

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 22, 2015 Session

IN RE JACOB B.

**Appeal from the Juvenile Court for Jackson County
Nos. 99-163, 4364-3-172 Tiffany Gipson, Judge**

No. M2014-00805-COA-R3-JV – Filed June 26, 2015

This is an appeal from the trial court’s denial of Father’s petition to modify custody. Following a one-day trial, the court found that Father had failed to demonstrate a material change in circumstance as necessary for either a change in primary residential parent or parenting time. Because we find that the evidence preponderates against the trial court’s finding of no material change in circumstance for purposes of modification of residential parenting time, we vacate and remand for further proceedings consistent with this opinion.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Vacated and Remanded

W. NEAL MCBRAYER, J., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR., P.J., M.S., and RICHARD H. DINKINS J., joined.

Angelique P. Kane (on brief) and Brody Kane (at oral argument), Lebanon, Tennessee, for the appellant, David B.

Michael R. Giaimo and Randy S. Chaffin, Cookeville, Tennessee, for the appellee, Angela W.

OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

This case arises from a petition for the modification of a parenting arrangement. David B. (“Father”) and Angela W. (“Mother”) are the parents of a minor child, Jacob B. Although never married, Father’s paternity was established by court order on October 8, 2002, when Jacob was four years old. At that time, a permanent parenting plan was entered designating Mother as Jacob’s primary residential parent.

On May 16, 2012, Father filed a petition to modify custody. By this time, Father was married and lived with his wife and a stepson in Nashville, Tennessee. Father sought to be designated Jacob's primary residential parent and to be granted increased parenting time.¹ Father's petition asserted that Jacob's changing desires with regard to his primary residential parent constituted a material change of circumstance justifying modification. He also asserted that Jacob had a strong interest in playing baseball and that, with Father, Jacob would be able to attend a private school that would be better for him both academically and athletically.

Mother responded by filing a motion to dismiss the petition on July 12, 2012. Mother's motion asserted that Father had failed to allege a material change of circumstance sufficient to allow for a change in custody arrangements. Father filed an amended petition to modify custody on October 1, 2012. The amended petition alleged that Mother subjected Jacob to "physical, emotional and verbal abuse." These alleged instances of abuse related to a number of arguments between Mother and Jacob. Father also alleged that Jacob felt like he was treated differently than his adopted siblings.

Since the entry of the permanent parenting plan, Mother began taking in foster children at her home in Cookeville, Tennessee. She had fostered between 16 and 18 children during the time that Jacob has lived with her and brought two children into her home on a more permanent basis.² Many of these children suffered from personal or developmental issues. Father's amended petition alleged a strain in Jacob's relationship with Mother caused, at least in part, by her decision to bring these other children into her home.

Following an initial hearing at which the trial court spoke with Jacob in camera on December 17, 2012, the court entered an order keeping the permanent parenting plan in place but granting Father visitation with Jacob in the summer until the next hearing. A trial was held on July 17, 2013.

In his opening statement, Father's attorney outlined what he considered to be material changes of circumstance justifying a change in primary residential parent: (1) Jacob's deteriorating relationship with Mother; (2) the adoption of two other children; (3) Jacob's preference to live with Father; and (4) Mother's lack of parenting skills.

Father testified first. He believed that it would be in Jacob's best interest to live with him and attend a local private school where Jacob could focus on academics and baseball. This was part of an overarching narrative by Father, in which he alleged that he would be able to offer a superior support system to Jacob because of his greater financial

¹ Attached to the petition was a proposed parenting plan allocating 97 days of parenting time to Mother and 268 days to Father.

² She has adopted one child and has full legal guardianship of another.

resources, his ability to mentor Jacob as an athlete, and his marriage subsequent to the entry of the original parenting plan. Father also testified that Jacob had changed significantly since the original parenting plan was entered in 2002 and that this fact alone constituted a material change of circumstance.

In addition to testifying that his home had become a more stable and nurturing environment to raise Jacob since the adoption of the original parenting plan, Father also claimed that arguments between Jacob and Mother were becoming more frequent. He testified to an incident where Mother called the sheriff after she got into an argument with Jacob over his failure to brush his teeth.

