

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
October 22, 2014 Session

**IN RE CALEB B.**

**Appeal from the Juvenile Court for Montgomery County  
No. 156112      Ray Grimes, Judge**

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**No. M2013-02564-COA-R3-JV- Filed March 19, 2015**

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This case involves a custody dispute between two parents and a non-parent intervener. Father originally filed a petition against Mother requesting a change of custody, but the couple reconciled and began living together while the litigation was pending. Thereafter, the maternal grandmother intervened, seeking custody of the child. The trial court found that Father presented a substantial risk of harm to the child based on his prior and current criminal history but granted Mother custody of the child. On appeal, Grandmother argues the court erred in not finding that Mother also presented a risk of substantial harm to the child because Mother lived with Father. We affirm the trial court.

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

W. NEAL MCBRAYER, J., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR., P.J., M.S., and BRANDON O. GIBSON, J., joined.

Stacy T. Olson-Turner, Clarksville, Tennessee, for the appellant, Angie M.

Thomas J. Bailey, Madison, Tennessee, for the appellees, Shane B. and Amanda M.

**OPINION**

**I. BACKGROUND AND PROCEDURAL HISTORY**

Shane B.<sup>1</sup> (“Father”) and Amanda M. (“Mother”) are the parents of Caleb B. Although Mother and Father have never been married, they lived together briefly prior to Caleb’s birth in 2004. Sometime in 2003, before Mother and Father began living

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<sup>1</sup> The transcript contained in the record refers to Father as “Shanne B.” However, all other filings in the record refer to Father’s first name as “Shane.”

together, Father was arrested and pled guilty to possession of cocaine for resale. He received an eight year community corrections sentence. Following Caleb's birth, Father was arrested once again and convicted of selling ecstasy, a Schedule I controlled substance. After his conviction, Father was incarcerated until 2006. Upon his release, he was placed back on community corrections for the remainder of the eight years.

Caleb has spent most of his life in the shared custody of Mother and her mother, Angie M. ("Grandmother"). Following his birth in 2004, Mother and Caleb returned from the hospital to live with Grandmother. According to Grandmother, Mother's living situation following Caleb's birth was unstable; she allegedly moved back and forth between multiple residences with various family members and friends. Grandmother kept Caleb during these periods of itinerancy. Mother's version of these events is slightly different. Although she acknowledges that she would stay with different friends or family members from time to time, particularly when she and Grandmother had a falling out, she maintains that she continuously lived with Grandmother and Caleb. Under either version of events, during this time period, Mother lived a "party" lifestyle, and much of the responsibility for raising Caleb fell upon Grandmother.

At some point,<sup>2</sup> Mother met a man, and they married. Mother and Caleb then moved with her new husband to Augusta, Georgia. However, the relationship encountered difficulties, and Mother eventually divorced. Mother and Caleb returned to Grandmother's home in Tennessee, and Mother entered an agreed order providing for grandparent visitation on March 25, 2009.<sup>3</sup> The order provided visitation for Grandmother and her husband "every weekend with the minor child, [Caleb], from Saturday, 12:00 pm (noon) until Sunday, 12:00 pm (noon)." The grandparents were also provided with visitation on Christmas Eve every year from 12:00 p.m. to 8:00 p.m. and one continuous week during the summer to be agreed upon between the parties. In 2010, Mother entered into an agreement granting Grandmother the power to make decisions over Caleb's medical care and education should Mother be unavailable.<sup>4</sup>

Throughout this time period, Father had little or no contact with Caleb. He claims that this was partially because of his incarceration and partially because Mother and her family discouraged any contact. Father stayed current with his child support obligations

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<sup>2</sup> It is unclear from the record before us when this relationship began or ended.

<sup>3</sup> This agreed order was entered in connection with a separate proceeding initiated by Grandmother and her husband. Other than the agreed order, nothing from the separate proceeding is included in the record.

<sup>4</sup> Although the existence of this agreement is established by the parties' testimony, and the agreement was admitted into evidence, it was not made a part of the record on appeal.

from 2006 and covered all arrearages before that time by sending checks to Mother. Father also claims to have purchased clothes, shoes, and school supplies for Caleb. However, Grandmother testified that she took primary financial responsibility for Caleb's upbringing and never received any money from Mother.

