

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2016-CA-001812-ME

ABIGAYLE MCBAEN

APPELLANT

v. APPEAL FROM WARREN FAMILY COURT  
HONORABLE DAVID A. LANPHEAR, JUDGE  
ACTION NO. 15-CI-00331

ROBERT MCBAEN

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, DIXON AND STUMBO, JUDGES.

ACREE, JUDGE: Abigayle McBaen seeks reversal of the Warren Family Court's October 28, 2016 order granting appellee Robert McBaen sole custody of the parties' two minor children and awarding Abigayle reasonable visitation. We affirm.

## FACTS AND PROCEDURE

Abigayle and Robert married on April 19, 2009. Two children were born of the marriage: R.W.B., born in 2010 (Son), and M.P.M., born in 2013 (Daughter). Son has been diagnosed as being on the autism spectrum.

Abigayle petitioned to dissolve the marriage in 2015, and the parties were divorced by an interlocutory (bifurcated) decree of dissolution entered on January 27, 2016. They eventually resolved all property issues,<sup>1</sup> leaving only children-related issues for further adjudication.

During the pendency of this action, the parties operated under a temporary joint custody arrangement with equal timesharing. Robert had physical custody of the children each Monday and Tuesday, Abigayle each Wednesday and Thursday, and they alternated weekends.

The family court held a custody hearing on October 12-13, 2016. Abigayle requested sole custody, or alternatively, joint custody with her designated the primary residential parent; Robert sought sole custody. The family court heard from the parties, multiple witnesses and family members, and psychologist Dr. Robert Bruce Fane, the parties' therapist, after which the family court entered detailed factual findings. Neither Abigayle nor Robert disputes those findings. Accordingly, we quote at length:

[Abigayle] is 38 years old and resides with her boyfriend, Richard Dort, . . . in Bowling Green. . . . [T]he Court has no reason to believe that [the children and Dort] do not

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<sup>1</sup> The parties entered into a property settlement agreement approved by the family court on June 1, 2016.

have a mutually acceptable relationship with each other. [Abigayle submitted evidence that her mother and her sister visit with the children about once per month, and they have a good relationship with them]. . . .

[Abigayle] also produced testimony from the parents of the children's soccer and school friends, who described how [Abigayle] is involved in the children's lives. Witness Beth Haselhoff testified [Abigayle] coaches [Son's] soccer team, and during games and practices, she carries 3-year-old [Daughter] on her back in a "back wrap." The Court finds that the children have developed friends through their activities and school.

[Robert] is married to Courtney McBaen, having been married on July 28, 2016. Courtney has sole custody of her 10 and 11 year old daughters. The Court finds that Courtney is involved with [Son] and [Daughter], and that the children have a close relationship with Courtney and her two children. The Court further finds that [Son] and [Daughter] are building a grandparent relationship with Ed and Laurie Harris, Courtney's mother and father.

The Court also finds that [Robert] is very involved and close to [Son] and [Daughter], and that he and Courtney understand that they have a blended family. They are striving to serve the needs of all four children, and specifically, the needs of [Son] and [Daughter]. The Court finds that [Son] and [Daughter] are close to [Robert] and that they depend on [Robert].

In addition, the Court finds as follows:

- [Abigayle] scheduled doctor visits for the children without consulting [Robert], including specifically an appointment to remove [Daughter's stitches] . . . , and [Abigayle] failed or refused to respond by a simple text.
- [Abigayle] applied for [Son] to have free lunch at school without informing [Robert] she was planning to do it. [Abigayle] responded that it was "not his business."

