# IN THE COURT OF APPEALS OF OHIO FOURTH APPELLATE DISTRICT JACKSON COUNTY

WILLIAM SCOTT KING, : Case No. 13CA8

Plaintiff-Appellee,

: DECISION AND

v. : <u>JUDGMENT ENTRY</u>

BRITTNEY T. KING, N/K/A

BRITTNEY T. SCOTT, : RELEASED: 12/29/2014

Defendant-Appellant. :

# APPEARANCES:

Brittney Scott, Tiffin, Ohio, pro se Appellant.

William King, Wellston, Ohio, pro se Appellee.

Harsha, J.

- **{¶1}** Brittney King, n/k/a Brittney Scott, appeals from the trial court's judgment reallocating the parties' parental rights and designating William King as the residential and custodial parent of their two youngest children. Initially she contends that the court erred under Civ.R. 52 by denying her request for findings of fact and conclusions of law for its entry continuing William King's temporary custody of their two youngest children. However, Civ.R. 52's requirement that the trial court issue findings of fact and conclusions of law upon a party's request only applies to judgments. Because the court's temporary order was subject to revision, it was not a judgment and Civ.R. 52 did not apply.
- **{¶2}** Next Scott argues that the trial court abused its discretion by failing to appoint a guardian ad litem (GAL) and interview the children pursuant to R.C. 3109.04(B)(1). That statute only requires a trial court to appoint a GAL if it intends to

conduct an in-camera interview of the children. Because the court did not interview the children before entering its final judgment, and Scott did not request such an interview, the statute did not mandate the appointment of a GAL.

- {¶3} Scott also claims that the trial court abused its discretion by failing to issue a summons compelling King to respond to and defend her motions for contempt.

  Because King appeared to contest the contempts, Scott cannot show she suffered any prejudice from the court's purported failure to issue subpoenas. Moreover, Scott lacks standing to raise a purported denial of her opponent's due process rights.
- Recause she retained custody of their oldest son and King was already in arrears, Scott argues that the trial court abused its discretion by granting King's motion to suspend child support after the court continued his temporary custody of their two youngest children. However, after suspending its previous child support order, the trial court recalculated the support based on Scott having custody of one child and King having custody of two children and ordered him to pay an additional sum towards his arrears each month. The court's order was retroactive to the day King filed his motion to modify support and thus there was no suspended period of time that King was not required to pay support. So, we reject Scott's argument.
- {¶5} Scott also claims that the trial court erred by failing to include a child support worksheet in the record. However, the Jackson County Child Support Enforcement Agency (CSEA) filed a notice with the court of the recalculated child support and attached a completed child support computation worksheet based on split parental rights and responsibilities. The magistrate adopted CSEA's notification and thus the completed worksheet became part of the record.

- {¶6} Scott argues that the trial court abused its discretion by failing to hold a hearing before ruling on five of the contempt motions that she filed after the final hearing date. In its September 30, 2013 entry the court specifically identified three contempt motions she filed before the final hearing date. However, Scott claims that because the five motions she filed after the hearing were still pending when the court filed its entry, its conclusory statement "the contempt motions are denied," also referred to these motions. We disagree. In a later entry the court specifically addressed several of the contempt motions that Scott identifies and scheduled a hearing on the motions. This directly contradicts her argument that the court overruled her motions in its September 30 judgment entry and we find her argument meritless.
- {¶7} Scott also attacks the merits of the trial court's judgment and argues that the court abused its discretion by modifying its previous decree and designating King as the residential parent and legal custodian of their two youngest children. The trial court followed the mandates of R.C. 3109.04 and first appropriately considered whether there had been a change of circumstances since its last decree. Scott admits she was convicted of misdemeanor charges of aiding and abetting and receiving stolen property and sentenced to a 20-day jail term after the court's decree. She also admits that her two oldest children, one of whom was a minor at the time, were involved in the crimes. Thus, we cannot say the trial court abused its discretion by finding a change of circumstances had occurred since its last decree.
- {¶8} The trial court also considered whether it was in the children's best interests to reallocate the parties' parental rights and responsibilities. Scott argues that the court abused its discretion in making its best interests determinations by failing to

consider King's actions and solely relying on her convictions. The court found that the children had adjusted well to King's home and new school, their grades had improved, and they were involved in several community activities. Because the trial court is in the best position to evaluate the children's situation, we will not second-guess its best interest determination where it has some factual and rational support in the award.

{¶9} Finally, Scott contends the trial court abused its discretion by failing to find "the child's present environment endangers significantly his physical health or his mental, moral, or environmental development." However, to support her argument she points to an outdated version of the statute. And because the current statutory provision contains no such requirement, we reject her argument.

#### I. FACTS

- {¶10} Scott appeals from the trial court's judgment reallocating the parties' parental rights and responsibilities for her two youngest children. In the divorce decree the trial court found it was in the children's best interests to designate Scott as their residential parent and legal custodian. Subsequently, she pleaded guilty to misdemeanor charges of aiding and abetting and receiving stolen property and received a 20-day jail sentence.
- {¶11} As a result of Scott's incarceration King filed an ex parte motion to modify allocation of parental rights and custody. He asked the court to modify its previous order and designate him as the residential parent and legal custodian of the parties' three minor children. The trial court granted King's ex parte motion and designated him as the temporary residential parent and legal custodian of the children. Scott filed a motion objecting to the trial court's temporary order and requested an evidentiary hearing.

