

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
MARCH 6, 2007 Session

IN RE: R.D.H., d/o/b 7/22/95
SUSAN DENTON v. LINDA MADORIN

Direct Appeal from the Juvenile Court for Cannon County
No. 931 Donna A. Scott, Judge, Sitting by Interchange

No. M2006-00837-COA-R3-JV - Filed on August 22, 2007

This case involves a child custody dispute between a mother and a grandmother. The child's parents agreed to transfer temporary custody of the child to the grandmother when the child was three years old. The parents were divorcing at the time, using illegal drugs, and financially incapable of providing for the child. Still, the child would stay at her mother's home every other weekend, during breaks from school, and for some time during the summer months. The mother eventually remarried and had two sons. When her daughter was nearly ten years old, the mother filed a petition to regain custody from the grandmother. The trial court determined that the mother was entitled to a presumption of "superior parental rights," and therefore she could not be denied custody of the child unless the grandmother could demonstrate a risk of substantial harm to the child upon a change of custody. Finding no risk of substantial harm, the trial court awarded custody to the mother. The grandmother appeals, contending that the trial court erred in applying the presumption of "superior parental rights." Alternatively, the grandmother claims that the court erred in finding no risk of substantial harm to the child. For the following reasons, we affirm.

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

ALAN E. HIGHERS, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and DAVID R. FARMER, J., joined.

M. Keith Siskin, Murfreesboro, TN, for Appellant

Brad W. Hornsby, Jonathan L. Miley, Murfreesboro, TN, for Appellee

OPINION

I. FACTS & PROCEDURAL HISTORY

On July 22, 1995, Susan Hoffman (now Denton) (“Mother”) and her husband Thomas Hoffman (“Father”) had a daughter (“child”) who is the subject of this action. At the time of the child’s birth, it was determined that she had a heart murmur that would require regular medical attention. Mother and Father sought financial help from Father’s mother, Linda Madorin (“Grandmother”). The child also began staying at Grandmother’s home several nights each week. Grandmother took responsibility for taking the child to her doctor’s appointments, and she eventually decided it was necessary to cover the child under her insurance policy.

Around that same time, Mother and Father decided to get a divorce. Both were using marijuana and cocaine. An order of protection was entered against Mother because of an alleged physical attack against Father. Also, they were involved with “wiccan” or Satanism practices which led Father to burn many of Mother’s belongings. Mother and Father felt that they were financially incapable of taking care of the child, and they joined Grandmother in filing a joint petition for change of custody in Cannon County Juvenile Court. On December 15, 1998, when the child was three years old, the juvenile court entered an agreed order granting “temporary custody” of the child to Grandmother.

During the time that Grandmother had custody of the child, she arranged for each parent to have “visitation” on alternating weekends, during breaks from school, and for some time during the summer. Father generally shared his weekend visitation time with Grandmother and the rest of their family. Mother would keep the child every other weekend. In 2000, Mother remarried, and in 2003, she had a son.

It is undisputed that Mother would sometimes mention regaining custody of her daughter, but Grandmother never took her statements seriously. Mother claimed that she had approximately seven discussions with Grandmother over the years about regaining custody of her daughter. According to Mother, Grandmother would simply tell her it was not a good time, and to wait until the next year. Mother explained that since she was not financially capable of “waging a custody fight,” she would wait another year hoping that Grandmother would agree to the change of custody. In March 2005, after Mother had again asked to discuss the custody situation, she arrived unannounced at the child’s school. Because the child was preparing to begin TCAP testing, Grandmother subsequently wrote Mother a letter informing her that she was temporarily suspending Mother’s visitation with the child. Finally, on March 15, 2005, Mother filed a petition in the Cannon County Juvenile Court seeking custody of the child because “the grounds existing to warrant a temporary custody order no longer exist[ed].” Grandmother filed an answer and counter-petition seeking reimbursement for necessities she had provided in raising the child, child support from both parents, and dismissal of Mother’s custody petition.

On November 2, 2005, the parties presented arguments to the trial court regarding the proper legal standard to be applied to the custody issue because the case involved a parent and a non-parent. Grandmother argued that Mother could not seek a change in custody without showing that a “material change in circumstances” had occurred that made the change in the child’s best interest. The trial court decided that it would apply the “superior parental rights” doctrine to Mother’s petition for custody, but it granted Grandmother permission to pursue an interlocutory appeal pursuant to Tenn. R. App. P. 9. The Court of Appeals ultimately denied the application for permission to appeal on January 6, 2006.

On December 28, 2005, the trial court heard testimony regarding the custody issue. Mother explained that she had been married to Bryan Denton for five years, and that they owned a three bedroom home in Murfreesboro. Their oldest son was two and a half years old, and he was sharing a room with their second son who had been born just a month earlier. Because the child stayed with Mother every other weekend, she already had her own room at Mother’s home. Mother stated that she and the child had a “great relationship,” and that the child loved both her half-brothers. Mother said that she had never physically abused her daughter. She also testified that she did not currently use drugs, and that she had quit using drugs soon after she and Father divorced. Mother had passed a drug screen earlier in the proceedings, and she stated that she could pass another one if asked to take one that day. Mother said that her current husband had used drugs in the past, but that he had quit before they were married. She also mentioned that he had been in jail over ten years ago for a theft conviction.

