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**SUPREME COURT OF KENTUCKY  
NO. 2014-SC-000309-DE, NO. 2014-SC-000582  
COURT OF APPEALS FILE NO. 2012-CA-002210-ME  
HARDIN CIRCUIT COURT ACTION NO. 06-CI-01275**

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**KEVIN ADDISON** **APPELLANT/CROSS- APPELLEE**

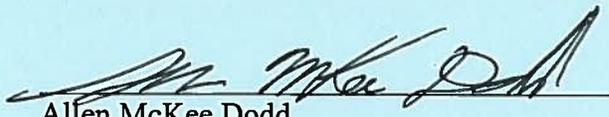
**V. DISCRETIONARY REVIEW FROM COURT OF APPEALS  
FILE NO. 2012-CA-002210-ME**

**LYDIA ADDISON** **APPELLEE/CROSS- APPELLANT**

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**BRIEF FOR THE APPELLEE/CROSS-APPELLANT**

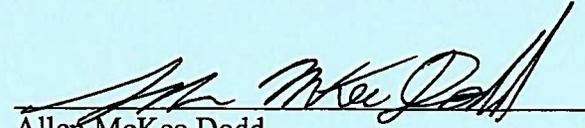
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Allen McKee Dodd  
Dodd & Dodd Attorneys, PLLC  
325 West Main Street, Ste. 2000  
Louisville, Kentucky 40202  
Phone: (502) 584-1108  
Fax: (502) 587-7756  
*Counsel for the Appellee/Cross-Appellant,  
Lydia Addison*

**CERTIFICATE OF SERVICE**

It is hereby certified that on the 9<sup>th</sup> day of February, 2015, a copy hereof was served by mail upon Jeremy Aldridge, Carey Aldridge, Aldridge & Aldridge, PSC, 2411 Ring Road, Suite 102, Elizabethtown, Kentucky 42701; LeeAnna Dowan-Hardy, Dowan Law Offices, 108 East Dixie Avenue, Elizabethtown, KY 42701; Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; and Judge Pamela K. Addington, Hardin County Justice Center, 120 E. Dixie Ave., Elizabethtown, KY 42701. It is further certified that ten (10) copies of this Brief were sent by first-class mail on this the 9<sup>th</sup> day of February, 2015, in accordance with CR 76.12(3)(a) to the Clerk of the Supreme Court of Kentucky, State Capitol, Room 235, 700 Capitol Ave., Frankfort, KY 40601.



Allen McKee Dodd  
Dodd & Dodd Attorneys, PLLC

## INTRODUCTION

This is a case in which a mother appeals from a judgment awarding her former spouse sole custody of the parties' two (2) minor children and restricting her to telephonic and supervised visitation. The Court of Appeals reversed and remanded the matter on grounds that the trial court improperly placed a time restriction on the hearing without considering the relevance or admissibility of the evidence pursuant to the Kentucky Rules of Evidence, and that the trial court erred in not permitting the children to testify absent a finding regarding their competence to testify.

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## COUNTER-STATEMENT OF THE CASE

The Appellee/Cross-Appellant, Lydia Addison (“Lydia”), does not accept the Appellant/Cross-Appellee’s summary of the evidence in question. Accordingly, and pursuant to CR 72.12, Lydia submits the following Counterstatement of the Case.

The underlying litigation at the trial court level stemmed from a motion to modify custody and parenting time filed by the Appellant/Cross-Appellee, Kevin Addison (“Kevin”), on January 23, 2012. [R. 632-640]. The Hardin Circuit Court, Family Division I, held a hearing on the issue on August 16, 2012. *See generally*, TR, 8/16/2012. Immediately following trial and after agreeing to counsel’s request to submit Trial Memoranda to brief the complex custody issues in this case, the court entered an interlocutory Order awarding sole custody of the parties’ two (2) minor children to Kevin and restricting Lydia to telephonic and supervised visitation. [R. 943-944]. The trial court’s final Findings of Fact and Conclusions of Law, which was almost a mirror image of Kevin’s tendered proposed order, was entered on October 26, 2012, and the court retained the custody and visitation arrangement previously set in the interlocutory order. [R. 1041-1045] Lydia’s subsequent post-judgment motions were denied by the trial court in its November 28, 2012 Order. [R. 1057-1080, 1087]

Lydia and Kevin were married on May 1, 1999. Respondent’s Post-Trial Memorandum at 1.<sup>1</sup> They have two (2) minor children, S.A. (age 11) and M.A. (age 7). *Id.* The underlying trial court action for dissolution of the parties’ marriage was filed on July 18, 2006 by Kevin. [R. 2-4]. The parties entered into an amended settlement agreement on January 20, 2007, and a decree of dissolution incorporating that agreement was entered by the trial court on March 2, 2007. [R. 20-27, 35-36]. Under the terms of

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<sup>1</sup> Included separately in the record certified by the Hardin Circuit Clerk.

the parties' settlement, the parties agreed that Lydia should have sole custody of the parties' two minor children. [R. 20]. In early 2007, Lydia and the children relocated to Valparaiso, Indiana, with Kevin's assent. Resp.'s Post-Trial Memorandum at 1.

At the time of trial, Lydia had always been the primary caregiver of S.A. and M.A. Resp.'s Post-Trial Memorandum at 2. In contrast, Kevin had largely failed to take the opportunity to become involved in, and to be knowledgeable about, his children's lives. During the marriage, Lydia was a stay-at-home mother who took care of the children's needs on a daily basis. *Id.* After the parties' separation in 2007, Kevin volunteered to work for six (6) months overseas, and when he returned, Kevin only exercised his parenting time with the children, on average, one weekend per month. *Id.* While Kevin had two (2) set times per week to call the children, on average, he called the children just once per week, or fifty percent (50%) of the time he was allocated. *Id.* at 3. Some weeks, Kevin did not even call at all to speak with the children. *Id.*

The parties did not contest at trial that Kevin had a strained relationship with the girls or that the children were doing exceptionally well in Lydia's care. Kevin testified that his relationship with the girls has been strained ever since the parties were divorced in 2007, five (5) years prior to the trial. Resp.'s Post-Trial Memorandum at 4. During that time, Kevin never asked Lydia to get the children into counseling so that he could work on his relationship with S.A. and M.A. *Id.* It was also not in dispute that the children were well-established living in Valparaiso, made good grades, were active in their church and community, and made friends wherever they went. *Id.* at 3-4. Dr. Kelli Marvin, a psychologist retained by Kevin to perform a custodial evaluation, testified that she did not have any concerns about the children living in Valparaiso. *Id.* at 4.

Litigation concerning visitation, maintenance, and child support continued for the five (5) years leading up to trial, including a prior appeal and cross-appeal to the Court of Appeals regarding a trial court's discretion to allow offsets against maintenance and child support for certain sums paid to a former spouse, issues which are unrelated to the instant appeal. *See generally* Resp.'s Post-Trial Memorandum at 1-2; *Addison v. Addison*, 2007-CA-001848-MR, 2007-CA-001849-MR, 2009 WL 484983 (Ky. App. 2009). In 2007, the trial court, after a colloquy with the court in Lydia's county of residence in Indiana, denied Lydia's first request to transfer the case into that jurisdiction. [R. 95]. A prior request to modify custody by Kevin was denied on March 30, 2009, for his failure to state adequate grounds in the attached affidavit. [R. 344-345].

Allegations that Kevin had sexually abused the parties' daughters lie at the heart of the instant appeal, although those allegations were ultimately not substantiated. It is not in dispute that several mental health professionals told Lydia that it was their opinion that Kevin sexually abused the children or that he "may have sexually abused the children" (Duneland Counseling; Mid-America Psychological & Counseling Services; Dr. Pi). Resp.'s 8/16/2012 Trial Ex. 10 and 17.

