

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned On Briefs November 16, 2009

IN RE: EMMA E.

**Direct Appeal from the Juvenile Court for Bedford County
No. 34-545 Charles L. Rich, Judge**

No. M2008-02212-COA-R3-JV - Filed February 17, 2010

This case concerns the allocation of parental responsibility between two unmarried parents of a minor child. Prior to trial, the father's attorney acknowledged removing a set of confidential records from the court clerk's office in violation of a qualified protective order. The juvenile court declined to hold the father's attorney in contempt and later admitted the records over the objection of the mother's counsel. At trial, the court treated the father's petition for change of custody as an original petition to establish residential parenting time. The court designated the mother primary residential parent, awarded the parties equal parenting time, granted the parties joint decision-making authority over all major life decisions, and ordered the mother to pay the father child support. The mother appeals. We affirm.

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

DAVID R. FARMER, J., delivered the opinion of the Court, in which HOLLY M. KIRBY, J. and J. STEVEN STAFFORD, J., joined.

Michelle Blaylock Howser, Murfreesboro, Tennessee, for the appellant, Rachel Smith Ferrell.

Trisha Lewis Henegar, Shelbyville, Tennessee, for the appellee, Greg Embry.

OPINION

I. Background and Procedural History

The parties, Gregory Andrew Embry ("Father") and Rachel Kay Smith Ferrell ("Mother"), are the parents of Emma Claire Embry ("Emma"), born September 12, 2005.

The parties were involved in an on-again-off-again relationship that lasted until May 2007. In September 2007, the parties entered an agreed order to legitimate the child. The agreed order, however, did not allocate parenting time between the parties, designate a primary residential parent, or determine child support. Nevertheless, the parties continued to enjoy a fairly amicable relationship in which each parent spent substantially equal time parenting the child.

The parties' relationship began to deteriorate after Mother sought and received admittance to Mercy Ministries of America, Inc. ("Mercy Ministries"), a faith-based counseling program in Nashville, Tennessee. Although Mother had expressed her desire to enter the program to Father, she commenced her stay at Mercy Ministries rather abruptly. Importantly, Mother enrolled in the residential program without reaching an agreement with Father on who would care for the child in her absence. Father and the maternal grandparents shared parenting time for a short period, but the improvised agreement soon fell apart after Father was denied parenting time for the majority of November 2007. The denial of parenting time motivated Father to file a petition for change of custody in which he sought temporary and permanent custody of the child. Mother, as a result, withdrew from the program at Mercy Ministries, which she could not complete while litigation continued.

In an amended petition, Father alleged that Mother's withdrawal from Mercy Ministries and general refusal to cooperate amounted to a material change in circumstances. Father endeavored to support his claim with information contained in the records of Mother's stay at Mercy Ministries. He issued a subpoena duces tecum to Mercy Ministries, which Mother and Mercy Ministries opposed in separate motions to quash asserting that Mother's records were privileged. The juvenile court denied the motions to quash, concluding that the records were not protected by privilege. The court, however, entered a qualified protective order limiting dissemination of the information contained therein. The order required the court clerk to keep the records under seal, granted the parties access to view the documents in the court clerk's office, prohibited the parties from using or disclosing the information contained in the records for any purpose other than the litigation, and obligated the court clerk to destroy the records at the conclusion of the case absent an order to the contrary.

In April 2008, Mother petitioned to hold Father in contempt for violating the court's qualified protective order. Father's attorney admitted to taking the confidential records to her office for review but contended that she had not disclosed the contents of the records to any other person. The juvenile court credited the testimony of counsel and declined to hold Father's attorney in contempt. The court's order acknowledged the admission of Father's attorney but concluded she did not intend to defy the qualified protective order, did not disclose information in violation of the order, and did not violate the spirit of the order. The court likewise declined to grant a motion in limine that Mother filed seeking to prohibit the

introduction of the records at trial.

