

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 21, 2015 Session

RONALD DAVID JONES v. KELLY ANN JONES

**Appeal from the Chancery Court for Dickson County
No. 1280410 George C. Sexton, Chancellor**

No. M2014-00921-COA-R3-CV – Filed March 18, 2016

This appeal arises from a long and turbulent custody dispute. Under the terms of the Permanent Parenting Plan, each parent was designated primary residential parent for one of the parties' two minor children. A few months after the divorce, the father filed an emergency petition to be named the primary residential parent of the younger child. After a hearing, the trial court dissolved the ex parte restraining order but awarded temporary custody of the child to the father. Five months later, the father filed a second emergency petition to suspend visitation with the mother. After a hearing, the trial court dissolved the second restraining order but left the temporary custody order in place. Two years after the father filed the original petition to modify custody, the court conducted a final hearing. The court found a material change in circumstance had occurred sufficient to justify a change in custody and the custody change was in the best interest of the child. Because the trial court did not make sufficient findings of fact concerning the issue of material change of circumstance, as required by Rule 52.01 of the Tennessee Rules of Civil Procedure, and the credibility of witnesses is at issue, we are unable to conduct an effective appellate review. While normally we would remand this case to afford the trial court the opportunity to state its findings of fact, the judge who tried this case has retired. Therefore, we have no choice but to reverse the judgment and remand for a new hearing.

Tenn. R. App. 3 Appeal as of Right; Judgment of the Chancery Court Reversed 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.

S. Jason Whatley, Columbia, Tennessee, for the appellant, Kelly Ann Jones.

Timothy V. Potter, Dickson, Tennessee, for the appellee, Ronald David Jones.

OPINION

I. BACKGROUND

A. PROCEDURAL HISTORY

Ronald David Jones (“Father”) and Kelly Ann Jones (“Mother”) were divorced on January 10, 2011. At the time of the divorce, the parties were the adoptive parents of two minor children, Aaron and Dylan. Under the terms of the Permanent Parenting Plan, Father was designated the primary residential parent for Aaron, and Mother was designated the primary residential parent for Dylan. At the time of the divorce, Father had no reservations about Mother being the primary residential parent for Dylan. Father remarried on July 29, 2011.

On August 26, 2011, Father filed a Petition to Modify Parenting Plan and for Emergency Relief, alleging a material change in circumstance such that he should be named Dylan’s primary residential parent. Father alleged Mother physically abused both Aaron and Dylan. Father also alleged Mother did not provide a safe and suitable home for Dylan and failed to meet his medical and educational needs. Father asked the court to immediately remove Dylan from Mother’s care and designate Father as primary residential parent on a temporary basis until a hearing could be conducted.

It appears the Chancery Court for Dickson County granted Father an ex parte Temporary Restraining Order, although no order was included in this record. On September 12, 2011, Mother answered Father’s petition, denying his allegations, and raising the affirmative defenses of estoppel, res judicata, and unclean hands.¹ On September 29, 2011, the court held a hearing on whether to extend the restraining order. Father, Mother, the maternal grandmother, Dylan’s therapist, and Dylan’s school teacher testified. The court ruled the temporary restraining order should not be extended, but Dylan should continue to live with Father on a temporary basis and have visitation with Mother on alternate weekends.

¹ Mother also filed a counterclaim against Father for criminal contempt. On February 14 and May 21, 2012, Father filed two motions for contempt against Mother. The court’s final order disposed of the May contempt motion, but the court never ruled on the other contempt motion or Mother’s counterclaim.

On February 17, 2012, Father filed another Motion for Emergency Ex Parte Restraining Order, seeking to suspend Mother's visitation. Father alleged Dylan was suffering emotional trauma from visiting Mother and he had been sexually abused by his maternal grandmother. The court conducted another hearing on May 29, 2012, on whether to extend the second restraining order.² Mother and Father testified at the hearing, as well as Sheila Levine, a licensed clinical social worker with a psychotherapy practice, who was treating Dylan. The court dissolved the restraining order but decreed Mother's visitation should be reinstated gradually. The court ordered supervised visitation for two weeks, followed by a return to the unsupervised visitation schedule ordered at the previous hearing. The court also prohibited any contact between the maternal grandparents and Dylan.

