In re Marriage of Cole

2002 | Cited 0 times | Court of Appeals of Washington | December 31, 2002

Concurring: Christine Jan Quinn-Brintnall, J Dean Morgan

UNPUBLISHED OPINION

Denise Shipley appeals from a trial court child support modification order. We affirm in part, reverse in part, and remand for further proceedings.

FACTS

Forrest and Denise Cole divorced in 1984 when their daughter, Rene, was about eight months old. Both parties later remarried.[1] The child support order required Cole to pay Shipley $250 per month in support.[2] The decree further provided that

{b}oth {Cole and Shipley} shall be equally responsible for the expenses of {Rene} should she, within five (5) months after graduating from high school, enroll and remain in regular attendance in a duly accredited college or trade school for a period not to exceed four (4) years from the date of entrance. While in college or trade school, if {Rene} voluntarily ceases to be in regular attendance for a period of six (6) consecutive months or becomes married, then {Cole's} obligation for child support shall cease and forever terminate. Clerk's Papers (CP) at 171.

Cole received a letter dated February 6, 2001, from Shipley's counsel. It informed Cole that Linfield College in Oregon had accepted Rene as a student at a yearly cost of $27,843.[3] Counsel for Shipley reminded Cole that he was responsible under the original parenting plan for one-half of Rene's college expenses.

On May 31, Cole petitioned for modification of his child support obligation only as it applied to Rene's post-majority education. Cole contended that since the original support order was entered, there had been a change in both parents' incomes, and Cole had become estranged from Rene. Cole argued that because this was a substantial change of circumstances and because he never contemplated Rene attending a private college, the court should find a change of circumstances sufficient to warrant modification of the order for Rene's post-majority education.

At the child support modification hearing, Cole argued that he never anticipated that Rene would enroll in a private college, and he asserted that he had not been consulted about Rene's plans for her post-majority education and that she was already enrolled at Linfield College by the time he was

notified of her plans to attend.

Cole also argued that he had voluntarily increased his monthly child support payment from $250 to $470 and that although he was also paying child support from a daughter from his second marriage and was supporting a step-daughter from his third marriage, Shipley's only child is Rene. Cole pointed to Rene's excellent academic status and argued that she would likely be eligible for scholarships comparable with Linfield's award should she attend a public university instead. Finally, Cole suggested that the court could order him, Shipley, and Rene to be equally responsible to fund Rene's post-majority education.

Shipley responded that although Cole was paying more than the original child support order required him to pay every month, Cole had not voluntarily increased the monthly payment for "the last six years." Report of Proceedings (RP) at 7. Shipley further argued that she had not petitioned for support modification because she relied on language in the initial decree, requiring Shipley and Cole to equally contribute to the costs of Rene's post-majority education. Shipley had been "setting aside money to fund that obligation" and assumed that Cole was too. RP at 7.

Shipley also argued that the disparity in cost between the Washington public universities and Linfield College was not so substantial as Cole argued, because Rene's $8,300 scholarship defrayed most of that disparity. Although she and Cole were each responsible for fifty percent of Rene's college costs, Shipley argued that the court should instead proportionately apportion payment obligations for Rene's college costs based on each parent's ability to pay. Under this methodology, Cole would be responsible for sixty-seven percent of Rene's post-majority education costs.

The trial court first found that the decree's language made it difficult to ascertain the parties' intent with respect to the initial post-majority education, because neither Cole nor Shipley held a college degree. The trial court concluded that "{a}bsent having an evidentiary hearing on this, and I don't know if that's even necessary, what I found was that there was a change of circumstances." RP at 14. The trial court concluded that calculating Cole's post-majority education obligation based on state university costs was reasonable, explaining:

I don't think necessarily that the Court is restricted to what the Court can consider is a substantial change of circumstances. {Rene} was eight months old when {Cole and Shipley} separated and the divorce was final. There was a parenting plan. I looked at the parenting plan. There was a regular visitation schedule set out regarding establishing a relationship or maintaining a relationship between . . . Cole and {Rene}. Now, there's been finger-pointing as to whose fault it was as to why that relationship failed. For whatever reason, there does not appear to be any relationship.

. . . The fact is that {Cole} indicates he has not been involved in {Rene's} life. {Cole} has not been invited back into {Rene's} life.

{Cole} was not notified of {Rene's high school} graduation, any type of special occasions in her life, so at this time the Court does feel there is some obligation on Rene when she is asking for dad to assist her in collage to at least have some minimal relationship with him. RP at 14-15.

The trial court also denied Shipley's request for attorney fees and costs.

