

FILED

10/04/2023

Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
May 17, 2023 Session

NATHANIEL B. CARDEN, ET AL. v. KRYSTAL L. CARDEN

Appeal from the Chancery Court for Bradley County
No. 2018-CV-63 Jerri Bryant, Chancellor

No. E2022-00721-COA-R3-CV

The father of two children learned that the mother eventually planned to relocate to Florida. The father opposed the relocation and applied for a temporary restraining order to disallow the mother from leaving the state. He further requested modification of the permanent parenting plan entered at the time of the divorce (a default judgment). In response, the mother filed a counter-petition requesting permission to relocate out-of-state. The paternal grandparents filed a petition to intervene in the action to establish visitation. The court conducted a best interest analysis to determine whether it was in the children's best interest to relocate with the mother. Concluding that it was in the children's best interest to relocate, the court entered a modified parenting plan, which provided a period of co-parenting time for the father to be supervised by the grandparents and set forth a parenting schedule reflective of the distance between the parties upon the mother's relocation. The father and the grandparents appealed. We affirm the judgment allowing the relocation. The trial court's order regarding the grandparents' visitation petition, however, is unclear. Accordingly, we vacate the modified parenting plan and remand this matter for specific findings under Tennessee Code Annotated section 36-6-307 and for a ruling whether the visitation by the grandparents will be separate from or derivative of the father's time.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court;
Affirmed in Part and Vacated in Part; Case Remanded.

JOHN W. MCCLARTY, J., delivered the opinion of the court, in which D. MICHAEL SWINEY, C.J., and KRISTI M. DAVIS, J., joined.

Randy Sellers, Cleveland, Tennessee, for the appellants, Nathaniel B. Carden, Jeffery Allen Carden, and Jackie Cathylene Carden.

David K. Calfee, Cleveland, Tennessee, for the appellee, Krystal Carden.

OPINION

I. BACKGROUND

Nathaniel Carden (“Father”) and Krystal Carden (“Mother”) were married on May 19, 2009. The two parties separated four years later, and on March 6, 2018, Mother filed for divorce. The trial court granted the divorce by default judgment on August 21, 2018, because Father never filed an answer. In the final decree of divorce the court ruled that “there has been virtually no contact between the parties ... [for] nearly five (5) years.”

Two minor children were born during the marriage. The court determined that the permanent parenting plan proposed by Mother was in the best interest of the minor children. In that plan, Mother was designated as the primary caregiver; Father was given zero days of visitation. However, the trial court granted Father co-parenting time with the children under the supervision of Solomon Family Solutions.

In July 2021, Father became aware that Mother was planning to move to Florida. On July 21, 2021, he filed for a temporary restraining order to prevent Mother from relocating out-of-state. Three months later, on October 26, 2021, the paternal grandparents (“Grandparents”) moved to intervene alleging that they were entitled to grandparent visitation. They asserted that from the time Father filed the temporary restraining order, Mother ceased to allow the children to visit them. They further claimed that they had a significant relationship with the children since the divorce. According to the Grandparents, before the motion for the temporary restraining order was filed, they watched the children, on average, three weekends per month, starting on Friday by picking the children up from school and ending Monday morning by dropping the children back off at school. Over those weekends, the Grandparents would take the children to movies, camping, four-wheeling, swimming, and various other outdoor activities. Additionally, Grandparents alleged that they served as supervisors of Father’s co-parenting time with Mother’s knowledge. On November 30, 2021, the trial court entered an agreed order allowing the Grandparents to intervene.

At the trial, Mother gave several reasons why she desired to move to Florida with the children. First, she wants to start a family with her fiancé, Nicholas Tiller, and the two have talked about having a child together. Mr. Tiller is a Florida resident. Second, her daughter wants to become an aquatic veterinarian and the University of Florida has such a program. Third, moving to Florida will improve her son’s health as he can breathe better in that state. Mother did acknowledge and stipulate that the paternal Grandparents had a bond with the children and cessation of contact or bond would cause harm to the children.

