COMMONWEALTH OF KENTUCKY
SUPREME COURT

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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REPLY BRIEF FOR APPELLANT

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CORY KEIFER

CERTIFICATE OF SERVICE

I hereby certify that on the 31 day of March, 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

STATEMENT OF POINTS AND AUTHORITIES

ARGUMENT

I. KRS 403.320 DOES NOT REQUIRE FINDINGS OF FACT FOR MODIFICATION OF APPELLEE'SVISITATION

Visitation Orders or Decrees are always modifiable upon proper motion. In the case at bar, the parties were awarded joint custody of their minor children, with neither party being designated the primary residential parent. (p. 20 of attached Exhibit 1). The Decree further contemplated that Respondent may be deployed outside the United States, wherein visitation would be automatically modified. Finally, the Decree provided that prior to relocation of either party to another county or state, the party intending to relocate must file a motion for mediation or a hearing to modify parenting times. New FCRPP 7(2)(a) provides similar restrictions on a parent who plans to move out of state with the children.

Pursuant to the directive from Hardin Family Court, Appellee filed a motion to modify parenting times when she planned to move to Fort Hood, Texas. After a hearing, her motion to essentially relocate the children with her to Fort Hood, Texas was denied. At that point, she didn't have to move to Fort Hood. She could have been discharged from the service and maintained her previous visitation times pursuant to the Court's Final Decree. Nevertheless, she left for Texas and this appeal ensued.

Appellee cites Mullins v. Mullins, 584 S.W.2d 601 (Ky. App. 1979) to support her claim that Hardin Family Court was required to make written Findings of Fact in overruling her motion. Mullins involved a modification of a property provision of the parties' Settlement Agreement, pursuant to KRS 403.250, and this case is completely inapplicable to a motion to modify visitation.

Likewise, Appellee's reliance upon Klopp v. Klopp, 763 S.W.2d 663 (Ky. App. 1988) is misplaced. Again, Klopp involved the modification of a Divorce Decree pursuant to KRS

403.250 regarding medical bills, not visitation. The applicable standard under KRS 403.250 is unconscionably, as opposed to "best interests" under KRS 403.320.

For the same reasons, Burnett v. Burnett, 516 S.W.2d 330 (Ky. App. 1974) is inapplicable to the case at bar. Burnett involved modification of maintenance pursuant to KRS 403.250 and application of the unconscionably standard, which is clearly distinguishable from Appellee's motion, as in Mullins and Klopp, supra.

In Hornback v. Hornback, 636 S.W.2d 24 (Ky. App. 1982) the mother was denied visitation in the original Divorce Decree. The Decree further provided that she would not be entitled to visitation until her mental state improved to stability, as verified by Comprehensive Care. This Decree in Hornback was not appealed. Upon a subsequent motion to modify by the mother, the Trial Commissioner recommended visitation, ignoring the criteria established in the original Decree. The court in Hornback "rewarded" the movant for seeking professional help instead of applying the best interest standard in KRS 403.320. This case may be distinguished from the instant case because:

(1) Hornback involved a Decree which denied visitation altogether;

(2) Appellee was awarded joint custody, with a reservation of her right to relocate;

(3) Appellee was awarded joint custody, with a reservation of parental times under local rules;

(4) The trial court gave Appellee the factual basis for her decision at the end of the hearing and utilized the best interest standard numerous times in doing so.

Appellee's argument that KRS 403.320 and case law requires specific written findings of fact by the trial court must be considered in light of her own failure to request specific Findings of Fact pursuant to CR 52.04. If she thought they were required, why didn't she file an

endangerment to the child. There is no support for this illogical conclusion in the clear language of the statute nor applicable case law.

II. CR 52.04 IS FATAL TO APPELLEE'S ALLEGATION THAT THE TRIAL COURT FAILED TO ENTER SPECIFIC FINDINGS OF FACT

CR 52.04 was designed to prevent Appellee from first complaining on appeal of the trial court's failure to enter specific findings of fact to support her Order. Citations to 3 cases in Appellee's brief do not apply nor support her argument. Hollon v. Hollon, 623 S.W.2d 898 (Ky. 1981) involved the appeal of a marriage dissolution action wherein the trial court failed to make findings under KRS 403.190 and KRS 403.200. An initial final Decree and the requirement to make specific findings of fact under these two statutes to divide property and award maintenance has nothing to do with the case at bar. The decision in Hornback, supra, has previously been distinguished in Appellant's Reply Brief. Elkins v. Elkins, 359 S.W.2d 620 (Ky. App. 1962) predated our current divorce act, KRS 403.320 and CR 52.04. Arguably, the results would have been different in Elkins if CR 52.04 existed at that time. Moreover, Elkins involved a motion to modify child support wherein the movant had previously released all claims to support in the Final Decree. As a result, Elkins is inapplicable to Appellee's motion under the facts of this case.

Appellee's failure to request findings of fact from the trial court renders this point not properly reserved for appellate review. Adkins v. Adkins, 754 S.W.2d 898 (Ky. App. 1978) and Underwood v. Underwood, 836 S.W.2d 438 (Ky. App. 1992).

III. THE TRIAL COURT COMPLIED WITH CR 52.01

CR 52.01 provides in part:

> 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.

