

Delaney, J.

{¶1} Defendant-Appellant Tonya Hardy appeals the October 6, 2008 judgment entry of the Licking County Court of Common Pleas, Domestic Relations Division, finding Appellant in contempt of court for failure to pay guardian ad litem fees. Appellee is Troy Reed, the guardian ad litem. Plaintiff Markane Raleigh did not file a brief in this case.

{¶2} For the reasons that follow, we affirm the decision of the Licking County Court of Common Pleas, Domestic Relations Division.

STATEMENT OF THE FACTS AND THE CASE

{¶3} Appellant and Plaintiff are the parents of two minor daughters. Appellant and Plaintiff are not married.

{¶4} On August 15, 2002, Plaintiff filed a complaint to determine parentage of one Minor Child, M.R., and for custody of the minor children. The complaint was filed with the Licking County Court of Common Pleas, Domestic Relations Division, pursuant to the jurisdiction conferred to the Domestic Relations Division by R.C. 2301.03(S). With Appellant's answer and counterclaim for support filed on September 20, 2002, Appellant filed an affidavit of indigency requesting that she be permitted to proceed in the action without prepayment of costs. The trial court granted her request.

{¶5} Plaintiff filed a motion for the appointment of a guardian ad litem pursuant to R.C. 3109.04(B)(2)(a) on February 3, 2003. The trial court granted the motion and appointed John Peters to serve as guardian ad litem ("GAL"). In the entry, Plaintiff was required to pay the \$500 deposit and the parties would share equally in the total costs of the GAL fees. (Judgment Entry, Feb. 3, 2003).

{¶6} On June 17, 2003, the parties entered into an agreed judgment entry of shared parenting. The parties complied with the terms of the shared parenting plan overall, but by 2006, the parties were unable to co-parent their children. Plaintiff filed a motion to terminate shared parenting and for reallocation of parental rights and responsibilities on April 7, 2006. Plaintiff was concerned about the children's mental and physical development while under Appellant's care. By agreed judgment entry, the trial court appointed Appellee as GAL for the minor children on May 11, 2006.

{¶7} The trial court dismissed Plaintiff's motion to terminate shared parenting on December 12, 2006, for Plaintiff's failure to file the mandatory jurisdictional parenting affidavit. The trial court stated in its judgment entry that if Plaintiff re-filed the motion, Appellee would continue as the GAL for the minor children. Plaintiff re-filed the Motion on January 3, 2007. An amended motion was filed on January 12, 2007.

{¶8} An oral hearing on Plaintiff's motion was held before a Magistrate on May 24, 2007 and August 17, 2007. Based upon the evidence presented at the hearing, the Magistrate granted Plaintiff's motion to terminate the shared parenting decree and designated Plaintiff as the residential parent for the two minor children. (Magistrate's Decision, Aug. 20, 2007). In the Magistrate's decision, the Magistrate stated:

{¶9} "1. Each of the parties shall be responsible to pay a portion of the Guardian *ad litem* fees (excluding the initial deposit(s) made by plaintiff) equal to his or her respective percentages of the parties' combined income as shown on line 16 of the attached child support work sheet. All Guardian *ad litem* fees are to be considered in the nature of child support and constitute a domestic support obligation as defined by

the United States Bankruptcy Code, as amended, effective October 17, 2005. As such, the fees are not dischargeable in bankruptcy.”

{¶10} Appellee filed his motion for payment on September 20, 2007 requesting payment of GAL fees as stated in the August 20, 2007 Magistrate’s decision. Pursuant to an agreed judgment entry filed October 11, 2007, the trial court ordered the parties to pay the GAL fees as follows:

{¶11} “The Court further ORDERS that the parties shall pay owing fees and expenses in the amount of \$4,850.00 to the Guardian ad Litem within thirty (30) days from the filing of this judgment entry. Of the owing fees, the Plaintiff’s share shall be \$3,739.84 and the Defendant’s share shall be \$1,110.16.

