



08/04/95 TANIA JANE WALDO WILSON

1995 | Cited 0 times | Court of Appeals of Tennessee | August 4, 1995

This child custody case presents two issues: (1) whether there had been a change of circumstances affecting the welfare of the child since the prior order; and (2) whether the court erred in restricting the mother's visitation privileges with the child. We modify the visitation order to allow the child to spend the summer with the mother. Otherwise, we affirm.

I.

The parties divorced in 1991 and agreed to joint custody of their three year old daughter. Both parties lived in the same area and the decree provided that the father would have custody of the child Friday through Sunday of one week and Wednesday through Friday of the next. The mother would have custody at all other times.

Both parties remarried; the father late in 1991, the mother in August of 1992. The mother's new husband, a serviceman, was stationed at Fort Sill, Oklahoma. In October of 1992, the parties petitioned the court for a modification of the custody decree and entered into an agreed order continuing the joint custody arrangement but providing that the child would spend her kindergarten year with her father in Tennessee and then attend the first grade in Oklahoma where she would live with her mother. The parties anticipated that beyond that they would make a joint decision about the future custody arrangements.

Near the end of the kindergarten year the father filed a petition for primary custody, alleging that the mother had become argumentative and belligerent concerning custody and support matters. The petition also alleged that the parties would not be able to agree in the following year on the future custody arrangement and that the child's best interests would be served by placing primary custody in the father. The mother filed a counter-petition in which she alleged that the parties had become unable to agree on the major decisions concerning the child's welfare and that the father and his new wife were inattentive to the child's needs.

The trial Judge changed the custody order and placed primary custody with the father. The order sets out an extensive visitation schedule for the mother including one week in each of the summer months.

II.

a. The Change of Circumstances



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On appeal the mother asserts that there had been no material change of circumstances since the previous agreed order. A change of circumstances is, of course, essential to the court's power to change a custody decree. *Griffin v. Stone*, 834 S.W.2d 300 (Tenn. App. 1992).

We think, however, that the record shows a dramatic change of circumstances since the October 1992 order. Both parties assert that they are now unable to agree on the major decisions concerning the child's welfare. It seems to us that the ability to agree and cooperate on such fundamental questions is essential to the success of a joint custody arrangement. The record also shows that after a visit with her mother the child exhibited some emotional problems at school. Perhaps of most significance, the mother disclosed for the first time at the hearing below that she had moved back to Nashville and was living with her mother until her husband received his army discharge and could join her.

We are satisfied that the record establishes the requisite change of circumstances.

b. The Custody Decision Itself

The mother also asserts that the record does not support the decision to award physical custody to the father. Although the case comes to us *de novo*, the trial Judge's decision is presumed to be correct. *Bah v. Bah*, 668 S.W.2d 663 (Tenn. App. 1983).

Faced with what we perceive as the necessity of changing the joint custody order, the trial Judge had two choices, the mother or the father. In his findings he noted that both were good parents, that neither was unfit. He did find, however, that the best interests of the child would be served by leaving her in the custody of her father. We cannot find that the evidence preponderates against that finding. The child had been with her father for the previous year. She had an excellent record at school. She had a good relationship with her father and stepmother and the trial Judge found that the child's relationship with her little half sister was beneficial.

Then there is the matter of the mother's uncertain living arrangements. At the time of the hearing she was living with her mother in a two bedroom apartment looking for permanent housing. She anticipated that her husband would join her in September and that both would be able to work in the Nashville area. Taking all the evidence into consideration, we affirm the trial Judge's award of primary custody to the father.

c. Summer Visitation

The trial Judge allowed the child to visit with the mother one week in each of the summer months. While we are satisfied that the trial Judge correctly awarded custody to the father, we think the summer visitation schedule unduly restricts the relationship between the mother and her daughter. See *Taylor v. Taylor*, 849 S.W.2d 319 (Tenn. 1993). Consequently, we modify the order to allow the



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mother to have custody of the daughter during the summer months, one week after school is out until two weeks before school begins in the fall.

We modify the trial Judge's order as noted herein. Otherwise the order is affirmed and the cause is remanded to the General Sessions Court of Wilson County for further proceedings in accordance with this opinion. Tax the costs on appeal to the parties equally.

BEN H. CANTRELL, JUDGE

CONCUR:

HENRY F. TODD, PRESIDING JUDGE

MIDDLE SECTION

SAMUEL L. LEWIS, JUDGE