At trial, the court conducted a comparative fitness analysis to determine how to best allocate parental responsibility. Several of the comparative factors were favorable to both parties. The court, for example, found that each party had developed strong emotional ties with the child and each party loved the child. Similarly, each party had spent substantially equal time with the child prior to the filing of Father's petition. The court found no proof that either party would expose the child to inappropriate third parties, giving some weight to the fact that the parties had continued to reside with the grandparents. The order noted that each set of grandparents had provided assistance in caring for the child and were part of an invaluable support system.

Other factors favored one parent over the other. Father, for example, was slightly more capable of providing a stable home for Emma. The court explained that Mother was involved in a brief relationship that precipitated an unexpected pregnancy following the parties' breakup. This second unexpected pregnancy – along with issues related to drug use, anxiety, lying, and prior instances of abuse – brought about Mother's desire to seek admittance at Mercy Ministries.¹ Mother, on the other hand, was slightly more capable of feeding, clothing, insuring, and providing medical care for the child based on her past performance.

Examination of these and other factors led the court to designate Mother primary residential parent, award the parties equal parenting time, provide the parties with joint decision-making authority over major issues, and order Mother to pay Father weekly child support. The court pointedly held that each parent had the ability to share parenting responsibilities and facilitate a relationship with the other parent. Although some divisiveness had emerged after Father filed his petition, the court concluded that the parties' inability to cooperate was attributable to the ongoing litigation. The court was convinced that Mother possessed the ability to communicate with Father and that she would be less likely to interfere with Father's parental rights once a specific schedule was determined. For these reasons, the court found that equal parenting time and joint decision-making authority were in the best interests of the child. Mother timely appealed the court's decision.

¹The court also placed some importance on the testimony regarding Mother's husband, Phillip Benton Ferrell ("Mr. Ferrell"), who is not the father of her second child. The record shows that Mother and Mr. Ferrell experienced difficulties early in their marriage. One argument escalated to the point that Mr. Ferrell punched a wall at the maternal grandparents' home. Mr. Ferrell moved out of the residence for some period of time but has since returned without incident.

II. Issues Presented

Mother raises the following three issues on appeal, as we perceive them:

- (1) Whether the court abused its discretion when it declined to hold Father's attorney in contempt;
- (2) Whether the court committed reversible error when it admitted Mother's records from Mercy Ministries;
- (3) Whether the court erred when it awarded the parties equal parenting time.

Father does not challenge any aspect of the juvenile court's ruling. Our review, therefore, is limited to the issues that Mother raises.

III. Standard of Review

This Court reviews the judgment of a trial court in a bench trial *de novo* upon the record, according a presumption of correctness to the factual findings of the court below. Tenn. R. App. P. 13(d); *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993) (citation omitted). We will not disturb a trial court's findings of fact unless a preponderance of the evidence is to the contrary. *Berryhill v. Rhodes*, 21 S.W.3d 188, 190 (Tenn. 2000) (citation omitted). Factual determinations based on a trial judge's assessment of witness credibility receive a higher degree of deference; we will depart from the trial court's determination only if clear and convincing evidence shows the finding to be in error. *Wells v. Tenn. Bd. of Regents*, 9 S.W.3d 779, 783 (Tenn. 1999) (citations omitted). Our review is *de novo* with no presumption of correctness if the trial court does not produce findings of fact. *Archer v. Archer*, 907 S.W.2d 412, 416 (Tenn. Ct. App. 1995) (citations omitted). Questions of law are similarly reviewed *de novo* with no presumption of correctness. *Bowden v. Ward*, 27 S.W.3d 913, 916 (Tenn. 2000) (citation omitted).

