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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

In re MARRIAGE OF)	Appeal from the Circuit Court
)	of Du Page County.
ELIZABETH K. ALDEN,)	
)	
Petitioner-Appellee,)	
)	
and)	No. 08-D-1034
)	
DANA A. ALDEN,)	Honorable
)	Robert A. Miller,
Respondent-Appellant.)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Zenoff and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held:* Because respondent complied with the trial court's purge order, an appeal concerning the underlying merits of the trial court's August 29, 2012, finding of contempt is moot. We also hold that the trial court's award of section 508(b) fees against respondent was not an abuse of its discretion. The evaluator's report was properly allowed in evidence; the trial court found the evaluator credible; and the trial court made the requisite findings in determining whether to modify the Joint Parenting Agreement. The trial court's October 10, 2012, ruling on petitioner's emergency motion to implement the recommendations of the evaluator was not against the manifest weight of the evidence and did not constitute an abuse of discretion. The trial court's October 23, 2012, judgment awarding sole custody, care, and control of the children to petitioner was not against the manifest weight of the evidence because the opposite conclusion was not clearly apparent based on the record presented to this court. Respondent also complied with the trial court's

July 6, 2012, order finding him in contempt, and the contempt was purged. Accordingly, an appeal concerning this finding of contempt is moot. Finally, we conclude that double jeopardy principles preclude a successive and identical prosecution against respondent for direct criminal contempt, where the evidence pertaining to his first prosecution was found to be insufficient and the trial court declined to find him in direct criminal contempt; we decline to disturb the trial court's ruling.

¶ 2 In this postdissolution matter, respondent, Dana A. Alden, appeals from orders of the circuit court of Du Page County finding him in indirect civil contempt for violating provisions of the Joint Parenting Agreement and awarding fees (No. 2-12-1046); restricting his visitation (No. 2-12-1127); and awarding sole custody to petitioner; and finding him in contempt (No. 2-12-1208). In a separate appeal, petitioner, Elizabeth K. Alden, challenges the trial court's refusal to hold respondent in direct criminal contempt for making false statements to the court (No. 2-12-1116). The four appeals have been consolidated for review.

¶ 3 I. BACKGROUND

¶ 4 Initially, we note that respondent has made numerous statements and arguments throughout his brief, which, upon our review of the common-law record and reports of proceedings, have compelled this court to conclude that he has misrepresented and mischaracterized the proceedings. The misrepresentations, in turn, made our review difficult, since we had to verify all of respondent's statements presented as facts and his supporting arguments. Illinois Supreme Court Rule 341 (eff. July 1, 2008) provides that all briefs should contain a fact section, which shall contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment. The rules of procedure concerning appellate briefs are rules, not mere suggestions, and it is within the appellate court's discretion to strike a brief and dismiss the appeal for failure to comply with those rules. See *Niewold v. Fry*, 306 Ill. App. 3d 735, 737 (1999). However, we determine that resolving the matters concerning

the children in this case should take precedence over respondent's lack of compliance. Therefore, despite these deficiencies, we will consider the issues but disregard any offending portions and admonish respondent that the supreme court rules "are not advisory suggestions, but rules to be followed." *In re Marriage of Hluska*, 2011 IL App (1st) 092636, ¶ 51.

¶ 5 A brief, objective, recitation of this litigation is necessary to place the issues raised on appeal in the proper context. The marriage of the parties was dissolved in December 2009. The trial court's judgment incorporated a Joint Parenting Agreement, which pertained to the parties' two children, E.A. and J.A. Relevant to the instant appeals are the following provisions:

"11. Neither parent will interfere with the children's reasonable and proper companionship with the other party.

13. Neither party shall obstruct the development and maintenance of love and affection between the children and the other party.

14. Each party shall make all reasonable efforts to foster a close and continuing relationship between the children and the other parent; including, without limitation, encouraging the children to spend time with the other parent, emotionally supporting the children's love for the other parent, and supporting the activities the other parent plans with the children.

15. Neither parent will do or say everything (*sic*) that may estrange the children from the other parent.

16. Each party agreed to do everything within his or her power to foster the respect, love, and affection of the children for the other party, so that they may have proper[] physical and emotional growth and retain their respect and affection for both of their parents."

¶ 6 On February 21, 2012, petitioner filed a petition for rule to show cause; petitioner was seeking an adjudication of indirect civil contempt. Petitioner alleged that the parties had a parenting schedule, and on February 10, she went to pick the children up from school because it was her parenting weekend. Petitioner saw the children, and then saw them run until they were gone from her sight. When she parked her car, she went to look for them, but was not able to locate them. She called respondent, and he informed her that he had the children. Petitioner alleged that respondent had told the children to go to a friend's house where he would then pick them up for the weekend. Petitioner alleged that respondent knew that the weekend was for her to be with the children; she alleged that respondent placed the children's physical safety in jeopardy when he told the children to go to a secret location without any supervision. Petitioner alleged that respondent's "reckless actions show a complete disregard for the negative impact those very actions would have on the children and the children's relationship with their mother." Petitioner further alleged that respondent's "abhorrent behavior is not only a blatant violation of the [Agreement], it evidences his continued intent to alienate the children from their mother."

¶ 7 Petitioner further alleged that she had recently learned that respondent had been taking the children to see a mental health professional without her knowledge or consent. Petitioner alleged that respondent's conduct was an example of his intent to deceive petitioner and violated paragraph 4 of the Joint Parenting Agreement, which required the parties to jointly discuss any extra-ordinary medical decisions.

¶ 8 On March 12, 2012, respondent filed a motion asking the trial court to appoint a guardian *ad litem*. Respondent alleged that petitioner had been inflicting physical injuries upon the children. By an agreed order entered the same day, the trial court appointed a guardian *ad litem* for the children.

¶ 9 On April 5, 2012, petitioner filed a motion for supervised visitation, asking the trial court for respondent's visitation to be supervised because of "his deliberate and continued effort to alienate the children from their mother and because of the negative impact of his actions on the *** children's emotional health and stability." Petitioner alleged that respondent told the children that, once they turned 12 years of age, they would be able to "choose" which parent with whom they wanted to live. Petitioner also alleged that respondent told the children he would go to jail because he could not afford the new child support amount. Petitioner also re-alleged the circumstances of the February 10, 2012, incident in which respondent told the children to meet him after school, despite it being petitioner's weekend as per the parenting schedule. Petitioner re-alleged the circumstances regarding respondent taking the children to see a mental health professional without her knowledge or consent. Petitioner further alleged that on March 10, 2012, respondent took the children to the hospital and told the staff that the children had been abused while in petitioner's care. The children were interviewed by police and a caseworker from the Department of Children and Family Services, and the investigation remained pending at the time. Petitioner alleged that respondent told the children to say that they were being physically abused by their mother. Petitioner alleged that respondent's conduct violate the terms of the Joint Parenting Agreement and evinced an intent to alienate the children from her.

¶ 10 On April 24, 2012, petitioner filed a petition to terminate joint custody and award sole custody to petitioner, and to modify the visitation schedule so that respondent's visitation would be "supervised because of his deliberate and continued effort to alienate the children from their mother." Petitioner alleged that, since the entry of the dissolution judgment, there had been a substantial change in circumstances of the parties and the children. Petitioner alleged that

respondent had failed to facilitate a positive relationship between the children and her, deliberately attempts to alienate the children from her, encourages the children to lie to her, and involves the children in the legal process between the parties, all with a complete disregard for the impact on the children's emotional health and stability. Petitioner set out examples similar to the ones described above in her other motions. Petitioner alleged that she and respondent were unable to communicate and cooperate regarding changes to the parenting schedule and provided examples. Petitioner also alleged that they were unable to effectively and consistently communicate and cooperate with each other toward the best interests of their children and asked the trial court to terminate the Joint Parenting Agreement and grant her the sole care, custody, and control of the children.

¶ 11 Also on April 24, the guardian *ad litem* filed a petition asking the trial court to appoint an evaluator to conduct an investigation and issue a report concerning an opinion on the residential custody arrangements for the children, appropriate parenting times, and type of parenting contact for the noncustodial parent going forward. On May 15, 2012, the trial court appointed Dr. Mary Gardner as a custody evaluator.

¶ 12 On July 6, 2012, the trial court conducted a hearing and found respondent in contempt for failing to pay ordered child support for December 2011 and January 2012. The purge contemplated by this order was later satisfied and respondent purged the contempt finding as expressed in an agreed order dated October 23, 2012. Respondent presents this contempt finding and purge as part of his appeal No. 12-1208.