After a hearing the court continued King's temporary custody of the parties' two youngest children, but designated Scott as the residential and custodial parent of their oldest son.

{¶12} Subsequently both parties filed numerous motions, including motions for contempt; the court held a hearing on King's motion to reallocate the parties' parental rights and responsibilities and Scott's pending motions for contempt. After both parties testified the court found that Scott failed to prove her charges of contempt and denied the motions. In addition it found that a substantial change of circumstances had occurred under R.C. 3109.04(E)(1) based on Scott's convictions and incarceration and that a modification of its prior decree was necessary to serve the best interests of the parties' youngest two children. The court designated King as the residential parent of the parties' two youngest children and granted Scott parenting tine in accordance with the standard court schedule. It also noted that their oldest son was no longer a minor child. Scott appeals the court's entry.

#### II. ASSIGNMENTS OF ERROR

**{¶13}** Scott raises eight assignments of error for our review:

- 1. TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT'S TIMELY REQUEST FOR FINDINGS OF FACT AND CONCLUSION[SIC] OF LAW ON THE APRIL 29, 2013 JUDGMENT ENTRY.
- 2. TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO APPOINT A GUARDIAN AD LITEM AND FAILED TO INTERVIEW THE PARTIES' SON, AFTER APPELLANT AND THE PARTIES' SON BOTH REQUESTED A GUARDIAN AD LITEM AND TO BE INTERVIEWED.
- 3. TRIAL COURT ABUSED ITS DISCRETION WHEN IT SUSPENDED APPELLEE WILLIAM KING'S CHILD SUPPORT ORDER AND VIOLATED APPELLANT'S DUE PROCESS.

- 4. TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO COMPLY WITH THE MANDATE OF R.C. 2705.031(C) AND ISSUE A SUMMONS OF APPELLANT'S CONTEMPT MOTIONS AND INSTEAD DENIED EACH OF APPELLANT'S CONTEMPT MOTIONS AGAINST APPELLEE.
- 5. TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO ENSURE A COMPLETED CHILD SUPPORT WORKSHEET WAS INCLUDED IN THE RECORD WHEN THE TRIAL COURT MODIFIED CUSTODY.
- 6. TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO CONDUCT A CONTEMPT HEARING BEFORE DENYING APPELLANT'S CONTEMPT MOTIONS WHEN APPELLEE STOPPED APPELLANT'S VISITATION FOR (2) MONTHS AND INSTEAD ENTERED A SEPARATE ENTRY ORDERING APPELLEE TO JUST OBEY ALL COURT ORDERS AND NOT DENY APPELLANT VISITATIONS WITHOUT A COURT ORDER.
- 7. TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO COMPLY WITH R.C. 3109.04 AND MODIFIED CUSTODY FROM APPELLANT TO APPELLEE.
- 8. TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO CONSIDER THE BEST INTEREST OF THE CHILDREN DURING ANY TIME OF THE PROCEEDINGS.

#### III. LAW AND ANALYSIS

### A. Findings of Fact & Conclusions of Law

{¶14} In her first assignment of error Scott claims that the trial court abused its discretion by denying her request for findings of fact and conclusions of law for its April 29, 2013 entry continuing King's temporary custody of their two youngest children. Specifically, she asserts that under Civ.R. 52 the trial court had a duty to issue findings of fact and conclusions of law upon her request. We review this assertion as a matter of law, not under an abuse of discretion standard as proposed by Scott.

#### **{¶15}** Civ.R. 52 states:

When questions of fact are tried by the court without a jury, judgment may be general for the prevailing party unless one of the parties in writing requests otherwise before the entry of judgment pursuant to Civ.R. 58, or not later than seven days after the party filing the request has been given notice of the court's announcement of its decision, whichever is later, in which case, the court shall state in writing the conclusions of fact found separately from the conclusions of law.

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{¶16} "[A] trial court has a mandatory duty under Civ.R. 52 to issue findings of fact and conclusions of law upon request timely made." *In re Adoption of Gibson*, 23 Ohio St.3d 170, 173, 492 N.E.2d 146 (1986). Moreover, "Civ.R. 52, requiring separate findings of fact and conclusions of law upon timely request, applies to change of custody proceedings which involve questions of fact tried and determined by the court without a jury." *Werden v. Crawford*, 70 Ohio St.2d 122, 435 N.E.2d 424 (1982), syllabus. However, by its terms Civ.R. 52 concerns only "judgments." *State ex rel. Add Venture, Inc. v. Gillie*, 62 Ohio St.2d 164, 165, 404 N.E.2d 151 (1980). The main requirement of Civ.R. 52 is "that a request for findings of fact and conclusions of law be based on a judgment." *State ex rel. Papp v. James*, 69 Ohio St.3d 373, 379, 632 N.E.2d 889 (1994). Accordingly, the trial court's April 29, 2013 entry must qualify as a judgment for Civ.R. 52 to apply. *See James* at 379.

