

IN THE COMMON PLEAS COURT OF CUYAHOGA COUNTY, OHIO
JUVENILE DIVISION

Walter Ackley,
Plaintiff,

Vs.

Michelle Topazio,
Defendant.

Case No. 99 770 053

Judge Donald L. Ramsey
By Assignment

Judgment Entry

This matter came before the Court for trial October 24, 2008 and January 12, 13, 14 and 15, 2009 upon the various motions listed and decided as set forth hereinafter. Present were the Plaintiff-Father, Walter Ackley; his attorney, Gary S. Okin; the Defendant-Mother, Michelle Topazio, *pro se*; and attorney Steven E. Wolkin, as Guardian *Ad Litem* for the parties' children. Upon the issues and the evidence adduced thereon, the Court finds and orders as follows:

Mother's Motions for Custody, filed May 16, 2008 and October 20, 2008

By prior Judgment Entry of this Court, filed May 13, 2008, the Court changed the custody of the parties' minor children, [REDACTED] and [REDACTED] who share the birth date of [REDACTED], from the Defendant-Mother to the Plaintiff-Father. Three days later on May 16, 2008 and again on October 20, 2008 the Defendant filed her motions requesting that this Court re-designate her as the residential and custodial parent of the children.

The controlling law relative to the Defendant's motions to change custody is set forth in O.R.C. Sections 3109.04(E) and (F). Section 3109.04(E)(1) provides that the court shall not modify a prior order allocating parental rights and responsibilities unless it finds that a change has occurred in the circumstances of the children or the children's residential parent since the time of the last order and that a change in residential parents is necessary to serve the best interests of the children. It is well-established law that before the court may consider the second prong of the statute, namely the best interest standard, the court must first determine that a significant change has occurred in the circumstances of the children or the children's residential parent. The Court finds that the Defendant has failed to show any significant change since the Judgment Entry of May 13, 2008.

The changes that have occurred with the children since the time they were transferred to the father have been a dramatic improvement in both their grades at school and in their overall behavior. From being chronically tardy and deficient in their school work while in the care of the mother, the children have progressed to being above-average students while in the care of the father. Academic deficiencies have been addressed by the father and the school system through individualized education programs. From being aggressive and out of control while in the care of the mother, the children have become polite and well-behaved toward others while under the care of the father. As testified to by one of the mother's own sisters, she (the mother's sister) no longer has to protect her own children from the two boys. Another of the mother's sisters testified that the boys are no longer "rowdy," "obnoxious," and "swearing." As described

by the Guardian *Ad Litem*, the boys are now polite and well-mannered. The boys are now focused and maintain eye-contact and listen when spoken with.

The gravamen of the mother's request for a change in custody is that she has moved to Hawaii, where she believes the children would prefer living rather than in Ohio, and that she has difficulty in maintaining contact with the children. From the prior trial of this case in January and February 2008, the Court had found that the mother had voluntarily and without just cause moved from her home in Ohio to California. (See, Judgment Entry, filed May 13, 2008.) In June 2008 the mother voluntarily moved even further away from the children by moving to Hawaii. The mother has failed to demonstrate that her difficulty in maintaining contact with the children and abiding by the prior orders of this Court has been prompted by any shortcomings of the father or have been caused by anything other than her own doings. To his credit, the father has consistently allowed frequent contact between the boys and the mother's own family, namely, the maternal grandparents and maternal aunts and cousins. This the father has done voluntarily and without any court order to do so.

The mother continues to lack insight into her own behavior and the impact it has upon her children. The mother persists in the belief that the father is abusive toward the children. Investigations by the children services agencies have been repeatedly made, together with monitoring by the Guardian *Ad Litem*. The mother's allegations have all been found to be unsubstantiated. Despite such investigations, findings and assurances, the mother refuses to accept such conclusions and any other opinions or findings contrary to her own unsubstantiated beliefs.

Accordingly, the mother's Motions, filed May 16, 2008 and October 20, 2008, are overruled.

