

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 16, 2009 Session

KIMBERLY CHRISTINE GROCE v. MARTY BRUCE GROCE

**Direct Appeal from the Chancery Court for Lincoln County
No. 12,583 J. B. Cox, Chancellor**

No. M2008-01516-COA-R3-CV - Filed October 13, 2009

This appeal involves several post-divorce petitions. Mother appeals the trial court's finding of a material change in circumstances and modification of custody, and also the assessment of the costs of the sale of the marital home against her. Finding no error, we affirm the judgment of the trial court.

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

J. STEVEN STAFFORD, J., delivered the opinion of the court, in which DAVID R. FARMER, J., and HOLLY M. KIRBY, J., joined.

Tusca R.S. Alexis, Nashville, Tennessee, for the appellant, Kimberly Christine Groce.

Lee Bussart Bowles, Lewisburg, Tennessee, for the appellee, Marty Bruce Groce.

OPINION

Background

Appellant, Kimberly Christine Groce ("Mother") filed for divorce against Appellee, Marty Bruce Groce ("Father") on November 21, 2006. The parties are the parents of three minor children. On April 10, 2007, the trial court entered a final decree of divorce in which the Mother was designated as primary residential parent and Father was awarded visitation. Also, the Final Decree stated that "the parties' marital home and real estate have been sold...."

Father filed a Petition for Modification of the Parenting Plan and Complaint for Contempt on October 3, 2007 in which he alleged violations of the Parenting Plan and that the marital home had not been sold. On October 19, 2007, Mother answered and filed a Counter-Petition for Contempt alleging that Father had not turned over funds from his retirement account as required by

the Final Decree. Father filed an answer to Mother's Counter-Petition on November 5, 2007. Father then filed a Complaint for Sale for Partition of the marital home on November 6, 2007.

The trial court ordered the marital home sold on November 13, 2007 reserving the adjudication of costs and other questions for a later date. Following this order, Father filed a Motion for Contempt on December 10, 2007 alleging that Mother was interfering with the sale. The next day, December 11, 2007, the trial court issued a temporary injunction prohibiting Mother from interfering with the sale of the marital home. On January 9, 2008 an order confirming sale was entered. Both parties waived appeal of the order confirming the sale.

After hearing proof on March 4, 2008 and April 29, 2008, the trial court entered an order on June 5, 2008 on the following: the Final Decree, Father's Petition for Modification and Complaint for Contempt, Mother's Answer and Counter-Petition for Contempt, on Father's Answer to Counter-Petition for Contempt, Father's Complaint for Sale for Partition, Father's Motion for Contempt, on the Order Confirming Sale, Father's Motion for Contempt, on the Order for Temporary Injunction, on the Qualified Domestic Relations Order, and on the Order Confirming Sale. The trial court found that the statement in the Final Decree that the real estate had been sold was fraudulent, as the house had not been sold. Further, the trial court found that had Mother followed the Final Decree, there would be no need for partition of the real estate and no costs of sale. The trial court also found that Mother had a "flagrant disregard for...truthfulness" and that if Mother was not the perpetrator in removing the "for sale" signs from the home, she was at least an accomplice. Additionally, the trial court found that Mother was at least an accomplice to the forgery of Father's signature on an insurance check. Based on these findings, the trial court valued the real estate at \$155,000 and assessed the costs of the sale of the home to the Mother.

The trial court also found that both Mother and Father were guilty of bad conduct regarding the children. It found, that but for the actions of the school, the minor children would have failed the prior school year. Further, the trial court found the conduct of the Mother "to be detrimental to the minor children." Accordingly, the trial court held that a material change of circumstances had occurred and awarded Father primary residential parent status.

On July 2, 2008, Mother filed a Motion to Alter or Amend the June 5, 2008 order. The same day, Mother also filed her notice to appeal. The trial court entered an order denying the Motion to Alter or Amend on February 3, 2009.

