

RENDERED: MAY 13, 2005; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000835-ME

DONNA ROSS, F/K/A DONNA ROSS HENNIES

APPELLANT

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

ANTHONY W. HENNIES

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: MINTON AND TACKETT, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

HUDDLESTON, SENIOR JUDGE: After several years, the marriage between Donna Ross and Anthony W. Hennies was dissolved. Prior to entry of a dissolution decree, Donna and Anthony entered into an agreement to share joint custody of their two young sons, Kyle and Patrick, with Donna as the children's "primary

¹ 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.

residential custodian."² In addition, the parties agreed to a parenting schedule that equally divided the boys' time between them. They included in their agreement a restriction that neither could establish a residence for the children outside a thirty-mile radius from downtown Cincinnati, Ohio.

In May 2001, Anthony moved Kenton Circuit Court to enforce joint custody or to modify the parenting schedule. In his motion, Anthony contended that Donna was planning to move herself and the boys to Kettering, Ohio, which would violate the agreement's relocation restriction. In response, Donna moved the court to adjust the parenting schedule, which was, in actuality, a request for permission to move the boys to Kettering. Donna argued the move was involuntary because her new employer required her to live in the Dayton, Ohio, area.

After an evidentiary hearing, the court found that Donna had voluntarily accepted the new job in Ohio; thus, it concluded, the move was not involuntary. The circuit court also found that it was in the boys' best interest for them to remain in Northern Kentucky. And, the court found that Donna could continue to live in Northern Kentucky while working in Dayton. Accordingly, Donna's request to relocate the boys was denied and the court refused to modify the parenting schedule.

² Although commonly used in joint custody situations, the term "primary residential custodian" is not statutorily defined.

Upon Donna's appeal to this Court, we vacated the circuit court's order and remanded with directions that the circuit court reconsider Donna's request to relocate the children and the need to modify the parenting schedule. We ordered the court to apply the "best interest of the child" standard found in Kentucky Revised Statutes (KRS) 403.270 and the factors for modifying custody found in KRS 403.340 when it revisited these issues.

Not long after we vacated the circuit court's decision, the Supreme Court of Kentucky rendered its decision in Fenwick v. Fenwick.³ In that case, a primary residential custodian in a joint custody situation wished to relocate with the children; the non-primary residential custodian objected to the move.⁴ The Court held that if a non-primary residential custodian wished to prevent the primary residential custodian from relocating with the children then the non-primary residential custodian must file, within a reasonable time, a motion seeking to be designated as the primary residential custodian, and the non-primary residential custodian must satisfy the standards set forth in KRS 403.340.⁵

In January 2004, Anthony sought designation as primary residential custodian, arguing that the children would be

³ 114 S.W.3d 767 (Ky. 2003).

⁴ Id. at 772.

⁵ Id. at 786.

adversely affected if they were relocated. After a two-day evidentiary hearing, the circuit court granted Anthony's motion and designated him as the boys' primary residential custodian, thus effectively denying Donna's request to relocate the boys to Kettering. Additionally, the court declined to modify the parenting schedule. Donna appealed once more to this Court.

On appeal, Donna argues that the circuit court erred when it refused to reconsider her request to relocate the children and to reconsider modification of the parenting schedule. Donna insists that the court failed to apply the "best interest of the children" standard and failed to apply the factors found in KRS 403.340. In doing so, she claims, the court intentionally circumvented the Supreme Court's holding in Fenwick and ignored directives contained in our prior opinion. Donna reminds us that the circuit court made a finding of fact that neither her household nor Anthony's presented a threat to the boys' physical, mental, moral or emotional well-being. Therefore, she reasons, the court's decision was not supported by sufficient evidence.

During the two-day hearing, numerous witnesses testified on Anthony's behalf, most notably, two of the boys' teachers who informed the court that Anthony was actively involved with the boys' school activities, and that the boys tended to perform better in school while in his care. In

contrast, both teachers testified that Donna was not as involved in the boys' school life as was Anthony. In fact, one teacher described Donna as the parent that teachers never meet. The teachers supported Anthony's contention that the boys were thriving in his Northern Kentucky home and that if they were relocated to Kettering they would lose the advantage of living in a nurturing environment.

When we review a circuit court's child custody decision, we will not reverse unless its findings of fact are clearly erroneous or its decision reflects a clear abuse of the considerable discretion granted trial courts in custody matters.⁶

Contrary to Donna's assertion, the circuit court neither ignored Fenwick nor our prior opinion. In fact, as the record reveals, the court took great pains to apply all the factors found in KRS 403.340, as required by both Fenwick and our prior opinion, and it based its decision on the children's best interest. And, while Donna claims that the court's decision is not supported by sufficient evidence, the court relied heavily on the teachers' testimony, which constituted substantial evidence. Since the court complied with our prior opinion, complied with the Fenwick decision, and based its decision on substantial evidence, it did not abuse its

⁶ Ky. R. Civ. Proc. (CR) 52.01. See also Reichle v. Reichle, 719 S.W.2d 442, 444 (Ky. 1986).

discretion when it designated Anthony as primary residential custodian.

Although the evidence supports the circuit court's decision to designate Anthony as primary residential custodian, it does not necessitate a modification of the parenting schedule. Consequently, the court did not err when it refused to modify the parenting schedule agreed to by the parties.

The custody order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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