

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 24, 2014 Session

KAREN ELIZABETH TOUCHTON v. PAUL JEROME TOUCHTON

**Appeal from the Chancery Court for Coffee County
No. 10267 L. Craig Johnson, Chancery**

No. M2013-01749-COA-R3-CV - Filed June 24, 2014

In this post-divorce proceeding, Mother filed a petition seeking a modification of Father's parenting time, recovery of medical expenses incurred on behalf of the parties' child, and an increase in child support. The trial court modified Father's parenting time, ordered an upward deviation to Father's support obligation, and awarded Wife judgment for one-half of the medical expenses and one-half of the attorney fees she incurred in prosecuting the petition; the court issued an order that the judgment for medical expenses, back child support, and attorney fees be enforced by wage assignment. Father appeals the upward deviation, the award for one-half of the child's medical expenses, and the wage assignment; Mother appeals the award for one-half of her attorney fees. We modify the wage assignment order to exclude the amount of the judgment for attorney fees; in all other respects we affirm the judgment.

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

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

James L. Collier and M. Robb Thompson, Nashville, Tennessee, for the appellant, Paul Jerome Touchton.

Eric J. Burch, Manchester, Tennessee, for the appellee, Karen Elizabeth Touchton (Fishman).

OPINION

Paul Touchton ("Father") and Karen Touchton ("Mother") were married December 10, 1994, and are the parents of one child, Jacob Paul Touchton, born in 1998; they were divorced on May 7, 2002 in Madison County, Alabama. In an agreement incorporated into

the final decree entered in their divorce case, Mother and Father agreed: to share legal custody of Jacob, with Mother having primary physical custody and Father exercising visitation; that Father's child support obligation would be \$1,561.00 per month in accordance with Alabama Child Support Guidelines; and that each would pay fifty percent of Jacob's uninsured medical, dental, and health-related expenses, with Mother to provide Father with the bills and/or receipts for payment or reimbursement within fifteen days of receipt.

Mother moved to Tullahoma, Tennessee, and on July 22, 2010 filed a Petition to Register a Foreign Decree and to Modify Custody in Coffee County Chancery Court. The petition alleged that: (1) Father had failed to pay his portion of the uncovered medical, dental, and health related expenses; (2) a material change in circumstances had occurred because Father was not exercising parenting time with Jacob; and (3) due to multiple medical conditions, Jacob had special needs which justified increasing Father's child support obligation. Father, who had relocated to Oregon following the divorce, answered generally denying the allegations in the petition.

Trial took place on November 20, 2012 and the court entered an order on January 24, 2013: modifying Father's parenting time by ordering that he have six weeks' visitation with Jacob during the summers; awarding Mother one-half of Jacob's uninsured medical, dental, and health related expenses since June 2010¹ and \$6,842.13 for one-half of her attorney fees. The court found that Mother incurred \$23,000.00 per year in expenses related to Jacob's condition and, on the basis of that finding, ordered that Father pay an additional \$1,000.00 per month as an upward deviation from the presumptive child support obligation². The court ordered that the judgments for medical expenses, retroactive child support and attorney fees be paid at \$500.00 per month. On July 5 the court entered an order in which it memorialized the total amount Father had been ordered to pay at \$37,758.71, to be paid at \$500.00 per month; the order directed the clerk to issue a wage assignment for Father's employer to withhold \$1,188.92 every two weeks "for child support and arrearages."³

¹ The January 24 order did not state the amount of the expenses. Father subsequently filed a motion requesting, among other things, that the court make a specific finding as to the amount that Mother was entitled to be reimbursed; on July 5 the court entered an order setting \$12,888.30 as Father's portion of Jacob's medical expenses.

² The court determined that the additional amount would be retroactive to the filing of Mother's petition in June 2010; however, the court did not grant Mother a judgment for a specific amount. In the July 5 order, the court set the amount at \$17,725.00.

