RENDERED: APRIL 1, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001635-ME

JAMES N. LAWSON — APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE STEPHEN M. GEORGE, JUDGE
ACTION NO. 02-CI-502000

LISA M. LANGFORD
(FORMERLY LAWSON) — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DYCHE, HENRY, AND TACKETT, JUDGES.

DYCHE, JUDGE: James M. Lawson challenges the order of the Jefferson Family Court which designated his ex-wife, Lisa M. Langford, as primary custodian for their three children. As a result of this designation, the children will move with their mother from Jefferson County to Verona, Kentucky, a distance of approximately 77 miles. Although we can certainly understand the father’s dismay at the prospect of his children being moved

that distance away from him, we can find no legal error in the Family Court's decision. We therefore affirm.

James and Lisa were married in 1995; their daughter was born in 1997, and twin boys in 1999. The parties separated in 2002, and after filing a dissolution action, participated in a court-ordered custody evaluation with a licensed clinical psychologist. They agreed to abide by the recommendations of the evaluator, and, in fact, amended their previously-agreed-upon visitation schedule as a result of her recommendations.

In April 2004, Lisa informed Jim that her new husband's employment was in Verona, and that she intended to move there, taking the children. She proposed amendments to the visitation schedule to make up for Jim's week-night overnight visits with the children which would necessarily end after the move. He declined the offer, choosing instead to seek a court order to restrain Lisa and the children from moving. Lisa also sought a hearing on her motion to "review and modify parenting time."

The parties filed pre-hearing statements with the trial court, and the court conducted a hearing, with each party allowed to present testimony. The trial court entered an order finding that the history and practice of the parties had resulted in Lisa being the primary residential custodian. The court made such a designation, without denigrating Jim's status

as a joint legal custodian. The trial court also authorized Lisa's move to Verona with the children.

Jim sought extraordinary relief from this court; his petition was denied. He now appeals, claiming that the trial court used an incorrect standard to decide the issue before it. We find no such error, and affirm.

Jim argues that the trial court used an "arbitrary mathematical calculation of parenting time exercised by the parties" as its sole factor in determining who would be the primary residential custodian. This, he argues, is a violation of the principles set out in Fenwick v. Fenwick, 114 S.W.3d 767 (Ky. 2003). Without finding that the trial court actually used the "mathematical calculation" as its sole means of determining the primary residential custodian, we think it odd, or even ironic, that Jim would object to that method. His prehearing statement, filed with the trial court, states, in full:

> Comes now the Respondent, James Lawson, by counsel, and submits the following Prehearing Statement regarding Petitioner's Motion to review and modify parenting time pursuant to her intention of moving to northern Kentucky. The parties have a six (6) year old daughter, Kate Lawson and two four (4) year old twin boys, Mark and Luke Lawson. The Property Settlement Agreement was entered into on January 15, 2004. The Settlement Agreement set forth that the parties were to be joint physical custodians of these children with neither party being designated as primary residential custodia[n].

> "The only exception to this pure joint custody arrangement is that the Petitioner shall have the ultimate choice of which school the children shall attend. If either party contemplates moving the children from Jefferson County, he/she shall first give ninety (90) days written notice to the other party to afford time for discussion/mediation and motion to the court. The parties, at any time, may mutually agree in writing to relocation of the children."

Thus, it was clearly the intent of the parties that the Court should be the final arbitrator of any objection to the other party moving from the Jefferson County area with the children. Petitioner has now made known she desires to move to the Cincinnati, Ohio area in Northern Kentucky. Respondent objects to the children having their primary residence moved to that area of the state.

The parties adopted the suggestion of Dr. Sally Brenzel regarding a parenting schedule. The parenting schedule was the only portion of the report by Dr. Brenzel adopted in the Marital Settlement Agreement. The schedule set forth in that agreement would have the Petitioner enjoying a slight majority of overnights. However, the Petitioner failed to exercise her allotted overnights and between the dates of January 16th through May 31st and the Respondent had over 50% of the overnights.

Attached to this Prehearing Statement are 3 exhibits prepared by the Respondent. The first lists the actual dates of overnights from January 16th through the end of May. Respondent had 72 out of 138 days over 50% of the overnights. The second exhibit is the actual day to day calendar kept by the Respondent noting, by circling of dates, the overnights that he enjoyed with the children

> between January 16th and the end of May. The third exhibit is a summary of those overnights by months. If the Court is to make this extremely important decision as to whether or not to allow the Petitioner to move with the children far from the Jefferson County area based upon who has the majority of overnights, it is clear that the Respondent has the advantage.
>
> The Respondent also has the advantage if the calculation of "waking hours" of time with the children is analyzed. If one is to assume that the children are awake on a daily basis from 8:00 a.m. to 9:00 p.m., the parenting schedule agreed to in the Marital Settlement Agreement would have the Respondent with the children 58% of these waking hours. However, if the actual schedule utilized between the parties between January 16th and the end of May is analyzed, the Respondent had the children 62% of the waking hours. Again, the Respondent should be designated as "primary" if the Court feels that such an analysis is necessary and critical.
>
> An alternative to this rigid mathematical calculation exists. Respondent asserts that the intention of the parties was clear in the Marital Settlement Agreement and that a [sic] analysis of best interest of the children is available to the Court.

He now strenuously objects to the court using that very information as a basis of its decision. As in W. W. Jacobs's story "the Monkey's Paw,"[1] one should be careful what he asks for, because his wish might be granted.

[1] Harper's Monthly 105 (Sept. 1902): 634-639.

This issue has been previously before a panel of this court, on Jim's motion for a Writ of Prohibition. In that action, the panel wrote,

> Contrary to [Jim]'s allegations, the judge did not arrive at the decision as a result of a purely mathematical computation. The judge considered that the parenting schedule [w]as consistent with the involvement of the parties as set forth in the evaluator's report. During the marriage, the mother had not been employed but had remained at home with the children. She was the party given final say on the choice of school for the children. While the petitioner's increased involvement with the children was recognized as good for the children, the circuit judge was compelled to recognize that the mother was the primary custodian of the children.

Although we are not bound by the rulings of a motion panel of this court, Knott v. Crown Colony Farm, Inc., 865 S.W.2d 326, 329 (Ky. 1993), we find the reasoning therein to be persuasive.

In any event, we have examined the record and find no error in the Family Court's actions. The judge considered the evidence before him, including that both parents were fit and proper custodians for the children. The parties themselves had, by their own actions, made a *de facto* decision as to the proper primary residential custodian. The court found nothing amiss in this tacit agreement of the parties, and ratified it. The order of the Jefferson Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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