IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 26, 2016 Session

VANESSA YOUNG COLLEY v. JOHN S. COLLEY, III

Appeal from the Fourth Circuit Court for Davidson County
No. 12D314 Philip E. Smith, Judge

No. M2014-02495-COA-R3-CV – Filed June 28, 2016

In this post-divorce action, Vanessa Young Colley ("Mother") filed a petition for modification of the Permanent Parenting Plan ("Parenting Plan") entered in connection with the parties' Marital Dissolution Agreement ("MDA") seeking to change the decision-making authority with regard to educational decisions for the parties' minor children. After a hearing, the Circuit Court for Davisdon County ("the Trial Court"), *inter alia*, modified the Parenting Plan to change joint decision-making with regard to education to Mother having sole decision-making authority with regard to education. John S. Colley, III ("Father") appeals the decision of the Trial Court raising issues with regard to the change in decision-making authority, the denial of Father's petition for recusal, and the award to Mother of attorney's fees, among other things. We find and hold that some of Father's issues seek an advisory opinion, and we refuse to address those issues. With regard to the issue of recusal, we find no error in the Trial Court's resolution of this issue. We further find and hold that Mother proved a material change in circumstances justifying a change in decision-making authority with regard to education and further proved that it was in the children's best interest for Mother to have sole decision-making authority with regard to education. We, therefore, affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed Case Remanded

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

John S. Colley, III, Columbia, Tennessee, pro se appellant.

Michael K. Parsley, Nashville, Tennessee, for the appellee, Vanessa Young Colley.

OPINION

Background

Mother and Father were divorced in July of 2012. Their divorce decree incorporated a MDA and the Parenting Plan. The Parenting Plan designated Mother as the primary residential parent for the parties' three minor children.[1] The Parenting Plan provided that Mother would have the children at all times except for Wednesday after school through Monday morning every other week. Thus, under the Parenting Plan Mother had the children seven out of ten school mornings. The Parenting Plan further provided that Mother had sole decision-making authority with regard to decisions involving religion and major medical. Father was granted sole decision-making authority with regard to extracurricular activities. The Parenting Plan provided that Mother could sign the Children up for extracurricular activities if she paid for the activity. Father was required to pay for any activities he signed the Children up for. The Parenting Plan optimistically provided for joint decision-making with regard to education.

In August of 2012, Father filed a motion seeking an injunction requiring Mother to transport the parties' youngest child ("the Child") to and from Whitthorne Middle School in Columbia, Tennessee ("Whitthorne") where Father alleged the Child had been enrolled and was attending. Mother was residing in Williamson County, Tennessee at that time. The Child had attended Whitthorne prior to the divorce. Father had enrolled the Child in Whitthorne for the 2012-2013 school year, and the Child had attended school at Whitthorne during the first few days of August of 2012, which occurred during Father's parenting time. When Mother's parenting time began on August 6, 2012, Mother refused to take the Child to Whitthorne asserting that the Child would attend school at Spring Station Middle School ("Spring Station") in Spring Hill, Tennessee based upon the zoning of Mother's residence because Mother was the primary residential parent.

The same day that Father filed his motion, Mother filed an emergency motion seeking a temporary restraining order preventing Father from interfering with the Child attending the school for which she was zoned by virtue of Mother's address. Mother asserted in her motion, among other things, that Father had applied for out-of-zone approval in order to enroll the Child at Whitthorne because Whitthorne is not the school the Child would have been zoned for if Father's address had been utilized. The Child had been able to attend Whitthorne while the parties were married only because in August of 2010 the parties had obtained an order naming Mother's mother ("Grandmother") as the Child's temporary guardian in order to allow the Child to utilize Grandmother's address for school enrollment purposes.

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[1] By the time of the trial on Mother's petition to modify the Parenting Plan, the parties' oldest child had turned eighteen. Thus, the Parenting Plan applied only to the parties' two youngest children.

Mother then filed a petition seeking, among other things, to modify the Parenting Plan to award Mother sole decision-making authority with regard to education. On August 24, 2012, Father filed a motion for sanctions alleging that Mother had "surreptitiously filed her Petition To Modify some ten (10) days earlier," and that said petition had not been served upon Father until the parties appeared in court to argue the competing motions to have the court determine the Child's school. Father sought, among other things, to have Mother's petition to modify dismissed for failure to include a certificate of service.

The Trial Court held a hearing on Mother's petition to modify the Parenting Plan and heard testimony. Both Mother and Father testified, and the rancor between the parties clearly was evident. Mother and Father cannot even agree upon what name to call the Child. Mother refers to the Child as "Emmy," and Father refers to the Child as "Dixie."[2]

Mother testified that she agreed to give Father sole decision making with regard to extracurricular activities because their middle child was very involved in "Olympic development team" soccer and it "becomes very, very expensive," and Mother "knew [her] finances were going to be extremely tight."

Mother testified that there were no problems with regard to educational decision making in the past, but a dispute recently arose about where the Child would go to school. Mother testified that all three of the parties' children had been attending public school, and they never had attended private school. Mother was asked if the children ever had required any special education, and she stated that she had them tested in elementary school for "[g]iftedness, and they did enter the gifted program because of my request. They would pull them aside out of class maybe an hour each week just with other gifted children and do special projects, and that was all that the program involved. But that was all, yes."

Mother testified that prior to the divorce the parties agreed to use Grandmother's address in order to allow the Child to attend Whitthorne instead of the school for which the Child would have been zoned. The Child's older sister also attended Whitthorne at that time.