Mother's Motion to Remove the Guardian *Ad Litem*, filed May 20, 2008

The mother maintains the steadfast belief that the Guardian *Ad Litem* has failed, is failing and will fail in his duties toward the children. The mother has sought redress of the Guardian by repeated grievances against him through Ohio Disciplinary Counsel. All such grievances have been found to be unsubstantiated and have been dismissed. The mother persists in repeatedly accusing the Guardian of unethical conduct and dereliction of duty. Not one shred of evidence exists in support of the mother's claims. The Guardian has discharged all of his duties in regards to the children, has attempted to ameliorate the difficulties the mother has caused and has been above reproach in all of his dealings. The mother is simply unable, or unwilling, to accept that the Guardian has done his job thoroughly and has arrived at a conclusion and recommendation contrary to the mother's wishes and beliefs.

The Mother's Motion to Remove the Guardian *Ad Litem* is overruled.

Mother's Motion for Court/GAL to Subpoena Substantiated Abuse, filed October 20, 2008

The mother's motion fails to state a claim upon which relief may be granted. There are no records of substantiated abuse to be subpoenaed. Further, if such records

did exist, the mother is the one who has the authority and capability to cause the Clerk of this Court to issue subpoenas. The mother did not do so.

The Mother's Motion for Court/GAL to Subpoena Substantiated Abuse is overruled.

Mother's Motion to Correct Child Support Calculations and Arrearages, filed October 20, 2008 and January 12, 2009, and Mother's Motion to Modify Child Support, filed January 12, 2009

Through her motions to correct child support calculations and arrearages, the mother is attempting to re-litigate the trial of January and February 2008 from which the Court issued its Judgment Entry of May 13, 2008. The mother had appealed that judgment. Her appeal was dismissed for want of prosecution.

The mother has failed to prove any grounds for modifying her present support obligations. As previously found by this Court, the mother had voluntarily quit her prior employment in Ohio without any just cause whatsoever. (See, Judgment Entry, filed May 13, 2008.) The Court then took into account the nature of the mother's occupation, namely, as a mortgage broker, and discounted her earning capability.

Since the time of the May 13, 2008 Judgment Entry, the mother has voluntarily quit subsequent employments and has elected to be underemployed. Notwithstanding her claims of lack of money and resources, the mother has since moved from California to Hawaii, purchased a \$250,000 condominium in Hawaii with a \$125,000 cash down payment, has spent \$3,000 in improvements to the condominium, and has had the financial resources to maintain the property and her lifestyle in Hawaii. Further, the mother is the owner of at least two other parcels of real estate, one in Ohio and one in Florida, from which she ostensibly receives payments from her sister pursuant to a land installment contract at \$950 per month and from her mother by way of rent or repayment of loans (amount unknown). The mother's testimony of low income, coupled with high minimum monthly expenses, does not add up. In these regards the Court finds the mother's assertions to be not credible. The mother has failed to make a *prima facie* case of any significant change of circumstance to warrant a change in child support as previously ordered.

The mother's Motions to Correct Child Support Calculations and Arrearages and to Modify Child Support are overruled.

Mother's Motion to Strike Foreign Decree, filed October 20, 2008

In 2008 during the pendency of the January/February 2008 trial in this case, the mother had twice attempted to secure custody orders from the state of California. In both instances the California court dismissed for want of jurisdiction. In the second dismissal, however, the California court required that before the mother could file any further such actions, she would first have to contact the Guardian *Ad Litem*. The Guardian *Ad Litem* caused the California judgment entry to be filed as a foreign decree with this Court on August 7, 2008. The mother is seeking that such filing be stricken of record. The Court finds no basis has been asserted by the mother in support of her motion.

Accordingly, the mother's Motion to Strike Foreign Decree is overruled.

