IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT NASHVILLE

SHARRON COGGINS SMITH,	)	
	)	
Plaintiff/Appellant,	)	**Giles Chancery No. 8497**
	)	
VS.	)	**Appeal No. 01A01-9511-CH-00536**
	)	
CHARLES STACEY SMITH,	)	
	)	
Defendant/Appellee.	)	

APPEAL FROM THE CHANCERY COURT OF GILES COUNTY
AT PULASKI, TENNESSEE
THE HONORABLE JIM T. HAMILTON, JUDGE

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VACATED IN PART, AFFIRMED IN PART

DAVID R. FARMER, J.

CONCUR:

W. FRANK CRAWFORD, P.J., W.S.

HOLLY KIRBY LILLARD, J.

Plaintiff-Appellant, Sharron Coggins Smith ("Mother"), appeals the trial court's order denying her petition to modify the parties' final divorce decree.

The parties were divorced in May 1994. The final divorce decree awarded Defendant-Appellee, Charles Stacey Smith ("Father"), custody of the parties' minor son and granted the Mother reasonable visitation rights. Although the final divorce decree is not included in the record on appeal, the trial court apparently gave the following reason for awarding custody to the Father:

> This Court is charged under its oath to do what is in the best interest of the children caught in the web of a divorce. This case is a perfect example of parents using or attempting to use a child as a club to punish one another. The evidence in this case betrays what The Court considers to be the worst housekeeping it has ever seen in twenty-eight (28) years of law practice. The condition of this home clearly shows a way of life and an uncaring attitude on the part of [the Mother]. This cannot be in the best interest of the child born of this union.[1]

On June 24, 1994, a general sessions judge for Giles County signed a Temporary Restraining Order ("TRO") upon the Father's motion. The TRO imposed the following restraints on the Mother and certain family members:

> [The Mother], her mother, and her sister, be and hereby are restrained from and ordered not to come around [the Father] or contact him at any time or any place or in any manner, including but not limited to his residence, his work place, and the ball park.
>
> This Restraining Order shall apply to and [the Mother], her mother and sister are further restrained from contacting [the Father] by telephone, by letter, or in person for any purpose. . . .

The TRO provided that it would remain in effect "pending further orders of this Court."[2] The record on appeal fails to include a verified complaint or affidavit by the Father to justify issuance of the TRO. ***See*** T.R.C.P. 65.03(1).

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[1]The Mother's attorney quoted this portion of the final divorce decree at the hearing below.

[2]The general sessions court judge signed the order based upon the affidavit of the Father's attorney stating that none of the district's circuit court judges were available to sign the order. ***See*** T.R.C.P. 65.03(2).

In August 1994, the Mother filed a petition to modify the final decree of divorce in which the Mother requested the trial court to set aside the TRO and to grant her increased visitation with the child. The Mother subsequently filed an amended petition in which she also requested a change in child custody from the Father to the Mother. As grounds for the change of custody, she asserted the following changes in circumstances: (1) that the Mother had changed her lifestyle and was now able to provide a stable, clean, loving home for her son; and (2) that, since the parties' divorce, the Father had attempted to interfere with the Mother's efforts to maintain a relationship with her son. The Mother also asserted that the child was now of sufficient age and maturity under Tennessee law to be heard as to his custody preference.

The Father answered the amended petition and asserted a counter-claim for child support. In his answer and counter-claim, the Father requested that the Mother be required to pay child support in accordance with the Child Support Guidelines[3] and to share responsibility for health care related expenses. The Father also requested an award of his attorney's fees.

The trial court conducted an evidentiary hearing on these issues in May 1995. On July 3, 1995, the trial court entered an order denying the Mother's petition to modify, ordering the Mother to pay child support in the amount of $37 per week and to share in the child's health care related expenses, and awarding the Father's law firm $1,660 in attorney's fees. The trial court's order additionally provided that "all things and matters contained in the previous Order(s) of this Court not in conflict herewith shall remain in full force and effect." Although the trial court's order did not specifically address the TRO, the order effectively extended the TRO.

On appeal, the Mother presents the following issues for review:

> 1. Did the Chancellor err by failing to find that the Temporary Restraining Order issued by Judge Lee was improperly issued and therefore void?
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> 2. In any event, did the Chancellor err in failing to set aside the Temporary Restraining Order issued by Judge Lee?

