IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 10, 2008 Session

JESSICA STACEY v. FLOYD CLIFFORD ARCHER, JR.

Appeal from the Juvenile Court for Coffee County
No. 06J-1519 Timothy R. Brock, Judge

No. M2007-02829-COA-R3-CV - Filed August 22, 2008

Mother appeals award of joint custody on the basis that the court applied a presumption in favor of joint custody. While the trial court may have applied an erroneous presumption favoring joint custody, we conclude that use of the presumption was harmless as the evidence does not preponderate against the trial court's award of joint custody.

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

ANDY D. BENNETT, J., delivered the opinion of the court, in which RICHARD H. DINKINS, J., joined. PATRICIA J. COTTRELL, P.J., M.S., not participating.

Doug Aaron, Manchester, Tennessee, for the appellant, Jessica Stacey.

Michelle M. Benjamin, Winchester, Tennessee, for the appellee, Floyd Clifford Archer, Jr.

OPINION

Jessica Stacey ("Mother") and Floyd Clifford Archer, Jr. ("Father") are the parents of a child born in September 2006. The parties were never married, and paternity is not at issue.

On October 2, 2006, Mother filed a petition to establish a permanent parenting plan and child support. At the hearing on September 10, 2007, Father proposed that he and Mother share equally in parenting time on an every-other-week schedule. Mother proposed that she have primary custody

with standard visitation for Father.[1] Prior to hearing any testimony, the court made the following statement:

> What is your position as to why it would not be in the best interest of this child to spend a substantial amount of time with the father? I guess that is the – where I start from in these cases, particularly with young children, you know, it is going to be roughly equal time unless there is some real issues, and then we usually have, unless they live really close together, at some point in time when the child starts school, either they agree, or we have to come back. That is usually the way – and you know that is usually how I handle this.

Mother testified that she had gotten married on June 29, 2007, and lived in an apartment with her husband. She stated that Father had tried to convince her to agree to joint custody before the child was even born. Mother testified that Father provided some support for the child before any order was entered: "Sometimes, it would be money, maybe $40 one week, maybe $50 here, $50 there, but there for the longest, it was mostly just six bottles of formula [a week]." Mother testified that she had allowed Father to see the child "whenever he wanted to pretty much." She stated that, prior to the general sessions court's issuance of a temporary order in August 2007, the parties had argued about custody and visitation.

Mother testified that she was concerned about Father's recent adjustment of the child's feeding regimen: "He had called to check on her, which he normally does every day, and he had told me that he had switched her from half formula to half milk." Mother felt that Father should have discussed this change with her beforehand. She testified that Father had gone to the pediatrician with her for some of the child's appointments.

Asked why she proposed that she be the primary residential parent, Mother stated that she had carried the child for nine months and had "taken care of her since day one." She further stated: "I feel like, you know, I'm her mother, and she needs to be with her mother, but I also understand and realize that she needs to be with her father as well."

Mother stated that she had recently stopped working in order to stay at home and take care of the child. She regretted that she previously had to work nights in order to provide for the child.

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[1] At that time, the parties had an informal arrangement whereby Father had the child every Tuesday, Wednesday, and Thursday from 2:00 p.m until 8:00 p.m. and alternating weekends. According to the attorneys' statements, this temporary arrangement was imposed by the general sessions court in July 2007 in conjunction with Mother's request for an order of protection, which was denied. The parties agreed at the hearing in September 2007 that the schedule imposed by the general sessions court was a temporary measure intended to apply only until the juvenile court's custody determination.

Mother testified that, when she was working, she took the child to her grandmother's house in the early afternoon before she went to work, and then her mother would pick the child up later in the afternoon.

On cross-examination, Mother testified that Father was a dedicated parent and brought the child back to her clean and healthy. She admitted that Father played an active role in the child's life. Mother acknowledged that she told Father on more than one occasion that he could not have time with the child because Mother's family wanted time with the child. She further testified that Father did not get to see the child the past Christmas Day but had seen her on Christmas Eve and Thanksgiving. Mother agreed that the child was very attached to Father.

During redirect examination, the following exchange occurred:

> Q. What do you want to see come out of this?
> A. I just – all I want, I'm not interested in my interest or his interest. All I want is what is in the best interest of our child. That's all I have ever wanted.
> Q. What do you think would be in her best interest?
> A. I feel that, you know, the times – the parenting times should be as equal as possible, and I feel like that – that's just basically it, what is just best for her.

Father testified about several instances in which Mother had been dishonest with him in order to prevent him from seeing the child. On one occasion, Father had agreed to allow Mother to have the child because Mother told him that she had the day off. Later that day, Father discovered that Mother had worked and left the child with her grandmother.

Father estimated that he spent between $1,500 to $2,000 on the child during her first year of life in addition to the support that he had been paying to Mother. He stated that he wanted to have equal parenting time with the child.

