IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA: FAMILY DIVISION

JANE HIGDON

PLAINTIFF,

v.

CIVIL ACTION
FILE NO.
2010CV184629

ALEX HIGDON,

DEFENDANT.

AMENDED APPLICATION FOR DISCRETIONARY APPEAL

NOW COMES, Alex Higdon, Defendant in the above-styled matter and files this APPLICATION FOR DISCRETIONARY APPEAL from Judge Gail S. Tusan's August 30th, 2011, Order (Exhibit 1 pages 1-34) ruling on the Appellant's Motion to hold the Appellee in Contempt. This applicant applies to this court as follows:

(1) To issue an order granting the applicant an appeal from the Order of the Superior Court of Fulton County, the Honorable Gail S. Tusan, presiding in a Civil Action file No. 2010CV184629, the court having denied the Appellant his motion for a citation of Contempt for the Appellee Jane Reid Higdon.

(2) Applicant shows that the Georgia Court of Appeals, rather than the Supreme Court, has jurisdiction in this case as the matters in question relate to Child Custody independent from a judgment of divorce and alimony. *Carter v. Foster*, 247 Ga. 26 (1981); *Ashburn v. Baker*, 256 Ga. 507, 350 S.E.2d 437 (1986). More specifically, an order adjudging a person in contempt means the trial court has passed upon the merits of the case. *Ramsey v. Ramsey* 231 Ga. 334, 201 S.E.2d 429 (1973). As such, the pertinent question for jurisdictional purposes then becomes whether the "legal action" was the divorce complaint filed in 2010, or the enforcement of child custody provisions pursuant to a court order in 2011. *Martinez v. Martinez*, 301 Ga.App. 330(1), 687 S.E.2d 610 (2009). Because the order being appealed by the Appellant is solely predicated upon a child custody matter and not the divorce complaint, the

relevant legal action for jurisdictional purposes is the Appellant's motion to enforce the Court's order of custody and such issues are properly before the Georgia Court of Appeals.

(3) This application for appeal is filed within thirty (30) days of the entry of the order complained of, which is the August, 30th, 2011 Order on Motions for Contempt.

(4) Copies of some pertinent documents have been attached to this application as exhibits, including a copy of the order and the transcript from the August 30th hearing (Exhibit 2).

PART I.

BRIEF STATEMENT OF THE FACTS SHOWING THE

GENERAL NATURE OF THE CASE

This application for appeal is from the Court's order regarding the Appellant's Motion for Contempt compelling the Appellee to address the Court and her willful disobedience to the Court's Custody Order. Over a nine (9) month period beginning in December 2010, the Appellee failed to follow multiple court orders to have her children assessed and treated medically. Her failure to do so necessitated the action of Contempt and the Court's subsequent failure to rule according to law has necessitated this action of appeal. A partial list of the facts enumerating the general nature of the case are as follows:

1. Appellant and Appellee were married on May 15th, 2004. The Appellant is employed as a Licensed Clinical Psychologist specializing in Family Therapy and Couples in Distress while the Appellee is a National Director of Sales for a Children's School Fundraising Company owned by her family. The Appellant earns five (5) times the annual salary of the Appellee. The couple have four (4) children together: A four (4) year old boy named [redacted] who is Autistic, a three (3) year old boy named [redacted] who was once diagnosed with Autistic Spectrum Disorder and who has since lost that diagnosis as a result of two (2) years of medical treatment, a two (2) year old twin

named [redacted] who has recently been diagnosed with Childhood Speech Apraxia, Expressive and Receptive language delay, heavy metal toxicity, developmental delay, and malnutrition, and a two (2) year old twin named [redacted] who has recently been diagnosed with heavy metal toxicity and malnutrition.

2. On November 3rd, 2009, the Appellant chose to leave the marital bedroom and initiate a separation in the relationship. The Appellant made this choice in response to the Appellee's refusal to continue doctor recommended treatments for the couple's two (2) year old son [redacted]. Both the Appellee and her parents refused the treatment not based on any doctor's recommendations, but because they deemed him "fine" based on their non-expert assessment of his functioning.

3. After the Appellee's continued refusal to have her children receive medically necessitated treatments and after she continued abusing the Appellant emotionally and verbally in front of the children, the Appellant chose to leave the marital residence on May 28th, 2010.

4. Approximately two (2) months after the temporary consent order was signed giving both parents equal custody of 3.5 days per week, the Appellee made a motion to gain full temporary custody. Upon the Guardian Ad Litem's recommendations which were not permitted to be contested by Judicial Officer Gary Alembik, the Appellant's equal child custody time was modified to essentially restrict him to three (3) weekends a month with individual parent time on Monday afternoons and dinners on Wednesday nights.

5. During the December 15th, 2010 hearing on the Appellant's Emergency Motion to compel the Appellee to have her children medically assessed and treated, the Court offered the following requests addressing child support determination issues arising at the end of the hearing:

> "I will consider the two worksheets. If you want to have on top of it just a short memo, whatever it is you're criticizing about the other, and then I will review the transcript from the last hearing and will be in a position to make a decision quickly about the support. Is that clear?" (Exhibit 4: Page 15 lines 14-19)

Seconds later, the Court continued to explain why these short memos "criticizing" the other side would be helpful:

> "And then I intuitively will be able to read the worksheets to a certain extent, but to the extent that you can explain to me why the worksheet is the way it is or why it shouldn't be the way they have it, vice versa, that would be helpful." (Exhibit 4: page 16 lines 1-5)

Despite his verbal requests to obtain them, his motion to compel discovery requests (Exhibit 5), and an emergency conference with Judge Tusan aimed at compelling the Appellee to produce these and other crucial discovery documents, those written criticisms by attorney Stone and any accompanying information and communications were not shared with the Appellant. Those criticisms were the last pieces of evidence given to Court before it made her ruling for child support; a ruling made in legal error based upon OCGA §19-6-5. In her February 4th, 2011 order addressing child support, the Court ruled to award the Plaintiff $[redacted] a month in child support while confirming the Appellant's monthly gross income was only $[redacted]. The aforementioned figure is roughly 53% of the Appellant's Gross income. The Court provided no findings of fact or conclusions of law and none of the required data which would justify such a profound deviation. There had been no evidence given in any hearing to justify such a ruling as it clearly exceeded the Appellant's ability to pay ($[redacted] a month: See Exhibit 3), was inconsistent with his prior eight (8) years of earnings (Appellant averaged [redacted] a year beginning from 2003 IRS Tax Returns when he started as a Clinical Psychologist: See Exhibit 6), and inconsistent with the government's statistics on what a psychologist of his experience and expertise earns ($[redacted] dollars a year: See Exhibit 7). One might ask, what might have accounted for a child support determination so far removed from the evidence in this case? In his quest to better understand this question, the Appellant's discovery efforts were ignored as his pleadings, emails, and judicial phone conferences were time and again thwarted.

