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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000773-MR

MONICA DAWN PAGE, NOW PRICE — APPELLANT

v.

APPEAL FROM MONROE CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 03-CI-00017

KEVIN LYNN PAGE — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ABRAMSON AND TAYLOR, JUDGES; KNOPF,[1] SENIOR JUDGE.

KNOPF, SENIOR JUDGE: This appeal challenges an order of the Monroe Circuit Court modifying custody of the parties' three minor children based solely upon a planned relocation of their mother, the primary residential custodian, to the state of Ohio. Monica Page (Price) argues that the order changing joint custody to vest sole custody of the children with their father, appellee Kevin Page, must be set aside as unsupported by

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

evidence demonstrating that their best interests would be served by placing them with a father the trial court essentially found was not a proper custodian. We agree and reverse.

Pursuant to a separation agreement incorporated into the December, 2003 decree dissolving their marriage, Monica and Kevin were to share joint custody of their children: Alivia Noelle, born February 23, 1996; Aason Christopher, born July 13, 1997; and Amelia Gracelyn, born August 5, 2003. Monica was designated the primary residential custodian. In July 2005, Monica informed Kevin that she had decided to remarry on January 1, 2006, and planned to relocate with the children to her new husband's residence in Fort Jennings, Ohio. Ten days before the wedding, on December 22, 2005, Kevin filed an emergency motion to restrain Monica from removing the children from the Commonwealth and seeking temporary custody pending a hearing on his motion for a modification of permanent custody. Kevin alleged the following factors in his affidavit supporting the emergency motion: that it was his belief that Monica planned to marry and that she intended to move with the children to the state of Ohio; that earlier in the year Monica had arbitrarily removed the children from the elementary school they had been attending and enrolled them at Gamaliel causing their son Aason to be moved back to the second grade instead of continuing on to the third grade; that Alivia suffers from Turner's Syndrome and requires a daily injection; that Alivia's treating physicians are in Louisville, Glasgow, and Bowling Green and she is required to have one to three visits with each of them annually; and that all of the children's relatives

reside in the immediate area of Tompkinsville. The trial judge granted the motion and set a hearing on the permanent modification motion for January 16, 2006.

After that hearing, the trial court granted Kevin's motion for a change in permanent custody. The trial court made an initial finding concerning the circumstances of Monica's marriage to Jeremy Price after the death of his first wife in an automobile accident, leaving him to care for four young children. The following findings were the basis for the ultimate conclusion that a change to the sole custody of their father was in the children's best interest:

> 3. This Court finds that Jeremy owns a house located in the country containing 7,500 square feet and nine (9) bedrooms. He is employed by Electronic Data Systems and earns over $100,000.00 annually. In addition, he and his brother own 17 apartment rental units. Jeremy has purchased a large van that will accommodate the seven (7) children with appropriate seat belts available for the children.
> 4. This Court finds that Monica unilaterally removed two of the children from the Joe Harrison Carter Elementary School in Monroe county, Kentucky, to Gamaliel, Kentucky. This Court still further finds that Aason Page was retrogressed from the third grade to the second grade. This Court specifically notes that Kevin was only informed the night before the meeting occurred with the school authorities at Gamaliel regarding the change in schools.
> 5. This Court still further finds that Alivia Page is afflicted with Turner's Syndrome, which requires her to receive an injection every day. The testimony presented was to the effect that if she did not receive her daily injection, her physical growth would be severely retarded. Alivia also has fluid in a portion of her spine and a heart problem. Her primary treating physician for Turner's Syndrome has his office in Louisville, Kentucky. Alivia has appointments with

the physicians who treat her periodically throughout the year.

6. This Court finds from the evidence that **Kevin has not been an exemplary father.** Kevin is now employed at Clark Lumber Company in Lafayette, Tennessee. His working hours are from 6:00 a.m. to 3:15 p.m., except on Friday when he works from 6:00 a.m. to 2:30 p.m. Kevin was terminated from Roy Anderson Lumber Company due to absenteeism. **He lived in Alabama for approximately one (1) year during which time he had little contact with his children**. **He lived in a motel in Tompkinsville, Kentucky, for a short time after the divorce and did, in fact, live in his automobile for about two (2) months due to problems with his parents. Kevin testified if he were granted custody of the children, he would continue living with his parents and that there would be adequate sleeping facilities for the children.**
7. This Court finds that the three (3) children have a close bond with their paternal cousins who live in Monroe County and testimony was adduced to the effect that the three (3) children and their cousins sing in a group known as "Country Cousins."[2]
8. This Court finds from the testimony of Shirley Page, mother of Kevin, that she and her husband have had an active role in the upbringing of the children. She plays with them, watches television with them and has picnics by the creek with them on Sunday afternoons. Shirley and her husband took Alivia for her MRI and to obtain her back brace. [Emphasis added, original footnote omitted.]

