THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Docket No. 2009-0275

In the Matter of Audrey A. Zikmanis and Mark Peabody

Appeal From Final Order of Hillsborough County Superior Court, Northern District

BRIEF OF APPELLANT-PETITIONER

Audrey A. Zikmanis

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the court erred in modifying a uniform support order as to the support obligation for payment of the children's uninsured medical expenses as a sanction against the plaintiff on contempt motions? Petitioner's Motion for Reconsideration and For Clarification of Court Order dated February 5, 2009; App. 175 and 190.

2. Whether the court's sanction of modifying the support obligation for payment of the children's uninsured medical expenses against the plaintiff is an unsustainable exercise of the court's discretion because the sanction is excessive, oppressive, unreasonable, and penalizes the children? Petitioner's Motion for Reconsideration and For Clarification of Court Order dated February 5, 2009; App. 175 and 190.

3. Whether the court's *sua sponte* modification of the support obligation for payment of the children's medical expenses as a sanction against plaintiff was error where the evidence did not support such a modification as a sanction? Petitioner's Motion for Reconsideration and For Clarification of Court Order dated February 5, 2009; App.175 and 190.

4. Whether the court erred when it, *sua sponte,* modified a uniform support order as to the support obligation for payment of the children's uninsured medical expenses as a sanction against plaintiff where there was no determination of the needs of the parties and the respective abilities to meet those needs, no determination of financial ability and the best interests of the children's health care needs, or any other evidence to support modification? Petitioner's Motion for Reconsideration and For Clarification of Court Order dated February 5, 2009; App. 175 and 190.

5. Whether the court's sanction against plaintiff is an unsustainable exercise of discretion where the sanction imposed is unknown and uncertain? Petitioner's Motion for Reconsideration and For Clarification of Court Order dated February 5, 2009; App. 175 and 190.

STATUTES/COURT RULES

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RSA 458-C:3
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STATEMENT OF THE CASE

This appeal arises from a decision issued by the Northern Division of the Hillsborough County Superior Court (Marital Master Leonard Green, approved by Judge Gillian Abramson) issued on February 2, 2009 and a motion for reconsideration and/or clarification, which was denied by Judge James O'Neill, III on March 9, 2009 and issued on March 13, 2009. The Petitioner/Appellant, Audrey A. Zikmanis, seeks review of the trial court's order effectively modifying a child support order as a sanction against her and the subsequent denial of her motion to reconsider.

STATEMENT OF FACTS

Audrey A. Zimanis, the Petitioner, and Mark Peabody, the Respondent, were granted a divorce by the Hillsborough County Superior Court on the grounds of irreconcilable differences on April 29, 1998 (Groff, J.). See Appendix[1] 93. At the time of their divorce, the parties undertook a permanent stipulation, which was incorporated into the final divorce decree. See App. 99. The Court also entered a Uniform Support Order[2] establishing the parties' responsibilities with respect to the basic and medical support needs for the two children born during the marriage, Matthew (DOB 8/19/1991) and Kayla (DOB 5/14/93). See App. 95. Kayla is not the Respondent's biological child; however, the permanent stipulation provided that the parties would continue to tell Kayla that the Respondent was her father and that Ms. Zikmanis did not object to the Respondent moving to adopt Kayla. See App. 101 (Stipulation ¶ 3(K)).

At the time of the Divorce Decree and the 1998 Support Order, Ms. Zikmanis was receiving public assistance, and as a result, the children were able to receive medical and dental insurance coverage from the Division of Human Services. See App. 96. The 1998 Support Order

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[1] Appendix is hereinafter referred to as "App."

[2] Hereinafter "1998 Support Order."

provided that the Respondent could not provide health insurance coverage for the children at the time because the insurance available to him at that time was limited to Massachusetts. Id. It further provided, however, that "at the point that coverage is available in NH, *he shall be* required to provide such coverage."[3] Id. (emphasis added). The permanent stipulation also required the Respondent to provide health insurance coverage in the event that Audrey was no longer on public assistance, and required that both parties *evenly divide* the cost of uninsured medical and dental expenses to the extent that they were not covered by public assistance. These costs include "uninsured health, medical, dental, orthodontic, prescription, optical, counseling, mental health, or other health related care costs of the minor children." App. 101 (Stipulation ¶ 5).

In 2001, the Hillsborough County Superior Court, Northern District, entered a second Uniform Support Order by way of an enforcement order, which remained in effect until the time of the proceeding underlying this appeal.[4] Once again, the 2001 Support Order provided that health insurance was not available through the Respondent's employment because the insurance coverage was only available in Massachusetts. The Court (Sullivan, J.) once again ordered the Respondent to provide coverage through his employer as soon as it became available. The 2001 Support Order further provided that each party was obligated to pay *50% of any uninsured medical expenses*. App. 109 (2001 Support Order ¶ 11 and ¶ 12).

The parties' relationship has been contentious. Issues of domestic violence and substance abuse arose during the divorce, and both children have undergone counseling. App.66-67 (Tr. 61-62). On or about the evening of January 1, 2008, Kayla spoke to Ms. Zikmanis about Kayla's

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[3] The standard language of the form was altered. Rather than providing that the Respondent is ordered to provide coverage "when it is available at reasonable cost," the "at reasonable cost" provision was crossed out. Therefore, it simply provided that he was to provide it when available in Massachusetts. App. 96 (1998 Support Order ¶ 11 and ¶ 19).

[4] Hereinafter referred to as "2001 Support Order."

relationship with the Respondent. Kayla informed Ms. Zikmanis that on or about December 30, 2007, she had a physical altercation with the Respondent, that she was scared of him, and that she never wanted to see him again. App. 46 (Tr. 41). Kayla reported two other physical altercations in the past. Id. The discussion became extremely emotional and Ms. Zikmanis disclosed that the Respondent is not Kayla's biological father.

Because of the physical altercation between Kayla and the Respondent, and because Kayla stated she was afraid of the Respondent and would hurt herself if forced to visit him as scheduled, Ms. Zikmanis petitioned the court for help.[5] Ms. Zikmanis first attempted to file the petition on January 11, 2008, but was unable to file because she did not have the filing fee. Ms. Zikmanis subsequently filed a Petition for Modification on January 25, 2008 to bring the Respondent 's parenting time with Kayla to an end due to concerns she had for her daughter's safety. She also sought similar relief *ex parte*, which was denied. Ms. Zikmanis later amended her Petition to suspend Respondent's existing parenting time with Kayla until such time it was recommended that visitation may be reinstated because of a "strong possibility" of harm to the minor daughter. Respondent denied and cross-petitioned for increased parenting time with the parties' minor son, Matthew, on February 6, 2008. The trial court appointed a Guardian Ad Litem.