¶ 13 On August 28, 2012, the trial court conducted a hearing on petitioner's rule to show cause (1) for respondent's alleged visitation violation and (2) for taking the children to see a psychologist without petitioner's knowledge. The trial court also heard petitioner's petition for

attorney fees pursuant to section 508(b) of the Illinois Marriage and Dissolution of Marriage Act (the Act) (750 ILCS 5/508(b) (West 2012)) with respect to the trial court's July 6 contempt finding. With respect to the visitation violation, the trial court noted that, before it would issue a rule, there needed to be some basis to determine whether February 10 through 12 was rightfully petitioner's custodial weekend with the children. In addition to the verified complaint, petitioner testified that the allegations in the verified complaint were true. Based on that, the trial court issued the rule, returnable on the same day. The burden shifted to respondent, and the hearing continued.

¶ 14 Respondent testified that the calendar, which reflected a parenting schedule, was confusing, and he had no input on the calendar. With respect to the February 10 weekend, respondent testified that he picked up the children at their school; he was in the back parking lot. He told the children that petitioner would be at the school to pick them up, but if they decided they wanted to go with him, they could. He denied that the children left the school grounds and went to a neighbor's house. Respondent testified that his car was parked a block away, and he walked to the rear of the school and picked up the children. The trial court questioned respondent regarding his terms relating to "calendar" and "schedule" and sought clarification of their meaning; respondent testified he was referencing different things, and he never followed the calendar that petitioner had sent him.

¶ 15 The trial court declined to find respondent in indirect civil contempt for considering the weekend of February 10, 2012, as his parenting time because the parenting schedule was not clear. The trial court reviewed the Joint Parenting Agreement and noted that petitioner and respondent changed the order "to the point where it's barely recognizable with regard to the Joint

Parenting Agreement.” The trial court cautioned the parties to “have something in writing that says they mutually agree to change something,” which they did not in this instance.

¶ 16 The trial court did, however, find respondent in civil contempt for his failure to comply with paragraphs 11, 13, 14, 15, and 16 of the Joint Parenting Agreement. The trial court reasoned that respondent knew that petitioner was at school to pick up the children, and respondent put the children in a position in which they had to choose which parent to go home with that day. The trial court also awarded petitioner attorney fees pursuant to section 508(b) of the Act. To purge the contempt, the trial court ordered respondent to write an apology to petitioner by August 29, 2012, for putting the children in a position of having to choose which parent to go home with on that day.

¶ 17 On August 29, 2012, the hearing continued. As an initial matter, the trial court found that respondent issued a written apology that complied with the court’s prior order, and the trial court purged the contempt order. The trial court then conducted a hearing on the second part of the rule, that is, for respondent to defend why he took the children to a therapist and why he would not divulge the therapist’s name to petitioner. Respondent testified that the name of the therapist was Osama El-Shafie; the first time the children saw him was in the fall of 2011, and the last time they saw him was in February 2012. The children saw El-Shafie approximately 10 to 15 times. Respondent testified that he did not tell petitioner “[b]ecause the kids were reporting to me that they were being hit, and being locked in the basement, and they were afraid of their mother, and they did not want her there.” Respondent agreed that he had no photographs that led him to bring the children to the therapist, but only what he observed.

¶ 18 On cross-examination, respondent testified that he was unaware whether El-Shafie ever reported petitioner to the Department of Children and Family Services for the alleged abuse of

the children; he had never been contacted, though. Respondent agreed that he stopped the children's therapy sessions because he was concerned that a motion might have been filed with the court, and then the court would have become involved. Respondent admitted he did not attempt to file any motion to protect the children from petitioner. Respondent was then shown a series of emails between him and petitioner in which he indicated that a female counselor named Tony Priester met with the children. Respondent acknowledged that he had testified that the children were seen by El-Shafie; respondent explained that "Tony is a member of [El-Shafie's] staff." Respondent continued, "[El-Shafie] is the head of the practice, and *** he's the person responsible for it, not Tony." Respondent testified that he "misunderstood" when petitioner asked for the name of the counselor that the children saw. The trial court then inquired whether El-Shafie ever met with the children, and respondent testified, "I don't know. I don't think so." Respondent testified that he was not aware of whether Priester reported any abuse to the Department of Children and Family Services.

¶ 19 The trial court questioned respondent regarding the children's therapy. The trial court asked respondent why he allowed the proceeding to discuss El-Shafie and his counseling for approximately 20 minutes when El-Shafie had never met with the children, and respondent explained it was because El-Shafie was the head of the practice and because he thought El-Shafie was overseeing the counseling. Following respondent's testimony, the trial court asked the parties whether the provisions of the Joint Parenting Agreement encompassed mental health care decisions. The court requested case law in which courts have found that the term "medical" also referred to "mental health."

¶ 20 The proceedings continued, and respondent called Umberto Davi, the children's guardian *ad litem*. Davi was appointed by the trial court to investigate the allegations of abuse allegedly

occurring in March 2012. Davi testified that the children never indicated to him that they had been struck by their mother or locked in the basement by their mother. The parties' son, J.A., told Davi that "somebody" had told him to say "that his mom had hit him and locked him in the basement"; the parties' daughter, E.A., told Davi that their mother had never hit him; she was too nice. When asked who the "somebody" was, E.A. "mouthed the word dad." When asked whether he thought in March 2012 that the children needed therapy, Davi answered that they probably could have benefited from therapy.

¶ 21 The trial court indicated that it was not ready to issue a decision until it determined whether a medical decision included a mental health counselor. At that time, counsel for petitioner asked the trial court to consider whether respondent committed perjury or direct criminal contempt. The trial court continued the matter.

¶ 22 On September 11, 2012, the parties reconvened before the trial court on petitioner's petition for indirect civil contempt and petitioner's oral motion for direct criminal contempt. The trial court heard arguments first, on the oral motion for direct criminal contempt. During the course of the arguments, the trial court inquired of petitioner's counsel the theory as to the benefit for respondent to state that El-Shafie was the counselor as opposed to Priester; petitioner's counsel did not know. The trial court seemed concerned with the purpose of respondent's testimony regarding El-Shafie. Respondent's counsel directed to the trial court an email that respondent had previously sent to petitioner, wherein he identified the correct name of the counselor as Priester. Respondent's counsel argued that petitioner and her counsel were not deceived because they both had the correct information from the prior email. Respondent's counsel argued that respondent had no intent to deceive. Respondent's counsel further argued that the counselor's name had no material bearing on the case. Following arguments, the trial

court found that respondent had lied. The trial court noted that it had focused on the elements of perjury in determining whether direct criminal contempt had occurred. The trial court stated that it was unable to answer why respondent lied, and thus, the trial court determined it was “unable to fulfill the requirement that he lied with willful and malevolent intention of assailing the dignity of the Court.” The trial court, therefore, declined to find respondent in direct criminal contempt.

¶ 23 The trial court proceeded to address the issue of indirect contempt for respondent taking the children to see a therapist without petitioner’s knowledge or agreement. Petitioner’s counsel argued that respondent directly violated the provisions in the Joint Parenting Agreement contained in the marital settlement agreement and the dissolution judgment. The trial court asked petitioner’s counsel regarding the recommended purge, and counsel suggested that petitioner could choose the next therapist without objection from respondent. Respondent’s counsel argued that no type of purge existed because respondent stopped taking the children to the therapist when he was threatened with litigation for it. Following the arguments of the parties, the trial court stated that, to support a finding of contempt, “the order must be so specific and clear as to be susceptible with only one interpretation.” The trial court determined that the medical health provisions in the Joint Parenting Agreement of the marital settlement agreement did not specifically mental health counseling, and therefore, declined to hold respondent in indirect contempt. The trial court, however, found that respondent violated provisions 11, 13, 14, 15, and 16 of the Joint Parenting Agreement with regard to “reasonable efforts to foster a close and continuing relationship” with the other parent. The trial court found, specific to this hearing, that respondent lacked credibility. The trial court explained that, if respondent put petitioner in a position where she had to question the children regarding the counselor because

respondent was giving her false information, then respondent was violating the Joint Parenting Agreement. The trial court further found, pursuant to section 508(b) of the Act, that respondent failed to comply, and his failure to comply was without compelling cause or justification. Therefore, the trial court ordered respondent to pay petitioner's attorney fees associated with enforcing the Joint Parenting Agreement. Following a brief discussion regarding attorney fees, the trial court entered judgment against respondent for \$7,500.

¶ 24 On September 11, 2012, the trial court memorialized its findings and order with respect to the August 29, 2012, hearing on petitioner's petition for rule to show cause. The trial court noted that, on August 29, respondent was under oath and provided testimony regarding the mental health counseling for the two children. Respondent stated on both direct and cross-examination that the children were seen by and counseled by El-Shafie and that the doctor saw the children approximately 15 times. Respondent's testimony led the trial court to believe that El-Shafie was the treatment provider for the children. On cross-examination, however, respondent eventually admitted that El-Shafie never counseled the children. Respondent explained that, when he was asked for the name of the person actually providing the treatment, he identified El-Shafie because he was the "contact person" for the office.

