

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 21, 2015 Session

IN RE JAYDEN C.

**Appeal from the Juvenile Court for Trousdale County
No. 47741076 Ken Witcher, Judge**

No. M2014-00957-COA-R3-JV – Filed March 23, 2015

The mother of the parties' only child contends the trial court erred in changing the designation of the primary residential parent from Mother to Father and in limiting her parenting time to 100 days a year. She also contends the court erred in failing to award her retroactive child support. We affirm the trial court's designation of Father as the primary residential parent and the parenting schedule. As for Mother's claim for retroactive child support and reasonable medical expenses for the birth of the child, she asserted these claims in her counter-petition; however, when Father attempted to introduce documentary evidence of support he had provided to Mother and child, Mother's counsel objected to the relevancy of the evidence, informing the trial judge that Father "made those payments" and that back child support was not an issue. Based on Mother's representations, the court ruled that evidence of Father's payments of back child support was not relevant, and no evidence was introduced to show that support had been provided or that any support was owed. While we acknowledge prior cases which stand for the general rule that parents may not waive or circumvent their minor child's right to support, *State ex rel. Dauda v. Harris*, No. W2006-01314-COA-R3-JV, 2007 WL 906746 (Tenn. Ct. App. Mar. 26, 2007), we cannot allow a litigant to proceed on a claim she affirmatively abandoned during trial. Moreover, because she deprived the trial court of the opportunity to rule on the issue at trial, we will not permit Mother to raise this issue for the first time on appeal. For the foregoing reasons, we affirm the trial court in all respects.

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

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.

Andrea Hagan and Anthony Ensley Hagan, Jr., Lebanon, Tennessee, for the appellant, Porsche L. L.¹

James H. Flood, Lebanon, Tennessee, for the appellee, William J. C.

OPINION

Porsche L. L. (“Mother”) and William J. C. (“Father”) began dating in 2006 and had one child together, Jayden C., born October 2007. Jayden is Mother’s only child, while Father has a minor child from a previous relationship. The couple shared a tumultuous relationship until February 2013 when they separated for the final time.

During Mother’s pregnancy, the couple first separated and Mother moved in with her parents in Trousdale County. When Jayden was three to five months old, Mother and Father reconciled, and Mother and Jayden moved in with Father into his mother’s home. In August 2008, when Jayden was ten months old, Father purchased a three-bedroom home in Wilson County, and Mother and Jayden moved in with him. In November 2008, Father’s other child, Alexandria, who is a few years older than Jayden, began living in the home. During this time, Father continued to work and supported Mother and Jayden while Mother cared for Jayden and attended college at Cumberland University.

In the spring of 2011, the couple separated for the second time; Mother and Jayden moved back into her parents’ home. The parties agreed that Father could visit the child every other weekend and that he would pay \$95 a week to cover the cost of daycare.

On June 22, 2011, Father filed a Petition for Paternity and Custody and a Motion for Custody and Child Support Pendente Lite. Soon thereafter, Father’s Motion for Custody and Child Support Pendente Lite came on for hearing. The pendent lite order that followed, which was entered on August 8, 2011, reads in pertinent part:

The Court, on its own *Motion* and due to commitments, continued this matter to an indefinite date. Until further order, the Court determined that the current situation should continue. It is, therefore, Ordered that:

1. [Father] is the biological Father of the minor child Jayden
2. Said minor child shall remain with [Mother].
3. The Father shall continue to pay child support to the Mother in the amount of Ninety-Five Dollars (\$95) per week.

¹This court has a policy of protecting the identity of children in parental termination cases by initializing the last names of the parties.

The August 2011 pendente lite order also directed that Father would continue to have visitation every other weekend, that Father would continue to provide health insurance for the child, and that “all other matters shall be held in reserve.”

In October 2011, the couple reconciled again, and Mother and Jayden moved back in with Father. In 2012, the couple separated for a few weeks with Mother and Jayden returning to her parents’ home, but the couple reconciled yet again, and Mother and Jayden moved back in with Father. In February 2013, Mother and Jayden moved out the final time; they began living with one of Mother’s friends near Father’s home while Mother simultaneously worked at a restaurant and finished obtaining her degree.

