IN THE COURT OF APPEALS OF TENNESSEE

CATHY ANN GRACEY,	)	C/A NO. 03A01-9511-CV-00419
	)	HAMILTON COUNTY CIRCUIT COURT
Plaintiff-Appellee,	)	
	)	
	)	
	)	
	)	
v.	)	HONORABLE L. MARIE WILLIAMS,
	)	JUDGE
	)	
	)	
	)	
	)	
JOSEPH DOUGLAS GRACEY, JR.,	)	
	)	VACATED
Defendant-Appellant.	)	REMANDED WITH INSTRUCTIONS

DAVID M. SIBLEY, Chattanooga, for Appellant

ALBERT L. WATSON, III, Chattanooga, for Appellee

O P I N I O N

Susano, J.

This is a post-divorce case. It revolves around the efforts of the appellant, Joseph Douglas Gracey, Jr. (Father), to move with his two minor children from the Hamilton County area to California. The trial court entered an order on July 5, 1995, changing the custody of the parties' minor child, Anna Rebekah Lee Gracey (Anna), from Father to the child's mother, the appellee Cathy Ann Gracey (Mother). The order provided that the custody of the other minor child, Joshua Joel Gracey (Joshua), would remain with Father. The order, by implication, allowed Father to move to California with Joshua. It contained a number of provisions addressing visitation back and forth between Hamilton County and California[1]. Father appeals, raising two issues.

> 1. Did the trial court abuse its discretion in changing the custody of Anna from Father to Mother?
>
> 2. Did the trial court abuse its discretion in the visitation schedule it established for each of the children and the child's now-custodial parent?

At the time of the most recent hearing on June 9, 1995, Anna (dob: 7/2/84) was almost 11 and Joshua (dob: 10/17/81) was approximately four months shy of his 14th birthday.

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[1]In addition to decreeing visitation during the summer and at spring break, Thanksgiving, and Christmas, the trial court ordered weekend visitation as follows:

> That Mr. Gracey shall arrange for Anna to visit him and for Joshua to visit his mother for a full weekend at least once a month so that both children are together for those two (2) weekends each month.

In other words, the trial court mandated transcontinental weekend visitation for each child "at least once a month."

I. *Procedural History*

The parties were divorced by judgment of the trial court on October 1, 1992. That judgment awarded Father custody of both of the parties' children. Mother was awarded the following visitation: "overnight visitation on weekdays" because her employment "require[d] [her to] work weekends"; three weeks in the summer; Christmas Day to New Year's Day; alternate Thanksgivings; and alternate Easters. The judgment of divorce contained the following injunction:

> . . . each of the parties is enjoined from moving the children from the State of Tennessee without first petitioning the Court for a hearing on such a proposed move.

On April 24, 1995, Mother filed a complaint alleging that Father had moved with the children to California in violation of the court's injunction. She asked for temporary and permanent custody. On May 3, 1995, Mother filed an amended complaint alleging that her complaint had not been served, but that the children had returned to Hamilton County. She again sought the children's custody. An order was entered the same day, apparently following an *ex parte* hearing, awarding temporary custody of the parties' children to Mother. After Mother was awarded temporary custody, Father filed his answer and a "counter-petition" seeking permission to relocate to California with his children. Father alleged that he was

> . . . contemplating moving to California with the children of the marriage. His reasons for contemplating this move are that it would

> enable him to take care of his 81-year old father, that it would reduce his living expenses, that it would provide an increased economical opportunity for him and his wife and it would provide improved educational opportunities for the children.
>
> It is in the best interest of the children to continue custody with the defendant.
>
> [Father] understands the need to provide visitation for [Mother] and has attempted to discuss a modified visitation schedule without avail due to [Mother's] unwillingness to discuss the matter.

On May 15, 1995, the trial court held a hearing on the parties' competing pleadings. After that hearing, the trial court entered an order (on June 1, 1995) vacating its award of temporary custody to Mother and providing that custody of the children was "restored to defendant, Joseph Douglas Gracey, Jr." The order further provided

> [t]hat [Father] shall not be allowed to relocate the parties' minor children to California, and the provisions of the parties' final decree of divorce that each of the parties are [sic] enjoined from moving the children from the State of Tennessee without first petitioning the Court for a hearing on such proposed move shall continue in full force and effect.