**{¶17}** "Judgment," as defined by Civ.R. 54(A) "includes a decree and any order from which an appeal lies as provided in R.C. 2505.02." Temporary orders allocating custody between parents are interlocutory orders, not final judgments. *Huffer v. Huffer*, 10th Dist. Franklin No. 09AP-574, 2010-Ohio-1223, ¶ 12, citing *State ex rel. Thompson v. Spon*, 83 Ohio St.3d 551, 554, 700 N.E.2d 1281 (1998). And because the trial court's order continuing King's temporary custody was interlocutory in nature, it was subject to revision and "no appeal could have properly been taken." *Amsbary v. Little*, 4th Dist.

Washington No. 88CA31, 1990 WL 71923, \*4 (May 25, 1990). Because the trial court's April 29, 2013 order was interlocutory and thus not a judgment under Civ.R. 54(A), Civ. R. 52 does not apply. The court did not err by denying Scott's request for findings of fact and conclusions of law.

# B. Request for GAL & In-camera Interview

- {¶18} In her second assignment of error Scott argues that the trial court abused its discretion by failing to appoint a GAL and interview the children pursuant to R.C. 3109.04(B)(1) upon her and her son's request.
- **{¶19}** To support her assignment of error Scott points to the motions she filed on March 15, 2013, and March 22, 2013, and claims she requested a GAL in each filing. However her March 15, 2013 motion only addressed objections to the court's ex parte order designating King as the temporary residential parent and legal custodian of the children. Thus, we focus on her March 22, 2013 "motion for a guardian ad litem."
- {¶20} Scott made her request for a GAL in the March 22 motion "pursuant to [R.C.] 2151.281." That statute applies to juvenile court proceedings "concerning an alleged or adjudicated delinquent child or unruly child \* \* \*," and thus was not applicable to this action concerning reallocation of parental rights and responsibilities in the domestic relations court. Nevertheless, we address the merits of her assignment of error.
- **{¶21}** R.C. 3109.04(B) provides the standard of review to address a party's claim that the trial court failed to appoint a GAL. The statute states:
  - (1) When making the allocation of the parental rights and responsibilities for the care of the children under this section in an original proceeding or in any proceeding for modification of a prior order of the court making the allocation, the court shall take into account that which would be in the best

interest of the children. In determining the child's best interest for purposes of making its allocation of the parental rights and responsibilities for the care of the child and for purposes of resolving any issues related to the making of that allocation, the court, in its discretion, may and, upon the request of either party, shall interview in chambers any or all of the involved children regarding their wishes and concerns with respect to the allocation.

- (2) If the court interviews any child pursuant to division (B)(1) of this section, all of the following apply:
- (a) The court, in its discretion, may and, upon the motion of either parent, shall appoint a guardian ad litem for the child.

{¶22} R.C. 3109.04(B)(2)(a) is mandatory in nature and requires a trial court to appoint "a guardian ad litem upon the motion of a parent if the court intends to privately interview a child in a custody dispute." *State ex rel. Papp v. James*, 69 Ohio St.3d 373, 377, 632 N.E.2d 889 (1994), *see also Cochran v. Cochran*, 4th Dist. Lawrence No. No. 10CA15, 2011-Ohio-1644, ¶ 12. Conversely, when no request to interview the children is made by either parent, the matter is "purely within the discretion of the trial court." *Enz v. Lewis*, 4th Dist. Scioto No. 10CA3357, 2011-Ohio-1229, ¶ 16. An abuse of discretion implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Stammco, L.L.C. v. United Tel. Co. of Ohio*, 136 Ohio St.3d 231, 2013-Ohio- 3019, 994 N.E.2d 408, ¶ 25.

{¶23} Our review of the record shows that the court did not interview the children before entering its final judgment, nor did Scott request such an interview in her March 22, 2013 motion.¹ Accordingly, the court was not required under R.C. 3109.04(B)(2)(a) to appoint a GAL to represent their interests and the matter was purely within its discretion. See Enz at ¶ 16; Feltz v. Feltz, 3rd Dist. Mercer No. 10-04-04, 2004-Ohio-

<sup>&</sup>lt;sup>1</sup> Scott filed a motion for an in-camera interview with her oldest son on March 28, 2013. However, he is no longer a minor and not subject to this appeal.

4160, ¶ 5 (although appellant requested a GAL, the court was not required to appoint one under R.C. 3109.04 because the court did not meet with the children before entering judgment).

Scott's request to appoint a GAL and stated that due to its inability to assure payment it would not appoint a GAL. The trial court had earlier found that both parties still owed payment to the original GAL from their divorce proceeding and ordered them to "pay all outstanding GAL fees within 30 days, or as agreed to with the GAL." Despite this, Scott points to no evidence that she ever made any payment to the GAL following the court's order. In its September 30, 2013 entry the court confirmed that the GAL fees from the original action remained unpaid. Due to these financial concerns, it was not unreasonable, arbitrary or unconscionable for the court to deny her request.

{¶25} Scott also argues that because the parties' oldest son filed a letter asking to speak with the court and for the appointment of a GAL for himself and his two younger siblings, the court was required to comply with R.C. 3109.04(B)(2)(a) and grant his requests. However, R.C. 3109.04(B)(1) requires the court to interview the children "upon the request of either party." (Emphasis added.) Likewise subsection (2)(a) requires the appointment of a GAL if the court intends to interview the children "upon the motion of either parent." (Emphasis added.) Because Scott's oldest son was not made a party to the action, the court did not err by denying his request and we find Scott's arguments meritless.

