IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 17, 2013 Session

# CLINT DEWAYNE GRAHAM v. NYCOLE ALEXANDRIA VAUGHN

**Appeal from the Chancery Court for Trousdale County**
**No. 7215 Charles K. Smith, Judge**

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**No. M2012-01982-COA-R3-CV - Filed January 30, 2014**

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The father of a nine year old girl filed a petition seeking to legitimate the child, requesting that he be named primary residential parent, and asking that the mother be prevented from moving to Florida with the child. In her answer, the mother asked to be named as the child's primary residential parent and, having already moved, to be allowed to remain in Florida with the child. After trial, the court ruled that there was no reasonable purpose in the mother's proposed relocation and that the mother was to return to Tennessee with the child; the court entered a permanent parenting plan which designated the mother as primary residential parent and also ordered the father to pay a portion of the mother's attorney fees. The mother appeals the court's disposition of the petition to legitimate; the father appeals the award of fees to the mother. We affirm the decision to award fees to the mother, but vacate the award and remand for a redetermination of the amount; we affirm the court's judgment in all other respects.

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

RICHARD H. DINKINS, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, M. S., P. J., and ANDY D. BENNETT, J., joined.

Jeffrey O. Powell, Goodlettsville, Tennessee, for the appellant, Nycole Alexandria Vaughn.

Edgar Taylor, III, Hartsville, Tennessee, for the appellee, Clint Dewayne Graham.

## OPINION

## I. FACTS & PROCEDURAL HISTORY

Clint Graham ("Father") and Nycole Vaughn ("Mother") are the parents of a daughter born out of wedlock in 2004. Following the birth of the child, the parties lived together for about six months and then separated.

On January 25, 2012, Father filed a petition to legitimate the child in which he also requested that he be named primary residential parent and that the parties exercise joint residential parenting time. Father sought an order to restrain Mother from taking the child out of Tennessee or more than 100 miles from Trousdale County, asserting that Mother intended to "move the minor child to Florida with her paramour." An order was entered the same day restraining Mother from removing the child from the state, and setting a hearing for February 3; the record does not show that the February 3 hearing was held.

An order to show cause was entered on February 7 setting a hearing for Mother to show cause why Father should not be named the child's primary residential parent and why she had moved the child out of state without following the "proper procedure as enumerated in Tennessee Code Annotated § 36-6-108."[1] The hearing was held on February 21; on March 1 the court entered an order which held, in part:

> 1) That Respondent does not dispute that [Petitioner[2]] is the father of the minor child;
> 2) That, based upon the best interest of the minor child, the Court excuses Respondent's failure to comply with T.C.A. Section 36-6-108 and allows Respondent to remain in Florida with the minor child, pending final resolution in this matter.

The court also set parenting time for Father pending further hearing. The order was not an order of parentage as contemplated by Tenn. Code Ann. § 36-2-311.

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[1] The record on appeal does not show what pleading or circumstance led to entry of the show cause order. In its final order, however the trial court stated that Mother moved to Florida before she was served with the restraining order.

[2] The order originally read "That Respondent does not dispute that Respondent is the father"; however, as the putative father in this case is the petitioner, it is clear that this was a misnomer.

A hearing on Father's petition to legitimate and to establish a parenting plan was held on June 25 and 26, and on August 6 the court entered an order holding that Mother "did not have a reasonable purpose to relocate to Florida with the minor child and therefore is to return to Tennessee with the minor child or allow this Honorable Court to determine custody of the minor child if [Mother] does not wish to return to Tennessee"; the court awarded $2,500 in attorney fees to Mother and also entered a permanent parenting plan which designated Mother as the primary residential parent and ordered parenting time for Father. Mother appeals the court's disposition of the petition; Father appeals the court's award of fees.

## II. STANDARD OF REVIEW

We review the trial court's findings of fact *de novo* upon the record, accompanied by a presumption of correctness unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *In re C.K.G.*, 173 S.W.3d 714, 732 (Tenn. 2005). "Once the factual findings are made, the trial court's application of the facts to the best interests standard involves the exercise of some discretion." *Thompson v. Thompson*, No. M2011-02438-COA-R3-CV, 2012 WL 5266319 (Tenn. Ct. App. Oct. 24, 2012). Custody and visitation or parenting plan determinations often hinge on subtle factors, including the parents' demeanor and credibility during the proceedings themselves. *Gaskill v. Gaskill*, 936 S.W.2d 626, 631 (Tenn. Ct. App. 1996). We accord trial courts broad discretion in these decisions, however, they must still base their decisions on the proof and upon the appropriate application of the applicable principles of law. *Id*.

