IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 5, 2004 Session

NANCY RENEE (MCREYNOLDS) DELBRIDGE v. ROBERT IRVING MCREYNOLDS

Appeal from the Chancery Court for Bedford County
No. 19,185 James B. Cox, Chancellor

No. M2003-00681-COA-R3-CV - Filed October 7, 2004

Mother appeals from the trial court's order modifying a prior agreed custody order concerning school placement for the parties' two minor children. Mother argues that there was no material change of circumstances that warranted the trial court's decision. Because we determine that the evidence does not preponderate against the trial court's findings that a material change in circumstances occurred and that the modification of the school placement arrangement was in the best interests of the children, we affirm the decision of the trial court.

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

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

R. Steven Waldron, Murfreesboro, Tennessee, for the appellant, Nancy Renee (McReynolds) Delbridge.

John H. Norton, III, Shelbyville, Tennessee, for the appellee, Robert Irving McReynolds.

OPINION

Following the parties' divorce in 1994, they were given joint custody of their two minor children, both daughters, Courtney, born August 31, 1988, and Ashley, born May 17, 1990. Under this arrangement, the girls spend half the week with Mother and the remainder with Father. Since Mother's remarriage and relocation from Bedford County to Rutherford County where she and her husband teach in the public school system, Mother has wanted the girls to attend Rutherford County schools rather than Bedford County schools. In 1999 the parties entered into an agreed custody modification order approved by Circuit Judge Charles Lee providing that the children would remain

in their Bedford County schools until the oldest daughter began 9th grade in the fall of 2002.[1] At that time, both Courtney and Ashley were to transfer to Rutherford County schools, although the shared residential schedule would continue.

As the time to change school systems approached the girls became more resistant, wanting to remain at their respective Bedford County schools where they were active in athletics, extracurricular activities, and happy with many friends.[2] The girls' relationship with their mother began to deteriorate over their desire to stay active in their Bedford County community and their mother's refusal to allow it in hopes of weaning them from Bedford County in anticipation of their move to their new Rutherford County schools.

As a consequence of the girls' resistance, Father filed a petition in December 2001 to modify both custody and the school placement for the girls.[3] Specifically, Father moved for primary custody and permission for the girls to remain in their Bedford County schools alleging in his petition that "since the entry of the 1999 Modified Order . . . there have been numerous problems by and between the parties that have, without question, adversely impacted upon the children."

At the August 2002 hearing, Chancellor Cox[4] heard testimony from the girls, Mother, Father, Stepfather, and David Pate, the children's counselor. Based upon the evidence the trial court found that "there do exist exigent material changes in circumstances not foreseeable" at the time the parties entered into the 1999 Agreed Order, but nonetheless upheld the prior order that required the girls to change school systems in the fall of 2002 when Courtney began high school. The trial court listed the changes in circumstances, including the deterioration of relationships, including specifically the relationship between Mother and the children. Having found a material change of circumstances, the court addressed comparative fitness. Although the court found both parents fit, it expressed some

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[1]This agreed order was triggered by Father's 1999 petition to change custody so the girls could live with him. Courtney had characterized the split living arrangement as "ridiculous" since she could not get settled at either place, and her complaints were the basis for Father's petition. In addition, the issue of school placement had arisen. At the hearing, Circuit Judge Lee warned that "the parties' inability to agree as to where their children would attend school does constitute such a significant change in material circumstances as to mandate the entry of a modification order in which joint custody would be ended." Father, fearing losing joint custody, reached an agreement with Mother that allowed the parents to continue to share joint custody and permit the girls to attend their Bedford County schools through the 2001-2002 school year, but thereafter attend Rutherford County schools.

[2]Courtney, the older child, testified at the August 2002 hearing that she was a junior high cheerleader and active in student council and the Fellowship of Christian Athletes. She expressed her love for school, said she had planned to tryout for cheerleader and run for 9th grade class president, and was confident she would make the soccer and softball team at Central High School in Bedford County. Courtney was upset that her mother had not permitted her to tryout for cheerleader for the fall of 2002 since she would be transferring to Blackman High School in Rutherford County.

[3]Father acknowledged that his petition triggered the new parenting statute. Accordingly, both parents successfully completed the TransParenting class and filed proposed parenting plans.

[4]Chancellor Cox is the third judge to hear the parties' dispute over custody.

concerns that "both parents have acted in a way that is inconsistent with their fitness." The court had concern about the 1999 Order:

> (a) There is a dilemma created by the October 28, 1999 Order in that continuity, as envisioned by the appellate courts, is not the continuity envisioned by that Order;
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> (b) Continuity envisioned by the appellate courts is a continuation of the circumstances that have clearly been shown to be in the best interests of the children over time; and
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> (c) The Order of October 28, 1999, is squarely at odds with this continuity in that the Order mandates that the children change school attendance as of this school year.
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> . . .
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> Continuity, as dictated by the statute, would lean in favor of leaving the children in Bedford County where they have had school, where they have had consistent extracurricular activity, where they have had stability with a parent and where they have had stability with grandparents. . . .

