

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned On Briefs July 31, 2015

IN RE: WILLIAM K.

**Direct Appeal from the Juvenile Court for Davidson County
No. 20123391 Sophia Brown Crawford, Judge**

No. M2014-01872-COA-R3-JV – Filed October 20, 2015

This is an appeal from an order designating a primary residential parent and setting visitation and child support. The juvenile court found that naming Father as primary residential parent was in the child’s best interest and set child support accordingly. Mother appealed both the designation of primary residential parent and the amount of child support owed to father. We affirm.

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

BRANDON O. GIBSON, J., delivered the opinion of the court, in which J. STEVEN STAFFORD, P.J., W.S., and KENNY ARMSTRONG, J., joined.

Jodi Ellen Melind and Dawn A. Garcia, Franklin, Tennessee, for the appellant, Rachel L.

William K., Jr., Nashville, Tennessee, *Pro se*.

OPINION

I. FACTS & PROCEDURAL HISTORY

The parties, William K., Jr. (“Father”) and Rachel L. (“Mother”), are the parents of the child William K., III (“the Child”)¹, who was born on July 31, 2011, out of wedlock. Father and Mother lived together in Nashville, Tennessee until they ended their relationship in 2012. Mother has a seventeen year-old son (“Brother”) from a previous marriage who also lives with Mother part of the time. Brother’s father recently moved to

¹In cases involving a minor child, it is this Court’s policy to redact names in order to protect the child’s identity. In this case, in order to preserve both clarity and the anonymity of the child, we will redact the names of individuals sharing the child’s surname and will refer to those individuals by their given name and the first letter of their surname.

Tennessee and shares parenting time with Mother. Brother has been diagnosed with Asperger's disorder, Autism, and psychosis. Father and Mother intended to marry on several occasions, but for one reason or another never followed through with their plans to marry and eventually ended their relationship. Since that time, the relationship between the two parties has been highly contentious and has resulted in numerous allegations that on occasion have ended with law enforcement becoming involved.

In June 2012, Father filed a petition in the juvenile court to enter a parenting plan regarding the Child. In his petition, Father requested a temporary restraining order enjoining Mother, who has family in Peru, from removing the Child from the United States, which the magistrate granted. In August 2012, the parties, through mediation, reached an agreement for a temporary parenting plan. The original temporary parenting plan assigned primary care of the Child to Mother, giving her care of the Child for eight days out of every fourteen. In October 2012, Father requested several modifications to the temporary parenting plan, including restricting Brother from being alone with the Child and providing a locking and monitoring mechanism to ensure that Brother could not access the Child's room at night. The magistrate granted each of those requests.

At that time, the magistrate also granted Mother's motion for *pendente lite* child support, finding that it was appropriate to enter an order of interim support. Due to Father's unconventional work, the magistrate noted the difficulty of determining a "true and accurate" figure that reflected Father's income and assets and chose to set his income, for child support purposes, at \$130,000, an approximation based on his 2011 tax return. This resulted in a child support payment of \$997 per month. On July 1, 2013, the juvenile court entered an order requiring each parent to allow the other a right of first refusal for any occasions that a non-related caregiver was needed during time that the Child was with that parent. On December 11, 2013, the juvenile court heard from both parties regarding an allegation that Mother violated Father's right of first refusal by leaving the Child with non-related caregivers without first notifying Father. Although the record does not contain an order stating such, we surmise from the juvenile court judge's largely indecipherable handwritten notes on a Family Service Decree Note form, trial testimony, and child support payment records that the court apparently modified the temporary parenting plan by assigning Father the majority of the parenting time and reducing Mother's parenting time to weekends only. The record does not indicate whether the court modified Father's child support to a lower amount and if so to what amount or why Father, the new primary caregiver, would continue to pay child support to Mother. However, Father's child support payment records show that Father began paying \$227 per month, down from \$997 per month, after the December hearing.

The juvenile court heard five days of testimony in this matter on May 7, May 8, May 12, May 16 and August 21, 2014, when the Child was nearly three years old. The

court had the opportunity to observe a number of witnesses, including Father and Mother. At trial, Father testified that he had been the Child's primary caretaker during the Child's waking hours despite the fact that the original temporary parenting plan entered by the juvenile court judge, prior to the juvenile court judge's apparent modification, assigned Mother 55 percent of the parenting time. Father testified that Mother's school, work, and social schedules resulted in him caring for the Child somewhere between 80 and 100 percent of the time the Child was awake. Father also testified that on one occasion Mother contacted him to let him know she would be late picking up the Child because she had to work, causing Father to find last minute child care so he could attend a business meeting. When he arrived at that meeting, held at a local restaurant and bar, he found Mother sitting with her boyfriend. Father's testimony also revealed that Mother often delivered the Child dirty and unkempt and on one occasion so lethargic that Father took him to the hospital.

