

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 23, 2014 Session

BRYAN DEWAYNE CLARK v. JENNIFER INEZ CLARK

**Appeal from the Chancery Court for Sumner County
No. 2011-DM-178 Tom E. Gray, Chancellor**

No. M2013-02632-COA-R3-CV - Filed December 30, 2014

This appeal arises from divorced parents' child custody dispute. After Mother was arrested twice for driving under the influence, Father requested that he be designated as the primary residential parent and that Mother have supervised parenting time only. Without making any specific factual findings, the trial court found that there had been a "substantial and material change in circumstances" since the prior custody order, and the trial court designated Father as the primary residential parent. Mother's parenting time was decreased by 196 days, her decision-making authority was removed, and she was ordered to pay child support to Father. Because the trial court's order fails to comply with Tennessee Rule of Civil Procedure 52.01, we vacate the trial court's judgment and remand.

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

W. NEAL MCBRAYER, J., delivered the opinion of the Court, in which RICHARD H. DINKINS and BRANDON O. GIBSON, JJ. joined.

Russ Heldman, Franklin, Tennessee, for the appellant, Jennifer Inez Clark.

Mary Arline Evans, Laura Yancey Goodall, and Charles Ralls Niewold, Nashville, Tennessee, for the appellee, Bryan Dewayne Clark.

OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

Bryan Dewayne Clark (“Father”) and Jennifer Inez Clark (“Mother”) were divorced in March 2012. They are the parents of two young children. The March 2012 Permanent Parenting Plan designated Mother as the primary residential parent and assigned Mother 286 days of parenting time and Father 79 days of parenting time. The parties had joint decision-making authority for the children. Under the 2012 parenting plan, Father paid Mother \$1,003.00 in monthly child support.

Mother was arrested on December 7, 2012, for driving under the influence and possession of controlled substances. On December 27, 2012, Father filed a petition for change of custody, requesting that the court grant him temporary custody of the children, designate him as the primary residential parent, and limit Mother’s parenting time to supervised visitation. On December 30, 2012, Mother was arrested a second time for driving under the influence; on this occasion, the parties’ two children were in her vehicle.

Over the next eight months, the parties entered into a temporary parenting plan and agreed orders. The temporary parenting plan, approved on January 14, 2013, gave Father primary responsibility for the children. Mother’s parenting time was limited to: Friday after school to Sunday at 6:00 p.m every other weekend, and every Wednesday after school to Thursday morning. Mother was required to reside with her parents in order to exercise her parenting time. Father worked out-of-town Monday through Thursday, but his parents provided child care while he was working. Mother was prohibited from driving with the children and all transportation was to be provided by Mother’s parents. Finally, Mother was required to pay Father \$273.00 in monthly child support.

The court held a hearing on Father’s petition for change of custody on August 1, 2013. On August 8, 2013, the court entered a new parenting plan. Father was granted 275 days of parenting time and designated as the primary residential parent. Mother was granted 90 days of parenting time. Father was given sole decision-making authority for the children, and Mother was ordered to pay \$273.00 to Father in monthly child support. The court subsequently issued a written order on August 14, 2013, finding that there had been a substantial and material change in circumstances since the prior custody order and designating Father as the primary residential parent. The court’s order stated, in pertinent part:

IT IS, THEREFORE, ORDERED & ADJUDGED BY THE COURT that the Court finds that there exists a substantial and material change in circumstances

since the last Permanent Parenting Plan in 2011, and after reviewing the relevant factors, the Court finds it is in the children's best interest to designate the Father, Bryan Dewayne Clark, as primary residential parent.

IT IS FURTHER ORDERED & ADJUDGED BY THE COURT that the Court approves the Father's Permanent Parenting Plan which will be entered by the Court.

On September 3, 2013, Mother filed a motion to alter or amend the August 8, 2013 parenting plan. In an order entered on October 30, 2013, the court altered the parenting plan by adding a mutual right of first refusal for parenting time. The right of first refusal did not apply to designated holidays and vacations. However, it applied at all other times when the other parent was at work, traveling to and from work, or personally unavailable to care for the children "without delegating a child's care to another person." On November 27, 2013, Mother appealed the trial court's October 30, 2013 order.

II. ANALYSIS

Mother raises the following issues on appeal: (1) whether the trial court erred in modifying the parties' parenting plan by designating Father as the primary residential parent and reducing her parenting time; (2) whether the trial court erred in calculating child support because it failed to consider the time she will care for the children under the right of first refusal provision; (3) whether the trial court erred in removing her decision-making authority for the children; and (4) whether Mother is entitled to attorney's fees and expenses on appeal under Tennessee Code Annotated section 36-5-103(c).

