

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 12, 2009 Session

IN RE Valerie T.

**Appeal from the Juvenile Court for Knox County
No. 40463 Timothy E. Irwin, Judge**

No. E2007-02517-COA-R3-JV - FILED MAY 13, 2009

This appeal arises out of a change of custody petition filed by the father. In the petition, the father asserted that a change of the primary residential custodian was warranted because his daughter was dependent or neglected and a material change of circumstances had occurred since the Juvenile Court's most recent order. The material change in circumstances cited by the father was the mother's failure to provide a stable home environment and consistent school enrollment for the child. After a hearing, the Referee for the Juvenile Court dismissed the dependant or neglected child claim for lack of proof; she found, however, that a material change of circumstances had occurred, established the father as the primary residential parent, and gave the mother alternate parenting time. When the mother appealed the Referee's findings, the Juvenile Court Judge conducted a hearing in this matter, after which the findings of the Referee were affirmed. The mother appealed. We affirm.

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

JOHN W. McCLARTY, J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR. and D. MICHAEL SWINEY, JJ., joined.

Cynthia J.B., Columbus, Georgia, the Appellant, pro se.

Theodore Kern, Knoxville, Tennessee, for the Appellee, Michael T.

OPINION

I. BACKGROUND

Michael T.¹ (“Father”) and Cynthia J.B. (“Mother”) are the parents of Valerie T. (“the Child”), who was born December 31, 1995, and is now 13 years old. Father and Mother were never married and terminated their relationship approximately six months after the Child’s birth. Mother was the Child’s primary residential parent until July 13, 2006, when Father filed an emergency petition for change of custody.

In the petition, Father asserted “that [Valerie T.] is a dependent or neglected child in [Mother’s] care, in that [Mother] fails to provide a stable home environment . . . , fails to provide a stable school environment . . . and fails to ensure the child attends school on a regular basis.” Father further asserted in his petition “that a substantial and material change in circumstances has occurred since the date of [the Court’s] most recent orders which warrant a change of primary residential custodian.”

More specifically, Father asserted “that [Mother] has moved numerous times to different cities and states, as a result of which the child has not been provided with a stable home environment, and that the child has frequently been required to change schools, to the point that the lack of stability has had a significant and adverse effect on her education.” Father’s petition went on to state “that the child will be irreparably harmed if left in the primary residential custody of [Mother] because the child will continue to be exposed to numerous moves to different communities and will be deprived of a stable living environment and a stable school environment”

A. Hearing Before Juvenile Court Referee

A hearing on the Father’s petition was held on three separate court dates during October 2006, before the Juvenile Court’s Referee. Following the presentation of the proof, the Referee made comprehensive findings of facts and conclusions of law. The pertinent portions of the Referee’s findings of facts are as follows:

The Father filed the **Emergency Petition for Change of Custody** in July 2006 after the child asked the father on the first night of her summer vacation at the father and step-mother’s home what the father had to do to enable the child to live with him. The child noted that her adult half-brother [Eric C.] had been allowed to live with his father when he was a minor and she did not understand why she was not allowed to remain with her father. The father subsequently received school records from Georgia in July 2006 (which he had requested from the school in December 2005 while the child was living in Georgia with the mother and step-father) that showed significant problems

¹First names and last initials will be used to protect the anonymity of the child in this matter.

for the child with failing grades, excessive absences and tardies, and warnings to the mother from Georgia school officials that legal action would occur if the child's attendance did not improve. The mother and child moved to Knox County in April 2006, but the father was aware the mother was considering a return to Georgia with the child from conversations with the mother in May 2006 when the mother inquired about the child's possible baptism in the father's Catholic faith which would reduce the tuition for the child to attend a private Catholic school in Georgia upon her return. The father indicated he had been attempting to communicate with the mother about his concerns for the child during the preceding eight months; however, the mother was not aware the father was considering filing a **Petition for Custody**.

