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IN THE
COURT OF APPEALS OF INDIANA

A.N.,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 49A02-1008-DR-851
	)	
J.N.,	)	
	)	
Appellee.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable John F. Hanley, Judge
The Honorable Christopher B. Haile, Magistrate
Cause No. 49D11-0811-DR-2942

June 20, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

A.N. ("Mother") appeals the trial court's modification of J.N.'s ("Father") parenting time.

We affirm in part and reverse in part.

ISSUE

Whether the trial court abused its discretion in modifying parenting time.

FACTS

Mother and Father were married on December 21, 1991. Three children (collectively, the "Children") were born of the marriage. M.N. was born on March 6, 1997; K.N. was born on August 25, 2000; and L.N. was born on June 19, 2002.

Father filed a petition for dissolution on March 17, 2008. The parties waived a final hearing pursuant to Indiana Code section 31-15-2-13 and filed a settlement agreement as to property, custody, child support, and parenting time (the "Settlement Agreement"). On May 15, 2009, the trial court entered the final dissolution decree, in which it approved the Settlement Agreement. Pursuant to the Settlement Agreement, the trial court awarded Mother legal and physical custody of the Children. Regarding parenting time and other child-related issues, the parties agreed to the following:

> 2. **Parental Cooperation**. . . . A child and a parent shall be entitled to private communications without interference from the other parent. . . .

The parties hereby adopt Section I of the Indiana Parenting Time Guidelines. . . .

3. **Dr. [Jonni] Gonso Counseling**. Dr. Gonso shall continue with reunification counseling. The parties shall equally share in this expense. Dr. Gonso shall meet with [Father] and [M.N.] and the other Children as she deems reasonable and at such times and in such frequency as she deems appropriate in her professional opinion. [Father] and [Mother] will follow the recommendations of Dr. Gonso with regard to the frequency of counseling and as to which of the parties and the Children shall participate in counseling. Dr. Gonso shall continue counseling while the parties observe the parenting time set forth herein. Dr. Gonso shall meet with all three girls following their first full week [of] parenting time in Minnesota with [Father] in June of 2009. At that time, Dr. Gonso shall make a non-binding recommendation as to what she deems to be appropriate parenting time in the best interests of the Children. If the parties accept such recommendation, they shall implement such plan and cooperate in preparing and filing an Agreed Modification with the Court to reflect the new plan. Should either object, either party may request a hearing on parenting time with the Court. <u>Pending any court hearings and rulings, the parties shall adhere to and observe the specific parenting plan of alternating month parenting time set forth in this Agreement</u>.

4. **Parenting Time**. The parties agree to deviate from the Indiana Parenting Time Guidelines based upon their plan for reunification with the Children and [Father]'s relocation to Minnesota. Specifically, [Father] shall have parenting time with the Children as follows:

a. [Father] shall have a weekend of parenting time in Indianapolis in March of 2009. Said weekend shall not include overnights;

b. [Father] shall have a weekend of parenting time in Indianapolis in April of 2009. Said weekend <u>shall</u> include overnights;

c. [Father] shall have a weekend of parenting time in Indianapolis in May of 2009. Said weekend <u>shall</u> include overnights;

d. After the first 2 months of weekend overnight parenting time in Indianapolis, [Father] shall be entitled to take the Children out of state (within three (3) hours from the city of Indianapolis) for his parenting time with advance written notice;

> e. [Father] shall have a week of parenting time with all of the Children in Minneapolis in June of 2009;
>
> f. Dr. Gonso shall meet with all of the Children following the one week of parenting time and shall render a recommendation as to what she deems appropriate parenting time in the best interests of the Children. If the parties accept such recommendation, they shall follow such recommendation and file an Agreement with the Court. In the event either party disagrees with the recommendation of Dr. Gonso, then any party can request a hearing on the issue of parenting time.
>
> g. <u>Until there is a hearing and a ruling on the matter of parenting time, the parties shall follow the following schedule as it relates to [Father]'s parenting time</u>:
>
> i. Starting in July, [Father] shall exercise one weekend in Indiana (or within 3 hours of Indianapolis) with the girls and shall come to Indiana to pick them up for his weekend parenting each alternating month thereafter (September, November, January . . .).
>
> ii. Starting in August, [Father] shall exercise one week of parenting time with the girls in Minnesota and each alternating month thereafter (October, December, February . . .).
>
> h. Pending the implementation of a final schedule, [Mother] shall enjoy the holidays with the Children. The parties are deviating from the Indiana Parenting Time Guidelines due to the great distance they live apart as well as the fact the Children are home schooled. Because they are home schooled, there exists greater flexibility in their schedules and allows [Father] the ability to have time with them over non-holidays and allowing [Mother] time with them over the holidays.

