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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002009-MR
AND
NO. 2001-CA-002314-MR

DONNA ROSS, F/K/A DONNA ROSS HENNIES — APPELLANT

v.

APPEALS FROM KENTON CIRCUIT COURT
HONORABLE STEVEN R. JAEGER, JUDGE
ACTION NO. 99-CI-01750

ANTHONY W. HENNIES — APPELLEE

OPINION
VACATING AND REMANDING
** ** ** ** **

BEFORE: BUCKINGHAM, McANULTY, AND SCHRODER, JUDGES.

McANULTY, JUDGE: The marriage of Donna Ross (hereinafter appellant) and Anthony Hennies (hereinafter appellee) was dissolved by the Kenton Circuit Court. They entered into a Property and Custody Agreement. Article VII of the Agreement dealt with the issue of custody of their two minor children. The parties agreed that it was in the best interests of the children at that time to have joint legal custody. They further agreed that appellant would be the primary residential parent. The

parties established a parenting schedule in the Agreement which fairly evenly divided the time with each parent. As to the question of future ARelocation,@ the parties stated in Article VII of the Agreement:

> Neither parent shall voluntarily establish a residence for minor children more than a thirty (30) mile radius from downtown Cincinnati without an agreement signed by both parents or unless authorized by court order. An unrequested transfer of employment shall not be considered as voluntary on the part of either party.

The trial court entered a Supplemental Decree of Dissolution on September 22, 2000, in which it incorporated the parties= separation agreement and ordered them to perform its terms.

In May 2001, appellee filed a motion to enforce the joint custody parenting arrangement or, in the alternative, to modify the arrangement to allow the children to stay with him. In the motion, appellee stated that appellant intended to relocate with the children outside Kentucky, and this would destroy the parenting arrangement established by the parties. Appellee alleged that a move from the Fort Wright, Kentucky community in which they lived would seriously endanger the children=s mental and emotional health due to their school and family ties to the community. He stated that one son had been attending parochial school, and the younger son would be starting kindergarten. He further argued that the move was not in the children=s best interests. Appellee filed a separate motion for injunctive relief. Appellant responded with a motion for

modification of the visitation schedule due to the fact that she was required by her new employer to move her residence to Dayton, Ohio.

The trial court held a hearing on the issues. The court found that appellant wanted to move to Kettering, Ohio, which was 47 to 50 miles from downtown Cincinnati. The court found that this did not qualify as an Ainvoluntary transfer@ under the Agreement because appellant voluntarily chose Anew and different@ employment. The court held that it was in the best interests of the children that they continue to reside in Northern Kentucky, because they had lived there all of their lives and their Afamily, doctors, schools and support network@ were in Northern Kentucky. The court further made a finding from appellant=s job description that appellant could continue to reside in Northern Kentucky and perform her job duties in Dayton. Therefore, the trial court denied the motion to modify the parenting schedule to allow the children to move to Ohio. The trial court ordered the parties to perform the separation agreement.

Appellant filed a CR 60.02 motion contending that the trial court erred in finding that appellant=s move was voluntary and that it was in the best interests of the children that they remain in Northern Kentucky. Appellant asserted in her motion that as the primary breadwinner of the family and the primary custodian, she had a responsibility to her children to position

herself in the most stable, well-paying job she could in medical device/implant sales, the industry in which she had ten years of skill and experience. Appellant submitted an affidavit from her supervisor in which he stated he had established an unwritten policy that the Asales representatives within his jurisdiction physically move to the territory where they serve.@ Appellant=s supervisor asserted that Aabsent the ability to relocate, a sales representative=s options are severely limited and employability and upward mobility are greatly restricted.@ Finally, appellant argued that the trial court erred in its assessment of the best interests of the children when faced with the question of a relocation, given our highly mobile society and dual income households. The trial court denied the motion for CR 60.02 relief. The court stated in its order: A[t]his was a joint custody award, and relocation issues were a negotiated term of the parties= September 22, 2000, Property and Custody Agreement.@