Drs. Gunn and Gopal at Mid-America Psychological & Counseling Services examined S.A. on October 11, 2007 and November 26, 2007. Resp.'s 8/16/2012 Trial Ex. 10. The examiners noted S.A.'s hostility and that she made "a few random comments that would [c]ause one to wonder whether there [h]as been abuse when she was somewhat younger." *Id.* at 10-11. They also stated that S.A. "tends to react in a very childish sort of manner and does give some indication that she may well [have] experienced some sexual abuse." *Id.* at 10. After this sexual abuse assessment and

concerns raised by the children's pediatrician, Dr. Pi, Ms. Dionna Hatfield (Lydia's attorney at that time) sent a letter to Kevin's former counsel, Mr. Barry Birdwhistell, advising him of the CPS complaint by Dr. Pi. Lydia, through her attorney, stated she was "not accusing Kevin of any wrong-doing," but that she was "concerned" about the doctors' reports and that they needed to figure out what was going on with the children. Resp.'s 8/16/2012 Trial Ex. 16.

In late 2009, the girls were referred by their school to Family Focus for counseling, based upon emotional outbursts by M.A. at school and similar emotional behavior by S.A. Resp.'s Post-Trial Memorandum at 10; Resp.'s 8/16/2012 Trial Ex. 17. The girls' counselor at Family Focus was Danielle Vance. *Id.* In a session on February 20, 2010, M.A. reported events to Ms. Vance where Kevin had sexually abused her. Resp.'s 8/16/2012 Trial Ex. 17 at 8. Ms. Vance reported the allegations to CPS, and CPS initiated an investigation. *Id.* at 9-10. Ms. Vance also expressed to Lydia that Kevin had sexually abused the children and told Lydia that she must take proactive measures to protect the children from Kevin. *Id.* at 8-9, 11. Ms. Vance recommended cutting off all contact between Kevin and the children during the pendency of the CPS investigation. Depo. of Danielle Vance at 26.

On March 19, 2010, the trial court overruled Kevin's motion for parenting time, citing the ongoing investigation of Kevin by child services. [R. 413]. However, the allegations of sexual abuse were never substantiated, and after receiving Dr. Marvin's report pointing out errors in the prior professionals reports of sexual abuse, Lydia submitted an affidavit agreeing to remove any restrictions on Kevin's parenting time and

setting forth acceptable parenting time dates for the remainder of the year. [R. 419-422]. Kevin was then awarded supervised parenting time. [R. 442-443].

On January 26, 2011, Kevin filed a motion for unsupervised parenting time and for the parties to participate in an evaluation with Dr. Marvin, a forensic psychologist, to ascertain parenting time. [R. 494-495]. Dr. Marvin was appointed to perform an evaluation by the trial court on February 2, 2011, but that order was silent as to the scope of said evaluation. [R. 496-497]. Lydia later requested that the trial court clarify Dr. Marvin's role to provide that she was performing a child access evaluation to determine whether Kevin's parenting time should be supervised or unsupervised, but Lydia's request was denied. [R. 564-571, 623].

Dr. Marvin filed her "child access report" on January 23, 2012, which consisted of two (2) narrative reports regarding Dr. Marvin's clinical contact with Kevin and Lydia, a report regarding records reviewed by Dr. Marvin, and a conclusory report which contained summaries of collateral interviews and Dr. Marvin's recommendations regarding visitation. In that report, Dr. Marvin stated that "the sole viable recommendation" was that the children remain in Lydia's care in Indiana, but spend all extended breaks, including summer vacation, and half of the monthly weekends with Kevin. Dr. Marvin's Conclusory Report at 27. Dr. Marvin admitted at trial that the purpose of this assessment was to determine if Kevin required ongoing supervised contact with the children. Resp.'s Post-Trial Memorandum at 11 (*see also* Dr. Marvin's Conclusory Report at 2).

Kevin then moved to extend the scope of Dr. Marvin's evaluation to include custodial recommendations and to have the children primarily reside with Kevin, even

though no motion to modify custody was pending at the time of his request. [R. 628-631]. Kevin's motion to modify custody, with its supporting affidavit, was filed on January 20, 2012. [R. 632-640]. Kevin's affidavit claimed that Lydia was engaged in an ongoing attempt to sabotage his relationship with the children and generally trying to "alienate" him from his children. [R. 634-638]. Lydia objected to Dr. Marvin issuing a custodial evaluation report and argued that was beyond the scope for which Dr. Marvin was retained and of which Lydia had agreed to when she had agreed to participate. *See generally*, TR, 1/20/2012. Pursuant to an order of the trial court, Dr. Marvin filed her recommendations regarding custody approximately two (2) weeks later. *See* Dr. Marvin's Addendum Report. While these motions were pending, Lydia readily agreed to allow Kevin unsupervised parenting time, based on Dr. Marvin's opinion that Kevin never sexually molested the children and her report that discredited the prior therapist, psychologists and pediatrician who told Lydia that Kevin had or was suspected of having sexually molested the children. [R. 643-645]. Lydia consistently expressed a strong willingness to co-parent the children with Kevin. Resp.'s Post-trial Memorandum at 5. Lydia submitted a number of emails to the court where she had consulted with Kevin on academic matters and worked out agreements on parenting time, choice of schools, medical decisions, et cetera. *Id.*; Resp.'s 8/16/2012 Trial Exs. 7, 12, and 20.

Lydia, as reflected in the children's counseling records, encouraged the children to have a better relationship with Kevin and to have parenting time with their father. Resp.'s Trial Ex. 17, at 29. Dr. Zamanian, a custodial evaluator retained by Lydia, testified that he believed that Lydia did not do anything intentionally to undermine the father-daughter relationship Kevin has with the children and that Lydia was actually

supportive of that relationship. Resp.'s Post-trial Memorandum at 6. As an example, Dr. Zamanian referred to the fact that Lydia actively sought for the children to work on their relationship with Kevin in counseling. *Id.* As further grounds to support his opinion that Lydia was not trying to alienate Kevin, Dr. Zamanian stated that Lydia does not have a track record of deceit, no criminal record, and that Lydia always followed the advice of the children's professionals. *Id.* Dr. Zamanian further testified that there was never a time that Lydia failed to follow the advice of the children's therapist. *Id.*

Dr. Marvin's addendum report was filed on February 13, 2012. She determined that the children should not be separated and should reside together. Dr. Marvin's Addendum Report at 2.<sup>2</sup> While Dr. Marvin opined that transfer of M.A. to Kevin's primary care and custody was in her best interest, she did not make such a recommendation for S.A., as she found that her best interests were "unknowable." *Id.* at 3. In fact, Dr. Marvin noted that S.A. "is likely to rebel if transferred" to Kevin's custody, and that it was possible that S.A. might "act-out against herself or others and require hospitalization." *Id.* Overall, Dr. Marvin recommended that Kevin receive primary residential care and custody of M.A. and S.A. based upon the best interests of M.A. and Kevin's "stance that it is in the children's best interests to have a relationship with" Lydia. *Id.* at 4. Dr. Marvin also reiterated her recommendation that S.A. receive therapy and added a recommendation that Lydia do the same. *Id.* at 4-5. With respect to visitation, she recommended that Lydia receive "a liberal visitation schedule, including every-other weekend visitation and a full share of holidays and school vacations." *Id.* at 5. This recommendation was issued only days after Kevin moved to modify custody.

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<sup>2</sup> Included separately in record certified by the Hardin Circuit Clerk.

In February 2012, Lydia again moved the court to relinquish its jurisdiction over the custody and visitation issues and to permit the parties to move the case to Porter County, Indiana, as the issues for the trial court were not limited to whether Kevin should have supervised or unsupervised parenting time, but whether the court should modify custody and with which parent the children would primarily reside. [R. 663-669]. The trial court overruled Lydia's request to change jurisdiction. [R. 663-669; 723-739]. Retaining jurisdiction, the trial court then set an August 16, 2012 hearing date for the modification of custody issue and whether the primary residence of the children should change from Lydia to Kevin. [R. 743]. Just six (6) weeks before trial, the trial court appointed LeeAnna Dowan-Hardy as guardian *ad litem* (GAL) for the parties' children. [R. 842]. Ms. Dowan-Hardy tendered a "report" on September 5, 2012, after the parties August 16, 2012 hearing. [R. 963-967].

