IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
April 11, 2023 Session

KIM RENAE NELSON v. LORING E. JUSTICE

Appeal from the Juvenile Court for Roane County
No. 16002 William B. Acree, Senior Judge

No. E2021-01398-COA-R3-JV

The trial court found Appellant/Father in civil contempt for alleged failure to comply with discovery propounded by Appellee/Mother. The trial court also dismissed Father's petition to modify visitation and child support on the ground that Father's petition constituted an abusive civil lawsuit. We reverse the trial court's findings of civil contempt and abusive civil lawsuit. However, because the parties' child has reached majority, we conclude that Father's petition to modify is moot. Therefore, we affirm the trial court's dismissal of Father's petition on the ground of mootness.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Reversed in Part, Affirmed in Part, and Remanded

KENNY ARMSTRONG, J., delivered the opinion of the court, in which JOHN W. MCCLARTY and THOMAS R. FRIERSON, II, JJ., joined.

Linn M. Guerrero, Knoxville, Tennessee, for the appellant, Loring E. Justice.

David L. Valone and Cecilia S. Peterson, Knoxville, Tennessee, for the appellee, Kim Renae Nelson.

OPINION

I. Background

Appellee Kim Renae Nelson ("Mother"), an attorney, and Appellant Loring E. Justice ("Father"), who has been disbarred, are the parents of Noah. Noah reached majority in February 2023. The protracted history of litigation by and between the parties is contained in six previous opinions from this Court. ***Nelson v. Justice***, No. E2020-01172-COA-R3-CV, 2022 WL 202636 (Tenn. Ct. App. Jan. 24, 2022); ***Nelson v. Justice***, No.

E2020-00287-COA-R3-CV, 2021 WL 870736 (Tenn. Ct. App. March 9, 2021); ***Justice v. Nelson***, No. E2018-02020-COA-R3-CV, 2019 WL 6716300 (Tenn. Ct. App. Dec. 10, 2019); ***Nelson v. Justice***, No. E2017-01546-COA-R3-JV, 2019 WL 338940 (Tenn. Ct. App. Jan. 25, 2019), *perm. app. denied* (Tenn. Sept. 18, 2019); ***Justice v. Nelson***, No. E2017-02009-COA-R3-JV, 2018 WL 4381690 (Tenn. Ct. App. Sept. 14, 2018), *overruled on other grounds by* ***In re Mattie L.***, 618 S.W.3d 335 (Tenn. 2021).

According to Mother's petition to compel discovery, discussed further *infra*, the trial court conducted a hearing on August, 6, 2019, and held that "once the [m]andate was issued by the Tennessee Supreme Court on the application for permission to appeal [this Court's affirmance of the trial court's judgment for discretionary costs in favor of Mother in ***Nelson v. Justice***, 2019 WL 338940,]" Mother "could have discovery." As noted above, the Tennessee Supreme Court denied certiorari on September 18, 2019. Before the Supreme Court issued its mandate, on August 27, 2019, Father filed a petition, in the trial court, to modify Noah's visitation schedule and Father's child support obligation.[1]

Mother first served Father with discovery requests on September 19, 2019.[2] Having received no response to the September 19 discovery requests, on October 24, 2019, Mother sent an email to Father's attorney, stating, "[W]hen will you be providing the responses to the Discovery Requests . . . . I hope to avoid filing a Motion to Compel." On November 12, 2019, Mother filed a motion to compel discovery alleging that Father had failed to answer discovery and seeking an order compelling him to do so. On January 14, 2020, Mother filed a motion for contempt against Father for his alleged failure to answer discovery.

On January 17, 2020, Mother filed a motion to classify Father's petition for modification of visitation and child support as an abusive civil action based on her assertion that Father's 2019 petition contained the same allegations he previously made in a voluntarily-non-suited 2017 petition for modification. On January 23, 2020, the trial court held a hearing and ordered Father to answer the outstanding discovery on or before March 2, 2020. On the same day, Mother served Father with requests for production of documents and interrogatories. On February 24, 2020, Mother filed a motion to disqualify Father's attorney, Linn M. Guerrero. Father married Ms. Guerrero in 2017, and they have one child together.

On or about March 1, 2020, Father submitted "Responses [to] Interrogatories Propounded by [Mother to Father] and General Objections." In addition to his "[g]eneral

[1] Father lodged an amended petition to modify on May 17, 2021, and the trial court denied it for failure to seek permission to amend.

[2] Due to the timing of Mother's first set of discovery requests, it is not clear to what extent Mother seeks information to defend against Father's petition to modify as opposed to information concerning the collection of her judgment(s).

