COMMONWEALTH OF KENTUCKY
SUPREME COURT
2010-SC-000694
NO. 2009-CA-002205-ME

CORY KEIFER — APPELLANT

VS.

JAYLYNNE KEIFER (now BERRIER) — APPELLEE

APPEAL FROM COURT OF APPEALS AND HARDIN CIRCUIT COURT
DIVISION I, HONORABLE PAMELA ADDINGTON
CIVIL ACTION NO. 08-CI-00272

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BRIEF FOR APPELLANT

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CERTIFICATE OF SERVICE

I hereby certify that on the 14 day of February, 2011, true copies of the foregoing Brief for Appellant was served upon the following: Kentucky Court of Appeals, 360 Democrat Dr., Frankfort, KY 40601 and Dawn Blair, LONNEMAN BLAIR AND LOGSDON, 202 North Mulberry, Elizabethtown, Ky 42701, *Counsel for Appellee, Jaylynne Keifer (now Berrier)* and Clerk, Hardin Circuit Court and Hon. Pamela Addington, Hardin Family Court.

I further certify that the Record on Appeal was not removed from the Office of the Hardin Circuit Clerk.

DOUGLAS E. MILLER

INTRODUCTION

This is a domestic case from Hardin Family Court wherein the Appellee appealed a Post Judgment Order modifying parenting times under KRS 403.320 and the Court of Appeals reversed Harding Family Court's failure to apply the statutory factors in KRS 403.270(2) and provide written findings of fact sufficient to modify parenting times.

STATEMENT CONCERNING ORAL ARGUMENT

This Court has already ordered that oral arguments be scheduled with Anderson v. Johnson, 2010-SC-0696-DE.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

The parties were awarded joint custody of their 2 minor children in the Final Decree dated February 17, 2009, with neither party designated as primary residential parent. The Hardin Family Court Decree further provided that in the event either party intended to relocate, that party must tender an Agreed Order modifying parenting time or file a motion to modify parenting time. (Appendix #1)

Upon her Army Orders to relocate to Fort Hood, Texas, Appellee filed a motion to modify parenting time with the children, allowing her to move to Texas with both children. After a hearing on her motion, Hardin Family Court entered an Order maintaining joint custody of the children with neither party designated as the primary residential parent. (Appendix #2) Appellee's parenting time was essentially switched with Appellant's parenting time, consistent with her move to Fort Hood, Texas. After hearing testimony and interviewing the children, Hardin Family Court dictated into the video record its basis for modifying parenting times. (VR 10/21/09 @ 16:22:19)

Appellee did not file a motion with Hardin Family Court pursuant to CR 52.02 requesting specific Findings of Fact. Neither did she allege in her appeal that the trial court failed to enter required Findings of Fact. She timely filed her Notice of Appeal but failed to give notice to Appellant or his counsel of record, the undersigned. (Appendix #3)

The Court of Appeal's opinion reversed Hardin Family Court for its failure to apply the statutory factors in KRS 403.270(2) in modifying parenting times pursuant to KRS 403.320. It further held that Appellee's deficient Notice of Appeal was in substantial compliance with CR 73.02. (Appendix #4)

ARGUMENT

I. NEITHER KRS 403.320 NOR CASE LAW REQUIRED HARDIN FAMILY COURT TO ENTER WRITTEN FINDINGS OF FACT TO SUPPORT THE VISITATION MODIFICATION

Hardin Family Court modified the parties' parenting time (visitation) pursuant to KRS 403.320 applying the statutory "best interest" standard. KRS 403.270 was inapplicable to Appellee's motion to modify parentint times under KRS 403.320. CR 52.01 does not require trial courts to make written findings on motions. Klopp v Klopp, 763 S.W.2d 663 (Ky. App. 1988), LeBus v. LeBus, 408 S.W.2d 200 (Ky. 1966), and Clay v. Clay, 424 S.W.2d 583 (Ky. 1968).

