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IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
September 20, 2017 Session

DALE (CRAFTON) ROBERTS v. JAMES FREDERICK ROBERTS

Direct Appeal from the Circuit Court for Shelby County
No. CT-000343-07 Rhynette N. Hurd, Judge

No. W2016-01810-COA-R3-CV

This is the second time we have considered this child custody case on appeal. The parties have been embattled in post-divorce litigation almost continuously since entry of the final decree of divorce in 2007. In 2012, the parties sought to modify their parenting arrangement, and the trial court allowed a divorce referee to hear the matter. The court then attempted to retroactively appoint the divorce referee as a Special Master and adopted a modified version of the findings and recommendations of the divorce referee/Special Master. Father appealed, and on December 28, 2015, this Court vacated the trial court's order and remanded the case for further proceedings as needed to adjudicate the parties' petitions related to custody and parenting. On remand, the trial court held a three day hearing to determine whether to modify the parties' current permanent parenting plan. The court concluded that the primary residential parent of the parties' remaining minor child should be changed from Father to Mother. Father appeals. We hold that the trial court erred in refusing to consider all of the applicable best interest factors set forth in Tennessee Code Annotated section 36-6-106, specifically the preference of a child age twelve or older. We, therefore, vacate the order of the trial court and remand for further proceedings consistent with this Opinion. We decline mother's request for attorney's fees incurred on appeal.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Vacated and Remanded

BRANDON O. GIBSON, J., delivered the opinion of the court, in which ANDY D. BENNETT, J., and J. STEVEN STAFFORD, P.J., W.S., joined.

James Frederick Roberts, Memphis, Tennessee, *Pro se*.

Jason Richard Ridenour, Memphis, Tennessee, for the appellee, Dale (Crafton) Roberts.

OPINION

I. FACTS & PROCEDURAL HISTORY

Appellant, James Frederick Roberts ("Father"), and Appellee, Dale (Crafton) Roberts ("Mother"), were divorced in August 2007. The parties have two children together, one of whom reached the age of majority during the pendency of this post-divorce litigation and another who is now a teenager. The trial court entered a permanent parenting plan on April 15, 2008 (the "2008 Parenting Plan") that designated Mother as the primary residential parent of the parties' older son and Father as the primary residential parent of the parties' younger son. In 2010, the parties began filing various pleadings seeking modification of their parenting arrangement. On July 11, 2011, the trial court temporarily modified the 2008 Parenting Plan to allow each parent to have parenting time with the children every other week. With several issues outstanding, the trial court then allowed a divorce referee to take over and hear the parties' disputes over parenting, unpaid financial obligations, and the like.

In 2012, the divorce referee decided that Mother should be designated as the primary residential parent for both of the parties' children. The referee's written findings and recommendations were filed with the trial court on July 31, 2012. That same day, the court entered an order appointing the divorce referee as a Special Master pursuant to Rule 53 of the Tennessee Rules of Civil Procedure. This order was entered *nunc pro tunc* with a purported effective date of October 28, 2011. The trial court ultimately adopted the referee/Special Master's findings and recommendations. Father appealed, claiming that the trial court erred in allowing the divorce referee to hear main issues in the case without a controlling order of reference as a Special Master and that the defect could not be cured retroactively by the court's *nunc pro tunc* order appointing the divorce referee as a Special Master. This Court agreed with Father and held as follows:

> The trial court's order adopting the referee's written findings and recommendations is hereby vacated. This cause is remanded to the trial court to conduct further proceedings as are necessary to adjudicate the parties' petitions relating to the custody and parenting schedule of the remaining minor child. Proof should be taken to evaluate the circumstances of the parties as they exist as of the date of the remand proceedings. Any orders that are entered modifying the original permanent parenting plan should contain appropriate findings of fact and conclusions of law in accordance with Rule 52.01 of the Tennessee Rules of Civil Procedure.

