IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 24, 2015 Session

MARK STEPHEN KEOWN v. ALYSON SAVINO KEOWN

Appeal from the Chancery Court for Williamson County
No. 40342 Robbie T. Beal, Chancellor

No. M2014-00915-COA-R3-CV – Filed May 29, 2015

The parties were married for less than two years, and they had one child together who was three years old at the time of the divorce. Shortly after the child's birth, Mother moved with the child to New York to be near her family. The trial court named Mother the primary residential parent, ordered Father to pay $697 a month in child support, awarded Father one weekend a month of visitation, and ordered Mother responsible for the transportation costs of the child to visit Father, including the cost of an additional ticket for a parent or guardian to fly with the three-year-old child. In dividing the parties' property, the trial court found that a 2006 Range Rover, purchased by Father's business before the marriage, was not marital property. Mother appeals the trial court's ruling that she pay all transportation costs to facilitate Father's parenting time, and the classification of the Range Rover. We have determined that the annual cost to Mother to transport the child to Tennessee to facilitate Father's parenting time will likely exceed the annual award of child support until the child reaches the required age to fly alone, creating an injustice to Mother; moreover, Father only requested that Mother be responsible for half of the cost of transportation, not all costs. Concluding that the trial court abused its discretion, we modify the trial court's judgment to require both parties to equally share the costs of transportation concerning Father's parenting time. We affirm the trial court in all other respects.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part and Modified in Part

FRANK G. CLEMENT, JR., P.J., M.S., delivered the opinion of the Court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

Joshua L. Rogers, Franklin, Tennessee, for the appellant, Alyson Savino Keown.

Trudy Bloodworth, Nashville, Tennessee, for the appellee, Mark Stephen Keown.

OPINION

The parties, Mark Stephen Keown ("Father") and Alyson Savino Keown ("Mother"), were married on January 21, 2010, and had one child together, Andrew, who was born in November 2010. Mother also had a minor child from a previous relationship.

During the marriage, the parties worked for J.G. Keown Insurance Agency, a company owned by Father and his father. Prior to the marriage, the company purchased and began financing a 2006 Range Rover, which was titled in both the Father's name and the company. The parties agreed that Mother would drive the vehicle.

Meanwhile, Mother discovered that Father had a serious drinking problem. After several discussions, rehabilitation facilities, and warnings concerning Father's addiction, Mother relocated in the spring of 2011 with both of her children to Rensselaerville, New York, to be near her family. Mother was unemployed but her grandmother and uncle supported her and the children by gifting her money each month to pay her bills.

Upon realizing that the marriage was irreconcilable, Father filed a complaint for divorce on October 28, 2011. Mother subsequently obtained an Order of Protection in New York against Father for herself and her children which prohibited Father from being near Mother and her children; because of the Order, Father did not visit his child in New York.

On April 23, 2012, the parties entered an agreed order which set forth a temporary visitation schedule for Father, granting him one weekend per month to exercise parenting time at Mother's residence in New York upon dissolution of Mother's Order of Protection. Father also agreed to refrain from consuming alcohol or smoking during his parenting time.

The Order of Protection was dismissed on May 3, 2012; however, Father exercised only one visitation from the time of the agreed order until trial in March 2014. Father stated that the reason he did not exercise visitation was due to an incident regarding the police during his visit in September 2012. During this visit, the police discovered that Father was in New York in violation of Mother's Order of Protection. The police handcuffed Father and placed him in the back of a police car, but released him upon discovering that the Order had been dismissed. Even though the police confirmed that the Order had been dismissed, Father did not visit again because he believed there was still an outstanding warrant for his arrest.

Mother subsequently filed an answer and counter-complaint for divorce. A two-day trial was held in March 2014, and both Father and Mother testified. Mother testified that she was still unemployed but had an undergraduate degree in sociology and had been

looking for a job. She further testified that her family was still supporting her by paying her rent, utilities, and credit card bills each month. She also testified that she paid $6,887.10 towards the note on the Range Rover and that her family members also contributed payments toward the vehicle.

