

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
December 3, 2008 Session

INOCENCIO R. SIERRA ORTEGA v. ALMA A. FLORES

**Direct Appeal from the Juvenile Court for Coffee County
No. 07J-0319 Timothy R. Brock, Judge**

No. M2008-00833-COA-R3-JV - Filed March 4, 2009

This is a modification of child custody case. The trial court granted Father's motion for directed verdict and denied Mother's petition to modify the child custody order which awarded joint custody and set parenting time for the parties' infant child at alternate three month intervals. Mother appeals. We reverse and remand for entry of judgment consistent with this Opinion.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Reversed; and
Remanded**

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

Cynthia A. Cheatham, Manchester, Tennessee, for the appellant, Alma A. Flores.

Eric J. Burch, Manchester, Tennessee, for the appellee, Inocencio R. Sierra Ortega.

MEMORANDUM OPINION¹

The parties, Inocencio R. Sierra Ortega (Mr. Ortega) and Alma A. Flores (Ms. Flores), are the unmarried parents of Ana Camila Sierra Ortega (Ana), born October 17, 2006, in Coffee County, Tennessee. In January 2007, Ms. Flores, an immigrant who speaks very little English, moved with Ana to Maryland when Ana was approximately three months old. Mr. Ortega filed a petition for legitimacy and primary residential parent status in the Coffee County Juvenile Court on February 12, 2007.

¹**Rule 10. Memorandum Opinion**

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION", shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

In July 2007, Ms. Flores filed a motion to transfer the matter to Maryland. In her motion, she asserted that Mr. Ortega had been physically abusive to her and that she and Ana had moved to Maryland to live with her sister. She further asserted that Mr. Ortega had not requested legitimization of Ana prior to the move, and that she had been the sole custodian and caretaker of the child. Ms. Flores also asserted that Mr. Ortega began to call and threaten her and her family, and that she therefore sought an order of protection in the District Court of Maryland for Arundel County on January 2007. According to Ms. Flores' motion to transfer, she also "ask[ed] the Court in Maryland to address issues regarding custody and support[.]" She asserted Mr. Ortega was not served because the Coffee County Sheriff could not locate him. Ms. Flores asserted that, under the Uniform Child Custody Jurisdiction Enforcement Act as codified at Tennessee Code Annotated § 36-6-201 *et. seq.*, Maryland had "home state" jurisdiction where she and Ana had resided in Maryland for at least six consecutive months immediately before the commencement of the custody proceeding filed by Mr. Ortega and where she was the sole custodian of Ana under Tennessee Code Annotated § 36-2-303. Ms. Flores' petition for order of protection was dismissed without prejudice on August 12, 2007.

The matter was set to be heard in the Coffee County Juvenile Court on August 20, 2007. On August 13, Ms. Flores filed a motion asking the court to rule on the her pleading objecting to jurisdiction and requesting a transfer of the matter to Maryland. Following hearings on April 8 and 10, 2008, the trial court determined Tennessee was the home state of Ana at the time Mr. Ortega filed his petition for custody and awarded the parties joint custody.² The court found that Mr. Ortega had not committed acts of domestic violence against Ms. Flores or her family, and that both parents were equally fit to care for Ana. The trial court determined it was in Ana's best interest to have an equal relationship with both parents, and found Mr. Ortega's income to be \$600 per week and Ms. Flores' income to be \$450 per week for child support purposes.

Although the technical record transmitted to this Court does not contain a permanent parenting plan signed by the trial court, the parties do not dispute that the trial court set child support and established a parenting schedule of alternate three month intervals. The trial court's order apparently provided for one week of visitation for each parent during the interval in which Ana resided with the other parent, and for weekend visitation provided that the non-residential parent traveled to the other's home state.

²Tennessee Code Annotated 36-6-216 provides, in relevant part:

(a) Except as otherwise provided in § 36-6-219, a court of this state has jurisdiction to make an initial child custody determination only if:

(1) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six (6) months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state;

When Mr. Ortega filed his petition in February 2007, Tennessee was Ana's home state where she was born in Tennessee and resided in Tennessee from birth until being removed to Maryland, where she had resided for less than one month as of February 2007.

In January 2008, Ms. Flores filed a petition to modify or vacate the September 2007 order and for an immediate temporary injunction. In her petition, Ms. Flores asserted that the visitation arrangement had “proved disastrous.” She alleged that Ana did not adapt to being removed from her mother’s care for three months, and that when Ana returned to Maryland she was “jumpy and fearful” and that she “appeared to have lost developmental milestones in the areas of speech and motor skills.” She also alleged that Mr. Ortega’s household situation was inappropriate, that Mr. Ortega had failed to return Ana as directed in the parenting plan, and that Ana’s health and “overall condition” had suffered during the three months spent in Mr. Ortega’s care. She prayed for a temporary restraining order suspending the visitation arrangement pending expert advice and for a visitation schedule that did not remove Ana for three months at a time. Mr. Ortega answered, denying Ms. Flores’ allegations and moving for dismissal for failure to state a claim. In his accompanying memorandum, Mr. Ortega asserted that there had been no material change of circumstance since entry of the trial court’s order warranting a change in the custody arrangement. He counter-petitioned asserting that, should the court find a material change in circumstance, he should be named primary residential parent or, in the alternative, that the court should require Ms. Flores to return to Coffee County to co-parent with him.

The trial court heard the matter on April 10, 2008, denied Ms. Flores’ request for temporary injunction and granted Mr. Ortega’s oral motion for directed verdict. In its final order of April 22, 2008, the trial court stated that it was dismissing Ms. Flores’ petition because it found no material substantial change in circumstances affecting the child. Ms. Flores filed a timely notice of appeal to this Court.