{¶12} “All Guardian ad Litem fees in this case are to be considered in the nature of child support and constitute a domestic support obligation as defined by the United States Bankruptcy Code, as amended, effective October 17, 2005. The Court enters this order with the express intention that the resulting financial obligation arises from professional services benefiting the minor children in this case and that the fees are not dischargeable in bankruptcy.”

{¶13} On March 11, 2008, Plaintiff filed an *ex parte* motion for an order suspending parenting time of Appellant based upon allegations of sexual abuse perpetrated by Appellant’s son on the two minor children while under Appellant’s care. In response to the motion, Appellant filed an application for a court appointed attorney with an affidavit of indigency on March 17, 2008. The trial court denied the motion, finding that Appellant was not entitled to legal representation because there was no current contempt action against Appellant.

{¶14} A hearing was held on the Motion on March 26, 2008. The Magistrate continued the matter to allow an investigation into the matters by the GAL.

{¶15} On April 28, 2008, the trial court sua sponte issued a judgment entry ordering Appellant to appear at a hearing to show cause as to why she should not be held in contempt for failing to pay the GAL fees as previously ordered by the trial court. The matter came on for hearing before the Magistrate on May 12, 2008. Appellant testified at the hearing as to her capability to pay the GAL fees, stating that she had recently gained sporadic employment and would be able to afford \$10 per week or \$40 per month to pay the GAL fees. (May 12, 2008 Hrg., p. 6). The remainder of the hearing concerned the sexual abuse allegations against Appellant's son and the termination of Appellant's parenting time.

{¶16} The Magistrate issued his decision on May 20, 2008. The Magistrate found Appellant to be not credible. He did not believe that Appellant would abide by an approximate two-year payment plan when she had not worked with the GAL to arrange a payment agreement since the time of the October 11, 2007 judgment entry. The Magistrate found Appellant to be in contempt of the October 11, 2007 judgment entry and sentenced Appellant to 15 days in the Licking County Justice Center. The sentence was suspended on the condition that Appellant comply with the order to pay the sum of \$125.00 per month. The Magistrate further granted Appellee a judgment against Appellant in the sum of \$1016.16, plus statutory interest, with the judgment being satisfied as set forth above.

{¶17} Appellant filed objections to the Magistrate's decision in regards to the contempt finding on August 1, 2008. The trial court issued its opinion on October 1,

2008, and judgment entry on October 6, 2008, sustaining the contempt finding. The trial court, however, reduced Appellant's sentence to three days in jail suspended on the condition that Appellant comply with an order that she pay \$40.00 per month.

{¶18} It is from this decision Appellant now appeals.

{¶19} Appellant raises two Assignments of Error:

{¶20} "I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT HELD MS. HARDY IN CONTEMPT FOR NON-PAYMENT OF GUARDIAN AD LITEM COSTS WHEN THE EVIDENCE IN THE RECORD ESTABLISHED MS. HARDY'S INABILITY TO PAY SUCH COSTS.

{¶21} "II. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING MS. HARDY IN CONTEMPT AND SENTENCING HER TO JAIL FOR NONPAYMENT OF GUARDIAN AD LITEM COSTS."

II.

{¶22} We will first address Appellant's second Assignment of Error. Appellant argues the trial court erred as a matter of law when it found Appellant in contempt of court for her failure to pay the Guardian ad Litem fees as ordered in the October 11, 2007 judgment entry.

