

IN THE COURT OF APPEALS OF TENNESSEE
EASTERN SECTION AT KNOXVILLE

FILED

March 21, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

WILLIAM E. BERSCH,)	GREENE CHANCERY
)	NO. 03A01-9608-CH-00266
Plaintiff/Appellee)	
v.)	WILLIAM L. JENKINS,
)	CIRCUIT JUDGE
)	AND
DEBRA K. GROETTUM (BERSCH))	THOMAS R. FRIERSON, II,
WEXLER,)	CHANCELLOR
)	
Defendant/Appellant)	AFFIRMED

M. Stanley Givens, Johnson City, for the Appellant

Edward Kershaw, Greeneville, for the Appellee

OPINION

INMAN, Senior Judge

These parties were divorced in Fairfax County, Virginia in March 1992. Custody of their two children was awarded to Mother.

They moved to Greene County, Tennessee soon after the divorce. The Father enjoyed reasonable visitation with the children.

Mother married Russell Wexler by whom she had a child. This marriage was of short duration, a divorce became final September 25, 1995. Custody of the Wexler child was awarded to Mr. Wexler and is not an issue in this case.

Mother, with her two children by Bersch, continued to reside in the Wexler residence. The parties agree that it was he who provided practically all of the care of the children.

Mother and Wexler engaged in a heated argument on September 28, 1995. She left the house and the children without revealing her destination. At trial she testified that she had a bad day and went to a female friend's house, but it developed

that she went to the house of McNeese whom she had been dating while married to Wexler. She subsequently married McNeese, her fifth husband.

When Father learned of the event of September 28, 1995, he filed a "Motion for Emergency Custody" in the Chancery Court, seeking temporary custody of the children. On October 2, 1995, the Circuit Judge, by interchange, found a material change in circumstances and awarded temporary custody to the Father. A custody pendente lite hearing was set for October 9, 1995.

The custody pendente lite hearing was held as scheduled, requiring several hours of testimony. The matter was taken under advisement until October 27, 1995 when the Court entered an order granting "joint legal custody pendente lite" to both parents. Father was awarded custody from Sunday evening to Friday, with Mother having the children on week-ends. Counseling was ordered for the children.

On October 30, 1995, Father petitioned for a change in custody, alleging a material change in circumstances had occurred since the time of the divorce and specifying forty-five specific instances reflecting adversely on the Mother's suitability to have continued custody.

A trial on the merits of the petition was held on January 29, 1996. Judgment was entered on April 30, 1996, finding a change in circumstances and awarding custody to Father. Mother was awarded visitation in accordance with a prior order, but issues of support and the visitation schedule were reserved. Thereafter, before a different trial judge, the support obligation of Mother was ordered to commence as of April 29, 1996, and a visitation schedule was arranged.

Mother appeals, presenting four issues for review, which may be cumulatively considered as whether the court erred in changing the custody of the children. Father appeals, presenting for review the issues of (1) whether support should have commenced on October 2, 1995 and (2) whether the visitation schedule improperly denies him week-end companionship with the children.

Our review is *de novo* on the record, accompanied by the presumption that the trial court's findings of fact are correct unless the evidence otherwise preponderates. TENN. R. APP. P. 13(d). Since all of the numerous witnesses testified

in open court, the trial judge's determination of credibility of these witnesses is well-nigh conclusive. *Walls v. Magnolia Truck Lines*, 622 S.W.2d 526, 528 (Tenn. 1981).

There was substantial testimony offered as to the instability and essential irresponsibility of Mother, who apparently does not look upon marriage with any semblance of sincerity, since, at age 35, she is currently married to her fifth husband. While married to Wexler, she was dating her present husband; she was content for Wexler to have the care of her children while she pursued other interests; she made no effort to discipline the children allowing them to "run wild," and made no effort to tend the children in Wexler's absence. On the occasion previously mentioned, she deserted the children for her paramour's company and apparently perjured herself when called upon to explain. The trial judge found a change of circumstances warranting modification of custody in accordance with the teaching of *Musselman v. Acuff*, 826 S.W.2d 920 (Tenn. Ct. App. 1991), and we find the preponderance of the evidence supports the finding of the trial judge.

We have reviewed the visitation schedule and find no good reason to modify it in any way. The Chancellor ordered the mother to pay support in the amount of \$280.00 monthly, commencing April 29, 1996. Father insists that the support should properly commence at an earlier time, October 2, 1995 when he was awarded "temporary joint custody." Suffice to say we do not agree. The judgment is affirmed in all respects, with costs assessed to the parties evenly. The case is remanded to the Chancery Court of Greene County.

William H. Inman, Senior Judge

CONCUR:

Houston M. Goddard, Presiding Judge

Herschel P. Franks, Judge