[o]bjections," Father also objected to the "collective amount of interrogatories." As discussed *infra*, the trial court did not rule on Father's specific objections. On March 6, 2020, Mother filed a motion for sanctions for Father's alleged failure to comply with discovery.

On August 12, 2020, the trial court held a hearing on Mother's motion to disqualify Ms. Guerrero and her motion to compel discovery. As discussed further *infra*, the trial court entered an order on September 25, 2020, disqualifying Ms. Guerrero from representing Father. As to Mother's motion to compel, without specifically addressing Father's objections to discovery, the trial court held that Father's March 1, 2020 discovery responses "were incomplete and filed in bad faith" and ordered him to "respond to discovery requests in good faith by October 15, 2020."

On October 15, 2020, Father filed supplemental discovery responses and again made detailed objections to the content and scope of Mother's discovery requests. On November 17, 2020, Mother filed a second motion for sanctions. The trial court held a scheduling conference on November 20, 2020, after which it held that Father was in contempt but "granted him until 12/21/20 to purge same by giving complete answers." Father submitted a third set of supplemental discovery responses on December 21, 2020. However, on Mother's review of these documents, she allegedly found that they contained, to quote the trial court's contempt order, "approximately 1600 pages of mixed- up, non-sequential, unindexed documents containing partial bank records, [and] partial credit card records." On April 5, 2021, Mother filed a second motion for contempt.

All pending motions came on for final hearing on May 17, 2021. Father did not attend the hearing, but his attorney was present. By order of May 18, 2021, the trial court: (1) found Father in civil contempt for failure to comply with discovery; (2) ordered him to jail until he purged himself of the contempt; (3) ordered suspension of Father's driver's license; (4) ordered Father to surrender his passport; and (5) entered judgment against Father and in favor of Mother for $45,000 for Mother's attorney's fees and costs. On the same day, the trial court entered an order granting Mother's petition for abusive lawsuit and dismissing Father's petition for modification. Father appeals.

II. Issues

Father raises the following issues for review as stated in his brief:

> 1. Whether the court violated the Constitution and this Court's holding in ***Godsey v. Godsey***, No. E2020-00442-COA-R3-CV (Tenn. [Ct.] App. 2021), an order must be objectively unambiguous to sustain a finding of civil contempt by repeatedly ordering Appellant to respond to post-judgment written discovery "in good faith" and by refusing to be more specific despite repeated requests for a specific order.

2. Whether the court erred holding Appellant in civil contempt based on his responses to written discovery including by failing to read Appellant's discovery responses and failing genuinely to find Appellant was willful in any violation of the court's "good faith" orders despite Appellant's January 4, 2021 motion requesting clarification and informing Appellant would do anything in his power to comply with a specific order and despite Appellant's several supplemental responses.

3. Whether the court committed reversible error by inviting Appellee's counsel to write, draft, and/or create rulings for the court, repeatedly, in violation of ***Anderson v. City of Bessemer City, N.C.***, 470 U.S. 564, 572 (1985), ***Smith v. UHS of Lakeside, Inc.***, 439 S.W.3d 303 (Tenn. 2014), and ***Huggins v. McKee***, 500 S.W.3d 350 (Tenn. App. 2016).

4. Whether the court erred in determining the Petition for Modification was an "Abusive Civil Action" under Tenn. Code Ann. 29-41-101 *et seq*.

5. Whether the court erred in failing to determine Tenn. Code Ann. 29-41-101 *et seq*. is unconstitutional despite Appellant's challenge of constitutionality and/or whether Tenn. Code Ann. 29-41-101 *et seq*. is unconstitutional.

6. Whether the court committed reversible error by disqualifying Guerrero in this non-jury case, removing her prior to trial and for almost all pretrial proceedings, finding she was "likely" a witness rather than holding an evidentiary hearing and/or performing a fact-intensive inquiry she was a "necessary witness" as required under ***United States v. Gonzalez-Lopez***, 126 S. Ct. 2557 (2006).

7. Whether the court violated Appellant's constitutional rights by denying all discovery to Appellant, including but not limited to Appellee's deposition, despite Appellee's pending motion under Tenn. Code Ann. 29-41-101 *et seq*. requiring an evidentiary hearing and despite Appellee filed a motion for summary judgment with her own affidavit in support. And, did the court violate due process in handicapping Appellant from further proving the Statute cited above is a bill of attainder and/or ex post facto law, by denying him discovery.

8. Whether the court violated this Court's holding in ***Justice v. Nelson***, et al., E2018-02020-COA-R3-CV (Tenn. App. 2019) by dismissing Appellant's Amended Petition for Modification filed as of right given Appellee had not filed a responsive pleading.

