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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2018-CA-000760-ME

AMBER NICOLE BIRNEY — APPELLANT

v.

APPEAL FROM MCCREARY CIRCUIT COURT
HONORABLE PAUL K. WINCHESTER, JUDGE
ACTION NO. 15-CI-00127

MICHAEL BEECHER BIRNEY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, KRAMER, AND SMALLWOOD, JUDGES.

KRAMER, JUDGE: Amber Nicole Birney and Michael Beecher Birney were married for ten years before separating in 2015 and divorcing in 2016, and they

currently share joint custody[1] of their two minor children, J.B. and E.B.[2] At issue in this appeal is a February 6, 2018 final custody decree of the McCreary Circuit Court directing Amber and Michael to share an alternating weekly parenting schedule with neither designated as primary residential parent, and with Michael's parenting time occurring in Kentucky during the regular school year. This is the visitation schedule Michael requested. Amber contends this parenting schedule is not in J.B.'s and E.B.'s best interests; and that their children's best interests would have been better served if the circuit court had instead designated her as primary residential parent, and limited Michael's visitation rights to every other weekend and three one-week periods during the summer. Upon review, we affirm.

In making a final custody decree, including the amount of parental timesharing and determination of the primary residential parent, the deciding court must apply KRS[3] 403.270 to ascertain the children's best interests. *See Frances v. Frances*, 266 S.W.3d 754, 759 (Ky. 2008). If substantial evidence of record supports a finding that it is in the children's best interests to reside primarily with

[1] In the proposed findings and order she submitted in this matter on November 28, 2017, Amber asked for sole custody of the children. On appeal, her focus is exclusively upon timesharing; she raises no argument of error with respect to the circuit court's determination of joint custody, and instead advocates adopting the recommendations of Dr. David Feinberg and the Friend of the Court that joint custody was in the children's best interests. As such, we need not address this point further.

[2] It appears J.B. is presently eight years old and E.B. is five.

[3] Kentucky Revised Statute.

one parent as opposed to another or, alternatively, that it is in the children's best interest not to reside primarily with either parent but for the parents to share equal time with the children, this Court will not disturb that finding because "judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court." *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003).

With that said, KRS 403.270(2) denotes a non-exclusive list of factors to be considered when making a best-interest determination. At the time the circuit court entered its final custody decree, those factors[4] included:

> (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;
> (g) The extent to which the child has been cared for, nurtured, and supported by any de facto custodian;
> (h) The intent of the parent or parents in placing the child with a de facto custodian; and
> (i) The circumstances under which the child was placed or allowed to remain in the custody of a de facto custodian, including whether the parent now seeking custody was previously prevented from doing so as a result of domestic violence as defined in KRS 403.720

[4] This statute was subsequently amended. We quote the version of KRS 403.270 in effect February 6, 2018, when the circuit court entered its final custody decree.

> and whether the child was placed with a de facto custodian to allow the parent now seeking custody to seek employment, work, or attend school.

Here, the circuit court explained in its February 6, 2018 final custody decree that its above-discussed timesharing schedule was in the children's best interests,

> considering the factors set forth in KRS 403.270(2), specifically the children's adjustment to home, school and community, and the mental and physical health of the parties, and the fact the Respondent, Michael, has purchased a home in the area and testified regarding his intention to reside in the area half of the time, so that he can be a more involved parent with his children, while still allowing the children to remain in the schools and communities in which they have become rooted.

The circuit court added that it believed "the children would benefit greatly from strong relationships with both parents and having regular contact with each," and that its findings and ultimate determination regarding visitation were "based upon the testimony of the parties, all witnesses, the Friend of the Court and Dr. [David] Feinberg[.]" In particular, the circuit court stated "[t]he report and testimony of Dr. Feinberg noted in an ideal situation both parties would be involved with the children on an equal level," and that "Dr. Feinberg recommended that both parties engage in co-parenting classes and individual therapy." The circuit court cautioned that in its view "the success of this schedule will require the parents to put aside their differences and cooperate fully with each

other and failure to do so will negatively affect the health, safety, and welfare of the children," and further directed both Michael and Amber to engage in and complete anger management classes and co-parenting classes as recommended by Dr. Feinberg.

