

IN THE COURT OF APPEALS OF TENNESSEE

FILED
November 18, 1997
Cecil Crowson, Jr.
Appellate Court Clerk

ALOMA ROBIN RANDOLPH,
Plaintiff-Appellant,

) C/A NO. 03A01-9704-CH-00133

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v.

) APPEAL AS OF RIGHT FROM THE
) GREENE COUNTY CHANCERY COURT

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)

TIMOTHY CHARLES RANDOLPH,
Defendant-Appellee.

) HONORABLE THOMAS R. FRIERSON, II
) CHANCELLOR

For Appellant

For Appellee

EDWARD KERSHAW
Leonard & Kershaw
Greeneville, Tennessee

ROGER A. WOOLSEY
Woolsey & Woolsey
Greeneville, Tennessee

OPINION

AFFIRMED AND REMANDED

Susano, J.

Following a bench trial, the court below modified the parties' judgment of divorce by changing the custody of their minor child, Brandon Charles Randolph (DOB: February 19, 1990), from Aloma Robin Randolph ("Mother") to Timothy Charles Randolph ("Father"). Mother appealed, arguing that the trial court erred in finding that a material change in circumstances had occurred since the divorce.

This case is before us for a *de novo* review on the record. Rule 13(d), T.R.A.P. The record comes to us accompanied by a presumption that the lower court's findings of fact are correct. *Id.* We must honor this presumption unless the evidence preponderates against the trial court's factual findings. *Id.*

The trial court heard this matter on September 23, 1996. It filed a memorandum opinion changing custody on October 7, 1996. That opinion provides, in pertinent part, as follows:

The parties were divorced by Judgment nunc pro tunc August 4, 1992, entered on July 3, 1996. Among other things, wife was awarded custody of the parties' minor child, Brandon Charles Randolph, subject to specified visitation rights in favor of Mr. Randolph.

* * *

Subsequent to the divorce, the parties, by mutual agreement, gradually deviated from the Court ordered visitation. From August of 1992 through March of 1993, Mr. Randolph was in the physical custody of the child two to three days a week. From March, 1993, through November of 1993, Mr. and Mrs. Randolph alternated days each week so that each maintained physical custody of the child approximately 50% of the time. From November, 1993, through July of 1995, Mr. Randolph maintained physical custody of the child each Friday through Tuesday with Mrs.

Randolph maintaining physical custody of the child from Tuesday through Thursday or Friday morning each week. By Order entered November 9, 1994, Mrs. Randolph, pro se, approved this Court's directive that Mr. Randolph's past obligation to support the child was deemed fully satisfied by his maintaining physical custody of the child. Mrs. Randolph asserts that she did not understand or intend her approval of the Order to constitute a change of custody.

From August, 1995, through October of 1995, Mrs. Randolph maintained physical possession of the child from Friday of each week through the following Monday with Mr. Randolph having physical possession the balance of each week. Beginning in November of 1995 until the present, Mrs. Randolph has enjoyed physical custody of the child each Friday through Sunday.

It is undisputed that both Mr. and Mrs. Randolph are responsible, loving and nurturing parents. The child appears to have a positive, healthy and loving relationship with both Mr. and Mrs. Randolph. As indicated above, since the divorce in August of 1992, the parties have amiably agreed to disregard the strict visitation schedule included in the Final Decree of Divorce by gradually allowing Mr. Randolph to enjoy increased physical custody of the child. The evidence supports a finding that the primary catalyst for the institution of these proceedings was a controversy arising between the parties approximately June 27, 1996, when Mr. Randolph requested of Mrs. Randolph reimbursement of the \$35.00 per week for baby sitting charges.

* * *

The Court specifically finds that by a preponderance of the evidence a material change in circumstances affecting the manifest best interest of the minor child has occurred since the time of the divorce. The minor child has maintained a gradually increasing physical custody arrangement with Mr. Randolph, including a move of residence to Jonesborough, Tennessee, and enrollment in school there. Mr. Randolph has remarried since the divorce and the evidence establishes that most weekends Mrs. Randolph maintains overnight company with Mr. Gerald Armstrong. The Court orders that the custody, care and control of the minor child

be placed with Mr. Randolph.

The court below found that there had been a material change in the circumstances of the parties and their child that was "compelling enough to warrant the dramatic remedy of changed custody." *Musselman v. Acuff*, 826 S.W.2d 920, 922 (Tenn.App. 1991). The court's critical finding was that since the divorce, the parties' "minor child has maintained a gradually increasing physical custody arrangement with [Father], including a move of residence to Jonesborough, Tennessee, and enrollment in school there." There is an abundance of evidence to substantiate this finding. Mother acknowledges that since November, 1995, her time with the child has been pretty much limited to weekends, with the child staying with Father during the week. Mother lives in Greene County and works in Hamblen County; Father resides in Washington County. The child attended kindergarten in Jonesborough during the 1995-1996 school term and was in the first grade there when this matter was heard below.

Mother argues that she was only obeying the judgment of divorce when she agreed to allow the child to spend more time with Father. She points to the following provision in the judgment:

...should the Wife at any time work a shift other than the second shift, the Husband shall have the first right to keep said child during such time as the Wife is working;...

She contends that she is now being "punished" because she complied with the judgment and allowed her son to spend more time

with his father so the two could develop a strong relationship. We believe that Mother mischaracterizes what happened in this case.

The judgment contemplates that if Mother works during a time period other than the 3:00 p.m. - 11:30 p.m. or similar shift, Father "shall have the first right to keep said child during such time as [Mother] is working." While it is true that Mother has worked late night - early morning shifts for the bulk of the time since November, 1993, it is likewise true that the child's time with Father has been substantially more than the time when "[Mother] is working." It is clear that he did more than *keep* the child while Mother was working late night - early morning shifts. Not only did he keep the child during Mother's work times, he moved the child, with Mother's acquiescence, from Greene County to Washington County. The child basically has had a change of residence. The increased time with Father went well beyond the accommodation contemplated by the divorce judgment. The trial court's order changing custody is nothing more than a recognition of the reality of the situation -- the parties' minor child lives with Father and visits Mother on weekends. The evidence does not preponderate against the trial court's order.

The judgment of the trial court is affirmed. Costs on appeal are taxed against the appellant and her surety. This case is remanded to the trial court for the enforcement of its judgment and for the collection of costs assessed below, all pursuant to applicable law.

Charles D. Susano, Jr., J.

CONCUR:

Houston M. Goddard, P.J.

William H. Inman, Sr.J.