IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 26, 2016 Session

MATTHEW LEE WHEELER v. ALETHIA DANIELLE WHEELER

Appeal from the Chancery Court for Coffee County
No. 096 Vanessa Jackson, Judge

No. M2015-00377-COA-R3-CV – Filed May 24, 2016

This appeal involves a mother's post-divorce petition to modify a parenting plan. The court below determined that while a material change of circumstances had occurred, modification of the plan was not in the child's best interest. The mother appeals. Finding no error, we affirm the judgment of the Chancery Court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

RICHARD R. DINKINS, J., delivered the opinion of the Court, in which D. MICHAEL SWINEY, C.J., and W. NEAL MCBRAYER, J., joined.

Thompson G. Kirkpatrick, Manchester, Tennessee, for the appellant, Alethia Danielle Rawn.

Trenena Genelle Wilcher Stanley, McMinnville, Tennessee, for the appellee, Matthew Lee Wheeler.

OPINION

I. FACTUAL AND PROCEDURAL HISTORY

Matthew Wheeler ("Father") and Alethia Wheeler ("Mother")[1] are the parents of one child, a daughter, born in 2005; the parties were declared divorced on May 11, 2009, by the Chancery Court of Coffee County. The final decree incorporated an agreed permanent parenting plan which, *inter alia*, named Mother as the primary residential parent and gave the parties co-parenting time in the amount of 182.5 days each year, to be exercised every other week. The parenting plan included the following provision: "No overnight guest that one is

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[1] Mother remarried in 2011 and is now Alethia Rawn.

romantically involved with unless by marriage. The parties shall not expose the children to alcohol or illegal drugs."

On July 18, 2014, Mother filed a petition to modify the parenting plan on the grounds that Father: lived with his girlfriend; delegated caretaking responsibilities for the child during his parenting time to his mother; had girlfriends spend the night while the child was in his care; had a "severe alcohol problem"; failed to maintain health insurance on the child; and had "generally failed to adhere" to the parenting plan. With her petition, Mother filed a proposed parenting plan, which reduced Father's parenting time to 80 days per year.

After an unsuccessful attempt to mediate the case, a trial was held on January 27, 2015, at which Mother and Father testified. The court determined that Mother had established that a material change of circumstances had occurred but not that modification of the parenting schedule was in the child's best interest. Mother appeals, articulating the following issues:

1. Whether the trial court erred in failing to consider the factors in T.C.A. § 36-6-406(d) and T.C.A. § 36-6-101(a).[[2]]
2. Whether the evidence preponderates against the trial court's findings regarding best interest.
3. Whether the trial Court erred in effectively granting paternal grandparents' co-parenting privileges during father's parenting time in violation of mother's constitutional right to parent her child.

II. STANDARD OF REVIEW

The standard of review we apply in this case is that stated in *Cook v. Cook:*

> Our review of the trial court's findings of fact in a non-jury case is de novo, with a presumption that the findings are correct unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); *Armbrister v. Armbrister,* 414 S.W.3d 685, 692 (Tenn. 2013); *Kendrick v. Shoemake,* 90 S.W.3d 566, 570 (Tenn. 2002). We review issues of law de novo, giving no presumption of correctness to the trial court's conclusions. *Armbrister,* 414 S.W.3d at 692; *Kendrick,* 90 S.W.3d at 569-70.

[2] While Mother references Tenn. Code Ann. § 36-6-101(a) in her statement of the issue, the discussion in her brief centers on the factors found in Tenn. Code Ann. § 36-6-106(a) and there are no other references to § 36-6-101(a) in her brief. We will address her argument that the court did not consider the factors at § 36-6-106(a).

