IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT KNOXVILLE

FILED

October 16, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

RONALD HITE,

Plaintiff-Appellant,

Green Law No. 4298NJ

Vs.

C.A. No. 03A01-9511-CV-00410

CANDY HITE,

Defendant-Appellee.

FROM THE CIRCUIT COURT AT GREENEVILLE
THE HONORABLE BEN K. WEXLER, JUDGE

Francis X. Santore, Jr., Santore and Santore
of Greeneville, For Appellee

Roger A. Woolsey of Greeneville,
For Appellant

AFFIRMED

Opinion filed:

W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.

CONCUR:

DAVID R. FARMER, JUDGE

SAMUEL L. LEWIS, JUDGE

This case involves a petition for increase of child support. Respondent, Ronald Hite (Father), appeals from the trial court's order awarding an increase in child support and other relief to petitioner, Candy Hite (Mother).

Mother filed a petition to increase child support in February, 1993. The petition, as amended, alleges that the parties were divorced by decree filed November 9, 1977, and that by order entered January 20, 1982, Father was ordered to pay $40.00 per week child support. The petition avers that there has been a substantial material change in circumstances which warrants a modification of the order for child support and seeks an increase to an amount equal to twenty-one percent of the monthly income of Father as provided by the Tennessee Department of Human Services Child Support Guidelines.

Although not part of the record, it appears from other parts of the technical record and the testimony at the evidentiary hearing that Father filed a response that admitted he was paying child support and had been paying it since the date of the 1982 order, but denies that he is the father of the child. Father also apparently filed a counter-petition seeking a blood test to determine that he is not the father of the child. An evidentiary hearing was held on July 30, 1994. The pertinent facts developed from this hearing and the technical record are as follows.

In 1977, the Father filed a Complaint for divorce from Mother, and the parties were divorced on May 4, 1977. Father's complaint alleged that the child was not his and alleged that Mother had admitted to him that the child was not his. Father requested blood tests at that time, but the court denied Father's request based on the fact that he could present no evidence which would call the Mother's fidelity into question. The court apparently decided that the child was Father's child, because the divorce decree states that "one child has been born of this marriage, namely Matthew Hite, and that custody of this child should be awarded to counter plaintiff (mother)." No child support was ordered in the final decree. Father claims that he agreed to the divorce because no child support was awarded.

The parties continued to live together for about three years after the divorce so Mother did not request child support during that time. However, the parties eventually separated for good and, in October 1981, Mother petitioned the court for child support. In his answer, Father once again claimed that he was not the father and requested a blood test. The court recited the 1977 divorce decree to establish that the child was born of the marriage and awarded $40.00 per week in child support. Father has paid that amount since.

In the July 30, 1994 evidentiary hearing, Mother admitted for the first time that she had

not been faithful during the term of the parties' marriage, and that she had sexual relations with two different men prior to the time of the child's birth, but did not know the precise dates or the number of sexual encounters. Mother's sister testified at the hearing that the child's grandmother said that the child belonged to another man. The sister further testified that the plaintiff did not respond when she was asked whom the father was. Mother also admitted that she lives in Virginia and does not have physical custody of the child, and that the child has lived with his maternal grandmother for his entire life. Although the grandmother takes care of the child, Mother has legal custody and provides for the support and maintenance of the child and uses the payments received from Father.

The trial court's Opinion filed September 6, 1994, states: "It would appear that with these two prior Judgments that this question of parentage has been answered several years ago; but it might be said this is the first time the husband [Father] has requested a blood test to determine parentage." Relying on T.C.A. § 24-7-112[1], the trial court held that the request for a blood test was not made at the initial court appearance and was not brought within a reasonable time. The trial court, therefore, denied the defendant's request for a blood test and dismissed the counter-petition. The trial court then ordered an increase in child support payments from $40.00 per week to $125.00 per week, which is twenty-one percent of Father's net income, as required by the Tennessee Department of Human Services Child Support Guidelines. Tenn. Comp. R. & Regs. tit. 10, ch. 1240-2-4-.01 *et seq.* (1989, revised 1994). The trial court made the increase effective January 1, 1994 and ordered Father to pay $3,643.50 in back support. The trial court also awarded $900.00 in attorney's fees to Mother.

Father has appealed and presents the following issues for consideration: (1) whether the trial court erred in dismissing the Father's counter-petition for a blood test in view of all the facts and evidence in the case, particularly in light of the fact that Mother had committed adultery with two different men during her marriage to Father; (2) whether the trial court erred in ordering

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[1]T.C.A. 24-7-112 (a)(1) (Supp. 1995). **Tests to determine parentage -- Admissibility in evidence -- Costs. --** (a)(1) In the trial court of any civil or criminal proceeding in which the question of parentage arises, the court before whom the matter may be brought, upon the motion of either party **at the initial appearance**, shall order that all necessary parties submit to any tests and comparisons which have been developed and adapted for purposes of establishing or disproving parentage. (Emphasis added).

Father to pay child support when Mother did not have physical custody of the child; (3) whether the trial court erred in increasing Father's child support obligation and requiring Father to pay a child support arrearage; and finally (4) whether the trial court erred in requiring Father to pay Mother's attorney's fees.

Since this case was tried by the court sitting without a jury, we review the case *de novo* upon the record with a presumption of correctness of the findings of fact by the trial court. Unless the evidence preponderates against the findings, we must affirm, absent error of law. T.R.A.P. 13(d).

