RENDERED: December 31, 1997; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 95-CA-2117-MR

THOMAS CARTER PADGETT — APPELLANT

v. APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE CHARLES W. BOTELER, JR., JUDGE
ACTION NO. 92-CI-0444

LAURA VANNOY PADGETT — APPELLEE

AND

NO. 96-CA-1759-MR
AND
NO. 96-CA-1810-MR

THOMAS CARTER PADGETT — APPELLANT

v. APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE CHARLES W. BOTELER, JR., JUDGE
ACTION NO. 92-CI-0444

LAURA VANNOY PADGETT;
MICHAEL HALLYBURTON;
DONNA NICHOLS — APPELLEES

OPINION
AFFIRMING

* * * * * * * *

BEFORE: KNOPF, MILLER, AND SCHRODER, JUDGES.

KNOPF, JUDGE. This opinion addresses three (3) appeals by Thomas Carter Padgett from orders of the Hopkins Circuit Court

addressing various aspects of his domestic relations litigation against Laura Vannoy Padgett. After considering the arguments presented by the parties and the applicable authorities, we affirm.

The parties were married in June of 1979. Their marriage produced two (2) children, Julie, born January 20, 1980, and Beau, born September 20, 1984. Laura initiated divorce proceedings in Hopkins Circuit Court on July 29, 1992. On August 13, 1992, Tom initiated his own divorce action in Fayette Circuit Court. Tom subsequently filed a motion to dismiss the Hopkins Circuit Court action arguing improper venue. On September 2, 1996, Hopkins Circuit Court issued an order finding that it was the proper venue to litigate the dissolution of the marriage of the parties. Fayette Circuit Court subsequently issued an order transferring venue to Hopkins Circuit Court. Extensive litigation on a wide range of issues followed including the relevance of the Church of Scientology to the trial court's custody and visitation determinations.

On May 5 and 6, 1994, the special trial commissioner held an evidentiary hearing to receive proof concerning custody of the children, division of marital assets, assignment of marital debt, maintenance, and attorney fees. On July 26, 1994, the commissioner entered his report and recommendations. Following the filing of exceptions, on June 26, 1995, the trial court entered an order adopting the report of the commissioner with one exception. The court ordered Tom to pay one-half of

Laura's attorney fees. Appeal 95-CA-002117 followed.

Meanwhile, litigation continued in the trial court. On April 9, 1996, the trial court issued an order restricting Tom's visitation with his children and requiring that Tom have no harassing communications with the court appointed psychologist. On May 17, 1996, the trial court denied Tom's motion for reconsideration of the April 9 order. On May 22, 1996, the trial court ordered the issuance of a bench warrant for the arrest of Tom for contempt of the trial court's orders of December 22, 1995, and February 26, 1996. Specifically, Tom was found in contempt because he 1) had failed to furnish to appellee a lien free title to the parties' Eagle automobile; 2) had failed to deliver certain IRS forms to Laura's attorney; and 3) had failed to pay $800.00 in fees to the court appointed psychologist. The appeals 96-CA-001759 and 96-CA-001810 followed. These cases were subsequently ordered consolidated and are to be heard with case 95-CA-002117.

CASE NO. 95-CA-2117-MR

ATTORNEY FEES

In its order of June 6, 1995, the trial court rejected the recommendation of the commissioner that each party pay its own legal fees and, instead, ordered that Tom pay one-half of Laura's fees due to the "protracted litigation instigated" by appellant. Tom argues that the trial court abused its discretion under KRS 403.220 by ordering him to pay attorney fees without a

finding of disparity between the financial resources of the parties. KRS 403.220 provides that the trial court may, after considering the financial resources of both parties, order a party to pay a reasonable amount to the other party for the cost of maintaining or defending any proceeding under KRS Chapter 403 and for attorney fees. An allowance of attorney fees is authorized by KRS 403.220 only when it is supported by an imbalance in the financial resources of the respective parties. Sullivan v. Levin, Ky., 555 S.W.2d 261, 263 (1977); Bishir v. Bishir, Ky., 698 S.W.2d 823, 826 (1985); Lampton v. Lampton, Ky.App., 721 S.W.2d 736, 739 (1986).