A. Standard of Review

We review custody and visitation decisions de novo on the record, with a presumption that the trial court's findings of fact are correct, unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); *see, e.g., Armbrister v. Armbrister*, 414 S.W.3d 685, 692 (Tenn. 2013). In weighing the preponderance of the evidence, determinations of witness credibility are given great weight, and they will not be overturned without clear and convincing evidence to the contrary. *In re Adoption of A.M.H.*, 215 S.W.3d 793, 809 (Tenn. 2007). We review the trial court's conclusions of law de novo, with no presumption of correctness. *Armbrister*, 414 S.W.3d at 692.

Trial courts have wide discretion in determining child custody arrangements. *Marlow v. Parkinson*, 236 S.W.3d 744, 748 (Tenn. Ct. App. 2007), citing *Parker v. Parker*, 986 S.W.2d 557, 563 (Tenn. 1999). The appellate court will not interfere with these decisions

except upon a showing of abuse of that discretion. *See, e.g., Suttles v. Suttles*, 748 S.W.2d 427, 429 (Tenn. 1988). A trial court abuses its discretion only if it: (1) applies an incorrect legal standard; (2) reaches an illogical conclusion; (3) bases its decision on a clearly erroneous assessment of the evidence; or (4) employs reasoning that causes an injustice to the complaining party. *Konvalinka v. Chattanooga-Hamilton Cnty. Hosp. Auth.*, 249 S.W.3d 346, 358 (Tenn. 2008); *see also Kline v. Eyrich*, 69 S.W.3d 197, 203-04 (Tenn. 2002); *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001). In other words, if “reasonable minds can disagree as to [the] propriety of the decision made,” the trial court’s ruling will be upheld. *Eldridge*, 42 S.W.3d at 85.

B. Modification of Parenting Plan

Regrettably, our review is hampered by the trial court’s failure to make specific findings of fact and conclusions of law with regard to its decision to name Father as primary residential parent and significantly reduce Mother’s parenting time. “In bench trials, trial courts must make findings of fact and conclusions of law to support their rulings.” *Hardin v. Hardin*, No. W2012-00273-COA-R3-CV, 2012 WL 6727533, at *3 (Tenn. Ct. App. Dec. 27, 2012); Tenn. R. Civ. P. 52.01. “Simply stating the trial court’s decision, without more, does not fulfill this mandate.” *Barnes v. Barnes*, No. M2011-01824-COA-R3-CV, 2012 WL 5266382, at *8 (Tenn. Ct. App. Oct. 24, 2012). Following an amendment in 2009, Tennessee Rule of Civil Procedure 52.01 requires trial courts to make these specific findings of fact and conclusions of law, even if neither party requests them. *See, e.g., Ward v. Ward*, No. M2012-01184-COA-R3-CV, 2013 WL 3198157, at *14 (Tenn. Ct. App. June 20, 2013). Rule 52.01 provides, in relevant part:

In all actions tried upon the facts without a jury, the court shall find the facts specially and shall state separately its conclusions of law and direct the entry of the appropriate judgment. The findings of a master, to the extent the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein.

Tenn. R. Civ. P. 52.01.

“[F]indings of fact are particularly important in cases involving the custody and parenting schedule of children, as these determinations often hinge on subtle factors, including the parents’ demeanor and credibility during [the] proceedings.” *In re Connor S.L.*, No. W2012-00587-COA-R3-JV, 2012 WL 5462839, at *4 (Tenn. Ct. App. Nov. 8, 2012) (internal quotations omitted). The parties themselves deserve to know the factual basis for the trial court’s decision on such important matters. *Ward*, 2013 WL 3198157 at *15.

Moreover, trial courts also need to be as “precise as possible in making child custody findings” in order to facilitate appellate review. *In re Connor*, 2012 WL 5462839 at *7.

Under Rule 52.01, the trial court’s order should indicate why and how it reached a decision, and which factual findings led the court to rule as it did. *Pandey v. Shrivastava*, No. W2012-00059, COA-R3-CV, 2013 WL 657799, at *4 (Tenn. Ct. App. Feb. 22, 2013). Although the court need not list every applicable statutory factor and an accompanying conclusion for each factor, the trial court is required to “consider all applicable factors.” *See id.*¹ However, we have no indication that a trial court has considered all applicable statutory factors apart from its written order. *Anil Const., Inc. v. McCollum*, No. W2013-01447-COA-R3-CV, 2014 WL 3928726, at *8 (Tenn. Ct. App. Aug. 7, 2014) (“It is well-settled that a trial court speaks through its written orders – not through oral statements contained in the transcripts – and that the appellate court reviews the trial court’s written orders.”) (citing *Alexander v. JB Partners*, 380 S.W.3d 772, 777 (Tenn. Ct. App. 2011); *Palmer v. Palmer*, 562 S.W.2d 833, 837 (Tenn. Ct. App. 1977)).

