IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 3, 2023 Session

ANDREW HASLEY v. HARLEIGH LOTT

Appeal from the Juvenile Court for Dickson County
No. 09-20-143-PAT Michael Meise, Judge

No. M2022-01141-COA-R3-JV

This appeal arises from a juvenile court's determination of a permanent parenting plan, in which the trial court found all best interest factors to be equal between the parents, granted Mother and Father equal parenting time, and designated them as "Joint Primary Residential Parents." Mother raises several issues. Generally, she contends that the evidence preponderated against the trial court's findings that all applicable best interest factors were equal between Mother and Father and that the trial court abused its discretion in crafting the permanent parenting plan. We find that the evidence preponderates against the trial court's findings concerning two of the best interest factors. We also find that the court erred, as a matter of law, by designating the parties as joint primary residential parents in the absence of an agreement to do so. In accordance with these findings, we designate Mother as primary residential parent, affirm the trial court's parenting plan in all other respects, and remand to the trial court for entry of judgment in accordance with this opinion.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed in Part; Reversed and Modified in Part; and Remanded

FRANK G. CLEMENT, JR., P.J., M.S., delivered the opinion of the court, in which ANDY D. BENNETT and CARMA DENNIS MCGEE, JJ., joined.

Sarah Reist Digby, Brentwood, Tennessee, for the appellant, Harleigh Lott.

Irene R. Haude, Nashville, Tennessee, for the appellee, Andrew Hasley.

OPINION

FACTS AND PROCEDURAL HISTORY

Andrew Hasley ("Father") and Harleigh Lott ("Mother") are the parents of one child, Aspyn, born in August of 2020. Both parents were minors when Aspyn was born. Nine days after Aspyn's birth, Father filed a petition to establish parentage, determine custody, and set support and visitation. Mother filed an answer and "counter petition to establish parentage, custody, visitation, establish support, retroactive support, payment of mother's prenatal care, and birthing expenses and postnatal care."[1]

Following an initial hearing on November 3, 2020, paternity was established, along with a temporary parenting plan and child support. Pursuant to the initial and temporary parenting plan, Mother was designated as the primary residential parent, she was authorized to make all major decisions, and Father was awarded parenting time every weekend.

In January 2021, Father filed a motion for contempt alleging that Mother refused visitation as set by the court. Father's motion for contempt was resolved in an agreed order. Following successful mediation in February, Father's parenting time was extended to include Wednesdays from 8 a.m. through Thursday at 6 p.m. every week.

In May 2021, Mother filed an emergency petition for ex parte temporary restraining order to suspend Father's parenting time, alleging that Aspyn suffered gastrointestinal issues and injuries as a result of Father's parenting time. Mother's petition was granted without a hearing and Father was restrained from seeing Aspyn pending further orders of the court.

On June 22, 2021, Father filed a motion to lift the restraining order, modify the parenting plan, and designate Father as the primary residential parent. The motion alleged that multiple baseless complaints had been filed against Father, requiring DCS to conduct multiple investigations, "all of which have been unsubstantiated." Father also made allegations against Mother concerning her care of Aspyn.

On June 23, 2021, DCS filed with the court a summary of their investigation of multiple referrals concerning Aspyn, stating, "Based on the evidence collected, there is not enough to say that the child was intentionally harmed at either home."

After a two-day hearing on June 29 and July 22, 2021, the court announced from the bench that it was lifting the temporary restraining order and awarded Father parenting time for ten hours each weekend to be supervised by Mother. The court also required co-parenting counseling sessions and an alcohol and drug assessment for Father. In the order that followed, which was entered on August 10, 2021, the court restored Father's

[1] Mother and Father were both minors at the time of the initial filings, and their respective parents filed pleadings on their behalf. Pursuant to an order entered on September 3, 2021, with both Father and Mother having reached the age of majority, Father and Mother replaced their parents as the parties in this case.

unsupervised visitation to every other weekend and a Wednesday overnight visitation on the opposite weeks. The order also provided that Mother remained the primary residential parent, but the parties were awarded joint decision-making authority with Mother to have the final word if the parties disagreed.

A final evidentiary hearing took place over three days in April and June 2022, with the court announcing its ruling from the bench on July 28, 2022, with the parties and their counsel present. Weighing the statutory factors, the court found that all relevant factors were equal for Mother and Father. The court also announced that "it is the preference, always, to have an equal custody arrangement." The trial court adopted Father's proposed parenting plan with some adjustments, establishing equal parenting time and designating the parties as "Joint Primary Residential Parents." The court set a "week-on, week-off schedule," joint decision-making authority, and noted that Father would claim Aspyn on his taxes for even years, beginning in 2022, with Mother claiming odd years. The final order with the permanent parenting plan was entered on August 12, 2022.

This appeal followed.

