

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

DWAYNE EDWYNN INGRAM,

Plaintiff-Appellee,

Vs.

Shelby Equity No. 20111-1
C.A. No. 02A01-9501-CH-00005

CATHERINE HALL INGRAM,

Defendant-Appellant.

FILED

March 27, 1996

FROM THE CHANCERY COURT OF SHELBY COUNTY

THE HONORABLE NEAL SMALL, CHANCELLOR

Cecil Crowson, Jr.
Appellate Court Clerk

Kay Farese Turner of Memphis
Charles W. McGhee of Memphis
For Plaintiff-Appellee

Stevan L. Black of Memphis
Vicki J. Singh of Memphis
For Defendant-Appellant

***REVERSED IN PART, AFFIRMED AS MODIFIED
IN PART AND REMANDED***

Opinion filed:

**W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.**

CONCUR:

DAVID R. FARMER, JUDGE

HOLLY KIRBY LILLARD, JUDGE

This is a child custody case. Dwayne Edwynn Ingram (Father) and Catherine Hall Ingram (Mother) were divorced by decree entered June 16, 1992. The decree provided for joint

legal custody of the parties' minor child, Matthew, born February 9, 1989, with Father having primary physical custody. Mother appealed to this Court and, while the appeal was pending, filed a Petition for Change of Custody in chancery court. In November of 1992, the chancellor declined to hear Mother's Petition for Change of Custody due to her appeal pending in this Court. On December 22, 1992, a Consent Order dismissing Mother's original appeal was entered.

On February 24, 1994, Mother filed the Petition for Change of Custody and Injunctive Relief which is the subject of this appeal. On May 12, 1994, the date set for hearing Mother's petition, Father filed an answer to Mother's petition and also filed a counter-petition seeking sole custody of their child. On July 7, 1994, after an evidentiary hearing, the trial court entered an order denying Mother's request for a change of custody. The trial court also modified the final divorce decree by eliminating the requirement of the original decree that required Father to consult Mother on major decisions involving Matthew. The court also ordered Mother to pay \$1,000.00 of Father's attorney fees and assessed court costs to Mother. Mother perfected the present appeal and presents four issues for review. The first issue is whether the trial court erred in denying Mother's petition for change of custody.

In the initial custody ruling, the trial court made the following statement:

Now, the court is frankly concerned about both parents in this case, that they both have some problems, and in the court's view that must be worked out. The father's attitude is not altogether satisfactory. Neither party seems to fully understand what it takes, what is needed to rear and deal with the child, and the relationship that the other parent should have with the child not for the other parent or either parents' benefit, but for the best interest of the child.

* * *

The court, however, feels that Mrs. Ingram has some serious problems, more serious problems than Mr. Ingram, that need to be dealt with that she needs to have time and the opportunity to improve. She needs to frankly reduce her medication in this court's view

* * *

Therefore, the court has attempted to structure the rest of this order so as to, number one, put the child in the best possible arrangement that the court believes will service its needs and frankly, number two, give Mrs. Ingram an opportunity to improve her own situation and her own problems and establish herself in

a profession, a paying profession that will enable her, allow her to make her own way in the years to come.

* * *

The mother will have visitation as follows: Every other weekend from 6:00 p.m. on Friday to 6:00 p.m. on Sunday. . . . They will rotate the federally listed holidays

The mother will also have the child for six weeks in the summer

Mother argues that the following factors constitute evidence of changed circumstances:

1. Father has subjected Matthew to immoral behavior by permitting Matthew to stay overnight with Father and Father's former girlfriend, now wife, Bonnie Fleming Ingram.
2. Father has acted improperly by permitting Bonnie to pick Matthew up at school, discipline Matthew, and babysit for Matthew in her home, despite the fact that Mother was available to babysit.
3. Matthew's behavior has changed drastically because of the parties' divorce, primarily because Father has physical custody of Matthew.
4. Father has refused to contact Mother to discuss the child's welfare, contrary to the divorce decree.
5. Father has acted arbitrarily in refusing to allow Mother additional visitation.
6. Father has refused to allow Mother access to information concerning Matthew.
7. Mother has not taken prescription medication for well over one year, and is gainfully employed in a stable job.

