IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 13, 2008 Session

JANE EVERETTE BURCHETT (NOW HOLT) v. JAMES THOMAS BURCHETT

Appeal from the Chancery Court for Montgomery County
No. D1-98-5070040 Laurence M. McMillan, Jr., Chancellor

No. M2008-00790-COA-R3-CV - Filed January 22, 2009

This appeal arises from Father's Petition for Modification of the Final Decree of Divorce seeking increased parenting time with the parties' minor child. The trial court found that Father had not proved that a material change in circumstances had occurred; nevertheless, the trial court, *sua sponte*, stated "the issue" was a question of interpretation, rather than modification, and awarded Father increased parenting time. Mother appeals. Having determined Father failed to prove a material change in circumstances and that his petition did not seek an interpretation of the Final Decree of Divorce, we reverse the decision to award Father increased parenting time and remand with instructions to reinstate the visitation schedule set forth in the Final Decree of Divorce.

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

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which RICHARD H. DINKINS, J., and DONALD P. HARRIS, SR. J., joined.

Roger A. Maness, Clarksville, Tennessee, for the appellant, Jane Everette Burchett (now Holt).

Steven T. Atkins, Clarksville, Tennessee, for the appellee, James Thomas Burchett.

OPINION

The marriage of Jane Everette Burchett (Mother) and James Thomas Burchett (Father) produced one child. The child was three years old at the time of her parents' divorce in 2000. The Marital Dissolution Agreement incorporated into the Final Decree of Divorce entered on March 27, 2000, provided that Mother would have custody of the parties' child and Father would have

> liberal visitation as can be worked out by the parties including, but not limited to, visitation every other weekend beginning Friday evening and continuing till Sunday evening at 6:00 P.M. The parties agree to split the holidays of Christmas and child's birthday for visitation purposes . . . [Father] shall have summertime or school break visitation of up to two (2) weeks per year.

The visitation schedule set forth in the Final Decree remained in effect without modification until Father's petition came on for hearing on December 4, 2007.

In Father's Petition for Modification he contended the circumstances since the entry of the Final Decree had changed in that the child is older and attends school, Father no longer lives with his parents, and Father's mother no longer provides daily care for the child, resulting in Father spending less time with the child. Mother responded to the petition by filing a Tenn. R. Civ. P. 12.02(6) motion to dismiss Father's Petition for Modification.[1] No action was taken on the motion to dismiss and Father's petition came on for an evidentiary hearing on December 4, 2007.

At the conclusion of the December 4, 2007 hearing on Father's Petition for Modification, the trial court found that Father had failed to prove by a preponderance of the evidence that a material change in circumstances had occurred and thereby denied his request for modification of the Final Decree. Nevertheless, the trial court found, *sua sponte*, that the issue before the court was one of interpretation of the Final Decree, not modification; whereupon the trial court made the finding that Mother's position was unreasonable and inconsistent with the express terms of the Final Decree and granted Father increased visitation during the school year. This appeal followed.

STANDARD OF REVIEW

This court reviews custody and visitation decisions *de novo* with a presumption that the trial court's findings of fact are correct unless the evidence preponderates otherwise. *Kendrick v. Shoemake*, 90 S.W.3d 566, 569 (Tenn. 2002); *Nichols v. Nichols*, 792 S.W.2d 713, 716 (Tenn.1990). Moreover, appellate courts are reluctant to second-guess a trial court's determination regarding custody and visitation. *Parker v. Parker*, 986 S.W.2d 557, 563 (Tenn. 1999). This is because of the broad discretion given trial courts in matters of child custody, visitation and related issues. *Id.*; *see also Nelson v. Nelson*, 66 S.W.3d 896, 901 (Tenn. Ct. App. 2001). Custody decisions often hinge on subtle factors, such as the parents' demeanor and credibility during the proceedings. *Adelsperger v. Adelsperger*, 970 S.W.2d 482, 485 (Tenn. Ct. App. 1997). Accordingly, trial courts have broad discretion to fashion custody and visitation arrangements that best suit the unique circumstances of each case. *Parker*, 986 S.W.2d at 563.

Furthermore, it is not the role of the appellate courts to "tweak [parenting plans] . . . in the hopes of achieving a more reasonable result than the trial court." *Eldridge v. Eldridge*, 42 S.W.3d 82, 88 (Tenn. 2001). This is particularly true when no error is evident from the record. *Id.* Thus, a trial court's decision regarding custody or visitation will be set aside only when it "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.*

[1] Father filed his Petition for Modification of the Final Decree of Divorce on May 20, 2003, and Mother filed a Tenn. R. Civ. P. 12.02(6) motion to dismiss on August 7, 2003. Mother's motion was never set for hearing and Father's petition was not heard until December 2007. Neither the record nor the parties' briefs explain the lengthy delay or why the case was set for hearing four years after the petition for modification was filed.

