RENDERED: October 8, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002551-MR

CATHY Y. NEWTON[1] APPELLANT

v.

APPEAL FROM FRANKLIN FAMILY COURT
HONORABLE REED RHORER, JUDGE
ACTION NO. 03-CI-00117

GARY SCOTT NEWTON APPELLEE

OPINION
AFFIRMING IN PART, VACATING IN PART AND REMANDING

** ** ** ** **

BEFORE: JOHNSON, KNOPF, AND SCHRODER, JUDGES.

JOHNSON, JUDGE: Cathy Y. Newton has appealed from the findings of fact, conclusions of law, and decree of dissolution of marriage of the Franklin Circuit Court, Family Court Division entered on September 30, 2003. Having concluded that the family

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[1] The notice of appeal in this case lists the appellant as "Kathy", however her signature on the response to the petition for dissolution of marriage shows her name as "Cathy." For purposes of this appeal, we will refer to the appellant as "Cathy."

court did not abuse its discretion given under KRS[2] 403.190 by ordering the marital residence sold, debts paid, and proceeds divided, and that it made sufficient findings under CR[3] 52.01, we affirm that portion of the decree of dissolution. Having concluded that the family court failed to make specific findings of fact regarding the physical possession of the children, leaving this Court unable to determine whether the family court properly applied the factors of KRS 403.270 in making this portion of the custody award, we must vacate that portion of the decree of dissolution and remand for further proceedings and specific findings to be entered as required by CR 52.01. Having concluded that the award of equal physical possession of the children must be vacated and the matter must be remanded for further findings, we also vacate the family court's child-support award. Even though we do not find an abuse of discretion as to the child-support award based upon equal physical possession of the children, we must vacate the child-support award so it can be reviewed on remand following the review of the custody award.

FACTS OF THE CASE

Cathy and Gary were married on June 28, 1980. Their

[2] Kentucky Revised Statutes.

[3] Kentucky Rules of Civil Procedure.

first child, Amber, was born on October 31, 1986, and their second child, Cameron, was born on April 29, 1997. The parties purchased the marital residence on April 6, 1992, and continuously lived together in the residence until Gary moved during March 2003. However, the parties' date of physical separation was January 1, 2003. Gary filed a dissolution of marriage action in the Family Court Division of the Franklin Circuit Court on January 29, 2003, and Cathy accepted service of summons on that date. This action was heard by the family court on July 31, 2003.

On September 30, 2003, the family court entered findings of fact, conclusions of law, and decree of dissolution of marriage, finding among other things that (1) the parties shall have joint custody of their two minor children, with equal possession time, alternating weeks; (2) Gary shall pay child support to Cathy in the amount of $42.08 per month, i.e. the difference in the child support each party would owe the other under the guidelines; and (3) the parties' marital home shall be sold and, after the two mortgage debts are paid, the remaining marital debts shall be satisfied from the proceeds and the parties shall divide equally the remaining proceeds from the sale. On November 6, 2003, the family court denied Cathy's motion to alter, amend, or vacate the family court's September

30, 2003, order as to the above-referenced findings. This appeal followed.

EQUAL PHYSICAL POSSESSION UNDER JOINT CUSTODY AWARD

Cathy has asked this Court to reverse the portion of the family court's joint custody award of equal physical possession for two reasons: (1) the family court failed to make specific findings of fact as required under CR 52.01 and (2) the family court failed to consider all the factors as set out in KRS 403.270 in making its conclusions of law.

We will first address whether the family court made sufficient findings of fact under CR 52.01 to support its joint custody award of equal physical possession. "The cornerstone of CR 52.01 is the trial court's findings of fact,"[4] as they give this Court "a clear understanding of the grounds and basis of the trial court's judgment . . . ."[5] In domestic relations cases,[6] there is no jury and the family court as the sole finder of fact must find the facts "specifically and state separately its conclusions of law thereon and render an appropriate judgment . . . ."[7] It is expected that courts "'. .

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[4] Stafford v. Stafford, Ky.App., 618 S.W.2d 578, 580 (1981).

[5] Id.

[6] Aton v. Aton, Ky.App., 911 S.W.2d 612, 615 (1995).