9. Whether the court's toleration and embrace of Appellee's summary judgment motion, admitted by Appellee's counsel to be bogus, not filed for its merits, demonstrate the court was so biased against Appellant and so unwilling to apply the law and to deviate from customary judicial administration the proceedings below cannot be allowed to stand and must be vacated.

III. Standard of Review

This case was tried by the court sitting without a jury. As such, our review of a trial court's findings of fact is de novo upon the record accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. R. Civ. P. 13(d); ***Armbrister v. Armbrister***, 414 S.W.3d 685, 692 (Tenn. 2013). We review a trial court's conclusions of law de novo, according them no presumption of correctness. ***Armbrister***, 414 S.W.3d at 692; ***Rigsby v. Edmonds***, 395 S.W.3d 728, 734 (Tenn. Ct. App. 2012). To the extent necessary, we expand our discussion of the standards of review relevant to the specific issues raised as we discuss those issues *infra*.

IV. Contempt

We begin with a review of the trial court's finding of contempt. Tennessee Code Annotated section 29-9-102 authorizes courts to "inflict punishments for contempts of court" for, *inter alia*, "[t]he willful disobedience or resistance of any . . . lawful writ, process, order, rule, decree, or command of such courts[.]" Tenn. Code Ann. § 29-9-102(3). A person can violate a court order "'by either refusing to perform an act mandated by the order or performing an act forbidden by the order.'" ***In re Samuel P.***, No. W2016-01665-COA-R3-JV, 2018 WL 1046784, at *8 (Tenn. Ct. App. Feb. 23, 2018) (quoting ***Overnite Transp. Co. v. Teamsters Local Union No. 480***, 172 S.W.3d 507, 510-11 (Tenn. 2005)). Here, Father was found in civil contempt. The Tennessee Supreme Court has outlined the requirements for civil contempt as follows:

> Civil contempt claims based upon an alleged disobedience of a court order have four essential elements. First, the order alleged to have been violated must be "lawful." Second, the order alleged to have been violated must be clear, specific, and unambiguous. Third, the person alleged to have violated the order must have actually disobeyed or otherwise resisted the order. Fourth, the person's violation of the order must be "willful."
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> The threshold issue in any contempt proceeding is whether the order alleged to have been violated is "lawful." . . . Naturally, the determination of whether a particular order is lawful is a question of law.
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> The second issue involves the clarity of the order alleged to have been violated. A person may not be held in civil contempt for violating an order unless the order expressly and precisely spells out the details of compliance in a way that will enable reasonable persons to know exactly what actions are required or forbidden. The order must, therefore, be clear, specific, and unambiguous.
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> The third issue focuses on whether the party facing the civil contempt charge actually violated the order. This issue is a factual one to be decided

> by the court without a jury. The quantum of proof needed to find that a person has actually violated a court order is a preponderance of the evidence. Thus, decisions regarding whether a person actually violated a court order should be reviewed in accordance with the standards in Tenn. R. App. P. 13(d).
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> The fourth issue focuses on the willfulness of the person alleged to have violated the order. The word "willfully" has been characterized as a word of many meanings whose construction depends on the context in which it appears. Most obviously, it differentiates between deliberate and unintended conduct. However, in criminal law, "willfully" connotes a culpable state of mind. In the criminal context, a willful act is one undertaken for a bad purpose.
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> In the context of a civil contempt proceeding . . . acting willfully does not require the same standard of culpability that is required in the criminal context. . . . Determining whether the violation of a court order was willful is a factual issue that is uniquely within the province of the finder-of-fact who will be able to view the witnesses and assess their credibility. Thus, findings regarding "willfulness" should be reviewed in accordance with the Tenn. R. App. P. 13(d) standards.

Konvalinka v. Chattanooga-Hamilton Cnty. Hosp. Auth., 249 S.W.3d 346, 354-57 (Tenn. 2008) (citations, headings, and footnotes omitted). Here, there are two flaws in the trial court's contempt finding. First, the trial court never specifically addressed Father's objections to the propounded discovery. Second, the trial court's orders regarding Father's requirements concerning discovery are not "clear, specific, and unambiguous." ***Id.***

As discussed above, in response to Mother's discovery requests and her motion to compel and for sanctions, Father filed three sets of responses. In all three filings, Father objected to the extent and the content of the discovery requests. However, there is no indication that the trial court heard Father's objections, much less ruled on them. In the absence of so much as a discussion or acknowledgement of Father's objections, it would be impossible to determine whether Father's alleged failure to properly answer discovery was willful. Perhaps this is the reason the trial court's orders are silent on the question of Father's willfulness.

