

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 8, 2003 Session

**IN RE: HUNTER EDEN, A Minor Child, SOMMER EASTMAN v.
DAVID EDEN**

**Appeal Juvenile Court of Sumner County
No. 59-501 Barry E. Brown, Judge**

No. M2002-000521-COA-R3-JV - Filed August 25, 2003

This appeal arises from the trial court's decision to remove custody of the minor child from the mother and place him with the father. The trial court considered testimony regarding the stability of the parents as well as the medical condition of the mother. The court modified the custody arrangement and ordered the mother to pay child support. The mother filed this appeal. We affirm.

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

DON R. ASH, S.J. delivered the opinion of the court, in which BEN H. CANTRELL, P.J., M.S., and PATRICIA J. COTTRELL, J., joined.

J. Todd Faulkner, Nashville, Tennessee, for the appellant, Sommer Eastman.

Mark T. Smith, Gallatin, Tennessee, for the appellee, David Eden.

OPINION

I.

Factual Background

On August 28, 1998, Kody Hunter Eden was born to Sommer Eastman (Mother) and David Eden (Father). On January 20, 1999, the Mother was awarded custody and the Father was awarded reasonable visitation with the minor child.

On November 8, 2000, the Mother requested to move with the minor child out-of-state and the Father filed a response opposing the move. Upon Motion of the Father, the

Mother was restrained by court order from removing the child from the state. On December 1, 2000, the Father then filed a Petition to change custody of the minor child.

The parents never married. The Mother was nineteen years of age when Kody was born. She did not complete high school, but earned a GED in 1997. Her employment history has been sporadic. Between 1999 and 2001, she held three jobs, leaving after less than a year with each employer. Since Kody's birth, Mother has moved seven times, requested the court's permission to move out-of-state, and has married twice.

The Father lives in Westmoreland in an addition on the other side of his parents' home. Kody has his own bedroom. The Father was employed four years with one employer, six months with a landscaper, and at the time of the hearing worked as an installer with H.H. Gregg.

The Mother has relied upon several different persons to care for Kody, since she was awarded custody of the minor child on January 20, 1999. While working at Hooters in the year 2000, she did not get off work until one, two or three o'clock in the morning. During this time period, the Father had their child at least three nights per week.

In July 2000, the Mother was hospitalized seven days at Middle Tennessee Mental Health Institute for a Prozac overdose. Kody stayed with the Mother's parents or stepfather, and the Father was not notified. The Mother confirmed she told health care providers she cried all the time, couldn't hold a job, had been drinking, could not take care of Kody, and did not take her medication properly. She could not recall how many times in the year 2000 she had left Kody to someone else's care because she did not feel good.

In July 2001, the Mother admitted herself to Tennessee Christian Hospital's dual diagnosis unit because she was starting to feel depressed. She stayed three or four days

and did not notify the Father. She quit her job in mid-September to avoid the long drive to work in Madison from her parent's home in Lafayette and to plan her upcoming wedding.

The Mother, in response to questions from her attorney, testified she had received a number of different diagnoses and treatments for medical conditions, including bi-polar disorder, psychiatric conditions, alcohol/drug abuse, and sexual abuse. She was being seen by a therapist once a week since July 2001 and continues to see her doctor to check her medications once or twice a month.

On December 3, 2001 a hearing was held and as a result of testimony and other evidence, the court delivered certain factual findings and took the final determination under advisement. On January 16, 2002, the court issued its final order regarding specific custody determinations. The trial judge found the Father had shown that there had been a material change of circumstances and that the best interest of the child would be served by placing custody with the Father. The court entered an order changing custody of the minor child from the Mother to the Father because of the "stability of the parents."

Approximately three weeks later, a subsequent hearing was held whereby Mother was ordered to pay child support to Father, a visitation schedule was established, and a permanent restraining order was issued prohibiting the parents from discussing the case with the child. The Mother timely filed her appeal on February 22, 2002.

II.

Issues

1. Whether the trial judge erred in admitting medical reports regarding the Mother's treatment for a mental condition.
2. Whether the trial judge erred in modifying the Order of January 20, 1999 and changing the custody of the minor child from the mother to the father.

III.

Standard of Review

Our review in child custody cases is *de novo* upon the record with a presumption of correctness of the trial court's factual findings. *Ray v. Ray*, 83 S.W.3d 726, 733 (Tenn. Ct. App. 2001). In matters of child custody, trial courts are better equipped to decide the matter and therefore appellate courts review child custody matters for areas where the trial court's decision lays outside the boundaries of a reasonable application of the law to the facts. *Eldridge v. Eldridge*, 42 S.W.3d 82, 88 (Tenn. 2001).

III.

A.Introduction of Medical Records

Mother argues the court erred by allowing the introduction of medical records regarding her recent medical history and then compounded the error by unduly emphasizing her medical problems in changing custody to Father. Essentially, she presents "a but for" argument regarding the judge allowing evidence¹ of Mrs. Eastman's bi-polar diagnosis and Mr. Eden's failure to show a material change of circumstance.

¹ **Importantly, the trial judge did not admit the document into evidence. Rather, the document was merely marked for identification. Although counsel did not formally state the excluded medical record was marked as an offer of proof, we will treat it as such. See Neil P. Cohen *Tennessee Law on Evidence* §1.03 (4th ed. 2002)**

Father responds by disputing the hearsay testimony was erroneously admitted.² Both party's arguments are slightly off the mark.