When Appellee's post-judgment motion to modify parenting time was denied, the trial court found that it was not in the best interest of the children to relocate to Fort Hood, Texas, where they had never been. Relocation would completely disrupt their relationship with their father and take them away from the parties' families in the local area. (Exhibit #1, Findings of Fact and VR 10/21/09 @ 16:30:40)

The ultimate fact related to Appellee's motion to modify (or relocate) was simply what is in the best interest of the children, as codified in KRS 403.320(2). It is clear from the record that Hardin Family Court considered and applied the proper standard in denying Appellee's motion to relocate. (VR 10/21/09 @ 16:27:37, 16:24:11 and 16:30:03)

This court held in Pennington v. Marcum, 266 S.W.3d 759 (Ky. 2008) that KRS 403.320 applies to Appellee's motion to relocate to Fort Hood, Texas. In essence, the holding in Pennington created a visitation motion out of a fact situation which previously would have required a motion to modify custody. As a result, KRS 403.270 no longer

applies to motions to relocate or modify visitation, i.e. parenting times. The standards in KRS 403.270 may be useful as a backdrop or foundation to the trial court's ruling, but they are neither necessary nor mandatory to the Family Court's ruling on Appellee's motion.

Appellee herself never asked the trial court to enter specific findings of fact and never argued before the Court of Appeals that this alleged failure constituted reversible error. Rather, without a mention in any of the arguments and briefs, the Court of Appeals pulled this conclusion out of left field, to the complete surprise of both parties. Granted, Appellee may be right for all the wrong reasons, but such is not true in the case at bar. Certainly, the Court of Appeals cites no authority supporting its sweeping legal conclusion—presumably because no such authority exists.

To the contrary, the unpublished opinion in the companion case of Anderson v. Johnson, 2010-SC-0646-DE and the published opinion in Kelsay v. Carson, 317 S.W.3d 595 (Ky. App. 2010) directly contradicted the lower court's opinion in this case. It is difficult to imagine the failure of the three Court of Appeals Judges to at least attempt to reconcile or differentiate these existing contrary decisions.

II. APPELLEE'S FAILURE TO REQUEST FINDINGS OF FACT PURSUANT TO CR 52.01 IS FATAL TO THE COURT OF APPEALS DECISION

Given that neither party briefed the issue raised for the first time in the Court of Appeals decision regarding necessary findings of fact, there was no opportunity to point out that Appellee did not request such findings from Hardin Family Court pursuant to CR 52.02. This failure may be the reason why Appellee never made this argument to the Court

of Appeals. Nevertheless, a cursory review of the certified record on appeal reveals that no such motion was ever filed or pursued in Hardin Family Court.

CR 52.04 required Appellee to request additional findings of fact to preserve this assignment of error on appeal. When Appellee failed to file such a motion, the alleged deficiency in the Hardin Family Court Order denying her motion is unpreserved in this appeal. Burnett v. Burnett, Ky., 516 S.W.3d 330 (1974). Given the denial of Appellee's motion to relocate, the trial court is not required to make findings of fact related to Appellee's motion. Mullins v. Mullins, 504 S.W.2d 601 (Ky. App. 1979) Since Hardin Family Court did not modify the existing Divorce Decree and only modified parenting times as it reserved in its previous Decree, there was no requirement in the Civil Rules nor case law to enter specific Finding of Fact. Appellee failed to sustain her burden under KRS 403.320(3) to show that the modification of visitation or parenting time would serve the best interests of the children.

If Appellee had requested that the trial court enter specific Findings of Fact, it is reasonable to assume that Hardin Family Court would have done so, in a fashion similar to the findings which Judge Addington dictated into the record on the day of the hearing. Alternatively, it would likewise have been reasonable for the trial court to overrule such a motion pursuant to CR 52.02 because such findings of fact are unnecessary. This decision would have been left to the discretion of the trial court.

III. HARDIN FAMILY COURT'S RECITATION INTO THE VIDEO RECORD OUTLINING THE BASIS FOR HER RULING STATISFIES ANY REQUIREMENT TO ENTER WRITTEN FINDINGS OF FACT

Hardin Family Court requested Appellant's counsel to prepare the Order appealed from by Appellee. (VR 10/21/09 @ 16:33:49) No specific Findings of Fact are contained in this Order. However, at the end of the hearing and after interviewing the children, Judge Addington told both parties that she was overruling Appellee's motion and gave reasons and factual basis for her decision. (VR 10/21/09 @ 16:22:19) This video record adequately satisfies any requirement for the findings of fact in the subsequent written Order.

