COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2012-SC-000420

SHANE THOMAS MASTERS — APPELLANT

v.

ON APPEAL FROM THE MADISON FAMILY COURT
CIVIL ACTION FILE NO. 04-CI-000960
COURT OF APPEALS FILE NO. 2010-CA-001332-ME

DENA SUE GREER MASTERS — APPELLEE

REPLY BRIEF ON BEHALF OF APPELLANT SHANE MASTERS

BY: _____

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that copies of this brief were served upon the following named individuals by mail, postage prepaid: Hon Crystal L. Osborne, Britton, Osborne, Johnson, PLLC, 200 West Vine Street, Suite 800, Lexington, KY 40507, Hon. Matthew R. Walter, Helton, Erwin & Associates, P.O. Box 137, Danville, KY 40423-0137, Hon. Bruce Petrie, Boyle County Courthouse, 321 W. Main St., Ste 215, Danville, KY 40422, Hon. Sheila F. Redmond, Office of Legal Services, 2050 Creative Drive, Ste 160, Lexington, KY 40505, Ms. Darlene Snyder, Madison Circuit Court Clerk, P.O. Box 813, Richmond, KY 40476-0813 and Sam Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601 and that ten (10) copies of this brief were mailed via registered mail to Clerk, Supreme Court of Kentucky, 700 Capitol Avenue Rm 209, Frankfort, KY 40601-3415 on this the 11th day of April, 2013.

BY: _____
REBECCA NOVAK ASHMAN

REPLY BRIEF

For his reply to the responsive brief filed by the Appellee (hereinafter "Dena") the Appellant (hereinafter "Shane") reaffirms everything stated in his brief and further states as follows:

KRS 403.340 does specifically require "affidavits", however it does not specifically state that the affidavits are a prerequisite to a court acquiring subject matter jurisdiction. The affidavits are required by statute but the metamorphosis of that statutory requirement into a jurisdictional one is entirely judicial in nature. As the concurring opinion from the Court of Appeals correctly points out, the "holding" in *Petry v. Cain*, 987 S.W.2d 786 (Ky. 1999) that the affidavit requirement is jurisdictional was both erroneous as well as dictum (Appendix 1 to Appellant's brief, p 6).

Further, the issue of the existence of sufficient number of affidavits was not raised during the trial or before the Court of Appeals because there was never any question that there were sufficient *number* of affidavits- Dena has only ever questioned the sufficiency of the multiple affidavits which accompanied Shane's motion. Her present argument that the affidavits "appear" to be forged is an issue that should have been properly raised before the trial court and the Court of Appeals. However, it was not. It is unrefuted that the trial court was presented these affidavits in support of Shane's motion when it was filed in 2007. It is also unrefuted that the Court of Appeals could not have based their decision on review of these affidavits because the affidavits were omitted from the record on appeal.

Dena's argument regarding the incorporation of the custody order into the divorce decree confuses the issues of custody and timesharing. As Dena admits, the April 18,

2005 order "granted the parties joint custody" (Appellee's Brief, p. 5). The fact that the parties may have proceeded to enter into subsequent visitation agreements had no bearing on the grant of joint custody. As stated in *Pennington v. Marcum*, 266 S.W.3d 759, 767 (Ky.2008), "...changing how much time a child spends with each parent does not change the legal nature of the custody ordered in the decree". KRS 403.280 provides a mechanism by which a party may secure a temporary custody order, but that is not what occurred with the April 18, 2005 order granting joint custody to the parties. The grant of custody in this order may have been interlocutory, but it was not temporary, as evidenced by the fact that it was incorporated verbatim into the divorce decree. Shane's argument is simply that in cases such as this, where permanent custody is established prior to the entry of the decree, and the decree merely incorporates the prior custody order verbatim, that motions to modify that custody order should relate back to the time of entry of the actual custody order, not the mere incorporation into the divorce decree. The reason for this is clear. As Appellee correctly points out, the statutory scheme was enacted for the purpose of creating stability (Appellee's brief, p.3). However, this purpose is subverted when the entry of the divorce decree is delayed beyond the entry of the relevant custody order. A rule that allows the two year requirement of KRS 403.340(2) to relate back to the actual custody order would create uniformity in application of the statute instead of allowing the peculiarities and complexities of an entire divorce proceeding to artificially extend the time requirements as set out by the statute with respect to custody alone. Dena's arguments with respect to the process of appealing a custody decision are misplaced as Shane's argument merely concerns the process set out in KRS 403.340(2) to request a modification of a prior custody order, not an appeal of same.

The record now reflects that Shane's motion to modify custody was, in fact, supported by a sufficient number of affidavits, and even if that were not true the motion to modify custody was filed more than two years after the entry of the order it sought to modify. In addition, the affidavit requirements of KRS 403.340 should not be interpreted as a requirement to the trial court obtaining subject matter jurisdiction over a motion to modify custody. As such, and for the any or all of the reasons set forth in Shane' brief, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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