IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 21, 2014 Session

MICHAEL JAMES LITTLE, JR. v. RHONDA G. LITTLE

Direct Appeal from the Circuit Court for Davidson County
No. 09FD4 Philip E. Smith, Judge

No. M2013-00983-COA-R3-CV - Filed April 21, 2014

The trial court determined that no material and substantial change in circumstance had occurred and denied Father's petition to modify the parties' parenting plan. We affirm.

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

DAVID R. FARMER, J., delivered the opinion of the Court, in which HOLLY M. KIRBY, J., and J. STEVEN STAFFORD, J., joined.

Paula Ogle Blair, Nashville, Tennessee, for the appellant, Michael James Little, Jr.

Rhonda G. Little, *Pro se.*

MEMORANDUM OPINION[1]

Petitioner/Appellant Michael James Little, Jr. ("Father") and Respondent/Appellee Rhonda G. Little ("Mother") were divorced in February 2005 in Idaho. The Idaho court awarded the parties joint custody of their minor children, a daughter born in June 1994 and a son born in January 1998. It appears from the record that, when the divorce decree was entered, Mother and the children resided in Oregon. Father subsequently filed a petition for contempt and to modify custody in the Circuit

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[1]Rule 10 of the Rules of the Court of Appeals of Tennessee provides:

> This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION", shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

Court for Malheur County, Oregon, which the court denied following a hearing in May 2007. By order entered June 2007 the Oregon court found Mother to not be in contempt; found that it was in the best interests of the children to be in Mother's custody, with Father having "significant parenting time"; and modified the parenting plan to award Father parenting time every summer, during spring break every year, and one-half of every Christmas vacation. The Oregon court also permitted Mother to relocate with the children to Tennessee. In April 2009, the judgment was registered in Tennessee.

In March 2010, Father filed a petition in the Circuit Court for Davidson County to change custody and modify the parenting plan. Acting *pro se*, Mother filed a "response" in April 2010 and no further action was taken in the matter until Father filed a petition for contempt in July 2011. Father apparently filed an amended petition to modify the parenting plan in February 2012, and Mother filed another written response on February 17, 2012. In June 2012, Father filed an amended petition to modify the parenting plan and child support. Mother responded in August 2012, asserting, in essence, that there had been no material and substantial change in circumstance and denying Father's assertion that she had interfered with his relationship with the parties' children. Following a hearing in February 2013, the trial court dismissed Father's petition for contempt, found that the parties' daughter had been emancipated, and determined that there had been no material change of circumstance with respect to the parties' son. By order entered March 21, 2013, the trial court found that there had been no material change of circumstance and denied and dismissed Father's petition. Father filed a timely notice of appeal to this Court.

Issues Presented

Father presents two issues for our review, as stated by Father:

(1) Whether the trial court erred in finding that there was no material and substantial change in circumstances warranting a modification of the parenting plan[.]

(2) Whether the trial court erred in finding that [the parties' son's] desire to live with this father failed to constitute a material and substantial change in circumstances[.][2]

Standard of Review

We review findings of facts of a trial court sitting without a jury *de novo* upon the record with a presumption of correctness unless the preponderance of the evidence is otherwise. *In Re Angela E.*, 303 S.W.3d 240, 246 (Tenn. 2010) (citation omitted); Tenn. R. App. P. 13(d). Insofar as a factual finding is based on the trial court's assessment of witness credibility, we will not reverse that finding absent clear and convincing evidence to the contrary. *In Re: M.L.D.*, 182 S.W.3d 890, 894 (Tenn. Ct. App.2005). No presumption of correctness attaches, however, to a trial court's conclusions on

[2]Mother/Appellee did not file a brief in this Court.

issues of law. *Bowden v. Ward*, 27 S.W.3d 913, 916 (Tenn. 2000); Tenn. R. App. P. 13(d).

