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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000958-ME

JOHN BARNETT APPELLANT

v. APPEAL FROM MONROE CIRCUIT COURT
HONORABLE DAVID L. WILLIAMS, JUDGE
ACTION NO. 14-CI-00114

BRITTANY WHITE APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, NICKELL AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: John Barnett appeals from the Monroe Circuit Court's custody decree, which denied him a 50/50 timesharing split with his child on the basis that he and the child's mother had difficulty cooperating. As the circuit court properly acted within its discretion in determining the best interest of the child, we affirm.

Brittany White and John Barnett were cohabitating when their daughter, E.B., (child) was born in December 2013. Five weeks after child's birth, Brittany moved out with child. After paternity was established in a Monroe District Court action in May 2014, John began having visitation with child and paying child support.[1]

In September 2014, approximately nine months after child's birth, John filed a petition in circuit court seeking joint custody and equal timesharing. He also requested temporary visitation.

Brittany opposed the motion, stating it was in child's best interest that Brittany be granted sole custody of child, be named the primary residential custodian of child and John's visitation be suspended until he could prove himself to be a proper caregiver. She requested that John be required to undergo extensive parental training.

In October 2014, an agreed order on visitation was entered granting John one day of visitation every other weekend for eight hours, to be supervised by John's mother.

In May 2015, the domestic relations commissioner (DRC) recommended that Brittany and John be awarded joint custody with Brittany being

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[1] We do not have the records from the paternity action before us and must rely on what the parties and the circuit court tell us occurred in that action. John states that it was he who filed the paternity action.

named as primary residential custodian and John having timesharing according to the model timesharing guidelines for the 40th Judicial Circuit (model guidelines), with child support to continue as ordered in the paternity action.

Brittany filed exceptions to the DRC's report and recommendation, arguing John should not be granted joint custody because he had "exhibited extreme behavior that makes it impossible for the parties to work together in the best interests of child" resulting in "numerous hearings on mundane items" based on "the acrimonious relationship that is the result of [John's] bullying and intimidating tactics" and he should not be granted overnight visits of 48 hours given that he had not had overnight visits before. John urged adoption of the DRC's recommendations.

In June 2015, an agreed order was entered for a temporary adoption of the DRC's recommendations with the caveat that "[a]ll [of] John's overnight visits are to take place in the home of [his] parents," and the case would be reviewed later to determine whether it should be made a permanent custody and timesharing order. In October 2015, an agreed order was entered modifying holiday timesharing.

In February 2016, Brittany filed a motion for contempt, arguing John was harassing her by calling and texting requested changes to visitation, being late to return child, not showing up for an exchange, demanding the exchange of the

child despite unsafe winter conditions and then coming to her home and blowing his horn and calling her. John denied most of the allegations, arguing he wished to spend time with child when Brittany was working and asserted there were no hazardous road conditions preventing visitation. The circuit court determined neither party was in contempt and ordered each party to strictly adhere to the timesharing guidelines and at all times do what was in the best interest of child.

In April 2017, the circuit court adopted the DRC's temporary order from May 2015, which granted joint custody and provided John with timesharing under the model guidelines.

In May 2017, John filed a motion to modify the temporary order on timesharing to a 50/50 schedule. John argued he was more capable of caring for child now that she was three years old, he did not need direct supervision and he was hindered by Brittany from being involved in child's life. The matter was once more referred to the DRC.

In December 2017, the DRC issued a report and recommendation on what permanent custody and timesharing order should be adopted. The DRC found that parents stipulated no supervision is required during John's time with child, both John and Brittany agreed that communication between them has improved and Brittany agreed John should have additional time with child. The DRC noted that although this was not a motion for temporary custody, it did

consider the presumption contained in Kentucky Revised Statutes (KRS) 403.280(2) that both parties should enjoy equal timesharing. The DRC recommended that the parties be granted equal timesharing.

Brittany filed exceptions which included her objection to the equal timesharing presumption being considered in assigning timesharing in their permanent custody order. She argued equal timesharing is not favored for small children and argued that although parents' relationship had improved, it had not improved to the extent that equal timesharing would work or be appropriate. John responded that equal consideration should be given to each parent and equal timesharing is encouraged with the 2017 amendment to KRS 403.280(2) which governs temporary custody.