6. On February 8th, 2011, after the Court had already made a special set for a Guardian Ad Litem Removal hearing and two (2) contempt motions filed by the Appellant, the Court delivered the following pronouncement and explanation by email (Exhibit 8):

> Please note that the Hearing set in this case for "PLAINTIFFS MOTION FOR CONTEMPT, DEFENDANTS MOTIONS FOR CONTEMPT, AND THE DEFENDANTS MOTION FOR REMOVAL OF GUARDIAN AD LITEM DAWN R. SMITH" have been removed from the 2/16/11 calendar. Judge Tusan has made the decision to remove this hearing due to the fact that the hearing that was held on 1/31/11 in which a Temporary Order was generated covered most of these issues. All remaining issues regarding this case will be heard at the Final Trial on March 28, 2011.

In direct contravention to the Court's order, the transcript of the January 31st Emergency hearing to once again Compel the Appellee to have the Higdon twin's medical testing assessed for recommendations of treatment failed to cover any of the issues related to Defendant's pending Motions for Contempt and his removal of the Guardian Ad Litem much less covering "most of the issues" as claimed in her email above. The Guardian Ad Litem was protected from having to account for various falsehoods would have been proven by legal audiotapes recorded by the Appellant.

7. The final hearing was a three (3) and one half day trial which began on March 28th, 2011 and ended on the morning of April 1st, 2011.

8. On June 13th, some two (2) and a half months after the final hearing, the order for the Final Divorce Decree was pronounced. In that order, issues of child support were essentially continued from the Temporary Order (Exhibit 3) with no findings of fact addressing the issue of why the Court would continue to order the Appellant pay $[redacted] dollars a month when he earned in total only $[redacted] dollars a month.

9. On the 29th of June, 2011, the Appellant filed his timely Motion for New Trial which

cites numerous abuses of discretion and errs of law committed by the Court during the final hearing and actions preceding it. In addition, he filed a Motion to Amend the Temporary Order in an attempt to revisit the unfair child support determination. That Motion to Amend the Temporary Order has never been set for hearing nearly four (4) months later.

10. On August 15th, 2011, the Court heard the Appellant's Motion for Contempt (Exhibit 9) against the Appellee for neglect of her children's medical issues and continued refusal to have medical testing examined by her expert. On August 15th, 2011, the Court also heard the Appellee's Motion for Contempt against the Appellant for his payment of Child Support. Despite the evidence showing (1) that the Appellee lied about the Appellant's alleged non-payment of child support and medical expenses and (2) the evidence supporting his contention that he is unable to pay the exact amount ordered by the Court, the Court held the Appellant in Contempt and Awarded Attorneys fees.

11. On August 30th, 2011, the Court gave its Order on the Appellant's Motion for Contempt (Exhibit 1: pages 1-34) against the Appellee. The order contains numerous errs for which this appeal is based.

PART II.

ENUMERATIONS OF ERRS

(1) During the August 15th, 2011 hearings on Contempt, the Trial Court abused its discretion and committed a reversible err when it excluded material evidence thereby denying the Appellant Due Process and his Constitutional Rights to a Fair Hearing.

Under the 14TH Amendment to the United States Constitution and Article I and in accordance with the Constitution of the State of Georgia, no person may be deprived of life, liberty, or property without "due process of law". The phrase "Due Process of Law" refers to a principal that "fundamental fairness" must be applied to every party in a civil or criminal proceeding. *Lassiter v. Department of*

Social Services, 452 U.S. 18, 101 S.Ct. 2153, 2158, (68 L.Ed.2d 640, 648) (1981). The due process requirement of fundamental fairness has been expressly interpreted to include the right to have a "fair hearing". A fair hearing includes the right to produce evidence and cross-examine parties. This fundamental element of due process was eloquently summarized by the California Court of Appeals, Second District, in *Buchman v. Buchman,* 123 Cal. App. 2d 546, 560 (1954):

> Judicial absolutism is not part of the American way of life. The odious doctrine that the end justifies the means does not prevail in our system for the administration of justice. The power vested in a judge is to hear and determine, not to determine without a hearing. *When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets established standards of procedure. It is not for nothing that most of the provisions of the Bill of Rights have to do with matters of procedure*. Procedure is the fair, orderly, and deliberate method by which matters are litigated. To judge in a contested proceeding implies the hearing of evidence from both sides in open court, a comparison of the merits of the evidence of each side, a conclusion from the evidence of where the truth lies, application of the appropriate laws to the facts found, and the rendition of a judgment accordingly. (Emphasis Added).

During the August 15th hearing of the Appellant's Motion for Contempt (Exhibit 9), the Court forbid any admission of evidence which related to the medical care of his four (4) children; an act clearly violating the *Buchman* precept of "to hear and determine, not to determine without a hearing." One of the Appellant's primary claims in his contempt pleading stated that the Appellee willfully refused to follow the court's order to, inter alia, have their twins assessed and treated based on testing which showed considerable pathology for both boys. Furthermore, he claimed that the Appellee failed to recognize and truthfully report their ailments to the essential parties responsible for their treatment while artfully impeding the Appellant access to numerous doctor's appointments. In response to his claims, the Court blocked any testimony relating to the central arguments of his contempt pleading and announced that it was already familiar with the evidence that the Appellant had not yet proffered. (Exhibit 2 - Page 2, lines 19-21)

The Court: "The court has given its best judgment, so I'm not prepared just

indefinitely to continue going over and around the same issues."

