FILED

February 16, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

IN THE COURT OF APPEALS OF TENNESSEE

KIMBERLY LYNN MUSICK KYKER	:	SEVIER CIRCUIT
	:	CA No. 03A01-9509-CV-00324
Plaintiff-Appellant	:	
	:	
	:	
vs.	:	HON. REX HENRY OGLE
	:	JUDGE
	:	
	:	
TONY JAMES KYKER	:	
	:	
Defendant-Appellee	:	REVERSED AND REMANDED

GARY L. ADKINS, WITH BILL HOTZ & ASSOCIATES, OF KNOXVILLE, TENNESSEE, FOR APPELLANT

JERRY K. GALYON, WITH GALYON & STOKES, OF SEVIERVILLE, TENNESSEE, FOR APPELLEE

O P I N I O N

Sanders, Sr.J.

The sole issue on this appeal from a judgment in a divorce proceeding is: Was it in the best interest of the parties' infant daughter for her custody to be awarded to her father instead of her mother? We hold it was not, and reverse for the reasons hereinafter stated.

The Plaintiff-Appellant, Kimberly Musick Kyker, and Defendant-Appellee Tony James Kyker were married in 1985. It was the first marriage for the wife and the second marriage for the husband. The wife was 18 years of age and the husband was 34 years of age. One child, Jadriane Kyker, was born to the marriage in March, 1988. The parties were separated and the wife filed for a divorce in 1991, alleging the husband was guilty of inappropriate marital conduct. She asked for a divorce and custody of their infant child with reasonable visitation rights by the husband, child support, a division of marital property, alimony, and attorney's fees.

The husband, for answer, denied he had been guilty of inappropriate marital conduct and, by way of counterclaim, alleged the wife had been guilty of inappropriate marital conduct. He asked for a divorce and for joint custody of their minor child. He also asked for an equitable division of marital property.

Although the petitions for divorce were filed in 1991, a final judgment was not entered in the case until October, 1994. In the interim, the custody of the daughter was with the wife and the father had regular visitation with the child. Numerous motions and counter motions, which are not at issue on this appeal, were filed by the parties. Also, both the husband and wife developed romantic relationships with other individuals.

As pertinent, in September, 1992, the wife filed a petition asking that the husband be required to pay child support pendente lite. The husband, in turn, filed a motion

to amend his counter complaint. He alleged the wife had entered into an adulterous relationship with Kevin Scott Klein and they were living together in the same house with the minor child. He asked the court to grant him temporary and permanent custody of the minor child.

Upon the hearing of the wife's petition and the husband's motion for custody, held November 9, 1992, the court entered an order denying a change in custody but ordering the husband to pay child support and fixing husband's visitation rights "under the following conditions: That the mother of the subject minor child shall not cohabit with Kevin Scott Klein or anyone else without the benefit of marriage, pending further orders of the court." The court also appointed a guardian ad litem to represent the interests of the minor child.

The divorce case came on for trial in May, 1993. Upon the trial of the case, it was stipulated the parties were entitled to a divorce. Although such issues as division of marital property, etc., were litigated, as far as this appeal is concerned the only litigated issue at trial involved the custody of the minor child, and the controlling issue on that question was whether or not the wife had cohabited with Kevin Klein after the order of the court which was entered on November 9, 1992, directing her not to do so.

Upon the trial of the case, the court found that, based upon the testimony of a private investigator who had been employed by the husband as a surveillant of his wife's activities, "cohabitation did, at least, on that one instance

continue" and, based upon that finding, the court awarded the custody of the child to the husband.

The wife has appealed, saying the court was in error in removing the custody of the child from her and awarding it to the husband. In support of her issue, she insists the evidence preponderates against the finding of the court that she did cohabit with Kevin Klein after November 9, 1992, but even if the evidence does not preponderate against the court's findings, he was in error in changing the custody as a punishment to her since the proof fails to show it was in the best interest of the child for her custody to be changed.

We must agree with the wife's insistence. At no time in the proceedings did the husband contend the wife was not a fit and proper person to have the custody of their minor child. It was approximately 18 months after the divorce had been filed when the wife filed an amended petition asking for child support, alimony, and attorney's fees pendente lite that the husband filed an amended answer and cross-complaint asking for custody of the child. His sole request up to that point was for joint custody of the child. The record is replete with testimony that the wife was a devoted, loving, caring mother to her child. Her training and discipline of the child were excellent and the child was happy and well adjusted in the custody of her mother. The maternal grandparents were also devoted to the child. After the separation of the parties, the grandparents took care of the child, except when she was in day care, while the mother was working.

