

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT NASHVILLE

CINDY WARREN DONEGAN,

Appellant,

Vs.

JOHN GRAHAM DONEGAN,

Appellee.

Dickson Chancery 4617-96
C.A. No. 01A01-9805-CH-00258

FILED

January 12, 1999

**Cecil W. Crowson
Appellate Court Clerk**

FROM THE DICKSON COUNTY CHANCERY COURT
THE HONORABLE ALLEN W. WALLACE, CHANCELLOR

Neal Lovelace of Centerville
For Appellant

Douglas Thompson Bates, III of Centerville
Appellee

AFFIRMED AND REMANDED

Opinion filed:

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

CONCUR:

ALAN E. HIGHERS, JUDGE

DAVID R. FARMER, JUDGE

This appeal involves a petition to change child custody. Appellant, Cindy Warren Donegan (Mother), appeals from the order of the trial court granting the petition to change custody filed by Appellee, John Graham Donegan (Father).

After twelve years of marriage, the parties were divorced by final decree entered August 19, 1997 after a very bitter divorce proceeding.¹ The trial court declared the parties divorced rather than awarding such to either party alone and granted Mother custody of the parties' three minor children: Zachery, age 11; Kelsey Alexandria, age 5; and Dylan Graham, age 3.

On September 18, 1997, Father filed a Petition for Change of Custody asserting that a material change in circumstances has occurred warranting that custody be changed. The petition specifically alleged that, despite the trial court's previous orders and instructions to the contrary, Mother began to cohabit with Steven Mark Montgomery² after the divorce and that such association was not in the best interest of the children. After an evidentiary hearing, the trial court, on February 27, 1998, filed a memorandum opinion and order finding that there had been a material change in circumstances and that, in the best interest of the children, custody of the three minor children should be changed to Father.

In determining that custody should be changed, the trial court, in its memorandum opinion and order, summarized the testimony and specifically found, in pertinent part, as follows:

This cause is now before the court alleging that in spite of the Court's previous orders and instructions, the wife immediately after the divorce, began cohabiting with Steven Mark Montgomery and that such actions on the part of the wife is a material change in circumstances.

Wife testified that she became intimate with Mr. Montgomery in late July 1997. Mr. Montgomery testified he started "staying" with her in July 1997.

Ms. Donegan and Mark Montgomery were married on December 2, 1997. They have cohabited since July 1997 to the present.

It becomes quite obvious to the Court that immediately following the divorce, wife began cohabiting with Mr. Montgomery in the presence of the children, and even though she later married Mr. Montgomery, this creates a material change in circumstances, that the question of custody of the children should

¹ An appeal was perfected by both parties from this decision. The Middle Section of the Court of Appeals of Tennessee filed an opinion on September 14, 1998 affirming the judgment of the trial court. One of the issues raised in the appeal concerned child custody. The Court of Appeals determined that the issue was moot because of the action of the trial court in the present appeal before us.

² Mr. Montgomery has been an issue in this dispute since its inception. Before and during the divorce proceedings, Father alleged that Mother had been engaged in an adulterous affair with Mr. Montgomery. Father also alleged at the divorce proceedings and at the change of custody proceedings that Mr. Montgomery has a reputation as a cocaine dealer. Furthermore, a temporary order was signed by Judge Weatherford, the trial judge who presided over the divorce proceedings, on April 24, 1997, which ordered Wife not to be in the presence of Mr. Montgomery or to allow the children to be in his presence.

be revisited by the Court. The Court must compare the fitness of each parent to determine what is in the best interest of the children.

Much of the testimony submitted by the husband was an attempt to prove that Mr. Montgomery was a drug dealer, however, it appears that most, if not all of this testimony, has previously been considered by Judge Weatherford in the divorce hearing in June 1997. However, it further appears that Judge Weatherford concluded that wife no longer had a relationship with Mr. Montgomery, and therefore, obviously did not have to consider this issue.

This Court has heard testimony that Mr. Montgomery was at a bar in 1994 and a sale of "crack cocaine" was discussed, however, no arrest was made. He further had a truck titled in his name that was confiscated in a drug bust, but testified he has sold that truck to another person. He has a driver's license with an address that does not exist. He further testified that he earned, from all sources in 1997, approximately twenty thousand (\$20,000.00) to twenty five [sic] thousand dollars (\$25,000.00), but has had no checking account in fifteen (15) years. He testified he had not received as of February 18, 1998, any of his forms 1099 [sic] from his employers for the year of 1997.

Detective Stewart Goodwin of the Dickson County Sheriff's Office and the husband, who is a narcotics officer of Metro Nashville Police Department, both testified such actions of Mr. Montgomery, (i.e. false address on a driver's license and no checking or banking account) was generally a profile of a drug dealer.

The evidence in this cause is insufficient to prove even by a preponderance of the evidence that Steven Mark Montgomery is a drug dealer.

