

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
LUCAS COUNTY

T.M.

Court of Appeals Nos. L-10-1014  
L-10-1034

Appellant

Trial Court No. JC 08-177645

v.

J.H.

**DECISION AND JUDGMENT**

Appellee

Decided: January 21, 2011

\* \* \* \* \*

Daniel T. Ellis and Frederick E. Kalmbach, for appellants T.M.  
and Lydy & Moan, LTD.

Stephen B. Mosier, pro se, and for appellant Hayes Soloway P.C.

Dennis P. Strong, for appellee J.H.

Charles S. Rowell, Jr., for appellee Ann Baronas, Guardian ad Litem.

\* \* \* \* \*

SINGER, J.

{¶ 1} This is a consolidated appeal from judgments of the Lucas County Court of  
Common Pleas, Juvenile Division, designating the father of a child the residential,

custodial parent and exacting sanctions against law firms representing the child's mother. For the reasons that follow, we affirm, in part, and reverse, in part.

{¶ 2} Appellant mother, T.M, and appellee father, J.H., are the parents of now four year-old A.H. A.H.'s father and mother were not married at the time of her birth. They nonetheless lived together for a number of months after the birth, at which point J.H. left. In 2007, J.H. was adjudicated A.H.'s father in an administrative proceeding.

{¶ 3} On January 10, 2008, the Lucas County Child Support Enforcement Agency ("LCCSEA") filed a complaint in the trial court seeking a child support order for A.H. LCCSEA and T.M. were the named plaintiffs and J.H. the defendant. J.H. eventually answered the complaint and interposed a counterclaim for custody of the child and establishment of a support order. Accompanying the counterclaim was a motion seeking the same result. T.M., through counsel, responded with her own motion requesting that she be designated the residential and custodial parent of the child. The trial court entered an interim support order and appointed attorney Ann Baronas to be A.H.'s guardian ad litem.

{¶ 4} At an October 15, 2008 parental rights hearing, a magistrate ordered both parents to attend parenting classes and granted J.H. visitation on Tuesdays and Wednesdays. On October 24, 2008, J.H. filed a show cause motion, accusing T.M. of refusing to allow J.H.'s court ordered visitation. Following a hearing, the court entered a judgment clarifying the responsibilities of the parties with respect to visitation. Trial was set for March 2009.

{¶ 5} In the intervening time, T.M.'s original counsel sought and was granted leave to withdraw. For a period, T.M. represented herself, until attorney Thomas Goodwin entered an appearance on her behalf a few weeks before trial. Shortly thereafter, T.M.'s father, attorney Stephen B. Mosier, moved to intervene seeking grandfather visitation or, alternatively, custody. Stephen Mosier would later withdraw his intervention motion and enter an appearance as co-counsel for appellant mother.

{¶ 6} On March 19, 2009, the guardian ad litem filed her report and recommendation. The guardian observed that the child was healthy and without special needs. With respect to the parents, the guardian noted that appellant mother was uncooperative in allowing appellee father visitation from the outset, refused to comply with the court's visitation order for a full week after the order and attempted to file municipal court criminal charges against appellee father to prevent visitation. Moreover, appellant mother would appear with the child while appellee father was at work and come unannounced to appellee father's home during visitation for "specious reasons."

{¶ 7} The guardian suspected that appellant mother had mental health issues and noted a recommendation from a court diagnostic psychologist that the mother have a mental health assessment and treatment. The guardian ad litem concluded that it was in the best interest of the child that appellee father be immediately named the residential parent and legal custodian, and that both parents attend parenting classes.

{¶ 8} While attorney Mosier's motion to intervene was pending, and prior to his entry of appearance in representation of his daughter, he filed a flurry of motions,

including motions to view the guardian's and psychologist's reports, to permit appellant mother to review the same reports, for appellant mother to have copies of the audiotapes of prior hearings and to dismiss appellee father's "motion" for custody for want of subject matter jurisdiction. Most of these motions would later be renewed by appellant attorney Mosier or other counsel for appellant mother and rejected, or at least not granted to appellant mother's satisfaction.

{¶ 9} Just prior to Easter in 2009, appellee father called the guardian ad litem to propose a visitation modification for the holiday. Appellee father told the guardian that he was able to obtain Easter Sunday off work and hoped to arrange holiday visitation on that day. The guardian agreed to attempt to assist and, according to her testimony, visited the office of appellant mother's attorney. Appellant mother happened to be there at the time.

