

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-000294-MR

ELMER LEROY FREE

APPELLANT

v. APPEAL FROM MUHLENBERG CIRCUIT COURT  
HONORABLE DAVID H. JERNIGAN, JUDGE  
ACTION NO. 97-CI-00587

BETTY JO FREE

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: BARBER, KNOPF, AND TACKETT, JUDGES

KNOPF, JUDGE: This is an appeal from an order of the Muhlenberg Circuit Court denying a motion to modify a joint custody award. Although the applicable standards for reviewing such motions have undergone significant change during the pendency of this appeal, we find that the trial court did not err in denying a further evidentiary hearing on the motion, regardless of the standard. Hence, we affirm.

The marriage between the appellant, Elmer Leroy Free (Leroy), and the appellee, Betty Jo Free (Jo), was dissolved by the Muhlenberg Circuit Court by a decree entered on March 3, 1998. Pursuant to a separation agreement entered between the parties, the trial court awarded joint custody of their son,

Kanan Robert (born May 10, 1994), and designated that the child shall primarily reside with Jo. The agreement set out that Leroy would have "reasonable and liberal" visitation with Kanan, designating generally alternate weekend visitation and certain holiday visitation.

In late 1999 the parties reached an impasse concerning visitation and several other issues. On October 4, 1999, Jo filed a motion requesting that the trial court set a specific holiday visitation schedule. In response, Leroy filed a motion to change custody. In his motion and in the accompanying affidavits, Leroy alleged that Jo had interfered with his visitation and that she had unilaterally made decisions regarding the child's upbringing. In addition, Leroy asserted that Jo's mental instability, her living situation, and changes in child care providers imperiled Kanan's mental, physical, moral, emotional, and psychological well being.

On October 29, 1999, the trial court conducted a hearing on the motions. In addition to considering the allegations contained in Leroy's affidavits, the court heard testimony from both Leroy and Jo. In a written order entered on November 3, 1999, the trial court denied Leroy's motion for a change in custody, finding as follows:

Respondent [Leroy] has failed to present evidence to support the affidavits filed to support the motion to modify the joint custody arrangement, as the court finds that the parties, for the most part, have cooperated very well in dealing with their child; . . .

Thereafter, Leroy filed a motion to reconsider, arguing that the allegations of the parties' inability to cooperate was sufficient to justify a full evidentiary hearing. Following a second hearing, the trial court disagreed, stating that Leroy's affidavits and testimony did not state any facts which would justify a change in custody, but only speculated that Jo's living conditions could pose a danger to the child. Leroy now appeals to this Court.

At the time the trial court considered the motion, modification of joint custody arrangements was governed by this Court's decisions in Mennemeyer v. Mennemeyer,<sup>1</sup> and Benassi v. Havens.<sup>2</sup> Benassi held that "joint custody is no award at all when considering modification of the [joint custody] arrangement" and that "when joint custody is awarded . . . and the parties subsequently disagree, neither KRS 403.340 nor KRS 403.350 applies."<sup>3</sup> The Benassi court further held that in such situations "modification should be made anew under KRS 403.270 as if there had been no prior custody determination."<sup>4</sup> In Mennemeyer, this Court established a threshold test for modification of joint custody. "[T]he trial court may intervene to modify a previous joint custody award only if the court first

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<sup>1</sup> Ky. App., 887 S.W.2d 555 (1994).

<sup>2</sup> Ky. App., 710 S.W.2d 867 (1986).

<sup>3</sup> Id. at 869.

<sup>4</sup> Id.

finds that there has been an inability or bad faith refusal of one or both parties to cooperate.”<sup>5</sup>

Thereafter, this Court reaffirmed and clarified the principles of Mennemeyer several times. In Stinnett v. Stinnett,<sup>6</sup> we stated that a trial court may intervene as to an existing joint custody award “whenever, based on a case-by-case determination, the situation presented to the court evidences an inability or bad faith refusal by one or both parties to *rationaly* participate in decisions concerning their child’s upbringing.”<sup>7</sup> In Jacobs v. Edelstein,<sup>8</sup> we concluded that even if a trial court makes the threshold determination that one or both parents are unable to cooperate, the court is not required to award sole custody. Rather the trial court must make a *de novo* determination as to custody, which may include a finding that continuation of joint custody would be in the best interests of the child.<sup>9</sup> More recently, in Briggs v. Clemons,<sup>10</sup> we stated that Mennemeyer “hinted” that grounds sufficient to modify a sole custody order under KRS 403.340 were also sufficient grounds to

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<sup>5</sup> Mennemeyer, 887 S.W.2d at 558.

