

IN THE COURT OF APPEALS
AT KNOXVILLE

FILED
February 28, 2000
Cecil Crowson, Jr.
Appellate Court Clerk

CHARLENE COLVIN LADD

Plaintiff-Appellee

) RHEA COUNTY
) E1999-02447-COA-RS-CV

v.

) HON. BUDDY D. PERRY,
) JUDGE

DOUGLAS EVAN COLVIN,

Defendant-Appellant

) REVERSED AND REMANDED

ARTHUR BASS OF CLEVELAND FOR APPELLANT

J. ARNOLD FITZGERALD OF DAYTON FOR APPELLEE

O P I N I O N

Goddard, P.J.

This appeal involves the parties' dispute over custody of their minor child, Mykayla Colvin. The Circuit Court denied Douglas Colvin's petition to modify custody and granted custody to the mother, Charlene Colvin Ladd. Mr. Colvin argues that the Court should have granted his petition for change of custody because material changes have occurred since the original custody order.

Douglas and Charlene Colvin were divorced by order

dated April 2, 1998. The Court granted custody of Mykayla Colvin, age 4, to Charlene Colvin ("Mother") with liberal visitation rights for Douglas Colvin ("Father"). On May 1, 1998, Father filed a motion to alter or amend the visitation rights alleging that the visitation schedule placed in the divorce decree was not the same as the schedule enunciated by the Court on the day of the divorce hearing. Before the Court ruled on the motion to alter or amend, Father filed a petition for modification of custody. On October 1, 1998, a hearing was held to determine custody and visitation rights.

THE PARTIES AND THEIR WITNESSES TESTIFIED AS FOLLOWS:

FATHER

Father is employed with Kayser-Roth in Dayton as a knitting machine technician. Although Father had scheduled visitation times, Mykayla was with him or his mother, Eva Goebel, almost everyday. Beginning in March 1998, Father recorded the dates and times when Mykayla was with him or his mother on a calendar. Prior to June 1998, Mykayla stayed overnight with Father or Ms. Goebel on every night except for two or three nights each month. On June 24, 1998, Mother began keeping Mykayla more and only bringing Mykayla to Father during scheduled visitation times. Father petitioned the court to grant custody of Mykayla to him because he believes Mother has not provided proper care for Mykayla. Father has been taking Mykayla to the dentist and the doctor for her appointments. Father conceded that Mother provided the majority of basic care to Mykayla during their marriage; but, now Father is prepared to provide Mykayla's basic care.

After the divorce, Father married Kim Riggle. Ms. Riggle has two children, Stacie and Sheryllyn. Ms. Riggle's children and Mykayla are amicable. Father and Ms. Riggle work during the day Monday through Friday. Father inquired about enrolling

Mykayla in a Dayton pre-school for three days during the week. Father's mother would keep Mykayla the other two days of the week. Mykayla shares a room with her stepsister Sherilyn in Father's double-wide mobile home.

Father and Jerry Ladd, Mother's present husband, were involved in a verbal confrontation at the local ballfield in August or September 1998. Father petitioned the Court for an order of protection from Mr. Ladd after this incident. Prior to this incident, a restraining order was placed on Father as part of the divorce decree.

Regarding Mykayla's health care, Father has taken her to the doctor on several occasions for urinary tract infections and he has taken her to the dentist several times. Mother did not assist him in taking Mykayla to these appointments.

MOTHER

Mother is married to Jerry Ladd. She is employed at United Technologies Automotive in Dayton. On the day of the hearing, the Ladds were in the process of moving into a three-bedroom house they were renting. Mr. Ladd's two sons will be living in the house, but Mykayla would have her own room. Prior to moving, Mykayla stayed in the same room as Mother and Mr. Ladd. Mykayla would sleep in Mother's bed when Mr. Ladd was not present. Mother allowed Mykayla to sleep on the floor near a vent if Mykayla asked.

Mother allowed Mykayla to spend many nights at Eva Goebel's home because Mother was required to be present at her job by 3 or 4 a.m. Mother's present job requires her to be present by 7 a.m. Ms. Goebel asked Mother to take Mykayla to another babysitter because Mykayla was too active.

Regarding Mykayla's medical appointments, Mother cancelled and rescheduled one of Mykayla's appointments. The reason she cancelled and rescheduled the appointment was because she and Mr. Colvin were in court that day regarding visitation problems. Mrs. Riggle-Colvin, wife of Father, offered to take Mykayla to the doctor for her rescheduled appointment on the same day Mrs. Riggle-Colvin's daughter was scheduled to see the same doctor. Additionally, Mrs. Riggle-Colvin offered to take Mykayla to the dentist.

