

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2011-CA-000169-ME

BRADLEY DYSCHER MURRELL

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT  
HONORABLE CATHERINE R. HOLDERFIELD, JUDGE  
ACTION NO. 09-CI-01466

ASHLEY NICOLE MURRELL

APPELLEE

OPINION  
AFFIRMING IN PART,  
REVERSING IN PART,  
AND REMANDING

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BEFORE: DIXON AND MOORE, JUDGES; LAMBERT,<sup>1</sup> SENIOR JUDGE.

DIXON, JUDGE: Bradley Dyschel Murrell (Father) appeals an order of the Warren Family Court, which granted Ashley Nicole Murrell's (Mother) motion to restrict Father's visitation with their minor child, H.M. (Child). After careful

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<sup>1</sup> Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

review, we reverse the portion of the court's order relating to visitation and remand for further proceedings.

Father and Mother married in September 2008, and they divorced in November 2009. Child was born June 13, 2009. Pursuant to an August 17, 2009, settlement agreement, the parties agreed to share joint custody of Child, with Mother designated as primary custodial parent. The agreement provided Father with "liberal co-parenting time" as mutually agreed upon by the parties. The agreement also included a provision that the parties would revert to the court's standard visitation guidelines if they could not agree on a co-parenting schedule.<sup>2</sup>

In August 2010, Mother filed a "Motion to Establish Child Support, Motion to Enforce Separation, and Motion for Restricted Visitation."<sup>3</sup> Mother requested that the family court impose supervised visitation between Father and Child at a family enrichment center to prevent Father from visiting Child at Mother's home. The court held an evidentiary hearing to address Mother's motion in December 2010.

Mother testified that, in August 2009, she returned to work from maternity leave, and Father agreed to babysit Child at his home. During Mother's workday, Father called her to say he could not handle caring for Child, and Mother overheard him yell and curse at Child to be quiet. Mother advised Father to take

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<sup>2</sup> The visitation guidelines allowed visitation on alternate weekends and Thursday evenings following the weekend visit.

<sup>3</sup> This appeal is limited to the issue of visitation; accordingly, we do not address the substance of the other issues raised below.

Child to the home of Mother's parents, and Father complied. Mother testified that, since the failed babysitting attempt, Father had visited Child for approximately one hour each weekend at Mother's house. Mother stated that, in August 2010, Father began asking her inappropriate questions via text messaging and during his visitation, making her feel threatened and harassed. Thereafter, Mother asked her father, Larry Marr, to supervise the visits at her home.<sup>4</sup> Mother acknowledged she refused to allow Father any visitation with Child after she filed the motion to restrict visitation. Mother also testified she believed Child would not be safe in Father's house because he smoked marijuana and had anger management issues.

Father, who appeared *pro se*, testified that he was a full-time college student and expected to graduate in May 2011. Father stated he had two other children with whom he had limited contact. Specifically, he visited with one child periodically, while he exercised no visitation with his oldest child. Father explained that his oldest child, who resided in Butler County, Kentucky, was removed from his mother's custody by social services and placed in the custody of the maternal grandfather. Father asserted that he had attended court proceedings in connection with the investigation of the mother, and he declined the Cabinet's request that he undergo certain assessments required for unsupervised visitation with the child.

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<sup>4</sup> Mr. Marr testified that he attended five or six visits, and he did not witness Father behave in a disrespectful manner.

In addressing Mother's motion, Father testified that he opposed any restrictions on his visitation with Child. Father admitted the incident of yelling at Child on the phone, and he admitted he smoked marijuana. Father denied that he harassed or behaved inappropriately toward Mother, and he opined that most of their communication involved Mother's refusal to allow him visitation with Child. Finally, Father alleged Mother filed the motion because she was angry and simply wanted to isolate Child from him.

At the conclusion of the testimony, Mother's attorney gave a closing statement. Counsel asserted that Father sent harassing text messages to Mother, but conceded the comments did not rise to the level of threats or domestic violence. Counsel stated that, while Father was entitled to standard guideline visitation, his demonstrated lack of involvement in co-parenting Child and the "red flag" that the Cabinet intervened regarding his oldest child warranted a restriction of visitation.

The family court stated it was concerned Father refused to cooperate with the Cabinet, it was concerned about the yelling incident, and it was concerned Father had not regularly participated in caring for Child. Thereafter, the court rendered an order providing that Father's co-parenting time would be supervised by Children's Service Society of Bowling Green or a mutually agreeable third party, with the cost of supervision paid by Father. This appeal followed.

Pursuant to KRS 403.320(3),

The court may modify an order granting or denying visitation rights whenever modification would serve the best interests

of the child; but the court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger seriously the child's physical, mental, moral, or emotional health.

Furthermore, “[t]he burden of proving that visitation would harm the child is on the one who would deny visitation.” *Smith v. Smith*, 869 S.W.2d 55, 56 (Ky. App. 1994). On appellate review, this Court will not reverse a visitation order unless it constituted “a manifest abuse of discretion, or [was] clearly erroneous in light of the facts and circumstances of the case.” *Drury v. Drury*, 32 S.W.3d 521, 525 (Ky. App. 2000). “Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision.” *Allen v. Devine*, 178 S.W.3d 517, 524 (Ky. App. 2005).

Father argues the family court abused its discretion by restricting his visitation without making a finding of endangerment pursuant to KRS 403.320(3). Mother contends the court did not restrict Father’s visitation; rather, Mother characterizes the court’s order as placing a condition on Father’s co-parenting time by requiring supervision.<sup>5</sup> Both parties cite *Kulas v. Kulas*, 898 S.W.2d 529, 530 (Ky. App. 1995), where a panel of this Court explained: “As used in [KRS 403.320(3)], the term ‘restrict’ means to provide the non-custodial parent with something less than ‘reasonable visitation.’”

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<sup>5</sup> We find this contention somewhat disingenuous, as Mother clearly argued for the family court to restrict Father’s visitation to supervised visits only.

After careful review, we conclude the family court improperly restricted Father's visitation without making the findings required by the statute. It is undisputed the settlement agreement clearly provides Father with reasonable visitation; yet, the court's order limits - or restricts - Father's freedom to exercise his visitation rights by requiring third party supervision at his expense. While we acknowledge the family court's authority to resolve disputes regarding visitation, the court must follow the mandate of KRS 403.320(3). The record indicates the court voiced concerns regarding Father's behavior; however, the court did not make a specific finding that Father's visitation with Child seriously endangered "the child's physical, mental, moral, or emotional health" to justify restricting Father to supervised visits. KRS 403.320(3).

After careful review, we believe the court abused its discretion by restricting Father's visitation without making a finding of endangerment pursuant to the statute. We reverse the portion of the December 20, 2010, order as to visitation and remand to the family court for appropriate findings in accordance with KRS 403.320. In all other respects, the court's order is affirmed.

For the reasons stated herein, the order of the Warren Family Court is affirmed in part, reversed in part, and remanded.

ALL CONCUR.

BRIEF FOR APPELLANT:

W. Ralph Beck  
Bowling Green, Kentucky

BRIEF FOR APPELLEE:

Leia Allen Knee  
Bowling Green, Kentucky