The locations the mother lived with the child since the mother's marriage to her husband [Dr. Roger B.] in February 2000 through the current date (October 2006) are as follows: (1) Knox County, Tennessee (with the step-father until the mother obtained a teaching position in North Carolina in 2001), (2) North Carolina (with the step-father approximately six months in 2001), (3) Maryland (with the step-father in 2001-2002 for six months when the step-father obtained temporary employment at a University), (4) Nashville, Tennessee (for one year in 2002 when the mother obtained a teaching position while the step-father remained in Maryland), (5) Wisconsin (in 2003 for one year with the step-father when the step-father obtained a temporary teaching position), (6) Knox County, Tennessee (in 2004 for one year with the step-father when the step-father's position ended in Wisconsin and the mother subsequently obtained a teaching position in Loudon County, Tennessee), (7) Nashville, Tennessee (in 2005 for a few months when the mother was offered a teaching position until the step-father obtained a tenure-track position at a college in Georgia), (8) Georgia (from September 2005 through April 2006 when the mother returned to Knoxville, Tennessee, while the step-father continued to reside in Georgia because the mother was unable to find employment in Georgia and did not like the school system in Georgia) and (9) Knox County, Tennessee (current residence since April 2006 while the step-father continues to reside in Georgia in his tenure-track teaching position). When the mother and step-father were married, the step-father was completing his doctoral dissertation in geography at the University of Tennessee and the mother was certified to teach kindergarten through sixth grade. Neither the mother nor the step-father was employed at the time of their marriage and the numerous relocations with employment began when the child entered kindergarten.

The mother and step-father moved to North Carolina when the mother obtained a teaching position through a posting on the internet and the child entered kindergarten in North Carolina. The child attended the first semester of kindergarten in North Carolina with three absences contained in school records. The mother reported the child did well in school and they lived within close proximity to the school. The mother and the step-father moved to Maryland from North Carolina due to a teaching position at a University available for the step-father and the mother obtained a substitute teaching position. The child was enrolled for the second semester of kindergarten in Maryland and had twenty unexcused absences from school. The mother received a letter from the child's Maryland school officials expressing concern about the number of absences and the consequences to the mother and the child if the attendance issues continued. The mother explained that the child's excessive absences were due to the deaths of the child's maternal grandfather and maternal great-grandmother in Tennessee within a few weeks of each other around the child's spring break from school. The mother indicated she had the child tested to ensure she had mastered her kindergarten skills and determined the child could be promoted to the first grade. The mother stated she had no reason to be concerned about the excessive number of days the child was absent from school. While the mother and child were residing in Maryland with the step-father during the second semester of kindergarten, the mother and father mediated an agreed change in the father's visitation because the father had just moved to Virginia and the parents did not want to return to Court to address the visitation issues. The mother and father agreed for the father to have additional visitation during the summer months. The father indicates he feels the mother did not mediate the changes in his visitation in good faith because the father was not aware of subsequent moves anticipated by the mother with the child.

The mother and child moved to Nashville, Tennessee, where the child was enrolled in the first grade while the step-father continued to reside in Maryland. The mother had been unable to find full-time employment in Maryland and obtained a teaching position with Davidson County Schools. The mother and child resided in Nashville for one year while the child completed first grade. The mother lived approximately 1.5 miles from the school and was employed 2 miles from the school. The child had eleven unexcused absences during the school year; however, the mother does not remember the reasons for the absences. The child was enrolled in the second grade in Nashville, Tennessee, for two weeks prior to the mother and child's move to Wisconsin where the step-father had been hired for one year at a University and where the mother also located a teaching position. The child remained in Wisconsin with the mother and step-father for the entire second grade but had 22 tardies and 7 unexcused absences during the school year.

The mother had no explanation for the child's attendance issues except that it was very cold in Wisconsin.

When the step-father's position in Wisconsin terminated after one year, the mother, the step-father, and the child relocated to Knoxville, Tennessee, where the mother found a teaching position in Loudon County and enrolled the child in A.L.Lotts school in Knox County. The step-father did not secure a full-time teaching position in Knox County, but had part-time employment at the University of Tennessee. The child began the third grade at A.L.Lotts School and remained in that school program for four grading periods. The child did not perform well academically and had a total of 15 absences and 16 tardies. The mother attributed the teaching method utilized by the child's teacher as the reason the child was not performing well academically and explained that traffic congestion near the school, a flu outbreak, and her employment in Loudon County were the reasons for the child's attendance issues. The mother requested and was granted a transfer for the child to another teacher at A.L.Lotts, however, the same teaching approach objected to by the mother was also used by the second teacher. The school informed the mother of concerns regarding the child's attendance at the end of the fourth grading period and concerns that the child would have to repeat the third grade if the attendance issues were not resolved. The mother obtained permission from Loudon County school officials to enroll the child in the school where the mother was employed for the remainder of the third grade.

