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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001803-ME

KEOKA ALI JACKSON — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CYNTHIA E. SANDERSON, JUDGE
ACTION NO. 08-CI-00269

MARSHA RICE CROCKETT — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, LAMBERT, AND NICKELL, JUDGES.

CAPERTON, JUDGE: The Appellant, Keoka Ali Jackson, appeals the September 19, 2011, order of the McCracken Family Court denying his motion to modify the parental timesharing arrangement between himself and the Appellant, Marsha Rice Crockett. Following a thorough review of the record, the arguments of the parties, and the applicable law, we affirm.

The parties were married on October 20, 2003, in McCracken County, Kentucky. Their minor child, K.A.J., was born in July of 2003, prior to the date of the marriage. Years later, the parties filed for divorce, and entered into a Marital Settlement Agreement, which was adopted by the McCracken Family Court by a Decree of Dissolution of Marriage, entered on June 2, 2008. Pursuant to that agreement, the parties were directed to "share joint legal custody" of the minor child. The agreement further described "equal decision making" between both parents.[1] The agreement also ordered that each party "shall keep the other reasonably informed of the whereabouts of the child." It established Marsha as the primary custodian, and stated that Keoka would receive visitation "as the parties may agree," which it stated would be no less than the McCracken County standard visitation schedule. The agreement also specifically stated:

> If Marsha moves to a location that makes the weekend visits inconvenient and requires travel, the parties will first try to agree on a visitation schedule that works best for everyone. If they are unable to reach an agreement, Keoka shall have the children [sic] for the entire summer. Keoka's summer visitation shall begin five (5) days after school is out for the summer and end five (5) days before school resumes for the fall. This extended summer visitation will take place in lieu of the provisions set forth in the McCracken County Standard Visitation Schedule.[2]

In 2009, Marsha was arrested on drug possession charges, with a firearm enhancement due to the proximity of a pistol. At that time, Marsha was

[1] The agreement stated that, "The parties shall consult with each other with respect toward the child's education, religious training … health, welfare, and other things of similar importance affecting the child, whose well-being … shall at all times be the paramount consideration of the parties."

[2] Appendix 1, p. 3.

living with a man named Daniel Samson, who is apparently her boyfriend. Keoka filed a motion to modify custody, arguing serious endangerment of the child. Marsha was convicted of the aforementioned drug charges in November of 2009. Nevertheless, Keoka's motion was denied and, according to the brief filed with this Court, the parties lived in relative harmony until early 2011. During that period of time, K.A.J. excelled in school, attended a Baptist church, and enjoyed time with her parents and paternal grandparents.

On March 1, 2011, Marsha decided to move with K.A.J. from Kentucky to Ullin, IL, in order to live at a place known informally as the "Black Israelite Farm." Ullin is approximately forty-five miles from Paducah. Keoka asserts that the Farm had all the characteristics of a cult. Below, the paternal grandmother testified that she visited the Farm in an attempt to deliver school supplies and clothes to K.A.J., and that it appeared to consist of "condemned homes."

Keoka now asserts that Marsha made this move without discussing its implications with him. To the contrary, Marsha asserts that since 2009, the parties have communicated through the paternal grandparents concerning issues related to K.A.J. She states that immediately after the move, she advised the paternal grandmother, Sandra Jackson, of her new address, phone number, and the name and address of the school that K.A.J. would attend in Illinois.

Both Keoka and Sandra denied being informed of the move in their testimony below, but conceded on cross-examination that they had been aware of

the move since March of 2011, although Keoka denies knowing the location to which Marsha actually moved. Marsha concedes that she did not file a motion seeking leave of the court to relocate, and claims that she was unaware of the requirement to do so pursuant to Kentucky Family Court Rule of Practice and Procedure 7(2) (herein after FCRPP). Marsha states that instead, she followed the aforementioned provision of the marital settlement agreement concerning relocation.

