RENDERED: NOVEMBER 9, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000813-ME

LARRY SCOTT BLEVINS — APPELLANT

v.

APPEAL FROM MORGAN CIRCUIT COURT
HONORABLE DAVID D. FLATT, JUDGE
ACTION NO. 16-CI-00052

KATHY BLEVINS — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: COMBS, J. LAMBERT, AND NICKELL, JUDGES.

LAMBERT, J., JUDGE: Larry Scott Blevins (Larry) appeals from the orders of the Morgan Circuit Court dividing marital property and ordering joint custody of the parties' son. We affirm in part, reverse in part, and remand.

Larry and Kathy Blevins were married in 2003, separated in 2015, and Larry filed the petition for dissolution in late April 2016. Larry and Kathy have

one son, who is now in 8th grade. Larry is a heavy equipment operator with the state highway department. During the marriage Kathy worked as a housekeeper at St. Clair Regional Hospital, but she suffered a work-related injury for which she underwent spinal surgery in 2016. Kathy is considered disabled and is compensated as such.

The parties were unable to agree on most issues other than that the marriage was irretrievably broken; multiple hearings were held over the course of several months. The final hearing was held on March 6, 2017. The Morgan Circuit Court entered its findings of fact, conclusions of law, and decree of dissolution on April 10, 2017. Larry's motion to alter, amend or vacate the judgment was denied on May 1, 2017, and Larry timely filed his notice of appeal. The matter was expedited per this Court's order of May 18, 2017.

The specific issues in this appeal pertain to the award to Kathy of the marital home, the division of non-marital equity, and the determination that the parties be given joint custody of their son, including overnight visitation of the child with Kathy. We shall consider the issues in the order presented in Larry's brief.

Larry first argues that the Morgan Circuit Court erred in allocating the parties' marital home (a 2006 mobile home situated on approximately one acre of property) and its attendant indebtedness to Kathy. Larry maintains that the trial

court abused its discretion in so finding because it "ignored probative evidence in the record, did not consider mandatory statutory factors in [Kentucky Revised Statutes] KRS 403.190(1), and its conclusion of law is not supported by substantial evidence."

Kentucky Rules of Civil Procedure (CR) 52.01 provides the general framework for the family court as well as review in the Court of Appeals:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment[.] . . . Findings of fact, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

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

> "[S]ubstantial evidence" is "[e]vidence that a reasonable mind would accept as adequate to support a conclusion" and evidence that, when "taken alone or in the light of all the evidence, . . . has sufficient probative value to induce conviction in the minds of reasonable men." Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses" because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court. Thus, "[m]ere doubt

> as to the correctness of [a] finding [will] not justify [its] reversal," and appellate courts should not disturb trial court findings that are supported by substantial evidence.

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

The pertinent sections of KRS 403.190 read as follows:

> (1) 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:
>
> (a) Contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker;
>
> (b) Value of the property set apart to each spouse;
>
> . . .; and
>
> (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.

Larry initially argues that the circuit court failed to recognize his marital contributions in the acquisition of the parties' home. KRS 403.190(1)(a). Yet Larry himself fails to recognize Kathy's contributions during the marriage, focusing only on events after the parties' separation when she was no longer living in the marital home. And it was during the separation that Larry missed a total of five mortgage payments, including insurance on the home, which caused the bank to increase the monthly payment to provide for bank-acquired insurance. Kathy assumed the indebtedness as well as the late fees which accrued because of Larry's failure to pay. All that evidence was considered by the circuit court in allocating the home and its financial obligations to Kathy. This finding is not "manifestly against the weight of the evidence," and we decline to disturb it. *Hempel v. Hempel*, 380 S.W.3d 549, 551 (Ky. App. 2012) (internal citation omitted).

Nor do we agree with Larry that the circuit court ignored Larry's mortgage payments made after the parties separated. Although Larry made fifteen payments out of twenty during that time, Kathy was no longer living in the home and was in fact paying rent on an apartment. More importantly, Larry failed to provide any documentation that the subject payments increased any equity in the home. His testimony supported an opposite conclusion, that there was little or no equity in the home. The appraisal he submitted verifies that assessment. The circuit court properly considered this evidence in its award to Kathy of the home

and its allocation to her of the mortgage and insurance payments. *McVicker*, *supra* at 416.

