IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 16, 2015 Session

KATJA UTE (FRANZ) BUCHANAN v. STEVEN JAMES LARRY BUCHANAN

Appeal from the Circuit Court for Wilson County
No. 6357DVC Clara W. Byrd, Judge

No. M2014-01247-COA-R3-CV – Filed July 30, 2015

Mother, a German citizen, married Father while he was stationed in Germany with the United States Army. The two moved to the United States, had one child, and were divorced. Approximately five years after being divorced, Mother sent Father a letter notifying him of her intention to relocate to Germany with the child. Father responded with a letter expressing his opposition to the child's relocation and subsequently filed a petition opposing relocation; the petition was filed outside the 30-day time period set forth in Tenn. Code Ann. § 36-6-108. Mother moved to dismiss Father's petition for failure to file it within 30 days of receipt of the notice of proposed relocation; the motion was denied, and after a hearing on Father's petition, the court found that Mother's motive for moving was vindictive and that she had no reasonable purpose in relocating. Finding that the petition opposing Mother's relocation should have been dismissed, we reverse the judgment of the trial court and remand the case for further proceedings.

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

RICHARD H. DINKINS, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P. J., M. S., and W. NEAL MCBRAYER, J. joined.

Amanda G. Crowell, Lebanon, Tennessee, for the appellant, Katja Ute (Franz) Buchanan.

Rayburn McGowan, Jr., Nashville, Tennessee, for the appellee, Steven James Larry Buchanan.

OPINION

I. FACTUAL AND PROCEDURAL HISTORY

Katja Ute (Franz) Buchanan ("Mother"), a native of Germany, and Steven James Larry Buchanan ("Father"), a member of the Tennessee National Guard, are the parents of one daughter, born in February 2003. Mother and Father were declared divorced in the Circuit Court for Wilson County on December 11, 2008. The Final Decree of Divorce incorporated an Agreed Parenting Plan, in which Mother was named the primary residential parent with 243 days of residential parenting time per year. Father received 122 days per year; his parenting time was exercised every other weekend, with an mid-week overnight visitation every week, and four hours after school on Thursdays in weeks when he did not have an upcoming weekend visitation. Father's monthly child support obligation was set at $840.

In 2009, Mother sent a certified letter to Father informing him of her intention to relocate with the child to her former hometown in Germany. Father, through counsel, filed a petition opposing the relocation, whereupon Mother withdrew her request and Father's petition was dismissed.

On December 27, 2013, Mother's counsel sent a certified letter to Father, which he received on December 28, informing him of Mother's intention to relocate with the child to Germany to assist her parents, whose health conditions had been deteriorating and who needed assistance with their everyday lives; the letter also stated that Mother had secured employment which would allow her and the child to have a better quality of life. The letter stated that Father "may file a petition in opposition to Ms. Buchanan's proposed relocation within thirty (30) days of receipt of this notice." Father responded by writing a letter to Mother's attorney opposing the relocation; the letter, dated January 24, 2014, was received at the attorney's office on January 27.

On February 3, 2014, Mother filed a Petition to Alter Visitation, stating:

> Father failed to file a Petition in opposition to Mother's proposed relocation within thirty (30) days of receipt of the notice which is required by statute in the event Father wishes to block the custodial parent from moving with the minor child and attempt to change custody. Father did otherwise indicate that he was not in agreement with Mother's move, but his actions can in no way be construed as "filing a petition" as required by statute. As a result, Mother now has the right to relocate with the minor child in accordance with her proposed move pursuant to the mandatory language in Tenn. Code. Ann. Section 36-6-108(g).

Mother requested that the court hold a hearing to determine Father's parenting time based upon her relocation; that her proposed permanent parenting plan be approved and entered as an order of the court; and that she be awarded her attorney's fees.

