COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2006-SC-000642-DG

CHRISTOPHER M. PENNINGTON **APPELLANT**

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

HEATHER M. MARCUM F/K/A MILES **APPELLEE**

BRIEF FOR APPELLEE

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The undersigned does hereby certify that copies of this Brief were served upon the following named individuals by United States Mail, postage pre-paid, to Hon. Susan Stokley Clary, Supreme Court of Kentucky, Clerk's Office, 209 Capitol Building, 700 Capitol Avenue, Frankfort, Kentucky 40601-3488; Hon. Marc I. Rosen, Judge, Boyd Circuit Court, Division I, Boyd County Courthouse, P.O. Box 417, Catlettsburg, Kentucky 41129-0417; and Hon. Rhonda M. Copley, Attorney for Appellant, P.O. Box 477, Ashland, Kentucky 41105-0477 on this the 6th day of September, 2007. The undersigned does also certify that the record on appeal has been returned to the Clerk, Kentucky Supreme Court, on or before this date.

MARTHA A. ROSENBERG

STATEMENT CONCERNING ORAL ARGUMENT

The Appellee believes an oral argument would assist the Court in deciding the issues presented. The primary issue to be considered by this Court is a determination and/or clarification of the standard of proof required for modification of custody of a minor child based upon the relocation of the custodial parent. The individual facts of this case do not assist the Court in making a determination, but rather, clarifying whether relocation is a change of circumstance on behalf of a child to warrant a hearing for modification of custody and if so, what proof other than relocation is required to modify custody consistent with KRS 403.340.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

The Appellant, Christopher M. Pennington, (hereinafter referred to as "Chris"), and the Appellee, Heather M. Marcum, formerly Heather M. Miles, (hereinafter referred to as "Heather"), are the biological parents of Mikayla L. Pennington, born out of wedlock, on May 17, 1999, in Boyd County, Kentucky.

Chris filed a Petition for Custody/Visitation in the Boyd Circuit Court, Case No. 00-CI-00594, on July 7, 2000, requesting custody, establishment of reasonable visitation and child support. [T.R. pp. 1-2] Pursuant to an Emergency Protective Order requested by Heather, and entered in the Boyd District Court, 00-D-00117-001, Chris was awarded timesharing with Mikayla two days per week. [T.R. p. 7] The parties entered into an Agreed Order and Judgment filed of record on February 1, 2001, acknowledging Chris as the biological father of Mikayla, awarding the parties joint custody, and designating Heather as the residential parent of Mikayla, subject to visitation with Chris from Sunday at Noon until Tuesday at Noon. By agreement, Chris was to provide child support in the amount of $140.00 per month to Heather for Mikayla's support. [T.R. pp. 22-23]

On October 8, 2001, Chris filed a motion in the Boyd Circuit Court requesting that the visitation agreed to seven months previously, be modified from visitation every Sunday at Noon through Tuesday at Noon, to every Saturday at Noon through Monday at Noon, due to a change in his school and work schedule. [T.R. pp. 29-32] The matter was heard before the Domestic Relations Commissioner, Hon. Anna H.

Ruth, on October 30, 2001. The Domestic Relations Commissioner granted Chris' request, on a temporary basis, by Report and Recommendation entered January 15, 2002, until his graduation, scheduled for May, 2002. A final hearing regarding visitation was to occur upon Chris' graduation on May 21, 2002. [T.R. pp. 36-38]

