IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
June 20, 2023 Session

SUSAN M. AUSTIN v. TOMMY JOE RICHMOND

Appeal from the Juvenile Court for Fayette County
No. C-202 James P. Gallagher, Judge

No. W2022-00559-COA-R3-JV

Mother appeals the trial court's order dismissing her petition for civil contempt and awarding Father a money judgment and his attorney's fees. Because the trial court failed to conduct an evidentiary hearing, we conclude that there was no evidence before it from which to make a ruling. Accordingly, we vacate the judgment of the trial court and remand with instructions to conduct an evidentiary hearing on all issues in this case.

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

J. STEVEN STAFFORD, P.J., W.S., delivered the opinion of the court, in which CARMA DENNIS MCGEE, and JEFFREY USMAN, JJ., joined.

R. Linley Richter, Jr., Cordova, Tennessee, for the appellant, Susan M. Austin.

Jason R. Ridenour, Memphis, Tennessee, for the appellee, Tommy Joe Richmond.

OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND[1]

Petitioner/Appellant Susan M. Austin ("Mother") and Respondent/Appellee Tommy Joe Richmond ("Father") share a child, Christopher, born in August 1999.[2] In September 2010, the Fayette County Juvenile Court ("the trial court") entered an agreed permanent parenting plan. Thereunder, Mother was designated as Christopher's primary residential parent, and Father was granted parenting time one weekend per month. The

[1] As discussed, *infra*, no evidence was introduced in this case. Accordingly, in establishing the following factual background, we rely on the pleadings themselves.

[2] Christopher reached the age of majority in August 2017 and graduated high school in May 2018.

parties shared joint decision-making authority on all major decisions, with Mother having the final authority if a dispute arose. All costs associated with keeping Christopher in private school were to be paid by Mother. Father was ordered to pay $353.00 in child support per month plus an additional $100.00 per month toward his arrearage of $10,637.00. Father was also ordered to pay the cost of Christopher's health insurance.[3] Payment of Father's child support obligation was "to be made through the Texas Attorney General's office through bank draft from Father's bank." In February 2013, Father filed a pro se petition to modify the plan and his child support obligation. Mother filed her own petition to modify the plan in May 2013.

Later, in October 2017, Mother filed a petition, alleging that Father was guilty of civil contempt for violations of the permanent parenting plan. The petition alleged that since September 2010, Father had not paid his child support and arrearage obligations in the manner ordered by the trial court. Mother admitted that Father had "made some payments directly to her instead of through the Texas Attorney General's office" but denied that the payments should be considered child support.

Father eventually filed an answer to Mother's petition in February 2018. Father admitted that he had made his child support and arrearage payments directly to Mother rather than through the Texas Attorney General's office as ordered by the trial court; however, Father denied that Mother had not received all of the child support and arrearage to which she was entitled. Father also raised a countercomplaint for scire facias, citation for civil contempt, and modification of child support. Father alleged that Mother had not paid Christopher's private school tuition for the 2016–2017 school year despite being ordered by the trial court to pay for all of his private school education costs, and that Father had paid the outstanding amount so that Christopher could return to the school for the 2017–2018 school year. Father amended his countercomplaint in October 2019 to include additional costs for Christopher's schooling, for a total request of $58,018.00 in educational expenses. Mother denied that Father was entitled to any relief.

The parties began exchanging discovery in October 2018. By letter to the Fayette County Juvenile Clerk of Court in September 2020, Father submitted a summary of his payments of child support to Mother, including check numbers and bank statements. Father filed a motion to dismiss for a lack of prosecution on May 27, 2021. The trial court entered an order on July 26, 2021, appointing a certified public accountant ("the CPA") to "conduct an accounting and return a report to the [c]ourt."

Then, on April 1, 2022, the trial court entered an order stating that "[t]his cause came to be ordered on April 1, 2022, . . . for a determination of child support, civil contempt

[3] Specifically, the permanent parenting plan stated that "Father shall pay an additional expense for the health insurance of the minor child on Mother's policy of major medical insurance commensurate with the cost it would be for Father to obtain coverage for the minor child through his employment."

and ruling on motions and requests." The trial court noted that it had "been presented with voluminous pleadings and exhibits," and, after listing each of the pleadings and orders in the record, stated: "It would appear that the court conducted a detailed accounting of all of the documented exhibits and evidence in this cause without the assistance of the court ordered CPA accounting." The trial court then listed its calculations of the amount, including arrears, owed to Mother and all payments made by Father before awarding Father $27,539.74 in overpaid support and $15,706.89 in attorney's fees. The trial court found several of Mother's motions, including her petition for civil contempt, to be without merit and dismissed those motions as well as all remaining pleadings and requests filed by either party not otherwise ruled upon.

