IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
December 11, 2008 Session

JEFF BECKHAM v. DONNA BURNS BECKHAM (CASTEEL)

Appeal from the Chancery Court for Wayne County
No. 11509 Jim T. Hamilton, Judge

No. M2007-02863-COA-R3-CV - Filed March 13, 2009

Jeff Beckham ("Father") and Donna Burns Beckham (Casteel) ("Mother") were divorced in November of 2004. Father and Mother have three minor children ("the Children"). In October of 2006, Mother filed a petition seeking to set aside the final divorce decree alleging that she only recently had received information that Father had a 401k accrued during the marriage but not disclosed during the divorce proceedings. The next month, Father filed a petition seeking to modify custody of the Children to make Father the primary residential parent. Mother then filed a petition for contempt alleging, among other things, that Father had failed to pay his share of summer child care expenses and medical bills for the Children, and had interfered with Mother's custody of the oldest child. After a trial, the Trial Court entered an order finding and holding, *inter alia*, that Mother was not entitled to relief from the final divorce decree under Tenn. R. Civ. P. 60.02; that a material change of circumstances existed warranting a change of custody; that Father be named the primary residential parent; and that Mother's petition for contempt was denied. Mother appeals to this Court. We affirm that portion of the Trial Court's order denying Mother relief from the final divorce decree, reverse that portion of the order finding a material change of circumstances warranting a change of custody, and remand this case for entry of orders consistent with our Opinion.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court
Affirmed, in part; Reversed, in part; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and THOMAS R. FRIERSON, II, SP. J., joined.

Barbara Hobock and Cynthia Chandler-Snell, Humboldt, Tennessee for the Appellant, Donna Burns Beckham Casteel.

James Y. Ross, Sr., Waynesboro, Tennessee for the Appellee, Jeff Beckham.

OPINION

Background

After sixteen years of marriage, Father and Mother were divorced in November of 2004, and a Marital Dissolution Agreement ("Divorce Decree") and Permanent Parenting Plan ("Parenting Plan") were entered. The Parenting Plan named Mother as the primary residential parent for the Children and granted Father visitation. At some time in late 2005, Father sought to obtain Mother's signature on an Authorization to Remove Frozen Account Status Form relating to Father's 401k account. Mother filed a petition in October of 2006 seeking to set aside the Divorce Decree alleging that she was unaware during the divorce proceedings of the existence of Father's 401k and that to allow the Divorce Decree to stand would constitute "inequity and unrelenting hardship."

Less than one month later, Father filed a petition alleging a material change in circumstances and seeking to modify the Parenting Plan to name Father as the primary residential parent of the Children. Mother subsequently filed a petition for contempt alleging, in part, that Father had failed to pay his share of summer child care expenses, that Father had failed to pay his share of medical bills for the Children, and that Father had interfered with Mother's rightful custody of the parties' oldest child.

The case was tried without a jury in November of 2007. Father testified at trial that he worked at Merle Howard during the entire course of the marriage. Father testified that Mother knew at the time the parties divorced that he had the 401k. Mother denied knowing anything about the 401k until she was presented with the Authorization to Remove Frozen Account Status Form.

When asked why he was requesting a change of custody Father testified:

> Well, first of all I love my children very much. When I go get my kids - - in other words I always hug them and kiss them and then when I come home we have a - - we go and - - we'll go out and eat…
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> * * *
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> [Mother] don't ever do nothing right. She don't give me no love. She don't give me no reason - - in other words she doesn't show me nothing what the kids do in school. She doesn't give me their grades. Every time we make an agreement she don't never - - she don't never - - she'll come up with one plan and then change it.

Father testified that the middle child is failing in school, but Father presented no proof of this. Although the Parenting Plan states that Father has the right to receive school records for the children upon written request to the school and payment of reasonable duplicating costs, Father admitted that he never has requested to receive anything from the Children's school and never has tried to contact the Children's school to find out about their grades or extracurricular activities.

When asked what he bases his proof regarding a material change in circumstance on, Father stated:

> I'm basing it on the way she does. She don't - - she does not treat the kids right.…She don't never tell them she loves them.…She never told them she loved them when I - - when we was together.…She talks bad - - she badmouths about all my family, calls us names.…She has told that right flat - - flat to my face.

Father testified that he never has said anything bad about Mother's family or Mother's new husband.

