

IN THE COURT OF APPEALS

FILED
December 11, 1995
Cecil Crowson, Jr.
Appellate Court Clerk

KIMBERLY DAWN SHORT (FRENCH),)

HAMBLEN CHANCERY)

C. A. NO. 03A01-9506-CH-00168)

Plaintiff - Appellant)

vs.)

HON. DENNIS H. INMAN)
CHANCELLOR)

ROY WAYNE SHORT,)

AFFIRMED AND REMANDED)

Defendant - Appellee)

MINDY NORTON SEALS, Morristown, for the appellant.

MARK A. SKELTON, Rogersville, for the appellee.

O P I N I O N

McMurray, J.

In this appeal the mother of a minor child claims that there has been a change in circumstances justifying a change of custody from the father to her or, in the alternative, that she receive

additional visitation privileges. The chancellor determined that that there was no change of circumstances which would warrant a modification of the current custody arrangement. However, he did modify the visitation arrangement. We affirm the judgment of the trial court.

These parties were divorced in 1989 and at that time, Ms. French, Roy Lee Short's natural mother, was awarded custody of her son who was then three years old. In August, 1990, temporary emergency custody of Lee was awarded to his father, Roy Short. In March, 1991, full custody of Lee was awarded to Mr. Short. Mr. Short subsequently filed a petition for termination of Ms. French's parental rights. Ms. French sought additional overnight and holiday visitation. Mr. Short voluntarily withdrew his petition and the chancellor awarded Ms. French holiday visitation based on legal holidays recognized by the State of Tennessee and the United States.

In 1994, Ms. French petitioned the court for a change in custody. After hearing testimony from several witnesses, including the parties and their respective spouses, the chancellor commended Ms. French for her efforts to improve upon her mothering skills. He added, however, that standing alone, her improvements were insufficient to warrant changing the current custody arrangement. However, the chancellor did modify the visitation schedule to more

closely comply with standard visitation as contemplated by the Child Support Guidelines.

Ms. French has appealed raising the following issues for our review:

1. Whether the trial court erred in not granting mother custody of the minor child as the evidence shows that there has been a change of circumstances and it is in the child's best interest to be in mother's custody.
2. If the trial court was correct in not awarding custody to mother, whether the trial court erred by not liberally expanding mother's visitation based upon the clinical psychologist's recommendation that child needs expanded visitation with mother and based upon the other evidence presented.

We enter upon our review of the trial court's judgment guided by Rule 13(d), Tennessee Rules of Appellate Procedure. "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 finding, unless the preponderance of the evidence is otherwise." We note that no such presumption attaches to conclusions of law. Adams v. Dean Roofing Co., 715 S.W2d 341 (Tenn. Ct. App. 1986).

Ms. French first argues that the chancellor erred in refusing to change custody. She bases her argument on an alleged change of

circumstances and argues that it is in her minor son's best interests that he be placed in her custody. As evidence of a change in circumstances, Mrs. French cites interference by Mr. Short and his wife with her relationship with her son. She is further concerned with her son's emotional and behavioral problems and his desire to live with her.

In child custody cases, the law is well-established that where a decree has been entered awarding custody of children, that decree is res judicata and is conclusive in a subsequent application to change custody unless some new fact has occurred which has altered the circumstances in a material way to make the welfare of the child require a change in custody. (citations omitted.) Griffin v. Stone, 834 S.W2d 300 (Tenn. App. 1992). The paramount consideration in a custody proceeding is the best interest of the child. Bah v. Bah, 668 S.W2d 663 (Tenn. App. 1993). When the issue before the court, however, is whether to modify a prior custody order, it need not repeat the comparative fitness analysis that is appropriate at the time of the original custody decree. See, e.g., Bah, supra. Rather, the trial judge in a modification proceeding must find a material change of circumstances which is compelling enough to warrant a change in custody. See T.C.A. § 36-6-101(a); Wodard v. Wodard, 783 S.W2d 188 (Tenn. App. 1989). See also Cheek v. Cheek, (an unreported opinion by this court filed August 29, 1995).

The chancellor stated from the bench: "There now exists nothing which would preclude Ms. Short from being a quite suitable custodian for this child. Her attitude and demeanor today is in stark contrast to what this Court has observed in earlier hearings. Of course, the fact that she has improved herself, and she has considerably, standing alone is an inadequate reason to change custody. Only if something about the child's present situation ... is detrimental to the child, should custody be changed again. Otherwise, the child is held hostage to the vagaries of ... a parent's particular changes in mood."

We agree, as commendable as the mother's efforts to improve herself are, that, standing alone, does not constitute such a change in circumstances which would warrant a change of custody.

Ms. French's second issue is something of a curious issue to us. She sought and successfully obtained expanded and liberal visitation privileges. In view of the difficulty in complying with the earlier order of the court relating to visitation and the expanded and less difficult visitation now in effect, she was quite successful in the trial court on this issue. Apparently, she is still dissatisfied.

It has long been well-settled that the trial court is vested with wide discretion in matters relating to custody and visitation.

In speaking to this issue, our Supreme Court in Suttles v. Suttles, 748 S. W 2d 427 (Tenn. 1988) made the following observation:

[T]he general rule is that "the details of custody and visitation with children are peculiarly within the broad discretion of the trial judge," Edwards v. Edwards, 501 S. W 2d 283, 291 (Tenn. App. 1973), and that the trial court's decision will not ordinarily be reversed absent some abuse of that discretion, "in reviewing child custody and visitation cases, we must remember that the welfare of the child has always been the paramount consideration" for the courts. Luke v. Luke, 651 S. W 2d 219, 221 (Tenn. 1983). In addition, the right of the noncustodial parent to reasonable visitation is clearly favored. E. g., Weaver v. Weaver, 37 Tenn. App. 195, 202-203, 261 S. W 2d 145, 148 (1953)..."

See Also Mirmino v. Mirmino, 34 Tenn. App. 352, 355, 238 S. W 2d 105, 107 (1950). We find no merit in this issue.

The appellee has urged us to find this appeal to be frivolous and award costs and attorney's fees. We believe that the appellant's exercise of her right to have the decision of the trial court reviewed by this court is not frivolous under the circumstances. Accordingly, we do not find this to be a frivolous appeal.

The trial court is affirmed in all respects. Costs of this appeal are taxed to the appellant. This cause is remanded to the trial court for the collection thereof.

Don T. Murray, J.

CONCUR:

Houston M Goddard, Presiding Judge

Charles D. Susano, Jr., J.

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| ROY WAYNE SHORT, |) | AFFIRMED AND REMANDED |
| |) | |
| Defendant - Appellee |) | |

ORDER

This appeal came on to be heard upon the record from the Chancery Court of Hamblen County and briefs filed on behalf of the respective parties. Upon consideration thereof, this Court is of opinion that there was no reversible error in the trial court.

The trial court is affirmed in all respects. Costs of this appeal are taxed to the appellant. This cause is remanded to the trial court for the collection thereof.

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