RENDERED: JULY 23, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-001833-MR

LYNN M. GARNER — APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE WILLIAM J. WEHR, JUDGE
ACTION NO. 96-CI-00531

DAVID M. GARNER — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: BARBER, SCHRODER, AND VANMETER, JUDGES.

VANMETER, JUDGE: This is an appeal from a postdissolution order entered by the Campbell Circuit Court after this court remanded an earlier joint custody modification order to the trial court for reconsideration. On remand, the trial court granted appellee David M. Garner's motion to modify joint custody and to designate him as the primary residential custodian of the parties' daughter. For the reasons stated hereafter, we vacate and remand for further proceedings.

The parties married in 1983 and divorced in October 1996 in Campbell County. As their son is now an adult, this appeal pertains only to their daughter, Lila, who was born in 1994.

Pursuant to the shared parenting plan which was incorporated into the parties' decree of dissolution, appellant Lynn Garner was designated as the children's primary residential custodian. Apparently matters concerning the children proceeded without incident until Lynn advised David in May 1998 that she intended to relocate with the children to Wisconsin in order to be closer to her ill father and her fiancé. On June 1, 1998, David filed a motion requesting the circuit court to modify custody in order to designate him as the primary residential custodian.

The court appointed a guardian ad litem (GAL). A court-ordered evaluation indicated that both parties had excellent parenting and coparenting skills. By agreement, a second evaluation was conducted several months later after Lila spent alternating three-week periods in Wisconsin and Kentucky. At that time the evaluator spoke highly of the parties' cooperation and parenting skills, but recommended that Lynn should not relocate to Wisconsin. The domestic relations commissioner (DRC) subsequently conducted a hearing and

concluded that although it was in Lila's best interest for joint custody to continue, she should reside primarily with David.

Meanwhile, a more complete custody evaluation was conducted. Again, the evaluator highly praised both parties and opined that although joint custody would continue to work well, David should be named Lila's primary residential custodian. The DRC conducted another hearing and filed a report concluding that Lynn had violated the parties' agreement and the court's order by moving Lila's residence to Wisconsin, that Lynn's behavior satisfied the bad faith standard set out in *Mennemeyer v. Mennemeyer*, Ky. App., 887 S.W.2d 555 (1994)[1], and that David should be designated as Lila's primary residential custodian. The trial court overruled Lynn's objections and confirmed the report as part of the order which it entered on March 10, 2000.

On appeal, this court vacated and remanded the matter for reconsideration in light of KRS 403.340, KRS 403.350, and *Scheer v. Zeigler*, Ky. App., 21 S.W.3d 807 (2000). On remand, the trial court specifically relied on KRS 403.340(3), as amended effective March 21, 2001. Based on the existing evidence, the court again sustained David's motion and designated him as Lila's primary residential custodian. Lynn's motion to alter the order was denied and this second appeal followed. The appeal subsequently was abated on January 30,

[1] *Mennemeyer* was subsequently overruled by *Scheer v. Zeigler*, Ky. App., 21 S.W.3d 807 (2000).

2002, pending the Kentucky Supreme Court's final disposition of *Fenwick v. Fenwick*, Ky., 114 S.W.3d 767 (2003). The appeal was returned to this court's active docket on October 21, 2003.

Fenwick addressed two separate appeals involving attempts by primary residential custodians to relocate with their children to other counties or states. The supreme court examined the development of case law pertaining to joint custody modifications, and it held that although a primary residential custodian's

> 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.

Fenwick, 114 S.W.3d at 785-86 (footnote omitted). The court further held that even though the amount of time available to parents to spend with their children might be affected by one parent's relocation, that fact

> does not, standing alone, support a finding that the proposed relocation creates a likelihood of serious harm to the children. Any move by a custodial parent, even one of only a short distance in the same community, has the potential to impact the noncustodial parent's personal time with his or her children. To hold that this inherent effect of relocation constitutes grounds for modification, however, would result in a blanket denial of relocation whenever the noncustodial parent objected to a proposed move. We recognize that tradeoffs are inevitable, and further observe that if Susan Fenwick were forced to relinquish her primary residential custodian designation in order to move closer to her employment, her time with the children would necessarily likewise be reduced.
>
> We realize that relocation often causes a hardship or inconvenience on the noncustodial parent's ability to exercise time-sharing with his or her child, but that fact, in itself, does not constitute a valid reason to prohibit relocation. Modern American society is increasingly mobile, and therefore, as the *Wilson* Court stated, "a custodial parent cannot, in today's mobile

> society, be forced to remain in one location in order to retain custody."

114 S.W.3d at 788-89 (footnotes omitted). Finally, the court noted that whether a primary residential custodian has plausible reasons for moving to another locale is simply not germane to a KRS 403.340 inquiry. *Id*. at 791.

Here, as in *Fenwick,* the motion to modify custody was first considered by the trial court long before the legislature amended KRS 403.340 in 2001 to require trial courts in custody modification situations to consider children's best interests in light of the factors set out in KRS 403.270(2) for use in making initial custody decisions. The version of KRS 403.340 which was in effect between July 1998 and March 2001 stated in pertinent part as follows:

> (2) 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 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. <u>In applying these standards, the court shall retain the custodian appointed pursuant to the prior decree unless</u>:
>
> (a) The custodian agrees to the modification;

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

(c) The 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 to him; or

(d) The custodian has placed the child with a de facto custodian.