¶ 25 The trial court was "convinced beyond a reasonable doubt" that respondent's assertions regarding the identity of the mental health counselor were false and untrue when made, and respondent knew the statements were false when he made them. The trial court, however, was not convinced beyond a reasonable doubt that respondent made the statements with a willful and malevolent intention of assailing the dignity of the court, or of interfering with its procedure and the due administration of justice. The trial court indicated that it could not understand why respondent would misstate the name of the provider other than to continue to perpetuate a past

misrepresentation. The trial court noted that the name of the provider was not germane to the rule to show cause that was being litigated, and respondent's intent was difficult to discern. The trial court found that respondent wasted the trial court's time, the attorneys' time, and the court personnel's time, and the court would consider respondent's conduct should credibility become an issue. Accordingly, the trial court declined to hold respondent in direct criminal contempt. Petitioner filed a timely notice of appeal, challenging the trial court's ruling not to hold respondent in direct criminal contempt (Appeal No. 12-1116).

¶ 26 Also on September 11, the trial court memorialized its order declining to find respondent in contempt for taking the children to the therapist and vacated the rule. The trial court also found respondent not in direct criminal contempt regarding the identity of the therapist. The trial court found, however, that respondent had not fostered the mother/child relationship. The trial court awarded a judgment for \$7,500 against respondent and in favor of petitioner's counsel in relation to the matter.

¶ 27 On September 20, 2012, respondent filed a verified motion to modify custody, alleging that he had desired primary custody for years, the children have a strong custodial preference for him, and petitioner has abused the children. Respondent also alleged that petitioner had a history of psychological problems and a history of substance abuse. Respondent alleged that the children have a good, healthy, and loving relationship with him, and it would be in the children's best interest to modify custody.

¶ 28 On September 24, 2012, respondent filed a notice of appeal. The notice reflects an appeal from the trial court's order of August 29, 2012, holding him in contempt of court, and an appeal from the trial court's order assessing attorney fees pursuant to section 508(b) of the Act. (Appeal No. 12-1046).

¶ 29 Gardner issued a 27-page custody report on September 25, 2012, wherein she summarized information that she had obtained during interviews, on questionnaires, in documents, and from test data. Gardner indicated that the present case involved parental alienation; she found evidence that respondent had followed “a campaign of denigration about [petitioner], and the children show signs of impaired reality testing and emotional disturbance.” Gardner continued, respondent’s efforts “have increased over the course of this evaluation and as this report was drawing to a close, he presented a letter from a doctor in Michigan who opined that [petitioner] suffers from Munchausen by Proxy” and has filed for sole custody of the children. Gardner suggested that the trial court consider petitioner as the residential parent and that she be granted sole legal decision-making authority. Gardner also recommended that respondent have supervised visits with the children for a period of time to help the children recover from the effects of alienation and for respondent to receive counseling on the harmful effects that alienation can have on the children. Gardner also recommended that respondent have therapeutic visitation with the children weekly with a mental health professional who is trained in high conflict divorce and parental alienation.

¶ 30 Following Gardner’s report, petitioner filed an emergency motion on September 28, 2012, to implement the recommendations of Gardner. On October 5, 2012, respondent filed his memorandum in opposition to petitioner’s motion to implement Gardner’s recommendations.

¶ 31 On October 4, 2012, the parties appeared before the trial court, wherein it reflected on some issues about which it was concerned, including discovery. The hearing continued on petitioner’s emergency motion, and petitioner called Gardner as a witness. Gardner testified that the targeted parent was petitioner, and the primary individual doing the alienation was respondent. Gardner described it as severe alienation with tactics being used. Gardner testified

that E.A. showed the most symptoms of having a compromised relationship with petitioner; “[s]he spoke very freely and guilt-free about [petitioner] in a negative way.” Gardner testified there was a need to move with great speed to reverse the alienation that was occurring. On cross-examination, Gardner agreed that the children have already been harmed in that the children have experienced a great deal of psychological damage. Following arguments of the parties, the trial court found that the circumstances presented a matter of emergency, and scheduled a hearing for the afternoon.

¶ 32 The parties reconvened, and they engaged in pretrial discussions off the record. Thereafter, petitioner called Gardner to testify. Gardner testified that she found severe alienation in the present case and it increased as her evaluation went forward. The children seemed to present many more symptoms of distress and alienation when they were brought in by respondent, and there was “pretty rapid change.” As the evaluation continued, she gathered information and updates from both parties. Gardner noted that respondent provided her a “lengthy list of doctors that [J.A.] had seen when he was young,” and as she was getting ready to release her report, she received a “letter from a physician in Michigan indicating that he thought, based on the information he was provided with, that this was a Munchausen’s by proxy case.”

¶ 33 Gardner further testified and described her interviews with the children and with the parents. Gardner learned that it was not possible for E.A. to have been locked in petitioner’s basement because there was no lock on the door. Gardner also learned that it was not possible for E.A. to have seen petitioner’s boyfriend “naked” because the boyfriend had never met the children. When Gardner asked respondent about E.A.’s reports, respondent indicated that he thought the door had a lock to it and he believed the children had met petitioner’s boyfriend. Gardner testified that she did not see any evidence of petitioner alienating the children from

respondent. Gardner also clarified the opinion from the Michigan doctor, describing his theory as a “preliminary opinion,” and described it as another example of respondent’s efforts at alienation.

¶ 34 Petitioner testified on her own behalf to implement the recommendations of Gardner. She testified that her present residence has no lock on the basement door, and her previous residence had no lock on the basement door. She also testified that the children had never been in the presence of her boyfriend. On cross-examination, petitioner admitted that they were all “under the same roof at the same time,” but they were not in the same room. Petitioner was also shown a picture of a door from a rental home, and she identified the doorknob as having a lock.

¶ 35 Respondent testified next. He testified that the children said that they had met petitioner’s boyfriend. E.A. was “goofing around on the internet,” and they had a conversation about petitioner’s boyfriend. Respondent testified that E.A. was “troubled, basically because she saw him without any clothes on.” E.A. told respondent that she did not like it and it made her uncomfortable. Respondent also testified that J.A. had told him that petitioner locked him in the basement with the lights off.

¶ 36 Kimberly Baird, respondent’s girlfriend, testified that she had never heard respondent make any disparaging remarks in front of his children about petitioner. Baird also testified that the children have a loving and warm relationship with respondent.

¶ 37 Following arguments of the parties, the trial court discussed Gardner and noted that she had a great deal of expertise in alienation and was aware of the signs of alienation. The trial court found Gardner credible; found that alienation had occurred; and was alienation of the children by respondent from petitioner. The trial court noted Gardner’s report that the children were at risk of irrevocable harm if the contact continued without the alienating behavior being

arrested. The trial court found that “the children are seriously endangered with regard to their mental and emotional health, that they are in a fragile situation, that the situation is only getting worse, that if it isn’t immediately given attention, that it may in fact be irrevocable, and it doesn’t have to be irrevocable for it to seriously endanger them now.” The trial court explained that was why it was granting the relief sought by petitioner, which also restricted respondent’s visitation.

¶ 38 On October 10, 2012, the trial court conducted a hearing on petitioner’s emergency motion to implement Gardner’s recommendations. Following a hearing, the trial court ordered respondent to have supervised visitation with the children with conditions. The trial court also ordered respondent to undergo a course of psychotherapy with a forensic mental health professional trained and having experience with the concept of parental alienation and to follow all treatment recommendations of the therapist.

¶ 39 On October 15, 2012, respondent filed a notice of interlocutory appeal from the trial court’s October 10, 2012, order (Appeal No. 12-1127), which order restricted respondent’s visitation with his children.

¶ 40 On October 23, 2012, the parties appeared before the trial court. The record reflects that the trial court and counsel had a discussion outside the courtroom, which was not recorded. When the parties and the trial court were back on the record, the trial court memorialized its decision. The trial court noted its belief that there was a joint parenting agreement in place, which should be changed if there’s an agreement that could be worked out to a sole custody agreement, which would vacate the Joint Parenting Agreement. The trial court noted that it would need to be rewritten into the sole custody agreement. With respect to visitation, the trial court anticipated that it would need to become a different parenting agreement and supplemental

court order, but for now it ordered a restricted visitation that was supervised. The transcript of the report of proceedings next contains the following exchange:

“UNIDENTIFIED MALE SPEAKER (context indicates respondent): Judge, if I may be heard briefly.

THE COURT: Yes, sir.

UNIDENTIFIED MALE SPEAKER (respondent): Can I put the – in there that I’m really not agreeing that the joint parenting agreement is being vacated. I’m agreeing that she has sole custody, right? Isn’t that the essence of my agreement?