IV. Analysis

A. Contempt

Mother first argues that the juvenile court erred when it refused to hold Father's attorney in contempt. Claims for civil contempt founded on a violation of a court order have four essential elements: (1) "the order alleged to have been violated must be 'lawful,'" (2) "the order alleged to have been violated must be clear, specific and unambiguous," (3) "the

person alleged to have violated the order must have actually disobeyed or otherwise resisted the order,” and (4) “the person’s violation of the order must be ‘willful.’” *Konvalinka v. Chattanooga-Hamilton County Hosp. Auth.*, 249 S.W.3d 346, 354-55 (Tenn. 2008) (footnotes omitted). “After determining that a person has willfully violated a lawful and sufficiently clear and precise order, the court may, in its discretion, decide to hold the person in civil contempt.” *Id.* at 358 (citation omitted).

A trial court’s decision whether to hold a person in civil contempt is “entitled to great weight.” *Id.* (citation omitted). “Accordingly, decisions to hold a person in civil contempt are reviewed using the abuse of discretion standard of review.” *Id.* (citations omitted). Our supreme court has described the abuse of discretion standard thus:

An abuse of discretion occurs when a court strays beyond the framework of the applicable legal standards or when it fails to properly consider the factors customarily used to guide that discretionary decision. Discretionary decisions must take the applicable law and relevant facts into account. Thus, reviewing courts will set aside a discretionary decision only when the court that made the decision applied incorrect legal standards, reached an illogical conclusion, based its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party.

Id. (citations omitted). “This review-constraining standard does not permit reviewing courts to substitute their own judgment for that of the court whose decision is being reviewed.” *Id.* (footnote omitted) (citations omitted).

Simply stated, we have reviewed the record and are unable to find that the juvenile court abused its discretion. The juvenile court declined to hold Father’s attorney in contempt because the court believed she did not intend to defy the court or violate the spirit of the order. The court was in the best position to assess the credibility and demeanor of Father’s attorney on this issue. *See Wells*, 9 S.W.3d at 783. We will not substitute our judgment for that of the juvenile court. The court’s ruling is affirmed.

B. Admission of Medical Records

Mother next argues that the court erred when it admitted the records of Mercy Ministries, which she claims were privileged. We hold that any error in this regard was harmless. “A final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process.” Tenn. R. App. P. 36(b). “The burden is on the complaining party to show that the error was

prejudicial.” *Brown v. Daly*, 83 S.W.3d 153, 158 (Tenn. Ct. App. 2001) (citing *Bishop v. R.E.B. Equip. Serv. Inc.*, 735 S.W.2d 449, 452 (Tenn. Ct. App. 1987)). “Ordinarily, an error in admitting evidence is harmless if the fact shown by the offending evidence is also shown by other evidence in the record which is competent.” *Love v. Smith*, 566 S.W.2d 876, 879 (Tenn. 1978) (citing *Snow v. Owens*, 505 S.W.2d 479, 486 (Tenn. Ct. App. 1973)). Also, an alleged error must be considered harmless if the reviewing court, upon examination of the record as a whole, concludes that the judgment is unlikely to change in the event of a retrial. *Id.* (citing *Hay v. Memphis Light, Gas and Water Div.*, 426 S.W.2d 182, 187-88 (Tenn. 1968)).

Having reviewed the record in this case, it is apparent that the exclusion of the Mercy Ministries records would have had a negligible effect, if any, on the juvenile court’s decision. In its order, the court expressly stated:

The Court is taking into consideration that both parties are still of a young age and is not applying much weight to either parties [sic] past drug and/or alcohol usage as there was no testimony that this had occurred in the presence of the minor child other than a graduation party that both parents attended together with the minor child. The Court is likewise not applying much weight to the disclosures made by the Mother in her application and interviews with Mercy Ministries. Although the Court does question the Mother’s credibility due to the fact she admitted in her testimony that she lied to Mercy Ministries to increase her chances of being accepted into the program.

