IN THE COURT OF APPEALS OF TENNESSEE

AT KNOXVILLE

PATRICK JAMES THOMSON,	)	UNION COUNTY
	)	
Respondent/Appellee	)	
	)	
v.	)	NO. 03A01-9809-CH-00308
	)	
HEATHER ALICIA ROACH THOMSON,	)	HON. BILLY JOE WHITE CHANCELLOR
	)	
Petitioner/Appellant	)	AFFIRMED
	)	and REMANDED

A. Thomas Monceret of Knoxville for Appellant.

F. D. Gibson, III, of Maryville for Appellee.

O P I N I O N

INMAN, Senior Judge

This is a post-divorce proceeding wherein both parties appeal the change of custody of their son and the visitation orders of the trial court together with a challenge to the trial court's jurisdiction.

I. FACTS AND PROCEEDINGS IN TRIAL COURTS

The mother, Heather Thomson, and father, Patrick Thomson, were divorced on June 20, 1996, in the Union County Chancery Court. They have one son, Derek, who was born October 9, 1995. The Chancellor granted joint custody of Derek to both parties, with primary physical custody to father. Father had physical custody of Derek for two months and Mother had physical custody every third month. From February 1996 through October 1996, the child lived primarily with his Father in Maryville, Tennessee. Father then moved to Florida to be nearer his family.

In early 1997, Mother filed a petition with the trial court alleging that a material change of circumstances had occurred. Father had allegedly neglected Derek and engaged in violent behavior in his presence. After a hearing, the trial court found that there was no material change in circumstances which would warrant a change of custody. The only change in circumstances was the fact that Mother had remarried. The trial court also kept in place the previous order of the court with regard to custody, visitation and support. On appeal, we affirmed the judgment of the trial court.

The episode giving rise to the current litigation occurred on December 9, 1997. Father resided with his paramour in a mobile home. Derek, then 21 months old, had been visiting his father - or had been in his custody - for eight days. According to Father, he was preparing to bathe Derek and had turned the hot water faucet on when the telephone rang. After two rings, he left the bathroom to answer the telephone which required a matter of seconds. Father testified that he then heard Derek cry "hot", that he ran back to the bathroom[1] where he discovered Derek "

sitting in the tub with his hands folded across his chest and wasn't saying much." He called the hospital emergency room whose personnel told him to put the child in cold water, observe the injury, and use his own judgment if Derek needed to be taken to the hospital that night or to his family doctor in the morning. Father also called his mother, Mary Margaret Kelly, and told her of Derek's burns.

Father and his paramour testified that Derek slept soundly through the night. For reasons not clear in the record, on the following morning Father discovered that Derek was badly burned, and he, with Derek's grandmother, took Derek to Shands Hospital in Gainsville, Florida, where he was admitted, with a diagnosis of second and third degree burns on his buttocks, feet and ankles.

The paternal great-grandmother, Margaret Thomson, immediately called Mother in Tennessee and advised her that Derek had suffered burns, which were not life threatening. Shortly after receiving the telephone call, Mother called the police in Florida claiming that the burns were the result of the child being abused and requested that the police investigate. The next day Mother came to Florida.

Detective Horace Parker investigated the complaint of child abuse. Mother told him that she had filed numerous reports of child abuse with the Tennessee Department of Children's Services. During Detective Parker's investigation of the incident (his first burn case), he talked with various people, including Mother, Father, Derek's babysitter in Florida, the Tennessee Department of Children's Services, and various people working at Shands Hospital. He also went to Father's home, examined the site, and tested the water temperature. He "plugged the drain to the bathtub and turned the hot water on. It took approximately three minutes for the

water to reach about three inches deep. At this level [he] obtained a temperature of 140 to 144 degrees." After the investigation, Detective Parker reported that "I couldn't substantiate that Patrick deliberately caused these injuries to his son."[2]

Mother intermittently visited with Derek at the hospital until shortly before Christmas. Father worked with the hospital treatment team helping with Derek's physical therapy. The families worked out visitation with Derek so that someone was with Derek constantly during his hospitalization.

A. Putnam County, Florida, Circuit Court

On January 2, 1998, the Circuit Court in Putnam County, Florida, invoked its emergency jurisdiction authority under Section 61.1308, Florida Statutes, and issued an Emergency Shelter Order placing the child in the temporary legal custody of his paternal grandmother, Mary Margaret Kelly, under the supervision of the Florida Department of Children and Family Services. A guardian *ad litem* was appointed to represent the child. Any contact with the child by Father was to be supervised by Mrs. Kelly.