On remand, the trial court heard Mother's amended petition to modify the parenting plan and Father's response to the same. The parties' younger son (the "Child")

was the only one at issue, as the older son had reached the age of majority by this time. The parties presented proof over the course of three days – May 25, May 27, and June 1, 2016 – with Mother being represented by counsel and Father proceeding *pro se*. Mother and Father both sought the designation of the Child's primary residential parent, and the only issue for the trial court's determination was what was in the best interest of the Child. Mother asserted that Father tended to place his own interests over those of the Child and that Mother was the more stable parent. Father disputed this and contended that, not only should he be named the Child's primary residential parent, but Mother's parenting time must be substantially limited because Mother and her boyfriend "abused" Father.

Throughout the course of the hearing, Father, who was proceeding *pro se*, repeatedly requested that the Child be allowed to express his preference to the court regarding where he wanted to live. In fact, Father insisted that Tennessee Code Annotated section 36-6-106 *required* the court to hear the preference of the Child, who was age thirteen at the time. The court, however, refused Father's request, stating that it preferred not to involve children in their parents' affairs. The court took the matter under advisement upon conclusion of the proof and entered written findings of fact and conclusions of law on June 16, 2016, modifying the 2008 Parenting Plan. In this order, the trial court found that it was in the Child's best interest for Mother to be designated as the Child's primary residential parent. Father timely filed this appeal.

II. Issues Presented

Father presents the following issues for review on appeal, which we have consolidated and restated:

1. Whether the trial court erred in weighing the factors of Tennessee Code Annotated section 36-6-106 to determine the best interest of the child by failing to hear testimony from fact witnesses and the Child?

2. Whether the trial court erred in refusing to apply Tennessee Code Annotated section 36-6-406 when crafting a permanent parenting plan?

Mother presents the following additional issue for review:

3. Whether Mother should be awarded attorney's fees and costs associated with this appeal?

III. STANDARD OF REVIEW

In nonjury cases, this Court's review is *de novo* upon the record of the proceedings in the trial court, with a presumption of correctness as to the trial court's factual determinations, unless the evidence preponderates against those findings. Tenn. R. App. P. 13(d); *Union Carbide Corp. v. Huddleston,* 854 S.W.2d 87, 91 (Tenn.1993). The trial court's conclusions of law, however, are afforded no such presumption. *Campbell v. Florida Steel,* 919 S.W.2d 26, 35 (Tenn. 1996).

IV. DISCUSSION

When a court considers a petition to modify a residential parenting schedule, the court must first determine whether a material change of circumstances has occurred. Tenn. Code Ann. § 36-6-101(a)(1)(C). If that change is established, the trial court then "proceeds to determine whether modification of the schedule is in the best interest of the child, utilizing the factors at § 36-6-106(a) and, where applicable, § 36-6-406." *Wheeler v. Wheeler*, M2015-00377-COA-R3-CV, 2016 WL 3095695, at *3 (Tenn. Ct. App. May 24, 2016) (*no perm. app. filed*). The parties in this case stipulated that there had been a material change of circumstances since the entry of the 2008 Parenting Plan as a result of the Child's current age, the considerable amount of litigation that had transpired, and their acknowledgement that the temporary week on/week off schedule under which they had been operating since 2011 was not working well for anyone involved. The trial court was therefore tasked with determining whether it was in the best interest of the Child to modify the 2008 Parenting Plan.

1. Best Interest Determination

The trial court determined that it was in the Child's best interest to modify the 2008 Parenting Plan in several ways, including changing the Child's primary residential parent from Father to Mother. Father argues that the trial court erred in weighing the "best interest factors" set forth in Tennessee Code Annotated section 36-6-106(a) and that a proper weighing of those factors should have resulted in the court leaving him as the Child's primary residential parent. Trial courts have broad discretion in fashioning child custody and visitation arrangements that best suit the unique circumstances of each case. *Parker v. Parker*, 986 S.W.2d 557, 563 (Tenn. 1999). However, that discretion is limited to some degree by the statutory directive that such determinations "shall be made on the basis of the best interest of the child." Tenn. Code. Ann. § 36-6-106(a). Additionally, Tennessee Code Annotated section 36-6-106 directs courts to consider "all relevant factors," including a non-exclusive list of fifteen factors, when determining the best interests of a child in a primary residential parent determination. Determining a child's best interest is a "fact-sensitive inquiry," and the relevancy and weight to be given each

