

FILED

02/27/2023

Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
November 30, 2022 Session

KAREN H. BUNTIN v. DAVID W. BUNTIN

**Appeal from the Circuit Court for Hamilton County
No. 20D1610 L. Marie Williams, Judge**

No. E2022-00017-COA-R3-CV

This divorce action involves a marriage of twenty-one years' duration wherein the husband maintained a significantly greater earning capacity than that of the wife. The trial court ordered the husband to pay transitional alimony to the wife during the time she sought to obtain her Ph.D. and for two years thereafter, or for seven years from the time of the divorce, whichever time period was shorter. The amount of the husband's child support obligation was reduced to zero because he had agreed to pay the minor children's private school tuition. Furthermore, the trial court's net division of the parties' marital assets and liabilities was nearly equal, and the trial court awarded attorney's fees to the wife. The husband has appealed. Discerning no reversible error, we affirm the trial court's judgment in its entirety. We further determine that the wife is entitled to an award of attorney's fees incurred on appeal, and we remand this matter for the trial court's determination concerning the proper amount to be awarded.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Affirmed; Case Remanded**

THOMAS R. FRIERSON, II, J., delivered the opinion of the court, in which JOHN W. MCCLARTY and KRISTI M. DAVIS, JJ., joined.

John P. Konvalinka and Lawson Konvalinka, Chattanooga, Tennessee, for the appellant, David W. Buntin.

Susie Lodico, Chattanooga, Tennessee, for the appellee, Karen H. Buntin.

OPINION

I. Factual and Procedural Background

This case originated with the filing of a complaint for divorce by Karen H. Buntin (“Mother”) against David W. Buntin (“Father”) on September 18, 2020, in the Hamilton County Circuit Court (“trial court”). In the complaint, Mother stated that two sons had been born of the parties’ marriage, R.B. and E.B (“the Children”), who were ages sixteen and fifteen, respectively, at the time of the complaint’s filing. Mother averred that the parties had been married since July 8, 2000, and that irreconcilable differences had arisen between them. Mother requested that the trial court grant a divorce; designate her as primary residential parent of the Children; adopt her proposed parenting plan, which suggested co-parenting time for Father on alternating weekends and holidays; equitably divide the marital assets and liabilities; and award to her child support, temporary alimony, permanent alimony, and attorney’s fees.

On September 24, 2020, Father filed a motion seeking to modify the statutory injunction concerning marital assets to allow Father to purchase a residence. Father proposed that he would be solely liable for any indebtedness related thereto and attached a purchase and sale contract for a residence on Seven Pines Lane in Chattanooga. The trial court subsequently entered an agreed order authorizing Father to purchase the residence and providing that the funds utilized for the down payment “shall be considered in the final distribution of the marital estate.” This order further directed that Father be solely responsible for any debt related to the residence, which liability would be characterized as his separate obligation.

On February 24, 2021, Father filed an answer and counterclaim for divorce. Father requested that the parties be named joint residential parents of the Children and proposed a parenting plan providing equal co-parenting time for each parent. Both parties subsequently filed income and expense statements, and Father filed an itemized list detailing the parties’ assets and liabilities.

On May 20, 2021, the parties entered a written stipulation agreeing to a designation of joint primary residential parents and equal co-parenting time for each party. The parties further stipulated that a divorce decree should be entered pursuant to Tennessee Code Annotated § 36-4-129. The stipulation also assigned values to a majority of their assets and liabilities, as shown on an attached list, and contained an agreement that their personalty had already been equitably distributed. The parties further agreed that Mother’s parents would testify that (1) Mother and Father are good parents and (2) Mother’s parents had given Mother and Father a total of \$25,000.00 per year from the time R.B. began his education at McCallie School (“McCallie”) through 2020.

The trial court conducted a bench trial on May 25, 2021, hearing testimony from each party and from Father's employer. On June 3, 2021, Father filed a motion requesting that the trial court enter a final decree declaring the parties divorced in accordance with their stipulation of grounds. Father also asked that the trial court consider Mother's recent unilateral increase in marital debt when allocating such liabilities. Mother objected to entry of the divorce decree, asserting that it would result in her having no means of support. Mother further responded that the items she had charged on the joint credit card were (1) her attorney's fees, which she had requested the court to allocate to Father when the marital estate was distributed, and (2) a bed frame and mattress for one of the parties' sons.

Pursuant to the trial court's request at the conclusion of trial, each party filed proposed findings of fact and conclusions of law. On August 12, 2021, the trial court entered a memorandum opinion, approving the parties' stipulations that their marriage was of twenty-one years' duration, that two children had been born thereof, and that grounds for divorce existed. The parties also had stipulated to a permanent parenting plan ("PPP") affording each party 182.5 days per year with the Children. Therefore, according to the court, the remaining issues for adjudication included only the equitable distribution of marital assets and liabilities; the value of certain assets and liabilities; whether Mother's request for alimony should be granted and, if so, what type and amount should be awarded; and the appropriate amount of child support to be ordered.

Before distributing the parties' marital assets and liabilities, the trial court made findings concerning each party's credibility. The trial court determined that Mother was "generally" more credible because "her analysis of the overall family economic situation [was] more realistic and practical and focused on the entire family." By contrast, the court found that Father's "view of the facts was focused on himself primarily" and that "[t]his perspective color[ed] his testimony."