(App. 23-25) (first and fourth emphasis added).

Father visited the Children in Indianapolis during weekends in March, April, and May of 2009. The Children visited Father in Minnesota in June of 2009. No subsequent parenting time took place.

On November 9, 2009, Mother filed a petition for a hearing on parenting time. Asserting that "parenting time is becoming more stressful and difficult to facilitate," (app. 35), Mother sought to modify parenting time "to remove the requirement of parenting time in Minnesota." (App. 36). Father filed an objection to the petition as well as a petition for the appointment of a parenting coordinator and motion for rule to show cause.

The trial court held a three-day hearing on Mother's petition on January 12, 2010, March 2, 2010, and May 7, 2010. Carla Gaff Clark, a licensed therapist, testified that she began counseling sessions with Mother and the Children on May 5, 2008. During the first nine months of counseling, however, Clark primarily met with Mother to help her "work[] through the divorce and separation." (Tr. 27). Later, Clark began counseling the Children to help them "deal[] with the divorce and the separation of their parents and visitation." (Tr. 20).

Clark testified that the Children "appear as though they would feel comfortable with time with their father where they didn't spend overnight with him." (Tr. 25). She opined that Mother is supportive of the Children's relationship with Father.

Dr. Gonso also testified. She testified that, as a "reunification counselor," it is her role to "assist the [Children] [sic] having a relationship with their father." (Tr. 53). In this capacity, Dr. Gonso met with the Children, Mother, and Father at various times. She opined that reunification counseling has not been successful due to Father living in Minnesota and Mother's "personality issues," including her "suspicions and suspiciousness and distrust[] of [Father] . . . ." (Tr. 57). Dr. Gonso testified that Mother

has cooperated in reunifying the Children with Father "in a superficial manner . . . ." (Tr. 60). According to Dr. Gonso, Mother has been "very restrictive" regarding parenting time. (Tr. 68).

Because Mother's telephone calls with the Children during Father's parenting time have been disruptive, Dr. Gonso recommended "no contact" with Mother unless the Children earned it with good behavior. (Tr. 69). As to M.N., Dr. Gonso testified that she "acts as a kind of surrogate mother," thereby influencing her sisters' behavior during the Children's time with Father. (Tr. 61). Dr. Gonso recommended that M.N. not participate in parenting time "because the other two girls seem quite inhibited around her." (Tr. 61). She further recommended that a parenting coordinator be appointed.

Joyce Lowery testified that the parties used the site of her practice, the Providence Guidance Center, as a place to exchange the Children for parenting time. She testified that five "attempted visitation exchanges" took place at the facility. (Tr. 96). None of the exchanges, however, were successful.

Lowery testified that she observed one attempted exchange on November 6, 2009. For that particular visit, Dr. Gonso had recommended that only K.N. visit with Father; Mother, however, "brought all three of the children to the facility" for the visit. (Tr. 97). When Father indicated that the scheduled parenting time was to be only with K.N., K.N. refused to go. Mother then took the Children home.

Michelle McGrotty, a counselor at Providence Guidance Center, testified that she supervised an attempted exchange with K.N. on October 10, 2009. She testified that

K.N. "seemed very defensive" and refused to go with Father. (Tr. 113). Father's parenting time on that occasion lasted only thirty-five minutes.

Susan Burke, the Children's paternal aunt, testified that in April of 2009, she traveled from Minnesota to Indianapolis to assist with an overnight visit. She testified that the Children initially refused to acknowledge Father's presence and were "clinging to their mom." (Tr. 116). Once the exchange took place, Burke testified that the Children refused to respond to Father and began "chanting" during the car ride. (Tr. 117). She characterized the Children's behavior during lunch as "disrespectful and mean . . . ." (Tr. 118).

Burke further testified that Father had reserved two adjoining hotel rooms during Father's parenting time; the Children slept in one room and Father, Burke, and Burke's daughter slept in the other room, but they kept the door between the rooms open. Burke testified that the Children "start[ed] to loosen up a little bit" and were not "as hostile . . . ." (Tr. 118). She testified that L.N. "seemed happy." (Tr. 119).

Burke testified that the Children seemed to enjoy the next day's activities. During the exchange with Mother, however, Burke testified that the Children "ignored" Father and "wouldn't hug him good bye or anything." (Tr. 122).

Burke also testified regarding the Children's week-long visit with Father in Minnesota during June of 2009. She testified that "sometimes they would be hostile and disrespectful to [Father] and other times they would relax and play and have fun with him." (Tr. 122). She observed that they often spoke with Mother on their cell phones,

after which they "would clam up . . . and . . . become withdrawn and they would cling to each other and they would get hostile towards [Father]" and the rest of the family. (Tr. 123). As to M.N., Burke testified that she "seem[ed] to lead the behavior of the other two girls." (Tr. 124). When M.N. noticed the other two girls having fun, she would "call[] them on it or call[] [Mother] and do[] something to bring . . . [Mother] into the picture." (Tr. 124). After contacting Mother, the Children would refuse to interact with anyone else.