Mother filed her notice of appeal on April 29, 2022. Upon receiving the record in this case, this Court entered an order directing the trial court to enter an order compliant with Rule 58 of the Tennessee Rules of Civil Procedure.[4] On January 9, 2023, the trial court complied by filing a supplemental record that showed that the order had been properly filed on January 6, 2023. Having determined that the order in this case is now final and that Mother timely filed her notice of appeal, we turn to consider the issues raised by Mother.

II. ISSUES PRESENTED

Mother presents the following issues for the Court's review, which are taken from her brief with minor alterations:

> I. Whether the trial court erred by failing to conduct an evidentiary hearing or otherwise take any proof prior to issuing a sua sponte order awarding a money judgement and disposing of all pending issues, pleadings, and motions?
> II. Assuming the trial court was correct in ruling without conducting an evidentiary hearing, whether the trial court erred in the following respects:
>
> > A. Giving credit for child support payments made by Father even though said payments were not made through the office of the Attorney General of the state of Texas as required by the September 16, 2010 Permanent

[4] Rule 58 of the Tennessee Rules of Civil Procedure provides, in pertinent part:

> Unless otherwise expressly provided by another rule, entry of a judgment or an order of final disposition or any other order of the court is effective when a judgment or order containing one of the following is marked on the face by the clerk as filed for entry:
> (1) the signatures of the judge and all parties or counsel, or
> (2) the signatures of the judge and one party or counsel with a certificate of counsel that a copy of the proposed order has been served on all other parties or counsel, or
> (3) the signature of the judge and a certificate of the clerk that a copy has been served on all other parties or counsel.

> Parenting Plan Order;
> B. Ruling Mother was required to repay the private school tuition for the parties' minor child without considering the reasons why Mother refused to pay the tuition or without considering Mother has final decision-making authority regarding the education of the minor child;
> C. Ordering Mother to reimburse Father for payment to Inspiration Academy even though said payment was not for the child's education and was paid after the child turned eighteen (18) years of age;
> D. Considering evidence that lacked proper authentication and/or lacked a proper evidentiary foundation;
> E. Awarding the Father his attorney's fees without first conducting a hearing.

In the posture of appellee, Father asks whether the trial court should have granted his motion for involuntary dismissal. He also asks to be awarded his attorney's fees incurred in defending this appeal.

III. ANALYSIS

We discern the dispositive issue in this case to be whether the trial court erred by adjudicating the issues before it without conducting an evidentiary hearing. After reviewing the record on appeal, we conclude that the trial court did not have evidence before it from which it could properly make a ruling.

This Court has previously considered a case in which no testimony was produced to support the allegations in a complaint:

> Allegations in the pleadings are not evidence of the facts averred. ***Hillhaven Corp. v. State ex rel. Manor Care, Inc.***, 565 S.W.2d 210, 212 (Tenn. 1978). "Unless such facts are admitted or stipulated, they must be proved by documents, affidavits, oral testimony or other competent evidence." ***Id.*** Furthermore, "mere statements of counsel are not evidence or a substitute for testimony." ***Metro. Gov't of Nashville & Davidson Co. v. Shacklett***, 554 S.W.2d 601, 605 (Tenn. 1977). . . . Witnesses are required to take an oath or affirmation before testifying, Tenn. R. Evid. 603, and in the absence of stipulations, findings of fact must come from the evidence introduced.

In re D.M.H., No. W2006-00270-COA-R3-JV, 2006 WL 3216306, at *7 (Tenn. Ct. App. Nov. 8, 2006); *see also* ***Dayhoff v. Cathey***, No. W2011-02498-COA-R3-JV, 2012 WL 5378090, at *3 (Tenn. Ct. App. Nov. 1, 2012) (relying on ***In re D.M.H.*** in vacating a trial court's judgment regarding contested issues where "no testimony was elicited from the parties or any other witnesses, [and] all evidence was introduced through argument and offers of proof to the trial judge"); ***State ex rel. Moody v. Roker***, No. W2019-01464-COA-

R3-JV, 2021 WL 872686, at *7 (Tenn. Ct. App. Mar. 9, 2021) (noting that "as there was neither testimonial evidence nor stipulations, [the single purported exhibit] was not properly introduced[,]" thus creating "significant doubt that any evidence was properly submitted" when combined with the trial court's lack of factual findings).

