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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001261-ME

SUZANNE ANDERSON — APPELLANT

v.

APPEAL FROM FRANKLIN FAMILY COURT
HONORABLE O. REED RHORER, JUDGE
ACTION NO. 02-CI-00977

JOSEPH JOHNSON — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; ACREE, JUDGE; BUCKINGHAM,[1] SENIOR JUDGE.

ACREE, JUDGE: Suzanne Anderson (Mother) appeals a May 23, 2009 order of the Franklin Family Court denying her motion to modify timesharing. For the following reasons, we affirm.

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute(s) (KRS) 21.580.

During their brief marriage, Mother and Joseph Johnson (Father) resided in Frankfort, Kentucky. They had one minor child together. The parties divorced in 2002. In 2007, upon the parties' joint motion, the family court entered an order awarding custody of the child to the parties jointly with equal, but flexible, timesharing.

On April 6, 2009, Mother filed a motion for "an order modifying the timesharing schedule of the parties." (Appellant's motion, April 6, 2009). Mother's basis for seeking the modification was to make it easier for her "to relocate with the minor child to Paducah, Kentucky." *Id*. The timesharing schedule proposed by Mother would have significantly reduced Father's time with the child.

The issue before the family court was whether a modification of timesharing was in the child's best interests. KRS 403.320(3)("court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child"); *see also Pennington v. Marcum*, 266 S.W.3d 759, 770 (Ky. 2008)("if the Appellant was actually seeking only a modification of visitation/timesharing, the standard the court had to apply is what is in the best interests of the child.").

The family court conducted a hearing on Mother's motion which lasted several hours. Not long thereafter, the family court entered an order denying modification as follows:

> [Mother] having filed a Motion to Modify Timesharing, which came before the Court for a hearing on May 4, 2009, the Court having heard testimony of both parties, the Court having heard testimony of the witnesses, the Court having reviewed the court record, and the Court being otherwise sufficiently advised, the Court hereby finds that it is not in the best interest of [the child] to relocate to Paducah, Kentucky. Therefore, [Mother's] Motion to Modify Timesharing is hereby DENIED.

(Order, May 23, 2009). Mother appealed that order to this Court.

"[T]his Court will only reverse a trial court's determinations as to visitation if they constitute a manifest abuse of discretion, or were clearly erroneous in light of the facts and circumstances of the case." *Drury v. Drury*, 32 S.W.3d 521, 525 (Ky. App. 2000). However, Mother does not argue either of these grounds. Instead, she asserts as error that "[t]he [family] court made no findings of fact." Consequently, the relief she seeks is not reversal; she instead asks this Court "to remand this case to the trial court with an order to make specific findings and to take such further proof as may be necessary." (Appellant's Brief, p.7).

Father responds by quoting Kentucky Rule(s) of Civil Procedure (CR) 52.01 that "[f]indings 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." CR 52.01. Mother's post-decree motion to modify visitation falls in the category of motions exempted by the quoted language. While Father's reading of the rule is technically correct, it does not fully illuminate how Kentucky's courts have come to apply CR 52 to post-decree motions in dissolution cases.

Our highest court has periodically indicated that CR 52.01 does not require the trial court to include findings of fact and conclusions of law when ruling on post-decree motions to modify. In *LeBus v. LeBus*, 408 S.W.2d 200 (Ky. 1966), the Court reviewed a trial court's order granting a motion to modify child support. The father presented four assignments of error, one of which was the trial court's "fail[ure] to make findings of fact as required by CR 52.01." *LeBus* at 201. Our former Court of Appeals said:

> There is no merit in the contention that the order must be overturned because of the court's failure to make findings of fact. CR 52.01 specifically excepts rulings upon motions from its mandate. It would have been better practice for the trial court to make findings of fact, but the cited rule does not make it mandatory.

Id. at 202.

A few years later, in *Clay v. Clay*, 424 S.W.2d 583 (Ky. 1968), the Court reviewed an order granting a post-decree motion for approximately $6,400 in child support arrearage. The Court said the father's argument "that the trial judge failed to make findings of fact and conclusions of law is without merit. CR 52.01 exempts rulings on motions from its mandate for such findings of fact and conclusions of law." *Clay* at 584.

