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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001401-ME

YVONNE CASKEY VERNATTER — APPELLANT

v.

APPEAL FROM CARTER FAMILY COURT
HONORABLE DAVID D. FLATT, JUDGE
ACTION NO. 17-CI-00247

BOBBY VERNATTER — APPELLEE

OPINION
AFFIRMING, IN PART,
REVERSING, IN PART, AND REMANDING

** ** ** ** **

BEFORE: ACREE, GOODWINE, AND KRAMER, JUDGES.

ACREE, JUDGE: In this dissolution action, Yvonne Vernatter appeals the Carter Family Court's findings of facts and conclusions of law. She contends the family court failed properly to: (1) apply the factors in KRS[1] 403.270; (2) calculate child

[1] Kentucky Revised Statutes.

support; and (3) divide the marital property. We affirm, in part, reverse, in part, and remand for more specific findings.

BACKGROUND

Yvonne Vernatter (Mother) and Bobby Vernatter (Father) married on July 1, 2005, and thereafter had two minor children together. During the marriage, the parties lived in a double-wide trailer, which Father owned before the parties married. Eventually, Father purchased the land from his father, using funds from his recovery on a personal injury claim.

Father's work caused him to be away from home, occasionally, for weeks at a time. Consequently, especially before the children began attending school, Mother was the children's primary caretaker. The elder child has Down syndrome, requiring frequent medical appointments. Mother received training to care for the child from the Michelle P. Waiver Foundation.[2] The younger child suffers from ADHD, requiring a regimented medication schedule. After the children reached school age, Mother qualified for payments from the Foundation program for the care she provides to her Down syndrome child.

After twelve years of marriage, Father filed for legal separation. Because he retained possession of the marital residence, Mother initially agreed

[2] The Michelle P. Waiver program is a Kentucky Medicaid, home and community-based program designed as an alternative to institutional care for people with intellectual or developmental disabilities.

that the children could remain with Father and she would visit them every other weekend to keep their children's home-life stabilized. She also agreed Father would have temporary, sole custody. Eventually, the custody arrangement changed to joint custody, pursuant to court order entered October 16, 2017.

Nonetheless, this was not an amicable split. On February 5, 2018, the family court entered what it denominated a "Putnam Decree."[3] While the record does not state a basis for dissolving the marriage before resolving other issues, *i.e.*, for bifurcating the proceeding, it is perhaps owing to hostility between the parties. Mother testified that Father called at least 60 times a day and threatened her, even in front of the children. Ultimately, Mother filed for a domestic violence order against Father, which the family court granted on June 27, 2018.[4]

[3] The phrase "Putnam Decree" is not referenced in the entirety of Kentucky jurisprudence. However, the family court is referencing *Putnam v. Fanning*, 495 S.W.2d 175 (Ky. 1973). In *Putnam*, for the first time, our high court addressed this question: "Can a trial court in a divorce case enter a final decree of dissolution before resolving the other issues specified in KRS 403.140, and in so doing can it find 'that the conciliation provisions of KRS 403.170 do not apply' without having granted a party's motion, supported by an affidavit to the effect that the marriage is not irretrievably broken, for a conciliation conference? Our answer to both of these questions is yes." *Id.* at 176. Therefore, a "Putnam Decree" is analogous to a bifurcated decree. Bifurcation is not the better practice. *Herndon v. Herndon,* 139 S.W.3d 822, 824 n.4 (Ky. 2004) ("This case well illustrates the problems that occur when trial courts bifurcate dissolution of marriage from the other issues in the case. Unless a compelling need for dissolution of the marriage is shown, better practice would be to resolve all issues in a single judgment.").

[4] The trial record made accessible to this Court includes no domestic violence order (DVO). Mother attached the DVO as an appendix in her brief. (Appellant's brief p. 43-45.) The same judge who entered the DVO also presided over this divorce action.

After a final hearing regarding custody, timesharing, support, and property division, the family court entered its findings of facts and conclusions of law on July 30, 2018. The family court found as follows:

> 1. The parties shall be awarded joint custody of their infant children, with the children spending a week at [Father]'s home from 6p.m. on Sunday through and including 6p.m. the following Sunday, and then spending an equal amount of time at [Mother]'s home and continuing in that fashion, week about.
>
>   a. The children shall continue in the Carter County School System, and [Mother] shall arrange transportation to school for the children for the weeks that the children are at her home.
>
>   b. Neither party shall pay support to the other.
>
>   c. Both parties shall pay equally for all medical expenses for the children, not paid by insurance.
>
>   d. [Father] shall continue to provide insurance for the children, as long as it is available through his employment.
>
> 2. Neither party shall receive maintenance from the other.
>
> 3. The land and double wide mobile home shall both be restored to the [Father] as non-marital property[.]
>
> 4. Each party shall be awarded the automobile currently in his/her possession, free of any claim of the other party, and each party shall pay any remaining indebtedness on his/her respective automobile.