Father also asserted that Mother's decision to bring foster children into the home constituted a material change of circumstance. In his opinion, this decision had fundamentally changed Jacob's relationship with Mother because both physical and emotional resources, which used to be invested solely in Jacob, were now shared with the other children.

Father then called a number of other witnesses who testified to Jacob's upstanding character, his excellent relationship with Father, and the quality education he would be able to receive at the proposed private school. All of these witnesses agreed that Jacob was a great young man with an excellent upbringing.

At the close of Father's proof, Mother's attorney moved to dismiss, arguing that Father had failed to demonstrate a material change of circumstance as necessary for the modification of a custody order. Rather than grant the motion, the trial court allowed Father's attorney to re-open proof and call Mother as an adverse witness.

Mother's testimony began with a recitation of her experiences with the various foster children who had been in her home over the years. She confirmed that she had adopted one of the children and had full legal guardianship of another. Mother spoke about the incident where she was forced to call the sheriff. She stated that Jacob only began acting out after Father initiated legal proceedings to modify custody. Mother also confirmed that she had been forced to call the sheriff on one of the foster children staying with her on a previous occasion. In regard to the foster children, Mother revealed on cross-examination that she had stopped allowing them into her house after the court advised her that it may not be in Jacob's best interest.

In its oral ruling, the trial court found that Father had failed to prove a material change of circumstance as necessary for either a change in primary residential parent or parenting time. The court found that Father's testimony was not credible in relation to the alleged material changes of circumstance. Instead, the court credited Mother's testimony in finding that her altercations with Jacob were caused, at least in part, by the disruption in their relationship brought about by the modification proceedings. The court

also found that Mother’s “willingness to be a positive influence in the life of foster children cannot rise to the level of a material change of circumstance[].” Although the court acknowledged that the foster children constituted a change in Jacob’s home environment, it refused to find that the change affected Mother’s parenting of Jacob. The court also found that Father’s testimony was not credible on this issue. Therefore, the court denied Father’s petition to modify.

The trial court confirmed this ruling in an order entered on March 24, 2014. Father appealed, arguing that the trial court erred in failing to find a material change of circumstance as necessary for either a change in designation of primary residential parent or increased parenting time.

II. ANALYSIS

A. STANDARD OF REVIEW

The “determination[] of whether a material change of circumstances has occurred” is a factual question. *Armbrister v. Armbrister*, 414 S.W.3d 685, 692-93 (Tenn. 2013); *see also In re T.C.D.*, 261 S.W.3d 734, 742 (Tenn. Ct. App. 2007). We review the trial court’s findings of fact de novo on the record, with a presumption of correctness, unless the evidence preponderates otherwise. *See, e.g., Armbrister*, 414 S.W.3d at 692. In weighing the preponderance of the evidence, determinations of witness credibility are given great weight, and they will not be overturned without clear and convincing evidence to the contrary. *In re Adoption of A.M.H.*, 215 S.W.3d 793, 809 (Tenn. 2007). We review the trial court’s conclusions of law de novo, with no presumption of correctness. *Armbrister*, 414 S.W.3d at 692.

B. PRIMARY RESIDENTIAL PARENT

We apply a two-step analysis under Tennessee Code Annotated § 36-6-101(a) (2014) to requests made in juvenile court for a modification of the primary residential parent or the residential parenting schedule. *See, e.g., In re T.C.D.*, 261 S.W.3d at 743 (primary residential parent modification); *In re T.R.Y.*, No. M2012-01343-COA-R3-JV, 2014 WL 586046, at *11-12 (Tenn. Ct. App. Feb. 12, 2014) (primary residential parent modification); *Williams v. Singler*, No. W2012-01253-COA-R3-JV, 2013 WL 3927934, at *11 (Tenn. Ct. App. July 31, 2013) (primary residential parent modification); *Taylor v. McKinnie*, No. W2007-01468-COA-R3-JV, 2008 WL 2971767, at *3 (Tenn. Ct. App. Aug. 5, 2008) (primary residential parent modification); *In re C.R.D.*, No. M2005-02376-COA-R3-JV, 2007 WL 2491821, at *6 (Tenn. Ct. App. Sept. 4, 2007) (parenting time modification). The threshold issue is whether a material change in circumstance has occurred since the court’s prior order approving a parenting plan. *See Armbrister*, 414 S.W.3d at 697-98; Tenn. Code Ann. § 36-6-101(a)(2)(B). Only if a material change of

circumstance has occurred will we determine if a modification is in the child's best interest. *Armbrister*, 414 S.W.3d at 705.