ISSUES

The issues raised by Mother, which we have consolidated and restated, are:[2]

I. Whether the trial court erred in failing to consider relevant events precipitating trial.

II. Whether the trial court made sufficient findings of fact and, if so, whether the evidence preponderates against the trial court's findings of fact.

[2] The issues as stated by Mother are as follows:
I. Whether the Trial Court's ruling should be awarded a presumption of correctness, given its failure to make appropriate findings of fact.
II. Whether the Trial Court erred in failing to consider relevant events precipitating trial.
III. Whether the evidence preponderates against the Trial Court's findings of fact.
IV. Whether the Trial Court abused its discretion in the entry of its Permanent Parenting Plan, specifically a) by failing to find that the Plan was in [Aspyn's] best interests; b) by defaulting to an award of equal parenting time; and c) when both parties acknowledged the schedule was not in [Aspyn's] best interests.
V. Whether the Trial Court abused its discretion in naming the parties joint Primary Residential Parents.
VI. Whether the Trial Court abused its discretion in awarding joint decision-making authority to the parties.
VII. Whether the Trial Court abused its discretion in ordering that Father would claim the tax exemption for [Aspyn] in 2022 and that the parties would alternate thereafter.
VIII. Whether Mother is entitled to attorney's fees for the trial and on appeal.

III. Whether the permanent parenting plan adopted by the trial court constitutes an abuse of discretion. Specifically, Mother challenges the decisions awarding the parties equal parenting time, designating the parties as joint primary residential parents, awarding them joint decision-making authority, and ordering that Father would claim the tax exemption for Aspyn in 2022 and that the parties would alternate the deduction each year thereafter.

IV. Whether Mother is entitled to attorney's fees for the trial and on appeal.

Father raises one issue on appeal: "[w]hether father is entitled to an award of attorney fees on appeal."

ANALYSIS

I. THE TRIAL COURT'S CONSIDERATION OF RELEVANT EVENTS

We begin with Mother's contention that the trial court erred by failing to consider evidence from prior hearings in its final adjudication. Specifically, Mother contends that the trial court erred by not considering evidence it heard in the pendente lite hearings on June 29 and July 22, 2021.

When the trial court stated that it did not wish to hear that evidence again, Mother's counsel argued:

> For purposes of the record, Your Honor, I do want to reiterate our position that — I understand your Honor doesn't want us to present evidence and testimony about things that this Court has already heard about in hearings on June — in June and July of last year regarding all the medical stuff, and the mental health evaluation of Mr. Hasley, and the formula and all of that. I understand that you don't want to hear it twice. I do think it is relevant to the determination of a parenting plan. I think it is important history. So I would ask that all of the exhibits, and all of the evidence, and the testimony that was presented at those two hearings be considered as Your Honor makes the final ruling.

Significantly, when the court stood its ground on this evidentiary issue, Mother did not make an offer of proof to preserve for our review on appeal the evidence she believed to be relevant and material to the determination of a parenting plan.[3] Father contends that this constitutes a waiver of the issue on appeal. We agree.

[3] "An offer of proof serves two primary purposes: (1) informing the trial court about the proof the party is seeking to offer; and (2) creating a record so that an appellate court can review the trial court's decision." *State v. Herron*, 461 S.W.3d 890, 911 (Tenn. 2015).

Tennessee Rule of Evidence 103 provides in part:

> (a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> . . .
>
> (2) *Offer of Proof.* In case the ruling is one excluding evidence, the substance of the evidence and the specific evidentiary basis supporting admission were made known to the court by offer or were apparent from the context.

"Pursuant to this rule, '[w]e will not reverse a trial court's ruling excluding evidence if the appellant fails to make an offer of proof regarding the substance of the evidence and the supporting evidentiary basis to support its admission.'" *Mitchell v. City of Franklin*, No. M2021-00877-COA-R3-CV, 2022 WL 4841912, at *14 (Tenn. Ct. App. Oct. 4, 2022) (quoting *Rose v. Cookeville Reg'l Med. Ctr. Auth.*, No. 2010-01438-COA-R3-CV, 2011 WL 251210, at *2 (Tenn. Ct. App. Jan. 13, 2011)).

Here, Mother failed to make an offer of proof, and we do not have a transcript of the evidence from the prior hearings to determine whether a substantial right of Mother was affected by the exclusion of this evidence. Because we may not reverse the trial court's ruling without such knowledge, we find this issue is waived.

II. Sufficiency of the Findings of Fact

Mother contends that the trial court's ruling should not be awarded a presumption of correctness because the trial court failed to make sufficient findings of fact. In this regard she principally relies on the rationale set forth in *Lovlace v. Copley*, 418 S.W.3d 1 (Tenn. 2013) and *Gooding v. Gooding*, 477 S.W.3d 774 (Tenn. Ct. App. 2015).

