

SC91716, A.E.B., a Minor by Next Friend, L.D., and L.D., Individually v. T.B.

Appeal from the St. Charles County circuit court, Judge Nancy L. Schneider
Argued and submitted Sept. 15, 2011; opinion issued Oct. 25, 2011

Attorneys: The mother was represented by Lawrence G. Gillespie of Gillespie Hetlage & Coughlin LLC in Clayton, (314) 863-5444, and the father was represented by Joshua G. Knight of Knight & Tomich in St. Charles, (636) 947-0550.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A mother appeals a trial court's initial child custody judgment requiring her to relocate from Ohio to a designated three-county area of Missouri. In a 5-2 decision written by Judge Mary R. Russell, the Supreme Court of Missouri reverses the trial court's judgment and remands (sends back) the case. The statute governing relocation applies only to existing custody determinations, and none of the statutes governing initial custody determinations give a court authority to compel a party to relocate his or her residence. Further, neither the mother's proposed parenting plans nor her testimony were sufficient to grant the court authority to compel her to move. Judge Patricia Breckenridge dissents. She would strike the portion of the judgment restricting the mother's residence to three counties in Missouri but would affirm the judgment in all other respects. She would hold that the mother invited the order requiring her to move from Ohio to Missouri by offering into evidence at trial an alternate parenting plan that required her and the child to live in Missouri. Judge Joel May, a circuit judge from the 16th Judicial Circuit (Jackson County), sat in this case by special designation to fill the vacancy on the Court.

Facts: A mother and father had a child in March 2006. The father lives in St. Charles County; the mother and child lived there too until July 2008, when they moved to Ohio. The child always has lived exclusively with her mother. While the mother was preparing to move to Ohio, the father filed a paternity and custody action against her. Each parent submitted two proposed parenting plans to the circuit court, which held a two-day trial in the matter. Of the mother's proposed parenting plans, one assumed the child would be living with her in Ohio; an alternative plan was offered in the event the court required the child to live in Missouri. Both of the mother's proposed plans scheduled time for the father to have visitation with the child. The court entered its judgment in February 2010, when the child was nearly four years old. The court awarded joint legal custody to the mother and the father, awarded sole physical custody to the mother, and ordered that the mother and the child move back to Missouri before March 2010 and live in Lincoln, St. Charles or St. Louis counties in Missouri. The court adopted a parenting plan with a visitation schedule very like that proposed in the mother's alternate proposal. The mother appeals, and the father cross-appeals.

REVERSED AND REMANDED.

Court en banc holds: (1) The trial court lacked the authority to compel the mother to move back to Missouri. Lacking such authority, it wrongly compelled the mother to relocate with the child to a designated three-county area of Missouri.

(a) Section 452.377, RSMo, contains procedures governing relocation of parties subject to existing child custody and visitation orders. This case, however, does not involve an existing order but rather the initial determination of custody. As such, section 452.377 does not preclude a party from relocating. Sections 452.375 and 452.310, RSMo, require a court in making an initial custody determination to determine what custody arrangement is in the best interests of the child, but these statutes provide no authorization for the court to compel a party to relocate his or her residence. The allowance pursuant to section 452.375.2(7) to consider either parent's intent to relocate at some point in the future does not provide statutory authority to compel a party to relocate from an existing residence as part of the initial custody judgment.

(b) The mother did not give the trial court authority to compel her to move. Although she submitted an alternate parenting plan in the event the court found that her child would have to live in Missouri, neither this plan nor her testimony at the trial was sufficient to give the court authority to compel her to move. The record shows that nothing in this proposed parenting plan indicated that the mother acquiesced to a court order requiring her to relocate her residence from Ohio to Missouri. It further shows that the mother's testimony showed her desire not to move back if given a choice; her testimony expressing her supposition that she would "have to" return to Missouri if the trial court so ordered was not sufficient to manufacture authority for the trial court to compel her to relocate her residence.

(2) It is necessary to remand this case to the trial court. Absent authority to relocate the mother's residence, the trial court was required to enter a judgment reflecting the actual circumstances of the parties and the child as they existed at the time of the trial. Both the mother and the father acknowledge that the visitation terms in the judgment are not designed for the mother's continued residence in Ohio, and reversal of the trial court's relocation order may render unfeasible other portions of the court's judgment. Because the case is being remanded, this Court will not reach the father's cross-appeal.

Dissenting opinion by Judge Breckenridge: The author would strike the portion of the judgment restricting the mother's residence to three counties in Missouri but would affirm the judgment in all other respects under the invited error rule. By offering into evidence at trial an alternate parenting plan that required her and the child to live in Missouri, the mother joined and acquiesced in the father's suggestion that the parents share joint legal and physical custody of the child in Missouri. As such, the mother is not entitled to relief from the trial court error that she invited.