

SUPREME COURT OF GEORGIA

Ward v. Ward, 289 Ga. 250

710 S.E.2d 555 (2011) · No. S11A0437 · Decided May 31, 2011

SUMMARY

The Supreme Court of Georgia reviewed a post-divorce proceeding involving visitation restrictions and an award of attorney fees. The court held that a restriction prohibiting all overnight male guests was overbroad and vacated the attorney-fee award because the trial court did not identify a statutory basis or make the required supporting findings. The judgment was reversed in part, vacated in part, and remanded.

CASE DETAILS

COURT	Supreme Court of Georgia
WRITING FOR THE COURT	Nahmias, Justice
JURISDICTION	Georgia
DECIDED	May 31, 2011
DOCKET	S11A0437
DISPOSITION	other
PROCEDURAL POSTURE	Dorene Ward appealed from a post-divorce modification and contempt proceeding in which the trial court declined to modify custody, increased her child-support obligation, restricted her visitation, and awarded Richard Ward attorney fees.
STANDARD OF REVIEW	The visitation restriction was reviewed for abuse of discretion. The attorney-fee award was reviewed to determine whether it had a valid statutory basis and adequate supporting findings.
PRECEDENTIAL VALUE	published precedential opinion
PARTIES	Dorene Ward v. Richard Ward

TOPICS

family law procedure child custody visitation child support appellate procedure

PRACTICE AREAS

family law appellate procedure remedies

QUESTIONS PRESENTED

1. Whether the trial court abused its discretion by prohibiting Dorene from having any overnight male guests while the children were present.
2. Whether the trial court properly awarded Richard attorney fees without identifying the statutory basis for the award or making the findings required by the applicable statute.
3. Whether Dorene waived her challenges to the visitation restriction and attorney-fee award on appeal.

HOLDINGS

1. A trial court may restrict a custodial parent's conduct when the evidence shows that the conduct or a third party's presence will adversely affect the children's best interests, but a restriction prohibiting all overnight male guests is overbroad when it also covers nonromantic visitors for whom no harmful effect is shown.
2. An attorney-fee award in a divorce-related proceeding cannot stand when the trial court does not identify the statutory basis for the award and does not make the findings required by that statute; the issue must be vacated and remanded for clarification and supporting findings.
3. Dorene did not waive her challenges to the visitation restriction and attorney-fee award.

KEY QUOTATIONS

“A trial court has discretion to place restrictions on custodial parents' behavior that will harm their children.” (710 S.E.2d at 556)

“Generally, an award of attorney fees is not available in Georgia unless authorized by statute or contract.” (710 S.E.2d at 557)

“An order awarding attorney fees under OCGA § 9-15-14 must include findings of conduct that authorize the award,” (710 S.E.2d at 557)

FACTUAL BACKGROUND

Dorene and Richard Ward were divorced in March 2007, and Richard received primary physical custody of their two young children. Dorene received substantial visitation and was ordered to pay child support. In the later proceeding, the trial court found Richard not in contempt, declined to change custody, increased Dorene's support obligation, prohibited her from having any overnight male guests while the children were present, and awarded Richard \$10,000 in attorney fees.

PROCEDURAL HISTORY

The parties were divorced in March 2007, with Richard Ward receiving primary physical custody and Dorene Ward receiving visitation and a child-support obligation. Dorene later sought contempt relief, sole custody, and child support, while Richard counterclaimed for increased support and attorney fees. The trial court denied contempt and custody modification, increased support, added an overnight-male-guest visitation restriction, and awarded \$10,000 in attorney fees. The Supreme Court of Georgia automatically granted Dorene's application to appeal because the case involved a child-custody issue.

DISPOSITION

other

REMAND INSTRUCTIONS

The visitation restriction is reversed. The attorney-fee award is vacated and remanded to the trial court to identify the statutory basis for the award and make any findings necessary to support it.

CASES CITED

- Arnold v. Arnold, 275 Ga. 354, 566 S.E.2d 679 (2002)
- Brandenburg v. Brandenburg, 274 Ga. 183, 551 S.E.2d 721 (2001)
- Moon v. Moon, 277 Ga. 375, 589 S.E.2d 76 (2003)
- Roberts v. Tharp, 286 Ga. 579, 690 S.E.2d 404 (2010)
- McDonogh v. O'Connor, 260 Ga. 849, 400 S.E.2d 310 (1991)
- Simmons v. Simmons, 288 Ga. 670, 706 S.E.2d 456 (2011)
- Cason v. Cason, 281 Ga. 296, 637 S.E.2d 716 (2006)

OPINION

NAHMIAS, J.

710 S.E.2d 555 (2011) 289 Ga. 250 WARD v. WARD. No. S11A0437. Supreme Court of Georgia. May 31, 2011. *556 Miller & Brown, John Broadhurst Miller, Fayetteville, for appellant. M. Barbara Gayle Moon, McDough, for appellee. NAHMIAS, Justice. Appellant Dorene Ward and appellee Richard Ward were divorced in March 2007. Richard was awarded primary physical custody of the parties' two young children.

Dorene was awarded substantial visitation and was required to pay child support. In February 2008, Dorene filed this action, seeking to hold Richard in contempt of the final divorce decree, to obtain sole custody of the children, and to obtain child support in the event child custody was given to her. Richard counterclaimed for an increase in child support and for attorney fees.

