IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 20, 2015 Session

LESLIE ANN CREMEENS v. ERIC SCOTT CREMEENS

Appeal from the Circuit Court for White County
No. CC2374 Amy V. Hollars, Judge

No. M2014-01186-COA-R3-CV – Filed July 24, 2015

In this post-divorce action, Father filed a petition to hold Mother in contempt, alleging, *inter alia*, that she violated the parenting plan by making derogatory statements about him in the presence of the parties' minor son. Father also sought to suspend Mother's visitation and enjoin her from coming to his home, place of employment, or the child's school. Realizing its ruling could impact Mother's parenting time, the court appointed a guardian *ad litem*. After Mother deposed the licensed clinical social worker who had counseled the child, the case went to trial. At the conclusion of the trial, the court found Mother in civil contempt for making derogatory statements about Father to the child in violation of the parenting plan, awarded Father attorney's fees he incurred in prosecuting the contempt petition, and assessed the guardian *ad litem*'s fees against Mother. The court denied Father's requests for an injunction and to restrict Mother's parenting time. Mother appealed, contending the trial court erred by considering lay testimony of the licensed clinical social worker in a redacted transcript because the deposition was taken pursuant to Tenn. R. Civ. P. 32.01(3) ("the Bearman Rule"), which provides that "depositions of experts taken pursuant to the provisions of Rule 26.02(4) may not be used at trial except to impeach . . . ." Mother also contends the finding of contempt should be vacated because the trial court erred by considering Father's petition as one for civil contempt instead of criminal contempt. Further, Mother argues that it was error to award Father attorney's fees because Father did not make a specific request for attorney's fees in his contempt petition and the court failed to conduct a hearing on the reasonableness of the fees as she requested. Mother also contends the trial court erred by requiring her to pay all of the guardian *ad litem*'s fees. Because Mother failed to provide a transcript or statement of the evidence, we assume that the record, had it been preserved, would have contained competent evidence, in addition to the challenged lay testimony of the social worker, sufficient to support the trial court's factual findings. Having determined that the trial court correctly ruled that the petition was for civil contempt and assuming the record contains sufficient evidence to support the trial court's factual findings, we affirm the trial court's ruling that Mother's violations of the parenting plan constituted civil contempt. As for Mother's challenges to Father's attorney's fees, we find no error with

the trial court's ruling that Father was entitled to recover reasonable and necessary attorney's fees incurred in prosecuting the petition for contempt. Because Mother made a timely request for a hearing on the fee request, which was denied, we must reverse the amount of the award and remand for the trial court to conduct a hearing on the reasonableness and necessity of Father's requested fees. With regard to the allocation of the guardian *ad litem*'s fees, although the trial court has broad discretion in the award and allocation of guardian *ad litem* fees, Tenn. Sup. Ct. R. 40A, § 11(b)(4) directs trial courts to "consider the equities of the situation, including both the financial resources of the parties and the conduct of the parties during the proceeding," and set forth its findings of fact in the order allocating such fees. This record contains no findings of fact concerning the guardian *ad litem*'s fees; accordingly, we must reverse the allocation of these fees and remand for the trial court to consider the equities of the situation, state its findings of fact, and allocate the fees as it deems appropriate in its discretion.

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

FRANK G. CLEMENT, JR., P.J., M.S., delivered the opinion of the Court, in which ANDY D. BENNETT and W. NEAL MCBRAYER, JJ., joined.

D. Michael Kress II, Sparta, Tennessee, for the appellant, Leslie Ann Cremeens.

Mark E. Tribble, Cookeville, Tennessee, for the appellee, Eric Scott Cremeens.

Jason F. Hicks, Cookeville, Tennessee, Guardian Ad Litem.

OPINION

This is the second post-divorce appeal involving these parties and the parenting plan for their child. Therefore, a brief history of prior proceedings is appropriate to set the stage for the issues now on appeal.

Leslie Ann Cremeens ("Mother") and Eric Scott Cremeens ("Father") were divorced in March 2011 while the couple resided with their only child in the State of Georgia. Mother was designated the primary residential parent for the parties' minor child. Soon thereafter, Mother and the child moved to White County, Tennessee, and Father remarried and moved to Kentucky.

The relocations rendered the initial parenting plan established by the Georgia court unworkable, and in August 2012, Mother filed in the Circuit Court for White County, Tennessee a "Petition to Assume Jurisdiction and to Modify Permanent Parenting Plan"

to modify the parenting plan because the current parenting schedule would require the parties' son to miss school.[1] Father responded with a counter-petition seeking to be designated the primary residential parent. The trial occurred over two days in August 2013. At the conclusion of the trial, the court found that a material change in circumstances existed and that it was in the child's best interest to designate Father as the primary residential parent. The best interest finding was based, in part, on the finding that Mother failed to provide the child with an appropriate psychological and emotional environment. The trial court also found that the child felt responsible for Mother's well-being and that, based on the child's testimony, the child could not tell the guardian *ad litem* the truth because Mother "might get mad or sad about things." Further, the trial court found that Mother had encouraged and instructed the child to lie about Father to one of the child's prior psychologists in Georgia and to the guardian *ad litem*, which the court found constituted psychological abuse of the child. In assessing the parties' willingness to facilitate the child's relationship with the other parent, the trial court found that Mother had "tried to scuttle" the relationship between the child and Father and that Mother had withheld visitation from Father. Mother appealed asserting numerous issues. We affirmed the trial court on all grounds.[2] *See Cremeens v. Cremeens*, No. M2014-00152-COA-R3-CV, 2015 WL 1946165 (Tenn. Ct. App. April 29, 2015), *no perm. app. filed*.