{¶23} Appellant argues that as a matter of law, GAL fees are to be taxed as court costs under Ohio law. The duty to pay court costs is a civil obligation arising from an implied contract, and as such, it is a debt within the purview of Section 15, Article I of the Ohio Constitution, which forbids imprisonment for debt in civil actions. *Strattman v. Studt* (1969), 20 Ohio St.2d 95, 253 N.E.2d 749, paragraphs six and seven of the syllabus. Because GAL fees are to be taxed as court costs, Appellant argues that a

contempt proceeding is an improper mechanism to attempt to collect payment of court costs. Court costs may be recouped only through the methods available for the collection of civil judgments. *Id.*

{¶24} Appellee argues that the GAL fees in this case should not be considered court costs, but rather in the nature of support ordered by the court. As such, contempt is a proper proceeding in which to punish a party for his or her failure to obey a court order.

{¶25} In support of her second Assignment of Error, Appellant refers this Court to the case of *In re Bailey*, Hamilton App. No. C-060700, 2007-Ohio-4192. In that case, the Hamilton County Juvenile Court held the appellants in contempt of court for failure to pay fees for the services of a GAL in a custody case. *Id.* at ¶1. The appellants appealed the decision of the trial court and First District Court of Appeals held the contempt sanction to be improper under the application of Juv.R. 4(G). *Id.* at ¶16.

{¶26} The appellate court stated:

{¶27} “The authority to levy GAL fees against a party in a private custody action is found in Juv.R. 4(G), which is titled ‘Costs’ and which provides that ‘[t]he court may fix compensation for the services of appointed counsel and guardians ad litem, *tax the same as part of the costs* and assess them against the child, the child's parents, custodian, or other person in loco parentis of such child.’ (Emphasis added.)

{¶28} “Accordingly, if the juvenile court exercises its discretion to assess fees for the compensation of a GAL, it is directed to tax the fees as part of the costs of the proceedings. Because the fees are denoted court costs under Juv.R. 4(G), the

obligation to pay the fees is a civil obligation for which a party may not be incarcerated.”
Id. at ¶16-17.

{¶29} Upon review of *In re Bailey*, we find that it has no application to the present case. *In re Bailey* involved a custody case originating in the Hamilton County Juvenile Court for which the Juvenile Rules of Procedure apply. Juv.R. 1(A). The present case involving the allocation of parental rights is under the statutory jurisdiction of the Licking County Court of Common Pleas, Domestic Relations Division. Under R.C. 2301.03(S), the Licking County Court of Common Pleas, Domestic Relations Division has jurisdiction over the proceeding and does not have concurrent jurisdiction with the juvenile court division. As such, we find that Juv.R. 4(G) does not apply to this case.

{¶30} Appellant also refers this Court to Civ.R. 75(B)(2) in support of her argument that GAL fees are to be taxed as costs. Civ.R. 75 is entitled “Divorce, annulment, and legal separation actions.” Civ.R. 75(B)(2) states, “[w]hen it is essential to protect the interests of a child, the court may join the child of the parties as a party defendant and appoint a guardian ad litem and legal counsel, if necessary, for the child and tax the costs.”

{¶31} For similar jurisdictional reasons, we find Civ.R. 75(B)(2) to also be inapplicable to the present case. The within case does not involve a divorce, annulment or legal separation action. Civ.R. 75(B)(2) is therefore inapplicable to this case.

{¶32} As the above rules are inapplicable to the present case, we first look to the Local Rules of the Licking County Court of Common Pleas, Domestic Relations

Division. Local Rule 29.15 addresses the fees a GAL shall be entitled. Appellant specifically raises Local Rule 29.15(b) as dispositive of this matter:

{¶33} “If a Guardian Ad Litem is requested by an indigent party who has filed a poverty affidavit, the Guardian Ad Litem’s fee shall be assessed as court costs and payment may be made in incremental payments. If both parties are found to be indigent the court may direct the Guardian Ad Litem fees to be paid from county funds.”

{¶34} Appellant states she filed a poverty affidavit with her motion for appointment of counsel on March 17, 2008. The trial court reviewed the documents and denied Appellant’s motion on March 24, 2008. The trial court, Appellant argues, should have used that poverty affidavit in application to Local Rule 29.15(b) and taxed the GAL costs as fees. We find that argument to be unpersuasive as Plaintiff filed the original motion for the appointment of a GAL on February 3, 2003, not Appellant, who is not an indigent party.

