IN THE COURT OF APPEALS OF TENNESSEE

JOHN DAVID FENLEY,	)	C/A NO. 03A01-9604-CH-00121
	)	WASHINGTON CO. CHANCERY COURT
Petitioner-Appellee,	)	
	)	
	)	
	)	
v.	)	HONORABLE LEWIS W. MAY, JR.,
	)	JUDGE, Sitting by Interchange
	)	
	)	
	)	
LINDA DIANE McFALL FENLEY,	)	AFFIRMED IN PART
	)	REVERSED IN PART
Respondent-Appellant.	)	REMANDED

JUDITH FAIN, Erwin, Attorney for Appellant

MARK D. SLAGLE, Johnson City, Attorney for Appellee

O P I N I O N

Susano, J.

This is a post-divorce case. John David Fenley (Father[1]), a psychiatrist, filed a petition for change of custody of the parties' child, Caitlin Ann Fenley (DOB: June 8, 1990). At the time of the divorce, the child's custody, by agreement of the parties and approval of the trial court, had been placed with the child's mother, the respondent Linda Diane McFall Fenley (Mother). At the close of Father's proof, the trial court, acting *sua sponte*, dismissed the petition. It then went further and modified the visitation rights of Father. Mother, being dissatisfied with the new visitation decree, appealed. Father did not raise an issue regarding the dismissal of his petition. Mother raises three issues.

> 1. Did the trial court abuse its discretion in directing that the child would be with Father every Sunday so he could take her to church?
>
> 2. Did the trial court abuse its discretion in not requiring Father to give Mother a month's notice of his intent to exercise visitation?
>
> 3. Did the trial court abuse its discretion in denying Mother's request for attorney's fees and discretionary costs?

We believe the trial court's judgment regarding Father's visitation should be reversed, but for reasons other than those suggested by Mother.

I

[1]Since the issues before us pertain to the parties' child, the litigants will be referred to in this opinion, for ease of reference, as "Father" and "Mother."

The petition in this case alleges that there has been a "substantial and material change in circumstances" so that "it is in the best interest of the child that [Father] be granted sole custody of the parties' minor child." It does *not* allege, alternatively, that the court should modify the divorce judgment with respect to his visitation in the event his custody petition is denied.[2] The prayers for relief in the petition only pertain to relief related to a change of custody to Father. Again, there is no specific prayer for a modification or any relief with respect to Father's visitation rights.

Mother's answer to the petition denied that a change of custody was appropriate. She asked for an award of court costs, attorney's fees, and discretionary costs. No counterclaim was filed.

Prior to receiving opening statements, the court engaged in the following exchange with counsel:

> THE COURT: I read the file yesterday. This is the case of change to custody?
>
> MR. SLAGLE: That's correct.
>
> MS. FAIN: Yes.

In his opening statement, counsel for Father told the court "we're here on the one issue and that issue is the child." At another point in his opening statement, the same counsel said

[2]While the divorce judgment is not in the record before us, it apparently does not set forth Father's visitation rights with specificity. At one point in the proceedings below, Father's counsel commented that "there's no set visitation schedule in the order here."

"[w]e're not here to talk about child support." There is nothing in the opening statements and the court's comments interspersed among them to suggest that the issue of Father's visitation was "on the table."

During the testimony of Father's wife, she alluded to the parties' church attendance. That precipitated the following exchange with the court:

> Q: Do you involve Katie in social and church activities?
>
> A: Yes.
>
> Q: How much so and on what level, what activity level?
>
> A: Caitlin, at this time, is in the cherub choir. She's been in that for probably the last month to two months. She goes to church usually every Sunday morning for Sunday school and then preaching after.
>
> THE COURT: Counselor, I understand that you want to introduce all the evidence you can to show any change of custody, but this hearing isn't to explain the church. It's the circumstances. This doesn't address that.
>
> MR. SLAGLE: I understand. I'll move on.

Father testified extensively at the hearing below. He told the court that the child was with him a substantial part of the time:

> Q: Since you [and] Lori Fenley have married -- well, quite frankly, even before then, how often do you get to see your daughter? I know there's no set visitation schedule in the order here. Could you tell us how often you see her?

> A: One -- one to two week nights; and then when we're in town, virtually every weekend. Some days just one twenty-four-hour period. Some days -- some -- I mean some weekends, one day, like Saturday evening to Sunday during the day; some Friday evening to Sunday evening.
>
> Q: So it's just about every weekend -- or on the average, how many weekends a month do you have her?
>
> A: I'd say three out of four.

At the close of Father's proof, the trial court abruptly terminated the case before the respondent was afforded an opportunity to put on any proof:

> THE COURT: All right. You may come down.
>
> MS. FAIN [Mother's counsel]: Can I not cross-exam?
>
> THE COURT: You may if you want to. I'm about to reach a decision.
>
> MS. FAIN: All right, sir. Well, I was about to make a motion otherwise. So. . . Come down Ms. Fenley, please.
>
> (Witness excused.)
>
> THE COURT: The Plaintiff, having closed their case -- there's been no material, substantial changes -- circumstances -- in this case to warrant change of custody.

After denying the only relief being sought in the case, i.e., a change of custody to Father, and over the objection of Mother, the trial court directed that the child would be with Father every Sunday--except when Mother took a summer vacation--so he could take the child to church. In so doing, the court commented that "the spiritual needs of this child are going to be paramount to the court." He also decreed specific visitation at

Thanksgiving. He also touched on visitation at Christmas although it is not clear if he awarded specific visitation at that time of year.

