

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001673-MR

BRIAN WILLIAMS

APPELLANT

v.

APPEAL FROM FLOYD FAMILY COURT
HONORABLE JOHNNY RAY HARRIS, JUDGE
ACTION NO. 02-CI-00414

KATHY WILLIAMS

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE AND STUMBO, JUDGES; GRAVES,¹ SENIOR JUDGE.

GRAVES, SENIOR JUDGE: Brian Williams appeals from an order of the Floyd Family Court establishing summer visitation with the parties' two minor children. Brian argues that the family court abused its discretion by including a provision in the visitation order that major extracurricular activities should take precedence over visitation, with the visitation to be made up at a later date. For the reasons stated below, we affirm.

¹ Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

The parties were married on July 18, 1992. Two children were born of the marriage: Bryson, born November 30, 1994, and Kaylee, born February 18, 1999. On April 26, 2002, the appellee, Kathy Williams, filed a petition for dissolution of marriage.

The final decree dissolving the marriage was entered on August 1, 2002. The parties were awarded joint custody of the children, with Kathy being designated as primary residential custodian.

Subsequent to the divorce Brian moved from the Floyd County area, and problems developed regarding summer visitation, in particular because of the children's extracurricular activities. On June 16, 2004, the court entered an order attempting to resolve the problem.

By 2007, Brian had moved to Montgomery, Alabama. This had the effect of making normal visitation (e.g., alternating weekends) impractical and requiring a long-distance visitation arrangement. On June 28, 2007, Brian filed a motion captioned "Motion to Establish Summer Visitation Schedule." The motion itself, however, essentially requested the establishment of a comprehensive visitation schedule addressing a year-round time frame. In connection with the motion, each side filed proposed visitation schedules. Commentary accompanying the proposed schedules addressed the issue of extracurricular activities which, as previously noted, has been an ongoing issue with respect to visitation.

On July 7, 2007, the family court entered an order establishing visitation. The order provided that Brian would have visitation with the children every spring break; one-half of the summer to take place during the last part of the summer with the children to be returned one week prior to the beginning of school; alternating Thanksgiving and Christmas holidays; and four weekends per year. The schedule is essentially as proposed by Brian, except that he had requested eight weeks during the summer and every fall break. Paragraph six of the order contained provisions addressed to when scheduled visitations conflict with extracurricular activities.

Before us, Brian does not challenge the amount of time he was awarded visitation. Rather, he challenges only the provisions of paragraph six of the order, which provides as follows:

Both parties shall work diligently to make sure that the children are able to continue in any and all extracurricular activities. Should a scheduling conflict arise regarding visitation and said activities the scheduled visitation shall continue provided that missing the activity at that time will not prohibit the child's participation in the same activity once the scheduled visitation is complete. Should the scheduled activity be of major importance, for example, all-star games, cheerleading competition, etc., then the scheduled activity shall take priority and any missed visitation shall be made up at a later date.

KRS² 403.320(1) provides, in relevant part, that "[a] parent not granted custody of the child is entitled to

² Kentucky Revised Statutes.

reasonable visitation rights," and that "[u]pon 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." (Emphasis added). KRS 403.320(3) provides that "[t]he 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."

"A trial court's visitation orders should attempt to provide the non-residential parent with the greatest amount of visitation which is reasonable under the circumstances. Unfortunately, in custody proceedings it is seldom possible for a trial court to impose a visitation regime which makes both parties happy. For this reason, matters involving visitation rights are held to be peculiarly within the discretion of the trial court." *Drury v. Drury*, 32 S.W.3d 521, 526 (Ky.App. 2000). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

Brian argues that the family court was without authority to order that the children's extracurricular activities take priority over visitation. He further states

that he "has an absolute right to visitation absent any finding that visitation would result in actual harm to the children"; and that Kathy "has never alleged or proven that the Appellant's proposed summer visitation with the children would result in any harm to the children."

As we construe Brian's argument, he is asserting that a family court may not enter orders addressing extracurricular activity issues, even though there is a dispute between the joint custodians regarding those issues, if those orders in any way interfere with the noncustodial parent's visitation, unless failure to give priority to the extracurricular activities will result in harm to the child.

A review of the authorities and standards as set forth above demonstrates that Brian is incorrect in his sweeping denial of the trial court's authority to address conditions of visitation, including conditions relating extracurricular activities. To the contrary, KRS 403.230(1) specifically vests the court with the authority to establish conditions relating to visitation, and KRS 403.230(3) vests the court with the authority to make modifications to visitation which serve the best interest of the child. Moreover, as previously noted, "matters involving visitation rights are held to be peculiarly within the discretion of the trial court." *Drury v. Drury*, *supra*. As such, we reject the fundamental premise of Brian's argument upon appeal.

We further note that the "harm to the child" standard is not applicable because the family court is not "restricting" Brian's visitation. To the contrary, the order as a whole provides visitation involving an amount of time to which Brian does not object. Paragraph six simply attempts to foreclose disputes by ruling before hand that extracurricular activities **"of major importance"** are to be given priority over visitation. Routine games and practices are obviously not covered by the provision. Of further significance, the paragraph provides that **"any missed visitation shall be made up at a later date."** Thus, Brian need only keep track of missed visitation resulting from extracurricular activities of major importance, make up the time at a later date, and he will receive all the visitation time provided for under the order (which, again, Brian does not object to).

In summary, contrary to Brian's assertion, the family court is vested with the discretion to enter orders addressing certain miscellaneous details concerning visitation, including extracurricular activities, particularly when such details have resulted in ongoing dissension between the parents.

As a final note, there could arise, in a hypothetical situation, a scenario where giving absolute priority to a child's extracurricular activities could frustrate the purpose of KRS 403.320, and, in that case, a court would abuse its discretion by ordering that such priority be given. However, this is clearly not such a case. Brian does not identify with

specificity the disruption which will be caused by paragraph six - if any. Nor was a record on this point developed in the proceedings below. With proper scheduling, it may be that Brain's visitation with the children can be arranged such that there are no extracurricular activities "of major importance" in Floyd County while the children are in Alabama. In any event, we find no reversible error in the family court's treatment of extracurricular activity issues in its visitation order.

For the foregoing reasons the judgment of the Floyd Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Thomas W. Moak
Prestonsburg, Kentucky

BRIEF FOR APPELLEE:

John T. Chafin
Prestonsburg, Kentucky