IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 19, 2013 Session

IN RE JACOB H. C.

Appeal from the Juvenile Court for Williamson County
No. 80103 Denise Andre, Judge

No. M2012-02421-COA-R3-CV - Filed November 20, 2013

Father of child born out of wedlock appeals the parenting time and child support provisions of the parenting plan and the denial of his request that the child's surname be changed from the Mother's to the Father's. We affirm the trial court's denial of Father's request that the child's surname be changed, vacate the parenting time and child support provisions of the parenting plan, and remand the case for the court to make findings relative to those provisions of the plan.

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

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

Jeffrey Spark, Nashville, Tennessee, for the appellant, Blake C.

Phillip R. Newman and Alisha Guertin Warner, Franklin, Tennessee, for the appellee, Stephanie B. C.

OPINION

The parties to this appeal are the parents of a child born out of wedlock on September 4, 2010. Mother filed a petition to establish paternity and to set support on February 24, 2011; Father answered and filed his counter-petition on April 1 and Mother filed her answer to the counter-petition April 11. Following a hearing the Juvenile Court Referee entered an order on June 20, 2011: (1) establishing the paternity of Father; (2) awarding Mother 285 days and Father 80 days of parenting time for purposes of calculating child support,

determining Father's gross monthly income to be $2,334.56 and Mother's to be $1,386.67[1] and ordering counsel to agree on the calculation of support; (3) setting parenting time for Father[2]; (4) reserving the issue of changing the child's surname; and (5) setting a review hearing for September 12.

On July 28, 2011, at Father's request, the Referee entered an order setting Father's support at $750.00 per month, based on a presumptive child support obligation of $850.00 with a $100 downward deviation based on Father's "current financial hardship . . . and the respective financial positions of the parties at this time, including the fact that the Court has imputed income to Mother who is a full-time student and currently resides with her parents." The court assessed Father $7,400.00 as child support arrearage since the birth of the child, to be paid at least $50.00 per month. Following a final hearing before the Referee on November 28, an order was entered adopting a parenting plan. Father thereafter filed a request pursuant to Tenn. R. Juv. P. 4(c) for a hearing before the Juvenile Court Judge; the hearings were held on June 20 and August 14, 2012.

On October 1, 2012 the court entered its final order adopting a parenting plan and denying Father's request that the child's surname be changed. Father appeals, asserting that the trial court erred in fashioning the permanent parenting plan, in setting the amount of child support and child support arrears, and in not changing the child's surname.

I. DISCUSSION[3]

A. PARENTING PLAN

Tenn. Code Ann. § 36-6-106 requires the court to make a determination in any proceeding in which the custody of a minor child is in question in accordance with the factors set forth therein. In performing this responsibility, Tenn. Code Ann. § 36-6-404 requires the court to prepare a parenting plan, including a residential parenting schedule, with the factors set forth at Tenn. Code Ann. § 36-6-404(b) to be considered.

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[1] Father was employed by the Davidson County Sheriff's Department. Mother was a full time student at MTSU; consequently her income was imputed at $8.00 per hour.

[2] Father's parenting time was to be increased on a monthly basis.

[3] Pursuant to Tenn Code Ann. § 36-2-311, once parentage of a child born out of wedlock is established, visitation with the child is determined pursuant to Chapter 6 of Title 36 and child support is determined pursuant to Chapter 5 of Title 36. Consequently, unless otherwise indicated, our resolution of the parenting time and support issues is governed by those chapters.

Within the foregoing parameters, trial courts have broad discretion to fashion parenting plans that best suit the unique circumstances of each case. *Parker v. Parker*, 986 S.W.2d 557, 563 (Tenn. 1999). While the court is empowered with such discretion, the ruling that results from the exercise of that discretion—and which we review—must be one 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). We review a trial court's findings of fact *de novo* with a presumption of correctness unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d). Thus, when the trial court has set forth its factual findings in the record, we will presume the correctness of those findings unless the evidence preponderates against them. *Bordes v. Bordes*, 358 S.W.3d 623, 627 (Tenn. Ct. App. 2011) (citing *Crabtree v. Crabtree*, 16 S.W.3d 356, 360 (Tenn. 2000)). The trial court's conclusions of law are reviewed *de novo*, with no presumption of correctness. *Lacey v. Lacey*, No. W2002-02813-COA-R3-CV, 2003 WL 23206069, at *2 (Tenn. Ct. App. Oct. 31, 2003) (citing *Huntley v. Huntley*, 61 S.W.3d 329, 334 (Tenn. Ct. App. 2001)).