In addition to the lack of a finding of willfulness, the trial court's orders are not clear. First, in its September 25, 2020 order, which was filed after Father made his first response and objection to discovery, the trial court held, in relevant part:

> 2. That relative to [Mother's] Motion to Compel Discovery from [Father], if that discovery has been answered, [Father's] counsel is to send copies to [Mother]. [If] [i]t has not been answered, [i]t is not necessary to answer that discovery until the abusive civil action motion has been resolved.
> 3. The Court specifically finds that the reason is that that discovery relates

> primarily to the modification issues against the abusive civil action and the motion is granted. That issue is moot.
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> 9. The Motion for Discovery Sanctions filed by [Mother] is granted in part and continued in part. The Court finds that the responses Mr. Justice previously submitted were incomplete and filed in bad faith.
> 10. That Mr. Justice shall respond to discovery request in good faith by October 15, 2020. Should he fail to respond, or should the Court determine that his responses were not in good faith, he will be held in contempt of court and incarcerated . . . until he complies with the Order.
> 11. The Contempt Order will be entered upon a showing of his failure to respond to discovery or failure to respond in good faith. The hearing will not be conducted to make this determination.

The trial court seems to contradict itself, stating first that Father's counsel is to send copies of discovery to Mother, but then stating that, "It is not necessary to answer [] discovery until the abusive civil action motion has been resolved." Then, in granting Mother's petition for sanctions in part, the trial court found that Father's "previously submitted [discovery responses] were incomplete and filed in bad faith," but the court made no attempt to clarify how the responses were incomplete or what it meant by "bad faith." Despite its failure to outline any specific shortcomings in Father's discovery responses, the trial court ordered Father to "respond in good faith" by October 15, 2020, but the court failed to clarify what would constitute a good-faith response. Nonetheless, Father filed responses by October 15 and again objected to the scope and content of the discovery. However, Father's objections were not addressed by the trial court. Rather, following a scheduling conference on November 20, 2020, the trial court held Father in contempt but "granted him until 12/21/20 to purge same by giving complete answers." The trial court made no attempt to outline what would constitute "complete answers," and, as such, its mandate is unclear and vague. Specifically, the trial court failed to address what sections of the discovery were incomplete and wholly failed to address any of Father's objections. However, Father submitted a third set of supplemental discovery responses on December 21, 2020 and again objected to the discovery. The trial court never addressed Father's objections before entering its May 18, 2021 order finding him in contempt.

The May 18, 2021 order largely reiterates the trial court's previous rulings, which we have determined were unclear. The trial court noted its "September 15, 2020 [order] . . . finding that [Father] answered the discovery in bad faith," and its mandate that Father "answer the discovery in good faith by October 15, 2020 or he would be held in contempt." But, again, the trial court did not elaborate on what it meant by these vague terms, *i.e.*, "bad faith" and "good faith." Concerning Father's October 15, 2020 supplemental responses, in its May 18, 2021 order, the trial court noted that these responses "were almost identical to

the responses provided in March 2020," but the court did not acknowledge the objections Father lodged in both his March 2020 and October 2020 responses. The trial court's May 18th order did clarify that, in previous discovery responses, Father "refused to provide any documentation," but the court did not specify what documentation was omitted. The trial court also charged Father with refusing to provide discovery answers concerning "his job title and duties[,] . . . investment interests[,] . . . all but one bank account[,] . . . charge accounts[, and] . . . lawsuits he could benefit from[.]" However, in his responses, Father objected to some of this information, but the trial court never ruled on any of these objections. Finally, the trial court found that Father "did not provide a list of transfers of property of value in the last five (5) years (Document Request 14)." The trial court also noted that, in his December 21, 2020 responses, Father "evaded answering, refused to provide his business banking records, provided incomplete records to accounts he did provide, argued as to the meaning of 'interest' and did not answer under oath." However, these are the only examples of Father's alleged failures to comply with discovery that the trial court cites in any of its orders. Because the only specific examples of any portion of the discovery Father failed to comply with are contained in the final order finding him in contempt, the examples come too late to aid Father's compliance. The trial court should have addressed Father's objections at an early date so that it could have outlined specific areas of non-compliance much earlier in the discovery process. Having failed to do so, we conclude that the orders on which the ultimate finding of contempt lies are not "clear, specific, and unambiguous" and, as such, cannot form the basis for contempt. ***Konvalinka***, 249 S.W.3d at 355 ("A person may not be held in civil contempt for violating an order unless the order expressly and precisely spells out the details of compliance in a way that will enable reasonable persons to know exactly what actions are required or forbidden.").