Tennessee Rules of Civil Procedure, Rule 32.01 allows the introduction of depositions. It does not provide hearsay documents can be introduced simply because they are wrapped in the cloak of a deposition. The medical records, if they ever were introduced, were clearly hearsay and not admissible under the authority cited by Father's counsel.

The transcript of the hearing is full of examples where counsel for both parties discussed with Ms. Eastman her mental condition and diagnosis. The record clearly provided the trial court knowledge of the challenges Ms. Eastman had faced since the initial custody order. This issue of Mother's health was not the only one considered by the court.

Any error in admitting or giving weight to the improperly introduced health records of Ms. Eastman health was harmless because the court more than likely based its decision on other factors. *See* Tenn. R. App. P. 36(a). "A final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process." *See* Tenn. R. App. P. 36(b).

Ordinarily, it is harmless error in admitting evidence if other competent evidence in the record also shows the fact shown by the offending evidence. Upon reviewing the entire

² We note Mr. Eden changed justification for admitting the hearsay testimony on appeal. At trial, Mr. Eden argued the medical report was admissible as an exhibit to deposition testimony under the Rules of Civil Procedure Rule 32. On appeal, Mr. Eden abandoned this justification in favor of the testimony being a statement for the purpose of diagnosis and treatment under the Rules of Evidence 803(4). A party normally will not be allowed to raise an issue for the first time on appeal. *See State v. Adkisson*, 899 S.W.2d 626, 635 (Tenn. Crim. App. 1994).

record, if the appellate court finds the outcome is unlikely to be different upon retrial, the error must be considered to be harmless. *See Brown v. Daly*, 83 S.W.3d 153, 158 (Tenn. Ct. App. 2001). Any error in admitting or giving weight to the medical records of Ms. Eastman's mental health problems was harmless.

B.

Modification of Previous Custody Order

On January 20, 1999 the court awarded custody to Mrs. Eastman. The original custody award decision is "res judicata upon the facts in existence or reasonably foreseeable when the decision was made". *Adelsperger v. Adelsperger*, 970 S.W.2d 482, 485 (Tenn. Ct. App. 1987) *citing Young v. Smith*, 246 S.W.2d 93, 95 (1952); *In re Parsons*, 914 S.W.2d 889, 893 (Tenn. Ct. App. 1995). The party petitioning for a change of custody bears the burden of proof. *Hoalcraft v. Smithson*, 19 S.W.3d 822, 828 (Tenn. Ct. App. 1999). "The courts will change a custody or visitation arrangement if the party seeking the change proves (1) that the child's circumstances have changed materially in a way that could not reasonably have been foreseen at the time of the original custody decision, and (2) that the child's interests will be better served by changing the existing custody or visitation arrangement." *Solima v. Solima*, 7 S.W.3d 30, 32 (Tenn. Ct. App. 1998)

Normally custody of minor children should not be modified unless there is a material change of circumstances affecting the welfare of a child. If that threshold of material change is crossed, the court should apply the best interests test. *Hoalcraft v. Smithson*, 19 S.W.3d. 822. In making that determination the court is not required to find a parent unfit. *Bah v. Bah*, 668 S.W.2d 633 (Tenn. Ct. App. 1983). The court should simply compare a long list of factors established by both the legislature and Tennessee

case law to determine which environment will best serve the interests of the minor children. *Adelsperger v. Adelsperger*, 920 S.W.2d 482 (Tenn. Ct. App. 1992) An appellate court will not reverse such a decision, absent an error of law, unless the appellate court finds the evidence preponderates against the trial courts findings. *Massengele v. Massengele*, 915 S.W.2d 818 (Tenn. Ct. App. 1995) It is not the responsibility of the appellate court to second-guess trial judges in custody cases when the credibility of the witness is critically important. *Gilliam v. Gilliam*, 776 S.W.2d 81 (Tenn. Ct. App. 1988)

In its ruling on January 16, 2002, the trial court announced its ‘major concern’ as the lack of stability Mrs. Eastman displayed prior to trial. She had recently married and was seeking to relocate herself and her child to West Virginia. Between the time of the hearing and the subsequent argument on custody issues, Mrs. Eastman had decided to remain in Tennessee. During young Kody’s life, she had been married twice and once divorced. She failed to hold steady employment. When she was working, one position required her to work six nights a week, occasionally until two a.m. or three a.m.

Regarding her medical condition, the court did in fact mention her diagnosis and made it clear the court was concerned about it. However, the court’s concern was not with the condition itself, but with Mrs. Eastman’s failure to properly control her condition with her prescribed medications. She testified her failure to take her medicine played some role in her hospitalization, her depression, and her alcohol abuse. By emphasizing Mrs. Eastman’s need to treat her condition with medication, the court treated her illness as any other illness treatable with proper medication. Therefore, we do not find sufficient evidence the court unduly relied on Mrs. Eastman’s medical condition in rendering its decision. Furthermore, the trial court properly found there had been a

material change of circumstances as well as applying the proper factors in determining it was in the child's best interest to have custody placed with the Father.

The ruling of the trial court is affirmed. Costs of the appeal are taxed to the appellant.

DON R. ASH, S. J.