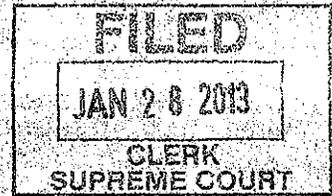


COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2012-SC-000420



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

BRIEF ON BEHALF OF APPELLANT SHANE MASTERS

BY: 

REBECCA NOVAK ASHMAN
The Grandler Building
253 S. Limestone
Lexington, Kentucky 40508
(859) 539-8023
Attorney for Appellant

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. Linda Spurlock Cates, 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 14th day of January, 2013.

BY: 

REBECCA NOVAK ASHMAN

INTRODUCTION

This is a family law case in which the Father appeals from the Court of Appeals decision reversing the trial court's order granting him sole custody.

STATEMENT CONCENRING ORAL ARGUMENT

The Appellant does not request oral argument

STATEMENT OF POINTS AND AUTHORITIES

I. THE “TWO AFFIDAVIT” REQUIREMENT OF KRS 403.340(2) SHOULD NOT BE A PREREQUISITE TO A COURT ACQUIRING SUBJECT MATTER JURISIDCTION OVER A MOTION TO MODIFY CUSTODY

KRS 403.340.....2
Petrey v. Cain, 987 S.W.2d 786 (Ky. 1999).....2

II. THE SUBSEQUENT ENTRY OF A DIVORCE DECREE SHOULD NOT “RESET THE CLOCK” ON A PRIOR CUSTODY ORDER

KRS 403.340.....4

III. THE MOTION TO MODIFY CUSTODY WAS IN FACT SUPPORTED BY MORE THAN ONE AFFIDAVIT

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STATEMENT OF THE CASE

The Appellant (hereinafter “Shane”) and the Appellee (hereinafter “Dena”) were married and have one child, Alek Masters (hereinafter “Alek”). The parties were married in 1994 and a Petition for Dissolution was filed in August of 2004. The parties were granted joint custody of their minor child pursuant to an order entered on April 18, 2005 (ROA 77, Appendix 8). A final decree of dissolution of their marriage was entered on August 12, 2005 (ROA139-142, Appendix 7). The decree of dissolution made no change to the permanent custody arrangement ordered on April 18, 2005 and merely incorporated the April 2005 custody order verbatim (ROA 140, Appendix 7 pg. 2). On May 31, 2007 Shane filed various motions, including a motion to modify custody (ROA 347-423). The motions and supporting exhibits included multiple affidavits, but two exhibits attached to this motion were originally omitted from the record on appeal. One of these exhibits, Exhibit 7, was comprised of multiple affidavits. Because the number of affidavits attached to Shane’s motion was never contested or at issue, this omission was not discovered until after the record on appeal was returned from the Court of Appeals. The omitted pages were subsequently supplemented to the appellate record (ROA 1173-1186).

In May of 2009, prior to a hearing being conducted on the previously filed motion to modify custody, Shane filed another motion requesting custody modification which was supported by his affidavit (ROA 565-579). The court subsequently granted Shane temporary sole custody and denied a motion to alter, amend or vacate that order (ROA 687-691, Appendix 6 and ROA 782-785, Appendix 5). In December 2009 the court conducted a hearing on timesharing and custody modification. In May 2010 the court

granted Shane permanent sole custody, including reaffirming the factual findings as set out in the May 2009 order (ROA 1085-1107, Appendix 4). In the May 2010 order, the trial court found that only one supportive affidavit was required for the court to have conducted the December 2009 hearing because it had been more than four years since the court entered a final, permanent custody order and Shane had provided the necessary affidavit attached to his May 2009 motion to modify (ROA 1091, Appendix 4 pg. 8). In June 2010 the court denied a motion to alter, amend or vacate the May 2010 order (ROA 1141-1143, Appendix 3). The appeal herein followed and on July 1, 2011 the Court of Appeals issued an Opinion Vacating and Remanding the trial court's May 13, 2010 order due to the fact that Shane's motion to modify custody was only accompanied by one supporting affidavit.