Then, as it had done several times before, the Court unabashedly advised the Appellant of where his time arguing his case should be spent and encouraged him to abandon those endeavors which seek ends that she deems fruitless and/or compromising to court. (Page 2: lines 23-26)

> ***The Court:*** "And so what you should be doing then is going to the next court and having that court review decisions as opposed to trying to convince this court that it's made the wrong decisions because that's not the court's opinion or it would have entered a different final judgment."

The issue before the court was whether the Appellee violated the court's existing order to have her children examined and treated. What the Appellant was seeking and what he was entitled to are issues ancillary to the civil action of determining a litigant's adherence to a court order. Because the Court had already made up its mind before permitting the Appellant his fair hearing of the evidence, it was indeed presented with a dilemma. According to the interpretation offered by the trial court, the Appellant was not asking the Court to protect his children by adjudicating a matter pursuant to his Constitutional rights, he was instead placing the Court in a "Dilemma."

> ***The Court***: "So this court's dilemma is really as to how to proceed…So you can probably see the dilemma you are putting the court in, and the court has already ruled. (Page 3: lines 5-12)

It is painfully clear from the Court's monologue that it was not extemporaneously working through its dilemma with an intent to discover the fair and proper resolution to it. Neither was it grappling with the question of what was really in the best interests of the children or it would have heard evidence to that effect. The Court had an agenda to extricate herself from having to rule on the contempt hearing before her by either (1) coaxing and coercing the Appellant to change his pleading and/or (2) illegally excluding the Appellant's evidence thereby avoiding another "dilemma" while changing the custody arrangements; a move it is prohibited by law from making.

Notwithstanding the universal rights afforded to the Appellant by the U.S. Constitution, Georgia case law is clear in its leanings. An Appellant in a contempt action is entitled to reasonable

notice and an opportunity for a fair hearing. [*Brown v. King*, 266 Ga. 890(1) 472 S.E.2d 65 (1996); *Barnes v. Tant*, 217 Ga. 67, 72, 121 S.E.2d 125 (1961)]. Any action which seeks to modify child custody "should be granted only if the trial court finds that there has been a material change of condition affecting the welfare of the child since the last custody award. If there has been such a change, then the court should base its new custody decision on the best interest of the child. In the *Interest of T.S.* 300 Ga.App. 788, 790(2) (686 S.E.2d 402) (2009); OCGA § 19-9-3(b) (a trial judge may modify custody "based upon a showing of a change in any material conditions or circumstances of either the party or the child"). Thus, in order for either the Appellee or the court to prevail in their efforts to modify custody, they were required to present evidence that certain material changes in the Higdon's circumstances had an adverse effect on the children or that changes in their circumstances would have a beneficial effect on the children. See *id*.; *Moses v. King*, 281 Ga.App. 687, 692(1) (637 S.E.2d 97) (2006); *Weickert v. Weickert*, 268 Ga.App. 624, 627(1) (602 S.E.2d 337) (2004). The Trial Court failed to honor that requirement.

(2) In an effort to entice the Appellant to change the nature of his pleadings, the Court abused its discretion and committed reversible err by dispensing legal advice contrary to the best interests of the Appellant and his four (4) children.

The Court's initial ten (10) minutes of participation during the August 15th hearings are clearly displayed on the first ten (10) pages of the hearing transcript (Exhibit 2) and are tantamount to practicing law. The following excerpts are just a sampling of judicial utterances contained in the hearing transcript which shed light upon the Court's attempts to advise the Appellant: (page 2: lines 19-25)

> ***The Court:*** "The court has given the case its best judgment, so I'm not prepared to just indefinitely continue going over and around the same issues…And so what you should be doing is going to the next court and having that court review the court's decisions as opposed to trying to convince this court that it's made the wrong decisions"

The Court continues its instruction and advice giving: (page 5: lines 8-12)

> ***The Court:*** "You know, another option would be to accept the final judgment and decree of divorce and then just move to modify it, you know, as opposed to trying to convince this court and another court to change the decision, to just modify it."

Further along the Court adds the following: (page 12: lines 19-25)

> ***The Court:*** "I'm trying to get us moving forward in a way so that legally you can address and argue and petition for whatever relief is appropriate, including as I have suggested…a modification."

And finally, when the subject of the unfair accumulation of child support arrearages against the Appellant arose during the final moments of the hearing, instead of the Court endeavoring to hear testimony as to why the Court should modify its order to comply with Georgia law, the Court peevishly responded with these suggestions: (page 105, lines 16-21).

> "I do understand that. The other alternative also remains, which you have decided not to pursue….To withdraw the motion for new trial and move to modify the obligations."

During this exchange near the close of the hearing, the Court made its final, feckless attempt to have the Appellant withdraw his pleading. At that moment, the Court had accumulated all the information it needed to modify the temporary order of child support, stop the unfair and unlawful accumulation of arrearages, and comply with the Georgia Law O.C.G.A. §19-6-15. It failed to avail itself of that opportunity. The question then becomes, how could a dispassionate observer of that three (3) hour proceeding ever believe that the Trial Court would be able to return in five (5) weeks to open-mindedly preside over a Motion for New Trial addressing most of the same issues she deemed unworthy on August 30th? The Court had clearly stated both in its comments and accompanying actions that it had (1) made its decision, (2) it was not going to change, and (3) the Appellant should abandon his pleading and move beyond the Trial Court to address a modification elsewhere.

The Courts actions during this hearing and those preceding it violate the following rules of Judicial Conduct:

> **CANON 1. JUDGES SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY.**
> An independent and honorable judiciary is indispensable to justice in our society. Judges should participate in establishing, maintaining, and enforcing, and should themselves

observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

CANON 2. JUDGES SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL THEIR ACTIVITIES.
A. Judges should respect and comply with the law and should conduct themselves at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

CANON 3. JUDGES SHOULD PERFORM THE DUTIES OF THEIR OFFICE IMPARTIALLY AND DILIGENTLY.
The judicial duties of judges take precedence over all their other activities. Their judicial duties include all the duties of their office prescribed by law.

CANON 5. JUDGES SHOULD REGULATE THEIR EXTRA-JUDICIAL ACTIVITIES TO MINIMIZE THE RISK OF CONFLICT WITH HIS JUDICIAL DUTIES.
F. Practice of Law. Judges should not practice law.

