IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 18, 2009 Session

THOMAS JERRY WILSON v. REGINA DAWN BAINES

Appeal from the Circuit Court for Davidson County
No. 08D282 Muriel Robinson, Judge

No. M2009-00249-COA-R3-CV - Filed November 25, 2009

Father registered and sought modification of a foreign decree related to custody of the parties' children. Following a trial, the trial court dismissed Father's petition; nevertheless, the trial court, *sua sponte,* modified the foreign decree. The trial court also awarded attorney's fees to Mother. Father appeals the action of the trial court modifying the foreign decree after dismissing his petition and the trial court's award of attorney's fees to Mother. We affirm in part and reverse in part the judgment of the trial court.

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

RICHARD H. DINKINS, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and ANDY D. BENNETT, JJ. joined.

Andrew M. Cate, Nashville, Tennessee, for the appellant, Thomas Jerry Wilson.

D. Scott Parsley and Michael K. Parsley, Nashville, Tennessee, for the appellee, Regina Dawn Baines.

OPINION

I. Background

The parties were divorced on December 3, 2004, in Catoosa County, Georgia. Two children, a girl (D.O.B. 08/11/94) and a boy (D.O.B. 01/11/99), were born during the marriage. The Final Order of Divorce granted "joint legal custody of the parties minor children . . . with [Mother] having primary physical custody and [Father] having secondary physical custody." Subsequent to the divorce, both parties relocated to Tennessee – Father moved to Goodlettsville while Mother moved to Knoxville.

After the parties moved and at some point prior to January 2008, Father petitioned the Catoosa County Superior Court to modify the custody arrangement and on January 22, 2008, that court entered a Final Order of Custody awarding Father "custody of the parties' minor children." The order provided, however, that Mother "shall have visitation at all reasonable times and places as the parties may agree." The order also established a schedule if the parties were unable to agree on visitation and established the places for pick-up (Manchester, Tennessee) and return of the children (Cookeville, Tennessee).

On January 28, 2008, Father filed a Petition to Register a Foreign Decree and To Modify in the Circuit Court for Davidson County, Tennessee. Father alleged that "there has been a material change in circumstances in that it would be in the Minor Children's best interest for custody of them to be placed solely in the Petitioner/Father with Respondent/Mother being allowed only supervised visitation with the Minor Children...." In essence, Father did not seek to reduce Mother's visitation under the Final Custody Order, rather he requested that her visitation with the children be supervised as a result of events that Father alleged occurred on January 19, two days after the judge signed the Final Order of Custody but before the order was entered by the clerk. The petition alleged that Mother was verbally and physically abusive toward the parties' children and had interfered with the treatment the children were receiving for psychological and behavioral problems.

A temporary restraining order, which Father sought in his petition, was entered on February 21, 2008, restraining both parties from subjecting the children or allowing the children to be subjected to derogatory comments about the children's other parent and restraining both parties from communicating with one another via electronic mail. Mother's visitation was allowed to continue with the parties' son, but was stayed pending further order from the court with respect to the parties' daughter.[1]

On May 22, 2008, the trial court entered an order registering the Final Order of Custody issued by the Georgia court. On August 7, 2008, Mother filed an answer to Father's petition and a counter-petition seeking to change custody from Father to Mother. Mother's counter-petition contained no factual allegations, but merely stated, "Counter-Petitioner would state and show unto this Honorable Court that since the entry of the last Order of January 17, 2008, a material and substantial change of circumstances has occurred justifying a change in custody from Father to Mother." Father filed a response to Mother's counter-petition.

A trial was held on December 16, 2008, and at the close of Father's proof, Mother moved to dismiss Father's petition asserting that Father had failed to meet his burden of proof establishing a material change in circumstance. The trial court granted Mother's motion following which Mother voluntarily withdrew her counter-petition.

