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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2007-CA-000854-ME
AND
N0. 2007-CA-000939-ME

DAWN M. HIGGINS — APPELLANT

v.

APPEALS FROM JESSAMINE FAMILY COURT
HONORABLE C. MICHAEL DIXON, JUDGE
ACTION NO. 06-CI-01019

CHRISTOPHER RYAN ABELL — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER AND THOMPSON, JUDGES; GRAVES, SENIOR JUDGE.[1]

GRAVES, SENIOR JUDGE: Dawn M. Higgins appeals from orders of the Jessamine Family Court challenging its disposition of various issues concerning the parties' infant child. For the reasons stated below, we affirm.

Dawn and Christopher Ryan Abell had a brief relationship which resulted in the birth of a son, Trevor James Higgins (now Abell), born July 21, 2006. The parties were never married.

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

On August 8, 2006, Christopher initiated a paternity action in Jessamine District Court. On October 31, 2006, after DNA testing was completed, the district court entered an order of paternity adjudging Christopher as Trevor's father.

On October 31, 2006, the district court entered a child support order setting Christopher's child support obligation at $355.00 per month. As relevant to this appeal, the underlying child support worksheet established Christopher's percentage of the parties' combined gross monthly income as 61.3%.

On November 29, 2006, Christopher filed a motion in Jessamine Circuit Court captioned "Motion for Joint Custody, Parenting-Time Schedule Including Christmas Visitation, and Change of Name." The change of name portion of the motion sought to change Trevor's last name from "Higgins" to "Abell."

In January 2007, the Jessamine Family Court was established and the cause was transferred to that forum. In the course of the family court proceedings Dawn expressed her desire to return to her home state of North Carolina.

On February 12, 2007, Dawn filed a motion in family court seeking unreimbursed medical expenses incurred by her relating to the pregnancy and birth of Trevor.

On February 13, 2007, the family court entered an order granting Christopher's motion to change Trevor's last name to Abell. On February 22, 2007, Dawn filed a motion to alter, amend, or vacate the order pursuant to CR[2] 59.05.

On February 13, 2007, Christopher filed a motion captioned "Motion to Set Aside Child Support Order and Compel Actual Medical Expenses." The motion sought to recalculate child support as established in district court, and to determine the proper level of medical expenses Christopher owed relating to Trever's birth.

[2] Kentucky Rules of Civil Procedure.

On March 6, 2007, an evidentiary hearing was held on the pending issues. On March 21, 2007, the trial court entered an order addressing those issues. More specifically, the order denied Dawn's motion to alter, amend, or vacate the family court's prior order addressing the name change issue; awarded joint custody of Trevor to the parties; implicitly held that Dawn could not remove Trevor's residence from the state of Kentucky; and set Christopher's child support obligation at $319.00 per month based upon a 46.15 percentage of the parties' combined monthly income.

On March 28, 2007, Dawn filed a motion to alter, amend, or vacate the family court's March 6, 2007, order.

On April 23, 2007, the trial court entered an order addressing Dawn's motion. As relevant to this appeal, the order clarified that Christopher's obligation for Trever's birthing expenses would be based upon the 46.15% determination as contained in the family court child support calculations rather than the percentages contained in the district court worksheets.

On April 23, 2007, Dawn filed a notice of appeal of the family court's March 21, 2007, order (Case No. 2007-CA-000854) and on May 7, 2007, filed a notice of appeal of the family court's order of April 23, 2007 (Case No. 2007-CA-000939). On August 14, 2007, the cases were ordered consolidated and the parties were directed to file a single brief addressing the two appeals.

## NAME CHANGE

As previously noted, the family court granted Christopher's motion to change Trevor's surname from Higgins to Abell. In her first and second enumerated

arguments, Dawn contends that the family court lacked jurisdiction to change Trevor's surname and, alternatively, if it did, that it erred in ordering the change.

KRS[3] 401.020 provides as follows:

> Both parents, provided both are living, or one (1) parent if one (1) is deceased, or if no parent is living, the guardian, may have the name of a child under the age of eighteen (18) changed by the District Court of the county in which the child resides. However, if one (1) parent refuses or is unavailable to execute the petition, proper notice of filing the petition shall be served in accordance with the Rules of Civil Procedure. If the child resides on a United States Army post, military reservation or fort his name may be changed by the District Court of any county adjacent thereto.

