[Cite as *Lake v. Lake*, 2010-Ohio-588.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

LORRAINE LAKE,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2009-P-0015**
- vs -	:	
EDWARD LAKE, JR.,	:	
Defendant-Appellee.	:	

Civil Appeal from the Portage County Court of Common Pleas, Domestic Relations Division, Case No. 2002 DR 0094.

Judgment: Affirmed in part, reversed in part, and remanded.

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William A. Watson, 1392 S.O.M. Center Road, Mayfield Heights, OH 44124 (For Defendant-Appellee).

DIANE V. GRENDELL, J.

{¶1} Plaintiff-appellant, Lorraine Lake, appeals the judgment of the Portage County Court of Common Pleas, Domestic Relations Division, finding her in criminal contempt, modifying the visitation schedule with respect to her minor son, and terminating child support. For the following reasons, we affirm in part, and reverse in part, the decision of the court below and remand the cause for further proceedings consistent with this Opinion.

{¶2} Lorraine and defendant-appellee, Edward Lake, Jr., were married in Kent, Ohio, on December 31, 1987. Three children were born as issue of the marriage: Amanda Kimberly (dob July 17, 1988), Courtney Jane (dob September 23, 1996), and Joshua Edward (dob May 21, 2000).

{¶3} On February 13, 2002, Lorraine filed a Complaint for Divorce.

{¶4} On July 1, 2002, the domestic relations court issued a Judgment Entry, granting Lorraine a divorce based upon an agreement of the parties. Lorraine was designated the residential parent and legal custodian of the minor children.

{¶5} The present appeal arises from a series of post-decree filings by Edward.

{¶6} On January 3, 2007, the domestic relations court adopted a shared parenting plan as being in the best interest of the children.

{¶7} On October 5, 2007, the domestic relations court ordered that "family therapy shall take place between [Edward] and [the] parties' child, Courtney, in order to restore and improve the father/daughter relationship."

{¶8} On April 30, 2008, the domestic relations court repeated its order that Edward and Courtney engage in family therapy.

{¶9} In August 2008, Edward filed a Motion for Contempt, complaining that Lorraine had "den[ied] a court order to go to counseling with my daughter [sic]."

{¶10} On September 2, 2008, the domestic relations court considered Lorraine's alleged interference in counseling for Edward and Courtney. The court's Judgment Entry states: "The court does not find from all the evidence that [Edward] presented any specific evidence reflecting dates that he established for counseling sessions with Courtney with which [Lorraine] interfered or prevented those sessions from taking place [sic]. *** During the course of the parties' presentation to the Court, [Lorraine] did

testify that Courtney is currently in counseling sessions with counselors from Kent State University. Those sessions shall continue and [Edward] shall participate in those sessions as the counselors may determine as to frequency and degree of attendance and participation. Accordingly, [Lorraine], through her counsel, shall provide to [Edward] notice of the time and date of those sessions."

{¶11} On September 26, 2008, Edward filed five Motions of Contempt, alleging Lorraine to be in contempt of court for the following: "denying a court order of taking the Family First Program [sic]"; "denying a court order to go to the After the Storm program"; "interfering with a court order of visitation"; "denying a court order to go to counseling with my daughter [Courtney]"; and "denying a court order of taking the Anger Management Program."

{¶12} On October 3, 2008, Edward filed a Motion of Child Neglect, alleging that Lorraine "is willfully allowing my daughter Amanda Lake and her husband to take over my son's [Joshua's] bedroom." On this date, Edward also filed a Motion of Harassment, alleging that Lorraine "is continuously harassing me during my time of court ordered visitation by calling 911 for trespassing."

{¶13} On October 6, 2008, Edward filed a Motion of Child Endangerment, generally alleging Lorraine of "willfully neglecting and endangering the minor children."

{¶14} On October 20, 2008, a hearing on Edward's post-decree Motions was continued on the grounds that he had not properly served Lorraine with them.