Mother's Motion for Relief from Judgment, filed January 12, 2009

For a party to obtain relief from judgment under Ohio Civ. R. 60(B), the party seeking relief must demonstrate that "(1) the party has a meritorious defense or claim to present if relief is granted, (2) the party is entitled to relief under one of the grounds stated in Civ. R. 60(B)(1) through (5), and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ. R. 60(B)(1), (2) or (3), not more than one year after the judgment . . . was entered." (See, *GTE Automatic Elec., Inc. v. ARC Indus., Inc.* (1976), 47 Ohio St. 2d 146, paragraph two of the syllabus.) The mother has failed to demonstrate in either her motion or through her evidence that any of the criteria has been met, except for the time limit. The mother is merely attempting to re-litigate the trial of January and February 2008. She appealed that judgment. The appeal was dismissed.

The mother's Motion for Relief from Judgment is overruled.

Father's Motion to Execute Sentence, filed November 26, 2008

Before proceeding on the father's motions to show cause and to execute sentence, the Court advised the mother of the nature of the proceedings, the potential consequences thereof, and of her rights to be represented by an attorney and court-appointed attorney, if she were found to be indigent. The mother requested that the Court appoint her legal counsel.

Upon her testimony the Court found that the mother lives by herself and, notwithstanding her allegations to the contrary, has an annual income of least \$21,180 (represented by her payment of minimum monthly expenses). In addition thereto, the Court found that the mother has additional income of \$950 per month as the vendor on a land installment contract with her sister. The Court further found from the evidence that the mother is the title owner of at least three parcels of real estate (Hawaii, Ohio and Florida) and has cash assets in excess of \$13,500. The Court concluded that the mother is not qualified for court-appointed legal counsel at taxpayers' expense.

By the prior order of this Court, filed May 13, 2008, the mother was found guilty of contempt of court for interfering with the father's parenting rights. The mother was sentenced to ten (10) days in jail, but was allowed to purge the contempt upon the conditions, *inter alia*, that she reimburse the father \$638 within thirty (30) days and \$556 within one hundred eighty (180) days of the filing date of the judgment entry, namely May 13, 2008. By clear and convincing evidence the Court finds that the mother paid the father the \$638 and the \$556, albeit the \$556 was paid beyond the time limits prescribed by the Court. The mother paid the \$556 on January 5, 2009 rather than by November 10, 2008. The Court deems the mother's payments to be in substantial compliance with the Court's orders.

Therefore, the father's Motion to Execute Sentence is overruled.

Father's Motions to Show Cause and for Attorney Fees, filed November 26, 2008

By the prior order of this Court, filed May 13, 2008, the mother was ordered to pay monthly child support in the amount of \$1,369.42, inclusive of two percent

administrative service fee, commencing January 30, 2008. By clear and convincing evidence, the Court finds that since that time the mother has only paid \$1,515 as child support. The Court further finds by clear and convincing evidence that the mother has received overpayments from the father, due to administrative error of the Cuyahoga County Child Support Enforcement Agency, the sum of \$5,462. In addition, the mother may have received through erroneous enforcement action of the state of California the sum of \$3,261. The mother has not reimbursed said sums to the father. The mother has offered no justifiable reason for her failure to pay child support.

The Court, therefore, finds the mother guilty of contempt of court for failing to pay child support. As and for sanctions in contempt, the mother is hereby sentenced to serve thirty (30) days in the Cuyahoga County Jail. Said sentence is suspended, and the mother is allowed to purge herself of the contempt, if she complies with the following conditions:

For a period of twenty-four (24) consecutive months, commencing March 1, 2009, and without fail the mother shall pay in full the sum of \$850 per month, plus two percent administrative service fee, for a total of \$867 per month to Ohio Child Support Payment Central, P.O. Box 182372, Columbus, OH 43218-2372. Failure by the mother to pay in full said sum each and every month may result in the imposition of the thirty-day jail sentence upon the filing a motion to execute sentence by the father or the Cuyahoga County Child Support Enforcement Agency.

The mother is hereby advised that the monthly purge payments of \$867 do not in any way modify or alleviate the mother's required compliance with her regular monthly child support obligation as previously ordered pursuant to the Judgment Entry, filed May 13, 2008.

