

RENDERED: NOVEMBER 4, 2005; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002214-ME

JENNIFER S. BALES (NOW MARTIN)

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NO. 99-CI-00760

RICHARD ALAN BALES

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MINTON, SCHRODER, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Jennifer S. Bales (now Martin) appeals from an October 21, 2004, order of the Campbell Circuit Court awarding sole custody of the parties' child to Richard Alan Bales. We affirm.

Jennifer and Richard were married March 9, 1996. One child, Emmelina M. Bales (Emma), was born of the parties' marriage on April 21, 1997. In January 1998, the parties

adopted a child, Dennis A. Bales.¹ Thereafter, the parties accepted teaching positions with Northern Kentucky University, Chase College of Law and moved to Kentucky. The parties were divorced by decree of dissolution entered in the Campbell Circuit Court on December 7, 1999. The decree dissolved the parties' marriage but reserved issues of division of marital property, assignment of debt, child support, and child custody.

Following several months of protracted litigation, the parties entered into an agreed order on January 23, 2001. The order awarded Jennifer sole legal custody of Emma and awarded Richard sole legal custody of Dennis. Richard was granted visitation with Emma. Jennifer did not seek visitation with Dennis.² The agreed order further provided that neither party would:

[R]elocate their current residences outside the Greater Cincinnati/Northern Kentucky . . . for one (1) year; thereafter, either party seeking to relocate at a distance more than ten (10) miles . . . shall be obligated to seek prior leave of court to be determined on motion, responsive pleading, and hearing on the motion and based upon applicable law.

On October 23, 2001, Jennifer filed a motion requesting leave of court to relocate to Massachusetts with

¹ Dennis A. Bales was born in Russia and lived in a Russian orphanage until age four when he was adopted by Jennifer and Richard.

² Jennifer has chosen not to have any contact with Dennis since she and Richard separated in the summer of 1999.

Emma. Jennifer asserted that the January 2002 relocation was necessary to allow her to maintain employment as a law professor. Jennifer proposed a revised visitation schedule for Richard. On November 9, 2001, Richard filed a motion to modify custody pursuant to Kentucky Revised Statutes (KRS) 403.340. The matter was referred to the domestic relations commissioner for a hearing. Ky. R. Civ. P. (CR) 53.03(3).

On January 14, 2002, the court transferred temporary residential custody of Emma from Jennifer to Richard. On October 16, 2003, Richard filed a Supplemental Motion for Modification of Custody Decree. Richard asserted that two years had passed since the agreed custody order was entered; thus, KRS 403.340(2) no longer applied. Richard argued the proper standard for modification of the custody decree was the best interest standard of KRS 403.340(3).

Following a five-day hearing, the commissioner filed a thirty-three page report on May 26, 2004. The commissioner recommended that sole custody of Emma be awarded to Richard and set forth a visitation schedule for Jennifer. Both parties filed exceptions, and by order entered September 24, 2004, the circuit court adopted the commissioner's report with only minor modifications. By order entered October 21, 2004, the order was made final and appealable by inclusion of CR 54.02 language. This appeal follows.

Jennifer contends the circuit court erred by misinterpreting the case law. Specifically, Jennifer argues that Wilson v. Messinger, 840 S.W.2d 203 (Ky. 1992) and Fenwick v. Fenwick, 114 S.W.3d 767 (Ky. 2003) are controlling despite the General Assembly's 2001 amendment to KRS 403.340.³ Jennifer argues that although the statute was subsequently amended, Wilson and Fenwick support a presumption that sole custodians are entitled to relocate. Jennifer further argues that these cases support her assertion that the potential relocation may not be considered when determining whether to modify custody.

KRS 403.340 governs modification of a custody decree and was significantly altered by legislative action in 2001. See Fowler v. Sowers, 151 S.W.3d 357 (Ky.App. 2004). Prior to the 2001 amendment, a change in custody was permitted only upon a finding:

(1)[T]hat substantial harm would result to the child's physical, mental, or emotional health without a change of the custodial arrangement and (2) that any harm caused by the change would be outweighed by its advantages.

Fowler, 151 S.W.3d at 359. The 2001 amendment to KRS 403.340 relaxed the standards for modification of custody and expanded the factors to be considered when making a modification to a custody decree. KRS 403.340(3) now permits custody to be

³ In Fenwick v. Fenwick, 114 S.W.3d 767 (Ky. 2003), the Court applied the pre-2001 version of Kentucky Revised Statutes 403.340 as it was the version in effect when the relevant orders were entered in the circuit court.

modified if "a change has occurred in the circumstances of the child or his custodian" and "the modification is necessary to serve the best interests of the child." See Fowler, 151 S.W.3d 357.