After Derek was placed in his paternal grandmother's custody, Mother was welcome at the paternal family's home for several hours each day. She also took Derek shopping with her in a stroller furnished by the paternal family.

On January 16, 1998, Mother filed a Petition for Temporary and Permanent Custody of the child in the Chancery Court in Union County, Tennessee. Later that day, the Putnam County Circuit Court entered an Order on Motion for Release of the Child to the Mother and Relinquishment of Court's Emergency Jurisdiction. The

order noted that

> 3. The child is scheduled for an appointment with the Burn Unit at Shands Hospital in Gainesville, Florida on February 19, 1998.
>
> 4. The father requested supervised visitation with the child when the child returns to Florida on February 19, 1998.
>
> 5. The evidence was sufficient to show that the child received burns to the lower extremities and buttocks area while in the father's legal custody, but the identity of the perpetrator and the manner in which the burns were inflicted was not determined by this court.
>
> 6. The Chancery Court for Union County, Tennessee indicated on January 20, 1998 that it would continue to exercise jurisdiction over the custody proceedings and would not transfer jurisdiction to this court.
>
> 7. The mother had filed pleadings in the Chancery Court for Union County, Tennessee to address the events which gave rise to the exercise of emergency jurisdiction by this court.

The court placed the child in the temporary legal custody of Mother effective January 26, 1998, until such time as the Union County Chancery court acted upon Mother's pleadings in the Petition to Change Custody. Mother was to ensure that the child attended his appointment at the Burn Unit at Shands Hospital on February 19, 1998. It was further ordered that visitation "between the father and child is authorized, but not required, when the child returns to Florida for his appointment provided that it is supervised by the paternal grandmother and that it is arranged by mutual agreement of the parents." The court then relinquished its emergency jurisdiction in the matter.

The judges of both courts conferred, and the Florida court declined to exercise jurisdiction over the custody determination deferring to the Union County Chancery Court. The Putnam County, Florida, court then entered an order on

January 30, 1998, relinquishing emergency jurisdiction and granting Mother temporary custody of Derek effective January 26, pending the outcome of the custody litigation in Union County Chancery Court.

On March 5, 1998, the Union County Chancery Court entered an order awarding temporary custody of Derek to Mother pursuant to, and in accordance with, the Florida Decree issued on January 26. The court determined that the temporary custody order should continue in effect until the court could rule on the change of custody petition.

Mother brought Derek back to Tennessee in late January. His maternal grandmother was a nurse and worked with Derek on physical therapy. In early February, Mother brought Derek back to Florida for treatment of his burns. She only stayed long enough for Derek's doctor's appointment. Mother refused to let Father or Derek's paternal family see him. Mother then unilaterally changed Derek's treatment to the Shriner's Hospital in Cincinnati, Ohio.

From the time Derek came back to Tennessee in January until the hearing the end of May, Mother did not permit Father or any of the paternal relatives to visit with Derek, even though they came to Tennessee on two different occasions. Telephone communications between the parents and between Father, the paternal grandmothers and Derek were sporadic and *de minimis.*

On March 6, 1998, Father filed a motion averring that Mother had not paid court ordered child support and was in contempt of court. On March 13, 1998, Father filed another motion for Mother's failure to allow any visitation with Derek; her refusal to allow meaningful telephone contact with Derek; her refusal to keep

Father informed of Derek's well-being or to notify him of any medical treatment. Father also sought to have the motion for change of custody dismissed.

A hearing was held in Union County on May 21, 1998. At the close of the hearing the Chancellor found as to the accidental burns suffered by Derek:

> But all the evidence is that he's a loving father, there has never been any deliberate abuse. The court does not feel that there is enough evidence in this case to find deliberate abuse . . . .
> Now, negligence, lack of attention, those are different matters . . . . you really should not leave a two-year-old child in the bathroom with hot water running under any circumstances. A mother probably wouldn't do that. A dad did. He made a mistake.