In support of her claim of changed circumstances, Mother presented a number of witnesses in support of her petition. Susan Harris, the manager at National Mortgage Company, Mother's employer, testified that Mother is a good employee, is alert on the job and exhibits no negative characteristics as an employee.

Jatel Allen also testified on Mother's behalf. Ms. Allen works at Mothers' Day Out at the Germantown Church of Christ, the church Mother and Matthew attend. Ms. Allen was Matthew's teacher at Mothers' Day Out prior to May of 1992, and Matthew was in her class for approximately five hours, one day each week. Ms. Allen testified that Matthew acted

appropriately in the day care's structured environment, but she admitted that she has not seen Matthew since the parties' divorce in May of 1992.

Shirley Speed, a friend of Mother's and the preschool coordinator at the Germantown Church of Christ testified that, while Matthew was cared for by his mother at home, he was a normal child. Ms. Speed testified that she noticed a drastic change in Matthew's behavior after May of 1992. She observed that Matthew was "clingy" and exhibited violent behavior at times. Ms. Speed stated that Mother has a very close relationship with Matthew, responds well to his outbursts, and disciplines him properly.

Sheila Braxton, a teacher at the YMCA summer camp during the summer of 1993, also testified on Mother's behalf. Matthew began attending the YMCA camp during his mother's six week summer custody period, and during this time the child behaved well. Ms. Braxton testified that after the child went back into Father's custody, he exhibited very poor behavior at camp. Ms. Braxton stated that Mother was very concerned about controlling Matthew's behavioral problems.

Bethany Mayfield also testified on Mother's behalf. On January 4, 1994, Ms. Mayfield had a birthday party for her child, to which Matthew was invited. Ms. Mayfield stated that Matthew had a violent outburst at the birthday party, screaming and kicking other children, but Mother controlled the tantrum efficiently. She stated that Mother is very close to Matthew and disciplines Matthew properly. Carol Eady, a counselor at Briarcrest, also testified.

Between August and October, 1993, Matthew was enrolled in the Briarcrest prekindergarten program. Because of numerous exhibits of violent and destructive behavior, Matthew was asked to leave Briarcrest's program. Ms. Eady stated that Matthew became violent whenever he was asked to do something he did not want to do. She testified that Mr. Ingram was very attentive to Matthew's behavioral problems, and that she had never met a parent who was as accessible as Matthew's father. Ms. Eady also stated that Bonnie Fleming Ingram interacted well with Matthew. Ms. Eady testified that Mother told her that the parties' divorce was the cause of Matthew's problems, and that Mother believed that a change in custody would fix Matthew's

problems. William Hall, Matthew's maternal grandfather, testified in his daughter's behalf. He stated that Mother had taken major steps to change her life. He stated that Mother had a good job and was no longer using prescription medicine. Mr. Hall testified regarding Matthew's behavioral changes since the divorce. He stated that Matthew was not able to sit still during a meal, frequently throwing food on the ground, and that Matthew had never acted this way prior to the parties' divorce. Finally, Mr. Hall stated that Matthew had a very strong relationship with his daughter.

Mother testified that she got a job with National Mortgage Company in July of 1992, approximately two months after the parties' divorce. Mother testified that ten days after the parties' divorce, she discontinued her use of Elavil, the prescription medication she had been taking. She took prescription medication to help her sleep, because she was under stress caused by the pending divorce, the child custody suit, and her own mother's terminal illness.

Mother attributes the changes in Matthew's behavior to Matthew's new environment. Mother stated that these changes, which she noticed as quickly as two days after the parties' divorce, were caused by Matthew's removal from his mother, his home, and other familiar surroundings. Mother described Matthew's behavioral problems that include rocking on the floor with his fingers in his mouth, lying in a fetal position staring off into the distance, trying to hit and kick, throwing himself against walls, trying to hit himself in the head, and being physically destructive with property. Mother stated that Father does not always seek her advice regarding medical attention for Matthew.

Mother and Father have had problems agreeing on visitation with Matthew. Mother stated that when Father is planning to be out of town, Father will not allow Mother additional visitation with Matthew. Mother testified that Father has offered to "trade" days with her; if Mother wants visitation with Matthew while Father is out of town, Mother must forfeit some of her visitation time in the future. Mother testified that Father becomes very angry if Mother fails to return even a single item of Matthew's clothing after a weekend visit. Despite all of these complications, Mother testified that she and Father are able to work together. She stated that if

she gets primary physical custody, she would allow Matthew to have ample visitation with Father, even more visitation than she has at present.

