COMMONWEALTH OF KENTUCKY
SUPREME COURT

NO. 2010-SC-000694-DGE

CORY KEIFER — APPELLANT

VS.

BRIEF FOR APPELLEE, JAYLYNNE BERRIER

JAYLYNEE KEIFER (now BERRIER) — APPELLEE

APPEAL FROM COURT OF APPEALS (2009-CA-002205)
AND HARDIN CIRCUIT COURT, DIVISION I,
HONORABLE PAMELA ADDINGTON (CIVIL ACTION NO. 08-CI-00272)

RESPECTFULLY SUBMITTED,

DAWN LONNEMAN BLAIR
PHYLLIS K. LONNEMAN
LONNEMAN, BLAIR & LOGSDON, PLLC
202 North Mulberry Street
Elizabethtown, Kentucky 42701
(270) 765-2190
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on the 17 day of March, 2011, I sent express mail, ten originals of the foregoing Brief to the Supreme Court of Kentucky, Clerk, Room 209, State Capitol, 700 Capitol Avenue, Frankfort, KY 40601-3488; and a copy to the following: Clerk of the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. Doug Miller, Counsel for Cory Keifer, 400 West Lincoln Trail Boulevard, Radcliff, KY 40160; Hardin Circuit Court Clerk and Honorable Pamela Addington. The record on appeal was not removed by the Appellee.

DAWN LONNEMAN BLAIR

STATEMENT CONCERNING ORAL ARGUMENT

This Honorable Court has already directed that oral arguments be heard in the above styled action.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

A final decree of divorce was entered on February 17, 2009 in Hardin Family Court between these two parties. (Hardin Family Court Trial Record (HFCTR), pgs. 93-115). The parties were awarded joint custody of the two minor children, with neither party designated as primary residential parent; however, the Appellant (herein Cory) was awarded parenting time consistent with the visitation schedule under Hardin Family Court Rule (herein "HFCR") 702. (HFCTR, p. 112). See Exhibit 2. The decree went on to state that in the event the Appellee (herein Jaylynne) was deployed outside the continental United States, then parenting time shall be modified to provide that she would receive parenting time consistent with HFCR 701. This order contained explicit findings that it was in the best interests of the children that Cory was to receive parenting times consistent with HFCR 702. See Exhibit 3 HFCR 701 and 702. This order was never appealed by Cory.

The children resided primarily with Jaylynne until the next order was entered on October 29, 2009. See Exhibit 4. The October 29, 2009 order arose due to Jaylynne filing a motion to modify the parenting times of the Appellant. As the order of February 17, 2009 stated, prior to the relocation of either party to another county or state, which would require modification of the present parenting schedule, the party intending to relocate shall either (1) tender an Agreed Order modifying parenting time, or (2) file a motion with the Court for mediation or a hearing to modify the current parenting times. Jaylynne has been employed with the United States Army at all times during this case. Due to her employment, Jaylynne received orders to relocate to Fort Hood, Texas in July 2009 from Fort Knox, Kentucky. Jaylynne's relocation was always an anticipated event and was discussed in the trial court's order of February 17, 2009. The trial

court even made findings of what would occur if Jaylynne was deployed outside of the United States.

After Jaylynne filed the motion to modify parenting times, the trial court went ahead and entered an order that Jaylynne could temporarily relocate with the parties' minor children. (HFCTR; p. 146). After a hearing, the trial court entered an order on October 29, 2009. Within that order, the parties' joint custody would continue; however, the trial court modified Jaylynne's parenting time and awarded her parenting time in accordance with HFCR 702. The court further modified child support. The order also stated that except as modified therein, the provisions of the Court's final order remained in full force and effect. The children were not permitted to relocate with Jaylynne. It is from this order that the underlying appeal with the Court of Appeals originated. See Exhibit 4.

