

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON

Sandra Litton Metz (Dodson) v. Monte A. Metz

**Direct Appeal from the Chancery Court for Dyer County
No. 95C664 J. Steven Stafford, Chancellor**

No. W1999-00023-C0A-R3-CV - Decided April 25, 2000

SPECIAL JUDGE HAYES concurring

SEPARATING CONCURRING OPINION

I agree with the majority that this case must be remanded for a determination of whether material changes have occurred in reference to the custodial placement of the minor children. I disagree, however, with the majority's conclusion that the remand is necessitated based upon error by the trial court.

This appeal was perfected as an appeal from a final judgment pursuant to Tenn. R. App. P. 3(a). It is apparent to me, however, that the Chancellor's ruling clearly contemplated only a temporary custody determination. I so find based upon the following:

1. The trial court's order specifically states: "That temporary custody of the male child, Christopher Metz, shall . . ." (emphasis added).
2. The statements of the trial court following the conclusion of the hearing:

THE COURT: For the record, I am going to make sure we understand this. On a temporary basis, and The Court is not finding on a permanent basis. On a temporary basis, The Court is going to award the custody - - . . . As I said, this is a temporary order. Either one of you can do something to change that temporary order . . . all you have got to do is file a motion and The Court will consider any facts that the counselors have determined are appropriate for The Court to consider to make changes to any of the custody arrangements. . . . The Court hasn't made a specific finding of abuse. The Court finds that there has been testimony that concerns it enough, as well as allegations about the parents, that reached a material change in circumstance. According to the statute, 36-6-106, I am not making a specific finding of abuse, no. Not without further clarification from some independent person.

(Emphasis added).

3. The court's order required continued counseling for both parties with monthly reports to the court as well as "periodic updates" by the "Guardian Ad Litem" prior to its final custodial determination.

4. The trial court's reliance upon Jean Kelly Fisher Wallace v. Richard Edward Wallace, No. 02A01-9702-CH-00029 (Tenn. App. at Jackson, Feb. 24, 1998), which implicitly permits monitoring of custodial arrangements on a temporary month to month basis.

Accordingly, I find that the trial court's order was temporary in nature, and that the court was attempting to resolve serious allegations of abuse in a conscious and thorough manner. As such, either party was free to seek an interlocutory appeal pursuant to Tenn. R. App. P. 9 or 10, as opposed to a Rule 3 which was sought in this case. Because the trial court's order was not a "final judgment," the trial court was under no duty to "articulate" findings, as suggested by the majority, relative to material changes in circumstances. Finding the appeal premature, I would remand for a final determination as provided by Tenn. Code Ann. § 36-6-106.