Father filed his petition seeking to modify custody in the fall of 2006. At trial, Father admitted that he had not had the problems he alleged existed with regard to visitation until the summer of 2007. Father claimed that Mother interfered with his visitation and when he was asked to tell specifically what Mother did, Father stated:

> She wasn't happy. She wasn't - - in other words she would always go against me on everything. She would let everything - - you say something to her she'd always change the deal, change the plan. We'd agree on one day and then when I go back and get them, that ain't the way it is.…I want to change it.

The Parenting Plan states that Father is to pick the children up at 6 p.m. on Fridays and bring them back to Mother by 8 p.m. on Sundays, and Father admitted that he does this. Father also admitted that before his filing the petition seeking a change in custody, things had run smoothly.

Father testified that Mother changes the dates for his visitation and that he was supposed to have the Children for three weeks during the summer. Father then testified that he got the Children for an extra week and, therefore, had the Children for four weeks during the summer of 2007 because Mother and her new husband took a trip. Father testified: "I was supposed to have them three weeks through the summer. And I was supposed to have them like the first week of June, the first week of July and the first week of August." Father testified he actually got the children "[t]he first week of June and first week of July, and the other week that came was July the 9th.…That was not even my weekend. She give me another weekend because they wanted to go on a trip."

Father testified that before the summer of 2006, his sister provided child care while Father and Mother worked, but during that summer, the oldest child, who was twelve, watched the other two children who were nine and three years old. Father did not know how many hours Mother worked while the oldest child babysat. Father testified that during the summer of 2007, after he filed the petition seeking a change in custody:

> She carried the kids and - - in other words - - and told me she was going to put them in a private school and it was going to cost me - - it was unreal. And I told her I

could not pay it. Because I told her I don't make that much money. And I asked her to let me keep the kids, because my sister did not charge that much, you know, and I would have brought them home every weekend and let her have them.

Father testified about an incident involving the oldest Child and visitation stating:

When - - we had went down to my dad's, and we always go down there on every Sundays [sic] night. And we - - we was sitting there and then their mom and them come and got them. And when they pulled up my two littlest ones came out, and I was getting a bag out of the car, out of the trunk of the car, and about that time she hollered and told me, she says, you need to talk to your daughter. She said - - she said she's not coming home. And I said well, I don't know what's going on.

I said I haven't heard a thing. She hasn't said nothing about going home with her. And before I get to the first step, I told her let me go see what's wrong, they were backing out of the driveway and didn't even give me a chance to even go talk to [the oldest child]. But when I went in the house, she was locked up in the bathroom and she was crying. And I told her, [oldest Child], it's okay.…[T]wo days later is when I get a phone call [from an officer in Hardin County].…Telling me, in other words, I was fixing to be picked up if I didn't bring [oldest Child] home.…Well, I carried the kids home. I carried the kids to the Hardin County jail, and it wasn't approximately an hour until her mom a showed up.

Father admitted that although the oldest Child missed school when she refused to go home with Mother, Father never brought the oldest Child to a school near him to try to enroll her. Father stated that he did not know if anyone else attempted to enroll the oldest Child in a school near Father's house.

Father testified that when he was on the phone with the Children, he heard Mother tell the Children to call her new husband 'daddy' and call Father 'Jeff.' Mother denied telling the Children to call her new husband 'daddy' and Father 'Jeff.'

Father has a three bedroom house. One of Father's sisters lives across the road from him, and the other lives approximately a mile away.

Father testified that he has a good relationship with Mother's brother and sisters and that they would help with the Children. When asked how Mother's siblings would help him with the Children, Father stated: "They give me money. They help me with other stuff, you know, buying things. They help me with a lot of things." Father testified that one of Mother's sisters purchased a cell phone for the oldest child, but that Mother took the phone away from the child.

Father admitted that a man named Nick Sherrell, who is 22 or 23 years old, lives approximately one mile from Father, and is "a friend of everybody," sometimes is around the oldest

child, a 13 year old female. Father denied that he allowed the oldest child to go out with Mr. Sherrell.

Judith Lee Burnham, a teacher at Hardin County Middle School, testified that she teaches the oldest child. Ms. Burnham is also the team leader or "mini principle" over the oldest child's other teachers. Ms. Burnham testified that the oldest child:

> [I]s the ideal student. One that if you could have a hundred of them you would take them in a heartbeat. She's as of this point straight As. She - - I am the sponsor of the Honor Society. She is in the Honor Society. And we chose her - - we can pick ten students out of a hundred and forty-five on my team to be on student counsel and we chose her two weeks ago to be in student counsel. She is very creative. She is a very creative young lady. Her work shows a lot of creativity.

