No. 45722-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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ANNE GIROUX,

Appellant,

v.

DANIEL KULMAN,

Respondent.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Diana L. Kiesel, Commissioner

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# OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR.

1. The trial court erred in creating a "purge" condition which Ms. Giroux was unable to satisfy, transforming the case from one of civil to criminal contempt.

2. The trial court denied Ms. Giroux due process in imposing a criminal contempt sanction without a criminal trial and the protections afforded an accused, including the proper filing of charges, effective counsel, and the right to a jury trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. A contempt sanction remains civil in nature only so long as the contemnor retains the ability to purge the contempt and earn her release. Here, the court detailed two "purge" conditions: requiring Ms. Giroux to schedule a mental health assessment for herself, and requiring Ms. Giroux to transition her teenaged children to a different therapist who would initiate re-unification with their father. Ignoring Ms. Giroux's repeated pleas that she could not afford to schedule the mental health assessment and that she was extremely concerned about disrupting the continuity of the children's therapy, the court also disregarded the fact that once Ms. Giroux was incarcerated, she would be unable to achieve either of these tasks. This transformed the

imposition of jail time into a punitive, rather than a coercive, sanction. Does the trial court's failure to construct a feasible purge condition require reversal of the contempt order?

2. A criminal contempt proceeding guarantees the accused a full range of due process protections. Here, Ms. Giroux faced a punitive, criminal contempt sanction, as she did not have the ability to satisfy the court's "purge condition." Ms. Giroux was not afforded the basic due process protections associated with criminal prosecution. Does the trial court's failure to provide Ms. Giroux with the panoply of due process protections required in a criminal proceeding require reversal of the contempt order?

C. STATEMENT OF THE CASE.

Anne Setsuko Giroux and Daniel Lance Kulman were divorced in 2008 and are subject to a parenting plan concerning their children, Kevin (17 ½) and Christin (15). CP 24-29.[1] A history of domestic violence perpetrated by Mr. Kulman resulted in severe restrictions on his ability to see his children. CP 24-25; RCW 26.09.191(1), (2).

[1] The Superior Court file corresponding to the divorce matter is No. 08-01158-4. Ms. Giroux's older daughter from a previous marriage, Kira (22), whom Mr. Kulman adopted, is not named in the modification to the parenting plan. CP 1-9.

In November 2012, Kevin experienced serious complications resulting from a pediatric heart condition, requiring surgery. CP 142-63. The Department of Social and Health Servies (DSHS) was concerned about Kevin's array of symptoms and Ms. Giroux's response to them, and placed a medical hold on Kevin, suggesting Ms. Giroux had influenced or even caused her son's physical symptoms. Id.; CP 1-9.[2]

On November 20, 2012, Mr. Kulman took advantage of the accusations against Ms. Giroux to move for modification of the parenting plan. CP 1-9. Mr. Kulman argued that his residential time was subject to severe restrictions under RCW 26.09.191(2), and that a substantial change in circumstances had occurred, in that Kevin was in danger of being removed from Ms. Giroux's home by DSHS. Id. Mr. Kulman also stated that he had completed domestic violence evaluations and treatment, as required by the court. Id.

Kevin unfortunately suffered ongoing cardiac symptoms while in DSHS custody, and while living with his paternal grandparents, requiring additional emergency treatment. CP 155. In light of the fact

[2] DSHS accused Ms. Giroux of Munchausen's by Proxy Syndrome – an accusation which was apparently retracted once Kevin's symptoms remained while in DSHS custody. See CP 142-63.

that Kevin's condition was unrelated to his mother's influence, both children were returned to Ms. Giroux's custody – Christin, within approximately ten days, and Kevin, within one month. CP 156. The dependency case against Ms. Giroux was deemed unfounded and was dismissed on February 12, 2013. CP 108.

On March 27, 2013, Pierce County Superior Court Commissioner Diana L. Kiesel issued an order related to the petition for modification to the parenting plan. CP 10-11. Among other requirements, the court ordered Ms. Giroux to enroll Kevin and Christin in counseling with a new therapist, and that Ms. Giroux obtain a mental health assessment. Id.[3] Ms. Giroux's motion to revise the order was denied on May 3, 2013. CP 12-14.

