IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 13, 2016 Session

ASHLI FALLON BRYAN v. BILLIE DEE MILLER

Appeal from the Circuit Court for Montgomery County
No. MCCCCVFN122288 Ross H. Hicks, Judge

No. M2015-00550-COA-R3-CV- Filed August 8, 2016

At issue in this case is the custody of a minor child. Although the child had previously been in the physical custody of his maternal grandmother pursuant to a temporary order, the child's mother regained custody after the grandmother failed to show that the child would be subjected to substantial harm if returned to the mother. We affirm.

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

ARNOLD B. GOLDIN, J., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR., P.J., M.S., and RICHARD H. DINKINS, J., joined.

Steven C. Girsky, Clarksville, Tennessee, for the appellant, Billie Dee Miller.

H. Reid Polland, III, Clarksville, Tennessee, for the appellee, Ashli Fallon Bryan.

OPINION

Background and Procedural History

The minor child at issue, W.L.B.,[1] was born to parents Ashli Fallon Bryan ("Mother") and Scott Bryan ("Father") in January 2005. Mother and Father separated approximately one year after W.L.B.'s birth, and on May 2, 2007, they were divorced pursuant to a judgment

[1] In cases involving minor children, it is this Court's policy to redact names sufficient to protect the children's identities.

from the Sevier County Circuit Court. Under the incorporated permanent parenting plan, Mother was designated as the primary residential parent for W.L.B.

After the divorce, post-divorce litigation soon ensued over a variety of issues. Among the parties' disputes was Father's allegation that Mother relocated with W.L.B. to Clarksville, Tennessee without his consent. On October 26, 2010, Father and W.L.B.'s maternal grandmother, Billie Dee Miller ("Grandmother"), appeared before the Sevier County Circuit Court in chambers on an *ore tenus* motion for emergency temporary custody. Testimony was offered that Mother was homeless and suffering from mental health issues, and the court subsequently entered an "Emergency Temporary Custody Order" providing that temporary custody of W.L.B. be placed with Father.[2]

Shortly after the entry of the emergency temporary custody order, on November 8, 2010, the parties announced an interim agreement that changed W.L.B.'s placement. This agreement was eventually memorialized in an "Interim Agreed Order" entered on December 16, 2011.[3] Under the terms of the "Interim Agreed Order," the parties agreed that W.L.B. would physically reside with Grandmother. Although Mother was allowed "as much visitation time with the child as can be arranged," the "Interim Agreed Order" provided that her visits would be supervised. Moreover, it was contemplated that Mother would "enter into or maintain an appropriate course of mental health treatment and or counseling."

Another agreed order was eventually entered on August 23, 2012. Under the August 23 order, which was denominated as an "Agreed Temporary Order," Grandmother was given "full physical custody" of the child. The order provided that legal custody "shall be split between the parties." Of note, the order recited that Mother did "not waive any of her parental rights." Moreover, the order provided that the case would be transferred to the Montgomery County Circuit Court for all future purposes.

Following the transfer of the case, Mother filed a motion with the Montgomery County Circuit Court seeking to regain custody of the minor child. The motion alleged that

[2] As we have indicated, the record indicates that the emergency temporary custody order was entered following the presentation of an *ore tenus* motion in chambers. Grandmother did, however, later file a formal motion to intervene in the case, as well as a formal petition for emergency temporary custody. Based on the time stamps appearing in the record, both of these court papers were filed at the same time that the emergency temporary custody order was entered. In Grandmother's petition for emergency temporary custody, she acknowledged that Father had a pending petition seeking custody of the child and stated that she was "seeking to assist him by taking temporary custody until such time as [he] is prepared and able to do so." She stated that she would "gladly surrender the child to the father when the father is ready to take the child."

[3] The "Interim Agreed Order" was entered *nunc pro tunc* to November 8, 2010.

Mother was able to "take care of and provide for the minor child." On May 28, 2013, the Circuit Court entered an order dismissing Mother's motion. The order stated, however, that "Complainant may revisit the issue by filing a Petition in the usual fashion." A few months later, on September 11, 2013, Mother filed a "Petition for Custody." Therein, Mother prayed that custody of W.L.B. be restored to her. As support for her request, Mother asserted that she was employed and had appropriate housing. Moreover, she claimed that she had "undergone the appropriate mental health treatment and counseling." Her petition further alleged that Grandmother was "controlling" and "vindictive" with regard to allowing Mother's access to W.L.B. On September 27, 2013, Grandmother filed a response to Mother's petition wherein she expressed fear that W.L.B. would be left dependent and neglected if removed from her custody. Grandmother's response also asserted that Mother had waived her superior parental rights.

On August 19, 2014, Mother filed a motion for partial judgment on the pleadings. Therein, Mother requested that the Circuit Court make a pre-trial determination regarding the applicable legal standard that would govern the case. Mother argued that she should be accorded a presumption of superior parental rights against the claim for custody made by Grandmother. On September 10, 2014, Grandmother filed a response to Mother's motion for partial judgment on the pleadings. Therein, Grandmother argued that Mother's position was incorrect. Grandmother contended that Mother had "clearly waived her superior parental rights" and therefore stated that the custody order from August 2013 could not be modified unless Mother showed a material change in circumstance. On September 17, 2014, the Circuit Court entered an order granting Mother's motion for partial judgment on the pleadings. Upon concluding that Mother was afforded a presumption of superior parental rights against the claim of Grandmother, the Circuit Court stated that Grandmother had the burden of proving "by clear and convincing evidence that returning the minor child to the Mother will expose the child to substantial harm."

The evidentiary hearing in the case took place on December 30, 2014. The proof consisted of both oral testimony and documentary exhibits. Although Father was present at the hearing, the transcript reflects that he did not engage in any meaningful participation. He did not testify or introduce any evidence, nor did he cross-examine any witnesses.

The first witness to testify at the hearing was Matthew Carfi. Although Mr. Carfi was married to Mother at the time of trial, he testified that their marriage had become a hostile one. He stated that he had started seeing a prior ex-girlfriend within a few weeks of his marriage to Mother. According to Mr. Carfi, his marriage to Mother was influenced, in part, by Mother's desire to appear stable. In fact, he stated that he and Mother had engaged in pre-marriage discussions concerning how their marriage would help Mother regain custody of W.L.B. His testimony generally covered the animosity that had arisen between him and

Mother. Moreover, his testimony revealed that shortly after his relationship with Mother had begun, she had become pregnant with their son, L.

