IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 4, 2022 Session

DANIEL LAUCHLAN MACOMBER, SR. v. MELISSA SHARON MACOMBER

Appeal from the Chancery Court for Montgomery County
No. MC CH CV DI 18 0000324 Lawrence M. McMillan, Jr., Chancellor

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No. M2021-01503-COA-R3-CV

This appeal arises from a father's petition for modification of a parenting plan and modification of child support in a post-divorce action. We have determined that the evidence preponderates against the trial court's finding that there was not a material change of circumstances for purposes of modifying the residential parenting schedule under Tennessee Code Annotated § 36-6-101(a)(2)(C). We affirm the trial court's order in all other respects and remand for a determination of the children's best interests under the applicable factors.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed in part, Affirmed in part; Case Remanded

JOHN W. MCCLARTY, J., delivered the opinion of the court, in which ANDY D. BENNETT and JEFFREY USMAN, JJ., joined.

Travis N. Meeks, Clarksville, Tennessee, for the appellant, Daniel Lauchlan Macomber, Sr.

Mark A. Rassas and Julia P. North, Clarksville, Tennessee, for the appellee, Melissa Sharon Macomber.

OPINION

I. BACKGROUND

Daniel Lauchlan Macomber, Sr. ("Father") and Melissa Sharon Macomber ("Mother") were divorced by order of the court in 2019. A permanent parenting plan was entered on May 30, 2019, which provided Father with 147 days of overnight co-parenting

time with their four children. The parties agreed that Father would pay Mother $900.00 monthly child support, which represented an upward deviation, "due to Mother's income level and a child with special needs." Following the divorce, the parties generally followed the parenting plan, whereby the children lived primarily with Mother during the school year, during which time Father had weekend visitation, and lived primarily with Father during the summer. Father also exercised additional co-parenting time pursuant to the plan on a daily basis during the school week. He was responsible for retrieving all four children from school and caring for them until Mother ended her workday, at which time Mother was to retrieve the children from Father's residence. This arrangement continued until March 15, 2020, when the children began remote schooling at home and Mother lost her employment due to the pandemic.

On June 23, 2020, Father filed a petition to modify the residential schedule and for a change in his child support obligation. On July 7, 2020, Mother filed an answer and counter-petition. The case proceeded to a final hearing on July 14, 2021.[1]

Father testified that from May 30, 2019 until March 15, 2020, he enjoyed daily visitation with the children after school until approximately 6:00 p.m., when Mother ended her workday. Citing medical concerns about one of the children, Father explained that he and Mother chose to remove the children from in-person schooling. He stated that Mother no longer permitted him to exercise his daily co-parenting time once the children began remote schooling in March 2020. Father requested equal co-parenting time and further sought the transfer of school districts for two of the four children. Father stated that he lived with his daughter's former counselor in a four-bedroom home where there could be six children at any given time. Father disapproved that Mother had married his best friend and that she and her new husband lived in what was once the marital residence.

Mother testified that she was remarried and pregnant. She maintained that even if a material change in circumstances had occurred, Father's proposed parenting plan providing for equal co-parenting time was not in the children's best interest. In support of this assertion, Mother cited Father's volatile nature and his inability to communicate with her without arguing. She was concerned that Father's girlfriend failed to return clothing and made decisions for the children, including preventing one child from attending physical therapy. Mother testified that she anticipated the children's return to in-person schooling, that she would accept Father's picking them up from school, but that the children needed to be returned to her because she was not working afternoon hours. By the time of the hearing, Mother had been working at a commission-based online auction company for eight months. The company's owner testified that Mother was welcome to continue bringing her children to work; that she could mostly work from home; and that her work schedule

[1] The hearing was not recorded. However, the record includes a statement of the evidence. Tenn. R. App. P. 24(c).

was 9:00 a.m. to 4:00 p.m. on weekdays.

By order entered August 12, 2021, the trial court dismissed Father's petition, finding as follows:

> The Petitioner . . . has not satisfied his burden to establish a material change in circumstances that affects the children's best interest. The Court found that, prior to COVID-19 and [Mother] losing her job, the Parenting Plan was working. The issue raised by [Father] occurred because the children were in virtual school supervised by [Mother]. The Court found that [Mother] should have allowed [Father] to pick up the children from her home after they completed their virtual schooling, which she did not do. Because the children will now be attending in-person schooling, the original Plan can be followed, therefore, there is no material change of circumstances.