While we do not have a transcript of the May 15, 1995, hearing, we do have the trial court's findings as set forth in the preamble of its order:

> . . . the Court finds that neither party has carried their respective burdens of proof. The plaintiff, Cathy Ann Gracey, has shown no change of circumstances which would warrant a change of custody. The defendant/counter-petitioner has not been able to show that his

> relocation to Los Angeles County, California is in the parties' children's best interest, and in fact, the Court finds these children, ages ten (10) and thirteen (13), are at vulnerable ages, needing stability in their environment and the continuation of the consistent contact they have had with their mother; that there is no necessity to move to California dictated by the father's current or past employment requirements. Mr. Gracey is commended for his responsible attitude toward his elderly father living in California, wanting to be near him, however, Mr. Gracey's testimony indicated he had tried in the past, unsuccessfully, to convince his father to move here and even though the move to California might be in the elderly father's best interests, it is not in the children's.

Following the May 15, 1995, hearing, the parties and their children found themselves in a posture identical to the situation that existed immediately following the divorce: Father had custody of both children, Father and Mother were residing in Hamilton County, and both parents were enjoined from removing the children from Tennessee without first petitioning the court for a hearing on the proposed move.

Against this "backdrop," the trial court took the action that prompted this appeal. On June 2, 1995, Father filed a motion to alter or amend, which, among other things, asserted that "post-hearing events have substantially changed critical factors germane to the decision of the court." The motion sought to introduce "additional evidence relating to these circumstances." On the same day, Father filed a motion asking

the court to receive the testimony of Joshua pursuant to the provisions of T.C.A. § 36-6-102 (1994), since repealed.[2]

The trial court heard testimony on Father's motion to alter or amend on June 9, 1995. We have a transcript of that hearing; however, we do not have a transcript of the testimony of Anna and Joshua received "separately [by] the Court in chambers." Following the hearing, the trial court entered an order (on July 5, 1995) awarding custody of Anna to Mother. Despite the fact custody of Joshua was already with Father by virtue of the June 1, 1995, order, the trial court decreed in its most recent order that "custody of [Joshua] is awarded to his father." Curiously, the order does not explicitly state that the trial court was lifting its injunction with respect to Father's planned move to California; but it is clear from the order and the court's memorandum opinion that the move, with Joshua, was allowed.

The appeal now before us is from the trial court's order of July 5, 1995.

II. *Facts*

[2]T.C.A. § 36-6-102 (1994) was repealed by Chapter 428 of the Public Acts of 1995, effective June 12, 1995. It was in effect when Father's motion was filed and when the trial court received the children's testimony in chambers. In pertinent part, it provided as follows:

> In a suit for annulment, divorce or separate maintenance, where the custody of a minor child or minor children twelve (12) years of age or older is a question, the court shall, upon motion by either party that such child or children has expressed a desire to make a custody preference known to the court, and prior to the award of care, custody and control of such child or children, seek the preference of such child or children relative to the parent with whom the child or children desire to live.

In the spring of 1995, Father was advised that his mother was terminably ill with cancer. He, his wife[3], and the children went to Los Angeles County, California, to be with her in her last illness. This temporary move was apparently what prompted Mother to seek custody of the children.

Father's mother died on May 5, 1995. Father and his wife were in California for approximately four weeks; however, the children were only there during their spring break and for a few days after that. They flew back to Chattanooga and stayed with Mother who took them back and forth to school.

Following his wife's death, the children's paternal grandfather asked Father and his wife to move to California and

[3]Father remarried on September 4, 1993.

live with him in his house. He is 82 years old. Father encouraged him to return with them to Chattanooga, but he refused, saying that he wanted to remain in the house he had shared with his wife of 60 years.

Father and Mother are both natives of California. Neither has any relatives in Tennessee. In addition to his father, the appellant has "some aunts and uncles and cousins" in California. Mother's grandmother, age 92, and her two brothers also live in California. While acknowledging a good relationship with her grandmother, Mother testified that she had not talked to her brothers in three years.

