Marks v. Soles, A16A0723

Georgia Court of Appeals, Civil Case (11/10/2016, 12/21/2016)

Fun Times with the Family: Custody, Parenting Plans for children of Different Fathers, Joint Custody for Grandparents, Motion to Intervene, Child Support, Retroactive Child Support, Garnishment-This case has it all!

by: Margaret Gettle Washburn, sr. ed.

This is a very lengthy, but entertaining, opinion dealing with a single mother (Marks) who has 3 children by 2 different fathers, one father (Soles) is pro se and one of the fathers (Lane) got the grandparents involved. The Court of Appeals, Judge Elizabeth Branch, found that the trial court, Superior Court of Bulloch County, erred in granting joint legal custody of Brad Lane's child to the mother Marks, to the father Lane **AND** to Lane's parents, the child's paternal grandparents; stating for the Court of Appeals, that "joint custody arrangements do not include third parties when one or both parents are suitable custodians."

The Court reversed the grant of joint legal and primary physical custody in the third child to the paternal grandparents, as "joint custody arrangements do not include third parties when one or both parents are suitable custodians." The Court also noted that the trial court did not distinguish between legal and physical custody in its order on reconsideration. The trial court judge did not explain in his Order how he awarded the mother, Marks, joint legal custody after finding her unfit for what it called "primary custody."

> OCGA § 19-9-6 defines the terms "joint custody," "joint legal custody," and "joint physical custody" as follows:
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> (4) "Joint custody" means joint legal custody, joint physical custody, or both joint legal custody and joint physical custody. In making an order for joint custody, the judge may order joint legal custody without ordering joint physical custody.
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> (5) "Joint legal custody" means *both parents have equal rights and responsibilities* for major decisions concerning the child, including the child's education, health care, extracurricular activities, and religious training; provided, however, that the judge may designate one parent to have sole power to make certain decisions while both parents retain equal rights and responsibilities for other decisions.
>
> (6) "Joint physical custody" means that physical custody is shared *by the parents* in such a way as to assure the child of substantially equal time and contact with both parents. (emphasis supplied.)
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> The Court of Appeals found that on their face, subsections (5) and (6) of OCGA § 19-9-6 give the right of joint legal or physical custody only to "parents." Further:

> "the Supreme Court of Georgia emphasized that "joint custody arrangements do not include third parties when one or both parents are suitable custodians." *Stone v. Stone*, 297 Ga. 451 (774 SE2d 681) (2015) (footnote omitted). The Court quoted OCGA § 19-9-3 (a) (1), which provides that when custody is an issue between a child's parents, "there shall be no prima-facie right to the custody of the child in the father or the mother," as well as OCGA § 19-9-3 (d), which provides that [i]t is the express policy of this state to encourage that a child has continuing contact with parents and grandparents who have shown the ability to act in the best interest of the child and to encourage parents to share in the rights and responsibilities of raising their child after such parents have separated or dissolved their marriage or relationship.
>
> As the Court explained, OCGA § 19-9-3 (d) "includes grandparents with parents for purposes of contact (visitation) with the minor child, but, when rights and responsibilities (custody) are in consideration, the statute excludes grandparents and encourages sharing between the parents only." *Stone*, 297 Ga. at 453. The Court found further support for its holding in OCGA § 19-9-6 (5) and (11),[6] which "exclude grandparents from sharing joint custody with a parent" such that "persons may have sole legal custody of a child when no parent is suitable for custody, but only parents may have joint legal custody." Id. at 454."

The Court of Appeals also found that the trial court erred in incorporating the parenting plan for the third child into the parenting plan for the other two children, as the parenting plan pertaining to the third child was erroneous on its face in awarding joint legal custody to the grandparents, with the result that the trial court also erred when it incorporated that parenting plan as to the first and second children.