V. Abusive Civil Lawsuit

Tennessee Code Annotated section 29-41-101, *et seq*. governs abusive civil lawsuits. In relevant part, the statutory scheme provides:

> (1) "Abusive civil action" means a civil action filed by a plaintiff against a defendant with whom the plaintiff shares a civil action party relationship primarily to harass or maliciously injure the defendant and at least one (1) of the following factors are applicable:[3]
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> (C) Issue or issues that are the basis of the civil action have previously been filed in one (1) or more other courts or jurisdictions by the same, and the actions have been litigated and disposed of unfavorably to the plaintiff;

[3] The statute defines a "[c]ivil action party relationship" as "[a]dults who are current or former spouses." Tenn. Code Ann. § 29-41-101(5)(A).

Tenn. Code Ann. §§ 29-41-101(1)(A), (B), and (C). As used in section 29-41-101(1), the statute provides that

> "[h]arass or maliciously injure" means the civil action determined to be an abusive civil action was filed with the intent or was primarily designed to:
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> (A) Exhaust, deplete, impair, or adversely impact the civil action defendant's financial resources unless:
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> (ii) A change in the circumstances of the parties provides a good faith basis to seek a change to a financial award, support, or distribution of resources;
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> (D) Force, coerce, or attempt to force or coerce the civil action defendant to alter, engage in, or refrain from engaging in conduct when the conduct is lawful and is conduct in which the civil action defendant has the right to engage;
> (E) Impair, or attempt to impair the health or well-being of the civil action defendant or a dependent of the civil action defendant;

Tenn. Code Ann. §§ 29-41-101(6)(A), (D), and (E).

In her petition for abusive civil lawsuit, Mother alleges that Father's 2019 petition for modification violates the statute because

> [n]ot only are the allegations in the Petition for Modification a rehash of the original custody litigation, they are also the same allegations filed immediately after Judge Ash's Order in April 2017 in a previous Petition for Modification that Petitioner ultimately non-suited the day before it was set to go to trial . . .[4] in August 2018 after Petitioner had caused Respondent Nelson to incur more attorneys' fees and needless harassment through depositions, discovery requests and motion hearings.

In the first instance, as noted by Mother, Father voluntarily non-suited his 2017 petition for modification. As set out above, the statute provides that an abusive civil lawsuit may arise when the "issues that are the basis of the civil action have previously been filed . . . **and**

[4] In his 2017 petition for modification, Father asserts that the changes in circumstances cited therein occurred after the entry of Judge Ash's April 11, 2017 order.

the actions have been litigated and disposed of unfavorably to the plaintiff." Tenn. Code Ann. § 29-41-101(1)(C) (emphasis added). As set out below, the trial court's order does not acknowledge Father's voluntary non-suit of his 2017 petition, much less the effect (if any) of that non-suit on Mother's petition for abusive civil lawsuit. This Court has explained that,

> [a]ccording to our Supreme Court, when a party to a lawsuit takes a voluntary nonsuit, "the rights of the parties are not adjudicated, and the parties are placed in their original positions prior to the filing of the lawsuit." ***Himmelfarb v. Allain***, 380 S.W.3d 35, 40 (Tenn. 2012). This is because the trial court "does not consider the merits of a case when a case is dismissed on procedural grounds." ***Id***. (citing Parrish v. Marquis, 172 S.W.3d 526, 532 (Tenn. 2005)). At issue in ***Himmelfarb*** was whether a voluntary nonsuit resulted in a favorable termination for the other party for purposes of a malicious prosecution claim. ***Id.*** at 38. . . . [T]he trial court in ***Himmelfarb*** neither addressed the merits of the plaintiff's claims nor the liability of the defendant. ***Id***. at 41. As a result, the ***Himmelfarb*** plaintiff's voluntary dismissal of his claims against the defendant was not a dismissal on the merits, and neither party ended up as the "prevailing party." ***Id***.; *see also* ***Fit2Race, Inc. v. Pope***, No. M2015-00387-COA-R3-CV, 2016 WL 373313, at *5 (Tenn. Ct. App. Jan. 29, 2016).

Jasinskis v. Cameron, No. M2019-01417-COA-R3-CV, 2020 WL 2765845, at *5 (Tenn. Ct. App. May 27, 2020). From the foregoing, to the extent that Mother's petition for abusive civil lawsuit relies on the claims made in Father's 2017, non-suited petition, it appears that those claims were never "litigated and disposed of unfavorably to the [Father]," Tenn. Code Ann. § 29-41-101(1)(C), thus negating that statutory criterion. Nonetheless, in the interest of full adjudication and in view of the fact that the trial court relied on other grounds (aside from the comparisons between the 2017 petition and the 2019 petition) to reach its holding of abusive civil lawsuit, we will proceed with our review despite Father's non-suit of his 2017 petition.