Trial courts have "broad discretion" to fashion parenting plans, as the Tennessee Supreme Court has explained:

> Because decisions regarding parenting arrangements are factually driven and require careful consideration of numerous factors, *Holloway v. Bradley,* 190 Tenn. 565, 230 S.W.2d 1003, 1006 (1950); *Brumit v. Brumit,* 948 S.W.2d 739, 740 (Tenn. Ct. App. 1997), trial judges, who have the opportunity to observe the witnesses and make credibility determinations, are better positioned to evaluate the facts than appellate judges. *Massey–Holt v. Holt,* 255 S.W.3d 603, 607 (Tenn. Ct. App. 2007). Thus, determining the details of parenting plans is "peculiarly within the broad discretion of the trial judge." *Suttles v. Suttles,* 748 S.W.2d 427, 429 (Tenn. 1988) (quoting *Edwards v. Edwards,* 501 S.W.2d 283, 291 (Tenn. Ct. App. 1973)). "It is not the function of appellate courts to tweak a [residential parenting schedule] in the hopes of achieving a more reasonable result than the trial court." *Eldridge v. Eldridge,* 42 S.W.3d 82, 88 (Tenn. 2001). A trial court's decision regarding the details of a residential parenting schedule should not be reversed absent an abuse of discretion. *Id.* "An abuse of discretion occurs when the trial court... appl[ies] an incorrect legal standard, reaches an illogical result, resolves the case on a clearly erroneous assessment of the evidence, or relies on reasoning that causes an injustice." *Gonsewski v. Gonsewski,* 350 S.W.3d 99, 105 (Tenn. 2011).

Armbrister, 414 S.W.3d at 693. Thus, the *Armbrister* Court concluded, an appellate court will not find that a trial court has abused its discretion unless the trial court's parenting arrangements "'fall[ ] outside the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence found in the record.'" *Id.* (quoting *Eldridge v. Eldridge,* 42 S.W.2d 82, 88 (Tenn. 2001)). In other words, "[d]iscretionary decisions must take the applicable law and the relevant facts into account." *Lee Med. v. Beecher,* 312 S.W.3d 515, 524 (Tenn. 2010).

No. M2015-00253-COA-R3-CV, 2015 WL 8482403, at *3 (Tenn. Ct. App. Dec. 9, 2015)

III. ANALYSIS

A. Best Interest

Two statutes, Tenn. Code Ann. §§ 36-6-101(a)(2)(C) and 36-6-405(a), direct the trial court in considering proposed modifications to a residential parenting schedule. Tenn. Code

Ann. §§ 36-6-101(a)(2)(C) reads:

> If the issue before the court is a modification of the court's prior decree pertaining to a residential parenting schedule, then the petitioner must prove by a preponderance of the evidence a material change of circumstance affecting the child's best interest. A material change of circumstance does not require a showing of a substantial risk of harm to the child. A material change of circumstance for purposes of modification of a residential parenting schedule may include, but is not limited to, significant changes in the needs of the child over time, which may include changes relating to age; significant changes in the parent's living or working condition that significantly affect parenting; failure to adhere to the parenting plan; or other circumstances making a change in the residential parenting time in the best interest of interest of the child.

Tenn. Code Ann. § 36-6-405(a) reads:

> In a proceeding for a modification of a permanent parenting plan, a proposed parenting plan shall be filed and served with the petition for modification and with the response to the petition for modification. Such plan is not required if the modification pertains only to child support. The obligor parent's proposed parenting plan shall be accompanied by a verified statement of that party's income pursuant to the child support guidelines and related provisions contained in chapter 5 of this title. The process established by § 36-6-404(b) shall be used to establish an amended permanent parenting plan or final decree or judgment.

In *Armbrister*, our Supreme Court set forth the process to be followed in modifying a residential parenting schedule:

> Once a permanent parenting plan has been incorporated in a final divorce decree, the parties are required to comply with it unless and until it is modified as permitted by law. *See* Tenn. Code Ann. § 36-6-405 (2010). In assessing a petition to modify a permanent parenting plan, the court must first determine if a material change in circumstances has occurred and then apply the "best interest" factors of section 36-6-106(a). *Id.* § 36-6-101(a)(2)(B)–(C) (2010),–106(a) (2010 & Supp.2013); *see also Kendrick,* 90 S.W.3d at 570; *Boyer[v. Heimermann],* 238 S.W.3d [249] at 255 [(Tenn. Ct. App. 2007)]. Finally, pursuant to the modification procedures described in section 36-6-405(a), the court must apply the fifteen factors of section 36-6-404(b), so as to determine how, if at all, to modify the residential parenting schedule. Just as the court's processes for determining the child's best interests and residential schedule when making its initial custody decisions overlap substantially, here again the

> two analyses are likely to be quite similar. *Compare* Tenn.Code Ann. § 36-6-106(a), *with* Tenn.Code Ann. § 36-6-404(b).

