IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 24, 2015 Session

VALERIE CECILE BURNETT v. DAVID SHAW BURNETT

Appeal from the Circuit Court for Montgomery County
No. MCCCCVDV10618 Michael R. Jones, Judge

No. M2014-00833-COA-R3-CV – Filed August 31, 2015

This case involves a mother's request for a change in the primary residential parent designation for her children. Following a one-day hearing, the trial court found that the mother failed to prove a material change in circumstance as necessary to change the primary residential parent designation. On appeal, the mother argues that the court's order did not comply with Tennessee Rule of Civil Procedure 52.01 and that the proof showed a material change in circumstance. After reviewing the record, we affirm the trial court's decision.

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

W. NEAL MCBRAYER, J., delivered the opinion of the Court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

Stephanie Ritchie Mize, Clarksville, Tennessee, for the appellant, Valerie Cecile Burnett.

Stacey A. Turner, Clarksville, Tennessee, for the appellee, David Shaw Burnett.

OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

David Shaw Burnett ("Father") and Valerie Cecile Burnett ("Mother") were divorced by final decree on August 19, 2011. The couple had five minor children: Marissa, Saralyn, Brady, Wyatt, and Brock. The Circuit Court for Montgomery County, Tennessee, appointed a guardian ad litem for the children. Following the guardian's recommendation, the court designated each child's primary residential parent according to their individual preferences. The court named Mother primary residential parent of Wyatt and Brock, and Father primary residential parent of Marissa, Saralyn, and Brady. The court did not enter a parenting plan in conjunction with making the designations.

The children in Mother's care continued to reside with her in Tennessee, while the children in Father's care moved with him to Montana.

Following entry of the final decree of divorce, Mother and Father continued to litigate various parenting time and child support issues, including a motion for contempt Mother filed against Father. The motion was largely related to Father's purported violations of Mother's visitation rights. Mother alleged Father failed to allow planned visitation, failed to encourage phone contact with the children, and that Father was generally uncooperative with Mother.

Possibly as a result of these difficulties, Mother filed a motion to adopt a permanent parenting plan. In an order entered August 20, 2012, the court adopted a parenting plan memorializing its previous primary residential parent determinations. The court granted Father 285 days of parenting time with Marissa, Saralyn, and Brady and Mother 80 days. Accordingly, the court granted Mother 285 days of parenting time with Brock and Wyatt and Father 80 days. The parenting plan provided that Mother and Father would have joint authority over major decisions concerning the children.

This appeal arises from Mother's petition seeking temporary and permanent custody of the children in Father's care[1] and to hold Father in civil and criminal contempt. Mother alleged that "Father is exposing the minor children to a dangerous and unstable lifestyle," that put them at risk of serious harm. As a material change in circumstance, Mother alleged that Father had violated the terms of the parenting plan by removing the children from school and deciding to homeschool them, a decision that should have been made by both parties under the terms of the parenting plan.

More specifically, the petition expressed Mother's concerns for the children's health, alleged that Father had an outstanding warrant against him for harassing Mother's new husband, and alleged that Father had violated the parenting plan in numerous other respects regarding Mother's visitation rights. She also alleged that Father refused to share information with her regarding the children's education, extracurricular activities, and medical care. Mother's petition sought, among other things, a change in the primary residential parent designation, granting her custody of the three children currently in Father's care.

Father filed an answer and counter-petition on August 27, 2013. Father's counter-petition alleged that Mother failed to comply with the parenting plan with regard to the two children in her custody by refusing to allow visitation, not allowing Father phone contact with the children, refusing to reimburse Father for plane tickets he bought for the children, and moving without notifying Father of the children's new address. The

[1] Since this case was argued, Marissa has reached the age of majority.

counter-petition requested that the court find Mother in willful contempt and sought the recovery of Father's attorneys' fees.