In addition to Canons 1, 2, 3, and 5(f) of the Judicial Code of Conduct, Canon 4G of the American Bar Association Model Code of Judicial Conduct also prohibits full-time judges from practicing law, and all states have similar or identical restrictions. The comparable prohibition in the 1972 model code was enacted because the "likelihood of conflicts of interest, the appearance of impropriety, and the appearance of a lack of impartiality--all have their greatest potential in the practice of law by a full-time judge." *Thode, Reporter's Notes* to [1972] Code of Judicial Conduct at 91 (ABA 1973). The practice of law includes rendering services that are legal in character, call for the skill and expertise of a lawyer, and constitute part of a lawyer's professional services. *Michigan Advisory Opinion* J-2 (1989).

Interpretations gleaned from an unbiased, impartial person's assessment of the hearing transcript will reveal that the Court was not just benignly exploring legal avenues with the Appellant and/or providing legal information, it was dispensing legal advice, clear and simple. The distinction between advice and information would be that advice holds within it a suggestion of some proper trajectory for which the Appellant must pursue in order to meet the ends he seeks. Because the Court

was attempting to guide the Appellant toward the end it was seeking, the proper distinction to be made by a reasoned, objective observer grappling with these questions is whether the improper advice dispensed by the Court was helpful or harmful. The Court understands, as it is certain from an examination of its clearly-spoken words displayed on the hearing transcript, that the Appellant's aim is to have the all the issues reexamined during a new trial. The Court clearly understood the Appellant's motivation before it came to this hearing as notwithstanding its testimony, the Court could safely deduct his intentions from the fact the two (2) months earlier he filed a Motion for New Trial. Therefore, the Court's effort to divert and derail the Appellant from his intended destination could reasonably be considered the intentional dispensation of bad advice.

From an examination of the transcript there were several instances during the three (3) hour contempt hearing where the Court made its agenda clear by expressing in countless ways that it wanted to speed the Higdon case off to final and off its docket. In an effort to do so, the Court not so subtly attempted to cajole the Appellant into abandoning his September 30th Motion for New Trial and allow the case to go final by filing a modification. The Court understood that by doing so, the Appellant would not only be summoned away from the Trial Court to address the matter of modification elsewhere, the Court would immediately thwart any accountability for its behaviors both past and present as the Appellant would lose his opportunity to appeal at the trial court level with his Motion for New Trial. Furthermore, any Judge who possesses Judge Tusan's wealth of experience on the bench would clearly understand that the Appellant would also lose his appeal opportunity with the Supreme Court of Georgia as the 30-day window for timely filing would have already expired upon the cancellation of his New Trial Motion which had been pending for nearly two (2) months.

(3) In its August 30th ruling regarding the excepting of the Supersedeas, the Trial Court committed a gross and reversible err when it falsely claimed that it had heard arguments from both the Appellant and the Appellee before it ruled to make a change of custody.

While findings of fact and conclusions of law are not required in a motion for contempt, an order of contempt must specify *sufficient* facts to show contempt. (emphasis applied). *Gay v. Gay*, 268 Ga. 106(1), 485 S.E.2d 187 (1997); *Hines v. Hines*, 237 Ga. 755, 756, 229 S.E.2d 744 (1976). The facts presented by this Court in support of its rulings not only lacked sufficiency, they were largely absent.

Georgia case law is clear regarding this issue. A trial court's contempt order must be supported by the record on appeal and it is not authorized to base its order on contempt upon facts not in the record. *In Re Spruell.,* 200 Ga. App. 218, 407 S.E.2d 451 (1991); *In re Bryant*, 188 Ga. App. 383, 384 (373 SE2d 74); *In re Hayes*, 185 Ga. App. 818, 819 (1) (366 SE2d 204); *In re Sykes*, 151 Ga. App. 233, 234 (2) (259 SE2d 215). Regarding the Court's claim that it had heard arguments from both the Appellant and the Appellee before it ruled to make a change of custody, the trial court clearly based this portion of its contempt order upon facts which were not supported by the record. Once again, in the absence of evidence establishing such facts, the trial court ruling in this instance was a reversible err that cannot stand. *In re Hayes,* 185 Ga. App. 818, 819 (1) (366 SE2d 204). More specifically, the first sentence addressing this issue of Supersedeas on page one (1) of the Order on Motions for Contempt begins with the following (Exhibit 1):

> Upon oral motion by the Plaintiff's counsel and *after hearing argument from both parties* including Defendant's detailed statement supporting his request for changes in the custody orders entered by the Court, the Court feels it is appropriate to review whether the automatic supersedeas that is imposed by the filing of the Defendant's Motion for New Trial should remain in effect." (emphasis applied).

If one were to scour the first ten (10) pages of the Contempt Hearing transcript (Exhibit 2), there would be no trace of argument from "both" parties. One would discover that the Court begins on

page 2 (line 19) to set the stage for excepting the supersedeas by introducing the topic to the litigants. Continuing on through page 3 (line 13), the Court is heard not so subtly suggesting the concept of excepting the supersedeas to the Appellee's counsel. On Page 7 and line 23 of the transcript, the Court falsely claims that it heard from "both parties" and "they're not sure what to do regarding the medical treatment of the children." And finally on page 10 and line 13 of the transcript, the Court delivers its clear and unequivocal "intent" to supersede the supersedeas by accepting the "child custody provision of the final judgment and decree of divorce."

(4) In its August 30th ruling regarding the excepting of the Supersedeas, the Trial Court committed a gross and reversible err when it falsely claimed that the Temporary Order had not worked well for the Higdon children because the parents were unable to work together.

While findings of fact and conclusions of law are not required in a motion for contempt, an order of contempt must specify *sufficient* facts to show contempt. (emphasis applied). *Gay v. Gay*, 268 Ga. 106(1), 485 S.E.2d 187 (1997); *Hines v. Hines*, 237 Ga. 755, 756, 229 S.E.2d 744 (1976). The facts presented by this Court in support of its rulings not only lacked sufficiency, they were largely absent.

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Contempt (Exhibit 1), the Court offers the following:

> **"**It is clear from the Defendant's many Motions for Contempt and Plaintiff's responses to those motions, as well as evidence submitted during the final hearing in this case, that the parties continue to be unable to consult and agree on healthcare decisions and that the *Temporary Order has not worked well for the children*." (emphasis added).

