IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 24, 2014 Session

MARKEESHA L. RUCKER v. FREDERICK E. HARRIS

Appeal from the Juvenile Court for Davidson County
No. 20101115 and 20101116 Walter C. Kurtz, Judge

No. M2013-01240-COA-R3-JV - Filed July 15, 2014

The trial court fashioned a parenting plan that designated the mother of five year old twins as their primary residential parent and gave the father 91 days of visitation each year. The father argues on appeal that the trial court should have divided parenting time equally between the parties, or, in the alternative, simply granted him additional parenting time. He relies on language in the child custody statute, Tenn. Code Ann. § 36-6-106(a), which directs the court to "order a custody arrangement that permits both parents to enjoy the maximum participation possible in the life of the child . . ." For her part, the mother argues that the parenting plan adopted by the trial court is in the best interest of the children. We affirm, but we remand this case to the trial court for correction of a clerical error.

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

LARRY B. STANLEY, JR., SP. J., delivered the opinion of the Court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

Rebecca S. Montgomery, Nashville, Tennessee, for the appellant, Frederick E. Harris.

Markeesha Rucker, Nashville, Tennessee, Pro Se.

OPINION

I. BACKGROUND

Markeesha Rucker ("Mother") and Frederick Harris ("Father") were in a romantic relationship for over four years. They became the parents of twin girls on May 14, 2008. Mother and Father never married and they both retained their own residences throughout the course of their relationship. The parties differed as to whether they actually ever lived together. Father insisted that they did, and that they alternated between staying at his home

and at hers. Mother adamantly testified that they never lived together, but she acknowledged that she and Father often spent weekends together, and that when she lost her car, she relied on him to bring her to work and her older children to school.[1]

According to Father, the parties separated in August of 2011 when a dispute arose between them over the participation of their older daughters in a Junior Olympics track meet.[2] When Mother was asked when the parties separated, she stated that they never separated because they never lived together, but that May of 2010 was "the point of no return." In any case, it was undisputed that when the parties' intimate relationship came to an end, their children remained in Mother's care. Father testified that Mother limited his access to the children after the separation, and that although he made many attempts to persuade Mother to allow him to see them more often, she would not agree.

Father filed a pro se petition in Juvenile Court on January 13, 2012, asking the court to order Mother to allow him to share equal custody of the twins. After a hearing on March 5, 2012, the Juvenile Court Magistrate entered a pendente lite visitation order, awarding the father visitation with the children every weekend. Mother filed a motion to set child support on August 6, 2012, asserting that the parties "separated their residence in May, 2010 and Petitioner/Father has sent nominal support since that date."

Because of Father's prior interactions with the Magistrate of the Juvenile Court in his previous capacities as an employee of the Department of Children's Services and of Child Protective Services, Mother filed a motion to have the Magistrate recuse herself from hearing any further proceedings. Her motion was granted.

II. THE FINAL HEARING

The final hearing in this case was conducted on December 17, 2012 before Senior Judge Walter Kurtz, who sat by special appointment. Both parties were represented by counsel. Aside from the parties, testifying witnesses included several of Father's friends, a track coach, the pastor of Father's church, Father's oldest daughter, Mother's mother and Mother's sister. Father's witnesses all testified that he was a great father who worked hard at meeting his children's needs. Mother's mother testified that Mother was "a wonderful

[1]The proof shows that Mother has two older children from an earlier relationship and that Father has two older children from an earlier marriage. Mother's older children live with her, while Father and his ex-wife alternate parenting time with their older children.

[2]The proof shows that Father and Mother initially met at a track meet, and that the older children of both parties are excellent students and athletes who are deeply involved in various sports.

mother" and that Father was "decent" as a parent, while Mother's sister was somewhat critical of Father's parental efforts.

The parties were also asked for their own opinions of each other, and each admitted, somewhat grudgingly, that the other was a capable parent. Mother acknowledged that Father does attempt to be a good father, but she stated that the parties have different parenting styles. She testified that she wants the children to have a good relationship with Father. Father acknowledged that Mother is "a pretty good mom in some areas," and that she has done a decent job with her older children. But he stated that he wants to take a more active part in the lives of the twins and he asserted that Mother has sometimes made it difficult for him to see them and to communicate with her about them.

Mother criticized Father for not supervising the children adequately. She asserted that at times he left them in the care of his disabled mother or his minor daughters, rather than taking care of them himself, and that "you can't be absent." For his part, Father admitted to the incidents Mother testified about, but he stated that he had corrected any problems and he denied that his supervision of the children was lax. He insisted that when they were with him, he bathed them, fed them, fixed their hair and washed and ironed their clothes. He contended that Mother tended to be too controlling and protective when it came to dealing with the children.

