

divorce judgment by changing custody of the parties' minor son, Jon Kindred Hall Jr., to the appellant, Jon Kindred Hall Sr., (father).

The parties were divorced in February, 1991. Full custody of the parties' only child was awarded to the mother. In 1996, after the mother moved from Tennessee to Mississippi, the father filed this action to modify the judgment. A restraining order was issued preventing the mother from removing the child from Hamilton County, and an ex parte order was issued awarding temporary custody to the father. The restraining order was subsequently modified to permit the mother to take the child to Mississippi for scheduled visitation. Trial was held on July 19, 1996. Final judgment was entered on August 5, 1996, changing permanent custody from the mother to the father, and establishing visitation and child support. This appeal followed.

The mother submits one issue for our consideration, which we summarize as follows: Whether the trial court was in error in changing custody from the mother to the father. For the reasons set forth herein, we affirm the judgment of the trial court.

We first note that our review of the trial court's judgment is guided by Rule 13(d), Tennessee Rules of Appellate Procedure. "Unless otherwise required by statute, review of findings of fact by the trial court in civil actions shall be de novo upon the

record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Adams v. Dean Roofing Co., 715 S.W2d 341 (Tenn. Ct. App. 1986).

In child custody cases, it is well-settled that where a decree has been entered awarding custody of the children, that decree is res judicata and is conclusive in a subsequent application to change custody unless some new fact has occurred which has altered the circumstances in a material way to make the welfare of the child require a change in custody. Griffin v. Stone, 834 S.W2d 300 (Tenn. Ct. App. 1992) (citations omitted). The paramount consideration in a custody proceeding is the best interest of the child. Bah v. Bah, 668 S.W2d 663 (Tenn. Ct. App. 1993). The trial judge in a modification proceeding must find a material change of circumstances which is compelling enough to warrant a change in custody. See Tenn. Code Ann. § 36-6-101(a); Woodard v. Woodard, 783 S.W2d 188 (Tenn. Ct. App. 1989). "Changed circumstances" includes any material change of circumstances affecting the welfare of the child including new facts or changed conditions which could not be anticipated by the former decree. Hicks v. Hicks, 26 Tenn. App. 641, 176 S.W2d 371 (1943).

The trial court found that the child when living in Mississippi was subject to "essentially unsupervised" care during

the day, while his mother and her new husband worked. The child testified that during the day while in Mississippi, he stays either at his mother's house alone, or visits a neighbor's house. The Creeches live next door to Mr. Creech's aunt, who Ms. Creech claims is responsible for supervising the child while she is at work. Ms. Creech testified that the child has the freedom to stay with Mr. Creech's aunt, or to go home as he chooses. The trial court found this arrangement to be unacceptable, and we agree.

We believe that children, nine years of age, require supervision. While some amount of independence can be beneficial to a child, some responsible party needs to be aware of the child's whereabouts and activities. The freedom to come and go as he chooses, is not an appropriate situation for a child of nine years of age. Ms. Creech argues in her brief that the aunt checks on the child "every five minutes." However, we find this argument unpersuasive and somewhat incredible. The aunt is also responsible for watching other children. Even if we were to accept Ms. Creech's argument, it would appear that the aunt is leaving the other children under her care (which are younger than this child) to check on this child. We feel that this action is, in and of itself, irresponsible.

Essentially, the Creeches were paying the aunt for day care services. However, a day care provider that allows a child to roam

freely between her home and an empty house next door does not appear to be looking to the best interests of the child. We are also troubled, as was the trial court, by the possibility that the child, who suffers with asthma, could have an asthma attack while not being supervised and would, therefore, not receive the proper medical attention when required.

Counsel for the mother argues in her brief that the trial court erred in basing its decision on the lack of appropriate supervision since this evidence was brought to the court's attention by the testimony of the child, and that it would have been objected to had the attorneys been present during the child's testimony. The record reveals, however, that the attorneys for both parties were given the opportunity to be present during the child's testimony, and counsel for the mother actually suggested the child meet with the judge and court reporter only. She will not now be heard to complain.

We find that the evidence does not preponderate against the trial court's decision. We concur in the court's finding that there was a substantial change in circumstances, and affirm the court's judgment. Costs are assessed to the Appellant.

Don T. Murray, Judge

CONCUR:

Houston M Goddard, Presiding Judge

Charles D. Susano, Jr., Judge

IN THE COURT OF APPEALS

SUSAN HALL CREECH,)	HAMILTON CHANCERY
)	C. A. NO. 03A01-9612-CH-00388
)	
Plaintiff - Appellant)	
)	
)	
)	
)	
vs.)	HON. HOWELL N. PEOPLES
)	CHANCELLOR
)	
)	
)	
JON KINDRED HALL, SR.,)	AFFIRMED AND REMANDED
)	
Defendant - Appellee)	

JUDGMENT

This appeal came on to be heard upon the record from the Chancery Court of Hamilton County, briefs and argument of counsel. Upon consideration thereof, this Court is of opinion that there was no reversible error in the trial court.

We find that the evidence does not preponderate against the trial court's decision. We concur in the court's finding that there was a substantial change in circumstances, and affirm the court's judgment. Costs are assessed to the Appellant.

PER CURIAM