

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
October 16, 2003 Session

STACEY ANNE SCHMALHOFER
v.
BRYAN MICHAEL SCHMALHOFER

An Appeal from the Circuit Court for Shelby County
No. CT-002478-01 Robert A. Lanier, Judge

No. W2002-01540-COA-R3-CV - Filed November 17, 2003

This is a child custody case. The parties were married in 1995. At that time, both were in the military and lived in North Carolina. About a year later, the parties had a daughter, who is the subject of this dispute. The father left the military. In 1999, after the mother received military orders, the parties moved to the navy base in Millington, Tennessee. Within a few months, the parties separated, and the father moved back to his hometown in Pennsylvania. In 2001, both parties petitioned for divorce. At the trial, the only dispute was over custody of the parties' minor child. After a bench trial, the trial court granted custody to the mother, based in part on the benefit of the child remaining in the same surroundings, rather than moving to Pennsylvania with the father. The father filed this appeal. While the appeal was pending, the appellate court granted the father's motion to consider the post-judgment facts that the mother had remarried, her new husband is also in the military, and that she and her new husband want to accept orders to move to England with the child. In light of the post-judgment facts, we reverse the trial court's custody determination and award custody to the father.

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

Reversed and Remanded

HOLLY M. KIRBY, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and ALAN E. HIGHERS, J., joined.

Marc E. Reisman, Memphis, Tennessee, for the appellant, Bryan Michael Schmalhofer.

Christopher L. Brown, Memphis, Tennessee, for the appellee, Stacey Anne Schmalhofer.

OPINION

Plaintiff/Appellee Stacey Anne Schmalhofer (“Mother”) and Defendant/Appellant Bryan Michael Schmalhofer (“Father”) met in Chicago in August 1994, where they were both stationed in the United States Navy. They began living together while Father was in the final stages of divorcing his first wife. Father has a son, Taylor, from his previous marriage, who was eleven years old at the time of the trial below.

When the parties finished Corps school in Chicago, they transferred to Jacksonville, North Carolina, where they were both stationed at Camp Lejeune. In August 1995, the parties were married in Father’s hometown of Lancaster, Pennsylvania. The parties’ daughter, Gabrielle, was born on April 29, 1996.

From the beginning, Mother and Father had a tumultuous marriage. While both were stationed at Camp Lejeune, Father left the Navy because of an injury. From September 1996 through November 1997, Father lived in Virginia to attend school to prepare for a career outside the military and visited Mother and Gabrielle on weekends. After completing his schooling, Father returned to North Carolina to live with Mother and Gabrielle. In November 1999, the Navy transferred Mother to Millington, Tennessee, just outside of Memphis. Father and Gabrielle moved there with her. For a few months, Father, Mother, and Gabrielle lived together in Tennessee, but the parties fought often.

In March 2000, Father moved back to his hometown in Lancaster, Pennsylvania. At that time, the parties agreed that Gabrielle would stay with Mother in Tennessee, and that Father would have visitation with her.¹

On April 19, 2001, Mother filed a petition for divorce, and on August 15, 2001, Father filed a counter-petition for divorce. All issues in the divorce were agreed upon except for custody of Gabrielle. Neither party asserted that the other was an unfit parent, but each sought primary custody.

The trial was held on April 29 and 30, 2002. At trial, Mother submitted the testimony of several persons who worked at Gabrielle's school and who were familiar with Gabrielle and her relationship with Mother. Generally, they testified that Gabrielle was a happy, intelligent child who was doing well in her school surroundings. Mother also submitted the testimony of some of her acquaintances and co-workers, who testified that Mother was a good, attentive mother to Gabrielle, and that Gabrielle was a happy child.

Mother testified on her own behalf. She said that she and Father had had marital difficulties from the beginning, which worsened when Father went to school in Virginia. Mother asserted that she was Gabrielle's primary caretaker, although she acknowledged that Gabrielle lived with Father between September 2000 and January 2001. Mother explained that she did not intend for Gabrielle to spend that length of time with Father, but that she had to go to Pennsylvania to retrieve Gabrielle because Father refused to return her. Mother conceded that she has no relatives in Tennessee, but testified that she has a large support group of friends in Tennessee. Mother's extended family lives in Jamaica, and her mother lives in New Jersey. Mother claimed that she had no objection to Father

¹Father later testified that he agreed to this only because Mother said Father would take Gabrielle with him to Pennsylvania "over her dead body."

seeing Gabrielle, and maintained that she never tried to alienate Father from Gabrielle. Mother said that “[h]e was a good father to [Gabrielle],” and that she did not “see anything neglectful or bad.” She admitted that, at times, Gabrielle had said that she wanted to live with Father.

