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Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
January 17, 2023 Session

KATHERINE SANKO v. CLINTON SANKO

**Appeal from the Chancery Court for Hamilton County
No. 130273 Pamela A. Fleenor, Chancellor**

No. E2022-00742-COA-R3-CV

Katherine Sanko (“Mother”) and Clinton Sanko (“Father”) dispute custody of two of their four children. The children have lived primarily with Mother in Pennsylvania. However, following a petition filed by Father to change custody, the trial court concluded that a material change in circumstances occurred and that Father should be the primary residential parent. Because the trial court determined that the material change in circumstances was Mother’s relocation from Tennessee to Pennsylvania and this Court sanctioned the relocation in a prior appeal, the ruling must be vacated and the case remanded.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Vacated;
Case Remanded**

KRISTI M. DAVIS, J., delivered the opinion of the Court, in which D. MICHAEL SWINEY, C.J., and ARNOLD B. GOLDIN, J., joined.

Lucy C. Wright, Chattanooga, Tennessee, for the appellant, Katherine Sanko.

Robert W. Sauser, Chattanooga, Tennessee, for the appellee, Clinton P. Sanko.

OPINION

BACKGROUND

This is a custody modification and parental relocation case. Mother and Father have four children, three of whom are still minors.¹ The parties married in 2001 in Pennsylvania

¹ The parties have four children total. The oldest child is no longer a minor, and custody of the youngest child is not at issue in this appeal. Rather, the parties dispute custody of the two middle children. One of the middle children, however, turns eighteen in April of 2023. Realistically, then, this appeal

and later moved to Tennessee, where Father is a successful attorney. Early in the marriage, Mother stayed at home with the children. The parties divorced in 2014 and soon thereafter, Mother sought permission to relocate back to Pennsylvania with the children. Mother wanted to go back to school and to be closer to her family. Father opposed Mother's relocation, and the dispute resulted in an appeal to this Court in 2015. Our 2015 opinion contains helpful background:

On May 1, 2014, Mother provided Father with a notice of intent to relocate to Butler, Pennsylvania, citing an educational opportunity and proximity to relatives as reasons for the relocation. Father responded by filing a petition in opposition to the requested relocation, asserting that Mother's relocation was proposed in a vindictive manner, was neither reasonable nor in the best interest of the Children, and would cause irreparable harm to the Children. He noted that Mother intentionally left her family in Pennsylvania to move to Tennessee and that her relatives rarely visited and were not involved with the Children to any significant degree. He asserted that Mother could easily pursue suitable educational opportunities in Tennessee. . . . A hearing was held at which several witnesses testified.

* * *

Following the presentation of the [evidence], the trial court granted Father's petition in opposition of Mother's request to relocate. The court found that the relocation did not have a reasonable purpose, that her motive for relocating was vindictive, and that the proposed relocation was not in the best interest of the Children.

Sanko v. Sanko, No. E2014-01816-COA-R3-CV, 2015 WL 4199204 (Tenn. Ct. App. June 16, 2015) ("*Sanko I*"). This Court reversed the trial court's ruling, concluding that "the court's finding that the relocation did not have a reasonable purpose was contrary to the preponderance of the evidence." *Id.* at *9. We also concluded that "the court's finding of vindictiveness was contrary to the preponderance of the evidence." *Id.*

The case was remanded to the trial court for proceedings consistent with the 2015 opinion. However, a new parenting plan reflecting Mother's permission to relocate was never entered. Rather, Mother moved to Pennsylvania with the children, and Father continued to have 125 days of parenting time per the original parenting plan. At the time of Mother's move, the two children at issue in this appeal, Brenden and Alyssa, were six and ten years old. While no new parenting plan was entered, the parties worked together and successfully co-parented for several years. Father typically traveled to Pennsylvania

concerns the custody of only one of the parties' four children.

to see the children. Father also remarried. Mother eventually got a Master's degree and is now a counselor.

On May 4, 2021, Father filed a Petition to Modify Parenting Plan and Child Support, seeking to modify the 2014 plan as to Brenden. Father attached a proposed parenting plan providing Mother 104 days and Father 261 days of parenting time with Brenden. Father alleged that several material changes in circumstance had occurred, including, *inter alia*, that Father was remarried and lived in a stable household while Mother had moved the children several times; that Brenden was thirteen and had expressed the desire to live with Father; and that Brenden had changed schools three times while in Mother's primary custody. Father later filed an amended petition asking that he also be made the primary residential parent for Alyssa. According to Father, Alyssa also changed schools multiple times and did not receive adequate support from Mother regarding college visits and college preparation. Father also alleged that both children repeatedly expressed the desire to move back to Tennessee and live with Father and Stepmother.

