

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-002414-ME

THOMAS KENNETH BRYANT

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT  
HONORABLE HUGH SMITH HAYNIE, JUDGE  
ACTION NO. 02-CI-503430

ANN MARIE GILBERT

APPELLEE

OPINION  
AFFIRMING

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BEFORE: TAYLOR, CHIEF JUDGE; DIXON, JUDGE; ISAAC,<sup>1</sup> SENIOR JUDGE.

DIXON, JUDGE: Appellant, Thomas Bryant, appeals *pro se* from an order of the Jefferson Family Court granting Appellee, Ann Marie Gilbert, the right to relocate to Mississippi with the parties' two minor children. Finding no error, we affirm.

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<sup>1</sup> Senior Judge Sheila Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Thomas and Ann Marie married on March 29, 1997, and are the parents of two minor children, a son born on June 9, 2000, and a daughter born on March 27, 2002. The parties separated in July 2002 and were divorced by a decree of dissolution of marriage entered by the Jefferson Family Court on January 14, 2004. They were awarded joint custody of the children with Ann Marie designated as the primary residential parent.

On August 19, 2009, Ann Marie filed a motion in the Jefferson Family Court to relocate to Mississippi with the children. In support of her motion, Ann Marie attached an affidavit stating that she had remarried and that her new husband had received an employment promotion and transfer from Louisville, Kentucky to Lucedale, Mississippi.

A hearing on Ann Marie's motion was held on November 9, 2009, during which the trial court heard testimony not only from the parties, but also the court-appointed guardian ad litem, and the children's therapist, Terry Fontenot. In granting the relocation request, the trial court found:

In support of her motion to relocate, Ms. Gilbert testified that she has remarried. Ms. Gilbert's new husband, Spencer Gilbert, was promoted and transferred from Louisville to Mississippi by his employer in 2008. Ms. Gilbert asks for the Court's permission to relocate to Mississippi so that she and the children can reside with Mr. Gilbert.

In Mississippi, Mr. Gilbert lives in a home on four (4) acres of land. Mr. Gilbert's residence is adjacent to his parent's farm. Ms. Gilbert testified that the children enjoy spending time on the farm and get along well with Mr. Gilbert and his family.

Ms. Gilbert also argues that Mr. Bryant has not exercised visitation with the children on a consistent basis. Due to allegations of abuse involving [the daughter] and another child, Mr. Bryant's visitation was suspended from August 2008 through March 2009. In March, the Court awarded Mr. Bryant therapeutic visitation with the children. Ms. Gilbert asserts that since that time, Mr. Bryant has only seen the children six (6) times.

In response to Ms. Gilbert's motion, Mr. Bryant argues that Ms. Gilbert should not be permitted to move to Mississippi because, if she is allowed to do so, she will seriously diminish his role in the children's lives. Mr. Bryant testified that the children are doing well in their current environment and that there is no reason to disrupt the status quo.

The children's therapist, Terry Fontenot, testified that the children have expressed their desire to live in Mississippi with Mr. and Mrs. Gilbert. He also testified that the children have a significant relationship with Mr. Bryant and would want to return to Louisville area to visit with him. Mr. Fontenot was confident that the children would do well whether they continued to reside in Louisville or relocated to Mississippi.

After considering the evidence presented, the Court believes that it is in the children's best interests to modify the parenting schedule and allow Ms. Gilbert and the children to relocate to Mississippi. Based on Mr. Fontenot's testimony, the Court believes that [the children] are likely to thrive in Mississippi.

The court further observed that the children had been under tremendous stress due to the parties' acrimonious relationship and constant litigation since the divorce.

The court opined that "increased distance and a reduction in the contact between Ms. Gilbert and Mr. Bryant may diminish the turmoil to which the children are exposed." Thomas was granted liberal and flexible visitation, essentially whenever

he was able to travel to Mississippi, not to exceed every other weekend. Further, in addition to sharing holidays, Thomas was awarded visitation for the entirety of the children's fall and spring breaks, as well as the majority of their summer break. Thomas thereafter appealed to this Court.

We agree with the trial court that this case is governed by the decision in *Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008). Therein, our Supreme Court held that a primary residential parent with joint custody seeking to relocate with the children may either make a motion to modify parenting time or a motion to modify custody. *Id.* 769-770. If the relocating parent simply asks the court to change the parenting schedule, and not to alter the joint custody agreement, the trial court must apply the standard set forth in KRS 403.320, which provides that “[t]he court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child; but the court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger seriously the child's physical, mental, moral, or emotional health.”

The family court herein found, and no one disputes, that Ann Marie was seeking a modification in the visitation schedule, not the joint custody arrangement. Therefore, in accordance with *Pennington*, the family court evaluated the best interest of the children in light of the testimony presented during the hearing and determined that it was, in fact, in their best interests to relocate to Mississippi with Ann Marie.

We observe that in his brief, Thomas does not argue that the family court erred in its best interests determination. Rather, Thomas focuses on the inconvenience and expense he will incur as a result of the court's decision. While we certainly agree with Thomas's notion that children need their father present, we are of the opinion that the family court weighed all of the determining factors and properly concluded that Ann Marie should be permitted to relocate. Moreover, we certainly cannot agree that the family court restricted Thomas's visitation rights as he was granted far more liberal and unsupervised visitation that he previously had received.

The order of the Jefferson Circuit Family Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Thomas K. Bryant, *Pro Se*  
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BRIEF FOR APPELLEE:

Phyllis Deeb  
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