Regarding the efficacy of the Temporary Order, there was no evidence given during the Contempt hearing in question and no evidence given at anytime during this divorce proceeding that the Temporary order was not working "well for the children." Quite to the contrary, the Temporary order, not the Final order, was responsible for allowing the Appellant to compel the Appellee to get additional medical testing that confirming the children's maladies and it allowed the Appellant to compel the Appellee to make doctor's appointments for their children which have uncovered numerous health challenges that are now being treated. The purpose of the Appellant's Contempt motion was to compel the Appellee to follow the court order to have her children assessed and treated. Because she knew that such assessment would confirm all the Appellant's contentions about the illnesses of his children, both the Appellee and her counsel have found creative and resourceful ways to disobey the process put in place by the Temporary Order for which the Appellant is fighting to uphold. This process which was often hailed by the Guardian Ad Litem for its efficacy, instructed both expert physicians from each party to confer upon medical issues until they agreed on a common path of treatment. There was never a time, nor evidence thereto, when this process was shown to not "work well."

Regarding the Court's false contention that the "parties continue to be unable to consult and agree on healthcare decisions", the Appellant asserts that it is not "the parties" plural who are unable and unwilling to consult, it is only the Appellee has refused to abide by the Court's order to follow a process of decision making for the Higdon children. The Appellant remains ready and willing to work with the Appellee but is unwilling to stand by and squander another year of his

children's health and future waiting for the Court to stop enabling a parent to harm her children by ignoring her denial of their issues.

(5) In its August 30th ruling regarding the Appellant's motion to hold the Appellee in Contempt for violating the custody provisions of the Court's February 2nd, 2011 order, the Trial Court committed a gross and reversible err when it falsely claimed that the Appellee asserted that the Appellant had unclean hands.

While findings of fact and conclusions of law are not required in a motion for contempt, an order of contempt must specify *sufficient* facts to show contempt. (emphasis applied). *Gay v. Gay*, 268 Ga. 106(1), 485 S.E.2d 187 (1997); *Hines v. Hines*, 237 Ga. 755, 756, 229 S.E.2d 744 (1976). The facts presented by this Court in support of its rulings not only lacked sufficiency, they were largely absent.

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> "The *Plaintiff asserts*, and this Court agrees, that Dr. Higdon has come to court with unclean hands." (emphasis applied).

Again, nowhere in the transcript will be found any mention of the Appellee asserting that she was unable to make and attend doctor's appointments or attain medical testing because she did not

have sufficient funds. In addition to making five (5) times the yearly earnings of the Appellant, the Appellee never contended, nor provided evidence thereto, that her failure to provide assessment or treatment for her children was based upon the Appellant's financial assistance provided to her. Such an assertion would be easily contested by anyone with knowledge of her finances which are inextricably intermingled with the family's business finances. The Appellee has, however, consistently offered the following reasons for her failure to have the children assessed and treated. Note that all of the following have since forth been proven false:

> (1) The Appellee claimed for 11 months that three (3) of the four (4) children were not ill.
>
> (2) The Appellee claimed that the Appellant had Munchausen's by Proxy.
>
> (3) The Appellee claimed that the children's medical testing which showed significant health problems was doctored by the Appellant.
>
> (4) The Appellee claimed numerous work-related conflicts impeded her ability to make and keep certain physician appointments for her children.

Based upon the transcript showing no claims by the Appellee of unclean hands against the Appellant, the Court has grossly erred in making such a claim against the Appellant.

(6) In its August 30th ruling regarding the Appellant's motion to hold the Appellee in Contempt for violating the custody provisions of the Court's February 2nd, 2011 order, the Trial Court committed a gross and reversible err when it falsely claimed that the Appellant had unclean hands because he failed to provide any financial aid to the Appellee.

While findings of fact and conclusions of law are not required in a motion for contempt, an order of contempt must specify *sufficient* facts to show contempt. (emphasis applied). *Gay v. Gay*, 268 Ga. 106(1), 485 S.E.2d 187 (1997); *Hines v. Hines*, 237 Ga. 755, 756, 229 S.E.2d 744 (1976). The facts presented by this Court in support of its rulings not only lacked sufficiency, they were largely absent.

Georgia case law is clear regarding this issue. In the case sub judice A trial court's contempt order must be supported by the record on appeal and it is not authorized to base its order on contempt upon facts not in the record. *In Re Spruell.,* 200 Ga. App. 218, 407 S.E.2d 451 (1991); *In re Bryant*, 188 Ga. App. 383, 384 (373 SE2d 74); *In re Hayes*, 185 Ga. App. 818, 819 (1) (366 SE2d 204); *In re Sykes*, 151 Ga. App. 233, 234 (2) (259 SE2d 215). Regarding the Court's claim that the Appellant had unclean hands because he failed to provide any financial aid to the Appellee, the trial court clearly based this portion of its contempt order upon facts which were not supported by the record. Once again, in the absence of evidence establishing such facts, the trial court ruling in this instance was a reversible err that cannot stand. *In re Hayes,* 185 Ga. App. 818, 819 (1) (366 SE2d 204). More specifically, in its ruling on the issues of medical custody on page three (3) of the Order on Motions for Contempt, the Court offers the following (Exhibit 1):

> "Here, Defendant demands that this Court order Plaintiff to aid in getting the parties' children the help that he believes the children need, however, Defendant has *failed and refused to aid* Plaintiff, financially, in getting the parties' children the help that he believes they need." (emphasis applied).

The two (2) troublesome statements offered by the Court in this excerpt above have to do with the phrases "the Defendant has *failed and refused to aid the Plaintiff financially*" and "getting the parties' children the help that *he* believes the children need." (emphasis added). Addressing first the Court's contention that the Appellant has refused to aid the Appellee financially, the very clear and incontrovertible evidence beginning on line 19 of page 77 of the hearing transcript which counters the falsehoods promoted by the Appellee that the Appellant was not providing child support and medical expenses during the previous six (6) months. The following evidence was proffered to demonstrate the Appellee's perjury regarding the Appellant's child support payment history (See Exhibit 2's IRS, BOA Bank Statements, and other related exhibits):

(1) The Appellant provided child support every month despite going into debt and borrowing monies.

