COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO.: 2010-SC-000646

SUZANNE ANDERSON — APPELLANT

APPEAL FROM KENTUCKY COURT OF APPEALS
CASE NO. 2009-CA-1261

V.

APPEAL FROM FRANKLIN CIRCUIT COURT
CASE NO. 02-CI-00977

JOSEPH JOHNSON — APPELLEE

BRIEF FOR APPELLEE, JOSEPH JOHNSON

Respectfully submitted by:

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of March, 2011, a true and accurate copy of the foregoing Brief For Appellee was served upon the following named individuals by hand-delivery to the Clerk, Kentucky Supreme Court, 700 Capitol Avenue, Room 235, Frankfort, Kentucky 40601, and the Honorable Reed Rhorer, Judge, Franklin County Family Court, 669 Chamberlin Avenue, Frankfort, Kentucky 40601, and by regular U.S. mail, postage prepaid, to Honorable William D. Tingley, Counsel for Appellant, First Trust Centre, 200 South Fifth Street, Suite 700N Louisville, Kentucky 40202.

COUNSEL FOR APPELLEE

STATEMENT CONCERING ORAL ARGUMENT

The Appellee believes that the issues raised on appeal may be adequately addressed by the parties' briefs. Therefore, Appellee does not request an oral argument.

COUNTER-STATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

The parties were married in September 2001. One female child, namely M.J., was born of the marriage on April 10, 2002. The parties divorced in November 2002. Prior to the entry of the Decree of Dissolution of Marriage, the parties entered into a Settlement Agreement which resolved all of the issues of the divorce including the care, custody, and support of the parties' minor child. The Settlement Agreement was filed with the Franklin Circuit Court and incorporated by reference into the Decree of Dissolution of Marriage.

Desiring to modify portions of the 2002 Settlement Agreement, the parties filed a joint motion with the Franklin Circuit Court in May 2007. An Agreed Order was entered by the Franklin Circuit Court on May 22, 2007. The May 22, 2007, Agreed Order granted the parties joint custody of M.J. and gave both parties timesharing with M.J. on an equal time basis.

On April 6, 2009, Appellant filed a motion to modify timesharing to facilitate her relocating from Frankfort, Kentucky to Paducah, Kentucky, with M.J., to be with her fiancé. The timesharing schedule she proposed would have significantly reduced Appellee's time with M.J.

On May 4, 2009, an evidentiary hearing was conducted in the Franklin Circuit Court at which the parties and their witnesses testified. Pursuant to KRS 403.320(3), the test applied by the Franklin Circuit Court at the May 4, 2009, evidentiary hearing was whether modification of the timesharing schedule would serve the best interest of the child. After hearing the testimony and reviewing the court record, the Franklin Circuit Court found that Appellant's motion to modify timesharing was not in the best interest of

the child and denied Appellant's motion. On May 28, 2009, an Order was entered by the Franklin Circuit memorializing its finding. The May 28, 2009, Order was signed by both Appellant's former counsel and counsel for the Appellee.

The Appellant did not make a motion for the Franklin Circuit Court to make additional findings of fact pursuant to CR 52.02, but rather filed appeal seeking the remand of the case to the trial court to make specific findings of fact and to take such further proof as may be necessary. The appeal did not allege error by the Franklin Circuit Court in addressing the merits of Appellant's motion. Therefore, if successful Appellant's only result is the remand of this case to the Franklin Circuit Court to make more specific findings of fact upon the evidence and testimony that was presented at the May 4, 2009, evidentiary hearing. A result that would have been more expeditious and economically accomplished by the filing of a motion pursuant to CR 52.02.

On August 27, 2010, the Kentucky Court of Appeals entered an Opinion and Order affirming the Franklin Circuit Court's May 28, 2009, Order. It is this Opinion and Order by the Kentucky Court of Appeals which is now before the Supreme Court upon the granting of Appellant's Motion for Discretionary Review.

