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 NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-000477-ME

MICHAEL LYNN SIMS

APPELLANT

APPEAL FROM LYON CIRCUIT COURT
v. HONORABLE WILLIAM E. MITCHELL, JUDGE
ACTION NO. 05-CI-00192

SUSAN PAIGE SIMS

APPELLEE

OPINION
AFFIRMING

*** * * * *

BEFORE: FORMTEXT COMBS, CHIEF JUDGE; DIXON AND TAYLOR,
JUDGES.

TAYLOR, JUDGE: Michael Lynn Sims brings this appeal from a Final Decree and Judgment entered in the Lyon Circuit Court on February 25, 2008, awarding the parties joint custody of their minor child and designating Susan Paige Sims (Paige) as primary residential custodian. We affirm.

Michael and Paige were married September 4, 1999. One child was born of the marriage. In October of 2005, Paige filed a petition for dissolution of marriage. An interlocutory decree of dissolution of marriage was subsequently entered on July 28, 2006, dissolving the parties' marriage and reserving all other issues for future adjudication. Following an evidentiary hearing, an interlocutory custody order was entered on February 5, 2007. Therein, the circuit court noted that the parties had stipulated to share joint custody of the child but left the issue of primary residential custodian for the court to decide. The court then ordered that Paige be designated primary residential custodian and awarded Michael visitation. Michael brought Appeal No. 2007-CA-000441-MR from that order. On August 2, 2007, this Court entered an order dismissing Appeal No. 2007-CA-000441-MR as being taken from an interlocutory order. On February 25, 2008, a Final Decree and Judgment was entered in the circuit court adjudicating all remaining issues between the parties.¹ This appeal follows.

Michael contends that the circuit court erred by designating Paige as primary residential custodian.² Upon review of a custody determination, an appellate court will not disturb the circuit court's findings of fact unless such findings are clearly erroneous. *Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003). Findings of fact are clearly erroneous if not supported by substantial evidence. *Id.*

¹ A Settlement Agreement was entered into by the parties on February 1, 2008, resolving all remaining issues. The Settlement Agreement was incorporated into the Final Decree and Judgment entered February 25, 2008.

² This is the only issue raised in this appeal and arises from the interlocutory custody order entered February 5, 2007, which became final February 25, 2008.

Substantial evidence is evidence that when taken in light of all the evidence or when taken alone has “sufficient probative value to induce conviction in the minds of reasonable men.” *Id.* at 354. A circuit court’s ultimate custody determination will not be disturbed on appeal absent an abuse of discretion. *Id.* An abuse of discretion implies action that is arbitrary or disposition that is capricious. *Id.* The scope of our appellate review was succinctly summarized in *Sherfey v. Sherfey*, 74 S.W.3d 777, 782-783 (citations omitted), *overruled on other grounds by Benet v. Com.*, 253 S.W.3d 528 (Ky.App. 2008):

“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.” A factual finding is not clearly erroneous if it is supported by substantial evidence. “Substantial evidence” is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people. After a trial court makes the required findings of fact, it must then apply the law to those facts. The resulting custody award as determined by the trial court will not be disturbed unless it constitutes an abuse of discretion. “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.” . . . “The exercise of discretion must be legally sound.”

Michael specifically contends that the circuit court erred by not setting forth separate conclusions of law as required by Kentucky Rules of Civil Procedure (CR) 52.01. Michael asserts that the circuit court improperly “intermingled” its findings of fact and conclusions of law resulting in reversible error. For the reasons hereinafter stated, we disagree.

CR 52.01 states, in relevant part:

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[.]

One of the primary reasons for requiring a circuit court to find facts specifically and state conclusions of law separately is to provide the appellate court with a clear understanding of the circuit court's view of the controversy. *Reichle v. Reichle*, 719 S.W.2d 442 (Ky. 1986).

In this case, a review of the circuit court's nine-page custody order reveals that the court made very detailed and specific findings of fact. Although the court's conclusions of law are located under the order's general heading of "Findings of Fact," the court nevertheless stated its conclusions therein separately. Thus, we conclude that the circuit court satisfied the requirements of CR 52.01.

Michael next contends that certain factual findings of the circuit court are not supported by substantial evidence and, thus, are clearly erroneous. In particular, Michael asserts that the circuit court erroneously found: (1) Paige "has suffered" from mental health issues and that Paige's only mental health issue was depression, (2) the child was "more tied" or "closer" to Paige than to Michael, (3) the primary issue "driving [Dr. Feinberg's] report was the animosity between [Paige] and the paternal grandmother," (4) Paige has "always taken appropriate action" for her own well-being and that of the child when she experienced problems with her mental health, and (5) it was in the child's best interests that

Paige serve as primary residential custodian. We shall address these issues seriatim.