On cross-examination, Mother admitted that she has at times denied Father extra visitation. Mother also stated that she had questions about putting Matthew on Ritalin, although advised to do so by a psychiatrist, Dr. Fred Godwin Thomason, M.D. Mother maintained on cross-examination that Matthew's problems began almost immediately after the parties' divorce. She denied that Matthew showed behavioral problems from the time he was eighteen months old, as suggested by Father. Mother admitted that Matthew had occasional tantrums prior to the parties' divorce; however, Mother stated that these tantrums were attributable to the "terrible twos." Mother also stated that she had noticed that Matthew's psychiatric therapy and his use of Ritalin had, to some extent, helped Matthew control his outbursts.

In response to questioning by the court, Mother stated that she had agreed to dismiss her earlier appeal of the original custody decision in the hope that she and Father could work out their problems. Mother stated that her decision was based both on her attorney's advice and her own belief that it would be best for Matthew if she and Father were not involved in further litigation.

Not surprisingly, Father's testimony conflicted sharply with Mother's testimony. Father stated that Matthew's behavioral problems are not related to the parties' divorce. He testified that Matthew began to have trouble sleeping at nine months, and that Matthew began to exhibit behavioral problems at the age of eighteen months. According to Father, Matthew has always had difficulty acting appropriately in a structured environment, and these problems were clear to the parties before Matthew was two years old.

In March of 1994, Father married Bonnie Fleming Ingram. Currently, Matthew and Father live with Bonnie Ingram and Bonnie's children from a former marriage; Mindy, age seven, and Mark, age five. They have a four bedroom house, and each child has his or her own bedroom. Father stated that Matthew has a good relationship with Bonnie and her children.

In response to Mother's petition for a change of custody, Father filed a counter-petition

seeking sole custody of Matthew. Father stated that Mother has acted inappropriately toward Father in front of Matthew. Father stated that Mother makes it impossible for him to be cooperative regarding additional visitation periods, because Mother attacks Father's character whenever she calls to discuss Matthew. Additionally, Father stated that Mother was not cooperative when the parties needed to make major decisions about Matthew's schools, doctors, and behavioral problems.

On cross-examination, Father admitted that, after their divorce, he and Mother consulted a clinical psychologist, Dr. Wyatt Nichols, hoping to improve their communication skills. Father testified that Dr. Nichols recommended that Mother have increased visitation with Matthew. Father stated that he declined to follow Dr. Nichols' recommendation because he believed Matthew needed stability. Father testified that he wanted Matthew to adjust to his new home and schedule without constantly changing environments. Father also admitted on cross-examination that he spent several nights at Bonnie's house before he and Bonnie were married. However, Father stated that he slept with Matthew in a separate bedroom.

Bonnie Ingram testified on Father's behalf. She stated that her children, Mark and Mindy, have known Matthew since 1992. She stated that both she and her children have a special relationship with Matthew. She testified that Mark, her five year old son, has muscle control problems, but he is not handicapped, nor does he require a great deal of special attention. Ms. Ingram also testified that she and Father had never acted improperly in the children's presence.

Dr. Fred Godwin Thomason, M.D., also testified. Dr. Thomason is a board certified child psychiatrist. On September 27, 1993, Dr. Thomason performed an initial evaluation of Matthew, with both Father and Mother present. Dr. Thomason diagnosed Matthew as having three different psychiatric conditions: attention deficit hyperactivity disorder (ADHD), opposition defiant disorder, and adjustment disorder with mixed disturbance and conduct (adjustment disorder).

Dr. Thomason explained that patients diagnosed with ADHD have symptoms which

include impulsive behavior, distractibility, and lack of attention. Dr. Thomason testified that he believes ADHD is caused by a delay in development in the brain. Dr. Thomason testified that although this condition is often observable from birth, it is often not diagnosed until the child is placed in a more structured environment, at which time the child often experiences difficulty controlling his or her behavior. Dr. Thomason stated that a structured home environment is very important to a child diagnosed with ADHD.

