable method is to allow the contumacious party to purge by faithful future compliance" with the court order); and *C.G. v. C.L.*, 8th Dist. Cuyahoga No. 90341, 2008-Ohio-3135, ¶ 27 (noting that "a trial court cannot fashion a remedy to correct past visitation violations but can compel future compliance with the court-ordered visitation schedule and, thus, allow the contemnor to purge himself of any contempt").

{¶ 47} We note that some districts disagree and hold that "an order suspending punishment on the condition the contemnor comply in the future with the court order does not allow for purging. Instead, it only regulates future conduct, and is a reaffirmation of the court's previous order."³ *Solove v. Solove*, 5th Dist. Delaware No. 2011-CAF-08-0070, 2012-Ohio-1335, ¶ 12. However, we can think of no other way to permit Father to purge when his contempt is directly based upon his refusal to allow the child to participate in games and practices that have already occurred. Those games and practices cannot be held again or made up, so that the only way Father can purge himself of his contempt is to permit the child

3. This court has applied a similar legal analysis when the contemnor's violation included a failure to pay support. *Davis v. Davis*, 12th Dist. Warren No. CA2008-07-098, 2009-Ohio-2815; *Marden v. Marden*, 108 Ohio App.3d 568 (12th Dist.1996); and *Mackowiak v. Mackowiak*, 12th Dist. Fayette No. CA2010-04-009, 2011-Ohio-3013. However, and unlike a situation where a party can purge by paying what is owed, we decline to apply this legal principle where it is impossible for Father to take the child to practices and games that occurred in the past.

to participate in future practices and games.

{¶ 48} The juvenile court stayed the jail sentence and fine imposed upon Father with the condition that Father comply with the court order in the future. As such, the juvenile court did not commit plain error by sentencing Father as it did, and Father's third assignment of error is overruled.

{¶ 49} Judgment affirmed.

S. POWELL, J., concurs.

HENDRICKSON, J., dissents.

HENDRICKSON, J., dissenting.

{¶ 50} I respectfully dissent from the majority's opinion. I find Section 9 of the Warren County Standard Order to be ambiguous and would not hold Father in contempt for his decision to exercise his parenting time with his daughter rather than taking her to an extracurricular activity for which he did not provide prior approval. Further, although the majority contends that Mother's actions in unilaterally signing A.A.J. up for softball in the fall of 2013 are not relevant to the finding of contempt, I believe otherwise. Given the language of Section 9 of the Warren County Standard Order, the actions of both parents are relevant in determining whether Father was in contempt.

{¶ 51} In September 2012, the parties entered into an agreement as to the parenting time of A.A.J. Mother was designated residential parent and legal custodian, and Father was to receive parenting time in accordance with the Warren County Juvenile Court Standard Order of Parenting Time. Pursuant to the Section 9 of the Warren County Standard Order of Parenting Time,

[s]cheduled periods of parenting time shall not be delayed or denied because a child has other activities (with friends, work,

lessons, sports, etc.). It is the responsibility of the parents to discuss extra-curricular activities of the child(ren) in advance, including time, dates and transportation needs, so that the child(ren) are not deprived of activities and maintaining friends. Each parent shall provide the other with copies of any written material (i.e. activity schedules, maps, instructions) that are distributed in connection with the child(ren)'s activities. The parent who has the child(ren) during the time of scheduled activities is responsible for transportation, attendance and/or other arrangements. Both parents are encouraged to attend all their child(ren)'s activities.

(Emphasis added). I find the language utilized in Section 9 of its Standard Order of Parenting Time ambiguous, as it is subject to more than one reasonable interpretation. See, e.g., *Wittstein v. Wittstein*, 12th Dist. Madison No. CA2006-03-013, 2006-Ohio-6707. On one hand, Section 9 establishes that parenting time takes precedent over a child's participation in extracurricular activities. On the other hand, Section 9 places a focus on ensuring that the child not be denied the right to participate in extracurricular activities. In the present case, both the trial court's decision and the majority's decision improperly places greater weight on ensuring a child's participation in extracurricular activities over that of ensuring quality parenting and family time.