II

Mother argues that the court's decree with respect to Sundays and, more particularly, the court's deference to the child's spiritual needs violates the First and Fourteenth Amendments to the United States Constitution and Article 1, Section 3, of the Tennessee Constitution. Because we find another basis for reversing this part of the trial court's judgment, we do not address the constitutional issues. "[O]ur courts do not decide constitutional questions unless the issue's resolution is absolutely necessary for determination of the case and the rights of the parties. ***Haynes v. City of Pigeon Forge***, 883 S.W.2d 619, 620 (Tenn. App. 1994), and numerous cases cited in that opinion.

The only issue at the trial level was whether there had been a substantial and material change of circumstances requiring that the child's custody be changed from Mother to Father. Neither party asked the court in their pleadings to modify or address, in any way, the visitation rights of Father; nor was that issue tried with the implied consent of the parties. *Cf.* ***Zack Cheek Builders, Inc. v. McLeod***, 597 S.W.2d 888 (Tenn. 1980). It is true that there was testimony regarding Father's visitation with the child; but it is clear from the record that this testimony was not given by the witnesses or received by the court

on the non-issue of Father's visitation. The court clearly stated, at a number of points in the record, that this was a case involving whether the child's custody should be changed from Mother to Father. There was nothing in the proceedings to put Mother on notice that the issue of the quantum of Father's visitation was going to be addressed by the trial court.

Mother was not permitted to put on any proof.[3] Of course, up until the trial court got into its visitation changes, she had no desire or need to put on proof--she had been completely successful on the only issue before the court. There was no reason for her to put on proof as to an issue on which she had already been "declared the winner."

It has long been the law in this state that a judgment beyond the pleadings or issues tried by consent, is not valid. ***Brown v. Brown***, 281 S.W.2d 492, 497 (Tenn. 1955); ***Fidelity-Phenix Fire Ins. Co. of New York v. Jackson***, 181 S.W.2d 625, 629 (Tenn. 1944); ***Tennessee Central Ry. Co. v. Pharr***, 198 S.W.2d 289, 292 (Tenn. App. 1946); ***Redding v. Barker***, 230 S.W.2d 202, 204 (Tenn. App. 1950); ***John J. Heirigs Const. Co., Inc. v. Exide***, 709 S.W.2d 604, 607 (Tenn. App. 1986); ***Zumstein v. Smith***, 1995 WL 113472 (Tenn. App. at Knoxville, March 16, 1995, Crawford, J.)

A party is entitled to notice that an issue will be tried by the court. It is axiomatic that without such notice, a party is at a disadvantage in preparing for trial. It is hard to

[3]While the court was rendering its opinion, the respondent, Ms. Fenley, told the judge that she had witnesses available to testify, to which he responded that witnesses would not change what he had said about the case.

defend against a claim or request that you do not know is going to be litigated. As the Supreme Court in the ***Brown*** case said:

> The policy underlying the rule seems to be that since the purpose of pleadings is to give notice to all concerned regarding what may be adjudicated, a judgment beyond the scope of the pleadings is beyond the notice given the parties and thus should not be enforced.

Id. at 497.

We do not mean to hold that a court can never address visitation issues in a custody case. Frequently, those issues are a natural adjunct to the matters before the court; but it is not fair to a party to explore these issues without any notice and without affording that party an opportunity to put on proof.

We also find that the evidence preponderates against the trial court's judgment regarding every Sunday visitation for Father. The testimony--some of which is quoted above--indicates that Father had the child a substantial amount of time under the existing visitation decree. Even if the issue of Father's visitation had been properly plead and tried, the evidence heard by the court below would not support the court's decree with respect to every Sunday visitation. Weekends are special times for each of the parties and they should be equitably divided. The proof does not support an award of every Sunday to Father. We believe a Rule 13(d), T.R.A.P. analysis militates in favor of reversal.

For the same reasons that we find the every Sunday visitation decree to be invalid, we also find that the court was not in error in refusing to require Father to give Mother a month's notice of his intent to exercise visitation.

Mother is entitled to her fees in successfully defending Father's change of custody petition. T.C.A. § 36-5-103(c); ***Deas v. Deas***, 774 S.W.2d 167, 170 (Tenn. 1989). We disagree with the trial court's conclusion that she was partially responsible for the filing of the petition. We find that the trial court abused its discretion in failing to award her fees for the defense of this petition. *See also* ***D v. K***, 917 S.W.2d 682, 686 (Tenn. App. 1995).

This case is remanded for a determination of reasonable fees for Mother's successful defense of the petition and also for her fees for pursuing this appeal. *See* ***Folk v. Folk***, 357 S.W.2d 828 (Tenn. 1962). We also find that she is entitled to discretionary costs, same to be determined by the trial court on remand.

The result reached by this court relieves us of the necessity of addressing the constitutionality of the court's action with respect to Sunday visitation and, accordingly, we pretermit this issue.

The judgment of the trial court dismissing the petition for change of custody is affirmed. The remainder of the court's

judgment is reversed, at appellee's costs. Costs on appeal are also taxed to the appellee.

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Charles D. Susano, Jr., J.

CONCUR:

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Houston M. Goddard, P.J.

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Herschel P. Franks, J.