IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 22, 2015 Session

# CASSIDY LYNNE ARAGON v. REYNALDO MANUEL ARAGON

**Appeal from the Chancery Court for Montgomery County**
**No. MCCHCVDI090483 Ross H. Hicks, Judge**

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**No. M2014-02292-COA-R3-CV – Filed November 30, 2015**

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Father and Mother were divorced in April 2010; a parenting plan was entered into providing that the parties would share equal parenting time. In March 2012, pursuant to the parental relocation statute at Tenn. Code Ann. § 36-6-108, Father notified Mother that he intended to relocate to Tucson, Arizona, for an employment opportunity and filed a petition requesting to modify the parenting plan and relocate. Mother filed a petition in opposition to relocation, stating, *inter alia*, that Father's proposed move served no reasonable purpose. The trial court determined that Father's move served no reasonable purpose; the court did not make the best interests determination as required by the relocation statute. Father appealed and this court vacated the judgment and remanded the case for the court to consider the best interests of the child and to make findings in that regard. On remand, the court made findings relative to the factors as designated in the relocation statute and concluded that relocation was not in the best interests of the child. Finding no reversible error, we affirm the decision of the trial court.

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

RICHARD H. DINKINS, J., delivered the opinion of the court, in which ANDY D. BENNETT joined. W. NEAL MCBRAYER, J., filed a dissenting opinion.

Steven C. Girsky, Clarksville, Tennessee, for the appellant, Reynaldo Manuel Aragon.

Matthew Joel Wallace, Clarksville, Tennessee, for the appellee, Cassidy Lynne Aragon.

## OPINION

### I. FACTS AND PROCEDURAL HISTORY

This case comes before us for the second time. Reynaldo Manuel Aragon ("Father") and Cassidy Lynn Aragon ("Mother") were married on October 23, 2006; one child, Aurelia, was born of the marriage. On December 16, 2009, Mother instituted a divorce proceeding and on April 9, 2010, a final decree of divorce was entered which adopted the parties' marital dissolution agreement. A parenting plan signed by both parties was approved and made the order of the court; a primary residential parent was not named and the parties shared equal parenting time under the plan.

On March 20, 2012, Father sent Mother a notice advising that he intended to move to Tucson, Arizona; the notice contained the information required by the parental relocation statute at Tenn. Code Ann. § 36-6-108(a).[1] On March 26 Father filed a "Petition to Modify Parenting Plan and Request for Parental Relocation" which stated, *inter alia*, that he intended to relocate due to employment opportunities; that he had extensive familial support in Tucson; that his request for relocation had a reasonable purpose; that his relocation along with Mother's employment overseas resulted in a material change in circumstances; that his relocation rendered the existing permanent parenting plan "no longer workable" and not in the best interest of Aurelia; and that it was in Aurelia's best interest that he be allowed to relocate to Tucson. Father requested that the court determine that his relocation had a reasonable purpose; that the relocation was in Aurelia's best interests; that he be permitted to relocate to Tucson; and that the parenting plan be modified to designate him as primary residential parent. With the petition, Father filed a proposed parenting plan which named him as primary residential parent and designated 275 days of residential parenting time to him and 90 days to Mother.

[1] Tenn. Code Ann. § 36-6-108(a) states:

> (a) If a parent who is spending intervals of time with a child desires to relocate outside the state or more than fifty (50) miles from the other parent within the state, the relocating parent shall send a notice to the other parent at the other parent's last known address by registered or certified mail. Unless excused by the court for exigent circumstances, the notice shall be mailed not later than sixty (60) days prior to the move. The notice shall contain the following:
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> (1) Statement of intent to move;
> (2) Location of proposed new residence;
> (3) Reasons for proposed relocation; and
> (4) Statement that the other parent may file a petition in opposition to the move within thirty (30) days of receipt of the notice.

