

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 23, 2014 Session

JOHN WAYNE McDONALD v. JAMIE RHEA McDONALD BUNNELL

**Direct Appeal from the Chancery Court for Lewis County
No. 2011-CV-75 Timothy L. Easter, Judge**

No. M2014-00581-COA-R3-CV - Filed November 26, 2014

John Wayne McDonald (“Father”) and Jamie Rhea McDonald Bunnell (“Mother”) had two children during their marriage before divorcing in 2012. The permanent parenting plan entered with the divorce named Mother the primary residential parent. After Mother remarried and relocated with the children, Father filed a petition to modify the existing parenting plan and asked the court to designate him the children’s primary residential parent. Father argued that the behavior of Mother’s new husband (“Stepfather”) around the children constituted a material change in circumstance and that the modification would be in the children’s best interest. At a hearing, Father presented evidence that Stepfather used foul language around the children and had, in jest, referred to them using a racial slur. The trial court found that Stepfather’s behavior, though “distasteful and ill-advised,” did not constitute a material change in circumstance. Father appealed. After careful consideration, we conclude that the evidence in the record does not preponderate against the trial court’s finding. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

BRANDON O. GIBSON, J., delivered the opinion of the Court, in which RICHARD H. DINKINS, J., and W. NEAL MCBRAYER, J., joined.

Douglas Thompson Bates, III, Centerville, Tennessee, for the appellant, John Wayne McDonald.

Melanie Totty Cagle, Centerville, Tennessee, for the appellee, Jamie Rhea McDonald Bunnell.

MEMORANDUM OPINION¹

I. BACKGROUND AND PROCEDURAL HISTORY

Mother and Father married in 1999 and divorced in 2012. The parties had two children during the marriage, John (born in 2000) and Audrey (born in 2001). At the time of their divorce, the parties were living in Lewis County. The parties entered into a marital dissolution agreement and submitted a proposed parenting plan to the court for approval. The proposed parenting plan designated Mother as the children's primary residential parent and set out a residential parenting schedule that provided for alternating parenting time between the parents on weekends, holidays, and school breaks. The proposed parenting plan was approved and entered by the Lewis County Chancery Court on March 12, 2012.

Shortly after the divorce was entered, Mother got engaged to Stepfather, a resident of Cookeville, Tennessee. In August 2012, Mother filed a petition to relocate and modify the permanent parenting plan, stating her desire to move to Cookeville with the children. Father opposed the relocation, and the matter proceeded to a hearing on November 9, 2012. At the conclusion of the hearing, the court determined that Mother's request had a reasonable purpose and ruled she could relocate with the children immediately. The court entered a revised permanent parenting plan on January 2, 2013 with Mother remaining the children's primary residential parent.

On September 20, 2013, Father filed a petition to modify the permanent parenting plan. Father claimed that, since the entry of the revised permanent parenting plan, there had been a material change in circumstance such that it was in the best interest of the children for the court to designate Father as the primary residential parent. The petition did not expound on the nature of the material change in circumstance. Mother answered Father's petition, denying the existence of any material change in circumstance that would require the court to revisit the existing parenting plan.

After a failed attempt at mediation, the parties appeared before the trial court for a hearing on February 28, 2014. The court heard testimony from Mother, Father, and Audrey, as well as from Stepfather and Stepfather's former wife, with whom he had two biological

¹Rule 10 of the Rules of the Court of Appeals of Tennessee provides:

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

children. The parties agreed that John and Audrey expressed a preference to live with Father, but the majority of the testimony focused on Stepfather's behavior around the children - particularly John, who has been diagnosed with autism. Audrey testified that Stepfather sometimes loses his patience and yells at John when John loses his temper. She also testified that Stepfather had used foul language around her and John, including jokingly referring to them using "the n-word"² on occasion. She recounted one instance in which Stepfather made an obscene hand gesture toward her and another in which Stepfather flipped open his pocket knife while playfully fighting with John. Though she acknowledged that Stepfather only wanted to scare John with the pocket knife and did not intend to hurt him, she stated that Stepfather's behavior made her feel unsafe. Father expressed concern about the effect that Stepfather's behavior had on the children. He stated that John does not respond well to harsh criticism and tends to be overly critical of himself when yelled at. Father testified that since May 2013 the children have been unusually reluctant to return to their Mother after visiting with him and that they get upset and cry when he takes them back.

Both Mother and Stepfather conceded during the hearing that Stepfather used foul language around the children and used the n-word, though they insisted that he did so in a joking manner, referencing Katt Williams and Chris Rock comedy skits. Stepfather testified that he started using foul language during his time in the Marines but that he tried to stop once Mother told him that it was an issue.³ Stepfather also acknowledged flipping his pocket knife open around John but insisted that was not done in a threatening manner. Stepfather's former wife also testified on his behalf, stating although Stepfather had always used foul language, she had no reservations about his parenting skills.