While that appeal was pending, a dispute arose regarding the new parenting plan, and on January 14, 2014, Father filed the petition at issue in this appeal seeking to hold Mother in contempt and to suspend Mother's parenting time.[3] Father alleged that Mother had violated the parenting plan by making derogatory statements about him in the child's presence and that she instructed the child to tell a social worker that Father and stepmother had touched the child inappropriately. According to the petition, the child disclosed this fact to Father and to Brian McDonald, a licensed clinical social worker who had been counseling the child. Father also sought an injunction to prohibit Mother from coming to Father's home, place of employment, or the child's school.

In preparation for a contested evidentiary hearing, Mother's attorney took the deposition of Mr. McDonald at his office in Kentucky. Although the notice of deposition is not in the record, Mother states that Father had designated Mr. McDonald as an expert

[1]The child was five years old and attending kindergarten when the 2012 petition was filed.

[2]We also declared this a frivolous appeal pursuant to Tenn. Code Ann. § 27-1-122. *Cremeens v. Cremeens*, No. M2014-00152-COA-R3-CV, 2015 WL 1946165, at *5 (Tenn. Ct. App. April 29, 2015), *no perm. app. filed*.

[3]Father's petition did not designate whether civil or criminal contempt was at issue or request attorney's fees.

witness[4] and, therefore, his deposition was taken only for discovery purposes pursuant to Tenn. R. Civ. P. 26.02(4). It is undisputed that Mr. McDonald requested and received payment from Mother's attorney for the time he spent being deposed pursuant to Tenn. R. Civ. P. 26.02(4)(C), which is expected and may be required when deposing an adversary's expert witness.[5]

Mother filed a pre-trial motion in limine asking the court to declare all of Mr. McDonald's deposition inadmissible under Tenn. R. Civ. P. 32.01(3), the "Bearman Rule," which provides that "depositions of experts taken pursuant to the provisions of Rule 26.02(4) may not be used at trial except to impeach in accordance with the provisions of Rule 32.01(1)." The trial court denied the motion, finding that the Bearman Rule did not apply because Mr. McDonald was testifying as a fact witness, not an expert witness. The court also ordered counsel for both parties to redact any expert opinions Mr. McDonald may have provided before introducing his deposition into evidence at the hearing.

The trial of Father's petition occurred on May 14, 2014, and on June 12, 2014, the trial court entered a final order. The court held Mother in civil contempt based upon the finding that she had willfully violated the provision of the parenting plan stating that each parent had "[t]he right to be free of unwarranted derogatory remarks . . . made in the presence of the child." The trial court's findings relative to the issues on appeal read as follows:

> 1. The Permanent Parenting Plan in effect . . . provides . . . that each parent is afforded "[t]he right to be free of unwarranted derogatory remarks made about the parent or his or her family by the other parent to the child or in the presence of the child." This order of the court is lawful and clear.

[4]The record reveals that Father also identified Mr. McDonald as a fact witness.

[5]The fact a fee is paid to a witness does not necessarily indicate that the witness was an expert witness. *See Smith v. Pfizer Inc*., 714 F. Supp. 2d 845, 852-53 (M.D. Tenn. 2010). The plaintiff in *Smith* argued that a witness was an "expert witness" because she had been compensated by the defendants and the witness testified that she was paid her usual hourly consulting fee for the time spent testifying and preparing for the deposition. *Id*. Based on these facts, the *Smith* court ruled: "But this, standing alone, does not make her an expert witness. It is not necessarily improper for a party to pay a fact witness if the money compensates the witness, at his or her professional rate, for lost time." *Id*. at 853 (citing *Prasad v. MML Investors Servs*., No. 04 Civ. 380 (RWS), 2004 WL 1151735, at *5 (S.D.N.Y. May 24, 2004) (noting that federal courts "are generally in agreement that a [fact] witness may properly receive payment related to the witness' expenses and reimbursement for time lost associated with the litigation")). The court went on to state: "An ABA ethics opinion allows parties to pay witnesses for their 'loss of hourly wages or professional fees.'" *Id*. (quoting ABA Ethics Op. 96-402 (Aug. 2, 1996)). For an excellent discussion of this issue, see Craig P. Sanders & Brandon J. Stout, *Compensating Fact Witnesses in Tennessee*, Tenn. B.J., July 2015, at 22.