“A ‘change of circumstance’ with regard to the [residential] parenting schedule is a distinct concept from ‘a change of circumstance’ with regard to the identity of the primary residential parent.” *Massey-Holt v. Holt*, 255 S.W.3d 603, 607 (Tenn. Ct. App. 2007); *see also* Tenn. Code Ann. §§ 36-6-101(a)(2)(B), -101(a)(2)(C). If the parent requests a change in the primary residential parent, then the parent must “‘prove by a preponderance of the evidence a material change in circumstance.’” *Massey-Holt*, 255 S.W.3d at 607 (quoting Tenn. Code Ann. § 36-6-101(a)(2)(B)). A material change of circumstance in this context may “include, but is not limited to, failures to adhere to the parenting plan or an order of custody and visitation or circumstances that make the parenting plan no longer in the best interest of the child.” Tenn. Code Ann. § 36-6-101(a)(2)(B). The change must have occurred after entry of the order sought to be modified, and the change must not have been reasonably foreseeable when the prior order was entered. *See, e.g., Caldwell v. Hill*, 250 S.W.3d 865, 870 (Tenn. Ct. App. 2007).

For purposes of modifying the primary residential parent designation, “a change in circumstances is measured from the *final* order of custody under which the parties are operating.” *In re M.J.H.*, 196 S.W.3d 731, 742 (Tenn. Ct. App. 2005). In this case, that would be the parenting plan entered on October 8, 2002.

Father's primary argument on the issue of modification of the primary residential parent is that the trial court erred in failing to find that the influx of foster children into Mother's home constituted a material change of circumstance. Father argues that the court put too much focus on possible public policy issues arising from a finding that fostering children constitutes a material change in circumstance and failed to focus on the specific facts of the case.

The fostering or adoption of children does not, by itself, constitute a material change of circumstance. It is, however, one factor to consider in determining whether a material change has occurred in the home environment. *See Caldwell*, 250 S.W.3d at 870-71 (finding that remarriage is a factor to be considered in determining whether there has been a sufficient change in the home environment to constitute a material change of circumstance); *Tortorich v. Erickson*, 675 S.W.2d 190, 192 (Tenn. Ct. App. 1984) (similarly finding remarriage as a factor); *Borders v. Borders*, No. 02A01-9811-CH-00320, 1999 WL 1097845, at *1 (Tenn. Ct. App. Oct. 30, 1999) (similarly finding remarriage as a factor). Although our previous cases apply this concept to situations where the primary residential parent remarries, it is also applicable where new children are introduced into the home. *See Riddick v. Riddick*, 497 S.W.2d 740, 742 (Tenn. Ct. App. 1973) (“The character, attitude and general personality of other persons who would be in a position to influence the children are important considerations for the court.”), *superseded on other grounds by rule as stated in Bah v. Bah*, 668 S.W.2d 663 (Tenn. Ct.

App. 1983). However, the petitioner must demonstrate more than the mere fact that the primary residential parent has brought other children into the home. The petitioner must also introduce evidence that this change in home environment has affected the child's well-being in a material way. *Caldwell*, 250 S.W.3d at 870; *Gervais v. Gervais*, No. M2005-01483-COA-R3-CV, 2006 WL 3258228, at *6 (Tenn. Ct. App. Nov. 9, 2006).

Although Mother's decision to bring foster children into her home could constitute a material change of circumstance, Father failed to demonstrate that this change materially affected Jacob's well-being. Taking into account the trial court's credibility determinations, and thus largely discounting Father's testimony, the evidence in the record does not preponderate against the trial court's findings. The only other witness to testify regarding the foster children was Mother.