The court also heard testimony regarding Brother's interactions with the Child. Father testified that Brother's mental health issues pose a risk to the Child's health and safety and recounted several situations in which Brother exhibited violent tendencies toward Mother and the Child. Both Mother and Brother's doctor testified that they do not believe Brother is an active danger to the Child; however, Brother is no longer receiving medications for his mental health issues.

The court also heard testimony from Mother's ex-husband, who is Brother's father. He testified that Mother moved with Brother away from him and that she made it difficult for Brother to contact him. Brother's father testified that he eventually moved to Tennessee in 2012 because Brother was in "bad shape" with very poor hygiene. Both Father and Brother's father testified that Brother's hygiene and behavior have improved considerably since his father moved to Tennessee.

Mother testified that she had been the Child's primary caregiver until the court modified her parenting time² and that she appropriately fed and cared for the Child. Mother admitted that she had, at one point, intended to move to Florida for a job and that she had planned to leave both the Child and Brother with their respective fathers. On August 25, 2014, the juvenile court entered a written order reflecting its findings and conclusions. The court's order indicated that Mother had credibility issues with the court and expressed concern over Mother's lack of judgment on other issues. Accordingly, the court concluded that designating Father primary residential parent was in the Child's best interest and set child support accordingly. The court also evenly split responsibility for

²Mother argues on appeal that her parenting time was not modified as a result of any violation of Father's right of first refusal, but because her work schedule required it. However, the court's final order indicates that this is not true, and that Mother's time was modified because she violated an order to give Father an opportunity to care for the Child when she could not.

the Child's unpaid medical bills between the parties and denied Father's request for attorney's fees.

II. ISSUES PRESENTED

Mother presents the following issues, as slightly re-worded, for review on appeal:

1. Whether the trial court appropriately designated Father primary residential parent of the parties' one minor child, pursuant to Tenn. Code Ann. § 36-6-404.
2. Whether the trial court appropriately based Father's income on his statement of what he believes he will make and not pursuant to the Tennessee Child Support Guidelines.
3. Whether the trial court appropriately retroactively modified Father's child support due under the original temporary parenting plan.
4. Whether unpaid medical bills should be paid pursuant to the Tennessee Child Support Guidelines based on pro rata income of the parties.

Additionally, Father presents the following issue, as we perceive it, for review on appeal:

1. Whether the trial court erred in not granting Father's request for attorney's fees.

III. STANDARD OF REVIEW

The Tennessee Supreme Court recently described in detail the standard of review that applies when an appellate court reviews a trial court's decision on a parenting arrangement:

In a non-jury case such as this one, appellate courts review the trial court's factual findings de novo upon the record, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. See Tenn. R. App. P. 13(d); *Armbrister v. Armbrister*, 414 S.W.3d 685, 692 (Tenn. 2013). We review the trial court's resolution of questions of law de novo, with no presumption of correctness. *Armbrister v. Armbrister*, 414 S.W.3d at 692.

Because decisions regarding parenting arrangements are factually driven and require careful consideration of numerous factors, trial judges,

who have the opportunity to observe the witnesses and make credibility determinations, are better positioned to evaluate the facts than appellate judges. *Armbrister v. Armbrister*, 414 S.W.3d at 693. Determining the details of parenting plans is “peculiarly within the broad discretion of the trial judge.” *Armbrister v. Armbrister*, 414 S.W.3d at 693 (quoting *Edwards v. Edwards*, 501 S.W.2d 283, 291 (Tenn. Ct. App. 1973)). “It is not the function of appellate courts to tweak a [residential parenting schedule] in the hopes of achieving a more reasonable result than the trial court.” *Armbrister v. Armbrister*, 414 S.W.3d at 693 (quoting *Eldridge v. Eldridge*, 42 S.W.3d 82, 88 (Tenn. 2001)).

A trial court’s decision regarding the details of a residential parenting schedule should not be reversed absent an abuse of discretion. *Armbrister v. Armbrister*, 414 S.W.3d at 693 (citing *Eldridge v. Eldridge*, 42 S.W.3d at 88). A trial court abuses its discretion when it applies an incorrect legal standard, reaches an illogical conclusion, bases its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party. *State v. Banks*, 271 S.W.3d 90, 116 (Tenn. 2008) (citing *Konvalinka v. Chattanooga–Hamilton Cnty. Hosp. Auth.*, 249 S.W.3d 346, 358 (Tenn. 2008)). A trial court abuses its discretion in establishing a residential parenting schedule “only when the trial court’s ruling 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.” *Armbrister v. Armbrister*, 414 S.W.3d at 693 (quoting *Eldridge v. Eldridge*, 42 S.W.3d at 88).

Kelly v. Kelly, 445 S.W.3d 685, 691-92 (Tenn. 2014).