Mother testified that although she did not work outside the home, her husband was an assistant manager at a Fed-Ex/Kinko’s location in Murfreesboro. She explained that she and her husband could financially support three children, and that their household income was \$35,000 per year. Mother admitted that she never paid any child support to Grandmother while the child was in Grandmother’s custody. However, Mother claimed that she had offered “a couple of times,” and Grandmother said she did not need the money and would not accept it. Mother also acknowledged that soon after Grandmother had obtained custody of the child, in February of 1999, Grandmother and her husband purchased land from Mother and Father in the context of their divorce. Father had declined approximately \$15,000 of what he was to receive from the sale and told Grandmother to use it for the child’s care. Mother received approximately \$23,000 in cash from the sale, but she did not offer any of the money for support of the child. Instead, she spent part of the money on a vacation to Hawaii with Bryan Denton.

When testifying, Mother expressed her appreciation for Grandmother’s efforts in raising her daughter, and she agreed that her daughter had a “wonderful upbringing” and a great relationship with Grandmother. Mother stated that if she was awarded custody of the child, she thought that Grandmother and Father should share visitation with the child every other weekend. When asked about psychological difficulties the child might experience from the change, Mother stated that she would provide help for her if needed.

The principal of the child's current school testified that the child was an excellent student who made nearly straight A's, and he stated that her attendance was excellent. The principal described the child as happy, and "an extremely well-adjusted child" who had lots of friends. He expressed his concerns about the possible effects on children when they experience a "traumatic change of a placement like that," but he also said that the effect could be good or bad.

Grandmother testified that the child had been very upset since Mother filed the petition seeking custody, and she believed that a change of custody would have a devastating impact on the child. Father also testified that it was in the child's best interest to remain with Grandmother. Grandmother described many extracurricular activities in which the child was currently involved, such as playing basketball, 4-H, competitive horseback riding, and raising farm animals. If custody was returned to Mother, the child would be sent to a different school. Also, although Mother's husband testified that they could financially provide for the child, he admitted that he had not budgeted for continuing the activities that she is presently involved in.

Grandmother had taken the child to a licensed clinical social worker, Ms. Debra Richardson, prior to trial because of some behavioral changes she had observed. The child had seen Ms. Richardson nine times for treatment. Ms. Richardson testified as follows, in relevant part:

Q. Okay. And what was the reason that you were told was – as to why this child needed to see you?

A. She had become extremely depressed and anxious and was exhibiting several symptoms that related to those two diagnoses since her mother has filed for custody of her.

...

Q. Okay. Now, throughout the course of your treatment with [the child], were there any concerns raised that you witnessed throughout your treatment?

A. Concerns regarding her mental status?

Q. Yes.

A. Well, yes. She was an extremely anxious child. She was having difficulty sleeping. She was having nightmares. She was getting up and going to her grandmother's bed every night. She was crying. She would just suddenly start crying. She would be in a low mood and start crying uncontrollably.

There were times that [the child] told me that when she knew she was going to see her mother, that she didn't want to go see her mother. [The child] made it very clear that

she did not want to live with her mother. She loves her mother, but she views [Grandmother] as her mother, and so she did not want to live with her birth mother.

She was extremely upset about the possibility of that happening, so that's why she would not want to go with her mother and her – I worked with her about going with her mom and her grandmother did, so that she was finally able to start going with her. And [Mother] also made some changes in the home at my suggestion to [the child], and then [the child] passed those on, to make the home more comfortable for [the child] and help her feel more comfortable.

She was having headaches daily. She was having upset stomachs or constipation or diarrhea just because her stomach was pretty much in knots all the time. She was having difficulty concentrating, so there was some concern with – towards the end of the school year as to how she was doing and how she would do when school started up again. The last time I saw her she was doing well in school.

She's obviously a very bright child, so that wasn't something that was going to be a problem. There were times when she would also be angry and had anger outbursts at home. So there was some acting-out behavior that was going on, also. Those are the basic –

Q. Okay.

A. – what was going on.

...

A. . . . [the child] believes that her mother wants her now because she has two other children now. At the time that I was seeing [the child], there was one child and [Mother] was pregnant. And [the child] said that she at one point had been left alone in the house to take care, watch the infant when her mom had to go someplace. And I asked [Mother] about this, and I believe she said she had to take her husband to Wal-Mart. They had to run down to Wal-Mart. And it wasn't a long time that she was away. Nevertheless, she left [the

child], a ten-year-old, with the infant. [The child] was scared. She was very frightened about that.¹

...

She was afraid that her mom wanted her to be there to take care of these children So [the child] was feeling – she already felt like she had been rejected by her parents when neither one of them raised her. And that’s the very core to understanding any child, when they are not raised by their parents or their parents divorce. Then on top of that, her mom is, you know, asking her to come back at such a late age, when her personality is very much fixed and formed

Q. Based on your treatment with [the child] and the matters you have been testifying about, in your expert opinion, is there a risk that some harm could come to [the child] emotionally if she is returned to her mother at this time?

A. There is already harm that’s been done to this child. She already has an adjustment disorder and it’s evidenced with depression and anxiety as I’ve already explained.

...

A. . . . she’s [sic] already would need, you know, healthcare after she returns to her mom to help with the adjustment.

...

