IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 14, 2015 Session

JOHN MICHAEL THAYER v. JENNIFER LYNN THAYER

Appeal from the Circuit Court for Davidson County
No. 09D974 Philip E. Smith, Judge

No. M2015-00194-COA-R3-CV – Filed July 26, 2016

This appeal arises from post-divorce efforts to modify child support. The father agreed, in the original parenting plan, to pay the tuition for a program for children with autism in lieu of child support. Subsequently, the parties agreed to enroll their child in a private school for children with learning challenges, and the father voluntarily paid the tuition. Several years later, the mother filed a petition for modification of child support after the father refused to continue paying the tuition. After a hearing, the trial court found a significant variance between the child support obligation in the agreed parenting plan and the presumed amount of child support under the Tennessee Child Support Guidelines. The court calculated a new child support amount after finding that the father was voluntarily underemployed and allocating additional income to him based on his earning potential. The court also ordered an upward deviation for extraordinary educational expenses and awarded the mother a portion of her attorney's fees. Upon review of the record, the evidence does not preponderate against the trial court's factual findings, and we find no abuse of discretion in the trial court's decision. Therefore, we affirm and remand this case for a determination of the amount of the mother's reasonable attorney's fees on appeal.

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

W. NEAL MCBRAYER, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S., and RICHARD H. DINKINS, J., joined.

J.P. Barfield and Mark C. Scruggs, Nashville, Tennessee, for the appellant, John Michael Thayer.

Mary Arline Evans, Nashville, Tennessee, for the appellee, Jennifer Lynn Thayer.

OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

When John Michael Thayer ("Father") and Jennifer Lynn Thayer ("Mother") divorced in 2010, they had one child (the "Child"), who was four years old. The Child was diagnosed with autism and attended the Brown Center for Autism. The agreed parenting plan incorporated into the final decree of divorce designated Mother as the primary residential parent and awarded Father ninety days of visitation each year. The parties agreed that, in lieu of child support, Father would pay the tuition for the Brown Center and any other fees would be divided equally between them. The plan further provided: "This is an upward deviation child support case because the minor child is a special needs child. No child support worksheet is attached. The parents acknowledge that court approval must be obtained before child support can be reduced or modified."

On September 6, 2013, Mother filed a petition to modify child support in the Circuit Court for Davidson County, Tennessee. In her petition, Mother alleged that the Child was currently attending Currey Ingram Academy because he was too old to attend the Brown Center. Mother further alleged that, although Father had agreed to pay the tuition for Currey Ingram, he was behind on his payments. Because there was no child support order currently in place, Mother requested modification of the agreed parenting plan to require Father to pay the tuition for Currey Ingram and to divide the related educational expenses between the parties.[1] On December 6, 2014, the court held a final hearing on Mother's modification petition.

A. PROOF AT THE HEARING

Although the Child went to the Brown Center when the parties divorced, both parents knew he would attend school elsewhere because the Brown Center only accepted children until they were ready for kindergarten. After considering the available options, Mother and Father applied for the Child to attend Currey Ingram. Mother described the Child as severely delayed when he started kindergarten. He had difficulties in several areas in addition to speech.

Both parents signed the contracts for the Child to attend Currey Ingram for kindergarten, first, and second grade. Father paid the tuition and half of the related educational expenses while Mother paid the remaining expenses, such as after care and

[1] Father's continuing failure to pay the Currey Ingram tuition engendered several additional pleadings from Mother. The court ordered Father to make timely tuition payments pending a final hearing and, subsequently, found him in contempt for failure to comply with the court's orders.

extracurricular fees. Mother applied for and received financial aid on the Child's behalf. The amount of the aid awarded varied each year. By the time the Child was scheduled to attend third grade, the family was receiving the maximum financial aid award, which was equal to fifty percent of the cost. With the financial aid package, the cost of attending Currey Ingram in third grade was $1,780 per month.

The parties agreed that Currey Ingram provided an exceptional educational environment. The school boasted an extremely low student to teacher ratio. In addition, the school crafted, with input from the parents, an individualized learning plan for the Child. That plan included individualized speech and occupational therapy sessions. Currey Ingram also utilized a cross-curricular program through which all the teachers worked cooperatively to ensure that the special needs of each student were met in every class. Mother testified that no other school in the area provided this level of specialized education for children with autism. Both parents agreed that the Child had made outstanding progress during his time at the school.

Mother could not afford to send the Child to Currey Ingram without both the financial aid and Father's help. Mother operated Camp Brick, a LEGO camp for children, during the summers and after school during the school year. Mother testified her monthly income was $4,693 in 2014.