Mother's step-sons, Nathan, age 8, and Alex, age 5, live with her. An "incident" occurred between Mykayla and Nathan, who is also known as Brett, while Carrie Cooper was watching them. According to Mother, Nathan and Mykayla came inside the house after swimming and got into a bed together. Mykayla told Mother that she was hot and removed her bathing suit bottoms. Mother did not report this incident to the Department of Children's Services because she believed nothing inappropriate occurred. Mykayla and Nathan both denied anything happened.

CARRIE COOPER (MOTHER'S NIECE)

Ms. Cooper and her sister, Kathy Cooper, babysat Mr. Ladd's two sons and Mykayla over the summer while Mr. Ladd and Mother were working. Near the end of July, Ms. Cooper walked into a bedroom where she saw Nathan Ladd and Mykayla under the covers in the bed together. Ms. Cooper lifted the sheet and saw Nathan pull his hand away from Mykayla's private area. Mykayla had been wearing a T-shirt and jean shorts, but she was not wearing the shorts or underwear when Ms. Cooper lifted the sheet. Ms. Cooper notified her mother.

KIM RIGGLE-COLVIN (FATHER'S PRESENT WIFE)

According to Mrs. Colvin, Mykayla stayed with Ms. Goebel almost every day and with the Colvins almost every night prior to June 1998. After June 1998, Mrs. Colvin noticed Mr. Colvin's difficulty in reaching Mykayla by telephone. Mrs. Colvin loves Mykayla like one of her own daughters. While Mrs. Colvin was unemployed, the electricity was terminated for a short period of time within a few months prior to the hearing.

EVA GOEBEL (FATHER'S MOTHER)

Ms. Goebel has been Mykayla's babysitter for most of Mykayla's life. Ms. Goebel and Mother had a disagreement in June 1998 which caused Mother to stop bringing Mykayla for Ms. Goebel to babysit. Ms. Goebel called Mother at work because she was concerned about Mykayla's whereabouts one morning. Mother told Ms. Goebel that Mykayla was with Mother's niece, Carrie Cooper. Ms. Goebel asked about Mykayla's medicine and told Mother that Mykayla needed to take her antibiotic on a certain schedule. Mother was angry with her due to this conversation.

Regarding Mother's care for Mykayla, Ms. Goebel noticed Mykayla's hair sometimes was not clean and she sometimes was dressed in boys' clothes when brought to Ms. Goebel's home. Ms. Goebel believed that Mother was unconcerned with Mykayla's medical needs.

ELIZABETH HAYMAN (MOTHER'S SISTER)

Mrs. Hayman lived in the same house with Mother. Mrs. Hayman and her three children lived downstairs, while Mother, Mr. Ladd and three children, including Mykayla, lived upstairs. Mrs. Hayman's sister and her two children had been living in

the same house for over a week. Additionally, Mrs. Hayman's mother had stayed with them for over a month.

Mrs. Hayman told Mother about the incident her daughter, Carrie Cooper, witnessed between Nathan and Mykayla. Mrs. Hayman and Mother questioned Mykayla about the incident and Mykayla "admitted it." Mrs. Hayman and Mother told Mr. Ladd about the incident.

SUSAN PENNINGTON (FORMER WIFE OF MOTHER'S PRESENT HUSBAND)

Mrs. Pennington was granted a divorce from Mr. Ladd in 1996. Mrs. Pennington obtained a restraining order against Mr. Ladd because of an alleged sexual incident between him and her daughter. The Court granted custody of the parties' minor sons, Nathan and Alex, to Mrs. Pennington. After Mrs. Pennington married Jack Pennington, Mr. Ladd was awarded temporary custody pending a final hearing.

VICKIE POLLARD (FATHER'S SISTER)

According to Ms. Pollard, Mykayla stayed with Ms. Goebel on a continuous basis from the summer of 1997 through most of June 1998. After June 1998, Mother only allowed Father to see Mykayla every other weekend. Ms. Pollard was angry with Mother for "taking advantage" of Ms. Goebel by continually leaving Mykayla with her. Mother attempted to purchase Phen-Fen pills from Ms. Pollard's daughter-in-law.

