

**SUPREME COURT OF KENTUCKY  
2006-SC-0642-DG**

CHRISTOPHER M. PENNINGTON

APPELLANT

VS:

HEATHER M. MILES

APPELLEE

**APPEAL FROM BOYD CIRCUIT COURT  
ACTION NO. 2000-CI-00594  
HON. MARC I. ROSEN, JUDGE**

**BRIEF FOR APPELLANT**

RHONDA M. COPLEY

BY: 

RHONDA M. COPLEY

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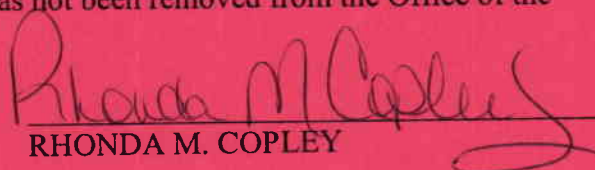
Ashland, Kentucky 41105-0477

606/324-9607

ATTORNEY FOR APPELLANT

This is to certify that on this day I mailed a true and correct copy of the foregoing BRIEF FOR APPELLANT by United States Mail, postage prepaid, to the Hon. Susan Stokley Clary, Clerk, Supreme Court of Kentucky, Room 209, State Capitol, 700 Capital Avenue, Frankfort, Kentucky 40601-3488; Heather M. Marcum, 1752 Oakleigh Avenue, Appomattox, Virginia 24522; Hon. Marc I. Rosen, Judge, Boyd Circuit Court, Division I, Boyd County Courthouse, Post Office Box 417, Catlettsburg, KY 41129-0417; Linda Kay Baker, Clerk, Boyd Circuit Court, Boyd County Courthouse, Post Office Box 694, Catlettsburg, Kentucky 41129, all on this 6 day of July 2007.

I certify that the record on appeal has not been removed from the Office of the Clerk, Boyd Circuit Court.

  
RHONDA M. COPLEY

## **INTRODUCTION**

This is a domestic relations case in which the Appellant appeals from an Order overruling the Motion to modify custody.

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## **II. STATEMENT CONCERNING ORAL ARGUMENT**

The Appellant desires an oral argument. The Appellant believes that an oral argument would be beneficial in deciding the issues presented because the issues involve modification of custody. Due to the recent changes in KRS 403.340, there has been some ambiguity in the interpretation of the statutes with respect to a motion to modify custody, a change in circumstances, and the best interest of the child.

### III. STATEMENT OF THE CASE

The Appellant, Christopher M. Pennington, [hereinafter "Chris"], and the Appellee, Heather M. Miles (now Marcum), [hereinafter "Heather"], had a child out of wedlock, Mikayla L. Pennington, who was born May 17, 1999. The parties resided together for approximately one year after the birth of the child. Chris filed a Petition for Custody and Visitation in the Boyd Circuit Court on July 7, 2000, Civil Action No. 00-CI-00594. [TR., pp. 1-2] On February 7, 2001, an Agreed Order was entered whereby the parties would share joint custody of the minor child, with Heather having physical custody (residential parent) and Chris having liberal visitation that included, but was not limited to, three days and two overnights each week, four weeks in the summer and alternating holidays. [TR., pp. 22-23]

In October 2001, Chris requested modification of the days of his weekly visitation due to his college schedule. [TR., pp. 29-32] Heather requested that Chris's visitation be limited to the Boyd Circuit Court Visitation Schedule of alternate weekends, four weeks in the summer and alternating holidays. [TR., pp. 52-53] During this time, the Boyd Circuit Court set a temporary visitation schedule that maintained his weekly contact of two overnights. [TR., pp. 36-39 and 52-53] The Boyd Circuit Court then referred the matter to the Domestic Relations Commissioner for another hearing on the visitation schedule after Chris completed his education. [TR., p. 72] While Chris was attending college, Heather relocated from Ashland, Kentucky to Charleston, West Virginia, which was approximately one hour away. The Domestic Relations Commissioner conducted a

hearing and a Report and Recommendation maintaining Chris's visitation was filed.

