IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 25, 2014 Session

DENNIS MICHAEL CHRISTIE v. SHANNON DENISE CHRISTIE

Appeal from the Chancery Court for Williamson County
No. 39046 James G. Martin, III, Chancellor

No. M2012-02622-COA-R3-CV - Filed August 28, 2014

In this divorce action, Mother asserts that the trial court erred in designating Father as primary residential parent and in allocating sole decision-making authority to him, in the distribution of marital property, and in failing to seal her medical records at trial. We modify the distribution of marital property in part; in all other respects we affirm the judgment of the trial court.

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

RICHARD H. DINKINS, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P. J., M. S., and AMY HOLLARS, SP. J., joined.

Shannon Christie, Antioch, Tennessee, Pro Se.

Judy A. Oxford, Franklin, Tennessee, for the appellee, Dennis Christie.

OPINION

Dennis Michael Christie ("Father") and Shannon Denise Christie ("Mother") were married on May 17, 2003; they have one son. On October 14, 2010, Father filed a complaint for divorce alleging inappropriate marital conduct and irreconcilable differences. Mother duly answered the complaint, admitting that there were irreconcilable differences between the parties, denying the remaining allegations, and asserting a counterclaim for divorce.

On October 3, 2011, Mother moved to continue the trial, which was set for October 7, in order to secure the depositions of the child's pediatrician, Dr. Albertson, and his psychologist, Dr. Shawn Stewart. The motion was heard and granted on October 4.[1] On October 13 Mother moved the court to appoint Dr. Stewart to evaluate the parents and child "given Dr. Stewart's knowledge on the specific area of children with autism and divorce, direct testimony at trial would be beneficial in determining what is in the minor child's best interest."[2] The motion stated that, at the October 4 hearing, the court also granted her request "to hire an expert for the child's special needs [and] evaluate the parents" and that, since the hearing, the parties had not been able to agree on which expert would perform the evaluation, with Father proposing Dr. Joseph LaBarbera. On October 21 the court entered an order, prepared by Father's counsel, which required the child and parents to undergo a parenting custody evaluation "with a qualified expert to be chosen by the Father." On November 8 Mother filed a motion for relief from the order, asserting that it did not accurately reflect the ruling of the court when the motion was argued; the motion was denied by order entered December 1.

Trial was held on July 19 and 20, and August 14, 16, 28, and 29, 2012. On October 18 the court entered a final decree of divorce which: awarded a divorce to Father on the grounds of inappropriate marital conduct; awarded Father the marital residence; established a method for dividing the personal property in the marital residence; divided the parties' numerous debts; awarded Mother $500 per month in transitional alimony for 36 months; designated Father as primary residential parent; and established a parenting plan which gave the parties equal parenting time and gave Father sole decision-making authority.[3]

ISSUES

Mother appeals, raising the following issues:

I. Whether the trial court erred in awarding primary residential parent and sole decision making to the Appellee.

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[1] The order setting forth the court's ruling was entered October 21, 2011.

[2] The parties' son has been diagnosed with Asperger's syndrome, which is a behavior disorder within the autism spectrum.

[3] The court thoroughly set forth its findings of fact and conclusions of law in an oral ruling covering over one hundred pages of transcript on August 29, 2012; the ruling was incorporated into the Final Decree entered October 23, 2012.

II. Whether the trial court erred in fairly distributing the assets and liabilities of the parties.
III. Whether the trial court erred in failing to seal the record containing the personal health information of the Appellant in violation of the Health Information Protection and Accountability Act of 1996 (HIPAA).
IV. Whether the trial court erred in awarding the minor child's social security/disability back pay based on Appellant's disability and work history to the Appellee.[4]

Father has requested an award of attorney's fees and costs incurred in the appeal.

STANDARD OF REVIEW

We review the trial court's factual findings *de novo* with a presumption of correctness, unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); *K.B.J. v. T.J.*, 359 S.W.3d 608, 613 (Tenn. Ct. App. 2011). Questions of law are reviewed *de novo* with no presumption of correctness. *Alford v. Alford*, 120 S.W.3d 810, 812 (Tenn. 2003).

ANALYSIS

I. DESIGNATION OF FATHER AS PRIMARY RESIDENTIAL PARENT AND ALLOCATION OF DECISION MAKING AUTHORITY TO HIM

Mother contends that the court did not properly weigh the statutory factors in designating Father primary residential parent and that there was insufficient disagreement between the parties to allocate sole decision-making authority to Father.

