

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
July 24, 2008 Session

MICKEL G. HOBACK v. LISA FAYE KEENER HOBACK

**Appeal from the Chancery Court for Bradley County
No. 05-273 Jerri S. Bryant, Chancellor**

No. E2007-02777-COA-R3-CV - FILED NOVEMBER 24, 2008

Mickel G. Hoback (“Father”) and Lisa Faye Keener Hoback (“Mother”) were divorced in 2006. The parties have a daughter who is six years old. In the divorce judgment, the trial court adopted a permanent parenting plan submitted by the parties which designated Father as the primary residential parent and set forth Mother’s co-parenting time. Soon thereafter, Father filed a petition seeking to suspend Mother’s co-parenting time based upon allegations of child sexual abuse that allegedly occurred while Mother was exercising her co-parenting time. The allegations pertained to sexual abuse allegedly committed by some of Mother’s family members. Father also alleged that Mother was aware of the abuse but failed to do anything about it or to otherwise protect the child. Mother denied the allegations and filed a petition claiming there had been a material change in circumstances and that she should be designated as the child’s primary residential parent. Following a hearing and later a plenary trial, the trial court changed custody and designated Mother as the primary residential parent. Father appeals. We vacate the trial court’s final judgment because it fails to comply with T.C.A. § 36-6-106(a)(8) (Supp. 2007). We remand this case for further proceedings consistent with this opinion.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court
Vacated; Case Remanded**

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which D. MICHAEL SWINEY, J., and SHARON G. LEE, SP. J., joined.

Phillip C. Lawrence, Chattanooga, Tennessee, for the appellant, Mickel G. Hoback.

Barrett T. Painter, Cleveland, Tennessee, for the appellee, Lisa Faye Keener Hoback.

OPINION

I.

In March 2006, Mother and Father were divorced based upon their agreement that irreconcilable differences existed between them. In the final judgment granting the divorce, the trial court approved and adopted a marital dissolution agreement that the parties had submitted. The marital dissolution agreement designated Father as the primary residential parent and set Mother's co-parenting time. Mother's co-parenting time was every week from Friday after school until Sunday at 6:00 p.m.; however, on every other Sunday, Mother was permitted to keep the child on Sunday night and "take the child to school Monday morning. . . . Father shall have one weekend every month provided that it is not a weekend when Mother has Sunday overnight."

Approximately six months after the parties were divorced, Father filed a petition to modify the permanent parenting plan and a request for an emergency order suspending Mother's residential time. According to the petition:

Petitioner would show that the minor child has revealed to a professional that [Mother] leaves her with the maternal grandmother and/or the maternal grandmother's boyfriend. Petitioner will show that the child is in grave danger, emotionally and physically, if left in the care of [Mother] at this time. . . .

Additionally, the child has made unsolicited statements to [Father] that have caused him great concern for her emotional and/or physical safety. Those statements include graphic description[s] of inappropriate conduct of males and females in the presence of the child. Some of the comments by the child strongly suggest that she has received or has been instructed on "french kissing". The child has also stated that she has been inappropriately touched by a member or frequent visitor of [Mother's] household, and the [mother] is not taking the appropriate steps to protect the child. . . .

It would be in the manifest best interest of the parties' child to suspend [Mother's] residential time with the child until such time as the Court is assured that the child's safety is not at risk. It is further in the manifest best interest of the parties' child that once [Mother] resumes contact with the child that it be under supervision until [Mother] demonstrates to the Court that her actions will not endanger the child's welfare.

Based upon Father's allegations, the trial court entered a temporary ex parte order suspending Mother's residential co-parenting time pending a hearing on the allegations in the petition. Mother responded to the petition and denied that the child was in any harm. Mother also filed a counterclaim alleging that a material change in circumstances had occurred and it was in the child's best interest for Mother to be designated as the primary residential parent.

Alternatively, Mother requested that her co-parenting time be increased and that her child support payment be modified accordingly.