It is clear from a review of the court's memorandum opinion, filed after the trial of the divorce case, that he changed the custody of the child from the mother to the father based on his finding the mother had violated his order of November 9, 1992, not to cohabit with Kevin Klein. It is also clear the court based his finding solely upon the testimony of Gary Litton, a private investigator the husband had employed as a surveillant of the wife for the purpose of proving the wife was violating the court's order.

From a review of Mr. Litton's testimony and the video pictures he relied upon in his testimony which, considered in connection with the time of both daylight and darkness when certain activities were supposed to have transpired, one can only conclude Mr. Litton was mistaken in his identity of individuals or he reached certain conclusions from what he saw that were not supported by proof or were shown to be wrong by other factual proof.

The time span covered by Mr. Litton's testimony, as pertinent, is from 6:30 p.m. on Wednesday, March 31, 1993, to between 8:40 and 9:00 a.m. on Thursday morning, April 1, 1993. At that time the wife, Kim Kyker, and her daughter were living in a mobile home located on her parents' property and only 490 feet from the residence of her parents, Mr. and Mrs. Musick. At that same time Kevin Scott Klein was living in the residence with Mr. and Mrs. Musick and had been living there for several months. All parties were consciously aware of the court's order that Kim and Scott were not to cohabit together, but there were no restrictions against their being together. On occasions Scott would go to Kim's trailer in the morning

and awaken her and then he and Mrs. Musick would ride to work together. All parties were also aware of the fact that the husband and other people secured by him had been keeping a close watch in Kim's activities as to her relationship with Scott.

As pertinent, Mr. Litton testified he was employed by Mr. Kyker in March, 1993, "to make some observance of the conduct of his wife." "The case where the boyfriend was staying all night." He testified Mr. Kyker told him where the wife lived and that the vantage point for watching her home was Hill Top Road. "Mr. Kyker had told me that they watched everybody on Hill Top Road. Hill Top Road is right above the house." He said, "Well, the main thing is Mr. Kyker advised in the beginning that this is the only vantage point that we had and that he had used it before and some of his people had used it before to look in on her. And they was aware of this being a good place and that they could look up there and see anybody. So you couldn't stay there too long without any problem...." He testified he started his surveillance of the wife's house at 6:30 p.m. Her car was already parked at the trailer. At 7:45 the lights came on outside the trailer. At 8:45 p.m. Scott Klein pulled into the driveway at Mr. and Mrs. Musicks' house and parked his car. He then walked up the driveway to Kim's trainer and entered through the rear door. At 11:15 the lights went out in Kim's trailer but he continued his surveillance until the next morning, which was April 1. He testified there was no further activity observed until the next morning. He stated, "{A]t 8:40, Mr. Klein left the trailer and he proceeded halfway down the driveway. This is

what the video consisted of basically, is that [sic] Mr. Klein exiting the trailer."

Mr. Litton testified he had a video camera with a 600 mm lens which he used to make a very short video film lasting less than one-half minute. The film showed a large, blurred, illegible white object in an open field, obviously beyond the range of the 600 mm camera lens, which Mr. Litton insisted was Scott Klein. Also, beyond the location of the white object (Scott Klein) was an automobile which Mr. Litton testified was Mr. Klein's automobile which he had parked in Mr. and Mrs. Musicks' driveway the night before. The only other animated object which appeared in the picture was a blurred picture of a light colored automobile which drove down a roadway and stopped momentarily opposite the white object (Scott Klein) and then moved on. Mr. Litton testified the automobile was Kim's automobile and she and her daughter were in the automobile. From the picture, however, no people were visible in the automobile.

The following exchange then occurred between the court and the witness:

"The Court: Did you see the child leave there?

"Witness: Could see the child in the front of the car.

"The Court: You said you could see her leave with her?

"Witness: Yes, sir."

There are, however, no pictures or other evidence to support this testimony of the witness.

The witness also made the statement that when the automobile stopped on the road opposite (Scott Klein) a

conversation took place between Kim and Scott Klein. He did not attempt to relate what that conversation was. We conclude, however, considering the fact that the objects in the film were beyond the focal range of a 600 mm telephoto lens, they were likewise beyond the audible range of a conversation, and this was a figment of the witness's imagination.

