[Cite as *Flowers v. Flowers*, 2011-Ohio-5972.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Kelly Flowers,	:	
Plaintiff-Appellant,	:	
		No. 10AP-1176
v.	:	(C.P.C. No. 99DR-11-4654)
James R. Flowers,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on November 17, 2011

Jack L. Moser, *Jr.*, for appellant.

Gerrity & Burrier, *Ltd.*, and *Timothy D. Gerrity*, for appellee.

APPEAL from the Franklin County Court of Common Pleas,
Division of Domestic Relations.

SADLER, J.

{¶1} Plaintiff-appellant, Kelly Vandenberge, f.k.a. Flowers, appeals from the November 22, 2010 decision of the Franklin County Court of Common Pleas, Division of Domestic Relations, finding her in contempt of court. For the reasons that follow, we affirm.

{¶2} The marriage of appellant and defendant-appellee, James R. Flowers, was terminated on September 28, 2001, pursuant to an Agreed Judgment Entry/Decree of Divorce. One child was born as issue of the marriage on December 26, 1997, and in the original decree, appellant was designated the residential parent and legal custodian of the child. Because appellant resided in Ohio and appellee resided in Florida, the decree included the long-distance model visitation schedule set forth in Franklin County Loc.R. 27. Following the divorce, a number of post-decree motions were filed, mostly concerning parental visitation; however, it appears that these motions were ultimately withdrawn or dismissed.

{¶3} On August 6, 2007, the trial court adopted the parties' Agreed Shared Parenting Plan ("SPP") via a Shared Parenting Decree. The SPP provided that while appellant would be the residential parent for school placement purposes, each party would be considered the residential parent and legal custodian of the child at the times they had physical custody of him pursuant to the parenting schedule. A few months after the SPP was adopted by the court, appellant filed, on February 20, 2008, a motion to terminate or, alternatively, to modify the SPP. This motion was followed by appellant's May 21, 2008 motions for reallocation of parental rights and responsibilities and suspension of appellee's summer parenting time. After involvement from the trial court, the issues pertaining to appellee's summer visitation were resolved.

{¶4} On July 7, 2010, appellee filed a motion for contempt, alleging appellant's failure to comply with previous orders of the court concerning visitation. Appellee's July 7, 2010 contempt motion came before the trial court for hearing on July 30 and August 4 and 5, 2010. In addition to the contempt motion, the trial court also considered the motion

of the guardian ad litem ("GAL"), asking the court to address the $1,725 in past-due fees. After consideration of the evidence, including an in camera interview of the child in the presence of the GAL, the trial court rendered a decision on November 22, 2010, finding appellant in contempt of court for failing to comply with the SPP and denying appellee his parenting time. The trial court ordered that appellant pay appellee's attorney's fees in the amount of $15,000 within 120 days of the trial court's decision. Additionally, appellant was sentenced to five days in jail. Appellant's jail sentence was "suspended on the condition that she fully complies with the letter and spirit of the mandates set forth herein." (Decision at 11.) Thus, according to the decision, appellant could purge the contempt by paying $15,000 in appellee's attorney's fees and complying with the decision's mandates, to wit: (1) paying for the child's nonstop airfare, including unaccompanied minor fees, to the airport closest to appellee's residence for the ordered make-up visitation periods; (2) facilitating the exercise of appellee's parenting time; and (3) paying 80 percent of the GAL fees.

{¶5} This appeal followed, and appellant brings the following five assignments of error for our review:

> [1.] TRIAL COURT ERRED, ABUSED ITS DISCRETION, AND RULED AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE WHEN IT FOUND APPELLANT KELLY (FLOWERS) VANDENBERGE IN CONTEMPT OF COURT.
>
> [2.] THE TRIAL COURT ERRED, ABUSED ITS DISCRETION, AND RULED AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE WHEN IT ORDERED APPELLANT KELLY (FLOWERS) VANDENBERGE TO PAY APPELLEE JAMES FLOWERS THE SUM OF $15,000.00 AS AND FOR ATTORNEY FEES.

