IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 22, 2015 Session

TERRENCE MOORE ROBINSON, JR. v. SUSAN KATHLEEN ROBINSON

Appeal from the Circuit Court for Williamson County
No. I-01269 James G. Martin, III, Judge

No. M2014-00431-COA-R3-CV – Filed March 16, 2015

In this post-divorce action, Mother appealed from the trial court's decision to change the designation of primary residential parent to Father. After an evidentiary hearing, the trial court found that a material change in circumstances had occurred based on the child's recent athletic development and its impact on his social development. The trial court also found that making Father the primary residential parent was in the best interests of the child. In making the best interests determination, the trial court made particular note that the parties' fifteen-year-old son preferred to live with Father. Mother appealed, arguing that there was no material change in circumstances and that the trial court erred by failing to consider the importance of continuity and by allowing the preference of the child to control the outcome of the best interests determination. Because we find that the evidence does not preponderate against the trial court's findings and that there is no error in the trial court's conclusions, we affirm.

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

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

Casey A. Long, Franklin, Tennessee, for the appellant, Susan Kathleen Robinson (Drolsum).

Roger Reid Street, Jr., Franklin, Tennessee, for the appellee, Terrance Moore Robinson, Jr.

OPINION

Susan Kathleen Robinson ("Mother") and Terrence Moore Robinson, Jr. ("Father") were divorced by a decree entered in June 2001. They have one child ("Son"), born in 1998. After the divorce was granted, Father moved to Memphis, and the

parenting plan was modified to provide that Son would reside with Mother in Fairview during the school year and with Father in Memphis for eight weeks in the summer.[1] Mother was designated the primary residential parent. The parenting plan was most recently modified in 2011.

In December 2013, Father filed a petition to change primary residential parent.[2] Father sought to be designated the primary residential parent so that Son could live with him in Memphis during the school year, attend Memphis University School ("MUS"), and swim for its team. In January 2014, the trial court conducted an evidentiary hearing and heard extensive testimony from the parties, Son, and others, which revealed that, in the years since the most recent modification of the parenting plan, Son had become a nationally-ranked swimmer with a demanding practice schedule. Son swam with the Nashville Aquatic Club during the school year and with the University of Memphis swim team during the summer. Due to the time commitment required to excel at this sport, Son's social circle was composed almost entirely of people who were involved in swimming with him. Son's current high school did not have a swimming team, and his opportunities to form friendships with his classmates were limited as a result.

Following the conclusion of the hearing, the trial court found that a material change in circumstance had occurred based on Son's swimming expertise and the exceptional amount of time he devoted to training coupled with its impact on his social development. The trial court also found that it was in Son's best interests to designate Father as the primary residential parent. In making this determination, the trial court found that most of the best interest factors favored neither parent. However, the trial court was greatly impressed by the testimony it heard from the parties' fifteen-year-old son about his desire to live with his Father and attend MUS. The trial court afforded great weight to Son's expressed preference, finding that it was genuine, long-standing, and based on good reasons.

As a result of its findings, the trial court designated Father as the primary residential parent and reversed the residential parenting schedule so that Son would spend the school year with Father and the summer with Mother. Mother appealed.

[1] There was a temporary exception to this plan for one year during which Son spent the year with Father and attended an elementary school in Memphis.

[2] Father's petition was also a petition for civil contempt. Mother responded with allegations that Father was guilty of civil contempt. The trial court dismissed both sets of allegations because neither party was able to prove those allegations. Neither party has appealed that dismissal, so we will not address any of those allegations.

