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Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs September 4, 2019

CRAIG DEWAYNE MASSEY v. HEIDI WADE MASSEY

**Appeal from the Circuit Court for Rutherford County
No. 68949 Barry R. Tidwell, Judge**

No. M2019-00294-COA-R3-CV

A father appeals the modification of a parenting plan, contending that the circuit court lacked subject matter jurisdiction to the modify the plan because the mother's petition raised allegations that the children were abused and neglected, which the juvenile court had exclusive jurisdiction to hear. Concluding that the circuit court retained subject matter jurisdiction over the post-divorce petition, we affirm the judgment.

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

RICHARD H. DINKINS, J., delivered the opinion of the court, in which D. MICHAEL SWINEY, C.J., and ARNOLD B. GOLDIN, J., joined.

William D. Cartwright, Murfreesboro, Tennessee, for the appellant, Craig Dewayne Massey.

Rebecca L. Lashbrook, Murfreesboro, Tennessee, for the appellee, Heidi Wade Massey.

OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

This appeal involves the post-divorce modification of a parenting plan brought by Appellee, Heidi W. Massey, ("Mother") against Appellant, Craig Massey, ("Father"), who were divorced by Final Decree entered on July 17, 2015. The Final Divorce Decree incorporated an agreed parenting plan regarding the parties' three (3) minor children, establishing equally divided parenting time to be exercised on a rotating two-week schedule as well as a division of holiday time and school vacations. The agreement included a provision allotting the federal income tax exemption for the children between the parties and requiring Father to maintain insurance for the benefit of the children; there was no other support obligation.

Shortly after the entry of the Final Decree, Mother's finances worsened, so the parties agreed that the children would primarily reside with Father until Mother's situation improved. This arrangement continued until Mother filed a petition on April 17, 2018, seeking modification of the parenting plan and requesting a temporary restraining order. The petition alleged that Father had engaged in abusive behavior toward the children and requested the court, inter alia, to prevent Father from removing the children from their primary placement with Mother; restrain Father from exercising visitation with the children without supervision; find a material change of circumstance as to the parties' children and to enter Mother's proposed parenting plan; and set child support.

On May 7, 2018, the court held a hearing at which both parties, as well as Julianna Potter of the Department of Children's Services testified. On May 14 the court entered an order finding that the children were being abused by Father and holding that Mother's proposed plan was in the best interest of the children; pending further orders, Father was only allowed supervised telephone contact with the children.

Trial of the petition was held on October 30 and November 7 and the court issued its Final Order and Permanent Parenting Plan Order on November 28. Among its findings, the court found that the testimony of the children, Mother, and the children's counselor were credible, specifically as it pertained to Father's abuse of the children. The court held that Mother had proved that there had been a material change in circumstance and that, after applying the factors in Tennessee Code Annotated section 36-6-106(a), it was in the best interest of the children to adopt Mother's proposed parenting plan; the court modified the plan to include a provision that precluded Father from any direct or indirect contact with the children, absent the recommendation and involvement of the children's therapist.

On December 28 Father filed a motion to dismiss the petition for lack of subject matter jurisdiction, asserting that Tennessee Code Annotated section 37-1-103 vested subject matter jurisdiction of all proceedings that raise issues of dependency and neglect of children exclusively in juvenile court; alternatively, Father moved to alter or amend the November 28 judgment. The court heard the motion on January 18, 2019, and denied the motion.

Father appealed on February 14, and articulates the following issues:

1. Whether the trial court erred by denying Father's Motion to Dismiss for Lack of Subject Matter Jurisdiction?
2. Whether the trial court erred in failing to find that it is unconstitutional for one subject matter to have two forums with different standards of proof and different rights for parents and children?

II. STANDARD OF REVIEW

Subject matter jurisdiction refers to a court's lawful authority to adjudicate a controversy. *Chapman v. DaVita, Inc.*, 380 S.W.3d 710, 712 (Tenn. 2012). Subject matter jurisdiction is conferred and defined by the Tennessee Constitution and statutes. *Id.* (citing *Kane v. Kane*, 547 S.W.2d 559, 560 (Tenn. 1977); *Computer Shoppe, Inc. v. State*, 780 S.W.2d 729, 734 (Tenn. Ct. App. 1989)). Where subject matter jurisdiction of a court is challenged under the rule governing the presentation of defenses to claims for relief, the party asserting that subject matter jurisdiction exists has the burden of proof. Tenn. Rules Civ. Proc., Rule 12.02(1). *Chapman*, 380 S.W.3d at 712. Because a determination of whether subject-matter jurisdiction exists is a question of law, an appellate court's standard of review is *de novo*, without a presumption of correctness. *Id.* at 712-713.