Mother was questioned about her relationship with a man named Terrence Stallings (“Stallings”), also in the military, who worked on the base with Mother. Mother admitted that they were friends, but claimed that they did not have a romantic relationship. On cross examination, entries from Mother’s diary dated June 2000 were admitted into evidence, indicating that she then had a romantic relationship with Stallings. In addition, evidence showed that Stallings’ name was included as a co-tenant with Mother on the lease for the apartment into which Mother and Gabrielle moved in May 2001. On the copy of the lease which Mother produced to Father’s attorney, however, Stallings’ name was omitted. Mother later explained that she and Stallings had been involved in a relationship between June and September 2000, but that she ended it because she was still married and needed to take care of Gabrielle. Mother asserted that Stallings did not spend the night with her while Gabrielle was there.

The trial court also heard testimony on the likelihood that the Navy would require Mother to relocate. Mother testified that she is given many different options, usually no less than ten, at the conclusion of every stint. Her position in Tennessee was scheduled to conclude in December 2003, and she was unsure about where she would be relocated at that time. Mother indicated that she had earlier declined orders to move to Jacksonville, Florida, because she wanted to stay in Tennessee. When asked whether she would be relocated in December 2003, Mother said, “Possibly, I have no idea.” Father testified that, under Mother’s rotation, she was due to go overseas at the time she was stationed in Tennessee. Father said that Mother had wanted to transfer overseas her whole military

career. Officer Stebbin Davis, who had been Mother's supervisor for a period of time, testified that someone in Mother's position was usually scheduled to work forty-eight months on shore, then thirty-six months at sea. He also indicated that Mother had requested to extend her stay in Tennessee through November 2003, and that she could request another one-year extension if she chose. Officer Davis said that, at the time of trial, Mother was not due to be transferred from her job in Tennessee.

Father's mother, Diane Schmalhofer ("Grandmother"), testified on behalf of Father. She said that Father's extended family lived in Pennsylvania, including Gabrielle's half-brother, Taylor. Grandmother noted that Gabrielle stayed with them during her visit in the fall of 2000. Grandmother claimed that Gabrielle was very upset when she had to return to Mother from visiting with Father. She asserted that Mother made it hard for Father to communicate with Gabrielle, but that, in contrast, Father encouraged Gabrielle to talk to Mother. Grandmother acknowledged that Father was living with his girlfriend, Christy Sloan, who had been a childhood friend of Father.

Father testified on his own behalf. He said that he has always had a very close relationship with Gabrielle. Father asserted that Mother did not facilitate his relationship with Gabrielle, and that she made it difficult for him to communicate with Gabrielle. Father said that, when he called Gabrielle, Mother would make excuses why Gabrielle could not talk to him, that she was just starting to watch a movie, out playing, and the like, and that she did not have Gabrielle return Father's phone calls. Father said that Gabrielle told him that she got in trouble with Mother for talking too long to Father on the telephone. Father testified that, in contrast, he facilitated Gabrielle's relationship with Mother, such as making Gabrielle call Mother while Gabrielle was visiting Father, even when Gabrielle did not want to do so. Father also described Mother as having an aggressive nature. He recounted an incident in which Mother was to meet him at a motel to pick up Gabrielle. Mother was

upset with Father at the time, acted in a belligerent manner, and jerked Gabrielle out of Father's arms and sped away in her car, hitting Father. Father alleged that Gabrielle had told him that Mother's boyfriend's name was Terrence, and that Gabrielle did not like it when he was there because she had to go to her room and stay there. Father admitted that he was living with his girlfriend, Christy, and stated that he was committed to that relationship.

On May 6, 2002, the trial judge entered a lengthy memorandum opinion, detailing his analysis. The trial court found that neither parent was without fault, noting that both parties had "used the child to report on the other party and sought to force the child to state a preference for that person," and that the parties had a "selfish and irrational inability to communicate with each other." The trial court recounted the incident in which Mother sped away with Gabrielle after jerking her from Father in a "fit of anger." The trial court also noted that Mother had engaged in "an illicit relationship" during the parties' separation, and that Father was openly living with a woman who was not his wife. The trial court observed that Mother "had difficulty in her testimony admitting to obvious facts." With respect to facilitating a relationship with the other parent, the trial court determined that Mother was often uncooperative, providing excuses and interfering with Gabrielle's scheduled telephone time with Father. The court noted that Father lived in Pennsylvania near Father's parents and extended family, including his son, but that Mother had no extended family in Millington or Shelby County. Mother's parents lived in New Jersey, and her extended family lived in Jamaica. The trial court found it significant, however, that Gabrielle was functioning well in school in Millington, and that she was expected to continue to do well in school. The trial court found that Mother "is intelligent and takes an active interest in [Gabrielle's] training and education." Concluding that it would be in Gabrielle's best interest for Mother to remain the primary residential

parent, the trial court emphasized the importance of continuity, while also recognizing the importance of Gabrielle having “maximum exposure” to Father:

Continuity in a child’s life is extremely important. The fact that she is flourishing in “school” indicates that she is not only bright but is adjusting emotionally as best she can to the situation. The parents do not appear to be making the effort required to prevent friction between themselves and to open the lines of communication for the benefit of the child. However, the child would benefit by continuing her life in her present surroundings without substantial interruption. On the other hand, she needs the maximum exposure to her father that the distance between the parties and his lifestyle permits.