Further, there was independent testimony on issues surrounding Mother’s prior drug use, anxiety, lying, and prior abuse. The juvenile court conducted a well-reasoned analysis of the factors relevant to its determination in this case. The court applied little to no weight to information gained through the admission of the Mercy Ministries records in reaching its ultimate conclusion. We hold that the alleged error in admitting the records was harmless and will proceed to evaluate the court’s allocation of residential parenting time. *See In re Eden*, No. M2002-000521-COA-R3-JV, 2003 WL 22002644, at *2-3 (Tenn. Ct. App. Aug. 25, 2003); *Durant v. Howard*, No. E2000-02072-COA-R3-CV, 2001 WL 1103500, at *2 (Tenn. Ct. App. Sept. 20, 2001).

C. Residential Parenting Time

Mother challenges the decision of the juvenile court to award the parties equal

residential parenting time.² The juvenile court, in its discretion, incorporated the use of a residential parenting schedule to allocate parental responsibility between the parties. *See* Tenn. Code Ann. § 36-6-411(b) (Supp. 2009). Although the parenting plan statute defines a primary residential parent as “the parent with whom the child resides more than fifty percent (50%) of the time,” Tenn. Code Ann. 36-6-402(4) (2005), our supreme court has not interpreted this definition as prohibiting the equal division of residential parenting time between parents. *Hopkins v. Hopkins*, 152 S.W.3d 447, 449 (Tenn. 2004). Further, the legislature has provided that there is no preference or presumption for or against equally dividing parenting time.³ *See* Tenn. Code Ann. § 36-6-101(a)(2)(A)(i) (Supp. 2009). Thus, the question before this Court is whether the juvenile court erred in awarding these parties equal residential parenting time in light of the relevant facts.⁴

²Mother’s argument is at times phrased in terms of “joint custody” and “visitation.” These terms, while not entirely obsolete, are outmoded when considering a determination of parental responsibility under the parenting plan statute, Tennessee Code Annotated section 36-6-401 *et seq.*, which was adopted in part to change the language of child custody decisions. *See* Janet Leach Richards, *Richards on Tennessee Family Law*, § 8-2(e) (3d ed. 2008) (footnotes omitted). Judge Don R. Ash, one of the leading proponents of reform, explained the need to recast the terminology of these decisions: “The archaic terms ‘custody’ and ‘visitation’ convey ownership over the child and imply that one party is merely a visitor in the home. These terms should be replaced with more user-friendly words.” Judge Don R. Ash, *Bridge Over Trouble Water: Changing the Custody Law in Tennessee*, 27 U. Mem. L. Rev. 769, 801 (2007) (footnote omitted). The parenting plan statute did just that, replacing the traditional concepts of joint legal and physical custody with a new concept: the residential parenting schedule. 19A W. Walton Garrett, *Tennessee Practice Series: Tennessee Divorce, Alimony and Child Custody* § 26:3, at 78 (2d rev. ed. 2007). As a result, traditional terms such as custody, visitation, custodial parent, and noncustodial parent have given way to new terms, e.g., “residential schedule, temporary and permanent parenting plans, primary residential parent, alternate residential parent, and parenting responsibilities.” Richards, *supra*, at § 8-2(e) (footnotes omitted). Because this change was intended to inspire parties to move beyond the win-lose mentality present in previous disputes over parental responsibility, *see id.*, we find it appropriate to re-frame Mother’s argument in these terms. We note, however, that the change of terminology does not necessarily undermine the reasoning of previous opinions deciding custody and visitation disputes where the same concerns – supporting parent-child relationships, providing a mechanism for decision-making, allocating time with the child, promoting the child’s best interests – predominated our review.

³The Code continues to harbor remnants of the prior regime, which have not been revised to reflect the prevailing terminology. Tennessee Code Annotated section 36-6-101, for example, provides that “neither a preference nor a presumption for or against joint legal custody, joint physical custody or sole custody is established, but the court shall have the widest discretion to order a custody arrangement that is in the best interest of the child.” Tenn. Code Ann. § 36-6-101(a)(2)(A)(i) (Supp. 2009).