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[3] ***See*** Tenn. Comp. R. & Regs. tit. 1240, ch. 2-4 (amended 1994).

> 3. Did the Chancellor err in awarding attorney's fees to [the Father] below sua sponte without first allowing [the Mother] an opportunity to inquire into the reasonableness of the fee?
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> 4. Did the Chancellor err by modifying the final Order of divorce between the parties to provide that [the Mother] must now pay child support and partial medical bills?
>
> 5. Did the Chancellor err in failing to consider the wishes of the minor child of the parties as to custody?
>
> 6. Did the Chancellor err in failing to find a material and unexpected change of circumstance in the life of [the Mother] sufficient to support, along with the stated preference of the minor child, a change of custody from [the Father] to [the Mother]?

I. The Temporary Restraining Order

As an initial matter, we conclude that the record on appeal fails to support the trial court's issuance or continuance of the TRO. Rule 65.03(1) of the Tennessee Rules of Civil Procedure provides that:

> A restraining order may be granted at the commencement of the action or during the pendency thereof without notice, if it is clearly shown by verified complaint or affidavit that the applicant's rights are being or will be violated by the adverse party and the applicant will suffer immediate and irreparable injury, loss or damage before notice can be served and a hearing had thereon.

T.R.C.P. 65.03(1). The record in this case contains no verified complaint or affidavit setting forth the bases for issuance of the TRO.[4] Based on the record before us, therefore, we are unable to determine whether the general sessions judge who initially issued the TRO complied with the procedural requirements of Rule 65.03(1).

The record does indicate, however, that both the general sessions judge and the trial court failed to comply with Rule 65 in that both failed to set forth reasons on the record when they extended the TRO. By making the TRO effective "pending further orders of this Court," the general

[4]Further, the record contains no evidence that the Father gave an injunction bond "for the payment of such costs and damages as may be incurred or suffered" by the Mother in the event she was found "to have been wrongfully restrained or enjoined." T.R.C.P. 65.05.

sessions judge extended the TRO beyond the fifteen-day time limit permitted by Rule 65.03(5).[5] But in doing so, the general sessions judge failed to set forth reasons for the extension as required by Rule 65.03(5) ("The reasons for the extension shall be entered of record."). Additionally, and as noted previously, the trial court's order effectively extended the TRO because the order provided that previous orders of the court "shall remain in full force and effect." Although the trial court heard some evidence at the hearing below regarding the justification for issuing the TRO,[6] the trial court's order fails to include the reasons for extending the TRO as required by Rule 65.03(5).

Further, authorities have noted that the extension of a temporary restraining order converts the order into a temporary or preliminary injunction. ***See*** 43 C.J.S. ***Injunctions*** § 10b (1978) ("Unless a temporary restraining order is extended by the court, which, in effect, converts it into a preliminary injunction, it ceases to be operative at the expiration of the time fixed by its terms."); 42 Am. Jur. 2d ***Injunctions*** § 14 (1969) ("Although the restraining order made at the commencement of the action would, by its own terms, expire at the hearing of the order to show cause, if at that time it is continued until the termination of the suit, the order so continuing it is in fact a new and distinct restraint, and itself constitutes a preliminary injunction."). In this regard, Rule 65.04(6), relative to temporary injunctions, provides that "[i]n granting, denying or modifying a temporary injunction, the court shall set forth findings of fact and conclusions of law which constitute the grounds of its action." T.R.C.P. 65.04(6). In the present case, neither the general sessions judge's TRO nor the trial court's order extending the TRO contain such findings.

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[5]As pertinent, Rule 65.03(5) provides that:

> Every temporary restraining order granted without notice shall expire by its terms within such time after entry, not to exceed fifteen days, as the Court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period, or unless the party against whom the order is directed consents that it may be extended for a longer period. . . .

T.R.C.P. 65.03(5).

[6]At the evidentiary hearing, the Father testified that he obtained the TRO after an incident at the ball park. According to the Father, the Mother and the Mother's mother attempted to interfere when the Father was disciplining the child. The Mother warned the Father that he "was going to get in trouble for whipping [the child]." The Mother's mother also objected and, when she became violent, the Father called the police. Although the Mother's sister was not present during the incident, the Father included the sister in the TRO because the sister previously had tried to interfere with the Father seeing the child at ball practice.

