IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs October 1, 2020

BENJAMIN G. PALMER v. JENNIFER J. PALMER

Appeal from the Circuit Court for Montgomery County
No. CC 2011-CV-2280 Ross H. Hicks, Judge

No. M2019-02071-COA-R3-CV

In this case arising from a divorce, the father of the parties' minor child petitioned to modify the existing parenting plan which he and the mother had agreed to in mediation approximately eight months earlier. Finding that the petition's allegations were unsubstantiated and that the father had failed to prove by a preponderance of the evidence that there had been a material change of circumstances that affected the child's best interest, the trial court dismissed the father's petition. The trial court awarded the mother attorney fees. Discerning no error, we affirm the trial court's judgment.

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

JOHN W. MCCLARTY, J., delivered the opinion of the court, in which J. STEVEN STAFFORD, P.J., W.S., and W. NEAL MCBRAYER, J., joined.

Gregory D. Smith, Clarksville, Tennessee, for the appellant, Benjamin G. Palmer.

Kimberly G. Turner, Clarksville, Tennessee, for the appellee, Jennifer J. Palmer.

OPINION

I. BACKGROUND

Jennifer Joy Palmer ("Mother") and Benjamin Grove Palmer ("Father") have a daughter ("the child") who was born in September of 2010. Following the parties' 2012 divorce, the original parenting plan ordered by the trial court designated Mother as the primary residential parent, specified that Mother would have 330 days of parenting time, and specified that Father would have 35 days of supervised parenting time with the child.

Father relocated to Connecticut.

On June 1, 2017, Father petitioned for civil contempt and to modify the parenting plan and child support. Following Mother's counter-petition for contempt, the parties resolved their issues through mediation. On October 20, 2017, the trial court ordered that the mediated agreement be enforced, adopted the agreed mediated parenting plan, resolved the contempt actions against the parties, and addressed Father's child support and arrearage. The agreed mediated parenting plan modified the original parenting plan and provided that: Mother would continue to be the primary residential parent with 320 days of parenting time; Father would exercise 45 days of parenting time; Father's visitation with the child would become unsupervised after he completed one weekend of visitation in Clarksville, Tennessee; the child would not fly unaccompanied; Father would pay long-distance transportation costs and would fly with the child to and from the Nashville airport; and Mother would make all major decisions regarding the child.

Less than nine months later, on July 5, 2018, Father again petitioned for civil contempt, to modify child support, and to modify the parenting plan. In his petition, Father alleged that Mother interfered with his parenting time in various ways and requested an increase in visitation based on the "bond and loving relationship" the child had formed with Father, the stepmother, and the stepsibling since the entry of the previous parenting plan. Following Mother's counter-petition for civil contempt, the parties mediated an agreement as to the division of the child's yearly Christmas vacation. All other matters were heard by the trial court on September 11, 2019.

During the testimony, it became apparent that little had truly changed since the 2017 parenting plan had been implemented. By order entered November 1, 2019, the trial court determined that the allegations in Father's petition were "not substantiated" and that there had been "no substantial and material change in circumstance as it concerns child custody." Thus, the court ordered that, except for the previously agreed upon change to the child's Christmas vacation, the 2017 parenting plan would remain in place. The court ordered that Mother's income be imputed at minimum wage and modified Father's child support obligation. The court further found that: Mother had not deliberately interfered with Father's ability to contact the child; Mother's communications with Father were "somewhat unreasonable;" and Father's language in his communications with Mother was "definitely unreasonable." Accordingly, the trial court dismissed Father's petition to modify the parenting plan and for civil contempt. In granting Mother's counter-petition for civil contempt, the trial court sentenced Father to ten days in jail for failure to provide income tax returns, but suspended the sentence because Father provided the tax returns on the day of trial. The trial court found both parties in contempt for their failure to attend a parenting class, but suspended the sentences because each party provided proof of completion within two weeks after trial. Both parties were ordered to read the parenting plan once a month. Finally, the trial court awarded Mother $5,000 for attorney fees. Father appealed.

II. ISSUES

Father raises two issues on appeal: (1) Whether "the trial court erred in not finding a material change in circumstances existed in this case" and (2) Whether "the trial court erred in awarding attorney fees."