⁴Mother concedes on appeal that the court properly applied a comparative fitness analysis to determine parental responsibility. *See* *Huntzinger v. Parham*, No. M2009-00045-COA-R3-CV, 2010 WL 175108, at *4-5 (Tenn. Ct. App. Jan. 19, 2010); *Durant v. Howard*, No. E2000-02072-COA-R3-CV, 2001 WL 1103500, at *2 (Tenn. Ct. App. Sept. 20, 2001).

The division of parental responsibility is one of the most important decisions confronting the courts. *See Chaffin v. Ellis*, 211 S.W.3d 264, 286 (Tenn. Ct. App. 2006) (citation omitted); *Steen v. Steen*, 61 S.W.3d 324, 327 (Tenn. Ct. App. 2001) (citations omitted). 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. *See In re Zaylen R.*, No. M2003-00367-COA-R3-JV, 2005 WL 2384703, at *3 (citing *Aaby v. Strange*, 924 S.W.2d 623, 629 (Tenn. 1996); *Taylor v. Taylor*, 849 S.W.2d 319, 331-32 (Tenn. 1993)). 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." *Darvarmanesh v. Gharacholou*, No. M2004-00262-COA-R3-CV, 2005 WL 1684050, at *3 (Tenn. Ct. App. July 19, 2005) (citing *Luke v. Luke*, 651 S.W.2d 219, 221 (Tenn. 1983); *In re Parsons*, 914 S.W.2d 889, 893 (Tenn. Ct. App. 1995); *Bah v. Bah*, 668 S.W.2d 663, 665 (Tenn. Ct. App. 1983)).

A court's decision on how to best allocate parental responsibility often turns on subtle factors such as witness credibility and demeanor. *See In re Zaylen R.*, 2005 WL 2384703, at *4 (citing *Adelsperger v. Adelsperger*, 970 S.W.2d 482, 485 (Tenn. Ct. App. 1997)). This Court, therefore, is hesitant to substitute its judgment for that of the trial court. *Id.* 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. *Id.* (citing *Eldridge v. Eldridge*, 42 S.W.3d 82, 88 (Tenn. 2001)). 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." *See id.* (quoting *Eldridge*, 42 S.W.3d at 88). A trial court's decision, however, must find support in the proof submitted at trial and in the applicable case or statutory law. *Darvarmanesh*, 2005 WL 1684050, at *3 (citing *Gaskill v. Gaskill*, 936 S.W.2d 626, 631 (Tenn. Ct. App. 1996)).

Courts have generally looked upon awards of "joint custody" with disfavor, believing that such arrangements rarely promote the best interests of the child. *Darvarmanesh*, 2005 WL 1684050, at *7 (citations omitted). This Court has reasoned that courts should award joint custody only "when there is *specific, direct proof* that the child's interest will be served best by dividing custody between the parents." *Id.* (quoting *Garner v. Garner*, 773 S.W.2d 245, 248 (Tenn. Ct. App. 1989) (Koch, J., dissenting) (emphasis added)) (citing *Zabaski v. Zabaski*, No. M2001-02013-COA-R3-CV, 2002 WL 31769116, at *4-5 (Tenn. Ct. App. Dec. 11, 2002) (finding joint custody appropriate where the record revealed the parents were able to communicate effectively regarding their son, they shared parenting and household duties while married, and one of the parties suggested a joint custody arrangement); *Martin v.*

Martin, No. 03A01-9708-GS-00323, 1998 WL 135613, at *6 (Tenn. Ct. App. Mar. 26, 1998) (affirming the trial court’s award of joint custody due to the fact that the parents had previously agreed to a joint custody arrangement); *Gray v. Gray*, 885 S.W.2d 353, 354-55 (Tenn. Ct. App. 1994) (finding that the evidence demonstrated that both parents were very active in the child’s life and there was no apparent animosity between the parties)). The same reasoning applies to an analogous decision under the parenting plan statute to award equal residential parenting time with joint decision-making authority.