The trial court considered the factors enumerated in Tennessee Code Annotated § 36-4-121 concerning an equitable distribution of the parties' assets. The court noted that the parties had been married for twenty-one years and that while Father enjoyed good health, Mother had endured a cancer diagnosis. Although Mother had recovered well, she was required to monitor her health via "expensive scans." The court also determined that Father's earning capacity was substantially higher than Mother's in that Father's year-to-date earnings would yield an annual income of \$360,000.00 to \$460,000.00 depending on how Father's earnings were averaged. On this point, the court elaborated:

When variable income is before the Court, it is appropriate for the Court to average the income over a reasonable period of time which time period is consistent with the circumstances of the case. *Hayes vs Hayes*, No. M201400237COAR3CV, 2015 WL 1450998 (Tenn. Ct. App. March 26, 2015). Generally speaking, averaging the income figures over a short

period of time may give an inaccurate reflection of the income available to a party. The Court finds in this situation [Father's] income has steadily increased and increased by significant amounts each year. Therefore, averaging his income over a long period of time does not have the effect of "smoothing out" the fluctuations. Rather, it results in an inaccurate picture of his current financial position. [Father's] taxable income over the last 4 years has been as follows:

2017	\$156,043.00
2018	\$176,563.00
2019	\$255,468.00
2020	\$352,237.00
January 1, 2021 - May 8, 2021	\$162,912.36

(If this earning trend continues he will earn \$464,554.78 in 2021)

Accordingly, the Court will do a one-year average to arrive at his estimated income. In 2021, [Father] earned an average of \$38,712.00 per month for four months or a total of \$154,848.00. In eight months in 2020, he earned income at the rate of \$29,353.08 a month or \$234,824.00. Averaging eight months of his 2020 income and four months of his 2021 income results in an average annual income of \$389,672.00 or \$32,472.00 per month.

The trial court found that although Mother's income had also experienced fluctuations spanning the last few years, they could be "smoothed out" by averaging Mother's income over a longer period of time. The court determined Mother's gross monthly wages to be \$1,432.98. Mother had been employed as a teacher since returning to the work force in 2009 after staying home with the Children for several years. According to the trial court, Mother was also pursuing a Ph.D. program that would require five years to complete.

The trial court determined that Father enjoyed greater earning capacity and a greater ability to acquire assets than Mother. Although the court observed that Father was "vastly less thrifty" than Mother, it found that both parties had contributed to the marital estate. The court specifically found that Mother's attention to the home had enabled Father to dedicate his time to his career as a financial advisor and to increase his earnings.

After valuing Father's Range Rover automobile at \$30,000.00, the trial court awarded to Father marital assets valued at \$561,918.00 while awarding to Mother marital assets valued at \$817,181.00. With reference to liabilities, the court directed Father to pay marital debt totaling \$60,984.80 and ordered Mother to pay marital liabilities, including the mortgage associated with the marital residence, totaling \$310,518.20.

Accordingly, the net sum of marital assets minus liabilities awarded to Father was \$500,933.20 while Mother was awarded a net total of \$506,662.80.

Concerning child support, the trial court noted that Father's presumptive child support obligation would be \$2,780.00 per month. However, the court found that the Children's collective private school tuition was \$41,780.00 per year and that Father had agreed to pay such expense. Because the tuition amount exceeded the presumptive child support obligation, the trial court reduced the amount of Father's child support obligation to zero and ordered Father to pay the private school expenses for the Children as a child support deviation.

Respecting Mother's request for spousal support, the trial court determined that even if Mother completed her Ph.D. and thereby increased her earning capacity, she would still earn significantly less income than Father. The court found that Mother had demonstrated a need for alimony in the amount of \$6,000.00 per month plus a need for health insurance. The court ordered Mother to obtain health insurance comparable to her current coverage under Father's plan. Father was ordered to pay the premium for such coverage as transitional alimony until Mother completed her Ph.D. program and obtained employment or for seven years, whichever time period was less. The court further ordered Father to pay transitional alimony of \$6,000.00 per month to Mother for seven years or until two years after Mother completed her Ph.D. program, whichever period was shorter. In support, the court found that although Mother could be rehabilitated to some degree, she could not be rehabilitated to match the earning capacity of Father or the lifestyle the parties enjoyed prior to the divorce.

With regard to Mother's claim for an award of attorney's fees as alimony *in solido*, the trial court reserved this issue for further proof following Mother's receipt of an updated fee statement. The court assessed court costs to Father.

On September 24, 2021, Mother filed a motion for contempt, alleging that Father had removed her access to the joint American Express card and joint First Horizon financial accounts. Mother also related that Father had terminated the authorization for automatic payments for Mother's vehicle and for the mortgage concerning the marital residence to be made from the parties' joint account without notifying Mother, causing those payments to become delinquent. Mother subsequently filed a motion for an award of attorney's fees, seeking an award in the amount of \$14,844.61. Mother's counsel filed an affidavit in support of the motion.

On September 30, 2021, the trial court entered a decree of divorce, incorporating its August 12, 2021 memorandum opinion. Mother thereafter filed a supplemental motion for an award of attorney's fees, revising the amount sought to \$18,070.31. On December 2, 2021, the trial court entered an order granting attorney's fees to Mother in the full amount requested. Father timely appealed.

II. Issues Presented

Father presents the following issues for this Court's review, which we have restated slightly:

1. Whether the trial court erred in the amount by which it deviated downward from the presumptive child support obligation.
2. Whether the trial court erred in the amount of alimony awarded to Mother considering her actual need.
3. Whether the trial court erred in the duration of its transitional alimony award.
4. Whether the trial court erred in the division of marital assets by awarding to Mother nearly all of the tax-advantaged accounts.
5. Whether the trial court erred in ordering Father to pay Mother's attorney's fees.