With respect to his parenting time, Respondent filed a Petition For Contempt against Ms. Zikmanis for failure to bring Kayla to him under the visitation schedule (Court Document No. 124), a Petition For Contempt alleging violation of the permanent stipulation that Kayla be told Respondent is her father (Court Document No. 125), a Petition For Contempt alleging violation of the permanent stipulation regarding talk of adoption (Court Document No. 126), and a Petition

[5] Kayla's threats to harm herself if forced to stay overnight with the Respondent were later found legitimate according to the Guardian Ad Litem. App.38-40 (Tr. 33-35).

for Contempt alleging certain negative comments allegedly made by Ms. Zikmanis to Kayla (Court Document No. 147).

In October 2008, Ms. Zikmanis filed a Motion for Contempt against Respondent (Court Document No. 151) for his failure to maintain the children on his health insurance plan and his failure to pay for fifty percent of the children's uninsured medical expenses for over a year, despite repeated requests. The children would be coming off her then husband's insurance. The lower court was provided with an itemized list of the outstanding uninsured medical expenses, which totaled over $1688.96. See App. 73 (Tr. 68). In her motion, Ms. Zikmanis sought the Respondent's court ordered half of the uninsured medical expenses to date or $844.48, which he continually refused to pay. See App. 128.

This post divorce matter involved the modification of parental time with the two minor children. Because this case did not involve issues of child support modification or modification of the uniform support order, no financial affidavits were required and neither party filed any affidavits with the court. Moreover, neither party filed a proposed uniform support order, as modification of the previous support orders, including medical coverage, was not at issue and the 2001 Support Order remained in force.

A hearing was held on the Respondent's Motions for Contempt on November 14, 2008.[6] At the hearing, while not scheduled to be heard, the lower court also heard Ms. Zikmanis's contempt motion.[7]

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[6] Ms. Zikmanis's Motion for Contempt was filed shortly before the November 14, 2008 hearing and as such, it was not scheduled to be heard at that time. The court also heard the Motion for Expeditious Hearing filed by the Guardian Ad Litem, which was scheduled for that time.

[7] During the hearing, the lower court was provided with email correspondence between the parties. App. 76 and 170-4. The Respondent objected to Ms. Zikmanis's unilateral placement of the children on her then husband's insurance. See App.76. (Tr. 71). Despite his protests and accusations of unilateral action by Ms. Zikmanis, the Respondent, never provided any insurance coverage for the children prior to the November 2008 hearing.

After a hearing on November 14, 2008, the lower court issued an order on February 5, 2009 ("February Order"). The February Order found Respondent's motions under Document Nos. 124 and 125[8] moot. See App. 2-3. After finding the motion for contempt against Ms. Zikmanis regarding visitation with Kayla moot, the lower court specifically limited the Respondent to day visits with the minor child Kayla as arranged by the Guardian and the child's therapist for the child's safety and wellbeing. Id. During the hearing, the lower court also had specifically stated that it would not sanction a parent for contempt (even if technically correct) when the child has threatened to hurt herself if she was made to go to visitation. See App. 41 (Tr. 36). In finding the motion for contempt regarding disclosure of paternity moot (Document No. 125), the lower court recognized that the child knows Respondent is not her natural father and "the horse has already left the barn." App. 3. The February Order made no finding of contempt as to the adoption issue and the allegation that Ms. Zikmanis made certain negative comments about the Respondent to Kayla (Document Nos. 126 and 147). See id.

With regard to Ms. Zikmanis's motion for contempt (Document No. 151), the lower court ordered Respondent to enroll the minor child[9] immediately for coverage under his health insurance plan but made no specific finding of contempt for his failing to do so as obligated under two prior court orders, despite uncontroverted evidence at the hearing. See App. 3. The court also made no specific finding of contempt for his failure to pay 50% of uninsured medical expenses, as he was obligated to do under two prior support orders and the permanent stipulation, despite uncontroverted evidence at the hearing. Despite making no finding regarding

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[8] The trial court clarified that its reference to Document Number 126 should have been Document Number 125 in paragraph 3 of its February Order. App. 5; See also App. 175-84.

[9] The trial court clarified that its reference to "child" for insurance coverage means both children. (Id.)

two of the Respondent's motions for contempt and finding his remaining motions moot, the trial court noted that

> "If one seeks equity one must do equity. The Court finds that Ms. Zikmanis' activities relative to the relationship between Mr. Peabody and Kayla have been less than helpful and, in fact, contemptible. The Court, in looking at the child's best interest, cannot punish the child by switching custody or mandating parenting time that would be counterproductive to the child. The Court can, however, indicate that there may be certain financial consequences, and the fact that Ms. Zikmanis has to pay all co-pays or uninsured expenses of $20 or less is one of those consequences."

Noting that Ms. Zikmanis represented about $844 due and owing in her motion by Respondent, the lower court sanctioned Ms. Zikmanis and held that expenses of $20 or less were her responsibility. App. 3-4.

Ms. Zikmanis moved to reconsider the sanction as improper and in error and to clarify that the sanction imposed related only to the approximately $844 sought in her motion and not to all future uninsured medical expenses of the children as well as other requests for clarification. While granting clarification as to both children being covered for insurance and a reference to a court document, the lower court denied all other relief by Notice of Decision dated March 13, 2009. App. 5.

Petitioner now brings this appeal as to the lower court's rulings relating to her motion for contempt (Document No. 151). Prior to the February Order being issued, Petitioner had filed a Second Motion for Contempt due to Respondent's continued failure and refusal to pay for half of the uninsured medical expenses following the November 2008 hearing. See App.175. That Second Motion for Contempt is currently pending below given this appeal.

SUMMARY OF ARGUMENT

It is the innocent children who will be made to suffer as a result of the lower court's February Order. Regardless of how the lower court feels about the parties or their actions, the children cannot be faulted or chargeable with the conduct of their parents. The children cannot be made to suffer as a result of decisions made by the parents. A sanction against a party that directly relates to the payment of uninsured health costs and expenses of the children should not be the device to reward or punish parents. That is what the lower court did here and its decision should be vacated.