The trial court also denied Father's requested change in his child support obligation, finding that "the threshold of a 15% variance" did not exist to warrant any modification of support. The court denied Father's motion to alter or amend by order entered December 14, 2021. Father appealed.

II. ISSUES

Father raises two issues on appeal: (1) Whether the trial court erred in finding that a material change in circumstances had not occurred that necessitated a modification in the residential parenting schedule and (2) Whether the trial court erred in finding that a significant variance in the current child support obligation and the proposed child support obligation did not exist.

III. STANDARD OF REVIEW

"A trial court's determinations of whether a material change in circumstances has occurred and whether modification of a parenting plan serves a child's best interests are factual questions." *Armbrister v. Armbrister*, 414 S.W.3d 684, 692 (Tenn. 2013) (citing *In re T.C.D.*, 261 S.W.3d 734, 742 (Tenn. Ct. App. 2007)). Therefore, "appellate courts must presume that a trial court's factual findings on these matters are correct and not overturn them, unless the evidence preponderates against the trial court's findings." *Id.*; *see also* Tenn. R. App. P. 13(d). Likewise, trial courts have "broad discretion in formulating parenting plans" because they "are in a better position to observe the witnesses and assess their credibility." *C.W.H. v. L.A.S.*, 538 S.W.3d 488, 495 (Tenn. 2017) (citing *Armbrister*, 414 S.W.3d at 693). On appeal, we review a trial court's decision regarding parenting schedules for an abuse of discretion. *Armbrister*, 414 S.W.3d at 693 (citing *Eldridge v.*

Eldridge, 42 S.W.3d 82, 88 (Tenn. 2001)). "An abuse of discretion occurs when the trial court . . . appl[ies] an incorrect legal standard, reaches an illogical result, resolves the case on a clearly erroneous assessment of the evidence, or relies on reasoning that causes an injustice." *Gonsewski v. Gonsewski*, 350 S.W.3d 99, 105 (Tenn. 2011). A trial court abuses its discretion in establishing a residential parenting schedule "only when the trial court's ruling falls outside the spectrum of rulings that might reasonably result from an application of the correct legal standard to the evidence found in the record." *Eldridge*, 42 S.W.3d at 88. We review questions of law de novo, affording the trial court's decision no presumption of correctness. *Armbrister*, 414 S.W.3d at 692 (citing *Mills v. Fulmarque*, 360 S.W.3d 362, 366 (Tenn. 2012)).

"Because child support decisions retain an element of discretion, we review them using the deferential 'abuse of discretion' standard." *Richardson v. Spanos*, 189 S.W.3d 720, 725 (Tenn. Ct. App. 2005).

IV. DISCUSSION

1.

Material Change in Circumstances

"Once a permanent parenting plan has been established, 'the parties are required to comply with it unless and until it is modified as permitted by law.'" *In re Jonathan S.*, No. M2021-00370-COA-R3-JV, 2022 WL 3695066, at *5 (Tenn. Ct. App. Aug. 26, 2022) (quoting *Armbrister*, 414 S.W.3d at 697). To modify an existing parenting plan, the trial court must first determine whether a material change in circumstances has occurred. *Armbrister*, 414 S.W.3d at 697–98 (citing Tenn. Code Ann. § 36-6-101(a)(2)(C)). "The petitioner . . . must prove by a preponderance of the evidence a material change of circumstance affecting the child's best interests, and the change must have occurred after entry of the order sought to be modified." *Gentile v. Gentile*, No. M2014-01356-COA-R3-CV, 2015 WL 8482047, at *5 (Tenn. Ct. App. Dec. 9, 2015) (citing *Caldwell v. Hill*, 250 S.W.3d 865, 870 (Tenn. Ct. App. 2007)). "[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." Tenn. Code Ann. § 36-6-101(a)(2)(C). If a material change in circumstances is found, the court must then determine whether a modification of the parenting plan is in the child's best interest in consideration of the factors set forth in Tennessee Code Annotated section 36-6-106(a). *Armbrister*, 414 S.W.3d at 697–98. "Facts or changed conditions which reasonably could have been anticipated when the initial residential parenting schedule was

adopted may support a finding of a material change in circumstances, so long as the party seeking modification has proven by a preponderance of the evidence 'a material change of circumstance affecting the child's best interest.'" *Id*. at 704 (quoting Tenn. Code Ann. § 36-6-101(a)(2)(C)).

