

JAMES DANIEL KISH,	)	
	)	
Petitioner/Appellee,	)	Appeal No.
	)	01-A-01-9604-PB-00163
v.	)	
	)	Davidson Probate
LISA MARIE (KISH) SALLAJ,	)	No. 91D-166
	)	
Respondent/Appellant,	)	
	)	
and	)	
	)	
MELVIN L. BESS, SR.,	)	
	)	
Intervening Petitioner/	)	
Appellant.	)	

<p><b>FILED</b></p> <p><b>December 18, 1996</b></p> <p><b>Cecil W. Crowson</b> Appellate Court Clerk</p>
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COURT OF APPEALS OF TENNESSEE  
MIDDLE SECTION AT NASHVILLE

APPEAL FROM THE PROBATE COURT FOR DAVIDSON COUNTY  
AT NASHVILLE, TENNESSEE

THE HONORABLE JOE P. BINKLEY, SR., SPECIAL JUDGE

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AFFIRMED AND REMANDED

O P I N I O N

This is an appeal by respondent/appellant, Lisa Marie (Kish) Sallaj, from a decision of the probate court which, in part, awarded custody of Mrs. Sallaj's daughter, Heather Marie Kish, to petitioner/appellee, James Daniel Kish. In addition, Mrs. Sallaj's father and intervening petitioner/appellant, Melvin L. Bess, appeals the trial court's decision with respect to his granddaughter.

On 28 July 1989, Mrs. Sallaj gave birth to Heather Marie Kish. Five months later, she married James Daniel Kish, the purported father of Heather. Mrs. Sallaj and Mr. Kish divorced in 1991. The final decree granted Mrs. Sallaj custody, granted Mr. Kish visitation, and ordered Mr. Kish to pay child support.

On 27 February 1993, Mr. Kish picked up Heather for his Sunday visitation. Mr. Kish refused to return Heather to Mrs. Sallaj's custody later that day. Mr. Kish claimed that he kept Heather because he feared Mrs. Sallaj was planning to leave the country with Heather to avoid a criminal conviction. Mrs. Sallaj caused a custodial interference warrant to issue the next day.

On 1 March 1993, Mr. Kish filed a petition to change custody alleging a substantial change in circumstances since the parties' divorce. Specifically, he alleged that Mrs. Sallaj was mentally unstable, that she acted violently, that she feared her current husband, Sami Sallaj, would harm her or Heather, and that she had committed certain criminal acts. The court entered an ex parte temporary restraining order prohibiting Mrs. Sallaj from interfering with Mr. Kish's possession of Heather. Thereafter, Mrs. Sallaj filed a petition to hold Mr. Kish in contempt for

failure to pay child support and responded to Mr. Kish's petition.

During the next nine months, the court entered multiple orders. In May 1993, the court dismissed the contempt petition upon finding Mr. Kish had paid the child support arrearage. The court also entered an order which granted temporary custody to Mr. Kish, granted Mrs. Sallaj visitation supervised by Mr. Kish's parents, and ordered Mr. Kish to continue paying child support. In December, the court ordered an investigation by a guardian ad litem. The guardian later filed her report on 19 April 1994. Finally, in February 1994, the court made the maternal grandmother, Linda Connaway, a party and required her to supervise Mrs. Sallaj's visits with Heather.

On 15 February 1994, Mrs. Sallaj filed a second petition for contempt alleging that Mr. Kish failed to pay support and interfered with her visitation. Two months later, the maternal grandfather, Melvin L. Bess, filed a petition for grandparent visitation. At some point, Mrs. Sallaj was hospitalized due to her mental state and Mr. Kish filed a motion to suspend her visitation. On 6 May 1994, the court addressed two of these issues. At that time, the court entered an order which suspended Mrs. Sallaj's visitation due to her hospitalization and granted Mr. Bess one day of visitation a month.

Nearly one year later, Mr. Bess filed a motion to intervene claiming the court had not properly made him a party. He also sought to amend his petition to gain custody of Heather. The court granted Mr. Bess' petition to intervene and his motion to amend his petition. As requested by Mr. Bess, the court also ordered blood testing to determine paternity. Finally, the court reinstated Mrs. Sallaj's visitation with Mr. Bess' supervision. The guardian ad litem filed a motion requesting the court reconsider its order as

to the blood tests. In support of her motion, the guardian attached an acknowledgment of paternity signed by Mr. Kish and Mrs. Sallaj prior to their marriage. As a result, the court vacated its order requiring a blood test. On 10 October 1995, the case came on for trial. The evidence at trial included the following.

Heather has been in the continuous custody of Mr. Kish since he gained custody. They are living in the home where the mother, father, and child lived prior to the divorce. Mr. Kish enrolled Heather in Holy Rosary Academy where she receives excellent reports.

Mr. Kish is employed and earns approximately five to eight hundred dollars per week. He owns his own company and has the support and help of his parents in caring for Heather. He is presently engaged to Michelle Adkison who has a young daughter, Leishia. Heather and Leishia are good friends.

Mrs. Sallaj has married four times and has remarried, Sami Sallaj, the man she accused of abusing her and Heather. During the pendency of the petition, Mrs. Sallaj enrolled in Nashville State Technical Institute where she has maintained a 3.0 grade point average.