> 2. Mr. Cremeens' [sic] proof established by a preponderance of the evidence that Leslie Cremeens willfully violated [the parenting plan] by asking [the parties' son] to tell her, or repeat to her, that his father and stepmother had touched his privates. This action by Ms. Leslie Cremeens is a material and willful violation of the court's order, and Leslie Cremeens is found in civil contempt of the court's order.
>
> 3. The proof showed by a preponderance of the evidence that Leslie Cremeens told [the parties' son] that "she could take him far away and not bring him back to his father's home." . . . In addition to threatening the emotional well-being and stability of the child, this statement by Ms. Leslie Cremeens necessarily implies to the child that he should not *want* to stay with his father and, hence, represents another derogatory statement about Mr. Eric Cremeens. . . . Accordingly, Ms. Leslie Cremeens is found in civil contempt of the court's order based upon this conduct.
> . . .
>
> 5. This court finds that Leslie Cremeens did not offer credible testimony in this proceeding when she denied having made destructive and disruptive statements to [the parties' son], as outlined in paragraphs 2 and 3, above.
>
> 6. [T]his Court believes that Ms. Cremeens can bring her conduct into compliance with the orders of this court by ceasing her long-standing efforts at alienating [the parties' son] from his father. The court further finds that [the parties' son] is closely bonded with his mother, and it is not in his best interests that visitation with his mother be altered or reduced at this time.
>
> 7. That Mr. Cremeens be awarded his attorney's fees related to the prosecution of [the contempt proceeding] as a vindication of the violation of his parental rights in this action.

In addition to the award of attorney's fees, the trial court ordered Mother to pay all of the guardian *ad litem*'s fees. Mother appealed.

ANALYSIS

Mother raises several issues on appeal. She contends the finding of contempt should be vacated for two reasons: (1) because the trial court erroneously admitted into evidence a redacted transcript of Mr. McDonald's deposition; and (2) because the trial court erred by treating Father's petition as one for civil contempt, rather than criminal contempt. Mother further asserts that the trial court erred by ordering her to pay all of the

guardian *ad litem*'s fees. She also contends the court erred by awarding Father his attorney's fees. Alternatively, if Father is entitled to recover any of his fees, she contends the court erred when it failed to hold a hearing, as she requested, to assess the reasonableness of Father's attorney's fees. In addition, the guardian *ad litem* contends that we should deem Mother's appeal frivolous and award damages. We will deal with each issue in turn.

I. MR. MCDONALD'S DEPOSITION TESTIMONY

Mother contends the trial court's finding of contempt should be vacated because the trial court erroneously admitted into evidence a redacted transcript of the discovery deposition of Mr. McDonald. She contends this was error because Mr. McDonald was expected to be called as an expert witness for Father, his deposition was for discovery purposes only, and, pursuant to Tenn. R. Civ. P. 32.01(3), the "Bearman Rule," the discovery deposition of an expert witness may not be used for any purpose except to impeach the expert witness.[6] As we explain below, we find this contention is without merit.

Assuming for the sake of argument that admitting any of Mr. McDonald's testimony into evidence was error, we have determined that Mother cannot establish that the admission of his deposition testimony constituted reversible error because she failed to provide a transcript or statement of the evidence, and the trial court's order reveals that it considered evidence other than that provided by Mr. McDonald in finding Mother in contempt.

[6]The "Bearman Rule" notwithstanding, Mr. McDonald would qualify as an "unavailable" witness under Tennessee Rule of Evidence 804(a)(6) and Tenn. R. Civ. P. 32.01(3) because his residence and office are in Kentucky, more than 100 miles from the place of the trial. Tenn. R. Civ. P. 32.01(3) states:

> At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the Tennessee Rules of Evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof in accordance with any of the following provisions:
> . . .
>
> (3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds that the witness is "unavailable" as defined by Tennessee Rule of Evidence 804(a). But depositions of experts taken pursuant to the provisions of Rule 26.02(4) may not be used at trial except to impeach in accordance with the provisions of Rule 32.01(1).

"The erroneous exclusion, or admission, of evidence in a bench trial does not, standing alone, justify a reversal of the trial court's judgment." *Citadel Investments, Inc. v. White Fox Inc.*, No. M2003-00741-COA-R3-CV, 2005 WL 1183084, at *11 (Tenn. Ct. App. May 17, 2005). Instead, a judgment should be set aside only if, after considering the entire record, an error involving a substantial right more probably than not affected the outcome of the trial or would result in prejudice to the judicial process. *Id.*; Tenn. R. App. P. 36(b); *see Scott v. Jones Bros. Constr.*, 960 S.W.2d 589, 593 (Tenn. Ct. App. 1997).

Ordinarily, the erroneous admission of evidence is harmless when "the fact the inadmissible evidence was submitted to establish is clearly established by other evidence in the case that is competent and properly admitted . . . ." *In re Estate of Smallman*, 398 S.W.3d 134, 153 (Tenn. 2013) (citing *Love v. Smith*, 566 S.W.2d 876, 879 (Tenn. 1978)). Thus, in addition to demonstrating that admitting the evidence in question was error, the complaining party must also show that this error more probably than not affected the judgment. *Coakley v. Daniels*, 840 S.W.2d 367, 371-72 (Tenn. Ct. App. 1992); *Bishop v. R.E.B. Equipment Serv., Inc.*, 735 S.W.2d 449, 451-52 (Tenn. Ct. App. 1987).