Now on appeal, Amber contends the circuit court's determination with respect to visitation was against the manifest weight of the evidence. She qualifies this by conceding: (1) the "factors of KRS 403.270 concerning domestic violence and de facto custodian standing clearly do not apply and warrant no discussion"; (2) the factor specified in KRS 403.270(2)(c) "bears little impact on the resolution of this case"; and (3) as it relates to the factor specified in KRS 403.270(2)(a), "this case is a litigious and bitter litigation between parents with very different wishes."

Rather, Amber's focus is upon: (1) the factors set forth in KRS 403.270(2)(b), (d), and (e); (2) a series of factual issues she claims the circuit court improperly failed to consider; and (3) what she perceives as the circuit court's improper adoption of a final custody decree tendered by Michael.

We begin with her first contention, *i.e.*, the circuit court's findings relative to the statutory best interest factors, starting with KRS 403.270(2)(d). As an aside, between the date Amber initiated divorce proceedings and until approximately September 2017, Michael resided primarily in Elkton, Maryland. He now has an additional home in Somerset, Kentucky, where he resides on

alternating weeks. As noted, the circuit court found that Michael "purchased a home in the area and testified regarding his intention to reside in the area half of the time, so that he can be a more involved parent with his children, while still allowing the children to remain in the schools and communities in which they have become rooted."

On appeal, Amber's complaints regarding this finding are limited to expressions of doubt on her part regarding Michael's ability to maintain his alternating schedule; and her insinuation that because the children's living arrangements have been altered, and "[a] new commute to school for 50% of [the children's] school attendance was put into place," the children will suffer.

However, Amber's suspicion and conjecture are not grounds for reversal. Moreover, the circuit court's finding in this respect is consistent not only with Michael's testimony, but with other substantial evidence of record. The "area" that the circuit court and parties recognized as the children's "community," for purposes of visitation orders designating the boundaries of where Michael has been generally permitted to take the children during his visitation, consisted of McCreary County (where Amber resides) and its neighboring counties. It is uncontested that Michael resides in Kentucky half of the time, where he maintains a residence in Somerset (located in Pulaski County, which neighbors McCreary County). As observed by the circuit court, residing with Michael every other week

at his home in Pulaski County does not uproot the children from their schools; and, Amber does not contest this point. Accordingly, the circuit court committed no error.

As to the factors set forth in KRS 403.270(2)(b)[5] and (e),[6] Amber argues neither of these factors find support in the evidence provided by Dr. Feinberg, which the circuit court relied upon in rendering its decision. Specifically, Amber represents that Dr. Feinberg recommended a visitation schedule identical to the visitation schedule she advocated because, in the words of her brief, "Dr. Feinberg's report clearly established that the children had a strong emotional attachment to Amber," and "Dr. Feinberg opined that [Michael's] mental health is littered with problems."

At best, Amber's interpretation of Dr. Feinberg's evidence is incomplete. By way of background, Dr. Feinberg was a psychologist who interviewed Amber, Michael, J.B., and E.B. on three or so occasions between July and October 2016 pursuant to a court-ordered custody evaluation. In a December 12, 2016 "custody conference summary" report Dr. Feinberg prepared for these proceedings, in which he recommended the visitation schedule Amber advocates,

[5] Amber acknowledges the children did not testify in this matter but asserts "their wishes were adequately conveyed through Dr. Feinberg and [the Friend of the Court.]