A hearing was conducted six days after the entry of the temporary order suspending Mother's co-parenting time. The first witness was Martha Biller, a licensed psychological examiner who had been counseling the parties' child. Biller testified that she first began counseling the child in January 2006 when the child was three years old. According to Biller, during the initial examination, the child became aggressive and began throwing toys. The child identified one of the toys as her Uncle Shawn¹, "and then she used it to rub the crotch area. She said this is what Uncle Shawn does and he loves me. He licked breasts, not bite them because that hurts." The child also indicated that when this occurred, her grandmother was there but she had been drinking beer and was "asleep." The child stated that her mother was not there at that time. Biller asked the child if she had told Mother about what Uncle Shawn did, and the child responded that she had. The child also told Biller that her "Grandma Vicki"² called her a "dumbass." The child made a drawing of "Grandma Vicki's" house and said it smelled like someplace "where you farted" and Grandma Vicki "drinks beer." Biller testified to a counseling session that occurred in May 2006. According to Biller:

In the May session, [the child] became more violent and she was actively acting out the violence, so I asked her dad to come back to the session. She does not like to separate from him, but he was in there and she started using the word asshole with him, asshole, you're a stupid asshole, and then she indicated that her mom and dad were married but they're not [now] and that mom had encouraged her to call dad names. . . . [T]he primary issue on that session that was of concern was that she indicates she's living at grandmother's house, and yet at grandmother's house there's not supervision that was needed since she was describing grandmother as being asleep or drunk.

Biller was questioned about a counseling session with the child which took place in September 2006. This session was even more disturbing. According to Biller:

[The child] indicates that she's in the trailer with Grandma Vicki and Grandma Vicki also has a person there living named Turkey³ who is a male. What she indicates is, and she drew a picture of Turkey, [he] encourages her to hold a washcloth while he shoots from his penis area. She didn't use the word penis, but she drew it in and she shows it shooting out something. She said I put the washcloth up and he poops in it. I want to put him in jail because he's bad to me. He goes to jail. He makes me hold the washcloth while he pees into where this was. . . .

1 "Uncle Shawn" is Mother's brother.

2 "Grandma Vicki" is Mother's mother.

3 "Turkey" is the maternal grandmother's brother whose proper first name is Terry.

[The child] indicated that when she was over in this trailer that it was nasty, that there were dogs in it, there was dog doo-doo, the dog had bit her hand. She indicated that she had told her mother about it, she had told Vicki about Turkey, but she says that her mom has to take her there on weekends because she works somewhere.

(Footnote added.)

Biller stated that, assuming Mother did have knowledge about what the child claimed was taking place at “Grandma Vicki’s” trailer, continuing to leave the child at the grandmother’s house subjected the child to danger. Biller stated that in her opinion, the child was in “severe danger” at the grandmother’s house and Mother had failed to safeguard her child. Biller added that she believed the child’s allegations of abuse and that the abuse was an ongoing situation.

On cross-examination, Biller acknowledged that she never interviewed Mother to get her perspective on what was happening. When asked if the child’s statements could be based on what someone told her to say, Biller stated that she did not believe the child had been coached into making the allegations of abuse. According to Biller:

There’s a difference in knowing whether somebody has coached her into saying it. And the pictures really become more telltale because they are her imprinted truth mechanism. Children don’t hold together lies real well. They can lie, but they don’t hold them together really well, and so certainly their drawings become much more of their own thoughts because it’s the creative process that’s involved, and so in that, it represents what their thoughts are. So this picture that she drew then of Turkey and his private areas and the stuff shooting out . . . is much more graphic in that she describes and portrays it, which makes it much more valid content.

Biller stated that Father was “mortified” when he heard the child’s comments at the September session. Biller explained that Father “was surprised, and as she began drawing the picture, my observation of him was he was shaking.”

Mother testified at the hearing. As relevant to this appeal, Mother testified that the child had never indicated to her that she had been abused by any family members and that if there was something to indicate that such abuse had taken place, she would have taken immediate action.

Following the hearing, the trial court made several observations from the bench. The trial court stated:

There has certainly, I think, been something raised by this child that’s going on at the grandmother’s, and this Court is forbidding this child from being around Vicki, Turkey Terry, Shawn, or

James[, who is Vicki's boyfriend], period, until all parties have been cleared of any specter of wrongdoing.

This child should be kept in therapy, and this Court will order that the child continue with therapy on a frequent basis to be determined by Marti Biller. Both parents will be involved.

The trial court then ordered the parties to mediation pursuant to the terms of the permanent parent plan adopted by the court when the parties divorced.

After the parties' attempt at mediation was unsuccessful⁴, the trial court conducted a plenary trial, following which the trial court entered a final judgment on the remaining issues. As pertinent to this appeal, the trial court designated Mother as the primary residential parent and entered a permanent parent plan which gave each party alternating weeks of custody. As to the allegations of abuse, the trial court simply stated:

Respondent/Mother has had some problems that justifiably called for an investigation. However, the Court finds that this case has been about Father flexing his muscles Father's desire to control Mother and to manipulate the Mother by using this child has overwhelmed his good sense on raising this child.

