RENDERED: October 1, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000409-MR

LISA A. REID — APPELLANT

v.

APPEAL FROM NELSON CIRCUIT COURT
HONORABLE LARRY D. RAIKES, JUDGE
ACTION NO. 97-CI-00116

JEFFREY WAYNE CLARK — APPELLEE

OPINION
REVERSING
** ** ** ** **

BEFORE: GUDGEL, CHIEF JUDGE, HUDDLESTON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from an order changing physical custody of the parties' child to the father in the event the mother, who formerly had physical custody under the separation agreement, moves to Texas. We believe the facts in this case are indistinguishable from those in Mennemeyer v. Mennemeyer, Ky. App., 887 S.W.2d 555 (1994). Thus, we reverse that portion of the order which prohibited the mother from taking the child to Texas.

Appellant, Lisa Reid, and appellee, Jeffrey Clark, were married in Texas in 1993. Thereafter, Lisa moved from Texas to

Louisville, Kentucky, to join Jeffrey, who has family in Kentucky. The couple subsequently moved to Nelson County, Kentucky, where Jeffrey's family is from. On October 25, 1995, Lisa gave birth to the parties' only child, Nina Leigh Clark. On March 12, 1997, Lisa filed for divorce in the Nelson Circuit Court. After filing for divorce, Lisa and Nina moved to Louisville, while Jeffrey remained in Nelson County.

On November 19, 1997, the parties executed a settlement agreement which provided the following with regard to custody of Nina:

> 1. The parties acknowledge and state that each is a fit and proper custodian for the parties' child, but that the best interests of the child are served by the Petitioner, Lisa Clark, being the primary custodial parent.

The settlement agreement also required Jeffrey to pay child support and provided that Jeffrey would have visitation according to the Local Rules of the Nelson Circuit Court, which sets visitation on alternating weekends, one day during the alternate week, on certain holidays, and certain vacation periods. On January 13, 1998, the decree of dissolution was entered which incorporated the parties' separation agreement.

Subsequently, Lisa informed Jeffrey that she intended to move to Texas with Nina in order to accept a better paying job and to be near her family. After Jeffrey had obtained a temporary injunction prohibiting Lisa from taking Nina to Texas until a hearing thereon could be held, the parties entered into an agreed order on April 13, 1998, requiring Lisa to notify Jeffrey sixty (60) days in advance if she planned to move to

Texas with Nina. On June 4, 1998, Lisa informed Jeffrey that she was planning to move to Texas with Nina. Jeffrey filed a motion opposing the move with the child, asserting his joint custody rights and contending the move was not in the best interests of Nina.

After a hearing on the matter, the Domestic Relations Commissioner (the "DRC") found that no custody determination had been made in the original settlement agreement since it did not specify whether custody was joint or sole. Accordingly, the DRC recommended that the parties share joint custody of the child. The DRC further found that it was not in the best interests of the child for her to be moved to Texas. Thus, the DRC recommended that Jeffrey be the majority custodian. Lisa filed exceptions to the DRC's report, and the matter was taken under submission by the circuit court. On October 22, 1998, the court issued its findings of fact, conclusions of law, and judgment. The court specifically rejected Lisa's argument that she was awarded sole custody in the separation agreement. The court agreed with the DRC that custody had not been determined in the separation agreement and further agreed with the DRC's recommendation of joint custody. As to majority custodian, the court found that it had no problem with Lisa being majority custodian so long as she lived in close proximity to Jeffrey. Thus, the court remanded the matter to the DRC for findings as to Lisa's intentions to move and the best interests of the child. Upon remand, the DRC again recommended that Jeffrey be majority custodian if Lisa persisted in her desire to move to Texas. Lisa

again filed exceptions. On February 12, 1999, the court upheld the DRC's findings and adopted his recommendations. From this order, Lisa now appeals.

