IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
January 18, 2023 Session

KATHERINE MECHELLE STOOKSBURY v. MATTHEW D. VARNEY

Appeal from the Juvenile Court for Knox County
No. 123969 Steven Lane Wolfenbarger, Judge

No. E2021-01449-COA-R3-JV

This appeal concerns a father's continued failure to remit payment for his child support obligation. Following the mother's contempt petitions, the trial court determined the father's current child support obligation and arrearage amount and awarded the mother her attorney fees. The father appeals arguing that the trial court lacked subject matter jurisdiction, erred in awarding the mother attorney fees, and erred in setting the arrearage payment amount. We affirm the trial court's rulings on these issues.

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

JOHN W. MCCLARTY, J., delivered the opinion of the court, in which THOMAS R. FRIERSON, II, and KRISTI M. DAVIS, JJ., joined.

Lance A. Evans and Andrew O. Beamer, Maryville, Tennessee, for the appellant, Matthew D. Varney.

Charles H. Child and Sloane Renee Davis, Knoxville, Tennessee, for the appellee, Katherine Mechelle Stooksbury.

OPINION

I. BACKGROUND

This case involves the nonpayment of child support. Appellee Katherine Mechelle Stooksbury ("Mother") and Appellant Matthew D. Varney ("Father") have one minor child together. In 2017, the Knox County Juvenile Court recognized Father's parentage of the child, set forth his current child support obligation, and entered a permanent parenting plan. In addition, the trial court determined Father's outstanding child support arrearage and

ordered Father to pay half of the birth costs, his remaining share of fees owed to Dr. Diana McCoy for a psychological evaluation, and Mother's attorney fees.

In early 2018, Dr. McCoy filed a show cause motion in the Juvenile Court for Knox County.[1] By order of the Tennessee Supreme Court on April 16, 2018, the Honorable Darryl W. Edmondson, a General Sessions Judge with Juvenile Court jurisdiction in Union County, Tennessee, was assigned to hear the post-trial matter by interchange.

Thereafter, on May 22, 2018, Mother filed a petition for contempt ("2018 petition") alleging that Father failed to remit support payments as required. The court in which Mother filed the 2018 petition is a matter of some dispute. Mother contends that the 2018 petition was filed in Knox County Juvenile Court and bears a Knox County Juvenile Court docket number. Father asserts that it was filed in Union County Juvenile Court. The 2018 petition is not in the appellate record. Regardless, Mother's filings were apparently erroneously transmitted to the Union County Juvenile Court, where Judge Edmondson regularly sits. It is unclear when this transmittal occurred. Ultimately, however, Mother's 2018 petition was assigned both a Knox County docket number and a Union County docket number.

On July 5, 2018, Father filed answers to Mother's 2018 petition and Dr. McCoy's show cause motion, generally denying all allegations made. Both answers were captioned in Union County, filed in Union County, and only bore the Union County docket number.

On August 7, 2018, all parties appeared before Judge Edmondson relative to Mother's 2018 petition and Dr. McCoy's motion. On September 6, 2018, the trial court entered an order specifically noting that Judge Edmondson was sitting by interchange and finding that Father had paid nothing toward the birth costs, attorney fee award, or child support except for one payment of $500.00 just prior to coming to court. Judge Edmondson reserved ruling on the final amount owed to allow Mother's counsel to submit an affidavit regarding his attorney fees and to verify Father's compliance with the court's order. The matter was continued to September 18, 2018, by an order captioned in Knox County but still bearing a Union County docket number.

Father failed to appear at the September 18, 2018 hearing. On that day, the trial court entered two orders. In the first September 18 order, the trial court found Father in contempt for failure to appear and reserved the question of whether Father had complied with its September 6, 2018 order. This first order was captioned "In the Juvenile Court for Knox County, Tennessee" but listed the Union County docket number. Upon its discovery of these clerical errors, the trial court, *sua sponte*, issued a second order dated September 18, 2018, which was styled, "Order Setting Aside and Vacating in its Entirety that

[1] Dr. McCoy's show cause motion is not in the appellate record.