Mother presents the following additional issue:

6. Whether Mother is entitled to an award of attorney's fees on appeal.

III. Standard of Review

Determinations regarding child support are reviewed under an abuse of discretion standard. *See Mayfield v. Mayfield*, 395 S.W.3d 108, 114-15 (Tenn. 2012); *State ex rel. Williams v. Woods*, 530 S.W.3d 129, 136 (Tenn. Ct. App. 2017). As this Court has explained:

Prior to the adoption of the Child Support Guidelines, trial courts had wide discretion in matters relating to child custody and support. *Hopkins v. Hopkins*, 152 S.W.3d 447, 452 (Tenn. 2004) (Barker, J., dissenting). Their discretion was guided only by broad equitable principles and rules which took into consideration the condition and means of each parent. *Brooks v. Brooks*, 166 Tenn. 255, 257, 61 S.W.2d 654, 654 (1933). However, the adoption of the Child Support Guidelines has limited the courts' discretion substantially, and decisions regarding child support must be made within the strictures of the Child Support Guidelines. *Berryhill v. Rhodes*, 21 S.W.3d 188, 193 (Tenn. 2000); *Jones v. Jones*, 930 S.W.2d 541,

545 (Tenn. 1996); *Smith v. Smith*, 165 S.W.3d 279, 282 (Tenn. Ct. App. 2004).

* * *

Because child support decisions retain an element of discretion, we review them using the deferential “abuse of discretion” standard. This standard is a review-constraining standard of review that calls for less intense appellate review and, therefore, less likelihood that the trial court’s decision will be reversed. *State ex rel. Jones v. Looper*, 86 S.W.3d 189, 193 (Tenn. Ct. App. 2000); *White v. Vanderbilt Univ.*, 21 S.W.3d 215, 222-23 (Tenn. Ct. App. 1999). Appellate courts do not have the latitude to substitute their discretion for that of the trial court. *Henry v. Goins*, 104 S.W.3d 475, 479 (Tenn. 2003); *State ex rel. Vaughn v. Kaatrude*, 21 S.W.3d 244, 248 (Tenn. Ct. App. 2000). Thus, a trial court’s discretionary decision will be upheld as long as it is not clearly unreasonable, *Bogan v. Bogan*, 60 S.W.3d 721, 733 (Tenn. 2001), and reasonable minds can disagree about its correctness. *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001); *State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000). Discretionary decisions must, however, take the applicable law and the relevant facts into account. *Ballard v. Herzke*, 924 S.W.2d 652, 661 (Tenn. 1996). Accordingly, a trial court will be found to have “abused its discretion” when it applies an incorrect legal standard, reaches a decision that is illogical, bases its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party. *Perry v. Perry*, 114 S.W.3d 465, 467 (Tenn. 2003); *Clinard v. Blackwood*, 46 S.W.3d 177, 182 (Tenn. 2001); *Overstreet v. Shoney’s, Inc.*, 4 S.W.3d 694, 709 (Tenn. Ct. App. 1999).

Richardson v. Spanos, 189 S.W.3d 720, 725 (Tenn. Ct. App. 2005).

Regarding adherence to the Guidelines, this Court has explained:

In Tennessee, awards of child support are governed by the Child Support Guidelines (“the Guidelines”) promulgated by the Tennessee Department of Human Services Child Support Services Division. Tenn. Code Ann. § 36-5-101(e)(2). Tennessee’s Child Support Guidelines have the force of law. *Jahn v. Jahn*, 932 S.W.2d 939, 943 (Tenn. Ct. App. 1996). Statutes and regulations pertaining to child support are intended to “assure that children receive support reasonably consistent with their parent or parents’ financial resources.” *State ex rel. Vaughn v. Kaatrude*, 21 S.W.3d 244, 248-49 (Tenn. Ct. App. 2000); *see also* Tenn. Comp. R. & Regs. 1240-02-04-.01(3)(e). Courts are therefore required to use the child support guidelines

“to promote both efficient child support proceedings and dependable, consistent child support awards.” *Kaatrude*, 21 S.W.3d at 249; *see also* Tenn. Code Ann. § 36-5-101(e); Tenn. Comp. R. & Regs. 1240-02-04-.01(3)(b), (c).

Williams, 530 S.W.3d at 137 (quoting *Sykes v. Sykes*, No. M2012-01146-COA-R3-CV, 2013 WL 4714369, at *2 (Tenn. Ct. App. Aug. 28, 2013) (footnote omitted in *Williams*)).

Related to awards of spousal support, our Supreme Court has “repeatedly . . . observ[ed] that trial courts have broad discretion to determine whether spousal support is needed and, if so, the nature, amount, and duration of the award.” *Gonsewski v. Gonsewski*, 350 S.W.3d 99, 105 (Tenn. 2011). The High Court has further explained:

[A] trial court’s decision regarding spousal support is factually driven and involves the careful balancing of many factors. *Kinard v. Kinard*, 986 S.W.2d 220, 235 (Tenn. Ct. App. 1998); *see also* *Burlew [v. Burlew]*, 40 S.W.3d [465,] 470 [(Tenn. 2004)]; *Robertson v. Robertson*, 76 S.W.3d 337, 340-41 (Tenn. 2002). As a result, “[a]ppellate courts are generally disinclined to second-guess a trial judge’s spousal support decision.” *Kinard*, 986 S.W.2d at 234. Rather, “[t]he role of an appellate court in reviewing an award of spousal support is to determine whether the trial court applied the correct legal standard and reached a decision that is not clearly unreasonable.” *Broadbent v. Broadbent*, 211 S.W.3d 216, 220 (Tenn. 2006). Appellate courts decline to second-guess a trial court’s decision absent an abuse of discretion. *Robertson*, 76 S.W.3d at 343. An abuse of discretion occurs when the trial court causes an injustice by applying 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. *Wright ex rel. Wright v. Wright*, 337 S.W.3d 166, 176 (Tenn. 2011); *Henderson v. SAIA, Inc.*, 318 S.W.3d 328, 335 (Tenn. 2010). This standard does not permit an appellate court to substitute its judgment for that of the trial court, but “‘reflects an awareness that the decision being reviewed involved a choice among several acceptable alternatives,’ and thus ‘envisions a less rigorous review of the lower court’s decision and a decreased likelihood that the decision will be reversed on appeal.’” *Henderson*, 318 S.W.3d at 335 (quoting *Lee Medical, Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010)). Consequently, when reviewing a discretionary decision by the trial court, such as an alimony determination, the appellate court should presume that the decision is correct and should review the evidence in the light most favorable to the decision. *Wright*, 337 S.W.3d at 176; *Henderson*, 318 S.W.3d at 335.