The sanction imposed by the lower court against Ms. Zikmanis effectively modified prior, valid orders governing the parties' support obligations to pay for half of the minor children's uninsured medical expenses without any consideration or determination as to the best interests of the children or the financial abilities of the parties. There was no request for a modification by either party and no evidence was submitted to support a modification of this support obligation. Nor was there any evidence on the impact this sanction would have on the children or the parties themselves. Moreover, the procedural requirements for modification of a support obligation were not met as there was no notice of modification given to Ms. Zikmanis and no financial affidavits or proposed uniform support orders had been filed or considered by the lower court.

Significantly reducing Respondent's obligation to support the children's health as a punishment to Ms. Zikmanis is reversible error and it should be vacated. Such a sanction without any evidence supporting the modification does a great prejudice and harm to the children. Ms. Zikmanis is financially strapped and represented through the New Hampshire Bar Association Pro Bono Program. With most co-payments at or below $20, the sanction

effectively quashes Respondent's obligation to pay for any uninsured medical costs. In the face of this sanction, Ms. Zikmanis now needs to choose between paying the bills and obtaining medical services and attention for her children. Many of the uninsured medical costs of the children are for the minor daughter's weekly counseling sessions, which started at or around the commencement of the Petition for Modification of parental time and which the GAL in this case has suggested are necessary, as well as for ongoing asthma medication for the then minor Matthew.

The lower court noted that to seek equity one must do equity. While there was evidence that the Respondent had failed to comply with prior support orders, the lower court proceeded to punish Ms. Zikmanis beyond the equitable relief she was seeking at the time. The February Order rewarded the Respondent for his failure to abide by his medical support obligations prior to that date. Under the facts and circumstances in this case, this decision is unsustainable.

This future sanction of medical uninsured medical costs is unknown and undetermined. To impose such a punishment against one party and to reward the other party here is unreasonable, excessive, and oppressive. The sanction is similar to a criminal contempt punishment without any of the necessary due process procedures. The decision on Ms. Zikmanis's motion for contempt should be reversed and vacated. Respondent should be obligated, consistent with the 2001 Support Order, to pay for half of all uninsured medical expenses of the children, including all co-payments.

ARGUMENT

I. THE LOWER COURT ERRED IN MODIFYING A VALID UNIFORM SUPPORT ORDER AS TO THE SUPPORT OBLIGATION FOR PAYMENT OF THE CHILDREN'S UNINSURED MEDICAL EXPENSES

A. The Lower Court Erred By Imposing A Sanction That Amounted To An Improper *Sua Sponte* Modification Of A Child Support Order.

The court erroneously modified a valid support order and permanent stipulation when it eradicated the amount past due on uninsured medical expenses and absolved the Respondent of any future responsibility to pay uninsured medical costs of $20 or below. Under the 2001 Support Order, the Respondent was required to enroll his children in health insurance coverage through his employer as soon as such coverage became available. See App. 109 (2001 Uniform Support Order ¶11 and ¶18). The 2001 Support Order further required that the parties equally divide the cost of uninsured medical expenses. Id. (at ¶ 12). Likewise, under the original permanent stipulation, the parties were required to "divide evenly all uninsured health, medical, dental, orthodontic, prescription, optical, counseling, mental health, or other health related care costs of the minor children by each paying 50%." App. 102 (Permanent Stipulation ¶ 5(B)).

Although instituted by way of a sanction against Ms. Zikmanis, the lower court's action altered the 2001 Support Order that was in effect by providing that the Respondent need only pay uninsured expenses of $20 or more. The modification of health insurance coverage or payment of uninsured medical expenses is a modification of a support order. Child support orders are required to include the court's findings and determinations regarding health insurance and the payment of uninsured medical expenses for the children. RSA 461-A:14, IX(a); 458-C:3, V. See also In the Matter of Coderre and Coderre, 148 N.H. 401, 404-405 (2002) (decided under prior law, repealed 2005) (Lower courts are required to issue specific findings with respect to health insurance and the payment of uninsured medical expenses. The guidelines contain no deductions

for the payment of uninsured medical expenses; instead a lower court may deviate from the guidelines if it finds that a child will incur ongoing extreme uninsured medical expenses.).

As evidenced by the requirement that support orders include findings and determinations regarding health insurance coverage and uninsured medical costs, these medical costs constitute part of the support order for the children. Therefore, they are properly subject to the same requirements for modification as a general child support obligation. Moreover, costs such as prescriptions and co-payments qualify as uninsured medical expenses. Cf. RSA 458-C:2, IV-a (added 2007) ("'Medical support obligation' means the obligation of either or both parents to provide health insurance coverage for a dependent child and/or to pay a monetary sum toward the cost of health insurance provided by a public entity..., *or for medical costs not covered by insurance, including payment for the cost of premiums, co-payments, and deductibles.*") (emphasis added).

Although the Respondent argued that he was not required to pay co-payments under the 2001 Support Order because they were not specifically deemed uninsured medical expenses, this argument is without merit. See App. 79 (Tr.74). First, expenses not paid by insurance, including co-pays, are uninsured medical expenses. The language of the permanent stipulation supports this as well: "To the extent these expenses are not covered by public assistance, the parties shall divide evenly all uninsured health, medical, prescription...*or health related care costs*...." App. 102 ¶5(B) (emphasis added). Second, co-payments qualify as uninsured medical costs. Cf. RSA 458-C:2, IV-a (medical support obligation means "...medical costs not covered by insurance, including payment for the cost of premiums, co-payments, and deductibles.").

B. There Was No Petition For Modification Before the Lower Court Or Notice of Modification

The parties were not before the court on a petition to modify a child support obligation. Although either party could have moved for such modification, neither one did. See In re Donovan, 152 N.H. 55, 66 (2005), citing RSA 458-C:7 (2004) (A party may move to modify a support order when there is a substantial change in circumstances or when three years have passed since entry of the last order.). The court's sanction was a *sua sponte* modification of a standing support order absent any petition or request to do so. Ms. Zikmanis had no notice that the 2001 Support Order would be subject to modification. She was there to respond to Respondent's contempt motions that had nothing to do with support. She was also there to enforce Respondent's medical support obligations that were previously ordered and that the Respondent never disputed or appealed. Absent any notice of modification, the support obligations should not have been modified. Cf. 458-C:7, II (modification shall not take effect prior to the date of notice for a petition for modification).

There was no request by Respondent to modify the fifty percent obligation under prior orders. Indeed, if Respondent had moved to modify his obligation, he would have born the burden of proof in obtaining a modification. Instead, Respondent received a modification of his obligation without having to meet his burden proof or present financial information supporting such a modification. And unlike other modifications of support orders, the lower court's sanction effectively modified the support obligation against Ms. Zikmanis without any notice or limitation. See RSA 458-C:7. To the extent an adjustment for uninsured expenses was discussed at the hearing, it appeared related to the $844 sought in Ms. Zikmanis's contempt motion, not a modification of a support obligation for expenses that would be incurred in the

future.[10] Without following any of the procedures necessary for modification relating to child support, the lower court's *sua sponte* change of a child support obligation for medical care was error.