<sup>6</sup> Ky. App., 915 S.W.2d 323 (1996).

<sup>7</sup> Id. at 324. (*Emphasis in original*)

<sup>8</sup> Ky. App., 959 S.W.2d 781 (1998).

<sup>9</sup> Id. at 784.

<sup>10</sup> Ky. App., 3 S.W.3d 760 (1999). Briggs v. Clemons became final on November 10, 1999, upon the Supreme Court’s denial of a motion for discretionary review. Accordingly, Briggs was not available for the trial court’s consideration at the time it entered its first order denying the motion to modify custody.

modify joint custody.<sup>11</sup> This Court specifically held that joint custody could be modified under KRS 403.340 even if the parties were cooperating with each other as long as a party could prove that the child's physical, mental, moral, or emotional health was endangered.<sup>12</sup>

Finally, in Scheer v. Zeigler,<sup>13</sup> this Court, sitting *en banc*, determined that the threshold requirement of Mennemeyer is unworkable and is contrary to the applicable statutes. We concluded that the central premise of Benassi--that joint custody is not an award of custody at all and therefore joint custody modification motions should be heard *de novo* in accordance with KRS 403.270--is contrary to the express language of KRS 403.270 and to the Supreme Court's decision in Squires v. Squires,<sup>14</sup>

The effect of Benassi was to destroy the statutory threshold requirements for modifying joint custody as set forth in KRS 403.340 and KRS 403.350--namely, that the parties must wait two years after the entry of the decree and must show a change in circumstances. KRS 403.340. These statutory safeguards had prevented parties to a joint custody award from petitioning for modification every time there was a dispute. By eliminating these requirements, however, Benassi opened wide the door for parties to challenge joint custody awards. After Benassi, a joint custody arrangement was subject to modification at the whim of any party at any time for any reason, since Benassi had held that such an award was no

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<sup>11</sup> Id. at 762.

<sup>12</sup> Id.

<sup>13</sup> Ky. App., 21 S.W.3d 807 (2000).

<sup>14</sup> Ky., 854 S.W.2d 765 (1993).

award at all and that modification motions must result in de novo determinations.

The Mennemeyer court viewed this lack of a threshold requirement as a problem which "would inappropriately encourage joint custodians to continually engage in ongoing disputes regarding physical custody, thereby potentially disrupting established living arrangements at any time without any justification or the use of any judicial safeguards." Mennemeyer, 887 S.W.2d at 558. Thus, Mennemeyer imposed a requirement that a party seeking to modify a joint custody award must prove an inability or bad faith refusal of one or both of the parties to cooperate as a threshold to modifying joint custody.  
Id.<sup>15</sup>

This Court also determined that it had overstepped its authority in attempting to circumvent the statutory standards for modification of custody. The Court further noted that its subsequent efforts to clarify the cooperation standard set out in Mennemeyer had merely made the rule more cumbersome and unclear. Finally, we held that Mennemeyer is unworkable because it encourages the very sort of non-cooperation among joint custodians which it sought to prevent. Accordingly, the Court concluded:

Rather than continue the flawed premise of Benassi and the subsequent efforts of Mennemeyer and its progeny to correct it, we overrule Benassi and Mennemeyer. We hold that joint custody is an award of custody which is subject to the custody modification statutes set forth in KRS 403.340 and KRS 403.350 and that there is no threshold requirement for modifying joint custody other than such requirements as may be imposed by the statutes. [footnote omitted] Our holding today in no way alters or destroys the ability of courts to modify joint custody in situations where the parties are unable to cooperate. Although this court first

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<sup>15</sup> Scheer v. Zeigler, 21 S.W.3d at 812.

