

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs March 7, 2005

LEIGHANN M. GULLETT v. MICHAEL J. HOPKINS

**Appeal from the Chancery Court for Coffee County
No. 98-337 John W. Rollins, Chancellor**

No. M2003-02086-COA-R3-CV - Filed August 9, 2005

This is a post-divorce change of custody proceeding wherein the trial court found no substantial change of circumstances and denied the Petition. The judgment of the trial court is affirmed.

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

WILLIAM B. CAIN, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL and FRANK G. CLEMENT, JR., JJ., joined.

Randall W. Morrison, Tullahoma, Tennessee, for the appellant, Leighann M. Gullett.

Timothy Scott Priest, Winchester, Tennessee, for the appellee, Michael J. Hopkins.

OPINION

Michael J. Hopkins (“Father”) and Leighann M. Gullett (“Mother”) were married and are parents of twin daughters, Heather Hopkins and Haley Hopkins, born June 29, 1992. The parties were divorced by decree entered May 10, 1999, wherein the court approved a Marital Dissolution Agreement providing that the parents would share joint custody of their twin daughters with Father having physical custody of the children during the school year and Mother having custody during the summer recess. Following the divorce, Father resided in Manchester, Tennessee, and Mother resided in Tusculumbia, Alabama. On March 16, 2000, a modification order was entered granting Father residential placement/custody of the twin daughters and providing visitation rights to Mother. This Order was further modified on March 18, 2002, by an Agreed Order and Permanent Parenting Plan which expanded the visitation privileges of Mother. This Permanent Parenting Plan provided that the parties would make joint decisions as to education, non-emergency healthcare, religious upbringing and extracurricular activities involving the minor children. Mother was required to pay \$40 per week as child support. On July 17, 2002, Mother filed the present Petition for Change of Primary Residential Parent alleging in pertinent part:

4. Your Petitioner would show that between the last court appearance in this cause and especially over the past several weeks, the Respondent herein has refused to provide for the appropriate care of the parties' minor children and, in fact, the Respondent's actions now pose a substantial threat of harm to both minor children, making it contrary to their manifest best interest for the Respondent to remain as the designated primary residential parent of said minor children.

Your Petitioner would further show that the Respondent continues to be separated from his present spouse which has contributed to, at least in part, the failure of Respondent to maintain a habitable and safe home for the minor children. Your Petitioner would further show that the home presently maintained by Respondent for the minor children is unclean, unsafe and filthy to such a degree that it poses a danger to the health of both minor children. In fact, the minor children constantly complain to your Petitioner of the urine and tobacco smell that is present in the Respondent's home. Further, the Respondent, instead of appropriately ridding the home of these odors, or its source, uses candles in an attempt to simply cover the odors, although the odor permeates the clothing, hair and skin of the minor children requiring Petitioner to wash the odor from their clothing and hair and otherwise rid them of these odors. Your Petitioner would further show that the parties' minor children continue to contract head lice at Respondent's home with Respondent doing nothing to rid his home of head lice. In fact, Petitioner would show that contrary to Respondent's assurances that he will eliminate the infestation that is obviously present in his home, the children have had three (3) additional episodes of head lice over the past few months with the last occurrence only some three (3) weeks before the filing of this Petition. Further, upon information and belief, Petitioner would show that if not for the parties' minor daughters' assuming complete responsibility for their own care and hygiene, they would never be encouraged by Respondent to bathe or otherwise maintain proper hygiene. In fact, it is the parties' two (2) minor daughters who have taken on the responsibility of trying to keep Respondent's home clean, doing laundry and at times cooking for themselves, without any help or interest shown by the Respondent. Further, despite the many admonishments of Petitioner to Respondent about these unclean and unsafe conditions in his home as evidenced by the children's condition as described above, the Respondent either ignores Petitioner or states that Petitioner and/or the two (2) minor children are lying about the children's conditions or the unclean and unsafe conditions in Respondent's home.

Your Petitioner would further show that in addition to the filthy and unkept environment existing in Respondent's home, the Respondent continues to smoke and allow others to smoke in the home with the minor children present, ignoring the restrictions of the Amended Permanent Parenting Plan in that regard and the fact that medical experts have indicated that the minor children must be kept in a smoke-free environment due to severe allergies.