(2) The Appellant provided medical expenses for his children throughout the period for which the Appellee claimed he did not.

Curiously, when the Appellee was found to have lied in court (Exhibit 10) about the Appellant's failure to pay, she was permitted to do so with impunity claiming that her inability to report over $4000 dollars worth of payments was a result of "clerical error."

Regarding the Court's contention that the Appellant was suggesting that the Appellee was failing get the children the help that *he* believed they needed, this subtle, yet spurious suggestion is false. The Appellant was fighting for the children to receive the medical "help" that was suggested by the following specialists:

(1) Dr. Rachel West, the children's Autism Specialist who was the care coordinator for the children over a three (3) year period.

(2) The speech pathologist Heather Taylor who recently diagnosed [redacted] Higdon with Childhood Speech Apraxia and Expressive and Receptive Language Disorder.

(3) Dr. Jennifer Duke, the physician who was chosen by the Court in the final order to replace both medical experts. She recently diagnosed the Higdon twins with malnutrition, gastrointestinal dysbiosis, and heavy metal toxicity.

The subtle suggestion by the Trial Court that the Appellant was seeking "help" for the children according only to what "he" believed they needed was a perpetuation of the Appellee's essential talking point which states the following: The Appellant should not be trusted with medical decision making for the children because he is seeking medical treatment for them based not on the opinions of those many qualified physicians that he has employed over the past 3 years, but based on his own "extreme and rigid" conception of what they need.

(7) In its August 30th ruling regarding the Appellant's motion to hold the Appellee in contempt for violating the custody provisions of the Court's February 2nd, 2011 order, the Trial Court abused its discretion and committed a gross and reversible err when it falsely claimed the Appellant had unclean hands as a result of direct acts he took which forced the Appellee's medical expert to decline treating the 2 year old twins.

While findings of fact and conclusions of law are not required in a motion for contempt, an order of contempt must specify *sufficient* facts to show contempt. (emphasis applied). *Gay v. Gay*, 268 Ga. 106(1), 485 S.E.2d 187 (1997); *Hines v. Hines*, 237 Ga. 755, 756, 229 S.E.2d 744 (1976). The facts presented by this Court in support of its rulings not only lacked sufficiency, they were largely absent.

Georgia case law is clear regarding this issue. A trial court's contempt order must be supported by the record on appeal and it is not authorized to base its order on contempt upon facts not in the record. *In Re Spruell.,* 200 Ga. App. 218, 407 S.E.2d 451 (1991); *In re Bryant*, 188 Ga. App. 383, 384 (373 SE2d 74); *In re Hayes*, 185 Ga. App. 818, 819 (1) (366 SE2d 204); *In re Sykes*, 151 Ga. App. 233, 234 (2) (259 SE2d 215). Regarding the Court's claim that the Appellant had unclean hands as a result of direct acts he took which forced the Appellee's medical expert to decline treating the 2 year old twins, the trial court clearly based this portion of its contempt order upon facts which were not supported by the record. Once again, in the absence of evidence establishing such facts, the trial court ruling in this instance was a reversible err that cannot stand. *In re Hayes,* 185 Ga. App. 818, 819 (1) (366 SE2d 204). More specifically, while addressing the issues of medical custody on page three (paragraph 2) of the Order on Motions for Contempt (Exhibit 1), the Court offers the following:

> "Furthermore, Dr. Higdon's direct acts perpetrated the same thing he complains of, which have resulted in Plaintiff's chosen doctor to decline to treat the parties' children."

The Court goes on to assert:

> "Dr. Nathanson-Lippett wrote a letter informing the parties that she

> was canceling said appointments due to the complexity of the issues surrounding the family, but most notably due to Dr. Higdon's 'inappropriate and confrontational behavior" that had been experienced by her office staff."

There was no evidence presented in this hearing or any credible evidence in other hearings that support the Court's contention that the Appellant ever perpetrated acts which would discourage the Appellee's medical expert to treat the couple's two (2) year old twins. However, there was evidence at the final trial which proved the Appellee's medical expert Dr. Nathanson-Lippett lied when she testified in court that she felt in some way threatened by the Appellant during the end of their last visit.

It has been the Appellant's contention from early on in the divorce proceeding that Dr. Nathanson-Lippett, the Appellee's lone expert witness, colluded with the Appellee in many ways including the intentional delay of medical results in order to deny the Appellant the ability to use them in various hearings including the final trial. The most egregious of Nathanson-Lippett's obstructions came with the second round of testing for the Higdon twins. After the Appellant obtained the first round of medical testing for the twins which showed significant medical challenges for both boys, those results were quickly maligned by Nathanson-Lippitt and the Guardian Ad Litem as "too bad to be true." Both individuals also suggested that the Appellant had Munchausen's by Proxy and somehow altered the results to reveal more pathology than actually existed. When Dr. Nathanson-Lippett's office manager received the second round of testing confirming the Appellant's initial medical testing for the Higdon twins, she claimed she could not share those results with the Appellant until the doctor had first looked at them but promised she would send them later by mail. This practice of "waiting for the doctor to see the test results" and then sending them weeks later by mail denied the Appellant his right to use those medical testing results in earlier emergency hearings. And so because it was only a few days from the start of the final hearing, the Appellant told the office manager he would just come down and

pick them up in person. The office manager stated that she would not give them to the Appellant and so he told her that as a licensed clinical psychologist, he understood his medical information rights regarding HIPPA which meant that he was an owner of those records and entitled to them at any time upon request. The office manager declined his invitation to provide the records and Appellant offered the following in a calm and non-threatening way: "I will be at your office tomorrow morning at 10am to pick up the new testing as I am entitled. If you fail to give me copies I will have to subpoena them immediately." The office manager asked the Appellant to hold the line, and when she returned, she informed him know that the medical testing results would be waiting for him when he arrived. These are the facts surrounding the Appellant's alleged "inappropriate and confrontational behavior" experienced by Nathanson-Lippitt's office manager.

