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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2007-CA-002280-ME

BRIAN STROSNIDER — APPELLANT

v.

APPEAL FROM GREENUP FAMILY COURT
HONORABLE JEFFREY L. PRESTON, JUDGE
ACTION NO. 05-CI-00599

REBECCA GWINN — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER AND TAYLOR, JUDGES; GUIDUGLI,[1] SENIOR JUDGE.

KELLER, JUDGE: Brian Strosnider[2] ("Brian") has appealed from the Greenup Family Court's award of visitation with his minor son, asserting that he was provided with substantially reduced parenting time than he had been receiving

[1] Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky constitution and KRS 21.580.

[2] As mentioned in Footnote 1 of Brian's brief, his last name was misidentified as "Stosnider" rather than "Strosnider" throughout the family court's record. We shall utilize the correct spelling of his name in this opinion.

under an arrangement reached between Brian and his son's mother, Rebecca Gwinn ("Becky"). We affirm.

Brian and Becky, who have never married, are the biological parents of Jacob Connor Strosnider, born March 24, 2003. When Jacob was two months old, Brian filed a Petition for Custody in Boyd Circuit Court,[3] where Brian lived and Jacob was born. Brian requested either physical custody or visitation on his days off from work. On June 6, 2003, the circuit court entered an order permitting Brian to have visitation with Jacob on a temporary basis from 10:00 a.m. to 5:00 p.m. on Mondays and Tuesdays.[4] Becky filed a counterclaim, requesting custody and child support. On June 27, 2003, the circuit court ordered Brian to pay Becky $580 per month in child support. Nothing happened in the case for more than two years, until Brian retained a new attorney and filed an amended Petition for Custody on September 20, 2005. Since April 2004, Brian, Becky, Jacob, and Becky's older son, Joshua, had been living in Brian's house in Flatwoods, Greenup County, Kentucky. During that time, Brian continued to pay Becky child support.[5] Becky moved out of Brian's home when he filed his amended petition, and bought a house in Worthington, Kentucky, near her mother.

Becky moved for a change in venue, as they were all permanent residents of Greenup County. The motion was granted, and the matter was

[3] 03-CI-00469.

[4] This order was set aside, on Brian's motion, on September 23, 2005.

[5] When Becky started working at Peoples Bank, Brian's child support obligation was reduced to $480 per month.

transferred to Greenup Family Court on September 30, 2005. The case languished in the family court until a Notice to Dismiss for Lack of Prosecution was entered on April 19, 2007. A status conference was held on June 20, 2007, when the family court entered an Agreed Order scheduling a portion of Brian's yearly visitation with Jacob from July 8 through July 18, 2007. The family court also scheduled a hearing on the merits for July 24, 2007.[6] That hearing took place over two days, July 24 and August 7, 2007. Over the course of those two days, the family court heard testimony from Brian, Becky, Brian's parents, Becky's mother and sister, and several of Brian's and Becky's friends and acquaintances. Throughout the testimony, it was undisputed that both Brian and Becky are good parents to their son.

Much of the testimony presented at the hearing centered on the agreed upon visitation schedule that had been in effect since Becky moved out in September 2005. We note that this agreement had never been reduced to a written court order, and that no court had ever entered a permanent order concerning custody or visitation. We shall attempt to summarize that schedule here. We note that Brian is a supervisor at CSX, where he works second shift from 2:00 p.m. to 11:00 p.m. from Wednesday to Saturday and from 6:00 a.m. to 3:00 p.m. on Sunday. Becky works full-time Monday through Friday until 5:00 p.m. at Peoples Bank in Ashland. During a typical week, Brian would get Jacob between 6:30 a.m.

[6] In the hearings that followed, there was testimony concerning the June 20, 2007, hearing. However, that hearing was not designated to be part of the record on appeal and accordingly was not included in the certified record.

and 7:30 a.m. on Monday and would keep him until Wednesday at 2:00 p.m. Brian's parents would watch Jacob each Wednesday afternoon until Becky picked him up when she completed work for the day. Brian would also have Jacob on Thursday and Friday from 6:30 a.m. or 7:30 a.m. until 2:00, when he went to work. His parents or Becky's mother would watch Jacob until Becky completed her work for the day. Becky would then have Jacob on Saturday and Sunday, her days off. Based on this schedule, Becky would have Jacob overnight from Wednesday through Sunday.

