

RENDERED: AUGUST 23, 2024; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2023-CA-1335-MR

DAWN MCLEOD

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GINA KAY CALVERT, JUDGE
ACTION NO. 14-CI-503238

SCOTT WILLIAMS

APPELLEE

OPINION
VACATING AND
REMANDING

** ** * ** * **

BEFORE: CALDWELL, COMBS, AND KAREM, JUDGES.

COMBS, JUDGE: Appellant, Dawn McLeod, appeals from the denial of her post-decree motion seeking to modify the parties' current parenting schedule consisting of alternating weeks. After our review, we vacate and remand.

The parties (Dawn and Scott) were divorced in 2015. By Agreed Order entered on February 25, 2020, they have equal parenting time with their son, S.W., on a week-on/week-off basis.

On July 3, 2023, Dawn filed a motion to modify parenting time. She argued that there had been a change in circumstances since the entry of the February 25, 2020, Order, and that consequently the current parenting schedule was no longer in S.W.'s best interests.¹ In her accompanying affidavit, Dawn averred that S.W. requires supplemental academic support and that there were problems with Scott's cooperation with the child's 504 Plan.² She charged that during his parenting time, Scott failed to ensure that S.W. completed his school assignments. Dawn stated that Scott, who was responsible for S.W.'s dental care, had failed to take S.W. to the dentist in November 2021 as he had represented. Dawn also averred that Scott was consistently late in dropping S.W. off at practice for his extracurricular/sports activities.

On September 28, 2023, the family court conducted a hearing on Dawn's motion. Dawn was present and was represented by counsel. Scott, *pro se*, was also present. Dawn testified that she did not think that the parenting schedule had been going well. She explained that S.W. has been diagnosed with ADHD and that consistency is fundamental. Dawn testified about Scott's lack of cooperation

¹ S.W., who was nine years of age at that time, has been diagnosed with Attention Deficit/Hyperactivity Disorder (ADHD).

² Section 504 of the Rehabilitation Act of 1973 is the federal law governing 504 plans. A 504 plan addresses the unique learning needs of a student with a disability. It provides reasonable accommodations which enable the student to have equitable access to school programs and meet learning needs. *Section 504 of the Rehabilitation Act of 1973*, KENTUCKY DEP'T OF EDUC., <https://www.education.ky.gov/specialed/Pages/Sct504.aspx> (last visited Jul. 29, 2024).

with respect to tutoring. She also testified about Scott's failure to take the child to the dentist in 2021 (despite his representation to the contrary) and about Scott's showing up late for S.W.'s sports/extracurricular activities. Dawn explained that she would like for S.W. to be with her during the week when he needs consistency -- for school, diet, exercise, and sleep; she proposed that Scott have S.W. on the weekends. Dawn testified that although she would like weekend time, the school week was more important. Her concern was S.W.'s success; *i.e.*, that his future not be compromised. Certified copies of the report of Dr. Raskin, who diagnosed ADHD, the child's dental records, and school records were entered into the record. Dawn also called the mother of Scott's older child as a witness.

Scott testified in narrative form. He disputed being late on a regular basis to S.W.'s activities. He claimed that the missed dental visit was not intentional. He testified that the focus on academics concerned the previous school year. Scott also testified that he and Dawn had had conflicts. He requested that the parenting schedule stay the same.

On cross-examination, Scott admitted that he had not taken S.W. to the dentist as agreed upon by the parties. Scott testified that he is a high school math teacher and acknowledged that his son was struggling with math. Scott was not sure what position his son played in lacrosse and believed the practices lasted for an hour rather than an hour and one-half.

By Order entered on October 13, 2023, the family court denied Dawn's motion. After summarizing the parties' testimony, the court stated as follows:

[T]he parties seem to still struggle with coparenting. The Petitioner mother is controlling, and the Respondent father is passive aggressive in his behaviors and his communications with the Petitioner mother. No doubt their child is aware of the parents' animosity toward each other. The interactions between the parents are very damaging to their child. The inability to coparent is grounds for this Court to change custody of the child to just one parent; the Court wants the parties to take note and endeavor to work together for the best interest of their child, not pull him in different directions as they are doing.

At this time the burden is not met to amend the existing parenting schedule and take parenting time away from the Respondent father.

On October 23, 2023, Dawn filed a motion to alter, amend, or vacate and/or to make additional findings of fact. By Order entered on October 31, 2023, the family court denied Dawn's motion.

On November 10, 2023, Dawn filed a notice of appeal to this Court. She primarily argues that the family court erred by failing to make any written findings regarding the child's best interests; Scott has not filed a brief.³

³ Rules of Appellate Procedure (RAP) 31(H)(3) allows for imposition of penalties where the Appellee's brief has not filed a brief. That matter lies within our discretion. *Roberts v. Bucci*, 218 S.W.3d 395 (Ky. App. 2007). We decline to impose any penalty because this case involves a request to modify parenting time. We have elected instead to address the merits.

KRS⁴ 403.320 governs modification of visitation or timesharing. The presumption of joint custody and equal parenting time in KRS 403.270 does not apply to modifications of visitation or timesharing. *Layman v. Bohanon*, 599 S.W.3d 423, 431 (Ky. 2020). KRS 403.320(3) provides that “[t]he court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child; but the court shall not restrict a parent’s visitation rights unless it finds that the visitation would endanger seriously the child’s physical, mental, moral, or emotional health.”

As our Supreme Court explained in *Anderson v. Johnson*, 350 S.W.3d 453 (Ky. 2011):

[F]amily court cases are heard by a judge only. . . . The judge is the finder of fact, the concluder on what law applies, and the giver of an order. . . .

On motions to modify timesharing, the judge has several factors to consider in making the determination of what the best interests of a child are, which are partially listed in KRS 403.270, but include all relevant *facts*. The basis for a modification decision is thus fact-driven rather than law-driven, because the legal standard is . . . the best interests of the child, which is stated plainly in the statute. To review the judge’s decision on appeal, it is important to know what facts the judge relied on in order to determine whether he has made a mistake of fact, or to even determine if he is right at law, but for the wrong facts. If a judge must choose between facts, it is clearly relevant which facts supported his opinion.

⁴ Kentucky Revised Statutes.

Id. at 455. *Anderson* further explains that “the findings requirement comes from CR^[5] 52.01 . . . [which] requires that the judge engage in at least a good faith effort at fact-finding and that the found facts be included in a written order. Failure to do so allows an appellate court to remand the case for findings” *Id.* at 457-58.

In the case before us, the family court did not discuss the best-interest factors with respect to Dawn’s motion to modify parenting time, simply concluding that the “burden is not met to amend the existing parenting schedule.” More is needed. As this Court recently explained in *Wilburn v. Wilburn*, No. 2023-CA-0816-MR, 2024 WL 2982749, at *4 (Ky. App. Jun. 14, 2024):

[w]hile it is true that the party seeking modification bears the burden of persuading the circuit court that the child’s best interests require such a change . . . , the circuit court should still outline the facts it relied upon when determining that burden has not been met by the movant.

In *Wilburn*, this Court vacated the circuit court’s order and remanded “for further fact finding and analysis to determine the child’s best interest regarding timesharing by the parents.” *Id.* That same directive is appropriate here.

Accordingly, we vacate the October 13, 2023, Order of the Jefferson Circuit Court, Family Division Nine, denying Dawn’s motion to modify the

⁵ Kentucky Rules of Civil Procedure.

parenting schedule. We remand for further analysis and factfinding to determine S.W.'s best interests with respect to Dawn's motion to modify parenting time.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE.

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