Mother also testified during the hearing. She testified that the Children became distraught over visiting Father. In response, she testified that she tried to "talk up the visits" and "make it a really positive experience for them . . . ." (Tr. 164). Mother denied saying negative things about Father in front of the Children or telling them that they did not have to visit Father. She testified that she wanted Father and the Children to have a relationship, but she wanted "parenting time to take place in Indiana . . . ." (Tr. 171).

During Mother's testimony, Mother offered, and the trial court admitted into evidence, several emails exchanged between Mother and Father. In one email from Mother, dated October 2, 2009, Mother offered several "alternative suggestions" to parenting time, including the cessation of visits to Minnesota; or in the alternative, that she travel to Minnesota with Children and stay with them in a hotel. (Mother's Ex. 2).

During cross-examination, Mother acknowledged that in February of 2009, Dr. Gonso recommended that Mother and the Children email weekly updates to Father regarding the Children's activities. Mother admitted that she did not send any updates to

Father during the period from March 4, 2009, and October 24, 2009. Furthermore, the Children emailed Father only twice.

As to telephone calls between Father and the Children, the trial court admitted into evidence an email dated March 5, 2009, from Mother to Father. In that email, Mother discouraged Father from telephoning L.N., writing:

> [L.N.] does not wish to talk to you on the phone. She would like to e-mail as the other two do. She tells me that she has tried to tell you this on more than one occasion as well, but you refuse to stop calling. When you continue to call against her wishes, the result frustrates her even more because she feels you are not hearing her wishes to communicate via e-mail. I can make her answer the phone, but I cannot make her talk or control what she says.

(Father's Ex. C). The trial court admitted another email into evidence, in which Mother refused to limit her telephone contact with the Children during their time with Father.

Father testified that during his parenting time with the Children in April of 2009, "there [were] times that they [were] very good and engaging and . . . there were times when they weren't and usually that was driven by some kind of phone contact with [Mother]." (Tr. 240). Father testified that when he attempted to limit the Children's telephone calls with Mother during their trip to Minnesota, M.N. "whipped out the Parenting Time Guidelines and then quoted . . . a reference on telephone conversations . . . ." (Tr. 258). Mother admitted to giving M.N. a copy of the guidelines prior to the visit.

Melissa Stephens testified that she has "been a very close friend for many years" of Mother and that their children "hang out frequently and play." (Tr. 32). She further testified that she has accompanied Mother and the Children to "every scheduled pickup

and drop off for the [C]hildren," (tr. 34), because she "want[s] the [Children] to know that there's somebody there to support them and to be there for [Mother] and to be there for them." (Tr. 36).

Stephens testified that during one attempted exchange, Stephens and Mother watched as Father transferred an object from the back seat of his car to the trunk. Within the Children's hearing, Stephens told Mother that she believed the object was a gun. Stephens also admitted to telling the Children during one exchange, "this is the hardest thing I have ever done; turning away and leaving you with this despicable man[.]" (Tr. 46).

On May 18, 2010, the trial court entered its order, finding and ordering as follows:

> 3. The Court finds that parenting time has not occurred as ordered and what parenting time has occurred has been fraught with problems.
>
> 4. The Court finds that [Mother]'s testimony that she desires the [C]hildren to have a relationship with their father is not credible.
>
> 5. The Court finds that [Mother] has interfered with parenting time and has consciously and subconsciously undermined the relationship between the [C]hildren and their father.
>
> 6. The Court finds [Mother] in contempt of Court.
>
> 7. The Court finds that it is in the best interests of the [C]hildren to modify parenting time as recommended by Dr. Jonni Gonso.
>
> 8. [Father] shall not have parenting time with [M.N].
>
> 9. [Father] shall have parenting time with [K.N.] and [L.N.] individually one weekend alternating months in Indianapolis and one week alternating months at his residence.

10. [Father] shall have parenting time with [K.N.] on Saturday and [L.N.] on Sunday during his weekend parenting time in Indianapolis.

11. The parties shall meet at Providence Guidance [C]enter to exchange [K.N. and L.N].

12. Melissa Stephens shall not be present at any parenting time exchange or present during any telephone conversation between [Father] and [K.N. and L.N].

13. [Father] shall have regular email and phone contact with [K.N. and L.N].

14. [Mother] shall have no phone contact with [K.N. and L.N.] during the weekend parenting time in Indianapolis.

15. [K.N. and L.N.] shall have the right to earn one phone call per day with [Mother] during the full week parenting time based upon their behavior.