Father filed a "Petition to Change Custody" on September 22, 2010, seeking to be designated as Caleb's primary residential parent and alleging, among other things, that Mother was subjecting Caleb to substandard living conditions and abusing prescription pain pills. Mother filed an answer in December 2010. While awaiting further proceedings, in June 2011, Father was arrested yet again and charged with being a felon in possession of firearms and selling synthetic marijuana.<sup>5</sup>

While the custody proceedings were pending, Mother and Father reconciled and resumed living together in August 2011. Upon learning of the couple's reconciliation, Grandmother responded by filing a petition to intervene for custody of Caleb on August 11, 2011. Grandmother also sought a temporary restraining order granting her custody pending the outcome of the current proceedings. The trial court granted Grandmother's motion to intervene and entered a restraining order.

Mother and Father have been living at the home of Father's mother since December 2011. Their second child was born in April 2012. The two entered into an agreed permanent parenting plan regarding Caleb on January 13, 2012, designating Mother as the primary residential parent and granting her 183 days of parenting time and granting Father 182 days. Grandmother contends this agreement was an attempt to remove physical custody of Caleb from her.

The trial court conducted hearings on April 12, 2013, and August 6, 2013, to determine whether custody should be granted to Mother and Father or Grandmother. When asked what kind of potential danger Caleb would face if left in Mother's custody, Grandmother answered, "[h]e's not in any danger except for maybe who she's with." In a report issued by Caleb's Guardian Ad Litem filed on August 6, 2013, she recommended that Caleb be allowed to live with Mother and Father. Because this was a custody dispute between a non-parent and parents, the court found that Grandmother must make a showing that each of the parents posed a risk of substantial harm to the child through clear and convincing evidence in order for her to receive custody of Caleb.

In its final order entered October 11, 2013, the court found that Father posed a risk of substantial harm to Caleb due to his criminal background and the current charges pending against him. As to Mother, however, the trial court found no evidence that Caleb

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<sup>5</sup> These charges were unresolved at the time of trial.

would be exposed to substantial harm if placed in her custody. In its ruling on the matter, the trial court stated:

Even considering the Father's criminal history and pending charges there is no evidence that the child will be exposed to substantial harm if placed in the custody of [Mother]. No doubt that [Mother] has not exercised the best judgment, that is leaving the child with [Grandmother] for nine years so she can carry on a single life. It does appear that [Mother] has matured and is more stable in her life. She has lived with [Father] for over 18 months. She has made an adjustment in life. She has had another child, which is Caleb's younger sibling.

As to Grandmother, the court recognized that she had formed a significant relationship with Caleb and awarded her visitation. Grandmother's visitation was later amended to reference the agreed grandparent visitation order entered on March 25, 2009.

On appeal, Grandmother contends that the trial court erred in awarding Mother custody of Caleb where it found that Father posed a substantial risk of harm to the child and Mother and Father were residing together. She also argues that the trial court erred in finding that Mother had demonstrated sufficient stability by living with Father and raising the couple's second child together and, therefore, posed no risk of substantial harm to Caleb.

## II. STANDARD OF REVIEW

We review the trial court's findings of fact de novo on the record and accord these findings a presumption of correctness unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); *In re Angela E.*, 303 S.W.3d 240, 246 (Tenn. 2010); *In re Bernard T.*, 319 S.W.3d 586, 596 (Tenn. 2010). Next, due to the heightened burden of proof in cases involving custody disputes between a parent and non-parent, we must determine whether the facts, either as found by the trial court or as supported by a preponderance of the evidence, provide clear and convincing evidence that the child would be exposed to substantial harm if placed in the parent's custody. *See Sikora ex rel. Mook v. Mook*, 397 S.W.3d 137, 145 (Tenn. Ct. App. 2012). Considerable deference is afforded to the trial court's findings in regard to witness credibility, and we will not reverse on an issue that hinges on credibility unless there is clear and convincing evidence "other than the oral testimony of witnesses which contradict the trial court's findings." *In re M.L.P.*, 228 S.W.3d 139, 143 (Tenn. Ct. App. 2007) (quoting *Galbreath v. Harris*, 811 S.W.2d 88, 91 (Tenn. Ct. App. 1990)). The trial court's conclusions of law are reviewed de novo with no presumption of correctness. *Id.* at 144.