{¶15} On February 12, 2009, a hearing was held in domestic relations court on Edward's Motions as well as other matters. At the hearing, testimony was heard regarding Joshua's living arrangements at his mother's house, his grades and school attendance, and his participation in activities such as cub scouts.

{¶16} Testimony was heard regarding Courtney and her relationship with her father. There was an incident on Courtney's birthday in September 2008. Edward was scheduled to pick Courtney up from her mother's house. Prior to his arrival, Courtney called her father to tell him that she did not wish to go with him. Edward went to Lorraine's house anyway, purportedly to deliver a present. A confrontation took place between Edward and Lorraine and/or Amanda and the Portage County Sheriff's Department was summoned. Edward left after about fifteen minutes and prior to the arrival of Sheriff's Deputies.

{¶17} Testimony was also heard regarding Courtney's My Space account wherein she represented herself as being older than she was.

{¶18} With respect to Edward and Courtney's counseling, Lorraine testified that Kent State referred her to Children's Advantage in Ravenna, allegedly because the counseling was court ordered. The court questioned Lorraine directly on this issue:

{¶19} The Court: Miss Lake, how did Mr. Lake know that the counseling was going to be at Children's Advantage instead of Kent State University?

{¶20} Lorraine: I believe last time I sat right here I said, "Kent State wouldn't take us because of it being Court ordered, and they referred me to Children's Advantage," and I had her first appointment set. We hadn't gone to it. So he just knew that from me sitting here saying last time.

{¶21} The Court: The last time is when everything was continued.

{¶22} Lorraine: Right.

{¶23} The Court: Because there was lack of service.

{¶24} Lorraine: Whenever I was here in this chair last time and spoke, I was asked about the counseling.

{¶25} The Court: Miss Lake, I read to your attorney earlier *** what you were to do and what he was to do when he received the information from you. Did you tell your attorney to say to Mr. Lake the fact that Children's Advantage was the place where counseling was to take place and that he was to make up his own schedule with them?

{¶26} Lorraine: Mr. Lake knew where counseling was supposed --

{¶27} The Court: That wasn't my question, Miss Lake. Did you give that information to your attorney and do you know if he did that?

{¶28} Lorraine: I did not give that information to my attorney.

{¶29} The Court: All right.

{¶30} Lorraine: I let my attorney know that they -- I was not allowed to set up Ed's counseling with --

{¶31} The Court: That wasn't my question.

{¶32} Lorraine: Okay.

{¶33} The Court: You want me to repeat it so you understand it?

{¶34} Lorraine: I did not --

{¶35} The Court: My question to you, ma'am, was since Kent State University -- which under the last Court order here of September 2nd you indicated that the children would be at Kent State University for counseling.

{¶36} Lorraine: Correct.

{¶37} ***

{¶38} The Court: You, apparently, found out that they would not take it because they thought it was Court ordered.[1] Correct?

{¶39} Lorraine: Correct.

{¶40} The Court: So they referred you eventually to Children's Advocate. Correct?

{¶41} Lorraine: That's correct. I guess I'm confused on --

{¶42} The Court: So my question to you was because of that change did you advise your attorney and ask him to tell Mr. Lake or to notify Mr. Lake where the children were counseling and that he was to set up his own schedule by contacting them? Did you do that?

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1. The domestic relations court, in the September 2nd Judgment Entry, did not order the children to attend counseling at Kent State. Lorraine indicated that the children were already in counseling at Kent. The court ordered Edward to participate and Lorraine, through counsel, to provide him with the time and date of the sessions.

{¶43} Lorraine: I did not ask my attorney to contact Ed.

{¶44} Edward submitted documentary evidence at the hearing indicating that Courtney attended one "intake" counseling session at Kent State on August 27, 2008. According to a letter from Kent State: "After the session, center staff referred the clients to Children's Advantage in Ravenna, OH. The primary reason for this referral was to provide the children with a setting that would aid them in developing a long-term relationship with a counselor." Edward also submitted documentary evidence from Children's Advantage that, as of October 1, 2008, Courtney had not received counseling there. The continued hearing, referred to in Courtney's testimony, occurred on October 20, 2008. Courtney began counseling at Children's Advantage on October 24, 2008.