Father worked as a mortgage broker. Before Mother filed her petition, he worked for New Penn Financial, earning over $12,000 per month. In September 2013, Father quit his job at New Penn Financial and took a similar job at Waterstone Mortgage, a startup company, earning $4,172 per month. During this same time frame, Father also remarried.

Father refused to sign the enrollment contract for third grade, claiming he could no longer afford to pay the tuition. Father stated that he had been forced to borrow from friends and family to pay part of the 2014 tuition. Mother pointed out that, although Father claimed he could no longer afford the tuition, he had sufficient income since September 2013 to pay for a wedding ring, a honeymoon, a new car, and an elaborate stone patio.

Father testified he did not change jobs to decrease his income but to better position himself for the future. He contended his job change was necessitated by the changes in the rules governing compensation for mortgage brokers. As Father described the changes, "you used to get paid on the front end of the loan and the back end of the loan. And the Federal Government basically came in and said that you can't get paid on the front and the back end of a deal, and so, as a result, you basically get paid one flat fee. And that's called the Frank-Dodd Act." [2] According to Father, the new compensation rule meant he would need to

[2] The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat 1376 (codified in scattered sections of 7, 12, 15, 18, 22, and 42 U.S.C.), was passed in 2010. The Dodd-Frank

increase his volume of loans to earn the same level of income. Because loans were taking more than thirty days to close at New Penn Financial,[3] he decided to take a lower paying job at Waterstone in the hopes of generating more volume in the future. Father explained:

> So, yes, I have changed jobs, as you-guys have alluded to, trying to find a better situation, based on the way the Fed has changed the rules with our income. And I believe I have found that with the Waterstone environment, but it is a startup; it is where I'm on the ground floor, to where I can have that volume, to where that's where the money is at. But to get there, I had to take a startup position to basically get to where I'm going.

According to Father, his job change was "all about future positioning."

Father also found the position at Waterstone desirable because he received a base salary before commission, which covered his insurance costs. At New Penn Financial, he worked solely on commission. At the time of the hearing, however, Father had only received his base salary during his fourteen months working at Waterstone. In moving to Waterstone, Father agreed not to receive any commission payments until his branch became profitable. While Father acknowledged that the Nashville real estate market was booming, he stated that being a mortgage broker was simply not as profitable as it used to be.

Father also contended that the Child no longer needed the level of specialized education provided at Currey Ingram. He described the Child as "very high functioning." Because Currey Ingram was not preparing the Child for real life, Father advocated sending the Child to a traditional school. He explained, "[w]e can't keep [the Child] in this little protective bubble." Father asserted the Child could attend a traditional school[4] and receive the necessary speech and occupational therapy. Father expressed his opinion that it was time to explore whether the Child could handle real life challenges. Father admitted, however, if he was still earning his previous income, he would not be trying to change the Child's school.

Mother, for her part, agreed that the Child was doing very well at Currey Ingram and might attend a traditional school in the future. In her opinion, however, moving him to a mainstream environment too soon would cause him to struggle, which could lead to

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Act significantly revised the regulation of mortgage lending in the United States. *See* Robert A. Cook & Meghan Musselman, *Summary of the Mortgage Lending Provisions in the Dodd-Frank Wall Street Reform and Consumer Protection Act*, 64 Consumer Fin. L.Q. Rep. 231 (2010) (discussing the impact of the changes in the law on the mortgage market).

[3] Father testified that New Penn Financial's inability to get loans closed in a timely manner caused him to lose business.

[4] Father admitted the only other school he had considered was the school his stepdaughter attended.

behavioral problems. She discussed the option of changing schools with the director of Currey Ingram before deciding to enroll the Child at the school for third grade. She testified, "we both came to the agreement that he was not ready to move."

B. The Court's Memorandum Opinion

The court issued a memorandum and order on December 19, 2014. The court found a significant variance between the child support amount provided in the parenting plan and the child support presumed under the Tennessee Child Support Guidelines ("Guidelines"). As part of its calculation of a new child support amount, the court found Father voluntarily underemployed and decided his gross monthly income should be equal to his previous earnings at New Penn Financial. The court determined that the presumed child support amount, based on the parties' incomes and allowed adjustments, was $1,116 per month. The court also determined it would be appropriate to order an upward deviation from the presumed amount for extraordinary educational expenses. Thus, the court divided the cost of attending Currey Ingram equally between the parties and added $890 per month to Father's child support obligation for a total child support amount of $2,006 per month.

The court also found Mother was entitled to an award of attorney's fees and ordered her to file an attorney's fees affidavit. After Mother submitted proof of her attorney's fees, the court awarded her a portion of the requested fees.