- [Abigayle] applied for Social Security Disability benefits for [Son] based on his autism diagnosis without informing [Robert] she was planning to do it or had done it.
- [Abigayle] cancelled the children's employment-related daycare arrangements without informing [Robert] she was planning to do it or had done it.
- [Abigayle] scheduled an appointment for the children to see a psychologist without informing [Robert] she was planning to do it or had done it. . . .
- During [Robert's] alternating weekend timesharing, he and his wife took the children to church services at the Episcopal Church where both [parties] attend. [Robert] placed the children in the children's service during the adult worship period. However, [Abigayle] removed [Daughter] from the children's service without notifying [Robert] and during the adult worship, would not allow [Daughter] out of her lap to go sit with her father. [Abigayle's] explanation for her behavior was that the child would not have been with [Robert] during that time anyway.
- [Abigayle] alleged that [Robert] was controlling and manipulative with [Abigayle] and the children, and as evidence of such manipulation, introduced and played recordings of two telephone conversations she had with [Robert]. The subject of the phone calls involved, at least in part, outstanding and unpaid child care expenses [Abigayle] claimed [Robert] owed to the children's child care provider outside of his child support obligation. [Abigayle] placed the calls using the Bluetooth function in her vehicle, and recorded the conversations while driving with the children inside the car. In truth, [Robert] owed nothing to the child care provider because his share of child

care expenses was included in his child support calculation.

The Court finds that [Abigayle] is very active and involved with the children, and cares for them very much. . . .

[Abigayle] appears to have a nice home . . . and she introduced photos to show it as a neat and suitable environment for the children. . . . [Robert] purchased [Abigayle's] interest in the martial residence . . . [and t]his is the residence the children have lived in for the last several years. . . . The Court further finds from the evidence that [both Abigayle and Robert] provide[] an appropriate, structured environment for the children.

The Court finds that [Son] is adjusted to his school and his school friends, and that both parents live in the McNeill Elementary School district. Consequently, the children will be able to attend McNeill Elementary regardless of the custodial arrangement ordered by the Court. . . .

[Abigayle] is healthy physically, but she admits to having anxiety attacks and depression, and testified she needs a service dog to keep her calm. . . .

Dr. Fane testified that he has seen the parties professionally for at least two years on dozens of occasions. [Dr. Fane provided the parties both marriage and individual counseling.] [Abigayle] quit seeing Dr. Fane after he testified for [Robert] in a domestic violence hearing between the parties in June 2015. Dr. Fane stopped short of saying that [Abigayle] has a personality disorder, but he described at length that she has "personality problems" which come from the personality disorder "cluster." Dr. Fane testified [Abigayle] has narcissistic and histrionic personality traits, which are personality problems that do not change and cannot be fixed. . . .

The Court specifically asked Dr. Fane whether the parties could cooperate with one another, even with the help of

Court Orders. Dr. Fane stated in his long involvement with the parties, [Robert] has demonstrated that he can and will cooperate, while [Abigayle] says she will cooperate, but does not show it in her actions. He opined, based on his experience with the parties, that they could not even attempt to cooperate without having an adverse impact on the children. He described that [Abigayle's] manipulative behavior and the parties' toxic relationship would impair the children with attachment difficulties similar to the relationship issues [Abigayle] previously experienced with her mother and sister. He added that even though [Son's] conflict threshold is already low because of his autism, the parties' inability to cooperate with each other could cause [Son] to be even less able to deal with conflict. . . .

There were three domestic violence petitions filed between the parties in Warren Circuit Court, Case Nos. 15-D-00084-001, -002, and -003. Two petitions were filed by [Abigayle] and one was filed by [Robert]. All three petitions were dismissed and the Court finds that they do not impact the Court's custody decision[.]

(R. 429-39).

After the close of the evidence, by thorough and detailed order entered October 28, 2016, the family court awarded Robert sole custody of the children and Abigayle visitation in accordance with the Warren County guidelines, except that the midweek visitation period should be every week as opposed to alternating weekends. The family court found much of Abigayle's behavior disturbing. Careful not to display judgment, the Court expressed concern that Abigayle and her boyfriend are unmarried and living together in front of the children. The court was also disturbed that Abigayle carried Daughter on her back at soccer games. The family court found Abigayle's behavior manipulative, serving no beneficial

purpose except to keep Daughter from spending time with Robert. It also found Abigayle displayed poor judgment and manipulative behavior when she placed and recorded the two phone calls, exposing the children to adult conversations and talking down to Robert as if he were a child in front of the children. The family court noted Robert kept his composure throughout both conversations.