THE COURT: But it’s my opinion and people –

MR. LEVY [petitioner’s counsel]: That’s your order.

UNIDENTIFIED MALE SPEAKER [respondent]: Okay.

THE COURT: But my opinion is once there’s sole custody, there is no joint parenting agreement because you’re not joint parenting; it’s a sole custody.

UNIDENTIFIED MALE SPEAKER [respondent]: I see what you’re saying.”

¶ 41 The trial court thereafter entered an order vacating the parties’ Joint Parenting Agreement; awarding the sole care, custody, control, and education of the minor children to petitioner; and modifying respondent’s visitation schedule. Respondent filed a timely notice of appeal from this order (Appeal No. 12-1208). Also on October 23, 2012, the trial court entered an agreed order modifying the terms and conditions of child support and purging a prior finding of contempt. Respondent appeals portions of this order as well (Appeal No. 12-1208).

¶ 42 During the pendency of the appeals, respondent filed a motion to supplement the record on appeal. On April 8, 2013, the parties appeared before the trial court on various matters. Petitioner had filed a motion to supplement the trial court record with Gardner’s report; the trial

court allowed the motion. On April 25, 2013, the trial court conducted a hearing regarding a document that had been purportedly tendered to the court and reviewed by the court on or before October 4, but was not a part of the record. The document was a declaration of Marcus DeGraw, M.D. The trial court recalled that it had the memorandum and had read it. Following arguments, the trial court determined that the record should be truthfully reflected that the court had received it and reviewed it. Accordingly, the trial court supplemented the record by stating that respondent had provided the court with a courtesy copy of a “Memorandum in Opposition to Petitioner’s Emergency Motion to Restrict Visitation” on or before October 4, 2012; and it did read respondent’s motion in opposition, as well as the declaration of Marcus DeGraw, M.D. The trial court noted in a separate order of April 25, 2013, that the Memorandum in Opposition was “not to be included in evidence or be given any more weight than the court’s statement herein.”

¶ 43 Since this litigation began, the parties have presented various appeals to this court. See *In re Marriage of Alden*, No. 2-12-1046 (current appeal); *In re Marriage of Alden*, No. 2-12-1116) (current appeal); *In re Marriage of Alden*, No. 2-12-1127 (current appeal); *In re Marriage of Alden*, No. 2-12-1208 (current appeal); *In re Marriage of Alden*, No. 2-13-1138 (appeal of trial court order denying respondent’s motion to dissolve the imposition of supervised visitation entirely; appellate court denied November 18, 2013); *In re Marriage of Alden*, No. 2-13-1151 (appeal of trial court’s order of October 15, 2013, refusing to modify an injunction; appellate court dismissed on December 31, 2013, except petitioner’s motion for sanctions is reserved pending the completion of all other appeals); *In re Marriage of Alden*, No. 2-13-1195 (appeal of trial court order enjoining respondent from filing exhibits to a motion, appellate court dismissed May 1, 2014); *In re Marriage of Alden*, No. 2-14-0346 (appeal of trial court order finding respondent had waived confidentiality; pending in appellate court).

¶ 44

II. ANALYSIS

¶ 45 In this consolidated appeal, respondent enumerates eight issues and petitioner presents one issue for our review. We note that, rather than address each appeal separately and according to the judgment being challenged, respondent has essentially set out issues and arguments, leaving this court with the task of determining which argument applies to which judgment and appeal. Therefore, we have determined that, in appeal No. 12-1046, respondent challenges the trial court's order finding him indirect contempt for violating provisions of the Joint Parenting Agreement. Respondent presents the following issues: (1) "The provisions of the Joint Parenting Agreement that the trial court concluded had been violated were not specific or clear so as to be susceptible of only one interpretation, and, as a result, the trial court erred when it *sua sponte* decided to hold [him] in contempt"; and (2) "The trial court's conclusion that [he] had violated the Joint Parenting Agreement by placing the children in a position of choosing with whom they were going to go after school was clearly erroneous and against the manifest weight of the evidence." Respondent also challenges the trial court's award of attorney fees to petitioner pursuant to section 508(b) of the Act (750 ILCS 5/508(b) (West 2012)).

¶ 46 With respect to appeal No. 12-1046, respondent filed his Notice of Appeal under Illinois Supreme Court Rule 304(b)(5) (eff. Feb. 26, 2010). In the Notice of Appeal, respondent appeals from the trial court's order of August 29, 2012, holding him in contempt of court; respondent attached the order at issue. The Notice further provides that respondent appeals "any order that required [him to] pay attorneys' fees" referenced in the August 29, 2012, order. Petitioner claims that this issue is moot because the trial court purged the contempt finding when respondent issued his written apology to petitioner. On our review of the briefs submitted, respondent does not appear to address or respond to petitioner's claim of mootness.

¶ 47 A contempt order that is purged by complying with the court's order renders an appeal of such contempt moot. See *In re Marriage of Betts*, 155 Ill. App. 3d 85, 104 (1987) (compliance with the purging provision renders contempt argument moot); see also *J.S.A. v. M.H.*, 384 Ill. App. 3d 998, 692 (2008) (an appeal regarding whether the contempt finding against respondents for their failure to submit to DNA was against the manifest weight of the evidence was moot, as M.H. submitted to DNA testing and purged the finding of contempt); *In re Keon C.*, 344 Ill. App. 3d 1137, 1148 (2003) (paying the entire arrearage and providing a copy of the insurance card, as required in the contempt order, purged these issues and rendered the contempt moot).

¶ 48 In the present case, respondent attached the August 29, 2012, order, which addressed a rule to show cause pertaining to the circumstances of the February 10, 2012, incident in which respondent told the children to meet him after school, despite it being petitioner's weekend as per the parenting schedule. The trial court found respondent not in indirect civil contempt for considering the weekend of February 10 as his parenting time because the schedule was not clear; however, it found respondent in indirect civil contempt for violating provisions of the Joint Parenting Agreement. The trial court allowed respondent to purge the contempt finding by writing an apology to petitioner. The transcript of the report of proceedings from the hearing on August 29 reflect the trial court's later finding that respondent had issued a written apology that complied with its prior order, and the trial court purged the contempt order. Because respondent complied with the trial court's order, an appeal concerning the merits of the trial court's finding of contempt is indeed moot. See *J.S.A.*, 384 Ill. App. 3d at 692. The apology letter has been written and delivered. There is nothing to be accomplished by reversing the trial court's purging order to review the underlying decision. See *Betts*, 155 Ill. App. 3d at 104. Accordingly, we

decline to consider respondent's issues regarding the specificity or the sufficiency of the trial court's August 29, 2012, contempt order.

¶ 49 This appeal also concerns the trial court's award of attorney fees to petitioner pursuant to section 508(b) of the Act, which is from the trial court's order of August 29, 2012. With respect to this particular fee award, respondent contends that "[t]he trial court erred in awarding fees under [section] 508(b) for violations of paragraphs 11, 13, 14, 15, and 16 that were never pleaded." Respondent argues that the supposed misconduct that ultimately formed the basis for the trial court's rulings was never pleaded or proven. Respondent argues that petitioner's pleadings were never "directed at the children being placed in a position of having to choose a parent with whom to go home." "The entire proceeding on visitation focused on whose weekend was whose." Respondent further argues that "there was no evidence that the children suffered in any way when they were supposedly placed in a position of choosing with whom they would go home." Respondent concludes that, as a result, he "was wholly unprepared to defend the trial court's *sua sponte* action in holding him in contempt and ordering fees."

¶ 50 The foregoing is one of the instances of respondent's factual and procedural misrepresentations to which we alluded earlier in this disposition. The trial court did not *sua sponte* hold respondent in contempt of court or *sua sponte* order fees. Petitioner brought a petition for indirect civil contempt on February 21, 2012, following the circumstances of the disputed February parenting weekend; the trial court began conducting hearings on August 28, 2012; and the trial court issued its ruling at the conclusion of the hearing.

¶ 51 A trial court's decision to grant or deny fees under section 508 of the Act is generally reviewed for an abuse of discretion. *In re Marriage of Schneider*, 214 Ill. 2d 152, 174 (2005). Section 508(b) provides, in relevant part:

“In every proceeding for the enforcement of an order or judgment when the court finds that the failure to comply with the order or judgment was without compelling cause or justification, the court shall order the party against whom the proceeding is brought to pay promptly the costs and reasonable attorney's fees of the prevailing party. If non-compliance is with respect to a discovery order, the non-compliance is presumptively without compelling cause or justification, and the presumption may only be rebutted by clear and convincing evidence. If at any time a court finds that a hearing under this Act was precipitated or conducted for any improper purpose, the court shall allocate fees and costs of all parties for the hearing to the party or counsel found to have acted improperly. Improper purposes include, but are not limited to, harassment, unnecessary delay, or other acts needlessly increasing the cost of litigation.” 750 ILCS 5/508(b) (West 2012).