Mother's testimony recounted her residential history, work history, and prior struggles with her mental health. Although Mother's testimony touched briefly on her divorce from Father in 2007, most of her testimony focused on events taking place from 2009 onward. In 2009, Mother had an "episode" that resulted in her suddenly flying to Miami with W.L.B. Regarding this incident, Mother testified that she spent nearly all of her funds to purchase the plane tickets to Miami. She indicated that her sister flew to Miami to bring her back to Tennessee and stated that she was hospitalized almost immediately upon her return home. According to Mother's testimony, her living arrangements were in flux following her release from the hospital, particularly from late 2010 to 2011. During that time, she lived with various friends and in various houses.

Mother stated that W.L.B. stayed with Grandmother during that time, except for a brief period when Mother took him to live with her at Father's aunt's house. After Mother was kicked out of the aunt's home, however, W.L.B. was returned to Grandmother. Although Mother stayed at a Pathfinders facility for a few weeks shortly after she left Father's aunt's house, she stated that she went to Grandmother's house in April 2012. According to her testimony, she lived with Grandmother and W.L.B. for approximately a year, until the spring of 2013. This arrangement eventually soured when the parties engaged in discussions regarding W.L.B.'s placement. As Mother explained:

> [W]e had discussed about me getting [W.L.B.] back. She told me that she would give custody of [W.L.B.] back to me when I was ready.
>
> I had a conversation with her in her basement and told her that I was ready to get him back. That I had hired an attorney. And she told me if I hired an attorney, that I needed to find somewhere else to live.

Mother testified that she moved in with her current husband, Mr. Carfi, in April 2013 after she left Grandmother's house. In July 2013, after her relationship with Mr. Carfi had deteriorated, Mother stated that she moved into an apartment on Dupuis Drive.

In December 2013, shortly after her son with Mr. Carfi was born, Mother left the apartment on Dupuis Drive to live with her sister. Concerning her motivations for the move, Mother testified that living with her sister allowed her to be closer to W.L.B. and to save money. Apparently, even Grandmother approved of the move. Nevertheless, Mother

continued to pay rent on the Dupuis Drive apartment through May 2014.[4] As she explained at trial: "I was hesitant due to the past history with my mother and my sister, and I kept my apartment as a safety net. In case something were to happen and things went wrong with my sister, I would not be left homeless with my child." Mother stated that she eventually left her sister's home in May 2014 after she and her sister got into an argument. Although Mother stayed with a friend for a few weeks immediately thereafter, her testimony indicated that she moved into another apartment located on Willow Heights in June 2014. Mother testified that she was still living in the Willow Heights apartment at the time of the December 30, 2014 hearing.

In addition to testifying about her residential history, Mother testified in detail about the prior jobs she had. Her testimony also covered certain gaps in employment that she had experienced. According to her testimony, she worked a variety of jobs from 2010 through 2012. These jobs included stints in restaurants, health care facilities, and a tobacco store. Mother stated that she also delivered papers for a short time and had cleaned private homes on the side.

In November 2012, Mother began work at Belk. This job only lasted a few months, however, as Mother was fired for theft. In explaining her firing, Mother stated as follows during trial: "I got mixed up with the wrong people and did some things that I should not have. And I did false transactions." Mother received pretrial diversion for the incident and was ordered to pay $700.00 in restitution. Mother testified that she had already paid the ordered restitution in full.

Mother worked a few other jobs immediately after Belk, and in June 2013, Mother began work at At-Home Health Care. Mother testified that she worked at At-Home Health until September 2014. Mother's testimony also revealed that she worked another job concurrent with her employment with At-Home Health from June 2013 to December 2013. According to Mother, she left her employment with At-Home Health due to safety concerns. She claimed that some of the homes she visited as part of her employment harbored people that were selling drugs. As she explained:

> I had written -- well, I had orally spoken with both of my supervisors about drug issues in two of the homes. Well, this is actually the fourth time that this had happened with this company.

[4] The transcript of Mother's testimony specifically states that the rent was paid through May 2013, but this appears to have been an inadvertent misstatement or transcription error. The logical progression of Mother's testimony should put the date in May 2014, as Mother had not even been living in the Dupuis Drive apartment until July 2013.

> The first time that this happened with drugs at home, I was told that if I didn't go back to this home, that I would have a write-up in my file and I could los[e] my job. So when I came to them with the two other cases that I had that were selling drugs in their home, I was told that they were gonna try to find someone to replace my cases, and that went on for -- they never found anyone. So they never looked into it. Nothing ever happened. I felt unsafe going to work.
>
> At that time, I went back to work. I wrote out a written statement explaining to them what was going on in the home, and no one was still concerned about my safety. I called the police department. And at that point, I know from the first incidents that I had if I didn't go back to work, I was gonna lose my job anyway. So instead of risking my safety, I did not go back.

In the course of Mother's testimony, Mother was asked if she had, in fact, been fired from At-Home Health for "clocking in and out of the system" but not actually going to work. In asking Mother about this, Grandmother's counsel introduced a separation notice that had been filed with the State's Department of Labor and Workforce Development. That notice alleged that Mother was being terminated as a result of "clocking in at member's home when she wasn't there." Also submitted into evidence, however, was a later decision by the Department of Labor and Workforce Development approving a claim for unemployment benefits that Mother made after she left At-Home Health while looking for other work. In relevant part, the agency decision stated as follows:

> [Mother] was discharged from most recent work. [At-Home Health] discharged the claimant when she missed a shift without notification. [Mother] admitted to her actions, alleging that the worksite was unsafe. The safety allegation was not disputed. [At-Home Health] has not provided sufficient evidence to prove [Mother's] actions constitute work-related misconduct. Therefore, under Tennessee Code Annotated 50-7-303, benefits are approved[.]

Following her employment with At-Home Health, Mother obtained a job cleaning rooms at a Super 8 Motel. She testified that she was still working at Super 8 at the time of trial and stated that she had up to $1,500 in savings in the bank. Moreover, she stated that she had another job lined up that was scheduled to start the Monday following trial. She testified that this job was a "reception position, [with] training for management" and would be for forty hours per week. When asked if she would also keep her job at Super 8, Mother responded as follows: "I have a very good relationship with my boss there so if she needs me, I will do what I can."

