



**In the Missouri Court of Appeals  
Eastern District**

DIVISION FIVE

A.E.B., a minor by next friend, L.D.,	)	No. ED94616
and L.D., Individually,	)	
	)	
Respondents/Cross-Appellants,	)	Appeal from the Circuit Court
	)	of St. Charles County
vs.	)	Cause No.: 0811-FC02092
	)	
T.B.,	)	Honorable Nancy L. Schneider
	)	
Appellant.	)	FILED: April 26, 2011

OPINION

T.B. (Mother) appeals from the trial court's judgment and challenges the trial court's requirement that she relocate her residence from the State of Ohio to a three-county area in East Central Missouri. L.D. (Father) cross-appeals arguing it would be in the best interest of A.E.B. (Child) to award him sole physical custody with reasonable custody and visitation with Mother residing in the State of Ohio. We would reverse and remand, in part, and affirm, in part, but because of the general interest and importance of the issue involved, we order this cause transferred to the Missouri Supreme Court, pursuant to Rule 83.02.

### Factual and Procedural Background

Child was born March 3, 2006, in St. Louis County, Missouri. Mother and Father were dating at the time Mother became pregnant with Child, but were not living together. Father was not present for Child's birth but later came to the hospital and participated in choosing her name.

After Child's birth, Mother asked Father to sign an affidavit of paternity. Father requested that paternity testing be done which was finally accomplished when Mother initiated support proceedings through the Division of Child Support Enforcement. Until this time, Father made no voluntary support payments.

Child has resided exclusively with Mother her entire life. Conversely, Father has had limited contact with Child.

Father resides in St. Charles County with his parents. Father has held employment sporadically, having worked at National Dealer Warranties, Pundmann Ford and Extended Warranty during Child's lifetime, but was unemployed at the time of trial. Mother was employed by Ameristar Casino as a waitress in the VIP lounge. In the spring 2008, Mother's roommate informed her that she was moving. At this point, Mother decided to move to Aurora, Ohio to live near her mother. She purchased one-way plane tickets for her and Child on July 6, 2008.

On July 8, 2008, Father filed his Petition for Declaration of Paternity, Order of Support and Custody, and Change of Name.

On July 11, 2008, Mother arranged with her employer to take a leave of absence. The leave of absence allowed her to maintain health insurance on Child until she obtained a new job in Ohio.

On July 13, 2008, Mother arranged with Federal Gateway Moving and Storage to transport her belongings to Ohio. A few days later, on July 16, 2008, Mother's last day of work at Ameristar, she was served with the summons in the case. Mother and Child flew to Ohio on July 17, 2008, and continued to reside there through trial and this appeal. Mother testified that she has an apartment, where she and Child live, a job, family, and other ties in Ohio.

On October 6, 2008, the trial court entered a Judgment Pending Paternity Proceeding that required Father to pay child support and established a temporary visitation schedule. On April 28, 2009, the parties entered into a Consent PDL Judgment whereby a visitation schedule was established through August 30, 2009.

A trial on the matter was heard on November 12-13, 2009. At trial, Mother requested that the court enter an order awarding her sole legal and physical custody in Ohio. Mother additionally submitted a backup custody plan to have sole physical custody of Child in Missouri if she was not granted sole physical custody in Ohio. Father requested the trial court to implement a custody plan which awarded the parties joint legal and physical custody in Missouri.

On February 11, 2010, the trial court entered its Judgment and Decree of Paternity and Order for Child Support, Visitation and Temporary Custody. The trial court granted Mother sole physical custody of the minor child and designated the parties as joint legal custodians. The trial court specifically ordered Mother to relocate her residence from Ohio to St. Charles County, St. Louis County or Lincoln County in Missouri.

Mother now appeals the custody determination requiring that she relocate her residence from the State of Ohio to a three-county area in East Central Missouri. Father cross-appeals

arguing it would be in the best interest of Child to award him sole physical custody with reasonable custody and visitation with Mother residing in the State of Ohio.<sup>1</sup>

#### Standard of Review

We will affirm the trial court's custody determination unless it is not supported by substantial evidence, it is against the weight of the evidence, it erroneously declares the law or erroneously applies the law. Dunkle v. Dunkle, 158 S.W.3d 823, 832 (Mo. App. 2005). With respect to custody and visitation issues, the trial court has broad discretion, and we give deference to these decisions. Id.

#### Discussion

In her sole point on appeal, Mother argues the trial court erred in requiring her, as the custodial parent, to move from Ohio to a three-county area in East Central Missouri. Mother alleges that this decision is based upon a misapplication of the law, is unsupported by substantial evidence, and constitutes an abuse of the trial court's discretion. In his cross-appeal, Father argues he should be granted sole physical custody of Child. Because Mother's and Father's arguments are interrelated, we will address them as one.

