IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
December 2, 2009 Session

DAVID ALLEN HEFFINGTON v. TAMMY SUE HEFFINGTON

Direct Appeal from the Chancery Court for Maury County
No. 03-054 Jim T. Hamilton, Judge

No. M2009-00434-COA-R3-CV - Filed February 19, 2010

The trial court modified the parties' parenting plan and reduced Father's child support in accordance with the current child support guidelines. Mother appeals. We affirm in part; vacate in part; and remand.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in part; Vacated in part; and Remanded

DAVID R. FARMER, J., delivered the opinion of the Court, in which ALAN E. HIGHERS, P.J., W.S., and J. STEVEN STAFFORD, J., joined.

Connie Reguli, Brentwood, Tennessee, for the appellant, Tammy Sue Heffington.

Barbara J. Walker, Columbia, Tennessee, for the appellee, David Allen Heffington.

Robert E. Cooper, Jr., Attorney General and Reporter, Michael E. Moore, Solicitor General, and Warren Jasper, Senior Counsel, for the appellee/intervenor.

OPINION

Appellee David Allen Heffington (Mr. Heffington) and Appellant Tammy Sue Heffington (Ms. Heffington) were divorced in November 2003. Under their Marital Dissolution Agreement ("MDA") and Permanent Parenting Plan, Ms. Heffington was named primary residential parent of the parties' two minor children and Mr. Heffington's child support obligation was set at $4,800 per month. The parenting plan provided that the amount of child support set forth by the plan was in accordance with the child support guidelines then in effect. Under the MDA, Mr. Heffington agreed to pay Ms. Heffington rehabilitative alimony in the amount of $2,000 per month for 48 months beginning January 2004.

On January 10, 2008, Mr. Heffington filed a petition in the Chancery Court for Maury County seeking to modify the parenting plan and child support. In his petition, Mr. Heffington asserted that the children's school schedule had changed since the decree of divorce was entered, that the children had more school-free days which should be divided between the parties, and that Ms Heffington had "shown little, if any, flexibility in working with" Mr. Heffington. He also asserted that the parenting plan was no longer in the children's best interests, that a material and substantial change in circumstance had occurred, and that the child support guidelines had changed significantly since the decree was entered. He prayed for modification of the parenting plan, a reduction in child support, and attorney's fees and costs.

Ms. Heffington answered and counter-petitioned in February 2008. She denied that a material and substantial change in circumstance had occurred, and asserted that she had relinquished her rights to shares of Mr. Heffington's retirement account "in part due to her continued receipt of $4,800 per month in child support." She asserted that Mr. Heffington should be estopped from petitioning for a reduction in child support due to her detrimental reliance on his agreement to pay child support in the amount of $4,800 per month. Ms. Heffington further asserted that there had been no reduction in Mr. Heffington's income since the decree of divorce was entered in 2003; that his child support obligation should be increased to reflect his increased income; and that an educational trust should be established for the children. She prayed for Mr. Heffington's petition to be dismissed; for enforcement of Mr. Heffington's agreement to pay child support above the guideline amount or for an award of damages; for an increase in child support; for an award of alimony; and for attorney's fees and costs.

Mr. Heffington answered the counter-complaint in March 2008. He asserted that his obligation to pay alimony had ceased in December 2007, and that Ms. Heffington had relinquished rights to his 403B account by agreed order in March 2004. He stated that he would not object to the establishment of an educational trust for the children, and denied the remainder of Ms. Heffington's allegations.

Following acrimonious proceedings in the trial court, the trial court entered an order modifying the parties' parenting plan and reducing Mr. Heffington's child support obligation, and adopting the parenting plan offered by Mr. Heffington. The trial court entered final judgment in the matter on February 19, 2009.[1] Ms. Heffington filed a timely notice of appeal to this Court on March 4, 2009.

[1] In October 2008, the trial court entered an order dismissing Ms. Heffington's claim for modification of alimony following her notice of non-suit under Rule 41.02 of the Tennessee Rules of Civil Procedure.

Issues Presented

Ms. Heffington presents the following issues for our review:

(1) Did the trial court err in reducing child support?

(2) Did the trial court err in modifying the parenting plan?

(3) Did the trial court err in failing to award attorney's fees to the Mother?

(4) Is the application of the income shares guidelines unconstitutional as applied as a retrospective law?

Standard of Review

We review the trial court's findings of fact *de novo* upon the record with a presumption of correctness. Tenn. R. App. P. 13(d). We will not reverse the trial court's factual findings unless they are contrary to the preponderance of the evidence. *Berryhill v. Rhodes*, 21 S.W.3d 188, 190 (Tenn. 2000). To preponderate against a trial court's finding of fact, the evidence must support another finding of fact with greater convincing evidence. *Mosley v. McCanless*, 207 S.W.3d 247, 251 (Tenn. Ct. App. 2006). If the trial court's factual determinations are based on its assessment of witness credibility, this Court will not reevaluate that assessment absent clear and convincing evidence to the contrary. *Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2002). We review the trial court's determinations on questions of law, and its application of law to the facts, *de novo*, however, with no presumption of correctness. *Bowden v. Ward*, 27 S.W.3d 913, 916 (Tenn. 2000). Similarly, we review mixed questions of law and fact *de novo*, with no presumption of correctness. *State v. Thacker*, 164 S.W.3d 208, 248 (Tenn. 2005).