Id. at 105-06 (footnotes omitted).

As to our review of the trial court's decision concerning attorney's fees in a divorce action, this Court has stated:

Our review of an award of attorney's fees is guided by the principle that "the allowance of attorney's fees is largely in the discretion of the trial court, and the appellate court will not interfere except upon a clear showing of abuse of that discretion." *Mimms v. Mimms*, 234 S.W.3d 634, 641 (Tenn. Ct. App. 2007) (quoting *Taylor v. Fezell*, 158 S.W.3d 352, 359 (Tenn. 2005)). "Reversal of the trial court's decision [regarding] attorney fees at the trial level should occur 'only when the trial court applies an incorrect legal standard, reaches a decision that is illogical, bases its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party.'" *Church v. Church*, 346 S.W.3d 474, 487 (Tenn. Ct. App. 2010).

Hernandez v. Hernandez, No. E2012-02056-COA-R3-CV, 2013 WL 5436752, at *8 (Tenn. Ct. App. Sept. 27, 2013).

IV. Child Support

Father contends that the trial court erred in the amount it deviated downward from the presumptive child support obligation. In its August 12, 2021 memorandum opinion, the trial court stated that Father's presumptive child support obligation was \$2,780.00 per month based on the parties' child support worksheet. We note that the child support worksheet submitted by the parties and utilized by the trial court calculated Father's presumptive child support obligation to be \$2,946.00. However, it is undisputed that the Children's combined private school tuition exceeded \$40,000.00 per year or \$3,333.00 per month and that Father had agreed to pay such tuition. Therefore, the trial court concluded that a downward deviation to zero out the amount of Father's child support obligation was appropriate due to the extraordinary educational expenses that Father had agreed to pay.

The Child Support Guidelines ("the Guidelines") provide that the "amounts of support established by these Guidelines are rebuttable" and that the court "may order as a deviation an amount of support different from the amount of the presumptive child support order if the deviation complies with the requirements of" the guidelines. *See* Tenn. Comp. R. & Regs. 1240-02-04-.07(1)(a), (b). The Guidelines also state that the "amount or method of such deviation is within the discretion of the tribunal provided, however, the tribunal must state in its order the basis for the deviation and the amount the child support order would have been without the deviation." *See* Tenn. Comp. R. & Regs. 1240-02-04-.07(1)(b). Furthermore, "primary consideration must be given to the

best interest of the child for whom support under these Guidelines is being determined.”
Id.

The Guidelines specifically provide that “extraordinary education expenses including” “tuition, room and board, fees, books, and other reasonable and necessary expenses associated with . . . private elementary and secondary schooling” “may be added to the presumptive child support order as a deviation.” Tenn. Comp. R. & Regs. 1240-02-04-.03(6)(i), (ii). In the section that directs how deviations should be calculated by the courts, the Guidelines state again that extraordinary educational expenses “may be added to the presumptive child support as a deviation,” including private school expenses “appropriate to the parents’ financial abilities and to the lifestyle of the child if the parents and child were living together.” Tenn. Comp. R. & Regs. 1240-02-04-.07(2)(d)(1)(i). Moreover, this Court has previously made clear that in addition to adding extraordinary educational expenses as a child support deviation, “a downward deviation in child support for extraordinary educational expenses can be appropriate when an obligor, custodial parent pays for private school tuition and is not credited for making those tuition payments.” *Cain-Swope v. Swope*, No. M2018-02212-COA-R3-CV, 2020 WL 865396, at *8 (Tenn. Ct. App. Feb. 21, 2020).

As the Guidelines further provide:

When ordering a deviation from the presumptive amount of child support established by the Guidelines, the tribunal’s order shall contain written findings of fact stating:

1. The reasons for the change or deviation from the presumptive amount of child support that would have been paid pursuant to the Guidelines; and
2. The amount of child support that would have been required under the Guidelines if the presumptive amount had not been rebutted; and
3. How, in its determination,
 - (i) Application of the Guidelines would be unjust or inappropriate in the particular case before the tribunal; and
 - (ii) The best interests of the child for whom support is being determined will be served by deviation from the presumptive guideline amount.

Tenn. Comp. R. & Regs. 1240-02-04-.07(1)(c).

In the instant action, the trial court determined the specific amount of the presumptive child support obligation, finding that a deviation was appropriate because (1) the Children had been attending the same private school since they began middle school, (2) Father had agreed to pay all expenses associated with the Children's private school, (3) the private school tuition before expenses and books would exceed the monthly presumptive child support amount, and (4) the Children's continued enrollment in private school was "in their best interests and consistent with the means of the family." Accordingly, the trial court determined that it would be appropriate to reduce Father's child support obligation to zero predicated on his payment of all private school expenses for the Children.

We reiterate that with regard to a child support determination, we "do not have the latitude to substitute [our] discretion for that of the trial court" and that the lower court's "discretionary decision will be upheld as long as it is not clearly unreasonable, and reasonable minds can disagree about its correctness." *See Richardson*, 189 S.W.3d at 725 (internal citations omitted); *see also Cain-Swope*, 2020 WL 865396, at *8 (explaining that "deviations . . . are highly discretionary, should be determined on a case-by-case basis and rest securely within the judgment of the trial court"). Therefore, "a trial court will be found to have 'abused its discretion' when it applies an incorrect legal standard, reaches a decision that is illogical, bases its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party." *See id.*

In this case, the trial court properly followed the directives of the Guidelines when deviating from the presumptive child support obligation by finding the amount of the presumptive award, stating valid reasons warranting a deviation from the presumptive amount, and determining that such a deviation was in the Children's best interest. Upon review, we conclude that the trial court did not abuse its discretion in ordering a downward deviation based upon Father's payment of extraordinary educational expenses.

