IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs March 11, 2014

JEANNIE MCFARLAND v. BRANDON BASS

Appeal from the Chancery Court for Giles County
No. 4573 Jim T. Hamilton, Chancellor

No. M2013-00768-COA-R3-CV - Filed June 30, 2014

Mother of two children appeals the denial of her petition to modify the parenting plan, the increase of her child support obligation, and the award of attorney fees to the Father. We reverse the increase in Mother's child support obligation; we affirm the judgment in all other respects.

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

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

Misty D. Parks, Spring Hill, Tennessee, for the appellant, Jeannie McFarland.

Joe W. Henry, Jr., Pulaski, Tennessee, for the appellee, Brandon Bass.

OPINION

I. FACTS AND PROCEDURAL HISTORY

Jeannie McFarland ("Mother") and Brandon Bass ("Father") were married in August 1997 and divorced by decree entered January 27, 2010; two girls were born of the marriage. The final decree of divorce incorporated an agreed Permanent Parenting Plan in which Father was designated primary residential parent with 209 days of residential parenting time and Mother exercising 156 days of parenting time; Mother was to pay child support of $364.00 per month.

On October 11, 2011, Mother filed a petition to modify the parenting plan in which she proposed, *inter alia*, to be designated primary residential parent and increase her number

of residential parenting days. Father answered the petition, denying that a material change of circumstance justifying a modification of the plan existed; Father also filed a proposed plan in the event the court determined that there was a material change of circumstance.

The petition was heard on January 9, 2013, and on January 22 the court entered an order finding that there was no change of circumstance which would require a modification in the residential parenting time schedule, recalculating Mother's child support obligation, and awarding Father attorney fees of $5,593.75.

Mother appeals, raising the following issues:

I. Whether the trial court erred in applying the wrong legal standard for a material change in circumstance and best interest pursuant to Tenn. Code Ann. §36-6-101(a)(2)(C)?

II. Whether the trial court erred in finding no material change in circumstance pursuant to Tenn. Code Ann. §36-6-101(a)(2)(C)?

III. Whether the trial court erred in finding a modification of the Permanent Parenting Plan was not in the best interest of the minor children?

IV. Whether the trial court erred in refusing to allow the minor child Alanna Bass to testify?

V. Whether the trial court erred in finding Appellant willfully underemployed and imputing an income of $34.00 per hour?

VI. Whether the trial court erred in ordering Appellant to pay Appellee's Attorney's Fees?

II. DISCUSSION

A. MODIFICATION OF THE PARENTING PLAN

1. The Standard Applied by the Trial Court

Once a permanent parenting plan is in place, the parties are required to comply with it until it is modified. *See* Tenn. Code Ann. § 36-6-405.[1] In accordance with Tenn. Code Ann. § 36-6-101(a)(2)(B)-(C), the threshold issue in proceedings to modify a plan is whether a material change in circumstances affecting the child's best interest has occurred since the adoption of the existing plan. Where a party seeks to modify the residential parenting schedule, that party has the burden to prove by a preponderance of the evidence that a material change of circumstance has occurred. Tenn. Code Ann. § 36-6-101(a)(2)(C).[2] As set forth in the statute:

> 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.

Id.

In her petition, Mother asserted that several factors constituted a change of circumstances justifying a modification in the parenting schedule, including: her remarriage and relocation from Alabama to Tennessee; a change in her work schedule which would allow her to spend more time with the children; that the children were encountering "age-related female issues" which were causing "significant changes in the needs of the children"; that Father and his wife were "unwilling to facilitate and encourage a close and continuing

---

[1] *See Armbrister v. Armbrister*, 414 S.W.3d 685, 697–704 (Tenn. 2013), wherein our Supreme Court analyses extensively the evolution of statutory law and case law related to modifications of child custody and visitation decrees.