For this court to review an award of attorney fees under KRS 403.220, the attorney whose fees are to be paid must be made a party to the appeal. Dubick v. Dubick, Ky. App., 653 S.W.2d 652, 655 (1983). Wilhelm v. Wilhelm, Ky., 504 S.W.2d 699 (1973). Tom relies on Lampton v. Lampton, Ky. App., 721 S.W.2d 736 (1986), for the proposition that opposing counsel need not be named. While apparently, Lampton did consider an appeal of an attorney fee award even though opposing counsel was not named as a party to the appeal, we agree with the dissent in that case that the issue was not properly before the court. Lampton at 721 S.W.2d 739, J. Wilhoit dissenting. See Wilhelm supra; Supreme Court Rule 1.030(8)(a).

Attorneys are necessary parties to appeals under fee shifting statutes, KRS 403.220. Knott v. Crown Colony Farm Inc., Ky., 865 S.W.2d 326, 329 (1993). The attorney must be made a

party to the appeal whether the fee is adjudged to be paid directly to him or is allowed to one of the parties to the divorce and ordered to be included as a court-cost item. Tyler v. Bryant, Ky., 394 S.W.2d 454, 455 (1965). This rule has been specifically held to apply in marriage-dissolution cases under KRS 403.220. Wilhelm v. Wilhelm, Ky., 504 S.W.2d 699, 701 (1973). Beaver v. Beaver, Ky. App., 551 S.W.2d 23, 25. (1977). We are unable to review any fees assessed under KRS 403.220 because Tom did not name Laura's attorney as a party to the appeal.

JOINT CUSTODY

Tom next argues that it was an abuse of discretion for the trial court to use animosity between appellant and appellee as the basis for rejecting joint custody of the parties' minor children. Both parties requested sole custody of the children. Following an evidentiary hearing the commissioner recommended that Laura be granted sole custody. This recommendation was subsequently accepted by the trial court.

KRS 403.270(4) provides that the court may grant joint custody to the children's parents if it is in the best interest of the children. There is no preference in favor of either joint custody or sole custody. Squires v. Squires, Ky., 854 S.W.2d 765 (1993). The parties are entitled to an individualized determination of whether joint custody or sole custody serves the best interest of the children. Squires at 770. In determining whether joint custody is appropriate, the trial court must

initially consider the factors contained in KRS 403.270(1). Squires at 769. Thereafter, the court should assess the likelihood of future cooperation between the parents and their respective levels of emotional maturity. Id. In deciding whether joint custody is appropriate, the trial court must weigh the positive and negative aspects and determine whether joint custody is in the best interest of the child. Squires at 768. The trial court possesses broad discretion in determining whether joint custody serves the child's best interest. Squires at 770; McNamee v. McNamee, Ky., 432 S.W.2d 816 (1968).

In the case sub judice, the record demonstrates that the parties have had repeated, serious disputes during this litigation. In the course of the proceedings, the parties admitted that they have difficulty communicating and cooperating. Further, it is obvious that the parties cannot cooperate with respect to the issue of the children's exposure to Scientology. The trial court found that the parties have experienced clear animosity during the course of this litigation and accepted the findings of two (2) psychologists who testified that this animosity would likely make joint custody a failure. Great weight must be given to the findings of the trial court concerning custody of a child and its conclusions will not be disturbed except where it has abused its discretion. Watson v. Watson, Ky., 434 S.W.2d 33, 35 (1968). We will not substitute our judgment for that of the trial court unless a manifest abuse of discretion has occurred. Smith v. Smith, Ky., 429 S.W.2d 387,

391 (1968); Borjesson v. Borjesson, Ky., 437 S.W.2d 191, 193 (1969). The trial court has broad discretion on matters of child custody. Grider v. Grider, Ky., 254 S.W.2d 714, 715 (1953). In view of the broad discretion accorded the trial court in determining the best interest of the child, we cannot say that there was an abuse of discretion in the trial court's conclusion that the appellee should be awarded sole custody of the children.