The proof showed that Mother and Father were both employed, although both had experienced periods of unemployment during the course of their relationship. Mother had enrolled the twins in a pre-kindergarten private school, and was paying $45 per child per week while the State paid $90 per child per week. Father testified that he pays for the children's medical insurance and that he consistently provided financial assistance in the form of cash to Mother for their support after the parties' separation, but that he only started documenting his payments in January of 2012 when he began giving her checks for $300 each month. Father also testified that he pays child support to the mother of his two older children, but he was unable to produce any records to verify that.

The parties testified that they live close to each other, only five to seven minutes apart, but there were disparities in their testimony about the suitability of Father's home as a place for the twins. Mother testified that the twins did not have their own bedroom to sleep in when they were visiting Father, but instead had to sleep on a cot in the kitchen, or on a futon. Father testified that his home has three bedrooms, one for him and two children's rooms. He acknowledged that it was crowded when all his children and Mother's children were there, but he denied that there was a cot in the kitchen. He stated that it was more like a den area near the kitchen that has a bed. He also testified that all the children were very close and loved each other, so "the girls may sleep in one room one night and sleep in another room

another night because they're family like that."

At the conclusion of testimony and closing argument, the trial court ruled from the bench. The court stated that it had reviewed all the factors set forth in Tenn. Code Ann. § 36-6-106(a) and made two specific findings. (1) The facts of this case do not warrant a pure equal split of the parenting time, and (2) The facts of this case indicate that great weight should be given to Factor 3 of Tenn. Code Ann. § 36-6-106(a): "the importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment . . ."[3] Therefore, Mother was ordered to be the primary residential parent.

Father was granted the right to exercise parenting time on the first weekend every month from Friday at 6:15 p.m. until Sunday at 6:00 p.m. and on the third weekend of the month from Friday at 6:15 p.m. until Tuesday at 6:00 p.m. He was also granted parenting time on Mondays during the off weeks from the end of day care to 8:30 p.m., as well as alternating holidays and three consecutive weeks in July. The court also took the unusual step of requiring Mother to read and initial the Parental Bill of Rights attached to the Parenting Plan, to make sure that Mother was aware of and would honor Father's rights under the plan, including the right to be informed about the children's extracurricular activities, to have access to the children at school and to have unimpeded telephone calls at least twice a week.

The court stated that Father had significantly overstated his involvement with Mother and the twins prior to the filing of his Petition, but that Mother had "somewhat perhaps understated it." The court announced that it was imputing income of $35,000 a year to Father for the purpose of calculating his child support obligation under the guidelines, and that he owed $6,000 in retroactive child support. The trial court's ruling was memorialized in an order that was filed on January 14, 2013. This appeal followed.

III. ISSUES ON APPEAL

A. The Question of Primary Custody

When a trial court is called upon to make an initial custody determination between two fit parents, the court must make its decision on the basis of the child's best interest. Tenn.

[3]The court applied the factors for custody set out in the Tenn. Code Ann. § 36-6-106 rather than the quite similar factors set out in the more recently enacted parenting plan statute, Tenn. Code Ann. § 36-6-404, which by its terms applies to "[a]ny final decree or decree for modification in an action for absolute divorce, legal separation, annulment, or separate maintenance involving a minor child . . ." The court nonetheless, did adopt a parenting plan to specify and clarify the rights and obligations of the parties.

Code Ann. § 36–6–106(a). Our review of the trial court's decision is governed first by the well-known rule that its findings of fact are accorded a presumption of correctness, and will not be overturned unless the evidence preponderates against them. See Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001); *Hass v. Knighton*, 676 S.W.2d 554 (Tenn. 1984). Our review of legal issues is conducted under a pure *de novo* standard of review, with no deference accorded to the lower court's conclusions of law. *Southern Constructors, Inc. v. Loudon County Bd. of Education*, 58 S.W.3d 706, 710 (Tenn. 2001).

In applying this general standard of review to matters of child custody, we are also mindful that the trial courts are vested with wide discretion in custody matters, and that "the appellate courts will not interfere except upon a showing of erroneous exercise of that discretion." *Koch v. Koch*, 874 S.W.2d 571, 575 (Tenn. Ct. App. 1993). See, also, *Parker v. Parker*, 986 S.W.2d 557, 563 (Tenn. 1999); *Adelsperger v. Adelsperger*, 970 S.W.2d 482 (Tenn. Ct. App. 1997). Because "[c]ustody and visitation determinations often hinge on subtle factors, including the parents' demeanor and credibility during the divorce proceedings themselves," appellate courts "are reluctant to second-guess a trial court's decisions." *Johnson v. Johnson*, 165 S.W.3d 640, 645 (Tenn. Ct. App. 2004)(quoting *Gaskill v. Gaskill*, 936 S.W.2d 626, 631 (Tenn. Ct. App. 1996)).