In its application of the motion exemption contained in CR 52.01, our highest court had, to that time, treated all post-decree orders the same whether those orders granted the post-decree relief sought or denied it. *See, e.g., Powell v. Powell*, 423 S.W.2d 896, 897-98 (Ky. 1968)(in "the trial court's denial of the relief

sought by [the father] . . . [b]y the terms of CR 52.01, the trial court was not required to state its findings of fact and conclusions of law."). In 1974, the Court began distinguishing between post-decree orders granting relief and those in which the relief sought was denied.

In *Burnett v. Burnett*, 516 S.W.2d 330 (Ky. 1974), a father filed a post-decree motion to terminate both his maintenance obligation and his former spouse's right to occupy the marital residence. The motion was denied, and "[t]he order was not accompanied by findings of fact and conclusions of law." *Burnett* at 331. The father

> concede[d] that the Civil Rules, CR 52.01, do not require findings on a motion to modify a divorce judgment, but he maintain[ed] that KRS 403.250, in authorizing modification of such a judgment in respect to support or maintenance only upon 'a showing of changed conditions so substantial and continuing as to make the terms unconscionable,' by necessary implication requires findings of evidentiary facts in support of an order *granting or denying* such a motion.

Id. at 332 (emphasis supplied). The Court found merit in the father's argument "*as concerns orders granting a motion to modify*, because it cannot be determined whether the requirement of the statute as to a showing of a change of conditions was complied with unless the circuit court makes appropriate findings of evidentiary facts." *Id.* (emphasis supplied). *Burnett*, therefore, continued to hold that CR 52.01 does not require findings in orders entered upon post-decree motions to modify; however, *Burnett* embraced a new rule, albeit in dicta – the extent to which findings of fact and conclusions of law are required in post-decree orders

granting a post-decree motion depends on the standard contained in the statute pursuant to which the motion was brought. *Id.* This dicta was soon embraced by this Court in *Mullins v. Mullins*, 584 S.W.2d 601 (Ky. App. 1979) where we said,

> *Burnett v. Burnett*, Ky., 516 S.W.2d 330 (1974), indicates that a trial court should make findings of fact when a motion for modification under KRS 403.250(1) is granted. This is true, although CR 52.01 might indicate contra. Unless the court makes appropriate findings of evidentiary facts, it cannot be determined whether the requirement of the statute as to a showing of change of conditions has been satisfied. The court did note, however, that CR 52.04 may require that a party request findings of fact in order to preserve the basis for a reversal or remand. *Burnett*, *supra*, 516 S.W.2d at 332, See n.1.

Mullins at 603; *see also Klopp v. Klopp*, 763 S.W.2d 663, 665 (Ky. App. 1988) ("Civil Rule 52.01 does not require a trial court to make findings on motions. Our case law, though, does require such findings in ruling on motions to modify dissolution judgments, at least when the court grants the motion.").

However, in *Burnett*, there was another more significant factor. The father's motion in *Burnett* was not granted. The motion was denied and the Court said that made a difference. The Court concluded

> that findings are unnecessary under KRS 403.250 when the motion is denied. When such a motion is denied, the reason necessarily is that the movant did not sustain his burden of showing the required change of conditions. There is no need for findings of evidentiary facts, because the finding would simply be that the movant had not produced sufficient proof to require an affirmative finding of the facts on which he relied. So we find no error here in the failure of the circuit court to make findings.

Id. at 332.

While *Burnett* specifically addressed post-decree modifications under KRS 403.250, the reasoning is equally applicable to Mother's motion brought pursuant to KRS 403.320(3). To paraphrase *Burnett*, when such a motion is denied, the reason necessarily is that the movant did not sustain her burden of showing the "modification would serve the best interests of the child." KRS 403.320(3).

We draw from these cases, and particularly from *Burnett*, these three rules: (1) CR 52.01 does not require a trial court to make findings on post-decree motions whether they are granted or denied; (2) when a post-decree motion is granted, case law rather than CR 52.01 does require findings of fact and conclusions of law sufficient to address the standard contained in the statute pursuant to which the motion was brought; (3) when a post-decree motion is denied, neither CR 52.01 nor case law requires findings of fact or conclusions of law because implicit in the denial is the finding that the movant failed to produce sufficient proof to require an affirmative finding of the facts on which he relied.

We emphasize that *Burnett* and its progeny do not leave the unsuccessful post-decree movant without recourse.