414 S.W.3d 685, 697-98, 706 (Tenn. 2013). Following *Armbrister*, the General Assembly amended §§ 36-6-404(b) and 36-6-106(a).[3] Giving effect to the amendments, when a court is considering a petition to modify a residential parenting schedule, it must first determine whether a material change of circumstance has occurred. Tenn. Code Ann. § 36-6-101(a)(1)(C). If such a change is established, the court proceeds to determine whether modification of the schedule is in the best interest of the child, utilizing the factors at § 36-6-106(a) and, where applicable, § 36-6-406.

Neither party has challenged the holding that a material change of circumstances was proven and, upon our review, the evidence supports this holding. Consequently, we proceed to address the determination that modification was not in the best interest of the child.

Mother first contends that the provisions at Tenn. Code Ann. § 36-6-406(d)(1), (3), and (7)[4] apply to Father's conduct and that the court "erred in not making an inquiry as to

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[3] The version of Tenn. Code Ann. § 36-6-404(b) construed in *Armbrister* contained a list of fifteen specific factors and one catch-all factor to be considered by the trial court in developing the residential parenting schedule; the amendment eliminated the sixteen factors and replaced those with the direction that the court "consider the factors found in § 36-6-106(a)(1)-(15)." Prior to the amendment, § 36-6-106(a) contained a list of ten factors to be considered by the court in making a custody arrangement; the amended section replaced the ten factors with fifteen factors. According to the legislative history of the bill which amended the statutes, the General Assembly determined:

> [T]hat subsections 36-6-106(a) [and] 36-6-404(b) . . . of the Tennessee Code Annotated establish different factors pertaining to judicial review of custodial arrangements and the establishment of residential schedules for minor children; [and that] the factors listed in each section differ slightly in their specifics, causing confusion and inconsistent application of the law; and . . . [that] the factors that determine custodial arrangements or establish a residential schedule for minor children should be consistent."

2014 Tennessee Laws Pub. Ch. 617 (S.B. 1488). The amended §§ 36-6-404(b) and 106(a)(1)-(15) were in effect at the time of the hearing in this case and, accordingly, are the statutes we apply in our review of the trial court's ruling.

[4] Tenn. Code Ann. § 36-6-406(d)(1), (3), and (7) states:

> (d) A parent's involvement or conduct may have an adverse effect on the child's best interest, and the court may preclude or limit any provisions of a parenting plan, if any of the following limiting factors are found to exist after a hearing:
>
> (1) A parent's neglect or substantial nonperformance of parenting responsibilities;
> ***
> (3) An impairment resulting from drug, alcohol, or other substance abuse that interferes with the performance of parenting responsibilities;

whether any one or more of these factors pertain to the conduct of the Father." This argument is without merit. The order under review shows that the court fully considered Father's conduct and whether it would have an adverse effect on the child's best interest, as contemplated by the statute.

The order stated the following findings of fact pertinent to our consideration of this issue:

> 1. That the Father has violated the provision of the parties' parenting plan which prohibits the consumption of alcohol in the presence of the child. The Father testified not only that he had consumed alcohol in the presence of the child, but also that he had at times driven with the child in the car after consuming alcohol. The Court also finds it extremely problematic that the Father admitted to on one occasion driving a vehicle that was not equipped with an ignition interlock device, while the child was with him.
>
> 2. That, although there was testimony that the Father had on a couple of occasions in the distant past violated the "no overnight paramour" provision of the parties' parenting plan, the Father is now making efforts to comply with this provision.
>
> 3. That the Mother has established a material change of circumstance based on the Father's violation of the alcohol provision of the parenting plan.
>
> 4. Mother has, however, failed to establish that a modification of the parties' parenting plan is in the child's best interest. The Mother and Father testified that their daughter was happy, well-adjusted, and is thriving. They also both testified that she is a good student, has very loving family, and is particularly close to her paternal grandparents. Although the child sleeps at her grandparents' house on weeknights because of Father's work schedule, this Court is of the opinion that the Father spends the quality hours of the day with his daughter, helping her with her homework and feeding her, and that merely sleeping at her grandparents' house is not an improper delegation of his duties.
>
> 5. That the Father has made some poor choices in the last several years, but he has demonstrated that he has taken steps to get his life back on track.[[5]]

> ***
>
> (7) A parent's criminal convictions as they relate to such parent's ability to parent or to the welfare of the child[.]

