

[Cite as *In re B.A.L.*, 2016-Ohio-300.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 103053**

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**IN RE: B.A.L.**  
**A Minor Child**

[Appeal by F.L., Mother]

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**JUDGMENT:**  
DISMISSED IN PART, REVERSED IN PART  
AND REMANDED

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Juvenile Court Division  
Case No. CU-15-100536

**BEFORE:** Blackmon, J., Kilbane, P.J., and Boyle, J.

**RELEASED AND JOURNALIZED:** January 28, 2016

**ATTORNEY FOR APPELLANT**

Michael J. Tony  
520 Broadway Avenue  
Second Floor  
Lorain, Ohio 44052

**ATTORNEY FOR APPELLEE**

Jennifer M. Himmelein  
Cavitch, Familo & Durkin, Co., L.P.A.  
1300 East Ninth Street, 20th Floor  
Cleveland, Ohio 44114

**GUARDIAN AD LITEM**

Candace L. Brown  
P.O. Box 286  
Medina, Ohio 44258

PATRICIA ANN BLACKMON, J.:

{¶1} In this accelerated appeal, appellant F.L. (“mother”) appeals the juvenile court’s award of custody of B.A.L. (“child”) to the child’s father J.S. (“father”) and the trial court’s finding her to be in direct contempt. She assigns the following three errors for our review:

- I. The trial court’s decision violates the due process and equal protection rights of the mother.
- II. The lower court abused its discretion by its apparent biased position in granting father pre-dispositional custody.
- III. The trial court erred by merely rubber-stamping the magistrate’s decision without conducting an independent review of the case and the objections.

{¶2} Having reviewed the record and relevant law, we dismiss the mother’s appeal as it pertains to the juvenile court’s grant of temporary custody because it is not a final, appealable order. We reverse and remand the trial court’s decision finding the mother in direct contempt. The apposite facts follow.

{¶3} The child was born prematurely at 23 weeks on July 25, 2014. Mother and father were never married. The child was regularly seeing doctors, and a nurse would come to the child’s home to give her a weekly shot.

{¶4} The mother and father lived together until December 12, 2014.<sup>1</sup> On January 2, 2015, the mother took the child to visit family in Georgia. She advised the father that she would return in one week. However, on January 12, 2015, she sent a text to the father stating that she would not be returning to Ohio.

{¶5} On January 16, 2015, the father filed an application to determine custody and a motion for temporary custody of the child. The father alleged he was concerned that the child was not receiving necessary medical care in Georgia, including the weekly shot.

{¶6} An emergency custody hearing was conducted on February 13, 2015 before a magistrate. Both parties appeared at the hearing pro se. The magistrate asked if the father had established paternity, and he responded that he had submitted the child's birth certificate, which named him as the father. The record established that at this point, the mother was not denying that he was the child's father.

{¶7} The mother assured the father that the child was receiving medical care and required shots. The mother brought medical records to verify that this was so. She also told the magistrate that she was living with her sister and her young nephew in a house with three bedrooms. She agreed that she wanted the father to have visitation because she herself grew up without a father. Because the parties were unable to come to an agreement regarding where the child should live while the custody matter was pending,

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<sup>1</sup>There is no evidence regarding where the mother lived between the time she ceased living with the father and went to Georgia.

the magistrate appointed a GAL and set the matter for a pretrial hearing on March 13, 2015. The child was not removed from the mother's custody at this time.

{¶8} On March 13, 2015, a different magistrate conducted the hearing. The mother told the court that the child was seeing a doctor in Georgia and had received all of her shots except for one because the insurance had to be switched. The baby is also in a program in Georgia similar to the Help Me Grow program she participated in Cleveland. The mother also conceded that J.S. was the father. The magistrate stated that she believed the child had the right to bond with both parents and that child was being denied that opportunity by the mother's unilateral decision to move to Georgia. The magistrate emphasized that the father had only three visits since the mother left Cleveland.