Father testified that he was currently employed as the finance director of a car dealership with an annual salary of $72,000. He also testified that Mother should be responsible for payment of his travel expenses to visit the minor child because she decided to move to New York with their minor child; in the alternative, he testified that the parties should split the cost of transportation. As for the Range Rover, he testified that the vehicle was purchased for $28,000 in 2008 by Keown Insurance Agency, which financed the payments until the business was sold in April 2011, and the remaining balance on the vehicle was paid from the profits of the sale.

In the final decree of divorce, the trial court granted Mother a divorce based upon the grounds of inappropriate marital conduct regarding Father's alcohol abuse. The trial court also designated Mother as the primary residential parent and awarded Father 80 days of parenting time per year, which amounted to one weekend per month with extended time during the summer and winter holiday.[1] Furthermore, the trial court found Father's income to be $75,000 and imputed income to Mother in the amount of $50,000, based upon her education and the money she was receiving from her relatives. The trial court ordered Father to pay child support in the amount of $697 per month and held Mother responsible for all costs to transport the child to and from Tennessee for Father's parenting time. In the division of marital assets, the trial court determined that the 2006 Range Rover was Father's separate property. Mother appeals.

ANALYSIS

I. CLASSIFICATION OF PROPERTY: 2006 RANGE ROVER

Mother argues that the trial court erred in classifying the 2006 Range Rover as separate property. Even though the vehicle was acquired by Father prior to the parties' marriage, she contends that the vehicle became marital property based on the legal construct of transmutation.

The determination as to whether property is marital or separate is "inherently factual." *McFarland v. McFarland*, No. M2005-01260-COA-R3-CV, 2007 WL 2254576, *4 (Tenn. Ct. App. Aug. 6, 2007). Thus, we review the trial court's classification of

[1] Specifically, the trial court ordered Father to have supervised visitation for the first three months and required him to attend five AA meetings per week and obtain a sponsor within the first thirty days. For the following three months' visitation, the trial court awarded Father unsupervised visitation and required him to attend three AA meetings per week. During his visitations, the trial court restrained and enjoined Father from consuming alcohol and smoking in the presence of the child.

property de novo with a presumption of correctness unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d).

Separate property is defined as: "All real and personal property owned by a spouse before marriage . . . ." Tenn. Code Ann. § 36-4-121(b)(2)(A) (Supp. 2011), whereas marital property is defined as "all real and personal property, both tangible and intangible, acquired by either or both spouses during the course of the marriage up to the date of the final divorce hearing, and owned by either or both spouses as of the date of filing of a complaint for divorce," Tenn. Code Ann. § 36-4-121(b)(1)(A) (2011).

Separate property, however, can become marital property by virtue of transmutation "if there is evidence that the parties intended for it to be marital property and treated it as such." *Whitley v. Whitley*, No. M2003-00045-COA-R3-CV, 2004 WL 1334518, at *6 (Tenn. Ct. App. June 14, 2004). Underlying the doctrine of transmutation is the rationale that dealing with property as if it is marital property creates a rebuttable presumption of a gift to the marital estate. *Langschmidt v. Langschmidt*, 81 S.W.3d 741, 747 (Tenn. 2002). The presumption of a gift to the marital estate may be rebutted "by establishing that one of the legal requirements of a gift is missing." *Burns v. Burns*, No. 01-A-01-9705-CH-00218, 1997 WL 691533, at *4 (Tenn. Ct. App. Nov. 7, 1997). The legal requirements of a gift are "the intention by the donor to make a present gift coupled with the delivery of the subject gift by which complete dominion and control of the property is surrendered by the donor." *Hansel v. Hansel*, 939 S.W.2d 110, 112 (Tenn. Ct. App. 1996).

In support of her argument that the vehicle should be classified as marital property, Mother presented evidence that she paid $6,887.10 towards the note on the vehicle and that she drove it prior to and during the marriage. Father argues that the vehicle is separate property because it was purchased by J.G. Keown Insurance Agency prior to the marriage, was financed by the company, and is titled in both his and the company's name.