[7] CR 52.01 provides:

. will give more careful consideration to the problem if they are required to state not only the end result of their inquiry, but the process by which they reached it.'"[8]

This Court is constrained by CR 52.01 from overturning the findings of the family court, if supported by substantial evidence and thus not clearly erroneous.[9] "'Substantial evidence' is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people."[10] The clearly erroneous standard protects against

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> 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; and in granting or refusing temporary injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review except as provided in Rule 52.04. 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. The findings of a commissioner, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41.02.

[8] Stafford, 618 S.W.2d at 580 (quoting U.S. v. Merz, 376 U.S. 192, 84 S.Ct. 639, 11 L.Ed.2d 629 (1964)).

[9] Sherfey v. Sherfey, Ky.App., 74 S.W.3d 777, 782 (2002).

[10] Id.

actions being "tried anew upon appeal."[11] Therefore, this Court uses caution in reversing a custody award of the family court. We must uphold the ruling of the family court if its decision is supported by findings which are supported by the evidence, and we cannot reverse the trial court just because we as an appellate court do not agree with its decision.[12] The importance and consequences of a family court's decision in domestic relations cases cannot be overstated.

> We, as an appellate court, are not unmindful that the most burdensome and frustrating work of the trial court is its task in decision making associated with nonjury trials under CR 52.01 and that the bulk of this burden is in family law cases. However, our Supreme Court, in its rule making and supervisory capacity, has placed the utmost trust and responsibility in the trial courts by adopting CR 52.01. The rule states that the facts shall be found 'specifically.' The rule is mandatory on the trial courts.[13]

It is apparent to this Court that the family court's findings regarding physical possession are not sufficient. The family court's only finding as to custody was as follows:

> (4) During the pendency of this action the children have primarily resided with Ms. Newton and Mr.

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[11] Stafford, 618 S.W.2d at 579.

[12] Chalupa v. Chalupa, Ky.App., 830 S.W.2d 391, 393 (1992).

[13] Stafford, 618 S.W.2d at 580 (citing Fleming v. Rife, Ky., 328 S.W.2d 151 (1959); and Standard Farm Stores v. Dixon, Ky., 339 S.W.2d 440 (1960)).

> Newton has had visitation with them every other weekend and on Wednesday evenings.

Later, the family court made the following conclusion of law:

> (3) Both parties are fit and proper parties to have custody of their minor children. It is in the children's best interest that the parties be awarded joint custody and that they have equal possession time with them, with each party having the children on alternating weeks. The parties should remain flexible and cooperate with each other in working out deviations from the week-to-week schedule upon each other's request.

In his petition, Gary pled for joint custody of the parties' minor children. In her verified response to the petition, Cathy pled for sole custody of the two minor children, subject to reasonable visitation rights by Gary. The temporary custody arrangements were by an agreement of the parties, but no <u>pendente</u> <u>lite</u> order was entered. Gary testified that he had chosen not to press the issue of equal time during the pendency of the action, but rather chose to allow the family court to make a final decision on the issue.

Both parties had testified at the final hearing as to custody of the children. But, there is no mention of this testimony in the family court's findings. Cathy testified that

(1) she had been the primary caregiver of the children during the marriage; (2) while Gary had from time to time assisted, she had been the one responsible for taking care of the marital home, including cooking, cleaning, and washing, and taking care of the children's medical needs, haircuts, and shopping for school clothes; and (3) Cameron had various medical problems including asthma and a respiratory infection, which required continual care and she primarily had been the one to make sure that he received this care. Gary denied in his testimony that Cathy was the primary caregiver of the children during the marriage. While he admitted that she met many of the children's needs, Gary testified that he also was involved in their lives and performed tasks such as cooking and washing, helping with school work and activities, maintaining Amber's car, and staying home with the children when they were sick and when Cathy had to go out of town to tend to a sick relative.

Both parties admitted that the other was a good parent and that Cathy was the one who primarily took the children to church. They both further admitted that the children were especially close to their paternal grandparents, who lived next door to the marital home. Cathy testified that the paternal grandparents had aided in some of the visitation since the parties had separated.