The Court further finds that the father incurred legal expenses in the preparation and prosecution of the motion to show cause in the amount of \$1,201.16. Said expenses are evidenced in Plaintiff's Exhibit 14 by entry dates of 11-14-08 (\$90), 11-15-08 (\$90), 11-18-08 (\$90), 11-24-08 (\$75), 11-11-08 (\$325), 12-31-08 (\$50), 12-31-08 (\$6.16), 1-5-09 (\$75), 1-6-08 (\$150), and one hour of trial time allowed for January 14 and 15, 2009 (\$250) in the prosecution of the motion. The Court finds that the hourly rate of \$250 is a reasonable and common rate in the greater Cleveland area for attorneys of the experience and qualifications of the father's lawyer, Gary S. Okin. The Court further finds that the number of hours and the amount of expenses incurred by Mr. Okin were reasonable and necessary in bringing the motion to show cause.

Therefore, the mother is ordered to reimburse the father the sum of \$1,201.16, as and for attorney fees incurred in the prosecution of the motion to show cause. Judgment is hereby entered against Michelle Topazio in favor of Walter Ackley in the amount of \$1,201.16, together with statutory interest thereon from the filing date hereof until paid in full. Execution on said judgment is awarded to the Walter Ackley.

**Motions of the Guardian *Ad Litem* Relating to Fees and Expenses, filed
October 5, 2007, May 7, 2008 and August 11, 2008**

Pursuant to the Judgment Entry of May 13, 2008 the Court retained jurisdiction to determine the fees and expenses of the Guardian *Ad Litem* and the allocation thereof as between the mother and the father. The Court first notes that the father has stipulated that

the Guardian's fees and expenses of \$22,531.56 are reasonable and were necessarily incurred by the Guardian in the discharge of his duties on behalf of the parties' children. The father's concern is the allocation of the fees and expenses as between himself and the mother. The mother disputes that the fees and expenses of the Guardian are reasonable and were necessarily incurred. Upon review of the issues, the Court finds as follows:

Attorney Steven E. Wolkin was appointed as the Guardian *Ad Litem* by proper order of this Court. Mr. Wolkin is, and has been, recognized by this Court in numerous cases to be a well-qualified guardian *ad litem*. Mr. Wolkin has charged the hourly rate of \$150 in this matter. The Court finds the hourly rate to be most reasonable in the greater Cleveland area given the level of difficulty of this case, the needs of the children and the parties, and Mr. Wolkin's qualifications and expertise. The Court has further reviewed the hours and expenses incurred by Mr. Wolkin in this matter. The Court further finds that the same were reasonably and necessarily incurred for the benefit of his wards.

Therefore, the Court awards judgment in favor of Steven E. Wolkin jointly and severally against Walter Ackley and Michelle Topazio in the amount of \$22,531.56, together with statutory interest thereon from the date hereof until paid in full. Said fees and expenses of the Guardian *Ad Litem* are found by the Court to be in the nature of child support incurred for the protection and welfare of the children. As such said judgment for the fees and expenses is deemed to be non-dischargeable in bankruptcy by the parties and is further subject to collection through appropriate child support enforcement agencies.

As to the allocation of the fees and expenses as between the parties, the Court finds as follows: Pursuant to the testimony of the Guardian, \$13,704.56 of his fees and expenses were incurred from the date of his appointment through the trial which concluded in February 2008. The Guardian testified that eighty percent (80%) of said fees were caused by the behavior of the mother. The Guardian testified that \$6,300 of his fees and expenses were incurred after the February trial through October 24, 2008, the beginning date of this trial. As to the \$6,300 the Guardian attributed ninety-five percent (95%) of those fees and expenses to the behavior of the mother. The remaining \$2,527 of the fees and expenses were incurred since October 24, 2008. The Guardian testified that that remaining balance was incurred one hundred percent (100%) due to the behavior of the mother.