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[1] The petition alleged that on January 19, 2008, Mother, against medical advice, removed the daughter from a hospital where the daughter was receiving inpatient psychiatric care after threatening to commit suicide. The petition also alleged that while at the hospital, the daughter was diagnosed with oppositional defiance disorder ("ODD") with traits of both histrionic and borderline personality disorder and Post Traumatic Stress Disorder ("PTSD"), which the petition alleged was the result of a severe beating the daughter received at the hands of Mother.

On January 9, 2009, the trial court entered an order memorializing its ruling from the bench. The order found that "Father has failed to meet or prove any material change in circumstances that materially affect the well being of the minor children in a meaningful way" and dismissed Father's petition to modify the foreign decree; the order noted that Mother voluntarily dismissed her counter-petition. The order directed the parties to "adhere to the Final Order of Custody of the Superior Court of Catoosa County, Georgia, entered on the 17th day of January, 2008, which Order has been domesticated by this Court."[2] However, the order also made several "modifications to the Georgia Order" including establishing a specific location for pick-up and return of the children (Exit 287 in Cookeville, Tennessee), alternated Christmas holiday visitation between the parties each year, gave Mother parenting time the last full week of June through the entire month of July, and set alternating parenting time schedules for spring and fall break. The order also made arrangements for counseling for the children and established the parties' respective obligations for paying for such counseling. Finally, the order found that Mother was entitled to reasonable attorney's fees and that the fee was awarded "as additional child support,[3] which is a non-dischargeable support obligation in the event of Petitioner's bankruptcy."

Father appeals the trial court's order in as much as the order modified the registered Final Order of Custody from the Superior Court of Castoosa County, Georgia; Father does not appeal the trial court's finding that he failed to prove a material change in circumstance existed. Father also appeals the trial court's award of attorney's fees to Mother and the designation of the award as additional child support.

II. Analysis

A. Modification of the Parenting Plan

Father contends that the trial court lacked authority to modify the parenting plan once it found no material change of circumstances existed and dismissed Father's petition. Mother responds by asserting that the trial court did not modify the final custody order, but merely "tweaked" it to add certain specifications "which were necessary" to "resolve all future potential conflicts and clarify issues for the parties."

This court reviews custody and visitation decisions *de novo* with a presumption that the trial court's findings of fact are correct unless the evidence preponderates otherwise. *Kendrick v. Shoemake*, 90 S.W.3d 566, 569 (Tenn. 2002). Moreover, appellate courts are reluctant to second guess a trial court's determination regarding custody and visitation because such decisions often hinge on subtle factors, such as the parents' demeanor and credibility during the proceedings. *Parker v. Parker*, 986 S.W.2d 557, 563 (Tenn. 1999); *Nelson v. Nelson*, 66 S.W.3d 896, 9012 (Tenn. Ct.

[2] The Final Order of Custody was signed by the judge on January 17, 2008, but it was not entered until January 22, 2008.

[3] The trial court designated Mother's award of reasonable attorney's fees as "additional child support," though the record shows the Final Order of Custody ordered Mother to pay father $140.00 per week as child support.

App. 2001); *Adelsperger v. Adelsperger*, 970 S.W.2d 482, 485 (Tenn. Ct. App. 1997). Accordingly, trial courts have broad discretion to fashion custody and visitation arrangements that best suit the unique circumstances of each case, *Parker*, 986 S.W.2d at 563, and appellate courts will only set aside a trial court's decision regarding custody or visitation when it "falls outside the specturm of rulings that might reasonably result from an application of the correct legal standards to the evidence found in the record." *Eldridge v. Eldridge*, 42 S.W.3d 82, 88 (Tenn. 2001).