Oppositional defiant disorder is characterized by severe opposition and defiance in a child. Dr. Thomason testified that he is uncertain what causes this disorder, but that it is probably caused by a combination of stressors in the child's life.

The third condition with which Dr. Thomason diagnosed Matthew is adjustment disorder. Adjustment disorder is usually traced to an event in the child's life, such as a divorce, that has caused the child to have difficulty controlling his or her emotions and conduct. Symptoms of adjustment disorder may include violent behavior, such as biting, kicking, and hitting. Dr. Thomason stated that ADHD and adjustment disorder often occur together. Dr. Thomason stated that adjustment disorder usually lasts for six months to one year.

Dr. Thomason stated that Matthew's behavior has improved since Matthew has been taking Ritalin, and that Matthew's teachers have seen this improvement. Although Dr. Thomason stated that he recalled telling Father that it would be beneficial for Matthew to see Mother more, Dr. Thomason did not recommend any particular visitation schedule or living situation. Dr. Thomason stated that he did not think that Father's custody had led to increased difficulties for Matthew.¹ Significantly, he stated that there could be a risk in changing custody

¹ Dr. Thomason acknowledged that his belief that Matthew's behavioral problems began at eighteen months was based entirely on Father's statement to that effect. There is no question that Father and Mother disagree regarding the origin and cause of Matthew's behavioral problems. Prior to their divorce, the parties consulted with Dr. Corey, a psychiatrist. Dr. Thomason admitted that he did not request Dr. Corey's notes before making Matthew's diagnoses. Counsel for Mother suggests that Dr. Corey's notes might have revealed the precise time at which Matthew's behavioral problems began. Although we express no opinion as to the contents of Dr. Corey's notes, we emphasize that Mother, as the party alleging a material change in circumstances, has the burden of proving that a change in circumstances has occurred. If Dr. Corey's notes would have established that Matthew did not exhibit behavioral problems prior to the parties' divorce, it was incumbent upon Mother to request and produce those records.

at this time.

II.

Our review of the findings of fact of the lower court is de novo upon the record, accompanied by a presumption of the correctness of the trial court's findings. Unless we find that the evidence preponderates against these findings, we must affirm, absent error of law. T.R.A.P. 13(d); *Nichols v. Nichols*, 792 S.W.2d 713, 716 (Tenn. 1990).

The doctrine of res judicata bars a second suit between the same parties on the same cause of action with respect to all issues which were or which could have been litigated in the former suit. *Wall v. Wall*, 907 S.W.2d 829, 832 (Tenn. App. 1995). Thus, a custody order cannot be changed absent a showing of new facts, or "changed circumstances," which require an alteration of the original custody award. *Woodard v. Woodard*, 783 S.W.2d 188, 189 (Tenn. App. 1989).

Child custody cases present primarily factual, not legal questions. *Rogero v. Pitt*, 759 S.W.2d 109, 112 (Tenn. 1988). Although there are no hard and fast rules as to what constitutes "changed circumstances," *Arnold v. Arnold*, 774 S.W.2d 613, 618 (Tenn. App. 1989), it is well settled that the best interest of the child is the paramount consideration in a child custody case. *Contreras v. Ward*, 831 S.W.2d 288, 289 (Tenn. App. 1991). The party seeking a change in custody has the burden of proving by the preponderance of the evidence that a change in custody is in the child's best interest. *Musselman v. Acuff*, 826 S.W.2d 920, 922 (Tenn. Ct. App. 1991). In considering whether or not changed circumstances exist, we find the statement of the *Wall* court instructive:

When two people join in conceiving a child, they select that child's natural parents. When they decide to separate and divorce, they give up the privilege of jointly rearing the child, and the divorce court must decide which parent will have primary responsibility for rearing the child. This decision of the Court 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. 907 S.W.2d at 834.

In the instant case, we agree with the trial court's finding that there has been no substantial change in circumstances which would warrant a change in custody. The record contains no proof that "the adjudicated custody will substantially harm" Matthew; to the contrary, there is competent evidence that a change in custody could present a risk to this child. Although we find that both parents are fit, we do not believe that, under the existing circumstances, moving Matthew's primary residence from his father's home to his mother's home would be in the child's best interests. In *Contreras*, this Court emphasized the importance of stability in a child's life:

The stability provided by the continuation of a successful relationship with a parent who has been in day to day contact with a child generally far outweighs any alleged advantage which might accrue to the child as a result of custodial change. In short, when all goes well with children, stability, not change, is in their best interests.

