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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001934-ME

BRIAN HARMON BROWN — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE HON. TIMOTHY NEIL PHILPOT, JUDGE
ACTION NO. 97-CI-00182

AMY CHRISTINE BROWN (NOW MCGEE);
AND A.C.B., A CHILD — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; KELLER AND MOORE, JUDGES.

KELLER, JUDGE: Brian Harmon Brown (Brown) argues that the family court abused its discretion when it did not award him standard timesharing with his ex-wife, Amy Christine McGee (McGee). McGee has not filed a response. Having reviewed the record, we affirm.

FACTS

The parties married on August 5, 1995, and dissolved their marriage on November 10, 1998. One child, A.C.B. (daughter), was born of the marriage. As part of the dissolution, the court awarded the parents joint custody, with Brown to have timesharing with daughter, in pertinent part, every other weekend from 6:00 p.m. Friday to 6:00 p.m. Sunday, every Wednesday from when he got off work until 7:00 p.m., and otherwise according to the court's general guidelines.

It does not appear that Brown and McGee sought input from the court again until May 26, 2010, when Brown filed a motion seeking "a specific order of timesharing." In support of his motion, Brown stated that McGee had been "dictatorial" regarding timesharing and had unilaterally denied Brown adequate timesharing.

On June 1, 2010, McGee filed a motion seeking modification of custody and timesharing. In support of her motion, McGee argued that: Brown had become emotionally abusive toward daughter; daughter's therapist was concerned about Brown's "psychological stability and parenting skills;" Brown had become obsessed with daughter's athletic endeavors; Brown isolated daughter when he had timesharing; and Brown behaved inappropriately at daughter's sporting events. McGee simultaneously filed a motion to limit Brown to supervised timesharing.

At a hearing on June 4, 2010, the court appointed a guardian *ad litem* (GAL) for daughter and, on June 10, 2010, the court issued an order suspending timesharing pending further orders. On June 11, 2010, Brown filed a motion

asking the court to restore the timesharing schedule that had been in place since the parents' dissolution. In support of that motion, Brown denied McGee's allegations of abusive and/or inappropriate behavior/parenting.

On June 18, 2010, the GAL filed a report indicating that she had spoken with both parents, daughter, and daughter's therapist. Following these discussions, the GAL recommended that the court not force timesharing between Brown and daughter and, if the court found it appropriate to order timesharing, to limit its duration. The GAL, noting that both parents had discussed the court proceedings with daughter, recommended that the court order them to refrain from doing so.

Following several hearings, the court entered an order on August 18, 2010, granting timesharing to Brown every Sunday from noon to 6:00 p.m. On September 7, 2010, the court entered another order setting timesharing for Brown for every other weekend from 6:00 p.m. Saturday to noon Sunday, with "two to three hours in the evening" on "either Thursday or Friday."

On October 29, 2010, the GAL filed an updated report, noting that Brown had started therapy in order to improve his parenting skills. The GAL noted that Brown's therapist indicated that Brown was gaining insight into and addressing what may have been perceived as his over-emphasis on sports. According to the GAL, daughter wanted to continue timesharing on Saturday night through Sunday morning every other weekend and to have the choice between Friday night and Saturday night in the future.

On January 31, 2011, the court held a final hearing and, on February 1, 2011, the court conducted an in chambers interview of daughter with the GAL present. On February 9, 2011, the GAL filed a supplemental report indicating that daughter did not want to spend extended periods of time with Brown. She did not feel comfortable having friends over to Brown's home, and "she [did] not ask to do activities because she [did] not want to upset her father." Based on her understanding of daughter's wishes, the GAL recommended that the weekend visitation remain the same with overnight visits on Thursday every other week.

On February 18, 2011, the court entered its final order. Having reviewed the record, including all of the hearings, we discern no fault with the court's summary of the evidence; therefore, we adopt that summary as set forth below:

> 1. **Jennifer Lanham** testified that she has been counseling the Father for some time now. In her 12 sessions with the Father, she sees no signs of maladjustment or mental illness.
>
> She has filed three reports with the Court which are incorporated herein. She testified that the Father had acknowledged that he had been overenthusiastic and somewhat unaware of the issues related to his daughter. She testified that the Father's relationship with the daughter was wholesome, as received in reports from the Father. She suggested that Family Therapy would be a good idea.
>
> On cross-examination, she acknowledged that she had spoken one time to Bette Peterson [sic], who is the therapist for the child, and she understood from that discussion that the child is feeling pressure concerning

sports and is concerned that she had no "voice" in their relationship.

Dr. Lanham testified that she believed that the Father was now recognizing the child's need for privacy, the child's need to have a voice, and the child's need to be respected.

