

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-000261-MR

JASON STUART DURHAM

APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT  
HONORABLE STEPHEN A. HAYDEN, JUDGE  
ACTION NO. 00-CI-00579

KATRENA RUTH DUKES DURHAM

APPELLEE

OPINION

AFFIRMING

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BEFORE: DYCHE, HUDDLESTON, AND KNOPF, JUDGES.

DYCHE, JUDGE. Jason and Katrena Durham were divorced by decree of the Henderson Circuit Court on March 1, 2001. That decree awarded joint custody of the parties' sole child; the child's primary residence was to be with Katrena, and Jason was awarded specific visitation rights. On October 21<sup>st</sup>, 2001, Jason filed a motion for change of custody, accompanied by affidavits alleging that the child's current surroundings seriously endangered his physical, mental, and moral well-being.

The domestic relations commissioner conducted a hearing on the motion, and recommended no change in the child's placement. The trial court overruled Jason's exceptions to the commissioner's report, and this appeal followed. We affirm.

Jason makes two arguments on appeal. The first is that the trial court applied the wrong standard of proof to the evidence in this case. He first argues that the requirement in KRS 403.340(2) that a motion to change custody filed within two years of a decree must allege the risk of serious endangerment to a child's physical, mental, moral, or emotional health is a procedural hurdle which must be cleared before a hearing can be held; and that, at the hearing, the standard is the child's best interest. He argues that the trial court applied the "serious endangerment" standard to the proof at the hearing instead of the less stringent "best interest" standard. The trial court ruled, and Katrena argues, that the more stringent standard applies both to the entitlement to a hearing, and to the merits of a change of custody.

The second argument made by Jason is that the court abused its discretion in not changing the custody of the child. Because we find that the trial court was within its discretion under either standard, we find it unnecessary to reach the first argument, and affirm on the second.

Jason alleged four reasons for the proposed change of custody: a bruise on the child's buttocks and lack of explanation for the bruise; negative changes in the child's behavior since the dissolution; the continued presence of insect bites on the child; and the violent and abusive nature of Katrena's current husband. We have examined the evidence, as cited by Jason, and must agree with the commissioner's report, and the trial court's adoption thereof. The evidence concerning the hand-print shaped bruise was unclear at best. The changes in the child's behavior were either typical of the stage of development of the child, or not serious enough to merit a change and the accompanying disruption in his life. The insect bites were a mystery to all concerned, and cannot be traced to any action or inaction by Katrina. The behavior of Katrina's current husband, while the most serious and troublesome of the allegations, was not shown to have occurred in the child's presence, or were explained by other testimony.

We have taken an overall view of the record, and find no abuse of discretion. The order of the Henderson Circuit Court is affirmed.

ALL CONCUR.

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