On cross-examination, the witness admitted that at 8:40 p.m., the time he testified Mr. Klein parked his car in the Musicks' driveway and walked up to and entered Kim's trailer, it was "black dark." He testified he had night vision equipment with him but there is no showing as to the distance the night vision equipment is effective. He also testified it could be attached to his camera but he did not do so on this occasion. As pertinent, the questions on cross-examination were as follows:

"Q. Okay. So you don't have any picture of him entering this trailer?

"A. Just my word.

"Q. Just your word that he entered the trailer. Did you know him?

"A. Did I know him?

"Q. Yes.

"A. Yes, sir, I know him.

"Q. And are you certain that what you saw through you equipment was Kevin Scott Klein at 600 feet?

"A. Yes, sir, I am absolutely positive.

"Q. In black dark?

"A. Yes, sir, I know Scott.

"Q. With infrared equipment?

"A. Right. He is [sic] a lot heavier then than he is now, but, I mean, he is probably ten times lighter today than he was when I saw him but I knew him. I knew him when he was an officer.

"Q. And his car was parked down at the lower trailer?

"A. Right."

We find this testimony to be incredulous for two reasons. First, in order for Mr. Litton to see and recognize the person here involved, who parked the car at the lower trailer and walked up the driveway, through his night vision equipment, the equipment would have to have a much greater capacity than the video camera with a 600 mm lens had in bright daylight. This is demonstrated by the illegibility of the white object photographed by Mr. Litton which was much closer to his vantage point than the lower trailer was. Second, Mr. Litton's testimony that Scott Klein was ten times lighter at the time of trial than when he was photographed in the field is beyond reason. The photographs were made on April 1, 1993, and the trial was held approximately a month and a half later, on May 19. The record does not show Mr. Klein's weight at the time of trial. It does show he was formerly a law enforcement officer, from which a reasonable conclusion could be drawn that he was at least average weight. If he weighed 150 pounds at the time of trial, that would mean his weight on April 1 would have been 1500 pounds at the time the photograph was made and he would have lost 1,350 pounds in 49 days. The extremes become greater or less depending on the weight used, but the principle remains the same. Also, although Mr. Litton had a camera in his hands or immediately available at the time he said he saw Scott Klein enter and

exit the trailer, he showed no pictures to substantiate his claim. He showed no legible picture of Scott Klein even in the proximity of the trailer, nor did he show pictures of either Kim or her daughter in the vicinity of the trailer. He only showed the blurred picture of an automobile which he insisted was occupied by Kim and her daughter, but neither is visible in the automobile.

Both Kim Kyker and Scott Klein testified they had not cohabited together since November 9, 1992, and, more important, the uncontradicted testimony of Mrs. Theresa Sudlow showed that on the night of March 31, 1993, she was in the home of Kim Kyker until about 1:00 a.m. Her testimony, as pertinent, was as follows:

"Q. Do you visit in her home on a regular basis?

"A. Yes, sir, I sure do.

"Q. Do you know Mr. Klein spent the night up there on March the 31st, this last March 31st? Did you know about that?

"A. I don't think he did, no.

"Q. How do you know?

"A. Well, because I came up there on Wednesday night after I got off from work and me and Kim watched TV until one o'clock in the morning.

"Q. Was that March the 31st?

"A. It was a Wednesday night, the last Wednesday in March. I'm not sure what date that was.

"Q. Have you looked at the calendar to see whether or not it was March the 31st?

"A. No, sir, I didn't look at the calendar and see.

[The calendar shows the date was March 31, 1993.]

"Q. Have you been up there since that time?

"A. Yes, sir."

After the entry of judgment, the wife filed a timely motion to alter or amend the judgment as it related to the change of custody of the child. As pertinent, the motion stated: "The Plaintiff would aver that the testimony of investigator Gary Litton concerning the co-habitation of the parties on or about March 31, 1993 was inaccurate and/or untruthful. The Plaintiff was unaware until the day of the trial of this cause that Mr. Litton would testify and of the content of his testimony. She was, therefore, unprepared to refute this testimony. Since the trial of this cause the Plaintiff and Kenneth (Scott) Klein have checked into their employment records and other material and have ascertained that they can prove that neither of them were [sic] in the places at the time that Mr. Litton claimed to have observed them on or about March 31, 1993. The Plaintiff can and will present both live testimony and documentary evidence to support her contention in this regard at the hearing of this Motion."

