IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
December 10, 2008 Session

CLAUDE EDWARD CLEMONS v. CHRISTEL SHYE ANNE DODD CLEMONS

Appeal from the Circuit Court for Sequatchie County
No. 8128 Buddy D. Perry, Judge

No. M2007-00639-COA-R3-CV - Filed June 29, 2009

The trial court conducted a final divorce hearing, granted both parties a divorce, and adopted the wife's proposed parenting plan, which named her as the primary residential parent of the parties' two children. There was no court reporter present at the hearing, and therefore no transcript was produced. Father moved the court to vacate the judgment as to the parenting plan. The court granted a hearing on the motion, after which it declined to vacate its judgment. A transcript of that hearing is in the record. The husband argues on appeal that the parenting plan was not in the best interest of the children and that it did not protect the younger child from bullying by the older one. For purposes of this appeal, the parties both produced statements of the evidence relating to the final divorce decree pursuant to Rule 24(c) of the Rules of Appellate Procedure. The trial court certified the wife's statement as the more accurate. *See* Tenn. R. App. P. Rule 24(e). The trial court's certification is conclusive under that rule, absent extraordinary circumstances. We have examined the record and have found no basis for reversing the trial court's order regarding the parenting plan. We accordingly affirm the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

PATRICIA J. COTTRELL, P.J.,M.S., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and ANDY D. BENNETT, JJ., joined.

Robert D. Philyaw, Signal Mountain, Tennessee, for the appellant, Claude Edward Clemons.

John R. Morgan, Chattanooga, Tennessee, for the appellee, Christel Clemons.

OPINION

I. MARRIAGE, DIVORCE

Claude Edward Clemons ("Father") and Christel Dodd ("Mother") married in 1995. Mother had a twenty-two month old son named Page, from an earlier relationship. Father adopted Page soon after marrying Mother. Father also had two daughters from his first marriage, who apparently lived with the parties at least some of the time. The parties became the parents of a second son, Caelan, in 1999. Unfortunately, their marriage was not a happy one, for reasons that became obvious during the course of the divorce proceedings.

Father filed a complaint for divorce in the Circuit Court of Sequatchie County on January 22, 2004. The complaint alleged that Mother was guilty of inappropriate marital conduct. Father attached a proposed parenting plan to the complaint and asked to be named as the primary residential parent of Page and Caelan. Mother answered the complaint and counterclaimed for divorce on the grounds of inappropriate marital conduct and severe physical abuse. She also alleged that Father was guilty of severe physical intimidation and emotional abuse of the children. In her proposed parenting plan, she asked the court to name her as the primary residential parent of both children.

The case went to trial on January 23, 2006. No court reporter was present at the trial, but the statements of the evidence submitted by both parties show that a number of witnesses took the stand aside from the parties, including Jim Walker, Mother's boy friend and future husband; Ashley Clemons, Father's fifteen year old daughter; Wayne Dodd, Mother's father; Laura Cox, the wife of one of Father's co-workers; and Sandra Kilpatrick, Ph.D., a psychologist who had treated Page, the parties' oldest son. Page himself testified in the judge's chambers.

Both parties submitted statements of evidence, which differ in many respects. We note, however, that both versions indicate that physical abuse frequently occurred within the marriage, with the parties citing different testimony as to the source and intensity of such abuse. Both statements also acknowledged that Page testified that he did not like Father, and that Father had once beat him with a belt, leaving bruises on his body. Both parties also reported that Page's therapist testified that the child was often upset and angry, that in her opinion Father should not be involved in Page's life, and that the child's wishes in that regard should be respected.

In its final decree of divorce, dated May 8, 2006, the court declared that both parties had grounds for divorce. It accordingly granted divorce to both of them under Tenn. Code Ann. § 36-4-129, without allocation of fault, and divided the marital property. Most significantly for purposes of this appeal, the court adopted the parenting plan submitted by Mother, which named her as the primary residential parent. Among other things, the plan contained a provision that "[n]either party shall have persons of the opposite sex overnight when the children are present without the benefit of marriage."