5. Each party shall be allowed those items held currently in his/her possession of furnishings and furniture, free of any claim of the other party.

6. [Mother] shall receive one-half (1/2) of the portion of [Father]'s retirement plan that accumulated during the marriage and a Qualified Domestic Relations Order shall be entered to that effect.

7. The parties shall be jointly responsible for any unpaid indebtedness owed for the vehicle which was repossessed from the care of [Mother].

Mother filed a motion for more specific findings, as well as a motion to alter, amend, or vacate. The family court denied both motions, and this appeal followed.

STANDARD OF REVIEW

Child custody matters involve two types of review. First, a family court's findings of fact are examined for clear error and will be set aside when they lack substantial evidence to support them. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). Substantial evidence from the record must support any factual determination regarding child custody or visitation. CR[5] 52.01; *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). Second, the analysis shifts to an examination of legal conclusions. Accordingly, our review of this decision by the trial court is *de novo*. *Laterza v. Commonwealth*, 244 S.W.3d 754, 756 (Ky. App. 2008). "Under

[5] Kentucky Rules of Civil Procedure.

this standard, we afford no deference to the trial court's application of the law to the facts[.]" *Id.* (citation omitted).

Regarding the division of marital property and debt, we decline to disturb the family court's rulings absent an abuse of discretion or clearly erroneous factual findings. *Powell v. Powell*, 107 S.W.3d 222, 224 (Ky. 2003); *Smith v. Smith*, 235 S.W.3d 1, 6 (Ky. App. 2006). "An abuse of discretion generally 'implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision.'" *Rice v. Rice*, 372 S.W.3d 449, 452 (Ky. App. 2012) (citation omitted). Clearly erroneous factual findings are those not supported by substantial evidence. *Mullins v. Picklesimer*, 317 S.W.3d 569, 581 (Ky. 2010).

ANALYSIS

Custody

When determining custody, the family court must utilize the best interest standard from, and apply the factors set forth in, KRS 403.270. Furthermore, CR 52.01 requires that the family court "shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment . . . ." CR 52.01. Specific factfinding is the mandatory cornerstone of the rule. *Fleming v. Rife*, 328 S.W.2d 151 (Ky. 1959); *Standard Farm Stores v. Dixon*, 339 S.W.2d 440 (Ky. 1960). Factfinding that lacks the

required specificity handicaps an appellate court's ability to undertake an adequate review. Furthermore, family judges who discipline themselves to fully comply with CR 52.01 tend to consider the issues more carefully. Their legal conclusions become less vulnerable on appeal because the rule compels their closer consideration of the process by which they reach those conclusions.

Our Supreme Court has repeatedly emphasized the importance of a family court's compliance with CR 52.01, stating:

> We again state with emphasis that compliance with CR 52.01 and the applicable sections of KRS Chapter 403 requires written findings, and admonish trial courts that it is their duty to comply with the directive of this Court to include in all orders affecting child custody the requisite findings of fact and conclusions of law supporting its decisions. Consideration of matters affecting the welfare and future of children are among the most important duties undertaken by the courts of this Commonwealth. In compliance with these duties, it is imperative that the trial courts make the requisite findings of fact and conclusions of law to support their orders.

Keifer v. Keifer, 354 S.W.3d 123, 125-26 (Ky. 2011).

In the case under review, the family court reached conclusions without making meaningful underlying specific findings that reflect consideration of the factors set out in KRS 403.270. Most notably, the family court failed to consider, in the context of the statute: (1) the domestic violence order entered against Father; (2) the parties' and children's wishes; and (3) the mental disabilities and the care required for both children. Instead, the family court makes generic

findings, such as the parties' employment, the current timesharing arrangement, and the children's school district. The award of custody appears less influenced by the best interests of the children than by the parties' work schedules and the "current state of the law regarding time sharing between the parties." (Record (R.) at 209). There are no findings correlating to the factors upon which KRS 403.270 focuses.

We cannot undertake meaningful review of the determination of joint custody. We reverse the award of joint custody and remand with instructions that the family court expressly consider and make findings of fact relative to "all relevant factors [as are applicable to the custody determination] including [but not limited to]:

> (a) The wishes of the child[ren]'s parent or parents, and any *de facto* custodian, as to his or her custody;
>
> (b) The wishes of the child[ren] as to his or her custodian, with due consideration given to the influence a parent or *de facto* custodian may have over the child[ren]'s wishes;
>
> (c) The interaction and interrelationship of the child[ren] with his or her parent or parents, his or her siblings, and any other person who may significantly affect the child[ren]'s best interests;
>
> (d) The motivation of the adults participating in the custody proceeding;
>
> (e) The child[ren]'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[ren] and the child[ren]'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;