Contempt Finding and Order Previously Entered in the Above Styled Cause."[2] The trial court again acknowledged that it was sitting by interchange in Knox County and ordered all the previous filings to be corrected and styled "as in the Juvenile Court for Knox County, Tennessee with the proper case style and docket number. . . ." The trial court further ordered the Union County Juvenile Court to forward any improperly styled or designated orders, motions, and pleadings "to the Juvenile Court Clerk for Knox County, Tennessee for proper filing and designation as being filed in the Juvenile Court for Knox County, Tennessee."

Father filed a Rule 60 motion requesting for all orders entered on May 7, 2018, or later to be set aside.[3] Father also filed a motion to dismiss Mother's 2018 petition, stating that the "Juvenile Court for Union County, Tennessee does not have jurisdiction" and that the "Juvenile Court for Knox County, issued the Order for Child Support and has never relinquished Jurisdiction of this matter." Father also noted that, "The Honorable Judge Darrel (sic) Edmondson has heard this case through interchange, however at no time was he sitting as the Judge for the Juvenile Court for Union County."

The trial court held a hearing on May 17, 2019, at which Mother, Father, and Dr. McCoy appeared. On June 11, 2019, the trial court denied Father's motions and found Father in contempt for his failure to pay either Mother or Dr. McCoy.

Father appealed, and this Court ruled that neither the September 6, 2018 order nor the June 11, 2019 order were final appealable orders and remanded the case to the trial court. *Varney v. Stooksbury*, No. E2018-01812-COA-R3-JV, 2020 WL 2950555, at *5 (Tenn. Ct. App. June 3, 2020).

In the meantime, on December 17, 2019, Mother filed a second contempt petition alleging Father's continued failure to pay child support ("2019 petition"). This petition was filed in Knox County and bore a Knox County file stamp; however, the pleading was erroneously captioned for Union County. During the pendency of the proceeding, Father moved to modify his child support obligation. At some point, Judge Steven Wolfenbarger, a General Sessions Judge with Juvenile Court jurisdiction in Grainger County, Tennessee, was assigned to replace Judge Edmondson.[4]

The matter again proceeded to a hearing, where the trial court addressed the 2018 petition, the 2019 petition, and Father's motion to modify support. By orders entered

[2] The first September 18 order is not in the appellate record. However, it is evidenced in the record by the second September 18 order.

[3] This motion is not in the appellate record but is evidenced by the trial court's June 11, 2019 order.

[4] Judge Wolfenbarger's assignment to hear the case by interchange is not in the appellate record.

August 16, 2021, the trial court found Father in contempt for his failure to pay child support relative to both the 2018 and 2019 petitions. After granting Father a modification retroactive to March 2020, the trial court found that Father owed an arrearage of $85,521.15, including statutory interest. The trial court set Father's ongoing child support obligation at $543.00 per month, ordered an arrearage payment of $1,000 per month, and awarded Mother her attorney fees in the amount of $16,483.50.

Father appealed following the denial of post-trial motions.

II. ISSUES

We consolidate and restate the issues on appeal as follows:

(1) Whether the trial court had subject matter jurisdiction to consider the 2018 petition.

(2) Whether the trial court erred in awarding Mother attorney fees.

(3) Whether the trial court erred in setting Father's monthly arrearage payment at $1,000.

(4) Whether Mother is entitled to attorney fees on appeal.

III. STANDARD OF REVIEW

We review a non-jury case de novo upon the record, with a presumption of correctness as to the findings of fact unless the preponderance of the evidence is otherwise. *See* Tenn. R. App. P. 13(d); *Bowden v. Ward*, 27 S.W.3d 913, 916 (Tenn. 2000). "In order for the evidence to preponderate against the trial court's findings of fact, the evidence must support another finding of fact with greater convincing effect." *Wood v. Starko*, 197 S.W.3d 255, 257 (Tenn. Ct. App. 2006). This presumption of correctness applies only to findings of fact and not to conclusions of law. *Campbell v. Fla. Steel Corp.*, 919 S.W.2d 26, 35 (Tenn. 1996). The trial court's conclusions of law are subject to a de novo review with no presumption of correctness. *Blackburn v. Blackburn*, 270 S.W.3d 42, 47 (Tenn. 2008); *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993). The trial court's determinations regarding witness credibility are entitled to great weight on appeal and shall not be disturbed absent clear and convincing evidence to the contrary. *See Morrison v. Allen*, 338 S.W.3d 417, 426 (Tenn. 2011).

