[Cite as *Holeski v. Holeski*, 2009-Ohio-6036.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

MICHELLE L. HOLESKI,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-P-0007**
- vs -	:	
KENNETH M. HOLESKI,	:	
Defendant-Appellant.	:	

Civil Appeal from the Portage County Court of Common Pleas, Domestic Relations Division, Case No. 2006 DR 0307.

Judgment: Affirmed in part, reversed in part and remanded.

Antonios C. Scavdis, Scavdis & Scavdis, L.L.C., 261 West Spruce Street, P.O. Box 978, Ravenna, OH 44266 (For Plaintiff-Appellee).

Harvey F. Miller, Anderson & Miller Co., L.P.A., 1650 Home Avenue, Akron, OH 44310 (For Defendant-Appellant).

Amy K. Corrigall, 57 South Broadway Street, Akron, OH 44308 (Guardian ad litem).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Kenneth M. Holeski, appeals the Judgment Entry of the Portage County Court of Common Pleas, Domestic Relations Division, in which the trial court modified the parties' Shared Parenting Plan; found Holeski in Contempt of Court; ordered Holeski to pay attorney fees, Guardian ad litem fees, counseling fees of plaintiff-appellee, Michelle L. Holeski, nka Michelle Holland; and participate in anger

management counseling. For the following reasons, we affirm in part, reverse in part, and remand the decision of the trial court.

{¶2} Holeski and Holland were married on July 23, 2005. There was one child born as issue of their marriage, a daughter, A. H., dob January 10, 2006. A Decree of Divorce was granted to the parties on January 10, 2007, and a Shared Parenting Plan, agreed upon by both parties, was accepted by the trial court.

{¶3} On December 29, 2008, an evidentiary hearing was held on several post-decree motions filed by the parties. The trial court noted that the case had been "pending for approximately one and a half years since the first motion was filed by [Holland]."

{¶4} The motions pending included motions by both parties to set aside their Shared Parenting Plan and to declare one of them primary residential parent of A. H. Holland also filed two Motions to Show Cause, contending first that Holeski had denied her personal property which was awarded to her as part of the divorce. Second, for abusing visitation rights by extending the time that Holeski kept possession of A. H. beyond the time stated in their Shared Parenting Plan. Holland additionally filed a Motion to Modify Visitation. Both parties also filed Motions for Attorney's Fees. Holland further motioned for the court to appoint a Guardian ad Litem (GAL) for the parties' minor child, A. H. The court subsequently appointed Amy K. Corrigall, Esq., as GAL for A. H.

{¶5} At the hearing, testimony was elicited from Holland, Holeski, and GAL Corrigall. Holeski withdrew a Motion for Modification of Child Support, which he had previously filed with the court. Both parties stipulated to the reasonableness of attorneys fees incurred by the other. After reviewing the evidence, the court found the following:

{¶6} As to the first Motion to Show Cause, the trial court found that "the evidence is clear that [Holeski] did provide to [Holland] certain personal property," however, Holeski failed to do so in a timely manner and the items delivered were "not the property that the parties owned during the marriage and contemplated by them to be divided." Consequently, the court found Holeski in Willful Contempt and sentenced him to 10 days in the Portage County Jail. Since Holland testified that she preferred to be compensated $700, the value she set as fair market value, as opposed to receiving the items, the court held that Holeski may purge himself of the contempt by paying $700 to Holland within 30 days of the Judgment Entry.

{¶7} The trial court further found that, based on the language in the Shared Parenting Plan, A. H. "should not be kept away from either of [her parents] for any period longer than seven days" and therefore, found that Holeski was "misguided in his interpretation of the language of the Shared Parenting Plan in this regard" and found him in Simple Contempt.

{¶8} Furthermore, the trial court found, based on the testimony of the parties and the GAL and the evidence presented, that the Shared Parenting Plan should not be disturbed. However, the court found that all future exchanges of A. H. will now take place at the Place of Peace in Ravenna, Ohio.

