IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

STEVEN JOSEPH MILLER,

Appellant,

v. Case No. 5D19-558

CAROLINE MILLER,

Appellee.

_____/

Opinion filed August 21, 2020

Appeal from the Circuit Court
for Orange County,
Diana Michelle Tennis, Judge.

C. Andrew Roy, of Winderweedle, Haines, Ward & Woodman, P.A., Winter Park, for Appellant.

Thomas R. Peppler, of Peppler Law, P.A., Oviedo, for Appellee.

GROSSHANS, J.

Steven Joseph Miller ("Father") appeals the Supplemental Final Judgment of Modification, arguing that the lower court erred in wholly rewriting the original parenting plan, ordering him to pay child support, and denying his request for attorney's fees. We affirm in part, reverse in part, and remand for further proceedings.

Factual and Procedural Background

After three years of marriage to Father, Caroline Miller ("Mother") filed a petition for dissolution of marriage. Ultimately, the parties agreed on a parenting plan for their two children and entered into a marital settlement agreement ("MSA"), which incorporated the parenting plan.

The agreed-upon parenting plan was expansive and can be divided into roughly three parts. The first part encompassed issues concerning parental responsibility and time-sharing including schedules, extracurricular activities, communication, medical decisions, and travel arrangements and expenses. The second part contained general provisions concerning jurisdiction, information sharing, tax exemptions, as well as specific stipulations concerning the award of prevailing party attorney's fees in post-judgment litigation. The third part addressed Father's military service and incorporated portions of section 61.13002, Florida Statutes, concerning deployment procedures and surrogate custodians.

With Mother living in Florida and Father stationed in California, the parenting plan provided that the parties would have equal time-sharing, with a three-week rotating schedule. That schedule was effective from the date of the parenting plan until the oldest child started school in 2018, at which point the parties would attend mediation to determine where the children would reside and attend school as well as a long-term schedule to maintain equal time-sharing. If mediation proved unsuccessful, the parties would then ask the court to resolve those issues. The parties agreed that the submission of those issues to the court would not qualify as a modification of the parenting plan and, therefore, would not require a showing of a substantial change in circumstances. The

parties similarly agreed that a change in duty station and time-sharing issues related to Father's surrogate during deployment would not qualify as a substantial change in circumstances.

In addition to incorporating the parenting plan, the MSA expressly provided that neither party had a need for child support since they were completely self-supporting, they intended to remain self-supporting until the children reached the age of majority, and they could each fully provide for the children. The Final Judgment of Dissolution of Marriage approved and incorporated the MSA and parenting plan.

In 2017, Father filed a petition for modification due to his change in duty station from California to Japan. He asserted that the "collateral issues" caused by his change in duty station created "a material and substantial change of circumstance that required court determination and modification of the time-sharing, physical custodian for school attendance purposes, amendments to the Parenting Plan, and other issues." Father requested that the court designate him as the primary physical custodian and determine that it was in the children's best interest to live with him during the school year "with equitable contact time with [Mother] during time off from school."

Mother counter-petitioned, requesting an order specifying that the children reside with her and attend school in Florida, leaving Father with "liberal and reasonable contact." She also alleged an "oversight" in the final judgment "in that there is no child support required," and she requested that the court order Father to pay child support pursuant to Florida law.

Prior to trial, Father filed a proposed parenting plan which reflected a 50/50 time-sharing schedule based on a two-year rotating schedule. In addition, Father's proposed

plan contained two significant differences from the original parenting plan with respect to the military considerations. First, the proposed plan extended the time-sharing period for Father's surrogate during a deployment from six months to one year. Second, the proposed plan added a provision requiring Father to seek court approval for delegation of his time-sharing rights to his surrogate during deployment.

During trial, the court informed the parties that it intended to fashion its own parenting plan. Father objected, arguing that the court could not do a wholesale rewrite because both the parenting plan and MSA were enforceable contracts. The court stated that, while it would try to accommodate the parties' reasonable requests, it could redraft the parenting plan because the issues raised within the petitions for modification went beyond a simple determination of where the children would go to school.

