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IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
June 20, 2023 Session

STEPHEN RUSHING v. DAWN RUSHING (STRICKLAND)

Appeal from the Chancery Court for Hamblen County
No. 2015-CV-249 Douglas T. Jenkins, Chancellor

No. E2022-01229-COA-R3-CV

This is an appeal of a modification to a permanent parenting plan. Dawn Rushing Strickland ("Mother") filed a motion to modify the permanent parenting plan governing the custody and visitation of two children from her prior marriage to Stephen Rushing ("Father"). The Chancery Court for Hamblen County ("Trial Court") granted the motion and modified the permanent parenting plan to designate Mother the primary residential parent and grant her 265 co-parenting days and Father 100 co-parenting days. Father has appealed. Upon our review of the final order, we conclude that the Trial Court erroneously considered Mother's gender in determining that a material change in circumstance had occurred affecting the children's best interest and that its finding that the best interest factors did not favor one parent over the other demonstrates that Mother failed to carry her burden of proof. We accordingly reverse the Trial Court's modification of the permanent parenting plan. Mother's request for attorney's fees on appeal is denied.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed; Case Remanded

D. MICHAEL SWINEY, C.J., delivered the opinion of the court, in which THOMAS R. FRIERSON, II, and KRISTI M. DAVIS, JJ., joined.

F. Clinton Little, Knoxville, Tennessee, for the appellant, Stephen Rushing.

Lauren Armstrong Carroll, Morristown, Tennessee, for the appellee, Dawn Rushing (Strickland).

OPINION

Background

Mother and Father have two daughters from their prior marriage to one another: Ember, born in 2009, and Autumn, born in 2011 (collectively, "the Children"). Although not stated in the record, Mother avers in her appellate brief that the parties divorced in 2015, while Father avers in his appellate brief that they divorced in 2016. Regardless of this disparity, the first document present in the record is a 2018 "Amended Final Order" and modified parenting plan entered by the Trial Court, permitting Father's relocation to Texas and denying Mother's petition in opposition to Father's relocation and her request for a modification of the parenting plan in her favor.

The 2018 permanent parenting plan ("2018 Plan") named Father the primary residential parent and granted him 236 days of co-parenting time and Mother 129 days of co-parenting time.[1] Mother's co-parenting time consisted of the Children's Summer Break, Spring Break, Fall Break, Christmas Break, and one "presumably long" weekend of Mother's choosing in the months of January, February, April, May, September, and October. The 2018 Plan also provided that Father would bear the cost of transporting the Children to Tennessee from his home in Texas to facilitate Mother's co-parenting time. The Children were to be flown to either Asheville, North Carolina, or Knoxville, Tennessee, where Mother would pick them up. In addition, the 2018 Plan provided that Mother would obtain a cell phone for the Children to facilitate communication between the parties and the Children. The eldest child, Ember, was to maintain possession of the cell phone. At the time of the Trial Court's entry of the 2018 Plan, the Children were eight and six years old.

Nearly four years later, on February 8, 2022, Mother filed in the Trial Court a "Petition for Contempt and to Modify the Permanent Parenting Plan," alleging that Father had failed to comply with the 2018 Plan on multiple occasions. Mother alleged that Father had not permitted her to exercise her co-parenting time during the Children's 2020 Spring Break and that he had arranged for the Children to fly to the Charlotte, North Carolina airport for their 2021 Spring Break visit with Mother, in contravention of the 2018 Plan's instruction that the Children arrive at either the Asheville, North Carolina airport or the Knoxville, Tennessee airport. She also alleged that Father, claiming to be unable to afford the Children's flight to Asheville or Knoxville, had offered to either drive the Children to Mother or fly the Children to Charlotte for their 2021 Christmas Break, resulting in either less co-parenting time for Mother or a farther drive for her to

[1] The original parenting plan was entered in January 2017. It is not included in the technical record. The 2018 Plan is a modification of the original parenting plan.

Charlotte. She also claimed that Father and the Children's paternal grandmother had confiscated the Children's cell phone that Mother purchased for them.