Despite a voluminous list of witnesses tendered by Lydia and her request for additional time to present her case at trial, the court limited the parties and GAL to a six (6) hour trial. TR, 2/7/2012; [R. 913-920]. The trial court indicated that it never provides more than six (6) hours' time for any hearing. *Id.* at 2:14:30. The trial was held on August 16, 2012. The only testimony elicited was that of Lydia, Kevin, Dr. Marvin, Dr. Pi, Dr. Trifone from Duneland Counseling, and Dr. Zamanian. *See generally* TR 8/16/2012. The children were not permitted to testify. *Id.* at 9:08:05-9:28:30. Lydia had additional witnesses she wanted to call to testify and who were ready to testify at Court, but the trial court would not allow her, as the court claimed there was not enough time. Lydia also had very little time to conduct a cross-examination of Kevin due to these time constraints. TR, 8/16/2012 at 3:33:30.

Contrary to Dr. Marvin's report, Dr. Trifone emphasized in her testimony that it was her decision to call CPS and report her concern that Kevin had sexually abused one or both of the children. TR, 8/16/2012, 1:14:10. Dr. Trifone emphasized that it was her decision, as the Director of Duneland Counseling, and that Lydia had no input into that decision. *Id.* Also contrary to Dr. Marvin's report, Dr. Pi's testimony and affidavit confirmed that Dr. Pi called CPS on her own initiative regarding concerns over Kevin sexually abusing one of the parties' children and that Lydia was not attempting to have her make such a report. *Id.* at 3:46:00; Resp.'s 8/16/2012 Trial Ex. 15.

Dr. Marvin admitted at trial that the primary purpose of her original assessment was to determine if Kevin required ongoing supervised contact with the children. TR, 8/16/2012, 1:32:00 (*see also* Dr. Marvin's Conclusory Report at 2). Dr. Zamanian, a professor of psychology and a forensic psychologist who has over 30,000 hours of clinical experience and has frequently been a court-appointed expert in family courts, testified that in his opinion it was error for Dr. Marvin to transform an evaluation to determine a parent's access to a child into a full custodial evaluation. TR, 8/16/2012, 3:54:30. Further, Dr. Zamanian did not recommend that the primary residence of the children should be changed. *Id.*

On cross-examination, Dr. Marvin admitted that there was likely to be estrangement, whether intentional or unintentional, if Lydia believed that Kevin sexually abused their child. TR, 8/16/2012, 2:27:00. She further testified that a well-intentioned parent, such as Lydia, seeking to protect her children could act in a way that damages the relationship with the noncustodial parent based on a genuine belief that the children had been sexually abused, and that it was necessary to protect the children from further sexual

abuse. *Id.* Dr. Marvin admitted in her testimony that Ms. Vance validated to the children and to Lydia that the children had been sexually abused when in fact they had not. *Id.* at 2:29:40. Dr. Marvin said it was reasonable for Lydia to rely upon the children's therapist, Ms. Vance, given that she "gave her professional assurance" that the children were sexually abused. *Id.*

Before the court entered its judgment, Lydia requested that the court supplement the trial record with the records from Kevin's employer, which, despite a court order compelling production, were not received by Lydia in advance of trial. [R. 970-976]. Lydia also sought additional time to present her proof or, in the alternative, to enter the affidavits of three (3) witnesses that she was prepared to call at the August 16<sup>th</sup> trial but was unable to question because of time constraints. *Id.* The records and witnesses were all duly listed on Lydia's supplemental compliance filed with the court. [R. 934-942]. The trial court denied these requests.

The trial court's Findings of Fact and Conclusions of Law was entered on October 26, 2012. [R. 1041-1045]. That order vaguely references "the testimony at the hearing on the matter" and the "cumulative evidence," without discussing who gave the testimony or describing the evidence. [R. 1042]. The court found that granting sole custody to Kevin was in the children's best interests because it found that Lydia "is not capable of acting jointly with [Kevin] in any meaningful decision making process." [R. 1043]. Further, the court restricted Lydia to supervised visitation to one hour per month, because it found that such visitation was in the best interests of the children, without setting any conditions that might lead to her regaining unsupervised visitation. *Id.* It also determined that each party would pay his or her own attorney's fees, but did not make

any findings regarding the parties' financial resources. [R. 1044]. Lydia then moved the trial court to make additional findings of fact and to alter, amend, or vacate its October 26, 2012 Order. [R. 1046-1056]. That motion was overruled by the order entered on November 28, 2012. [R. 1087]. The trial court subsequently filed an Amended and Supplemental Findings of Fact, Conclusions of Law, Decree and Order on June 21, 2013<sup>3</sup>.

### ARGUMENT

**I. The Court of Appeals Correctly Held That the Trial Court Improperly Placed a Time Restriction on the Hearing Without Considering the Admissibility or Exclusion of the Evidence Pursuant to the Kentucky Rules of Evidence.**

This issue is preserved in the record at [R. 688]. Lydia was limited in her ability to present evidence and to introduce the testimony of a number of relevant witnesses at the August 16, 2012 hearing. The Court of Appeals agreed with Lydia that the “trial court’s time limit was an abuse of discretion given Lydia’s lengthy witness list and what appears to be an arbitrary imposed time limitation.”<sup>45</sup>

As stated by the Court of Appeals, Lydia recognizes that a trial court has power to impose reasonable time limits on trial and hearings.

A trial court clearly has the power to impose reasonable time limits on the trial of both civil and criminal cases in the exercise of its reasonable discretion. *See, United States v. Reaves*, 636 F.Supp. 1575 (E.D.Ky.1986). As long as these trial limits are not arbitrary or unreasonable we will not disturb the court’s decision on review.

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<sup>3</sup> Appellant’s Appendix 4

<sup>4</sup> The Court of Appeals declined to address Lydia’s argument concerning restriction of cross-examination because their reversal and remand rendered this argument moot. Court of Appeals Opinion, page 15, footnote 7.

<sup>5</sup> Appellant’s Appendix 1

*Hicks v. Commonwealth*, 805 S.W.2d 144, 151 (Ky. App. 1990). A trial court abuses its discretion where its decision “was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Miller v. Eldridge*, 146 S.W.3d 909, 914 (Ky. 2004).

The Court of Appeals notes that the trial court’s decision to limit the trial to six (6) hours did not appear to be an individualized assessment by the trial court regarding the time required by the parties to present their evidence. *See* Court of Appeals Opinion, page 15.

An arbitrary time limitation excludes testimony or other evidence without considering its admissibility or inadmissibility pursuant to the Kentucky Rules of Evidence. KRE 402 provides, with some exceptions, that all “relevant evidence is admissible.” KRE 401 defines relevant evidence to be “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Relevant evidence may be excluded “if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.” KRE 403. The Kentucky Rules of Evidence provide exceptions to these general rules.

As noted by the Court of Appeals, trial courts are presented with the difficult and delicate task of adjudicating large volumes of cases with little time to do it. However, crowded dockets and administrative efficiency do not serve as excuses to deprive the litigants of their day in court. 75 Am. Jur. 2d Trial 21 (2013) (citing *Ingram v. Ingram*, 125 P.3d 694, 698 (Ok. App. 2005)). In *Ingram*, the court considered whether the trial court had abused its discretion by imposing rigid time limits at trial, holding that “the

overriding principle is that parties in litigation are entitled to a meaningful and full opportunity to be heard, so rigid time limits are disfavored.” 125 P.3d at 698 (citing *Brown v. U.S. Fidelity & Guar. Co.*, 977 P. 2d 807, 812-813 (Ariz. App. 1998)).