More specifically, and as Mother correctly notes in her appellate brief, when making a child custody determination, "the determination shall be made on the basis of the best interest of the child . . . [and] the court shall consider all relevant factors[.]" See Tenn. Code Ann. § 36-6-106(a). In such cases, a court is required to make specific findings of fact and conclusions of law. *Cantey v. Cantey*, 2019 WL 2932676, *3–4 No. W2018-01331-COA-R3-CV (Tenn. Ct. App. July 9, 2019). Findings of fact "are particularly important in cases involving the custody and parenting schedule of children." *In re Connor S.L.*, 2012 WL 5462839, *4 No. W2012-00587-COA-R3-JV (Tenn. Ct. App. Nov. 8, 2012).

In cases such as this where the action is "tried upon the facts without a jury," Tennessee Rule of Civil Procedure 52.01 provides that the trial court "shall find the facts specially *and* shall state separately its conclusions of law and direct the entry of the appropriate judgment." Tenn. R. Civ. P. 52.01 (emphasis added). The underlying rationale for the Rule 52.01 mandate is that it facilitates appellate review by "affording a reviewing court a clear understanding of the basis of a trial court's decision" and enhancing the authority of the trial court's decision. *In re Est. of Oakley*, No. M2014-00341-COA-R3-CV, 2015 WL 572747, at *10 (Tenn. Ct. App. Feb. 10, 2015) (quoting *Lovlace*, 418 S.W.3d at 34).

In the absence of findings of fact and conclusions of law, "this court is left to wonder on what basis the court reached its ultimate decision." *Id.* Further, compliance with the mandate of Rule 52.01 enhances the authority of the trial court's decision because it affords the reviewing court a clear understanding of the basis of the trial court's reasoning. *Gooding v. Gooding*, 477 S.W.3d 774, 782 (Tenn. Ct. App. 2015) (quoting *In re Est. of Oakley*, 2015 WL 572747, at *10).

"There is no bright-line test by which to assess the sufficiency" of the trial court's factual findings. *Lovlace*, 418 S.W.3d at 35. The general rule is that "the findings of fact must include as much of the subsidiary facts as is necessary to disclose to the reviewing court the steps by which the trial court reached its ultimate conclusion on each factual issue." *Id.*

If the trial court makes the required findings of fact, the trial court's factual findings are reviewed de novo, accompanied by a presumption of the correctness of the finding of fact, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *see Boarman v. Jaynes*, 109 S.W.3d 286, 290 (Tenn. 2003). For the evidence to preponderate against a trial court's finding of fact, it must support another finding of fact with greater convincing effect. *Walker v. Sidney Gilreath & Assoc's.*, 40 S.W.3d 66, 71 (Tenn. Ct. App. 2000); *Realty Shop, Inc. v. R.R. Westminster Holding, Inc.*, 7 S.W.3d 581, 596 (Tenn. Ct. App. 1999).

As shall become evident from our review of the best interest factors below, as well as the trial court's other findings, the trial court goes well beyond stating only conclusions of law. The trial court first provides eight lengthy, general findings of fact, then provides a brief finding of fact in response to each of the best interest factors, which we review below. As a threshold matter, however, we have determined that while the trial court's findings of fact are admittedly not exhaustive, they disclose the steps by which the trial court reached its ultimate conclusion on each factual issue. *See Lovlace*, 418 S.W.3d at 35; *see also Gooding*, 477 S.W.3d at 782. Accordingly, and contrary to Mother's contention, we find the trial court's findings of fact sufficient for appellate review.

III. THE PERMANENT PARENTING PLAN

Mother contends that the permanent parenting plan adopted by the trial court constitutes an abuse of discretion. More specifically, she challenges four decisions: 1) designating the parties as joint primary residential parents, 2) awarding the parties equal parenting time, 3) awarding them joint decision-making authority, and 4) granting Father the dependent child tax exemption for Aspyn in 2022 and every even year thereafter. We will discuss each in turn after first discussing our standard of review as well as the general parameters to be followed in crafting permanent parenting plans.

A. The Abuse of Discretion Standard

Decisions regarding parenting arrangements are factually driven and require careful consideration of numerous factors. *Holloway v. Bradley*, 230 S.W.2d 1003, 1006 (Tenn. 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 therefore better positioned to evaluate the facts than appellate judges. *Rousos v. Boren*, No. M2013-01568-COA-R3-CV, 2014 WL 4217415, at *11 (Tenn. Ct. App. Aug. 26, 2014); *Massey-Holt v. Holt*, 255 S.W.3d 603, 607 (Tenn. Ct. App. 2007). Thus, decisions regarding parenting plans are "peculiarly within the broad discretion of the trial judge." *Armbrister v. Armbrister*, 414 S.W.3d 685, 692 (Tenn. 2013).

