

Commonwealth Of Kentucky
Court Of Appeals

NO. 1999-CA-000221-MR

SCOTT ALAN ELDER

APPELLANT

v. APPEAL FROM MERCER CIRCUIT COURT
HONORABLE STEPHEN M. SHEWMAKER, JUDGE
ACTION NO. 96-CI-00294

JACQUELINE L. ELDER

APPELLEE

OPINION

REVERSING AND REMANDING

** ** * * * **

BEFORE: BUCKINGHAM, KNOPF, AND MILLER, JUDGES.

MILLER, JUDGE: Scott Alan Elder brings this appeal from a December 30, 1998 order of the Mercer Circuit Court. We reverse and remand.

Scott and Jacqueline Elder were married on December 2, 1988 and had one minor child, Matthew Elder. The parties' marriage was dissolved by a decree of dissolution in the Mercer Circuit Court on December 12, 1996. This decree incorporated a separation and property settlement agreement. Therein, the parties agreed to exercise joint custody of their minor child, Matthew, with Jacqueline having "primary physical possession." On December 27, 1996, less than one month after the decree, the

parties entered into an agreed order transferring primary physical possession of Matthew from Jacqueline to Scott. Scott retained primary physical possession of Matthew for two years under the terms of the agreed order. On November 4, 1998, Jacqueline filed a motion claiming that the agreed order only effectuated a temporary transfer of possession and requested the return of primary physical possession of Matthew. The court ultimately agreed with Jacqueline and granted her primary physical possession of Matthew. This appeal follows.

Scott claims that the circuit court committed error by allowing introduction of parole evidence that operated to alter the written terms of the January 8, 1998 agreed order. We agree. The agreed order was unambiguous on its face, and the parties apparently fulfilled its written terms for some two years. Absent ambiguity, fraud, or mistake, we do not believe parole evidence may be admitted to alter the written terms. See Johnson v. Dalton, Ky., 318 S.W.2d 415 (1958); 47 Am. Jur. 2d Judgments § 750 (1995). Hence, we are of the opinion that the circuit court erred by admitting such parole evidence.

Scott also contends that the circuit court committed reversible error by transferring primary physical possession of Matthew to Jacqueline. Specifically, Scott asserts that the circuit court erroneously transferred primary physical possession of Matthew without first making findings mandated by Stinnett v. Stinnett, Ky. App., 915 S.W.2d 323 (1996), and Mennemeyer v. Mennemeyer, Ky. App., 887 S.W.2d 555 (1994). In Stinnett, 915 S.W.2d 323, the Court observed that:

On appeal this court held that in the circumstances presented, the trial court erred by intervening to amend the joint custody award to change primary physical possession, over the non-movant's objection, **without first finding that there had been "an inability or bad faith refusal of one or both parties to cooperate."** Only after making such a finding may a court order a modification of a joint custody decree, "in light of the best interest of the children and based upon the factors which are enumerated in KRS 403.270."

Id. at 324 (citation omitted) (emphasis added). It is well established that the circuit court must initially find an inability or bad faith refusal of one or both parties to cooperate before amending a joint custody award to change primary physical possession of a child from one parent to another. Id. In the case *sub judice*, the circuit court's only finding remotely relating to the parties' inability to cooperate was as follows:

Respondent [Scott] remarried. It is obvious that Respondent's new wife and the Petitioner [Jacqueline] do not get along. There is conflict there that creates tensions for all involved.

We are of the opinion that the above findings are insufficient under the standard enunciated in Stinnett and Mennemeyer. We hold that the circuit court must specifically find that there exists an inability or bad faith refusal of Scott and Jacquelin to cooperate before changing primary physical possession of Matthew. As such, we remand to the circuit court for reconsideration of its award of primary physical possession.

ALL CONCUR.

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