III. ANALYSIS

Father argues that the trial court erred in denying his motion to dismiss because “the substance of Mother’s petition alleged that the parties’ children were dependent and neglected as defined by Tennessee Code Annotated section 37-1-102(b)(13),” and section 37-1-103 vests exclusive subject matter jurisdiction of such petitions in the juvenile court. The question presented in this case was before our Supreme Court in *Cox v. Lucas*, 576 S.W.3d 356 (Tenn. 2019). In that case a father filed a petition to modify the parenting plan seven years after it had been incorporated into the final decree; the petition alleged facts regarding the mother’s conduct and care of the parties’ child and asserted that the child was in danger of immediate harm. *Id.* at 358. In due course, the circuit court modified the plan, designating father as primary residential parent; mother did not appeal. *Id.* Mother thereafter filed a motion to dismiss for lack of subject matter jurisdiction on the grounds that the allegations of the petition were dependency and neglect allegations that divested the circuit court of jurisdiction and vested the proceeding in juvenile court; the motion was denied. *Id.* at 359. On appeal, this court reversed the trial court and held that the actions taken were void for lack of subject matter jurisdiction. *Id.* (citing *Cox v. Lucas*, No. E2017-02264-COA-R3-CV, 2018 WL 5778969, at *3 (Tenn. Ct. App. Nov. 2, 2018)). The Supreme Court granted review “to consider whether a circuit court loses continuing, exclusive subject matter jurisdiction if a post-divorce petition seeking modification of a parenting plan adopted in a final divorce decree alleges facts that are tantamount to claims of dependency and neglect, over which juvenile courts have exclusive original jurisdiction pursuant to Tennessee Code Annotated section 37-1-103.” *Id.* at 357-58.

At the time the modification petition at issue in *Cox* was filed in the trial court, the part of section 37-1-103 pertinent to this case read:

(a) The juvenile court has exclusive original jurisdiction of the following proceedings, which are governed by this part:

(1) Proceedings in which a child is alleged to be delinquent, unruly or dependent and neglected, or to have committed a juvenile traffic offense as defined in § 37-1-146;

While the case was pending in the supreme court, the Legislature amended section 37-1-103 to add subsection (g), which reads:

(g) Notwithstanding this section, nothing in subdivision (a)(1) shall be construed to preclude a court from exercising domestic relations jurisdiction pursuant to title 36, regardless of the nature of the allegations, unless and until a pleading is filed or relief is otherwise sought in a juvenile court invoking its exclusive original jurisdiction.

Act of April 18, 2019, 2019 Tenn. Pub. Acts ch. 167. The bill provided that the amendment was to take effect upon becoming law and that it was to be applied “to any case pending or filed on or after the effective date of this act”; the bill became law on April 18, 2019. In resolving the appeal, the Supreme Court applied the amended version of the statute and held:

Applying these guiding principles, we conclude that under the plain language of the amendment, the Circuit Court was not precluded “from exercising domestic relations jurisdiction” pursuant to title 36, “regardless of the nature of the allegations” of Father’s petition because no “pleading [had been] filed or relief ... otherwise sought in a juvenile court invoking its exclusive original jurisdiction.”

Id. at 360. Accordingly, the court reversed the judgment of the Court of Appeals and reinstated that of the trial court. *Id.* at 361.

In the instant case, Mother invoked the subject matter jurisdiction of the circuit court when she filed her petition to modify pursuant to section 36-6-101¹ on April 17,

¹ Tennessee Code Annotated section 36-6-101 states in pertinent part:

(a)(1) In a suit for annulment, divorce or separate maintenance, where the custody of a minor child or minor children is a question, the court may, notwithstanding a decree for annulment, divorce or separate maintenance is denied, award the care, custody and control of such child or children to either of the parties to the suit or to both parties in the instance of joint custody or shared parenting, or to some suitable person, as the welfare and interest of the child or children may demand, and the court may decree that suitable

2018; trial was held, and the court entered its final order on November 28. Father filed a Notice of Appeal on February 14, 2019, and the appeal was pending as of April 18, 2019. In accordance with the holding in *Cox*, we hold that the section 37-1-103, as amended, applies in this case and conclude the trial court did not err in denying Father's motion to dismiss the petition.² We proceed to review the ruling on Mother's petition.

The court made findings of fact from the bench which were incorporated into the

support be made by the natural parents or those who stand in the place of the natural parents by adoption. *Such decree shall remain within the control of the court and be subject to such changes or modification as the exigencies of the case may require.*

* * *

(2)(B)(i) If the issue before the court is a modification of the court's prior decree pertaining to custody, the petitioner must prove by a preponderance of the evidence a material change in circumstance. A material change of circumstance does not require a showing of a substantial risk of harm to the child. A material change of circumstance may include, but is not limited to, failures to adhere to the parenting plan or an order of custody and visitation or circumstances that make the parenting plan no longer in the best interest of the child.

(ii) In each contested case, the court shall make such a finding as to the reason and the facts that constitute the basis for the custody determination.

* * *

(C) If the issue before the court is a modification of the court's prior decree pertaining to a residential parenting schedule, then the petitioner must prove by a preponderance of the evidence a material change of circumstance affecting the child's best interest. A material change of circumstance does not require a showing of a substantial risk of harm to the child. 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.

(Emphasis added).