IV. DISCUSSION

A. Primary Residential Parent

First, Mother challenges the juvenile court’s decision to designate Father as the primary residential parent. Mother argues that the juvenile court erred in its analysis by finding the majority of the statutory factors in Father’s favor and that designating her primary residential parent would be in the Child’s best interests. We disagree.

Trial courts have broad discretion in fashioning child custody and visitation arrangements that best suit the unique circumstances of each case. *Parker v. Parker*, 986 S.W.2d 557, 563 (Tenn. 1999). This is because such decisions often hinge on subtle factors, such as the parents’ demeanor and credibility during proceedings. *Rountree v.*

Rountree, 369 S.W.3d 122, 129 (Tenn. Ct. App. 2012). However, that discretion is limited to some degree by the statutory directive that such determinations “shall be made on the basis of the best interest of the child.” Tenn. Code. Ann. § 36-6-106(a). Additionally, Section 36-6-106 directs courts to consider “all relevant factors,” including a non-exclusive list of fifteen factors, when determining the best interests of a child in a primary residential parent determination. Determining a child’s best interest is a “fact-sensitive inquiry” that does not call for “rote examination of each of the [relevant] factors and then a determination of whether the sum of the factors tips in favor of or against the parent. The relevancy and weight to be given each factor depends on the unique facts of each case.” *Solima v. Solima*, No. M2014-01452-COA-R3-CV, 2015 WL 4594134, at *4 (Tenn. Ct. App. July 30, 2015) (*no perm. app. filed*)(quoting *In re Marr*, 194 S.W.3d 490, 499 (Tenn. Ct. App. 2005)).

In its thirty-one page order, the juvenile court made findings for each of the relevant factors³ and determined that naming Father primary residential parent was in the

³The statutory factors are:

(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

Child's best interests. Mother argues that the juvenile court failed to appropriately apply the statutory factors in making a determination as to the comparative fitness of the parents. Had the court done so, she argues, the factors would weigh in her favor, and the court would not have concluded that the Child's best interest would be served by designating Father primary residential parent.

The testimony regarding Mother and Father's parenting abilities was conflicting at times. The trial court alone has the ability to observe the manner and demeanor of a witness while testifying, thus we give "considerable deference" to the trial court's findings of credibility and the weight to be given testimony. *Kelly*, 445 S.W.3d at 692. The court found that Mother admitted to lying about a variety of topics of varying degrees of seriousness in a number of circumstances. We find no evidence in the record to indicate that the juvenile court abused its discretion in designating Father as the primary residential parent of the Child. The juvenile court referenced each of the fifteen statutory factors in its order. As in most cases, some of the relevant factors weigh equally in favor of both parents, however the court did not find in favor of Mother on any single factor. A factor that clearly favored Father was his proactive approach to enrolling the Child in suitable education programs and keeping him clean and appropriately dressed. On the other hand, the court found that Mother failed to provide the "bare necessities of daily care" for the Child and often delivered the Child to Father unkempt and dirty. The

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.

Tennessee Code Ann. § 36-6-106.

court found that Brother continued to pose a “substantial” danger to the Child and that Mother failed to recognize the seriousness of Brother’s mental-health issues. The court also found that Father’s self-employment allowed him to more freely adjust his schedule so as to avoid placing the Child in daycare, while Mother often used daycare during her parenting time because of her work, school, and social schedules. The court’s order demonstrates that particularly relevant to its decision was its finding that “Father has put the interests of [the Child] as his top priority,” whereas “Mother’s interest in her son appears to this Court to be one of convenience” Additionally, the court expressed concern with Mother’s ability to effectively co-parent. The court found that Mother had a history of moving Brother away from his father and also that she violated a court order allowing Father to care for the Child when she was unable to do so. The record supports these findings by the juvenile court. Given the trial court’s proper exercise of its discretion, we affirm the trial court’s decision with respect to Father’s designation as primary residential parent.

B. Father’s Income

Next, Mother challenges the calculation of Father’s income for purposes of her child support obligation. Father is self-employed. He deals in real estate investments and also sells parabolic funnels⁴ to companies engaged in fundraising. Due to the volatile nature of the real estate market, Father’s income fluctuates from year to year. The juvenile court found that Father’s “income from all sources in 2010 was a loss of \$53,594[.00]; in 2011 was \$129,742.00; in 2012 was a loss of \$3,221.00; and in 2013 was a loss of \$65,040[.00].” Pursuant to the Tennessee Child Support Guidelines, the court imputed income to Father in the amount of \$37,589 for the period between August 2012 and August 2013, and set it at \$50,000 for 2014 onward, based on what Father stated he believed he could make. Tenn. Comp. R. & Regs. 1240-02-04-.04.