The plan also gave Father two days of visitation per week with Caelan "based upon the Father's work schedule."[1] Father's visitation with Page was more uncertain, because the parenting plan stated only that it "shall be agreed upon by the child and recommended by his counselors." Father was also required to pay child support of $1,329 per month by wage assignment, in accordance with the income shares formula. Mother and Jim Walker apparently married shortly after the decree of divorce became final.

II. POST-DIVORCE PROCEEDINGS

On June 7, 2006, Father filed a motion to vacate the trial court's judgment in regard to the parenting plan. He contended that the plan contained errors, that it went against the weight of the evidence, and that it was not in the best interest of the children, especially Caelan, the youngest. The court conducted a hearing to consider Father's motion, which took place over two days, October 24 and November 30, 2006. The court stated that it was allowing Father to present witnesses so he could "build the record." A court reporter was present during both days of hearing, and a transcript of the proceedings was prepared and made a part of the record.

On the first day of hearing, Father offered the testimony of a private investigator whom he had hired to monitor the comings and goings at Mother's house. The detective testified as to a several occasions when he observed Jim Walker's car parked in her driveway at night and on the following morning, thus raising an inference that Mother had violated the parenting plan and that she may have perjured herself when she testified that he did not stay overnight in her home when the boys were present.

On the second day of hearing, both children testified before the court but out of each other's presence. The judge told both of them that they did not have to answer any questions they did not want to. He also counseled them at appropriate moments in their testimony that they did not get to choose which parent to live with, as that was the judge's decision alone.

Seven-year old Caelan was questioned about things Page had done to him. He testified that his older brother had hit him on the back with a plastic baseball bat that was broken and had a sharp tip, leaving him with marks on his back. He also testified as to an incident when Page pulled on his leg, causing him to fall and break an arm. He also complained that Page liked to scare him, and that sometimes he showed him "nasty websites." On further questioning, Caelan testified that he liked spending time with Father, but that he didn't want to have to choose between his parents, and that he liked Mother's new husband, who was "a pretty cool guy."

Thirteen year old Page testified that he didn't like Father and that he very rarely sees him – and then only when Mother drops Caelan off for visitation. He acknowledged that he was still in counseling, and he testified that he got along well with his little brother, that he liked his new

[1] The proof showed that Father was a firefighter for the town of Signal Mountain and that his schedule was on a rotation that resulted in different days off each week.

stepfather, that the stepfather treated his mother well, and that he liked the house in which the family was now living, a house that the stepfather owned prior to marriage.

After Page testified, the court announced that it did not want to retry the case and that it would not hear any more proof. It then declared that it was denying Father's motion to vacate. The trial court's decision was memorialized in an order dated March 14, 2007. Although the court denied Father's motion, it reduced his child support obligation to $833 per month pursuant to new child support worksheets, and it addressed the problematic state of Father's relationship with Page by ordering that "The parties shall work together, in conjunction with the child's counselor, to establish regular contact between the father and the minor child, Page, in an effort to restore the relationship between father and son and ultimately for the purpose of engaging in regular visitation with Page."

Father filed a notice of appeal, and since there was no transcript of the divorce hearing itself, he filed a statement of the evidence with the trial court pursuant to Tenn. R. App. P. 24(c). Mother timely filed an objection to Father's version of the testimony presented at the hearing, asserting that it did not accurately reflect the evidence presented, but was rather a biased and untruthful account. Mother subsequently filed her own statement of the evidence.

The trial court compared both statements of the evidence, and on October 30, 2007 it announced by letter that "I am going to approve [Mother's] statement of the evidence because it is more comprehensive and better reflects my memory of the facts." Father responded by filing a supplemental brief in which he reproduced portions of both statements of the evidence, highlighting in bold italics discrepancies between the two versions that he wished the trial court to consider, in the hope that the court would either revise Mother's statement in regard to those discrepancies or reverse itself and choose Father's statement as the more accurate. After a brief hearing on July 10, 2008, the trial court affirmed its earlier decision favoring Mother's statement of the evidence.

III. Issues on Appeal

Although Father's appellate brief purports to set out five issues on appeal, it appears to us that there are really only two. The first is substantive: whether the trial court erred in naming Mother as the primary residential parent for the children, or more precisely, in not naming Father as the younger child's primary residential parent, for Father acknowledges that Page does not want to have anything to do with him. He is accordingly only interested in becoming Caelan's primary residential parent.

The second issue is more procedural, but its intended effect is to bolster Father's position on the substantive issue: whether the trial court erred in determining that Mother's statement of the evidence is the most accurate and complete version of what transpired in the hearing of January 23, 2006. Because it bears heavily on the parenting plan decision, we will address the statement of the evidence first.

A. THE STATEMENT OF THE EVIDENCE

In any case where there is deemed to be a possibility of appeal, it is always advisable for the parties to arrange for the presence of a court reporter at the dispositive hearing so that a substantially verbatim transcript of the evidence will be available for the broadest appellate review possible. The procedures for filing such a transcript are found in Rule 24(b) of the Rules of Appellate Procedure. If no such verbatim transcript is available, then Rule 24(c) allows the appellant to prepare a statement of the evidence or proceedings "from the best available means, including the appellant's recollection."

That rule also provides that "If the appellee has objections to the statement as filed, the appellee shall file objections thereto with the clerk of the trial court within fifteen days after service of the declaration and notice of the filing of the statement. Any differences regarding the statement shall be settled as set forth in subdivision (e) of this rule." 24(e) reads as follows in its entirety:

> (e) Correction or Modification of the Record. If any matter properly includable is omitted from the record, is improperly included, or is misstated therein, the record may be corrected or modified to conform to the truth. Any differences regarding whether the record accurately discloses what occurred in the trial court shall be submitted to and settled by the trial court regardless of whether the record has been transmitted to the appellate court. **Absent extraordinary circumstances, the determination of the trial court is conclusive.** If necessary, the appellate or trial court may direct that a supplemental record be certified and transmitted. (emphasis added).

Father's attorney was asked at oral argument if there were any extraordinary circumstances in this case that would justify a reversal of the trial court's determination regarding the statement of the evidence. He did not answer the question directly, but he pointed out that more than twenty-one months had passed between the divorce hearing and the trial court's decision, thereby raising an inference that the court's memory of the hearing may have faded in the interim.

Indeed, the trial judge stated several times that it would have been preferable to have a transcript of the evidence because it was hard to remember all the details of the hearing. Father's counsel also pointed out that at the hearing of July 10, 2008, the court had said, "I had to pick one and I picked the one that was more consistent with the facts that I found when I did the decree." Counsel implied that this was somehow improper, but he was unable to suggest a better way for the trial court to proceed. Father has therefore not presented any valid basis for challenging the conclusive effect of the trial court's decision to certify Mother's statement of the evidence rather than his own. In other words, Father has not shown any extraordinary circumstances that would justify deviation from the conclusiveness of the trial court's determination.

Accordingly, pursuant to Rule 24(e), we must rely on the statement of the evidence approved by the trial court.[2]

B. The Parenting Plan

Our legislature has directed the trial courts to create permanent parenting plans in all cases of divorce where minor children are involved. *See* Tenn. Code Ann. § 36-6-401 *et seq*. The statutes include a list of factors for the trial court to consider when determining which parent should be named as the primary residential parent as part of such a plan. Tenn. Code Ann. § 36-6-404(b) lists the factors as follows:

> (1) The parent's ability to instruct, inspire, and encourage the child to prepare for a life of service, and to compete successfully in the society that the child faces as an adult;
>
> (2) The relative strength, nature, and stability of the child's relationship with each parent, including whether a parent has taken greater responsibility for performing parenting responsibilities relating to the daily needs of the child;
>
> (3) The willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, consistent with the best interests of the child;
>
> (4) Willful refusal to attend a court-ordered parent education seminar may be considered by the court as evidence of that parent's lack of good faith in these proceedings;
>
> (5) The disposition of each parent to provide the child with food, clothing, medical care, education and other necessary care;
>
> (6) 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;
>
> (7) The love, affection, and emotional ties existing between each parent and the child;
>
> (8) The emotional needs and developmental level of the child;
>
> (9) The character and physical and emotional fitness of each parent as it relates to each parent's ability to parent or the welfare of the child;

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[2] Even though this court is not obligated to give any consideration to Father's statement of evidence when reviewing the substantive issue in this case, we have taken the time to read his statement carefully. We note that he devotes almost five pages of the statement to his own testimony, more than to the testimony of all the other witnesses combined. He barely acknowledges the allegations of abuse against him, and he adopts language designed to minimize the impact and significance of those allegations. Conversely, he sets out Mother's testimony as to her own conduct in wholly negative terms, while totally omitting any mention of other testimony found in Mother's statement which might explain or mitigate that conduct to some extent. Our impression is that Father produced an account that selectively presented testimony favorable to him, while ignoring testimony favorable to Mother or unfavorable to him.

(10) The child's interaction and interrelationships with siblings and with significant adults, as well as the child's involvement with the child's physical surroundings, school, or other significant activities;

(11) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment;

(12) Evidence of physical or emotional abuse to the child, to the other parent or to any other person;

(13) 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;

(14) 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;

(15) Each parent's employment schedule, and the court may make accommodations consistent with those schedules; and

(16) Any other factors deemed relevant by the court.

The evidence in the record of this case is somewhat scanty in regard to many of the above factors. But one factor which is featured prominently in the record and which must loom large in our analysis is factor (12), "[e]vidence of physical or emotional abuse to the child, to the other parent or to any other person."

Mother's testimony, as set out in her statement of the evidence, describes in detail a history of verbal, emotional, and physical abuse by Father throughout the course of the marriage. Among other things, she testified to separate incidents where Father threw her to the floor and violently choked her, forcefully pushed her into the bathtub while she was bathing her young son, and pinned her against a wall in their home, "pushing his face into hers and causing her to struggle to escape." After another violent episode, Mother obtained an order of protection against Father, which she later dismissed. After yet another incident, she went to the emergency room, and Father was criminally charged with domestic assault for that attack. Page's testimony confirms some of those incidents.

Mother also testified that when Father was angry at his daughter, he punched a hole in her bedroom door, and that when he was angry at Page he punched a hole in the wall of his bedroom. She also testified that on one occasion he "severely beat Page with a belt, causing serious bruising to his legs." Page also testified as to that beating. Mother's father, Wayne Dodd, testified that he and his wife received many telephone calls for help when Father became abusive to his daughter and grandson, and that on many occasions, Mother and her sons would stay with them to avoid Father's "abuse, rage and violence." Mr. Dodd, also testified that [Father's] own father once told him in conversation that he needed "to watch Claude because he doesn't know where discipline ends and abuse begins."

Father places much emphasis on the testimony of seven-year old Caelan as to Page's abusive conduct towards his younger brother, which testimony was part of the hearing on the Motion to vacate, and he argues that Mother's inability to control that conduct shows that it is dangerous to require the two children to live together, and that it is in Caelan's best interest for the court to name Father as the younger child's primary residential parent.

While Page's conduct is indeed cause for concern, it is telling that Father does not acknowledge his own violent tendencies, which were testified to by Mother, by his daughter Ashley, by Page and by Wayne Dodd. Dr. Kilpatrick testified that Page's anger was influenced by two concerns: "(1) the death of a young friend in a bicycle/automobile incident; and (2) the tensions in the household." It therefore appears to us, as it appeared to Dr. Kilpatrick, that some of Page's aggression against his brother can be traced to Father's own conduct. In that respect, we find it reassuring that Page apparently has a good relationship with his new stepfather, and that he appears to be well-satisfied with his current living arrangements.

Father notes that there is no proof that he ever acted in an abusive manner towards Caelan, and he argues that this proves that the child would be safer living with him than with Mother and his older brother. However, we cannot accept the validity of this argument without turning a blind eye to the abuse that Father has inflicted on his wife and his older son, abuse which constitutes justification for not giving Father the majority of the residential schedule. Father's argument also contradicts the strong presumption under Tennessee law against the separation of siblings. *See Ray v. Ray*, 83 S.W.3d 726, 738 (Tenn. Ct. App. 2001); *Baggett v. Baggett*, 512 S.W.2d 292, 293-94 (Tenn. Ct. App. 1973). Admittedly, this presumption is rebuttable. "It must give way to other considerations if the best interest of a child so dictates." *Rice v. Rice*, 983 S.W.2d at 680, 684 (Tenn. Ct. App. 1998). However, we do not believe the circumstances of this case are sufficient to defeat the presumption.

Our courts have long recognized that creating a parenting arrangement for minor children is one of the most important things that they are called upon to do. *Shofner v. Shofner*, 181 S.W.3d 703, 715 (Tenn. Ct. App. 2004); *Steen v. Steen*, 61 S.W.3d 324, 327 (Tenn. Ct. App. 2001); *Adelsperger v. Adelsperger*, 970 S.W.2d 482, 484 (Tenn. Ct. App. 1987) In any such plan, the needs of the children must come first, while the desires of the parents are secondary. *Lentz v. Lentz*, 717 S.W.2d 876, 877 (Tenn. 1986).

An award of custody to one parent is equivalent to a finding of fact that such an award is in the best interest of the children.[3] *Garner v. Garner*, 773 S.W.2d 245, 246 (Tenn. Ct. App. 1989).

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[3] *Garner* and other earlier cases speak of "an award of custody," a "custodial parent," and "visitation" by "a non-custodial parent." However, the terminology has changed with the enactment of Tenn. Code Ann. § 36-6-401 et. seq, which requires the trial court to create or adopt permanent parenting plans in divorce cases and sets out procedures and factors for doing so. *See* Tenn. Code Ann. § 36-6-404. That legislation does not use the terms "custody" or "visitation," but rather directs the court to name a "primary residential parent," defined as "the parent with whom the child resides more than fifty percent (50%) of the time." Tenn. Code Ann. § 36-6-402(4). *See also Cain v. Cain*, No. M2006-02259-
(continued...)

Such a finding is reviewed *de novo* upon the record of the trial court accompanied by a presumption of the correctness of the finding, unless the evidence preponderates otherwise. Tenn. R. Civ. P. 13(d); *Hass v. Knighton*, 676 S.W.2d 554, 555 (Tenn. 1984). Appellate courts are reluctant to second-guess a trial court's parenting arrangement decision because so much depends on the trial court's assessment of the witnesses' credibility. *Chaffin v. Ellis*, 211 S.W.2d 264, 289 (Tenn. Ct. App. 2006); *Steen v. Steen*, 61 S.W.3d at 328; *Adelsperger v. Adelsperger*, 970 S.W.2d at 485.

There is no evidence in the record of this case to suggest that Mother has ever behaved toward either of her children other than in a loving and nurturing manner. Conversely, Father's conduct has so alienated the older child that he wants nothing to do with him. The evidence also indicates that Mother has always been the children's primary caregiver. Thus allowing them to remain in her care is consistent with Tenn. Code Ann. § 36-6-404(11), "[t]he importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment." In sum, we do not believe the evidence preponderates against the trial court's determination that it is in the best interest of both children for Mother to serve as their primary residential parent.

IV.

The judgment of the trial court is affirmed. We remand this case to the Circuit Court of Sequatchie County for any further proceedings necessary. Tax the costs on appeal to the appellant, Claude Clemons.

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PATRICIA J. COTTRELL, P.J., M.S.

[3](...continued)
COA-R3-CV, 2008 WL 2165963 at *5 (Tenn. Ct. App. July 10, 2007) (no Tenn. R. App. P. 11 application filed). Nonetheless, prior judicial observations as to the importance of custody decisions and the paramount place of the best interest of the child in making such decisions apply with equal force to the designation of a primary residential parent as part of a permanent parenting plan.