

IN THE COURT OF APPEALS OF TENNESSEE

FILED
April 24, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

DAVIS A. REED,) C/A NO. 03A01-9511-GS-00392
Plaintiff-Appellee,) ROANE COUNTY GENERAL SESSIONS
) COURT
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v.) HONORABLE THOMAS A. AUSTIN,
) JUDGE
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)
KATHY L. REED,) AFFIRMED IN PART
) VACATED IN PART
Defendant-Appellant.) REMANDED

CHRISTOPHER VAN RIPER of STUART & VAN RIPER, Clinton, for Appellant

ROBERT W. WILKINSON of BUXTON AND WILKINSON, Oak Ridge, for Appellee

O P I N I O N

Susano, J.

This is a post-divorce case. Davis A. Reed filed a petition seeking an order holding his former wife, Kathy L. Mabry, in contempt. In the same petition, he also sought to modify the parties' judgment of absolute divorce; specifically, he asked the court to relieve him of his obligation to pay half of the mortgage payment on the parties' former marital residence. Ms. Mabry filed a counterclaim seeking an increase in child support. The trial court found Ms. Mabry in contempt; ordered her to pay Mr. Reed \$3,614.50 plus a portion of his attorney's fee; and denied her request for an increase in child support. Ms. Mabry appeals, raising four issues:

1. Was it appropriate for the trial court to find Ms. Mabry in contempt in the absence of an allegation in the petition that her conduct was willful?
2. Does the trial court's failure to expressly state that Ms. Mabry's contemptuous conduct was willful in nature invalidate the finding of contempt?
3. Did the trial court err in awarding Mr. Reed a judgment against his former wife for \$3,614.50?
4. Did the trial court err in failing to increase Mr. Reed's child support obligation?

I. *Facts*

The judgment of absolute divorce was entered January 31, 1994. It incorporated the parties' agreement. The judgment provided, in pertinent part, as follows:

Custody of the minor children Christopher and Roger Reed are [sic] awarded to Kathy L. Reed.

Davis Reed shall have visitation at those times and places to [sic] agreed upon by the parties.

Davis Reed shall pay child support in the amount of \$1,238.92 per month, . . . and this amount complies with the applicable guidelines established for child support by the laws of the State of Tennessee.

* * *

The marital residence of the parties shall be sold . . .

* * *

(d) the payments on the mortgage of the marital residence shall be equally divided by the parties until the marital residence is sold . . .

(e) Kathy L. Reed and the minor children of the parties shall be entitled to occupy the marital residence until the time of the sale and shall have thirty (30) days from the date of the contract to sell the marital residence to vacate the same; provided, however, no third parties shall be entitled to live in the marital residence prior to the sale of the same described herein.

(f) The proceeds of the sale of the marital residence shall be equally divided by the parties after the indebtedness secured by the same is satisfied, . . .

With the passage of time, the judgment became final.

Mr. Reed's petition¹ was filed September 15, 1994, some seven and a half months after the judgment was entered. It alleged that Mr. Reed's former wife was "allowing an adult male to reside in the marital residence in direct contravention" of the judgment. The former Ms. Reed responded to this allegation in the following manner:

¹The petition did not allege that Mr. Reed was entitled to relief under Rule 60, Tenn. R. Civ. P. Furthermore, there are no allegations in the petition that bring it within the ambit of that rule.

The allegations of Paragraph 3 of the Petition are true. Defendant would affirmatively aver that sufficient reasons exist relating to the best interests of the parties' minor children for the "adult male" residing in the marital residence. Defendant affirmatively avers that Paragraph 3 fails to state a claim upon which relief can be granted.

The proof was undisputed that Ms. Mabry's present husband took up residence in the former marital residence in May, 1994.

II. *Law and Analysis*

We will first address the appellant's issues pertaining to the trial court's finding of contempt.

The petition for contempt adequately charged a failure to abide by the judgment. That judgment clearly stated that "no third parties shall be entitled to live in the marital residence." The petition alleged that Ms. Mabry was allowing a third party to live in the residence. This was a sufficient allegation of contemptuous conduct on the part of the appellant. It was not essential to include the word "willful." Rule 8.01, Tenn. R. Civ. P. provides that a claim for relief "shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." This the appellee did. It was up to the appellant to allege and prove that her conduct was in some way legally justified and therefore non-contemptuous. The appellant's first issue is found to be without merit.