In order to determine whether the admission of certain evidence affected the judgment, this court must have a sufficient record of the other relevant evidence the trial court considered. In this regard, it is the duty of the appellant to prepare a record that conveys a fair, accurate, and complete account of what has transpired in the trial court with respect to the issues that form the basis of the appeal. *See* Tenn. R. App. P. 24; *Outdoor Management, LLC v. Thomas*, 249 S.W.3d 368, 377-78 (Tenn. Ct. App. 2007). An appellant may fulfill this duty by submitting a verbatim transcript according to Tenn. R. App. P. 24(b) or a statement of the evidence as provided in Tenn. R. App. P. 24(c).

When the appellant does not provide a transcript or statement of the evidence, this court must assume that the record, had it been preserved, contained sufficient evidence to support the trial court's factual findings. *Sherrod v. Wix*, 849 S.W.2d 780, 783 (Tenn. Ct. App. 1992). Thus, in cases where there is no transcript or statement of the evidence, the presumption of correctness afforded to a trial court's findings of fact becomes almost conclusive. *See Outdoor Management*, 249 S.W.3d at 377; *Beaty v. Hood*, 306 S.W.2d 671, 672 (Tenn. Ct. App. 1957). For these reasons, to the extent that resolution of the issues on appeal depends on factual determinations, the absence of a transcript or statement of the evidence is essentially fatal to the party having the burden on appeal. *See Sherrod*, 849 S.W.2d at 783.

Here, the trial court found that Mother willfully violated the parenting plan by "asking [the child] to tell her, or repeat to her, that his father and stepmother had touched his privates" and by telling the parties' son that "she could take him far away and not bring him back to his father's home." The trial court also found that Mother did not offer credible testimony when she denied making those statements. The trial court's order indicates that it relied not only on Mr. McDonald's deposition but also on other evidence

presented at trial. Because we have no transcript or statement of the evidence, we must assume the other evidence the trial court considered was sufficient to support the factual findings upon which the trial court based its contempt ruling. *See id.*

For the foregoing reasons, even assuming that consideration of Mr. McDonald's redacted deposition testimony was error, Mother has not demonstrated that she was prejudiced by the admission of Mr. McDonald's deposition, and her argument on this issue is without merit.

II. CIVIL CONTEMPT

Mother contends the trial court erred by treating Father's petition as one for civil rather than criminal contempt. She argues that Father's petition should have been treated as one for criminal contempt and, because the procedural safeguards specific to criminal contempt were not provided, the trial court's order finding her in contempt should be reversed. We disagree.

Every Tennessee court has the power to punish for contempt. Tenn. Code Ann. §§ 16-1-103, 29-9-101 to -108. The scope of this power includes the authority to impose punishments for "[t]he willful disobedience or resistance of any officer of the such courts, party, juror, witness, or any other person, to any lawful writ, process, order, rule, decree, or command of such courts." Tenn. Code Ann. § 29-9-102(3). Contempt proceedings are traditionally classified as either "civil" or criminal"; however, our Supreme Court has noted that "contempt proceedings are neither wholly civil nor criminal in nature and may partake of the characteristics of both." *Baker v. State*, 417 S.W.3d 428, 435 (Tenn. 2013) (citing *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 441 (1911)).[7] Indeed, both criminal and civil contempt have the same elements when the contempt at issue is the willful violation of a court order.[8] *Konvalinka v. Chattanooga-Hamilton Cnty. Hosp. Auth.*, 249 S.W.3d 346, 354-55 (Tenn. 2008); *Furlong v. Furlong*, 370 S.W.3d 329, 336 (Tenn. Ct. App. 2011) (citing *Ross v. Ross*, No. M2008-00594-COA-R3-CV, 2008 WL 5191329, at *5-6 (Tenn. Ct. App. Dec. 10, 2008)).

Although both civil and criminal contempt involve punishment, "[i]t is not the fact of punishment, but rather its character and purpose, that often serve to distinguish between the two classes of cases." *Baker*, 417 S.W.3d at 435 (quoting *Gompers*, 221 U.S. at 441); *In re Lineweaver*, 343 S.W.3d 401, 415 (Tenn. Ct. App. 2010); *see Ahern v.*

[7]We note that the provisions in the Tennessee Code dealing with contempt do not explicitly distinguish between civil and criminal contempt. *See* Tenn. Code Ann. §§ 16-1-103, 29-9-101 to -108.

[8]While the elements are the same for both civil and criminal contempt, the standard of review is different. In the context of criminal contempt, we review facts in light of Tenn. R. App. P. 13(e) rather than Tenn. R. App. P. 13(d). *See Furlong v. Furlong*, 370 S.W.3d 329, 336 (Tenn. Ct. App. 2011).

Ahern, 15 S.W.3d 73, 78 (Tenn. 2000) ("Traditionally, contempt has been classified as civil or criminal depending upon the action taken by the court to address the contempt.").

