

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

NO. 2013-CA-002118-ME

DARRELL ASHER

APPELLANT

v. APPEAL FROM CLAY CIRCUIT COURT  
HONORABLE GENE CLARK, JUDGE  
ACTION NO. 09-CI-00057

ASHLEY ASHER  
(n.k.a. Ashley Brooke Munn)

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, CHIEF JUDGE; CLAYTON AND KRAMER,<sup>1</sup> JUDGES.

KRAMER, JUDGE: Darrell Asher appeals the Clay Circuit Court's order denying his motion to alter, amend, or vacate and/or motion for reconsideration of the court's order vacating and amending its findings of fact, conclusions of law and order regarding visitation with the parties' minor child. Following a thorough

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<sup>1</sup> Judge Joy A. Kramer, formerly Judge Joy A. Moore.

review of the record, we affirm because the circuit court did not abuse its discretion in finding that it would be in the child's best interest to remain in one household during the week.

## **I. FACTUAL AND PROCEDURAL BACKGROUND**

Darrell Asher and Ashley Brooke Asher (now known as Ashley Brooke Munn) entered into a separation agreement. Included in that agreement were provisions regarding child custody, visitation, and support pertaining to their one-year-old son. Darrell and Ashley agreed, *inter alia*, that they would have joint legal and physical custody of the child with Ashley being designated as the primary residential custodian. They agreed to share child care responsibilities, decisions regarding medical care, school, religious practices, and extracurricular activities. Regarding visitation, the parties agreed:

[Darrell] shall have liberal and reasonable visitation with the [child] by agreement of the parties. The Primary Residential Custodian will allow proper visitation when [Darrell] is in town. [Darrell] agrees that the Child will not be away from [Ashley] for more than 3 consecutive nights, unless pre-approved by [Ashley]. [Darrell and Ashley] agree that neither shall take the Child out of the Commonwealth of Kentucky without proper notification to the other. Additionally, when either party has the Child for vacation, he/she shall be available for contact at any time throughout the vacation. Holiday visitation will be decided on [an] as[-]needed [basis] based upon the demands of both parties' work schedules. Both parties will discuss and agree on holiday visitation and will make every effort to split the holidays evenly. In the event the parties cannot agree, [Darrell] shall have visitation in accordance with the 41st Judicial Circuit Family Court Shared Custody/Visitation Schedule, a

copy of which is attached hereto and incorporated by reference the same as if fully set out herein.

A decree of dissolution of marriage was entered by the court. The decree found the parties' separation agreement was not unconscionable, and it incorporated by reference the terms of the separation agreement into the decree.

Less than a year later, Ashley moved to modify visitation and/or parenting time, arguing that since the decree was entered, Darrell's work schedule had changed and the current visitation schedule was unworkable for the parties. She asked that the court grant Darrell a standard visitation, pursuant to the 41st Judicial Circuit Family Court Shared Custody/Visitation Schedule, as provided in their separation agreement. A mediation between the parties occurred, and they entered into a visitation agreement, which the court adopted into its March 26, 2010 order on visitation. The agreement provided:

Week 1: Friday @ 4:30 pm until Monday @ 9:00 am (or school time)

Week 2: Thursday @ 4:30 pm until Saturday @ 9:00 am

Week 3: Friday @ 4:30 pm until Sunday @ 6:00 pm

Week 4: Thursday @ 4:30 pm until Saturday @ 9:00 am[.]

Parties agree this schedule starts 3-26-10. Parties agree this agreement modifies the separation agreement of 6-19-2009. Parties agree to accommodate each other reasonably. Parties agree that this agreement may not be modified without consent of the parties or by court order. Holiday schedule attached to remain in effect.

Several years later, Ashley again moved to modify custody and/or

visitation. In support of her motion, Ashley contended that the parties' work

schedules had changed, which rendered the visitation schedule impractical. She argued that the visitation schedule in place at that time provided her without any weekend visitation with the child. Ashley also argued that when the then-five-year-old child enrolled in school, the visitation schedule in place would require him to be in two separate households during the school week. She believed it would be in the child's best interest to be in the same household during the school week. She wanted the child to remain in her household during the school week.