A summary of the evidence from the October 21, 2009 hearing is as follows. Jaylynne testified that she still resided on Fort Knox; however, that she had been reassigned to Fort Hood, Texas. (October 21, 2009 hearing; 15:05:59). She filed with the court a copy of her orders for the transfer. C.K., the parties' son, had attended school at Fort Knox, Kentucky for first grade and Jaylynne and the children had lived at Fort Knox for 4 ½ years. Id. At 15:06:24. Just one day after the parties' final divorce hearing on October 24, 2008, Cory moved out of state to Indiana. Id. At 15:06:38. Following his move, Cory visited with the children every other weekend and Jaylynne was the primary residential custodian of the children. Id. At 15:07:16. The parties worked out a holiday visitation schedule also. Jaylynne testified that Cory originally moved to Noblesville, Indiana, but that he had moved again. Id. At 15:08:29.

Jaylynne testified that she first learned of the transfer order in July 2009. Id. At 15:09:07.

In conformity with military procedures, she physically picked up her orders in September. Her report date to Fort Hood was November 10, 2009; however, she was expected to be there one week early for training. She was not able to get these transfer orders deleted, as she had already gotten two prior sets deleted during the pendency of the parties' divorce. In addition, Fort Knox is in the transition associated with the Base Realignment and the Armor Brigade will no longer be on Fort Knox. Jaylynne's unit and job would be transferring either to Fort Benning, Georgia or Fort Hood, Texas. In the prior divorce hearing in October 2008, Jaylynne had testified that she expected to receive transfer orders in the near future. Jaylynne's job would be as a supply sergeant, and her hours of work would be from nine to five at Fort Hood. She had located a residence in Killeen, Texas for she and the children. She had spoken with the schools and C.K. would be attending Brookhaven Elementary School. The children would have free medical and dental care available to them. Id. At 15:10:02-15:13:48.

On cross-examination, Jaylynne testified that she did not apply for this transfer order. Her immediately family is located in Carmel, Indiana, and that her mother had regular telephone contact with the children. The child, C.K., was doing well in school. Jaylynne had remarried to Eugene Berrier, who was deployed, but he also would be assigned to Fort Hood upon his return. C.K. is diagnosed with ADHD and has been on medication for about one year. Jaylynne had been the parent to obtain that medical attention, and she did call and keep Cory apprised of the treatment. Id. At 15:14:40-15:23:48.

Jaylynne's superior officer, Lakisha Saylor, testified that Jaylynne had received these transfer orders. The orders came from DA (Department of the Army) in D.C., and she first became aware of them in July. She confirmed that the Armor Brigade was being reassigned

mostly to Fort Benning, Georgia. She also testified that she had never heard of a soldier which had two prior sets of orders deleted being able to get a third set of orders deleted. Id. At 15:28:00-15:32:50.

Cory testified that he now resided in Cicero, Indiana and had moved there recently from his prior location in Noblesville, Indiana. He was visiting with the children every other weekend. His parents lived nearby in another city, as well as several other family members. The children only visited with his family during his visitation times. He has seen a change in C.K.'s demeanor since becoming aware of the orders to move. He was aware of the ADHD medication but he did not agree with it being prescribed. He is employed with a brokerage company and the children would be with his girlfriend during the day. Id. At 15:33:44-15:38:25. On cross-examination, he testified that had he gotten custody of the children in the divorce, they would have had to change schools when he moved from Noblesville to Cicero, Indiana. He resided with his girlfriend for only about three months, a girlfriend whom he had met on the internet and who moved to live with him from California. She does not have any children. Id. At 15:43:24-15:45.

Cory called Bryan Kish, a soldier stationed at Fort Knox. He testified that Jaylynne could have requested a change in orders. On cross-examination, he admitted that the Armor Brigade is being moved from Fort Knox, and that Jaylynne's unit was being moved away from Fort Knox. Id. At 15:52:24. Lastly, Cory called his stepfather, Jim Trump, as a witness. He testified that he lived in Noblesville, Indiana and had a good relationship with the children.

The trial court interviewed the minor child, C.K. C.K. testified that he did fun things when he would visit his dad. His younger sister was 2 ½ years old. He gets along with Eugene, his stepfather, very well and he is very nice to he and his younger sister. He stated he only saw

his dad on holidays. In regard to the move to Texas, he testified that he was excited about the move and when asked if anything about the move made him unhappy, his response was no. He stated he felt sad when he left his father and grandparents. He has fun with both parents and once again stated he felt happy about moving to Texas and was looking forward to the move. When asked if he would be more sadder if he saw his daddy or mommy less, his response was his daddy. Id. At 16:07:53-16:17:30. At the conclusion of the evidence, the trial court modified the prior order insomuch as the children were to begin residing with Cory and Jaylynne would receive parenting time consistent with the visitation schedule found in HFCR 702.