The court clearly struggled with foreseeability issues related to the 1999 Order. After weighing all the factors, the court held:

> The Court finds that the joint custody arrangement previously existing under the Order of October 28, 1999, should remain in place, although the Court questions whether it will continue to work.

The court also made specific orders regarding conduct by each parent and the stepfather. Additionally, it ordered that the girls continue counseling with Mr. Pate and that the parents begin counseling so they could foster better relationships with the children. The court also ordered that the parties continue joint decision-making regarding the children. Having found a material change of circumstances and given the court's reservations about the 1999 Order, it provided in its August 2002 order that:

> The Court will review this case near the Christmas school break for the 2002/2003 school year, it being the feeling of the Court that, between now and the Christmas break, the childrens' grades should show their true capability as students, provided, however, if their school performance is not good, the Court will consider returning them back to the Bedford County school system . . . .

At the December 2002 status hearing,[5] the trial court heard testimony from the girls' counselor, David Pate, several teachers at the girls' new schools in Rutherford County, Mother and both the girls. Mother and the teachers testified that the girls were adjusting and doing well in school. However, the girls and their counselor painted a different picture. The trial court questioned the family counselor, Mr. Pate:[6]

> Court: Do you have any opinion as a counselor as it relates to adjustment of these children . . . .
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> Pate: [T]he children are in the process and they adjusted to some degree to their current living arrangements. They have not accepted at all that arrangement and due to that fact they are exhibiting through their actions emotional upheaval that is causing stress and anger in both of their lives . . . And it is continuing to increase rather than decrease based on my observations.

The trial court also questioned fourteen year old Courtney in chambers:[7]

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[5]Mother complains that the trial court committed reversible error by setting a hearing to review its August order in December. The record does not indicate that she objected at trial, at either hearing, to the procedure. Therefore, it is waived. Further, although the court found in August there had been a change in circumstances justifying a change of custody, the court changed neither the joint custody arrangement nor the planned transfer of schools. In other words, the court gave Mother the advantage of the 1999 order pending proof of whether the change in schools turned out to be in the children's best interests or contrary to them.

[6]On appeal, Mother agues that the trial court committed reversible error when it allowed Mr. Pate to testify as to statements made to him by the children. At trial, Mother made the same argument before Mr. Pate testified. Having reviewed Mr. Pate's testimony, we find little reference to specific statements made to him by the girls. Mother did not object to any particular question or testimony and has pointed to none in her brief. Mr. Pate testified at the August 2002 hearing regarding treating the girls. The trial court was apparently impressed enough with Mr. Pate to ask the parents and stepfather to also meet with Mr. Pate, and they did so. At the December 2002 status hearing, Mr. Pate was called and gave his opinion as to how the girls were handling their situation. Mr. Pate was treated as an expert based upon his training and knowledge under Rule 702, Tenn. R. Evid., and we see no error committed in admitting his testimony.

Mother also complains that Mr. Pate's records reflecting statements by the children were improperly admitted under Tenn. R. Evid. 803(4) because Mr. Pate is not a doctor and the statements were not made for diagnostic or treatment purposes. We find nothing in the record or in the court's orders to indicate that the court relied on any out-of-court statements by the children that may have been reflected in Mr. Pate's records. The court heard directly from the girls themselves. Mother has pointed to no particular statement in the records that was objectionable and has failed to state how any error in the admission of the records may have affected the outcome of the case.

[7]Just as at the August hearing, Courtney and Ashley were questioned by the lawyers and the court in chambers. Mother's trial counsel specifically asked the court to speak to the children *in camera*. Moreover, the court asked counsel for the parties if they objected, and neither side did so. Chancellor Cox's procedure was considerate of the girls who were placed in a delicate and stressful situation. The trial court wanted the children to testify outside the presence of their parents. The court allowed the parties' attorneys to be present and allowed counsel to disclose to their respective clients the substance of the testimony. However, the parties were admonished that neither parent was to question or criticize the children concerning their testimony. On appeal, Mother objects, not to the in-chambers procedure *per se*, but to the

(continued...)

CM: A school is a school. Academically - - I'm not trying to be conceited. I'm smart. I'm going to do good.

Court: You don't have to work too hard to get good grades?

CM: I don't do anything. I don't even take books home. . .I'm going to do good wherever I go. So why not let me be happy. . . For a long time I didn't want to hurt anybody. But now I'm hurting. I can't do it anymore.

