

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs, June 19, 2007

**STATE OF TENNESSEE, v. TERESA MURPHY, and STATE OF
TENNESSEE, v. DWIGHT BRIGHT**

**Direct Appeal from the Juvenile Court for Monroe County
No. J04-176 Hon. J. Reed Dixon, Judge**

No. E2006-02468-COA-R3-JV - FILED SEPTEMBER 21, 2007

This is an action by the State to require the defendant to pay to the State previously ordered child support payments. The Trial Court determined that the children were never in the physical custody of the State, but were in the custody of the grandparents and the mother, during the time period the child support payments had been ordered, and that the grandparents had received no child support payments from the State and waived any payments of child support. The Trial Court dismissed the State's action. On appeal, we affirm.

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

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., J., and D. MICHAEL SWINEY, J., joined.

Robert E. Cooper, Jr., Attorney General and Reporter, and
Juan G. Villasenor, Assistance Attorney General, Nashville, Tennessee, for appellant.

Teresa Murphy, Madisonville, Tennessee, *pro se*.

OPINION

Background

The State Petitioned for Temporary Custody of the two children of Teresa Murphy and Dwight Bright on April 21, 2004. As a result of that Petition, a Protective Custody Order was entered on April 22, 2004, and a guardian ad litem appointed for the children. The

State also filed a Petition to Set Support for a Child in State Custody, seeking support for the children from both parents.

A hearing on the support petitions was held before the Juvenile Court Referee, and in his Findings and Recommendations, he stated that neither party appeared even though each had been served. A default judgment was entered, which decreed that each parent was in arrears in the amount of \$429.00, and payments were ordered of \$27.50 per month toward the arrearage, plus monthly child support payments of \$122.50. The Findings and Recommendations of the Referee were confirmed by the Juvenile Court Judge on August 26, 2004.

On November 17, 2004, an Agreed Custody Order was entered, and custody of the children was given to the grandparents. Another hearing was held before the referee regarding child support, and an Order was entered on May 3, 2005, wherein the father was found in contempt and as to the mother, an arrearage of \$1041.50.

On June 13, 2005, the mother and father and the paternal grandparents filed an Agreed Petition for Custody, asking the Court to return the custody of the children back to the mother from the grandparents. The Petition recited that the custody of the children had been with the paternal grandparents. An Agreed Custody Order was entered that day, giving the custody of the children to the mother.

A Petition for Civil Contempt was filed against the father on May 16, 2006, stating that he was in arrears \$3,001.50. An Order was entered on July 28, 2006, which states:

In this case, it appears that although there is a Child Support Order and Judgment, that the actual physical custody of the children during the period of time they were not in the mother's custody was with the children's maternal grandmother, and that she received no assistance from the state for providing that care, and is requesting none. The court finds that were any support to be paid under the executed order, it would be owed to the maternal grandmother, and since she is requesting none, it is determined by the court that the judgment is satisfied, and this case is dismissed as to both Teresa Murphy and Dwight Bright.

The State appealed from that Order.

Issue on Appeal

Whether the trial court erred in retroactively modifying the parents' child support obligations?

Discussion

The State argues that pursuant to Tenn. Code Ann. §37-1-151(b)(1), when children are placed in the custody of a state agency, their parents are liable for support from the effective date of the court's order placing the children in state custody. *See State v. Wilson*, 132

S.W.3d 340 (Tenn. 2004). Tenn. Code Ann. §37-1-151(b)(1) states: “The court's placement of the child's custody with the state shall be deemed as an automatic application by the state, as custodian of the child, for child support services from the department of human services Title IV-D child support program.”

The State argues that the Trial Court's finding the Judgment was satisfied, effectively modified the parents' child support obligation retroactively, which it cannot do pursuant to Tenn. Code Ann. §36-5-101. The State concedes, however, “[t]he record does not support the continued accrual of Ms. Murphy and Mr. Bright's arrears after their children exited DCS custody (on November 17, 2004) because the children's custodians, the grandparents, did not apply for Title IV-D services.” (See Brief of Appellant, p. 8, f.n. 4.)

However, the Trial Court found that “the actual physical custody of the children during the period of time they were not in the mother's custody was with the children's maternal grandmother”, thus negating any entitlement by DCS to any support by its own concession. Tenn. Code Ann. §37-1-151 (b)(2) supports this result, since it states that when “physical custody” of the child is placed with an agency of the State, child support shall be set, and further in subsections (b)(6)(C) and (D), states that when the child is no longer in the “physical custody” of the State, support will be paid to the child's custodian and not to the State. In this case, the Trial Court found that the children were always in the physical custody of their grandparents, and that if any support was owed, it would be owed to the grandparents, and not to the State. Further, that since the grandparents had not requested any support, the parents' support obligation was satisfied.

The Trial Court's findings of fact are reviewed *de novo* with a presumption of correctness unless the record preponderates otherwise. Tenn. R. App. P. 13. When there is no transcript nor statement of evidence, however, as here, the Court must presume the record would support the trial court's findings. As this Court has explained:

We begin our analysis by noting that the appellant has the burden to demonstrate that the evidence preponderates against the judgment of the trial court. Additionally, under Rule 24 of the Tennessee Rules of Appellate Procedure, the appellant has the 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. The appellant also has the burden to provide this Court with a transcript of the evidence or a statement of the evidence from which we can determine whether the evidence preponderates for or against the findings of the trial court. In the absence of a transcript or statement of the evidence, we conclusively presume that the findings of fact made by the trial court are supported by the evidence and are correct.

In re MLD, 182 S.W.3d 890, 895 (Tenn. Ct. App. 2005).

Since there is no transcript of the evidence nor statement of the evidence, we presume that all facts as found by the Trial Court are supported by the evidence and are correct.

This demonstrates that these children were always in the physical custody of their grandparents during the period of removal from the parents, and that the grandparents never asked for any State assistance. Pursuant to the statute and DCS' own concession, we affirm the Judgment of the Trial Court.

Finally, the State's argument regarding retroactive modification must fail for another reason. As we have previously held, the prohibition against retroactive modification found in Tenn. Code Ann. §36-5-101 does not apply to support orders made pursuant to Tenn. Code Ann. §37-1-151, as in this case. *See State v. Freeman*, 2001 WL 468664 (Tenn. Ct. App. May 4, 2001).

The Judgment of the Trial Court is affirmed with the cost of the appeal assessed to the State of Tennessee.

HERSCHEL PICKENS FRANKS, P.J.