We note first that *Burnett* does not deprive any party of the *remedial* provisions of CR 52. That is, even though CR 52.01 does not require findings on motions, nothing prevents a party from eliciting the trial court's discretion to enter

findings by bringing a motion pursuant to CR 52.02. After all, Kentucky appellate courts continue to require the unsuccessful respondent to a post-decree motion to preserve error by complying with CR 52.04. *See* Louise E. Graham & James E. Keller, 15 *Kentucky Practice - Domestic Relations Law* § 13:6 fn.1-3 (2009).

Next, and more importantly, nothing prohibits an unsuccessful post-decree movant from appealing the denial of the motion on the grounds set forth in *Drury, supra*. *Drury*, 32 S.W.3d at 525. *Drury* makes it clear that orders denying post-decree motions, even without findings of fact and conclusions of law, do not inhibit appellate review; such orders will still be reversed "if they constitute a manifest abuse of discretion, or were clearly erroneous in light of the facts and circumstances of the case." *Id.*

Unfortunately, Mother pursued neither of these courses. Instead, she is asking this Court to order the family court to do that which CR 52.02 empowered her to ask the family court directly. We decline to do so.

Our Supreme Court adopted CR 52 (*i.e.*, CR 52.01 to CR 52.04) because it recognized that a trial court is best suited to provide the type of relief Mother seeks. The requirement in CR 52.04 that litigants first use CR 52.02 as a prerequisite to pursuing relief in the appellate courts is wise and beneficial for a number of reasons.[2] First, requiring the use of CR 52.02 assures that

[2] Giving credit where it is due, we note that while CR 52.01, 52.02, and 52.03 are taken from Federal Rules of Civil Procedure 52(a) and 52(b), Kentucky's CR 52.04 is an original creation of our former Court of Appeals.

> Rule 52.04, adopted in 1973, effective March 1, 1974, is original and has no counterpart in the Federal Rules. It was designed to

reconsideration of an order or judgment occurs when the trial court is most familiar with the issues and the evidence. This increases the likelihood of a just final result. Second, use of CR 52.02 is the most expeditious way for litigants to obtain the relief Mother seeks. This increases the odds that a final result will be swift as well as just. Third, use of the rule can yield an order or judgment that is either more satisfactory to both parties or less assailable on appeal, thereby reducing the possibility that resort to this Court will be necessary. This preserves judicial resources and likely lowers the parties' costs. Fourth, use of CR 52.02 gives the trial

court the opportunity to refine or elaborate upon its reasoning in the case. This allows for more effective appellate review when resort to this Court is necessary. All these reasons justify, in any case, the requirement that the family court be given the first opportunity to consider making additional findings before this Court is asked to order them. The case before us is no exception.

In our case, the Franklin Family Court denied Mother's motion to modify visitation. According to *Burnett*, the family court was not required to enter any findings of fact or conclusions of law. We, therefore, must affirm the order absent controlling authority to the contrary. Mother cites as that controlling

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> solve a practical problem of appellate review when a party wishes to raise the point that the failure of the trial court to make findings constitutes reversible error.

Kurt A. Philipps, Jr., David V. Kramer and David W. Burleigh, 7 *Kentucky Practice – Rules of Civil Procedure Annoted* Rule 52.04 (6th ed. 2009).

authority *McFarland v. McFarland*, 804 S.W.2d 17 (Ky. App. 1991), because she believes the case is "on all fours" with her case. We disagree.

The mother in *McFarland* sought review of a decree, entered after a contested dissolution hearing, which granted custody of the children to the father; the mother was not seeking review of an order denying relief she sought pursuant to a motion. Therefore, the exemption as to motions contained in CR 52.01 was not at play in *McFarland* as it is in the case before us.