The matter came up for a hearing on January 18, 2018. The circuit court commented that it was not convinced that it was appropriate to change the existing timesharing to equal timesharing based on parents' improved relationship and father's being a good parent. The circuit court stated that while equal consideration was being given to both parents, the court did not favor equal timesharing. The circuit court repeatedly urged the parties to try to reach a negotiated settlement on timesharing and to try to get along with one another because as child matured she would soon understand and be impacted by parents' ongoing conflict.

In its written order entered on April 12, 2018, the circuit court overruled the recommendations of the DRC. While acknowledging the current trend toward equal timesharing, the court opined "structure and stability are paramount during a child's formative years and a 50/50 split can often be detrimental to such objectives and not in the best interest of the child." The court then decided "at this time a 50/50 split is not in the best interest of child, but a visitation schedule that maximizes [John's] time with the child is."

Brittany and John were awarded joint custody with Brittany being named the primary residential custodian and John to have timesharing for two overnights each week on the following rotating schedule: on week one from 6 p.m. on Friday to 6 p.m. on Sunday and on week two from 6 p.m. on Wednesday until 6 p.m. on Friday. In addition to the rotating schedule, Brittany and John were to observe a standard holiday visitation schedule. John was ordered to pay child support.

John filed a timely motion to alter, amend or vacate. He argued that there was nothing in the record which should prevent him from having equal time with child. He argued child would inevitably have a split home because he and Brittany were never married and because there was no evidence that one parent was better suited to caring for child than another, they should have equal timesharing. He argued he did not receive maximized time with child where he

only gained about an additional visitation day a month over the model guidelines. He argued that the circuit court erred in failing to cite to specific findings of fact from the hearing to overcome the 50/50 schedule recommended by the DRC.

On May 17, 2018, a hearing was held on the motion to alter, amend or vacate. The circuit court orally granted John's motion, stating that it was the better practice to give more specificity as to why equal timesharing was not being granted. Multiple times the circuit court urged parents to reach an agreement, indicating that the timesharing was not going to be 50/50 and they needed to improve their relationship for the sake of the child. The circuit court also heard testimony from Brittany that John failed to return child at 8 a.m. as required for Mother's Day and eventually she had to get the sheriff involved to enforce getting child. John testified it was his weekend and he did not realize Brittany was supposed to have child at that time. That same day, the order granting the motion to alter, amend or vacate was entered.

Meanwhile, an amended version of KRS 403.270, which governs final custody orders, went into effect on July 14, 2018. This amendment added the following language to KRS 403.270(2):

> Subject to KRS 403.315, there shall be a presumption, rebuttable by a preponderance of evidence, that joint custody and equally shared parenting time is in the best interest of the child. If a deviation from equal parenting time is warranted, the court shall construct a parenting time schedule which maximizes the time each parent or

> de facto custodian has with the child and is consistent with ensuring the child's welfare.

In its amended order, entered on July 27, 2018, the ultimate results were the same, but the circuit court provided additional reasoning to justify the outcome.

> This Court agrees with [Brittany] that structure and stability are paramount during a child's formative years and a 50/50 split can often be detrimental to such objectives and not in the best interest of the child, especially when the parties' relationship is of a toxic nature. At the DRC hearing, [John] admitted that in the past the parties did not have a good working relationship or communication, but both parties testified that their relationship had improved. While this Court is encouraged by the healthier attempts at cooperation, it is not convinced that the newly mended relationship has endured the test of time or the pressures of a 50/50 custody split. These concerns are supported by the text message exchange reported by [Brittany] in her Exceptions. The communication exhibited in this interchange indicates a current instability that would be detrimental to a child's best interest. This Court would note that it accepts the [DRC's] findings that [John] loves his [child] and enjoys spending time with her, but that alone is not enough to achieve healthy, positive co-parenting. This Court does not fundamentally depart from the DRC's facts, but only from the legal conclusions drawn therefrom, and this is not a denial of due process[].