Any final order in an action for absolute divorce that involves a minor child must incorporate a permanent parenting plan, Tenn. Code Ann. § 36-6-404(a), which must include, *inter alia*, a residential schedule and an allocation of parental responsibilities, specifically including decision-making authority relative to the child's education, health care, extracurricular activities and religious upbringing. The parent with whom the child resides more than fifty-percent (50%) of the time is the "primary residential parent." Tenn. Code

[4] Mother had applied for a lump sum social security disability payment for the benefit of the child and, when the payment was approved, Mother was designated by the Social Security Administration as the representative payee for the son and was to receive the payment on his behalf. In distributing the marital property, the trial court classified this payment as marital property and awarded it to Father. On appeal Father concedes that the payment should be awarded to Mother; consequently, we shall not address the issue in this opinion but will include an appropriate order as part of the judgment.

Ann. § 36-6-402(4). Where residential time is divided equally, the court must designate one of them as the primary residential parent. *Coley v. Coley*, No. M2007-00655-COA-R3-CV, 2008 WL 5206297, at *8 (Tenn. Ct. App. Dec. 12, 2008) (citing *Hopkins v. Hopkins*, 152 S.W.3d 447, 450 (Tenn. 2004)). The primary consideration in establishing a parenting plan is the best interest of the child. *Chaffin v. Ellis*, 211 S.W.3d 264, 286 (Tenn. Ct. App. 2006); *Coley,* 2008 WL 5206297, at *4.

Residential schedule and parenting responsibility decisions are peculiarly within the broad discretion of the trial judge; accordingly, we review these decisions under an abuse of discretion standard. *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001) (citing *Suttles v. Suttles*, 748 S.W.2d 427, 429 (Tenn. 1988)).[5] An abuse of discretion occurs when the trial court "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." *Id.* at 85. This standard recognizes that the trial court is in a better position than an appellate court to make certain judgments; an appellate court is not permitted to tweak a visitation order or substitute its judgment for that of the trial court in order to achieve a more reasonable result or a "'better' resolution." *Id*. at 88.

In its findings stated from the bench, the court discussed at length the evidence relative to each of the factors contained in §36-6-404(b).[6] The court found the evidence

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[5] *Eldridge* was a case in which the court reviewed what it termed the trial court's "visitation order"; in light of the adoption of the parenting plan statute, Tenn. Code Ann. § 36-6-401, *et seq*., that term is outmoded. *See In re Emma E.*, No. M2008-02212-COA-R3-JV, 2010 WL 565630, at *7 n. 2 (Tenn. Ct. App. Feb. 17, 2010) ("Traditional terms such as visitation and custody have been replaced with new terms, e.g. 'residential schedule . . . and parenting responsibilities.' . . . [T[he change in terminology does not necessarily undermine the reasoning of previous opinions deciding custody and visitation disputes where the same concerns-supporting parent-child relationships, providing a mechanism for decision-making, allocating time with the child, [and] promoting the child's best interests. . . ." (quoting Janet Lee Richards, *Richards on Tennessee Family Law,* § 8-2(e) (3d ed. 2008))). The standard of review remains the same.

[6] Effective July 1, 2014, the General Assembly amended the language of Tenn. Code Ann. § 36-6-404(b) to state that, "If the limitations of § 36-6-406 are not dispositive of the child's residential schedule, the court shall consider the factors found in § 36-6-106(a)(1)–(15)." Additionally, the amendment deleted subdivisions (1)–(16) of 36-6-406. This action was instituted prior to the amendment; thus, the following 16 factors were considered by the court:

> (1) The parent's ability to instruct, inspire, and encourage the child to prepare for a life of service, and to compete successfully in the society that the child faces as an adult;

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relative to some factors to favor Mother, some evidence to favor Father, and some evidence to be neutral. Upon our review, the evidence does not preponderate against the court's findings on these statutory factors as stated by the court.

A few factors were of particular concern to the court. One was "the parent's ability to instruct, inspire, and encourage the child to prepare for a life of service, and to compete successfully in the society that the child faces as an adult." Tenn. Code Ann. § 36-6-404(b)(1). The court found that Mother was limited in her ability to teach the minor child social skills and the ability to interact with others.