Ms. Giroux argued that the children were already engaged in therapy, and had expressed to their therapist their fear and anxiety concerning visitation with their father. CP 260 (letter from therapist). Kevin, who was almost 18, had also submitted a declaration to the

[3] Commissioner Kiesel's March 27, 2013 order specifies that "Kevin's counseling shall be re-unification counseling from the beginning." CP 10. The order acknowledges that Christin is not ready to begin such specific counseling yet, and need not begin a reintroduction to her father until "such time as counselor and GAL agree [she] is ready to begin re-unification efforts with Dad." Id.

court, explaining his reluctance to have further contact with his father and his reasoning. CP 93-95 (declaration of Kevin Kulman).

On July 23, 2013, Mr. Kulman filed a motion for an order to show cause for contempt, alleging that Ms. Giroux had failed to comply with the Commissioner's order requiring the change in the children's counselor and the submission to a mental health assessment. CP 133-38.

Ms. Giroux argued that maintaining continuity of mental health care for her children was critical, and requiring the children to change therapists was not in their best interests. CP 253-61. Ms. Giroux also argued that she had been unable to comply with the court's order that she obtain a mental health assessment due to indigency. 5/31/13 RP 21-24. On each of the above dates, Ms. Giroux appeared *pro se*, while Mr. Kulman was represented by private counsel.

On November 21, 2013, Commissioner Kiesel appointed an attorney for Ms. Giroux, and then found her in contempt. 11/21/13 RP 2, 16; CP 265-71. The court found that Ms. Giroux had intentionally failed to comply with lawful orders of the court – specifically, that she had failed to submit to a mental health assessment, and had failed to

enroll the children in counseling with an approved provider.[4] The order contains a "purge clause," by which Ms. Giroux might cure the contempt: "by scheduling her mental health assessment with collateral input from GAL and enrolling the children in counseling [with specified providers]." CP 268. The order specified that these conditions "shall be accomplished" by December 4, 2013. Id.

The contempt order also contains a handwritten "imprisonment" clause, which reads:

> The court sentences Anne Giroux to an indeterminate jail sentence. The sentence is suspended until 12/4/13, if Anne Giroux does not pugrge [sic] contempt as set forth in par. 3.8 then she shall report to the Pierce County Jail on 12/4/13 at 4:00 PM. Bail will be $500 cash only.

CP 268 (Sec. 3.2).[5]

On December 5, 2013, Ms. Giroux appeared in court, and Commissioner Kiesel found the contempt had not been purged. CP 273-74. The court found Ms. Giroux "still unwilling to comply with

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[4] In the order on the motion for revision, Judge Elizabeth Martin permitted the selection of a counseling provider by the GAL for insurance or availability purposes. CP 15.

[5] The November 21 order indicated that the court would review the matter on December 5 at 3:30 p.m., and the jail would transport Ms. Giroux to court, if she were in custody. CP 280.

the court's order regarding re-unification counseling." Id.[6] The matter was continued to December 10, 2013, for a review hearing, and Ms. Giroux was given the names of specific counselors on Mr. Kulman's insurance plan that would work toward re-unification of the children with their father. Id.

On December 10, 2013, the parties appeared for a review hearing. Ms. Giroux was assigned new counsel, at her request. 12/10/13 RP 2. The new attorney told Commissioner Kiesel that she had only had one conversation with Ms. Giroux. Id.

After Ms. Giroux informed the court that it was her understanding the children had not yet been taken to a new counselor, Mr. Kulman's attorney told the court, "I think that the Court needs to incarcerate Ms. Giroux at this point." Id. at 8. Mr. Kulman's attorney urged Commissioner Kiesel, "I think we need to order a night of incarceration." Id. at 9. The court ultimately ordered:

> Based upon a finding of civil contempt Anne Giroux shall be incarcerated in the Pierce County Jail on 12/10/13 for one day. There shall be a review hearing on 12/11/13 at 2:30 PM. The Pierce County Jail shall transport Anne Giroux to Courtroom

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[6] Ms. Giroux was not transported to court by the Pierce County Jail on December 5th, but was at liberty -- despite her failure to comply with the court order -- as she had made $500 cash bail. 12/5/13 RP 6. The court reserved as to whether her bail money could be disbursed as attorney's fees for Mr. Kulman's lawyer. Id.