Your Petitioner would further show that the minor children are left unattended on numerous occasions and have been found by your Petitioner several blocks from their home, with Respondent knowing nothing of children's whereabouts. Further, upon information and belief, when Respondent does utilize the services of a babysitter, he uses many times a fourteen (14) year old many times to watch and supervise the children. Further, upon information and belief, Respondent has on numerous other occasions advised the minor children that he was going to town for a short period of time although he refuses to allow the children to go with him and does not return until three (3) to four (4) hours later with the children being attended or supervised by no one during these absences. Further, Petitioner would show that the Respondent's brother resides in the home with Respondent and on occasion brings his paramour to that residence to spend the night, at which time the parties' minor children are required to sleep in a make shift bed elsewhere in Respondent's home.

More importantly, your Petitioner would show that the parties' minor child, Heather has a serious allergy condition that requires scheduled medication. In fact, your Petitioner has taken this child to an allergy specialist in Florence, Alabama who has been treating this child over a significant period of time and has established a set routine and specific course of treatment for this child's allergies. Further, this course of treatment, as presently prescribed by the allergy specialist, followed two (2) full days of medical testing to determine the exact nature of the allergies and the most effective course of treatment indicated by these tests. This course of treatment includes shots that must be administered to this child on a regular set schedule in addition to other medications the child is to take by mouth.

Your Petitioner would show that, despite the course of treatment as prescribed by the allergy specialist, the Respondent refuses to give this minor child her needed medications, including the shots, which must be administered in accordance with the prescribed schedule to be effective. Further, in spite of the fact that Respondent has been told that if this minor child misses a scheduled allergy injection she must start the procedure all over again, the Respondent continues to refuse to abide by the doctor's prescribed schedule. Your Petitioner would show that instead of complying with the established routine as prescribed by the allergy specialist, the Respondent states that he is of the opinion that nothing is wrong with this minor child except that "she might be allergic to cats" and that this child should be taking no medication except as prescribed by a local physician in Tullahoma who has done nothing in the way of extensive testing to determine the true nature of this minor child's allergies. Further, the Respondent now advises Petitioner that she need not sent (sic) any billing from the allergy specialist to him as he has no intention of paying any portion of what he claims is an "unnecessary medical expense". Moreover, Petitioner would show that Respondent's failure to administer these shots in accordance with the prescribed schedule can have serious health consequences and despite being advised of that fact, Respondent still refuses to cooperate.

On August 26, 2002, Father filed his Answer and Counter-Petition with the answer being a general denial of the material allegations of the Petition and the Counter-Petition asserting:

2. The counter-petitioner now alleges that material change in circumstance has occurred since the entry of the Permanent Parenting Plan and Amended Permanent Parenting Plan. The counter-petitioner asserts that the counter-respondent has interfered with the counter-petitioner's time with the children. The counter-respondent continues to make unfounded allegations that the counter-petitioner does not properly care for the children. The counter-respondent has also scheduled numerous doctor's visits for the children that are unwarranted and unneeded. The counter-petitioner asserts that the counter-respondent has become unstable while around the children and presents an immediate danger to their health and welfare. The counter-petitioner asserts that the joint decision making authority asserted in the Permanent Parenting Plan should be modified and the counter-respondent's time with the children should be monitored or supervised.

3. The counter-petitioner asserts that the Permanent Parenting Plan in this cause should be modified to grant the counter-petitioner full decision-making authority regarding the children.

4. The counter-petitioner further asserts that the counter-respondent's scheduled time with the children should be monitored or supervised.

5. The counter-petitioner further asserts that the counter-respondent has shown signs of instability that causes the counter-petitioner concern for the parties minor children. The counter-petitioner respectfully requests the Court to require the counter-respondent to undergo a mental evaluation to determine if she is competent and stable enough to care for the parties' minor children.

Obviously troubled by the behavior of both of these parents, the trial court on October 14, 2002, entered an order requiring each parent to submit to a mental evaluation by David C. Mathis, EDD.

After a number of vendetta-like proceedings and much discovery, the cause came on for trial on June 19-20, 2003, after which on August 6, 2003, the trial court entered its order providing in pertinent part:

And it satisfactorily

APPEARING unto the Court that the original petitioner, Leighann M. Gullett, has failed to establish a material change in circumstance that presented a threat of substantial harm to the children as alleged in her original Petition before this Court. The Court does further find that the petitioner, Leighann M. Gullett, has made false statements before this Court and the petitioner has no credibility with the Court. The Court does find that several conflicts have arisen between the parties regarding the decision-making authority of the parents and that it would be in the manifest best interest of the children for the defendant, Michael J.