[6] For purposes of KRS 403.270(2)(e), the parties' *physical* health has never been at issue.

he identified several concerns with Michael *and* Amber, most of which related to their acrimony toward one another and how it interfered with their ability to effectively function as co-parents. Dr. Feinberg repeatedly identified Michael's residence in Maryland, as opposed to Kentucky, as an additional concern. That aside, he emphasized both Michael's and Amber's wide-ranging virtues as parents to the children and concluded, as the circuit court observed, that "[i]deally, [J.B. and E.B.] should be allowed to have both of their parents as active caregivers in their daily lives." For context, the relevant extent of his conclusions and recommendations were as follows:

> Michael and Amber married in January 2005 and separated in March 2015. They are separated, but not divorced. They share temporary joint custody of their 2 children: [J.B. and E.B.] Michael lives in Elton, Maryland. Amber lives with her fiancé, Dustin Hamlin in Pine Knot, Kentucky. The parties live about 600 miles (about 10 hours driving time) apart. Amber and Dustin have one child together . . . born in July 2016.
>
> Amber and Michael have a highly contentious and litigious marital breakup. They have done little work toward resolving their mutual anger and establishing a functional co-parenting relationship. Compounding the discord is the geographical distance between their homes. Both Michael and Amber are emotionally immature and have had immense difficulty in shielding the children (and [J.B.] particularly) from the post-marital conflict. As a result, [J.B.] suffers from divorce-related trauma and distress.
>
> The children demonstrated positive emotional attachment to both of their parents during this evaluation. Michael

and Amber showed warmth and responsive parenting skills in their interactions with [J.B. and E.B.] Estrangement due to distance, in addition to exposure to his father's emotional distress related to the divorce, has caused some strain in the relationship between Michael and [J.B.]. In addition, extended time away from his mother has caused [J.B.] to feel emotionally stressed at times. Ideally, [J.B. and E.B.] should be allowed to have both of their parents as active caregivers in their daily lives. Unfortunately, the parties now reside 600 miles apart. An equal split of time between Maryland and Kentucky is not a feasible option, as the distance is too great and such an arrangement would not provide the children with the stability and structure that they need to be emotionally well-adjusted.

Though they show appropriate parent-child attachments to both parents, the children view Amber as their primary attachment figure. In addition, Kentucky has been established as their home. As a result of these findings, it is recommended that the children remain in Kentucky and in the primary care of Amber, with joint legal custody shared between Michael and Amber.

In regard to timesharing, it is recommended that the children continue to have timesharing with Michael every other weekend and be allowed to travel to Maryland during extended school breaks and holidays. In addition, it is recommended that they have three one-week timesharing periods with Michael during the summer. During the times that they are away from Amber, it is important that they continue to be allowed Facetime and/or phone calls on a daily basis.

Michael is struggling emotionally in dealing with the marital breakup and separation from his children. It is strongly recommended that he participate in individual therapy to assist him in the divorce recovery process; to adaptively deal with feelings of depression and any thoughts of self-harm; to assist him in developing better

emotional boundaries with the children; and to increase his repertoire of parenting and co-parenting skills.

It is strongly recommended that Amber participate in individual therapy to assist her in resolving her feelings of anger and resentment toward Michael; to assist her in recognizing the need to promote and support the children's relationship with Michael; and to increase her repertoire of parenting and co-parenting skills.

[J.B.] should continue to participate in individual therapy to assist him in addressing emotional distress related to the marital breakup and in adjusting to the divorce and family dynamics.

Productive communication between Michael and Amber is essential for effective co-parenting. It is strongly recommended that they make use of Parenting Coordinating sessions, in lieu of litigation or unilateral decision-making, to help them:

- communicate with each other directly and effectively;
- work out their methods of sharing information;
- negotiate and implement timeshare changes;
- discuss the children's activities (school and extracurricular);
- and address any other issues related to the children's welfare.

The custody and timesharing recommendations are contingent upon Amber and Michael complying with the recommendations generated by this evaluation, including but not limited to:

- participating in recommended counseling and parenting coordinating;
- not engaging in potentially alienating behavior;
- refraining from discussing adult matters with or in front of the children, or in any other way placing them in the middle of any negativity.