The family court further found troubling Abigayle's decision to arrange doctor visits for the children without informing Robert, and her unwillingness to respond to simple text messages. It described Abigayle's behavior "at its worst manipulative and controlling, and its best extremely poor judgment." The family court found that Abigayle chose not to inform Robert that she had signed Son up for free lunch because she did not want to include him in any decisions she made involving the children, and her behavior during the soccer games and church demonstrated her refusal to recognize that the children have two parents.

Collectively, the family court opined that Abigayle's behavior reinforced and coincided with Dr. Fane's testimony and opinions that Abigayle is manipulative and controlling, and she deliberately kept the children from Robert. The family court's perception was that Abigayle repeatedly attempted to exclude Robert from important decisions, activities, and events to interfere with Robert's relationship with the children. The court was troubled by the impact the parties' ongoing disagreements and "drama" would have on the children. The family court found Abigayle's level of discord and inability to even communicate, much less cooperate, resulted from "a more deep-se[at]ed problem, as Dr. Fane described." It

found little prospect for improvement in light of Dr. Fane’s opinion that Abigayle’s personality issues would not change and cannot be fixed. The family court reinforced that Abigayle “saw nothing wrong with excluding [Robert] from decision after decision, and took no thought that he should be involved.”

Based on all the evidence, the family court concluded that a sole custody arrangement serves the best interest of the children. Abigayle appealed.

### **STANDARD OF REVIEW**

The standard of review regarding child custody issues is whether the family court’s decision was clearly erroneous and constituted an abuse of discretion. *Eviston v. Eviston*, 507 S.W.2d 153, 153 (Ky. 1974). We will only reverse a family court’s custody decision if its findings of fact are clearly erroneous or its decision reflects a clear abuse of the wide discretion granted to family courts in custody matters. CR<sup>2</sup> 52.01; *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). A factual finding supported by substantial evidence is not clearly erroneous. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003) (footnote omitted). Substantial evidence is “evidence that a reasonable mind would accept as adequate to support a conclusion[.]” *Id.* In that regard, “[m]ere doubt as to the correctness of a finding will not justify its reversal[.]” *Id.*

### **ANALYSIS**

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<sup>2</sup> Kentucky Rules of Civil Procedure.

As referenced, Abigayle does not take issue with the family court's findings of fact. Her displeasure lies with the family court's insinuations and legal conclusions drawn from those facts. We are not persuaded.

KRS<sup>3</sup> 403.270 is the statutory authority on point. *Frances v. Frances*, 266 S.W.3d 754, 756 (Ky. 2008). When determining an award of child custody, KRS 403.270(2) instructs the family court to give equal consideration to both parents and to award custody in accordance with the best interests of the children involved. KRS 403.270(2). The statute further permits an award of joint custody if it is in the children's best interests. KRS 403.270(5). However, there is no statutory preference for an award of joint custody, an arrangement which entails joint decision-making and significant participation by both parents in the upbringing of their children. *Squires v. Squires*, 854 S.W.2d 765, 769 (Ky. 1993).

KRS 403.270 does "not include a definition of the best interest of the child standard." *Frances*, 266 S.W.3d at 756. Instead, the statute denotes a non-exclusive list of factors to be considered when making a best-interest determination. The factors relevant to this matter include:

- (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;

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<sup>3</sup> Kentucky Revised Statute.

(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[.]

KRS 403.270(2).

We are mindful that the family court, in its capacity as the finder of fact, “is entitled to make its own decisions regarding the demeanor and truthfulness of witnesses” and, in its discretion, “may choose to believe or disbelieve any part of” the testimony presented. *Bailey v. Bailey*, 231 S.W.3d 793, 796 (Ky. App. 2007). The family court's credibility assessments are significant to our review and remain undisturbed.