JERRY LADD (MOTHER'S PRESENT HUSBAND)

Mr. Ladd married Charlene Colvin on July 31, 1998. He has been employed with United Technologies Automotive in Dayton as a quality engineer for two years. Mr. Ladd described the home which they were moving into on the day of the hearing. Concerning the allegation of improper contact between Mr. Ladd and Mrs. Pennington's daughter, no charges were ever filed and there was no truth to the allegation. Mr. Ladd talked to Nathan about the incident involving Mykayla. Nathan denied that he touched Mykayla. Mr. Ladd believed Carrie Cooper testified untruthfully about the incident between Nathan and Mykayla.

Mr. Ladd approached Mr. Colvin at the ballfield and Mr. Colvin told Mr. Ladd not to talk to him and get out of his face. Mr. Ladd responded to Mr. Colvin by saying "Leave our family alone. The next time it happens I'm going to kick your butt." Mr. Colvin continued to harass him by glaring at him.

Regarding Mykayla's sleeping arrangements, Mykayla has a mattress bed with a small metal frame. The frame bent, therefore, Mr. Ladd placed the frame outside the house. Mykayla had been sleeping with her grandmother and her aunt who had been visiting them. Mr. Ladd and Mother never engaged in sexual activity in the presence of Mykayla.

After considering the foregoing testimony, the Court entered an order on April 20, 1999 granting Father's petition to modify custody. On April 27, 1999, the court set aside its order entered April 20, 1999, and returned custody of Mykayla to Mother. The Court stated that the April 20, 1999 order should be set aside because there was "proof that the Defendant's counsel had forwarded a copy of the Order to counsel for Plaintiff; however, counsel for Plaintiff had not received the documents that were mailed

by the Defendant's attorney." On May 4, 1999, the Court entered an order denying Father's petition for modification, while leaving custody of Mykayla with Mother.

In a custody case, our review is *de novo* with a presumption of correctness unless the preponderance of the evidence is otherwise. See Tenn. R. App. P. 13(d). We must affirm, unless the preponderance of evidence is otherwise. Hass v. Knighton, 676 S.W.2d 554, 555 (Tenn. 1984). Tennessee Code Annotated § 36-6-101(a)(1) provides that the decree for custody "shall remain within the control of the court and be subject to such changes or modification as the exigencies of the case may require."

The noncustodial parent carries the burden to prove changed circumstances. Muselman v. Acuff, 826 S.W.2d 920, 922 (Tenn. Ct. App. 1991). There is no definitive rule as to what constitutes changed circumstances. Dantzer v. Dantzer, 665 S.W.2d 385, 387 (Tenn. Ct. App. 1983). "Changed circumstances" includes any material change of circumstances affecting the welfare of the child or children including new facts or changed conditions which could not be anticipated by the former decree." Dalton v. Dalton, 858 S.W.2d 324, 326 (Tenn. Ct. App. 1993) (citation omitted).

The Court's reasoning for granting custody to Father and then returning custody to Mother is not clear from the record. In both the April 20, 1999 order and the May 4, 1999 order, the Court ordered that Mykayla should "not be left alone in the company of Jerry Ladd's children, and that any contact between MyKayla Danielle Colvin and the children of Jerry Ladd during visitation should be closely and personally supervised by either [Mother] or her husband." Obviously, the Court was concerned

about the testimony regarding the inappropriate touching of Mykayla Colvin by Nathan Ladd. However, the Court denied Father's petition to modify custody. We cannot agree with this decision.

After reviewing the record, we conclude that Father should be granted custody of Mykayla. The testimony at the custody hearing shows there are changed circumstances in Mother's home which affect the welfare of Mykayla. Carrie Cooper testified that Nathan Ladd touched Mykayla in her private area. Mrs. Hayman testified that Mykayla admitted Nathan had touched her in her private area. The Court found this testimony to be reliable and placed language in the orders to restrict contact between Mr. Ladd's children and Mykayla.

Father testified that he can provide the proper care for Mykayla. Father and Father's mother, Ms. Goebel, appeared to provide a majority of Mykayla's care after Father and Mother divorced. Father's wife, Mrs. Riggle-Colvin, and Mother have been very cooperative, such that Mrs. Colvin offered to take Mykayla to the dentist and doctor when Mother was unavailable to do so. We conclude that Mykayla's best interests will be served by granting custody to Father.

For the foregoing reasons the judgment of the Circuit Court is reversed and the cause remanded for enforcement of the judgment of this Court and the collection of costs below. Costs of appeal are adjudged half against Douglas Colvin and his surety and half against Charlene Ladd.

Houston M. Goddard, P.J.

CONCUR:

Herschel P. Franks, J.

Charles D. Susano, Jr., J.