The circuit court conducted a hearing on October 29, 2013. Father, Mother, and the two children in Mother's custody all testified at the hearing. During her testimony, Mother expressed concerns that Saralyn exhibited an overwhelming fear of being in public when she came to visit her, a fear that had not been demonstrated prior to moving with Father. Mother also testified that Brady had an unkempt appearance and displayed antisocial tendencies. Marissa refused to visit Mother.

When asked about a material change in circumstance, Mother responded that the children's "safety, their health, their welfare, and their education are all at stake." Mother testified that the children had been removed from school and were being homeschooled without her permission, though Saralyn had since returned to public school. Mother also testified that, despite providing plane tickets for the children's visits for Thanksgiving and Christmas of 2012, Father had refused to use them. None of the three children attended their scheduled visitation with Mother on Thanksgiving and only Brady and Saralyn visited her during Christmas. In addition to obstructing her visitation with the children, Mother claimed that Father refused to provide her with the children's medical records.

The two boys in Mother's care, Brock and Wyatt, each testified that they choose not to speak with Father much. They indicated their relationship with Father was strained. They claimed that Father had not sent them any kind of card or gift for their birthdays or Christmas over the last few years. Brock also testified that, while he was visiting Father over summer break, he saw boys going in and out of Marissa's room late at night. Father denied these allegations. At the conclusion of the boys' testimony, Mother rested her case.

In defense of the petition, Father only offered his own testimony. He stated that he refused to use the tickets provided by Mother for the children's travel because she had scheduled them to fly out of Salt Lake City, Utah, an eight-hour drive from Father's residence. Instead, he bought tickets for Saralyn and Brady to depart from a closer airport in Montana for their Christmas visit with Mother. Although Mother's tickets offered the children a direct flight to Tennessee and Father's required a layover, he testified that flying from Montana seemed more reasonable than having the children and himself travel eight hours by car on Christmas day. Father also claimed that he did not receive Christmas visitation with the children in Mother's custody despite his requests. Mother claimed that no such request had ever been made.

Father reported that he removed the children from public school in January 2013 and placed them in a homeschool program because he felt they were too advanced for the curriculum taught in the public school. He did not deny that he failed to consult with

Mother in making this decision or to provide her with documentation regarding the children's schooling. On cross-examination, it was revealed that each of the three children had excessive absences from school prior to their removal.

Following Father's testimony, the court announced its ruling from the bench. The court began by noting that, "[f]rankly, this sounds like the same case I've tried three or four times between these same parties." After discussing the contentious relationship between Mother and Father, the court considered the difficulties the parties were having in maintaining contact with their children—especially when attempting to maintain such a long-distance relationship—and encouraged them to attempt to work together in the future.

Despite the divisive nature of Mother and Father's relationship and the difficulty the parties were experiencing in communicating with their children, the court found that the children in Father's care were doing well and that no material change in circumstance had occurred. The court noted that, although not a proponent of homeschooling, that it was a "parenting decision to make" and Father "made that decision." The court found that no evidence had been introduced demonstrating that Father discouraged the children from speaking on the phone with Mother or receiving mail from her.

The court memorialized its ruling in an order entered on December 12, 2013. After summarizing the factual and procedural history, the court stated its finding of fact and conclusions of law in three short paragraphs:

> [] That since the Final Decree [of divorce], there has been substantial litigation with regard to both parents[']claims of lack of access to the other children, refusal of the other parent to facilitate a health[y], stable and nurturing relationship between the other parent and the children primarily under their care and a concern for the welfare of the respective children in the other parent's primary care. The Court has heard from Brock and Wyatt [], both in the Mother's care in two separate hearings and is concerned about their lack of relationship with their Father. This has been an ongoing issue since before the parties' divorce and has not changed since that time.
>
> The Court has heard proof with regard to Marissa, [Brady] and Saralyn [], all primarily in the Father's care. The Court finds that they are doing well and that, although the Court is not a fan of home school, there is no proof that the children are suffering in any manner while in [] Father's care.
>
> [] As such, the Court finds that the ongoing conflict between the parties has not changed and that there is no material change in circumstances that

would warrant a modification of the Court's previously ordered parenting plan entered August 20, 2012.

Mother filed a motion to alter or amend the court's order. The motion argued that the court erred in failing to find a material change in circumstance as necessary for a change in primary residential parent. Also, apparently for the first time, Mother requested that the parenting schedule be modified to grant her greater visitation in the event she was not designated the primary residential parent.

Following a hearing on the motion to alter or amend, the court entered an amended order. Although it declined to grant Mother her requested relief, or alter its ruling finding a lack of a material change in circumstance, the court did amend its order to address the allegations of contempt made by each of the parties. Father's counter-claim for contempt against Mother was denied. Mother's petition for contempt against Father was denied in part, except that Father was found to be in technical contempt for failing to provide Mother with the children's medical records. Because the records were provided at the hearing, no penalty was assessed against Father. Mother filed a timely notice of appeal.

II. ANALYSIS

Mother raises two issues on appeal. First, she argues that the circuit court erred in failing to set forth specific findings of fact and conclusions of law in its order as required by Tennessee Rule of Civil Procedure 52.01. Second, she argues that the court erred in refusing to find a material change in circumstance as necessary to modify the parenting plan.

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, 692-93 (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. 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). However, where the trial court fails to make specific findings of fact on an issue, we may conduct an independent review of the record to determine where the preponderance of the evidence lies. *Kendrick v. Shoemake*, 90 S.W.3d 566, 569 (Tenn. 2002) *superseded by statute on other grounds*, Tenn. Code Ann. § 36-6-101(a)(2), *as recognized in Armbrister*, 414 S.W.3d at 704; *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997); *Kesterson v. Varner*, 172 S.W.3d 556, 566 (Tenn. Ct. App. 2005). We

review the trial court's conclusions of law de novo, with no presumption of correctness. *Armbrister*, 414 S.W.3d at 692.

B. ADEQUACY OF THE CIRCUIT COURT'S ORDER

Mother requests that we vacate the trial court's order and remand with instructions to make specific findings of fact and conclusions of law in accordance with Tennessee Rule of Civil Procedure 52.01. Rule 52.01 states, in part, that "[i]n all actions tried upon the facts without a jury, the court *shall* find the facts specially and *shall* state separately its conclusions of law and direct the entry of the appropriate judgment." Tenn. R. Civ. P. 52.01 (emphasis added). We have previously stated that the requirement of detailed findings of fact and conclusions of law is "not a mere technicality." *In re K.H.*, No. W2008-01144-COA-R3-PT, 2009 WL 1362314, at *8 (Tenn. Ct. App. May 15, 2009) (discussing a similar requirement found in Tenn. Code Ann. § 36-1-113(k)). Absent these findings, we are "left to wonder on what basis the court reached its ultimate decision." *Id.* "Simply stating the trial court's decision, without more, does not fulfill this mandate." *Barnes v. Barnes*, No. M2011-01824-COA-R3-CV, 2012 WL 5266382, at *8 (Tenn. Ct. App. Oct. 24, 2012).

Specific findings of fact and conclusions of law serve three main purposes. *Lovlace v. Copley*, 418 S.W.3d 1, 34 (Tenn. 2013). First, they facilitate appellate review by giving us "a clear understanding of the basis [for] a trial court's decision." *Id.* at 34-35. Second, such findings illustrate precisely which issues the court is deciding so that the doctrines of collateral estoppel and res judicata may be applied to future cases. *Id*. at 35. Third, findings of fact and conclusions of law may eliminate the need for or limit the scope of an appeal by prompting the trial court to carefully articulate and apply the facts underlying its decision. *Id*.

In reviewing whether the trial court has complied with Rule 52.01, our Supreme Court has stated:

> There is no bright-line test by which to assess the sufficiency of factual findings, but "the findings of fact must include as much of the subsidiary facts as is necessary to disclose to the reviewing court the steps by which the trial court reached its ultimate conclusion on each factual issue."