¶ 52 A finding of contempt is sufficient to require an award of fees under section 508(b), but such a finding is not necessary. *In re Marriage of Davis*, 292 Ill. App. 3d 802, 811 (1997). The party that fails to comply with an order bears the burden of proving that compelling cause or justification for the noncompliance exists. *In re Marriage of McGuire*, 305 Ill. App. 3d 474, 481 (1999). In *In re Marriage of Putzler*, 2013 IL App (2d) 120551, the trial court had not specifically found that the husband's failure to comply with the underlying order was without compelling cause or justification. In upholding the award of section 508(b) attorney fees, we explained:

“Although in its written order the court did not state that the failure to comply with the court orders was ‘without compelling cause or justification,’ such findings are implied by the contempt findings. Preliminarily (and as to both contempt findings), ‘finding a party in contempt for failing to comply with a court order implies a finding the failure to comply was

without cause or justification,’ rendering mandatory the imposition of attorney fees per section 508(b). *In re Marriage of Deike*, 381 Ill. App. 3d 620, 634 (2008). Specifically, ‘[b]ecause the primary prerequisite to any contempt finding is willful, contumacious conduct, it follows that a finding that a party is in contempt of court for failing to comply with a court's orders carries with it an implicit finding that the failure to comply was without cause or justification.’ (Emphases added.) *In re Marriage of Cierny*, 187 Ill. App. 3d 334, 348 (1989).” *Putzler*, 2013 IL App (2d) 120551, ¶ 38.

¶ 53 Respondent’s argument on this issue is not directed at the trial court’s discretion or ruling. Rather, respondent focuses on the factual allegations pertaining to the trial court’s underlying order finding him in contempt. We have already determined the contempt issue was moot and will not revisit the issue. With respect to the section 508(b) fee award, the trial court found respondent in contempt for violating the provisions of the Joint Parenting Agreement, and it ordered that respondent pay petitioner’s attorney fees that were incurred. Implicit with its contempt findings was the trial court’s determination that respondent’s failure to comply with the provisions of the Joint Parenting Agreement was without cause or justification. See *id.*

¶ 54 Although respondent does not mention this point, it does not matter the trial court found respondent had purged himself of contempt by issuing a written apology to petitioner at the next hearing. See *In re Marriage of Wassom*, 165 Ill. App. 3d 1076, 1081 (1988). The policy behind section 508(b) is to eliminate or lessen the financial burden on the party that is compelled to seek enforcement. *Id.* (citing *Fogliano v. Fogliano*, 113 Ill. App. 3d 1018, 1023 (1983)). Petitioner incurred attorney fees in an effort to, among other things, enforce the Joint Parenting Agreement contained in the dissolution judgment. Therefore, petitioner was entitled to attorney fees at the time the trial court granted her relief by enforcing the provisions of the Joint Parenting

Agreement. The later purge order did not excuse respondent from the obligation imposed by section 508(b). As such, the trial court's imposition of section 508(b) attorney fees was not an abuse of its discretion.

¶ 55 To summarize, because respondent complied with the trial court's purge order, an appeal concerning the merits of the trial court's finding of contempt is moot. We also hold that the trial court's award of section 508(b) fees against respondent was not an abuse of its discretion. Accordingly, we affirm the trial court's judgment in appeal No. 12-1046.

¶ 56 The next order respondent appeals from is the trial court's October 10, 2012, ruling on petitioner's emergency motion to implement the recommendations of Dr. Gardner. This is appeal No. 12-1127, and it appears that respondent presents the following issues with respect to this order: (1) "Without any evidence linking [his] visitation to the serious endangerment standard of section 607 [of the Act], the trial court failed to make the requisite finding that [his] visitation would seriously endanger the children's physical, mental, moral or emotional health and therefore it had no authority to restrict [his] visitation to being supervised"; and alternatively, (2) "To the extent the trial court found that [his] visitation would seriously endanger the children's mental or emotional health, that finding was based upon speculation and contrary to the manifest weight of the evidence."

¶ 57 We note that, at this stage of the proceedings, the Joint Parenting Agreement was still in place. Therefore, petitioner's emergency motion to implement Gardner's recommendations would be akin to a request for a hearing in furtherance of her April 24, 2012, motion to modify the Joint Parenting Agreement. See *In re Marriage of Smithson*, 407 Ill. App. 3d 597, 600-06 (2011).

¶ 58 When deciding issues pertaining to custody, the trial court has broad discretion, and its judgment “is afforded ‘great deference’ because ‘the trial court is in a superior position to judge the credibility of witnesses and determine the best interests of the child.’ ” *In re Marriage of Bates*, 212 Ill. 2d 489, 516 (2004) (quoting *In re Marriage of Gustavson*, 247 Ill. App. 3d 797, 801 (1993)). Accordingly, a reviewing court will not disturb a trial court’s decision to modify the terms of a custody agreement unless its decision is against the manifest weight of the evidence and constitutes an abuse of discretion. *Bates*, 212 Ill. 2d at 515; *Smithson*, 407 Ill. App. 3d at 600. In determining whether a judgment is contrary to the manifest weight of the evidence, the evidence will be reviewed in the light most favorable to the appellee. *Bates*, 212 Ill. 2d at 516. If multiple inferences can be drawn from the evidence, a reviewing court will accept those inferences that support the court’s order. *Id.*

¶ 59 Respondent’s first contention addresses the findings the trial court was required to make. Respondent argues that “the trial court failed to make any finding that [respondent’s] visitation would seriously endanger the children’s physical, mental, moral, or emotional health.” In a footnote, however, respondent admits that the trial court concluded that “the children are seriously endangered with regard to their mental and emotional health,” and essentially modifies the argument that the trial court failed to link the finding to his visitation as required by section 607 of the Marriage Act. Respondent also argues, without citation to authority, that “[t]he theory of parental alienation put forth in the trial court was insufficient as a basis for restricting [his] visitation.” Respondent also claims that there was no evidence at the hearing that his visitation was causing “alienation” between petitioner and the children. Respondent directs this court to the evidence that he never spoke negatively to or with the children with respect to petitioner; he

told the children to listen to petitioner; and he was never heard to make any disparaging remark in front of the children about petitioner during his visitation.

¶ 60 In this regard, respondent has misstated the evidence and true findings of the trial court. The record clearly reflects Gardner's testimony concerning alienation: that the targeted parent was petitioner, and the primary individual doing the alienation was respondent. Gardner described it as severe alienation with tactics being used. As detailed above, the trial court discussed Gardner and noted that she had a great deal of expertise in alienation and aware of the signs of alienation. The trial court found Gardner credible; found that alienation had occurred; and was alienation of the children by respondent from petitioner. The trial court noted Gardner's report that the children were at risk of irrevocable harm if the contact continued without the alienating behavior being arrested. The trial court found that "the children are seriously endangered with regard to their mental and emotional health, that they are in a fragile situation, that the situation is only getting worse, that if it isn't immediately given attention, that it may in fact be irrevocable, and it doesn't have to be irrevocable for it to seriously endanger them now." To the extent that the trial court found Gardner credible and relied on her testimony over that of respondent's evidence, it was the trial court's discretion to do so. See *In re Marriage of Debra N. & Michael S.*, 2013 IL App (1st) 122145, ¶ 45 (stating that a trial court's custody determination is afforded great deference because the trial court is in the best position to judge the witnesses' credibility and assess the best interests of the child) (citing *Bates*, 212 Ill. 2d at 516). Accordingly, we reject respondent's contention that the trial court failed to make the requisite findings.

¶ 61 Respondent's next contention pertaining to the trial court's October 10, 2012, ruling is that, "[t]o the extent the trial court found that [his] visitation would seriously endanger the

children's mental or emotional health, that finding was based upon speculation and contrary to the manifest weight of the evidence." Respondent argues that Gardner's opinion "was not based on fact" and never included any factual basis that respondent had done anything to alienate the children from petitioner. Respondent challenges the foundation for Gardner's testimony to be admitted into evidence, and asserts that her testimony concerning the children's drawings was speculative and implausible. Respondent concludes that the "overwhelming evidence at trial was that [he] did not alienate the children from [petitioner]."