[TR., pp. 71-79] On January 15, 2003, the Circuit Court entered an Order that continued Chris's weekly contact of three days and two overnights with the child over Heather's objections. [TR., pp. 93-94]

Chris continued to maintain his visitation with the minor child three days and two overnights each week, four weeks in the summer, and alternating holidays. Chris resided in Ashland, Kentucky, and Heather resided in Charleston, West Virginia.

In July 2004, Heather moved with her husband and the minor child from Charleston, West Virginia to Appomattox, Virginia without providing any prior notice of the move to Chris. In fact, Heather notified Chris of the move after she had completed her relocation to Virginia. [TR. of Hearing March 30, 2005, p. 45, lines 9-23] Since the entry of the Agreed Order in February 2001, Heather had relocated with the minor child eight (8) times. [TR., p. 107 and TR. of Hearing March 30, 2005, pp. 45-53] On July 29, 2004, Chris filed a Motion requesting modification of custody. [TR., pp. 105-112] The matter was referred to the Domestic Relations Commissioner for a hearing. [TR., p. 114]

A hearing on the motion to modify custody had been continued due to scheduling conflicts and to provide Chris the opportunity to drive to Virginia to look over the area. The hearing was conducted on March 30, 2005, at which each party presented evidence. [TR., p. 129] The Domestic Relations Commissioner interviewed the minor child on May 20, 2005. On July 22, 2005, the Domestic Relations Commissioner filed a Report and Recommendation that the parties maintain joint custody, with primary custody being awarded to Chris. [TR., pp. 141-151] On July 27, 2005, Heather filed Exceptions to the

Report and Recommendation of the Domestic Relations Commissioner. [TR., pp. 152-156] A hearing was held before the Boyd Circuit Court on August 22, 2005. [TR., p. 162] At the hearing, the Boyd Circuit Court only heard oral arguments of counsel and did not hear any additional testimony from witnesses. A transcript of the hearing was not provided. On October 31, 2005, the Boyd Circuit Court entered an Order overruling the Report and Recommendation of Domestic Relations Commissioner and leaving primary custody with Heather. [TR., pp. 163-165] The Notice of Appeal was filed on November 14, 2005. [TR., pp. 156-167]

The Court of Appeals affirmed the trial court's decision in an Opinion entered on or about August 4, 2006. The Court of Appeals found that the trial court's Order was within the discretionary power of the trial court. A Motion for Discretionary Review was filed.



## IV. ARGUMENT

### I. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY SETTING FORTH NEW FINDINGS OF FACT THAT ARE CONTRARY TO THE REPORT AND RECOMMENDATION OF THE DOMESTIC RELATIONS COMMISSIONER WITHOUT CONDUCTING AN EVIDENTIARY HEARING OR CONSIDERING THE TESTIMONY PRESENTED.

In Boyd County, the trial court refers issues involving family matters to a domestic relations commissioner pursuant to Civil Rule 53.03. Once a matter has been referred to a domestic relations commissioner, the commissioner must hear testimony orally, by deposition or by interrogatory. Civil Rule 53.03(5). The domestic relations commissioner must provide a report of recommendation to the trial court regarding the submitted evidence after the completion of testimony. Civil Rule 53.06. In the report of recommendation, the commissioner must set forth the findings of fact based upon the evidence heard and must provide a recommendation for the trial court. Civil Rule 53.06. Once a report of recommendation is filed, the trial court must adopt the report, modify the report, reject the report in whole or in part, hear additional evidence, or refer the report to the commissioner with further instructions. Civil Rule 53.06(2). The trial court has discretion in acting upon the report of recommendation of the domestic relations commissioner. Civil Rule 53.06(2). Haley v. Haley, 573 S.W.2d 354 (Ky. App. 1978). Eiland v. Farrell, 937 S.W.2d 713, 716 (Ky.1997)

Even though the trial court may have discretion when considering a report of a

domestic relations commissioner, the findings of the trial court must be supported by the evidence that has been presented at the hearing. Civil Rule 52.01. In this case, the trial court is bound by the evidence that was presented at the hearing before the domestic relations commissioner on March 30, 2005, because the trial court did not hear additional evidence. Therefore, the findings of the trial court must be supported by the evidence that was heard on March 30, 2005. Even though the trial court does not have to accept the findings of fact of the domestic relations commissioner, the trial court's findings must be supported by credible evidence. Civil Rule 52.01. A trial court's findings will not be set aside unless they are clearly erroneous. Therefore, the findings must be supported by sufficient evidence. Civil Rule 52.01.

