IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 17, 2015 Session

LAWRENCE JOSEPH WILKERSON, III v. CHARLENE MONIQUE WILKERSON

Appeal from the Chancery Court for Montgomery County
No. MC-CH-CV-DI-06-838 Laurence M. McMillan, Jr., Chancellor

No. M2014-02412-COA-R3-CV – Filed May 19, 2016

This appeal arises from post-divorce efforts to modify a permanent parenting plan. Mother filed a petition in which she requested a modification to the permanent parenting plan. Father filed a counter-petition in which he requested to be named the primary residential parent of their children. The trial court found that Father failed to prove a material change in circumstance as necessary to change the primary residential parent designation and that Mother failed to prove a material change in circumstance as necessary to modify the permanent parenting plan. After reviewing the record, we find the evidence preponderates against the trial court's finding that there was no material change in circumstance sufficient to modify the residential parenting schedule. Accordingly, we affirm in part, reverse in part, and remand to the trial court for further proceedings.

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

W. NEAL MCBRAYER, J., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR., P.J., M.S., and ANDY D. BENNETT, J., joined.

Justin Sensing, Clarksville, Tennessee, for the appellant, Lawrence Joseph Wilkerson, III.

No brief filed on behalf of appellee, Charlene Monique Wilkerson.

OPINION

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Lawrence Joseph Wilkerson, III ("Father") and Charlene Monique Wilkerson ("Mother") are the parents of three minor children, two born in 2003 and one in 2007. After separating, Father filed and Mother counter-claimed for divorce in the Chancery Court for Montgomery County, Tennessee. On December 9, 2009, the court entered a final decree of divorce, designating Mother primary residential parent and granting her 275 days of parenting time. The court granted Father ninety days of parenting time and ordered him to pay $998 in monthly child support. In its order, the court specifically noted that Mother and the children would be relocating to Virginia.

On September 19, 2012, having returned to Tennessee,[1] Mother filed a Petition for Civil Contempt and Modification of Child Support in the Chancery Court for Montgomery County. In her petition, Mother alleged that Father had moved to Texas and that he refused to provide his current contact information; that Father was not paying his share of medical expenses for the children; that Father's income had increased, warranting a modification of his child support obligation; and that she was no longer able to abide by the transportation provisions of the permanent parenting plan. Mother requested that Father be held in contempt, that she be awarded her attorneys' fees and expenses, that she be awarded a judgment against Father equal to one-half the children's medical expenses, that Father's child support payment be increased, and that the transportation provisions of the permanent parenting plan be modified.

Father filed an answer denying most of Mother's allegations and a counter-petition requesting that the permanent parenting plan be modified to name him the primary residential parent. In his counter-petition, Father alleged that, since the divorce, Mother had moved to three different states; that the children were failing in school; that Mother failed to keep him informed about the children, particularly about health related issues; that Mother interfered with his communications with the children; that, at exchanges, Mother did not have the children "dressed adequately" or provide "proper hygiene items" or their medications; that the children were left at home alone by Mother; that Mother was "not financially stable;" and that the children were suffering mentally and emotionally in Mother's care. Mother responded denying most of Father's allegations.

The parties went to mediation. At mediation, the parties agreed that a material change

[1] According to pleadings filed by Mother, soon after moving to Virginia, Mother injured her foot, requiring her to move with the children to her parents' home in Hazlehurst, Mississippi. According to the statement of the evidence, Mother then moved from Mississippi to Tennessee.

of circumstance had occurred, but apparently disagreed as to whether the material change of circumstance was sufficient to only modify the residential parent schedule or if it was sufficient to change the primary residential parent designation. The parties also reached an agreement as to their current monthly income, the number of children in each home,[2] and the actual number of days Father was exercising parenting time. The mediator's report described the following issues as remaining for trial: "1) Visitation/custody/child support; 2) Transportation arrangements and costs; 3) Unpaid medical bills; and 4) Who should be named the primary residential parent."

On October 7, 2014, the trial court held a hearing on Mother's petition and Father's counter-petition. At the hearing, both Mother and Father testified that there had been a material change of circumstance.[3] In light of the material change of circumstance, Mother asked the court to reduce Father's parenting time to the number of days he was actually spending with the children, sixty days, and to require Father to bear all expenses of transportation of the children between their residences. Father asked the court to name him the primary residential parent and grant Mother eighty days of parenting time.

On October 14, 2014, the trial court entered in a memorandum opinion and order in which it denied both parties' request for modifications to the permanent parenting plan. The court entered a judgment against Father of $409.35 for medical and dental expenses and ordered Father to pay his portion of the children's orthodontic care. The court also denied both parties' request for attorneys' fees. The court later supplemented its memorandum opinion and order by increasing Father's child support obligation to $1,180 per month based on the parties' incomes "as stipulated at mediation." Father filed a notice of appeal.