Several continuances were granted and the final hearing regarding Chris' motion to modify visitation was heard on August 6, 2002. At the time of the hearing, Heather was married to Jeremy Marcum and had relocated with Mikayla, approximately one hour away, to Charleston, West Virginia. Chris was scheduled to marry on September 15, 2002 with a planned move within the Ashland area. [T.R. p. 72] Chris did not request a change of custody on the basis of Heather's relocation with Mikayla from Ashland, Kentucky to Charleston, West Virginia. At the time of the August, 2002 hearing, according to Chris, Heather had moved eight (8) times, living with Mikayla in South Point, Ohio; Rush, Kentucky; Huntington, West Virginia and Charleston, West Virginia. [T.R. 107] Rather than requesting modification of custody, Chris requested visitation continue two days per week, with Mikayla to be in Heather's care the remaining five days per week. Heather requested that Chris be awarded visitation of alternating weekends and adding one day to the second weekend to make up for mid-week time, but lessen the transitions for Mikayla. [T.R. p.73] After review of the testimony and evidence presented, the Domestic Relations Commissioner filed a report on November 25, 2002 recommending Chris be awarded alternating weekends from Friday at 5:30 until Sunday at 6:00 p.m., and during the

week he did not have weekend visitation, Wednesday from 6:00 p.m. to Friday at 6:00 p.m. Holidays and summer timesharing were to be consistent with Boyd County Visitation Schedule. The parties were to meet halfway at the Huntington Mall exit in Barbourville, West Virginia to exchange the child for visitation. [T.R. pp. 71-79] Judge Marc I. Rosen, heard objections (styled as Exceptions) regarding the Commissioner's report and entered an Order on January 15, 2003 awarding Chris visitation on alternating weekends from Friday at 3:00 p.m. until Sunday at 3:00 p.m. and on alternate weeks when Chris did not have weekend visitation, Wednesday from 3:00 p.m. until Friday at 3:00 p.m. Further, the parties were to exchange Mikayla for visitation at the Wendy's restaurant in Milton, West Virginia. [T.R. pp. 93-93] Mikayla was not yet school age at this time.

Heather, Mikayla and Heather's husband, Jeremy, lived in Charleston, West Virginia for two and one half years, prior to moving to Appomattox, Virginia in late July, 2004. [Transcript of March 30, 2005 hearing, pp. 30-31, lines 23, 24, 1]

On July 29, 2004, Chris filed a motion requesting the Court modify custody by awarding custody to him or, in the alternative, modify his timesharing with Mikayla to include every weekend. [T.R. p. 105] The basis for Chris' motion was Heather's relocation with her husband Jeremy and Mikayla to Appomattox, Virginia. [T.R. pp. 110-112] [Transcript of March 30, 2005 hearing, p. 32, lines 3-6] Chris's motion was scheduled for hearing before the Domestic Relations Commissioner on August 31, 2004 [T.R. p. 114], then rescheduled for September 14, 2004 [T.R. p. 116] and

September 27, 2004 [T.R. 118] On September 30, 2004, a notice was filed of record stating the parties had reached a temporary agreement. [T.R. p. 120] An Agreed Order was entered on October 15, 2004 providing that Heather remain as primary residential custodian on behalf of Mikayla, and the status quo of Mikayla living with Heather continue in Appomattox, Virginia. Chris' visitation with Mikayla would consist of alternating weekends, with an exchange of Mikayla to occur in Dawson, West Virginia. Mikayla was enrolled and began kindergarten in Appomattox, Virginia in the fall of 2004. Pursuant to the Agreed Order, Chris was to travel to Appomattox and visit Mikayla's school and then make a determination whether to pursue modification of custody. [T.R. pp. 122-123]

Chris' motion to modify custody was heard by the Domestic Relations Commissioner on March 30, 2005, and her Report and Recommendation was filed on July 22, 2005. [T.R. pp. 141-150] The Domestic Relations Commissioner noted that Fenwick v. Fenwick, 114 S.W.3d 767 (Ky. 2003) requires "the non-custodial parent to show that the relocation endangered the child's health and that the advantages of the change in custody outweighed any harm that it may cause." [T.R. p. 145] The Domestic Relations Commissioner, however, determined that Fowler v. Sowers, 151 S.W.3d 357 (Ky. App. 2004) controlled and determined that the decision as to whether modification should occur should be based on KRS 403.340(3). [T.R. p. 145] The Domestic Relations Commissioner determined that the change of circumstances which occurred consistent with the requirements of KRS 403.340(3) was Heather's