In this case, the trial court's findings in the Order entered on October 31, 2005 are in direct contradiction to the findings of the Report and Recommendation of the Domestic Relations Commissioner filed July 27, 2005. (TR. pp. 141, 151, 163-165) At the hearing on Heather's Exceptions, the trial court did not consider any additional evidence. Therefore, the trial court is bound by the evidence presented at the hearing on March 30, 2005.

In the Order entered on or about October 31, 2005, the trial court found, "The Respondent [Heather] has basically raised the child on her own with the Petitioner [Chris] being an active part of the child's life, enjoying regular visitation." [TR. p. 163] The domestic relations commissioner, on the other hand, found that, "The Petitioner [Chris] has been actively involved in caring for the parties' child since her birth." [TR. p. 144] The two findings stated above are in direct contradiction. The evidence in this case

did not demonstrate that Heather had raised her child on her own, with Chris acting as a visiting father, as the trial court so found. The evidence clearly demonstrated that Chris was active in the child's daily life, such as education prior to her starting school by assisting her in reading and counting in Japanese. [Transcript of Hearing March 30, 2005, pp. 15, 19-21, 23-25] Chris further involved the child in several activities, such as church, sports and private dance lessons, demonstrating that he maintained a very active family life for her. [Transcript of Hearing March 30, 2005, pp. 15, 19-21, 23-25] Chris's role was not that of a visiting parent. Chris's role clearly indicated active participation in her day-to-day life, and did not demonstrate that Heather basically raised the child on her own. Therefore, the trial court's finding is not supported by the evidence and is clearly erroneous.

The trial court found that, "The Respondent [Heather] married and her husband accepted a job in Virginia and the Respondent her husband the child Mikyala and the Respondent's new child moved to Virginia." [TR. p. 163] The domestic relations commissioner found that Heather and her husband moved to Virginia in July 2004, even though they decided to move around Easter of 2004. At the time that Heather moved, her husband did not have a job, did not have any job prospects or interviews until after the move to Virginia. [TR. p. 143] Heather testified that she decided to move to Virginia around Easter 2004, after discussing the move with her husband and her husband's family, but did not tell Chris until after the move. Her husband interviewed for a job after they relocated to Virginia. [Transcript of Hearing March 30, 2005, pp. 45, 1. 9-23.] Heather's mother-in-law also acknowledged the family discussions to move to

Virginia that occurred during Easter 2004, with Heather moving in July 2004.

[Transcript of Hearing March 30, 2005, p. 125] Once again, the trial court's findings are not supported by the evidence that was presented at the hearing on March 30, 2005.

The trial court found that the minor child is involved in many extracurricular activities in Virginia. [TR. p. 164] The trial court, however, failed to note that the child's involvement in activities with Heather came only after the Motion to modify custody was filed. The trial court failed to consider that the child was involved in many activities in Ashland, Kentucky while in the care of Chris three days and two overnights each week, but that she was not consistently involved in activities while in the care of Heather. Heather testified that the child started attending church in Virginia and did not attend church in Charleston, West Virginia. [Transcript of Hearing March 30, 2005, p. 57, l. 9-13] Heather testified that the child started gymnastics in Virginia. [Transcript of Hearing, March 30, 2005, p. 70.] Chris, however, presented evidence that the child had been active in church, played t-ball, and had been enrolled in private dance classes, and that these activities began in 2002, as opposed to after the filing of the Motion to modify custody. [Transcript of Hearing March 30, 2005, pp. 19-21]

The trial court found that Chris himself testified that Heather was a good mother and took care of the child exceptionally well; however, that is incorrect. In fact, Heather testified that Chris was a good father. [Transcript of Hearing March 30, 2005, p. 47, l. 12-20] Chris, on the other hand, testified that he had concerns regarding the minor child in the care of Heather. [Transcription of Hearing March 30, 2005, p. 39, l. 14-24]

After the hearing on the Heather's Exceptions, the trial court did not have a

transcript of the evidence. If the trial court had actually reviewed the evidence, the trial court would have discovered that the proposed findings of the domestic relations commissioner were supported by the evidence that was presented at the hearing and would not have entered such contradictory findings in the Order entered October 31, 2005.