C. The Lower Court Erred by Modifying the 2001 Support Order Without the Required Financial Affidavits or Procedures

The lower court further erred when it modified a support order absent the submission of a financial affidavit by either party. Superior Court Rule 197 requires that at every hearing involving financial matters or property "each party *shall* file" a financial affidavit with the court. Super. Ct. R. 197 (emphasis added). This rule applies to modifications of support orders. In the Matter of Rohdenburg and Rohdenburg, 149 N.H. 276, 280 (2003). Failure to adhere to the Superior Court Rule 197 requirement of a financial affidavit is reversible error. See id. (failure to require a complete financial affidavit in modification proceeding was clear error.). Likewise, Superior Court Rule 199 requires proposed uniform support orders be submitted at every hearing in which "child support, medical support, or arrears are at issue." Super.Ct.R. 199.

The sanction imposed by the lower court effectively modified a valid support order and permanent stipulation governing the parties' support obligation to pay for the minor children's uninsured medical expenses without any consideration or determination as to the best interests of the children's health care needs or the financial abilities of the parties. It did so without any petition to modify the support obligations, nor was any financial affidavit evidence submitted to support the modification of this support obligation. Moreover, there was no evidence of the impact the modification would have on the children or the parties themselves. This is directly contrary to determinations involving child support obligations of the parties.

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[10] Ms. Zikmanis filed a Motion For Reconsideration and for Clarification of Court Order Dated February 5, 2009. See App. 175.

Significantly reducing Respondent's medical support obligation as a punishment to Ms. Zikmanis was error. Such a sanction without any evidence to support it (particularly the required financial affidavits) greatly prejudices her ability to meet the basic and medical needs of the children, and therefore, greatly prejudices the children. Ms. Zikmanis is financially burdened and represented through the New Hampshire Bar Association Pro Bono Program—a fact that the court was made aware of at the hearing. With most prescription costs or co-payments at or below $20, the sanction effectively quashes the Respondent's previously ordered obligation to pay for uninsured medical costs. Furthermore, by eradicating the uninsured medical expenses owed by Mr. Peabody under a valid support order, the court impermissibly altered support arrearages.

The lower court clearly erred by relieving the Respondent of his obligation to pay uninsured medical expenses that were past due. In attempting to punish Ms. Zikmanis for her "contemptible" activities, the lower court then altered the amount unquestionably due under the 2001 Support Order. This was error. RSA 461-A:14, VIII plainly states that "[n]o modification of a support order shall alter any arrearages due prior to the date of filing the motion for modification." Likewise, RSA 458-C:7, II provides that "[a]ny child support modification shall not be effective prior to the date that notice of the petition for modification has been given to the respondent." See In re Stall, 153 N.H. 163, 166-67 (2005) (plain meaning of RSA 458-C:7, II is that a court may modify a support order retroactive only to the date that the responding party has been served or accepted a copy of the petition.)

The procedural requirements, in large part, are required to safeguard the rights of the children to the support due to them, regardless of their parents' actions. Cf. In the Matter of Carr and Edmunds, 156 N.H. 498, 503 (2007) ("The purpose of child support is to provide economic

support for the *children*, not the obligee parent. Regardless of the parents' actions, the children should not be deprived of the amount of support to which they are entitled.") (emphasis in original) (internal citation omitted). Regardless of the lower court's intent to sanction, it erred when it altered amounts due under the support order and altered all future amounts under the then standing order. It did so without following any of the procedural safeguards required to protect the children.

Failure to follow any of the procedural requirements represents clear errors of law. Therefore, reversal is warranted and the ruling should be vacated.

II. MODIFICATION OF THE SUPPORT OBLIGATION FOR PAYMENT OF THE CHILDREN'S UNINSURED MEDICAL EXPENSES IS EXCESSIVE, OPPRESSIVE, UNREASONABLE AND PENALIZES THE CHILDREN

The lower court's sanction against Ms. Zikmanis should be vacated because it was an unsustainable exercise of discretion. While it properly recognized that to seek equity one must do equity, the lower court then went beyond the equitable remedy of medical reimbursement sought by Ms. Zikmanis. It punished her for seeking equitable relief and gave the Respondent a reward or a boon for failing to abide by a prior court order for years. The lower court's attempt to "do equity" resulted in an excessive, oppressive, and unreasonable punishment to Ms. Zikmanis for contempt claims that it had already deemed moot or unsupported. It also penalized the children for the Respondent's failure and refusal to pay his obligations of support of medical expenses without any consideration of the financial ability of the parties to meet the children's medical needs.

After indicating that there was likely no remedy for the contempt motions filed by the Respondent, even if granted, the lower court altered its course when hearing Ms. Zikmanis's motion for contempt. Specifically, the lower court stated at the November 2008 hearing:

> And here comes an interesting adjunct in remedy. If, for example, I find any one of Mr. Peabody's contempts contemptible—and I say I have no remedy. But now I realize I do have a remedy. He or she who comes into contempt—comes into court—must come in with clean hands. So if I find any one of those three—your client in contempt—under the clean hands doctrine, even if I find your allegations that he's in contempt—I can throw them all out. Saying, nobody has clean hands. And therefore, goodbye to everybody. I do have a remedy.

App. 68 (Tr. 63). The lower court, however, did not say 'goodbye' to everybody. Instead, it went beyond the equitable relief Ms. Zikmanis had requested in connection with her motion for contempt and significantly expanded her support obligations at the same time it drastically decreased the Respondent's support obligations.

While the lower court has "broad and flexible equitable powers which allow it to shape and adjust the precise relief to the requirements of the particular situation," Claremont School Dist. v. Governor, 147 N.H. 499, 502 (2002) (quotation and ellipsis omitted), its discretion in affording equitable relief must not be untenable or unreasonable. State v. Forbes, 157 N.H. 570, 572 (2008). In exercising its equitable powers in the case at bar, the lower court extended its reach beyond the relief requested. See Noddin v. Noddin, 123 N.H. 73, 76 (1983) (superseded by statute) ("Equitable relief will be denied if one comes to the court with unclean hands."). The lower court did not stop at the $844 of reimbursement for half of the uninsured medical expenses Ms. Zikmanis sought. Instead, the court fashioned a remedy that went far beyond foreclosing her ability to recover those monies at that time. By doing so, it improperly modified the parties' obligations and responsibilities, and their continuing obligations and responsibilities, with respect to the medical support of their children in an unfair, disproportionate, and unsupported way.

