IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
June 27, 2006 Session

THOMAS EDWARD GERVAIS v. CRISTI MICHELLE GERVAIS (Now DUEKER)

Appeal from the Chancery Court for Montgomery County
No. MCCHCVFD-04-7 Laurence M. McMillan, Jr., Chancellor

No. M2005-01483-COA-R3-CV - Filed on November 9, 2006

A Texas court granted a divorce to an Air Force couple stationed in that state and named the mother primary custodian of the couple's two daughters. While both parents were deployed overseas, the children lived with their grandparents in Tennessee. Father filed a petition in Tennessee for a change of custody. At the time the petition was heard, the mother had returned to the states and was living with the children at an Illinois air base, and the father was stationed in Alaska. The trial court denied the father's petition, finding that he had failed to prove that a material change of circumstances had occurred which could not have been anticipated at the time of the initial custody determination. We affirm.

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

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM B. CAIN and FRANK G. CLEMENT, JR., JJ., joined.

Carrie W. Gasaway, Clarksville, Tennessee, for the appellant, Thomas Edward Gervais.

Gregory D. Smith, Clarksville, Tennessee, for the appellee, Cristi Michelle Gervais (Now Dueker).

OPINION

I. A DIVORCE IN TEXAS

Cristi Michelle Gervais ("Mother") and Thomas Edward Gervais ("Father") are both active-duty Air Force personnel who enlisted together on Aug. 10, 1995. During the course of their marriage they became the parents of two daughters: Madalyn Paige Gervais who was born on November 11, 1996, and Caylie Elizabeth Gervais who was born on August 22, 1999. The

parents were stationed at Travis Air Force Base in California when both children were born. They were subsequently transferred to Goodfellow Air Force Base in Texas. At some point, Father filed for divorce in a Texas court. In November of 2002, the court entered an Agreed Decree of Divorce, which made both parties "management conservators" of their two children, but designated the wife as the primary custodial parent.[1]

In 2003, both parents received orders to report to different air bases in Korea for one-year deployments. Father's deployment was scheduled to begin in January of 2004. Mother's deployment was scheduled to begin in October of 2003. At some point her orders were apparently changed to make her deployment, like Father's, begin in January 2004, but they were subsequently changed back to October 2003. The record is unclear as to when the changes in Mother's orders occurred. In any case, Mother planned to move the children to Tennessee during her deployment and place them in the care of her parents who live in Clarksville. Father's parents live in Stewart County, Tennessee.

In August of 2003, Father filed a petition for a temporary restraining order to enjoin Mother from removing the children from Texas. He also asked the court to transfer custody to him. He claimed that he would be able to either take the children to Korea with him or get his orders changed to stateside. The mother filed a response contending that neither of these scenarios was likely to happen. The Texas court granted the temporary restraining order, but after a hearing vacated the order and dismissed Father's petition. The filings in that proceeding recite a projected deployment date for Mother of October 5, 2003. A subsequent agreed order provided that the mother would maintain the children's Texas residence "until the week of September 20, 2003."

On September 25, Mother called Father to let him know she was on the road and moving the children to Tennessee. He objected because he had a scheduled visit with them that day and thought he had Mother's verbal agreement not to make the move so soon. He testified that he had been counting on spending Thanksgiving and Christmas with the girls. The events of September 25 clearly led to strife between the parties, and Father has cited those events frequently in his legal filings.

II. PROCEEDINGS IN TENNESSEE

While in Korea, Mother met and married another member of the Air Force. Father was on leave in the United States during April of 2004, and at that time he filed a petition in the Chancery Court of Montgomery County to register the Texas decree, to modify custody, and to enjoin Mother from removing the children from the State of Tennessee.[2] In an obvious reference to the events of September 25, 2003, he alleged that Mother had earlier absconded from Texas

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1 The Agreed Order included a provision changing the children's last name to Mother's maiden name of Dueker. Father testified that he and Mother decided on the change because they anticipated that after divorce they would be stationed at different bases and they wished to avoid the possibility of complications arising from mistakes in handling of the children's medical records.