After the trial, the trial court made several rulings:

1. The Children's "attitudes changed" towards Father and Grandparents after Mother ceased visitation and "there is no good explanation as to why" their attitudes changed.
2. The Children "have been harmed by their lack of visits" with Father and Grandparents.
3. Mother "has begun to do things" to negatively impact the children's relationship "with Father and Grandparents and the court has doubts about the feasibility of preserving the relationship" of Father and Grandparents "if [Mother] ... move[s] two states away, although I do think that if parents aren't alienating their children from the other parent that parents can parent that far away through suitable co-parenting"
4. Mother has "tried to harm" the children's relationship with Father.
5. On ruling whether the relocation will enhance relocating parent's and children's quality of life, the court found that "having someone at least part-time in the home to co-parent" is a benefit. Mother will receive emotional benefit from moving to Florida because she and Mr. Tiller are on the "same page."
6. Paternal Grandparents became even more involved in the children's lives after the divorce to provide childcare for Mother and Father "enjoyed time with the children" during those visits. Both Father and parental Grandparents have "a good relationship" with the children.
7. Mother "has performed the majority of the parenting responsibilities," and she "is still capable of performing" these duties. Father "has grown into having ... a potential for performance of future parenting responsibilities."
8. The court was uncertain if Mother "would try to facilitate and encourage a close and continuing ... relationship" with Father and Grandparents.
9. Prior to the current lawsuit, "the children seemed to have love and affection and emotional ties" with Father and Grandparents.
10. The children have no significant activity ties here in Tennessee besides school.

Although describing it as "a close call," the trial court issued a ruling permitting Mother to move to Florida. The court entered a modified parenting plan in order to enhance the relationship between Father and Grandparents and children. Mother was awarded 296

days of residential time with the children; Father received 69 days. Father and Grandparents timely appealed the trial court's decision.

II. ISSUES

The issues raised by the appellants on appeal are as follows:

- I. Whether the trial court correctly applied the Grandparent Visitation Statutes.
- II. Whether the trial court abused its discretion in granting the Mother's relocation plea.

III. STANDARD OF REVIEW

Parental relocation issues are tried to the trial court sitting without a jury; therefore, we review the case *de novo* upon the record with a presumption of correctness of the findings of fact by the trial court, unless the preponderance of the evidence is otherwise. *See* Tenn. R. App. P. 13(d); *Armbrister v. Armbrister*, 414 S.W.3d 685, 692 (Tenn. 2013). Conclusions of law are reviewed *de novo* with no presumption of correctness. *Id.* In child custody matters, trial courts are given wide discretion and appellate courts will not interfere unless there is a showing of erroneous exercise of that discretion. *See Johnson v. Johnson*, 165 S.W.3d 640, 645 (Tenn. Ct. App. 2004). Also, because "custody and visitation determinations often hinge on subtle factors, including the parents' demeanor and credibility ... appellate courts are reluctant to second-guess a trial court's decisions." *Id.* Finally, the court's paramount concern in a custody case is the welfare and best interest of the minor children. *Id.*

IV. DISCUSSION

A. Grandparent Visitation

As we observed in *Rose v. Malone*, No. M2021-00569-COA-R3-CV, 2022 WL 2914644, at *4 (Tenn. Ct. App. July 25, 2022):

A dispute between a parent and a grandparent over visitation with a child presents "a conflict between the parent's constitutional right to make decisions about the care and custody of the child and the grandparent's right to visitation under Tennessee Code Annotated section 36-6-306." *Coleman v. Olson*, 551 S.W.3d 686, 697 (Tenn. 2018); *see Smallwood v. Mann*, 205 S.W.3d 358, 362-63 (Tenn. 2006). "The right of a parent to raise a child is a fundamental liberty interest protected by the Fourteenth Amendment to the United States Constitution and article I, section 8 of the Tennessee Constitution." *Id.* at 697-98 (citing *Hawk v. Hawk*, 855 S.W.2d 573, 578-79

(Tenn. 1993) (citations omitted)). It is well established that a parent’s “rights to the care and custody of their children without undue government interference is ‘among the oldest of the judicially recognized liberty interests protected by the due process clauses of the federal and state constitutions.’” *Id.* at 698 (quoting *Lovlace v. Copley*, 418 S.W.3d 1, 30 (Tenn. 2013) (citation omitted)); *see also State ex rel. Bethell v. Kilvington*, 45 S.W. 433, 435 (Tenn. 1898). Additionally, a parent has “a privacy interest that protects them from unwarranted state intervention in parental decision-making and prohibits the court from imposing its subjective notion of what is in the ‘best interests of the child.’” *Id.* (quoting *Hawk*, 855 S.W.2d at 579-80).