C. Summons Requirement in Contempt Action

**{¶26}** In her fourth assignment of error Scott contends that the trial court abused its discretion by failing to comply with R.C. 2705.031(C) and issue a summons compelling King to respond and defend her motions for contempt.

{¶27} Under R.C. 2705.031(B)(2) "[a]ny parent who is granted parenting time rights under a parenting time order or decree issued pursuant to section 3109.051 or 3109.12 of the Revised Code \* \* \* may initiate a contempt action for a failure to comply with, or an interference with, the order or decree." R.C. 2705.031(C) addresses the summons requirement and states "[i]n any contempt action initiated pursuant to division (B) of this section, the accused shall appear upon the summons and order to appear that is issued by the court."

{¶28} It is not clear from her brief whether Scott is attempting to raise her own due process claim or that belonging to King. We look initially at whether Scott suffered a denial of due process due to the court's purported failure to issue subpoenas to King and bring him properly before the court to answer for Scott's claims of contempt. In making our analysis we assume for purposes of argument that the court failed to issue a proper summons and order to show cause to King. However, the record clearly reflects King was present and subject to examination by Scott and the court. Accordingly, any purported error in the court's procedure could only be harmless in light of King's appearance and submission to examination.

{¶29} Scott also seemingly argues that the trial court failed to provide King with the required notice of her allegations of contempt and violated his due process rights. However, we decline to address the merits of her claims. Even assuming, arguendo, this to be true she cannot establish standing to raise King's right to due process or how

the court's failure to follow the mandates of R.C. 2705.031(C) has prejudiced her. In order to secure a reversal it is not enough for an appellant to demonstrate error, she must also show that the error was prejudicial to her. *Smith v. Flesher*, 12 Ohio St.2d 107, 107, 233 N.E.2d 137 (1967); *Holt Co. of Ohio v. Kline*, 4th Dist. Lawrence No. 02CA1, 2002-Ohio-5123, ¶ 11. In other words, she must have suffered an injury in fact. Scott lacks standing and suffered no prejudice due to the trial court's alleged failure to issue the required notice to King. Moreover, the record shows that he was present at the hearing on the motions so he suffered no prejudice either. We reject her argument.

## D. Child Support

{¶30} In her third assignment of error Scott argues that the trial court abused its discretion by granting King's motion to suspend child support after awarding him temporary custody of the children. Specifically, she contends that because their oldest son remained in her custody and King was "thousand[s] of dollars in arrears," the court should have denied his motion. In her fifth assignment of error Scott contends that the trial court abused its discretion by failing to include a child support worksheet in the record as required by R.C. 3113.215. Because these arguments are related we address them together.

**{¶31}** Appellate courts generally review a trial court's decision involving a modification of child support under an abuse of discretion standard. *Harless v. Lambert*, 4th Dist. Meigs No. 06CA6, 2007-Ohio-2207, ¶ 10. Motions for modification of child support are frequently filed when a party wants to reduce or suspend his or her obligation based on a change in circumstances. *In re Marriage of Heidnik*, 11th Dist. Lake No. 2012-L-031, 2013-Ohio-1289, ¶ 30.

**{¶32}** Although Scott cites R.C. 3115.215 as applicable to child support calculations, it was repealed and replaced by R.C. 3119.01, et seq., effective March 22, 2001. *Cassidy v. Cassidy*, 4th Dist. Pike No. 03CA721, 2005-Ohio-3199, ¶ 14, fn.2. R.C. 3119.02 states:

In any action in which a court child support order is issued or modified, in any other proceeding in which the court determines the amount of child support that will be ordered to be paid pursuant to a child support order, or when a child support enforcement agency determines the amount of child support that will be paid pursuant to an administrative child support order, the court or agency shall calculate the amount of the obligor's child support obligation in accordance with the basic child support schedule, the applicable worksheet, and the other provisions of sections 3119.02 to 3119.24 of the Revised Code. The court or agency shall specify the support obligation as a monthly amount due and shall order the support obligation to be paid in periodic increments as it determines to be in the best interest of the children. In performing its duties under this section, the court or agency is not required to accept any calculations in a worksheet prepared by any party to the action or proceeding.

Thus a trial court must calculate child support using the statutory child support worksheet. State ex rel. Athens Cty. Child Support Enforcement Agency v. Patel, 4th Dist. Athens No. 05CA20, 2006-Ohio-2951, ¶ 8. In addition, R.C. 3119.02 mandates that the trial court ensure a completed child support worksheet is made part of the record. See Marker v. Grimm, 65 Ohio St.3d 139, 142, 601 N.E.2d 496, 499 (1992) (applying former R.C. 3113.215); Murral v. Thomson, 4th Dist. Hocking No. 03CA8, 2004-Ohio-432, ¶ 17. The primary purpose for requiring the worksheet is to ensure meaningful appellate review of the trial court's actions in establishing or modifying support. Jones v. Brister, 4th Dist. Lawrence No. 00CA44, 2001 WL 911649, \*1 (Aug. 6, 2001). Thus we review whether the trial court included the required worksheet as a matter of law and not under the abuse of discretion standard that Scott argues.

that the trial court "reduce or suspend child support," for the two minor children that were in his temporary custody. In his motion he acknowledged that, against his wishes, their oldest son wanted to remain in Scott's home. On March 25, 2013, the trial court suspended its previous order requiring King to pay child support effective March 11, 2013. Scott filed a motion to vacate the entry and asserted that King was still required to pay support for their oldest son in her custody and his arrears. However, following the hearing on the ex parte order of custody, the court continued King's temporary custody of the parties' two youngest children and designated Scott as the residential and custodial parent of their oldest son. The court also ordered the CSEA to recalculate child support based on King "having custody of two children" and Scott "having custody of one child," and clarified "[t]he redetermination shall be effective March 11, 2013."

