

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2010-CA-001403-ME

CHRISTINA COLLINS (FKA DUFFUS)

APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT  
HONORABLE MATTHEW B. HALL, JUDGE  
ACTION NO. 08-CI-00522

WILLIAM C. DUFFUS

APPELLEE

OPINION  
REVERSING AND REMANDING

\*\* \*\* \* \* \* \* \*

BEFORE: CLAYTON AND KELLER, JUDGES; ISAAC,<sup>1</sup> SENIOR JUDGE.

CLAYTON, JUDGE: This is an appeal of a decision changing the primary residence of a minor child. Based upon the following we will vacate the trial court's decision and remand this action for a new order.

---

<sup>1</sup> Senior Judge Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

## BACKGROUND INFORMATION

Appellant, Christina Collins, and Appellee, William Duffus, are the parents of a minor child, Angelina. The parties were married when Angelina was born, but divorced in March of 2009. Pursuant to the terms of the settlement agreement the parties entered into, both parties were awarded joint care, custody, and control of their daughter with Christina having primary physical custody. The settlement agreement also provided that once the parties lived outside the proximity identified in Hardin Local Rule 701, William would have visitation with Angelina for her entire summer break except for the first week after her school year ended.

William is a member of the U.S. Army and, as such relocated to Fort Stewart, Georgia, and was then deployed to Iraq. During his deployment to Iraq, Christina asked William's wife, Nicole, to keep Angelina after an incident during which Christina's boyfriend, Eric Cole, assaulted her and was arrested for Assault IV. William petitioned the court, through Nicole, for a change in the primary residence of Angelina. The court granted William's petition and this appeal followed.

## STANDARD OF REVIEW

Kentucky Rules of Civil Procedure (CR) 52.01 provides that “[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” A judgment is not “clearly erroneous” if it is “supported by substantial

evidence.” *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). Substantial evidence is “evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men.” *Id. Kentucky State Racing Comm’n v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972).

## DISCUSSION

In Kentucky, the decision of how custody is divided between the child’s parents depends upon the best interests of the child. KRS 403.270 provides, in relevant part, that:

(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;
- (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[.]

In *Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008), the Kentucky

Supreme Court explained that:

when a final custody decree has been entered, . . . and a relocation motion arises, any post-decree determination made by the court is a modification, either of custody or timesharing/visitation. If a change in custody is sought, KRS 403.340 governs. If it is only timesharing/visitation for which modification is sought, then KRS 403.320 either applies directly or may be construed to do so.

In this case, the timesharing/visitation is governed by KRS 403.320, which provides, in relevant part, that:

(3) The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child; but the court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger seriously the child's physical, mental, moral, or emotional health.

In determining there should be a change in timesharing/visitation of Angelina, the trial court found:

The Court feels that it is in the best interest of the child to modify parenting time to allow the Petitioner and his wife to be the child's primary, residential custodians. The Respondent does not have permanent housing and has maintained a multiple-term relationship with a domestic violence perpetrator. She has been to victim's counseling as recommended by Adult Protective Services.

.....

The life that the Respondent has had in Kentucky has been somewhat transient with many recent moves

within the recent months. She has not maintained stable housing or a productive relationship for the minor child. The Court has no doubt that she loves the child, but the Court is concerned about the best interest of the child.

While the Petitioner is deployed, all parties appear to agree that his wife is an appropriate caregiver for Angelina. Therefore, the Court awards the Petitioner, William Duffus, and his wife, Nicole Duffus, primary residential custodianship of the minor child, Angelina Duffus. The Respondent may exercise her parenting time with the child pursuant to Hardin County Family Court Local Rule 702, 703 and 704.

The Respondent shall have no contact with Eric Cole and shall not allow the minor child to have any contact with him. The Respondent shall enroll and complete victim's counseling at a suitable and sanctioned provider and show proof of completion to this Court.

It was clearly erroneous for the trial court to modify the timesharing arrangement to include Nicole who was not a de facto custodian.

Thus, we reverse this case and remand it to the trial court for an appropriate order consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Caleb T. Bland  
Elizabethtown, Kentucky

BRIEF FOR APPELLEE:

Lori A. Kinhead  
Elizabethtown, Kentucky