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Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 28, 2023 Session

DARRYL LEE POGUE v. JESSICA SIMMS

Appeal from the Juvenile Court for Lincoln County
No. 21-JC-92 N. Andy Myrick, Judge

No. M2022-01095-COA-R3-JV

This is an appeal from a custody order. In its order, the trial court named Mother the primary residential parent of the parties' minor child and awarded Father less than equal parenting time. Father appeals, arguing that the trial court failed to maximize his parenting time in accordance with Tennessee Code Annotated section 36-6-106(a). Because we find no indication from the record that the trial court's disposition was made in consideration of the legislative intent of section 36-6-106(a)'s requirement that courts are to fashion custody arrangements to maximize a parent's time with their child, we vacate the trial court's order and remand for reconsideration of Father's parenting time.

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

ARNOLD B. GOLDIN, J., delivered the opinion of the Court, in which D. MICHAEL SWINEY, C.J., and J. STEVEN STAFFORD, P.J., W.S., joined.

Donald Capparella and Jacob A. Vanzin, Nashville, Tennessee, for the appellant, Darryl Lee Pogue.

Glen C. Moore, Chattanooga, Tennessee, for the appellee, Jessica Simms.

OPINION

BACKGROUND AND PROCEDURAL HISTORY¹

Darryl Pogue ("Father") and Jessica Simms ("Mother") share one minor child, B.

¹ As we will discuss in more detail later in this Opinion, there were no findings of fact or conclusions of law in the trial court's final order. Accordingly, our recitation of the pertinent facts is gleaned from the parties' appellate briefs and the pleadings and testimony contained in the record.

S. (“Child”), who was born in June 2021.² The parties were never married and never in a “serious relationship” with one another, nor was Father aware that he was the father of Child at the time of Child’s birth.

Subsequent to Child’s birth, Father sued Mother to establish paternity and for custody, or, in the alternative, joint custody. Following a DNA test, Father was determined to be Child’s biological father. By order entered November 5, 2021, the trial court memorialized a temporary parenting schedule that had been mediated by the parties.³ Father subsequently asked Mother for increased visitation, but she declined.

Trial in the case began April 1, 2022. Providing testimony was Child’s daycare provider, Father, Father’s new wife whom he married during the pendency of the proceedings, and Mother. Notably, there was little, if any, disagreement among the witnesses during their testimony. An overview of the testimony revealed that Mother and Father were both excellent parents who provided well for Child. Testimony also reflected that the parties agreed on most things concerning the care of Child and the other’s parenting abilities. Moreover, both acted respectfully towards one another.

The trial court thereafter entered an order, with no findings of fact or conclusions of law, with an attached parenting plan that awarded Mother 229 days of parenting time and Father 136 days of parenting time. This appeal followed.

ISSUES PRESENTED

Father raises three issues on appeal, restated as follows:

1. Whether the trial court erred by failing to make findings of fact and conclusions of law in its order.
2. Whether the trial court erred in failing to maximize Father’s participation in Child’s life by not awarding him equal parenting time.
3. Whether Father is entitled to an award of attorney’s fees on appeal.

Mother raises a single additional issue on appeal, restated as follows:

1. Whether Mother is entitled to an award of attorney’s fees on appeal.

² It is the policy of this Court, in certain cases, to abbreviate the names of minor children.

³ This order set forth visitation concerning Thanksgiving and Christmas, but it failed to specify a regular visitation schedule. Rather, the regular visitation schedule was not specified until after testimony was offered at the final hearing.

DISCUSSION

At the outset of our analysis, we are compelled to address what we conclude are significant deficiencies in the trial court's order. Specifically, we are unable to discern the reasoning for the trial court's decision due to its failure to set forth any findings of fact or conclusions of law in its order as required by the rules of civil procedure.

"In bench trials, trial courts must make findings of fact and conclusions of law to support their rulings." *Hardin v. Hardin*, No. W2012-00273-COA-R3-CV, 2012 WL 6727533, at * 3 (Tenn. Ct. App. Dec. 27, 2012). Rule 52.01 of the Tennessee Rules of Civil Procedure provides, in pertinent part, that "[i]n all actions tried upon the facts without a jury, the court shall find the facts specially and shall state separately its conclusions of law and direct the entry of the appropriate judgment."⁴ Tenn. R. Civ. P. 52.01. "Simply stating the trial court's decision, without more, does not fulfill this mandate." *Barnes v. Barnes*, No. M2011-01824-COA-R3-CV, 2012 WL 5266382, at *8 (Tenn. Ct. App. Oct. 24, 2012). This Court has previously held that "the General Assembly's decision to require findings of fact and conclusions of law is 'not a mere technicality.'" *Hardin*, 2012 WL 6727533, at *3 (quoting *In re K.H.*, No. W2008-01144-COA-R3-PT, 2009 WL 1362314, at *8 (Tenn. Ct. App. May 15, 2009)). "Findings and conclusions serve the important purposes of facilitating appellate review and promoting the just and speedy resolution of appeals." *In re Noah J.*, No. W2014-01778-COA-R3-JV, 2015 WL 1332665, at *4 (Tenn. Ct. App. Mar. 23, 2015) (citing *Hardin*, 2012 WL 6727533, at *3). In the absence of the necessary findings and conclusions, "this [C]ourt is left to wonder on what basis the court reached its ultimate decision." *In re K.H.*, 2009 WL 1362314, at *8.

