

- I. Whether the Special Judge of the Domestic Relations Court erred in excluding from the evidence herein a report of the Hamblen County Department of Human Services ("DHS"), and testimony relating thereto, concerning official investigation of a charge of sexual abuse lodged by the Child's older sister against their stepfather.
- II. Whether the Special Judge of the Domestic Relations Court erred in concluding that the best interests of the Child would be served by awarding custody to Defendant/Appellee.

His former wife also raises issues:

Issue I:

Whether the trial court erred in permitting introduction into evidence of sexually explicit photographs and a letter which were taken and written during 1986 or 1987.

Issue II:

Whether the Trial Court erred in not awarding child support to the mother for the child's support.

Issue III:

Whether the Trial Court erred in not ordering appellant to pay mother's attorney's fees.

Issue IV:

Whether the appellant's appeal is frivolous so that appellee should be awarded her attorney's fees and costs for this appeal.

The parties were divorced by a decree entered on October 1, 1986, and, in accordance with an agreement of the parties, they were to have joint custody of their minor daughter, Elizabeth, but Mr. Beckner was to have actual physical custody the majority of the time.

A second child, who was conceived during the marriage, but born after the divorce is at the center of the parties' controversy.

Several petitions, usually resolved by entry of an agreed order, were filed prior to the judgment here on appeal. The last order addressing custody, which was an agreed order, was entered on May 24, 1994. It provided that Mr. Beckner would continue to have custody of the older child, Elizabeth, and Ms. Zimmer custody of the younger child, Victoria. Visitation privileges for the non-custodial parent were also detailed.

Thereafter, the petition now on appeal was filed on October 3, 1994.

The Trial Court denied introduction of the DHS report and, after a full evidentiary hearing, made the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Prior to the entry of the last Agreed Order concerning custody of the parties minor child Victoria, both the Plaintiff and Defendant were guilty of poor judgment which could affect their ability to be a proper custodial parent of their child.
2. The allegations that the Defendant was consuming alcohol and driving her vehicle with the child in the vehicle are not sustained by the evidence.
3. The allegations that the Defendant's resident is not a fit and proper place for the child to live are not sustained by the evidence.

4. The allegations that the babysitting arrangements made by the Defendant are not proper are not sustained by the evidence.

5. The allegations that the Defendant's present husband is a danger or potential danger to the child are not sustained by the evidence.

CONCLUSIONS OF LAW

1. All acts of misconduct raised prior to the entry of the last Agreed Order in this cause can not be considered by the Court in this present Motion for Change of Custody.

2. Both parties are fit and proper persons to have custody of their daughter Victoria.

3. The Plaintiff has failed to show that there is a substantial and material change of circumstances such that the custody of the child Victoria should be granted to him

4. Custody of the child Victoria should remain with the Defendant, Nancy Lynn Love Beckner.

Our review of the record persuades us that upon giving deference to the Trial Judge's assessment of the credibility of witnesses, the evidence does not preponderate against his findings unless he improperly excluded the evidence addressed in issue one.

Although the issue refers to the excluded evidence as a DHS report, it consists of two letters to the DHS, the first by representatives of the Child and Family Services of Knoxville, and the second by Psychological Services, also of Knoxville. Both letters contained conclusions¹ and hearsay statements by others detailing statements by Elizabeth that she had been

¹ E.g., "this case was investigated and validated by DHS. . . ."

sexually abused by her mother's present husband while visiting her mother.

Mr. Beckner contends the letters were admissible under the Business Records Exception to the Hearsay Rule, Rule 803(6), Tennessee Rules of Evidence, which provides the following:

(6) Records of Regularly Conducted Activity.-- A memorandum, report, record, or data compilation in any form of acts, events, conditions, opinions, or diagnoses made at or near the time by or from information transmitted by a person with knowledge and a business duty to record or transmit if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes every kind of business, institution, association, profession, occupation, and calling, whether or not conducted for profit.

