

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
June 28, 2007 Session

WILLIAM BISHOP LAND v. CAROLYN SUZANNE LAND

**Appeal from the Chancery Court for Grundy County
No. 5582 Jeffrey Stewart, Chancellor**

No. M2006-01268-COA-R3-CV - Filed September 24, 2007

William Bishop Land (“Husband”) sued Carolyn Suzanne Land (“Wife”) for divorce. The Trial Court entered a Final Decree of Divorce, *inter alia*, awarding the parties a divorce and finding and holding that it was in the best interests of the parties’ minor child (“the Child”) for Husband to be the primary residential parent. Wife appeals to this Court claiming that the Trial Court erred in awarding primary residential custody of the Child to Husband. Wife also argues that the Trial Court further erred by considering a report filed by the guardian ad litem and by refusing to consider post-trial facts. We affirm.

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

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Connie Reguli, Brentwood, Tennessee for the Appellant, Carolyn Suzanne Land.

Michelle M. Benjamin, Winchester, Tennessee for the Appellee, William Bishop Land.

OPINION
Background

Husband and Wife were married in November of 1988. At the time of the marriage, Husband had custody of his two minor daughters from a previous marriage. The Child was born in 1996. Husband's two children from his previous marriage were adults by the time this lawsuit was filed. The Child still is a minor. After she left Husband, Wife moved with the Child from the marital home in Grundy County to Murfreesboro, Tennessee.

Husband sued Wife for divorce in November of 2004. The case was tried in August of 2005.

Husband testified at trial that although Wife has allowed the Child to spend time with her parents on a regular basis since the Child's birth, she has allowed the Child to spend only one night with Husband's parents. Husband also testified that since he and Wife separated, he has had problems reaching the Child by telephone. Husband stated:

A lot of times I would try to call and they would have the phone off the hook. I would have the operator break in on the line, and he would say there's no one on the line - - the operator would. Then I would call and talk to him and they would turn the music up so loud to where I couldn't even hear him a lot of times.

Because of these problems, Husband gave the Child a cell phone. However, Husband continues to have problems reaching the Child by telephone.

Husband also testified that Wife has attempted to interfere with Husband's court ordered visitation on several occasions. Husband testified that during the Child's spring break:

I went to pick him up on - - I go down on Wednesday nights. I get him 5:30 to 8:00 Wednesday nights there in Murfreesboro. And I talked to [my attorney] and [my attorney] said [he] would talk to [Wife's attorney] and said it would be all right for me to get him. So I got him. I took him back that Friday evening....I called [Wife] on the telephone and [let her know when I would bring the Child back]. Then the next Wednesday night I went back, I had him, we went out and played games and when I let him out and went in the house the Rutherford County and Murfreesboro City Police pulled me over and said they had a warrant for my arrest and they searched me and everything, had me handcuffed and everything, searching me and everything. I was told it was reported I was armed and dangerous. I didn't have no gun or knife or nothing. They took me to jail and I had to make a \$1,500 bond to get out of jail that night. And when I got down there it was for custodial interference is what it was for...[The warrant stated] husband who was identified as William Land visit with his son which supposed to take place in Murfreesboro on the same day, Mr. Land telephoned and stated that he and their son were in Clides Hill which is in Grundy County. Advised that Mr. Land did return their son at 4:00 on Friday evening.

Kelly Lusk, one of Husband's adult daughters, testified at trial. Husband and Wife married when Ms. Lusk was twelve years old. Ms. Lusk testified that Wife never complained to her that Husband was mistreating Wife. Further, Ms. Lusk stated that she has never seen the Child demonstrate any fear of Husband. Ms. Lusk stated that the Child and Husband have "a good relationship, wonderful, couldn't ask for any better relationship." When the Child and Husband visited Ms. Lusk and stayed at her house, the Child has asked to sleep in the same room as his father. Ms. Lusk also testified that one time "[the Child] and my son, Corbin, wanted to have a pretend camp out and they pitched a tent down in my den down in the library area. But they made daddy sleep on the couch that same night, but that was their idea of a camp out." Ms. Lusk also testified that prior to Husband and Wife's separation, Wife wouldn't allow the Child to spend the night with extended family members like his sisters.

Dewayne Lusk, Husband's son-in-law, testified that he has observed the relationship between Husband and the Child and has never observed that the Child was afraid of Husband. Further, Mr. Lusk could not recall ever hearing Husband use profanity in front of the Child.