On February 12, Father, acting *pro se*, filed a "Petition in Opposition of Altering Visitation and Request for Full Custodial Rights."[1] On February 19, Mother filed a motion to dismiss the petition on the grounds that it was not timely filed. The court held a hearing on the motion to dismiss as well as the Petition to Alter Visitation and entered an order on March 18, denying the motion to dismiss and rescheduling the hearing on the petition.[2]

The trial court held a hearing on June 2 and 3 and made a ruling from the bench granting Father's petition; an order was entered on June 20 memorializing the oral ruling. The court held that Mother's motive for relocating was vindictive and had no reasonable purpose; neither the oral ruling nor the order included factual findings relative to the child's best interests.[3] The court reiterated why it previously denied the motion to dismiss Father's petition in opposition, holding that the requirement at Tenn. Code Ann. §36-6-108(g) that Father's petition be filed within 30 days of receipt of notice of Mother's intent to relocate was an "unreasonable burden on a *pro se* petitioner." Finally, the court adjusted the parenting plan, giving Father parenting time during the entire month of June, and lowered Father's support obligation from $840 to $458 per month. Mother appeals, raising numerous issues, one of which we find to be dispositive: whether the trial court erred in failing to dismiss Father's petition as not being timely filed.

We review the trial court's factual findings *de novo* upon the record, accompanied by a presumption of correctness. Tenn. R. App. P. 13(d). If the trial court made no specific findings of fact, then we must look to the record to "determine where the

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[1] Father later retained counsel who moved the court on March 28 to amend the pleading "to the more appropriate[ly] titled and intended pleading of Petition in Opposition to Relocation and For Full Custodial Rights." On the same day, Father's counsel filed a Motion for Enlargement of Time to File Petition in Opposition to Relocation and for Full Custodial Rights. The record does not contain an order entered on the motion for enlargement.

[2] In denying the motion to dismiss, the court ruled:

> It is without dispute that Father's Petition in opposition of relocation was not filed within thirty (30) days of his receipt of notice of Mother's proposed relocation. As Father has stated his opposition and informed Mother of his opposition within thirty (30) days, and as Father is not represented by counsel, the Court will allow Father a hearing on his Petition opposing her relocation.

[3] In both the oral ruling and the order, however, the court makes numerous comments regarding the child's age, intelligence, education and ambitions. While the court did not denominate these statements as factual determinations, to the extent necessary in our analysis of this appeal, we have considered them to constitute the court's best interest findings.

preponderance of the evidence lies." *Kendrick v. Shoemake*, 90 S.W.3d 566, 570 (Tenn. 2002). We review the court's legal conclusions *de novo* with no presumption of correctness. *Caudill v. Foley*, 21 S.W.3d 203, 206 (Tenn. Ct. App. 1999).

II. ANALYSIS

Parental relocation in Tennessee is governed by Tenn. Code Ann. § 36-6-108; the portions of the statute pertinent to this appeal are § 36-6-108(d)(1) and (g).[4]

According to the statute, a party opposing a proposed relocation may file a petition within 30 days of receipt of notice, and in the event no petition is filed within that 30-day period, "the parent proposing to move with the child shall be permitted to do so." In the case at bar, the court held that imposing the 30-day time period on Father was "an unreasonable burden on a *pro se* petitioner" and that "it is unfair to require someone whose child is going to be taken forty-five hundred miles away only thirty days in which to hire an attorney and file a pleading and pay them a huge retainer fee." From the record before us, it is unclear what evidence the court relied on in so ruling.

The record shows that Father received a certified letter on December 28, 2013, notifying him of Mother's intended relocation and advising him that he "may file a

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[4] Tenn. Code Ann. §§ 36-6-108(d)(1) and (g) state:

> (d)(1) If the parents are not actually spending substantially equal intervals of time with the child and the parent spending the greater amount of time with the child proposes to relocate with the child, the other parent may, within thirty (30) days of receipt of the notice, file a petition in opposition to removal of the child. The other parent may not attempt to relocate with the child unless expressly authorized to do so by the court pursuant to a change of custody or primary custodial responsibility. The parent spending the greater amount of time with the child shall be permitted to relocate with the child unless the court finds:
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> (A) The relocation does not have a reasonable purpose;
> (B) The relocation would pose a threat of specific and serious harm to the child that outweighs the threat of harm to the child of a change of custody; or
> (C) The parent's motive for relocating with the child is vindictive in that it is intended to defeat or deter visitation rights of the non-custodial parent or the parent spending less time with the child.
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> (g) Nothing in this section shall prohibit either parent from petitioning the court at any time to address issues, such as, but not limited to, visitation, other than a change of custody related to the move. In the event no petition in opposition to a proposed relocation is filed within thirty (30) days of receipt of the notice, the parent proposing to relocate with the child shall be permitted to do so.

