

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs May 25, 2001 Session

**In Re: E.K.C.T.
H.C. v. S.T.**

**Appeal from the Juvenile Court for Anderson County
No. J-15346 Pat Hess, Judge**

FILED JULY 17, 2001

No. E-2000-00197-COA-R3-CV

This is a child custody case. A paternity action was filed on behalf of H.C. (“Mother”), and S.T. (“Father”) admitted he was the natural father of the minor child, E.K.C.T. Over two years later, Father filed a petition seeking custody of E.K.C.T., alleging that there had been a material change in circumstances and that it would be in the best interest of E.K.C.T. for custody to be transferred to him. After a trial, the Juvenile Court granted Father’s petition finding there had been a material change in circumstances and that it would be in the best interest of the child for Father to have custody. Mother appeals the admission of certain evidence which she claims was protected by the attorney-client privilege, as well as the transfer of custody to Father. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the
Juvenile Court Affirmed; Case Remanded.**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HOUSTON M. GODDARD, P.J., and HERSCHEL P. FRANKS, J., joined.

Dail R. Cantrell, Clinton, Tennessee, for the Appellant H.C.

Vivian L. Crandall, Oak Ridge, Tennessee, for the Appellee S.T.

OPINION

Background

In March of 1995, a petition to establish the paternity of E.K.C.T. was filed by the Tennessee Department of Human Services on behalf of Mother who was receiving public assistance. Mother claimed that Father was the natural father of her one-year old daughter, E.K.C.T. In his answer, Father admitted paternity. Father claimed, however, that he was unable to provide any support for the child because he was unemployed and had a five month old son from a recent marriage. When E.K.C.T. was conceived, both Father and Mother were in high school. After E.K.C.T. was born, Father started working part-time at McDonald's and attempted to go to college, but eventually dropped out because of his grades. Father then went to technical school and obtained a certificate as a recording technician. Although eventually he was able to secure employment in this field, he quit his job after several of his payroll checks bounced. Father then applied for public assistance. The record establishes that Father never denied he was the natural father of E.K.C.T., although a DNA test was conducted to make sure. Father always attempted to maintain regular visitation with E.K.C.T. Although having trouble securing gainful employment, Father was nevertheless ordered to pay child support in the amount of \$86.00 per month. He made these child support payments and continued regular visitation.

On June 13, 1996, the Anderson County Juvenile Court entered an Agreed Order granting Mother custody of E.K.C.T. subject to Father's right to reasonable visitation.¹ On September 22, 1997, Father filed a petition to modify the Agreed Order and asked the Juvenile Court to award him custody of E.K.C.T. In the petition, Father alleged there was a material change of circumstances since the previous order was entered in that: (1) Mother had been denying Father's requests for visitation with the child; (2) Father had joined the United States military, had a stable income, and could provide a stable home; (3) Mother had exhibited violent behavior towards E.K.C.T. and had been neglectful; (4) Mother threatened to kill her parents if they tried to obtain custody; and (5) Mother had exhibited violent behavior towards her parents, with whom E.K.C.T. resided, to the point that police intervention was required. Father also claimed that it would be in the best interest of E.K.C.T. to transfer custody to him.

During the course of the litigation discussed above, Father was represented by his father ("Turner"), a licensed attorney. In November of 1997, Turner withdrew as attorney for Father, who had obtained new counsel. Shortly after obtaining new counsel, Father filed a Motion for Contempt claiming that Mother was denying him reasonable visitation in violation of the previous court order. Although Mother denied being in contempt, an Agreed Order was entered by the Juvenile Court establishing a specific visitation schedule. In March of 1998, Father filed a motion to have a guardian ad litem appointed. Father claimed that E.K.C.T. was being mentally and emotionally abused by Mother. In the motion, Father stated that Mother was making a concerted effort to affect negatively Father's relationship with E.K.C.T. by telling the child not to eat when she

¹ Because Father was required to show a material change in circumstances before custody of E.K.C.T. could be transferred to him, the Juvenile Court was very careful to limit testimony at trial to events which occurred after this Agreed Order was entered.

was visiting Father, that Father did not care about her, etc. The Juvenile Court appointed a guardian ad litem and, pursuant to the request of Mother's counsel, ordered both parties to undergo a psychological evaluation.