Father's wife is a nurse, who was working as a nursing supervisor in the Chattanooga area prior to the parties' decision to move to California. Father had worked as an accountant for Chattanooga Office Supply for 9-1/2 years before he was laid off in September, 1994. In his last year there, he earned in the range of $28,000--$30,000. He then went to work for Coats America for $8 per hour. Father is less than "one year away from his B.S. in accounting." He plans to pursue his degree in California.

Following the hearing on May 15, 1995, Father and his wife sold the two houses owned by them in the Chattanooga area and made the decision to move to California. This firm decision was precipitated by the fact that, following the May 15, 1995, hearing, both had been offered employment in California. Father was offered a job with Accountants on Call at a wage rate of $11

to $15 per hour. His wife was offered, and accepted, a nursing position with Premier Health Care making $45,000 to $50,000 per year, approximately $8,000 more than her last employment in Chattanooga. Her job started June 12, 1995.

Father and his wife testified that each of them had an excellent relationship with both of the children. They explained that they wanted to move to California to live with the children's paternal grandfather because of better employment opportunities and to pursue a life that they thought would be in the best interest of the children as well as their own best interest. There was testimony that a dry, hot climate would be better for the children's stepmother who has rheumatoid arthritis and has had a total joint replacement three times. There was also testimony that the educational and recreational opportunities for the children in California were excellent. Their grandfather's house is located in a "nice" neighborhood with more than ample accommodations for the children. Apparently, both of the children are good students. Anna had a 99.3 grade average at Ooltewah Intermediate School.

III. *Law and Analysis*

The trial court initially refused to allow Father to move to California and also refused to change custody. Since we do not have a transcript of the May 15, 1995, hearing that prompted that initial decision, we must presume that the trial court had before it sufficient evidence to justify those decisions at that time. ***Sherrod v. Wix***, 849 S.W.2d 780, 783 (Tenn. App. 1992). Furthermore, neither party appealed from the June 1, 1995, order memorializing the May 15, 1995, hearing. As previously indicated, that order put the parties in exactly the same position they were in following the divorce.

With respect to the trial court's order (of July 5, 1995) now before us, it is clear that Father had the burden of proving that relocation was in the best interest of the children. ***Taylor v. Taylor***, 849 S.W.2d 319, 332 (Tenn. 1993). There was an injunction prohibiting removal of the children from Tennessee on a permanent change of residence. ***Taylor***, under those circumstances, places the burden of proof on the custodial parent when that parent seeks to lift such a prohibition:

> If . . . the custodial parent files for relief, seeking to lift a prior prohibition on removal or asking the court's permission to move from the jurisdiction, or both, the custodial parent has the burden of proving that removal is in the child's best interest. That burden can be shifted by a prima facie showing of a sincere, good-faith reason for the move and a prima facie showing that the move is consistent with the child's best interest.

Id. The appellee does not challenge the trial court's determination that Father met his burden *as far as Joshua is concerned*. Therefore, we will not concern ourselves further with that aspect of this case except to examine how that ruling impacts the decisions that are challenged on this appeal.

Unfortunately, we do not have a complete transcript of the most recent hearing--the one that led to the rulings challenged on this appeal. We do not have the testimony of the children. This is troublesome because it is clear that Judge Williams took into consideration her private conversations with the children. We do not mean to criticize the trial court's decision to receive the children's testimony out of the presence of the parents. Such a procedure was authorized by the provisions of T.C.A. § 36-6-102 (1994) then in effect. ("The court, in its discretion, may receive the testimony of such child or children out of the presence of the parties to such action.")[4] However, we do not understand why that testimony was not preserved since it was received by the trial court at a hearing attended by a court reporter. We note the trial court's comment that "in talking with the children, I promised them I would not discuss what they had said." If the trial court made the decision not to permit this testimony to be preserved, that was error. While children's testimony in custody cases can be extremely sensitive, parties are entitled to a transcript of that evidence unless they freely waive their right to preserve that

[4]We note, in passing, that this provision was deleted when the custody preference provision was re-codified at T.C.A. § 36-6-106(7) (1995) following the repeal of T.C.A. § 36-6-102 (1994).

testimony. The better procedure is to preserve that testimony in case an appeal becomes necessary.

