

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
December 7, 2000 Session

LORRI LISA BAILEY (CAPPS) v. DAVID WAYNE CAPPS

**Appeal from the Circuit Court for Wilson County
No. 1566 Clara W. Byrd, Judge**

No. M1999-02300-COA-R3-CV - Filed April 2, 2001

This child custody case has already been the subject of one appeal before this Court. The father was awarded sole custody of the parties' only child, with the mother receiving liberal visitation rights. The mother petitioned for a change of custody. The trial court found that there was no material change in circumstances sufficient to warrant an award of sole custody to the mother. However, the original custody order was modified to provide that the parties had joint custody, with the father being the "primary residential custodian." The trial court also ordered that the mother was no longer required to pay child support and that the mother owed no arrearage in child support. The father appeals. We affirm in part and reverse in part, affirming the order of joint custody and the order that the mother is not required to pay child support, but we reverse on the issue of the mother's child support arrearage.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in part;
Reversed in Part**

HOLLY KIRBY LILLARD, J., delivered the opinion of the court, in which DAVID R. FARMER, J., and BEN H. CANTRELL, P.J., M.S., joined.

John G. Doak, Sr., Nashville, Tennessee, for the appellant, David Wayne Capps.

Anthony E. Hagan, Lebanon, Tennessee, for the appellee, Lorri Lisa Bailey (Capps).

OPINION

In this case, Lorri Lisa Capps (now Lorri Lisa Bailey) ("Mother") and David Wayne Capps ("Father") were divorced in August 1997. The parties had one child, Heather Grace Capps ("Heather"), born April 27, 1990. In its final decree, the trial court granted sole custody of Heather to her Father and granted "specific and liberal visitation" to Mother. The decree provided that Mother would have visitation with Heather three weekends each month and for alternating two week periods during the summer. Since Mother spent more time with Heather than the time set forth in the Guidelines promulgated by the Department of Children's Services, the decree provided for an

award of child support that deviated from the Guideline amount. In the decree, Mother was ordered to pay 15% of her net income, as opposed to the 21% ordinarily required under the Guidelines. *See Rules of Tenn. Dep't of Human Services*, Chap. 1240-2-4-.03, Child Support Guidelines.

Mother appealed the original divorce decree, and it was affirmed on appeal. *See Capps v. Capps*, No. 01A01-9710-CV-00606, 1998 WL 426975 (Tenn. Ct. App. July 29, 1998).

Subsequently, on March 1, 1999, Mother filed a petition to change custody. In the petition, Mother alleged that, since the parties' divorce, there were many months in which she had spent more time with Heather than Father had spent. She noted that she had remarried, and she stated that her new husband had developed a close and loving relationship with Heather. Mother argued that these facts constituted a material change in circumstances sufficient to warrant a change in custody. She asked the trial court to grant her sole custody, with Father having "reasonable visitation" and to require Father to pay child support. In his response, Father denied that Mother spent more time with Heather than he did. He filed a counter-petition seeking an increase in Mother's child support obligation, alleging that she was willfully under-employed. Father filed a subsequent motion to amend his counter-petition to seek \$337.47 in child support arrearage from Mother.

The matter was heard on September 22 and October 12, 1999. The trial judge who presided over the parties' original divorce did not preside over this proceeding. Testimony at trial described the manner in which the parties' parenting time had evolved since the divorce. The trial judge heard testimony regarding the number of days spent at each parent's home, the waking hours Heather spent with each parent when not in school, and the parties' participation in Heather's school and other activities. Heather told the trial judge in chambers that she was happy with the current arrangement and did not want to change it.

On the issue of child support, Father testified in the proceeding below that Mother paid \$200 per month in child support, even though the divorce decree required her to pay \$216.07 per month. Prior to the filing of Mother's petition to change custody, Mother had been ordered to pay \$265.55 in child support arrearage. At that time, the trial court also amended its previous order to require Mother to pay 21% of her income, the Guideline amount, instead of the 15% in the prior order, and to continue paying half of Heather's insurance premiums. Mother was ordered to pay a total of \$241.07 (\$216.07 + \$25.00 in arrearage) each month from January 1998 through October 1998, \$231.62 for the month of November 1998, and then \$216.07 every month thereafter.

