

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 6, 2005 Session

DESHAYNE FAYE NEAL v. JERRY BRENT NEAL

**Appeal from the Chancery Court for Fentress County
No. 02-86 Gerald L. Ewell, Judge**

No. M2003-02703-COA-R3-CV - Filed August 2, 2005

This is an appeal from the chancery court order refusing to modify the parties' divorce decree and permanent parenting plan. Mother filed a Petition to Modify, and Father filed an Answer and Counter Petition also requesting modification. The Chancellor dismissed both the Petition and Counter Petition finding that there had not been sufficient change in circumstances since the initial entry of the divorce decree to justify modification. Upon review of the Permanent Parenting Plan and Final Decree of the Chancery Court, we find that this Permanent Parenting Plan and the judge's approval of such plan do not meet the requirements of Tennessee law. As such, the Permanent Parenting Plan is vacated, and the case is remanded to the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court is Vacated and Remanded

WILLIAM B. CAIN, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

S.N. Garrett, Jamestown, Tennessee, for the Appellant, DeShayne Faye Neal.

Lynda W. Simmons, Livingston, Tennessee, for the appellee, Jerry Brent Neal.

OPINION

The parties in this matter, DeShayne Faye Neal ("Mother") and Jerry Brent Neal ("Father") are the parents of two minor children, K.B.N., born on January 31, 1992, and H.B.N., born on October 19, 1996. In 2002, the parties filed for divorce, filing their Marital Dissolution Agreement and Permanent Parenting Plan on September 6, 2002. The Permanent Parenting Plan failed to provide any child support stating:

That the parties shall share parenting of their minor children on an equal basis and no child support shall be paid by either party. Defendant further agrees to reimburse

Plaintiff ½ of costs for the purchase of clothing, pictures and supplies for school providing that the Plaintiff provides a receipt for the purchase of said items.

The Plan also basically provided that Mother would have the children on weekdays, Sunday evening until Friday afternoon, and Father would have the children on the weekends, Friday afternoon until Sunday evening. In approving this Parenting Plan, the trial court simply stated, “The Permanent Parenting Plan, as filed with the court, is appropriate.” No reason was given by the trial court for deviating from the Tennessee Child Support Guidelines. The Final Decree of Divorce was entered on September 24, 2002.

On October 25, 2002, Mother filed her Petition to Modify requesting child support and additional parenting time. On November 15, 2002, Father filed his Answer and Counter Petition requesting primary residential custody and child support. On March 24, 2003, a hearing was held giving Mother one weekend of parenting time in addition to her usual weekdays. All other issues were continued until a later date.

On September 29, 2003, another hearing was held on the Petitions to Modify. At that hearing, the regular judge was unavailable, and a special judge was sitting. The parties agreed to continue all issues other than child support; however, at the conclusion of the hearing, the trial judge dismissed Mother’s original Petition to Modify as well as Father’s Counter Petition to Modify finding no change of circumstances since the Final Decree of Divorce. This action effectively vacated the March 24, 2002, Order providing Mother with an extra weekend of visitation and reinstated the original Parenting Plan of September 6, 2002, as written. The parties appeal this Order on various different grounds. Upon review of the original Parenting Plan and Final Decree of Divorce, we find that the Permanent Parenting Plan and Final Decree fail to comply with Tennessee law. We, thus, vacate the Permanent Parenting Plan and remand this case for further proceedings.

Tennessee law provides mandatory child support guidelines in addition to specific requirements for deviation from these guidelines.

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.

Tenn.Code Ann. § 36-5-101(e)(1)(A).

Tennessee's rules and regulations further elaborate on this requirement that a court rebut the presumption that the child support guidelines are in the best interest of the children with a finding that application of the guidelines is unjust or inappropriate and that the deviation would be in the best interest of the children. These findings must be contained in the trial court's order in addition to the amount of child support that would have been required under the guidelines and the reason for the deviation from this amount. *See* Tenn. Comp. R. & Regs. 1240-2-4-.01 and .07.

These parties are in large part authors of their own misfortune. At the time the Final Decree of Divorce was entered on September 24, 2002, they presented a proposed Permanent Parenting Plan to the trial court that was fatally flawed as to child support. The court, without elaboration, simply approved the jointly proffered Parenting Plan that was presented to him. While it is clear from the provisions of this Parenting Plan that the mother is the primary residential parent, no child support in accordance with the Child Support Guidelines is set either in the Parenting Plan or the Decree of the court adopting the Parenting Plan. No reason is stated by the trial court for the downward deviation from the Child Support Guidelines. Regardless of the agreement of the parties, the Parenting Plan adopted in the Final Decree of Divorce contravenes settled law.

Agreements incorporated into decrees which purport to relieve a parent of his or her child support obligation are void as against public policy. *Witt v. Witt*, 929 S.W.2d 360, 363 (Tenn.Ct.App.1996). The duty of support cannot be permanently bargained away; agreements not to seek future increases in child support are likewise void as against public policy. *Berryhill v. Rhodes*, 21 S.W.3d 188, 193 (Tenn.2000).

Child Support Guidelines have the force of law. *Jahn v. Jahn*, 932 S.W.2d 939, 943 (Tenn.Ct.App.1996). Any deviation from the guidelines must be explicitly stated on the record. Tenn.Code Ann. § 36-5-101(e)(1). If the guidelines are not followed, the court must make written specific findings that their application would be unjust or inappropriate, stating the amount that should be awarded under the guidelines, along with justification for the deviation. Tenn. Comp. R. & Regs. Ch. 1240-2-4-.02(7).

State ex rel. Wrzesniewski v. Miller, 77 S.W.3d 195, 197 (Tenn.Ct.App.2001).

Further guidance is provided by the supreme court in *Gray v. Gray*, 78 S.W.3d 881 (Tenn.2002) wherein the court holds:

Section 36-5-101(e) of the Tennessee Code Annotated provides that a trial court must apply as a rebuttable presumption the Child Support Guidelines in determining the amount of child support to be awarded. The Child Support Guidelines indicate that the award of child support for two children is 32% of the obligor's net income. Tenn. Comp. R. & Regs. 1240-2-4-.03(5). The rebuttable presumption in this case, therefore, is that Mr. Gray should be awarded 32% of Mrs. Gray's net income as child support. However, § 36-5-101(e)(1)(A) goes on to state:

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.

See also Tenn. Comp. R. & Regs. 1240-2-4-.04(2) (establishing grounds for deviation from Guideline-calculated child support). As previously discussed, the trial court failed to follow the proper procedure in its award of child support in this case. We therefore remand this case to the trial court for a determination of an appropriate award of child support, if any, to Mr. Gray under the facts of this case.

Gray, 78 S.W.3d at 885.

Since the failure to follow the Child Support Guidelines is in the Final Decree of Divorce, we see no practical alternative than to remand the case to the trial court for trial of all issues made under the pleadings and to address, in the first instance, the rights of the parties and the child during the interim between September 24, 2002, and the retrial on remand.

Costs of appeal are assessed equally to the parties.

WILLIAM B. CAIN, JUDGE