IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs September 26, 2013

NANCY PARSON HILL (BOWRON) v. MARK DAVID HILL

Appeal from the Chancery Court for Williamson County
No. 29624 Michael Binkley, Judge

No. M2012-02699-COA-R3-CV - Filed October 11, 2013

Mother sued Father for one-half of child's college expenses based on the language of their Marital Dissolution Agreement's parenting plan. Father defended based on the same language. The trial court found the language ambiguous and, based on all the circumstances, found that Father was required to pay one-half of the child's college expenses at the University of Alabama. Father appealed. We do not find the language ambiguous, but agree with the trial court that the language requires Father to pay one-half of the expenses. We reverse the trial court's denial of prejudgment interest and remand for a calculation of that interest. We also award Mother attorney's fees for this appeal and remand to the trial court for a calculation of those fees.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part, and Reversed and Remanded in Part

ANDY D. BENNETT, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, M.S., P.J., and RICHARD H. DINKINS, J., joined.

Geoffrey Coston, Franklin, Tennessee, for the appellant, Mark David Hill.

Joanie L. Abernathy, Franklin, Tennessee, for the appellee, Nancy Bowron.

OPINION

The parties, Nancy Bowron ("Mother") and Mark Hill ("Father"), divorced in 2003. Knowing that their three daughters would be going to college, the parties addressed college expenses in the Permanent Parenting Plan, which was incorporated into their Marital Dissolution Agreement. Section II(C) of the plan states:

> The parties shall jointly participate in their children's' [sic] choice of college. Cost of tuition, room and board, fees, and books will first be paid from the children's' [sic] college funds (whatever remains after any scholarship(s), grants, or other funds are applied or disbursed). All uncovered college expenses (tuition, room, board, fees, and books) shall be divided equally.

While Leigh's educational desires created some challenges, the parties each paid one-half of the college expenses of Leigh and Margeaux. The problem giving rise to this case concerns Father's college expense payments for the youngest daughter, Julie. Father, claiming he was not consulted about Julie's choice of the University of Alabama and that the university was too expensive, decided to pay only $2,500 dollars per semester. Mother filed a petition to enforce the divorce decree in Williamson County Chancery Court. The chancellor concluded that "the Father should not be relieved of his contractual obligation simply because the obligation proved to be more burdensome than anticipated." The court awarded Mother a judgment of $23,750.60 for Father's unpaid portion of Julie's college expenses and $6,225.00 for Mother's attorney fees. Father appealed.

Standard of Review

A marital dissolution agreement is a contract. *Pylant v. Spivey*, 174 S.W.3d 143, 151 (Tenn. Ct. App. 2003). Since the interpretation of a contract is a question of law, no presumption of correctness attaches on appeal to the trial court's interpretation. *Id.* at 150. The trial court's factual findings, however, are reviewed de novo upon the record with a presumption of correctness unless the record indicates otherwise. *Id.* at 151; Tenn. R. App. P. 13(d).

Analysis

A parent's agreement to provide for college education expenses beyond the age of the child's majority is a valid contractual obligation. *Penland v. Penland*, 521 S.W.2d 222, 224-25 (Tenn. 1975). As a general rule, "where the parties have unambiguously set out the terms of their agreement, courts will enforce those terms as written, regardless of any inequity arising from that enforcement." *Pylant v. Pylant*, 174 S.W.3d 143, 152 (Tenn. Ct. App. 2003).

The trial court found the words "jointly participate" in the college expense provision to be ambiguous. We respectfully disagree. The words of a contract should be read with their usual, natural and ordinary meaning. *Pitt v. Tyree Org., Ltd.*, 90 S.W.3d 244, 252 (Tenn. Ct. App. 2002). "Participate" means "to take part." MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/ dictionary/ participate. "Jointly," an adverb modifying

the word "participate," refers to "combined action or effort." MERRIAM-WEBSTER THESAURUS, http://www.merriam-webster. com/thesaurus/jointly. Our reading of the college expense provision is that the parents would, together, take part in each child's selection of a college. There is nothing in the words "jointly participate" that provides a veto to either parent over the child's college choice.

Father strenuously argues that, "[t]he joint decision making is in the same paragraph as the requirement that the obligation to pay [is in]. The natural implication is that the joint decision regards a college that each parent feels is within their budget and satisfies the child's interests." The fallacy of his argument is the premise that the provision mandates joint decision making. It does not.

