

FILED

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Cecil Crowson, Jr.
Appellate Court Clerk

LORI CARMEN (TRITSCHLER) GOGUS,)

Plaintiff/Appellant,)

VS.)

JESSE M. TRITSCHLER,)

Defendant/Appellee.)

Cheatham Chancery

No. 6130

Appeal No.

01-A-01-9508-CH-00373

IN THE COURT OF APPEALS OF TENNESSEE

MIDDLE SECTION AT NASHVILLE

APPEAL FROM THE CHANCERY COURT OF CHEATHAM COUNTY

AT ASHLAND CITY, TENNESSEE

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AFFIRMED AND REMANDED

HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:
BEN H. CANTRELL, JUDGE
WILLIAM C. KOCH, JR., JUDGE

LORI CARMEN (TRITSCHLER) GOGUS,)	
)	
Plaintiff/Appellant,)	
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OPINION

The captioned plaintiff, (hereafter mother) has appealed from a post-divorce decree changing custody of the minor child of the parties from the mother to the captioned defendant, (hereafter father).

The parties were divorced in February, 1991. The mother was granted custody of the daughter of the parties, then aged two years and two months. The father was allowed specified visitation.

On June 1, 1993, the father filed a petition for contempt for failure to allow visitation as ordered. The mother answered the petition denying contempt and asserting justification by father's abuse of the child. By counter-petition the mother requested that father's visitation be supervised, and that the conduct of father be investigated by the Department of Human Services. Later, mother moved for a stay of summer visitation.

On August 10, 1993, the Trial Court stayed summer visitation and designated Dr. William D. Kenner, a child psychologist, to interview the child (then aged 4 1/2) and report on child abuse by the father.

On November 15, 1993, the father filed a petition for change of custody alleging:

3. That the minor child JESSICA ERIN TRITSCHLER has been exposed to immoral conduct in that the mother and her

current husband continue to fight and argue in the presence of the child.

4. Among other problems, wife has continually moved her place of residence, and has even been evicted from some apartments due to nonpayment and disturbances within the apartment complex.

5. Mother has not complied with the divorce decree in regard to the location of the day care center for the child, which was to be agreed to by father. The child has been enrolled in five (5) different day care centers since the parties' separation and divorce.

6. Father was forced to file a restraining order restraining wife from leaving the State with the parties' minor child in order to live with her present husband in New York.

7. Mother has continually interfered with father's visitation, and has recently alleged that he has sexually abused the child.

....

9. At the hearing on the motion to terminate the father's visitation privileges pending an investigation, mother testified that she and her present husband were separated and that he was "a sick individual." She also testified that her present husband physically abused her in their home. With all of this known to Ms. Gogus, she allowed Mr. Gogus to return to the home and exposed the minor child to this individual that has abused her and allows him to be alone with the minor child.

Mother's response stated:

9. She would show that the record in this cause speaks for itself, but that her current husband has not engaged in any conduct in the presence of the child which would be abusive or neglectful to the child.

On January 25, 1994, Dr. Kenner rendered to the Trial Court a six page psychiatric evaluation of the child based upon interviews with the child, the mother and the father, and evaluation of the mother and father by a psychologist, the records of a social worker of an interview of the child, a letter from a "teacher" at a child care center, hospital record of a medical examination of the child, records of investigations by the Department of Human Services and Hendersonville Police Department and a letter from a sister of the mother. As to the minor child, Dr. Kenner's report stated:

On September 22, 1993 I saw Jessica for evaluation. She was a bright, verbal child who engaged easily in conversation. During the forty-five minutes that I spent with Jessica she talked with me about school and her relationships with her father, mother, and step-father. Regarding school, Jessica talked about activities, routine, and her teacher's expectations. She did not talk about routine, activities or expectations at home. Instead she talked about adults in chaos: Kaan hollering, her mom crying, her mother taking her into a room and locking the door and Kaan "punching a hole in the house." She reported Kaan hollering when her mother was going out on a date while still married to Kaan and that Kaan and her Daddy had a fight a long time ago. Mr. Tritschler reported the same fight during my interview with him. He said the fight had occurred when he did not hand Jessica over to the Goguses when he met them at a gas station because he could tell that Mr. Gogus had been drinking.

Regarding the way that she is treated by her parents and step-father, Jessica said that her father sometimes spanks her when she's bad and that he fusses at her. She indicated that he spanks her on her bottom, which she calls her "my private." She said that "Mom spanks me too, real hard - slaps." When I asked who hurt her, she said "My mommy, Kaan does spank me all the time. He hurts me." She later said that her Mommy did not hurt her, but misses her "when I'm at Daddy's." With regard to her Dad, Jessica said "I love him very much. I wish I could go see him." She also said that she loved both of her parents and missed them both when she's with the other. Jessica did not allude to or report any sexual abuse.