The trial court then applied the KRS 403.340 factors to reach the following conclusions:

> ... this Court is of the opinion that the harm likely to be caused by a change of environment relating to the children

[2]This finding is in error because the testimony at the hearing was clear that only the oldest child, Alivia, was a member of the singing group. However, the trial judge corrected the error in his ruling on Monica's motion to alter, amend or vacate his initial findings and conclusions.

outweighs the advantages of the children being removed to Ohio. This Court concludes as a matter of law that **moving the children from the schools of Monroe County to Ohio would produce such a cultural change that the children would suffer emotionally.** Undoubtedly, the school system in Ohio is a good school system, however, the children would be beginning school at a time when they would not **perhaps** be familiar with the curriculum offered and would **perhaps** have to retrogress in school. **The dialect in Ohio is distinctly different from the dialect in Kentucky and the children might well be ridiculed over their native dialect.** The children would also be away for considerable periods of time from their cousins and other family members with whom they have developed significant bonds. The longer driving distance from Fort Jennings, Ohio, to Louisville, Kentucky, for the purpose of seeing Alivia's physician is certainly a relevant consideration. Although the children may look forward to riding in the new van, this Court is mindful that the children's adjustment to their new home, new school, new community and new family is one of the key factors to be considered in deciding what is in the best interests of the children. KRS 403.270(2)(d). This Court further concludes that it would be a traumatic change for the three (3) children to suddenly go to a household where there are four (4) additional children with whom they must adapt. This Court further concludes that it is concerned over the short duration of time Monica knew Jeremy or his children and their behavior patterns.

(2) To deracinate these young children from the only environment they have been familiar with to one that is unfamiliar **is just not necessary** when the respondent **and his parents** are willing and able to provide the familiar surroundings to which the children have been accustomed. **To suddenly introduce these children to a new home, new town, new state, new stepfather married to their mother, and new stepsiblings would endanger seriously the mental, moral and emotional health of the children.** Monica testified that the traveling time from Fort Jennings, Ohio, to Tompkinsville, Kentucky, was six and one-half (6 ½) hours if the children were along.

1. This Court concludes as a matter of law that the testimony heard by this Court when applied to the

> extant law dictates that a change of custody should occur. Consequently, this Court awards Kevin sole custody of the three (3) infant children **with the express proviso that Kevin's parents shall give close attention to the welfare and upbringing of the children.** [Emphasis added.]

We commence our discussion by acknowledging the deference to be accorded a trial court's findings of fact and conclusions of law in matters of child custody and the fact that we are not to substitute our judgment for that of the fact-finder. *Reichle v. Reichle,* 719 S.W.2d 442 (Ky. 1986). It is likewise well-settled that those findings must be supported by substantial evidence in the record, not mere supposition. Finally, we are mindful of the decision of this Court in *Fowler v. Sowers,* 151 S.W.3d 357, 359 (Ky.App. 2004), concerning legislative amendments impacting longstanding caselaw on child custody modification:

> It is true that KRS 403.340 was significantly altered by the General Assembly in 2001. The previous standard (utilized in *Fenwick,* [*v. Fenwick,* 114 S.W.3d 767 (Ky. 2003), and relied upon by Tara) permitted a change in custody only upon a dual demonstration: (1) that substantial harm would result to the child's physical, mental, or emotional health without a change of the custodial arrangement and (2) that any harm caused by the change would be outweighed by its advantages. The statute now permits modification if "a change has occurred in the circumstances of the child or his custodian" and if "the modification is necessary to serve the best interests of the child." KRS 403.340(3).
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> The strict standards for modification in the pre-2001 version of the statute were "intended to inhibit further litigation." *Quisenberry v. Quisenberry,* Ky., 785 S.W.2d 485 (1990). In enacting its amendments, the General Assembly not only relaxed the standards for modification of custody, but it also expanded upon the factors to be considered when

> modification is requested. The statute now directs the trial court to consider and to permit a change of custody based on the factors enumerated in KRS 403.270(2), the statute used in making initial custody decisions. KRS 403.340(3)(c). The former standards for modification, which Tara argued before the family court, are now mere elements or factors to be considered by the court. KRS 403.340(3)(d)and (e).

