IN THE COURT OF APPEALS OF TENNESSEE

AT KNOXVILLE

FILED

December 17, 1998

Cecil Crowson, Jr.
Appellate Court
Clerk

GARLENA GALE DAVENPORT,	) C/A NO. 03A01-9804-CV-00154
	)
Appellant-Plaintiff,	) KNOX CIRCUIT
	)
v.	) HON. BILL SWANN,
	) JUDGE
BRADLEY CURTIS DAVENPORT,	)
	) REVERSED AND
Appellee-Defendant.	) REMANDED

CHARLES H. CHILD, O'CONNOR, PETTY, CHILD & BOSWELL, Knoxville, for Appellant-Plaintiff.

THOMAS F. MABRY, Oak Ridge, for Appellee-Defendant.

O P I N I O N

Franks, J.

In this custodial dispute, the Trial Judge ordered 50/50 visitation, i.e., a rigid alternate weekly schedule between the parents on the grounds there had been a material change in circumstances to justify the changed visitation schedule.

The child, born on July 19, 1989, was the only child of the marriage, and at the time of the divorce in 1991, the parties entered a Marital Dissolution Agreement which was approved by the Trial Judge. The Agreement acknowledged that both parties were fit and proper parents, and provided that each party would "have joint input as it relates to health, education and welfare decisions of Derek during his minority". It also stated:

> The parties agree to consult with each other regarding school and any special activities for Derek, and it is expressly agreed and understood

> between them that they will communicate with each other regarding any non-routine decisions necessary for medical, psychological, and/or dental care or attention for Derek. It is the desire and intent of the parties to exchange all information so that each will be fully informed and that the parties will maximize their efforts to foster the parent-child relationships.

The mother was designated as the primary residential custodian, with the father having reasonable and liberal visitation on the first and third weekends, as well as the second, fourth and fifth Wednesdays of each month. The father's Petition for Modification of Visitation asked for 50/50 visitation, or custody to be granted to the father, based upon the fact that the father had remarried, and the living arrangement of the parties and the communication problems between the parties.

The Trial Judge ordered an evaluation of the parties and child by a Dr. Nordquist and after hearing the parties' evidence, ordered changes in the provision of the Joint Custodial Agreement.

At the conclusion of the trial, the Court observed in pertinent part:

> I want to emphasize that each of these parents has done an excellent job by the child since the divorce. There is a passion for involvement and knowledge in order to effect an appropriate maturation, and that is good, that reflects good parenting. I wish that the Davenports were the parents in all of the cases that come before this Court, Knox County would be far better off.
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> . . .
>
> It is a positive that the father is remarried to a supporting person, Sandy. It is a positive that the mother is significantly involved with Mr. Derek Heffron who is a positive influence, and esteemed by the child. It is a positive that all of the extended family exists and continues to support this boy on both sides. It is a positive that Derek is doing so well in school.

Then the Court observes that difficulties continue with the parental communications, one with the other. However, he said that "none of them add up to anything of great moment". The Court reasoned that the changes were necessary because:

> The father's standards of communication are extremely high, and that is good. But the mother will not ever be able to satisfy his standards, nor indeed, would anyone else. And this will result only in further

frustration and tension if we maintain this communication requirement.

Dr. Nordquist, the Court's witness, stated in his report that both of the parents were psychologically stable and are "very good parents". He thought the litigation was the result of "a lot of little things that have combined to make a 'big thing', particularly for Brad Davenport [the father]." Specifically he found that:

> Brad is a person who needs to know "everything", literally. I truly believe that any of us would have some difficulty at times meeting his standards of the "other parent". He will meet them, make no mistake about that, because it is his nature to know what is going on and plan for every eventuality. Some people might say he is very compulsive . . . I have never met a parent more prepared to present his case than Mr. Davenport. . . . Despite his pleasant and often reserved manner, I found myself thinking, "Boy, I would hate to have my behavior monitored by this person! Any little slip and he would bring it [to] my attention".

Dr. Nordquist recommended the Court "leave things as they are and recommend that these parents see a counselor and learn how to communicate better".

In the modification proceeding the Court does not repeat the comparative fitness analysis. Instead, it must find a "material change of circumstances that is compelling enough to warrant the dramatic remedy of changed custody". *Musselman v. Acuff*, 826 S.W.2d 920, 922 (Tenn. App. 1991); *see also Woodard v. Woodard*, 783 S.W.2d 188, 189 (Tenn. App. 1989). "Changed circumstances" includes "any material change of circumstances affecting the welfare of the child, including new factors or changed conditions which could not be anticipated by the custody order. *Blair v. Badenhope*, 940 S.W.2d 575, 576 (Tenn. App. 1996); *Dalton v. Dalton*, 858 S.W.2d 324, 326 (Tenn. App. 1993). The primary consideration in both the original custody award and any modification of the custody award is to do what is in the best interest of the child. *Nichols v. Nichols*, 792 S.W.2d 713, 716 (Tenn. 1990); *Woodard*, and *Dantzler v. Dantzler*, 665 S.W.2d 385, 387 (Tenn. App. 1983).

The remarriage of either party "does not of itself constitute change of

circumstances that would warrant a change of custody. A possible change of home environment caused by remarriage is a factor to be considered in determining whether there has been a material change in circumstances that would warrant alteration of custody arrangements". *Arnold v. Arnold*, 774 S.W.2d 623, 618 (Tenn. App. 1989); *Tortorich v. Erickson*, 675 S.W.2d 190, 192 (Tenn. App. 1984). Thus, there must be more than a change of circumstances that is simply the marriage of a party to justify a change in custody. Moreover, as the Trial Court found, the mother's relationship with a third party is beneficial, rather than detrimental, to the child's best interest.

The evidence demonstrates at the time of the hearing that the child was well adjusted, an outstanding student, and in the words of the Court's witness, "very comfortable with his current lifestyle". The evidence preponderates against a finding that it would be in the best interest of the child to disturb the custodial arrangement that existed at the time of the hearing.

Accordingly, we reverse the order of the Trial Judge and restore the parties to the custodial arrangement existing under the terms of the Joint Custody Agreement.

The final decree incorporating the Marital Dissolution Agreement provides in pertinent part:

> In the event it becomes reasonably necessary for either party to institute legal proceedings to procure the enforcement of any provision of this agreement or to defend unsubstantiated claims hereunder, in addition to any other relief to which the enforcing party may be adjudged entitled, he or she shall also be entitled to a judgment for reasonable expenses, including attorney's fees incurred in prosecuting or defending the action.

In view of our holding the mother is entitled to recover her reasonable attorney's fees pursuant to T.C.A. §36-5-103(c), and under the Marital Dissolution Agreement, because she was required to defend unsubstantiated claims under that Agreement. Accordingly, upon remand, the Trial Judge will set reasonable attorney's fees for the mother incurred in the Trial Court and on this appeal.

Under our holding it is unnecessary to address the remaining issues, and we remand, adjudging the costs against the father.

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Herschel P. Franks, J.

CONCUR:

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Houston M. Goddard, P.J.

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Charles D. Susano, Jr., J.
(Not participating)