{¶35} Second, we will look to how the trial court ordered the GAL fees to be paid in order to determine whether the GAL fees should be considered support or costs. The October 11, 2007 agreed judgment entry stated:

{¶36} “The Court further ORDERS that the parties shall pay owing fees and expenses in the amount of \$4,850.00 to the Guardian ad Litem within thirty (30) days from the filing of this judgment entry. Of the owing fees, the Plaintiff’s share shall be \$3,739.84 and the Defendant’s share shall be \$1110.16.

{¶37} “All Guardian ad Litem fees in this case are to be considered in the nature of child support and constitute a domestic support obligation as defined by the United States Bankruptcy Code, as amended, effective October 17, 2005. The Court enters

this order with the express intention that the resulting financial obligation arises from professional services benefiting the minor children in this case and that the fees are not dischargeable in bankruptcy.”

{¶38} Instructive in the interpretation of the above language to determine whether it should be considered support or costs is the case of *In re Lever* (N.D. Ohio 1991), 174 B.R. 936. The court in *Lever* was required to determine whether GAL fees were dischargeable in bankruptcy. In order to make such a determination, the court closely examined the *nature* of the debt, whether it could be considered “support.”

{¶39} In the first part of the court’s analysis, the *Lever* court reflected upon the purpose for which a GAL is appointed. The record in that case included expert testimony with respect to the numerous duties of a GAL, especially in complicated custodial matters. One expert testified, “* * * there is a need for an independent person who can relate to the minor child, and a GAL plays a crucial role in this regard due to a child’s fragility. The focus of the GAL’s duty is that which reflects the best interest and welfare of the minor child. An effective GAL will address all aspects of the child’s life.” *Id.* at 940. As in this case, the GAL was appointed pursuant to R.C. 3109.04(B)(2), so that the court could take in account the best interests of the child when allocating parental rights.

{¶40} The next part of the *Lever* court’s analysis required the court to examine whether the nature of the debt had the effect of providing support for the minor child. *Id.* at 942. The court found that a GAL is to be appointed when it is necessary to protect the best interests of the child. In *Lever*, the GAL had been appointed to protect the interests of a minor child in a divorce action where there was an allegation of sexual

abuse of the child. The GAL duties in that case included investigation, monitoring court proceedings, and mediation. *Id.* The court found that the “totality of the factors substantially demonstrated that the statutory duties of a GAL were performed by the Plaintiff [GAL] in this case, and the nature of such services rendered is clearly within the nature of support to meet the needs of the minor child. The statutory purpose and duties of a GAL are premised to provide support for the minor child.” *Id.*

{¶41} The record in this case demonstrates a majority of the GAL fees were generated due to the protracted custody battle between Appellant and Plaintiff. Allegations were made that Appellant was not meeting the children’s medical and developmental needs resulting in the termination of the shared parenting plan on August 20, 2007. The matter became further complicated when the daughters revealed to Plaintiff’s fiancée that they may have been sexually abused by Appellant’s son while in Appellant’s care. (May 12, 2007 Hrg., p. 26).

{¶42} The record further demonstrates the GAL was actively involved in all aspects of the investigation and litigation of these matters, resulting in his motion for payment of GAL fees in the amount of \$4,850.00. We find that similar to the *Lever* case, Appellee was performing the duties of a GAL and the nature of the services rendered was to meet the needs of the minor children.

{¶43} We find the GAL fees in this case to be in the nature of support, rather than court costs, based on: (1) the language of the October 11, 2007 agreed judgment entry stating that the GAL fees were in the nature of support; (2) the persuasive authority of *Lever*, and (3) the duties performed by the GAL to protect the best interests

of the minor children. This determination is further bolstered by the inapplicability of Juv.R. 4(G) and Civ.R. 75(B)(2) to the instant matter.

