IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 18, 2016 Session

# EDGAR MICHAEL GALAWAY v. PATRICE JOLENE GALAWAY

**Appeal from the Circuit Court for Davidson County**
**No. 09D2148 Phillip R. Robinson, Judge**

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**No. M2015-00670-COA-R3-CV – Filed March 31, 2016**

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In this post-divorce appeal, Father asserts the trial court erred in failing to find a material change of circumstance had occurred such that he should be designated the child's primary residential parent. Father also asserts the trial court erred in awarding Mother her attorney's fees. We affirm the trial court in all respects.

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

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

Paul W. Moser, Madison, Tennessee, for the appellant, Edgar Michael Galaway.

Rebecca K. McKelvey, Nashville, Tennessee, for the appellee, Patrice Jolene Galaway.

## OPINION

### FACTUAL AND PROCEDURAL HISTORY

After a fourteen-year marriage, Edgar Galaway ("Father") and Patrice Galaway ("Mother") were divorced in 2010. One child, a daughter, was born of the marriage and was three years old at the time of divorce. The parties entered into a marital dissolution agreement and an agreed parenting plan which designated Mother as the child's primary residential parent. Mother exercised 280 days of parenting time per year, and Father exercised 85 days of parenting time per year. The parenting plan provided the following statement regarding the parties' "day-to-day schedule":

> The parties acknowledge that the Father is currently serving in the Army and that his work schedule is not set. Therefore, the parties agree that, for so long as the Father is stationed in the Knoxville, Tennessee area, he shall have parenting time with the minor child at least six overnights per month with the exact times and days to be agreed upon by the parties with reasonable prior notice of Father's requested days.
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> In the event the Father is relocated for a reasonable purpose which is related to his employment, the parties shall work together to agree on a parenting schedule that is reasonable and in the minor child's best interest. In the event the parties are unable to agree, either party may petition the Court to set a specific parenting schedule.

On July 24, 2013, Father filed a Petition to Modify Alimony, Child Support, and for Contempt, alleging, among other things, that a material change of circumstances had arisen such that he should be designated the child's primary residential parent. On September 13, 2013, Mother responded and filed a counter-petition requesting the court to modify the parties' residential schedule so that the child could spend less time traveling between the parties' homes, especially during the school year. On October 14, 2013, Father amended his petition and alleged the following material changes in circumstances: the child was now school age; Mother had withheld parenting time and information regarding school activities and aftercare; Father had relocated to West Tennessee; Father had remarried and the child now has step-siblings; and Mother had been initiating arguments regarding parenting time.

The trial court held a hearing on March 4, 2015, at which the parties; the child's first and second grade teachers; April Galaway, Father's new wife; Jerry Galaway, the child's paternal grandfather; and Angie Hartlow, Mother's friend, testified. Father described the changes that have occurred in his professional and personal life since the entry of the parties' agreed parenting plan in 2010. During the parties' marriage, Father was deployed three times with the 49th Platoon, once to Afghanistan and twice to Iraq. Following the divorce, Father sustained an injury to his knee which left him unable to be deployed on military missions. He testified that at the time of the divorce, he was stationed in Knoxville with the U.S. Army Reserve and lived in an apartment duplex. He has since moved from Knoxville to West Tennessee and lives in a larger home "in the country." Father's work schedule in West Tennessee is far more flexible than it was when he was stationed in Knoxville.

Father stated that he has re-married and now has two step-children who are very close with the parties' daughter. Father testified that if the child lived with him she would not have to attend aftercare after school. Father acknowledged that he did not believe the

current residential schedule was working for the child, stating that her visiting him three weekends per month "is harsh and a lot of travel." Father stated that his interests parallel that of the child and that he purchased her a firearm for Christmas so she could practice her marksmanship. Father testified that prior to his re-marriage, he exercised more parenting time with the child than was outlined in the parenting plan, but that once he re-married, the communication between the parties deteriorated and the parties interpreted the parenting plan differently. Father described disagreements between himself and Mother regarding the child's eating habits and treatment of the child's constipation. Father testified that the child is often sad to leave at the end of visitation with him.

The child's first and second grade teachers testified that the child was well-adjusted and performed well in school. Her first grade teacher described the child as "positive, very bubbly . . . [and] smart." Both teachers testified that Mother was very involved in the classroom and Father had participated in a few school-related events, like a parent-teacher conference and an open house.

