SUPREME COURT OF KENTUCKY
CASE NO. 2010-CA-0646-DE
(2009-CA-1261)

SUZANNE ANDERSON — APPELLANT

VS.

ON REVIEW FROM COURT OF APPEALS
CASE NUMBER 2009-CA-001261-ME
APPEAL FROM FRANKLIN CIRCUIT COURT
CASE NUMBER 02-CI-00977
HON. REED RHORER, JUDGE, PRESIDING

JOSEPH JOHNSON — APPELLEE

BRIEF FOR APPELLANT

Respectfully submitted by,

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FORE, MILLER & SCHWARTZ
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CERTIFICATE OF SERVICE

I hereby certify that on this the 14th day of February, 2010, a true and accurate copy of the foregoing Brief For Appellant was sent via UPS to the Clerk, Kentucky Supreme Court, 700 Capitol Avenue, Room 235, Frankfort, Kentucky 40601, and by regular U.S. mail, postage prepaid, to Hon. Judge Reed Rhorer, Franklin County Family Court, 669 Chamberlin Avenue, Frankfort, Kentucky 40601 and Hon. Max Comley, Counsel for Appellee, 101 St. Clair Street, Frankfort, Kentucky 40601.

William D. Tingley, Attorney at Law

INTRODUCTION

This is a family law case. Discretionary review was granted after the Kentucky Court of Appeals affirmed the decision of the trial court which, after a full evidentiary hearing on Appellants motion to relocate the parties' daughter, issued an order simply overruling the motion rather than an order which also included CR 52.01 findings of fact.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant requests oral arguments. This case presents an important issue of civil procedure, especially to the Family Law bench and bar. There is perhaps no other area of the law which routinely has such a high volume of post-judgment motions practice. In addition, there is no other area of the law Appellant is aware of where there is a statutory scheme which gives litigants the right to alter a final judgment long after the trial court has lost jurisdiction under traditional rules of jurisprudence. Counsel for the Appellant would welcome the opportunity, both for the benefit of the Appellant as well as for the benefit of those similarly situated, to engage this Court in a dialogue about the importance and necessity of findings of fact being made after any evidentiary hearing under KRS 403 et seq., but especially after a post-judgment hearing to change a visitation schedule to accommodate relocation of a custodial parent.

STATEMENT OF POINTS AND AUTHORITIES

I. THE COURT OF APPEALS ERRONOUSLY HELD THAT FINDINGS OF FACT ARE NOT REQUIRED WHEN POST-JUDGMENT MOTIONS, BROUGHT PURSUANT TO KRS 403.320(3), ARE DENIED AFTER AN EVIDENTIARY HEARING

II. THE COURT OF APPEALS ERRED WHEN IT CONCLUDED THAT IT HAS AUTHORITY TO CONDUCT DE NOVO REVIEWS OF POST-JUDGMENT MOTIONS TO RELOATE BROUGHT PURSUANT TO KRS 403.320

STATEMENT OF THE CASE

The parties divorced in 2002. They have one (1) child in common. In 2007, on joint motion, the trial court entered an order awarding them joint custody of their daughter. The trial court further ordered that "Timesharing with the child will be on an equal time basis as agreed by the parties." On April 6, 2009, in anticipation of remarriage, Appellant filed a motion to modify the timesharing schedule to accommodate her relocation from Frankfort to the home of her betrothed in Paducah, Kentucky. After an extensive hearing wherein each party called multiple witnesses the trial court entered an order denying Appellant's motion to change the timesharing schedule. The trial courts order, in its entirety, was as follows:

> The Respondent [Appellant] 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, Court hereby finds that it is not in the best interest of the Megan Elizabeth Johnson [the minor child] to relocate to Paducah, Kentucky. Therefore, the Respondent's [Appellant's] Motion to Modify Timesharing is hereby DENIED.

Appellant timely appealed the trial court's decision to the Kentucky Court of Appeals. In that court, relying fundamentally upon CR 52.01 and McFarland v. McFarland, 804 S.W.2d 17 (Ky.App.1991), she asserted that the trial court's decision must be reversed because it was required but failed to make findings of fact. The remedy she sought was an instruction to the trial court to make findings of fact. (Appellants Brief, page 7).