factor depends on the unique facts of each case. *Solima v. Solima*, No. M2014-01452-COA-R3-CV, 2015 WL 4594134, at *4 (Tenn. Ct. App. July 30, 2015) (*no perm. app. filed*) (quoting *In re Marr*, 194 S.W.3d 490, 499 (Tenn. Ct. App. 2005)). To that end, the determination of what is in a child's best interest could turn on a single factor. *See In re Marr*, 194 S.W.3d at 499.

A. <u>Subpoenas of Witnesses</u>

Father alleges that the trial court erred in its best interest analysis by "not allowing Father to subpoena witnesses from the [Child's] school." Father's brief is not clear on which witnesses should have testified, who should have required them to testify, what their testimony would have been, or how it would have affected the outcome of this matter. Father does mention Greg Grabor and Eddie Street, who were apparently faculty members at the Child's school. However, it appears from the record that the subpoenas issued to these men were subpoenas *duces tecum* seeking the Child's school records. These records were filed by the school with the trial court pursuant to the requirements set forth in Tennessee Code Annotated section 49-50-1503. We can discern no error on the part of the trial court for the failure of Mr. Grabor or Mr. Street to appear at trial.

B. <u>Testimony of the Child</u>

We next turn to Father's contention that the trial court erred in refusing to allow the Child, then age thirteen, to testify regarding his preference on a custodial arrangement. Again, Tennessee Code Annotated section 36-6-106 states that when a court is determining what is in a child's best interest, a court shall consider all relevant factors, *including fifteen (15) factors that are expressly written into the statute* for a court's consideration:

> (a) In a suit for annulment, divorce, separate maintenance, or in any other proceeding requiring the court to make a custody determination regarding a minor child, the determination shall be made on the basis of the best interest of the child. . . . The court ***shall consider*** all relevant factors, ***including the following***, where applicable:
>
> (1) The strength, nature, and stability of the child's relationship with each parent, including whether one (1) parent has performed the majority of parenting responsibilities relating to the daily needs of the child;
>
> (2) Each 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. . . ;

(3) Refusal to attend a court ordered parent education seminar may be considered as a lack of good faith effort in these proceedings;

(4) The disposition of each parent to provide the child with food, clothing, medical care, education and other necessary care;

(5) The degree to which a parent has been the primary caregiver, defined as the parent who has taken the greater responsibility for performing parental responsibilities;

(6) The love, affection, and emotional ties existing between each parent and the child;

(7) The emotional needs and developmental level of the child;

(8) The moral, physical, mental and emotional fitness of each parent as it relates to their ability to parent the child. . . ;

(9) The child's interaction and interrelationships with siblings, other relatives and step-relatives, and mentors, as well as the child's involvement with the child's physical surroundings, school, or other significant activities;

(10) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment;

(11) Evidence of physical or emotional abuse to the child, to the other parent or to any other person. The court shall, where appropriate, refer any issues of abuse to juvenile court for further proceedings;

(12) 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;

(13) The reasonable preference of the child if twelve (12) years of age or older. The court may hear the preference of a younger child upon request. The preference of older children should normally be given greater weight than those of younger children;

> (14) Each parent's employment schedule, and the court may make accommodations consistent with those schedules;
>
> (15) Any other factors deemed relevant by the court.

Tenn. Code Ann. § 36-6-106 (a)(1) through (15) (emphasis added).

