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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2011-CA-000341-ME

ERIK M. GROOM APPELLANT

v.

APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE ROBERT DAN MATTINGLY, JR., JUDGE
ACTION NO. 10-CI-00007

CARA K. GROOM APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE, STUMBO AND WINE, JUDGES.

STUMBO, JUDGE: Erik Groom appeals from a judgment of the Marshall Family Court awarding joint custody of the parties' minor child with Cara Groom being designated as the primary residential parent. Mr. Groom argues that the trial court failed to determine the best interests of the child in designating Ms. Groom as primary residential parent. He also argues that the trial court's findings of fact were clearly

erroneous and that the trial court erred in not including certain internet communications into evidence. We find no error and affirm.

Mr. and Ms. Groom were married on September 23, 2005. A child was born to the parties six days later. Since the child is still a minor, we will refer to him as "Son." Ms. Groom also has an older child born from a previous relationship. This child is also a minor and will be referred to as "Daughter." Ms. Groom has sole custody of Daughter.

Ms. Groom currently resides in Benton, Kentucky and is employed at her family owned and operated business, Steeley House Assisted Living. Mr. Groom currently resides in Nashville, Tennessee and is employed as the owner and operator of a café located at the Vanderbilt Law School. After the marriage, the parties primarily resided in downtown Nashville. In June of 2007, Mr. Groom obtained employment with Ms. Groom's parents at Steeley House. At this time, all parties then moved to Benton. They also maintained their condo in Nashville. Ms. Groom would also frequently travel to Nashville to operate the café.

Ms. Groom has a psychiatric diagnosis of bipolar disorder which she treats through prescribed medication and regular mental health counseling and treatment. Her primary psychiatrist is Dr. Amanda Sparks-Bushnell. Dr. Sparks-Bushnell has been treating Ms. Groom since 2006. Ms. Groom also has a history of drug abuse, but has had no substantiated relapses since she completed a treatment program in 2000.

Mr. Groom also has had mental health issues, suffering from depression in high school and college. He also abused alcohol during this time. He too has not had any substantiated relapses since the late 90's.

The parties separated on or about December 31, 2009, and their marriage was dissolved on December 7, 2010. After the parties separated, Ms. Groom remained in Benton with Daughter while Mr. Groom resided in Nashville with Son. A timesharing agreement was later worked out between the parties with Son being with Mr. Groom through the week until Thursday and then with Ms. Groom each weekend commencing on Thursday. On December 7 and 13, 2010, hearings were held to determine the issue of permanent custody, child support, and visitation.

At the conclusions of the hearings, the trial court found that both parents were appropriate caregivers for Son and that Son was equally bonded with both parents. Ultimately, the court found that Ms. Groom would be the primary residential parent and Mr. Groom would get visitation. It also set forth the factors it considered in reaching that conclusion. This appeal followed.

Kentucky Rules of Civil Procedure (CR) 52.01 directs that "[f]indings 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 judgment "supported by substantial evidence" is not "clearly erroneous." *Owens–Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). Substantial evidence is defined as "evidence of substance and relevant consequence, having the fitness to

induce conviction in the minds of reasonable men." *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972).

> In reviewing the trial court's decision, we must determine whether it abused its discretion by awarding custody of the children to [the parent at issue]. An abuse of discretion occurs when a trial court enters a decision that is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000); *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). We will not substitute our own findings of fact unless those of the trial court are "clearly erroneous." *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). Further, with regard to custody matters, "the test is not whether we would have decided differently, but whether the findings of the trial judge were clearly erroneous or he abused his discretion." *Eviston v. Eviston*, 507 S.W.2d 153, 153 (Ky. 1974); *see also Cherry v. Cherry*, 634 S.W.2d 423 (Ky. 1982).

*Miller v. Harris*, 320 S.W.3d 138, 141 (Ky. App. 2010).

Mr. Groom's first argument is that the trial court failed to apply the factors in Kentucky Revised Statutes (KRS) 403.270 to determine the best interests of the minor child. We disagree. The relevant part of KRS 403.270 states:

> (2) The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent and to any de facto custodian. The court shall consider all relevant factors including:
>
> (a) The wishes of the child's parent or parents, and any de facto custodian, as to his custody;
>
> (b) The wishes of the child as to his custodian;
>
> (c) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;

> (d) The child's adjustment to his home, school, and community;
>
> (e) The mental and physical health of all individuals involved;
>
> (f) Information, records, and evidence of domestic violence as defined in KRS 403.720 . . . .

The trial court specifically set forth the factors it used to determine custody.

THE WISHES OF THE CHILD'S PARENTS

The trial court found that both parents wanted custody of Son and each wanted to be the primary residential parent.

THE WISHES OF THE CHILD AS TO HIS CUSTODIAN

At the time of the hearing, Son was only five years old. He was not interviewed and neither party sought to have the court interview him.

THE INTERACTION OF THE CHILD WITH PARENTS, SIBLINGS AND OTHERS

The trial court noted that Son has a strong bond with Daughter and Ms. Groom's parents. The court also found that Son was equally bonded with both parents. The court also found Ms. Groom had a larger and supportive extended family.