Conclusions

1. I am not able to make a diagnosis of sexual abuse of Jessica Tritschler. One finds a number of competing possible explanations for these allegations. Jessica could conceivably be talking about sexual activity that is based on her exposure to activities of her mother and boyfriend(s). She may be referring to long held family expectations apparently started by her maternal aunt that her father was a pedophile and would sexually abuse his daughter.

2. More important than the issue of treatment for Jessica is her need for a stable home environment. I seriously doubt whether Jessica's mother is competent as custodial parent. She is impulsive, highly emotional and apparently unable to provide a stable, protective environment for her daughter. Unfortunately, Mrs. Gogus is unable to recognize the effect of her behavior on her daughter. The father, Mr. Tritschler, is a much more psychologically stable individual. I recommend that Jessica be in his custody.

If the Court were to change Jessica's custody, then I would recommend that after two or three months, once she was settled in with the move, she might start a therapy process with a child psychiatry fellow at Vanderbilt Child Psychiatry.

3. While Mrs. Gogus retracted or disclaimed her threat to go underground (see attached report by Dr. Auble and Mrs. Gogus' letter in response to the report), when she sees this report, she may still have the temptation to think with her feet and flee with Jessica. I suggest that the Court take that possibility into account when deciding custody and visitation issues.

On February 23, 1994, the Trial Court entered an order transferring custody to the father and setting a hearing to allow contest of Dr. Kenner's report.

On April 28, 1994, the mother filed a petition to rehear.

On October 17, 1994, the Trial Court entered an order reading as follows:

This cause came on to be heard on the 5th day of October, 1994, before the Honorable Allen W. Wallace, Chancellor, Chancery Court for Cheatham County, Tennessee, sitting at Waverly, Tennessee, as a result of a motion filed by the plaintiff, Lori Carmen (Tritschler) Gogus, requesting the Court to grant her a full hearing in this matter in an effort to present to the Court all the proof she has pertaining to the possible change of custody of the parties' minor child, Jessica Tritschler. Upon argument of counsel, discussion and so forth, the Court is of the opinion that said motion is well taken. It is, therefore,

Ordered that this matter shall be set for further hearing in Ashland City, Cheatham County, Tennessee, on the 30th day of December, 1994, at 9:00 A.M. said date to be determined by the Clerk of Court as well as counsel for both parties.

On December 30, 1994, the Trial Judge held a further hearing, at the conclusion of which his oral remarks included the following:

You know, this Court and this particular Judge has gotten comfortable with these type of cases. I have some kind of intuition that something is wrong with this case that I thought there was a possibility that this man had been falsely accused. I can't think of anything worse than this. Based on that I ordered that everybody was to quit talking to this child. The order that I gave was done by Mr. Tritschler and I think he has done a good job. I have got some reports back that indicated that some of my intuitions were right.

....

Now, what I have in this case, I saw the same person in Ms. Gogus today that I saw last time. She is frustrated, hostile and angry. I am convinced that this same thing is going on today

that I saw last time, that you are in playing mind games with this child. . . .

. . . .

Ms. Gogus, I trust that you understand. You are playing games with this child's mind and it will come back to haunt you. One of these days that child, when she gets a little older will find out what you did to her, and you will have the most bitter enemy that you [have] ever seen in your life, someone that you love more than anything in this world. It is going to happen to you if you don't straighten up.

On February 23, 1995, the Trial Court entered an order reading in part as follows:

This cause came on to be heard on the 30th day of December, 1994, before the Honorable Allen W. Wallace, Chancellor, Chancery Court for Cheatham County, Tennessee, sitting at Ashland City, Tennessee, as a result of a motion previously filed by the plaintiff, Lori Carmen (Tritschler) Gogus, requesting the Court to re-hear the defendant, Jesse M. Tritschler's, petition to change custody. Upon testimony from the witnesses and the respective parties, psychiatric report from William D. Kenner, M.D., argument of counsel and the entire record in this cause, the Court is of the opinion that the defendant's petition for change of custody is well taken and that it is in the best interest of the parties' minor child, Jessica Tritschler, that the complete care, custody and control of said minor child remain with the defendant/father, Jesse M. Tritschler, with the following visitation privileges with the minor child be awarded to the plaintiff/mother, Lori Carmen (Tritschler) Gogus: . . .

The last quoted order does not deal specifically with or dispose of the mother's petition to rehear. It appears to reiterate the custody order of February 23, 1994, upon consideration of all evidence presented prior to and since said order.

On appeal, the mother presents three issues, of which the first is:

I. Whether the father carried his burden of proof to show a material change in circumstances justifying a re-analysis of the best interest of the minor child.

Since this record does not contain the evidence adduced at the trial of the divorce case or the resulting divorce decree, this Court is at a disadvantage in comparing the circumstances at the time of the divorce and those at the time of the change of custody.