Turning to the trial court's order finding that Father's 2019 petition for modification of child support and visitation constituted an abusive lawsuit, the trial court found:

> 1. The Court finds by a preponderance of the evidence that, as defined in T.C.A. § 29-41-101(1) and 29-41-101(6)(A), (D) and (E) the Pending Petition for Modification is an Abusive Civil Action filed to primarily harass or maliciously injure [Mother] with the intent to exhaust, deplete or adversely affect her financial resource and to impair the health and well-being of [Mother].
> 2. The Court finds by a preponderance of the evidence that, as defined in T.C.A. § 29-41-101(1)(A),(B), and (C), [Mother] has established that the

> claims, allegations and legal contentions are not warranted by existing law or an extension thereof, they are without evidentiary support and [] the issue or issues that are the bases of the civil action have been previously filed in one (1) or more other courts [and] have been litigated and disposed of unfavorably to [Father].

In support of the foregoing conclusions, the trial court made the following findings in its order:

> [Mother] introduced into the record as Exhibit 1 certified copies of fourteen (14) Complaints that [Father] had filed against her; her then-husband []; health care professionals . . .; and attorneys. . . . [Mother] introduced into the record as Exhibit 1A the "Statement of Lawsuits" summarizing those actions. [Mother] demonstrated that [Father's] Four (4) Petitions for Modification of Judge Don Ash's Order Entered April 11, 2017 were almost identical in averments; that when pressed for discovery or trial was imminent [Father] would dismiss and a year later refile those actions, that some of the averments of "change in circumstance" had been ruled upon already by the trial Court and Court of Appeals. [Mother] established that [Father] sued every health care worker involved in the underlying parentage dispute that he disagreed with. [Mother] established that [Father] sued the attorneys under theories rejected by the trial Court and the Court of Appeals (*i.e.*, "hostage negotiation" and "human trafficking". [Mother] established that [Father] sued [Mother's] attorney Cecilia S. Peterson under RICO and a theory of conspiracy that not only occurred years before her representation of [Mother] but also had been dismissed as to [Mother] and David L. Valone before that action was filed.

Turning back to the abusive civil lawsuit statutes, Tennessee Code Annotated section 29-41-105 provides, in relevant part that

> evidence of any of the following creates a rebuttable presumption that the civil action is an abusive civil action and that the person filing the action is an abusive civil action plaintiff and prefiling restrictions should be imposed upon the abusive civil action plaintiff:
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> (1) The same or substantially similar issues between the same or substantially similar civil action parties that are the subject of the alleged abusive civil action have been litigated against the civil action defendant within the past five (5) years in another court within the judicial district or another judicial district and the actions were dismissed on the merits or with prejudice against the civil action plaintiff;

Tenn. Code Ann. § 29-41-105(1). Respectfully, the trial court's findings concerning previous lawsuits brought by Father against Mother's attorneys, health care providers, or Mother's former husband are not "substantially similar" to Father's 2019 petition for modification.

Furthermore, issues concerning changes in child support and visitation can be brought numerous times before the child reaches majority. Under the governing Child Support Guidelines, "the initial inquiry in a petition for child support modification is whether 'a significant variance exists.'" ***In re Jonathan S.***, 2022 WL 3695066, at *13 (quoting Tenn. Comp. R. & Regs. 1240-02-04-.05(2)(a)). "A significant variance is defined as at least fifteen percent (15%) difference in the current support obligation and the proposed support obligation." Tenn. Comp. R. & Regs. 1240-02-04-.05(2)(b). In addition, if a significant variance is established under Rule 1240-02-04-.05, a child support order "may be modified to reflect a change in the number of children for whom a parent is legally responsible." Tenn. Comp. R. & Regs. 1240-02-04-.05(7). Likewise, modification of a residential parenting schedule requires proof of "a material change of circumstance affecting the child's best interest." Tenn. Code Ann. § 36-6-101(a)(2)(C). "A material change of circumstance for purposes of modification of a residential parenting schedule may include, but is not limited to, significant changes in the needs of the child over time, which may include changes relating to age; significant changes in the parent's living or working condition that significantly affect parenting; failure to adhere to the parenting plan; or other circumstances making a change in the residential parenting time in the best interest of the child." ***Id.*** A parent's income and circumstances may change many times before his or her child turns eighteen. As such, the mere fact that a parent brings more than one petition for modification does not, *ipso facto*, establish that the parent has engaged in an abusive civil action. Here, the averments set out in Father's 2019 petition differ from those set out in his 2017 petition. The 2017 petition alleges a material change in circumstances based on the following factual averments:

> (A) Noah's [M]other refuses to allow him to attend his [F]ather's wedding;
> (B) The order is having an adverse effect on Noah;
> (C) Noah is getting older and the oddness of the Order and unnecessary impairment of his relationship with his Father is hurting him;
> (D) The former Court issued the order before certain witnesses could testify even though Defendant, through her attorneys, procured their absence. The information from these witnesses show Noah is in need of more time with his [F]ather and less pathological relationship with his [M]other.