A valid custody order or residential placement schedule, once entered by the court, is *res judicata* as to the facts in existence or reasonably foreseeable when the decision was made, *Keisling v. Keisling*, 196 S.W.3d 703, 719 (Tenn. Ct. App. 2005); *Hoalcraft,* 19 S.W.3d 822, 828 (Tenn. Ct. App. 1999); however, such an order remains within the control of the court and is subject to "such changes or modification as the exigencies of the case may require." Tenn. Code Ann. § 36-6-101(a)(1). The threshold issue when a modification of either a custody decree or a residential parenting schedule is sought is whether a material change of circumstances has occurred since the entry of the previous order. Tenn. Code Ann. §§ 36-6-101(a)(2)(B) and (a)(2)(C); *Kendrick*, 90 S.W.3d at 569; *Badenhope*, 77 S.W.3d 137, 150 (Tenn. 2002); *Curtis v. Hill*, 215 S.W.3d 836, 840 (Tenn. Ct. App. 2006).[4] Only after the trial court has found by a preponderance of the evidence that a material change in circumstances has occurred may the court go on to consider the second prong of the analysis – whether modification is in the best interest of the child. *Cranston v. Combs*, 106 S.W.3d 641, 644 (Tenn. 2003); *Burchett v. Burchett*, M2008-00790-COA-R3-CV, 2009 WL 161084, at *2-3 (Tenn. Ct. App. 2009). "[I]f the petition is denied for failure to prove a material change of circumstance, modification is not to be considered." *Burchett*, 2009 WL 161084, at *2.

Here, the trial court expressly found that Father failed to prove any material change in circumstances following which Mother voluntarily withdrew her petition to modify the custody order. Father does not appeal the trial court's finding that he failed to meet his burden of proof. Having made its finding and dismissed Father's petition, there was nothing left for the trial court to do after Mother dismissed her counter-petition.

Mother contends that the trial court merely "tweaked" the final custody order for clarification purposes and that the trial court was within its authority to act in the best interest of the children. Mother cites *Bah v. Bah*, 668 S.W.2d 663, 665 (Tenn. Ct. App. 1983) for the proposition that "[t]he Trial Court has the burden of acting in the minor children's best interest." Mother asserts that "[i]n this case, by virtue of the change in location, filing of Father's petition and involvement of his new wife, as well as the request of Counsel for Father after dismissal of Father's petition,[5] the Trial

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[4] Neither Father's petition nor Mother's counter-petition cites the particular statute upon which they seek relief. It is clear, however, that Father seeks relief under Tenn. Code Ann. § 36-6-101(2)(C) and Mother seeks relief under Tenn. Code Ann. § 36-6-101(2)(B).

[5] The record does not indicate that Father's counsel made any request of the court after Father's petition was dismissed; though, we note Mother's counsel made a request that the trial court change or "address" certain aspects of the Final Order of Custody. We presume Mother is referring to Father's counsel's statement to the court in response to (continued...)

Court felt compelled to make some specific findings to ensure the minor children's best interest were protected and to 'adhere to the spirit of the Georgia Order.'" We find that Mother's reliance on *Bah* misplaced as that case dealt with the trial court's custody determination during a suit for divorce, not the modification of an existing custody order. *Bah*, 668 S.W.2d at 665. Unlike in divorce actions where a court need only address itself to the best interest of the children in making an initial custody determination, when a court is asked to modify an existing, valid custody order it is statutorily directed to first make a determination of whether a material change of circumstances has arisen since the entry of the custody order. Tenn. Code Ann. §§ 36-6-101(a)(1) and (2)(B). If the court finds that there is no material change of circumstances, the court must dismiss the petition and affirm the existing custody order. *See Cranston*, 106 S.W.3d at 644; *Kendrick*, 90 S.W.3d at 570. Moreover, we disagree with Mother's characterization that the trial court merely "tweaked" the final custody order. The trial court did substantially more than specify a different pick-up and drop-off location for the children; it designated a new counselor for the children and changed the days and amount of visitation given to the parties including giving Mother almost six additional weeks of visitation throughout the year.[6]

Mother asserts that there were "issues that needed clarification and that the [trial] [c]ourt had a duty to address" in order to resolve all future potential conflicts and clarify issues for the parties. Specifically, Mother argues on appeal:

> The school break system, meeting places, etc. that would have been previously addressed by the Georgia Order were no longer applicable since the parties were functioning in Tennessee. Additionally, the therapist who had been seeing the children was not well suited and was replaced. In order to resolve all future potential conflicts and clarify issues for the parties, the Court included in this Order that the Father shall pay for 2/3rd of the new therapist fee and the Mother shall pay for 1/3rd of new therapy fees.