{¶9} Next, the trial court found that the parties "can improve and become better parents" and, therefore, ordered Holland and Holeski to "obtain family counseling with any licensed family counselor of their choice." The parties were further ordered to attend and complete the "After the Storm" program conducted by Townhall II. Holeski was also required to enroll in the Anger Management program at Townhall II.

{¶10} The court then ordered Holeski to pay the remaining balance of the GAL expenses, totaling $4,350, and to pay $11,500 of Holland's $14,767.50 attorney fees, with Holland paying the remainder from her own resources.

{¶11} Holeski timely appeals and raises the following assignments of error:

{¶12} "[1.] The trial court erred and abused its discretion in awarding attorney fees to appellee.

{¶13} "[2.] The trial court erred and abused its discretion in ordering appellant to pay the entire balance due in Guardian Ad Litem fees when neither party prevailed on the underlying motions and there was evidence that appellant's income had declined.

{¶14} "[3.] The trial court erred and abused its discretion in ordering appellant to pay for appellee's counseling expenses.

{¶15} "[4.] The trial court erred and abused its discretion in finding appellant in contempt of court.

{¶16} "[5.] The trial court erred and abused its discretion in requiring appellant to submit to anger management.

{¶17} "[6.] The trial court erred and abused its discretion in requiring that the parties meet at The Place of Peace to exchange the minor child."

{¶18} Holeski first argues that since Holland "did not prevail on her motions," and "an award of attorney fees amounts to a reward *** for filing a meritless motion," the award was improper. He also contends that he testified at trial that his income was going to be "substantially reduced". Specifically, he testified "I expect this year that my business will show a 50 to $80,000 loss for the year." He maintains that "[u]nder the facts and circumstances of this matter it was not appropriate for the trial court to award attorney fees to [Holland]." We disagree.

{¶19} "A trial court has broad discretion in the award of attorney fees." *Welty v. Welty*, 11th Dist. Nos. 2007-A-0013 and 2007-A-0015, 2007-Ohio-5217, at ¶37, citing *Bates v. Bates*, 11th Dist. No. 2000-A-0058, 2001-Ohio-8743, 2001 Ohio App. LEXIS 5428, at *13, citing *Birath v. Birath* (1988), 53 Ohio App.3d 31, 39. "A court's decision on a request for attorney fees will not be reversed absent" an abuse of discretion which signifies that the trial court's decision "is unreasonable, arbitrary, or unconscionable." Id. (citations omitted).

{¶20} R.C. 3105.73(B), states that "[i]n any post-decree motion or proceeding that arises out of an action for divorce, dissolution, legal separation, or annulment of marriage or an appeal of that motion or proceeding, the court may award all or part of reasonable attorney's fees and litigation expenses to either party if the court finds the award equitable. In determining whether an award is equitable, the court may consider the parties' income, the conduct of the parties, and any other relevant factors the court deems appropriate, but it may not consider the parties' assets."

{¶21} In granting Holland part of her attorney fees, the court reasoned "that because of [Holeski's] personality traits, his narcissistic qualities, his controlling qualities, the fact that he views this relationship with his former wife over physical possession of time of their child as a war of attrition and also corroborated by his court demeanor during his testimony, and also to some extent by the lengthy period of time that [Holeski] engaged in taking the deposition of [Holland]," Holeski "should pay some of the attorney fees incurred by [Holland]." Furthermore, the court based its findings on the fact that Holeski's income is "far greater" than Holland's and he has "the capacity to earn a far greater income" than she does.

{¶22} The record indicates that the trial court considered the relevant statutory guidelines when making the award.

{¶23} However, as discussed more thoroughly below, there was no final appealable order on the finding of contempt for violation of parenting time. As a result, we do not have jurisdiction as to that issue at this time and, therefore, we cannot determine whether the attorney fees pertaining to the contempt finding for violation of parenting time was an abuse of the court's discretion until the contempt matter is finally adjudicated by the trial court. Therefore, this assignment of error is affirmed to the extent indicated above.

{¶24} Holeski next argues that "[i]t is an abuse of discretion and inequitable to require [him] to pay the entire balance due in Guardian Ad Litem fees when neither party prevailed on the underlying motions and there was evidence that [his] income declined."