During the trial, after the court denied Father's request for the Child to testify, Father, pro se, made the following offer of proof:

> FATHER: Okay. I would like to make the offer of proof about [the Child's] preference. I don't – because I am not for sure if you are even allowed to talk to [the Child] outside, if you are going to be able to talk to [the Child] behind closed doors in camera, if you are going to allow it. [The Child] is wanting –
>
> COURT: (Shakes head negatively.)
>
> FATHER: No, I can't do that?
>
> COURT: No.
>
> FATHER: What about the preference where he wants to live? How do you get that in, if you can't – if he is allowed to –
>
> COURT: I can – I can leave the bench and you can put in the record what you want. I don't know how else to do that.
>
> At this point, I have not made a decision about whether I will ask [the Child] to come in and testify.
>
> Typically, it's very rare that I do that, that I get a child involved in the parents' disputes, particularly regarding custody issues, unless that is the only way I can make a decision about it, because I just don't think it's necessary to have children go through that even in chambers.
>
> And so, I – at this point, I am saying no, that I don't need to speak with him. If you want to provide for the record, a short offering of hearsay evidence, your understanding of [the Child's] wishes, I can step off the

bench and allow you to get it in the record for the purpose of the appeal, if you wish, or either party wishes to do that.

. . . .

(Whereupon, the Judge left the bench.)

. . . .

FATHER: This testimony is strictly for the record. [The Child] absolutely does not want to live with Mother full time.

MOTHER'S COUNSEL: Objection.

FATHER: [The Child] wants to live with Father.

MOTHER'S COUNSEL: Objection.

FATHER: [The Child] has a strong bond with Father. Father works out with [the Child] consistently when he is with Father. [The Child] is a teenager, into sports, wanting to spend more time with his father.

Mother has already admitted that he is into sports, and Mother – and Mother complained about [the Child's] sports in the summertime interfering with her trips to Hot Springs.

Father is willing – more than willing to take [the Child] at any time during the summer and to do his sports with schools. Father – [the Child] wants to live with Father.

MOTHER'S COUNSEL: Objection to that statement.

. . . .

FATHER: [The Child] states that he can never get any rest from his brother while at Mother's house.

MOTHER'S COUNSEL: Objection. Hearsay.

At the close of all proof in the trial, the court took the matter under advisement and told the parties that it had not decided what it would do yet with regard to revising the 2008 Parenting Plan. Regarding Father's repeated request to allow the Child to testify, the court stated the following:

> And at this point, I do not see the need – I know that I have the authority to speak with [the Child], if I wish. And in fact, some read the statute to suggest that I should consider it. But I think I shall consider it if it's applicable or if, considering all circumstances, that it's necessary to do so.
>
> This Court has always practiced avoiding having children come in and be directly involved in their parents' litigation. When I do not find that it's necessary, I do not call youngsters in. This is not the only time that I have declined to call a teenager, thirteen-year-old in this case, in to talk with me about preferences.
>
> So, I find it's unnecessary at this point and will render a decision as quickly as possible.

In its written order, the trial court opined that:

> Father requested the Court interview the parties' younger child regarding his preferences, but the Court determined that, in light of the protracted litigation involved in this case and the numerous courts in which the parties have pending litigation[1], the potential for harm to the child by involving him in this litigation is far outweighed by the probative value of the child's testimony.

Mother asserts, and we agree, that while the trial court did not expressly cite Rule 403 of the Tennessee Rules of Evidence, the analysis the court employed in excluding the Child's testimony is akin to a Rule 403 analysis. Rule 403 gives a court the discretion to exclude otherwise relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Tenn. R. Evid. 403. To that end, Mother compares the issue raised by Father in this case to the issue on appeal in *Omohunduro v. Arnsdorff*, No. E2005-00315-COA-R3-CV, 2005 WL 2372758 (Tenn. Ct. App. Sept. 27, 2005). In *Arnsdorff*, a father contended that the trial court erred in limiting the number of witnesses father was allowed to call at trial. *Id.* The father asserted that his excluded witnesses would have testified that the mother abused the child and that she was untruthful. *Id.* On appeal, we held that the trial court did not abuse its discretion in excluding Father's witnesses because the record had already established the mother's abuse and propensity to be untruthful, which would make further testimony in that regard cumulative and subject to exclusion under

[1]Issues relating to child support have been transferred to the Juvenile Court of Memphis and Shelby County, Tennessee.

