

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs June 9, 2014

IN RE MARIANNA F. ET AL.

**Appeal from the Juvenile Court for Montgomery County
No. 112-10 Ross H. Hicks, Judge**

No. M2013-01898-COA-R3-JV - Filed August 28, 2014

Unmarried parents of two children sought to modify a Permanent Parenting Plan. Mother also sought to collect a child support arrearage owed by Father. The trial court modified the residential parenting plan without conducting a best interest analysis. The trial court also declined to add statutory interest, as requested by Mother, to the child support arrearage owed by Father. Mother appealed certain aspects of the trial court's judgment and sought attorney's fees incurred on appeal. We affirm in part, reverse in part, vacate in part, and remand.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed in Part, Reversed in Part, Vacated in Part, and Remanded

W. NEAL MCBRAYNER, J., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR., P.J., M.S., and ANDY D. BENNETT, J., joined.

Carrie W. Gasaway, Clarksville, Tennessee, for the appellant, Yolanda A. W.

No brief filed on behalf of appellee, Dhusten G. F.

MEMORANDUM OPINION¹

I. FACTUAL AND PROCEDURAL BACKGROUND

This case concerns the parenting plan for two children, Marianna and Gabriel, born to Yolanda A. W. (“Mother”) and Dhusten G. F. (“Father”). Mother and Father have never been married to one another. In June 2003, the Juvenile Court of Montgomery County entered an Order of Paternity finding Father was the biological father of both children and ordering Father to pay monthly child support of \$675.² Later that month, the juvenile court adopted and approved a Permanent Parenting Plan proposed by the parties. The plan named the Mother as primary residential parent. Father was granted residential time every other weekend except during the summer, when Father had residential time for the entire month of either June or July, which was to alternate each year. The plan awarded Mother use of the standard federal tax deduction for the children, and the parties were made equally responsible for the children’s uncovered medical expenses.

Despite having two children together, Mother and Father never got along after going their separate ways, and the rancor led to several additional court filings. In July 2005, Mother filed a petition to modify the residential schedule set forth in the Permanent Parenting Plan, and Father filed a counter-petition in which he sought to be named the primary residential parent. The basis for both petitions, at least in part, was the parents’ inability to carry out residential time in a civil manner.

While her petition to modify was pending, Mother moved with her spouse and the children to Seattle, Washington.³ Realizing the distance between them made the Permanent Parenting Plan untenable, the parties submitted proposed agreed orders addressing Father’s time with the children during the 2005 winter holiday and the summer of 2006. After Mother

¹ Rule 10 of the Rules of the Court of Appeals states as follows:

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated “MEMORANDUM OPINION,” shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

² The Order of Paternity also awarded Mother retroactive support in the amount of \$11,364, which was to be repaid at the minimum amount of \$25 per month, plus interest.

³ The record does not reflect whether Mother provided the required notice of the move to Father or if Father consented to the move. *See* Tenn. Code Ann. § 36-6-108 (2010).

amended her petition to modify to reflect her family's move to Seattle, the juvenile court held a hearing on October 30, 2006, to address the petitions to modify the parenting plan. The hearing resulted in a January 2007 order that approved, after the fact, Mother's move and declared she would remain the primary residential parent. The juvenile court granted Father visitation with the children in the summer from the day after school ends for the academic year until four days before school resumes. The court also awarded Father visitation during the winter break from the day school is out in December until the day before school resumes in January.⁴ Finally, Father's monthly child support obligation was increased.

Mother returned to Montgomery County, Tennessee, in the fall of 2008. Father filed a Motion for Temporary Visitation in which he sought "regular weekly visitation with the minor children, if not a week on, week off, visitation schedule." For her part, in November 2008, Mother filed an Amended Petition to Modify Parenting Plan and for Contempt. Mother asserted that her return to Tennessee from Washington constituted a material change of circumstances warranting modification of the Permanent Parenting Plan. She proposed providing Father time with the children throughout the year and allowing herself time with the children during the winter and summer holidays. Mother further asserted that Father was behind in his child support payments and that his arrearage exceeded \$10,000. The majority of the arrearage appeared to be composed of the "retroactive support" awarded by the juvenile court in the Order of Paternity. She requested interest on the arrearage amount at the statutory rate of 12% per annum. Finally, Mother sought an order requiring Father to pay at least half of the children's uncovered medical and dental expenses.