Mother also testified about her medical history, particularly as it related to her mental health and general stability. Although some records reflected that she had previously been diagnosed as bipolar, Mother claimed that her current diagnosis was "major depressive disorder." Mother testified that she was not taking any medication for that condition and asserted that no doctor was recommending that she do so. With respect to her decision to suddenly fly to Miami in 2009, Mother's medical records reflected that "she was . . . hearing God and he was telling her to organi[z]e her life." Moreover, her records reflected that "she was seeing faces in the window." Mother admitted that this was accurate at trial and attributed the incident to being on a high dosage of Adderall. Mother also attributed another hospitalization that occurred in September 2010 to her use of Adderall. She testified that she had originally been prescribed Adderall for ADHD but stated that she stopped using it in October 2010.

Medical records introduced at trial revealed that Mother struggled with anxiety and depression for a number of years. The evidence reflected that she pursued both therapy and psychiatric treatment. As reported in her medical records and as testified to at trial, Mother attributed a lot of her anxiety to being away from W.L.B. and the fear that she would never regain custody of him. Moreover, she attributed some of her depression from January 2014 to having postpartum depression following the birth of her son with Mr. Carfi. Indeed, although Mother was identified as having an elevated depressed mood that month, her therapist normalized her feelings "as probably being post partum depression."

The records reflected that Mother's treatment varied over time as it related to taking medication. Concerning her more recent treatment, the records reflected that Mother began retaking Prozac in late January 2014. A note from February 2014, however, indicated that the medication did not appear to be working as well as it previously had. Moreover, a subsequent medical progress note from March 2014 revealed that Mother wanted to pursue therapy with "oils and yoga." Her treatment plan called for her to discontinue Prozac and Abilify[5] and to return later for a follow-up. While the medical records indicated that Mother struggled at times with her anxiety, nearly every progress note in the record after January 2014 stated that Mother had improved in developing coping skills to reduce her stressors and increase her mood. One note from March 2014 even stated that Mother had made "significant improvement." During trial, Mother testified that her therapy over the years had helped her, and she expressed a desire to continue with it in the future. She stated that she had a "very good relationship" with her therapist and that he helped her "immensely."

[5] Mother testified that she had not been on Abilify and Prozac at the time this treatment note was made. She claimed that the medical charts simply were not updated. The records certainly seem to confirm her testimony concerning her use of Abilify. Indeed, a medical progress note from the month immediately prior stated that "[Mother] *used to be on abilify* as well with her prozac." (emphasis added)

With regard to her overall stability, Mother stated that she had lived in her current apartment duplex for seven months and had sufficient room for W.L.B. to reside there. She testified that she was not on any medication and introduced evidence of a recent negative drug screening. When asked if her mental health treatment was an impediment to her parenting, Mother responded, "Absolutely not." Mother also testified that she intended to keep W.L.B. enrolled at his current school and stated that she was furthering her own education by attending Nashville State Community College. Mother stated that she was signed up for online courses at the school at the time of trial.

Following Mother's testimony, her sister, Erika Hoelscher, testified. Ms. Hoelscher generally testified about how Mother acted "crazy" at times and said things that were "not normal." She claimed that Mother's behavior was a "cycle . . . [that] goes up and down."

Grandmother testified next. She expressed concern that W.L.B. would be subjected to substantial harm if returned to Mother. Among other things, she opined that Mother would not be able to meet the needs of W.L.B. and L. on her current income. She stated that her home provided an environment where W.L.B. could thrive, and she claimed that she and her longtime boyfriend had provided for all of W.L.B.'s needs and expenses since 2009. When asked specifically how returning W.L.B. to Mother would harm him, Grandmother testified as follows:

> The harm that I believe would be the bouncing around from homes because school could stop any minute because she changes her mind a lot, as we have heard in testimony about her changing what she wants to do in school now. It's like all the changes are just like what I would change clothes. And I believe that there are a lot of times in between, which are documented, where she hasn't had any employment and now I think that that would put any child at risk.

As revealed by the following exchange, however, Grandmother also testified that Mother's positive employment prospects could cause harm to W.L.B.:

> Q: So you don't think any mother out there that's going to school and working a full-time job can adequately take care of their children?
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> A: At a 40-hour job at the hours and the activities that [W.L.B.] is involved in, the things he does at school, it would be a very hard task.
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> Q: So you think that would be substantial harm for her going to school or try to prepare herself --

A: I think he would be neglected.

Q: So your statement, yes or no, is you think a mother that's working 40 hours a week and going to school is neglecting her children?

A: That's not my statement. I said I think that [W.L.B.] would be neglected.

Q: Neglected how?

A: He would be tossed in an after-care or taken to her job. He probably wouldn't get to his activities on time if she had to do stuff for school.

In addition to Grandmother's concerns about Mother's alleged lack of time for W.L.B., Grandmother accused Mother of failing to properly manage her mental health.

Grandmother's longtime boyfriend, Boyd Shearer, testified that Mother had lived in Grandmother's home off and on over the years. He claimed that Mother had unresolved mental issues that she had failed to address. When asked whether he and Grandmother were trying to hold on to W.L.B. simply to make Mother's life difficult, Mr. Shearer testified as follows: "I'm legitimately concerned about the safety of those children. If she gets them, she'll run off someplace and expose them to danger. She's done it before." When asked to clarify what previous event he was referring to, Mr. Shearer named Mother's previous decision to suddenly fly to Miami in 2009.

Following Mr. Shearer's testimony, W.L.B. testified in the judge's chambers. W.L.B. testified that he loved Mother, but he expressed concern over whether she would be able to provide for him financially. He testified that "without . . . money, you can't really take care of a child." He also expressed concern that he would have to go to aftercare due to Mother's work schedule.

Following the presentation of Grandmother's proof, Mother called two witnesses. Mother's first witness was Belinda Landolt. Although Ms. Landolt lived in Bowling Green, Kentucky at the time of trial, she testified that she had previously lived next door to Mother at Mother's current apartment duplex on Willow Heights. Ms. Landolt stated that Mother was a "[v]ery loving" parent, and she testified that she had spent a lot of time with Mother and L., Mother's son from her relationship with Mr. Carfi. When asked specifically what things she had done with them, Ms. Landolt stated as follows: "We do movie nights. We cook dinner together. We go to the marina and walk. We talk on the phone. We send text [messages]. We spend a lot of time together." She testified that she had never noticed

anything that gave her a concern for L.'s safety. Moreover, she stated that she had no fear of W.L.B. being returned to Mother's custody.

