

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002023-MR

CHERI ANNE MILLER

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 96-CI-03187

DAVID CHARLES CHRISTIANSEN

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * *

BEFORE: BUCKINGHAM, JOHNSON AND MINTON, JUDGES.

JOHNSON, JUDGE: Cheri Anne Miller has appealed from an order of the Fayette Circuit Court entered on August 17, 2001, which denied her motion to relocate her minor children to California. Having concluded, in light of the Supreme Court of Kentucky's recent decision in Fenwick v. Fenwick,¹ that the trial court did not apply the appropriate standard in ruling on Miller's motion to relocate, we vacate and remand for further proceedings.

¹ Ky., 114 S.W.3d 767 (2003).

Miller and David Charles Christiansen were married on February 12, 1986. Two children were born of this marriage, Elizabeth Christiansen, born on November 11, 1990, and Melissa Christiansen, born on August 8, 1992. On July 19, 1999, a decree of dissolution of marriage was entered by the Fayette Circuit Court, dissolving the marriage of Miller and Christiansen. The trial court incorporated the parties' property settlement agreement into the divorce decree, which provided, inter alia, that Miller and Christiansen would have joint custody of their children, and that Miller would be the primary residential parent. In addition, the agreement provided that Miller "shall not relocate the children's residence outside of Fayette County or its contiguous counties without approval by the Fayette Circuit Court."²

On July 9, 2001, Miller filed a motion asking the trial court to approve her relocating to California with the two children. Among the reasons for her desire to move to California, Miller cited an opportunity to obtain a higher paying job and a chance to be closer to her family. On August 6, 2001, Christiansen filed a response objecting to Miller's motion to relocate, and filed his own motion to modify the parties' custody agreement. Christiansen asked the trial court

² The property settlement agreement did not provide any standards for the trial court to follow in deciding whether to approve a proposed relocation by Miller.

to modify the parties' custody agreement by designating him as the primary residential parent. A hearing on this matter was held on August 9, 2001. On August 17, 2001, the trial court entered an order denying Miller's motion to relocate, finding that "it is in the best interest of the children to remain in Lexington, Kentucky." The trial court further stated that it would consider designating Christiansen as the primary residential parent if Miller insisted on relocating to California. This appeal followed.³

Miller argues that the trial court did not apply the appropriate standard in considering her motion to relocate. We agree. In Fenwick, our Supreme Court explained the test for trial courts to follow when considering a primary residential parent's motion to relocate:

[A] non-primary residential custodian parent who objects to the relocation can only prevent the relocation by being named the sole or primary residential custodian, and to accomplish this re-designation would require a modification of the prior custody award.

. . .

To sum up, when a primary residential custodian gives notice of his or her intent

³ On July 5, 2002, we ordered that this appeal be held in abeyance pending a final determination by the Supreme Court in Fenwick v. Fenwick (2000-SC-000697) and Huck v. Huck (1999-SC-001055). The Supreme Court considered Fenwick and Huck in a consolidated appeal, and rendered a final determination in both cases on September 18, 2003. We allowed Miller and Christiansen to file supplemental briefs addressing the impact of Fenwick on the case at bar.

to relocate with the parties' child, the burden is then upon any party objecting to file a custody modification motion within a reasonable time and after that, to satisfy the modification standard of KRS⁴ 403.340 in order to change the designation of primary residential custodian.⁵

Hence, a primary residential parent's decision to relocate is presumptively permissible.⁶ In order to prevent the children from being relocated along with the primary residential parent, the parent objecting to the relocation must "satisfy the modification standard of KRS 403.340⁷ in order to change the designation of primary residential custodian."

⁴ Kentucky Revised Statutes.

⁵ Fenwick, 114 S.W.3d at 786.

⁶ Id. at 785.

⁷ As amended on March 21, 2001, KRS 403.340 states, in pertinent part, as follows:

(2) No motion to modify a custody decree shall be made earlier than two (2) years after its date, unless the court permits it to be made on the basis of affidavits that there is reason to believe that:

(a) The child's present environment may endanger seriously his physical, mental, moral, or emotional health; or

(b) The custodian appointed under the prior decree has placed the child with a de facto custodian.

(3) If a court of this state has jurisdiction pursuant to the Uniform Child Custody Jurisdiction Act, the court shall not modify a prior custody decree unless after hearing it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of entry of the prior decree, that a change has occurred in the circumstances of the child or his custodian, and that the modification is necessary to serve the best interests of the child. When determining if a change

has occurred and whether a modification of custody is in the best interests of the child, the court shall consider the following:

(a) Whether the custodian agrees to the modification;

(b) Whether the child has been integrated into the family of the petitioner with consent of the custodian;

(c) The factors set forth in KRS 403.270(2) to determine the best interests of the child;

(d) Whether the child's present environment endangers seriously his physical, mental, moral, or emotional health;

(e) Whether the harm likely to be caused by a change of environment is outweighed by its advantages to him; and

(f) Whether the custodian has placed the child with a de facto custodian.

(4) In determining whether a child's present environment may endanger seriously his physical, mental, moral, or emotional health, the court shall consider all relevant factors, including, but not limited to:

(a) The interaction and interrelationship of the child with his parent or parents, his de facto custodian, his siblings, and any other person who may significantly affect the child's best interests;

(b) The mental and physical health of all individuals involved;

(c) Repeated or substantial failure, without good cause as specified in KRS 403.240, of either parent to observe visitation, child support, or other provisions of the decree which affect the child, except that modification of custody orders shall not be made solely on the basis of failure to comply with visitation or child support provisions, or on the basis of which parent is more likely to allow visitation or pay child support;

(d) If domestic violence and abuse, as

Our review of the trial court's order denying Miller's motion to relocate shows that the above standard was not applied. In its order denying Miller's motion, the trial court stated in part as follows:

In sum, the Court feels it is in the best interest of the children to remain in Lexington, Kentucky. If [Miller] still wishes to relocate to California the Court will consider granting [Christiansen] residential custody.

Clearly, the trial court did not consider Miller's motion to relocate within the framework of KRS 403.340. The trial court did not determine whether Christiansen had met his burden to warrant a modification in the custody agreement. Indeed, the trial court did not consider Christiansen's motion to modify custody at all. Accordingly, the trial court's order denying Miller's motion to relocate is vacated, and this matter is remanded with directions to consider Miller's motion to relocate in light of Fenwick and KRS 403.340.

Finally, we note that when a trial court considers a primary residential parent's motion to relocate and the objecting parent's motion to modify custody, the test as announced in Fenwick requires the trial court to consider numerous factors set forth in KRS 403.340. Therefore, on

defined in KRS 403.720, is found by the court to exist, the extent to which the domestic violence and abuse has affected the child and the child's relationship to both parents.

remand, the trial court should make specific factual findings to show the basis for its decision in order to facilitate meaningful review on appeal.⁸

Based on the foregoing, the order of the Fayette Circuit Court is vacated and this matter is remanded for further proceedings consistent with this Opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Vicki L. Buba
Louisville, Kentucky

W. Stokes Harris, Jr.
Lexington, Kentucky

BRIEFS FOR APPELLEE:

Martha A. Rosenberg
Lexington, Kentucky

⁸ See Kentucky Rules of Civil Procedure 52.01; and Reichle v. Reichle, Ky., 719 S.W.2d 442, 444 (1986)(holding that one of the principal reasons for requiring specific factual findings "is to have the record show the basis of the trial judge's decision so that a reviewing court may readily understand the trial court's view of the controversy").