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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000539-ME

BRIAN KEITH IRONS — APPELLANT

v.

APPEAL FROM CARROLL CIRCUIT COURT
HONORABLE REBECCA LESLIE KNIGHT, JUDGE
ACTION NO. 15-CI-00092

KRISTIAN DAWN SIMS and
ASHLEY ELIZABETH SIMS — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, LAMBERT, AND TAYLOR, JUDGES.

LAMBERT, JUDGE: Brian Keith Irons (the Father) appeals from the Carroll Circuit Court decision granting Kristian Dawn Sims (the Aunt) *de facto* custodianship to C.C.R.J. (the Child). The order further awarded joint custodianship to the Father and the Aunt, with the Aunt as primary residential custodian. Ashley Elizabeth Sims (the Mother, sister to the Aunt) was not granted

custody or visitation rights. The Mother does not appeal. The Father further appeals the denial of his motion to alter, amend, or vacate the judgment pursuant to Kentucky Rule of Civil Procedure (CR) 59.05. We affirm.

The Child, born in 2014, was drug dependent at birth and spent the first two weeks of his life in the hospital, where he was weaned from opiates. He was then placed in the care of his maternal grandparents. At three months old, the Aunt was granted custody, and he has remained in her home ever since. The Aunt filed a petition for custody the following year; it was not adjudicated until October 2017. A hearing was held before the Carroll County Domestic Relations Commissioner (DRC), who made findings on the record at the hearing's conclusion and filed his recommended report on October 30, 2017. The Carroll Circuit Court adopted the commissioner's findings on November 29, 2017. The Father filed his CR 59.05 motion on December 14, 2017; a hearing on the motion was held the following month, and the circuit court order denying the motion was entered on February 28, 2018. The Father appeals from that order as well as the custody decision.

CR 52.01 provides the general framework for the circuit (family) court as well as review in the Court of Appeals:

> 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[.] . . . 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.

See Moore v. Asente, 110 S.W.3d 336, 354 (Ky. 2003) (footnote omitted) (An appellate court may set aside a lower court's findings made pursuant to CR 52.01 "only if those findings are clearly erroneous."). The *Asente* Court went on to address substantial evidence:

> "[S]ubstantial evidence" is "[e]vidence that a reasonable mind would accept as adequate to support a conclusion" and evidence that, when "taken alone or in the light of all the evidence, . . . has sufficient probative value to induce conviction in the minds of reasonable men." Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses" because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court. Thus, "[m]ere doubt as to the correctness of [a] finding [will] not justify [its] reversal," and appellate courts should not disturb trial court findings that are supported by substantial evidence.

Id. at 354 (footnotes omitted). *See also McVicker v. McVicker*, 461 S.W.3d 404, 415-16 (Ky. App. 2015).

With these standards in mind, we address the specific issues brought on appeal. The Father presents two reasons why the circuit court should have granted him sole custody. He first insists that the decision lacked adjudication of

all issues as well as finality language. We disagree, and begin by addressing the allegation of non-finality:

> The question of [the Child's] care and custody is a continuing matter to be considered whenever it is properly brought before the family court. *Gates v. Gates*, 412 S.W.2d 223, 224 (Ky. 1967) (citing *Cole v. Cole*, 299 Ky. 319, 185 S.W.2d 382 (1945)). When, by the exercise of its continuing jurisdiction, the family court enters an order regarding a minor child's care and custody, that order "is an appealable order and this Court may review it." *Gates*, 412 S.W.2d at 224[.]

N.B. v. C.H., 351 S.W.3d 214, 219 (Ky. App. 2011). We thus find no issue regarding finality and deem the matter appealable and properly before this Court.

We also disagree with the Father that the circuit court failed to adjudicate all issues pertaining to the Aunt's petition for custody. The court first considered her request that she be granted DFC status, and ruled according to the statutory requirements of Kentucky Revised Statute (KRS) 403.270(1), namely:

> (1) (a) As used in this chapter and KRS 405.020, unless the context requires otherwise, "de facto custodian" means a person who has been shown by clear and convincing evidence to have been the primary caregiver for, and financial supporter of, a child who has resided with the person for a period of six (6) months or more if the child is under three (3) years of age and for a period of one (1) year or more if the child is three (3) years of age or older or has been placed by the Department for Community Based Services. Any period of time after a legal proceeding has been commenced by a parent seeking to regain custody of the child shall not be included in determining whether the child has resided with the person for the required minimum period.