On August 27, 2010 the Kentucky Court of Appeals entered an Opinion and Order marked "To Be Published" affirming the trial courts order. Relying heavily on Burnett v. Burnette, 516 S.W.2d 330 (Ky.1974), the Court of Appeals ruled that findings

of facts are not necessary when trial courts, after an evidentiary hearing, *deny* post judgment motions for changes in timesharing. In dicta, the Court of Appeals, relying on Drury v. Drury, 32 S.W.3d 521 (Ky.App. 2000), stated that it has the authority to review timesharing decisions in cases where trial courts make no findings of fact *de novo*. (Opinion and Order Affirming, page 8).

On September 27, 2010 the Appellant moved this Court for discretionary review. Discretionary review was granted by order entered January 14, 2010. By virtue of the same order the briefing schedule was expedited.

ARGUMENT

I.

THE COURT OF APPEALS ERRONOUSLY HELD THAT FINDINGS OF FACT ARE NOT REQUIRED WHEN POST-JUDGMENT MOTIONS, BROUGHT PURSUANT TO KRS 403.320(3), ARE DENIED AFTER AN EVIDENTIARY HEARING

Respectfully, the Court of Appeals in a 2 to 1 decision failed to correctly apply CR 52.01 to the trial court's ruling on Appellants KRS 403.320(3) motion to change the parties' visitation schedule. Appendix Exhibit "1", August 27, 2010 Opinion and Order Affirming, Case No. 2009-CA-001261-ME. Appendix Exhibit "2", May 28, 2009 Order overruling relocation motion. Appendix "3", KRS 403.320. Its construction of CR 52.01 in the case at bar overlooked the clear language of the rule as well as its main objective, to "facilitate meaningful appellate review." McKinney v. McKinney, 257 S.W.3d 130, 135 (Ky.App.2008). The Court of Appeals also appears to have overlooked the precedent set by this Court in Reichle v. Reichle, 719 S.W.2d 442 (Ky.1986) as well as its own decision in McKinney. For these reasons the decision of the Court of Appeals should be reversed and the trial court ordered to amend its order of May 28, 2009 to make

specific findings of fact as required by CR 52.01.

KRS 403.320 is part of a special statutory proceeding commonly known as the No Fault Divorce Act. KRS 403 et seq. CR 1(2) mandates that the Civil Rules are subjugated to the procedural requirements of special statutory proceedings, be those requirements expressed or implied in the statute. Commonwealth, Division of Unemployment Insurance v. 20th Century Coal Company, 373 S.W.2d 159 (Ky.1963). Having failed to recognize that a special statutory proceeding was involved, it appears the Court of Appeals confused the nature of the proceeding with the style of the pleading which traditionally initiates it. In other words, that Court failed to recognize that just because these types of actions are traditionally initiated by a pleading styled "motion" does not mean they are "motions" as that term is used in CR 52.01. The error in the majority's analysis was a failure to recognize that the turning point on applicability of the "findings" requirement of CR 52.01 is whether an evidentiary hearing has been held, not the name of the pleading used to initiate the hearing.

There are two reported cases which are consistent with the Appellants analysis. The first is Reichle which was decided by this Court. The second is McKinney which was decided by the Court of Appeals. In both cases CR 52.01 was construed to require trial courts to make CR 52.01 findings after evidentiary hearings under KRS 403.

Reichle arose from a petition for child custody. In that action the father was seeking to be awarded the primary residential custody of the parties' minor child. In light of this Courts holding in Pennington v. Marcum, 266 S.W.3d 759 (Ky. 2008), the issue at the trial court level in Reichle was actually visitation/parenting time and not custody. This was the same issue in the case at bar. Because the Court of Appeals had made a "*de*

novo determination of the facts" this Court reversed the Court of Appeals decision and reinstated the trial court's decision. Id., 445. While the trial court had made findings of fact, in its decision reversing this Court nonetheless specifically held:

> Civil Rule 52.01 provides in part that findings of fact shall not be set aside unless clearly erroneous with due regard given to the opportunity of the trial judge to view the credibility of the witnesses. The rule also provides that in all actions tried upon facts without a jury, the court shall find the facts specifically and state separately its conclusions of law. One of the principal reasons for the rule 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. *See Fleming v. Rife,* Ky., 328 S.W.2d 151 (1959); *Robinson v. Robinson,* Ky. 548 S.W.2d 155 (1977). These rules clearly apply to child custody cases and the findings of fact are particularly important in such situations. (Emphasis Added.)