The court entered its order on March 19, 2014. Based on the testimony presented, the trial court determined that Father's proof was aimed at establishing a material change of circumstance based on the children's preference and the Stepfather's behavior. The court found that Father had not satisfied his burden of proving a material change in circumstance by a preponderance of the evidence. The court stated in its order:

3. With regard to the children's preference the Court notes, and the parties' know, that the children prefer to live with the Father. However, the stated preference of the child, "standing alone," does not

²We do not believe it worthwhile or useful to repeat the specific words contained in the transcript of the evidence presented to the trial court. "The n-word" has become a socially acceptable reference to the racial slur that is at issue in this case.

³Audrey testified that at the time of the hearing, Stepfather's use of foul language had decreased dramatically from when they first started living together.

constitute a material change of circumstance.

4. That behavior of Mr. Bunnell, *i.e.* the use of foul language in the presence of the minor children, is distasteful and ill-advised but is not enough to give rise to the level of a material change of circumstance. In addition, it appears that the foul language has since been corrected and is no longer an issue.

The court issued a restraining order prohibiting the use of foul language around the children and ordered Mother and Stepfather to seek family counseling through an organization called Autism Speaks. Because Father failed to demonstrate a material change of circumstance, the court did not address whether the proposed change of custody would be in the children's best interest. Father appealed.

II. ISSUE

Father raises one issue on appeal: whether the trial court erred in finding that Father failed to establish a material change in circumstance.

III. STANDARD OF REVIEW

On appeal, our review of the trial court's findings of fact is *de novo* upon the record, with a presumption of correctness unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d). We review the trial court's resolution of questions of law *de novo*, with no presumption of correctness. *Kendrick v. Shoemake*, 90 S.W.3d 566, 569 (Tenn. 2002). A trial court's determination of whether a material change in circumstance has occurred is a factual question. *Armbrister v. Armbrister*, 414 S.W.3d 685, 692 (Tenn. 2013). Accordingly, this Court may not reverse the trial court's finding on that issue unless it is contrary to the preponderance of the evidence. *Id.* at 693.

IV. DISCUSSION

Father contends that the trial court erred in concluding that he failed to establish that a material change in the parties' and children's circumstances occurred after Mother and the children moved in with Stepfather in Cookeville. He argues that Stepfather's behavior constitutes a material change of circumstance and requests that this Court reverse the trial court and remand the matter for a determination of the children's best interest. After careful consideration, we do not find that the evidence in the record preponderates against the trial court's judgment. We therefore affirm.

The decision to modify an existing parenting arrangement requires a two-step analysis. *Cranston v. Combs*, 106 S.W.3d 641, 644 (Tenn. 2003). The party petitioning to change an existing custody order must establish (1) that a material change of circumstance has occurred and (2) that a change of custody or residential schedule is in the child's best interest. *Kendrick v. Shoemake*, 90 S.W.3d 566, 575 (Tenn. 2002). The court cannot make a fresh determination of the best interests of the child until it makes a threshold finding that a material change in circumstance has occurred. *Id.* at 569.

In 2004, the Tennessee General Assembly enacted legislation setting forth the criteria for determining whether a material change of circumstance exists for a modification of custody.⁴ *Armbrister v. Armbrister*, 414 S.W.3d 685, 702-03 (Tenn. 2013). The legislation, codified at Tennessee Code Annotated section 36-6-101(a)(2)(B) (2014), provides:

(B) If the issue before the court is a modification of the court's prior decree pertaining to custody, the petitioner must prove by a preponderance of the evidence a material change in circumstance. A material change of circumstance does not require a showing of a substantial risk of harm to the child. A material change of circumstance may include, but is not limited to, failures to adhere to the parenting plan or an order of custody and visitation or circumstances that make the parenting plan no longer in the best interest of the child.

(i) In each contested case, the court shall make such a finding as to the reason and the facts that constitute the basis for the custody determination.

Over the course of time, the circumstances of parents and children change, but not all changes in the circumstances of the parties and their children warrant a change in custody. *Curtis v. Hill*, 215 S.W.3d 836, 840 (Tenn. Ct. App. 2006). A change must be "significant" before it will be considered material. *In re T.C.D.*, 261 S.W.3d 734, 744 (Tenn Ct. App. 2007). We note initially that the trial court was correct in ruling that the children's preference to live with Father is not, standing alone, sufficient to constitute a material change in circumstance. *See Pippin v. Pippin*, 277 S.W.3d 398, 402 (Tenn. Ct. App. 2004) ("While the Court is certainly interested in the reasonable preferences of children, that circumstance standing alone cannot be the basis for finding a material and substantial change of

⁴See *Armbrister v. Armbrister*, 414 S.W.3d 685, 697-704 (Tenn. 2013), for further discussion of the historical development and current status of the concept of material change in circumstance in Tennessee, including discussion of the distinction between material change in circumstance for modification of custody and the lower threshold for establishing material change in circumstance in modification of a residential parenting schedule.

circumstances.”). Accordingly, the only question on appeal is whether the evidence in the record preponderates against the trial court’s finding that stepfather’s behavior did not rise to the level of a material change in circumstance.