She acknowledged that if the Father said to the daughter, "see you in Court tomorrow," just the day before the hearing, that would not be wise judgment.

2. **Bette Sloan Robinson** testified that she works at Beaumont Behavioral Health and has been the therapist for [daughter] since March 2010. She sees her weekly, and has diagnosed her as having an adjustment disorder with anxiety and depressive traits.

The general themes in her visits with the child are concerns with the child not wanting to upset her dad and not wanting to be with him sometimes. She feels stuck "between her parents". She has indicated that [daughter] was a "fear based thinker," worrying about how things will be interpreted in her relationship with her parents. There are issues with both parents that Ms. Robinson attempts to help her with.

She acknowledged that it would be helpful for Dr. Lanham and her to get a better picture of where these parties are. She indicated that she would be happy to meet with Father, but had not done so yet. She indicated that [daughter] did not want to have family therapy.

She plans to continue seeing [daughter for] some unknown period of time.

3. After both therapists testified, Mother's first witness was **Brian Brown**, the Father, as if on cross[-] examination. He testified that he currently works at Eastern State Hospital as a nurse's assistant. He was asked about several incidents intended to show that he was either deliberately or negligently unaware of [daughter's] needs as a fourteen year old young lady. There was discussion about a deep sea fishing trip which

was scheduled on the anniversary of the death of the Mother's father and swimming accident. There was a separate incident involving swimming in Florida when [daughter] may have been uncomfortable because of the menstrual cycle.

There was discussion of a funeral issue with the great-grandmother just in the last two or three weeks. The parents were unable to understand and agree about an appropriate schedule for [daughter] to attend the funeral events.

There was great discussion about [daughter's] sports, mainly volleyball and basketball, and the Father testified that she is a "unique athlete" who is being scouted by Division 1 coaches already in 8th grade.

The father further testified about an incident after a basketball game where the Mother cursed him in front of several witnesses in a manner that was loud and abusive. This was an incident at Bryan Station Middle School where the Mother called the Father a "stupid m-f" and told him it was none of his f'ing business. [Daughter] was present during this incident, according to the Father, and hobbled off to the mom's car. He further testified that [daughter] had reported that her Mother was a tyrant and a terrorist.

Basically the Father denies all allegations about his parenting issues[.]

4. **Amy McGee,** Mother, testified that she had been married now for ten years to John McGee, who works at Valvoline. Mother works as the general manager of Fayette Mall and [in] addition to [daughter], she is the mother of Mathew McGee, age 6.

The Mother related her side of the Bryan Station Middle School incident, indicating that she was responding to perceived maltreatment of [daughter] by the Father, which she testified [to] repeatedly, was systemic. Another incident of what she considers abuse of [daughter] was an incident in softball where [daughter]

had a "melt down" after the Father screamed at [daughter] in front of all the players.

She further testified that she did everything possible to make [daughter] available for the funeral of the great grandmother, sending flowers and otherwise doing the best she could to cooperate.

She testified that [daughter] really did not want to play basketball. She testified that [daughter] was terrified and terrorized by her father.

She testified that [daughter] wanted to be in the girl scouts but her father would not allow it because it would interfere with his weekends.

She testified that the father volunteers himself to be a coach for all the sports and even after he promised not to be there for practices, he showed up for tryouts and practice.

She further testified that, without details presented, that there was a history of sexual abuse in the family and she has always been scared to death that something might be happening between the father and the child. She testified that she is "terrified" of the Father and that the child needs tools to deal with him. Because of that, the Mother put the child in therapy in February 2010. She was especially disturbed that the child was sleeping with the Father even at an advanced age. She agreed that there was no real evidence of any kind of sexual abuse, but it was still in the back of her mind as a concern.

She testified that she should have Sole Custody of [daughter] because she and the Father are unable to mutually agree upon any reasonable action for the child. She testified that [daughter] is a "performer" when she goes to the Father's house, and often breaks into tears instantly upon her return home.

On cross[-]examination, she admitted that [daughter] had heard her call the father names and that she often cursed

in totally inappropriate ways to the Father in [daughter's] presence.

She testified that this Motion really had been building for a long time because of the incidents of the Father trying to control her and [daughter] for many years.

5. **Andee Brown** testified that she is the nineteen year old daughter of the Father by a previous relationship. She currently is a freshman at Eastern Kentucky University on a cheerleading scholarship, although she acknowledged at the end of her testimony that she quit cheerleading now. She testified repeatedly that her father is a "great dad." Even though she had no relationship with him until she was ten years old, they have become very close since then. She testified that she calls and texts her father every day.

