IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

CHRISTOPHER SCOTT WELLS,	)	
	)	
Plaintiff/Appellant,	)	Appeal No.
	)	No. M1998-00748-COA-R3-CV
v.	)	
	)	
BETTY SUE WELLS,	)	Coffee County Chancery
	)	No. 97-234
Defendant/Appellee.	)	

APPEAL FROM THE CHANCERY COURT FOR COFFEE COUNTY

THE HONORABLE JOHN W. ROLLINS, PRESIDING

MICHELLE M. BENJAMIN
102 FIRST AVENUE, N.W.
P.O. BOX 177
WINCHESTER, TN 37398

Attorney for Plaintiff/Appellant

ROBERT T. CARTER
HENRY, McCORD, BEAN & MILLER, P.L.L.C.
300 NORTH JACKSON STREET
P.O. BOX 538
TULLAHOMA, TN 37388

Attorney for Defendant/Appellee

REVERSED AND REMANDED

_____PATRICIA J. COTTRELL, JUDGE

CONCUR:

KOCH, J.
CAIN, J.

OPINION

Christopher Scott Wells ("Father") and Betty Sue Wells ("Mother") divorced in October 1997. By the terms of their Marital Dissolution Agreement (MDA), the parties had joint custody of the two children with Mother as primary custodian. Shortly after the MDA was accepted by the court, Father changed his mind. He sought custody of the children based on Mother's relationships with men. The trial court found no change in circumstances and left custody with Mother. Because of evidence of the children's altered behavior during their visit with Father, we find it necessary to remand the case to the trial court for a determination of the best interests of the children, including the comparative fitness of the parents at the time of the hearing on remand.

I.

Father sought a divorce from Mother on grounds of inappropriate marital conduct and irreconcilable differences. The parties signed an MDA and obtained their divorce in October 1997 on grounds of irreconcilable differences. In their MDA, they agreed to joint custody of the children with Mother as primary custodian. The decree placed no restrictions on Mother's conduct and specifically allowed Mother to move the children to Florida without further court approval.

Mother had entertained men overnight at her apartment during the parties' separation, even with the children present, and Father knew it. Mother continued to entertain men overnight, with the children present, following the divorce. Father claimed that Mother had agreed to quit seeing men overnight as a condition of his agreement that she obtain physical custody and move to Florida, and that she had, indeed, stopped seeing men for a brief period before the divorce. Mother claimed that Father had mentioned, only once, that he did not like her seeing men while the children were present, but that it was never a condition of his agreement on custody.

Ten days after the divorce was granted, Father filed a motion to set aside the final decree, seeking custody of the children. He claimed that primary custody with Mother was not in the children's best interest. The court denied his motion. A few weeks later, in November 1997, Father filed a Petition to Modify the Final Decree of Divorce. In January 1998, Father helped Mother and children move to Florida.

A hearing was held on custody modification in July 1998 while the children were in Tennessee for summer visitation. Testimony at the hearing showed that Mother had allowed a man with a history of domestic violence to live with her and the children from November 1997 until January 1998, when she and the children moved to Florida. She had also dated a man with a criminal record during the summer while the divorce was pending. Mother testified that she had not seen those men since her move to Florida and that she was no longer in contact with either of them.

Father and his relatives testified to various changes in the conduct of the children. The most troubling were the seven year old daughter's inappropriate sexual acting out, anger displayed by the son, and violence between the children. The daughter had also failed first grade.

A child psychologist, who testified for Father, met with the children four times shortly before the trial, but never spoke to Mother. The psychologist claimed that the daughter had more sexual knowledge than a seven year old should have. The four year old son did not seem to have age-inappropriate sexual knowledge, but displayed anger.

Testimony also indicated that Mother had become more settled in Florida. At the time of the hearing, she was living in an efficiency apartment attached to her parents' home and helping to care for her ailing mother. She had a job, was working on her GED, attended church regularly, and was dating only one man. The children liked Mother's new boyfriend and told the psychologist that they were not afraid he would hurt Mother, as they had been with other boyfriends. Mother did not allow the boyfriend to spend the night

at her apartment.

II.

In making an initial custody decision, a trial court must attempt to set custody arrangements "that promote the best interest of the child, enhance the child's relationship with each parent, and interfere as little as possible with post-divorce family decision-making." *Adelsperger v. Adelsperger*, 970 S.W.2d 482, 484 (Tenn. Ct. App. 1997). No parent can be perfect, and trial courts must decide between imperfect custodians. *See Bah v. Bah*, 668 S.W.2d 663, 666 (Tenn. Ct. App. 1983); *Edwards v. Edwards*, 501 S.W.2d 283, 290-91 (Tenn. Ct. App. 1973). In the case before us, the trial court never decided that the children's best interests would be served by being in the custody of their mother, because Father never contested custody. Instead, Father signed the MDA, allowing Mother to have primary custody and to move to Florida, without informing the court of his reservations about Mother's conduct.