On December 31, 2008, Father filed an Answer to Mother's Amended Petition to Modify Parenting Plan and for Contempt and Counter-Petition. In his Counter-Petition, Father alleged a material change of circumstances had occurred that justified a modification of the parties' residential schedule. Father again asked to be named the primary residential parent and sought equal time with the children. Father requested the court to award each parent alternating weeks with the children.

The juvenile court ultimately held a trial on February 25, 2010, to address Mother's Amended Petition to Modify Parenting Plan and Father's Counter-Petition.⁵ The primary issues at trial concerned Father's residential time with the children, Father's overdue child

⁴ The juvenile court noted that it would revisit the issue of Father's visitation, if necessary, in the event Mother and the children moved out of the Seattle area.

⁵ The juvenile court addressed visitation from the filing of Mother's Amended Petition to Modify Parenting Plan through the filing of Father's Counter-Petition and the hearing via separate order or agreed order.

support payments, and whether Mother or Father was entitled to the federal tax deduction for the children.

Only Mother and Father testified during the trial. Mother testified to various complaints about Father, including that both Father and Mother shouted and “cussed” at each other in front of the children, that Father made inappropriate comments to Marianna when Father was exercising his residential time with her, and that Marianna did not want to spend additional time with Father. Mother did not testify about any inappropriate comments Father made to Gabriel, nor did she object to Gabriel spending time with Father.⁶

In support of her case and in rebuttal, Mother attempted to call Marianna, who was thirteen years old at the time, to testify. Mother offered the child for testimony regarding purportedly inappropriate comments Father made to Marianna during their time together and physical altercations between Father and his girlfriend. The juvenile court refused to allow Marianna to testify; the court also refused to meet with Marianna in chambers. The court explained that it did not want to put the child in the middle of the parents’ dispute. Mother’s attorney made an offer of proof by explaining what she expected Marianna to say if she were permitted to testify.

Mother provided evidence that Father owed past-due child support in the amount of \$8,994.22. Father did not dispute this figure. Mother also presented evidence of uncovered dental bills for the children in the amount of \$1,837.⁷

II. TRIAL COURT’S ORDER

The juvenile court entered its order on July 1, 2010. The court found that, “[d]ue to [Mother’s] relocation back to Clarksville, Tennessee, a new *Permanent Parenting Plan* needs to be entered.” The court also found that Mother should remain the primary residential parent of the two children. The court then modified the residential parenting plan by granting Father residential time with the children three weekends each month, one month in the summer, roughly half of the winter holiday, and every other spring break.

With regard to the child support arrearage, the court ordered Father to pay the arrearage of \$8,994.22 at the rate of \$25 per month. The court did not award interest on the arrearage. With regard to the federal tax deduction for the minor children, the court awarded

⁶ Mother did testify about a Boy Scout event Father caused Gabriel to miss during one of his visits with Father, but this seemed to be an isolated occurrence.

⁷ The trial exhibits are not included in the record on appeal.

Mother the deduction in odd-numbered years and Father the deduction in even-numbered years. In addition, the court ordered the parties to be equally responsible for the children's uncovered medical and dental expenses.

Mother filed a Notice of Appeal⁸ challenging certain aspects of the trial court's Order. Mother contends the trial court erred by: (1) refusing Mother's request to call Marianna as a witness; (2) allowing Father to claim the children as dependents for federal income tax purposes every other year; (3) failing to apply the statutory interest rate to Father's child support arrearage; (4) approving an unreasonably low repayment schedule; and (5) ordering uncovered medical and dental expenses to be divided equally rather than *pro rata*. Mother requests an award of her attorney's fees and costs incurred on appeal. Father did not file an appellate brief.

III. ANALYSIS

Our review of the trial court's decision is *de novo* upon the record, accompanied by a presumption of correctness of the trial court's findings of fact, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Armbrister v. Armbrister*, 414 S.W.3d 685, 692 (Tenn. 2013); *Rigsby v. Edmonds*, 395 S.W.3d 728, 734 (Tenn. Ct. App. 2012). We review a trial court's conclusions of law *de novo*, according them no presumption of correctness. *Armbrister*, 414 S.W.3d at 692; *Rigsby*, 395 S.W.3d at 734.