Cathy testified that the children should not be uprooted from the martial home where Amber had resided for most of her life and where Cameron had resided his entire life. She further testified that she felt that the children needed stability and security and that this could be provided by her being allowed to reside with them in the marital residence until they reached the age of majority.

Gary testified that he wanted more time with the children than he had received during the separation period. He testified that he felt that the parties should sell the marital real estate and pay off all debts and the remaining proceeds would be available for each of them to start over in a home for the children. He further testified that he did not feel that alternating the weeks that the children lived with their parents would be disruptive or unsettling to them. Gary testified that seeing his children only every other weekend would be "devastating" to both him and the children. He felt that a schedule of alternating weeks would allow him to help the children with their homework and to remain current with their school activities.

After a family court has made the findings required by CR 52.01, it is then required to apply the law to the facts and its decision is not to be disturbed unless it constitutes an

abuse of discretion.[14] This Court is unable to determine whether the family court appropriately took the next step and applied the law set out in KRS 403.270 because of its lack of specific findings to support its equal physical possession award of the minor children.

KRS 403.270(2) requires the family court to determine custody based on the best interests of the child, while considering both parents equally and considering all relevant factors.[15] This Court has determined that there is no

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[14] Sherfey, 74 S.W.3d at 782-83.

[15] KRS 403.270(2) states:

> 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. 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 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 403.270;

"significant difference" in the analysis required to make an award of joint custody versus sole custody.[16] "The ultimate or conclusory fact to be found is a determination of the 'best interests of the child.' However, before the factual conclusion can be reached the court is to consider all relevant factors including those specifically enumerated in the statute."[17] This is because the factors allow a child to be "individualized and his or her unique circumstances accounted for."[18]

In this case, it is undisputed that it is in the best interests of the children that the parties share jointly in making decisions regarding the children. In this appeal, Cathy challenges the award of equal physical possession of the children. The determination of the physical custody of the

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(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 by KRS 403.270 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.

[16] Squires v. Squires, Ky., 854 S.W.2d 765, 768 (1993).

[17] Stafford, 618 S.W.2d at 580.

[18] Squires, 854 S.W.2d at 769.

children is a part of the joint custody award and it should be based on the "child's best interest." This does not require "an equal division of time with each parent; rather, it means that physical custody is shared by the parents in a way that assures the child frequent and substantial contact with each parent under the circumstances."[19]

Not one of the nine factors set out in KRS 403.270 is addressed in the family court's findings. From the testimony of the parties as set out above, several of the factors were relevant, including:

> (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;[20]
>
> (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[.][21]

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[19] Fenwick v. Fenwick, Ky., 114 S.W.3d 767, 777-78 (2003).

[20] Gary, in his brief, argues that there was not testimony regarding Amber's desire not to live with him, as Cathy claims in her brief. This Court will not address whether or not these facts were raised at the final hearing, as the ruling on custody is vacated and this matter is remanded for further proceedings.

[21] KRS 403.270(2).

We do not contend that these are the only factors that the family court should have considered in making its award, but they are clearly relevant as evidenced by the testimony of record in this case.

The findings supporting the custody award in the case of McFarland v. McFarland,[22] were very similar to those in this case and simply stated, "[t]hat the Respondent is the fit and proper person to have custody of the three minor children." This Court found that the trial court's findings were "less than adequate" and remanded the case for more specific findings and for the taking of further proof, if necessary, on the custody issue.[23] This Court is required to do no less in this case, and therefore, we vacate the family court's order awarding equal physical possession of the parties' minor children and remand this matter for further proceedings and specific findings to be entered in compliance with CR 52.01.

CHILD SUPPORT

Cathy also argues that the family court's decision to deviate from the child-support guidelines constituted an abuse of discretion. Gary is an Engineering Technician III with the Transportation Cabinet and his gross monthly earnings are $4,768.72. Gary, in October 2003, received an annual increment

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[22] Ky.App., 804 S.W.2d 17 (1991).

[23] Id. at 18.

to increase that amount. Also, in 2002 Gary earned a gross profit of $7,155.00 from his painting business, for a total gross monthly income of $5,228.72. Cathy's gross income was found to be $3,914.68 per month. The family court correctly noted that, under the applicable guidelines and using the undisputed incomes of the parties, Gary's monthly child support would be $849.54. Rather than imposing this amount, the family court reasoned that, since each of the parties have the children one-half of the time, child support should be based upon the difference between Cathy's and Gary's respective obligations under the guidelines and concluded that Gary should pay Cathy child support in the amount of $42.08 per month.