A trial court has the duty to afford a litigant sufficient time to make an orderly presentation of his or her case, including the case-in-chief and cross-examination. *In re Marriage of Glenn*, 18 Kan.App.2d 603, 856 P.2d 1348 (1993). Crowded dockets and administrative efficiency do not serve as excuses to deprive the litigants of their day in court. *Id.* at 1351; *see In re Marriage of Finer*, 893 P.2d 1381, 1389 (Colo.Ct.App.1995). Finally, the exercise of a trial court's discretion to impose time limitations should be done according to general guidelines so as to avoid arbitrary and surprise procedures. *Goodwin v. Goodwin*, 618 So.2d 579, 583 (La.Ct.App.1993).

*Id.* The *Ingram* court ultimately held that, by setting a rigid time limit for trial, the trial court abused its discretion and committed fundamental error. *Id.* at 699. The court also established a list of non-exclusive factors for courts to consider when determining if specific time limits need to be imposed. *Id.*

- 1) The court may rely on any statute dealing with exclusion of otherwise relevant evidence where probative value is substantially outweighed by considerations of undue delay or waste of time, as well as statute requiring proceedings to be conducted in expeditious manner so that justice is done;
- (2) The court should thoroughly familiarize itself with the case through pretrial proceedings before imposing limitations, should require litigants to estimate length of their cases and, if necessary, amount of time for each witness;
- (3) Time limits should normally be imposed on all parties, before any party presents any evidence, and sufficiently in advance of trial for litigants to prepare for trial within limits imposed, although a court may impose limits after trial has begun if it becomes apparent that they have become necessary;
- (4) The trial court should inform parties before trial begins that reasonable extensions of limits will be granted for good cause shown;
- (5) The court should develop an equitable method of charging time against each litigant's time limits; and,
- (6) The trial court should put all rulings regarding time limits and reasons for them on the record. The Guidelines are not exclusive and do not cover all contingencies, and a court should also use its common sense and sound discretion to ensure that relevant, admissible, noncumulative evidence is presented in timely fashion so that justice is done.

*Id.* (citing *Goodwin*, 618 So.2d at 583-584).

The Ohio Supreme Court, addressing a similar dilemma, stated that “[w]hile courts inherently have the power to supervise and control their dockets, this power is tempered by the responsibility to efficiently administer justice.” *Disciplinary Counsel v. Sargeant*, 889 N.E.2d 96 (Ohio 2008).

To accommodate this arduous task of balancing interests, trial courts have a number of docket control measures at their disposal to manage their caseload. Docket control measures, which are provided for in the Kentucky Rules of Civil Procedure and the Kentucky Rules of Evidence, could have been employed by the trial court in order to manage the length of the hearing. *See* CR 43.04; CR 16. For example, under CR 43.04, the trial court had the option of allowing the parties to take testimony by deposition. Similarly, under CR 16, the trial court could have required the parties to appear for a pre-trial conference in order to resolve case issues before trial began. Once the witness lists had been exchanged, the trial court could have allowed the proffer of testimony to be considered by the court in chambers for relevance and possible exclusion pursuant to KRE 403 in advance of the hearing on admissibility. Unfortunately, the trial court did not take advantage of any of these docket control measures, and instead imposed an arbitrary time limitation on the August 16, 2012 custody hearing.

While it is certainly within a trial court’s discretion to impose time limitations on the length of arguments, the time restriction must be, “reasonable and of such length as not to impair the right of argument or to deny a full and complete defense.” *Braeunig v. Russell*, 166 N.E.2d 240, 242 (Ohio 1960). However, imposing an arbitrary time limitation in order to control a court’s docket “is not consistent with the expectations of

the parties to have a fair and impartial hearing based upon all admissible evidence, nor is it in the interest of justice.” Court of Appeals Opinion at 16.

Here, the trial court imposed an arbitrary time limitation for the August 16, 2012 custody hearing when it forced the parties, as it does all custody and/or modification of primary parenting time cases, to present their cases within a strict six (6) hour time. “In fixing the time to be allowed for argument, the importance of the case, the legal questions involved as shown in the instructions, the extent and character of the testimony, are all elements that must be considered.” *Asher v. Golden*, 50 S.W.2d 3, 4 (Ky. 1932). The time limitation imposed in this case was implemented well in advance of the hearing before the trial court as a blanket rule of the Court before the Court even had an opportunity to consider the relevance or admissibility of expected evidence and testimony to be presented at the hearing. Kevin argues that there is no evidence that the trial court did not consider the facts and circumstances of the case when it set the matter for a six-hour hearing. However, Lydia’s counsel had requested that the court allow an entire day for the final hearing in this matter, reminding the court of the complex nature of this case. TR, 2/7/12 at 1:55:50. Counsel’s request was denied, and *the Court indicated that it never provides more than six (6) hours’ time for any hearing.* *Id.* at 2:14:30. Further, as noted by Kevin, the hearing date and time was set well before the parties had exchanged witness and exhibit lists pursuant to the Family Court Rules of Procedure.

Lydia had requested that she be given additional time to put on proof in this matter so that all relevant testimony could be taken and all relevant witnesses may be heard. However, the court would not allow additional time or alternative means for the testimony and evidence to be presented to the court as allowed by the Kentucky Rules of

Civil Procedure and Kentucky Rules of Evidence. In fact, the trial court made no findings as to the relevance or admissibility of the fifty-three (53) persons that Lydia listed as potential witnesses, including the parties' children. As the trial court indicated that it never provides more than six (6) hours' time for any hearing, the time limit was clearly an arbitrarily imposed time limitation, especially given Counsel's request for additional time and the trial court's failure to consider the relevancy and admissibility of Lydia's listed witness' testimony.

Kevin contends that it was unrealistic for Lydia to expect to call 53 witnesses and that she failed to demonstrate how she was prejudiced by not being able to call the witnesses. The trial court erred in not considering and in failing to make findings concerning the relevance or admissibility of the expected testimony of Lydia's potential witnesses. Lydia was in fact prejudiced, as sole custody of her two children was transferred from her to her ex-husband. Kevin argues that the trial court had the report of Dr. Marvin, the court's witness, prior to trial. However, roughly a third of the allotted six (6) hours was occupied by the testimony of Dr. Marvin. The time for Lydia to present her case was further reduced by the fact that the trial court included the guardian *ad litem's* direct and cross-examination of witnesses in the same time period. Additionally, another twenty (20) minutes of the allotted time were expended in addressing preliminary motions filed by the guardian *ad litem*. See generally TR, 8/16/2012. In all, Kevin examined witnesses for over three (3) hours. *Id.* Lydia's witness list named fifty-three (53) potential witnesses who could provide relevant testimony. Lydia also planned on taking more extensive testimony from Dr. Marvin, Kevin Addison, and Dr. Zamanian, but was forced to constrict her examination of these witnesses due to time constraints.

**II. The Court of Appeals Correctly Held That the Trial Court Erred in Not Permitting the Children to Testify**

This issue is preserved in the record at [R. 913-920; 925-929].

The Court of Appeals correctly held that the trial court erred in not permitting both S.A. and M.A from offering any testimony. The issue of whether a child can be excluded as a witness, in a case involving the custody of said child, absent a finding of lack of competency, has not been decided by this Court. In Kentucky, there is no statutory or precedential authority that precludes a child from being called as a witness when the custody and/or visitation with that child is at issue. Prior to trial, Lydia requested that both S.A. and M.A. be allowed to testify as to their wishes regarding their custodian and parenting time with each parent. Although arguments were offered by the parties and GAL, the trial court did not hold a hearing to determine the competency of either child to testify nor was either child's competence to testify discussed in any trial court order.

KRE 402 provides, with some exceptions, that all "relevant evidence is admissible." KRE 401 defines relevant evidence to be "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." KRE 403. The Kentucky Rules of Evidence provide exceptions to these general rules.