THE CHILD'S ADJUSTMENT TO HOME, SCHOOL, AND COMMUNITY

The trial court found that for two and a half years prior to the couple's separation, Benton was Son's primary residence. Son then moved back to Nashville with Mr. Groom in December of 2009. It also found that Ms. Groom's home is more suitable to raising a child because it is a safe subdivision with other children in the neighborhood. Mr. Groom lives in a condo located in downtown Nashville, which consists of one room with a separate bathroom. Also, not noted in the findings of the court, but contained in

the record, is information regarding Son's schooling. When Son returned to Nashville, Mr. Groom enrolled him in preschool. Then, in September of 2010, when Son would spend Thursday and Friday with Ms. Groom, he would attend a preschool in Kentucky.

THE MENTAL AND PHYSICAL HEALTH OF ALL INDIVIDUALS INVOLVED

The trial court found both Mr. and Ms. Groom have mental health issues, but that both are stable and have been for a number of years.

EVIDENCE OF DOMESTIC VIOLENCE

The trial court found the parties' testimony to be in direct conflict with one another. Both claimed the other was abusive during the marriage. The trial court could not determine who was being truthful and who was lying, or if both were exaggerating.

Aside from these specific factors, the court also noted that both parties took an active role in the daily and general care for Son and that neither was more of a caregiver than the other. The court also found that "[i]t is apparent from the record that both parties have been guilty to some degree of losing control, being angry or generally acting in an immature and irrational manner." It is clear to this Court that the trial court specifically considered the factors set forth in KRS 403.270 and determined the best interests of Son based on those factors.

Mr. Groom next argues that the trial court's findings to support the decision that it was in Son's best interest to designate Ms. Groom as the primary residential parent were clearly erroneous. The findings Mr. Groom claims are clearly erroneous are: that he was not the primary caregiver since Son's birth; that Ms. Groom's mental health issues impaired her ability to be a primary residential parent; that the trial court erred in giving

more weight to the testimony of Ms. Groom's witnesses regarding her mental health; that Ms. Groom had exhibited instability in her behavior and judgment concerning the safety of Son; and that the trial court exhibited a bias against Mr. Groom when it questioned him at the conclusion of his testimony. We find no error here.

The evidence presented at trial suggested that even though Ms. Groom would travel from Benton to Nashville during the week to work at the café, both parents were actively engaged in the raising of Son. Additionally, the café would not be open during the summer or on the weekends.

As to Ms. Groom's mental stability, three psychiatrists presented evidence. Dr. Sparks-Bushnell stated that Ms. Groom's bipolar disorder was stable and under control. Dr. Sarah Shelton was a psychiatrist appointed by the court to conduct a custody evaluation. Dr. Shelton concluded that Mr. Groom would be the better primary residential parent. Dr. William Austin was retained by Ms. Groom to evaluate Dr. Shelton's custody evaluation. He testified that Dr. Shelton's evaluation was the lowest quality evaluation he had ever seen and that her evaluation methods were flawed. There was also general testimony from the psychiatrists that people with bipolar disorder can be successful parents.

As for Ms. Groom's behavior and judgment concerning the safety of Son, this revolves around an internet conversation she had with a man named Clint Graves, who Mr. Groom claims is a stranger. The conversation was of a sexual nature. During the conversation Ms. Groom told Mr. Graves where she was. Son was with Ms. Groom at the time. Mr. Groom argues that this was inappropriate behavior that could have led to

a dangerous situation if Mr. Graves had been a dangerous person. The trial court found that Ms. Groom had known Mr. Graves for a number of years and that while the communication was "highly inappropriate," there was no serious risk to Son.

As for the suggested bias of the trial court, we find no evidence of that. The hearing was taped and at the close of evidence the trial judge asked Mr. Groom a few questions that clarified or gave further detail to previous testimony. Mr. Groom claims in his brief that this was akin to an interrogation, but that is definitely not the case.

> The trial court heard the evidence and saw the witnesses. It is in a better position than the appellate court to evaluate the situation. The court below made findings of fact which may be set aside only if clearly erroneous. We do not find that they are. They are not 'manifestly against the weight of evidence.' A reversal may not be predicated on mere doubt as to the correctness of the decision. When the evidence is conflicting, as here, we cannot and will not substitute our decision for the judgment of the [trial court].

*Wells v. Wells*, 412 S.W.2d 568, 571 (Ky. 1967) (citations omitted).

Mr. Groom's final argument is that the trial court committed reversible error when it refused to permit the introduction of evidence regarding more internet communications. As stated previously, there was evidence that Ms. Groom had inappropriate internet conversations with Mr. Graves. Mr. Groom wanted to introduce other communications and internet activity. The trial court denied the introduction of this evidence. We find no error here. KRS 403.270(3) states that "[t]he court shall not consider conduct of a proposed custodian that does not affect his relationship to the child." There is no evidence these other internet communications affected Ms. Groom's relationship with Son.

For the foregoing reasons we affirm the judgment of the trial court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

Thomas L. Osborne
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