

FILED

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SUPREME COURT

**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**

*** **

REPLY BRIEF ON BEHALF OF APPELLANT

*** **

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BY:

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This is to certify that on this day I mailed a true and correct copy of the foregoing REPLY BRIEF ON BEHALF OF 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; Hon. Martha A. Rosenberg, 183 North Upper Street, Lexington, 40507; 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 ___ day of September 2007.

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

Rhonda M. Copley
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ARGUMENT

- I. 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.

The trial court does not have to conduct an evidentiary hearing; however, if the trial court is going to enter contrary findings of fact, then the trial court must consider the evidence that was presented at the hearing. In this case, it is clear that the trial court failed to consider the evidence that was presented. A transcript had not been provided to the trial court, and the trial court did not listen to the audio tapes. The findings were made based upon oral arguments that were presented at the hearing on objections and not from the evidence that was presented at the hearing before the domestic relations commissioner. The trial court's findings must be supported by the evidence that was presented at the hearing before the domestic relations commissioner. At the hearing on objections, the trial court did not take additional testimony. The trial court only heard arguments from counsel. Therefore, the only evidence that the trial court can consider in its findings is the evidence that was presented at the hearing before the domestic relations commissioner.

- II. THE RELOCATION WITH THE MINOR CHILD IS SUFFICIENT TO TRIGGER A MOTION TO MODIFY CUSTODY PURSUANT TO KRS 403.340.
- III THE TRIAL COURT FAILED TO CONSIDER THE REQUIREMENTS OF KRS 403.340(3) IN OVERRULING THE MOTION TO MODIFY CUSTODY.

Due to the similarities in argument II and III, they will be combined.

Heather argues in this case that Chris remains a joint custodial parent and, therefore, nothing changes by her relocation other than a few missed days which may be made up over the summer and school breaks. Once again, Heather refuses to acknowledge Chris as an active parent in this child's life by being involved in the decisions that affect the child. Joint custody is more than visitation. Joint custody allows a parent to maintain an active role in the child's life. In this case, Heather unilaterally chose to move Mikayla away from the tri-state area. Charleston, West Virginia, is approximately one hour away from Ashland, Kentucky; however, Chris was able to transport the child to preschool, and was able to participate in those educational activities, and could have continued to do so once the child started compulsory school (despite Heather's unfounded assumptions to the contrary.) Unfortunately, Heather, once again, assumes that contact with Chris is not in the best interests of the minor child, without any evidence to support such a claim. The actions of Heather ensure that Chris is nothing but a visiting parent by unilaterally deciding to relocate to Virginia. She has placed continual obstacles in Chris' path to be a joint custodial parent.

Joint custody requires joint decision making. Heather, in her argument, states that Chris will have the right to make joint decisions on behalf of Mikayla. One has to question whether Chris had to the same right when Heather decided to move to Virginia, as he does according to her brief.

Joint custody is not a token title to a parent. Joint custody requires the parents to communicate. The trial court has to consider the fact that Heather failed to communicate and cooperate with Chris in her decision to relocate. It is undisputed that Heather unilaterally made the decision to relocate, and therefore, the trial court must consider that action. See Scheer v. Zeigler, 21 S.W.3d 807, p. 814 (Ky. App. 2000) [TR. of Hearing March 30, 2005, pp. 45-47] Heather argues that this move merely affects Chris' time with the child, which is easily made up over breaks. Heather fails to accept that this move is more than a few lost days. This move affects the ability of Chris to maintain an active role in his daughter's day-to-day life. Chris could have driven to Charleston, West Virginia several times each week. He could have participated in school activities, watched her participate in extracurricular activities, attended medical appointments, and maintained participation in all of the other events in which a day-to-day parent is involved. In this case, the unilateral move to Appomattox, Virginia severs the ability of Chris to be the day-to-day parent that he had been throughout this child's life.

Clearly, the relocation of the minor child would be sufficient to trigger a hearing on the issue of modification of custody. Thereafter, KRS 403.270 and KRS 403.340 support that custody be modified and that Chris be named as the primary custodian based upon the best interests of the child.

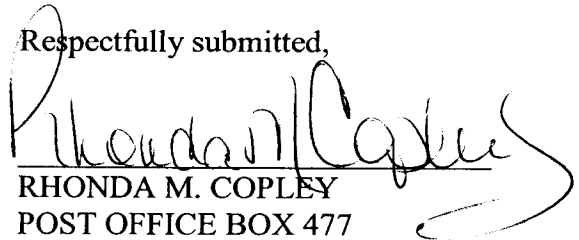
CONCLUSION

While a trial court is not required to conduct an additional hearing before overruling or modifying a report and recommendation of a domestic relations commissioner, the findings of fact of the trial court must be supported by credible evidence, based upon the evidence presented at the hearing. In this case, the findings of fact of the trial court are not supported by the evidence that was presented at the hearing before the Domestic Relations Commissioner on March 30, 2005.

The trial court failed to consider the change in circumstances resulting from the move from Charleston, West Virginia to Appomattox, Virginia, and the impact that move would have on the Appellant's ability to be a joint custodial parent. The trial court further failed to consider Heather's unilateral decision in making the move to Virginia.

The trial court failed to consider the statutory requirements of KRS 403.270 and KRS 403.340 in determining the best interests of the child.

Respectfully submitted,


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