Mother testified that she rents a place to live in Williamson County. Mother signed a lease on July 18, 2012. Mother plans to live in this place even after the current lease term expires. Mother testified that "it's a great community right like two miles

[2] The Child's full name is Dixie Emmaline Colley.

from [Spring Station].” Mother lives approximately 27 miles away from Father’s residence. Mother testified that she is substitute teaching full-time in the Williamson County School System. She stated that the schools in Williamson County are “ranked top schools in the state.”

Mother informed Father of her address shortly after she signed the lease. Mother asked her attorney to send a letter to Father’s attorney notifying them of Mother’s new address. Mother testified that she received numerous emails from Father demanding her address and that when she told him she had signed the lease with friends of theirs “he didn’t seem to believe it.” The letter sent by Mother’s attorney with regard to Mother’s address was dated July 19, 2012. Mother testified that Father continued to send her emails stating that if she did not have an address by August 1st, their children would attend Maury County schools. Father sent Mother an email dated July 25, 2012 that stated:

> All three children will start school in Columbia on Wednesday if you have not moved into a home in another county. I have yet to see a lease for any home anywhere, and now that you are telling me you can’t move out until midnight on the 31st, I really doubt that you have anywhere to go.

Mother responded by sending an email to Father that stated:

> The previous renters are in the Montroses’ house until midnight on the 31st. I can’t kick them out. You are welcome to call Tim.
>
> You know the Columbia schools are crappy. This is a great opportunity for them and their education. You need to think about them. Arts, theater, German, Spanish, good soccer, guitar, good basketball, great media and computer equipment, plays, creative writing, music, a former Titan as Athletic Director, just to name a few advantages of the schools right down the road, and close to soccer. Ive [sic] been doing research. Did you get the address? Happy to give it to you, since all finalized, just like Tim could have as well. 2579 Milton Lane, Thompson Station, TN. 37179.

Father responded to this email with an email stating: “Like I said, unless you are moved in somewhere August 1, all three kids will start Maury County schools that day.” Mother testified that this line of communication from Father “is even a lot more civil than it usually is from him.”

Mother enrolled the Child in Spring Station, the school for which the Child was zoned pursuant to Mother’s address, on July 20, 2012. Mother registered the parties’

other two children at Independence High around the same time. Williamson County schools, including Spring Station, started on August 10, 2012. Maury County schools, including Whitthorne, started on August 1, 2012.

Mother testified that Father was exercising his parenting time with the parties' children on August 1, 2012 "[p]ursuant to the summer schedule." The Parenting Plan provided that the summer schedule would end on the Monday previous to the beginning of school. Father took the Child to Whitthorne on August 1, 2012. The principal at Whitthorne called Mother that morning and asked if Mother was the primary residential parent. The parties' other two children did not attend school in Maury County on August 1, 2012.

Mother testified that on August 2, 2012, the Child "had to go to Santa Fe Unit School, because that's where she was zoned for if she resided at Williamsport [with Father]." Mother was shown an out-of-zone, out-of-county registration form for Maury County public schools for the school year 2012-2013. This form was approved on August 2, 2012. Mother testified that she did not have any part in requesting this out-of-zone approval for the Child. She testified that she was not aware that it was being submitted and was not provided with a copy of it. On August 3, 2012, the Child went back to school at Whitthorne. The Child also went to school at Whitthorne on August 6, 2012, which was a Monday.

Mother's parenting time with the children began on August 6, 2012 after school. All three of the parties' children began school in Williamson County on August 10, 2012, during Mother's parenting time. At the time of trial, all three children continued to attend Williamson County schools. Mother testified that the Child was "thriving academically, doing very well," in Spring Station, the Williamson County school. The Child is a straight A student.[3]

Mother testified that Father had interfered with the Child's education. Mother did not feel that Father had interfered with the eduation of the parties' two oldest children. Mother testified that Father had interfered by taking the Child to Whitthorne and by constantly sending the Child texts about the school situation. Mother testified that Father's actions have sabotaged Mother's relationship with the Child. She further testified that it was her understanding when they entered into the Parenting Plan that the children would attend school where she was zoned because Mother is the primary residential parent. At the time the Plan was entered into, Mother believed that if an educational decision needed to be made she and Father could manage to make it jointly.

[3] Mother testified that the middle child also was doing well at school achieving As and Bs, but the oldest child had received a failing grade in English and was participating in "credit recovery." The oldest child had turned 18 prior to the hearing.

Mother was asked about her communications with Father, and she stated:

> Well, it is only by emails now. I had to block his number from my phone back in July because of the constant texting, and I never had a moment of peace. And all of the texts were degrading, harassing, intimidation. It's just really to wear me down. It's always a mission to wear me down. . . . No, we rarely speak [when we see one another at the children's events]. He never says hello. And with the texting instead of emailing him, after I blocked his number from my cell phone, emailing constantly became more harassing, intimidating, and degrading. I don't remember one kind, helpful email, not one.

Mother expressed her concern via email to Father about the Child's friend because the friend's mother previously had been represented by Father, who is an attorney, on drug charges.

Mother was asked if she had considered assenting to Father's and the Child's stated desire for the Child to attend Whitthorne, and she stated:

> Yes. I admit I've had weak moments when I just can't take it and tried to think of ways how can I work this out. And then when I reevaluate the facts, it just doesn't make sense, and how could I do the driving and work and just taking advantage of this great opportunity. I would have those weak moments and try to consider it.
>
> But then I would realize, just as a mother, there's no way I could do this; for one year maybe, and then this situation would arise again. And that would be the easy way out to say, "Okay, you can go for a year." But we need to solve this now, and then I would worry again that this would happen in high school. I want her, desperately, to be with her sister in high school so . . . .