The Psychological Evaluation was prepared by Robert G. Wahler, Ph.D., and filed with the Juvenile Court. Because Mother did not complete the evaluation, it focused on the personal adjustment of E.K.C.T. with Father and his wife. The report reveals that Father and his wife have two children. Their oldest child was almost four years old when the evaluation was completed and suffers from autism. The report described Father's wife as proactive in learning about autism and seeking out special parenting plans to help the child. She was also proactive with Father and was "devoted to him . . . [and] a persuasive and stabilizing influence on him." Dr. Wahler described Father as someone who has proven himself since joining the military by steadily moving up in rank. According to Dr. Wahler, Father "has made significant strides in maturity over the past three years and he now demonstrates consistent evidence of responsibility to his wife and children. I found him to be thoughtful, goal oriented, committed to his family, and realistic about his future plans." Dr. Wahler found E.K.C.T. to be very direct. Both Mother and E.K.C.T. acknowledged that respect was not present in their relationship, which often included arguing. E.K.C.T. also stated that Mother spanked her with a switch. Dr. Wahler opined that whichever parent ended up with E.K.C.T., they would need to be prepared to guide her and moderate her stubborn nature. Dr. Wahler concluded, in part, that:

[E.K.C.T.] has responded well to the authority and affection inherent in both [Father and his wife], as well as her two [half-brothers]. Both parents understand [E.K.C.T.'s] personality, both have demonstrated their skill in calming her and fostering her cooperation within the family. Despite the challenge posed by adding [E.K.C.T.] to [the] family, I have no doubt that [Father and his wife] will be able to do so with no loss in their effectiveness as parents.

At the trial on Father's petition seeking custody of E.K.C.T., he related a conversation which took place in 1997 and which forms the primary basis for this appeal. Specifically, Father received a phone call from Turner (who was still Father's attorney at that time). Turner told Father that he had Mother's parents ("Parents") in his office.² Parents knew Father was on the phone because Father participated in the conversation by way of speaker phone. Father explained the conversation as follows:

A. [Mother's] parents were upset because they were afraid that [Mother] might harm [E.K.C.T.], and they were initially looking to try to get custody.

² It was actually Mother's stepfather and mother who were in Turner's office.

Q. Okay. Can they tell you – did they discuss specifically how they thought she might harm [E.K.C.T.]?

A. They said there were instances where [E.K.C.T.] was in the bathroom with [Mother], and [E.K.C.T.] came running out screaming saying that her mom had hit her.

* * *

Q. Did they give you any other indication as to why they were concerned for [E.K.C.T.]?

A. Just that [Mother] was becoming – had been violent to her mother also.

* * *

A. [T]hey were wanting [custody]. But my father was saying that's not right, and I was saying, no, that's not right, let me get custody of her, temporary, and work everything out.

* * *

They – they were fearing that [Mother] was going to do something because she hadn't been taking medicine for a disorder and she was getting out of control. . . .

According to Father, Parents then stated that they had to leave and would return to Turner's office at 5:00 p.m. They never returned. Father testified that to his knowledge, Parents were not seeking a temporary guardianship of any kind. After that conversation, Father was unable to exercise visitation with E.K.C.T. for a couple of months because his telephone calls would not be returned.

Father testified that his wife, who works at home, is the primary caretaker of their two sons. Mother has two other daughters who are younger than E.K.C.T. Father stated that he would attempt to arrange for E.K.C.T. to spend time with the older of her two half-sisters when he was able to do so. This half-sister does not reside with Mother. At the time of trial, Father was stationed at Fort Bragg in North Carolina. He testified that prior to seeking court intervention, he was not able to have E.K.C.T. visit him in North Carolina. Once E.K.C.T. was able to visit him in North Carolina, he would take her to parks and museums and the like. Father stated that if he obtained custody of E.K.C.T., he hoped Mother would be able to exercise as much visitation as possible. Father testified that he was evaluated by Dr. Wahler at the request of Mother and her counsel, and he kept every appointment that was scheduled.

Father claimed that he was unaware that Mother had bipolar disorder during their brief relationship which resulted in the birth of E.K.C.T. Father stated that at times when he would pick up E.K.C.T. for visitation, she would look like she had not been bathed in several days and act depressed. Mother would seem either like she was in a hurry and “ready to just let [E.K.C.T.] go”, or she would cry. Father testified that Mother recently had her third daughter, but instructed Father to tell E.K.C.T. that this infant was her cousin because Mother “gave” the child to her aunt. Father testified that E.K.C.T. is often bruised. She has had bruises on her back, ribs, and arms. He does not know how she is being bruised, but has been told it was from “child accidents”.