The record contains suggestions that Father did not participate in Julie's choice of a college. For example, Father's email to Mother of May 8, 2010 says, "I am extremely disappointed that I have not been included in the discussions leading up to her potential decision in this matter." Father's answer to the petition states that he "was not included in the decision for Julie to attend the University of Alabama." In his testimony, Father claims that Julie just announced her decision to him and that "I did not feel that my participation was being considered at all." Yet, he also testified to the following upon questioning from his own attorney:

> Q. . . . did you hear anything about the University of Alabama before she decided?
> A. I heard that she was looking at that, yes.
> Q. From her?
> A. From her, yes.
> Q. Did she solicit your input?
> A. We did discuss it, yes.

Later on, in response to a question from the court about conversations prior to Julie's decision, Father testified:

> A. We had discussed what she was looking into as far as colleges. And I had listened to what she was looking at and what her interest[s] were. Honestly, directly relevant to this case, if I had any idea how expensive [the] University of Alabama was I would have looked into it sooner and made my opinion known sooner. . . .

Father's attorney then asked, "Did you discuss the expense with her at all? Were there any discussions about expense prior to her decision?" Father replied, "No."

The college education provision states that, "[t]he parties shall jointly participate in their children's' [sic] choice of college." It gives each parent a right to be a part of each child's college search and to give input in the college selection. It is a right that can be exercised or not. Father learned that Julie was considering the University of Alabama. He and Julie had some discussion. He did not investigate the cost of the school until she had made a decision. It appears from his testimony that he did have the opportunity to participate in her decision, but he did not avail himself of the cost information until after she made her choice.

Father points to the fact that both parties refused to pay for their oldest child to take an online class from ITT. He maintains that their conduct was evidence of their interpretation of the college expense language as giving them control over the final decision. The ITT decision was made by both parents acting in concert in the best interest of the child. It was not a unilateral decision by one parent not to pay the agreed-upon share of college expenses. The ITT situation does not support Father's argument.

Similarly, Father maintains that Mother unilaterally refused to pay for their oldest daughter to live near the MTSU campus while taking classes. Yet, the daughter was only taking six or nine hours of course work and Mother viewed paying room and board for six hours of classes as "silly" and "unnecessary." We will merely point out that the "jointly participate" language dealt only with the choice of college. It does not address a parent's attempt to keep the expenses down by ruling out unnecessary costs.

Father also argues that any interpretation of the joint participation language other than his renders the language meaningless, because each parent already had the right to talk to the child about college, including expenses. Looking at the college expense provision as a whole, it is abundantly clear that the provision involved trade-offs. Mother wanted to commit father to paying for half of the children's college. Father wanted guaranteed input to keep the cost down.[1] He may, indeed, have wanted a veto, but he did not use the right language in the parenting plan.

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[1]Father's recitation of the facts includes these statements:

> [Mother] also says [Father] is frugal and cheap and that she would expect him to try to keep the cost of his daughter's education as low as possible[.] [Mother] stated that she anticipated that [Father's] participation in his daughter's choice of college, at the time of signing was to control the cost. (citations to record omitted)

In his brief, Father admits that his goal was to protect the parties from a decision that was "unreasonable or too costly."

The courts of Tennessee read an implied condition of reasonableness into agreements to pay for college. *Pylant*, 174 S.W.3d at 152-53; *Hathaway v. Hathaway*, 98 S.W.3d 675, 680 (Tenn. Ct. App. 2002); *Vick v. Vick*, No. 02A01-9802-CH-00051, 1999 WL 398115, at *7 (Tenn. Ct. App. June 16, 1999). In order to determine the reasonableness of the college, our courts look to whether the chosen college fits the child's needs and the obligated parent's ability to pay for that college. *Pylant*, 174 S.W.3d at 156; *Hathaway*, 98 S.W.3d at 681; *Brinton v. Brinton*, No. M2009-02215-COA-R3-CV, 2010 WL 2025473, at *3 (Tenn. Ct. App. May 19, 2010); *Vick*, 1999 WL 398115, at *7.