relocation with Mikayla to Virginia. [T.R. pp. 145-146] The Domestic Relations Commissioner made a finding that Mikayla was doing well in school in Appomattox, Virginia [T.R. p. 146] She further stated that the "ideal situation for Mikayla would be if the parties and their spouses lived in close proximity to each other." [T.R. p. 147] However, since they did not, the Domestic Relations Commissioner recommended that the parties continue to have joint custody, but modified the custodial arrangement to designate Chris as the "primary physical custodian". [T.R. p. 147] The Domestic Relations Commissioner made no finding that Mikayla's present environment in Virginia seriously endangered her physical, mental, moral or emotional health or that the harm likely caused by a change in environment was outweighed by its advantages to Mikayla as required by KRS 403.340(3)(d) and (e).

On July 27, 2005, Heather filed objections (styled Exceptions) to the Domestic Relations Commissioner's Report and Recommendation. [T.R. pp. 152-156] A hearing on the Exceptions was held on August 22, 2005 before Judge Marc I. Rosen. [T.R. p. 162] Upon hearing the arguments of counsel and review of the record, Judge Rosen issued an Order on October 31, 2005 overruling the Domestic Relations Commissioner and thereby denying Chris' motion to modify custody. Judge Rosen made findings that:

> "The Respondent (Heather) married and her husband accepted a job in Virginia and the Respondent (Heather), her husband the child, Mikayla, and the Respondent's (Heather's) new child moved to Virginia. The parties have lived in Virginia for over a year. The Court finds that the child is excelling in school in Virginia and is involved in many extra-

curricular activities. The only reason advanced by the Petitioner (Chris) for a change of custody is the move, even though he has alleged that the Respondent (Heather) has lived in several locations. The Respondent (Heather) explains this away by always trying to advance her living environment.

The Court is not inclined to end a six-year relationship of a child with a parent merely because that parent remarries and moves to a different location. The child is well adjusted, has a new sibling, is involved in her church, is part of a youth group, is involved in many extra-curricular activities and is excelling in her new environment. Even the Petitioner (Chris) testified that the Respondent (Heather) was a good mother and took care of the child exceptionally well. This Court finds that it would be in the best interest of the minor child for the parties to continue to have joint custody, but for the Respondent (Heather) to have the primary physical custody and the Petitioner (Chris) to have secondary custody with liberal visitation, as the parties have been exercising. The Court understands that the parties have been working together in allowing the Petitioner (Chris) to have visitation, with the parties meeting half way for transfer of the child. This is ordered to continue in the manner it is currently being done and at the same times it is being done. [T.R. pp. 163-164]

Chris filed a Notice of Appeal on November 14, 2005. [T.R. pp. 166-167] On August 4, 2006, the Court of Appeals rendered its Opinion, Affirming the trial court. [No. 2005-CA-002349-ME] The Court of Appeals determined that the trial court was not required to hold an additional evidentiary hearing subsequent to the Domestic Relations Commissioner's report citing Haley v. Haley, 573 S.W.2d 354, 356 (Ky. App. 1978). Further the appellate court determined there was substantial evidence to support the findings made by Judge Rosen awarding the parties joint custody of Mikayla, designating Heather as the primary physical custodian and that the trial court's determination was fully within the trial court's broad discretionary power, citing Krug v. Krug, 647 S.W.2nd 790, 793 (Ky. 1983).

ARGUMENT I

THE TRIAL COURT IS NOT REQUIRED TO HOLD AN EVIDENTIARY HEARING BEFORE RULING ON OBJECTIONS TO THE DOMESTIC RELATIONS COMMISSIONER'S REPORT AND RECOMMENDATIONS

Pursuant to CR 53.06(2), the trial court held a hearing on August 22, 2005 on Heather's objections to the Domestic Relations Commissioner's Report and Recommendations. Both Heather and Chris were present with their respective counsel and the trial court heard arguments of counsel and reviewed the record. [T.R. p. 162] On October 31, 2005, the trial court issued an Order confirming a continuing award of joint custody between Heather and Chris, but overruled the Domestic Relations Commissioner's recommendation to designate Chris as the primary physical custodian. [T.R. 163-165]