> [J.B.] and [E.B.] need the positive input of both their parents. Their relationships with either parent should not be jeopardized by exposure to anyone speaking negatively to or about the other parent. Both parents are urged to cooperate and conduct themselves in a civil and businesslike manner with each other to avoid placing the children at risk for emotional and behavioral problems.

During a May 11, 2017 hearing, Dr. Feinberg later testified consistently with his conclusions and recommendations. He was not asked whether the children regarded Amber as "their primary attachment figure," but he reiterated his opinion that both Michael and Amber had strong bonds with and were responsive to the needs of their children. He also reiterated his belief that both Michael and Amber were possibly subjecting J.B. and E.B. to alienating behaviors; and his observation that Amber and Michael had a "pretty much non-existent" co-parenting relationship on the dates he evaluated them.

With respect to his opinion of the parties' timesharing, Dr. Feinberg testified "substantial" weight had been given to the fact that Michael was residing in Maryland at the time, as opposed to the area in Kentucky that the children were familiar with. Aside from that, however, he qualified his testimony by stating that he had had no contact with and had received no further information about Amber, Michael, or the children since interviewing them on the occasions prior to December 12, 2016, the date of his report. Accordingly, he was unable to make any updated conclusions or recommendations regarding timesharing.

With that said, while Dr. Feinberg did not consider the parties' circumstances beyond December 12, 2016, the circuit court – which never expressed exclusive reliance upon Dr. Feinberg's evidence in making its final timesharing determination – considered testimony and evidence that reflected upon the parties' continuing circumstances beyond that date. The circuit court noted the changed circumstances of Michael's residence, which Dr. Feinberg had considered a "substantial" factor in his timesharing analysis. Aside from that, during the May 11, 2017 hearing, Michael testified and produced documentation supporting that since January 31, 2017, he had been receiving regular professional therapy for the issues Dr. Feinberg postulated about his mental state; and, that he had completed a sixteen-hour course in parent education and family stabilization.[7]

As discussed, the circuit court awarded joint custody and equal timesharing, but also made note of Michael's and Amber's lack of cooperation as parents, and it directed Michael and Amber to engage in co-parenting classes and individual therapy. What is implicit from this is that the circuit court recognized Michael *and* Amber have room for improvement as parents, but that any shortcomings they may have had were overshadowed by the greater benefit their children would receive "from strong relationships with both parents and having

[7] Michael's certificate of completion, a photocopy of which was filed of record, specifies he completed this course on May 5, 2017.

regular contact with each." The circuit court's assessment of the evidence is not manifestly unreasonable in this respect, and thus not indicative of clear error.

As to her second contention, Amber argues the circuit court failed to consider several factual issues she raised during the underlying proceedings, many of which were set forth in a pair of supplemental reports the Friend of the Court[8] filed in this matter in 2017. Below, she contended:

- Shortly after she served Michael with her divorce petition in 2015, and during a period when she was hospitalized for a medical condition, Michael "abducted" and "kidnapped" their children by taking them to Maryland to stay with his relatives for a period of eleven days;[9]

[8] A "Friend of the Court" is an individual appointed by the court to "to investigate the child's and the parents' situations, to file a report summarizing his or her findings, and to make recommendations as to the outcome of the proceeding[.]" *Morgan v. Getter*, 441 S.W.3d 94, 111 (Ky. 2014).

[9] While Amber continuously refers to this incident as an "abduction" and a "kidnapping," nothing indicates any criminal charges were filed or resulted from it. During a May 11, 2017 hearing in this matter, Michael testified that what had prompted him to go to Maryland with the children in late June 2015 and ultimately stay there with the children for eleven days was his concern for the children's safety. Specifically, he testified Amber had informed him shortly beforehand that "she wanted to end her life." He further testified he was advised by attorneys in Kentucky and Maryland that taking the children to stay with his family in Maryland was lawful because no order regarding the children's custody had yet been entered. While there, he petitioned a Maryland court for custody of the children. He later dismissed those proceedings. Later, on July 31, 2015, the circuit court directed the parties to keep their children in Kentucky during the pendency of this action. It appears the parties then agreed, during the pendency of these proceedings, to allow Amber to function as the primary residential parent and for Michael to have visitation rights every other weekend. This arrangement was later memorialized in an October 5, 2015 order of the circuit court regarding the parties' respective visitation rights.