The mother accepted a teaching position in Nashville with an increase in salary when the mother's teaching position in Loudon County was not renewed. The mother and child moved to Davidson County where the child was enrolled in the fourth grade. The mother was unable to transport the child to the school zoned for their residence and then commute fifteen miles to the school where the mother was employed. The mother obtained permission to transfer the child to the mother's school; however, the mother's continued employment at that school was ended due to lower than anticipated enrollment and the mother began traveling to different schools in the district. The mother was unable to continue the child in the second school and decided to resign her position in Nashville and move to Georgia in September 2005 with the step-father who had been hired for his current professorship at a Georgia University. The child was enrolled in the fourth grade in Georgia from September 2005 until April 2006. The mother never found employment in Georgia. The child was failing academically in Georgia and had continued attendance problems. The mother received notices from the school officials in Georgia regarding the child's attendance with concerns regarding the child's ability to promote to the fifth grade. The mother indicated she did not approve of the Georgia teaching methods – the child was expected to change

classes for each subject as if in high school. The mother acknowledged that she did not provide notes to the school regarding the child's absences or tardy arrivals. The mother decided to relocate with the child to Knox County, Tennessee, in April 2006, and the child was enrolled in Farragut Intermediate School (FIS). The child's attendance has been consistent and the child is making passing grades since her enrollment at FIS.

The mother admitted she has not worked a lot with the child on the child's school assignments even during the periods of time when the mother was not employed (the child had earlier acknowledged to the Court that her mother was too busy to help her with homework). The mother minimizes the impact of repeated unexcused absences and tardies for the child despite the child's concerns that she was labeled as always being late. The step-father testified he had advised the mother to ensure the child was attending school regularly and on time when he observed the notices from schools regarding attendance issues and the child's failing grades. The mother identified no significant concerns regarding the child's academic performance because the child's periodic proficiency testing indicates the child is generally performing in the average range and the child has not been held back in school. The mother testified she is currently staying in more frequent contact with the child's teachers at Farragut Intermediate School to monitor the child's performance. The child has no unexcused absences and no tardies during the current school year beginning August 2006. Attendance issues have been reported to the mother in four different states (Maryland, Tennessee, Wisconsin and Georgia) where the child was enrolled in school. The mother did not ensure the child was attending school regularly until the current custody issues were raised by the father before this Court.

In her Conclusions of Law, the Referee made additional findings which bear listing in this opinion. These findings are as follows:

Although the proof presented to the Court does not substantiate a finding of dependence and neglect of the child by the mother, the proof does establish a change of circumstances for the child since the entry of the Order in 2002 that has altered the situation in a material way that affects the welfare of the child resulting from the child's response to the numerous relocations and changes in school enrollment occurring while in the custody of the mother. The Order entered in 2002 continued the child in the residential custody of the mother with co-parenting time established for the father. The subsequent modification of the father's co-parenting time by the parents' agreement took into consideration the parents' moves to different states, but did not anticipate the impact the continued relocations would have on the child's progress and

continued welfare. The mother, the maternal grandmother, and the child's adult half-brother all indicated that the frequent moves by the mother had a positive influence on the child. The maternal grandmother compared the child's circumstances to her own childhood when she was required to live in different states in one year and viewed her granddaughter's relocations as a non-issue. The mother frequently stated the child enjoyed moving to new locations, having new experiences, and making new friends – the child had never told her mother she did not want to move (although, the mother did admit the child has stated since the last hearing on 10-10-06 that she does not want to return to Georgia). The mother views the child as having an outgoing personality and able to adapt to new circumstances without difficulty. The child's adult brother originally indicated he had remained in the mother's custody until he graduated from high school in 2003; however, the adult sibling subsequently admitted that he had moved into his father's home when his mother and half-sister moved to North Carolina in 2001 so he could continue in school in Knox County without interruption. The child was aware of the arrangements agreed to for her half-brother to remain with his father in Tennessee while the child was required to move frequently to new locations with her mother. The child's school performance has steadily declined while residing with the mother with concerns that the child would not be promoted and that legal action would be brought against the mother because of attendance issues. The mother is a certified kindergarten through sixth grade teacher married to a college professor; however, academic performance and school attendance have not been a priority in the mother's household.

Although the child's educational issues are an important factor in determining a change in circumstances affecting the child, the child's emotional well-being is also a circumstance to be considered by the Court. The child became so distraught in November 2005 after boarding an airplane to return to her mother in Georgia following visitation with the father and step-mother in Virginia that the pilot had to bring the father onto the plane to calm the child before the flight could depart. The child has acknowledged to her mother and her maternal grandmother (while they were questioning the child before and after the Court proceedings were initiated) that she wanted to live with her father. The child approached her father requesting that he obtain custody of her. The child has expressed to her Guardian ad Litem that she desires a "stable" home, she knows what a stable home is, and she has experienced that stability with her father.

The child's needs have clearly been overlooked by the mother and maternal relatives in their large extended family where "everyone wants attention and everyone talks over everybody else." The mother and the maternal

grandmother have transferred to the child their own experiences with frequent moves to different locations without considering that the child is unique in how she has experienced and internalized the impact of frequent relocations and the lack of stability in her mother's home.