On October 10, the trial court entered a written order modifying Cole's post-majority education support obligation, along with findings of fact and conclusions of law. The most pertinent but disputed finding of fact provides:

1.6 There has been a substantial change of circumstances in that {Rene} is now older, {her} name was changed in 2000,[4] {Cole} and {Rene} do not have a significant relationship, and {Rene} will be attending private school. CP at 9.

The conclusions of law at issue here provide:

2.1 The parents' obligation to contribute to post-secondary education expenses should be limited to the costs of attendance at a public institution.

2.2 The Faculty Scholarship which Rene received from Linfield College shall be subtracted from the costs of attending the University of Washington or Washington State University.

2.3 The remaining costs should be equally divided between the parents. {Cole's} obligation is $2,740, or $228 per month. CP at 10.

Shipley appeals.

ANALYSIS

Post-Majority Child Support

Estoppel

Shipley first argues that Cole should be estopped from seeking modification of the post-majority education provision because both she and Rene relied on the post-majority education provision as originally written and agreed to. To support this contention, Shipley argues that because she anticipated that Cole would abide by the original post-majority education provision, she never sought support modification that would have resulted in a significantly higher monthly support obligation under the current statutory child support schedule.

Because Cole is entitled by statute to seek modification, and because case law holds that collateral

estoppel may not be applied in cases of child support, Shipley's estoppel argument fails. In re Marriage of Studebaker, 36 Wn. App. 815, 817-18, 677 P.2d 789 (1984) ("principles of collateral estoppel . . . have no application in cases involving the custody and support of children") (citing In re Marriage of Cook, 28 Wn. App. 518, 521, 624 P.2d 743 (1981)); see also RCW 26.09.100(1) and (2).

Substantial Change in Circumstances

Shipley next contends that the trial court erred in finding that the estrangement between Cole and Rene was sufficient to support its conclusion that modification of the child support order was warranted. She asserts that there is no authority for the argument that the lack of a significant relationship constitutes a change in circumstances sufficient to justify a child support modification and that this finding is contrary to public policy.

We review child support modifications and adjustments for abuse of discretion. In re Marriage of Booth, 114 Wn.2d 772, 776, 791 P.2d 519 (1990). The challenging party must demonstrate that the trial court's decision is manifestly unreasonable, based on untenable grounds, or granted for untenable reasons. In re Marriage of Peterson, 80 Wn. App. 148, 152, 906 P.2d 1009 (1995), review denied, 129 Wn.2d 1014 (1996). To succeed on a motion to modify child support, the moving party must show a substantial change of circumstances since the entry of the dissolution decree. RCW 26.09.170. A deviation should be based on circumstances not existing or contemplated at the time the decree is entered. In re Marriage of Zander, 39 Wn. App. 787, 790, 695 P.2d 1007 (1985). Whether a substantial change of circumstances has occurred is a question of fact within the trial judge's discretion. Lambert v. Lambert, 66 Wn.2d 503, 508, 403 P.2d 664 (1965). Ample evidence in the record supports the trial court's finding of a substantial change in circumstances. Cole and Shipley have both remarried twice since the dissolution of their marriage. Cole has little to no relationship with Rene, who planned to attend a private college without telling him and who changed her name in 2000. Cole has a child support obligation with another daughter and also supports a step-daughter from his present marriage. It is not likely that Cole could have anticipated such circumstances when he and Shipley divorced. Thus, the trial court did not abuse its discretion.[5]

Private versus Public Education and Scholarship Deduction

Shipley further contends that the trial court erred in basing Rene's post-majority education support on the average cost of a local, public institution. We disagree. Once the trial court properly concluded that there had been a substantial change in circumstances, it was not limited by the dissolution decree language.[6] It did not abuse its discretion in limiting Cole's obligation on this basis, nor in dividing the costs equally between Cole and Shipley.

Shipley also asserts that the trial court abused its discretion by including Rene's scholarship from Linfield in its determination of the parties' modified post-majority education obligations. The trial court first found:

1.3 The parties' daughter, Rene, turned 18 on May 15th of this year. She is registered and planning to attend Linfield College, a private educational institution located in Oregon. {Rene} has received $8,300 in a Faculty Scholarship from Linfield College, which is available only if she attends Linfield. She has received an additional one-time award of $1,250 ($750 from Tumwater Education Foundation and $500 from Public School Employees of Washington).

1.4 The remaining cost to attend Linfield College for the 2001-2002 school year is $18,164.

1.5 The cost to attend the University of Washington and Washington State University averages $13,700. CP at 9.

The trial court then concluded:

2.2 The Faculty Scholarship which Rene received from Linfield College shall be subtracted from the costs of attending the University of Washington or Washington State University. CP at 10.