STANDARD OF REVIEW

A trial court's determinations of whether a material change in circumstances has occurred and where the best interests of the child lie are factual questions. *In re T.C.D.*, 261 S.W.3d 734, 742 (Tenn. Ct. App. 2007). This court reviews custody and visitation decisions de novo with a presumption that the trial court's findings of fact are correct unless the evidence preponderates otherwise. *Kendrick v. Shoemake*, 90 S.W.3d 566, 569 (Tenn. 2002); *Nichols v. Nichols*, 792 S.W.2d 713, 716 (Tenn. 1990). Evidence preponderates against the trial court's findings of fact when it supports another finding with greater convincing effect. *See Walker v. Sidney Gilreath & Associates*, 40 S.W.3d 66, 71 (Tenn. Ct. App. 2000). We will affirm the trial court's decision unless the evidence preponderates against the trial court's factual determinations or unless the trial court has committed an error of law affecting the outcome of the case. *Boyer v. Heimermann*, 238 S.W.3d 249, 254-55 (Tenn. Ct. App. 2007).

Appellate courts are reluctant to second-guess a trial court's determination regarding custody and visitation. *Parker v. Parker*, 986 S.W.2d 557, 563 (Tenn. 1999). This is because of the broad discretion given to trial courts in matters of child custody, visitation and related issues. *Id.*; *see also Nelson v. Nelson*, 66 S.W.3d 896, 901 (Tenn. Ct. App. 2001). Custody decisions often hinge on subtle factors, such as the parents' demeanor and credibility during the proceedings. *Adelsperger v. Adelsperger*, 970 S.W.2d 482, 485 (Tenn. Ct. App. 1997). Accordingly, trial courts have broad discretion to fashion custody and visitation arrangements that best suit the unique circumstances of each case. *Parker*, 986 S.W.2d at 563.

Furthermore, it is not the role of the appellate courts to "tweak [parenting plans] . . . in the hopes of achieving a more reasonable result than the trial court." *Eldridge v. Eldridge*, 42 S.W.3d 82, 88 (Tenn. 2001). This is particularly true when no error is evident from the record. *Id.* Thus, a trial court's decision regarding custody or visitation will be set aside only when it "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." *Id.*

ANALYSIS

Once made and implemented, a custody decision is considered *res judicata* upon the facts in existence or those which were reasonably foreseeable when the decision was made. *Rigsby v. Edmonds*, 395 S.W.3d 728, 735 (Tenn. Ct. App. 2012) (citing *Steen v. Steen*, 61 S.W.3d 324, 327 (Tenn. Ct. App. 2001)). However, the trial court may modify custody "when both a material change of circumstances has occurred and a change of custody is in the child's best interests." *Kendrick*, 90 S.W.3d at 568. The "threshold issue" is whether a material change in circumstances has occurred after the initial custody determination. *Id.* at 570 (citing *Blair v. Badenhope*, 77 S.W.3d 137, 150 (Tenn. 2002)).

A petition to change the primary residential parent invokes a two-step analysis, *Cranston v. Combs*, 106 S.W.3d 641, 644 (Tenn. 2003), and the petitioner bears the burden of proof in each step. *Keisling v Keisling*, 196 S.W.3d 703, 718 (Tenn. Ct. App. 2005). First, the petitioner must prove by a preponderance of the evidence that a material change of circumstances has occurred. *See* Tenn. Code Ann. § 36-6-101(a)(2)(B); *Kendrick*, 90 S.W.3d at 568. Second, the petitioner must show that a change of custody is in the child's best interest. *Kendrick*, 90 S.W.3d at 568.

On appeal, Mother challenges both steps of this analysis. She first contends that there was not a material change in circumstances sufficient to justify a change in the designation of primary residential parent. Second, she argues that the trial court erred in its best interests determination by (1) applying the factors in Tenn. Code Ann. § 36-6-404 rather than the factors in Tenn. Code Ann. § 36-6-106 and therefore failing to consider the importance of continuity in Son's life; and (2) allowing Son's expressed preference to control the custody determination. We find that the evidence does not preponderate against the trial court's factual findings and that the trial court did not err in the conclusions it based on those findings. We, therefore, affirm the judgment of the trial court.