6. **John McGee** testified that he is the Mother's current husband and they have been married now for ten years. He testified to several instances where he believed that the Father's actions were inappropriate, especially at sporting events. He was very disturbed that the Father had basically attempted to force [daughter] to play basketball with a sprained ankle. This was one of many occasions that he considered to be inappropriate parenting relating to the over exuberance of the Father and [daughter's] sports. He testified that [daughter] is often angry the day before visits with the Dad. He believes that shorter visits are better. He testified that [daughter] is "scared" of her Dad and that she had even said so as late as yesterday, meaning the day before this hearing. He admitted that he and the Father had verbal instances with each other on previous occasions. He believes that his wife, the Mother herein, has "bent over backwards" to accommodate the Father and his visitation, but that negotiating with him about visitation is difficult. He generally believes that [daughter's] wishes with regard to visitation should be honored by the Father and this Court.

7. **Jonathan Wise** testified. He lives in Paducah, Kentucky. He has been the Father's friend for twenty

years. He testified to an incident on January 1, 2010 where he listened in over a speaker phone after the Father told him to "listen to what I go through." He heard a conversation wherein the Mother basically cussed out the Father related to a misunderstanding regarding visitation on that day.

8. **Paul Hamilton** also testified. He is a friend of the Father. He testified that the Father is "reserved" at basketball and volleyball games. His own daughter plays with [daughter], and they are friends. He overhead [McGee] cussing out [Brown] at the Bryan Station Middle School incident.

He testified that both [daughter] and his daughter get straight A's and that she is an amazing athlete.

9. **Matt Sherard** testified that he coaches volleyball at Edith Hayes Middle School. The Father tapes the games, which he indicated is a great benefit to him and the team. In terms of the Father's deportment at games, he said that he was gentlemanly. He believed that there was a genuine father/daughter bond between [daughter] and her dad. He indicated that she was a good athlete who led his team to the championship this year in 8th grade volleyball.

He further indicated that she is a good student, a "sweet young lady," and believes that her success in athletics and academics is related to both parents apparently doing a good job.

He did acknowledge that it was rare for him to observe [daughter] any other [place] than [at] volleyball. He indicated that both parents have been supportive.

10. **Wanda Lavit** is the wife of the Father's attorney, [Brown's] mother, and Grandmother of [daughter]. She testified that she was very close to [daughter] and "worshipped her ever since she was born." She testified that the child is a unique person with great gifts academically and athletically. She is a former teacher and she testified that [daughter] is a "sponge."

She testified that [McGee], the Mother, had told her at the child's six year old birthday that "if I had known what kind of good father [Brown] is I would have never divorced him."

She also testified that at the eight year old birthday party the mother said, "I'd like to have the child that [Brown] takes on weekends." She further testified to a conversation with John McGee where he made some comment about life is too short and it was "easier to do what [McGee] says," which the Father's counsel seems to believe means something, even though the witness herself testified that he was just "being nice."

She testified that [daughter] had used the word "tyrant" or "terrorist" related to the Mother because she "screams until you agree with her." She testified that the child is "exceptional," with far more "gifts from God than any child" she's ever seen.

11. **Dr. Dale Smith** testified. He is a para-educator and an associate pastor at New Horizon Church in Danville, KY. He has been, in the past, [daughter's] basketball coach. He testified that the Father attends church and revival with him. He testified that he had seen the Father and [daughter] together and that they have a loving relationship. He believed that [daughter] and her Dad have a special bond that all kids would like to have with their Father.

On cross[-]examination, he testified that he would be very surprised to learn that [daughter] was forced to play basketball because she seemed to enjoy it.

12. **Jennifer Short** testified. She lives in Athens. She is a fellow parent. Her two daughters, age[s] 15 and 13, play volleyball with [daughter]. She usually sits with the [Father] at games. She testified that the Father is easy going and always joking around and a lot of fun at games. She saw no dysfunctional behavior at games.

. . . .

> 14. The Court interviewed [daughter] outside the presence of her parents or counsel. The Guardian Ad Litem, Helen Bongard, was present. The interview was recorded for purposes of appeal. However, the Court advised [daughter] that the meeting would be private unless an Appeals Court ordered otherwise.

Based on that evidence, the court concluded that daughter had emotional issues that she needed to work through, and the court urged the parents to continue with daughter's counseling. The court also concluded that both parents had contributed to daughter's emotional condition, noting in particular Brown's "obsession" with daughter's participation in sports. However, the court noted that Brown was working on this with his therapist and making improvement. Furthermore, the court noted that the parents' continued inability to effectively communicate with each other would likely add to daughter's "teenage difficulties" and made co-parenting impossible. Finally, the court noted that there was no evidence that Brown seriously endangered daughter's "physical, mental, moral or emotional health."