On appeal, appellant first argues that the court=s order prohibiting appellant from moving to another state, in addition to prohibiting her children from residing in another state, violates the Kentucky Constitution. We agree. We find an abuse of discretion in the trial court=s suggestion that the mother continue to live in Fort Wright, Kentucky and perform her job in Dayton. We believe this was beyond the authority of the court. Kentucky Constitution § 24 states, AEmigration from the State shall not be prohibited.@ While the agreement between the

parties would have permitted appellant to live in Cincinnati, Ohio, the trial court=s order effectively requires appellant to maintain residence in Kentucky. Furthermore, we do not agree with appellee that the fact that appellant could move without the children means that her right to relocate was not restricted. Instead, we believe that:

> [i]t makes no difference that the parent who wishes to relocate is not prohibited outright from doing so; a legal rule that operates to chill the exercise of the right, absent a sufficient state interest to do so, is as impermissible as one that bans exercise of the right altogether.

Jaramillo v. Jaramillo, 113 N.M. 57, 823 P.2d 299, 301 (N.M. 1991). Moreover, it cannot be said that appellant waived this constitutional right by agreeing to the separation agreement, as it did not restrict her to living in the Commonwealth of Kentucky.

Next, appellant argues that the court did not employ the proper standards in rendering its decision. According to this Court=s opinion in Scheer v. Ziegler, Ky. App., 21 S.W.3d 807 (2000), any modification of custody is subject to the custody modification statutes, KRS 403.340 and KRS 403.350. KRS 403.340(2) states the threshold conditions:

> No motion to modify a custody decree shall be made earlier than two (2) years after its date, unless the court permits it to be made on the basis of affidavits that there is reason to believe that:

> (a) The child's present environment may endanger seriously his physical, mental, moral, or emotional health; or
>
> (b) The custodian appointed under the prior decree has placed the child with a de facto custodian.

The motions in this case were filed less than two years after entry of the decree incorporating their separation agreement. Appellee submitted affidavits alleging serious endangerment to the children if appellant was permitted to move outside of the Fort Wright community. Therefore, the trial court had authority to entertain the motion and hold a hearing under the above statute. Petrey v. Cain, Ky., 987 S.W.2d 786 (1999).

Once the trial court determined that it had jurisdiction to consider the motion within the two-year time period, it was required to consider the factors in KRS 403.340(3) to determine whether to modify the custody decree. KRS 403.340(3) states:

> If a court of this state has jurisdiction pursuant to the Uniform Child Custody Jurisdiction Act, the court shall not modify a prior custody decree unless after hearing it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of entry of the prior decree, *that a change has occurred in the circumstances of the child or his custodian, and that the modification is necessary to serve the best interests of the child*. When determining if a change has occurred and whether a modification of custody is in the best interests of the child, the court shall consider the following:

(a) Whether the custodian agrees to the modification;

(b) Whether the child has been integrated into the family of the petitioner with consent of the custodian;

(c) The factors set forth in KRS 403.270(2) to determine the best interests of the child;

(d) Whether the child's present environment endangers seriously his physical, mental, moral, or emotional health;

(e) Whether the harm likely to be caused by a change of environment is outweighed by its advantages to him; and

(f) Whether the custodian has placed the child with a de facto custodian.

(Emphasis supplied.)

The best interests of the child standard in KRS 403.270(2) states, in pertinent part:

> 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 . . .

Despite the terms of the relocation clause in the Separation Agreement, the statute requires the court to determine whether a change of circumstances has occurred requiring modification to serve the best interests of the children.