{¶9} The GAL agreed that the child needed to bond with both parents. The magistrate inquired regarding the parties' living conditions. The mother stated she lived in a double-wide trailer with her sister and her young nephew. The GAL stated that the father's home would meet the necessities of the child, because all of the child's belongings such as crib and clothes were still at his home. Because the mother lived in Georgia, there was no way for the GAL to determine whether her home was appropriate. The magistrate also asked the father who would take care of the child while he was at work; he responded he had arranged for the assistance of three babysitters.

{¶10} The magistrate, after concluding that the father was being deprived of bonding time with the child, and because there was no way to determine if the mother's living conditions were appropriate for the medically fragile child, issued an order granting temporary custody of the child to the father and ordered as follows:

IT IS ORDERED THAT: Father shall have temporary pre-dispositional custody of the child.

IT IS FURTHER ORDERED THAT: Mother can have visitation with the child every other weekend.

IT IS FURTHER ORDERED THAT: The child is NOT to leave the jurisdiction of the this court.

IT IS FURTHER ORDERED THAT: Mother is to have a home study completed by a verified agency in Georgia at her expense.

IT IS FURTHER ORDERED THAT: Mother is to be kept informed of all medical and service provider appointments.

IT IS FURTHER ORDERED THAT: This matter is continued to May 20, 2015 at 10:00 a.m. for pretrial trial.

IT IS FURTHER ORDERED THAT: The parties shall file his/her witness list and evidence list a minimum of fourteen (14) days prior to the trial date. Failure to do so and to properly serve the lists on all necessary parties shall result in the parties' witnesses and evidence being excluded from trial.

The parties are advised that failure to appear at the next hearing may result in an adverse judgment including, but not limited to, dismissal of these proceedings, the issuance of a warrant, the issuance of an order for parenting time or visitation, or change in custody.

Journal Entry, March 13, 2015.<sup>2</sup>

{¶11} On March 18, 2015, the father filed a motion to show cause because the mother had not returned the child after her weekend visitation on March 15, and he believed that the mother had returned to Georgia with the child.

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<sup>2</sup>R.C. 3109.042(A) provides in pertinent part: "An unmarried female who gives birth to a child is the sole residential parent and legal custodian of the child until a court of competent jurisdiction issues an order designating another person as the residential parent and legal custodian. A court designating the residential parent and legal custodian of a child described in this section shall treat the mother and father as standing upon an equality when making the designation."

{¶12} On March 23, 2013, the mother's attorney entered a notice of appearance and filed a motion to set aside the magistrate's March 13, 2015 order arguing that Ohio did not have jurisdiction because the child lived in Georgia and that the mother was entitled to a formal hearing regarding temporary custody.

{¶13} On March 27, 2015, the magistrate concluded that its March 13, 2015 order had been violated and set the matter for a show cause hearing on April 17, 2015.

{¶14} On April 3, 2015, the father's attorney filed a notice of appearance and filed a motion in opposition to the mother's motion to set aside. As to the mother's argument that the juvenile court had no jurisdiction, the father argued that because Ohio was the child's home six months prior to the filing of the proceeding, the Cuyahoga County Juvenile Court had jurisdiction pursuant to R.C. 3127.15(A).<sup>3</sup> He also argued that pursuant to Juv.R. 13(B)(1) a formal hearing regarding temporary custody was not necessary.

{¶15} On April 6, 2015, the mother filed a motion to continue the April 17 hearing on the father's motion to show cause because the mother's attorney was scheduled for seven different hearings in Lorain County on that date. Attached to his motion were the orders from the other cases proving the hearings scheduled for that day. The mother's attorney also contended that he was recently retained by the mother and needed time to

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<sup>3</sup>R.C. 3127.15(A)(1) states that Ohio has jurisdiction if "this state is the home state of the child on the date of the commencement of the proceeding, *or* was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent \* \* \* continues to live in this state." (Emphasis added.)

familiarize himself with the case. The mother also filed a motion objecting to the magistrate's requiring a motion to show cause hearing given that the mother had filed a motion to set aside the very order that the father was contending the mother violated. The father filed a motion in opposition to the motion to continue.

{¶16} On April 12, 2015, the trial court approved the magistrate's decision finding the mother to be in contempt for not complying with the order regarding temporary custody.

{¶17} On April 15, 2015, the magistrate denied the mother's motion to continue the April 17, 2015 motion to show cause hearing, finding that good cause was not shown.