Rather than barring the equitable relief sought, and sending both parties home empty-handed because "nobody has clean hands," the lower court modified a prior court order. Its

ruling unreasonably punished one party and favored another, despite that other party having failed to pay under prior orders. Specifically, its ruling imposed an extreme sanction on Ms. Zikmanis and an unwarranted reward on the Respondent for his conduct.

The lower court significantly reduced the Respondent's obligation under the 2001 Support Order and Permanent Stipulation to the detriment of Ms. Zikmanis and the minor children and allowed the Respondent to benefit despite his own unclean hands. See App. 68. At no time did the lower court consider whether its punishment or modification was extreme or disproportionate given Ms. Zikmanis' financial position. It did not consider that the monetary sanction against Ms. Zikmanis was for an indeterminate and unknown amount of money. It also did not consider whether her conduct at issue was intended to protect the safety of her daughter to make such a sanction unreasonable and unfair. While argued at the hearing, there is no indication from the hearing transcript that the lower court gave consideration to the fact that the Respondent had refused and failed to pay his court ordered obligation of half of the uninsured expenses for well over a year. The Respondent had not placed the children on his insurance despite a court order. Because the decision condones Respondent's actions of noncompliance and unclean hands, it is unreasonable and should be vacated.

At no time did the lower court consider whether the sanction it issued would penalize or harm the children or whether it was in the best interests of the children to drastically change a support obligation as a punishment to a parent. Ms. Zikmanis's financial position given this sanction now requires her to choose between paying the bills or buying groceries and obtaining medical services for her children. The lower court failed to consider whether the sanction it issued would penalize or harm the children by changing a support obligation. Children should not be punished for the conduct of a parent. See Webb, 133 N.H. 665, 672 (1990) (children are

not chargeable for their parents' misconduct.). There was no determination at all as to the effect of the sanction upon the children's medical health care needs.

There was no evidence before the lower court as to the parties' financial abilities or consideration of the children's medical needs in issuing the sanction against Ms. Zikmanis. To the extent there was any discussion of Ms. Zikmanis's financial abilities at the hearing, it went to her inability to shoulder the burden of the uninsured medical expenses alone. There was no financial information as to the Respondent's ability to pay despite his refusal to do so. The nature of the ruling was not remedial to Respondent but rather a punitive measure by the lower court against a parent. A modification of support obligations should only occur upon an express and supportable finding of financial ability and the best interests of the children. Despite the lower court hearing evidence of Respondent's non-payment of his obligated $844 in uninsured medical expenses for over a year and failure to obtain coverage for the children, the lower court sanctioned Ms. Zikmanis. She now suffers the full $1,668.96 in expenses incurred for the children's uninsured health care at the time of her motion and all future uninsured costs at or below $20. A decision to turn a prior court order on its head with no evidence or consideration to the children is error.

The lower court did not consider whether its ruling was excessive, oppressive, or unreasonable under the circumstances. The lower court's application of this sanction to all costs and expenses results in a windfall for the Respondent, who had unclean hands for his continued and repeated failure to pay amounts required by court order. See App. 69-70 (Tr. 65-66). The Respondent was subject to a valid court order that required him to put the children on his medical insurance. Indeed, the 2001 Support Order provided that while health insurance coverage was, purportedly not available through the Respondent's employer at the time of entry,

he was ordered "to immediately obtain coverage" once it was available at a reasonable cost. App. 106 (2001 Uniform Support Order ¶ 13). The 2001 Support Order further noted that "[c]urrently health insurance for the Obligor is only available through Massachusetts. At the point that coverage is available, he agrees to provide coverage to his child." Id. (at ¶ 18). During the hearing, counsel for Mr. Peabody admitted that he did not include his children on his health insurance. First claiming that the insurance was formerly applicable in Massachusetts only, the Respondent then argued that his failure to place the children on his insurance at an earlier time was due to the fact that he was waiting for the next "open enrollment" period, which would occur in March. Based upon the record, this argument is without merit. Moreover, the lower court gave no consideration to the fact that the Respondent had not had to incur costs for insurance coverage for the children and had refused and failed to pay his court ordered obligation of half of the uninsured expenses for over a year. The sanction condones Respondent's actions of noncompliance in contravention of the evidence and is unreasonable.

The lower court's February Order as to Ms. Zikmanis's motion for contempt should be vacated. Its ruling is not sustainable. It was untenable and unreasonable to the prejudice of her case.

III. THE LOWER COURT ERRED WHEN IT, *SUA SPONTE,* MODIFIED THE SUPPORT OBLIGATION FOR PAYMENT OF THE CHILDREN'S UNINSURED MEDICAL EXPENSES AS A SANCTION AGAINST MS. ZIKMANIS WHERE THE EVIDENCE DID NOT SUPPORT MODIFICATION

"Lower courts have broad discretion in reviewing and modifying child support orders." In the Matter of Jerome and Jerome, 150 N.H. 626, 628 (2004). "Because lower courts are in the best position to determine the parties' respective needs and their respective abilities to meet them, [the Court] will overturn modification orders only if it clearly appears that the lower court engaged in an unsustainable exercise of discretion." Id. (quotation omitted). In this case, the

lower court committed an unsustainable exercise of discretion because its ruling was clearly untenable or unreasonable to the prejudice of Ms. Zikmanis's case.