Id. (quoting 9C Charles A, Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2579, at 328 (3d ed. 2005)). The trial court is not required to make findings regarding stipulated or undisputed facts, unless conflicting inferences can be drawn from them. *Id.*

Here, the trial court made scant findings of fact and conclusions of law. The court found that Mother and Father had engaged in substantial litigation over their respective visitation rights since the entry of the parenting plan. It also found that the children in

Father's care were doing well, and despite the fact that Father chose to withdraw them from school, there was "no proof that the children [we]re suffering in any manner while in [] Father's care." Finally, the court noted that the ongoing conflict between the parties had not changed since the entry of the parenting plan. Based on these findings, the court concluded that no material change in circumstance had occurred.

When confronted with insufficient findings of fact, an appellate court is not without alternatives. One alternative is to vacate the decision and remand so that the trial court can make specific findings of fact and conclusions of law. *Id.* at 36. Another alternative is to conduct a de novo review of the record to determine where the preponderance of the evidence lies. *Id.* The appropriate alternative depends on the particular circumstances of the case, including the adequacy of the record, the fact-intensive nature of the case, and whether witness credibility determinations must be made. *See id*. (declining to conduct a de novo review because credibility determinations were necessary to resolve factual disputes); *Town of Middleton v. City of Bolivar*, No. W2011-01592-COA-R3-CV, 2012 WL 2865960, *26 (Tenn. Ct. App. July 13, 2012) (stating that independent review is appropriate when the case involves a legal issue or the court's decision is "readily ascertainable"); *see also State v. King*, 432 S.W.3d 316, 328 (Tenn. 2014) (considering the adequacy of the record, the fact-intensive nature of the case, and the ability to request supplementation of the record in determining whether to conduct a de novo review in the context of a criminal case).

We conclude that a de novo review of the record to determine where the preponderance of the evidence lies is appropriate in this circumstance. The record is sufficient to resolve the issue raised on appeal given the burden of proof, and we can do so without making our own credibility determinations. Further, remand to the trial court would only serve to unnecessarily prolong the already protracted and contentious litigation over these children's custody and would probably result in a second appeal. *See Lovlace*, 418 S.W.3d at 36 (disapproving of such a result). This is especially true considering that the judge who decided this case has retired since the entry of the final order, meaning remand would likely necessitate a new hearing.

C. MATERIAL CHANGE IN CIRCUMSTANCE

Next, we must consider whether the evidence in the record establishes a material change in circumstance. Mother argues that the trial court erred in failing to find a material change in circumstance as required for modification of the primary residential parent. In the alternative, she argues that, even assuming the court correctly found no material change of circumstance for purposes of a change in primary residential parent, the evidence was at least sufficient to establish a material change in circumstance for purposes of modifying the residential parenting schedule.

We apply the two-step analysis in Tennessee Code Annotated § 36-6-101(a) (2014) to requests for modification of the primary residential parent or the residential parenting schedule. *See, e.g.*, *In re T.C.D.*, 261 S.W.3d at 743 (primary residential parent modification); *In re C.R.D.*, No. M2005-02376-COA-R3-JV, 2007 WL 2491821, at *6 (Tenn. Ct. App. Sept. 4, 2007) (residential parenting schedule modification). The threshold issue is whether a material change in circumstance has occurred since the court's prior custody order. *See* Tenn. Code Ann. § 36-6-101(a)(2)(B); *Armbrister*, 414 S.W.3d at 697-98. Only after it is determined that a material change in circumstance has occurred must the court determine whether modification is in the child's best interest. *Armbrister*, 414 S.W.3d at 705.

A change in circumstance with regard to a residential parenting schedule is "a distinct concept" from a change in circumstance with regard to custody. *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). If a parent requests a modification of custody, also known as a change in the primary residential parent, then the parent must "prove by a preponderance of the evidence a material change in circumstance." *Massey-Holt*, 255 S.W.3d at 607. 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." Tenn. Code Ann. § 36-6-101(a)(2)(B). 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*, 90 S.W.3d at 570.