Court: Okay. Do you feel like you've reached a breaking point?

CM: Dangerously close.. .. Nobody should be forced to be this unhappy.

Court: What about living with your dad full time if you got your way in that regard would it make your relationship with your mother better?

CM: It would make it a little better. It can't get much worse. Maybe if she didn't have the ability to force me to be so unhappy maybe we could actually work on our relationship. . . . My mother is a very selfish person. I mean, she's changing or she's making an attempt to change my life to make hers a little better.

Court: How much do you know about the prior order in this case? . . . .

CM: All I knew was that the judge said something like there's going to be a big winner and a big loser. And both my parents freaked out because I remember my mom was all nervous and my dad was all scared, and they didn't know what to do. So basically they came to an agreement that I would go to school in Murfreesboro. I couldn't believe it. I was mad. But I figured hey, I was like maybe I can either change my mom's mind, maybe she'll come to her senses. I'll make her see how good things are here. And then you were my last hope.

Following the December status hearing, the trial court found "that the preponderance of the evidence is that the children's attending Rutherford County schools is not going to work" and ordered his August order modified so that the children be allowed to return to their Bedford County schools for the spring semester of the 2001-2002 school year.[8] The trial court reasoned that the 1999 Order "frustrated the current appropriate analysis of this case . . . and that it might not have approved the 1999 Agreed Order," and that it was not in the children's best interest to continue in their new schools. Mother appeals.

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[7](...continued)
trial court's ruling that the children's testimony "could not be addressed specifically by in-court testimony or statement of counsel." Again, Mother is not clear about any adverse effect of this procedure and has not pointed out any objection or attempt to introduce evidence at trial relating to this issue. Mother also acknowledges that "resolution of this issue will not be determinative of her appeal." We agree.

[8]The trial court ordered the joint custody arrangement to continue.

I. THE CHILDREN'S SCHOOL PLACEMENT

This appeal does not involve a change in custody. It does not involve a change in visitation. Instead, the decision under review was about what schools the children would attend while continuing to spend their residential time almost equally with the parents. Educational decisions are generally left to parents. After divorce, decision-making authority on such issues was generally left to the primary custodian or, in this case of joint custody, to the parents jointly. Under newer legislation, a permanent parenting plan is required to allocate decision-making authority on issues such as education. Tenn. Code Ann. § 36-6-404(a)(5). In the case before us, the court was required to make the educational decision, or, as the court put it, to pick the schools the children would attend.

Although this case is not about change of custody, our analysis must begin with the law regarding such changes because custody, visitation, and parental decision-making are part of the whole arrangement designed to further the welfare of the children involved. Our analysis, however, is governed by admonition that, "It is not the function of appellate courts to tweak a visitation order . . . . When no error is evident from the record, the trial court's ruling must stand." *Eldridge v. Eldridge*, 42 S.W.3d 82, 88 (Tenn. 2001). Because of the broad discretion given trial courts in matters of child custody, visitation, and related issues, including change in circumstances and best interests, and because of the fact specific nature of such decisions, 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); *Nelson v. Nelson*, 66 S.W.3d 896, 901 (Tenn. Ct. App. 2001); *Gaskill v. Gaskill*, 936 S.W.2d 626, 631(Tenn. Ct. App. 1996)). Accordingly, this court will decline to disturb a parenting arrangement fashioned by a trial court unless that decision is based on the application of incorrect legal principles, is unsupported by a preponderance of the evidence, or is against logic or reasoning. *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001); *Adelsperger v. Adelsperger*, 970 S.W.2d 482, 485 (Tenn. Ct. App. 1997).

Once a valid order of custody has been issued, a court may modify that custody arrangement when both a material change in circumstances has occurred and a change of custody is in the child's best interests. *Kendrick v. Shoemake*, 90 S.W.3d 566, 570 (Tenn. 2002); *Blair v. Badenhope*, 77 S.W.3d 137, 148 (Tenn. 2002). "While there 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," *Blair*, 77 S.W.3d at 150, a material change of circumstance does not require a showing of a substantial risk of harm to the child. *Kendrick*, 90 S.W.3d at 570 n.5 (citing Tenn. Code Ann. § 36-6-101(a)(2)). To justify modification, the change must have occurred after entry of the order sought to be modified, must be one that was not known or reasonably anticipated when the original order was entered, and must affect the child's well-being in a meaningful way. *Kendrick*, 90 S.W.3d at 570; *Blair*, 77 S.W. at 150. Although *Kendrick* speaks in terms of an actual change in custody, its principles apply to

changes in a custodial and visitation arrangement, including arrangements that are now established in a permanent parenting plan.[9]

The prior agreed order set up the change in circumstances, and, as the trial court observed, actually triggered the actions that destabilized the children's environment and exacerbated strains in the relationships involved. However, the court considered the actual effects of the change in schools before deciding whether to modify the prior order. Tenn. Code Ann. § 36-6-101(a)(2)(B) provides:

> If the issue before the court is a modification of the court's prior decree pertaining to custody or a residential parenting arrangement, the petitioner must prove by a preponderance of the evidence a material change in circumstance. A material change of circumstance does not require a showing of a substantial risk of harm to the child. A material change of circumstance may include, but is not limited to, failures to adhere to the parenting plan or an order of custody and visitation or circumstances which make the parenting plan no longer in the best interest of the child.