Regarding contempt matters specifically, "[a] trial court's use of its contempt power is within its sound discretion and will be reviewed by an appellate court under an abuse of discretion standard." *McLean v. McLean*, No. E2008-02796-COA-R3-CV, 2010 WL

2160752, at *3 (Tenn. Ct. App. May 28, 2010) (citing *Outdoor Mgmt., LLC v. Thomas*, 249 S.W.3d 368, 377 (Tenn. Ct. App. 2007)). Likewise, we review a trial court's award of attorney fees by an abuse of discretion standard. *See Wright v. Wright*, 337 S.W.3d 166, 176 (Tenn. 2011). Although this appeal primarily involves a contempt action, to the extent that child support issues are also involved, we review those decisions "using the deferential 'abuse of discretion' standard" as well. *Richardson v. Spanos*, 189 S.W.3d 720, 725 (Tenn. Ct. App. 2005). "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).

IV. DISCUSSION

1.

Father first argues that the trial court lacked subject matter jurisdiction over Mother's 2018 petition for contempt. Father argues that the 2018 petition was filed in Union County, that the Knox County Juvenile Court never relinquished exclusive jurisdiction, and that the trial court's orders relating to the 2018 petition are therefore void.

Initially, we note that the record before us on this issue is incomplete. It is the appellant's duty "to prepare the record which conveys a fair, accurate, and complete account of what transpired in the trial court regarding the issues which form the basis of the appeal." *In re M.L.D.*, 182 S.W.3d 890, 894 (Tenn. Ct. App. 2005); *see also* Tenn. R. App. P. 24. The Tennessee Rules of Appellate Procedure provide that the appealing party may either transmit the entire record on appeal or, instead, designate a portion of the record that is to be sent. Tenn. R. App. P. 24(a). These Rules also allow parties to correct and modify the record as may be necessary. *See* Tenn. R. App. P. 24(a), (e), and (g).

Here, Father elected not to transmit the entire record on appeal and instead designated the portion of the record that he deemed necessary to his issues on appeal. However, critically, Father failed to include the 2018 petition in the record. Even after the trial court granted Father's motion to supplement the record, Father did not include the 2018 petition. Failing to do so significantly hinders appellate review because Father's argument hinges on his contention that Mother's 2018 petition was filed in Union County rather than Knox County as Mother contends. Without the 2018 petition itself, there is simply insufficient evidence in the record to support Father's conclusory allegations.

Nevertheless, we have reviewed the record, which shows that on April 16, 2018, the Chief Justice of the Tennessee Supreme Court appointed Judge Edmondson to hear post-trial matters in this case. Rule 11 of the Rules of the Tennessee Supreme Court provides that the Chief Justice may ". . . designate and assign temporarily any judge or chancellor

to hold, or sit as a member of any court, of comparable dignity or equal or higher level, for any good and sufficient reason." Tenn. R. Sup. Ct. 11(I)(1). When a judge is sitting by interchange, "the judge or chancellor holding court in the circuit or division of another, shall have the same power and jurisdiction as the judge or chancellor in whose place the judge or chancellor is acting." Tenn. Code Ann. § 17-2-206. A judge sitting by interchange "shall not be required to be a resident of the county of the judge for whom such judge is sitting, but must otherwise possess the same qualifications as such judge." Tenn. Code Ann. § 17-2-208.

At the time he presided over this case, Judge Edmondson was a Juvenile Court judge for Union County. He possessed the same qualifications as the judge for whom he was sitting when he was appointed to hear this matter. Contrary to Father's argument, simply because Judge Edmondson was appointed a Juvenile Court judge in Union County does not mean that he heard the matter in the courts of Union County. He sat by interchange. Accordingly, at all times relevant, Judge Edmondson acted with the same power and jurisdiction as a Knox County Juvenile Court judge. *See* Tenn. Code Ann. § 17-2-206. The same holds true for Judge Wolfenbarger.