Ms. Burnham further testified that the oldest child is "a typical teenager" and that Ms. Burnham has not observed anything that would lead her to believe that something might be wrong in the oldest child's life.

Mother, who is a registered nurse, testified:

> I am the clinical coordinator for our company in the Hardin County Wayne County offices and I do all of the training of the nurses and a lot of it is on the computer. And I can work from home or I can work at the office. So I can be there when the kids get home or I can take them with me to work in the afternoon.

Mother testified about an instance in July when Father interfered with her custodial time after Father exercised one of his weekend visitations with the Children. Mother testified that instead of returning the Children to Mother as required by the Parenting Plan, Father took the Children to the Smoky Mountains and had one of the Children call Mother at 7:30 p.m. on Sunday evening to tell Mother they were not coming home. Mother testified that as a result of this trip, Father kept the children for two weeks.

Mother also testified regarding the incident when the oldest child refused to go home with Mother after a visit with Father. Mother testified that Father called her at approximately 6 p.m. that Sunday night and told her that even though he normally transported the Children, Mother would have to come get them at Father's father's house. Mother went to Father's father's house, and the oldest child refused to go with her. Mother testified that there were several people at the house. Mother stated: "I didn't want to start any trouble there in front of the children with all these people present. So I - - the other two were already in the car. I got in the car and we went home." Mother called her attorney the next day seeking advice.

Mother testified that she and her new husband do not drink alcoholic beverages. Father admitted that he never has seen Mother or her new husband drinking alcohol when the Children were in their care.

Eric Gables is employed with QUINCO Mental Health Center and has counseled the oldest child on two occasions. The oldest child had another appointment to meet with Gables in the near future. The oldest child told Gables that she was unsure which parent she preferred to live with. Mr. Gables testified that his notes for a counseling session of November 29, 2006 state that the oldest child wanted to live with Father. Notes for same session also state:

> Improved overall outlook and learned to talk about her problems. Client indicated that she is unable to talk to her mother, as her mother gets very angry and screams. Client stated that her mother is the one that basically caused all the family problems, due to her going out on father causing the divorce. Client stated she does not think this marriage will work either, as they are already screaming at each other.
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> Client indicated that she loved her mother but she is angry all the time.

Mr. Gables agreed that it is normal for a twelve or thirteen year old to have some problems when his or her parents divorce.

The oldest Child testified that she used to be able to call her aunts and uncles, but she does not call her aunts and uncles anymore because Mother told her not to once the custody battle started. The oldest Child also testified that Mother has told her to call Mother's new husband 'daddy' and Father 'Jeff' and stated that she did not like being told that.

Stevie Burns, Mother's brother, testified that Mother "told she would kill [the Children] before she'd let anybody have them." When asked if he has any other concerns about the Children, Mr. Burns stated: "Just the way she - - she goes off and leaves them and everything. You know, she just don't care much about them. They'll get out drinking and running down the creek on the four wheelers and then come pick them up and carry them home." When asked what he meant by stating that Mother leaves the Children, Mr. Burns testified that Mother leaves the Children at home with the oldest child babysitting.

When questioned, Mr. Burns admitted that he and Mother do not get along because "[s]he took me up with a warrant and had me move my trailer off her land.…Yes, ma'am, but that's the best thing she ever done to me." Mr. Burns also testified that he has seen Mother and her new husband drinking beer on the four wheeler while with the youngest child, but that he could not tell what kind of beer it was because "I didn't stop." Mr. Burns testified that he saw this last summer and that was the last contact he has had with Mother.

Vicki Burns, Mother's sister, testified that she and Mother talked about getting the oldest Child a cell phone and stated:

> [Mother] said [her new husband] was tired of paying for [oldest Child's] cell and I told her my contract was coming up for renewal and that if she didn't care that I would put [oldest Child] on my cell phone bill that - - just add her line to mine. That way she would have a phone, you know, because [Mother] let her have one so - - you know, she needed one.

Ms. Burns testified that Mother later took the cell phone away from the oldest child. Ms. Burns testified that the only time she gets to see the oldest child now is when Father has the Children. Ms. Burns stated that she has concerns about the Children because "I observe the kids cry all the time. They never wants to go home." She stated she also has concerns because:

> [Mother] is erratic. She is moody. She is hateful. And I have seen her scream and holler at the kids. I have seen her walk out of my house when I have - - I kept the kids, I have seen her walk out of my house and those kids be telling her mamma I love you and she never acknowledge them and just keep on walking. I have seen her holds [sic] [youngest child], the baby in the floor. I go pick them up to take them to a movie and I've seen her hold [youngest child] in the floor and have [Mother's new husband] on the phone that you have to tell daddy that you love him or you're not going and [youngest child] is screaming at the top of her lungs he is not my daddy.