Larry's next allegation of error is that the circuit court failed to account for Kathy's lesser economic circumstances when it awarded her the marital home. KRS 403.190(1)(d). In this respect Larry argues that he had recently received a significant increase in hourly pay which put him in a superior position to afford the mortgage. But the circuit court correctly recognized that Larry had already made more money than Kathy, yet he fell behind in the payments. Even after Larry received the pay increase, he failed to catch up on the missed mortgage payments. The circuit court was aware of the parties' respective financial situations when it allocated the home and mortgage to Kathy, and we decline to disturb that finding. *Asente*, *supra*.

Under this same statutory factor Larry continues that, because he is the primary custodian, the circuit court should have awarded him the marital residence. Kathy concedes that this is a factor the circuit court should consider but argues that deciding the matter rests in that court's discretion. We agree with Kathy. *Id.*

Larry next asks this Court to revisit the distribution of other marital property, namely, the equity in the home, and the allocation of certain personal property. Kathy agrees with Larry that the circuit court wrongly affixed an

appraisal value of $64,000.00 to the trailer when in fact the parties agreed that the trailer was worth $59,000.00. After the mortgage of $53,000.00 and additional debt of nearly $4,000.00 for a garage addition are subtracted, there is left an equity amount of approximately $2,000.00. This should have been recognized and addressed by the circuit court, and we remand the issue of the division of the home's equity to that court for consideration. *See McVicker*, *supra* at 419; *see also Mattingly v. Fidanza*, 411 S.W.3d 250, 255 (Ky. App. 2013). However, we decline Larry's challenge to the failure of the circuit court to award him any non-marital contribution to the parties' home as there was no evidence submitted by him to that effect. *Smith v. Smith*, 235 S.W.3d 1, 5 (Ky. App. 2006). Larry's attempt to do so after the fact in his CR 59 motion to alter, amend, or vacate was correctly denied by the circuit court.

We also agree with Larry that the circuit court failed to make findings regarding the parties' pension accounts. In his pretrial memorandum, Larry had suggested that each party retain his or her own retirement account. Larry offered no documentation concerning his account, while Kathy testified that the savings account which she had closed out had contained funds from a retirement account from a previous employment that she had cashed out. Thus, it would appear that the circuit court was satisfied that each party kept his or her own funds, yet there was no direct allocation of same. The issue of the parties' retirement and savings

accounts needs to be addressed upon remand. The remaining personal property issues were equitably divided between the parties, and no further proceedings are necessary in that regard.

We lastly turn to the matter of custody of the parties' son. Larry contends that the circuit court erred in its determination that the parties share joint custody of their child and that Kathy is entitled to overnight visitation on a gradually increasing schedule. Larry insists that the circuit court failed to address the statutory factors enumerated in KRS 403.270(2), particularly the wishes of the parents, of the child, the parties' interactions and relationships, the child's adjustment to the home, information and records of abuse, and the extent to which the child has been nurtured or cared for by the temporary custodial parent. KRS 403.270(2)(a), (b), (c), (d), (f), and (g), respectively.

> A joint custody award envisions shared decision-making and extensive parental involvement in the child's upbringing, as in general serves the child's best interest. *Squires v. Squires*, 854 S.W.2d 765, 769 (Ky. 1993). With joint custody, a visitation schedule should be crafted to allow both parents as much involvement in their children's lives as is possible under the circumstances. *Aton v. Aton*, 911 S.W.2d 612 (Ky. App.1995).
>
> . . . .
>
> Reasonable visitation is decided based upon the circumstances of each parent and child, with the best interests of the child in mind. [*Drury v. Drury*, 32 S.W.3d 521,] at 524-25 [(Ky. App. 2000)]. The trial court

> has considerable discretion in determining which living arrangements will best serve the interests of the child. *Id.* at 525.

Hudson v. Cole, 463 S.W.3d 346, 351 (Ky. App. 2015).

We disagree with Larry that the circuit court failed to consider the statutory factors; the circuit court spent three pages of its decision detailing those factors, the current case law, and the testimony and evidence before it. We find no error or abuse of discretion in that court's ultimate determination that joint custody is in the best interest of the child. We adopt the circuit court's findings as our own as if completely set out herein, with special emphasis on its reference to *Squires, supra*, at 769, that the parties "put aside their differences to work toward what is in the best interest of their child." *See also Maxwell v. Maxwell*, 382 S.W.3d 892, 895 (Ky. App. 2012).

The orders of the Morgan Circuit Court are affirmed in part, reversed in part, and remanded for proceedings in accord with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
Daniel Frederick West Liberty, Kentucky	Monica Hill Morehead, Kentucky