Discussion

We first address Ms. Heffington's assertion that the application of the income shares guidelines is unconstitutional as applied as a retrospective law. As the Attorney General noted in his brief to this Court, Ms. Heffington did not raise this issue in the trial court. A "cardinal principle of appellate practice" is that an issue not raised in the trial court cannot be raised for the first time on appeal. *Waters v. Farr*, 291 S.W.3d 873, 918 (Tenn. 2009)(citations omitted). This rule applies to issues regarding the constitutionality of a statute unless the statute is "so obviously unconstitutional on its face as to obviate the necessity for any discussion." *Id.* (quoting *Lawrence v. Stanford*, 655 S.W.2d 927, 929 (Tenn. 1983)). We agree with the Attorney General that the child support statutes are not

obviously unconstitutional, and therefore decline to address this question here.

We next turn to whether the trial court erred in modifying the parties' parenting plan. In its February 2009 order, the trial court found that there had been a material change in circumstance that had affected the best interests of the children. The trial court found that Ms. Heffington had "been inflexible in working with [Mr. Heffington] regarding his residential sharing time and [had] done little to foster the children's relationship with [Mr. Heffington]." The trial court also found that the school calendar had changed since the 2003 decree was entered, and that the children's school breaks should be divided equally between the parties. The trial court adopted the parenting plan offered by Mr. Heffington.

In her brief to this Court, Ms. Heffington asserts the trial court erred in finding that a material change in circumstance had occurred; that the court abused its discretion by not permitting the parties' older child to testify; and that the trial court failed to consider the best interests of the children. Upon review of the record, we note that the trial court's findings with respect to Ms. Heffington's inflexibility were largely based upon implicit credibility determinations. There is no clear and convincing evidence in the record to contradict the trial court's findings.

We next turn to Ms. Heffington's assertion that the trial court abused its discretion by not permitting the parties' oldest child to testify, and that the child's preferences are a necessary element of the best interest determination in this case. When considering whether to modify a parenting plan, the trial court must consider, *inter alia*, "[t]he reasonable preference of the child if twelve (12) years of age or older." Tenn. Code Ann. § 36-6-404(b)(14)(2005). Ms. Heffington asserts that the trial court did not make a finding that the parties' older child, who the trial court noted was nearly 15 years of age, was not competent to testify, but that the trial court "just refused to hear him." She further asserts that her offer of proof demonstrates that the child did not want a change in his schedule because he was satisfied with the current schedule; did not receive as much help with homework at Mr. Heffington's home; that it was difficult to study at Mr. Heffington's home; and because Mr. Heffington spent more time with his three adopted children than with him and his sister. Mr. Heffington submits that the trial court was "not bound" to hear the child's preference, and that whether to allow the testimony was within the trial court's discretion.

As we previously have noted, the decision regarding whether a child will be allowed to testify is within the discretion of the trial court, and a child's preference is only one factor to be considered by the trial court when deciding whether to modify a parenting plan. *E.g., Hill v. Hill*, No. M2006-01792-COA-R3-CV, 2008 WL 110101, at *6 (Tenn. Ct. App. Jan. 9, 2008), *perm. app. denied* (Tenn. June 30, 2008). Although the trial court's decision regarding whether to allow a child to testify will not be overturned absent an abuse of

discretion, the trial court must nevertheless *consider* the "reasonable preference" of a child twelve years of age or older when modifying a parenting plan. *Id.* If the record shows that the trial court took the child's preference into consideration, its determination will not be overturned absent an abuse of discretion. *Id.*

In this case, when the matter was heard before the trial court in January 2009, Ms. Heffington's counsel stated to the court:

> Your Honor, I have . . . the 14-year-old, here to testify today regarding any changes or modifications in the parenting plan if you would like to hear from him.

The court replied: "I don't want to hear from him."

Ms. Heffington's counsel then asked to make an offer of proof, which the court permitted.

The record in this case is devoid of any indication that the trial court considered the preferences of the older child, or that the trial court exercised its discretion when it simply stated that it did not want to hear the child's testimony. Further, in light of the offer of proof contained in the record, and in light of the entirety of the circumstances of this case, we agree that the preferences of the child must be considered by the court in order to determine whether modification of the parenting plan is in the children's best interest, as opposed to their parents'. We accordingly vacate that part of the judgment finding that a material change of circumstances had occurred such that modification of the parenting plan to substantially increase Mr. Heffington's parenting time was in the children's best interest, and remand for further proceedings regarding the bests interests of the children.