Furthermore, in *McFarland* not only did the trial court make no findings in support of its custody award, the court also failed to apply the best-interests-of-the-child standard. *McFarland* at 18. True, we will reverse an order granting a motion to modify visitation if the family court fails to "address the threshold inquiry of the children's best interests *and* ma[kes] no findings in support of that ultimate fact in accordance with K.R.S. 403.320(2) [recodified in 1992 as KRS 403.320(3)]." *Hornback v. Hornback*, 636 S.W.2d 24, 26 (Ky. App. 1982)(emphasis supplied). This is because whether modification of visitation would serve the best interests of the child is the "conclusory or ultimate fact to be found as required by the statute" and which the family court was required to determine. *Id.* It is clear in the case *sub judice* that the Franklin Family Court did consider the proper standard – the best interests of the child – and did enter a finding on the ultimate fact that modification of visitation was not in the child's best interest.[3]

[3] Technically speaking, the family court's order determined that "it is not in the best interest of [the child] to relocate to Paducah, Kentucky," indicating the court's adherence to the proper

Finally, in addition to failing to consider the best-interests-of-the-child standard, the trial court in *McFarland* failed to "consider all relevant factors including those specifically enumerated in KRS 403.270(1) in determining the 'best interests of the child.'" *Id.* at 18. There were no additional enumerated factors in KRS 403.320(3) for the Franklin Family Court to consider. Both *McFarland* and *Burnett* hold, without regard to the applicability of CR 52.01, that the extent to which findings must be included in the court's determination is established by the applicable statute. To that extent, these cases are in harmony.

In sum, Mother's reliance on *McFarland* is unavailing, and we are compelled to affirm the Franklin Family Court's order.

In so finding, however, we do not intend to encourage minimalism in the drafting of orders. As even the Court in *LeBus*, *supra*, stated, "[i]t would have been better practice for the trial court to make findings of fact, but the cited rule does not make it mandatory." *LeBus*, 408 S.W.2d at 202.

Additionally, we are sympathetic to the concern expressed in dicta by another panel of this Court "urg[ing] our Supreme Court and Rules Committee to review and revise CR 52.01." *McKinney v. McKinney*, 257 S.W.3d 130, 135 (Ky. App. 2008). That panel noted,

> Many motions require a court to try the issues upon the facts. To hold that a trial court is not obligated to make findings of fact when ruling on a motion of any kind

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standard. We therefore construe this determination as indistinguishable from the ultimate issue before the family court – whether modification of visitation was in the child's best interest. Under *Burnett*, the denial of the motion itself is sufficient to permit appellate review based on the standard established in *Drury, supra*.

> except as provided in CR 41.02 [footnote omitted] necessarily deprives litigants of an understanding of the order or judgment, as well as inhibits any type of meaningful appellate review.

Id. To a large degree, however, the evolution of Kentucky's domestic relations jurisprudence, as outlined herein, has addressed this concern by requiring post-decree orders granting modification to contain findings sufficient to satisfy the standard in the statute pursuant to which the motion is brought, and by holding that findings are unnecessary when the post-decree motion is denied.

Because we find no error in the May 23, 2009 order of the Franklin Family Court, we affirm.

BUCKINGHAM, SENIOR JUDGE, CONCURS AND FILES SEPARATE OPINION.

TAYLOR, CHIEF JUDGE, DISSENTS AND FILES SEPARATE OPINION.

BUCKINGHAM, SENIOR JUDGE, CONCURRING: The only issue before this court is whether the trial court erred in regard to findings of fact. Any question concerning alleged error by the court in addressing the merits of the appellant's motion is not before this court.

I agree that findings of fact and conclusions of law were unnecessary. "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." CR 52.01. I also agree that the appellant's reliance on the *McFarland* case is

unavailing. As has been noted, *McFarland* involved an appeal from a custody decree, and this case involves an appeal from an order denying a motion to modify timesharing. Thus, I agree that the trial court's order in this case is exempt from the portion of CR 52.01 that requires findings of fact in "all actions tried upon the facts without a jury."

I disagree with the dissent that the *Reichle*[4] case mandates that trial courts must make findings of fact and conclusions of law in deciding post-decree modification motions. While the court in *Reichle* did state that CR 52.01 applies to custody cases, that case, like *McFarland*, involved an initial custody determination. I conclude that the language of the court therein contemplated only such determinations or decrees and did not refer to motions to modify as well.

The dissent states that the majority denies appellate review to the appellant pursuant to CR 52.04 because she failed to file a motion for additional findings pursuant to CR 52.02. I do not read the majority opinion in that manner. Rather, the majority opinion simply affirms the trial court's order because the trial court was not required to make findings of fact and conclusions of law. The appellant did not ask for appellate review of the trial court's order on its merits. Had the appellant asked for a review of the order on its merits, I conclude we would have been required to do so regardless of whether she moved the court for additional findings or not.

[4] *Reichle v. Reichle*, 719 S.W.2d 442 (Ky. 1986).

