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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000169-ME

MERRICK A. SCHILL APPELLANT

APPEAL FROM KENTON CIRCUIT COURT
FAMILY DIVISION
v. HONORABLE CHRISTOPHER J. MEHLING, JUDGE
ACTION NO. 16-CI-02190

CRYSTAL E. SCHILL (NOW PIATT) APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL AND TAYLOR, JUDGES; AND HENRY,[1] SPECIAL JUDGE.

HENRY, SENIOR JUDGE: Merrick Schill (father) appeals from a judgment of the Kenton Family Court awarding sole custody of the parties' minor child to her

[1]Special Judge Michael L. Henry sitting by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

mother, appellee Crystal Schill (mother). He also challenges as error the award of child support and the requirement that the parties meet with the child's psychiatrist to develop a plan to reunite father with the child. We affirm.

The parties married in 2004 and subsequently adopted the child which is the subject of this appeal when she was six months old. After they separated in August 2016, mother and father voluntarily shared custody equally. On December 19, 2016, father filed a dissolution petition in which he sought joint custody of the child and requested that he be named residential custodian. Alleging that she was the proper person to have custody and primary residential status for the child, mother answered seeking sole custody and reasonable support. The case was initially scheduled to be tried on September 22, 2017.

However, on August 15, 2017, mother moved for appointment of a guardian *ad litem* to represent the child's best interest and on August 23, 2017, father filed a motion seeking an order of joint custody and equal parenting time. Father alleged in his motion that mother had for no reason refused to allow him to see or even speak to the child. Shortly thereafter, on September 1, 2017, the parties filed a partial settlement agreement which contained the following provision pertinent to the issues advanced in this appeal:

> 4) Child custody and support. The parties are the parents of [child], age 12, and they have been unable to agree on custody, a parenting schedule or child support. This determination shall be left to the discretion of the Court.

a) The parties agree their minor child will be seen by a therapist, Dr. Teresa Izquerdo. Husband shall make the first appointment and take the child to said appointment. Both parties shall participate as directed by Dr. Izquerdo and shall not discuss the contents of counseling with the child.
b) Wife shall maintain health insurance on behalf of the minor child and shall provide a copy of the insurance proof to Husband. Both parties shall have access to all medical records for the child and shall inform the other of any medical treatment for the child.

A decree dissolving the parties' marriage was entered on September 11, 2017, which specifically reserved for a later hearing the issues of child custody and support. The family court conducted hearings on those issues on November 6 and December 13, 2017, and thereafter entered the supplemental decree which forms the basis for this appeal. In its January 9, 2018 supplemental decree, the family court determined that it was in the best interest of the child that mother be awarded sole custody. Noting that it was always reluctant to "do anything but award joint custody," the family court stated that in this case it was "deeply disturbed by the conduct of the father" and cited recordings introduced into evidence which "disclosed a quickness to anger which runs out of control." Nevertheless, the family court concluded that it was important for father to remain a part of the child's life and to that end ordered as follows:

> 9. This Court does believe that it is important that father stay in [child's] life. However, as of the time of the trial, [child] continues to be under mental health care by Dr.

> Izquerdo. As the Court enters this opinion, the Court has no evidence about the impact upon [child] of the various tirades that she was subjected to by the father, or the impact of the threats to kill her pet and the indications that she could be readopted.
> 10. Instead, the parties and their counsel will be ordered to meet with Dr. Izquerdo and develop a plan to reunite [child] with her father and provide him some visitation time with [child]. The extent of that cannot be determined at this time, but **can be determined pursuant to the findings at a later hearing.**

(Emphasis added).

In addition, the family court ordered mother to keep father fully apprised about matters concerning the child, including her health, mental health, education, and extracurricular activities and ordered father to pay child support in the amount of $773.40 per month, as well as being responsible for 66 percent of unreimbursed medical, dental, vision, daycare, and extracurricular activity expenses. The family court supported its decree by the entry of detailed and specific findings of fact and conclusions of law regarding the best interests of the child and the basis for its award of child support.

This appeal followed.

We commence our discussion of the issues presented by reiterating the well-established proposition that appellate courts review child custody and visitation decisions for abuse of discretion. Thus, the standard is not whether the appellate court would have decided the case differently, but whether the findings of

the family court are clearly erroneous, whether it applied the correct law, or whether it abused its discretion. *Varney v. Bingham*, 513 S.W.3d 349, 352 (Ky. App. 2017). Similarly, the standard by which we review the establishment, modification, and enforcement of child support obligations is abuse of discretion. *McCarty v Faried*, 499 S.W.3d 266, 271 (Ky. 2016). "The test for abuse of discretion is whether the trial court's decision was 'arbitrary, unreasonable, unfair, or unsupported by sound legal principles.'" *Id.* at 271 (quoting *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001)). With these principles in mind, we turn to an analysis of the issues presented.