Mother testified that trying to send the Child to Whitthorne would "involve so much cooperation, which doesn't seem to work with [Father]." She further stated it would involve extra gas money, different schedules, different spring breaks, and extra commute time. Mother stated that Whitthorne was approximately 20 or 25 miles from her home and would involve approximately one hour each way for commuting in "school morning traffic." Mother testified that the parties have attempted mediation twice and attended a settlement conference also, all to no avail.

Mother testified that the parties' oldest child turned eighteen prior to the hearing. Father testified that the oldest child quit coming to Father's parenting time when he turned eighteen.

Father testified that in July of 2012 he took the Child shopping to buy her dress-code-compliant clothes so she could attend Whitthorne after the Child "informed [Father] where she wanted to go [to Whitthorne] . . . ." Father also took the Child to purchase school supplied for Whitthorne and went to Whitthorne to determine who the Child's homeroom teacher would be. Father stated that "during this time [Mother] was telling me that she was going to go to . . . Williamson County, period, and why she should."

Father testified that he was "under the assumption, based on what [Mother] was telling me, that the kids were being allowed to choose [which school they wanted to attend]." Father admitted that the Parenting Plan calls for joint decision-making with regard to education, not for the children to make decisions. Father insisted that he and Mother had agreed that the children could choose.

Father testified that he sent Mother an email dated July 28, 2012 asking if he could take the Child shopping to buy her school supplies for Whitthorne. Father testified about what preparations he made to send the Child to Whitthorne stating:

> Again, getting the school supplies, getting the dress-code-compliant clothes, going to the school a couple of times to find out who her homeroom teacher was, when soccer tryouts were. And then once she got to school, I had to take her to Santa Fe, the school she was zoned for, for one day, before Maury County would let her go to Whitthorne again this year, out of zone. . . . I filled out an out-of-zone application, which was approved as well.

Father testified that he made Mother aware via email of these preparations and that Mother's response was to ignore the emails or to respond that Williamson County schools were better schools.

Father was asked if he had made promises to the Child with regard to school, and he stated: "If I have done anything, it would be to tell her, 'I will do whatever I can to get you back to Whitthorne,' if that - - if that qualifies as something to discourage her." Father admitted that he sent the Child a text in response to one from her expressing concern about where she was going to school, and his text stated: "Who is the lawyer in our fambly [sic]? . . . Me or mom? I know the law, and you will be in Room 102 this week." Father sent a text to the Child that stated: "You have to know that I will do

everything in my power to make you happy at Whitthorne. Do not give up. If she takes your phone, use [your sister's]. I love you." Father sent another text to the Child that stated: "Sugar, it will be okay. I will try to get an order signed and get you in there by lunchtime." Father sent another text that stated: "Don't give up on me! If you want this, I will make it happen. Once the judge looks at this, I believe he will make mom or [your brother] take you. Mom does not get to decide where you go."

Father admitted that he and Mother do not communicate well with one another. When asked if they got along, Father stated: "Well, we're not around each other enough not to get along, so - - if we were, we wouldn't get along. I'll say that." Father admitted that this disagreement about the Child's school had been going on for approximately ten months and that he and Mother had been to mediation twice, had attended a settlement conference, and had been to a parenting seminar, and still could not agree.

On July 1, 2013, after the hearing on Mother's petition to modify but before entry of the Trial Court's order, Father filed a motion seeking a psychiatric evaluation of Mother, alleging, in part, that Mother had sent Father an email that stated: "I have always been the only parent to our children, and as Judge Norman said to me, 'Nothing can be resolved until someone shoots Mr. Colley.'"

On August 21, 2013 the Trial Court entered its Judgment Order modifying the Parenting Plan after finding and holding, *inter alia*:

> 7. The first witness to testify was [Mother]. [Mother] testified that she is the primary residential parent and that she has the children seven (7) out of ten (10) school mornings. She also testified that she has primary decision-making authority in the areas of non-emergency healthcare and religious upbringing, [Father] has primary decision-making authority in the area of extracurricular activities, and she and [Father] have joint decision-making authority regarding educational decisions.
> 8. [Mother] testified that the Maury County schools started on August 4, 2012, and that [Father] took [the Child] to the first day of school at Whitthorne Middle School in Maury County, over [Mother's] objection. [Mother] explained that Whitthorne was out of zone where she and [Father] lived when they were married; however, when married, she and [Father] had given guardianship of [the Child] to her maternal grandmother so that she could attend Whitthorne.
> 9. [Mother] testified that she had moved to Williamson County, rented a home for her and the then three (3) minor children, and that she is settled and has no plans to move at this time. [Mother's] residence is twenty-seven (27) miles from [Father's] residence. [Mother] testified that she is

substitute teaching in the Williamson County school system, and that this is, basically, a full-time position.
10. [Mother] further testified that all three (3) children attended Williamson County schools during the 2012-2013 school year. She testified that [the Child] is a straight- "A" student and has thrived at the Willimason County School that she attended, Spring Station Middle School. [Mother] testified that the parties' other daughter, Sam, is an "A"- "B" student, and that their son, Tom, has struggled and, in fact, failed an AP English class.
ll. [Mother] testified that she thought [Father's] action had interfered with her responsibilities as the primary residential parent. First, she stated that [Father] taking [the Child] to Whitthorne over [Mother's] objection sabatoged [the Child's] school year at the Williamson County school. Second, she testified that [Father] and his constant harassment of her over the past year has harmed her relationship with [the Child]. Third, she stated that [Father's] actions had terrorized her personally.
12. [Mother] explained that before the divorce, she and [Father] were able to make educational decisions together, but that they are no longer able to do that.
13. [Mother] testified that, in her belief, the Williamson County schools are better than the Maury County schools, and that she has attempted to discuss this with [Father], but to no avail.
14. [Mother] testified that she and [Father] only communicate by email, and she has had to block his numbers from her cell phone. She further testified that the parties do not even speak to each other at the children's events.
15. [Mother] explained that she is requesting sole decision-making authority in the category of educational decisions, and that this is in the best interests of her children.
16. On cross-examination, [Mother] denied that she ever agreed to give the children the choice of where they wanted to go to school. She admitted that she told [the Child] on three (3) occasions that she could attend Whitthorne; however, on re-examination, she testified that she does not think it appropriate for a twelve (12) year-old to make the decision regarding where she wants to go to school.