Father also posits that the trial court should have ordered deviation in a lesser amount because the trial court's reduction of Father's child support obligation due to Father's payment of private education expenses resulted in an increase in Mother's financial need and a greater amount of alimony being awarded. Father asserts that although his child support obligation would end in May 2023 when the Children are expected to graduate from high school, Mother's alimony award was ordered to continue for seven years. In support, Father relies on Mother's trial testimony, purportedly indicating that she desired less child support so that she could receive more spousal support over a longer period of time. We determine Father's argument with respect to child support and alimony to be unavailing.

The trial court made its determination concerning a child support deviation premised on certain facts that are largely undisputed. The court related that the Children had attended a private school since entering middle school, that the parties desired for the Children to continue their education at the same institution, and that this educational decision was within the family's financial means. Furthermore, Father had agreed to pay all expenses related to the Children's private school education, which obligation well exceeded the amount of the presumptive child support award. We reiterate that the trial court's decision to order a downward deviation in the amount of Father's child support obligation that effectively negated his obligation to make any payment was within the trial court's discretion. Moreover, we determine that in reaching this decision, the trial court did not apply an incorrect legal standard, reach an illogical decision, base its decision on an erroneous assessment of the evidence, or employ reasoning that caused an injustice to Father. *See Richardson*, 189 S.W.3d at 725. Whether the trial court appropriately evaluated Mother's needs for spousal support purposes will be considered in the following section of this Opinion. Finding no abuse of discretion respecting the trial court's child support determination, however, we affirm that decision.

V. Spousal Support Award

Although Father does not challenge Mother's entitlement to spousal support, he does contend that the trial court erred in both the amount and duration of its award of transitional alimony to Mother. We will address each of these issues in turn.

A. Amount of Award

With reference to the amount of the trial court's alimony award, Father argues that the award of \$6,000.00 per month was excessive considering Mother's needs. Father takes issue with several of the court's findings that form the basis for the award, including: (1) whether Mother's monthly expenses were inflated because they included expenses attributable to the Children, (2) whether the court should have imputed as income to Mother the \$25,000.00 annual gift that her parents had given to the parties during certain years, and (3) whether the court erred by averaging Mother's income over a four-year period.

As this Court has previously explained:

Tennessee Code Annotated § 36-5-121(i) outlines the factors to be considered in determining whether to award alimony and, if so, the type and amount. The two most important factors are the need of the disadvantaged spouse and the obligor spouse's ability to pay.

Watson v. Watson, 309 S.W.3d 483, 497-98 (Tenn. Ct. App. 2009).¹ In this matter, Father has not taken issue with the trial court's determination that he maintained the ability to pay alimony.

Concerning Mother's income, which impacts her need for spousal support, the trial court found Mother's gross monthly income from her employment to be \$1,432.98. In calculating this amount, the trial court averaged Mother's income for the years 2017 through 2020, explaining:

[Mother's] income has had variance over the last 4 years also. She earned as follows:

2017	\$12,000.00
2018	\$14,300.00
2019	\$12,800.00
2020	\$29,683.32

¹ The factors enumerated in Tennessee Code Annotated § 36-5-121(i) (Supp. 2022) include:

- (1) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;
- (2) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earnings capacity to a reasonable level;
- (3) The duration of the marriage;
- (4) The age and mental condition of each party;
- (5) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;
- (6) The extent to which it would be undesirable for a party to seek employment outside the home, because such party will be custodian of a minor child of the marriage;
- (7) The separate assets of each party, both real and personal, tangible and intangible;
- (8) The provisions made with regard to the marital property, as defined in § 36-4-121;
- (9) The standard of living of the parties established during the marriage;
- (10) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party;
- (11) The relative fault of the parties, in cases where the court, in its discretion, deems it appropriate to do so; and
- (12) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

This is the type of fluctuation which is “smoothed out” by averaging a longer period of time. Her gross monthly wages are \$1,432.98. The significant increase in her wages between 2019 and 2020 is the result of a stipend of \$17,000.00 per year through her graduate teaching assistant program. This is a position awarded to her on a year to year basis and her continued employment is contingent on her performance evaluations.

Mother testified at trial regarding her income, relating that she had been employed by the University of Tennessee at Chattanooga (“UTC”) as an adjunct professor for a few years. Mother explained that she had enjoyed a slight increase in her income in 2018 because she had covered the courses of a pregnant colleague who was placed on bed rest. Mother clarified that this was a temporary situation. For 2019, Mother stated that she had received a salary increase of \$800.00 per year.

Relative to her income for 2020, Mother articulated that she had been accepted into a graduate program at the University of Tennessee at Knoxville in July 2020 and had obtained a graduate teaching assistant position there, which provided her with \$17,000.00 in income for that year. However, Mother reported that she had also received additional income in the amount of \$9,600.00 in 2020 upon obtaining permission to continue teaching her courses at UTC during the fall. Mother pointed out, however, that this extra income would not continue. Following the resumption of in-person classes, Mother would attend classes in Knoxville Monday through Friday.

Mother later clarified that her ability to secure the yearly graduate teaching assistant position was dependent upon her performance as a student and as a teacher. Should she perform poorly in either capacity, her position as a teaching assistant would be terminated. Mother noted that her current monthly income from that position was \$1,416.66.

