[Cite as *Stephens v. Stephens*, 2008-Ohio-4882.]

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
SARAH E. STEPHENS, NKA BAKER	:	Hon. William B. Hoffman, P.J.
	:	Hon. W. Scott Gwin, J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	
-vs-	:	
	:	Case No. 2007-COA-052
LEE E. STEPHENS	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING: Civil appeal from the Ashland County Court of Common Pleas, Case No. 96-DIV-09895

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: September 24, 2008

APPEARANCES:

For-Appellant	For-Appellee
THOMAS L. MASON P.O. Box 345 153 West Main Street Ashland, OH 44805	GEORGE R. KEYSER 44 Park Avenue West, Suite 202 Mansfield, OH 44902

Gwin, J.,

{¶1} Defendant-appellant Lee E. Stephens, hereinafter referred to as father, appeals a judgment of the Court of Common Pleas of Ashland County, Ohio, which held plaintiff-appellee Sarah E. Stephens, nka, Baker, hereinafter referred to as mother, was not in contempt for failure to abide by the court's order regarding companionship with the parties' children, and other issues. Father assigns a single error to the trial court:

{¶2} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY MODIFYING THE COMPANIONSHIP ORDER WITHOUT MAKING FINDINGS TO SUPPORT THE MODIFICATION, WHICH WAS DONE PURSUANT TO A CONTEMPT MOTION."

{¶3} On November 23, 2005, a magistrate conducted a hearing on father's motion to find mother in contempt. The parties are divorced and have three children, and mother is the residential parent. The magistrate entered his original decision on November 6, 2006. The magistrate found, inter alia, the children are not to be the decision makers with regard to parenting time.

{¶4} Father requested findings of fact and conclusions of law, and the magistrate directed both parties to submit proposed findings. Subsequently, on October 9, 2007, the magistrate issued an amended decision.

{¶5} The magistrate's amended decision found the parties were divorced in 1996, and two of the children were teenagers at the time of the hearing. The magistrate found the parties have a history of non-cooperation on parenting time issues and neither party is totally blameless. The magistrate noted the parties' divorce file needed three separate folders and was approximately seven inches thick.

{¶6} On the issue of parenting time, the magistrate found mother and father do not speak to one another, and all communication is done through the children or relatives. At the hearing, mother testified the children had been making decisions regarding parenting time, and father did not dispute that testimony.

{¶7} The magistrate ordered that mother should not get the children ready for parenting time if father has cancelled parenting time for that date. The youngest child (age 10 at the time of the hearing) is not be the decision maker with regard to parenting time. However, the school and social activities of the two teenage children disrupts normal parenting time schedules. In his amended decision the magistrate directed that the two teenagers should be responsible for coordinating the parenting time with their father, rather than mother being the one to make the decisions.

{¶8} Father filed objections to the amended magistrate's decision, but did not provide the trial court with a transcript of the evidence pursuant to Civ. R. 53. In its judgment entry of November 27, 2007, the court adopted the amended magistrate's decision, and declined to review any objections to the magistrate's findings of fact. The trial court found there was competent and credible evidence supporting the magistrate's decision in the case and there was no error of law or other defect in the decision.

{¶9} Civ. R. 53 (D)(3)(b)(iii) provides: "An objection to a factual finding, whether or not specifically designated a finding of fact under Civ. R. 53 (D)(3)(a)(ii), shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available.***" Subsection (iv) provides a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or

conclusion of law under Civ. R. 53 (D)(3)(a)(ii), unless the party objected to that finding or conclusion as required by Civ. R. 53 (D)(3)(b).

{¶10} On appeal, father argues the magistrate did not make a finding his orders are in the best interest of the children, but he did not raise this as an objection in the trial court. The balance of appellant's argument is based on the findings of fact made by the magistrate, and pursuant to the Rule this court cannot review the factual determinations without a transcript of the evidence.

{¶11} 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 alimony orders in *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217; to property divisions in *Martin v. Martin* (1985), 18 Ohio St. 3d 292; and to custody proceedings in *Miller v. Miller* (1988), 37 Ohio St. 3d 71. More recently, the Court has applied the abuse of discretion standard to decisions calculating child support, see *Dunbar v. Dunbar,* 68 Ohio St. 3d 369, 533-534, 1994-Ohio-509, 627 N.E.2d 532. The Supreme Court has repeatedly held the term abuse of discretion implies the court's attitude is unreasonable, arbitrary or unconscionable, *Blakemore,* supra, at 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.

{¶12} We find the magistrate's order does not modify father's visitation rights. The court acknowledged the children's activities might very well disrupt ordinary parenting time schedules. The order simply directs father and the children to arrange visitation times to coordinate with the children's school and social activities. Given that

the magistrate found mother and father only communicate through the children or other relatives, it appears reasonable for the court to order the children to deal directly with father, and in an effort to reduce potential conflict between the parties, remove mother from the decision making process.

{¶13} We find the trial court did not abuse its discretion in entering this order. The assignment of error is overruled.

{¶14} For the foregoing reasons, the judgment of the Court of Common Pleas of Ashland County, Ohio, is affirmed.

By Gwin, J., and

Farmer, J., concur;

Hoffman, P. J., dissents

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

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HON. SHEILA G. FARMER

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Hoffman, P.J., dissenting

{¶15} I respectfully dissent from the majority opinion. I find the magistrate's decision, adopted by the trial court, represents a de facto modification of the pre-existing companionship order and went beyond the scope of Appellant's motion for contempt. Although I concede father's exercise of his companionship rights have been frustrated in the past and may be so in the future, enforcement of Court ordered companionship rights take priority over children's extracurricular activities. The parents' hopefully will recognize the value of such activities and seek to accommodate them by voluntary adjustments to the companionship schedule. However, I do not think it wise or expedient to place responsibility for such accommodations with the children. Under the worse case scenario, father might arguably be placed in the untenable situation of filing a contempt action against his children to enforce his companionship rights. I believe such concerns are cognizable despite the lack of a transcript.

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HON. WILLIAM B. HOFFMAN

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IN THE COURT OF APPEALS FOR ASHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

SARAH E. STEPHENS, NKA BAKER	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
LEE E. STEPHENS	:	
Defendant-Appellant	:	CASE NO. 2007-COA-052

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Ashland County, Ohio, is affirmed. Costs to appellant.

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

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HON. SHEILA G. FARMER