2 At that time, the children had resided with their grandparents in this state more than six months. *See* Tenn. Code Ann. § 36-6-216.

without prior notification to him. He also claimed that Mother had neglected the younger daughter's medical needs. The court granted the restraining order.[3]

In October of 2004, Mother's Korean deployment was completed. At her request she was subsequently stationed at Scott Air Force Base in Illinois.[4] She chose that station because members of her extended family lived nearby and it was not too distant from her parents in Clarksville. On Mother's motion, the trial court dissolved the restraining order, and the children were able to join her and her new husband in Illinois, pending the resolution of Father's petition.

Father completed his Korean deployment in January 2005, and the Air Force offered him the opportunity to be stationed in Alaska. The proof showed that the parties had spoken often during their marriage about moving to Alaska and that he had told Mother's father that this had always been a dream of his. Father agreed to the Alaska deployment. While there, Father became engaged to a veterinary technician who lived in Anchorage.

The final hearing on Father's petition to modify custody was conducted on March 22, 2005. Aside from the parties, the testifying witnesses included Mother's new husband, Father's fiancé, and the parents of both parties. The testimony showed that although the relationship between Mother and Father remained strained, they both loved their children and maintained good relationships with them. There was no dispute that the maternal grandparents had taken good care of the children during the year that Mother was in Korea and that the children had adjusted well to their new home in Illinois.

One matter extensively testified to involved medical care for Caylie, the younger daughter. She suffers from urinary reflux disease, a condition that her older sister also had to endure, but had grown out of. The condition is treated with medication. Father attempted to prove that Mother was negligent in failing to administer the medication consistently. He introduced photographs of medicine bottles with labels showing that four teaspoons of the medication were supposed to be given daily, and alleged that the level of liquid in the bottles proved that Caylie was not getting the required amount.

Mother admitted that she usually gave Caylie only one teaspoon a day. She also admitted that she had been reprimanded by her military superiors for negligence in that regard in August of 2003.[5] Mother testified that at that time the medicine was a thick yellow gel, that the little girl usually refused to take it, that she often spit it up, and that administration sometimes involved a physical struggle. However, Mother said that the prescription was now being given in the form of gelcaps to be taken once a day, thus resolving the problem.

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[3] The restraining order is not found in the record.

[4] The proof indicates that Air Force personnel who are assigned overseas are permitted to submit a list of places where they wish to be stationed at the conclusion of their overseas assignment. In this case, both parties received the assignment they requested.

[5] The Air Force apparently became involved in this question after Father complained to her chain of command. Mother provided Father with a copy of the letter of reprimand during discovery, but it was not admitted into the record because of hearsay objections.

The trial court entered a final order dismissing Father's petition. The court's order included findings of fact and conclusions of law. Its central holding was that there had not been a material and unforeseeable change of circumstances since the entry of the Texas divorce decree and, thus, that the father did not meet the threshold requirement for a change of custody. The court noted that any change in circumstances was not unforeseeable in light of the facts that "both parents were members of the United States Air Force on the date of the Final Decree; both parties had talked frequently about someday moving to Alaska; the Final Decree contained provisions for visitation if the parents were someday more than 100 miles apart, which was a probable, foreseeable circumstance given the fact that the parties were active duty United States Air Force as of the date of the Final Decree." This appeal followed.

III. STANDARDS FOR MODIFICATION DECISIONS

Once a valid order of custody or a residential parenting schedule has been entered, the party petitioning to change that order must prove both that a material change of circumstances has occurred and that a change of custody is in the child's best interest. *Kendrick v. Shoemake*, 90 S.W.3d 566, 575 (Tenn. 2002). Such determinations involve a two-step analysis. *Cranston v. Combs*, 106 S.W.3d 641, 644 (Tenn. 2003); *Kendrick*, 90 S.W.3d at 570. Only after a threshold finding that a material change of circumstances has occurred is the court permitted to go on to make a fresh determination of the best interest of the child. *Kendrick*, 90 S.W.3d at 569; *Blair v. Badenhope*, 77 S.W.3d 137, 150 (Tenn. 2002); *see also* Tenn. Code Ann. § 36-6-101(a)(2)(B) and (C).

In determining whether such a change of circumstances has occurred, the court should consider several factors. *Blair*, 77 S.W.3d at 150.

