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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000982-ME

JENA LEE POWELL APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE PAMELA K. ADDINGTON, JUDGE
ACTION NO. 16-CI-00376

ANTHONY THOMAS POWELL APPELLEE

OPINION
AFFIRMING IN PART, VACATING IN PART, AND REMANDING

** ** ** ** **

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

COMBS, JUDGE: Jena Powell appeals from the judgment of dissolution of her marriage to Anthony Powell, entered November 4, 2016, by the Hardin Family Court. Jena argues that the family court erroneously ruled in the judgment on matters relating to child custody and division of assets. After our review, we vacate those portions of the judgment relating to child custody and finances and

remand for further proceedings.

BACKGROUND

Jena and Anthony married in 2011 in Fayetteville, North Carolina, and moved to Kentucky before their separation in 2013. The parties had one child together in 2007. Following the parties' separation and while their child was in Jena's care, there was an incident in which the child was physically abused by James Boone, Jena's paramour at that time. The Kentucky Cabinet for Health and Family Services (the Cabinet) removed the child from Jena's care on July 4, 2016. Following a dependency, neglect, or abuse (DNA) proceeding, the Hardin Family Court ordered the child to be temporarily placed in Anthony's care on August 1, 2016. Contemporaneously with the ongoing DNA proceedings against Jena, the parties were also in Hardin Family Court to finalize their divorce.

Anthony filed multiple amended petitions for divorce. Issues of confusion and controversy in this case surrounded his filings and the question of whether Jena was properly served on one or more of the successive ones. The original petition, dated March 7, 2016, was sent by certified mail to Jena's home in Radcliff, Kentucky; the certification returned indicating proper service with Jena's signature. Anthony filed an amended petition on March 24, 2016; the summons indicated successful hand-delivery to Jena by a deputy clerk. On June 24, 2016, Anthony moved the family court for leave to file another amended petition for

dissolution of marriage, which the court granted. Anthony sent notice on the motion to Jena via first-class mail, using her temporary address in Tallahassee, Florida. Finally, on July 27, 2016, Anthony moved the family court for leave to file a "second amended petition," which at this point was actually the third such amended pleading. The court granted the motion, and Anthony again sent notice to Jena by first-class mail to the Tallahassee address. Anthony's first three petitions requested joint custody of their child, but the final amended petition changed this request and asked the family court for sole custody. In a later hearing, Jena testified that she did not receive notice of that petition.

Jena was not initially represented by counsel, and she did not file responses to the petitions which were properly served upon her. Nonetheless, she appeared in court after service of the first amended petition. She maintained communication with Anthony's counsel until June 2016 and inquired about a court-ordered mediation. However, the parties never actually entered mediation; instead, Jena's relationship with James Boone led to the aforementioned DNA action.

Following the DNA proceeding, the family court entered a judgment of dissolution of marriage on November 4, 2016. The family court awarded Anthony sole custody of the child based on the following finding: "Petitioner is a fit and proper person to have sole custody of said infant child, and the best interests

of said infant child will be served by placing him in the sole custody of Petitioner." The family court also divided the marital assets, assigning one vehicle to each party, "exclusive ownership of all of the personal property in their possession," and "any indebtedness in their own names" to each party, "the Military Star credit card debt" to Anthony, and "the GCI debt" to Jena. The judgment does not identify the total sums due on each debt or the nature of the "GCI debt." Finally, the family court ordered Jena to pay Anthony $378.00 per month in child support.

Jena had retained counsel as part of her DNA proceedings. When she received the family court's dissolution decree, she showed her copy of the judgment to her attorney. By counsel, Jena moved the family court to alter, amend, or vacate the judgment pursuant to CR[1] 52 and 59. As grounds, Jena contended that she had not been properly served pursuant to the Civil Rules. She also argued that neither party had filed a verified financial disclosure statement with the family court regarding the marital property. Finally, she also argued that the judgment "awards a child custody designation different from requests and averments made" in the original petition.

In a hearing on the motion held on March 27, 2017, the family court heard arguments and testimony which largely dealt with the issue of whether Jena had received proper notice of the petitions. The family court concluded that Jena

[1] Kentucky Rules of Civil Procedure.

had received notice sufficient to satisfy due process because she was properly served at least twice. The family court found that Jena did not respond to the petitions while she was proceeding *pro se*, noting she had not even sent a letter to the court. The family court also addressed Jena's assertion that no finding was made regarding the best interests of the child for custody purposes, stating that it could take judicial notice of a prior order in a DNA case and that it had made a best-interest finding during the DNA hearing when it awarded temporary custody to Anthony. This appeal follows.

ANALYSIS

Jena presents two issues on appeal. First, she contends that the family court erroneously entered judgment on child custody, visitation, child support, and division of property without first conducting an evidentiary hearing. Second, she contends that the family court's judgment is void because Anthony failed to file a final verified disclosure statement.