Ruth Cook, another one of Mother's sisters, testified that she is concerned about the Children because Mother "has made the statement that anybody that wanted to help with her kids she had - - she had no use for them. You know, that tried to help them." Ms. Cook also stated she had concerns because the Children have cried when they have been taken back to Mother's house in the past. Ms. Cook testified that she has not seen the Children in approximately one year because Ms. Cook is on speaking terms with Father and his family.

Megan Lashae Mackland, Father's niece, testified that she has seen Mother and Mother's new husband drinking beer on the four wheeler while riding with the youngest child. Ms. Mackland testified that the Children were not wearing helmets while riding the four wheelers in the creek bank.

Melanie Doss, Mother's friend, testified that she has socialized with Mother and Mother's new husband and Ms. Doss has never seen Mother or Mother's husband drinking alcoholic beverages. Ms. Doss testified that she believes that Mother is a good mother and stated: "All the times I have observed [Mother] with her children, I have no question that she is a good mom. She is a compassionate person. She loves her kids."

Amy Franks, a friend who attended nursing school with Mother, also testified that she never has seen Mother or Mother's new husband drinking alcoholic beverages. Ms. Franks testified

that she believes that Mother is a good mother. Ms. Franks testified that her daughter and the parties' oldest child are friends and spend time together and that the oldest child has never demonstrated that she was having problems living with Mother.

After trial, the Trial Court entered an order December 3, 2007 finding and holding, *inter alia*:

> The Respondent (Defendant/Father) testified the Petitioner (Plaintiff/Mother) did know about his retirement during the course of their sixteen (16) [year] marriage, and the Court found him to be a credible witness throughout this proceeding. Moreover, since the statutory restraining order, automatically issued with the divorce proceeding she commenced, must have been forwarded to Respondent's (Defendant/Father) employer to freeze the subject matter retirement account, it appears to the Court, and the Court finds the Petitioner's (Plaintiff/Mother) testimony that she never knew about the Respondent's (Defendant/Father) retirement prior to December 14, 2005, is not credible.
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> Based on the weight of the evidence, including all testimony and exhibits, and considering the credibility of the witnesses, the Court finds, based on a totality of the circumstances, that Petitioner (Plaintiff/Mother) has failed to carry her burden of proof to justify relief under Rule 60.02 of the Tennessee Rules of Civil Procedure.
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> * * *
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> The role of custodial parent carries with it a particularly important duty to foster a relationship between the child and the non-custodial parent. In this case, Plaintiff/Mother has not only abrogated this responsibility, but she has intentionally placed barriers between the parties' minor children and Defendant/Father, including preventing visitation, impeding phone calls, making derogatory remarks about Defendant/Father, and his family, not communicating with Defendant/Father about the children's school records, health issues, counseling and extra-curricular activities, attempting to substitute her spouse as the children's "Daddy["], averting any communication between herself and Defendant/Father, his family and her family, and involving her spouse unnecessarily in their parenting matters. This behavior by Plaintiff/Mother, in addition to the allegations leading to the arrests of the Defendant/Father and his sister, Connie McLin, for custodial interference, screaming and hollering at the children and riding four-wheelers without helmets while under the influence of alcohol, expressed custodial preferences in chambers and contents of [the oldest child's] Quinnco records, certainly constitute a material change of circumstances.

Mother appeals to this Court.

Discussion

Although not stated exactly as such, Mother raises four issues on appeal: 1) whether the Trial Court erred in denying Mother's motion for designation of additional parts of the record on appeal; 2) whether the Trial Court erred in denying Mother's Rule 60.02 motion for relief from the final divorce decree; 3) whether the Trial Court erred in finding that a material change in circumstances had occurred and that it was in the best interest of the Children for custody to be changed; and, 4) whether the Trial Court erred in failing to award Mother a judgment against Father for one-half of the unpaid medical bills. Father requests that this Court find Mother's appeal frivolous and award him attorney's fees.

We first consider whether the Trial Court erred in denying Mother's motion for designation of additional parts of the record on appeal. "Any differences regarding whether the record accurately discloses what occurred in the trial court shall be submitted to and settled by the trial court regardless of whether the record has been transmitted to the appellate court. Absent extraordinary circumstances, the determination of the trial court is conclusive.…" Tenn. R. App. P. 24(e).