{¶ 52} As it is written, the first sentence of Section 9 clearly states that scheduled parenting time is not to be delayed or denied because of a child's extracurricular-sporting activities. The second sentence of the Section 9 then states that if a child is going to participate in extracurricular activities, parents are to *discuss* the extracurricular activities *in advance* of the child's participation. Only after the parents have had a discussion and reached a decision as to the child's participation in the extracurricular activity are the parents to ensure that the child is able to attend the activity.

{¶ 53} The evidence introduced at the hearing on Mother's motion for contempt clearly demonstrated that Mother did not consult with Father before unilaterally enrolling A.A.J. in softball in the fall of 2013. Although the majority is willing to ignore this fact and place the

entire blame on Father, I am not so willing to do so. This was a prerequisite the parties agreed upon before either parent could sign a child up for an extracurricular activity that would occur during the other parent's parenting time. The purpose of this provision is for the parents to communicate with each other in advance so that the time, dates, and transportation needs for the child's extracurricular activity can be addressed.

{¶ 54} The majority hands Mother an absolute pardon for her violation of the court order by excusing her conduct based upon the past conduct of the parties and the fact that Father did not file his own motion for contempt against Mother. However, the record does not justify the majority's treatment of Mother in this regard. First, by the time the parties entered into the Agreed Entry regarding parenting, Mother had already signed A.A.J. up for the fall 2012 season. Therefore, Father's consent was not necessary. Secondly, the only time Mother signed A.A.J. up for an extracurricular activity without first discussing it with Father after the effective date of the Agreed Entry was the spring 2012 softball season. One time simply does not constitute an established course of conduct between the parties. Furthermore, according to Mother's own testimony, she was aware that communication with Father declined after the fall of 2012. This should have cautioned Mother that she could not arbitrarily sign A.A.J. up for the fall session in 2013 without first discussing it with Father.

{¶ 55} Although Father did not object to A.A.J.'s participation in softball in the fall of 2012 or spring of 2013, circumstances in Father's family significantly changed in the fall of 2013. Had Mother abided by the requirements of Section 9, Mother would have learned that Father wished for A.A.J. to spend time bonding with her new half-sibling during his parenting time. The record reflects that A.A.J. had not been given an opportunity to bond with her younger brother prior to the fall of 2013 due to his health problems and Mother's refusal to allow A.A.J. to receive a vaccination so she could visit her new half-brother in the hospital. Once visitation between the two siblings was possible after A.A.J.'s baby brother returned

home, Father indicated that he made "family plans," which involved the two children spending time together during Father's parenting time. It was never disputed that Father had a newborn son with severe health issues in June of 2013. As Father pointed out to the court, "sometimes other things in life take precedent." This is precisely what the first sentence of Section 9 contemplates. Thus, Father's decision to have A.A.J. spend time getting to know her new half-brother was entirely consistent with the first sentence of Section 9 that parenting time shall not be denied because of the child's other activities.

{¶ 56} There is also great emphasis placed by the majority upon the fact that Father did not communicate to Mother that A.A.J. would not be attending softball activities during his parenting time and that Mother found out through the coach instead. Obviously, for the sake of A.A.J., it would have been better for Father to inform Mother of his family plans. But, as Mother acknowledged at trial, Section 9 of the Warren County Standard Order of Parenting Time does not allow her to dictate how Father spends his parenting time and it does not require that he give Mother advanced notice that A.A.J. will not be attending an extracurricular activity for which he was never consulted about or provided approval for. As mentioned above, had Mother discussed the fall 2013 season with Father in advance, the parties would have had the opportunity to address the dates, times, and transportation needs for this activity. Therefore, I cannot put the sole blame on Father.

{¶ 57} Pursuant to the agreement the parties entered and the language of Section 9 of the Warren County Standard Order, I believe that Father's parenting time with A.A.J. comes first and that the child's participation in an extracurricular activity should not interfere with his parenting time. I therefore respectfully dissent from the majority's opinion. I would sustain Father's assignments of error and reverse the trial court's finding of contempt.