"In all actions tried upon the facts without a jury . . . the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment[.]" CR 52.01. We review a trial court's findings of fact for clear error. CR 52.01. Such factual findings are not clearly erroneous if they are supported by substantial evidence. *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). "Substantial evidence has been

conclusively defined by Kentucky courts as that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person." *Bailey v. Bailey*, 231 S.W.3d 793, 796 (Ky. App. 2007) (citations omitted). However, "[a] trial court's reliance upon evidence not in the record constitutes clear error." *S.R. v. J.N.*, 307 S.W.3d 631, 634 (Ky. App. 2010) (citation omitted).

There are a number of statutory factors which a family court *must* consider in child custody matters:

> 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. Subject to [Kentucky Revised Statutes (KRS)] 403.315, there shall be a presumption, rebuttable by a preponderance of evidence, that joint custody and equally shared parenting time is in the best interest of the child. . . . The court shall consider all relevant factors including:
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> (a) The wishes of the child's parent or parents, and any de facto custodian, as to his or her custody;
>
> (b) The wishes of the child as to his or her custodian, with due consideration given to the influence a parent or de facto custodian may have over the child's wishes;
>
> (c) The interaction and interrelationship of the child with his or her parent or parents, his or her siblings, and any other person who may significantly affect the child's best interests;

(d) The motivation of the adults participating in the custody proceeding;

(e) The child'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 and the child'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 has been cared for, nurtured, and supported by any de facto custodian;

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

(j) 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 in KRS 403.720 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; and

(k) The likelihood a party will allow the child 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 and that a continuing relationship with the other parent will endanger the health or safety of either that party or the child[.]

KRS 403.270(2).[2]

"[CR] 52.01 requires the family court to make highly specific findings because custody determinations are matters conducted without a jury." *Hicks v. Halsey*, 402 S.W.3d 79, 84 (Ky. App. 2013). A family court's findings on factors relating to custody *must* be reflected in its written order. "Failure to do so allows an appellate court to remand the case for findings, even where the complaining party failed to bring the lack of specific findings to the trial court's attention." *Id*. (quoting *Anderson v. Johnson*, 350 S.W.3d 453, 458 (Ky. 2011)). "Consideration of matters affecting the welfare and future of children are [*sic*] 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." *Id*. (quoting *Keifer v. Keifer*, 354 S.W.3d 123, 125-26 (Ky. 2011)).

Here, neither the family court's original judgment of dissolution of marriage nor its subsequent order denying the motion to alter, amend, or vacate the

[2] This is the most current version of KRS 403.270(2) as recently revised by the Kentucky General Assembly. 2018 Ky. Acts, Ch. 198 (HB 528), § 1 (effective July 14, 2018). The statutory revision does not change our analysis.

judgment contained any findings supporting its custody determination. The family court's orders are entirely conclusory. The family court stated that Anthony was "a fit and proper person to have sole custody" and thereafter merely referenced its decision in the concurrent DNA action as a matter of "judicial notice." A court may take judicial notice of its prior orders and findings of fact -- but not of evidence offered in the previous case. *S.R.*, 307 S.W.3d at 637. However, the family court in this case alludes to the earlier DNA action without explicitly providing any adjudicatory facts resulting from that proceeding. This reference is not sufficient.

> To perform meaningful review of a trial court's decision, this Court must be able to fully understand the facts and evidence upon which the court relied. Without specific findings, this Court "cannot discern the basis of the circuit court's decision and there can be no meaningful review[.]"

Patmon v. Hobbs, 495 S.W.3d 722, 728 (Ky. App. 2016) (quoting *Kindred Nursing Centers Ltd. P'ship v. Sloan*, 329 S.W.3d 347, 348 (Ky. App. 2010)). CR 52.01 requires the trial court to "find the facts specifically," and there are no facts present in the family court's judgment and subsequent order. "A bare-bone, conclusory order such as the one entered here, setting forth nothing but the final outcome, is inadequate and will enjoy no presumption of validity on appeal." *Keifer*, 354 S.W.3d at 126 (footnote omitted).

Aside from the conclusory nature of the orders, the lack of factual findings is especially troubling in this case because a family court **must** utilize the factors listed in KRS 403.270(2) to support its orders in child custody matters. *Id*. The family court's judgment made no reference to the statute or to any of the factors listed therein. For child custody, "a rigid standard of reciting statutory standards—coupled with supporting facts—has now become a requirement." *Hicks*, 402 S.W.3d at 84. Because of the insufficiency of findings of fact supporting the family court's orders required under CR 52.01, as well as the absence of references to the factors found in KRS 403.270(2), we are compelled to vacate those portions of the family court's judgment of dissolution concerning child custody. We remand for further proceedings.

Jena also argues that the family court erred in its division of marital assets because the parties did not submit verified financial disclosure statements as required under Family Court Rules of Procedure and Practice (FCRPP) 2(1)(e). That rule requires the parties to submit a disclosure statement "unless otherwise ordered by the court." The record contains Anthony's "Affidavit Waiving Right to File Verified Disclosure Statements," but a party's unilateral waiver is not equivalent to a court's order dispensing with the requirement. Furthermore, in the hearing held on March 27, 2017, Jena provided unrefuted testimony in which she stated that she never filed financial disclosures with the court, that the assignment

of debts in the decree did not cover all of the debt from the marriage, and that she believed the parties' personal property was not satisfactorily divided.