Two years after Father filed his original petition to modify custody, a new judge conducted a final hearing over two days: August 22, 2013, and November 25, 2013. The judge reviewed the September and May hearing transcripts and heard live testimony from Aaron and Dylan, the maternal grandparents, and Dr. Shawn Stewart, Dylan's treating psychologist.

B. TESTIMONY AT THE HEARINGS

1. September 29, 2011 Hearing

Father testified Aaron confided to his stepmother that Mother had abused him. Subsequently, Aaron also told Father he had been abused. Aaron specifically related an incident during which Mother had beaten him with a bamboo rod or cane while on vacation in Florida. Father decided to take Aaron to a counselor to make sure he was telling the truth because "all kids lie." Mother testified Aaron had problems with truthfulness.

After Dylan reported to Father his mother had hit him in the mouth when he asked for a haircut, Father took Dylan to a counselor as well. During counseling, Dylan revealed Mother had beaten him with a belt on the legs and back. According to Father, Dylan was afraid to return to Mother's residence. Father admitted both parents had used corporal punishment with the children during their marriage.

Mother, for her part, denied she had beaten the children. She characterized her actions as "spanking," not abuse. She admitted she had used a belt to spank Aaron before the divorce. She also admitted to spanking Dylan before the divorce but claimed she had not done so since she moved out, other than a "swat" with her hand. Maternal grandmother testified she had witnessed Mother spank Dylan with a belt two or three times since the

² The second restraining order was not included in the record on appeal.

divorce. Mother specifically denied she had ever beaten anyone with a bamboo cane or hit Dylan in the mouth.

Janelle Cassidy, a mental health therapist, testified about her sessions with Aaron and Dylan. Dylan used terms such as “abusive, rage, and ballistic” when describing his living situation with Mother. Both boys claimed Mother had beaten them with a bamboo stick. Ms. Cassidy testified both children were afraid of Mother and told similar stories. Ms. Cassidy explained, however, as a therapist, she helps children address their feelings; she does not investigate the facts.

Father also expressed concern about Mother’s living arrangement. After the divorce, Mother moved in with her parents. She lived in a 900-square-foot house with her parents and Dylan. Mother slept on the couch, and Dylan slept with his grandparents because the house had only one bedroom. Mother testified she was living with her parents temporarily while studying to be a pharmacy technician. By September, however, Mother had managed to provide a bedroom for Dylan in her parents’ home. Father admitted he knew about Mother’s living situation at the time of the divorce.

Father explained he was also concerned about the availability of swords at Mother’s residence. Dylan reported to Father he had a collection of swords in a vase in the living room that he could use. Dylan showed Father a scar he received while using one of the swords. Mother testified Dylan had always been fascinated with Father’s sword collection. According to Mother, Dylan’s swords were toys. She denied the blades were sharp enough to cut a person. She explained Dylan had accidentally scraped his stomach with the edge of the hilt of a sword.

With regard to Dylan’s medical and educational needs, the record reflects Dylan has always been a good student. His only issues at school are behavioral, not academic. The only medical issue was a disagreement between the parents over how to have Dylan tested for Asperger’s Syndrome.

2. May 29, 2012 Hearing

Father testified Dylan’s health suffered after the court dissolved the first temporary restraining order and he resumed visitation with Mother. According to Father, when Dylan returned from his weekends with Mother, he would be “sick at his stomach.” Father admitted Dylan had stomach issues before the divorce but testified his symptoms during this time period were much more severe. Father claimed he had to pick Dylan up from school two or three times per week because of stomach aches and panic attacks. Dylan’s medical records confirm Dylan missed three days of school in late January and early February of 2012 due to

stomach ailments the physician attributed to anxiety. Father testified Dylan's stomach problems improved greatly after visitation with Mother was suspended.

By the May hearing, Dylan had been diagnosed with ADHD and a mild form of Asperger's Syndrome. Sheila Levine began treating Dylan in early February of 2012. Ms. Levine described Dylan as an intense, hyperactive child with poor social skills. Dylan speaks in an emotional manner, making it difficult to discern factual information, and Ms. Levine acknowledged Dylan exaggerates at times. Ms. Levine testified when she met Dylan he was anxious about visiting with Mother. Because of Dylan's anxiety symptoms, Ms. Levine recommended supervised visitation with Mother at a neutral location.