Mother further claimed that material changes in circumstance had arisen such that the 2018 Plan was no longer in the Children's best interest. Mother asserted the following as material changes in circumstance: (1) the Children were approaching an age in which they would experience physical and emotional changes that would be better handled and nurtured by their Mother; (2) the Children expressed their desire to live primarily with Mother, had been unable to freely communicate with Mother, and were often the "target" of Father's "frustrations and anger;" (3) the Children's paternal grandmother "significantly interferes in the parents' co-parenting" and the Children's ability to communicate with Mother; (4) the Children wish to spend more time with their half-sibling, Mother's child from a different relationship; (5) Mother has concerns about the Children's emotional health if they continue to reside primarily with Father due to information the Children and the Children's counselor have expressed to her; and (6) Father's relocation to Texas for his job has not resulted in "significantly more income" as he had claimed it would.

Mother included with her petition a proposed permanent parenting plan, naming her as the primary residential parent and granting her 265 days and Father 100 days of co-parenting time. Mother proposed that the modified plan take effect in June 2022. With Mother's proposed plan, Father would receive the Children's Fall Break, the second half of their Christmas Break, their Spring Break, the first half of their Summer Break, and one weekend of his choosing in the months when he has no scheduled co-parenting time.

On March 15, 2022, Mother filed a motion for judgment by default, averring that Father had failed to file an answer to her petition despite being served with the petition on February 11, 2022. The next week, Father filed a "Motion to Dismiss or in the Alternative Motion to Determine Jurisdiction Under U.C.C.J.E.A." In his filing, Father notified the Trial Court that he had made a formal request on March 1, 2022, with the "County Court at Law No. Three in Montgomery County, Texas" ("Texas Court") to register the 2018 Plan in accordance with Texas law. In addition, Father filed an "Original Petition in suit affecting the Parent-Child Relationship seeking to Modification [sic] of Out-of-State Order with Request for Temporary Orders." Father stated that these motions were pending in the Texas Court. Father contended that the Texas Court had obtained jurisdiction to hear Mother's petition and, alternatively, that the Trial Court and the Texas Court needed to confer and determine which court should exercise jurisdiction over the matter. Father claimed he could not adequately respond to Mother's petition until this jurisdictional question had been answered. Mother filed a response, in which she denied that the Texas Court had obtained jurisdiction over the Children and contended that she had not yet been served with any Texas filing.

The Trial Court and Texas Court conducted a Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") hearing via Zoom to determine which court was "the home state of the minor children and the more appropriate forum to exercise jurisdiction" in the action. The two courts determined that Mother's petition would be heard in Tennessee and that the Trial Court would maintain jurisdiction over the parties and the Children.

After this jurisdictional issue had been resolved, Father filed an answer to Mother's petition as well as a counter-petition. Therein, Father objected to "being compelled to respond to Mother's Petition because it is defective," arguing that Mother had failed to specify whether she was alleging civil contempt or criminal contempt. Father also denied all the allegations of Mother's petition. In his counter-petition, Father presented his own proposed changes to the 2018 Plan, proposing that he should be permitted to fly the Children to other airports given the significant increase in airline ticket prices, that transportation costs be shared between the parents, that he should be permitted to restrict access to the Children's cell phones as a form of discipline, that he should have the same access to their cell phones as Mother, that the holiday schedule should be revised, and that he should be able to claim the federal income tax deduction for the Children every tax year.[2] Father concomitantly filed a motion for a forensic custody evaluation due to the Children's involvement with a licensed mental health care provider and Mother's "obfuscation of her ability to properly care" for the Children.

Mother filed a response the next day. Mother noted Father's failure to comply with Tenn. Code Ann. § 36-6-405(a)'s requirement that his proposed parenting plan be filed and served with his counter-petition for modification and the response. Father did not file a proposed parenting plan. As such, Mother contended that the Trial Court should not consider Father's response or counter-petition and grant her motion for judgment by default. Mother also filed a response to Father's motion for a forensic custody evaluation, contending that Father's motion was a "delay tactic." Mother stated that the Children were provided mental health care by a therapist when they resided in Tennessee and that they had recently been seeing a therapist for eighteen months in Texas. The Texas-based therapist was scheduled to testify at trial.

