

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001468-ME

ERIC LEE SPEARS

APPELLANT

v. APPEAL FROM OWEN CIRCUIT COURT
HONORABLE R. LESLIE KNIGHT, JUDGE
ACTION NO. 09-CI-00164

MICHELE RENE' SPEARS¹

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: DIXON, KRAMER, AND D. LAMBERT, JUDGES.

KRAMER, JUDGE: Eric Spears appeals an order of the Owen Circuit Court which modified an existing parenting time schedule. After careful review of the record and applicable law, we reverse and remand for further proceedings.²

¹ In the notice of appeal and appellant brief, Michele Spears's first name is incorrectly spelled "Meichele." We will use the correct spelling for the entirety of this opinion.

² The record was not received in the authoring Judge's office until September 18, 2018.

The Owen Circuit Court entered a divorce decree for Eric and Michele Spears in February 2010. At the time of dissolution, the two children born to the marriage were three years old and ten months old, respectively. Eric and Michele maintain joint custody of the two children. In March 2010, the court ordered the following parenting schedule for the children: Every week Michele would have them from Tuesday at 6 p.m. through 9 a.m. on Sunday, and Eric would have them from Sunday at 9 a.m. through 6 p.m. on Tuesday. This parenting schedule was specifically structured around Eric's work schedule. At the time of the entry of the decree and timesharing schedule, Eric's only day off from work was Monday. This arrangement was in effect and was utilized over the ensuing seven years.

In April 2017, Eric moved the circuit court to modify the parenting time schedule. The case was heard by the domestic relations commissioner (DRC).³ Eric testified before the DRC that his work schedule recently changed to Monday through Friday. Because of this, he wanted weekend timesharing and equal parenting time with his children. Michele agreed that Eric should have

³ Kentucky's Family Court Rules for Practice and Procedure provide:

(1) In jurisdictions having no family court, the circuit judge may appoint a domestic relations commissioner The court may refer domestic relations matters under KRS Chapter 403 to the domestic relations commissioner, except for domestic violence proceedings, contempt proceedings and injunctive relief proceedings.

FCRPP 4.

timesharing Friday through Sunday every other weekend. However, she did not believe Eric should have equal parenting time simply because his work schedule changed.

The DRC's recommendations to the circuit court state "that [Eric]'s only change in circumstances is his change in employment which does not require the reopening of every case. Nevertheless, the court does believe a modification is in the best interest of the children given [Eric]'s work schedule[.]" The DRC's recommended modification granted Eric parenting time from Friday at 6 p.m. to Sunday at 7 p.m. one week, and Sunday at 9 a.m. to Tuesday at 8 p.m. the following week. This gave Eric essentially the same number of timesharing days as he had under the previous order but decreased his timesharing when measured by hours.⁴ Eric objected and argued he should be granted *equal* parenting time. In August 2017, the circuit court overruled this objection and entered an order adopting the DRC's recommended order in full. This appeal followed. Additional facts are discussed below as necessary.

At the outset, we note that Michele did not file an appellee brief.

Pursuant to CR⁵ 76.12(8)(c), "a range of penalties . . . may be levied against an

⁴ By our calculations, the net result of this new arrangement was that Eric would get six hours *less* timesharing with his children every two weeks than he did under the previous order.

⁵ Kentucky Rule of Civil Procedure.

appellee for failing to file a timely brief.” *St. Joseph Catholic Orphan Soc’y v. Edwards*, 449 S.W.3d 727, 732 (Ky. 2014). This Court may “(i) accept the appellant’s statement of the facts and issues as correct; (ii) reverse the judgment if appellant’s brief reasonably appears to sustain such action; or (iii) regard the appellee’s failure as a confession of error and reverse the judgment without considering the merits of the case.” *Id.* at 732; CR 76.12(8)(c). We agree that Eric’s brief justifies the reversal he seeks.

Eric correctly argues that the circuit court erred because it failed to apply the correct law. On appeal, this court may only reverse a trial court’s timesharing determination if that determination constitutes an abuse of discretion. *Ryan v. Ryan*, 473 S.W.3d 637, 639 (Ky. App. 2015). “The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Id.* (quoting *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000)) (internal citations omitted).

The Kentucky Supreme Court has stated that, “[i]f it is only timesharing/visitation for which modification is sought, then KRS 403.320 either applies directly or may be construed to do so.” *Pennington v. Marcum*, 266 S.W.3d 759, 765 (Ky. 2008). Specifically, KRS 403.320(3) states in relevant part: “The court may modify an order granting or denying [timesharing] rights *whenever modification would serve the best interest of the child[.]*” (Emphasis added). After

a careful review of the hearings and record in this case, we conclude that instead of relying on what was in the best interests of children, much of the evidence and testimony in front of the DRC was focused on the father's "change in circumstances."

In the DRC's recommended findings, which the circuit court adopted, the following finding was made regarding timesharing:⁶ "With respect to [Eric]'s motion to modify the visitation schedule, the Court finds that [Eric]'s only *change in circumstances* is his change in employment which does not require the reopening of every case." (Emphasis added). The use of the phrase "change in circumstances" leads this Court to believe the DRC was applying the incorrect statute; namely KRS 403.340. KRS 403.340(3) states, in pertinent part: "[T]he court shall not modify a prior custody decree unless after hearing it finds . . . that a *change has occurred in the circumstances* of the child or his custodian, and that the modification is necessary to serve the best interests of the child." (Emphasis added.) Simply put, KRS 403.340 has no application to this case. As stated in *Pennington*, "[i]f a change in custody is sought, KRS 403.340 governs. If it is only timesharing/visitation for which modification is sought, then KRS 403.320 . . .

⁶ Both the DRC and the parties incorrectly use the term "visitation" when referring to Eric's time with the children. This is a term used for sole custody arrangements. *Pennington*, 266 S.W.3d at 764-65. When parents maintain joint custody of their children the proper term is "timesharing." *Id.*

applies[.]” *Pennington*, 266 S.W.3d at 765. KRS 403.320 makes no mention of a “change in circumstances,” it simply states the order may be modified “whenever modification would serve the best interest of the child.” Therefore, in applying a “change in circumstances” test to this situation, instead of just a best interest test, the DRC’s recommendations were unsupported by sound legal principles.

In light of the foregoing, because the DRC’s recommendations were unsupported by sound legal principles, the circuit court abused its discretion in adopting them. *See Ryan*, 473 S.W.3d at 639. Thus, this matter is REVERSED and REMANDED for a hearing to determine the best interest of the children.

DIXON, JUDGE, CONCURS.

D. LAMBERT, JUDGE, DISSENTS AND DOES NOT FILE A SEPARATE OPINION.

BRIEF FOR APPELLANT:

Jack S. Gatlin
Ft. Mitchell, Kentucky

BRIEF FOR APPELLEE:

NO BRIEF FILED