Discretionary decisions are reviewed under the abuse of discretion standard. *See Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010). The abuse of discretion standard does not permit reviewing courts to substitute their discretion for the trial court. *Id.* Nevertheless, the abuse of discretion standard of review does not immunize a lower court's decision from meaningful appellate scrutiny:

> Discretionary decisions must take the applicable law and the relevant facts into account. An abuse of discretion occurs when a court strays beyond the applicable legal standards or when it fails to properly consider the factors customarily used to guide the particular discretionary decision. A court abuses its discretion when it causes an injustice to the party challenging the decision by (1) applying an incorrect legal standard, (2) reaching an illogical or unreasonable decision, or (3) basing its decision on a clearly erroneous assessment of the evidence.

Id. (citations omitted). Discretionary decisions require "a conscientious judgment, consistent with the facts, that takes into account the applicable law." *White v. Beeks*, 469 S.W.3d 517, 527 (Tenn. 2015) (citing *Lee Med., Inc.*, 312 S.W.3d at 524).

Thus, we will review the trial court's decision to designate Father as the primary residential parent and determine, where applicable, whether there is a factual basis for the decision in the record, whether the court properly identified and applied the correct legal

principles, and whether the decision is within the range of acceptable alternative dispositions.[4] *See Lee Med., Inc.*, 312 S.W.3d at 524.

When "[a]pplying this framework, we look first at whether the factual basis for the trial court's decision is supported by evidence in the record." *Harmon v. Hickman Cmty. Healthcare Servs., Inc.*, 594 S.W.3d 297, 306 (Tenn. 2020). We "review the underlying factual findings using the preponderance of the evidence standard contained in Tenn. R. App. P. 13(d)." *Lee Med., Inc.*, 312 S.W.3d at 525. We then look at whether the trial court identified and applied the correct legal principles relevant to its decision. *See Harmon*, 594 S.W.3d at 306.

Our review of the trial court's legal determinations is "de novo without any presumption of correctness." *Lee Med., Inc.*, 312 S.W.3d at 525.

Finally, we look at "whether the [trial] court's decision was in the range of acceptable alternative dispositions." *Id.* When doing so, we are mindful of the inherent limitations in the abuse of discretion standard:

> [B]ecause, by their very nature, discretionary decisions involve a choice among acceptable alternatives, reviewing courts will not second-guess a trial court's exercise of its discretion simply because the trial court chose an alternative that the appellate courts would not have chosen. Accordingly, if the reviewing court determines that reasonable minds can disagree with the propriety of the decision, the decision should be affirmed.

Harmon, 594 S.W.3d at 306 (quoting *State v. McCaleb*, 582 S.W.3d 179, 186 (Tenn. 2019)).

B. The Best Interest Factors

Because Mother and Father have never married, the trial court was required to follow the procedures for establishing parentage and custody for a child born out of

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[4] In *Lee Medical, Inc.*, 312 S.W.3d 515, the Tennessee Supreme Court provided a framework for determining whether a trial court properly exercised its discretion:

> [R]eviewing courts should review a [trial] court's discretionary decision to determine (1) whether the factual basis for the decision is properly supported by evidence in the record, (2) whether the [trial] court properly identified and applied the most appropriate legal principles applicable to the decision, and (3) whether the [trial] court's decision was within the range of acceptable alternative dispositions.

Id. at 524.

wedlock as governed by Tennessee Code Ann. § 36-2-311. *See Graham v. Vaughn*, No. M2012-01982-COA-R3-CV, 2014 WL 356975, at *2 (Tenn. Ct. App. Jan. 30, 2014). "Once the parentage of the child is established, parental access is to be determined pursuant to Chapter 6 of Title 36." *Id*. (citing Tenn. Code Ann. § 36-2-311(a)(10)).

In any Tennessee proceeding "'where the custody of a minor child or minor children is a question,' Tenn. Code Ann. § 36-6-101(a)(1), the court must 'make a custody determination.'" *Armbrister*, 414 S.W.3d at 693. "To allocate parenting responsibilities properly, the court must ensure that each permanent parenting plan designates a primary residential parent and establishes a residential parenting schedule." *Id.* at 695 (citing Tenn. Code Ann. § 36–6–404(b)).