{¶34} Thereafter on May 7, 2013, CSEA filed a notice with the court of its recalculation of child support based on King having custody of two children and Scott having custody of one child. Under this custody arrangement and "the factors using a split custody worksheet," CSEA recommended that King pay \$68.51 per month when health insurance is provided and \$124.37 per month when health insurance is not provided effective March 11, 2013. The recommendation also addressed King's arrears and attached a "child support computation worksheet split parental rights and responsibilities." The magistrate adopted CSEA's Administrative Adjustment Review Notification, and made the same findings of child support based on CSEA's recommendation. The magistrate also notified the parties that they may file objections

to his decision within 14 days pursuant to Civ.R. 53(E)(3). Neither party filed an objection and the court adopted the magistrate's decision, ordering King to pay the recommended amount of child support effective March, 11, 2013, plus \$50.00 per month as payment for his arrears.

{¶35} The court's order clearly contradicts Scott's claim that the parties' oldest son "went seven months without support." Because the order was retroactive to the date of King's motion for modification, there was no suspended period of time where he was not required to pay support or arrears as Scott contends. Accordingly, we cannot say its decision to grant King's motion was unreasonable, arbitrary or unconscionable and we reject her argument.

{¶36} Likewise, we find her contention that the trial court failed to include a completed child support worksheet in the record meritless. CSEA filed a completed worksheet as part of its recommendation. This recommendation was journalized as part of the record and the magistrate explicitly adopted CSEA's notification in his decision. See Sullivan v. Howard, 11th Dist. Lake No. 2010-L-102, 2011-Ohio-2329, ¶ 25 (adopting worksheet prepared by CSEA is an acceptable method of fulfilling the requirement to have a completed worksheet made part of the record). However, Scott acknowledges none of these filings in her argument. Based on the magistrate's adoption of the CSEA's recommendation, which contained a completed child support worksheet, we find her assignment of error meritless.

#### E. Hearing on Scott's Contempt Motions

**{¶37}** In her sixth assignment of error Scott argues that the trial court abused its discretion by failing to hold a hearing before ruling on her motions for contempt.

Specifically, she identifies five contempt motions based on King's alleged denial of her scheduled parenting time she filed after the final hearing date but before the court issued its journal entry.

**{¶38}** Contempt sanctions arising from one parent's failure to honor a court-ordered visitation schedule usually constitute civil contempt because the finding is designed to coerce future compliance with the court order. As we have already noted, R.C. 2705.031(B)(2) affords a parent deprived of parenting time the right to pursue a contempt action under R.C. 2705.05. A trial court has a duty to follow the procedure for a contempt proceeding as outlined by R.C. 2705.05(A) and "must conduct a hearing," as mandated by the statute. *Caldwell v. Caldwell*, 4th Dist. Gallia No. 02CA17, 2003-Ohio-1752, ¶ 18. Thus, we again reject Scott's argument to apply an abuse of discretion standard and instead apply a de novo review.

{¶39} Based on King's alleged denial of her scheduled parenting time and taking the children out of the state without a court order, Scott points to five contempt motions that she filed after the final hearing, but before the trial court entered its judgment.<sup>2</sup> In its September 30, 2103 entry the court specifically denied three of Scott's contempt motions she filed before the July 8, 2013 hearing date. However, she claims that because the five motions she filed after the hearing date were still pending when the court issued its entry on September 30, 2013, its conclusory statement "the contempt motions are denied," also referred to these motions. We disagree.

<sup>&</sup>lt;sup>2</sup> 1.) July 20, 2013 Motion for Contempt for denying her visitation; 2.) July 20, 2013 Motion for Contempt for taking the children out of the state; 3.) September 11, 2013 Motion for Contempt for denying her visitation; 4.) September 13, 2013 Motion for Contempt for denying her visitation; and 5.) September 26, 2013 Motion for Contempt for denying her visitation. Although she identifies the first two motions as filed on July 20, 2013, a review of the record shows she actually filed them on August 20, 2013.

addressed the first four contempt motions that Scott identifies in her assignment of error and scheduled a hearing on the motions. This entry directly contradicts her argument that the court's statement "the contempt motions are denied" was also referring to her motions filed after the final hearing and makes it clear that the court still considered those motions pending and appropriately scheduled a hearing. Although the court's entry did not identify the fifth and most recent contempt motion identified by Scott, the hearing was held after she filed her notice of appeal in this case and the transcripts were not included in the record. And because Scott does not appeal from the court's entry ruling on these motions, those motions are not properly before us. We reject her sixth assignment of error.