Generally, decisions regarding custody are within the broad discretion of the trial court and will not be reversed absent a showing of abuse of discretion. *See, e.g., Armbrister v. Armbrister*, 414 S.W.3d 685, 693 (Tenn. 2013); *In re Abigail G.D.H.*, No. E2011-00118-COA-R3-JV, 2011 WL 3209180, at \*6 (Tenn. Ct. App. July 28, 2011). A trial court abuses its discretion only where 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 Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001).

### III. ANALYSIS

Our courts have addressed a number of custody disputes between a parent and non-parent over the years. *Blair v. Badenhope*, 77 S.W.3d 137 (Tenn. 2002), *superseded by statute*, Tenn. Code Ann. § 36-6-101(a)(2)(B), *as recognized in Armbrister*, 414 S.W.3d at 701-02; *In re Askew*, 993 S.W.2d 1 (Tenn. 1999); *In re Adoption of Female Child*, 896 S.W.2d 546 (Tenn. 1995); *Hawk v. Hawk*, 855 S.W.2d 573 (Tenn. 1993); *Mook*, 397 S.W.3d at 140; *In re Abigail G.D.H.*, 2011 WL 3209180; *Nolen v. Nolen*, No. M2002-00138-COA-R3-CV, 2003 WL 21796882 (Tenn. Ct. App. Aug. 5, 2003). A custody dispute between a parent and non-parent must begin with a recognition of the parent's fundamental right, based in both the federal and State constitutions, to the care, custody, and control of his or her child. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *In re Angela E.*, 303 S.W.3d at 250; *Nash-Putnam v. McCloud*, 921 S.W.2d 170, 174 (Tenn. 1996); *In re Adoption of Female Child*, 896 S.W.2d at 547. In a custody dispute with a non-parent, therefore, the parent is generally afforded a presumption of superior parental rights. *Blair*, 77 S.W.3d at 141; *Mook*, 397 S.W.3d at 143.

Our Supreme Court has recognized the presumption of superior parental rights should be applied in four circumstances:

- (1) when no order exists that transfers custody from the natural parent;
- (2) when the order transferring custody from the natural parent is accomplished by fraud or without notice to the parent;
- (3) when the order transferring custody from the natural parent is invalid on its face; and
- (4) when the natural parent cedes only temporary and informal custody to the non-parents.

*Blair*, 77 S.W.3d at 143. Grandmother was granted custody of Caleb pending the outcome of this case, so we start by considering whether the order granting Grandmother custody precludes application of the presumption of superior parental rights.

We have previously discussed the difference between a temporary and final custody order at some length:

The law makes a distinction between temporary and final orders of custody. “An interim order is one that adjudicates an issue preliminarily; while a final order fully and completely defines the parties’ rights with regard to the issue, leaving nothing else for the trial court to do.” *State, ex rel., McAllister v. Goode*, 968 S.W.2d 834, 840 (Tenn. Ct. App.1997) (citing *Vineyard v. Vineyard*, 170 S.W.2d 917, 920 (Tenn. 1942)). Trial courts have discretion to grant temporary custody arrangements in circumstances “where the trial court does not have sufficient information to make a permanent custody decision or where the health, safety, or welfare of the child or children are imperiled.” *King v. King*, No. 01A01-91-10PB00370, 1992 WL 301303, at \*2 (Tenn. Ct. App. Oct. 23, 1992).

*Warren v. Warren*, No. W1999-02108-COA-R3-CV, 2001 WL 277965, at \*4 (Tenn. Ct. App. Mar. 12, 2001). Furthermore, we have noted:

Final custody orders are res judicata and cannot be modified unless there has been a material change in circumstances that makes a change of custody in the child’s best interest. A temporary order of custody, on the other hand, does not constitute a final order that shifts the burden of proving a change of circumstances to the parent.

*In re R.D.H.*, No. M2006-00837-COA-R3-JV, 2007 WL 2403352, at \*10 (Tenn. Ct. App. Aug. 22, 2007) (citations omitted). Here, the order granting Grandmother custody of Caleb was not final. Therefore, the trial court correctly applied the presumption of superior parental rights.

In light of the presumption of superior parental rights, a two-part test must be applied to Grandmother’s request for custody of Caleb:

[I]n a contest between a parent and a non-parent, a parent cannot be deprived of the custody of a child unless there has been a finding, after notice required by due process, of substantial harm to the child. Only then may a court engage in a general “best interest of the child” evaluation in making a determination of custody.