Wife testified at trial and accused Husband of being verbally abusive to her and the Child. She stated "[Husband] would just have temper fits just like a child would and he would cuss and scream and it just escalated and escalated." Wife also testified that there was police involvement in Husband's first visit with the Child after Wife and the Child moved to Murfreesboro stating:

Well it was my understanding that he wasn't supposed to leave the house, that he was supposed to stay there with [the Child] and I left. I mean, I left, you know, when he came thinking he was going to stay there and he left with him and made it to Bell Buckle to that exit and a police officer called him and told him to turn around and come back.

When Wife was asked why Husband's cell phone calls to the Child were not being answered, Wife stated: "Because [the Child's cell phone is] not where ever we are." Wife also testified that she has concerns about the Child's physical health when the Child is with Husband and stated: "A number of times he's come back home really sun burnt. He's really fair skinned. He has to have sunscreen on. He has to or he just burns to a crisp."

Wife admitted that she did not want the Child to play with his cousins and that she has allowed the Child to spend only one night at his paternal grandparents' home, but that she has allowed him to spend several nights at her parents' home. Wife also admitted that when Husband and his first wife divorced, Husband was granted custody of his two daughters and found to be fit and proper to raise them. Wife further admitted that she smokes both in her home and in her car while the Child is present, even though she knows the dangers of secondhand smoke. Wife also admitted that she has never known Kelly Lusk to lie but stated that what Ms. Lusk said during her testimony was untrue.

After the trial, the Trial Court entered a Final Decree of Divorce on September 29, 2005 granting the parties a divorce and finding and holding, *inter alia*:

ORDERED, ADJUDGED AND DECREED that it is in the best interest of the minor child to live with his father and visitation be provided to [Wife] every other weekend and one day or evening every week from 5:00 P.M. until 8:00 P.M. The holidays shall be rotated with the father receiving the child on every Father's Day from 6:00 P.M. on the day preceding that day until 6:00 P.M. on Sunday and the mother shall have the child every Mother's Day from 6:00 P.M. on the day preceding Mother's Day until 6:00 P.M. on Sunday. Each party shall be entitled to shared parenting one-half (1/2) of the summer, spring and fall vacations.

In its memorandum opinion, the Trial Court stated:

I first of all want to take a look at the positives of both of you as parents. Ms. Land, you have a college degree and you have been a social worker. You have also been a teacher for a number of years. You've been involved in [the Child's] life. I believe Ms. Judy Fults said that on a scale of ten as an involved mother, you were eleven. So you were very involved in his life. I don't think Mr. Land denies that, that you took him to school, picked him up after school, helped him with homework, got him to his doctor and dental appointments.

On the other hand, Mr. Land worked for the railroad company and provided a good lifestyle. He provided the insurance, very good insurance. He was involved and came to things when he could, but his work didn't permit him to have the same luxuries of coming to the things that Ms. Land was able to come to.

On Mr. Land's side, there's no question that the proof is that he had custody of his daughters from a prior marriage. They both testified on his behalf that he was a very good and loving father, that he always treated him well. There's no mistreatment or abuse that they ever observed certainly as to this young man, [the Child]. They love [the Child] very much.

They think very highly and thought very highly of Ms. Land. Ms. Land thought very highly of them. She was part of their life in raising them. So I think they came in to some degree as a neutral witness. They basically were telling me they saw no fear by [the Child] of his father during the visit, and there was certainly no history of abuse or neglect or mistreatment that they have ever observed.

As far as [the Child], there is certainly no question that [the Child] was born and raised in Grundy County. Ms. Land attended Grundy County High School and graduated. She was raised in this area. Mr. Land continues to live here.

The home that [the Child] was born in and raised in is still here in Grundy County. He attended all of his life, Coalmont school, was a good student. He has

cousins and aunts and grandparents here in Grundy County as well. Now, he is very well-adjusted and he's a very good student.

Now, part of the problem for [the Child] is - - and as we heard from another, I guess, psychologist who testified, and she indicated that [the Child] is suffering from a separation syndrome that needs treatment.

And with regard to a separation syndrome, I think these points are certainly important to point out, that he left here and was taken to Murfreesboro. He was put into a new school. There is no question according to the testimony that I heard, that [the Child] has had an adjustment to being in Murfreesboro, since being taken there in November of 2004.

His grades went down for a period of time. There is no question that he doesn't have as many friends. He's making new friends there, but certainly he has a loss of all the friends that he had grown up with all of his life. And so I think there's no question that he would have some separation anxiety as a result of this move, and that he was uprooted and taken from his home here.

I think that the testimony that I have heard indicates to me that there is no reason to fear for [the Child's] safety when he is with his father....I refer to the history of this man in raising his children, that there's no reference to that on prior occasions.