Jaylynne filed an appeal to the Court of Appeals, which resulted with the Court entering an opinion reversing and remanding. The Court of Appeals held:

> In the case before us, the court merely issued the order and referred to the findings of its original decree. It did not apply any of the factors set forth in KRS 403.270(2). In its original decree incorporated by reference in the order now on appeal, the court had made findings as to the best interests of the children and reached the opposite result, i.e. that the children were to reside primarily with Jaylynne while Cory had visitation under the standardized schedule. In the order now before us, the court did not provide any findings to support the opposite result. Nor did it indicate what circumstances, if any, had changed other than Jaylynne's relocation, which was a contingency that the original order had specifically contemplated and addressed.

See Exhibit 1. Following the entry of this Opinion, the Appellant filed a Motion for Discretionary Review, which was granted.

ARGUMENT

I. THE TRIAL COURT'S ORDER FAILED TO MAKE FINDINGS TO SUPPORT THE MODIFICATION OF THE APPELLEE'S PARENTING TIME AS SUCH FINDINGS ARE REQUIRED PURSUANT TO K.R.S. 403.320 AND THE CIVIL RULES.

The Court of Appeals unanimously ruled the Hardin Family Court failed to provide any findings in the order to support its decision, a decision which was the opposite result of the trial court's prior order of February 17, 2009 which did contain findings of fact to support the best interest of the children. The October 29, 2009 order stated:

> That the parties shall continue to have joint custody of their two minor children, with neither party designated as primary residential parent.
>
> Given Respondent's relocation to Ft. Hood, Texas, absent an agreement between the parties, she shall be entitled to parenting time which are consistent with the visitation schedule under HFCR 702.
>
> Petitioner's child support obligation is terminated. Other than modified herein, the provisions of this Court's Final Order entered August 17, 2009 remain in full force and effect.

Appellee will note the entry date for the final order is incorrectly stated in the October 29, 2009 order, as the final decree was entered February 17, 2009, not August 17, 2009. The crucial issue before this Court is whether the trial court should have issued findings within its order of October 29, 2009.

First, the Court of Appeals appears to make some distinction as to whether findings of fact are required depending on whether a motion is granted or denied. While the Appellee disagrees that there should be any distinction between the two outcomes, the Appellee will first address how this case still required findings to be made due to the fact the trial court modified the

prior order. The Hardin Family Court was presented with a motion to modify the Appellant's parenting times due to the fact the Appellee was relocating as part of her employment with the U.S. Army. The court did not just outright deny the motion, but instead issued an order that did not contain any findings or conclusions of law and which significantly modified the preceding order. Thus, the motion to modify the parenting times was granted by the court; however, the modification was not in the Appellee's favor. Whether the motion is favorable to the movant or not is irrelevant, as a modification still occurred. Case law supports the conclusion that the order should have contained findings of fact. As held in Mullins v. Mullins, 584 S.W.2d 601, 603 (Ky.App. 1979):

> Unless the court makes appropriate findings of evidentiary facts, it cannot be determined whether the requirement of the statute as to a showing of change of conditions has been satisfied.

See also Klopp v. Klopp, 763 S.W.2d 663, 665 (Ky.App. 1988)(holding that Kentucky case law does require findings of fact when a motion to modify a divorce judgment is granted) and Burnett v. Burnett, 516 S.W.2d 330 (Ky.App. 1974)(holding that if a motion to modify support or maintenance is granted, the court must make findings of evidentiary facts in support of the order).