Rule 403 of the Tennessee Rules of Evidence. *Id.*

This case is distinguishable from *Arnsdorff*, however, in that none of the proffered testimony, i.e., the Child's preference, fits into a category of evidence that the court has discretion to exclude under Rule 403. The Child's preference cannot be said to potentially unfairly prejudice either of the parties (Mother and Father), confuse the issues, mislead a jury, cause delay, waste time, or present cumulative evidence. The Child, and the Child alone, is the person whose preference is sought by Tennessee Code Annotated section 36-6-106 (a)(13), which specifically says that a court "*shall* consider . . . (13) [t]he reasonable preference of the child if twelve (12) years of age or older." *See* Tenn. Code Ann. § 36-6-106(a)(13) (emphasis added). On the other hand, the Tennessee General Assembly does, however, appear to recognize a court's discretion over hearing the preference of a child under the age of twelve, providing that a "court *may* hear the preference of a younger child upon request." *See* Tenn. Code Ann. § 36-6-106(a)(13) (emphasis added).

Mother also argues that the threshold paragraph section of Tennessee Code Annotated section 36-6-106 recognizes a court's authority to determine what proof to consider in a best interest analysis, providing that "the court shall consider all relevant factors, including the following [factors], *where applicable*." *See* Tenn. Code Ann. § 36-6-106 (emphasis added). According to Mother, "[w]hat is 'applicable' evidence is within the sound discretion of the trial court." While true, we cannot agree with Mother's inference that the word "applicable" simply means that a court can consider a factor if it wants to. What would be "applicable" in this case is factor (13) relating to the preference of a child age 12 or older. An example of a factor that does not appear to be "applicable" in this case is factor (3) regarding a parent's refusal to attend court ordered education seminars.

To be clear, nothing in this Opinion would prevent the trial court from hearing and considering the preference of the Child and still deciding that Mother is more suitable to be named the primary residential parent. *See Hardin v. Hardin*, 979 S.W.2d 314, 317 (Tenn. Ct. App. 1998) (rejecting "the Husband's contention that the trial court erred in awarding custody of the parties' younger son, thirteen-year-old Michael, to the Wife in light of Michael's stated preference to live with Husband. In making its custody determination, **the trial court was required to consider, among other factors, the reasonable preferences of the parties' children, inasmuch as both children were over the age of twelve years** . . . . As this court previously recognized, however, a child's stated preference 'is not binding upon the trial court but is just one of the factors to be considered by the court in making its custody determination.'" *Smith v. Smith*, No. 01A01-9511-CH-00536, 1996 WL 526921, at *4 (Tenn. Ct. App. Sept. 18, 1996) (emphasis added)). According to Mother, this aforementioned scenario is what would

have transpired in the instant case even if the court had heard the preference of the Child – making the court's refusal to consider the Child's preference harmless error. But this Court has no way of knowing what impact the Child's preference would have had on the court's best interest analysis. Here, the proffered testimony, albeit the Father's version of the Child's expected testimony, concerned the Child's desire to live with his Father rather than his Mother. The trial court made many findings of fact favorable to Father as well as Mother. Given the fact-intensive nature of a best interest analysis, it is simply impossible for this Court to know whether the exclusion of the Child's preference affected the outcome of the case.

Discretionary decisions of a trial court must take applicable facts and legal principles into account and are not immune from meaningful review on appeal. *See Gooding v. Gooding*, 477 S.W.3d 774 (Tenn. Ct. App. 2015). "An abuse of discretion occurs when a court strays beyond applicable legal standards or when it fails to properly consider the factors customarily used to guide the particular discretionary decision." *Id.* The trial court gave no reasoning for refusing to consider the Child's preference other than its desire to keep the Child out of the middle of his parents' litigation. While we certainly understand the trial court's preference to keep the Child out of the middle of his parents' dispute, the fact remains that the very nature of child custody litigation puts the children squarely in the middle of the dispute. Furthermore, Father attempted to testify as to the Child's preference and was thwarted at every turn by objections from Mother's counsel. The Child's preference was not allowed into evidence in any manner or method in this case. We must, therefore, adhere to the plain language of the statute at issue, which requires the trial court's consideration of this Child's preference, and conclude that the trial court erred in excluding proof of the Child's preference.