"Criminal contempt is used to preserve the power and vindicate the dignity and authority of the law as well as to preserve the court as an organ of society." *Overnite Transp. Co. v. Teamsters Local Union No. 480*, 172 S.W.3d 507, 510 (Tenn. 2005) (quoting *Black v. Blount*, 938 S.W.2d 394, 398 (Tenn. 1996)) (internal quotation marks omitted). Proceedings for criminal contempt "in a very true sense raise an issue between the public and the accused." *Black*, 938 S.W.2d at 398 (quoting *State v. Daugherty*, 191 S.W. 974 (Tenn. 1917)). Sanctions for criminal contempt are both punitive and unconditional. *Baker*, 417 S.W.3d at 436. They are designed to punish past behavior rather than coerce compliance with a court's order or influence future behavior. *Id.*

In contrast, civil contempt is remedial in character, *Baker*, 417 S.W.3d at 436, and it is intended to benefit a private litigant rather than vindicate the authority of the court. *See Doe v. Bd. of Prof'l Responsibility of Supreme Court of Tennessee*, 104 S.W.3d 465, 473-74 (Tenn. 2003); *Sherrod*, 849 S.W.2d at 786 n.4.

Civil contempt proceedings may serve two purposes. *XL Sports, Ltd. v. Lawler*, No. 2006-00637-COA-R3-CV, 2007 WL 2827398, at *6 (Tenn. Ct. App. Sept. 28, 2007). One purpose is to coerce future compliance with a trial court's order. *See Doe v. Bd. of Prof'l Responsibility*, 104 S.W.3d at 473-74 ("Punishment for civil contempt is designed to coerce compliance with the court's order and is imposed at the insistence and for the benefit of the private party who has suffered a violation of rights."). When the goal of punishing a party for civil contempt is to obtain his or her compliance in the future, civil contempt is only available if the party has the present ability to comply with the trial court's order. *See Ahern*, 15 S.W.3d at 79; Tenn. Code Ann. § 29-9-104.

Civil contempt may also serve a compensatory function, providing "relief to a party who has suffered unnecessarily as a result of contemptuous conduct." *XL Sports*, 2007 WL 2827398, at *6; *see Overnite Transp.*, 172 S.W.3d at 511.[9] When the contempt at issue is the performance of a forbidden act, "the person may be imprisoned until the act is rectified by placing matters and person in status quo, or by the payment of damages." Tenn. Code Ann. § 29-9-105; *see Overnight Transp.*, 172 S.W.3d at 511. In cases of

[9]Some decisions in Tennessee have noted that, while federal courts distinguish between coercive and compensatory civil contempt, Tennessee courts have not done so. *See Bryan v. Leach*, 85 S.W.3d 136, 161 n.27 (Tenn. Ct. App. 2001); *Young v. Young*, No. 01A01-9609-CV-00415, 1997 WL 107159, at *1 n.1 (Tenn. Ct. App. Mar. 12, 1997). These cases predate the Tennessee Supreme Court's decision in *Overnite Transp.*, which recognizes compensatory civil contempt in Tennessee by holding that compensatory damages are available as a remedy for civil contempt. *Overnite Transp. Co. v. Teamsters Local Union No. 480*, 172 S.W.3d 507, 511 (Tenn. 2005).

compensatory civil contempt, even when the conduct at issue has ceased, the disobedience of the court's order is not "rectified" until the offending party pays damages to make the other party whole. *See Overnight Transp.*, 172 S.W.3d at 511.

In the context of civil contempt, an award of attorney's fees is appropriate because it serves to compensate the prevailing party for the expenses incurred to obtain compliance with a court order. *See Reed v. Hamilton*, 39 S.W.3d 115, 119-20 (Tenn. Ct. App. 2000); *Keeley v. Massey*, No. 02A01-9307-CH-00159, 1994 WL 59556, at *5 (Tenn. Ct. App. Feb. 28, 1994); *see also XL Sports*, 2007 WL 2827398, at *6.

In his contempt petition, Father expressly alleged that Mother was engaging in conduct forbidden by a court order, the parenting plan, and he sought to compel Mother's compliance with specific provisions of that order. A fair reading of the petition clearly reveals that Father was seeking Mother's future compliance with the parenting plan for his benefit because her continuing violations of the parenting plan were impairing his relationship with their son. As noted above, one of the primary purposes of civil contempt is to enforce compliance with the court's order for the benefit of the petitioner who has suffered a violation of his or her rights. *See Doe*, 104 S.W.3d at 474; *see also Ahern*, 15 S.W.3d at 79.

Moreover, the trial court addressed the violation of the parenting plan by awarding Father the reasonable attorney's fees he incurred to enforce compliance with the court's order. Such action falls squarely within the character and purpose of punishment for compensatory civil contempt. *See Overnight Transp.*, 172 S.W.3d at 511; *Reed*, 39 S.W.3d at 119-20. Thus, the trial court correctly ruled that Father's petition would be tried as one for civil contempt.