16. [Mother] shall impose consequences on [K.N. and L.N.] if they refuse to speak on the phone or email [Father].

17. The parties and [K.N. and L.N.] shall continue reunification therapy with Dr. Gonso.

18. [K.N. and L.N.] shall discontinue counseling with Carla Gaff Clark.

19. [K.N. and L.N.] shall receive counseling from a counselor recommended by Dr. Gonso if she believes it would benefit them.

20. The Court shall appoint Phyllis Armstrong as a Level III Parenting Coordinator . . . .

21. [Mother] shall pay attorney fees to [Father's counsel] in the amount of $6,500.00 within forty-five days.

22. All other relief requested by either party is denied.

(App. 10-12). On June 11, 2010, Mother filed a motion to correct error, which the trial court denied.

DECISION

Initially, we note that Father has not filed an appellee's brief.

> In such a situation, we do not undertake the burden of developing arguments for the appellee. Applying a less stringent standard of review with respect to showings of reversible error, we may reverse the lower court if the appellant can establish prima facie error. Prima facie is defined in this context as "at first sight, on first appearance, or on the face of it." The purpose of this rule is not to benefit the appellant. Rather, it is intended to relieve this court of the burden of controverting the arguments advanced for reversal where that burden rests with the appellee. Where an appellant is unable to meet that burden, we will affirm.

State Farm Ins. v. Freeman, 847 N.E.2d 1047, 1048 (Ind. Ct. App. 2006) (internal citations omitted).

Mother asserts that the trial court abused its discretion in modifying parenting time. Specifically, she argues that the trial court improperly ordered that 1) L.N. and K.N. shall earn the right to speak with Mother on the telephone; 2) Mother shall impose consequences on L.N. and K.N. for refusing to communicate with Father; 3) Stephens shall not be present during exchanges or during telephone calls with Father; 4) Father shall have parenting time with K.N. and L.N. individually; and 5) K.N. and L.N.'s counseling sessions with Clark shall cease. Mother also asserts that the trial court improperly found her in contempt.

> When reviewing a trial court's determination of a parenting time issue, we will grant latitude and deference to our trial courts, reversing only when the trial court abuses its discretion. No abuse of discretion occurs if

> there is a rational basis supporting the trial court's determination. "Therefore, on appeal it is not enough that the evidence might support some other conclusion, but it must positively require the conclusion contended for by appellant before there is a basis for reversal." We will not reweigh the evidence or judge the credibility of the witnesses. In all parenting time issues, courts are required to give foremost consideration to the best interest of the child.

Gomez v. Gomez, 887 N.E.2d 977, 983 (Ind. Ct. App. 2008) (internal citations omitted).

Regarding the modification of parenting time, Indiana Code section 31-17-4-2 provides that a trial court "may modify an order granting or denying parenting time rights whenever modification would serve the best interests of the child." Furthermore, "the right of a noncustodial parent to visit his or children is a 'precious privilege.'" *D.B. v. M.B.V.*, 913 N.E.2d 1271, 1274 (Ind. Ct. App. 2009) (quoting *Duncan v. Duncan*, 843 N.E.2d 966, 969 (Ind. Ct. App. 2006)), *reh'g denied*. This privilege shall not be restricted unless the trial court "finds that the parenting time might endanger the child's physical health or significantly impair the child's emotional development." *D.B.*, 913 N.E.2d at 1274 (citing Indiana Code section 31-17-4-2).

1. <u>Communications with Mother</u>

Mother argues that the trial abused its discretion in ordering that the L.N. and K.N. must earn telephone calls with Mother during Father's week-long visits. She argues that the trial court's order "is punitive to [L.N. and K.N.] and interferes with Mother and the children's right to have free and reasonable telephone communication." Mother's Br. at 22.

The Indiana Parenting Time Guidelines (the "Guidelines") provide:

> Both parents shall have reasonable phone access to their child at all times. Telephone communication with the child by either parent to the residence where the child is located shall be conducted at reasonable hours, shall be of reasonable duration, and at reasonable intervals, without interference from the other parent.

Ind. Parenting Time Guidelines, § I.

"Where the trial court deviates from the Guidelines, it must give a written explanation." *Saalfrank v. Saalfrank*, 899 N.E.2d 671, 682 (Ind. Ct. App. 2008) (citing Parenting Time G., Scope of Application (2)). The written explanation, however, need not be as formal as a findings of fact and conclusions of law. *Id.* Rather, it need only "state the reason(s) for the deviation." *See* Parenting Time G., Scope of Application (2), cmt. Thus, finding a deviation is in the child's best interest is sufficient. *See Saalfrank*, 899 N.E.2d at 682 (finding sufficient written explanation to deviate from the Guidelines where the trial court found additional parenting time to be in the children's best interest).