105 at 2:30 if bail has not been paid. Bail shall be set at $1,000 cash only.

CP 267-68.

Ms. Giroux was, in fact, sentenced and incarcerated, pursuant to the court's order. 12/10/13 RP 13. Before ruling, the court and Ms. Giroux had the following exchange:

THE COURT: I have given you more chances than any litigant I can recall to comply with my order ...

MS. GIROUX: It's not about chances, Your Honor. It's about safety.

THE COURT: I'm sorry, but I have to incarcerate you, so I am incarcerating you right now. The bail will be $1,000, and we will have a review on – I guess it has to be tomorrow.

12/10/13 RP 13.

On December 11, 2013, a review hearing was held, and the court ordered Ms. Giroux's release. CP 288-91; 12/11/13 RP 9. The court conditioned Ms. Giroux's release on her scheduling the mental health assessment and that she permit the GAL to interview the children. Id.[7]

[7] Ms. Giroux, upon her release, complained that her attorney had been unprepared and that her due process rights had been violated. 12/11/13 RP 4-5, 14. The court responded, "You have had more due process than any litigant I've dealt with." Id. at 5.

Ms. Giroux appeals the contempt findings and sanctions. CP 276-82.[8]

D. ARGUMENT

1. THE PURGE CONDITION IN THE CONTEMPT ORDER IGNORED MS. GIROUX'S INABILITY TO COMPLY WITH THE ORDER, TRANSFORMING THE FINDING OF CONTEMPT INTO A PUNITIVE SANCTION.

> A "punitive sanction" is "a sanction imposed to punish a past contempt of court for the purpose of upholding the authority of the court." RCW 7.21.010(2). A "remedial sanction" is "a sanction imposed for the purpose of coercing performance when the contempt consists of the omission or refusal to perform an act that is yet in the person's power to perform." RCW 7.21.010(3).

State v. Hobble, 126 Wn.2d 283, 292, 892 P.2d 85 (1995). Here, the court's findings – that Ms. Giroux had the past ability to comply with the court order and did not do so, demonstrates the contempt sanction was criminal in nature as it punished her for her purported past failure to comply with the court order.

Washington courts recognize three separate grounds upon which a court may rely in exercising its contempt authority: (1) civil

[8] The November 21, 2013 order on show cause issued by the Superior Court also awarded attorney's fees to Mr. Kulman; Ms. Giroux does not specifically assign error to the amount of the fees. CP 276-82.

contempt; (2) criminal contempt; and (3) the court's inherent contempt authority. State v. Boatman, 104 Wn.2d 44, 46, 700 P.2d 1152 (1985).

The character of a contempt proceeding is determined by its purpose and the purpose of the sanction imposed. State v. Browet, Inc., 103 Wn.2d 215, 218, 691 P.2d 571 (1984) (citing Shillitani v. United States, 384 U.S. 364, 86 S.Ct. 1531, 16 L.Ed.2d 622 (1966); State v. Sanchez, 4 Wn.2d 432, 104 P.2d 464 (1940)). Where the purpose of a proceeding is punitive and results in a determinate jail sentence, with no opportunity for a defendant to purge himself of the contempt, the proceeding and the resulting contempt are criminal in nature. Browet, 103 Wn.2d at 218 (citing In re Parent, 112 Wn. 620, 192 P. 947 (1920); Shillitani, supra). In contrast, a proceeding which results in a coercive or remedial sanction is civil, as is the contempt itself. Browet, 103 Wn.2d at 218 (citing Arnold v. National Union of Marine Cooks & Stewards Ass'n, 41 Wn.2d 22, 246 P.2d 1107 (1952); Shillitani, 384 U.S. at 370). Where a contempt proceeding is civil, no jury is required since the sanction is simply coercive. Browet, 103 Wn.2d at 218.

Over the years, the distinctions have become somewhat obscured. State v. Heiner, 29 Wn.App. 193, 195, 627 P.2d 983 (1981). Nonetheless, whatever the type of contempt authority, the sanction

imposed by the court is limited by the requirements of due process. See § E. 2., infra.