A. The Proffered Testimony of Marianna

Mother asserts that the trial court erred in not permitting Marianna to testify. We are constrained to note that “[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected.” Tenn. R. Evid. 103(a); *see also* Tenn. R. App. P. 36(b). With the delay in this appeal reaching us, Marianna has attained the age of majority, and she is no longer subject to a parenting plan. *See* Tenn. Code Ann. §§ 36-6-101(a) and 36-6-106(a) (custody arrangements apply only to minor children). Consequently, the proffered⁹ testimony is now largely, if not completely, irrelevant. Even assuming that not permitting Marianna to testify was error and that the error involved a

⁸ We note that this case has taken an unusually long time to reach this Court. This delay is due in part to Mother appealing the juvenile court's decision first to the circuit court. This error led to additional motion practice. Ultimately, the circuit court directed the juvenile court to assemble the record and transmit it to this Court. Due to an apparent oversight, the record was not transmitted to this Court for nearly three years after entry of the circuit court's order.

⁹ Mother did not request the making of an offer in question and answer form, which limits our ability to fully review the trial court's determination. Tenn. R. Evid. 103(b).

substantial right, we cannot conclude that such error “more probably than not affected the judgment or would result in prejudice to the judicial process.” Tenn. R. App. P. 36(b). Under the present circumstances, we conclude that any error in excluding the testimony of Marianna was harmless.

B. Federal Income Tax Exemption and Uncovered Medical and Dental Expenses

At trial, both Mother and Father sought modifications to the original Permanent Parenting Plan beyond the residential parenting schedule. Mother sought to change responsibility for uncovered medical and dental expenses, and Father sought permission to claim the children as dependents for purposes of federal income taxes. Mother appeals the juvenile court’s determination on both issues.

Responsibility for uncovered medical and dental expenses and claiming the federal income tax deduction are both issues related to child support. Modification of child support is governed by Tennessee Code Annotated section 36-5-101(g) (2010) and requires the petitioner to prove a significant variance between the current obligation and the obligation set by the Child Support Guidelines. *Kaplan v. Bugalla*, 188 S.W.3d 632, 636 (Tenn. 2006); *Wine v. Wine*, 245 S.W.3d 389, 393-94 (Tenn. Ct. App. 2007); Tenn. Comp. R. & Regs. 1240-2-4-.05(2) (2006).

Because we find that neither Mother nor Father carried their burden of proving a significant variance exists to warrant modifying the sections relating to the federal tax exemption or uncovered medical and dental expenses, we hold the Permanent Parenting Plan adopted in June 2003 controls on these issues. The original Permanent Parenting Plan provides that the parties are to share responsibility equally for the children’s uncovered medical expenses. The plan also indicates Mother is to receive the tax deduction unless certain conditions are met.¹⁰ Therefore, the juvenile court did not err when it ordered uncovered medical and dental expenses to be divided equally rather than *pro rata*, but we do find Mother should continue to receive the tax deduction provided that the conditions found in the original Permanent Parenting Plan have not been met.

C. Statutory Interest

We next turn to Mother’s argument concerning statutory interest. Mother contends the trial court erred in failing to add statutory interest of 12% to the amount of Father’s child

¹⁰ The Permanent Parenting Plan states: “The mother shall receive the tax deduction for the children, so long as the child support is current on the 15th day of January of every year until she is financially established to care fully for the children and stops receiving state assistance.”

support arrearage. Chapter 5 of Tennessee Code Annotated concerns alimony and child support and addresses the issue of interest thusly:

If the full amount of child support is not paid by the date when the ordered support is due, the unpaid amount is in arrears, shall become a judgment for the unpaid amounts, and *shall accrue interest from the date of the arrearage, at the rate of twelve percent (12%) per year*. All interest that accumulates on arrearages shall be considered child support.

Tenn. Code Ann. § 36-5-101(f)(1) (emphasis added). “The [statutory] language is clearly mandatory regarding the accrual of interest on arrearages.” *Gibson v. Prokell*, No. W2000-01236-COA-R3-CV, 2001 WL 935461, at *7 (Tenn. Ct. App. Aug. 15, 2001). We also note that the Order of Paternity, which set the original amount of “retroactive support” that makes up the bulk of the child support arrearage awarded pursuant to the judgment, awards interest. Judgments for child support are not “subject to modification as to any time period or any amounts due prior to the date that an action for modification is filed and notice of the action has been mailed.” Tenn. Code Ann. § 36-5-101(f)(1); *see id.*

In light of the statute and its prior order, the trial court did not have discretion to decline to award statutory interest on the amount of Father’s overdue child support. On remand, the trial court shall determine the accrued interest “from the date of the arrearage.”