Mother's testimony establishes that between 16 and 18 children were introduced into the home, but nowhere does she state that this had any kind of material effect on Jacob's well-being. Some of the foster children suffered from behavioral and developmental disorders, but there was no credible proof as to how this affected Jacob. Mother even stated that, when it was brought to her attention by the court that fostering children may not be in Jacob's best interest, she immediately closed her home to them. Furthermore, if we are to credit Mother's testimony—as the trial court did—then the cause of the increasing arguments between Mother and Jacob was not the introduction of foster children into Mother's home. Rather, the arguments resulted from the disruption caused by the modification proceedings and Father's tendency to undermine Mother's authority.

C. PARENTING TIME

The threshold for establishing a material change of circumstance where the issue before the court is a modification of the residential parenting schedule is low. *See, e.g., In re C.R.D.*, 2007 WL 2491821, at *6 (citing *Boyer v. Heimermann*, 238 S.W.3d 249, 259 (Tenn. Ct. App. 2007)); *see also* Tenn. Code Ann. §§ 36-6-101(a)(2)(B) & (C). The petitioner must “prove by a preponderance of the evidence a material change of circumstance affecting the child's best interest.” Tenn. Code Ann. § 36-6-101(a)(2)(C). The change must have occurred after entry of the order sought to be modified. *Caldwell*, 250 S.W.3d at 870. However, unlike the standard for a change of primary residential parent, whether the change was reasonably anticipated when the prior residential parenting schedule order was entered is irrelevant. *Armbrister*, 414 S.W.3d at 703. To modify a residential parenting schedule, “merely showing that the existing arrangement [is] unworkable for the parties is sufficient to satisfy the material change of circumstance test.” *Rose v. Lashlee*, No. M2005-00361-COA-R3-CV, 2006 WL 2390980, at *2 n.3 (Tenn. Ct. App. Aug. 18, 2006). A material change of circumstance in this context may include, but is not limited to:

significant changes in the needs of the child over time, which may include changes relating to age; significant changes in the parent's living or working condition that significantly affect parenting; failure to adhere to the parenting plan; or other circumstances making a change in the residential parenting time in the best interest of the child.

Tenn. Code Ann. § 36-6-101(a)(2)(C).

As with a change in the primary residential parent, the finding of a material change of circumstance does not end the inquiry. Once the threshold question is answered with a finding that a material change of circumstance has occurred, the trial court must determine the child's best interest. Tenn. Code Ann. § 36-6-101(a)(2)(C); *Armbrister*, 414 S.W.3d at 705. As in every primary residential parent or parenting time determination, the child's needs are paramount; the desires and behaviors of the parents are secondary. *See In re T.C.D.*, 261 S.W.3d at 742.

The evidence in the record before us preponderates against the trial court's finding that there was no material change of circumstance for the purposes of residential parenting time. In this case, the original parenting plan was entered in 2002, over eleven years before the trial court's final order was issued. In *Boyer v. Heimermann*, 238 S.W.3d 249 (Tenn. Ct. App. 2007), we stated, "the courts and the General Assembly have recognized that material changes in circumstances can arise solely by the passage of time because children's needs change as they grow older." *Id.* at 257. In *Boyer*, much like this case, over a decade had passed since the entry of the prior custody order. *Id.* Even discounting Father's testimony, without a doubt Jacob's needs have changed significantly since the entry of the prior custody order in 2002. Both Father and Mother have also had significant changes in their living conditions by the addition of other people to their households.

These changes were material under the lower threshold of Tennessee Code Annotated § 36-6-101(a)(2)(C). Therefore, the trial court should consider, consistent with the requirements of Tennessee Code Annotated §§ 36-6-106(a) & -404(b) (2014), whether it is in Jacob's best interest to grant Father greater parenting time. *See* Tenn. Code Ann. § 36-6-405(a) (2014); *Armbrister*, 414 S.W.3d at 705.

III. CONCLUSION

For the foregoing reasons, the judgment of the trial court is vacated, and we remand for further proceedings consistent with this opinion.

W. NEAL McBRAYER, JUDGE