FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-3275

ROBYNN N. HUGHES, f/k/a
Robynn N. Binney, Former Wife,

Appellant,

v.

ROBERT BINNEY, Former
Husband,

Appellee.

On appeal from the Circuit Court for Santa Rosa County.
Marci L. Goodman, Judge.

November 27, 2019

M.K. THOMAS, J.

Ms. Hughes seeks review of a modification of time-sharing, arguing that the terms set forth by the lower court for future reinstatement of equal time-sharing are contrary to section 61.13(3), Florida Statutes. We agree and reverse that portion of the order on appeal.

The parties were divorced in 2016, at which time they agreed to equally share in parental responsibility and time-sharing of their two minor children. The arrangement began to show cracks shortly thereafter when Mr. Binney was faced with a cascading series of medical issues and attendant complications, which left

him unable to fully fulfill his role as agreed upon in the divorce. This led Ms. Hughes to request that the trial court modify the final judgment dissolving the marriage to grant her sole parental responsibility, with Mr. Binney allowed supervised visitations. At the final hearing, multiple witnesses testified to having observed Mr. Binney in an "impaired" state while the minor children were under his watch, and military police officers described responding to calls involving Mr. Binney. On one occasion, Mr. Binney was passed out in the parking lot of the children's daycare. He exhibited slurred speech, had difficulty standing, and was found clutching an aerosol can to his chest. On another occasion, Mr. Binney was observed driving erratically while the children were in the car. Additionally, military police were called to Ms. Hughes' house following a display of mercurial behavior by Mr. Binney that resulted in his arrest for battery. Testimony established another unfortunate episode involving a firearm during which Mr. Binney shot off his own toe.

Mr. Binney testified that prior to the hearing, he checked himself into and completed a twenty-seven-day inpatient rehabilitation program. He acknowledged having an opioid addiction before attending rehab. He denied that he participated in "huffing" that caused him to fall asleep in his car at the daycare center. He further denied that he used "huffing" as a substitute for pain medications.

At hearing, the trial court expressed concern with respect to Mr. Binney's driving, and that because he resided with his father, who was a heavy smoker, the children would also be exposed to second-hand smoke. Further, the trial court determined that Mr. Binney was in denial regarding his addiction and found his testimony regarding "huffing" to be noncredible. The trial court indicated that the parties could resume 50/50 timesharing at some point when Mr. Binney was "healthy."

The trial court granted Ms. Hughes' petition for modification but found Ms. Hughes had failed to prove that Mr. Binney poses any danger to the minor children in the home. However, the trial court believed he did pose a danger when driving. The trial court crafted a new time-sharing schedule in which Mr. Binney was assigned a reduced time-sharing allowance of every other

Saturday and Sunday from 9 a.m. to 6 p.m., in addition to a weekday after-school option. Ms. Hughes, the trial court ordered, would have the remainder. The trial court's order also made several additional provisions. Provision twenty directed that:

> If [Mr. Binney] completes Veterans' court, obtains his own residence, and has no motor vehicle violations for a calendar year commencing March 30, 2018, visitation shall revert to 50/50 time sharing as outlined in the original Final Judgment of Dissolution of Marriage dated April 27, 2016.

It is this provision that Ms. Hughes now appeals. Specifically, she argues that the court's automatic future reinstatement of equal time-sharing was an abuse of discretion under *Arthur v. Arthur*, 54 So. 3d 454 (Fla. 2010). We agree.

A time-sharing schedule "may not be modified without a showing of a substantial, material, and unanticipated change in circumstances and a determination that the modification is in the best interests of the child." § 61.13(3), Fla. Stat. (2018). Determining what course of action is in the best interests of a child requires a court to evaluate "all of the factors affecting the welfare and interests of the particular minor child and the circumstances of" the family. *Id.*

Trial courts may not engage in a "prospective-based analysis" when modifying a time-sharing schedule that attempts to anticipate what the future best interests of a child will be. *Arthur*, 54 So. 3d at 458-59; *Preudhomme v. Preudhomme*, 245 So. 3d 989, 990 (Fla. 1st DCA 2018) (affirming the lower court's present-based modification of time-sharing but reversing the court's future modification of time-sharing and directing that on remand the portion of the order addressing future events be deleted). Here, no evidence was presented that a substantial change in circumstances would occur if Mr. Binney completed Veteran's court, obtained his own residence, and avoided motor vehicle violations for a calendar year.

By enumerating conditions precedent to an automatic future modification of the time-sharing schedule, the lower court effectively made a prospective determination of what course of

action would be in the best interests of the children in the future. This is precisely the kind of analysis prohibited by *Arthur* and *Preudhomme*. This is not to say that a court cannot instruct a parent as to steps they might take to sufficiently cure what might be ailing them and preventing their presence from being in the best interest of a child's life. Indeed, some courts have found that such a listing of rehabilitative steps is required. *See Witt-Bahls v. Bahls*, 193 So. 3d 35, 38-39 (Fla. 4th DCA 2016); *Perez v. Fay*, 160 So. 3d 459, 466-67 (Fla. 2d DCA 2015). This Court has not. *See Dukes v. Griffin*, 230 So. 3d 155, 157 (Fla. 1st DCA 2017) (stating that vesting trial courts with authority to enumerate steps to re-modify timesharing schedules and alleviate timesharing restrictions "appears contrary to section 61.13(3), which sets forth its own specific requirements for modifying parenting plans, including time-sharing schedules" and certifying conflict with *Perez*, 160 So. 3d at 466-67, and *Witt-Bahls*, 193 So. 3d at 38-39.) Regardless, that interdistrict conflict does not influence the analysis here—whether section 61.13(3) requires that a trial court determine in the future if such rehabilitative steps have been satisfied such that modification, at that future time, is in the best interest of the child.

We reverse provision twenty of the order providing for an automatic future modification of the time-sharing schedule, affirm the remaining provisions of the order, and remand for the trial court to proceed consistent with this opinion.

AFFIRMED in part, REVERSED in part, and REMANDED.

B.L. THOMAS and KELSEY, JJ. concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Ross A. Keene, Pensacola, for Appellant.

Robert Binney, pro se, for Appellee.