The cases *Ash v. Thompkins*, 914 S.W.2d 788,(Ky.App. 1996), *Blasi v. Blasi*, 648 S.W.2d 80,(Ky. 1983), and *Winkenhofer v. Griffin*, 511 S.W.2d 216 (Ky. 1974) held that pursuant to KRS 401.020, the district court, and not the circuit court, held exclusive jurisdiction over the name change of a child.

The foregoing cases, however, were rendered prior to the establishment of the family court system in 2003. The 2003 enactments establishing the jurisdiction of family courts are KRS 23A.100 and KRS 23A.110. KRS 23A.100 provides as follows:

> (1) As a division of Circuit Court with general jurisdiction pursuant to Section 112(6) of the Constitution of Kentucky, a family court division of Circuit Court shall retain jurisdiction in the following cases:
>
> (a) Dissolution of marriage;
> (b) Child custody;
> (c) Visitation;
> (d) Maintenance and support;
> (e) Equitable distribution of property in dissolution cases;
> (f) Adoption; and
> (g) Termination of parental rights.
>
> (2) In addition to general jurisdiction of Circuit Court, a family court division of Circuit Court shall have the following additional jurisdiction:

[3] Kentucky Revised Statutes.

(a) Domestic violence and abuse proceedings under KRS Chapter 403 subsequent to the issuance of an emergency protective order in accord with local protocols under KRS 403.735;
(b) Proceedings under the Uniform Act on Paternity, KRS Chapter 406, and the Uniform Interstate Family Support Act, KRS 407.5101 to 407.5902;
(c) Dependency, neglect, and abuse proceedings under KRS Chapter 620; and
(d) Juvenile status offenses under KRS Chapter 630, except where proceedings under KRS Chapter 635 or 640 are pending.

(3) Family court divisions of Circuit Court shall be the primary forum for cases in this section, except that nothing in this section shall be construed to limit the concurrent jurisdiction of District Court.

KRS 23A.110 broadly defines additional areas of family court jurisdiction as follows:

The additional jurisdiction of a family court division of Circuit Court shall be liberally construed and applied to promote its underlying purposes, which are as follows:

(1) To strengthen and preserve the integrity of the family and safeguard marital and familial relationships;

(2) To protect children and adult family members from domestic violence and abuse;

(3) To promote the amicable settlement of disputes that have arisen between family members;

(4) To assure an adequate remedy for children adjudged to be dependent, abused, or neglected, and for those children adjudicated as status offenders;

(5) To mitigate the potential harm to the spouses and their children caused by the process of legal dissolution of marriage;

(6) To make adequate provision for the care, custody, and support of minor children of divorce and for those children who have been born out of wedlock; and

(7) To provide a level of proceedings, when necessary, that is more appropriate to a family court division of Circuit Court.

In *Wallace v. Wallace*, 224 S.W.3d 587 (Ky.App. 2007), this Court expounded upon family court jurisdiction as follows:

> Moreover, Kentucky has created the family court system. **The "one judge, one family" approach is a remedy to the fractionalization of family jurisdiction.** In 1988 the Legislative Research Committee appointed a Task Force to examine the need for and feasibility of establishing a family court system. In its report, the Task Force found that fractionalization leads to a "waste of time and delays, that it increases the time and expense involved in these cases, and creates an inordinate delay between intake and final resolution." *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 681 (Ky. 1994). Hence, our current family court system was created. In those circuits where the Supreme Court has designated a family court division, matters set forth in KRS 23A.100, including child custody and visitation, are now exclusively vested in the family court.
>
> **The very purpose for the creation of he family courts is to consolidate litigation and controversies related to a family into one court. . . .** (Emphasis added).

*Id.* at 591.

KRS 23A.110 provides that the "additional jurisdiction of a family court division of Circuit Court shall be liberally construed and applied to promote its underlying purposes[.]" In this case, we have no difficulty in concluding that a family court has jurisdiction over the name change of a child when a wide range of other issues concerning the child are pending before the court. This conclusion clearly serves the underlying legislative purpose in creating the family court system. We note, however, that the district courts retain concurrent jurisdiction pursuant to KRS 402.020, and that that forum may be preferable when the only issue at hand is the name change of a child.