{¶44} As such, we find the trial court did not err as a matter of law in conducting a contempt proceeding against Appellant for her failure to pay her portion of the GAL fees pursuant to the October 11, 2007 judgment entry.

{¶45} Appellant's second Assignment of Error is overruled.

I.

{¶46} Appellant argues in her first Assignment of Error that the trial court abused its discretion in finding Appellant in contempt for nonpayment of the GAL fees when Appellant presented evidence at the May 12, 2008 hearing that she could not pay the GAL fees. We disagree.

{¶47} "A trial court may employ sanctions to coerce a party who is in contempt into complying with a court order. *Peach v. Peach*, Cuyahoga App. Nos. 82414, and 82500, 2003-Ohio-5645, at ¶37. Any sanction for civil contempt must allow the party who is in contempt an opportunity to purge the contempt. *Carroll v. Detty* (1996), 113 Ohio App.3d 708, 712, 681 N.E.2d 1383. A trial court abuses its discretion by ordering purge conditions which are unreasonable or where compliance is impossible. *Burchett v. Miller* (1997), 123 Ohio App.3d 550, 552, 704 N.E.2d 636. If a party makes a good faith effort to pay support, contempt is not justified. *Courtney v. Courtney* (1984), 16 Ohio App.3d 329, 475 N.E.2d 1284. The burden to show an inability to pay is on the party being held in contempt. *Danforth v. Danforth* (Apr. 15, 2001), Cuyahoga App. No. 78010." *Farrell v. Farrell*, Licking App. No. 2008-CA-0080, 2009-Ohio-1341, ¶15 citing *Baker v. Mague*, Cuyahoga App. No. 82792, 2004-Ohio-1259, ¶14.

{¶48} Appellant appeared at the May 12, 2008 show cause hearing without legal counsel. She testified on her own behalf that she had only recently gained sporadic employment. (May 12, 2008 Hrg., 6). She offered to make a payment arrangement during her direct testimony, but could only offer \$10 per week or \$40 per month to pay her \$1,110.16 GAL fee. Id.

{¶49} Appellant's portion of the GAL fees was determined by Line 16 of the child support worksheet filed with the Magistrate's Decision of August 20, 2007. Line 16 calculated that Appellant's percentage of income to total was 22.89%. Plaintiff's percentage to income to total was 77.11%. Appellee's Motion for Payment of Guardian ad Litem filed on September 20, 2007, stated the total GAL fees were \$4,850.00. Plaintiff's portion was \$3,739.84. Appellant's portion was \$1,110.16.

{¶50} In the trial court's opinion adopting the Magistrate's Decision as to the contempt finding, the trial court noted the "magistrate doubted the defendant's credibility and trustworthiness. This impacted the defendant's argument and supporting evidence regarding defendant's inability to pay." (Opinion, Oct. 1, 2008). The trial court further noted, "the defendant's inaction regarding the arrangement of any periodic payment also impacted the magistrate's decision."

{¶51} As a reviewing court, we neither weigh the evidence nor judge the credibility of witnesses. Our role is to determine whether there is relevant, competent, and credible evidence upon which the fact finder could base its judgment. *Cross Truck v. Jeffries* (Feb. 10, 1982), Stark App. No. CA-5758. Accordingly, upon review of the record, we hold the trial court's finding that Appellant did not meet her burden in

establishing her inability to pay was not an abuse of discretion. In fact, the trial court adopted the payment plan suggested by Appellant.

{¶52} Appellant's first Assignment of Error is overruled.

{¶53} The judgment of the Licking County Court of Common Pleas, Domestic Relations Division, is affirmed.

By: Delaney, J.

Edwards, P.J. and

Farmer, J. concur.

HON. PATRICIA A. DELANEY

HON. JULIE A. EDWARDS

HON. SHEILA G. FARMER

PAD:kgb