* * *

18. The last witness to testify was [Father]. He was called by his counsel. [Father] testified that he and [Mother] made decisions regarding education jointly when they were married. He also testified that when he told

[Mother] that he wanted a divorce, she informed him that she was going to be moving to Williamson County.
19. [Father] testified that he and [Mother] had a private agreement that the children would choose where they would like to go to school. [Father] requested that the Court enforce the private agreement that he says existed between he and [Mother].
20. [Father] also testified that [the Child] was more active in school activities at Whitthorne and was in the Honors Program at that school. He then testified that she is not in the Honors Program at the Williamson County school, but does concede that she is a straight-"A" student.

FINDINGS REGARDING THE TESTIMONY

21. This Court finds that [Mother] testified in a very straightforward manner, and that she answered questions appropriately. Her demeanor on the stand was very good, and her testimony was reasonable. In the eyes of the trier of fact, [Mother] was an excellent witness.

* * *

23. The Court finds that while [Father] appeared to be honest, his positions on the issues were often unreasonable, and at times he would avoid answering a question directly. It is the finding of the Court that the testimony of [Father] should be given slightly less weight than the testimony of [Mother].
24. The Court further finds that the testimony of [Mother] was of greater assistance to the trier of fact in deciding the issues raised in her Petition. Where the testimony between [Mother] and [Father] differs, this Court will accept the testimony of [Mother].

b. <u>Conclusions of Law</u>

* * *

8. This Court finds that in the case at bar, the joint decision-making ability of the parties has failed. The testimony of [Mother] reflects that she and [Father] do not speak. [Mother] has blocked [Father's] number from her cell phone, and they do not speak at events for the children. Moreover, [Mother's] relationship with [the Child] was disrupted primarily as a result of [Father's] assurances to the child that she would attend Whitthorne in Maury County.

> 9. The Court in [*Hansen v. Hansen*, M2008-02378-COA-R3-CV, 2009 WL 3230984 (Tenn. Ct. App. Oct. 7, 2009), *no appl. perm. appeal filed*] recognized that there can be no doubt that it is in the best interests of children that decisions about their welfare be made without undue delay and stress. Therefore, this Court finds that the failure of the joint decision-making process between the parties regarding educational matters constitutes a material change in circumstances.
> 10. Further, with consideration of the factors set forth in T.C.A. § 36-6-404(b), the Court finds that the best interests of the parties' two (2) remaining minor children requires that [Mother] be vested with sole decision-making authority regarding educational decisions.
> 11. This Court further finds that [Father's] request for a permanent injunction should be denied, and that [Mother] should be awarded a judgment in the amount of Twelve Thousand Five Hundred and 0/100 Dollars ($12,500.00) for her reasonable attorney's fees. [Father] will be awarded a hearing on the fees before the Order becomes final, if he chooses.

A hearing was held before Judge Phillip Robinson, sitting by interchange, on Father's motion for a psychiatric examination and a motion filed by Mother seeking an order stating that she need not respond to discovery requests propounded by Father after the hearing on the motion to modify but before entry of the order on that motion. After the hearing, Judge Robinson entered an order on August 26, 2013 denying Father's motion and finding that discovery was moot and withdrawn.

After a hearing on the award of attorney's fees, the Trial Court entered an order on October 2, 2013 finding and holding, *inter alia*, that Mother was entitled to the award of attorney's fees pursuant to the MDA because Mother was forced to defend the Parenting Plan when the parties could not jointly make a decision regarding the education of the Child. Father filed a motion for additional findings of fact or to alter or amend.

On December 27, 2013 Father filed a motion for recusal. Father's motion to recuse alleged, in pertinent part:

> This matter ([Father's] Motion for An Evaluation) was set to be heard on the Court's August 2, 2013 motion docket, when the parties were summoned into court for the preceding afternoon, August 1, 2013.
>
> On that afternoon, the Court announced "that the failure of the joint decision-making authority – or the joint decision-making process between the parties regarding educational matters constitutes a material change in

> circumstances." The Court then awarded [Mother] the relief she sought, sole decision-making as to the children's educations.
>
> At the conclusion of the August 1 hearing, the Court told the parties to appear the very next day (August 2) before another judge, Honorable Phillip Robinson, for the hearing on [Father's] motion to have [Mother] evaluated. The Court did not explain why it could not or would not be hearing [Father's] motion on August 2.
>
> On August 2, [Father] asked Judge Robinson why he was hearing the motion instead of this Court, and Judge Robinson indicated this Court felt it had a conflict of interest: . . . .
>
> * * *
>
> [Father] does not know whether the Court questioned its special master/judicial mediator regarding the statement attributed to him by [Mother], nor does [Father] know whether the Court's special master/judicial mediator actually told his ex-wife that nothing can be resolved until someone shoots him. What the record *does* clearly show is that once the alleged statement was brought to the Court's attention, the Court did a complete about-face on the matter pending before the Court, refused to hear the Motion for Psychiatric Evaluation, and refused to explain why it did not hear that Motion. Assuming Judge Robinson was correct, this Court had concluded it had a conflict because allegations regarding its special master/mediator were at the crux of the matter, and the Court should have recused itself as soon as it reached that conclusion.