ARGUMENT

I. THE "TWO AFFIDAVIT" REQUIREMENT OF KRS 403.340(2) SHOULD NOT BE A PREREQUISITE TO A COURT ACQUIRING SUBJECT MATTER JURISDICTION OVER A MOTION TO MODIFY CUSTODY

Current case law has interpreted KRS 403.340(2) to require that any motion to modify a prior custody decree filed within two years of the decree must be accompanied by at least two affidavits. *Petrey v. Cain*, 987 S.W.2d 786, 788 (Ky. 1999). Absent support by the requisite number of affidavits, present law holds that the court is without subject matter jurisdiction to consider the motion. *Id.* This case is a prime example of the hazards of such an interpretation, as set out in the concurrence to the Court of Appeals Opinion (Appendix 1 pps 6-7). The Court of Appeals vacated the trial court's order due to the present interpretation of *Petrey*, even though the issue of the number of

affidavits was not raised anywhere in the appellate briefs or to the trial court. The number of affidavits was not contested because multiple affidavits were indeed attached to the motion to modify custody, however due to a clerical error the Court of Appeals was not aware of this fact (ROA 1173-1186). If the requirement was not interpreted as being jurisdictional, the Court of Appeals would not have been required to vacate the opinion even though the issue of number of affidavits was never contested. Because the statute is currently interpreted as being jurisdictional, in this case the requirements of KRS 403.340 have actually caused lack of finality and instability rather than increasing stability for the child.

**II. THE SUBSEQUENT ENTRY OF A DIVORCE DECREE SHOULD
NOT "RESET THE CLOCK" ON A PRIOR CUSTODY ORDER**

Requests to modify a prior custody order should relate back to the time of entry of the actual order establishing custody. For example, in this case the order establishing joint custody between the parties was entered on April 18, 2005 (ROA 76-80, Appendix 8). Due to other matters which remained disputed, the final decree of dissolution of the parties' marriage was not entered until August 12, 2005 (ROA 139-142, Appendix 7). The final decree of dissolution made no modification to the April 18, 2005 order, it merely incorporated that custody order verbatim (ROA 140, Appendix 7 pg. 2).

This appears to be a case of first impression in this Court, however it is clear the trial court understood the requirements of KRS 403.340 to relate back to the original custody order entered in April 2005, not the decree (ROA 1091, Appendix 4 pg. 8). In cases such

as this where a subsequent order merely repeats a prior custody order and does not make any modifications to that order, the calculation of time for purposes of KRS 403.340 should relate back to the initial order establishing custody. If the trial court correctly interpreted the law in this regard then Shane's motion to modify custody was only required to be supported by one affidavit, as set out in the trial court's May 2010 order (ROA 1091, Appendix 4 pg. 8).

III. THE MOTION TO MODIFY CUSTODY WAS IN FACT SUPPORTED BY MORE THAN ONE AFFIDAVIT

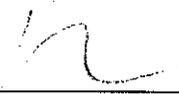
The record on appeal considered by the Court of Appeals was incomplete. Shane's motion to modify custody and supporting exhibits included multiple affidavits, but two exhibits attached to this motion were originally omitted from the record on appeal. One of these exhibits, Exhibit 7, was comprised of multiple affidavits (ROA 1173-1186). The number of affidavits attached to Shane's motion was never contested or at issue because the motion was in fact supported by more than one affidavit. Even if the requirement of KRS 403.340(2) is jurisdictional, and even if Shane's motion was filed within two (2) years of the order it sought to modify, the motion complied with the statutory requirements and therefore the trial court had jurisdiction to conduct the evidentiary hearing on custody modification and issue the May 2010 final order.

CONCLUSION

For any or all of the foregoing reasons the decision of the Court of Appeals should be reversed. 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.

Respectfully submitted,

BY: 

REBECCA NOVAK ASHMAN
The Grandler Building
253 S. Limestone
Lexington, Kentucky 40508
(859) 539-8023
Attorney for Appellant

APPENDIX

1. Court of Appeals Opinion Vacating and Remanding dated July 1, 2011
2. Court of Appeals Order Denying Petition for Rehearing dated June 15, 2012
3. Trial Court Order dated June 18, 2010 (ROA 1141-1143)
4. Trial Court Order dated May 14, 2010 (ROA 1085-1107)
5. Trial Court Order dated June 8, 2009 (ROA 782-785)
6. Trial Court Order dated May 13 , 2009 (ROA 687-691)
7. Findings of Fact, Conclusions of Law and Decree of Dissolution of Marriage,
dated August 12, 2005 (ROA 139-142)
8. Trial Court Order dated April 18, 2005 (ROA 76-80)