However, his conduct is suspicious. The Court observed Mr. Montgomery very closely during his testimony, and he is not a very believable witness. He was evasive in many of his answers. For instance, he testified at one time he earned ten thousand dollars (\$10,000.00) in 1997, and later he earned twenty thousand (\$20,000.00) to twenty five [sic] thousand dollars (\$25,000.00). He testified he lived with the respondent wife in July and most of August and they had no intimate relations.

Further he has a cousin, Vince Hall, who has had a drug connection and is regularly around the children. Respondent [wife] has a brother who has previously been convicted of a drug charge.

Evidence from witnesses who are regularly around both parents convinces the Court that both parents love their children dearly. Either of the parents can properly care for their children.

Since the parents have been separated, the minor child, Zach, has not done well in school, he has gone from an excellent student to a poor student without any explanation.

The evidence in this case regarding the petitioner father is that he lives near his family members in Dickson County, and has for many years worked with Metro Nashville Police Department. He, like respondent wife, has family support from other members of his family.

These children are very young, with the oldest being in the 6th grade. The Court can only conclude that the most appropriate surroundings for the children should be with the father, and that it would be in the best interest of the children that custody should be granted to the father.

Mother appeals the order of the trial court granting Father custody of the children and presents the following issues, as stated in her brief, for our review:

- I. Whether the doctrine of *res judicata* precludes the trial court from changing custody of the minor children where the father merely repeated the same allegations as he did at the original divorce proceeding where upon the original trial court granted custody of the children to the mother.
- II. Whether the trial court erred in repeating the comparative fitness test to determine which party should have custody of the minor children.
- III. Whether there was sufficient change of circumstances to warrant the drastic remedy of change of custody.

The issues are rephrased to (1) whether there was a change of circumstances affecting the best interests of the children, and (2) whether the trial court erred in changing custody to Father. We will consider these issues together.

Since this case was tried by the trial court sitting without a jury, we review the case *de novo* upon the record with a presumption of correctness of the findings of fact by the trial court. Unless the evidence preponderates against the findings, we must affirm, absent error of law. T.R.A.P. 13(d). This presumption applies in child custody cases. *Hass v. Knighton*, 676 S.W.2d 554, 555 (Tenn. 1984).

Mother contends that the trial court erred in changing custody for numerous reasons. First, Mother asserts that the doctrine of *res judicata* precludes the trial court from changing custody when Father merely repeated the same allegations as he did at the original divorce proceeding. Furthermore, Mother avers that the trial court erred by repeating the comparative fitness test to determine which party should have custody of the minor children. She contends that a court must find that there is a material change in circumstances before granting a petition to change custody. Finally, Mother argues that Father failed to prove that there has been a material change in circumstances to justify a change in custody. In support of such, she contends that her subsequent marriage to Mr. Montgomery does not constitute a change in circumstances to warrant a change in custody, that Father has not sufficiently established that the children would be harmed by living in the same household with her and Mr. Montgomery, and that Father's attempts to establish that Mr. Montgomery was associated with drugs failed.

On the other hand, Father contends that there has been a change in circumstances that justify the change in custody ordered by the trial court. He points out that in the original hearing concerning custody, the trial judge warned Mother about future cohabitation with Mr. Montgomery and that such could constitute a change in circumstances. Father avers that Mother blatantly ignored this warning by the trial judge in that she began cohabiting with Mr. Montgomery directly after she was awarded custody of the children. Furthermore, Father asserts that the children are exposed to several negative influences including being in the regular presence of Vince Hall, who is Mr. Montgomery's cousin and who has a connection to drugs. Finally, Father contends that the circumstances warranted a change in custody in that the parties' oldest son Zachery, once an honor student, has become a failing student since the award of custody to Mother. Thus, with the foregoing, Father argues that the trial court was correct in finding a material change in circumstances and that it was in the best interest of the children that custody be changed to him.

A decree awarding custody of children is *res judicata* and is conclusive on a subsequent application to change custody unless some new fact has occurred which has altered the circumstances in a material way to make the welfare of the children require a change in custody. *Long v. Long*, 488 S.W.2d 729, 731-32 (Tenn. App. 1972); *Hicks v. Hicks*, 26 Tenn. App. 641, 176 S.W.2d 371, 374-75 (1943). 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 is no hard and fast rule as to what constitutes a change in circumstances, *Dantzler v. Dantzler*, 665 S.W.2d 385, 387 (Tenn. App. 1983), 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). In *Wall v. Wall*, 907 S.W.2d 829 (Tenn. App. 1995), this Court discussed "changed circumstances":

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. at 834 (citation omitted).

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. App. 1991). In child custody cases, the welfare and best interest of the children are the paramount concern and the determination of the children's best interest must turn on the particular facts of each case. *Akins v. Akins*, 805 S.W.2d 377, 378 (Tenn. App. 1990) (citing *Holloway v. Bradley*, 190 Tenn. 565, 570-72, 230 S.W.2d 1003, 1006 (1950)). In *Holloway*, the Court stated:

The determining facts in these adoption and custody cases are so infinite in their variety that the reported decision in one case is of little aid or assistance in settling the next. The supreme rule to which all others should yield is the welfare and best interest of the child.