## F. Reallocation of Parental Rights & Responsibilities

**{¶41}** Scott also attacks the merits of the trial court's judgment and in her seventh and eighth assignments of error, argues that the court abused its discretion by modifying its previous custody order and designating King as the residential parent and legal custodian of their two youngest children. Specifically, she argues that her change in circumstances had no adverse effect on the children as required by R.C. 3109.04 and the trial court failed to consider the children's best interests. Because these arguments are related we will address them together.

**{¶42}** Generally, decisions concerning child custody matters rest within the trial court's sound discretion. *In re C.D.M.*, 4th Dist. Hocking No. 13CA1, 2013-Ohio-3792, ¶ 12. "Custody determinations are some of the most difficult and agonizing decisions a trial judge must make, and, therefore, appellate courts must grant wide latitude to their

consideration of the evidence." *Id.*, quoting *Eatherton v. Behringer*, 3rd Dist. Seneca No. 13-11-12, 2012-Ohio-1584, ¶ 13. Accordingly, we will not reverse a trial court's decision regarding child custody absent an abuse of discretion. *Masters v. Masters*, 69 Ohio St.3d 83, 85, 630 N .E.2d 665 (1994). As we have already stated, an abuse of discretion implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Stammco*, 136 Ohio St.3d 231, 2013-Ohio- 3019, 994 N.E.2d 408, at ¶ 25. The Supreme Court of Ohio has stated that a trial court does not abuse its discretion in parental rights cases when the determination "is supported by a substantial amount of credible and competent evidence." *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 674 N.E.2d 1159 (1997), quoting *Bechtol v. Bechtol*, 49 Ohio St.3d 21, 550 N.E.2d 178 (1990), syllabus; *In re C.D.M.* at ¶ 12.

**{¶43}** The reason for this deferential standard of review is that the trial judge has the best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page. *Davis at* 418. "This is even more crucial in a child custody case, where there may be much evident in the parties' demeanor and attitude that does not translate to the record well." *Id.* at 419.

**{¶44}** In exercising this discretion to modify parental rights and responsibilities, courts are guided by R.C. 3109.04(E)(1)(a), which provides:

The 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 or that were unknown to the court at the time of 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. In applying these standards, the court shall retain the residential parent designated by the prior decree or the prior shared parenting decree, unless a modification is in the best interest of the child and one of the following applies:

\* \* \*

- (iii) The harm likely to be caused by a change of environment is outweighed by the advantages of the change of environment to the child.
- **{¶45}** Thus, before the trial court could modify the allocation of parental rights and responsibilities it must find: 1.) that a change in circumstances of the children or Scott has occurred since the last decree; 2.) that modification is necessary to serve the best interest of the children; and 3.) that the advantages of modification outweigh the potential harm. *Enz*, 4th Dist. Scioto No. 10CA3357, 2011-Ohio-1229, at **¶** 22.

## 1. Change in Circumstances

- {¶46} "A change in circumstances is the threshold requirement intended to provide some stability to the custodial status of the child." *Jones v. Jones*, 4th Dist. Highland No. 06CA25, 2007-Ohio-4255, ¶ 36, citing *In re Brayden James*, 113 Ohio St.3d 420, 2007-Ohio-2335, 866 N.E.2d 467, ¶ 15. "This is a high standard, as a 'change' must have occurred in the life of the child or the parent before the court will consider whether the current designation of residential parent and legal custodian should be altered." *Fisher v. Hasenjager*, 116 Ohio St.3d 53, 2007-Ohio-5589, 876 N.E.2d 546, ¶ 33.
- **{¶47}** "The requirement that a parent seeking modification of a prior decree allocating parental rights and responsibilities show a change of circumstances is purposeful." *Id.* at ¶ 34. "The clear intent of [R.C. 3109.04] is to spare children from a constant tug of war between their parents who would file a motion for change of custody each time the parent out of custody thought he or she could provide the children a 'better' environment. The statute is an attempt to provide some stability to the custodial status of the children, even though the parent out of custody may be able to prove that

he or she can provide a better environment." *Davis* at 418, quoting *Wyss v. Wyss*, 3 Ohio App.3d 412, 416, 445 N.E.2d 1153 (10th Dist.1982).

**{¶48}** However, appellate courts "must not make the threshold for change so high as to prevent a trial judge from modifying custody if the court finds it necessary for the best interests of the child." *Davis*, 77 Ohio St.3d at 420-421. Because of the need for stability in the child's life, any change in circumstances "must be a change of substance, not a slight or inconsequential change." *Id.* at 418.

**{¶49}** Here, Scott argues in her seventh assignment of error that the trial court "failed to satisfy" R.C. 3109.04(B) because it did not "mak[e] the finding that [her] incarceration had an 'adverse effect' on the two younger boys." Rather, she contends that the court "only made the finding that there had been a change in circumstances." Although nothing in R.C. 3109.04(E)(1)(a) expressly requires that a party seeking modification of a prior decree allocating parental rights and responsibilities show that the parties' children have been adversely affected by the alleged change of circumstances, Ohio courts have generally interpreted "change of circumstances" to mean an event, occurrence, or situation that has a material and adverse effect on the child. *In re C.D.M.*, 4th Dist. Hocking No. 13CA1, 2013-Ohio-3792, at ¶16. From its judgment entry is clear that the court considered how Scott's change in circumstances affected the children.