The trial court made a very explicit finding that the appellant was in contempt of court. The divorce judgment had prohibited her from moving a third party into the marital residence. She was well aware of this prohibition. Despite her knowledge of the prohibitory language of the judgment, she allowed her soon-to-be husband to move into the residence. She willfully--of her own free will--made this decision. She was under no compulsion to do so. It was immaterial that she thought she had a good reason for allowing him to live in the house. It was not for her to assess the wisdom of the court's judgment as applied to her then circumstances; her "job" was simply to obey the dictates of the judgment. Her explanation--that the children needed a male figure in their life at that particular time--is no justification for her conduct. This is not a case where it is beyond the ability of a party to obey a court order. *Cf. Haynes v. Haynes*, 904 S.W.2d 118, 120 (Tenn. App. 1995). She clearly had the ability to comply. The appellant's second issue is also found to be without merit.

The trial court was vested with the authority to impose an appropriate punishment for Ms. Mabry's contempt. It chose not to do so, explicitly stating that "it was not going to punish [her]"; however, having said that, it proceeded to hold that Ms. Mabry should reimburse her former husband "for seven months . . . when somebody else was living there in violation of the order." The judgment of \$3,614.50 represented the one-half mortgage payment made by Mr. Reed during the time Mr. Mabry was living in

the house in 1994.² It is apparent that the judgment of \$3,614.50 was not designed to respond to the contempt petition. On the contrary, it is clear that the money judgment was in response to Mr. Reed's petition to be relieved of his mortgage payment obligation. This means that the trial court purported to modify the judgment of absolute divorce. This was error. The division of the parties' property--and the court's decree in this case with respect to the mortgage payments is a part of that division--was not subject to modification. *Vanatta v. Vanatta*, 701 S.W.2d 824, 827 (Tenn. App. 1985); *Towner v. Towner*, 858 S.W.2d 888, 891-92 (Tenn. 1993). The judgment provided that each party would pay half of the mortgage payment, and that each was to receive half of the net proceeds when the property was sold. This was a part of the division of property and not subject to modification.

In *Vanatta*, this court addressed an obligation to make a mortgage payment as set forth in a divorce judgment:

Contrary to the import of defendant's first issue, the mortgage payments were a contractual obligation voluntarily assumed by the husband as a part of a property settlement agreement and made a part of the property division provisions of the divorce decree. As such, it was and is just as final and unchangeable as the award of physical property to the wife or the obligation of the wife to hold the husband harmless from liability for mortgage installments maturing more than 8 years after the decree.

In response to defendant's first issue, the division of property was a contract between the parties, but was merged into the divorce

²By agreement of the parties, Ms. Mabry assumed full responsibility for payment of the mortgage beginning January, 1995.

decree which, on this subject is final and unchangeable as any other court judgment, and not subject to modification except for fraud and other grounds upon which any judgment may be attacked.

701 S.W.2d at 827. In the instant case, the trial court erred in granting Mr. Reed a judgment for \$3,614.50.

The trial court refused to increase Mr. Reed's child support obligation. The appellant argues that the appellee is not exercising visitation with his children. The appellee does not seriously dispute this contention. It is true, as the appellant argues, that the Child Support Guidelines assume that the noncustodial parent is exercising a certain level of visitation with his or her children. Tenn. Comp. R. & Regs. ch. 1240-2-4-.02(6). However, the record also reflects that the appellee's annual income had decreased approximately \$8,000 - \$9,000 since the divorce. When these two elements are weighed together, we cannot say that the evidence preponderates against the trial court's determination that the appellant is not entitled to an increase in child support.

All of the trial court's judgment except the judgment for \$3,614.50 is affirmed. The aforesaid money judgment is hereby vacated. This cause is remanded to the trial court for such further proceedings as may be required, consistent with this opinion. Costs on appeal are taxed half to the appellant and half to the appellee.

Charles D. Susano, Jr., J.

CONCUR:

Herschel P. Franks, J.

William H. Inman, Senior Judge