Father's argument appears to be that clerical errors in the captioning and filing of the pleadings and orders in this case ultimately deprived the trial court of subject matter jurisdiction. We acknowledge that such clerical errors exist, but we are not persuaded that these clerical errors robbed the trial court of subject matter jurisdiction. Indeed, some of the pleadings contain both a Union County docket number and a Knox County docket number. However, the trial court continuously acknowledged in its orders that both Judge Edmondson and Judge Wolfenbarger were presiding over the matter by interchange. The trial court also entered an order on September 18, 2018, in part to clarify the record with respect to these clerical errors. Although the clerical errors have caused a regrettable amount of confusion in the record, they do not deprive the trial court of subject matter jurisdiction. On this record, we cannot conclude that the trial court lacked subject matter jurisdiction.

2.

Father next argues that the trial court erred in granting Mother attorney fees. The trial court awarded Mother attorney fees of $16,483.50 based on a fee affidavit from her attorney and on Mother's testimony. Following a hearing, the trial court denied Father's arguments for the fees to be found unreasonable. We review a trial court's award of attorney fees according to an abuse of discretion standard. *See Wright v. Wright*, 337 S.W.3d 166, 176 (Tenn. 2011).

Father offers three arguments regarding the reasonableness of the attorney fee award. First, Father argues that the trial court erred in awarding fees for the time period May 22, 2018, to December 17, 2019. Father's argument is based on his contention,

addressed above, that the trial court lacked subject matter jurisdiction between Mother's 2018 petition and her subsequent 2019 petition and that any attempt to collect attorney fees during which time the trial court lacked subject matter jurisdiction is improper. Because we have concluded that no basis exists in the record to find that the court lacked subject matter jurisdiction, we likewise conclude that there is no basis to overturn the award of attorney fees for work performed between May 22, 2018, and December 17, 2019.

Second, Father argues that the trial court's award of attorney fees is unreasonable. Tennessee Supreme Court Rule 8, Rule of Professional Conduct ("RPC") 1.5(a) directs that unreasonable attorney fees should not be charged or collected and provides a list of factors to determine the reasonableness of an attorney fee:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) the fee customarily charged in the locality for similar legal services;
> (4) the amount involved and the results obtained;
> (5) the time limitations imposed by the client or by the circumstances;
> (6) the nature and length of the professional relationship with the client;
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
> (8) whether the fee is fixed or contingent;
> (9) prior advertisements or statements by the lawyer with respect to the fees the lawyer charges; and
> (10) whether the fee agreement is in writing.

Tenn. R. Sup. Ct. 8, RPC 1.5(a). Comment 1 to RPC 1.5 clarifies that "the factors specified in (1) through (10) are not exclusive. Nor will each factor be relevant in each instance." Tenn. R. Sup. Ct. 8, RPC 1.5, Comment 1. Regarding the preference for a written fee agreement, RPC 1.5(b) further explains that:

> The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

Tenn. R. Sup. Ct. 8, RPC 1.5(b).

Father's argument that the trial court abused its discretion in finding Mother's attorney fees reasonable takes two tacks. First, he argues that Mother's counsel sent letters

instead of emails and that the number of letters sent was too many. Next, he argues that the fees were unreasonable because the fee agreement was not in writing.

We are unpersuaded. The trial court received Mother's counsel's attorney fee affidavit, gave Father the opportunity to review and object to line-items on the affidavit, inspected the affidavit, and specifically referred to the factors set forth in Tennessee Supreme Court Rule 8, RPC 1.5(a). Father has failed to provide any legal basis for his arguments that Mother's counsel should not have been able to bill for client communications sent via letter rather than email or that the lack of a written contract between Mother and her counsel alone prohibited an attorney fee award. Indeed, although written representation agreements are preferred, they are not required. *See* Tenn. R. Sup. Ct. 8, RPC 1.5(b).