The trial court averaged Mother’s income for the years 2017-2020, arriving at an average monthly income of \$1,432.98. Father argues that this was error because “the record does not demonstrate [Mother’s] job is the type that constitutes a variable income” because she was paid a salary by UTC in the past. Following our review, we conclude that the trial court properly calculated Mother’s income.

As the trial court determined, Mother’s income experienced some fluctuation for the four years preceding trial. Mother did receive a salary increase in 2019, and she also enjoyed some augmented income for teaching additional classes. By the time of trial, Mother’s sole income was by reason of her graduate teaching position, for which she received gross compensation of \$1,416.66 per month. By averaging Mother’s income spanning those four years, however, the trial court captured all of Mother’s income, including the additional income that she enjoyed in 2020, which she testified would not be recurring.

As this Court previously explained in *Jekot v. Jekot*, 362 S.W.3d 76, 82 (Tenn. Ct. App. 2011), a case involving an alimony obligor with fluctuating income: “Determining a party’s income is a question of fact that requires careful consideration of all the attendant circumstances.” Here, the trial court averaged Mother’s income spanning four years’ time and arrived at an average monthly income that was slightly greater than what she was currently earning. We conclude that the trial court properly considered Mother’s circumstances and that the evidence does not preponderate against the trial court’s findings.

Father also propounds that the trial court erred by failing to include as income to Mother an annual gift of \$25,000.00 that the parties had received from Mother’s parents each year from 2015 to 2020. Just prior to trial, the parties entered into a written stipulation stating that Mother’s parents had given Mother and Father a total of \$25,000.00 per year from the time R.B. began his education at McCallie through 2020. During trial, however, Mother testified that the parties had not received \$25,000.00 from her parents in 2020. Regardless of whether such a gift was made and received in 2020, there was no proof presented at trial demonstrating that these gifts delivered to the parties by Mother’s parents would be ongoing inasmuch as the gifts were clearly voluntary in nature. As such, we conclude that the trial court did not err in declining to include these annual gifts in its calculation of Mother’s gross income.²

Having concluded that the trial court properly calculated Mother’s income, we now turn to the question of whether the trial court properly determined Mother’s need. Father contends that Mother’s monthly expenses were inflated because they included \$1,725.00 in monthly expenses attributable to the Children. However, Father has provided this Court with no authority establishing that a trial court cannot consider any expenses a parent may incur relative to minor children when determining that parent’s need for spousal support purposes.

Father relies on this Court’s opinion in *Bolt v. Bolt*, No. E2017-02357-COA-R3-CV, 2018 WL 5619733, at *7 (Tenn. Ct. App. Oct. 30, 2018), wherein this Court

² Father suggests that this Court’s decision in *Rogin v. Rogin*, No. W2012-01983-COA-R3-CV, 2013 WL 3486955, at *7 (Tenn. Ct. App. July 10, 2013), demands a different result. However, in *Rogin*, the father argued on appeal that when calculating the mother’s income for child support purposes, the trial court had failed to consider numerous potential sources of income to the mother, including interest, capital gains, dividends, stock options, bonuses, income from a family trust, and gifts from her family. *See id.* In vacating the trial court’s finding concerning the mother’s income, the *Rogin* Court stated, “it is difficult to discern the basis for the trial court’s ruling regarding Mother’s variable income, including gifts, stock options, bonuses, trust income, and investment income, given the sparse findings made by the trial court on this issue.” *Id.* As such, the trial court was concerned with a lack of findings by the trial court or stated basis for its determination of the mother’s income. Gifts to her were only a minor portion of that overall concern. We conclude that Father’s argument regarding *Rogin* is unavailing.

remanded an issue of spousal support to the trial court for further determination because child support had not been set properly. In doing so, the *Bolt* Court explained that “the amount of child support awarded materially affects whether spousal support is appropriate and the amount of spousal support awarded.” *Id.* *Bolt* is clearly distinguishable from the case at bar wherein the trial court made a proper and final determination regarding Father’s child support obligation before awarding alimony.

The remaining authority upon which Father seeks to rely involves situations wherein the spouse receiving alimony was paying expenses related to an adult child rather than a minor child, as here. In cases involving expenses related to minor children spending time with and dependent upon a parent, it does not appear that this Court has excluded all child-related expenses when determining the parent’s need for spousal support, even though child support is also ordered. *See, e.g., Montgomery v. Silberman*, No. M2009-00853-COA-R3-CV, 2009 WL 4113669, at *5 (Tenn. Ct. App. Nov. 24, 2009); *Duban v. Duban*, No. 02A01-9404-CV-00086, 1995 WL 241431, at *3 (Tenn. Ct. App. Apr. 25, 1995).

Furthermore, when considering the applicable statutory factors, we determine that the trial court’s award of \$6,000.00 per month in transitional alimony was supported by the evidence presented. This was a lengthy marriage wherein Father was able to achieve a significantly greater earning capacity due in part to Mother’s support as homemaker and caregiver to the Children. Both parties contributed to the marriage in tangible and intangible ways. Although the parties were of similar age, Mother suffered from a health condition that required life-long monitoring. The trial court divided the parties’ marital estate in a near-equal fashion; however, many of the assets awarded to Mother were not liquid. Most importantly, it appears that Mother would not be able to enjoy a standard of living following the divorce similar to that enjoyed by Father following the divorce or to that which the parties enjoyed during the marriage without the trial court’s transitional alimony award.

Our review of the record demonstrates that while Mother claimed on her income and expense statement certain food costs and other recurring expenses attributable to the Children, who were spending one-half of their time with her, Father similarly claimed identical types of expenses on his income and expense statement. We reiterate that inasmuch as Father has provided no authority to this Court stating otherwise, we cannot conclude that the trial court’s consideration of recurring and ordinary household expenses attributable to the Children for the purposes of determining an economically disadvantaged spouse’s need constituted an abuse of discretion. As such, we affirm the amount of the trial court’s transitional alimony award.