Now, therefore, as between the parties the father's share of the Guardian's fees is found to be \$3,055.91, and the mother's share is \$19,475.65. In the event either parent pays more to the Guardian than his or her respective share of said fees and expenses, pursuant to the joint and several judgment awarded to the Guardian, then such parent shall have an action-over against the other parent for reimbursement of such excess payment. In making this determination and allocation, the Court specifically finds that the mother's behavior and conduct in these matters has been purposefully unreasonable and recalcitrant, as will be set forth in this Judgment Entry hereinafter.

All sums of money currently on deposit with the Clerk of this Court from the parents as security for payment of the Guardian's *Ad Litem* fees and expenses shall be immediately paid by the Clerk of this Court to Steven E. Wolkin.

Guardian's Motion to Declare Mother a Vexation Litigator, filed November 18, 2008, and Mother's Motion to Strike, filed December 3, 2008

As to the mother's Motion to Strike the Guardian's Motion to have the mother Declared a Vexatious Litigator, the Court finds that the mother offered no factual or legal basis upon which to grant her motion.

Therefore, the Court overrules the mother's Motion to Strike.

Upon the issues and the evidence presented on the Guardian's Motion to have the mother declared a vexatious litigator, the Court finds said motion well taken. The Court finds that the mother has demonstrated an unyielding effort through her legal filings to cause injury and malicious harassment to the father and their children. Notwithstanding the fact that the mother has been previously represented by various attorneys in these matters, she repeatedly filed numerous causes of actions in other courts, numerous motions and pleadings in this court which have been repetitive and concerning matters that have already been adjudicated. In many instances, the mother filed documents with this Court while she was being represented by legal counsel. By the mother's own admissions she has filed, and will continue to file, the pleadings "to get the judge to change his mind."

The docket of the Court reflects numerous occasions where the mother has repeatedly filed *pro se* pleadings, which are repetitive, in violation of Civil Rules and designed only for the purpose of injury and malicious harassment. By Judgment Entry, filed November 19, 2008, this Court found that the mother filed 135 pages of miscellaneous documents. The Court determined that the documents contained confidential records relating to the children and impertinent material to the matters before the Court. By Judgment Entry, filed November 18, 2008, the Court found that the mother had filed motions which were impertinent, immaterial and seeking relief which was barred by the doctrine of *res judicata*. By Judgment Entry, filed May 13, 2008, the Court found that the mother had repeatedly filed claims of child abuse with various authorities, none of which had found her allegations substantiated. The mother has further filed two separate actions in the state of California alleging domestic violence and seeking custody of the children, all the while knowing that this Court was exercising jurisdiction over the very issue of custody. The mother's efforts in California were for the express purpose of defeating this Court's prior orders awarding parenting rights to the father. The California court put a stop to such actions by the mother, as indicated in the California judgment entry which was filed with this Court as a foreign decree. The mother has repeatedly made domestic violence referrals and filings against the father, while not carrying forward with them immediately thereafter. The Court finds that the mother's allegations and repeated filings with this Court, the California court and various public safety and children's agencies cannot be supported by good faith argument. Instead, the Court finds that the mother's actions have been motivated out of her intractable attitudes and beliefs that everyone is biased and prejudiced against her. The Court concludes that the mother's continued behavior is solely for the purposes of delay, interference with this Court's exercise of jurisdiction and harassment of the father. That her actions have caused harm to the father and to the children has been demonstrated through the needless incurrence of legal fees by the father, as will be set forth later in this Judgment Entry.

Now, therefore, the Court sustains the Guardian's Motion and hereby declares the mother, Michelle Topazio, a vexatious litigator pursuant to O.R.C. Section 2323.52. As a

vexatious litigator, Michelle Topazio is hereby prohibited from doing one or more of the following without first securing leave of court to proceed:

1. Instituting legal proceedings in the Cuyahoga County, Ohio Common Pleas Court, Juvenile Division.
2. Continuing any legal proceedings that she had instituted in this matter prior to the journalization of this Judgment Entry other than those currently set for hearing.
3. Making any application, other than an Application for Leave to Proceed as identified hereafter, in any legal proceedings instituted by Michelle Topazio, or another person.