After a hearing, the trial court ruled that Richard was not in contempt, declined to modify custody, increased Dorene's monthly child support payment, amended the visitation provision of the final decree to provide that Dorene "shall not have any overnight male guests while the minor children are present," and awarded Richard \$10,000 in attorney fees. Dorene filed an application to appeal, which this Court automatically granted under OCGA § 5-6-35(j) because she had the right to a direct appeal under OCGA § 5-6-34(a)(11) based on the child custody issue she raised.

On appeal, Dorene contends that the trial court erred by adding the visitation provision and in awarding attorney fees.[1] 1. Dorene contends that the amended visitation provision is overbroad,

because on its face it prohibits her from having her father, a brother, a new spouse, or even the children's father spend the night at her house while the minor children are present.

We agree. A trial court has discretion to place restrictions on custodial parents' behavior that will harm their children. See *Arnold v. Arnold*, 275 Ga. 354, 354, 566 S.E.2d 679 (2002) (holding that if evidence shows that "exposure to a third party will have an adverse effect on the best interests of the children," a trial court may prohibit a parent "from exercising his or her custodial rights in that person's presence"); *Brandenburg v. Brandenburg*, 274 Ga. 183, 184, 551 S.E.2d 721 (2001) (holding that the husband's relationship with a girlfriend "could support the imposition of certain limitations upon his visitation rights if it was shown that such conduct adversely affects his children").

Here, however, even assuming that the evidence was sufficient to find that the children would be adversely affected if any boyfriends of Dorene spent the night with her, the restriction against "any overnight male guests" would prohibit Dorene from having visitors with whom she has no romantic relationship and for whom the record does not support a finding of any harmful effect on her children.

Accordingly, the trial court abused its discretion *557 in adopting this provision. See *Arnold*, 275 Ga. at 354, 566 S.E.2d 679; *Brandenburg*, 274 Ga. at 184, 551 S.E.2d 721. 2. We also agree with Dorene that the trial court erred in awarding attorney fees. "Generally, an award of attorney fees is not available in Georgia unless authorized by statute or contract."

Moon v. Moon, 277 Ga. 375, 378, 589 S.E.2d 76 (2003). Here, because the case involved an action for contempt of a divorce decree and modification of child support and was not purely an action for modification of custody, the award could have been based on OCGA § 19-6-2. See *Roberts v. Tharp*, 286 Ga. 579, 581, 690 S.E.2d 404 (2010); *McDonogh v. O'Connor*, 260 Ga. 849, 850, 400 S.E.2d 310 (1991).

OCGA § 19-6-2 "authorizes a trial court in a divorce action to exercise its sound discretion and, after considering the financial circumstances of the parties, to award attorney fees as necessary to ensure the effective representation of both parties." *Simmons v. Simmons*, 288 Ga. 670, 673, 706 S.E.2d 456 (2011).

The award of attorney fees also could have been based on OCGA § 9-15-14, which authorizes attorney fees in any civil action against a party who asserts frivolous claims or defenses. Where a review of the record does not reveal whether the trial court based the award on § 19-6-2 or § 9-15-14, "the issue of attorney fees must be remanded for an explanation of the statutory basis for the award and any findings necessary to support it."

Cason v. Cason, 281 Ga. 296, 300, 637 S.E.2d 716 (2006). Having reviewed the record in this case, we conclude that the award of attorney fees must be vacated and remanded. The trial court

did not specify the statutory basis for its award either at the final hearing or in its written order.

Although Richard also did not identify the statutory basis for his request for attorney fees, he moved for "reasonable attorney fees for having to defend this frivolous action," thus indicating that he was relying on OCGA § 9-15-14. At the hearing, after explaining its reasons for denying Dorene's request for custody modification, the trial court said that "this was a weak case for a change."

It is unclear whether the court meant for this remark to explain its award of attorney fees to Richard, as a "weak" case is not necessarily the same as a "frivolous" case, but the comment suggests that the court intended to award fees under OCGA § 9-15-14.

However, "[a]n order awarding attorney fees under OCGA § 9-15-14 must include findings of conduct that authorize the award," Cason, 281 Ga. at 300, 637 S.E.2d 716, and the trial court's order contains no such findings, so any award under § 9-15-14 cannot stand.

In addition, at the final hearing and in the court's order, there is no indication that the trial court made the award under OCGA § 19-6-2 based on the financial circumstances of the parties. Compare Simmons, 288 Ga. at 673-674, 706 S.E.2d 456 (concluding that the award was properly made pursuant to § 19-6-2 where the wife did not move for attorney fees under § 9-15-14, "there is no indication that the trial court considered an award of attorney fees on that basis," and the "record indicates that the trial court considered the relative financial positions of the parties").

Accordingly, we vacate the award of attorney fees and remand the issue to the trial court to explain "the statutory basis for the award" and to make "any findings necessary to support it." Cason, 281 Ga. at 300, 637 S.E.2d 716. Judgment reversed in part, vacated in part, and case remanded with direction. All the Justices concur. NOTES [1] We reject Richard's contention that Dorene waived her right to raise these two issues on appeal.