[2] In the petition to modify the parenting plan, Mother sought to be designated primary residential parent as well as a change in the residential parenting schedule. On the day of the hearing Mother filed another proposed plan in which Father was designated primary residential parent and the residential parenting time was divided equally. At the hearing Mother's counsel stated that Mother only sought a modification of the residential schedule and acknowledged that the standard to be applied was that set forth in Tenn. Code Ann. § 36-6-101(a)(2)(C).

parent-child relationship" with both parents; and that Father refused to address Mother's concerns regarding the children's religious upbringing, despite the fact that they had joint responsibility for making such decisions. The trial court discussed the testimony and other evidence relating to each of Mother's contentions and concluded:

> After considering all the factors as pertains to T.C.A. § 36-6-101(a)(2)(B) and T.C. A. § 36-6-101(a)(2)(C):
>
> The court finds that no material change of circumstance which significantly affects the well-being of the minor children has occurred making a change in the residential parenting time in the best interest of the children.

Mother contends that in considering the evidence the court applied an "adulterated hybrid standard" in which it "melded the material change and best interest analysis." We respectfully disagree.

A person seeking to modify a residential parenting schedule "must prove by a preponderance of the evidence a material change of circumstance *affecting the child's best interest*." Tenn. Code Ann. § 36-6-101(a)(2)(C) (emphasis added). If the petitioner makes such a showing, the court then proceeds to apply the "best interest" factors at Tenn. Code Ann. § 36-6-106(a) to determine if the schedule should be modified and, if so, in what manner. Thus, the nomenclature "best interest" is used in different contexts and for different purposes.

In the portion of the order where the court discussed the matters which Mother contends constituted a material change of circumstance, the court held that Mother did not meet her burden; in making that threshold determination the court properly considered the children's "best interest" in the manner and for the purpose the statute directs. For instance, in discussing Mother's remarriage and relocation to Tennessee from Alabama, the court held "the mother moving back to Tennessee has had no bearing on the best interest of the children." With respect to the fact that the children were growing older, the court found that "the children's ages and the amount of time they are spending with their mother has not affected their well being, is not a material change of circumstances and it is not in the best interest of the children to change their current schedule."[3] The court found no factual basis for several of the other matters asserted by Mother to show a change of circumstances, e.g.,

---

[3] While the court at times referred to "the well-being of the minor children" rather than "affecting the best interest of the children," the context clearly shows that the court was ruling on whether the evidence of changes (e.g. Mother's relocation and/or the children's aging) affected the children's best interest and not whether a modification of the parenting schedule was in the children's best interest.

that in various ways Father was not fostering a relationship between the children and Mother and that he was undermining the religious decision-making authority that they jointly shared under the parenting plan; thus, the court did not make a finding as to any effect of these matters on the children. Viewed in context, we consider the court's reference to "the best interest of the children" in the conclusion quoted above as dicta, since in the other portions of the order the court clearly held that the factual predicate had not been laid to make a determination as to whether or not a modification was in the children's best interest.

2. Material Change of Circumstance

Mother next contends that the court erred in failing to find a material change of circumstance. She specifically cites her relocation to Tennessee, her change in employment from working in a contracted position as a registered nurse to working on an "as needed" basis, the change in the children's ages, and "issues with the current parenting plan" as matters which the court should have found to affect the children's best interest and modify the plan.

Tenn. Code Ann. § 36-6-101(a)(2)(C) "sets a very low threshold for establishing a material change of circumstances." *Rose v. Lashlee*, M2005-00361-COA-R3-CV, 2006 WL 2390980, at *3 n.3 (Tenn. Ct. App. Aug. 18, 2006); *see also Armbrister*, 414 S.W.3d at 703. The determination of whether a material change of circumstance has occurred and whether a modification would be in the best interest of the children are factual questions; on review, we presume that the trial court's findings are correct and will not overturn them unless the evidence preponderates against them. *Armbrister*, 414 S.W.3d at 692–93; Tenn. R. App. P. 13(d).

