

<p>SHEILA M. MAPPS,</p> <p style="padding-left: 40px;">Plaintiff/Appellant,</p> <p>VS.</p> <p>JIMMY H. MAPPS, JR.,</p> <p style="padding-left: 40px;">Defendant/Appellee.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Montgomery Chancery</p> <p>No.92-69-212</p> <p>Appeal No.</p> <p>01-A-01-9604-CH-00192</p>
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FILED

September 18, 1996

Cecil W. Crowson
Appellate Court Clerk

IN THE COURT OF APPEALS OF TENNESSEE

MIDDLE SECTION AT NASHVILLE

APPEAL FROM THE CHANCERY COURT FOR

MONTGOMERY COUNTY, TENNESSEE

AT CLARKSVILLE

HONORABLE ALEX W. DARNELL, CHANCELLOR

ROBERT H. MOYER, BOPR #13664
 107 North Third Street
 Clarksville, Tennessee 37040
 ATTORNEY FOR PLAINTIFF/APPELLANT

KEVIN C. KENNEDY, B.O.P.R. #10793
 127 South Third Street
 Clarksville, Tennessee 37040
 ATTORNEY FOR DEFENDANT/APPELLEE

AFFIRMED IN PART, REMANDED IN PART.

HENRY F. TODD
 PRESIDING JUDGE, MIDDLE SECTION

CONCUR:

SAMUEL L. LEWIS, JUDGE
 WILLIAM C. KOCH, JR., JUDGE

<p>SHEILA M. MAPPS,</p> <p style="padding-left: 40px;">Plaintiff/Appellant,</p> <p>VS.</p> <p>JIMMY H. MAPPS, JR.,</p> <p style="padding-left: 40px;">Defendant/Appellee.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Montgomery Chancery</p> <p>No.92-69-212</p> <p>Appeal No.</p> <p>01-A-01-9604-CH-00192</p>
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OPINION

This is a post-divorce decree proceeding upon petition and counter-petition regarding child custody, visitation and support. From an unsatisfactory result, the wife, Sheila M. Mapps, has appealed and presented the following issues for review:

- I. Whether the Chancery Court erred in its modification of the Final Decree of Divorce to award joint custody of the minor child to both parties and to alter the visitation schedule to provide for almost daily exchanges of the child between the parties.
- II. Whether the Chancery Court erred as a matter of law in its reduction of child support payable by the Appellee and its failure to increase the child support payable by Appellee.
- III. Whether the Chancery Court erred as a matter of law in its refusal to impose an income assignment order with respect to Appellee’s child support obligation in this case.

JOINT CUSTODY

On May 5, 1992, the Trial Court entered a final decree of divorce which approved and adopted a marital dissolution agreement of the parties providing:

Child Support. It is further agreed between the parties that the Husband will pay \$240.00 per month, as child support for Amber Monique Mapps. Both parties agree that this amount is substantially in compliance with the Department of Human Services guidelines for child support, considering the relative earnings ability of the parties, and the needs of the child. Unless specifically ordered by the Court, such

support shall not be reduced or prorated. Husband shall receive the child dependency deduction for income tax purposes.

Custody and Visitation. Wife shall be responsible for the care, supervision and guidance of Amber Monique Mapps, and shall, therefore, be awarded custody. Very liberal visitation rights shall be granted to Husband. Any other visitation shall be agreed upon by Husband and Wife with advance notice.

Both parties will keep the other party informed of his or her address at all times, including telephone number. The parties shall make every reasonable effort to provide access to the other parent and to support the child's feelings of love for the other parent. Neither party shall in any way attempt to harm, hinder decrease or destroy the natural love of the child for the other parent. Neither parent shall speak badly of the other parent to the child.

On March 23, 1994, the husband initiated the present proceeding by petition seeking joint custody, assessment of child support against the wife, a visitation schedule, attorney's fees and an order prohibiting the wife from cohabitation without marriage.

On April 8, 1994, the wife filed an answer opposing the petition of the husband and a counter-petition for increase in child support, an assignment of wages of the husband, a detailed visitation schedule, and allocation of dependant's income tax deduction to the wife.

The petition and counter-petition, filed in March and April, 1994, were not heard by the Trial Judge until October 17, 1995. During this 18 month period, the following occurred:

The mother determined that conditions in her home were not appropriate. Without consulting the Court or the father, the mother sent the child to her father (the child's grandfather) in North Carolina. In November, 1994, the mother "signed over" temporary custody of the child to the grandfather in North Carolina.