D. Installment Payments

The final substantive issue Mother raises on appeal relates to the payment of the child support arrearage. The trial court found that Father had a child support arrearage of \$8,994.22 and ordered that the arrearage be paid at the rate of \$25 per month. In *Tallent v. Cates*, 45 S.W.3d 556 (Tenn. Ct. App. 2000), we addressed a similar situation where the trial court ordered the father to pay a child support arrearage in installments over a ten-year period. *Id.* at 560, 563. The mother appealed, arguing that ten years was unreasonably long for the arrearage to be satisfied. *Id.* at 563. We noted that “Father’s court ordered payments to Mother of \$200 monthly, with post-judgment interest accruing at 10% annually, would not cover even the interest, let alone pay down the judgment.” *Id.* Because we could not “countenance such a result,” we remanded the case to the trial court “for entry of an Order which . . . prescribes a payment plan designed to pay this judgment within a reasonable period of time.” *Id.*

In this case, as in *Tallent*, payments ordered by the trial court would not cover the accrual of statutory interest. When originally awarding “retroactive support,” the Order of Paternity provided that the arrearage would be paid at “the rate of \$25.00 per month plus

interest,” which ensured some reduction of principal by Father. The Order of Paternity went on to provide that the \$25 plus interest rate was “a minimum payment and d[id] not preclude [Mother] from collecting the judgment by other means, such as tax refund intercept, lien or levy and execution.” The record does not reflect whether Mother availed herself of the other methods of recovery. Nonetheless, we remand the case to the trial court for determination of a payment plan designed to pay the arrearage, plus statutory interest, within a reasonable period of time.¹¹

E. Attorney’s Fees

Mother seeks an award of the attorney’s fees she incurred on appeal. In support of this request, Mother relies on Tennessee Code Annotated section 36-5-103(c) (2010), which states:

The plaintiff spouse may recover from the defendant spouse, and the spouse or other person to whom the custody of the child, or children, is awarded may recover from the other spouse reasonable attorney fees incurred in enforcing any decree for alimony and/or child support, or in regard to any suit or action concerning the adjudication of the custody or the change of custody of any child, or children, of the parties, both upon the original divorce hearing and at any subsequent hearing, which fees may be fixed and allowed by the court, before whom such action or proceeding is pending, in the discretion of such court.

A court may use this statute as the basis for awarding a litigant the attorney’s fees incurred on appeal to enforce a child support order. *Pippin v. Pippin*, 277 S.W.3d 398, 407 (Tenn. Ct. App. 2008). Such an award is discretionary. *Id.*; *Shofner v. Shofner*, 181 S.W.3d 703, 719 (Tenn. Ct. App. 2004).

Although Mother was successful with regard to her claim for statutory interest and payment of the support arrearage, Mother raised issues on appeal that do not relate to Father’s child support obligation and that are not covered by this statute. We decline to exercise our discretion to award Mother the attorney’s fees she incurred on appeal.

¹¹ The trial court may refer to the *Tallent* court’s discussion of factors to consider in setting a reasonable payment plan that will result in the payment of the judgment within a reasonable period of time. *See Tallent*, 45 S.W.3d at 563-64 (quoting *State ex rel. Coleman v. Clay*, 805 S.W.2d 752 (Tenn. 1991)).

IV. CONCLUSION

For the reasons stated above, we vacate that portion of the judgment of the juvenile court that alternated the parent who could claim the children as dependants for federal income tax purposes and that set Father's payment on the child support arrearage at \$25 per month. We reverse the judgment insofar as it denied Mother statutory interest on Father's child support arrearage. We affirm the judgment in all other respects. The case is remanded for a determination of the interest accrual on the child support arrearage and the amount necessary to pay the arrears judgment within a reasonable period of time. The case is also remanded for a determination of whether the conditions were satisfied under the original Permanent Parenting Plan such that Father was entitled to claim the children as dependents for federal income tax purposes.¹² The costs of the appeal are assessed against the parties equally for which execution may issue, if necessary.

W. NEAL McBRAYER, JUDGE

¹² To the extent that Mother was entitled to claim the children as dependents for one or more years following the juvenile court's judgment, amended tax returns may be required.