{¶25} Holland contends that "[p]ursuant to App.R. 16(A)(7), an appellant is required to include in his appellate brief an argument containing his contentions with respect to each assignment of error, with citations to authorities, statutes and parts of the record *** [and] [n]ot a single citation to authority or statute has been cited in support of [Holeski's] argument regarding this Assignment of Error." Holland also states that no citation to any authority has been set forth in Holeski's third, fourth, fifth, and sixth assignments of error.

{¶26} An appellant "bears the burden of affirmatively demonstrating error on appeal." *Village of S. Russell v. Upchurch*, 11th Dist. Nos. 2001-G-2395 and 2001-G-2396, 2003-Ohio-2099, at ¶10 (citation omitted). "It is not the obligation of an appellate court to search for authority to support an appellant's argument as to an alleged error. See *Kremer v. Cox* (1996), 114 Ohio App.3d 41, 60 ***. Furthermore, if an argument exists that can support appellant's assignments of error, 'it is not this court's duty to root it out.' *Harris v. Nome*, 9th Dist. No. 21071, 2002-Ohio-6994." Id. Holland is correct in

that we "*may* disregard an assignment of error that fails to comply with App.R. 16(A)(7)." *Tally v. Patrick*, 11th Dist. No. 2008-T-0072, 2009-Ohio-1831, at ¶22 (emphasis added). However, since his assignments of error take issue with the discretion of the trial court, and not specific case law, we will address them.

{¶27} Holland also argues that this assignment of error is moot because Holeski has already paid the GAL fees. However, even if Holeski had not paid the fees, the trial court did not abuse its discretion in ordering Holeski to pay them.

{¶28} "[A]n appellate court reviews a ruling of the trial court relative to an award of guardian ad litem fees under an abuse of discretion standard." *In re Kovacic*, 11th Dist. No. 2008-L-101, 2008-Ohio-6882, at ¶15 (citation omitted). "A trial court has broad authority to tax guardian ad litem fees as costs, including the amount of the fees and the allocation to either or both of the parties." *Padgett v. Padgett*, 10th Dist. No. 08AP-269, 2008-Ohio-6815, at ¶36 (citations omitted). "Fees may be allocated based on the parties' litigation success and the parties' economic status." Id. As stated above, Holeski's income is greater than Holland's and he has the capacity to earn a far greater income than she does. The trial court's finding, as well as the evidence of record, supports the allocation of GAL fees. Thus, the decision was not unreasonable, arbitrary, or unconscionable.

{¶29} Holeski's second assignment of error is without merit.

{¶30} In his third assignment of error, Holeski contends that the award of counseling expenses was an abuse of discretion.

{¶31} The trial court ordered "that both parties shall obtain family counseling with any licensed family counselor of their choice." The court further directed that Holland was to exhaust her insurance benefits for the coverage of counseling and Holeski was to pay any balance, or in the event Holland does not have insurance coverage, Holeski

was to pay the entire cost, as well as cost for his own counseling. The court reasoned that Holeski was to pay the cost "based on the [GAL's] testimony and written report that [Holeski's] conduct toward [Holland] has harmed her emotionally and continues to impair [her] from being the best mother she can be."

{¶32} The court also reasoned that counseling will help the parties "improve and become better parents." The GAL recommended that Holland and Holeski "should attend counseling in order to learn how to communicate with one another and foster a positive relationship." Furthermore, the parties need to "learn how to heal from the divorce and provide their child with a calm, loving environment."

{¶33} The GAL had witnessed numerous conversations with Holland "wherein she cried and became very emotional about the situation and her perception of Ken Holeski's behavior towards her." The GAL's report also included commentary from her interview with Dr. Smith, a mental health professional that interviewed both Holland and Holeski. The GAL wrote that "Dr. Smith described Ken Holeski as a narcissistic, controlling, and mild OCD. He stated that this process is a 'war of attrition' for Mr. Holeski and that he has the resources to prolong this battle against Ms. Holland in an effort to 'wear her down.'"