ARGUMENT

I. FINDINGS OF FACT ARE NOT REQUIRED ON POST DECREE MOTIONS WHEN THE POST DECREE MOTION IS DENIED

The Franklin Circuit Court did not err as a matter of law in failing to make findings of fact in denying Appellant's post decree motion to modify timesharing. Appellant has argued that CR 52.01 requires trial courts to make findings of fact when post decree motions are denied after an evidentiary hearing. CR 52.01 states:

> 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.**

CR 52.01 (emphasis added).

As explicitly set forth in the emphasized portion of CR 52.01, findings of fact and conclusions of law are unnecessary on decisions of motions. Therefore, Appellant's argument is simply without basis in the express language of CR 52.01.

Judge Acree, in Kentucky Court of Appeals Opinion and Order Affirming, Case No. 2009-CA-001261, discussed in detail the progression of the case law on how Kentucky's courts have applied CR 52.01 to post-decree motions in dissolution cases. In

analyzing 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), Mullins v. Mullins, 584 S.W.2d 601 (Ky. App. 1979), Klopp v. Klopp, 763 S.W.2d 663 (Ky. App. 1988) and Burnett v. Burnett, 516 S.W.2d 330 (Ky. 1974), Judge Acree found three black letter rules on the application of CR 52.01 to post-decree motions in dissolution cases.

> We draw from these case, 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.

Appellant has relied upon the cases of McFarland v. McFarland, 804 S.W.2d 17 (Ky. App. 1991), Reichle v. Reichle, 719 S.W.2d 442 (Ky. 1986), and McKinney v. McKinney, 257 S.W.3d 130 (Ky. App. 2008) to support her argument that CR 52.01 requires trial courts to make findings of fact when post decree motions are denied after an evidentiary hearing. None of these cases were appeals seeking review of an order denying relief pursuant to a motion. In McFarland the mother 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. In Reichle the father sought review of a child custody judgment, entered after a contested custody hearing, which granted custody of the child to the mother; the father was not seeking review of an order denying relief she sought pursuant to a motion.

In McKinney the father sought review of the trial court's imputation of income to him in an order establishing child support; the father was not seeking review of an order denying relief he sought pursuant to a motion. Therefore, the exemption as to motions contained in CR 52.01 was not at play in McFarland, Reichle, or McKinney.

II. APPELLANT FAILED TO PRESERVE THIS ISSUE FOR APPEAL

As set forth above, the sole issue on appeal is whether the Franklin Circuit Court erred as a matter of law when it failed to make findings of fact in its May 28, 2009, Order denying Appellant's post decree motion to modify timesharing. The relief requested by the Appellant is for this Court to remand this case to the trial court with an order to make specific findings and to take such other proof as may be necessary. Even if the explicit language of CR 52.01 did not state that findings of fact and conclusions of law are unnecessary on decisions of motions and the case law did not hold that findings of fact are unnecessary when a trial court denies a post decree motion, the Appellant failed to preserve this issue for appeal. It is well-established that a final judgment shall not be set aside because of the failure of the trial court to make a finding of fact on an issue essential to the judgment unless the failure is brought to the attention of the trial court by a written motion pursuant to CR 52.02. CR 52.04. Appellant failed to file such a written motion or make an oral motion for specific findings. In fact, Appellant's attorney signed the May 28, 2009, Order. Appellant had the opportunity to request that the Franklin Circuit Court make specific findings, but failed to do so. By failing to bring this issue to the attention of the trial court, the Appellant has waived this issue. Cherry v. Cherry, 634 S.W.2d 423, 425 (Ky. 1982). In addition, by failing to bring this issue to the attention of

the trial court by a written motion, this Court must presume that the evidence presented at trial supports the trial court's conclusions. Id.

CONCLUSION

The Franklin Circuit Court did not err as a matter of law in failing to make findings of fact in denying Appellant's post decree motion to modify timesharing. The explicit language of CR 52.01 states that findings of fact and conclusions of law are unnecessary on decisions on motions to modify timesharing and case law holds that findings of fact are unnecessary when a trial court denies a post decree motion. In addition, the Appellant failed to preserve this issue for appeal.

For the reasons set forth above, the Appellee respectfully requests the Court to affirm the opinion of the Kentucky Court of Appeals which affirmed the May 28, 2009, Order of the Franklin Circuit Court.

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