Lisa first argues that the trial court erred in interpreting the custody portion of the separation agreement. The trial court found that no award of custody was made in the agreement since it could not be determined whether custody was joint or sole. Although the provision as to custody in the separation agreement does not specify whether custody is joint or sole, we do not agree that no determination of custody was made such that a *de novo* determination of custody was warranted. Clearly, a custody determination was made in the agreement, which was incorporated into the decree presumably after the court examined the agreement and found that it was in the best interests of the child. See KRS 403.180(2) and Morell v. Morell, 291 Ky. 686, 165 S.W.2d 351 (1942). Hence, the court's *de novo* determination of custody was in error.

For purposes of modification, we must now determine whether the agreement granted joint or sole custody. Lisa maintains that the agreement gave her sole custody because it used the term "primary custodian." It has been held that the term "primary custodian" should not be used to refer to one parent if the parents share joint custody. Aton v. Aton, Ky. App., 911 S.W.2d 612 (1995). It is Lisa's position that this evidences the fact that she was awarded sole custody. We do not agree. The agreement also clearly states that "each [parent] is a fit and proper custodian of the parties' child." Further, in

our view, Aton demonstrates that the term "primary custodian" has been commonly used by parties and the court to refer to the majority custodian in a joint custody situation, although the Court in Aton strongly discourages use of the term as it relates to joint custody. We believe that if the parties had intended that Lisa be awarded sole custody they could have used the term "sole custodian." Thus, we adjudge that the agreement granted joint custody of the child.

We next turn to the issue of whether the joint custody award should be modified as a result of Lisa's intent to move to Texas with Nina. It has been held that when a joint custody award is to be modified the court must decide custody *de novo* "as if no prior custody determination had been made." Erdman v. Clements, Ky. App., 780 S.W.2d 635, 637 (1989). However, material issues relating to joint custody will not be modified unless the court first finds an inability or bad faith refusal of one or both of the parties to cooperate as to custody of the child. Chalupa v. Chalupa, Ky. App., 830 S.W.2d 391 (1992).

In Mennemeyer v. Mennemeyer, Ky. App., 887 S.W.2d 555 (1994), the parties had an agreement to share joint custody of the child, with the mother having physical custody a majority of the time. When the father learned that the mother intended to move to Florida with the child, he filed a motion to modify joint custody to award him sole custody on the ground that the mother intended to move to Florida. The trial court ordered that joint custody continue but changed physical custody from the mother to

the father. Our Court reversed, adjudging that the threshold requirement had not been met:

> As we view the matter, in nonconsensual modification situations involving joint custody, such as the situation here, the trial court may intervene to modify a previous joint custody award only if the court first finds that there has been an inability or bad faith refusal of one or both of the parties to cooperate.

Mennemeyer, 887 S.W.2d at 558. Hence, as there was no evidence of the parties' inability to cooperate prior to the filing of the motion to modify, this Court refused to allow a change in physical custody and allowed the mother to move out of state with the child. Likewise, in Stinnett v. Stinnett, Ky. App., 915 S.W.2d 323 (1996), it was held that the threshold finding must be met in order to change physical custody of the child from one joint custody parent to the other.

In our view, Mennemyer cannot be distinguished from the case at hand as the facts are virtually identical. In the present case, there was likewise no evidence that the parties were unable to cooperate as to custody of Nina until Lisa advised Jeffrey of her intent to move to Texas. As in Mennemeyer, the motion was prompted solely by Lisa's intent to move to Texas.

Lisa cites to Brumleve v. Brumleve, Ky., 416 S.W.2d 345 (1967) wherein it was held that a sole custodian can move out of state with the child so long as there is some plausible reason for the move. However, unlike the case at bar, that case involved an award of sole custody.

Both parties urge us to adopt a reasonable test to determine whether a joint custody parent who has physical custody

of the child a majority of the time should be allowed to move out of state with the child. While we agree that relocation of a joint custody parent with a child is an issue which could benefit from some such test, given the permanent and traumatic implications of such a decision, we have no authority to adopt such a test.

For the reasons stated above, the judgment of the Nelson Circuit Court modifying the joint custody award is reversed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

Regina Rapier Beckman
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