**{¶50}** In its entry, the trial court stated:

The Court earlier found and confirms its findings that there was a substantial change of circumstances as required by Revised Code 3109.04(E)(1) and that a modification of the prior decree of custody is necessary to serve the best interests of [the children]. Specifically [Scott] was incarcerated as a result of a conviction in the Tiffin Municipal Court on February, 14, 2013. At the time of the filing of the Judgment Entry and

Decree of Divorce on January 3, 2012 the Court found both Plaintiff and Defendant to be capable, loving parents. Either could name[sic] been designated the residential parent. For the reasons set forth in the decree, the Court determined it was in the best interests of the children to designate Defendant-Mother as the residential parent. There was however a substantial change in circumstances as to Defendant-Mother on February 14, 2013. On that date she entered a plea of guilty and was found guilty of a violation of Revised Code 2923.03(A)(2) Aiding & Abetting. \* \* \* She was ordered to pay a fine and was sentenced to 180 days in jail, with 160 days conditionally suspended. On February 14, 2013 Defendant also entered a plea of guilty and was found guilty of a violation of Revised Code 2913.51(A) Retaining Property. She was ordered to pay a fine and was sentenced to 180 days in jail, with 160 conditionally suspended. Jail time was to be served concurrently. (The Court confirmed that she was in jail prior to issuing the ex parte order changing custody on March 6, 2013). Defendant urged at hearing that incarceration itself is not enough to constitute a change in circumstances and that is relevant only to any adverse impact. There is however more than the fact of criminal conviction and incarceration. Defendant has previously been convicted in federal court and served a prison term. She should therefore be more aware of her conduct and possible consequences of her conduct that otherwise would be the case. Additionally, the incidents which led to her convictions in the Tiffin Municipal Court involved her children. Plaintiff's Exhibit "G" details \* \* \* the parties' 16 year old son, and Haley's involvement, the parties' adult daughter. The adverse effects on the children are obvious. Perhaps they were subject to criminal sanctions. More importantly, what is the lesson the children learned from their involvement in the criminal conduct. The Court notes this incident did not directly involve the two younger boys subject to this custody motion. Their mother however went to jail. She made arrangements for their care but did not advise Plaintiff-Father she was going to jail. He found out by looking at the Court's online docket. The Court should not and will not overlook Defendant's conduct. Going to jail under these circumstances is a substantial change in circumstances of the mother.

{¶51} We have recognized that the incarceration of a custodial parent may constitute a "change of circumstances." *Hubbard v. Anderson*, 4th Dist. Scioto No. 96CA2440, 1998 WL 34150, \*4 (Jan. 21, 1998). In this case, it was not an abuse of discretion for the trial court to determine that Scott's incarceration and convictions constituted a change of circumstances. Although she admits that her crimes involved the parties' daughter and oldest son, who was a minor at the time, Scott claims that

because her youngest sons were not involved and unaware of her incarceration there was no adverse effect on them. However, the police reports admitted as evidence under seal at trial show that the Tiffin Police Department recovered the stolen items at Scott's home, where her youngest children lived. Moreover, the trial court, sitting as the trier of fact, was in the best position to evaluate the children's situation and the change that occurred as a result of these circumstances. *See Jones v. Jones*, 4th Dist. Highland No. 06CA25, 2007-Ohio-4255, ¶ 41. We see nothing in the record to indicate that the trial court's decision lacked a basis in fact and reason. Accordingly, the trial court's determination that Scott's judgment to involve her older children in criminal acts and her resulting convictions and incarceration had an "obvious" adverse effect on her two youngest children was not unreasonable, arbitrary, or unconscionable.

#### 2. Best Interests

**{¶52}** After finding that a change of circumstances exists, the trial court next must consider whether a modification of parental rights and responsibilities is in the child's best interests. R.C. 3109.04(E)(1)(a); *Jones* at ¶ 44. In determining the child's best interests, "the court shall consider all relevant factors, including, but not limited to" the following factors listed in R.C. 3109.04(F)(1):

- (a) The wishes of the child's parents regarding the child's care;
- (b) If the court has interviewed the child in chambers pursuant to division
- (B) of this section regarding the child's wishes and concerns as to the allocation of parental rights and responsibilities concerning the child, the wishes and concerns of the child, as expressed to the court;
- (c) The child's interaction and interrelationship with the child's parents, siblings, and any other person who may significantly affect the child's best interest;
- (d) The child's adjustment to the child's home, school, and community;

- (e) The mental and physical health of all persons involved in the situation;
- (f) The parent more likely to honor and facilitate court-approved parenting time rights or visitation and companionship rights;
- (g) Whether either parent has failed to make all child support payments, including all arrearages, that are required of that parent pursuant to a child support order under which that parent is an obligor;
- (h) Whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child \* \* \*;
- (i) Whether the residential parent or one of the parents subject to a shared parenting decree has continuously and willfully denied the other parent's right to parenting time in accordance with an order of the court;
- (j) Whether either parent has established a residence, or is planning to establish a residence, outside this state.