On April 23, Mother filed a "Petition in Opposition to the Removal of Child" in which she asserted, *inter alia*, that Father's proposed move served no purpose; was not in Aurelia's best interests; posed a "specific and serious harm" to Aurelia; and that Father's motive for relocation was vindictive and intended to "defeat or deter" Mother's visitation rights. On April 24, Father filed a "Motion To Permit Parental Relocation Pending Final Hearing," in which he requested permission to relocate with the child pending final resolution of the case.

On May 18, the court entered an agreed order which stated in pertinent part:

> 5. The Parties agree that during the pendency of this matter that the current parenting plan shall remain in effect with the exception that the Petitioner shall be allowed to relocate to Tucson, Arizona on or about May 29, 2012, and the Respondent does not object to this relocation.
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> 6. The parties shall continue to operate under the terms of the Parenting Plan incorporated into the Final Decree of Divorce, with the following exception. The Father shall enjoy parenting time consecutively from May 29, 2012 through June 28, 2012 in Tucson, Arizona. Thereafter, the Mother will enjoy parenting time with the minor child until the next hearing before the court which is scheduled for July 26, 2012. The Father shall be responsible for the travel expense for the summer visitation.

The court held hearings on July 26 and August 3, 2012. On August 9, the court entered a temporary order stating in pertinent part:

> [T]he Court is of the opinion that the [Mother] has shown the [Father]'s proposed move of the minor child to Arizona is unreasonable. Because the [Father] has already moved to Arizona, the Court further finds that a new Parenting Plan should be entered providing for Mother to be designated as the Primary Residential Parent and for Father's residential parenting time to be during the summer and extended school holidays and for other parenting time to be exercised in the State of Tennessee during 3-day weekends and on such other weekend occasions as he can arrange.
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> The court has chosen to enter a Temporary Order in this matter at this time because the child at issue needs to be enrolled in school. The court intends to issue a Supplemental Opinion containing additional Findings of Fact and Conclusions of Law and attaching a new Parenting Plan at a later date. . . . The Mother shall be designated the Primary Residential Parent and shall exercise parenting time with the child at all other times until further orders of the court.

On January 7, 2013, the court issued a Memorandum Opinion making additional findings of fact; the court held that there was "no proof in this case that [Father] has better job opportunities, greater salary opportunities or career advancement opportunities in the Tucson area" and that there was "no proof whatsoever with regard to [Father]'s comparable job opportunities in the Middle Tennessee or Southern Kentucky area because he has not made any inquiries or pursued such opportunities." The court determined that Father's proposed relocation did not have a reasonable purpose, directed the parties to negotiate regarding a parenting plan, and, if they could not agree, to submit separate plans to the court no later than February 1. On August 2 the court entered a new parenting plan in which Mother was designated as the primary residential parent, granting her 285 days of residential parenting time and Father 80 days.[2]

Father appealed to this court raising two issues: (1) whether the trial court erred in concluding that the Father's requested relocation did not have a reasonable purpose, and (2) whether the court erred in concluding that it was in the best interest of the child to reside primarily with Mother. We declined to address the first issue until the trial court made findings of fact with regard to the best interests of the child; rather, we vacated the decision, remanding the case with instructions for the trial court to "consider the child's best interest" in accordance with Tenn. Code Ann. § 36-6-108(e) and to make appropriate findings of fact pursuant to Tenn. R. Civ. P. 52.01. *Aragon v. Aragon*, No. M2013-01962-COA-R3-CV, 2014 WL 1607350, at *9 (Tenn. Ct. App. Apr. 21, 2014).

On remand, no additional proof was taken; both parties filed proposed findings of fact and conclusions of law. On October 24, 2014, the trial court entered an order in which it reviewed the factors at Tenn. Code Ann. §§ 36-6-108(e) and 36-6-106(a) and made findings of fact relative thereto; the court restated its earlier finding that Father's proposed relocation had no reasonable purpose and held that the evidence weighed in favor of Mother being named primary residential parent**.**

Father appeals, asserting that the trial court erred in holding that his requested relocation did not have a reasonable purpose and that it was in the best interest of Aurelia to reside primarily with Mother.