{¶ 10} The guardian later testified that appellant mother indicated that she had plans for Sunday afternoon, but that she did not object to a Saturday visitation. Appellant mother also indicated that she wanted the child on her birthday, Tuesday, which would have been appellee father's regular visitation day. After some discussion between the guardian, appellant mother's attorney and appellee father's attorney, who was reached by telephone, the lawyers concluded that it would be a fair compromise to permit appellee father to have the child from 9:00 a.m. Saturday morning until 11:00 a.m. on Sunday. Appellant mother would keep the child on Tuesday with appellee father's schedule set back a day. Appellant mother apparently agreed to this arrangement.

{¶ 11} According to appellee father's testimony, when his attorney advised him of this plan, he called the guardian immediately. Appellee father told the guardian that he was scheduled to work all day Saturday and that rescheduling his work to accommodate the day change the next week was not practical. Appellee father informed the guardian that he would rather return to the previously ordered regular visitation schedule. According to the guardian, she advised appellee father to notify appellant mother and his counsel of his decision. It is undisputed that he did this.

{¶ 12} On Tuesday, when appellee father arrived to pick up A.H. for regular visitation, appellant mother refused to cooperate. Appellee father called the guardian ad litem to advise her of appellant mother's refusal to abide with the original visitation order. The guardian then called appellant mother and her lead attorney, leaving messages with both to return her call. The lead attorney was on vacation and did not immediately respond. According to the guardian, appellant mother returned the call, but refused to speak to the guardian unless her father, who by now was her co-counsel, joined the call.

{¶ 13} Appellant mother's father was initially without any knowledge of the situation, but eventually, after talking to his daughter, told the guardian that appellant mother believed there had been an agreement reached at her lead counsel's office and that appellant mother was uncertain how to proceed when appellee father called to say there would be no change in visitation. When she did not receive any response from her call to her lead attorney, appellant mother elected to follow her attorney's last instruction, which

was based on the office agreement. This entailed appellant mother keeping A.H. on what would have been appellee father's usual day to have the child.

{¶ 14} The guardian ad litem would later testify that she believed that appellant mother was "trying to play ostrich," pretending that appellee father never called her and doing "exactly" what her lawyer last told her, irrespective of the changed circumstances. As a result, the guardian filed a second supplemental report to the court, detailing the episode and reiterating her recommendation that appellee father be named custodial parent. The guardian also suggested that the court consider granting appellee father temporary custody pending completion of the trial.

{¶ 15} Appellant mother responded with an "emergency motion," drafted by appellant attorney Mosier, to compel the guardian ad litem to supplement her report and "other relief." In the motion, appellant mother asked the court to compel the guardian to disclose the existence of an agreement concerning Easter visitation reached with the guardian's direct participation, explain why the guardian advised appellee father to contact appellant mother outside the presence of counsel for the purpose of persuading appellant mother to rescind the agreement and to explain why the guardian's failure to inform the court of the "agreement" and its terms "\* \* \* does not constitute a direct and egregious violation of her Duties of Candor and Truthfulness to the Court \* \* \*." Appellant mother characterized the guardian's report as containing "multiple highly material misrepresentations and omissions of facts" and called for the immediate removal of the guardian, referral of the guardian to a bar grievance committee, an order that the

guardian reimburse appellant mother costs and attorney fees and other unspecified sanctions.

{¶ 16} The guardian ad litem responded with the entry of appearance of counsel to represent her. The guardian also sent notice to the parties that the fees of the guardian's counsel would be taxed as guardian fees.

{¶ 17} The next hearing date set in the continuing trial was April 23, 2009. Prior to that time both of appellant mother's attorneys sought to withdraw, ostensibly to testify at the hearing regarding the events prior to Easter. Both also submitted to the court declarations concerning those events. Substitute counsel's motion for a continuance was overruled and the matter proceeded as scheduled. This proceeding concerned the Easter visitation incident.

{¶ 18} Following the hearing, the magistrate denied appellant mother's motion to compel the guardian to supplement her report and to remove the guardian. The magistrate ordered her original visitation agreement amended to incorporate the standard juvenile court holiday schedule and directed that child exchange be at a neutral site. The order did not change appellant mother's status as residential parent.

{¶ 19} Appellant mother moved to set aside the magistrate's order, complaining of the denial of her motion for a continuance and evidentiary rulings within the hearing and reiterating her allegation that the guardian attempted "to defraud the Court, by multiple material misrepresentations and material omissions of relevant facts, concerning [what the guardian] deceitfully characterized as a 'refusal' by [appellant mother] to permit \* \* \*

visitation \* \* \*." (Emphasis sic.) Appellant mother also moved the court to assess sanctions against appellee father's counsel.