(h) The extent to which the child[ren have] been cared for, nurtured, and supported by any *de facto* custodian;

(i) The intent of the parent or parents in placing the child[ren] with a *de facto* custodian;

(j) The circumstances under which the child[ren] 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 and whether the child[ren] was placed with a *de facto* custodian to allow the parent now seeking custody to seek employment, work, or attend school; and

(k) The likelihood a party will allow the child[ren] frequent, meaningful, and continuing contact with the other parent or *de facto* custodian, except that the court shall not consider this likelihood if there is a finding that the other parent or *de facto* custodian engaged in domestic violence and abuse, as defined in KRS 403.720, against the party or a child[ren] and that a continuing relationship with the other parent will endanger the health or safety of either that party or the child[ren].

KRS 403.270(2).

Child Support

We agree with Mother who argues the family court erred by awarding no child support, despite the disparity between her income and Father's income. She demonstrated this disparity at the hearing. She testified she would receive about $15,423.20 annually from the Michelle P. Wavier Program when she was caring for the children pursuant to that program. She noted that Father testified he made approximately $70,000 per year.

Regarding child support, the family court's order says only that "[n]either party shall pay support to the other." (R. at 211). There are no findings regarding the parties' incomes despite Mother's motion pursuant to CR 52.02 to "make findings as to the income of the parties . . . [and to] make findings as to the amount of child support . . . and why the Court failed to award her support, given the disparity in the incomes of the parties." (R. at 226). There is no explanation why the family court did not follow KRS 403.211.

As noted by this Court in *McKinney v. McKinney*, a family court is not obligated to grant a CR 52.02 motion because, in the first instance, it is up to that "court to determine the sufficiency of its factual findings." 257 S.W.3d 130, 134 (Ky. App. 2008) (citation and internal quotation marks omitted). However, "where a party preserved the issue through a proper motion, the question on appeal is whether the omitted finding involves a matter which was essential to the trial

court's judgment." *Id.* Clearly, the additional factual findings sought were essential to the family court's judgment and should have been made.

The award of no child support in this case is error. It is a deviation from the child support guidelines. "Courts may deviate from the guidelines where their application would be unjust or inappropriate. Any deviation shall be accompanied by a written finding or specific finding on the record by the court, specifying the reason for the deviation." KRS 403.211(2). Nothing indicates that an award of child support would be unjust or inappropriate. On remand, the family court shall apply KRS 403.211 to the calculation of a child support award.[6]

Division of Marital Property

Mother's last argument pertains to division of marital property. She contends the trial court failed to justly divide the marital and non-marital property. Mother states she "received no property, marital or non marital in the Judgment." (Appellant's brief, p. 13). We reviewed the record and conclude this is not so.

[6] Father asserts that, subsequently to the appeal of this case, the family court entered an order awarding child support to Mother. We acknowledge that a family court maintains concurrent jurisdiction for such purpose. *Johnson v. Commonwealth*, 17 S.W.3d 109, 113 (Ky. 2000) ("As a general rule, except with respect to issues of custody and child support in a domestic relations case, the filing of a notice of appeal divests the trial court of jurisdiction to rule on any issues while the appeal is pending."). However, Father did not supplement the record on appeal with a copy of this order certified by the Clerk of the Carter Circuit Court. We undertake review only of the certified record presented to this Court.

According to the findings of facts and conclusions of law, Mother received:

> 5. Each party shall be allowed those items held currently in his/her possession of furnishings and furniture, free of any claim of the other party.
>
> 6. [Mother] shall receive one-half (1/2) of the portion of [Father]'s retirement plan that accumulated during the marriage and a Qualified Domestic Relations Order shall be entered to that effect.

(R. at 211-12). This shows the trial court undertook its responsibility for justly dividing all marital and non-marital property.

It is not enough to assert as fact that a family court erred. To succeed, the appellant must say *why or how* the family court erred. Mother failed to accomplish this task.

On the contrary, Mother says she "testified, during the hearing, to a list of non marital property which she had . . . ." (Appellant's brief, p. 12). The family court ordered that she be allowed to keep what she had. We see no error in the award to Mother of the non-marital property she had.

As for marital property, Mother said nothing more to this Court than that she "testified to marital property that she desired to be awarded to her . . . ." She does not describe that property to this Court, nor does she cite to any part of the record that would demonstrate a disparity between what she sought and what the family court awarded.

In short, Mother brought nothing to the attention of this Court that would justify reversal and fails to assert any argument that would support her contention that the division was unjust. Therefore, we affirm the trial court's ruling.

CONCLUSION

For the reasons stated above, we affirm the property division, and remand for further findings regarding custody and child support.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
MaLenda S. Haynes Grayson, Kentucky	Robert W. Miller Grayson, Kentucky