

RENDERED: OCTOBER 16, 2009; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-000059-ME

CHARLES FRANKLIN GASKINS

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE O. REED RHORER, JUDGE  
ACTION NO. 04-CI-00332

MARSHA LEE GASKINS  
(NOW ETHINGTON)

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: KELLER AND NICKELL, JUDGES; LAMBERT,<sup>1</sup> SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Charles Franklin Gaskins appeals from the  
December 4, 2008, order of the Franklin Circuit Court. That order denied Charles'  
motion for a change in primary residential custodian of his and Marsha Lee

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<sup>1</sup> Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Gaskins' minor children. Because we hold that the trial court applied the incorrect legal standard in its consideration of Charles' motion, we reverse and remand.

The parties were married on May 26, 2000. Two children were born of the marriage. On August 19, 2004, a final order was entered, by the Franklin Circuit Court, dissolving the marriage between the parties. Pursuant to an agreement, the parties were to share joint custody of the children, with Marsha being the primary residential custodian. On September 16, 2008, Charles filed a motion for a change in custody, seeking to make himself the children's primary residential custodian. On December 8, 2008, the trial court entered an order finding that modification was not necessary and effectively denying Charles' motion.<sup>2</sup> This appeal followed.

In a recent opinion, the Kentucky Supreme Court held that a motion seeking to change the primary residential parent was in reality a motion to modify visitation/timesharing and not a motion to modify custody. *Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008). Motions to modify visitation/timesharing are brought under KRS 403.320(3), which permits modification when it "would serve the best interests of the child."

On appeal, Charles argues that the trial court abused its discretion and that its findings were clearly contrary to the weight of the evidence. However, it is unnecessary for us to address the merits of Charles' argument. Our review of the December 8, 2008 order, from which this appeal was taken, reveals that the trial

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<sup>2</sup> More detailed findings of fact and conclusions of law were entered by the trial court on January 9, 2009.

court applied the improper custody modification standard of KRS 403.340, instead of the appropriate visitation/timesharing modification standard of KRS 403.320(3). As Charles' notice of appeal was filed on January 7, 2009, the circuit court was thereafter without jurisdiction and the January 9, 2009, findings of fact and conclusions of law are a nullity. *See, e.g., Hoy v. Newburg Homes, Inc.*, 325 S.W.2d 301 (Ky. 1959).

Accordingly, the December 8, 2008, order of the Franklin Circuit Court is reversed and remanded with instructions to reconsider the evidence and apply the appropriate visitation/timesharing modification standard of KRS 403.320 and to enter new findings of fact, conclusions of law, and an appropriate order.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Jean Kelley Cunningham  
Shelbyville, Kentucky

BRIEF FOR APPELLEE:

Marsha Lee Ethington  
Frankfort, Kentucky