

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 2, 2016 Session

BETTINA LUISE LIPPERT ENGH v. DANIEL JAMES ENGH

Appeal from the Circuit Court for Davidson County
No. 14D-1210 Philip E. Smith, Judge

No. M2016-00595-COA-R3-CV – Filed January 10, 2017

Father appeals the trial court's designation of Mother as the primary residential parent for their daughter. Applying the factors in Tenn. Code Ann. § 36-6-106(a) to the testimony, the trial court determined, *inter alia*, that Mother acted as the primary caregiver, formed a stronger emotional bond with the child, and showed a greater willingness to foster a relationship between the child and Father. Following a thorough review of the record, we have determined that the trial court correctly identified and properly applied the relevant legal principles and that the evidence does not preponderate against the trial court's findings of fact. Accordingly, we affirm the trial court's decision to make Mother the primary residential parent.

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.

Mary B. Langford, Nashville, Tennessee, for the appellant, Daniel James Engh.

John J. Hollins, Jr. and Sarah Richter Perky, Franklin, Tennessee, for the appellee, Bettina Luise Engh.

OPINION

Mother and Father married on March 17, 2007. Shortly after the birth of their only child on March 20, 2011, Father lost his job as a researcher at Vanderbilt University due to lack of funding. Mother and Father agreed that he would stay home with the child because Mother worked as a nurse practitioner. For approximately one year, Father took care of the child during the day and brought the child to Mother's place of work to breastfeed. Co-workers of Mother testified that Father often left the child in the care of

Mother beyond the time necessary for breastfeeding, which interfered with Mother's ability to care for her patients.

In 2012, Father told Mother he wanted to return to work, so she obtained a nanny and began looking for daycare. Father worked for approximately one week. Despite Father's unemployment, the child began attending a daycare program in July or August of 2012, Monday through Friday. According to the daycare employee's testimony, Father dropped the child off at the daycare program at 8:30 a.m. and then picked the child up at 4:30 p.m. On April 19, 2014, Father accepted a job and relocated to Sioux Falls, South Dakota, where his parents and extended family lived.

Ten days after Father relocated, Mother filed for divorce alleging irreconcilable differences and inappropriate marital conduct. She also requested primary custody of the child. Mother simultaneously filed a petition for a temporary restraining order and temporary exclusive custody of the minor child and the marital residence. The trial court granted the petition and gave Father parenting time.

The main focus of the proceedings in the trial court concerned the designation of the child's primary residential parent. During the proceedings, Father argued that he had been the primary caretaker of the child while unemployed until the time he moved to Sioux Falls. Mother argued that Father did not act as the primary caretaker during that time because, rather than care for the child while he was at home, Father dropped the child off at her workplace, with a nanny, or at daycare. The trial court found Mother more credible than Father. Accordingly, it awarded the divorce to Mother and designated Mother as the primary residential parent. Father initiated this appeal challenging only the trial court's designation of Mother as the primary residential parent for their daughter.

STANDARD OF REVIEW

In this non-jury case, our review is de novo on the record with a presumption that the trial court's factual findings are correct, unless the evidence preponderates against those findings. Tenn. R. App. P. 13(d); *Armbrister v. Armbrister*, 414 S.W.3d 685, 692 (Tenn. 2013). A trial court's conclusions of law are subject to a de novo review with no presumption of correctness. *Armbrister*, 414 S.W.3d at 692.

In child custody and visitation cases, the paramount concern is the welfare and best interest of the child. *Luke v. Luke*, 651 S.W.2d 219, 221 (Tenn. 1983). These determinations often pivot on inconspicuous factors, such as the trial court's assessment of the demeanor and credibility of the witnesses while testifying. *Armbrister*, 414 S.W.3d at 693. Because trial courts are in a better position than appellate courts to make those assessments, an appellate court will not reverse a trial court's decision concerning the details of a parenting schedule absent an abuse of discretion. *Id.* Nevertheless, the abuse of discretion standard of review does not immunize a trial court's decision from any

meaningful appellate scrutiny. *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010). When reviewing a trial court’s discretionary decision, the appellate court should determine, where applicable, whether there is a factual basis for the decision in the record, whether the court properly identified and applied the applicable legal principles, and whether the decision is within the range of acceptable alternative dispositions. *Id.*

ANALYSIS

A final decree in a divorce action involving minor children must include a permanent parenting plan. Tenn. Code Ann. § 36-6-404(a). A permanent parenting plan is “a written plan for the parenting and best interests of the child, including the allocation of parenting responsibilities and the establishment of a residential schedule.” Tenn. Code Ann. § 36-6-402(3). Designing a residential schedule includes, *inter alia*, designating the primary residential parent. Tenn. Code Ann. § 36-6-402(5). Generally, the primary residential parent is the parent with whom the child resides more than fifty percent of the time. Tenn. Code Ann. § 36-6-402(4). When the court divides residential time equally between the two parents, the court must designate one of them as the primary residential parent. *Hopkins v. Hopkins*, 152 S.W.3d 447, 450 (Tenn. 2004).