Conspicuously absent from the Court's ruling is any mention that the Appellee's expert witness Dr. Nathanson-Lippitt testified at trial that during the final moments of the last pre-trial visit with both parents in March, there was a significant verbal exchange with the Appellant where she felt he was in some way threatening and hostile. She claimed that her feelings of being threatened by the Appellant made it impossible for her to treat the two (2) year old twins. (Exhibit 11) What she did not know is that during this allegedly "threatening discussion" which was to have transpired in late March, the Appellant felt threatened and immediately turned on his iphone digital recorder to record the session. Exhibit 12 is a transcript of the audio recording of the event that Nathanson-Lippett claims the Appellant was threatening in some way. That transcript and the doctor's testimony regarding it at trial clearly impeached her credibility by proving she had lied about any threatening events, and yet, the Court curiously employs Nathanson-Lippitts assertion to buttress its specious claim of unclean hands.

Two (2) questions which continue to puzzle the Appellant are the following:

(1) If Nathanson-Lippitt lied about the Appellant threatening her and those lies were clearly outted during trial, how could the Court give any credence to further claims offered by this perjurer much less cite her claims as reasons for denying material evidence with substantial probative value?

(2) If the Appellant was so threatening that Nathanson-Lippitt would not be able to treat the Higdon twins in March, why has she continued to treat the two (2) oldest boys for the last six (6) months?

(8) In its August 30th ruling regarding the Appellant's motion to hold the Appellee in contempt for violating the custody provisions of the Court's February 2nd, 2011 order, the Trial Court abused its discretion and committed a reversible err when it used the Doctrine of Unclean Hands to support its rulings in a matter of Child Custody.

In an explanation of its ruling to deny the Appellant a fair hearing of his evidence in the instant case, the Court, without providing any evidence thereto, cites the Appellant's possession of unclean hands as basis for its rulings and actions. In cases of child custody matters, a Judge is not permitted to use such a claim to buttress it rulings as the rule regarding equitable rights does not apply in child custody actions. *Green v. Krebs*, 245 Ga.App 756(4), 538 S.E.2d 832 (2000). Not only were the Court's contentions about the Appellant's unclean hands baseless, the Court was not permitted to use the argument to support its unwillingness to hold the Appellee in contempt. Such a ruling would be tantamount to claiming that since the Appellant was in some way neglectful to the children and not held accountable for it, then it would be acceptable for the Appellee avoid accountability as well. While the evidence given to this Appellate Court will be clear and abundant showing the Appellant has done everything in his power to get his children the medical help they need, equally convincing will be the evidence demonstrating the Appellee's willful failure to act in kind.

(9) In its August 30th ruling regarding the Appellant's motion to hold the Appellee in contempt for violating the custody provisions of the Court's February 2nd, 2011 order, the Trial Court abused its discretion and committed a reversible err by falsely claiming that it had (1) carefully weighed the Appellant's evidence regarding his Contempt claim against the Appellee and (2) failed to recognize anything new in his Contempt allegations against the Appellee.

While findings of fact and conclusions of law are not required in a motion for contempt, an order of contempt must specify *sufficient* facts to show contempt. (emphasis applied). *Gay v. Gay*, 268

Ga. 106(1), 485 S.E.2d 187 (1997); *Hines v. Hines*, 237 Ga. 755, 756, 229 S.E.2d 744 (1976). The facts presented by this Court in support of its rulings not only lacked sufficiency, they were largely absent.

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> "While this Court declined to hear oral argument to testimony on this issue, the Court *carefully considered* the allegations and defenses thereto. Furthermore, Defendant's allegations and requests are not novel to this divorce proceeding." (emphasis applied).

This statement at its root is baseless and contradictory. Despite presenting "novel" evidence in his written motion for Contempt, the Appellant was denied his constitutional right to present additional "novel" evidence of the Appellee's recent neglect of her children, a neglect for which the court has never heard in either oral or written form. Secondly, if the Court declined to hear oral argument during the hearing, how could it have "carefully considered the allegations and defenses thereto?

(10) During the August 15th, 2011, hearings on Contempt, the Trial Court committed reversible err when it modified child custody arrangements during a hearing for contempt.

Over several of the Appellant's objections during the August 15th Contempt hearing, the Court chose to alter the supersedeas enacted from the Appellant's filing of a Motion for New Trial in July 2011. With the Court's temporary order in effect, the Court excepted only the final order provisions of custody thereby abolishing the custody arrangements given from the Temporary order (Exhibit 3) pronounced on February 4th, 2011. The newly abandoned temporary order of custody made any medical decision making a joint venture between both parents with the final decision arising from an agreement made between each parent's medical expert**.** The final order's custody arrangement instituted the Appellee as the decision maker regarding medical issues thereby silencing any voice the Appellant had regarding the health issues of his children. Here, the court committed reversible err when it made such a change, and upon closer examination, evidence will show that the court manifestly abused its discretion in the manner in which it superseded the temporary custody arrangement. A trial judge has no authority in a contempt proceeding to modify the terms of custody. *Bautz v. Best*, 170 Ga.App. 219(1) 316 S.E.2d 589 (1984). Even a temporary change of custody requires a new proceeding based upon evidence showing a change in circumstance affecting the interest and welfare of the minor children. *Skinner v. Skinner*, 172 Ga.App. 609(1), 323 S.E.2d 905 (1985). Although O.C.G.A. section 19-9-1(b) provides that visitation rights may be modified in a contempt action, such does not permit a change of custody. *Blalock v. Blalock*, 247 Ga. 548, 277 S.E.2d 655 (1981). *McCall* is also instructive revealing that a contempt proceeding and a change of custody proceeding must be instituted as two (2) separate actions and the trial court's failure to comply will be reversed if in a contempt action the order modifies custody as opposed to merely changing visitation. *McCall v. McCall*, 246 Ga.App. 770, 542S.E.2d 168 (2000).

More recently, the Georgia Court of Appeals has re-emphasized this long standing Georgia case law that prohibits custody modification in a contempt action. *Coker v. Moemeka*, A11A0005

(2011). In the *Coker* case, shortly before the court was scheduled to hear the father's contempt action, he moved for a change of custody which the court granted at hearing. *Id* at 4. The mother subsequently filed for appellate review and the Court of Appeals agreed that Georgia case law clearly states that during contempt proceedings, the trial court does not have authority to modify an order of custody as it must be brought as a separate action. *Id*. at 6, *McCall v. McCall*, 246 Ga. App. 770, 772 (1) (542 SE2d 168) (2000). Much like the instant case, *Coker* was a question of law, rather than fact, and therefore the Appellate Court owed no deference to the Trial Court's ruling and vacated the custody order for what it was; a plain legal error. *Coker*, at 5.