The step-father acknowledged arguments in front of the child with the mother, but indicated that the arguing "did not progress to tears." The mother testified she and the step-father did not argue. The step-mother recalled an evening meal with the child during the child's summer visitation when the child assumed a posture suggesting that she was fearful an argument would erupt between the father and step-mother while they were discussing a new recipe because the mother and step-father's discussions end in arguments. The mother refused to respond to the question asked by the father's attorney during cross-examination regarding her future plans to live with her husband by stating that the information was none of the attorney's business. Upon further inquiry, the mother stated that she was planning to remain in Knox County with the child and had no plans to relocate to Georgia where her husband continues to reside. The mother informed the father in May 2006 of her intention to return to Georgia with the child and the step-father indicated his preference for the mother to return to Georgia. The mother filed for divorce from the step-father in 2002 due to their inability to find employment in the same locations, but subsequently withdrew the **Petition**. [Eric C.] (the child's adult half-brother) was not aware a **Petition for Divorce** had been filed. The mother's future plans for herself and her daughter are uncertain regarding her husband and the location of her residence.

The Referee determined that a change in circumstances had occurred that affects the Child in a material way and went on to determine whether a modification in the parenting agreement is in the Child's best interest. She considered the factors listed in T.C.A. §§ 36-6-101(a) and 36-6-404(b). The Referee's consideration of these factors are as follows:

- a. THE LOVE, AFFECTION, AND EMOTIONAL TIES EXISTING BETWEEN THE PARENTS AND THE CHILD – The proof clearly establishes that the child is bonded to her mother, her father, and her step-mother. The father has been an active parent in the child's life and has maintained regular contact with the child. The step-mother described a strong, loving relationship with the child which was unintentionally verified by the mother when the mother showed the Court scrapbooks created solely by the child – the step-mother had previously testified that she does scrap booking with the child and the child identified an arts and crafts room at the father and step-mother's home. The mother acknowledges that the father needs to be in the child's life and the father recognizes that the child is very bonded to the mother. The step-father described his relationship with the child as "OK," however,

the child stated the step-father would help her with homework if he were available and he could assist her with playing the violin since he played the guitar. Both parents are equally favored in this analysis; however, the child's relationship with the step-mother appears more bonded than the child's relationship with the step-father.

b. THE DISPOSITION OF THE PARENTS TO PROVIDE THE CHILD WITH FOOD, CLOTHING, MEDICAL CARE, EDUCATION, AND OTHER NECESSARY CARE AND THE DEGREE TO WHICH A PARENT HAS BEEN THE PRIMARY CAREGIVER. – The mother has been the child's primary caregiver since birth, however, the father has consistently been a significant part of the child's life. No information has been presented to the court indicating the child would not receive the basic necessities while residing with either parent including adequate food, clothing, and shelter. The mother has appeared to support the child financially despite periods of unemployment; however, the father has provided child support to the mother to assist with the child's care. The mother's failure to carefully monitor the child's educational performance and ensure the child's school attendance results in the father having the advantage in the comparative fitness analysis regarding this factor. The father has assisted the child during the summer vacation time at the father's home with academic deficiencies identified for the child. The father has private school available for the child with a reduced student to teacher ratio to enable the child to receive more individualized attention and gain the academic ground she has lost due to the frequent relocations and problems with school attendance while residing with the mother. The father has obtained information from the various schools regarding the child's academic performance and attendance, including direct contact with the child's teachers to monitor the child's progress. The father has consistently maintained his interest and concerns regarding the child's education in comparison to the mother's serious lack of attention to the child's educational needs.

c. THE IMPORTANCE OF CONTINUITY IN THE CHILD'S LIFE AND THE LENGTH OF TIME THE CHILD HAS LIVED IN A STABLE, SATISFACTORY ENVIRONMENT -- This factor weighs heavily against the mother and in favor of the father. The child has moved eight times with the mother since 2001 . . . The child has not benefitted from the numerous relocations as suggested by the mother and as clearly demonstrated by the child's behavior. The child has sought the stability with her father and step-mother during visitation that the mother has failed to provide during the preceding five years. The mother's testimony regarding her future plans continues to perpetuate the uncertainty of the mother's ability to recognize or focus on the child's needs. The father and step-mother have been married since 2003 and have one child together [Aubrey T.], [date or birth: 7-21-04]. The father and step-mother have a stable employment history with the same employer and are financially able to assume responsibility for the child. The child is very bonded to her younger half-sister (which is acknowledged by the mother). The father and step-mother both arrange time alone with the child during her summer visitation

with the father. The child has contact with the father and step-mother's extended relatives during her summer visitation and has established a relationship with those individuals.² The child's adult half-brother is an engineering student at the University of Tennessee, but continues to have contact with the child by phone and during his visits to the mother's residence. The child's maternal grandmother and step-grandfather reside close to the mother and the child and have had regular contact with the child since her return to Knox County in April 2006. The child is bonded to her maternal relatives, although the maternal grandmother, the half-brother, and the mother all describe the maternal family members as attention seeking and talking over each other which could create an environment in which the child's needs are easily overlooked.

d. THE STABILITY OF THE FAMILY UNIT OF THE PARENTS -- . . . Due to the availability of the extended family with the father for greater interaction with the child, this factor weighs more favorably with the father.