[5] Also pertinent to this issue, although not a finding of fact, the trial court stated at the hearing:

The testimony of Mother and Father supports the findings of fact quoted above, and Mother does not cite to evidence preponderating against the findings, which directly relate to the factors at Tenn. Code Ann. § 36-6-406(d)(1),(3), and (7). The court did not fail to consider these factors, as contended by Mother; rather, the court concluded that the facts did not warrant a limitation on Father's parenting time.[6]

Mother next argues that the court "erred in ruling on best interest without considering the fifteen (15) factors" found in Tenn. Code Ann. § 36-6-106(a) and that, had the court "appl[ied] the fifteen (15) factors, the trial court should have modified father's parenting time."[7]

The order did not include specific findings of fact relative to the factors at Tenn. Code Ann. § 36-6-106(a), in accordance with Tenn. R. Civ. P. 52.01. This court addressed the absence of specific findings in *Solima v. Solima* and observed:

> Although the court need not list every applicable statutory factor and an accompanying conclusion, the trial court is required to "consider all the applicable factors." Moreover, Tennessee Rule of Civil Procedure 52.01 requires trial courts to make specific findings of fact and conclusions of law, even if neither party requests them. "[F]indings of fact are particularly important in cases involving the custody and parenting schedule of children...."
>
> Where findings of fact are insufficient, the appellate court may remand to the trial court or "conduct its own independent review of the record to determine where the preponderance of the evidence lies, without presuming the trial court's decision to be correct[.]" In determining whether to perform a de novo

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> The drinking with the child in the car and not using the interlock device gives the Court a lot of problems. Your probation could be revoked, sir, if that comes to your probation officer's attention and you're at risk [of] going back to jail if you fail to do that. I don't care if you have to move ten cars to get it out of the driveway, you cannot drive any vehicle without an interlock device on it. And if you ever drink with the child in the car again and it comes to the Court's attention, it will be a lot of - it will be some serious consequences, it's just not acceptable.

[6] In this regard we note that the court also ruled:

> That if there is any other instance of the Father drinking in the child's presence or transporting the child in a vehicle not equipped with an ignition interlock device — as long as that is required of him—there will be severe consequences for this behavior and violation of the parenting plan.

[7] This statement is the totality of Mother's argument on this point, and her brief includes no reference to proof in the record to support her position, as required by Tenn. R. App. P. 27(a)(7)(A).

> review, we consider the adequacy of the record, the fact-intensive nature of the case, and whether witness credibility determinations must be made.

No. M2013-01074-COA-R3-CV, 2015 WL 1186251, at *4 (Tenn. Ct. App. Mar. 11, 2015) (internal citations and footnotes omitted). The credibility of either party is not at issue in this case, and the record before us is sufficient to conduct an analysis of the issues we are called upon to resolve; accordingly, we proceed to conduct an independent review to determine where the preponderance of the evidence lies.

Father testified that he lived with a woman to whom he was engaged to be married; that the child sleeps at his mother and stepfather's home when Father has parenting time; that he had dated nine women since his divorce and on two occasions had a woman spend the night with him when the child was present; that he had violated the provision of the parenting plan that required him to not drink alcohol around the child; that he had been convicted of driving under the influence and was now required to have an interlock device installed in any vehicle he drove; that he is a staff sergeant in the National Guard and also works at Home Depot; and that when the child stays with him, he leaves work at 3 p.m. and picks the child up from his grandmother's house, helps her with homework, bathes her every other night, eats supper with her, and then takes her to his parents' home where he spends time with her and his mother and stepfather before she goes to bed. He also testified that the child is very close to his mother and stepfather, who go to her softball games and practices; that the child is an "extremely good" fast-pitch softball player; and that she makes good grades and seems happy when she is with him.