Here, we agree with Mother that the trial court abused its discretion in ordering that the Children must "earn" telephone calls with Mother. (App. 11). *See In re Brown*, 597 N.E.2d 1297, 1299 (Ind. Ct. App. 1992) ("In a divorce action, the parents are considered the parties before the court and the trial court lacks authority to direct the conduct of the children or to enforce its order against the children upon pain of sanction.").

To the extent, however, the trial court deviated from the Guidelines, which provide for "reasonable" telephone access between a child and parent, *see* Parenting

Time G., § 1(A)(3), we find no abuse of discretion. The evidence presented during the hearing showed that Mother's telephone calls with L.N. and K.N. interfered with Father's parenting time, and the trial court found limiting telephone calls, as recommended by Dr. Gonso, to be in K.N.'s and L.N.'s best interests. The trial court therefore provided sufficient written explanation for limiting communication with Mother via telephone. *See Saalfrank*, 899 N.E.2d at 682.

2. Communications with Father

Mother also asserts that the trial court abused its discretion in ordering her to impose consequences upon L.N. and K.N. if they refuse to communicate with Father. She maintains that "[a]dministering consequences to a child for bad or inappropriate behavior is within the sole discretion of a party," and the trial court's directive "is nothing more than a method for the court to punish the children for noncompliance with the court's order." Mother's Br. at 23. We disagree.

In *MacIntosh v. MacIntosh*, 749 N.E.2d 626, 629-30 (Ind. Ct. App. 2001), the custodial parent argued that the trial court's order that she obtain a passport for her minor daughter in order for the daughter to visit the father was void because it improperly directed the child's conduct. The *MacIntosh*-court acknowledged that although a visitation order "necessarily direct[s] the conduct of the children affected by the marital dissolution," the order is "not enforceable against the children" as the parents are the parties before the court. 749 N.E.2d at 630. The *MacIntosh*-court, however, found that as the mother had custody and authority over her child, the trial court properly ordered

her to make reasonable efforts to ensure that the child complied with the parenting time order. *Id.* Furthermore, a custodial parent may not "justify inaction simply because a child refuses to cooperate with a visitation order." *Id.*; *Norris v. Pethe*, 833 N.E.2d 1024, 1031 (Ind. Ct. App. 2005).

Given L.N. and K.N.'s prior refusal to communicate with Father, and Mother's failure to support regular communication, the trial court ordered Mother to "impose consequences" on L.N. and K.N. if they refused to communicate with Father. (App. 11). Contrary to Mother's assertion, the trial court's order that Mother control the behavior and attitude of L.N. and K.N., both minor children, is not contrary to law. *See* Norris, 833 N.E.2d at 1031 (finding that "our established case law . . . expects parents to control their minor child's behavior and attitude"). Accordingly, we find no abuse of discretion in ordering Mother to impose consequences for the failure to L.N. and K.N. to cooperate with the trial court's order.

3. Stephens' Presence

Mother argues that the trial court abused its discretion in ordering that Stephens not be present during the parties' exchange of K.N. and L.N. or during any telephone conversation between Father and K.N. and L.N. She maintains that the trial court may not direct the conduct of a non-party; its order infringes upon Stephens right to "freely associate" with Mother and the Children; and is vague. Mother's Br. at 26.

We agree with Mother that, regarding property interests, a divorce decree does not affect the rights of nonparties. *See, e.g., In re Marriage of Dall*, 681 N.E.2d 718, 723

(Ind. Ct. App. 1997) ("Unless the nonparty is joined, the dissolution court is powerless to adjudicate with certainty the extent of the marital property interest in the real estate, and any such determination is illusory."). This issue, however, does not involve property rights. Rather, it concerns a restriction imposed upon a custodial parent, and therefore the parent's associate, during the parenting time exchanges.

In reviewing whether the trial court abused its discretion, we look to other cases in which restrictions have been imposed upon parenting time. In *Pennington v. Pennington*, 596 N.E.2d 305 (Ind. Ct. App. 1992), the trial court ordered that the father's adult male friend not be present during overnight visitations after determining the friend's presence would be injurious to the child's emotional development. 596 N.E.2d at 307. Finding that the record revealed a rational basis supporting the restriction, this court affirmed the trial court's restriction on visitation. *Id.*

In *Marlow v. Marlow*, 702 N.E.2d 733 (Ind. Ct. App. 1998), the trial court ordered that during visitation, the father shall "not have any other non-blood related person in the house overnight when the children of the parties are present"; and shall "not include in the children's activities during periods of visitation, any social, religious or educational functions sponsored by or which otherwise promote the homosexual lifestyle." 702 N.E.2d at 735. The father appealed, arguing that the restrictions were not supported by a rational basis; "violated his constitutional right to equal protection," *id.* at 736; and were "unconstitutionally vague and over broad." *Id.* at 737.