Mother's last witness was Dr. Janice Martin. Dr. Martin testified that she had previously been W.L.B.'s therapist but had often seen both Mother and Grandmother as a part of his counseling sessions. When asked about Mother's parenting skills, Dr. Martin stated that although Mother was an "anxious person," Mother had been willing to implement the things that they had discussed. When asked if she had observed any mental health issues with Mother that could affect Mother's ability to parent W.L.B., Dr. Martin stated that she had not, but noted that it was not unusual for such things to go unnoticed given the brevity and infrequency of W.L.B.'s sessions. She did opine, however, that Mother's stability appeared to be adequate to parent W.L.B. Although Dr. Martin acknowledged that she had not conducted a parenting assessment, she testified that Mother was a "good enough mother" as far as she could tell. Based on the information that W.L.B. had relayed to her towards the end of his therapy, Dr. Martin concluded that "[Mother] was becoming a more consistent mom."

Although Dr. Martin stated that W.L.B. had anxiety about his mother, she testified that he was not as anxious towards Mother as Grandmother had initially led her to believe. Moreover, she estimated that approximately eighty percent of W.L.B.'s anxiety towards his situation had been created by Grandmother. She stated that W.L.B. was not afraid of his mother but was afraid of making Grandmother mad. Dr. Martin testified that W.L.B. appeared to have been "coached" on what to say at times.

According to Dr. Martin, W.L.B.'s therapy was terminated shortly after he started to "drift" towards Mother:

> Toward the end, [Mother] was working much better with [W.L.B.], according to [W.L.B.]. All I can do is tell you the world according to [W.L.B.'s] eyes because I wasn't in this home. But [W.L.B.]started being so happy with his mother, and she got him some clothes to have at her house, and he was so happy.
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> He said, "Dr. Martin, my mom has clothes for me at her house." That's one of the things that nana had told him mom would never do, never be able to do. And so that's what happened at the end.
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> [Mother] was becoming a more consistent mom, which is what [Grandmother] said she wanted when she first started this interaction.

> * * * *
> And so [W.L.B.] was drifting, sort of, that way. And then he told me what he did, and I talked to [Grandmother] about that, and he didn't come back. Well, he came back two more times.

After W.L.B. started to "drift" towards Mother, he then suddenly began to discuss the negative consequences that would arise by living with her. As Dr. Martin explained:

> [W.L.B.] came in and told me that his grandmother had said -- his nana is what he calls her -- had said that he needs to live with her because he couldn't go to school. He couldn't go to karate. He couldn't go to boy scouts. That he didn't have any clothes at his mother's house, and he wouldn't have enough good food.
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> * * * *
>
> And then grandma came in and told me that she just couldn't let [W.L.B.] go with his mother because he wouldn't be able to go to his school. She didn't make enough money. And her working hours, he wouldn't be able to go to karate. He wouldn't be able to go to scouts and that she couldn't support him, quite frankly.
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> And I said, Well, you don't have to stop being a grandmother just because he lives with his mom.

Dr. Martin testified that Grandmother came to the next counseling session and informed her that W.L.B. did not want to come to therapy anymore. According to Dr. Martin's testimony, however, she later held a termination session with W.L.B. after requesting it.

Following the conclusion of proof, the Circuit Court took the case under advisement. Approximately two months later, on February 23, 2015, the Circuit Court entered its "Findings of Fact, Memorandum Opinion and Order." Therein, the Circuit Court concluded that Grandmother had not met "her burden of showing by clear and convincing evidence that substantial harm will come to W.L.B. if returned to his Mother." In pertinent part, the trial court found that Mother's employment situation had stabilized, that she had "been very stable in her residence for the last 15 months," and that there had "been no instances of erratic behavior, or mental health issues [on her part] since early 2011." Although the Circuit Court

accordingly returned primary care of W.L.B. to Mother, Grandmother was awarded specified Grandparent visitation. This appeal followed.[6]

Issues Presented

In her appellate brief, Grandmother raises the following issues for our review:

1. Whether the trial court erred when it determined that the Knox County, Tennessee[7] Orders were "temporary orders" despite the fact that the Court had previously dismissed the Mother's "Motion to Review Temporary Custody" by Order of May 28, 2013 leaving no pending or unresolved actions.

2. Whether the trial court erred in determining that the Mother did not waive her superior parental rights.

3. Whether the trial court erred in concluding that the Grandmother did not meet her burden of proof by showing clear and convincing evidence that substantial harm will come to the child if returned to his Mother.

Mother proposes, as an additional issue, that she be awarded costs and attorney fees under Tennessee Code Annotated section 27-1-122 for defending a frivolous appeal.

Discussion

This case involves competing claims for custody between a parent and non-parent. The ultimate question to be resolved concerns which party should have custody of the minor child. As is evident from the parties' briefs, however, the resolution of this issue is itself dependent on another issue that is contested on appeal: what evidentiary standard applies? Mother argues that Grandmother was required to show, by clear and convincing evidence, that returning W.L.B. to Mother would result in substantial harm. Grandmother, on the other

[6] Although the record indicates that Father was a party to the trial proceedings, he did not participate in this appeal concerning Grandmother's claim for custody. In fact, he signed a waiver stating that "he has been aware of the appeal filed in this cause and does not object to said proceedings, nor does he have any interest in said action." We further note that although the trial court's February 23, 2015 order did not resolve all issues between all the parties, the trial court subsequently directed the entry of a final judgment concerning the claims adjudicated therein, expressly finding that there was no just reason for delay.

[7] The reference to Knox County appears to be inadvertent. The orders at issue were actually entered in Sevier County.

hand, contends that Mother was required to prove a material change in circumstance in order to regain custody of W.L.B. As will be explained below, the relevant standard that should govern the case is dependent upon whether Mother has retained her superior parental rights. It is well-settled under existing Tennessee jurisprudence that "the Tennessee Constitution protects the fundamental right of natural parents to have the care and custody of their children." *Blair v. Badenhope*, 77 S.W.3d 137, 141 (Tenn. 2002) (citations omitted), *superseded by statute on other grounds as recognized in Armbrister v. Armbrister*, 414 S.W.3d 685 (Tenn. 2013). Persons who are not a child's biological parent, however, do not have the same constitutionally protected interests as are possessed by a biological parent. *Ray v. Ray*, 83 S.W.3d 726, 732 (Tenn. Ct. App. 2001). Indeed, "when faced with competing custody claims by a biological parent and a third party, the courts must favor the biological parent." *Id.* In initial custody proceedings, the natural parents simply have superior rights in relation to non-parents who are seeking custody. *In re Adoption of A.M.H.*, 215 S.W.3d 793, 811 (Tenn. 2007) (citation omitted). If a parent retains his or her superior parental rights, the parent cannot be deprived the custody of a child "unless there has been a finding, after notice required by due process, of substantial harm to the child." *In re Adoption of Female Child*, 896 S.W.2d 546, 548 (Tenn. 1995). "Only then may a court engage in a general 'best interest of the child' evaluation in making a determination of custody." *Id.* In light of the constitutional protections afforded to natural parents, "the burden is on the non-parent to establish by clear and convincing evidence that the child will be exposed to substantial harm if placed in the custody of the biological parent." *Sikora ex rel. Mook v. Mook*, 397 S.W.3d 137, 143 (Tenn. Ct. App. 2012) (citations omitted).