Mother testified that she does the same things as Father in the afternoons; that the child is with her before the child goes to sleep; that Father is a good father; that the child is healthy, happy, and intelligent; that the child loves her paternal grandparents and has a close relationship with them; that Father's fiancé "seems like a very nice lady" but Mother wanted to keep issues with the child between Father and herself; that the child "appeared to be uncleaned and unbathed" on two occasions after being in Father's care.

This evidence relates to factors (1), (2), (4), (6), (7), (8), (9), (10), (12), and (14) of Tenn. Code Ann. § 36-6-106(a).[8] In our judgment, factors (1), (2), (4), (6), (7), (8), (10),

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[8] The factors at Tenn. Code Ann. § 36-6-106(a) to which the testimony related are:

> (1) The strength, nature, and stability of the child's relationship with each parent, including whether one (1) parent has performed the majority of parenting responsibilities relating to the daily needs of the child;
> (2) Each parent's or caregiver's past and potential for future performance of parenting responsibilities, including the willingness and ability of each of the parents and caregivers to facilitate and encourage a close and continuing parent-child relationship between the child and both of the child's parents, consistent with the best interest of the child. In

(12), and (14) weigh equally in favor of Mother and Father. Factor (2) weighs in favor of Mother, while Factor (9) weighs in favor of Father.

As to the common factors, the testimony of both parents is that each has a strong, loving relationship with the child; that she is a happy, smart child who makes good grades in school; that, when exercising parenting time, each spends the majority of after school hours with her; and that each bathes, feeds, and helps her with her homework.

Factor (2) weighs in favor of Mother in light of Father's admissions that he had violated the no overnight paramour and no alcohol provisions of the parenting plan.

The testimony relative to Factor (9) was that the child was very close to her paternal grandparents and had a good relationship with Father's fiancé. The record is silent regarding

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determining the willingness of each of the parents and caregivers to facilitate and encourage a close and continuing parent-child relationship between the child and both of the child's parents, the court shall consider the likelihood of each parent and caregiver to honor and facilitate court ordered parenting arrangements and rights, and the court shall further consider any history of either parent or any caregiver denying parenting time to either parent in violation of a court order;

* * *

(4) The disposition of each parent to provide the child with food, clothing, medical care, education and other necessary care;

* * *

(6) The love, affection, and emotional ties existing between each parent and the child;
(7) The emotional needs and developmental level of the child;
(8) The moral, physical, mental and emotional fitness of each parent as it relates to their ability to parent the child. The court may order an examination of a party under Rule 35 of the Tennessee Rules of Civil Procedure and, if necessary for the conduct of the proceedings, order the disclosure of confidential mental health information of a party under § 33-3-105(3). The court order required by § 33-3-105(3) must contain a qualified protective order that limits the dissemination of confidential protected mental health information to the purpose of the litigation pending before the court and provides for the return or destruction of the confidential protected mental health information at the conclusion of the proceedings;
(9) The child's interaction and interrelationships with siblings, other relatives and step-relatives, and mentors, as well as the child's involvement with the child's physical surroundings, school, or other significant activities;
(10) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment;

* * *

(12) The character and behavior of any other person who resides in or frequents the home of a parent and such person's interactions with the child;

* * *

(14) Each parent's employment schedule, and the court may make accommodations consistent with those schedules;

the child's relationship with Mother's husband or with Mother's other daughter, who is close in age to the child. We thus conclude that this factor weighs in favor of Father.