The trial court determined that the vehicle was not a marital asset and ordered Mother to return the vehicle to Father. The trial court reasoned that the vehicle was titled in Father's name and J.G. Keown Insurance Agency, that Mother's payments toward the vehicle were nominal, and that the overwhelming contribution to the value of the vehicle was made by J.G. Keown Insurance Agency.

The burden to establish transmutation is on Mother. *Nesbitt v. Nesbitt*, No. M2006-02645-COA-R3-CV, 2009 WL 112538, at *9 (Tenn. Ct. App. Jan. 14, 2009). It is undisputed that the vehicle is titled in the name of both Father and the company and that the company made the overwhelming majority of payments on the vehicle. Moreover, Father's testimony is clear that he never had any intention for the vehicle to become marital property, and the trial court found that Mother's contributions toward the vehicle

were nominal. *See Eldrige v. Eldridge*, 137 S.W.3d 1, 13-14 (Tenn. Ct. App. 2002) (transmutation requires intent on part of owner that property become marital property).

Upon review of the record, we find the evidence does not preponderate against the trial court's finding that the 2006 Range Rover is not marital property and did not become marital property as a result of transmutation.

II. TRANSPORTATION COSTS

Mother also appeals the parenting plan requirement that she be responsible for costs of transporting the child to and from Tennessee to accommodate Father's parenting time. She argues that Father should bear half of these costs because it is an extraordinary expense and will be more than the $697 award of child support each month.

Assigning travel expenses for visitation is an issue on which the relative financial resources of the parties may be considered. *Bowers v. Bowers*, 956 S.W.2d 496, 499-500 (Tenn. Ct. App. 1997) (citing *Dodd v. Dodd*, 737 S.W.2d 286, 292 (Tenn. Ct. App. 1987)). As with all matters concerning custody and visitation, trial courts are vested with broad discretion in making determinations regarding transportation. *Ohme v. Ohme*, No. E2004-00211-COA-R3-CV, 2005 WL 195082, at *5 (Tenn. Ct. App. Jan. 28, 2005).

Pursuant to the parenting plan, Mother is "solely responsible for transporting the child to and from the state of Tennessee for visitation with the Father and she shall bear the expense to do so." Father was awarded 80 days of parenting time, including one weekend per month, winter holidays and extended summer parenting time. In its order, the trial court reasoned that:

> Although the Court understands that Mother moved out of the state of Tennessee using a very common-sense analysis, the Court still has to enter the analysis that she chose to have a child in the state of Tennessee and that she is bound to this state for that purpose. The Court does not begrudge Mother for moving and the Court finds that Mother did not make the wrong decision in moving. The Court finds that Mother acted in a way that she thought was appropriate to benefit the child. If a party moves out of the jurisdiction of this Court, it is generally accepted that the party moving will be responsible for the transportation of the child back to this state or the cost of the visitation will be incurred.

Mother argues that this responsibility will exceed her annual award of child support. She contends that she moved for the benefit of the child, that Father's income is greater than Mother's, and both parties testified at trial that an equitable solution to the transportation expenses would be for each party to pay one-half of those expenses.

The trial court found that Father's annual income totaled $75,000 based on his employment, and imputed an annual income of $50,000 to Mother based on her education, ability to secure a job, and the money donated from her relatives. Based on the relative financial status of the parties, the fact that both parents recommended to the court that they equally share the costs of transporting the child to facilitate Father's parenting time, and realizing that requiring Mother to pay all costs of transportation will significantly deplete, if not exceed, the annual award of child support, which creates an unjust result upon Mother, *see Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001) (a trial court abuses its discretion when it reaches a decision which is against logic or reasoning that causes an injustice to the party complaining), we modify the parenting plan to the extent that the parties shall share equally the costs of transporting the child.

IN CONCLUSION

The judgment of the trial court is affirmed, as modified, and this matter is remanded with costs of appeal assessed equally against the parties.

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FRANK G. CLEMENT, JR., JUDGE