The fallacy of this argument, however, is that there is no proof to show that the documents meet the requirement of the Rule, in that there is no showing that the material transmitted was "made at or near the time by or from information transmitted by a person with knowledge." Indeed, a person giving the report, i.e., the psychologist, does not have personal knowledge, but is quoting hearsay evidence from Elizabeth, nor is there any showing that the person transmitting the information had a business duty to record or transmit. On the contrary, the letter from Child

and Family services states that the letter is written "at the request of Mr. Olan Beckner."

Moreover, there is some question whether Elda Bryan, a Department of Human Services employee and the witness proffered as custodian of the records, is in fact a custodian as required by the Rule. She testified that she was "a social counselor," and "maintained the file on Elizabeth Beckner." It is true that in arguing the objection to the admission of the letter, counsel for Mr. Beckner stated that "this woman . . . is the keeper of the records for the State of Tennessee Department of Human Services."

Assuming, as stated by counsel for Mrs. Zimmer, Ms. Bryan is the custodian of the records as contemplated by Rule 803(6), the materials sought to be introduced do not meet the other requirements thereof.

We conclude in light of the foregoing the Trial Court was not in error in excluding the letters.

Alternatively, Mr. Becker contends that even if not admissible under Section 803(6), it is admissible under Rule 803(25), addressing children's statements:

(25) Children's Statements.--Unless the circumstances indicate lack of trustworthiness, statements about abuse or neglect made by a child alleged to be the victim of physical, sexual, or psychological abuse

or neglect, offered in a civil action concerning issues of dependency and neglect pursuant to T. C. A. § 37-1-102(b)(10), issues concerning severe child abuse pursuant to T. C. A. § 37-1-102(b)(19), or issues concerning termination of parental rights pursuant to T. C. A. § 37-1-147(d). Declarants of age thirteen or older at the time of the hearing must testify at the hearing unless unavailable as defined by T. R. Evid. 804(a); otherwise this exception is inapplicable to their extrajudicial statements.

The Rule is limited to specific proceedings, namely dependency and neglect, severe child abuse, and termination of parental rights, and does not encompass the issue of custody. We are disinclined to expand the Rule beyond that established by the Legislature.

Finally as to this point, we observe that the testimony of Elizabeth herself, who was 11 years old at the time of the hearing below, would clearly have been admissible, and certainly more accurate, than the statements contained in the letters in question. In saying this, we recognize that it might very well be a traumatic experience for Elizabeth to have testified, but observe that if in fact Mr. Beckner is as concerned for his younger daughter as he professes to be, he would have nonetheless allowed his older daughter to testify rather than subject his younger daughter to child abuse at the hands of the step-father.

Ms. Zimmer's first issue is in reality a non-issue, as there is no adverse holding as to her, which the Court's action in admitting this evidence would impact. To put it another way, whether she is entitled to child support for Victoria--the only

ultimate issue upon which she did not prevail--could not be affected by the receiving or the excluding of the evidence in question.

As to her second issue, it appears that the parties, if not expressly, tacitly agreed that under all the circumstances it was appropriate that the parties would pay the support for the child in their physical custody and seek no support therefor. We believe in the context of this case, given the 10-year period² they supported the child in their custody and did not seek support from the other parent, that the Trial Judge acted properly in denying child support for Victoria.

With regard to attorney fees raised in Ms. Zimmer's third issue, the trial court has wide discretion in such matters and this Court will not interfere unless this discretion is abused. Threadgill v. Threadgill, 740 S.W.2d 419 (Tenn. App. 1987). Because Ms. Zimmer has failed to show such an abuse, we affirm the Trial Court's denial of attorney fees.

Responding to Ms. Zimmer's fourth issue, we do not find Mr. Beckner's appeal to be frivolous.

For the foregoing reasons the judgment of the Trial Court is affirmed and the cause remanded for collection of costs

² For some 18 months during this 10-year period Mr. Beckner had custody of both children.

below. Costs of appeal are adjudged one-half against Mrs. Zimmer and one-half against Mr. Beckner and his sureties.

Houston M Goddard, P. J.

CONCUR:

Herschel P. Franks, J.

Charles D. Susano, Jr., J.