Although lower courts are granted broad discretion in modifying support orders, their discretion is not unbridled. There was no evidence before the lower court regarding the parties' abilities to pay the support costs and expenses or the projected amount of future uninsured medical expenses. "While marital masters are granted broad discretion in matters relating to child support determinations, they *must have all information relevant to that determination* before exercising that discretion." In the Matter of Rohdenburg and Rohdenburg, 149 N.H. 276, 279 (2003) (emphasis added). In particular, the needs of the parties and their respective abilities to meet them are fundamental considerations in determining both an initial support award as well as any subsequent modification. Fortuna v. Fortuna, 103 N.H. 547, 549 (1961) (decided under prior law). See also In the Matter of Rohdenburg and Rohdenburg, 149 N.H. at 280 (The court must consider all relevant evidence regarding the parties' ability to provide support, including their assets and liabilities.). Underscoring the importance of such considerations, Superior Court Rule 197 requires each party to file a financial affidavit in any marital hearing, including post-divorce child support and modification proceedings. Rohdenburg, 149 N.H. at 279; Super. Ct. R. 197.[11]

A. There Was No Evidence To Support Modifying a Child Support Order On Uninsured Medical Expenses

This Court has previously emphasized the need for adequate evidence when considering financial ability in modification proceedings. In Rohdenburg, this Court held that Rule 197

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[11] The Family Division Rules further illustrate the necessity for a financial affidavit in cases such as this one. Family Division Rule 2.16 provides, in pertinent part that "[i]n all cases in which support and/or division of property...and/or payment of the guardian ad litem or mediator are ***in any way*** involved, each party ***shall file*** with the court and with the other party a typewritten or legible handwritten financial affidavit which contains the information requested on the family division financial affidavit." Fam. Div. R. 2.16(A) (eff. 2007) (emphasis added).

requires the submission of financial affidavits in all support modification proceedings and mandates full disclosure by both parties. In the Matter of Rohdenburg and Rohdenburg,149 N.H. at 279. On this basis, the Court reversed the modification of a child support order and ruled that the marital master erred by accepting an incomplete financial affidavit from the plaintiff during the modification proceeding. Id. at 279.

Here, despite the clear mandate of Superior Court Rule 197, the lower court modified the 2001 Support Order absent the submission of a financial affidavit by either Ms. Zikmanis or Mr. Peabody.[12] No other evidence of the parties' respective abilities to pay was provided to the lower court, and there was no evidence with respect to the cost of the children's future health care expenses or Ms. Zikmanis' ability to meet those costs. The lower court's *sua sponte* modification of a support obligation absent the availability of evidence to support these considerations constitutes an unsustainable exercise of discretion.

Because the matter before the lower court concerned the modification of parental time with the children, no financial affidavits were required to be filed with the court. In this post-divorce matter, the parties never filed financial affidavits or submitted evidence relating to their finances in this post-divorce matter. The lower court never heard evidence relating to the parties' financial assets or liabilities, other than the representation that Ms. Zikmanis was being represented through the New Hampshire Pro Bono Program. There was also no evidence as to the parties' separate abilities to meet the children's health care needs to fulfill this support obligation for the children.

If Respondent had moved to modify his fifty percent support obligation for uninsured medical expenses for the children as ordered under the 2001 Support Order, which he did not, he

[12] The issue as to the filing of financial affidavits did not arise prior to or during the November 2008 hearing because it was not anticipated that a modification of the support order would be considered, as neither party had petitioned for one.

would have had the burden of proof in that proceeding. Evidence relating to the parties' ability to pay this support obligation would have been heard and considered by the court. Financial affidavits would have been required to be filed. An analysis of the children's best interests for medical care and the parties' financial abilities would have occurred. Instead, the Respondent obtained a drastic modification of his support obligation for the children without any burden or evidence to support it. He also obtained this *sua sponte* modification despite having failed to follow his court ordered obligation to pay for half of those healthcare expenses for over a year. The lower court's sanction was against the weight of the evidence and error.

The evidence that was before the lower court did not support a modification of a support obligation. The only evidence close to financial information that the court heard was that Ms. Zikmanis was being represented through the New Hampshire Pro Bono Program. Evidence was submitted that Ms. Zikmanis had electric bills and was on heating assistance. App. 74 (Tr. 69). There was evidence that she goes to the food pantry. Id.

Moreover, at the hearing it was noted that the minor daughter, who was then 15 years old, was in counseling. Shortly after the filing of the Petition for Modification filed by Ms. Zikmanis, the minor daughter began counseling, which sessions were held generally weekly with about a $20 per office visit co-pay. The Guardian Ad Litem had already suggested the sessions were necessary and it appeared that they may continue. The sanction imposed leads to the absurd result that Respondent pays for none of the $20 or less co-pays for these medical services of the minor daughter. Additionally, the minor son did not turn 18 years old until August 2009.

The sanction imposed also gives the Respondent a "bonus" and condones his conduct in *not* abiding by prior court orders to pay 50% of the uninsured medical expenses before Ms. Zikmanis's motion. The lower court sanctioned Ms. Zikmanis in an apparent punishment even

though it found Respondent's motions moot or not supported. The lower court ignored Respondent's unclean hands and not having done equity himself in not paying his court ordered obligation for over a year. Noddin v. Noddin, 123 N.H. at 76 (unclean hands doctrine may bar equitable relief). The lower court also ignored that such a sanction against Ms. Zikmanis did not serve as remedial to Respondent for any conduct he alleged by her. Cf. Mortgage Specialists v. Davey, 153 N.H. 764 (2006).

While there was evidence of continuing co-pay medical expenses due to counseling and medical care, there was no consideration or determination as to the ability to meet those co-pay or medical expenses by the parties in the best interests of the minor children. The lower court also heard evidence that the Respondent had not put the minor children on his medical insurance. The lower court also heard that Respondent had failed to pay for half of the uninsured medical expense for the children for over a year.

The lower court's decision was not supported by the evidence and it should be vacated.

B. There Were No Specific Findings Of the Parties' Financial Needs or Respective Abilities To Pay or Consideration of the Healthcare Needs Of The Children.

Not only did the lower court have no evidence to support a modification of child support obligations, it also failed to make specific findings with respect to the parties' financial needs or respective abilities to pay these child support obligations. This Court has previously upheld a lower court's use of discretion in modifying a support award when specific findings exist in the record to support it. In the Matter of Fulton and Fulton, 154 N.H. 264, 269 (2006). In Fulton, the respondent sought to modify a prior support award on the basis of the plaintiff's increased salary. The lower court modified the award, but credited the plaintiff for increased travel costs associated with his new job. On appeal, the respondent argued that the lower court erred by

considering the increased travel costs without proper evidence or specific offers of proof to support it. Id. This Court rejected the respondent's argument, noting that the record demonstrated that the plaintiff's attorney represented the specific costs associated with the increased commute and the respondent never challenged the representations. The Court concluded that the lower court acted within in its discretion because it made specific findings that the amount of costs, based upon uncontroverted evidence, equated a special circumstance warranting adjustment under RSA 458-C:4-5. Id.