{¶45} At the close of the hearing, Guardian ad Litem, Melissa R.V. Roubic, testified:

{¶46} And what concerns me the most is the children should have a relationship with both of their parents. The relationship between Courtney and Ed is very damaged at this point. I would recommend that counseling be commenced immediately. But right now Courtney and even Josh are afraid of dad, and I question whether that fear is the result of actual physical abuse -- I mean, I think he's intimidating to them, and he's got to get a grip on how he communicates with the children. *** Mom, she's got to foster that relationship. The children are learning that it's okay to say no to their dad. *** It's going to take some time for Courtney to be able to re-establish a relationship with her dad, and if there's not some immediate intervention with Josh, we're going to be in the same boat with Josh in a short time.

{¶47} On February 19, 2009, the domestic relations court rendered its Judgment Entry. The court found Lorraine to be in contempt for "fail[ing] to provide any information to [Edward] that the [counseling] sessions at Kent State University were not taking place and that she was referred to Children's Advantage." In the court's opinion, "when [Lorraine] learned that the counseling sessions could not take place at Kent State University, she had the responsibility to provide proper information to [Edward] that counseling sessions were thereafter to take place at Children's Advantage rather than

at Kent State University." The court sentenced Lorraine to five days in the Portage County Jail. Three days were suspended on the condition that Lorraine provide Edward with the appropriate counseling information within thirty days. The remaining two days Lorraine was ordered to serve during March 2009.

{¶48} The domestic relations court found that Lorraine had not denied Edward his visitation rights with respect to Joshua, but had denied them with respect to Courtney. In particular, the court noted the negative influence of Lorraine and the parties' eldest daughter, Amanda, as contributing to the breakdown in Edward and Courtney's relationship. However, "finding [Lorraine] in contempt for such violation would serve no fruitful purpose at this point in restoring a more favorable relationship between [Edward] and Courtney."

{¶49} "Having concluded that a more favorable relationship between Courtney and [Edward] may be irreversible," the domestic relations court determined that it could not "allow the deterioration of the relationship between [Edward] and the parties' son Josh to follow along the path of that which has occurred between [Edward] and Courtney." Accordingly, the court found it in Joshua's best interest to modify the visitation schedule so that Edward and Lorraine alternate custody of Joshua on a weekly basis.

{¶50} Finally, the domestic relations court ordered that all child support orders should terminate, effective March 1, 2009. "[S]ince each of the parties will have one minor child in their care, no child support order is hereby issued requiring either of the parties to pay child support to the other."

{¶51} All other pending motions were dismissed.

{¶52} On March 17, 2009, Lorraine filed her Notice of Appeal. On appeal, she raises the following assignments of error:

{¶53} "[1.] The trial court erred in finding that Appellant was in criminal indirect contempt when there was insufficient evidence to prove beyond a reasonable doubt that Appellant intended to defy the September 2nd Order."

{¶54} "[2.] The trial court abused its discretion in modifying visitation without considering the statutory factors of R.C. 3109.051(D); in modifying visitation when the applicable factors weigh against modifying visitation; and in modifying visitation based solely on the trial court's desire to prevent the relationship between father and son from deteriorating."

{¶55} "[3.] The trial court abused its discretion in terminating child support based upon a modification of visitation [for] one of the parties' two minor children without any consideration of the child support guidelines and without a child support calculation worksheet in the record."

{¶56} Under the first assignment of error, Lorraine argues the domestic relation court's finding of contempt was improper, since there was no competent, credible evidence that she intended to defy the court's order.

{¶57} A person may be punished for contempt when he or she is found "guilty of *** [d]isobedience of, or resistance to, a lawful writ, process, order, rule, judgment, or command of a court." R.C. 2705.02(A). Indirect contempt has been defined as contempt "committed outside the presence of the court but which *** tends to obstruct the due and orderly administration of justice." *In re Lands* (1946), 146 Ohio St. 589, 59. "The acts proscribed by R.C. 2705.02 are considered to be indirect acts of contempt."

