

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 16, 2014 Session

RANDY SCOTT LOWER v. MELANIE EWING LOWER

**Appeal from the Chancery Court for Montgomery County
No. MCCHCVDI09328 Hon. Ross H. Hicks, Judge¹**

No. M2013-02593-COA-R3-CV - Filed October 8, 2014

This post-divorce appeal concerns Mother's request to relocate to Alabama with the Parties' minor child. Father objected to the move and responded by filing a petition to modify the parenting plan in which he opposed Mother's requested relocation and requested designation as the Child's primary residential parent. Following a hearing, the trial court granted Mother's request to relocate and revised the parenting plan to reflect the change in visitation as a result of the relocation. Father appeals. We affirm the decision of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court
Affirmed; Case Remanded**

JOHN W. MCCLARTY, J., delivered the opinion of the Court, in which J. STEVEN STAFFORD, P.J., W.S., and BRANDON O. GIBSON, J., joined.

Sharon T. Massey and Gregory D. Smith, Clarksville, Tennessee, for the appellant, Randy Scott Lower.

Stephanie D. Ritchie, Clarksville, Tennessee, for the appellee, Melanie Ewing Lower.

OPINION

I. BACKGROUND

The Child at issue was born of the marriage between Randy Scott Lower ("Father") and Melanie Ewing (Lower) Seal ("Mother") in December 2007. Mother and Father (collectively "the Parties") divorced in December 2009. Pursuant to agreement, Mother was

¹Sitting by Interchange.

designated as the primary residential parent. However, the parenting plan provided for equal visitation, allowing each parent to exercise approximately 182.5 days of visitation.

Following the divorce, Father married Allison Marie Lower (“Stepmother”), while Mother married Jason Eugene Seal (“Stepfather”). Father and Stepfather each served in the United States Army. Upon Stepfather’s return from deployment, Stepfather requested a position in Alabama that would allow him to avoid any future deployments for the remainder of his career in the Army. After his request was approved, Mother made preparations to move to Alabama and provided Father with a notice of intent to relocate. In response, Father filed a petition to modify the parenting plan in which he opposed Mother’s requested relocation and requested designation as the Child’s primary residential parent.

A hearing was held at which several witnesses testified. Mother testified that she initially moved to Clarksville, Tennessee when she began dating Father and that she did not have any family in the area. She provided that she and Father divorced when the Child was almost two years old. She recalled that she and Stepfather began dating in March 2012 and that in July 2012, he was transferred from Fort Campbell in Tennessee to Fort Rucker in Alabama, where he currently served as a flight instructor. She and Stepfather married in March 2013. She requested permission to move because they had already endured a long distance marriage for approximately one year.

Mother testified that the Child was approximately five years old and was scheduled to begin school in Fall 2013. She related that the Child had attended three different preschools with different teachers in different locations in the past five years. She stated that the Child was also active in church and in gymnastics and soccer but that the Child did not have any particularly strong attachments to any of the other children involved. She believed that the Child had adjusted well to each new location and activity and easily established new friendships. She conceded that the Child had exhibited some troubling behavior at times but that she and Father sought help and learned how to redirect the behavior. She asserted that the Child had never required counseling or services for anxiety or adjustment issues and that the Child did not suffer from physical or mental health issues that required treatment.

Mother testified that she was currently employed with the Army but that she planned to stay at home with the Child until the Child had adjusted to her new surroundings in Fort Rucker. She stated that the Child had visited Stepfather’s home in Fort Rucker and had adapted well to the new surroundings and Stepfather’s three children. She provided that Stepfather’s children lived with their mother in Washington and visited Stepfather as often as their school schedule allowed. She related that the Child enjoyed spending time with Stepfather and his children and acknowledged that the Child also enjoyed spending time with Stepmother and her two children.

Mother agreed that she and Father amicably shared custody of the Child. She related that Father had served in three different positions since the divorce. She claimed that his first two positions did not require deployment but that he was required to regularly attend training. She asserted that in 2012, he requested a position that required deployment. She claimed that Father missed 44 days of his visitation in 2010 and in 2011 because of training obligations and that he missed 73 days of visitation in 2012 because of training and deployment obligations. She asserted that in the current year 2013, Father had already been absent for approximately 20 days, some of which fell on his scheduled visitation days. She acknowledged that Father regularly exercised his visitation without issue when he was available. She claimed that if granted permission to relocate, she hoped to provide Father with every possible opportunity for visitation. She claimed that her request to relocate was not sought for a vindictive purpose and that she was even willing to meet Father at a halfway point between Fort Rucker and Fort Campbell to facilitate visitation.

Stepfather testified that he enjoyed a good relationship with the Child. He stated that he had three children of his own, two boys and one girl. He claimed that his residence was large enough for the Child and his three children. He related that his sons would share a room, while his daughter and the Child would each have their own room. He acknowledged that during his periods of deployment, his children resided with their mother. He asserted that he requested the transfer to Fort Rucker when he was petitioning for custody of his children. He related that his current position did not require deployment.