April Galaway, Father's wife and the child's step-mother, testified regarding the positive relationships between her biological children and the child. She testified the child often seems upset to leave when the time comes for her to go back to Mother's home. Ms. Galaway testified that she treats the child in the same manner she treats her own biological children. She stated that her relationship with Mother is strained, and she described one particular interaction where Mother "made a scene" at a "meet the teacher night" at the child's school.

Jerry Galaway, the child's paternal grandfather, testified that he has lived with Father and Ms. Galaway in their home for about a year and a half since his wife passed away. He testified that he loved the child and enjoyed taking her fishing. He testified regarding his monthly retirement income. He stated that he had not been around Mother more than once or twice since the parties divorced. Angie Hartlow, a long-time friend of Mother, testified next. She described the relationship between Mother and the child as "very warm and very nurturing."

Mother testified that she works full-time in the mortgage and real estate industry. She stated that during the parties' marriage she was the child's primary caregiver, and after the divorce she has continued in that role. She takes the child to school every day and picks her up from a YMCA aftercare program at the end of her workday. Mother testified that she and the child are very involved in their church. Mother acknowledged that Father may have exercised more than 85 days of parenting time following the divorce, but she stated that the decrease in Father's parenting time was a result of the child starting school, not his remarriage. Mother testified that the constant travelling on the weekends seemed to be stressful for the child. Specifically, Mother stated:

> [The child] was very tired. She had no time at home. She had just started kindergarten. So that was a big enough transition. . . .
>
> The exchanges became very difficult. . . . [A]fter she started kindergarten, that's when she started acting out, being very anxious about going to her dad's, telling me she didn't want to go. . . .
>
> I believe that with her being tired and her constipation, I believe it was because she was going back and forth.

Mother testified that she believes Father and the child "love each other," but she does not believe it is in the child's best interest for Father to be named the primary residential parent.

On March 25, 2015, the trial court entered an order holding that there had not been a material change of circumstance warranting a change in the primary residential parent. With respect to the residential parenting schedule, the court found a material change in circumstance had occurred. Specifically, the court found:

> Since the Court last addressed parenting, the child is five years older and moved from daycare to elementary school. The Father has relocated a distance even further from the Mother's residence than was the case at the time the original parenting plan was approved. The distance and number of overnights provided under the original Parenting Plan per month (up to three weekends per month) and the uncertainty of the Father's schedule are wearing on both the Mother and the child. The Court finds the current arrangement is not in the best interest of the minor child. The Court finds by a preponderance of the evidence that there has been a material change of circumstance to justify the modification of the residential parenting schedule of the Father.

The court held that the current schedule was not in the best interest of the child. The court prepared a parenting plan that minimizes the child's travel schedule by reducing the Father's parenting time during the school months and increasing his parenting time during the summer. The new residential parenting schedule awarded Mother 279 days of parenting time and Father 86 days of parenting time. The court prepared a new child support worksheet which resulted in a modification of Father's child support obligation. Finally, the court denied Father's request to terminate alimony and awarded Mother $18,000 in attorney's fees. Father appeals, raising two issues for our consideration: (1) whether the trial court erred in failing to find a material change in circumstances warranting a change in the primary residential parent and (2) whether the trial court's award of attorney's fees was appropriate.

## STANDARD OF REVIEW

Our review of the trial court's findings of fact in a non-jury case is de novo, with a presumption that the findings are correct unless the evidence preponderates otherwise. TENN. R. APP. P. 13(d); *Armbrister v. Armbrister*, 414 S.W.3d 685, 692 (Tenn. 2013); *Kendrick v. Shoemake*, 90 S.W.3d 566, 570 (Tenn. 2002). "[F]or the evidence to preponderate against a trial court's finding of fact, it must support another finding of fact with greater convincing effect." *Nashville Ford Tractor, Inc. v. Great Am. Ins. Co.*, 194 S.W.3d 415, 425 (Tenn. Ct. App. 2005). We review issues of law de novo, giving no presumption of correctness to the trial court's conclusions. *Armbrister*, 414 S.W.3d at 692; *Kendrick*, 90 S.W.3d at 569-70.

