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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001880-ME

ELIZABETH DODD — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GINA KAY CALVERT, JUDGE
ACTION NO. 14-CI-503056

JOSH LOCOCO — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; LAMBERT AND SPALDING, JUDGES.

CLAYTON, CHIEF JUDGE: Elizabeth Dodd appeals from a Jefferson Family Court order modifying the parenting schedule she shares with her former husband, Josh Lococo, and its order addressing her subsequent motion to alter, amend or vacate. Dodd argues that her due process rights were violated because the family court modified the schedule without notice or a hearing.

Elizabeth and Josh were divorced in July 2015. They entered into a marital settlement agreement which incorporated a parenting schedule for their three minor children, of whom they share joint custody. The basic elements of the agreement were as follows: Josh was to have parenting time every Wednesday night and alternating weekends from Friday after school until 3:00 p.m. on Sunday afternoon. Elizabeth was to have the children on Mother's Day and Josh on Father's Day. On Thanksgiving, Josh was to have parenting time commencing at 4:00 p.m. on the Wednesday before Thanksgiving Day until 4:00 p.m. on Thanksgiving Day; Elizabeth was to have parenting time from then until 4:00 p.m. the following Friday. For Christmas, Elizabeth was given parenting time from 12:00 p.m. on Christmas Eve until 12:00 p.m. on Christmas Day and Josh from 12:00 p.m. Christmas Day until 12:00 p.m. the following day. For the summer break, the regular parenting schedule was to be followed except that each party was to have nine consecutive days to take a vacation with the children. No party was permitted to use vacation time to have three consecutive weekends with the children. The agreement also provided that the other parent had the right of first refusal for any overnights the children spent with babysitters.

The parenting schedule became a source of continuous conflict between the parties. After approximately one year, they agreed to the appointment of a parenting coordinator to assist with the goal of avoiding further litigation.

Nonetheless, the conflict continued; the record following the adoption of the parenting schedule consists of ten volumes.

On June 19, 2018, Josh filed a motion to hold Elizabeth in contempt for alleged violations of the parenting schedule which included interrupting his vacation with the children, refusing to allow him to have his parenting time on Memorial Day and not allowing him to see the children on Father's Day. Elizabeth filed a response to his allegations and the motion was heard on October 16, 2018.

Elizabeth was examined by Josh's attorney and by her own attorney. Josh did not testify. Her detailed testimony, which continued for over an hour, indicated that a primary source of conflict was coordinating the children's numerous extracurricular sports activities and a summer camp they regularly attended in North Carolina with the parenting and vacation times designated in the agreement. Elizabeth also testified at some length about a dispute regarding the children's attendance at Josh's family picnic.

At that point in the proceedings, the family court expressed its frustration with both parties' inability to compromise and work together. Ultimately, the family court concluded that they had set up a schedule that was unworkable and doomed to fail because it was designed for individuals who had the ability to co-parent. In an effort to reduce the level of animosity between Elizabeth and Josh, the court suggested they instead create strict rules and

guidelines and eliminate some of the potential for fruitless negotiation. The family court called the couple's parenting coordinator into the courtroom. In his unsworn testimony, he stated that co-parenting did not work because the parties were unable to make joint decisions. He described their dysfunction as "rampant" and opined that even with an amended parenting schedule, a change in "decisional capacity" was required and should be assigned to someone else. He also suggested the need for a full custodial evaluation by a mental health professional.

The court and the coordinator both expressed concern regarding the deleterious effect of the parties' behavior on their children. The family court calculated ways in which the parenting schedule could be modified to accommodate Josh's summer vacation as well as the children's swimming, field hockey and summer camp, streamlined holiday timesharing and directed the parties to use Family Wizard, a scheduling app, to obviate their need to speak to each other. The court stated that if the new system did not work, the court would order a full custodial evaluation.

During the course of the hearing, Elizabeth raised several objections to specific aspects of the family court's modification of the parenting schedule. Neither party made a general objection to the family court's *sua sponte* decision to modify the schedule without prior notice, nor did either party request a separate evidentiary hearing on the modification.

On October 31, 2018, the family court entered an order modifying the parenting schedule. It extended Josh's alternate weekend parenting time from Sunday afternoon the children's to return to school on Monday morning; in regard to Thanksgiving, it was changed from having Josh and Elizabeth divide the holiday time to giving each the entire holiday in alternating years; it reduced the number of summer vacation days each parent was given from nine to seven and required one parent to schedule vacation in August and in a manner which did not conflict with the children's field hockey practice; it removed the rule that neither parent could use vacation time to have three weekends in a row; and it eliminated the right of first refusal. The order did not directly reference the motion for contempt but did state its order resolved all motions and matters that were before the court at the October 16, 2018, hearing.