The trial court did not make findings of fact nor did it discuss the factors at either Tenn. Code Ann. § 36-6-106(a) or Tenn. Code Ann. § 36-6-404(b) in the final order. At the close of the proof at the hearing on August 14, 2012, the court heard argument from counsel, ruled that Mother would remain primary residential parent, and proceeded to discuss with counsel for both parties provisions for Father's visitation. The dialogue with counsel and ruling from the bench were not incorporated into the final decree, which was entered on October 1.[4] We have reviewed the court's comments and do not find a reference to the statutory factors with sufficient specificity to determine whether the evidence supports or preponderates against the parenting time provisions of the parenting plan.[5] We are particularly concerned that the court did not address, either in the final order or in its oral statements, Father's contention at trial that he should exercise substantially more than the 80 days per year residential parenting time proposed by Mother, consistent with the requirement at Tenn. Code Ann. § 36-6-101(a) that the parenting plan permit him to enjoy "the maximum possible participation in the life of the child." While we are cognizant of testimony of Jacob's grandmother, noted by the court in its comments, that Jacob took some time to "calm

[4] At the conclusion of the hearing, Mother's counsel was permitted to prepare the final order and a parenting plan consistent with the court's statements at the hearing.

[5] While the parties cited to testimony in the record that they contend supports or does not support the court's final order in their briefs on appeal, we do not presume that the court based its ruling on the evidence cited by the parties.

down" following his visitation with Father, this testimony, standing alone, does not support the parenting schedule.[6]

Both Tenn. Code Ann. §§ 36-6-106(a) and 36-6-404(b) contemplate that the trial court articulate the manner in which it has considered the statutory factors in making custody determinations, even though written findings of fact are not required. When a court clearly expresses the reasons for its decision, it allows this court to perform its review responsibility and to accord the trial court the deference to which it is entitled as we determine whether the trial court correctly applied the law to the facts. *See Hardin v. Hardin*, No. W2012-00273-COA-R3-CV, 2012 WL 6727533 (Tenn. Ct. App. Dec. 27, 2012).[7] We are unable to do this in this instance. Accordingly, we vacate that portion of the final decree adopting the parenting plan and remand the matter for the trial court to enter a judgment incorporating written findings of the evidence pertinent to the factors at Tenn. Code Ann. §§ 36-6-106(a) and 36-6-404(b).

B. CHILD SUPPORT

In the final order, the court set Father's child support obligation at $1,646.00 per month, based on a Father's gross monthly income of $2,922.74; the court attributed no monthly income to Mother. In addition, the court awarded Mother $15,133.36 as retroactive child support. Father contends that the court erred by failing to grant a downward deviation from the child support guidelines and for failing to take into account the fact that Mother lived with her parents.

Courts are required to use the child support guidelines developed by the Tennessee Department of Human Services "to promote both efficient child support proceedings and dependable, consistent child support awards." *State ex rel. Vaughn v. Kaatrude,* 21 S.W.3d 244, 249 (Tenn. Ct. App. 2000); *see also* Tenn. Code Ann. § 36-5-101(e); Tenn. Comp. R. & Regs. 1240-02-04-.01(3). The guidelines create a rebuttable presumption of the proper award in child support cases; the court may order a deviation from the guidelines if it determines that the evidence rebuts the presumption. If the court determines to do so, it must

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[6] It appears that the court limited Father's parenting time based on the testimony of Jacob's grandmother that she "was very concerned about how the child would react" if Father was given more time. There was, however, no testimony as to the cause of Jacob's behavior or whether his grandmother's concerns were justified.

[7] As noted in *Hardin* "this Court has encouraged trial courts to 'be as precise as possible in making child custody findings' in order to facilitate meaningful appellate review." 2012 WL 6727533, at *2 (quoting *In re Elaina M.*, No. M2010-01880-COA-R3-JV, 2011 WL 5071901, at *8 (Tenn. Ct. App. Oct. 25, 2011)).

make "a 'written or specific' finding of the amount that would be required under the guidelines and the reasons why application of the child support guidelines would be unjust or inappropriate in a particular case." *Taylor v. Fezell*, 158 S.W.3d 352, 357 (Tenn. 2005); *see* Tenn. Comp. R. & Regs. 1240-02-04-.07(1)(b), (c).

Within the parameters of the child support guidelines, setting child support is a discretionary matter. *Kaatrude,* 21 S.W.3d at 248. Thus, we review the amount of a child support award to determine whether the trial court abused its discretion. *Id.* Under the abuse of discretion standard, we must consider "(1) whether the decision has a sufficient evidentiary foundation, (2) whether the trial court correctly identified and properly applied the appropriate legal principles, and (3) whether the decision is within the range of acceptable alternatives." *Id.*

The order for support was included in the parenting plan and neither the plan nor the final order included any discussion of Father's request for a downward deviation in either the final order or its comments after the hearing.[8] While Tenn. Comp. R. & Regs. 1240-02-04-.07(1)(b) and (c) do not require the court to make specific findings where it has determined not to order a downward deviation, the lack of a clear expression as to why the trial court herein rejected Father's request for a downward deviation impairs our ability to review the order.[9] Accordingly, we vacate the portion of the final decree setting Father's support

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[8] The court began its comments at the conclusion of the hearing by stating:

> Both of you had arguments, but I tend to follow with the mother's argument. When dad said he would be out on the street if it wasn't for someone, she might also be out on the street if it wasn't for someone. Based on your argument, I'm going to follow your child support guidelines here for the arrearage as well.