Evidence that an existing custody and visitation arrangement is not working is sufficient to support a finding of material change of circumstances. *Vaccarella v. Vaccarella*, 49 S.W.3d 307, 315-16 (Tenn. Ct. App. 2001); *Dalton v. Dalton*, 858 S.W.2d 324, 326 (Tenn. Ct. App. 1998). Here, clearly the facts support the trial court' s finding that the children's move to Rutherford County schools is "not working." The girls are not happy being forced to leave their schools, activities and friends. Their relationship with their mother is far worse than before and, contrary to the mother's hopes that the move would bring them closer, it has had the opposite effect. Although the girls' grades are still quite good, they certainly cannot be characterized as the well-rounded children that they were while attending Bedford County schools.[10]

The welfare and best interests of the children are the paramount concern in custody and residential placement determinations, and the goal of any such decision is to place the child in an environment that will best serve his or her needs. *Eldridge*, 42 S.W.3d at 85; *Parker*, 986 S.W.2d at 562; *Lentz v. Lentz*, 717 S.W.2d 876, 877 (Tenn. 1986). The General Assembly has found that "[t]he best interests of the child are served by a parenting arrangement that best maintains a child's emotional growth, health and stability, and physical care." Tenn. Code Ann. § 36-6-401(a). The aim of a custodial or residential arrangement is to promote the child's welfare by creating an environment that promotes a nurturing relationship with each parent. Tenn. Code Ann. § 36-6-404(b); *Aaby v. Strange*, 924 S.W.2d 623, 629 (Tenn. 1996).

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[9]The parties herein were not attempting to modify a prior permanent parenting plan, since one was not in effect; they were seeking modification of a prior custody order. However, the parties agreed that this proceeding was under the new parenting plan legislation and, consequently, that the court was required to approve or fashion a permanent parenting plan. *See* Tenn. Code Ann. § 36-6-404(a).

[10]In contrast to their activities in Bedford County, *infra* at n.4, neither girl participated in athletics at their new schools. Nor did they serve in student government or try out for cheerleading.

We review the findings of fact by a trial court *de novo* with a presumption of correctness for the trial court's decision, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Kendrick*, 90 S.W.3d at 569-70; *Brooks v. Brooks*, 992 S.W.2d 403, 404 (Tenn. 1999). The evidence does not preponderate against the trial court's finding that the prior school placement arrangement was not working and was a material change of circumstances affecting the children's well-being in a negative and meaningful way. The trial court correctly recognized that the 1999 Order did not promote stability, but was fostering only discord and, therefore, it was no longer in the children's best interests. Similarly, the evidence does not preponderate against the finding that modification of that order is in the children's best interests. The court appropriately modified the prior decision regarding school placement to one that was in the children's best interests. Accordingly, we affirm the trial court's modification of the prior order to allow the girls to continue attending schools in the system they had been in throughout their educational experience.

II. ATTORNEY'S FEES

Mother complains that the trial court erred in not awarding her attorney's fees incurred in defending Father's petition for modification pursuant to Tenn. Code Ann. § 36-5-103(c). That statute permits reasonable attorney fees to be awarded the prevailing party in an action concerning the adjudication of custody or change of custody.

A decision on attorney's fees will be reviewed on an abuse of discretion standard. Under the abuse of discretion standard, a trial court abuses its discretion only when it "applies an incorrect legal standard, or reaches a decision which is against logic or reasoning or that causes an injustice to the party complaining." *Eldridge*, 42 S.W.3d at 85. Here, although the trial court declined to change the joint custody or residential placement arrangement, Mother did not prevail with respect to the crucial issue of the children's school placement. The trial court did not abuse its discretion in requiring each party to pay his or her own attorney's fees in this dispute, the seeds of which were sown by the agreed order entered earlier.

Consequently, we affirm the trial court's denial of attorney fees to Mrs. Delbridge.

CONCLUSION

We affirm the trial court's modification of the custody order which permits the minor children to return to their Bedford County schools. Costs of this appeal are taxed equally between the two parties.

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PATRICIA J. COTTRELL, JUDGE