At trial, Mother testified that she was 22 years old and had been residing with her grandparents for the past two years. She spends the night at her parents once a week. She obtained employment at Dollywood the day before the trial, after just having ended a job at a body shop. Mother had approximately six other jobs since 1997, and her mother or aunt would care for E.K.C.T. when she was working. Mother has another daughter who is three years old. This child’s father has custody. Mother had seen this daughter only once between New Year’s day and the July trial date. This child’s grandmother testified that when Mother had custody of this child, Mother would drop the child off and would not retrieve her for several months and had little involvement with the child at these times. Mother testified that she is not allowed visitation with this child pursuant to a court order. Mother claimed she had “no idea” why the court prohibited her from seeing this daughter. In June of 1998, Mother had a third daughter. E.K.C.T. does not know that this is her half-sister. This third daughter has been adopted by Mother’s aunt.

Mother testified that she has bipolar disorder. She admitted there were times that she did not or would not take her medication, which would cause drastic behavioral changes. Mother claimed this happened because she did not have money to purchase the medication, although she admitted that she was able regularly to purchase cigarettes. Mother testified to an incident where her mother would not allow E.K.C.T. to be taken from the premises because Mother was not taking the medication for her bipolar disorder. Mother stated that she had to call the police in order to leave with E.K.C.T.

Mother claimed she could care for E.K.C.T. as well as Father. She did, however, acknowledge that she had no reason to be concerned about Father’s ability to properly care for E.K.C.T. Mother described Father’s wife as a “very nice person” who was kind and gracious to Mother and who had a good relationship with E.K.C.T.

At trial, Turner was called to testify about the conversation he had at his office with Parents in 1997, among other things. No objection was made at trial that this conversation was privileged. In any event, Turner testified that Parents came by his office and told him they wanted to get E.K.C.T. out of the situation, that they were sorry they had to bring this to his attention, but they felt that E.K.C.T. was being mistreated by Mother. They indicated that Mother was not taking her medication and had missed appointments with the Department of Human Services. Parents stated that Mother had become volatile and erratic, was throwing fits, screaming and yelling, and even punched a hole in the wall. Parents were afraid to leave E.K.C.T. alone with Mother and

claimed they had seen Mother strike E.K.C.T. According to Turner, Parents believed Mother needed to be institutionalized. Turner testified that after being informed of the foregoing, he then placed a telephone call to Father. Once Father was on speaker phone, Turner stated that Parents reiterated to Father their concerns about Mother and the safety of E.K.C.T. Once it became clear to Parents that Father wanted custody of E.K.C.T., Parents' attitude during the conversation changed. They agreed to come back to Turner's office that afternoon at 5:00 p.m., but they did not return. Turner testified that when Parents first came into his office and started talking about the situation, he told them there was only one position he could take, and that would be for Father to have custody. Turner believed that Parents were coming to him as "grandparent to grandparent", not as clients. Turner testified it was his impression that Parents wanted to obtain custody, although they never explicitly said that.

Parents testified that when they went to Turner's office, it was their intention to obtain a power of attorney in case Mother had to be hospitalized. Parents stated that they did not know the correct legal terminology and used the word "custody" while at Turner's office. Parents stated that once they explained to Turner the situation with Mother, Turner called Father and put him on the speaker phone. Once this occurred, Parents assert they were ambushed by Turner who began trying to convince Father to take custody away from Mother. Although Parents denied that they were afraid that Mother was going to harm E.K.C.T., Mother's stepfather admitted on cross-examination that he told Turner of many concerns he had about Mother as testified to by Turner. He also admitted that when Mother was not taking her medication, she became depressed, moody, and angered very quickly. Parents claim when they went to Turner's office, they wanted both legal advice and advice as a grandparent.

The guardian ad litem appointed to the case was present during all of the trial testimony and was given an opportunity to question all of the witnesses. At the close of all of the proof, the guardian ad litem recommended to the Juvenile Court that custody be transferred to Father.

The Juvenile Court found that there had been a material change in circumstances since the entry of the order in June of 1996 and that there was a risk of harm to E.K.C.T. if custody was not changed. This conclusion was based in large part on Mother's failure to properly take her medication, with the most recent failure occurring just two weeks before trial. The Juvenile Court found "there is a high risk of physical and/or emotional abuse in the Mother's care." The Juvenile Court also went through the various factors set forth in Tenn. Code Ann. § 36-6-106(a) in making a determination as to what was in the best interest of E.K.C.T. These factors include, but are not limited to, the love, affection and emotional ties existing between the parents and child; the disposition of the parents to provide the child with food, clothing, medical care, education and other necessary care; the degree to which a parent has been a primary caregiver; the importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment; the stability of the family unit of the parents; the mental and physical health of the parents; and each parent's past and potential for future performance of parenting responsibilities, including the willingness and ability of each of the parents to facilitate and encourage a close and

continuing parent-child relationship between the child and other parent, consistent with the best interest of the child. After considering the relevant factors, the Juvenile Court concluded that it would be in the best interest of E.K.C.T. for custody to be changed to Father.