Concerning child support, Father's 2017 petition sought a change "based on incorrect line items in tax returns and [the failure to] average income over sufficient years."

Although Father's 2019 petition reiterates the foregoing facts from his 2017 petition, in 2019, Father sought modification of visitation and child support on additional

factual grounds, to-wit:

> (E) Noah's [M]other refuses to inform his Father, under the Order, of important events in Noah's life of which she is required to inform the Father, including failing to inform [Father] of Noah's significant illnesses which require medical appointments and prescriptions. [Mother] is not only failing to inform of medical appointments within the time frame contemplated by the Order, she is failing to inform of them altogether;
> (F)Noah's Mother refuses to inform his Father, under the Order, of important activities and extracurricular events in Noah's life as to which parental participation and observation would be appropriate of which she is required to inform the Father. . . .
> (G) [Father] married on November 11, 2017 and Noah enjoys a good relationship with his Step-Mother;
> (H) The family's former therapist . . . quit the case;
> (I) Noah is now coming for co-parenting with his Father unsupervised without complications and is having a good time and positive experiences and there is no need for restricted co-parenting;
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> ***
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> (K) Since the November 2017 petition, Noah has a brother—a child of his Father and Step-Mother . . . . Noah was present for his birth and has formed a relationship with him but spends insufficient time with him;
> (L) Noah has entered high school;
> (M) [Mother] has divorced Noah's former Step-Father;

Concerning Father's request for modification of his child support obligation, in the 2019 petition, he reiterates the information set out in his 2017 petition, *supra*, and also avers that his support obligation should be reduced because he "now has the obligation to also provide for Noah's brother and this materially affects proper child support." By comparison, the averments set out in Father's 2017 petition differ from those averments set out in his 2019 petition. So, although the issue of modification of visitation and support are common between the petitions, the facts on which modification is sought differ, which negates the trial court's finding of abusive civil lawsuit.

VI. Disqualification of Ms. Guerrero

Concerning the standard of review this Court applies in reviewing a trial court's decision to disqualify a party's attorney, we have explained that

> [a] trial court's disqualification of an attorney is usually reviewed under the abuse of discretion standard. ***Clinard v. Blackwood***, 46 S.W.3d 177, 182

(Tenn. 2001). "A trial court abuses its discretion whenever it 'applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining.'" ***Id***. (quoting ***State v. Shirley***, 6 S.W.3d 243, 247 (Tenn. 1999)). That standard is not, however, always applied.

> The same appellate deference is not appropriate when the facts are undisputed and the conduct at issue does not directly involve conduct in open court. Trial courts enjoy no particular functional advantage over appellate courts in formulating and applying the ethical principles governing the attorney-client relationship. Accordingly, we will review trial courts' decisions to disqualify a lawyer based on undisputed facts and conduct not taking place in court using Tenn. R. App. P. 13(d)'s standard of review.

In re Ellis, 822 S.W.2d 602, 605-06 (Tenn. Ct. App. 1991). "In other words, in such cases, we presume the disqualification was proper unless the evidence preponderates to the contrary." ***In re Conservatorship for Allen***, No. E2010-01625-COA-R10-CV, 2010 WL 5549037, at *6 (Tenn. Ct. App. Dec. 29, 2010).

Maloney v. Maloney, No. W2013-02409-COA-R9-CV, 2014 WL 3538553, at *1 (Tenn. Ct. App. July 17, 2014).

> As this Court has explained,
>
> [d]isqualifying a party's lawyer is the most drastic remedy because it causes delay, increases costs, and deprives a litigant of its attorney of choice. Accordingly, disqualification is discouraged, ***Lemm v. Adams***, 955 S.W.2d 70, 74 (Tenn. Ct. App. 1997), and the courts should be extremely reluctant to disqualify a lawyer and should do so only when no other practical alternative exists. ***Whalley Dev. Corp. v. First Citizens Bancshares, Inc.***, 834 S.W.2d 328, 331-32 (Tenn. Ct. App. 1992); ***In re Ellis***, 822 S.W.2d [602,] at 605 [(Tenn. Ct. App. 1991)].

Hoalcraft v. Smithson, No. M2000-01347-COA-R10-CV, 2001 WL 775602, at *12 (Tenn. Ct. App. July 1, 2001). Furthermore, "'[w]here the motion to disqualify comes . . . from an opposing party, the matter should be reviewed with caution.'" ***Pfizer, Inc., v. Farr***, No. M2011-01359-COA-R10-CV, 2012 WL 2370619, at * 12 (Tenn. Ct. App. Dec. 14, 2011) (quoting ***Crown v. Hawkins Co.***, 910 P.2d 786, 795 (Idaho Ct. App.1996)).