The circuit court rejected John's interpretation that its discretion was limited in how it used the DRC's report. It then reiterated:

> Due to the enduring tensions in the parties' relationship and based upon the facts of this case and the

> testimony presented to the Commissioner, this Court is of the opinion that at this time a 50/50 split is not in the best interest of the child. [John] was not involved in the child's life for the first four months and has since exercised standard visitation, with supervised visitation being exercised initially. Uprooting a very young child and placing her in a 50/50 time-sharing schedule with parents who have yet to prove the longevity of their amiableness is a risk this Court is not willing to take at this time. The Court is of the opinion that a visitation schedule that maximizes [John's] time with the child without causing turmoil in the child's life is what is in the child's best interest at this time. This does not preclude a reconsideration of the 50/50 time-sharing at some point in the future.

On appeal, we are reviewing the custody decree which includes the decision to make Brittany the primary residential custodian and to award John timesharing which exceeds that specified in the model guidelines but is significantly less than 50/50 timesharing. This was the first final order as prior to this time the parties were operating under a temporary custody order.

We review this decision as to primary residential custodian and timesharing under the best interest standards of KRS 403.270(2) because this determination was made as part of the custody decree. *Frances v. Frances*, 266 S.W.3d 754, 756 (Ky. 2008); *Chappell v. Chappell*, 312 S.W.3d 364, 366 (Ky.App. 2010).

Trial courts have broad discretion to decide custody and timesharing. *Jones v. Livesay*, 551 S.W.3d 47, 51 (Ky.App. 2018). In reviewing a decision as to

where a child will primarily live, we must give a great deal of deference to both the trial court's findings of fact and discretionary decisions. *Frances*, 266 S.W.3d at 758. The trial court is in the best position to resolve the conflicting evidence and make the determination that is in the child's best interest. *Id.* at 758-59. So long as the trial court properly considers the mandate of KRS 403.270, including giving due consideration to all relevant factors, we will defer to its decision if it is neither clearly erroneous nor an abuse of discretion. *Id.* at 759.

John argues on appeal that we should apply the present version of KRS 403.270(2) as it became effective prior to the entry of the final amended order, and when (2) is applied it is evident that the circuit court abused its discretion in determining that equal parenting time was not in child's best interest. John argues that the circuit court did not properly apply either version of KRS 403.270 in considering the best interest of child, specifically arguing: the circuit court erred by focusing on the lack of visitation for four months after Brittany moved out, which resulted in the need for John to file a paternity action and ask for visitation, as well as past difficulties in cooperation which had largely resolved by the time of the DRC's hearing; any past difficulties did not provide a reason to favor either parent with more timesharing; and he was wrongfully disfavored because child is female and has resided with Brittany since birth and this should not be enough to deny him equal parenting time or at least a substantial increase in

his parenting time. John requests a reversal for a grant of equal parenting time pursuant to the current version of KRS 403.270(2), or a reversal for the circuit court to apply KRS 403.270(2) to meaningfully maximize his time with child.

We affirm because under either version of KRS 403.270(2), the circuit court properly exercised its discretion in determining that equal timesharing was not appropriate. In both versions of the statute, the trial court is given a wide amount of latitude in deciding the best interest of the child as to custody and timesharing as it "shall consider all relevant factors[.]" KRS 403.270(2). Therefore, the trial court is not limited to the eleven enumerated factors for best interest listed in KRS 403.270(2)(a) through (k).

Although John argues the circuit court used the fact that John had no visitation with child for four months against him, we disagree that this fact was unfairly used against John. While the circuit court summarized the history regarding John's involvement in child's life, this was done as background for how the court arrived at the present juncture. It is relevant that John was not in child's life for a period of time (regardless of who was responsible for this lack of involvement). It is relevant that when he began to have visitation, it was limited to supervised visitation and that this visitation was then expanded to model guideline timesharing. This history showed that granting John 50/50 timesharing would be vastly increasing his involvement from what it had been before and that even his

standard model guideline timesharing was not of longstanding duration. It was not error to consider this in determining what was in child's best interest.

John's insinuation that he was discriminated against because he is male is completely unsupported by the record and without merit. Time and time again when Brittany brought up examples of John's obstreperous behavior, the circuit court refused to assign blame to John and continually urged the parties to try to get along. John and Brittany were simply in different positions relative to child based on the level of care they previously exercised.

