

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 18, 2013 Session

KALA SHAY HUNN v. KEVIN CARLTON HUNN

**Appeal from the Circuit Court for Robertson County
No. 74CC32011CV570 John H. Gasaway, III, Judge**

No. M2013-00860-COA-R3-CV -Filed November 25, 2013

In this divorce proceeding, Father appeals the trial court's award of attorney's fees to Mother. Finding no error, we affirm. Additionally, we grant Mother her attorney's fees on appeal.

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

RICHARD H. DINKINS, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and ANDY D. BENNETT, JJ., joined.

Justin Sensing, Clarksville, Tennessee, for the appellant, Kevin Carlton Hunn.

Gregory D. Smith, Clarksville, Tennessee, for the appellee, Kala Shay Hunn.

MEMORANDUM OPINION¹

Kala Hunn ("Mother") and Kevin Hunn ("Father") were married in June 2011; two children were born of the relationship. Mother and Father each filed a Complaint for Divorce in November 2011, and the cases were consolidated. After a hearing on February 9, the trial court set temporary child support pursuant to the child support guidelines, established a temporary parenting schedule, and enjoined Father from having the children in the presence of his paramour.

¹Tenn. R. Ct. App. 10 states:

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

The parties participated in a mediation in May 2012, and the mediator submitted a final report to the court stating that the case settled as to all issues.² On June 25 Father filed a motion to enforce the mediation agreement which stated that Mother “refused to abide by the agreement” and “has yet to sign the Marital Dissolution Agreement”; Mother responded, asserting that the mediated agreement was not in the best interest of the children and that it was in the children’s best interest to proceed to trial.

On July 5 Father moved to amend the court’s temporary order with respect to the provisions which restricted the children’s exposure to his paramour; a hearing was set for July 12. The court entered an order on the July 12 hearing which ordered Father to disclose his current address and telephone number to Mother immediately, stated that Father’s motion to enforce the mediated agreement would be taken up at a later date, and denied Father’s motion to amend the temporary order with respect to his paramour.

Mother filed a motion on August 3 styled “Second Motion to Obtain Address & Location of Minor Children and for Sanctions,”³ which asked the court to compel Father to disclose his correct address and to “assess sanctions and attorney’s fees against the Father for his failure to abide by the previous Orders of this Court, specifically, the hearing that was held on July 12, 2012.” After a hearing on September 13, the court entered an order instructing both parties “to provide complete contact information of the whereabouts of the Minor Children to the other parent at all times while in their possession as well as any caregivers”; the court stated, “If either party violates this portion of the Order, they are likely to go to jail.” On September 21 Father filed a “Motion for Contempt.”

A hearing was conducted on January 10, 2013, on Mother’s complaint for divorce, Father’s counter-complaint, and Father’s “Motion for Contempt.” On March 5 the court entered a Final Decree of Divorce, which made the following findings:

² The mediated settlement agreement is not found in the record. Father has attached a copy of the mediated settlement agreement to his brief. The agreement states that the parties agree that a divorce should be granted on the grounds of irreconcilable differences; each party should retain any items in their possession with the exception of a television that Mother was to return to Father; each party was responsible for their own debts with the exception of medical bills; the attached parenting plan should be incorporated into the final decree of divorce; child support should be set according to attached worksheets; and “any remaining costs shall be divided equally between the parties” and “each party shall be responsible for their own attorney fees.”

³ After a review of the record, this Court has been unable to find a prior motion seeking the same relief.

1. The parties entered an agreement at mediation. Normally, the Court treats such a mediated agreement as a contract; however, this is just a general rule and the Court has found circumstances when the Court should exercise its discretion based on the fact that the agreement was made with one or both of the parties not acting in good faith. The Court finds in this particular case that [Father] has not acted in good faith. . . .
2. The Court finds that the Father . . . has perjured himself in his testimony to the Court. . . . [Father] has gone out of his way to secret where he and the Minor Children have been living and this has been detrimental and made his credibility more than suspect. The Court finds that [Father's] credibility with this Court is non-existent. . . .
3. The Court's finding that [Father's] credibility is non-existent with this Court does not mean that he is a bad parent; however it does mean that he has exerted efforts to control everything in this case. He is not believable here, I don't believe [Father] and I must do what is in the best interest of the Minor Children. Therefore, the Court finds that the mediated agreement is not the result of a good faith negotiation and therefore the Court is not bound by it. The Court will determine what it feels is in the best interest of the children based on the factors enumerated in Tennessee [Code Annotated §] 36-6-106 et seq.