The court then proceeded to discuss the designation of Mother as primary residential parent and had no further discussion of support issues other than ruling that Mother would receive the income tax deduction for Jacob for years in which she was working.

[9] We note in this regard that the temporary order of support calculated a presumptive child support obligation of $850.00 per month. After setting this amount, the order stated:

> It is the Order of this Court, based on present circumstances, that Father shall be entitled to a downward deviation in the amount of $100.00 per month. The deviation is based on current financial hardship to Father and the respective financial positions of the parties at this time, including the fact that the Court has imputed income to Mother who is a full time student and currently resides with her parents.

There is no indication in the record as to why the court apparently did not take these considerations into

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obligation and arrearage and remand the matter for the trial court to make appropriate findings in accordance with Tenn. Comp. R. & Regs. 1240-02-04-.07(1)(b) and (c).

C. CHANGE OF NAME

In accordance with Tenn. Code Ann. §68-3-305(b)(1)(A) a child born out of wedlock carries the surname of the mother; the child's surname is not changed following a legitimation or paternity proceeding unless so ordered by the court. Tenn. Code Ann. §68-3-305(c); *Sullivan v. Brooks*, No. M2009-02510-COA-R3-CV, 2011 WL 2015516, at *1 (Tenn. Ct. App. May 23, 2011). The standard for changing a nonmarital child's surname was set forth in *Barabas v. Rogers*:

> The courts should not change a child's surname unless the change promotes the child's best interests. Among the criteria for determining whether changing a child's surname will be in the child's best interests are: (1) the child's preference, (2) the change's potential effect on the child's relationship with each parent (3) the length of time the child has had its present surname, (4) the degree of community respect associated with the present and proposed surname, and (5) the difficulty, harassment, or embarrassment that the child may experience from bearing either its present or its proposed surname. The parent seeking to change the child's surname has the burden of proving that the change will further the child's best interests.

Barabas v. Rogers, 868 S.W.2d 283, 287 (Tenn. Ct. App. 1993) (internal citations omitted).

In denying Father's request to change Jacob's surname, the court acknowledged the reasons for Father's request, particularly, that Father wanted a closer bond with Jacob and that Father was concerned about possible "difficulty or embarrassment". The court, however, held that there was "a degree of community respect associated with the child's present name" based on Jacob's maternal grandfather's involvement for many years in a number of civic endeavors as well as his association with the Brentwood Police Department, and that, for that reason, it was in Jacob's best interest to keep his Mother's surname. Father contends that the court should have ordered Jacob's name to either be changed to Father's or hyphenated on two bases: Father's concern that Mother may remarry and change her name, thereby causing embarrassment to Jacob, and to give Father a "concrete bond" with Jacob. We are unable

[9](...continued)
account in setting Father's support obligation, particularly where the amount of support Father was ordered to pay exceeds one-half of his monthly income and no income was imputed to Mother.

to conclude on the record before us that Father has borne his burden of proving that changing Jacob's surname would be in his best interest.

On the record before us the pertinent *Barabas* factors are numbers 4 and 5, quoted above. With respect to factor 5, Father cites the following testimony:

> Q: Okay. But what I am asking you about here is probabilities. Okay? Because we don't know what is going to happen with Jacob. He may very well be comfortable with whatever last name - - with the last name of [ ]. But by the same token, your friend is just one case. It's possible Jacob could be very embarrassed by the fact that he doesn't have a name that is associated with anybody in his family. Correct?
> A. There is a possibility.

This testimony is speculative and insufficient to support a holding that Jacob would experience embarrassment or difficulty if his name were not changed.[10]

The other evidence cited by Father in support of his argument relative to the court's failure to change Jacob's surname consists largely of Father's testimony of efforts he asserts Mother made to keep him from forming a bond with Jacob, beginning in the hospital when Jacob was born. The testimony cited does not address any of the *Barabas* factors but, more importantly, do not show that changing Jacob's surname would be in his best interest.

II. CONCLUSION

For the foregoing reasons, the judgment of the trial court denying Father's request to change Jacob's surname is affirmed; the judgment adopting the parenting plan and setting child support and arrearage is vacated and the case remanded for the court to make findings in accordance with this opinion.

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RICHARD H. DINKINS, JUDGE

[10] In the other testimony cited by Father in support of this contention Mother testifies to the importance of the family name; she does not testify as to any effect on Jacob if his name is not changed.