Discussion

It is well-settled that the party seeking to modify a parenting plan bears the burden to prove, by a preponderance of the evidence, that a material change of circumstance affecting the child's best interest has occurred. Tenn. Code Ann. § 36-6-101(a)(2)(C)(2010). A material change of circumstance "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*. Modification of an existing parenting plan requires a two-step analysis. *Conner v. Conner*, No. W2008-02254-COA-R3-CV, 2009 WL 3720582, at *4 (Tenn. Ct. App. Nov. 9, 2009) (citation omitted). First, the trial court must determine whether a material change in circumstances has occurred. If it finds a material change in circumstances, the trial 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 § 36-6-106(a). If the party seeking modification cannot prove that the child's circumstances have changed in a material way, the trial court should not engage in a new comparative fitness or best interest analysis. *Id.* (citations omitted). Rather, it should decline to change custody. *Id*. (citation omitted). Whether a material change in circumstances has occurred is a question of fact for the finder of fact. *Maxwell v. Woodard*, No. M2011–02482–COA–R3–CV, 2013 WL 2420500, at *16 (Tenn. Ct. App. May 31, 2013).

In his brief to this Court and in the trial court, Father asserts a material change in circumstance exists based on 1) Mother's interference with his parenting time and 2) statements made by the parties' son that he would like to live with Father. We observe, however, that Father's allegations with respect to Mother's interference relate to two instances concerning the parties' daughter during spring break 2010 and summer 2011. As noted above, the parties' daughter had attained majority when this matter was tried, and these instances are not relevant to modification of the parenting schedule with respect to the parties' son.[3] Father points to no instance of interference by Mother with his parenting time with the parties' son. The trial court specifically found, moreover, that there was "no proof" that Mother "ha[d] acted in any way calculated at alienating the affections of these minor children towards [Father], quite the contrary[,]" although Father "made it clear, he can't stand his ex-wife." The evidence does not preponderate against the trial court's finding that Mother did not interfere with Father's relationship with the parties' son.

We next turn to Father's assertion that the trial court erred by determining that no material

[3]The trial court found, and it appears undisputed, that Father agreed to allow the parties' daughter to spend spring break 2010 on a mission trip which subsequently was cancelled, and that Mother allowed the daughter to spend the time participating in other activities with her youth group. It appears the parties' daughter objected to spending summer 2011, the summer before her senior year of high school, with Father in Idaho, and that Mother permitted her to remain in Tennessee.

change in circumstance occurred where the parties' son expressed a desire to live with Father. Father's argument, as we understand it, is that the desire of the parties' minor son to live with his Father, without more, constitutes a material change in circumstance. We have long held that, although a child's preference may amount to a material change in circumstances when combined with other circumstances, "'the stated preference of a child, standing alone, does not constitute a material change in circumstances.'" *Conner v. Conner*, No. W2008-02254-COA-R3-CV, 2009 WL 3720582, at *7 (Tenn. Ct. App. Nov. 9, 2009) (quoting *Conner v. Conner*, No. W2007-01711-COA-R3-CV, 2008 WL 2219255, at *3 (Tenn. Ct. App. May 29, 2008) (citing *Mulkey v. Mulkey*, No. E2004-00590-COA-R3-CV, 2004 WL 2412610, at *5 (Tenn. Ct. App. Oct.28, 2004))). Rather, the reasonable preference of a child twelve years of age or older is one of the factors to be considered by the court in determining the best interest of the child. Tennessee Code Annotated § 36-6-106(a)(7)(A)(2010); *see Maxwell*, 2013 WL 2420500, at *16.

The trial court concluded its findings in this matter by stating that it found Mother to be more credible than Father with respect to discrepancies between the parties' testimony. It concluded that, based on the entirety of the evidence, no material change in circumstance had occurred warranting modification of custody. Upon review of the record, we observe that although the parties' son testified that he would like to spend more time with Father in the country, he did not testify as to any other change in circumstance warranting modification. The evidence contained in the record does not preponderate against the trial court's finding that no material change of circumstances warranting a change of custody had occurred in this case.

Holding

In light of the foregoing, we affirm the judgment of the trial court. Costs on appeal are taxed to the Appellant, Michael James Little, Jr. This matter is remanded to the trial court for enforcement of the judgment and the collection of costs.

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DAVID R. FARMER, JUDGE