Mother testified Dylan has never liked going back and forth between his parents' homes. According to Mother, Dylan always seemed happy to see her. Mother claimed Dylan had never had problems with anxiety or panic attacks before Father obtained temporary custody.

On February 13, 2012, Dylan reported to Father his maternal grandmother had sexually molested him. Father admitted he did not know whether the alleged sexual abuse happened before or after the divorce. Father further admitted he had no proof Mother knew anything about the alleged sexual abuse. The sexual abuse allegation prompted Father to seek the second restraining order.

After Dylan reported the alleged sexual abuse to Ms. Levine, she made an abuse report to the Tennessee Department of Children's Services ("DCS").³ According to Ms. Levine, Dylan reported only one instance of sexual abuse, not an ongoing situation. When Dylan described the incident, he used the term "sexual abuse," which, according to Ms. Levine, is not a common phrase for a child.

Mother categorically denied anyone in her household had physically or sexually abused Dylan. Mother testified Dylan had made accusations of sexual abuse against his brother before the divorce. Mother believed the prior allegations against Aaron were true, but Father did not.

Mother also testified Father was preventing her from talking to Dylan by telephone. Father agreed he was not encouraging Dylan to speak with Mother.

³ A DCS worker interviewed Dylan, but DCS took no additional action.

3. August 22, 2013 Hearing

Aaron, now nineteen, testified at the August hearing. In 2012, Aaron moved out of Father's house after a violent argument. At the time of the hearing, Aaron was living with his maternal grandparents. Mother had remarried and moved to Murfreesboro.

Aaron testified Father told him Mother did not want him after the divorce, which made him angry. When his stepmother asked him if Mother had ever done anything to hurt him, he told her he had been beaten by Mother with a vacuum hose, a bamboo stick, and a belt. He also told his stepmother he had witnessed Dylan being beaten by Mother.

At the hearing, however, Aaron readily admitted what he had previously characterized as beatings were actually spankings. Both his parents had spanked him with a belt before the divorce. Father usually cornered him for the corporal punishment, but he often ran away from Mother. On those occasions, she would chase him with the belt and sometimes he would be hit on his legs or back. He also explained the "bamboo cane incident." During the last family vacation before the divorce, Mother spanked him with a bamboo stick because he would not stop fighting with Dylan. Mother had purchased the stick to stabilize a house plant; it was approximately two feet long and as wide as his finger. The stick broke during the spanking, and Mother hit him again with the broken piece of stick. While Dylan witnessed the spanking, Mother did not hit Dylan with the stick. Aaron confirmed he had never seen Mother abusing Dylan or his grandmother acting inappropriately with Dylan.

Aaron testified Father had given him a negative impression of Mother. Aaron confirmed Father and his stepmother spoke negatively about Mother in front of Dylan. According to Aaron, Father has taught Dylan to hate Mother. Aaron testified, since Father obtained temporary custody of Dylan, Dylan has become disrespectful of Mother and calls her by her first name instead of "mom."

Dylan testified Mother hit him with bamboo sticks and belts with metal and even kicked him. Dylan stated this abuse occurred during the marriage when Father was not home. He also testified Mother abused him after the divorce. He agreed he is not currently being abused but testified he fears it could reoccur. Dylan explained he no longer calls Mother "mom" because she does not deserve the title. Dylan stated he intentionally behaves badly when visiting Mother in an attempt to provoke her. He stated if Mother spanks him when he visits, "it's an instant win for us."

Dylan also testified he had been sexually abused by his maternal grandmother and his brother, Aaron. Both grandparents denied any sexual abuse.

4. November 25, 2013 Hearing

Dylan concluded his testimony at the November hearing. Dylan testified he stopped loving Mother because “Dad gave me the big picture.” He explained Father helped him understand Mother had abused and manipulated him.