When Mrs. Sallaj was fourteen, she attempted to commit suicide. In October 1994, she was admitted to intensive care because of an overdose of prescription drugs. She has been admitted to health care facilities at least four times since the divorce. For the last two years, Mrs. Sallaj has been under the care of a licensed psychiatrist who has prescribed medication for her. Mrs. Sallaj stopped seeing the psychiatrist just prior to the divorce hearing because she felt she had no need to see a psychiatrist anymore. The psychiatrist has diagnosed her as having

schizo effective disorder.<sup>1</sup> In his deposition, the psychiatrist testified as follows:

Q Doctor, in your opinion, is there anything which -- which you would state would prohibit Lisa Sallaj from having regular, unsupervised visitation with her oldest daughter, Heather?

A If she is not taking her medication.

Q That would be the only thing?

A Right. When Lisa takes her medication, she -- she does very well.

Q Is there anything, in your opinion, that would keep her from having custody of Heather?

A I am not aware of Lisa's parenting skills; but, other than that, she is -- I have no -- if someone can testify that, I -- I have no objection. But she definitely needs to take her medication.

Q If she does not take her medication, what is likely to be the result of her condition?

A Every time Lisa stops taking her medication, she gets very depressed, she stops -- she loses [a] lot of weight, and she -- and she becomes psychotic.

Q When she takes her medication, is there any reason to fear for Heather's welfare, in any shape, form or fashion --

A No.

At the time of the hearing, Mrs. Sallaj had quit taking the medication because she felt she did not need it. Mr. Bess also testified as to Mrs. Sallaj's temperament. He stated as follows: "Lisa is a high-strung, high-tempered lady and I know that, but she's been worse since she has lost Heather. She seems to be doing better lately but I still see the anger in her."

One month after the trial, the court entered its final order in which it: 1) awarded custody of Heather to Mr. Kish; 2) granted visitation to Mr. Bess; 3) granted visitation to Mrs. Sallaj supervised by Mr. Bess; 4) ordered Mr. Kish to pay the guardian's fees; 5) set aside Mr. Kish's child support payments; and 6) dismissed Mr. Bess's petition. Thereafter, both Mrs. Sallaj and Mr. Bess filed their notices of appeal. Mrs. Sallaj presented the following issues:

- I. Whether the court should have granted a change of custody.
- II. Whether the trial court should have relied upon [the] guardian ad litem's report.

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<sup>1</sup> psychosis as well as severe depression

Mr. Bess asked:

- A. Did the Court err in denying the timely motion for a test to determine parentage pursuant to T.C.A. § 24-7-112?
- B. Should custody have been awarded to the maternal grandfather whose home environment was found to be head and shoulders above the other two choices?

Finally, Mr. Kish presented the following issue:

- V. Whether the trial court should have adjudged court costs, guardian ad litem fees, and the Father's attorneys fees against the mother and grandfather.

We first discuss Mrs. Sallaj's issues together.

Courts of Tennessee are authorized by statute to determine child custody. Tenn. Code Ann. § 36-6-101(a)(1)(1996). Tennessee Code Annotated section 36-6-106 directs courts to take into consideration certain factors when determining custody. One of the most important factors to consider is the best interest of the child. *Bah v. Bah*, 668 S.W.2d 663, 665 (Tenn. App. 1983). After reviewing the record and considering the factors set forth in Tennessee Code Annotated section 36-6-106, we are of the opinion that the trial court correctly awarded custody of Heather to her father. The record is clear that there has been a substantial change in circumstances since the divorce and that it is in Heather's best interest for Mr. Kish to have custody.

Mrs. Sallaj argued that the court changed the custody of Heather ex parte. The record, however, reveals that the court afforded Mrs. Sallaj a hearing or the opportunity for a hearing. She also argued there were no changed circumstances which would justify the court in modifying the custody decree. We are of the opinion that the circumstances regarding Mrs. Sallaj's past and present relationship with her present husband and her mental health problems, all of which occurred after the divorce and prior to the previous custody determination, were sufficient to support the court's determination.

Mrs. Sallaj also argued that the court erred when it relied on the guardian ad litem's report. The court appointed the guardian ad litem and directed her to complete an investigation regarding the custody of Heather. During the investigation, the guardian ad litem interviewed and took statements from several persons including Mrs. Sallaj. After analyzing the statements, the guardian expressed her concerns, opinions, and recommendations in a report which she filed with the court. During the hearing, the guardian ad litem stated that her opinions and recommendations were the same as in her filed report. She participated fully in the pre-trial process, took part in discovery, and questioned witness along with counsel representing the parties. Even if the trial court was in error for allowing the guardian ad litem's report, we are of the opinion that it was harmless error. The record contained evidence independent of the guardian's report which supported the court's decision to change the custody of the child from Mrs. Sallaj to Mr. Kish. Tenn. R. App. P. 36(b)(West 1996).

We next discuss the grandfather's issue of whether the court erred in "denying the timely motion for a test to determine parentage pursuant to T.C.A. § 24-7-112."