The trial was on July 29, 2022, and the Trial Court entered a final order on August 5, 2022, modifying the 2018 Plan in Mother's favor and reflecting its findings of fact and conclusions of law. In its final order, the Trial Court made the following findings of fact:

1. Both parents are equally fit and proper parents capable of parenting the minor children;

[2] It is unclear from the record whether each child has her own cell phone or if they share one. Mother's filings suggest that each child has her own cell phone.

2. Since the Parties divorce, Father has dutifully fulfilled his parental role by caring for the minor children in his household;

3. Mother is now capable of also fulfilling her parental role by caring for the minor children in her household;[3]

4. The minor children's increased age and gender weigh in favor of designating Mother as the Primary Residential Parent and Father as the Alternate Residential Parent;

5. After the factors enumerated in *Tenn. Code Ann. §36-6-101(a)(2)(C)* and *Tenn. Code Ann. §36-6-106* are applied to the facts in this case, Mother has shown that a material change in circumstances exists;

6. The best interest factors are basically a tie between the parents;

7. The children need to be with their mother more right now to receive her attention and guidance[.]

The court made the following conclusions of law:

1. That, after considering each of the enumerated factors prescribed by *Tenn. Code Ann. §36-6-101(a)(2)(C)* and *Tenn. Code Ann. §36-6-106*, the Permanent Parenting Plan entered by this Court on April 12, 2018, shall be modified as the Current Petitioner/Mother has proven a material change in circumstances. Mother shall be designated as the Primary Residential Parent and Father shall be designated as the Alternate Residential Parent. The Modified Permanent Parenting Plan submitted by Mother shall be adopted and made an Order of this Court.

2. The parties shall appear before the Court in the Summer of 2023 for a review on how this modified Plan is going. At such time, the Court will review any warning signs or issues that may arise over the next year,

[3] The Trial Court does not provide details to explain why Mother was previously incapable of parenting the Children. Additional context can be gleaned from the transcript of the Court's oral ruling, in which it stated: "Ma'am, you have had . . . hard times you've been through here in the past. But the last couple of years I think you've done real well. And this gentleman that you've married I think is a good, stable factor in your life. You're doing a whole lot better. . . . She's really got her life straightened up."

and depending on this review, the Court may modify the schedule or leave the schedule as it is.

3. Father's Motion to Dismiss Mother's Petition for Contempt is DISMISSED;

4. Father's Counter-Petition to Modify the Permanent Parenting Plan is DENIED;

5. Father's Motion for Forensic Custody Evaluation is DENIED;

6. Father's Motion to Compel is DENIED;[4]

7. Father's Motion to Continue is DENIED;

8. Mother's Motion to Exclude Witness Testimony and Evidence is GRANTED in part and OVERRULED in part as Father was permitted to call certain witnesses and introduce certain evidence;[5]

9. Father's Motion to Bifurcate Contempt allegations and issues is DENIED as being MOOT;

10. Mother's Motion to Dismiss Father's Counter-Petition to Modify is DENIED as Father was permitted to introduce his requests for modification without being required to introduce a Proposed Permanent Parenting Plan;

11. The parties shall continue to ensure that the children participate in therapy with Theresa Burbank and the parties shall split the costs of same;

12. Each party shall be responsible for any attorney fees and costs they have individually incurred.

13. In accordance with *Tenn. R. Civ. P. 54.02(1)*, the Court has determined that there is no just reason for delay; therefore this Order shall be entered as a Final Order.

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[4] Father's Motion to Compel is not included in the technical record.

[5] Mother's motion to exclude witness testimony and evidence is not included in the technical record.

Father timely appealed.