{¶ 20} While appellant mother's motion was pending, she filed a motion challenging the magistrate's authority to issue subsequent orders while the decision from the April 23 hearing was "on appeal." Appellant mother also moved to disqualify the magistrate. On July 1, 2009, the judge to whom the case had originally been assigned recused herself. A retired juvenile judge was appointed visiting judge in her stead. The first action of the visiting judge was to deny appellant mother's motion to disqualify the magistrate.

{¶ 21} On July 9, 2009, the parental rights and responsibilities hearing continued. No transcript of that hearing is in the record, but as a result of those proceedings the magistrate ordered an immediate change of possession of A.H. to appellee father. In her findings of fact related to this hearing, the magistrate noted that appellant mother has significant mental health history, has had outbursts in the courtroom, including once bolting from the room, and had engaged in violent behavior with at least four persons, including her mother and brother.

{¶ 22} Appellant mother filed objections and a motion to set aside the magistrate's July 9 order. Concurrently, she applied to this court for writs of prohibition and mandamus. Appellant mother sought orders prohibiting the juvenile court from proceeding with the case and mandating the return of A.H. to her mother. We denied the writs and dismissed appellant mother's complaint. *State ex rel. T.M v. Fornof*, 6th Dist.

No. L-09-1192, 2009-Ohio-5618, affirmed, *State ex rel. Mosier v. Fornof*, 126 Ohio St.3d 47, 2010-Ohio-2516.

{¶ 23} Meanwhile, another incident at the neutral site for visitation exchange resulted in the site staff calling police to cope with appellant mother's disruptive behavior. As a result, appellee father moved for, and following a hearing, was granted an order that further visitation between appellant mother and A.H. be supervised. Appellant mother again responded with a motion to set aside the order.

{¶ 24} On November 4, 2009, the magistrate entered her final decision. Appellee father was designated the residential parent and legal custodian of A.H. The magistrate ordered appellant mother to pay \$215.45 plus processing charge for monthly child support. Appellant mother filed objections to this decision.

{¶ 25} On December 22, 2009, the visiting judge assigned to the case issued a global judgment disposing of all outstanding matters. The court found all of appellant mother's objections, motions to set aside and motions to stay not well-taken and affirmed the prior orders and decisions of the magistrate. This is the judgment at issue in one of the appeals now before us.

{¶ 26} On January 11, 2010, counsel for the guardian ad litem moved that the attorney fees accrued in service of the guardian be taxed to the law firms representing appellant mother as sanctions pursuant to Civ.R. 11.

{¶ 27} On January 26, 2010, the trial court found the guardian's motion for sanctions well-taken and entered a joint and several judgment in the amount of \$8,748.50

against the law firms of appellant mother's counsel. This is the second judgment at issue in this consolidated appeal.

{¶ 28} Appellant mother sets forth the following eight assignments of error:

{¶ 29} "1. The Juvenile Court, a Court of limited statutory jurisdiction, erred by acting without jurisdiction in purporting to decide parenting issues between unwed parents, issues requiring determination in a proceeding defined by statute, when the statutory prerequisites necessary to establish jurisdiction to decide such issues were not observed.

{¶ 30} "2. The Juvenile Court, in a proceeding brought by a child support enforcement agency solely to enforce a child support obligation of an unwed father, erred by continuing to act after its jurisdiction ceased by virtue of entry of final judgment on all issues framed by the pleadings.

{¶ 31} "3. The Juvenile Court erred by acting without jurisdiction in purporting to adjudicate custody issues against a non-party.

{¶ 32} "4. The Juvenile Court erred by entering orders signed by proxy, by or on behalf of a Judge previously recused from all further proceedings.

{¶ 33} "5. The Juvenile Court erred by conducting proceedings under a Magistrate judge after a reference to the Magistrate had been withdrawn.

{¶ 34} "6. The Juvenile court erred by entering an order purporting to retroactively reinstate reference to a Magistrate Judge, with respect to a proceeding previously conducted by the Magistrate Judge acting after reference had been withdrawn.

{¶ 35} "7. The Juvenile Court erred by improperly interfering with a party's rights to counsel.

{¶ 36} "8. The Juvenile Court erred by denying the Appellant due process and fundamental fairness in the proceedings by:

{¶ 37} "precluding Appellant from reviewing the guardian ad litem's reports and the psychologist's report, key evidence considered by the court in making its determination of child custody, and prohibiting Appellant's counsel from discussing such evidence with appellant prior to the evidentiary hearing; and .[sic]

{¶ 38} "denying Appellant's counsel's request for a stay and/or continuance to allow counsel to review audio tapes of hearings that took place prior to counsel's representation of the Appellant thereby impairing counsel's ability to adequately prepare for the evidentiary hearing."

