IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

FILED

June 11, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

JACQUELINE S. EDENFIELD FLORIAN	)	SULLIVAN COUNTY
	)	03A01-9406-CV-00217
Plaintiff-Appellant/	)	
Appellee	)	
	)	HON. ROGER E. THAYER,
	)	JUDGE
v.	)	
	)	
	)	HON. JOHN S. McLELLAN, III,
MARK EMMETT EDENFIELD	)	JUDGE
	)	
Defendant-Appellee/	)	
Appellant	)	AFFIRMED AND REMANDED

DOUGLAS J. TOPPENBERG OF KNOXVILLE FOR JACQUELINE EDENFIELD FLORIAN

JOHN S. BINGHAM OF KINGSPORT FOR MARK EMMETT EDENFIELD

OPINION

Goddard, P.J.

Jacqueline S. Edenfield Florian and her former husband, Mark Emmett Edenfield, appeal orders entered in the Circuit Court for Sullivan County. The appeals arise from two separate proceedings involving their minor child, which have been consolidated in this Court.

The first appeal arose after a hearing conducted by Judge Thayer in the Sullivan County Law Court upon Mrs. Florian's motion to relocate with her minor child to the Jacksonville, Florida, area or to Nashville, Tennessee. Judge Thayer denied her petition to relocate, but increased child support, modified Dr. Edenfield's visitation rights and denied Mrs. Florian's request for attorney fees.

While the first appeal was pending, Mrs. Florian filed a new petition requesting to relocate with the parties' minor child to Ponte Vedra, Florida, and to modify visitation. Judge John McLellan, in the Sullivan County Law Court, granted Mrs. Florian's petition to relocate with the child and modified Dr. Edenfield's visitation accordingly. Mrs. Florian's request for attorney fees was again denied.

The following is a summary of the findings of fact of both of the Courts below. The parties were divorced in 1986. They continued to cohabit for five years. On April 22, 1991, they entered into an agreed order which provided for joint custody of the parties' minor child, Nathaniel. Dr. Edenfield was to have visitation with Nathaniel three week-ends per month, three of six Thanksgivings, spring breaks, and the first half of Christmas break. Dr. Edenfield was also to pay $1500 per month in child support, maintain medical insurance for Nathaniel, and pay all necessary medical, dental, optical, and prescription drug bills. In August of 1991, the parties separated and Mrs. Florian

and Nathaniel moved from Edenfield's home in Kingsport to Knoxville where Mrs. Florian was to attend nursing school.

On October 21, 1992, Mrs. Florian petitioned the Trial Court seeking modification of the agreed order. Mrs. Florian sought sole custody, increased child support and a reduction in visitation. She later amended her petition on April 1, 1993, asking the Trial Court to allow her to remove Nathaniel to Nashville. At trial, Mrs. Florian requested alternatively that she be permitted to remove the child to Jacksonville, Florida. Mrs. Florian had married James Florian in May of 1993. She claimed at the first trial that neither she nor her husband could find satisfactory employment in Knoxville.

Mr. Florian holds a Bachelor's degree in Management/Human Resources from East Tennessee State University. At the first trial, there was testimony that Mr. Florian had five jobs in the preceding four years. At trial, Mr. Florian testified that he had sent resumes to Nashville and to Jacksonville, but had received no offers of employment from either locale. Mrs. Florian had been a licensed practical nurse prior to her pregnancy with Nathaniel. At the time of both trials, her nursing license was not active. However, she testified that she would be able to return to work as a licensed practical nurse with either a refresher course in Nashville or the reactivation of her license in Jacksonville.

At the time of the first trial, Nathaniel was in fourth grade at Bluegrass Elementary School in Knoxville. There was testimony that his grades had been improving. Due to his attention deficit disorder, Nathaniel was placed in a Special Resources Program, which was in addition to the basic school program. He also spent an additional one hour each day with a teacher to help him in subjects with which he was having difficulty.

Dr. Edenfield is an anesthesiologist in Kingsport. He has 24 weeks of paid vacation per year and, additionally, there are some weeks in which he is on call but does not have to be in the office unless there is an emergency. He had exercised only some of the visitation opportunities granted by the agreed order. However, through his income, he had the ability to take Nathaniel on many vacations, the likes of which Mrs. Florian is unable to afford. Also, during times of visitation he and Nathaniel engaged in many activities together.

At the first trial, Mrs. Florian's expert, Dr. Vey Nordquist, testified that in his opinion sole custody should be awarded to Mrs. Florian and that neither of the proposed relocations would harm Nathaniel. Dr. Nordquist also testified that Mrs. Florian wanted to physically distance herself from Dr. Edenfield, whose expert, Dr. B. Wayne Lanthorn also gave testimony that Mrs. Florian wanted to get away from Dr. Edenfield

and that neither of the proposed moves would be in the best interest of the child.