{¶34} The record demonstrates the existence of various conflicts between Holland and Holeski. Due to the nature of these conflicts, and the impact on A. H., the trial court correctly determined that the difficulty involved in restoring the parties to a normal relationship would be best facilitated by ordering the parties to undergo counseling. Further, as stated above, Holeski has a greater income and far greater earning capabilities. Therefore, it was not an abuse of discretion to order family counseling and have Holeski pay for Holland to attend.

{¶35} However, we agree with Holeski in that the "order in question is far too broad and far too vague to be effectively administered." The trial court should have established guidelines, specifically as to the extent and duration of counseling. Furthermore, in light of the parties' tumultuous relationship and history of hostile interactions, Holeski and Holland would be best served by having specific, documented guidelines, set forth in the order for counseling, so there can be no confusion to further exasperate the situation. As it stands, the order for counseling is so vague that it is open to potential abuse, as there is no definite timeline set forth for days, months, and/or years. Since the trial court has continuing jurisdiction under Civil Rule 75, the Order can be re-evaluated over time so that it does not become unjust or unfair. While we want to leave counseling up to the professionals, we do not want the duration open to potential abuse, especially since Holeski has been ordered to pay for Holland's counseling fees.

{¶36} This cause is remanded to the trial court with instructions to expound upon and clarify the order for family counseling. Specifically, the trial court should establish the scope and duration of the counseling. See *Stricker v. Stricker*, 5th Dist. No. 91-CA-32, 1992 Ohio App. LEXIS 6656, at *3 (case remanded to the trial court with instructions to clarify after a finding that the "order of the trial court is vague with respect to the real estate title of the real property *** [b]y this order, the trial court has made no clear determination of who gets what").

{¶37} Holeski's third assignment of error has merit to the extent indicated above.

{¶38} Holeski next argues that the trial court abused its discretion in finding him in Contempt of Court and ordering him to pay Holland $700.

{¶39} As mentioned above, the trial court found that Holeski failed to deliver certain items to Holland in a timely manner and the items delivered were "not the

property that the parties owned during the marriage and contemplated by them to be divided." Holeski was then found to be in Willful Contempt and sentenced him to 10 days in the Portage County Jail. The court held that Holeski may purge himself of the contempt by paying $700 to Holland within 30 days of the Judgment Entry.

{¶40} Holland argues that this "issue has been mooted by the payment from Holeski to Holland." We agree.

{¶41} Holeski's "appeal presents us nothing to adjudicate. By paying the $[7]00 ordered under the trial court's contempt action and purging the contempt, [Holeski] rendered the contempt finding moot ***. Because this court will not rule upon an issue which has become moot, we decline to consider whether the trial court properly found [Holeski] in contempt and sanctioned him." *Davis v. Lewis*, 10th Dist. No. 99AP-814, 2000 Ohio App. LEXIS 5747, at *9; *Gabriel v. Gabriel*, 6th Dist. No. L-08-1303, 2009-Ohio-1814, at ¶12 ("payment rendered the issue of the propriety of the contempt order moot"); *Green v. Green*, 11th Dist. No. 2007-P-0092, 2008-Ohio-3064, at ¶24 ("[a]n appeal from a civil contempt finding and sentence becomes moot when a party purges herself of the contempt or serves the sentence imposed by the court") (citation omitted).

{¶42} Holeski further contends that the trial court abused its discretion when it found him "in contempt of court as to the parenting time for exercising regular parenting time immediately before or after vacation parenting time." The court found that Holeski was "misguided in his interpretation of the language of the Shared Parenting Plan in this regard" and found him in Simple Contempt without imposing a sentence or penalty. This court has held that "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, at

¶3 (emphasis added). Therefore, since no penalty or sanction was imposed, this issue is not ripe for review.

{¶43} Holeski's fourth assignment of error is without merit.

{¶44} In his fifth assignment of error, Holeski argues that "there was absolutely no credible evidence presented to the trial court that could support an order for anger management counseling" and "[t]o order such counseling was an abuse of discretion."

{¶45} Testimony presented revealed that Holeski became hostile at exchanges in front of A. H. and has made angry, intimidating phone calls to Holland. The GAL's report indicated that Holeski "continuously communicates with [Holland] *** in a condescending and argumentative manner."