Another factor of concern was "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 interests of the child" Tenn. Code Ann. § 36-6-

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> (2) The relative strength, nature, and stability of the child's relationship with each parent, including whether a parent has taken greater responsibility for performing parenting responsibilities relating to the daily needs of the child;
> (3) 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 interests of the child;
> (4) Willful refusal to attend a court-ordered parent education seminar;
> (5) The disposition of each parent to provide the child with food, clothing, medical care, education and other necessary care;
> (6) The degree to which a parent has been the primary caregiver;
> (7) The love, affection, and emotional ties existing between each parent and the child;
> (8) The emotional needs and developmental level of the child;
> (9) The character and physical and emotional fitness of each parent as it relates to each parent's ability to parent or the welfare of the child;
> (10) The child's interaction and interrelationships with siblings and with significant adults, as well as the child's involvement with the child's physical surroundings, school, or other significant activities;
> (11) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment;(12) Evidence of physical or emotional abuse to the child, to the other parent or to any other person;
> (13) 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;
> (14) The reasonable preference of the child if twelve (12) years of age or older.
> (15) Each parent's employment schedule, and the court may make accommodations consistent with those schedules; and
> (16) Any other factors deemed relevant by the court.

404(b)(3), which the court found to weigh heavily in favor of Father. The court noted that Mother had fabricated criminal charges against Father on several occasions to gain advantage in the case and had sworn falsely in support of an application for a protective order; those matters, along with testimony from Dr. LaBarbera, led the court to be concerned that Mother "does not recognize the importance of [Father] in [the child's] life."

The court was also concerned about the "character, physical, and emotional fitness of each parent as it relates to each parent's ability to parent or the welfare of the child." Tenn. Code Ann. § 36-6-404(b)(a). The court found that Father had some problems with assertiveness, but recognized his problem and was aware of the need to improve; the court found Father to be a person of good character with the physical and emotional fitness to take care of the child. The court found that, while Mother was physically healthy, she lacked emotional fitness, and that her character had been tarnished by her conduct throughout the proceedings.

Considering the entire record, we find no abuse of discretion in designating Father as primary residential parent; the decision was supported by the evidence and the court did not apply an incorrect legal standard or make a "decision which is against logic or reasoning that cause[d] an injustice to the party complaining." *Eldridge*, 42 S.W.3d at 85.

Tenn. Code Ann. § 36-6-402(a)(5) requires that a parenting plan allocate decision-making authority for a child's education, healthcare, extracurricular activities, and religious upbringing to one or both of the parties. When the parties are unable to agree on the exercise of decision-making authority, the trial court is called upon to allocate decision-making responsibilities in accordance with Tenn. Code Ann. § 36-6-407(c).[7]

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[7] Tenn. Code Ann. § 36-6-407 provides that the Court is to consider the following factors in allocating decision-making authority:

> (1) The existence of a limitation under § 36-6-406;
> (2) The history of participation of each parent in decision making in each of the following areas: physical care, emotional stability, intellectual and moral development, health, education, extracurricular activities, and religion; and whether each parent attended a court ordered parent education seminar;
> (3) Whether the parents have demonstrated the ability and desire to cooperate with one another in decision making regarding the child in each of the following areas: physical care, emotional stability, intellectual and moral development, health, education, extracurricular activities, and religion; and
> (4) The parents' geographic proximity to one another, to the extent that it affects their ability to make timely mutual decisions.

In decreeing that Father would have sole decision-making responsibilities for their son, the court stated:

> Now, under TCA Section 36-6-407, the Court is required to allocate parenting responsibilities. And under Subsection D in that code provision, it says that "the Court shall order decision making to one parent when it finds that both parents are opposed to mutual decision."
>
> The testimony in this case from Mother and from Dad is, We can't agree on anything with respect to [son]. They cannot make mutual decisions for him.
>
> Consequently, the Court is required to then allocate the decision making responsibility based upon the history of participation of each parent in making the decisions in physical care, emotional stability, intellectual and moral development, health, education, extracurricular activities, religion, and attendance at the parenting seminar.
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> Further, I'm required to determine whether the parents have demonstrated the ability and the desire to cooperate with one another in decision making regarding the child in the areas of physical care, emotional stability, intellectual and moral development, health, education, extracurricular activities and religion, which they have not on any of those areas. And the parents' geographic proximity to one another, and they are going to be living very close to one another.
>
> But in this case, the Court finds that [Father] should be given the authority to make education decisions, non-emergency healthcare decisions, religious upbringing decisions, and extracurricular decisions regarding [son].

Mother contends that the court erred in giving Father sole decision-making authority because the parties' disagreements were not so significant that the authority could not be shared.