Mother appealed to this Court and, subsequently, filed a Designation of Additional Parts of the Record to be Included seeking to have two proposed orders and Mother's memorandum of law in support of her motion for new trial included with the record on appeal. Father opposed including these additional documents in the record on appeal claiming both that the items Mother sought to have included in the record were not properly includable, and also that Mother's designation was technically deficient. Mother then filed an Amended Designation of Additional Parts of the Record to be Included, in an attempt to cure the alleged technical deficiencies in her designation. On May 1, 2008, Mother filed a Withdrawal of Amended Designation of Additional Parts of Record. Despite Mother's filing of the withdrawal, the Trial Court held a hearing on June 2, 2008 on Mother's motion for Designation of Additional Parts of the Record to be Included and denied the motion finding and holding, *inter alia*, that inclusion of the three documents was not proper under Rule 24 of the Tennessee Rules of Appellate Procedure.

In pertinent part, Rule 24 of the Tennessee Rules of Appellate Procedure provides:

> **Rule 24. Content and Preparation of the Record. --** (a) Content of the Record. – The record on appeal shall consist of: (1) copies, certified by the clerk of the trial court, of all papers filed in the trial court except as hereafter provided; (2) the original of any exhibits filed in the trial court; (3) the transcript or statement of the evidence or proceedings, which shall clearly indicate and identify any exhibits offered in evidence and whether received or rejected; (4) any requests for instructions submitted to the trial judge for consideration, whether expressly acted upon or not; and (5) any other matter designated by a party and properly includable in the record as provided in subdivision (g) of this rule.

> The following papers filed in the trial court are excluded from the record: (1) subpoenas or summonses for any witness or for any defendant when there is an appearance for such defendant; (2) all papers related to discovery, including depositions, interrogatories and answers thereto, reports of physical or mental examinations, requests to admit, and all notices, motions or orders relating thereto; (3) any list from which jurors are selected; and (4) trial briefs; and (5) minutes of opening and closing of court. Any paper relating to discovery and offered in evidence for any purpose shall be clearly identified and treated as an exhibit. No paper need be included in the record more than once.
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> (g) Limit on Authority to Add or Subtract from the Record. – Nothing in this rule shall be construed as empowering the parties or any court to add to or subtract from the record except insofar as may be necessary to convey a fair, accurate and complete account of what transpired in the trial court with respect to those issues that are the bases of appeal.

Tenn. R. App. P. 24.

Of the three documents that Mother sought to have included in the record on appeal, the trial brief is specifically excluded under Tenn. R. App. P. 24(a). As such, we cannot find that the Trial Court erred in denying permission to include this document in the record. As for the remaining two documents, the proposed orders, although they are not specifically excluded, their inclusion in the record is not necessary to convey a fair, accurate and complete account of what transpired in the trial court with respect to the issues on appeal. As such, we cannot find any error in the Trial Court's refusal to include these proposed orders in the record either. Further, we note that Mother filed a withdrawal of her designation to include additional documents, which, if acted upon by the Trial Court would have resulted in the very same outcome Mother now argues was reached incorrectly. We find no error in the Trial Court's decision to hold a hearing on Mother's designation of additional documents notwithstanding Mother's attempted withdrawal of this designation and, further, find no error in the outcome of this hearing. This issue is without merit.

We next consider whether the Trial Court erred in denying Mother's Rule 60.02 motion for relief from the final divorce decree. Our standard of review as to a trial court's grant of a Tenn. R. Civ. P. 60.02 motion for relief from a judgment is set forth in *Henry v. Goins*, where our Supreme Court stated as follows:

> In reviewing a trial court's decision to grant or deny relief pursuant to Rule 60.02, we give great deference to the trial court. *See Underwood v. Zurich Ins. Co.*, 854 S.W.2d 94, 97 (Tenn. 1993). Consequently, we will not set aside the trial court's ruling unless the trial court has abused its discretion. *See id*. An abuse of discretion

> is found only when a trial court has "'applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining.'" *State v. Stevens*, 78 S.W.3d 817, 832 (Tenn. 2002) (quoting *State v. Shuck*, 953 S.W.2d 662, 669 (Tenn. 1997)). The abuse of discretion standard does not permit an appellate court to merely substitute its judgment for that of the trial court. *See Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001).

Henry v. Goins, 104 S.W.3d 475, 479 (Tenn. 2003).