In the proceeding which is the basis of this appeal, Mother asserted that she asked Father how much he wanted her to pay, and that he replied, "\$200 a month is fine." Mother testified that she was working for an insurance agency 40 hours per week at \$9 per hour. Father testified that he earned \$21 per hour at his job as a machinist.

After the hearing, the trial judge ruled from the bench. She stated that she did not find that there was a material change in circumstances sufficient to grant Mother's petition to change custody. The trial court considered the number of days each month that Heather spent with each parent, the

number of waking hours spent with each parent when Heather was not in school, and the parents' participation in Heather's school and other activities. The trial judge found that the residential arrangement in place between the parties was in reality "a joint custody arrangement," observing, "how much more evenly could I split this child?" In its written order, the trial court did not change the relative amounts of parenting time each parent spent with Heather, but found that "the parties are spending substantially the same amounts of time with the child in the current order of custody and visitation." Consequently, the trial judge amended the original custody order "to reflect that the parties shall have joint legal custody and the Father shall remain the primary residential custodian." On the issue of child support, the trial court ordered that Mother was no longer required to pay child support and owed no arrearage to Father, but that she was equally responsible for Heather's welfare and should contribute equally with Father toward Heather's expenses. From this order, Father now appeals.

In his appeal, Father raises two issues. He argues that the trial court could not, as a matter of law, amend the original custody order to reflect that the parties had joint custody of Heather without a finding that there was a material change in circumstances. To do so, Father contends, would violate the principle of *res judicata*. Secondly, Father argues that it was also improper for the trial court to end Mother's child support obligation and erase her arrearage.

In child custody cases, we review the trial court's decisions *de novo* upon the record before this Court, accompanied by a presumption of correctness in the trial court's factual findings. *See Hass v. Knighton*, 676 S.W.2d 554, 555 (Tenn. 1984); *Whitaker v. Whitaker*, 957 S.W.2d 834, 838 (Tenn. Ct. App. 1997). In child custody cases, the welfare and best interest of the child are paramount. *Whitaker*, 957 S.W.2d at 837; Tenn. Code Ann. § 36-6-106 (Supp. 2000). The determination of the child's best interest must turn on the particular facts of each case. *See Taylor v. Taylor*, 849 S.W.2d 319, 326 (Tenn. 1993); *In re Parsons*, 914 S.W.2d 889, 893 (Tenn. Ct. App. 1995).

When an order is issued granting custody of children to one parent over the other, that decree is *res judicata* and is conclusive as to the issues in question at the time the order is issued. *See Dodd v. Dodd*, 737 S.W.2d 286, 290 (Tenn. Ct. App. 1987); *Long v. Long*, 488 S.W.2d 729, 731-32 (Tenn. Ct. App. 1972). A decree granting custody, then, should not be disturbed "unless some new fact has occurred which has altered the circumstances in a material way so that the welfare of the child requires a change in custody." *Dodd*, 737 S.W.2d at 290.

There is a strong preference for maintaining continuity in a child's life by preserving an initial custody order and not moving the child from one parent to the other. *See Placencia v. Placencia*, 3 S.W.3d 497, 503 (Tenn. Ct. App. 1999). The initial custody decision can be changed upon a showing that there has been a material change in circumstances. *See id.* at 499; *Massengale v. Massengale*, 915 S.W.2d 818, 819 (Tenn. Ct. App. 1995); *Wall v. Wall*, 907 S.W.2d 829, 834 (Tenn. Ct. App. 1995). The change in circumstances must be such that the welfare of the child is directly affected. *See Massengale*, 915 S.W.2d at 819 (citing *Dailey v. Dailey*, 635 S.W.2d 391, 393 (Tenn. Ct. App. 1981)).

In this case, the trial court dismissed Mother's petition to grant her sole custody. Taking into consideration the factor of continuity in Heather's life, the trial court left in place the residential arrangement that had been implemented by the parties. The trial court found that under the arrangement at the time of the hearing, "the parties are spending substantially the same amounts of time with the child. . . ." The evidence does not preponderate against this finding. In view of this finding, the trial court amended the previous order "to reflect that [the] parties shall have joint legal custody and the Father shall remain the primary residential custodian." Under these circumstances, we find no error in this decision.