After the wife filed her motion to alter or amend the judgment, the court entered an order allowing her to file affidavits of the testimony of the witnesses, which the wife did. She filed four affidavits in support of her motion.

The affidavit of Mr. Sam Choy stated he was the general manager of Ponderosa Steakhouse on March 31, 1993. Kimberly Kyker was an employee of the steakhouse on that date. It was part of Mr. Choy's duties to insure proper records and

documentation of all the hours worked by all employees of the steakhouse. Hours worked by employees were recorded by an electronic time clock and time cards. Attached to the affidavit was a document in which Mr. Choy said, "I can positively identify as the time card for employee Kimberly Kyker for the week including March 31, 1993." The affidavit further stated: "The electronic time clock measures portions of hours by hundredths rather than by the minute. The clock also uses a 24 hour military style timekeeping procedure. For example, the entry of Mrs. Kyker's time card indicating 19:81 is a actual time of 7:48 p.m. The 19 represents nineteen hundred hours or 7:00 p.m. The 81 represents eighty-one hundredths of sixty minutes which is approximately 48.6 minutes.

"Mrs. Kyker's time card indicates that on March 31, 1993, she reported to work at 10:17 a.m. and went off duty at 4:10 p.m. She went back on duty at 5:03 p.m. and completed her work shift and clocked out at 7:48 p.m.

"Because of our procedures at Ponderosa Steakhouse and the complex electronic nature of our time clock, I believe that our timekeeping system and record keeping are extremely accurate. Tampering with or changing the electronic time clock would be virtually impossible. I am 100% certain that the attached time card accurately reflects the times at which Kimberly Kyker clocked in and out on March 31, 1993."

The affidavit of Kimberly Kyker (Klein) was filed, in which she said: "I cannot state with certainty my whereabouts on the evening of March 31, 1993. I can state and swear with certainty that if my time records indicate that I was 'on the time clock' at Ponderosa Steakhouse between

approximately 5:00 p.m. and 7:48 p.m. on March 31, 1993 then I was at the restaurant on duty and working at that time. I am never 'on the clock' at Ponderosa Steakhouse unless I am actually there. I must enter the time card into the electronic clock myself when I begin and finish my shift."

The affidavit of Mr. Roy Von Campbell, the employer of Scott Klein on March 31, 1993, was filed. He stated in his affidavit he is the owner of Campbell's Private Investigations. Scott Klein was an employee on March 31, 1993. His company was employed at that time to furnish security to the Red Roof Mall. A Mrs. Velma Huskey fell and injured herself on the mall premises and Scott Klein took her to the office of Dr. Larry Davenport. The affidavit stated: "Enclosed herewith is an Offense Report, the preparation of which I supervised and approved. I removed this record from our files. I recognize this document as the report which I signed reflecting the incident involving Mrs. Huskey's fall on March 31, 1993. My company was providing Security on that date for Red Roof Mall. This report indicates that this incident occurred on March 31, 1993 which corresponds with my recollection of the date. This report also indicates that I arrived at the Mall near Full Size Fashions at 21:17 (9:17 p.m.) and assisted and supervised Mr. Scott Klein in the preparation of this report. This also corresponds with my personal recollection of times." The affidavit further stated: "I left Mr. Klein at the parking lot...between 9:30 and 10:00 p.m. on the night of March 31, 1993." The business record referred to by Mr. Campbell in his affidavit is not in the record before us but the facts stated therein are unrefuted.

The affidavit of Scott Klein was also filed and was to the same effect as the affidavit of Mr. Campbell.

Upon the hearing, this court denied the motion to alter or amend the judgment but failed to show the court considered the affidavit testimony offered in support of the motion. The order denying the motion, as pertinent, stated: "This cause came on to be heard on the 22nd day of August...upon all remaining issuses, including the plaintiff's Motion to Alter or Amend Final Judgment, the Court having heard argument of counsel finds that the motion is not well taken and the same is overruled and disallowed."

In cases of this nature, our review shall be de novo upon the record of the trial court, accompanied by a presumption of the correctness of the trial court, unless the preponderance of the evidence is otherwise. TRAP 13(d). From our review of all the evidence in the record and the facts and circumstances of the case, we find the evidence preponderates against the findings of the trial court that Kim Kyker and Scott Klein cohabited together on March 31, 1993, and it was in the best interest of the minor child that her custody be taken from the mother and granted to the father.

