[Cite as *Sloat v. James*, 2009-Ohio-2849.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

THERESA SLOAT		:	JUDGES:
		:	Sheila G. Farmer, P.J.
	Plaintiff-Appellant	:	W. Scott Gwin, J.
		:	Julie A. Edwards, J.
-vs-		:	
		:	Case No. 2008 CA 00048
KEVIN JAMES		:	
		:	
	Defendant-Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal From Stark County Court Of Common Pleas, Domestic Relations Division, Case No. 1996 DR 01499
JUDGMENT:	Affirmed In Part and Reversed and Remanded In Part
DATE OF JUDGMENT ENTRY:	June 15, 2009

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
KIMBERLY L. STOUT Stark County Public Defenders Office 200 West Tuscarawas Street Suite 200 Canton, Ohio 44702	HERBERT J. MORELLO 808 Courtyard Center 116 Cleveland Ave., N.W. Canton, Ohio 44702

Edwards, J.

{¶1} Plaintiff-appellant, Theresa Sloat, appeals from the February 7, 2008, Judgment Entry of the Stark County Court of Common Pleas, Family Court Division, finding her guilty of contempt and ordering her to pay attorney fees to defendant-appellee Kevin James.

STATEMENT OF FACTS AND CASE

{¶2} On October 2, 1996, appellant Theresa Sloat filed a complaint for divorce against appellee Kevin James. Pursuant to an interim order, filed on October 23, 1996, appellee was ordered to have Stark County "Exhibit A" visitation with the parties minor child, Heather James, whose date of birth is May 28, 1995.

{¶3} On December 3, 1996, appellee filed a Motion for Contempt against appellant, alleging that appellant had denied appellee visitation with the minor child. Pursuant to the Judgment Entry filed on January 24, 1997, the court found appellant in contempt for failing to adhere to the visitation order.[1]

{¶4} A Judgment Entry of Uncontested Divorce was filed on September 4, 1998. Appellant, Theresa Sloat, was named the residential and custodial parent of the parties' minor child, and appellee, Kevin James, was granted Stark County's "Exhibit A" scheduled visitation with the minor child.

{¶5} Thereafter, on September 6, 2007, appellee filed a Motion for Contempt, alleged that appellant had continuously denied appellee visitation with their minor child since February 28, 2007, and had threatened to deny appellee visitation indefinitely.

[1] The trial court Judge who found appellant in contempt in 1997 was Judge Julie A. Edwards, who was then a Judge in the Stark County Court of Common Pleas, Family Court Division. During a telephone conference call on April 13, 2009, counsel for both parties indicated that they had no problem with Judge Edwards sitting on this case as an appellate Judge.

{¶6} The matter came before the court for an evidentiary hearing on February 5, 2008.

{¶7} At the hearing, appellee Kevin James testified that the last time he saw his daughter was at the end of February in 2007. He stated that prior to February 2007, he enjoyed a good relationship with his daughter. He testified that he believed the precipitating reason for the denial of visitation occurred in February of 2007 when he saw Heather's best friend, Ashley Schreffler, age 14 or 15, being dropped off on the corner of 14th Street and Shorb by a 25 year old man. Appellee stated that he yelled at Ashley and said "what are you doing?" and that Ashley ran. T. at 7. Appellee further testfied that two weeks later, he was summoned to the police department to discuss the incident and other allegations, but was never charged with a crime. Appellee testified that after this event, appellant stopped all visitation. He further testified that he called the appellant "probably a hundred times or more" to schedule visitation with his daughter, but that appellant never answered the phone. T. at 8.

{¶8} Appellee also testified that in 1999, he went to prison for 6 months on a drug related charge, and that, in 2002, he was charged with corruption of a minor and was placed on probation. Appellee testified that although he has a criminal history, appellant never denied him visitation or moved for a modification of visitation because of his criminal convictions.

{¶9} Ashley Schreffler, 15 years of age, testified, that she has known Heather James for approximately 4 or 5 years and that she and Heather regularly visited each other's homes. She testified that during visits at appellee's house, appellee would say "sexually perverted things" to her. T.16. She testified that on one occasion, appellee

held her down on a bed and hurt her arms. She also testified that she told Heather to "get him [appellee] off of me" and "he [appellee] wouldn't get off. T.18. According to Ashley Schreffler, Heather started screaming at appellee. Schreffler further testified that after these incidents, Heather stopped seeing her dad. T.19. On cross-examination, Ashley Schreffler admitted that she had been driving around with a man in his twenties who she testified, was like a brother to her. On cross-examination, Ashley Schreffler further admitted that appellee saw her in the car with the man. She further admitted going back to appellee's house despite the alleged incident in the bedroom and the alleged sexual comments. Ashley did not report the alleged incidences with appellee until after appellee saw her in the car with the man.