Chancellor White also found as to visitation issues:

> And I see an awful lot of that even today that the mother out of anger or bitterness or whatever it is absolutely is uncooperative on visitation . . . .
> The court is still faced with about the same problem I had a year ago when I gave the father residential custody. I did that mostly because the mother was just not cooperative on visitation . . . .
> I want to make it plain and clear that Mr. Thomson has a right to see his child, and his mother and grandmother have a right to see this child. And to just refuse visitation is incomprehensible.
> The atmosphere at the natural mother's home is not conductive to visitation . . . .
> The mother in this case is one of the most stubborn people I've ever dealt with. But if this visitation is not allowed and we don't have proper cooperation, I"ll change custody back to the father at the drop of a hat, and I'll drop the hat . . . .
> The next time, I'm going to change custody full-time to Florida. It won't be two months or one month or six months. I'm going to send this child to its father and leave it down there.
> I want it clearly understood that I'm doing this not because I think the father deliberately injured this child, but I really just think that the mother has matured a lot. She, I hope, has a good marriage and married a good man and has a stable home and that this child would be better suited to spend more time with her.

In his Order entered on August 25, 1998, Chancellor White held the following:

1. That the burns and injuries suffered by the minor chid were the result of negligence on the part of the original Plaintiff, but not a deliberate act.

2. That the previous co-parenting terms afforded the Plaintiff shall be vested in and awarded to the original Defendant, Heather Thomson Douglas, effective May 21, 1998.

3. The original plaintiff shall have co-parenting time from May 22, 1998, up through and until Jun 22, 1998, as the child has been withheld and has had no visitation with the Plaintiff since January, 1998.

4. That the Plaintiff/Respondent shall make an audio recording of all telephone conversations between himself, the defendant, his minor child and any members of the Defendant's family.

5. That the Petitioner shall not interfere with the Respondent's visitation with the minor child and any instance of interference with visitation or right to access of the minor child will be deemed a material change of circumstances sufficient to award sole custody to the Respondent.

6. That the Respondent shall pay unto the Petitioner child support during the months previously ordered to be paid by the Petitioner based upon the required 21% of his net income as required by Tennessee guidelines. The court finds that proof is that the income of the Plaintiff is $9.50 per hour on a 40 hour week and child support shall be set at $282.00 per month for the months required and said amount is equal to or greater than the current child support guidelines.

7. That the Petitioner is ordered an allowance of $500.00 toward her legal fees to be paid by the Respondent to her attorney.

8. That the Respondent shall be allowed credit against his child support obligation for $408.00 in past child support not paid by the Petitioner as of the date of hearing and $755.00 balance owed on judgment for funds borrowed for a total of $1163.00.

9. During the periods when the child is not in that parent's possession, the parent not having possession of the child at those times, shall have:

    a. The right to unimpeded telephone conversations with the child at least two times per week at

reasonable times and for reasonable durations;

b. The right to send mail to the child which the other parent may not open or censor;

c. The right to receive notice and relevant information as soon as practicable, but within twenty-four (24) hours of any event of hospitalization, major illness, or death of the child;

d. The right to receive directly from the child's school, upon written request which includes current mailing address and upon payment of reasonable costs of duplicating, copies of the child's report cards, attendance records, names of teachers, class schedules, standardized test scores, and any other records customarily made available to parents;

e. The right to receive copied of the child's medical records directly from the child's doctor or other health care provider, upon written request which contains current mailing address and upon payment of reasonable costs of duplications; and

f. The right to be free of unwarranted derogatory remarks made about him or her or his or her family by the other parent to or in the presence of the child.

10. The parties shall continue to pick up and drop off the child at the previously designated location or at such places that will be agreeable to both parties.

It was from this Order that Mother filed an appeal on September 1, 1998 and Father filed an appeal on September 19, 1998.

The Putnam County Circuit Court recognized Chancellor Billy Joe White's rulings and findings. On May 29, 1998 the court dismissed the Department of Children and Family Services' petition finding no need for shelter care, no jurisdiction under *res judicata*, and no deliberate abuse of the minor child. The court also recognized the Chancellor's change of custody to Mother and

relinquished custody of the minor child to her subject to Father's visitation.

II. ISSUES

Mother presents the following issues for our review:

1. Did the trial court err by exercising jurisdiction when a dependent and neglect proceeding had been filed by the Department of Children and Family Services in the State of Florida?
2. Does the evidence preponderate against the trial court's determination that father's visitation should not be supervised?

Father's issues for our review are as follows:

1. The Union County Chancery Court properly exercised jurisdiction, and its order and finding of no deliberate injury is *res judicata* on the courts of both states and estop further action on the same facts.
2. The Union County Chancery Court did not abuse its discretion in ordering unsupervised visitation.
3. The evidence preponderates against finding a material change of circumstance that warrants a change of custody.

III. LAW AND DISCUSSION

Our standard of review is as follows: "Unless otherwise required by statute,

review of findings of fact by the trial court in civil actions shall be *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Rule 13(d), Tennessee Rules of Appellate Procedure.