However, it may be reasonably presumed that, at the time of the divorce, the mother had not remarried and that the alleged misconduct of her present husband was not occurring in the presence of the child.

Remarriage of either parent does not of itself constitute a change of circumstances that would warrant a change of custody. *Arnold v. Arnold*, Tenn. App. 1989, 774 S.W.2d 613.

However, a change in home environment caused by remarriage of the custodial parent is a factor to be considered in determining whether there has been a material change in circumstances that would warrant alteration of custody. *Tortorich v. Erickson*, Tenn. App. 1984, 675 S.W.2d 190.

It is significant that the accusation in the father's petition that the new husband was abusing the mother in the presence of the daughter was not denied in the answer of the mother. A failure to deny is an admission. T.R.C.P. Rule 8.04.

"Changed circumstances" includes any material change in circumstances affecting the welfare of the child, including new facts and circumstances which could not be anticipated by a former decree. *Dalton v. Dalton*, Tenn. App. 1993, 858 S.W.2d 324.

It is self evident that a child will be severely disturbed by witnessing the abuse of its mother by the spouse of the mother. This circumstance alone was sufficient to empower the Trial Court to change the previously ordered custody of the child for "change of circumstances," but also "make such changes or modifications as the exigencies of the case may require." T.C.A. § 36-6-101(a).

The mother's second issue is:

II. Whether the Trial Judge erred in considering evidence outside of the record in making his "best interest" determination in regard to the child.

The oral statement of the Trial Court was unfortunate in that it suggested that his decision may have been based upon intuition and undisclosed reports. The record does not disclose what information was derived from reports. However, any error of the Trial Judge in considering "intuition" or "reports" will be corrected by this Court in reviewing his decision *de novo* upon the record as required by T.R.A.P. Rule 13(d); and in doing so, to disregard evidence inappropriate for consideration.

This Court will not consider the "intuition" of the Trial Judge or "reports" received by him and not included in the record on appeal.

The mother's third, and last, issue is:

III. Whether the evidence preponderates against the Trial Court's decision changing custody from the mother to the father.

This record contains no transcript of any evidence received by the Trial Court prior to the entry of the order of February 23, 1994, except the report of Dr. Kenner. However, the order refers to "the evidence previously presented," which is not in this record.

The motion to rehear (quoted above) requested leave to "submit additional proof."

The order sustaining her motion (quoted above) recited the request for leave "to present all the proof she has" and granted a "further hearing."

It is seen that the motion and order did not envision a new trial, which would have eliminated the consideration of former evidence. It effectually reopened the presentation of evidence to permit the mother to present additional evidence to be considered with the former evidence.

The transcript before this Court specifically states that it is the record of proceedings on December 30, 1994, and as stated, the former evidence mentioned in the order of the Trial Court is not in this record.

Without a complete record of the evidence received and considered by the Trial Court, this Court is unable to review the findings of the Trial Court *de novo*, but must assume that a complete record, if preserved, would have contained sufficient evidence to support the factual findings of the Trial Court. *Anderson v. Sharp*, 195 Tenn. 274, 259 S.W.2d 521 (1953); *Sherrod v. Wix*, Tenn. App. 1992, 849 S.W.2d 780; *Beaty v. Hood*, 43 Tenn. App. 228, 306 S.W.2d 671 (1957).

Even from a review of the competent evidence in this record, this Court is satisfied that, after the divorce, the mother married an alien who had a radically different view of marriage, who severely abused her, and who was allowed to return and continue cohabitation after a separation. The testimony of the mother is strong evidence of her unfortunate and irresponsible disposition which is not characteristic of responsible parenthood.

Also, the report of Dr. Kenner, to which no objection was made, contains the following:

A diagnostic impression from these data is of a histrionic personality. She is an emotionally responsive individual who needs a great deal of social contact with others. She is ambivalent about men, but from both the interview and the testing, she looks to her relationships with men to change her life in positive ways. Success is important to her. She also takes pride in keeping up her physical appearance. She expressed anger toward her ex-husband and love toward her daughter. She does not appear to be depressed, anxious or psychotic.

(Pamela Auble, Ph.D., Clinical Psychologist)

The testimony of the mother in open court, as recorded in this record raises serious doubts as to her emotional balance and capacity to remember and accurately relate facts.

The evidence does not preponderate against the finding of the Trial Judge that the circumstances have changed and that "the exigencies of the case" require a change of custody.

The judgment of the Trial Court is affirmed. Costs of this appeal are taxed against the appellant and her surety. The cause is remanded for further necessary proceedings.

Affirmed and Remanded.

HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:

BEN H. CANTRELL, JUDGE

WILLIAM C. KOCH, JR., JUDGE