IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs July 30, 2007

BRANCE E. MYERS, III v. ROBERTA JILL MYERS

Appeal from the Family and Probate Court for Cumberland County
No. 14267 Larry M. Warner, Judge

No. E2007-00621-COA-R3-CV - FILED SEPTEMBER 26, 2007

Brance E. Myers, III ("Father") filed a Petition to Modify Parenting Plan alleging a material change in circumstances and seeking to modify the parenting plan entered into when Father and Roberta Jill Myers ("Mother") divorced three years earlier. The case was heard by Judge Steven C. Douglas who entered an order on March 17, 2006, finding and holding, *inter alia*, that there was a material change in circumstances sufficient to require a modification. Mother filed a motion to alter or amend the judgment. Judge Douglas was defeated in the August election and never ruled on Mother's motion to alter or amend the judgment. The new judge, Judge Larry M. Warner, heard argument on the motion to alter or amend and granted a new trial. After the new trial, Judge Warner entered an order on March 6, 2007, finding and holding, *inter alia*, that there was no material change in circumstances that would warrant a modification of the parenting plan. Father appeals to this Court raising issues regarding the grant of a new trial and the finding of no material change in circumstances. We reverse the grant of a new trial, vacate the March 6, 2007 order, and reinstate the March 17, 2006 order.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Family and Probate Court Reversed, in part, Vacated, in part; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Tom Beesley, Crossville, Tennessee for the Appellant, Brance F. Myers, III.

Roberta Jill Myers, Crossville, Tennessee, Pro Se Appellee.

OPINION

Background

Father and Mother were divorced in 2002. One child was born of the marriage ("the Child"). At the time of the divorce, the Trial Court approved the Permanent Parenting Plan entered into by the parties that named Mother as the primary residential parent with Father to have visitation every week from Thursday through Sunday and on specified holidays. The Permanent Parenting Plan also provided that Father would pay child support in accordance with the guidelines of $200 per month.

The parties both agree that they never followed the Permanent Parenting Plan. Instead, shortly after the divorce, Mother moved to California and left the Child to reside with Father. Mother lived in California for a couple of months and then moved back to Tennessee. After Mother moved back to Tennessee, the Child began spending some time each week with Mother but continued to live primarily with Father. Because the Child resided primarily in his home, Father did not pay child support to Mother as required by the Permanent Parenting Plan.

In May of 2005, Father filed a Petition to Modify Parenting Plan alleging that the parties' failure to follow the Permanent Parenting Plan constituted a material change in circumstances. The case was heard by trial judge Steven C. Douglas and an order was entered on March 17, 2006 finding and holding, *inter alia*, that the parties' failure to follow the Permanent Parenting Plan constituted a material change in circumstances sufficient to support a modification, and that no child support arrearage existed because Father had been the actual primary residential parent and had been providing necessities for the Child. No transcript of this hearing exists. The March 17, 2006 order modified the parenting plan to name Father as the primary residential parent with Mother to have visitation every week from Friday to Sunday and on holidays and also provided that Mother would pay child support in accordance with the guidelines in the amount of $34 per week.

Mother filed a motion styled Motion of Respondent/Counter-Petitioner for Amendment of Findings of Fact and Motion to Alter or Amend Judgment or in the Alternative a New Trial ("Motion to Alter or Amend"). In substance, Mother's Motion to Alter or Amend sought to have the Trial Court clarify its findings of fact and conclusions of law and amend the judgment to find in favor of Mother.

On October 17, 2007, Father filed a motion to dismiss Mother's Motion to Alter or Amend alleging, in part, that Judge Douglas had continued the hearing on the Motion to Alter or Amend "in order for the movant to prepare a statement of the case to refresh the judge's recollection, since the underlying hearing had been six months earlier," but that Mother never filed the statement of the case as directed. Judge Douglas had been defeated in the August 2006 election by Larry M. Warner.

Judge Warner heard argument on Father's motion to dismiss the Motion to Alter or Amend and on Mother's Motion to Alter or Amend and entered an order on November 14,

2006 finding and holding, *inter alia*: "The matter will be reheard due to the fact that the current Judge did not hear the proof entered on November 5, 2005 and cannot make finding[s] without sufficient knowledge of the testimony entered during the hearing."

The second trial was held on December 13, 2006. A transcript of this hearing is in the record on appeal. After the second trial, Judge Warner entered an order on March 6, 2007 finding and holding, *inter alia*, that no material change in circumstances had occurred that would support a modification of the Permanent Parenting Plan and that no arrearage in child support existed and Father was relieved of same. Father appeals to this Court.

Discussion

Although not stated exactly as such, Father raises two issues on appeal: 1) whether the Trial Court erred in granting a new trial; and, 2) whether the Trial Court erred in finding that no material change in circumstances existed sufficient to support a modification of the Permanent Parenting Plan.