- Michael hired a private investigator to "stalk" her, tamper with the brakes of her car, and on one occasion run her off the road while she was driving;[10]
- Michael often recorded his interactions with their children during his visitation time;[11]
- Michael had coached their children to call her new fiancé a "butthead" during his visitation time;[12]
- Michael had, during his visitation time, told their children it was Amber's fault that he was unable to spend enough time with them or take them to Maryland to visit with his side of their family, and had coached their children to tell the Friend of the Court they wanted to live with him;[13]

[10] When she testified on this subject at an April 4, 2017 hearing, Amber admitted she had "no visible proof" that her brake lines had ever been tampered with. Amber also provides no citation to any evidence aside from her own testimony supporting that she was run off the road at any point in time, much less at Michael's behest. Michael, on the other hand, acknowledged hiring a private investigator to follow Amber and report on her whereabouts sometime between December 2015 and May 2016, but denied any knowledge of how the private investigator went about doing so, and further denied instructing the private investigator to tamper with Amber's brakes or run her off the road. Beyond this, the record provides no further insight.

[11] In her brief, Amber asserts that Michael's frequent recording of his interactions with their children signify that his "mental health is littered with problems." When asked about this during a May 11, 2017 hearing, Michael admitted he often recorded his interactions with the children during his visitation time, but without their knowledge. He further testified he did not want to do this but had done so upon the advice of a prior attorney to "protect" himself from what he asserted were frequent untrue allegations from Amber in her various pleadings about anger issues on his part and his alleged outbursts in the presence of their children.

[12] Michael denied this.

[13] Michael denied this.

- Michael had, during his visitation time, fed their daughter grapes after Amber had specifically told him their daughter was allergic to grapes. This, according to Amber, caused their daughter to have nausea and diarrhea during Amber's time with their daughter the following day;[14]
- On one occasion, Michael caused their son "intense anxiety" (in her words) by arriving unannounced at one of their son's basketball games;[15]
- Michael had repeatedly violated a continuing order from the court by speaking with the children about their divorce proceedings during his visitation time;[16] and
- Michael had intentionally and repeatedly violated a continuing order from the court by taking their children on excursions outside of Kentucky during his visitation time.[17]

[14] Michael denied this.

[15] This incident apparently took place sometime in October 2017, and Michael's version of it significantly differed from Amber's. In a motion to clarify his visitation rights, which he filed later that month, Michael asserted he had been encouraged by school faculty to attend their son's basketball games; he noted that no court order prohibited him from doing so; and that shortly after he arrived at the basketball game, Amber's new fiancé "made a scene, implying that [he] should not be present at the game, swearing and using profane language in front of [J.B.], with [Amber's] partner going so far as to slam a door on [his] leg." Michael also supplied the Friend of the Court with a recording of the incident; and the Friend of the Court acknowledged in a supplemental report that the recording demonstrated Amber's fiancé yelled, "Get the fuck out of here" at Michael.

[16] Michael denied this, and the circuit court never held him in contempt for violating any order.

[17] Again, the circuit court never held Michael in contempt for violating any order. That aside, at a May 11, 2017 hearing, Michael acknowledged he would occasionally take the children on short

In short, Amber asserts that if the circuit court had properly considered her evidence relating to these issues, it would have been compelled to designate her as primary residential parent and to limit Michael's visitation rights to every other weekend and three one-week periods during the summer.