Id., 831 S.W.2d at 290. We agree and, accordingly, decline to modify the trial court's ruling at this time.²

Mother's next issue on appeal is whether the trial court erred in denying Mother expanded visitation. In *Edwards v. Edwards*, 501 S.W.2d 283, 291 (Tenn. Ct. App. 1973), this Court stated: "[T]he details of custody of and visitation with children are peculiarly within the broad discretion of the Trial Judge whose decisions are rarely disturbed." We conclude, under the circumstances of this case, that Matthew's best interest warrants additional visitation time for Mother. The record reveals that both Dr. Nichols and Dr. Thomason felt that additional visitation between Mother and Matthew would be beneficial. We agree. Under the terms of the original decree, Mother has visitation with Matthew one week-night every other week in the weeks she does not have weekend visitation. The record reveals that this visitation takes place

²Counsel urges that the trial court determined that it would deny Mother's request for a change in custody prior to hearing the proof. While the record shows that the trial court believed there had been excessive litigation in this matter, there is no evidence that the court failed to fully consider the evidence presented by Mother.

on Thursday nights, and Mother takes Matthew to school on Friday mornings. This arrangement appears to be successful, therefore, we modify the visitation arrangement set forth in the original decree as follows: Mother will have visitation from 5:30 p.m. Thursday until 7:30 p.m. Sunday, every other weekend. Mother will continue to have visitation one night in the weeks she does not have weekend visitation, commencing at 5:30 p.m. on Thursday. All other visitation provided for in the original decree shall remain the same.

Having made these changes, we are compelled to comment that it should be quite apparent to both Mother and Father that Matthew needs the care, attention, and love of each of them and is entitled to nothing less. The parties' continuing conflicts can only be detrimental to the child. Each parent should be ready and willing to do everything possible for Matthew's welfare, and his welfare would best be served by an end to the conflicts between the parents. We urge Mother and Father to consider the best interests of their child, rather than themselves, in arranging supplemental or varied visitation when requested.

Mother's third issue is whether the trial court erred in modifying the original decree by finding that Father is no longer required to consult Mother on major issues involving Matthew. Under the original custody decree, Father was required to consult Mother regarding decisions affecting Matthew. However, the final decision was left with Father.

We disagree with the trial court's decision to alter the arrangement set forth in the original decree. Both Mother and Father should have a genuine interest in Matthew's well-being, and the best interests of this child will be served by permitting both parents to continue to have input in decisions affecting Matthew's welfare. Accordingly, we hold that Father must continue to consult with Mother before making decisions affecting Matthew's welfare. Again, we admonish these parents to work together, for Matthew's benefit, in implementing this Court's decision.

Mother's fourth issue on appeal concerns the trial court's order that Mother pay \$1000.00 toward Father's attorney's fees. Mother argues that, because of the extreme disparity between her income and Father's income, the trial court acted improperly in making this award. Although

Father's ability to pay his attorneys' fees is not controlling, *Sherrod v. Wix*, 849 S.W.2d 780 (Tenn. Ct. App. 1992), it is a factor which this Court may consider. The record clearly establishes that Mother's annual income is approximately \$20,000.00 per year, while Father's annual income is approximately \$90,000.00 per year. The *Sherrod* court stressed that the purpose of requiring the non-custodial parent to pay attorney fees is to protect the legal remedies of the child, not the parent. *Id.* at 785. There is no indication that Matthew's welfare will be adversely effected if Father is required to pay his own attorneys' fees. Under the circumstances presented in this case, we cannot agree with the trial court's action.

The order of the trial court altering the requirement of consultation by Mother and Father is reversed, the order of the trial court awarding Father attorney fees is reversed, the order is modified with regard to visitation as provided herein, and the order is in all other respects affirmed. Costs of the appeal are assessed equally to the parties. The case is remanded for such other proceedings as are necessary. We decline to find, as appellee suggests, that this is a frivolous appeal.

**W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.**

CONCUR:

DAVID R. FARMER, JUDGE

HOLLY KIRBY LILLARD, JUDGE