

**IN THE COURT OF APPEALS OF TENNESSEE  
WESTERN SECTION AT NASHVILLE**

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<b>JUDY DIANE RICH OVERTON,</b>	)	From the Chancery Court of
	)	Cheatham County at
Plaintiff/Appellant,	)	Ashland City, Tennessee
	)	
<b>VS.</b>	)	Hon. Leonard W. Martin,
	)	Chancellor
	)	
	)	Cheatham Chancery No. 6376-R1
	)	Appeal No. 01A01-9503-Ch-00117
<b>JAMES WILLIAM RICH,</b>	)	
	)	<b>REMANDED</b>
Defendant/Appellee.	)	
	)	Jennifer Davis Roberts
	)	Dickson, Tennessee
	)	Attorney for Plaintiff/Appellant
	)	
	)	James William Rich, pro se

<b>FILED</b> <b>Oct. 19, 1995</b>
<b>Cecil Crowson, Jr.</b> Appellate Court Clerk

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**MEMORANDUM OPINION<sup>1</sup>**

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**HIGHERS, J.**

This case involves a dispute over child custody. Appellant, Judy Diane Rich Overton (Mother), appeals from the trial court's decision to award custody of one of the parties' minor children to the Father.

The parties were divorced pursuant to a final decree of divorce entered on July 6, 1991. The decree adopted and ratified a marital dissolution agreement in which the parties agreed to maintain joint custody of three of their four minor children, with physical custody of these three children going to the Mother. The Father, James William Rich, took physical custody of the fourth and oldest son, John Daniel Rich.

On July 15, 1993, Father filed a petition seeking a change in physical custody of James Isaac Richard ("Isaac"), relying primarily on the fact that Isaac had expressed a desire to live with Father.

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<sup>1</sup>Rule 10 (Court of Appeals). Memorandum Opinion. -- (b) The Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied upon for any reason in a subsequent unrelated case.

A hearing on the petition was held on March 15, 1994. Sitting without a jury, the trial judge heard testimony from several witnesses, and at the conclusion of the bench trial, he awarded custody of Isaac to Father and established specific visitation rights for Mother.

Mother has appealed the award of custody, insisting that the trial court erred in two respects. First, she argues that the evidence presented at trial was insufficient for the court to find a material change in circumstances justifying modification of a previous child custody decree. Second, she alleges that the trial court erred in placing undue importance on Isaac's testimony that he wanted to live with his Father.

In support of her contentions, Mother filed with this Court a two and a half page statement of the evidence and a brief. Neither party submitted a transcript of the proceedings, nor did the appellee submit a brief.

In her statement of the evidence, Mother concedes that Isaac, who was 12 years old at the time of the hearing, testified that he preferred to live with his Father. Other pertinent testimony included in Mother's statement of the evidence was that of the Father, who stated that if he were awarded custody of Isaac, he would send Isaac to Clarksville Academy, a private school in the area in which he lives. Father further testified that he, his present wife, and Isaac's paternal grandparents all enjoyed regular visitation and a good relationship with Isaac.

Mother testified that Isaac's desire to live with his Father stemmed solely from the fact that he had more fun when he was at his Father's home. Mother's present husband, Steve Overton, testified that he had a good relationship with Isaac. Finally, the pastor of Mother's church and a family friend provided testimony that Isaac is happy and well-adjusted, and active in both his school and his church.

It is a well-settled principle of law in Tennessee that when a court has entered a final decree awarding custody of children, such decree is conclusive in any subsequent petition to change custody unless some new fact has emerged that has altered the circumstances

in some material manner that affects the welfare of the children. Dalton v. Dalton, 858 S.W.2d 324 (Tenn. App. 1993); Harris v. Harris, 832 S.W.2d 352 (Tenn. App. 1992); Griffin v. Stone, 834 S.W.2d 300 (Tenn. App. 1992). The controlling statute, Tennessee Code Annotated §36-6-101, provides that a custody decree is subject to modification "as the exigencies of the case may require." TENN. CODE ANN. § 36-6-101(a) (1991 & Supp. 1994) The word "exigencies" as used in the statute has been interpreted to mean "facts and conditions which have emerged since the decree, new facts and changed conditions which were not determined and could not be anticipated by the decree...." Smith v. Haase, 521 S.W.2d 49, 50 (Tenn. 1975). The mere fact that a child expresses a custody preference cannot by itself constitute a change of circumstances sufficient to warrant a modification of a previous custody award. Harris v. Harris, 832 S.W.2d 352, 353 (Tenn. App. 1992).

Trial courts are vested with broad discretion in cases dealing with child custody and appellate courts should not interfere in the absence of evidence of an erroneous exercise of that discretion. Koch v. Koch, 874 S.W.2d 571 (Tenn. App. 1993); Bah v. Bah, 668 S.W.2d 663 (Tenn. App. 1993). The trial judge in this matter had the opportunity to observe the credibility, manner, and demeanor of both of the parties during their testimony in order to evaluate their suitability as custodians. This fact, coupled with the wisdom and experience of the trial judge with respect to custody disputes, put the trial judge in a much better position than this Court to make a custody determination. Where a custody or divorce case is tried upon oral testimony and factual issues turn largely upon the comparative credibility of the parties or witnesses, the findings of the trial court are entitled to great weight on appeal. Kelly v. Kelly, 679 S.W.2d 458, 460 (Tenn. App. 1994); Bush v. Bush, 684 S.W.2d 89 (Tenn. App. 1984).

In this case, however, the welfare of a child is at stake. Unfortunately, there is no verbatim transcript of the testimony in the record. We have only a two and a half page statement of the evidence and the appellant's brief before us. In addition, the trial judge did not file a memorandum opinion. The meager record is devoid of any indication that there

existed a change of circumstances sufficient to justify a change of custody. On the other hand, the record fails to show that there did not exist a sufficient change of circumstances.

Tennessee Code Annotated § 27-3-128 provides:

The court shall also, in all cases, where, in its opinion, complete justice cannot be had by reason of some defect in the record, want of proper parties, or oversight without culpable negligence, remand the cause to the court below for further proceedings, with proper directions to effectuate the objects of the order, and upon such terms as may be deemed right.

Similarly, Rule 24(g) of the Tennessee Rules of Appellate Procedure provides that a court may add to the record "insofar as may be necessary to convey a fair, accurate and complete account of what transpired in the trial court with respect to those issues that are the bases of appeal."

The narrative statement of the evidence filed by appellant is so inadequate that complete justice cannot be had on the record before us. The statement fails to comply with Rule 24(c) of the Tennessee Rules of Appellate Procedure, which mandates that if a verbatim transcript of the evidence is unavailable, the appellant's statement of the evidence must convey a "fair, accurate and complete account of what transpired with respect to those issues that are the bases of the appeal."

We feel that under the circumstances of this case, the application of T.C.A. § 27-3-128 is proper and the interest of justice can best be served by remanding this case to the trial court. Accordingly, we remand the case to the trial court for supplementation and such other necessary proceedings as will result in a correction of the record to reflect a "fair, accurate and complete account" of the proceedings.

Costs of this appeal are taxed to Appellant.

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HIGHERS, J.

CONCUR:

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FARMER, J.

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TOMLIN, J.