Hopkins, to have the exclusive decision-making authority with regard to the children. The Permanent Parenting Plan shall be modified to reflect this modification. Furthermore, the holiday schedule devised by the parties in 2002 provided that one parent would have all holiday visitation each year the other party would have all of the holiday visitation the next year. This is not in the best interest of the minor children. Beginning in 2004 the holiday scheduling shall be modified to reflect that each party share in the holiday schedule each year with the children. It further

APPEARING unto the Court that the counter-petitioner, Michael J. Hopkins, has shown a material change in circumstance and shown that the counter-respondent, Leighann M. Gullett, is now gainfully employed. The counter-respondent testified that she earns \$300.00 to \$450.00 per week. Child support should be modified and set pursuant to the Guidelines. The counter-defendant, Leighann M. Gullett, shall be responsible for child support in the amount of \$439.00 per month. This child support obligation shall be paid through the Registry of the Clerk & Master's office with any requisite fees and commissions assessed by the Clerk & Master. It is, therefore,

ORDERED, ADJUDGED AND DECREED by this Court that the petitioner's Petition to Modify the Permanent Parenting Plan in this cause is hereby denied. The Counter-Petition filed by Michael J. Hopkins is hereby granted and the Permanent Parenting Plan shall be amended as provided by the Permanent Parenting Plan attached hereto as "Exhibit A." It is further

ORDERED, ADJUDGED AND DECREED by this Court that the counter-respondent, Leighann M. Gullett, shall be responsible for child support in the amount of Four Hundred Thirty Nine Dollars (\$439.00) per month. The Permanent Parenting Plan shall be amended to reflect this modification of child support.

Mother filed a timely appeal.

Mother presents a sole issue on appeal: "Whether the evidence preponderated against the finding that no material change of circumstance had occurred granting the father primary residential placement of the parties' two (2) minor children and designating sole decision-maker on matters concerning the minor children."

In the Complaint it is alleged that a change of circumstances has occurred and that "the respondent's actions now pose a substantial threat of harm to both minor children." In the Order of August 6, 2003, the court finds that petitioner "has failed to establish a material change in circumstance that presented a threat of substantial harm to the children as alleged in her original Petition."

Both the allegation of the Complaint and this finding of the court represent the standard applied in *Musselman v. Acuff*, 826 S.W.2d 920 (Tenn.Ct.App.1991) and *Wall v. Wall*, 907 S.W.2d 829 (Tenn.Ct.App.1995). This "substantial risk of harm" standard has been both judicially and legislatively abrogated. *Blair v. Badenhope*, 77 S.W.3d 137 (Tenn.2002); *Kendrick v. Shoemaker*, 90 S.W.3d 566 (Tenn.2002); *Cranston v. Combs*, 106 S.W.3d 641 (Tenn.2003); Tenn.Code Ann. § 36-6-101(a)(2)(B)(2001 and supp. 2002). This common law

and statutory metamorphosis is discussed at length in *Kesterson v. Varner*, No. M2003-00743-COA-R3-CV, 2005 WL 195113, (Tenn.Ct.App. January 27, 2005). (perm. app. denied June 27, 2005)

The present standard in the words of the Tennessee Supreme Court is:

We clarified that this standard requires the trial court to engage in a two-step process to make its final custody determination. First, the court must determine whether a material change in circumstances has occurred after the initial custody determination. Although there are no bright-line rules for determining when such a change has occurred, there are 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. *Kendrick*, 90 S.W.3d at 570; *see also Blair*, 77 S.W.3d at 150.

Second, after finding that a material change in circumstances has occurred, the trial court must determine whether modification of custody is in the child's best interests using the factors enumerated in Tennessee Code Annotated section 36-6-106(2001).

Cranston v. Combs, 106 S.W.3d 641, 644 (Tenn.2003).

As is usually true in parenting disputes, this case is fact intensive and heavily dependent upon an assessment of the credibility of witnesses. Appellate review of the facts is governed by Tennessee Rule of Appellate Procedure 13(d) under which the case is heard *de novo* with the findings of fact of the trial court being presumed correct unless the preponderance of the evidence shows otherwise. Credibility of witnesses is primarily a judgment call for the trial court which has an opportunity to observe the manner and demeanor of the witnesses while testifying, an advantage not available to an appellate court reviewing the record. Accordingly, great deference is afforded on appeal to the credibility determinations made by the trial judge. *Mitchell v. Archibald*, 971 S.W.2d 25, 29 (Tenn.Ct.App.1998).