Holloway, 230 S.W.2d at 1006. In *Bah v. Bah*, 668 S.W.2d 663 (Tenn. App. 1983), the court established some guidelines for determining the best interest of a child:

We adopt what we believe is a common sense approach to custody, one which we will call the doctrine of "comparative fitness." The paramount concern in child custody cases is the welfare and best interest of the child. *Mollish v. Mollish*, 494 S.W.2d 145, 151 (Tenn. App. 1972). There are literally thousands of things that must be taken into consideration in the lives of young children, *Smith v. Smith*, 188 Tenn. 430, 437, 220 S.W.2d 627, 630 (1949), and these factors must be reviewed on a comparative approach:

Fitness for custodial responsibilities is *largely a comparative matter*. No human being is deemed perfect, hence no human can be deemed a perfectly fit custodian. Necessarily, therefore, the courts must determine which of two or more available custodians is more or less fit than others.

Edwards v. Edwards, 501 S.W.2d 283, 290-91 (Tenn. App. 1973) (emphasis supplied).

Bah, 668 S.W.2d at 666.

We find the trial judge's instructions and warnings to Mother in the original custody proceeding to be enlightening on the issue before us. We quote his comments from the bench

as follows:

Now the first thing that came to the Court through the testimony is about Ms. Donegan cohabitating with Mr. Montgomery. And, of course, that happened. It's been testified that there was no sexual relationship between Mr. Montgomery and Ms. Donegan. And nobody knows that except the two of them and the Lord.

But, I can say this, that that type situation, I think, would be frowned upon by any judge. Now, whenever this case might come back to the Court, I don't know whether I'll be the judge or not, but I don't know of any judge -- and I guess I know every one of them in the state -- any judge would frown upon that type situation.

I understand that is not the situation now. But, if a lady is living with some man she's not married to, three little children -- these children right now are 11, 4, and 3, I don't know about Mr. Montgomery, he certainly didn't impress me as being one of the nicer citizens of this county.

And I think that it'd be a very unwholesome situation for a lady to be living with him with these children in the same house.

* * *

Now, as far as the custody is concerned, like I mentioned with Ms. Donegan's situation with Mr. Montgomery being in the house, I don't like that.

Fortunately, it's not the situation right now. And if I were by chance to ever be the judge where that was before the Court again, and I very well might be or it's possible that I could be, I would certainly take that into very serious consideration about these children.

I don't think it's good for them, and I wouldn't permit it. I'll just go ahead and state that now. I would not permit it.

* * *

These comments were made on June 30, 1997. In July 1997, with blatant disregard of and in the face of the trial court's warnings, Mother allowed Mr. Montgomery to cohabit with her and the three minor children. Then, in December 1997, after approximately six months of cohabiting without the benefit of marriage, Mother and Mr. Montgomery married. Mr. Montgomery's character has continuously been drawn into question and both of the trial judges, especially the original trial judge, determined that Mr. Montgomery's character was, at best, questionable. Furthermore, the children, as found by the trial judge in this matter, are in the regular presence of Vince Hall who has a definite connection to drugs. In addition, Zachery's performance in school has changed dramatically for the worse as is evident from his 1997-1998 grade report for the fall term. He has gone from an excellent student who had once received an award for academic excellence to a student who is failing in school.

As previously noted, there are no hard and fast rules as to what constitutes a change in

circumstances. However, Tennessee court's have based modification of child custody decrees on the following criteria: the children's performance in school; remarriage of the parents; and the character of the custodian's spouse. W. Walton Garrett, *Tennessee Divorce, Alimony & Child Custody* § 26-5 (1997). While neither one of these are, *per se*, grounds to constitute a material change in circumstances, *see, e.g., Arnold v. Arnold*, 774 S.W.2d 613 (Tenn. App. 1989) (Remarriage of either parent, in and of itself, is not a sufficient change of circumstances to justify a change in custody. However, a change in the home environment caused by remarriage is a factor that can be taken into consideration in determining whether there has been a material change in circumstances.), all three combined, as in the present case, would appear to constitute a change in circumstances to justify a change in custody. Zach's poor performance in school, Mother's cohabitation and subsequent marriage to Mr. Montgomery, and Mr. Montgomery's very questionable character combined with the fact that Mother blatantly disregarded the trial court's warnings concerning Mr. Montgomery justify the trial court in finding a material change in circumstances.

To reiterate, the best interests of the minor children are the primary concern of this Court and should also be the main focus of both Father and Mother. Mother's actions in direct contravention of the trial court's warnings demonstrates that the minor children's interests are secondary to hers. From a review of the record in the case, we cannot say that the evidence preponderates against the finding of the trial court that a material change in circumstances has occurred and that the best interests of the minor children are served by the award of custody to Father. Thus, the trial court was correct in granting Father's petition to change custody.

Accordingly, the judgment of the trial court is affirmed, and the case is remanded to the trial court for such further proceedings as may be necessary. Costs of appeal are assessed against the Appellant.

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

CONCUR:

ALAN E. HIGHERS, JUDGE

DAVID R. FARMER, JUDGE