{¶18} On April 16, 2015, the mother's counsel filed a motion requesting that the mother be permitted to testify telephonically because she was experiencing problems with her car to the extent it was not driveable. Attached to the motion was an April 15, 2015 notarized receipt from the car repair shop that was repairing the mother's vehicle. The receipt stated that the car was not driveable and that the transmission was on back-order. Counsel also advised the court that he would be late to the 11:30 a.m. hearing because he was not able to reschedule his hearings in Lorain County, because they were scheduled for the next day. Counsel also stressed that the matter was set in the notice as a pretrial and not a "full contested hearing," and that this was the first motion to show cause to be filed against the mother.

{¶19} The trial court conducted the hearing on April 17, 2015 on the father's motion to show cause. A review of the transcript shows that the father, the father's



counsel, and mother's counsel were all present. The mother failed to appear. A review of the transcript indicates the following discussion occurred:

Counsel: I believe my client would have an opportunity to be heard on the contempt, so those aren't violations until she has this opportunity. And there's an issue, as a civil matter, to give her an opportunity to purge.

I did request a continuance in a timely manner based upon my docket in Lorain County. I had to call the officer to find out whether that was granted. I was told Wednesday it was denied. I had to scramble to deal with issues in Lorain County.

As this court's aware, my client — I filed on behalf of my client a motion to allow her to appear telephonically because of her problem with her car. There was an attachment signed by a mechanic as to the problems with her car. It's not driveable at this time. And also alerting the Court that Mr. Henry would be here with me and that I may be tardy.

My office advised me yesterday that within — there was a call placed to my office by a Debbie indicating that if my client didn't appear, there [would] be a warrant issued for her arrest and that I needed to be here at 11:30. I am here on time with some struggle in coordinating my schedule in Lorain County.

I would ask the Court to defer any warrant to arrest my client, because she does have a legitimate car problem relative to her vehicle not in a driveable condition, and defer this hearing and any warrant that this Court may be inclined to issue for a date within the next couple of weeks that's acceptable to everybody's schedule. Thank you.

Court: The warrant is not because she is not appearing. The warrant is because she has taken this child out of the jurisdiction against the direct court order. That is what the warrant is. That child is to be back in this jurisdiction.

As an officer of the court, I'm sure you understand that the child was not to be removed from this jurisdiction. That is a direct violation of this Court's order, so the warrant will be issued. I will set the hearing on the VCO.

The warrant is not the — her arrest will not be based on the VCO. The arrest is on her failure to appear today and her failure to follow this Court's

order [by] remov[ing] this child from this jurisdiction. The orders were very specific.

Counsel: So you are indicating that my client's in direct contempt?

Court: Your client is in direct contempt. You've told me, as you represent her, that the child was with her in Georgia. The order that this Court issued was very clear that this child was not to be removed from the jurisdiction. That is direct contempt.

April 17, 2015, tr. 4-6.

{¶20} The court then issued the following order:

The magistrate finds, per counsel for the mother, that the mother has removed the child from this Court's jurisdiction and taken the child to the State of Georgia in direct violation of this Court's direct order. Counsel further advised that mother would not be presenting herself before the court on this day as ordered.

The magistrate further finds that on March 13, 2015, this court ordered that Father shall have temporary pre-dispositional custody of the child with the additional orders stating the child is NOT to leave the jurisdiction of this court and Mother is to have a home study completed by a verified agency in Georgia at her expense.

The magistrate further finds that Mother has failed to comply with the orders and failed to appear for court today.

IT IS THEREFORE ORDERED THAT: An arrest warrant is issued for [the mother] The court will entertain a motion to recall the warrant upon the child's return to the custody of [the father], Father.

MOTHER'S VISITATION WITH THE CHILD IS SUSPENDED UNTIL FURTHER NOTICE UNLESS SUPERVISED BY THE FATHER OR HIS DESIGNEE.

IT IS FURTHER ORDERED THAT: This matter is continued to June 10, 2015 at 10:00 A.M. for trial on the motion to show cause filed by [the father] and for a pretrial hearing on the Application to Determine Custody filed by [the father.]