Father testified that he had served in the Army for approximately 15 years and that he had been stationed at Fort Campbell for the past 14 years. He disagreed with Mother's estimation of his missed visitation. He explained that Mother calculated the total time he was gone for assignments, not his actual missed visitation days. He asserted that he documented his actual visitation days on a calendar but acknowledged that he did not have any documentation with him at the present time. He claimed that he also paid more child support than required because he wanted to provide for the Child.

Father asserted that he enjoyed a very close relationship with the Child and that he was intricately involved in her extracurricular activities, namely gymnastics and soccer. He claimed that he even coached her soccer team. He asserted that he was involved with her education and that even while deployed, he communicated with her teachers on a weekly basis. He opined that the Child did well in preschool and was a "very smart child" and was also "very energetic." He believed that she had developed friendships with the other children in her preschool and sports teams. He related that he was also involved in the Child's medical care and regularly took her to doctor's appointments.

Father testified that he and Stepmother began dating in June 2012 and married in May 2013. He related that Stepmother had two children, one boy and one girl, that lived with

them. He stated that the Child and Stepmother's children each had their own room. He opined that the Child enjoyed a close relationship with Stepmother and her stepbrother and stepsister.

Father testified that Mother and Stepmother did not have a good relationship. He related that Mother also refused to facilitate the Child's visitation with his parents while he was in training or deployed. He conceded that his parents were able to visit while he was exercising visitation with the Child. He acknowledged that if he were designated as the Child's primary residential parent, Stepmother would be responsible for the Child while he was in training or deployed. He asserted that Stepmother would facilitate visitation with Mother, despite his deployment for approximately one month each year. He opined that he intended to retire in four years and that he did not believe his military service hindered his ability to parent the Child.

Stepmother confirmed that the Child enjoyed a very close relationship with Father, who was very involved in the Child's activities. She asserted that Father and the Child also enjoyed a close relationship with her children. She believed that she also had a great relationship with the Child and was able to care for the Child in Father's absence.

Frances Elaine Napier, the Child's paternal grandmother, testified that she regularly visited the Child while in Father's care and that she observed a "loving, caring relationship" between the Child and Father. She believed it was in the Child's best interest to remain at Fort Campbell in Father's care. She opined that she would not be able to visit the Child if the Child moved to Fort Rucker because Mother refused to contact her while Father was in training or deployed. She acknowledged that the Child was happy and well-adjusted.

Josslyn Perkins, the Child's preschool teacher, testified that the Child was very "sociable" and "outgoing" and was well-adjusted. She claimed that the Child had easily established relationships with the other children. She asserted that the Child was always excited to see Father, who was very involved in the Child's education. She acknowledged that the Child was also always excited to see Mother, who also visited the classroom.

Following the presentation of the above evidence, the trial court granted Mother's request to relocate pursuant to Tennessee Code Annotated section 36-6-108. The court found that Father failed to exercise "substantially equal intervals of time" with the Child. It further found that the requested relocation was reasonable, would not harm the Child, and was not sought for a vindictive purpose. This timely appeal followed.

II. ISSUE

We restate the issue raised on appeal by Father as follows:

Whether the trial court erred in granting Mother's request to relocate pursuant to Tennessee Code Annotated section 36-6-108.

III. STANDARD OF REVIEW

On appeal, the factual findings of the trial court are accorded a presumption of correctness and will not be overturned unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d). The trial court's conclusions of law are subject to a de novo review with no presumption of correctness. *Blackburn v. Blackburn*, 270 S.W.3d 42, 47 (Tenn. 2008); *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993). Mixed questions of law and fact are reviewed de novo with no presumption of correctness; however, appellate courts have "great latitude to determine whether findings as to mixed questions of fact and law made by the trial court are sustained by probative evidence on appeal." *Aaron v. Aaron*, 909 S.W.2d 408, 410 (Tenn. 1995). "Because [c]ustody and visitation determinations often hinge on subtle factors, including the parents' demeanor and credibility during . . . proceedings," appellate courts "are reluctant to second-guess a trial court's decisions." *Hyde v. Amanda Bradley*, No. M2009-02117-COA-R3-JV, 2010 WL 4024905, at *3 (Tenn. Ct. App. Oct. 12, 2010) (quoting *Johnson v. Johnson*, 169 S.W.3d 640, 645 (Tenn. Ct. App. 2004)).

IV. DISCUSSION

The parental relocation statute, codified at Tennessee Code Annotated section 36-6-108, governs this action. The statute creates a mechanism for determining whether a parent who has custody of a child may relocate outside the state or more than 50 miles from the other parent within Tennessee. When a parent objects to the relocation, the trial court must first determine the amount of time each parent spends with the child. *See* Tenn. Code Ann. § 36-6-108; *Kawatra v. Kawatra*, 182 S.W.3d 800, 802 (Tenn. 2005); *In re Jack H.L. B-K.*, No. M2010-00561-COA-R3, 2010 WL 4940586, at *2 (Tenn. Ct. App. Nov. 30, 2010).