{¶10} Diana Schreffler, Ashley's mother, testified that she has known appellee for approximately seven years and that they are neighbors. Diana Schreffler stated that Ashley would visit Heather at appellee's home. She testified that Ashley told her about appellee's inappropriate behavior and she reported the behavior to the Department of Job and Family Services. On cross-examination, Diana Schreffler admitted that Ashley has been exposed to domestic violence and that she drove around with a "twenty some year old" man named, Amelio. She also testified that in February of 2007, Ashley told her that appellee had yelled at her when she was getting out of a car being driven by an older man. Ashley, during her own testimony, had denied that this occurred.

{¶11} Heather James, age 12 years, testified that her visits with appellee occurred every other Friday, every Wednesday and every other Monday. She stated that she overheard a telephone conversation during which she heard her dad make sexually suggestive comments to Ashley. Heather stated that she was afraid Ashley

wouldn't be her friend anymore because of her father's behavior. Heather testified that she talked to her mom about the problem. When asked why she did not want to go with her dad, Heather testified that she didn't want to go to appellee's house anymore because, "it feels like when I go over there, I would …sometimes, he, he would have me eat left over pizza, * * * and drink pop." T.38. On cross-examination, Heather testified that she had a good relationship with appellee and that he has never done anything inappropriate to her. She further testified that she has never observed appellee engage in any inappropriate behavior with Ashley.

{¶12} Appellant, Theresa Sloat testified that since the end of February of 2007, she has not allowed the appellee to exercise his court ordered visitation with Heather. T.4. Appellant testified that "Heather told me she didn't want to go, so, I don't force the issue." T.46. Appellant stated that she usually transports Heather to appellee's home and that she has not taken Heather to her father's home since February of 2007. Appellant testified that the caseworker who investigated Ashley's allegations told her that "Heather was in no kind of danger from her Dad…But as a Mother, I wouldn't send her over to that person's house." T.53. Appellant testified that she was not concerned for her daughter's safety, and understood that the caseworker couldn't advise her to violate a court order, but that she was concerned that appellee was using Heather to get other young girls to come to his home. She further admitted that she had not sought any modification of the visitation order based on these concerns or appellee's criminal history.

{¶13} As memorialized in a Judgment Entry filed on February 7, 2008, the trial court found that appellant had violated the existing court order by denying appellee

visitation. The trial court further found appellant guilty of contempt. The court, in its Judgment Entry, stated that appellant could purge the contempt by "affording parenting time with the Defendant [appellee] as ordered and paying the Defendant [appellee] $1250 in attorney fees at no less than $100 per month until satisfied."

{¶14} It is from the February 7, 2008, Judgment Entry that the appellant now appeals, setting forth the following assignments of error:

{¶15} "I. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY FINDING THE PLAINTIFF-APPELLANT GUILTY OF CIVIL CONTEMPT.

{¶16} "II. THE TRIAL COURT ERRED BY FINDING PLAINTIFF-APPELLANT GUILTY OF CONTEMPT BECAUSE EXTRAORDINARY CIRCUMSTANCES EXISTED THAT PLAINTIFF-APPELLANT VIOLATED THE VISITATION ORDER WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE. (a) THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY FAILING TO DEFINE WHAT IS IN THE BEST INTEREST OF THE CHILD.

{¶17} "III. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY FAILING TO PROVIDE PLAINTIFF-APPELLANT A REASONABLE PURGE CONDITION. (a) THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY AWARDING DEFENDANT-APPELLEE ATTORNEY'S FEES."

I, II

{¶18} Appellant, in her first and second assignments of error, argues that the trial court erred in finding her guilty of civil contempt. Appellant specifically argues that the trial court failed to consider the extraordinary circumstances that she argues justified

her non-compliance with the visitation order. Appellant further contends that the trial court erred by failing to define what was in Heather's best interest. We disagree.

{¶19} Our standard of review regarding a finding of contempt is limited to a determination of whether the trial court abused its discretion. *Wadian v. Wadian,* Stark App. No. 2007 CA 00125, 2008-Ohio-5009, paragraph 12, citing *In re Mittas* (Aug. 6, 1994), Stark App. No. 1994 CA 00053, 1994 WL 477799. In order to find an abuse of discretion, we must determine that the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140, 1142.