Our review is limited to determining whether substantial evidence supports the trial court's findings and, if so, whether the findings in turn support the trial court's conclusions of law. Rideout v. Rideout, 110 Wn. App. 370, 377, 40 P.3d 1192, review granted on other grounds, 147 Wn.2d 1008 (2002).

Here, substantial evidence does not support the trial court's finding that the Linfield Faculty Scholarship, which cannot be applied to any other institution, should be deducted from the cost of Rene attending a public college or university.[7] There is no evidence in the record showing the availability to Rene of a comparable level scholarship from a local, public institution. Thus, the trial court abused its discretion. That portion of its support modification order deducting $8,300 is reversed. The matter is remanded for a recalculation of the parties' respective support obligations, taking into account scholarship funds, if any, available to defray the cost of Rene attending a local, public institution.[8]

Attorney Fees

The trial court denied Shipley's request for attorney fees under RCW 26.09.140. Shipley argues that the trial court's decision that was apparently "based upon a comparison of the parties' financial resources" was error. Appellant's Br. at 17.

"`{A} reviewing court will not overturn a decision to grant or deny attorney's fees absent a showing of a manifest abuse of discretion.'" Lay v. Hass, 112 Wn. App. 818, 826, 51 P.3d 130 (2002) (citing Mackey v. Am. Fashion Inst. Corp., 60 Wn. App. 426, 429, 804 P.2d 642 (1991) (citing Bill of Rights Legal Found. v. Evergreen State Coll., 44 Wn. App. 690, 696, 723 P.2d 483 (1986))). Shipley fails to show that the trial court abused its discretion here.

Both parties seek attorney fees on appeal. Shipley cites no authority as a basis for an award of attorney fees and costs on appeal. We decline her request.

Citing RAP 18.9(a), Cole urges us to exercise our discretion to award fees to him for defending a "frivolous appeal."[9] Respondent's Br. at 20. Shipley clearly raised a meritorious issue and we decline to award Cole fees on appeal. Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Houghton, J.

We concur:

Morgan, J.

Quinn-Brintnall, A.C.J.

1. Cancelled child support checks provided in the record show that as of 1992, Denise had remarried and was Denise Clevenger, and that in late 1996, her name became Denise Shipley. We refer to her as Shipley.

2. The initial order of child support was never formally modified after it issued. Over the years, Cole voluntarily and gradually increased the payment to $470 per month.

3. Rene received a Linfield College Faculty Scholarship, defraying $8,300 of the yearly cost to attend.

4. Rene changed her last name from Cole to Clevenger "for purposes of college and so that she had her own identity." CP at 14. The record indicates that Cole was aware of but did not object to the name change.

5. We do not address whether any of these facts standing alone would support a substantial change of circumstances conclusion.

6. Although it is relatively difficult to obtain orders that modify final parenting plans and child support decrees, "the provisions of any decree respecting . . . support may be modified . . . upon a showing of a substantial change of circumstances." RCW 26.09.170(1)(b); In re Marriage of Barone, 100 Wn. App. 241, 247, 996 P.2d 654 (2000). See also, e.g., Pippins v. Jankelson, 110 Wn.2d 475, 478, 754 P.2d 105 (1988) (once court finds substantial change in circumstances, Washington courts have general and equitable powers to modify child support obligation); In re Marriage of Scanlon and Witrak, 109 Wn. App. 167, 171-72, 34 P.3d 877 (2001) (once sufficient basis for modification is established, court may modify original order in any respect).

7. Cole submitted In re Marriage of Boisen, 87 Wn. App. 912, 943 P.2d 682 (1997), review denied, 134 Wn.2d 1014 (1998), as additional authority after oral argument as "relevant to the issue of crediting post-secondary educational payments made from a third-party source." Respondent's Statement of Additional Authority at 1. We presume that Cole wants us to view the gratuitous payment in Boisen of post-secondary education costs made by a third party (a step-parent) equivalent to the payment toward tuition costs from scholarship funds awarded by an educational or other subsidizing institution. We see no such relationship and do not apply Boisen here.

8. Clearly, our opinion does not limit Rene to attending only a local, public institution. It only limits Cole's contribution to Rene's post-majority education, either at a public or private institution.

9. RAP 18.9(a) provides in part that an appellate court "on its own initiative or on motion of a party may order a party or counsel . . . who . . . files a frivolous appeal . . . to pay terms or . . . damages to any other party . . . or to pay sanctions to the court."