## ANALYSIS

### *Modification of the Primary Residential Parent*

With respect to a petition to modify a permanent parenting plan to change the primary residential parent, the threshold issue is whether there has been a material change of circumstances since the plan took effect. *See* Tenn. Code Ann. § 36-6-101(a)(2)(B); *Cranston v. Combs*, 106 S.W.3d 641, 644 (Tenn. 2003). In this context, a material change of circumstance "may include, but is not limited to, failures to adhere to the parenting plan or an order of custody and visitation or circumstances that make the parenting plan no longer in the best interest of the child." Tenn. Code Ann. § 36-6-101(a)(2)(B). Although there are no bright-line rules for determining whether a material change of circumstances has occurred, courts should consider: "(1) whether a change has occurred after the entry of the order sought to be modified; (2) whether a change was not known or reasonably anticipated when the order was entered; and (3) whether a change is one that affects the child's well-being in a meaningful way." *Cranston*, 106 S.W.3d at 644. If the trial court finds that there has been a material change in circumstances, only then must it determine whether it is in the child's best interest to modify the parenting plan as requested. *Boyer v. Heimermann*, 238 S.W.3d 249, 259 (Tenn. Ct. App. 2007).

A trial court's determinations as to "whether a material change in circumstances has occurred and whether modification of a parenting plan serves a child's best interests are factual questions." *Armbrister*, 414 S.W.3d at 692. The Court of Appeals has noted that trial courts have broad discretion in determining which parent should be the primary residential parent and appellate courts are reluctant to second guess a trial court's decision on this issue. *Reinagel v. Reinagel*, M2009-02416-COA-R3-CV, 2010 WL 2867129, at *4 (Tenn. Ct. App. July 21, 2010); *Scofield v. Scofield*, M2006-00350-COA-R3-CV, 2007 WL 624351, at *2 (Tenn. Ct. App. Feb. 28, 2007); *see Armbrister*, 414 S.W.3d at 693 (opining that trial courts have broad discretion to work out details of parenting plans). According to the *Armbrister* Court, a trial court abuses its discretion

when it:

> appl[ies] an incorrect legal standard, reaches an illogical result, resolves the case on a clearly erroneous assessment of the evidence, or relies on reasoning that causes an injustice.

*Id.* (quoting *Gonsewski v. Gonsewski*, 350 S.W.3d 99, 105 (Tenn. 2011)).

Father contends the trial court erred in failing to find a material change had occurred since the parenting plan took effect. As the parent requesting the change in primary residential parent, Father had the burden of proving a material change in circumstance had occurred by a preponderance of the evidence. Tenn. Code Ann. § 36-6-101(a)(2)(B). Not every change in circumstance is a material change. "The change must be 'significant' before it will be considered material." *In re T.C.D.*, 261 S.W.3d 734, 744 (Tenn. Ct. App. 2007). Moreover, this Court has explained that a material change in circumstance is a change that "affect[s] the child's well-being in a meaningful way." *Gentile v. Gentile*, No. M2014-01356-COA-R3-CV, 2015 WL 8482047, at *6 (Tenn. Ct. App. Dec. 9, 2015) (citing *Birdwell v. Harris*, No. M2006-01919-COA-R3-JV, 2007 WL 4523119, at *7 (Tenn. Ct. App. Dec. 20, 2007); *Gervais v. Gervais*, No. M2005-01483-COA-R3-CV, 2006 WL 3258228, at *6 (Tenn. Ct. App. Nov. 9, 2006); *Williams v. Williams*, No. E2004-00964-COA-R3-CV, 2005 WL 524810, at *2 (Tenn. Ct. App. Mar. 7, 2005)).

Here, Father asserts that his remarriage and the existence of new step-siblings; the child's increased age and maturity level; Father's move to a new home in West Tennessee; the child's participation in an after-school program; and the breakdown of communication between Mother and Father constitute material changes in circumstance warranting a change in the primary residential parent. We have reviewed the record and have determined that the evidence does not preponderate against the trial court's determination that these changes do not amount to a material change in circumstance for purposes of modifying the primary residential parent. It is true that the child has new step-siblings and, by all accounts, she enjoys spending time with Father at his new home in West Tennessee. The child does attend aftercare some days after school, and Mother and Father have experienced tension in their communications related the child's schedule. However, Father has failed to demonstrate that these changes affect the child's well-being in a meaningful way. As we have explained, not every change in a child's life or the life of her parents rises to the level of a material or significant change warranting a change in her primary residential parent. *See Rigsby v. Edmonds*, 395 S.W.3d 728, 736 (Tenn. Ct. App. 2012) ("The fact that a child gets a year older every year, inevitable as it is, cannot be regarded on its own as inherently a material change of circumstances for purposes of altering the primary residential parent."); *In re T.C.D.*, 261 S.W.3d at 744 ("A marriage of either parent does not, in and of itself, constitute a material change of

circumstances warranting a change in custody."). Therefore, we affirm the trial court's holding that Father failed to meet his burden to prove that a material change in circumstance, as described in Tenn. Code Ann. § 36-6-101(a)(2)(B), has occurred. [1]