¶ 62 With respect to respondent's challenge to the admission of Gardner's report, his challenge is meritless. Under section 604(b) of the Act, the trial court "may seek the advice of professional personnel, whether or not employed by the court on a regular basis." 750 ILCS 5/604(b) (West 2012). Advice given by the professional personnel "shall be given in writing and made available by the court to counsel." *Id.* Additionally, section 605(a) of the Act provides that, in a contested custody proceeding, the trial court "may order an investigation and report concerning custodial arrangements for the child." 750 ILCS 5/605(a) (West 2012). The trial court "may examine and consider the investigator's report in determining custody." 750 ILCS 5/605(c) (West 2012). This court has held that a trial court erred when it excluded an investigator's report on the basis that it was hearsay. *In re Marriage of Lonvick*, 2013 IL App (2d) 120865, ¶ 42 (citing *In re Marriage of Noble*, 192 Ill. App. 3d 501, 510 (1989)). In *Lonvick*, this court reaffirmed the *Noble* court's interpretation of section 605(c) as an exception to the hearsay rule, and it also pointed out that any party may call the investigator for cross-examination. *Lonvick*, 2013 IL App (2d) 120865, ¶ 42 (citing *Noble*, 192 Ill. App. 3d at 511.)

¶ 63 With respect to respondent's claim regarding the speculative nature of Gardner's testimony and opinions, we reject his claim as conclusory with little support in the record. A

review of the report itself reflects that Gardner's documentary sources of information included the legal documents filed in the case; medical records; questionnaires, test data; emails; letters; she also interviewed petitioner, respondent, the children, and other individuals. That respondent calls evidence "speculative" or "implausible" does nothing to persuade this court that the trial court abused its discretion in considering such evidence. See, e.g., *Ahmed v. Pickwick Place Owners' Ass'n*, 385 Ill. App. 3d 874, 894 (2008) (rejecting conclusory assertions about the trial court when the assertions were wholly unsupported by the record before the appellate court).

¶ 64 Again, the trial court discussed Gardner and noted that she had a great deal of expertise in alienation and awareness of the signs of alienation. Respondent was provided ample opportunity to cross-examine Gardner regarding her report and recommendations. The trial court found Gardner credible; found that alienation had occurred; and was alienation of the children by respondent from petitioner. "A custody determination inevitably rests on the parties' temperaments, personalities, and capabilities, and the witnesses' demeanor." *In re Marriage of Spent*, 342 Ill. App. 3d 643, 652 (2003). A reviewing court accords great deference to the trial court's custody decision since it is in the best position to observe the temperaments and personalities of the parties and assess the credibility of the witnesses. *Id.* The trial court reviewed the evidence presented and assessed the credibility of the witnesses. Accordingly, we decline now to second guess the trial court's findings. Further, we conclude that respondent has failed to persuade this court that the trial court's decision was against the manifest weight of the evidence and constituted an abuse of discretion. See *Bates*, 212 Ill. 2d at 515.

¶ 65 To summarize, Gardner's report was properly allowed in evidence; the trial court found Gardner credible; and the trial court made the requisite findings in determining whether to modify the Joint Parenting Agreement. We conclude that the trial court's October 10, 2012,

ruling on petitioner's emergency motion to implement the recommendations of Dr. Gardner was not against the manifest weight of the evidence and did not constitute an abuse of discretion. Accordingly, we affirm the trial court's judgment in appeal No. 12-1127.

¶ 66 The next order respondent appeals from is the trial court's October 10 and 23, 2012, rulings regarding custody and visitation, as well as the trial court's July 6, 2012, order holding him in contempt and awarding section 508(b) attorney fees. This is appeal No. 12-1208, and it appears that respondent presents the following issues with respect to this order: "Without providing [him] any notice and without conducting a hearing, the trial court erred in terminating joint custody and vacating the Joint Parenting Agreement"; and "The trial court's hearing did not comport with the requirements of section 610 [of the Act] when it modified custody without considering the best interests of the minor children."

¶ 67 For this appeal, respondent makes a number of claims: the only matter set for hearing on October 23, 2012, was his petition to decrease child support; petitioner's petition to terminate joint custody, modify the visitation schedule, and award sole custody was never set for hearing on October 23; the trial court *sua sponte* vacated the parties' Joint Parenting Agreement, granted petitioner sole custody, and terminated his visitation indefinitely; the trial court lacked jurisdiction to hear petitioner's faxed pleading (the emergency motion to implement Gardner's recommendations) on October 4, 2012; the Act does not provide for an emergency hearing "permanently terminating a party's custody and visitation"; the trial court's order dissolving joint custody and terminating his visitation was void as a matter of law; scheduling a hearing on only three days' notice rendered it impossible for respondent to serve a valid subpoena upon Gardner for the October 4 hearing. Respondent further argues that the trial court did not conduct a hearing on the best interests of the children under section 602(a) of the Act and made no

findings. He claims that the trial court “never considered any of the best interest factors” and “did not consider any testimony regarding what [he] and the children did together during his parenting time.” Respondent concludes that “[t]his failure of the trial court to follow the minimal requirements of the Marriage Act render its order void” and it “clearly erred in modifying and terminating [his] visitation.”

¶ 68 Again, we are compelled to correct respondent’s misrepresentation of the proceedings. The record clearly reflects that trial court took no actions “*sua sponte*.” See *In re Marriage of Greenburg*, 102 Ill. App. 3d 938, 949 (1981) (rejecting unsupported allegations of judicial misconduct following a review of the record). On April 24, 2012, petitioner filed a petition to terminate joint custody and award sole custody to petitioner, and to modify the visitation schedule so that respondent’s visitation would be “supervised because of his deliberate and continued effort to alienate the children from their mother.” On September 20, 2012, respondent filed his verified motion to modify custody, alleging that he had desired primary custody for years, the children had a strong custodial preference for him, and petitioner had abused the children. Because each party filed a petition seeking sole custody, they effectively stipulated to terminate the joint-custody arrangement and agreed that a change in circumstances warranted awarding custody to only one of the parents. See *Spent*, 342 Ill. App. 3d at 651 (citing *In re Marriage of Lasky*, 176 Ill. 2d 75, 81 (1997)). Therefore, once both parties filed motions seeking custody (indicating a change of circumstances had occurred), they were effectively seeking to vacate the Joint Parenting Agreement, and the trial court, pursuant to section 610(b) of the Act, necessarily had to terminate the joint-custody arrangement and make any modification that was in the children’s best interests. See *Spent*, 342 Ill. App. 3d at 651.

¶ 69 With respect to the trial court's jurisdiction to hear petitioner's emergency motion to implement Gardner's recommendations on October 4, 2012, the local rules of the circuit clearly provided for emergency motions and emergency relief. Local rules 15.10 and 6.08 of the circuit court of Du Page County provide for emergency matters to be heard at the discretion of the trial court and the procedures by which a party make seek a hearing. See 18th Judicial Cir. Ct. Rs. 15.10, 6.08 (July 16, 2008, May 10, 1993). Accordingly, respondent's jurisdictional claim fails. Because this purported jurisdictional defect was respondent's underlying reason for his assertion that the trial court's order was void as a matter of law, his claim of voidness also fails. To the extent respondent challenges the trial court's finding of emergency, which he does for the first time in his reply brief, his challenge is waived. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) ("Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing."); *In re Marriage of Petrick*, 2012 IL App (2d) 110495, ¶ 40. Therefore, we decline to address this new argument. Respondent raised other arguments for the first time in his reply brief, *e.g.*, the trial court's order for supervised visitation was an injunction, and the Gardner report was not a part of the common-law record and cannot be considered. Petitioner noted these instances and others in her sur-reply brief. For the same reasons, and without setting all of them out here, we decline to address any of the new arguments respondent presents in his reply brief. We also reject respondent's claim of his inability to serve a valid subpoena upon Gardner for the October 4 hearing. Gardner was present at the October 4 hearing, so there was no need to subpoena her. Generally, if a witness is willing to testify voluntarily, no subpoena is required. See Ill. Sup.Ct. R. 327 (eff. July 1, 2005); *Lisowski v. MacNeal Memorial Hospital Ass'n*, 381 Ill. App. 3d 275, 285 (2008) ("This rule provides that the missing witness of one party can be compelled by another party to appear and testify at trial.").

¶ 70 This takes us to the October 23, 2012, hearing. Respondent claims that the only matter set for hearing on October 23, 2012, was his petition to decrease child support; petitioner's petition to terminate joint custody, modify the visitation schedule, and award sole custody was never set for hearing on October 23. Respondent claims that the trial court *sua sponte* granted petitioner sole custody and terminated his visitation indefinitely based upon the findings from the emergency hearing conducted on October 4. Petitioner counters that the transcript reflects that respondent agreed to the transfer of custody to her. Petitioner's argument follows:

“Nothing in the transcript of proceedings on October 23, 2012 indicates that [respondent] objected to the court's entering a custody judgment that day. The entire transcript (which was added to the record on appeal on [respondent's] motion) consists of the parties and their counsel discussing other terms and conditions to be included in the order granting [petitioner] sole custody, not challenges as to whether the sole custody order should be entered. In fact, [respondent] stated, on the record in open court, that he understood he was agreeing to [petitioner] receiving sole custody. All of his arguments regarding the trial judge's findings, the evidence, the timing of the hearing—none of that matters, because [respondent] agreed. That agreement bars [respondent] from challenging the trial court's custody judgment to this court.”

