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

CHRISTOPHER WAYNE MCELHINEY v. ELIZABETH ALLISON BILLIPS

Appeal from the Circuit Court for Rutherford County
No. 53616 Royce Taylor, Judge

No. M2009-02309-COA-R3-CV - Filed March 5, 2014

This appeal involves a post-divorce modification of a parenting plan. Mother appeals the trial court's decision modifying the parenting plan to designate Father the primary residential parent of the parties' children. Finding no error in the court's ruling, we affirm.

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

ANDY D. BENNETT, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and BEN H. CANTRELL, SR. J., joined.

Venus M. Stanek, Murfreesboro, Tennessee, for the appellant, Elizabeth Allison Billips.

Christopher Wayne McElhiney, Franklin, Tennessee, Pro Se.

MEMORANDUM OPINION[1]

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[1]Tenn. R. Ct. App.10 states:

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 When a case is decided by memorandum opinion, it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

FACTUAL AND PROCEDURAL HISTORY

Christopher Wayne McElhiney ("Father") and Elizabeth Allison Billips ("Mother") were divorced by final decree entered August 29, 2002. The parties submitted a parenting plan which was approved by order entered April 23, 2004. Pursuant to the parenting plan, the parties were named "joint custodians of their minor child" and exercised parenting time on alternating weeks. The plan designated Mother as "primary custodian" of the child. On August 25, 2005, Father filed a petition to change custody requesting the court to, *inter alia*, designate him primary custodian of the child. A hearing was held on Father's petition, and on April 24, 2007, the trial court entered an order declining to modify Father's parenting time finding that, "neither party has proven by a preponderance of the evidence that modification of the joint custody status is in the minor child's best interest."

On March 24, 2009, Father filed another petition to modify, requesting the court to name him the child's primary residential parent. In his petition, Father alleged that the child was being emotionally abused by Mother and her husband. A hearing was held on Father's petition on September 24, 2009. The Court entered an Order on October 16, 2009 granting Father's petition and designating Father the primary residential parent of the child. Specifically, the court stated:

> The Court finds this matter was before the Court in April 2007 wherein there was no finding of a change of circumstance; however, the Court feels strongly that there is a problem with the arrangement today that cannot continue. The Court finds the Father feels so strongly that if he is not successful with his Petition he is willing to give the Mother residential time; however, the Court has a [sic] issue with the Mother on disability and the Court feels there is an issue with the Mother's household that creates problems that are not appropriate for the minor child to be there fulltime.

The court went on to consider and apply the factors at Tenn. Code Ann. § 36-6-404(b)(1) to find that designating Father as the primary residential parent was in the child's best interest. Finally, the court adopted Father's parenting plan. Mother appeals.

ISSUES PRESENTED

Mother presents two issues for our review. First, she asserts the trial judge erred in failing to recuse himself. Second, she contends the trial court erred by modifying the parenting plan.

STANDARD OF REVIEW

In a civil case tried without a jury, we review the trial court's findings of fact de novo with a presumption of correctness unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d). We review questions of law de novo with no presumption of correctness. *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 628 (Tenn. 1999).

ANALYSIS

Mother argues that the trial judge should have recused himself from the case because he "presented a witness to the Plaintiff" prior to trial. In her brief, Mother explains that the judge's colleague at the Rutherford County Court allegedly overheard a conversation between Mother and the child following a court hearing between the parties, and the judge's colleague repeated that conversation to the trial judge. Mother asserts that the trial judge requested his colleague to contact Father's counsel to discuss what was overheard. Mother states that the judge's colleague testified at the September 24, 2009 hearing on Father's petition to modify regarding the alleged conversation between Mother and child. Mother argues that these circumstances created a personal bias on the part of the judge which warranted his recusal.

At the outset, we note that we may only "consider those facts established by the evidence in the trial court and set forth in the record." Tenn. R. App. P. 13(c). The record in this case does not contain a transcript of the hearing, nor does it include a statement of the evidence prepared in accordance with Tenn. R. App. P. 24(c). Neither the recitation of facts contained in Mother's brief nor the statements made by Mother's counsel during argument before this Court constitute evidence. *See Greer v. City of Memphis*, 356 S.W.3d 917, 923 (Tenn. Ct. App. 2010). There is no evidence whatsoever regarding the witnesses who testified at the hearing, the content of their testimony, or the judge's statements during the course of the hearing. Moreover, Mother raises the issue of recusal for the first time on appeal. This Court has previously ruled that:

> Parties may lose the right to challenge a judge's impartiality if they do not file recusal motions soon after the facts forming the basis of the motion become known. [*Wilson v. Wilson*, 987 S.W.2d 555, 562 (Tenn. Ct. App. 1998).] The frequently cited rule that "a party must complain and seek relief immediately after the occurrence of a prejudicial event and may not silently preserve the event as an 'ace in the hole' to be used in the event of an adverse decision," applies in cases where a party challenges a judge's impartiality. *Gotwald v. Gotwald*, 768 S.W.2d 689, 694 (Tenn. Ct. App. 1988); *see also Davis* [*v. Tenn. Dep't of Emp't Sec.*, 23 S.W.3d 304, 313 (Tenn. Ct. App. 1999)]; *Kinard v.*

> [*Kinard*, 986 S.W.2d 220, 228 (Tenn. Ct. App. 1998)]. Accordingly, the failure of a party to seek the recusal of a judge in a timely manner results in a waiver of the issue. *Davis*, 23 S.W.3d at 313.

Eldridge v. Eldridge, 137 S.W.3d 1, 8 (Tenn. Ct. App. 2002).

Mother failed to file a transcript of the hearing or a statement of the evidence, and she failed to question the trial judge's impartiality by filing a motion to recuse during the trial of this matter. Accordingly, Mother's issue regarding the trial court's alleged bias or impartiality is waived.

Likewise, Mother's argument that the trial court erred in modifying the parenting plan must fail. "It is well settled that, in the absence of a transcript or statement of the evidence, there is a conclusive presumption that there was sufficient evidence before the trial court to support its judgment, and this Court must therefore affirm the judgment." *Outdoor Mgmt., LLC v. Thomas*, 249 S.W.3d 368, 377 (Tenn. Ct. App. 2007) (citing *McKinney v. Educator & Exec. Insurers, Inc.*, 569 S.W.2d 829, 832 (Tenn. Ct. App. 1977)). Mother, as the appellant in this case, has the burden to provide this Court with a fair, accurate, and complete account of what transpired in the trial court. *See* Tenn. R. App. P. 24(b). Without a complete record or sufficient statement of the evidence from which to determine whether the trial court acted appropriately, we are compelled to presume that the trial court's decision was supported by the evidence submitted at the hearing. Therefore, we affirm the trial court's order modifying the parenting plan.

CONCLUSION

For the foregoing reasons, we affirm the decision of the trial court modifying the parenting plan to designate Father as the primary residential parent. Costs of appeal are assessed against the appellant.

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ANDY D. BENNETT, JUDGE