In regard to child support, Father argued that the parties agreed there would be no child support and that, with the adoption of his time-sharing schedule, equal time-sharing still meant no child support. He additionally argued that Mother only pled an "oversight" on child support and did not plead a substantial change in circumstances.

Supplemental Final Judgment of Modification

Ultimately, after considering the interests of the children and finding that the parties had placed all of the time-sharing issues before it, the court drafted and entered an entirely new parenting plan which established time-sharing, child support, and childcare directives. The revised parenting plan lacked many of the original parenting plan's provisions and details.

The court also awarded Mother child support, despite the parties' prior agreement. The court found that Mother requested child support, determined that child support is a

right of the children, and stated that, "with a schedule that puts more responsibility on each [parent] for much longer periods of time, and with the Children being older," it felt "compelled by statute to calculate ongoing child support."

Also in the Supplemental Final Judgment, the court ruled on Father's motion for attorney's fees sought in connection with the modification proceedings. The court denied that request, finding that much of the litigation was caused by Father's focus on the child support issue. Following the denial of his motion for rehearing, Father appealed.

Issues on Appeal

Father raises three issues on appeal, arguing that the court erred in rewriting the parties' agreed-upon parenting plan, in ordering Father to pay child support to Mother, and in denying Father's request for attorney's fees.

Standard of Review

"A trial court's order modifying a parenting plan is reviewed for an abuse of discretion." Schot v. Schot, 273 So. 3d 48, 50 (Fla. 4th DCA 2019). "However, it is well-settled that a trial court's authority and discretion in a modification proceeding is substantially more restricted than at the time of the original [parenting plan] determination." Id. (quoting Sanchez v. Hernandez, 45 So. 3d 57, 62 (Fla. 4th DCA 2010)). "'[M]odification of a parenting plan and time-sharing schedule requires a showing of a substantial, material, and unanticipated change of circumstances' and that modification is in the 'best interests of the child.'" Id. (quoting § 61.13(2)(c), Fla. Stat. (2018)). "The party seeking modification 'bears an "extraordinary burden" to satisfy the "substantial change in circumstances" test.'" Id. (quoting Sanchez, 45 So. 3d at 61–62).

Modification of Parenting Plan

We first address the court's complete rewrite of the parties' previously agreed-upon parenting plan. In doing so, we acknowledge the challenges trial courts face when parties engage in contentious, protracted litigation over parenting plan modifications. However, in this case, rewriting the parenting plan in its entirety was error as neither party requested the court to do so. Based on that error, we conclude as follows:

Part I: Parental Responsibility and Time-Sharing

As to sections II, III, IV, V, VI, XIII, and XIV of the parties' original parenting plan, we find that the parties placed these issues squarely in front of the court. Despite his assertions otherwise, Father requested relief far beyond a determination of residency for school purposes, and there was competent substantial evidence to support the trial court's findings as to the above-mentioned sections. See Schwieterman v. Schwieterman, 114 So. 3d 984, 987 (Fla. 5th DCA 2012) ("A trial court's time-sharing plan must be affirmed if there is competent substantial evidence to support that decision and reasonable people could differ with respect to the trial court's decision."). Thus, we hold that the trial court did not abuse its discretion in modifying the above-listed provisions of the parenting plan and affirm those modifications without further discussion.

Part II: Other Provisions

As to sections I, VIII, IX, X, XI, and XV of the original parenting plan, we find that the trial court was without authority to modify or delete these provisions in its creation of a "wholly new" parenting plan. The parties did not request modification of these provisions in their pleadings, nor did they present evidence establishing a substantial change in circumstances to warrant modification of these sections. Therefore, we reverse as to the

new parenting plan insofar as these provisions were modified or deleted in their entirety. See Schot, 273 So. 3d at 50; Todaro v. Todaro, 704 So. 2d 138, 139 (Fla. 4th DCA 1997) ("[A] trial court is without jurisdiction to hear and determine matters which are not the subject of appropriate pleadings and notice.").

Part III: Military Considerations

As to section VII, we find no material difference between the revised parenting plan and the original parenting plan. Both specify that Father's change in duty station is not a relocation that would trigger section 61.13001, Florida Statutes. More importantly, Father has not argued that the trial court erred as to this provision.