In June, 1995, the child was returned to the custody of the mother.

At the time of the hearing in October, 1995, the mother was working from 7 p.m. to 7 a.m. three nights one week and the same hours four nights the other week. The child was left with a sitter in a separate home while the mother worked.

During the hearing, the mother testified as follows:

- Q. And about this man who perpetrated this thing on your daughter, did you tell him it's none of his business, too?
- A. No.
- Q. Who is the man that did this to your daughter?
- A. He's not a man. He's a 14-year-old boy.
- Q. What's his name?
- THE COURT: I don't think that's a material question.
- THE WITNESS: I mean, I will say it. It's no problem.
- Q. (By Mr. Kennedy) Your child was sexually molested?
- A. Yes, sir.
- Q. And you know that?
- A. Yes, sir.
- Q. And she was under your supervision when this was going on?
- A. Yes, sir. It was - - I had given her into the custody of a baby-sitter.
- Q. Ma'am, looking back now, was that poor judgment on your part?
- A. No, sir.
- Q. You don't accept any responsibility over that then?
- A. I accept the fact that my daughter was molested, and I had no control over the situation. I have no control over anybody who sexually molests another child. Children are molesting children.
- Q. Ma'am, what opposition do you have in them taking care of the day care of this child?
- A. What - - because I think that it would not be in her best interest.
- Q. Why? Tell the Court.
- A. One moment. Because it would - - with her staying over at your house all the time and then coming over to my house, it would disrupt her daily routine. She would not understand the difference between your home and my home.

The father testified that, since the divorce he has remarried, that his present wife does not work and is available to care for the subject child along with her three children who get along with the subject child "just fine."

At the conclusion of the October 17, 1995 hearing, the Trial Judge commented orally:

It's the Court's opinion that the movement of the child to

North Carolina marks a consideration of questionable purpose. The Court is bound by the agreement the parties entered into in making the decision, but the parties are bound to it in the conduct of visitation and custody. There is a sentence in that agreement which states, "The parties shall make every reasonable effort to provide access to the other parent and support the child's feeling of love for the other parent." The Court thinks that seven months in North Carolina is not reasonable access in view of the availability of some type of share-keeping in Clarksville, Tennessee at the same time. Especially in view of the fact that there was pending in this court a petition for change of custody.

With respect to child care, it is this Court's opinion that the needs of a child would best be served if it could be cared for by a parent.

On November 22, 1995, the Trial Court entered an order stating:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the parties' are hereby awarded joint custody of the parties' minor child Amber Mapps with the Respondent Sheila M. Mapps having the primary physical custody.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the parties' child shall be with the Petitioner, Jimmy H. Mapps, Jr., carried there by the Respondent, between 6:00 and 6:15 p.m. each evening on Wednesday, Thursday, Friday and Saturday that the Respondent works at Quebecor. The Respondent shall pick the parties' minor child up at 8:00 a.m. on the following morning. On the Saturday that the child is picked up in the morning, the Respondent shall keep the child through that weekend. On the following weekend, the Respondent shall bring the child to the Petitioner's home Saturday at 2:00 p.m. and the petitioner will return the child to the Respondent Sunday at 6:00 p.m..

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that Respondent Sheila Mapps shall claim the parties' minor child as a deduction for income tax purposes.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Petitioner, Jimmy H. Mapps shall pay unto the Respondent the sum of \$160.00 per month as child support, beginning with the month of November, 1995.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Petitioner, Jimmy H. Mapps shall have visitation with the parties' minor child starting Christmas afternoon and for a total of two nights

and three days.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Petitioner, Jimmy H. Mapps shall have visitation with the parties' minor child on Thanksgiving at 4:00 p.m. until Sunday at 6:00 p.m. if the same falls on his regular Sunday visitation, if not, then Saturday at 4:00 p.m.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Petitioner, Jimmy H. Mapps shall have visitation with the parties' minor child two weeks each summer, provided that the Petitioner gives the Respondent notice on or before June 1, of his intentions to visit.

Child custody decisions are reviewed by this Court de novo upon the record with a presumption that findings of fact are correct unless the evidence preponderates otherwise. *Nichols v. Nichols*, Tenn. 1990, 792 S.W.2d 713. In cases tried without a jury, the decision of the Trial Judge as to credibility of witnesses is binding upon the reviewing Court unless other real evidence compels a contrary conclusion. *State ex rel. Balsinger v. Town of Madisonville*, 222 Tenn. 272, 435 S.W.2d 803 (1968).