On August 15, 2013, the circuit court entered findings of fact, conclusions of law, and an order. It found, *inter alia*:

9. [T]he child is now five (5) years old and will begin kindergarten in August. It was argued by the father that school was anticipated at the mediation because the mediation agreement says "9:00 a.m. or school time." That is the Court's interpretation as well.

10. In order to modify time sharing, the Court must take into consideration the best interests of the child and the relevant factors listed in KRS<sup>[2]</sup> 403.270(2).

11. The Court has considered the wishes of the child's parents. The father wants to take the child to school and to pick up the child from school. The mother wants a full weekend. The Court finds that each parent cares for and loves the child and wants to spend as much time as they can with the child.

12. The Court finds the child is too young to consider the wishes of the child.

13. The Court has considered the interaction and interrelationship between the child and its parents, siblings, and any other person who could significantly

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<sup>2</sup> Kentucky Revised Statute.

affect the child's best interests. The Court finds that in both homes the child has a new sibling, step-parents and grandparents whom the child is around and has a close relationship.

14. The Court considered the child's adjustment to home, school and community. The Court finds the child is well adjusted to the current schedule. The Court agrees the child's schedule will change some with the transition from preschool to kindergarten. Further, there will be some adjusting by the parents. Although the child will be in two (2) separate households during the school week, this Court has no question that the parties and [the child] can and will adjust.

15. There is no evidence or indication of any health concerns or domestic violence for this Court to consider.

16. Both parties testified they live within walking distance of one another's homes.

17. Both parties live in the same school district.

18. However, the Court is concerned that under the current schedule the mother does not get a full weekend.

19. The Court wants to be clear that the hearing and ruling is not about the best interest of the child as the best interest of this child is being looked after by his parents. The hearing and ruling is more to accommodate the wishes of both parents.

The court then stated the following conclusions of law:

The Court finds the best interest of the child is being met by the parties and they will look after what is best for the child. Therefore, no finding is being made in the "best interest" of the child as it is covered by parents. However, any modification to visitation is made to try to accommodate the wishes of the parents.

The circuit court entered the following order pertaining to visitation:

[Darrell's] visitation is modified as follows:

Week One: Two (2) hours on Wednesday; Friday from 4:30 p.m. until Monday at 9:00 a.m. (or school time).

Week Two: Thursday at 4:30 p.m. until Saturday at 9:00 a.m.

Week Three: Friday at 4:30 p.m. until Sunday at 6:00 p.m.

Week Four: Two (2) hours on Wednesday; Thursday at 4:30 p.m. until Friday at 4:30 p.m.

Summer: Three (3) non-consecutive weeks during the summer. The father shall give reasonable notice to the mother of his vacation times.

Holiday: Visitation shall remain the same.

(Emphasis removed).

Ashley moved to alter, amend, or vacate and/or for reconsideration of the court's order. In her motion, she contended the new schedule gave Darrell more time with the child during the school week, which created new problems; that Darrell had been granted three full, uninterrupted weeks of parenting time in the summer, but Ashley had not been granted any uninterrupted parenting time; and that neither Darrell nor his wife would be able to pick up the child from Ashley or from school at 4:30, as the schedule required. Thus, Ashley alleged that the new schedule was not in the child's best interest.

The circuit court found that the visitation schedule did not provide Ashley with a full weekend of visitation with the child. The court also found that it was in the child's best interest to remain in the same household during the week.

The court then granted Ashley's motion to alter, amend, or vacate and/or for reconsideration. An order was entered on September 27, 2013, modifying Darrell's visitation as follows:

Week 1: Two (2) hours on Wednesday. The parties shall work out the specific times for the Wednesday visitation depending upon the father's work schedule. Friday at 6:00 p.m. until Sunday at 6:00 p.m.

Week 2: Friday at 6:00 p.m. until Sunday at 6:00 p.m.

Week 3: Friday at 6:00 p.m. until Sunday at 6:00 p.m.

Week 4: Two (2) hours on Wednesday. The parties shall work out the specific times for the Wednesday visitation depending upon the father's work schedule. The mother shall have visitation with the child every 4th weekend on a rotating basis (*i.e.*, October 18, 2013; November 15, 2013, etc.).

Summer: Three (3) non-consecutive weeks during the summer to be agreed upon between the parties. The parties shall give the other party a reasonable amount of notice prior to his or her vacation during the summer.

Holiday: Visitation shall remain the same.

(Emphasis removed).

