

RENDERED: AUGUST 4, 2006; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2005-CA-002349-ME

CHRISTOPHER M. PENNINGTON

APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT  
HONORABLE MARC I. ROSEN, JUDGE  
CIVIL ACTION NO. 00-CI-00594

HEATHER M. MARCUM (f/k/a MILES)

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; MINTON,<sup>1</sup> JUDGE; HUDDLESTON,<sup>2</sup> SENIOR JUDGE.

HUDDLESTON, SENIOR JUDGE: Christopher Pennington appeals from a Boyd Circuit Court order denying modification of a custody agreement. Pennington and Heather Marcum (formerly known as Miles) are the parents of a minor child born out-of-wedlock. In January 2001, the parties agreed to share joint custody of the child, with Miles having physical custody. In February 2002,

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<sup>1</sup> Judge John D. Minton, Jr. concurred in this opinion prior to his resignation to accept appointment to the Kentucky Supreme Court. Release of the opinion was delayed by administrative handling.

<sup>2</sup> Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Miles married Jeremy Marcum and moved to West Virginia. Pennington continued exercising visitation with the child weekly. In July 2004, the Marcums moved to Appomattox, Virginia, approximately six hours from Pennington's home in Ashland, Kentucky. Pennington subsequently filed a motion to modify the custody agreement seeking physical custody of the child.

Boyd Circuit Court referred the matter to its Domestic Relations Commissioner, who held a full hearing. After the DRC recommended modification of the custody agreement to allow Pennington physical custody of the parties' child, Marcum filed exceptions to the DRC's recommendations. After considering the DRC's report and hearing oral arguments on the matter, the circuit court sustained Marcum's exception to the award of physical custody to Pennington and restored custody to her, prompting this appeal.

Pennington contends that the circuit court abused its discretion by disregarding the findings of the DRC and in making a decision contrary to her recommendations without conducting a new evidentiary hearing. Pennington also claims the court erred when it allegedly failed to consider the statutory "best interest of the child" factors when making its decision.

Kentucky Rules of Civil Procedure (CR) 53.06(2) provides that "[t]he [circuit] court after hearing may adopt the

[DRC's] 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." Furthermore, this Court has said that "the reference to a 'hearing' in CR 53.06(2) merely intends that the parties be afforded an opportunity for oral argument. A full-blown evidentiary hearing is not contemplated by the rule."<sup>3</sup> Accordingly, the circuit court was not required to hold an evidentiary hearing in this case. The court appropriately reviewed the DRC's report and considered the arguments of counsel.

Pennington next claims that the court failed to consider the best interest of the child standard in its decision not to modify custody. Kentucky Revised Statutes (KRS) 403.340(3) outlines the factors that the circuit court must consider before modifying custody. Among the several factors delineated, the modification statute also refers to the best interest of the child analysis set forth in KRS 403.270(2):

The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent and to any de facto custodian. The court shall consider all relevant factors including:

(a) The wishes of the child's parent or parents, and any de facto custodian, as to his custody;

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<sup>3</sup> *Haley v. Haley*, 573 S.W.2d 354, 356 (Ky.App. 1978).

(b) The wishes of the child as to his custodian;

(c) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;

(d) The child's adjustment to his home, school, and community;

(e) The mental and physical health of all individuals involved;

(f) Information, records, and evidence of domestic violence as defined in KRS 403.720;

(g) The extent to which the child has been cared for, nurtured, and supported by any de facto custodian;

(h) The intent of the parent or parents in placing the child with a de facto custodian; and

(i) The circumstances under which the child was placed or allowed to remain in the custody of a de facto custodian, including whether the parent now seeking custody was previously prevented from doing so as a result of domestic violence as defined in KRS 403.720 and whether the child was placed with a de facto custodian to allow the parent now seeking custody to seek employment, work, or attend school.

In its order, the circuit court noted that the child had flourished in her new home, school and church in Virginia. The court further explained that the child had been reared by Marcum since birth, and the court refused to deprive her of

custody merely because she had moved farther away from Pennington.

In this case, there is substantial evidence to support a finding in favor of Marcum. Consequently, the court's determination of the child's best interests was fully within the circuit court's broad discretionary power.<sup>4</sup>

The custody order from which this appeal is prosecuted is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Rhonda M. Copley  
Ashland, Kentucky

BRIEF FOR APPELLEE:

Jeffrey L. Preston  
Catlettsburg, Kentucky

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<sup>4</sup> *Krug v. Krug*, 647 S.W.2d 790, 793 (Ky. 1983).