II. ANALYSIS

On appeal, Father argues that the evidence preponderates against the trial court's finding that there was not a material change in circumstance sufficient to justify a change in the primary residential parent. Although the issue is not exactly presented in this manner, we perceive that Father also argues, in the alternative, that the evidence preponderates against the trial court's finding that there was not a material change in circumstance sufficient to justify a modification of the residential parenting schedule.

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[2] Father had remarried and had two stepchildren. Mother had another child after divorcing Father.

[3] The record on appeal does not include a transcript from the October 7, 2014, hearing. Father prepared and filed a statement of the evidence. *See* Tenn. R. App. P. 24(c). When no objection was filed by Mother and the trial court did not rule on the statement of the evidence within thirty days of the deadline to file objections, the statement of the evidence was "deemed to have been approved," and it must "be so considered by the appellate court." *See* Tenn. R. App. P. 24(f).

A. STANDARD OF REVIEW

The "determination[] of whether a material change of circumstance[] has occurred" is a factual question. *Armbrister v. Armbrister*, 414 S.W.3d 685, 692 (Tenn. 2013); *see also In re T.C.D.*, 261 S.W.3d 734, 742 (Tenn. Ct. App. 2007). We review the trial court's findings of fact de novo on the record, with a presumption of correctness, unless the evidence preponderates otherwise. *See, e.g.*, *Armbrister*, 414 S.W.3d at 692. Evidence preponderates against a trial court's finding of fact when it "support[s] another finding of fact with greater convincing effect. *Watson v. Watson*, 196 S.W.3d 695, 701 (Tenn. Ct. App. 2005). In weighing the preponderance of the evidence, determinations of witness credibility are given great weight, and they will not be overturned without clear and convincing evidence to the contrary. *In re Adoption of A.M.H.*, 215 S.W.3d 793, 809 (Tenn. 2007). We review the trial court's conclusions of law de novo, with no presumption of correctness. *Armbrister*, 414 S.W.3d at 692.

B. PRIMARY RESIDENTIAL PARENT

A decision concerning the primary residential parent is considered res judicata upon the facts in existence as of the hearing. *Rigsby v. Edmonds*, 395 S.W.3d 728, 735 (Tenn. Ct. App. 2012). Once a permanent parenting plan is incorporated in a final divorce decree, absent an agreement, the parties must comply with it unless it is modified by the court. Tenn. Code Ann. § 36-6-405(b) (2014). Courts apply a two-step analysis to requests for either a modification of the primary residential parent or the residential parenting schedule. *See, e.g.*, *Armbrister*, 414 S.W.3d at 705 (modification of residential parenting schedule); *Rigsby*, 395 S.W.3d at 735-36 (modification of primary residential parent). For requests to modify either the primary residential parent or the residential parenting schedule, "[t]he threshold issue . . . is whether a material change in circumstance[] has occurred." *In re T.C.D.*, 261 S.W.3d at 743. However, "a 'change in circumstance' with regard to the parenting schedule is a distinct concept from a 'change in circumstance' with regard to the identity of the primary residential parent." *Massey-Holt v. Holt*, 255 S.W.3d 603, 607 (Tenn. Ct. App. 2007); *see also* Tenn. Code Ann. §§ 36-6-101(a)(2)(B), -101(a)(2)(C) (Supp. 2015).

If a change in the primary residential parent is sought, "the petitioner must prove by a preponderance of the evidence a material change in circumstance." Tenn. Code Ann. § 36-6-101(a)(2)(B). A material change in circumstance in this context 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." *Id.* Although there are "no hard and fast rules for determining when" a material change in circumstance has occurred, factors for our consideration include: (1) whether the change occurred after entry of the order sought to be modified; (2) whether the change was known or reasonably anticipated when the order was entered; and (3) whether the change affects the

child's well-being in a meaningful way. *Kendrick v. Shoemake*, 90 S.W.3d 566, 570 (Tenn. 2002), *superseded by statute*, Tenn. Code Ann. § 36-6-101, *as recognized by*, *Armbrister*, 414 S.W.3d 685.

Father argues the evidence at the hearing supports with greater convincing effect that a material change of circumstance occurred that would justify a change in the primary residential parent. In support of his argument, Father points to Mother's two additional moves with the children that were not contemplated by the final decree of divorce. Both parties testified that the permanent parenting plan was no longer workable, and Father testified that he could not exercise all of his residential parenting time because Mother would not or could not pay her share of travel expenses for the children. Finally, unlike in 2009, Father claimed that he was now able to provide a stable and nurturing environment for the children, while Mother had grown unable to do so.