I. MATERIAL CHANGE IN CIRCUMSTANCE

There is no bright line rule for determining when a change in circumstance is material enough to warrant changing an existing custody arrangement. *Keisling*, 196 S.W.3d at 718. Instead, when making this determination, courts should consider: "(1) whether a change has occurred after the entry of the order sought to be modified; (2) whether a change was not known or reasonably anticipated when the order was entered; and (3) whether a change is one that affects the child's well-being in a meaningful way." *Cranston*, 106 S.W.3d at 644.[3] A material change in circumstance does not require a

[3] In their briefs, both parties assert that proving a material change in circumstance for purposes of changing the primary residential parent no longer requires a showing that the change was unknown at the time the order was entered. *See Armbrister v. Armbrister*, 414 S.W.3d 685, 704-05 (Tenn. 2013). Notably, the issue in *Armbrister* was a modification of a residential parenting *schedule* rather than a modification of the designation of the primary residential *parent*. *Id.* As a result, the Tennessee Supreme Court based its decision on the language of Tenn. Code Ann. § 36-6-101(a)(2)(C) rather than Tenn. Code Ann. § 36-6-101(a)(2)(B). *See id.* at 704 ("We further conclude that section 36-6-101(a)(2)(C) abrogates any prior Tennessee decision [. . .] which may be read as requiring a party *requesting modification of a residential parenting schedule* to prove that the alleged material change in circumstances could not reasonably have been anticipated when the initial parenting schedule was established." (emphasis added)). Different sets of criteria exist for determining whether a material change in circumstances exists for a modification of a "residential parenting schedule" as compared to the standard that applies for a modification of "custody." *Id.* at 702-03; *see* Tenn. Code Ann. § 36-6-101(a)(2)(B)-(C). As a result, the Tennessee Supreme Court's decision in *Armbrister*, which applied directly to modifications of the residential parenting schedule, does not extend to modifications of the primary residential parent. *See Austin v. Gray*, No. M2013-00708-COA-R3CV, 2013 WL 6729799, at *4 n.3 (Tenn. Ct. App. Dec. 18, (continued…)

showing of a substantial risk of harm to the child. Tenn. Code Ann. § 36-6-101(a)(2)(B). Such a change includes "circumstances that make the parenting plan no longer in the best interests of the child." *Id.*

The trial court found that a material change in circumstance had occurred based on Son's athletic development and its impact on his social development. The evidence does not preponderate against this finding. While both parties knew that Son was interested in swimming in 2011, neither party claimed it was reasonable to anticipate the degree to which he would excel in and become devoted to the sport at that time. The testimony at the evidentiary hearing demonstrated that Son practices for swimming nine times per week for several hours at a time. His close friendships are with others who share his devotion to swimming as well as this demanding schedule. Indeed, swimming has become the basis for all of Son's extracurricular activities and social relationships. His current school, Fairview High School, does not have a swimming team, and Son has not developed a circle of friends there. Both Son and Mother testified that Son spent most of his time swimming and did not interact much with friends in Fairview. Son has developed a circle of friends who attend MUS and are involved in swimming, and he has developed a very strong relationship with his stepmother, who has a background in swimming.

Considering these facts and after reviewing the record in its entirety, we have concluded that the evidence does not preponderate against the trial court's finding that a material change in circumstance occurred after the parenting plan was last modified in 2011. We, therefore, affirm the determination that a material change in circumstance occurred.

II. BEST INTERESTS OF THE CHILD

Mother argues that the trial court made two errors in its determination of the best interests of the child. First, she argues that the trial court erred by considering the set of best interest factors listed in Tenn. Code Ann. § 36-6-404 rather than the factors in Tenn. Code Ann. § 36-6-106. Specifically, Mother argues that the trial court's decision to use Tenn. Code Ann. § 36-6-404 caused it to fail to consider the importance of continuity during its best interests determination. Second, Mother argues that the trial court erred by allowing Son's expressed preference to control the outcome of the best interests determination.