Rule 65.07 provides that:

> In domestic relations cases, restraining orders or injunctions may be issued upon such terms and conditions and remain in force for such time as shall seem just and proper to the judge to whom application therefor is made, and the provisions of this Rule shall be followed only insofar as deemed appropriate by such judge.

T.R.C.P. 65.07. We are cognizant of the discretion given to trial courts to issue restraining orders and temporary injunctions in domestic cases pursuant to Rule 65.07; however, we do not believe that this rule envisions a TRO remaining in effect ***ad infinitum***. ***See*** 43 C.J.S. ***Injunctions*** § 10b (1978) ("A temporary restraining order is of short duration, and should be limited to the time specified by statute or to such a reasonable time as may be necessary to notify the adverse party."); 42 Am. Jur. 2d ***Injunctions*** § 10 (1969) ("The purpose of [a temporary restraining order] is to restrain the defendant for what should be a very brief period, pending a hearing on the application for a temporary injunction."). Nor do we believe that this rule envisions dispensing with the requirement that the trial court enter reasons or findings of record when extending a TRO or when granting a temporary injunction. ***See, e.g., Carpenters' District Council v. Cicci***, 261 F.2d 5, 7 (6th Cir. 1958) (holding that formal findings of fact were mandatory where federal rule 52(a) required that "in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action."). Accordingly, we vacate the TRO.

II. Child Custody

We affirm, however, the trial court's refusal to change custody from the Father to the Mother. In a custody modification proceeding, the comparative fitness analysis of the original custody proceeding is no longer determinative. Instead, the non-custodial parent has the burden of proving a material change in circumstances "compelling enough to warrant the dramatic remedy of changed custody." ***Musselman v. Acuff***, 826 S.W.2d 920, 922 (Tenn. App. 1991). We conclude that the Mother has failed to meet this burden in the present case.

The Mother first contended that a material change in circumstances had occurred in that the Father had interfered with the Mother's visitation rights with the child. Specifically, the Mother testified, the Father had refused to let the Mother's sister pick up the child for visitation when the Mother worked late, had at times refused to permit the Mother to interact with the child at the ball park when it was not the Mother's visitation time, and had scheduled sports activities and trips during the Mother's visitation time.

Although the Father admitted that he objected to the Mother's sister picking up the child, the Father denied preventing the child from speaking to the Mother at ball games. Further, relative to an out-of-town trip to see the Atlanta Braves that the Father scheduled during the Mother's visitation time, the Mother acknowledged that she did not lose any visitation time because she was able to swap weekends with the Father. Under these circumstances, the trial court did not err in refusing to modify custody based on the Father's interference with the Mother's visitation.

The Mother also contended that a material change in circumstances had occurred in the Mother's lifestyle which warranted a change in custody. The Mother testified that, since the divorce, the Mother had gained full-time employment, had begun attending church, and was now living in her mother's home which she helped to keep clean and well-maintained. The Mother blamed her past housekeeping problems on the fact that she was in a bad marriage for almost twelve years.

Again, we are unable to conclude that the trial court erred in refusing to modify custody based on this asserted change in circumstances. Although such an improvement in the Mother's lifestyle might have made a difference in the comparative fitness analysis of the original custody proceeding, we reiterate that comparative fitness is no longer the standard at this stage of the proceedings. Rather, the Mother was required to prove that the improvement in her lifestyle constituted a material change in circumstances compelling enough to warrant the dramatic remedy of changed custody. ***Musselman v. Acuff***, 826 S.W.2d at 922. While the Mother's improved

lifestyle is commendable, we agree with the trial court that, under the circumstances of this case, any change demonstrated by the Mother did not warrant a modification of custody.[7]

In holding that the trial court did not err in denying the Mother's petition to modify, we reject the Mother's contention that the trial court failed to properly consider the wishes of the child. As conceded by the Mother on appeal, the child's stated preference is not binding upon the trial court but is just one of the factors to be considered by the court in making its custody determination. ***See Harris v. Harris***, 832 S.W.2d 352, 353-54 (Tenn. App. 1992) (decided under T.C.A. § 36-6-102 (1991)); ***see also*** T.C.A. § 36-6-106(7) (Supp. 1995) (effective June 12, 1995).[8] Here, the trial court properly conducted an in camera interview of the child, who was twelve years old at the time of the hearing. The fact that the trial court's ultimate custody determination was not in accordance with the child's wishes does not constitute grounds for reversal.

