

IN THE COURT OF APPEALS OF TENNESSEE

AT KNOXVILLE

FILED
November 24, 1998
Cecil Crowson, Jr.
Appellate Court
Clerk

KAREN NEWPORT (FUGATE),) C/A NO. 03A01-9712-
JV-00543)
)
Plaintiff/Respondent/Appellant,) ANDERSON
JUVENILE)
)
v.) HON. PAT HESS,
) JUDGE
NATHAN NEWPORT,)
)
Defendant/Petitioner/Appellee.) AFFIRMED IN PART AND
) REVERSED IN PART

JACK W. PIPER, JR., O'CONNOR, PETTY, CHILD & BOSWELL, Knoxville, for Appellant.

PHILIP R. CRYE, JR., MAGILL, CRYE & CIZEK, Clinton, for Appellee.

OPINION

Franks, J.

In this child custody dispute, the Trial Judge ordered the custody of the child changed from the mother to the father, and the mother has appealed, insisting that the father did not carry his burden to establish a change of circumstances to support a change of custody.

Noah Newport was born to Karen Newport and Nathan Newport on August 16, 1989. When Noah was about a year and a half old, his father joined the United States Navy for a four-year tour of duty. Visitations between Noah and his father, while the father was on leave from the Navy, were conducted on an informal basis. When the father returned from the Navy, disputes arose over visitation, and the Juvenile Court Judge found the mother in contempt for failure to allow visitation.

On November 7, 1992, the mother married David Fugate, and they have

one son who was born in 1993. The father has another son who was born in 1996.

Our review is *de novo* upon the record of the Trial Court, with the presumption of the correctness of the Trial Court's findings, unless the preponderance of the evidence is otherwise. *Hass v. Knighton*, 676 S.W.2d 554, 55 (Tenn. 1984). T.R.A.P. 13(d). However, as to issue of credibility, the Trial Judge is in the "premier position" to determine credibility. *Bowman v. Bowman*, 836 S.W.2d 563, 567 (Tenn. App. 1991). After a trial court has determined the custody which is in the best interest of the child, 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 so that the welfare of the child requires a change in custody." *Nichols v. Nichols*, 792 S.W.2d 713, 715-716 (Tenn. 1990). In a modification proceeding, the trial court must find circumstances compelling a change of custody and the burden in such a case is upon the non-custodial parent to prove such change. *Musselman v. Acuff*, 826 S.W.2d 920, 922 (Tenn. App. 1991).

Upon review of the evidence in this case, we conclude that the evidence does not preponderate against the Trial Court's findings. T.R.A.P. Rule 13(d). While the father has offered evidence of circumstances which, standing alone, would not justify a change in custody, there is compelling evidence of domestic violence in the mother's home to warrant a change of custody. The violence was such, that the mother felt the need to petition for an order of protection against her husband, and admitted to four instances of domestic violence, along with numerous occasions of verbal assaults. Though she claims that Noah was not aware of these instances, due to his either being asleep or being in another part of the house, they did occur in the presence of, or in the same residence as the child. She conceded that Noah was present when verbal abuse took place, and she admitted taking a baseball bat and hitting her husband, and then going outside and smashing the windows of his truck. The mother pleaded guilty to assault for the incident, and was placed on probation.

In her defense, the mother claims that she has taken steps to protect herself and her children from the violence. She moved out of the residence that she shared with her husband, and she and the husband began to undergo counseling. However, she has not ceased her relationship with her husband, and at the time of trial, her husband was spending at least the weekends at the home, and sometimes more often.

There is evidence that Noah was present when some of the violence occurred and evidence suggesting that some violence has been directed toward Noah. In this atmosphere there is ample reason for concern that violence could be directed toward Noah in the future, and that he suffered emotional harm by witnessing the ongoing violent behavior. This concern is reflected by the Trial Judge's ordering that Noah be kept away from David Fugate while in the care of his mother. *Accord Bjork v. Bjork*, 1997 WL 653917 (Tenn. Ct. App. 1997). We affirm the Trial Court's order changing custody of the minor child to the father.

Next, the mother argues she should not have been held in contempt for violation of a visitation order, which awarded the father eight hours of visitation every other week. The order of March 22, 1991 awarded the father eight hours of visitation every other weekend. A subsequent order of July 1, 1991 stated that the visitation issue would resolve itself, since the father was entering military service, and the parties should agree to visitation when the father was home on leave. It appears that visitations between the father and son were always conducted on an informal basis, and apparently neither party was aware of the March 21, 1991 visitation order, until sometime in January of 1996. The Trial Judge, in holding the mother in contempt of the March 22, 1991 order, did not impose any sanctions. We do not believe under all of the circumstances that there is a basis to hold the mother in contempt for violation of the March 22, 1991 order. *See Hawk v. Hawk*, 855 S.W.2d 573, 583 (Tenn. 1993).

For the foregoing reasons, we affirm the Trial Court's order changing

custody of the minor child, and reverse the holding of the mother in contempt.

The cost of the appeal is assessed one-half to each party.

Herschel P. Franks, J.

CONCUR:

Don T. McMurray, J.

Charles D. Susano, Jr., J.