* * *

f. THE HOME, SCHOOL, AND COMMUNITY RECORD OF THE CHILD – The school record of the child with the mother indicates academic difficulties stemming from lack of consistent attendance and lack of involvement by the mother to ensure the child's academic success. The mother's involvement with the child's various school systems has frequently been contentious. The mother has minimized the impact of attendance issues on the child's academic performance to the child's detriment. The child has not been a behavioral problem at any of the schools she has attended and has not been described as exhibiting behavior problems in the home of her father or her mother. The child has not been required to repeat any academic grades, however, retaining the child has been considered on at least two occasions from the testimony presented. For the child to progress to her full potential, her education must be a priority. The father's willingness [to] focus on the child's education has been established by the proof presented, however, the mother's willingness to ensure educational success for the child has only recently been demonstrated with the child's attendance and grades being monitored by the Court. The ability and willingness to ensure the steadfast improvement in the child's educational record weighs in favor of the father.

g. THE REASONABLE PREFERENCE OF THE CHILD IF TWELVE (12) YEARS OF AGE OR OLDER – The child will be eleven years of age on December 31, 2006. The child has stated her preference to reside with her father to the

²The parents of Lori T. ("Stepmother") were designated as sponsors during the Child's baptism in the Catholic Church in July 2006. The paternal grandmother lives in close proximity to Father and Stepmother and has regular contact with the Child.

Guardian ad Litem, to the father and step-mother, to the mother, and to the maternal grandmother. . . . The child has expressed a preference which shall be considered by the Court.

* * *

j. EACH PARENT’S PAST AND POTENTIAL FOR FUTURE PERFORMANCE OF PARENTING RESPONSIBILITIES, INCLUDING THE WILLINGNESS AND ABILITY OF EACH OF THE PARENTS TO FACILITATE AND ENCOURAGE A CLOSE AND CONTINUING PARENT-CHILD RELATIONSHIP BETWEEN THE CHILD AND THE OTHER PARENT, CONSISTENT WITH THE BEST INTEREST OF THE CHILD – . . . Clearly, the parents have not demonstrated an ability to communicate with each other since their reported modification of the father’s visitation. . . . The father has expressed his willingness to make information available to the mother regarding the child and the father has not previously restricted the mother’s access to the child while the child was visiting with the father [like Mother has done]. This factor is more favorable with the father.

k. THE EMOTIONAL NEEDS AND DEVELOPMENTAL LEVEL OF THE CHILD – The child requires individualized attention which the father and step-mother have been providing for the child. The child wants a stable environment and recognizes that her father and step-mother provide that environment for her. The mother does not recognize the impact her lack of stability [h]as had on the child and continues to insist the child has benefitted from the frequent relocations and has not suffered from the attendance issues with school. Despite the mother’s training as an educator, the mother has failed to identify or focus on the child’s educational or emotional needs. This factor weighs in favor of the father.

* * *

The Referee concluded in her findings of facts and the conclusions of law that the proof established a change in circumstances had altered the Child’s situation in a material way that affects the welfare of the Child and that a change in custody was in the Child’s best interest. She then ordered that the petition alleging dependency and neglect be dismissed and granted the petition for change of custody based upon a material change in circumstances. She granted physical custody of the Child to the Father with co-parenting rights to Mother.

Mother, pursuant to Rule 4(c)(1) of the Rules of Juvenile Procedure, requested and was granted an appeal and rehearing before the Juvenile Court Judge.