In the case *sub judice*, the circuit court found that a change in circumstances had occurred and that modification was in Emma's best interest. The commissioner engaged in a thorough analysis pursuant to KRS 403.340(3) and also addressed the more stringent standard espoused in Fenwick that was in effect prior to the 2001 amendment to KRS 403.340. The circuit court adopted those findings as well as the conclusion that Richard had met his burden of proof.⁴ Although Fenwick carries limited precedential weight and does not apply to a case governed by the current version of KRS 403.340, under either analysis, we believe the circuit court properly determined that modification of custody was appropriate. See Fowler, 151 S.W.3d 357.

Jennifer next contends the circuit court erred by misapplying KRS 403.340. Jennifer specifically argues that no modification of custody under KRS 403.340(3) is warranted since no new supporting facts have arisen since the custody decree was entered nor has there been disclosure of facts that were unknown

⁴ The circuit court adopted the commissioner's finding that Richard had met the burden of proof to establish that the child's present environment with Jennifer endangered seriously her physical, mental, moral or emotional health and that the harm likely to be caused by the change in custody was outweighed by the advantages.

to the court when the decree was entered. Jennifer asserts that her relocation is not a "change in circumstances" contemplated by KRS 403.340 and that the remaining factors considered were known by the court before the agreed custody order was entered.

It has been held that a relocation involving "considerable distance from Kentucky, is a change in circumstances contemplated by [KRS 403.340]." Fowler, 151 S.W.3d at 359. Obviously, Jennifer's relocation to Massachusetts was one of "considerable distance" and, thus, was properly considered as a change in circumstances pursuant to KRS 403.340(3). See Fowler, 151 S.W.3d 357. The court also enumerated several other factors that constituted a "change in circumstances" pursuant to KRS 403.340(3): (1) Jennifer subsequently remarried and divorced; (2) Jennifer exposed Emma to domestic violence; (3) Jennifer repeatedly violated court orders regarding the children (i.e., child support, mediation orders, etc...); and (4) Jennifer refused to foster the relationship between Emma and Dennis. We believe the court properly determined that a change in circumstances had occurred justifying a best interest determination pursuant to KRS 403.340(3)(c).

Jennifer also alleges that the testimony of Dr. Stan Heck and Linda Mika should have been excluded by the circuit court. Jennifer specifically asserts that Dr. Heck was

Richard's personal therapist and should not be permitted to testify regarding her.

It is well-established that an appellate court is constrained from reviewing an allegation of error that was not properly reserved for review. CR 76.12(4)(c)(v); Combs v. Knott County Fiscal Court, 283 Ky. 456, 141 S.W.2d 859 (1940). In this case, Jennifer did not object to Dr. Heck being offered as an expert and did not object when his report was offered as a trial exhibit. Jennifer's only objection at trial was "that Dr. Heck had never seen [her] and therefore could not testify about her." The commissioner overruled Jennifer's objection based upon Dr. Heck's testimony that Jennifer had consented to and participated in the evaluation and that Dr. Heck had seen her on several occasions. Jennifer did not take exception to the commissioner's ruling. As such, we are of the opinion that Jennifer waived the objection to Dr. Heck's testimony. See Eiland v. Ferrell, 937 S.W.2d 713 (Ky. 1997).

Jennifer further contends the testimony of Linda Mika should have been excluded. Jennifer alleges that Mika "should have been disqualified for lack of qualifications." Appellant's Brief at 20. This is the extent of Jennifer's argument upon this issue. Jennifer failed to state how this issue was preserved for our review, failed to cite a single authority in support of her assertion, and most importantly failed to supply

this Court with sufficient facts to glean any understanding of the issue. See CR 76.12(4)(c)(v). Based upon the foregoing, we summarily reject Jennifer's allegation on this issue.

Jennifer's final argument is that the visitation schedule established by the circuit court is "without support or findings" and is "against the recommendations of the *Guardian Ad Litem*." Appellant's Brief at 22. It is well-established that an appellate court will not set aside a visitation schedule unless it was "a manifest abuse of discretion" or was "clearly erroneous in light of the facts and circumstances of the case." Drury v. Drury, 32 S.W.3d 521, 525 (Ky.App. 2000). In this case, the visitation schedule is very detailed, being some six pages in length. The court obviously gave a great amount of consideration to the schedule which requires Emma to travel extensively to visit with her mother. Upon the whole, we simply do not believe the circuit court abused its discretion or that the decision was clearly erroneous.

For the foregoing reasons, the order of the Campbell Circuit Court is affirmed.

ALL CONCUR.

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