Upon review, this court found that the record revealed a rational basis for restricting visitation; namely, evidence that the father's lifestyle had an adverse impact on the children. *Id.* at 736. This court further declined to find the restrictions unconstitutional as the restrictions were not based on private bias but rather on the children's best interests. *Id.* at 737. This court also found that the father's argument as to the restrictions being vague and overly broad must fail as the restrictions only applied to the father's visitation rights, restricting them as to satisfy the children's best interests. *Id.* at 738.

Here, Stephens admitted that she did not have a good relationship with Father. She also admitted to making a disparaging remark regarding Father and accusing him of having a gun in front of the Children. Finally, Stephens testified that she often overheard telephone conversations between Father and the Children and admitted to spying on Father and the Children during one of the exchanges.

Given the testimony, we find that a rational basis exists to restrict Mother's association with Stephens during the exchange of L.N. and K.N. and during the Children's communications with Father. We therefore cannot say that the trial court abused its discretion in ordering Stephens not be present during specific times.

We also find Mother's argument that the restrictions are vague to be unavailing. Given the evidence in the record, it is abundantly clear that Stephens shall not be involved or present during the transportation of the L.N. and K.N. to and from the parenting time exchanges; Stephens shall not be present at the site of the exchange; and

telephone calls between Father and the Children shall be conducted in private, outside of Stephens' earshot.

4. Separate Parenting Time

Mother also asserts that trial court "erred when it ordered individual parenting time with" K.N. and L.N. Mother's Br. at 28. She maintains that the trial court improperly relied on Dr. Gonso's recommendations and deviated from the Guidelines, the commentary to which provides that "the presumption is that all the children should remain together during the exercise of parenting time."[1] *See* Parenting Time G., § II, cmt.

The evidence shows that in August of 2009, Dr. Gonso recommended separate parenting time with K.N. and L.N. in order for them to "develop a relationship" with Father. (Father's Ex. B). Dr. Gonso further opined that Father's request for separate parenting time was reasonable. Given the testimony, we cannot say the trial court abused its discretion in ordering separate parenting time with K.N. and L.N. during Father's parenting time in Indianapolis, where it found Dr. Gonso's recommendations to be in the best interests of K.N. and L.N.[2]

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[1] We note that the trial court only ordered separate parenting time with K.N. and L.N. during Father's "weekend parenting time in Indianapolis." (App. 11). The trial court did not order separate parenting time during Father's parenting time in Minnesota.

[2] Mother argues that "[t]here is no evidence that individual parenting time with the two younger children was successful." Mother's Br. 29. We find this argument unpersuasive as no parenting time took place subsequent to June of 2009.

5. L.N. and K.N.'s Counseling Sessions with Clark

Mother asserts that the trial court abused its discretion when it ordered that L.N. and K.N.'s counseling sessions with Clark be discontinued. We agree.

Indiana Code section 31-17-2-17 provides a child's custodian "may determine the child's upbringing, including the child's education, health care, and religious training." If, however, the trial court "finds after motion by a noncustodial parent that, in the absence of a specific limitation of the custodian's authority, the child's . . . emotional development would be significantly impaired; the court may specifically limit the custodian's authority." Ind. Code § 31-17-2-17(b)(2).

In his response and objection to Mother's petition to modify parenting time, Father raised "significant concerns" that the Children's treatment by Clark "may serve to undermine and/or oppose Dr. Gonso's efforts" to reunify Father and the Children. (App. 62). During the hearing, Father testified that he believed it is "grossly inappropriate" for Clark to counsel the Children as Clark also counsels Mother individually. (Tr. 282). Father, however, conceded that "if Dr. Gonso believes it appropriate," he would be "fine with it." (Tr. 283). Although Dr. Gonso expressed reservations regarding Clark counseling L.N. and K.N. because she did not know whether Clark had had contact with Father, she testified that she believed Clark's "goals were appropriate that [sic] she felt the . . . the girls having a relationship with their father . . . was necessary." (Tr. 67).

Here, the trial court did not find, and we cannot say that the evidence would support a finding, that the Children's emotional development would be significantly

impaired by continuing counseling with Clark. We therefore find that the trial court abused its discretion in ordering that the Children must cease their counseling sessions with Clark.

6. Contempt

Mother further asserts that the trial court abused its discretion in finding her in contempt and therefore ordering her to pay Father's attorney's fees in the amount of $6,500.00 as a sanction. Mother contends that "there is no evidence to support the court's determination that [she] willfully disobeyed the court's orders regarding parenting time." Mother's Br. at 35. Rather, she maintains that the "[C]hildren have not abided by them," while she "has tried in vain to comply with the court's parenting time orders." Mother's Br. at 35.