## II. ANALYSIS

Parental relocation is governed by Tenn. Code Ann. §36-6-108. The statute contains two different standards for relocation, set forth in subsection (c) and subsection (d)(1), depending on whether the parents spend equal or unequal intervals of time with

[2] There is no explanation in the record for the delay in the entry of a parenting plan, nor of the circumstances surrounding the adoption of the plan.

the child.[3] Mother and Father entered into an Agreed Permanent Parenting Plan, which was incorporated into the Final Decree of Divorce; the plan did not designate a primary residential parent and provided that they would each have 182.5 days of residential parenting time, alternating on a week-to-week basis. In the agreed order entered on May 18, 2012, the parties acknowledged that the plan, which had been incorporated in the Final Decree, was still in effect. At the hearing of this matter, Mother's attorney stipulated that, despite the provisions of the Final Decree and in the agreed order, the actual parenting time shared by the parties was not equal. In the January 7, 2013 memorandum opinion, the court found that Mother and Father "were not spending substantially equal intervals of time with the minor child," and that because Father "was exercising more parenting time," Tenn. Code Ann. § 36-6-108(d)(1) controlled.

Given the unique facts and procedural posture of this case, we agree with the trial court that Tenn. Code Ann. § 36-6-108(d)(1) is the statute governing this matter. Both Tenn. Code Ann. § 36-6-108(c) and (d)(1) speak of the time parents are or are not

[3] Tenn. Code Ann. § 36-6-108(c) establishes the standard for parents who spend substantially equal time with their child as follows:

> (c) If the parents are actually spending substantially equal intervals of time with the child and the relocating parent seeks to move with the child, the other parent may, within thirty (30) days of receipt of notice, file a petition in opposition to removal of the child. No presumption in favor of or against the request to relocate with the child shall arise. The court shall determine whether or not to permit relocation of the child based upon the best interests of the child. The court shall consider all relevant factors including those factors found in § 36-6-106(a)(1)-(15).

Subsection (d)(1) sets forth the standard for parents spending unequal amounts of time with their child:

> If the parents are not actually spending substantially equal intervals of time with the child and the parent spending the greater amount of time with the child proposes to relocate with the child, the other parent may, within thirty (30) days of receipt of notice, file a petition in opposition to removal of the child. The other parent may not attempt to relocate with the child unless expressly authorized to do so by the court pursuant to a change in custody or primary custodial responsibility. The parent spending the greater amount of time with the child shall be permitted to relocate with the child unless the court finds:
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> (A) The relocation does not have a reasonable purpose;
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> (B) The relocation would pose a threat of specific and serious harm to the child that outweighs the threat of harm to the child of a change of custody; or
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> (C) The parent's motive for relocating with the child is vindictive in that it is intended to defeat or deter visitation rights of the non-custodial parent or the parent spending less time with the child.

"actually spending" with the child. Because Father was "actually" spending substantially more time with Aurelia than Mother, it is appropriate to guide our consideration in accordance with the standards for relocation set forth in subsection (d)(1). *See Webster's II New College Dictionary* 12 (3rd ed. 2005) (defining "actually" as "in fact : in reality").

"Our standard of review in child custody cases is *de novo* upon the record of the trial court with a presumption of correctness, unless the evidence preponderates otherwise." *In re C.K.G.*, 173 S.W.3d 714, 732 (Tenn. 2005) (citing Tenn. R. App. P. 13(d); *Hass v. Knighton*, 676 S.W.2d 554, 555 (Tenn. 1984)). We review questions of law "under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts." *Johnson v. Johnson*, 165 S.W.3d 640, 645 (Tenn. Ct. App. 2004) (quoting *Southern Constructors, Inc. v. Loudon County Bd. Of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001)). "In applying this standard of review, we are mindful that '[t]rial courts are vested with wide discretion in matters of child custody' and that 'the appellate courts will not interfere except upon a showing of erroneous exercise of that discretion.'" *Johnson*, 165 S.W.3d at 645 (quoting *Koch v. Koch*, 874 S.W.2d 571, 575 (Tenn. Ct. App. 1993)).