The trial court granted Mother a divorce based upon the inappropriate marital conduct of Father, designated Mother as primary residential parent, and ordered each party to maintain personal property as previously divided. The court denied Father's motion for contempt and held that "the contempt Motion filed by Mother is well-founded in the Father's failure to comply with this Court's Order to disclose the location of the Minor Children to the Mother at all times." With respect to attorney's fees, the trial court stated:

Due to the additional attorney's fees necessary for [Mother] to determine the whereabouts of the parties' Minor Children and proceed with the case, the Court finds that the attorney's fees, Court Reporter fees and mediation costs of \$11,000.00 requested by [Mother] is reasonable and these fees are approved to [Mother's counsel].

Father appeals the trial court's award of costs and attorney's fees to Mother. Mother requests her fees on appeal.

I. DISCUSSION

Father contends that the trial court erred in failing to uphold the portions of the parties' mediated agreement not dealing with child custody; specifically, Father appeals the court's order that he pay Mother's attorney's fees where the terms of the mediated settlement agreement stated that each party would pay their own fees.⁴

A. Failure to Enforce Mediated Settlement Agreement

As an initial matter, we review whether the trial court erred in failing to enforce the mediated settlement agreement. Until it is approved by the court, a mediated agreement is essentially contractual in nature. *Ledbetter v. Ledbetter*, 163 S.W.3d 681, 685 (Tenn. 2005). Whether the mediated agreement is enforceable is, therefore, a question of law. *Id.* at 683.

After a full hearing, the trial court held that it was not bound by the mediated agreement because the agreement was "not the result of a good faith negotiation" and because Father had "not acted in good faith." Although a party may not be released from his agreed obligation due to a "change of heart," proof of misrepresentation at mediation is a different matter. *See Coleman v. Coleman*, E2011-00974-COA-R3-CV, 2012 WL 1622240, at *5 (Tenn. Ct. App. May 8, 2012). Further, although the implied covenant of good faith and fair dealing does not apply to the formation of a contract, *Wallace v. Nat'l Bank of Commerce*, 938 S.W.2d 684, 687 (Tenn. 1996), "[p]articular forms of bad faith in bargaining are the subjects of rules . . . as to [contract] invalidating causes such as fraud and duress." Restatement (Second) of Contracts § 205 (1981).

Father has elected not to file a transcript or a statement of the evidence; therefore, the exact nature of Father's misconduct is not clear from the record before us. In the absence of a transcript or statement of the evidence, this Court presumes that sufficient evidence existed to support the trial court's finding that Father did not act in good faith. *See Reinhardt v. Neal*, 241 S.W.3d 472, 477 (Tenn. Ct. App. 2007); *Sherrod v. Wix*, 849 S.W.2d 780, 783 (Tenn. Ct. App. 1992). Based upon this finding and the legal principals stated above, we affirm the trial court's determination that it was not bound by the mediated agreement due to Father's bad faith.

⁴ Father does not appeal the trial court's award of a divorce to Mother, the parenting plan devised by the court, the setting of child support, or the court's finding of contempt.

B. Award of Attorney's Fees at Trial

Tennessee abides by the American Rule regarding the payment of attorney's fees. *State v. Brown & Williamson Tobacco Corp.*, 18 S.W.3d 186, 194 (Tenn. 2000). The rule requires litigants to pay their own attorney's fees unless a statute or an agreement provides otherwise. *Hansen v. Hansen*, M2008-02378-COA-R3-CV, 2009 WL 3230984 (Tenn. Ct. App. Oct. 7, 2009). Tenn. Code Ann. § 36-5-103(c) codifies the court's power to award attorney's fees in custody or support proceedings:

The plaintiff spouse may recover from the defendant spouse . . . reasonable attorney fees incurred in enforcing any decree for alimony and/or child support, or in regard to any suit or action concerning the adjudication of the custody or the change of custody of any child, or children, of the parties, both upon the original divorce hearing and at any subsequent hearing, which fees may be fixed and allowed by the court, before whom such action or proceeding is pending, in the discretion of such court.