Child custody ordered in a divorce decree is subject to such changes or modification as the exigencies of the case may require. T.C.A. 336-6-101(a). "Exigencies," as used in this section refers to new facts and changed conditions which have emerged since the decree which were not determined and could not have been anticipated by the decree. *Smith v. Haase*, Tenn 1975, 521 S.W.2d 49; *Dalton v. Dalton*, Tenn. App. 1993, 858 S.W.2d 324.

The order under review changed from sole custody in the wife to joint custody in both parents with primary physical custody in the wife and extensive specified visitation with the husband.

Joint legal custody necessarily implies a sharing of parental responsibility for decisions regarding care, above, education, health and other matters of general welfare of the child *Shepherd v. Metcalf*, Tenn. 1990, 794 S.W.2d 348.

Appellant mother first complains that the Trial Court made no finding of a change of circumstances justifying a change in details of custody.

The conditions in the mother's home were such that she found it necessary to send the child out of the state to stay until the conditions in the home were corrected. The record is unclear as to the duration of the unsatisfactory conditions. The petition to change custody filed on March 24, 1994, did not complain of any home condition except cohabitation without marriage. The mother testified that she sent the child to North Carolina until conditions could be improved, but did not state when this took place. She testified that she "signed over custody" to her father in November, 1994. Presumably the child was sent to North Carolina at this time or before. She testified that the child returned in June, 1995, when conditions in the home had been rectified. It appears, therefore that conditions in the mother's home were unsatisfactory for at least eight months, and that the child was sent to North Carolina without the close cooperation of the parents as contemplated by the agreement of the parties and the resulting order of the Court. Both of these factors were proper for consideration by the Trial Court in the determination of change of circumstances and change from exclusive custody with visitation to joint custody with extensive visitation.

The working hours of the mother, requiring her absence from the home at night and requiring that the child spend the night elsewhere where she was sexually molested was a change in circumstances which continued to the date of hearing and was a sufficient basis for changing the custodial arrangements.

The remarriage of the father to a wife who was available to care for the child with her congenial children was also a changed circumstance in making available a more secure and wholesome environment during the working hours of the mother.

Upon consideration of the record de novo, this Court concludes that there were adequate changes of circumstances to justify a re-evaluation and modification of the provisions of the divorce decree in regard to custody.

Appellant next insists that it was not in the best interest of the child to provide joint custody in both parents rather than sole custody in the mother as provided in the divorce decree.

It is true that joint custody involves cooperative action by two parties whose other relations have been stormy. However difficult, joint custody is specifically approved by statute, and is the preferable choice if the parties would be reasonable in exercising it. Under the circumstances of this case, this Court finds no legitimate ground for disturbing the discretion of the Trial Judge in ordering joint custody. If it does not prove workable, the Trial Judge will be able to determine fault and decree accordingly.

CHILD SUPPORT

Appellant complains that the child support set by the Trial Court does not conform with the child support guidelines as required by T.C.A. § 36-5-101.

The joint custody and extensive responsibility of the father may well be valid grounds for deviating from the guidelines, but the order of the Trial Court does not contain a written finding that the application of the guidelines in the present case would be unjust or inappropriate as required by T.C.A. § 36-5-101(e) (1).

Upon remand, the Trial Court will review its action on the matter of child support, will make specific findings as required by T.C.A. § 36-5-101(e) (1), and will make such revision of the amount of child support, if any, as may be appropriate.

WAGE ASSIGNMENT

The order of the Trial Court does not appear to address the request of the mother for a wage assignment to secure child support. Upon remand, the Trial Court will address this issue and order a wage assignment or state reasons why same is not being provided.

The judgment of the Trial Court regarding custody and visitation is affirmed with a reservation of jurisdiction of the Trial Court to revise the terms of custody if the parties or either of them fail to cooperate in exercising joint custody. The judgment of the Trial Court as to child support and wage assignment is remanded to the Trial Court for reconsideration for findings and such modifications as may appear to the Trial Court to be appropriate.

Costs of this appeal are adjudged against the parties equally; that is, each party shall pay one half.

AFFIRMED IN PART, REMANDED IN PART.

HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:

SAMUEL L. LEWIS, JUDGE

WILLIAM C. KOCH, JR., JUDGE