In ***In re D.M.H.***, no sworn testimony was presented and no exhibits were introduced into evidence. 2006 WL 3216306, at *7. Instead, counsel for the parties and sometimes the parties themselves "simply presented the facts to the judge." ***Id.*** Similarly, in ***Dayhoff***, the parties "simply argued their case and submitted documents directly to the trial judge without the benefit of testimony or authentication." 2012 WL 5378090, at *1. Both cases were remanded to the trial court so that an evidentiary hearing could be held.

Like in those cases, here there was no evidentiary hearing, no sworn testimony of witnesses, no cross examination, and no stipulations. And as Mother points out, the majority of the discovery responses in the file were not sworn to by the parties and no exhibits were properly introduced. Indeed, the language in the trial court's order shows that it dismissed Mother's petition for civil contempt and calculated Father's award of overpaid child support and attorney's fees based entirely on the pleadings and other documents on file. "It is well-settled that '[m]erely attaching a document to a pleading does not place that document in evidence.'" ***In re Jaxon C.***, No. M2021-00537-COA-R3-JV, 2021 WL 5080513, at *2 (Tenn. Ct. App. Nov. 2, 2021) (quoting ***Pinney v. Tarpley***, 686 S.W.2d 574, 579 (Tenn. Ct. App. 1984)). Without testimonial evidence, stipulations, or properly introduced documentary evidence, there is no evidence in the record from which the trial court could have made its ruling in this case.[5]

Moreover, unlike ***In re D.M.H.*** and ***Dayhoff***, here neither party was aware that the trial court was planning to forego a formal hearing. It appears that no hearing at all had been held since August 2020. Neither party had submitted a pretrial brief. The last document filed in the matter was an order by the trial court appointing the CPA, entered in July 2021, almost an entire year before the trial court's sua sponte April 2022 final order.[6]

[5] Even considering the documents that are included in the technical record, it is unclear how the trial court arrived at some of its rulings. Take, for example, the award of attorney's fees to Father. Father submitted his retainer agreement with his counsel and several billing statements in a 2018 response to Mother's request for production and amended his response in January 2020 to include a complete list of transactions and payments. Father's counsel submitted an affidavit in August of 2020, also including a list of transactions and payments. None of these accountings list Father's total financial obligation to his counsel as the amount awarded by the trial court and no further accountings are in the record. Thus, we simply cannot glean from the meager filings in this case how the trial court reached its conclusion as to attorney's fees. *See* ***Lucy v. Lucy***, No. W2020-01275-COA-R3-CV, 2021 WL 2579763, at *3 (Tenn. Ct. App. June 23, 2021) (holding that a trial court's findings are inadequate when this Court is "left to wonder" at how the trial court reached its decision).

[6] There is nothing in the record to suggest that either party met with the CPA or otherwise provided any documentation after her appointment.

Father concedes, as he must, that the trial court did not conduct an evidentiary hearing. However, Father argues that the failure should be considered harmless error based on the narrow scope of Mother's argument and the trial court's failure to grant Father's motion to dismiss based on failure to prosecute. But Father cites to no specific authority for the proposition that a trial court's failure to hear evidence or, even more importantly, to make the parties aware that no evidence would be heard is subject to a harmless error analysis. We have previously held that "[t]he most basic principle underpinning procedural due process is that individuals be given an opportunity to have their legal claims heard at a meaningful time and in a meaningful manner." ***Knoxville Cmty. Dev. Corp. v. Orchard Entm't Grp., LLC***, No. E2019-01831-COA-R3-CV, 2020 WL 6018754, at *7 (Tenn. Ct. App. Oct. 9, 2020) (quoting ***Lynch v. City of Jellico***, 205 S.W. 384, 391 (Tenn. 2006)); *see also* ***AmSouth Bank v. Cunningham***, 253 S.W.3d 636, 644 (Tenn. Ct. App. 2006) (noting that "interested parties who file petitions and demand hearings are generally entitled to their so-called 'day in court' unless the matter is moot, frivolous, barred by the doctrine of *res judicata*, or as in matters of summary judgment, the material facts are not disputed or a party is entitled to relief as a matter of law"). And recently, our Supreme Court has emphasized the importance of providing parties with "fair notice and an opportunity to be heard on dispositive issues" prior to appellate review. ***State v. Bristol***, 654 S.W.3d 917, 923 (Tenn. 2022) (quoting ***State v. Harbison***, 539 S.W.3d 149, 165 (Tenn. 2018)) (citing ***In re Kaliyah S.***, 455 S.W.3d 533, 540 (Tenn. 2015); ***State v. Sprunger***, 458 S.W.3d 482, 492 (Tenn. 2015)).