II. Analysis

On appeal, Father argues the court erred in finding him voluntarily underemployed, in granting an upward deviation in child support for extraordinary educational expenses, and in awarding attorney's fees to Mother. Mother seeks an award of attorney's fees in defending this appeal.

A. Modification of Child Support

Appellate courts review child support decisions using the deferential abuse of discretion standard and will refrain from substituting their discretion for that of the trial court. *Richardson v. Spanos*, 189 S.W.3d 720, 725 (Tenn. Ct. App. 2005). "We will not reverse the trial court's decision unless we determine it is clearly unreasonable based on the facts of the case and the applicable law." *Yates v. Yates*, No. M2015-00667-COA-R3-CV, 2016 WL 748561, at *11 (Tenn. Ct. App. Feb. 24, 2016); *see Richardson*, 189 S.W.3d at 725.

1. Determination of Voluntary Underemployment

Father challenges the court's finding that he is voluntarily underemployed. The issue

of voluntary underemployment is a question of fact which requires a careful consideration of all the relevant circumstances. *Reed v. Steadham*, No. E2009-00018-COA-R3-CV, 2009 WL 3295123, at *2 (Tenn. Ct. App. Oct. 14, 2009). We afford the trial court considerable discretion in this determination. *Willis v. Willis*, 62 S.W.3d 735, 738 (Tenn. Ct. App. 2001). In fact, the trial court's decision is entitled to a presumption of correctness, particularly "when it is premised on the trial court's singular ability to ascertain the credibility of the witnesses." *Reed*, 2009 WL 3295123, at *2.

No parent is presumed willfully or voluntarily underemployed. Tenn. Comp. R. & Regs. 1240-02-04.04(3)(a)(2)(ii). Instead, in making this determination, the court must consider a parent's past and present employment, education, training and ability to work, and any other relevant facts. *Id.* 1240-02-04-.04(3)(a)(2)(iii). "The purpose of the determination is to ascertain the reasons for the parent's occupational choices, and to assess the reasonableness of these choices in light of the parent's obligation to support his or her child(ren) and to determine whether such choices benefit the children. *Id.* 1240-02-04-.04(3)(a)(2)(ii).

The Guidelines are clear that a finding of voluntary underemployment "may be based on any intentional choice or act that adversely affects a parent's income." *Id.* The employment decision need not be motivated by an intent to avoid paying child support. *Id.; Anderson v. Anderson*, No. 01A01-9704-CH-00186, 1998 WL 44947, at *5 (Tenn. Ct. App. Feb. 6, 1998). Our courts have been more inclined to find voluntary underemployment when the parent's decision to change employment was voluntary. *Richardson*, 189 S.W.3d at 726. *See, e.g., Willis*, 62 S.W.3d at 738-9 (affirming determination that the father was voluntarily underemployed when he voluntarily changed jobs because he was dissatisfied); *Watters v. Watters*, 22 S.W.3d 817, 823 (Tenn. Ct. App. 1999) (affirming finding of voluntary unemployment when the father quit his job rather than accept a lateral transfer); *Armbrister v. Armbrister*, No. E2010-01561-COA-R3-CV, 2011 WL 5830466, at *5 (Tenn. Ct. App. Nov. 21, 2011) (affirming finding of voluntary underemployment when father quit his job to fulfill his life goal of owning a performing arts summer camp); *DeWerff v. DeWerff*, No. M2004-01283-COA-R3-CV, 2005 WL 2104736, at *4 (Tenn. Ct. App. Aug. 31, 2005) (affirming finding father was voluntarily underemployed when he "voluntarily chose to abandon a successful legal practice in order to relocate to another state for purely personal reasons.").

Not every voluntary employment decision that negatively impacts the parent's income requires a finding of voluntary underemployment, however. Our courts have declined to find voluntary underemployment when a parent's decision to work at a lower wage is reasonable and made in good faith. *Willis*, 62 S.W.3d at 738. *See, e.g., Reed*, 2009 WL 3295123, at *4; *Johnson v. Johnson*, No. M2008-00236-COA-R3-CV, 2009 WL 890893, at *7 (Tenn. Ct. App. Apr. 2, 2009); *Guthrie v. Guthrie*, No. W2012-00056-COA-R3-CV, 2012 WL 5200079, at *3-4 (Tenn. Ct. App. Oct. 23, 2012); *State ex rel. Brown v. Brown*, No. M2014-02497-COA-R3-CV, 2016 WL 506732, at *5 (Tenn. Ct. App. Feb. 8, 2016). In evaluating

reasonableness, courts look at the entirety of the circumstances. *Ralston v. Ralston*, No. 01A01-9804-CV-00222, 1999 WL 562719, at *5 (Tenn. Ct. App. Aug. 3, 1999) ("[T]he determination of whether an obligor parent is willfully and voluntarily underemployed is one which is dependent upon the complete factual background of the obligor's situation.").