Keoka states that since Marsha was responsible for the displacement of K.A.J., Marsha should have provided transportation for the regular visits between K.A.J. and Keoka from March 2011, to Father's Day 2011. Keoka states that he had previously allowed Marsha to have unscheduled visitation on Mother's Day in exchange for reciprocal visitation on Father's Day, which he now asserts that Marsha denied him in 2011. Marsha asserts that on that weekend, she informed Sandra that she could not afford to make the trip to Paducah to bring K.A.J. for visitation, and asked that either Keoka or Sandra pick the child up. Marsha states that she further explained that Keoka was behind in child support, and that she had made the trip to Paducah for visitation the weekend immediately preceding Father's Day weekend. Marsha asserts that no one came to pick K.A.J. up that weekend.

Keoka further states that Marsha also refused to allow K.A.J. to go to Keoka's family reunion in July of 2011, despite previously agreeing that she would do so. Keoka states that when he and his parents enlisted the help of local law

enforcement to facilitate the visitation, Marsha again denied same, stating that Keoka had filed court pleadings seeking the return of K.A.J. to the Commonwealth.

Keoka filed a Motion to Modify Timeshare and/or to Require Petitioner to Return to Kentucky and to Enforce Joint Custodial Rights in July of 2011, requesting that he be named primary residential custodian. In the alternative, he petitioned the trial court to order Marsha to return the child to the Commonwealth and to require Marsha to consult with Keoka concerning major decision-making for the child.

A full evidentiary hearing was conducted below over the course of two days. At the conclusion of the hearing, the court denied Keoka's motion to modify timesharing in the aforementioned order of September 19, 2011. The motions regarding the return of K.A.J. to the Commonwealth and the enforcement of joint custodial rights were not addressed. It is from this order that Keoka now appeals to this court.

On appeal, Keoka makes three arguments. First, he argues that the court erred in failing to require that K.A.J. be returned to Kentucky. Secondly, he argues that the court erred in failing to grant him the status of primary residential custodian. Finally, he argues that the court below abused its discretion in failing consider the best interests of K.A.J. under the factors enumerated in Kentucky Revised Statutes (KRS) 403.340(3). In response, Marsha argues that the court

below properly ruled upon all motions, and did not abuse its discretion. We address the arguments of the parties in turn.

Prior to addressing the arguments of the parties, however, we note that this court reviews the findings of fact of a circuit court under the clearly erroneous standard set forth in Kentucky Rules of Civil Procedure (CR) 52.01. *Humphrey v. Humphrey,* 326 S.W.3d 460, 463 (Ky.App. 2010). Further, due regard shall be given to the trial court to judge the credibility of the witnesses. *Id.* The determination of whether modification of visitation/timesharing is warranted lies within the sound discretion of the circuit court. *Pennington v. Marcum,* 266 S.W.3d 759 (Ky. 2008). We review this matter with these standards in mind.

As his first basis for appeal, Keoka argues that the court below erred in failing to require K.A.J. to be returned to Kentucky. Keoka asserts that Marsha was required by FRCP 7(2)[3] to file a motion with the trial court when relocating the child out of state, and notes that she did not do so. Accordingly, Keoka asserts that absent court approval, this is a decision that must be made by both joint custodians. Keoka directs the attention of this Court to our recent holding in *N.B. v. C.H.*, 351 S.W.3d 214 (Ky.App. 2011), wherein the residential parent, in the midst of a trial court battle concerning visitation, filed notice of his intention to

[3] That provision provides that, "(a) If either parent intends to move with the child(ren) from the Commonwealth of Kentucky to another state, or more than 100 miles from the present residence of the child(ren), he or she shall give notice to the other parent at least sixty (60) days prior to such move. Either parent may file a motion for change of custody or time sharing if the other parent is not in agreement with the move or an agreed order if they are in agreement. No relocation of the children shall occur unless the court enters an order modifying the status quo."

relocate from Kentucky to Texas. The non-custodial residential parent filed an objection to the proposed relocation, as well as a motion to compel the return of the child to Kentucky, upon learning that the child had already moved to Texas with the other parent. Her motions were denied by the trial court. On appeal, this Court found that:

> A decision to establish a new residence for a child far across the country is of such great moment that, absent court approval, the decision must be made by both joint custodians.