In re Guardianship of Hards, 175 Ohio App.3d 168, 2008-Ohio-630, at ¶37 (citation omitted).

{¶58} "In cases of criminal, indirect contempt, it must be shown that the alleged contemnor intended to defy the court." *Midland Steel Prods. Co. v. Internatl. Union, United Auto. Aerospace and Agricultural Implement Workers of Am., Local 486* (1991), 61 Ohio St.3d 121, at paragraph two of the syllabus. It has been repeatedly held "that reckless or indifferent conduct also provides a sufficiently culpable mental state for indirect criminal contempt." *Univ. of Cincinnati v. Tuttle*, 1st Dist. No. C-080357, 2009-Ohio-4493, at ¶8 (citations omitted); *State v. Mobley*, 2nd Dist. No. 19176, 2002-Ohio-5535, at ¶15 (citations omitted); *Basore v. Basore*, 5th Dist. No. 02-COA-011, 2002-Ohio-6089, at ¶35 (citations omitted).

{¶59} "The standard of proof required in a criminal contempt proceeding is proof of guilt beyond a reasonable doubt." *Brown v. Executive 200, Inc.* (1980), 64 Ohio St.2d 250, at the syllabus. When reviewing a finding of criminal contempt, we must determine whether the trial court could reasonably conclude that the contemnor was guilty of disobedience of a lawful court order. *Midland Steel*, 61 Ohio St.3d at 127.

{¶60} Lorraine argues that the evidence before the court demonstrates she informed her attorney that Courtney would be in counseling at Children's Advantage, who advised "court personnel" and was told that Edward would be informed. Lorraine concedes that she failed to instruct her attorney to contact Edward directly regarding the change in counseling, but that this does not evince an intent to defy the court's order. We disagree.

{¶61} The court's September 2, 2008 Judgment Entry ordered Lorraine, through her counsel, to provide Edward with notice of the time and date of Courtney's

counseling sessions at Kent State. This order was based on information provided by Lorraine that Courtney was currently in counseling at Kent State. In fact, Courtney had only attended an "intake" counseling session. According to the letter from Kent State, Courtney was referred, "after the session," to Children's Advantage so that she could develop "a long-term relationship with a counselor." This evidence suggests that Lorraine's testimony about Courtney being in counseling was misleading. It also contradicts Lorraine's statement that Courtney was referred to Children's Advantage because the court ordered the counseling at Kent State, which is also a misleading representation.

{¶62} Assuming, arguendo, that Lorraine was not aware of the referral at the time she represented that Courtney was in counseling at Kent State, she failed to comply with the order to convey this information to Edward through her attorney. The evidence before the court demonstrates that, by the beginning of October, Courtney had been referred to Children's Advantage, she had not received counseling at Children's Advantage, and Edward had not been informed about the change in counseling. Lorraine claims she advised him in person that Courtney would be at Children's Advantage at a continued hearing on October 20, 2008. At this point, Edward had already motioned the court to find Lorraine in contempt for failing to inform him regarding Courtney's counseling. Moreover, this informal method of communication, if believed, did not comply with the court's order and occurred only four days before Courtney began counseling at Children's Advantage, and almost two months after the intake session at Kent State.

{¶63} Given this record, the domestic relations court could, and did, reasonably conclude that Lorraine defied its September 2nd Order by failing to inform Edward

regarding Courtney's counseling sessions. Lorraine violated the letter of the court's order as well as its intent, thereby demonstrating a reckless or indifferent disregard of the order for Edward to participate in counseling with Courtney. *Basore*, 2002-Ohio-6089, at ¶35 ("intent required to prove criminal contempt for a late appearance is reckless or indifferent disregard of the trial court's order to appear at a stated time").

{¶64} The first assignment of error is without merit.