Pursuant to CR 53.06(2), "The Court after hearing may adopt the report, or may modify it, or may reject it in whole or in part, or may receive further evidence, or may recommit it with instructions." The trial court has the "broadest possible discretion with respect to the use it makes of reports of domestic relations commissioners." Eiland v. Ferrell, 937 S.W.2d 713at 716 (Ky. 1997). The trial court is not required to hold an additional evidentiary hearing, but rather afford the parties an opportunity for oral argument, as occurred in this case. Eiland, Id; Haley v. Haley, 537 S.W.2d 354 (Ky. App. 1978), and Kelley v. Feddle, 54 S.W.3d 812 (Ky. 2002).

The Appellant further claims error in the trial court's findings, stating that the findings by the trial court differed from findings of the Domestic Relations Commissioner. However, the Appellant failed to file a motion requesting the trial court make additional findings based on the essential issue of whether a change of circumstance had occurred concerning Mikayla, unknown at the time of the entry of the original Agreed Order in February, 2001 and the basis of application of a best interest standard pursuant KRS 403.340(3)(4).

If the Appellant believed the trial court failed to make a finding of fact on an issue essential to support the trial court's ruling, then the Appellant is required to file a written request for additional findings. CR 52.02 and CR 52.04. Failure to bring this issue before the trial court by means of a written request is fatal to this appeal. Cherry v. Cherry, 634 S.W.2d 432 (Ky. 1982). Pursuant to CR 52.04, "A final judgment shall not be reversed or remanded because of the failure of the trial court to make a finding of fact on an issue essential to the judgment unless such failure is brought to the attention of the trial court by a written request for a finding on that issue or by a motion pursuant to Rule 52.02."

Further, the distinctions in findings of fact between the trial court and the Domestic Relations Commissioner are merely the manner in which each interpreted the testimony presented. The trial court found that, "the child Mikayla was born on May 17, 1999 and has lived her entire 6-year life with her mother, the Respondent. The child was born out of wedlock. 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." [T.R. p.163] The Domestic Relations Commissioner found that, "The Petitioner (Chris) has been actively involved in the caring for the parties' child since her birth. He has cared for Mikayla at least two days per week since initiating this action in July, 2000." [T.R. 144] Neither finding contradicts the other, but rather both are supported by the evidence presented. Both the trial court and the Domestic Relations Commissioner acknowledge through their findings that Mikayla was residing primarily with Heather five days per week and she was with Chris two days per week. Both the trial court and the Domestic Relations Commissioner made findings that Heather relocated with Mikayla to Appomattox, Virginia in July, 2004. [T.R. 143, 163] The Domestic Relations Commissioner noted that at the time of the move, Heather's husband did not have a job in Appomattox, but it was unknown to the Commissioner whether applications for employment were submitted prior to the move. [T.R. 143] The trial court made a finding that Heather married Jeremy and Jeremy accepted a job in Virginia and the parties moved to Virginia. [T.R. 163] It is uncontroverted, that the testimony during the hearing was that Heather and Jeremy moved to Virginia because they determined it was better for their family economically. Jeremy testified that the the cost of living was cheaper and he had obtained a job at BB&T bank making more money. Jeremy further testified that he, Heather, Mikayla and Mikayla's sister, Hannah all moved initially into his parent's home in Appomattox as he had a job before the family found a place

to live. [Transcript of March 30, 2005 hearing pp. 105-108]

Both the Domestic Relations Commissioner and the trial court determined that Mikayla had adjusted well to her environment in Virginia and was doing well in school and participating in church and extracurricular activities in Appomattox, Virginia. [T.R. 146, 164]

The trial court's findings are supported by the evidence presented and cannot be set aside unless clearly erroneous. CR52.01 Reichle v. Reichle, 719 S.W.2d 442 (Ky. 1986); Sexton v. Sexton, 125 S.W.3d 258 (Ky. 2004). A factual finding is not clearly erroneous if it is supported by substantial evidence. "Substantial evidence is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people." Sherfey v. Sherfey, 74 S.W.3d 777 at 782 (Ky. 2002). The evidence presented by testimony of the parties and Heather's husband was substantial evidence and supported the findings of the trial court. The trial court has the right to re-evaluate the evidence and reach a different conclusion than the Domestic Relations Commissioner. Basham v. Wilkins, 851 S.W.2d 491 (Ky. App. 1993).

