IN THE COURT OF APPEALS OF TENNESSEE

AT KNOXVILLE

FILED

January 25, 2000

Cecil Crowson, Jr.
Appellate Court Clerk

KELLY RENEE TROUT CONNELL, Plaintiff-Appellee, v. BRIAN SUTHERLAND CONNELL, Defendant-Appellant.	C/A NO. 03A01-9808-CV-00282 APPEAL AS OF RIGHT FROM THE HAMILTON COUNTY CIRCUIT COURT THE HONORABLE L. MARIE WILLIAMS, JUDGE

For Appellant

WILLIAM H. HORTON
Horton, Maddox
& Anderson, PLLC
Chattanooga, Tennessee

For Appellee

SELMA CASH PATY
Chattanooga, Tennessee

O P I N I O N

AFFIRMED AND REMANDED

Susano, J.

This is a post-divorce proceeding that addresses the custody of Chase Sutherland Connell ("Chase") (DOB: July 11, 1990) and Dalis Paige Connell ("Dalis") (DOB: May 16, 1992). The custodial parent, Kelly Renee Trout Connell ("Mother"), filed a motion seeking the trial court's permission to move to California with the children. Their father, Brian Sutherland Connell ("Father"), resisted Mother's motion and also filed a petition seeking a change of custody. The trial court granted Mother's request and, following a later hearing, denied Father's petition, finding that Father had failed to prove a change of circumstances warranting a change of custody. Father appeals from both orders, arguing that the trial court erred (1) in permitting Mother to move with the children; and (2) in finding that he had failed to prove a change of circumstances such as to require a change in custody. We affirm.

I.

The parties' marriage was dissolved by final judgment entered December 20, 1996. The trial court awarded custody of Chase and Dalis to Mother and granted Father visitation every other week from Friday afternoon until Wednesday morning, along with one week at Christmas, three weeks in the summer, and four holidays throughout the year. In the divorce case, the trial court decreed as follows:

> This Court is well aware of the possibility of [Mother's] leaving the jurisdiction and she is ORDERED not to do so without the prior consent of the Court. The Court does find both parties have committed manipulative and vindictive acts against the other and is well aware [that Mother] is perfectly capable of removing the children from the jurisdiction of this Court purely for vindictive motives. The Court further recognizes [that Father]

> would have to carry the burden of proof under ***Aaby v. Strange*** to keep the children in Tennessee. However, based upon the proof presented in this trial, the Court does not anticipate [Father] being faced with a dearth of evidence in that regard unless [Mother's] actions truly are well intended.

After the divorce, Mother began working in Chattanooga as a salesperson for Kinko's. In her first year of employment, she earned $33,000; by 1998, her salary had increased to approximately $80,000 a year. However, she had no opportunities for advancement or promotion with Kinko's in the Chattanooga area other than a possible promotion to a regional sales management position -- a position that Mother testified she would not consider because it would necessitate traveling three weeks out of the month.

In April, 1998, while attending a training seminar in California, Mother was offered a position as an account manager for Kinko's in Los Angeles. Mother testified that the job offered the potential for greater income based on commissions, but did not require the traveling that a sales position entails. She also testified that by living in Los Angeles, she would be within three hours of her immediate family in Las Vegas. Mother called Father and advised him of the job offer. Father objected to the children's relocation to California. Thereafter, on June 6, 1998, Mother filed a motion seeking permission to move the children, citing the offered promotion as the basis for her relocation. The following day, Father filed a "Petition for Modification of Parental Responsibility," seeking custody of the children. In his petition, Father alleges that Mother (1) has not provided the children with a wholesome environment; (2) has not attended to the children's grooming, nutritional, and medical

needs; (3) has not helped the children with their homework or otherwise participated in their schooling; (4) has failed to provide separate bedrooms for the children; (5) has cursed and degraded Father in the children's presence; and (6) has "threatened to take the children from their environs." Father further asserts in his pleading that he provided the "primary emotional and family net"; that he spent the most quality time with the children; that he was the primary caretaker; and that he had shown the most attention to the children. Father later amended his petition to allege, in general terms, that the relocation posed a threat of specific, serious harm to the children. Father also filed a motion for a temporary injunction, seeking to enjoin Mother from moving with the children to California, pending a hearing on Father's petition to change custody.

A hearing on Mother's removal motion was held on May 21, 1998. The trial court denied Father's motion for a temporary injunction and granted Mother's request to move with the children. The court noted that its ruling on Mother's motion was not pre-determinative of any of the issues raised in Father's petition seeking a change of custody.

A hearing was held on Father's petition on July 27, 1998. Following the hearing, the trial court held that Father had not carried his burden of proof on the issue of a material change of circumstances that would warrant a change in custody. This appeal followed.

II.