2013). Because this case involves a change in the primary residential parent, Tenn. Code Ann. § 36-6-101(a)(2)(B) and the associated case law contain the proper standard. *Id.*

A. THE IMPORTANCE OF CONTINUITY

Mother's first assignment of error with respect to the trial court's best interests determination is without merit. Mother asserts that by using the factors listed in Tenn. Code Ann. § 36-6-404 rather than the factors in Tenn. Code Ann. § 36-6-106, the trial court failed to consider the importance of continuity in Son's life. *See* Tenn. Code Ann. § 36-6-106(a)(3). It is true that there were two statutes setting out non-exclusive lists of factors for the trial court to apply to help it determine a child's best interest at the time the trial court made its ruling.[4] *See* Tenn. Code Ann. § 36-6-106(a) (2013); Tenn. Code Ann. § 46-6-404(b) (2013). The factors in Tenn. Code Ann. § 36-6-106 applied to "any . . . proceeding requiring the court to make a custody determination regarding a minor child," while the factors in the applicable version of Tenn. Code Ann. § 36-6-404(b) applied to modifications of the child's residential schedule. Because this proceeding involved a custody determination, the applicable list of factors was contained in Tenn. Code Ann. § 36-6-106. *See Kendrick*, 90 S.W.3d at 570.

While the trial court stated it was referring to the factors in Tenn. Code Ann. § 36-6-404, Mother's argument remains unavailing. Both lists of factors are "substantially similar" and allow for consideration of any other factors the court deems relevant. *Thompson v. Thompson*, No. M2011-02438-COA-R3-CV, 2012 WL 5266319, at *6 (Tenn. Ct. App. Oct. 24, 2012). As a result, in most cases the analysis will be the same regardless of which set of factors the trial court applied. *Id.* Thus, it is not necessarily error to use one list of factors over the other if that use does not impact the outcome of the proceeding. *See id.*; *Boyer*, 238 S.W.3d at 254-55.

Mother argues that the outcome in this case would be different if the trial court had considered the factors in Tenn. Code Ann. § 36-6-106 because those factors require the trial court to consider the importance of continuity. However, this argument ignores the fact that both sets of factors contain virtually identical provisions related to the importance of continuity. *Compare* Tenn. Code Ann. § 36-6-404(b)(11) (2013) ("The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment") *with* Tenn. Code Ann. § 36-6-106(a)(3) (2013) ("The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment…"). As a result, the trial court would consider the importance of continuity, if relevant, regardless of which list of factors it employed.

Indeed, pursuant to both lists of factors, the trial court did consider the importance of continuity and incorporated it into the analysis. The trial court's detailed and thorough order specifically notes that "the importance of continuity [. . .] would weigh in favor of

[4] In 2014, the General Assembly amended Tenn. Code Ann. § 36-6-404(b) to replace its list of factors with a reference to the factors in Tenn. Code Ann. § 36-6-106. 2014 Tenn. Pub. Ch. 617.

the Mother [. . .]; however, the Court finds he [Son] has spent significant time with his Father in Memphis." When it issued its ruling, the trial court also addressed continuity, stating that Mother's home was stable and that the environment was satisfactory. The evidence does not preponderate against this finding. As a result, we find that the trial court properly considered the relevant factors, including the importance of continuity, when it made its determination of Son's best interests.