B. Hearing Before Juvenile Court's Presiding Judge

The case was heard in July 2007 de novo before the Juvenile Court's presiding judge. During the hearing, Donna Jean Lang, the child's fifth grade teacher at Holy Cross Academy, a private school in Fredericksburg, Virginia, testified that the child came into her class with the following educational deficits: had never learned to write in cursive, a skill normally acquired in the third grade; had not mastered basic math (addition, subtraction, multiplication, and division), skills normally acquired by fourth grade; lacked basic phonics skills; was deficient in reading skills; and was below grade level in sentence structure. Ms. Lang stated that the Child, while at Holy Cross, attended school regularly, was very attentive, and worked hard, but struggled to keep up with the her peers in the class. The teacher opined that the Child's educational development had been affected by frequent absences from school in prior years and by the lack of consistency which occurred due to changing schools. To help address the Child's educational deficiencies, Ms. Lang developed a "student assistance plan." She further testified that Father and Stepmother also had made special efforts to help integrate the Child into the Holy Cross community. The teacher indicated that the Child engaged in extra-curricular activities and was well-liked at the school. According to Ms. Lang, because the Child had shown so much improvement during her fifth grade year at Holy Cross, she was chosen for a presidential educational achievement award -- an honor granted to only three students in a school year. As for contact with Mother, Ms. Lang noted that Mother had requested to meet with her, but had never shown up at the scheduled times. She testified, however, that while a one-on-one meeting with Mother had never occurred, she had talked with her on the phone.

After gaining the status of primary residential parent, Father obtained counseling for his family. The licensed clinical social worker he utilized, Christine Agnellini, testified that she conducted at least seven sessions, including individual encounters with the Child, from December 2006, through April 2007. She stated that the Child initially presented with hyper-vigilant characteristics and trust issues, which are seen in persons who have experienced trauma or anxiety. After observing that the Child had "a high need for security and stability," Ms. Agnellini concluded that the Child had developed a significant amount of anxiety due to her concerns about where she was going to permanently reside. She expressed the opinion that the Child's educational, social, and emotional needs – negatively impacted by the frequent moves – were now being met in Father's household. She observed that the Child repeatedly stated to her in their sessions that she wanted to continue to live with Father.

Thomas Hanaway, Ph.D., conducted psychological evaluations of both Mother and Father, interviewed various persons in both families, and met with the Child. He observed that Mother minimized or failed to recognize the effect that frequent moving had on the Child. Dr. Hanaway specifically noted, after Mother discussed during his evaluation of her that she might move to Georgia, that he "was a little appalled that [Mother] would even be thinking about" moving after the issue of the frequent moves had been raised. He described Mother as "a little eccentric and a little quirky," noting that "[Mother] has a little bit of this marching-to-her-own-drummer kind of quality about her."

Dr. Hanaway stated his belief that the numerous moves and school changes had adversely impacted the educational performance of the Child. He testified as follows in regard to his interview with her:

A. Yes. [Valerie T.], she clearly wanted to continue living with her father. She thought that her father was a better listener. She thought that sometimes when she was talking to her mother that her mother would appear to be listening but she really wasn't, that she would space out sometimes.

Although Dr. Hanaway did not perform a complete custody evaluation, he observed that he had collected enough information to form an opinion that the Child's best interest would be served by residing with Father and having summer visits with Mother:

I would leave [Valerie T.] with her father and have her spend summers with her mother and make sure that she gets plenty of contact with her mother. But I just think that the stability that she's getting being in one school, I think it's beneficial to her. And she has a good relationship with her father and stepmother, and I think she'll thrive there."

In testimony received from the Child, she related the following: she did not like moving frequently because she could not keep friends; she frequently missed school or was late while living with Mother; frequent fights occurred between Mother and her Stepfather; and she wants to live with Father. The Child observed that moving around had become "boring." She testified that both Father and Stepmother help with her school work now that she is living with them. She described her time at Holy Cross as follows:

Q. How do you feel like you did in school this last year?

A. I thought I did really good since, like, as I said, my mom would give me answers in math, so – [Father and Stepmother] didn't give me answers at all, and I thought I did really good since I didn't actually learn math when I lived with my mom. I felt like I did really good.

My mom . . . said, "You made these same grades when you were here." And I said, "I thought, I didn't make, like, A's or B's." I usually made like F's and D's when I was here with my mom. I don't remember making at least one A when I lived with my mom.

After four days of hearings, the Juvenile Court Judge determined that clear and convincing evidence established that a change of circumstances had arisen since the custody proceedings in

2002. It was ordered that the prior decision issued by the Referee would remain in effect as to all findings, supplemented by a specific schedule for co-parenting time. The Juvenile Court Judge found as follows:

I think the proof in this record does establish a change of circumstances for this child since the order was entered in 2002. I think her grades have gotten worse, and I think the instability contributed to that, although . . . I don't believe that it's specifically anything the parent could help. You have raised a son, ma'am, that is, what, 22 or 23 years old, that did well through many moves in his childhood.

But children are different. What affects one may affect another one in an adverse way, and I have to agree with the experts in this case that these moves have had a negative effect on [the Child's] ability to keep up with her school work. . . .