In his brief, Father admits that the University of Alabama is a good fit for Julie. Thus, the university meets that portion of the reasonableness standard. Father questions the reasonableness of the cost in light of his income.[2] Father makes approximately $96,000 a year and maintains that paying half of Julie's college expenses at the University of Alabama will require him to "forfeit" 32% of his take home pay.[3] At this level, Father claims that, "[h]e lacks sufficient income to cover his monthly bills and pay for the children's education." On cross-examination, Father conceded that he had "at least" $150,000 in equity in his home and that it was possible for him to borrow money, in the form of a second mortgage or a student loan, to pay his share of Julie's college expenses. He also testified about a small college fund for Julie, $1,000 to $1,500, that had not yet been used. Exhibit 1, an education expense summary for the University of Alabama, indicates that at the time of trial Father's one-half share of Julie's Fall 2012 college expenses was $9,250.28.

The reasonableness standard we use addresses "the obligated parent's ability to pay" for the particular college. *Pylant*, 174 S.W.3d at 156. In the context of college expenses, "the ability to pay" is not a mere calculation of income and expenses, especially where other substantial assets are available for use. Father's ability to borrow against the significant equity in his home must be considered. The trial court found that Father had the ability to pay his one-half of Julie's college expenses at the University of Alabama. The evidence does not preponderate against this finding.

Mother urges this court to reverse the trial court's decision not to award prejudgment

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[2] Father's brief states: "Even where, as in the case before us, the chosen college is an excellent fit for the child, the ability of the parent to pay must also be considered." He has apparently abandoned the argument he put forth at trial that the cost of the university did not match its benefits, stating that, "it is like buying a Lexus to deliver papers."

[3] The 32% figure includes Father's college expense obligations for his other two daughters as well for Julie.

interest.[4] An award of prejudgment interest is discretionary. *Scholz v. S. B. Int'l, Inc*., 40 S.W.3d 78, 81 (Tenn. Ct. App. 2000). Prejudgment interest is intended "to fully compensate a plaintiff for the loss of the use of funds to which he or she was legally entitled, not to penalize a defendant for wrongdoing." *Myint v. Allstate Ins*., 970 S.W.2d 920, 927 (Tenn. 1988).

The trial court found that "since the amount and reasonableness of the financial obligation was disputed upon reasonable grounds, the award of pre-judgment interest would be inequitable and therefore not allowed in this case." However, "uncertainty of either the existence or amount of an obligation does not *mandate* a denial of prejudgment interest . . . ." *Id.* at 928. The court must decide whether an award of prejudgment interest is fair under the circumstances. *Id.* at 927; *In re Estate of Ladd*, 247 S.W.3d 628, 645 (Tenn. Ct. App. 2007).

> Fairness will, in almost all cases, require that a successful plaintiff be fully compensated by the defendant for all losses caused by the defendant, including the loss of use of money the plaintiff should have received. That is not to say that trial courts must grant prejudgment interest in absolutely every case. Prejudgment interest may at times be inappropriate such as (1) when the party seeking prejudgment interest has been so inexcusably dilatory in pursuing a claim that consideration of a claim based on loss of use of the money would have little weight; (2) when the party seeking prejudgment interest has unreasonably delayed the proceedings after suit was filed; or (3) when the party seeking prejudgment interest has already been otherwise compensated for the lost time value of its money.

Scholz, 40 S.W.3d at 83 (internal citations omitted).

There have been no claims of unreasonable delay. Mother was forced to spend money to make up for the amount Father did not pay and, therefore, lost the use of that money. Father's underpayments are easily ascertained. Finally, Mother has not been otherwise compensated for the loss of use of these funds. Consequently, we reverse the trial court's denial of prejudgment interest and remand the case with directions to calculate and award Mother the prejudgment interest to which she is entitled.

The parties' Marital Dissolution Agreement states: "In the event that it becomes necessary to seek to enforce the terms of this agreement, then the other party shall be responsible for a reasonable attorney's fee and the court costs." Mother seeks attorney's fees

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[4] *See* Tenn. Code Ann. § 47-14-123.

for this appeal. The trial court awarded attorney's fees based on this language and Father has not raised the award as an error. We find that the above-quoted language provides for attorney's fees on appeal and that Mother is entitled to such an award. We remand this matter to the trial court for a determination of the amount of attorney's fees to be awarded to Mother for this appeal.

Costs of appeal are assessed against Father, for which execution may issue if necessary.

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ANDY D. BENNETT, JUDGE