Section 452.377, RSMo 2000,<sup>2</sup> is most frequently applied to cases where the parties are already bound by a court-ordered custody agreement, and the parent with primary custody seeks to change the child's residence and thereby alter the visitation plan. DeFreece v. DeFreece, 69 S.W.3d 109, 113 (Mo. App. W.D. 2002). Typically, in this situation, a parent with physical custody decides that he or she wants to move and, as required by Section 452.377, provides

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<sup>1</sup> Alternatively, Father requests that we affirm the trial court's parenting plan with the requirement that Mother return with Child to Missouri, as specified in the judgment, or, that we remand the cause for a hearing to determine the best interests of the minor child regarding sole physical custody being either with Father in Missouri or with Mother in Ohio.

<sup>2</sup> Unless otherwise indicated, all further statutory references are to RSMo 2000.

notice to the other parent of his or her desire to change the child's residence. Id. The other parent then objects to the relocation and, pursuant to the statute, files a motion seeking an order to prevent the relocation. Id. The party seeking to relocate then has the burden of proving that the relocation is in the best interest of the child and that the request is made in good faith. Id.

Here, Mother moved to Ohio nearly eighteen months before trial. Therefore, the trial court was faced with the task of making an initial custody determination and not a motion to modify custody. Courts apply a different standard when making an initial custody determination than when determining whether to modify custody. Id. The initial determination of custody is made based on consideration of the eight factors set out in Section 452.375, under a best interests of the child standard, and not based on who happens to have actual custody of the child from the time of separation until the judge makes the custody determination. Id.

Section 452.375 requires courts to consider all relevant factors including:

- (1) The wishes of the child's parents as to custody and the proposed parenting plan submitted by both parties;
- (2) The needs of the child for a frequent, continuing and meaningful relationship with both parents and the ability and willingness of parents to actively perform their functions as mother and father for the needs of the child;
- (3) The interaction and interrelationship of the child with parents, siblings, and any other person who may significantly affect the child's best interests;
- (4) Which parent is more likely to allow the child frequent, continuing and meaningful contact with the other parent;
- (5) The child's adjustment to the child's home, school, and community;
- (6) The mental and physical health of all individuals involved, including any history of abuse of any individuals involved. If the court finds that a pattern of domestic violence has occurred, and, if the court also finds that awarding custody to the abusive parent is in the best interest of the child, then the court shall enter written findings of fact and conclusions of law. Custody and visitation rights shall be ordered in a manner that best protects the child and the parent or other family or household member who is the victim of domestic violence from any further harm;
- (7) The intention of either parent to relocate the principal residence of the child; and
- (8) The wishes of a child as to the child's custodian.

Section 452.375.2. Here, the trial court determined, under Section 452.375, that the child's best interest was served by being in the sole physical custody of Mother. However, the trial court then proceeded to treat this case as a relocation case under Section 452.377, which is inapplicable to an initial custody determination. DeFreece, 69 S.W.3d at 113; Dunkle, 158 S.W.3d at 835. Chapter 452 does not contain any authorization allowing a trial court to require a parent to move his or her residence as part of its initial custody determination or to create an environment that is, in the trial court's opinion, more desirable for the child than that which exists. Instead, the trial court must fashion a parenting plan based on the actual circumstances of the parents and of the children as they exist at the time of trial.

We find the decision of the Washington Supreme Court in In re Marriage of Littlefield, 940 P.2d 1362 (Wash. 1997) instructive in helping us reach our decision. In Littlefield, the mother challenged the trial court's order that she relocate to Washington from her residence in California as part of its initial dissolution decree. Littlefield, 940 P.2d at 1367. The court construed its Parenting Act, which was very similar to the provisions of Section 452.310<sup>3</sup>

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<sup>3</sup> Any judgment providing for custody also must include "a specific written parenting plan setting forth the terms of such parenting plan arrangements specified in subsection 7 of section 452.310." Section 452.375.9. Section 452.310.7 in turn specifies:

- (1) A specific written schedule detailing the custody, visitation and residential time for each child with each party including:
  - (a) Major holidays stating which holidays a party has each year;
  - (b) School holidays for school-age children;
  - (c) The child's birthday, Mother's Day and Father's Day;
  - (d) Weekday and weekend schedules and for school-age children how the winter, spring, summer and other vacations from school will be spent;
  - (e) The times and places for transfer of the child between the parties in connection with the residential schedule;
  - (f) A plan for sharing transportation duties associated with the residential schedule;
  - (g) Appropriate times for telephone access;
  - (h) Suggested procedures for notifying the other party when a party requests a temporary variation from the residential schedule;

regarding the contents of a parenting plan, and concluded that while a trial court, in applying the “best interests” standard, had the authority to prohibit a parent from relocating, it had no power under the statute to require a parent to move to and live in a particular geographic area. Id.