petition in opposition to Ms. Buchanan's proposed relocation within thirty (30) days of receipt of this notice." Father waited until January 24, 2014, to write Mother's attorney expressing his opposition to the move. It was not until after Mother filed her petition to alter visitation — in which she noted Father's failure to timely file a petition in opposition gave her the right to relocate, pursuant to Tenn. Code Ann. §36-6-108(g) — that Father filed a petition in opposition, asking the court "to have sympathy due to me not having the finical [sic] means for counsel or the understanding of the Tennessee laws."[5]

This case presents facts similar to those in *Rutherford v. Rutherford*, in which this Court examined Tenn. Code Ann. §36-6-108(d)(1) and (g) and, in a divided opinion, held that the Legislature intended the 30-day period to file a petition opposing relocation to be mandatory, stating:

> [S]ection 36-6-108 mandates that a parent wishing to oppose relocation file a petition in opposition within thirty days of receipt of notice of the proposed relocation. If no written petition in opposition is timely filed, the parent proposing to relocate with the child shall be permitted to do so, notwithstanding the absence of harm or prejudice to the relocating parent due to the untimely petition.

Rutherford, 416 S.W.3d 845, 853 (Tenn. Ct. App. 2013), *app. den.* (Aug. 6, 2013). In this case as well as *Rutherford*, the Mother was the primary residential parent and notified the Father of the proposed relocation, pursuant to subsection (d)(1) of Tenn. Code Ann. § 36-6-108; the Father made the Mother aware that he opposed her relocation within the 30-day period but did not file a petition opposing the relocation within the 30-day period, citing his lack of financial resources as the reason he could not hire an attorney; the trial court, *inter alia*, excused Father's failure to file a petition within the 30-day period and determined that, in any event, Mother was not prejudiced by the delay.

As in *Rutherford*, we are constrained to hold that Father's delay in filing the petition in opposition to relocation permits Mother to relocate. The language of Tenn. Code Ann. § 36-6-108(g) is clear and mandatory. The record does not support the court's determination that it was an "unreasonable burden" or "unfair" to apply the 30-day time

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[5] In the Final Order, the Court stated: "At the time Father received this letter, he was a member of the active military reserve, and the legislature in this state has shown in any kind of custody case if someone is deployed or if they are active military, the courts are to continue the time limits to allow them additional time because they are in military service and there are very good reasons for that." The record does not show that Father was deployed at any time pertinent to this appeal or that he sought relief from any time limitation which might have been necessitated by his military status. At oral argument, Father's counsel conceded that relief pursuant to the Soldiers' and Sailors' Civil Relief Act of 1940 would not apply to this case.

limit to Father.[6] Stating one's opposition to a proposed move, without more, is not in compliance with the statute and is not sufficient to invoke the adjudicatory powers of the court. Moreover, whether Mother was prejudiced by Father's failure to timely file the petition is not an appropriate consideration. *Rutherford*, 416 S.W.3d at 853 ("We reject the trial court's conclusion that the thirty-day period may be invoked only where non-invocation would result in harm or prejudice to the relocating parent.").

Our resolution of this issue pretermits consideration of the other issues raised on appeal.

III. CONCLUSION

For the foregoing reasons, we reverse the order of the trial court denying Mother's motion to dismiss Father's petition in opposition of relocation. Mother may relocate to Germany. We remand the case for entry of a new parenting plan as necessitated by the relocation and for reconsideration of Father's child support obligation.

RICHARD H. DINKINS, JUDGE

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[6] We are not unmindful of the fact that Father was initially acting *pro se* in this matter; however, *pro se* litigants are expected to adhere to the same rules as parties who have counsel. *See Whitaker v. Whirlpool Corp*., 32 S.W.3d 222, 227 (Tenn. Ct. App. 2000) ("Pro se litigants are entitled to fair and equal treatment. Pro se litigants are not, however, entitled to shift the burden of litigating their case to the courts."). We have also held that "the courts must also be mindful of the boundary between fairness to a pro se litigant and unfairness to the pro se litigant's adversary. Thus, the courts must not excuse pro se litigants from complying with the same substantive and procedural rules that represented parties are expected to observe." *Brandon v. Williamson Med. Ctr.*, 343 S.W.3d 784, 790 (Tenn. Ct. App. 2010) (citing *Hessmer v. Hessmer*, 138 S.W.3d 901, 903 (Tenn. Ct. App. 2003)) (internal citations omitted).