**A. Father's Relocation Request**

Now that the trial court has made the appropriate findings, we review the record to determine if, as Father contends, the evidence preponderates against the determination that his move served no reasonable purpose.

In the August 9, 2012 Temporary Order, the court held that Mother demonstrated that Father's "proposed move of the minor child to Arizona is unreasonable." In the January 7, 2013 Memorandum Opinion, the court made factual findings relative to Father's relocation; upon our review we have determined that the facts which relate to the conclusion that Father's move did not serve a reasonable purpose are in paragraphs nine through fifteen:

> 9. The proof shows that the parties were married in Clarksville, Tennessee, in 2006. Defendant was in the army at the time. At some point the parties moved to Tucson, Arizona, where Mr. Aragon's immediate family lived. When their child, Aurelia, was born July 19, 2007, the parties were then living in the living room of Mr. Aragon's parents' home. Both Plaintiff and Defendant were unemployed at the time. Mr. Aragon decided that he wanted to be a policeman and pursued that at least to the extent of making inquiries and/or beginning some training. However, he determined that he did not want to pursue that career in the Tucson area as it was too dangerous. He had some connections in New Hampshire and moved his family there for the purpose of pursuing his law enforcement career in New

Hampshire. After arriving in New Hampshire however, he abandoned that idea and later decided that he would move his family back to Clarksville, Tennessee, to pursue a business opportunity with one of his former army buddies. The parties separated sometime after they moved back to Tennessee.

10. The business opportunity in Tennessee did not pan out and Mr. Aragon never obtained employment. Ultimately the parties decided that Mrs. Aragon would go to work and that Mr. Aragon would go to school. Because of Mrs. Aragon's educational background and work opportunities, she was able to make a substantial income if she would agree to work on a contract basis overseas. Mrs. Aragon had a child by a former relationship and the parties agreed that Mr. Aragon would care for Aurelia and the other child, go to school and that Mrs. Aragon would go overseas to work and provide income for the family. It was not clear from the proof when this arrangement was agreed upon but it existed prior to the divorce and continued after the divorce. When Mr. Aragon completed his schooling, he notified Mrs. Aragon of his intended relocation to Arizona for the purpose of accepting employment there and Mrs. Aragon filed her objection to the relocation.

11. Since at least April of 2010 (the divorce), it is clear that Mrs. Aragon has sacrificed her parenting time in order to provide income for the family and enable Mr. Aragon to complete his education. This was done with Mr. Aragon's express approval and agreement. Mrs. Aragon testified (not denied by Mr. Aragon) that the parties had agreed that this arrangement would continue until such time as Mr. Aragon graduated and then it was anticipated that he would get employment in the Clarksville, Tennessee area and the parties would resume their 50/50 parenting arrangement with regard to both children.

12. Although it is clear that Mr. Aragon has spent substantially more time with both children, this occurred as a result of the arrangement the parties made whereby Mrs. Aragon would be the provider for the family and work overseas while Mr. Aragon pursued his education and cared for the children.

13. In December of 2011, Mr. Aragon first raised the prospect of returning to Arizona. Mrs. Aragon made it known that she would not agree. Mrs. Aragon testified (and Mr. Aragon did not deny) that in all their previous discussions concerning Mr. Aragon's post graduation plans that Mr. Aragon had indicated he would want to stay in the general Nashville/Clarksville area because of the support system he had developed to include his old army buddies, a distant family connection in Nashville, and classmates, faculty and friends from school.