Nevertheless, “the state may interfere with these rights when there is a compelling state interest.” *Id.* (citing *Smallwood*, 205 S.W.3d at 362-63). Our Supreme Court has explained that “[t]he state has a role of *parens patriae* and a duty to protect minors, and the state may intervene in parental decision-making when necessary to prevent substantial harm to the child.” *Id.* (citing *In re Hamilton*, 657 S.W.2d 425, 429 (Tenn. Ct. App. 1983) (citation omitted)); *see also Hawk*, 855 S.W.2d at 581 (holding that “neither the legislature nor a court may properly intervene in parenting decisions absent significant harm to the child from those decisions”). A parent is protected from unwarranted state interference in the parenting process by this substantial harm requirement. *Id.* (citing *Hawk*, 855 S.W.2d at 580). Finally, when addressing grandparent visitation rights, this Court must perform a “three-pronged analysis.” *McGarity [v. Jerrolds]*, 429 S.W.3d [562,] 572 [Tenn. Ct. App. 2013] (quoting Marlene Eskind Moses & Jessica J. Uitto, *The Current Status of Tennessee’s Grandparent Visitation Law*, 46 Tenn. B.J., 24, 24 (Jan. 2010) (footnotes omitted)). That analysis is described as follows:

First, the grandparent seeking the court’s intervention must show that one of six situations exists pursuant to Tenn. Code Ann. § 36-6-306(a). Second, the court must determine whether there is a danger of substantial harm to the child if the child does not have visitation with the grandparent.... In conjunction with this analysis, the court must also determine if the relationship between the child and grandparent is significant based on [the] factors set out in Tenn. Code Ann. § 36-6-306(b)(2). Third, if the court finds that there is danger of substantial harm if the child does not have visitation with the grandparent, it must decide whether the visitation would be in the child’s best interest based on [eleven] factors under Tenn. Code Ann. § 36-6-307.

Id. (quoting Moses & Uitto, *supra*, at 24 (footnotes omitted)).

Rose, 2022 WL 2914644, at *4.

Tennessee Code Annotated section 36-6-306(a) lays out six circumstances where grandparents can show the custodial parent opposes visitation to the grandparents:

- (1) The father or mother of an unmarried minor child is deceased;
- (2) The child's father or mother are divorced, legally separated, or were never married to each other;
- (3) The child's father or mother has been missing for not less than six (6) months;
- (4) The court of another state has ordered grandparent visitation;
- (5) The child resided in the home of the grandparent for a period of twelve months or more and was subsequently removed from the home by the parent, parents, or custodian (this grandparent-grandchild relationship establishes a rebuttable presumption that denial of visitation may result in irreparable harm to the child); or
- (6) The child and the grandparent maintained a significant existing relationship for a period of twelve (12) months or more immediately preceding severance or severe reduction of the relationship, this relationship was severed or severely reduced by the parent, parents, or custodian for reasons other than abuse or presence of a danger of substantial harm to the child, and severance or severe reduction of this relationship is likely to occasion substantial emotional harm to the child.

See Tenn. Code Ann. § 36-6-306(a)(1-6).

In the matter before us, Grandparents argue that the trial court did not make specific findings of fact and conclusions of law as to their request for visitation. They assert that the trial court did not address their petition, ordering “that any and all matters not specifically addressed herein are hereby deemed denied and dismissed with prejudice.”

Although the trial court did not make determination or finding regarding the relevant statute, it is somewhat understandable why it did not, as Mother stipulated that “Grandparents had a bond with the minor children and that cessation of contact or [] bond would cause harm to the children.” Looking at this stipulation and Tennessee Code Annotated section 36-6-306(a)(6), the first prong to be addressed had been met without the trial court having to make a finding.

The second prong involves three circumstances that the trial court considers to determine whether there is a danger of substantial harm to the child if the child does not have visitation with a grandparent:

(A) The child had such a significant existing relationship with the grandparent that loss or severe reduction of the relationship is likely to occasion severe emotional harm to the child;

(B) The grandparent functioned as a primary caregiver such that cessation or severe reduction of the relationship could interrupt the provision of the daily needs of the child and thus occasion physical or emotional harm; or

(C) The child had a significant existing relationship with the grandparent and loss or severe reduction of the relationship presents the danger of other direct and substantial harm to the child.

See Tenn. Code Ann. § 36-6-306(b).

Just as Mother's stipulation satisfied the first prong, it also satisfies the second prong. Mother stipulated that Grandparents have a relationship with the children and cessation of that relationship would cause harm to the children, thus satisfying subsection (A) of Tennessee Code Annotated section 36-6-306(b).