The trial court does have the authority to accept, modify or reject the report of recommendation of the domestic relations commissioner; however, any action that the trial court takes must be supported by the evidence that has been presented at any hearing pursuant to Civil Rule 53.06 and Civil Rule 52.01. In this case, the trial court is bound by the evidence that was presented at the hearing before the domestic relations commissioner on March 30, 2005, and the findings of the trial court must be supported by the evidence from that hearing. In this case, the trial court's findings are not supported by the evidence that was presented at that hearing, and the trial court has abused its discretion and the Order must be set aside. Civil Rule 52.01.

II. WHETHER RELOCATION WITH A MINOR CHILD  
IS SUFFICIENT TO TRIGGER A MOTION TO MODIFY  
CUSTODY PURSUANT TO KRS 403.340.

KRS 403.340 sets forth the standards by which custody is modified. If a motion is made within two years of an order of custody being entered, the moving party must demonstrate an immediate danger to the minor child to modify custody. If the motion is made after the order has been in effect two years, the moving party must demonstrate that a continued change in circumstances has occurred and that the modification of custody is in the best interests of the child. KRS 403.340. The trial court found that Chris is not entitled to modification of custody because the only factor is Heather's move; however, that is incorrect.

KRS 403.340 requires that there be a change in circumstances if the motion to modify custody is made two years after the award of custody. In this case, the original award of custody was made on February 7, 2001. [TR., pp. 22-23] Therefore, Chris filed the motion in July 2004, in excess of two years had elapsed since the original decree of custody. [TR., p. 105-112] Since two years had lapsed since the entry of the original decree, the moving party, Chris in this case, must demonstrate that a continued change in circumstances has occurred and that a change in custody is necessary to serve the best interest of the child. KRS 403.340(3). In this case, Chris and Heather share a joint custody relationship of the minor child and Chris had the child three days and two overnights each week, as well as four weeks in the summer and alternating holidays.

Moving the child six hours away would trigger a continued change in circumstances that would warrant a custody hearing. Fowler v. Sowers, 151 S.W.3d 357 (Ky. App. 2004) In Fowler, the appellate court found that relocation could trigger a modification in custody pursuant to the statutory changes in KRS 403.340. Id. at 359-360. The appellate court found that a move of “considerable distance” is a change of circumstances. Id. at 360. In this case, the move of six (6) hours prevented Chris from exercising his weekly parental contact with the child, and would be a move of “considerable distance”, which constitutes a change in circumstances. Further, the change in circumstances would include changes in her education and activities.

Heather may argue that the relocation could not be considered a continued change in circumstances unless Chris demonstrates an immediate danger pursuant to Fenwick v. Fenwick, 114 S.W.3d 767 (Ky. 2003); however, the decision in Fenwick was based upon the statutory language of KRS 403.340 in effect prior to its 2001 amendment and its precedent would be limited to that prior statute. Fowler at 359. The prior language of KRS 403.340 did require a “danger” threshold to modify custody, but that threshold would not apply to this case because of the current status of KRS 403.340.

The trial court suggests in its Order that Heather must be retained as the custodial party because Chris did not prove that the move was detrimental to the child; however, that is not the standard. In 2001, the Kentucky General Assembly modified the statutory language of KRS 403.340. The amendment to KRS 403.340 expanded the statutory language by providing the trial court with more factors to consider in modifying custody. Also, language that required a trial court to retain a custodian unless the moving party

was able to demonstrate certain matters was eliminated from the statute. In particular, the prior statutory language of KRS 403.340 set forth “in applying these standards the court shall retain the custodian appointed pursuant to the prior decree unless...” The language requiring that a custodian be retained was eliminated when the changes in 2001 were made to KRS 403.340. The current statute further provides a trial court the opportunity to review the best interests of the child by considering the factors set forth in KRS 403.270(3)(C). Therefore, the trial court must consider whether Chris demonstrated a continued change in circumstances and that the modification of custody would serve the best interest of the child. KRS 403.340, KRS 403.270, and Fowler.