In determining who should be the primary residential parent and what the residential schedule should be, the court should consider the following factors set forth in Tenn. Code Ann. § 36-6-106(a):

- (1) The strength, nature, and stability of the child’s relationship with each parent, including whether one (1) parent has performed the majority of parenting responsibilities relating to the daily needs of the child;
- (2) Each parent’s or caregiver’s past and potential for future performance of parenting responsibilities, including the willingness and ability of each of the parents and caregivers to facilitate and encourage a close and continuing parent-child relationship between the child and both of the child’s parents, consistent with the best interest of the child. In determining the willingness of each of the parents and caregivers to facilitate and encourage a close and continuing parent-child relationship between the child and both of the child’s parents, the court shall consider the likelihood of each parent and caregiver to honor and facilitate court ordered parenting arrangements and rights, and the court shall further consider any history of either parent or any caregiver denying parenting time to either parent in violation of a court order;

- (3) Refusal to attend a court ordered parent education seminar may be considered by the court as a lack of good faith effort in these proceedings;
- (4) The disposition of each parent to provide the child with food, clothing, medical care, education and other necessary care;
- (5) The degree to which a parent has been the primary caregiver, defined as the parent who has taken the greater responsibility for performing parental responsibilities;
- (6) The love, affection, and emotional ties existing between each parent and the child;
- (7) The emotional needs and developmental level of the child;
- (8) The moral, physical, mental and emotional fitness of each parent as it relates to their ability to parent the child. The court may order an examination of a party under Rule 35 of the Tennessee Rules of Civil Procedure and, if necessary for the conduct of the proceedings, order the disclosure of confidential mental health information of a party under § 33-3-105(3). The court order required by § 33-3-105(3) must contain a qualified protective order that limits the dissemination of confidential protected mental health information to the purpose of the litigation pending before the court and provides for the return or destruction of the confidential protected mental health information at the conclusion of the proceedings;
- (9) The child's interaction and interrelationships with siblings, other relatives and step-relatives, and mentors, as well as the child's involvement with the child's physical surroundings, school, or other significant activities;
- (10) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment;
- (11) Evidence of physical or emotional abuse to the child, to the other parent or to any other person. The court shall, where appropriate, refer any issues of abuse to juvenile court for further proceedings;

- (12) The character and behavior of any other person who resides in or frequents the home of a parent and such person's interactions with the child;
- (13) The reasonable preference of the child if twelve (12) years of age or older. The court may hear the preference of a younger child upon request. The preference of older children should normally be given greater weight than those of younger children;
- (14) Each parent's employment schedule, and the court may make accommodations consistent with those schedules; and
- (15) Any other factors deemed relevant by the court.

In the present case, the trial court stated its findings of fact and conclusions of law in support of its designation of Mother as the child's primary residential parent. Specifically, the trial court's determination was based in part on findings as to the credibility of Mother and Father. The trial court found Mother's testimony to be "appropriate" and "truthful," and described her demeanor while testifying as "exceptional." To the contrary, the court found Father's testimony to be "problematic" and "self-serving," and described his demeanor while testifying as "arrogant" and "controlling." Consequently, the trial court gave Mother's testimony greater weight. The court found both Mother's and Father's witnesses to be truthful, with the exception of Father's brother, whom the court described as "inappropriate" and clearly biased in favor of Father.

The trial court also considered all the relevant factors set forth in Tenn. Code Ann. § 36-6-106(a). The trial court found that factors (1), (4), (5) and (6) favored Mother. Those factors are related, in that, the primary caregiver, the parent who takes greater responsibility for the provision of necessities, typically forms the stronger emotional bond with the child. The trial court found that Mother took primary responsibility for providing for the child's daily needs, and thus formed a stronger, more stable bond with the child than Father. Mother testified that she provided the clothing for the child and selected the child's medical and dental providers. Father admitted in his testimony that he never talked to the child's daycare director, dentist or medical doctor about the child. Mother and Mother's witnesses testified that Mother performed a vast majority of the tasks related to the child's daily needs such as changing diapers, providing food, dressing the child, and scheduling play dates with other children. Mother and her co-workers testified that Father frequently left the child in the care of Mother at her place of employment for long periods of time, well beyond the time necessary for breastfeeding, and continuing well after Mother had weaned the child.

The trial court further determined that factor (2) favored Mother, because she was more likely to facilitate and encourage a close and continuing bond between the child and Father. The trial court based its finding on Father's apparent animosity toward Mother's family, contrasted with Mother's testimony, which showed a willingness to foster a relationship between the child and Father's family. Father testified that he believed Mother's parents were responsible for the break-up of their marriage. Likewise, Mother testified that Father did not get along with her parents and made derogatory comments about them. To the contrary, Mother testified that she got along with his parents. Even more significant, she allowed the child to Skype with Father three times per week and flew the child to South Dakota for Father's parenting time.

The trial court found that factors (7) and (10) also favored Mother. Those factors are related, in that, a stable, satisfactory environment fosters the emotional and intellectual development of a child. The court found the child to be "well-adjusted and very bright." The court determined that the child was thriving in Mother's care, and the trial court was impressed with the child's daycare program. A daycare employee testified that the child was bright, happy and well-adjusted.

Finally, the trial court found that factor (9) favored both Mother and Father equally. The trial court determined that the child had a good relationship with both sides of her extended family, and, as previously stated, the child thrived in her daycare program.¹

Following a thorough review of the record, we have determined that the trial court's findings are supported by the preponderance of the evidence. The testimony supports the trial court's finding that Mother acted as the primary caregiver, and hence, formed a stronger emotional bond with the child. Mother has also provided the child with a stable environment, conducive to the child's emotional and intellectual development. Additionally, Mother appears willing to foster a continuing, close relationship between the child and Father. With the foregoing in mind, we have determined that the trial court acted within its discretion in designating Mother as the primary residential parent. Therefore, we affirm the trial court's decision to make Mother the primary residential parent.

¹ The trial court found factors (3) and (8) inapplicable. As to the remaining factors, it found no testimony that would make them "appropriate for consideration in any meaningful way."

IN CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against Daniel James Engh.

FRANK G. CLEMENT, JR., P.J., M.S.