Mother asserts that the issue of parentage and the legitimacy of the child is *res judicata*. She argues that a blood test should not be allowed because the issue of parentage has already been decided in a court of competent jurisdiction. The trial court dismissed the counter-petition and refused to allow a blood test based on T.C.A. § 24-7-112. Since neither the original divorce complaint nor the pleadings in the 1982 proceedings for child support are a part of the record, we cannot determine whether Father requested blood tests as his testimony indicates. In any event, if he did not request blood tests on these occasions, as found by the trial court, he is precluded from making the request at this time by the provisions of T.C.A. § 24-7-112 (Supp. 1995); ***Steioff v. Steioff***, 833 S.W.2d 94 (Tenn. App. 1992).

If he did request blood tests on these occasions and the requests were denied by the trial court the record indicates that there was no appeal. We agree with Mother's assertion that the doctrine of *res judicata* is determinative of this issue.

The doctrine of *res judicata* bars a second suit between the same parties on the same cause of action with respect to all issues which were or which could have been litigated in the former suit. ***Wall v. Wall***, 907 S.W.2d 829, 832 (Tenn. App. 1995). Material facts or questions which were in issue in a former action and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and such facts or questions become *res judicata* and may not again be litigated in a subsequent action brought between the same parties or their privies. ***Medlock v. Ferrari***, 602 S.W.2d 241, 246 (Tenn. App. 1979). A judgment on the merits exhausts the cause of action on which it was based, and is an absolute bar to a subsequent suit between the same parties and their privies upon the same cause of action.

Boring v. Miller, 215 Tenn. 394, 397, 386 S.W.2d 521, 522 (1965).

In the case *sub judice*, Father admits that he raised the issue of the legitimacy of the child in the original petition for divorce and, at that time, also requested blood tests. That prior litigation embraced the same issue and the parties to the prior litigation are identical to the parties in the present litigation. The trial court in the divorce action found that Father was the father of the child. Father had the right to appeal this judgment, but neglected to pursue this right. The correctness or incorrectness of the former adjudication is not before this Court and should have been raised by Father in an appeal. This issue has been conclusively settled and may not be litigated again in this action. ***See also Madyun v. Ballard***, 783 S.W.2d 946 (Tenn. App. 1989).

Father contends, in his second and third issues, that the increase in the amount of child support payments was in error. He argues that any child support is inappropriate because Mother does not have physical custody of the child. We find no merit to this argument because the child is entitled to support regardless of where he lives. The father's duty of support is owed to the child, not to the mother. ***Pickett v. Brown***, 462 U.S. 1, 103 S.Ct. 2199, 76 L.Ed.2d 372 (1983). Mother and Father are both responsible for the support and maintenance of the child. T.C.A. § 34-11-102 (Supp. 1995). Father cannot avoid his duty merely because the child lives with his grandmother.

Father next argues that the modification of the child support agreement increasing the payment to 21% of his net income and requiring back support was also in error. Child support in Tennessee is statutorily governed by T.C.A. § 36-5-101 (Supp. 1995). Section 36-5-101(e)(1) provides that "[i]n making its determination concerning the amount of support of any minor child . . . of the parties, the court shall apply as a rebuttable presumption the child support guidelines as provided in this subsection." Modification of an existing child support order is controlled by T.C.A. § 36-5-101(a)(1) (Supp. 1995), which states, in pertinent part:

> In cases involving child support, upon application of either party, the court shall decree an increase or decrease of such allowance when there is found to be a significant variance, as defined in the child support guidelines established by subsection (e), between the guidelines and the amount of support currently ordered unless the variance has resulted from a previously court-ordered deviation from the guidelines and the circumstances which caused the deviation have not changed.

Currently, in Tennessee a "significant variance" is 15%. ***See*** Tenn. Comp. R. & Regs. tit. 10, ch. 1240-2-4-.02(3); ***Turner v. Turner***, 919 S.W.2d 340, 343 (Tenn. App. 1995). In the case *sub judice*, the difference between what Father was ordered to pay and the amount required by the guidelines exceeds fifteen percent. There is a significant variance, which under the current state of the law, requires an increase in the amount of child support payments.

However, the amended statute, T.C.A. § 36-5-101(a)(1) (Supp. 1995), took effect on July 1, 1994, after the filing of the petition to increase the child support. The new statute replaced the old "material change of circumstances" test with the "significant variance" test. ***Turner***, 919 S.W.2d at 343. The previous statute said in pertinent part, "[T]he court may decree an increase or decrease of such allowance only upon a showing of a substantial and material change of circumstances." T.C.A. § 36-5-101(a)(1) (1980). Under either provision, the trial court properly increased the support amount. The evidence showed that the amount of the child support had not changed since 1981, and that Father's salary had increased over that period. In addition, the child obviously has grown which increases the expense of support. These facts show a substantial and material change of circumstances. ***See Ragan v. Ragan***, 858 S.W.2d 332, 333 (Tenn. App. 1993). The trial court was correct in its judgment increasing the child support payments to 21% of the defendant's monthly income and in awarding back support to January 1, 1994.

Finally, Father argues that the trial court erred in awarding attorney's fees to Mother. Pursuant to T.C.A. § 36-5-101(i) (Supp. 1995), the court may, in its discretion, award the costs to prosecute or defend a child support suit. The allowance 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). In the case *sub judice*, Father has not shown an abuse of discretion.

Accordingly, the order of the trial court is affirmed. Costs of this appeal are assessed against the appellant.

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W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.

CONCUR:

DAVID R. FARMER, JUDGE

SAMUEL L. LEWIS, JUDGE