The threshold for establishing a material change in circumstance where the issue before the court is a modification of the residential parenting schedule is much lower. *See, e.g.*, *Boyer v. Heimermann*, 238 S.W.3d 249, 259 (Tenn. Ct. App. 2007); *see also* Tenn. Code Ann. §§ 36-6-101(a)(2)(B), -101(a)(2)(C). The petitioner still must "prove by a preponderance of the evidence a material change of circumstance affecting the child's best interest," Tennessee Code Annotated § 36-6-101(a)(2)(C), and like a material change for modification of the primary residential parent, the change must have occurred after entry of the order sought to be modified. *Caldwell v. Hill*, 250 S.W.3d 865, 870 (Tenn. Ct. App. 2007). 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 703. To modify a residential parenting schedule, "merely showing that the existing arrangement [is] unworkable for the parties is sufficient to satisfy the material change of circumstance test." *Rose v. Lashlee*, No. M2005-00361-COA-R3-CV, 2006 WL 2390980, at *2 n.3 (Tenn. Ct. App. Aug. 18, 2006).

As to Mother's argument that a material change in circumstance for purposes of a change in primary residential parent has occurred, our review of the record leads us to the conclusion that the evidence preponderates against finding such a change. Mother alleges that the evidence offered at the hearing reveals two potential material changes in circumstance: (1) Father's continued obstruction of Mother's visitation rights; and (2) Father's decision to unilaterally remove the children from school.

As to the first change, Mother and Father have been embroiled in conflict over their respective visitation rights since long before the entry of the parenting plan. In fact, Mother's motion to enter a parenting plan was filed because of these frequently occurring conflicts over visitation rights. Although violation of a non-custodial parent's visitation rights can establish a material change in circumstance in some situations, the record lacks evidence that Father's violations affected the children's well-being in a meaningful way. Our findings on this issue, as well as the one that follows, is also influenced by the fact that one of the children, Marissa, has now reached the age of majority.

Father's unilateral decision to withdraw the children from school and enroll them in a homeschool program presents a closer question. Father undisputedly acted in contravention of the parenting plan—which grants joint educational decision-making authority to both parents—when he decided to remove the children from school without consulting Mother. Tennessee Code Annotated § 36-6-101(a)(2)(B) contemplates that such a violation can constitute a material change in circumstance. However, as discussed above, not every such violation will rise to the level of a material change in circumstance necessary to change the primary residential parent designation. In this instance, we find that Mother failed to prove by a preponderance of the evidence that the change in the children's education affected their well-being in a meaningful way.

We decline to consider Mother's alternate argument that the evidence at least establishes a material change in circumstance for purposes of modifying the residential parenting schedule. Mother first requested such relief in her motion to alter or amend, after the trial court conducted the hearing on the change in primary residential parent. Where a parent does not specifically seek modification of the residential parenting schedule, the trial court may choose to address the issue, but it is not required to do so. *See Pippin v. Pippin*, 277 S.W.3d 398, 407 (Tenn. Ct. App. 2008) (concluding that the court need not apply the lower material change in circumstance standard where the parent's petition only requested a change in primary residential parent, even though such a change may also necessarily involve a modification of the parenting schedule); *Wall v. Wall*, No. W2010-01069-COA-R3-CV, 2011 WL 2732269, at *24-25 (Tenn. Ct. App. July 14, 2011) (finding that, although the parent only sought a change in primary residential parent and failed to prove a material change in circumstance on that issue, the trial court retained authority to consider whether a lesser change existed justifying a modification of the parenting schedule); *see generally Shofner v. Shofner*, 181 S.W.3d 703, 716 (Tenn. Ct. App. 2004) (holding that trial courts have broad discretion in

fashioning parenting plans that serve the best interest of the child). Here, the trial court chose not to do so. We find the record inadequate to make any determination on the issue.

III. CONCLUSION

For the foregoing reasons, the decision of the circuit court is affirmed.

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W. NEAL McBRAYER, JUDGE