From our own research, we note that this Court has previously acknowledged that a trial court's action in deciding a case without taking evidence or receiving stipulations, while "inappropriate," could constitute harmless error in the limited circumstances where "the parties [were] in general agreement as to the facts." ***Duggan v. Bohlen***, No. 01-A-01-9611-CV00535, 1997 WL 379177, at *1 n.1 (Tenn. Ct. App. July 9, 1997). This is in a similar vein to a situation wherein a trial court grants summary judgment sua sponte. *See* ***Est. of Smith v. Highland Cove Apartments, LLC***, 670 S.W.3d 305, 315 (Tenn. Ct. App. 2023) (noting that, in rare cases, a trial court may grant summary judgment sua sponte, but only so long as the opposing party "had a full and fair opportunity to meet the proposition that there is no genuine issue of material fact to be tried."), *perm. app. denied* (Tenn. May 10, 2023); *see also* ***AmSouth Bank***, 253 S.W.3d at 644 (noting that a party may be deprived of their "day in court" when judgment may be granted as a matter of law based on undisputed facts). Of course, Father does not characterize the trial court's action as granting judgment as a matter of law. Nor do we conclude that such an action would have been permitted in this situation. While the parties agree that Father made payments directly to Mother, she sharply disputes whether those payments should be considered proper child support payments in light of Tennessee precedent. *See* ***Smith v. Smith***, 255 S.W.3d 77, 83 (Tenn. Ct. App. 2007) (holding that "[i]n general, an obligor parent is not given credit for child support payments made in a manner other than that specified in the operative child support order[,]" but noting exceptions). Moreover, the parties appear to disagree as to whether Mother was obligated to reimburse Father for the tuition for Christopher's senior

year and the post-graduate class, based on Christopher's coming of age. As such, although the facts may generally not be in dispute, the conclusions to be drawn from those facts very much are. Accordingly, the limited circumstances found in ***Duggan*** are not present here. *See also* ***Brooks Cotton Co. v. Williams***, 381 S.W.3d 414, 429 (Tenn. Ct. App. 2012) (holding that judgment as a matter of law is inappropriate when "the parties disagree about the inferences and conclusions to be drawn from the facts" (internal quotation marks and citation omitted)). Thus, we decline to accept Father's argument that the trial court's failure to hear evidence or to give the parties notice that it would not conduct a hearing was merely harmless error.

It appears that there were considerable delays in this case that may have frustrated the trial court.[7] While such frustration may have been justified, it cannot serve as an excuse for short-circuiting the most basic principles of our jurisprudence. *Cf.* ***Golf Vill. N., LLC v. City of Powell, Ohio***, 42 F.4th 593, 601 (6th Cir. 2022) (holding that even where a party alleged delay as justification for its action in not following the established procedure, "it can't short-circuit the process like that"). Because no evidence was properly submitted on any of the issues on appeal, we must vacate the judgment of the trial court and remand this cause to the trial court to hold an evidentiary hearing whereby the parties may have the opportunity to present testimony and introduce evidence. Father is not entitled to his attorney's fees on appeal. All other issues are pretermitted.

IV. CONCLUSION

The judgment of the Fayette County Juvenile Court is vacated, and this case is remanded for further proceedings in accordance with this Opinion. Costs of this appeal are assessed to Appellee Tommy Joe Richmond, for which execution may issue if necessary.

S/ J. Steven Stafford
J. STEVEN STAFFORD, JUDGE

[7] From the record on appeal, it is entirely unclear what caused the delay. We are unable to say whether "the protracted litigation was an intentional and direct result" of Mother's actions alone, as the trial court states in its order, or whether additional factors, including the COVID-19 Pandemic, had any effect on the proceedings.