(Internal citations omitted).

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[5](...continued)
Mother's counsel's oral motion to dismiss wherein Father's counsel stated, "I believe what the Court has seen that this needs to be tweaked, that it needs to be – that things need to be put in place to ensure the safety of the children and the parties act right."

[6] Under the Final Order of Custody, Mother received visitation with the children every other weekend. The order established the following schedule for holiday visitation: Mother was to have visitation with the children on Labor Day, Memorial Day and Thanksgiving Day during even numbered years and on Martin Luther King, Jr. Day, July Fourth and Easter Sunday on odd numbered years; Mother was to receive visitation with the children every year during Christmas from December 25 - January 1. The trial court modified the visitation schedule by alternating the Christmas holiday, December 25 - January 1, every other year between the parties and awarding Mother additional visitation time during spring break every year and during the summer (last full week in June and the entire month of July each and every year including the July 4th holiday each and every year).

Regardless of, or in spite of, the "issues" Mother raises, the trial court made a finding upon Mother's motion to dismiss Father's petition at the conclusion of Father's proof that no material change in circumstance had occurred since the entry of the Georgia order and dismissed Father's petition. Moreover, Mother's voluntary dismissal of her counter-petition demonstrated that Mother no longer felt modification of the Final Order of Custody was necessary. Without a pleading requesting modification before it and without a finding of a material change in circumstances, the trial court was without authority to modify the Final Order of Custody.

B. Award of Attorney's Fees

The trial court found that Mother was entitled to an award of reasonable attorney's fees "incurred in the defense of Father's petition pursuant to T.C.A. 36-5-103(c)" and that after review of the expenses submitted by Mother's counsel, a fee in the amount of $8,500.00 was ordered to be paid by Father to Mother's counsel as "additional child support, which is a non-discargeable support obligation in the event of [Father's] bankruptcy." Father challenges the trial court's award.

Tennessee abides by the American Rule, which requires litigants to pay their own attorney's fees unless a statute or an agreement provides otherwise. *State v. Brown & Williamson Tobacco Corp*., 18 S.W.3d 186, 194 (Tenn. 2000). Tenn. Code Ann. § 36-5-103(c) provides the statutory authority for courts to award attorney's fees to a party in a custody proceeding. The statute provides in pertinent part:

> 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.

Tenn. Code Ann. § 36-5-103(c)(emphasis added).

Whether to award attorney's fees incurred by a party in enforcing a custody or support decree lies within the discretion of the trial court. Tenn. Code Ann. § 36-5-103(c); *Richardson v. Spanos*, 189 S.W.3d 720, 729 (Tenn. Ct. App. 2005); *Shofner v. Shofner*, 181 S.W.3d 703, 719 (Tenn. Ct. App. 2004); *Eldridge v. Eldridge*, 137 S.W.3d 1, 25 (Tenn. Ct. App. 2002). A court abuses its discretion when it "either applie[s] an incorrect legal standard or reache[s] a clearly unreasonable decision, thereby causing an injustice to the aggrieved party." *Kline v. Eyrich*, 69 S.W.3d 197, 204 (Tenn. 2002); *Owens v. Owens*, 241 S.W.3d 478, 495 (Tenn. Ct. App. 2007).

Father first contends that the trial court erred in considering Mother's request for attorney's fees because "[a]ll pleadings requesting relief had been dismissed, leaving no pleading requesting

payment of attorney fees." Mother points out that her request for attorney's fees was contained in the prayer for relief in her Answer wherein she requested "[t]hat [Father's] Petition be dismissed and that [Mother] be awarded her reasonable costs and attorney's fees in defense thereof." While Mother's request was at the end of the counter-petition portion of her Answer and Counter-Petition, the nature of the request was clearly part of Mother's pleadings and the trial court properly considered the request following dismissal of Father's petition; in any event, a party's failure to include a prayer for attorney's fees in custody and child support cases is not fatal to such a request. *Deas v. Deas*, 774 S.W.2d 167, 169 (Tenn.1989) (citing *Graham v. Graham*, 140 Tenn. 328, 204 S.W. 987 (1918)).