In a *de novo* review, the parties are entitled to a reexamination of the whole matter of law and fact and this court should render the judgment warranted by the law and evidence. Thornburg v. Chase, 606 S.W.2d 672 (Tenn. App. 1980); American Buildings Co. v. White, 640 S.W.2d 569 (Tenn. App. 1982); Rule 36 of the Tennessee Rules of Appellate Procedure. No such presumption, however, attaches to conclusions of law. Adams v. Dean Roofing Co., 715 S.W.2d 341, 343 (Tenn. App. 1986).

Additionally, it is a well-established principle that the trial court is in the best position to assess the credibility of the witnesses; accordingly, such determinations are entitled to great weight on appeal. Massengale v. Massengale, 915 S.W.2d 818, 819 (Tenn. App. 1995); Bowman v. Bowman, 836 S.W.2d 563, 567 (Tenn. App. 1991).

A. Jurisdiction of the Trial Court

The first issue we will address is whether the Union County Chancery Court had jurisdiction of this matter. At oral argument, Mother essentially conceded that the Chancery Court had jurisdiction, and the point need not be labored further.

B. *Res Judicata* of Court Findings

Chancellor White heard the testimony of Ms. Marilyn Barnes, an advance registered nurse practitioner and a member of the University of Florida Department of Pediatrics Child Protection Team, pertaining to the child abuse charges against Father. He also heard testimony from Margaret Thomson and Patrick Thomson and reviewed the deposition testimony of Detective Horace Parker, the police investigator. After hearing and seeing the evidence, Chancellor White found that there was "not enough evidence to find deliberate abuse."

We cannot find that the evidence preponderates against the Chancellor's findings on the issue of whether Derek's burns were deliberately inflicted by his father. But it is appropriate to observe that the evidence reveals many unanswered questions and does not satisfactorily explicate various inconsistencies. The graphic photographs of Derek reveal severe scalding of his buttocks and feet. He had no burns on his hands, head, or upper body. He had no splash burns, keeping in mind that he allegedly fell into the tub from a stool. If he fell into the tub, it is puzzling as to why his hands were not burned. The time sequence is also puzzling, because the test made by the Detective revealed that three minutes were required to fill the tub to a depth of three inches, and Father testified that the telephone - 25 feet away - rang just as he turned the water on. His telephone call only lasted seconds, certainly less than three minutes. Ms. Queen, father's paramour, who was in the bedroom 30 feet away, never heard the telephone. We are further mystified by testimony that Derek slept comfortably throughout the night notwithstanding that his burns were severe and necessarily painful.

Father contends that the findings and holding of the Union County Court will

be *res judicata* on both the Tennessee and Florida Courts. We agree that at the termination of the appeal process in this matter, the parties will be precluded from relitigating the facts before the court in this matter either in the Florida courts or the Tennessee courts, including the juvenile court.[3]

Father submitted to the jurisdiction of the Union County Chancery Court. Under T.C.A. § 36-6-213, a "custody decree rendered by a court of this state which had jurisdiction under 36-6-203 binds all parties . . . who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard. As to these parties, the custody decree is conclusive as to all issues of law and fact decided and as to the custody determination made unless and until that determination is modified pursuant to law, including the provisions of this part, issues of law and fact decided by the court." *See* Brown v. Brown, 847 S.W.2d 496, 506 (Tenn. 1993).

C. Change of Custody of Child

After a trial court has determined the custody which is in the best interest of the child, that decree is "*res judicata* and is conclusive in a subsequent application to change custody, unless some new fact has occurred which has altered the circumstances in a material way so that the welfare of the child requires a change in custody." Nichols v. Nichols, 792 S.W.2d 713, 715-716 (Tenn. 1990).

The paramount consideration in any custody proceeding is the best interest of the child. When the issue before the Court is whether to modify a prior custody order, the Court does not need to repeat the comparative fitness analysis that is

appropriate at the time of the original custody decree. *See e.g.*, Bah v. Bah, 668 S.W.2d 663 (Tenn. App. 1983). Instead, in a modification proceeding, the trial judge must find a material change in circumstances that is compelling enough to warrant the dramatic remedy of changed custody. Moreover, the burden is on the non-custodial parent to prove changed circumstances. Musselman v. Acuff, 826 S.W.2d 920, 922 (Tenn. App. 1991); Woodard v. Woodard, 783 S.W.2d 188 (Tenn. App. 1989); Dailey v. Dailey, 635 S.W.2d 391 (Tenn. App. 1981); T.C.A. § 36-6-101(a). Further, the burden of proof for establishing a "material change in circumstances" is by a preponderance of the evidence. T.C.A. § 36-6-101(a) (2).