A. From my experience in working with her and what I saw through the treatment period where I saw [the child] is, yes, this is a child who is suffering with symptoms of a mental health disorder. . . . Even though, as I said, she loves her mom and she’s been to see her every, you know, two weeks for the most part as far as I know, it’s very different from living with your caretaker, the person who you trust, who you count on, the person who you think is always going to take care of you and protect you, when she does not think and view her parents, either one of them, as going to be her caretakers and protectors because of what happened, you know, with [the child] when she was three years old.

¹ Mother admitted that on one occasion, she had left her daughter alone at her house. She also stated that she would not leave the child at home alone with the newborn and agreed that her daughter was old enough to care for another child as long as an adult was present.

In sum, Ms. Richardson stated that, in her expert opinion, returning custody to Mother would pose a risk of harm to the child's emotional state. Ms. Richardson had met with Mother on only one occasion and had not visited her home. Also, Ms. Richardson made clear that she was not accusing Mother of being a bad parent. Still, Ms. Richardson observed the child's behavior around her mother at the one meeting, and she noted that the child did not seem as comfortable around Mother. The child also did not want to leave the session with Mother because she was afraid that Mother would be angry with her. Ms. Richardson described Mother's expectations regarding the change of custody as "rather idealistic," and she did not agree with Mother's opinion that the situation would "even out," because the child's lifestyle would be so different. According to Ms. Richardson, the child desired to live with Grandmother, but her next choices would be either her aunt or her father and his fiancée, and Mother was her last choice. She said the child had confided in her that she would run away if forced to live with Mother.

The trial judge had ordered an investigative visit of Mother's current home by a case manager with the Department of Children's Services. The case manager testified that she considered the home to be cleaner than normal, with appropriate room for all the children. Mother was pregnant with her youngest son at the time of the visit, but the case manager reported that the parents appeared to be very nurturing to their other son. The report she prepared described the home as "a positive and nurturing environment" for the daughter.

On March 9, 2006, the trial court issued an opinion letter granting Mother's petition for custody of the child. The trial court applied the "superior parental rights" doctrine to the case, and it found no clear and convincing evidence that the child would be exposed to substantial harm if returned to Mother. Also, the court found that Grandmother was entitled to a judgment in the amount of \$21,873.69 for the necessities she had provided for the child. An order incorporating the opinion letter was entered on April 10, 2006. Grandmother filed a motion to alter or amend the judgment and a motion to stay judgment pending appeal, which were denied by the trial court on April 17, 2006. Grandmother filed her notice of appeal on April 20, 2006.

II. ISSUES PRESENTED

Grandmother has timely filed her notice of appeal and presents the following issues, as we perceive them, for review:

1. Did the trial court apply an incorrect legal standard when it restored custody of the child to Mother.
2. In the alternative, if the trial court applied the correct standard, did the court err in finding no risk of substantial harm to the child.

For the following reasons, we affirm the decision of the juvenile court.

III. STANDARD OF REVIEW

A trial court's factual findings are presumed to be correct, and we will not overturn those factual findings unless the evidence preponderates against them. Tenn. R. App. P. 13(d) (2006); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). We review a trial court's conclusions of law under a *de novo* standard upon the record with no presumption of correctness. *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993) (citing *Estate of Adkins v. White Consol. Indus., Inc.*, 788 S.W.2d 815, 817 (Tenn. Ct. App. 1989)).

IV. DISCUSSION

A. Parent v. Non-parent Custody Disputes

We find it necessary to begin with a discussion of the standard applied to custody disputes between parents and non-parents, which is very different from the standard applied to disputes involving two parents. "The comparative fitness analysis commonly associated with custody disputes between biological parents cannot be used because it fails to take into account that the custody claims of biological parents and the custody claims of third parties do not have the same legal weight." *Ray v. Ray*, 83 S.W.3d 726, 731 (Tenn. Ct. App. 2001). It is well-settled that the Tennessee Constitution protects a natural parent's fundamental right to have the care and custody of his or her children. *Blair v. Badenhope*, 77 S.W.3d 137, 141 (Tenn. 2002) (citing *Nale v. Robertson*, 871 S.W.2d 674, 680 (Tenn. 1994); *Hawk v. Hawk*, 855 S.W.2d 573, 579 (Tenn. 1993)). Parental rights are superior to the rights of others and continue without interruption unless a parent consents to relinquish them, abandons the child, or forfeits parental rights by conduct that substantially harms the child. *Id.* (citing *O'Daniel v. Messier*, 905 S.W.2d 182, 186 (Tenn. Ct. App. 1995)).

Courts deciding initial custody disputes must give natural parents a presumption of "superior parental rights" regarding the custody of their children. *Blair*, 77 S.W.3d at 141 (citing *In re Askew*, 993 S.W.2d 1, 4 (Tenn. 1999)). This means that in an initial custody dispute involving a parent and a non-parent, a natural parent may only be deprived of custody of a child upon a showing of substantial harm to the child. *In re Adoption of Female Child*, 896 S.W.2d 546, 548 (Tenn. 1995). Specifically, the non-parent has the burden of establishing by clear and convincing evidence that the child will be exposed to substantial harm if placed in the custody of the parent. *Ray*, 83 S.W.3d at 732-33; see also *Hall v. Bookout*, 87 S.W.3d 80, 86 (Tenn. Ct. App. 2002). Only after a clear showing of substantial harm may the court engage in a general "best interest of the child" analysis. *In re Adoption of Female Child*, 896 S.W.2d at 548. It follows then, that in an initial custody dispute, if a court awards custody to a non-parent over a parent's objection, the original custody order must contain the requisite finding of substantial harm, or else it is invalid and unenforceable. See *In re Askew*, 993 S.W.2d 1, 5 (Tenn. 1999); *Baker v. Smith*, No. W2004-02867-COA-R3-JV, slip op. at 11 (Tenn. Ct. App. Aug. 5, 2005).