A final hearing was held on April 11, 2022, at which the parties and Brenden and Alyssa testified. On May 26, 2022, the trial court entered an order concluding that Father proved a material change in circumstances occurred. The trial court found that Mother's move to Pennsylvania was the material change in circumstances, insofar as it resulted in significant travel back and forth and a drastic reduction in Father's parenting time. Despite Father alleging multiple material changes in circumstance in his amended petition, the trial court's only basis for the change in custody was Mother's relocation to Pennsylvania. The trial court then concluded that making Father primary residential parent was in the Children's best interests, relying heavily on the fact that the children testified about their preference to live with Father. The trial court found the children credible. Under the new permanent parenting plan, Father was given primary custody and 269 days of parenting time per year. Mother was given 69 days, including one weekend per month in which the children would travel to Pennsylvania.

Mother appealed to this Court.

ISSUES

Mother raises nine issues on appeal. However, we have determined that her first issue, which we restate slightly for clarity, is dispositive:

Whether the trial court erred in concluding that Mother's relocation is a material change in circumstances warranting a change in custody, when this Court approved the relocation in 2015.

STANDARD OF REVIEW

Per our Supreme Court,

A trial court's determinations of whether a material change in circumstances has occurred and whether modification of a parenting plan serves a child's best interests are factual questions. *See In re T.C.D.*, 261 S.W.3d 734, 742 (Tenn. Ct. App. 2007). Thus, appellate courts must presume that a trial court's factual findings on these matters are correct and not overturn them, unless the evidence preponderates against the trial court's findings. *See* Tenn. R. App. P. 13(d); *In re C.K.G.*, 173 S.W.3d [714, 732 (Tenn. 2005)]; *Kendrick [v. Shoemake]*, 90 S.W.3d 566, 570 (Tenn. 2002)]; *Hass [v. Knighton]*, 676 S.W.2d 554, 555 (Tenn. 1984)].

Armbrister v. Armbrister, 414 S.W.3d 685, 692–93 (Tenn. 2013).

DISCUSSION

Mother's first issue on appeal is whether the trial court erred in concluding a material change in circumstances occurred, such that a change in custody was warranted, due to Mother's relocation from Tennessee to Pennsylvania. As Mother puts it in her principal brief, the trial court "did not follow the remand instructions provided by this Court" in *Sanko I*. Mother claims that the trial court "ignored this Court's instructions and proceeded as though there was no Tennessee Court of Appeals opinion [allowing] Mother to relocate with the parties' children[.]" Under the circumstances, we agree with Mother and conclude that the trial court erred in treating Mother's relocation as a material change in circumstances when this Court sanctioned the relocation in *Sanko I*.

We reach this conclusion for multiple reasons. First, the finding that Mother should be allowed to relocate notwithstanding Father's loss of parenting time is the law of the case.

The phrase "law of the case" refers to a legal doctrine which generally prohibits reconsideration of issues that have already been decided in a prior appeal of the same case. In other words, under the law of the case doctrine, an appellate court's decision on an issue of law is binding in later trials and appeals of the same case if the facts on the second trial or appeal are substantially the same as the facts in the first trial or appeal. The doctrine applies to issues that were actually before the appellate court in the first appeal and to issues that were necessarily decided by implication. The doctrine does not apply to dicta.

. . . [I]t is a longstanding discretionary rule of judicial practice which is based on the common sense recognition that issues previously litigated and decided by a court of competent jurisdiction ordinarily need not be revisited. This rule promotes the finality and efficiency of the judicial process, avoids indefinite relitigation of the same issue, fosters consistent results in the same litigation, and assures the obedience of the lower courts to the decisions of appellate courts.

Therefore, when an initial appeal results in a remand to the trial court, the decision of the appellate court establishes the law of the case which generally must be followed upon remand by the trial court, and by an appellate court if a second appeal is taken from the judgment of the trial court entered after remand.

Hawkins v. Hart, 86 S.W.3d 522, 531–32 (Tenn. Ct. App. 2001) (quoting *Memphis Publ. Co. v. Tenn. Petroleum Underground Storage Tank Bd.*, 975 S.W.2d 303, 306 (Tenn. 1998)). Here, Mother’s relocation to Pennsylvania was authorized by this Court in 2015. *Sanko I*, 2015 WL 4199204. Specifically, we concluded that Mother’s reasons for relocation “were reasonable and substantial when considered together and [] the purposes outweighed Father’s loss of co-parenting time.” We further noted:

Mother’s relocation will naturally result in less co-parenting time for Father due to distance and his work restraints. Such is the case when most parents relocate. The record is simply devoid of any evidence that the motive for relocating was vindictive in that it was intended to defeat or deter Father’s co-parenting time.