Father testified that he lived about three miles from his parents and had other family members who lived close by. He had to be at work at 5:00 in the morning. His mother and other family members were willing to take care of the child when he worked.

As to the issue of changing the child's formula, Father testified that he talked to the child's doctor about it and the doctor told him it was fine to mix whole milk with the formula since they needed to work toward switching her from formula to milk.

In making its ruling from the bench, the court stated:

> I have heard nothing from either of them to indicate to me that they are not fit as a parent. They have been real candid. They have each admitted that the other person takes care of the child, that the child is attached to each of them, that the child wants to be with each of them, that the child is happy where she is, whether it's with her

> mother or her father. They both agree to that. . . . You are fortunate that you live this close together, or it wouldn't be this easy.[2] All right, folks, there is no reason for me to do anything other than divide the time as equally as I can. That's where we start from. You are each parents, and that's just the way it is. That's the way it is when you are both equally suited to be parents, but you are not married and live separate.

The court proceeded to order that the parents have equal parenting time on a three day/four day alternating schedule. Mother was designated the primary residential parent.

In its order entered on December 10, 2007, the court included the following finding:

> This Court began this hearing as it begins all custody hearing: With the proposition that the parties should have equal parenting times with the minor child. This issue of custody in this case is very easy to decide. Both parties have shown an ability to care for the minor child and the parties appear to get along with one another without major disagreements. Further the father lives in Belvidere Tennessee, while the mother lives in Manchester Tennessee. This Court holds that distance of travel between the two households is not a factor in this case. Therefore the parties should both have an equal amount of parenting time with the minor child.

On appeal, Mother argues that the trial court erred in applying a presumption in favor of joint custody and in failing to adequately explain the application of the various factors listed in Tenn. Code Ann. § 36-6-106 to the facts of this case.

Analysis

Trial courts necessarily have broad discretion to make decisions regarding parenting arrangements to suit the unique circumstances of each case. *See Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001); *Chaffin v. Ellis*, 211 S.W.3d 264, 286 (Tenn. Ct. App. 2006). Decisions regarding parenting schedules "often hinge on subtle factors, including the parents' demeanor and credibility" during the proceedings. *Smith v. Smith*, No. M2005-01688-COA-R3-CV, 2008 WL 1127855, *5 (Tenn. Ct. App. Apr. 9, 2008) (citing *Adelsperger v. Adelsperger*, 970 S.W.2d 482, 485 (Tenn. Ct. App. 1997) (no Tenn. R. App. P. 11 application filed)). Accordingly, "appellate courts are loathe to second-guess a trial court's conclusion." *Chaffin*, 211 S.W.3d at 286. Though trial courts have broad discretion, their determinations regarding parenting schedules must be based on the proof and applicable principles of law. *Id.* at 286; *D v. K*, 917 S.W.2d 682, 685 (Tenn. Ct. App. 1995). We review the trial court's findings of fact de novo upon the record with a presumption of correctness unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); *Marlow v. Parkinson*, 236 S.W.3d 744, 748 (Tenn. Ct. App. 2007) (perm. app. denied Sept. 17, 2007). We review conclusions of law de novo with no presumption of correctness. *D v. K*, 917 S.W.2d at 685.

[2]Mother and Father lived in adjoining counties.

Mother argues that the trial court erred in awarding joint custody because the court applied a presumption in favor of joint custody. It does not necessarily appear from the trial court's ruling and order that the court began with a presumption in favor of joint custody. The trial court may have meant that the parties begin the case on equal footing. A presumption of joint custody does not exist under Tennessee law. Tenn. Code Ann. § 36-6-101(a)(2)(A)(i) provides, in pertinent part:

> Except as provided in this subdivision (a)(2)(A), neither a preference nor a presumption for or against joint legal custody, joint physical custody or sole custody is established, but the court shall have the widest discretion to order a custody arrangement that is in the best interest of the child. Unless the court finds by clear and convincing evidence to the contrary, there is a presumption that joint custody is in the best interest of a minor child where the parents have agreed to joint custody or so agree in open court at a hearing for the purpose of determining the custody of the minor child.

Thus, there is a presumption in favor of joint custody only when the parents agree to such an arrangement. *See Smithson v. Eatherly*, No. 01A01-9806-CV-00314, 1999 WL 548586, *4 (Tenn. Ct. App. July 29, 1999).

Even if the trial court was operating under an erroneous understanding of the law relative to joint custody, it does not mean that the evidence preponderates against the trial court's decision to award joint custody. In determining residential schedules, the paramount consideration is the best interest of the child. *Chaffin*, 211 S.W.3d at 286. Tenn. Code Ann. § 36-6-106(a) sets out a list of factors to be considered by a trial court in determining the best interest of the child.[3] The statutory factors are:

> (1) The love, affection and emotional ties existing between the parents or caregivers and the child;
> (2) The disposition of the parents or caregivers to provide the child with food, clothing, medical care, education and other necessary care and the degree to which a parent or caregiver has been the primary caregiver;
> (3) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment . . .
> (4) The stability of the family unit of the parents or caregivers;
> (5) The mental and physical health of the parents or caregivers;
> (6) The home, school and community record of the child;
> (7) The reasonable preference of the child . . .