While the trial judge did not favor us with specific findings of fact, he made a general finding that Mother had made false statements to the court and had no credibility. Careful review of the record shows that Mother has alleged a bombshell and proved a firecracker. One would assume that her allegations of deplorable conditions in the father's home, including lice infestations, odor of urine, uncleanness and inattention to the personal hygiene of the children would surely spill over into the school classroom. Not so, say the children's teachers. Dr. Lisa White, D.Ed., was fourth grade teacher for the children at Westwood Elementary School. She testifies:

Q. In the capacity of a fourth grade teacher, did you have contact ever with Heather or Hailey?

A. I have taught them both.

Q. Tell us about that. What did you teach them?

A. Hailey was in my homeroom this past year and Heather would come to my class for two different subjects.

Q. How would you describe these two little girls?

A. Very likeable. They seemed to be very happy.

Q. When they came to school were they well-groomed and appropriately dressed?

A. Yes.

Q. Please explain.

A. They were always clean, their hair was clean.

Q. At any time during the last year, was there any problems with head lice?

A. No.

Q. If someone alleges they had head lice ten times over the last eight to ten months would that be accurate or inaccurate?

A. That would [be] inaccurate.

Q. If someone made the statement that these children came to school disheveled, came to school with dirty clothes, would that be an accurate or inaccurate statement?

A. Inaccurate.

Q. If someone told you that these children, in particular, that there was a behavior problem, misconduct, would that be an accurate or inaccurate statement?

A. Inaccurate.

Q. How would you describe these girls?

A. Very bright girls. They made very good grades, the girls were prepared for class.

Q. How did they do the things you asked of them?

A. Very, very compliant, very positive, very respectful toward me.

Q. How would you rate the children as far as studies, average, above average, below average?

A. Above average.

Q. Their actions in school?

A. Excellent.

Q. Are you familiar with any extracurricular activities the children are involved in?

A. I believe Heather was in basketball. I believe she was really more athletic than Hailey. At recess Heather would go out and play soccer. I believe that's what they played. Hailey was doing stuff with her friends. They both were very active during recess. Neither one have (sic) trouble making friends, keeping friends or interacting with other children.

Q. Do the children seem to get along with the other kids?

A. Yes.

Q. Were you aware that both children were involved in chorus?

A. Oh, yes.

Q. Have you had any contact with Mr. Hopkins?

A. On many occasions.

Q. Explain, please.

A. He would visit the school from time to time to see how the girls were doing, any problems he would always be there. He would also be there for any concert, programs that took place or open house or parent-teacher conferences. I've frequently sent grade reports home with students to their parents. If he had a question about something or a concern, he would write me a note. I would respond either with a face-to-face visit or by letter.

Q. Did you ever have the opportunity to see Mr. Hopkins personally interact with the children?

A. Yes.

Q. Have you ever witnessed children when they seemed to be intimidated by a parent?

A. Yes.

Q. Do you think you know how to pick up on that?

A. Yes.

Q. Did you see that at all in these children?

A. No.

Q. Did the children ever say whether or not they were scared of their father?

A. They never mentioned that to me.

Q. How did they interact? Was it obvious how they got along?

A. Well, they were laughing and hugging, just casual hanging on to him. Just a friendly relationship and they seemed to really enjoy each other.

Q. Do the children love their father?

A. Yes. Oh, yes.

Rita Pope was third grade teacher to both of the children at Westwood Elementary School. She testifies:

Q. Right. They completed fourth grade in May, so you had the children last year. How did the children do last year?

A. They were wonderful students. They always had their homework and were well-prepared for class. They were always clean, well mannered, very polite, always happy. You could just tell that they loved to be at school. They were just happy children.

Q. Was there any incident where one or both children may have had some lice -- head lice?

A. To my knowledge, like I said, Hailey was in another classroom -- I only had her for social studies, but, to my knowledge, I believe that Hailey ended up with lice one time. I'm sure it was from who she sat with in the classroom.

Q. And so that would have been the school year -- let me make sure I get my years right, that would have been the school year 2001, ending 2002; correct?

A. Yes.

Q. May of 2002 was when the school year ended?

A. Yes, May.

Q. So the lice episode would have occurred during that period of time; is that correct?

A. To my knowledge.

Q. Have you had any contact with them this year?

A. Yes, I've seen them in the hallways. Like I said, they are both really happy children, very loving and always when they see me, they are always hugging me.

Q. Mrs. Gullett in her petition alleges that the children were not well-groomed during the year that you had them. What is your observation of how the children came to school?

A. They were always clean. They were always dressed appropriately for school. There was no problem about grooming at all, they were always well-groomed.

Q. How did they do in their studies?

A. They always made good grades. And they would tell me at times that their father would help them with stuff if they didn't understand how to do something. Like I said, they always just made wonderful grades.