{¶ 39} Appellants Hayes Soloway P.C. and Stephen B. Mosier assert the following six assignments of error;

{¶ 40} "Assignment of Error Number 1

{¶ 41} "The Juvenile Court errs by imposing Rule 11 sanctions without conducting an evidentiary hearing as mandated by that rule.

{¶ 42} "Assignment of Error Number 2

{¶ 43} "The Juvenile Court errs by awarding attorney's fees in favor of a non-party movant, when the literal language of Rule 11 grants 'standing' only to 'parties' to seek such an award.

{¶ 44} "Assignment of Error Number 3

{¶ 45} "The Juvenile Court errs as a matter of law in assessing Rule 11 sanctions purportedly based on a motion first filed nearly 19 months after entry of final judgment, and without any lawful continuing jurisdiction, during proceedings which are a legal nullity.

{¶ 46} "Assignment of Error Number 4

{¶ 47} "Insofar as Rule 11 sanctions may only be assessed against a party or its individual counsel, the Juvenile Court errs in assessing Rule 11 sanctions against non-party law firms.

{¶ 48} "Assignment of Error Number 5

{¶ 49} "The Juvenile Court errs in awarding attorney's fees which bear no causal relationship to any wrongful conduct as defined by Rule 11.

{¶ 50} "Assignment of Error Number 6

{¶ 51} "Where a guardian *ad litem* makes material misrepresentation of fact to the court in connection with a purported emergency motion and interrelated custody recommendations and where multiple good grounds are shown to exist supporting and fully warranting factually accurate criticism of the guardian's of said conduct, such criticism is not sanctionable conduct under Rule 11 as a matter of law."

{¶ 52} Appellant law firm Lydy & Moan, LTD, interpose the following five assignments of error:

{¶ 53} "1. The Juvenile Court erred by imposing Rule 11 sanctions without conducting an evidentiary hearing.

{¶ 54} "2. The Juvenile Court erred by awarding attorneys' fees in favor of a non-party when Rule 11 grants standing only to a party to seek an award under Rule 11.

{¶ 55} "3. The Juvenile Court erred in assessing Rule 11 sanctions against a law firm insofar as Rule 11 sanctions may be only assessed against a party or his counsel.

{¶ 56} "4. The Juvenile Court erred in awarding attorneys' fees which are not argued or shown to be in any way causally related to any wrongful conduct of a party or his counsel.

{¶ 57} "5. The Juvenile Court erred as a matter of law when it held the challenge to its subject matter jurisdiction (the appeal on behalf of appellant's client during its pendency) was 'without basis in law or fact' because it was divested of jurisdiction."

#### I. Jurisdiction

{¶ 58} We shall discuss appellant mother's first three assignments of error together.

{¶ 59} Once appellee father had entered his counterclaim for custody, appellant mother, on numerous occasions, attempted to challenge the jurisdiction of the court to hear the case. Initially, she argued that, because R.C. 3109.12 provides that one who has been found to be the father of a child, "\*\*\* *may file a complaint* \*\*\* for reasonable parenting time rights \*\*\*" (emphasis added), the filing of a complaint is statutorily

prerequisite to the exercise of a court's jurisdiction. Since appellee father did not file a complaint, appellant mother argued, any action by the trial court is void.

{¶ 60} Later, appellant mother set forth an alternative argument concerning the trial court's jurisdiction, suggesting that she was never more than a "nominal" plaintiff in the child support case. Even though her name appeared in the caption of the action as a plaintiff, the real party was the LCCSEA. Appellant mother cites Morganstern and Sowald, Baldwin's Ohio Domestic Relations Law (2009) Section 22:24 (which in turn cites and quotes Op. No. 90-10 (June 15, 1990) Ohio Sup.Ct. Bd. of Commrs. on Grievances and Discipline) for the proposition that the LCCSEA represents the interests of the state, not the custodial parent. Since appellant mother did not have the power to settle, dismiss or compromise the child support claim, she argues, she was a party in name only, necessitating that appellee father take the statutory steps to initiate a custody action before she can be bound by a determination.

{¶ 61} To some extent these issues have been addressed. When the trial court ordered temporary custody of A.H. to appellee father, appellant mother applied to this court for writs of prohibition and mandamus, seeking to bar the trial court's further consideration of the case and to compel the surrender of the child to appellant mother. The foundation of appellant mother's plea for relief was the trial court's lack of jurisdiction.

