IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 6, 2003 Session

TIFFANY T. SENN (WILLIAMS) v. ROMANDO LADELL HAYNES

Appeal from the Juvenile Court for Rutherford County
No. 1113C Donna Scott, Judge

No. M2002-01519-COA-R3-JV - Filed August 5, 2003

Tiffany T. Senn (Williams) appeals the action of the Juvenile Court of Rutherford County, changing the primary residential custody of her minor child from Tiffany Senn to the biological father of the child, Romando Haynes. We affirm the action of the trial court.

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

WILLIAM B. CAIN, J., delivered the opinion of the court, in which BEN. H. CANTRELL, P.J., M.S., and WILLIAM C. KOCH, JR., J. joined.

Sarah H. Cope, Murfreesboro, Tennessee, for the appellant, Tiffany T. Senn (Williams).

Robert Todd Jackson and Patricia Campbell, Nashville, Tennessee, for the appellee, Romando Ladell Haynes.

OPINION

Tiffany T. Senn (Williams) and Romando L. Haynes are both residents of Rutherford County, Tennessee. The minor child, J.H., was born to them on August 29, 1992. The record does not disclose anything about the first four years of the child's life, but, apparently, an Order was entered September 19, 1996 requiring Romando L. Haynes to pay $58 per week in child support. Another Order was, apparently, entered on March 2, 2000, which order provides something of a starting place in our consideration of this appeal. Neither the September 19, 1996 Order nor the March 2, 2000 Order are included in the record on appeal.

On February 26, 2002, Tiffany Senn filed a Petition for Modification alleging that Romando L. Haynes was $304.36 in arrears on his child support, that a significant variance between the Tennessee Child Support Guidelines and the amount of child support being paid had occurred since the entry of the September 19, 1996 Order, and that an increase in child support was justified. On April 17, 2002, Romando Haynes filed an Answer and Counter-Petition denying that he was in

arrears in child support and denying any significant variance. In his Counter-Petition, he asserted that, since March 2, 2000, he had been, in effect, an equal custodian of the child and that the Mother was uncooperative in exchange of the minor child. He further asserted that the Mother made harassing telephone calls to his residence. Specifically, he stated:

> 4. By Order entered March 2, 2000, before the Honorable Donna Scott, Referee of the Juvenile Court of Rutherford County, Tennessee, the Father was awarded a structured visitation schedule with the minor child. The Father will show that he has spent one-half of the time with the minor child during the years 2001 and 2002 such that the child support should be set according to the Tennessee Child Support Guidelines for each parent or, in the alternative, that there should be a deviation downward granting the Father credit for any additional days which he spends with the minor child more than the days contemplated by the Guidelines.

In the prayer for relief he sought an Order requiring Tiffany Senn to pay one-half of medical and dental expenses not covered by insurance and one-half of expenses for the child to participate in school and after school activities. He also asked that she be enjoined from using obscene or derogatory language toward Mr. Haynes, either in person or on telephone messages that are accessible to the child.

On May 10, 2002, Romando Haynes filed an Amended and Supplemental Answer and Counter-Petition wherein he sought primary custody of the minor child, alleging:

> 4. By Order entered March 2, 2000, before the Honorable Donna Scott, Referee of the Juvenile Court of Rutherford County, Tennessee, the Father was awarded a structured visitation schedule with the minor child. The Father will show that he has spent one-half of the minor chid's free time with the minor child since the last Court Order.
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> 5. The Father will further show that significant and material changes of circumstance have occurred such that a change in the primary residential custody and care of the minor child is warranted. The minor child, at 9 years of age, is now requesting to have her primary residence be with the Father. The Mother has recently divorced, moved her residence, changed her surname to Williams, and frequently has male guests at her home late at night. In 2002-2003, the minor child will be attending a third school in six years of schooling. If the child resides with the Father, she will remain in one school zone for the remainder of her education. As the visitation schedule stands right now, it has become more of a burden for the minor child to go back and forth between homes during the school week. The minor child must carry an extra bag of clothing daily and with the constant switching throughout the week, she is not given the opportunity to get settled in at either home. The minor child's desire to participate in extra curricular activities has grown much stronger. The Mother will not allow the child to participate in any extracurricular activities. The Father feels that it is very important for the minor child to participate in

extracurricular activities and school functions to help the child remain interested in and happy with school. Also, the mother will not provide any assistance with the child's homework or school projects. The child relies entirely on the Father for assistance with homework and projects.