Father also contends that “this Court [should] find that the burden for obtaining an insurance policy should be placed upon [Mother] because the overwhelming evidence in the record demonstrates that [Mother] could receive an equivalent policy for \$0 through

the Health Insurance Marketplace” and that “no credible evidence . . . disputed this.” We note, however, that the trial court’s memorandum opinion stated in pertinent part:

There are disputes in the proof as to whether [Mother] can obtain health insurance coverage appropriate to the care needed because of her medical condition at no cost to her or for a cost of \$1,107.18 per month. Neither party has sufficient evidence to make his or her position persuasive. Accordingly, it is ordered that [Mother] shall obtain health insurance comparable to the coverage she now has under [Father’s] policy through the Blue Cross Blue Shield Silver Plan at the most economical cost. [Father] shall pay the premium for said coverage as transitional alimony until [Mother] is a graduate of her PhD program and obtains employment or for seven years whichever is less.

Ergo, the trial court did place the burden upon Mother to obtain a comparable insurance policy at the “most economical cost.” Father was ordered to reimburse Mother for that cost for a certain transitional period. Based on Mother’s health status and her need for adequate health insurance to ensure that she can receive the tests needed to monitor for a recurrence of cancer, we conclude that the trial court’s approach to this issue was reasonable, was supported by the evidence, and was not an abuse of discretion. We therefore affirm the trial court’s directive regarding Father’s payment of the premiums for Mother’s comparable health insurance, obtained at the most economical cost, for seven years or until Mother completes her Ph.D. program and obtains employment, whichever time period is less.

B. Duration of Award

Father also questions whether the trial court erred in setting the seven-year duration of its award of transitional alimony to Mother. According to Father, Mother testified that she would graduate from her Ph.D. program in four years. He urges that there was no proof presented demonstrating that it would take Mother an additional three years to obtain employment. He therefore postulates that the duration of the trial court’s transitional alimony award is excessive.

Following our review of Mother’s trial testimony, we disagree with Father’s contentions. When questioned regarding how long she anticipated would be required to complete her Ph.D. program, Mother stated:

I anticipate five total years. So that’s an anticipation. The average in the arts and humanities, the average time for a Ph.D. is seven point one years. I am trying to get mine done. I’ve completed one year of coursework. I have four more years. I’ve [provided] a breakdown of four more semesters. That is very ambitious.

Mother proceeded to articulate that her plan would demand that she meet her dissertation writing-hours requirement over the summer, giving her “two months to do what many students do over a year or semester-long period.” Mother further explained that she had requested seven years of spousal support in order to provide her some “wiggle room” with completing her studies and writing and defending her dissertation. She also testified that she anticipated it might take her up to one year to find employment in the current job market.

The trial court awarded Mother transitional alimony for “a period of seven years or until two years after she has completed her graduate program[,] whichever is shorter.” Transitional alimony is characterized by payment of a certain amount “for a determinate period of time.” Tenn. Code Ann. § 36-5-121(g)(1) (Supp. 2022). It is “awarded when the court finds that rehabilitation is not necessary, but the economically disadvantaged spouse needs assistance to adjust to the economic consequences of a divorce.” *Id.*

In this cause, the trial court’s award of transitional alimony for seven years (at most) was not an abuse of discretion. The trial court’s award of spousal support for up to seven years would afford Mother time to secure her degree and higher paying employment and was designed to assist Mother in adjusting to “the economic consequences” of the divorce. This is a marriage of twenty-one years’ duration wherein Mother was the primary caregiver for the Children and had also experienced significant health issues. Clearly, both of these life events have impacted her ability to earn income. Furthermore, she cannot hope to achieve the standard of living that Father will enjoy following the divorce without some assistance. Moreover, awards of transitional alimony of seven to eight years’ duration are not unusual if the circumstances support such awards. *See, e.g., Watson*, 309 S.W.3d at 496 (affirming the trial court’s award of transitional alimony to the wife for a total of seven years); *Miller v. McFarland*, No. M2013-00381-COA-R3-CV, 2014 WL 2194382, at *8 (Tenn. Ct. App. May 23, 2014) (holding that a period of eight years is not an unreasonable duration for an award of transitional alimony); *Kelly v. Kelly*, No. E2012-02219-COA-R3-CV, 2013 WL 4007832, at *12 (Tenn. Ct. App. Aug. 6, 2013), *rev’d in part*, 445 S.W.3d 685 (Tenn. 2014) (modifying award to transitional alimony of eight years’ duration); *Lewis v. Lewis*, No. M2002-02964-COA-R3-CV, 2005 WL 366894, at *3 (Tenn. Ct. App. Feb. 15, 2005) (affirming an award of transitional alimony for seven years).

Following our thorough review of the evidence in light of the statutory factors provided in Tennessee Code Annotated § 36-5-121, we conclude that the trial court’s award to Mother of \$6,000.00 per month in transitional alimony for up to seven years was not an abuse of discretion. The trial court’s transitional alimony award does not “cause[] an injustice by applying an incorrect legal standard, reach[] an illogical result, resolve[] the case on a clearly erroneous assessment of the evidence, or rel[y] on

reasoning that causes an injustice.” *See Gonsewski*, 350 S.W.3d at 105. We therefore affirm the trial court’s spousal support award in its entirety.

VI. Marital Property Distribution

Father posits that the trial court erred in its distribution of marital assets by awarding to Mother nearly all of the tax-advantaged accounts. Father contends that Mother received 84% of the parties’ non-taxable assets and only 21% of the taxable assets, resulting in an inequitable distribution.