*Attorney's Fees*

The trial court ordered Father to pay $18,000 of Mother's attorney's fees, which was only a portion of the fees Mother requested. Father argues that the trial court erred in awarding Mother her attorney's fees as "in solido alimony." Mother requests her fees on appeal.

Tennessee abides by the American Rule regarding the payment of attorney fees. *State v. Brown & Williamson Tobacco Corp.*, 18 S.W.3d 186, 194 (Tenn. 2000). The rule requires litigants to pay their own attorney fees unless a statute or an agreement provides otherwise. *Id.* Tennessee Code Annotated section 36-5-103(c) applies in cases involving alimony, child support, and "custody or the change of custody" and provides:

> 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.

As an alternate or additional basis for awarding fees in cases involving a post-divorce request to modify alimony, this Court has relied on the general principles applicable to initial awards of alimony in divorce cases as authority to award attorney's fees to a spouse who defended against a petition to reduce or eliminate an alimony obligation. *See Evans v. Evans*, No. M2002-02947-COA-R3-CV, 2004 WL 1882586, at *15 (Tenn. Ct. App. Aug. 23, 2004) (discussing cases in which this Court affirmed a spouse's entitlement to attorney's fees when the spouse defended a challenge to her receipt of alimony); *Seal v. Seal*, 802 S.W.2d 617, 624 (Tenn. Ct. App. 1990) (noting that a spouse should not have to pay the cost of defending her entitlement to alimony); *see also*

[1] We note that Father has not appealed the trial court's finding that a material change in circumstances has occurred regarding the parties' residential schedule. *See* Tenn. Code Ann. § 36-6-101(a)(2)(C); *Armbrister*, 414 S.W.3d at 703 (discussing the "very low threshold" for establishing a material change of circumstances when a party seeks to modify a residential parenting schedule).

*Eldridge v. Eldridge*, 137 S.W.3d 1, 24 (Tenn. Ct. App. 2002) ("In a divorce case, an award of attorney's fees is treated as an award of alimony *in solido*.").

Most importantly, it is well settled that an award of attorney's fees is "largely in the discretion of the trial court, and the appellate court will not interfere except upon a clear showing of abuse of that discretion." *Aaron v. Aaron*, 909 S.W.2d 408, 411 (Tenn. 1995) (citations omitted). A trial court abuses its discretion when it applies an incorrect legal standard, reaches a result that is not logical, decides a case based on an assessment of the evidence that is clearly erroneous, or relies on reasoning that results in an injustice to an interested party. *Gonsewski*, 350 S.W.3d at 105.

With respect to the award of $18,000 in attorney's fees, the trial court stated as follows:

> The Wife requests attorney's fees and other expenses in the amount of $28,541.32. This is comprised of $27,255 in attorney's fees and $1,286.32 in related expenses. The Court first notes that billable hours on counsel's affidavit begin in September of 2010, long before the subject petition of the Father was filed. The Court will not consider expenses prior to 6/21/13 and has therefore deducted $1,436.25 from the requested attorney's fees. The Father was not successful on his two primary goals of changing the Primary Residential Parent and terminating the Mother's alimony. The Mother, however, was successful in her petition to modify the Father's residential time. The Court finds that the Mother is entitled to a portion of her reasonable attorney's fees in the amount of $18,000 and is awarded a judgment against the Father in said amount as in *solido alimony* for which execution may issue if necessary.

Considering Mother's success in enforcing the trial court's prior order regarding alimony and defending against Father's efforts to change the primary residential parent, we find no abuse of the trial court's discretion in deciding to award Mother a portion of her attorney's fees.

Mother has requested her attorney's fees on appeal. Exercising our discretion, we respectfully deny this request.

## CONCLUSION

For the foregoing reasons, we affirm the circuit court in all respects. Costs of the appeal are assessed against Father, for which execution may issue if necessary.

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ANDY D. BENNETT, JUDGE