

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-000618-MR

EMMA MARIE RUNYON

APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT  
HONORABLE EDDY COLEMAN, JUDGE  
ACTION NO. 96-CI-01201

RONALD RUNYON

APPELLEE

OPINION  
AFFIRMING IN PART -VACATING AND REMANDING IN PART  
\*\* \*\* \* \* \* \* \*

BEFORE: DYCHE, GUIDUGLI AND MILLER, JUDGES.

GUIDUGLI, JUDGE. Emma Marie Runyon appeals from the Findings of Fact, Conclusions of Law, and Supplemental Decree of Dissolution of Marriage of the Pike Circuit Court. We affirm in part and vacate and remand in part.

Emma Marie Runyon ("Emma") and Ronald Douglas Runyon ("Ronald") were married in 1986. The marriage produced one child, Will, who is now 13 years old. The parties separated in August, 1996, and Emma later filed the instant action seeking dissolution of the marriage. The matter proceeded before the Special Commissioner ("the Commissioner"). One or more hearings on the petition were conducted, and on August 12, 1997, the

Commissioner submitted a Report and Recommendations to the Court for its consideration. The Report and Recommendations made (in relevant part) the following uncontested findings of fact:

1) Prior to the marriage, Ronald purchased a parcel of real property for \$14,600. His down payment and monthly payments totaled \$6,400 at the time of marriage, with an \$8,200 balance.

2) Prior to the marriage, Ronald purchased a flood-damaged trailer for \$4,500. The trailer was renovated, partially furnished, and relocated to the real property. Approximately two years after the marriage, the parties borrowed \$50,000 to make additions to the trailer.

3) When the petition for dissolution was filed, Emma's monthly gross income was approximately \$649. Ronald's annual income was approximately \$57,120.

4) The parties purchased a 1996 Mazda on which they owed approximately \$14,000. Ronald leased a 1996 Chevrolet for \$499 per month. His employer reimbursed him in the amount of \$600 per month, including insurance and repair costs. The parties also owned a Chevrolet Celebrity and an MG Midget.

5) Ronald had approximately \$86,000 in a retirement account. During the marriage, he withdrew approximately \$20,000 of this amount to purchase a motorcycle. Emma's retirement was valued at approximately \$400.<sup>1</sup>

The Commissioner recommended to the Circuit Court that Ronald be awarded the real property and improvements, subject to the condition that Emma was allowed to live with the parties' son in the home until he reached age 18. It was recommended that Ronald be responsible for the mortgage on the parcel, and that if

---

<sup>1</sup>After the Report and Recommendations were issue, Emma filed a claim to recover damages arising from an automobile accident. Testimony was introduced that the value of the claim was approximately \$5000.

the parties could not agree on the disposition of the parcel, it should be sold when Will reached age 18 with the proceeds allocated 30% to Emma and 70% to Ronald.

The Commissioner further recommended that the parties be awarded joint custody of Will, with Emma being the primary custodian. It was recommended that Ronald pay \$629.20 in child support pursuant to KRS child support guidelines. The DRC found that Emma had no claim against Ronald's retirement. Finally, Emma was to receive the 1996 Mazda and the Chevrolet Celebrity, with Ronald receiving the Chevrolet Tahoe, MG Midget, and motorcycle. Under the recommendation, Emma would be responsible for the monthly payment on the Mazda.

Thereafter, Emma filed exceptions to the Report and Recommendations. She argued therein that she was entitled to sole custody of Will, since Ronald had visited him only once during the prior year. She sought an order relating to which party would be responsible for repairs of the marital home until it was sold, and requested a 50/50 division of the marital home proceeds. She also sought  $\frac{1}{2}$  each of the furniture, Ronald's retirement, and the equity in the motorcycle.

The matter then went before the Circuit Court, which rendered Findings of Fact, Conclusions of Law, and Supplemental Decree of Dissolution of Marriage. The Court adopted every major recommendation of the Commissioner, altering the Report only to make note of Emma's automobile accident claim (see Footnote 1), to order Ronald to pay for any repairs to the marital residence costing in excess of \$1000, and to address attorney fees.

Emma moved to alter, amend or vacate the Supplemental Decree. That motion was sustained as to her request that the Decree set forth Ronald's obligation to pay the mortgage payment on the marital residence, and in all other respects was overruled. This appeal followed.

Emma now argues that the Circuit Court's division of marital property was improper and constitutes an abuse of discretion. Specifically, she maintains that other than the home furnishings and the 1996 Mazda, which likely does not exceed its loan value, the only substantial item of value she received was a 30% future interest in the marital home. She further notes that the home cannot be liquidated for another 5-6 years. In contrast, she points to the property received by Ronald - a \$20,000 motorcycle, the pension valued at approximately \$68,000, and a 70% interest in the marital home. By her calculations, Emma received less than 20% of the marital estate. This figure, she argues, clearly is inequitable and runs afoul of the statutory guidelines. She seeks a greater share of the marital estate, including a lump sum payment representing a one-half interest in Ronald's retirement.

Kentucky Revised Statutes (KRS) 403.190 addresses the division of marital property. It states in relevant part that

(1) In a proceeding for dissolution of the marriage . . . or in a proceeding for disposition of property following dissolution of the marriage . . . , the court shall . . . divide the marital property . . . in just proportions considering all relevant factors including:

(a) Contribution of each spouse to acquisition of the marital

property, including contribution of a spouse as homemaker;

(b) Value of property set apart to each spouse;

(c) Duration of the marriage; and

(d) Economic circumstances of each spouse when the division of property is to become effective. . . .