"'Contempt of court involves disobedience of a court which undermines the court's authority, justice, and dignity.'" *Srivastava v. Indianapolis Hebrew Congregation, Inc.*, 779 N.E.2d 52, 60 (Ind. Ct. App. 2002) (quoting *Carter v. Johnson*, 745 N.E.2d 237, 240 (Ind. Ct. App. 2001)). "It includes any act which tends to deter the court from the performance of its duties." *Id.*

A person can be held in indirect contempt of court for the willful disobedience of any order lawfully issued:

> (1) by any court of record, or by the proper officer of the court;
> (2) under the authority of law, or the direction of the court; and
> (3) after the process or order has been served upon the person[.]

I.C. § 34-47-3-1.

> To be held in contempt for failure to follow the court's order, a party must have willfully disobeyed the court order. The order must have been so clear and certain that there could be no question as to what the party must do, or not do, and so there could be no question regarding whether the order is violated. A party may not be held in contempt for failing to comply with an ambiguous or indefinite order. Otherwise, a party could be held in contempt for obeying an ambiguous order in good faith. The determination of whether a party is in contempt of court is a matter left to the discretion of the trial court. We will reverse a trial court's finding of contempt only if there is no evidence or inference therefrom to support the finding.

Whitaker v. Town of Cloverdale Town Council, 902 N.E.2d 885, 887-88 (Ind. Ct. App. 2009) (internal citations omitted).

In this case, the Settlement Agreement, as approved by the trial court, ordered that "[p]ending any court hearings and rulings, the parties shall adhere to and observe the specific parenting plan of alternating month parenting time set forth in this Agreeement." (App. 24). Specifically, the Settlement Agreement set forth the following plan:

> g. Until there is a hearing and a ruling on the matter of parenting time, the parties shall follow the following schedule as it relates to [Father]'s parenting time:
>
> i. Starting in July, [Father] shall exercise one weekend in Indiana (or within 3 hours of Indianapolis) with the girls and shall come to Indiana to pick them up for his weekend parenting each alternating month thereafter (September, November, January . . .).
>
> ii. Starting in August, [Father] shall exercise one week of parenting time with the girls in Minnesota and each alternating month thereafter (October, December, February . . .).

(App. 25).

The Guidelines state that "each parent shall be responsible to ensure the child complies with the scheduled parenting time. In no event shall a child be allowed to make the decision on whether scheduled parenting time takes place." Parenting Time G., § I(E)(3). Again, "we have rejected the notion that a custodial parent may justify inaction simply because a child refuses to cooperate with a visitation order." *MacIntosh*, 749 N.E.2d at 630.

The evidence is undisputed that no parenting time took place after June of 2009, despite the Settlement Agreement's provisions that Father shall have one weekend of parenting time every other month and one week of parenting time during the alternate month. The evidence further shows that Father attempted to exercise parenting time at least five times after June 2009, to no avail. The evidence also reveals that Mother consistently discouraged Father's exercise of parenting time in Minnesota; sought to limit Father's parenting time during his weekend visits;[3] attempted to interject herself into Father's parenting time; and resisted Dr. Gonso's recommendations.

Mother has not shown that the trial court abused its discretion when it found her in contempt for failing to comply with the Settlement Agreement. Mother's argument is merely a request to reweigh the evidence and judge witness credibility, which we will not do. *See MacIntosh*, 749 N.E.2d at 629.

> Once a party has been found in contempt of court, monetary damages may be awarded to compensate the other party for injuries

[3] For example, when Father attempted to exercise weekend parenting time in November of 2009, Mother required that it be limited to the hours between 10:00 a.m. and 1:00 p.m. due to the Children's prior "commitments." (Mother's Ex. 8).

> incurred as a result of the contempt. In determining an amount of damages the trial court may take into account "the inconvenience and frustration suffered by the aggrieved party. . . ." The determination of damages in a contempt proceeding is within the trial court's discretion, and we will reverse an award of damages only if there is no evidence to support the award.

City of Gary v. Major, 822 N.E.2d 165, 172 (Ind. 2005) (internal citations omitted). "Sanctions in a civil contempt proceeding may seek to both coerce behavior and to compensate an aggrieved party." *MacIntosh*, 749 N.E.2d at 631. As sanctions, "a trial court has inherent authority to award attorney's fees for civil contempt." *Crowl v. Berryhill*, 678 N.E.2d 828, 831 (Ind. Ct. App. 1997).

Father sought $12,907.85 in attorney's fees. In addition to attorney's fees, Father also sought reimbursement for expenses in the amount of $12,693.70, incurred in his unsuccessful attempts to secure parenting time. In support thereof, Father submitted, and the trial court admitted into evidence without objection, an affidavit for attorney's fees and litigation expenses as well as an itemized list of expenses incurred. The trial court ordered Mother to pay $6,500.00 in attorney's fees.