{¶ 62} We denied the writs, concluding that absent the trial court's patent and unambiguous lack of jurisdiction the writs should not issue. Since, pursuant to R.C.

2151.23(A), a juvenile court has jurisdiction to determine the custody of any child not the ward of another court, the juvenile court was not unambiguously without jurisdiction.

*State ex rel. T.M.*, supra, 2009-Ohio-5618, at ¶ 8.

{¶ 63} When appellant mother appealed that decision, the Supreme Court of Ohio affirmed, noting that appellant mother's reliance on any intricacies in R.C. 3109.12 was misplaced because that statute deals with "parenting time" rather than custody. *State ex rel. Mosier*, 2010-Ohio-2516, ¶ 6. What appellee father sought was custody.

"Therefore, Mosier's claim alleges, at best, an error in the court's exercise of its jurisdiction rather than a lack of subject-matter jurisdiction." *Id* at ¶ 7.

{¶ 64} "'Jurisdiction' means 'the courts' statutory or constitutional power to adjudicate the case.' The term encompasses jurisdiction over the subject matter and over the person. \* \* \*. It is a 'condition precedent to the court's ability to hear the case. If a court acts without jurisdiction, then any proclamation by that court is void.'

{¶ 65} "The term 'jurisdiction' is also used when referring to a court's exercise of its jurisdiction over a particular case. The third category of jurisdiction [i.e., jurisdiction over the particular case] encompasses the trial court's authority to determine a specific case within that class of cases that is within its subject matter jurisdiction." *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, ¶ 11-12. (Citations omitted.)

{¶ 66} Jurisdiction over a particular case is an elusive concept, defined best by example. A common pleas court is a court of general jurisdiction and has subject matter jurisdiction over crimes committed by an adult. Nevertheless, where the common pleas

court fails to strictly comply with procedures in a capital case, such as the failure to utilize a statutorily mandated three judge panel, it is an improper exercise of jurisdiction over the case. *Id.*, syllabus.

{¶ 67} This example is similar to that which appellant mother claims here. However, the improper exercise of jurisdiction appellant claims is based on a statute inapplicable to the present circumstances. *State ex rel. Mosier*, 2010-Ohio-2516, ¶ 6. In any event, appellant mother's assertion of lack of subject matter jurisdiction is unavailing. *Id.* at ¶ 4.

{¶ 68} Appellant mother's argument with respect to personal jurisdiction is similarly unpersuasive. Appellant mother asserts that she is only a "nominal" plaintiff because the LCCSEA represents not her, but the state. In support, she indirectly cites a 1990 Board of Grievances advisory opinion. The question there was not whether the child support recipient was a party to an enforcement action, but who the child support agency attorney represented.

{¶ 69} At the time, there was concern that, if the agency lawyer represented the child support obligee, a conflict might exist should custody change and the former obligor became the obligee. The Board of Grievances concluded that the state has a strong interest in the enforcement of child support obligations and it is, therefore, the state that is the CSEA's client. The opinion recognized that the state and the obligee are separate parties that may have conflicting interests. Thus, the board recommended that, "[t]he custodial parent therefore should be informed at the outset that the CSEA attorney

represents the state and that the custodial parent should obtain counsel." Op. 90-10, supra.

{¶ 70} The state and the obligee, in this case appellant mother, have related but distinct interests in a child support enforcement action. Consequently, the case caption, which lists the LCCSEA and appellant mother as separate plaintiffs, would appear accurate. Moreover, while appellant mother's role was initially passive, after appellee father interposed his counterclaim for custody, she obtained counsel who entered an appearance, filed numerous motions and actively participated in the proceedings. Such participation would constitute a waiver of any challenge to in personam jurisdiction even had appellant mother not been an original named plaintiff. *Maryhew v. Yova* (1984) 11 Ohio St.3d 154, 156.

{¶ 71} Accordingly, the trial court had both personal and subject matter jurisdiction in this matter and there is nothing to suggest that the court improperly exercised jurisdiction over the case. Appellant's first three assignments of error are not well-taken.

## II. Acts After Recusal

{¶ 72} On two occasions after the original trial judge recused herself, she signed judgment entries on the case from which she had removed herself. In her fourth assignment of error, appellant mother suggests this was error.