ARGUMENT II

WHETHER RELOCATION BY A PARENT SUBSEQUENT TO ENTRY OF A CUSTODY DECREE IS A CHANGE IN CIRCUMSTANCE NOT PREVIOUSLY CONTEMPLATED IN A MOBILE SOCIETY

Pursuant to KRS 403.340(3) "...the court shall not modify a prior custody decree unless after hearing it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of the entry of the prior decree, that a change has occurred in the circumstances of the child or his custodian, and that the modification of custody is in the best interest of the child..."

At the time of Mikayla's birth, Heather and Chris resided together in Ashland, Kentucky. Subsequent to Mikayla's birth in May, 1999, but prior to the entry of the February 7, 2001, Agreed Order [T.R. pp. 22-23] awarding Heather and Chris joint custody, and designating Heather as the primary residential custodian, Chris alleged Heather moved from Ashland, Kentucky to South Point, Ohio, and then to Rush, Kentucky. At the time Chris filed his Petition for Custody, Heather and Mikayla lived in South Point, Ohio.[T.R. p. 107] Heather's relocation with Mikayla from Ashland, Kentucky to Ohio and then back to Kentucky was not a basis used by Chris to request an award of sole custody or be designated as the primary residential custodian of Mikayla. Rather, Chris acknowledged by agreement that it is was in Mikayla's best interest that the parties be awarded joint custody and Heather be designated as the child's primary residential custodian.

While a designation of primary residential parent is not a form of custody defined by statute, it is a designation that is created by the parties conferring certain responsibilities upon a particular parent. In the facts of this case, Chris, by agreement designated Heather as the residential parent for Mikayla, thereby, providing Heather with the responsibility of providing Mikayla's residence, while reserving time for visitation with Mikayla for himself. [T.R. 22] He did so, after being fully aware of Heather's prior incidents of relocation.

Clearly it was contemplated at the time of the entry of the Agreed Order that either party may be subject to relocation which would impact visitation with Mikayla. Both parties were young and neither had committed to one another by virtue of marriage. Chris was aware that Heather had moved three times prior to entry of the February 7, 2001 Agreed Order. [T.R. 107] Chris also relocated after entry of the Agreed Order. In today's mobile society, it is unrealistic to believe that relocation was not a possibility known to the parties or the Court at the time of the entry of the Agreed Order regarding custody.

In Fenwick, the Supreme Court held that "relocation does not change the essential nature of an award of joint custody – both parties still retain the right to participate in major decisions affecting their children's lives."supra at 777. Even with the relocation of Mikayla with Heather to Virginia, Chris remains the joint custodian of Mikayla. He continues to have the right to participate in major decisions regarding Mikayla and continues to have regular bi-weekly weekend visitation with said child.

The issue to be clarified by this Court is whether a parent's wish to relocate with the minor child is a change of circumstance sufficient to provide for a hearing to modify custody and whether a parent is required to remain in one location to retain custody. Is modifying Chris's visitation from forty-eight (48) hours every week, to forty-eight (48) hours bi-weekly due to Heather and Mikayla's relocation, a change of circumstance that would warrant modification of custody? There is no dispute that prior to Heather and Mikayla's relocation to Virginia, Chris maintained visitation with Mikayla forty-eight (48) hours per week, plus alternating holidays and summer visitation and currently he has Mikayla for visitation forty-eight (48) hours every two weeks, plus alternating holidays and extended time in the summer. What change constitutes a substantial change? If Chris were provided additional time during the summer and other school breaks, would that nullify a claim to change of circumstance?