³ The amount of medical expenses, retroactive support and attorney fees totals \$37,455.43; the July 5 order did not break down the \$37,758.71 and there is no explanation for the difference of \$303.28 in the record. Father does not take issue with the total amount, but with the fact that the portion attributable to attorney fees is not enforceable by wage assignment, an issue we discuss in more detail *infra*. The three

Both parties appeal. Father raises the following issues:

1. Whether the trial court erred in ordering an upward deviation from the amount of child support required under the child support guidelines.
2. Whether the trial court erred in awarding the Mother a judgment against the Father in the amount of \$12,888.30 for the Father's portion of medical expenses incurred on behalf of the minor child between June 2010 and the date of the trial.
3. Whether the trial court erred in ordering the Father to pay the Mother \$500.00 per month by wage assignment toward a judgment of \$37,758.71.

Mother raises the following issue:

1. Whether the Mother should be awarded the entire amount of her attorney fees at trial and on appeal.

DISCUSSION

I. THE UPWARD DEVIATION FROM THE CHILD SUPPORT GUIDELINES

The Child Support Guidelines promulgated by the Tennessee Department of Human Services are to be applied in child support cases. Tenn. Code Ann. § 36-5-101(e)(2). The amount of support derived from application of the guidelines is the presumptive amount of child support, which is rebuttable. Tenn. Code Ann. § 36-5-101(e)(1)(A). A trial court may order an upward deviation from the presumptive amount if the deviation complies with the requirements of the child support guidelines; “[t]he amount or method of such deviation is within the discretion of the tribunal.” Tenn. Comp. R. & Regs. 1240-02-04-.07(1)(b). When ordering a deviation, a court is to include written findings of fact stating the reasons for the deviation, the amount of child support that would have been required under the guidelines if the presumptive amount was not rebutted, how the application of the guidelines would be unjust or inappropriate, and how the best interests of the child would be served by the deviation. Tenn. Comp. R. & Regs. 1240-02-04-.07(1)(c). We review the trial court's specific findings of fact *de novo* in accordance with Tenn. R. App. P. 13(d); thus, when the trial court has set forth its factual findings in the record, we will presume the correctness of those findings unless the evidence preponderates against them. Under the abuse of discretion

judgments are the only money judgments in the record and our analysis considers those to be the judgments covered by the wage assignment.

standard, we must consider “(1) whether the decision has a sufficient evidentiary foundation; (2) whether the trial court correctly identified and properly applied the appropriate legal principles; and (3) whether the decision is within the range of acceptable alternatives.” *Farmer v. Stark*, M2007-01482-COA-R3-CV, 2008 WL 836092 (Tenn. Ct. App. Mar. 27, 2008) (citing *State ex rel. Vaughn v. Kaatrude*, 21 S.W.3d 244, 248 (Tenn. Ct. App. 2000)).

The Guidelines recognize “Extraordinary Expenses” as a type of expense which allows a court to deviate from the presumptive child support amount⁴; those expenses include both “Extraordinary Educational Expenses” and “Special Expenses”. Tenn. Comp. R. & Regs. 1240-02-04-.07(2)(d)(1)–(2). “Special Expenses” include “summer camp, music or art lessons, travel, school-sponsored extra-curricular activities, such as band, clubs, and athletics, and other activities intended to enhance the athletic, social or cultural development of a child. . . .” Tenn. Comp. R. & Regs. 1240-02-04-.07(2)(d)(2)(i).⁵

The court made the following findings in determining that an upward deviation was appropriate:

[T]hat “special education” expenses average Eleven Thousand Dollars (\$11,000.00) per year for Jacob (which does not include parties) and that the “care counselor/provider” expenses average around Twelve Thousand Dollars (\$12,000.00) a year.[⁶] Considering these expenses are extraordinary and the fact that they are necessary given Jacob’s conditions, the Court finds that an additional One Thousand Dollars (\$1,000.00) a month be added to the

⁴ Tenn. Comp. R. & Regs. 1240-02-04-.07(2)(d) states:

The Schedule includes average child rearing expenditures for families based upon the parents’ monthly combined income and number of children. Extraordinary expenses are in excess of these average amounts and are highly variable among families. For these reasons, extraordinary expenses are considered on a case-by-case basis in the calculation of support and are added to the basic support award as a deviation so that the actual amount of the expense is considered in the calculation of the final child support order for only those families actually incurring the expense. These expenses may be, but are not required to be, divided between the parents according to each parent’s [Percentage of Income].

