

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs November 3, 2003

CONAN DOYLE CLARK, JR. v. CAROL MICHELLE CLARK

**Appeal from the Chancery Court for Rutherford County
No. 00DR-200 Royce Taylor, Judge**

No. M2002-03071-COA-R3-CV - Filed December 30, 2003

A divorced mother of two girls sent a letter to her former husband, declaring her intention to move with the children to Virginia in order to marry her new fiancé. The father filed a petition objecting to the relocation and asking for a change of custody. The trial court held that under the provisions of Tenn. Code Ann. § 36-6-108, the mother was entitled to relocate once she remarried. We affirm.

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

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM B. CAIN, and FRANK G. CLEMENT, JR., JJ., joined.

Jim Wiseman, Murfreesboro, Tennessee, for the appellant, Conan Doyle Clark.

David W. Kious, Janet D. Powell, Murfreesboro, Tennessee, for the appellee, Carol Michelle Clark.

OPINION

I. DIVORCE, CUSTODY AND VISITATION

Conan Doyle Clark Jr. and Carol Michelle Clark divorced in Rutherford County on January 26, 2001. The divorce decree incorporated a Marital Dissolution Agreement that included a parenting plan for their two daughters, who were ten and eight years old respectively at the time. The plan made both parties jointly responsible for major decisions concerning their children, and declared, "This is a co-parenting plan, with each party having equal rights regarding the child(ren), but the Mother shall be considered the primary residential parent." The agreement specifically excluded alimony, but provided that the husband would pay child support of \$884 per month.

The visitation schedule deviated somewhat from the standard schedule for non-custodial parents, in part to accommodate the parties' work schedules. The mother worked at Southern Title

Services, and apparently followed a typical 40 hour a week schedule. The father, a Bridgestone employee, worked twelve hour shifts that resulted in alternating work weeks of 36 and 48 hours.

The father was granted visitation with the girls every other weekend during the school year, as well as the first Wednesday and Thursday and the second Monday after their weekend with him, with the periods of weekday visitation to run from the end of the school day to 8:00 p.m. The children were also given the option of visitation with the father on the second Tuesday after their weekend with him. The same schedule was to be followed during Winter and Spring vacation, "as long as father works for Bridgestone." The father was given additional days of visitation each summer, in accordance with his work schedule.

The proof showed that the parents cooperated quite well on visitation. While they adhered reasonably closely to the visitation schedule in the parenting plan, they usually managed to reach agreement when the circumstances of their lives or of their children's schedules required them to deviate from the plan. The maternal grandmother and different babysitters provided childcare during times when neither parent was able to be present.

In July of 2001, Ms. Clark became re-acquainted with Jeff Lamons, a man she had briefly dated in high school. Mr. Lamons' parents and his other relatives live in Middle Tennessee, but he himself had been living in Richmond, Virginia for the previous eleven years, and working as a computer specialist at Capital One Corporation. Ms. Clark and Mr. Lamons became engaged. Mr. Lamons had been previously married and divorced. His ex-wife and son live in the Richmond area.

On or about March 28, 2002, Ms. Clark sent a letter to her ex-husband stating that due to her planned remarriage, she was preparing to move to Richmond, Virginia and that the letter was to serve as her sixty day notice of her intent to relocate with the children. See Tenn. Code Ann. § 36-6-108(a). Mr. Clark responded on April 24 with a Petition Objecting to Relocation and to Change Custody.

In the Petition, Mr. Clark claimed that he and his wife were "actually spending equal intervals of time with the children." He also set out reasons why he believed that the proposed relocation would not be in the best interest of the children, and contended that it would negate the Parenting Plan that both parties had agreed to. The father asked the court to allow the mother to relocate to Richmond "if she wishes," but to transfer custody of the girls to him, and to order the mother to pay child support.

The mother filed an Answer and Counter-Petition on June 7, 2002, in which she denied that the father spends substantially equal amounts of time with the children. She also discussed the reasons she desired to relocate and the steps she had taken to ensure that the children would be able to adjust to their new home. She further suggested a new Parenting Plan that would involve less frequent visitation with the father during the school year (one weekend a month) but longer visitation during the summer, with the parties to divide the costs of transportation equally between them.

II. COURT PROCEEDINGS

After a continuance, a hearing on the Petition was conducted on September 23, 2002. The judge announced at the inception that the hearing would be bifurcated, with the first phase to focus on the current visitation arrangements, so the court could determine which section of the relocation statute, Tenn. Code Ann. § 36-6-108 should be applied.