{¶ 73} An order signed by a judge who has recused himself or herself from a case is void because the judge possessed no authority to act on behalf of the court. *In re B.D.*,

11th Dist. Nos. 2009-L-003, 2009-L-007, 2010-Ohio-2299, ¶ 76. A void judgment has no legal force or effect. *Hague v. Hague*, 11th Dist. No. 2008-A-0069, 2009-Ohio-6509, ¶ 37. For a judgment or order to constitute reversible error on appeal it must have operated to the prejudice of the appellant. *Smith v. Flesher* (1967), 12 Ohio St.2d 107, paragraph one of the syllabus. Since the orders apparently signed in error had no legal force and no action was taken pursuant to them, appellant could not have been prejudiced by them. Accordingly, appellant's fourth assignment of error is not well-taken.

### III. Magistrate Referral

{¶ 74} In her fifth and sixth assignments of error, appellant maintains that the magistrate acted without authority in the interim between the recusal of the original judge on the case and the magistrate's reappointment by the visiting judge.

{¶ 75} The entry of the original judge's recusal was journalized on July 7, 2009. On July 8, 2009, the visiting judge signed a judgment that overruled appellant mother's motion to disqualify the magistrate and continued the referral of the case to the magistrate. That entry was journalized on July 9, 2009, the same day as the magistrate's hearing on allocation of parental rights and responsibilities of the parties and the date of the magistrate's decision granting appellee father possession of the child.

{¶ 76} Appellant insists that the hearing actually commenced on July 8, 2009. The record does not support that assertion. Moreover, even were that true, the visiting judge's re-referral of the case to the magistrate occurred concurrently and the magistrate took no action until July 9, 2009, the day the order of re-referral was journalized. On this record,

we find that the magistrate had authority to act at all times. Accordingly, appellant mother's fifth and sixth assignments of error are not well-taken.

#### IV. Interference with Counsel

{¶ 77} In her seventh and eighth assignments of error, appellant mother suggests that the trial court interfered with her right to counsel by 1) refusing to appoint her counsel at the state's expense, 2) denying her trial transcripts and/or copies of hearing audiotapes at state's expense, 3) restricting her personal access to psychological and guardian ad litem reports and prohibiting counsel from discussing these reports with her, and 4) denying her motion for a continuance when her co-counsel elected to withdraw in order to testify about the Easter visitation incident.

{¶ 78} Appellant regularly confuses the posture of these proceedings, referring to this as a permanent custody action. It is not. "Permanent custody" is a term of art referring to the ultimate disposition of a termination of parental rights action. In such a proceeding, the parental rights of a natural parent is wholly abrogated without any residual rights or responsibilities and "permanent custody" ordinarily is awarded to a children's services agency antecedent to adoption. R.C. 2151.011(B)(30).

{¶ 79} This is a proceeding for legal custody of a child who is not a ward of any other court in the state, pursuant to R.C. 2151.23(A)(2). *State ex rel. Mosier*, supra, at ¶ 4. Legal custody, "\* \* \* vests in the custodian the right to have physical care and control of the child and to determine where and with whom the child shall live, and the right and duty to protect, train, and discipline the child and to provide the child with food,

shelter, education, and medical care, all subject to any residual parental rights, privileges, and responsibilities. \* \* \*." R.C. 2151.011(B)(19). When a parent loses legal custody of a child, he or she retains certain residual parental rights including visitation. That parent also retains the right to request return of legal custody in the future. *In re Nice* (2001), 141 Ohio App.3d 445, 455. Legal custody is determined by that which is the best interest of the child. *In re Bell*, 7th Dist. No. 04 NO 321, 2005-Ohio-6603, ¶ 37.

{¶ 80} Appellee father's counterclaim for custody is the equivalent of a request for an initial determination of custody in a domestic relations proceeding. The result is that a proceeding under R.C. 2151.23(A)(2) is considered a civil matter, excepted from any entitlement to appointed counsel for an indigent party as might be the case in other juvenile court proceedings. R.C. 2151.352. Concomitantly, a party to such a proceeding is no more entitled to transcripts, copies or other items at the expense of the state than would a party to a civil proceeding. Consequently, the trial court did not err in denying appellant mother's requests for such material at the public's expense.

{¶ 81} Appellant mother also complains that the trial court violated Sup.R. 48 concerning the availability of guardian ad litem reports when it limited inspection of the supplemental guardian reports and psychological reports to counsel. Appellant mother also complains that she was prejudiced when she was denied access to digital recordings of prior hearings to copy or transcribe at the state's expense.

{¶ 82} As we have already noted, this is a civil matter to which parties are not entitled to services that are taxed to the public. Concerning the availability of the

guardian and psychological reports, Sup.R. 48(F)(2) provides with respect to the guardian ad litem's report:

{¶ 83} "In domestic relations proceedings involving the allocation of parental rights and responsibilities, the final report shall be filed with the court and made available to the parties for inspection no less than seven days before the final hearing unless the due date is extended by the court. Written reports may be accessed in person or by phone by the parties or their legal representatives. A copy of the final report shall be provided to the court at the hearing. The court shall consider the recommendation of the guardian ad litem in determining the best interest of the child only when the report or a portion of the report has been admitted as an exhibit."