Q. Was there ever a behavioral problem --

A. Never.

Q. -- with either one of them?

A. Never a behavioral problem at all.

Q. If Ms. Gullett had, in an interview with an independent evaluator, mentioned that one of the children had some behavioral problems, would that be accurate or inaccurate?

A. Inaccurate. There was never any trouble with behavior.

Q. Do you recall them being in trouble for anything?

A. No.

Q. Did they do their schoolwork as they were requested?

A. Always.

Q. Now then, were either of the girls active in school in extracurricular activities in the third-grade year to your knowledge?

A. In the third grade we didn't have anything. They didn't participate in cheerleading or ball or anything like that in third grade at all.

Q. What about Girl Scouts? Weren't they involved in Girl Scouts at that age? Or do you even know?

A. I'm not for sure.

Q. Okay. All right. That's good enough. Tell the Court about Mr. Hopkins. Did he participate in the school functions? How did he interact with the children?

A. He -- any time there was an after-school activity he tried his best to be there. He was almost always there. He was there for parent-teacher conferences, he was there for open house. He was there as much as he could be.

Q. Did he seem to be active and interested in the children's behavior during their time there at the school, their conduct?

A. Always. Always. He would also send notes to school. If the child didn't understand something then he would say, I helped them with this or whatever. He always sent notes.

Q. Did he seem to help them with homework?

A. Yes, if they needed help. They were both sharp girls. They hardly ever needed help, but if they did, he always helped them.

Q. Did you ever notice whether Ms. Gullett ever made any contact with you? Did she every (sic) attend any parent-teacher conferences?

A. In third grade she never did. In fact, I saw her only one time and I did not know who she was.

Q. Tell us about that incident.

A. The children – – at that time, it was lunchtime, so both girl’s classes were in the cafeteria and I was walking back from the cafeteria on my way to lunch and I saw Hailey, which was another classroom and she was standing to the side of the hallway, and then here came Heather and I saw a lady walking down the hall and they went over and hugged her, but it was not an emotional-type hug. It was just a, you know, a hi-hug. And so, they’re always hugging me, they’re always real loving and I said, who was that you were giving my hugs away to? They just kind of paused for a minute and didn’t say anything and I said, who is this lady, or something like that, and they said, they paused and said, it’s our mom.

Q. How did the kids – – did you ever have an opportunity to observe how the children interacted with Mr. Hopkins? Did they seem to be loving towards him? How did they interact with him?

A. They were always real loving. They were happy to see him any time he was there. They were just always happy to be around him.

Q. Did he take steps to become involved with the school activities other than just the parent-teacher conferences?

A. Our school is not a real active – – a lot of parents are in there at different times, but like I said, anything that was scheduled, he was there.

The report cards from Westwood Elementary School indicate that both of these twin girls are far above average in their academic work and exhibit no behavioral problems.

Mother alleges that Father blocked her from receiving information pertinent to the children from the records at school. The teachers dispute this assertion indicating that Mrs. Gullett had never requested copies of anything and that had she done so, she would have received any information that she sought.

As one might expect, the testimony of Mother and Father reflect strongly divergent views as to the controlling facts. The testimony of other witnesses not having an interest in the outcome of the case is far more corroborative of Father than of Mother. This record does not reflect that Father is without shortcomings in his parenting of these two girls. These shortcomings, however, are buried under a deluge of bizarre allegations by the mother which are not sustained by anything other than her less-than-credible testimony. As is usually the case, the two children are caught in the middle, and while expressing a preference for their mother, they have little to say that reflects adversely on Father. The two psychological experts, Dr. David Mathis, of Tullahoma, and Dr. James S. Walker, assistant professor of psychiatry and neurology at Vanderbilt University, reach opposite conclusions as to which of the parents should have primary parental responsibility. Both of these professionals are critical of the inability of these two parents to resolve their own personal conflicts, which both of them indicate have a detrimental effect on the two girls. Dr. Mathis recommends that primary parenting

responsibilities be given to Mother, while Dr. Walker recommends that primary parenting responsibilities be left with Father.

The trial court held that Mother had not carried her burden of proving a substantial change of circumstances, and the evidence certainly does not preponderate against this finding. The trial court further found that Father had carried his burden of proving a change of circumstances which required that Father have exclusive decision-making authority with regard to the children. Upon this finding, the trial court further determined that such a decision was in the manifest best interest of the children. Once again, the evidence does not preponderate against this finding.

No other issues are raised on appeal, and the judgment of the trial court is in all respects affirmed. Costs of the cause are assessed to Appellant.

WILLIAM B. CAIN, JUDGE