In the previous appeal of this case, we bemoaned having to extend this seemingly never-ending custody battle: "We are not without regret in acknowledging that this custody dispute has dragged on far too long." *Crafton v. Roberts*, No. W2015-0048-COA-R3-CV, 2015 WL 9466011 at *4 (Tenn. Ct. App. Dec. 28, 2015). We reiterate that sentiment now, nearly two years later. However, we are bound by our duty to interpret the law and enforce it as written. This matter is, therefore, remanded to the trial court.

2. <u>Tennessee Code Annotated Section 36-6-406</u>

Father also contends that the trial court erred in refusing to apply Tennessee Code Annotated section 36-6-406 to this case based on his allegations that Wife abused him. Section 406 sets forth circumstances that warrant imposing severe restrictions on a parent's visitation with their children. *See* Tenn. Code Ann. § 36-6-406. During the trial, Father and his witnesses described two specific instances from 2009 and 2010 when altercations occurred between Mother, Father, and Mother's boyfriend (who is now

deceased). The trial court heard testimony from the parties and others regarding the instances of alleged abuse and ultimately concluded: "No prior order exists nor has either party presented reliable evidence concerning the existence of abusive behavior by the other party or any person living with that party as contemplated by T.C.A. § 36-6-406; therefore, none of the § 36-6-406 restrictions or limitations are warranted in this case."

Appellate courts are not inclined to relitigate factual issues on appeal that were reasonably resolved by the trier of fact, which, in this case, was the trial judge. *See* Tenn. R. App. P. 13(d). This Court has repeatedly held that the trier of fact, "having observed the demeanor of the witnesses and heard their testimony," is far better positioned to assess a witness's credibility than appellate courts who are reading a cold record. *See In re M.J.H.,* 196 S.W.3d 731, 746 (Tenn. Ct. App. 2005). The incidents to which Father refers have been litigated throughout the various trials and proceedings in this case. After reviewing the record, we conclude that the evidence does not preponderate against the trial court's finding against Father's allegations of abuse, and accordingly we discern no error in the trial court's failure to apply Tennessee Code Annotated section 36-6-406 when fashioning a permanent parenting plan in this case.

3. <u>Attorney's Fees on Appeal</u>

Mother asserts that she is entitled to reimbursement for attorney's fees she has incurred on appeal pursuant to Tennessee Code Annotated section 36-5-103(c), which allows a court to award reasonable attorney's fees to a party who is successful in a dispute over child support and/or child custody. *See* Tenn. Code Ann. § 36-5-106(c). The determination of whether to award attorney's fees on appeal is within the sole discretion of the appellate court. *Moses v. Moses*, E2008-00257-COA-R3-CV, 2009 WL 838105, at *10 (Tenn. Ct. App. Mar. 31, 2009) (*no perm. app. filed*) (citing *Archer v. Archer*, 907 S.W.2d 412, 419 (Tenn. Ct. App. 1995)). Both litigants were partially successful on appeal. We therefore decline to award Mother attorney's fees.

IV. CONCLUSION

For the foregoing reasons, we vacate the order of the trial court and remand for further proceedings consistent with this Opinion. As we did on the first remand of this case, we note that "events and lives have not stood still while this custody dispute has been in the courts." *Gorski v. Ragains,* No. 01A01–9710–GS–00597, 1999 WL 511451, at *4 (Tenn. Ct. App. July 21, 1999). To that end, the trial court has discretion to take additional proof to evaluate the circumstances of the parties as they exist as of the date of the remand proceedings. Mother's request for attorney's fees incurred on appeal is denied. Costs of this appeal are taxed one-half to appellee, Dale (Crafton) Roberts, and one-half to appellant, James Frederick Roberts. Because James Frederick Roberts is

proceeding *in forma pauperis* in this appeal, execution may issue for costs, if necessary.

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BRANDON O. GIBSON, JUDGE