In addition to the lack of factual findings in the order, the order is devoid of any reference to the standard of law which was applied by the trial court. K.R.S. 403.320 required the trial court to apply the best interest standard. One cannot tell by reading the order what standard the court employed. In Hornback v. Hornback, 636 S.W.2d 24 (Ky.App. 1982), the trial court was faced with a modification of the mother's visitation under K.R.S. 403.320. As one basis for the reversal, the Court held that the trial court's order did not address the "threshold inquiry of the

children's best interests and made no findings in support of that ultimate fact in accordance with K.R.S. 403.320(2)." Id. At 26. *See also* McFarland v. McFarland, 804 S.W.2d 17 (Ky.App. 1991)(wherein the trial court failed to apply the best interest standard). This is not a situation of the denial of Jaylynne's motion. Instead, the trial court modified the parties' prior parenting arrangement. The modification required the trial court to apply the standards of K.R.S. 403.320 and make findings. The trial court's failed to do so and the order should be reversed for its failure to make findings **and** its failure to apply the best interest standard.

In the alternative, if the Hardin Family Court's order is viewed as a denial, findings of fact are still required by C.R. 52.01, statutory law, and case law. The underlying rationales of a custody case or a visitation case are extremely similar. In both situations, the court has to hear evidence that impacts the welfare of the child. Both K.R.S. 403.320 and K.R.S. 403.340 require that an evidentiary hearing take place before the court may modify a prior order. Case law also supports that a hearing must occur. *See* McNeeley v. McNeeley, 45 S.W.3d 876 (Ky.App.2001) and Pennington v. Marcum, 266 S.W.3d 759 (Ky. 2008). While the applicable statutes may set different standards to be able to modify the arrangements, the overall purpose is the same, to protect the best interests of the child. Therefore, the requirements of an order which modifies visitation, or parenting times, should be no different than the requirements to modify custody. The impact of those orders are felt by the child and the parents in either case. The litigants are entitled to know why the trial court has ruled the way it did, and under what law. Further, the findings assist the appellate court in review of these types of matters. These principles remain the same whether a custody or parenting time/visitation matter.

This Honorable Court has recognized the importance of findings within an order in

custody cases. See Reichle v. Reichle, 719 S.W.2d 442 (Ky. 1986) and Frances v. Frances, 266 S.W.3d 754 (Ky. 2008). As stated in Reichle in regard to C.R. 52.01:

> 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 rules it 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.

As the underlying principles afforded protection in the Reichle case are no different than the underlying principles which should be afforded protection in a modification of parenting time case, the holding of Reichle is applicable to the Appellee's case.

The Appellee is aware of holdings in Burnett v. Burnett, 516 S.W.2d 330 (1974) and Mullins v. Mullins, 584 S.W.2d 601 (Ky.App.1979), and the Court of Appeals recent unpublished opinion in the companion case of Anderson v. Johnson, 2010-SC-0646. In the companion case, the trial court did reference the best interest standard in its order but denied the mother's request without any factual findings to support the denial. As stated above, Jaylynne believes the Hardin Family Court's order is different than the order in Anderson as a modification did in fact occur for Jaylynne and order did not state what standard was applied. However, if the Hardin Family Court's order is viewed as a denial, then the decisions in Burnett and Mullins are distinguishable. In both Burnett and Mullins, the Court held that the C.R. 52.01 requirement of findings did not apply to post judgment motions to modify maintenance which were denied. The Court of Appeals has applied the same rationale to the denial of a motion to modify parenting times. However, both of these cases are maintenance cases governed by a different statute than the statute to be applied to modification of custody, parenting time or visitation cases. Secondly, the maintenance modification statute does not reference an

evidentiary hearing, nor does it make specific reference that a court must make findings. K.R.S. 403.320 does require a hearing and the court to make findings. Therefore, the holdings in Burnett and Mullins are distinguishable.

Even if C.R. 52.01 is construed that findings are not required in the denial of a post judgment motion, this rule is overcome by C.R. 1 and K.R.S. 403.320. As stated in C.R. 1(2):

> These rules govern procedure and practice in all actions of a civil nature in the Court of Justice except for special statutory proceedings, in which the procedural requirements of the statute shall prevail over any inconsistent procedures set forth in Rules.