> 14. Mr. Aragon has graduated from nursing school and has obtained employment in a entry-level position at Tucson Medical Center. He testified that he had not specifically sought employment in either the Clarksville-Montgomery County, Tennessee area, the Nashville area or the Middle Tennessee area prior to accepting employment in Tucson. He testified that he had rented an apartment in Tucson but still continued to own a residence in Clarksville.
> 15. Defendant cites in his petition as a reason for his move to Tucson, "greater opportunity for greater income" and the "support, companionship and assistance of family and friends in the Tucson area". He produced 9 witnesses, 7 of them from the Clarksville area in support of his petition. This number of witnesses and testimony is indeed indicative that Mr. Aragon does indeed have a strong support network in this area. This substantiates and lends credibility to Mrs. Aragon's testimony that until December, 2011, Mr. Aragon had always indicated his intentions to stay and work in this area after his graduation.

Upon this basis, the court concluded:

> There is no proof in this case that Mr. Aragon has better job opportunities, greater salary opportunities or career advancement opportunities in the Tucson area. In fact, there is no proof whatsoever with regard to Mr. Aragon's comparable job opportunities in the Middle Tennessee or Southern Kentucky area because he has not made any inquiries or pursued such opportunities.

The evidence before the court when it made the determination that Father's move did not have a reasonable purpose consisted primarily of the testimony of Father, Mother and nine witnesses, which we now summarize.

Father testified that his relocation stemmed from his belief that the life he would be able to provide Aurelia in Arizona would be better than the life he could provide her in Clarksville; that he secured a better job opportunity at Tucson Medical Center as a registered RN on the neurology floor—the same hospital where his Mother had worked for thirty years; that his compensation would be "$24 an hour plus a 10 percent premium for night shift and then overnight 17 percent added onto that"; that he chose not to pursue jobs in the Clarksville community because the "nursing market wasn't what it could be"; that his job before enrolling in nursing school paid $9 per hour; that he took into account "the instability of [Mother]" in Aurelia's life; that while he and Mother have no family in the Clarksville area, both he and Mother have family living in and around the Tucson area; and that his relocation would allow him to "foster those relationships" and provide a support network for him and Aurelia.

Mother testified that, during the marriage, she secured a job in Iraq in order to get enough money for she and Father to go back to school after they had spent several months unemployed; that, shortly after their divorce, Father expressed a desire to attend nursing school and that they made an agreement that if he enrolled in and completed school "he'd be able to go anywhere and work anywhere . . . and [she] could pursue [her] degree as well"; that she worked other contracting jobs overseas, including a contracting position in Afghanistan which, due to Father's lack of steady income, she agreed to work until he graduated from nursing school; that, in exchange for her willingness to work in Afghanistan, Father agreed to move to Hermitage, where she resided after the divorce; that she considered relocation and the best jobs for her were primarily in Maryland, Washington D.C., and Virginia; that, before he decided to relocate to Tucson, Father had agreed to move wherever Mother secured a job stateside, but later expressed a desire to live in Mt. Juliet; that Father used the same reasons for wanting to relocate to Tucson that he did for wanting to stay in Nashville; that she felt there were plenty of nursing jobs in the surrounding area; and that Father did not look for jobs in Tennessee because he felt he would make more money in Tucson.

Peggy Bozarth, director of the nursing program at Hopkinsville Community College, where Father received his nursing degree, testified that the college sent surveys to the medical facilities in the Clarksville and Hopkinsville area seeking information regarding the employment environment in the nursing field and determined that there was a nursing shortage and that there were more jobs available in the long term care facilities; and that because she did not know exactly what the wages were in the Clarksville/Hopkinsville area, she could not compare those wages with Father's wages.

Ben Aragon, Aurelia's paternal grandfather, testified that many members of Father's extended family live in Arizona; that he had taken care of Aurelia in the past; and that was willing to provide care for Aurelia during Father's night shifts.

Claire Aragon, Aurelia's paternal grandmother, testified that she worked as manager for patient relations at Tucson Medical Center; that her hours were typically from 9:00-5:00; and that she was willing to provide care for Aurelia when Father worked.

Rebecca Johnson, a childcare worker at Aurelia's daycare center, testified that Father was an attentive and caring parent and that she occasionally babysat Aurelia.