The court heard testimony from both parties and found they were not able to make mutual decisions with respect to the minor child. After weighing the statutory factors, the court allocated Father sole decision-making authority; we have reviewed the record and the evidence does not preponderate against the court's finding that the parties were unable to agree on matters related to their child, such that it was necessary for the court to allocate responsibilities to one or the other. As with the designation of Father as primary residential

parent, there is no basis to conclude that the court abused its discretion in allocating decision-making authority to Father.

II. DISTRIBUTION OF ASSETS AND LIABILITIES

Mother argues that the division of assets and liabilities was "clearly not an equitable division" and that once Father's debts are discharged in bankruptcy he will be in a much better financial position. We are somewhat constrained in addressing this issue inasmuch as, other than pointing out certain testimony relative to marital assets and debts, Mother has not asserted specific error in the court's division of marital property or debt.[8]

A trial court's division of property is guided by the factors contained in Tenn. Code Ann. § 36-4-121(c)[9]. *Batson v. Batson*, 769 S.W.2d 849, 859 (Tenn. Ct. App. 1988). An

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[8] Under the procedure adopted by the court for division of household furniture and furnishings, the court divided specific marital property, including bank accounts and Father's 401(k) and, as to the remainder, adopted a procedure whereby the parties would alternate in choosing items. Mother complains that Father "simply gave the Appellant the things he thought she should have." The record does not show, however, that Mother sought relief from the court or that this matter was brought to the attention of the trial court in any other fashion.

[9] Tenn. Code Ann. § 36-4-121(c) lists the following factors:

> (1) The duration of the marriage;
> (2) The age, physical and mental health, vocational skills, employability, earning capacity, estate, financial liabilities and financial needs of each of the parties;
> (3) The tangible or intangible contribution by one (1) party to the education, training, or increased earning power of the other party;
> (4) The relative ability of each party for future acquisitions of capital assets and income;
> (5)(A) The contribution of each party to the acquisition, preservation, appreciation, depreciation or dissipation of the marital or separate property, including the contribution of a party to the marriage as homemaker, wage earner or parent, with the contribution of a party as homemaker or wage earner to be given the same weight if each party has fulfilled its role;
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> > (B) For purposes of this subdivision (c)(5), dissipation of assets means wasteful expenditures which reduce the marital property available for equitable distributions and which are made for a purpose contrary to the marriage either before or after a complaint for divorce or legal separation has been filed.
>
> (6) The value of the separate property of each party;
> (7) The estate of each party at the time of the marriage;

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equitable division is achieved by weighing the most relevant factors within the context and unique facts of each case. *Id.* Accordingly, an equitable division is not necessarily an equal one. *Id.* The appellate courts of this state are inclined not to disturb a trial court's division of marital property unless we find the distribution lacked proper evidentiary support or resulted from an error of law or a misapplication of the statutory requirements. *Ford v. Ford*, 952 S.W.2d 824, 826 (Tenn. Ct. App. 1996) (citing *Thompson v. Thompson*, 797 S.W.2d 599, 604 (Tenn. Ct. App. 1990)). In *Alford v. Alford,* 120 S.W.3d 810, 814 (Tenn. 2003), our Supreme Court held that four factors should be considered in dividing marital debt: (1) the debt's purpose; (2) which party incurred the debt; (3) which party benefitted from incurring the debt; and (4) which party is best able to repay the debt.

With respect to the division of assets, in its ruling the court discussed at length the factors at Tenn. Code Ann. § 36-4-121 and the financial condition of the parties and we have not been cited to evidence to preponderate against the court's findings. Upon our review, we discern no error or abuse of discretion in the division of marital assets.

Similarly, with respect to the allocation of marital debt, we find no error or abuse of discretion. The court noted that it was applying the *Alford* factors in dividing the marital debt and the court's division resulted in Father being allocated $197,590.69 of debt and Mother being allocated $6,289.00. Again, Mother has failed to assign specific error in the court's ruling or to point to evidence which would preponderate against the allocation of debt or render it inequitable. Upon our review, the court considered the proper factors, applied the appropriate law, and the division of marital assets and debt was supported by the facts; the court did not err in the allocation.

Mother also asserts that Father's bankruptcy will make the court's distribution inequitable because it will relieve him of his debts; this contention has no merit. A trial court is charged with distributing the assets and debt as of the time of the divorce; the court

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(8) The economic circumstances of each party at the time the division of property is to become effective;
(9) The tax consequences to each party, costs associated with the reasonably foreseeable sale of the asset, and other reasonably foreseeable expenses associated with the asset;
(10) The amount of social security benefits available to each spouse; and
(11) Such other factors as are necessary to consider the equities between the parties.

properly divided the property and debt based on then current values and did not err in not considering the possibility that some debt might be discharged in bankruptcy.[10]

III. MOTHER'S HEALTH INFORMATION.

Mother contends that the trial court should have sealed certain of the trial record which contained her medical information that is protected by the Health Insurance Portability and Accountability Act ("HIPPA").