Under the statute, if the parents actually spend substantially equal amounts of time with the children, then there is no presumption for or against relocation, and the court must decide the question based upon the best interests of the children after consideration of enumerated factors. Tenn. Code Ann. § 36-6-108(c). However, if the parent wishing to relocate spends the greater amount of time with the children, a presumption is created in favor of relocation. Tenn. Code Ann. § 36-6-108(d). Relocation will be allowed in the absence of proof of at least one of three circumstances: that there is no reasonable purpose for the relocation; that there is a risk of harm to the child arising from the relocation; or that the custodial parent is acting out of a vindictive motive, *i.e.*, with the intent to deprive the other parent of visitation.

A.

Mr. Clark argued that the court should decide this case under Tenn. Code Ann. § 36-6-108(c). He contended that if one calculated the time each parent spent with the children on the basis of waking hours alone, their time would be substantially equal. Since the custody of the children during weekends was equally divided, his testimony focused on a comparison of the number of after-school hours he and the mother spent with the children on weekdays.

Mr. Clark calculated his time on the basis of the hours between 2:30 or 3:00 p.m. on the days when he picked the children up from school, and 8:00 p.m. when he returned them to the mother. He calculated the mother's time on the days when he did not exercise visitation as beginning at 5:30 p.m. when she returned from work, and continuing until the children's 9:00 p.m. bedtime.

During cross-examination, Mr. Clark conceded that his calculations did not include the time after 8:00 p.m. when the children had been returned to the mother and she had to get them ready for bed. He also omitted weekday mornings, during which the mother awakened the children at 6:00 a.m., gave them breakfast, and got them ready for school. Further testimony showed that the girls participated in chorus and Girl Scouts, and that on the days when they did so, Mr. Clark did not pick them up until several hours after the end of the regular school day.

At the conclusion of the first phase of the hearing, the trial court stated that he had calculated that the father exercised custody of the children for 46.7% of their waking hours, which he characterized as "a substantial time." It is unclear exactly how he reached this conclusion. However, the court also held that it was inappropriate to base its decision on waking hours alone, because such an analysis discredits the mother's continuing responsibility for the children during the time they are in school, and even when they are asleep. The court therefore held that the mother spent the greater

amount of time with the children within the meaning of 36-6-108(d), and ordered the hearing to proceed solely on the question of whether any of the statutory factors in that subsection would bar her from relocating.

B.

Once the trial court determined that Tenn. Code Ann. § 36-6-108(d) applied to the father's petition, the burden shifted to him to prove either a lack of reasonable purpose for the proposed relocation, a risk of harm to the children arising from the relocation, or that the mother was acting out of a vindictive motive. For the purpose of the statute, vindictive motive means that the move is "intended to defeat or deter visitation rights of the non-custodial parent or the parent spending less time with the child." Tenn. Code Ann. § 36-6-108(d)(3).

Vindictive motive is not an issue in this case. The parents have cooperated with the established visitation schedule and accommodated adjustments. The mother expressed a willingness to adhere to a new visitation schedule that would enable the father to enjoy three day weekends with the children whenever their school schedule permitted, as well as expanded visitation in the summer, and during winter and spring breaks. Such a schedule would at least partly compensate the husband for the reduction in the frequency of weekend visitation during the school year to one weekend per month, necessitated by the distance between Nashville and Richmond. The mother also expressed a willingness to bear the greater part of the transportation costs involved. No evidence was presented of any intent on the mother's part to deter visitation with the father.

A risk of harm to the children was also not an issue. The proof showed that both girls were well-adjusted and doing well in school. The younger girl had some vision problems, and the Murfreesboro Public Schools had furnished her with an optical magnifier and large print textbooks. The mother testified that she could obtain similar accommodations in Richmond. None of the examples of specific and serious harm set out in Tenn. Code Ann. § 36-6-108(d) was shown.

The reasonableness of the mother's purpose for relocating thus became the focus of the second phase of the hearing. The father's attorney questioned Ms. Clark about the fact that she and Mr. Lamons had not yet married, seeking to raise an inference that she was not sufficiently committed to the marriage to justify uprooting the children. But Ms. Clark testified that she had not yet gotten married because the question of relocation was still uncertain, that she would definitely marry if the court allowed her to relocate, and that she had not decided what she would do if the court did not allow her to relocate.

The attorney also questioned Ms. Clark as to why Mr. Lamons wanted her to move to Richmond, rather than moving to Middle Tennessee himself. She testified that the only jobs available in his area of expertise (which she described as "infrastructural networking of computers") were to be found in the Washington D.C. area. She also testified that in his current job, he earned enough to enable her not to work outside the home, so she could function as a full-time mother and

homemaker. The mother's attorney attempted to question her about her fiancé's income, but the father's attorney's objection on the ground of hearsay was sustained by the trial court.

At the conclusion of the proof, the trial judge announced from the bench that Ms. Clark had a reasonable purpose for wishing to relocate, and that she would be permitted to do so once she had remarried. His Final Order of September 30, 2002, also set out a new visitation schedule, with transportation costs shared between the parties. The court also ordered a reduction in the father's child support obligation to balance his contribution to the cost of transportation. One clause of the Final Order stated that "[t]his Order will not go into effect until the order is a final order of the Court."

The father subsequently filed a Motion to Alter or Amend or to Set Aside the Judgment. The trial court amended its order to make some small adjustments in the visitation schedule that the father had asked for, but declined to set aside the judgment. However, following another motion and hearing, the court issued a formal stay of its decision allowing the mother to relocate, in the event the father chose to appeal the decision upon the issue of "waking hours" being substantially equal between the parties. He did so, and that issue is now squarely before us.

III. THE ISSUE OF "WAKING HOURS"

The enactment of Tenn. Code Ann. § 36-6-108 in 1998 established different standards for deciding relocation disputes, depending on whether or not both parents spend "substantially equal intervals of time with the child." The question of how one is to determine whether this requirement has been met is not addressed in the statute, nor has it been conclusively addressed by the courts.

In *Connell v. Connell*, No. 03A01-9808-CV-00282, 2000 WL 122204 (Tenn. Ct. App. Jan. 28, 2000) (no Tenn. R. App. P. 11 application filed),¹ the trial court found that the non-custodial father exercised visitation with his children less than 40% of the time, and that since this was not substantially equal to the time the mother cared for them, Tenn. Code Ann. § 36-6-108(d) applied to the mother's motion for relocation. This court affirmed the trial court's determination in all respects.

In *Monroe v. Robinson*, M2001-02218-COA-R3-CV, 2003 WL 132463 (Tenn. Ct. App. Jan. 16, 2003) (no Tenn. R. App. P. 11 application filed), the trial court found that the divorce decree gave the husband physical custody of the parties' daughter approximately 43% of the time, and the wife physical custody 57% of the time. The court held that this amounted to substantially equal amounts of time. This court affirmed, observing that the statute "does not require that the time be

¹ Both parties have cited a number of unpublished opinions of this court. However, neither of them has complied with Rule 12(a) of the Rules of the Court of Appeals, which requires that copies of any such cited opinions be included in appendices to briefs, or to any other papers citing them which are filed with this court. See also Rule 4(I) Rules of the Supreme Court.

exactly equal,” and that it “does not set any concrete perimeters as to what qualifies as substantially equal,” but that the evidence did not preponderate against the trial court’s finding. *Id.* at *5.

The father argues that since the trial court found that he was exercising custody of the children for 46.7% of their waking hours, this falls well within the parameters established by *Connell* and *Monroe v. Robinson*. We note, however, that Mr. Monroe apparently had overnight visitation with his children about ten days each month, while Mr. Clark’s overnight visitation was about four days each month. There are no cases in which the courts of this state have approved of a comparison of custodial time based upon waking hours only.

Thus, we believe that, contrary to Mr. Clark’s argument, the reasoning of the trial court was correct. There is no mention of waking hours in Tenn. Code Ann. § 36-6-108. Further, the responsibilities of a parent do not end when the children go to sleep or when they are in school. In this case, Ms. Clark testified that her older daughter frequently awakens during the night when she has stomach problems. Her younger daughter sometimes awakens with aching legs from growing pains. When this occurs, the mother must herself awaken to take care of the girls. Similarly, when the girls are in school, it is the mother who has to leave work to pick them up when they are sick, or bring them a lunch they have forgotten, or a pair of tennis shoes they will need for gym.

In sum, we see no reason to adopt the “waking hours” methodology proposed by Mr. Clark either as a general principle or for the purposes of this particular case. We therefore affirm the decision of the court to examine Ms. Clark’s request to relocate under the requirements of Tenn. Code Ann. § 38-6-108(d).

IV. THE QUESTION OF REASONABLENESS

Mr. Clark argues on appeal that the admissible evidence was insufficient to prove that his former wife had a reasonable purpose for her proposed move. He relies in particular on Mr. Lamons’s failure to appear at the hearing and on his own attorney’s numerous objections to Ms. Clark’s testimony as to her fiancé’s circumstances as inadmissible hearsay.

To support this argument, Mr. Clark cites *Butler v. Butler*, M2002-00347-COA-R3-CV, 2003 WL 367241 (Tenn. Ct. App. Feb. 20, 2003) (no Tenn. R. App. P. 11 application filed). In that case, the trial court found that a mother’s desire to move to the Dallas-Fort Worth area to advance her career was reasonable, but denied her Petition to Relocate for other reasons. This court disagreed with the trial court’s analysis, but affirmed the result on the ground that the proposed relocation did not have a reasonable purpose.

In our opinion, we quoted extensively from those portions of the trial transcript which showed the mother offering a series of evasive and inconsistent answers to questions about prospective jobs and possible salaries. The mother claimed to have a firm job offer, but failed to produce as witnesses any of the three people she claimed could offer proof concerning a job in

Texas. Instead, she offered into evidence letters that allegedly included a job offer, but the admission of those letters “were promptly and properly objected to by father’s attorney.” *Id.* at *5.

The transcript in the case before us shows that Mr. Clark’s attorney objected to virtually all the testimony Ms. Clark offered as to her fiancé’s circumstances (including her assertion that he could not be present on the day of the hearing because he was starting a new position). The trial court sustained many of these objections, but allowed her to testify as to the nature of Mr. Lamons’ employment, her belief that his support will enable her to stay home with the children, and that she had researched the availability of jobs in Middle Tennessee in the area of her fiancé’s specialty, and found there to be none.

We do not believe that the trial court’s evidentiary rulings were in error, and it appears to us that the mother’s testimony was sufficient to establish a reasonable purpose for her proposed move. She was getting married, and her intended spouse was long settled in Virginia and had a career there. We note that, in contrast to the testimony of Ms. Butler in the case cited above, Ms. Clark’s testimony was forthright and consistent in the face of aggressive cross-examination, and she was able to articulate a plan and a rationale for relocation that was well thought-out and took into account the best interests of her children.

The appellant also cites *Schremp v. Schremp*, No. W1999-01734-COA-R3-CV, 2000 WL 1839127 (Tenn. Ct. App. Dec.7, 2000) (no Tenn. R. App. 11 application filed), a case in which this court found that a Memphis mother’s purpose in relocating to another state to be with her new husband was unreasonable. However, the facts of that case are distinguishable from the one before us. In the *Schremp* case, the new husband was a Federal Express pilot, whose job involved frequent travel and did not require that he live in any particular place. Although the husband chose to make his residence in Charlotte, North Carolina, he could easily have moved to Memphis. Both the trial court and this court ruled that his reasons for remaining in North Carolina were not compelling enough to outweigh the disruption that a move to North Carolina would have on the children.

In the present case, the mother testified that her fiancé is employed in Richmond, Virginia, and he cannot find a comparable job in Tennessee in his area of expertise. His job is remunerative enough that if the mother moves, she will be able to stay at home and take care of the children full-time. The trial court found that it would not be reasonable for the mother to move without first marrying Mr. Lamons, but the court made the mother’s removal of the children contingent on her marriage.

Under Rule 13(d) of the Tennessee Rules of Appellate Procedure, a trial court’s findings of fact are presumed to be correct unless the evidence preponderates otherwise. We do not believe that the evidence preponderates against the trial court’s finding that Ms. Clark has a reasonable purpose for wishing to relocate, and we must therefore affirm that finding.

IV. CHANGE OF CUSTODY

Mr. Clark's final argument is that the mother's relocation plan showed such poor judgment that it constitutes a material change of circumstances that would justify transferring custody of the children to the father. He notes that she is proposing to quit her job and leave the Middle Tennessee area where all of her relatives live in order to live with a man she is not yet married to.

It appears to us, however, that despite any uncertainty about the ultimate wisdom of her proposed move, the mother has shown the ability to think clearly about her plan and to prepare for its consequences. The proof shows that she has never ignored the needs of her children. She investigated the possibility of Mr. Lamons moving to Tennessee. When that proved unfeasible, she researched the ability of the Richmond school system to duplicate the accommodations that the Murfreesboro school system has provided for her daughter. She agreed to a visitation schedule that would enable the children to maintain their relationship with their father. Finally, she put her own desires on hold by deciding not to marry or to move until the court reached its decision.

In any event, a finding that the move was reasonable eliminates any argument that such a move is a change of circumstances "which makes a change in custody in the child's best interests," which is the standard for modification of an existing custody order. See *Kendrick v. Shoemaker*, 90 S.W.3d 566, 570 (Tenn. 2002). In *Aaby v. Strange*, 924 S.W.2d 623, 630 (Tenn. 1996), our Supreme Court noted, "A move in any child's life, whether he or she is raised in the context of a one or two parent home, carries with it the potential of disruption; such common phenomena - both the fact of moving and the accompanying distress cannot constitute a basis for the drastic measure of a change of custody." The relocation statute addresses the situation in which a change of custody may be ordered where there is a planned relocation. Tenn. Code Ann. § 36-6-108(e). Absent the findings requisite to the application of subsection (e), a change of custody is not warranted. Those findings were not made herein. The statute applies to requests for "a change of custody related to the move." Tenn. Code Ann. § 36-6-108(f). Thus, the trial court properly allowed the relocation, no change of custody was justified.

V.

The judgment of the trial court is affirmed. The case is remanded to the Chancery Court of Rutherford County for any further proceedings that may be necessary. Costs on appeal are taxed to the appellant, Conan Doyle Clark, Jr.

PATRICIA J. COTTRELL, JUDGE