Journal Entry, April 20, 2015.

{¶21} On April 30, 2015, the mother filed a motion to set aside the April 20, 2015 order and requested that the magistrate's order be stayed. In the motion, she stated that she was still awaiting the trial court's decision regarding her motion to set aside the magistrate's order in which temporary custody was awarded to the father. She also argued that her alleged violation of the court order would constitute indirect not direct contempt; therefore, she was entitled to a hearing prior to the court imposing sanctions.

{¶22} On May 5, 2015, the trial court denied the mother's motion to set aside the magistrate's order that ordered temporary custody to the father and adopted the magistrate's decision. On May 12, 2015, the trial court overruled the mother's objections to the magistrate's order finding her to be in direct contempt. The trial court also denied the mother's motion for a stay.

{¶23} The mother appealed the trial court's May 5 and May 12, 2015 orders. On June 3, 2015, this court granted the mother's motion to stay pending appeal.

### **Deprivation of Due Process Rights**

{¶24} In her first assigned error, the mother argues that the trial court violated her right to due process by awarding temporary custody of the child to the father and by finding her to be in direct contempt without first conducting a hearing.

#### **1) Temporary Custody**

{¶25} At the outset, we find that we have no jurisdiction to review the temporary custody order because such an order is not a final, appealable order. A temporary order allocating custody between parents is not a final judgment, but rather is an interlocutory

order. *See State ex rel. Thompson v. Spon*, 83 Ohio St.3d 551, 554, 700 N.E.2d 1281 (1998); *State ex rel. Willacy v. Smith*, 78 Ohio St.3d 47, 50-51, 676 N.E.2d 109 (1997); *In re Devlin*, 78 Ohio App.3d 543, 605 N.E.2d 467 (10th Dist.1992); *Shear v. Shear*, 8th Dist. Cuyahoga No. 65339, 1994 Ohio App. LEXIS 1382 (Mar. 31, 1994).

{¶26} We acknowledge that the Ohio Supreme has created an exception to this rule regarding the finality of temporary custody when the custody dispute is between a parent and a public services agency. In *In re Murray*, 52 Ohio St.3d 155, 556 N.E.2d 1169 (1990), syllabus, the Ohio Supreme Court held that an adjudication by a juvenile court that a child is neglected or dependent followed by a disposition awarding temporary custody to a public children services agency constitutes a final order and is appealable to the court of appeals. *See also In re H.F.*, 120 Ohio St.3d 499, 2008-Ohio-6810, 900 N.E.2d 607 (“an appeal of an adjudication order of abuse, dependency, or neglect of a child and the award of temporary custody to a children services agency \* \* \* must be filed within 30 days of the judgment entry pursuant to App.R. 4(A)).

{¶27} Within the *Murray* opinion, the court acknowledged a distinction between neglect or dependency proceedings followed by an award of temporary custody to a public children services agency and custody disputes between parents. *Murray* at 159, fn.2. This court also acknowledged this distinction in *In re S.M.*, 8th Dist. Cuyahoga No. 81566, 2004-Ohio-1243. In *S.M.* we held as follows:

[T]he mother argues that the trial court erred in awarding temporary custody to the father and grandmother because there was no motion pending and no

finding of suitability was determined. We are without jurisdiction to address this issue. An order awarding temporary custody which does not make an adjudication on dependency or neglect is an interlocutory order that is subject to modification upon a later dispositional hearing. *See* Juv.R. 13; Juv.R. 29; *In re Murray* (1990), 52 Ohio St.3d 155, 556 N.E.2d 1169; *Morrison v. Morrison* (1973), 45 Ohio App.2d 299, 344 N.E.2d 144. As such, it is not a final appealable order. *Id.* *See also Brooks v. Brooks* (1996), 117 Ohio App.3d 19, 22, 689 N.E.2d 987; *In re Devlin* (1992), 78 Ohio App.3d 543, 544, 605 N.E.2d 467; *In re Papay Children* (Nov. 4, 1982), Richfield App. No. CA-2042, 1982 Ohio App. LEXIS 15124.