The trial court, after the hearing, denied any modification on the stated basis of the best interests of the children. The trial court instead endeavored to enforce the separation agreement as written. Appellant argues that this ruling is impossible to reconcile since the trial court, in effect, either prohibited her from relocating or altered her custodial rights. We agree that the trial court=s attempt to enforce the separation agreement left a situation which is unworkable. The trial court effectively restricted appellant to continue to live in the Fort Wright area, despite the fact that appellant asserts that due to the demands of her job, as dictated by her employer, she must live in the Dayton area on a full-time basis. Yet, if appellant moves to Dayton to satisfy her employer, then she cannot be the primary residential parent because she is not permitted to take the children with her. However, under the separation agreement appellant is named the primary residential parent. We fail to understand how the parties can carry out the separation agreement under the changed circumstances.

Although the trial court clearly wanted to hold the parties to their bargain, we believe it was an abuse of discretion for the trial court to decline to make any modification in this case. We conclude that the parties needed some sort of modification of the agreement to reflect that their current circumstances have changed. Since the court could not require appellant to live in Fort Wright, the trial court must reconsider the request to authorize appellant=s relocation and/or decide on an appropriate modification or change of visitation under these circumstances, using KRS 403.340(3) and 403.270(2) as a guide.

Under the Separation Agreement, the parents have joint custody of the children. Neither of the parties seeks to change the fact that they share joint custody, with joint responsibility and decision-making regarding the children. Joint custody has been defined in Kentucky as Aan arrangement whereby both parents share the decision making in major areas concerning their child=s upbringing, a role traditionally enjoyed by both parents during the marriage, but which is usually reposed solely in one parent following dissolution.@ Burchell v. Burchell, Ky. App., 684 S.W.2d 296, 299 (1984). Joint custody does not require an equal division of residential custody of the children. Drury v. Drury, Ky. App., 32 S.W.3d 521 (2000). In a joint custody arrangement, a visitation schedule should be crafted to allow both parents as

much involvement in their children's lives as is possible under the circumstances. Id. at 524.

The relative merits of relocation must also be considered on remand. The courts of this state have not favored restriction of the custodial parent=s right to move. In a case involving a relocation, the Kentucky Supreme Court noted that, Aa custodial parent cannot, in today=s mobile society, be forced to remain in one location in order to retain custody.@ Wilson v. Messinger, Ky., 840 S.W.2d 203 (1992). Furthermore, our courts have concluded that parents should be given considerable latitude in choosing where they live, subject only to the requirement that when the right to move is challenged they should offer a plausible reason, not mere whim, for taking minors out of the jurisdiction of the court to the prejudice of the other parent=s visitation rights. Brumleve v. Brumleve, Ky., 416 S.W.2d 345 (1967). See also Stroud v. Stroud, Ky. App., 9 S.W.3d 579, 580-581 (1999), a case in which the parents had joint custody.

Appellant has shown plausible reasons, not based on whim, to relocate with the children. Her reasons were not demonstrated to be an attempt to thwart the agreement of the parties or destroy appellee=s parental rights. Appellant explained the reasons for her job change. She was under pressure to leave the employment she had at the time of the separation agreement because of the instability of the company and her perceived disfavor there due to some poor performance

evaluations. Appellant detailed her job search and related that this was essentially her only acceptable offer, given her age and the state of the economy and her industry in particular. The fact that the job she found was only 17 miles beyond the agreed upon radius to us evinces an attempt to comply with the spirit of the Separation Agreement.

In addition, the modification standards require the court to examine whether the advantages of the proposed change outweigh the harm likely to be caused by a change of environment. KRS 403.340(2)(c). The trial court did not consider the circumstance that appellant by moving 50 miles away had secured a better employment situation with a comparable rate of compensation in which she would not have to fear being laid off. Additionally, appellant=s new city of residence is only somewhat more than an hour=s drive from her former residence and the home of appellee. Appellant evinced an intent to work with appellee despite the increased difficulty of the larger distance from Fort Wright. Therefore, it is reasonable to believe that the parents, and extended family, can have a close relationship with the children whether they live in Fort Wright or Kettering, Ohio.