Turning to the record, in its September 25, 2020 order, the trial court granted Mother's motion to disqualify Father's attorney, Ms. Guerrero. Specifically, the trial court held:

> 6. . . .The Court finds that Ms. Guerrero is disqualified from further representation of Mr. Justice in this case. With respect to [Mother's] efforts to collect the judgment against Mr. Justice, the Court finds that she has or may have knowledge as a spouse of Mr. Justice about his assets and also about what appears to be efforts by Mr. Justice to hinder the collection of that judgment, thus, she is a likely witness.
> 7. The Court additionally finds that, relative to the *Motion to Modify the Parenting Plan*, Ms. Guerrero as the spouse of Mr. Justice is a likely witness.

In this case, it is clear that the trial judge disqualified Ms. Guerrero when there was no objective basis to do so. There is no indication that Ms. Guerrero was subpoenaed to testify in any matter involving Mother and Father, and there is no evidence of an existing conflict arising from Ms. Guerrero's participation. As such, the trial court's statement that Ms. Guerrero "is a likely witness" is mere speculation. In this regard, the instant case is similar to ***Maloney*** case, where this Court reversed the trial court's disqualification of a party's attorney on its finding that:

> [T]here is no evidence of a conflict. No proof was taken on this issue. Only oral argument by the attorneys took place at the hearing. Arguments by attorneys are not evidence. ***Elliot v. Cobb***, 320 S.W.3d 246, 252 (Tenn. 2010) (Koch, J. concurring) (citing T.P.I.-Civil 15.03 (2010)). There is no indication in the transcripts . . . that any of the attorneys were sworn or testified as witnesses. *See* ***Wyatt v. Lassiter***, 299 S.W.2d 229, 232 (Tenn. Ct. App. 1957). Thus, no evidence was introduced. The trial court ruled based on an assumption of inevitable future conflicts. . . .
>
> Given the seriousness of disqualifying the attorney chosen by one of the parties, the fact that the motion to disqualify was made by the opposing party, the vagueness of the reasons for disqualification, and the absence of evidence, we must reverse the trial court's decision.

Maloney, 2014 WL 3538553, at *2. The same is true here. In the absence of any evidence to suggest an actual, existing conflict, the trial court abused its discretion in disqualifying Ms. Guerrero. Should an actual conflict of interest arise in the future, the trial court is not precluded from revisiting the issue.

VII. Posture of the Case

Before concluding, we briefly address Mother's contention that Father's appellate issues are moot. As noted above, Noah has reached majority. As such, Father's petition to

modify visitation and child support is moot. In view of Noah's age, there is no basis for prospective modification of the visitation schedule or Father's child support obligation, and there is a statutory prohibition against any retroactive modification of child support. Tenn. Code Ann. § 26-5-101(f)(1)(A). So, although the trial court dismissed Father's petition on the erroneous basis of abusive civil lawsuit, the dismissal of the petition is warranted on the ground that it is moot. The Tennessee Supreme Court has explained that "when a case has been fully and completely tried . . . and the right result has been reached, it will not be reversed and remanded because the trial judge gave the wrong reason in reaching the right result." ***State ex rel. Moretz v. City of Johnson City***, 581 S.W.2d 628, 631 (Tenn. 1979). So, although we reverse the trial court's finding of abusive civil lawsuit, we affirm its decision to dismiss Father's petition for modification because the petition is moot.

As to the discovery in this matter, having determined that Father's petition to modify is moot, discovery should be limited to information necessary for Mother to collect her judgments as affirmed by this Court in its previous opinions. To this end, on remand, the parties and the trial court should endeavor to hone and narrow the discovery. This is not to say that Father is precluded from objecting to propounded discovery, but perhaps he will be more forthright and accommodating with his answers. Regardless, it is the hope of this Court that the parties, who have engaged in protracted, expensive, and often unnecessary legal battles, will finally cooperate to end the cycle of litigation once and for all.

In view of our holdings herein, we pretermit any remaining issues or arguments as unnecessary.

VIII. Conclusion

For the foregoing reasons, we reverse the trial court's order finding Appellant in civil contempt. We also reverse the trial court's order finding an abusive civil lawsuit, but we affirm its dismissal of Appellant's petition for modification on the ground that the petition is moot. The case is remanded for such further proceedings as may be necessary and are consistent with this opinion. Costs of the appeal are assessed one-half to Appellant, Loring E. Justice, and one-half to Appellee, Kim Renae Nelson, for all of which execution may issue if necessary.

S/ Kenny Armstrong
KENNY ARMSTRONG, JUDGE