Father contends that the trial court erred in not dividing custody equally between the parties, so that he and Mother would each have the same amount of parenting time with the children. Tenn. Code Ann. § 36-6-101(a)(2)(A)(i) states that unless the parents have agreed to joint custody, "neither a preference nor a presumption for or against joint legal custody, joint physical custody or sole custody is established, but the court shall have the widest discretion to order a custody arrangement that is in the best interest of the child."

According to Father, the trial court reached the wrong conclusion because it relied too heavily on the single factor of continuity of care in making its custody determination. See Tenn. Code Ann. § 36-6-106(a)(3). He argues that other factors point to a more equal division of custody, such as Tenn. Code Ann. § 36-6-106(a)(10), "[e]ach of the parent's or caregiver's past and potential for future performance of parenting responsibilities, including the willingness and ability of each of the parents and caregivers to facilitate and encourage a close and continuing parent-child relationship between the child and both of the child's parents, consistent with the best interest of the child."

Father argues that "the record is replete with examples of Ms. Rucker's failure to encourage and facilitate Mr. Harris' relationship with the twins." He points out that Mother was frequently late in delivering the children to him in accordance with the schedule set out in the pendente lite custody order. He admitted at trial, however, that Mother's work schedule often made it impossible for her to deliver the children on time. Father also asserted

that Mother did not allow him to see the children or to have any contact with them between the date that he filed his Petition and the first hearing before the magistrate, a period of about two and a half months.

We agree that a parent's willingness to facilitate and encourage a healthy relationship with the other parent is an important factor in custody decisions, and that it has been decisive in a number of cases. See, for example, *In re Zamorah B.*, M2011-00864-COA-R3-JV, 2013 WL 614449 (Tenn. Ct. App. Feb. 15, 2013)(no Tenn. R. App. P. 11 application filed); *In re Jonathan S. C-B*, M2010-02536-COA-R3-JV, 2012 WL 3112897 (Tenn. Ct. App. July 31, 2012) (petition to rehear denied Aug. 20, 2012) (no Tenn. R. App. P. 11 application filed).

In both of the above cases, however, one of the parents showed such unrelenting and irrational hostility towards the other that it would have eliminated any possibility for the child to have a healthy relationship with both parents if left in the care of the hostile one. In contrast, Mother has testified that she wishes her daughters to have a good relationship with their Father. Also, the evidence in the present case shows that both parties are capable of cooperating closely in matters involving their children's well-being, and that they generally put the best interest of the children first, despite the disagreements that have sometimes arisen between them.

We also note that in its ruling from the bench, the trial court mentioned that it had considered all the statutory factors for custody determinations before deciding that the best interest of the children would be served by awarding their primary custody to Mother. "While this Court encourages trial judges to be as precise as possible in making child custody findings, trial judges are not required to articulate every factor and its application to the facts at issue." *In re Elaina M.*, M2010-01880-COA-R3-JV, 2011 WL 5071901 (Tenn. Ct. App. Oct. 25, 2011) (citing *Murray v. Murray*, No. M2009-01576-COA-R3-CV, 2010 WL 3852218, at *8 (Tenn. Ct. App. Sept. 28, 2010)). In light of the trial court's direct observation of the demeanor of the parties and its declaration that it had considered all the relevant statutory factors, we are unable to find that the trial court abused its discretion in designating Mother as the children's primary custodial parent.

B. The Question of Parenting Time

As an alternative to his claim for equal custody, Father asks this court to award him substantially more parenting time than was awarded by the trial court. He complains that under the parenting plan adopted by the court, he will only have 91 days with the children each year while Mother will have 274 days. He insists that he cannot fully perform his parental role if he is only allowed to be a weekend father. He relies on a one sentence amendment to the child custody statute, Tenn. Code Ann. § 36-6-106(a), added in 2011, to

support his position. [Acts 2011, ch. 433. § 2].