On appeal, the parties have vigorously disputed the content and adequacy of the record. This dispute began on December 5, 2008 when Father objected to Mother's designation of the record asserting that the transcript filed was not a "contemporaneous recording" and was only a partial transcript since it only contained testimony from the 2nd day of trial.¹ On January 2, 2009 the trial

¹ Neither a transcript nor audio recording exists from the first day of the hearing. The transcript of the April 29, 2008 hearing, was transcribed from a recording of the proceedings by the court's audio recording system. This audio
(continued...)

court entered an order finding that Mother's Statement of the Evidence was not complete. On January 20, 2009, Father filed his Statement of the Evidence, to which Mother objected. Mother then filed her Statement of the Evidence on January 28, 2009. On January 30, 2009, this Court remanded this matter back to the trial court to resolve the dispute over the content of the record and to transmit a supplemental record. Mother filed another Designation of the Record on April 3, 2009. On April 6, 2009, the trial court entered an order altering, amending and merging Mother's and Father's Statements of Evidence. In this order the trial court again found that, "the statement of the evidence is not complete. The record does not wholly and accurately reflect the entirety of the trial court proceedings." The record was subsequently transmitted to the appellate court for our review.

Issues:²

On Appeal, Wife raises two issues. We restate them as follows:

1. Whether the trial court erred in holding that a material change in circumstances had occurred since the parties divorce which warranted a modification of the parenting plan?
2. Whether the trial court erred in assessing the costs of the sale of the marital home to the Mother?

Husband presents two additional issues for our review. We restate them as follows:

1. Whether this appeal must be dismissed because the record is incomplete?
2. Whether Father should be awarded attorney's fees for this appeal?

Standard of Review

We review the trial court's findings of fact *de novo*, with a presumption of correctness unless the evidence preponderates against the finding. Tenn. R. App. P. 13. Questions of law are reviewed on appeal *de novo* with no presumption of correctness. Tenn. R. App. P. 13. Furthermore, when the resolution of the issues in a case depends upon the truthfulness of witnesses, the trial judge who has the opportunity to observe witnesses and their manner and demeanor while testifying is in a far better position than this Court to decide those issues. *See McCaleb v. Saturn Corp.*, 910 S.W.2d 412, 415

¹(...continued)
recording system was installed in between the two days of hearings.

²We note that in Mother's "Issues on Appeal" filed with the trial court on January 1, 2009, she lists an additional issue related to the determination of child support. "In order for an issue to be considered on appeal, a party must, in his brief, develop the theories or contain authority to support the averred position." *Hawkins v. Hart*, 86 S.W.3d 522, 531 (Tenn. Ct. App. 2001). "Where a party makes no legal argument and cites no authority in support of a position, such issue is deemed to be waived and will not be considered on appeal." *Branum v. Akins*, 978 S.W.2d 554, n.2 (Tenn. Ct. App. 1998). Finding no mention of the child support issue in the statement of issues or argument in Mother's brief, we hold that this issue is waived.

(Tenn. 1995); *Whitaker v. Whitaker*, 957 S.W.2d 834, 837 (Tenn. Ct. App. 1997). The weight, faith, and credit to be given any witness' testimony lies in the first instance with the trier of fact, and the credibility accorded will be given great weight by the appellate court. *See id.*; *see also Walton v. Young*, 950 S.W.2d 956, 959 (Tenn. 1997).

The Record

We must first determine if the record is so incomplete as to require us to dismiss this appeal. Father, in his brief, contends that the record and transcripts provided to this Court are “woefully incomplete.” He bases this argument on the fact that the record does not contain transcripts or statements of the evidence from the hearings which resulted in the Order for Sale of the marital home and the Temporary Injunction against Mother, and because there is no transcript from the March 4, 2008 hearing. The completeness and accuracy of the record has been vigorously disputed between the parties. The trial court itself stated that the record is not complete and “does not wholly and accurately reflect the entirety of the trial court proceedings.”

Tenn. R. App. P. Rule 24 provides instructions on preparing the record for appeal. Specifically, Tenn. R. App. P. Rule 24(c) instructs the parties on what to do when no transcript of the proceeding is available. Rule 24(c) requires the appellant to provide a statement of the evidence which “convey[s] a fair, and accurate and complete account of what transpired.” The rule further allows the appellee to file objections to appellant’s statement of evidence and instructs that differences are to be resolved according to Tenn. R. App. P. 24(e). Under Rule 24(e), the trial court is to settle “any differences regarding whether the record accurately discloses what occurred in the trial.” Furthermore, Rule 24(e) provides that the trial court’s determination is conclusive absent extraordinary circumstances. In this case, both Mother and Father have provided us with a Statement of the Evidence from the March 4, 2008 hearing and the trial court has informed us that the statements do not convey an accurate representation of the proceeding. We note that Mother’s and Father’s statements of the evidence from the March 4, 2008 hearing, differ greatly.