Heather’s relocation to Virginia with the minor child is sufficient to trigger the motion to modify custody. Therefore, the trial court’s finding that Chris is not entitled to a modification of custody because the only factor is Heather’s move is erroneous. The trial court must find that a continued change in circumstances has occurred pursuant to the relocation to Virginia. After that finding, the court must then consider the best interest of the child and the factors set forth in KRS 403.340 and KRS 403.270.



III. WHETHER THE TRIAL COURT ERRED IN  
OVERRULING MOTION TO MODIFY  
CUSTODY.

In the Report and Recommendation, the Domestic Relations Commissioner recommended that custody of the minor child Mikayla be awarded to Chris based upon the best interests of the child. Relying on KRS 403.340, the Domestic Relations Commissioner found that a continued change in circumstances had occurred that would warrant a review of custody to determine the best interest of the child. [TR., p. 145] Thereafter, the Domestic Relations Commissioner considered the best interest of the child, and found that it would be in best interest of the child that the parties maintain joint custody with primary physical custody being awarded to Chris, subject to Heather's visitation. [TR., pp. 141-151] In overruling the Report and Recommendation of Domestic Relations Commissioner, the trial court found that the only reason advanced for the change of custody is the move, and that, "The Court is not inclined to end a 6-year relationship of a child with a parent merely because that parent remarries and moves to a different location." [TR., p. 164] Unfortunately for Chris, the trial court failed to consider Chris's six-year relationship with his daughter. By failing to consider that change in circumstances and the best interest of the child, the trial court erred.

Pursuant to KRS 403.340(3), in determining whether a change has occurred and whether a modification of custody would serve the best interest of the child, the trial court must consider the following factors:

- a) Whether the custodian agrees to the modification;

- b) Whether the child has been integrated into the family of the petitioner with the consent of the custodian;
- c) The factors set forth in KRS 403.270 to determine the best interests of the child;
- d) Whether the child's present environment endangers seriously his physical, mental, moral or emotional health;
- e) Whether the harm likely to be caused by a change of environment is outweighed by its advantages; and,
- f) Whether the custodian has placed the child with a de facto custodian.

KRS 403.340(3)(c) permits the trial court to consider the best interests of the child, which would include the following factors set forth in KRS.270(2):

- a) The wishes of the child's parent or parents, and any de facto custodian, as to his custody;
- b) The wishes of child as to his custodian;
- c) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;
- d) The child's adjustment to his home, school and community;
- e) The mental and physical health of all individuals involved;
- f) Information, records and evidence of domestic violence as defined in KRS 430.720;
- g) The extent to which the child has been cared for, nurtured and supported by any de facto custodian;
- h) The intent of the parent or parents in placing the child with a de facto custody; and,
- i) The circumstances under which the child has been placed or allowed to remain in the custody of a de facto custodian, including whether the parent now seeking custody was previously prevented from doing so as a result of domestic violence as defined in KRS 403.720, and whether the child was placed with a de facto custodian to allow the parent now seeking custody to seek employment, work or attend school.

The trial court must consider the above factors in determining whether to modify custody. The trial court sets forth that the only reason for the motion to modify custody is the move from West Virginia to Virginia. The trial court failed to consider any evidence of the best interest of the child that was presented by Chris. The trial court must

consider the evidence in relation to the statutory factors.