The Court further orders that Michelle Topazio or another person on her behalf may not institute legal proceedings in a Court of Appeals, or make any application other than the Application for Leave to Proceed allowed by Division (F)(2) of O.R.C. Section 2323.52 or proceed in a Court of Appeals without first obtaining a leave of the Court of Appeals to proceed pursuant to Division (F)(2) of this section.

It is further ordered that this order shall remain in full force and effect indefinitely.

It is further ordered that the Clerk of this Court that enters an order under this section shall send a certified copy of the order to the Supreme Court of Ohio for publication in a manner that the Supreme Court determines is appropriate and that will facilitate the Clerk of the Court of Claims, and the Clerk of a Court of Appeals, Court of Common Pleas, Municipal Court or County Court in refusing to accept pleadings or other papers submitted for filing by Michelle Topazio who has been found to be a vexatious litigator under O.R.C. Section 2323.52 and who has failed to obtain leave to proceed under this section.

Father's Motion for Attorney Fees and Sanctions Pursuant to Civ. R. 11 and O.R.C. 2323.51, filed November 26, 2008

With reference to the Court's findings in the immediately preceding sections of this Judgment Entry, the Court finds the father's motion for sanctions pursuant to Civ. R. 11 and O.R.C. Section 2323.51 is well taken. The Court finds, however, that pursuant to O.R.C. Section 2323.51(B)(1), the Court's scope of inquiry is limited to actions of the mother and fees incurred by the father after May 13, 2008.

Civ. R. 11 provides that a *pro se* party "shall sign the pleading, motion, or other document . . . The signature of . . . [a] *pro se* party constitutes a certificate by the . . . party that the . . . party has read the document; that to the best of the . . . 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, [a] . . . *pro se* party, upon motion of a party . . ., 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."

O.R.C. Section 2323.51 provides for an award of attorney fees as a sanction against the party engaged in "frivolous conduct" as defined by the statute. "Frivolous conduct" is defined a conduct by any party to a civil action which "obviously serves merely to harass or maliciously injure another party to the civil action . . . cannot be supported by a good faith argument, . . . consists of allegations or other factual

contentions that have no evidentiary support . . . or are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.”

In the instant case the mother’s pleadings and conduct have met the foregoing criteria of Civ. R. 11 and O.R.C. Section 2323.51. The father’s Motion for Attorney Fees and Sanctions is, therefore, sustained.

From the testimony and the evidence taken, the Court awards to the father, Walter Ackley, against the mother, Michelle Topazio, judgment in the amount of \$7,500. Said amount is derived from deducting from Plaintiff’s Exhibit 14 (Mr. Okin’s fees and costs in representing the father) all charges and costs associated with Mr. Okin’s representation of the father in relationship to prior appellate work from the Judgment Entry of May 13, 2008, the costs and fees associated with the father’s motions to show cause and execute sentence and further reducing his bill by items not identifiable on Plaintiff’s Exhibit 14 relating to the defense of the mother’s motions. The award of the \$7,500 does include a specific finding that Mr. Okin’s hourly rate of \$250 is reasonable and customary within the greater Cleveland area and in keeping with the skills and expertise of attorneys comparable to those of Mr. Okin. The award further represents a finding that Mr. Okin easily incurred thirty (30) hours in defending his client against the frivolous conduct of the mother.

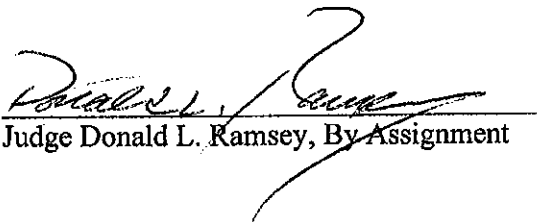
The judgment of \$7,500 in favor of the father and against the mother shall bear statutory interest thereon from the date hereof until paid. Execution on said judgment is awarded to the father.

Court Costs

All court costs associated with the matters herein are taxed to the Michelle Topazio. The Clerk of this Court is awarded execution thereon.

It is so ordered.

2-13-09
Date



Judge Donald L. Ramsey, By Assignment