

RENDERED: October 3, 1997; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-1637-MR

MARSHA LANCASTER

APPELLANT

v. APPEAL FROM MERCER CIRCUIT COURT
HONORABLE STEPHEN M. SHEWMAKER, JUDGE
ACTION NO. 88-CI-121

RONALD ROYCE

APPELLEE

OPINION AND ORDER
VACATING AND REMANDING WITH DIRECTIONS

* * *

BEFORE: GUIDUGLI, JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This appeal asks whether the action taken by the circuit court after a child custody decision was reversed and remanded "for proceedings consistent with this opinion" was proper. Appellant contends the court was directed to award sole custody, but in error, entered new findings to justify joint custody. We agree.

The parties were divorced in 1988 in Mercer County. Appellant was awarded sole custody of the parties' infant child, Christopher, with visitation to appellee. In September 1993, appellee filed a motion for modification of child custody,

seeking permanent and sole custody. On August 1, 1994, the court modified the custody arrangement to joint custody with appellee being the primary custodian. Appellant filed an appeal contending that the circuit court committed reversible error by modifying sole custody without the required findings under Kentucky Revised Statute (KRS) 403.340(2). In an unpublished opinion rendered February 16, 1996, this Court agreed, reversing and remanding for proceedings consistent with our opinion. On remand, the circuit court was asked to make such findings by the appellee. Without an evidentiary hearing, the court entered new findings on May 8, 1996, and again awarded joint custody (after making findings under KRS 403.340(2)(c)) with actual physical custody changed to the appellee. The issue in this appeal is what proceeding would be consistent with the February 16 opinion. Was the trial court directed to make findings which could be reviewed, or directed to reverse the custody arrangement for not making the necessary findings in the August 1, 1994 order?

To understand what this Court meant, it is necessary to review the opinion of February 16, 1996. That opinion reviewed the circuit court's findings and opined that the circuit court changed or modified the early custody order because the mother was denying the father visitation. Our Court went on to cite KRS 403.340(3)(c) for authority that the failure to comply with visitation was not a sufficient ground for modification of a custody order, and that the circuit court, "[t]hus improperly altered the sole custody arrangement." That means on remand, the

circuit court must enter an order denying the September 1993 request for modification of the original child custody award of sole custody to the appellant with visitation to the appellee. If visitation is still a problem, the trial court has its contempt powers. Also, the February 16, 1996 opinion of this Court does not preclude future motions for modifications upon proper grounds. In view of our opinion interpreting this Court's opinion of February 16, 1996, it is unnecessary to supplement the record to consider anything not in the record when the February 16 opinion was rendered. Therefore, appellee's motion to supplement the record is DENIED. As to the respective parties' motions to strike portions of the briefs and exhibits, we note that the objectionable portions were unnecessary in rendering our opinion and, therefore, DENY said motions.

For the foregoing reasons, it is hereby ORDERED that the order of the Mercer Circuit Court entered May 8, 1996 is hereby VACATED and the matter REMANDED to the circuit court with directions to enter an order which reinstates sole custody to the appellant with visitation to the appellee.

JOHNSON, JUDGE, CONCURS.

GUIDUGLI, JUDGE, CONCURS IN RESULT.

ENTERED: October 3, 1997

/s/ Wil Schroder
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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