RENDERED: April 24, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 97-CA-1392-MR

APRIL DAWN MILLS — APPELLANT

v. APPEAL FROM McCRACKEN CIRCUIT COURT
HONORABLE JAMES R. DANIELS, JUDGE
ACTION NO. 95-CI-0674

DEREK VEITCH — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** ** ** ** **

BEFORE: COMBS, GUIDUGLI, and JOHNSON, Judges.

COMBS, JUDGE. April Dawn Mills (Mills) appeals from an order of the McCracken Circuit Court denying her motion to alter, vacate, or amend an earlier order of the Court which voided portions of an agreed order. Mills argues that the circuit court erred when it voided the two clauses in an agreed order relating to custody because the parties had agreed to joint custody. After reviewing the record and the applicable law, we vacate and remand for further proceedings.

Mills and Derek Veitch (Veitch) were divorced on March 6, 1996, by order of the McCracken Circuit Court. The court awarded sole custody of the couple's son to Veitch, and Mills appealed. While the appeal was pending, she entered into an agreement with her former husband. Both parties and Circuit Judge Ron Daniels signed an agreed order, which was entered in the record on April 22, 1996. A typewritten paragraph of the order provided that the parties "shall have joint custody, care, and control of Child with Child's time to be as equally divided between Parents as feasible." A handwritten paragraph stated that "Both parties agree that the father will be the custodial parent and that no legal action will be taken beyond this point." Mills moved to dismiss her appeal after the entry of the agreed order.

Shortly thereafter, Veitch moved from Kentucky to his home state of Massachusetts and took the child with him. Mills caused a warrant for Veitch's arrest to be issued based on custodial interference and gained possession of the child. Veitch moved to hold Mills in contempt and to modify visitation in August of 1996. On September 6, 1996, Mills responded with a motion to modify custody from joint to sole.

The Domestic Relations Commissioner held a hearing on October 18, 1996. In written recommendations entered on November 14, 1996, he found that the parties had been awarded joint custody and that a hearing on the motion to modify custody should be conducted de novo. Veitch filed exceptions challenging the

Commissioner's interpretation of the agreed order. In an order entered February 12, 1997, Judge Daniels ruled that the terms "joint custody" in paragraph three and "custodial parent" in paragraph fifteen were mutually exclusive and voided each other. The court held that the effect of the agreed order was to set visitation only and that Veitch had been awarded sole custody under the original judgment of the court. Mills filed a motion to alter, vacate or amend the judgment on February 26, 1997. The court denied Mills's motion by order entered May 29, 1997. This appeal followed.

Mills argues that the trial court erred in its interpretation of the agreed order because it failed to give effect to the intentions of the parties. She also argues that the trial court abused its discretion when it repudiated its signature on the agreed order. We address these issues in turn.

We hold that the agreed order clearly called for joint custody. The term, "custodial parent", standing alone, may be ambiguous. It is used in sole custody cases to refer to the parent with sole custody and in joint custody cases to refer to the parent with whom the child primarily resides. Cf..,Kulas v. Kulas, Ky. App., 898 S.W.2d 529 (1995), and Newton v. Riley, Ky. App., 899 S.W.2d 509, 509 (1995); see also, KRS 403.320(2) (custodial parent used as opposite of parent not granted custody). In the context of this particular agreed order, however, "custodial parent" is not ambiguous. Where the order clearly states the parties have agreed to joint custody and

designates one parent the custodial parent, that term can only mean the parent with whom the child primarily (not exclusively) resides.

Our interpretation of the agreed order is supported by Erdman v. Clements, Ky. App., 780 S.W.2d 635 (1989). In that case, the father claimed that the custody agreement incorporated into the decree of dissolution was in fact a sole custody arrangement with the mother having the right of visitation because the father was designated as providing the primary residence and as possessing the tie-breaking vote when he and the mother were unable to agree. A panel of this Court held that the parties actually had joint custody even though the father's home was termed the primary residence. This Court noted that the parties had designated the arrangement as joint custody, that they agreed to share medical and transportation costs, and that they divided time with the child almost equally. Id. at 637.

In this case, the agreed order called for joint custody, equal visitation, shared medical costs, and waiver of child support by both parties; it named Veitch the custodial parent. We find that the parties intended joint custody at the time of their agreement and that the agreed order in fact created a joint custody arrangement. Erdman, supra.

In denying Mills's motion to alter, vacate, or amend the previous ruling concerning the agreed order, the circuit court noted that it would not have signed the agreed order in the first place had it read it carefully. Having ordered joint

custody by entry of the agreed order, the circuit court erred in altering its terms unilaterally by construing the order for joint custody to constitute sole custody.

The circuit court has continuing jurisdiction over domestic relations cases, Burchell v. Burchell, Ky. App., 684 S.W.2d 296, 300 (1984), and it may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child. KRS 403.320(3). However, custody is not so readily changed. A party cannot seek modification of a sole custody award within two years of the decree unless he or she files affidavits attesting that there is reason to believe the child's physical, mental, moral or emotional health is in danger. KRS 403.340. In order to modify an award of joint custody, the court must first find that there has been an inability or bad faith refusal of one or both parties to cooperate. If that finding has been made, the court must decide the custody issue de novo in light of the best interest of the child and the standards set forth in KRS 403.270. Mennemeyer v. Mennemeyer, Ky. App., 887 S.W.2d 555, 558 (1994).

Veitch implicitly waived the requirements of KRS 403.340 by signing the agreed order permitting the court to change custody from sole to joint. KRS 403.340(2)(a) (court should retain prior custodian unless custodian agrees to modification). However, we find no authority for the court's repudiation of its own order of joint custody. Its reinterpretation of the agreed order came more than ten days

after its entry; thus it came too late under CR 59. Carroll v. Carroll, Ky., 338 S.W.2d 694, 696 (1960). Even had the court erred (which we find it did not), the court lost jurisdiction to correct an alleged mistake sua sponte after the passage of the ten-day limitation contained in CR 59.05. Commonwealth v. Gross, Ky., 936 S.W.2d 85, 89 (1996).

A court may relieve a party from its order because of a mistake if a party moves for such relief within one year. CR 60.02(a). Although neither Mills nor Veitch filed a motion invoking this rule, they did request that the court interpret the agreed order within this time frame. However, there was no "mistake" to be corrected because the agreed order as entered had plainly called for joint custody. The trial court's repudiation of the order amounted to an attempt to correct a judicial error, which is not subject to correction under CR 60.02. McMillen v. Commonwealth, Ky. App., 717 S.W.2d 508, 509 (1986) (trial court erred by adding language to an earlier order regarding conditional discharge). The court lacked jurisdiction to "correct" the order.

We hold that the agreed order entered April 22, 1996, awarded the parties joint custody of their child. Accordingly, the circuit court is directed to determine whether modification of joint custody is appropriate. Mennemeyer, supra.

ALL CONCUR.

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