Judge Addington painstakingly placed into the video record on October 21, 2009 the requisite findings of fact to support her decision. From 16:22:19 through 16:33:17, she explains to the parties the facts which were important to the court in modifying parenting times as follows:

(1) Overall best interests of the children. (16:24:11; 16:27:37 and 16:28:50)

(2) Appellee's conscious career choice. (16:25:54)

(3) Different schools, no matter what she decides. (16:24:55)

(4) Lack of family in Texas. (16:30:40)

(5) Interview of the child. (16:31:40)

(6) The hearing record as a whole. (16:32:42)

Although Circuit Courts normally issue Orders in writing, the written Order in this case may be supplemented by the Video Record at the end of the parties' hearing on October 21, 2009. Courts may speak through verbal Orders as well as written Orders. Parties, themselves, are bound by separation agreements dictated into the record, although not reduced to writing pursuant to KRS 403.180. Calloway v. Calloway, 707 S.W.2d 789

(Ky. App. 1986) Judges in civil and criminal cases often dictate into the formal record the basis for their rulings and Orders, without the legal necessity of a subsequent written Order.

IV. APPELLEE'S FAILURE TO SERVE APPELLANT WITH HER NOTICE OF APPEAL REQUIRES DISMISSAL AND THE RULE OF SUBSTANTIAL COMPLIANCE DOES NOT APPLY

Appellee's Notice of Appeal was never served on Appellant nor his counsel. In fact, it was only served on her own previous attorney. See Appendix # 3. As a result, the notice is defective on its face and completely fails to comply with the mandate of CR 73.03(1). Appellee cannot argue substantial compliance with the rule because there was no effort at all to comply with the rule.

The principal objective of the Notice of Appeal is to give fair notice to the opposing party. Lee v. Stamper, Ky, 300 S.W.2d 251 (Ky. 1957) and Blackburn v. Blackburn, 810 S.W.2d 55 (Ky. 1991). Since no notice was given to Appellant nor his counsel, there can be no finding of "fair notice".

Failure to file a timely Notice of Appeal as required by CR 73.03(1), with notice to the opposing party, is a jurisdictional defect that cannot be remedied. Manly v. Manly, 669 S.W.2d 537 (Ky. 1984) and City of Devondale v. Stallings, 795 S.W.2d 954 (Ky. 1990). Failure to timely file a Notice of Appeal mandates dismissal of the appeal. CR 73.02(2)

The first time counsel actually knew that an appeal had been filed on December 11, 2009 was when he received an Order expediting the appeal. Prior, counsel simply presumed that the Notice of Appeal had been served on his client in Cicero, Indiana. Later, on December 30, 2009, counsel discovered the Notice of Appeal had not been properly served.

The first Notice of Appeal served was at Appellee's counsel's request on December 30, 2009, via facsimile. When the Notice of Appeal fails to designate the Judgment appealed from, the appeal must be dismissed. Rose Bowl Lanes, Inc. v. City of Louisville, 373 S.W.2d 157 (Ky. 1963). Failure to name an indispensable party requires a dismissal of the appeal. Watkins v. Fannin, 278 S.W.3d 637 (Ky. App. 2009). This long-standing rule requires notice to all parties who may be affected by the appeal. By analogy, a failure to serve notice on all parties deprives that party or his counsel proper notice of the appeal.

To have substantial compliance there must at the very least be some modicum of compliance. If the Certificate of Service was incorrect, but actual service had been made on the Appellee, this argument would fail. See Morris v. Cabinet for Families and Children, 69 S.W.3d 73 (Ky. 2002). Rather, there cannot be substantial compliance with CR 73.03(1) given the facts before the court. Subsequent belated efforts to serve counsel at his request are of no merit or significance. Moreover, the policy of substantial compliance is inapplicable to a defective notice of appeal. City of Devondale v. Stallings, 795 S.W.2d 954 (Ky. 1990).

Failure of a party to timely complete procedural steps may not affect the validity of an appeal. However, the timely filing of a Notice of Appeal pursuant to CR 73.03 is still mandatory and failure to do so is fatal.

CONCLUSION

The Court of Appeals should be reversed for a procedural defect, i.e. defective notice. Presuming Appellee's Notice of Appeal is not deficient, the lower court's opinion must nevertheless be reversed. Based upon the language of the Final Decree, Appellee was

required to bring a motion if she wanted to relocate to Texas with the minor children. The original decree was never appealed by Appellee. Appellee brought her motion seeking to allow her to relocate with the children, and the result was not in her favor.

The Court of Appeals decision, which requires the trial court to enter written findings of fact, is erroneous and contrary to KRS 403.320 and existing case law. Moreover, this failure was not brought to the attention of Hardin Family Court, and therefore, is not preserved for appellate review.

Respectfully Submitted,

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