C.R. 1 (2) recognizes that a statute's requirements shall prevail over the Civil Rules. Further, it is well known that when it comes to statutory construction, the more specific statute controls. Pennington, 266 S.W.2d at 769. Specifically, K.R.S. 403.320 does require the trial court to make findings. K.R.S. 403.320(1) states:

> A parent not granted custody of the child is entitled to reasonable visitation rights unless the court **finds**, after a hearing, that visitation...

K.R.S. 403.320(3) states:

> The Court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child; but the court shall not restrict a parent's visitation rights unless it **finds** that the visitation would....

It is clear by reading this statute that findings are mandatory when a court modifies visitation. This statute has been determined to be the applicable law in modification of parenting time cases. Pennington, 266 S.W.2d at 770. Not only did the Hardin Family Court's order modify the parenting times of the parties, the end result was that Jaylynne's parenting times with her children were significantly restricted and changed. Undoubtedly, such a restriction should require findings of fact by the trial court, and the trial court's failure to do so is reversible error.

II. THE COURT OF APPEALS REFERENCE TO THE FACTORS SET FORTH IN KRS 403.270(2), I.E. THE BEST INTEREST FACTORS, WAS NOT IN ERROR.

The Court of Appeals states that the appropriate law to be applied to a modification of parenting time case is that set forth in Pennington v. Marcum. The Court then correctly noted that K.R.S. 403.320 allows for the modification of parenting times if it would serve the best interest of the child. The Appellant takes exception to the Court of Appeals reference to the factors set forth in K.R.S. 403.270, and believes the Court is mistakenly applying K.R.S. 403.270 instead of K.R.S. 403.320. However, this is not the case. The Court did not reverse this case because the trial court failed to consider the factors of K.R.S. 403.270. Instead, the Court reversed this case because the order "did not provide any findings to support the opposite result." The Court simply referred to the factors set forth in K.R.S. 403.270 as an example that the order is devoid of any evidence similar to the factors found in K.R.S. 403.270. The Appellant cites to Kelsay v. Carson, 317 S.W.3d 595 (Ky.App. 2010) as being a direct contradiction to the decision in this case. A close reading of Kelsay actually supports the Court of Appeals decision in this case. As stated in Kelsay, the lower family court may have not used the correct statute but it did follow the same best interest standard that governs K.R.S. 403.320. Therefore, any reference to the best interest factors set forth in K.R.S. 403.270 is the same standard to be applied for the best interest standard of K.R.S. 403.320.

III. C.R. 52.04 DOES NOT PRECLUDE REVIEW OF THE TRIAL COURT'S ORDER.

C.R. 52.04 did not require the Appellee to request additional findings of fact to preserve this issue for appeal. In the October 29, 2009 order issued by Hardin Family Court, the order is devoid of any factual findings and any reference to the appropriate standard of law which the

court applied. In Hollon v. Hollon, 623 S.W.2d 898 (Ky. 1981), this Court held that C.R. 52.04 did not apply when a trial court does not comply with the procedural requirements of the statutory proceeding. This rule was once again followed in Hornback v. Hornback, 636 S.W.2d 24 (Ky.App. 1982) when the Court of Appeals reversed the trial court's order which modified visitation because the order did not address the threshold inquiry of the children's best interests. K.R.S. 403.320 sets forth basic statutory requirements when it comes to modifying visitation/parenting time. The statute requires the court to apply the best interest of the child standard. The order which was entered makes no reference as to what standard of law was applied, and the appellate court is left to speculate. As stated in Elkins v. Elkins, 359 S.W.2d 620, 622 (Ky.App. 1962), "a record that leaves us in the dark in this respect inevitably conduces to a substitution of our own judgment for that of the trial court." The Court also stated that a losing party should not be deprived of a proper review due to the trial court's failure to record its specific rulings of law and fact. Id. Therefore, C.R. 52.04 does not preclude the appellate review of this issue, and since the order of Hardin Family Court is devoid of any reference to factual findings and the standard applied, it should be reversed.

IV. THE TRIAL COURT'S STATEMENTS ON THE RECORD DO NOT RECTIFY THE REVERSIBLE ERROR COMMITTED BY FAILING TO HAVE FINDINGS IN THE ORDER.