First, Michael complains that the circuit court erroneously found that Paige “has suffered” from mental health issues and that her only mental health issue was depression. Michael asserts that Paige’s mental health issues are ongoing and are not limited to depression. We think Michael misconstrued the findings of fact on this issue. When taken in proper context, it is clear that the circuit court did not find that Paige’s mental health issues were confined to the past nor did the circuit court find that Paige only suffers from depression. In fact, the circuit court was aware that Paige suffers from chronic mental health issues. In its findings of fact, the circuit court noted that Paige described herself as suffering from a “chemical imbalance” and “major depression.” Later in its order, the circuit court also cited the opinion of Paige’s expert, Dr. Janice Martin, that Paige suffers from depression and anxiety. Moreover, the circuit court specifically quoted the testimony of Paige’s mother that Paige’s mental health condition would “come and go.” Thus, we reject the above contention of error.

Secondly, Michael asserts that the circuit court erroneously found that the parties’ child was “more tied” or “closer” to Paige than to Michael. However, the testimony of the custodial evaluator, Dr. David Feinberg, was that test results were “strongly indicative” of the child having a closer psychological bond with Paige. Furthermore, Dr. Martin testified that the test results revealed the child “resoundingly chose” Paige over Michael. Therefore, we conclude that substantial

evidence of a probative value supports the circuit court's finding that the child was closer or more attached to Paige.

Michael thirdly asserts that the circuit court erred by finding that Dr. Martin indicated that the primary issue "driving [Dr. Feinberg's] report was the animosity between [Paige] and the paternal grandmother." We believe Michael's contention is essentially an attack upon the validity of Dr. Martin's expert opinion, rather than an attack upon the court's finding of fact. Thus, we perceive no merit in Michael's assertion of error.

Michael's forth contention is that the circuit court erroneously found Paige "has always taken appropriate action" for her own well-being and of the child when experiencing mental health problems. Specifically, Michael asserts that "the court ignores the fact that even if [Paige] takes steps to protect the child when she is having mental health problems, there will likely be periods when [Paige] is not physically or emotionally available to care for the child." Michael's argument appears to be that at some point, Paige may not be available to care for the child because of her mental health. This contention does not negate the circuit court's finding that Paige has taken appropriate actions for both her well being and that of the child when she experienced mental health difficulties. In fact, Michael's mother testified that Paige often called upon her for assistance with the child when Paige was experiencing problems with her depression. As such, we do not believe the circuit court's above finding of fact is clearly erroneous.

Michael's fifth assertion is that the circuit court erred in finding that it was in the child's best interest for Paige to serve as primary residential custodian. Michael's entire argument on this issue consists of the following two sentences:

The trial court, in the same numerical paragraph eighteen (18) of its findings of fact, then utilized the previously discussed erroneous findings of fact (largely coupled together) to support its finding of fact that "it would be in the best interest of the child that [Paige] and [Michael] to (*sic*) share joint custody and that the home of [Paige] be designated as the primary residence of the child." Again, based on the preceding analysis, such a factual finding is clearly erroneous and does not properly consider the mental health of both parents and other factors set forth in KRS 403.270.

Michael's Brief at 11-12. As hereinbefore stated, we do not think that the circuit court's findings of fact were clearly erroneous. Additionally, we believe the circuit court properly considered the factors set forth in KRS 403.270, including the mental health of both parties. Upon the whole, we conclude that the circuit court's finding that it was in the child's best interest to designate Paige as primary residential custodian was not clearly erroneous.

Michael lastly contends that the circuit court abused its discretion by designating Paige as primary residential custodian. In this regard, Michael makes two arguments: (1) the circuit court relied upon the above-alleged erroneous findings of fact and, thus, abused its discretion by designating Paige as primary residential custodian, and (2) the circuit court's designation of Paige as primary residential custodian was an abuse of discretion because the decision was arbitrary, unreasonable, unfair, and unsupported by sound legal principles. As we have

previously determined that the circuit court's findings of fact are not clearly erroneous, we believe Michael's first contention to be without merit. As to Michael's second argument, he particularly maintains that the circuit court did not place enough emphasis on Paige's mental health when determining the best interests pursuant to KRS 403.270 and, thus, abused its discretion. We disagree.

In this case, the circuit court pointed out that the child had been in the primary care of Paige since October 2005. Moreover, the court emphasized that expert testimony supported the conclusion that "the child is more closely connected to her mother." The court also thoroughly considered Paige's mental health issues. The court found that while Paige's mental health issues were cause for concern, the evidence supported the following conclusion:

[Paige] has been maintaining her emotional and physical health since her separation from [Michael]. There is no evidence to indicate that the child has in any way been placed in jeopardy during the period of time that she has been in the primary care of [Paige]. [Paige] has shown that she has always taken appropriate action for her own well being and for the protection of the child when she has experienced difficulties with her mental health.

Given the thoroughness of these findings, we are unable to conclude that the circuit court's decision to designate Paige as primary residential custodian was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Hence, we hold that the circuit court's decision to designate Paige as primary residential custodian did not constitute an abuse of discretion.

For the foregoing reasons, the Final Decree and Judgment of the Lyon Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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