The trial court must give consideration to Heather's numerous moves. Heather has moved five (5) times since she moved from Ashland, Kentucky to Charleston, West Virginia in February 2002. Prior to moving to Charleston, Heather moved at least three (3) times. [TR. of Hearing March 30, 2005, pp. 45-53] Further, the fact that Heather's numerous moves impact the child's relationship with Chris and the child's stability in the home must be considered. Chris is not an alternate weekend parent. This is a parent who has exercised three days and two overnights of parental contact with this child each week, in addition to holidays and summers. Chris has been extremely active despite the barriers that Heather has imposed. Chris made an effort to involve her in community activities and family activities during his parenting time. Since 2003, the Appelle has made a concerted effort to limit Chris's contact with the minor child, and was finally able to succeed by relocating to Virginia. Heather tried to limit the contact to alternate weekends, and was even anticipating the reduction in his visitation prior to the move. [TR. of Hearing March 30, 2005, pp. 113, 118, 131-132] Heather told Chris that if she moved further away than Charleston, Chris's visitation would be reduced. [TR. of Hearing March 30, 2005, pp. 26-27] Heather had no reason to move to Virginia other than to limit Chris's visitation/parental contact. Her husband was employed in West Virginia at the time of the move and did not have employment when he moved. Heather had requested in previous hearings that the trial court limit his visitation to what she referred to the "Kentucky State" guidelines, being every other weekend. Heather did not understand why Chris should receive more than alternate weekend visitation. [TR., pp.

63-64] Heather seems to think she has a superior right to Chris to care for the child because she is the mother, but in this case, Chris has demonstrated the superior ability to care for the child and provide consistency for the child.

Heather has relocated approximately eight (8) times since the entry of the Agreed Order in 2001. Her moves have been from family members to boyfriends to her husband to his family, while Chris has maintained two residences, both of which are in the Ashland area. The first residence was while he was attending college and living with his mother. The second is the house that he and his wife obtained when they married. [TR. of Hearing March 30, 2005, pp. 13-14] The child deserves some stability instead of being relocated repeatedly. In 2002, Heather and her husband relocated to Charleston, West Virginia to be closer to her husband's family, despite the fact that her family lived in the Ashland area, and Mikayla's extended family lived in the Ashland area. With Charleston being approximately one hour away, Chris was able to maintain his parental contact of three days and two overnights each week, including transporting the child to preschool in order to maintain his contact. In July 2004, when Heather relocated to Virginia, providing no notice to Chris of the move, and moving the child approximately six (6) hours away from Chris, he was prevented from having weekly contact with his child. [TR. of Hearing March 30, 2005, pp. 45-46, 48] Heather unilaterally decided to strip away Chris's weekly contact with the child even though Chris is a joint custodial parent.

The trial court found in its Order that Heather's husband had secured a new job in Virginia and then relocated to Virginia. However, the testimony does not support that

finding. Heather discussed the move with her husband's family during Easter weekend of 2004. [Easter was April 11, 2004.] Heather testified that her husband did not secure a job until after he moved to Virginia. There was no job transfer or any specific known job prospects prior to the move. This was merely a choice to move to Virginia. [TR. of Hearing March 30, 2005, pp. 45-46] Obviously, while Heather has the right to move wherever she so desires, when the move affects the minor child, her choices must be scrutinized. Fowler. The move impacts the child's relationship with Chris and her activities in the Ashland area.

The parties in this case have joint custody, which requires that there must be communication and contact regarding the child. Heather made a selfish, unilateral decision without consulting Chris. Heather believes she has the right to make whatever decisions she so desires on behalf of the child, which is not correct, but the findings of the trial court would appear to support that irrational belief. The Domestic Relations Commissioner who heard the evidence found that Heather's actions were immature and selfish, and further, that since February 2002, Heather had lived in five (5) different locations, while the Petitioner had maintained the same residence since his marriage in 2002. [TR., p. 146] The Domestic Relations Commissioner also found that Chris had no address or telephone to contact the minor child for more than one week after the move, even though he was supposed to have in person contact of at least two overnights each week. [TR., p. 146 and TR. of Hearing March 30, 2005, pp. 45-48] Each of these actions of Heather demonstrates her complete disregard of Chris's role as a parent.

Joint custody requires shared decision-making when it relates to the minor child.