{¶53} In her eighth assignment of error, Scott argues that the trial court abused its discretion by failing to consider King's actions in deciding whether a modification of parental rights and responsibilities was in the children's best interests. She does not point to a specific factor to support her argument, but rather contends that R.C. 3109.04(F)(1) requires the court to "consider all relative factors" in determining the children's best interests and if the court had considered King's actions it would have denied his motion and allowed her to retain custody. Specifically, she argues that the court failed to consider that King: 1.) "repeatedly" filed false and unsubstantiated allegations that the children were being physically and mentally abused by her husband, Tod Scott; 2.) removed the children from school and enrolled them in a new district before the court ruled on his emergency motion ex parte to modify allocation of parental

rights and custody; 3.) "abandoned" his oldest son since 2011; and 4.) denied Scott visitation while he had temporary custody.

## **{¶54}** The trial court found:

There is substantial evidence as to the best interests of the minor children. The Court finds Plaintiff has a large extended family in the Jackson County area where he resides that provides opportunity for the children to interact with others. The Court finds the children have adjusted to school well, are excelling in their academics and are involved in the community. Plaintiff's Exhibit 'A' shows the children are doing better in school now than in their previous school. Exhibit 'C' reflects various activities of the children. Exhibit 'D' shows the children are in good health.

The Court therefore finds by clear and convincing evidence that modification of parental rights and responsibilities is in the best interests of the minor children, and that the harm likely to be caused by a change of environment is outweighed by the advantages of the change of environment to the child.

{¶55} Scott did not request findings of fact and conclusions of law pursuant to Civ.R. 52 for the court's September 30, 2013 entry. If a party makes no request for findings of fact and conclusions of law, we must presume the trial court applied the law correctly and must affirm if there is some evidence to support the judgment. *Hamilton v. Hamilton*, 4th Dist. Washington No. 95CA6, 1996 WL 346910, 8\* (June 20, 1996) (affirming the trial court's judgment regarding child's best interests where the appellant did not request findings of fact and conclusions of law). "[A]Ithough a trial court must consider each of the factors delineated in R.C. 3109.04(F)(1), it is not necessary for the court to set forth its analysis as to each factor in its judgment entry. In the absence of evidence to the contrary, an appellate court will presume that the trial court considered the listed factors." *Schiavone v. Antonelli*, 11th Dist. Trumbull No. 92-T-4794, 1993 WL 548034, \*2 (Dec. 10, 1993).

{¶56} Here, nothing in the record suggests that the court failed to consider all the evidence presented before making its best interest determination. At the hearing, Tod Scott testified about his relationship with the parties' children and denied abusing them. He described his relationship with the parties' youngest two children as "great," and stated neither is afraid of him. Scott questioned King about his relationship with their oldest son and removing the younger children from school without a court order. Both parties testified about their visitation issues and Scott questioned King about the specific instances she alleged he denied her scheduled parenting time with the children.

**{¶57}** In its entry the court found that based on the evidence the children had adjusted well to their father's home and new school. As the trial court pointed out, their grades had improved and they were involved in several community activities. The court also noted that King has a large extended family in the Jackson County area. We cannot say that the trial court abused its discretion by determining a modification of parental rights and responsibilities would serve the children's best interests.

#### 3. Harm

**{¶58}** In the final step of the court's analysis, it must determine whether the advantages of modification outweigh the likely harm. R.C. 3109.04(E)(1)(a); *Jones v. Jones*, 4th Dist. Highland No. 06CA25, 2007-Ohio-4255, ¶ 46. In the remainder of her seventh assignment of error Scott argues that court had to also find "the child's present environment endangers significantly his physical health or his mental, moral, or environmental development," and it abused its discretion by failing to do so.

**{¶59}** To support her argument, Scott cites R.C. 3109.04(B). Former R.C. 3109.04(B) provided in pertinent part:

- (1) \* \* \* [T]he court shall not modify a prior custody decree unless it finds, based on facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child, [or] his custodian \* \* \* and that the modification is necessary to serve the best interest of the child. In applying these standards, the court shall retain the custodian \* \* \* designated by the prior decree, unless one of the following applies:
- (c) The child's present environment endangers significantly his physical health or his mental, moral, or emotional development and the harm likely to be caused by a change of environment is outweighed by the advantages of the change of environment to the child."

{¶60} However, the current statutory provision regarding a modification of a prior allocation of parental rights and responsibilities does not contain the same language regarding the child's present environment. *Jones* at ¶ 48. "Effective April 12, 1990, former R.C. 3109.04(B)(1)(c) was amended and the clause containing the term 'present environment' was deleted. As amended and renumbered, R.C. 3109.04(E)(1)(a)(iii) provides: 'The harm likely to be caused by a change of environment is outweighed by the advantages of the change of environment to the child." *Gardini v. Moyer*, 61 Ohio St.3d 479, 484, 575 N.E.2d 423, fn. 3 (1991). Thus, the current statute contains no requirement that the trial court must find a present danger to the children before modifying custody and because Scott's argument is based on an outdated version of the statute, her assignment of error is meritless. *Jones* at ¶ 49.

### IV. CONCLUSION

**{¶61}** In conclusion, the trial court complied with R.C. 3109.04 and did not abuse its discretion by modifying its prior decree and designating King as the residential parent and legal custodian of the parties' youngest two children. We also reject her other arguments concerning the trial court's alleged procedural errors. Accordingly, we overrule her assignments of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

## JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Jackson County Court of Common Pleas to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, P.J. & McFarland, J.: Concur in Judgment and Opinion.

For	the Court
BY:	William H. Harsha, Judge

### NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.