¶ 71 In response, respondent points to the order itself, which was not an “agreed” order, and “[a]s a factual matter, [he] never agreed that [petitioner] should have sole custody or that the joint parenting agreement should be vacated.” Respondent claims that he was “trying to preserve his appellate rights and was not agreeing to the joint parenting agreement being vacated; at best, the transcript shows [him] questioning the essence of the ‘sole custody agreement’ that the trial court had asked him to ‘put together.’ ” Respondent also asserts that neither party “ever signed

any agreement regarding [petitioner] being awarded sole custody, and therefore, there was no contract awarding [petitioner] sole custody.”

¶ 72 The transcript of the proceedings from October 23, 2012, reflects that the trial court and counsel had a discussion outside the courtroom, which was not recorded. When the parties and the trial court were back on the record, the trial court memorialized its decision. The trial court noted its belief that there was a joint parenting agreement in place, which should be changed if there’s an agreement that could be worked out to a sole custody agreement, which would vacate the Joint Parenting Agreement. The trial court noted that it would need to be rewritten into the sole custody agreement. With respect to visitation, the trial court anticipated that it would need to become a different parenting agreement and supplemental court order, but for now it ordered a restricted, supervised, visitation. Respondent, by all accounts speaking for himself, inquired of the trial court whether he could “put *** in there that I’m really not agreeing that the joint parenting agreement is being vacated. I’m agreeing that she has sole custody, right? Isn’t that the essence of my agreement?” The trial court explained, “my opinion is once there’s sole custody, there is no joint parenting agreement because you’re not joint parenting; it’s a sole custody.” Respondent indicated that he understood.

¶ 73 Neither party disputes that the foregoing were respondent’s own words addressed to the trial court. Respondent essentially argues that he was not provided with proper notice of the hearing and he was not provided due process when the trial court modified custody. “The fundamental requirements of due process are notice of the proceeding and an opportunity to present any objections.” *People ex rel. Birkett v. Konetski*, 233 Ill. 2d 185, 201 (2009). It would be “unjust, unfair, and inequitable” to allow an order modifying custody and visitation to stand where it is clear that a party had no notice that such an order was contemplated. See *In re*

Custody of Ayala, 344 Ill. App. 3d 574, 587 (2003) (quoting *Berg v. Mid-America Industrial, Inc.*, 293 Ill. App. 3d 731, 735 (1997)).

¶ 74 Both sides claim that the phrase, “I’m agreeing that she has sole custody, right?” and the rest of the colloquy have different meanings and legal effect. Petitioner asserts that respondent’s on-the-record agreement should preclude him from challenging the trial court’s custody judgment. Respondent asserts that that he was “trying to preserve his appellate rights.” We decline to allow this issue to devolve into some sort of discussion of semantics and interpretation of a brief colloquy between a party who was represented by counsel but speaking on his own; that is not the function of an appellate court. See *Board of Education of the City of Chicago v. Chicago Teachers Union, Local 1, American Federation of Teachers*, 26 Ill. App. 3d 806, 813 (1975) (stating that the appellate court’s function is to review the rulings, order, or judgments of the court below). Rather, we will exercise our review of the issue based on the record preserved on appeal. See *Love v. Levissey*, 11 Ill. App. 2d 531, 536 (1956) (stating that the jurisdiction that the appellate court exercises is appellate, and the review by the appellate court is of the record made in the trial court).

¶ 75 In the present case, the record on appeal reflects that, on October 4 and 23, 2012, the parties appeared before the trial court; the October 4 hearing has already been reviewed. The record from October 23, 2012, reflects that the trial court and counsel had a discussion outside the courtroom, which was not recorded. When the parties and the trial court were back on the record, the trial court memorialized its decision. The transcript contains a discussion of terms and conditions to be included in the trial court’s order granting petitioner sole custody. The trial court entered an order vacating the parties’ Joint Parenting Agreement; awarding the sole care, custody, control, and education of the minor children to petitioner; and modifying respondent’s

visitation schedule. The transcript reflects that respondent's counsel did not object to the hearing on the grounds of improper notice or any substantive matters, and counsel continued to participate in the hearing. As such, we conclude that respondent has forfeited any claim that he was not provided with proper notice of the hearing. See *Williamsburg Village Owners Ass'n, Inc. v. Lauder Associates*, 200 Ill. App. 3d 474, 479 (1990) (stating that, to preserve a question for review, a party must make an appropriate objection in the trial court). However, respondent has no meritorious due process or substantive objections either. Respondent was represented by counsel. The fact that he disagrees with the trial court's decision is no different from any other dissatisfied party who is represented by counsel in court. There is no allegation by respondent that these were *ex parte* proceedings or orders. All of the orders at issue in this consolidated appeal explicitly indicated respondent's counsel was present. In fact, the October 23, 2012, order indicated that respondent himself was also present. The transcript of the hearing contains no formal objection by respondent through his counsel. Respondent has not shown any grounds for us to review the trial court's October 23, 2012, custody modification order, and we decline to do so.

¶ 76 In *In re Marriage of Gulla & Kanaval*, 234 Ill. 2d 414, 422 (2009), our supreme court provided the following familiar guidance, which applies to this case: "This court has long recognized that to support a claim of error, the appellant has the burden to present a sufficiently complete record." The sufficiency of the record to address a claim of error turns on the question presented on appeal. In the seminal case of *Foutch v. O'Bryant*, 99 Ill. 2d 389 (1984), the question was whether the trial court abused its discretion in denying a motion to vacate an *ex parte* judgment. *Id.* at 391-92. Absent a transcript of the hearing where evidence was heard and absent specific grounds for the denial, review for an abuse of discretion of the trial court's ruling

was foreclosed. *Id.* at 392. Here, the record contains the trial court’s October 23, 2012, hearing and its written order addressing the custody issue. But because the appellant, in this case, respondent, was required to provide the reviewing court with a record sufficient to support his claim of error, including relevant objections, any doubts and deficiencies arising from an insufficient record will be construed against respondent. See *id.* at 391.

¶ 77 We will not reverse a trial court’s modification of custody unless the decision is against the manifest weight of the evidence and an abuse of discretion. *Debra N. & Michael S.*, 2013 IL App (1st) 122145, ¶ 45 (citing *Bates*, 212 Ill. 2d at 515). The trial court’s decision is against the manifest weight of the evidence only where an opposite conclusion is clearly apparent. *In re Marriage of Romano*, 2012 IL App (2d) 091339, ¶ 100. Where, as here, the record supports the trial court’s finding that respondent had attempted to alienate petitioner’s efforts to foster a close and continuing relationship with the children, the court’s decision to modify the custody arrangement and transfer custody of the child to petitioner is not against the manifest weight of the evidence and will be upheld on appeal. See also, *e.g.*, *Mullins v. Mullins*, 142 Ill. App. 3d 57, 74-78 (1986) (affirming trial court’s order transferring custody of children where there was sufficient evidence to support a finding that the other parent had engaged in a “scheme” to destroy the children’s relationship with their father).

¶ 78 Respondent’s final challenge with respect to this appeal No. 12-1208 concerns the trial court’s order “on July 6, 2012, holding him in contempt of court with the purge for said contempt being resolved via an agreed order entered on October 23, 2012.” For the reasons previously mentioned, this challenge is moot. See *Betts*, 155 Ill. App. 3d at 104 (stating that a contempt order that is purged by complying with the court’s order renders an appeal of such contempt moot); see also *J.S.A. v. M.H.*, 384 Ill. App. 3d at 692 (2008). The trial court’s

“Agreed Order” dated October 23, 2012, expressly provides that “the purge contemplated in the July 6, 2012 Order which finds [respondent] in contempt for his failure to pay the proper amount of support *** is satisfied; and [respondent] has purged the contempt finding.” Because respondent complied with the trial court’s order, an appeal concerning the merits of the trial court’s finding of contempt is moot. See *J.S.A.*, 384 Ill. App. 3d at 692. There is nothing to be accomplished by reversing the trial court’s purging order to review the underlying decision. See *Betts*, 155 Ill. App. 3d at 104. Accordingly, we decline to consider the July 6, 2012, order.

¶ 79 To summarize, the trial court’s October 23, 2012, ruling, which awarded petitioner the sole custody, care, and control of the children, was not against the manifest weight of the evidence and did not constitute an abuse of discretion. Further, because respondent complied with the trial court’s purge order, an appeal concerning the merits of the trial court’s July 6, 2012, finding of contempt is moot. Accordingly, we affirm the trial court’s judgment in appeal No. 12-1208.