III. STANDARD OF REVIEW

"A trial court's determinations of 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 v. Armbrister*, 414 S.W.3d 684, 692 (Tenn. 2013) (citing *In re T.C.D.*, 261 S.W.3d 734, 742 (Tenn. Ct. App. 2007)). Therefore, "appellate courts must presume that a trial court's factual findings on these matters are correct and not overturn them, unless the evidence preponderates against the trial court's findings." *Id.*; *see also* Tenn. R. App. P. 13(d). Likewise, trial courts have "broad discretion in formulating parenting plans" because they "are in a better position to observe the witnesses and assess their credibility." *C.W.H. v. L.A.S.*, 538 S.W.3d 488, 495 (Tenn. 2017) (citing *Armbrister*, 414 S.W.3d at 693). On appeal, we review a trial court's decision regarding parenting schedules for an abuse of discretion. *Armbrister*, 414 S.W.3d at 693 (citing *Eldridge v. Eldridge*, 42 S.W.3d 82, 88 (Tenn. 2001)). "An abuse of discretion occurs when the trial court . . . 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." *Gonsewski v. Gonsewski*, 350 S.W.3d 99, 105 (Tenn. 2011). A trial court abuses its discretion in establishing a residential parenting schedule "only when the trial court's ruling falls outside the spectrum of rulings that might reasonably result from an application of the correct legal standard to the evidence found in the record." *Eldridge*, 42 S.W.3d at 88. We review questions of law de novo, affording the trial court's decision no presumption of correctness. *Armbrister*, 414 S.W.3d at 692 (citing *Mills v. Fulmarque*, 360 S.W.3d 362, 366 (Tenn. 2012)).

IV. DISCUSSION

1.

To modify an existing parenting plan, the trial court must first determine whether a material change in circumstances has occurred. *Armbrister*, 414 S.W.3d at 697–98 (citing Tenn. Code Ann. § 36-6-101(a)(2)(C)). "The petitioner . . . must prove by a preponderance of the evidence a material change of circumstance affecting the child's best interests, and the change must have occurred after entry of the order sought to be modified." *Gentile v.*

Gentile, No. M2014-01356-COA-R3-CV, 2015 WL 8482047, at *5 (Tenn. Ct. App. Dec. 9, 2015) (citing *Caldwell v. Hill*, 250 S.W.3d 865, 870 (Tenn. Ct. App. 2007)). "[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; significant changes in the parent's living or working condition that significantly affect parenting; 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." Tenn. Code Ann. § 36-6-101(a)(2)(C). If a material change in circumstances is found, the court must then determine whether a modification of the parenting plan is in the child's best interest in consideration of the factors set forth in Tennessee Code Annotated section 36-6-106(a). *Armbrister*, 414 S.W.3d at 697–98. "Facts or changed conditions which reasonably could have been anticipated when the initial residential parenting schedule was adopted may support a finding of a material change in circumstances, so long as the party seeking modification has proven by a preponderance of the evidence 'a material change of circumstance affecting the child's best interest.'" *Armbrister*, 414 S.W.3d at 704 (quoting Tenn. Code Ann. § 36-6-101(a)(2)(C)).

First, Father briefly argues that the trial court erred by applying the wrong legal standard to determine whether he had established a material change of circumstance for purposes of modifying the residential parenting schedule. He points to the trial court's statement wherein the court used the words "substantial change" instead of "material change":

> All right. The first thing that makes Mr. Palmer's petition for modification somewhat suspect is that it was filed in July of 2018, which was only about eight to nine months after the entry of this Court's order in October of 2017, which followed on, very closely, to a mediation which occurred a short time before that. And it's just hard for the Court to accept that—the concept that we have a substantial change of circumstances in that short a period of time.

Later in its oral ruling, the trial court stated:

> And I would just remind everyone that in two thousand—October 2017, there was an agreement about what was in the best interest of the child. And there is no proof before me that that should—that changed in any material way prior to July of 201[8] when this petition was filed, and there's no evidence before me that it's happened since.

In its final order, the trial court ruled that there was no proof that anything affecting the child's best interest had "changed in a material way prior to this Petition being filed in July 2018 and there has been presented no evidence that such a change has happened since." Both the trial court's final order and the record indicate that the trial court applied the correct legal standard to the proof. The trial court was looking for, but did not find, a

material change of circumstance affecting the child's best interest. Thus, we find no merit in Father's first argument.

Father seeks modification of the parenting plan to include more parenting time. At trial he summarized his request as follows:

> Q. And so currently you have 45 days?
>
> A. Currently.
>
> Q. And are you just asking for more block time in the summer?
>
> A. I'm asking—due to Connecticut and Tennessee being on different time schedule[s] when it comes to school, I'm asking from—we move June to July, usually a week. I'm asking for additional two weeks in the summer and then the two fall and spring, yes.
>
> Q. Spring and fall breaks? And the reason why you want the time changed, is that because—so it coincides with your son's schedule as well?
>
> A. Yes.

Father further testified that his work now offers a more flexible schedule, an increase in pay, and the ability to take sick leave and annual leave. However, "[n]ot every change in the circumstances of either a child or a parent will qualify as a material change in circumstances. The change must be 'significant' before it will be considered material." *Boyer v. Heimermann*, 238 S.W.3d 249, 257 (Tenn. Ct. App. 2007). Here, the evidence adduced at trial failed to establish that the change in Father's work schedule was significant or significantly impacted his parenting. Tenn. Code Ann. § 36-6-101(a)(2)(C). We conclude that the evidence presented does not preponderate against the trial court's determination that the changes asserted by Father do not amount to a material change in circumstances for purposes of modifying the parenting plan.

