IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs September 17, 2014

CESAR O. RODRIGUEZ v. AMANDA LILY RODRIGUEZ

Appeal from the Circuit Court for Montgomery County
No. MCCCCVDV121661 Ross H. Hicks, Judge

No. M2013-02648-COA-R3-CV - Filed October 30, 2014

Mother and Father were married for eight years and had two children when they were divorced in 2012. The trial court divided the marital assets, named Father the primary residential parent, and ordered Father to pay child support to Mother. Father appealed the trial court's judgment, contending the child support worksheet contains incorrect information and that he should not be required to pay child support because he is the primary residential parent. He also argued the trial court erred in awarding Mother a full half of retirement benefits he earned during the parties' marriage because Mother left him for periods of time during the marriage. Father contends those periods of separation should not be counted as time the parties were "together." The record contains no transcript of the proceedings or statement of evidence that we can review to determine whether the evidence presented preponderates against the trial court's findings and judgment. However, we agree with Father that the child support worksheet includes an incorrect figure representing Mother's average parenting time. We remand the case for the trial court to correct that number and determine whether the correction results in a different child support award. We affirm the trial court's judgment in all other respects.

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

ANDY D. BENNETT, J., delivered the opinion of the court, in which RICHARD H. DINKINS, and W. NEAL MCBRAYER, JJ., joined.

Peter M. Napolitano and Wayne Hibbeler, Clarksville, Tennessee, for the appellant, Cesar O. Rodriguez.

No appellee brief filed.

OPINION

Cesar O. Rodriguez ("Father") and Amanda Lily Rodriguez ("Mother") were married in February 2004 and have two children who were born in 2005 and 2006. The parties separated in June 2012, and Father filed a complaint for divorce the following month, on July 10, 2012. The trial court held a hearing on Father's complaint on July 15, 2013, and issued a final decree of divorce on August 26, 2013. The court divided the marital property between the parties and incorporated a permanent parenting plan into the divorce decree.

The trial court designated Father the primary residential parent. He was awarded 238 days per year with the children, and Mother was awarded 127 days with the children. The court ordered Father to pay Mother $113 per month in child support based on the calculations in the child support worksheet attached to the parenting plan.

In dividing the marital assets, the court awarded Mother a portion of Father's retirement benefits. Father was employed as a soldier with the United States Army beginning in November 2000, and the court awarded Mother one-half of the portion that Father earned during their marriage. The court wrote:

> Should the Husband become eligible to receive military retired pay for the U.S. Army, the Wife is awarded 36% of the disposable military retired pay the Husband/service-member would have received had the member retired with a retired pay base of E-6 with 11 years of creditable service. This percentage is calculated by multiplying 0.5 by the product of the number of months that the parties were married and together while the Husband was in the U.S. Army (100 months) divided by the Husband's total months of creditable service at the time of the parties' separation (139 months). If this award requires future clarification, its purpose is to credit the Wife only with a percentage of the military retired pay benefits the Husband/service-member has accrued since the parties were married and through their separation. Its purpose is further to prevent the Wife from receiving any credit for any increases to the Husband/service-member's military retired pay resulting from his additional creditable service beyond the date the parties separated.

Father filed a motion to alter the divorce decree on the basis that it contained errors and was inconsistent with the court's oral ruling that was issued from the bench following the hearing on July 15. The trial court denied the motion "[u]pon reviewing the entire record and hearing argument of counsel for the parties."

Father appealed from the trial court's denial of his motion to alter the divorce decree.

Father contends the court erred in the following ways: (1) calculating the number of days the children will spend with each parent; (2) ordering Father to pay Mother child support; and (3) awarding Mother too much of his military retirement pay.

ANALYSIS

Our review of the trial court's judgment 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.

The record in this case contains neither a transcript from the hearing nor a statement of the evidence.[1] Without the ability to review the evidence presented to the court, we are unable to determine whether the trial court's findings and judgment are supported by a preponderance of the evidence. Mother did not file a brief and is not participating in the appeal. As the only party presenting an argument to this Court, Father is responsible for providing a record for the Court to review. *See* TENN. R. APP. P. 24. This Court has addressed this issue and has stated:

> "The duty to see to it that the record on appeal contains a fair, accurate, and complete account of what transpired with respect to the issues being raised on appeal falls squarely on the shoulders of the parties themselves, not the courts." *Trusty v. Robinson*, No. M2000-01590-COA-R3-CV, 2001 WL 96043, at *1 (Tenn. Ct. App. Feb. 6, 2001) (citing Tenn. R. App. P. 24(b); *State v. Ballard*, 855 S.W.2d 557, 560-61 (Tenn. 1993); *Realty Shop, Inc. v. RR Westminister Holding, Inc.*, 7 S.W.3d 581, 607 (Tenn. Ct. App. 1999); *Nickas v. Capadalis*, 954 S.W.2d 735, 742 (Tenn. Ct. App. 1997)).

