

IN THE MISSOURI COURT OF APPEALS WESTERN DISTRICT

COMPLETE TITLE OF CASE

NDEYE MARIEME NDIAYE,

Respondent,

v.

CHEIKH IBRA SEYE,

Appellant.

DOCKET NUMBER WD78558

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

DATE: May 10, 2016

APPEAL FROM

The Circuit Court of Boone County, Missouri
The Honorable Robert Sterner, Judge

JUDGES

Division Four: Ahuja, C.J., and Pfeiffer and Mitchell, JJ.

CONCURRING.

ATTORNEYS

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MISSOURI APPELLATE COURT OPINION SUMMARY MISSOURI COURT OF APPEALS, WESTERN DISTRICT

NDEYE MARIEME NDIAYE,)
)
 Respondent,)
v.) **OPINION FILED:**
) **May 10, 2016**
CHEIKH IBRA SEYE,)
)
 Appellant.)

WD78558

Boone County

Before Division Four Judges: Alok Ahuja, Chief Judge, and Mark D. Pfeiffer and Karen King Mitchell, Judges

Cheikh Ibra Seye (Father) appeals the trial court's judgment denying his motion to modify the parenting plan between himself and Ndeye Marieme Ndiaye (Mother), which was adopted by the court in 2012. The 2012 Judgment and Order granted the parents joint legal and physical custody of their two children, S.S. and M.S. In his motion to modify, Father sought sole legal custody and a modification of the joint physical custody of the children. He also requested that the trial court modify the child support award. The trial court found that there had not been a change in circumstances sufficient to warrant considering modification of either child support or custody. We affirm the trial court's judgment.

AFFIRMED.

Division Four holds:

1. If a motion to modify custody seeks to change the custody of the children from joint legal or physical custody to sole legal or physical custody or from sole custody in one parent to sole custody in the other parent, the change in circumstances required for such a modification must be substantial. This is because such a modification is premised upon a change in the factual underpinning of the original judgment, and in such circumstances it is fitting for courts to respect the finality of such judgments and to be unwilling to alter such judgments fundamentally without a showing that the change in circumstances is indeed substantial.

2. Where a motion to modify custody seeks only changes in terms related to the custodial arrangement, such as changes in the parenting time schedule or to the minor child's address for mailing and educational purposes, the change in circumstances need not be substantial; rather, all that is required is that a change has occurred in the circumstances of the children or their custodian. This is true even if the parents live a great distance from each other and a modification would significantly affect the children's lives.
3. Father has requested that custody be changed from joint legal custody with both parents to sole legal custody with Father. This is a "drastic" modification that would require a substantial change in circumstances to justify. Father has also requested that the physical custody remain joint, but that the children's address be changed to show Father as the residential parent, with the children residing with Father during the school year. This is simply a rearrangement in a joint physical custody schedule, which does not require that the change in circumstances be substantial. Father has not argued, either in his point relied on or the argument section of his brief, that there was a *substantial* change in circumstances. Rather, he argues that the trial court erred in not finding that the lesser standard of change in circumstances had been met. Accordingly, any argument that the trial court erred in not finding a substantial change in circumstances sufficient to warrant modifying joint legal custody to sole legal custody has been abandoned.
4. For a parent seeking modification to complain that he had insufficient input in decision-making so as to warrant a finding in change of circumstance, he must provide at least some evidence that, had he participated in the decision-making, different decisions would have been made. Father claims Mother took M.S. off of his ADHD medication without first consulting him. But Father testified that he agreed that M.S. should not be taking any medication, because "none of the medications he was taking . . . helped him." Accordingly, Father cannot challenge this decision as a change in circumstance.
5. Father alleges that Mother interfered with his phone calls with the children at designated times, as required by the parenting plan. Mother acknowledged that, when she was working, she did not always give the children's caregivers express instructions about when the children were to call Father, although she claimed they were free to initiate such calls. Moreover, Mother testified that she made sure that the children called Father regularly, even though the calls did not always come at the times stated in the parenting plan. The trial court was allowed to credit Mother's testimony, as well as to conclude that a technical violation of the parenting plan as to timing of phone calls between the children and Father did not result in a change in circumstances sufficient to warrant considering modification.
6. Father correctly notes that a breakdown in communication and inability of the parents to work together can constitute a change in circumstances. But here, the evidence is that parents have not communicated particularly well at any point. Indeed, in the 2012 modification, the court noted that Father and Mother "have had an acrimonious relationship" and that their communication "worsened when [Father] relocated to the state of Indiana." Anticipating that the parents would have difficulty communicating

constructively, the trial court directed them, in the parenting plan, to communicate only by text or email. Under these circumstances, unless the alleged communication problems are different in kind or severity than those anticipated by the parenting plan, they should not be considered a change of circumstances. The trial court did not err in determining that the failure to communicate had not deteriorated since its earlier judgment so as to represent a change in circumstances.

7. In addressing whether a *substantial* change in circumstances has occurred, courts have held that a *pattern* of ignoring the trial court's custody decree can constitute a change in circumstances sufficient to support modification, but that not every violation of a custody decree should be viewed to *per se*, warrant a modification of custody. While less significant violations of a decree would be sufficient to satisfy the lesser standard of a simple change in circumstances, isolated violations that do not have any effect on the moving parent's parental rights or relationship with the children are still insufficient to meet the threshold requirement for modification.
8. Mother's removal of M.S. from private school, after the school indicated that it did not have an appropriate class for his grade level, arguably did not violate the parenting plan, which contemplated that the children would eventually stop attending the private school "due to age."
9. While Mother's removal of S.S. from the private school, and subsequent homeschooling, was in violation of the parenting plan, the parties subsequently agreed that M.S. would be placed in public school, while S.S. would return to the private school. The trial court did not err in finding that this violation of the parenting plan, in combination with the technical violation of the parenting plan's procedures regarding phone calls taking place at specific times, did not constitute a change in circumstances sufficient to warrant considering modification of the parenting plan.
10. If, in a modification proceeding, the trial court determines that changes in circumstances have taken place, it must then make findings on whether the best interests of the children would be served by modifying custody. If the trial court does not find a change of circumstances, it never reaches the best interests issue. Because the trial court determined that there was not a change in circumstances sufficient to support considering modification, it was not required to reach the issue of best interests.
11. A parent requesting modification of child support must prove a substantial and continuing change in circumstances in order to justify the modification. When the parent's current payment for child support deviates by more than twenty percent from the presumed child support amount as calculated on the Form 14, this establishes a *prima facie* case of substantial and continuing change in circumstances, because there is a rebuttable presumption that the amount of child support calculated under Form 14 is the correct amount of child support.
12. Father's current payment for child support deviates by more than twenty percent from the presumed child support amount in the Form 14 that Father filed with his motion to

modify, which would normally be sufficient to establish a prima facie case of substantial and continuing change in circumstances. But the rule only applies to a correctly calculated Form 14. Father's Form 14 calculations, and request to modify, were based on the assumption that Father would receive primary custody of the children during the school year. In other words, Father's proposed Form 14 is based on the assumption that the trial court would grant his motion to modify the parenting time schedule and residential designation, which it did not. An incorrect Form 14 cannot support the modification of child support. Accordingly, the trial court did not err in finding that Father had failed to prove a substantial and continuing change in circumstances required to justify the modification of child support payments.

Opinion by: Karen King Mitchell, Judge

May 10, 2016

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THIS SUMMARY IS UNOFFICIAL AND SHOULD NOT BE QUOTED OR CITED.