> Although there are no bright-line rules for determining when such a change has occurred, there are several relevant considerations: (1) whether the 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, 106 S.W.3d at 644, citing *Kendrick*, 90 S.W.3d at 570, and *Blair*, 77 S.W.3d at 150.

Additionally, "a parent's change in circumstances may be a material change in circumstances for the purposes of modifying custody if such a change affects the child's well-being." *Kendrick*, 90 S.W.3d at 570.

At the time this matter was heard and decided, the relevant statute provided, in pertinent part:

> (B) If the issue before the court is a modification of the court's prior decree pertaining to custody, the petitioner must prove by a preponderance of the evidence a material change in circumstance. A material change of circumstance does not require a showing of a substantial risk of harm to the children. A material change of circumstance may include, but is not limited to, failure 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.
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> (C) If the issue before the court is a modification of the court's prior decree pertaining to a residential parenting schedule, then the petitioner must prove by a preponderance of the evidence a material change of circumstance affecting the child's best interest. A material change of circumstance does not require a showing of a substantial risk of harm to the child. A material change of circumstance for purposes of modification of a residential parenting schedule 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)(B) and (C).

In an appeal of a modification of custody decision, this court will review the trial court's findings of fact *de novo* with a presumption of correctness, unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); *Kendrick*, 90 S.W.3d at 569; *Blair*, 77 S.W.3d at 151. The question on appeal is whether the party seeking modification has met his or her burden to establish both requirements for a modification.

IV. THE QUESTION OF MATERIAL CHANGE

Father contends on appeal that the trial court should have considered any of three events to have been a material change of circumstances. These were (1) Mother's removal of the children from Texas without notice to Father; (2) the alleged unworkability of the modified standard possession order "due to the distance and the animosity between the parties;" and (3) Mother's alleged neglect of the younger child's medical needs. We will discuss each of these in turn.

As stated earlier, the alleged change of circumstances must have been unanticipated at the time of entry of the order sought to be changed. The Agreed Order entered by the parties in Texas stated that Mother would not remove the children from Texas until the week of September 20, 2003.[6] It was clearly intended that the children would be taken to Tennessee to stay with

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[6] The Agreed Order of Possession provided that Mother would "maintain the residence of the children in Tom Green County, Texas until the week of September 20."

their maternal grandparents during Mother's deployment to Korea[7] and, obviously, that Mother would take them there sometime before her own leaving and after September 20, 2003. Consequently, Mother's leaving Texas with the children on September 25, 2003, to take them to Tennessee was neither unforeseeable nor unanticipated.

Father contends that the manner of the removal of the children from Texas violates the "modified standard possession order" contained in the divorce decree. Mother's departure from Texas on September 25 was not a violation of the Agreed Order, and since she did in fact deploy to Korea on October 5, we cannot say she was too hasty in removing the children. Father complains that Mother's handling of the departure of the children was deceitful and that it deprived him of important opportunities to spend time with the children. Since everyone understood the children were to be taken to Tennessee before Mother left for Korea, we must interpret this argument as referring to the visitation that was scheduled for September 25, 2003.

We cannot condone Mother's failure to tell Father she was leaving before she was actually on the road or her disregard of Father's expectations that he would have visitation with the children on the day she actually left with them. However, while this court has previously held that a custodial parent's interference with the other parent's visitation and attempts to interfere with that parent's relationship with his or her children may constitute a material change of circumstances, those situations have involved more than a one time alleged interference.

In the case before us, the material change of circumstance was the children's going to live in Tennessee. While that relocation was going to affect the children's visitation with both parents, it was anticipated, ordered, and necessary. The change of circumstances that most affected the interactions between Father and the children (as well as Mother and the children), and the change that triggered the children's relocation to Tennessee, was the deployment out of the country of both parents. Father could not have reasonably anticipated regular visitation with his children while he was in Korea, and he knew they were going to go to Tennessee before his deployment. Consequently, we cannot conclude that Mother's action in removing the children from Texas in compliance with the Agreed Order but in disregard of Father's expectations as to their departure date constituted a material change of circumstances as that term has been defined.