VENUE

In June of 1990 the parties moved to Lexington, Fayette County, Kentucky and owned a home there at the time these dissolution proceedings were initiated. In August of 1991, Tom, a hotel manager, was transferred to Southfield Michigan, and plans had been made for the remainder of the family to join him there. Laura signed her dissolution papers in Hopkins County on July 27, 1992. At 10:01 a.m. on July 29, 1992, Laura filed her action for dissolution of marriage in Hopkins Circuit Court. Laura alleges that she moved in with her mother in Madisonville, Hopkins County, Kentucky, on July 29, 1992. Tom alleges that Laura did not move to Madisonville until August 9, 1992. He submitted affidavits, sworn to by Lexington neighbors, that Laura did not remove her possessions from the Lexington home until approximately August 9, 1992, and that she continued to reside there as usual until that date. Tom alleges that Laura did not reside in Hopkins County at the time she filed her divorce, and, therefore, Hopkins County cannot serve as the venue in this proceeding. Tom filed a divorce action in Fayette Circuit Court

on August 13, 1992. On September 2, 1992, the trial court issued its order finding that appellee properly filed in Hopkins County. The Fayette Circuit Court subsequently issued an order transferring venue to Hopkins Circuit Court.

KRS 452.470 provides that "[a]n action for maintenance or dissolution must be brought in the county where the husband or wife usually resides." Following an evidentiary hearing, in its order of September 2, 1992, the trial court found that Hopkins County was the county where Laura usually resided at the time she filed her petition. We have reviewed the record, including the full contents of the videotapes, and are unable to locate either a transcript or a video recording of the evidentiary hearing. While portions of the record appear to support the position that Laura did not usually reside in Hopkins County at the time she filed her petition, we cannot adequately review the issue without the testimony given at the September 1, 1992, hearing. We are in no position to say the circuit judge did not have ample evidence on which to base his decision when such evidence is not available to us. The presumption is that the proceedings in circuit court are regular. Turner v. Gentry, Ky., 402 S.W.2d 104, 105 (1966). We will not engage in gratuitous speculation based upon a silent record. When the complete record is not before the appellate court, that court must assume that the omitted record supports the decision of the trial court. Commonwealth. v. Thompson, Ky.,697 S.W.2d 143, 145 (1985). It is the appellant's duty, along with the clerk, to see that the record on appeal is

properly prepared for transmittal to this court. Belk-Simpson Co. v. Hill, Ky., 288 S.W.2d 369, 370 (1956); CR 75.07. Under these appellate standards, we assume the omitted record supports that trial court's determination that appellee usually resided in Hopkins County at the time she filed her petition.

The final venue issue is whether Hopkins Circuit Court properly asserted venue over Fayette County. If competing petitions are filed in two (2) circuit courts, and both technically having jurisdiction, then the doctrine of forum non conveniens should be applied. See 1 Petrilli, Kentucky Family Law, sec. 23.4, 1988. KRS 403.270 does not require venue of the action for dissolution and maintenance to be related to the last residence of the parties or any other factor. Lancaster v. Lancaster, Ky. App., 738 S.W.2d 116, 117 (1987). When, as here, the proper forum is disputed, the following factors are relevant in determining proper venue: (1) the county of the parties' marital residence prior to separation; (2) the usual residence of the children, if any; (3) accessibility of witnesses and the economy of offering proof. Hummeldorf v. Hummeldorf, Ky.App., 616 S.W.2d 794, 798 (1981). In disputes over child custody, where the issue to be determined is the best interests of the child, the "more convenient and most interested" forum is particularly appropriate. Shumaker v. Paxton, Ky., 613 S.W.2d 130 (1981). Here it is unquestionable that Laura and the children had moved to Hopkins County and resided there when this issue was heard and decided by the court. While Tom claims to