⁵ An average amount of “special expenses” is included in the basic child support computation, however, when the amount of the special expenses “exceeds seven percent of the monthly [Basic Child Support Obligation], the [court] shall consider the additional amounts of support as a deviation to cover the full amount of these special expenses.” Tenn. Comp. R. & Regs. 1240-02-04-.07(2)(d)(2)(ii).

⁶ The court characterized Camp Huntington as a “special education” expense and the therapist expense as “care counselor/provider”; the record shows that these are both a “special expense” governed by Tenn. Comp. R. & Regs. 1240-02-04-.07(2)(d)(2)(i).

calculation under the guidelines to make up the father's total child support obligations per month. Although this calculation may exceed the Twenty-One Hundred Dollar (\$2100.00) cap for one child, the Court believes [Mother] has shown by a preponderance of the evidence that these extraordinary expenses are reasonably necessary to provide for a child with severe autism and related conditions that he suffers from.

Father contends that the court erred in failing to determine the presumptive amount of child support, to provide "specific written findings" to justify the deviation, to enter the amount of the expenses used to support the deviation on the worksheet in the deviation section, and to state how it arrived at \$11,000.00 per year for "special education" expenses and \$12,000.00 per year for "care counselor/provider" expenses in the order establishing support. Considering the record as a whole, we have determined that the court complied with the Tenn. Comp. R. & Regs. 1240-02-04-.07(1)(c) by supplying the required information in the January and July orders.

As noted earlier, Mother's petition alleged, *inter alia*, that Father was not exercising parenting time with Jacob and that Jacob had special medical and care needs which justified increasing Father's child support obligation. Father's original support obligation of \$1,561.00 per month was stated in the parenting agreement which was incorporated in the final divorce decree entered in Alabama.⁷ The parenting agreement also established visitation for Father while he resided in Alabama and in the event he moved to Oregon, provided that Father's summer visitation would "not conflict with the child's special education school schedule," and reserved the issue of post-minority support "in light of the child's disabilities." The hearing on the petition was held on November 20, 2012 at the conclusion of which the court allowed the parties until the first week in January 2013 to submit written arguments.⁸ The order was entered January 24; on February 22 Father filed a motion to alter or amend and for additional findings of fact. In the motion Father did not complain that the court erred in failing to determine the presumptive amount of support, to make findings justifying the deviation, to

⁷ A child support work sheet comparable to that used in Tennessee was included as part of the Alabama decree.

⁸ At the conclusion of the hearing the court stated:

With that said then, we've reached the stage of closing argument. I would say considering the research issues that we talked about in the back and the arguments that you want to make in regards to what you think the proper amount of child support and/or any backdated child support and medical bills would be, I would ask that you put your closing arguments in writing and highlight any findings of fact that you think are necessary to support your position.

include a worksheet as part of the order, or to state the basis of the findings as to the amount of the extraordinary expenses; neither did Father request that the court make additional findings relative to either of these matters. On July 5 the court entered an order on Father's motion and a separate Wage Assignment Order, which was signed "approved for entry" by both counsel and to which a child support worksheet dated January 31, 2013 was attached.⁹ It is in this context that we measure the court's compliance with the regulation and any prejudice to Father.

With respect to child support, the January 24 order noted that Father's child support obligation, established in the Alabama decree, was \$1,561.00, along with one-half of the unpaid medical expenses. The court found that Father's salary exceeded \$120,000.00 per year and that Mother earned \$1,833.00 per month and stated "[t]he Court finds, based on the previous findings in regard to the parties' income and related matters, that [Father's] child support obligation should be calculated according to the Tennessee guidelines."¹⁰ The record does not disclose the reason the amount of support was not stated in the order or whether counsel for the parties were directed to calculate the amount and supply the amount to the court. In light of the procedural posture of this case following the hearing, we do not deem the fact that the January 24 order did not include all of the information of which Father now complains to be a violation of the regulations. The child support worksheet, which was attached to the July 5 wage assignment order, shows that the presumptive child support amount was \$1,076.00.

With respect to the deviation, the January 24 order stated that the expenses for Camp Huntington and the care providers were necessary in order to provide for Jacob and that "these extraordinary expenses are reasonably necessary to provide for a child with severe autism and related conditions that he suffers from." Jacob's particular needs were well known to Father,

⁹ The worksheet is not signed and there is no indication who prepared it or for what purpose; the Wage Assignment Order appears to have been prepared by Father's counsel.