Whether we be right or wrong in our holding that the evidence preponderates against the court's holding that the parties cohabited together on March 31, that does not resolve the most important and controlling issue in this case. That issue is: What is in the best interest of the minor child?

Certainly, the indiscretion of the wife in cohabiting with Scott Klein in the household where she and her minor child lived is not to be condoned and the trial court was correct in ordering a termination of that relationship. As stated, however, in **Mimms v. Mimms**, 780 S.W.2d 739, 745 (Tenn.App.1989): "[S]exual infidelity or indiscretion does not ipso facto disqualify a parent from receiving custody of children. However, when the activities of a parent involve neglect of the children, such neglect may be considered in relation to the best interests of the children."

In reading the court's memorandum opinion as it relates to the custody of the child, it appears the court was incensed by the thought the wife had violated his order of November 9. In his opening statement relating to custody, he said, "I stated at the hearing in November that I would not tolerate any cohabitation by either party in the presence of this child." He made further reference to his November order five or more times in his memorandum opinion. He also said, "And the fact that parties change their behavior only upon order of the Court or only upon fear of what is going to happen in court doesn't really impress me in the sense that I hear enough criminal cases to know that most people you cannot rehabilitate." Although the court did mention the welfare of the child, that was not the thrust of his opinion. The court's opinion expressed hostility toward the wife.

In the case of **Long v. Long,** 488 S.W.2d 729 (Tenn.App.1972) this court said, at 733:

> In custody cases the Court shall not use the custody of the child as a reward or punishment to the parent, but shall be governed by the welfare of

the child. **Carrere v. Prunty**, 257 Iowa 525, 133 N.W.2d 692.

Approximately one month prior to the trial of the case, the guardian ad litem for the child filed a very comprehensive report of his investigation and conclusions as to what would be in the child's best interest for custody. In his report he referred to the relationship of the mother and Mr. Klein and then, as pertinent, said: "With the exception of the above, the Guardian can find no problems with the manner in which the mother is presently rearing the child. In fact, all evidence gathered by the Guardian, including interviews with the day care center owners, and the Guardian's interview with the husband, indicates that Mrs. Kyker is a good mother to the child and is genuinely concerned with the child's upbringing.

"Likewise, the husband appears to be dedicated to the child's proper upbringing and is genuinely concerned for his daughter's wellbeing. The Guardian can find no criticism of the husband's living conditions, or reputation....

"Conclusion

"In conclusion, the Guardian finds that the mother is the appropriate parent to have permanent physical custody of the child subject to liberal visitation rights in the husband. The opinion of the Guardian, in this reference, is based primarily, and overwhelmingly, on the fact that the child is of tender years (age 4) and has lived with the mother continuously since the parties separation in May of 1991. It is the Guardian's opinion, that although both parents exhibit true concern for the child and good parenting skills, it would be unduly disruptive to the child's development and emotional

status to place physical custody of the child with the husband at this time."

Another factor which is material to the custody issue is the fact that soon after the divorce was granted, the wife and Mr. Klein were married and the husband and his girlfriend were also married. This makes the following finding by the guardian ad litem pertinent: "She [the daughter] was friendly and open, and spoke fondly of both parents. She indicated that she enjoys being in both homes although her father's girlfriend's son, David, fights with her and she 'doesn't like David'." It follows that if the daughter's custody is with the father she will be required to live in a household with a youngster who fights with her and whom she "doesn't like."

At the time of trial the daughter was either four or five years of age. The mother was 26 years of age and the father was 41. TCA §36-6-101(d) provides:

> It is the legislative intent that the gender of the parties seeking custody shall not give rise to a presumption of parental fitness or cause a presumption in favor or against the award of custody to such parties; provided, that in the case of a child of tender years, the gender of the parent may be considered by the Court as a factor in determining custody after an examination of the fitness of each party seeking custody.

Contrary to the holding of the trial court, considering the disparity in the age of the child and the father, we think this statute is applicable to the case at bar.

We hold the evidence preponderates against the best interests of the child being served by the award of her custody to her father. The judgment of the trial court is

reversed. The custody of the child is awarded to her mother. The case is remanded to the trial court for fixing visitation rights of the father, awarding child support, and entering a judgment in keeping with this opinion. The cost of this appeal is taxed to the Appellee.

_____
Clifford E. Sanders, Sr.J.

CONCUR:

_____
Herschel P. Franks, J.

_____
Don T. McMurray, J.