Unlike Fulton, the lower court in this case made no specific findings with respect to the financial needs or abilities of the parties before modifying the 2001 Support Order. Moreover, given the lack of evidence on the record, there is also no basis to assume that the court made implicit findings with respect to the parties' financial abilities. But see In the Matter of Kosek and Kosek, 151 N.H. at 722, 725 (Court may assume lower court made subsidiary findings supporting its general ruling in the absence of an explicit finding and any evidence to the contrary.). There were no financial affidavits filed and the court did not inquire into the finances of either party. The court failed to make specific findings about the ongoing medical expenses that, in light of Ms. Zikmanis' financial position, are quite onerous. The lower court also failed to estimate the projected cost for the future uninsured expenses that Ms. Zikmanis will shoulder for the next three years under its ruling, or her financial ability to meet the altered support obligation for the health and safety of the children.

Although the lower court lacked the evidence necessary and relevant to modifying a support order, the evidence it did have should have precluded it from diminishing to almost nothing the Respondent's obligation. There was evidence to show that 1) both children have been in counseling; 2) Kayla is having extreme emotional difficulty that requires significant and

routine mental health treatment; 3) there are frequent prescription and co-payment costs associated with her treatment; and 4) Matthew has routine costs associated with his asthma. The lower court was also provided with a list of uninsured expenses to date, which demonstrate that the vast amount of prescriptions and co-payments are either $20 or below. The court was also apprised of Ms. Zikmanis' tenuous financial situation, a fact supported by her representation through the Pro Bono program. Therefore, regardless of the propriety of the lower court's desire to punish Ms. Zikmanis, it committed an unsustainable exercise of discretion when it altered the support order and changed the financial responsibilities of the parties, despite evidence of mounting uninsured expenses and without regard for the parties' respective abilities to pay. Its ruling punishes the children and puts the children's health care needs in jeopardy when a parent cannot meet the financial burden.

Finally, the lower court committed an unsustainable exercise of discretion because it is required to issue support orders that parties can meet. See generally 458-C (devising formula based upon parties' adjusted gross income and issuing support obligations that correspond to a party's ability to pay.). Given the significant healthcare needs of one child and Ms. Zikmanis' probable inability to fully meet them, the court failed to adhere to this requirement and it is the children who will suffer the consequences. Cf. In the Matter of Kosek and Kosek, 151 N.H. 722, 726-27 (2005) (Broderick, C.J. dissenting) ("Children have independent interest in divorce proceedings and may not be used as pawns to punish a non-cooperative parent.").

C. The Evidence Did Not Support Imposing Modification as A Sanction On Ms. Zikmanis

The evidence before the lower court did not support modification of a support obligation as a sanction against Ms. Zikmanis. The lower court heard evidence that Ms. Zikmanis's conduct resulted from an emotionally charged discussion with her daughter and her concern for

the safety of her daughter given physical events with Respondent relayed to her by her daughter. There was no evidence before the court that Ms. Zikmanis's conduct was malicious in any way. To the contrary, there was evidence as to concern for the minor child and her need to obtain substantial counseling.

The record does not support the sanction issued by the lower court. The lower court was made aware that the children were previously in counseling for what one counselor deemed to be problems due to their exposure to violence in the home. App. 47 (Tr. 42). Officer Parsons was present and ready to testify regarding Kayla's concern for her safety with her father. Id. The paternity disclosure occurred during an emotionally charged discussion on January 1, 2008 between Kayla and Ms. Zikmanis, during which Kayla detailed an incident on December 30, 2007 where the Respondent was physical with her, that she was scared of him, and that she did not want to see him again. App.46. The Respondent also had prior physical altercations with Kayla. Id. On January 11, 2008, Ms. Zikmanis attempted to petition the court to modify custody but was unable to file the petition because she did not have money for the filing fee.[13] App. 48. She filed the petition later that month. Id. The Guardian Ad Litem also noted the paternity disclosure was an emotionally charged discussion, and thus supported Ms. Zikmanis's position that it was not an intentional violation of the permanent stipulation. Id. Furthermore, physical abuse was present during the parties' marriage and that it was an issue during their divorce. App. 46-47 (Tr. 41-42). Ms. Zikmanis had also taken out restraining orders against the Respondent in the past. Id.

Despite the facts available to the lower court, it issued a sanction that was contrary to the information that was available and unwarranted in light of the evidence presented at the hearing.

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[13] The documents are dated January 11, 2008. See App. 48.

But see In the Matter of Connor and Connor, 156 N.H. 250 (2007) (upholding finding of contempt and modification of parenting plan where there was evidence based upon plaintiff's offers of proof and the respondent's own acknowledgement that he failed to provide 50% of daycare expenses, and the lower court made a finding that he simply refused to pay, which was supported by evidence in the record.).

To the extent that Ms. Zikmanis's "contemptible" activities included noncompliance with the visitation schedule that provided for overnight visits with the Respondent, there was evidence that Kayla engaged in legitimate threats to hurt herself if Ms. Zikmanis made her go to the Respondent's house. In response to that motion, the lower court stated the following:

> a contempt issue where there's a chance the child would hurt herself. While technically you may be correct, don't think for a minute I'm going to find somebody in contempt for putting a child a risk or not putting a child at risk. Okay. So that's number 124.

Tr. 36.

The lower court also heard evidence that the Respondent had not put the minor children on his medical insurance and that Respondent failed to pay for half of the uninsured medical expense for the children for over a year. While Ms. Zikmanis was being represented through the New Hampshire Pro Bono Program, the lower court did not consider any evidence regarding the parties' financial affidavits or their abilities to pay for more than fifty percent of this support obligation of the children. While there was evidence of continuing copayments and other medical expenses due to counseling and medical care, there was no consideration or determination as to the ability to meet those expenses by the parties in the best interests of the minor children.

In sum, the lower court's decision to sanction Ms. Zikmanis by modifying a support obligation relating to the children was not supported by evidence. Nonetheless, the lower court

found her activities contemptible and punished her. Despite evidence of the Respondent's unclean hands, the lower court rewarded him. The evidence simply did not support the lower court's ruling on Ms. Zikmanis's motion for contempt. It should be vacated.

IV. THE LOWER COURT'S SANCTION AGAINST MS. ZIKMANIS IS AN UNSUSTAINABLE EXERCISE OF DECISION WHERE THE SANCTION IMPOSED IS UNKNOWN AND UNCERTAIN

In addition to disregarding legal and evidentiary requirements for modification of a support obligation, the lower court also erred by imposing a sanction that is unknown and uncertain. Although the court did not specifically impose its sanction as one for contempt, it referenced Ms. Zikmanis's actions as "contemptible." This language, combined with a sanction that reaches beyond the remedy allowed by unclean hands, demonstrates that the court intended to sanction her. Moreover, as a future sanction, Ms. Zikmanis has no meaningful opportunity to know the exact punishment or to respond to this sanction given the future uncertainties of medical care. Finally, while the lower court's application of this sanction to future costs and expenses results in an undefined and uncertain punishment to Ms. Zikmanis, it creates a "bonus" for the Respondent, who had unclean hands for his continued and repeated failure to pay amounts required by court order.