Dawn argues, however, that even if the family court does have jurisdiction, then it erred in granting Christopher's motion to change Trevor's surname to Abell. In a name change contest, the issue is to be resolved pursuant to the best-interest-of-the-

child standard. *Likins v. Logsdon*, 793 S.W.2d 118, 122 (Ky. 1990). We review a family court's determination of the best interest of the child pursuant to the abuse of discretion standard. *Krug v. Krug*, 647 S.W.2d 790, 793 (Ky. 1983). The family court addressed the issue, in relevant part, as follows:

> This child will forever have a difficult time establishing and maintaining a substantial parental relationship with his father. The case history is evidence of the continuing difficulty and the eventual move by [Dawn] would dictate that under the best of circumstances. There is contact or connection through one's name and that connection should not be thwarted or severed by the desire of [Dawn]. There is insufficient evidence, either objective or substantial, that justifies further severing this parental tie with the father.

Hence, the family court anticipated the eventual move of Dawn and Trevor to North Carolina and the burden this would place upon the maintaining of Christopher and Trevor's relationship. The court also anticipated that Dawn would continue to interfere with the forming of that relationship. In light of this, the family court determined that Christopher and Trevor's sharing of the same surname would be of extreme value in enhancing and maintaining their relationship under difficult circumstances. Accordingly, there was a sound rationale for the trial court's decision.

In effect, Dawn is asking this Court to substitute its judgment for that of the family court. However, as previously noted, our standard of review is the abuse-of-discretion standard. We are constrained to conclude that the family court did not abuse its discretion in ordering the name change.

JOINT CUSTODY

Dawn contends that family court erred in awarding the parties joint custody rather than awarding her sole custody.

Kentucky's child custody statute, KRS 403.270, provides, in relevant part, as follows:

> (2) The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent and to any de facto custodian. The court shall consider all relevant factors including:
>
> (a) The wishes of the child's parent or parents, and any de facto custodian, as to his custody;
> (b) The wishes of the child as to his custodian;
> (c) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;
> (d) The child's adjustment to his home, school, and community;
> (e) The mental and physical health of all individuals involved;
>
> ....
>
> (3) The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child....
>
> ....
>
> (5) The court may grant joint custody to the child's parents ....

In custody matters tried without a jury, the family court's "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." CR 52.01; *Sherfey v. Sherfey*, 74 S.W.3d 777, 782 (Ky.App. 2002). "A factual finding is not clearly erroneous if it is supported by substantial evidence." *Sherfey*, 74 S.W.3d at 782. "Substantial evidence" is "evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people." *Id*. As stated in *R.C.R. v. Com. Cabinet for Human Resources*, 988 S.W.2d 36 (Ky.App. 1998), "when the testimony is conflicting we may not substitute our decision for the judgment of the trial court." *Id.* at 39.

After a trial court makes the required findings of fact, it must then apply the law to those facts. The resulting custody award as determined by the trial court will not be disturbed unless it constitutes an abuse of discretion. *Sherfey v. Sherfey*, 74 S.W.3d

at 782-83. Broad discretion is vested in trial courts in matters concerning custody and visitation. *See Futrell v. Futrell*, 346 S.W.2d 39 (Ky. 1961); *Drury v. Drury*, 32 S.W.3d 521, 525 (Ky.App. 2000). *Id.* "Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision." *Sherfey* at 783. Essentially, while "[t]he exercise of discretion must be legally sound," *id.*, and in reviewing the decision of the circuit court, the test is not whether the appellate court would have decided it differently, but whether the findings of the circuit judge were clearly erroneous or that he abused his discretion. *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982). Mere doubt as to the correctness of the trial court's decision is not enough to merit a reversal. *Wells*, 412 S.W.2d at 571.

Dawn's argument that Christopher should not have been awarded joint custody is based upon her allegation that he abuses alcohol, has attempted to purchase cocaine, and has driven while intoxicated. At the evidentiary hearing Dawn presented evidence in support of her contentions; however, Christopher substantially denied the allegations.

In its March 21, 2007, order, the family court addressed Dawn's drug and alcohol allegations as follows:

> At every step, Dawn has placed hurdles over which [Christopher] must jump and, at each step after jumping the hurdle, the hurdle has changed. It has proceeded through drug use to alcoholism to parental inexperience. . . . At each step, Dawn's allegations have changed. **However, they have also remained unproven**. (Emphasis added).