Awards for legal expenses in such proceedings are "familiar and almost commonplace." *Deas v. Deas*, 774 S.W.2d 167, 170 (Tenn. 1989). Whether to award attorney's fees in a divorce proceeding is largely in the discretion of the trial court, and we will not interfere on appeal except upon a clear showing of abuse of that discretion. *Hogan v. Yarbro*, No. 02A01-9905-CH-00119, 1999 WL 1097983, at *4 (Tenn. Ct. App. Oct. 5, 1999) (citing *Aaron v. Aaron*, 909 S.W.2d 408, 411 (Tenn. 1995)). A trial court abuses its discretion when the evidence does not support the court's decision or when the court applies an incorrect legal standard, reaches a decision that contravenes logic, or employs reasoning that causes an injustice to the complaining party. *Owens v. Owens*, 241 S.W.3d 478, 496 (Tenn. Ct. App. 2007).

Although the trial court did not state the legal basis for its award, Tenn. Code Ann. § 36-5-103(c) provides the same.⁵ As for the reasonableness of the award, on appeal the record must contain "some evidence showing that an award of attorneys' fees is unreasonable under the circumstances before a reversal of that fee is warranted." *Clarkson v. Clarkson*, M2006-02239-COA-R3-CV, 2007 WL 3072772, at *11 (Tenn. Ct. App. Oct. 22, 2007) (quoting *Kline v. Eyrich*, 69 S.W.3d 197, 209 (Tenn. 2002)). Here, the only factor discussed in the trial court's final order with respect to fees was that additional attorney's fees were "necessary for [Mother] to determine the whereabouts of the parties' Minor Children." Once again, we have no transcript or statement of evidence of the hearing at which Mother's

⁵ In her Complaint, Mother asked that Father be responsible for her attorney's fees, mediation costs, court costs, and any other associated costs.

counsel introduced the exhibit listing the fees.⁶ We have nothing to indicate whether Mother’s counsel was questioned about the fees, whether the fees listed in the affidavit constituted all or a portion of fees in the matter, whether other factors were considered by the court, or how the court reached its decision. “[R]eversal of a fee award is not required merely because the record does not contain proof establishing the reasonableness of the fee.” *Kline*, 69 S.W.3d at 210. Given the lack of a transcript or statement of the evidence, we cannot determine that the trial court abused its discretion in awarding attorney’s fees to Mother.

C. Award of Attorney’s Fees on Appeal

Mother has requested that this Court award her a judgment against Father for legal fees and costs she has incurred on this appeal pursuant to Tenn. Code Ann. § 27-1-122 or Tenn. Code Ann. § 36-5-103(c).

The remedy for a frivolous appeal is provided in Tenn. Code Ann. § 27-1-122, which states:

[w]hen it appears to any reviewing court that the appeal from any court of record was frivolous or taken solely for delay, the court may, either upon motion of a party or of its own motion, award just damages against the appellant, which may include but need not be limited to, costs, interest on judgment and expenses incurred by the appellee as a result of the appeal.

An appeal in which the reviewing court’s ability to address the issues raised is undermined by the appellant’s failure to provide an adequate record is deemed frivolous because it has no reasonable chance of succeeding. *Young v. Barrow*, 130 S.W.3d 59, 67 (Tenn. Ct. App. 2003). This statute “must be interpreted and applied strictly so as not to discourage legitimate appeals” *Davis v. Gulf Ins. Grp.*, 546 S.W.2d 583, 586 (Tenn. 1997).

Tenn. Code Ann. § 36-5-103(c) also vests this court the discretionary authority to award these fees and costs in proper cases. *Shofner v. Shofner*, 181 S.W.3d 703, 719 (Tenn. Ct. App. 2004). “In determining whether an award for attorney’s fees is warranted, we

⁶ The record contains a fee affidavit from Mother’s counsel stating that she spent “the following time in the preparation of this matter”:

Attorney Fees to Date:	\$9,843.75
Estimated time for preparation and trial	\$900
Costs	\$648.90
TOTAL	\$11,393.65

should consider, among other factors, the ability of the requesting party to pay his or her own attorney's fees, the requesting party's success on appeal, and whether the requesting party has been acting in good faith." *Id.*

Given Father's failure to file a transcript or a statement of the evidence and all the circumstances of this case, we grant Mother's request for attorney's fees for this appeal.

II. CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court and remand the case for a determination of attorneys' fees incurred on appeal.

RICHARD H. DINKINS, JUDGE