I noted in the testimony of one of the witnesses who was counseling with Ms. Land, that she had taken in history that Ms. Land talked about how Mr. Land had threatened to shoot her and do physical abuse to her, but I didn't hear any of that in the testimony that I was given here. More what I heard about was his cursing them. And I noticed that she used those curse words freely in her testimony, and I have not heard any cursing or seen any of that kind of conduct on behalf of Mr. Land, and neither does anyone in the background of his life remember having heard that or seen it.

So I don't think that any of these witnesses who have - - I think in the words of Ms. Land, they're not known to be lying people. They never lied before, but she felt like some of them had lied in court. These were regarding the testimony of Mr. Land's children, I think is what that was in reference to.

With regard to cooperating in parenting, I'll have to say I'm deeply concerned about Ms. Land's conduct. I think that she admits that she's overprotective, and she admitted that she dictated where [the Child] could go. She referred to [the Child] as her child....It was okay for [the Child] to spend the night at her parents' house, but not at Mr. Land's parents' house.

Mr. Land attempted to have his first visitation with Tyler under the court order, but he ended up with an order of protection. There was another time when

he went down to get [the Child] for what he thought was his spring break, and a custodial interference warrant was signed. And so he's had several problems with the law enforcement at the insistence of Ms. Land during that period of time.

I think that there's also been a problem in his ability to contact [the Child] by phone, even though he's provided [the Child] with a cell phone. I just feel like that is something that had not worked out very well.

I think that based upon all that I have heard, and the uprooting of [the Child] from his home, the only home that he had known, that it is in the best interest for [the Child] to live with his father as the primary custodial parent.

Wife filed a motion to alter or amend or for a new trial, and also requested that the Trial Court consider post-trial facts. The Trial Court denied Wife's motions. Wife appeals to this Court.

Discussion

Although not stated exactly as such, Wife raises three issues on appeal: 1) whether the Trial Court erred in considering a report filed by the guardian ad litem but not introduced at trial; 2) whether the Trial Court erred in awarding Husband primary residential custody of the Child; and, 3) whether the Trial Court erred in refusing to hear post-trial facts regarding the best interest of the Child .

We first discuss whether the Trial Court erred in considering a report filed by the guardian ad litem but not introduced at trial. Wife argues that the Trial Court "relied heavily on the GAL report in determining that the child did not have any fear of his father." We disagree. Although the Trial Court did note in its memorandum opinion that it had reviewed the guardian ad litem's report, any error in considering this report was harmless in this case as there was other significant evidence presented at trial and relied on by the Trial Court to support the Trial Court's findings. Several witnesses testified that the Child had no fear of Husband, and the Trial Court's memorandum opinion found those witnesses to be more credible than Wife. This issue is without merit.

We next consider whether the Trial Court erred in awarding Husband primary residential custody of the Child. In *Burnett v. Burnett*, No. E2002-01614-COA-R3-CV, 2003 WL 21782290 (Tenn. Ct. App. July 23, 2003), *no appl. perm. appeal filed*, this Court discussed the relevant standard of review in child custody cases. We stated:

The standard of review on appeal for issues addressing child custody and visitation was set forth by our Supreme Court in *Suttles v. Suttles*, 748 S.W.2d 427 (Tenn. 1988), and recently reaffirmed in *Eldridge v. Eldridge*, 42 S.W.3d 82 (Tenn. 2001). In *Suttles*, the Court acknowledged the general rule that:

Although ... “the details of custody and visitation with children are peculiarly within the broad discretion of the trial judge,” *Edwards v. Edwards*, 501 S.W.2d 283, 291 (Tenn. App. 1973), and that the trial court's decision will not ordinarily be reversed absent some abuse of that discretion, “in reviewing child custody and visitation cases, we must remember that the welfare of the child has always been the paramount consideration” for the courts. *Luke v. Luke*, 651 S.W.2d 219, 221 (Tenn. 1983)....

Suttles, 748 S.W.2d at 429. The Supreme Court further explained the abuse of discretion standard in *Eldridge*, stating:

Under the abuse of discretion standard, a trial court's ruling “will be upheld so long as reasonable minds can disagree as to propriety of the decision made.” *State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000); *State v. Gilliland*, 22 S.W.3d 266, 273 (Tenn. 2000). A trial court abuses its discretion only when it “applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining.” *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999). The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court. *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998).

Eldridge, 42 S.W.3d at 85.

Burnett, 2003 WL 21782290, at ** 5, 6.

A list of non-exclusive factors to be considered by the trial court in child custody matters are set forth in Tenn. Code Ann. § 36-6-106(a) which provides, in relevant part, as follows:

§ 36-6-106. Child custody. – (a) In a suit for annulment, divorce, separate maintenance, or in any other proceeding requiring the court to make a custody determination regarding a minor child, such determination shall be made upon the basis of the best interest of the child. The court shall consider all relevant factors including the following 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;...
- (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) (A) The reasonable preference of the child if twelve (12) years of age or older;
(B) 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 fact 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; and
- (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) (2005).