Id. at *9. The primary issue in this appeal, whether Mother’s relocation is a material change in circumstances warranting a change in custody, is substantially the same as the primary issue considered in *Sanko I*. Indeed, the final order appealed from in this case provides that

the Parties could not follow the PPP with a more than 600 mile distance between Mother’s home and Father’s home. Thus the Court determines there was a failure to adhere to the PPP. Further the circumstances of relocation make the PPP no longer in the best interests of the Children, as they would be constantly traveling if they were to follow the 2014 PPP visitation times.

Essentially, the trial court chastised Mother for failure to adhere to the permanent parenting plan because Father could not exercise his full parenting time due to the distance resulting from Mother’s move. However, this Court had already determined that Mother was allowed to move the Children that distance. In light of *Sanko I*, the trial court erred in considering whether Mother’s relocation was a material change in circumstances

warranting a custody change.

Second, this Court has previously held that “[a] finding that a proposed move has a reasonable purpose ‘eliminates any argument that such a move is a change of circumstances ‘which makes a change in custody in the child’s best interests.’” *Lima v. Lima*, No. W2010-02027-COA-R3-CV, 2011 WL 3445961, at *9 (Tenn. Ct. App. Aug. 9, 2011) (quoting *Clark v. Clark*, No. M2002-03071-COA-R3-CV, 2003 WL 23094000, at *7 (Tenn. Ct. App. Dec. 30, 2003)). In *Lima*, the mother of the children at issue sought to relocate from Jackson, Tennessee to Las Vegas, Nevada. 2011 WL 3445961, at *1. The father challenged the relocation in two ways. First, he filed a petition to prevent relocation. Second, he petitioned to change the parties’ permanent parenting plan and be named primary residential parent. *Id.* The purported material change in circumstances was the mother’s proposed move to Nevada. *Id.* On appeal, this Court first concluded that the mother was allowed to relocate with the Children. More importantly, we then “note[d] that [the] [m]other’s relocation to Las Vegas cannot serve as the basis for [the] [f]ather’s asserted material change in circumstances.” *Id.* at *9.

While the case is procedurally different, here we are persuaded by Mother’s reliance on *Lima*. Insofar as this Court already gave Mother permission to relocate to Pennsylvania with the parties’ children, we conclude, as the *Lima* court did, that Mother’s relocation alone cannot serve as the basis for a material change in circumstances. Consequently, the portion of the trial court’s order finding that Mother’s relocation constitutes a material change in circumstances is vacated.

However, Father alleged several other material changes in circumstance in his petition to modify. Among other things, Father claimed that the Children had developed a strong preference to reside in Tennessee, had experienced housing and educational instability with Mother, and were not getting adequate support in their education and extra-curricular activities. In its final order, the trial court touched on some of these alleged changes, but did not sufficiently expound:

When Mother first relocated to Pennsylvania she lived twenty minutes from the paternal grandparents. Father would stay with his parents and drive the children to school. However, Mother and the children now live an hour and a half away from his parents. The Children spend several weeks in the summer with Father in Chattanooga. Mother sometimes fails to give adequate notice of her consent to allow Father visitation for things such as vacations and camps. Both Children testified that they do not get to see their dad often enough.

Consequently, the trial court’s order appears to suggest that factors other than Mother’s relocation amount to a material change in circumstances. If this was the trial court’s intention, the foregoing findings are insufficient. Likewise, there is little to no discussion

in the order about how any purported changes, other than the relocation, have affected the Children's well-being. While Father alleged in his petition and argues in his brief that other significant changes have occurred, and while the proof at trial seems to support these contentions, the final order before us is insufficient for meaningful appellate review on these issues.

Accordingly, we remand this case for consideration of whether Father established a material change in circumstances *other than* Mother's relocation to Pennsylvania. Whether to hear additional and updated proof is left to the discretion of the trial court. All other issues on appeal are pretermitted.

CONCLUSION

The judgment of the Chancery Court for Hamilton County is vacated, and the case remanded for further proceedings consistent with this opinion. Costs on appeal are assessed to the appellee, Clinton Sanko, for which execution may issue if necessary.

KRISTI M. DAVIS, JUDGE