¶ 80 We turn now to appeal No. 12-1116, in which petitioner challenges the trial court’s September 11, 2012, order wherein it declined to hold respondent in direct criminal contempt for making false statements to the court. Petitioner contends, *inter alia*, that the trial court erred because it could not ascertain respondent’s intent or determine why he lied. Petitioner requests that we employ a *de novo* standard of review because the trial court’s exercise of discretion was based on an erroneous conclusion of law.

¶ 81 “Criminal contempt of court has been generally defined as conduct which is calculated to embarrass, hinder or obstruct a court in its administration of justice or derogate from its authority or dignity, thereby bringing the administration of law into disrepute.” *People v. Javaras*, 51 Ill. 2d 296, 299 (1972). Two forms of criminal contempt have been recognized: direct and indirect.

People v. L.A.S., 111 Ill. 2d 539, 543 (1986). Direct criminal contempt may occur in either of two ways: (1) the contemptuous acts are personally observed by the judge or (2) the contemptuous acts are committed outside the immediate physical presence of the judge but within an integral part of the court, *i.e.*, the circuit clerk's office. *People v. Minor*, 281 Ill. App. 3d 568, 572-73 (1996). "Direct criminal contempt may be found and punished summarily because all elements are before the court and, therefore, come within its own immediate knowledge." *L.A.S.*, 111 Ill. 2d at 543. Therefore, the usual procedural-due-process safeguards are not required for a direct-criminal-contempt conviction. *Id.*

¶ 82 However, the alleged contemnor in an indirect criminal contempt proceeding is entitled to "due process safeguards, including notice, opportunity to answer, and a hearing." *Id.* at 543-44. Direct criminal contempt that allegedly occurs in the constructive presence of the court is subject to the same procedural requirements as indirect-criminal-contempt proceedings. *In re Marriage of Betts*, 200 Ill. App. 3d 26, 59-60 (1990). Accordingly, respondent in the present case was entitled to the following procedural safeguards, including: (1) notice of the nature of the contempt charges; (2) an opportunity to answer the alleged charges; (3) right to a hearing; (4) the privilege against self-incrimination; (5) the presumption of innocence; (6) the right to be proved guilty beyond a reasonable doubt; (7) right to counsel (and to appointed counsel if indigent); (8) right to confront and cross-examine witnesses; (9) right to be personally present at trial; (10) right to testify or to remain silent; (11) right to compulsory process for obtaining witnesses; and (12) right to present the testimony of witnesses favorable to his or her defense. See *id.* at 58-59 (setting forth the procedural requirements for indirect-criminal-contempt proceedings and constructive-direct-criminal-contempt proceedings).

¶ 83 The trial of an indirect criminal contempt charge must conform to all procedural requirements and rights normally applicable to criminal trials. *In re Marriage of Oleksy*, 337 Ill. App. 3d 946, 949 (2003). With a criminal contempt proceeding, as opposed to a civil contempt proceeding, certain admonitions, such as the right to remain silent, are to be administered, and the burden of proof is not shifted to a respondent. *In re Marriage of Samuel*, 394 Ill. App. 3d 398, 401 (2009). In criminal contempt cases, the State—or in this case, the petitioner—must prove the charges beyond a reasonable doubt. See *People ex rel. City of Chicago v. Le Mirage, Inc.*, 2013 IL 113482, ¶ 64; *Petrakh v. Morano*, 385 Ill. App. 3d 855, 859 (2008). Further, before citing one with direct criminal contempt, a court must find the alleged contemnor’s conduct was willful. *People v. Hixson*, 2012 IL App (4th) 100777, ¶ 15 (citing *People v. Simac*, 161 Ill. 2d 297, 307 (1994)).

¶ 84 In the present case, respondent counters that principles of double jeopardy preclude this court from ordering a retrial, since he was already acquitted of the offense. Petitioner responds that, although respondent cited numerous cases in support of his claim, none of the cases dealt with either indirect or direct criminal contempt. Respondent is correct.

¶ 85 The constitutional bar against double jeopardy provides three basic protections: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense. *People v. Milka*, 211 Ill. 2d 150, 170 (2004). Here, merely because respondent failed to cite any cases in which double jeopardy principles applies to those found in direct or indirect criminal contempt does not mean that no cases exist.

¶ 86 Contrary to petitioner’s assertion, reviewing courts have previously considered similar circumstances and have determined that double jeopardy principles do apply in this context. See,

e.g., *Winning Moves, Inc. v. Hi! Baby, Inc.*, 238 Ill. App. 3d 834 (1992) (finding no double jeopardy barrier to retrial when reviewing court reversed the trial court's judgment as it related to direct criminal contempt and remanded for a new hearing); *In re Marriage of D'Attomo*, 211 Ill. App. 3d 914, 922 (1991) (holding that the defendant's conviction for child abduction barred an indirect criminal contempt proceeding against him for violating a court order by removing the child from the jurisdiction because the two offenses were the same).

¶ 87 In *Alltop v. Alltop*, 203 Ill. App. 3d 606 (1990), the petitioner petitioned the trial court for a rule to show cause for the respondent's failure to pay education expenses of their child and for failure to distribute a worker's compensation settlement according to the court's order. *Id.* at 616. The trial court imposed a sanction of imprisonment, which constituted a criminal contempt finding. On appeal, the respondent argued that the trial court failed to follow the proper procedural safeguards before finding him in criminal contempt. *Id.* at 614. The reviewing court agreed. The reviewing court held that the pleading must be entitled a "petition for adjudication of criminal contempt" and that a "petition for rule to show cause" was not adequate to give notice to the respondent of the criminal nature of the proceedings. *Id.* at 616. Before ordering a remand, however, the reviewing court considered whether doing so would subject the respondent to double jeopardy. *Id.* at 616 (citing *People v. Taylor*, 76 Ill. 2d 289, 309 (1979)); see also *Falcon, Ltd. v. Corr's Natural Beverages, Inc.*, 173 Ill. App. 3d 291 (1988) (upon determining that the defendants were entitled to a jury trial, and thus, a new trial, on an appeal of a trial court's finding of indirect criminal contempt, the reviewing court applied the requirements of *Taylor* to avoid the risk of subjecting the defendants to double jeopardy).

¶ 88 Pursuant to the foregoing authorities, principles of double jeopardy undoubtedly apply when a party is found in criminal contempt, either direct or indirect. We do recognize that, in

certain circumstances, a criminal charge following and arising out of an adjudication of criminal contempt may not offend the double jeopardy clause of either the U.S. or Illinois Constitution. For example, a individual who has been sentenced for indirect criminal contempt for striking an attorney may also be prosecuted for aggravated battery. *People v. Totten*, 118 Ill. 2d 124 (1987). The present case, however, does not share those characteristics. The instant case concerns a successive prosecution for the exact same act and circumstances of alleged direct criminal contempt for which respondent has already been acquitted. Accordingly, we conclude that double jeopardy principles preclude a successive and identical prosecution against respondent for direct criminal contempt, where the evidence pertaining to his first prosecution was found to be insufficient and the trial court declined to find him in direct criminal contempt. We decline to disturb the trial court's ruling.

¶ 89 As a final matter, we must address the timeliness of our disposition. Illinois Supreme Court Rule 311(a)(5) (eff. Feb. 26, 2010) provides that, in appeals from orders concerning child custody, “[e]xcept for good cause shown, the appellate court shall issue its decision within 150 days after the filing of the notice of appeal.” The four notices of appeal in these cases were filed between August 2012 and November 2012, and the 150-day period for filing our disposition expired in April 2013. Under the circumstances of the present case, including its procedural history, we believe good cause existed to excuse the delay in filing our decision. Over a period of years, the parties have vigorously pursued and defended their actions through litigation; the instant appeals are the first four of at least eight presented to date for this court to review. Because both petitioner and respondent presented appeals, each attorney needed to review the record, research the issues, and write an appellate brief, all of which took a measure of time. The parties were entitled to a fair and full opportunity to develop and present their positions.

¶ 90 It is this court's duty to carefully review the record on appeal and the briefs the parties have presented to this court in support of their respective positions before rendering a decision. In view of our decision above, we believe we have fulfilled our duty. Accordingly, under the circumstances of the present case, a 150-day time limit should be subordinate to the justice this case deserves.

¶ 91

III. CONCLUSION

¶ 92 For the reasons stated, we affirm the judgment of the circuit court of Du Page County in the consolidated appeals of Nos. 12-1046, 12-1116, 12-1172, 12-1208.

¶ 93 Appeal No. 2-12-1046, affirmed.

¶ 94 Appeal No. 2-12-1127, affirmed.

¶ 95 Appeal No. 2-12-1208, affirmed.

¶ 96 Appeal No. 2-12-1116, affirmed.