The trial court addressed each matter cited by Mother.[4] The court found that Mother's return to Tennessee "has had little to no effect on the current parenting schedule" and that it "has had no bearing on the best interest of the children." With respect to the change in the children's ages, the court found that "the amount of time they are spending with their mother

[4] In her brief on appeal, Mother raises "issues with the current parenting plan" and "the effect on the current parenting plan on the children's relationships with Mother's family" as material changes, evidence as to which she contends the court "erroneously failed to consider." Mother acknowledges that, in the format the court used in crafting the order, it addressed the specific allegations of the petition; the matters that Mother raises in her brief, however, were not specifically pled in the petition and were not specifically addressed by the court in determining whether there was a material change of circumstance. We do not assume, as does Mother, that the fact that the order did not specifically address the testimony cited by her indicates that the court did not consider the testimony; we find no error in the fact that those matters were not specifically addressed in the order. Accordingly, we will review the testimony in the context of our review of the disposition of the petition.

has not affected their well being [and] is not a material change of circumstance."[5] The court's discussion of Mother's assertion that the change to a part-time flexible work schedule allowed her to be available for additional parenting time focused on her work history and, particularly, the reasons for her moves from a full-time position to successive part-time positions; the court noted that Mother "currently works the same weekend/night schedule she previously worked at this hospital." As noted earlier the court found no factual basis for the matters which Mother alleged exhibited Father's unwillingness to facilitate a close relationship between Mother and the children. Mother's testimony regarding the "issues with the parenting plan" arose in response to a line of questions primarily relating to the parenting plan she proposed rather than whether a material change of circumstances existed which would make a modification in the best interest of the children; it is apparent that the trial court did not deem this testimony pertinent to the threshold issue.[6] We have reviewed the evidence cited by Mother; taken in context, it does not preponderate against the factual finding that mother's relocation, change in work schedule, and the aging of the children did not create a material change of circumstance.

Inasmuch as a finding of a material change of circumstance is a prerequisite to modification of a parenting plan, our holding on this issue pretermits our consideration of the third issue raised by Mother.

B. TESTIMONY OF THE PARTIES' CHILD

Tenn. Code Ann. § 36-6-106(a)(7) requires a court when making a custody determination to consider, among other things, the reasonable preference of a child twelve years old or older. Mother contends that the court erred in refusing to allow her to call the parties' twelve year old daughter.

The transcript of the hearing shows the following colloquy which occurred during the presentation of Mother's proof:

> MS. PARKS: Your Honor, at this point we would be calling Alanna Bass. It would be my proposal to the Court that maybe the court reporter and the two attorneys and you meet with her separately if the Court prefers we do that in open court.

---

[5] The court noted that "there was no testimony presented . . . to indicate that this [aging of the children] is a material change of circumstance or that it is in the best interest of the children to spend more time with their mother and thereby spend less time with their father."

[6] The question eliciting the testimony was: "You proposed a parenting plan that gives both you and [Father] exactly equal time with the children. Why do you believe that is in their best interest?"

THE COURT: How old is she?

MS. PARKS: She's 12; she'll be 13 in April.

THE COURT: You're going to ask her about what?

MS. PARKS: I'm going to ask what she thinks of the schedule now, what problems it presents, what things she doesn't like about it, what she thinks would be better, when she would like to switch residences--which she thinks would be easier--and I'm also going to ask her about the incident that happened over the weekend with her father.

MR. HAYES: If your Honor please, I think we ought to hear from the witnesses.

THE COURT: Let's go ahead and hear this case, and I may or may not want to talk to them.

Mother then proceeded to testify, after which the following transpired between her counsel and the court:

THE COURT: Thank you. Anything else? . . .
MS. PARKS: Your Honor, that would conclude our side of the proof, but I would like, subject to The Court's ruling, reserve the right to call Alanna.

Following the presentation of Father's proof Mother's counsel announced that Mother had "nothing further" by way of proof or argument.

The foregoing shows that Mother did not tender the witness or address the matter further with the court when given the opportunity to do so; the record does not support Mother's contention that the court refused to allow her to call her daughter as a witness. This issue is without merit.[7]

C. MOTHER'S CHILD SUPPORT OBLIGATION

[7] Mother did not make an offer of proof of the child's testimony.