{¶20} The burden of proof in a civil contempt action is proof by clear and convincing evidence. *Jarvis v. Bright,* Richland App. No. 07CA72, 2008-Ohio-2974 at paragraph 19, citing *Brown v. Executive 200, Inc.* (1980), 64 Ohio St.2d 250, 416 N.E.2d 610. The determination of "clear and convincing evidence" is within the discretion of the trier of fact. The trial court's decision should not be disturbed as against the manifest weight of the evidence if the decision is supported by some competent, credible evidence. *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578.

{¶21} A non-custodial parent's right of visitation with his or her children is a natural right. *Pettry v. Pettry* (1984), 20 Ohio App.3d 350, 486 N.E.2d 213. The right to visitation should not be denied unless there are extraordinary circumstance. *Foster v. Foster* (1974), 40 Ohio App.2d 257, 272, 319 N.E.2d 395. Extraordinary circumstances include but are not limited to the following: (1) unfitness on the part of the non-custodial parent; and (2) a showing that visitation with the non-custodial parent would cause harm

to the children. *Foster,* supra; *Smith v. Smith* (1980), 70 Ohio App.2d 87, 434 N.E.2d 749. However, if a parent believes that further visitation is not in the child's best interest, based on the child's wishes, then the parent should not unilaterally suspend visitation but should "take the less drastic step of seeking modification." *Fallat v. Fisher*, (Dec. 12, 2000), Mahoning App. No. 99-CA061, 2000 WL 1847673, unreported, citing, *Huff v. Huff*, (Oct. 13, 1995), Mahoning App. No. 14823, 1995 WL 60012, unreported.

{¶22} In the case sub judice, appellee testified that he had a good relationship with his daughter, Heather. He admitted that he had a prior criminal history that included a 2002 conviction for corruption of a minor, but stated that his convictions had not interfered with his visitation rights. Appellee stated that his visitation was terminated by appellant after he intervened in a situation involving Heather's best friend. He further testified that he made over a hundred telephone calls to appellant in order to discuss the problem with appellant but that appellant would not answer his calls.

{¶23} Appellant acknowledged that in 1997, the court had awarded appellee Stark County's "Exhibit A" visitation. Appellant testified that she stopped transporting Heather for visitation in February of 2007 after Ashley, Heather's friend, alleged that appellee had engaged in inappropriate behavior with her even though no criminal charges were filed against appellee.

{¶24} Appellant also testified that she was aware of appellee's criminal history, but had continued to permit visitation. She further testified that she had never sought a modification of the visitation order based on the allegations against appellee and/or Heather's refusal to visit. Appellant testified that she unilaterally stopped visitation after Heather refused to go to visits because she did not want to force her child to do

something that she did not want to do. Appellant did not testify that she was concerned for Heather's safety during the visits.

{¶25} Although appellant testified to a strained and potentially abusive relationship between Heather and appellee, Heather herself testified that she had a good relationship with appellee. Heather stated that appellee had not done anything inappropriate to her and that, in contrast to Ashley's testimony, she had not witnessed any inappropriate behavior between appellee and her friend Ashley. When asked, Heather also testified that she did not want to visit appellee because her father only fed her left over pizza and pop. Heather did not express concerns for her safety or express emotional trauma over visits with appellee.

{¶26} Based on the foregoing, we find that the trial court did not abuse its discretion in finding appellant in contempt. After considering the testimony presented, the trial court did not find appellant's explanations for her non-compliance with the court's visitation either credible or sufficient to establish extraordinary circumstances. Nor did the trial court find Ashley Schreffler's testimony credible. We do not find the trial court's decision to be arbitrary, unconscionable or unreasonable. See *State v. Awan* (1986), 22 Ohio St.3d 120, 123, 489 N.E.2d 277. ("[T]he choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact.")

{¶27} Appellant also argues that the trial court erred in failing to consider what was in Heather's best interest. Appellant specifically cites to R.C. 2151.414(D) and R.C. 3109.04(F)(1). R.C. 2151.414 concerns what procedures should be followed after a motion for permanent custody of a child is filed pursuant to R.C. 2151.413. Because

no such motion was filed in this case, such section is not applicable. R.C. 3109.04(F)(1) lists factors that a court is to consider in allocating parental rights or responsibilities or modifying a decree allocating the same. Such section is, therefore, not applicable. In addition, this matter was not before the trial court on a motion to modify visitation. Had it been so, arguments regarding best interest would have been appropriate pursuant to R.C. 3109.051.