> [3.] THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT ALLOCATED THE PAYMENT OF GUARDIAN AD LITEM FEES, ORDERING APPELLANT TO PAY 80% AND APPELLEE TO PAY ONLY 20% OF THE FEES.
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> [4.] TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN GRANTING APPELLEE JAMES FLOWERS "LIBERAL" TELEPHONE PARENTING TIME AND REQUIRING APPELLANT KELLY (FLOWERS) VANDENBERGE TO "FACILITATE" SAID PARENTING TIME BETWEEN 5 P.M. AND 7 P.M. ON NON-POSSESSORY DAYS.
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> [5.] TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT ORDERED THAT APPELLANT KELLY (FLOWERS) VANDENBERGE "SHALL PROVIDE" NON-STOP AIRFARE FOR THE CHILD, INCLUDING ANY REQUIRED UNACCOMPANIED MINOR FEES, TO THE AIRPORT CLOSEST TO RESIDENCE OF APPELLEE JAMES FLOWERS.

{¶6} Appellant's five assignments of error arise out of the trial court's November 22, 2010 decision that addressed the GAL's oral motion for fees and appellee's July 7, 2010 motion for contempt.

{¶7} Contempt results when a party before a court disregards or disobeys an order or command of judicial authority. *Fidler v. Fidler*, 10th Dist. No. 08AP-284, 2008-Ohio-4688, ¶10, citing *First Bank of Marietta v. Mascrete, Inc*. (1998), 125 Ohio App.3d 257, 263. Contempt of court may also involve an act or omission substantially disrupting the judicial process in a particular case. *Fidler* at ¶10, citing *In re Davis* (1991), 77 Ohio App.3d 257, 262. The law surrounding contempt was created to uphold and ensure the effective administration of justice, secure the dignity of the court, and affirm the supremacy of law. *Fidler* at ¶10, citing *Cramer v. Petrie*, 70 Ohio St.3d 131, 133, 1994-Ohio-404.

{¶8} Contempt may be characterized as either direct or indirect. *Sansom v. Sansom*, 10th Dist. No. 05AP-645, 2006-Ohio-3909, ¶23. Direct contempt occurs in the presence of the court and obstructs the administration of justice. R.C. 2705.01; *Sansom*; *Turner v. Turner* (May 18, 1999), 10th Dist. No. 98AP-999. " 'Since direct contempt interferes with the judicial process, the court may summarily deal with it in order to secure the uninterrupted and unimpeded administration of justice.' " *Sansom* at ¶23, quoting *Turner*. By contrast, indirect contempt involves behavior that occurs outside the presence of the court and demonstrates a lack of respect for the court or its lawful orders. Id.

{¶9} Courts may further classify contempt as civil or criminal, depending upon the character and purpose of the contempt sanctions. *Sansom* at ¶24. Civil contempt is remedial or coercive in nature and will be imposed to benefit the complainant. Id., citing *Pugh v. Pugh* (1984), 15 Ohio St.3d 136, 139. The burden of proof for civil contempt is clear and convincing evidence. *Sansom* at ¶24. A sanction for civil contempt must provide the contemnor the opportunity to purge himself or herself of the contempt. Id. " 'The contemnor is said to carry the keys of his prison in his own pocket * * * since he will be freed if he agrees to do as so ordered.' " Id., quoting *Brown v. Executive 200, Inc*. (1980), 64 Ohio St.2d 250, 253.

{¶10} In contrast, criminal contempt sanctions are not coercive, but punitive in nature. *Sansom* at ¶25, citing *State ex rel. Corn v. Russo*, 90 Ohio St.3d 551, 555, 2001-Ohio-15. Such sanctions are designed to punish past affronts to the court and to vindicate the authority of the law and the court. *Sansom* at ¶25. 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., citing *Brown* at

254. The burden of proof for criminal contempt is beyond a reasonable doubt. *Sansom* at ¶25, citing *Brown* at 251. Criminal contempt requires proof of a purposeful, willing or intentional violation of a trial court's order. Courts typically view contempt proceedings for failure to appear as criminal in nature. *Samsom* at ¶25. Normally, contempt proceedings in domestic relations matters are indirect and civil in nature because their purpose is to coerce or encourage future compliance with the court's orders and they concern behavior that occurs outside the presence of the court. *Fidler* at ¶11; see also *Foley v. Foley*, 10th Dist. No. 05AP-242, 2006-Ohio-946, ¶34.