The case was heard on May 30, 2002. An order entered June 19, 2002, provided, in pertinent part:

> This cause came on to be heard on Thursday, the 30th day of May, 2002, before the Honorable Donna Scott, Judge of the Juvenile Court for Rutherford County, Tennessee, upon the Petition for Modification filed by the State of Tennessee on behalf of the Mother, and the Answer and Counter-Petition and Amended and Supplemental Answer and Counter-Petition filed by the Father. Parties and representatives present were Tiffany T. Senn Williams, the Mother of the minor child, represented pro se on the issues of custody and visitation, Romando L. Haynes, the Father of the minor child, and attorney Patricia G. Campbell, Molly Haynes, the Father's wife and the minor child, [J.H.].
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> Upon a finding by the Court that the Mother had failed to answer the Counter-Petitions filed by the Father and upon the Court's offer to the Mother to continue the hearing on the issue of custody to give her additional time to answer the Father's Amended and Supplemental Answer and Counter-Petition, the Mother announced to the Court that she wished to waive her rights to a continuance and wished to proceed pro se with the hearing on the issues of custody, visitation and support.
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> Based upon the testimony of witnesses, the statements of counsel in open court, and all of the evidence presented, the Court has given sincere and careful consideration of the law. The Court, therefore, makes the following findings on the issues of custody, visitation and support for the minor child:
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> 1. The minor child sincerely loves both of her parents and manifests a maturity and understanding far beyond her age of nine years as to the difficult decision facing the Court.
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> 2. In determining the primary residence of the minor child, the Court must consider the best interest of the minor child. The shared custody arrangement of divided residential time with the minor child, ordered by this Court on March 2, 2000, is not in the best interest of the minor child. A change of custody is therefore warranted. It is in the minor child's best interest for the Father to be the primary residential parent and for the Mother to have visitation every other weekend and at other times by mutual agreement of the parties. The parties have cooperated with each other during holidays and with the exchange of the minor child for visitation.
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> 3. There have been material changes of circumstances, which the Court has taken into account in determining the best interest of the minor child for the purpose of designating the minor child's primary residence. These material changes include the instability of the Mother's current lifestyle; the minor child's attendance at three different schools in six years; evidence of the Mother's difficulty assisting

the child with extra curricular activities, homework and school projects; the Mother's moves to more than one residence in two years; the Mother's own admission that she has undergone difficult times in her life; the Mother's use of inappropriate language toward the Father and his family in the presence of the minor child; evidence that the Father spends one-half of the year with the minor child; and the Mother's admission that she failed to exercise her summer visitation with the minor child for the past two years.

4. The Mother should pay child support to the Father in the amount of $50.00 per week based on her weekly gross income of $403.00, taking into account a deviation downward from the Tennessee Child Support Guidelines for the additional time it is contemplated that the Mother will spend with the minor child.

5. As of May 13, 2002, the Father has overpaid his child support obligation to the Mother by $127.25. This overpayment, as well as the Father's other contributions to clothing and activities for the minor child and the additional time he has spent with the child over and above the time contemplated by the Tennessee Child Support Guidelines, meets or exceeds any amount of retroactive child support the Father would have owed based on his increase in salary.

Tiffany Senn obtained counsel and filed a timely appeal.

Proper appellate review of this case is foreclosed by deficiencies in the appellate record. First of all, the original Order of the trial court, apparently entered on March 2, 2000, setting forth the trial court's findings as to custody and visitation, is not included in the appellate record. We are left with the task of trying to find out the specifics of the original custody Order by perusing the briefs of the parties and the trial court Order of June 19, 2002, which never directly address exactly what the trial court did on March 2, 2000.

Secondly, and even more inhibiting to proper appellate review, is the procedure whereby the trial court interviewed, in private, the nine year old child outside the presence of the parties and outside the presence of the attorneys and made no record of what was discussed with the minor child during the interview. Appellant was pro se at the trial court hearing, and, when all of the testimony had been concluded, the following occurred:

> THE COURT: Thank you.
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> What I'm going to do next is, I'm going to talk to [J.]. And, Ms. Campbell, since we don't have two attorneys, usually what the Court does is, I talk to the child with my two attorneys. Would you have any objection to the Court just talking to [J.] herself? Is that okay? I was just going to bring her in and we were going to sit down at one of the tables. It will be on the record. But usually what we do is, we don't let the parties in when we're talking, but I do allow the attorneys. And then I usually tell them not to repeat anything that's said, anyway. So, if you don't have any objection then, Ms. Campbell, I'm just going to talk to [J.] for a few minutes. Okay? So,

whoever feels more comfortable bringing [J.] in and introducing her to me, we're going to sit down right here and chat.

MS. CAMPBELL: Do you want to go outside?

THE COURT: Just right in the hall. I don't think we'll have to chat too long.

(Whereupon, everybody leaves Courtroom and [J.] and the Court have discussion.)

THE COURT: Let the Court first say I've got a very mature nine-year-old, so somebody has done something right in raising her. She's articulate, beautiful, sweet, and she loves both of you very much. And I don't think that that has ever been a question with this Court, that both of you haven't loved your daughter and wanted to always be in sharing her life.

Ms. Campbell, if you would be kind to draw my order. And I'm going to go slow so that you can write everything down. Okay? Because I'm going to have a lot of findings and fact that we need to address.

This type of a procedure is fraught with peril, particularly to the party attempting to appeal the action of the trial court. The burden rests upon the party appealing the case to preserve a record of the proceedings before the trial court, and, upon failure to do so, a fact-based appeal is doomed to failure.