The General Assembly has determined that the testimony of a child is relevant evidence as the "wishes of the child as to his custodian" is a relevant factor in

determining the best interests of the child for purposes of custody and parenting time. KRS 403.270(2)(b). The children could have offered testimony concerning their own thoughts, wishes, and feelings. The children were also the only witnesses to testify as to concerns about Kevin and to rebut facts and statements attributed to them by Dr. Marvin and the GAL. No one was more qualified to express this kind of testimony than the children themselves. As a child's testimony is relevant evidence that is admissible under KRE 402, a trial court must analyze whether the child witness is competent to testify.

KRE 601(a) states "[e]very person is competent to be a witness except as otherwise provided in these rules or by statute." For a witness to be disqualified, the trial court must determine whether the witness:

- (1) Lacked the capacity to perceive accurately the matters about which he proposes to testify;
- (2) Lacks the capacity to recollect facts;
- (3) Lacks the capacity to express himself so as to be understood, either directly or through an interpreter;
- or (4) Lacks the capacity to understand the obligation of a witness to tell the truth.

KRS 601(b)(1)-(4). Thus under, KRE 601, a child called as a witness by a parent must be allowed to testify unless the court determines that the child is disqualified under KRS 601(b)(1)-(4).

Kevin incorrectly contends that such a conclusion leaves a trial court with no control over the presentation of a child's testimony and no discretion as to whether the child will testify in open court. Given the often contentious nature surrounding a custody dispute, the KRE and the General Assembly have taken various measures to protect children who are called to testify in a court proceeding. First, the trial court retains the power to exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to... [p]rotect witnesses from harassment or undue

embarrassment.” KRE 611(a)(3). Furthermore, KRS 403.290 provides a specific mechanism for a trial court to control the mode and order of interrogating a child to ascertain the child’s wishes as to his custodian and as to visitation. It is within the discretion of the trial court to conduct an interview of the child in chambers in the absences of the parties and counsel as long as there is a record of the interview that is made part of the record in the case. KRS 403.290. The Kentucky Court of Appeals has consistently held that the decision whether to interview a child in chambers under 403.290(1) is permissive and left to the sound discretion of the trial judge. *Coleman v. Coleman*, 323 S.W.3d 770, 771 (Ky. App. 2010); *Brown v. Brown*, 510 S.W.2d 14, 16 (Ky. 1974); *Chappell v. Chappell*, 312 S.W.3d 364, 365 (Ky. App. 2010). However, neither KRE 611 nor KRS 403.290(1) can be interpreted to stand as grounds to exclude a child when called as a witness by a party in a custody proceeding.

Kevin also incorrectly contends that the decision in *Parker v. Parker*, 467 S.W.2d 595 (Ky. 1971) is controlling in this case. The ultimate issue before the *Parker* court was whether appellant’s attorney should have been present when the child was interviewed in chambers. *Id.* at 597. While the *Parker* court did discuss, in dicta, the court’s interest in protecting a child from the adversarial proceeding between his or her parents, the court ultimately held that the interview of the child without the presence of appellant’s attorney was not so prejudicial as to require reversal of the case. *Id.* Thus, *Parker* supports the argument that a child may not be excluded as a witness unless disqualified under KRE 611 and that 403.290(1) serves as a safeguard to protect the child from the adversarial proceeding.

This Court has previously addressed the delicate balancing of the interest of protecting a child for an adversarial proceeding and the procedural rights of the parents. *Couch v. Couch*, 146 S.W.3d 923 (Ky. 2004). In *Couch*, the trial court conducted an in camera interview of the child in the absence of the parties and counsel and sealed the transcript of said interview. While the *Couch* Court was silent as to the trial court's ability to decline to allow a child to be called as a witness in a case involving his custody and care, in its analysis of the competing interests at play, the Court reasoned:

We are cognizant of the fact that in many instances it may be helpful for the trial court to privately interview the child whose welfare is so vitally affected by the trial court's decision in an attempt to protect him or her from the pain of openly choosing sides. Nevertheless, it is the parties' constitutional right to hear all of the evidence offered in the case... In striking the appropriate balance between the interests of children and the procedural rights of parents, we hold that while it is certainly within the discretion of the trial court to conduct an *in camera* interview in the absence of the parties and counsel, a record of such interview must be made so that the parties are afforded the subsequent opportunity to determine and contradict the accuracy of statements and facts given during the interview.

*Id.* at 925-26. This holding is consistent with Lydia's argument that the trial court cannot deny a parent his or her right to call a competent child to testify as to his wishes regarding custody and parenting time within the procedural safeguards of 403.270(2)(b) and KRE 611.

Kevin also contends that this case is distinguishable from the *Coleman* case because the children were interviewed by psychologists and a guardian *ad litem* who provided testimony and reports to the trial court. KRS 403.290(2) permits a court to "seek the advice of professional personnel" as long as such advice is given in writing and the professional is available for cross-examination. However, the testimony of such professionals should not wholly substitute the testimony of the child as especially in this case where Lydia disputed the accuracy of Dr. Marvin's and GAL's report.

Similarly, the testimony of the guardian ad litem does not serve as a substitute for the testimony of the children in light of this Court's recent opinion in *Morgan v. Getter*, 441 S.W.3d 94 (Ky. 2014). As in *Morgan*, the GAL in this case served a dual role in that she submitted a report as a "friend of the court" and also served as the attorney for the children, which made her not subject to cross-examination. In her report and questioning at trial, the GAL was clearly trying to advocate for the best interests of the children and not solely serving as a voice to the children's wishes. Regardless, the testimony of each child witness serves as better evidence than that of another person voicing the child's alleged wishes.

**III. The Court of Appeals Should Have Also Reversed On Grounds That The Trial Court Should Have Relinquished Jurisdiction To The Indiana Trial Court**

This issue is preserved in the record at R. [663-677].

The Court of Appeals erred in upholding the trial court's decision to deny Lydia's Motion to Transfer Continuing and Exclusive Jurisdiction to Indiana. Contrary to the requirements of KRS 403.824(1), at the time of Lydia's motion, Lydia and the children did not have a "significant connection" with the state of Kentucky and there was no "substantial evidence" available in Kentucky regarding the children's care, training, and personal relationships. The case should have been transferred to Porter County, Indiana, which is a more appropriate forum to address the children's custody.

*A. Because Lydia and the children had no "significant connection" to Kentucky at the time Lydia filed her motion to transfer and the Court failed to properly apply the factors of KRS 403.834(2), the Court erred in exercising jurisdiction over this case.*

Under Kentucky law, the Hardin Circuit Court erred in exercising exclusive, continuing jurisdiction over this case, because neither Lydia nor the children continued to

have a “significant connection” with Kentucky, the forum state, at the time her motion to transfer was filed. Further, the Court erred when it failed to follow the “analysis and procedures mandated by the UCCJEA” when applying the factors listed in KRS 403.834(2) to determine whether or not Kentucky was an inconvenient forum. *Biggs v. Biggs*, 301 S.W.3d 32, 34 (Ky. App. 2009). The question of whether a trial court acted within its jurisdiction “is a question of law.” *Id.* at 33. Therefore, the standard of review on appeal is *de novo*. *Id.*

Kentucky’s implementation of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) is codified at KRS 403.800 *et seq.* KRS 403.824(1)(a) states, in pertinent part, that “a court of this state which has made a child custody determination . . . has exclusive, continuing jurisdiction over the determination until [a] court of this state determines that neither the child, nor the child and one (1) parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child’s care, protection, training and personal relationships.” The term “significant connection” was explained in a comment to UCCJEA § 202:

[E]ven if the child has acquired a new home State, the original decree State retains exclusive, continuing jurisdiction . . . If the relationship between the child and the person remaining in the State . . . becomes so attenuated that the court could no longer find significant connections and substantial evidence, jurisdiction would no longer exist.

*Biggs*, 310 S.W.3d at 33.

While “significant” for the purposes of KRS 403.824(2) is not defined by the statute, it must mean something more than a bare connection with the forum state. “Significant” can have several meanings, including “of a noticeably or measurably large

amount.” *Merriam-Webster’s Collegiate Dictionary* 1091 (Frederick C. Mish ed., 10th ed., 1999). Simply because a child visits with a non-custodial parent in a given jurisdiction does not mean that the child’s connection to that jurisdiction is “of a noticeably large amount.”