¹⁰ In addressing Father's parenting time, the order stated in pertinent part:

The Court finds that the testimony at trial proved that the father has not seen the child for almost three-and-a-half years (3-1/2 years). The proof before the court was that the Father's shorter visitation periods had been eliminated because of the distance between the parties and that the parties had tentatively agreed on larger summer visitation periods. Beginning in 2010, the father has not exercised this visitation because of varying but similar reasons in that too much expense was involved, the time offered for visitation conflicted with work and other family obligations, and the fact that Jacob attends camp for four (4) to six (6) weeks every summer. . . . The Court finds in future years, the visitation schedule is modified, and father is entitled to up to six (6) weeks of visitation with the child during the summer.

as noted in the parenting agreement, and the court's language was sufficient to justify the deviation.¹¹

Lastly, Father complains that the court "failed to enter amounts or findings in the deviation section of the Child Support Worksheet." As with information which was omitted from the January 24 order, under the circumstances presented in this record we do not deem the failure to include this information to be a violation of the regulation; the reason for and amount of the special expenses is clear from the court's orders.

The court did not abuse its discretion in ordering an upward deviation for the extraordinary expenses.

II. UNINSURED MEDICAL EXPENSES

In its January 24 order the court made the following findings relative to Jacob's uninsured medical expenses:

The Court finds that the parties had previously agreed to split [Jacob's medical, dental, and orthodontic] expenses Fifty/Fifty (50/50). The Court finds that the communication between the parties had broken down since June 2010, and the passing of bills and receipts may have been impossible pending litigation. Therefore, the Court awards [Mother] Fifty Percent (50%) of the necessary medical, health, and dental-related expenses that she has expended since June 2010 as proven by the testimony of [Mother].

In the order entered on Father's Motion to Alter or Amend, the court stated:

The court finds it proper to enter a specific dollar amount of \$12,888.30 representing Father's portion of the medical expenses for the minor child

¹¹ The finding that the Camp Huntington expense averaged \$11,000.00 per year is supported by exhibits which showed the cost of Jacob's attendance during the summers of 2010, 2011, and 2012; Mother also testified that the camp costs included Jacob's medication. Likewise, exhibits introduced by Mother show that she paid an average of \$12,000.00 per year for five therapists she hired to assist Jacob from 2010 through 2012. Although Father has not specifically challenged the court's holding that the expenses were reasonably necessary, the holding was supported by the testimony of Dr. Clifford Seyler, Jacob's pediatrician, that he recommended camps similar to Camp Huntington because such camps provide autistic children an opportunity to learn new techniques for controlling their behavior and to enhance their social skills; likewise Mother testified that the therapists worked with Jacob on improving his communication, behavior, and social skills and that they would take Jacob to different social events to further enhance his social development.

incurred between June 2010 and the date of the trial for which Father must reimburse Mother.

Father contends that the court erred in awarding Mother \$12,888.30 for Jacob's uninsured medical expenses because Mother failed to send him the medical bills in compliance with the final divorce decree. Mother does not contest that she did not provide the bills to Father in a timely manner.

Mother testified at length as to amounts of the medical and medication bills she incurred from 2010 to 2012 and the reasons the expenses were incurred. She testified as well that, for various reasons, communication between she and Father became more of a challenge as time progressed and that, as a result, she was reluctant to send him the bills. The record supports the finding that her passing the bills to Father for reimbursement was impracticable, if not impossible.

In *Beckham v. Beckham*, No. M2007-02863-COA-R3-CV, 2009 WL 690692 (Tenn. Ct. App. March 13, 2009), we addressed a similar issue and held a father responsible for paying a portion of his child's unpaid medical expenses despite the mother's failure to provide him with the bills; we remanded the case and instructed the trial court to determine an amount and enter a judgment ordering the father to pay his portion of those expenses. Father in this case, as in *Beckham*, does not deny responsibility for the bills, rather he takes issue with the fact that they were not provided to him in a timely manner. The trial court herein did not deem Mother's failure a sufficient default, such as to relieve Father of his responsibility to reimburse Mother, and we are not persuaded to find error in this regard.