> (b) A person shall not be a de facto custodian until a court determines by clear and convincing evidence that the person meets the definition of de facto custodian established in paragraph (a) of this subsection. Once a court determines that a person meets the definition of de facto custodian, the court shall give the person the same standing in custody matters that is given to each parent under this section and KRS 403.280, 403.340, 403.350, 403.822, and 405.020.

The Child, born in 2014, had resided with the Aunt since he was three months old. She had provided all his care, education (he had been attending programs since he was six months old and was currently enrolled in the Head Start Program, where he was thriving), health and medical treatment responsibilities, and financial obligations since he was placed with her as an infant. Therefore, the Aunt easily met the required minimum period in KRS 403.270(1)(a) to be named the Child's DFC. Her evidence on that aspect was not contested by the Father. Furthermore, there was no evidence at the hearing or in the record of "shared parenting." *See Jones v. Jones*, 510 S.W.3d 845, 849 (Ky. App. 2017) (citing *Brumfield v. Stinson*, 368 S.W.3d 116, 118 (Ky. App. 2012)). Accordingly, the Aunt was entitled to be given the same standing in custody matters as the Father. KRS 403.270(1)(b).

The circuit court then considered KRS 403.270(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.** 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.

(Emphasis added). Here the circuit court awarded joint custody to the Father and the Aunt, with the Aunt as primary physical custodian. In awarding joint custody, the circuit court correctly focused on the best interests of the Child. It noted that the Child has been in the Aunt's care since he was three months old. The circuit court acknowledged that the Father was at a disadvantage because he was not told of the Child's existence until nine months after the Child's birth, a situation the DRC expressed to be "unfortunate at best." However, the Father was over $11,000.00 behind in his child support payments, which the court took into consideration in adjudging the Father's sincerity in providing financial support for the Child. The Father's employment was sporadic. He testified that he was a comedian (and acted as his own agent yet had "no steady gigs") as well as a member of the Local 290 Ironworkers Union (although he declined most job offers as they were mainly out-of-state employment opportunities). The Father said that he would be willing to relocate to obtain steady employment. He currently lived with his mother and wished to place the Child in preschool in Ohio. In

determining what were the Child's best interests, the circuit court did not err in including the Aunt as a joint custodian of the Child. *Asente*, 110 S.W.3d at 354.

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 circuit 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 circuit court that decided the case acted arbitrarily, unreasonably, or unfairly. *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky. 1994). The Father has not shown that the award of joint custody was arbitrary, unreasonable, or unfair. The circuit court's decision comports with Kentucky statutory and case law. KRS 403.270; *Burton v. Burton*, 355 S.W.3d 489, 493-94 (Ky. App. 2011).

We lastly consider the Father's allegation that the circuit court erred in denying the CR 59.05 motion because it was not timely brought and that the Father had not offered sufficient grounds. The Rule states: "A motion to alter or amend a judgment, or to vacate a judgment and enter a new one, shall be served not later than 10 days after entry of the final judgment." The date of service on the Father's motion was the 14th day and would have been untimely but for the fact that he had filed electronically on the 10th day and had merely re-served and re-noticed the motion on the 14th day in order to comply fully with the local rules of court. Thus, the Father's claim of error here is well taken.

However, "[a] party cannot invoke CR 59.05 to raise arguments and to introduce evidence that should have been presented during the proceedings before the entry of the judgment." *Gullion v. Gullion*, 163 S.W.3d 888, 893 (Ky. 2005) (citation omitted). The Father did not allege that any grounds existed to justify granting this extraordinary measure. *Id.* at 894. The circuit court's order denying the CR 59.05 motion because the Father had offered "insufficient grounds for [this] extraordinary remedy" was proper under the circumstances.

We affirm the custody decision of the Carroll Circuit Court and the order denying CR 59.05 relief.

ACREE AND TAYLOR, JUDGES, CONCUR IN RESULT ONLY.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Ryan Smither Louisville, Kentucky	Stacey L. Graus Olivia F. Amlung Covington, Kentucky