Based on a finding that the parties could not communicate well enough to make the present custody arrangement work, the Trial Court changed the parties' custody arrangement from joint to sole custody in favor of Mrs. Florian. Dr. Edenfield's visitation privileges were modified accordingly. Also, Dr. Edenfield's child support obligations were increased from $1750 to $2300 per month.[1] The Trial Court justified this increase by finding that the original decree invisioned equal time spent with each parent and Mrs. Florian was to pay tuition for private schooing out of the increased amount. Mrs. Florian's request to remove Nathaniel was denied because neither she nor her husband had obtained employment in Nashville or the Jacksonville area. As already noted, both parties appealed this order.

In June of 1994, Mrs. Florian again petitioned the Trial Court to allow her to relocate with Nathaniel. After the first hearing, Mr. Florian accepted employment in Ponte Vedra, which paid two-thirds more than his prior job in Knoxville. Mrs. Florian testified that she anticipated she would be able to find employment there as well. Mrs. Florian also testified that the school system in Ponte Vedra would prove beneficial to Nathaniel and would help him with his attention deficit disorder. There

[1] This order was entered on January 25, 1994, prior to the effective date of the amended guidelines.

was testimony that the family would have the opportunity to live in much nicer housing than they could afford in Knoxville. There was also testimony to the effect that Nathaniel was unhappy with the current visitation arrangement.

The Trial Court found that Mrs. Florian would have an increased opportunity to reactivate her nursing license and, thereafter, her employment opportunities would be more versatile. The Trial Judge also found that the move would be in the best interest and welfare of Nathaniel and that he would be benefited by having a happier, more adjusted parent. Thereafter, the Trial Judge granted Mrs. Florian's motion to remove Nathaniel to Ponte Vedra, modified Dr. Edenfield's visitation rights and denied Mrs. Florian's request for attorney fees. As already noted, both parties also appealed this order.

Dr. Edenfield argues that Judge McLellan erred by allowing Mrs. Florian to remove Nathaniel to Florida. He argues that there was not a sufficient showing of changed circumstances between the first and second trials and that the outcome of the first proceeding, which denied Mrs. Florian's motion to remove, is res judicata. However, the Trial Judge found that the fact that Mr. Florian had found employment in Ponte Vedra in the interim period was a change in circumstances.

As is stated in Taylor v. Taylor, 849 S.W.2d 319 (Tenn. 1993), the burden of proof is upon Mrs. Florian, as the

petitioning party, to show that removal from the jurisdiction is in the child's best interest. That burden is shifted upon a prima facia showing of a good-faith reason for the move and that the move is consistent with the child's best interest. Once the burden is shifted, Dr. Edenfield must show by a preponderance of the evidence that removal is adverse to the best interest of Nathaniel. However, "the motives of the custodial parent in making the move must appear to be valid, that is, not intended to defeat or deter visitation by the non-custodial parent."

There was proof at trial that Mr. Florian had been unsuccessful in finding satisfactory employment in the Knoxville area. The record shows that prior to the second proceeding, Mr. Florian secured employment in Ponte Vedra, which, as already noted, offered a two-thirds increase in compensation from what he was making in Knoxville. Mrs. Florian testified that she would have the potential to make more money in Florida and would be able to get preferential work schedules. In light of this evidence, we agree with the Trial Court that Mrs. Florian offered a good faith reason for the move and made a sufficient showing that the move would be in Nathaniel's best interest. Such a showing by Mrs. Florian is sufficient to carry her burden of proof under Taylor.

Thus, the burden is shifted to Dr. Edenfield to prove by a preponderance of the evidence that the move is not in Nathaniel's best interest. Dr. Edenfield does not assert that

the move would be adverse to the best interest of the child as is required under the Taylor scheme. Instead, Dr. Edenfield argues that the change in circumstances was "created" by the Florians. Therefore, the motion to remove should be disallowed. Here, there was evidence that would show that the Florians sought to relocate in order to find better employment opportunities, better housing, and better educational opportunities. All of these aspects of the relocation would enure to the benefit of Nathaniel and the Trial Judge so found. Without making a finding as to whether the Florians created the change in circumstances, Dr. Edenfield has not met his burden under Taylor unless it is proved by a preponderance of the evidence that the move will not be in Nathaniel's best interest. By failing to show that the move would not be in the best interest of the child, Dr. Edenfield has failed to carry his burden under Taylor. Thus, we affirm Judge McLellan's findings on this issue.

Next, Dr. Edenfield appeals the decision to increase child support, arguing that Judge Thayer erred in increasing the amount of child support from $1750 to $2300. However, Mrs. Florian asserts that the Trial Court in the first hearing erred in ordering an increase in Dr. Edenfield's child support obligations only up to $2300. Mrs. Florian has indicated through her affidavit that she needs $3235 for Nathaniel's support.

Before a trial court may increase child support it must find that there has been a substantial and material change in

circumstances that occurred since the date of the original order. T.C.A. 36-5-101(a)(1)(1993).[2] Dr. Edenfield argues that the Trial Judge erred in finding that a substantial and material change in circumstances had been shown. However, the Trial Judge stated that the fact that custody had been changed from joint custody to sole custody in favor of Mrs. Florian was a significant change in circumstances because the original order contemplated that the time spent with Nathaniel would be split equally.