In its August 12, 2021 memorandum opinion, the trial court carefully considered the factors enumerated in Tennessee Code Annotated § 36-4-121(c) (Supp. 2022), including that (1) the marriage was of twenty-one years’ duration; (2) Mother had battled cancer while Father’s health was mostly good; (3) Father’s earning capacity was substantially higher than Mother’s; (4) both parties had contributed to the marital estate as wage earners, and Mother had also contributed as a homemaker and caretaker, enabling Father to dedicate more effort to his employment; and (5) Mother was more frugal in spending. In addition, the trial court noted:

The parties have evaluated the tax consequences of the assets in making their proposed division of assets and liabilities. [Father] is in a superior economic situation which will permit him to more easily pay taxes on assets.

Accordingly, the trial court proceeded to equitably distribute the parties’ assets in a near-equal fashion with respect to dollar value.

Father complains that the trial court should have adopted his proposed marital asset division in order to avoid awarding him a greater share of taxable assets and thus increasing his tax burden. However, the trial court clearly took this factor into consideration, concluding that Father’s “superior economic situation” would enable him to pay respective taxes more easily. The evidence preponderates in favor of this finding.

In essence, Father asks this Court to “tweak” the trial court’s equitable distribution of marital assets in order to provide him with a greater share of non-taxable assets. This we will not do. As this Court has often elucidated:

[I]t is not our role to tweak the manner in which a trial court has divided the marital property. *Morton v. Morton*, 182 S.W.3d [821,] 834 [(Tenn. Ct. App. Aug. 15, 2005)]. Rather, our role is to determine whether the trial court applied the correct legal standards, whether the manner in which the trial court weighed the factors in Tenn. Code Ann. § 36-4-121(c) is consistent with logic and reason, and whether the trial court’s division of the marital property is equitable.

Long v. Long, 642 S.W.3d 803, 828 (Tenn. Ct. App. 2021) (quoting *Owens v. Owens*, 241 S.W.3d 478, 490 (Tenn. Ct. App. 2007)).

In the instant action, the trial court applied the correct legal standards and properly considered and weighed the statutory factors provided in Tennessee Code Annotated § 36-4-121(c). We determine that the trial court's division is consistent with logic and reason and that it is equitable. We therefore affirm the trial court's marital property distribution.

VII. Attorney's Fees at Trial and on Appeal

Finally, Father takes issue with the trial court's decision to award to Mother attorney's fees in the amount of \$18,070.31. Father argues that Mother received over \$500,000.00 in marital assets and thus could easily pay her attorney's fees without depleting her resources. Mother insists that the award of fees by the trial court was proper and that she should also receive an award of attorney's fees incurred on appeal.

We reiterate our Supreme Court's directives concerning an award of attorney's fees in a divorce matter:

It is well-settled that an award of attorney's fees in a divorce case constitutes alimony in solido. The decision whether to award attorney's fees is within the sound discretion of the trial court. As with any alimony award, in deciding whether to award attorney's fees as alimony in solido, the trial court should consider the factors enumerated in Tennessee Code Annotated section 36-5-121(i). A spouse with adequate property and income is not entitled to an award of alimony to pay attorney's fees and expenses. Such awards are appropriate only when the spouse seeking them lacks sufficient funds to pay his or her own legal expenses or the spouse would be required to deplete his or her resources in order to pay them. Thus, where the spouse seeking such an award has demonstrated that he or she is financially unable to procure counsel, and where the other spouse has the ability to pay, the court may properly grant an award of attorney's fees as alimony.

Gonsewski, 350 S.W.3d at 113 (citations omitted).

When reviewing the trial court's decision to award attorney's fees as alimony *in solido*, we must consider the same factors contained in Tennessee Code Annotated § 36-5-121(i) that we considered when analyzing the transitional alimony award. In doing so, we cannot conclude that the trial court abused its discretion in awarding to Mother attorney's fees in the amount of \$18,070.31. Although Mother did receive significant

assets in the divorce, many of those assets were not liquid and were thus unavailable to be utilized to pay Mother's fees and living expenses. As this Court has previously explained in a case involving a similar circumstance:

While Husband technically is correct that Wife had the funds to pay her attorney's fees, Wife needed to draw significantly upon one of her few liquid assets to do so. Husband, meanwhile, as has been noted, is in a significantly better economic position relative to Wife. This being the case, we find that Wife has the need, and, Husband the ability to pay attorney's fees to Wife.

Folger v. Folger, No. E2014-02069-COA-R3-CV, 2016 WL 7786448, at *6 (Tenn. Ct. App. Jan. 28, 2016).

In the case at bar, Mother should not be compelled to spend her limited liquid assets to pay attorney's fees given her significant economic disadvantage and her lack of ability to replace those assets. We therefore determine that the trial court did not abuse its discretion in awarding attorney's fees to Mother. *See Hernandez*, 2013 WL 5436752, at *8.

With respect to an award of attorney's fees on appeal, Mother acknowledges that this Court has discretion concerning whether to award such fees and will consider factors such as: "the ability of the party seeking the fee award to pay such fees, success on appeal, whether the appeal was taken in good faith, and any relevant equitable factors." *Dodd v. Dodd*, No. M2012-00153-COA-R3-CV, 2013 WL 126194, at *4 (Tenn. Ct. App. Jan. 9, 2013). Given Father's lack of success with the issues he has raised on appeal, Mother's limited financial resources, and the significant economic disparity between the parties, we determine that Mother is entitled to an award of attorney's fees incurred on appeal, and we remand this matter for the trial court's determination concerning the proper amount to be awarded.

VIII. Conclusion

For the foregoing reasons, the trial court's judgment is affirmed in all respects. Mother is entitled to an award of attorney's fees incurred on appeal, and we remand this matter for the trial court's determination concerning the proper amount to be awarded. Costs on appeal are assessed to the appellant, David W. Buntin.

s/Thomas R. Frierson, II

THOMAS R. FRIERSON, II, JUDGE