This Court has held that remarriage of either parent does not, in and of itself, constitute a material change of circumstance to warrant a change in custody. *In re T.C.D.*, 261 S.W.3d at 744. A change in the home environment caused by the remarriage, however, is a factor the court may consider in determining whether a material change in circumstance warrants a change in custody. *Id.* As this Court stated in *Riddick v. Riddick*, 497 S.W.2d 740, 742 (Tenn. Ct. App. 1973), “[t]he character, attitude and general personality of other persons who would be in a position to influence the children are important considerations for the court.” While there is no hard and fast rule as to what conduct by a stepparent may constitute a material change of circumstance, *see Dantzler v. Dantzler*, 665 S.W.2d 385, 387 (Tenn. Ct. App. 1983), past cases offer guidance on factors a court may find relevant.

In *Tortorich v. Erickson*, 675 S.W.2d 190 (Tenn. Ct. App. 1984), the trial court found that changes in the child’s home environment resulting from “the character of the mother’s new husband” were a material change in circumstance. *Id.* at 191. The noncustodial father in that case introduced evidence that the stepfather was under indictment for conspiracy to import marijuana and had claimed that he could put a “hit” contract on the father through connections to the mafia. *Id.* In its opinion affirming the trial court, this Court noted that the stepfather chose not to testify despite being present in the county at the time of the custody hearing. *Id.* at 192-93. Though it recognized that the father had the burden of proof, the court stated that once the father presented evidence of materially changed circumstances, it was in the mother’s best interest to produce some evidence in rebuttal. *Id.* The court found that the absence of testimony from the stepfather to explain his actions or to show his willingness to change his conduct for the sake of the child was an important consideration that it could not overlook. *Id.* (citing *Riddick v. Riddick*, 497 S.W.2d at 742).

In *In re T.C.D.*, 261 S.W.3d 734 (Tenn. Ct. App. 2007), the mother’s new husband had been convicted of domestic violence and felony child abuse stemming from possession of child pornography during his previous marriage. *Id.* at 745. Despite the stepfather’s past, the trial court ruled that no material change in circumstance had occurred because the stepfather had not done anything bad to the child since his marriage to the mother. *Id.* This Court reversed. *Id.* at 746. The court recounted the testimony of stepfather’s former wife regarding the stepfather’s violent nature in its opinion. *Id.* at 739-40. It also expressed concern regarding the mother’s “apparent cavalier attitude towards the character and conduct of [the stepfather].” *Id.* at 745. The court ruled that the stepfather’s history of criminal activity and domestic violence, coupled with Mother’s indifference towards his character and

conduct, sufficiently satisfied the standard for finding a material change in circumstance. *Id.* at 746.

In the present case, the trial court ruled that Stepfather's behavior, though "distasteful and ill-advised" was not enough to rise to the level of a material change of circumstance. We recognize Father's concerns with Stepfather's use of foul language around the children. Indeed, such language is offensive to this Court. While one might be inclined to focus only on the most salacious aspect of this case - the racial slur and other offensive language - this Court is required to focus on a broader issue.

Our task is to determine whether the evidence presented in the trial court preponderates against the trial court's ruling. After careful consideration, we do not find that the evidence in this record preponderates against the trial court's ruling. The record reflects that once the children communicated their concerns about Stepfather's behavior to Mother, Mother told Stepfather to stop. Stepfather testified that he subsequently tried to stop using foul language around the children, and the trial court found that it was no longer an issue by the time of the hearing. Additionally, Stepfather's former wife, with whom he has two biological children, testified that although Stepfather had always used foul language around their children, he was a good father and she had never seen any behavior from him that would cause her to question his parenting skills. Though we find Stepfather's use of offensive language to be misguided and inadvisable, the trial court's injunction prohibiting foul language around the children, along with its order that Mother and Stepfather seek family counseling on how to better relate to John are sufficient to ensure the children's continued well-being. Accordingly, we do not find that the evidence in the record preponderates against the trial court's ruling that Stepfather's behavior did not constitute a material change of circumstance.

V. CONCLUSION

After carefully reviewing all of the evidence in this case, we affirm the judgment of the trial court. Costs of this appeal are taxed to the appellant, John Wayne McDonald, and his surety, for which execution may issue if necessary.

BRANDON O. GIBSON, JUDGE