Dr. Florian correctly points out that the original order provided that Nathaniel should reside primarily with his mother rather that a split custody arrangement. However, all prior custody agreements between the parties provided for "joint" custody and the 1993 proceeding, from which Dr. Edenfield appeals, changes that arrangement from joint custody to sole custody in Mrs. Florian. Pursuant to the change from joint to sole custody, the Trial Judge decreased Dr. Edenfield's visitation rights. The Trial Court found this to be sufficient to find a change in circumstances.

We agree that the change of custody from joint custody to sole custody in favor of Mrs. Florian was a change of circumstances which was sufficiently material to warrant a change

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[2] T.C.A. 36-5-101 was amended in 1994. *See* 1994 Tenn. Pub. Acts Ch. 987 §3(b). The amended version requires a finding of "significant variance" between the statutory guidelines and the amount of support currently ordered in order to increase child support. T.C.A. 36-5-101. Because this case was decided prior to the amendment, we will evaluate the modification under the "material change in circumstances" test.

in the support amount. The Trial Judge found that the first decree envisioned a relationship in which custody would be shared equally between Dr. Edenfield and Mrs. Florian. By the time of the first trial this was no longer the case. Also, the increase included Nathaniel's private school tuition. The Trial Judge found there to be a sufficient material change in circumstances, and we affirm the judgment of the Trial Court on this issue.

Mrs. Florian, on the other hand, argues that Judge Thayer erred by increasing Dr. Edenfield's support obligations by only $550 per month. Mrs. Florian notes that the $2300 awarded by Judge Thayer represents less than six percent of Dr. Edenfield's monthly income.[3] Mrs. Florian cites us to the Tennessee Child Support Guidelines contained in Tenn. Comp. R. And Regs. Ch. 1240-2-4. The guidelines provide that for one child, 21 percent of the non-custodial parent's net income should be devoted to support. Tenn. Comp. R. And Regs. Ch. 1240-2-4-.03(5).

In Nash v. Mulle, 846 S.W.2d 803 (Tenn. 1993), the Supreme Court addressed the appropriate application of the Guidelines when the non-custodial parent's income exceeds $6250. There, the Court stated that the Guidelines permit an award of greater than 21 percent of $6250 without a specific showing of need by the custodial parent. The Court stated that the trial Court should have the discretion to make a determination of a

[3] Dr. Edenfield earned $481,936 in 1992; $403,312 in 1991; and $346,185 in 1990.

support award when the non-custodial parent's monthly income exceeds $6250. Such is the present case. Mrs. Florian has not pointed to any abuse of discretion by Judge Thayer. As the Court stated in Nash v. Mulle, "Twenty-one percent of an enormous monthly income may provide far more money than most reasonable, wealthy parents would allot for the support of one child."

Mrs. Florian appeals Judge McLellan's change of visitation. After granting Mrs. Florian's request to remove Nathaniel to Florida, Judge McLellan modified Dr. Edenfield's visitation rights to account for the increased geographic separation and to insure an ongoing relationship between Dr. Edenfield and his son. Mrs. Florian argues that the visitation ordered by Judge McLellan was inappropriate and excessive.

The details of visitation are within the discretion of the trial court. Edwards v. Edwards, 501 S.W.2d 283 (Tenn.App. 1973). The decision of the trial court regarding visitation will not be disturbed unless there is an abuse of discretion. Suttles v. Suttles, 748 S.W.2d 427 (Tenn.1988); Grant v. Grant, 39 Tenn.App. 539, 286 S.W.2d 349 (1954). "[R]emoval of the child from the jurisdiction may require rescheduling of the non-custodial parent's visitation." Taylor, supra. Mrs. Florian points to no clear abuse of discretion of the Trial Judge. Therefore, we are not persuaded to reverse the findings of the Trial Judge.

Finally, Mrs. Florian charges that the Trial Judge in the first proceeding erred by failing to award Mrs. Florian attorney fees and costs after he awarded her sole custody of Nathaniel and increased Dr. Edenfield's support obligation. It is her contention that Tennessee case law dictates that a custodial parent is *entitled* to attorneys fees and costs for representation in a custody modification proceeding.

Attorney fees in custody and support cases are authorized by statute in Tennessee. T.C.A. 36-5-103(c). See also Deas v. Deas, 774 S.W.2d 167 (Tenn.1989). However, the statute also directs that the decision to grant such an award lies within the discretion of the trial court. "In the awarding of attorney's fees in custody cases, the trial court is given wide discretion and this Court will not interfere in the exercise of that discretion in the absence of a clear showing of abuse." Salisbury v. Salisbury, 657 S.W.2d 761 (Tenn.App.1983); Grant, supra. Mrs. Florian has failed to show any abuse of discretion on behalf of the Trial Court. Therefore, we affirm the Trial Court on the issue of attorney fees and costs.

For the foregoing reasons the judgments of the Trial Courts are affirmed and the causes remanded for such further proceedings, if any, as may be necessary and collection of costs below. Costs of appeal are adjudged one-half against Mrs. Florian and one-half against Dr. Edenfield.

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Houston M. Goddard, P.J.

CONCUR:

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Don T. McMurray, J.

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Charles D. Susano, Jr., J.