Trial courts retain the inherent authority to "enforce compliance with their own orders through civil contempt." Shillitani, 384 U.S. at 370-71. Due process, however, will not permit a court to rely on its inherent contempt authority to impose a criminal or punitive contempt sanction absent a criminal trial. In re the Interests of M.B., et al, 101 Wn. App. 425, 453, 3 P.3d 780 (2000), rev. denied, 142 Wn.2d 1027 (2001) (citing In re King, 110 Wn.2d 793, 800, 756 P.2d 1303 (1988)). The Shillitani Court recognized a contempt sanction can meet the requirements of due process in one of two ways: 1) a coercive and conditional contempt sanction where the contemnor may earn his release merely through compliance with the original order or 2) a punitive sanction imposed following a criminal trial. 384 U.S. at 370-72.

A contempt sanction is considered civil when "it is conditional and indeterminate, i.e., where the contemnor carries the keys of the prison door in his own pocket and can let himself out by simply obeying the court order." King, 110 Wn.2d at 800; In re Marriage of Didier, 134 Wn. App. 490, 501-02, 140 P.3d 607 (2006) (finding

contempt order punitive). So long as the contemnor retains the ability to purge the contempt and earn his or her release, his contempt sanction is civil. Shillitani, 384 U.S. at 370 n.6. In contrast, criminal contempt, as a punitive sanction, may be determinate and need not provide the contemnor with the ability to purge the contempt.

In Shillitani, two individuals refused to testify before a grand jury despite a grant of immunity from prosecution. 384 U.S. at 365. The Court concluded the two could be confined until they agreed to testify, as the confinement sought to coerce their compliance with the court's order to testify and, because they could choose at any time to comply with the order and testify, the sanction remained civil. Id. at 371. The Court, however, noted that once the grand jury was discharged, the court could no longer keep the two in jail absent a criminal proceeding, since, by that time, the contemnors had "no further opportunity to purge [themselves] of contempt." Id. at 371-72.

A civil contempt order must contain a purge clause by which the contemnor has the ability to avoid a finding of contempt or incarceration for non-compliance. Didier, 134 Wn. App. at 501-02; State ex rel Shafer v. Bloomer, 94 Wn. App. 246, 253, 973 P.2d 1062 (1999); see also Pompey v. Cochran, 685 So. 2d 1007, 1013 (Fla. Dist.

Ct. App. 1997) (where contemnor "is jailed without a purge condition that is within his power to accomplish, the sentence transforms into one for criminal contempt without having been preceded by any of the necessary constitutional safeguards").

In Didier, the trial court held the father in contempt for failure to comply with the court's child support order. 134 Wn. App. at 500. On appeal, this Court closely examined the language of the purge condition in the lower court's contempt order, distinguishing between terms meant to coerce compliance with a court order, and terms that are strictly punitive. Id. at 503. Specifically, the Didier Court noted, "the use of the term 'sentenced' suggests the court's punitive thinking here." Id.

The Court also specified that in order for a penalty to be coercive and not punitive, a contemnor must "at all times" have the capacity to purge the contempt and gain his or her release. Id. at 504 (emphasis in original). Thus, if the contemnor were to satisfy the purge condition, he or she would be entitled to immediate release, without bail or any other prerequisite required.[9]

[9] The Didier Court even included suggested language for an acceptable purge condition: " ... in the event that [appellant] fails to satisfy the judgment by that date, he must report to the Pierce County Jail on [date], and must remain in

In this case, because Ms. Giroux did not have the ability to avoid the finding of contempt, the contempt order was criminal in nature, entitling her to the due process protections accorded in criminal matters. In this case, the court created the following "purge condition" – that she must schedule a mental health assessment with collateral input from the GAL and enroll her children in counseling with an approved provider. CP 268. The purge condition ignored the fact that once Ms. Giroux was incarcerated, she would no longer be able to comply with the court's orders, rendering her contempt sanctions punitive.