Here, the trial court based its determination that Father was voluntarily underemployed on Father's voluntary decision to leave his lucrative job as a mortgage broker and accept similar employment at another company at significantly lower pay. As the court stated, "[t]his 'voluntary act' has put [Father] in a position of being able to generate far less income and claim that he does not have the ability to pay what he was once able to pay." The court acknowledged Father's testimony that he proactively changed jobs to better position himself as a mortgage broker after new federal mortgage rules were enacted. The court found Father's reason for changing employment was unreasonable, however, in light of his obligation to support his child.

Father argues that, because his testimony about his reason for leaving New Penn Financial was uncontested and the court found him to be a truthful witness, the court had no choice but to find his explanation reasonable. We disagree. Even if Father made his decision in good faith, the court retained the discretion to determine whether, under all the circumstances, Father's decision was reasonable in light of his obligation to support his child. Tenn. Comp. R. & Regs. 1240-02-04.04(3)(a)(2)(iii); *In re John H.B.*, No. M2013-00496-COA-R3-JV, 2014 WL 1572715, at *3 (Tenn. Ct. App. Apr. 17, 2014) (affirming finding that father's decision to semi-retire despite his obligation to support his child was unreasonable). "Although we realize that a person has a right to pursue happiness and to make reasonable employment choices, an obligor parent will not be allowed to lessen his child support obligation as a result of choosing to work at a lower paying job." *Willis*, 62 S.W.3d at 738.

The evidence in this record does not preponderate against the trial court's factual findings. Father was earning over $12,000 per month as a mortgage broker when Mother filed her petition. Less than a month later, Father chose to accept a new job doing the same work but earning only $4,172 per month. According to Father's most recent income and expense statement, his current household income cannot cover his expenses even without paying the Currey Ingram tuition. Father did not testify that his income at New Penn Financial was declining. Rather, he expressed his opinion that the new federal mortgage rules would negatively impact his future earnings. This was not a case of a parent forced to change jobs. Father admitted that he made a proactive decision to join a startup company whose operational structure could help him close a larger volume of loans. To reach his goal, Father agreed to a compensation arrangement that vastly limited his present income in the hopes of a future benefit. Even if we accept Father's claim that the passage of the Dodd-Frank Act would have inevitably reduced his income at New Penn Financial, we conclude that the trial court did not abuse its discretion in determining that Father's voluntary decision

to change jobs under these circumstances was unreasonable in light of his obligation to support his special needs child.

We also find no abuse of discretion in the trial court's finding that Father had the capacity to earn $12,291 per month, as evidenced by his previous earnings at New Penn Financial. Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)(2)(ii)(II). The trial court appropriately based its calculation of earning capacity on the numbers from Father's most recent tax return. *See Waters*, 22 S.W.3d at 823 (stating evidence of previous earnings was a sufficient basis for determining earning capacity).

2. Upward Deviation for Extraordinary Educational Expenses

Next, we must determine whether the trial court erred in granting an upward deviation for extraordinary educational expenses. Father argues that the court erred in awarding an upward deviation because the parties can no longer afford the tuition at Curry Ingram and the Child's needs can be met at another, less expensive school. The Guidelines give the trial court discretion to deviate from the presumptive amount of child support under certain circumstances. Tenn. Comp. R. & Regs. 1240-02-04-.07(1); Tenn. Code Ann. § 36-5-101(e)(1)(A) (Supp. 2015). We will uphold the court's decision "as long as the trial court applied a correct legal standard, the decision is not clearly unreasonable, and reasonable minds can disagree about its correctness." *Reeder v. Reeder*, 375 S.W.3d 268, 275 (Tenn. Ct. App. 2012) (citations omitted).

Extraordinary educational expenses may be added to the presumptive child support amount as an upward deviation. Tenn. Comp. R. & Regs. 1240-02-04-.07(2)(d)(1). The Guidelines specify:

> Extraordinary educational expenses include, but are not limited to, tuition, room and board, lab fees, books, fees, and other reasonable and necessary expenses associated with special needs education or private elementary and/or secondary schooling that are appropriate to the parents' financial abilities and to the lifestyle of the child if the parents and child were living together.