(citation omitted).

On January 10. 2014 Father filed a petition seeking to modify custody and child support. Father non-suited this petition in May of 2015.

By order entered February 5, 2014 the Trial Court denied Father's motion to recuse. In its February 5, 2014 order, the Trial Court found and held, *inter alia*:

> This cause came to be heard on January 10, 2014, before the Honorable Philip E. Smith, Judge of the Fourth Circuit Court for Davidson County, Tennessee, pursuant to the defendant, [Father's], motion to recuse. The motion requests that the Court recuse itself based on the appearance of bias or lack of impartiality. The Court finds the motion to be without merit and

is most respectfully denied.

The motion to recuse filed by [Father] is based, in part, on the Court's decision in the ruling that was rendered on August 1, 2013. Apparently, [Father] is of the opinion that the Court altered its decision after he filed a motion for [Mother] to submit to a psychiatric evaluation. The main basis of the motion for psychiatric evaluation involved an allegation that the Court's Special Master, Jack Norman, Jr., had stated during a judicial settlement conference that "nothing can be resolved until someone shoots [Father]." See copy of motion attached as Exhibit 1. According to [Father], after this motion was filed this Court somehow changed its ruling. The basis for the change in the Court's position, according to [Father], is evidenced by questions and statements made by the Court during the hearing. [Father's] position is that the ruling of the Court evidences a different view of the proof than what the Court had during the hearing. Apparently, according to [Father], it was the filing of the motion for psychiatric evaluation that caused the Court somehow to change its position.

For purposes of the record the Court will state that the Court never had a conversation with the Special Master about the alleged statement made by the Special Master in the judicial settlement conference. The Court felt that as Mr. Norman was the Special Master for the Fourth Circuit Court it would be more appropriate for another Circuit Court Judge to hear the motion for psychiatric evaluation. The Court did ask Judge Phillip Robinson, Judge of the Third Circuit Court for Davidson County, Tennessee, to hear the motion for psychiatric evaluation by interchange. The intent of the Court was to avoid any appearance of impropriety in dealing with the motion.

A review of the file will indicate that the motion for psychiatric evaluation filed by [Father] was, in fact, denied by Judge Robinson.

As stated earlier, this Court rendered its decision on August 1, 2013, after having this matter under advisement for a period of time. The Court will acknowledge finding "that the failure of the joint decision-making authority or the joint decision making process between the parties regarding the educational matters constitutes a material change in circumstances." The Court made the ruling on August 1, 2013, after reviewing all of the testimony by the parties and witnesses, as well as the applicable case law and statutory law. Copy of the order attached as Exhibit 2. The Court will state emphatically that the filing of the motion for psychiatric evaluation had

nothing to do with the ruling on August 1, 2013. Additionally, the Court would submit that the only reason that Judge Phillip Robinson heard the motion was to avoid any appearance of impropriety or bias.

> Tennessee Supreme Court Rule 10, Canon 2.11 (A) states:
>
> "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including, but limited to the following circumstances:
>
> (1) The judge has personal bias or prejudice concerning a party or a party's lawyer or personal knowledge of the facts that are in dispute in the proceeding."

The Court has no personal knowledge of the facts of the case or the parties themselves other than what the Court has heard or witnessed in the courtroom.

This Court would state for the record that it has no doubt as to its ability to preside impartially in this matter. This Court has no personal bias or prejudice considering either party or their lawyers. Further, the Court finds there is no reasonable appearance of bias to question the Court's impartiality.

The Tennessee Supreme Court recognized the potential manipulation of trial courts by motions to recuse in the case of *Davis v. Liberty Mutual Insurance Company,* 38 S.W. 3d 560 at 565 (Tenn. 2001), when the Court stated:

> Given the adversarial nature of litigation, trial judges necessarily assess the creditability of those who testify before them, whether in person or by some other means. Thus, the mere fact that a witness takes offense at the Court's assessment of a witness cannot serve as a valid basis for a motion to recuse. *If the rule were otherwise, recusal would be required as a matter of course since trial courts necessarily rule against parties and witnesses in every case, and litigants could manipulate the impartiality issue for strategic*

> *advantage, which the Court's* [sic] *frown upon.* (Emphasis supplied).
>
> The ruling by this Court's [sic] was contrary to the position of [Father].
>
> As this Court previously stated, this Court has no doubts as to its ability to preside impartially in this case. This Court has no personal bias or prejudice concerning either party or their lawyers. Further, the Court finds there is no reasonable appearance of bias to question the Court's impartiality.
>
> Based on all of these reason [sic], [Father's] motion is denied.

On July 31, 2014, Father filed a motion for contempt alleging, in part, that Mother was in contempt for violating the Parenting Plan by allegedly interfering with the extracurricular activities of the parties' middle child. On November 10, 2014 the Trial Court entered an order on Father's motion for contempt and Mother's motion for attorney's fees for collection of the previously awarded attorney's fees. The November 10, 2014 order found that Mother was not in contempt, denied Mother's motion seeking attorney's fees for collection of the previously awarded attorney's fees, and awarded Mother an additional judgment for attorney's fees in the amount of $3,250 for having to defend against Father's motion for contempt.

Father appeals to this Court.

Discussion

Although not stated exactly as such, Father raises five issues on appeal: 1) whether the Trial Court erred in finding that a material change in circumstances occurred to justify awarding Mother sole decision-making authority with regard to education; 2) whether the Trial Court erred in awarding Mother attorney's fees with regard to the modification of decision-making authority; 3) whether a summons must be issued and served on a petition to modify custody when the respondent is represented by counsel in on-going proceedings; 4) whether parenting time overcomes decision-making authority with regard to extra-curricular activities; and, 5) whether the Trial Court erred in denying Father's motion to recuse. Mother requests an award of attorney's fees on appeal.