We are unable to conclude, however, that the juvenile court abused its discretion in this case.⁵ The juvenile court relied on specific, direct proof to conclude that equally dividing residential parenting time was in the best interests of the child. The court found that each parent had developed a strong emotional bond with the child; each parent was able to rely on a strong support system to help raise the child; each parent was able to facilitate a relationship with the other; and each parent tended to the physical, emotional, and spiritual needs of the child. The parties’ testimony supported the court’s observation. The maternal grandmother explained that Mother and Father had done an “excellent job” caring for Emma. The parties’ testimony was that Emma is a well-clothed, well-fed, smart, respectful, and “good” little girl. The testimony in this case further showed that each parent would like for the other to remain an active part of Emma’s life. Mother testified that she and Father are able to communicate “just fine” and saw no reason she could not continue to have a good relationship with the paternal grandparents.

The fact that Mother was the only party to provide the court with a proposed parenting plan is irrelevant. Even in cases where the filing of a parenting plan is mandatory, the failure of a party to file a proposed plan gives the court discretion to adopt the proposed plan of the opposing party. The relevant statutory language provides that a party’s failure to file a proposed plan “may result in the court’s adoption of the plan filed by the opposing party if the court finds such plan to be in the best interests of the child.” Tenn. Code Ann. § 36-6-404(c)(3) (2005). The plain language of the statute is permissive, not mandatory; courts remain free to reject any parenting plan that is not in the best interests of the child. We find no support for the suggestion that the court was required to blindly accede to the provisions set forth in Mother’s plan without providing for the best interests of the child. Mother’s argument on this point is without merit.

⁵We express no opinion as to whether the juvenile court erroneously awarded child support to Father in contravention of the Tennessee Supreme Court’s decision in *Gray v. Gray*, 78 S.W.3d 881, 884 (Tenn. 2002) (holding that “support may be awarded only to the primary residential parent”). This argument was not raised on appeal and is therefore waived. *Branum v. Akins*, 978 S.W.2d 554, 557 n.2 (Tenn. Ct. App. 1998) (citations omitted) (“Where a party makes no legal argument and cites no authority in support of a position, such issue is deemed waived and will not be considered on appeal.”).

We are also not persuaded that the court failed to account for the alleged abuse of Mother at the hands of Father. If the court determined that Father physically, sexually, or emotionally abused Mother, it would have been bound to limit Father's parenting time to some degree. *See* Tenn. Code Ann. § 36-6-406(a)(2) (2005); Tenn. Code Ann. § 36-6-404(b)(12) (2005). But the court was not obligated to specifically list each factor relevant to its decision or an explanation of how that factor affected its decision. *See Coley v. Coley*, No. M2007-00655-COA-R3-CV, 2008 WL 5206297, at *6 (Tenn. Ct. App. Dec. 12, 2008) (citations omitted). Although the court acknowledged Mother's allegations of abuse in relation to the reasons she sought treatment at Mercy Ministries, it did not make a specific finding on this issue. Having reviewed the record, we are unwilling to hold that court failed to properly account for all relevant factors in this case.

In conclusion, the juvenile court expressed confidence in the parties' ability to share joint decision-making authority and equal parenting time; we find insufficient reason to second-guess that assessment. Although Mother has cited evidence to raise doubts as to the health of the parties' relationship preceding trial, this evidence does not preponderate against the juvenile court's factual determination nor does it convince this Court that the lower court abused its discretion. If future experience shows contrary to the expectations of the court that the parties are unable to set aside their differences in the best interests of the child, our legal system provides for reexamination of the prior determination. *See Gray v. Gray*, 885 S.W.2d 353, 355 (Tenn. Ct. App. 1994). In the meantime, we hope the all interested persons will continue their commendable efforts to raise this child. The court's decision is affirmed.

V. Conclusion

For the foregoing reasons, we affirm the decision of the juvenile court. Costs of this appeal are taxed to the appellant, Rachel Smith Ferrell, and her surety for which execution may issue if necessary.

DAVID R. FARMER, JUDGE