The Appellant asserts the trial court's recitation into the video record satisfied any requirement to enter written findings of fact. This statement is absolutely not true. C.R. 52.01 clearly states that "the court shall find the facts specifically and state separately its conclusions of law thereon and **render an appropriate judgment."** (Emphasis added.) How else is this rule to be interpreted if not to require a judgment be entered. A judgment is in writing, and for it to be

appropriate it must contain the requirements set forth in C.R. 52.01 (i.e. the findings) and K.R.S. 403.320 (i.e. that the court applied the best interests standard and make findings). This order contained neither. A trial court speaks through its written orders. Midland Guardian Acceptance Corp. of Cincinnati, Ohio v. Britt, 439 S.W.2d 313 (Ky.App. 1968). Verbal findings which are dictated into the record do not meet the requirements of C.R. 52.01. *See* Skelton v. Roberts, 673 S.W.2d 733 (Ky.App. 1984). Thus, the Hardin Family trial court's recitation at the conclusion of the hearing does not replace or satisfy the requirements of a judgment which complies with the law.

V. THE TRIAL COURT'S ORDER SHOULD BE REVERSED AS IT CONSTITUTED MANIFEST ABUSE OF DISCRETION AS IT WAS CLEARLY ERRONEOUS IN LIGHT OF THE PRIOR ORDER AND THE EVIDENCE.

The October 29, 2009 order of Hardin Family Court should be reversed as it was clearly in error in light of the evidence. As stated in Drury v. Drury, this order can be reversed if it constitutes a manifest abuse of discretion, or was clearly erroneous in light of the facts and circumstances of the case. Drury v. Drury, 32 S.W.3d 521 (Ky.App. 2000). First, the order itself reaffirms the findings and conclusions of the prior order of February 17, 2009, except as modified within the October order. The October order did not contain any findings; therefore, the only findings are those in the prior order. Within the February order, the court went through a detailed explanation as to why it was in the best interests of the children to reside with Jaylynne and visit with their father pursuant to HCFR 702. Also, the February order discussed the fact Jaylynne was going to have to relocate due to her employment and provided that in the event she was deployed, then Jaylynne would get visitation in accord with HCFR 702. Nothing changed

from February to October. As the Court of Appeals correctly noted, the October order failed to indicate any change of circumstances that had occurred, other than Jaylynne's relocation, which was a contingency the original order had contemplated. Thus, the October 29, 2009 order is a manifest abuse of the trial court's discretion and was correctly reversed by the Court of Appeals.

VI. THE COURT OF APPEALS CORRECTLY HELD THAT THE FAILURE TO INCLUDE THE APPELLANT WITHIN THE CERTIFICATE OF SERVICE OF THE NOTICE OF APPEAL IS NOT FATAL TO THE APPEAL, AS THE REQUIREMENTS OF THE APPEAL WERE SUBSTANTIALLY COMPLIED WITH.

The Appellee substantially complied with C.R. 73.03; therefore, the appeal is proper. The Appellant is correct that C.R. 73.03(1) does state that a copy of the notice is to be served on the Appellant's counsel. However, such a typographical error in the notice of appeal does not divest the appellate court of jurisdiction of this matter. Jurisdiction of this appeal is vested with the appellate court upon the timely filing of the notice of appeal. The appeal was timely filed pursuant to C.R. 73.02, and the filing fee was properly paid. C.R. 73.02(2) only states that a parties' failure to file *timely* a notice of appeal shall result in dismissal. C.R. 73.02(2) goes on to state that a failure to comply with the other rules relating to appeals does not affect the validity of the appeal.

The mistake was an inadvertent error and was clerical in nature. The 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. The Appellant had notice of this appeal, even though on the notice of appeal he was not in the certification. The notice of appeal correctly identified the Appellant and correctly noted the identity of his counsel. A review of this Court's record provides evidence that the Appellant was sent notice of everything which has occurred. The order expediting appeal entered

December 8, 2009, shortly after the appeal was filed, was sent to counsel for the Appellant by the Clerk of the Court of Appeals. The designation of evidence filed on December 15, 2009, was sent to Appellant's counsel by Appellee's counsel. The certification of the record on December 29, 2009, was sent to the Appellant's counsel by the clerk of the court.