Our review is *de novo* upon the record, accompanied by a presumption of correctness of the findings of fact of the trial court, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727

(Tenn. 2001). A trial court's conclusions of law are subject to a *de novo* review with no presumption of correctness. *S. Constructors, Inc. v. Loudon County Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

We first will consider whether the Trial Court erred in finding that a material change in circumstances occurred justifing awarding Mother sole decision-making authority with regard to education. Father argues in his brief on appeal that the Trial Court erred in changing the educational decision-making authority because there was no material change in circumstances. Father bases his argument, in part, upon comments made by the Trial Court during the hearing on Mother's petition seeking a modification of the Parenting Plan in which the Trial Court questioned whether a material change of circumstances had occurred. After the hearing the Trial Court took the matter under advisement, reviewed the evidence and the law, and then entered its order finding that a material change in circumstances had occurred justifying a change in decision-making authority with regard to education. Father argues that this finding was contrary to the statements made during the hearing and constituted an "about-face" on the part of the Trial Court. We disagree.

As our Supreme Court has stated: "the court speaks through its order, not through the transcript." *In re Adoption of E.N.R.*, 42 S.W.3d 26, 31 (Tenn. 2001). The fact that the Trial Court made comments or asked questions during the hearing that Father took to mean that the Trial Court was questioning whether a material change in circumstances had occurred is conclusive of nothing. No ruling was made until the Trial Court entered its order in which it clearly and unequivocally found that a material change in circumstances had occurred. Father's argument is without merit.

With regard to the issue of whether Mother proved a material change in circumstances, we note that this Court explained in *Reeder v. Reeder*:

> Trial courts have broad discretion to fashion custody and visitation arrangements that best suit the unique circumstances of each case, and the appellate courts are reluctant to second-guess a trial court's determination regarding custody and visitation. *Parker v. Parker*, 986 S.W.2d 557, 563 (Tenn. 1999); *Nelson v. Nelson*, 66 S.W.3d 896, 901 (Tenn. Ct. App. 2001). Decisions concerning custody and visitation often hinge on subtle factors, such as the parents' demeanor and credibility during the proceedings. *Adelsperger v. Adelsperger*, 970 S.W.2d 482, 485 (Tenn. Ct. App. 1997).
>
> Furthermore, it is not the role of the appellate courts to "tweak [parenting plans] . . . in the hopes of achieving a more reasonable result than the trial court." *Eldridge v. Eldridge*, 42 S.W.3d 82, 88 (Tenn. 2001).

> Thus, a trial court's decision regarding custody or visitation will be set aside only when it "falls outside the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence found in the record." *Id*.
>
> * * *
>
> Tennessee Code Annotated § 36–6–101(a)(2)(C) sets forth the standard for modification of a court's prior decree pertaining to a residential parenting schedule:
>
>> [T]he petitioner must prove by a preponderance of the evidence a material change of circumstances affecting the child's best interest. A material change of circumstance does not require a showing of a substantial risk of harm to the child. A material change of circumstance for purposes of modification of a residential parenting schedule may include, but is not limited to, significant changes in the needs of the child over time, which may include changes relating to age; . . . failure to adhere to the parenting plan; or other circumstances making a change in the residential parenting time in the best interest of the child.
>
> The threshold issue in every case involving a modification in an existing custody or visitation arrangement is whether a material change in circumstances has occurred. *Kendrick v. Shoemake*, 90 S.W.3d 566, 570 (Tenn. 2002). If a material change in circumstances has occurred, it must then be determined whether modification of the plan is in the best interest of the child. *Id*.

Reeder v. Reeder, 375 S.W.3d 268, 278-79 (Tenn. Ct. App. 2012). As noted in *Reeder*, Tenn. Code Ann. § 36-6-101(a)(2)(C) clearly provides that the failure to adhere to the parenting plan can constitute a material change in circumstances. Tenn. Code Ann. § 36-6-101(a)(2)(C) (2010).

In the instant case the Trial Court specifically found, among other things:

> the joint decision-making ability of the parties has failed. The testimony of [Mother] reflects that she and [Father] do not speak. [Mother] has blocked [Father's] number from her cell phone, and they do not speak at events for the children. Moreover, [Mother's] relationship with [the Child] was

> disrupted primarily as a result of [Father's] assurances to the child that she would attend Whitthorne in Maury County.

The evidence in the case now before us shows overwhelmingly that the parties were unable to adhere to the Parenting Plan and engage in joint decision-making with regard to education. The evidence shows that because Mother and Father were unable to exercise joint decision-making with regard to education, the Child unnecessarily attended three different schools during the first two weeks of August of 2012. This lack of stability about where she was attending school could only have been detrimental to the welfare of the Child. Apparently, Father would have this impasse continue leaving the Child in this intolerable situation.

Furthermore, we note that the Trial Court specifically found Mother's testimony to be more credible than Father's and found that Mother's testimony "was of greater assistance to the trier of fact in deciding the issues raised . . . ." As our Supreme Court has instructed:

> When credibility and weight to be given testimony are involved, considerable deference must be afforded to the trial court when the trial judge had the opportunity to observe the witnesses' demeanor and to hear in-court testimony. *Estate of Walton v. Young*, 950 S.W.2d 956, 959 (Tenn. 1997) (quoting *Randolph v. Randolph*, 937 S.W.2d 815, 819 (Tenn. 1996)). Because trial courts are able to observe the witnesses, assess their demeanor, and evaluate other indicators of credibility, an assessment of credibility will not be overturned on appeal absent clear and convincing evidence to the contrary. *Wells v. Bd. of Regents*, 9 S.W.3d 779, 783 (Tenn. 1999).