In order to be compelling enough to warrant the dramatic remedy of changed custody, the change of circumstances must be such that "continuation of the adjudicated custody will substantially harm the child." Wall v. Wall, 907 S.W.2d 829, 834 (Tenn. App. 1995). When the requested modification is based on the behavior of the custodial parent, such behavior must clearly posit or cause danger to the mental or emotional well-being of the child. Musselman v. Acuff, at 924. We also are mindful that custody decisions should not be designed to punish one parent or to reward the other. Wall v. Wall, 907 S.W.2d 829, 834 (Tenn. App. 1995). Instead, our paramount concern remains the welfare and best interest of the minor child. In re Parsons, 914 S.W.2d 889, 893 (Tenn. App. 1995).

This court has discussed "changed circumstances" as follows:

> This decision [regarding custody] is not changeable except for "change of circumstances" which is defined as that which requires a change to prevent substantial harm to the child. Custody is not changed for the welfare or pleasure of either parent or to punish either parent, but to preserve the welfare of the child. Custody is not changed because one parent is able to furnish a more commodious or pleasant environment than the other, but where

continuation of the adjudicated custody will substantially harm the child. Wall v. Wall, 907 S.W.2d 829, 834 (Tenn. App 1995).

Custody and visitation arrangements should promote the development of a healthy relationship between children and both their parents. Aaby v. Strange, 924 S.W.2d 623, 629 (Tenn. 1996); Taylor v. Taylor, 849, S.W.2d 319, 331-32 (Tenn. 1993); Varley v. Varley, 934 S.W.2d 659, 668 (Tenn. App. 1996).

Unfortunately, the relationship between Mother and her family and Father and his family has been rancorous and uncivilized from the beginning. At oral argument of this case, the attorneys stated that it was a Hatfield and McCoy feud situation which would continue until Derek reached his majority. Moreover, the record is replete with evidence demonstrating that Mother and her family continue their acrimonious deeds against father and his family as to Derek, which is harmful to him. The Chancellor minced no words in warning mother that her obstreperous attitude would not be tolerated because it was inimical to Derek's welfare, and that Father would be awarded permanent, exclusive custody if she persisted in her contrariety. Mother would be well advised to heed the Chancellor's warning that he expected the visitation schedule to honored.

In addressing the question of a change of circumstance which would warrant change of custody in this case, we first note that Mother concedes that since the Court's last ruling on the custody question, the only change of circumstance is the incident involving the child being burned:

Cross Examination by Mr. Gibson:

Q Since the last time we were here in court, this unfortunate incident is the only change in the circumstances that's happened; is that true?

A. Yes.

The extensive investigation made by the law enforcement authorities in Florida criminally exonerated Father,[4] and the Chancellor specifically found that at most he was guilty of negligence. In order to change custody, a trial court must find "a material change in circumstances that is compelling enough to warrant the dramatic remedy of changed custody." Musselman v. Acuff, 826 S.W.2d 920, 922 (Tenn. App. 1991). It is clear that in making this evaluation, a trial court has wide discretion. Grant v. Grant, 286 S.W.2d 349, 350 (Tenn. App. 1954). "(W)hen the activities of a parent involve neglect of the children, such neglect may be considered in relation to the best interest of the children." Mimms v.Mimms, 780 S.W.2d 739, 745 (Tenn. App. 1989).

The Chancellor has endured these warring parties for years, and his empirical judgment as to the welfare of the child is entitled to great deference. While the Father argues that he should not be divested of custody on the basis of one isolated act of negligence, the circumstances of the scalding of Derek portend otherwise.

Neither are we inclined to interfere with the visitation schedule which is admittedly somewhat unusual. Before the scalding episode Derek's primary physical custody was reposed in his father, with reasonable visitation privileges awarded to mother; thereafter, the Chancellor essentially transposed the awards of custody and visitation. It is apparent that with the advent of schooling of Derek the Chancellor will consider the circumstances then existing and order whatever action is deemed necessary to protect his interests and further his welfare.

The judgment of the Chancellor is in all things affirmed. Costs are

apportioned equally. Implementation of the order entered in this case is stayed pending finality or as otherwise ordered by the Supreme Court.

_____
William H. Inman, Senior Judge

CONCUR:

_____
Charles D. Susano, Jr., Judge

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Houston M. Goddard, Presiding Judge