

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-001477-MR

DEVON LITTLE

APPELLANT

APPEAL FROM BREATHITT CIRCUIT COURT  
FAMILY COURT DIVISION  
v. HONORABLE LARRY MILLER, JUDGE  
ACTION NO. 08-CI-00418

ISHMAEL DWAYNE LITTLE

APPELLEE

OPINION  
AFFIRMING

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BEFORE: MOORE, TAYLOR, AND THOMPSON, JUDGES.

TAYLOR, JUDGE: Devon Little brings this appeal from a July 31, 2009, Findings of Fact, Conclusions of Law and Decree of Dissolution of the Breathitt Circuit Court, Family Court Division awarding the parties joint custody of their minor child and awarding nearly equal timesharing. We affirm.

Devon and Ishmael Dwayne Little (Dwayne) were married July 12, 2007. One child, Hayden Paul Dwayne Little, was born during the marriage. The parties were divorced by decree of dissolution of marriage entered in the Breathitt Circuit Court, Family Court Division on July 31, 2009. Pursuant to the decree, Devon and Dwayne were awarded joint custody of Hayden, and neither party was designated the primary residential parent. The decree further provided that Devon and Dwayne would follow a “time sharing arrangement . . . as follows; with Week 1 and Week 2 alternating:”

WEEK 1

Petitioner, Ishmael Dwayne Little, shall have physical custody of the child beginning Sunday at 8:00 a.m. until Wednesday at 7:00 a.m.

Respondent, Devon Michelle Little, shall have physical custody of the child the remainder of the week.

WEEK 2

Petitioner, Ishmael Dwayne Little, shall have physical custody of the child beginning Sunday at 7:00 p.m. until Wednesday at 7:00 a.m.

Respondent, Devon Michelle Little, shall have physical custody of the child the remainder of the week.

Holidays and the child’s birthday shall be divided according to the usual schedule of the 39<sup>th</sup> Judicial Circuit. A copy of which is attached hereto.

Each party may have such additional timesharing with their minor child as they may agree upon.

Being dissatisfied with the custody and timesharing arrangement, Devon pursues this appeal.

Devon contends that the family court erred by failing to designate her as the primary residential parent and by ordering nearly equal timesharing with Hayden. Devon asserts that Hayden has a close bond with Devon's prior born child, Harley, and Devon's extended family. Devon further asserts that Hayden would benefit from a timesharing schedule that provided more stability. To achieve same, Devon argues that she should be designated the primary residential parent of Hayden and that Dwayne should have standard visitation (every other weekend, every Wednesday night and alternating holidays). Essentially, Devon is seeking an award of shared custody as opposed to joint custody.<sup>1</sup> See *Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008).

Under Kentucky Revised Statutes (KRS) 403.270(2), a court is directed to “determine custody in accordance with best interests of the child” with equal consideration given to each parent. In addition, the court is to consider “all relevant factors including:”

- (a) The wishes of the child's parent or parents, and any de facto custodian, as to his custody;
- (b) The wishes of the child as to his custodian;

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<sup>1</sup> In *Pennington v. Marcum*, 266 S.W.3d 759, 764 (Ky. 2008), the Supreme Court held that shared custody was a “subset of joint custody that combines the concept of joint custody with some of the patterns of sole custody.” The Court explained that in shared custody one parent is typically named primary residential parent and timesharing usually “mirrors a typical sole custody pattern where the child may live with one parent during the week and reside with the other on alternate weekends.” *Id.* at 764-765.

- (c) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;
- (d) The child's adjustment to his home, school, and community;
- (e) The mental and physical health of all individuals involved;
- (f) Information, records, and evidence of domestic violence as defined in [KRS 403.720](#);
- (g) The extent to which the child has been cared for, nurtured, and supported by any de facto custodian;
- (h) The intent of the parent or parents in placing the child with a de facto custodian; and
- (i) 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.

KRS 403.270(2). Our review of the circuit court's custody award is limited to whether the court's findings of fact are clearly erroneous or whether the court abused its discretion in reaching those findings. *Eviston v. Eviston*, 507 S.W.2d 153 (Ky. 1974); *Frances v. Frances*, 266 S.W.3d 754 (Ky. 2008). A finding of fact is clearly erroneous if not supported by substantial evidence of a probative value. *See Hunter v. Hunter*, 127 S.W.3d 656 (Ky. App. 2003). Our review shall proceed accordingly.

In the case at hand, the record reveals that both parties enjoyed a close relationship with Hayden and that both parties were well-suited to care for him. Regardless of which parent had physical possession of Hayden, Devon's sister provided care for him during the daytime hours while the parties worked. Devon's sister also cared for Devon's prior born child, Harley, which allowed the two children to maintain regular contact even during Dwayne's designated time with Hayden. Devon also graciously allowed Dwayne to exercise some visitation with Harley; this visitation also provided an opportunity for the children to spend time together. Both parties specifically testified that the other was a good parent to Hayden. There were no issues of domestic violence or mental/physical health.

Based upon our review of the record, we do not believe the family court's findings of fact were clearly erroneous or that the court abused its discretion by determining that a nearly equal timesharing arrangement without designating a primary residential parent was in the child's best interests. As such, we hold that the family court did not commit error by awarding the parties' joint custody with nearly equal timesharing.

For the foregoing reasons, the Findings of Fact, Conclusions of Law and Decree of Dissolution of the Breathitt Circuit Court, Family Court Division, is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Michael A. Stidham  
Jackson, Kentucky

BRIEF FOR APPELLEE:

Dawn R. Watts  
Jackson, Kentucky