Elizabeth filed a motion pursuant to Kentucky Rules of Civil Procedure (CR) 59 and CR 52 to alter, amend and/or vacate the order and for additional findings. She argued that the family court had violated her due process rights in issuing a ruling without allowing her to present evidence against Josh's motion for contempt. She contended that the family court modified the parenting schedule because it was convinced that Elizabeth had violated the decree as alleged by Josh, and therefore the court had found, without explicitly saying so, that she was in contempt of that judgment. She also objected specifically to the following

changes made to the parenting schedule, arguing that she was not given an opportunity to present evidence against the modifications: the extension of Josh's weekend parenting time from Sunday afternoon to the children's return to school Monday morning; the alternating Thanksgiving and Christmas vacation schedules; the reduction of their respective summer vacations from nine to seven days and setting the second vacation in August; deleting the prohibition against either parent having the children three weekends in a row; and deleting the parties' right of first refusal. Elizabeth did not request the family court to make additional findings regarding the best interests of the children.

The family court entered an order specifically finding that Elizabeth's conduct did not create a factual basis for a finding of contempt. The court further stated that it did not need to hear additional evidence to justify the modifications to the parenting schedule, stating that it was fully familiar with the record of the case which had come before the court approximately nineteen times on its motion docket. It further stated that it had "only nominally modified the parenting time provisions and the modifications made are intentionally designed to eliminate significant areas of historical dispute." The family court also granted Elizabeth's motion in part, making further modifications to the Christmas schedule and vacation period. This appeal by Elizabeth followed.

KRS 403.320(3) is applicable to timesharing schedules and provides that the family court "may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child[.]" *See Pennington v. Marcum*, 266 S.W.3d 759, 769 (Ky. 2008), *as modified* (Oct. 24, 2008). The court is provided with the following list of factors to consider in determining the child's best interests:

> (a) The wishes of the child's parent or parents, and any de facto custodian, as to his or her custody;
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> (b) The wishes of the child as to his or her custodian, with due consideration given to the influence a parent or de facto custodian may have over the child's wishes;
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> (c) The interaction and interrelationship of the child with his or her parent or parents, his or her siblings, and any other person who may significantly affect the child's best interests;
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> (d) The motivation of the adults participating in the custody proceeding;
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> (e) The child's adjustment and continuing proximity to his or her home, school, and community;
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> (f) The mental and physical health of all individuals involved;
>
> (g) A finding by the court that domestic violence and abuse, as defined in KRS 403.720, has been committed by one (1) of the parties against a child of the parties or against another party. The court shall determine the extent to which the domestic violence and abuse has affected the child and the child's relationship to each party, with due consideration given to efforts made by a

> party toward the completion of any domestic violence treatment, counseling, or program;
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> (h) The extent to which the child has been cared for, nurtured, and supported by any de facto custodian;
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> (i) The intent of the parent or parents in placing the child with a de facto custodian;
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> (j) The circumstances under which the child was placed or allowed to remain in the custody of a de facto custodian, including whether the parent now seeking custody was previously prevented from doing so as a result of domestic violence as defined in KRS 403.720 and whether the child was placed with a de facto custodian to allow the parent now seeking custody to seek employment, work, or attend school; and
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> (k) The likelihood a party will allow the child frequent, meaningful, and continuing contact with the other parent or de facto custodian, except that the court shall not consider this likelihood if there is a finding that the other parent or de facto custodian engaged in domestic violence and abuse, as defined in KRS 403.720, against the party or a child and that a continuing relationship with the other parent will endanger the health or safety of either that party or the child.

KRS 403.270(2).

"[I]n domestic relations cases, post-decree motions concerning visitation and timesharing modifications are 'actions tried upon the facts without a jury,' CR 52.01, which require specific findings of fact and separate conclusions of law, followed by an appropriate judgment." *Anderson v. Johnson*, 350 S.W.3d 453, 454 (Ky. 2011). On appeal, we review the trial court's findings of fact only to

determine if they are clearly erroneous. CR 52.01. "A finding of fact is clearly erroneous when it is not supported by substantial evidence." *Kindred Nursing Centers Ltd. Partnership v. Brown*, 411 S.W.3d 242, 246 (Ky. App. 2011) (citation omitted). "Substantial evidence has been defined as that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person." *Id*. (citation omitted). "Every case will present its own unique facts, and the . . . modification of visitation/timesharing must be decided in the sound discretion of the trial court." *Pennington*, 266 S.W.3d at 769. The test for abuse of discretion is whether the trial court's decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Miller v. Eldridge*, 146 S.W.3d 909, 914 (Ky. 2004) (citation omitted).

Elizabeth argues that her due process rights were denied when the family court modified the parenting schedule without prior notice and without holding an evidentiary hearing. She contends that the changes made by the family court were not raised by the parties or addressed at the hearing, no evidence was adduced regarding these changes, and the family court made no findings regarding the best interests of the children as required by the statute. She contends the family court was simply motivated by its desire to reduce the number of appearances by the parties before the court rather than by concern for the children's best interests.