N.B. v. C.H. at 15. Upon review of the trial court's order, this Court determined that:

> Nothing addresses the Father's acknowledged unilateral decision-making in contravention of the joint custody order; and nothing addresses whether any aspect of the acknowledged relocation is in the daughter's best interests.

Id. at 18. Accordingly, this Court reversed and remanded that case for a hearing in accordance with *Pennington*, finding that nothing in the findings of the trial court addressed the primary custodian's "unilateral decision-making in contravention of the joint custody order; and nothing addresses whether any aspect of the acknowledged relocation is in [the child's] best interests."

In reliance upon *N.B.,* Keoka now argues that Marsha unilaterally assumed the role of sole custodian, as the father did in *N.B.*, even though there was an order of joint custody in place. He thus asserts that the trial court erred in allowing her to do so without requiring a motion to relocate, a hearing on the

relocation once it had occurred, and by failing to place a burden on Marsha to prove that it was indeed in the best interest of K.A.J. to relocate to the Black Israelite Farm.

In response, Marsha argues that the ruling of the court allowing her relocation was not in error, and is consistent with precedent. Marsha also relies upon *N.B.,* and insists it supports the trial court's ruling below in this matter. She notes that the court below conducted a best-interest hearing in accordance with *Pennington*, following Keoka's motion to modify timesharing five months after she had moved. Moreover, she asserts that the matter *sub judice* is distinguishable from the situation in *N.B.*, since she sought to move only forty-five minutes from Keoka's home in Paducah, and since visitation proceeded as it always had in the months following the move. Finally, she argues that unlike the case in *N.B.*, herein, the parties both signed a Marital Settlement Agreement containing a provision specifying an alternative visitation schedule in the event that the non-custodial parent moved to a location which made weekend visits inconvenient. Marsha thus argues that as the parties previously agreed to visitation in the event that Marsha relocated, and because it was Keoka who sought modification of the agreement, he appropriately had the burden of proof in this matter.

Having reviewed the arguments of the parties, the record, and the applicable law, we are compelled to agree with Keoka that Marsha was in contravention of the law in relocating without following the procedure for relocation clearly set forth in FCRPP 7(2), and that the court erred in failing to

make a finding that this was the case. Indeed, FCRPP 7(2) is clear in its mandate that:

> If either parent intends to move with the child(ren) from the Commonwealth of Kentucky to another state, or more than 100 miles from the present residence of the child(ren), he or she *shall* give notice to the other parent at least sixty (60) days prior to such move. (Emphasis added).

Further, that provision provides that:

> No relocation of the children shall occur unless the court enters an order modifying the status quo.

Despite the mandatory language of this provision, Marsha essentially argues that by moving to a state outside of the Commonwealth, her duty to comply with FCRPP 7(2) prior to relocating was superseded by her compliance with the marital settlement agreement.

Below, the evidence was ambiguous as to whether Marsha informed Keoka or his mother of her move prior to the time that she did so. Marsha acknowledges not informing Keoka; however, the record also reflects that Keoka mandated that all communication between the parties be conducted through his mother. Marsha testified that she informed the paternal grandmother immediately after the move, a fact which the grandmother disputes. Certainly, it was within the discretion of the court below to judge the credibility of the witnesses, and accord the weight it thought appropriate to their testimony. CR 52.01. However, there seems no question from the evidence presented below on behalf of both sides that

Marsha did not inform either Keoka or Sandra prior to the move, nor did she file a motion to relocate with the court as mandated by FCRPP 7(2).

Marsha acknowledges this fact, but asserts that her compliance with the marital settlement agreement should supersede her failure to comply. We cannot agree, particularly because we do not find that the evidence indicated compliance with the marital agreement in any event. The visitation portion of that agreement provides as follows:

> Keoka shall have visitation with the child as the parties may agree. If the parties cannot agree as to visitation, they shall follow the guidelines of the McCracken County Standard Visitation Schedule. If Marsha moves to a location that makes the weekend visits inconvenient and requires travel, the parties will first try to agree on a visitation schedule that works best for everyone. If they are unable to reach an agreement, Keoka shall have the children for the entire summer. Keoka's summer visitation shall begin five days after school is out for the summer and end five days before school resumes for the fall. This extended summer visitation will take place in lieu of the provisions set forth in the McCracken County Standard Visitation Schedule.