"By statute as well as case law, the welfare and best interests of the child are the paramount concern in custody, visitation, and residential placement determinations, and the goal of any such decision is to place the child in an environment that will best serve his or her needs." *Burden v. Burden*, 250 S.W.3d 899, 908 (Tenn. Ct. App. 2007) (quoting *Cummings v. Cummings*, No. M2003-00086-COA-R3-CV, 2004 WL 2346000, at *5 (Tenn. Ct. App. Oct. 15, 2004)). In doing so, the trial court must determine which of the parents is comparatively more fit to have primary residential responsibility of the child. *See Grissom v. Grissom*, 586 S.W.3d 387, 392 (Tenn. Ct. App. 2019) (quoting *Chaffin v. Ellis*, 211 S.W.3d 264, 286 (Tenn. Ct. App. 2006)) ("In choosing which parent to designate as the primary residential parent for the child, the court must conduct a 'comparative fitness' analysis, requiring the court to determine which of the available parents would be comparatively more fit than the other."). "In engaging in this analysis, the court must consider the relevant factors set out in Tennessee Code Annotated § 36-6-106(a)." *Chaffin*, 211 S.W.3d at 286 (footnote omitted). Thus, we shall examine the trial court's best interest findings of fact to determine whether the evidence preponderates against the trial court's findings.

1. Factor One

The first best interest factor considers "[t]he 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." Tenn. Code Ann. § 36-6-106(a)(1).

In its final order, and prior to specifically discussing factor one, the trial court made the following general findings that related to Aspyn's relationship with each parent, including whether one parent performed the majority of parenting responsibilities. These findings include:

> 5. Despite extensive testimony by witnesses for both parties that the initial attempt to foster an equal relationship between the parents was not a

> complete success, specifically, failure of Mother to include Father in all aspects of the early months of Minor Aspyn's development, and Father's initial lack of enthusiasm to take on the responsibility of parenting, the testimony on both sides, including both parents and both sets of grandparents, demonstrates to the Court that there now exists an equal understanding of the important role of both parents and that both parents should play a role in Minor Aspyn's life.
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> Then, with regard to factor one specifically, the trial court found:
>
> > As previously stated, though the testimony reveals that in the initial months Mother and Mother'[s] parents were primarily taking care of these responsibilities, Father did step up and both sets of grandparents also played a very large role. Therefore, the Court finds this factor to be equal between the parties.

From the time of Aspyn's birth in August 2020, until the entry of the first temporary parenting plan on November 12, 2020, Aspyn lived with Mother the vast majority of the time, while Father visited a few hours per week during some weeks but then he exercised no visitation at other times. From the entry of the first temporary parenting plan in November of 2020 until the entry of the final order on August 12, 2022, Mother was designated the primary residential parent with a majority of the parenting time. Throughout this period, Mother exercised the majority of the parenting time, made the majority of the doctors' appointments and visits, and overall performed the majority of the parenting responsibilities.

While testimony suggests that both parents share a strong relationship with Aspyn, Mother performed a majority of the parenting responsibilities from Aspyn's birth until the entry of the final order. Therefore, we find that the evidence preponderates against the trial court's finding that this factor is equal between the parties and further find that this factor favors Mother.

2. Factor Two

Factor two considers:

> 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.

Tenn. Code Ann. § 36-6-106(a)(2).

For this factor, the trial court found that "although it was a somewhat shaky start for the first few months, this factor is equal between the parties."

After careful consideration of the record, we find that the evidence does not preponderate against the trial court's finding that this factor was equal between the parties.

3. Factor Three

The third factor provides: "(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." Tenn. Code Ann. § 36-6-106(a)(3).

The trial court found "that both parents attended the court-ordered parenting education seminar. Therefore, the Court finds this factor to be equal between the parties."

We agree.

4. Factor Four

Factor four considers "[t]he disposition of each parent to provide the child with food, clothing, medical care, education and other necessary care." Tenn. Code Ann. § 36-6-106(a)(4).

The trial court first found generally, "Both Mother and Father are pursuing post-secondary educations, whatever those might be or look like in the future. They both have the ability to do so because of the support they have from their parents, the grandparents of Minor Aspyn." Then, specifically for factor four: "[t]he Court notes that the parents are still young themselves and are planning on obtaining post-secondary educations, which the grandparents are helping them achieve. Therefore, the Court finds that this factor is equal between the parties."

After a review of the record, we agree with this finding.

5. Factor Five

Factor five measures "[t]he degree to which a parent has been the primary caregiver, defined as the parent who has taken the greater responsibility for performing parental responsibilities." Tenn. Code Ann. § 36-6-106(a)(5).

The trial court found "that although early on Mother was the primary caregiver, Father, whether excluded by his own acts or by Mother in the beginning, has now stepped up fairly early in Minor Aspyn's life. Therefore, the Court does not find that this factor weighs either way."

However, we find here that the evidence preponderates against the trial court's finding that this factor is equal. While the record reveals painstaking efforts taken by each parent to meet the needs of the child, we find, as in factor one, that Mother had the "greater responsibility for performing parental responsibilities" from Aspyn's birth until entry of the final order. *Id.* Therefore, we find that this factor weighs in favor of Mother.

6. Factor Six

Factor six considers "[t]he love, affection, and emotional ties existing between each parent and the child." Tenn. Code Ann. § 36-6-106(a)(6).