Father's second argument is that the existing order of possession had become unworkable because of "the distance and animosity between the parties," and that this constituted a material change of circumstances. We note that the modified standard possession order contains specific provisions for parents who reside over 100 miles apart. These include possible visitation with the children several weekends a month, during spring vacation, and for six weeks during summer vacation. Father complains that the distance and expense involved in traveling from Alaska to Illinois renders much of this visitation impossible or impractical.

As the trial court found, the fact that the parents were in active military service and subject to assignment at various places around the world clearly made it foreseeable that they would at times live at great distances from each other, making regular weekend visitation impossible or impracticable. The trial court found that Father was able to call the children on the

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[7] The order stated that if Mother was unable to change her assignment, the residence of the children would be moved to that of her parents in Clarksville.

telephone on an almost daily basis and that Mother had not denied visitation with Father when he requested it. The proof supports these findings, and there is no proof that Mother ever prevented Father from exercising visitation during spring or summer vacations.

In this case, both parties knew that as Air Force personnel, they could be sent almost anywhere in the world. Father himself put Alaska at the top of his list of proposed postings and then chose that posting when it was offered to him. Thus, Father could easily have anticipated just the sort of situation, *i.e.*, geographic distance between the parents' residences, that actually developed in this case. Because this change was one that could have been reasonably anticipated when the prior custody order was entered, it does not constitute a material change of circumstances sufficient to justify a modification of that order. *Kendrick*, 90 S.W.3d at 571.

Finally, Father claims that Mother's alleged neglect of Caylie's medical condition was a material change of circumstances that the trial court erroneously failed to recognize. The child's medical care included an annual radiological procedure to check the condition of her urinary tract. Both parties were present at the most recent procedure, and both wished to testify as to its results. Mother attempted to testify that it showed that Caylie's condition was getting better, while Father attempted to testify that it showed her condition worsening. All such testimony was excluded by the trial court because there was no expert testimony, and neither party was able to lay a proper foundation for the offered testimony.

Among its findings of fact, the trial court stated that there was no medical proof that the Mother's failure to properly administer the medication had caused any harm to Caylie or that the child's medical condition had worsened with time. Father argues on appeal that the trial court misapplied the law because a material change of circumstance does not require a showing of a substantial risk of harm to the child. Tenn. Code Ann. § 36-6-101(a)(2)(B) and (C); *Kendrick*, 90 S.W.3d at 570 n. 5 (recognizing the legislature's rejection of the substantial risk of harm standard). While that statement is correct, it is also well established that a material change of circumstances must be one that affects the child's well-being in a meaningful way. *Cranston*, 106 S.W.3d at 644. Consequently, evidence, or the lack thereof, as to the effect on the child's well-being of the alleged failure to follow medical direction was relevant. Without evidence that the deviation from the instructions for the medicine, for whatever period of time it occurred, affected the child's well-being, a material change of circumstances was not proved.

To support his position, Father cites two unpublished cases in which this court found a parent's neglect of a child's medical or dental needs to be a material change of circumstances sufficient to warrant a change of custody: *Roache v. Bourisaw*, M2000-02651-COA-R3-CV, 2001 WL 1191379 (Tenn. Ct. App. Oct. 10, 2001) (no Tenn R. App. P. 11 application filed) and *Baker v. Baker*, W1999-02660-COA-R3-CV, 2000 WL 1346650 (Tenn. Ct. App. Sept. 15, 2000) (no Tenn. R. App. P. 11 application filed).

One important distinction between the two cited cases and the one before us is that custodial parents in both *Roache* and *Baker* appear to have been unwilling to address their children's medical needs at all and to allow those needs to remain unmet up to and including the time of the hearing on change of custody.[8] A change of custody was required to address the problems.

In contrast, Mother's testimony in the present case indicates that she was well aware of her daughter's medical problem, but that she had at some point been unable to fully comply with prescription instructions because of the child's resistance. Nonetheless, she did participate in the annual monitoring of Caylie's condition, and it appears that a change in the child's prescription has resolved the medication problem. Thus, we agree with the trial court that Father has not demonstrated a material change of circumstances to warrant a change of custody.

V. THE QUESTION OF BEST INTEREST

Even if we found that one of Father's allegations constituted a material change of circumstances, we would still affirm the trial court's denial of the modification of custody because the evidence does not show that giving primary custody to Father would be in the best interest of the children. *Cranston*, 106 S.W.3d at 644 (explaining the two-step analysis, the second of which is a fresh determination of best interest).

