STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED
October 19, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Angela Christina Lambert,
Petitioner Below, Petitioner

vs.) No. 11-1129 (Mercer County 08-D-127)

Bruce Alan Lambert,
Respondent Below, Respondent

MEMORANDUM DECISION

Petitioner Angela Christina Lambert, pro se, appeals the June 27, 2011, order of the Circuit Court of Mercer County denying her petition for appeal from the March 29, 2011, order of the Family Court of Mercer County declining to find her former husband in contempt for failure to pay child support and alimony and making various other rulings concerning child support and child visitation. Respondent Bruce Alan Lambert, by Phillip A. Scantlebury, his attorney, filed a summary response.

The Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

One child was born of the parties, on July 21, 1999. When the parties divorced, they agreed that petitioner should be the primary residential parent and that respondent was to have "liberal visitation" in accordance with the parties' schedules. By an agreed order, child support was set at $626.25 per month. Respondent also agreed to pay petitioner $172.50 per month in "alimony" until such time that her vehicle had been paid in full.

Petitioner subsequently filed a petition for contempt and modification of child support. The family court heard the petition on February 11, 2011, when petitioner appeared in person pro se[1] and respondent appeared in person and by counsel. Although named in the petition, the Bureau for Child Support Enforcement (hereinafter "BCSE") did not appear.

[1] Petitioner is an attorney who is currently on inactive status.

The family court found "a significant change in circumstances" and ordered that respondent "shall now pay the sum of Seven hundred ninety-four and no/100 ($794.00) per month in child support." The family court declined, however, to find respondent in contempt for failure to pay child support. The family court found that respondent provided "adequate evidence" that a payment was made in the amount of $2,800 for his child support arrearage and that proper withholding from respondent's payment was established pursuant to a prior order of the court. With respect to "alimony," the family court ordered that respondent's monthly payments shall begin to be paid "via automatic income withholding as this will enable BCSE to enforce the alimony obligation, along with the child support obligation."

The family court acknowledged that an issue existed as to whether "[respondent]'s employer has paid the amounts shown on his check stubs to the [BCSE] for disbursement to [petitioner]." The family court gave petitioner leave to implead respondent's employer "by proper pleading served."[2] The family court also ordered that a further hearing was to be held on March 21, 2011, on the issue of "whether BCSE is receiving and/or properly disbursing child support and alimony to [petitioner]."

When the March 21, 2011, hearing was held,[3] the family court also considered a motion for reconsideration filed by petitioner, an additional motion by petitioner to have respondent post bond as security for his child support payments, and a motion by respondent to modify the parties' parenting plan. The family court once again declined to find respondent in contempt and affirmed that his new child support obligation was $794 per month "in accordance with the worksheet for child support dated February 11, 2011." The family court found that the irregularities in the payments to petitioner by the BCSE and/or respondent's employer "were not the fault of [respondent]." The family court ordered that respondent was not required to post a bond. With respect to "alimony," the family court found that there had been an arrearage in the amount of $424.96 but that it had been satisfied "as evidenced by the DHHR[/BCSE] receipt attached hereto." The family court ruled that respondent's alimony obligation would cease on May 1, 2011.

The family court ordered that respondent provide petitioner with his tax returns for 2009 and 2010 citing the West Virginia Rules of Practice & Procedure for Family Courts. *See* Rule 13(a)(2). According to respondent's counsel, respondent already provided the family court and petitioner copies of his "2008 W-2, 2009 W-2, and about ½ of 2010 W-2." To the family court's question if he was working anywhere else in addition to his present employer, respondent answered, "No ma'am." Petitioner wanted complete copies of respondent's tax returns, including the 2008 return, because gross income can encompass more than just wages. At one point during the hearing, the family court indicated to petitioner that it would require respondent to provide his complete return for 2008 "if you have information that current child support is not accurate and there's a [subsequent] motion to modify child support."

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[2] Petitioner named respondent's employer in her petition for contempt and modification of child support; however, the family court found that "I don't believe that there's been proper service upon [respondent's employer]."

[3] Petitioner appeared in person pro se, and respondent appeared in person and by counsel. The BSCE appeared by counsel.

