IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 20, 2015 Session

LESLIE ANN CREMEENS v. ERIC SCOTT CREMEENS

Appeal from the Circuit Court for White County
No. CC2374 Amy V. Hollars, Judge

No. M2014-00152-COA-R3-CV – Filed April 29, 2015

Mother challenges the modification of the parenting plan, specifically the designation of Father as the primary residential parent and the new parenting schedule. Mother contends that the trial court's best interest determination was flawed because the trial court failed to consider the expert testimony of a psychologist who examined the child in Tennessee. She also contends the court erred by failing to require the guardian *ad litem* to investigate the records of a psychologist who examined the child in Georgia. Because Mother failed to provide a transcript of the evidence or a statement of the evidence, we must assume there was sufficient evidence to support the trial court's factual determinations. We find no error with the investigation by the guardian *ad litem* because he was not required to investigate the records of every medical professional that examined the child; instead, by rule, the guardian *ad litem* is to "conduct an investigation to the extent that the guardian ad litem considers necessary to determine the best interests of the child. . . ." Tenn. Sup. Ct. R. 40A, § 8(b)(1). Further, Mother failed to proffer a summary of the Georgia psychologist's records or testimony; therefore, there is no factual basis for us to conclude that testimony of the Georgia psychologist would have affected the court's decision. As for the Tennessee psychologist, the record reveals that the trial court did consider the expert's testimony. As a result, we affirm the judgment of the trial court. We also declare this a frivolous appeal pursuant to Tenn. Code Ann. § 27-1-122.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

FRANK G. CLEMENT, JR., P.J., M.S., delivered the opinion of the Court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

D. Michael Kress, II, Sparta, Tennessee, for the appellant, Leslie Ann Cremeens.

Mark E. Tribble, Cookeville, Tennessee for the appellee, Eric Scott Cremeens.

Jason F. Hicks, Cookeville, Tennessee, Guardian Ad Litem.

OPINION

In March 2011, Leslie Ann Cremeens ("Mother") and Eric Scott Cremeens ("Father") were divorced by order of the Superior Court of Floyd County, Georgia ("Georgia court"). The Georgia court adopted a permanent parenting plan for the parties' minor child ("the child"), and Mother was designated the primary residential parent. Soon thereafter, Mother and the child moved to White County, Tennessee while Father moved to Versailles, Kentucky.

In August 2012, Mother filed a "Petition to Assume Jurisdiction and to Modify Permanent Parenting Plan" in White County, Tennessee.[1] The child was five years old at that time. Mother sought to modify the parenting plan because the child had begun attending kindergarten and the current visitation schedule would require him to miss school. Father responded with a counter-petition seeking to be designated the primary residential parent. In April 2013, the trial court appointed a guardian *ad litem* for the child.

The trial occurred over two days in August 2013; however, our knowledge of the proceedings is limited because the record does not contain a transcript of the evidence or a statement of the evidence. Based on the briefs, orders, and other materials in the record, it appears the trial court heard the testimony of Mother, Father, and the child and admitted into evidence the deposition of Dr. Roy Bilbrey, a psychologist who met with the child several times shortly before trial.

At the conclusion of the trial, the court found that a material change in circumstances had been proven because, *inter alia*, Mother and the child had relocated to Tennessee, Father had married and moved to Kentucky, and the child had begun attending school in White County, Tennessee, all of which made the existing parenting plan unworkable.

The trial court also found that it was in the child's best interest to designate Father as the primary residential parent. While Mother had been the child's primary caregiver

[1] Although there is no order assuming jurisdiction, it is clear that the trial court did in fact assume jurisdiction in this case. On appeal, neither party claims that the trial court lacked jurisdiction to modify the parenting plan established by the Georgia court; however, because this issue concerns subject matter jurisdiction, we briefly address it here. *See McQuade v. McQuade*, No. M2010-00069-COA-R3-CV, 2010 WL 4940386, at *5 (Tenn. Ct. App. Nov. 30, 2010) (noting that the provisions of the Uniform Child Custody Jurisdiction and Enforcement Act address the issue of subject matter jurisdiction). A Tennessee court may modify the custody determination of the court of another state if the child has lived in Tennessee for six months prior to the proceeding and the court finds that neither the child nor the child's parents presently reside in the other state. *See* Tenn. Code Ann. §§ 36-6-216, 218. Here, Mother, Father, and the child do not presently live in Georgia. Additionally, there is no evidence that Mother and the child have lived in Tennessee for less than six months. As a result, the record before us indicates that the trial court had jurisdiction to modify the custody determination of the Georgia court.

for nearly all of the child's life and had provided for his physical needs, the trial court found that Mother had failed to provide the child with an appropriate psychological and emotional environment. The trial court also found that the child felt responsible for Mother's well-being and that, based on the child's testimony, the child could not tell the guardian *ad litem* the truth because Mother "might get mad or sad about things." Further, the trial court found that Mother had encouraged and instructed the child to lie about Father to one of the child's prior psychologists, Dr. Elizabeth Hudson in Georgia, and to the guardian *ad litem*, which the court found constituted psychological abuse of the child. In assessing the parties' willingness to facilitate the child's relationship with the other parent, the trial court found that Mother had "tried to scuttle" the relationship between the child and Father and Mother had withheld visitation from Father.

Thereafter, Mother filed a motion for the trial court to amend its findings or grant a new trial based, in part, on the fact the trial court had not heard testimony from Dr. Elizabeth Hudson of Rome, Georgia, who has served as a counselor to the child. The trial court denied the motion in December 2013, and this appeal followed.

Mother appeals contending the trial court erred by failing to consider the testimony of Dr. Bilbrey and failing to direct the guardian *ad litem* to investigate the findings of Dr. Hudson, the child's prior psychologist in Georgia. Mother contends the guardian *ad litem* had a duty to investigate Dr. Hudson's records and call her as a witness even in the absence of an order from the trial court. Mother also challenges the new parenting schedule, contending the trial court erred by failing to equitably balance the residential parenting time. The guardian *ad litem* raises one additional issue: whether Mother's appeal should be deemed frivolous.

ANALYSIS

Once made and implemented, a custody decision is considered res judicata upon the facts in existence or reasonably foreseeable when the decision was made. *Rigsby v. Edmonds*, 395 S.W.3d 728, 735 (Tenn. Ct. App. 2012). Thus, the parenting plan established in the Georgia Final Decree of Divorce in 2011 is res judicata. Nevertheless, trial courts may modify parenting plans when both a material change of circumstances has occurred and a change of the parenting plan is in the child's best interests. *Id.*; *Kendrick v. Shoemake*, 90 S.W.3d 566, 568 (Tenn. 2002). Modifying a parenting plan, including both the designation of primary residential parent and parenting schedule, is a two-step procedure. The court must first determine whether a material change in circumstances has occurred. *Rigsby*, 395 S.W.3d at 735-36. If not, the petition is to be dismissed; however, if a material change in circumstance that affects the child is proven, the trial court must then determine if the modification of the parenting plan is in the child's best interest. *See id.*

A trial court's determinations of whether a material change in circumstances has occurred and where the best interests of the child lie are factual questions. *In re T.C.D.*, 261 S.W.3d 734, 742 (Tenn. Ct. App. 2007). We review the trial court's factual findings de novo with a presumption that they are correct unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); *Armbrister v. Armbrister*, 414 S.W.3d 685, 692-93 (Tenn. 2013). Evidence preponderates against the trial court's findings of fact when it supports another finding of fact with greater convincing effect. *See Walker v. Sidney Gilreath & Associates*, 40 S.W.3d 66, 71 (Tenn. Ct. App. 2000). We will affirm the trial court's decision unless the evidence preponderates against the trial court's factual determinations or the trial court has committed an error of law affecting the outcome of the case. Tenn. R. App. P. 36(b); *see Boyer v. Heimermann*, 238 S.W.3d 249, 254-55 (Tenn. Ct. App. 2007).

The burden is upon the appellant to show that the evidence preponderates against the trial court's judgment. *Outdoor Management, LLC v. Thomas*, 249 S.W.3d 368, 377-78 (Tenn. Ct. App. 2007). Thus, it is the duty of the appellant to prepare a record that conveys a fair, accurate, and complete account of what has transpired in the trial court with respect to the issues that form the basis of the appeal. *See id.*; Tenn. R. App. P. 24; *see also State v. Boling*, 840 S.W.2d 944, 951 (Tenn. Crim. App. 1992). "Mere statements of counsel, which are not appropriate proffers or not effectively taken as true by the parties, cannot establish what occurred in the trial court unless supported by evidence in the record." *State v. Thompson*, 832 S.W.2d 577, 579 (Tenn. Crim. App. 1991).

In cases where there is no transcript or statement of the evidence, the presumption of correctness afforded to a trial court's findings of fact becomes almost conclusive. *See Outdoor Management*, 249 S.W.3d at 377; *Beaty v. Hood*, 306 S.W.2d 671, 672 (Tenn. Ct. App. 1957). Therefore, to the extent that resolution of the issues on appeal depends on factual determinations, the lack of a transcript or statement of the evidence is essentially fatal to the party having the burden on appeal. *See Sherrod v. Wix*, 849 S.W.2d 780, 783 (Tenn. Ct. App. 1992) (holding that without an appellate record containing the facts, the court must assume that the record, had it been preserved, would have contained sufficient evidence to support the trial court's factual findings).

The record before us does not contain a transcript of the evidence or a statement of the evidence. Therefore, we must assume that the record, had it been preserved, would have contained sufficient evidence to support the trial court's factual findings. *Sherrod*, 849 S.W.2d at 783.

DR. BILBREY'S TESTIMONY

Mother contends the trial court failed to consider Dr. Bilbrey's testimony in its best interests analysis. We are not persuaded by this argument because, in its ruling, the

trial court addressed much of the substance of Dr. Bilbrey's testimony and because this incomplete record requires us to assume that the trial court's factual findings were supported by the evidence.

While the trial court did not mention Dr. Bilbrey by name, it did address the substance of his testimony. A large portion of his deposition concerns the child's desire to live with Mother and dislike of visiting Father. The trial court's ruling indicates that it heard testimony from the child himself about his preferences. To the extent that Dr. Bilbrey's deposition is evidence of the child's preference, it is unclear what it can add to the child's own testimony. Moreover, the trial court correctly stated that it was not required to consider that preference because the child was only six years old. *See* Tenn. Code Ann. § 36-6-106(a)(13).

Similarly, Dr. Bilbrey expressed the opinion that "it might do [the child] a lot of harm, in fact, to remove him from people that he has good feelings about and is around quite a lot." In its ruling, the trial court recognized that Mother had been the child's primary caregiver for most of his life, that they shared a close bond, and that it would be difficult to make this change in custody. However, the trial court found that Mother's status as the primary caregiver weighed *against* her based on the emotional and psychological environment she had created. Because we cannot review the bases for these findings, they are, in effect, conclusively established, and we cannot say that the evidence preponderates against them. *See Outdoor Management*, 249 S.W.3d at 377; *Beaty*, 306 S.W.2d at 672.

Ultimately, Mother's failure to provide us with a complete record is fatal to this argument. Without a transcript or statement of the evidence we are unable to determine if Dr. Bilbrey's deposition, in conjunction with the other evidence that was presented, supports another finding of fact with greater convincing effect. Instead, we must assume that there was sufficient evidence to support the trial court's best interest determination. *See Outdoor Management*, 249 S.W.3d at 377-78. As a result, Mother's argument on this issue is without merit.

DR. ELIZABETH HUDSON OF ROME, GEORGIA

Mother also contends the trial court's best interest analysis was flawed because it did not include evidence from Dr. Elizabeth Hudson. While the record does not contain any proof regarding the evidence Dr. Hudson would have offered, Mother argues that the trial court was required to order the guardian *ad litem* to investigate this evidence. Similarly, she argues that the guardian *ad litem* had a duty to investigate Dr. Hudson's records whether the trial court required it or not. In support of these arguments, Mother cites Tenn. Sup. Ct. R. 40A, which governs the appointment of guardians *ad litem* in child custody proceedings.

Contrary to Mother's contention, Tenn. Sup. Ct. R. 40A, which outlines requirements for trial courts and guardians *ad litem* in child custody matters, does not establish a bright-line rule that requires guardians *ad litem* to investigate the records of every medical professional that ever examined the child in question. Instead, the rule provides that a guardian *ad litem* shall "conduct an investigation *to the extent that the guardian ad litem considers necessary to determine the best interests of the child* . . . ." Tenn. Sup. Ct. R. 40A, § 8(b)(1) (emphasis added). This investigation does not require a guardian *ad litem* to review all of a child's records. *See id*. at § 8(b)(2) (providing that a guardian *ad litem* shall "obtain and review copies of the child's relevant medical, psychological, and school records . . . ."). In this case, it is noteworthy that the guardian *ad litem* participated in Dr. Bilbrey's deposition, during which Dr. Bilbrey testified that he had received a letter from a "Georgia psychologist" that contained "essentially the same things I [Dr. Bilbrey] found." In light of that testimony and the discretion afforded to guardians *ad litem* under Rule 40A, we find no error with the guardian *ad litem*'s decision not to investigate Dr. Hudson's records.

Furthermore, we will not set aside a final judgment based on an error that did not affect the outcome of the proceeding. *See* Tenn. R. App. P. 36(b) ("A final judgment . . . will not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment. . . ."). Thus, when parties contend that a trial court erred by failing to admit or consider certain evidence, they must provide us with some basis for determining if the requirements of Tenn. R. App. P. 36(b) are satisfied. *See State v. Springs*, 976 S.W.2d 654, 657-58 (Tenn. Ct. App. 1997). It is impossible to make this determination without knowing what that evidence was. *See id.*; *Dossett v. City of Kingsport*, 258 S.W.3d 139, 145 (Tenn. Ct. App. 2007).

The record does not include anything that indicates what Dr. Hudson's records or testimony would have revealed, other than the fact that her records were consistent with Dr. Bilbrey's findings; thus there is no basis for us to conclude that the failure to investigate or consider such testimony more probably than not affected the judgment. *See* Tenn. R. App. P. 36(b). Accordingly, Mother's arguments on this issue are unavailing.

DIVISION OF PARENTING TIME

Mother also argues on appeal that the trial court erred by failing to have a "more equitable balancing of residential parenting time."

Decisions regarding parenting plans often hinge on subtle factors, such as the parents' demeanor and credibility during the proceedings. *Roundtree v. Roundtree*, 369 S.W.3d 122, 129 (Tenn. Ct. App. 2012). As a result, appellate courts are reluctant to second-guess a trial court's determination regarding custody and visitation. *See Marlow v. Parkinson*, 236 S.W.3d 744, 748 (Tenn. Ct. App. 2007). This is particularly true when no error is evident from the record. *Id.*

As the appellant, Mother had the burden to show that the evidence preponderates against the trial court's judgment. *Outdoor Management*, 249 S.W.3d at 377-78. Furthermore, it was her duty to prepare a record that conveys a fair, accurate, and complete account of what has transpired in the trial court with respect to the issues that form the basis of the appeal. *See id.*; Tenn. R. App. P. 24. As previously noted, we are not favored with a transcript of the proceeding pursuant to Tenn. R. App. P. 24(b) or a statement of the evidence pursuant to Tenn. R. App. P. 24(c). The only evidence provided to us is the deposition of Dr. Bilbrey, which is insufficient for this court to conduct a proper review of the factual basis for the trial court's factual determinations challenged in this appeal. *See In re T.C.D.*, 261 S.W.3d at 742.

In cases where there is no transcript or statement of the evidence, the presumption of correctness afforded to a trial court's findings of fact becomes almost conclusive, *see Outdoor Management*, 249 S.W.3d at 377; *Beaty*, 306 S.W.2d at 672; thus, the lack of a transcript or statement of the evidence is essentially fatal to issues that depend on factual determinations. *See Sherrod*, 849 S.W.2d at 783.

Considering the foregoing and realizing that Mother's challenge to the parenting schedule depends on the factual foundation of the trial court's decision, we affirm the parenting schedule.

FRIVOLOUS APPEAL

The guardian *ad litem* argues that Mother's appeal should be deemed frivolous.

This court is statutorily authorized to award just damages against the appellant if we determine the appeal is frivolous or that it was taken solely for delay. Tenn. Code Ann. § 27-1-122. The statute, however, is to be interpreted and applied strictly to avoid discouraging legitimate appeals. *Wakefield v. Longmire*, 54 S.W.3d 300, 304 (Tenn. Ct. App. 2004); *see Davis v. Gulf Ins. Group*, 546 S.W.2d 583, 586 (Tenn. 1977) (discussing the predecessor of Tenn. Code Ann. § 27-1-122). A frivolous appeal is one that is devoid of merit or has no reasonable chance of success. *Wakefield*, 54 S.W.3d at 304. Occasionally, a party's failure to provide an adequate record will render its appeal frivolous. *See Williams v. Williams*, 286 S.W.3d 290, 297-98 (Tenn. Ct. App. 2008).

Having conducted a thorough review of the modest record before us, we have determined that: 1) contrary to Mother's contention in this appeal, the trial court did consider the testimony of Dr. Bilbrey; 2) there was no factual or legal basis to support Mother's challenge to the conduct of the guardian *ad litem* under Tenn. Sup. Ct. R. 40A; and 3) Mother failed to provide us with a record that would allow us to conduct a review of the trial court's findings of fact even though her arguments focus exclusively on the trial court's factual determinations and she, as the appellant, had the duty to prepare a

fair, accurate, and complete record. Based on these significant factors, we find that this appeal is devoid of merit; therefore, it is a frivolous appeal.

Accordingly, on remand the trial court shall award "just damages against the appellant, which may include but need not be limited to, costs, interest on the judgment, and expenses incurred by the appellee as a result of the appeal." Tenn. Code Ann. § 27-1-122.

IN CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded for further proceedings consistent with this opinion. Costs of appeal are assessed against Appellant, Leslie Ann Cremeens.

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FRANK G. CLEMENT, JR., JUDGE