On the other hand, Father does assert that the trial court erred in substantially revising section XII of the original parenting plan, which focused primarily on unaccompanied deployment procedures. He argues that the trial court's unilateral decision to alter the time frame of unaccompanied deployment from six months to sixty days materially affects rights that were contracted for under the original parenting plan.

Although Father did not address this section specifically in his petition for modification, he effectively requested two significant changes to this section through his proposed parenting plan. First, he asked the court to lengthen the surrogate time-sharing for unaccompanied deployment from six months to one year. Second, he included a new provision requiring that he ask the court to resume his visitation rights during deployment.

Notwithstanding that Father opened the door for the court to adjudicate these issues, he argues that there was not a substantial change in circumstances warranting modification. However, the original parenting plan specifically noted that issues relating to surrogate time-sharing would not be subject to the "substantial change" requirement.

Further, and contrary to Father's argument, the trial court did not remove all protections afforded to service members; rather, it noted that these considerations would be governed "to the extent allowable by law" and specifically referenced the controlling Florida statute. Accordingly, we find no abuse of discretion in the court's revision of this section. We, therefore, affirm the court's modification of sections VII and XII.

Modification of Child Support

Father argues that the trial court erred in awarding child support to Mother as it was contrary to the parties' previous agreement and because Mother did not prove a substantial change in circumstances. We agree.

The parties' original MSA and parenting plan, which was ratified by the court and incorporated into the final judgment of dissolution, clearly established that the parties would have equal time-sharing and that they both had ample means to provide for the children. See Gentry v. Morgan, 83 So. 3d 924, 926 (Fla. 3d DCA 2012). As a result of the entry of this legally valid provision as part of the final judgment, Mother had the burden to prove a substantial change in circumstances in order to justify a modification. See Poe v. Poe, 63 So. 3d 842, 843 (Fla. 5th DCA 2011); see also Jane v. Fero, 678 So. 2d 496, 497 (Fla. 5th DCA 1996). We find that Mother did not meet this burden.

Under the original parenting plan, the parties agreed to no child support until the children reached the age of majority. That plan included an equal, long-distance time-sharing schedule that would continue until their oldest child started school. The parties further agreed that they had no need for child support because both could fully support their children and they intended to remain in the same financial positions until the children reached the age of majority. Thus, even knowing that they would need a new time-sharing

schedule in the not-so-distant future and also knowing that Father could receive a change in duty station every few years, the parties agreed that child support was unnecessary.

The court's new parenting plan maintained equal, long-distance time-sharing, despite the change of rotation schedule. Although the court found the revised rotation schedule warranted an award of child support, there was no testimony that the longer period of time shared by each parent would result in a financial burden to either parent. There also was no testimony that the overseas assignment would create a financial change of circumstances for the parties or that the changes naturally occurring as children "grow older" was something unanticipated by the parties. Nor did the court find that there was a significant disparity between the parties' incomes that occurred since the original agreement.

Accordingly, because Mother failed to prove a substantial change in circumstance, we reverse that portion of the Supplemental Final Judgment that modified the child support provision. See Brown v. Brown, 180 So. 3d 1070, 1072 (Fla. 1st DCA 2015) (reversing and remanding modifications to parenting plan where there was no substantial, material, and unanticipated change in circumstances).

Attorney's Fees

In denying Father's request for attorney's fees, the court made extensive findings, many of which were predicated upon the award of child support. Based upon our reversal of the award of child support and reversal of the portion of the new parenting plan that omitted the attorney's fees provision, we reverse the court's decision to deny fees and remand for reconsideration in light of this opinion.[1]

[1] We express no opinion as to the merits of Father's motion for attorney fees.

Conclusion

For the reasons stated above, we affirm in part, reverse in part, and remand. Upon remand, the trial court shall enter a Supplemental Final Judgment incorporating a parenting plan with the modifications affirmed in this appeal but retaining all other provisions of the original parenting plan. Further, the Supplemental Final Judgment shall reflect the parties' original agreement concerning child support. The court shall also reconsider Father's motion for attorney's fees pursuant to the attorney's fee provision in the original parenting plan.

AFFIRMED, in part; REVERSED, in part; REMANDED with instructions.

HARRIS and SASSO, JJ., concur.