During his testimony, Brian indicated that he wanted the family court to award him time with Jacob on Mondays and Tuesdays, to award Becky time with Jacob on Wednesdays and Thursdays, and for the parties to alternate the remainder of the week (Fridays, Saturdays, and Sundays). Brian also requested time with Jacob for the first and second weeks of both June and July. During her testimony, Becky indicated that she wanted the schedule with Jacob to continue as it had been. We note that at the time of the hearing, Jacob was four-years-old and was scheduled to start preschool in August.

On August 8, 2007, the family court entered an order awarding joint custody and establishing a visitation schedule. The pertinent part of that order is as follows:

> Based on the evidence presented at the hearing herein the Court finds it would be in the best interest of the child to grant the parties joint custody. Both parents are good parents and appear to be reasonable people. . . . The Court finds that the pattern in the past established by

> the parties is that Mr. Stosnider [sic] would receive the child Monday morning between 6:30 – 7:00 a.m. until Wednesday evening when Ms. Gwinn would pick up the child. With Jacob starting school this fall it is not fair to him to require the child to be taken to the father's home on Thursday and Friday morning and then brought back to the mother that evening. Also, Mr. Stosnider [sic] works Wednesday through Sunday and Monday and Tuesday are his days off. Jacob would be able to spend more time with a parent under this arrangement. Because of the stability that is needed in Jacob's life, the Court finds it would be in the best interest of Jacob to grant primary residential custodian [status] to Ms. Gwinn and secondary residential custody to Mr. Stosnider [sic] with Mr. Stosnider [sic] receiving the child from Monday morning between 6:30 – 7:30 a.m. until Wednesday when Ms. Gwinn gets off work. Ms. Gwinn would then have custody of the child until the following Monday morning. The parties are ordered to follow the Greenup County Visitation Guidelines in regards to holiday visitation. Mr. Stosnider's [sic] request to have the child the first two weeks of June and the first two weeks of July for his summer visitation time with the child is granted. The Court has utilized the factors in KRS 403.270 in determining this custody arrangement.

The family court then ordered Brian to pay Becky $595 per month in child support and allowed the parties to alternate the tax exemption for Jacob from year to year. The family court also restrained Brian from contacting Becky at home or at work, except to arrange visitation. Regarding transportation, Brian was ordered to pick Jacob up on Monday mornings and Becky was to pick him up on Wednesday evenings. Finally, the family court reminded Brian and Becky that each of them had the responsibility to get Jacob to school on the days that each had custody of him.

Brian filed a motion to alter, amend, or vacate the family court's order on two grounds. The first addressed his interpretation of the family court's order restraining him from contacting Becky by telephone, in that it appeared he was being prohibited from contacting Jacob while he was with Becky. Brian requested that he be permitted one call per day to Jacob when they were not together. The second ground was based upon Brian's assertion that the family court's visitation schedule greatly reduced the time he was able to spend with Jacob. Although not supported by way of affidavit or testimony, Brian disclosed for the first time in his motion that Jacob's preschool started at 12:00 p.m. and that there was no preschool on Fridays. Accordingly, Brian requested time with Jacob on Thursdays from between 6:30 a.m. to 7:30 a.m. until Jacob's preschool started at noon and on Fridays from the same time until Becky completed work.[7] In addition, Brian requested time with Jacob every other Sunday starting at 3:30 p.m., which would extend through Wednesday. Becky objected to Brian's motion, asserting that his arguments regarding visitation were merely a re-argument of the issues already decided. In an order entered September 5, 2007, the family court allowed Brian one fifteen-minute telephone call with Jacob at 7:00 p.m. each day they were not together. However, it denied Brian's motion in all other respects. This appeal followed.

On appeal, Brian continues to argue that the family court denied his request for equal and shared parenting time by impermissibly reducing his

[7] We assume that Brian's parents or Becky's mother would watch Jacob from the time Brian went to work until Becky picked him up after work.

visitation time with Jacob. During their prior arrangement, Brian calculated that he had Jacob for 73 hours per week (43% of the time); his parents had him for 10.5 hours (6 % of the time); and Becky had him for the remaining 84.5 hours (51% of the time). With its order, Brian contends that his and his parents' time with Jacob was reduced to 59 hours per week (35% of the time). In support of his argument, Brian states that the family court's findings of fact were contrary to the evidence, and therefore do not support a valid custody decision under KRS 403.270. Furthermore, Brian argues that the family court failed to properly apply the statutory factors as set forth in KRS 403.270. In her brief, Becky contends that Brian's motivation for 50/50 parenting status is merely an attempt to avoid paying, or to substantially reduce, child support. She also argues that the family court's ruling recognizes that Jacob is getting older and will be starting full-time school; the ruling was not made for the sole purpose of reducing Brian's time with Jacob.