Lisa McDaniel, Father's neighbor in Clarksville, testified that she established a friendship with Father; that her children often had play dates with Aurelia and her half-sister; that she was the emergency contact at Aurelia's sister's school; and that she would help out with the children whenever feasible. [4]

[4] The half-sister referenced is Mother's daughter from a previous relationship; her custody is not an issue in this case.

Monika Lemmonds, Father's friend and classmate in nursing school, testified that she works at a nursing home rehab facility; that she and Father often studied together and interacted socially; that their nursing program was very strenuous; and that Father's main priority was the children.

Sheryl Mack, a childcare worker at Aurelia's daycare center, testified that she knew Father through working at the daycare center, babysitting for the children, and playing ultimate frisbee; that Father was a great parent; and that Aurelia and her half-sister were very independent children.

Brian Delestowicz, Father's friend and former military colleague, testified that Father was a good parent; that he and Father discussed starting a real estate business that had not come to fruition; that he occasionally gifted small amounts of money to Father; and that he purchased Father's trailer when Father was in need of money.

Kimberly Robitaille, Father's instructor at Hopkinsville Community College, testified that Father took her class for two semesters; that the nursing program was very difficult; that Father brought Aurelia to class on a few occasions; and that Father seemed to have great affection for his children.

The testimony supports the court's findings quoted earlier in this opinion; other evidence, while conflicting, does not preponderate against those findings.[5] We therefore proceed to review the holding that Father's move did not have a reasonable purpose as a matter of law. A succinct statement of the nature of this inquiry was articulated in *Redmon v. Redmon*:

> There are no bright-line rules with regard to what constitutes a reasonable purpose for a proposed relocation. [D]eterminations concerning whether a proposed move has a reasonable purpose are fact-intensive and require a thorough examination of the unique circumstances of each case. In assessing whether a proposed relocation has a reasonable purpose, courts take into account both economic and non-economic factors. Regardless,

[5] We acknowledge Father's argument that Mother did not satisfy her burden "to produce evidence from which such a [job] comparison could be made." *Redmon v. Redmon*, No. W2013-01017-COA-R3-CV, 2014 WL 1694708, at *7 (Tenn. Ct. App. Apr. 29, 2014) *no perm. app. filed*. As noted in *Redmon*, however, "determinations concerning whether a proposed move has a reasonable purpose are fact-intensive and require a thorough examination of the unique circumstances of each case." *Id.* at *5 (quoting *Lima v. Lima*, No. W2010-02027-COA-R3-CV, 2011 WL 3445961, at *7 (Tenn. Ct. App. Aug. 9, 2011)). In addition to evidence that there were nursing positions available in Tennessee, which Father chose not to pursue, there was evidence to support the court's conclusion that Father had a strong support network in the Clarksville area. Given the nature of the trial court's inquiry and the facts presented in this case, the fact that Mother did not introduce evidence of pay rates for nursing positions in the Clarksville area, standing alone, is not determinative of the issue.

> the reasonable purpose of the proposed relocation must be a significant purpose, substantial when weighed against the gravity of the loss of the non-custodial parent's ability to participate fully in their children's lives in a more meaningful way.

2014 WL 1694708, at *5 (quotation marks and citations omitted).

In his petition for permission to relocate, Father stated the following in support of his contention that his proposed move had a reasonable purpose:

> 7. Pursuant to Tennessee Code Annotated § 36-6-108, this is a proper case for the Court to permit the Father to relocate and to adopt the Father's proposed Parenting Plan filed herewith due to the following circumstances:
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> ***
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> b. The Father intends to relocate to Tucson, Arizona on or about May 26, 2012 and begin new employment as a nurse with Tucson Medical Center. Said employment offers the Father the opportunity for greater income over his current options in the state of Tennessee.
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> c. The Father has an extensive family support system in the Tucson, Arizona area including his parents and several aunts, uncles and cousins.
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> d. The Father can provide the parties' minor child, Aurelia Aragon, with a stable and loving home environment and can provide many opportunities for the minor child to interact with the Father's family that are otherwise unavailable in Tennessee.
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> e. The Mother is employed as an overseas civilian contractor and has been absent from the minor child's life for most of the time since the parties' divorce.
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> f. The parties have never enjoyed substantially equal intervals of parenting time with the minor child
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> g. The Father, despite not being named the primary residential parent, has largely cared for the parties' minor child as well as the Mother's child from her previous husband. The Father has an excellent relationship with both children.