In addition, the court ordered that Ms. Giroux be incarcerated for "one day." CP 286. The court's order set bail ("$1000, cash only"), and set forth no alternative method in which Ms. Giroux could comply with the court's orders, other than serving a jail sentence. Id. This Court stated in Didier that "the use of the term 'sentenced' suggests the court's punitive thinking." 134 Wn. App. at 503. The same can be said for terms such as "bail" and "incarceration," used by the trial court in Ms. Giroux's case. CP 286; see Didier, 134 Wn. App. at 503.

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the custody of the Pierce County Jail until [date], or until the judgment is paid in full, whichever occurs first." Didier, 134 Wn. App. at 505 (emphasis added).

Had Ms. Giroux's contempt sanction truly been civil in nature, the court would have created a purge condition with which she could still comply in order to avoid incarceration, or in the alternative, gain early release. See e.g., King, 110 Wn.2d at 805 (contemnor must be afforded opportunity to purge himself of the contempt, or to show the contempt order has lost its coercive effect, at regular intervals); Didier, 134 Wn. App. at 504 (contemnor must "at all times" have the ability to purge the contempt and gain his or her release). Such a purge condition would have given Ms. Giroux "the keys" to her own jail cell. Instead, the court sentenced Ms. Giroux to "one day" in jail, in order to punish her for past non-compliance –a punitive measure taken by the court in frustration.

Because Ms. Giroux did not have the ability to comply with the purge condition, the sanction was punitive in nature, requiring compliance with due process protections as set forth below.

2. MS. GIROUX WAS DENIED DUE PROCESS OF LAW WHEN SHE RECEIVED A CRIMINAL CONTEMPT SANCTION WITHOUT CONSTITUTIONALLY REQUIRED PROTECTIONS.

In Int'l Union v. Bagwell, 512 U.S. 821, 826, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994), the United States Supreme Court noted:

> "Criminal contempt is a crime in the ordinary sense," Bloom v. Illinois, 391 U.S. 194, 201, 20 L.Ed.2d 522, 88 S.Ct. 1477 (1968), and "criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings." Hicks v. Feiock, 485 U.S. 624, 632, 108 S.Ct. 1423, 99 L.Ed.2d 721 (1988).

See also In re Bradley, 318 U.S. 50, 63 S.Ct. 470, 87 L.Ed. 608 (1943) (double jeopardy); Cooke v. United States, 267 U.S. 517, 537, 45 S.Ct. 390, 69 L.Ed. 767 (1925) (rights to notice of charges, assistance of counsel, summary process, and to present a defense); Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 444, 55 L. Ed. 797, 31 S. Ct. 492 (1911) (privilege against self-incrimination, right to proof beyond a reasonable doubt).

Ms. Giroux asks this Court to recognize that because her contempt proceeding was criminal in nature and she did not receive adequate notice, the effective assistance of counsel, or a jury trial, she was denied her due process rights in defending herself as required by the state and federal constitutions.

Where imprisonment is imposed pursuant to a "civil" contempt proceeding, but the contemnor does not have an opportunity to purge the contempt through compliance, the contempt proceeding loses its civil nature and becomes a punitive, criminal contempt proceeding.

Didier, 134 Wn. App. at 503-04 (finding civil contempt proceeding transforms into criminal contempt when contemnor lacks ability "at all times" to gain her release by purging the contempt); Heiner, 29 Wn. App. at 197 (citing Keller v. Keller, 52 Wn.2d 84, 88-89, 323 P.2d 231 (1958)). As under the United States Supreme Court cases cited above, a punitive contempt order is the result of a criminal proceeding, mandating due process of the law, including the right to jury trial, for the contemnor. Boatman, 104 Wn.2d at 48.

Any exercise of the contempt power, whether it be to punish or to coerce, must comport with due process of law. In re Marriage of Nielsen, 38 Wn. App. 586, 589, 687 P.2d 877 (1984).

> Incarceration for civil contempt obviously loses its coercive effect if the contemnor no longer has the ability to comply with the particular court order he is charged with violating. To continue one's incarceration for contempt for omitting an act he is powerless to perform would make the sanctions purely punitive. Maggio v. Zeitz, [333 U.S. 56, 72, 68 S.Ct. 401, 92 L.Ed.2d 476 (1948)]. As soon as it becomes clear to the court that the contemnor cannot obey its original order, the court must release him. Oriel v. Russell, 278 U.S. 358, 366, 73 L. Ed. 419, 49 S. Ct. 173 (1929). See also Smiley v. Smiley, 99 Wash. 577, 169 P. 962 (1918) (affidavit as to lack of ability to comply being undenied, commitment for contempt by failure to pay alimony held erroneous).