When dividing property in a divorce, a trial court is required to follow a three-step process:

> (1) the trial court first characterizes each item of property as marital or nonmarital; (2) the trial court then assigns each party's nonmarital property to that party; and (3) finally, the trial court equitably divides the marital property between the parties.

Travis v. Travis, 59 S.W.3d 904, 909 (Ky. 2001) (footnotes omitted). The property division statute, KRS 403.190(1), contains factors which the trial court must consider for a division of marital property:

> (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;
>
> (c) Duration of the marriage; 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.

Ford v. Perkins, 382 S.W.3d 821, 824 (Ky. 2012).

As with the child custody issue, the family court's judgment lacks factual findings to support its rationale, again preventing meaningful review. *See*

Patmon, 495 S.W.3d at 728. There is no mention of the statutory factors in KRS 403.190, no assessment of exactly which property is marital or non-marital, and no discussion of the nature and amounts of the debts assigned to the parties. A trial court errs when it "fail[s] to make sufficient findings under KRS 403.190 prior to dividing" assets in a divorce. *Ford*, 382 S.W.3d at 825. CR 52.01 requires a trial court to "find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment[.]" *Id*. When a trial court makes insufficient findings in a division of assets, we are required to remand for further proceedings in order to permit the trial court to consider the relevant factors under KRS 403.190. *Id*.

CONCLUSION

For the foregoing reasons, we affirm the judgment of dissolution of marriage entered by the Hardin Family Court on November 4, 2016, except for those portions of the judgment concerning child custody and division of financial assets. With respect to those issues, we vacate and remand for a hearing to allow the family court to receive evidence for the record. The family court shall thereafter enter an amended judgment containing explicit findings of fact and conclusions of law supporting its decisions on child custody and asset division with appropriate consideration of the factors outlined in the applicable statutes.

LAMBERT, J., JUDGE, CONCURS.

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

THOMPSON, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I concur with the majority opinion as to the reversal of the family court on the issue of failure to make specific findings as to custody of the child. I disagree with the majority that the family court erred in the division of marital property.

Jena Lee Powell was served multiple times and only personally appeared in this matter on one occasion. She was dilatory and failed to participate by either written motion or letter to the family court or give other notice to the court to preserve any rights she now complains were violated by failure to provide adequate pretrial discovery on the assets. When Jena abandoned her duty to defend this litigation, the family court acted within its authority when it divided the marital property based upon the limited evidence before it.

Jena's only complaint about the division of marital assets is that the family court erred in dividing them in the absence of the submission of verified financial disclosure statements as required by Family Court Rules of Procedure and Practice (FCRPP) 2(1)(e). Jena claims the family court lacked "particular issue jurisdiction" to divide their marital assets in just proportions as mandated by

Kentucky Revised Statutes (KRS) 403.180(2) where mandatory financial case disclosures were not filed. For this proposition, she relies on *Day v. Day*, 937 S.W.2d 717 (Ky. 1997), which voided a judgment of adoption for failure to follow proper statutory procedures. The majority opinion, rather than addressing this argument, goes far afield by granting Jena relief on a ground that she did not argue, that the family court failed to make adequate factual findings.

Jena's argument that *Day* can be extended to deprive a family court of jurisdiction for failure to comply with the mandatory requirements of FCRPP 2(1) was recently rejected in *Mitchell v. Mitchell*, No. 2016-CA-000627-MR, 2018 WL 1773518, 2 (Ky. App. 2018) (unpublished).[3] In *Mitchell*, the appellant claimed the family court was not able to comply with KRS 403.180(2), thus voiding that portion of the decree, because it lacked the information needed to divide the couple's property in just proportions where the appellee failed to provide financial information in compliance with FCRPP 2(1) or 2(3). In rejecting that argument our Court explained it did not read *Day* so generally as *Day* "dealt with issues unique to adoption" which must be interpreted strictly given "the fundamental nature of the rights of parents to direct the upbringing of their children." *Mitchell*, 2018 WL 1773518 at 2. Our Court further explained "[t]here is no parallel statutory prerequisite found in KRS Chapter 403[,]" and the family court's findings

[3] Kentucky Rules of Civil Procedure 76.28(4)(c) allows us to consider this recent unpublished decision because there is no published decision which adequately addresses this issue.

were sufficient where they "complied with the spirit, even if not the letter, of KRS 403.180(2) . . . consistent with the legislative mandate to liberally construe an exercise of jurisdiction which meets with the purpose of effectuating amicable settlements of disputes." *Mitchell*, 2018 WL 1773518 at 2.

Additionally, I note Jena invited error by failing to submit any verified financial disclosure statements. She also does not explain in her brief how she was prejudiced by her and Anthony's failure to submit verified financial disclosure statements.

Accordingly, I concur in part and dissent in part.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
William D. Tingley Louisville, Kentucky	Carol B. Meinhart Radcliff, Kentucky