ANALYSIS

Once it becomes a final judgment, a valid custody order or residential placement schedule is *res judicata* as to the facts in existence or reasonably foreseeable when the decision was made. *Keisling v. Keisling*, 196 S.W.3d 703, 719 (Tenn. Ct. App. 2005); *Hoalcraft v. Smithson*, 19 S.W.3d 822, 828 (Tenn. Ct. App. 1999). Nevertheless, a custody and visitation order, or the residential schedule in a permanent parenting plan, remains within the control of the court and is subject to "such changes or modification as the exigencies of the case may require." Tenn. Code Ann. § 36-6-101(a)(1).

The Tennessee General Assembly established the requirements for modification, in recognition of the fact that the circumstances of children and their parents change, which sometimes requires adjustment of the existing parenting arrangement. When a petition to modify a parenting plan is presented, the threshold issue is whether there has been a material change in circumstances since the plan went into effect that was not reasonably anticipated when the decree was entered, and the change affects the child's well-being in a meaningful way.[2] *Kendrick v. Shoemake*, 90 S.W.3d 566, 570 (Tenn. 2002). If a material change in circumstances has occurred, it must then be determined whether modification of the plan is in the best interests of the child. *Marlow v. Parkinson*, 236 S.W.3d 744, 749 (Tenn. Ct. App. 2007) (citing *Kendrick*, 90 S.W.3d at 570; *Blair v. Badenhope*, 77 S.W.3d 137, 150 (Tenn. 2002)). If it is not proven that a material change in circumstances has occurred, the petition is to be denied. *See Blair*, 77 S.W.3d at 151 (affirming the judgment of the trial court not to grant the petition to modify the previous custody order based upon the trial court's finding that the evidence failed to show the existence of a material change in circumstances). Only after a threshold finding that a material change of circumstances has occurred is the court permitted to go on to make a determination as to the best interests of the child. *See Kendrick*, 90 S.W.3d at 570; *Curtis v. Hill*, 215 S.W.3d 836, 840 (Tenn. Ct. App. 2006). Therefore, if the petition is denied for failure to prove a material change of circumstance, modification is not to be considered. *See Curtis*, 215 S.W.3d at 840; *Caudill v. Foley*, 21 S.W.3d 203, 213 (Tenn. Ct. App. 1999).

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[2] (B) 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) (Supp. 2008).

The trial court found that Father had not proven by a preponderance of the evidence that "a material change of circumstances not reasonably anticipated by the parties as of the date of the final decree has occurred, and therefore his request to modify the final decree . . . is hereby denied."[3] The only relief sought by Father in his petition was based upon an alleged material change of circumstances. Significantly, Father did not contend in his petition that the Final Decree was ambiguous or subject to interpretation, and he did not ask the court to interpret the visitation schedule. Therefore, once the trial court denied the petition for modification, there was nothing left for the trial court to do other than to reaffirm the fact that the visitation schedule as set forth in the Final Decree remained in effect. Nevertheless, the trial court, *sua sponte,* determined that the visitation schedule needed interpretation and ordered that Father "should enjoy each Wednesday night with the minor child beginning the first Wednesday following resumption of the school year following the Christmas break. The father shall make arrangements to pick up the child from school on Wednesday and return the child to school on Thursday mornings."

The relevant portion of the Final Decree clearly stated that Father's visitation would occur "every other weekend beginning Friday evening and continuing till Sunday evening at 6:00 P.M. The parties agree to split the holidays of Christmas and child's birthday for visitation purposes . . . [Father] shall have summertime or school break visitation of up to two (2) weeks per year." We find nothing ambiguous about the visitation schedule, and thus we are unable to "interpret" the Final Decree in a manner to justify the award of an additional night of parenting time "every week." Therefore, the trial court's decision to interpret the Final Decree and to award Father additional parenting time is reversed.

IN CONCLUSION

Based on the foregoing, we affirm the trial court's finding that Father had not proven a material change of circumstances not reasonably anticipated by the parties as of the date of the Final Decree, and we affirm the trial court's ruling that Father's request to modify the Final Decree be denied. We, however, reverse the trial court's determination that the Final Decree was subject to interpretation and remand with instructions for the trial court to reinstate visitation as stated in the Final Decree of Divorce and dismiss Father's petition. Costs of appeal are assessed against Father.

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FRANK G. CLEMENT, JR., JUDGE

[3] Neither party appealed this finding, and we would add that the trial court's finding is fully supported by the record.