Father failed to provide any evidence at trial to rebut Mother's computation of his time actually spent with the Child. Indeed, on appeal, he argues that his case is distinguishable from others because his absence was anticipated as a result of his career choice in the Army. He notes that he and Mother crafted a right of first refusal in the marital dissolution agreement because of his unique career responsibilities. Mother responds that at the time of divorce, Father's position in the Army did not require deployment but that he later sought a promotion that would subject him to deployment.

We agree that Father's admirable profession should not be discounted or held against him. However, in parental relocation cases, the court is tasked with simply determining whether the parent opposing the relocation actually spent substantially equal intervals of time

with the Child. *Kawatra*, 182 S.W.3d at 803-04. The appellate courts have declined to establish a bright-line rule in determining whether the time spent was equal, but the Tennessee Supreme Court provided some guidance in *Kawatra* by stating,

To determine the number of days to credit to each parent for purposes of Tennessee Code Annotated section 36-6-108(c) and (d), the trial court should first examine the provisions of the residential schedule. The trial court should then consider additional time each parent spent with the child that is not reflected in the residential schedule. If either parent violated the terms of the residential schedule by interfering with the other parent's time with the child, the trial court should make any necessary adjustments to reflect the time that the child should have been in the care of the other parent.

Id. (footnotes omitted). In this case, the residential schedule provided for equal visitation time, and neither parent was accused of interfering with the other parent's time. Father simply failed to exercise substantially equal intervals of time with the Child.

Accordingly, in determining whether to grant the request to relocate, the court was required to apply section 36-6-108(d)(1), which provides,

(d)(1) 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 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:

(A) The relocation does not have a reasonable purpose;

(B) The relocation would pose a threat of specific and serious harm to the child that outweighs the threat of harm to the child of a change of custody; or

(C) 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.

The parent opposing the relocation bears the burden of proof to establish one of these three grounds. *Clark v. Clark*, No. M2002-03071-COA-R3-CV, 2003 WL 23094000, at *3 (Tenn. Ct. App. Dec. 20, 2003). The relocation shall be permitted if the opposing parent fails to prove any of the three grounds. Tenn. Code Ann. § 36-6-108(d)(1). If the court finds one of the grounds to be present, “the court shall determine whether or not to permit relocation of the child based on the best interest of the child.” Tenn. Code Ann. § 36-6-108(e).

Father agrees that Mother’s request to relocate was not made with a vindictive motive. Instead, he argues that the relocation did not have a reasonable purpose and that the relocation posed a threat of serious and specific harm to the Child. Relative to the first ground, he asserts that Stepfather requested the assignment in Alabama for no apparent reason. The record reflects that Stepfather’s relocation allowed him to remain home with his family without the possibility of future deployments. At the time of the hearing, Mother and Stepfather had been married for approximately one year. With these considerations in mind, we agree with the trial court that Mother’s relocation had a reasonable purpose.

Relative to the second ground, section 36-1-108(d)(2) provides,

(2) Specific and serious harm to the child includes, but is not limited to, the following:

(A) If a parent wishes to take a child with a serious medical problem to an area where no adequate treatment is readily available;

(B) If a parent wishes to take a child with specific educational requirements to an area with no acceptable education facilities;

(C) If a parent wishes to relocate and take up residence with a person with a history of child or domestic abuse or who is currently abusing alcohol or other drugs;

(D) If the child relies on the parent not relocating who provides emotional support, nurturing and development such that removal would result in severe emotional detriment to the child;

(E) If the custodial parent is emotionally disturbed or dependent such that the custodial parent is not capable of adequately parenting the child in the absence of support systems currently in place in this state, and such support system is not available at the proposed relocation site; or

(F) If the proposed relocation is to a foreign country whose public policy does not normally enforce the visitation rights of non-custodial parents, that does not have an adequately functioning legal system or that otherwise presents a substantial risk of specific and serious harm to the child.

Father claims that removal would result in severe emotional detriment to the Child, who relies on him for emotional support, nurturing, and development. In support of his assertion, he presented evidence concerning his close relationship with the Child and his involvement in her education and extracurricular activities. While we do not wish to discount Father's bond with the Child, the evidence presented reflected that the Child was capable of easily adjusting to new surroundings. Moreover, the Child spent more time with Mother, who was equally capable of addressing the Child's emotional and developmental needs. With these considerations in mind, we conclude that the trial court did not err in granting Mother's request to relocate because Father failed to establish any of the three grounds found in section 36-6-108(d)(1).

V. CONCLUSION

The judgment of the trial court is affirmed, and the case is remanded for such further proceedings as may be necessary. Costs of the appeal are taxed to the appellant, Randy Scott Lower and his surety, if any.

JOHN W. McCLARTY, JUDGE