Prior to trial Mother filed a Motion for Protective Order seeking to prevent the disclosure of her medical records; she claimed, *inter alia*, that the information Dr. LaBarbera included in his report was privileged.[11] The record reflects that sometime before trial, the parties had a conference call in which they agreed to argue the issue when the medical information was proffered. During the testimony of Dr. LaBarbera, Mother objected to Dr. LaBarbera's report being offered into evidence on the grounds of hearsay and a lack of authentication; the objection was overruled.[12] Mother did not renew her motion for a protective order or move to seal the medical record; because this issue was not presented to the trial court, there is no action of the trial court for us to review and this issue is waived.

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[10] In addressing Mother's argument in this regard, we do not agree with her contention that Father would be able to discharge much of the debt in bankruptcy, that whether any of the debt could be discharged in bankruptcy made the allocation inequitable or, indeed that this was even a factor in the court's allocation of debt. When the court discussed the allocation of debt, it stated:

> But I'm not making the responsibility to pay these debts a domestic support obligation so if it ever becomes possible for [Father] to discharge them in bankruptcy, then he'll have the ability to do so.
>
> He's explained to the Court that because of his income, he had to file a Chapter 13 and could not file a Chapter 7. And [Mother] has testified on two occasions during the course of this trial that she intends to file a Chapter 7 bankruptcy when this case is over.

[11] Mother asserted that the information was privileged under Tenn. Code Ann. § 24-1-207, which states:

> Communications between a patient and a licensed physician when practicing as a psychiatrist in the course of and in connection with a therapeutic counseling relationship regardless of whether the therapy is individual, joint, or group, are privileged in proceedings before judicial and quasi-judicial tribunals. Neither the psychiatrist nor any member of the staff may testify or be compelled to testify as to such communications or otherwise reveal them in such proceedings without consent of the patient.

[12] On appeal, Mother does not assign error to the ruling on her objection.

See Barnhill v. Barnhill, 826 S.W.2d 443, 458 (Tenn. Ct. App. 1991) (holding that an issue was waived where there was "no evidence that Father made a motion or objected at the trial court level. . . . ").

IV. ATTORNEY FEES

Father has asked this court to award the attorney fees he has incurred in this appeal. Whether to award attorney's fees on appeal is a matter within the sole discretion of this Court. *Archer v. Archer*, 907 S.W.2d 412, 419 (Tenn. Ct. App. 1995). In considering a request for attorney's fees, we look at "the ability of the requesting party to pay the accrued fees, the requesting party's success in the appeal, whether the requesting party sought the appeal in good faith, and any other equitable factor that need be considered." *Hill v. Hill*, No. M2006-02753-COA-R3-CV, 2007 WL 4404097, at *6 (Tenn. Ct. App. Dec. 17, 2007) (citing *Dulin v. Dulin*, No. W2001-02969-COA-R3-CV, 2003 WL 22071454, at *10 (Tenn. Ct. App. Sept. 3, 2003)).

After weighing these considerations, we decline to award Father fees.

V. ISSUES RAISED DURING ORAL ARGUMENT

Mother raised issues during oral argument that were not listed in the statement of issues in her brief or briefed by the parties.[13]

Courts of appeal are "limited in authority to the adjudication of issues that are presented . . . in compliance with the Rules of this Court." *Dorrier v. Dark*, 537 S.W.2d 888, 890 (Tenn. 1976). The appellant's brief must contain a "statement of the issues presented for review," Tenn. R. App. P. 27(a)(4), and our review will generally only extend to those issues. Tenn. R. App. P. 13(b). Accordingly, we will typically only consider "the issues set forth in the briefs." Tenn. R. App. P. 13 Advisory Comm'n Comment.

Issues initially raised at oral argument are not properly presented for review in accordance with this court's rules. Accordingly, we do not reach any issues that were first raised at oral argument.

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[13] Mother requested, *inter alia*, that Father be compelled to get life insurance and her alimony be changed from transitional to *in futuro*.

CONCLUSION

For the foregoing reasons, we modify the judgment to award the Social Security disability payment to Mother; we affirm the court's ruling in all other respects.

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RICHARD H. DINKINS, JUDGE