IN THE COURT OF APPEALS OF TENNESSEE

PAULA DEVEAU RECTOR,	)	C/A NO. 03A01-9604-CV-00123
	)	HAMILTON COUNTY CIRCUIT COURT
Plaintiff-Appellee,	)	
	)	
	)	
	)	
v.	)	
	)	
	)	
	)	
	)	
STEVEN ELY RECTOR,	)	
	)	HONORABLE ROBERT M. SUMMITT,
Defendant-Appellant.	)	JUDGE

For Appellant

LEONARD MIKE CAPUTO
Phillips & Caputo
Chattanooga, Tennessee

For Appellee

TIMOTHY R. SIMONDS
ERIC PAUL EDWARDSON
Baker, Donelson, Bearman
& Caldwell, P.C.
Chattanooga, Tennessee

O P I N I O N

AFFIRMED AND REMANDED

Susano, J.

This is a post-divorce case. As later amended, the petition of Steven Ely Rector (Father) filed March 3, 1995, seeks to prevent his former wife, Paula Deveau Elliott (Mother), from relocating with the parties' two daughters, ages 7 and 8, to Florence, Kentucky. The amended petition asks the court to change the children's custody from Mother to Father.[1] The trial court refused to block Mother's move with the children to Kentucky; denied Father's petition for change of custody; and established new visitation rights for Father. Father appeals, raising one issue that poses the question of

> [w]hether there was a material change in circumstances justifying a change of custody of the minor children of the parties from the mother to the father.

I

Father's petition, as amended, is essentially an effort to obtain sole custody of the parties' children. While the refusal of the trial court to block the removal of the children to Florence is not raised as an issue on this appeal (except to the extent it impacts the change of custody question), the amended petition does allege that "it is not in the best interests of the minor children to be removed to Florence, Kentucky." Quite frankly, it is not entirely clear from the pleadings and proof whether Father is seeking to block the removal of his children to Kentucky *separate and apart* from his change of custody request. As previously noted, the question of

[1]Mother was awarded custody of the children in the parties' divorce judgment entered April 26, 1993.

relocation is not stated as a separate issue on this appeal. However, there is enough in the record to prompt us to briefly examine the relocation issue.

It is now clear that a non-custodial parent can only prevent a relocation by showing,

> . . . by a preponderance of the evidence, that the custodial parent's motives for moving are vindictive--that is, intended to defeat or deter the visitation rights of the non-custodial parent.

Aaby v. Strange, 924 S.W.2d 623, 629 (Tenn. 1996). In the instant case, Father does not allege, nor is there any evidence in the record to suggest, that Mother's motives for moving are in any way vindictive in nature as defined in ***Aaby***. The evidence does not preponderate against the trial court's refusal to block Mother's planned move to Kentucky. Her desire to move is obviously tied to the fact that her new husband operates a business out of Florence transporting Thoroughbreds to and from racetracks in the eastern part of the country.

II

Aaby teaches, however, that relocation can support a change of custody "where [it] could pose a *specific, serious* threat of harm to the child."[2] ***Id***. (Emphasis added). This is true because a "specific, serious threat of harm" would satisfy the threshold finding of a change of circumstances essential to the success of a petition to change custody, ***id***; but in the instant case, Father's petition to change custody is not really relocation-based. Father argues that the circumstances that have developed since the divorce militate in favor of a change of custody and that this is true regardless of whether Mother lives in Hamilton County, the state of Kentucky, or anywhere else. He argues that she showed bad judgment in marrying Eddie G. Elliott after a short courtship[3] when, so the argument goes, she did not know a lot about him; and that Mr. Elliott is not a fit and proper person to be around the children. It is clear that the basis of Father's petition is broader than the factual scenario contemplated by ***Aaby***.

[2]In such cases, it is the "specific, serious threat of harm," and not the relocation, that is the gravamen of the action. *Id*.

[3]The parties first met in August, 1994; started dating the last week of the following November; and married in February, 1995.

III

A custody decree is *res judicata* as to the facts existing at the time of its pronouncement. ***Woodard v. Woodward***, 783 S.W.2d 188, 189 (Tenn. App. 1989); ***Griffin v. Stone***, 834 S.W.2d 301 (Tenn. App. 1992). As long as those facts remain substantially the same, a court will not "revisit" the issue of custody. Once litigated, the question of custody is "final" unless and until there has been a material and substantial change of circumstances. ***Id***.

In practically every custody modification case, the circumstances have changed in some respect--children are older, their needs have changed, one or both of the parents have remarried, there are changes in residence and/or employment, and the like; but not all changes in the parties' circumstances are sufficient to warrant what has been referred to as "the drastic legal action of changing custody." ***Musselman v. Acuff***, 826 S.W.2d 920, 924 (Tenn. App. 1991) (quoting from the Mississippi Supreme Court case of ***Ballard v. Ballard***, 434 So.2d 1357, 1360 (Miss. 1983)). It is only when the circumstances have changed to the extent that "the behavior of the custodial parent clearly posits a danger to the physical, mental or emotional well-being of the child," that a court is justified in changing custody. ***Aaby***, 924 S.W.2d at 629.