Another instructive case is In Matter of Custody of D.M.G., 951 P.2d 1377 (Mont. 1998), in which the Montana Supreme Court addressed a factually similar situation to the one before us now. In D.M.G., the father initiated an action in Montana to establish custody rights to his twin sons. D.M.G. 951 P.2d at 1379. At the time the father filed his lawsuit, the mother was living with the boys in Oregon. Id. The trial court granted the mother physical custody provided that she move from Oregon to Montana. Id. The Montana Supreme Court reversed this decision.

Although D.M.G. deals with constitutional issues beyond the scope of this appeal, the court’s reasoning in that case is applicable to the instant case. In D.M.G., the court found problematic the trial court’s requirement that “the children’s primary residential custodian move to Montana from another state where the custodian had already established her home and the children’s home prior to the initial custody determination and prior to the relocation issue being raised.” Id. at 1382-83 (emphasis in original). In noting that the circumstances of D.M.G. differed from the usual situation where a trial court was asked to rule upon a custodial parent’s request to move to another state, the Montana Supreme Court observed:

Instead of preserving the stability of the home and community to which the children are accustomed by restraining their relocation from their home state to another state, the court order at issue here effectively requires the custodial parent to disrupt the stability and continuity of the children’s home in the state where they have lived for a substantial portion of their young lives and to instead relocate and start over again in Montana.

Id. at 1384-85.

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(i) Any suggested restrictions or limitations on access to a party and the reason such restrictions are requested....

That is precisely the situation which is presented to this Court. Here, Child was three and a half years old at the time of trial, and had lived in Ohio for nearly a year and a half. The effect of the trial court's order that Mother move to Missouri only serves to disrupt the stability and continuity of her home, not to preserve it. The D.M.G. court went on to say:

While as a general proposition, it may be preferable that . . . parents both live in the same community and that their children have frequent and consistent contact with each parent, realistically that ideal cannot always be met.

\* \* \* \*

Absent . . . case-specific proof, however, there is no compelling state interest justifying a court ordering the custodial parent to live in a state other than the one he or she freely chooses....

[T]he custodial parent who bears the burdens and responsibilities of raising the child is entitled, to the greatest possible extent, to the same freedom to seek a better life for herself or himself and the children as enjoyed by the non-custodial parent.

Id. at 1385. Again, as in D.M.G., we believe Father in the instant case failed to present sufficient proof with respect to the best interests of Child to justify forcing Mother to relocate to Missouri.

We further note with respect to the three-county restriction, Missouri courts have uniformly held that a trial court does not have the power to confine a parent's residence to a particular area. See In re Marriage of Dusing, 654 S.W.2d 938, 942 (Mo. App. S.D. 1983) (finding that provisions to ensure a relationship with both parents could be made without confining the residence of the custodial parent to a particular area of the state); see also Kline v. Kline, 686 S.W.2d 13, 17 (Mo. App. W.D. 1984) (affirming the trial court's refusal to restrict the mother's residence to either Boone or Calloway Counties); Murray v. Rockwell, 952 S.W.2d 350, 353 (Mo. App. W.D. 1997) (eliminating the trial court's restriction of the child's residence to the Greater Kansas City Metropolitan Area); Haden v. Riou, 90 S.W.3d 538, 541 (Mo. App. W.D. 2002) (finding the trial court's restriction of both parents to Jackson County, Missouri was invalid). There is no question that the trial court here, with the child's best interest in mind,

determined that Mother should have sole physical custody. However, custodial parents also have rights which must be considered and, in the instant case, requiring Mother to move from Ohio to the three-county area of St. Louis County, and in Missouri, was an abuse of discretion.

Finally, it is important to stress that in the present case, the parents were not married and paternity and visitation was not established by court order at the time of Mother's relocation to Ohio. See Brown v. Shannahan, 141 S.W.3d 77, 79 (Mo. App. E.D. 2004). Thus, Mother's move to Ohio was not in violation of any court order. As such, Section 452.377, which provides for modification of existing custody or visitation arrangements, does not apply when the mother has relocated with child prior to an initial determination of paternity and custody rights. Id.

We find no authority under Chapter 452 allowing the trial court to require Mother to move her residence from Ohio to Missouri as part of an initial custody determination. Further, under the circumstances of this case, the judgment requiring Mother to move from Ohio and its direction to limit Mother's residence to a three-county area constituted an abuse of its discretion.

#### Conclusion

We deny Father's cross-appeal requesting sole physical custody of Child. We affirm the trial court's award of sole physical custody of Child to Mother and joint legal custody to Mother and Father as in the best interests of the minor child. We reverse the judgment regarding the physical custody plan for Child and remand to the trial court to determine a custody and

visitation plan consistent with our findings. In all other respects, the judgment is affirmed. However, because of the general importance of this case, we transfer the case to the Supreme Court, pursuant to Rule 83.02.

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Mary K. Hoff, Judge

Gary M. Gaertner, Jr., Presiding Judge and Patricia L. Cohen, Judge, concur.