As to the parties' parenting plan, the family court found that "[e]vidence was presented with respect to respondent being unable to regularly visit with his child and requested the Court to set regularly scheduled visitation." Respondent testified that he intended to begin taking Saturdays off "starting sometime in April," and he answered "correct" to the question of whether he already had Sundays off work. The family court modified the parties' parenting plan to grant respondent visitation every other weekend from 8:30 p.m. Friday until 8:30 p.m. Sunday to begin on April 1, 2011. The family court ordered that petitioner provide respondent with her phone number and that respondent provide her with the physical location of his residence. In response to respondent's stated desire to see his son prior to April of 2011, the family court ruled that "[l]iberal visitation is still the order [until the new visitation schedule takes effect]." Also at the hearing, petitioner objected to respondent taking their child to the local lodge of the Loyal Order of the Moose during his visitation on the ground that it was a bar. The family court responded that "if your [former] husband wants him in a bar, and takes him to a bar, that's his business." Respondent's counsel stated that respondent was an official at the lodge. Petitioner appealed the family court's March 29, 2011, order to the circuit court which denied her appeal in a one page order entered June 27, 2011.

STANDARD OF REVIEW

In its findings and application of the law to the facts, the family court is entitled to deference:

> In reviewing a final order entered by a circuit court judge upon a review of, or upon a refusal to review, a final order of a family court judge, we review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. We review questions of law *de novo*.

Syllabus, *Carr v. Hancock*, 216 W. Va. 474, 607 S.E.2d 803 (2004).

CHILD VISITATION

Petitioner argues that the family court's rulings regarding child visitation violated her constitutional right to the care, custody, and control of the parties' child. Petitioner notes that she objects to respondent's current spouse or some other third party taking care of their son while respondent is not home during his visitation and that she also objects to respondent taking their son to the local Moose lodge. Petitioner asserts that respondent's counsel drafted the family court's March 29, 2011, order in a way inconsistent with the court's rulings regarding child visitation made at the March 21, 2011, hearing. (The hearing transcript found in the appendix contradicts this assertion.) In response, respondent argues that there have been no violations of petitioner's constitutional rights as a parent. Respondent asserts that his current spouse is not an improper or unfit caregiver for the parties' son, having children of her own. Respondent further asserts that the local Moose lodge is a family-oriented place and notes that it is his counsel's understanding that a prominent state officeholder is a fellow member of the Loyal Order of the Moose. Respondent

argues that the circuit court's denial of petitioner's appeal from the family court's March 29, 2011, order should be summarily affirmed. After careful consideration of the parties' arguments, this Court concludes that the family court's findings were not clearly erroneous and that its rulings regarding child visitation did not constitute an abuse of discretion.

CHILD SUPPORT, ALIMONY, AND
PETITIONER'S PETITION FOR CONTEMPT

Petitioner asserts that the arrearage with respect to alimony was not paid by the time of the March 21, 2011, hearing. However, the family court made an express finding to the contrary. Petitioner argues that the family court abused its discretion in not requiring respondent to post a bond as security for his child support payments. Petitioner further argues that respondent should be required to provide her with the complete copy of his 2008 tax return, in addition to his 2009 and 2010 returns, in accordance with the previously entered agreed order. Petitioner argues that the BSCE should be ordered, possibly in mandamus at this Court's discretion, to perform the necessary services in the parties' case to effect and enforce accurate, consistent child support payments and that the BSCE should also be ordered to investigate whether respondent owns property that was not disclosed in these proceedings. Petitioner asserts that respondent should be the one who is required to implead his employer.

In response, respondent asserts that there was sufficient proof established that he purged himself of any contempt by paying the sum of $2,800 for any past due child support arrearages and that the family court carefully deliberated and considered its ruling after hearing all the evidence. Respondent notes that he is paying and will continue to pay child support as ordered by the family court and the ordered amounts have been deducted by his employer. After careful consideration of the parties' arguments, this Court concludes that the family court's findings were not clearly erroneous and that its rulings regarding child support and alimony and in denying petitioner's petition for contempt did not constitute an abuse of discretion.

For the foregoing reasons, we find no error in the decision of the Family Court of Mercer County and the June 27, 2011, order of the Circuit Court of Mercer County denying petitioner's petition for appeal from the family court's March 29, 2011, order is affirmed.

Affirmed.

ISSUED: October 19, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh