

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 6, 2005 Session

DAVID LESLIE MITCHELL v. CATHY RENAE MITCHELL

Appeal from the General Sessions Court for Putnam County
No. 150D98R Nolan R. Goolsby, Judge

No. M2004-00849-COA-R3-CV - Filed June 27, 2005

Cathy Mitchell, mother and primary residential parent for the parties' nine-year-old child, seeks to relocate with the child to California. Her stated reasons are to live with her new husband and to be near his family, to seek a better job and better education for herself and her child. The father, David Mitchell, opposes the move. The mother spends substantially more time with the child and thus Tenn. Code Ann. § 36-6-108(d) applies. The trial court held there was no reasonable purpose for moving to California, such a move would pose a threat of specific and serious harm to the child, and the move was not in the child's best interest. Therefore, it denied the requested relocation. Mother appealed. Finding no error, we affirm.

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

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., MS., and WILLIAM B. CAIN, J., joined.

Clark L. Shaw, Nashville, Tennessee, and Steven Qualls, Cookeville, Tennessee, for the appellant, Cathy Renae Mitchell.

Rankin P. Bennett, Cookeville, Tennessee, for the appellee, David Leslie Mitchell.

OPINION

David Mitchell (Father) and Cathy Mitchell (Mother) were divorced in 1998 following a five year marriage. Mother was designated as the primary custodial parent. Following the divorce, she continued to live in Putnam County, Tennessee.

In April of 2003, Mother served Father with notice of her intent to move with the parties' minor child to California. Father contested the move and additionally raised issues about parenting time and/or custody depending on the court's ruling. A temporary hearing was held to determine whether Mother could move while awaiting a full hearing on the matter. The trial court denied the motion pending a full hearing. Following the full evidentiary hearing, the trial court denied Mother's request to relocate on three grounds: there was not a reasonable purpose for the move, the move

posed a serious and specific harm to the child and relocation was not in the child's best interest. The trial court also modified parenting time to accommodate Father's work schedule, increased Father's child support payments and ruled that each party was responsible for his or her own attorney fees. Court costs were assessed equally.

Mother appeals asserting that the proposed relocation is for a reasonable purpose and in the child's best interest contrary to the trial court's ruling. She also seeks to recover her attorney fees.

STANDARD OF REVIEW

The standard of review of a trial court's findings of fact is *de novo* and we presume that the findings of fact are correct unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Rawlings v. John Hancock Mut. Life Ins. Co.*, 78 S.W.3d 291, 296 (Tenn. Ct. App. 2001). For the evidence to preponderate against a trial court's finding of fact, it must support another finding of fact with greater convincing effect. *Walker v. Sidney Gilreath & Assocs.*, 40 S.W.3d 66, 71 (Tenn. Ct. App. 2000); *The Realty Shop, Inc. v. R.R. Westminster Holding, Inc.*, 7 S.W.3d 581, 596 (Tenn. Ct. App. 1999). Unless there is an error of law, we must affirm the trial court's decision as long as the evidence does not preponderate against the findings. *Umstot v. Umstot*, 968 S.W.2d 819, 821 (Tenn. Ct. App. 1997). We also give great weight to a trial court's determinations of credibility of witnesses. *Estate of Walton v. Young*, 950 S.W.2d 956, 959 (Tenn. 1997); *B & G Constr., Inc. v. Polk*, 37 S.W.3d 462, 465 (Tenn. Ct. App. 2000). Where the trial court does not make findings of fact, there is no presumption of correctness and we "must conduct our own independent review of the record to determine where the preponderance of the evidence lies." *Brooks v. Brooks*, 992 S.W.2d 403, 405 (Tenn. 1999). Issues of law are reviewed *de novo* with no presumption of correctness. *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 628 (Tenn. 1999).

RELOCATION

The parental relocation statute, Tenn. Code Ann. § 36-6-108, specifies the requirements for a parent intending to relocate with his or her child. Tenn. Code Ann. § 36-6-108(a) requires that the relocating parent provide notice of the proposed relocation to the other parent and to inform the "non-relocating" parent of his or her right to file a petition to oppose the relocation. If the parents are unable to agree on the proposed relocation and a revised visitation schedule, then the relocating parent is required to file a petition "to alter visitation" pursuant to Tenn. Code Ann. § 36-6-108(b). If the parents spend "substantially equal" intervals of time with their child, then the court is required to determine whether to permit relocation based on the best interests of the child. See Tenn. Code Ann. § 36-6-108(c)(1)-(11).¹ If the parents are not spending "substantially equal" intervals of time with the child, and if the parent spending the greater amount of time with the child is the one seeking to relocate, then relocation "shall" be permitted unless one or more of three factors listed in Tenn. Code Ann. § 36-6-108(d) are found. The factors are:

¹The statute provides a list of eleven non-exclusive factors to be considered when making a best interests analysis.

- (1) The relocation does not have a reasonable purpose;
- (2) The relocation would pose a threat of specific and serious harm to the child which outweighs the threat of harm to the child of a change in custody; or
- (3) The parent's motive for relocating with the child is vindictive in that it is intended to defeat or deter visitation rights of the non-custodial parent or the parent spending less time with the child.

Tenn. Code Ann. § 36-6-108(d)(1)-(3). The statute further provides that if the trial court finds one or more of the grounds designated in subsection (d), the court shall determine whether or not to permit relocation of the child based on the best interest of the child. If the court finds it is not in the best interest of the child to relocate and denies relocating with the child, but the parent with whom the child resides the majority of the time elects to relocate, the court shall make a custody determination and shall consider all relevant factors. Tenn. Code Ann. § 36-6-108(e).

The trial court found Mother spent substantially more time with the child and proceeded to examine the issue pursuant to the criteria in Tenn. Code Ann. § 36-6-108(d). Upon finding Mother did not have a reasonable purpose for relocating with the child to California and relocation posed a threat of specific and serious harm to the child, the trial court then conducted the examination pursuant to subsection (e) and found the relocation was not in the best interest of the child. Based upon these findings the trial court denied Mother's relocation with the child to California.

Mother contends that the evidence preponderates against the trial court's findings that the proposed relocation was not for a reasonable purpose and that it was not in the child's best interest. Relocation cases are fact intensive and require an examination of the specific facts related to the rationale and motives for moving. *Schremp v. Schremp*, W1999-01734-COA-R3-CV, 2000 WL 1839127 at *2 (Tenn. Ct. App. Dec. 7, 2000). Thus, we will examine the record to see if the evidence preponderates against the findings by the trial court.

Mother offers three reasonable purposes for relocating to California. One, she found employment in California. Two, she was moving to be closer to her future spouse's family. Three, California provided better educational opportunities for her and her child.²

Employment

There is evidence that Mother discussed employment with three companies, however, there is no evidence that she has employment in California. She has provided no definite position or firm salary as an impetus for or to justify the move. At best, she has the mere hope of future work, which this court has previously deemed insufficient to support a finding of a reasonable purpose for relocation. See *O'Bannon v. O'Bannon*, No. E2002-02553-COA-R3-CV, 2003 WL 22734673 at *2

²There were two hearings, one on November 25, 2003 and the other on February 13, 2004. At the first hearing Mother's only ground for relocation was a job offer in California. Prior to the second hearing, she married her boyfriend and added the additional grounds for relocation to be with her husband and to be closer to her husband's family.

(Tenn. Ct. App. Nov. 20, 2003). Mother's purported employment purpose is little more than a belief that she can secure work after she moves to California.

The trial court found not only that Mother did not have employment but that she had failed to show that any of the job possibilities would be economically sufficient to justify relocation with the child. Mother testified about a possible position with Nordstrom as a sales representative. The specific position and salary were unknown to Mother as she had not been actually offered a job with Nordstrom; nevertheless, if she were hired and if she worked in the jewelry department and if she were offered the highest hourly wage in that department, she could earn \$10.75 an hour with 4.5% commission on sales. This illusive and improbable scenario must be compared to Mother's previous employment with Cookeville Regional Medical Center where her hourly compensation, depending on the shift, was \$7.00, \$7.50 or \$9.00.

The employment opportunities must also be compared to the cost of living in California, particularly that of housing. Mother's house payments in Tennessee were a mere \$393 a month. Her housing costs in California were estimated at either \$1,125 for a two bedroom or \$900 for a one bedroom apartment. The evidence demonstrates that the higher income per hour, should she be employed by Nordstrom, would be more than offset by the higher cost of living in California. Accordingly, we find that the evidence does not preponderate against the trial court's finding.

Engagement and Marriage

In the notice to Father of the reasons for relocating with the child, Mother contended that she needed to be near her then fiancé and his family.³ At the first hearing she introduced some evidence to explain why she needed to relocate to where her fiancé resided but no evidence was introduced to justify relocation for the purpose of being closer to his family. To the contrary, the evidence shows that Mother had not met his family when she listed being closer to them as a reasonable ground for relocation.

While this action was pending, and after the court denied her *pendente lite* motion to relocate, Mother married her fiancé. Mother, understandably, desires to reside with her new husband; however, residing with her new husband does not necessitate that she and the child relocate to California. Moreover, her desire to reside with her new husband in California does not necessitate that it is reasonable for the child to relocate to California. A relocation based solely on a new marriage has been held to be insufficient. See *Schremp*, 2000 WL 1839127 at *2. As this court explained, while it is reasonable for a husband and wife to want to live together, marriage often requires sacrifices on the part of the husband and wife so they can share a residence. *Id.* Mother did not offer any additional evidence to explain why she had to relocate to California as opposed to her new husband relocating to Putnam County, Tennessee or another location. As *Schremp* explained, new spouses have to make many choices, one of which is where they desire to reside. 2000 WL

³Mother met her fiancé, now husband, on the Internet. They corresponded without meeting for approximately two years. Their first meeting occurred in Nashville in June of 2002. They married after six additional meetings.

1839127 at *2. Furthermore, if one of them is a parent residing in Tennessee, then there is another choice to make and that is whether it is reasonable, or more reasonable, for the husband to relocate to the wife's community or for the wife to relocate to the husband's community. *Id.* Here, the evidence does not preponderate against the trial judge's finding that it was not reasonable for Mother to relocate with the child to California.

Education

Mother additionally contends that the charter schools in California will provide better educational opportunities for the parties' child. She also states that she desires to finish her college degree and the colleges and universities are better in California. Mother, however, provided no evidence to support her contention that the schools in California were better for her and her child. Indeed, there is no evidence of the California charter school's superiority over the child's present school, and both parents testified that they were pleased with their child's present school and that she was doing well in school. Further, there was no evidence offered supporting her belief that the California university system offered a better program for the degree she seeks.⁴ Unsubstantiated claims of better educational opportunities, where there was no proof of the superiority of the school system other than the parent's own statement of the superiority, are insufficient to provide a reasonable purpose for the move. *Dunkin v. Dunkin*, M2002-01899-COA-R3-CV, WL 22238950 at *3 (Tenn. Ct. App. 2003). As her unsupported assertions regarding educational opportunities are insufficient, the evidence does not preponderate against the trial court's findings that the educational opportunities are not a reasonable purpose for separating the child from her father.

Harm to the Child

The trial court also found that a separation from her father, other family members that she had significant relationships with and the only place the child had every lived, would pose a threat of specific and serious harm to the child. Mother contends the trial court erred by making such a finding. We find her argument to be without merit.

Mother has lived all her life in Putnam County, as well as her entire family, who have been very involved in helping her care for all three of her children.⁵ We find it of great significance that Mother has repeatedly needed the help and support of family members to care for all of her children. In fact, Mother's two older children do not reside with her or their father. They reside with the maternal grandparents. Moreover, the parties' child spends time almost every day at her grandparents' home.

The record clearly establishes that Mother has needed and relied on the support of other family members to care for her children. Relocation to California would separate her from that help

⁴It is unclear from the transcripts which specific degree Mother seeks to obtain from a college or university.

⁵She has three children by three different fathers. Her current husband has no children.

and support, and there is no evidence in the record that Mother's husband or his family are capable or willing to provide the amount of assistance Mother has needed to care for her children. The trial court found this separation would pose a specific and serious harm to the child and that harm outweighed the threat of harm to the child if custody were granted to Father. The evidence clearly supports this finding.

Best Interest of the Child

Based upon the above findings, the trial court had to determine whether or not to permit relocation of the child based on the best interest of the child. Tenn. Code Ann. § 36-6-108(e). It found that it was not in the child's best interest to relocate to California. We agree.

Factors to be considered in a best interest analysis include, but are not limited to the following:

- (1) The extent to which visitation rights have been allowed and exercised;
- (2) Whether the primary residential parent, once out of the jurisdiction, is likely to comply with any new visitation arrangement;
- (3) The love, affection and emotional ties existing between the parents and child;
- (4) The disposition of the parents to provide the child with food, clothing, medical care, education and other necessary care and the degree to which a parent has been the primary caregiver;
- (5) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment;
- (6) The stability of the family unit of the parents;
- (7) The mental and physical health of the parents;
- (8) The home, school and community record of the child;
- (9) 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 preferences of older children should normally be given greater weight than those of younger children;
- (10) Evidence of physical or emotional abuse to the child, to the other parent or to any other person; and
- (11) 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.

Tenn. Code Ann. § 36-6-108(e).

The record contains compelling evidence of a strong and loving relationship between the grandparents and the parties' child. There is also a meaningful, loving relationship between the child and Father and a good relationship between the child and other family members who reside in Putnam County. All of these relationships benefit the parties' child and all of these relationships would be seriously impaired by the relocation of the child to California. Of greater significance, the

relocation would remove the child from the safety net the family provides the child. This is critical in light of the substantial assistance Mother has repeatedly required over the years to care for her children. Moreover, she has failed to provide any evidence of a safety net in the absence of those in Putnam County. We therefore find that the evidence does not preponderate against the trial court's finding that it is not in the child's best interest to relocate to California. To the contrary, there is compelling evidence that it is in the child's best interest not to relocate.

ATTORNEY FEES

Mother contends that she is entitled to recover her attorney fees at the trial court level and on appeal. She bases this contention on Tenn. Code Ann. § 36-5-103(c). Her reliance on that statute is misplaced.

Tenn. Code Ann. § 36-5-103(c) pertains to child custody or changes in child custody issues, which are distinct from relocation issues. *Schremp*, 2000 WL 1839127 at * 4. The relocation statute, Tenn. Code Ann. § 36-6-108, contains no provision for the recovery of attorney fees. Mother has cited no other authority that would entitle her to recover her attorney fees. Therefore, we find no error with the trial court holding each party accountable for their own attorney fees and deny her request for attorney fees incurred on appeal.

IN CONCLUSION

The judgment of the trial court is affirmed and this matter is remanded with costs of appeal assessed against the appellant, Cathy Renae Mitchell.

FRANK G. CLEMENT, JR., JUDGE