{¶ 84} In contrast, appellee father points to Juv.R. 32(C), which states:

{¶ 85} "A reasonable time before the dispositional hearing, or any other hearing at which a social history or physical or mental examination is to be utilized, counsel shall be permitted to inspect any social history or report of a mental or physical examination. The court may, for good cause shown, deny such inspection or limit its scope to specified portions of the history or report. The court may order that the contents of the history or report, in whole or in part, not be disclosed to specified persons. If inspection or disclosure is denied or limited, the court shall state its reasons for such denial or limitation to counsel."

{¶ 86} Sup.R. 48(F) provides for the availability to the parties of guardian ad litem reports. Juv.R. 32(C) declares social histories and reports of physical and mental

examinations, absent good cause shown, are ordinarily available only to counsel.

Clearly, the trial court acted in conformity with Juv.R. 32(C) with respect to restricting access to the parties' psychological reports.

{¶ 87} Arguably, a guardian ad litem's report contains a social history. But Sup.R. 48(F) specifically deals with a guardian ad litem's report in "domestic relations proceedings involving the allocation of parental rights and responsibilities \* \* \*." It is a rule of construction that where general and special provisions cannot be reconciled, the special provision prevails. R.C. 1.51. Applying this rule to the present situation, it would appear that the trial court should have made the guardian ad litem's report available to appellant mother.

{¶ 88} Nevertheless, for this denial of access to constitute reversible error, it must also be shown that the error was prejudicial to appellant. App.R. 12(B). Appellant mother has not persuasively articulated the manner in which her inability to personally view the guardian's report operated to her prejudice. From the time the report was issued until the conclusion of the case, appellant mother was represent by counsel, frequently co-counsel, who were permitted access to the report and its various supplements. Throughout the case, the recommendation of the guardian was no secret, nor were the grounds for that recommendation. Given this access by counsel to the documents, we can conceive of no manner in which appellant mother's inability to personally view the documents harmed her case.

{¶ 89} Finally, appellant mother complains that the trial court abused its discretion when it denied her motion for a continuance for the April 23, 2009 hearing. This is the hearing at which appellant mother's co-counsel withdrew, ostensibly to provide factual testimony as to the events surrounding the Easter visitation incident. Appellant mother insists that she suffered a disadvantage, because her replacement counsel had inadequate time to prepare for the hearing.

{¶ 90} The decision to grant or deny a continuance rests within the sound discretion of the court and will not be reversed absent an abuse of that discretion. *State v. Unger* (1981), 67 Ohio St.2d 65, syllabus. An abuse of discretion is more than an error of judgment or a mistake of law, the term connotes that the court's attitude is arbitrary, unreasonable or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 91} In the present matter, there was a long-standing hearing date set, rescheduling of which would have involved the coordination of the parties, the court, the guardian ad litem and many attorneys. Moreover, since the reason for the request for a continuance was the withdrawal of co-counsel to provide witness testimony, the preparation and timing of the request with respect to new counsel was in the hands of the party requesting a continuance. Additionally, since the co-counsel who had withdrawn were available in the courtroom to assist substitute counsel, the need for extensive preparation appears lessened. We might also add that, having reviewed the transcript of the proceeding, substitute counsel appears to have been fully prepared. Balancing all of these factors, we can only conclude that the court acted within its discretion when it

denied appellant mother's motion for a continuance. Accordingly appellant mother's seventh and eighth assignments of error are not well-taken.

#### V. Attorney Sanctions

{¶ 92} On January 26, 2010, the trial court, without a hearing, ruled on the motion from counsel for the guardian ad litem that the attorney fees incurred by the guardian be assessed to the law firms that represented appellant mother. The trial court found the motion well-taken. In doing so, the court found that appellant Stephen Mosier, as a partner in the firm of appellant law firm Hayes Soloway P.C., signed pleadings accusing the guardian ad litem of unethical conduct and requesting that she be referred to a bar grievance committee. The court further found that appellant attorney Mosier filed a declaration with the court "purportedly under oath," the content of which was defamatory and scandalous. The court concluded that appellant attorney Mosier's acts "were specious and scandalous matter within the meaning of Civ.R. 11."