We next consider whether it was proper for the trial court to terminate Mother's child support obligation. Tennessee Code Annotated § 36-5-101(e)(1) states that:

In making its determination concerning the amount of support of any minor child or children of the parties, the court shall apply as a rebuttable presumption the child support guidelines as provided in this subsection. If the court finds that evidence is sufficient to rebut this presumption, the court shall make a written finding that the application of the child support guidelines would be unjust or inappropriate in that particular case, in order to provide for the best interest of the child(ren) or the equity between the parties. Findings that the application of the guidelines would be unjust or inappropriate shall state the amount of support that would have been ordered under the child support guidelines and a justification for the variance from the guidelines.

Therefore, in appropriate circumstances, the trial court may be justified in making an award of child support which varies from the amount that would result from application of the Guidelines promulgated by the Tennessee Department of Children's Services. The Guidelines provide that deviation "may be appropriate . . . [i]n cases where physical custody of the child(ren) is more equally divided between the parties than occurs in a situation where one party has an average amount of overnight visitation as defined in 1240-2-4-.02(6)." *See Rules of Tenn. Dep't of Human Services*, Chap. 1240-2-4-.04(2)(b), Child Support Guidelines.

In this case, the trial judge considered the amount of time and financial resources that Mother and Father contributed toward Heather's support. She also considered the disparity in the parties' incomes. The trial judge noted that Heather's time was split fairly evenly between the parents, and that both parents bought a similar amount of clothes and gifts and the like, "even though dad makes three times the amount of mom." Under these circumstances, the trial court concluded that it would be "unfair" for Mother to be required to pay child support. Indeed, under circumstances in which the parties have joint custody and spend similar amounts of time with the child, if the child support guidelines were applied to both parents, with the substantial disparity in income between Mother and Father, the net result would be that Father would owe child support to Mother. In view of this, we cannot conclude that the trial court erred in eliminating Mother's obligation to pay child support. The trial court's decision on this issue is affirmed.

Finally, we consider whether the trial court erred in finding that Mother owed Father no child support arrearage. Mother acknowledged that she was paying \$200 per month to Father, even though she was ordered to pay \$216.07 plus a portion of the arrearage that she had accumulated prior to the filing of her petition to modify custody. Father's original counter-petition did not seek any payment for child support arrearage, but he later moved to amend his petition, claiming that Mother owed him \$337.47 in past due child support. There is no specific disposition of Father's motion to amend his counter-petition in the record, but it is obvious from the trial court's final order that the issue of Mother's arrearage was considered.

Child support orders are enforceable judgments, and they are not subject to retroactive modification. *See Rutledge v. Barrett*, 802 S.W.2d 604, 606 (Tenn. 1991); Tenn. Code Ann. § 36-5-101(a)(5). Mother's testimony indicated that Father had agreed to accept a reduced amount of child support; however the parties are without authority to enter into a private agreement which alters the court's final decree regarding child support, absent an order modifying the child support obligation. *See State ex rel. McAllister v. Goode*, 968 S.W.2d 834, 838 (Tenn. Ct. App. 1997). The trial court could have modified Mother's child support obligation retroactive to the filing of Mother's petition, but apparently did not do so, since the trial court's order states only that Mother "is no longer required to pay child support. . . ." Therefore, in light of the undisputed evidence of Mother's arrearage, we reverse the decision of the trial court holding that Mother owed Father no arrearage, and find that Mother owed Father \$337.47 in child support arrearage, representing the twenty-one months in which Mother was supposed to pay Father \$216.07 each month, but only paid him \$200.00 each month.

In sum, we affirm the decision of the trial court to dismiss Mother's petition for sole custody and to modify the original custody order to reflect that the parties have joint custody with Father as primary residential custodial parent. Additionally, we affirm the trial court's decision to eliminate Mother's child support obligation. We reverse the trial court's finding that Mother owed no arrearage to Father, holding that Mother owes Father \$337.47 in child support arrearage.

The decision of the trial Court is affirmed in part and reversed in part, as set forth above. Costs of this appeal are taxed equally to Appellant, David Wayne Capps, and his surety, and Appellee, Lorri Lisa Bailey (Capps), and her surety, for which execution may issue if necessary.

HOLLY KIRBY LILLARD, JUDGE