

***Pennington v. Marcum* Answers Important Child Custody Relocation Litigation Questions**

The Supreme Court of Kentucky delivered a much anticipated opinion on child custody relocation litigation in *Pennington v. Marcum*. As hoped, the Court set forth the legal standards to be applied in cases in which a relocation issue arises after a custody decree has been entered. If the moving party seeks to modify timesharing/visitation due to a parent relocation, the best interests standard governs. If the moving party seeks to modify custody due to relocation within two years of the custody decree, the serious endangerment standard governs. If the moving party seeks to modify custody due to relocation two or more years after the custody decree, the change in circumstances and best interests standard governs. However, must a parent give notice of her intent to relocate? Who has the burden of proof? These and other important questions are answered in the Court's opinion.

To begin, what is the difference between a modification of custody and a modification of timesharing/visitation?

"Custody" refers to decision-making authority regarding the child. Custody is either sole, joint, split (the subset of sole custody), or shared (the subset of joint custody). To modify custody is to change it from one category to another. In contrast, modifying timesharing/visitation does not change the legal nature of custody. Decision-making authority regarding the child and physical possession of the child are two distinct and separate principles. The amount of time a child spends with a parent does not affect whether decision-making authority is held by one parent or both. When a party wishes to modify who has decision-making authority regarding the child, the party should move the court for a change in custody. When the party merely wishes to modify the time that each parent has physical possession of the child, the party should move for a modification of timesharing/visitation.

Must a parent give notice of relocation?

No. No notice of relocation was given in *Pennington*, and the Court did not include such a requirement in its holding. Unless the relocating parent seeks a modification of custody or timesharing/visitation due to the relocation, that parent does not even need to file a motion with the court. Although either party may file a modification motion, the burden to file falls on the party who seeks to modify custody or timesharing/visitation due to relocation. This may result in either parent filing a motion or both parties filing motions, especially if one party seeks a custody modification and the other party seeks a timesharing/visitation modification. Practically speaking, however, it is likely that a court would not look favorably upon a parent who fails to give notice of relocation.

Who has the burden of proof?

Although it is not clearly stated in the opinion, the *Pennington* Court seems to place the burden of proof on the party opposing the relocation. It appears that the Court created a presumption that a parent may relocate with a child, stating, "[s]ince 'serious endangerment' or 'best interests' is not defined [in the statute], it is left to the sound discretion of the trial court whether the party opposing relocation has met his burden on

either a modification of custody or visitation/timesharing.” Therefore, depending on the timing and type of modification sought, it is up to the parent opposing relocation to prove either 1) that the relocation seriously endangers the child, or 2) that it is in the child’s best interests to not relocate. However, it could be argued that the party filing for modification carries the burden of proof, as CR 43.01 assigns the burden of proof to the party that would be defeated if neither party presented evidence.

What does the term “primary residential parent” mean now?

Under *Fenwick v. Fenwick*, the term had legal implications which gave preference to the parent who was deemed the primary residential parent. The Court in *Pennington* stripped the term of most, if not all, of its legal significance under *Fenwick*. The *Pennington* Court has defined and reduced the term to more of a label that indicates “the child primarily lives in one parent’s home and identifies it as his home versus ‘Dad’s/Mom’s house’.” Therefore, the term is most appropriately used in a shared custody arrangement. Shared custody is a subset of joint custody. With shared custody, while both parents are legal guardians subject to limitations, a common timesharing agreement is for the child to live with one parent during the week and the other parent on alternate weekends.

What factors may the court consider under the best interests standard?

The Court seems to view the best interests standard as the same, regardless of whether KRS 403.320 or KRS 403.340 applies. In addition to the factors listed in the statutes, the *Pennington* Court mentioned in dicta other factors that may be considered: 1) the child’s relationship with a parent’s new family and new siblings, 2) whether a parent is acknowledged to be a good parent, 3) whether the parties have been able to work out visitation/timesharing for a considerable amount of time in the past, 4) whether the party opposed to relocation is an active participant in the child’s life, and 5) whether the child is well-adjusted in her new home.

In child custody relocation cases, the first question answered must be whether the moving party seeks a modification of custody or a modification of timesharing/visitation. Once that answer is determined, the proper legal standards can be applied. While *Pennington* has clarified many of the issues surrounding child custody relocation litigation, it is important to note that this area of law continues to evolve. Therefore, family law practitioners must watch for future relocation cases that will further define the legal standards set forth in *Pennington*.

Sarah Jost Nielsen is an associate with Diana L. Skaggs + Associates