We next turn to Ms. Heffington's assertion that the trial court erred in reducing Mr. Heffington's child sport obligation by finding that Ms. Heffington was voluntarily unemployed and imputing income in the amount of $29,300 per year to her. Ms. Heffington asserts that Mr. Heffington did not plead that she was voluntarily unemployed, and that she has not worked outside the home since shortly after the birth of the parties' first child. She asserts that Mr. Heffington offered no proof as to voluntary unemployment, but testified only that he did not remember agreeing that she could be a stay-at-home mother. She also asserts that the rehabilitative alimony which she had received was intended to allow her to remain on the parties' farm.

In its February 2009 order, the trial court found that Ms. Heffington was voluntarily unemployed where she had a college degree and previous experience in banking; where the children were nearly fifteen and ten years of age; where she had the time and ability to work;

and where she had received rehabilitative alimony in the amount of $96,000 over four years and "did nothing to rehabilitate herself" but had "maintained an extravagant lifestyle in spite of her unemployment." In addition to imputing income to Ms. Heffington in the amount of $29,300 per year, the trial court found that Mr. Heffington's gross income for the purposes of setting child support was $21,571.80 per month. The trial court also found that Mr. Heffington should receive a credit for the three children whom he had adopted prior to entry of the court's 2009 order. The trial court reduced Mr. Heffington's child support obligation retroactive to the date Mr. Heffington filed his petition for modification, and ordered Ms. Heffington to repay Mr. Heffington for excess amounts paid at the rate of $269.35 per month for 72 months, without interest.[2]

Upon review of the record, we find that, although the question of voluntary unemployment was not asserted in Mr. Heffington's petition, the matter was tried by consent in the trial court. During the hearing of this matter, the trial court heard testimony regarding Ms. Heffington's income and expenditures, her education and work experience, and the parties' expectations with regard to whether she would return to work. Additionally, the alimony agreed to by the parties in their MDA was rehabilitative alimony, which, by definition, is intended to assist the economically disadvantaged spouse to obtain training and/or additional education in order to facilitate a return to the work place. *E.g., Bowie v. Bowie*, 101 S.W.3d 420, 425 (Tenn. Ct. App. 2002)(citation omitted). The evidence in this case does not preponderate against the trial court's finding that Ms. Heffington was voluntarily unemployed where it is undisputed that Ms. Heffington made no attempt to rehabilitate herself or to seek employment outside the home.

In addition to setting prospective child support at $1,932 per month, the trial court ordered Mr. Heffington to pay the children's private school tuition as additional child support in accordance with Mr. Heffington's proposed parenting plan. Ms. Heffington asserts that the trial court erred by permitting Mr. Heffington to pay the tuition directly to the school, rather than to her. Her argument, as we perceive it, is that because Mr. Heffington must pay the children's school fees as additional child support, the fees must be paid directly to her because she has the authority to make decisions regarding the children's education. We find no error.

Ms. Heffington also asserts the trial court erred by not granting an upward deviation from the child support guidelines. The trial court found that the 2003 decree of divorce and MDA contained no written findings that the amount of child support included an upward deviation, and found that the current circumstances did not warrant an upward deviation.

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[2]The record reflects that the amount of overpayment paid by Mr. Heffington per month was adjusted to reflect the respective dates on which Mr. Heffington's adopted children came into his custody.

The trial court found that Ms. Heffington had failed to prove that an amount in excess of $1,932 per month was reasonably necessary to provide for the children's needs. In light of the trial court's order requiring Mr. Heffington to pay the children's school tuition, we affirm. Ms. Heffington failed to carry her burden to demonstrate that an upward deviation was warranted. The evidence does not preponderate against the trial court's finding.

Ms. Heffington finally asserts that the trial court erred in failing to award her attorney's fees. She asserts that Mr. Heffington caused this litigation to be protracted and delayed, resulting in increased fees. As Ms. Heffington states in her brief to this Court, the trial court has wide discretion when awarding attorney's fees that are not required by statute or contract. A trial court's decision regarding an award of attorney's fees will not be disturbed on appeal absent an abuse of discretion. *Langschmidt v. Langschmidt*, 81 S.W.3d 741, 751 (Tenn. 2002). In light of the above discussion, and in light of the contributions that both parties made to prolonging the discovery process in this case, we find no abuse of discretion in the trial court's decision.

Holding

In light of the foregoing, we vacate the trial court's judgment that a modification of the parties' parenting plan is in the best interests of the children. We remand for further proceedings on this issue, limited to the trial court's consideration of the wishes of the parties' children above 12 years of age and to the recalculation, if necessary, of Mr. Heffington's child support obligation in light of the number of parenting days awarded to him. The remainder of the trial court's judgment is affirmed. Costs of this appeal are taxed one-half to the Appellee, David Allen Heffington, and one-half to the Appellant, Tammy Sue Heffington, and her surety, for which execution may issue if necessary.

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DAVID R. FARMER, JUDGE