Hughes v. Metro. Gov't of Nashville and Davidson County, 340 S.W.3d 352, 360 (Tenn. 2011).

The evidence in the record on appeal does not preponderate against the Trial Court's findings that a material change in circumstances had occurred due to the failure of joint decision-making with regard to education and that it was in the best interest of the parties' minor children for Mother to be vested with sole decision-making authority with regard to education.

We next consider whether the Trial Court erred in awarding Mother attorney's fees with regard to the modification of decision-making authority. In *Cracker Barrel Old Country Store, Inc. v. Epperson*, our Supreme Court explained:

> Tennessee, like most jurisdictions, adheres to the "American rule" for award of attorney fees. *John Kohl & Co. v. Dearborn & Ewing*, 977 S.W.2d 528, 534 (Tenn. 1998); *Pullman Standard, Inc. v. Abex Corp.*, 693 S.W.2d 336, 338 (Tenn. 1985). Under the American rule, a party in a civil action may recover attorney fees only if: (1) a contractual or statutory provision creates a right to recover attorney fees; or (2) some other recognized exception to the American rule applies, allowing for recovery of such fees in a particular case. *Taylor [v. Fezell]*, 158 S.W.3d [352] at 359 [(Tenn. 2005)]; *John Kohl*, 977 S.W.2d at 534.

Cracker Barrel Old Country Store, Inc. v. Epperson, 284 S.W.3d 303, 308 (Tenn. 2009) (footnote omitted).

In the case now before us on appeal, a contractual provision allows for an award of attorney's fees. Specifically, the MDA provides, in pertinent part:

> In the event it becomes reasonably necessary for either party to institute or defend legal proceedings related to the enforcement of any provision of this Agreement, the prevailing party shall also be entitled to a judgment for reasonable expenses, including attorney's fees, incurred in connection with such proceedings.

Mother was forced to file her petition seeking to modify the portion of the Parenting Plan with regard to educational decision-making authority because the provision for joint decision-making with regard to education had failed completely. As such, Mother was entitled to an award of attorney's fees pursuant to the MDA, and we find no error by the Trial Court as to this issue.

Next, we address Father's issue regarding whether a summons must be issued and served on a petition to modify custody when the respondent is represented by counsel in on-going proceedings. Father filed a petition to modify custody and personally served the petition on Mother's attorney when the parties were in court for the hearing on Father's motion to recuse. Father did not serve a summons on either Mother or Mother's attorney. Father raises this issue because the Trial Court quashed Father's notice of deposition of Mother. In his brief on appeal Father states: "The decision by the trial court to insist on a summons being issued and served on Mother was incorrect and must be reversed."

To begin, we note that Father non-suited his petition to modify custody. As such, the issue of whether a summons should have been served with Father's petition to modify custody has been rendered moot. In raising this issue Father is seeking an advisory

opinion. "It is well-settled that the role of the court is to adjudicate and settle legal rights, not to give abstract or advisory opinions." *Thomas v. Shelby County*, 416 S.W.3d 389, 393 (Tenn. Ct. App. 2011). We decline Father's request to issue an advisory opinion on this issue.

We next consider Father's issue with regard to whether parenting time overcomes decision-making authority with regard to extra-curricular activities. Father alleged that Mother was interfering with their middle child's extracurricular activities during Mother's parenting time. Father argues in his brief on appeal that Mother's actions interfere with the sole decision-making authority regarding extracurricular activies granted to Father in the Parenting Plan. Father, however, seeks no specific relief with regard to this claim, but asks this Court to "recognize the importance of extracurricular activities in children's lives . . . ." Furthermore, we note that the parties' middle child now is eighteen years old and no longer a subject of the Parenting Plan. Again, Father is seeking an advisory opinion. As noted above, "[i]t is well-settled that the role of the court is to adjudicate and settle legal rights, not to give abstract or advisory opinions." *Thomas*, 416 S.W.3d at 393. We decline Father's request to issue an advisory opinion on this issue.

We next consider whether the Trial Court erred in denying Father's motion to recuse. Appeals from orders denying motions to recuse or disqualify a trial court judge from presiding over a case are governed by Rule 10B of the Rules of the Supreme Court of Tennessee.

Without question, "[t]he right to a fair trial before an impartial tribunal is a fundamental constitutional right." *Bean v. Bailey*, 280 S.W.3d 798, 803 (Tenn. 2009) (quoting *State v. Austin*, 87 S.W.3d 447, 470 (Tenn. 2002)). Article VI, section 11 of the Tennessee Constitution states:

> No Judge of the Supreme or Inferior Courts shall preside on the trial of any cause in the event of which he may be interested, or where either of the parties shall be connected with him by affinity or consanguinity, within such degrees as may be prescribed by law, or in which he may have been of counsel, or in which he may have presided in any inferior Court, except by consent of all the parties.

This constitutional right "is intended 'to guard against the prejudgment of the rights of litigants and to avoid situations in which the litigants might have cause to conclude that the court had reached a prejudged conclusion because of interest, partiality, or favor.'" *Bean*, 200 S.W.3d at 803 (quoting *Austin*, 87 S.W.3d at 470). By statute, the Legislature has delineated those circumstances in which recusal is constitutionally

required. *See* Tenn. Code Ann. § 17–2–101 (providing that no judge shall be competent to preside over a case, except by consent of all parties, where (1) the judge "is interested in the event of any cause;" (2) the judge "is connected with either party, by affinity or consanguinity, within the sixth degree, computing by the civil law;" (3) the judge "has been of counsel in the cause;" (4) the judge "has presided on the trial in an inferior court;" or (5) the judge presiding over a felony criminal case is connected to the victim of the crime "by affinity or consanguinity within the sixth degree, computing by the civil law.").