King, 110 Wn.2d at 804.

As the United States Supreme Court discussed, due process of law requires that the accused should be advised of contempt charges and have a reasonable opportunity to meet them by way of defense or explanation. Cooke, 267 U.S. at 537. "[T]his includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed." Cooke, 267 U.S. at 537.

a. Ms. Giroux was denied her constitutional right to the assistance of counsel.

The federal and state constitutions provide a person who faces a loss of liberty the right to appointed counsel, if they cannot afford to pay for legal representation. U.S. Const. amend. VI; Const. art. I, § 22; Tetro v. Tetro, 86 Wn.2d 252, 253, 544 P.2d 17 (1975) (citing Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972), Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)); State v. Silva, 108 Wn. App. 536, 542, 31 P.3d 729 (2001) ("It is fundamental that 'deprivation of the right to counsel is so inconsistent with the right to a fair trial that it can never be treated as harmless error'") (internal citation omitted). Included in the right is the constitutional right to the effective assistance of counsel at a hearing.

Strickland v. Washington, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); Tetro, 86 Wn.2d at 254.

In Tetro, the contemnor was sentenced to serve 30 days in jail for failing to meet court-ordered support payments, at a hearing during which he was never advised of his right to counsel. 86 Wn.2d at 253. A co-petitioner, Mr. Scollard, was similarly ordered to show cause why he should not be held in contempt for violating a support order. Id. Mr. Scollard's specific request for counsel was denied. Id. The Tetro Court found there is a right to appointed counsel in show cause hearings "whenever a contempt hearing may result in a jail sentence." Id.

The Tetro Court noted that "outside the purely criminal arena" the right to legal representation was not clearly defined. Id. Nevertheless, the Court recognized that both Mr. Tetro and Mr. Scollard were required to appear and defend against charges of past illegal conduct and faced the potential of imprisonment if their defenses were not successful. Id. at 254. The Court found the possibility of imprisonment outweighed any label of the proceeding as criminal, quasi-criminal, or civil. Id. at 254-55. In sum, the Tetro Court concluded:

> [W]herever a contempt adjudication may result in incarceration, the person accused of contempt must be

> provided with state-paid counsel if he or she is unable to afford private representation.

Id. at 255. The Tetro court thus reversed the trial court's denial of Mr. Scollard's request for counsel and reversed the judgment against Mr. Tetro, as it found the right to counsel may only be waived knowingly and intelligently. Id.

Here, Ms. Giroux acknowledges that appointed counsel appeared on her behalf at the November 21, 2013 hearing, but it is evident from the record that neither Ms. Giroux nor her counsel were prepared to deal with the gravity of the contempt sanctions that day. 11/21/13 RP 5. First, the court-appointed attorney, Katherine Price, was not prepared to address the court's prior orders. Id.[10] The court was immediately frustrated with Ms. Price, stopping her mid-argument and asking, "Okay. I've got to stop you. Did you listen to CD's of any of the prior hearings?" Id. at 5. When counsel for Ms. Giroux admitted that she had not, the court chided her, stating, "I suggest in the future you do that because this has been discussed over and over." Id.

After the court explained to counsel for Ms. Giroux that she had misunderstood the nature of the court's order, counsel admitted, "Okay.

[10] Ms. Price was later replaced with different counsel.

I'm sorry. I am confused. Was Ms. Giroux in front of Your Honor since September 4th?"

Opposing counsel informed her that Ms. Giroux had, in fact, been before the court "a couple of times." Id. at 6. In exasperation, the court finally advised Ms. Price, "Again, I think you need to listen – it's only $10 a CD. I suggest you and your client get a copy of every single hearing and listen to them." Id.

Later during the same hearing, counsel permitted Ms. Giroux to make incriminating statements on the record which solidified the court's decision to hold Ms. Giroux in contempt. Id. at 12-16. On the same date, the court sentenced Ms. Giroux to an determinate jail sentence and set bail. Id. at 16.