As indicated, however, Amber's contentions were disputed. Michael denied most of her allegations; disagreed with her characterization of the evidence; and he presented evidence to the contrary. More importantly, and as Michael notes in his appellate brief, the circuit court never addressed these issues in its order; nor did the circuit court hold any evidentiary hearing or take any other action relating to what was set forth in the Friend of the Court's two supplemental reports.[18] To the extent that findings resolving any of these issues could have been considered material to the circuit court's disposition of their visitation schedule, Amber never filed a post-judgment motion requesting them. This, in turn, leads to the problem with the second point of Amber's appeal: Boiled down, Amber is arguing the circuit court's fact-finding was inadequate.[19] Though we presume that the circuit

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excursions to Dollywood or to the movies in Tennessee during his visitation weekends. He testified his attorney had advised him this was permissible.

[18] In the role of Friend of the Court, the appointee's investigation and conclusions are subject to challenge. "The investigator's file must be made available to the parties, and the investigator himself or herself must be available for cross-examination." *Morgan*, 441 S.W.3d at 113 (citing KRS 403.300(3)).

[19] This is not an instance in which the circuit court failed to engage in at least a good faith effort at fact-finding or make *any* findings of fact, nor does Amber make such a claim. *See Anderson*

court fully considered the evidence, we cannot know the extent to which the circuit court actually considered, weighed, or discounted the evidence regarding these issues in making its decision. And, Amber's failure to seek additional factual findings as required by CR[20] 52.04 precludes that inquiry. Accordingly, this is not a basis for reversal. *See Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982).

Lastly, as to her third contention, Amber argues "the trial court's findings, which adopted proposed finding language ignoring the parental deficiencies of [Michael], is an invasion of the trial court's decision-making authority."

But, Amber's contention presents this Court with very little. In violation of our civil rules, Amber fails to indicate where in the eleven volumes of appellate record Michael's proposed findings of fact are located,[21] and she has failed to include a copy of the circuit court's order with the appendix of her brief.[22]

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*v. Johnson*, 350 S.W.3d 453, 458 (Ky. 2011) (explaining that as opposed to inadequate fact-finding, "as a matter of policy, when a court fails to make *any* kind of factual findings as required, the litigant should not be prohibited from asking an appellate court to require the lower court to make such findings."); *see also Keifer v. Keifer*, 354 S.W.3d 123, 127 (Ky. 2011) (explaining in this context that "[a] bare-bone, conclusory order . . . setting forth nothing but the final outcome, is inadequate and will enjoy no presumption of validity on appeal.")

[20] Kentucky Civil Rule.

[21] *See* CR 76.12(4)(c)(v).

[22] *See* CR 76.12(4)(c)(vii).

In any event, even if error could be found in this respect,[23] we have searched the record, reviewed both of these documents, and there are few similarities between the two apart from the result that was ultimately reached in this matter. That aside, the remainder of Amber's contention in this vein appears to be merely a rehashing of her prior two arguments, both of which we have already discussed.

In conclusion, we have addressed the breadth of Amber's appellate arguments, and find no error. Accordingly, we AFFIRM.

ALL CONCUR.

| BRIEF FOR APPELLANT: | BRIEF FOR APPELLEE: |
|---|---|
| Jane R. Butcher<br>Williamsburg, Kentucky | Rachel T. Caudel<br>Louisville, Kentucky |

[23] As explained in *Keith v. Keith*, 556 S.W.3d 10, 13-14 (Ky. App. 2018),

> [I]n *Bingham v. Bingham*, 628 S.W.2d 628, 628-30 (Ky. 1982), the Kentucky Supreme Court rejected the notion that a trial court is prohibited from adopting proposed findings tendered by a party. *Id*. at 629. An appellate court will affirm an order supported by substantial evidence in the absence of a showing that "the decision-making process was not under the control of the judge" or "that these findings and conclusions were not the product of the deliberations of the trial judge's mind." *Id*. at 629-30. Our Supreme Court reiterated this point in *Prater v. Cabinet for Human Res.*, 954 S.W.2d 954, 956 (Ky. 1997).