{¶11} When reviewing a finding of contempt, including a trial court's imposition of penalties, an appellate court applies an abuse of discretion standard. *Fidler* at ¶12, citing *In re Contempt of Morris* (1996), 110 Ohio App.3d 475, 479, citing *Dozer v. Dozer* (1993), 88 Ohio App.3d 296; *Arthur Young & Co. v. Kelly* (1990), 68 Ohio App.3d 287, 294. An abuse of discretion connotes more than an error of law or judgment; it implies the trial court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶12} Here, the trial court's order sentenced appellant to five days in jail, but suspended that sentence so that appellant could purge the contempt. The trial court's purpose clearly being coercive, we characterize the November 22, 2010 decision as an indirect civil contempt order.

{¶13} In her first assignment of error, appellant challenges the weight of the evidence upon which the trial court relied. Therefore, appellant " 'must demonstrate that the judgment is contrary to the greater weight of the credible evidence.' " *Fidler* at ¶14, quoting *Calhoun v. Calhoun*, 2d Dist. No. 21923, 2008-Ohio-405, ¶13. While appellant is

correct that the burden of proof in a criminal contempt proceeding is beyond a reasonable doubt, as previously stated, we are presented with a civil contempt proceeding, and, therefore, " '[t]he standard of proof in a civil contempt proceeding is by clear and convincing evidence.' " *Fidler* at ¶14, quoting *Jarvis v. Bright*, 5th Dist. No. 07CA72, 2008-Ohio-2974, ¶19, citing *Brown*.

{¶14} "The determination of 'clear and convincing evidence' is within the discretion of the trier of fact. We will not disturb the trial court's decision as against the manifest weight of the evidence if the decision is supported by some competent, credible evidence" supporting the movant's burden of proof. *Fidler* at ¶14, citing *C.E. Morris Co. v. Foley Constr. Co*. (1978), 54 Ohio St.2d 279. As the court explained in *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶24, citing *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, "[a] reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court. A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not."

{¶15} Appellant contends there is insufficient evidence in the record to demonstrate that she was in contempt of the trial court's orders. According to appellant, appellee's lack of parenting time occurred because he chose not to exercise it, not because appellant interfered with it. In support, appellant directs us to portions of the transcript in which the parties testified about visits that appellant voluntarily missed and an email in which appellee wrote in an apparently emotional correspondence to appellant that he "[would not] be exercising visitation henceforth." In contrast, appellee contends

the record is replete with evidence of appellant's "utter disregard" for the trial court's orders.

{¶16} We first note that in the November 22, 2010 decision, the trial court indicated its familiarity with this case by noting that "unfortunately, the parties are becoming 'break-time regulars' at Franklin County DRJ Court due to [appellant's] active coaching of and enabling the parties' minor child to violate [appellee's] parenting time rights." (Decision at 1.) Additionally, the court referenced appellant's concession that she voluntarily entered into the SPP filed on August 6, 2007, and her acknowledgement that Dr. Smalldon was of the opinion that shared parenting is in the child's best interest.

{¶17} Though recognizing that appellant blamed appellee for failing to utilize all of his available parenting time and maintaining only sporadic telephone contact with the child, the court concluded that appellant's "actions belie her words." (Decision at 6.) As examples, the court cited appellant's selling her home and moving in with her mother without informing appellee, as well as the phone logs submitted by appellee demonstrating his efforts to contact the child via telephone. The court found appellant's "deliberate attempts" to deny appellee parenting time were "despicable," and further characterized appellant's behavior as "especially egregious." (Decision at 11.)

