IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 9, 2009 Session

JUDITH V. HANSEN v. ANTON B. HANSEN

Appeal from the Circuit Court for Davidson County
No. 04D-3478 Carol Soloman, Judge

No. M2008-02378-COA-R3-CV - Filed October 7, 2009

Father filed a petition to modify his child support obligation. Mother filed a counter-petition seeking final decision-making authority. At the hearing, Father dismissed his petition. The trial court awarded Mother her attorney's fees for preparation for the child support aspect of the hearing. The trial court also granted Mother final decision-making authority. Father appealed the award of decision-making authority, the award of and reasonableness of the attorney's fees, and the admission of several documents into evidence. The trial court's decision regarding the amount of attorney's fees is reversed and remanded. The trial court is affirmed in all other respects.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit 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, P.J., M.S., and RICHARD H. DINKINS, J., joined.

Connie Reguli, Brentwood, Tennessee, for the appellant, Anton B. Hansen.

Timothy T. Ishii and Cynthia J. Bohn, Nashville, Tennessee, for the appellee, Judith V. Hansen.

OPINION

Anton Hansen ("Father") and Judith Hansen ("Mother") were divorced on June 20, 2005. At the time of the divorce, they entered into an agreed parenting plan and a marital dissolution agreement. Mother was designated as the primary residential parent. Mother and Father agreed to joint decision-making regarding their two minor children. Father was ordered to pay $1,616.48 per month for child support and 10% of all income over $63,194.00 per year. He was also ordered to provide health insurance for the children.

At some point, problems began. The younger child began having behavior issues. He was suspended from school because of threats he made against two girls. Father and Mother experienced communication issues. She felt he called her too much about the children, and he felt he was not

being kept informed enough about the children. They had conflicts over what to do about the younger child's behavior.

On April 21, 2008, Father filed a petition to modify his child support obligation. He based the petition on a belief that Mother's income had increased and that she no longer incurred work-related child care expenses. In addition, he claimed that his income had changed.

Soon thereafter, Mother arranged for the younger child to be evaluated without the knowledge or consent of Father. Father did not find out about this until he received an explanation of benefits from his insurance provider. On July 3, 2008, Father faxed a letter to the doctors evaluating the child explaining that he and Mother had joint decision-making responsibility and requesting that they "cease any evaluation or treatment that is not life saving from a clear and present threat to either of my children." He further explained that he hoped to mediate the dispute with Mother over health care issues.

Mother filed a counter-petition seeking a modification of the parenting plan to remove the joint decision-making requirement and give her the final decision on matters regarding the children. The parents eventually agreed to let the child's treatment continue and to let Father take the child to another doctor to seek a second opinion. The second doctor told the parents that it would not be productive for him to intervene in the treatment plan that had been established by the first doctor. Father took this advice.

A hearing on the petition and counter-petition was held on September 15, 2008. At the beginning of the hearing, Father's attorney announced that they were dismissing the petition to modify the child support obligation. Mother's attorney immediately asked for an award of attorney's fees. The hearing proceeded to address the counter-petition regarding decision-making authority. After hearing testimony from both parents and the daughter, the trial court found that "Mother should have the final say in the decision making process in the event the parties are unable to reach an agreement in the decision making process regarding the children."[1] The trial court did, however, require that the parties "should attempt to make joint decisions if possible." Father appealed.

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[1] The trial court's order does not limit Mother's final say only to health care decisions. This appears to be consistent with the somewhat confusing dialogue between the court and Mother's attorney:

> THE COURT: He already said he agrees that the A.D.H.D. - - that you're going to be in charge, but that doesn't mean you can go willy-nilly and make all those decisions. You have to consider what he says and - - The religious thing, I'm going to still leave that as joint. And - -
> MS. BOHN: So this is on medical and education that you're doing this?
> THE COURT: Right. . . .
> MS. BOHN: Extracurricular?
> THE COURT: I'll have them still agree about extracurricular. But, again, put it joint, but mother has the final say-so.
> MS. BOHN: So basically all of it?
> THE COURT: Yes.

Standard of Review

Our review of the trial court's findings of fact is de novo with a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Kendrick v. Shoemake,* 90 S.W.3d 566, 570 (Tenn. 2002); *Marlow v. Parkinson*, 236 S.W.3d 744, 748 (Tenn. Ct. App. 2007). When the trial court makes no specific findings of fact, however, we review the record to determine where the preponderance of the evidence lies. *Kendrick,* 90 S.W.3d at 570.

Analysis

(1) Modification of Parenting Plan

First, Father claims that the trial court erred in modifying the parenting plan to give Mother the final say. Alteration of a parenting plan cannot be accomplished on a whim. A parenting plan is res judicata between the parties unless a new fact has occurred which materially alters the circumstances so that the best interest of the child requires a modification of the plan. *Dishman v. Dishman*, No. M2008-01194-COA-R3-CV, 2009 WL 1181341 at *2 (Tenn. Ct. App. May 1, 2009) (no Tenn. R. App. P. 11 application filed) (citing *Hoalcraft v. Smithson*, 19 S.W.3d 822, 828 (Tenn. Ct. App. 1999)). The failure of a joint decision-making provision in a parenting plan can constitute a material change in circumstances. *Marlow*, 236 S.W.3d at 749.