B. THE WEIGHT AFFORDED TO SON'S PREFERENCE

Mother's second assignment of error regarding the trial court's determination of Son's best interests is also without merit. Mother argues that the trial court erred by allowing Son's preference to control the outcome of the best interests determination. The preference of a child older than twelve is one of many factors to be given consideration in determining his best interests. *See* Tenn. Code Ann. § 36-6-106(a)(13); Tenn. Code Ann. § 36-6-404(b)(14) (2013). This preference is not controlling on the trial court, and it is error for a trial court to base its decision solely on a child's preference. *Harris v. Harris*, 832 S.W.2d 352, 354 (Tenn. Ct. App. 1992). There is good reason for this rule. While a child's expressed preference may reflect legitimate and wise reasons, it may just as easily reflect manipulation by a parent or a successful campaign by one parent to alienate the child from the other parent. *Krupp v. Cunningham-Grogan*, No. M2005-01098-COA-R3-CV, 2006 WL 2505037, at *9 (Tenn. Ct. App. Aug. 29, 2006). However, when a trial court is reasonably satisfied that a child has not been manipulated and the child's reasons for his preference are not frivolous, "it is permissible, indeed important, to give significant weight to the child's testimony on the parent with whom he wants to live." *Maxwell v. Woodard*, No. 2011-02482-COA-R3CV, 2013 WL 2420500, at *19 (Tenn. Ct. App. May 31, 2013). Finally, it is not error for a trial court to state that a child's preference was a "deciding factor" in its decision as long as it clearly weighed other factors and circumstances in reaching its decision. *See In re NRG*, No. E2006-01732-COA-R3-CV, 2007 WL 1159475, at *3 (Tenn. Ct. App. Apr. 19, 2007).

Here, the trial court clearly considered the source of and reasons for Son's expressed preference as part of a larger inquiry involving all the relevant statutory factors. In its order, the trial court stated it was satisfied that Son genuinely wanted to live in Memphis with Father for good reasons, including his desire to cultivate a group of friends there and to attend a school that promotes swimming. The evidence does not preponderate against the finding that Son's preference was genuine and based on good reasons.

Both Son and the parties testified that Son had expressed this preference long before the evidentiary hearing took place. In part, Son's preference was motivated by a desire to participate in a high school swimming team. While MUS has a swim team, Son's current high school does not. Testimony revealed that there are benefits of being on a high school swim team including comradery, recognition from others, as well as the

ability to win swimming awards and break records specific to high school swimming teams. Son also testified that it was beneficial for him to train with the University of Memphis during the school year and with the Nashville Aquatic Club during the summer so that he could train with college athletes who had returned home from school.

Additionally, Son based his preference on the closeness of his friendships in Memphis, and the testimony supported his assessment. Son and Mother testified that Son has little opportunity to interact with friends at his current high school because none of those friends are competitive swimmers. Based on this testimony, the evidence does not preponderate against the trial court's findings that Son's expressed preference was genuine and based on sound reasons, including the promotion of his athletic and social development. As a result, the trial court did not err in giving significant weight to Son's expressed preference. *See Maxwell*, 2013 WL 2420500, at *19.

The trial court's decision to afford additional weight to Son's preference was also not error because that preference was only one of many factors the trial court considered. The trial court's order lists at least thirteen other factors that it considered in its best interests determination, including each parent's ability to instruct and inspire Son; the strength of each parent's relationship with Son; the degree to which a parent has been Son's primary caregiver; and the character and emotional fitness of each parent. Son's preference was clearly important to the trial court, but it was not the only thing the trial court considered. We find that the trial court carefully examined the source of and reasons for Son's expressed preference and, because it was satisfied that Son's preference was genuinely his alone and based on good reasons, afforded that preference significant weight. However, the trial court did not base its decision solely on this important factor and instead included it as one of many other considerations. Because the trial court analyzed the reasons for Son's preference and because that preference was only one of many factors considered, we find that the trial court did not err in its consideration of Son's expressed preference.

Both of Mother's assignments of error regarding the trial court's best interests analysis are unavailing. The trial court did consider the importance of continuity, and the evidence does not preponderate against its findings. The trial court also did not commit error by affording weight to the Son's expressed preference because it was reasonably satisfied that this preference was genuine and reflected sound reasons. The evidence also does not preponderate against this finding. We, therefore, affirm the determination that it was in Son's best interests to designate Father as the primary residential parent.

IN CONCLUSION

Based on our review of the record, we hold that the evidence does not preponderate against the trial court's findings of fact, and we find no error in the trial

court's conclusions that a material change of circumstances occurred and that it is in the best interests of Son to designate Father as the primary residential parent.

Accordingly, the judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against Mother.

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FRANK G. CLEMENT, JR., JUDGE