The ruling in Fenwick, supra at 788-789 is that the desire of one parent to relocate is not sufficient to justify a modification of custody. Citing Wilson v. Messinger, 840 S.W.2d 203 (Ky. 1992), the Court stated that "a custodial parent cannot in today's mobile society be forced to remain in one location in order to retain custody." Fenwick, supra at 785 and 789.

The Appellant argues that Fenwick provides limited precedential weight because it was based on the standard set forth in KRS 403.340 prior to the 2001 amendment, thereby requiring proof that the proposed relocation seriously endangers

the child's physical, mental, moral or emotional health. The language of KRS 403.340 regarding whether a change of circumstance has occurred as a threshold requirement for modification of custody was not changed with the 2001 amendment. KRS 403.340 continues to require that "the court shall not modify a prior custody decree unless after hearing if finds, upon the basis of the facts that have arisen since the prior decree or that were unknown to the court at the time of entry of the prior decree..." remains unchanged with the 2001 amendment. Therefore, the 2001 amendment to KRS 403.340 would not effect the holding in Fenwick that relocation is not a change of circumstance. While relocation may cause a hardship or modify the non-residential parent's ability to exercise time with the child, relocation itself does not change the essential award of joint custody. The non-residential parent continues to have the ability to participate in major decisions concerning his or her children, have visitation and maintain a relationship with their children.

In Fowler v. Sowers, 151 S.W.3d 357 (Ky. App. 2004), the Court of Appeals reversed the trial court for dismissing the father's motion to modify custody without an evidentiary hearing. The trial court stated the pleadings were insufficient, however, the trial court failed to recite the standard it was applying in making a determination that the pleadings were insufficient. Id. at 359. The Court of Appeals stated that a move to Alaska from Kentucky was a change of circumstance contemplated by statute and that removal of the child from "one of his parents and from his entire extended family could create the potential of causing a negative impact

on his best interests." Id. The issue in Fowler was not whether custody should be modified, but whether the movant was entitled to an evidentiary hearing. The Court of Appeals did not address in Fowler what constituted a change of circumstance, but rather specific to the facts of that case, a move from Kentucky to Alaska and the resulting cutting the child off from one parent was a change in circumstance was considered to be a change of circumstance that required a hearing. The Appellant takes the position that any relocation that affects the frequency of his visitation is a sufficient change of circumstance to warrant a change of custody. As stated in Fenwick, "Any move by a custodial parent, even one of only a short distance in the same community, has the potential to impact the noncustodial parent's personal time with his or her children. To hold that this inherent effect of relocation constitutes grounds for modification, however, would result in a blanket denial of relocation whenever the noncustodial parent objected to a proposed move."supra at 788.

With the current situation, Heather moved five hours from her previous residence in Charleston, West Virginia. The parties already were previously more than one hour away from one another and Mikayla was not compulsory school age. Once Mikayla was compelled to attend school, transporting her more than one hour to and from school would not be in the child's best interest and the visitation would require modification. Would modification of visitation on the basis of becoming school age, be a basis for modification of custody if no relocation had occurred? Chris continues to maintain regular visitation with his child and continues to have

custodial rights to determine major decisions regarding his child, therefore there is no substantial and continuing change of circumstance to warrant a modification of custody.

ARGUMENT III

THE TRIAL COURT PROPERLY CONSIDERED THE REQUIREMENTS OF KRS 403.340(3) IN OVERRULING THE APPELLANT'S MOTION TO MODIFY CUSTODY

The trial court overruled the Domestic Relations Commissioner's recommendation that joint custody be modified by designating Chris as the primary residential parent. Since the motion for modification filed by Chris was more than two years after the entry of the original custody order, the trial court was required to consider the factors of KRS 403.340(3), which include "if a change has occurred and whether a modification of custody is in the best interest of the child." Pursuant to KRS 403.340 (3), the trial court must consider the following:

(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(2) 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 change of environment is outweighed by its advantages to him; and

(f) Whether the custodian has placed the child with a de facto custodian.