We review a trial court's decision regarding a motion for new trial for abuse of discretion. *Schrader v. Schrader*, No. E2005-02614-COA-R3-CV, 2007 Tenn. App. LEXIS 10, at *15 (Tenn. Ct. App. Jan. 4, 2007), *no appl. perm. appeal filed*. Father's brief on appeal argues, in part, that it was error to grant a new trial because Mother's Motion to Alter or Amend sets out no basis to grant a new trial. We agree. In fact, although Mother's Motion to Alter or Amend is styled, in part, "in the Alternative a New Trial," the body of the motion never requests a new trial. Rather, the motion only seeks clarification of the Trial Court's findings of fact and conclusions of law and requests that the Trial Court amend its judgment to find in Mother's favor. Mother never actually requested a new trial and has shown no basis upon which she was entitled to a new trial. Further, we find nothing in the record that would establish that Mother was entitled to a new trial. Mother was not granted a new trial because she met her burden and proved she was entitled to a new trial, but rather was granted a new trial only because the new trial judge had no way of knowing what evidence had been presented at the first trial.

Mother was not entitled to a new trial simply because the judge who heard the evidence in the first trial, Judge Douglas, vacated office before ruling on Mother's Motion to Alter or Amend. In her brief on appeal, Mother admits that prior to vacating office Judge Douglas requested that the parties "put everything on paper to remind him of the facts…" so that the Trial Court could rule on Mother's Motion to Alter or Amend. Mother's brief asserts that she spoke with someone at her attorney's office and was told that "all items were filed," but that "we never received a Court date." The record before us, however, contains no statement of the case or statement of the facts from the trial held before Judge Douglas and, as discussed above, there is no transcript of this trial. Thus, nothing appears in the record that, in the absence of a trial transcript, would have assisted either Judge Douglas or Judge Warner in ruling on Mother's Motion to Alter or Amend. As best we can tell from the record before us, Mother never complied with Judge Douglas's direction for a written submission to refresh his recollection.

In addition, there is nothing in the record before us that even hints that Mother attempted to avail herself of Tenn. Code Ann. § 17-1-304 to get Judge Douglas, who had heard

the evidence presented at the first trial, to rule on her Motion to Alter or Amend. Tenn. Code Ann. § 17-1-304 provides:

> **17-1-304. Powers after vacation of office.** – (a) Whenever any trial judge shall vacate the office of judge for any cause whatsoever other than the death or permanent insanity of such judge, the judge shall have and retain, as to cases pending before the judge, the trial of which has begun prior to the judge's vacation of office, all the powers in connection with the cases which the judge might have exercised therein, had such vacation of office not occurred.
> (b) The judge's powers in this respect shall not extend beyond sixty (60) days from the date of such vacation of office.
> (c) Such powers shall especially include, but shall not be limited to, the right to render judgments, to hear and determine motions for new trial, to grant appeals and to approve bills of exceptions.
> (d) Such powers may be exercised by such judge either within or without the geographical limits theretofore assigned by law to such judge.

Tenn. Code Ann. § 17-1-304 (1994). Judge Douglas had the power under Tenn. Code Ann. § 17-1-304 to rule on Mother's Motion to Alter or Amend up to sixty days after his vacating office, but the record is devoid of anything showing that Mother attempted to have her motion heard by Judge Douglas during this time.

Mother never specifically requested a new trial, has shown no reason why she is entitled to a new trial, did not comply with Judge Douglas's direction for a written submission to assist in his ruling on the Motion to Alter or Amend, and did not avail herself of the opportunity provided by Tenn. Code Ann. § 17-1-304 to request that the judge who had heard the evidence at trial rule on the Motion to Alter or Amend even after he had vacated the office. Even assuming Mother's motion can be read broadly enough so as to specifically request a new trial, Mother still had the burden to show she was entitled to relief under that motion.

We recognize the difficult position Judge Warner was placed in. However, the fact that there was neither a transcript or statement of the evidence available to Judge Warner does not relieve Mother from meeting her burden to show she is entitled to a new trial. The General Assembly by its enactment of Tenn. Code Ann. § 17-1-304 provided a means for Mother to at least attempt to obtain a ruling from the trial judge who tried her case. From what is contained in the record before us, Mother never availed herself of that opportunity and instead presented nothing to the new trial judge to support her motion. Given all this, we hold that it was error to grant a new trial.[1]

We reverse the Trial Court's grant of a new trial and vacate the Trial Court's March 6, 2007 order. We reinstate the Trial Court's March 17, 2006 order finding and holding, *inter alia*, that there was a material change in circumstances sufficient to support a modification. We remand this case to the Trial Court and direct the Trial Court to take all necessary

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[1] Our resolution of this issue pretermits the necessity of considering the second issue as raised by Father.

transitional steps to assure an orderly shift to compliance with the Trial Court's March 17, 2006 order.

Conclusion

The order of the Trial Court is reversed as to the Trial Court's grant of a new trial, and the Trial Court's March 6, 2007 order is vacated. The Trial Court's March 17, 2006 order is reinstated. This cause is remanded to the Trial Court for any necessary transitional steps to effectuate our judgment and for collection of the costs below. The costs on appeal are assessed against the Appellee, Roberta Jill Myers.

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D. MICHAEL SWINEY, JUDGE