That amendment declares that "[i]n taking into account the child's best interest, the court shall order a custody arrangement that permits both parents to enjoy the maximum participation possible in the life of the child consistent with the factors set out in subdivisions(a)(1)-(10), the location of the residences of the parents, the child's need for stability and all other relevant factors." Father insists that the trial court failed to comply with the statute. He asserts that because the parties live so close to each other, there was no reason for the court not to allow him to participate more fully in the children's lives by awarding him more than 91 days of parenting time.

But although the parenting plan recites that Father will get only 91 days of parenting each year, a closer look at the plan reveals that Father will enjoy more parenting time than that bare figure indicates. Not only will he alternate two and four day weekends with the children every other week, he will also have them for a three week period each summer, alternating holidays and half of Christmas break and every other Monday from the end of school until 8:30 p.m. Those clearly amount to more than 91 days each year.

After a period of uncertainty about how to count days of parenting for the purpose of calculating child support when both parents have parenting time on the same day, the Department of Human Services promulgated a new definition of a day of parenting time and added it to the Child Support Guidelines as follows:

> For purposes of this chapter, a 'day' of parenting time occurs when the child spends more than twelve (12) consecutive hours in a twenty-four (24) hour period under the care, control or direct supervision of one parent or caretaker. The twenty-four (24) hour period need not be the same as a twenty-four (24) hour calendar day. Accordingly, a 'day' of parenting time may encompass either an overnight period or a daytime period, or a combination thereof.

Tenn. Comp. R. & Regs. 1240-2-4-.02(10). See, also, *Stogner v. Stogner*, M2011-00503-COA-R3-CV, 2012 WL 1965598 (Tenn. Ct. App. May 31, 2012) (perm. app. denied Oct. 19, 2012).

Although it is not clear exactly how Father's parenting time was calculated, the application of the above definition would mean that alternate Mondays, when Father takes care of the children between the end of aftercare and 8:30 p.m., would not count at all towards Father's total parenting days. Instead, those Mondays would fall on Mother's side of the ledger, even though her exercise of parenting time on those days would mostly consist of overnight hours. It thus appears to us that once the trial court concluded that equal custody

was not in the best interest of the children, it proceeded to award Father the maximum amount of quality parenting time possible under the circumstances, even though the court did not specifically mention the new amendment to Tenn. Code Ann. § 36-6-106(a).

C. The Cost of Tuition

The proof showed that Mother had enrolled the children in a pre-Kindergarten program at F.H. Jenkins, a private school, at a cost to her of $45 per child per week. The trial court included that cost in the child support worksheet as "work-related childcare." Such an additional expense presumably increased the presumptively correct child support amount that the trial court obligated Father to pay.

Father contends that under the child support guidelines, the trial court should have included the private school expense in the worksheet as "an extraordinary educational expense." Such an extraordinary expense may justify, at the discretion of the trial court, a possible upward deviation from the presumptive child support amount. It may seem that Father is urging us to treat that expense in a way that would increase his obligation of payment. But Father argues that because of the strained financial condition of both parties, the trial court should exercise its discretion by not granting Mother an upward deviation, or if it does, to reduce that deviation "by the amount of assistance Ms. Rucker received on behalf of the twins."

It appears to us, however, that even though the children are enrolled in a program at a private school and the cost of that program is billed as tuition, the nature of that program and its cost are not so different from what parents ordinarily encounter when arranging daycare for children who have not yet reached school age. We therefore hold that the tuition Mother pays is a legitimate child care expense, and that the trial court did not err in characterizing as it did for purposes of calculating child support.

D. A Clerical Error

Father also contends that the trial court made a clerical error in the wage assignment order of February 6, 2013 that it entered to guarantee the payment of his child support obligation to Mother. The order recited that Father's child support obligation of $451.85 every two weeks would be supplemented by a payment of $35 each pay period on his $6,000 arrearage. The order then went on to say that "the total amount of child support and arrearage is $527.68 every two weeks . . ," even though the correct amount should have been $486.85.

Father asserts that due to this clerical error, he has been overpaying his child support

by $40.83 every two weeks. Mother does not dispute Father's assertion. Tenn. R. Civ. P. 60.01 gives the trial court the authority to correct clerical mistakes at any time on its own initiative or on the motion of any party. We accordingly grant Father leave to file a Rule 60.01 motion in the trial court to correct the error in its Wage Assignment Order and to direct the Juvenile Court to amend its Income Withholding for Support Order to make it consistent with the corrected Wage Assignment Order.

IV.

The judgment of the trial court is affirmed. We remand this case to the Juvenile Court of Davidson County for any further proceedings necessary, including the correction of error in its child support order. Tax the costs on appeal to the appellant, Frederick E. Harris.

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LARRY B. STANLEY, JR., SP. JUDGE