Finally, Father argues that the trial court erred in finding that Mother and her attorney did not have a contingency fee arrangement. Father contends that the fee arrangement between Mother and her counsel violated Tennessee Supreme Court Rule 8, RPC 1.5(d), which provides that:

> (d) A lawyer shall not enter into an arrangement for, charge, or collect:
>
> (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or the award of custodial rights, or upon the amount of alimony or support, or the value of a property division or settlement, unless the matter relates solely to the collection of arrearages in alimony or child support or the enforcement of an order dividing the marital estate and the fee arrangement is disclosed to the court . . . .

Tenn. R. Sup. Ct. 8, RPC 1.5(d).

Father points to Mother's testimony that she was not sure how much she had paid her attorney, that she was not sure how much he charged per hour, that she did not have a contract with her attorney, that she had never been billed, and that she had made no payment in at least three years.

Father has construed Mother's counsel's leniency in collecting payments as a *de facto* contingency fee; however, such a conclusion is not supported by the record. Comment 2 to Tennessee Supreme Court Rule 8, RPC 1.5 elaborates that, "when the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible." Tenn. R. Sup. Ct. 8, RPC 1.5, Comment 2. Father has failed to demonstrate that Mother and her counsel had the sort of contingency fee agreement forbidden by RPC 1.5(d)(1).

Rather, the record shows that, although there was not a written representation agreement, Mother, her family, and her attorney had a longstanding relationship that allowed counsel the ability to charge Mother, a "regularly represented client" within the meaning of RPC 1.5(b), his regular, longstanding hourly rate. Mother testified that she and her family had been represented by her attorney for numerous years on numerous matters. She testified that she had been told her attorney's hourly billing rate when he began representation and that he had maintained his time records. Although Mother did testify at one point that she was unsure of her counsel's hourly rate, she later testified that she had reviewed itemized affidavits of her counsel's time and hourly rate. She also testified that she had made a payment to her attorney. Mother further testified that she did not currently have the financial ability to pay her attorney's bill because of the significant child support arrearage she was owed by Father.

With the above considerations in mind, we conclude that the trial court properly found that Mother's fee arrangement with her attorney did not violate Tennessee Supreme Court Rule 1.5(d) and that the trial court did not abuse its discretion in its award of attorney fees to Mother.

3.

Father next argues that the trial court abused its discretion in setting his child support arrearage payment at $1,000 per month. Father contends this amount violates the 50% ceiling set in Tennessee Code Annotated section 36-5-501(a)(1).

As of May 21, 2021, Father owed a child support arrearage of $85,521.15 plus interest. Father testified, and the trial court found, that his income was $4,000 per month plus bonuses. The trial court ordered Father to pay $543 per month for current child support, $1,000 per month on the arrearage, and $200 per month in attorney fees. Father argues that this total of $1,743 is over fifty percent of his income and violates Tennessee Code Annotated section 36-5-501(a)(1). The statute provides, regarding any assignment of an obligor's income, that said withholding "shall not exceed fifty percent (50%) of the employee's income after FICA, withholding taxes, and a health insurance premium that covers the child, are deducted." Tenn. Code Ann. § 36-5-501(a)(1).

Although Father raised the issue of the reasonableness of the arrearage payment in his post-trial motions and in a subsequent hearing, he did not argue the applicability of section 36-5-501(a)(1) before the trial court. "The law in Tennessee is well settled that issues not raised in the trial court may not be raised on appeal." *Blankenship v. Anesthesiology Consultants Exch., P.C.*, 446 S.W.3d 757, 760 (Tenn. Ct. App. 2014); *see also Jackson v. Burrell*, 602 S.W.3d 340, 344 (Tenn. 2020). Having failed to raise the issue of the applicability of section 36-5-501(a)(1) before the trial court, Father consequently failed to develop a record amenable to appellate review with respect to the

requirements of that section. Accordingly, Father has waived the issue of the applicability of section 36-5-501(a)(1).[5]

Regarding the reasonableness of the arrearage payment, we discern no abuse of the trial court's discretion. Father's total child support arrearage had reached $85,521.15 by May 2021. The trial court observed that even paying $1,000 per month, it would take Father "several, several, several years to pay just to get even." The trial court also noted that Father had assets that could be liquidated to pay the arrearage. The trial court carefully balanced Father's ability to pay his substantial arrearage against the obligation that it be paid within a reasonable time. For these reasons, we conclude that the trial court did not abuse its discretion.