{¶28} Accordingly, appellant's first and second assignments of error are not well taken and are, thereby, overruled.

III

{¶29} Appellant, in her third assignment of error, argues that the trial court abused its discretion in imposing the purge conditions that it did. First, appellant argues that the condition, which requires the appellant to adhere to all future visitation orders, does not properly allow for the purging of contempt. Second, appellant argues that the trial court's award of $1,250.00 attorney's fees as a condition of purge is unreasonable due to her financial status.

{¶30} As is stated above, appellant argues that the trial court erred when, as a condition of purge, it required appellant to afford appellee parenting time with Heather as ordered. 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 paragraph 37. Any sanction for civil contempt must allow the party who is in contempt an opportunity to purge the contempt. *Tucker v. Tucker* (1983), 10 Ohio App.3d 251, 461 N.E.2d 1337. A trial court abuses its discretion in ordering

purge conditions that are unreasonable or where compliance is impossible. *Burchett v. Miller* (1997), 123 Ohio App.3d 550, 552, 704 N.E.2d 636.

{¶31} Furthermore, this court has held that a purge condition which requires future compliance with an established order is an abuse of discretion. *Brett v. Brett,* Knox App. No. 01 CA000018, 2002-Ohio-1841. *Sexton v. Sexton*, Richland App. No. 2006CA0083, 2007-Ohio-4751; *Ryder v. Ryder*, Stark App. No. 2001CA00190, 2002-Ohio-765; *Tucker v. Tucker*, supra. Orders that purport to regulate future conduct do not provide the party with a true opportunity to purge. *Tucker v. Tucker*, supra. A contempt order which regulates future conduct "simply amounts to the court's reaffirmation of its previous support order and can have no effect since any effort to punish a future violation of the support order would require new notice, hearing and determination." *Tucker*, supra., at 252, citing *Matter of Grohoske* (June 16, 1983), Franklin App. No. 82AP-948, 1983 WL 3573, unreported (holding a purge order may provide for suspension of a jail sentence on condition that the contemnor pays an arrearage; however, it may not regulate future conduct by conditioning suspension of a jail sentence on making payments on current support obligations.)

{¶32} We find that the trial court's purge condition, that appellant afford appellee parenting time with Heather in the future, constituted an abuse of discretion because this purge condition requires future compliance with an established order of visitation.

{¶33} Appellant also challenges the trial court's award of attorney fees to appellee. Initially, we note that a trial court's award of attorney's fees in a contempt action is not discretionary. Pursuant to the language of R.C. 3109.051(K), if the court finds a person in contempt for failing to comply with or interfering with any order or

decree granting parenting time rights, the court must require the person found in contempt 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." A court's attorney fee award will not be reversed unless it is determined to be arbitrary, unreasonable or unconscionable. *Rand v. Rand* (1985), 18 Ohio St.3d 356, 359, 481 N.E.2d 609.

{¶34} Thus, the issue for determination is whether, as appellant alleges, the trial court's $1,250.00 attorney fee award was arbitrary, unreasonable or unconscionable. In the case sub judice, appellee testified that he incurred $750.00 in fees to prepare and file the contempt action and an additional $500.00 in fees because the matter proceeded to hearing. T.9. Appellant testified that she earns $7.00 an hour. The trial court awarded appellee $1,250.00 in attorney's fees and took appellant's financial situation into consideration by allowing her eighteen months to pay the award. We do not find the award of attorney's fees to be arbitrary, unreasonable, or unconscionable.

{¶35} For these reasons, we find that the trial court did not abuse its discretion in awarding $1,250.00 in attorney fees to appellee and in requiring appellant to pay the same over eighteen months.

{¶36} Accordingly, appellant's third assignment of error is overruled in part, and affirmed in part.

{¶37} Accordingly, the judgment of the Stark County Court of Common Pleas is affirmed in part and reversed and remanded in part.

By: Edwards, J.

Farmer, P.J. and

Gwin, J. concur

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JUDGES

JAE/d0128

[Cite as *Sloat v. James*, 2009-Ohio-2849.]

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

THERESA SLOAT	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
KEVIN JAMES	:	
Defendant-Appellee	:	CASE NO. 2008 CA 00048

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Stark County Court of Common Pleas, Domestic Relations Division, is affirmed in part, and reversed and remanded in part. Costs assessed 80% to appellant and 20% to appellee.

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JUDGES