The above evidentiary standard does not typically apply, however, when parents seek to modify a valid order placing custody with a non-parent. As a general matter, parents are not entitled to invoke the doctrine of superior parental rights under such circumstances. Rather, the trial court "should apply the standard . . . applied in parent-vs-parent modification cases: that a material change in circumstances has occurred, which makes a change in custody in the child's best interests." *Blair*, 77 S.W.3d at 148 (citation omitted). This is true even if the initial award of custody to the non-parent was the result of the natural parent's decision to voluntarily cede custody of the child. "[T]he parent's voluntary transfer of custody to a non-parent, with knowledge of the consequences of that transfer, effectively operates as a waiver of [superior parental rights]." *Id.* at 147. Exceptions do exist, however, and the fact that a non-parent has been awarded custody of a child does not necessarily prevent a biological parent from successfully asserting superior parental rights in a proceeding to regain custody of the child. For example, if a natural parent was not afforded an opportunity to assert superior parental rights in the initial custody proceeding, those rights should not be considered to be forfeited. *See id.* at 148. The Tennessee Supreme Court has identified four circumstances in which a natural parent retains a presumption of superior parental rights as to custody:

(1) when no order exists that transfers custody from the natural parent;

(2) when the order transferring custody from the natural parent is accomplished by fraud or without notice to the parent;

(3) when the order transferring custody from the natural parent is invalid on its face; and

(4) when the natural parent cedes only temporary and informal custody to the non-parents.

Id. at 143.

In this case, because the trial court determined that Mother retained her superior parental rights vis-à-vis Grandmother's claim for custody, it required Grandmother to prove, by clear and convincing evidence, that returning W.L.B. to Mother would result in substantial harm. Both of Grandmother's first two raised issues on appeal challenge the imposition of this evidentiary standard. First, Grandmother asserts that the trial court erred in determining that the orders entered in Sevier County were temporary orders. Second, she asserts that the trial court erred in determining that Mother did not waive her superior parental rights. For the reasons discussed below, we conclude that Grandmother's arguments are without merit and that the trial court applied the proper evidentiary standard regarding the competing claims for custody.

Although the entry of an order awarding custody of a child to a non-parent generally prohibits the child's natural parents from thereafter asserting superior parental rights regarding the child, this is not true where the order "grants only temporary custody to the non-parent[]." *Id.* at 148. In this case, the parties have identified three specific orders regarding W.L.B.'s custody that were entered prior to the trial in the Montgomery County Circuit Court. In chronological succession, these orders are as follows: (1) the October 26, 2010 "Emergency Temporary Custody Order"; (2) the December 16, 2011 "Interim Agreed Order" which was entered *nunc pro tunc* to November 8, 2010; and (3) the August 23, 2012 "Agreed Temporary Order." Whereas Mother maintains that none of these orders contained a final custody determination, Grandmother disagrees. According to Grandmother, the August 23, 2012 order was a final custody order. This position is consistent with her claim that Mother did not retain her superior parental rights.

The trial court determined that each order entered by the Sevier County Circuit Court was temporary in nature. Because we agree with its conclusion on this issue, we also agree

that Mother retained her superior parental rights in this matter. The October 26, 2010 order clearly did not result in a forfeiture of Mother's superior parental rights. That order was denominated as an "Emergency **Temporary** Custody Order" and was entered following Father and Grandmother's appearance in chambers on an *ore tenus* motion. (emphasis added). The December 16, 2011 order was also clearly a temporary order regarding custody. That order noted that it was an "interim agreement" and stated that the case would be reset on the court's docket in ninety days.

With regard to the August 23, 2012 order, which is the only order that Grandmother takes specific issue with on appeal,[8] we also agree with the trial court's determination that it was a temporary order. First and foremost, like the other two orders mentioned, the August 23 order uses express language representing that it is not a final custody determination. Indeed, the heading of the August 23 order reads specifically as follows: "Agreed **Temporary** Order." (emphasis added). In her brief on appeal, Grandmother urges us to disregard the order's designation as a "temporary" one. She asserts that courts often disregard the term "temporary" as pure surplusage when used in the context of child custody. Moreover, in support of her position that Mother's superior parental rights were not retained, she cites to a previous opinion of this Court, *In the Matter of K.C., Jr.*, No. M2005-00633-COA-R3-PT, 2005 WL 2453877 (Tenn. Ct. App. Oct. 4, 2005) (hereinafter "*K.C., Jr.*,"), which refused to apply the "temporary and informal custody" exception outlined in *Blair*. *K.C., Jr.*, involved a mother's attempt to regain custody of a child after that child had been placed with his aunt. Like this case, a dispute arose on appeal as to whether the mother had retained her superior parental rights. Although the mother argued that she should be afforded a presumption of superior parental rights because the order transferring custody to the aunt only granted the aunt temporary custody, we found this argument to be unavailing. *Id.* at *5 n.7. Among other considerations, we noted that the child had remained in the custody and care of the aunt for ten years, with the mother's knowledge and consent. *Id.* Although the Grandmother's specific reliance on *K.C., Jr.*, is somewhat unclear, it appears to us that she relies on it to suggest that the "temporary" custody exception from *Blair* does not apply when the child has actually been in the custody of a non-parent on a long-term basis, notwithstanding what was provided for in a previous custody order. Such an argument is misguided, however, as is Grandmother's suggestion that we should treat the August 23 order's designation as a "temporary" order to be surplusage. As this Court explained in a later opinion evaluating the merits of the analysis employed in *K.C., Jr.*,:

[8] Because it is clear to us that all of the referenced orders were temporary in nature, we have discussed each briefly. We do note, however, that although Grandmother generally claims that the trial court erred in its determination that the Sevier County orders were temporary, her brief only specifically attacks the trial court's classification of the August 23, 2012 order.