For this factor, the trial court stated, "The Court believes it is very obvious that both parents love Minor Aspyn and have emotional ties to him. Therefore, the Court finds that this factor is equal between the parties."

We agree with the trial court's finding that this factor is equal between the parties.

7. Factor Seven

Factor seven considers "[t]he emotional needs and developmental level of the child." Tenn. Code Ann. § 36-6-106(a)(7).

For this factor, the trial court found: "All testimony indicated that Minor Aspyn is smart, physically in good shape, and does not have any special needs, so the Court finds that this factor does not apply."

We would consider this factor to be applicable for most every child; nevertheless, we find that the evidence indicates that child's emotional and developmental needs are being met and that this factor is equal for both parents.

8. Factor Eight

For the eighth best interest factor, we consider:

> 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.

Tenn. Code Ann. § 36-6-106(a)(8).

The trial court found: "While there were accusations, the Court does not find that either parent has a specific moral, physical, mental, or emotional issue that would prevent him or her from being a good parent. Therefore, the Court finds that this factor is equal between the parties."

After a thorough review of the record, we agree with the trial court's finding that this factor is equal between the parties.

9. Factor Nine

Factor nine considers "[t]he 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." Tenn. Code Ann. § 36-6-106(a)(9).

The trial court found:

> The Court finds that this is a strong factor for both parties. There is a strong support system on both sides with family members. Minor Aspyn has many relatives on both sides to step in and help out if needed. Therefore, the Court finds that this factor is equal between the parties.

There is ample evidence to support the trial court's finding that there is a strong familial support system surrounding both Mother and Father and as such, positive interrelationships and interaction with Aspyn. We agree with the trial court's finding that this factor is equal between the parties.

10. Factor Ten

Factor ten considers "[t]he importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment." Tenn. Code Ann. § 36-6-106(a)(10).

The trial court noted "that Minor Aspyn is still only two (2) years of age. The Court hopes that the parties will work together in the future to enable continuity to be strong."

While we indeed share the trial court's hope for the future of this child, factor ten prompts the trial court to consider existing evidence, specifically, "the length of time the child has lived in a stable, satisfactory environment." *Id.* For this reason, the trial court's finding is slightly incongruent with the considerations of factor ten.

Nevertheless, we find that the evidence preponderates in favor of the trial court's implication that this factor does not favor either parent.

11. Factor Eleven

For factor eleven, the court considers: "[e]vidence 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." Tenn. Code Ann. § 36-6-106(a)(11).

In this case, the trial court found "no substantial evidence of any physical, or emotional abuse to the child."

We agree that this factor does not apply.

12. Factor Twelve

This factor considers "[t]he 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." Tenn. Code Ann. § 36-6-106(a)(12).

The trial court stated, "There is no testimony that this is a concern on either side."

We agree with the trial court's finding on this factor.

13. Factor Thirteen

Factor thirteen considers "[t]he 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." Tenn. Code Ann. § 36-6-106(a)(13).

The trial court found "that this factor does not apply given that Minor Aspyn is not twelve (12) years of age or older."

We agree.

14. Factor Fourteen

Factor fourteen considers "[e]ach parent's employment schedule, and the court may make accommodations consistent with those schedules." Tenn. Code Ann. § 36-6-106(a)(14).

The trial court found, "The Court recognizes that the issue of employment is uncertain because both parties are planning on pursuing post-secondary education."

We agree with the trial court's finding that the employment schedule is equally uncertain for both parties as they further their education, making this factor equal for both parties.

15. Factor Fifteen

The fifteenth factor authorizes the court to consider "[a]ny other factors deemed relevant by the court."[5] In this case the trial court noted, "This Court finds that it is the preference, always, to have an equal custody arrangement."

Although maximizing both parents' parenting time may be a generalized preference, the relevant statute provides that "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 [best interest] factors*." Tenn. Code Ann. § 36-6-106(a) (emphasis added). Thus, the statute does not direct courts to "always . . . have an equal custody arrangement," which was the preference expressed by the trial court. Instead, each parent's parenting time in the life of the child is a decision that should be "consistent with the best interest factors." *See id*.

Having considered the best interest factors as discussed in detail above, we agree with the trial court's implicit finding that both parents are relatively equally fit to have and share the primary residential responsibilities for Aspyn. *See Chaffin v. Ellis*, 211 S.W.3d at 286 ("In choosing which parent to designate as the primary residential parent for the child, the court must conduct a 'comparative fitness' analysis, requiring the court to determine which of the available parents would be comparatively more fit than the other.").

[5] A sixteenth factor, "(16) Whether a parent has failed to pay court-ordered child support for a period of three (3) years or more," went into effect immediately upon becoming law, on March 18, 2022, before the final hearing in this case. Tenn. Code Ann. § 36-6-106(a)(16); 2022 Tenn. Laws Pub. Ch. 671 (H.B. 1866) ("This act takes effect upon becoming a law, the public welfare requiring it."). However, this factor was not relevant in the present case, and as such, the trial court is not required to consider it. Tenn. Code Ann. § 36-6-106(a) ("The court shall consider all relevant factors.").