The trial court is vested with wide discretion in determining what constitutes "just proportions," and such a determination will be reversed only upon a finding that the discretion was abused. Davis v. Davis, Ky., 777 S.W.2d 230 (1989). Our review begins with the principle that the trial judge is presumptively correct in his rulings and that we shall not tamper with his conclusions absent a showing of clear error. City of Louisville v. Allen, Ky., 385 S.W.2d 179 (1964).

In the matter at bar, the parties' primary assets are the residence and Ronald's retirement. We believe there is a sufficient basis in the record for concluding that the residence was divided in just proportions. Emma received the use of the residence for approximately 6 years and 30% of its equity thereafter, while paying 30% of the taxes and insurance, and any maintenance costs under \$1000. Ronald will receive 70% of the equity, while making the mortgage payment, paying 70% of the taxes and insurance, and any necessary maintenance costing in excess of \$1000. Though there are other ways in which this asset could have been properly divided, the existing scheme clearly comports with KRS 403.190(1) and does not constitute an abuse of discretion.

Our examination of the Circuit Court's disposition of Ronald's retirement leads us to a different conclusion. The record appears to indicate that the retirement is a marital asset, having accrued during the pendency of the marriage. See generally, KRS 403.190(2). As such, it would be subject to division between the parties under KRS 403.190(1). The Circuit Court did not expressly find it to be a marital asset, however, and on this point we must remand for further findings of fact.

If said retirement is found to be a marital asset, in whole or in part, KRS 403.190(1) subjects it to division in just proportions. This is not to say that every marital asset must be divided, nor that every asset must be divided equally. Quiggins v. Quiggins, Ky. App., 637 S.W.2d 666 (1982). Rather, the marital estate as a whole must be divided in just proportions. Had Emma received most or all of the marital home, for example, clearly the Court could exercise its sound discretion by awarding most or all of the retirement to Ronald. Since the marital home was apportioned more or less equally (when taking into account Ronald's non-marital contribution and his ongoing mortgage obligation), we must conclude that the retirement must also be subject to division if the Circuit Court on remand finds it to be marital property.

Again, while we recognize that the Circuit Court's rulings are presumptively correct, Allen, supra, and are reluctant to tamper with those rulings, we must conclude that if the retirement is found to be a marital asset, Emma's share of the marital estate is not a just proportion. If the retirement

is found to be a marital asset, it must be subject to apportionment between the parties.

Emma also briefly argues that the division of the maintenance and repair costs for the marital home is inequitable. As we noted above, we must conclude that the Circuit Court's division of the home and its associated costs was equitable considering Ronald's non-marital contribution and his ongoing obligation to pay the mortgage. While we recognize that Emma's obligation to make repairs under \$1000 is a heavy burden given her income, we cannot go so far as to conclude that the Circuit Court abused its discretion on this issue.

Lastly, Emma argues that the Circuit Court's award of joint custody was erroneous. She maintains that Ronald visited Will on only one occasion during the first year of the divorce, and that he had little interest in pursuing legal visitation. As such, Emma seeks to have the Circuit Court's order of joint custody reversed, with instructions that sole custody be awarded.

KRS 403.270 provides that custody should be determined in accordance with the best interest of the child, and sets out several relevant factors. It states in relevant part:

(1) The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent. The court shall consider all relevant factors including:

(a) The wishes of the child's parent or parents 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; and

(e) The mental and physical health of all individuals involved.

As a general rule, a trial court has broad discretion in determining the best interest of a child when awarding child custody. Krug v. Krug, Ky., 647 S.W.2d 790, 793 (1983). In reviewing a child custody determination, the standard of review is whether the factual findings of the trial court are clearly erroneous. Reichle v. Reichle, Ky., 719 S.W.2d 442, 444 (1986); Basham v. Wilkins, Ky. App., 851 S.W.2d 491, 493 (1993). Findings of fact are clearly erroneous if they are manifestly against the weight of the evidence or not supported by substantial evidence. Wells v. Wells, Ky., 412 S.W.2d 568, 571 (1967); Poe v. Poe, Ky. App., 711 S.W.2d 849, 852 (1986). A trial court's decision on an award of custody will not be disturbed absent an abuse of discretion. Dudgeon v. Dudgeon, Ky., 458 S.W.2d 159, 160 (1970); Cherry v. Cherry, Ky., 634 S.W.2d 423, 425 (1982).

In the matter at bar, virtually no findings of fact were made relating to the issue of custody. Kentucky Rule of Civil Procedure (CR) 52.01 applies in child custody cases and requires the trial court to find facts either on issues raised in the pleadings or on issues which are mandated to be considered by statute. See Stafford v. Stafford, Ky. App., 618 S.W.2d 578, 580



(1981), overruled on other grounds by Largent v. Largent, Ky., 643 S.W.2d 261 (1982). Since failure of the trial court to make adequate findings of fact was not brought to its attention as required by CR 52.04, any deficiency was waived. See Cherry v. Cherry, Ky., 634 S.W.2d 423, 425 (1982); Holland v. Holland, Ky. App., 679 S.W.2d 835, 836 (1984). Emma has not directed our attention to any facts in the record which would serve as a basis for tampering with the Circuit Court's custody order, and our review of the record has uncovered no such facts. Accordingly, we find no error on this issue.

For the foregoing reasons, the Findings of Fact, Conclusions of Law, and Supplemental Decree of Dissolution of the Pike Circuit Court are vacated and remanded for a determination of whether Ronald's retirement is marital property and, if so, for division thereof in accordance with this opinion. The Decree is in all other respects affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Shelia P. Singleton  
Pikeville, KY

BRIEF FOR APPELLEE:

Michael de Bourbon  
Pikeville, KY