Counsel's efforts regarding the possibility of contempt sanctions were nominal, at best, and, when coupled with Ms. Giroux's comments made at the attorney's request, clearly indicate that counsel did not anticipate the significance of the sanctions faced by Ms. Giroux.

Ms. Giroux fared no better with her newly appointed counsel on December 10, 2013, as this attorney was not given adequate opportunity to familiarize herself with the record, nor to establish a relationship with her client, before Ms. Giroux was found in contempt and incarcerated.

12/10/13 RP 10-13. New counsel for Ms. Giroux informed the court that she had only had one conversation with Ms. Giroux, and had only begun to read the reports relevant to the case that very day; yet, moments later, Ms. Giroux was escorted to the jail to serve a sentence, as a consequence of the contempt finding. Id.

Ms. Giroux was essentially denied her right to counsel at her contempt proceeding, and alternatively was denied the effective assistance of counsel where counsel's deficient performance prejudiced her defense.

To obtain relief based on a claim of ineffective assistance of counsel, a criminal defendant must establish that: 1) counsel's performance was deficient; and 2) the deficient performance prejudiced her case. Strickland, 466 U.S. at 687; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Should this Court not recognize that Ms. Giroux was denied the right to counsel altogether, Ms. Giroux urges this Court to find she was denied the effective assistance of counsel.

At best, counsel's efforts may be described as deficient, since she made no attempt to object to the criminal proceedings. Plainly these shortcomings prejudiced Ms. Giroux. Had counsel sought a

continuance to prepare the case for a full hearing, or to have ordered the CD's, as the court suggested, or even to ask for more time to prepare, the court might have been able to consider the evidence on Ms. Giroux's behalf.

b. Ms. Giroux was denied other constitutional rights associated with a criminal trial.

Due process requires the provision of a jury trial in a punitive contempt setting. Bagwell, 512 U.S. at 825. Plainly, Ms. Giroux was sentenced to a jail term in the absence of a jury trial. CP 265-71. Moreover, she was not prosecuted by a State agent or by a special prosecutor appointed by the court. Young v. United States ex rel. Vuitton et Fils, S.A., 481 U.S. 787, 800-01, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987). This, too, is a fundamental part of the process due in a criminal prosecution. Id. Finally, Ms. Giroux did not receive adequate notice that she would be facing a criminal contempt proceeding, nor the protections associated therewith, when she appeared in court.

c. Because Ms. Giroux was denied the protections provided in criminal proceedings, her contempt sanction and findings must be reversed.

As set forth above, Ms. Giroux was denied the due process protections afforded to criminal defendants under the state and federal

constitutions. Accordingly, Ms. Giroux asks this Court to reverse her contempt sanctions and findings.

### 3. ALTHOUGH MS. GIROUX HAS SERVED THE CONTEMPT SANCTION IMPOSED, THIS COURT SHOULD NONETHELESS REACH THE MERITS OF HER CASE.

In general, a case is moot when the court can no longer provide meaningful relief. Sorenson v. City of Bellingham, 80 Wn.2d 547, 558, 496 P.2d 512 (1972). Cases presenting moot issues on appeal are generally dismissed. In re Eaton, 110 Wn.2d 892, 895, 757 P.2d 961 (1988) (quoting Sorenson, 80 Wn.2d at 558); Seattle v. Johnson, 58 Wn. App. 64, 66-67, 791 P.2d 266 (1990). However, an appellate court has the discretion to retain and decide a moot case when "'matters of continuing and substantial public interest are involved.'" Eaton, 110 Wn.2d at 895 (quoting Sorenson, 80 Wn.2d at 558).

Even if this Court finds, *arguendo*, that the issues presented in this case are technically moot, this Court should render a decision because of the public's need to address the issues raised by this case, as well as their likelihood to recur.

Upon finding Ms. Giroux in contempt, the court imposed a one-day term of confinement. CP 286-87. Although the court set cash bail of $1000, Ms. Giroux did not make bail, and remained incarcerated until the

court ordered her release the following day. CP 286-87, CP 288-91. Ms. Giroux remains subject to further contempt actions, as the modification of custody has occurred and review hearings continue. Due to Ms. Giroux's stated belief that "the court system is not protecting her children or acknowledging her children's wishes," CP 267, Ms. Giroux will likely be subject to further contempt actions as a result.

a. Because this Court can provide effective relief, the case is not moot.