Dr. Stewart, a psychologist and national expert in the area of autism spectrum disorders, first saw Dylan in February of 2013. Dr. Stewart confirmed Dylan has a mild form of Asperger’s Syndrome. Because of his diagnosis, Dylan has attention-related issues, panic attacks, and extreme emotional outbursts. Dylan also has difficulty interpreting social situations.

A stable environment is crucial for Dylan to allow him the ability to handle the less predictable aspects of his life. Any type of significant change in his environment can trigger a panic attack. Dr. Stewart testified Dylan had experienced panic attacks at visitation exchanges.⁴ According to Dr. Stewart, Dylan’s visits with Mother trigger high levels of stress and anxiety.

Dylan’s anxiety and stress reactions can be treated and improved. While Dylan will have symptoms his entire life, he can learn behaviors that will help him cope with changes. Dr. Stewart recommended the use of schedules, reminders, and planners to allow Dylan a sense of control over his environment. Dylan’s panic attacks have lessened in frequency since Dr. Stewart began treating him through medication and behavioral therapy. Dr. Stewart recommended continued individual therapy and family systems therapy for Father and Mother.

Dr. Stewart conducted clinical assessments with Dylan to verify whether he has been abused. Dr. Stewart testified the assessments confirmed Dylan had been physically abused, but he could not verify sexual abuse. While Dr. Stewart agreed children with Asperger’s Syndrome would be more susceptible to parental alienation, he testified Dylan did not exhibit the typical signs of alienation.

C. TRIAL COURT’S MEMORANDUM OPINION AND ORDER

On December 16, 2013, the court issued a Memorandum Opinion, finding Father had met his burden of proving a material change of circumstance. The court also found it was in Dylan’s best interest to designate Father the primary residential parent. The trial court made

⁴ Evidence was introduced at the hearing that Dylan had a panic attack at one of the visitation exchanges in November of 2012. Emergency medical personnel were called.

the following findings:

1. The love, affection and emotional ties to the child by the parents is obviously great by both parents. However, these ties by the child to the mother are somewhat strained at this point in time for some reason unknown to this court;
2. The court finds both parents equally willing and able to provide the child with food, clothing, medical care, education and other necessary care and each has at some point been the primary caregiver;
3. The court finds the importance of continuity in the child's life leans in favor of the father at this time;
4. The court finds the stability of the family unit to be equally balanced between mother and father;
5. The court finds the mental and physical health of the parents to be a nonfactor in this case;
6. The court finds the home, school and community record of the child to lean in favor of father at this time the same as continuity in paragraph 3 above;
7. The court has given some consideration to the preference of the child; and
8. The court does not find evidence of physical, sexual or emotional abuse; (Even though evidence was introduced to establish these conditions of abuse, the court finds the evidence insufficient to make such a finding.)
9. Even though the child testified to the contrary, the court does not find the character and behavior of any other person who resides in or frequents the home of a parent to be a factor in this case;
10. The court finds each parent's ability to perform parenting responsibilities equally adequate, but the ability to facilitate and encourage a close and continuing parent-child relationship between the child and both parents is woefully inadequate with both parents.

Mother filed a notice of appeal on May 5, 2014. The court entered a final order on May 8, 2014. The final order incorporated the findings in the Memorandum Opinion and adopted a new permanent parenting plan, designating Father as primary residential parent and granting Mother 92 days of visitation each year.

On appeal, Mother argues the trial court failed to make specific findings of fact on the issue of material change of circumstance and res judicata should have barred the court from considering Father's proof of a material change because these events occurred before the divorce.

II. ANALYSIS

A. STANDARD OF REVIEW

We review the trial court's findings of fact de novo on the record with a presumption of correctness, unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); *Armbrister v. Armbrister*, 414 S.W.3d 685, 692 (Tenn. 2013). 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). "Because '[c]ustody . . . determinations often hinge on subtle factors, including the parents' demeanor and credibility during . . . proceedings themselves,' appellate courts 'are reluctant to second-guess a trial court's decisions.'" *In re Alexandra J.D.*, No. E2009-00459-COA-R3-JV, 2010 WL 5093862, at *3 (Tenn. Ct. App. Dec. 10, 2010) (quoting *Johnson v. Johnson*, 169 S.W.3d 640, 645 (Tenn. Ct. App. 2004)). We review the trial court's conclusions of law de novo with no presumption of correctness. Tenn. R. App. P. 13(d); *Armbrister*, 414 S.W.3d at 692.

B. MODIFICATION OF THE PRIMARY PARENT DESIGNATION

Adjudicating disputes over who should be designated the primary residential parent is one of a court's greatest responsibilities. *Massey-Holt v. Holt*, 255 S.W.3d 603, 607 (Tenn. Ct. App. 2007). A court's designation of the primary residential parent as part of a final decree of divorce is considered res judicata upon the facts in existence or those which were reasonably foreseeable when the decision was made. *Steen v. Steen*, 61 S.W.3d 324, 327 (Tenn. Ct. App. 2001). However, because circumstances change in unanticipated ways, courts are statutorily empowered to modify a primary residential parent designation. See Tenn. Code Ann. § 36-6-101(a)(1) (Supp. 2015) (indicating a decree awarding custody of a minor child "shall remain within the control of the court and be subject to such changes or modification as the exigencies of the case may require").

Courts apply a two-step analysis to requests to change the primary residential parent designation. *Keisling v. Keisling*, 196 S.W.3d 703, 718 (Tenn. Ct. App. 2005). The threshold issue is whether a material change in circumstance has occurred since the court's prior custody order. *Armbrister*, 414 S.W.3d at 697-98; Tenn. Code Ann. § 36-6-101(a)(2)(B) (Supp. 2015). Only if a material change in circumstance has occurred do we consider whether a modification is in the child's best interest. *Armbrister*, 414 S.W.3d at 705. The "determinations of whether a material change of circumstances has occurred and where the best interests of the child lie are factual questions." *In re T.C.D.*, 261 S.W.3d 734, 742 (Tenn. Ct. App. 2007).

The parent requesting a change in the primary residential parent has the burden of proving the threshold issue of a material change in circumstance by a preponderance of the evidence. Tenn. Code Ann. § 36-6-101(a)(2)(B) (Supp. 2015). In determining whether a material change has occurred, courts consider the following factors: “(1) whether a change has occurred after the entry of the order sought to be modified; (2) whether a change was not known or reasonably anticipated when the order was entered; and (3) whether a change is one that affects the child’s well-being in a meaningful way.” *Cranston v. Combs*, 106 S.W.3d 641, 644 (Tenn. 2003).

Mother correctly points out that nowhere in the Memorandum Opinion or Final Order does the court state what the material change of circumstance was in this case. The court had an obligation to state “the reason and the facts that constitute the basis for the custody determination.” Tenn. Code Ann. § 36-6-101(a)(2)(B)(i) (Supp. 2015). Moreover, Rule 52.01 directs the court, in all bench trials, to “find the facts specially.” Tenn. R. Civ. P. 52.01. “Simply stating the trial court’s decision, without more, does not fulfill this mandate.” *Barnes v. Barnes*, No. M2011-01824-COA-R3-CV, 2012 WL 5266382, at *8 (Tenn. Ct. App. Oct. 24, 2012). While “[t]here is no bright-line test by which to assess the sufficiency of factual findings, . . . ‘the findings of fact must include as much of the subsidiary facts as is necessary to disclose to the reviewing court the steps by which the trial court reached its ultimate conclusion on each factual issue.’” *Lovlace v. Copley*, 418 S.W.3d 1, 35 (Tenn. 2013) (quoting 9C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2579, at 328 (3d ed. 2008)).

The trial court’s statement that a material change of circumstance exists does not fulfill the mandate of Rule 52.01. The Memorandum Opinion contains only two relevant factual findings on the material change issue: there was no physical, sexual, or emotional abuse and Dylan has a somewhat strained relationship with Mother. These findings do not provide this Court with a “clear understanding of the basis of [the] trial court’s decision.” *Id.* at 34. A finding of no abuse cannot be a material change. At oral argument, Father’s attorney conceded the only factual basis for a finding of a material change in the Memorandum Opinion is the child’s strained relationship with Mother. Without additional factual findings, we are left to wonder how the court proceeded from its finding of a somewhat strained relationship to its conclusion of a material change.

When confronted with insufficient findings of fact in a written order, appellate courts generally pursue one of two alternatives. One alternative is to remand so the trial court can make specific findings of fact. *Lovlace*, 418 S.W.3d at 36. Another alternative is to conduct a “de novo review of the record to determine where the preponderance of the evidence lies.” *Id.* The appropriate alternative depends on the particular circumstances of the case, including the adequacy of the record, the fact-intensive nature of the case, and whether witness

credibility determinations must be made. *See id.* (declining to conduct a de novo review because credibility determinations were necessary to resolve factual disputes).⁵

Unfortunately, neither of these alternatives is available to us. Remand with instructions to make the requisite findings of fact is unavailable because the judge who decided this case has retired. While we are reluctant to unnecessarily prolong the already protracted and contentious litigation over this child's custody, "[i]t has long been recognized that the trial court is in the best position to determine whether a witness's testimony is credible." *In re Estate of Oakley*, No. M2014-00341-COA-R3-CV, 2015 WL 572747, at *12 (Tenn. Ct. App. Feb. 10, 2015). This is particularly important in custody cases, such as this one. *See Armbrister*, 414 S.W.3d at 693 ("Because decisions regarding parenting arrangements are factually driven and require careful consideration of numerous factors, trial judges, who have the opportunity to observe the witnesses and make credibility determinations, are better positioned to evaluate the facts than appellate judges.") (citations omitted). Here, the parties dispute whether and when abuse occurred, whether Father knew about the alleged abuse during the marriage, and whether Father has engaged in a pattern of parental alienation. Without an indication of the court's findings on credibility of the witnesses, we are not in a position to resolve these disputes. *See Clark v. Clark*, No. M2013-02632-COA-R3-CV, 2014 WL 7465651, at *4 (Tenn. Ct. App. Dec. 30, 2014), *perm. app. denied*, (Tenn. June 12, 2015) (acknowledging appellate courts are ill-equipped to conduct an independent review of the record in the absence of an assessment of witness credibility).

Thus, under Tennessee Rule of Appellate Procedure 36, we reverse the judgment and remand for a new hearing on Father's petition to modify the primary residential parent designation. Tenn. R. App. P. 36(a). Father will bear the burden of proof at the new hearing. *See In re E.J.M.*, No. W2003-02603-COA-R3-JV, 2005 WL 562754, at *17-18 (Tenn. Ct. App. Mar. 10, 2005) (holding an award of temporary custody does not shift the burden of proof on the original petition to modify custody).

Because of our decision to reverse the judgment, we do not reach the issue of the effect of res judicata on the facts of this case. We note, however, that the parent requesting a change in custody must base the argument of a change of circumstance on new facts, not old ones. *Scoggins v. Scoggins*, No. M2007-02148-COA-R3-CV, 2008 WL 2648966, at *4 (Tenn. Ct. App. July 2, 2008). "In child custody cases, the law is well established that when

⁵ Father contends we should conduct a de novo review of the record based on *Villaneuva v. Allen*, No. E2003-01252-COA-R3-CV, 2004 WL 1656387, at *2 (Tenn. Ct. App. July 23, 2004). The *Villaneuva* case, however, was decided before the 2009 amendment to Rule 52.01, and, more importantly, our Supreme Court's opinion in *Lovlace*. As such, we find Father's argument unpersuasive.

a decree awarding custody of children has been entered, 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 of custody.” *Id.* See *Jackson v. Williams*, No. W2008-00148-COA-R3-CV, 2009 WL 2986106, at *6 (Tenn. Ct. App. Sept. 18, 2009) (affirming trial court finding that alleged circumstances had been ongoing before the final divorce decree and could not form the basis for a material change).

III. CONCLUSION

For these reasons, the judgment of the trial court is reversed, and this matter is remanded for a new hearing on whether there has been a material change of circumstance sufficient to justify a change of custody and, if so, whether it is in the best interest of the child to establish a new permanent parenting plan in accordance with the evidence and applicable law. The permanent parenting plan, attached as Exhibit A to the trial court’s Final Order, shall remain in effect pending further orders of the trial court.

W. NEAL McBRAYER, JUDGE