Darrell then moved to alter, amend, or vacate and/or for reconsideration of the court's order.<sup>3</sup> He contended that the parties had anticipated the child would someday attend school, as evidenced by the fact that their visitation agreement following the initial mediation in this case provided as follows

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<sup>3</sup> We note that the court in its order also made a finding that there was no need to modify Darrell's child support obligation, and neither party challenges this decision of the court. Therefore, we will not address child support in this opinion.

for the first week in the rotation: “Week 1: Friday @ 4:30 pm until Monday @ 9:00 am (or school time).” Darrell also argued that he had previously

had overnight visitation time with the child every two (2) to five (5) days. At the hearing of June 26, 2013, the Court found that [Darrell] had visitation about every five (5) days “no matter what.” However, based on the Court’s Order of September 27, 2013, [Darrell] will not see his child at all for eight (8) consecutive days each month. In fact, [Darrell] will only see his child for four (4) hours for eleven (11) consecutive days each month.

Although the Court granted [Darrell] additional summer visitation time with the child, the summer visitation time was to compensate for the full weekend [Ashley] was awarded to receive each month.

Therefore, the Order of September 27, 2013 is not consistent with the parties’ testimony and the Court’s ruling on June 26, 2013.

Darrell also argued that the court’s order was inconsistent with its prior findings. Specifically, he noted that the circuit court had stated in a prior order that it knew the parties were acting in the child’s best interests, so the court did not need to address the child’s best interests. However, its most recent order stated that “[i]t is in the best interest of the child to be in the same household during the week,” and “. . . it is in the best interest of the child that the current visitation schedule be modified.” Therefore, Darrell requested an order consistent with the court’s prior findings.

The circuit court denied Darrell’s motion to alter, amend, or vacate and/or for reconsideration. Darrell now appeals, contending that: (a) the circuit court abused its discretion and/or was clearly erroneous in modifying Darrell’s



parenting time as set out in the court's order of September 27, 2013; and (b) the court erred in vacating and amending the findings of fact, conclusions of law, and order entered on August 15, 2013.

## II. ANALYSIS

### A. MODIFICATION OF PARENTING TIME

Darrell first contends that the circuit court abused its discretion and/or was clearly erroneous in modifying Darrell's parenting time as set out in the court's order of September 27, 2013. On appeal, we "will only reverse a trial court's determinations as to visitation if they constitute a manifest abuse of discretion, or were clearly erroneous in light of the facts and circumstances of the case." *Drury v. Drury*, 32 S.W.3d 521, 525 (Ky. App. 2000). Pursuant to KRS 403.320(3), "[t]he 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."

In its order of September 27, 2013, the circuit court held that it was "in the best interest of the child to be in the same household during the week." The court also found that it was "in the best interest of the child that the current visitation schedule be modified."

Thus, the circuit court modified its prior order granting visitation rights because it believed the modification was in the best interests of the child to be in the same household during the week, considering the child was five years old

and he was going to be in kindergarten soon. We do not find that the circuit court abused its discretion in modifying Darrell's visitation in such a way as to allow the child to remain in one household during the week, spend two hours on two Wednesdays a month with Darrell, spend three weekends out of every four with Darrell, and spend three non-consecutive weeks in the summer with Darrell. Therefore, this claim is without merit.

**B. AUGUST 15, 2013 FINDINGS OF FACT, CONCLUSIONS OF LAW,  
AND ORDER**

Darrell next alleges that the court erred in vacating and amending the findings of fact, conclusions of law, and order entered on August 15, 2013. The court held in its September 27, 2013 order that “[t]he Order entered on August 15, 2013, is contradictory to this Court’s ruling. It is in the best interest of the child that the Order and Visitation Agreement entered on March 26, 2010, be modified.”

Although Darrell argues that the court’s findings and ruling in its September 27, 2013 order are “not consistent with the evidence presented at the hearing [on June 26, 2013,] and [were] not supported by substantial evidence,” the court simply found that it would be in the child’s best interests if he were to remain in the same household during the week because he would soon be starting school. We cannot find any error in the court’s determination, let alone an abuse of discretion. Consequently, this claim lacks merit.

Accordingly, the order of the Clay Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jennifer Caudill Bundy  
London, Kentucky

BRIEF FOR APPELLEE:

Robert Stivers  
Manchester, Kentucky