In September 2013, Mother graduated, and she and Jayden permanently moved back in with her parents in Trousdale County. Jayden had been attending kindergarten at Sam Houston Elementary School since July 2013, but Mother placed him in Trousdale County Elementary School when she moved back with her parents. In October 2013, Mother began working for Genco Logistics; her work schedule varied weekly, but she would leave for work around 4 a.m. or 5 a.m. and would return home between 4 p.m. and 5:30 p.m., sometimes working weekends. Mother heavily relied on her parents in caring for the child during the week; the grandparents helped Jayden get ready for school, prepared his meals, and transported him to and from school. Father continued to visit the child every other weekend and pay \$95 a week.

After their final separation, Mother filed an Answer to Father’s Petition for Custody and filed her own Counter-Petition for custody. Trial was held on March 4, 2014; the trial court noted from the bench that “both of these parents are good parents,” but since the parents lived so far apart it would not be practical to make an equal division of time between the parents. The trial court considered the factors outlined in Tenn. Code Ann. § 36-6-106 and determined that the majority of factors weighed in Father’s favor. As a result, the trial court awarded custody to Father and awarded Mother 100 days of visitation and ordered her to pay support in the amount of \$88 per week.

Before the trial court entered a written order, Mother filed a motion requesting that the court reopen the proof due to additional information obtained in an affidavit from Father’s ex-girlfriend concerning Father’s treatment of Jayden. The trial court denied Mother’s motion to allow additional proof, finding that “the motion on its face did not establish grounds to grant the request and a hearing is not necessary.” Mother filed a timely appeal.

STANDARD OF REVIEW

This court reviews custody and visitation decisions de novo with a presumption that the trial court’s findings of fact are correct unless the evidence preponderates otherwise. *Kendrick v. Shoemaker*, 90 S.W.3d 566, 569 (Tenn. 2002); *Nichols v. Nichols*,

792 S.W.2d 713, 716 (Tenn. 1990). Moreover, appellate courts are reluctant to second-guess a trial court's determination regarding custody and visitation. *Parker v. Parker*, 986 S.W.2d 557, 563 (Tenn. 1999). This is because of the broad discretion given trial courts in matters of child custody, visitation and related issues. *Id.*; *see also Nelson v. Nelson*, 66 S.W.3d 896, 901 (Tenn. Ct. App. 2001). Custody decisions often hinge on subtle factors, such as the parents' demeanor and credibility during the proceedings. *Adelsperger v. Adelsperger*, 970 S.W.2d 482, 485 (Tenn. Ct. App. 1997). Accordingly, trial courts have broad discretion to fashion custody and visitation arrangements that best suit the unique circumstances of each case. *Parker*, 986 S.W.2d at 563.

Moreover, it is not the role of the appellate courts to "tweak [parenting plans] . . . in the hopes of achieving a more reasonable result than the trial court." *Eldridge v. Eldridge*, 42 S.W.3d 82, 88 (Tenn. 2001). Thus, a trial court's decision regarding custody or visitation will be set aside only when 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." *Id.*

ANALYSIS

Mother challenges the designation of Father as the primary residential parent and the failure to maximize Mother's parenting time as required by statute. Mother also challenges the trial court's failure to award her retroactive child support. Both Mother and Father request their respective attorney's fees on appeal. We shall address each issue in turn.

I. THE PRIMARY RESIDENTIAL PARENT

Mother argues that the evidence preponderates against the trial court's designation of Father as the primary residential parent. In particular, Mother contends that the trial court's decision should be reversed because the trial court's findings are not supported by the record, and the court failed to consider other factors enumerated in Tenn. Code Ann. § 36-6-106(a) that favor Mother. She also contends the trial court erred by refusing to reopen the proof to consider evidence related to Father's ex-girlfriend who he dated from November 2013 until March 2014.