A different standard may apply, however, when a natural parent is seeking to *modify* an existing court order awarding custody to a non-parent. In *Blair v. Badenhope*, the Tennessee Supreme Court determined that nothing in our Constitution demands that a parent be allowed to assert “superior parental rights” to custody when a valid court order properly transferred custody from that parent in the first instance. *Blair*, 77 S.W.3d at 143. “[A] parent who is given the opportunity to rely upon the presumption of superior rights in an initial custody determination may not again invoke that doctrine to modify a valid custody order.” *Id.* at 148. This reasoning applies even if the parent voluntarily ceded custody to the non-parent when the original custody order was entered.² *Id.* The Court held that, absent specific extraordinary circumstances, a natural parent cannot invoke the doctrine of superior parental rights to modify a valid order of custody. *Id.* at 141. Instead, the parent must show that a “material change in circumstances” has occurred, which makes a change in custody in the child’s best interest. *Id.* at 139.

The *Blair* Court went on to discuss those “extraordinary circumstances” in which a parent would be able to assert superior parental rights in a modification proceeding. A natural parent still enjoys the presumption of superior rights under four circumstances:

- (1) when no order exists that transfers custody from the natural parent;
- (2) when the order transferring custody from the natural parent is accomplished by fraud or without notice to the parent;
- (3) when the order transferring custody from the natural parent is invalid on its face; and
- (4) when the natural parent cedes only temporary and informal custody to the non-parents.

Blair, 77 S.W.3d at 143. When any of these circumstances are present in a given case, then protection of the natural parent’s right to have the care and custody their child demands that they be accorded a presumption of superior parental rights against claims of custody by non-parents. *Id.* In addition, the Court noted that if the parent had voluntarily relinquished custody to a non-parent when the original order was entered, the parent must have had “knowledge of the consequences of that decision” in order for that action to operate as a waiver of parental rights. *Id.* at 147, n.3. If the parent did not understand the legal ramifications of the action, the superior parental rights doctrine may still apply in a modification proceeding. *Id.*

In this case, the trial court allowed Mother to assert superior parental rights to custody even though this proceeding involved modification of a custody order. The trial court’s final order set forth the following findings regarding its decision on the standard to be applied:

² Naturally, a court is not required to determine that a parent poses a risk of substantial harm to the child when the parent voluntarily agrees to relinquish custody of the child. See *Baker v. Smith*, No. W2004-02867-COA-R3-JV, slip op. at 8, n.2 (Tenn. Ct. App. Aug. 5, 2005). Presuming that the parent was afforded the *opportunity* to assert superior parental rights in the initial custody proceeding, then the parent’s voluntary transfer of custody to a non-parent, with knowledge of the consequences of that transfer, effectively operates as a waiver of his or her fundamental parental rights. *Blair*, 77 S.W.3d at 147 (footnote omitted). The Constitution does not again entitle the parent to assert superior parental rights to modify the order even if no court has previously found the natural parent to be unfit. *Id.* at 148.

It appears that no valid initial determination was ever made of substantial harm to the child. Absent that finding, the mother has been deprived of the custody of her child and an abridgement of mom's fundamental right to parent.

The Juvenile Court in its initial order did not contain a clear finding of dependency and neglect or any language implied or declared that the child was in substantial harm. Therefore, the order entered amounts to an invalid order. Mom never was advised in writing of the consequences of her actions and by way of proof to this court in the recent hearing; mom did not consent to relinquish her Superior Parental Rights.

Grandmother must prove by clear and convincing evidence, which the Court finds has not been proven, that this child will be exposed to substantial harm if returned to mother. Therefore, mom shall be granted custody of her child

On appeal, Grandmother asserts that the trial court erred when it allowed Mother to assert superior parental rights, instead of requiring her to demonstrate a material change in circumstances. Mother argues that the trial court was correct in applying the superior parental rights presumption, and she claims that two of the "extraordinary circumstances" listed in *Blair* apply to this case: "when the order transferring custody from the natural parent is invalid on its face"³ and "when the natural parent cedes only temporary and informal custody to the non-parents." Also, Mother claims that she did not understand the consequences of her action when she agreed to the change in custody, and therefore she should be allowed to assert superior parental rights in this proceeding. In any event, if we find that any one of the "extraordinary circumstances" listed in *Blair* should apply, the trial court's application of the superior parental rights doctrine was proper.⁴

B. Does the "Temporary and Informal Custody" circumstance apply?

In *Blair*, the Tennessee Supreme Court stated that "when the natural parent cedes only temporary and informal custody to the non-parents," the parent can assert the presumption of superior rights in a subsequent modification proceeding. *Blair*, 77 S.W.3d at 143. In this case, the agreed order entered by the juvenile court stated that "[Grandmother] shall be granted temporary custody of [the child]" Still, Grandmother contends that the exception should not apply because

³ Mother argues that the initial order was invalid on its face because the juvenile court lacked jurisdiction over the matter and/or because the agreed order did not contain a finding of substantial harm when awarding custody to Grandmother.

