

RENDERED: October 30, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002365-OA

JENNIFER L. HUCK

PETITIONER

v.

ORIGINAL ACTION
REGARDING OLDHAM CIRCUIT COURT
ACTION NO. 95-CI-00203

DENNIS A. FRITZ, JUDGE,
OLDHAM CIRCUIT COURT

RESPONDENT

AND

BENJAMIN F. HUCK, JR.

REAL PARTY IN INTEREST

OPINION AND ORDER

* * * * *

BEFORE: HUDDLESTON, KNOPF AND MILLER, JUDGES.

PER CURIAM: This Court has considered the motion for intermediate relief and/or petition for writ of prohibition filed by Jennifer L. Huck and the response thereto filed by the real party in interest, Benjamin F. Huck, Jr.

On December 18, 1997, the Oldham Circuit Court entered an interim order in a divorce proceeding awarding Jennifer and Benjamin joint custody of their children. The order named Jennifer

as the primary custodian and granted her the right to determine the residency and educational needs of the children. However, the order directed that neither parent was to remove the children from Kentucky "with the intent to establish a separate residence" in absence of an agreement between the parties or as ordered by the Court. This order was made final and appealable by an order entered September 18, 1998.

On May 29, 1998, Jennifer filed a motion requesting, among other things, that she be granted leave to take the children with her to her new residence in Collegedale, Tennessee. This residence will be near members of her family. This motion did not come on for hearing before the respondent Judge Fritz until August 28, 1998, and September 2, 1998, because the respondent had suffered a heart attack.

On July 14, 1998, Jennifer gave notice that she had tendered a proposed visitation schedule on Benjamin and that school was scheduled to begin in Collegedale on August 11, 1998. On August 11, 1998, Benjamin served Jennifer a motion to hold Jennifer in contempt of court for moving to Tennessee in violation of the court directive.

In an order dated September 15, 1998, the respondent found that the reasons advanced by Jennifer for relocating in Tennessee were solely related to her desire and not the result of anything beyond her control, that the children could receive a similar education in Kentucky, and that such a relocation would disrupt the "previously established joint custody and frequency of

contact with the parents." The respondent accordingly denied Jennifer's motion to relocate and found Jennifer in contempt of court. The respondent directed that Jennifer be given until September 28, 1998, to purge herself of contempt by returning the children to Oldham County, Kentucky and enrolling them in their previous schools.

The order directing Jennifer purge herself of contempt by September 28, 1998, was stayed by an emergency order signed by Court of Appeals Judge Daniel T. Guidugli.

On September 18, the respondent entered a final order. Jennifer Huck has appealed both from the September 15 and September 18 orders.

In Mennemeyer v. Mennemeyer, Ky. App., 887 S.W.2d 555 (1994), this Court held that relocation from Kentucky to Florida was not a sufficient reason to modify joint custody. Thus, relocation by the primary custodial parent standing alone is not enough to trigger reexamining joint custody.

In Brumleve v. Brumleve, Ky., 416 S.W.2d 345, 346 (1967) the Court said:

Mothers should be given considerable latitude in choosing where they will live. But when this right is challenged by the former husband and father of the children, she should offer some plausible reason for taking minor children out of the jurisdiction of the court to the prejudice of the visitation rights of the father. Mere

whim is not enough. For a summary of authority see: 154
A.L.R. 552.

In the instant case, Jennifer indicated she was moving to be near relatives. Section 24 of the Kentucky Constitution states that "[e]migration from the State shall not be prohibited." It is true that before Jennifer permanently relocates in Tennessee, it is necessary to obtain court approval. She sought that approval. It is our opinion that the reasons for the move to Tennessee are not so lacking in merit as to be characterized as whimsical. The hearing required before relocating her residence is not so much intended to determine the basis for the move but to set up a new visitation schedule to suit the change in residence. Under Section 24 of the Kentucky Constitution, Jennifer is entitled to relocate. Further, since relocation alone is not sufficient to meet the threshold test to reconsider joint custody under Mennemeyer, Jennifer is entitled to take the children with her.

Since there is a substantial likelihood that Jennifer Huck will prevail on the appeal, it is appropriate to grant her request so as to prevent irreparable injury during the pendency of the appeal.

This Court ORDERS that petitioner's motion for leave to correct the original petition is GRANTED.

This Court DENIES the petition for writ of prohibition since there is an adequate remedy at law. This Court DIRECTS the Clerk of the Court of Appeals to REFILE the petition as a motion

for intermediate relief on appeal and further DIRECTS the clerk to REFILE the response in that appeal.

It is hereby ORDERED that Jennifer's motion for intermediate relief is GRANTED and the order directing Jennifer to purge herself of contempt be stayed pending the appeal.

ALL CONCUR.

ENTERED: October 30, 1998

Joseph R. Huddleston
JUDGE, COURT OF APPEALS

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