The court increased Mother's child support obligation from $364.00 to $396.00 per month; in so doing the court found that Mother was voluntarily underemployed and imputed income of $34.00 per hour for a 36 hour work week, leading to an annual income of $63,648.88. Mother contends that the finding that she was willfully underemployed is erroneous; she also contends that, even with the imputed income, the court erred in increasing her obligation because there was not a significant variance between her then-existing child support obligation and that increased amount.

Modification of an award of child support is governed by Tenn. Code Ann. § 36-5-101(g)(1); the modification must be based on a "significant variance, as defined in the child support guidelines . . . between the guidelines and the amount of support currently ordered." *Id*. Tenn. Comp. R. & Regs. 1240-02-04-.05(2)(c) defines a significant variance as "at least a fifteen percent (15%) change between the amount of the current support order (not including any deviation amount) and the amount of the proposed presumptive support order." Tenn. Comp. R. & Regs. 1240-02-04-.05(3) sets forth the procedure for determining whether a significant variance is present under the circumstances presented in this case:

> To determine if a modification is possible, a child support order shall first be calculated on the Child Support Worksheet using current evidence of the parties' circumstances. . . . If the current child support order was calculated using the income shares guidelines, compare the presumptive child support order amounts in the current and proposed orders. . . . If a significant variance exists between the two amounts, such a variance would justify the modification of a child support order unless, in situations where a downward modification is sought, the obligor is willfully and voluntarily unemployed or underemployed, or except as otherwise restricted by paragraph (5) below or 1240-2-4-.04(10) above.

We agree with Mother that her increased child support obligation, given the increased income imputed to her, does not exceed 15% of the original obligation and does not constitute a significant variance. Consequently, her child support obligation should not have been modified and that portion of the order must be reversed.

D. THE AWARD OF ATTORNEY FEES TO FATHER

Mother contends that, in light of various factors, it was "unjust and inequitable" for the court to award Father the attorney fees he incurred in defending the petition. She argues that the fees were assessed "as a punitive measure" and that, in making the award, the court was "incorrectly attempting to retroactively impose sanctions" on Mother for a discovery dispute which led to the filing of a contempt petition.

Tenn. Code Ann. §36-5-103(c) grants authority to a trial court, in its discretion, to award attorney fees in a proceeding such as the one at bar.[8] This court has recognized that "requiring parents who precipitate custody or support proceedings to underwrite the costs if their claims are ultimately found to be unwarranted is appropriate as a matter of policy." *Hansen v. Hansen*, M2008-02378-COA-R3, 2009 WL 3230984, at *7 (Tenn. Ct. App. July 9, 2009) (quoting *Sherrod v. Wix*, 849 S.W.2d 780, 785 (Tenn. Ct. App. 1992)).

In making the award the court made the following findings:

> The mother has had three (3) attorneys representing her in this matter. The father was required to defend his position as a result of the mother's accusations against him. The mother was not cooperative and was required to come to Court on two (2) occasions in order to be compelled to comply with the discovery requests. It appears to the Court that the mother's blatant refusal to provide her employment records was an attempt to keep valid and pertinent information from the Court.

While Mother takes issue with the court's findings and argues that the fees should not have been awarded, the matters cited by the court are not improper considerations in the determination of whether an award is appropriate. The findings do not demonstrate that the court was acting in a punitive manner and we have been cited to no other evidence to conclude that the court abused its discretion in making the award.

III. CONCLUSION

---

[8] Tenn. Code Ann. § 36-5-103(c) provides in pertinent part:

> The plaintiff spouse may recover from the defendant spouse . . . reasonable attorney fees incurred in enforcing any decree for alimony and/or child support, or in regard to any suit or action concerning the adjudication of the custody or the change of custody of any child, or children, of the parties, both upon the original divorce hearing and at any subsequent hearing, which fees may be fixed and allowed by the court, before whom such action or proceeding is pending, in the discretion of such court.

For the foregoing reasons, we reverse the order increasing Mother's child support obligation; in all other respects the judgment is affirmed. The case is remanded for further proceedings in accordance with this Opinion and the Judgment entered herewith.

_____

RICHARD H. DINKINS, JUDGE