This provision of CR 52.01 applies to Appellee's motion to modify parenting time under KRS 403.320. "Any other motions" is broad and all-inclusive as it applies to a myriad of motions to be considered by the trial court, including Appellee's motion. Reference to KRS 403.320 as if it required findings of fact has been previously examined in Appellant's Reply Brief. No such language appears in KRS 403.320. As a result, there is no requirement in CR 52.01 for the trial court to enter written findings of fact when denying Appellee's motion. Powell v. Powell, 423 S.W.2d 896 (Ky. 1968); Clay v. Clay, 424 S.W.2d 583 (Ky. 1968); and Burnett v. Burnett, 516 S.W.2d 330 (Ky. 1974).

Alternatively, the trial court entered adequate findings of fact into the record to satisfy CR 52.01. The court's written Order, coupled with its recitation into the record of the factual basis for its decision, satisfies CR 52.01. The language of CR 52.01 allows the trial court to dictate into the record any necessary findings of fact and conclusions of law. CR 52.01 permits the trial court to adopt the findings of a trial commissioner or utilize a separate memorandum of decision. Likewise, the trial court's written Order is consistent with and supported by the video record in this case.

Appellee's citation to Midland Guardian Acceptance Corp of Cincinnati, Ohio v. Britt, 439 S.W.2d 313 (Ky. App. 1968) is unhelpful to her position because that decision involved a final adjudication of a collection case in Marion County, Indiana. Midland certainly has no bearing on a post-judgment motion to modify visitation.

Likewise, Skelton v. Roberts, 673 S.W.2d 733 (Ky. App. 1984) involved a Jefferson Circuit Court dismissal of an action to collect a debt without rendering written findings of fact. Curiously, Skelton filed a motion for specific findings of fact pursuant to CR 51.04, unlike Appellee. Absent this motion, the final decision in Skelton would likely have been

different. Nevertheless, the requirement to enter findings of fact after a trial has nothing to do with Appellee's motion.

The reviewing court may waive the requirements for findings of fact when the record is sufficiently clear as in the instant case. Clark Mechanical Constructors v. KST Equip Co, 514 S.W.2d 680 (Ky. 1974). A review of the trial video tape which includes Judge Addington's findings and conclusions render the record sufficiently clear as in Clark Mechanical, supra.

IV. THE RULE OF SUBSTANTIAL COMPLIANCE DOES NOT APPLY TO APPELLEE'S FAILURE TO GIVE NOTICE OF HER APPEAL TO APPELLANT

The rule of substantial compliance does not apply to Appellee's complete failure to notify Appellant or his counsel of the Appeal. The only notice given of the Appeal was to Appellee's previous counsel, Hon. Christopher Gohman.

Appellee argues on p. 14 of her Brief that, "Appellant does not state he was not aware of the appeal, but only states the Notice of Appeal does not recite he was given notice." To the contrary, Appellant was completely unaware of the Appeal as was his counsel until December 11, when counsel received an Order expediting her Appeal. Counsel did not receive a copy of the actual Notice of Appeal until December 30, 2009 when it was requested. There was no belated effort to provide a copy of the Notice of Appeal by Appellee because it was obviously defective on its face.

Conversation between counsel in December 2009, after the Notice of Appeal was required to be served, certainly doesn't salvage the Appellee's failure to give timely written notice of her Appeal. Although the notice was timely filed, the directive to give notice in CR 73.03(1) was ignored. By analogy, the Notice of Appeal was timely filed in City of Devondale

v. Stallings, 759 S.W.2d 954 (Ky. 1990), but it was nevertheless defective and dismissed for failure to name an indispensable party (who was not listed on the Notice of Appeal).

Appellee cites to this court dicta from Johnson v. Smith, 885 S.W.2d 944 (Ky. 1994) to support her contention that the rule of substantial compliance applies to all situations except for tardy appeals and naming of indispensable parties. City of Devondale, supra. However, this citation from p. 950 of Johnson simply recites the previous holding in City of Devondale, in an effort to distinguish strict compliance from the Appellant's premature Appeal. Rather, a careful reading of Johnson ellicits the lynchpin for the opinion is "notice" to the other party. The opinion in Johnson solely distinguishes a premature appeal from a tardy appeal. In construing the rationale for the rule of strict compliance application to tardy appeals, the Johnson decision provides on page 949:

> The logic in this is that such parties, having not been timely notified of the Appellant's intent to appeal, had a right to consider the Judgment final.

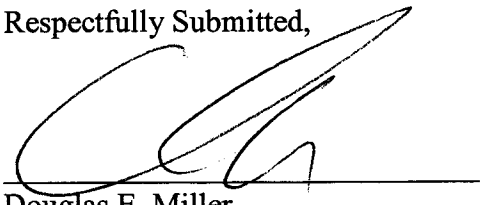
This recitation of the rationale for strict compliance application to tardy appeals is likewise applicable to appeals without notice. Having not been notified of Appellee's appeal, Appellant had a right to consider the Judgment final. As a result, the rule of strict compliance should apply to Appellee's failure to give timely notice of her appeal.

V. THE TRIAL COURT DID NOT ABUSE IT'S DISCRETION NOR IS THE ORDER CLEARLY ERRONEOUS

Hardin Family Court's Order denying Appellee's motion to allow her to relocate with the children is supported by substantial credible evidence in the record and it is not clearly erroneous. Frances v. Frances, 266 S.W.3d 754 (Ky. 2008) The record reflects that the parties were married in Indiana; both sets of extended families live in Indiana; and the parties' minor child desired to live with his father. (Hearing 10/21/09 @ 16:17:20) Appellee desired to move

the children to a new community, completely unfamiliar as to stability and schooling and certainly foreign to the children. Given the facts presented to the trial court, it is clear that substantial probative evidence exists to support her decision.

Respectfully Submitted,



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