Despite the testimony that there was a nursing shortage and available jobs in the Clarksville area, particularly in long term care facilities, Father chose not to seek opportunities in the Clarksville area before relocating; his decision that he would not apply for nursing positions in Tennessee undermines his contention that he moved

because he had an opportunity for greater income over his options in Tennessee. Father and his parents testified relative to the support system available to him in Arizona, while other witnesses testified as to the support available to him in Clarksville; the trial court implicitly found that the support available in Clarksville was entitled to greater weight in the context of the reasonable purpose inquiry than that in Arizona. As the trial court is the sole judge of the weight to be given testimony, we defer to the court in this regard. *See Duncan v. Duncan*, 686 S.W.2d 568, 571 (Tenn. Ct. App. 1984) ("The findings of the trial judge in a non-jury case are entitled to great weight where the trial judge saw and heard the witnesses and observed their manner and demeanor on the stand and was therefore in a much better position than the appellate court to judge the weight and value of their testimony.") (citing *Smith v. Hooper*, 438 S.W.2d 765, 773 (Tenn. Ct. App. 1968)). The evidence does not preponderate against the holding that Father had a support system available to him in the Clarksville area.

As noted above, the "reasonable purpose" of relocating must be "substantial when weighed against the gravity of the loss of the non-custodial parent's ability to participate fully in their children's lives…" *Redmon*, 2014 WL 1694708, at *5. As the trial court noted at the conclusion of the trial, "this is not a run-of-the-mill relocation case, and it's a difficult - - I've got a difficult decision to make." The testimonial evidence, some of which conflicted, could be construed differently, but we are persuaded by the trial court's statement that "[w]hile it appears that [Father] posits a rational basis for his move, the move is nonetheless not reasonable under all the circumstances." Affording the trial court the deference it is due, the evidence does not preponderate against the holding that Father's relocation did not have a reasonable purpose within the meaning of Tenn. Code Ann. § 36-6-108(d)(1).

We now address whether or not the court should have permitted relocation based on the best interests of Aurelia. *See* Tenn. Code Ann. § 36-6-108(e).

**B. Best Interests**

At the time of the original hearing in this case, Tenn. Code Ann. § 36-6-108(e) required the court to weigh eleven factors in considering the best interests of a child if it found one or more of the grounds designated in subsection (d)[6]; the statute was amended

[6] At the time of the hearing, Tenn. Code Ann. § 36-6-108(e) provided:

> (e) If the court finds one (1) or more of the grounds designated in subsection (d), the court shall determine whether or not to permit relocation of the child based on the best interest of the child. If the court finds it is not in the best interests of the child to relocate as defined herein, but the parent with whom the child resides the majority of the time elects to relocate, the court shall make a custody determination and shall consider all relevant factors including the following where applicable:
> (1) The extent to which visitation rights have been allowed and exercised;

effective July 1, 2014 to require the court to consider the fifteen factors at Tenn. Code Ann. § 36-6-106(a) in making the best interest determination. On remand, the court heard no new testimony and made findings relative to the eleven factors in Tenn. Code Ann. §36-6-108(e) as it was worded at the time of the hearing, as well as the fifteen factors at Tenn. Code Ann. § 36-6-106(a). The court concluded:

> After review of the factors listed in both the original and revised versions of T.C.A. § 36-6-108[[7]], the Court finds that the evidence in this case preponderates in favor of the Mother being named the primary residential parent of the child and that the Father should enjoy substantial and liberal visitation. The Court reaffirms its previous finding that Father's proposed relocation did not have a reasonable purpose.