"Since the interpretation of a statute is a legal question, the trial court's interpretation is subject to de novo review by an appellate court."[24] A decision whether to deviate from the guidelines is within the family court's discretion.[25] "KRS 403.211(2)[26] specifically provides, '[c]ourts may deviate

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[24] Clary v. Clary, Ky.App., 54 S.W.3d 568, 571 (2001).

[25] Rainwater v. Williams, Ky.App., 930 S.W.2d 405, 407 (1996).

[26] KRS 403.211(1)-(4) states:

> (1) An action to establish or enforce child support may be initiated by the parent, custodian, or agency substantially contributing to the support of the child. The action may be brought in the county in which the child resides or where the defendant resides.
>
> (2) At the time of initial establishment of a

child support order, whether temporary or permanent, or in any proceeding to modify a support order, the child support guidelines in KRS 403.212 shall serve as a rebuttable presumption for the establishment or modification of the amount of child support. 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.

(3) A written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case shall be sufficient to rebut the presumption and allow for an appropriate adjustment of the guideline award if based upon one (1) or more of the following criteria:

(a) A child's extraordinary medical or dental needs;

(b) A child's extraordinary educational, job training, or special needs;

(c) Either parent's own extraordinary needs, such as medical expenses;

(d) The independent financial resources, if any, of the child or children;

(e) Combined monthly adjusted parental gross income in excess of the Kentucky child support guidelines;

(f) The parents of the child, having demonstrated knowledge of the amount of child support established by the Kentucky child support guidelines, have agreed to child support different from the guideline amount. However, no such agreement shall be the basis of any deviation if public assistance is being paid on behalf of a child under the provisions of Part D of Title IV of the Federal Social Security Act; and

(g) Any similar factor of an extraordinary nature specifically identified by the court which would make application of the guidelines inappropriate.

from the guidelines where their application would be unjust or inappropriate.' Subsection (3)(g) of the same statute allows the court, with appropriate findings, to deviate from the guidelines for any circumstance of an 'extraordinary nature.'"[27] "Thus, the courts have the flexibility to fashion appropriate orders for situations not addressed by our statutory scheme."[28] "[W]e think it is clear that the trial court could take into consideration the period of time the children reside with each parent in fixing support, and could deviate from the guidelines . . . if convinced their application would be unjust.[29]

Thus, we conclude, assuming equal physical possession of the children, that the family court's method of calculating child support was authorized by law. Therefore, under the circumstances as determined by the family court, its award was not an abuse of its discretion. However, because we are vacating and remanding the family court's joint custody award of equal physical possession, it is premature to determine the sufficiency of the child-support award and we must vacate and remand the child-support award. Following the family

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(h) "Extraordinary" as used in this section shall be determined by the court in its discretion.

[27] Downey v. Rogers, Ky.App., 847 S.W.2d 63, 64-5 (1993).

[28] Brown v. Brown, Ky.App., 952 S.W.2d 707, 708 (1997).

[29] Downey, 847 S.W.2d at 65.

court's determination of custody, the family court shall set an amount for child support.

IMMEDIATE SALE OF THE MARITAL RESIDENCE

Finally, we address the family court's order of the sale of the marital residence and the application of its proceeds. Once again, we must determine whether the family court made sufficient findings under CR 52.01, and we hold that the findings were sufficient. The family court's findings as to this issue were as follows:

> (5) The parties jointly own the real estate at 5332 Sleepy Hollow Drive in Frankfort which they purchased on April 6, 1992. Ms. Newton submitted an appraisal of the property in the amount of $190,000.00. Mr. Newton testified that the house is worth more than the appraisal. The debt against the property is $114,606.05, including a home equity line of credit.
>
> (14) The parties have the following debts (other than those against the house and against their vehicles) which were incurred during their marriage and for the benefit of both of the parties:

Visa	$ 8,383.99
Dillards	$ 472.31
Shell	$ 1,762.93
Lazarus	$ 1,135.39
Discover	$ 1,816.22
Total	$13,570.84

> (15) During the pendency of this

action each party has paid toward marital obligations and no further adjustment between the parties for those payments is appropriate.