> In pertinent part, Tenn. R. Civ. P. 60.02 provides as follows:
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> On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party . . . .

Tenn. R. Civ. P. 60.02.

> In *Rogers v. Estate of Russell*, this Court observed that:
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> To set aside a judgment under Rule 60.02, the movant has the burden to prove that he is entitled to relief, and there must be proof of the basis on which relief is sought. *Banks v. Dement Const. Co., Inc.*, 817 S.W.2d 16, 18 (Tenn. 1991); *Federated Ins. Co. v. Lethcoe*, 18 S.W.3d 621, 623-624 (Tenn. 2000). A motion for relief from a judgment pursuant to Rule 60.02 addresses the sound discretion of the trial judge, and the scope of review on appeal is limited to whether the trial judge abused his discretion. *Banks*, 817 S.W.2d at 18. Rule 60.02 "was designed to strike a proper balance between the competing principles of finality and justice." *Id.*, *quoting Jerkins v. McKinney*, 533 S.W.2d 275, 280 (Tenn. 1976). Rule 60.02 "acts as an escape valve from possible inequity that might otherwise arise from the unrelenting imposition of the principle of finality imbedded in our procedural rules." *Id.*, *quoting Thompson v. Firemen's Fund Ins. Co.*, 798 S.W.2d 235, 238 (Tenn. 1990). Because of the importance of this "principle of finality," the "escape valve" should not be easily opened. *Id.*, quoting *Toney v. Mueller Co.*, 810 S.W.2d 145, 146 (Tenn. 1991).

Rogers v. Estate of Russell, 50 S.W.3d 441, 444-45 (Tenn. Ct. App. 2001).

With respect to the issue now before us, we note that the record on appeal reveals that Father testified that Mother was aware of the existence of his 401k at the time of the divorce proceedings, and Mother vehemently denied this assertion. The Trial Court made specific findings regarding the credibility of the witnesses with regard to this issue stating that Mother's testimony with regard to this issue "is not credible."

In *Wells v. Tennessee Bd. of Regents*, our Supreme Court observed:

> Unlike appellate courts, trial courts are able to observe witnesses as they testify and to assess their demeanor, which best situates trial judges to evaluate witness credibility. *See State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990); *Bowman v. Bowman*, 836 S.W.2d 563, 566 (Tenn. Ct. App. 1991). Thus, trial courts are in the most favorable position to resolve factual disputes hinging on credibility determinations. *See Tenn-Tex Properties v. Brownell-Electro, Inc.*, 778 S.W.2d 423, 425-26 (Tenn. 1989); *Mitchell v. Archibald*, 971 S.W.2d 25, 29 (Tenn. Ct. App. 1998). Accordingly, appellate courts will not re-evaluate a trial judge's assessment of witness credibility absent clear and convincing evidence to the contrary. *See Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315, 315-16 (Tenn. 1987); *Bingham v. Dyersburg Fabrics Co., Inc.*, 567 S.W.2d 169, 170 (Tenn. 1978).

Wells v. Tennessee Bd. of Regents, 9 S.W.3d 779, 783 (Tenn. 1999).

Unfortunately for Mother, there is no clear and convincing evidence contrary to the credibility determination made by the Trial Court. As the evidence in the record on appeal with regard to this issue rests upon a he said/she said dichotomy, the factual determination hinged upon witness credibility. We find no abuse of discretion in the Trial Court's denial of Mother's request for relief pursuant to Tenn. R. Civ. P. 60.02.

Next, we consider whether the Trial Court erred in finding that a material change in circumstances had occurred and that it was in the best interest of the Children for custody to be changed. Our review is *de novo* upon the record, accompanied by a presumption of correctness of the findings of fact of the trial court, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). A trial court's conclusions of law are subject to a *de novo* review with no presumption of correctness. *S. Constructors, Inc. v. Loudon County Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

Existing custody arrangements are favored because children thrive in stable environments. *Aaby v. Strange*, 924 S.W.2d 623, 627 (Tenn. 1996); *Hoalcraft v. Smithson*, 19

S.W.3d 822, 828 (Tenn. Ct. App. 1999). A custody decision, once made and implemented, is considered res judicata upon the facts in existence or those which were reasonably foreseeable when the decision was made. *Steen v. Steen*, 61 S.W.3d 324, 327 (Tenn. Ct. App. 2001). However, our Supreme Court has held that 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." *Kendrick v. Shoemake*, 90 S.W.3d 566, 568 (Tenn. 2002). According to the *Kendrick* Court:

> As explained in *Blair* [*v. Badenhope*, 77 S.W.3d 137 (Tenn. 2002)], the "threshold issue" is whether a material change in circumstances has occurred after the initial custody determination. *Id*. at 150. While "[t]here are no hard and fast rules for determining when a child's circumstances have changed sufficiently to warrant a change of his or her custody," the following factors have formed a sound basis for determining whether a material change in circumstances has occurred: the change "has occurred after the entry of the order sought to be modified," the change "is not one that was known or reasonably anticipated when the order was entered," and the change "is one that affects the child's well-being in a meaningful way." *Id*.