delineated this authority in [Chalupa v. Chalupa, Ky. App., 830 S.W.2d 391 (1992)] without statutory support, we nonetheless find statutory support by interpreting KRS 403.340(2)(c) and KRS 403.340(3) to cover this situation.<sup>16</sup>

Initially, the procedural posture of this case presents some difficulties. The trial court based its decision to deny the motion to modify the joint custody arrangement, in part, upon the threshold requirement of Menemeyer. Scheer v. Zeigler clearly set aside that requirement. Once the court announces a new rule of law, the integrity of judicial review mandates the application of the new rule to similar pending cases in which the issue has been preserved for appellate review, even if the decision constitutes a clear break with past precedent.<sup>17</sup>

However, Leroy did not challenge the applicability of the Menemeyer standard before the trial court. Indeed, this Court did not render Sheer v. Zeigler until after the parties in this case submitted their appellate briefs. Thus, we question whether any challenge to the applicability of the Menemeyer threshold test is properly preserved for appeal. Nevertheless, we conclude that a resolution of this issue is not necessary to determine the outcome of this appeal.

As previously noted, Briggs v. Clemons held that a party need not show a bad faith refusal or inability to cooperate, if he or she can prove that the child's present environment in the custody of the other parent endangers the

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<sup>16</sup> Sheer, 21 S.W.3d at 814.

<sup>17</sup> Burns v. Level, Ky., 957 S.W.2d 218 (1997).

child's physical or mental health.<sup>18</sup> The primary question presented in this appeal is whether Leroy's allegations were sufficient to justify a full evidentiary hearing on his motion to modify joint custody.

KRS 403.350 requires a party seeking a change in custody to submit an affidavit with his motion setting forth facts supporting the requested change. Such facts must establish adequate cause for a hearing.<sup>19</sup> Mere allegations or recitations of the statutory standards are not adequate.<sup>20</sup> Rather, the affidavits must set out the factual grounds upon which the allegations are based.<sup>21</sup>

KRS 403.350 further provides that a trial court shall deny a motion for modification of a custody decree unless it finds adequate cause for a hearing based upon the affidavits. The implication then is that only these affidavits may be considered in determining adequate cause.<sup>22</sup> Thus, the trial court's consideration of the testimony of Leroy and Jo was most likely error. Nevertheless, we find no prejudicial error. At the first hearing, Leroy repeated his concerns about Jo's work hours, living conditions, and her mental state. He offered no additional evidence, except for the calendars showing the times

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<sup>18</sup> Id. at 762; *citing* KRS 403.340.

<sup>19</sup> West v. West, Ky. App. 664 S.W.2d 948, 949 (1984).

<sup>20</sup> Id.

<sup>21</sup> Betzer v. Betzer, Ky. App., 749 S.W.2d 694, 695 (1988).

<sup>22</sup> Id.



when he had possession of Kanan. While Jo denied the allegations, her testimony had the same effect as would an affidavit, which the trial court may consider under KRS 403.350.<sup>23</sup>

For purposes of this appeal, the trial court's oral findings supporting its decision to deny the motion to modify custody are far more relevant than its written findings. After the initial hearing, the trial court stated that it did not believe Leroy had shown evidence supporting his more serious allegations. Following the motion to reconsider, the trial court reiterated that Leroy's mere allegations of Jo's mental instability, violent boyfriends, and illegal drug use were not sufficient to require a further hearing. The court found that Leroy's affidavits did not allege any facts or show that there are witnesses to support these allegations. Rather, the trial court concluded that Leroy's affidavits merely invited speculation as to these circumstances. The trial court further noted that the fact that Jo is taking Prozac and Valium by prescription for treatment of depression is not sufficient, by itself, to call into question her fitness to remain as Kanan's residential custodian. Upon our review of the record, we cannot find that the trial court's assessment of the affidavits presented in support of the motion constituted an abuse of discretion. Consequently, we find that the trial court did not err in denying Leroy's motion for an evidentiary hearing on his motion to modify joint custody.

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<sup>23</sup> Id.

Accordingly, the judgment of the Muhlenberg Circuit Court is affirmed.

ALL CONCUR.

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