have never relinquished his Lexington domiciliary, he lived most of the time in Michigan. Thus three of the four affected parties were in Hopkins County, and none of the parties resided in Fayette County. At the time of the venue hearing the parties had sold their home in Fayette County and it appears that Fayette County had been abandoned as a residence by all concerned. In its order of September 2, 1992, the trial court properly invoked the doctrine of forum non conveniens in concluding that, as between Hopkins County and Fayette County, Hopkins County was the proper venue. On September 9, 1992, the Fayette Circuit Court issued an order transferring venue of this action to Hopkins Circuit Court. It is within the discretion of a circuit court to decline jurisdiction when it is appropriate under the doctrine of forum non conveniens. Williams v. Williams, Ky. App., 611 S.W.2d 807 (1981). Such a determination will not be reversed absent an abuse of discretion. Hummeldorf at 807 (1981). There being no abuse of discretion, it was proper for Hopkins Circuit Court to assume venue in this action.

SCIENTOLOGY

Laura is an active member of the Church of Scientology. In the past, Tom has been a member, but at some point he disassociated himself from the organization. Tom argues that the Church of Scientology is a "cult," and that the trial court should consider Laura's active participation in the organization as a relevant factor in its custody and visitation decisions. On occasion the children have participated in Scientology functions.

In the course of the proceedings, the relevance of Scientology to these proceedings was litigated and on March 17, 1994, the trial court issued an order ruling that appellee's practice of Scientology was protected by the first amendment and could not be considered without a showing of harm to the parties' children. Tom's argument on appeal is that the trial court improperly took judicial notice that Scientology is a religion. While Tom concedes that the trial court did not take explicit judicial notice that Scientology is a religion, he contends that the trial court took "apparent notice" in that it, without making a specific finding of fact, asserted that Laura's belief in Scientology enjoyed first amendment protection. Tom's argument that the trial court failed to make specific findings of fact with respect to Scientology's status as a religion is not preserved for appeal. A final judgment shall not be reversed or remanded because of the failure of the trial court to make a finding of fact on an issue unless such failure is brought to the attention of the trial court by a written request for a finding on that issue. CR 52.04. Where appellant did not request a finding of fact below, Rule 52.04 prohibits reversal or remand on the ground that none was made. Jones v. Jones, Ky. App., 577 S.W.2d 43 (1979). Tom does not cite to his preservation of the issue, and our review of the record failed to ascertain that a CR 52.04 request was made. In view of this we conclude that the issue of whether it is proper for the trial court to take judicial notice of whether Scientology is a religion is not

properly preserved for appeal. However, appellant's general objection to the trial court's failure to take Scientology into consideration is preserved for appeal.

Appellant appears to place undue emphasis on the significance of whether Scientology is or is not treated as a religion for child custody purposes. Quinn v. Franzman, Ky., 451 S.W.2d 664 (1970), addressed the issue of religion in a child custody proceeding and endorsed the prevailing view that "courts may consider religion as a factor in custody cases, but it will not be given controlling weight where there are other important considerations bearing upon the temporal welfare of the child." Id. at 668. The court noted that this rule is very similar to the established rule in Kentucky that applies to all custody cases, wherein the welfare and best interests of the children are the paramount concerns of the courts. Id. citing McLemore v. McLemore, Ky., 346 S.W.2d 722 (1961); Roaden v. Roaden, Ky., 394 S.W.2d 754 (1965); Knight v. Knight, Ky., 419 S.W.2d 159. This rule is also consistent with the statutory requirement that "[t]he court shall not consider conduct of a proposed custodian that does not affect his relationship to the child." KRS 403.270(3).