{¶18} In support of her position that the trial court's decision is against the manifest weight of the evidence, appellant points primarily to her testimony and an email from appellee in which appellee stated he would not be exercising visitation "henceforth." In doing so, appellant ignores the testimony and evidence presented by appellee. Appellee testified to his need for the court's involvement in 2008 so that he could exercise his summer parenting time. Although appellee explained that the 2009 summer parenting

time was exercised successfully, communication between the parties apparently deteriorated resulting in the instant motion. According to appellee, he notified appellant in accordance with the SPP that he would be exercising his summer visitation on June 20, 2010; however, because appellant indicated to a third party facilitator that she would not be there, appellee did not arrive in Columbus on the twentieth. Instead, appellee arrived in Columbus on June 30, 2010, and appellee testified that when he went to the child's residence, the child was resistant to leave. According to appellee, it appeared that appellant was coaching the child in what to say from behind the door. Appellee also explained that he voluntarily did not exercise his parenting time from September 2009 to June 2010 because he could not afford to do so financially.[1] Additionally, appellee testified as to his state of mind when he composed the email stating he would not be exercising visitation henceforth.

{¶19} Given the trial court's characterization of appellant's behavior, it is clear that the court did not find appellant to be credible in her assertion that she has done everything in her power to comply with the current visitation orders. The trial court is in the best position to determine the credibility of the witnesses, and there is nothing to indicate the trial court erred in its credibility determination in this case. In view of the conflicting testimony and the trial court's credibility determination, we do not find that the trial court's contempt finding is against the manifest weight of the evidence.

{¶20} Accordingly, we overrule appellant's first assignment of error.

[1] Appellee testified that due to an August 2005 accident that resulted in severe injuries to his face and head, he has been deemed permanently disabled under his private disability insurance policy and earns $49,080 per year under the policy. Additionally, appellee testified that because of the accident he had to file for bankruptcy under Chapter 13.

{¶21} In her second assignment of error, appellant contends the trial court abused its discretion in ordering her to pay $15,000 of appellee's attorney's fees. An award of attorney's fees in a domestic relations action is committed to the sound discretion of the trial court. *Conley v. Conley* (Apr. 26, 1990), 10th Dist. No. 89AP-826, citing *Stuart v. Stuart* (1944), 144 Ohio St. 289. This court will not reverse an award of attorney fees absent a finding that the trial court abused its discretion. Id.

{¶22} The essence of appellant's argument is that instead of awarding fees pursuant to R.C. 3105.73(B), the trial court should have awarded fees pursuant to R.C. 3109.051(K), and, therefore, could only have awarded the fees that arose specifically in relation to the act of contempt. R.C. 3109.051(K) provides:

> If any person is found in contempt of court for failing to comply with or interfering with any order or decree granting parenting time rights issued pursuant to this section or section 3109.12 of the Revised Code or companionship or visitation rights issued pursuant to this section, section 3109.11 or 3109.12 of the Revised Code, or any other provision of the Revised Code, the court that makes the finding, in addition to any other penalty or remedy imposed, shall assess all court costs arising out of the contempt proceeding against the person and require the person to pay any reasonable attorney's fees of any adverse party, as determined by the court, that arose in relation to the act of contempt.

{¶23} Instead of awarding fees pursuant to R.C. 3109.051(K), the trial court cited R.C. 3105.73(B), which provides:

> In 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.

{¶24} The trial court stated that appellee provided credible testimony that, in total, he has expended more than $100,000 in attorney's fees trying to secure an equitable share of parenting time with the child, and that for "filings and hearings in spring/summer 2010 alone, he proffered an attorney fee bill in excess of $13,945, not including the instant hearing." (Decision at 10.) The court also noted appellee's evidence of room and board expenses incident to multiple days of attempting to coax the child to return to Florida with him.