{¶46} Holland testified about an incident that took place at an exchange of possession of A. H. She stated that after an argument about the adjustment of A. H.'s car seat strap, Holeski "said a few choice things" to Holland and "ended up slamming the car door, [A. H.'s] car door, so hard that [Holland was] thankful the glass did not break in her face." Holeski then proceeded to exchange words with Holland's boyfriend, who was sitting in the passenger seat of Holland's car. Holeski said to him, "Come on, come on, you want to fight? Come on, bring it on."

{¶47} Holland stated that Holeski has made obscene gestures in front of her and her 11 year old son. Holland also testified that Holeski sent her emails and text messages of a "bullying nature." Further, she stated that Holeski sent bullying messages to her parents and swore at them during an exchange of A. H.

{¶48} Therefore, it was not arbitrary, unreasonable, or unconscionable to order Holeski to enroll in and complete an anger management course.

{¶49} Holeski's fifth assignment of error is without merit.

{¶50} In his final assignment of error, Holeski argues that "ordering the parties to use Place of Peace is an abuse of discretion." He contends that conducting exchanges of A. H. at the Place of Peace "will result in [A. H.] spending several hours in the car for every visit" as Holeski will have to travel "nearly an hour" to get to the place of exchange, subjecting A. H. to "risk of the travel". Moreover, the hours of operation "do not coincide with the parties parenting time schedule."

{¶51} The trial court held that A. H.'s "best interests are protected and preserved in the most favorable fashion if parties exchange physical possession of their child at a neutral supervised site." Therefore, the court modified the Shared Parenting Plan "to the extent that the place of exchange shall be at the Place of Peace located in the City of Ravenna, Portage County, Ohio." Furthermore, "[i]n the event that the Place of Peace is closed on any occasion when the exchange is to occur, then the exchange shall be at a place recommended by the Place of Peace."

{¶52} R.C. 3109.04(E) sets forth the procedure for modifying a prior decree allocating parental rights and responsibilities for the care of children. R.C. 3109.04(E)(1)(a) states that "[t]he 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 ***, that a change has occurred in the circumstances of the child, 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."

{¶53} Testimony indicated that Holeski can become argumentative in his exchanges with Holland. The GAL wrote in her report that "[b]ased on the parties' volatile relationship, it is the undersigned's recommendation that a permanent neutral drop-off and pick up location be selected, such as the Place of Peace." The GAL further

testified that Holland and Holeski's "contact face to face should be limited" for the "welfare of the child." A. H.'s best interests are best protected if the parties exchange physical possession of A. H. at the Place of Peace, a neutral supervised site.

{¶54} Testimony further indicated that Holland and Holeski attempted to exchange possession of A. H. at neutral locations, like McDonalds, and a police station. Holland testified that she experienced numerous problems with the exchanges at the public locations. Holland stated that Holeski has blocked her car in twice, forcing her to be "stuck" in the parking lot until Holeski left. Holland also stated that at the exchanges, Holeski has used inappropriate language in front of A. H.

{¶55} Holland also testified that she had experienced problems with the exchanges at A. H.'s daycare center. She testified that many times she did not know when Holeski had picked up A. H. or dropped her off, due to Holeski's failure to notify Holland when his pick-up or drop-off would be contrary to the time specified in the Shared Parenting Plan. She stated that Holeski "will pick her up [from the daycare] whenever he wants." "Thursday he's to have her back at day care at 8 a.m., and he will return her whenever. *** There's been a couple of occasions where [Holeski] has gone *** and has woken [A. H.] from her nap to take her," a time contrary to the Shared Parenting Plan. Holland did state that there "are a couple of times that [Holeski] did text" Holland to notify her of the change in time of pick-up/ drop-off, however, "not every, not even close to every time."

{¶56} Moreover, Holland stated that she felt the Place of Peace was appropriate because A. H. "will not be subject to see these things and the bickering and the arguing and the - - nastiness that goes on."

{¶57} Therefore, the trial court did not abuse its discretion, as the Place of Peace serves the best interest of the child.