The trial court did not commit error in its approach to limiting the introduction of evidence concerning Laura's membership in the Church of Scientology. Tom was not prohibited from introducing evidence relating to Scientology. The trial court at all times remained receptive to the admission of

evidence relating to Scientology if harm to the children could be shown. We believe that the trial court acted within its discretion in establishing this criterion for limiting evidence relating to Scientology. See KRE 401 Et seq.. It is within the discretion of the trial court to determine whether the probative value of proffered evidence is substantially outweighed by undue prejudice. Ford Motor Co. v. Fulkerson, Ky., 812 S.W.2d 119 (1991); Kroger Co. v. Willgruber, Ky., 920 S.W.2d 61, 67 (1996). The trial court found that "there is simply no substantial or credible evidence that Scientology has impacted the lives of either Julie or Beau in any way." Unless clearly erroneous we are bound by this finding. Reichle v. Reichle, Ky., 719 S.W.2d 442 (1986). The court psychiatrist testified that the children were successful and well-adjusted. There being substantial evidence in the record to support the trial court's finding that Scientology has not affected the children, the trial court did not abuse its discretion in limiting the admissibility of evidence relating to Scientology.

CONSOLIDATED CASES NO. 96-CA-1759-MR & 96-CA-1810-MR

RESTRICTION OF VISITATION

In its order of April 9, 1996, the trial court restricted Tom's visitation with his children to one weekend per month and within a two-hour driving distance of Madisonville. Tom alleges that the trial court abused its discretion in that it 1) restricted visitation without examining Laura's motives of

scientological "disconnection"; 2) used animosity between the parties as a basis for restricting visitation; 3) restricted visitation without considering the children's needs and wants; and 4) restricted visitation without considering expert testimony, eye witness testimony, and factual evidence.

KRS 403.320(1) provides that the non-custodial parent "is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral, or emotional health." Further, KRS 403.320(3) provides that visitation rights may be modified if the modification would serve the best interest 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." As used in the statute, the term "restrict" means to provide the non-custodial parent with something less than "reasonable visitation." Kulas v. Kulas, Ky. App., 898 S.W.2d 529, 530 (1995). The statute creates the presumption that visitation is in the child's best interest for the obvious reason that a child needs and deserves the affection and companionship of both its parents. The burden of proving that visitation would harm the child is on the one who would deny visitation. 869 S.W.2d 55, Smith v. Smith, Ky. App., 869 S.W.2d 55, 56 (1994).

Following two (2) hearings, in its order of April 9, 1996, the trial court found that, as a result of the then existing visitation schedule, the "children have experienced

emotional trauma and there exists a likelihood that such trauma will continue by the actions of [appellant] unless [the trial court] restricts [appellant's] visitation rights." Further, the trial court accepted the testimony of the court appointed psychologist, Dr. Donna Nichols, that the children were being subjected to emotional trauma by appellant. Lastly, the trial court found that Tom "attempts to wreak havoc upon . . . [the] children's relationship with . . . [appellee] and to influence at least the parties' son, Beau Padgett, to want the . . . appellant to be his custodial parent, all of which the court finds to be detrimental to said children's mental and emotional well being."

The trial court's order of April 9, 1996, meets the standards mandated by KRS 403.320 to restrict visitation. While the trial court does not specifically find that unrestricted visitation with appellant "would endanger seriously" the children, the trial court does find that the visitation has resulted in "emotional trauma." While the trial court could have better observed the specific language of the statute, there is little difference between "emotional trauma" and serious emotional endangerment. We cannot overturn findings of fact made by the trial court unless clearly erroneous. Reichle v. Reichle, Ky., 719 S.W.2d 442 (1986). Here the testimony of Dr. Nichols supports the trial court's findings. There being substantial evidentiary support for the trial court's findings, we cannot conclude that the trial court abused its discretion in restricting visitation. Endangerment, in the form of "emotional

trauma," was found by the trial court and that finding was supported by substantial evidence in the record. In view of this, the trial court did not abuse its discretion under KRS 403.320.