Aside from her challenge to the deposition testimony of Mr. McDonald, Mother does not expressly contend that Father failed to establish the required elements for civil contempt. Nevertheless, in the interest of judicial economy, we believe it prudent to review the findings of the trial court to determine whether the finding of civil contempt was appropriate.[10]

[10]Although the record does not include a transcript or statement of the evidence, we have the benefit of the trial court's findings concerning the issue of contempt. Tenn. R. App. P. 52.01 requires a trial court, in certain circumstances, to find the facts specially and shall state separately its conclusions of law. 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 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." *In re Estate of Oakley*, No. M2014-00341-COA-R3-CV, 2015 WL 572747, at *10 (Tenn. Ct. App. Feb. 10, 2015) (citing *Lovlace v. Copley*, 418 S.W.3d 1, 34-35 (Tenn. 2013)), *no perm. app. filed*. 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. *MLG Enterprises, LLC, v. Richard Johnson*, No. M2014-01205-COA-R3-CV,

(continued…)

Claims of civil contempt based on an alleged violation of a court order have four essential elements.

> First, the order alleged to have been violated must be "lawful." Second, the order alleged to have been violated must be clear, specific, and unambiguous. Third, the person alleged to have violated the order must have actually disobeyed or otherwise resisted the order. Fourth, the person's violation of the order must be "willful."

Konvalinka, 249 S.W.3d at 354-55 (footnotes omitted). "Whether a party violated an order and whether a violation was willful are factual issues, which appellate courts review de novo, with a presumption of correctness afforded the trial court's findings." *Lovlace v. Copley*, 418 S.W.3d 1, 34 (Tenn. 2013).

After considering testimony from the parties, Mr. McDonald, and possibly other witnesses,[11] the trial court found that the parenting plan was a lawful court order and that it unambiguously prohibited both parties from making derogatory statements in the presence of the child. The trial court further found that Father established by a preponderance of the evidence that Mother instructed the child to repeat to her false allegations that his father and stepmother had touched his privates and that she told the child she could take him away and not bring him back to Father's home. The court also found that her actions threatened the emotional well-being and stability of the child and constituted willful violations of the court's order, the parenting plan, for which the court found Mother in civil contempt. The court went on to find that Mother was presently able to bring her conduct into compliance with the orders of the court "by ceasing her long-standing efforts at alienating [the parties' son] from his father." The foregoing reveals that the trial court correctly identified the four essential elements of civil contempt and found that Father had proven each element.

As discussed in some detail earlier, because Mother did not provide a transcript or statement of the evidence, we must assume that the record, had it been preserved, contained sufficient evidence to support the trial court's factual findings. *Sherrod*, 849

2015 WL 4162722, at *4 (Tenn. Ct. App. July 9, 2015); *Gooding v. Gooding*, No. M2014-01595-COA-R3-CV, 2015 WL 1947239, at *6 (Tenn. Ct. App. Apr. 29, 2015), *no perm. app. filed*; *In re Zaylen R.*, No. M2003-00367-COA-R3-JV, 2005 WL 2384703, at *2 (Tenn. Ct. App. Sept. 27, 2005) ("Findings of fact facilitate appellate review, *Kendrick v. Shoemake*, 90 S.W.3d 566, 571 (Tenn. 2002), and enhance the authority of the court's decision by providing an explanation of the trial court's reasoning.").

[11]Other than Father, Mother, and Mr. McDonald, we do not know who testified because the record does not contain a transcript or statement of the evidence. We also do not know which portions of his deposition the trial court considered because the record does not contain a redacted version of his deposition, only the entire deposition.

S.W.2d at 783. In cases such as this, where there is no transcript or statement of the evidence, the presumption of correctness afforded to a trial court's findings of fact becomes almost conclusive. *See Outdoor Management*, 249 S.W.3d at 377; *Beaty*, 306 S.W.2d at 672. Therefore, we affirm the trial court's finding that Mother willfully violated the parenting plan, that she had the present ability to comply with the plan, and her conduct constituted civil contempt.

III. ALLOCATION OF THE GUARDIAN AD LITEM'S FEES

Mother contends the trial court erred by ordering her to pay all of the guardian *ad litem*'s fees. Mother does not challenge the appointment of the guardian *ad litem* or the reasonableness of his fees. Her challenge is limited to the allocation of those fees, and she insists it was error to allocate all of the fees to her.

The trial court has broad discretion in the award and allocation of guardian *ad litem* fees, and we review such decisions under the abuse of discretion standard. *See Kahn v. Kahn*, No. W2003-02611-COA-R3-CV, 2005 WL 1356449, at *5 (Tenn. Ct. App. June 6, 2005). The abuse of discretion standard of review envisions "a less rigorous review of the [trial] court's decision and a decreased likelihood that the decision will be reversed on appeal" because "it does not permit reviewing courts to . . . substitute their discretion for the [trial] court's." *Lee Medical, Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010) (citations omitted). Nevertheless, "[t]he abuse of discretion standard of review does not . . . immunize a [trial] court's decision from any meaningful appellate scrutiny." *Id.* (citing *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 211 (Tenn. Ct. App. 2002)).

Even when making discretionary decisions, the trial court "must take the applicable law and the relevant facts into account."[12] *Id.* (citing *Konvalinka*, 249 S.W.3d at 358; *Ballard v. Herzke*, 924 S.W.2d 652, 661 (Tenn. 1996)). Accordingly, a trial court abuses its discretion when it "strays beyond the applicable legal standards or . . . fails to properly consider the factors customarily used to guide the particular discretionary decision." *Id*. (citing *State v. Lewis*, 235 S.W.3d 136, 141 (Tenn. 2007)).

