

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2001-CA-002530-MR

CAMUEL KELLY ADAMS

APPELLANT

v. APPEAL FROM MONTGOMERY CIRCUIT COURT  
HONORABLE WILLIAM B. MAINS, JUDGE  
ACTION NO. 99-CI-00068

ANN-MARYE COFFEY  
(FORMERLY ADAMS)

APPELLEE

OPINION  
AFFIRMING  
\*\* \*\*

BEFORE: BARBER, BUCKINGHAM, AND MILLER, JUDGES.

MILLER, JUDGE: Camuel Kelly Adams brings this appeal from an October 22, 2001 order of the Montgomery Circuit Court. We affirm.

Camuel and Ann-Marye, appellee herein, were married May 18, 1996. One child, Josh Harrison Adams, was born of the marriage August 13, 1997. The parties were divorced by decree of dissolution entered by the Montgomery Circuit Court July 22, 1999. The decree incorporated by reference a "Divorce Agreement" entered into by Camuel and Ann-Marye. Therein, the parties agreed to joint custody of Josh, with Ann-Marye being primary

custodian, and Camuel awarded visitation.

In September 2000, each party moved to modify visitation. The matter was settled through mediation, resulting in an Agreed Order entered October 23, 2000. In August 2001, Ann-Marye moved to amend joint custody to sole custody, and to modify Camuel's visitation. The circuit court awarded sole custody to Ann-Marye, and modified Camuel's visitation to its "Standard Visitation Order" plus one overnight visit per week by order entered October 22, 2001. This appeal follows.

Camuel asserts that the circuit court erred by granting Ann-Marye sole custody and by modifying his visitation. Specifically, Camuel maintains that the circuit court failed to follow the mandates of Kentucky Revised Statutes (KRS) 403.340(2) and KRS 403.340(3). KRS 403.340(2) is applicable only if custody modification comes within two years of the custody decree. Camuel urges us to view the October 23, 2000 order modifying his visitation as a "custody order." This we cannot do. We observe the October 23, 2000 order dealt strictly with visitation, and in no way addressed custody. At the time of Ann-Marye's motion to modify custody, the only custody decree in effect was the July 22, 1999 decree of dissolution. Ann-Marye's motion was made August 30, 2001, outside the two-year statutory period, thus rendering KRS 403.340(2) inapplicable.

As to KRS 403.340(3), Camuel contends the circuit court failed to make the required findings thereunder to support its order modifying custody. KRS 403.340(3) reads:

[T]he court shall not modify a prior custody decree unless after hearing it finds, upon

the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of entry of the prior decree, that a change has occurred in the circumstances of the child or his custodian, and that the modification is necessary to serve the best interests of the child. When determining if a change has occurred and whether a modification of custody is in the best interests of the child, the court shall consider the following:

- (a) Whether the custodian agrees to the modification;
- (b) Whether the child has been integrated into the family of the petitioner with consent of the custodian;
- (c) The facts set forth in KRS 403.270(2) to determine the best interests of the child;
- (d) Whether the child's present environment endangers seriously his physical, mental, moral, or emotional health;
- (e) Whether the harm likely to be caused by a change of environment is outweighed by its advantages to him; and
- (f) Whether the custodian has placed the child with a de facto custodian.

The applicable factors in KRS 403.270(2) are as follows:

- (a) The wishes of the child's parent or parents, and any de facto custodian, as to his custody;
- (b) The wishes of the child as to his custodian;
- (c) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;
- (d) The child's adjustment to his home, school, and community;
- (e) The mental and physical health of all individuals involved;
- (f) Information, records, and evidence of domestic violence . . . ;

The court found that based upon incidents occurring since the July 22, 1999 custody decree, joint custody was "not

working.” The circuit court further found that modification was necessary for the best interest of the child. The order of the circuit court evidences consideration of factors required by both KRS 403.340(3) and KRS 403.270(2)(a)-(f). We think the findings sufficient under the statute. We also believe substantial evidence supports the circuit court's conclusion that joint custody was not working, and sole custody in Ann-Marye was in the best interest of the child. Thus, we are of the opinion the circuit court did not err in awarding Ann-Marye sole custody of Josh.

Camuel contends the circuit court erred by not making the required findings in the modification of his visitation. Modification of visitation is controlled by KRS 403.320(3), which reads:

The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child; but the court shall not **restrict** a parent's visitation rights unless it finds that the visitation would endanger seriously the child's physical, mental, moral, or emotional health. (Emphasis added).

Camuel argues that the circuit court did not specifically find Josh's visitation would seriously endanger Josh's physical, mental, moral, or emotional health. For the purposes of KRS 403.320(3), “restrict' means to provide the non-custodial parent with something less than 'reasonable visitation.'” Kulas v. Kulas, Ky. App., 898 S.W.2d 529, 530 (1995). In the October 23, 2000 Agreed Order, Camuel was awarded visitation every Wednesday evening from 6:00 p.m. to 8:00 p.m., every Thursday and Friday

night, and alternating weekends. The circuit court awarded Camuel visitation of one evening each week from 6:00 to 9:00 p.m., every Thursday overnight, and every other weekend. The result was that Camuel's visitation was reduced by one overnight visit per week. We are of the opinion that such visitation is reasonable, and cannot be said to "restrict" Camuel's visitation rights. As such, we do not believe the court erred in modifying visitation under KRS 403.320(3).

For the foregoing reasons, the order of the Montgomery Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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