Discussion

Although not stated exactly as such, Father raises two issues on appeal, which we have consolidated as follows: whether the Trial Court erred in modifying custody to designate Mother as the primary residential parent and, as a result, modifying the residential parenting schedule as well. Mother raises two additional issues, which we have slightly restated as follows: (1) whether Father's appeal should be dismissed due to his failure to provide this Court with a sufficient record of the evidence and (2) whether she should be awarded attorney's fees on appeal due to the purported frivolousness of Father's appeal.

Our Supreme Court has previously explained the standard of review for decisions relating to parenting plans, providing:

> In this non-jury case, our review of the trial court's factual findings is de novo upon the record, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. *See* Tenn. R. App. P. 13(d); *Kendrick v. Shoemake*, 90 S.W.3d 566, 570 (Tenn. 2002); *Hass v. Knighton*, 676 S.W.2d 554, 555 (Tenn. 1984). We review the trial court's resolution of questions of law de novo, with no presumption of correctness. *Kendrick*, 90 S.W.3d at 569. Statutory interpretation is a question of law, which we review de novo. *Mills v. Fulmarque*, 360 S.W.3d 362, 366 (Tenn. 2012).
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> A trial court's determinations of whether a material change in circumstances has occurred and whether modification of a parenting plan serves a child's best interests are factual questions. *See In re T.C.D.*, 261 S.W.3d 734, 742 (Tenn. Ct. App. 2007). Thus, appellate courts must presume that a trial court's factual findings on these matters are correct and not overturn them, unless the evidence preponderates against the trial court's findings. *See* Tenn. R. App. P. 13(d); *In re C.K.G.*, 173 S.W.3d [714] at 732 [(Tenn. 2005)]; *Kendrick*, 90 S.W.3d at 570; *Hass*, 676 S.W.2d at 555.
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> Because decisions regarding parenting arrangements are factually driven and require careful consideration of numerous factors, *Holloway v. Bradley*, 190 Tenn. 565, 230 S.W.2d 1003, 1006 (1950); *Brumit v. Brumit*, 948 S.W.2d 739, 740 (Tenn. Ct. App. 1997), trial judges, who have the opportunity to observe the witnesses and make credibility determinations, are better positioned to evaluate the facts than appellate judges. *Massey-*

> *Holt v. Holt*, 255 S.W.3d 603, 607 (Tenn. Ct. App. 2007). Thus, determining the details of parenting plans is "peculiarly within the broad discretion of the trial judge.'" *Suttles v. Suttles*, 748 S.W.2d 427, 429 (Tenn. 1988) (quoting *Edwards v. Edwards*, 501 S.W.2d 283, 291 (Tenn. Ct. App. 1973)). "It is not the function of appellate courts to tweak a [residential parenting schedule] in the hopes of achieving a more reasonable result than the trial court." *Eldridge v. Eldridge*, 42 S.W.3d 82, 88 (Tenn. 2001). A trial court's decision regarding the details of a residential parenting schedule should not be reversed absent an abuse of discretion. *Id.* "An abuse of discretion occurs when the trial court . . . appl[ies] an incorrect legal standard, reaches an illogical result, resolves the case on a clearly erroneous assessment of the evidence, or relies on reasoning that causes an injustice." *Gonsewski v. Gonsewski*, 350 S.W.3d 99, 105 (Tenn. 2011). A trial court abuses its discretion in establishing a residential parenting schedule "only when the trial court's ruling falls outside the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence found in the record." *Eldridge*, 42 S.W.3d at 88.

Armbrister v. Armbrister, 414 S.W.3d 685, 692-93 (Tenn. 2013).