## III. ANALYSIS

While Mother does not challenge the trial court's application of the parental relocation statute at Tenn. Code Ann. § 36-6-108, she does challenge the holdings that there was not a reasonable purpose in her proposed move to Florida and that the move was not in the child's best interest. We analyze the issues presented, however, in light of the fact that the proceeding below was to have the child legitimated and an initial parenting plan adopted; in this posture, the parental relocation statute does not apply.[3] For this reason, we cannot

[3] In a series of cases beginning with *Gregory v. Gregory*, No. W2002-01049-COA-R3-CV, 2003 WL 2179431 (Tenn. Ct. App. July 14, 2003), this court has held that the standards in the relocation statute should not be applied when the court is making the initial custody decision or parenting arrangement. "In *Gregory*, this Court held that, in making an initial custody decision, the trial court must 'consider what is in the child's best interests,' and that determination 'depends on the facts and circumstances of the case.'" *Rudd v. Rudd*, No. W2009-00251-COA-R3-CV, 2009 WL 4642582, at *6 (Tenn. Ct. App. Dec. 9, 2009) (affirming trial court's use of general custody and visitation statute instead of relocation statute in ordering (continued...)

address Mother's issues as she has articulated them. Inasmuch as Mother does not raise an issue with her designation as primary residential parent or with the parenting plan entered by the court, we consider Mother to challenge the requirement that she remain in Tennessee as a condition of her designation as primary residential parent.[4]

The procedure for establishing parentage and custody for a child born out of wedlock is governed by Tenn. Code Ann. § 36-2-311. Once the parentage of the child is established, parental access is to be determined pursuant to Chapter 6 of Title 36. Tenn. Code Ann. § 36-2-311(a)(10). In any proceeding between parents under the chapter, "the bests interests of the child shall be standard by which the court determines and allocates the parties' parental responsibilities." Tenn. Code Ann. § 36-6-106.

In her answer to Father's petition, Mother admitted that she had moved to Florida with the child and requested that she and the child be allowed to remain there. In ruling, the court applied the framework and standards of Tenn. Code Ann. § 36-6-108, and held that Mother's move to Florida was not for a reasonable purpose and that the move was not in the child's best interest.

Notwithstanding the fact that the parental relocation statute does not apply in this proceeding, it was appropriate for the court to consider Mother's plan to remain in Florida as the court designated the primary residential parent and adopted the parenting plan. *See Morris*, 2011 WL 398044, at *9 (stating that "where the trial court considers the relocation of the parent seeking to be designated as the primary residential parent, it is to consider the parent's relocation in making its best interest analysis . . ."). [5] Although the trial court determined the child's best interest using the factors enumerated at Tenn. Code Ann. § 36-6-108(e) rather than those set forth in Tenn. Code Ann. § 36-6-404(b), the trial court used the

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[3](...continued)
initial permanent parenting plan); *see also Pandy v. Shrivastava*, No. W2012-00059-COA-R3-CV, 2013 WL 657799, at *3 n.3 (Tenn. Ct. App. Feb. 22, 2013); *Sikora ex rel. Mook v. Mook*, 397 S.W.3d 137 ( Tenn. Ct. App. 2012); *Nasgovitz v. Nasgovitz*, No. M2010-02606-COA-R3-CV, 202 WL 2445076, at *6–7 (Tenn. Ct. App. June 27, 2012); *Morris v. Morris*, No. W2010-00293-COA-R3-CV, 2011 WL 398044, at *9 (Tenn. Ct. App. Feb. 8, 2011).

[4] Father likewise does not challenge Mother's designation as primary residential parent or the parenting plan adopted by the court; he states in his brief that "if the Mother would not return to Tennessee he would want full custody."

[5] In *Morris*, this court specifically referenced the best interest analysis pursuant to the factors enumerated at Tenn. Code Ann. § 36-6-106(a). However, the factors found at Tenn. Code Ann. § 36-6-106(a) and those found at Tenn. Code Ann. § 36-6-404(b) "are not substantively different and both are designed to reach a decision based upon the child's best interest." *Nasgovitz*, 2012 WL 2445076 at *6 n.6.

correct standard—best interest of the child. *See Nasgovitz*, 2012 WL 2445076, at *7 (holding that where the court applied Tenn. Code Ann. § 36-6-108(e) instead of Tenn. Code Ann. § 36-6-404(b) that "the trial court made its decision by applying the same standard, best interests of the child, even if the same exact statutory factors do not specifically apply"). In our review, we apply the factors set out in Tenn. Code Ann. § 36-6-404(b).

The trial court made specific findings of fact with respect to whether it was in the child's best interest to remain in Tennessee:

> [The child] has gone to school here in Trousdale County most of her life, all except for this few months she's been living in Florida. Of course, Father lives here. Mother has lived in at least 15 different places since the birth of [the child], instability. She's had several different jobs, difficult for her to hold a job. . . .

The court also expressed concern regarding Father's prior drug use and Mother's criminal history. Ultimately, the court relied heavily on the fact that the child had significant connections to the extended family members living in Tennessee, stating:

> [T]he minor child has been involved with and cared for by [Father] and both sets of paternal grandparents on a regular and daily basis. . . . [Father] and his family have provided financial assistance to [Mother] and minor child on several different occasions and . . . the minor child has a continuing and substantial relationship with the Petitioner and his parents and it is in the best interest of the minor child that she be in Tennessee with the family she has always lived around and who has cared for her on a daily basis since her birth.