{¶65} In her second assignment of error, Lorraine argues the domestic relations court erred by modifying the visitation schedule, with respect to Joshua, without considering the statutory factors set forth in R.C. 3109.051(D).

{¶66} "[W]hen reviewing the propriety of a trial court's determination in a domestic relations case, [the Ohio Supreme Court] has always applied the 'abuse of discretion' standard." *Booth v. Booth* (1989), 44 Ohio St.3d 142, 144.

{¶67} Lorraine relies upon the Ohio Supreme Court's decision in *Braatz v. Braatz*, 85 Ohio St.3d 40, 1999-Ohio-203, for the following propositions: "Modification of visitation rights is governed by R.C. 3109.051." Id. at paragraph one of the syllabus. "Pursuant to R.C. 3109.051(D), the trial court shall consider the fifteen factors enumerated therein." Id. at paragraph two of the syllabus.

{¶68} Lorraine's reliance on R.C. 3109.051 is misplaced, inasmuch as the parties' parental rights and responsibilities are governed by a shared parenting plan.

{¶69} "Once a shared-parenting decree has issued, R.C. 3109.04(E) governs modification of the decree." *Fisher v. Hasenjager*, 116 Ohio St.3d 53, 2007-Ohio-5589, at ¶11. Pursuant to R.C. 3109.04(E)(2)(b): "The court may modify the terms of the plan for shared parenting approved by the court and incorporated by it into the shared parenting decree upon its own motion at any time if the court determines that the

modifications are in the best interest of the children or upon the request of one or both of the parents under the decree. Modifications under this division may be made at any time. The court shall not make any modification to the plan under this division, unless the modification is in the best interest of the children."

{¶70} "The allocation of parenting time is a 'term' of a shared parenting plan, which is modifiable if the change is in the children's best interests." *Herdman v. Herdman*, 3rd Dist. No. 9-08-32, 2009-Ohio-303, at ¶6, citing *Fisher*, 2007-Ohio-5589, at ¶¶29-33, and ¶36; *Bishop v. Bishop*, 4th Dist. No. 08CA44, 2009-Ohio-4537, at ¶35 (citations omitted); *Picciano v. Lowers*, 4th Dist. No. 08CA38, 2009-Ohio-3780, at ¶24 (citations omitted).

{¶71} In determining the best interest of a child within the context of a modification of parenting time in a shared parenting plan, "the court shall consider all relevant factors, including, but not limited to" the factors set forth in R.C. 3109.04(F)(1).[2]

{¶72} In the present case, the domestic relations court stated that the modification in parenting time was in Joshua's "best interests *** to reverse the current adverse relationship between [Edward] and Josh." Although it did not expressly reference the factors set forth in R.C. 3109.04(F)(1), the court did set forth its reasoning and the factual basis for its decision. Thus, many of the factors set forth in R.C.

2. "In determining the best interest of a child pursuant to this section ***, the court shall consider all relevant factors, including, but not limited to: (a) The wishes of the child's parents regarding the child's care; (b) *** the wishes and concerns of the child ***; (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; (d) The child's adjustment to the child's home, school, and community; (e) The mental and physical health of all persons involved in the situation; (f) The parent more likely to honor and facilitate court-approved parenting time rights or visitation and companionship rights; (g) Whether either parent has failed to make all child support payments ***; (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; (i) Whether *** one of the parents subject to a shared parenting decree has continuously and willfully denied the other parent's right to parenting time; (j) Whether either parent has established a residence, or is planning to establish a residence, outside this state." R.C. 3109.04(F)(1).

3109.04(F)(1) were discussed by the court, such as the parties and Joshua's wishes, his relationship with his parents, the parties' psychological issues, and Lorraine's interference with Edward's parenting time with respect to Courtney. Cf. R.C. 3109.04(F)(1)(a), (b), (c), (e), (f), and (i). Conversely, several of the factors set forth in R.C. 3109.04(F)(1) have no relevance to present factual situation.