[12]Our review of whether the trial court took the applicable law and relevant facts into account in making a discretionary decision greatly benefits from the trial court's findings of fact and conclusions of law. *See Gooding*, 2015 WL 1947239, at *7. Findings of fact are helpful even when reviewing such highly discretionary decisions as the decision to award attorney's fees. *See Kathryne B.F. v. Michael B.*, No. W2013-01757-COA-R3-CV, 2014 WL 992110, at *8 (Tenn. Ct. App. March 13, 2014) ("[T]he lack of explanation in the court's order stymies our ability to review the court's decision [to deny a request for attorney's fees] for an abuse of discretion."), *no perm. app. filed*.; *In re Estate of Campbell*, No. E2011-02765-COA-R3-CV, 2012 WL 3090299, at *6 (Tenn. Ct. App. July 31, 2012) (remanding an award of attorney's fees because of "a complete absence of any factual findings to show why the court awarded the fees.").

With the foregoing principles in mind, the appellate 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. When called upon to review a lower court's discretionary decision, the reviewing court should review the underlying factual findings using the preponderance of the evidence standard contained in Tenn. R. App. P. 13(d) and should review the lower court's legal determinations de novo without any presumption of correctness.

Lee Medical, 312 S.W.3d at 524-25 (internal citations omitted).

A rule or statute may establish the applicable law and prescribe the relevant facts that a trial court must take into account when making a discretionary decision. Supreme Court Rule 40A governs the appointment of guardians *ad litem* in "custody proceedings" as well as the allocation of their fees. *See* Tenn. Sup. Ct. R. 40A, §§ 2, 11. According to this rule, a "custody proceeding" is *"a court proceeding*, other than an abuse or neglect proceeding, *in which legal or physical custody of, access to, or visitation or parenting time with a child is at issue*, including but not limited to divorce, post divorce [sic], paternity, domestic violence, contested adoptions, and contested private guardianship cases." Tenn. Sup. Ct. R. 40A, § 1(a) (emphasis added).

In this post-divorce proceeding, Father petitioned the court to suspend Mother's parenting time and limit her access to the parties' child; thus, this was a "custody proceeding" within the meaning of Rule 40A; accordingly, Rule 40A governs the allocation of the guardian *ad litem*'s fees in this case. The relevant provisions of Rule 40A read as follows:

> Concerning the allocation of the fee among the parties, the court may do one or more of the following:
>
> (1) order a deposit to be made into an account designated by the court for the use and benefit of the guardian ad litem;
>
> (2) before the final hearing, order an amount in addition to the amount ordered deposited under paragraph (1) to be paid into the account;

> (3) equitably allocate fees and expenses among the parties; and
>
> (4) reallocate the fees and expenses at the conclusion of the custody proceeding, in the court's discretion, if the initial allocation of guardian ad litem fees and/or expenses among the parties has become inequitable as a result of the income and financial resources available to the parties, the conduct of the parties during the custody proceeding, or any other similar reason. Any reallocation shall be included in the court's final order in the custody proceeding and shall be supported by findings of fact.

Tenn. Sup. Ct. R. 40A, § 11(b).

In this case, the allocation of the guardian *ad litem*'s fees occurred at the conclusion of the trial court proceedings. Subsections 11(b)(1)-(3) authorize the court to "equitably allocate fees and expenses among the parties" at any time before the conclusion of the proceedings, and none of these subsections expressly require the court to make written findings of fact. However, when the court elects to *reallocate* the fees and expenses *at the conclusion of the proceedings*, the rule expressly requires consideration of the factors stated in subsection (4). Rule 40A also requires the court to make findings of fact and to state those findings in the order allocating the fees and expenses. The rule does not expressly identify the court's responsibilities if the only allocation of fees and expenses occurs at the conclusion of the hearing. Having considered the purpose of Tenn. Sup. Ct. R. 40A and appreciating the benefit of knowing the factual basis and reasoning of a trial court's discretionary ruling, when a party challenges the allocation of the fees and expenses at the conclusion of the proceedings, we believe the rule requires the trial court to consider the factors stated in subsection (4), make findings of fact relevant thereto, and set forth those findings in the order allocating the fees and expenses.

Although the trial court likely considered the equities in deciding to allocate all of the fees to Mother, the order does not include the trial court's findings; therefore, we believe it appropriate to remand this issue to the trial court with instructions to consider the relevant factors identified in Rule 40A, § 11(b)(4), make the appropriate findings of fact, and allocate the fees and expenses as it deems equitable in its discretion.

Accordingly, we reverse the trial court's allocation of the guardian *ad litem*'s fees and remand for consideration of the relevant factors as required by Rule 40A.

IV. ATTORNEY'S FEES

Mother argues that the trial court erred by awarding Father any attorney's fees because he did not expressly request them. Alternatively, if Father is entitled to recover his reasonable and necessary fees, Mother argues that she filed a timely objection to the

fee request and that the trial court erred by not conducting a hearing to assess the reasonableness of the fees.