Further, the Appellant's counsel was notified of the appeal by the Appellee's trial counsel, as well as participated in a discussion with Appellee counsel contemporaneous in time to which the notice was filed. Affidavits were filed with this court detailing those conversations. Also, the Appellant and the Appellee discussed the appeal during a visitation exchange which took place in December. Thus, the Appellant was fully aware of the appeal and the conduct of the parties illustrated that.

The cases cited by the Appellant are distinguishable to the present matter. First, the standard set forth in Manly v. Manly, 669 S.W.2d 537 (Ky. 1984) is not in place any longer. The case of Lee v. Stamper, 300 S.W.2d (Ky. 1957) did not involve a notice of appeal. The appeal was fatal in City of Devondale v. Stallings, 795 S.W.2d 954 (Ky. 1990) because an indispensable party was not named. As set out in Excel Energy Inc. v. Commonwealth Institutional Securities, Inc., 37 S.W.3d 713, 715 (Ky. 2000), C.R. 73.02 was amended after Manly was decided. The amendment resulted in the substantial compliance policy with the appellate rules. While the notice of appeal still has to be filed within 30 days, other defects are governed by the substantial compliance policy. *See also* Johnson v. Smith, 885 S.W.2d 944 (Ky. 1994)(holding that except for tardy appeals or failure to name indispensable parties, a rule of substantial compliance applies). Examples of the substantial compliance policy can be found in Foxworthy v. Norstam Veneers, Inc., 816 S.W.2d 907 (Ky. 1991) wherein the Supreme Court did not dismiss an appeal

which was timely filed but in which the filing fee was not paid timely. *See also* Ready v. Jamison, 705 S.W.2d 479 (Ky. 1986)(holding that the failure to properly designate the judgment appealed from in the notice of appeal did not justify dismissal of appeal). The Appellee substantially complied with C.R. 73.03, and it is the Appellee's belief the Appellant has not been prejudiced to warrant dismissal of this appeal.

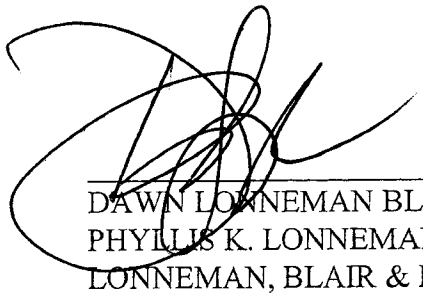
As stated in Ready v. Jamison, 705 S.W.2d 479, 482 (Ky. 1986), there are three significant objectives of appellate practice, which are for orderly appeals, addressing the merits of an appeal, and making sure an appellant does not needlessly lose their right to appeal. A dismissal of this appeal would prevent the merits of this custody case being addressed and result in the Appellee's loss of her right to appeal. The harm in the clerical error, if any, has not resulted in substantial prejudice or loss to the Appellant. As stated, the Appellant was aware the appeal had been filed, and since the date of the notice of appeal being filed, the Appellant has received copies of all documentation from both the Appellee and the Clerk of the Court of Appeals.

Wherefore, as the Court of Appeals has already overruled the Appellant's motion, the Appellee respectfully requests this Court to overrule the Appellant's argument once again.

CONCLUSION

Wherefore, the Appellee, Jaylynne Berrier, respectfully requests this Court to concur in the Court of Appeals decision to reverse the trial court's order, and to enter an order that the children be permitted to relocate with her to Texas. First, the trial court's failure to issue findings of fact in support of its order is in error. Second, the trial court modified its prior order and changed the primary residence of the children from the Appellee to the Appellant, even though the original decree already anticipated the relocation of the Appellee. Lastly, the notice of appeal was not defective so as to warrant dismissal of the appeal, and the Appellant's motion in regard to this issue should be overruled.

Respectfully submitted,



DAWN LONNEMAN BLAIR
PHYLLIS K. LONNEMAN
LONNEMAN, BLAIR & LOGSDON, PLLC
ATTORNEY FOR APPELLANT
202 North Mulberry Street
Elizabethtown, KY 42701
(270) 765-2190