A careful and thorough review of the record on appeal reveals that the Trial Court did consider the relevant statutory factors in light of the evidence presented at trial. In its memorandum opinion, the Trial Court discussed several of the relevant factors and specifically noted its deep concern regarding Wife's ability to cooperate with Husband regarding parenting of the Child and her ability to facilitate and encourage the relationship between Husband and the Child. The Trial Court noted that the evidence showed that Wife had attempted to interfere with

Husband's court ordered visitation and with Husband's right to have telephone contact with the Child. The evidence does not preponderate against these findings.

Further, the Trial Court found Husband and other witnesses to be more credible than Wife specifically noting that although Wife complained that Husband cursed her and the Child, Husband did not curse during his testimony at trial but Wife "used those curse words freely in her testimony." The Trial Court also noted that other witnesses denied ever hearing Husband use curse words in front of the Child. In addition, the Trial Court noted that although a psychologist who was treating Wife testified that Wife had reported during treatment that Husband had physically abused Wife, Wife made no such allegations during her testimony at trial.

"When a trial court has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded to the trial court's factual findings." *Seals v. England/Corsair Upholstery Mfg. Co.*, 984 S.W.2d 912, 915 (Tenn. 1999) (quoting *Collins v. Howmet Corp.*, 970 S.W.2d 941, 943 (Tenn.1998)). The Trial Court found Husband and the other witnesses to be more credible than Wife and we accord great deference to these findings.

We share the Trial Court's concern regarding Wife's inability to facilitate the Child's relationship with Husband and what can only be described as her intentional interference with the Child's relationship with Husband. Given the evidence in the record before us as applicable to the relevant statutory factors, we find no error in the Trial Court's award to Husband of primary residential custody of the Child.

We next consider whether the Trial Court erred in refusing to consider certain alleged post-trial facts regarding the best interest of the Child. Our Supreme Court has set out the standard to be applied to a trial court's decision regarding post-trial facts stating:

This Court has stated that it is "within the discretion of the trial judge to decide whether to reopen the proof for further evidence, and the decision of the trial judge... will not be set aside unless there is a showing that an injustice has been done." *Simpson v. Frontier Community Credit Union*, 810 S.W.2d 147, 149 (Tenn. 1991) (quoting *Higgins v. Steide*, 47 Tenn. App. 42, 335 S.W.2d 533 (1959)).

Robinson v. LeCorps, 83 S.W.3d 718, 725 (Tenn. 2002).

In a supplement to her motion to amend, Wife made allegations regarding alleged post-trial facts that she sought to have the Trial Court consider. Among those allegations were that the Child "reacted with panic" when told that he was to live with Husband, and that on an occasion when Husband left the Child in the care of the Child's sister, one of the Child's nephews had "engaged in inappropriate sexual contact." Wife's supplement to her motion further stated:

13. [Wife], out of concern for the child, refused to return him to [Husband], thinking that a referral would be made to the Department of Children's Services who would then commence an investigation and act to protect the child.
14. [Wife] was incarcerated on October 23rd, 2005 for her failure to return the child to [Husband] under a warrant for custodial interference.
15. [Wife] remained incarcerated until December 2nd, 2005 when she entered into an agreement with the Sheriff's Department of Grundy County and the Murfreesboro City Police Department that she would turn over the child if the child would be protected and with the understanding that an investigation on the sex abuse would commence. It was also her understanding that the Department would keep the child "safe" and away from the Father. She was informed that she would be contacted by the Department of Children's Services to take her referral and develop a safety plan on that same day.
16. [Wife] turned over the child early am hours of Friday, December 2nd, 2005.
17. [Wife] was not contacted by the Department, but appeared at their office at about 3:30 p.m. to make the referral.
18. Supervisor Pamela Hood at the Franklin County office of the Department of Children's Services refused to take her referral and refused to disclose to [Wife] the location of the child.

Wife provided no supporting documentation, affidavits, or any other evidence in support of her allegations. The Trial Court refused to consider the post-trial facts.

Given the Trial Court's determinations regarding credibility and the nature of Wife's asserted post-trial facts, which include Wife's continuing assertion that the Child is afraid of Husband, we find no abuse of discretion and no injustice in the Trial Court's refusal to hear the post-trial facts. If Wife can prove a material change in circumstances, she is free to file a petition seeking a change in custody. We, however, will not set aside the Trial Court's decision on this issue.

Conclusion

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for collection of the costs below. The costs on appeal are assessed against the Appellant, Carolyn Suzanne Land, and her surety.

D. MICHAEL SWINEY, JUDGE