Therefore, the trial court designated Mother as the primary residential parent, but ordered the parties to facilitate regular, uninterrupted telephone calls between Gabrielle and Father, and granted him supplemental parenting time during any three-day holiday period, with sufficient notice to Mother. Accordingly, on June 7, 2002, the trial court entered its final decree of divorce, incorporating the rulings set out in its memorandum opinion. Father then filed this appeal.

After the trial court issued its order naming Mother as the primary residential parent, Mother married Terrence Stallings, with whom she had denied having a romantic relationship. Stallings was also in the Navy.

On September 9, 2003, while this appeal was pending, Father filed in this Court a “Motion to Consider Post-Judgment Facts.” Father attached to his motion Mother’s petition, filed in the trial court on August 19, 2003, requesting that the trial court grant her permission to relocate to England with Gabrielle, because Mother and her husband, Stallings, had both received orders from the Navy to transfer to England, beginning September 2003 through September 2006. Mother asserted that it would be in Gabrielle’s best interest to allow the child to move with her to England. Father’s

motion requested that this Court consider these post-judgment facts in determining his appeal. This motion was granted.

The presumption of correctness applicable to a trial court's findings of fact, as set forth in Rule 13(d) of the Tennessee Rules of Appellate Procedure, applies in a child custody case. *Hass v. Knighton*, 676 S.W.2d 554, 555 (Tenn. 1984). Therefore, the trial court's findings of fact are reviewed *de novo* on the record, with a presumption that those findings are correct, unless the preponderance of the evidence is otherwise. *Id.* Nevertheless, decisions involving matters of child custody are "factually driven and require the careful consideration of numerous factors." *Adelsperger v. Adelsperger*, 970 S.W.2d 482, 485 (Tenn. Ct. App. 1997) (citations omitted). Because the trial court has the benefit of observing the demeanor of the two parents as well as the other witnesses, the trial court is given wide discretion in determining the custody of the child. *Mayberry v. Mayberry*, No. M2002-004240COA-R3-CV, 2003 WL 21392193, at *2 (Tenn. Ct. App. 2003). Questions of law, on the other hand, are reviewed *de novo*, with no presumption of correctness. *Jahn v. Jahn*, 932 S.W.2d 939, 941 (Tenn. Ct. App. 1996).

In a child custody decision, the best interest of the child is the paramount concern. *See Whitaker v. Whitaker*, 957 S.W.2d 834, 837 (Tenn. Ct. App. 1997); Tenn. Code Ann. § 36-6-106 (2001). In order to determine what would be in the child's best interest, the trial court must engage in a "comparative fitness" analysis to determine which of the available custodians is comparatively more fit to care for the minor child or children. *See Gaskill v. Gaskill*, 936 S.W.2d 626, 630 (Tenn. Ct. App. 1996); *Bah v. Bah*, 668 S.W.2d 663, 666 (Tenn. Ct. App. 1983). In determining the comparative fitness of the parents, "[t]here are literally thousands of things that must be taken into

consideration” *Id.* Section 36-6-106(a) of the Tennessee Code Annotated enumerates several of the factors to be considered, where applicable:

- (1) The love, affection and emotional ties existing between the parents and child;
- (2) 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;
- (3) The importance of continuity in the child’s life and the length of time the child has lived in a stable, satisfactory environment; provided, that where there is a finding, under § 36-6-106(8), of child abuse, as defined in § 37-15-401 or §39-15-402, or child sexual abuse, as defined in § 37-1-602, by one (1) parent, and that a non-perpetrating parent has relocated in order to flee the perpetrating parent, that such relocation shall not weigh against an award of custody;
- (4) The stability of the family unit of the parents;
- (5) The mental and physical health of the parents;
- (6) The home, school and community record of the child;
- (7) 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;
- (8) Evidence of physical or emotional abuse to the child, to the other parent or to any other person; provided, that where there are allegations that one (1) parent has committed child abuse, [as defined in § 39-15-401 or § 39-15-402], or child sexual abuse, [as defined in § 37-1-602], against a family member, the court shall consider all evidence relevant to the physical and emotional safety of the child, and determine, by a clear preponderance of the evidence, whether such abuse has occurred. The court shall include in its decision a written finding of all evidence, and all findings of facts connected thereto. In addition, the court shall, where appropriate, refer any issues of abuse to the juvenile court for further proceedings;
- (9) 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.
- (10) Each parent’s past and potential for future performance of parenting responsibilities, including 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 interest of the child. . . .