Despite the reasoning in *K.C., Jr.*, we believe that our Supreme Court intended the focus of the "temporary and informal" custody circumstance to be on the finality of the initial order, and not on the length of time that the custody arrangement has persisted. This Court has previously rejected the line of cases suggesting that "the term 'temporary' when used in the context of child custody is pure surplusage." *See In re E.J.M.*, No. W2003-02603-COA-R3-JV, slip op. at 19 (Tenn. Ct. App. Mar. 10, 2005). Although all custody decisions are "temporary" in the sense that they remain under the control of the court and can be changed upon a proper showing that a material change in circumstances has occurred,

> [t]he law makes a distinction between temporary and final orders of custody. "An interim order is one that adjudicates an issue preliminarily; while a final order fully and completely defines the parties' rights with regard to the issue, leaving nothing else for the trial court to do." *State, ex rel., McAllister v. Goode*, 968 S.W.2d 834, 840 (Tenn. Ct. App.1997) (citing *Vineyard v. Vineyard*, 170 S.W.2d 917, 920 (Tenn. 1942)). Trial courts have discretion to grant temporary custody arrangements in circumstances "where the trial court does not have sufficient information to make a permanent custody decision or where the health, safety, or welfare of the child or children are imperiled." *King v. King*, No. 01A01-91-10PB00370, 1992 WL 301303, at *2 (Tenn. Ct. App. Oct. 23, 1992).

Warren v. Warren, No. W1999-02108-COA-R3-CV, slip op. at 5 (Tenn. Ct. App. Mar. 12, 2001). Final custody orders are res judicata and cannot be modified unless there has been a material change in circumstances that makes a change of custody in the child's best interest. *In re E.J.M.*, No. W2003-02603-COA-R3-JV, slip op. at 17 (Tenn. Ct. App. Mar. 10, 2005) (citing *Kendrick v. Shoemake*, 90 S.W.3d 566, 570 (Tenn.2002); *Blair v. Badenhope*, 77 S.W.3d 137, 148 (Tenn. 2002)). A temporary order of custody, on the other hand, does not constitute a final order that shifts the burden of proving a change of circumstances to the parent. *Id.* (citing *Warren v. Warren*, No. W1999-02108-COA-R3-CV, 2001 WL 277965, at *3 (Tenn. Ct. App. Mar. 12, 2001); *Spatafore v. Spatafore*, No. E2001-02459-COA-R3-CV, 2002 WL 31728879 (Tenn. Ct. App. Dec. 5, 2002); *Phillips v. Phillips*, No. W2001-01685-COA-R3-CV, 2002 WL 927514 (Tenn. Ct. App. May 2, 2002); *Placencia v. Placencia*, 3 S.W.3d 497 (Tenn. Ct. App. 1999); *Gorski v. Ragains*, No. 01A01-9710-GS-00597, 1999 WL 511451 (Tenn. Ct. App. July 21, 1999)). A change of circumstances is measured from the entry of a final

> order of custody, even though temporary orders may be entered thereafter. *In re M.J.H.*, 196 S.W.3d 731, 743 (Tenn. Ct. App. 2005).

In re R.D.H., No. M2006-00837-COA-R3-JV, 2007 WL 2403352, at *9-10 (Tenn. Ct. App. Aug. 22, 2007).

The fact that W.L.B. remained with Grandmother for several years following the entry of the temporary custody orders does not negate Mother's ability to rely upon a presumption of superior parental rights. Indeed, it would be error for us to disregard the trial court's designation of the custody arrangement—which was agreed to by the parties—as temporary. Although Mother agreed to allow W.L.B. to physically reside with Grandmother pursuant to the August 23 order, we fail to see how this should have resulted in a forfeiture of her superior parental rights when her assent was to an order that was specifically marked as "temporary." Again, when a parent cedes only temporary custody to a non-parent, the order transferring custody does not extinguish a biological parent's superior parental rights. *See Blair*, 77 S.W.3d at 143. Further, we note that the August 23 order recites that Mother did not waive *any* of her parental rights incident to the order's entry. In pertinent part, the August 23 order states as follows: "[Mother] by affixing her signature hereto does not waive any of her parental rights nor does she waive the right to pursue any petitions or pleadings currently pending in this case." Thus, aside from the fact that the order was stated to be temporary, it seems fundamentally unfair to treat the order as removing any of Mother's rights regarding the child when the order specifically disclaims such a consequence.[9]

Given our agreement with the trial court's determination that Mother retained her superior parental rights, there is no reason to disturb the evidentiary standard applied by the trial court. The trial court was correct in requiring Grandmother to prove, by clear and convincing evidence, that W.L.B. would be exposed to substantial harm if returned to Mother. *See Mook*, 397 S.W.3d at 143 (citations omitted) ("[T]he burden is on the non-parent to establish by clear and convincing evidence that the child will be exposed to

[9] Grandmother seems to suggest that Mother's preservation of parental rights is of no moment and cites to Judge (now Justice) Kirby's dissenting opinion in *Sharp v. Stevenson*, No. W2009-00096-COA-R3-CV, 2010 WL 786006 (Tenn. Ct. App. Mar. 10, 2010). In *Sharp*, one of the parties claimed that an attorney had informed him that "he was not giving up his parental rights" incident to his decision to enter into an agreed permanent parenting plan. *Id.* at *21 n.5 (Kirby, J., dissenting). Judge Kirby noted that this information was correct, stating as follows: "Mr. Sharp to this day retains his parental rights. His parental rights are separate and distinct from his superior right to custody of his child." *Id.* We agree that such a distinction does exist: one may retain parental rights even when superior parental rights have been forfeited. We disagree with Grandmother's position in this case, however, that the August 23, 2012 decree somehow resulted in a forfeiture of Mother's superior parental rights when the order was (a) a "temporary" one (b) and purported not to waive "any" of Mother parental rights.

substantial harm if placed in the custody of the biological parent.") The resolution of this question, of course, does not end our inquiry. As we noted at the outset of our discussion, the ultimate question in this case concerns which party should have custody of W.L.B.

