

COURT OF APPEALS  
STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

DONNA J. LARSEN	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
	:	Hon. John W. Wise, J.
Plaintiff-Appellant	:	Hon. Patricia A. Delaney, J.
	:	
-vs-	:	
	:	Case No. 2008-CA-00281
KEITH LARSEN	:	2008-CA-00282
	:	
Defendant-Appellee	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Civil appeals from the Stark County Court of Common Pleas, Domestic Relations Division, Stark County, Ohio, Case No. 2007-CR-00730

JUDGMENT: Affirmed in part; Reversed in part  
Remanded

DATE OF JUDGMENT ENTRY: September 21, 2009

APPEARANCES:

For Plaintiff-Appellant

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For Defendant-Appellee

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*Gwin, P.J.*

{¶1} These are two appeals, consolidated by this court under case number 2008-CA-00281, and designating appellee Keith Larsen as the cross-appellant. Plaintiff-appellant Donna J. Larsen appeals a judgment of the Court of Common Pleas, Domestic Relations Division, which granted a divorce to appellant and defendant-appellee and allocated the parental rights and responsibilities between the parties. Appellant assigns four errors to the trial court:

{¶2} “I. THE COURT ERRED IN RESTRAINING THE PARTIES FROM EXPOSING THE MINOR CHILD TO ANY PARAMOURS.

{¶3} “II. THE COURT, CONTRARY TO LAW, FAILED TO PROVIDE A CHILD SUPPORT GUIDELINE WORKSHEET TO SUPPORT THE AMOUNT ORDERED AS CHILD SUPPORT.

{¶4} “III. THE COURT ABUSED ITS DISCRETION IN SUSPENDING THE PARENTING TIME OR COMPANIONSHIP RIGHTS OF THE PARTIES WITH THE MINOR CHILD IN THE EVENT THAT CIRCUMSTANCES WOULD PREVENT THEM FROM PAYING THE GUARDIAN AD LITEM ON OR BEFORE SEPTEMBER 1, 2008.

{¶5} “IV. THE COURT ABUSED ITS DISCRETION IN REQUIRING THE PARTIES SEND EACH OTHER A COPY OF ANY PETITION FILED IN A BANKRUPTCY COURT IN THAT IT WAS STIPULATED THAT THERE WERE NO JOINT DEBTS OF THE MARRIAGE.”

{¶6} Appellee assigns a cross-assignment of error:

{¶7} “I. THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING FATHER’S REQUEST FOR MORE TIME TO PRESENT EVIDENCE ON THE ISSUE OF CUSTODY.”

{¶8} The parties were married on July 15, 2007, and produced one child. The parties had resolved most of their issues, but were unable to resolve certain details of the shared-parenting plan and portions of the proposed separation agreement.

{¶9} Our standard of reviewing decisions of a domestic relations court is generally the abuse of discretion standard, see *Booth v. Booth* (1989), 44 Ohio St. 3d 142. The Supreme Court made the abuse of discretion standard applicable to custody proceedings in *Miller v. Miller* (1988), 37 Ohio St. 3d 71. The Supreme Court has repeatedly held the term abuse of discretion implies the court’s attitude is unreasonable, arbitrary or unconscionable, *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217, 219. When applying the abuse of discretion standard, this court may not substitute our judgment for that of the trial court, *Pons v. Ohio State Med. Board*, (1993), 66 Ohio St.3d 619, 621.