Kentucky Rules of Civil Procedure (CR) 52.01 sets out our standard of review:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment. . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

In *Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003), the Supreme Court of Kentucky addressed this standard, holding that a reviewing court may set aside findings of fact

> only if those findings are clearly erroneous. And, the dispositive question that we must answer, therefore, is whether the trial court's findings of fact are clearly erroneous, i.e., whether or not those findings are supported by substantial evidence. "[S]ubstantial evidence" is "[e]vidence that a reasonable mind would accept as adequate to support a conclusion" and evidence that, when "taken alone or in the light of all the evidence, . . . has sufficient probative value to induce conviction in the minds of reasonable men." Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses" because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court. Thus, "[m]ere doubt as to the correctness of [a] finding [will] not justify [its] reversal," and appellate courts should not disturb trial court findings that are supported by substantial evidence. [Citations omitted.]

*Id.* at 354. With this standard in mind, we shall review the trial court's decision.

In his first argument, Brian contends that the family court's findings are not supported by the evidence. He asserts that the three grounds the family court stated for its award (fairness to Jacob; that Jacob would spend more time with a parent under the arrangement; and stability) are not borne out by the evidence. As the record stands, we disagree with Brian's assertion. What the family court knew when it entered its order was that Jacob was starting preschool in the fall of 2007; the testimony at the hearing clearly establishes this uncontested fact. What the family court did not know was when Jacob's preschool was held; there was no testimony or other evidence in the record to establish either the days Jacob would be attending preschool or the hours his preschool class was in session.

Thus, the family court was free to believe that Jacob would be attending all-day preschool five days per week, which clearly supports its visitation arrangement. Had the family court been aware of the actual circumstances of Jacob's preschool through supporting evidence, its decision might very well have been different. We note that Brian did not include an affidavit or other documentary evidence in his motion to alter, amend, or vacate to support his statement in his motion.

Second, Brian contends that the family court did not properly apply the substantive criteria for child custody determinations pursuant to Kentucky Revised Statute (KRS) 403.270. While Brian and the family court in its order both refer to a custody arrangement, we believe that what the family court did was set up a visitation schedule after deciding to award joint custody and naming Becky the primary residential custodian. In deciding to award joint custody, which the parties have not contested, the family court would have determined the best interest of Jacob and considered the relevant factors listed in KRS 403.270(2).

While we recognize that Brian's argument centers on custody, as we have stated, it appears that the true issue before this Court is the amount of visitation Brian, the secondary, or non-residential, custodian, was awarded. Kentucky's General Assembly has provided for visitation through KRS 403.320(1): "A parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral, or emotional health." In

*Drury v. Drury*, 32 S.W.3d 521 (Ky. App. 2000), this Court addressed the definition of "reasonable visitation" as follows:

> What constitutes "reasonable visitation" is a matter which must be decided based upon the circumstances of each parent and the children, rather than any set formula. When the trial court decides to award joint custody, an individualized determination of reasonable visitation is even more important. A joint custody award envisions shared decision-making and extensive parental involvement in the child's upbringing, and in general serves the child's best interest. . . . A visitation schedule should be crafted to allow both parents as much involvement in their children's lives as is possible under the circumstances.

*Id*. at 524. The *Drury* Court also recognized that "the trial court has considerable discretion to determine the living arrangements which will best serve the interests of the children. Furthermore, joint custody does not require an equal division of residential custody of the children." *Id*. at 525. Finally, the Court stated that "this Court will only reverse a trial court's determinations as to visitation if they constitute a manifest abuse of discretion, or were clearly erroneous in light of the facts and circumstances of the case." *Id*.

Based upon the evidence of record, we hold that the family court's visitation order was reasonable under the circumstances of this case. It was undisputed that Jacob was starting preschool shortly after the hearing was held and the order was entered, and that he would be continuing with school the following year, and for years to come, on an all-day basis. Even if we were to agree with Brian that, in light of the facts as he alleged in his motion and brief to this Court,

the family court's visitation arrangement for at least the year after its entry was unreasonable, a reversal at this point would be meaningless. By the time this case was assigned for a decision on the merits, Jacob had already completed his preschool year, and, according to Becky's brief, he will be entering a full-day kindergarten program in the fall of 2008. We agree with Becky that in making its visitation arrangement, the family court recognized that Jacob was getting older and was getting ready to enter his school-age years. These are relevant factors for the family court to consider in determining visitation. Therefore, we hold that the family court's findings were supported by the evidence of record, and that it did not abuse its considerable discretion in deciding Jacob's living arrangements, especially based on the evidence before it.

For the foregoing reasons, the judgment of the Greenup Family Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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