{¶25} The parties stipulated that the fees incurred by appellee were reasonable and necessary. As noted previously, in finding appellant in contempt and ordering her to pay attorney's fees in the amount of $15,000, the trial court found appellant's behavior "especially egregious" and "despicable." Additionally, while under R.C. 3109.051(K), reasonable attorney's fees are automatically assessed to the prevailing party in a contempt action arising from the failure to comply with a visitation order, attorney's fees could have been sought and awarded under R.C. 3105.73(B), as the instant matter came about pursuant to a post-decree motion that arose out of the original divorce action. We find no authority mandating that the attorney's fees in the present case be awarded pursuant to R.C. 3109.051(K), as opposed to R.C. 3105.73(B), and we note that appellant has not provided this court with any such authority. *Erwin v. Erwin*, 3d Dist. No. 9-08-15, 2009-Ohio-407, ¶42 (no authority mandating that attorney's fees in domestic contempt proceeding be awarded pursuant to R.C. 3109.051(K), as opposed to R.C. 3105.73(B)).

Furthermore, we note that the trial court's decision specifically cited appellant's conduct in awarding appellee attorney's fees, as allowed for in R.C. 3105.73(B).

{¶26} For these reasons, we cannot discern that, pursuant to R.C. 3105.73(B), the trial court abused its discretion in awarding appellee a total of $15,000 in attorney's fees. Accordingly, appellant's second assignment of error is overruled.

{¶27} In her third assignment of error, appellant contends the trial court abused its discretion in requiring appellant to pay 80 percent of the GAL fees. According to appellant, the 80/20 allocation is "inequitable, unreasonable, and unconscionable" due to the other financial obligations for which she is responsible.

{¶28} The trial court has discretion over the amount of GAL fees, as well as the allocation to either or both of the parties. *Karales v. Karales*, 10th Dist. No. 05AP-856, 2006-Ohio-2963, ¶21, citing *Davis v. Davis* (1988), 55 Ohio App.3d 196, 200; *Robbins v. Ginese* (1994), 93 Ohio App.3d 370. Fees may be allocated based on the parties' litigation success and the parties' economic status. *Karales*. Moreover, it is proper to allocate GAL fees based upon which party caused the work of the GAL. *Karales*, citing *Jarvis v. Witter*, 8th Dist. No. 84128, 2004-Ohio-6628, ¶100, citing *Marsala v. Marsala* (July 6, 1995), 8th Dist. No. 67301.

{¶29} In the present case, the parties stipulated that the GAL "worked and generated fees" during the case. (Tr. 300.) Additionally, the parties submitted memoranda to the court regarding allocation. Appellee requested that appellant be responsible for 100 percent of the fees. In contrast, appellant requested that GAL interaction necessitated by a third party or the child should be allocated 50/50 between the parties, while in all other instances, the party initiating contact with the GAL should

pay 100 percent of the fees. The trial court expressly stated, "[w]hile [appellant's] position appears on its face logical and reasonable it completely glosses over the fact that the GAL's involvement in this case is largely necessitated by [her] blatant and repeated acts of parental alienation." (Decision at 1.) In fashioning the 80/20 allocation, the trial court expressly considered not only appellant's contemptuous conduct, but, also, appellee's unilateral cancellation of some visits and, what the trial court termed, his "indecisive emailing." (Decision at 2.) Though considering the actions of both parties, it is clear that the trial court believed appellant's alienating behavior necessitated and created the bulk of the work for the GAL. See *Marsala* (because mother's behavior in attempting to alienate the children from their father necessitated the GAL's involvement, mother was required to pay all of the GAL's fees).

{¶30} Upon review of the record, we do not find an abuse of discretion in the trial court's allocation of GAL fees, and, accordingly, we overrule appellant's third assignment of error.

{¶31} In her fourth assignment of error, appellant contends the trial court abused its discretion in granting "liberal" telephone parenting time to appellee and requiring appellant to "facilitate" the same between 5 p.m. and 7 p.m. on non-possessory days.

{¶32} If a party's visitation rights are contemptuously interfered with, a court may award compensatory parenting time or visitation to that party. R.C. 3109.051(K). A court's decision of whether or not to grant compensatory visitation will not be disturbed absent an abuse of discretion. *Rapp v. Pride*, 12th Dist. No. CA2009-12-311, 2010-Ohio-3138, ¶23, citing *Huff v. Huff* (Oct. 13, 1995), 2d Dist. No. 14823.