Father advances four primary arguments in support of his contention that the supplemental decree is erroneous: 1) that the family court erred as a matter of law in failing to perform the requisite statutory analysis in awarding sole custody to mother; 2) that the award of sole custody is against the weight of the evidence; 3) that the award of child support is unreasonable and arbitrary; and 4) that the family court improperly delegated its decision-making authority to Dr. Izquerdo. Prior to discussing these contentions, however, we must address the state of the record.

Although both parties cite extensively to the video record and in fact many of father's arguments focus directly upon that record, the video transcripts of the hearings on custody and support were not included in the certified record. On

March 5, 2018, the Kenton Circuit Clerk entered the certification of the record on appeal and attested that copies of that certification had been mailed to counsel of record. The certification is clear that the only record certified as constituting the entire "Record on Appeal" is 114 pages of written record. There is no check mark in the box for video record and in the box labelled "CD/DVD RECORDINGS," a check mark indicated there were no such recordings. The very purpose for providing parties with a copy of this certification is to permit counsel to inspect the contents of the record being certified by the clerk and to request a supplemental certification if essential portions of the record have been omitted. No such request was made in this case.

This Court, as well as the Supreme Court of Kentucky, has repeatedly cautioned counsel that the appellant bears responsibility for ensuring "that the record on appeal is 'sufficient to enable the court to pass on the alleged errors.'" *Burberry v. Bridges*, 427 S.W.2d 583, 585 (Ky. 1968). More recently, in *Smith v. Smith*, 450 S.W.3d 729 (Ky. App. 2014), and *Gambrel v. Gambrel*, 501 S.W.3d 900 (Ky. App. 2016), this Court undertook a detailed analysis of the danger in assuming "the circuit clerk will automatically certify as part of the appellate record any event recorded on court equipment." *Gambrel,* 501 S.W.3d at 902. Although we will not reiterate the thorough and well-reasoned analysis set out in those cases, we again caution counsel "to carefully read and follow CR 98 to avoid missteps on

behalf of their clients and to ensure a complete record—containing all relevant videos, CDs and DVDs—is certified to the appellate court." Unfortunately, as was the case in *Smith* and *Gambrel*, the scope of our record is confined by the following principles:

> Since Janet did not request any video recordings to be certified for the appeal, they are not part of the appellate record and, thus, we are unable to review them. Moreover, "[i]t has long been held that, when the complete record is not before the appellate court, that court must assume that the omitted record supports the decision of the trial court." *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985). Accordingly, our resolution of this appeal is based upon the record provided to us, and we assume the missing portions of the record support the trial court's decision.

Smith, 450 S.W.3d at 732.

With those principles in mind, we now turn to father's contention that the family court failed to engage in the statutory analysis of best interests required by Kentucky Revised Statute ("KRS") 403.270(2). That statute provides in pertinent part:

> 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. Subject to KRS 403.315, there shall be a presumption, rebuttable by a preponderance of evidence, that joint custody and equally shared parenting time is in the best interest of the child. If a deviation from equal parenting time is warranted, the court shall construct a parenting time schedule which maximizes the time each parent or de facto custodian has with the child and is consistent

> with ensuring the child's welfare. 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 or her custody;
>
> (b) The wishes of the child as to his or her custodian, with due consideration given to the influence a parent or de facto custodian may have over the child's wishes;
>
> (c) The interaction and interrelationship of the child with his or her parent or parents, his or her siblings, and any other person who may significantly affect the child's best interests;
>
> (d) The motivation of the adults participating in the custody proceeding;
>
> (e) The child's adjustment and continuing proximity to his or her home, school, and community;
>
> (f) The mental and physical health of all individuals involved;
>
> (g) A finding by the court that domestic violence and abuse, as defined in KRS 403.720, has been committed by one (1) of the parties against a child of the parties or against another party. The court shall determine the extent to which the domestic violence and abuse has affected the child and the child's relationship to each party, with due consideration given to efforts made by a party toward the completion of any domestic violence treatment, counseling, or program[.]

As previously noted, the family court set out thorough and complete findings to support its conclusion that the child's interests were best served by being placed in the sole custody of her mother. These findings included the fact that mother

testified that the child posted a YouTube video which was apparently suicidal in nature and which caused mother to withhold time-sharing with father for a period in excess of 30 days; that father revealed to the child that she was adopted without consultation with mother; that father is quite stern and inflexible when dealing with the child as evidenced by tape recordings which demonstrate the father's inability to control his temper and which the trial court labelled "disturbing"; that father threatened to kill the child's cat and kicked the cat; that father had told the child that she has no brain and is stupid and lazy and would be better off finding a husband; that father told the child in a fit of anger that she could be re-adopted; that father had been physically abusive to mother; that father had previously used a belt to discipline the child although he had stopped doing that; and that because of the YouTube video posted by the child, she is currently under the care of a mental health professional. Based upon these findings, the family court entered the following conclusions of law:

> 4. This court is always reluctant to do anything but award joint custody as parents have a constitutional right to parent and each should have an equal say in the raising of their child.
>
> 5. In this case, however, this Court is deeply disturbed by the conduct of the father. The recordings disclose a quickness to anger that runs out of control. There is almost a "hatefulness" or "meanness" that permeates all of it. In addition, the father threatened to kill the child's cat and threatened the child by telling her she could be "re-adopted."