KRS 403.340(4) further directs the Court to consider all relevant factors when reaching a conclusion regarding whether the child's present environment seriously endangers his physical, mental, moral, or emotional health. "All relevant factors" include those enumerated in the statute such as the child's interrelationship with his parents, siblings, and other persons important in the child's life; the mental and physical health of the individuals involved; any domestic violence or abuse; and any failure, without good cause, to observe visitation, child support, or other provisions of the decree of dissolution that effect the child. However, the Court is not permitted to change custody solely on the basis of noncompliance with visitation or child support.

The trial court accurately determined from the evidence that the sole basis for Chris' motion to modify custody was Heather's relocation with Mikayla to Virginia. The trial court then made findings based on the wishes of the parents, interaction and interrelationships with Mikayla's parents and siblings, her adjustment to her home, school and community in Virginia, and whether her present environment endangered seriously Mikayla's physical, mental, moral, or emotional health. The trial court made findings that this child had historically resided with her mother, that she was integrated into the home of her mother, having resided in Virginia for more than a year, had good relationships with her siblings, was performing well in school and participated in a number of extracurricular activities. In addition, the trial court noted

that Chris continued to maintain a relationship with Mikayla by having regular visitation with the parties meeting at an agreed upon halfway point to exchange the child. The trial court therefore refused to modify custody by transferring primary residential custody to Chris because Heather moved to Virginia with Mikayla and her husband. [T.R. 163-164]

Pursuant to CR 52.01, the trial court's findings of fact shall not be set aside unless clearly erroneous. Reichle, supra at 444. In reviewing the decision of the trial court, the test is not whether the reviewing court would have decided the case differently, but whether the findings of the trial court are clearly erroneous or the trial court abused its discretion. Eviston v. Eviston, 507 S.W.2d 153 (Ky. 1974). Abuse of discretion requires "arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision." Sherfey, supra at 783, citing Kuprion v. Fitzgerald, 888 S.W.2d 679, 684 (Ky. 1994). There was sufficient evidence to support the trial court's denial of Chris's motion to modify custody and therefore the trial court acted appropriately within his broad discretion. Krug, supra 793.

CONCLUSION

Heather's relocation to Virginia was not a change of circumstance that was not reasonably contemplated or unknown at the time of the entry of the Agreed Order. The parties entered into an Agreed Order of custody designating Chris and Heather as joint custodians, with Heather as the primary residential custodian on behalf of Mikayla, with complete knowledge that Heather had relocated a number of times with Mikayla, after she and Chris separated. Due to the youth of the parties, their single status, Chris being in school, Heather's previous relocations and the age of Mikayla at the time of the entry of the order, relocation of one or both of the parties as has occurred was to be expected. There was no provision in the Agreed Order that prohibited relocation by either party.

Visitation orders are not stagnant and inflexible or are they intended to be. Visitation of a nonresidential parent requires modification as a child matures, becomes school age, and the child's needs change. Modification of visitation as a result of relocation, but which continues to provide a nonresidential parent with regular and consistent contact with their child is not a change of circumstance that mandates a change of custody.

The trial court had substantial evidence to support its findings that it was in Mikayla's child's best interest to have Heather remain as Mikayla's primary residential custodian and deny Chris' motion to modify custody on the basis of

Heather's relocation to Virginia with Mikayla. The order of the trial court should be affirmed.

There has been substantial and continuing litigation since the entry of Fenwick at the trial and appellate levels, regarding whether relocation in and of itself is a change of circumstance on behalf of a child, so as to require a hearing modification of custody. It is requested that this Court clarify whether relocation is a change of circumstance which requires a hearing to modify custody. If the Court determines that relocation is a change of circumstance, then a definition of what is relocation, whether it be defined by distance, (15 miles, 250 miles, 500+ miles), length of time required to travel, (30 minute commute, one hour, ten hours), substantial change in the visitation arrangement, or the other variety of factors that are considered by trial courts each day in making a determination. Trial courts further require clarification as to what proof other than the relocation itself is required to modify custody consistent with KRS 403.340.

Respectfully submitted,

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