Kendrick, 90 S.W.3d at 570. *See also* Tenn. Code Ann. § 36-6-101(a)(2)(B) (2005).

The *Kendrick* Court went on to explain that if a material change in circumstances has been proven, "it must then be determined whether the modification is in the child's best interests … according to the factors enumerated in Tennessee Code Annotated section 36-6-106." *Kendrick*, 90 S.W.3d at 570 (footnote omitted). It necessarily follows that if no material change in circumstances has been proven, the trial court "is not required to make a best interests determination and must deny the request for a change of custody." *Caudill v. Foley*, 21 S.W.3d 203, 213 (Tenn. Ct. App. 1999).

In the case now before us on appeal the Trial Court specifically found:

> The role of custodial parent carries with it a particularly important duty to foster a relationship between the child and the non-custodial parent. In this case, Plaintiff/Mother has not only abrogated this responsibility, but she has intentionally placed barriers between the parties' minor children and Defendant/Father, including preventing visitation, impeding phone calls, making derogatory remarks about Defendant/Father, and his family, not communicating with Defendant/Father about the children's school records, health issues, counseling and extra-curricular activities, attempting to substitute her spouse as the children's "Daddy["], averting any communication between herself and Defendant/Father, his family and her family, and involving her spouse unnecessarily in their parenting matters. This behavior by Plaintiff/Mother, in addition to the allegations leading to the arrests of the Defendant/Father and his sister, Connie McLin, for custodial interference, screaming

> and hollering at the children and riding four-wheelers without helmets while under the influence of alcohol, expressed custodial preferences in chambers and contents of [the oldest child's] Quinnco records, certainly constitute a material change of circumstances.

The evidence in the record on appeal does not support the finding that Mother placed barriers between the Children and Father by preventing visitation or impeding phone calls. Father admitted that not only did he have no problems with visitation until the summer of 2007, after he filed the petition seeking a change in custody, but that things had run smoothly until that time. In addition, Father admitted that although he was supposed to have only three weeks visitation with the Children during the summer, he, in fact, had four weeks visitation with the Children during the summer of 2007. Further, rather than Mother impeding Father's time with the Children, the record reveals that on two occasions Father interfered with Mother's rightful custody of the Children, once when he took the Children to the Smoky Mountains for a week during Mother's custodial time, and once when he allowed the oldest child to remain at his residence rather than returning to Mother's residence at the end of Father's visitation time.

At trial, Father asserted that he was seeking a change of custody because:

> [Mother] don't ever do nothing right. She don't give me no love. She don't give me no reason - - in other words she doesn't show me nothing what the kids do in school. She doesn't give me their grades. Every time we make an agreement she don't never - - she don't never - - she'll come up with one plan and then change it.

Father also testified that he was basing his allegations of a material change of circumstance on:

> the way she does. She don't - - she does not treat the kids right.…She don't never tell them she loves them.…She never told them she loved them when I - - when we was together.…She talks bad - - she badmouths about all my family, calls us names.…She has told that right flat - - flat to my face.

However, Father admitted that his allegations about Mother never telling the Children that she loved them did not constitute a change in circumstances as he stated that Mother behaved in this manner when "we was together…."

The Trial Court also found that Mother had failed to communicate with Father regarding the Children's school records and extra-curricular activities. Even though the Parenting Plan gives Father the right to receive school records for the Children upon written request to the school and payment of reasonable duplicating costs, Father admitted that he never even once made a request to receive anything from the Children's school, and never had tried to contact the Children's school to find out about their grades or extracurricular activities. As Father has never attempted to avail himself of his rights to receive these records as provided for in the Parenting Plan,

we find his contention that Mother failed to communicate with him regarding these subjects to be unconvincing and misplaced.