{¶33} The SPP provided that each parent may have daily telephone and/or email access to the child at reasonable times on non-possessory days. During the hearing, the court heard testimony from appellee that appellant sold her house and moved in with her mother and stepfather without informing appellee and that he discovered the move only after receiving a recorded message about the phone number being disconnected. Appellee also testified that he was told he was not permitted to call appellant's mother's home phone number, so he was left with only cellular phone access to appellant and the child; however, he often found that the cellular phones were either turned off or not answered. Though appellant testified appellee had only "sporadic" telephone contact with the child from September 2009 until March 2010, appellee produced telephone records showing over 100 attempts to call the child during that time frame.

{¶34} In fashioning the make-up periods of visitation, the trial court stated, "[m]oreover, [appellee] shall be granted LIBERAL telephone parenting time with [the child], and [appellant] is expected to FACILITATE that exercise of [appellee's] parenting time. He may initiate calls to her home telephone number or to the child's mobile phone number between the hours of 5 pm and 7 pm on non-possessory days." (Decision at 7.)

{¶35} According to appellant, the trial court's November 22, 2010 decision requires that the child be available for telephone calls from appellee between 5 p.m. and 7 p.m. every evening while with her. Appellant contends such an order interferes with the child's "after-school homework, sports, and extracurricular activities." (Appellant's brief, 17.) However, we find no evidence in the record to support this broad and conclusory assertion, nor does appellant direct us to any such evidence. Thus, we do not find this portion of the trial court's order to be unreasonable, arbitrary or unconscionable.

{¶36} Accordingly, we overrule appellant's fourth assignment of error.

{¶37} In her final assignment of error, appellant contends the trial court erred in ordering her to pay the child's airfare for specified visits to appellee. We are cognizant that the parties' SPP provides that appellee is responsible for transportation of the child, including all expenses, with the exception of the child's transportation to and from Port Columbus International Airport at the beginning and end portions of his parenting times. Additionally, appellee is required to notify appellant at least 96 hours in advance of any travel arrangements made on the child's behalf. Because the SPP requires appellee to assume the cost of the child's transportation, appellant asserts the portion of the November 22, 2010 decision requiring her to pay airfare and unaccompanied minor fees is unreasonable, arbitrary, and unconscionable. We disagree.

{¶38} The portion of the trial court's decision with which appellant takes issue requires appellant to pay the child's airfare for the ordered compensatory visitation. Specifically, the decision states that as a remedy for appellant's contemptuous interference with appellee's parenting time, "[appellee] shall enjoy the entirety of Christmas/winter break in 2010 and spring break 2011 – unless the parties are able to otherwise mutually negotiate and execute an alternate make-up schedule consisting of a minimum of 3 weeks. This shall be in addition to his normal allotment of parenting time with [the child]. *For these make-up periods*, [appellant] shall provide non-stop airfare for the child, including the required unaccompanied minor fees, to the airport closest to [appellee's] residence." (Decision at 6; emphasis added.)

{¶39} Hence, appellant is being ordered to bear the cost only of the nonstop airfare for the compensatory visitation that the court ordered to make up for the periods of

visitation missed due to appellant's contemptuous conduct. In finding appellant in contempt, the trial court found appellant's behavior constituted a "continued unwillingness/inability to ensure that the minor child actually attends his court-ordered parenting time" with appellee. (Decision at 6.) Moreover, the trial court noted the child's willfulness was fully nurtured by appellant.

{¶40} Based on the record, we do not find an abuse of the trial court's discretion in ordering appellant to pay the airfare costs associated with the ordered compensatory visitation. Accordingly, we overrule appellant's fifth assignment of error.

{¶41} For the foregoing reasons, appellant's five assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, is hereby affirmed.

Judgment affirmed.

TYACK and CONNOR, JJ., concur.

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