TAYLOR, CHIEF JUDGE, DISSENTING: Respectfully, I dissent. The majority concludes that CR 52.01 does not require a circuit court to make findings of fact on post-decree motions regardless of whether the motion is granted or denied and that applicable case law requires findings of fact and conclusions of law only if the post-decree motion is granted. I believe the majority's interpretation of CR 52.01 is in error and the applicable case law analysis flawed for several reasons.

First, this case involves modifications pertaining to child visitation orders. Accordingly, I do not believe that either *Burnett* or *Mullins*, upon which the majority relies, is applicable since both involve post-decree modifications pertaining to maintenance. As provided for in KRS 403.250, the requirements for post-decree modifications of maintenance are substantially different than modifications pertaining to child visitation under KRS 403.320. The primary consideration in obtaining maintenance modification is changed circumstances whereas the primary consideration in modification of child visitation is always the best interests of the child. KRS 403.320(3). For the purpose of determining the best interests of the child, our Courts have inferred from this statute that an evidentiary hearing is required for making the best interests determination. *McNeeley v. McNeeley*, 45 S.W.3d 876 (Ky. App. 2001); *Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008).

Second, I believe post-decree child visitation modification proceedings are more closely akin to child custody modification proceedings as

provided under KRS 403.340, which also requires that any modification must be in the best interests of the child. In *Reichle v. Reichle*, 719 S.W.2d 442 (Ky. 1986), the Kentucky Supreme Court specifically held that CR 52.01 applied to child custody cases and that "the findings of fact are particularly important in such situations." *Id.* at 444. The Supreme Court makes no distinction in whether a motion is granted or denied.

In *Reichle*, the parties were married six months before getting a divorce. They later resumed cohabitation, which resulted in the birth of a child out of wedlock. The child lived with the mother for six years when the father initiated proceedings, post-decree, to obtain custody of the child. The father's motion was denied, which subsequently was reversed the by Court of Appeals. In reversing the Court of Appeals, the Supreme Court applied CR 52.01, despite the father's motion having been denied below. Therein, the Supreme Court stated the obvious:

> One of the principal reasons for the rule [CR 52.01] is to have the record show the basis of the trial judge's decision so that a reviewing court may readily understand the trial court's view of the controversy.

Reichle, 719 S.W.2d at 444. Accordingly, I believe under Kentucky case law, including the mandate of *Reichle* and its progeny, that CR 52.01 is applicable to any post-decree modification motion that involves a determination of the best interests of the child, including visitation modification proceedings.

Third, I believe the majority's historical analysis regarding the application of CR 52.01 and its exclusion of "motions" from the findings of fact

requirement is also flawed. CR 52.01 was adopted effective July 1, 1953. Kentucky's no-fault dissolution statutes (KRS 403.110 *et seq*.) were enacted by the Kentucky General Assembly in 1972. I believe the language in the post-decree modification statutes, as pertains to visitation and child custody (KRS 403.320(3) and KRS 403.340), reflects a legislative intent that contemplates courts conducting evidentiary proceedings to determine whether modification is in the best interests of the child. Likewise, I do not believe Kentucky's highest court, in adopting CR 52.01, contemplated that post-decree modification motions enacted some twenty years later would be outside the scope of CR 52.01. As noted earlier in *Reichle*, the Kentucky Supreme Court explicitly stated that CR 52.01 was applicable to child custody proceedings. However, the focus of the majority gets hung up on the distinction of whether the motion for modification is granted or denied, to justify whether findings are required under CR 52.01. While there may be some legal precedent for such an analysis in maintenance proceedings, there certainly exists no binding precedent to support such a position as pertains to child visitation or child custody proceedings. If the circuit court conducts evidentiary hearings which are subject to the mandate of CR 52.01, it should make absolutely no legal difference whatsoever whether the modification motion is granted or denied. The analysis and legal reasoning in any ruling by a circuit or family court will be the same regardless of whether the modification motion is granted or denied. Unless findings of fact are provided by the circuit or family court, our Court simply has no ability to conduct an adequate and intelligent appellate review. Appellate courts

should not be placed in the position of having to read the mind of a circuit or family court judge to determine the basis for the judge's ruling.