While the equitable powers of a lower court are discretionary, a lower court's decision must be reversed if it unsustainably exercised its discretion. In the Matter of Stall and Stall, 153 N.H. 163, 168 (2005). To establish that the court committed an unsustainable exercise of discretion, a party must show that the ruling is "clearly untenable or unreasonable to the prejudice of [her] case." New Hampshire Ball Bearings, Inc. v. Jackson, 158 N.H. 421, 437 (2009). In this case, the lower court committed an unsustainable exercise of discretion by

imposing a monetary sanction that is unknown and uncertain, and that will continue despite Ms. Zikmanis's future compliance with court orders.

The sanction imposed by the lower court fails to meet the characteristics of civil contempt. "In civil contempt, the punishment is remedial, coercive and for the benefit of the complaining party. In the Matter of Kosek and Kosek, 151 N.H. 722, 727 (2005). This Court has upheld monetary sanctions when they are remedial in nature and for the benefit of the complaining party. See In the Matter of Stall and Stall, 153 N.H. at 169-170 (requiring that violating party pay the out of pocket expense she forced the complaining party to undertake for her noncompliance with a court order). Here, however, the lower court imposed an undefined and uncertain monetary sanction against Ms. Zikmanis that served no remedial purpose. As to the paternity disclosure, as the court noted, there was no remedial measure available as "the horse has already left the barn." App. 3. Indeed, even during the hearing, the court repeatedly recognized that even if it found Ms. Zikmanis in contempt for the paternity disclosure, the action did not lend itself to an appropriate civil contempt sanction that would serve a remedial purpose. See App. 43-51.

Furthermore, despite some language to the contrary at the end of the February Order, the sanction is not an attempt to coerce Ms. Zikmanis into complying with court orders for the benefit of the Respondent, as the Respondent's motions were found to be moot or there was no finding of contempt. Ms. Zikmanis has no ability to purge this sanction or contest such an unknown future punishment against her. Instead, the prospective nature of the lower court's sanction in this case is akin to a finding of criminal contempt because it was designed to punish Ms. Zikmanis for conduct the lower court found objectionable. See App. 43. Mortgage Specialists, Inc. v. Davey, 153 N.H. 764, 788 (2006) ("two classes of contempt, civil and

criminal, are distinguishable by the character and purpose of the punishment imposed"). The purpose of criminal contempt proceedings "is punitive and to vindicate the 'authority and dignity' of the court." Mortgage Specialists, Inc. v. Davey, 153 N.H. at 788. See also New Hampshire Ball Bearings, Inc. v. Jackson, 156 N.H. 421, 437 (clarifying that in Mortgage Specialists, Inc. v. Davey, it was the nature of the sanction—punitive fines—that required disinterested prosecution for indirect criminal contempt.).

The lower court's sanction, though akin to criminal contempt, was made without any of the accompanying protective procedures. To punish for indirect criminal contempt, adherence to certain procedural formalities must be followed. "The alleged contemnor must first be provided notice, stating the time and place of hearing and the essential facts constituting the criminal contempt charged, and describing the charge as one for criminal contempt." Mortgage Specialists v. Davey, 153 N.H. 764 (2006); Super. Ct. R. 95. Moreover, criminal contempt actions arising out of civil litigation is between the public and the defendant and cannot be part of the original cause. Id. None of the procedural requirements for criminal contempt were satisfied here. Perhaps most importantly, she had no notice of such a result or the potential for a *sua sponte* modification of a support obligation for her children.

The lower court's application of this sanction to future costs and expenses results in a punishment to Ms. Zikmanis that cannot be quantified at this time. The minor daughter at the time was only 15 years old and had three more years of uninsured medical expenses. Shortly after the filing of the Petition for Modification filed by Ms. Zikmanis, the minor daughter began counseling, which sessions are held generally weekly with about a $20 per office visit co-pay. The Guardian Ad Litem has already suggested these sessions are necessary and it appears that they may continue. The sanction imposed leads to the absurd result that Respondent pays for

none of the $20 or less co-pays for these medical services of the minor daughter. Additionally, the minor son did not turn 18 years old until August 2009 and had continued to incur medical expenses until then. To apply a future, unknown sanction as to a child support obligation is error and should be vacated.

CONCLUSION

The sanction against Ms. Zikmanis modified a valid support order by altering the Respondent's medical support obligation for his children, resulting in great prejudice to her and to the needs of her children. The trial court's failure to consider adequate evidence and to comply with the statutory scheme and court rules governing support modifications led to an unjust result that is error and an unsustainable exercise of the court's discretion. Ms. Zikmanis asks that this Court reverse and vacate the trial court's order with respect to the payment of medical expenses and find that the Respondent remains obligated to pay the $844 and half of all the children's uninsured medical expenses, including co-pays under the 2001 Support Order.

REQUEST FOR ORAL ARGUMENT

Pursuant to the Court's Order of May 29, 2009, this appeal has been placed on the 3JX Docket. The Appellant requests oral argument as allowed by Supreme Court Rule 12-D(6). Jennifer L. Parent will argue for the appellant.

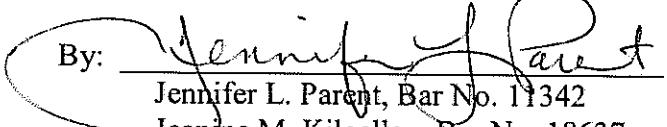
Respectfully submitted,

AUDREY ZIKMANIS

By Her Attorneys,

McLANE, GRAF, RAULERSON & MIDDLETON,
PROFESSIONAL ASSOCIATION

Date: 9/30/09

By: 

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Certificate of Service

I hereby certify that on this 30th of September, 2009, I served the foregoing Brief of Appellant-Petitioner by mailing two copies thereof by first class mail, postage prepaid, to:

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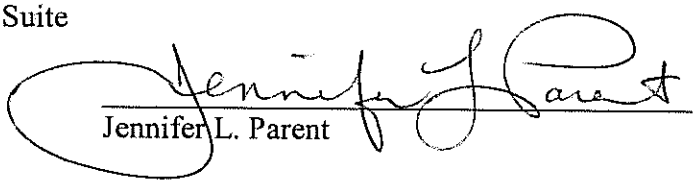

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