The evidence does not preponderate against the court's findings of fact. The record contains ample evidence of the child's meaningful relationship with Father and other family members who live in Tennessee, relationships which benefit the child and would be impaired by the child's move to Florida. The evidence shows that Father and his parents have provided a safety net to Mother and the child, which is significant given the court's finding of Mother's instability—a finding that is also supported by the record. Considering the factors at Tenn. Code Ann. § 36-6-404(b), the trial court did not err in its determination that remaining in Tennessee is in the child's best interest; accordingly, we affirm the court's requirement that Mother return to Tennessee with the child and, if she fails to do so, the court

may make a fresh determination of the parenting plan.[6] Nothing in this opinion, however, should be construed as prohibiting Mother from filing a future petition to relocate.

## IV. ATTORNEY FEES

The final issue presented for our review is the award of $2,500.00 in attorney fees to Mother. Father challenges the award as "burdensome and unjust" given his limited income; Mother challenges the amount as insufficient and also requests her attorney fees for the appeal.

Tenn. Code Ann. § 36-5-103(c) grants trial courts the authority to award attorney fees in custody proceedings. Determining whether an award of fees is appropriate is within the discretion of the trial court; we will uphold a trial court's award of fees unless it has abused its discretion. *Kline v. Eyrich*, 69 S.W.3d 197, 203–04 (Tenn. 2002). "An abuse of discretion can be found only when the trial court's ruling falls outside the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence found in the record." *Eldridge v. Eldridge*, 42 S.W.3d 82, 88 (Tenn. 2001). The amount must be reasonable, and the fees must relate to issues of custody or support. *Miller v. Miller*, 336 S.W.3d 578, 586 (Tenn. Ct. App. 2010). An award of fees is not primarily for the benefit of the custodial parent but rather to facilitate a child's access to the courts. *Sherrod v. Wix*, 849 S.W.2d 780, 784 (Tenn. Ct. App. 1992) (citing *Graham v. Graham*, 204 S.W. 987, 989 (Tenn. 1918)). Accordingly, the attorney's work in securing the award must ultimately inure to the benefit of the minor children. *Miller*, 336 S.W.3d at 586; *see also Dalton v. Dalton*, 858 S.W.2d 324, 327 (Tenn. Ct. App. 1993).

The transcript of the hearing shows the following discussion with respect to attorney fees:

> THE COURT: I ask you attorneys if I failed to address an issue, attorney's fees, court costs - - she obviously, is not making enough money . . . to pay his attorney fees. I'm going to require him to pay the cost of this matter. How much are your attorney fees? Guess.
>
> MR. POWELL: Probably, 8,500, 9,000.
>
> THE COURT: I'm going to require him to pay - - because he's making a lot of money - -

[6] Even though not contested by Father, to the extent necessary, we affirm the designation of Mother as primary residential parent if she chooses to remain in Tennessee.

* * *

I'm going to let [Father's] average weekly income be figured at $400 a week, and he's to pay her child support based upon $400 a week, and I'll just say he pays $3,000 of attorney's fees since he doesn't make $800 a week.

MR. TAYLOR: Can we cut it in two?

THE COURT: 2,500 is the best deal you're going to get.

The record does not contain any additional proof as to the amount of fees incurred by Mother's attorney. In its final order, the court ordered "that [Father] shall be responsible for the discretionary costs in this cause and shall be responsible for [Mother's] attorney's fee in the amount of two thousand five hundred dollars ($2,500.00)."

This was a custody proceeding where the court determined the primary residential parent and entered a permanent parenting plan, and the court was within its power to award attorney fees if appropriate. Given the discretion afforded the trial court's decisions and the court's determination that Father had the ability to pay and Mother did not, we affirm the trial court's ruling that Mother was entitled to a reasonable award of attorney fees. The proof in the record, however, includes only the unsworn statements of Mother's counsel as to the amount of his fees, and is insufficient to support a finding that the amount of the fees awarded was reasonable; in addition, it does not appear that Father was given an opportunity to review any documentation relative to the request. Where there is insufficient evidence in the record, we are unable to review the trial court's conclusions to determine whether there has been an abuse of discretion; accordingly, we remand the matter to the trial court for a redetermination of the amount of the award.[7]

Mother also requests an additional award of attorney fees on appeal. "Whether to award attorney fees on appeal is a matter within the sole discretion of this Court." *Hill v. Hill*, No. M2006-02753-COA-R3-CV, 2007 WL 4404097, at *6 (Tenn. Ct. App. Dec. 17, 2007). In determining whether an award is appropriate, 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 need be considered." *Id*. at *6. As a result of our disposition of this appeal, we deny Mother's request for fees.

[7] On remand, we suggest that Mother's counsel prepare an affidavit of time spent and services rendered and that Father respond.

## V. CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed in part and vacated in part, and this matter is remanded for further proceedings consistent with this opinion.

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RICHARD H. DINKINS, JUDGE