* * *

And once I have found a change of circumstance – which, I believe that the deterioration of the child's grades and the continuation of the moves and the uncertainty of will there be another move, all those factors contributed and were a change of circumstance – I have to look at the best interest of the child and the relevant factors that I am supposed to consider

* * *

The expert testimony is all in agreement . . . I can't find any reason not to adopt Referee Kaserman's order after rehearing this case.

* * *

I find clearly and convincingly that there was a material change of circumstances, those being that her grades declined significantly, with more travel being anticipated and continuing, and that the Court was correct in accepting the father's petition, and that the rest of Referee Kaserman's orders with those changes that I've just enumerated be in full effect, that I'm adopting her order and supplementing it with the visitation schedule that I've just given you. But her order remains in effect and full as far as the findings.

Mother filed a timely appeal.

II. ISSUES

The issues we address in this appeal are restated as follows:

1. Whether a material change in circumstances occurred since the parties' mediated parenting plan in 2002.
2. Whether a change of custody was in the Child's best interests.
3. Whether this appeal was frivolous.

III. STANDARD OF REVIEW

Rule 13(d) of the Tennessee Rules of Appellate Procedure provides that a review of findings of fact by the trial court shall be de novo upon the record with a presumption of correctness, unless the preponderance of evidence is otherwise. Tenn. R. App. P. 13(d); *Kendrick v. Shoemake*, 90 S.W.3d 566, 570 (Tenn. 2002). Questions of law are afforded de novo review without any presumption of correctness. *Burlew v. Burlew*, 40 S.W.3d 465, 470 (Tenn. 2001). We note that "the details of custody and visitation with children are peculiarly within the broad discretion of the trial judge." *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001) (citations omitted).

IV. DISCUSSION

A. Material Change of Circumstances

Under Tennessee statutes, a parent seeking to modify the primary residence of a minor child must "prove by a preponderance of the evidence a material change in circumstance." T.C.A. § 36-6-101(a)(2)(B) (2005 & Supp. 2008). In *Kendrick*, 90 S.W.3d at 570, the Supreme Court stated that once a valid order designating the primary residential parent has been issued, if the other parent seeks to change that designation, the threshold issue is whether a "material change in circumstances has occurred after the initial custody determination." *Id.* (citing *Blair v. Badenhope*, 77 S.W.3d 137, 150 (Tenn. 2002)). A qualifying change of circumstances may include changes which make the existing parenting plan no longer in the child's best interests. *Id.* 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.* (quoting *Blair*, 77 S.W.3d at 150).

The Referee's findings, adopted by the Juvenile Court Judge, concluded that a material change of circumstances had occurred, based on the Child's school performance and on her emotional well-being:

The Order entered in 2002 continued the child in the residential custody of the mother with co-parenting time established for the father. The subsequent modification of the father's co-parenting time by the parents' agreement took into consideration the parents' moves to different states, but did not anticipate the impact the continued relocations would have on the child's progress and continued welfare. The child's school performance has steadily declined while residing with the mother with concerns that the child would not be promoted and that legal action would be brought against the mother because of attendance issues

Although the child's educational issues are an important factor in determining a change in circumstances affecting the child, the child's emotional well being is also a circumstance to be considered by the Court. The child became so distraught in November 2005 after boarding an airplane to return to her mother in Georgia following visitation with the father and step-mother in Virginia that the pilot had to bring the father onto the plane to calm the child before the flight could depart. The child has acknowledged to her mother and her maternal grandmother (while they were questioning the child both before and after the Court proceedings were initiated) that she wanted to live with her father. The child approached her father requesting that he obtain custody of her. The child has expressed to her Guardian ad Litem that she desires a "stable" home, she knows what a stable home is, and she has experienced that stability with her father. The child's needs have clearly been overlooked by the mother and maternal relatives in their large extended family where "everyone wants attention and everyone talks over everyone else." The mother and the maternal grandmother have transferred to the child their own experiences with frequent moves to different locations without considering that the child is unique in how she has experienced and internalized the impact of frequent relocations and the lack of stability in her mother's home.

The facts in the record before us do not preponderate against the finding by the Juvenile Court, by clear and convincing evidence, that there had been a material change in circumstances, based on the effects of Mother's numerous moves and the frequent school changes for the Child. The change affected the Child's well-being "in a meaningful way." *Kendrick*, 90 S.W.3d at 570. Thus, the evidence supports the Juvenile Court's finding of a material change in circumstances.