Below, there was no evidence that following the move Marsha attempted to negotiate an alternate visitation schedule with Keoka, or with his mother, through whom they conducted their communication. While Marsha asserts that she continued, for some portion of the summer, to transport K.A.J. to Keoka for weekend visitation, there is no dispute that as of Father's Day visitation this was no longer occurring. Certainly, there was no evidence that Keoka had visitation with K.A.J. for the entire summer. Moreover, the agreement also clearly provides that:

> The parties shall consult with each other with respect toward the child's education, religious training, summer, and after-school activities.

There is no question that Marsha made this move, which resulted in a change of school, church attendance, and after-school activities, without consulting Keoka or seeking the permission of the court. This was not in compliance with the law as it stands in this Commonwealth, or with the parties' marital agreement.

Accordingly, for the foregoing reasons, we are compelled to find that the court below erred in its failure to find that Marsha contravened the law by relocating without following the proper procedures, and in failing to order her compliance with same. Nevertheless, we are equally compelled to find that this error was harmless, in light of the fact that the court has already conducted a hearing in accordance with *Pennington, supra*.

In conducting that hearing, the court made determinations on the record, and in some detail concerning the best interest of the child, including ongoing visitation between the child and the paternal grandparents, excellent academic performance on the part of the child since moving to Illinois, the fact that Keoka had voluntarily exercised less than full standard visitation and the continued attendance by the child at the church of the paternal grandparents. Were this court to remand the matter back to the trial court, it would be in order for it to conduct a hearing identical to that which has already been conducted. Presuming that the findings would be the same, we decline to do so now.

Wherefore, for the foregoing reasons, we hereby affirm the September 19, 2011, order of the McCracken Family Court denying the motion to modify the parental timesharing arrangement.

LAMBERT, JUDGE, CONCURS.

NICKELL, JUDGE, CONCURS IN RESULT ONLY AND FILES SEPARATE OPINION.

NICKELL, JUDGE, CONCURRING IN RESULT ONLY: I concur with the majority in result only and write separately to express my frustration in knowing that our affirmation of the trial court's decision, though correct, nevertheless appears to reward Marsha's disregard of the mandatory procedure set forth in FCRPP 7(2), requiring timely notice and a court order *prior* to relocation of a child from the Commonwealth to another state or more than 100 miles from the child's current residence. While the trial court erred in failing to find Marsha contravened the law and in failing to order her compliance, I reluctantly agree the error was "harmless" in the sense that the trial court did conduct a hearing regarding K.A.J.'s best interests, albeit with regard to circumstances existing *after* the child's wrongful relocation. KRS 403.270; KRS 403.340; and *Pennington*. Even so, I am mindful that consideration of K.A.J.'s best interests *after* relocation changed the entire complexion of the trial court's inquiry.

Marsha's disregard of the requirements under FCRPP 7(2), resulting in the hearing being held *after* relocation, effectively changed the trial court's perspective in determining the best interests of K.A.J. in several ways. First, the

analysis was altered from whether the best interests of K.A.J. would be served by allowing the child's uprooting and removal from the Commonwealth to whether the best interest would be to order the child's return after adjusting to the unauthorized relocation. Second, by addressing the issue of K.A.J.'s best interest *after* relocation rather than *before*, the burden of proof was reversed from Marsha, who desired the child's removal from the Commonwealth, to Keoka, who moved for K.A.J.'s return. Third, the substance of proof necessary to support relocation being in the best interests of K.A.J. was altered. And fourth, the likely outcome of the trial court's ultimate determination regarding K.A.J.'s best interests in relocating the child from its *prior* circumstances in the Commonwealth may have been entirely different than the trial court's decision in regard to ordering the child uprooted and relocated a second time merely to achieve a return to the *status quo*. However, though our affirmation, and its consequences, may seem unfair to Keoka, our focus is upon the best interests of K.A.J. I agree that a remand directing the trial court to hold a second and identical hearing to determine the child's best interests under the current circumstances, existing *after* the unauthorized relocation, would likely produce the same result and would serve no legitimate purpose.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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