Notwithstanding the higher burden of proof imposed by the trial court, Grandmother maintains that she properly established that returning custody of W.L.B. to Mother would result in substantial harm. Accordingly, she asserts that the trial court erred in denying her claim for custody. Mother, on the other hand, insists that the trial court committed no error in returning W.L.B. to her custody and care. Because the heightened burden of proof in this matter differs from the customary evidentiary standard applicable to most civil cases, we must adjust our usual standard of review in determining whether error was, in fact, committed with regard to W.L.B.'s custody placement. *Ray*, 83 S.W.3d at 733. We begin by presuming the trial court's factual findings to be correct, unless the evidence preponderates otherwise. *In re Caleb B.*, No. M2013-02564-COA-R3-JV, 2015 WL 1306755, at *3 (Tenn. Ct. App. Mar. 19, 2015) (citations omitted). Considerable deference is given to the trial court's findings in regard to witness credibility. *Id.* Then, however, we must proceed to determine "whether the facts, either as found by the trial court or as supported by a preponderance of the evidence, provide clear and convincing evidence that the child would be exposed to substantial harm if placed in the parent's custody." *Id.* (citation omitted). "The 'clear and convincing evidence standard' is more exacting than the 'preponderance of the evidence' standard." *In re Emmalee O.*, 464 S.W.3d 311, 323 (Tenn. Ct. App. 2015) (citing *In re C.W.W.*, 37 S.W.3d 467, 474 (Tenn. Ct. App. 2000)). Evidence satisfying the clear and convincing evidence standard should eliminate "any serious or substantial doubt concerning the correctness of the conclusions to be drawn from the evidence." *Id.* at 323-24 (citing *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n.3 (Tenn. 1992)).

As a result of the variability of human conduct, the circumstances that pose a risk of substantial harm to a child are not capable of precise definition. *Ray*, 83 S.W.3d at 732. In general, however, the use of the modifier "substantial" suggests two things:

> First, it connotes a real hazard or danger that is not minor, trivial, or insignificant. Second, it indicates that the harm must be more than a theoretical possibility. While the harm need not be inevitable, it must be sufficiently probable to prompt a reasonable person to believe that the harm will occur more likely than not.

Id. (internal footnote omitted). In order to determine whether a parent poses a risk of substantial harm, courts may inquire into a person's fitness as a parent. *In re Caleb B.*, 2015 WL 1306755, at *5 (citation omitted). Naturally, as a part of their efforts to assess a party's present parental fitness, courts may consider past conduct and events. *Id.* With that said,

"[c]ustody decisions should not be used to punish parents for past misconduct or to award parents for exemplary behavior." *Ray*, 83 S.W.3d at 734 (citations omitted). The courts recognize that parents are able to turn their lives around, and custody decisions should "focus on the parties' present and anticipated circumstances." *Id.* (citations omitted). In this vein, "courts may and should consider past conduct to the extent that it assists in determining a person's current parenting skills or in predicting whether a person will be capable of having custody of a child." *Id.* Importantly, "consideration of past conduct must be tempered by the realization that the persons competing for custody, like other human beings, have their own virtues and vices." *Id.* (citation omitted). Among other things, courts must consider "the nature and severity of the past conduct in relation to the welfare of the child, when the conduct occurred, and what remedial actions, if any, the parent has taken." *In re D.J.R.*, No. M2005-02933-COA-R3-JV, 2007 WL 273576, at *6 (Tenn. Ct. App. Jan. 30, 2007). Biological parents are not required to prove that they are perfect in order to be granted custody. *Ray*, 83 S.W.3d at 734.

In this case, much of Grandmother's evidence offered in support of proving the threat of substantial harm focused on Mother's prior employment history, residential history, and struggles with her mental health. As previously noted, for example, Grandmother testified that Mother could not financially provide for W.L.B. and expressed concern that he would not get to participate in the activities in which he had been enrolled as of the trial.[10] In general, her proof was aimed at depicting Mother as both financially and emotionally unstable. The trial court, however, found otherwise, and concluded that the evidence did not clearly and convincingly show that W.L.B. would be subjected to substantial harm if returned to Mother. It found that Mr. Carfi's testimony was not credible and further found that W.L.B.'s testimony had been coached by Grandmother. With respect to Mother's overall stability and fitness, the trial court found specifically as follows:

> 17. [Mother] testified that in 2010 she had an unanticipated reaction to adder[]all, and was addicted to it, and this brought [W.L.B.] into the custody of [Grandmother]. [Mother] no longer takes adder[]all. [Mother] submitted a

[10] With respect to this latter point, we note that Grandmother testified that W.L.B. would be "neglected" if returned to Mother because Mother's work schedule would interfere with W.L.B.'s activities. Such proof does not, in and of itself, amount to a risk of substantial harm even if accepted as true. Although a significant change in W.L.B.'s schedule could arguably result in psychological harm, no expert testimony was produced to this effect. "As a general matter, clear and convincing evidence of the sort of psychological harm that would be severe enough to justify denying custody to a biological parent should take the form of expert testimony." *Ray*, 83 S.W.3d at 738. Thus, even assuming Mother did plan to curtail W.L.B.'s social activities upon regaining custody, there is insufficient proof for concluding that such a decision would expose W.L.B. to substantial harm.

hair follicle drug test that shows she is drug free. There was no medical proof or expert testimony that [Mother] currently suffers from any condition that requires medication she is neglecting to take. [Grandmother] offers no proof of on-going mental health issues since 2010 which establish a risk of substantial harm to [W.L.B.] or [L.]. [Mother] has provided the court with medical records regarding her mental health and the Court finds nothing therein which arises to the level of a showing of risk of substantial harm to [W.L.B.].

* * * *

24. The Court finds that the Mother has had a relatively stable residential history since mid-2012 and has been very stable in her residence for the last 15 months.

* * * *

26. [Mother] has not had any significant gaps in employment since 2011. She is currently employed and attending school to try to better herself. Despite her somewhat irradiate [sic] employment history, she has managed to support herself and her new infant son. Mother's work history does not support Grandmother's contention of substantial risk of harm to [W.L.B.] if Mother regains custody of him.

28. The Mother has made some poor decisions. She has acknowledged that. However, through that she has been able to provide a stable home. She has had some employment problems, but always finds another job or two to replace it. She is in college, and just garnered a good job. She has made some good decisions over the last 18-24 months. Dr. Martin believes she is stable and has worked hard on her parenting skills to enable her to be an effective parent. There have been no instances of erratic behavior, or mental health issues on the part of [Mother] since early 2011. She has completed several rehab programs, and continues therapy, not due to any issue, but because she feels it is beneficial. There has been no medical or expert proof that [Mother] is not taking medications or has a mental health issue that is going to cause substantial harm to the minor child, [W.L.B.].

29. In contrast to the [previous situation that existed], the Court finds that [Mother] now has a stable residence, has transportation, is employed, her

whereabouts are certainly known, she currently has no untreated mental health issues, and has not been recently hospitalized.