For the foregoing reasons, we vacate the Court’s order and remand this matter back to the circuit court for a determination of modification under the best interests of the child standard.

SCHRODER, JUDGE, CONCURS.

BUCKINGHAM, JUDGE, CONCURS BY SEPARATE OPINION.

BUCKINGHAM, JUDGE, CONCURRING BY SEPARATE OPINION. I concur with the majority opinion but desire to write separately.

The appellant argues, and the majority agrees, that the trial court could not force her to continue to live in Fort Wright because such was contrary to the relocation provision in the agreement which would allow her to move to Ohio so long as her relocation was within a thirty-mile radius of downtown Cincinnati. I believe the appellant and the majority have misconstrued the court's ruling. It is true the trial court held that it is in the best interest of the children for them to continue to reside in Northern Kentucky. However, the court did not modify the parties' agreement and prohibit the appellant from relocating as claimed by the appellant. Rather, the court only opined that it would be in the best interest of the children for them to remain at their present location. The court then denied the appellant's request to move to a location in Ohio that was more than thirty miles from downtown Cincinnati. To the extent the court attempted to prevent any relocation to Ohio that was within thirty miles of downtown Cincinnati, I would agree the court erred. However, it does not appear to me that it did so.

The majority opinion also seems to state that the trial court's order prohibiting the appellant from relocating with the children contrary to the parties' agreement violates Section 24 of the Kentucky Constitution. If the order prohibited the appellant from relocating out of Kentucky, I would agree as noted

above. However, as I have stated, I do not believe the court did this. Further, I do not believe that an order by the trial court enforcing the separation agreement would violate Section 24 of the Kentucky Constitution in this case because the appellant waived any violation of her constitutional right by signing the agreement restricting her right to relocate with the children.

Nevertheless, I concur with the majority opinion to the extent it vacates and remands the order of the trial court because the trial court's order left in place an unworkable situation. Obviously, if the appellant lived in or near Dayton, Ohio, and the Appellee lived in Fort Wright, Kentucky, it would be impossible to carry out the shared custody arrangement provided in the separation agreement.

The majority opinion appears to me to suggest to the trial court that it should allow the appellant to relocate with the children to Dayton, Ohio. The trial court has already determined that such a move would not be in their best interest. I do not believe that such a ruling was an abuse of discretion. However, in light of the unworkable situation as it now exists, I would vacate and remand to the trial court for reconsideration of the issue and for a likely modification of custody. Whether the trial court allows the children to relocate with the appellant to Ohio or requires the appellant's residence to be within the thirty-mile radius if she is to continue to have shared custody, it appears that modification of the shared custody arrangement will be necessary.

Once the case is remanded to the trial court, the question becomes which party bears the burden of proof. The facts are that the appellant filed a motion to adjust visitation, and the appellee filed a motion to enforce the separation agreement or, alternatively, a motion to modify the appellant's parenting time. The majority has approached the remanding of the case in terms of the court addressing the appellee's motion to modify. This would put the burden of proof on the appellee. I disagree with this approach.

When the appellant moved the court to adjust the appellee's visitation, she essentially moved the court to modify custody. It has been held that "[w]here the parents truly share both legal and physical custody, an application by one parent to relocate with the child to an out-of-state location is analyzed as an application for a change of custody." See O'Conner v. O'Conner, A-1155-01T4, 2002 LEXIS 160 (N.J. Super. Ct. App. Div., Mar. 27, 2002). In short, in light of the appellant's move to Ohio, both parties have moved the court to modify the shared custody arrangement. Since it is the appellant who prompted this action by her move, she must have the burden of proof in this case.

Finally, I see no need for any further evidentiary hearing. The trial court has heard the evidence, and it should now reconsider its decision in accordance with this opinion. If another evidentiary hearing is held, it would allow the appellant to introduce the evidence that she attempted to present "through

the backdoor" in her CR 60.02 motion. Such would be unfair to the appellee and should not be allowed.

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