Similarly, in its April 23, 2007, order, the family court stated, in the context of visitation, "[t]here was proof of drug and alcohol use by [Christopher], however, **it was sufficiently unpersuasive proof** upon which to base a restriction of or supervision during the visitation." (Emphasis added).

We again note that the family court is the fact-finder in the cause, and it is that court's duty to weigh the credibility of the testimony and evidence and resolve the conflicts therein. CR 52.01. We will not substitute our judgment for the family court's.

While Dawn presented testimony of drug and alcohol use by Christopher, he presented conflicting testimony. It was the family court's function, not ours, to resolve the conflicting testimony. As such, we will not disturb the family court's finding that there is insufficient evidence of drug and alcohol abuse to be a factor in its decisions concerning, among other things, custody. Because Dawn bases her argument exclusively upon her allegations of drug and alcohol abuse, and because we are unable to conclude that the family court's findings upon the issue are clearly erroneous, we will not disturb the family court's decision to award joint custody to Christopher.

BIRTHING EXPENSES

Dawn contends that the family court erred in determining that Christopher's share of Trevor's birthing expenses should be based upon the income percentages as determined in family court rather than the percentages previously calculated in the district court proceedings. We construe Dawn's argument to be that Christopher should be required to reimburse birthing expenses based upon the 61.3% percentage calculated in the district court child support work sheets rather than the 46.15 % calculated in the family court work sheets.

In its April 23, 2007, order, the family court addressed this issue as follows:

> The Commonwealth, in its petition ask[s] for reimbursement of funds expended by the Commonwealth for the birth of the child. This issue was not addressed in either the motion for summary judgment on paternity or the order of support entered 31-Oct-07 [sic], nor was the issue of past medical costs; presumably it was reserved for this action. The issue

> was before the [family court] as a de novo issue and the support percentages found in the [family court] are the percentages that [Christopher] is directed to pay.

Dawn cites us to no order or action by the district court which purported to require Christopher to repay birthing expenses based upon the percentages calculated in district court. As the matter was before the family court as an issue of first impression for its de novo review, we do not believe the court abused its discretion by using the updated child support percentages to allocate responsibility for birthing expenses.

RESTRICTION'S ON ABILITY TO MOVE

In her fourth and sixth enumerated arguments Dawn contends that the family court improperly restricted her ability to move with Trevor to her home state of North Carolina in contravention of *Fenwick v. Fenwick*, 114 S.W.3d 767 (Ky. 2003).

In its March 21, 2007, order, the family court addressed this issue as follows:

> Dawn wants to move to [North] Carolina; her entire family is there. It is understandable to the Court. She presented her father, pictures of her home, her plans for living arrangements and her plans for her future, all of which were most enticing; the move cannot be found to be an arbitrary decision or one made on a "whim"; her future is in [North] Carolina. However, the focus of the court is not her, it is Trevor. She testified that what is best or beneficial to her is best or beneficial for Trevor. "The happier those boys' mother is, the better off they are going to be." Were there no father in Kentucky, this might be true; but, Trevor's father is here. His reasons to stay here are as compelling as hers are to leave. His support is here, his fiancée and her child are here; his future is in Kentucky. Each have legitimate reasons for their future plans.
>
> It should go without saying that fathers are an important part of the full healthy development of a child. Dawn has offered to transport Trevor back to Kentucky two or three times per month for a visit with [Christopher]. She states that [Christopher] can come to [North] Carolina anytime and see Trevor. She was asked by counsel how she would replace the male influence that Trevor would miss; she responded that her brothers, her father and perhaps a new male would

be in her life. While extended family is important, it is not parental. This child is an infant and this Court's position when dealing with infants and parenting times is that frequency of time is preferable to duration of time, quite the reverse of older children and adolescents. The infant must recognize the face, the sound of the voice, the quality and nature of the touch and for infantile recognition the amount of time between exposures is critical. Otherwise, the parent is relegated to status of a visiting uncle, a nice and perhaps important relationship, but it is not paternal. Trevor may spend his infancy with his parents in close proximity, building a relationship, with both or he may live in [North] Carolina with his mother and intermittently seeing his father.

Dawn states in her deposition [] that if it was ordered that Trevor reside with [Christopher] then she "will stay wherever my son is court ordered to stay." The testimony did not elicit further inquiry [] but it is not an unreasonable inference to believe that Dawn loves the child and knows intrinsically that a relationship with an infant requires time. This can not come from a couple of weekends per month after a several hour trip or spending a weekend in a motel room in [North] Carolina. This relationship requires real, frequent and meaningful time to establish.