The parents' ability to get along with one another can certainly be considered as a relevant factor in determining whether equal timesharing is in child's best interest. While there are no published cases discussing parents' inability to cooperate as a basis for granting one parent status as the primary residential custodian over the other or as a reason for denying 50/50 timesharing, inability to cooperate has been considered when courts are deciding whether to award joint or sole custody. While joint custody should not be automatically rejected where parents cannot cooperate at present, especially if they are in the midst of a divorce, joint custody can be appropriate if it appears that with time parents will be able to achieve an acceptable level of cooperation. *Squires v. Squires*, 854 S.W.2d 765, 768-69 (Ky. 1993). An award of sole custody is proper when a parent cannot cooperate in making joint decisions affecting the children

with the other parent and seeks to control the other parent's behavior. *See e.g. Gertler v. Gertler*, 303 S.W.3d 131, 135-36 (Ky.App. 2010).

If problems with cooperation can provide a reason to reject joint custody and award sole custody to one parent, this can certainly be an appropriate consideration in determining that 50/50 timesharing is not in a child's best interest. While John's and Brittany's animosity toward each other was understandable in the period immediately following the termination of their romantic relationship, there was ample evidence that John and Brittany continued to experience problems getting along and exchanging their child even three years later. Like the circuit court, we are encouraged that John's and Brittany's relationship seems to have improved, but there are still demonstrated ongoing issues. The inability of parents to cooperate would make a 50/50 timesharing arrangement impractical and problematic. Parents were repeatedly before the court regarding problems with jointly parenting and exchanging their child. Every time, the circuit court urged parents to cooperate and resolve their differences for the sake of child. There was no abuse of discretion in the circuit court's determining that while conflicts of this type continued (even if there was improvement in the amount and severity of the conflicts over the past), equal timesharing was not in child's best interest.

While the circuit court did not rely on the new version of KRS 403.270(2), any error in this regard is harmless as the standard it sets out was

undoubtedly satisfied under these facts and the circuit court's analysis and application of the law to them. While the new version of KRS 403.270(2) puts a finger on the scale in favor of joint custody and equal timesharing by requiring only a preponderance of evidence to overcome, such a preference is a slight burden and the trial court continues to possess broad discretion in determining the best interest of the child as to who should have custody and where the child shall live.[2]

It has long been recognized that "the trial court has considerable discretion to determine the living arrangements which will best serve the interests of the children." *Drury v. Drury,* 32 S.W.3d 521, 525 (Ky.App. 2000). That discretion is not altered by the change in KRS 403.270(2) once an appropriate ground is established in favor of deviation from 50/50 timesharing. Undoubtedly parents' lack of cooperation was sufficient to establish by a preponderance of the evidence that the best interest of child would be best served by adopting an unequal timesharing arrangement.

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[2] Essentially, the change in the law as to custody is a codification of the interpretation in *Chalupa v. Chalupa*, 830 S.W.2d 391, 393 (Ky.App. 1992), which was rejected in *Squires*, 854 S.W.2d at 770, that "the best interest of the child leads this Court to interpret the child's best interest as requiring a trial court to *consider* joint custody first, before the more traumatic sole custody." Similarly, the requirement that "[i]f a deviation from equal parenting time is warranted, the court shall construct a parenting time schedule which maximizes the time each parent . . . has with the child and is consistent with ensuring the child's welfare," KRS 403.370(2), appears to codify the oft-cited statement in *Drury v. Drury,* 32 S.W.3d 521, 524 (Ky.App. 2000), that "[a] visitation schedule should be crafted to allow both parents as much involvement in their children's lives as is possible under the circumstances."

The circuit court is also given a great deal of discretion in deciding what schedule deviating from equal parenting time is warranted which will maximize the time each parent has with the child and be consistent with ensuring the child's welfare. "Unfortunately, in custody proceedings it is seldom possible for a trial court to impose a [timesharing] regime which makes both parties happy. For this reason, matters involving [timesharing] rights are held to be peculiarly within the discretion of the trial court." *Drury*, 32 S.W.3d at 526.

John was granted two overnights a week which is sufficient to promote his relationship with child while promoting stability for child by continuing Brittany's role as her primary caregiver. We do not doubt that the circuit court was being genuine when it indicated that should parents establish a more productive working relationship which stands the test of time, it would be willing to entertain a more equal division of timesharing.

Accordingly, we affirm the Monroe Circuit Court's custody decree providing John with less than a 50/50 timesharing split based on parents' inability to cooperate.

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