An analogy should be drawn from the findings that courts must make in determining whether a defendant may be subjected to personal jurisdiction in the forum. In such situations, courts may be required to determine whether a defendant has “minimum contacts” or “continuous and systematic . . . contacts” with a forum state. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984). As this Court is aware, “minimum contacts” support specific personal jurisdiction arising out of a defendant’s conduct in the forum, where “continuous and systematic . . . contacts” are required to support general personal jurisdiction. *Helicopteros*, 466 U.S. at 414, 415-416. Thus, courts draw a well-defined distinction between “minimum” and “continuous and systematic” connections.

A “significant” connection should be placed in a continuum somewhere between minimum and systematic contacts. If the drafters of the UCCJEA had intended that a mere, minimal connection be sufficient to confer continuing, exclusive jurisdiction, they could have omitted the inclusion of the word “significant” altogether. Therefore, a “significant” connection should be construed as something more than a minimum connection, but need not rise to the level of a systemic connection.

While Lydia recognizes that the children do not need to live in Kentucky for a Kentucky court to exercise jurisdiction, at the time of Lydia’s motion to transfer

jurisdiction, the connection between Lydia or the children and Kentucky was not significant. Even more importantly, under the factors listed in KRS 403.834, at the time of Lydia's motion to transfer jurisdiction, Kentucky was an inconvenient forum for this case to be heard. At the time of her motion to transfer, Lydia and the children had been residents of Indiana for approximately five (5) years, and Indiana was the home state of the children. Furthermore, outside of Kevin and his family, all of S.A.'s and M.A.'s contacts were in Indiana. S.A. and M.A. attended school in Indiana, all of their extracurricular activities occurred in Indiana, all of their friends lived in Indiana, and the children only attended church in Indiana. Lastly, all of the children's medical providers were in Indiana.

Even if Lydia and the children's connection to Kentucky were significant, no "substantial evidence" was available in Kentucky "concerning the child's care, protection, training and personal relationships." KRS 403.824(2). In *Ky. State Racing Comm'n v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972), the Commonwealth's highest court held that "[t]he test of substantiality of evidence is whether when taken alone or in the light of all the evidence it has sufficient probative value to induce conviction in the minds of reasonable men." (citation omitted).

The relevant evidence available in Kentucky was not "substantial," as the Indiana evidence was determinative in this case. Most of the potential witnesses were in Indiana, and Dr. Marvin was even required to travel there to complete her report. With the exception of Kevin, Kevin's family, and Dr. Marvin, almost every witness with information regarding S.A. and M.A. was in Indiana, including their teachers, coaches,

and health care professionals.<sup>6</sup> Because of the difficulty and expense of securing her witnesses' attendance at hearings in Kentucky as well as the short time frame of the trial, Lydia was only able to call a limited number of witnesses. In fact, the only Indiana witnesses that testified, other than Lydia, were Drs. Trifone and Pi, who testified telephonically. This should be contrasted with Lydia's trial compliance, which lists thirty-eight (38) possible witnesses with Indiana addresses and several other possible witnesses from Indiana for whom Lydia did not have addresses. [R. 934-942]. Further, the trial court denied Lydia's motion to allow Lydia's crucial witness, Danielle Vance, to testify telephonically and required her to be present at the hearing in order to testify. [R.922]. As Dr. Vance was not able to make the trip from Indiana to Kentucky, she did not testify.

The Kentucky evidence presented at trial is unlikely to "induce conviction in the minds of reasonable men" and was therefore not significant. The only Kentucky persons interviewed by Dr. Marvin were Kevin and his wife, Leslie. *See* Dr. Marvin's Sources of Information and Review of Records. While Dr. Marvin consulted some Kentucky records, such as Hardin County CHFS records and court documents, all of the documentary evidence directly relating to the children came from Indiana. Further, Dr. Marvin's report was based in large part on the various interviews of Indiana persons.

*B. The Court of Appeals erred in upholding the trial court's determination that Hardin County, Kentucky was not an inconvenient forum.*

Even if the trial court properly exercised its jurisdiction in the first place, it erred in refusing to transfer this case to Indiana because Kentucky was an inconvenient forum in which to adjudicate the custody issue pursuant to KRS 403.834. The trial court's error

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<sup>6</sup> While Dr. Zamanian is located in Kentucky, he was not retained in this case until after the motion to transfer was denied by the trial court.

in this determination was twofold. First, it failed to determine whether Indiana would be a more convenient forum as required by KRS 403.834. Second, it abused its discretion by retaining jurisdiction.

In upholding the trial court's decision to deny Lydia's motion to transfer this case to Indiana, the Court of Appeals relied heavily on the fact that Lydia had waited five (5) years before requesting the transfer of jurisdiction. *See* Court of Appeals Opinion, page 9. The Court of Appeals stated, "we believe that this issue should have been raised years ago after the initial jurisdictional determination by the Hardin Court, as opposed to Lydia waiting years to bring this matter before the court when it appeared that the court would change the custody determination." *See* Court of Appeals Opinion, page 12.

Although it is true that Lydia could have requested to transfer jurisdiction of this case earlier in the proceedings, such a possibility is of no consequence. Under the UCCJEA, a Kentucky court properly vested with jurisdiction "may decline its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum." KRS 403.834(1). Therefore, the timing of Lydia's request is of no import. A Kentucky court may decline its jurisdiction, "at any time." *Id.* Consequently, the Court of Appeals should only have considered whether or not, at the time Lydia made her request, if the Kentucky Court was "an inconvenient forum under the circumstances" and there was "a court of another state" that was a "more appropriate forum." *Id.*

Prior to determining whether Kentucky is an inconvenient forum, a court of this state must "consider whether it is appropriate for a court of another state to exercise jurisdiction" and must "consider all relevant factors." KRS 403.834(2). However, instead

of analyzing whether the trial court had properly considered these factors, the Court of Appeals assumed that because the trial court had “concluded that it was retaining jurisdiction given the length of time the case had been pending before it” that the trial court had “considered the factors set forth in KRS 403.834 and found that factor, ‘The familiarity of the court of each state with the facts and issues in the pending litigation’ to warrant exercising its jurisdiction instead of declining it.” *See* Court of Appeals Opinion, page 13.

Under the UCCJEA, a court must follow the analysis mandated by statute. Before a new state may exercise custody jurisdiction, a Kentucky trial court must determine whether the new state would be a more convenient forum under the factors listed in that KRS 403.834(2). *Mauldin v. Bearden*, 293 S.W.3d 392, 401 (Ky. 2009). In other words, a trial court is “required to consider what – if any – other courts might be appropriate.” *Biggs*, 301 S.W.3d at 35.

Under KRS 403.834(2), the factors to be considered are:

- (a) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
- (b) The length of time the child has resided outside this state;
- (c) The distance between the court in this state and the court in the state that would assume jurisdiction;
- (d) The relative financial circumstances of the parties;
- (e) Any agreement of the parties as to which state should assume jurisdiction;
- (f) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;
- (g) The ability of the court of each state to decide the issue expeditiously and the procedure necessary to present the evidence; and

(h) The familiarity of the court of each state with the facts and issues in the pending litigation.

These factors weigh heavily in favor of Porter County, Indiana as a more appropriate forum in which to have litigated the custody matter. However, there is no evidence that the trial court considered any of these factors other than the final factor, “the familiarity of the court of each state with facts and issues in the pending litigation.” At the time of Lydia’s motion, the children lived in Porter County, Indiana and had lived there for five (5) years. The distance between Valparaiso, Indiana and Hardin County, Kentucky is over three hundred (300) miles and is an approximately six (6) hour drive each way. The long distance between the Court and the children’s home subjected Lydia and the children to substantial hardship each time the children or Lydia were required to appear in court. While both parties worked, Lydia, who earned only \$17,692 in 2011, had considerably fewer financial resources and less means to bear the cost of litigation and travel with the children, when compared to Kevin who made approximately \$90,000 a year – nearly four (4) times her income. *See* Resp.’s Post-Trial Memorandum at 30-31. By litigating the custody issue in Kentucky instead of Indiana, Lydia was subjected to substantial costs that Kevin was never required to bear. As discussed above, most of the evidence regarding the children’s protection, training, personal relationships and best interests was in Indiana. Further, as Indiana witnesses were not subject to the jurisdiction of Kentucky’s courts, Lydia was unable to secure the attendance of critical witnesses in Kentucky, including Danielle Vance.