There can be no doubt that it is in the best interest of the children that decisions about their welfare be made without undue delay and stress. "[W]here the parents are unable to agree on matters of great importance to the welfare of their minor children, the primary decision-making authority must be placed in one parent or the other." *Coley v. Coley*, No. M2007-00655-COA-R3-CV, 2008 WL 5206297, at *7 (Tenn. Ct. App. Dec. 12, 2008) (no Tenn. R. App. P. 11 application filed). In this instance, there is ample evidence showing that the parties do not communicate well and have had difficulty agreeing on the child's appropriate course of treatment. Delays or gaps in treatment resulted. Based on the record in this case, we must conclude that joint decision-making, requiring the assent of both parents, is not in the children's best interest. Neither Father nor Mother is a bad parent, but decisions must be made. Since Mother has the children the majority of the time, she is the obvious person with whom to place this responsibility. We affirm the decision of the trial court that, after consultation with Father, Mother has the final decision-making authority for education, health care, and extracurricular activities.

(2) Attorney Fees

Father waited until the hearing to voluntarily dismiss his petition to modify his child support obligation. Mother's counsel was prepared to proceed with the hearing on the child support modification request and sought attorney's fees. The trial court awarded Mother attorney's fees of $6,335.23. Father's counsel moved for a hearing on the reasonableness of the attorney's fees. A hearing on the fees was held on December 1, 2008. Without citing any specific legal authority, the

trial court adhered to its prior fee ruling. Father challenges the award of attorney's fees and the reasonableness of those fees.

Tennessee abides by the American Rule regarding the payment of attorney's fees. *State v. Brown & Williamson Tobacco Corp*., 18 S.W.3d 186, 194 (Tenn. 2000). The rule requires litigants to pay their own attorney's fees unless a statute or an agreement provides otherwise. *Id.* One of Mother's theories for recovery of the attorney's fee relies on Tenn. Code Ann. § 36-5-103(c):

> 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.

This statute has been interpreted as allowing for the award of attorney's fees to a party defending an action to change a prior order on the theory that the defending party is enforcing the prior order. *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). The Court of Appeals has observed that "requiring parents who precipitate custody or support proceedings to underwrite the costs if their claims are ultimately found to be unwarranted is appropriate as a matter of policy." *Sherrod v. Wix*, 849 S.W.2d 780, 785 (Tenn. Ct. App. 1992).

Whether to award attorney's fees incurred by a party in enforcing a decree lies within the discretion of the trial court. *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). In light of the fact that Mother's counsel had to prepare for the hearing as if the issue of support would be litigated, we find no abuse of discretion in the trial court's decision to award attorney's fees for that preparation.[2]

The reasonableness of the trial court's fee award is another matter. Some of the fees and expenses awarded do not appear to relate to the defense of Father's petition, and others are unclear. Therefore, we remand the issue of the amount of the fee award back to the trial court with instructions to examine the attorney's fee affidavit and any clarifying affidavit or testimony and to award attorney's fees only for time spent in preparation for defending against Father's petition to decrease child support.

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[2] In his complaint and through his counsel at the hearing, Father maintained that he had to file the petition because Mother did not comply with the marital dissolution agreement by disclosing her income. Since Mother's answer is not in the record, we cannot determine if this assertion is correct based on the record before the court.

Mother also seeks attorney's fees for this appeal. We respectfully decline to make such an award.

(3) Admission of Documents

Father maintains that Exhibit 4 (assessment session information), Exhibit 6 (physician/medical progress note dated July 31, 2008), Exhibit 7 (individual progress notes for the child), and Exhibit 8 (second grade daily reports) were either introduced without meeting the requirements of the Business Records Act or hearsay. Mother has conceded that Father is correct; however, she contends that the admission of these documents was harmless error because "there is ample testimonial proof of the subject matter of the complained of documents, i.e. the son's troubled mental state, his treatment therefore, and the Father's problem with such."

Tenn. R. App. P. 36(b) requires that the appellate court not set aside the judgment "unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process." The admission of Exhibit 4 and Exhibit 8 was harmless because there is plenty of testimony about the child's condition. The hearing transcript reveals that no objection was made to the admission of Exhibits 6 and 7. Consequently, any issues regarding the admissibility of these exhibits is waived. *Wright v. United Servs. Auto. Ass'n*, 789 S.W.2d 911, 914 (Tenn. Ct. App. 1990).

Conclusion

The trial court's decision regarding the amount of attorney's fees is reversed and remanded for further proceedings consistent with this opinion. The trial court is affirmed in all other respects. Costs of appeal are assessed against Father, for which execution may issue if necessary.

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ANDY D. BENNETT, JUDGE