In State ex rel. T.B. v. CPC Fairfax Hosp., the Supreme Court concluded a statutory provision allowing parents to "voluntarily" confine their children in mental health institutions without judicial process was violative of due process. 129 Wn.2d 439, 918 P.2d 497 (1996). The Court reached the merits of T.B.'s *habeas corpus* petition challenging her confinement, despite the fact that following the filing of the petition T.B. had escaped from the facility and her whereabouts remained unknown throughout the pendency of her petition. Id. at 447. The Court reasoned:

> the case is not moot because [T.B.] still faces the possibility of reincarceration and therefore the court can provide appellant effective relief. In re LaBelle, 107 Wn.2d 196, 200, 728 P.2d 138 (1986). Moreover, the claim represents a question of public nature which is likely to recur and for which an authoritative

> determination is desirable. In re Harris, 98 Wn.2d 276, 278, 654 P.2d 109 (1982); LaBelle, 107 Wn.2d at 200.

T.B., 129 Wn.2d at 439.

Similarly, while Ms. Giroux has completed her confinement pursuant to the November 21 order, based on the trial court's past actions the possibility of reincarceration following future findings of contempt remains a possibility. In fact it is a near certainty in light of the court's past statements, as well as Ms. Giroux's.

In addition, the court not only incarcerated Ms. Giroux as a result of the November 21 order, but also imposed civil penalties and attorney's fees – an order which yet stands against Ms. Giroux. CP 265. In fact, following Ms. Giroux's release from jail on December 11th, counsel for Mr. Kulman moved to have the $500 bail that Ms. Giroux had previously posted as bail, disbursed as attorney's fees to himself. 12/11/13 RP 12-13; see also 12/15/13 RP 6. The court granted this request, disbursing Ms. Giroux's bail money to Mr. Kulman's attorney. 12/11/13 RP 12-13.

Because this Court can provide effective relief, the matter is not moot. CPC Fairfax, 129 Wn.2d at 439.

b. This case presents an issue of continuing and substantial public interest.

Additionally, this case involves a matter of continuing and substantial public interest which requires this Court's determination. In re M.B., 101 Wn. App. at 432-33 (finding the distinction between civil and criminal contempt to be issue of substantial and continuing public interest, and granting review, despite technical mootness). In determining whether a matter is of continuing and substantial public interest, this Court looks to three factors: (1) whether the issue is of public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur. Id. at 432-33. Ms. Giroux's case satisfies these criteria.

The power of a trial court generally, and more specifically its contempt power, is fundamentally a public issue. It is not an issue which merely calls upon this Court to determine a specific claim between private litigants, but reaches litigants in any number of cases. An authoritative determination of the limits of the trial court's power is necessary. Moreover, in light of the history of this case, it is clearly an issue which is likely to recur.

Finally, the Supreme Court has recognized "the contempt power is uniquely "liable to abuse." Bagwell, 512 U.S. at 831-32 (internal quotes and citations omitted). Contempt proceedings "leave the offended judge solely responsible for identifying, prosecuting, adjudicating, and sanctioning the contumacious conduct." Id. Yet, the fleeting nature of contempt sanctions is such that normal appellate review will likely never be available during the pendency of the sanction. Therefore, even if the Court deems this issue moot, it should reach the merits of this claim.

E. CONCLUSION

For the reasons set forth above, Ms. Giroux respectfully asks this Court to vacate the order of contempt and remand the case for compliance with statutory and constitutional protections.

Respectfully submitted this 16th day of June, 2014.

JAN TRASEN (WSBA 41177)
Washington Appellate Project - 91052
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**
**DIVISION TWO**

| | | |
|---|---|---|
| DANIEL KULMAN,<br><br>Respondent,<br><br>v.<br><br>ANNE GIROUX,<br><br>Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | NO. 45722-9-II |

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**SIGNED** IN SEATTLE, WASHINGTON THIS 16TH DAY OF JUNE, 2014.

X_____

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# WASHINGTON APPELLATE PROJECT

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