In addition, "preservation of the public's confidence in judicial neutrality requires not only that the judge be impartial in fact, but also that the judge be perceived to be impartial." *Kinard v. Kinard*, 986 S.W.2d 220, 228 (Tenn. Ct. App. 1998); *see also Offutt v. United States*, 348 U.S. 11, 14, 75 S. Ct. 11, 13, 99 L. Ed. 11 (1954) (holding that "justice must satisfy the appearance of justice"). As such, Rule 2.11(A) of the Code of Judicial Conduct as set forth in Rule 10 of the Rules of the Supreme Court of Tennessee requires a judge to recuse himself or herself "in any proceeding in which the judge's impartiality might reasonably be questioned. . . ." In other words, even if a judge subjectively believes he or she can be fair and impartial, the judge still must recuse himself or herself upon request whenever "'the judge's impartiality might be reasonably questioned because the appearance of bias is as injurious to the integrity of the judicial system as actual bias.'" *Smith v. State*, 357 S.W.3d 322, 341 (Tenn. 2011) (quoting *Bean*, 280 S.W.3d at 805).

The terms "bias" and "prejudice" generally "refer to a state of mind or attitude that works to predispose a judge for or against a party;" however, "[n]ot every bias, partiality, or prejudice merits recusal." *Alley v. State*, 882 S.W.2d 810, 821 (Tenn. Crim. App. 1994). To merit disqualification of a trial judge, "prejudice must be of a personal character, directed at the litigant, 'must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from . . . participation in the case.'" *Id*. However, "[i]f the bias is based upon actual observance of witnesses and evidence given during the trial, the judge's prejudice does not disqualify the judge." *Id*.

"A trial judge's adverse rulings are not usually sufficient to establish bias." *State v. Cannon*, 254 S.W.3d 287, 308 (Tenn. 2008). "Rulings of a trial judge, even if erroneous, numerous and continuous, do not, without more, justify disqualification." *Alley*, 882 S.W.2d at 821. The reason for this proposition has been explained by our Supreme Court as follows:

> [T]he mere fact that a judge has ruled adversely to a party or witness in a prior judicial proceeding is not grounds for recusal. Given the adversarial

> nature of litigation, trial judges necessarily assess the credibility of those who testify before them, whether in person or by some other means. Thus, the mere fact that a witness takes offense at the court's assessment of the witness cannot serve as a valid basis for a motion to recuse. If the rule were otherwise, recusal would be required as a matter of course since trial courts necessarily rule against parties and witnesses in every case, and litigants could manipulate the impartiality issue for strategic advantage, which the courts frown upon.

Davis v. Liberty Mut. Ins. Co., 38 S.W.3d 560, 565 (Tenn. 2001) (internal citations omitted).

Basically, in his motion for recusal Father asserted that the Trial Court did an about-face with regard to Mother's petition seeking to modify educational decision-making authority after Father filed his motion seeking a psychiatric examination of Mother. As discussed above, the record simply does not support this assertion. The record shows that in an abundance of caution the Trial Court recused itself from hearing Father's motion seeking a psychiatric examination of Mother because of the allegations of statements made by the Trial Court's special master. Father's motion then was heard by another judge sitting by interchange, and Father's motion was denied. The record reveals nothing whatsoever that would show that the Trial Court could not and would not impartially hear any and all other matters in this case. The Trial Court specifically addressed Father's concerns in its February 5, 2014 order denying Father's motion to recuse.

Furthermore, we note that despite knowing the facts he alleged in his motion for recusal as early as August 1st or 2nd of 2013, Father waited until December 27, 2013 to file his motion for recusal. Additionally, Father failed to comply with Rule 10B of the Rules of the Supreme Court, which requires: "The motion shall be supported by an affidavit under oath or a declaration under penalty of perjury on personal knowledge and by other appropriate materials." Tenn. Sup. Ct. R. 10B, § 1.01. This Court has held that the filing of the affidavit is mandatory. *E.g., Childress v. United Parcel Serv., Inc.*, W2016-00688-COA-T10B-CV, 2016 WL 3226316 (Tenn. Ct. App. June 3, 2016), *no appl. perm. appeal filed*; *Elliott v. Elliott*, No. E2012-02448-COA-10B-CV, 2012 WL 5990268 (Tenn. Ct. App. Nov. 30, 2012), *no appl. perm. appeal filed*. Father also failed to comply with Rule 10B's requirement that the motion "shall affirmatively state that it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Tenn. Sup. Ct. R. 10B, § 1.01.

There are no facts alleged or shown in the record that demonstrate either actual bias on the part of the Trial Court Judge or that would lead a well-informed, disinterested

observer to question the impartiality of the Judge in this case. We find no error by the Trial Court as to this issue.

Mother requests an award of attorney's fees on appeal. As discussed more fully above, the parties' MDA provides for an award of attorney's fees to the prevailing party forced to institute or defend legal proceedings related to the enforcement of any provision of the parties' agreement. We find and hold that Mother is entitled to an award of attorney's fees on appeal pursuant to the parties' MDA and remand this case to the Trial Court for a determination of the appropriate amount of said award.

Conclusion

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for further proceedings consistent with this Opinion and for collection of the costs below. The costs on appeal are assessed against the appellant, John S. Colley, III, and his surety.

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D. MICHAEL SWINEY, CHIEF JUDGE