Chandler v. Chandler, No. W2010-01503-COA-R3-CV, 2012 WL 2393698, at *6 (Tenn. Ct. App. June 26, 2012). In another case, we explained: "'This Court's authority to review a trial court's decision is limited to those issues for which an adequate legal record has been preserved.'" *Reed's Track Hoe & Dozier Serv. v. Dwyer*, No. W2012-00435-COA-R3-CV, 2012 WL 6094127, at *5 (Tenn. Ct. App. Dec. 7, 2012) (quoting *Taylor v. Allstate Ins. Co.*, 158 S.W.3d 929, 931 (Tenn. Ct. App. 2004)).

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[1]The record contains a transcript of the trial court's ruling from the bench, but it contains no transcript of the evidentiary proceedings.

CHILD SUPPORT ORDER

Father raises several issues regarding the trial court's order that Father pay child support to Mother. Father's first complaint is that the trial court erred in calculating the number of days the children are to spend with Mother. According to the parenting plan, Mother has the children for one-half of the winter holiday, alternating fall and spring breaks, five weeks of summer vacation, and every other weekend during the remainder of the year. Mother and Father alternate time with the children on special days like birthdays and one-day holidays from school. Our calculation reveals Mother was awarded 90-100 days a year with the children, not 127 as reflected in the parenting plan order and child support worksheet. It is impossible to determine the exact number of days each parent will have to spend with the children because the length of school holidays changes from year to year.

Father does not contest the court's day-to-day schedule. Instead, Father contests only the court's calculation of total days Mother will have with the children. As the parent with whom the children reside less than 50% of the time, Mother is the "alternate residential parent" under the child support guidelines. TENN. COMP. R. & REGS. 1240-2-4-.02(4). Mother's average parenting time is a factor that is considered when calculating the appropriate amount of child support to award. *See* TENN. COMP. R. & REGS. 1240-2-4-.08. By relying on an incorrect number for Mother's "average parenting time," the trial court's ultimate award of child support may be incorrect. We believe it is appropriate to remand this case to the trial court so that the child support worksheet can be reworked to reflect the correct average parenting time the court has awarded to Mother. If correcting Mother's parenting time results in a different child support award, the trial court shall enter a new child support order.

Father contests another part of the child support worksheet as well. He contends that he spends $150 per week, and $600 per month, for work-related childcare. The worksheet attached to the parenting plan reflects a *monthly* total of $150, rather than a weekly total of $150, for Father's work-related childcare expenses. Father asserts that the ultimate child support order would be materially different if the correct amount of his work-related childcare expenses were included in the worksheet. As noted above, the record does not contain a transcript or statement of the evidence. Without a record of evidence to review to determine what exactly was presented to the court at the hearing, we have no way to determine whether the $150 amount included in the worksheet is an error.[2]

"In the absence of a transcript or statement of the evidence, a presumption arises that

[2]Although not determinative, we note that the income and expense statement Father filed with the trial court in October 2012 does not include any child-care expenses.

the parties presented sufficient evidence to support the trial court's judgment, and this court will affirm the judgment." *Mfrs. Consol. Serv., Inc. v. Rodell*, 42 S.W.3d 846, 865 (Tenn. Ct. App. 2000) (citing *Coakley v. Daniels*, 840 S.W.2d 367, 370 (Tenn. Ct. App. 1992) and *Irvin v. City of Clarksville*, 767 S.W.2d 649, 653 (Tenn. Ct. App. 1988)). Because Father is unable to establish that the evidence presented at the hearing preponderates against the trial court's judgment, we have no choice but to let stand the work-related childcare expense of $150 contained in the child support worksheet that the trial court incorporated into its divorce decree.

Father's final argument with respect to child support is that the trial court erred in ordering him to pay child support to Mother. For this argument, Father relies on language from the court's oral ruling indicating the court's expectation that Mother would be the one required to pay child support to Father. In its oral ruling from the bench, the court said the following:

> THE COURT: [I]t would be my intention he'll be receiving child support, but it's not going to be much given their disparaging [sic] income.
>
> FATHER'S COUNSEL: Right. I just -- I was wondering because I did a worksheet at minimum wage and I think it actually, even with all the days and expenses, had him paying her child support.
>
> MOTHER'S COUNSEL: Well, are we just going to be applying them to the typical worksheet and guidelines? I think that's how the worksheet comes out. Isn't that how it . . .
>
> THE COURT: Well, if . . .
>
> MOTHER'S COUNSEL: If it's based upon the disparate of time, she's - - it takes into account time that she's enjoyed.
>
> THE COURT: Well, let me look at it, all right, and see what it says.

Despite the expectation that the court expressed at the hearing, the divorce decree is clear that Father was ordered to pay Mother child support, rather than the other way around. The child support award is based on the numbers set forth in the child support worksheet, which Father's attorney prepared. Despite Father's contention that he should not have to pay child support since he is the primary residential parent, the child support guidelines specify that the parent responsible for paying child support can be either the primary residential parent or the alternate residential parent. TENN. COMP. R. & REGS. 1240-2-4-.02(16).