Our analysis is also informed by the court's oral ruling:[9]

> Now, however my job is to decide what's in the best interest of the child and here's what the people have said to me: She is a happy, well-adjusted, good student who loves her dad, who loves her grandparents, who seems to be thriving. It doesn't seem like anything that's gone on, up to this point, has caused a problem with the child.
>
> We're fortunate she hasn't been injured, if you were drinking and driving in the car, but I'm going to give you an opportunity to correct that. It better never happen again.
>
> Apparently, you spend quality time with her from the time she gets off from school till the time she goes to bed. You're involved in her life. The fact that she goes and spends the night with her grandparents, she's asleep. (To Mrs. Rawn) She's asleep at your house when you're not working. So I don't think that you are missing quality parenting time with her, because -- And, quite frankly, it's good to have grandparents involved in children's lives, especially good grandparents. You admit that they're good grandparents. Apparently they're wonderful people if they'll come to all the ball games and sit there and be involved, and she loves them and we don't want to take that. I mean, what a blessing she's got those people in her life. A lot of people nowadays with the families living far apart don't get that opportunity to grow up with grandparents, so I'm glad.
>
> You both seem to love the child dearly. You both really seem to be good parents. You've made some poor choices occasionally, it seems to me, Mr. Wheeler, but it look to me like you're trying to get your life back on track, and I hope your life with Ms. Turner turns out to be a good thing. I hope it's [sic] continues to be a good influence on you.

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[9] The order did not incorporate the oral ruling, such as to ensure that the ruling became part of the order and is entitled to deference on appeal. "Our deference to a trial court's discretionary decision for which Rule 52.01 compliance is required may abate when the record does not reveal which legal principles and facts the trial court relied upon in making its decision." *Gooding v. Gooding*, 477 S.W.3d 774, 782 (Tenn. Ct. App. 2015) (footnote omitted). While a court "speaks through its order," as stated in *In re Adoption of E.N.R.*, 42 S.W.3d 26, 31 (Tenn. 2001), this ruling provides context for the holding in the written order that the parenting plan should not be modified.

Once the court makes the threshold determination that there has been a material change of circumstance, the court proceeds to make the factual determination of whether a change in the residential parenting plan is in the child's best interest.

> (a) In a suit for annulment, divorce, separate maintenance, or in any other proceeding requiring the court to make a custody determination regarding a minor child, the determination shall be made on the basis of the best interest of the child. *In taking into account the child's best interest, the court shall order a custody arrangement that permits both parents to enjoy the maximum participation possible in the life of the child consistent with the factors set out in this subsection (a), the location of the residences of the parents, the child's need for stability and all other relevant factors*.

(Emphasis added.)

While Mother argues that the court should have reached a different result, she does not point to evidence which preponderates against the trial court's findings relative to the factors at Tenn. Code Ann. § 36-6-106; in our review of the record, we have found no evidence that supports another factual conclusion with greater convincing effect. *See Hardeman Cty. v. McIntyre*, 420 S.W.3d 742, 749 (Tenn. Ct. App. 2013) ("For the evidence to preponderate against a trial court's finding of fact, it must support another finding of fact with greater convincing effect. *Watson v. Watson,* 196 S.W.3d 695, 701 (Tenn. Ct. App. 2005)"). Upon evaluating all the relevant factors, the trial court concluded that modifying the parenting schedule was not in the child's best interest. The evidence does not preponderate against this finding.

B. Whether the Court Granted Co-parenting Privileges to Paternal Grandparents

Mother's final argument is that "the effective result of the Court's ruling is to permit the paternal grandparents to perform the primary parenting functions during the father's parenting time," which "violat[ed] Mother's constitutional right to parent her child." Mother does not cite to the record or any authority in support of this argument, which is apparently based on the finding in the order that "merely sleeping at her grandparents' house is not an improper delegation of [Father's parenting] duties." Father's testimony was that his work schedule and desire not to violate the "no overnight paramours" provision of the parenting plan resulted in the child spending the night with Father's mother and stepfather when Father was exercising his parenting time. The court's order reflects this. The testimony is clear that Mother and Father spent effectively the same amount of time and engaged in the same activities with the child between the time she came home from school and the time she went to bed, as was stated by the trial court in its verbal ruling. Accordingly, this contention is without merit.

C. Mother's Request for Modification

In the conclusion section of Mother's brief she asks that we modify the parenting plan to grant Father daytime visitation for three weekends each month and grant decision-making authority to Mother. In light of our resolution of this appeal, we decline to address this request.

IV. CONCLUSION

For the foregoing reasons, we affirm the decision of the trial court.

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RICHARD H. DINKINS, JUDGE