Clearly this precedent was not followed by the Court of Appeals in the case at bar. SCR 1.030(a).

McKinney arose from a hearing on a petition to, *inter alia*, set child support. The trial court imputed monthly income to the payor and he appealed. The issue on appeal was the trial court's rejection of his request for additional findings of facts as to the formula used to arrive at the imputed figure. Reversing and remanding with instructions to make the additional findings of fact, the Court of Appeals held in pertinent part:

> We are of the opinion the omitted finding involves a matter which was essential to the trial court's judgment. As such, the trial court erred by denying Keith's motion for additional factual findings on this issue. Consequently, this matter must be remanded for additional findings. *Greathouse v. American National Bank and Trust Co.,* 796 S.W.2d 868, 870 (Ky.App.1990).
>
> In rendering the decision herein, we are cognizant of the fact that CR 52.01 specifically states that "[f]indings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41.02." Although the instant appeal arises from "decisions of motions," the issue of child support was initially raised in Kimberly's petition for dissolution and was only resolved after an evidentiary hearing. Thus, we conclude that the crux of this appeal stems from an action "tried upon the facts without a jury[,]" as set forth in CR 52.01.

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 [FN3] 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. (Emphasis added)

Again respectfully, the Appellant is at a loss to explain why the Court of Appeals did not apply the same reasoning as McKinney to the case at bar. Like the instant case, the hearing in McKinney was post-decree, are in the instant case it arose on a "motion", and as in the instant case there was an evidentiary hearing. Interestingly, the only mention of McKinney by the Court of Appeals in the case as bar is the same point made by this Court in Reichel, failure to make findings of fact after an evidentiary hearing "inhibits any type of meaningful appellate review." Id., 135.

In its opinion and order affirming the Court of Appeals drew three conclusions which are totally erroneous. First, the court concluded that "CR 52.01 does not require a trial court to make findings on post-decree motions whether they are granted or not." The very language of the rule bespeaks the error of this conclusion. It states "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts separately and state separately its conclusions in conclusions of law thereon and render an appropriate judgment:". CR 52.1. There is no exception stated in the rule for post-decree motions brought pursuant to KRS 403.

Their second erroneous judgment was that "when a post-judgment 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 action was brought." In fact, the case law specifically directs that CR 52.01 does apply.

Reichle, McKinnery.

Finally, the Court of Appeals erroneously concluded "when a post-judgment motion is denied, neither CR 52.01 nor case law requires findings of fact and conclusions of law....". In fact, there is no such limitation in CR 52.01 and case law does not support this conclusion. The Court of Appeals relies on the cases of LeBus v. LeBus, 408 S.W.2d 200 (Ky.1966), Clay v. Clay, 424 S.W.2d 583 (Ky.1968), Powell v. Powell, 423 S.W.2d 896 (Ky.1968), Burnett v. Burnett, 516 S.W.2d 330 (Ky.1974), Mullins v. Mullins, 584 S.W.2d 601 (Ky.App. 1979), and Klopp v. Klopp, 763 S.W.2d 663 (Ky.App.1988), to support its conclusion.

The problem with relying on LeBus, Clay,and Powell is that all of these cases were decided before the enactment of the No Fault Divorce Act which is the statutory scheme under which the Appellant brought the underlying motion to relocate. Burnett was decided after the enactment of said statutory scheme but before this Court decided Reichel. Mullins was also decided before Reichel and Klopp was decided before McKinney. More importantly, **none** of the cases relied upon by the Court of Appeals involved issues of visitation.