⁴ If the trial court reached the correct result for the wrong reason, we may still affirm its order on a proper basis. *Allen v. Nat'l Bank of Newport*, 839 S.W.2d 763, 765 (Tenn. Ct. App. 1992).

the child has been in her custody since 1998, and thus, the arrangement was not “temporary and informal.” The few cases involving this exception demonstrate the uncertainty of its meaning.

In *Downs v. Bailey*, No. W2002-01362-COA-R3-JV, slip op. at 2 (Tenn. Ct. App. Feb. 10, 2003), an aunt had been granted temporary custody of her two nephews, and the boys’ father petitioned for permanent custody two years later. The trial court applied the superior parental rights doctrine, and this Court affirmed. *Id.* at 6. We observed that “the challenged custody order awarding custody to Aunt is a temporary, not a permanent, order of custody. Since the order awarding custody to Aunt is a temporary one, Father still ‘enjoys the presumption of superior rights’ over Aunt, because he is a parent and she is a non-parent.” *Id.* at 6 (citing *Blair v. Badenhope*, 77 S.W.3d 137, 143 (Tenn. 2002)).

However, the Middle Section Court of Appeals refused to apply the “temporary and informal custody” exception in *In the Matter of K.C., Jr.*, No. M2005-00633-COA-R3-PT, slip op. at 6 (Tenn. Ct. App. Oct. 4, 2005). In that case, a mother was unable to care for her infant and placed him in the care of his aunt. *Id.* at 1. The aunt was granted temporary custody of the child in 1994 when the child was less than a year old, and the custody order stated that “the parents are not financially or emotionally able to care for the minor child.” *Id.* at 2. The mother filed a petition to regain custody of the child in 1998, but it was dismissed without prejudice when the mother failed to appear. *Id.* The mother filed a second petition for custody in 2004, which the trial court denied. *Id.* On appeal, the mother argued that she was entitled to the superior parental rights presumption because the initial order was only designated “temporary.” *Id.* However, the Court rejected her argument in a footnote, as follows:

Mother relies on this or similar language in *Blair* to argue she still should be afforded the presumption of superior parental rights to custody because the order only granted temporary custody and that she did not knowingly consent to a permanent transfer of custody. We find these arguments unavailing. First the court making the original grant of custody to Aunt found the parents were not capable of providing care. Second, the child remained in the custody and under the care of Aunt for ten years, with Mother’s knowledge and apparent consent.

Id. at 6, n.7. The Court determined that the mother was not entitled to assert superior parental rights, and that she had failed to demonstrate a material change of circumstances that would make a change of custody in the child’s best interests. *Id.* at 7.

Despite the reasoning in *K.C., Jr.*, we believe that our Supreme Court intended the focus of the “temporary and informal” custody circumstance to be on the finality of the initial order, and not on the length of time that the custody arrangement has persisted. This Court has previously rejected the line of cases suggesting that “the term ‘temporary’ when used in the context of child custody is pure surplage.” See *In re E.J.M.*, No. W2003-02603-COA-R3-JV, slip op. at 19 (Tenn. Ct. App.

Mar. 10, 2005). Although all custody decisions are “temporary” in the sense that they remain under the control of the court and can be changed upon a proper showing that a material change in circumstances has occurred,

[t]he law makes a distinction between temporary and final orders of custody. “An interim order is one that adjudicates an issue preliminarily; while a final order fully and completely defines the parties’ rights with regard to the issue, leaving nothing else for the trial court to do.” *State, ex rel., McAllister v. Goode*, 968 S.W.2d 834, 840 (Tenn. Ct. App. 1997) (citing *Vineyard v. Vineyard*, 170 S.W.2d 917, 920 (Tenn. 1942)). Trial courts have discretion to grant temporary custody arrangements in circumstances “where the trial court does not have sufficient information to make a permanent custody decision or where the health, safety, or welfare of the child or children are imperiled.” *King v. King*, No. 01A01-91-10PB00370, 1992 WL 301303, at *2 (Tenn. Ct. App. Oct. 23, 1992).

Warren v. Warren, No. W1999-02108-COA-R3-CV, slip op. at 5 (Tenn. Ct. App. Mar. 12, 2001). Final custody orders are res judicata and cannot be modified unless there has been a material change in circumstances that makes a change of custody in the child’s best interest. *In re E.J.M.*, No. W2003-02603-COA-R3-JV, slip op. at 17 (Tenn. Ct. App. Mar. 10, 2005) (citing *Kendrick v. Shoemake*, 90 S.W.3d 566, 570 (Tenn. 2002); *Blair v. Badenhope*, 77 S.W.3d 137, 148 (Tenn. 2002)). A temporary order of custody, on the other hand, does not constitute a final order that shifts the burden of proving a change of circumstances to the parent. *Id.* (citing *Warren v. Warren*, No. W1999-02108-COA-R3-CV, 2001 WL 277965, at *3 (Tenn. Ct. App. Mar. 12, 2001); *Spatafore v. Spatafore*, No. E2001-02459-COA-R3-CV, 2002 WL 31728879 (Tenn. Ct. App. Dec. 5, 2002); *Phillips v. Phillips*, No. W2001-01685-COA-R3-CV, 2002 WL 927514 (Tenn. Ct. App. May 2, 2002); *Placencia v. Placencia*, 3 S.W.3d 497 (Tenn. Ct. App. 1999); *Gorski v. Ragains*, No. 01A01-9710-GS-00597, 1999 WL 511451 (Tenn. Ct. App. July 21, 1999)). A change of circumstances is measured from the entry of a final order of custody, even though temporary orders may be entered thereafter. *In re M.J.H.*, 196 S.W.3d 731, 743 (Tenn. Ct. App. 2005).