Where the issue before the court is a modification of the residential parenting schedule, the threshold for determining whether there has been a material change of circumstances is "much lower" as compared to the threshold for modification of the primary residential parent. *Burnett v. Burnett*, No. M2014-00833-COA-R3-CV, 2015 WL 5157489, at *6 (Tenn. Ct. App. Aug. 31, 2015). Having reviewed the record, we determine that the evidence preponderates against the trial court's findings. The undisputed evidence in the record satisfies the "very low threshold for establishing a material change of circumstances" under Tennessee Code Annotated § 36-6-101(a)(2)(C). *See Armbrister*, 414 S.W.3d at 703 (quoting *Boyer v. Heimermann*, 238 S.W.3d 249, 257 (Tenn. Ct. App. 2007)). In particular, the testimony at the hearing established that the changes in Mother's work schedule—from the loss of her job at the beginning of the pandemic to the new hours and mostly work-from-home arrangement in her new job—were significant or significantly impacted parenting. Tenn. Code Ann. § 36-6-101(a)(2)(C). The result was Father's missing the weekday parenting time contemplated in the original parenting plan. *See id*. (failure to adhere to the parenting plan may constitute a material change of circumstance for purposes of modification of a residential parenting schedule). As the days turned to weeks, and then to months, Father spent much less time with the children than he did before Mother lost her job and before the children began virtual schooling. The testimony was that even after the children resumed in-person schooling, they needed to be returned to Mother after school because she was not working afternoon hours. All of the aforementioned changes "occurred after entry of the order sought to be modified." *Gentile*, 2015 WL 8482047, at *5 (citing *Caldwell*, 250 S.W.3d at 870). With the foregoing considerations in mind, we reverse the trial court's finding that Father did not establish a material change in circumstances sufficient to modify the residential parenting schedule.

Best Interest

Once the court determines that there has been a material change in circumstances, the second step in the modification analysis requires the court to determine whether modification is in the children's best interest under the factors in Tenn. Code Ann. § 36-6-106(a).[2] *Armbrister*, 414 S.W.3d at 705. The best interest determination "is a fact-sensitive

[2] The General Assembly amended this statute effective March 18, 2022, by adding a sixteenth factor. *See* 2022 Tenn. Laws Pub. Ch. 671 (H.B. 1866), eff. March 18, 2022. However, courts consider the factors in effect at the time the petition was filed. *See C.W.H. v. L.A.S.*, 538 S.W.3d 488, 497–98 (Tenn. 2017) (noting that statutes are presumed to operate prospectively and not retroactively, unless the statute is procedural in nature). The instant petition was filed in 2020. Regardless, based on the record, the sixteenth factor, "[w]hether a parent has failed to pay court-ordered child support for a period of three (3) years or

inquiry." *Steakin v. Steakin*, No. M2017-00115-COA-R3-CV, 2018 WL 334445, at *5 (Tenn. Ct. App. Jan. 9, 2018). The determination "'does not call for a rote examination of each of [the relevant] factors and then a determination of whether the sum of the factors tips in favor of or against the parent.'" *Id*. (quoting *In re Marr*, 194 S.W.3d 490, 499 (Tenn. Ct. App. 2005)). Rather, "'[t]he relevancy and weight to be given each factor depends on the unique facts of each case.'" *Id*. The goal of § 36-6-106 "is to allow both parents to enjoy the 'maximum participation possible' in the lives of their children." *Armbrister*, 414 S.W.3d at 707 (citing Tenn. Code Ann. § 36-6-106(a)).

Here, we decline to conduct a de novo review of the record to make the initial best interest determination in this case. This is because our jurisdiction is appellate only, Tenn. Code Ann. § 16-4-108, and because what is in the children's best interest requires a "particularly fact-driven analysis." *Hardin v. Hardin*, No. W2012-00273-COA-R3-CV, 2012 WL 6727533, at *5 (Tenn. Ct. App. Dec. 27, 2012). Thus, "trial judges, who have the opportunity to observe the witnesses and make credibility determinations, are better positioned to evaluate the facts than appellate judges." *Kelly v. Kelly*, 445 S.W.3d 685, 692 (Tenn. 2014) (citing *Armbrister*, 414 S.W.3d at 693). Accordingly, we remand for a determination of the children's best interests. Likewise, time has marched on during this litigation and the eldest child has now reached the age of majority. Therefore, any new parenting plan should address only the needs of the three remaining minor children. The trial court may conduct a new evidentiary hearing to account for developments since the July 2021 hearing on modification of the residential parenting schedule.

