

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000057-MR

JOHN PETER VINCENT HOLLIS

APPELLANT

v. APPEAL FROM WOODFORD CIRCUIT COURT
HONORABLE O. REED RHORER, SPECIAL JUDGE
ACTION NO. 99-CI-00152

CHERYL LEE HOLLIS

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: KELLER AND NICKELL, JUDGES; LAMBERT,¹ SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Appellant, John Peter Vincent Hollis, moved for a change of custody and a modification of child support. The trial court found the affidavit tendered with the motion insufficient to demonstrate a change in circumstances. Appellant appeals and argues that he was entitled to a hearing on

¹ Senior Judge Joseph E. Lambert 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.

his motion. Upon review of the record we reverse the trial court and remand for a hearing consistent with this opinion.

Appellant's motions were set for hearing on August 21, 2008. He appeared *pro se*, as in this appeal. After hearing the parties' arguments, the trial court elected to set the motion styled "Motion to change the primary residence of" the children "for a date certain" and inquired whether both parties could return on November 6, 2008. The parties agreed. On that date, Appellee objected on grounds that the accompanying affidavit failed to show a change in circumstances. The trial court inquired of Appellant whether he could identify any additional changes in circumstances and nothing more was provided. Appellant's motions were denied for his failure to make a showing of changed circumstances.

Appellant argues that at the initial hearing on August 21, 2008, the trial court automatically determined that he was entitled to a hearing on the merits when it set the motion for November 6, 2008. We disagree with this interpretation. The trial court merely established a date that was convenient for the parties and the court to further review the motion. There was no determination or any order holding that the statutory requirements had been met for a change in custody. In any event, even if the trial court had tentatively decided to hear the merits, it was entitled to reconsider and reverse its decision.

The underlying custody arrangement provided for joint custody with Appellee designated the primary residential parent and with Appellant having

visitation or timesharing. This is “shared custody” as described in *Pennington v. Marcum*, 266 S.W.3d 759, 764 (Ky. 2008). Under *Pennington*, a motion seeking to change the primary residential parent is in reality a motion to modify visitation or timesharing, not a motion to modify custody. When a party seeks a change in actual legal custody, KRS 403.340 applies. *Id.* at 765. This was the statute the trial court used in its determination that Appellant’s moving papers were insufficient. However, *Pennington* holds that when a change in timesharing or visitation is sought, the trial court should apply KRS 403.320. *Id.*

We therefore reverse the determination of the trial court denying the motion and remand this matter for a hearing at which the best interest of the children shall be the controlling standard.

The judgment of the Woodford Circuit Court is reversed and this matter is remanded for a hearing to determine whether any change in visitation or timesharing is appropriate.

ALL CONCUR.

BRIEF FOR APPELLANT:

John Peter Vincent Hollis, *pro se*
Frankfort, Kentucky

BRIEF FOR APPELLEE:

James L. Thomerson
Lexington, Kentucky