Tenn. Code. Ann. § 36-6-106(a) (2001). The determination of the best interest of the child turns on the particular facts of each case. *See Taylor v. Taylor*, 849 S.W.2d 319, 326 (Tenn. 1993); *In re Parsons*, 914 S.W.2d 889, 893 (Tenn. Ct. App. 1995).

In this appeal, Father argues that the evidence is contrary to the trial court's finding that Mother should be the primary residential parent. He asserts that the evidence shows that he can provide Gabrielle with more stability and continuity than can Mother, particularly in light of the post-judgment fact that Mother plans to live in England for the next three years. Father claims that the trial court failed to consider evidence that Gabrielle preferred to live with him. Father argues that he is willing to facilitate a relationship between Gabrielle and Mother, while Mother is uncooperative and has expressed her desire that Father be eliminated from Gabrielle's life.

In the trial court's memorandum opinion designating Mother as the primary residential parent, the trial court analyzed many of the factors set forth in section 36-6-106(a), but placed particular emphasis on the importance of continuity to Gabrielle. The trial court clearly presumed that, if Mother were designated Gabrielle's primary residential parent, Mother and Gabrielle would continue to live in Tennessee in an environment in which Gabrielle was "flourishing." The trial court found that Gabrielle "would benefit by continuing her life in her present surroundings without substantial interruption." While the trial court emphasized the importance of continuity to Gabrielle, it also noted that Gabrielle needed "the maximum exposure to her father that the distance between the parties and his lifestyle permits."

Even without considering the post-judgment facts, it is questionable whether the decision to designate Mother as the primary custodial parent would be affirmed. The relative willingness of each parent to facilitate the child's healthy relationship with the other parent is an important consideration. Tenn. Code Ann. § 36-6-106(a)(10); *see Buckles v. Riggs*, 106 S.W.2d 668, 674 (Tenn. Ct. App. 2003). Mother's behavior indicates a reluctance to facilitate Gabrielle's relationship with her father. The trial court went so far as to set out a regular phone schedule for Father's telephone conversations with Gabrielle, directing Mother to leave Gabrielle alone "to speak privately with the father." Moreover, as noted by the trial court, Father lives in a city near Gabrielle's half-brother and Father's extended family, while Mother was in Shelby County with no family. Adequate familial support is a valid consideration in weighing the comparative fitness of the parents. *See Julian v. Julian*, No. M1997-00236-COA-R3-CV, 2000 WL 343817, at *5 (Tenn. Ct. App. Apr. 4, 2000) ("Courts making custody decisions frequently consider the amount of assistance and support the parties can reasonably expect to receive from their extended families.") (citing *Adelsperger v. Adelsperger*, 970 S.W.2d at 482, 486 (Tenn. Ct. App. 1997)). While Father's line of work permits him to continue living in Lancaster, Pennsylvania indefinitely, Mother's career in the military makes frequent moves likely, despite Mother's testimony otherwise. Mother's lack of candor at trial was apparent, with the trial court noting in its memorandum opinion that Mother "had difficulty in her testimony admitting to obvious facts."

While the trial court obviously did not have the benefit of hindsight, the post-judgment facts make it clear that Mother's lack of candor deprived the trial court of the opportunity to evaluate Mother's true circumstances. One of the statutory factors to be considered, as set forth in section 36-6-106(a)(9), is 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." As a result of Mother's disingenuous denial of a relationship with Stallings, the effect of that relationship on Gabrielle could not be fully examined. Mother's marriage to a spouse also in the military clearly makes frequent moves, and the resulting disruption to Gabrielle, even more likely and makes Gabrielle's visitation with Father more difficult and infrequent. Mother's currently pending request for permission to relocate with Gabrielle to England to join her new husband undermines the considerations most emphasized by the trial court in its decision, namely, the benefit of Gabrielle being permitted to continue her life in the same surroundings and the importance of Gabrielle having "maximum exposure" to Father.

Considering the fact that it is undisputed that both parties are fit parents, Mother's marriage to a spouse in the military and her imminent move to England, Father's willingness to facilitate Gabrielle's relationship with the other parent and Mother's apparent reluctance to do so, and the stability and continuity that would benefit Gabrielle by living in Pennsylvania with Father and his extended family, we must conclude that the designation of Mother as primary residential parent must be reversed. Father is hereby designated the primary residential parent. The cause is remanded to the trial court for further proceedings to implement an appropriate transition and set a parenting and visitation schedule, as well as any other proceedings not inconsistent with this Opinion.

Accordingly, we reverse the decision of the trial court and remand for further proceedings not inconsistent with this Opinion. Costs on appeal are to be taxed to Appellee Stacey Anne Schmalhofer, for which execution may issue, if necessary.

HOLLY M. KIRBY, JUDGE