On appeal, Mother argues that the court improperly imputed Father’s income at \$50,000. She argues that the court did not follow the Tennessee Child Support Guidelines but fails to mention in what way the court failed to follow the aforementioned guidelines. Additionally, she argues that the court failed to consider Father’s lease agreement with a tenant that should result in rental income in the amount of \$1,800 per month.

The Tennessee Child Support Guidelines allow a court to impute “additional gross income to a parent . . . [w]hen there is no reliable evidence of income.” Tenn. Comp. R. & Regs. 1240-02-04-.04(2)(II). The juvenile court found that Father’s income fluctuated

⁴Parabolic funnels can be found in many shopping malls. They are often known as “coin funnels” and are often used to support charitable work. People can toss coins into the funnel and watch them spin in circles until they eventually disappear into the funnel.

to such an extent that imputing an expected income of \$50,000 was appropriate. Additionally, Father testified that although he had a lease agreement with a renter, he had not made the renter pay due to her substantial medical issues. The evidence does not preponderate against the trial court's finding that Father should expect an income of \$50,000. With respect to the trial court's calculation of Father's income, we affirm.

C. Retroactive Modification of Child Support Payments

Next, Mother argues that the juvenile court improperly retroactively modified Father's *pendente lite* child support in violation of the Tennessee Child Support Guidelines. In February 2013, the juvenile court magistrate based Father's income on his 2011 tax return and ordered child support in the amount of \$997 per month. Father paid that amount until the juvenile court modified it to \$227 per month in December 2013. In its final order, the juvenile court found that Father's ability to support for retroactive purposes should have been the imputed amount of \$37,589. Based on that figure, the court determined that Father overpaid child support in the amount of \$9,513 between August 2012 and August 2014.

To be clear, "once child support payments become due, they cannot be altered, reduced, or forgiven by the courts of this state." *State ex rel. Estes v. Estes*, No. E2011-01067-COA-R3-CV, 2012 WL 826595 at *4, (Tenn. Ct. App. Mar. 13, 2015) (*no perm. app. filed*) (citing *Rutledge v. Barrett*, 802 S.W.2d 604, 607 (Tenn. 1991)). However, nothing in the order suggests that Father should be credited that amount or that Mother was required to repay Father for the amount he overpaid. The discussion of Father's overpayment appears to be nothing more than dicta. As a result, there is no impermissible retroactive modification of child support payments in the juvenile court's order.

D. Unpaid Medical Bills

Additionally, Mother raises on appeal the issue of unpaid medical bills. The juvenile court's order stated that "[t]he parties will equally divide all unpaid medical bills for [the Child]." Mother makes no argument regarding the unpaid medical bills but asks that this Court divide the medical bills on a pro rata basis. Tennessee Code Annotated section 36-5-101(h)(1) provides courts with the authority to "direct the acquisition or maintenance of health insurance covering each child..." and to "order either party to pay all, or each party to pay a pro rata share of, the health care costs not paid by insurance proceeds." Here, the court exercised its discretion and divided the costs evenly, when it was within its authority to levy the full amount against either party. Given the trial court's proper exercise of its discretion, we affirm the trial court's decision with respect to medical bills.

E. Attorney's Fees

Lastly, Father requests an award of his attorney's fees at trial. "In the awarding of attorney's fees in custody cases, the trial court is given wide discretion and this Court will not interfere in the exercise of that discretion in the absence of a clear showing of abuse." *Salisbury v. Salisbury*, 657 S.W.2d 761, 770 (Tenn. Ct. App. 1983) (citing *Grant v. Grant*, 286 S.W.2d 349, 350 (Tenn. Ct. App. 1954)). In its order, the juvenile court stated that the Father's success would normally entitle him to an award of attorney's fees, but found that Mother had no ability to pay and also found it "appropriate under the facts of this case for each party to bear his or her own attorney fee expense." On appeal, Father argues that the court "made absolutely no factual findings as to whether the Mother would not be able to pay the Father's attorney's fees." To the contrary, the juvenile court made factual findings regarding both parties' income and ability to support the Child. After making findings of Mother's income, the court exercised its discretion and did not award Father his attorney's fees. Discerning no error, we affirm.

Father also requests that this Court "declare the Mother's appeal to be frivolous" and sanction Mother's attorneys. A frivolous appeal is one that is so "devoid of merit...that it [has] no reasonable chance of succeeding." *Clark v. Nashville Mach. Elevator Co.*, 129 S.W.3d 42, 50 n.4 (Tenn. 2004). We decline to designate this appeal as frivolous and further decline to award any sanctions for attorney's fees on appeal.

V. CONCLUSION

For the aforementioned reasons, the decision of the juvenile court is affirmed. Costs of this appeal are taxed to the appellant, Rachel L., and her surety, for which execution may issue, if necessary.

BRANDON O. GIBSON, JUDGE