Second, Father contends that the trial court erred in awarding Mother's attorney's fees because the facts of this case do not bring it within the statutory authority of Tenn. Code Ann. § 36-5-103(c). Father argues first that section 36-5-103(c) is inapplicable and cannot provide the basis for the trial court's award because the statute only allows "the spouse . . . to whom the custody of the child, or children, is awarded" to recover and that in this case Father, not Mother, was awarded custody of the children. Father further contends that the statute is inapplicable to the facts of this case because Father's petition was not a "suit or action concerning the adjudication of the custody or the change of custody of any child, or children, of the parties" as required by the statute. Father explains that his petition did not seek a change of custody or to reduce Mother's visitation, but merely to create protections for the children by requiring Mother's visitation with the children be supervised. Father observes that Mother's petition was the only action before the trial court seeking a change of custody; consequently, Father contends, the trial court erred in awarding Mother's attorney's fees.

Tenn. Code Ann. § 36-5-103(c) allows for the award of attorney's fees to a custodial party defending an action to change a prior custody order on the theory that the defending party is enforcing the prior order for the benefit of the children. *See Shofner v. Shofner*, 232 S.W.3d 36, 40 (Tenn. Ct. App. 2007); *Scofield v. Scofield*, No. M2006-00350-COA-R3-CV, 2007 WL 624351, at *7 (Tenn. Ct. App. Feb. 28, 2007); *Sherrod v. Wix*, 849 S.W.2d 780, 785 (Tenn. Ct. App. 1992). "These awards are not primarily for the benefit of the custodial parent but rather to facilitate a child's access to the courts." *Graham v. Graham*, 140 Tenn. 328, 334-35, 204 S.W. 987, 989 (1918); *Sherrod*, 849 S.W.2d at 785.

Here, Father, who initiated the proceeding to modify Mother's visitation, was the custodial parent. Following the dismissal of his petition, Father remained the custodial parent. We find no authority for awarding a non-custodial parent's attorney's fees in a proceeding to modify visitation. The Western Section, in *Burlew v. Burlew*, No. W2005-00526-COA-R3-CV, 2006 WL 26361 (Tenn. Ct. App. Jan. 05, 2006), vacated an award of attorney's fees to a custodial father following the dismissal of the mother's petition to set visitation. In holding that Tenn. Code Ann. § 36-5-103(c) provided no authority for Mr. Burlew's award, the Court explained, "[t]he change of custody of Geoff, however, was not an issue in this lawsuit[; r]ather, the primary matter before the trial court was Ms. Burlew's petition to set visitation." *Burlew*, 2006 WL 26361, at *4. Similarly, the primary matter before the trial court here was, as the trial court correctly stated, Father's "petition to modify

the visitation" of the parties' children. Tenn. Code Ann. § 36-5-103(c) does not authorize an award of attorney's fees in such circumstances; consequently, we vacate the trial court's award of Mother's attorney's fees. Father's assertion that the trial court erred in designating Mother's award of attorney's fees as additional child support is, thus, pretermitted.

IV. Conclusion

In accordance with the foregoing, we affirm the following action of the trial court: dismissing Father's petition to modify visitation; approving the voluntary dismissal of Mother's petition to modify custody; ordering the parties to adhere to the Order of the Superior Court of Catoosa County, Georgia; enjoining the parties from alienating the minor children from the other party; stating the parties' parental rights afforded under Tenn. Code Ann. § 36-6-101; and assessing costs to Father. In all other respects the judgment is reversed.

Costs of the appeal are taxed to Mother.

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RICHARD H. DINKINS, JUDGE