> This issue is fact-based. Where the issues raised go to the evidence, there must be a transcript. In the absence of a transcript of the evidence, there is a conclusive presumption that there was sufficient evidence before the trial court to support its judgment, and this Court must therefore affirm the judgment. *McKinney v. Educator and Executive Insurers, Inc.*, 569 S.W.2d 829, 832 (Tenn.App.1977). This rule likewise applies where there is a statement of the evidence which is incomplete. The burden is upon the appellant to show that the evidence preponderates against the judgment of the trial court. *Capital City Bank v. Baker*, 59 Tenn.App. 477, 493, 442 S.W.2d 259, 266 (1969). The burden is likewise on the appellant to provide the Court with a transcript of the evidence or a statement of the evidence from which this Court can determine if the evidence does preponderate for or against the findings of the trial court. The appellant has failed to carry this burden.

Coakley v. Daniels, 840 S.W.2d 367, 370 (Tenn.Ct.App.1992).

In this case we face precisely the same problem that faced the Court of Appeals in *Scarbrough v. Scarbrough*, 752 S.W.2d 94 (Tenn.Ct.App.1988). In that case, the Court of Appeals strongly discouraged the practice of in-chambers ex parte interviews with a child who is the subject of a custody controversy. Said the court:

> The record reflects that in addition to the witnesses that testified for and against each party seeking custody, the trial court interviewed the minor child in

chambers. Apparently, the lawyers were not present at this interview and the record does not contain a transcript of the proceedings in chambers. The record states:

> THE COURT: All right, I have talked to Trina, and she is a mighty sweet girl, and loves both of you, and I have assured her that both of you love her, both of you.

Apparently the lawyers for the respective parties acquiesced in the interview of the child outside of their presence. This practice should be discouraged. The only purpose for hearing from the child is to assist the trier of fact in making a determination of the issues before it, which in this case was to determine the best interest for the child. Every person of sufficient capacity to understand the obligation of an oath is competent to be a witness. T.C.A. § 24-1-101 (Supp.1987). If there is some compelling reason for the proceedings to be held in chambers, the trial court, nevertheless, should determine the qualifications of a witness and such witness' testimony should be preserved in the record. In the case before us, it is clear that the trial judge, with the acquiescence of the parties, heard testimony of the child, but we do not have the benefit of this testimony in the record. When the trial court hears the evidence, but the evidence is not included in the record on appeal, it is presumed that the evidence supports the ruling of he trial court. *Turner v. Turner*, 739 S.W.2d 779 (Tenn.App.1986).

Scarbrough, 752 S.W.2d at 96-97.

To invoke the *Coakley-Scarbrough* rule in this case is particularly troublesome since Appellant is pro se and it is the trial court and not either of the parties that was responsible for the in-chambers conference with the minor child. This practice is a bad idea. It is inconsistent with the status of trial courts as courts of record whose proceedings are open. It also undermines the efficacy of appellate review. The harshness of the *Coakley-Scarbrough* presumption relative to the incomplete record is alleviated in large measure in this case by the ample evidence in the record supporting the judgment of the trial court without the aid of the presumption but the practice that gives rise to all of the trouble is the ex parte conference between the trier of fact and the child. This practice certainly does not serve the interest of justice.

Obviously, in this case the trial court was favorably impressed with the nine-year-old daughter of the parties, and it would be extremely difficult for any testimonial record to provide a basis for review of a trial court's determinations based upon observations of the child and determinations of credibility. Such matters provide, in great measure, the basis for the rule that the findings of the trial court, which are based upon an assessment of the credibility of witnesses, are entitled to great weight on appeal. The trial court, after all, has the opportunity to observe the manner and demeanor of witnesses, an element that is absent where the appellate court must depend upon a written transcript. *Saddler v. Saddler*, 59 S.W.3d 96, 101 (Tenn.Ct.App.2000).

> Our scope of review is governed by Tennessee Rule of Appellate Procedure 13(d) and unless otherwise required by statute, review of findings of fact by the trial

> court in civil actions shall be de novo upon the record of the trial court, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. *Hass v. Knighton*, 676 S.W.2d 554, 555 (Tenn.1984); *Foster v. Bue*, 749 S.W.2d 736, 741 (Tenn.1988). Where the trial judge has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, on review considerable deference must still be accorded to those circumstances. *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315 (Tenn.1987). Where the issue for decision depends on the determination of the credibility of witnesses, the trial court is the best judge of the credibility and its findings of credibility are entitled to great weight. This is true because the trial court alone has the opportunity to observe the appearance and the demeanor of the witnesses. *Royal Insurance Co. v. Alliance Insurance Co.*, 690 S.W.2d 541, 543 (Tenn.App.1985).

Tenn-Tex Props. v. Brownell-Electro, 778 S.W.2d 423, 425-26 (Tenn.1989).

As best we can tell in the absence of the original custody Order of March 2, 2000, the trial court therein provided for a divided custody arrangement with the child being exchanged in the middle of the week. The court was not satisfied with this arrangement, and, apparently, neither of the parties were satisfied with it either. The parties seemed to get along fairly well with each other, and both have the affections of the minor child. Given the limited record before us, we see no basis for disturbing the action of the trial court.

The judgment of the trial court is in all respects affirmed with costs assessed to Appellant.

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WILLIAM B. CAIN, JUDGE