

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000516-MR

AMANDA MALONE (NOW SCHAEFER)

APPELLANT

v. APPEAL FROM SHELBY CIRCUIT COURT
HONORABLE WILLIAM F. STEWART, JUDGE
ACTION NO. 00-CI-00140

MARK MALONE

APPELLEE

OPINION
AFFIRMING IN PART
VACATING IN PART AND REMANDING WITH DIRECTIONS

** ** * * *

BEFORE: BUCKINGHAM, MINTON AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Amanda Malone (now Schaefer) brings this appeal from a February 11, 2003, order of the Shelby Circuit Court. We affirm in part, vacate in part, and remand with directions.

Amanda and Mark Malone married on March 26, 1994. Two children were subsequently born of the marriage. The parties were divorced by decree of dissolution of marriage entered in the Shelby Circuit Court on February 21, 2001. Issues of custody and visitation were reserved for future adjudication.

On October 31, 2001, the circuit court entered an order adopting the parties' agreement regarding custody and visitation. The order provided the parties would share joint custody and Amanda would serve as the children's primary residential custodian. The visitation schedule set forth in Mark's post-hearing memorandum was adopted by the court. It provided that Mark would have "visitation every other week, Thursday through Sunday at 5:00 p.m." It also provided for "overnight visitation with the children on the other Thursday from after school through Friday morning . . . [and] every other Monday from after school until 8:00 p.m."

In January 2002, Amanda remarried. Shortly thereafter, Amanda informed Mark that she and her new husband would be relocating, with the parties' children, to Stuttgart, Germany. On March 22, 2002, Mark filed a "Motion To Revise Parenting Schedule." The parties were initially ordered to seek mediation, but no agreement was reached. On May 21, 2002, Mark filed a Motion for a Restraining Order to preclude the relocation of the children to Germany.

The circuit court's order of September 5, 2002, found that Amanda's proposed relocation of the children to German may endanger seriously their physical, mental, moral or emotional health. Thus, the matter was referred to the Domestic Relations Commissioner for an evidentiary hearing. Ky. R. Civ. P. 53.03.

The Commissioner's Recommended Order of December 18, 2002, set forth a "visitation schedule" that would require the children to alternate school semesters and summers between Germany and Kentucky. The recommendation relied extensively upon the report of Dr. Lee Epstein who had previously evaluated both parties and the children. In his report, Dr. Epstein opined the oldest child would benefit from remaining in Kentucky with Mark during the upcoming school year and continuing relationships with her extended family. Dr. Epstein further recommended that the two girls not be separated.

Both parties subsequently filed exceptions to the Commissioner's recommendation and the matter was then heard by the circuit court. On February 11, 2003, the circuit court's order was entered, which set out the following "visitation schedule or parenting plan":

Spring term 2003	Mark (Kentucky)
Summer	Amanda (Germany)
Fall term 2003	Mark (Kentucky)
Christmas (2 weeks)	Amanda (Germany)
Spring term 2004	Amanda (Germany)
Summer 2004	Mark (Kentucky)
Fall term 2004	Amanda (Germany)
Christmas (2 weeks) 2004	Mark (Kentucky)
Spring term 2005	Mark (Kentucky)

Summer 2005	Amanda (Germany)
Fall term 2005	Mark (Kentucky)
Christmas (2 weeks) 2005	Amanda (Germany)

The order also provided that the "same rotation pattern or schedule shall continue beyond 2005 unless the parties agree otherwise or until further order of this Court."¹ Neither party was ordered to pay child support. This appeal follows.

Amanda raises two issues on appeal. First, she contends the circuit court abused its discretion by applying the wrong standard to the relocation issue and, thus, ordering the parties' children to divide the school year in separate locations (countries). Second, she contends the circuit court abused its discretion by not awarding her child support, we shall address these issues *seriatim*.

In considering the issue of relocation, the circuit court utilized the modification of visitation standard of KRS 403.320(3). By so doing, we think the circuit court committed error.

In Fenwick v. Fenwick, Ky., 114 S.W.3d 767 (2003), the Supreme Court of Kentucky recently held that if the primary residential custodian wishes to relocate with the children against the wishes of the non-custodial parent, the non-

¹ The court notes that both the recommendation of the domestic relations commissioner and the circuit court's order set out a plan that would require the children to divide their school year in Germany and Kentucky for at least three years.

custodial parent must seek to change the primary residential custodian designation pursuant to the modification of custody standard set forth in Kentucky Revised Statutes (KRS) 403.340. Simply put, Fenwick clearly established when a that primary custodian wishes to relocate against the wishes of a non-custodian, the appropriate standard is the modification of custody standard set forth in KRS 403.340, and not the modification of visitation standard set forth in KRS 403.320. As Amanda (primary custodian) wished to relocate the children against the wishes of Mark (non-custodian), the circuit court should have applied the modification of custody standard under KRS 403.340.²

² Kentucky Revised Statutes 304.340(3) states:

- (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

This matter is therefore remanded to the circuit court with directions to apply KRS 403.340 and make a determination of custody in accordance therewith. We, however, harbor grave doubt that the "visitation schedule" set forth in the February 11, 2003, order will be the appropriate outcome under such analysis. It is very unlikely that a schedule which requires a division of the school year between two different schools in different countries is in the best interest of the children pursuant to KRS 403.340.

Amanda's final contention is that the circuit court erred by not awarding child support. Amanda asserts that even if the children spend equal time with each party it is an abuse of discretion for her not to be awarded child support given the vast disparity in the parties' incomes.

KRS 403.211(2) provides that "[c]ourts may deviate from the guidelines where their application would be unjust or inappropriate." Under such circumstances the court must make a finding identifying the reason for the deviation.

In this case, the circuit court addressed the issue of child support and specifically stated that the "shared rotation plan necessitates a modification of child support since the parties will share time equally with the children." The court

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

also stated that consideration was given to cost of the children's travel pursuant to the shared parenting plan. Upon the whole, we cannot say that it was an abuse of discretion for the circuit court to deviate from the child support guidelines and not award support to Amanda under the circumstances of the shared parenting plan. We recognize, however, the circuit court will undoubtedly be required to revisit the issue of child support in light of modification to the custody decree.

For the foregoing reasons, the order of the Shelby Circuit Court is affirmed in part, vacated in part, and this matter is remanded with directions for the circuit court to enter an order not inconsistent with the foregoing opinion.

ALL CONCUR.

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