On appeal, Father's primary issue is that the trial court erred in not maximizing his parenting time in accordance with Tennessee Code Annotated section 36-6-106(a), which provides, in pertinent part:

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. **In taking into account the child's best interest, the court**

⁴ The fact that this case is under the jurisdiction of the juvenile court is without consequence. Rule 1(b) of the Rules of Juvenile Procedure provides that:

The Tennessee Rules of Civil Procedure shall govern all cases involving the termination of parental rights, paternity cases, guardianship and mental health commitment cases involving children, and child **custody** proceedings under T.C.A. §§ 36-6-101, et seq., 36-6-201, et seq., and 37-1-104(a)(2) and (f)[.]

(emphasis added).

shall order a custody arrangement that permits both parents to enjoy the maximum participation possible in the life of the child consistent with the factors set out in this subsection (a), the location of the residences of the parents, the child's need for stability and all other relevant factors.

(emphasis added). This Court has previously interpreted this provision as requiring Tennessee courts to “fashion custody arrangements so as to give each parent the maximum amount of time possible with the child, in accordance with the child's best interests.” *Rountree v. Rountree*, 369 S.W.3d 122, 129 (Tenn. Ct. App. 2012).

Here, both Mother and Father agree that the other is an excellent parent to Child, that they each play an active role in Child's life, and that they co-parent effectively. Having discerned the parties' agreement on these pertinent facts, we conclude that the central issue here revolves around the manner in which the court awarded parenting time in light of the statutory language contained in section 36-6-106(a). Upon reviewing the record in conjunction with the trial court's order, it is difficult for this Court to ascertain the reasoning behind the trial court's award of parenting time to the parties, specifically its failure to maximize Father's parenting time with Child. Indeed, as noted earlier, the trial court's order contains no findings of fact or conclusions of law regarding its decision to award Mother 229 days and Father only 136 days of parenting time, and we find no indication in this record that the trial court's disposition was made in consideration of the legislative intent of section 36-6-106(a)'s requirement that courts are to fashion custody arrangements to maximize a parent's time with their child in accordance with the child's best interests. As we noted, it is apparent from the record that Mother *and* Father both play a positive and important role in Child's life and that they are able to effectively co-parent. Moreover, the record reflects that Child is attached to both parents and also reveals no concerns regarding either party's environment or fitness as it pertains to Child. In light of our analysis of the record and the pertinent order, we vacate the trial court's order as it pertains to the award of parenting time and remand this matter for the trial court to reconsider its determination in accordance with the mandatory language contained in section 36-6-106(a) and to set forth its reasoning in written findings of fact and conclusions of law.

Attorney's Fees

Mother and Father each asked that this Court award them attorney's fees on appeal pursuant to Tennessee Code Annotated section 36-5-103(c), which provides:

A prevailing party may recover reasonable attorney's fees, which may be fixed and allowed in the court's discretion, from the nonprevailing party in any criminal or civil contempt action or other proceeding to enforce, alter, change, or modify any decree of alimony, child support, or provision of a permanent parenting plan order, or in any suit or action concerning the

adjudication of the custody or change of custody of any children, both upon the original divorce hearing and at any subsequent hearing.

Tenn. Code Ann. § 36-5-103(c).

“Whether to award attorney’s fees on appeal is a matter within the sole discretion of this Court.” *Luplow v. Luplow*, 450 S.W.3d 105, 119 (Tenn. Ct. App. 2014). In determining whether to award a party attorney’s fees on appeal, “we consider the ability of the requesting party to pay the accrued fees, the requesting party’s success in the appeal, whether the requesting party sought the appeal in good faith, and any other equitable factor that should be considered.” *Ellis v. Ellis*, 621 S.W.3d 700, 709 (Tenn. Ct. App. 2019). Exercising our discretion, and in light of our decision herein, we decline to award either party their attorney’s fees on appeal.

CONCLUSION

Based on the foregoing, we vacate the trial court’s order and remand the case such that the trial court shall reconsider its disposition of the parties’ parenting time in accordance with this Opinion.

s/ Arnold B. Goldin
ARNOLD B. GOLDIN, JUDGE