Regarding both issues raised by Father, we must decide if the evidence preponderates against the trial court's judgments. Rule 13(d), T.R.A.P. Our review is *de novo* with a presumption of correctness as to the trial court's factual findings. ***Id***. There is no such presumption as to the trial court's conclusions of law. ***Campbell v. Florida Steel Corp***., 919 S.W.2d 26, 35 (Tenn. 1996).

In ***Aaby v. Strange***, 924 S.W.2d 623 (Tenn. 1996), the Supreme Court substantially limited the circumstances under which a non-custodial parent could block removal of a child to a location away from that of the non-custodial parent. In ***Aaby,*** the Supreme Court decreed that

> a custodial parent will be allowed to remove the child from the jurisdiction unless the non-custodial parent can show, by a preponderance of the evidence, that the custodial parent's motives for moving are vindictive –- that is, intended to defeat or deter the visitation rights of the non-custodial parent.
>
> This conclusion does not mean, however, that a non-custodial parent's hands are tied where removal could pose a specific, serious threat of harm to the child. In these situations, the non-custodial parent may file a petition for change of custody based on a material change of circumstances. The petition would state, in effect, that the proposed move evidences such bad judgment and is so potentially harmful to the child that custody should be changed to the petitioner.

Id. at 629 (footnote omitted).

After the ***Aaby*** decision, the Legislature enacted Chapter 910 of the Public Acts of 1998, which was codified at T.C.A. § 36-6-108. This statute provides, in pertinent part, as follows:

> (c) If the parents are actually spending substantially equal intervals of time with the child and the relocating parent seeks to move with the child, the other parent may, within thirty (30) days of receipt of notice, file a petition in opposition to removal of the child. No presumption in favor of or against the request to relocate with the child shall arise. The court shall determine whether or not to permit relocation of the child based upon the best interests of the child.
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> * * *
>
> (d) 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 the 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:
>
> > (1) The relocation does not have a reasonable purpose;
> >
> > (2) The relocation would pose a threat of specific and serious harm to the child which outweighs the threat of harm to the child of a change of custody; or
> >
> > (3) 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.
>
> * * *
>
> (e) If the court finds one (1) or more of the grounds designated in subsection (d), the court shall determine whether or not to permit relocation of the child based on the best interest of the child.

T.C.A. § 36-6-108 (Supp. 1998). The most significant change in the law of removal of children in a custody case is the

introduction of the distinction between parents who spend "substantially equal intervals of time" with their children and those who do not. In cases of parents who spend substantially equal time with their children, a court simply applies the familiar best interest analysis to determine whether a parent may remove the child. If the time spent is not substantially equal, one of the following grounds must be established before a court engages in a best interest analysis: (1) there is no reasonable purpose for the relocation; (2) the relocation poses a threat of specific, serious harm to the child; or (3) the parent's motive for the relocation is vindictive, as that concept is defined in the statute. If none of the grounds is found, the custodial parent is permitted to move with the children.

The trial court relied on the new statute[1] and the ***Aaby*** case in determining that Mother should be permitted to relocate with the children. While Father does not dispute the applicability of the statute, he contends that the trial court erred in the critical threshold determination of what part of the statute applies to the facts of this case. Specifically, he argues that the trial court erred in finding that the time spent by the parties with the children was not substantially equal. Father asserts that his visitation with the children has consistently been more than 40%, and that by the time of the hearing on Mother's motion for permission to move, he was with the children nearly 50% of the time. Mother disagrees with Father's calculations of his time spent with the children and asserts that Father never received any more visitation, in gross, than that specified in the divorce judgment. If this be the

[1]The hearing on Mother's motion was held one day after the new statute went into effect.

case, it is obvious from the language of the divorce judgment that the time with the children is not substantially equal.

In support of his contention that he spent substantially equal time with the children, Father points to the "increased" visitation that he had prior to the hearing on Mother's motion. This "increase" in visitation resulted from an informal agreement between the parties in which Mother agreed that Father could keep the children from Wednesday to Tuesday every other week. In return for this additional day every other week, Father gave up the twenty days of visitation in the summer months awarded to him in the divorce judgment. Although Father argues that the parties' informal agreement gave him significantly more time with the children, we find that the evidence preponderates that the intervals of time spent by each parent remained essentially the same. The divorce decree awarded Father visitation that amounted to slightly less than 40% of the children's time. Mother testified that the parties adhered to this order until the informal agreement was made two months prior to the May, 1998, hearing on Mother's removal petition. While Father's visitation may have increased immediately prior to the hearing, this is offset by the fact that he gave up twenty days in the summer months that he would have received under the divorce judgment. That the intervals of time spent by each parent remained essentially unaltered is also supported by Father's own testimony:

> Q: Mr. Connell, for the last two or three months, what has been the arrangement with respect to the children? How often you keep the children?
>
> A: For the last approximately two months, Kelly and I had worked out an arrangement to where I would pick up the children on

> Wednesday after school, and I would keep them to Tuesday morning every other week.
>
> And how this arrangement came is I asked Kelly, let's –- let's discontinue the summer agreement where I get them 20 days, because that's a long time, for three months in a row, and to offset that, if we kept it from Thursday to Wednesday, if you added it up for 52 weeks, however it would break down, *it would be about the same, give or take a day or two.*

(Emphasis added). Accordingly, we hold that the trial court utilized the correct provisions of the statute because the evidence does not preponderate against the court's finding that the parents "are not actually spending substantially equal intervals of time with the child[ren]." *See* T.C.A. § 36-6-108(d).

Having determined that the trial court did not err in finding that the parties did not spend substantially equal time with the children, we must now determine whether any of the three grounds set forth in T.C.A. § 36-6-108(d) exist to justify the denial of Mother's request to relocate with the children. The trial court found that the relocation had a "reasonable purpose," T.C.A. § 36-6-108(d)(1); that the relocation did not "pose a threat of specific and serious harm to the child[ren]," T.C.A. § 36-6-108(d)(2); and that Mother's motive for relocating was not "vindictive," T.C.A. § 36-6-108(d)(3). We find no error in these determinations. First, the evidence clearly shows that Mother's relocation to California had a reasonable purpose, *i.e.*, Mother's acceptance of a job that would provide an opportunity for advancement within the corporation as well as greater income potential. Second, Father did not show, nor did he even allege, except in the most general of terms, any threat of specific, serious harm that would result from the children's removal to

California. Although we are mindful that such a move may be disruptive to the children, we join in the Supreme Court's observation that

> [a] move in any child's life, whether he or she is raised in the context of a one or two parent home, carries with it the potential of disruption; such common phenomena –- both the fact of moving and the accompanying distress –- cannot constitute a basis for the drastic measure of a change of custody.

Aaby, 924 S.W.2d at 630. T.C.A. § 36-6-108 contemplates a showing of some *specific* harm in order to block a proposed relocation. Father's mere allegation that harm will occur, without more, is obviously not enough. There must be proof of "a threat of specific and serious harm to the child" of the type described in the statute. T.C.A. § 36-6-108(d)(3). *See also* ***Aaby,*** 924 S.W.2d at 630 (noting evidence that "removal could be generally detrimental to the child will usually not suffice to establish an injury that is specific and serious enough to justify a change of custody"). Furthermore, the evidence preponderates that Mother's motive to relocate was not vindictive, that is, it was not "intended to defeat or deter visitation rights of the non-custodial parent." T.C.A. § 36-6-108(d)(3). Father contends that Mother's vindictiveness was shown by her "gleeful" tone when she advised him of her job offer and by her alleged misrepresentations about certain aspects of the new position, such as the amount of the guaranteed salary. We do not find that the evidence preponderates against the trial court's determination that Mother's move was not vindictive, as that term is defined in the statute. T.C.A. § 36-6-108(d)(3).

Father contends that Mother failed to follow the proper procedure when she filed a motion for permission to move instead of a petition seeking to alter the visitation schedule. Father also complains that it was error for the trial court not to hear his petition to change custody at the same time that Mother's motion was heard. Father also complains that because the hearing on Mother's motion was held only 12 days after it was filed[2], he was not afforded sufficient time to investigate the circumstances of the move. As a result, he contends, it was not until after the hearing that he was able to conduct a telephonic deposition of Frederick Scott, Mother's future supervisor in California. Father contends that Scott's deposition shows that some of Mother's representations made to Father and the trial court regarding her new position were not true. Father relies on these alleged misrepresentations as proof that Mother's motivation for the move was vindictive.

First, we note that there is nothing in the record to indicate that Father objected to the expedited hearing on Mother's motion. On the contrary, the trial court's order allowing Mother's move states that the parties agreed to waive one of the time periods specified in the statute in order to expedite the hearing on Mother's motion. *See* T.C.A. § 36-6-108(a).[3] In the absence of any evidence of Father's objection to the expedited hearing on the relocation motion and in view of the "exigent circumstances," *i.e.*, Mother's deadline for accepting the new position, we find no error in the trial court's decision

[2]Mother was given a deadline for accepting the new position. For this reason, the hearing on the issue of removal was expedited.

[3]T.C.A. § 36-6-108(a) provides, in part, that "[u]nless excused by the court for exigent circumstances, the notice [of the custodial parent's desire to relocate] shall be mailed not later than sixty (60) days prior to the move."

to expedite the hearing on the relocation motion, and to bifurcate it from the hearing on Father's petition for change of custody.