In interpreting CR 52.01, the former Kentucky Court of Appeals, the predecessor to the Kentucky Supreme Court, addressed this very issue in *Elkins v. Elkins*, 359 S.W.2d 620 (Ky. 1962), after the adoption of CR 52.01. In *Elkins*, a woman attempted to modify a child support agreement that had been entered into with the father of the children in conjunction with the divorce.[5] The circuit court denied the mother's motion to modify the child support agreement. In reversing the circuit court by applying CR 52.01, despite the mother's motion having been denied, Judge Palmore made the following eloquent observation regarding the necessity of findings of fact in post-decree modification proceedings:

> The order from which this appeal is taken neither contains findings of fact nor discloses the basis on which the trial court's decision was made. This is unfortunate, for a losing party ought not to be deprived of a proper review by the court's failure to record its specific rulings of law and fact. By its failure to conform with CR 52.01 a record that leaves us in the dark in this respect inevitably conduces to a substitution of our own judgment for that of the trial court.

Id. at 622.

To the extent that our courts have strayed in their interpretation and application of CR 52.01, I believe those decisions are distinguishable or otherwise simply in error. In recent years, the interpretation and application of CR 52.01 has generated substantial discussion and confusion by both the bench and bar regarding

[5] The applicable child support law in effect when *Elkins* was decided (1962) was prior to the enactment of no-fault divorce statutes in 1972.

its interpretation and application. Another panel of this Court recently criticized any limitation of CR 52.01 to post-dissolution decree motions. In *McKinney v. McKinney*, 257 S.W.3d 130 (Ky. App. 2008), Judge Dixon made the following astute observation:

> However, we are also of the opinion that CR 52.01, as currently written, is not only overbroad but illogical. The majority of orders and judgments from the trial court originate from a motion. Many motions require a court to try the issues upon the facts. To hold that a trial court is not obligated to make findings of fact when ruling on a motion of any kind except as provided in CR 41.02 necessarily deprives litigants of an understanding of the order or judgment, as well as inhibits any type of meaningful appellate review. We would urge our Supreme Court and Rules Committee to review and revise CR 52.01.

Id. at 135 (footnote omitted). Given that the majority in this case has limited the proper application of CR 52.01 to a post-decree modification proceeding, I concur totally with Judge Dixon's observation.

Finally, I believe the majority has totally misinterpreted and misapplied CR 52.04 in this case. Assuming that CR 52.01 were applicable to this case, once a circuit court conducts evidentiary proceedings, the rule requires that the court shall state specific findings of fact and shall further state separate conclusions of law in rendering the appropriate judgment. In this case, the family court failed to make any findings of fact whatsoever for this Court to review. The order on appeal simply stated that the family court found that it was not in the best interests of the child to relocate to Paducah, Kentucky. While this may be a

conclusory finding, it is not supported by any analysis or findings regarding the statutory requirements set forth in KRS 403.320. The requirement for making findings of fact is mandatory for proceedings pursuant to CR 52.01. *Brown v. Shelton*, 156 S.W.3d 319 (Ky. App. 2004). In my opinion, CR 52.04 is not triggered until the family court makes findings of fact but otherwise fails to make adequate findings or does not address an issue that a party believes should be addressed in the findings. Thereupon, the failure to make adequate findings of fact must be brought to the circuit court's attention by a motion for more definite findings under CR 52.04 or the error is considered waived. *Cherry v. Cherry*, 634 S.W.2d 423 (Ky. 1982).

This is totally distinguishable from the case now on appeal where the family court has failed to make any findings of fact which I believe results in reversible error regardless of whether a CR 52.04 motion was filed. *Brown*, 156 S.W.3d 319. In other words, a party is not required to ask for additional findings if the circuit court fails to make findings that are mandatory under CR 52.01. Here, the majority has denied appellant a review on the merits because she failed to file a motion under CR 52.04. The majority cannot have it both ways. If CR 52.01 is not applicable, as the majority holds, because appellant's motion was denied, then CR 52.04 cannot be applied independent of CR 52.01, which the majority has done in this case. However, if CR 52.01 is applicable, then findings of fact were mandatory which, as noted, were not made by the family court. Contrary to the

majority's position, the failure to make findings under CR 52.01 is reversible error as a matter of law. *See Brown*, *supra*.

For these reasons I would reverse and remand to the Franklin Family Court for further proceedings in conformance with CR 52.01 and KRS 403.320(3).

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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