In *Blair*, the Court set out the four “extraordinary circumstances” after examining principles that had been applied in several previous custody cases. One of these cases was *In re Askew*, 993 S.W.2d 1 (Tenn. 1999), where a juvenile court had awarded temporary custody of a child to a third party, but it noted that it was “only delaying restoring custody to the natural parents.” *Id.* at 2. The mother later filed a petition to regain custody that was appealed to the circuit court, but the court found that the mother had not demonstrated a material change in circumstances. *Id.* at 3. The Supreme Court reversed, finding that the temporary order was not entitled to res judicata effect because it conveyed no suggestion of finality and was merely a continuance of the case until the court heard more proof. *Id.* at 4. The Court also found that the trial court had not made a finding of substantial harm when awarding temporary custody to the third party instead of the mother. *Id.*

In the absence of a valid initial order finding substantial harm, the mother could not be deprived of the custody of her child. *Id.* at 5.

Our conclusion is supported by the following language from *Blair*, when the Court summarized its findings regarding the standards applicable to change of custody cases:

Accordingly, we hold that a natural parent is not generally entitled to invoke the doctrine of superior rights to modify a valid custody order awarding custody to a non-parent. Instead, *in the absence of extraordinary circumstances – for instance*, the natural parent was not afforded an opportunity to assert superior parental rights in the initial custody proceeding; the custody order is invalid on its face; the order is the result of fraud or procedural illegality; or *the order grants only temporary custody to the non-parents* – a trial court should apply the standard typically applied in parent-vs-parent modification cases: that a material change in circumstances has occurred, which makes a change in custody in the child’s best interests.

Blair v. Badenhope, 77 S.W.3d 137, 148 (Tenn. 2002) (emphasis added). Applying these standards to the case at bar, we find that application of the “superior parental rights” doctrine was proper because the initial order granted only temporary custody to Grandmother.⁵ As such, Mother can only be denied custody of the child if Grandmother established, by clear and convincing evidence, that the child would be exposed to substantial harm if placed in Mother’s custody.

C. *Substantial Harm*

Trial courts have broad discretion to fashion custody arrangements that best suit the unique circumstances of each case. *Ray*, 83 S.W.3d at 734 (citing *Parker v. Parker*, 986 S.W.2d 557, 563 (Tenn.1999)). On appeal, our role is not to tweak these decisions in the hopes of achieving a more reasonable result than the trial court. *Id.* “Rather, it is to determine whether the trial court’s decision ‘falls outside the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence found in the record.’” *Id.* (citing *Eldridge v. Eldridge*, 42 S.W.3d 82, 88 (Tenn. 2001)).

Again, this custody case involved a heightened burden of proof that is different from the usual burden in civil cases. However, the trial court made no factual findings, oral or written, in support of its conclusion that there was no risk of substantial harm. Accordingly, we must review the record to determine whether the evidence presented clearly and convincingly established that the child would be exposed to a risk of substantial harm if placed in Mother’s custody. *Cf. Elmore v. Elmore*, 173 S.W.3d 447, 450 (Tenn. Ct. App. 2004); *Ray v. Ray*, 83 S.W.3d 726, 733 (Tenn. Ct. App. 2001). The “clear and convincing evidence” standard is more exacting than the

⁵ Because this finding establishes that Mother was entitled to the benefit of the superior parental rights presumption, Mother’s alternative arguments are pretermitted.

“preponderance of the evidence” standard, but it does not demand the certainty required by the “beyond a reasonable doubt” standard. *In re D.J.R.*, No. M2005-02933-COA-R3-JV, slip op. at 5 (Tenn. Ct. App. Jan. 30, 2007). Evidence satisfying this high standard produces a firm belief or conviction regarding the truth of facts sought to be established, and it eliminates any serious or substantial doubt concerning the correctness of the conclusions to be drawn. *Id.* at 5.

The courts have not gone so far as defining what circumstances constitute a risk of “substantial harm” to a child. *Ray*, 83 S.W.3d at 732. Common sense and judicial experience are therefore appropriate processors of evidence in determining what acts constitute substantial harm. *Nolen v. Nolen*, No. M2002-00138-COA-R3-CV, slip op. at 5 (Tenn. Ct. App. Aug. 5, 2003).

These circumstances [that constitute substantial harm] are not amenable to precise definition because of the variability of human conduct. However, the use of the modifier “substantial” indicates two things. First, it connotes a real hazard or danger that is not minor, trivial, or insignificant. Second, it indicates that the harm must be more than a theoretical possibility. While the harm need not be inevitable, it must be sufficiently probable to prompt a reasonable person to believe that the harm will occur more likely than not.

Ray, 83 S.W.3d at 732 (footnote omitted). A finding that a parent is unfit or that a child is dependent and neglected may constitute a threat of substantial harm. *In re Askew*, 993 S.W.2d at 4.