*In re Adoption of Female Child*, 896 S.W.2d at 548. In applying this test, the burden rests on the non-parent to demonstrate through clear and convincing evidence that “the child

will be exposed to substantial harm if placed in the custody of the biological parent.” *Mook*, 397 S.W.3d at 143; *see also Nolen*, 2003 WL 21796882, at \*3.

We have refused to define the precise circumstances that constitute a risk of substantial harm to the child, finding that such circumstances “‘are not amenable to precise definition because of the variability of human conduct.’” *Mook*, 397 S.W.3d at 147 (quoting *Ray v. Ray*, 83 S.W.3d 726, 732 (Tenn. Ct. App. 2001)); *see also Nolen*, 2003 WL 21796882, at \*3. “The circumstances, however, must conn[on]te ‘a real hazard or danger that is not minor, trivial, or insignificant’ and ‘the harm must be more than a theoretical possibility.’” *Mook*, 397 S.W.3d at 147 (quoting *Ray*, 83 S.W.3d at 732); *see also Nolen*, 2003 WL 21796882, at \*3. An inquiry into a person’s fitness as a parent has been utilized to determine whether they present a substantial risk of harm. *See In re Askew*, 993 S.W.2d at 4. To determine a parent’s fitness, we may consider their past conduct to aid us in assessing their current parenting skills and whether they are capable of having custody of the child. *Mook*, 397 S.W.3d at 147.

Each parent has an individual right to the care, custody, and control of their children. *See Nolen*, 2003 WL 21796882, at \*3-4 (noting with approval the trial court’s findings of fact regarding each parent’s fitness individually); *see also Means v. Ashby*, 130 S.W.3d 48, 58 (Tenn. Ct. App. 2003) (finding that order transferring custody from a mother to a non-parent was not binding on the father who had not been provided with notice of the proceedings and, therefore, required the court to apply a presumption of superior parental rights as to the father). Therefore, Grandmother had the burden of demonstrating, through clear and convincing evidence, that Mother and Father *each* posed a substantial risk of harm to Caleb before the trial court could consider whether granting Grandmother custody was in Caleb’s best interest.

Grandmother’s argument on appeal is that the trial court erred in granting custody of Caleb to Mother where Mother was residing with Father—whom the court found posed a substantial risk of harm to Caleb. The central thrust of this argument is that the risk of substantial harm posed by Father must be imputed to Mother because the two live together, allowing Father contact with Caleb. Although it is appropriate to consider the people with whom Mother lives in deciding whether she presents a risk of substantial harm to Caleb, this factor alone is not determinative of the issue. *See Mook*, 397 S.W.3d at 144, 147 (concluding that a daughter’s exposure to “undesirable associates” contributed to a finding that father presented a substantial risk of harm); *Nolen*, 2003 WL 21796882, at \*4 (considering the people father knowingly exposed his child to in finding him unfit).

The trial court considered Father’s criminal background in determining that Mother did not pose a substantial risk of harm to Caleb. The court explicitly stated that “even considering [Father’s] criminal history and pending charges, there is no evidence that the

child will be exposed to substantial harm if placed in the custody of [Mother].” In making this statement, the court seems to have credited Mother’s testimony that she would take her children and leave if Father were to endanger them by engaging in illegal behavior. In support of its decision, the court also found that Mother had matured significantly between Caleb’s birth and the time of the hearing and had made adjustments in her life.

The facts, both as found by the trial court and as shown by the record, do not clearly and convincingly establish that Mother poses a risk of substantial harm to the child. Nothing in the record before us suggests that the trial court abused its discretion in crediting Mother’s testimony. *See In re M.L.P.*, 228 S.W.3d at 143. Mother lived with Father in the sixteen months before trial and actively participated in raising the couple’s second child. She pledged to protect Caleb from any danger arising from Father’s past criminal behavior. Although Grandmother was apparently instrumental in Caleb’s upbringing, such a circumstance does not warrant removing the child from Mother’s custody.

#### IV. CONCLUSION

Because we conclude Mother does not pose a risk of substantial harm to Caleb, we need not consider whether it is in Caleb’s best interest to grant custody to Grandmother. Therefore, the trial court’s judgment is affirmed.

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W. NEAL McBRAYER, JUDGE