On appeal, Mother has a duty to provide this Court with a “record which conveys a fair, accurate and complete account of what transpired in the trial court with respect to the issues which form the basis of the appeal.” *Nickas v. Capadalis*, 954 S.W.2d 735, 742 (Tenn. Ct. App. 1997)(quoting *State v. Boling*, 840 S.W.2d 944, 951 (Tenn. Crim App. 1992)(citing Tenn. R. App. P. 24(b)). This court cannot review facts de novo without an appellate record containing the facts, and therefore, we must assume that the record, had it been preserved, would have contained sufficient evidence to support the trial court’s factual findings.” *Sherrod v. Wix*, 849 S.W.2d 780, 783 (Tenn. Ct. App. 1992). However, during oral argument in this court, Mother’s counsel stated, “The record is complete with respect to the issues on appeal.”

We are extremely conscious of the fact that the trial court found the record incomplete and that it did not “wholly and accurately reflect the entirety of the trial court proceeding” in its April 7, 2009 order. However, this court remanded this matter to the trial court on January 30, 2009 for the “limited purpose of resolving the parties dispute over the content of the record on appeal and for

approval of the Statement of the Evidence, a Transcript of the Evidence or some combination thereof, that conveys a fair, accurate and complete account of what transpired in the trial court”. We have independently reviewed the record and find that taken in conjunction with the assurance of appellant’s counsel that the record is complete with respect to the issues on appeal, we may proceed with our review in this case.

Custody

Custody determinations are among the most important decisions that courts make and as such, trial courts are vested with wide discretion in matters involving custody of children. “Accordingly, a trial court’s decision regarding custody or visitation should be set aside only when it ‘falls outside the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence found in the record.’” *Curtis v. Hill*, 215 S.W.3d 836, 839 (Tenn. Ct. App. 2006)(quoting *Eldridge v. Eldridge*, 42 S.W.3d 82, 88 (Tenn. 2001)). Tenn. Code Ann. § 36-6-101(a)(2)(B) provides that in cases where a party seeks to modify an existing custody order, the threshold issue is whether a material change of circumstances has occurred since the custody determination they seek to modify was made. In addition to occurring subsequent to the order which they seek to modify, the party must show that the material change in circumstance was not known or reasonably anticipated. *Pippin v. Pippin*, 217 S.W.3d 398, 405 (Tenn. Ct. App. 2008). If the party seeking to modify custody demonstrates by a preponderance of the evidence that there has been a material change of circumstances, the trial court must determine if a modification is in the best interests of the child according to the factors listed in Tenn. Code Ann. § 36-6-106. *Pippin v. Pippin*, 217 S.W.3d at 404.

The trial court found a material change of circumstances occurring after the Parenting Plan was entered and that based on this change of circumstances it was in the best interest of the children to modify custody. In making this determination, the trial court had before it, the testimony of both Mother and Father and the school records of the children. On appeal, the parties dispute whether the school records show and the school officials testified as to the number of absences or tardies for the children and if they were excused. The trial court found that but for the efforts of the school and teachers, the children would have failed. The trial court further found that Mother’s bad conduct affects the minor children.

Upon our review of the record, we find that the evidence does not preponderate against the trial court’s finding of a material change of circumstances. The record shows that the children missed a significant amount of school. The school records provided were for the 2007-2008 school year, which was subsequent to the Final Decree. The records reflect both absences and tardies through March 4, 2008 and they reveal that one child was absent 23 times, the second child was absent 10 times and tardy 25 times, and the third child was absent 9 times and tardy 23 times. Further, the majority of the absences and tardies were unexcused. The records also show that the absences were so excessive that Mother was required to appear before the truancy board. Additionally, the record supports the trial court’s finding that but for the efforts of the school, the children would have failed. We also find testimony from the Father that on several occasions Mother

did not allow him visitation as provided in the Parenting Plan. Accordingly, we agree with the trial court's finding that a material change of circumstances has occurred.