In this case, the trial judge heard extensive testimony about Mother’s irresponsibility when she was married to Father, and soon after they divorced in 1999. It is undisputed that Mother was using drugs at the time, and that an order of protection was entered against her for an alleged attack on Father. Also, she had a job as a waitress and admittedly could not financially provide for the child’s needs. However, we recognize that “custody decisions should focus on the parties’ present and anticipated circumstances” and on their “current fitness to be custodians of children.” *Ray*, 83 S.W.3d at 734. Custody decisions “should not be used to punish parents for past misconduct.” *Id.* Although courts may properly consider past conduct to the extent that it assists in determining one’s current parenting skills or in predicting whether a person will be capable of having custody of the child, biological parents are not required to demonstrate that they are perfect before they can be granted custody of their children. *Id.* “While a parent who has a present drug or alcohol abuse problem may be unfit to care for a child, past substance abuse problems do not directly reflect the parent’s attitudes, sense of responsibility and dedication toward raising a child.” *Marsh v. Sensabaugh*, No. W2001-00016-COA-R3-JV, slip op. at 6 (Tenn. Ct. App. Oct. 1, 2001).

The Middle Section of this Court recently addressed the relevance of a parent’s past behavior when making a custody decision in *In re D.J.R.*, No. M2005-02933-COA-R3-JV, slip op. at 7 (Tenn. Ct. App. Jan. 30, 2007). The Court determined that when considering past conduct, we should look to “the nature and severity of the past conduct in relation to the welfare of the child, when the conduct occurred, and what remedial actions, if any, the parent has taken.” *Id.* at 7. The Court discussed a previous case finding that illegal drug use occurring two years prior to a hearing

was not an accurate predictor of behavior thereafter. *Id.* at 4 (citing *Ray v. Ray*, 83 S.W.3d 726, 734 (Tenn. Ct. App. 2001)). Another case had focused on a parent's fitness in the six months prior to trial and discounted past alcohol abuse because the record revealed that the parent had turned his life around. *Id.* at 5 (citing *In re Crawford*, No. 02A01-9405-CH-00124, 1995 WL 72615, at *6 (Tenn. Ct. App. W.S. Feb. 22, 1995)). In applying these principles to the case before it, the Middle Section concluded that a domestic incident, a DUI, and drug problems occurring in 2002 did not clearly and convincingly establish that the child would be exposed to substantial harm when the mother petitioned for custody in 2005. *Id.* Again, the Court noted that parents can turn their lives around. *Id.*

Similarly, in the case at bar, we believe the record reveals that Mother has turned her life around. She testified that she did not currently use drugs, and she had quit using drugs right after she and Father divorced. Mother passed a drug screen earlier in the proceedings, and at trial, she stated that she could pass another one if asked to take one that day. We find no evidence in the record to indicate that she has used or abused drugs since approximately 1999. Also, there is no evidence in the record that Mother's domestic dispute with Father in any way threatened the child. Mother testified that she had never physically abused the child, and no one alleged any such abuse involving the child or in her presence. There is no indication that Mother's two sons are not well-cared for or that she and her husband are unfit parents. Although Mother does not work and her husband will be providing the only income for the family, both he and Mother testified that they could financially provide for the three children. "Financial advantage and affluent surroundings simply may not be a consideration in determining a custody dispute between a parent and a non-parent." *In re Adoption of A.M.H.*, No. W2004-01225-SC-R11-PT, slip op. at 20 (Tenn. Jan. 23, 2007).

Next, we turn to the issue of Mother's failure to pay child support to Grandmother during the years that Grandmother had temporary custody of the child. "Although financial resources, or lack thereof, are not indicative of parental fitness, a clear disregard of parental responsibilities when one is capable of performance indicates one may not be ready for the duties of a custodial parent." *Marsh v. Sensabaugh*, No. W2001-00016-COA-R3-JV, slip op. at 5 (Tenn. Ct. App. Oct. 1, 2001). "Certainly, a parent who has abandoned his child, either by willfully failing to visit or by willfully failing to support, is unfit." *In re Swanson*, 2 S.W.3d 180, 188 (Tenn.1999).

In this case, Mother admitted that she never paid any child support to Grandmother while the child was in her custody. Mother claimed that she had offered "a couple of times," and Grandmother said she did not need the money and would not accept it. Still, the child spent every other weekend, breaks from school, and time during the summer at Mother's home, and Mother bought clothing and provided for the child during those times. We find that Mother's actions did not rise to the level of abandonment and do not demonstrate that she is an unfit parent. "Abandonment imports any conduct on the part of the parent which evinces a settled purpose to forego all parental duties and

relinquish all parental claims to the child.”⁶ *Matter of Gordon*, 980 S.W.2d 372, 374 (Tenn. Ct. App. 1998) (citing *Ex Parte Wolfenden*, 48 Tenn.App. 433, 441, 348, S.W.2d 751, 755 (1961)). The conduct must amount to an “absolute, complete and intentional relinquishment of all parental control and interest in the child in order to constitute abandonment.” *Id.* at 374-75 (citing *O’Daniel v. Messier*, 905 S.W.2d 182, 187 (Tenn. Ct. App. 1995)). The evidence of abandonment must demonstrate “an actual desertion, accompanied with an intention to entirely sever, so far as it is possible to do so, the parental relationship and throw off all obligations growing out of the same.” *Id.* at 375. Abandonment may only be found when the parent is given the benefit of every controverted fact, but such inference follows from the evidence as a matter of law. *Id.* (citing *Wolfenden*, 48 Tenn. App. at 444, 348 S.W.2d at 756). The facts of this case do not demonstrate willful abandonment of the child.

Finally, we must address the social worker’s testimony in which she opined that the child had an adjustment order, and that returning custody to Mother would pose a risk of harm to the child’s emotional state. She also discussed the physical symptoms that the child had displayed since Mother had filed the petition to regain custody, such as headaches, upset stomach, crying, etc., and discussed the child’s fears that Mother only wanted to regain custody so that the child could help her with chores. “As a general matter, clear and convincing evidence of the sort of psychological harm that would be severe enough to justify denying custody to a biological parent should take the form of expert testimony.” *Ray v. Ray*, 83 S.W.3d 726, 738 (Tenn. Ct. App. 2001). Nevertheless, an expert’s opinion that a change of custody will result in substantial harm is not conclusive on the issue. See *Ellington v. Maddox*, No. W2000-00948-COA-R3-CV, slip op. at 8 (Tenn. Ct. App. Mar. 12, 2001) (finding no risk of substantial harm to child despite social worker’s opinion that change in custody would result in substantial harm).

During the social worker’s testimony, she also said that the child loved her mother and that she was not accusing Mother of being a bad parent. In fact, she had only met Mother one time for about an hour, and she had never been to Mother’s home. The social worker described the child’s reluctance to visit Mother after the petition was filed, but said that after working with the child, she was able to go to Mother’s home. Also, the social worker had suggested some changes that Mother could make at the home that had made the child more comfortable. A Department of Children’s Services case manager testified that she considered the home to be cleaner than normal, with appropriate room for all the children, and “a positive and nurturing environment” for the child. Regarding the child’s concerns about doing chores, the social worker said that it was totally acceptable for a parent to expect their child to help out around the house, and that the chores the child described were not unreasonable. Although Mother admitted to leaving the child at home

⁶ This Court has previously determined that a finding of willful abandonment in the context of parental termination proceedings amounts to a finding of substantial harm on the issue of parent versus non-parent custody. *In re Adoption of McCrone*, No. W2001-02795-COA-R3-CV, slip op. at 13 (Tenn. Ct. App. July 21, 2003).

The Tennessee General Assembly has statutorily defined “abandonment” for purposes of terminating parental rights, legislatively overruling the definition adopted in prior case law. See Tenn. Code Ann. § 36-1-102(1)(A), (G) (2005). Because this case does not involve a termination petition, we are not limited to the statutory definition applicable to those proceedings.

alone on one occasion, she testified that she would not leave her alone to care for the infant. Mother agreed that the child was old enough to take care of another child as long as an adult was around.

The social worker said she did not feel it was necessary to refer the child to a psychiatrist to seek medication for her disorder. She stated that the child would need “healthcare” after she returns to her mom to help with the adjustment, and Mother testified that she would provide her with psychological help if it was needed.

Contrary to the social worker’s description of the child as anxious and depressed, the child’s principal described her as happy, extremely well-adjusted, and having lots of friends. He also stated that she had nearly straight A’s and was an excellent student. The child had transferred to the principal’s school about three years before, and she had done very well in that time. Although he expressed his concerns about the possible effects of a change of custody, he also said that the effect could be good or bad.

Mother stated that if she was awarded custody of the child, she thought that Grandmother and Father should share visitation with the child every other weekend. A natural parent’s expressed intention regarding how she intends to exercise her parental prerogatives is relevant to the question of custodial fitness. *Ray*, 83 S.W.3d at 737. It takes on controlling significance only if there is evidence that exercising those rights in the intended manner will cause substantial harm to the child. *Id.* In this case, however, Mother is seeking to prevent such potential harm by allowing the child to continue her relationship with Grandmother.

In a previous custody contest involving a parent and relatives, this Court made the following observations that apply equally to our concerns in the case before us:

. . . the chancellor felt that petitioners could provide better overall care for the minor than the natural father and his wife. This should not be a controlling consideration. *Stubblefield v. State ex rel. Fjelstad*, 171 Tenn. 58, 106 S.W.2d 558 (1937). Moreover, it does appear that the chancellor gave much weight to the fact that the child had been with the aunt and uncle for a long period of time, while at the same time evidencing confidence in respondent’s responsibility by awarding weekend visitation. We have no doubt that the aunt and uncle are kind, caring and loving and have been good custodians for [the child]. The fact remains, however, that they are not the natural parents. Undoubtedly, the policy of the law favors a natural parent and every effort should be made to put stability in the child’s life with its natural parents. The parenthood bond should be nurtured in every way possible, because it is by far one of the strongest bonds known to humankind. By the same token, [the child] deserves the love and affection derived from loving grandparents, aunts and uncles. Every effort should be made by [the child’s] entire family that she not be

deprived of all of the love and care available to her. The extended family is by far a blessing which cannot be duplicated.

In re Crawford, No. 02A01-9405-CH-00124, 1995 WL 72615, at *6 (Tenn. Ct. App. W.S. Feb. 22, 1995). After reviewing the entire record, we find that the evidence presented does not clearly and convincingly indicate that Mother is an unfit parent or that a grant of custody to Mother would result in substantial harm to the child.

V. CONCLUSION

For the aforementioned reasons, we find that the trial court reached the correct result, and its order awarding custody to Mother is affirmed. Costs of this appeal are taxed to Appellant, Linda Madorin, and her surety, for which execution may issue if necessary.

ALAN E. HIGHERS, JUDGE