(3) 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 defined by 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.

(Emphasis added.)

The trial court on remand, however, specifically considered David's custody modification motion under the amended version of KRS 403.340 which was in effect at the time of its July 2001 reconsideration. The court found that Lila had "been integrated into the family of her father with the consent of her mother" since by agreement she had spent equal amounts of time with each party, that Lila's relationship with David was "more important" than that with Lynn, that Lila was "more comfortable and adjusted in Kentucky," and that it would be in Lila's best interest to remain in Kentucky with David. Next, the court considered the effects of Lila's present environment on her physical, mental, moral or emotional health. The court referred to evidence regarding David and Lila's relationship, Lynn's health and anger toward David, Lynn's failure to encourage David and Lila's relationship, Lila's expressed desire to remain in Kentucky, and the impact which frequent traveling had on Lila. The court concluded that it would be in Lila's best interest to remain in Kentucky with David.

It is clear from *Fenwick* that on remand, David's motion should have been considered in light of the version of KRS 403.340 which was in effect in 2000 when the motion first

was ruled upon by the trial court.[2] As stated in *Commonwealth, Department of Agriculture v. Vinson*, Ky., 30 S.W.3d 162, 168 (2000),

> Kentucky law prohibits the amended version of a statute from being applied retroactively to events which occurred prior to the effective date of the amendment unless the amendment expressly provides for retroactive application. . . . This is a very fundamental principle of statutory construction in Kentucky. The courts have consistently upheld this admonition and have declared there is a strong presumption that statutes operate prospectively and that retroactive application of statutes will be approved only if it is absolutely certain the legislature intended such a result. This is particularly true when the legislation is substantive and not remedial, and new rights and new duties are created.

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[2] The supreme court acknowledged in *Fenwick* that although KRS 403.340 had been modified, it was applying the version of the statute which was in effect when the appealed orders were entered in December 1997 and September 1998. Our review of the statute's legislative history shows that KRS 403.340 was modified in 1998 to add provisions regarding de facto custodians. Those modifications are not relevant to *Fenwick* or the instant proceeding. However, effective March 21, 2001, the Kentucky General Assembly renumbered KRS 403.340(2) as subsection (3), and it deleted the requirement that in response to a motion to modify custody, the trial court should "retain the custodian appointed pursuant to the prior decree" unless certain specific conditions exist. Although the best interest factors set out in KRS 403.270(2) formerly were applied only to initial determinations of custody, the legislature amended KRS 403.340(3) to require the court to consider those factors "[w]hen determining if a change has occurred and whether a modification of custody is in" a child's best interests.

Given *Fenwick's* intentional reliance on the version of KRS 403.340 which existed when the appealed orders were entered by the trial courts in 1997 and 1998, it is clear in the matter now before us that the trial court's March 2000 order on remand, granting David's motion for modification, should have been based on KRS 403.340 as it existed prior to the March 2001 amendments. Our opinion does not address the effects which the 2001 amendments to KRS 403.340 may have on custody modification orders entered subsequent to March 1, 2001.

Hence, the trial court was statutorily required to retain Lynn as Lila's custodian unless David was able to show that Lila's present environment seriously endangered her "physical, mental, moral, or emotional health," and that the advantages involved in changing her environment would outweigh the harm likely associated with such a change. KRS 403.340. Since the trial court utilized the wrong standard by addressing David's motion to modify custody under KRS 403.340 as amended in 2001, rather than under the version of the statute which existed in 2000, this matter must be remanded for reconsideration under KRS 403.340, KRS 403.350, and *Fenwick*.

Finally, Lynn contends that the single affidavit which David filed with his initial motion to modify custody was insufficient to satisfy the threshold requirements pertaining to a motion for custody modification filed within two years of the custody decree. When David filed his motion in 1998, however, it was settled under *Mennemeyer* that a modification of joint custody should be treated as an initial custody determination under KRS 403.270. Hence, at that time David's single affidavit was sufficient. However, while the order granting David's motion was pending on appeal, this court overruled *Mennemeyer* and held in *Scheer* that a motion to modify joint custody, like a motion to modify sole custody, is subject to the KRS 403.340 and KRS 403.350 requirements pertaining to the filing of two or more

affidavits in support of any custody modification motion filed within two years of the entry of a custody decree.[3] However, under circumstances such as these, where David's custody modification motion predated *Scheer* by some two years and evidently complied with the statutes and case law which were applicable at the time, it would be inequitable to apply current threshold filing requirements to the motion to modify. *Cf. Manly v. Manly*, Ky., 669 S.W.2d 537 (1984) (supreme court prospectively applied its holding that the payment of a filing fee is a condition precedent to the filing of a notice of appeal). Hence, we conclude that the trial court did not err by failing to further address the affidavit issue on remand.

The circuit court's order granting David's motion to modify custody is vacated, and this matter is remanded with directions to consider the motion in light of *Fenwick,* KRS 403.340, and KRS 403.350.

ALL CONCUR.

[3] KRS 403.340 and KRS 403.350 both require the filing of "affidavits" if a custody modification motion is made within two years of the entry of a custody decree. The Kentucky Supreme Court has interpreted such language as requiring the filing of at least two affidavits if the motion is made within that time period. *Petrey v. Cain*, Ky., 987 S.W.2d 786 (1999). *See also Copas v. Copas*, Ky. App., 699 S.W.2d 758 (1985).

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