*Id.* at ¶ 30. *See also Howell v. Rintala*, 11th Dist. Trumbull No. 2011-T-0102, 2012-Ohio-1464, fn. 1; *Fritz v. Burch*, 5th Dist. Stark No. 2008CA00286, 2009-Ohio-4004; *In re Stamper*, 5th Dist. Richland No. 99CA73, 2000 Ohio App. LEXIS 691 (Feb. 18, 2000).

{¶28} The instant case is a temporary custody dispute between the mother and the father of the child and is not a case where the child has been adjudicated dependent or neglected with custody being awarded to an agency. Accordingly, this court is without jurisdiction to review the temporary custody order; therefore, that portion of the appeal related to the temporary order is dismissed.

## 2) Direct Contempt Order

{¶29} The mother also contends that the trial court erred by finding her in direct contempt of court and issuing an arrest warrant due to her failure to appear at the April 17, 2015 hearing and for removing the child from the court's jurisdiction.

{¶30} We conclude we have jurisdiction to determine whether the trial court erred by finding the mother to be in direct contempt of the magistrate's order. This court held in *Briggs v. Moelich*, 8th Dist. Cuyahoga No. 97001, 2012-Ohio-1049, ¶ 7, as follows:

We have previously recognized that the mere adjudication of contempt of court is not a final appealable order when the court defers the imposition of punishment for the contempt. *Cleveland Civ. Serv. Emps. Assn. v. Cleveland*, 8th Dist. No. 93922, 2010-Ohio-4352, ¶ 58; *Cooper v. Cooper*, 14 Ohio App.3d 327, 328-329, 471 N.E.2d 525 (8th Dist.1984). While some cases have found there is no final appealable order when the opportunity to purge the contempt is pending, that principle does not apply when the contempt order includes the imposition of a penalty or a sanction. *See Davis-Wright v. Wright*, 4th Dist. 09CA1, 2010-Ohio-3984, ¶ 7-8; *Check v. Rossetti*, 5th Dist. No. 2004-CA-332, 2005-Ohio-3463, ¶ 3; *Noll v. Noll*, 9th Dist. No. 03CA008216, 2003-Ohio-5358, ¶ 9-11.

{¶31} Here, the trial court's order included an arrest warrant for the mother because she removed the child from the jurisdiction of the court in violation of the magistrate's order and also ordered that any visitation with the child be supervised. Under these circumstances, the contempt order constitutes a final appealable order.

{¶32} The mother contends that the magistrate erred by finding her in contempt of an order that was subject of a motion to set aside. However, pursuant to Civ.R. 53(D)(2)(b), "the pendency of a motion to set aside does not stay the effectiveness of the

magistrate's order." Therefore, the mother had to comply with the magistrate's order until the trial court ruled otherwise.

{¶33} However, the trial court erred in concluding that the alleged contempt constituted direct contempt instead of indirect contempt. "The purpose of contempt proceedings is to secure the dignity of the courts and the uninterrupted and unimpeded administration of justice." *Windham Bank v. Tomaszczyk*, 27 Ohio St.2d 55, 271 N.E.2d 815 (1971), paragraph two of the syllabus. While a direct contempt occurs within the actual or constructive presence of the court, indirect contempt involves conduct that occurs outside of the actual or constructive presence of the court. *Strauss v. Strauss*, 8th Dist. Cuyahoga No. 94129, 2010-Ohio-6166, ¶ 9.

{¶34} The mother's noncompliance constitutes indirect contempt because it concerned the mother's violation of a court order that occurred outside the presence of the court. *SKF United States, Inc. v. Zarwasch & Heza Seals, L.L.C.*, 8th Dist. Cuyahoga No. 99232, 2013-Ohio-2543, ¶ 16 (indirect contempt is "behavior which occurs outside the presence of the court and demonstrates a lack of respect for the court or its lawful orders.") Thus, the court erred by finding the mother was in direct contempt of the court's order.

{¶35} A person accused of indirect contempt is entitled to a "hearing on the charge, at which the court must investigate the charge, hear any answer or testimony that the accused makes or offers, and then determine whether the accused is guilty." *Id.* The

alleged contemnor is thus furnished with an opportunity to explain his or her actions. *Hamper v. Dobrski*, 8th Dist. Cuyahoga No. 101770, 2015-Ohio-1381.