III. Child Support

We also reject the Mother's contention that the trial court erred by ordering her to pay child support to the Father in the amount of $37 per week. At the time of the divorce, the Mother worked part-time at a grocery store where her salary averaged $100 to $120 per week. At the time of the hearing on the Mother's petition, however, the Mother had gained full-time employment and was earning a net income of $178.10 per week.

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[7]We also note that this court previously has "emphasized the importance of continuity of placement in custody cases." ***Hall v. Hall***, 1995 WL 316255, at *2 (Tenn. App. 1995) (citing ***Contreras v. Ward***, 831 S.W.2d 288, 290 (Tenn. App. 1991), and ***Bah v. Bah***, 668 S.W.2d 663, 666 (Tenn. App. 1983)). There was evidence in this case that the child has benefited from living in the stable environment provided by the Father.

[8]Section 36-6-106 became effective after the trial court conducted the evidentiary hearing in this case but before the court entered its order denying the Mother's petition. 1995 Tenn. Pub. Acts 428. Under Section 36-6-106, the trial court, in making custody determinations, is required to consider, among other factors, "[t]he reasonable preference of the child if twelve (12) years of age or older." T.C.A. § 36-6-106(7) (Supp. 1995).

Contrary to the Mother's contention on appeal, this increase in income was sufficient to warrant the change in child support made by the trial court in this case. As this court recently explained,

> [Tennessee Code Annotated Section] 36-5-101(a)(1) (Supp. 1994) presently empowers the trial court to increase or decrease a child support award "when there is found to be a significant variance, as defined in the child support guidelines [between the guidelines and the amount of support currently ordered]." Prior to the effective date of the Act of April 21, 1994, [Section] 36-5-101(a)(1) permitted a change in child support only in the presence of changed circumstances.
>
> The change in [Section] 36-5-101(a)(1) allows the court to recognize that an increase in a non-custodial parent's income can be a changed circumstance if the increase results in a significant variance from the guidelines support amount. This is consistent with the computation of child support being based upon a flat percentage of the non-custodial parent's net income.

Hall v. Hall, 1995 WL 316255, at *5 (Tenn. App. 1995) (footnote omitted).

In the present case, application of the Child Support Guidelines results in a significant variance between the amount of child support previously ordered (zero) and the current guidelines amount ($37 per week, or roughly $160 per month). Under these circumstances, the trial court did not err in ordering the Mother to begin paying child support to the Father in accordance with the guidelines.

IV. Attorney's Fees

While we conclude that the trial court did not err in determining the issues of child custody and support, we are unable to affirm the trial court's award of attorney's fees. We recognize that the trial court was authorized by statute to order the Mother to pay the Father's attorney's fees. ***See Sherrod v. Wix,*** 849 S.W.2d 780, 785 (Tenn. App. 1992); T.C.A. § 36-5-103(c) (Supp. 1994). Here, however, the record contains no evidence to support the trial court's award of $1,660 to the Father's law firm. Although the Father's answer and counter-claim requested an award of attorney's fees, the Father neither produced evidence at the hearing nor submitted affidavits in support of such

an award. ***See, e.g., Dover v. Dover***, 821 S.W.2d 593, 595 (Tenn. App. 1991) (holding that trial court properly based award of attorney's fees on affidavit of wife's attorney where husband failed to object to procedure employed); ***Hennessee v. Wood Group Enterprises***, 816 S.W.2d 35, 37 (Tenn. App. 1991) (holding that, although attorney's affidavit would have been preferable, trial court properly awarded attorney's fees based on client's testimony as to fees paid). Accordingly, we vacate that portion of the trial court's order requiring the Mother to pay $1,660 to the Father's law firm.

V. Conclusion

We vacate the TRO and the award of attorney's fees. In all other respects, the trial court's order denying the Mother's petition to modify is affirmed. Costs of this appeal are taxed one-half to the Father and one-half to the Mother, for which execution may issue if necessary.

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FARMER, J.

CONCUR:

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CRAWFORD, P.J., W.S.

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LILLARD, J.