There was no indication that the court in Porter County, Indiana was not equally equipped to resolve the parties’ custody issue expeditiously. Although the trial court was

more familiar with the procedural history of the case, Indiana courts of competent jurisdiction are ably equipped to adjudicate custody issues. The issues in this case would have been readily understood by such a court.

Furthermore, at the time Lydia moved to transfer jurisdiction in this case, at least six (6) of the eight (8) factors listed in KRS 403.834(2) weighed in favor of Porter County, Indiana being a more appropriate forum in which to hear the case. Only one (1) of those factors -- that the Hardin County Circuit had refused to relinquish jurisdiction over the matter for quite some time, actually weighed against Porter County, Indiana being a more appropriate forum for this litigation.

It is unclear from the record whether the trial court even addressed the factors of KRS 403.834(2) in making its determination of whether Kentucky was an inconvenient forum. The March 1, 2012 Order overruling Lydia's motion states no grounds for its disposition and makes no findings regarding whether Indiana is a more convenient forum. The only reasoning the trial court gave to support its retention of jurisdiction over this case was the length of time that the case had been before the court. TR, 2/7/2012, at 2:07:45.

In *Biggs*, the Kentucky Court of Appeals found that a trial court had committed error in determining that a father and his son had no significant connections to Kentucky without properly considering the factors listed in KRS 403.834(2). Before making its findings, the Court of Appeals noted that other jurisdictions around the country consistently require their courts to apply, "rather meticulously," the factors listed in their respective statutes that correspond with KRS 403.834(2). 301 S.W.3d 32 at 34. See *Meyeres v. Meyeres*, 196 P.3d 604, 609 (Utah App. 2008) (holding that trial court had not

appropriately declined jurisdiction when it failed to consider any of the relevant statutory factors determining whether or not Utah was an inconvenient forum other than the factor focusing on length of time that the child had lived in the state); *In re Adoption of Baby Boy M.*, 193 P.3d 520, 525 (Kan. App. 2008) (holding that trial court's considering whether to decline jurisdiction on the basis that Kansas was an inconvenient forum must consider all relevant statutory factors, rather than focusing solely on the residence of the child.)

In this case, the trial court made its determination that Kentucky was a convenient forum for litigation based on only one of the KRS 403.834(2) factors. The Kentucky Court of Appeals then upheld this determination despite its earlier findings in *Biggs*, that Kentucky trial courts must consider all of the relevant 403.834(2) factors when making inconvenient forum determinations.

The trial court abused its discretion in retaining jurisdiction over this custody matter when it failed to address the factors contained in KRS 403.834(2). As Kentucky's courts have recognized, "[t]he test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Miller*, 146 S.W.3d at 914 (citation omitted). Here, several of the KRS 403.834(2) factors weighed in favor of transferring this case to Indiana, while only one (1) of those factors weighed in favor of the trial court retaining jurisdiction. The Court of Appeals erred when it upheld the trial court's determination despite the fact that there was no indication that an Indiana court would not have been able to decide the custody issue expeditiously. The trial court's decision to arbitrarily retain jurisdiction over this case

was an abuse of discretion, and should have been overturned by the Court of Appeals when this case was set before it on Appeal in 2013.

**IV. The Court of Appeals Should Have Also Reversed on Grounds That The Best Interests of the Child Standard Must be Applied to Each Child**

This issue is preserved in the record at [R. 1051-1052].

The Court of Appeals declined to address Lydia's argument concerning custody and parenting time because of its decision to remand on other grounds. As this Court has accepted discretionary review, this issue should be considered in reviewing the appeal in order to properly dispose of the case.

KRS 403.340(3) states that a custody decree may be modified upon a "basis of facts that have arisen since the prior decree or that were unknown 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 is necessary to serve the best interests of the child." KRS 403.340 references the "child," with respect to a modification of child custody, in the singular form of the noun. Therefore, the modification of custody of each child must be in that child's own best interest. "The purpose of statutory construction 'is to give effect to the intent of the legislature.'" *Cosby v. Com.*, 147 S.W.3d 56, 60 (Ky. 2004) (quoting *County of Harlan v. Appalachian Regional Healthcare, Inc.*, 85 S.W.3d 607, 611 (Ky. 2002)). Courts "should refrain from surmising what the state legislature 'may have intended but failed to articulate.'" *Id.* (quoting *Peterson v. Shake*, 120 S.W.3d 707, 709 (Ky. 2003)). A court cannot substitute an analysis of the children's best interest where the legislature, by its clear language, requires it to determine the best interest of each child.

In this case, the custodial best interests of S.A. and M.A. are not the same. Dr. Marvin was appointed by the court to prepare a findings of fact in this case on the issues of custody and parenting time. At trial, Dr. Marvin stated that switching S.A. to Kevin's custody was not in S.A.'s best interest and that it may, in fact, cause her harm. She addressed S.A.'s best interest in detail in her report:

[S.A.] is likely to rebel if transferred to the primary care of the petitioner [Kevin]. This child will also likely seek to undermine the petitioner's attempts to forge a positive relationship with the subject child [M.A.]. It is within the realm of possibility that the child may even act-out against herself or other and require hospitalization. . . . Even if successfully transferred to the primary care and custody of [Kevin], the examiner can offer the Court no assurance that, even with the assistance of a skilled mental health professional, this child will be able to develop a positive relationship with the petitioner.

Dr. Marvin's Addendum Report at 3-4.

Dr. Marvin's report suggested S.A.'s mental and physical well-being could be severely harmed by a forced modification of the parties' custody agreement. In addition, it indicated that S.A.'s presence in such a modification could inhibit M.A.'s ability to successfully cope with a change in custody. Dr. Marvin's written recommendation cites only the best interests of M.A., and Kevin's contention that a father-daughter relationship is in each child's best interest, as the basis for her recommendation that both of the children should be placed in Kevin's care. *Id.* at 4. However, Dr. Marvin's written recommendation also states that S.A.'s best interests are unknowable. *Id.*

One of the factors courts must consider, when determining whether a modification of custody is in the best interest of the child, is "[w]hether the harm likely to be caused by a change of environment is outweighed by its advantage to [the child]." KRS 403.340(3)(e). The trial court failed to address the concerns Dr. Marvin had regarding

the possible transfer of M.A. and S.A. to Kevin's care which she mentioned in her report. Although the trial court appeared to rely solely upon the findings and recommendations Dr. Marvin made, it never articulated any factors or advantages that may have mitigated or outweighed Dr. Marvin's concerns. As a result, it is concerning that the court ignored Dr. Marvin's substantial fears over transferring S.A. to Kevin's care.

The clear language of KRS 403.340 requires Kentucky courts to address the best interest of each individual child, not the best interests of the children collectively. It is apparent from the clear language of the statute that the legislature did not intend for courts to consider sibling's best interests jointly when making custody modifications. However, when the trial court made its determination that custody of S.A. and M.A. should be modified, it made blanket statements concerning the best interests of both children as a whole. The court never provided a complete and detailed analysis of how the KRS 403.340 factors applied to the children as a pair. More importantly, however, the court never discussed how those factors applied to each child individually. The trial court's decision to modify custody was not in S.A.'s best interests. Because the trial court failed to meet the requirements of KRS 403.340, and because its final determination regarding the transfer of S.A. to Kevin's custody stands in direct opposition to the opinions of the experts who testified in this case, the trial court's custody modification determination should be overturned by this Court.