Id. In determining the amount to award as extraordinary educational expenses, the court should take into consideration any financial aid received by or on behalf of the child. *Id.*

We agree with the trial court that the Child is a special needs child. He was diagnosed with autism at a young age. Both parents praised the education provided at Currey Ingram and described the Child's progress as outstanding. Father described the Child as "very high functioning" but admitted he still needs special services, such as speech therapy. While the

parties differred on whether the Child was ready to attend a traditional school, at the time of the hearing, the Child attended Currey Ingram. Thus, as noted by the trial court, the court was "not called upon to decide where [the Child] shall attend school at this time. That is a decision of the parents."

Therefore, the question before the court was whether the cost of a Currey Ingram education was "appropriate to the parents' financial abilities and to the lifestyle of the child if the parents and child were living together." Tenn. Comp. R. & Regs. 1240-02-04-.07(2)(d)(1). Both parents agreed to send the Child to Currey Ingram, and it was the only school he ever attended. Moreover, the parents' income, as imputed by the court, exceeded $200,000 per year. Mother obtained the largest financial aid package available at Currey Ingram, a fifty-percent reduction in cost. We conclude that the current cost of attending Currey Ingram is commensurate with the parents' financial abilities. *See Richardson*, 189 S.W.3d at 728-9 (determining the parents' combined income was sufficient to cover the costs of private education); *Blankenship v. Cox*, No. M2013-00807-COA-R3-CV, 2014 WL 1572706, at *11 (Tenn. Ct. App. Apr. 17, 2014) (affirming both the upward deviation for extraordinary educational expenses and the determination of voluntary underemployment).

B. ATTORNEY'S FEES

By statute, the prevailing party in child support proceedings may recover from the other spouse reasonable attorney's fees incurred in that effort. Tenn. Code Ann. § 36-5-103(c) (2014). Awards of attorney's fees under this statutory provision are now "familiar and almost commonplace." *Deas v. Deas*, 774 S.W.2d 167, 170 (Tenn. 1989). Courts grant these awards to "facilitate a child's access to the courts." *Sherrod v. Wix*, 849 S.W.2d 780, 784 (Tenn. Ct. App. 1992). The amount of attorney's fees awarded must be reasonable, and the fees must relate to custody or support issues. *Miller v. Miller*, 336 S.W.3d 578, 586 (Tenn. Ct. App. 2010).

Father appears to argue that he should not be ordered to pay Mother's attorney's fees because he should have been the prevailing party and, alternatively, that he cannot afford to pay Mother's fees. We conclude Mother's efforts benefited the child, and the award of attorney's fees was appropriate under the statute. *See Evans v. Evans*, No. M2002-02947-COA-R3-CV, 2004 WL 1882586, at *12 (Tenn. Ct. App. Aug. 23, 2004) (stating the general rule that the award of fees "is for the benefit of the child and is a necessary part of, or inseparable from, the child's right to support").

Mother requests an award of her attorney's fees on appeal.[5] We have discretion under

[5] At oral argument, Mother's attorney asserted Father's appeal was frivolous and requested an award of attorney's fees as damages pursuant to Tennessee Code Annotated section 27-1-122 (2010). The statute authorizing an award of damages for frivolous appeal "must be interpreted and applied strictly so as not to

Tennessee Code Annotated § 36-5-103(c) to award a prevailing party fees incurred on appeal. *Pippin v. Pippin*, 277 S.W.3d 398, 407 (Tenn. Ct. App. 2008); *Shofner v. Shofner*, 181 S.W.3d 703, 719 (Tenn. Ct. App. 2004). We consider the following factors in our decision to award fees: (1) the requesting party's ability to pay the accrued fees; (2) the requesting party's success in the appeal; (3) whether the requesting party sought the appeal in good faith; and (4) any other relevant equitable factors. *Hill v. Hill*, No. M2006-02753-COA-R3-CV, 2007 WL 4404097, at *6 (Tenn. Ct. App. Dec. 17, 2007). Considering these factors, we award Mother her attorney's fees incurred on appeal. On remand, the trial court should determine the proper amount of attorney's fees to be awarded to Mother.

III. CONCLUSION

For the foregoing reasons, the decision of the circuit court is affirmed. This case is remanded for the court to determine a reasonable amount of attorney's fees to be awarded to Mother for defending this appeal.

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W. NEAL MCBRAYER, JUDGE

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discourage legitimate appeals." *See Davis v. Gulf Ins. Grp.*, 546 S.W.2d 583, 586 (Tenn. 1977) (citing the predecessor to Tennessee Code Annotated section 27-1-122). A frivolous appeal is one "utterly devoid of merit." *Combustion Eng'g, Inc. v. Kennedy,* 562 S.W.2d 202, 205 (Tenn. 1978). We do not find this appeal devoid of merit or any indication that it was undertaken for delay. Therefore, we decline to award Mother her attorney's fees on this basis.