Just as Father had his burden of proof, Mother likewise had hers--it was her burden to prove that the circumstances of the parties had changed so as to require a change of custody. "The burden is therefore upon the party who seeks to modify the court's custody decree . . . to prove that a material change in circumstances has occurred which requires an alteration of custody." ***Woodard v. Woodard***, 783 S.W.2d 188, 189 (Tenn. App. 1989).

In reviewing the trial court's decision to change the custody of Anna, we are mindful of the very clear, unambiguous holding in ***Taylor***:

> . . . removal is not, in and of itself, a change of circumstance sufficient to justify modification of the custody order.

849 S.W.2d at 332.

While we do not have a transcript of the children's testimony, we believe the trial court's motivation--what really prompted it to change Anna's custody--can be clearly gleaned from her comments following the hearing:

> THE COURT: First, it is the finding of this Court that both parents are well intended, love their children and will try to do what is in the best interest of the children. Second, there is no question in the Court's mind that it is in the best interest of the

> 10-year-old daughter to stay in Chattanooga and to restrain her removal from this state for the purpose of permanent residence. The Court is well aware of established law, that the best interest of the child is intertwined with what is in the best interest of the custodial parent. Additionally, the convenience of the noncustodial parent is not a determining factor. However, this is a loving and vulnerable [sic] who is feeling very strongly the effects of her father's decision to move all way across the country and who has a need for a consistent contact with her mother. The Court finds that this 10-year-old girl cannot adequately maintain that relationship with her mother by the telephone or by letter and needs to be in geographic proximity to her mother. The son presents very different problems. He is in formative years and very much in need of a father's strong guidance, and the Court is well aware of the goals of and the interest of keeping the children together. In this case, the Court is very concerned that if the son stays here in Chattanooga and is forced to stay here, he will become rebellious and out of the control in the father's absence. Therefore, the son is permitted to go with the father. The daughter is not. I find it difficult to understand how a father who has been a good custodial parent cannot understand the huge difficulties he is creating for his children by deciding to make this move and how he can honestly testify the move is in the long term best interest of the children. The only rational explanation is that this is his way of dealing with a huge loss in his life and the responsibilities he has gained as a result of the death of his mother, and he must believe that California is the land of opportunity and that the mother will succumb to his move by moving to California, also. There was proof to that effect. The Court finds the plaintiff has not carried the burden of proof as to Anna, and the plaintiff is prohibited from moving her from this jurisdiction with the intention of establishing residency. He has carried the burden of proof as to Joshua.

There is absolutely no indication in the trial court's memorandum opinion that it was changing Anna's custody for any reason other than the planned relocation to California and its

natural outgrowth. There is not one scintilla of proof in the record before us that Father is other than a fit and proper custodian. He was found to be such at the time of the divorce. That has not changed. We are convinced that if the trial judge had heard something to the contrary in talking with the children, she would have put that on the record. Her findings--"that both parents are well-intended, love their children and will try to do what is in the best interest of the children" and that "father . . . has been a good custodial parent"--are so incompatible with a finding that Father is not a fit custodian, we are sure the *in camera* examination of the children did not disclose anything that is not in the record before us. Under the unusual circumstances of this case, we believe we can review this case even in the absence of a transcript of the children's testimony.

The only reason advanced by the trial court to change Anna's custody is directly related to Father's relocation. The trial court held that

> . . . this is a loving and vulnerable [sic] who is feeling very strongly the effects of her father's decision to move all way across the country and who has a need for a consistent contact with her mother. The Court finds that this 10-year-old girl cannot adequately maintain that relationship with her mother by the telephone or by letter and needs to be in geographic proximity to her mother.

The reason given by the trial court is nothing more or less than the move to California. ***Taylor*** clearly does not permit this rationale as a justification for a change of custody.