This Court has outlined the analysis to be employed when a child's primary residential parent, as opposed to simply the details of the residential parenting schedule, is at issue:

> Adjudicating disputes over who should be designated the primary residential parent is one of a court's greatest responsibilities. *Massey-Holt v. Holt*, 255 S.W.3d 603, 607 (Tenn. Ct. App. 2007). A court's designation of the primary residential parent as part of a final decree of divorce is considered res judicata upon the facts in existence or those which were reasonably foreseeable when the decision was made. *Steen v. Steen*, 61 S.W.3d 324, 327 (Tenn. Ct. App. 2001). However, because circumstances change in unanticipated ways, courts are statutorily empowered to modify a primary residential parent designation. *See* Tenn. Code Ann. § 36-6-101(a)(1) (A decree awarding custody of minor child "shall remain within the control of the court and be subject to such changes or modification as the exigencies of the case may require.").
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> Courts apply a two-step analysis to requests to change the primary residential parent designation. *Keisling v. Keisling*, 196 S.W.3d 703, 718 (Tenn. Ct. App. 2005). The threshold issue is whether a material change in circumstance has occurred since the court's prior custody order. *See Armbrister v. Armbrister*, 414 S.W.3d 685, 697-98 (Tenn. 2013); Tenn.

> Code Ann. 36-6-101(a)(2)(B). Only if a material change in circumstance has occurred do we consider whether a modification is in the child's best interest. *Armbrister*, 414 S.W.3d at 705. The "determinations of whether a material change of circumstances has occurred and where the best interests of the child lie are factual questions." *In re T.C.D.*, 261 S.W.3d 734, 742 (Tenn. Ct. App. 2007).

Skowronski v. Wade, No. M2014-01501-COA-R3-CV, 2015 WL 6509296, at *5 (Tenn. Ct. App. Oct. 27, 2015).

Regarding a material change in circumstance to justify a change in custody, Tenn. Code Ann. § 36-6-101(a)(2)(B) (West July 1, 2021 to current) provides:

> (i) If the issue before the court is a modification of the court's prior decree pertaining to custody, the petitioner must prove by a preponderance of the evidence a material change in circumstance. A material change of circumstance does not require a showing of a substantial risk of harm to the child. A material change of circumstance may include, but is not limited to, failures to adhere to the parenting plan or an order of custody and visitation or circumstances that make the parenting plan no longer in the best interest of the child.

This Court has further elaborated on what may constitute a material change in circumstance, explaining:

> Although there are no bright-line rules for determining whether such a change has occurred, there are several relevant factors to consider: (1) whether the change occurred after the entry of the order sought to be modified; (2) whether the change was not known or reasonably anticipated when the order was entered; and (3) whether the change is one that affects the child's well-being in a meaningful way. *H.A.S. v. H.D.S.*, 414 S.W.3d 115, 123 (Tenn. Ct. App. 2013). "Not every change in a child's life or the life of his or her parents rises to the level of a material or significant change warranting a change in his or her primary residential parent." *In re Gunner F.*, No. M2016-01650-COA-R3-JV, 2017 WL 2438572, at *2 (Tenn. Ct. App. June 6, 2017). "Once the court has made an initial determination of custody, it is generally reluctant to change that determination unless it is clear that such a modification is necessary." *Canada v. Canada*, No. W2014-02005-COA-R3-CV, 2015 WL 5178839, at *4 (Tenn. Ct. App. Sept. 4, 2015).

McAdams v. McAdams, No. E2019-02150-COA-R3-CV, 2020 WL 4723762, at *4 (Tenn. Ct. App. Aug. 13, 2020).

We note, however, that a lower threshold of proof applies to a material change in circumstance to justify a change in the residential parenting schedule. This Court has recently explained:

> Notably, the law regards a change in a parenting *schedule* differently than a change in the primary residential parent. As this Court has previously explained,
>
> > Tennessee now has a different set of criteria for determining whether a material change of circumstance has occurred to justify a modification of a "residential parenting schedule" and the specifics of such a schedule. The amendment, specifically the addition of subsection [Tenn. Code Ann. 36-6-101](a)(2)(C), establishes different criteria and a lower threshold for modification of a residential parenting schedule. *See Rose v. Lashlee*, No. M2005-00361-COA-R3-CV, 2006 WL 2390980, at *2, n. 3 (Tenn. Ct. App. Aug. 18, 2006) (holding that Tenn. Code Ann. § 36-6-101(a)(2)(C) "sets a very low threshold for establishing a material change of circumstances"). However, the statutory criteria pertaining to a modification of "custody"-the term used in the statute, which we equate to the designation of "primary residential parent" and matters more substantive than a change of schedule-remain unchanged. *See* Tenn. Code Ann. § 36-6-101(a)(2)(B).
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> *Scofield v. Scofield*, No. M2006-00350-COA-R3-CV, 2007 WL 624351, at *3 (Tenn. Ct. App. Feb. 28, 2007). Consequently, "a different standard applies when a parent seeks modification of a residential schedule but not the designation of the primary residential parent." *McAdams*, 2020 WL 4723762, at *3 n.4. Stated differently, "Tennessee courts have required a higher measure of proof when the petitioner seeks a change in custody (*i.e.*, a change in the primary residential parent) than when he or she seeks only a change in the existing parenting schedule." *Tutor v. Tutor*, No. W2019-00544-COA-R3-CV, 2020 WL 1158075, at *2 (Tenn. Ct. App. Mar. 10, 2020); *see also Pippin* [*v. Pippin*], 277 S.W.3d [398] at 407 [(Tenn. Ct. App. June 4, 2008)] ("[B]ecause [f]ather's petition seeks a change of primary residential parent status, i.e., a change of 'custody,' we conclude that the lower threshold contained in Tenn. Code Ann. § 36-6-101(a)(2)(C) simply does not apply.").

L.A.S. v. C.W.H., No. E2021-00504-COA-R3-JV, 2022 WL 17480100, at *5-6 (Tenn. Ct. App. Dec. 7, 2022).

Once a court determines that a material change in circumstance has occurred, it must then consider the best interest of the child or children involved. Tenn. Code Ann. § 36-6-106(a) (West July 1, 2021 to March 17, 2022) sets forth the following factors relevant to the best interest of the child:

> (a) In a suit for annulment, divorce, separate maintenance, or in any other proceeding requiring the court to make a custody determination regarding a minor child, the determination shall be made on the basis of the best interest of the child. In taking into account the child's best interest, the court shall order a custody arrangement that permits both parents to enjoy the maximum participation possible in the life of the child consistent with the factors set out in this subsection (a), the location of the residences of the parents, the child's need for stability and all other relevant factors. The court shall consider all relevant factors, including the following, where applicable:
> (1) The strength, nature, and stability of the child's relationship with each parent, including whether one (1) parent has performed the majority of parenting responsibilities relating to the daily needs of the child;
> (2) Each parent's or caregiver's past and potential for future performance of parenting responsibilities, including the willingness and ability of each of the parents and caregivers to facilitate and encourage a close and continuing parent-child relationship between the child and both of the child's parents, consistent with the best interest of the child. In determining the willingness of each of the parents and caregivers to facilitate and encourage a close and continuing parent-child relationship between the child and both of the child's parents, the court shall consider the likelihood of each parent and caregiver to honor and facilitate court ordered parenting arrangements and rights, and the court shall further consider any history of either parent or any caregiver denying parenting time to either parent in violation of a court order;
> (3) Refusal to attend a court ordered parent education seminar may be considered by the court as a lack of good faith effort in these proceedings;
> (4) The disposition of each parent to provide the child with food, clothing, medical care, education and other necessary care;
> (5) The degree to which a parent has been the primary caregiver, defined as the parent who has taken the greater responsibility for performing parental responsibilities;
> (6) The love, affection, and emotional ties existing between each parent and the child;
> (7) The emotional needs and developmental level of the child;