Issues Presented

Ms. Flores raises the following issues for our review:

- (1) Was the order of custody and visitation filed September 19, 2007, a final order?
- (2) Did the trial court err in refusing to modify a custody and visitation order granting joint custody to the parents living in two different states?

Standard of Review

In the trial court’s order dismissing Ms. Flores’ petition, the trial court stated that it was granting Mr. Ortega’s oral motion for directed verdict. Directed verdicts, however, are not appropriate in bench trials. *Thurmon v. Sellers*, 62 S.W.3d 145, 151 n. 2 (Tenn. Ct. App. 2001). The proper motion in a bench trial is a motion for involuntary dismissal at the conclusion of the plaintiff’s proof in accordance with Tennessee Rule of Civil Procedure 41.02. *Id.* Accordingly, we will construe the trial court’s order as if it were an order granting a Rule 41.02 dismissal.

When considering a motion for involuntary dismissal made at the close of plaintiff's proof, "the trial court must impartially weigh the evidence as though it were making findings of fact and conclusions of law after all the evidence has been presented." *Building Materials Corp. v. Britt*, 211 S.W.3d 706, 711 (Tenn. 2007). The trial court should grant the motion if the plaintiff has failed to demonstrate his or her right to relief by a preponderance of the evidence in consideration of the facts as found by the court and under the applicable law. *Id.*

Our review of the findings of fact of a trial court sitting without a jury is *de novo* on the record, with a presumption of correctness unless the evidence preponderates otherwise. *Id.*; Tenn. R. App. P. 13(d). We review the trial court's conclusions of law *de novo*, with no presumption of correctness. *Id.*

Analysis

On appeal, Ms. Flores asserts the trial court erred by refusing to admit evidence of facts occurring prior to the September 2007 order because that order was not final but temporary. She asserts the trial courts statement: "Let's try that for a year and see how that works. If there is [sic] any problems, come back" evidences the temporary nature of the court's order. She further asserts the trial court erred by awarding joint custody where the parties did not propose or agree to it, and where it is not in Ana's best interest.

Upon review of the record, we find that the order entered by the trial court in September 2007 was a final order although, as noted above, no parenting plan has been transmitted to this Court. We therefore turn to whether the trial court erred by granting Mr. Ortega's motion for involuntary dismissal.

The court may modify a child custody or visitation order when the petitioner proves by a preponderance of the evidence that a substantial and material change in circumstance has occurred such that a change to the custody or visitation order would be in the best interest of the child. Tenn. Code Ann. § 36-6-101(a)(2)(B)-(C)(2005 & Supp. 2008). A showing of a substantial risk of harm to the child is not required. *Id.* A material change of circumstance may include circumstances that make the parenting plan no longer in the best interest of the child. *Id.* When determining whether a material change in circumstance has occurred, the court must consider several relevant considerations: (1) whether a change has occurred after the entry of the order sought to be modified; (2) whether a change was not known or reasonably anticipated when the order was entered; and (3) whether a change is one that affects the child's well-being in a meaningful way. *Cranston v. Combs*, 106 S.W.3d 641, 644 (Tenn. 2003)(citations omitted). If a change has occurred, the court must determine whether a modification of the plan is in the best interest of the child. Tenn. Code Ann. § 36-6-106. To assess what arrangement is in the child's best interest, the court shall consider the relevant factors provided by Tennessee Code Annotated § 36-6-106(a).

As the courts have noted, a stable and secure environment is in the best interests of a child. *E.g., Blair v. Badenhope*, 77 S.W.3d 137, 149 (Tenn. 2002). The three months on/three months off

custody/visitation schedule set by the trial court in this case provides Ana with neither stability nor security. The record in this case contains the affidavits and depositions of Ana's treating pediatricians, one in Tennessee and the other in Maryland. The pediatricians agreed that the custody/visitation schedule set by the trial court would have serious detrimental effects on a child as young as Ana. They stated that, according to the scientific literature, such a custody/visitation schedule would cause "emotional, behavioral and psychological harm, lasting into adulthood" which would be "possibly irreversible," including difficulties with bonding and trust and behavioral problems. Ana's treating physician in Tennessee stated that, although he could not testify as to the veracity of Ms. Flores, Ana's reactions as described by Ms. Flores were "consistent with a disorganized pattern of development and insecurity predicted by studies on parent-infant separation." The physicians recommended that Ana remain with her mother.

Ana's reaction to the trial court's visitation schedule, in combination with the post-order examinations and evaluations of Ana by her pediatricians, constitute a material change of circumstance warranting a modification of the visitation schedule. The three months on/three months off custody/visitation schedule ordered by the court could not reasonably have been anticipated in an order applicable to a child as young as Ana, and we are not surprised that it has not proven successful. Upon review of the record, we have determined that modification of the custody and visitation schedule is in Ana's best interest.

In its September 2007 order, the trial court determined that Mr. Ortega and Ms. Flores were equally fit parents. In light of this comparative fitness analysis, the sole remaining determination is that of the best interest of the child. Having reviewed the record, particularly the testimony of Ana's two treating physicians, we are convinced that it is in Ana's best interest that Ms. Flores be named primary residential parent. This matter is remanded to the trial court to establish an alternate parenting/visitation schedule that is appropriate in light of the circumstances.

Holding

We reverse the order of the trial court dismissing this matter, and find that modification of the September 2007 custody/visitation order is in Ana's best interest. This matter is remanded to the trial court for entry of a judgment naming Ms. Flores primary residential parent and establishing an alternate parenting/visitation schedule for Mr. Ortega. Costs of this appeal are taxed to the Appellee, Inocencio R. Sierra Ortega.

DAVID R. FARMER, JUDGE