If we cannot determine from the trial court’s written order what legal standard it applied or what reasoning it employed, then the trial court has not complied with Rule 52.01. *See Ray v. Ray*, No. M2013-01828-COA-R3-CV, 2014 WL 5481122, at *16 (Tenn. Ct. App. Oct. 28, 2014); *Halliday v. Halliday*, No. M2011-01892-COA-R3-CV, 2012 WL 7170479, at *12 (Tenn. Ct. App. Dec. 6, 2012). The reviewing court must be able to ascertain “the steps by which the trial court reached its ultimate conclusion on each factual issue.” *Lovlace v. Copley*, 418 S.W.3d 1, 35 (Tenn. 2013) (quoting 9C Fed. Prac. & P. § 2579, at 328). “Without such findings and conclusions, this court is left to wonder on what basis the [trial] court reached its ultimate decision.” *Hardin*, 2012 WL 6727533, at *3. That is precisely the scenario we face in this case.

Here, we are left to wonder how the trial court reached its decision to modify the parties’ custody arrangement; what legal standard it applied; what factual findings influenced its final decision; and what statutory factors were considered. The trial court made no factual findings regarding witnesses’ credibility, and made no mention of the statutory best interest factors that should have directed the trial court’s decision. Tenn. Code Ann. § 36-6-106(a) (2012); *see also Pandey*, 2013 WL 657799 at *4. Because the trial court did not make any findings of fact or conclusions of law to explain its decision, we cannot discern whether the

¹ We have previously noted the seeming inconsistency between cases holding that a trial court is not required to articulate the statutory factors it considered and Tennessee Rule of Civil Procedure 52.01. *See Pandey*, 2013 WL 657799, at *4 n.8; *In re Connor S.L.*, 2012 WL 5462839, at *7 n.6 (citing *In re Elaina M.*, No. M2010-01880-COA-R3-JV, 2011 WL 5071901, at *8 n.13 (Tenn. Ct. App. Oct. 25, 2011)).

trial court abused its discretion.

Although “the appellate court may choose to conduct its own independent review of the record” in the absence of sufficient findings of fact, it is not prudent to do so in this case. *Williams v. Singler*, No. W2012-01253-COA-R3-JV, 2013 WL 3927934, at *10 (Tenn. Ct. App. July 31, 2013); *see also Lovlace*, 418 S.W.3d at 36; *Brooks v. Brooks*, 992 S.W.2d 403, 404-05 (Tenn. 1999); *Coley v Coley*, No. M2007-00655-COA-R3-CV, 2008 WL 5206297, at *6 (Tenn. Ct. App. Dec. 12, 2008). Unlike other cases in which we have conducted an independent review, this record lacks conclusions of law and assessments of the witnesses’ credibility. Without these determinations, we are ill-equipped to conduct an independent review of the record.

We therefore vacate the trial court’s order and remand for entry of an order in compliance with Rule 52.01.² *See Hardin*, 2012 WL 6727533, at *6; *Pandey*, 2013 WL 657799, at *5-6; *In re Connor S.L.*, 2012 WL 5462839, at *4; *Simpson v. Fowler*, No. W2011-02112-COA-R3-CV, 2012 WL 3675321, *4 (Tenn. Ct. App. Aug. 28, 2012). Pending entry of the trial court’s order on remand, we reinstate the provisions of the parties’ temporary parenting plan entered on January 14, 2013. We are mindful that this arrangement was created nearly two years ago and that the needs and circumstances of the parties and their children may have evolved since that time. However, we cannot provide the parties with the meaningful review they deserve without an order from the trial court that includes factual findings and conclusions of law to support its decision.

The other issues raised by Mother on appeal are not properly reviewable in light of our conclusion that the trial court’s order failed to comply with Tennessee Rule of Civil Procedure 52.01. The trial court’s order also failed to provide an explanation for Mother’s child support obligation and the removal of Mother’s decision-making authority. These matters should be addressed on remand as well. Finally, we decline to grant Mother’s

² We are aware the trial judge who presided over this case has recently retired. We take no position on whether the retired judge may make the requisite findings and enter judgment accordingly, or whether a successor judge must be designated to preside over this matter. *See* Tenn. R. Civ. P. 63. Tennessee Rule of Civil Procedure 63 states:

If a trial or hearing has been commenced and the judge is unable to proceed, any other judge may proceed upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties. In a trial or hearing without a jury, the successor judge shall at the request of a party recall any witness whose testimony is material and disputed and who is available to testify again without undue burden. In any trial or hearing, with or without a jury, the successor judge may recall any witness.

request for attorney's fees on appeal under Tennessee Code Annotated section 36-5-103(c).

III. CONCLUSION

The judgment of the trial court is vacated and this cause is remanded to the trial court for all further proceedings as may be necessary and consistent with this opinion. Costs of this appeal shall be taxed jointly to Appellant, Jennifer Inez Clark, and Appellee, Bryan Dewayne Clark, for which execution may issue, if necessary.

W. NEAL McBRAYER, JUDGE