[3]Because the parties in this case were never married, Tenn. Code Ann. § 36-6-106(a) is the applicable provision, rather than Tenn. Code Ann. § 36-6-404(b). *Dillard v. Dillard*, No. M2007-00215-COA-R3-CV, 2008 WL 2229523, *4 n.4 (Tenn. Ct. App. May 29, 2008) (no Tenn. R. App. P. 11 application filed). The two provisions contain essentially the same factors for determining comparative fitness and the best interest of the child. *Id.* at *6 n.5.

> (8) Evidence of physical or emotional abuse to the child, to the other parent, or to any other person . . .
> (9) The character and behavior of any other person who resides in or frequents the home of a parent or caregiver and the person's interactions with the child; and
> (10) Each parent 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.

Tenn. Code Ann. § 36-6-106(a).

A trial court is required by Tenn. Code Ann. § 36-6-106(a) to consider all of the applicable statutory factors. Contrary to Mother's second argument, however, a trial court is not required to list each factor in its decision and explain its effect on the overall determination. *Dillard*, 2008 WL 2229523 at *5; *Woods v. Woods*, M2006-01000-COA-R3-CV, 2007 WL 2198110, *2 (Tenn. Ct. App. July 26, 2007) (no Tenn. R. App. P. 11 application filed); *In re D.A.J.*, No. M2004-02421-COA-R3-JV, 2005 WL 3369189, *6 (Tenn. Ct. App. Dec. 9, 2005). When the trial court fails to make specific factual findings, however, a reviewing court must make its own determination as to where the preponderance of the evidence lies since there are no findings to which the presumption of correctness can attach. *Dillard*, 2008 WL 2229523, at *5; *Curtis v. Hill*, 215 S.W.3d 836, 839 (Tenn. Ct. App. 2006).

In its order and ruling from the bench, the trial court made specific findings with regard to factors (1), (2), and (10). In particular, the court found that there were strong emotional ties between both parents and the child, that both parents were able to take care of the child's physical needs, and that the parents "appear to get along with one another without major disagreements." The evidence does not preponderate against these findings. Factor (2) also includes "the degree to which a parent or caregiver has been the primary caregiver." Tenn. Code Ann. § 36-6-106(a)(2). Factor (3) highlights the importance of stability and continuity in the child's life. Tenn. Code Ann. § 36-6-106(a)(3). In arguing that she should have more residential time with the child than Father, Mother relies primarily on the factors of stability and continuity since she had primary custody of the child during the first year and quit her job to allow her to stay at home with the child. As to factor (10), Father put on evidence that Mother had at times kept him from seeing the child for inappropriate reasons. There was no evidence presented by either side to indicate that either parent had an unstable family unit; both parents received support from members of their extended family. Thus, factor (4) does not militate in favor of either party. No evidence was presented as to factors (5) and (6), and factor (7) is not applicable in light of the child's young age. Factor (8) also is not applicable as there were no allegations of abuse. As to factor (9), there were no allegations that other persons in either household presented any threat to the child.

In assigning error to the trial court's award of joint custody, Mother cites caselaw indicating that "joint custody arrangements are generally disfavored by the courts of this state due to the

realization that such rarely serves the best interest of the child." *Darvarmanesh v. Gharacholou*, M2004-00262-COA-R3-CV, 2005 WL 1684050, *7 (Tenn. Ct. App. July 19, 2005). Mother points out that, "as a practical matter, a joint custody arrangement requires a level of cooperation that not all parents can provide." *Swett v. Swett*, M1998-00961-COA-R3-CV, 2002 WL 1389614, *6 (Tenn. Ct. App. June 27, 2002). In this case, however, the trial court specifically found that Mother and Father "appear to get along with one another without major disagreements." We cannot say that the evidence preponderates against this finding.

Finally, Mother herself acknowledged at the hearing that equal parenting time or joint custody was a desirable outcome in this case. She stated that "[t]he parenting time should be as equal as possible, and I feel like that – that's just basically it, what is just best for her." By making this statement, Mother essentially agreed that joint custody was in the child's best interest.

A trial court's decision regarding parenting time will be set aside only when it "falls outside the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence in the record." *Eldridge*, 42 S.W.3d at 88. Having applied the factors in Tenn. Code Ann. § 36-6-106(a) to the evidence in this case, we have concluded that the trial court's decision to award joint custody falls within the range of reasonable results.

The decision of the trial court is affirmed. Costs of appeal are assessed against the appellant, for which execution may issue if necessary.

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ANDY D. BENNETT, JUDGE