There is another reason why we cannot approve Anna's change of custody. While the trial court crafted extensive visitation between Hamilton County and California to insure the children would be together as much as geography would permit, the court's order cannot mask the fact that these siblings are being separated. There is absolutely nothing in the record to suggest that they have other than a loving brother-sister relationship. There is certainly nothing in the record--not one scintilla of proof--to indicate that these children should be separated and raised in separate households, some two thousand miles apart. It is generally not a good idea to separate minor children by a custody order. ***Terry v. Terry***, 361 S.W.2d 500, 504 (Tenn. App. 1960); ***Baggett v. Baggett***, 512 S.W.2d 292, 294-95 (Tenn. App. 1973). Generally speaking, siblings, following a divorce, have a right to spend their minority together in the absence of proof of potential harm to one of them or other extenuating circumstances.

The trial court has allowed Father to relocate to California with Joshua. The evidence preponderates against the trial court's finding that the father should not be permitted to relocate with Anna. When the factors set forth in ***Taylor*** are applied to the facts of this case, 849 S.W.2d at 332, it is clear that the move is in the best interest of both of the children. Particularly relevant here are the "strong presumption in favor of continuity of the original award," *id*.; the fact that the welfare of the children is "affected by the welfare of the custodial parent," *id*.; advantages of the move to the children, *id*.; and the fact that the motive of Father in moving is clearly

"not intended to defeat or deter visitation by the non-custodial parent." *Id*.

Relocation cases almost always present a trial court with a number of less than ideal choices; but such is the natural outgrowth of divorce. A court cannot "make it well." It can only do what it thinks is in the best interest of the children, under the law, in view of the fact the children can no longer live with both of their parents. Judge Williams tried to do that in this case by crafting an extensive plan of visitation, including even weekend visitation between California and Tennessee; however, in the final analysis, what she has decreed is not workable and not in the children's best interest. Under her decree, the children would spend too much of their free time getting on airplanes for transcontinental flights.

The Supreme Court's words in ***Taylor*** are particularly poignant:

> It is essential that the courts deal pragmatically with circumstances such as those presented in this case. We all recognize that "[i]n a perfect world, every chid would live in a loving, two-parent home. Unfortunately, we do not live in such a world. When parents are divorced or separated, the family unit, even from the perspective of the child, is broken. The parents no longer live in harmony but have competing and often irreconcilable interests." (Citation omitted).
>
> Furthermore, "[i]n considering the parental relationship between the child and the non-custodial parent, it must be recognized that after a divorce the child of the marriage becomes a member of two separate families, the mother's and the father's. The family unity which is lost as a consequence is lost

> irrevocably, and *there is no point in judicial insistence on maintaining a wholly unrealistic simulation of unity*." (Citation omitted).

849 S.W.2d at 333. (Emphasis added).

The highest court of New York, the respected New York Court of Appeals, recently addressed the same issue:

> Like Humpty Dumpty, a family, once broken by divorce, cannot be put back together in precisely the same way. The relationship between the parents and the children is necessarily different after a divorce and, accordingly, it may be unrealistic in some cases to try to preserve the noncustodial parent's accustomed close involvement in the children's everyday life at the expense of the custodial parent's efforts to start a new life or to form a new family unit. In some cases, the child's interests might be better served by fashioning visitation plans that maximize the noncustodial parent's opportunity to maintain a positive nurturing relationship while enabling the custodial parent, who has the primary child-rearing responsibility, to go forward with his or her life.

Tropea v. Tropea, 1996 WL 137476 at *7 (March 26, 1996).

The judgment of the trial court is hereby vacated. This cause is remanded to the trial court with instructions to enter an order immediately placing the custody of Anna Rebekah Lee Gracey with the appellant, Joseph Douglas Gracey, Jr.; however, she will remain with her mother until the end of the current school year, after which she will immediately go to California at Father's expense. After a hearing, the trial court will craft a new visitation arrangement utilizing, in a fair

fashion, the time that the children are not in school, i.e., Easter (or spring break), Thanksgiving, Christmas, and the summer period. The court's order will permit visitation by the appellee in California, at her expense. Under the circumstances of this case, we do not believe it is realistic to structure visitation at times other than those indicated in this opinion. To the extent possible, the trial court is directed to take into consideration the children's organized activities in California in the summer. The trial court will also need to review its support order in view of the fact that both children will now be living with Father.

Costs on appeal are taxed to the appellee.

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Charles D. Susano, Jr., J.

CONCUR:

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Houston M. Goddard, P.J.

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Don T. McMurray, J.