**V. The Court of Appeals Should Have Also Reversed on Grounds That Restricting Parent to One Hour Per Month Supervised Visitation Is Reversible Error Absent Finding that Unsupervised Visitation Would Seriously Endanger the Child's Physical, Mental, Moral, and Emotional Health**

This issue is preserved in the record at [R. 1052-1053].

The Court of Appeals declined to address Lydia's argument concerning parenting time because of the decision to remand on other grounds. As this Court has accepted discretionary review, this issue should be considered in reviewing the appeal in order to properly dispose of the case.

The trial court erroneously applied a best interest of the child standard in restricting Lydia to one (1) hour per month of supervised visitation. It found that "[i]t is in the best of the children that the Respondent [Lydia] receive supervised parenting time." [R. 1043]. However, the court did not address whether the children would be endangered by unsupervised visitation with Lydia, even though a finding of endangerment is required to support any restriction of a non-custodial parent's visitation. KRS 403.320.

KRS 403.320(1) requires a court to award "reasonable visitation rights" unless visitation would "endanger seriously the child's physical, mental, moral, or emotional health." KRS 403.320(3) forbids a court from restricting visitation, "unless it finds that the visitation would endanger seriously the child's physical, mental, moral, or emotional health." A finding of endangerment is required to restrict "reasonable visitation" as contemplated by KRS 403.320. *Kulas v. Kulas*, 898 S.W.2d 529, 530 (Ky. App. 1995). As used in KRS 403.320, "the term 'restrict' means to provide the non-custodial parent with something less than 'reasonable visitation.'" *Id.* "The burden of proving that visitation would harm the child is on the one who would deny visitation." *Smith v. Smith*, 869 S.W.2d 55, 56 (Ky. App. 1994). Since the trial court's findings were predicated on the best interest of the child, granting anything less than reasonable visitation was inappropriate.

The record does not reflect that any expert recommended supervised visitation. In her Addendum report, Dr. Marvin wrote: “It is recommended that the respondent be allowed a liberal visitation schedule, including every-other weekend visitation and full share of holidays and school vacations.” Dr. Marvin’s Addendum at 5. She continued: “Restricted access to the subject children and/or the implementation of supervised visitation should *only* be undertaken if the respondent is not amenable to therapeutic interventions and there are clear/objective indications that she is attempting to undermine the stability of the subject children’s residential/custodial transfer.” *Id.* at 6 (emphasis added). The court made no findings that Lydia is not “amenable to therapeutic interventions” nor that Lydia has worked to “undermine the stability of the subject children’s residential/custodial transfer.” In fact, Lydia has been cooperative in transferring the custody of the parties’ children to Kevin and has continually attended therapy, as suggested by both Drs. Marvin and Zamanian, since August of 2012.

The trial court based its restriction of visitation on Lydia’s inability to jointly parent with Kevin. This is an improper standard, as visitation may only be restricted based upon a finding of serious endangerment. Because the trial court incorrectly applied a best interest standard, the trial court should be reversed.

**VI. The Court of Appeals Should Have Also Reversed on Grounds That The Trial Court Failed to Make Findings of Fact or Conclusions of Law Regarding The Parties’ Financial Resources or Otherwise Address the Issue of Attorney’s Fees**

This issue is preserved in the record at [R. 1053].

The Court of Appeals declined to address Lydia’s argument concerning attorney’s fees because of its decision to remand on other grounds. As this Court has accepted

discretionary review, this issue should be considered in reviewing the appeal in order to properly dispose of the case.

The trial court made no findings or conclusions with respect to Lydia's request for attorney's fees pursuant to KRS 403.220. KRS 403.220 provides, in part, "[t]he court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for attorney's fees." In *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 521 (Ky. 2001), the Kentucky Supreme Court held that "[a]s with reimbursement of fees already incurred, an assignment of prospective attorney's fees rests in the sound discretion of the trial court." Therefore an award of prospective attorneys' fees is appropriate under KRS 403.220.

Kentucky law holds that attorney's fees will be awarded when it is supported by an imbalance in the financial resources of the respective parties. *Lampton v. Lampton*, 721 S.W.2d 736, 739 (Ky. App. 1986). The purpose of an award of attorney's fees is to level the playing field and ensure "access to the courts." *Neidlinger*, 52 S.W.3d at 521. KRS 403.220 exists to prevent one party to the contested action from controlling the outcome solely because he is in position of financial superiority. *Id.* Under KRS 403.220, no more than a finding of disparity in the financial resources of the parties is required to assess costs against the wealthier party. *Gentry v. Gentry*, 798 S.W.2d 928, 937 (Ky. 1990).

Here, Lydia requested attorney's fees for defending against Kevin's motion to modify. Lydia presented evidence of the attorney's fees she had incurred at trial. She also presented evidence that a financial disparity existed between her and Kevin. Kevin

has been employed for many years with the United States Army Corps of Engineers and holds the position of regional project engineer. Depo. of Kevin Addison, 11/18/11, 15:10 - 17:19. He earns approximately \$90,000 per year. *Id.* In contrast, Lydia lacks any significant assets and worked as a teacher's aide at Victory Christian Academy in Valparaiso, Indiana for the last four (4) to five (5) years. At the time of trial, she had recently took a job at the Marinosci Law Group, earning \$13.94 per hour. Lydia earned a gross income of only \$17,692 in 2011 per her federal tax return, which was consistent with the prior three (3) years of tax returns. Resp.'s Trial Ex. 25.

Despite the obvious disparity in the parties' income and Lydia offering evidence that she could not afford the attorney's fees resulting from litigation in this matter, the trial court denied Lydia's request for attorney's fees. The court, in contradiction to the requirements of KRS 403.220, failed to proffer any reason for its decision.

**VII. The Court of Appeals Should Have Also Reversed On Grounds That The Trial Court Erred In Failing to Order Kevin to Participate In a Mental Health Evaluation with Dr. Zamanian**

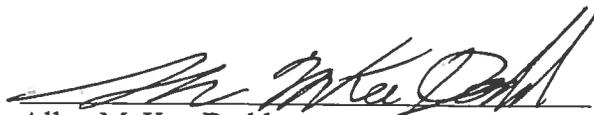
This issue is preserved in the record at [R. 774-780; 830-834].

Lydia also requested that Kevin be required to meet with Dr. Zamanian for a mental health evaluation pursuant to CR 35.01. [R. 774-780]. Kevin refused to participate in such an evaluation, and the trial court refused to compel Kevin to participate. [R. 830-834]. This refusal placed Lydia at a disadvantage as her expert, Dr. Zamanian, did not have an opportunity to evaluate Kevin for the purpose of recommending the appropriate custody arrangement between the parties and could not opine on the same, as he was not permitted to interview Kevin. Dr. Marvin, on the other hand, was given extensive access to both parties and to the children. She was able to

conduct multiple interviews with both Lydia and Kevin. In denying Lydia's request, the trial court abused its discretion, as its actions were arbitrary and the result was unfair. While Kevin benefitted from a favorable opinion from his expert, Lydia was unable to make necessary discovery and secure an opinion from her forensic psychologist. Kentucky courts have noted that "one purpose of CR 35.01 is to 'preserve the equal footing of the parties to evaluate the plaintiff's [physical] state,'" and this should apply equally to mental examinations. *Taylor v. Morris*, 62 S.W.3d 377, 379 (Ky. 2001) (citation omitted). The court continued, "[o]nly if no additional relevant information could be gleaned from such an examination should the motion be denied." *Id.*

#### CONCLUSION

Based upon the foregoing, the Appellee/Cross-Appellant, Lydia Addison, respectfully request that this Court vacate the October 26, 2012 and November 28, 2012 Orders and remand this case with instructions to transfer the case to Porter County, Indiana.

  
Allen McKee Dodd  
Dodd & Dodd Attorneys, PLLC  
*Counsel for the Appellee/Cross-Appellant*