Mother filed a motion for a new trial or to alter or amend the judgment. The basis for this motion was Mother's claim that Turner's conversation with Parents when they went to Turner's office was protected by the attorney-client privilege. According to Mother, if this evidence is excluded, then there is insufficient evidence to justify transferring custody of E.K.C.T. to Father. The Juvenile Court denied the motion, concluding that there was no attorney-client relationship between Turner and Parents. The Juvenile Court also concluded that Turner was at one time the attorney for Father in this litigation and, therefore, Parents did not have a reasonable expectation of privacy in their communications with Turner. Finally, the Juvenile Court concluded that even if this evidence had been excluded, there nevertheless was sufficient evidence to change custody to Father. Mother appeals the transfer of custody to Father.

Discussion

The sole issue raised by Mother on appeal is whether the Juvenile Court erred by denying her motion for a new trial or to alter or amend the final judgment based upon her claim that there was error because "testimony from . . . [her] parents was entered through . . . [Turner's] violating the attorney-client privilege." Stated another way, Mother claims it was reversible error by the Juvenile Court to allow Turner to testify concerning the conversation between Turner and Parents. Father argues on appeal that Mother has waived any challenge to the admission of this evidence because no objection was made at trial. In order to challenge the admission of evidence on appeal, there must be a timely and specific objection to the evidence or motion to strike the evidence. Otherwise, the right to appeal the admission of evidence will be considered waived. *Tire Shredders, Inc. v. ERM-North Central, Inc.*, 15 S.W.3d 849, 864 (Tenn. Ct. App. 1999). We agree that this issue has been waived. Due to the importance of this issue since it could impact the custody of E.K.C.T., we will exercise our discretion and address the merits of this issue notwithstanding its waiver.

First, we will address Mother's argument that the discussion between Turner and Parents was protected by the attorney-client privilege and should have been excluded. By common law and statute, Tennessee recognizes an evidentiary privilege which protects attorney-client communications. Tenn. Code Ann. § 23-3-105 provides that:

No attorney, solicitor or counselor shall be permitted, in giving testimony against a client, or person who consulted the attorney, solicitor or counselor professionally, to disclose any communication made to the attorney, solicitor or counselor as such by such person, during the pendency of the suit, before or afterwards, to the person's injury.

The admission or exclusion of testimony is within the sound discretion of the trial court. A trial court's decision to admit testimony will not be disturbed on appeal unless there is a clear showing that the trial court has abused its discretion. *State v. McCord*, 1997 WL 732513 at *9, No. 03C01-9403-CR-00110 (Tenn. Crim. App., No v. 26, 1997)(citing *State v. Brimmer*, 876 S.W.2d 75, 79 (Tenn. 1994)). As stated by the Court of Criminal Appeals in *McCord*, 1997 WL 732513 at *9:

The relationship between attorney and client is a mainstay of our system of justice, and the purpose of the privilege is to protect that relationship by fostering the free flow of communication in an atmosphere of mutual trust and confidentiality. *See Bryan v. State*, 848 S.W.2d 72, 79 (Tenn. Crim. App. 1992). The object of the rule is to protect the professional communications between attorney and client "by profound secrecy." *Id.* (quoting from *McMannus v. State*, 39 Tenn. 213, 215-16 (1858)).

However, the privilege is not absolute. Not only must the communication occur within the bounds of the attorney-client relationship, it must be made with the intent that the communication be kept confidential. *Bryan*, 848 S.W.2d at 80. The privilege is designed to protect the client, and because it belongs to the client, the client may waive the privilege. *Smith County Educ. Assoc. v. Anderson*, 676 S.W.2d 328, 333 (Tenn. 1984). The client waives the right to keep attorney-client communications secret when he divulges the communications he seeks to protect. *Taylor v. State*, 814 S.W.2d 374, 377 (Tenn. Crim. App. 1991).

In addition, an attorney may be required to testify about communications "that have no element of confidence in them. . . . For example, the presence of a third party at the time of the communication or the client's expectation that the substance of the communication is to be disclosed to others does not bring the privilege into play." *Bryan v. State*, 848 S.W.2d 72, 80 (Tenn. Crim. App. 1992).