> 6. These things lead this Court to believe that the father should not share in the decision making regarding this child. These are all harmful to [child] and are not in her best interest. For this reason, this Court awards sole custody to the mother. *See Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008).

We are convinced that the family court's findings and conclusions fully comport with the spirit and letter of KRS 403.270. As the Supreme Court of Kentucky instructed in *Anderson v. Johnson*, 350 S.W.3d 453, 457 (Ky. 2011), KRS 403.270 requires only that the enumerated factors be *considered* and "includes no requirement to make findings of fact." Any requirement for specific findings comes from CR 52.01 which "requires that the judge engage in at least a good faith effort at fact-finding and that the found facts be included in a written order." *Id*. at 458. Having fully complied with the dictates of the statute and applicable caselaw, the trial court did not fail to undertake the requisite best interests analysis and did not err in awarding sole custody to mother.

Father next argues that the family court's findings are not supported by the record, that the tape recordings upon which the family court relied were not properly admitted into evidence, and that the family court abused its discretion in relying on several pieces of speculative evidence. As previously explained, these arguments cannot be examined because the video record was not certified for our review. Without an opportunity to review the video recording of the hearings, we

must assume the evidence adduced at those hearings supports the decision of the family court. *Smith, supra*.

Next, father insists that the award of child support was unreasonable and arbitrary because mother never filed a motion seeking child support and because the family court ordered support retroactive until August 1, 2017, prior to the date of the final hearing in December 2017. We disagree.

Although father complains that mother failed to comply with Family Court Rule of Procedure and Practice ("FCRPP") 9(4), we are convinced that the purpose of the rule is to specify what information must be provided to the family court when child support is in issue. All of the information required by FCRPP 9(4) had previously been provided the family court in the dissolution proceeding and the family court completed a worksheet that fully complies with the requirements of the guidelines set out in KRS 403.212.

Furthermore, because KRS 403.270(2) requires courts to determine custody based upon the best interests of the child, the family court took into consideration that mother was the sole custodian of the child and that father had an obligation to pay support for his child. Therefore, we do not find it to be outside the family court's authority to assess child support as part of its best interests analysis in granting of custody. Importantly, the issue of support for the child was

expressly before the court via mother's answer and father's custody motion. We thus perceive no error in the decision of the family court to award child support.

Concerning the date upon which the award of support was ordered to commence, father argues that it was error to make the award retroactive to any date other than the date of the final hearing. The family court specifically found that the "custodial arrangements which had been informally made by the parties, changed as of August 1, 2017. The child went from being shared between the parties to exclusively with the mother." There is nothing arbitrary or unreasonable in the selection of that date for the child support to commence. Both parties had requested an award of child support prior to that date. As the Supreme Court made clear in *McCarty v. Faried*, a child's reasonable needs do not

> manifest the day the final child support order was entered; those needs existed at least as of the date McCarty made a motion for support. Thus, the trial court ordered that the child support award be applied retroactively to the date of the motion. Absent a significant change in circumstances, that order was not arbitrary, unreasonable, erroneous, or an abuse of discretion.

499 S.W.3d at 275. Similar to the situation in *McCarty*, the support needs of the child in this case existed on the date on which shared custody was no longer workable. Accordingly, nothing in the family court's award of child support, or in the date that support was ordered to commence, is arbitrary, unreasonable, erroneous or constitutes an abuse of discretion.

Finally, father argues that the family court abused its discretion in improperly delegating its authority by ordering the child's psychiatrist to develop a plan to bring father back into the child's life and to provide him with reasonable visitation. We are convinced there was no improper delegation of authority. The family court simply directed the parties and their counsel to meet with the child's psychiatrist in the hope of restoring father's presence in the child's life—ultimately with reasonable visitation. The finding on this issue plainly contemplated that the parties and their counsel work together with Dr. Izquerdo to develop a plan to reintegrate father into the child's life. The family court made absolutely clear that at the appropriate time, based upon the child's psychiatrist's recommendation, it would conduct another hearing and enter its own findings concerning the best interest of the child. Furthermore, we see no significant difference in the family court's order and the procedure for the utilization of experts authorized by KRS 403.300(1):

> **In contested custody proceedings**, and in other custody proceedings if a parent or the child's custodian so requests, **the court may order an investigation and report concerning custodial arrangements for the child.** The investigation and report may be made by the friend of the court or *such other agency* as the court may select.

(Emphases added). As is contemplated in this statutory procedure, the family court in this case retained its ultimate decision-making function. There is no error.

Discerning no reversable error in any of the arguments presented, we affirm the supplemental judgment of the Kenton Family Court.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Kathie E. Grisham Covington, Kentucky	Michael W. Bouldin Covington, Kentucky