{¶36} At the April 17, 2015 hearing, the magistrate found that the mother violated the order and issued an arrest warrant for the mother. The court then stated, “This matter is continued to June 10, 2015 at 10:00 a.m. for trial on the Motion to Show Cause filed by [the father].” However, the trial court had already found the mother to have committed direct contempt at the April 17, 2015 hearing without providing the mother the opportunity to be heard.

{¶37} The magistrate was advised that neither the mother nor her counsel would be able to attend the April 17, 2015 hearing, yet the magistrate refused to grant the continuances filed by the mother. The decision to grant or deny a motion for continuance lies within the discretion of the trial court and will not be reversed on appeal unless the trial court has abused its discretion. *Burton v. Burton*, 132 Ohio App.3d 473, 725 N.E.2d 359 (3d Dist.1999). An abuse of discretion is defined as a decision that is unreasonable, arbitrary or unconscionable, rather than a mere error in judgment. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983).

{¶38} “There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.” *State v. Unger*, 67 Ohio St.2d 65, 67, 423 N.E.2d 1078 (1981). The *Unger* court listed factors to consider in balancing the trial court’s interest in controlling



its own docket, including the efficient dispensation of justice, versus the potential prejudice to the moving party. *Id.* at 67. They are as follows:

The length of the delay requested; whether other continuances have been requested and received; the inconveniences to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstances which give rise to the request for a continuance; and other relevant factors, depending on the unique facts of each case.

*Id.*

{¶39} In the instant case, 1) no other continuances on the mother's behalf had been requested and received; 2) the delay was for a legitimate reason as evidenced by the mother's attaching a notarized receipt from the car repair shop; and, 3) there is no evidence that the mother contributed to the circumstances requiring the continuance because the need for her car to be repaired was due to circumstances beyond her control. We do realize that continuing the matter would deprive the father of further contact with the child, however, there is no indication that a lengthy delay would be necessary. In fact, the mother's attorney requested a continuance of several weeks. The mother did offer to appear by telephone.

{¶40} Given the circumstances outlined above, and the proof supplied to the court showing the mother's inability to be at the hearing, it was unreasonable for the court to refuse to continue the matter. Moreover, given that this is a medically fragile child, the court should not have been so cavalier in ordering that the child be immediately returned to the court's jurisdiction without first considering the child's medical needs. The child

had evidently established medical care with doctors in Georgia, and it was careless to order her removal without consulting those doctors. The child's condition may require stability and consistency of care. The child's best interest is paramount to the father's interest in having bonding time with the child.

{¶41} Accordingly, we sustain the mother's first assigned error as it relates to the motion to show cause and the trial court's finding the mother to be in direct contempt of court. The matter is remanded for a hearing to be conducted regarding the motion.

{¶42} Additionally, our review of the record suggests that this matter should be reviewed by the administration for a change of the judge and magistrate. We acknowledge that this is only a suggestion. However, since the lower court has had extensive involvement with the case and the appearance of partiality was raised during the oral argument, we strongly suggest a change of the judge and magistrate.

{¶43} The mother's second assigned error is dismissed because it concerns the temporary custody order, which we have determined is not a final, appealable order. The mother's third assigned error, in which she argues the trial court merely "rubber stamped" the magistrate's decision regarding the contempt is moot because we have reversed the magistrate's order as it pertains to the contempt order.

{¶44} Appeal dismissed as to the temporary custody order; judgment reversed and remanded as to contempt order. The juvenile court is instructed to conduct a hearing that comports with the requirements for an indirect contempt hearing.

It is ordered that appellant and appellee each pay their respective costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Juvenile Court to carry this judgment into execution.

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

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PATRICIA ANN BLACKMON, JUDGE

MARY EILEEN KILBANE, P.J., CONCURS  
IN JUDGMENT ONLY;  
MARY J. BOYLE, J., CONCURS IN PART  
AND DISSENTS IN PART

MARY J. BOYLE, J., CONCURRING IN PART AND DISSENTING IN PART:

{¶45} I concur in the majority's decision to reverse the trial court's contempt finding and its suggestion that this matter be reviewed by the administration for a change of the judge and magistrate. But I respectfully dissent in the majority's decision not to address the temporary custody award.