The trial court chastised Father for not being more cooperative with Mother by not agreeing to alter the co-parenting schedule without court intervention when Mother's work schedule changed.

II.

Father appeals claiming Mother failed to prove that there had been a material change in circumstances sufficient to warrant a change in custody to her. Father also claims that the trial court erred when it determined that designating Mother as the primary residential parent and establishing a split co-parenting schedule was in the child's best interest.

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After the failed attempt at mediation, the trial court appointed a guardian ad litem on behalf of the child.

III.

A review of findings of fact by a trial court is *de novo* upon the record of the trial court, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Brooks v. Brooks*, 992 S.W.2d 403, 404 (Tenn. 1999). Review of questions of law is *de novo*, without a presumption of correctness. See *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 628 (Tenn. 1999).

IV.

In *Massey-Holt v. Holt*, 255 S.W.3d 603 (Tenn. Ct. App. 2007), this Court discussed in depth the statutory requirements for a court to change custody as opposed to what is required to modify co-parenting time schedule. According to *Holt*:

The statute governing such decrees makes clear that a “change in circumstance” with regard to the parenting schedule is a distinct concept from a “change in circumstance” with regard to the identity of the primary residential parent:

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 child. A material change of circumstance may include, but is not limited to, failures to adhere to the parenting plan or an order of custody and visitation or circumstances that make the parenting plan no longer in the best interest of the child. . . .

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-C). This statutory scheme is the result of a 2004 amendment As we explained earlier this year,

[a]s a result of the 2004 amendment, Tennessee now has a different set of criteria for determining whether a material change of circumstance has occurred to justify a modification of a “residential parenting schedule” and the specifics of such a schedule. The amendment, specifically the addition of subsection (a)(2)(C), establishes different criteria and a lower threshold for modification of a residential parenting schedule. However, the statutory criteria pertaining to a modification of “custody” - the term used in the statute, which we equate to the designation of “primary residential parent” and matters more substantive than a change of schedule - remain unchanged.

Scofield v. Scofield, No. M2006-00350-COA-R3-CV, 2007 WL 624351, at *3 (Tenn. Ct. App. M.S., filed February 28, 2007) (citations omitted).

Holt, 255 S.W.3d at 607-08.

In the present case, it goes without saying that the trial court changed “custody” when it designated Mother as the primary residential parent. Therefore, the more stringent statutory standard in T.C.A. § 36-6-101(a)(2)(B) (Supp. 2008) applies. The trial court also was required to undertake a best interest analysis consistent with T.C.A. § 36-6-106(a) (Supp. 2008). See *Kendrick v. Shoemaker*, 90 S.W.3d 566, 568 (Tenn. 2002) (A trial court may modify an award of child custody “when both a material change of circumstances has occurred *and* a change of custody is in the child’s best interests.”). (Emphasis added.) As pertinent to this appeal, T.C.A. § 36-6-106(a) provides:

In a suit for annulment, divorce, separate maintenance, or in any other proceeding requiring the court to make a custody determination regarding a minor child, the determination shall be made on the basis of the best interest of the child. The court *shall* consider all relevant factors, including the following, where applicable:

- (1) The love, affection and emotional ties existing between the parents or caregivers and the child;
- (2) The disposition of the parents or caregivers to provide the child with food, clothing, medical care, education and other necessary care and the degree to which a parent or caregiver has been the primary caregiver;

- (3) The importance of continuity in the child’s life and the length of time the child has lived in a stable, satisfactory environment . . . ;
- (4) The stability of the family unit of the parents or caregivers;
- (5) The mental and physical health of the parents or caregivers;
- (6) The home, school and community record of the child;

* * *

(8) Evidence of physical or emotional abuse to the child, to the other parent or to any other person; provided, that, where there are allegations that one (1) parent has committed child abuse, as defined in § 39-15-401 or § 39-15-402, or child sexual abuse, as defined in § 37-1-602, against a family member, the court shall consider all evidence relevant to the physical and emotional safety of the child, and determine, by a clear preponderance of the evidence, whether such abuse has occurred. The court shall include in its decision a written finding of all evidence, and all findings of facts connected to the evidence. In addition, the court shall, where appropriate, refer any issues of abuse to the juvenile court for further proceedings;

(9) The character and behavior of any other person who resides in or frequents the home of a parent or caregiver and the person’s interactions with the child; and

(10) Each parent or caregiver’s past and potential for future performance of parenting responsibilities, including the willingness and ability of each of the parents and caregivers to facilitate and encourage a close and continuing parent-child relationship between the child and both of the child’s parents, consistent with the best interest of the child.

T.C.A. § 36-6-106(a) (Supp. 2008) (emphasis added).

T.C.A. § 37-1-602 (Supp. 2008), which is referenced in T.C.A. § 36-6-106(a)(8), specifically states that “[h]arm to a child’s health or welfare can occur when the parent” of a child allows child sexual abuse to be committed or allows a child to be exploited. T.C.A. § 37-1-602(b). Given the testimony of Biller set forth earlier in this opinion, we think the provisions of T.C.A. § 36-6-106(a)(8) are unquestionably implicated in this case.⁵ We hasten to add that there is no indication in the record before us indicating that the trial court questioned Biller’s credibility. On the contrary, there is every reason to believe – again based on that record – that the trial court found Biller to be totally credible. That testimony is very disturbing.

⁵ Biller’s testimony at trial was consistent with her testimony at the initial hearing.

In the order designating Mother as the primary residential parent, the trial court made virtually no mention of the allegations of abuse other than: (1) to say that Mother “has had some problems that justifiably called for an investigation”; and (2) to lift the restriction on Shawn Lewis being around the child, but to maintain the restriction as to Terry “Turkey” Belcher.⁶ As set forth previously, T.C.A. § 36-6-106(a)(8) requires the court to:

consider all evidence relevant to the physical and emotional safety of the child, and determine, by a clear preponderance of the evidence, whether such abuse has occurred. The court *shall* include in its decision a written finding of all evidence, and all findings of facts connected to the evidence. (emphasis added).

Compliance with T.C.A. § 36-6-106(a)(8) is important for several reasons, one of which is to allow this Court to effectively review the propriety of the trial court’s decision. Because the statute was not complied with in this case, there is a gaping hole in the final judgment which leaves significant questions unanswered and prohibits effective review by this Court. Therefore, the judgment of the trial court must be vacated and this case remanded to the trial court for further proceedings. On remand, the trial court is instructed to discuss the factors in T.C.A. § 36-6-106(a) that it finds applicable and to explain how the relevant factors affect the court’s best interest analysis. In addition, the trial court must comply with the mandatory provisions of T.C.A. § 36-6-106(a)(8). In the meantime, the custody arrangement in the original permanent parenting plan is hereby reinstated effective immediately upon the release of this opinion, pending further action by the trial court consistent with our opinion.

There are a couple of other points we feel compelled to address. First, the trial court’s judgment does not specifically state what it found to be a material change in circumstance. On remand, and in the event the trial court persists in changing custody to Mother, the trial court shall specifically state what it finds to qualify as a material change in circumstance warranting a change of custody to her. Second, we completely agree with the trial court that all parents should cooperate with their ex-spouses in an effort to minimize the potential negative impact disagreements can have on the minor children. Having said that, in a situation like we have in the present case, we do not believe that it is appropriate to criticize and/or penalize Father when he simply required Mother to stick to the terms of the existing court order adopting the parenting plan initially agreed to by the parties and approved by the trial court. There are numerous cases in the court system charging a parent with failure to comply with a court-ordered permanent parenting plan, and we do not hesitate to impose sanctions when such allegations are proven. For obvious reasons, we are extremely reluctant to approve penalizing a parent just because that parent refuses to voluntarily alter the terms of a parenting plan absent judicial approval. To do so would create a quagmire for all parents and subject them to being penalized if they fail to comply with a court order, and, at the same time, subject them to negative consequences if they do not voluntarily agree to change the terms of an existing order.

⁶ Following the trial, the trial court made some observations from the bench and these observations were incorporated into the final judgment. As with the language in the final judgment, the trial court merely stated that Mother “has had some problems that justifiably called for investigation.”

V.

The judgment of the trial court is hereby vacated. The original permanent parenting plan with its designation of Father as the primary residential parent and Mother's co-parenting time is hereby immediately reinstated pending further action by the trial court. This case is remanded to the trial court for further proceedings consistent with this opinion and for collection of the costs below. Costs on appeal are taxed to the appellee, Lisa Faye Keener Hoback.

CHARLES D. SUSANO, JR., JUDGE