Nevertheless, we must discuss Mother's contentions that the trial court abused its discretion by defaulting to an award of equal parenting time, "in awarding joint decision-making authority to the parties," "in ordering that Father would claim the tax exemption for [Aspyn] in 2022 and that the parties would alternate thereafter," and "in naming the parties joint Primary Residential Parents."

C. Equal Parenting Time

Mother challenges the decision of the trial court to award equal parenting time. We begin by noting that the legislature provided no preference or presumption for or against dividing parenting time equally. *See* Tenn. Code Ann. § 36-6-101(a)(2)(A)(i). Thus, the question is whether the court abused its discretion by awarding equal residential parenting time in light of the relevant facts and factors.

> The division of parental responsibility is one of the most important decisions confronting the courts. It is incumbent on courts to develop a parenting schedule that will facilitate a child's relationship with both parents to the greatest degree possible, at all times viewing its decision through the lens of the child's best interests. The General Assembly has codified a list of factors that courts should consider before allocating parental responsibility. *See* Tenn. Code Ann. § 36–6–106(a) (Supp. 2009); Tenn. Code Ann. § 36–6–404(b) (2005). "Out of all of the factors which may be relevant in a given case, the welfare and best interest of the child must be the court's paramount concerns."
>
> A court's decision on how to best allocate parental responsibility often turns on subtle factors such as witness credibility and demeanor. This Court, therefore, is hesitant to substitute its judgment for that of the trial court. It is not our duty to refashion a court's determination simply to achieve what we may perceive as a more reasonable result in a given case. We will set aside a court's decision regarding parental responsibility only if it "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." A trial court's decision, however, must find support in the proof submitted at trial and in the applicable case or statutory law.

In re Emma E., No. M2008-02212-COA-R3-JV, 2010 WL 565630, at *5–6 (Tenn. Ct. App. Feb. 17, 2010) (internal citations omitted).

Based on the facts of this case, we are unable to conclude that the trial court abused its discretion in awarding equal parenting time. This is due in principal part to the fact that both parents are essentially equally fit to parent Aspyn, and dividing their parenting time equally does not place a burden on either party or Aspyn. We acknowledge Mother's

argument that separating her from Aspyn for seven days at a time may have its own drawbacks; however, ordering shorter or longer periods of uninterrupted parenting time has its own pros and cons. Here, the court found that each parent had a strong emotional bond with Aspyn, that each of them was able to rely on a strong support system (mainly their respective parents, Aspyn's grandparents) to help raise the child, and each parent was able to facilitate a relationship with the other. For these and other reasons, we find no abuse of discretion with the decision to award the parents equal parenting time with a week-on, week-off protocol.

D. Joint Decision-Making Authority

Mother also contends that the trial court abused its discretion in awarding joint decision-making authority to the parties because, generally, "[i]t is clear that these parties will be unable to agree on major decisions."

As guidance for allocating decision-making authority, statute provides:

> The court shall order sole decision making to one (1) parent when it finds that:
>
> > (1) A limitation on the other parent's decision-making authority is mandated by § 36-6-406;
> >
> > (2) Both parents are opposed to mutual decision making; or
> >
> > (3) One (1) parent is opposed to mutual decision making, and such opposition is reasonable in light of the parties' inability to satisfy the criteria for mutual decision-making authority.

Tenn. Code Ann. § 36-6-407(b).

Here, the trial court ordered that:

> the parties will enjoy joint decision-making for all major decisions, with neither parent to have final say over the other. If the parties are unable to agree, they will have to attend mediation to resolve any disputes. Further if one parent attempts to contact the other about a major decision and does not receive a response within three (3) days, the parent attempting to communicate may move forward with the requested decision.

A recent case before this court presented the same issue where Father challenged the trial court's award of joint decision-making authority because the parties had not "demonstrated an ability to cooperate." *Smallbone v. Smallbone*, No. M2020-01556-COA-R3-CV, 2022 WL 1405655, at *7 (Tenn. Ct. App. May 4, 2022). In that case, "Mother failed to provide him with copies of the children's health insurance cards. She objected to

counseling. . . . She deliberately scheduled medical appointments for the children at times when Father could not attend. He maintained that reaching a joint decision with Mother was difficult." *Id.* However, the trial court found that the parties "were able to make joint decisions about major issues," and the "disagreements have been more logistical than substantive." *Id.* The trial court also "removed at least two obstacles to future cooperation" by requiring the father to provide health insurance and requiring continued counseling for a child, two major topics of disagreement. *Id.* This court found no abuse of discretion there and affirmed the trial court's decision.