COMMUNICATIONS WITH DR. NICHOLS

Tom next argues that it was an abuse of discretion for the trial court, in its order of April 9, 1996, to order him to stop harassing Dr. Nichols. In its order, the trial court found that appellant had "bombarded Dr. Donna Nichols with notes, questionnaires, letters and drawings, all of which the court finds to be harassment by [appellant] in an attempt to intimidate Dr. Nichols apparently to have her recuse herself from this case . . . ." Tom argues that there was no motion to have the harassment stopped, that there are no persons who witnessed that appellant harassed Dr. Nichols, and that, if he did harass Dr. Nichols, the trial court was not the proper venue to consider the issue. These arguments are unpersuasive. A court, once having obtained jurisdiction of a cause of action, has, as an incidental to its constitutional grant of power, inherent power to do all things reasonably necessary to the administration of justice in the case before it. Smothers v. Lewis, Ky., S.W.2d 62, 64 (1984). In the exercise of this power, a court, when necessary in order to protect or preserve the subject matter of the litigation, to protect its jurisdiction and to make its judgment effective, may grant or issue a temporary injunction in aid of or ancillary to the principal action. Id.

The findings of the court are sufficient to support the action taken. The court specifically found that the appellant was attempting to intimidate Dr. Nichols, apparently in an attempt to have her recuse herself from the case. We must defer to the findings of the trial court unless clearly erroneous. CR 52.01; Reichle v. Reichle, supra. The trial court's findings not being clearly erroneous, it was proper for it to issue the orders enjoining appellant from harassing an important witness in the case. The trial court did not abuse its discretion.

COSTS TO APPELLANT AND BENCH WARRANT

Tom next argues that the trial court, in its order of May 22, 1996, abused its discretion by ordering certain debts and expenses to be paid by him. Specifically, appellant alleges that the trial court 1) failed to acknowledge the disparity in income and financial resources between appellant and appellee; 2) failed to acknowledge contractual obligations which provided for the payment of expenses; 3) failed to require appellee to share in visitation costs; and 4) erred by issuing a bench warrant related to his failure to pay certain costs and expenses. However, the May 22, 1996, order did nothing more than hold appellant in contempt for failing to pay costs assessed in trial court orders dated December 22, 1995, and February 26, 1996. It further ordered the issuance of a bench warrant. The May 22 order did not, in and of itself, assess additional costs or debts on appellant. Inasmuch as the December 22, 1995, order and the February 26, 1996, order are not designated as judgments being

appealed from in the notice of appeal in this action, we cannot reach the merits of the properness of the assessment of these fees. CR 73; Cf. Preston v. Williamson, Ky., 483 S.W.2d 448, 450 (1972).

With respect to appellant's allegation that the trial court abused its discretion because it issued a bench warrant in absence of all the facts, this is unpersuasive. Appellant does not deny that the trial court's orders required him to pay the psychiatrist's fees and obtain a release of the lien from his sister. Nor does he deny that he is not in compliance with these orders. His brief is, in essence, an admission that he is in violation of the trial court's orders. Courts have inherent power to enforce compliance with their lawful orders through civil contempt. Blakeman v. Schneider, Ky., 864 S.W.2d 903, 906 (1993). It is within a trial court's discretion whether to use its contempt power, Smith v. City of Loyall, Ky.App., 702 S.W.2d 838, 839 (1986). The appellant clearly being in violation of lawful orders of the trial court, we find no abuse of discretion.

FAILURE TO ORDER BILATERAL DISCLOSURE

Lastly, appellant argues that the trial court erred in that it required him to turn over to appellee his 4056 IRS forms while not likewise requiring appellee to do so. In the orders being appealed from, there is no evidence that the trial court refused appellant's discovery request while granting the same discovery request by appellee. Under the civil rules, an appellant must point out to this court the location in the record

where favorable evidence appears. CR 76.12(4)(c)(iv). Elwell v. Stone, Ky.App., 799 S.W.2d 46 (1990). In summary, we are unaware whether appellant even asked for "bilateral disclosure." We will not pass on an issue that has not been presented to the trial court. Department of Highways v. Williams, Ky., 317 S.W.2d 484, 484 (1958).

The judgment of the Hopkins Circuit Court is affirmed.

ALL CONCUR.

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BRIEF FOR APPELLEE
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