Even though the trial court did not look beyond the MDA to determine whether the parents' agreement served the children's best interests, the initial custody decision became a final order when it was approved by the court and properly filed by the clerk. *See* Tenn. R. Civ. P. 58. The award of custody, then, became *res judicata* "upon the facts in existence or reasonably foreseeable when the decision was made." *Adelsperger*, 970 S.W.2d at 485; *see also Long v. Long*, 488 S.W.2d 729, 731-32 (Tenn. Ct. App. 1972); *Hicks v. Hicks*, 26 Tenn. App. 641, 650, 176 S.W.2d 371, 374-75 (1943). Having been awarded, custody should not be disturbed unless there is some change in circumstances that affects the welfare of the child. *See Contreras v. Ward*, 831 S.W.2d 288, 290 (Tenn. Ct. App. 1991); *Adelsperger*, 970 S.W.2d at 485.

Changes in a child's circumstances may require modifying an existing custody and visitation arrangement. *See Adelsperger*, 970 S.W.2d at 485*; see also* Tenn Code Ann. § 36-6-101(a)(1) (Supp. 1999) (courts are empowered to

change custody "as the exigencies of the case may require"). There is no hard and fast rule as to what constitutes a change of circumstances sufficient to justify a change of custody. *See Dantzler v. Dantzler*, 665 S.W.2d 385, 387 (Tenn. Ct. App. 1983). However, a custody order cannot be modified absent a showing of some new facts or "changed circumstances" affecting the physical, mental, or emotional welfare of the child which has occurred since the initial custody award. *See Adelsperger*, 970 S.W.2d at 485; *Blair v. Badenhope*, 940 S.W.2d 575, 576 (Tenn. Ct. App. 1996).

This court has addressed the change of circumstances requirement in the context of a request to modify an agreed custody arrangement:

> Custody decisions are best made by trial courts that are fully appraised of the present and anticipated circumstances of the parents and the children. Trial courts usually acquire this information when custody is contested, but they may not be as fully informed when the parties have sorted out their affairs in a marital dissolution agreement. Thus, change of custody proceedings in cases that were originally resolved by agreement frequently bring to the trial court's attention information that the parties did not present to the trial court in the original proceeding.
>
> Even if this evidence would have affected the original custody decision had it been presented, the trial court should not rely on it to change custody unless the child's circumstances have changed materially after the original custody decision.

Hall v. Hall, 01-A-01-9310-PB-00465, 1995 WL 316255 at *2-3 (Tenn. Ct. App. May 25, 1995) (no Tenn. R. App. P. 11 application filed).

III.

Child custody cases are particularly fact driven, both on the initial award of custody and on requests to modify a previous award. *See Rogero v. Pitt*, 759 S.W.2d 109, 112 (Tenn. 1988); *Brumit v. Brumit*, 948 S.W.2d 739, 740 (Tenn. Ct. App. 1997). A trial court's ruling on custody is presumed to be correct, and, absent an error of law, an appellate court will not disturb such a finding unless the evidence preponderates against it. *See* Tenn. R. App. P. 13(d). *Hass v. Knighton*, 676 S.W.2d 554, 555 (Tenn. 1984).

The trial court heard testimony in this case for more than two days, much of it centering on the children's behavior, but made no explicit findings

regarding the existence of alterations in behavior. The court simply declared that the circumstances had not changed. Based upon the reasoning of *Hall*, discussed earlier, we are of the opinion that the evidence supports a finding that Father did not meet his burden of proving an unforeseeable change of circumstances based on Mother's conduct.[1]

However, the evidence of the changes in the children's behavior is sufficient to raise concerns about the welfare of the children. Much of the behavior described, especially that of the daughter, can clearly be described as unforeseeable. The record is unclear, however, on the potential causes of these changes,[2] and we will not conclude that they are related to either parent's conduct. Because of the changes in the children's behavior, however, we find that the evidence preponderates against the trial court's finding that no change of circumstances has occurred.

IV.

Once a change in circumstances has been shown to exist, the court must proceed to an analysis of the best interests of the children before changing custody. *See Adelsperger*, 970 S.W.2d at 485. No best interest analysis was performed in this case. Therefore, we remand this matter to the trial court for a hearing and determination of whether the best interests of the children will be served by remaining in the custody of their mother, or whether custody should be changed to the father. The determination of the best interests of the children should be based upon the comparative fitness of the parents as of the time of the upcoming hearing, not the time of the divorce nor the time of the modification hearing.

---

[1]In addition, the changes in Mother's conduct since her move to Florida appear to be positive rather than detrimental to the children's welfare. Father can hardly complain that these changes, which comport with his alleged conditions of agreement to custody, were either unforeseeable or negatively impacting the children.

[2] Father's witnesses testified to the actions in question. Mother's witnesses testified that the girl had not exhibited sexually inappropriate behavior prior to her visit with Father.

This case is remanded to the trial court for such further proceedings as may be necessary. Costs of this appeal are to be taxed to both parties equally.

_____
PATRICIA J. COTTRELL, JUDGE

CONCURS:

_____
WILLIAM C. KOCH, JR., J.

_____
WILLIAM B. CAIN, J.