In the present case, we understand that decision making between the parties has not always gone smoothly. Yet there is also a history of the parties successfully making major, mutual decisions, such as choosing a pediatrician for Aspyn, along with more minor logistical decisions, such as adjustments to parenting time. Father has shown a willingness to record and communicate to Mother even the most minute details of Aspyn's schedule during his parenting time, and Mother has attempted to lengthen the periods of Father's parenting time in Aspyn's best interest. While there has been friction, as in many parenting arrangements, these parties demonstrate the ability to communicate and arrive at decisions in the best interest of the child.

Here, too, the trial court provided guidance for future disputes, first by requiring "mediation to resolve any disputes" in major decisions and also by providing that a parent can move forward with a major decision if there is no response from the other parent within three days.

Accordingly, we find no abuse of discretion in awarding joint decision-making authority to the parties.

E. Tax Exemption

Mother argues that the trial court "abused its discretion in ordering that Father would claim the tax exemption for [Aspyn] in 2022 and that the parties would alternate thereafter."

"Decisions with regard to the allocation of exemptions for minor children are discretionary and should rest on [the] facts of the particular case." *Barabas v. Rogers*, 868 S.W.2d 283, 289 (Tenn. Ct. App. 1993). With its determination of equal parenting time, it was within the range of acceptable alternatives for the trial court to alternate the exemption between the parents each year. *See Harmon*, 594 S.W.3d at 306. Thus, we find no abuse of discretion with the court awarding the exemption to Father in the even years, beginning in 2022, and to alternate each year thereafter.

Thus, we affirm the schedule for claiming the tax exemption for Aspyn.

F. Joint Primary Residential Parents

Mother contends and Father agrees that the trial court erred by designating the parents as joint primary residential parents. Unless the parties agree on such an arrangement, a joint designation is not authorized. *See* Tenn. Code Ann. 36-6-410(b) ("In the absence of an agreement between the parties, a single primary residential parent must be designated; provided, that this designation shall not affect either parent's rights and responsibilities under the parenting plan."). Thus, we reverse the trial court's designation of the parents as joint primary residential parents.

Typically, we would remand this issue to the trial court to determine which parent should be the primary residential parent. However, we note that Mother has filed a motion asking this court to "make any required determination of the terms of a modified Permanent Parenting Plan itself in the interests of judicial economy," considering that the judge who tried this case is no longer in office.

Mother's reasoning for this motion is well-taken, and we note that Father is amenable to Mother's suggestion. In light of the "extensive and lengthy history" of this case, especially as it relates to the child's young age, and the likelihood that a remand and rehearing would lengthen the pendency of this matter, affect the stability of this child's parenting plan, and likely be most expensive to both parties, we grant Mother's motion and make the following determinations.

As set forth previously, "[i]n the absence of an agreement between the parties, a single primary residential parent must be designated." Tenn. Code Ann. § 36-6-410(b). Considering that the sum of the best interest factors slightly weighed in favor of Mother, we designate Mother as primary residential parent, provided that, in accordance with statute, "this designation shall not affect either parent's rights and responsibilities under the parenting plan." *Id.* We affirm the trial court's parenting plan determinations in all other respects and remand this case to the trial court with instructions to enter an order consistent with this opinion.

G. Attorney's Fees

Mother asked that attorney's fees be awarded at trial and on appeal, while Father requested that he be awarded attorney's fees on appeal.

As the relevant statute provides:

> (c) A prevailing party may recover reasonable attorney's fees, which may be fixed and allowed in the court's discretion, from the nonprevailing party in any criminal or civil contempt action or other proceeding to enforce, alter, change, or modify any decree of alimony, child support, or provision of a permanent parenting plan order, or in any suit or action concerning the

> adjudication of the custody or change of custody of any children, both upon the original divorce hearing and at any subsequent hearing.

Tenn. Code Ann. § 36-5-103(c). However, in this case, the parenting plan determinations were equal; thus, there was essentially no prevailing party.

The trial court did not award attorney's fees to either party, and we find no abuse of discretion in this decision.

For the award of attorney's fees on appeal, this court has explained, "In determining whether an award for attorney's fees is warranted, we should consider, among other factors, the ability of the requesting party to pay his or her own attorney's fees, the requesting party's success on appeal, and whether the requesting party has been acting in good faith." *Shofner v. Shofner*, 181 S.W.3d 703, 719 (Tenn. Ct. App. 2004). Applying these factors, we decline to award either party attorney's fees on appeal.

IN CONCLUSION

The judgment of the trial court is affirmed in part, reversed and modified in part, and this matter is remanded to the trial court for the entry of judgment consistent with this opinion. Costs of appeal are assessed as follows: two-thirds of the costs are assessed against Mother and one-third of the costs are assessed against Father.

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FRANK G. CLEMENT JR., P.J., M.S.