"Due process requires, at the minimum, that each party be given a meaningful opportunity to be heard." *Lynch v. Lynch*, 737 S.W.2d 184, 186 (Ky. App. 1987) (citations omitted).

KRS 403.320(3) makes no mention of a mandatory evidentiary hearing. *Miranda v. Miranda*, 536 S.W.3d 196, 200 (Ky. App. 2017). The hearing conducted by the family court was initially intended to address only Josh's motion to find Elizabeth in contempt. It became clear as the hearing progressed, however, that the family court intended to resolve what it perceived as the underlying problem, which was the ongoing intractable conflict stemming from the parties' inability to compromise in following the timesharing schedule. The family court ascribed fault to both parties and outlined its plan for a new schedule. At no time were the parties unable to participate in the discussion and indeed counsel for Elizabeth and Josh discussed the specifics of the schedule with the family court. At no point did either party request another evidentiary hearing on the modifications to the timesharing schedule. As we have already noted, neither party requested the parenting coordinator to testify under oath nor did they ask to examine him.

At the hearing, the court focused primarily on creating a workable schedule for the summer months which would accommodate vacation time for both parents as well as the children's sports activities and camp. In its written order,

however, the court made additional changes to the parenting schedule which were not discussed at the hearing. For instance, Josh's weekend parenting time was extended until the children's return to school on Monday morning, the Thanksgiving and Christmas schedules were modified, and the three consecutive weekend rule and the right of first refusal rule were stricken. On the other hand, the family court did notify the parties that it was going to put strict rules and guidelines in place and the only alternative if these did not work was to appoint a friend of the court and implement a "50/50" schedule which would not accommodate the children's extracurricular activities. The parenting coordinator expressed skepticism that even a modified schedule would work because the parties were incapable of making joint decisions and recommended a change in "decisional capacity." The court told the parties they had "burned out" the parenting coordinator and the modified schedule it was putting in place would be their last chance to improve before the court ordered a full custodial evaluation.

The facts elicited at the hearing support the family court's view of the situation as a crisis which had to be resolved. The court put the parties on notice the modified schedule would be their final opportunity to continue co-parenting. Under the circumstances, the family court did not violate Elizabeth's due process rights by providing a reasonable alternative to a full custodial evaluation and the possible removal of decision-making from the parties.

As to Elizabeth's contention that the family court failed to consider the children's best interests as required by KRS 403.270(2), the record shows the court very clearly expressed both at the hearing and in its subsequent orders that the continuous conflict between Elizabeth and Josh over the schedule would have a negative impact on the children's emotional wellbeing. The family court specifically found that the animosity of the parties towards each other appeared to outweigh their love for their children, a finding which relates directly to KRS 403.270(2)(d): "The motivation of the adults participating in the custody proceeding[.]" The family court specifically cited the parenting coordinator's recommendation that a mental health professional perform a custodial evaluation in order to facilitate the parties' ability to co-parent, a finding which relates directly to KRS 403.270(2)(f): "The mental and physical health of all individuals involved[.]"

Finally, the circumstances of this case are distinguishable from those in the unpublished opinions cited by Elizabeth in which due process violations were held to have occurred. In *Heaston v. Smith*, the appellant's petition for a DVO was dismissed after the family court found she lacked credibility, and citing time restraints, did not allow the appellee's counsel to complete his examination of witnesses or allow the appellant to cross-examine the appellee. *Heaston v. Smith*, No. 2013-CA-000113-ME, 2013 WL 5522825, at *10 (Ky. App. Oct. 4, 2013). A

panel of this Court reversed, citing the immense impact a DVO has on individuals and family life, and holding that the appellant was not afforded due process because the hearing was so truncated. *Id*. In *Osborne v. Osborne*, the family court's finding of indirect criminal contempt was reversed because it was based on findings about events that occurred outside the courtroom and without an evidentiary hearing, thus violating the appellant's due process rights, as "all elements of the contempt must be proved during the evidentiary hearing beyond a reasonable doubt." *Osborne v. Osborne*, No. 2008-CA-000502-MR, 2009 WL 414460, at *3 (Ky. App. Feb. 20, 2009).

Although a parenting schedule is of great significance to parents and children, the relatively minor modifications to the schedule made by the family court in this case do not implicate the parties' rights to the same extent as the denial of a DVO or the imposition of indirect criminal contempt. Elizabeth acknowledges that under local Jefferson Family Court Rule ("JCFR") 705, a parenting coordinator is empowered to modify a parenting schedule without conducting any hearing whatsoever. Under the circumstances, the family court provided the parties an adequate and meaningful opportunity to be heard before modifying the schedule, especially in light of the exigent circumstances of the case.

The orders of the Jefferson Family Court modifying the parenting schedule are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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