Father invites us to compare the relative parental fitness of the parties. This is clearly the appropriate analysis on an *initial* custody determination when there are competing

applications for custody, ***Bah v. Bah***, 668 S.W.2d 663 (Tenn. App. 1983); but in a modification case, this suggestion "puts the cart before the horse." In such a case, we must find a material and substantial change of circumstances as described above *before* we can consider a change of custody. If there has not been a material and substantial change of circumstances as generally described in ***Musselman*** and ***Aaby***, we should go no further.

Father argues that the operative change of circumstances in this case can be found in Mother's "poor judgment" in marrying an individual after a short courtship,[4] without finding out about his alleged "checkered" past. He also argues that the necessary change of circumstances finds its genesis in her new husband's violent and criminal past. His past conduct is central to Father's claim that custody should be changed. He strongly urges that Mother's new spouse is not a proper person to share in the raising of his children.

As can be seen, the heart of Father's case is the presence of Mother's new spouse, Eddie G. Elliott, in the lives of the parties' minor children. The essence of Father's argument is that Mr. Elliott's violent tendencies as exhibited in an eight-year relationship with his former wife, Deborah Ann Groh, which stretched from 1983 to 1991, disqualifies him from parenting children. He contends that since Mr. Elliott is now in Mother's life, she is no longer an appropriate custodian. Father

[4]Father has also remarried. Interestingly enough, he dated his present wife only six months before their marriage.

contends that he, together with his new wife, can provide the children with a better environment.

Father's fitness as a custodian is a non-issue. Mother agrees that he is a good father. While she does not entirely concede he is a fit person to have custody, she also does not seriously dispute his contention that he is; but all of this begs the real question--has there been a material and substantial change of circumstances since the divorce as contemplated by ***Musselman*** and ***Aaby***? On this issue, the trial court found Father's evidence to be lacking:

> And other than [Mr. Elliott's relationship with Ms. Groh], there has been no evidence that would prove that this man would not be fit to be around children. In fact, he has had children of his own that are grown and has grandchildren. There's been no evidence that he's done anything to any of these children to cause them woe or any situation that would be considered unfit.
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> * * *
>
> And the Court feels, and under the facts and circumstances, that there was no credible evidence to show that Mr. Elliott is going to do anything improper to these children in the future.

The question before us is whether the evidence preponderates against the trial court's judgment. *See* Rule 13(d), T.R.A.P. That judgment comes to us accompanied by a presumption of correctness that we must honor unless the evidence is to the contrary.

We do not find that the evidence preponderates against the trial court's judgment. It is true that there was proof of significant disagreements with physical overtones during the time that Mr. Elliott and Ms. Groh lived together; however, there was no evidence that their physical altercations--in which both agreed they were active participants--in any way impacted or involved children.[5] Furthermore, there was no evidence that there had been any violent conduct by Mr. Elliott since 1991, and certainly none involving Mother or the parties' two minor children.

There were innuendos advanced by Father's counsel, particularly in a rigorous examination of Ms. Groh, that Mr. Elliott had been involved in drug use and/or sale at some unspecified time prior to their breakup in 1991; but there was absolutely no credible evidence--not one scintilla--that proved such drug involvement. There was also proof that Mr. Elliott had been charged with passing bad checks during the time he was with Ms. Groh; but we do not understand how this evidence has any relevancy to the parenting of these children. Financial problems--even involving the writing of some bad checks--do not disqualify one from being around children.

Father strenuously argues that Ms. Groh changed her testimony at trial to accommodate Mr. Elliott. As previously indicated, his counsel subjected her to vigorous cross-examination in an effort to convince the trial court that she had gone from being a truthful narrator of events outside of court to

[5]The union of Mr. Elliott and Mr. Groh did not produce any children.

a perjuring witness at trial. While her credibility[6] was very much "in play," there are at least three pertinent observations that can be made about her testimony. First, most of it was not current--going back at least some four years, long before the Elliotts met; second, even if Mr. Elliott had been violent with Ms. Groh in the past, there was nothing to suggest that those incidents--involving his relationship with a girl friend who later became his wife--were a harbinger of conduct that is reasonably calculated to adversely impact these children in the future; and third, there was no proof of any negatives in Mr. Elliott's present relationship with the children or Mrs. Elliott. On the contrary, the proof is that he has a good, loving relationship with all of them.

In order to justify a change of custody, a party must do more than show conduct--now four years old or more--that is totally unrelated to children. This is particularly true when the most that can be said is that the temper that contributed to the conduct *might* adversely impact minor children. A temper is not necessarily inconsistent with parenting. As previously indicated, there is no evidence in this record that Mr. Elliott is unable to control his temper when he interacts with children.

Father asks us to move from the conclusion that Mr. Elliott did bad things in the past that did not involve children, directly or indirectly, to the conclusion that he will do bad things in the future that will involve and adversely impact the

[6]Generally speaking, the credibility of witnesses is for the trial judge. ***Tennessee Valley Kaolin Corp. v. Perry***, 526 S.W.2d 488, 490 (Tenn. App. 1974).

children. The ***Musselman/Aaby*** test requires more--we must find "behavior . . . [that] *clearly posits* a danger" to the children. (Emphasis added). That type evidence is simply lacking in this case.

We do not reach the "comparative fitness" test of ***Bah***. This is because we are unable to say that the evidence preponderates against the trial court's judgment that Father has failed to show a change of circumstances of the sort required in a custody modification case.

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

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Charles D. Susano, Jr., J.

CONCUR:

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Houston M. Goddard, P.J.

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Don T. McMurray, J.