(15) The parties previously made a division of their personal property and the division is reflected in the exhibits introduced at the hearing. The division made is an equitable one and the Court will make no further adjustment of those items.

The family court's conclusions of law as to this issue were as follows:

(6) The property at 5332 Sleepy Hollow Drive, Frankfort, Kentucky shall be sold and, after the two mortgage debts are paid, the debts in paragraph 14 of the Findings of Fact shall be satisfied. After the said debts have been paid, the remaining proceeds shall be divided equally between the parties. The sale of the property will allow both parties to make a new start and be essentially debt-free.

KRS 403.190(1)(d)[30] allows the family court to divide

[30] KRS 403.190(1) states:

In a proceeding for dissolution of the marriage or for legal separation, or in a proceeding for disposition of property following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall assign each spouse's property to him. It also shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors including:

the marital property of divorcing parties and allows the court to consider "the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children."[31] This Court has, in the past, upheld such a ruling.[32] However, the trial court has "wide discretion in the division of marital assets,"[33] and such a ruling is not required.

In support of her argument to remain in the marital home, Cathy cites the case of Spratling v. Spratling.[34] Even though the marital home in Spratling was the only one the child had lived in,[35] we agree with Gary that Spratling is distinguishable from this case. In Spratling, there was no debt owed on the house and further the non-custodial spouse had received approximately $8,200.00 more in the marital property division. "[T]he trial court considered that the unpaid interest

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. . .

> (d) Economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children.

[31] Id.

[32] See Colley v. Colley, Ky., 460 S.W.2d 821 (1970).

[33] Lykins v. Lykins, Ky.App., 34 S.W.3d 816, 819 (2000).

[34] Ky.App., 720 S.W.2d 936 (1986).

[35] Id. at 938.

on this excess would be a reasonable consideration for occupancy of the house."[36] While such a ruling was authorized in Spratling, it does not require the same ruling in similar cases.

In this case, there is substantial evidence in the record that the real estate is not free from debt and that there has been an equitable division of other marital property between the parties. Because the family court made specific findings in this case as required by CR 52.01, and due to the wide discretion granted the family court by KRS 403.190(1)(d), we affirm the family court's division of the parties' marital real estate.

For the foregoing reasons, we affirm the Franklin Family Court's order that the marital residence be sold, debts paid, and proceeds divided; we vacate the portion of the family court's joint custody order awarding equal possession of the parties' minor children and the portion of the family court's order awarding child support and remand these two matters for further proceedings consistent with this Opinion.

KNOPF, JUDGE, CONCURS.

SCHRODER, JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

SCHRODER, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: While I agree with the majority that the trial court

[36] Id.

should have made specific findings on the appropriateness of split custody of the children, I disagree that the absence of such findings in this case is grounds to set aside the trial court's judgment in this case. I recognize that a trial court must make specific findings regarding the applicable factors enumerated by KRS 403.270(1) in determining the best interests of the children. However, CR 52.04 requires a motion for additional findings of fact when the trial court has failed to make findings on essential issues. Failure to bring such an omission to the attention of the trial court by means of a written request will be fatal to an appeal.[37] The thread which runs through CR 52 is that a trial court must render findings of fact based on the evidence, but no claim will be heard on appeal unless the trial court has made or been requested to make unambiguous findings on all essential issues.[38]

In this case, Cathy's motion to alter, amend, or vacate merely requested that the trial court designate her as the primary residential provider. She did not ask the trial court to make specific findings on whether the split custody arrangement was in the best interests of the children. Accordingly, I would deem any error waived, and affirm the trial court on this question.

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[37] Cherry v. Cherry, Ky., 634 S.W.2d 423, 425 (1982).

[38] Eiland v. Ferrell, Ky., 937 S.W.2d 713, 716 (1997).

BRIEF FOR APPELLANT:

Edwin A. Logan
Frankfort, Kentucky

BRIEF FOR APPELLEE:

James D. Liebman
Frankfort, Kentucky