Father also seeks joint decision-making authority with Mother and to change the transportation arrangement so that the child can fly to and from Connecticut either unaccompanied or accompanied by Mother. The child was seven years old when the October 2017 agreed parenting plan was ordered, and was not yet eight years old when Father filed the petition. The child was nine years old at the time of trial. When Father filed the petition, the child had traveled on three roundtrip flights accompanied by Father. He alleged that the transportation arrangement causes him to miss "an entire day of work which prevents him from maximizing his paid time off to enjoy time with the child." He further alleged that the child had "become comfortable with flying and does not express any anxiety to fly alone." At trial, Father suggested that Mother should accompany the

child on flights because it was "time for [Mother] to take some responsibility for the child and help [him] out." Father was unwilling to ask his current wife to fly with the child, despite Mother's agreement, reasoning, "it's not her daughter. It's us." The trial court found that although the child may fly unaccompanied in the future, it was not yet appropriate for her to fly from Tennessee to Connecticut unaccompanied, "particularly when she has some special needs." The evidence does not preponderate against the trial court's finding on this point, particularly considering the lack of evidence that flying unaccompanied or with Mother would serve the *child's* best interest as opposed to Father's convenience or his desire to place additional responsibility on Mother.

A central point of contention between the parties is whether Father and Mother should share decision-making authority as to the child. As the trial court observed when admonishing both parties, Mother and Father do not communicate effectively enough to make joint decisions on major issues. The evidence adduced at trial showed their frequent bickering, Father's use of very vulgar language toward Mother, and Father's repeated threats of litigation against Mother. Based on this record, we, like the trial court, do not find proof of a material change of circumstance such that it would be in the child's best interest to modify the parenting plan to allow joint decision-making between the parents.

In sum, there is insufficient evidence in the record to support Father's claim that a material change of circumstance occurred in the eight or so months following the October 2017 parenting plan. Because Father did not establish a material change of circumstance that affected the child's best interest under Tennessee Code Annotated section 36-6-101(a)(2)(C), we have no need to conduct a best interest analysis. *See Armbrister*, 414 S.W.3d at 697–98. Because the evidence does not preponderate against the trial court's findings, we affirm the trial court's judgment as to modification of the parenting plan.

2.

Father asserts that the trial court erred in awarding Mother $5,000 for attorney fees incurred in her civil contempt action against Father. Tennessee Code Annotated section 36-5-103(c) provides:

> A prevailing party may recover reasonable attorney's fees, which may be fixed and allowed in the court's discretion, from the non-prevailing party in any criminal or civil contempt action or other proceeding to enforce, alter, change, or modify any decree of alimony, child support, or provision of a permanent parenting plan order, or in any suit or action concerning the adjudication of the custody or change of custody of any children, both upon the original divorce hearing and at any subsequent hearing.

"Tennessee courts long have recognized that the decision to grant attorney's fees under section 36-5-103(c) is largely within the discretion of the trial court and that, absent an

abuse of discretion, appellate courts will not interfere with the trial court's finding." *Eberbach v. Eberbach*, 535 S.W.3d 467, 475 (Tenn. 2017).

Father contends that the trial court's basis for the fee award was unclear. He further argues that Mother was not the prevailing party because the trial court found both parties in contempt for their failure to complete the parenting class. "[A] party need not prevail on every issue raised in litigation in order to be deemed the prevailing party." *RCK Joint Venture v. Garrison Cove Homeowners Ass'n*, No. M2013-00630-COA-R3-CV, 2014 WL 1632147, at *5 (Tenn. Ct. App. Apr. 22, 2014). We find Father's arguments unavailing. The basis for the attorney fee award is apparent from Mother's testimony that she incurred expenses in pursuing a meritorious contempt action against Father and in defending against Father's petition to modify the parenting plan that the parties agreed to in mediation eight months earlier. The trial court dismissed Father's contempt action and petition for modification of the parenting plan, and found Father in contempt as alleged by Mother.[1] Thus, Mother was the prevailing party under Tennessee Code Annotated section 36-5-103(c).

With the above considerations in mind, we find that the trial court's decision to award a $5,000 attorney fee to Mother was both reasonable and within the range of acceptable alternatives. Accordingly, we affirm the trial court's decision.

V. CONCLUSION

We affirm the judgment of the trial court. The case is remanded for such further proceedings as may be necessary and consistent with this opinion. Costs of the appeal are taxed to the appellant, Benjamin G. Palmer.

JOHN W. McCLARTY, JUDGE

[1] Father's 10-day jail sentence was suspended because his counsel's office delivered his missing tax returns to the courtroom midway through trial.