2.
Child Support

Father also petitioned for a modification of his child support obligation. In the parties' original parenting plan, they agreed that Father would pay $900.00 monthly child support, which represented an upward deviation, "due to Mother's income level and a child with special needs." In its order on Father's petition, the trial court explained:

> The Court finds that for purposes of child support, [Mother's] income is $2,000.00 per month and [Father's] income is $4,678.00.[3] Modification of child support, when there is a prior deviation, is controlled by the Child Support Guidelines, Section 1240-02-04-.05(2)(c), requiring computation not including any deviation amount. The original child support worksheet calculated child support as $721.00 without the referenced deviation. The current worksheet calculates child support at $764.00, without any deviation.

more," is inapplicable to this case. Tenn. Code. Ann. § 36-6-106(a)(16).

[3] Father does not challenge these income findings.

> Based on these computations, the threshold of a 15% variance has not been met, so the child support shall continue at $900.00 per month.

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)). "The parent seeking to modify a child support obligation has the burden to prove that a significant variance exists." *Wine v. Wine*, 245 S.W.3d 389, 394 (Tenn. Ct. App. 2007). "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). When comparing the previously ordered child support to the current presumptive child support amount for the purpose of determining whether a significant variance exists, the court must "not include the amount of any previously ordered deviations or proposed deviations in the comparison." *See* Tenn. Comp. R. & Regs. 1240-02-04-.05(4); *see also Tigart v. Tigart*, No. M2020-01146-COA-R3-CV, 2021 WL 4352539, at *4 (Tenn. Ct. App. Sept. 24, 2021).

Father argues that he established a significant variance between his current child support amount of $900.00 and the amount of $764.00 due pursuant to the Guidelines. He claims that the court's consideration of the original presumptive amount of $721.00 was error when the original order did not reference the original presumptive amount. Father's argument is without merit. The trial court specifically and correctly found that the original child support worksheet calculated child support as $721.00, without the referenced deviation. The court then found that the proposed child support obligation was $764.00, again not including any deviation, as required by the Guidelines. The difference between these two amounts is 5.79%. Accordingly, we affirm the trial court's decision to deny Father's request to modify child support because he did not prove that a significant variance exists.

3.
Attorney Fees

Finally, Mother requests an award of attorney fees on appeal pursuant to Tennessee Code Annotated section 36-5-103(c), which provides as follows:

> A prevailing party may recover reasonable attorney's fees, which may be fixed and allowed in the court's discretion, from the nonprevailing party in any criminal or civil contempt action or other proceeding to enforce, alter, change, or modify any decree of alimony, child support, or provision of a permanent parenting plan order, or in any suit or action concerning the adjudication of the custody or change of custody of any children, both upon the original divorce hearing and at any subsequent hearing.

Tenn. Code Ann. § 36-5-103(c). Mother is not the prevailing party in this appeal. We also note that Mother's request was not presented in the statement of issues in her appellate brief. A request for attorney fees is waived if not included in the statement of issues. *See Keeble v. Keeble*, No. E2019-01168-COA-R3-CV, 2020 WL 2897277, at *4 (Tenn. Ct. App. June 3, 2020) (citing *Killingsworth v. Ted Russell Ford, Inc*., 205 S.W.3d 406, 410–11 (Tenn. 2006)). Accordingly, Mother's request for attorney fees on appeal is denied.

V. CONCLUSION

We reverse the trial court's finding that Father did not establish a material change in circumstances sufficient to modify the residential parenting schedule. We affirm the trial court's judgment in all other respects. The case is remanded for a determination of the children's best interests and such further proceedings as may be necessary and consistent with this opinion. Costs of the appeal are taxed one half to the appellant, Daniel Lauchlan Macomber, Sr., and one half to the appellee, Melissa Sharon Macomber.

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JOHN W. McCLARTY, JUDGE