In his motion to alter or amend the January 24 order Father requested that the court "make a specific finding as to the amount of uncovered medical expenses for which Mother is entitled to reimbursement." In his brief on appeal, Father acknowledges that the July 5 order "directed that the Father pay the Mother \$12,888.30 representing the Father's portion of the medical expenses incurred for the minor child between June 2010 and the date of trial for which Father must reimburse Mother." Father argues that the court erred in not specifically stating which expenses the court "found to be appropriate" and that "the court did not address the specific issues Father had with some of the bills."

A hearing on the motion to alter or amend was held on May 6, 2013. At the conclusion of the hearing, counsel discussed the computation of amount of the medical expenses with the court; the transcript of the hearing contains the following colloquy in this regard:

MR. SCOTT: Correct. Some of those came out; some did not.

There was a - - I believe she has some columns on them. Medical, dental, and vision were in that first column. And then the others, there was, you know, the after-school program, which gets factored into child support and some things of that nature. But as far as being ordered to pay half, what we were lacking is a specific number as to what - -

THE COURT: . . . I was hoping you guys could figure that out.

MR. SCOTT: Well- -

THE COURT: Because it was hard for me to.

MR. SCOTT: Okay.

MR. BURCH: I think we can give that a shot.

MR. SCOTT: I think perhaps we can. I guess if I know the - - I believe what she had testified to was - - what she had listed were things she had actually paid. And I guess if we're looking at that part, as far as the medical, dental, vision, it would be those medical, vision, dental expenses that were listed in that column. And I guess perhaps, too, that would include that prescription, which is the third column.

THE COURT: Yeah.

MR. SCOTT: Because those were listed somewhat separately from that.

And I do know that we went through and we took some of them out for each year and such as that, but - -

THE COURT: If you guys think that you can come to an agreement. . .

MR. SCOTT: I think we can. I think we can.

THE COURT: If not- - if you can't, get on the phone with me and we can figure it out.

MR. SCOTT: So we'll talk about that and enter a specific amount.

And I guess the reason I want to do that is to make sure we have a specific amount in there so we wouldn't have any confusion over paying of the bills or things coming in - -

THE COURT: Right.

MR. SCOTT: - - and we would know that anything during that period would be part of that judgment.

The foregoing shows that counsel for the parties agreed to attempt to determine the specific amount of medical expenses and, absent an agreement, to contact the court; the record does not show that counsel was unable to agree on the amount or how the court arrived at the \$12,888.30 figure.¹² Father does not identify the bills he contends were not proper, why those bills should not have been included, or the amount the court should not have awarded; in the

¹² In her brief on appeal, Mother states that counsel "actually agreed to the amount."

absence of such, the evidence does not preponderate against the finding that Mother was entitled to be reimbursed \$12,888.30.

III. WAGE ASSIGNMENT

On July 5, 2013 the court entered a Wage Assignment Order which stated that the total judgment against Father was \$37,758.71, that it would be paid at \$500.00 per month, and that Father's employer was to withhold \$1,188.92 every two weeks "for child support and arrearages." Father contends that the amount of the judgment includes the award of attorney fees to Mother, and that court erred in including attorney fees in the amount covered by the wage assignment.¹³

Tenn. Code Ann. § 36-5-501(a)(1)¹⁴ provides that a court may issue a wage assignment for the payment of child support and medical expenses that the obligor is ordered to pay. The statute does not allow a court to order the payment of attorney fees by wage assignment, which is a money judgment enforced, if necessary, by execution. *See* Tenn. Code Ann. §26-1-103. Accordingly, we modify the wage assignment order to record that the amount of the judgment enforced thereby is \$30,916.58.¹⁵

¹³ Mother does not contest that the amount stated in the Wage Assignment Order includes attorney fees.