And finally, even assuming a change in custody was permitted during a Contempt action, the Court understands that any such action which seeks to modify child custody "should be granted only if the trial court finds that there has been a material change of condition affecting the welfare of the child since the last custody award. If there has been such a change, then the court must base its new custody decision on the best interest of the child. In the *Interest of T.S.* 300 Ga.App. 788, 790(2) (686 S.E.2d 402) (2009); OCGA § 19-9-3(b) (a trial judge may modify custody "based upon a showing of a change in any material conditions or circumstances of either the party or the child"). Thus, in order for either the Appellee or the court to prevail in their efforts to modify custody, they were required to present evidence that certain material changes in the Higdon's circumstances had an adverse effect on the children or that changes in their circumstances would have a beneficial effect on the children. See *id*.; *Moses v. King*, 281 Ga.App. 687, 692(1) (637 S.E.2d 97) (2006); *Weickert v. Weickert*, 268 Ga.App. 624, 627(1) (602 S.E.2d 337) (2004). By the Trial Court refusal to hear any evidence from the Appellant regarding the "best interests of the children, it abjectly failed to honor that requirement.

(11) The Trial Court erred in not recusing itself sua sponte from the proceeding based on actions demonstrating clear possession of partiality, prejudice and impropriety.

According to 28 U.S.C. § 455(a): "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

Indeed, "'[t]he very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the *appearance* of impropriety whenever possible.'" *United States v. Patti*, 337 F.3d 1317, 1321 (11th Cir. 2003) [(quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 865 (1988)] (emphasis added). Under § 455(a), a judge *must* recuse himself or herself when "an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality, and any doubts must be resolved in favor of recusal." *Patti*, 337 F.3d at 1321 (quoting *Parker v. Conners Steel Co.*, 855 F.2d 1510, 1524 (11th Cir. 1988)). Similarly, Canon 3(C) of the Code of Conduct for United States Judges provides that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned."

The Appellant agreed that recusal in the instant case is also necessary in order to "enforce society's legitimate expectation that judges maintain, in fact and appearance, the conviction and discipline to resolve those disputes with detachment and impartiality." *Litecky v. United States*, 510 U.S. 540, 564 (1994) (Kennedy, J., concurring, with Blackmun, Stevens, and Souter, JJ.) The recusal of Judge Gail S. Tusan is required not only as a result of her actions during the August 15th Contempt hearing and subsequent August 30th rulings which lack the appearance of impartiality, but also due to the judicial record this Court has established throughout the entire Higdon Divorce Case. *See* S.J.C. Rule 3:09 Canon 3; *In re United States*, 441 F.3d 44, 65 (1st Cir. 2006) ("a motion to recuse is a very serious matter and must have a factual foundation; it may take some time to build the foundation."). While the record of those past rulings cannot be addressed presently in any detail, it is a record from which an objective observer could have a reasonable doubt about her impartiality. It includes unlawful judicial exparte communications, the unlawful exclusion of material evidence, the unlawful admission of falsehoods that can be proven by audiotape, and the canceling of key hearings such as two (2) Contempt hearings against the Appellee and the Court's eleventh hour cancellation of a Guardian Ad

Litem Removal hearing for which evidence was to be given that would prove manifest Guardian Ad Litem misconduct.

Lastly, the Court understands that during the Appellant's upcoming Motion for New Trial Hearing it will be called as a material fact witness concerning the Court's initiation and execution of exparte communications with the Appellee's counsel regarding key matters of child support determination. Such testimony warrants immediate recusal and precludes the Court from presiding over future matters concerning the case. Moreover, even if the those exparte communications were in reality harmless and impartial, and even if her recent conduct and rulings were somehow proven to be the same, her recusal would still be required in this case even if "the appearance of partiality [had] arise[n] when in fact there was none." *Litecky*, 510 U.S. at 563 (Kennedy, J., concurring, with Blackmun, Stevens, and Souter, JJ.).

And so the Appellant asserts that it is clear from the Court's now twelve (12) month body of work in the Higdon case recently culminating in its August 30th, 2011 rulings, that this Court evidences a pattern of pronouncing orders that are biased, prejudiced, and partial. Its rulings have often been contrary to the rule of law and made for the benefit of Appellee while sacrificing the best interests of the Appellant and his four (4) small children.

(12) The Court erred in denying the Appellant his right to argument during the close of his hearing on a Motion to hold the Appellee in Contempt.

On page thirty-three (33) line seven (7) of the Appellant's transcript for his Motion for Contempt (Exhibit 2), he can be heard initiating a request for a closing argument and citing the Uniform Superior Court Rule 13 which clearly states his right to that closing argument. The following exchange transpired soon after:

> **Court:** All right. So you're seeking to provide the court with closing argument on the issue raised in your contempt action as to the health insurance and the property that you wish to pick up; is that correct? You've already put your objection on the record about the other issues, so I would not be receiving closing argument because I didn't receive any evidence on those issues. So we would be talking about solely the

> insurance issue and the property issue, which I thought that I had received your argument on.
>
> **Dr. Higdon:** Okay. So basically in my closing argument you're denying that, to be able to close on that because you didn't hear evidence. So it wouldn't be appropriate? Did I hear that correctly?
>
> **The Court**: Yes
>
> **Dr. Higdon**: Okay. I guess I object to that given that it's—if it's not a part of the previous objection as to where it's. –
>
> **The Court:** I think you have sufficiently put on the record your objection. I'm clear on you objection sir.
>
> **The Court:** It's not going to change. I understand what you are objecting to.

Based upon the rights extended to the Appellant by the Uniform Superior Court Rules, the Court, over objection and the re-statement of USCR Rule 13, denied the Appellant his right to a closing argument in this case. Such a denial of fundamental rights is a clear and compelling abuse of discretion by this Court.

PART III.

CONCLUSION

Based on the above enumerated errs, the Applicant respectfully prays that the Application for Discretionary appeal be GRANTED.

Respectfully submitted this the 17th day of October, 2011

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