In the case before us, the family court, in detailed fashion, examined each applicable statutory factor.<sup>4</sup> It was aware of each parent's wishes. It was unable to consider the wishes of the children as they lack the maturity to meaningfully contribute to the decision given their ages. The family court described in detail the children's relationships with each parent and extended family. It was aware that both parents are actively involved in the children's lives and activities; that both parents have suitable homes for the children and offer a structured, safe living environment; and that both parents live in the same school district. The family court considered Son's adjustment to his school and

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<sup>4</sup> The family court found, and the parties agree, that the subsections of KRS 403.270 related to a *de facto* custodian inapplicable in this case. See KRS 403.270(g) – (i).

extracurricular activities. It did not take into consideration the dismissed domestic violence petitions, and found both parents to be in secure physical health. At this point, the factors weigh rather evenly in favor of the parties.

But this is where Dr. Fane's testimony came into play. *See Frances*, 266 S.W.3d at 756 (KRS 403.270(2) requires the family court to consider all relevant factors beyond those specifically enumerated). Dr. Fane described Abigayle as manipulative and at times untruthful and disingenuous with an anger problem. He testified that Abigayle's narcissism and histrionic personality traits will remain unchanged over time, and she lacks the capacity to cooperate and co-parent. Importantly, Dr. Fane testified that the parties' discord and inability to cooperate would impair and negatively impact the children, possibly creating difficulties for the children into adulthood.

The family court gave equal consideration to Abigayle and Robert as custodians before determining that it was in the best interests of the children that sole custody be awarded to Robert. Nevertheless, Abigayle claims that the family court's custody award was an abuse of its discretion. She argues that *Squires*, *supra*, counsels against relying on actions that were undertaken during the divorce when making a decision as to whether the parties can move forward and properly co-parent children post-litigation. She notes that *Squires* specifically declined to require a cooperative spirit as a prerequisite for granting joint custody and holding that to do so "would permit a party who opposes joint custody to dictate the result by his or her own belligerence[.]" *Squires*, 854 S.W.2d at 768.

How then do courts justify a joint custody award to parents who, in the throes of divorce, display antagonism one to the other? In *Squires*, the Kentucky Supreme Court directed courts to “look beyond the present and assess the likelihood of future cooperation between the parents. . . . By cooperation we mean willingness to rationally participate in decisions affecting the upbringing of the child.” *Squires*, 854 S.W.2d at 769. The family court followed this admonition. It noted Abigayle’s habit, particularly during the temporary joint-custody period, of deliberately excluding Robert from the decision-making process, and her manipulative and controlling behaviors designed specifically to interfere with Robert’s parenting of the children. Abigayle made numerous unilateral decisions regarding significant decisions involving the children – applying for free lunch and social security disability benefits, scheduling medical appointments, cancelling daycare arrangements – all without notifying or involving Robert. It was convinced that Abigayle’s behaviors would endure long after the divorce, negating any possibility that she could effectively co-parent these children alongside Robert in the future. Dr. Fane’s professional opinions align with and support the family court’s findings. We, like the family court, are convinced that the likelihood of future cooperation between these parties is extremely low.

We are mindful that Abigayle takes significant issue with the family court’s interpretation of the evidence. She downplays her actions as isolated incidents of discord and lack of cooperation. The family court was not convinced

of this, and its conclusion that future cooperation is unlikely and unworkable is supported by the testimony and record.

When reviewing the propriety of a custody award, the test is not whether some other court may have reached a different decision, but rather, whether the family court abused its discretion. *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982). To prove abuse of discretion, a party must show that the family court that decided the case acted arbitrarily, unreasonably, or unfairly. *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky. 1994). Abigayle has not shown that the award of sole custody to Robert was arbitrary, unreasonable, or unfair.

For the foregoing reasons, the Warren Family Court's October 28, 2016 judgment awarding Robert sole custody of the children is affirmed.

ALL CONCUR

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