B. Best Interest

If a material change in circumstances has occurred, it must then be determined whether modifying the primary residence is in the Child's best interest. *See id.*, 90 S.W.3d at 570. T.C.A. § 36-6-106(a) establishes the framework which a trial court must follow in making the best interest determination:

(a) 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;

(7)(A) The reasonable preference of the child, if twelve (12) years of age or older;

(B) The court may hear the preference of a younger child on request. The preferences of older children should normally be given greater weight than those of younger children;

(8) Evidence of physical or emotional abuse to the child, to the other parent or to any other person . . . ;

(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) (2005 & Supp. 2008).³

The Referee documented extensive findings of fact as to each of these factors in her memorandum order. The Juvenile Court Judge was able to consider evidence of both the Child's difficulties while in Mother's custody and of the changes that occurred for her after being placed in Father's custody. He additionally heard testimony from two expert witnesses who were not involved in this matter at the time of the first hearing. The Juvenile Court Judge found that the majority of the factors – the disposition to provide education; the importance of continuity in the Child's life; the stability of the family unit; the home, school, and community record of the Child; and the Child's reasonable preference – all favored Father. Further, the expert testimony also favored Father. From our review of the record, we find that the evidence does not preponderate against the Juvenile Court's finding that designating Father as the primary residential parent was in the Child's best interest.

C. Frivolous Appeal

Father raises the issue of whether Mother should be liable for damages for bringing a frivolous appeal. T.C.A. § 27-1-122 (2000) provides for an award of damages, including attorney fees, when an appeal is determined to be frivolous:

When it appears to any reviewing court that the appeal from any court of record was frivolous or taken solely for delay, the court may, either upon motion of a party or of its own motion, award just damages against the appellant, which may include, but need not be limited to, costs, interest on the judgment, and expenses incurred by the appellee as a result of the appeal.

A frivolous appeal is one “so utterly devoid of merit as to justify the imposition of a penalty,” *Combustion Eng'g, Inc. v. Kennedy*, 562 S.W.2d 202, 205 (Tenn. 1978), or when it appears the appellant has no reasonable chance of success. *Liberty Mut. Ins. Co. v. Taylor*, 590 S.W.2d 920, 922 (Tenn. 1979). Our decision on this issue is discretionary, and we are generally reluctant to award such damages so as not to discourage legitimate appeals. *Whalum v. Marshall*, 224 S.W.3d 169, 180-81 (Tenn. Ct. App. 2006).

We do not find this appeal so devoid of merit as to characterize it as frivolous. Some of the evidence of record was supportive of Mother's position, and the Juvenile Court Judge did make

³ A 2007 amendment to this statute made minor stylistic changes, substituted “parents or caregivers” in places that previously denoted “parent,” and added two subsections. The revised version of the statute is not substantively different from the statute in place at the time of the hearings.

some findings in favor of Mother. Specifically, he recognized that Mother's parenting techniques had apparently had no adverse effect on her son, an engineering student at the University of Tennessee. Additionally, the record reveals that the Knox County Achievement Test scored for Grade 4 showed the Child to be "Proficient" in all areas but one -- Writing/Organization. Mother did not present a very strong case on appeal, but we are not willing to label her appeal as frivolous.

V. CONCLUSION

The Juvenile Court specifically identified the changed circumstances that warranted the custody modification and conducted an analysis of the best interest of the Child. The facts underlying the Juvenile Court's ruling support that determination. We conclude that the evidence does not preponderate against the Juvenile Court's findings that there had been a material change in circumstances and that it was in the Child's best interest to designate Father as the primary residential parent. Accordingly, the judgment of the Juvenile Court is affirmed in its entirety.⁴ Costs on appeal are taxed to the Appellant, Cynthia J.B. This case is remanded to the Juvenile Court for further proceedings, pursuant to applicable law.

JOHN W. McCLARTY, JUDGE

⁴Just prior to oral argument in this matter, Mother filed a motion requesting this court supplement the record. She sought to include the 2002 mediation agreement, a calendar relating to the Child's school attendance, test scores, and a pamphlet from a Catholic school in Georgia. Father filed an objection, asserting that Tenn. R. App. P. 24(e) requires that any disputes regarding the accuracy of the record of the proceedings in the trial court shall be directed to, and resolved by, the trial court. Thus, Father contends that this appellate court is not the proper forum for this motion. We agree with Father and deny the motion. We further note that the Juvenile Court Judge previously denied a similar motion by Mother to supplement the record, finding as follows:

[T]he Court finds that the record on appeal should be limited to those documents which were presented to the Court and introduced as exhibits, or of which the Court took specific notice, during trial. The Court finds that any other decision would create substantial confusion as to what evidence the Court considered in rendering the decision on appeal. . . .

We find the Juvenile Court Judge's reasoning in regard to denying the prior motion to be sound and deny this motion on that basis as well.