{¶46} Unlike the majority, I cannot agree that the juvenile court's award of temporary custody is not subject to review in this exceptional case. Because the contempt finding is directly linked to the juvenile court's order awarding temporary custody, which also mandated for the child to remain in the jurisdiction of the juvenile court, this court should address the juvenile court's decision granting the temporary order of custody. In an appeal from a contempt finding, the Ohio Supreme Court addressed the validity of an underlying temporary order and held that "a juvenile court may issue temporary visitation orders in cases within its jurisdiction under R.C. 2151.23 if it is in the child's best interest." *Rowell v. Smith*, 133 Ohio St.3d 288, 2012-Ohio-4313, 978 N.E.2d 146, ¶ 19. Despite the *Rowell* case involving a temporary order of visitation, the court specifically addressed the juvenile court's authority to issue such an order and did not decline to address the arguments on the grounds that it was not a final appealable order. The same rationale applies in this case.

{¶47} Turning to the juvenile court's order granting temporary custody, I find that the record overwhelmingly demonstrates that the trial court did not act upon the best interests of the child; thus, its order awarding temporary custody cannot stand.

{¶48} While Juv.R. 13 authorizes the juvenile court to make temporary orders regarding custody, such authority arises only "as the child's interest and welfare may require." Indeed, a juvenile court's paramount concern in a custody dispute must always be the "best interest" of the child. As noted by the Ohio Supreme Court, "the time-honored precedent in this state [is] that the 'best interests' of the child are the

primary consideration in questions of possession or custody of children.” *In re Cunningham*, 59 Ohio St.2d 100, 391 N.E.2d 1034 (1979), citing *Gishwiler v. Dodez*, 4 Ohio St. 615 (1855); *Clark v. Bayer*, 32 Ohio St. 299 (1877); *Children’s Home of Marion Cty. v. Fetter*, 90 Ohio St. 110, 127 (1914); *In re Tilton*, 161 Ohio St. 571, 120 N.E.2d 445 (1954); *see also Rowell* at ¶ 20 (emphasizing that Ohio Supreme Court precedent does not suggest “that a parent’s wishes should be placed before a child’s best interest”).

*Id.* Based on the proceedings below, the trial court appears to have lost focus of this directive and unfortunately seemed more concerned with the father’s desire for more bonding time and the mother’s relocation than the child’s best interest.

{¶49} Here, despite B.A.L. being an eight-month-old medically fragile child, who has been in the exclusive and constant care of her mother, the magistrate ordered that the mother immediately turn over B.A.L. and relinquish custody, albeit temporarily, to the father. The magistrate’s rationale for doing so focused on the father’s denial of bonding time and the mother’s unilateral decision to move to Georgia. But the mother’s decision to move to Georgia was not in violation of any court order, and at that time, mother was the sole residential parent and legal custodian of the child. As noted by the majority, Ohio law recognizes that “[a]n unmarried female who gives birth to a child is the sole residential parent and legal custodian of the child until a court of competent jurisdiction issues an order designating another person as the residential parent and legal custodian.” *See R.C. 3109.042(A)*. Father had not filed his petition until after mother relocated to Georgia.

{¶50} Notably, father's stated concerns in support of his motion for temporary custody proved not to be an issue at the time of the March 13, 2015 hearing. Mother stated that B.A.L. was current on all her shots and appointments. Mother also submitted documentary proof supporting this assertion.

{¶51} And while it is understandable that the father wants bonding time with his daughter, his interest is secondary to the child's best interest. Here, where the child has special needs and has an established routine under the exclusive care of her mother, I fail to see how the child benefits from being abruptly removed from her mother's care and sent to live with her father, who must rely on the assistance of babysitters to care for the child while he is at work. Moreover, at the time of the juvenile court's order, the child had been receiving ongoing medical care in Georgia. I agree with the majority that it was careless for the juvenile court to order B.A.L.'s removal without consulting those doctors.

{¶52} Accordingly, based on the record in this case, I would address mother's challenge of the trial court's award of temporary custody and reverse the trial court's decision.