> (8) The moral, physical, mental and emotional fitness of each parent as it relates to their ability to parent the child. The court may order an examination of a party under Rule 35 of the Tennessee Rules of Civil Procedure and, if necessary for the conduct of the proceedings, order the disclosure of confidential mental health information of a party under § 33-3-105(3). The court order required by § 33-3-105(3) must contain a qualified protective order that limits the dissemination of confidential protected mental health information to the purpose of the litigation pending before the court and provides for the return or destruction of the confidential protected mental health information at the conclusion of the proceedings;
> (9) The child's interaction and interrelationships with siblings, other relatives and step-relatives, and mentors, as well as the child's involvement with the child's physical surroundings, school, or other significant activities;
> (10) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment;
> (11) Evidence of physical or emotional abuse to the child, to the other parent or to any other person. The court shall, where appropriate, refer any issues of abuse to juvenile court for further proceedings;
> (12) The character and behavior of any other person who resides in or frequents the home of a parent and such person's interactions with the child;
> (13) The reasonable preference of the child if twelve (12) years of age or older. The court may hear the preference of a younger child upon request. The preference of older children should normally be given greater weight than those of younger children;
> (14) Each parent's employment schedule, and the court may make accommodations consistent with those schedules; and
> (15) Any other factors deemed relevant by the court.

We first address Mother's argument that we should not reach the substantive issues of Father's appeal due to his failure to provide an adequate transcript of the trial in the appellate record. Mother argues that "without reviewing the testimony of the parties, the children and the children's therapist, that took place over the course of several hours, this Court should affirm the Chancery Court's decision." Although we agree with Mother that ideally, we would have been provided a complete transcript of the trial to review, we note that Father is not challenging the Trial Court's findings of fact or arguing that the evidence at trial did not support the Trial Court's findings. Rather, Father is arguing that the Trial Court's findings of fact, taken as supported by the evidence, fail to support its ultimate conclusion that a material change in circumstance had occurred and that a modification of the parenting plan was in the Children's best interest. In doing so,

Father is presenting a question of law, whether the Trial Court correctly applied the law to the facts as found by the Trial Court.

Considering that Father's contentions have to do with the sufficiency of the Trial Court's findings of fact and its application of the law, rather than the sufficiency of the evidence to support those findings, we may proceed to review the Trial Court's order to determine whether its findings of fact are deficient without need of a transcript or statement of the evidence. *See Gross v. McKenna*, No. E2005-02488-COA-R3-CV, 2007 WL 3171155, at *3 (Tenn. Ct. App. Oct. 30, 2007) ("Because of the absence of a proper record, we are limited to addressing those issues which raise pure questions of law, as well as any issues challenging the trial judge's application of the law to the *facts as stated by the judge himself* in his memorandum opinions."). In doing so, we presume that the evidence supported the Trial Court's findings of fact. *See In re K.A.P.*, No. W2012-00281-COA-R3-JV, 2013 WL 6665012, at *6 (Tenn. Ct. App. Dec. 17, 2013) ("Where the appellant fails to prepare an adequate appellate record, we are unable to determine where the preponderance of the evidence lies as to the trial court's findings of fact and have no choice but to assume that the record, had it been preserved and provided to us, would have contained sufficient evidence to support those factual findings.")

In contesting the Trial Court's determination that Mother proved that a material change in circumstance had occurred, Father has argued:

> Despite finding that both parents are fit and proper parents capable of parenting the minor children, that [Father] has dutifully fulfilled his parental role by caring for the minor children in his household, and that the best-interest factors are "basically a tie" between the parents, [t]he trial court summarily stated that after applying the best-interest factors enumerated in *Tenn. Code Ann. § 36-6-101(a)(2)(c)* and *Tenn. Code Ann. § 36-6-106* are applied to the facts presented, [Mother] "has shown that a material change in circumstances exists." The trial court then found that only two (2) *changes* were actually found: 1) That [Mother] is "now capable of also fulfilling her parental role by caring for the minor children in her household;" and 2) The minor children's "increased age and gender weigh in favor of designating [Mother] as the Primary Residential Parent and [Father] as the Alternate Residential Parent."

Father accordingly argues that the Trial Court erred by considering Mother's gender in violation of Tenn. Code Ann. § 36-6-101(d) and by considering the Children's increased ages, a change that was reasonably anticipated at the time the 2018 Plan was entered.