A determination of best interest is to be made using the factors enumerated in Tenn. Code Ann. § 36-6-106.[9] *Id.* Those factors include "The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment." Tenn. Code Ann. § 36-6-106 (a)(3); Tenn. Code Ann. § 36-6-404 (b)(11). Stability has always been an important consideration in a child's best interest. *See*, *e.g.*, *Contreras v. Ward*, 831 S.W.2d 2 88, 290 (Tenn. Ct. App. 1991). Stability, continuity, and security remain important components of the decision. *Blair*, 77 S.W.3d at 151 ("Because [the child's] present environment with [her grandmother] is not one that adversely affects her well-being in any way, the interest in maintaining a stable and successful relationship between [the child] and her grandmother weighs against any custodial change at this point.")

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8 In the *Roache* case the court found there to be other material changes of circumstances besides the medical neglect, including the stepfather's alleged abuse of another of the mother's children, the mother's neglect of her child's educational needs, and the mother's unwillingness to allow an unimpeded relationship between the child and his father.

9 Tennessee Code Annotated § 36-6-404(b) lists the factors to be included in establishing a residential schedule for a child as part of a permanent parenting plan or a modification to a parenting plan through Tenn. Code Ann. § 36-6-405(a). Many of the factors are identical to those listed in Tenn. Code Ann. § 36-6-106 (a)(3), and there is no issue in this case that would require reconciliation of any differences.

The trial court made the following findings relevant to this issue, and the evidence does not preponderate against them:

1. The two children of this union are doing very well in school and are emotionally adjusted.

2. The maternal grandparents live in Clarksville, Tennessee, and were the primary care givers for the two minor children while both parents were deployed to Korea.

3. The paternal grandparents live in Stewart County, Tennessee.

4. Other members of [Mother's] extended family live near Scott Air Force Base where she is currently stationed.

5. The maternal grandparents did "an outstanding job" taking care of the children while both parents were deployed to Korea in [Father's] opinion.

6. The children have a very close relationship with both sets of grandparents.

Thus, the children are happy, well-adjusted, and doing well in school and maintain close relationships with other family members. Faced with these facts, Father did not otherwise prove that changing primary custody to him and having the children move to Alaska would be in the children's best interests.

The proof in this case showed that Mother works on computers as a systems administrator for the Air Force, and that her normal workday is from 8:00 a.m. to 5:00 p.m. Many members of Mother's extended family live near Scott Air Force Base in Illinois, and both sets of grandparents are in Tennessee, less than a day's drive away. The children are making good grades in school and have lots of friends.

If the children were placed in Father's custody in Alaska, they would have no access to family members other than Father and his fiancé. Father's schedule in his work as an Air Force fire fighter is 24 hours on and 24 hours off. He can also be called away at any time to deal with wildfires anywhere in the west. Father's fiancé testified that she had recently met the children and that she would be happy to have them live with her and Father, but she has never raised children of her own.

Father is clearly devoted to his children, and the geographical distance between them makes it difficult for him to remain as much a part of their lives as he would wish. We agree that maintaining a close relationship with both parents is in a child's best interest, but it is the distance between the parents' residences that makes that difficult in this case. Even though we do not doubt the sincerity of his wish to have primary custody of the girls, we must consider the children's best interests paramount to the parent's wishes. *Adelsperger v. Adelsperger*, 970 S.W.2d 482, 484-485 (Tenn. Ct. App. 1997). Custody decisions are not intended to reward or punish parents. *Id.*; *Barnhill v. Barnhill*, 826 S.W.2d 443, 453 (Tenn. Ct. App. 1991).

We hold that Father has failed to meet his burden of demonstrating that it would be in the children's best interests to modify the existing custody order and name him as primary custodian or primary residential parent, thereby requiring the children to move to Alaska.

VI.

The order of the Trial Court is affirmed. Remand this case to the Chancery Court of Montgomery County for any further proceedings necessary. Tax the costs on appeal to the appellant, Thomas Gervais.

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PATRICIA J. COTTRELL, JUDGE