I

{¶10} R.C. 3109.04 states:

{¶11} “(F)(1) In determining the best interest of a child pursuant to this section, whether on an original decree allocating parental rights and responsibilities for the care of children or a modification of a decree allocating those rights and responsibilities, the court shall consider all relevant factors, including, but not limited to:

{¶12} “(a) The wishes of the child's parents regarding the child's care;

{¶13} “(b) If the court has interviewed the child in chambers pursuant to division (B) of this section regarding the child's wishes and concerns as to the allocation of parental rights and responsibilities concerning the child, the wishes and concerns of the child, as expressed to the court;

{¶14} “(c) The child's interaction and interrelationship with the child's parents, siblings, and any other person who may significantly affect the child's best interest;

{¶15} “(d) The child's adjustment to the child's home, school, and community;

{¶16} “(e) The mental and physical health of all persons involved in the situation;

{¶17} “(f) The parent more likely to honor and facilitate court-approved parenting time rights or visitation and companionship rights;

{¶18} “(g) Whether either parent has failed to make all child support payments, including all arrearages, that are required of that parent pursuant to a child support order under which that parent is an obligor;

{¶19} “(h) Whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child; whether either parent, in a case in which a child has been adjudicated an abused child or a neglected child, previously has been determined to be the perpetrator of the abusive or neglectful act that is the basis of an adjudication; whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to a violation of section 2919.25 of the Revised Code or a sexually oriented offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding;

whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to any offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding and caused physical harm to the victim in the commission of the offense; and whether there is reason to believe that either parent has acted in a manner resulting in a child being an abused child or a neglected child;

{¶20} “(i) Whether the residential parent or one of the parents subject to a shared parenting decree has continuously and willfully denied the other parent's right to parenting time in accordance with an order of the court;

{¶21} “(j) Whether either parent has established a residence, or is planning to establish a residence, outside this state.”

{¶22} In her first assignment of error, appellant argues the trial court erred in adopting the language proposed by appellee, which states “Both parties are prohibited from exposing the minor child to a live-in paramour. Live-in is defined as someone who sleeps over at the residence.”

{¶23} Appellant argues this clause deprives her of her constitutional right of freedom of association, and places a restraint upon the parties without any determination regarding the best interest of the minor child.

{¶24} Courts of appeals have generally held that before imposing restrictions like this, a trial court must find there is some harm to the child or that the restriction is otherwise necessary to protect the best interest of the children. For instances, in *Bernard v. Bernard*, Columbiana App. No. 00CO25, 2002-Ohio-552, the Seventh District Court of Appeals found the trial court had a valid concern for the best interest of the

children, in that the mother's paramour supplied marijuana to his own daughter. There were also allegations the paramour had twice threatened the mother's life.

{¶25} In *Dilworth v. Dilworth* (1996), 115 Ohio App. 3d 537, 685 N.E. 2d 847, the Court of Appeals for the Second District held a trial court errs in failing to consider the statutory factors for determining the best interest of the children. In *Dilworth*, the trial court adopted the magistrate's order preventing the parents from having "romantic guests" stay over night when the children were present. The *Dilworth* court found the record supported a finding the overnight stays by mother's boyfriend had an adverse impact on the health of the children, because they did not understand why there were "a number of different men" staying overnight with their mother, and they became depressed and weepy. The court of appeals reversed only on procedural grounds.

{¶26} In *Whaley v. Whaley* (1978), 61 Ohio App. 2d 111, 399 N.E. 2d 1270, the mother was sexually involved with a married man and had gone on vacation with him, taking the child. The Lawrence County Court of Appeals held there should be no presumption immoral conduct is harmful, because such a presumption would be unworkable in practice and beyond the realm of legitimate judicial inquiry. Instead, the trial court must determine whether the immoral conduct has a direct or probable adverse impact on the welfare of the child. *Whaley*, at 117-118.

{¶27} In *Bibler v. Bibler* (August 20, 1993), Hancock App. Nos. 5-93-12 and 5-93-20, the Third District Court of Appeals found a trial court may consider the effect the conduct of a mother's boyfriend had on the children when he was confrontational with their mother and had abused alcohol in the past.

{¶28} *Bernard*, supra and *Bibler*, supra dealt with the original custody order in the divorce decree, while *Dilworth*, supra and *Whaley* supra concerned modifications of an earlier order. However, R.C. 3109.04 applies to both original orders and modifications.