The Juvenile Court did not abuse its discretion when it held there was no attorney-client relationship between Parents and Turner. This determination was based primarily on factual findings by the Juvenile Court and witness credibility. A trial court's factual determination involving witness credibility will be given great weight on appeal. *See Barnhill v. Barnhill*, 826 S.W.2d 443, 448 (Tenn. Ct. App. 1991)(citing *Town of Alamo v. Forcum-James Co.*, 205 Tenn. 478, 327 S.W.2d 47 (1959)). Likewise, the Juvenile Court did not abuse its discretion when it concluded that because Turner had represented Father in this litigation, Parents had no reasonable expectation of privacy in their communications with Turner. Although not addressed by the Juvenile Court, we further believe that any communications made while Father was on the speaker phone would certainly constitute a communication made in the presence of a third party which would negate any claimed privilege. In addition, any voluntary testimony at trial by Parents as to any matters they

claimed were privileged would destroy the privilege. Considering all of these factors, we conclude that the Juvenile Court did not abuse its discretion when it concluded that this conversation was not privileged, and we accordingly affirm the decision of the Juvenile Court on this issue.

The standard of review in child custody cases as well as the burden required to be shown before a change in custody can be properly made was recently discussed by this Court in *Crabtree v. Crabtree*, 2000 WL 816807 at *1, *2, No. E2000-00501-COA-R3-CV (Tenn. Ct. App., June 23, 2000), from which we quote liberally:

The standard of review in child custody cases is *de novo* upon the record, of the Trial Court, accompanied by a presumption of correctness as to findings of fact, unless a preponderance of the evidence is otherwise. Rule 13(d) T.R.A.P., *Hass v. Knighton*, 676 S.W.2d 554 (Tenn. 1984).

In recognition of the importance of stability and continuity, custody and visitation decisions, once made and implemented are *res judicata* upon the facts in existence or reasonably foreseeable when the decision was made. *Adelsperger v. Adelsperger*, 970 S.W.2d 482 (Tenn. Ct. App. 1997); *Young v. Smith*, 246 S.W.2d 93 (Tenn.1952).

Tennessee Code Annotated § 36-6-101(a)(1) empowers courts to change custody “as the exigencies of the case may require.” Courts will change custody when the party seeking the change in custody proves that the child’s circumstances have materially changed in a way that could not have been foreseen at the time of the original decision, and the child’s best interest will be served by changing the existing custodial arrangements. *Adelsperger*, at 485; *Musselman v. Acuff*, 826 S.W.2d 920 (Tenn. Ct. App. 1991).

Before engaging in this analysis, the Court must determine whether there has been a material change in circumstances. We observed in *Wall v. Wall*, 907 S.W.2d 829 (Tenn. Ct. App. 1995):

This decision [regarding custody] is not changeable except for “change of circumstances” which is defined as that which requires a change to prevent substantial harm to the child. Custody is not changed for the welfare or pleasure of either parent or to punish either parent, but to preserve the welfare of the child. Custody is not changed because one parent is able to furnish a more commodious or pleasant environment than the other, but where continuation of

the adjudicated custody will substantially harm the child.

Id. at 834.

A trial court is vested with broad discretion in matters of child custody, and an appellate court will not interfere with a decision of the trial court except upon a showing of erroneous exercise of that discretion. *Hoalcraft v. Smithson*, 19 S.W.3d 822, 827 (Tenn. Ct. App. 1999). Under the abuse of discretion standard, the ruling of the trial court will be upheld “so long as reasonable minds can disagree as to propriety of the decision made.” *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001). As noted by our Supreme Court in *Eldridge*:

A trial court abuses its discretion only when it “applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining.” *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999). The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court. *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998).

Eldridge, 42 S.W.3d at 85. After a careful review of the entire record in this case, it is apparent that the Juvenile Court did not abuse its discretion when it concluded that there had been a material change in circumstances, as defined by the relevant case law, and that it was in the best interest of E.K.C.T. for custody to be transferred to Father.

Conclusion

The decision of the Juvenile Court is affirmed, and this case is remanded to the Juvenile Court for further proceedings as necessary, if any, consistent with this Opinion. Costs of the appeal are taxed to the Appellant H.C. and her surety.³

D. MICHAEL SWINEY, JUDGE

³ At the initial stages of this appeal, Father filed a motion to dismiss because Mother had not timely filed her brief. Although we denied the motion, we reserved the issue of Father’s request for attorney’s fees incurred up to that point in time. After considering the entire record in this case, we decline to award any attorney’s fees to Father.