A. Notice of Attorney's Fees

Tennessee "follows a liberal notice pleading standard, which recognizes that the primary purpose of pleadings is to provide notice of the issues presented to the opposing party and court." *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011) (internal citations omitted); *see* Tenn. R. Civ. P. 8.01. In conjunction with that standard, the Tennessee Rules of Civil Procedure also provide that "[w]hen items of special damage are claimed, they shall be specifically stated." Tenn. R. Civ. P. 9.07. Attorney's fees are considered special damages because "in the absence of a statute, contract, or equitable rule requiring otherwise, attorneys must generally look to their own clients for their fees." *See In re Estate of Greenamyre*, 219 S.W.3d 877, 884 (Tenn. Ct. App. 2005) (citing *Kline v. Eyrich*, 69 S.W.3d 197, 204 (Tenn. 2002)); *see also Marshall v. First Nat. Bank of Lewisburg*, 622 S.W.2d 558, 561 (Tenn. Ct. App. 1981). In the past, this court has noted that "[s]ince an award of attorneys' fees is fairly unusual, plaintiff should have the obligation of pleading such an item of damages." *Marshall*, 622 S.W.2d at 561.

In the 34 years since we made that statement, it has become common for parties to seek payment of attorney's fees, and awards of attorney's fees are no longer so unusual. *See In re Estate of Greenamyre*, 219 S.W.3d at 885. As a result, our courts have held that the failure to comply with Tenn. R. Civ. P. 9.07 is not necessarily fatal to an award of attorney's fees when parties already know that attorney's fees may be recovered. *See id.*; *Hardcastle v. Harris*, 170 S.W.3d 67, 90-91 (Tenn. Ct. App. 2004). Thus, while including a specific request for attorney's fees in one's pleadings remains the prudent practice, failure to do so will not necessarily result in a reversal of the award. *See In re Estate of Greenamyre*, 219 S.W.3d at 885.

As our analysis of civil contempt indicates, the trial court had authority to award Father attorney's fees as actual damages based on a finding of contempt. *See* Tenn. Code Ann. § 29-9-105; *Overnight Transp.*, 172 S.W.3d at 511; *Reed*, 29 S.W.3d at 119-20. Therefore, we find no error with the trial court's determination that Father was entitled to recover the attorney's fees he incurred in the prosecution of the contempt petition.

B. The Reasonableness and Necessity of the Attorney's Fees

We now address Mother's argument that the trial court should have conducted a hearing to assess the reasonableness and necessity of the attorney's fees in question. For the reasons stated below, we have concluded that Mother made a timely request for a hearing on Father's fee request and that one should have been conducted.

We begin by recognizing that it is not always necessary for there to be a "fully developed record" when the judge who presided over a case is asked to award attorney's fees. *Miller v. Miller*, 336 S.W.3d 578, 587 (Tenn. Ct. App. 2010). Indeed, trial courts are generally capable of determining the value of an attorney's services by virtue of the fact that they have overseen the proceedings before them. *See Richards v. Richards*, No. M2003-02449-COA-R3-CV, 2005 WL 396373, at *15 (Tenn. Ct. App. Feb. 17, 2005).

"Should a dispute arise as to the reasonableness of the fee awarded, then in the absence of any proof on the issue of reasonableness, it is incumbent upon the party challenging the fee to pursue the correction of that error in the trial court by insisting upon a hearing on that issue, or to convince the appellate courts that he was denied the opportunity to do so through no fault of his own." *Moran v. Willensky*, 339 S.W.3d 651, 664 (Tenn. Ct. App. 2010); *see Kline*, 69 S.W.3d at 210. Accordingly, a trial court is not required to hold a hearing as to the reasonableness of the amount of attorney's fees awarded unless a party makes a timely request. *See Moran*, 339 S.W.3d at 664; *Richards*, 2005 WL 396373, at *15.

Here, Mother made a timely demand for a hearing on the reasonableness and necessity of Father's application for attorney's fees. Because her request was timely, we have determined the trial court should have held a hearing on the reasonableness and necessity of the fees requested. Accordingly, we remand for a hearing on Father's fee request.

V. FRIVOLOUS APPEAL

The guardian *ad litem* contends that Mother's appeal was frivolous and that we should award damages pursuant to Tenn. Code Ann. § 27-1-122 because Mother has failed to provide us with an adequate record. *See Williams v. Williams*, 286 S.W.3d 290, 297-98 (Tenn. Ct. App. 2008). Mother's failure to provide a transcript or statement of the evidence prevented us from conducting a thorough review of some of issues she raised, however, Mother prevailed to an extent on two issues. As a result, we decline to deem this appeal frivolous.

IN CONCLUSION

The allocation of the fees and expenses awarded the guardian *ad litem* (but not the amount awarded) and the amount of attorney's fees awarded Father (but not his right to recover fees) are reversed, and these two issues are remanded to the trial court for further proceedings. We affirm the trial court in all other respects.

Therefore, the judgment of the trial court is affirmed in part and reversed in part, and this matter is remanded for proceedings consistent with this opinion. Two-thirds of the costs of appeal are assessed to Mother and one-third of the costs of appeal are assessed to Father.

_____

FRANK G. CLEMENT, JR., JUDGE