{¶58} Holeski's sixth assignment of error is without merit.

{¶59} Pursuant to Civil Rule 75, the court retains continuing jurisdiction over this action, which shall be invoked by motion of either parties. Civ.R. 75(J).

{¶60} For the foregoing reasons, the Judgment Entry of the Portage County Court of Common Pleas, Domestic Relations Division, ordering Holeski to pay GAL fees, ordering him to submit to anger management classes, and ordering the parties to meet at the Place of Peace to exchange the minor child, is affirmed. The order of the trial court ordering Holeski to pay attorney fees is affirmed to the extent indicated above. The order of the trial court ordering Holeski to pay for counseling fees for Holland is reversed and remanded for further proceedings consistent with this Opinion. Costs to be taxed against appellant.

COLLEEN MARY O'TOOLE, J., concurs,

MARY JANE TRAPP, P.J., concurs in part, dissents in part, with a Concurring/Dissenting Opinion.

MARY JANE TRAPP, P.J., concurring and dissenting.

{¶61} I agree with the majority in its affirmation of the trial court's order as to the payment of GAL fees, the orders concerning anger management classes, and the visitation exchange at the Place of Peace, as well as the majority's determination that inasmuch as Mr. Holeski purged himself of the contempt finding relative to the personal property issue, that issue is now moot. I respectfully submit, however, that this case should be affirmed in toto, as I find that the trial court's order regarding the payment of

counseling fees to be appropriate, and further find that the trial court's contempt finding relative to the parenting time issue is indeed a final appealable order.

{¶62} The trial court's order regarding the payment of plaintiff's counseling fees, which are not covered by plaintiff's insurance, is appropriate. The trial court wisely left it to the experts to determine the nature and extent of counseling required for this family while at the same time overseeing the process by requiring the parties to provide to the court written reports within nine months of the order. Such reports are to reflect completion of the "After the Storm" program, the anger management program, as well as detailing the "accomplishments made through family counseling." While the court could set an arbitrary time period for counseling, it would be just that, arbitrary, and not in the best interests of the parties or their daughter.

{¶63} Finally, the majority found that this court "cannot determine whether the attorney fees pertaining to the contempt finding for violation of parenting time was an abuse of discretion *until the contempt matter is finally adjudicated by the trial court.*" (Emphasis added.) I disagree. In this case, the contempt finding without punishment is a final appealable order.

{¶64} R.C. 2705.05 provides, in pertinent part:

{¶65} "(A) 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 ***." (Emphasis added.)

{¶66} Thus, the statute clearly gives the trial court the discretion whether to impose a penalty.

{¶67} While we generally find that a contempt finding is accompanied by some form of punishment, be it coercive in order to compel the contemnor to comply with an order or punitive in nature in order to, as the Supreme Court of Ohio in *Brown v. Executive 200, Inc.* (1980), 64 Ohio St.2d 250 explained, "vindicate the authority of the law and the court," there are instances where the trial court has deliberately chosen not to impose any penalty, even for "willful" contempt; and such an order may be reviewed as a final appealable order. Id. at 254. See, also, *Michalek v. Michalek* (Feb. 14, 1986), 11th District No. 1625, 1986 Ohio App. LEXIS 5644, in which this court reviewed the lower court's order finding the appellee to be in willful contempt for his failure to make certain child support payments but imposing no penalty or punishment. Our court determined that "[a]s a general rule, the trial court is given broad discretion in determining whether or not to punish for contempt" and affirmed a contempt finding that contained no punishment. Id. at 5.

{¶68} The finding of "simple" contempt on the part of Mr. Holeski for his "misguided interpretation of the language of the Shared Parenting Plan" is immediately followed by an admonition to both parties that the plan does not permit the "tacking on" to any visitation period an additional seven days.

{¶69} Thus, the court's order determining the motion to show cause relative to parenting time is clear, unambiguous, and final as the trial court in the exercise of its discretion chose not to impose any punishment. Therefore, there is no further action to be taken by the trial court. The question has been finally adjudicated and is appealable.

{¶70} Thus, I would affirm the trial court's decision in toto.