We also find that the record supports the trial court's finding that changing custody to Father was in the best interests of the children. After hearing testimony from Mother and Father, school officials, the paternal grandmother, and the maternal grandfather, the trial court found Father to be comparatively more fit. The trial court made this determination after evaluating the testimony and credibility of each witness during the two day hearing as well as the applicable factors contained in Tenn. Code Ann. § 36-6-106. In reviewing the record, we find that the trial court considered the behavior of both parents, the stability of the home of each parent, the school records of the children, and the willingness of each parent to encourage the children's relationship with the other parent. We find ample evidence in the record to support the trial court's findings.

We affirm the trial court's findings that there has been a material change in circumstances and that it is in the best interests of the children for the Father to be the primary residential parent.

House

Mother next asserts that the trial court erred in assessing the costs of the sale of the marital home entirely against her.³ When it announced its decision the trial court provided its reasoning for requiring Mother to be responsible for the cost of the sale. First, it found the statement in the Final Decree indicating that the marital home had been sold, to be a fraud on the court. Also, it found Mother to be at least an accomplice in the disappearance of the "for sale" signs from the property after the sale was ordered. The trial court also found suspicious the fact that while the home was appraised for \$185,000, it sold for \$155,000 and was then immediately sold by the buyer to Mother's Father for \$160,000. Finally, as stated in his order, the trial court found that had Mother followed the Final Decree, there would be no need for a partition for sale. Based on these findings, the trial court assessed the costs of the sale entirely against the Mother.

We have reviewed the record and find that the trial court did not err in assessing the costs of the sale against Mother. The trial court ordered the sale of the home pursuant to Father's Complaint for Sale for Partition, but reserved the issue of costs for later determination. After the two day hearing, the trial court assessed the costs to the Mother. In a partition action, the trial court is to distribute the proceeds of the sale after it deducts the costs to be borne by each share. Tenn. Code Ann. 29-27-218. "The Court has a statutory and inherent right to adjust the equities and settle all claims between or among the parties...." *Yates v. Yates*, 571 S.W.2d 293, 296 (Tenn. 1978); see also *Utter v. Sherrod*, 132 S.W.3d 344, 353 (Tenn. Ct. App. 2004). Upon finding that but for Mother's actions the sale would not have been necessary and the other bad conduct of Mother, the trial court balanced the equities and held that the entire costs of the sale were to be borne by Mother's share

³ It appears to this court that there are some discrepancies between the trial court's ruling from the bench, the order and the attachment breaking down the costs assessed against each party. Neither party, however, raises this issue on appeal and therefore we must find this issue to be waived.

of the proceeds. Upon reviewing the record before us, we do not find that the evidence preponderates against the trial court's findings. Therefore, we affirm the trial court's assessment of costs of the partition sale against Mother.

Frivolous Appeal

On appeal, Father requests attorney's fees and litigation costs for this appeal pursuant to Tenn. Code Ann. § 27-1-122. This statute allows this Court to award damages against the appellant if we find the appeal to be frivolous or taken solely for delay. Tenn. Code Ann. § 27-1-122 (1975). An appeal is frivolous when it has "no reasonable chance of success," *Jackson v. Aldridge*, 6 S.W.3d 501, 504 (Tenn. Ct. App. 1999), or is "so utterly devoid of merit as to justify the imposition of a penalty." *Combustion Eng'g, Inc. v. Kennedy*, 562 S.W.2d 202, 205 (Tenn. 1978). The decision to award damages for a frivolous appeal rests within the discretion of this Court. *Whalum v. Marshall*, 224 S.W.3d 169, 180-81 (Tenn. Ct. App. 2006). Exercising our discretion, we decline to find this appeal frivolous and award damages.

Conclusion

We affirm the trial court's finding of a material change in circumstances to justify modification of custody and the decision to grant Father primary residential status. We also affirm the trial court's decision to tax the costs of the sale of the marital home to the Mother. Costs of this appeal are taxed to the Appellant, Kimberly Christine Groce, and her surety, for which execution may issue if necessary.

J. STEVEN STAFFORD, J.