We agree with Father that the Trial Court erred by considering Mother's gender in finding that a material change in circumstance had occurred. Tenn. Code Ann. § 36-6-101(d) (West July 1, 2021 to current) provides: "It is the legislative intent that the gender

of the party seeking custody shall not give rise to a presumption of parental fitness or cause a presumption or constitute a factor in favor or against the award of custody to such party." We observe that the Trial Court's order provides very few findings of fact and scant reasoning to explain those findings or why they constituted a material change in circumstance justifying a modification of the parenting plan. Nevertheless, one of the few findings of fact provided by the Trial Court to support its determination that a material change in circumstance had occurred was related to gender. The Trial Court clearly considered Mother's gender as a factor in favor of changing custody and making her the primary residential parent. The Trial Court found: "The minor children's increased age and gender weigh in favor of designating Mother as the Primary Residential Parent and Father as the Alternate Residential Parent." This presumption by the Trial Court is contrary to the stated intent of Tenn. Code Ann. §36-6-101(d). Our General Assembly has made this policy determination, and we must apply it. We, therefore, conclude that the Trial Court misapplied the law when determining whether a material change in circumstance had occurred and the best interest of the Children by arriving at and applying a presumption in favor of Mother due to her gender.

Furthermore, even assuming that the Trial Court's remaining two findings of fact, (1) that Mother was now able to take care of the Children in her home and (2) that the Children were now older, constitute material changes in circumstance, we still must reverse the Trial Court's modification of the 2018 Plan given that it found that the best interest factors were "basically a tie between the parents." *See Keisling v. Keisling*, 196 S.W.3d 703, 718 (Tenn. Ct. App. 2005) ("If a material change in circumstances has occurred, the trial court must then proceed to the second step in the analysis, that is, determining whether the modification of custody is in the child's best interest in light of the factors enumerated in Tennessee Code Annotated § 36-6-106."). We emphasize that: "When a petition to change custody is filed, the parent seeking the change has the burden of showing (1) that a material change in circumstances has occurred and (2) that a change in custody or residential schedule is in the child's best interest." *Webb v. Webb*, No. M2008-02039-COA-R3-CV, 2009 WL 3321038, at *3 (Tenn. Ct. App. Oct. 14, 2009). Mother bore the burden of proving that a change in the 2018 Plan was in the Children's best interest. Based on the face of the order, Mother did not carry her burden. The Trial Court did not find that it was in the best interest of the Children for Mother to now have custody but rather that it was "basically a tie" and that both parents were "equally fit and proper parents capable of parenting the minor children." The Trial Court's best interest analysis was inconclusive in that it failed to find that the best interest factors weighed in favor of one parent over the other. Without more, we cannot conclude that the Trial Court properly made a best interest determination justifying custody modification of the 2018 Plan. Again, taking the Trial Court's findings of fact as being supported by the evidence, these findings of fact fail to establish that Mother satisfied her burden that modification of the 2018 Plan as the Trial Court did was in the best interest of the Children.

Mother requests that we award her attorney's fees on appeal, arguing that Father's appeal is frivolous. Tenn. Code Ann. § 27-1-122 addresses damages for frivolous appeals:

> When it appears to any reviewing court that the appeal from any court of record was frivolous or taken solely for delay, the court may, either upon motion of a party or of its own motion, award just damages against the appellant, which may include, but need not be limited to, costs, interest on the judgment, and expenses incurred by the appellee as a result of the appeal.

Given the outcome of this appeal, we conclude that Father's appeal was not frivolous and deny Mother's request for attorney's fees.

Conclusion

Having concluded that the Trial Court erred by considering Mother's gender to arrive at and apply a presumption in favor of Mother and by modifying the permanent parenting plan despite finding that the best interest factors did not favor one parent over the other, we reverse the Trial Court's modification of the permanent parenting plan. We also deny Mother's request for attorney's fees on appeal. This cause is remanded to the Trial Court for collection of costs below. The costs on appeal are assessed against the Appellee, Dawn Rushing (Strickland), and her surety, if any.

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D. MICHAEL SWINEY, CHIEF JUDGE