The Trial Court also found that Mother was "riding four-wheelers without helmets while under the influence of alcohol…." The record on appeal, however, is devoid of evidence showing that Mother ever rode a four-wheeler while "under the influence of alcohol…." Rather, the testimony of Stevie Burns was that he had seen Mother and her new husband "drinking and running down the creek on the four wheelers…," without the Children, and that on one occasion he had seen Mother and her new husband drinking beer on a four-wheeler with the Children. The only other testimony regarding this subject was that of Father's niece, Megan Lashae Mackland, who testified that she had seen Mother and Mother's new husband drinking beer on the four wheeler while riding with the youngest child and that the Children were not wearing helmets while riding the four wheelers in the creek bank. The record on appeal is devoid of evidence that Mother was intoxicated or under the influence at any time whatsoever as no witness testified that Mother was intoxicated or under the influence.

Assuming Father's proof on this disputed factual issue is accepted, as the Trial Court did, we agree that Mother exercised poor judgment by allowing the Children to ride four-wheelers without helmets, and by her drinking a beer while riding a four-wheeler. However, an apparently isolated episode of poor judgment of this nature is insufficient to establish a material change of circumstance. If that were the case, no parent ever would be able to maintain custody of his or her children as parents are inherently human and fallible. A parent is not required to be perfect or error free in his/her parenting in order to avoid there being a material change of circumstances.

The evidence in the record on appeal does support the finding that Mother told the Children to call Father "Jeff" and Mother's new husband "daddy." Although Mother denied doing this, several witnesses testified to this fact including the oldest child. While this behavior is contrary to the letter and the spirit of the Parenting Plan and is unacceptable, this does not rise to the level of constituting a material change of circumstances. We believe that this behavior would be better handled by the Trial Court entering an order prohibiting Mother from (1) telling the Children to call anyone other than Father "daddy," "dad," or "father," and (2) telling the children to call Father "Jeff."

We cannot help but notice the timing of the events leading up to this appeal. Father's petition seeking to change custody was filed mere weeks after Mother filed her petition seeking to set aside the final divorce decree and obtain a distribution of Father's 401k account. Father admits that prior to filing his petition seeking a change of custody, things ran smoothly. In addition, several witnesses testified that the situation with regard to the Children changed after Father filed his petition seeking a change in custody. The record reveals that both parties have behaved in a childish manner towards each other when it comes to parenting their Children. We sincerely hope that both Father and Mother will realize that neither of them is acting in the best interest of their Children when they behave in a childish manner toward one another and that things will return to running smoothly as they did in the past.

Our careful and thorough *de novo* review of the record on appeal shows that Father failed to prove a material change of circumstances as the evidence preponderates against a finding of material change of circumstances. Therefore, we reverse that portion of the Trial Court's order modifying custody and reinstate the original Parenting Plan.

Next, we consider whether the Trial Court erred in failing to award Mother a judgment against Father for one-half of the unpaid medical bills and summer child care expenses. The Trial Court found that Father's failure to pay his portion of the medical expenses and summer child care expenses was not intentional, willful and/or deliberate and denied Mother's petition for contempt. However, Mother's petition for contempt also requested a judgment ordering Father to pay his portion of the unpaid medical bills and his portion of the unpaid child care expenses.

At trial, Father admitted that he was behind on paying his share of the Children's medical bills and alleged that Mother had not given those bills to him in a timely manner. Father testified that he was willing to follow the parties' agreement with regard to these bills if Mother provided them timely pursuant to the parties' agreement. Upon remand, we direct the Trial Court to take the steps necessary to determine the amount and enter a judgment against Father for his rightful portion of these bills, and to require Mother to provide such bills to Father in a timely manner in the future.

Finally, Father requests that this Court find Mother's appeal frivolous and award him attorney's fees. In the exercise of our discretion, we decline to hold this appeal frivolous and further decline to award either party attorney's fees.

Conclusion

The judgment of the Trial Court is affirmed as to the denial of relief from the final divorce decree under Tenn. R. Civ. P. 60.02. The judgment of the Trial Court is reversed as to the modification of the Parenting Plan. This cause is remanded to the Trial Court with the direction to take the steps necessary to determine the amount and then enter a judgment in favor of Mother ordering Father to pay his portion of the unpaid medical expenses and his portion of the unpaid child care expenses; for entry of an order forbidding Mother from telling the Children to call anyone other than Father "daddy," "dad," or "father," and from telling the children to call Father "Jeff;" and for collection of the costs below. The costs on appeal are assessed one-half against the Appellant, Donna Burns Beckham Casteel and her surety; and one-half against the Appellee, Jeff Beckham.

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D. MICHAEL SWINEY, JUDGE