The final step the trial court had to consider is the third prong of the statutory requirements—the best interest of the children. Tennessee Code Annotated section 36-6-307 lays out eleven factors for the trial court to consider:

(1) The length and quality of the prior relationship between the child and the grandparent and the role performed by the grandparent;

(2) The existing emotional ties of the child to the grandparents;

(3) The preference of the child determined to be of sufficient maturity to express a preference;

(4) The effect of hostility between the grandparent and the parent of the child manifested before the child, and the willingness of the grandparent, except in case of abuse, to encourage a close relationship between the child and the parent or parents, or guardian or guardians of the child;

(5) The good faith of the grandparent in filing the petition;

- (6) If the parents are divorced or separated, the time-sharing arrangement that exists between the parents with respect to the child;
- (7) If one (1) parent is deceased or missing, the fact that the grandparents requesting visitation are the parents of the deceased or missing person;
- (8) Any unreasonable deprivation of the grandparent's opportunity to visit with the child by the child's parents or guardian, including denying visitation of the minor child to the grandparent for a period exceeding ninety (90) days;
- (9) Whether the grandparent is seeking to maintain a significant existing relationship with the child;
- (10) Whether awarding grandparent visitation would interfere with the parent-child relationship; and
- (11) Any court finding that the child's parent or guardian is unfit.

Tenn. Code Ann. § 36-6-307.

The trial court did not specifically discuss Tennessee Code Annotated section 36-6-307 to address what is in the children's best interest, but it did consider the best interest factors found in Tennessee Code Annotated sections 36-6-106 and 36-6-108 as it considered Mother's request to relocate. There are parallel factors between section 36-6-106 and section 36-6-108 and section 36-6-307. In Tennessee Code Annotated section 36-6-108(c)(2), subsections a, d, and e mirror factors in section 36-6-307. Some of the factors in Tennessee Code Annotated section 36-6-108(c)(2) are as follows:

- (A) The nature, quality, extent of involvement, and duration of the child's relationship with the parent proposing to relocate and with the non-relocating parent, siblings, and other significant persons in the child's life;
- (D) The child's preference, if the child is 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;
- (E) Whether there is an established pattern of conduct of the relocating parent, either to promote or thwart the relationship of the child and the non-relocating parent.

And some factors in Tennessee Code Annotated section 36-6-106(a)(2) are:

(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;

(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

Upon reviewing the best interest factors in the three statutes, when the trial court considered the best interest factors in Tennessee Code Annotated sections 36-6-106 and 36-6-108, the trial court in effect considered the section 36-6-307’s best interest factors given the similarities in all the statutes. In *Thompson v. Thompson*, No. M2011-02438-COA-R3-CV, 2012 WL 5266319 (Tenn. Ct. App. Oct. 24, 2012), the court of appeals observed that the lists of factors to consider to determine best interest are “non-exclusive,” “are substantially similar” across the statutes, and “allow for consideration of any other factors the court deems relevant.” *Thompson*, 2012 WL 5266319, at *6. As noted in *Thompson*, “in most cases, the analysis and result would be the same regardless of which set of factors is applied.” *Id.* Therefore, even though the trial court did not specifically address section 36-6-307, the “substantially similar” nature of the best interest factors that were considered lends support to the affirmance of the court’s decision-making process. Upon our review, it appears that the trial court intended for Grandparents to receive court-ordered visitation with the children. However, it overlooked making findings specifically addressing the visitation petition. Accordingly, we remand this matter in order for the trial court to make specific best interest findings pursuant to the relevant statutory provision, to determine whether the visitation by Grandparents is separate from or derivative of Father’s time, and to enter a new parenting plan reflecting the necessary modifications.

B. Mother’s and Children’s Relocation

Tennessee Code Annotated section 36-6-108(c)(2) returns discretion to trial courts when deciding on whether to allow a parent to relocate with children. *See* Tenn. Code Ann. § 36-6-108(c); *Hall v. Hall*, No. M2021-00757-COA-R3-CV, 2022 WL 1642700, at *7-*8 (Tenn. Ct. App. May 24, 2022). Absent abuse of discretion, appellate courts are to leave a trial court’s parenting schedule intact. *See Eldridge*, 42 S.W.3d at 88.