4.

At the conclusion of his brief, Father seeks to recover his "attorney fees from [Mother] subsequent to submission of an affidavit." However, this request was not presented in the statement of issues or supported by argument in Father's brief. A request for attorney fees is waived if not included in the statement of issues. *See Keeble v. Keeble*, No. E2019-01168-COA-R3-CV, 2020 WL 2897277, at *4 (Tenn. Ct. App. June 3, 2020) (citing *Killingsworth v. Ted Russell Ford, Inc.*, 205 S.W.3d 406, 410–11 (Tenn. 2006)). Accordingly, Father's request for attorney fees on appeal is waived. Regardless of waiver, Father is not entitled to attorney fees because he is not the prevailing party.

Mother also asks for an award of attorney fees on appeal.[6] Tennessee follows the American Rule which provides that "litigants pay their own attorney's fees absent a statute or an agreement providing otherwise." *State v. Brown & Williamson Tobacco Corp.*, 18 S.W.3d 186, 194 (Tenn. 2000); *accord Taylor v. Fezell*, 158 S.W.3d 352, 359 (Tenn. 2005).

[5] Even if the issue were not waived, section 36-5-501(a) is not implicated in this case because the trial court's order is not a wage assignment order or garnishment. Father pays his child support directly to Child Support Services. *See* Tenn. Code Ann. § 36-5-501(2)(A)(ii) (providing that, "Income assignment . . . shall not be required . . . [i]f there is a written agreement by both parties that provides for alternative arrangements.").

[6] Mother also requests attorney fees pursuant to Tennessee Code Annotated section 36-5-103(c) (permitting fee awards incurred in the defense of a child support obligation). Exercising our discretion in such matters, we deny Mother's request for attorney fees on appeal based upon section 36-5-103(c) but, for the reasons stated herein, grant her request for attorney fees based on Father's frivolous appeal.

Tennessee Code Annotated section 27-1-122, provides that:

> When it appears to any reviewing court that the appeal from any court of record was frivolous or taken solely for delay, the court may, either upon motion of a party or of its own motion, award just damages against the appellant, which may include but need not be limited to, costs, interest on the judgment, and expenses incurred by the appellee as a result of the appeal.

Tenn. Code Ann. § 27-1-122.

The decision whether to award damages for a frivolous appeal rests solely in our discretion. *Chiozza v. Chiozza*, 315 S.W.3d 482, 493 (Tenn. Ct. App. 2009). Appellate courts exercise their discretion to award fees under this statute '"sparingly so as not to discourage legitimate appeals."' *Eberbach v. Eberbach*, 535 S.W.3d 467, 475 (Tenn. 2017) (quoting *Whalum v. Marshall*, 224 S.W.3d 169, 181 (Tenn. Ct. App. 2006)). '"Successful litigants should not have to bear the expense and vexation of groundless appeals."' *Whalum*, 224 S.W.3d at 181 (quoting *Davis v. Gulf Ins. Grp*., 546 S.W.2d 583, 586 (Tenn. 1977)). "A frivolous appeal is one that is 'devoid of merit,' or one in which there is little prospect that it can ever succeed." *Indus. Dev. Bd. v. Hancock*, 901 S.W.2d 382, 385 (Tenn. Ct. App. 1995).

This appeal had no prospect of success. Father relied on conclusory assertions regarding pleadings outside the appellate record and a construal of the facts and the law that does not align with reality. The record in this case demonstrates Father's disregard for the trial court's child support orders, and, based on Father's poor record of paying child support, it appears to us that Father's appeal was filed to further delay his financial obligations. Accordingly, we exercise our discretion to grant Mother's request for attorney fees and costs in defense of this appeal because Father's appeal was so devoid of merit as to be characterized as frivolous.

V. CONCLUSION

We affirm the decision of the trial court. The case is remanded for such further proceedings as may be necessary and consistent with this Opinion, including a determination of the proper amount of appellate attorney fees and entry of judgment thereon. Costs of the appeal are taxed to the appellant, Matthew D. Varney.

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JOHN W. McCLARTY, JUDGE