Nevertheless, we are convinced that the decision of the trial court to modify custody in this case cannot be supported by an examination of the evidence adduced at the hearing, the statutory factors, or recent caselaw.

Monica's first argument for reversal focuses upon Kevin's failure to make a motion for custody within a reasonable time of learning of the proposed relocation. Although he acknowledged at the hearing that he was informed of Monica's planned wedding and relocation as early as July 2005, he waited approximately six months--ten days before her wedding--to lodge the emergency motion which precipitated this appeal. Monica posits that the true motivation for the delay was to allow the two-year mark from the original custody decision to pass, which occurred shortly before the filing of his motion. We agree. Because the sole basis offered for the delay was Kevin's unreasonable and incorrect belief that Monica would not "go through" with the marriage or relocation, the "emergency" nature of his motion is suspect.

Procedural machinations notwithstanding, the bottom line in this appeal is there was absolutely no **evidence** presented which would rise to the "serious endangerment" standard for emergency motions, nor facts from which one could conclude that relocation with their primary residential custodian since birth would be

detrimental to the children's best interest. In this regard, we concur in the the rationale expressed in the recent decision of this Court in *Robinson v. Robinson,* 211 S.W.3d 63, 71 (Ky.App. 2006):

> Furthermore, we have thoroughly examined the record and see no substantive basis for preventing Gina from relocating with her children to the Memphis area. Although the "interaction and interrelationship" of the children with their father and other persons where they now live is a relevant factor in determining the likelihood of harm by the proposed relocation, [footnote omitted] the mere fact that relocation may affect the frequency of [Dale's] time-sharing with his children and the children's contact with other persons does not, standing alone, support a finding that the proposed relocation creates a likelihood of serious harm to the children.

The application of this reasoning appears to be especially apropos in a case in which the trial court made a specific finding that the party opposing relocation "has not been an exemplary father" and specifically ordered that his parents "give close attention to the welfare and upbringing of the children." The trial court also in this same order held Kevin in contempt for his failure to abide by certain economic terms of the parties' separation agreement, noting that continued failure to comply with terms of repayment would result in his incarceration.

Even a cursory review of these findings, in light of the concerns over Kevin's parenting ability, leads us to conclude that the trial court has in reality modified custody in favor of non-parents without so much as a single reference to Monica's fitness. The findings with respect to dialect and difficulties associated with integration into a blended family present only **potential** problems not significantly different than those

facing any child of divorce whose parents elect to remarry and relocate. The evidence adduced at the hearing simply fails to support the conclusion that these children's best interests would be served by removing them from the residential custody of their mother, whose only alleged shortcoming was her decision to relocate to her new husband's residence, and vesting sole custody in a father whose parenting skills were suspect even to the fact-finder.

Not only did Kevin admit at the hearing that he failed to even contact his children for approximately three months after his return to Tompkinsville from Alabama, but favorable testimony concerning his attention to the children's needs was primarily confined to the period before the initial custody decree was entered. Nor does the evidence support the trial court's concerns about Alivia's health and medical treatment. Monica testified that she intended to continue treatment with Alivia's primary physicians who are all located in Louisville, not Tompkinsville. This Court takes judicial notice of the fact that Fort Jennings, Ohio is approximately a 4-hour drive to Louisville and Tompkinsville to Louisville is approximately a 2 1/2-hour trip, a difference not so significant as to support a change in custody. Monica also testified that her re-marriage will allow her more time with her children as she intended to be a stay-at-home mom, rather than having to work as she did as a single mother. Monica testified at the hearing that despite her recent marriage, she had not, and would not, relocate to her husband's residence without her children. Most importantly in our opinion, and as was the case in *Fenwick*, Kevin utterly failed to demonstrate any likelihood of harm to the children

"other than the general adjustment problems normally associated with a move." 114 S.W.3d at 792. Considering all of these factors, we are convinced that the trial court's conclusions in this case are little more than a parroting of the statutory prerequisites without substantial evidence supporting them. Because the findings as to the children's best interests are not supported by the evidence, they must be set aside as clearly erroneous.

Accordingly, the judgment modifying custody is reversed and this action is remanded for an order restoring joint custody with Monica as primary residential custodian. Monica shall have immediate entitlement to physical custody of the children. Thereafter, a hearing shall be conducted to determine an appropriate modification of the parties' time-sharing arrangement and to reconsider issues relating to child support.

ALL CONCUR.

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