Squires v. Squires, 854 S.W.2d 765, (Ky. 1993). The goal has always been to promote cooperation by the parents in making decisions on behalf of the child. Therefore, Chris should have been involved in the decision-making in his child's life. The relocation should have been discussed by both parents. Heather unilaterally decided to move to Virginia, impacting Chris's time with the child and his ability to be an active parent based upon her own decision. Interestingly, when questioned whether she would want to have input into the child's life and decisions involving the child, Heather indicated that she would. [TR. of Hearing March 30, 2005, p. 47] When questioned as to when she decided to move to Virginia, Heather testified that it was right after Easter in 2004, but that she did not tell Chris that she moved until after the move was completed. [Transcript of Hearing March 30, 2005, p. 45] Heather testified that she did not think that Chris needed to know before the move and that the decision to move was made by her, her husband and their respective families. [TR. of Hearing March 30, 2005, p. 46] She never talked to the minor child's father and only believes that he should be involved in decisions to a certain extent. [TR. of Hearing March 30, 2005, pp. 46-47] However, joint custody mandates shared decision-making on behalf of a child.

Heather's actions denied Chris of a joint role in the decision involving the child. The trial court must give consideration to Heather's actions as a joint custodial parent. KRS 403.270(2)(c) requires that consideration be given to the interrelationship of the child with the parents. In this case, Heather ignores Chris as a parent to this child. The fact that she failed to discuss this move demonstrates that she does not understand that her joint parental role includes discussing issues with the other parent. Also, the

testimony of Heather's husband demonstrates that he does not respect Chris as a parent. Heather's husband testified that moving the minor child to Virginia is not Chris's concern as to whether the child moves. [TR. of Hearing March 30, 2005, p. 112, lines 12-23 and p. 119, lines 9-22] Heather's selfishness speaks volumes as to her ability to be a joint custodian.

The trial court fails to consider any of the factors as they relate to Chris in determining whether a modification of custody would serve the best interest of the child pursuant to KRS 403.340 and KRS 403.270. For example, the trial court failed to consider the interaction and interrelationship of the minor child to members of Chris's household. The evidence clearly demonstrated that Chris and his wife maintained a very close family unit, and they were able to blend their families, with each party having a child from a prior relationship, as well as their own children from the marriage. The testimony presented demonstrated that the stepsiblings were extremely close; that they interacted very well together; that Chris and his wife made no distinction between the children; that Chris's wife's family accepted the child as their own; and that the children were encouraged to participate in a variety of activities while in their care. In its decision, the trial court failed to consider any of that testimony. Pursuant to KRS 403.340, the trial court is mandated to consider that testimony.

The trial court cannot strike down Chris's motion to modify merely because the trial court believes that a move is not enough to modify custody. Heather focused on the child's adjustment to her home in Appomattox, Virginia and her activities. The motion to modify was filed immediately when Chris was told that Heather had moved the child.

Unfortunately, due to scheduling issues, the hearing was not conducted for a few months. Heather did not have the child involved in any activities until after the motion to modify custody was filed. Chris, on the other hand, maintained the child in an active environment, such as placing the child in church activities, t-ball and private dance lessons. The trial court must consider all of the factors as they relate to the child, since the entry of the Agreed Order on custody in February 2001. Therefore, the trial court erred in not considering the factors set forth in KRS 403.270 as they relate to Chris.

While the trial court may have discretion in its findings, that discretion is not absolute. In this case, it is clear that the trial court's findings are not supported by the evidence, and the trial court failed to consider the factors set forth in KRS 403.340 and KRS 403.270. Once the trial court found that a change in circumstance has been met, then the trial court must determine what is in the child's best interests. In this case, the trial court has failed to do so. In this case, the trial court failed to consider KRS 403.340 and KRS 403.270 in relation to the testimony.



## V. CONCLUSION

The findings of fact of the trial court are not supported by the evidence that was presented at the hearing on March 30, 2005. The trial court in this case is bound to make its findings based upon the facts that were presented at that hearing before the Domestic Relations Commissioner on March 30, 2005. While the trial court may make findings contrary to that of the Domestic Relations Commissioner, the findings must be supported by credible evidence. The trial court's findings are not supported by the evidence in this case.

The trial court further erred when it failed to consider the change in circumstances resulting from the move to Virginia and the best interests of the child in determining custody.

Chris respectfully requests that this Court reverse the trial court and place custody of the minor child with him.

Respectfully submitted,



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