"It is well settled . . . that a court speaks through its orders and not through the transcript." *Conservatorship of Alexander v. JB Partners*, 380 S.W.3d 772, 777 (Tenn. Ct. App. 2011). On appeal, we review the trial court's written orders. *Id.* As the Court of Appeals has recently explained,

> A judgment must be reduced to writing in order to be valid. It is inchoate, and has no force whatever, until it has been reduced to writing and entered on the minutes of the court, and is completely within the power of the judge or Chancellor. A judge may modify, reverse, or make any other change in his judgment that he may deem proper, until it is entered on the minutes, and he may then change, modify, vacate or amend it during that term, unless the term continues longer than thirty days after the entry of the judgment, and then until the end of the thirty days.

Anil Constr., Inc. v. McCollum, W2013-01447-COA-R3-CV, 2014 WL 3928726, at *8 (Tenn. Ct. App. Aug. 7, 2014) (quoting *Cunningham v. Cunningham*, No. W2006-02685-COA-R3-CV, 2008 WL 2521425, at *4-5 (Tenn. Ct. App. June 25, 2008) (itself quoting *Broadway Motor Co. v. Fire Ins. Co.*, 12 Tenn. App. 278, 280 (1930))).

As discussed above, without a transcript from the hearing or a statement of evidence, we cannot review the evidence presented at the hearing to determine whether the divorce decree or information contained in the child support worksheet is incorrect, other than as noted above with regard to Mother's parenting time. Although the divorce decree may be somewhat inconsistent with the court's oral ruling, the divorce decree is the operative document. Accordingly, we reject Father's argument that the trial court's judgment is in error because of an inconsistency with the court's oral ruling.[3]

MILITARY RETIREMENT BENEFITS

Father's final assertion of error concerns the trial court's award to Mother of a portion of Father's future military retirement benefits. The court awarded Mother one-half of the amount that Father earned during the parties' marriage, dating from the date the parties were married until the time the parties separated in June 2012. Father does not object to an award to Mother of one-half of his retirement pay for the period the parties spent together. However, Father contends the court's oral ruling contemplated reducing the portion awarded to Mother to reflect periods of time that Mother spent apart from Father during the marriage,

[3] If Father continues to believe grounds exist to support modifying the child support order after the case is remanded to correct the figure representing Mother's average parenting time, he can file a petition to modify in the trial court. *See* Tenn. Code Ann. § 36-5-101.

before the parties separated in June 2012. We disagree.

In its oral ruling, the court said,

> With regard to the retirement, you gentlemen know how to do that. Come to your fraction and that should be calculated as of June 18 to December 12th, the date they separated.

In the divorce decree, however, there is no reference to the date December 12th. The court made a finding of fact that the parties were married on February 12, 2004, and separated on June 18, 2012. Father does not dispute these dates. The trial court noted in its oral ruling that Mother left Father for certain periods throughout the parties' marriage, prior to the parties' official separation on June 18, 2012, but the court did not indicate that these earlier periods of separation had any effect on Mother's entitlement to her share of Father's military retirement benefits that were earned during the parties' marriage.[4] Instead, the court specifically stated that Mother was to receive 50% of the amount of retirement pay Father earned during their marriage, prior to their separation in June 2012:

> This [36] percentage [amount] is calculated by multiplying 0.5 by the product of the number of months that the parties were married and together while the Husband was in the U.S. Army (100 months) divided by the Husband's total months of creditable service at the time of the parties' separation (139 months).

We reject Father's contention that the court's use of the phrase "married and together" is meant to exclude the periods of time when Mother left Father prior to the parties' official separation on June 18, 2012. The parties were married in February 2004 and agreed to separate in June 2012, which is 100 months. Father was employed with the military beginning in November 2000. As of the date the parties separated in June 2012, Father had served 139 creditable months in the military. Father does not offer an explanation for the court's reference in its oral ruling to "December 12th," and we can find none. As discussed above, a trial court speaks through its written orders rather than through a transcript.

We find the court's divorce decree unambiguously awards Mother one-half of Father's military retirement benefits for the period of time starting when the parties were married and ending when the parties separated in June 2012. Father has not established that the trial court

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[4] In its oral ruling, the trial court seemed to rely on Mother's decisions to leave Father throughout the parties' marriage as justification for awarding the parties a divorce and designating Father as the primary residential parent.

erred in awarding Mother this portion of his retirement benefits.[5] Accordingly, we affirm the trial court's judgment on this issue.

CONCLUSION

The case is remanded for the purpose of correcting the child support worksheet to reflect the proper number of parenting days awarded to Mother. If the corrected figure results in a different child support order, the court shall issue a corrected child support order. We affirm the trial court's judgment in all other respects. Costs of this appeal shall be assessed against the appellant, Cesar O. Rodriguez, for which execution shall issue, if necessary.

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ANDY D. BENNETT, JUDGE

[5]Even if Father were correct that Mother should not be awarded a portion of Father's retirement benefits for the periods when she unilaterally left Father prior to June 2012, there is no evidence in the record of when these dates were, or how many days Mother spent away from Father.