¹⁴ Tenn. Code Ann. § 36-5-501(a)(1) states:

For any order of child support issued, modified, or enforced on or after July 1, 1994, the court shall order an immediate assignment of the obligor's income, including, but not necessarily limited to: wages, salaries, commissions, bonuses, workers' compensation, disability, payments pursuant to a pension or retirement program, profit sharing, interest, annuities, and other income due or to become due to the obligor. The order of assignment shall issue regardless of whether support payments are in arrears on the effective date of the order. The court's order, shall include an amount sufficient to satisfy an accumulated arrearage, if any, within a reasonable time. The order may also include an amount to pay any medical expenses that the obligor owing the support is obligated or ordered to pay. Withholding shall not exceed fifty percent (50%) of the employee's income after FICA, withholding taxes, and a health insurance premium that covers the child, are deducted. The order shall also include an amount necessary to cover the fee due the clerk of the court or the department, if appropriate. In the event the court does not order an immediate assignment pursuant to subdivision (a)(2), every order shall be enforceable by income assignment as provided in this chapter.

¹⁵ The modification of the wage assignment order pretermits our consideration of Father's argument that including the judgment for attorney fees was error because the rate at which money judgments accrue interest is different than judgments for child support.

IV. ATTORNEY FEES

Mother asserts that she should have been awarded the entire amount of her attorney fees at trial.

The authority for a trial court to award attorney fees, and for this court to review the same, was succinctly set forth in *Huntley v. Huntley*:

In child support modification cases, Tenn.Code Ann. § 36–5–103(c), gives trial courts the power to award “reasonable attorney fees....” The award of attorneys’ fees is within the trial court’s discretion. *Richardson v. Richardson*, 969 S.W.2d 931, 936 (Tenn.Ct.App.1997). Unless it “affirmatively appears that the trial court’s decision was against logic or reasoning, and caused an injustice or injury to the party complaining,” the trial court’s exercise of discretion will not be reversed on appeal. *Marcus v. Marcus*, 993 S.W.2d 596, 601 (Tenn.1999).

Huntley, 61 S.W.3d 329, 341 (Tenn. Ct. App. 2001).

Mother states that she should have been awarded all of her fees at trial because she “prevailed on almost every issue at trial”; she has not otherwise articulated a basis for us to hold that the court abused its discretion. In awarding Mother half of the fees she incurred, the trial court noted the parties had agreed to split medical costs equally, as well as the lack of communication between the parties and the fact that Mother had not submitted bills to Father for reimbursement, all of which resulted in the judgment against him for \$12,888.30.¹⁶ Under the circumstances presented, we find no abuse of the court’s discretion in awarding Mother one-half of her fees.

Both Mother and Father request an award of fees incurred on appeal. An award of attorney fees on appeal is within this Court’s sound discretion. *Archer v. Archer*, 907 S.W.2d 412, 419 (Tenn. Ct. App. 1995). In determining whether to award attorney’s fees on appeal, we consider the ability of the party seeking the fee award to pay such fees, success on appeal, whether the appeal was taken in good faith, and any relevant equitable factors. *Darvarmanesh v. Gharacholou*, No. M2004-00262-COA-R3-CV, 2005 WL 1684050, at *16 (Tenn. Ct. App. July 19, 2005).

¹⁶ In the July 5 order the court stated the following: “With regard to the award of \$6,842.13 in attorney’s fees to Mother, the Court considered the facts at trial which is why Mother was awarded only half of her requested fees.”

We grant Mother’s request for attorney fees on appeal and deny Father’s request. This was an appeal of a proceeding in which Mother sought to have the court order an upward deviation in the presumptive amount of support and to recover amounts paid on behalf of the parties’ child; Mother has been largely successful on appeal. As noted in *Huntley*, in which we awarded the custodial parent fees incurred on appeal, “[t]his Court has recognized that ‘[t]he allowance of attorney’s fees for [an appeal] is for the benefit of the child, and the custodial spouse should not have to bear the expense incurred on the child’s behalf.’” *Huntley*, 61 S.W.3d at 341 (citing *Ragan v. Ragan*, 858 S.W.2d 332, 334 (Tenn. Ct. App. 1993)).

CONCLUSION

For the foregoing reasons, we modify the wage assignment order entered July 5, 2013 to state that the amount of the judgment subject to the wage assignment is \$30,916.58; in all other respects the judgment is affirmed. The case is remanded for a determination of the amount of the award of attorney fees to Mother for the appeal.

RICHARD H. DINKINS, JUDGE