The paramount question in parental relocation cases is what is in the child or children’s best interest. *See* Tenn. Code Ann. § 36-6-108; *Hall*, 2022 WL 1642700, at *10. Tennessee Code Annotated section 36-6-108(c)(2) lists several factors for trial courts to consider when determining what is in the best interest of the child:

In determining whether relocation is in the best interest of the minor child, the court shall consider the following factors:

(A) The nature, quality, extent of involvement, and duration of the child's relationship with the parent proposing to relocate and with the non-relocating parent, siblings, and other significant persons in the child's life;

(B) The age, developmental stage, needs of the child, and the likely impact the relocation will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child;

(C) The feasibility of preserving the relationship between the non-relocating parent and the child through suitable visitation arrangements, considering the logistics and financial circumstances of the parties;

(D) The child's preference, if the child is 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;

(E) Whether there is an established pattern of conduct of the relocating parent, either to promote or thwart the relationship of the child and the non-relocating parent;

(F) Whether the relocation of the child will enhance the general quality of life for both the relocating parent and the child, including, but not limited to, financial or emotional benefit or educational opportunity;

(G) The reasons of each parent for seeking or opposing the relocation; and

(H) Any other factor affecting the best interest of the child, including those enumerated in § 36-6-106(a).

See Tenn. Code Ann § 36-6-108(c)(2).

Father and Grandparents argue that the trial court abused its discretion when ruling to allow Mother to relocate. They reason that the trial court made numerous findings of fact substantially adverse to Mother.

When considering subsection (A), the trial court found that "Mom has been the primary caretaker of the Children since the party's divorce. However, Dad and Grandparents have been involved with the children's life and have a good relationship with them" Considering section 36-6-108(c)(2)(D), the court gave little weight to the twelve-year-old's preferences. As to section 36-6-108(c)(2)(F), the trial court found that Mother would receive emotional benefits from moving in with her fiancé, but there was no

evidence of any different educational opportunities between Tennessee and Florida.

The trial court then addressed the best interest factors in Tennessee Code Annotated section 36-6-106(a):

(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. In determining the willingness 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, the court shall consider the likelihood of each parent and caregiver to honor and facilitate court ordered parenting arrangements and rights, and the court shall further consider any history of either parent or any caregiver denying parenting time to either parent in violation of a court order;

* * *¹

(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

¹ The trial court found no evidence was presented concerning factor (3) regarding attendance at a parent education seminar.

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 ...;

(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.

Tenn. Code Ann. § 36-6-106(a).

The trial court made the following findings:

Both parents have "the potential for future performance of parenting responsibilities."

"Mom has taken care of all of the children's food, medical care, and education."

"[P]rior to filing the petition, the children seemed to have love and affection and emotional ties with Father and Grandparents and I think they also continue to have those with Mom."

"I find that both parents have an ability to parent. I can't find one more moral than the other as both of them are living with people outside of marriage and so that factor doesn't factor either way."

"Evidence of physical or emotional abuse, I don't find that from either side."

"When I look at each parent's employment schedule, I look at Mom has said that she will be available to take care of the children's needs and that factor I weigh in favor of Mom."

“I think under the old law I would have had no choice but to allow the children to leave, and it’s a close call in this case. However, Mom has been the primary parent. The children, at least [E.C.], is on the A-B honor roll, so at least as far as her schooling is concerned Mom seems to have taken good care of them.”

“[W]hen reviewing a discretionary decision by the trial court, ... the appellate court should presume that the [trial court’s] decision is correct and should review the evidence in the light most favorable to the decision.” *Gonsewski v. Gonsewski*, 350 S.W.3d 99, 105 (Tenn. 2011). Our review of the record reveals that the trial court applied the correct law for determining the best interest of the children in this relocation matter. The court addressed each factor listed in Tennessee Code Annotated section 36-6-108(c)(2) and Tennessee Code Annotated section 36-6-106(a), which was required to decide whether relocation is in the best interest of the children. The trial court did not abuse its discretion.

As noted above, the trial court held, “I think ... it’s a close call in this case. However, Mom has been the primary parent . . . [and] Mom seems to have taken good care of them.” Father and Grandparents admitted that Mother is a good parent, and there is no dispute that since the parents’ divorce, Mother has been the primary caregiver. The fact that Mother served as the primary caregiver weighed heavily in her favor. *See Sansom v. Sansom*, No. M2016-01111-COA-R3-CV, 2017 WL 1948690, *7 (Tenn. Ct. App. Feb. 22, 2017). This case is no different. Mother has performed all of the children’s day-in-and-day-out needs from medical to educational, and the trial court determined that the children were well cared for under her watch. This is not an illogical result when looking at the record. There is no abuse of discretion necessitating reversal on this issue.

V. CONCLUSION

For the reasons stated above, the judgment of the trial court is affirmed in part and vacated in part. We remand this matter for further proceedings as directed above. Costs of the appeal are taxed equally between the parties, one half to the appellants, Nathaniel B. Carden, Jeffery Allen Carden, and Jackie Cathylene Carden and one half to the appellee, Krystal Carden.

JOHN W. MCCLARTY, JUDGE