Father is correct in his assertion that the statute provides that "[u]nless the parents can agree on a new visitation schedule, the relocating parent shall file a petition seeking to alter visitation." T.C.A. § 36-6-108(b). However, the pleading filed by Mother, coupled with the pleadings filed by Father, squarely presented the issues contemplated by the statute. In construing pleadings, substance must prevail over form. ***Tennessee Farmers Mutual Ins. Co. v. Farmer***, 970 S.W.2d 453, 455 (Tenn. 1998). We find no reversible error in the alleged misnomer of Mother's pleading.

As previously indicated, Father contends that he was prejudiced by the expedited hearing in that it was only after that hearing that he was able to take the deposition of Mother's future supervisor in California. He argues that the deposition contains evidence indicating that Mother's motive for relocating was vindictive. The short answer to this argument is that the deposition was filed and considered by the trial court at the time of the hearing on Father's petition for change of custody -- at a time when all matters, including Mother's relocation motion, were still within the jurisdiction of the court. The record reflects that Father made his evidence-of-vindictiveness argument at that subsequent hearing. Furthermore, we have reviewed the subject deposition as it relates to the relocation motion. That review does not change our judgment that the evidence does not preponderate against the trial court's decision to allow the relocation of the children to California.

III.

Father's second issue on appeal complains of the trial court's determination that Father failed to prove that a change of circumstances exists such as to warrant a change of custody. Father's petition to change custody invokes the sound discretion of the trial court. ***Burmit v. Burmit,*** 948 S.W.2d 739, 740 (Tenn.Ct.App. 1997).

Father argues that several factors -- his recent remarriage, Mother's relocation to California, and Mother's conduct since the final divorce judgment -- taken in conjunction with each other constitute a material change of circumstances. Specifically, in regard to Mother's conduct since the divorce, Father complains that she has failed to adequately care for the children's needs; that she has blocked his phone calls; that she has cursed at him on the phone in the children's presence; and that she has made derogatory remarks about him to the children. While Mother admits that she sometimes blocked his phone calls and cursed at him *in the children's absence*, she denies making any derogatory remarks about him to or in the presence of the children. While Mother's conduct has not always been laudable, we do not think that the evidence preponderates against the trial court's finding that these incidents do not rise to a level of a *material* change of circumstances warranting the drastic remedy of a change of custody. Regarding the allegations of inadequate care, the record indicates that many of these allegations were litigated in the divorce proceeding. As to the new allegations, the parties' testimony is sharply conflicting. This conflicting testimony brings into play the issue of the parties' credibility, an issue that we have held is primarily for the trial court. *See*

Tennessee Valley Kaolin Corp. v. Perry, 526 S.W.2d 488, 490 (Tenn.Ct.App. 1974). The trial court was in a position to make credibility determinations with respect to these conflicts in the testimony; we are not. We will not disturb the trial court's determinations that are essentially dependent on resolving which of the parties has truthfully and accurately testified as to relevant matters.

IV.

Mother argues that the trial court erred in denying her an award of attorney's fees when it found Father in contempt -- for the third time -- for failing to pay child support. The award of attorney's fees in a post-divorce proceeding such as the one now before us is governed by T.C.A. § 36-5-103, which states, in relevant part, as follows:

> The plaintiff spouse may recover from the defendant spouse, and the spouse or other person to whom the custody of the child, or children, is awarded may recover from the other spouse reasonable attorney fees incurred in enforcing any decree for alimony and/or child support, or in regard to any suit or action concerning the adjudication of the custody or the change of custody of any child, or children, of the parties, both upon the original divorce hearing and at any subsequent hearing, which fees may be fixed and allowed by the court, before whom such action or proceeding is pending, in the discretion of such court.

T.C.A. § 36-5-103(c) (Supp. 1998). The award of attorney's fees "is in the sound discretion of the trial court." ***Richardson v. Richardson,*** 969 S.W.2d 931, 936 (Tenn.Ct.App. 1997). The trial court, in its order denying an award of attorney's fees to Mother, noted that "the litigious nature of this case is the equal responsibility of the parties and each party should continue to pay his or her own attorney's fees." We affirm the trial court's decision on this subject.

We do find, however, that an award to Mother of attorney's fees and expenses incurred in defending this appeal is appropriate. On Mother's motion, this matter will be addressed

by the trial court on remand. *See* ***Seaton v. Seaton***, 516 S.W.2d 91, 93 (Tenn. 1974).

V.

The judgment of the trial court is affirmed. Costs on appeal are taxed to the appellant. This case is remanded to the trial court for such further proceedings as may be required and for collection of costs assessed below, all pursuant to applicable law.

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Charles D. Susano, Jr., J.

CONCUR:

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Houston M. Goddard, P.J.

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Herschel P. Franks, J.