Additional errors in the judgment of the Court of Appeals were set out in the Dissenting Opinion filed by Chief Judge Taylor. They are fairly summarized as follows:

1. The cases relied upon by the majority, Burnett v. Burnett, 516 S.W.2d 330 (Ky.1974) and Mullins v. Mullins, 584 S.W.2d 601 (Ky.1979), involved post-decree modifications of maintenance. The standard for modification of maintenance is different than the standard for modification of child custody and visitation which is always the best interest of the child.

2. Evidentiary hearings are always required when the best interest of the child standard is to be applied. Reichle.

3. Post-decree modifications of visitation are more closely akin to child custody modification proceedings. The Kentucky Supreme Court has held that CR 52.01 applies to child custody cases and "that findings of fact are particularly important in such situations." Richele at 444.

4. Supreme Court made no distinctions between whether motions for custody were granted or denied in Richele.

5. It is important for the reviewing court to have findings of fact so that the reviewing court can understand the trial courts view of the controversy. (Citing Richele)

6. CR 52.01 was enacted 20 years before the no-fault divorce statutes, statutes which reflect a legislative intention that hearings be held whenever the best interest of the child standard is to be applied. Citing Reichle, if a hearing is to be held regarding child custody CR 52.01 applies.

7. There is no legal precedent for whether findings of fact are required when motions denying relocation are overruled.

8. There is no rational reason to make a distinction between whether a motion [to modify visitation] is granted or denied.

9. CR 52.04 is not triggered until the Family Court makes findings of fact. Failure to make any findings of fact is erroneous as a matter of law.

For the foregoing reasons, the decision of the Kentucky Court of Appeals should be reversed and the trial court should be instructed to amend its May 28, 2009

order to make findings of fact.

II.

THE COURT OF APPEALS ERRED WHEN IT CONCLUDED THAT IT HAS AUTHORITY TO CONDUCT DE NOVO REVIEWS OF POST-JUDGMENT MOTIONS TO RELOATE BROUGHT PURSUANT TO KRS 403.320

In its opinion and order affirming the Court of Appeals also concluded that it had the authority, even when a motion to relocate is denied and no findings of fact are made, to nonetheless conduct a *de novo* review of the evidence. Specifically, it held in pertinent part:

> Next, and more importantly, noting 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 52. 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 reserved "if they constitute a manifest abuse of discretion, or were clearly erroneous in light of the facts and circumstances of the case." *Id.* Appendix "1", page 8. (Emphasis added.)

Drury v. Drury, 32 S.W.3d 521 (Ky.App.2000) is a Court of Appeals decision wherein it was the trial court who was charged with making a "*de novo* determination of what amount of visitation is appropriate..." not the Court of Appeals. Id., 525. On the issue of the Court of Appeals conducting *de novo* reviews of a trial court's decision after an evidentiary hearing in timesharing cases, this Court held in Reichle, in pertinent part:

> Even where a trial judge has essentially tried the case on depositions, the Court of Appeals should not make a *de novo* determination of the facts. *Department for Human Resources v. Moore,* Ky.App. 552 S.W.2d 672 (1977). Id., 444. (Emphasis added.)

Therefore, despite their judgment to the contrary, the Court of Appeals simply does not have the jurisdiction to conduct *de novo* review of evidence where no findings of fact are entered by a trial court.

CONCLUSION

CR 52.01 requires trial courts, sitting as fact finders, to make specific findings of fact and to setout separately their conclusions of law and judgment separately. This rule applies to any post-judgment motion brought pursuant to KRS 403 et seq. when an evidentiary hearing is conducted. If the post-hearing order does not contain findings of fact but is nonetheless appealed, the Court of Appeals does not have the authority to conduct a *de novo* review of the hearing or trial. In such instances the case must be remanded to the trial court with instructions to make findings of fact. Therefore, because the trial courts order of May 28, 2009 was entered after an evidentiary hearing under KRS 403.320, CR 52.01 required that the trail court make findings of fact. The decision of the Kentucky Court of Appeal should therefore be reversed and the trail court ordered to amend its order

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