Having made the preceding findings of fact, the court awarded sole custody to McGee and awarded timesharing to Brown from 4:00 p.m. to 7:00 p.m. every Thursday and from 1:00 p.m. Saturday to 1:00 p.m. Sunday every other weekend. The court then ordered the parents to "negotiate in good faith" any issues related to summer and future holiday timesharing.

On July 5, 2011, Brown filed another motion asking the court to grant timesharing pursuant to the standard schedule and to award Brown an additional

week of timesharing. On July 15, 2011, the GAL filed a third report indicating that daughter had gone on vacation with both parents and enjoyed both experiences. Daughter was engaged in preparing for high school and volleyball season. She also noted that she enjoys being with friends, but her father complains that when she brings a friend, she spends more time with the friend than with him. The GAL recommended that timesharing remain as then scheduled. On October 7, 2011, the court entered an order denying Brown's request for additional timesharing.

STANDARD OF REVIEW

We review the circuit court's orders on visitation matters for abuse of discretion. *Wireman v. Perkins,* 229 S.W.3d 919 (Ky. App. 2007). In the absence of an agreement between the parties, the family 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 (Ky. App. 2000). A timesharing schedule must be crafted to allow both parents as much involvement in their children's lives as possible under the circumstances. *Id.*

ANALYSIS

Prior to the filing of any motions herein, Brown had timesharing pursuant to the standard visitation schedule in effect at the time of the dissolution of his marriage to McGee. According to Brown, the family court erred in altering that timesharing schedule because it did not find that continuing under that

schedule would seriously endanger daughter's physical, mental, moral, or emotional health.

KRS 403.320 provides that

> (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. Upon request of either party, the court shall issue orders which are specific as to the frequency, timing, duration, conditions, and method of scheduling visitation and which reflect the development age of the child.
>
> . . . .
>
> (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.

As we understand it, Brown argues that any modification that reduces the non-custodial parent's timesharing amounts to a restriction under KRS 403.320(3) and the court is required to find serious endangerment before making such a modification. We find Brown's argument to be unpersuasive for two reasons.

First, Brown relies on *Hornback v. Hornback*, 636 S.W.2d 24 (Ky. App. 1982), to support his argument, a reliance that is misplaced. In *Hornback,* the court initially denied the mother's request for timesharing, indicating that certain conditions needed to be met before timesharing would be considered. The court then granted a subsequent request for timesharing, even though the conditions had not been met. On appeal, this Court reversed the trial court, holding, in pertinent

part, that timesharing cannot be disallowed absent a finding that the child's welfare would be seriously endangered. Furthermore, once timesharing had been disallowed, the court could not modify that judgment absent a finding that the best interests of the child would be served by doing so. Thus, this Court did not interpret KRS 403.320(3) to require a finding of serious endangerment as a precursor to modification of a timesharing judgment. Rather, this Court interpreted KRS 403.320(3) to require a finding that any modification would be in the best interests of the child.

Second, as this Court noted in *Kulas v. Kulas*, 898 S.W.2d 529, 530 (Ky. App. 1995), the word "'restrict' means to provide the non-custodial parent with something less than 'reasonable visitation.'" It does not refer to any modification in a judgment that reduces timesharing. In fact, interpreting "restrict" as meaning any modification that reduces timesharing, which Brown urges us to do, would render the first clause in KRS 403.320(3) essentially meaningless. This we may not do. *See Commonwealth v. Phon,* 17 S.W.3d 106, 107-08 (Ky. 2000).

As noted above, daughter was unhappy with the existing arrangement and daughter's therapist and the GAL agreed that the existing arrangement should be altered. That is sufficient evidence of substance to support the court's finding that revision of the timesharing schedule was in daughter's best interests.

However, our analysis cannot stop there. We must determine if the modified timesharing schedule is less than reasonable. Brown correctly argues that the timesharing schedule he sought was essentially the timesharing schedule set forth

in the Model Time-Sharing/Visitation Guidelines (the Guidelines) in the Family Court Rules of Procedure and Practice (FCRPP). However, Brown fails to note that, pursuant to FCRPP 8 and the Guidelines, the court is not required to order timesharing in accordance with the Guidelines. Thus, the FCRPP and the Guidelines do not negate the court's ability to set a different, reasonable timesharing schedule based on the best interests of the child. In light of daughter's statements to her therapist and the GAL concerning timesharing and the recommendations from daughter's therapist and the GAL, we cannot say that the court's timesharing schedule is less than reasonable.

CONCLUSION

Based on our review of the record, the court crafted a reasonable timesharing schedule that takes into account the circumstances of both parents and daughter. Therefore, we discern no error and affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Joseph R. Stewart Lebanon, Kentucky	None