² Father argues that he was denied certain substantive due process rights that he would have been entitled to in juvenile court, such as the right to have counsel appointed, an additional opportunity to appeal, and the right to a heightened standard of proof. Father, however, did not file a pleading in juvenile court invoking its original jurisdiction or seeking relief therein; consequently, there is not error to assign in this regard to the ruling of the circuit court. Father also argues that it was unconstitutional to allow more than one forum, such as the circuit court, to hear allegations of dependency and neglect in addition to the juvenile court. The holding in *Cox v. Lucas* pretermits our consideration of this argument.

final order.³ The court then considered the factors at Tennessee Code Annotated section 36-6-106 to make the best interest determination and held:

As to the specific factors of Tennessee Code Annotated §36-6-106, the Court finds factor (1) to be the most applicable. As to this factor, based upon the totality of the evidence and testimony in this cause, the Court finds in favor of the Mother. The Court further finds that factor (2) also favors the Mother as to past and potential for future performance of parenting responsibilities. Next, given the gravity of the evidence in this cause as to the physical and emotional abuse of the children, the Court finds in favor of the Mother as to factor (11).⁴

³ The portion of the order containing factual findings stated:

1. The Court finds that the Mother has met her burden of proof in these proceedings, necessitating a modification of the Parenting Plan entered by this Honorable court on July 17, 2015, pursuant to Tennessee Code Annotated §36-6-106. Specifically, the Court finds that “there has been a material change in circumstance since the original entry of the parenting plan, such as the girls have been subjected to verbal and physical abuse by the Father.”
2. The Court specifically finds that that pursuant to the Temporary Restraining Order entered by this Honorable Court on May 14, 2018, the Father’s contact with the three (3) minor children at issue in this cause via supervised telephone calls two (2) times per week and “precluding the Father from any direct or indirect contact with the minor children, absent a recommendation from the minor children’s therapist.” Said supervised telephone calls were suspended by Order of this Court entered on October 5, 2018, “due to the Father’s treatment of girls while on the supervised phone calls and inappropriate comments regarding the case and the veracity of the children.” Further, the Court finds the recordings of said telephone calls “inappropriate, disturbing, and verbally abusive of these minor children.”
3. The Court further finds that photographic evidence introduced in these proceedings show that the parties’ minor children, Mollie and Maggie, received bruising and “whip marks.” Therefore, the Court finds that “these marks came from excessive beatings administered by the Father on the girls with various objects, including switches, sticks, belts, and his hands.” As a result of the Father’s excessive corporal punishment, in part, the children are in counseling. The Court finds that these children have made separate, credible disclosures of abuse to their counselor. Further, the Court finds that the parties’ youngest child, Abigail, “has also been subject to the same abuse from the Father as the other two children.”
4. This Honorable Court heard testimony of the minor children, Mollie and Maggie, in camera, and further from the Mother and the children’s counselor, Peggy Christian. The Court finds each of these individuals to be credible.

(Internal citations to the transcript of the court’s ruling omitted.)

⁴ Tennessee Code Annotated section 36-6-106 requires a court to make a custody determination “on the basis of the best interest of the child” consistent with the factors listed in the statute; the factors which the trial court in this case considered most applicable were factors (1), (2) and (11):

Father does not challenge these findings or the court's application of the statutory factors.

Father did not provide a transcript of the evidence or statement of the evidence in the record. Therefore, we assume that the record contains sufficient evidence to support the trial court's factual findings and holding that there was a material change in circumstances. *See Sherrod v. Wix*, 849 S.W.2d 780, 783 (Tenn. Ct. App. 1992). The factors which the court identified in making the determination to modify the existing plan and to adopt Mother's plan are appropriate given the factual findings. Affording the trial court the deference our standard of review requires, we affirm the judgment. *See Eldridge v. Eldridge*, 42 S.W.3d. 82 (Tenn. 2001).⁵

IV. CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court.

(1) The strength, nature, and stability of the child's relationship with each parent, including whether one (1) parent has performed the majority of parenting responsibilities relating to the daily needs of the child;

(2) Each parent's or caregiver's past and potential for future performance of parenting responsibilities, including the willingness and ability of each of the parents and caregivers to facilitate and encourage a close and continuing parent-child relationship between the child and both of the child's parents, consistent with the best interest of the child. In determining the willingness of each of the parents and caregivers to facilitate and encourage a close and continuing parent-child relationship between the child and both of the child's parents, the court shall consider the likelihood of each parent and caregiver to honor and facilitate court ordered parenting arrangements and rights, and the court shall further consider any history of either parent or any caregiver denying parenting time to either parent in violation of a court order;

* * *

(11) Evidence of physical or emotional abuse to the child, to the other parent or to any other person. The court shall, where appropriate, refer any issues of abuse to juvenile court for further proceedings.

⁵ Our standard of review was set forth in *Eldridge*:

"[T]he details of custody and visitation with children are peculiarly within the broad discretion of the trial judge." . . . [A] "trial court's decision [on visitation] will not ordinarily be reversed absent some abuse of that discretion." . . . "An abuse of discretion can be found only when the trial court's ruling falls outside the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence found in the record."

42 S.W.3d. at 85 (internal citations omitted).

RICHARD H. DINKINS, JUDGE