{¶ 93} The court further found that Daniel Ellis, as a partner in appellant law firm Lydy & Moan LTD, advanced the allegations of Steven Mosier which were found to be "baseless and untrue." Further, the court found that Lydy & Moan repeatedly filed challenges to the jurisdiction of the court which were "without basis in law or fact."

{¶ 94} Both appellant law firms assert in their first assignment of error that the trial court erred in assessing Civ.R. 11 sanctions without first conducting a hearing.<sup>1</sup> In material part, Civ.R. 11 provides:

{¶ 95} "Every pleading, motion, or other document of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name \* \* \*. The signature \* \* \* constitutes a certificate by the attorney or party that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. \* \* \* For a willful violation of this rule, an attorney or pro se party, upon motion of a party or upon the court's own motion, may be subjected to appropriate action, including an award to the opposing party of expenses and reasonable attorney fees incurred in bringing any motion under this rule. Similar action may be taken if scandalous or indecent matter is inserted."

{¶ 96} Citing cases related to frivolous conduct sanctions imposed pursuant to R.C. 2323.51, appellant law firm Hayes Soloway P.C. insists that fundamental fairness requires that, before a court imposes a sanction, it must conduct a hearing to provide the party opposing sanctions an opportunity to establish a good faith basis for his or her pleading. While no hearing is required to deny such a motion, due process demands such a hearing when an award may be made. The same principles apply with respect to a

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<sup>1</sup>Appellant Lydy & Moan LTD, intent on arguing the merits of the Civ.R. 11 sanction, never actually addresses its first assignment of error.

Civ.R. 11 sanction, appellant law firm insists. Consequently, the trial court's order imposing sanctions should be vacated and the matter remanded for a hearing.

{¶ 97} Appellee guardian ad litem responds, arguing that there was no need for a hearing in this matter, or alternatively that the April 23, 2009 hearing was sufficient to satisfy any hearing requirement. Appellee guardian notes that the trial court waited for approximately two weeks to rule on her motion. When neither law firm responded, the court issued what appellee guardian characterizes as the equivalent of a default judgment. Additionally, appellee guardian asserts, appellant law firms' accusation of that the guardian ad litem engaged in unethical conduct was scandalous per se when found unsupported after the April 23 hearing.

{¶ 98} We are not persuaded that there should be a significant difference in the manner in which R.C. 2323.51 sanctions and Civ.R. 11 sanctions are imposed. The principal difference between these provisions is that broader sanctions may be imposed under the rule, but these sanctions may only be imposed upon attorneys or, in certain circumstances, pro se litigants. *Shaffer v. Mease* (1991), 66 Ohio App.3d 400, 409, 410. Both provisions require that, prior to the imposition of sanctions, the trial court must conduct a hearing. *Sandberg v. Crouch*, 2d Dist No. 21342, 2006-Ohio-4519, ¶ 156; *Rondini v. Semen*, 11th Dist. No. 2002-L-017, 2002-Ohio-6590, ¶ 7; *Cic v. Nozik* (July 20, 2001), 11th Dist. No. 2000- L-117. "[B]oth Civ.R. 11 and R.C. 2323.51 require the trial court to conduct an evidentiary hearing at which the parties and counsel must be given the opportunity to present any evidence relevant to the issues raised before

imposing sanctions." *Nozik v. Sanson* (June 8, 1995), 8th Dist. No 68269. It is an abuse of discretion to award attorney fees without such a hearing. *Goff v. Ameritrust Co.* (May 5, 1994), 8th Dist. Nos. 65196, 66016.

{¶ 99} In this matter, it is undisputed that the trial court never held a hearing at which those against whom sanctions were sought were afforded an opportunity to explain their actions. Accordingly, appellant law firms' first assignment of error is well-taken.

{¶ 100} Both appellant law firms raise issues in their remaining assignments of error which are best raised first before the trial court. Given that this matter must be remanded for a sanction hearing, those issues are not yet ripe and are found moot.

{¶ 101} On consideration whereof, the judgments of the Lucas County Court of Common Pleas, Juvenile Division, are affirmed, in part, and reversed, in part. This matter is remanded to said court for further proceedings in conformity with this decision. Court costs pursuant to App.R. 24 are assessed to appellant mother in case No. L-10-1014 and to appellee guardian ad litem in case No. L-10-1034.

JUDGMENTS AFFIRMED, IN PART,  
AND REVERSED, IN PART.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

T.M. v. J.H.  
C.A. Nos. L-10-1014  
L-10-1034

Mark L. Pietrykowski, J.

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JUDGE

Arlene Singer, J.

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JUDGE

Thomas J. Osowik, P.J.  
CONCUR.

\_\_\_\_\_  
JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:  
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.