{¶73} "[A] trial court substantially complies with R.C. 3109.04(E)(2)(b) if its reasons for modifying the terms of a shared parenting plan are apparent from the record; i.e., if it is apparent from the record that the modification is in the child's best interest." *Bishop*, 2009-Ohio-4537, at ¶38 (citations omitted); *In re Fair*, 11th Dist. No. 2007-L-156, 2009-Ohio-683, at ¶49 (citations omitted). "'[I]n the absence of any indication to the contrary, [this court] will assume that the trial court considered all of the relevant factors' which must be reviewed in determining the best interest of a child." *Pickett v. Pickett*, 11th Dist. No. 2001-L-136, 2002-Ohio-3128, at ¶33, quoting *Sickinger v. Sickinger*, 11th Dist. No. 95-A-0046, 1996 Ohio App. LEXIS 1428, at *11.

{¶74} The second assignment of error is without merit.

{¶75} In her third assignment of error, Lorraine asserts that the trial court erred by terminating Edward's child support obligation "without any consideration of the child support guidelines and without a child support worksheet in the record." We agree.

{¶76} "[A] trial court's decision regarding child support obligations falls within the discretion of the trial court and will not be disturbed absent a showing of an abuse of discretion." *Pauly v. Pauly*, 80 Ohio St.3d 386, 390, 1997-Ohio-105.

{¶77} "A court that issues a shared parenting order *** shall order an amount of child support to be paid under the child support order that is calculated in accordance with 3119.022 *** of the Revised Code, through the line establishing the actual annual

obligation, except that, if that amount be unjust or inappropriate to the children or either parent and would not be in the best interest of the child because of extraordinary circumstances of the parents or because of any other factors or criteria set forth in section 3119.23 of the Revised Code, the court may deviate from that amount." R.C. 3119.24(A)(1).

{¶78} "The court shall consider extraordinary circumstances and other factors or criteria if it deviates from the amount described in division (A)(1) of this section and shall enter in the journal the amount described in division (A)(1) of this section and shall enter in the journal the amount described in division (A)(1) of this section its determination that the amount would be unjust or inappropriate and would not be in the best interest of the child, and finds of fact supporting its determination." R.C. 3119.24(A)(2).

{¶79} In the present case, the domestic relations court's February 19, 2009 Judgment Entry does not contain the amount of support Edward would have to pay calculated in accordance with the R.C. 3119.022 worksheet. Such a worksheet was not attached to the court's Judgment Entry, nor has such a worksheet been completed since the time of the original divorce decree in July 2002.

{¶80} The court also failed to make adequate factual findings to support its determination that the amount Edward would have to pay according to the worksheet would be unjust/inappropriate and not in the best interest of the child. The court's Judgment Entry states: "since each of the parties will have one minor child in their care, no child support order is hereby issued requiring either of the parties to pay child support to the other." This is inaccurate. The court's Judgment provides that Courtney will remain in Lorraine's care and that care of Joshua will alternate between the parties on a weekly basis. In these circumstances, the court's decision to terminate Edward's

support obligation constitutes an abuse of discretion. Cf. *Ankey v. Bonos*, 9th Dist. No. 23178, 2006-Ohio-6009, at ¶44 ("[e]qual parenting time is an insufficient basis, without a worksheet and evidence of deviation, to terminate child support"); *Glassner v. Glassner*, 160 Ohio App.3d 648, 2005-Ohio-1936, at ¶48.

{¶81} Accordingly, the cause must be remanded for the domestic relations court to complete the R.C. 3119.022 worksheet and to set forth the extraordinary circumstances justifying a deviation from the amount determined therein.

{¶82} The third assignment of error is with merit.

{¶83} For the foregoing reasons, the judgment of the Portage County Court of Common Pleas, Domestic Relations Division, is reversed with respect to the order to terminate Edward's child support obligation and remanded for further proceedings consistent with this Opinion. In all other respects, the judgment is affirmed. Costs to be taxed against the parties equally.

MARY JANE TRAPP, P.J.,

TIMOTHY P. CANNON, J.,

concur.