Tennessee Code Annotated section 24-7-112 sets forth the procedures used when requesting and conducting tests to determine parentage. This section provides:

(1) In the trial of any civil or criminal proceeding in which the question of parentage arises, the court before whom the matter may be brought, upon the motion of either party at the initial appearance, shall order that all necessary parties submit to any tests and comparisons which have been developed and adapted for the purposes of establishing or disproving parentage.

(2) During any civil proceeding in which the question of parentage arises, upon the motion of either party or on the court's own motion, the court shall, at such time as it deems equitable, order all necessary parties to submit to any tests and comparisons which have been developed and

adapted for purposes of establishing or disproving parentage.

Tenn. Code Ann. § 24-7-112(a)(Supp. 1996). We are of the opinion that the grandfather is not a party as contemplated by Tennessee Code Annotated section 24-7-112. It is the opinion of this court that the term "party" as used in this section refers to the parents of the child including any putative or legal fathers and the biological mother of the child. **See Queen v. Jolley**, 410 S.W.2d 416, 418 (Tenn. 1966). Moreover, subsection (a)(1) requires the party to file the motion at the initial appearance. Mr. Bess did not do so; instead, he raised the issue approximately one year later.

Moreover, it is the opinion of this court that the probate court lacks jurisdiction to make a paternity determination or to legitimate or declare a child illegitimate under these circumstances. The juvenile court has original and exclusive jurisdiction to hear paternity cases. Tenn. Code Ann. § 36-2-103(c) (1996). "The circuit, juvenile and probate courts have concurrent jurisdiction to legitimate children upon application by the natural father of the children." **Id.** § 36-2-201. In addition, "[a]ll illegitimate children whose parents have heretofore intermarried or who shall hereafter intermarry shall thereby become legitimized and shall become legitimate for all purposes and entitled to all the rights and privileges of legitimate children, without the necessity of any proceedings under this part . . . ." **Id.** § 36-2-207.

The marriage of Mrs. Sallaj and Mr. Kish after the birth of Heather acted to legitimate her. Also, there is an acknowledgment of paternity in which both parents acknowledged that Mr. Kish was Heather's father. While the paternity statute states that a petition to establish paternity can be filed by any person it also



confers jurisdiction exclusively in the juvenile court and not the probate court which heard this matter. Tenn. Code Ann. § 36-2-103(a)(1)&(c)(1996). Moreover, Tennessee Code Annotated section 36-2-201 only grants the probate court jurisdiction to legitimate a child when the natural father files an application. *Id.* § 36-2-201. We are of the opinion that the probate court did not have jurisdiction to determine the paternity of Heather as the grandfather attempted to have it do. This issue is without merit.

We next discuss the grandfather's issue of whether the trial court should have granted him custody. The grandfather contended that the court should have awarded custody to him instead of to Mr. Kish for the following reasons: 1) Mr. Kish committed perjury when testifying as to who was living with him and Heather at the time of trial; 2) Mr. Kish's fiancée and her daughter were staying at Mr. Kish's home; and 3) Mr. Kish and his fiancée had slept in the same bed on occasions.

In his brief, Mr. Kish responded to Mr. Bess's allegations. He explained that when he was asked who resided with him he stated his daughter. When later asked who are you "living with, is anybody living at that house with you," he replied that two people were staying with him, Michelle Adkisson and her daughter, Leishia. Both Mr. Kish and Ms. Adkison admitted that they slept in the same room, but denied that they had sex while the children were in the house. There was testimony from both Mr. Kish and Ms. Adkison that they planned to get married soon after the hearing. There was no evidence in the record that the living arrangement had adversely affected Heather. We find no merit to Mr. Bess's argument.

We last discuss the issue of whether the trial court should have adjudged court costs, guardian ad litem fees, and Mr. Kish's attorney's fees against Mrs. Sallaj and Mr. Bess. In its final

order, the court ordered Mr. Kish to pay the fees of the guardian ad litem and ordered Mr. Kish and Mrs. Sallaj to pay the court costs. The trial court is given wide discretion in awarding attorney's fees and costs. Thus, this court will not interfere in the exercise of that discretion absent a clear showing of an abuse of discretion. **See *Salisbury v. Salisbury***, 657 S.W.2d 761, 770 (Tenn. App. 1983). Our review of this record fails to disclose any abuse of discretion on the part of the court in assessing the costs to Mr. Kish.

The guardian ad litem has also requested that she be awarded attorney's fees for representation of the minor on appeal. We are of the opinion that there is merit to her request and that she has provided a valuable service to the minor. Therefore, on remand, the trial court shall determine a reasonable fee for the guardian ad litem's services on appeal and the party responsible for payment of those fees.

The judgment of the trial court is affirmed, and the cause is remanded to the trial court for any further necessary proceedings. Costs on appeal are assessed to respondent/appellant, Lisa Marie (Kish) Sallaj, and intervening petitioner/appellant, Melvin R. Bess, Sr.

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SAMUEL L. LEWIS, JUDGE

CONCUR:

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HENRY F. TODD, PRESIDING JUDGE,  
MIDDLE SECTION

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BEN H. CANTRELL, JUDGE