Having reviewed the record transmitted to us on appeal, we conclude that the evidence does not preponderate against the trial court's findings as they pertain to Mother's employment/residential stability and her mental health outlook. With respect to the latter issue, we note that Mother has actively pursued treatment for her depression, and her medical progress notes indicated that she made repeated improvements in developing her coping skills in the year leading up to the trial. Contrary to the assertions of Grandmother, there is no evidence that Mother actively mismanaged her struggles with depression. Moreover, there is not any evidence that her depression poses a risk of substantial harm to W.L.B. We note that according to Ms. Landolt's testimony, Mother has been an effective parent for L., her son with Mr. Carfi.

The evidence also showed that Mother had achieved a general sense of stability as it pertained to her housing and employment. Regarding housing, the evidence showed that Mother had lived in the same apartment duplex for seven months immediately preceding trial. Moreover, at the time of time of trial, the evidence demonstrated that Mother's employment situation had stabilized and was trending upwards: she was employed, going to school, and was scheduled to start a new job soon.

We disagree that Mother's past troubles, namely her firing from Belk, cast serious doubt on her ability to hold a steady job. Although Mother's actions at Belk were troubling, she made a number of positive choices since then. Much time has passed, and Mother's recent actions are indicative of her ability to maintain employment. In this vein, we feel obliged to respond to two comments made by Grandmother's counsel at oral argument in this matter. First, Grandmother's counsel referenced Mother's firing at Belk as a recent incident that supposedly took place some six to twelve months prior to trial. Second, he stated that Mother had supposedly been fired from another recent job amidst allegations of TennCare fraud. With regard to the Belk incident, counsel's time reference is wholly inaccurate. Mother's tenure at Belk began in November 2012 and only lasted a few months. The affidavit of complaint accompanying Mother's arrest warrant showed that Mother's illegal actions took place between December 2, 2012 and January 8, 2013. The December 30, 2014 trial in this matter was clearly a period more than six to twelve months after the Belk matter. With respect to counsel's TennCare fraud reference, he is presumably referring to Mother's tenure at At-Home Health. Although Mother testified that she ceased going to work there due to safety concerns, Grandmother attempted to prove that she had been fired for "clocking in and out of the system" but not actually going to work. As we previously noted, although Grandmother introduced some evidence to support her position on this issue, her allegation of impropriety was substantially weakened by evidence of a later agency decision from the

Department of Labor and Workforce Development. This decision, which was included in the record transmitted to us on appeal, stated that Mother's safety allegation had not been disputed and that At-Home Health had not provided sufficient evidence of work-place misconduct. Although the trial court did not specifically reference Mother's departure from At-Home Health in its final order,[11] it implicitly accredited her testimony that she ceased going to work there due to safety concerns. Indeed, in referencing Mother's recent efforts at stability, the trial court stated as follows: "She has made some good decisions over the last 18-24 months." Inasmuch as the trial court appeared to have implicitly accredited Mother's testimony concerning her departure from At-Home Health, the record does not support Grandmother's allegation that Mother committed any fraud.

We agree with the trial court that Mother has made several good decisions over the past year, and we conclude that its findings militate against Grandmother's claim for custody. The evidence does not clearly and convincingly show that W.L.B. will be subjected to substantial harm if returned to Mother.[12] Undoubtedly, Mother's past is marked by moments of discord and general instability. Her circumstances at the time of trial, however, pointed towards a positive future: she was employed, had stable housing, and expressed a desire to continue working with her therapist to cope with her depression. As we have noted, a parent's past conduct must be measured against a parent's improvement and present ability to care for his or her child. *See In re D.J.R.*, 2007 WL 273576, at *6 (noting that "the existence of Mother's substantial risk of harm to the child must be measured at times relevant to the custody determination, especially when the record indicates Mother made changes in her life"). Because Grandmother did not satisfy her burden of proof, the trial court did not err in awarding Mother custody of W.L.B.

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[11] Although the trial court's order does mention "At Home Health Care" and states that Mother was pursuing a management position there, this specific reference is clearly inadvertent and is intended to refer to Mother's employment at "A Caring Home Care." At the time of trial, Mother testified that she had an impending position at the latter company where she would make $12 an hour; she also testified that she would be trained for management.

[12] Despite our conclusion on this issue, one portion of the trial court's order deserves comment. The trial court noted that it was "curious and inconsistent" that Grandmother was seeking to retain custody of W.L.B. but had not attempted to take custody of L., Mother's son with Mr. Carfi. It is unclear the specific weight the trial court placed on this observation, but we agree with Grandmother that it is not directly relevant to the question before us. We note that Grandmother testified at trial that she had not attempted to get custody of L. because Mother was still married to Mr. Carfi. She stated as follows in this regard: "[Mr. Carfi] said that he was going to do something about that. But if I had to do that . . . I would step up and do that." Regardless of the fact that the trial court's statement regarding Grandmother's concern for L. was misplaced, it does not affect the outcome of this case. The facts in this case, as found by the trial court and as supported by a preponderance of the evidence, do not clearly and convincingly show that W.L.B. will be subjected to a risk of substantial harm if returned to Mother.

Mother's Request for Attorney's Fees

In her appellate brief, Mother requests that she be awarded appellate attorney's fees pursuant to the authority in Tennessee Code Annotated section 27-1-122. Under that statute, this Court may award damages when we determine that an appeal is frivolous or was taken solely for delay. *See* Tenn. Code Ann. § 27-1-122 (2000) ("When it appears to any reviewing court that the appeal from any court of record was frivolous or taken solely for delay, the court may, either upon motion of a party or of its own motion, award just damages against the appellant, which may include, but need not be limited to, costs, interest on the judgment, and expenses incurred by the appellee as a result of the appeal."). "Determining whether to award these damages is a discretionary decision." *Young v. Barrow*, 130 S.W.3d 59, 66-67 (Tenn. Ct. App. 2003) (citation omitted). Exercising our discretion in this case, we cannot say that this appeal was frivolous or was taken solely for delay and respectfully decline to award Mother any attorney's fees related to the cost of this appeal.

Conclusion

The trial court did not err in determining that Mother retained her superior parental rights. Moreover, Grandmother failed to prove by clear and convincing evidence that returning W.L.B. to Mother's custody would result in a risk of substantial harm. We accordingly affirm the trial court's custody decision and remand this case to the trial court for the collection of costs, enforcement of the judgment, and for such further proceedings as are necessary and are consistent with this Opinion. Costs of this appeal are assessed against the Appellant, Billie Dee Miller, and her surety, for which execution may issue if necessary.

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ARNOLD B. GOLDIN, JUDGE