We do not find the evidence preponderates against the trial court's finding of no material change of circumstance sufficient to justify a change in the primary residential parent. A change of circumstance sufficient to justify a change in the primary residential parent requires evidence that the change impacts the child's well-being in a material way. *Caldwell v. Hill*, 250 S.W.3d 865, 870 (Tenn. Ct. App. 2007); *Gervais v. Gervais*, No. M2005-01483-COA-R3-CV, 2006 WL 3258228, at *6 (Tenn. Ct. App. Nov. 9, 2006). Father did testify that the children had been held back in school and that they were making failing grades. However, Mother testified that the children were held back due to learning disabilities and that their grades were improving. Poor grades alone do not necessarily constitute a material change. *See Scofield v. Scofield*, No. M2006-00350-COA-R3-CV, 2007 WL 624351, at *5 (Tenn. Ct. App. Feb. 28, 2007) (finding a decline in the children's grades insufficient to constitute a material change for custody purposes). Although we are concerned by Father's claims that Mother interfered with his parenting time and Mother's admission that she could not comply with the travel expense provision of the parenting plan, such evidence does not convince us that there was a material change of circumstance sufficient to change the primary residential parent.

D. PARENTING TIME

If a modification of the residential parenting schedule is sought, the statute "sets 'a very low threshold for establishing a material change of circumstances.'" *Boyer v. Heimermann*, 238 S.W.3d 249, 257 (Tenn. Ct. App. 2007) (quoting *Rose v. Lashlee*, No. M2005-00361-COA-R3-CV, 2006 WL 2390980, at *2 n. 3 (Tenn. Ct. App. Aug.18, 2006)). The petitioner 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). The change must have occurred after entry of the order sought to be modified. *Caldwell*, 250 S.W.3d at 870. However, unlike the standard for a change of primary residential parent, whether the change was reasonably anticipated when the prior residential parenting schedule

order was entered is irrelevant. *Armbrister*, 414 S.W.3d at 704. "[M]erely showing that the existing arrangement [is] unworkable for the parties is sufficient to satisfy the material change of circumstance test" for residential parenting schedule modification. *Rose*, 2006 WL 2390980, at *2 n. A material change of circumstance in this context may include, but is not limited to:

> [S]ignificant 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.

Tenn. Code Ann. § 36-6-101(a)(2)(C).

Once the threshold question is answered with a finding that a material change of circumstance has occurred, the trial court must determine the child's best interest. Tenn. Code Ann. § 36-6-101(a)(2)(C); *Armbrister*, 414 S.W.3d at 705. As in every primary residential parent or parenting time determination, the child's needs are paramount; the desires and behaviors of the parents are secondary. *See In re T.C.D.*, 261 S.W.3d at 742.

The trial court found no material change of circumstance sufficient to modify the residential parenting schedule. The court reasoned that Mother and Father anticipated one or both would relocate from Tennessee. However, whether parents anticipated circumstances warranting modification does not, by itself, prohibit a material change finding. *Boyer*, 238 S.W.3d at 257 (finding that "[w]hether a particular change in circumstances could reasonably have been anticipated at the time of the entry of the original decree is only one of many factors to consider"); *see also Armbrister*, 414 S.W.3d at 703 (stating that changes to a child's age or a parent's living or working condition may constitute a material change sufficient to modify residential parenting time).

The greater convincing effect of the evidence is that a material change of circumstance has occurred. Seven years have passed since the entry of the permanent parenting plan, which suggests the possibility for changes. *See Boyer*, 238 S.W.3d 257 (stating that "the courts and the General Assembly have recognized that material changes in circumstances can arise solely by the passage of time because children's needs change as they grow older."). Both Mother and Father agreed at mediation that a material change of circumstance had occurred, and both testified that the parenting plan was no longer workable. We also find significant the additions to both Mother's and Father's families, and the fact that Father, who is on active duty with U.S. Army, is no long eligible to deploy.

These changes proven at the hearing were material under the lower threshold of Tennessee Code Annotated § 36-6-101(a)(2)(C). Therefore, the trial court should have

considered, consistent with the requirements of Tennessee Code Annotated §§ 36-6-106(a) and -404(b) (2014), whether a change in parenting time was in the children's best interest. *See* Tenn. Code Ann. § 36-6-405(a) (2014); *Armbrister*, 414 S.W.3d at 705.

III. CONCLUSION

We reverse the trial court's finding that there was no material change of circumstance sufficient to modify the residential parenting schedule and related permanent parenting plan provisions and remand for a determination of whether a modification is in the children's best interest. We affirm the trial court's order is all other respects.

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W. NEAL MCBRAYER, JUDGE