With respect to the eleven factors previously set forth at Tenn. Code. Ann. § 36-6-108(e), the court determined that factors 4, 5, 6 and 8 favored Mother; that factors 1, 2, 3, 7, 10 and 11 favored neither parent, and that factor 9 was inapplicable.[8] In his brief, Father does not cite to evidence that preponderates against the court's findings; Mother

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> (2) Whether the primary residential parent, once out of the jurisdiction, is likely to comply with any new visitation arrangement;
> (3) The love, affection and emotional ties existing between the parents and child;
> (4) The disposition of the parents to provide the child with food, clothing, medical care, education and other necessary care and the degree to which a parent has been the primary caregiver;
> (5) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment;
> (6) The stability of the family unit of the parents;
> (7) The mental and physical health of the parents;
> (8) The home, school and community record of the child;
> (9)(A) The reasonable preference of the child if twelve (12) years of age or older;
> (B) The court may hear the preference of a younger child upon request. The preferences of older children should normally be given greater weight than those of younger children;
> (10) Evidence of physical or emotional abuse to the child, to the other parent or to any other person; and
> (11) The character and behavior of any other person who resides in or frequents the home of a parent and such person's interactions with the child.

[7] While the court erroneously referenced "the factors listed in both the original and revised versions of T.C.A. § 36-6-108" in its ruling, the court correctly reviewed the factors at both Tenn. Code Ann. § 36-6-108(e) and § 36-6-106(a).

[8] With respect to factors 5 and 8, Father contends that the court considered evidence not in the record. As a result of Father's relocation during the pendency of this matter, the court took into consideration the fact that Aurelia has resided with Mother since August 3, 2012, and had been attending school in Tennessee. While Father perceives this as the court considering new evidence, we have determined that the court merely considered the present state of affairs.

has cited to evidence that supports the court's findings with regard to factors 1 and 4. Upon our review of the entire record, the evidence supports the court's findings. In like manner, we hold that the evidence does not preponderate against the determination that relocation was not in Aurelia's best interest, as measured by the factors at § 36-6-108(e).[9]

Because relocation would not have been appropriate as measured by the factors applicable at the time the decision was made, consideration of the factors at Tenn. Code Ann. § 36-6-106(a) is pretermitted.

## III. CONCLUSION

In light of the foregoing, we affirm the trial court's determination that Father's move did not have a reasonable purpose; that relocation was not in the best interest of Aurelia; and that the evidence preponderates in favor of Mother being named primary residential parent.[10]

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RICHARD H. DINKINS, JUDGE

[9] While Tenn. Code Ann. § 36-6-108(e) requires the court, after finding "one or more of the grounds designated in subsection (d)," to "determine whether or not to permit the relocation of the child based on the best interests of the child", the court did not expressly make that determination; rather, it named Mother primary residential parent. It is clear, however, considering the record as a whole that the court, having found that Father's proposed relocation did not have a reasonable purpose, correctly considered the factors at subsection (e) and implicitly determined that relocation was not in Aurelia's best interest. Father's petition was denied in accordance with the procedure set forth in the relocation statute.

[10] Although not raised, briefed or argued as an issue for resolution by this court, Father asserts as part of his argument on the second issue he presents, that, contrary to Tenn. Code Ann. § 36-6-106(a) and *Armbrister v. Armbrister*, 414 S.W.3d 685, 693 (Tenn. 2013), the parenting plan which was adopted by the court on August 2, 2013, does not allow him to enjoy maximum participation with Aurelia. As noted earlier, *supra* footnote 2, the record is silent on the circumstances surrounding the adoption of the parenting plan. The plan was adopted after the entry of the order which led to the first appeal and was not a part of that appeal; nothing in this opinion precludes Father from addressing matters which have arisen after August 2, 2013, with the trial court.