{¶29} We agree with appellant the trial court was required to make an independent determination as to whether or not exposing the minor child to certain individuals would impact the child's best interest. No evidence was presented at trial on this issue, and neither party requested findings of fact on any contested issue.

{¶30} Further, the language of the prohibition is quite broad, and prohibits contact in general, rather than any specific circumstances the court might deem harmful.

{¶31} The first assignment of error is sustained.

## II

{¶32} In her second assignment of error, appellant argues the trial court failed to attach a child-support worksheet to the judgment entry. Appellee concedes this is reversible error. *Marker v. Grimm* (1992), 65 Ohio St. 3d 139.

{¶33} The second assignment of error is sustained.

## III

{¶34} In her third assignment of error, appellant argues the court abused its discretion in suspending parenting time and companionship rights of the parties in the event they did not pay the guardian ad-litem fee on or before September 1, 2008.

{¶35} Appellee points out appellant has not alleged, and the record does not indicate, that either party actually failed to pay the guardian ad-litem, and it does not

show whether the court actually enforced the provision. Appellant has failed to support the error in the record.

{¶36} The third assignment of error is overruled as moot.

#### IV

{¶37} In her fourth assignment of error, appellant argues the trial court abused its discretion in requiring the parties to send each other a copy of any petition filed in a bankruptcy court, because the parties stipulated there were no joint debts of the marriage. Appellant argues this constitutes an invasion of the parties' right to privacy.

{¶38} As appellee points out, bankruptcy filings are public records, and requiring one party to notify the other of a bankruptcy petition does not invade either party's right to privacy.

{¶39} The fourth assignment of error is overruled.

{¶40} Turning to appellee's cross-assignment of error, appellee/cross appellant argues the court erred in not granting a continuance of the final hearing. He concedes the grant or denial of a continuance is a matter entrusted to the sound discretion of the trial court. *Truex v. Truex*, 179 Ohio App. 3d 188, 2008-Ohio-5690 at paragraph 13.

{¶41} Appellee argues neither party had prepared for an evidentiary hearing because they believed the issues would be settled although they were unable to resolve certain details.

{¶42} At the beginning of the final hearing on August 11, 2008, the court inquired about the status of the case. Appellant's counsel indicated he believed they were about ninety percent settled with respect to the shared-parenting plan, and the remaining ten percent dealt with times for pickups and drop-offs, and other small issues. Even though

the situation had digressed a bit, appellant still believed shared parenting would be in the best interest of the child, with the court determining the details.

{¶43} Appellee's counsel also indicated to the court the parties agreed in principle that the child would be best served by the shared-parenting plan, which provided the child's time would be divided evenly between the parents. However, appellee wished to be designated the residential parent for school purposes, and appellant did not agree.

{¶44} Both parties testified, and then appellee's counsel requested a continuance so he could present more reasons why he should be the residential parent for school purposes. At the time of the hearing the child was less than two years old, but appellee maintained the court should make the determination at the time of the final hearing rather than waiting until the child actually became of school age.

{¶45} The court responded it could not consider every conceivable variance that may come up over the course of the next sixteen years of the child's minority. The court indicated it had no crystal ball, and cannot make decisions upon any potential imaginary or horrible event that may arise. The court reminded the parties it continues to have jurisdiction to deal with all the contingencies regarding the best interest of the child. The court also found that for several months previously the parties had represented they had agreed on shared parenting.

{¶46} We find the trial court did not err in overruling the motion for a continuance, given the specific circumstances of the case and the extensive evidence it already had before it.

{¶47} The cross assignment of error is overruled.

{¶48} For the foregoing reasons, the judgment of the Court of Common Pleas, Domestic Relations Division, of Stark County, Ohio, is affirmed in part and reversed in part, and the cause is remanded to the court for further proceedings in accord with law and consistent with this opinion.

By Gwin, P.J.,

Wise, J., and

Delaney, J., concur

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HON. W. SCOTT GWIN

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HON. JOHN W. WISE

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HON. PATRICIA A. DELANEY

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