The evidence does support an award for attorney's fees and expenses incurred due to Mother's contempt. We therefore find no abuse of discretion in awarding $6,500.00 to compensate Father.

In conclusion, we reverse the trial court's order that K.N. and L.N. must earn telephone calls with Mother during Father's parenting time and that the Children must cease counseling sessions with Clark. We affirm the trial court in all other respects.

Affirmed in part and reversed in part.

RILEY, J., concurs.

BARNES, J., concurs in part and dissents in part with separate opinion.

IN THE
COURT OF APPEALS OF INDIANA

A.N.,	)	
	)	
Appellant,	)	
	)	
	)	
vs.	)	No. 49A02-1008-DR-851
	)	
J.N.,	)	
	)	
Appellee.	)	

BARNES, Judge, concurs in part and dissents in part with opinion.

I concur with my colleagues in all matters except the contempt issue. I do not believe the record supports that finding. I realize that conniving custodial parents and their children sometimes can and do frustrate the orders of a court from time to time, with respect to visitation by the non-custodial parent. I do not condone such behavior and would be pleased to sternly address such conduct.

That said, a contempt finding is serious and should not be entered into lightly. A contempt finding requires evidence in the record that a party willfully disobeyed a court order. Henderson v. Henderson, 919 N.E.2d 1207, 1210 (Ind. Ct. App. 2010). Here, to the extent the trial court found in part that Mother had "subconsciously" undermined the children's relationship with Father, that in my opinion does not satisfy the requirement of willful disobedience of a court order. App. p. 10.

As for whether there was any evidence of conscious undermining or interference with Father's visitation rights under the dissolution decree, I am aware that we review contempt findings for an abuse of discretion and will not reweigh the evidence or judge the credibility of the witnesses. Mitchell v. Mitchell, 785 N.E.2d 1194, 1198 (Ind. Ct. App. 2003). Still, there must be some evidence in the record to support a contempt finding, rather than mere speculation. I also highlight the fact, as the majority notes, that Father has not filed a brief on appeal, thus reducing Mother's burden of obtaining reversal to a showing of prima facie error.

The evidence here is that although Father had no visitation with the children after June 2009, Mother brought the children to the scheduled places and times for visitation exchanges on at least five occasions. On all five occasions, the children refused to leave with Father, prompting Father to ask Mother to take the children back. There is not one iota of evidence that Mother ever failed to produce the children for an agreed scheduled

visitation without reason,[4] or discouraged the children from visiting Father or talking to him, or that she ever said one bad word about Father in front of the children. Given that it was proving extremely difficult for the children to cooperate in visitation, Mother did sometimes suggest to Father alternative ways for his parenting time to be carried out that did not strictly comply with the dissolution decree or the reunification counselor's recommendations, but that does not rise to the level of willful disobedience of the decree in my view.

It is true that in Indiana, a custodial parent can be held in contempt for a child's refusal to visit with the other parent. See MacIntosh v. MacIntosh, 749 N.E.2d 626, 630 (Ind. Ct. App. 2001), trans. denied; but see In re Marriage of Brown, 597 N.E.2d 1297, 1300 (Ind. Ct. App. 1992) (stating, "where a young adult is unwilling to visit the noncustodial parent, the trial court may not hold the custodial parent in contempt for not forcing the young adult to visit."). However, I believe it only is implied that the custodial parent has to make "reasonable efforts to ensure that the children complied with the scheduled parenting time." MacIntosh, 749 N.E.2d at 630; see also Rideout v. Rideout, 40 P.3d 1192, 1196 (Wash. Ct. App. 2002), aff'd, 77 P.3d 1174, 1183 (Wash. 2003) (reviewing MacIntosh and cases from other jurisdictions and holding that in order to hold parent in contempt for child's failure to participate in visitation, "the evidence must show that the parent has either contributed to the child's attitude or failed to make reasonable efforts to require the child to comply."). I think Mother made such efforts; I do not

[4] There was one occasion on which Mother did not deliver the children due to illness; Father has not disputed that assertion.

believe the custodial parent should effectively have to guarantee that a child will cooperate with visitation.

Alternatively, the contempt finding should not rest only upon the mere assumption that Mother must have done something to the children to make them extremely reluctant to visit Father. I do not believe it is fair to draw that conclusion with no evidence in the record to support it, aside from psychological speculation as to Mother's personality. The sad truth is that courts, for all their power, cannot force children to love their parents or want to visit with them.

Particularly in the absence of any argument from Father as to why we ought to affirm the contempt finding against Mother, I vote to reverse that finding.