Cases such as this are difficult. The Court has two parents who were unable to make any commitment to each other but want a relationship with and what is best for Trevor. Again, Trevor is an infant. In most custody matters, the child has some period of time where the father was in the home, seen by the child on a regular basis and a relationship has begun, the separation of a long distance move is probably never good. It may happen frequently, many children endure and prevail but that does not make it beneficial. Here, with Trevor and [Christopher], the time spent together may be counted in mere intermittent hours since birth, hardly the foundation for a parental relationship.

This Court finds that a couple of trips into Kentucky by Trevor and Dawn every month or [Christopher] traveling to [North] Carolina to stay in a motel will not suffice, it is not in Trevor's best interest. Trevor's best interest will be served by remaining in Kentucky with Dawn. [Christopher] should have every other weekend from Friday at 6:00 PM to Sunday at 6:00 PM. Additionally, Monday, Wednesday and Friday on the weeks that he does not have Friday overnight; Monday and Wednesday from 6 PM to 7:30 PM the alternate week. This will continue for two years at which time the parties may move the Court for further orders.

> This is an intensive time schedule for both parents; it will be difficult. This schedule is not to be seen or taken as punitive toward Dawn, though the court has used harsher language than it is accustomed to using. It is intended to promote a relationship of father, mother and child. Should [Christopher's] persistence and sincerity cool over time and the demands of this schedule and should he begin to regularly miss visits then Dawn may move the Court for a change in this Order.

In *Fenwick v. Fenwick*, *supra*, the Kentucky Supreme Court held that, in situations involving a prior award of joint custody, "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 786.[4]

*Fenwick* presupposes that there has been a prior custody award and that sometime *after* that award the custodial parent seeks to move. The present case is different because Dawn announced her desire to move *prior* to the custody award. Thus, *Fenwick* is not directly on point.

Further *Fenwick* does not, as Dawn appears to argue, grant an unrestricted right of the custodial parent to move. Rather, it obligates the custodial parent to announce her intent, and then shifts the burden to the noncustodial parent to move for modification pursuant to KRS 403.340. If the KRS 403.340 standard is met, a de novo custodial decision is made pursuant to KRS 403.270, taking into consideration

[4] While KRS 403.340, a statute substantially relied upon in *Fenwick*, was significantly altered by the General Assembly in 2001, we do not construe those changes as affecting this aspect of the Supreme Court's holding. Rather, the changes would only affect the burden placed upon the noncustodial parent to succeed in the new custody determination. *Cf*. *Fowler v. Sowers*, 151 S.W.3d (Ky.App. 2004) (Because *Fenwick* was based on the pre-2001 version of KRS 403.340, *Fenwick* carries quite limited precedential weight).

the present custodial parent's proposed move. When this occurs, we cannot conclude that a family court may not fashion a similar order as occurred here.

In other words, under *Fenwick*, if the modification requirements would be met pursuant to KRS 403.340 in the event of a move, and application of the best interest provisions under KRS 403.270 establish that the move would not be in the child's best interest, a family court could fashion an order providing that if the current custodial parent does not move, then custody will remain with her, but if she chooses to relocate, then custody will be changed to the current noncustodial parent. That is analogous to the present situation. Thus, we are unpersuaded by Dawn's *Fenwick* argument.

As previously noted, a family court has broad discretion in matters concerning child custody. Here, the family court has entered an order that, while it does not directly require Dawn to remain in Kentucky, nevertheless finds that it is in Trevor's best interest to live in Kentucky with Dawn, and directs a visitation schedule which can only be complied with if Dawn remains in Kentucky. By its own terms, this situation is contemplated to remain in effect for only two years, at which time Dawn will be entitled to move for a modification of the present order. Further, the order foreshadows that Dawn will be permitted to then remove Trevor to her home state. We believe that the foregoing falls within the family court's discretion.

In summary, we cannot conclude that the family court's order violates the Supreme Court's holding in *Fenwick*. Nor can we say that the family court clearly erred or abused its discretion in determining that it would be in Trevor's best interest for him to presently remain in Kentucky, in Dawn's primary custody, for two years with intensive visitations with Christopher during this period. We accordingly will not disturb the family court's determinations.

## CONCLUSION

For the foregoing reasons the judgment of the Jessamine Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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