> "OCGA § 19-9-1 (a) provides in relevant part that "[t]he final order in any legal action involving the custody of a child, including modification actions, shall incorporate a permanent parenting plan." The statute does not require a trial court "to incorporate a particular party's parenting plan" or to make explicit findings of fact and conclusions of law "as to why it accepted or failed to accept a particular parenting plan." *Moore v. Moore-McKinney*, 297 Ga. App. 703, 710-711 (3) (678 SE2d 152) (2009). As we have held in Division 2, the parenting plan incorporated into the second order was erroneous on its face in awarding joint legal custody in the third child to his paternal grandparents, with the result that the trial court also erred when it incorporated that parenting plan as to the first and second children. We therefore remand with direction that any future modification of custody should include at least two new and discrete parenting plans, one for the third child and one for the first and second children. See *McKinney*, 297 Ga. App. at 711."

Accordingly, the Court remanded with direction that any future modification of custody should include at least two new and discrete parenting plans, one for the third child and one for the first and second children.

The mother, Marks, contended that the court erred in (a) considering the Father Soles' traverse to the garnishment, (b) imposing child support payments on her, the mother, **retroactive** to March 2013, (c) failing to consider the statutory Child Support Guidelines before awarding child support from Mother to Father Soles and (d) reducing Soles' child support arrearage amount from $12,000 to $5,000. The Court of Appeals agreed, in part: "Although OCGA § 18-4-10 now provides that a garnishment defendant's "answer shall be filed . . . not sooner than 30 days and not later than 45 days after the service of the summons" to the garnishment action, former OCGA § 18-4-65 provided that "when garnishment proceedings are based upon a judgment, the defendant, by traverse of the plaintiff's affidavit, may challenge the existence of the judgment or the amount claimed due thereon."

Next, the Court found that the trial court erred as a matter of law when it imposed child support payments on Marks retroactively to March 2013, as there was no evidence that Marks owed any child support payments before March 2014. Accordingly, the Court reversed that portion of the trial court's order. Finally, the trial court erred in entering a child support award as to the first and second children without using the Child Support Guidelines set out in O.C.G.A. § 19-6-15 to calculate that award.

> "A child support judgment cannot be modified retroactively," however. *Jarrett*, 259 Ga. at 561 (1) (citation omitted); see also OCGA § 19-6-17 (e). Rather, "'[a]n order modifying child support may operate only prospectively.'" *Wright v. Burch*, 331 Ga. App. 839, 843 (1) (c) (771 SE2d 490) (2015) (punctuation omitted), quoting *Robertson v. Robertson*, 266 Ga. 516, 518 (1) (467 SE2d 556) (1996). Thus although a trial court is authorized to "'modify child support obligations and enter orders regarding repayment of past due amounts . . . , it cannot simply forgive or reduce the past due amount owed under a valid child support order."

The record also shows that the trial court erred when it used Uniform Child Support Guidelines only as to the **third child, but entered child support awards as to the first and second children.** (emphasis supplied.)

"OCGA § 19-6-15 (k) (4) provides that a court modifying custody "shall enter a written order specifying the basis for the modification, if any, and shall include all of the information set forth in paragraph (2) of subsection (c) of this Code section," which provides in turn that the court "[s]hall (A) [s]pecify in what sum certain amount and from which parent the child is entitled to permanent support as determined by use of the worksheet" prepared by the parties or child support services.[9] The Child Support Guidelines of OCGA § 19-6-15 "'are mandatory and must be considered by a trier of fact setting the amount of child support.'" *Evans v. Evans*, 285 Ga. 319 (1) (676 SE2d 180) (2009), quoting *Swanson v. Swanson*, 276 Ga. 566, 567 (1) (580 SE2d 526) (2003). **Thus, the trial court erred when it entered a child support award as to the first and second children without using the Child Support Guidelines set out in OCGA § 19-6-15 to calculate that award."** (emphasis supplied.)

Accordingly, the Court vacated the remainder of the trial court's judgment and remanded for further proceedings.