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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002037-MR

ALLISON LAYNAE JONES — APPELLANT

v.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JULIE PAXTON, JUDGE
ACTION NO. 00-CI-01030

GREGORY R. JONES II — APPELLEE

OPINION

VACATING AND REMANDING

** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE; GUIDUGLI, JUDGE; and MILLER, SENIOR JUDGE.[1]

GUIDUGLI, JUDGE. Allison Laynae Jones (hereinafter "Allison") has appealed from the Floyd Circuit Court's September 10, 2001, order denying her motion for permission to move out-of-state with her minor child and to modify the visitation schedule. Having determined that the circuit court did not apply the appropriate standard when considering Allison's motion, we must

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

vacate the circuit court's order and remand this matter for reconsideration in light of the Supreme Court of Kentucky's recent opinion in Fenwick v. Fenwick, Ky., 114 S.W.3d 767 (2003).

Allison and Gregory R. Jones II (hereinafter "Gregory") were married on July 20, 1996, and one child, Alexandria Chase Jones, was born of the marriage on February 4, 1998. Allison and Gregory separated in 2000, and Allison filed a Petition for Dissolution of Marriage on November 8, 2000. Thereafter, Allison and Gregory entered into a Separation Agreement in which they agreed to joint custody of their child, with Allison having residential custody and Gregory being entitled to standard visitation.[2] The circuit court adopted the Separation Agreement in its Findings of Fact, Conclusions of Law, and Decree of Dissolution of Marriage entered April 6, 2001.

On April 24, 2001, Allison filed a motion for authorization to move from Kentucky to Minocqua, Wisconsin, asserting that the move would be in her and the child's best interests as she would be able to obtain adequate employment there. Allison renewed her motion on July 29, 2001, including as an additional basis that she would be able to finish her education. Furthermore, she suggested that Gregory's visitation

[2] The Separation Agreement also addressed child support, maintenance, and the distribution of property.

schedule be amended. Although there is no indication of this in the record, the circuit court appointed a Guardian ad litem to review the issue of the out-of-state move, and a preliminary report regarding this matter was filed on July 3, 2001. By that time, the Guardian ad litem had interviewed Allison and the child. He discovered that Allison's current boyfriend lived in Wisconsin and that she had obtained an entry-level job at a jewelry store and wanted to attend a technical school in the area. The Guardian ad litem indicated that the stability of Allison's relationship with her boyfriend was of great concern to him, as she had not considered the possibility that their relationship might dissolve. However, there did not appear to be any evidence that the proposed move would endanger the child. A final report was filed on July 20, 2001, detailing the Guardian ad litem's meeting with Gregory. Following this meeting, the Guardian ad litem again stated that the proposed move would not endanger the child, but that it would not be in her best interest as she would be unable to continue her relationships with both parents at the same level. If the move were to be permitted, the joint custody arrangement would effectively be destroyed.

During a hearing on July 19, 2001, the trial court denied Allison's motion for permission to move out-of-state, basing the decision on Allison's lack of permanency planning and

the child's extensive family support in Kentucky. This ruling was memorialized by an order entered September 10, 2001, and this appeal followed.[3]

This appeal, which was filed on September 17, 2001, has had a rather long history in this Court. Following the certification of the record in April 2002, this Court granted the parties' joint motion to hold the appeal in abeyance as they had reached a settlement, but needed time to confirm and reduce the settlement to writing. By September 2002, there was still no agreement, and the matter was returned to the Court's active docket with an order that Allison's brief be filed in sixty days. She filed her brief on November 7, 2002, and shortly thereafter, Gerald Derossett, counsel for Gregory, moved to withdraw. This Court passed the motion to withdraw for service on Gregory, and in response received a copy of a letter from attorney Derossett to Gregory repeating a telephone conversation in which Gregory indicated that he and Allison had reached an agreement and no longer wished to continue the action. The Court ordered Allison to move to dismiss the action or file a response indicating that she still wished to continue with her

[3] The record on appeal contains a December 26, 2001, motion from Allison again requesting that the circuit court modify the visitation schedule so that she could move to Wisconsin. In the motion, she indicated that she had married Brady Peterson and she attached affidavits from various members of Brady's family and their friends in Wisconsin in support of her motion. Because this matter is currently on appeal before this Court, the circuit court properly has not yet ruled on the motion.

appeal. Allison filed a response on March 17, 2003, in which she stated that there was no agreement. On May 12, 2003, the Court granted attorney Derossett's motion to withdraw and placed the appeal in abeyance for another thirty days to allow Gregory to retain new counsel. Gregory did not retain new counsel. Therefore, the Court returned the appeal to the active docket on July 24, 2003, with Gregory proceeding without counsel, and ordered him to file a brief in sixty days. Gregory did not file a brief, and the matter was submitted to this panel on Allison's brief alone. Although Gregory's failure to file a brief would allow this Court to impose sanctions pursuant to CR 76.12(8)(c), we decline to do so, and shall address the merits of Allison's appeal.

On appeal, Allison argues that the circuit court erred in denying her motion for permission to move out-of-state as there was no showing that the proposed move would endanger the child, and that the appropriate action should have been to modify Gregory's visitation schedule consistent with the child's best interest. She relied upon the opinions of Wilson v. Messenger, Ky., 840 S.W.2d 203 (1992), Mennemeyer v. Mennemeyer, Ky.App., 887 S.W.2d 555 (1994), and Stroud v. Stroud, Ky.App., 9 S.W.3d 579 (1999), to support her position. In particular, she argues that there was no showing that the child's physical, mental or emotional health would be endangered, that she was not

actually required to seek approval prior to moving as there was no provision requiring such action in the Separation Agreement, and that there was no finding of an inability or bad faith refusal of the parties to cooperate.

After the filing of Allison's brief in this matter, the Supreme Court rendered its opinion in Fenwick v. Fenwick, Ky., 114 S.W.3d 767 (2003). In Fenwick, the Supreme Court held as follows:

> [A] custodial parent's decision to relocate with the children is presumptively permissible, and a custodial parent may relocate with the children without prior approval or modification of the joint custody award[.] . . . Although the relocation will, as a practical matter, impact a non-primary residential custodian's ability to share physical custody of the children, the relocation does not extinguish the non-primary residential custodial parent's *rights* with regard to shared physical custody, nor would the relocation affect the essential nature of the joint custody – i.e., the parents' shared decision-making authority. Thus, 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. He or she must therefore show that "[t]he child's present environment endangers seriously his physical, mental, moral, or emotional health, *and* the harm likely to be caused by a change of environment is outweighed by its advantages[.]"[]
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> . . .

> To sum up, when a primary residential custodian gives notice of his or her intent 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 KRS 403.340 in order to change the designation of primary residential custodian. If no motion is filed within a reasonable time, the primary residential custodian may relocate with the parties' child.

Id. at 785-86 (footnotes omitted).

In the present matter, we first note that neither the parties' Settlement Agreement nor the decree contains any provision requiring the residential custodial parent to seek court approval prior to relocation. However, Allison did seek permission to do so in this case, and Gregory clearly objected to the relocation. In reviewing the circuit court's findings made on the record during the July 19, 2001, hearing and in the written order, we note that the decision to deny Allison's motion was based upon a lack of permanency planning in the move to Wisconsin as well as the presence of family support in Kentucky. It does not appear that the circuit court based its decision upon the factors for modification delineated in KRS 403.340, as is required. Therefore, we must vacate the circuit court's order and remand this matter for further proceedings and specific findings in light of both the Supreme Court's decision in Fenwick, supra, and pursuant to KRS 403.340.

For the foregoing reasons, the Floyd Circuit Court's September 10, 2001, order denying Allison's motion for permission to move out-of-state and modify visitation is vacated, and this matter is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

John T. Chafin
Prestonsburg, KY

No appellee brief