In designating Father as the primary residential parent, the court stated that it had weighed the factors enumerated in Tenn. Code Ann. § 36-6-106(a) (2013) (amended July 1, 2014),² and finding that the comparative fitness analysis favored Father, the court referenced the following:

² Trial was held on March 4, 2014, and the trial court entered its order on April 21, 2014. In its ruling, the trial court analyzed factors set forth in a previous version of Tenn. Code Ann. § 36-6-106,

(continued . . .)

a. Father's home has been the primary residence of the parties' minor child. Said child has spent most of his life living in that physical environment. The Father owns his home and if the child is with him the Court knows that the child is going to be in that home providing stability for the minor child. The Mother has moved from the Father's home to a friend's home to her parent's home since leaving Father's residence. This factor weighs in favor of Father.

b. The parties' minor child has a half-sibling that lives in the Father's home. Said minor child will be allowed to develop a closer relationship with his sibling. This factor weighs in favor of Father.

c. The Father had actually in fact been more involved with the parties' minor child's life than Mother. Father has spent more time himself with the child, actual time just playing with the child, being involved in sport activities, soccer primarily. Father spent more time meeting with teacher(s) and school officials and spent more time with the minor child than Mother has in rearing/upbringing of the child. This factor weighs in favor of Father.

which was amended effective July 1, 2014. The factors set out in the previous version of Tenn. Code Ann. § 36-6-106(a) are:

- (1) The love, affection and emotional ties existing between the parents and child;
- (2) The disposition of the parents to provide the child with food, clothing, medical care, education and other necessary care and the degree to which a parent has been the primary caregiver;
- (3) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment ...;
- (4) The stability of the family unit of the parents;
- (5) The mental and physical health of the parents;
- (6) The home, school and community record of the child;
- (7) The reasonable preference of the child if twelve (12) years of age or older. The court may hear the preference of a younger child upon request. The preferences of older children should normally be given greater weight than those of younger children;
- (8) Evidence of physical or emotional abuse to the child, to the other parent or to any other person ...;
- (9) The character and behavior of any other person who resides in or frequents the home of a parent and such person's interactions with the child; and
- (10) Each parent's past and potential for future performance of parenting responsibilities, including the willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, consistent with the best interest of the child.

d. Mother's parents do have some health issues and, while they have been taking care of the child while Mother is living in her parents' home, the Court is concerned that the current arrangements may not last much longer. Mother may have to move because of the parents' health issues. This factor weighs in favor of Father.

Based on these findings, the trial court designated Father as primary residential parent and awarded Mother 100 days of visitation. Mother was to have the child every other weekend and a full week of visitation for spring and fall breaks. During summer breaks, Mother was to have the child for two weeks in June and July, and alternate holidays.

The evidence shows that Father's home has been the minor child's primary residence and that Father is able to provide a stable, satisfactory environment for the minor child. Father is financially stable and able to provide Jayden with food, clothing, medical care, education, and other necessary care. Father also lives with his daughter from a previous relationship, and Jayden shares a close relationship with his half-sibling. In addition, Father's neighborhood provides a safe environment for Jayden. Father and his neighbors testified that Jayden and his half-sibling play with several children in the neighborhood on a daily basis; Mother and the maternal grandmother testified that, while there were children in their neighborhood, neither could testify as to their names or that Jayden played with them.

Furthermore, Father is very active in Jayden's life; however, we cannot agree that Father has "been more involved with the parties' minor child's life than Mother." The preponderance of the evidence shows that Mother was the primary caregiver for the majority of the child's life. She was a stay-at-home mom while Father worked during the first four years of Jayden's life, and she continued to care for Jayden when the parties separated. While Father spent more time than Mother attending soccer practices and games, interacting with other parents, and meeting with teachers and school officials, Mother has been the primary caregiver and responsible for Jayden's daily care.

The testimony relative to Mother was that while she was able to provide a stable environment for Jayden in her parents' home, Mother's long work hours caused her to heavily rely on her parents for support; in fact, Mother testified that her parents would get Jayden ready for school, feed him his meals, and transport him to and from school. Furthermore, Mother testified that, since she began working full-time in October 2013, a typical day with Jayden is not until the weekend, when she isn't working. The trial court also noted that Mother's current living situation may be jeopardized by the grandparents' health issues. The maternal grandfather testified that he suffered from sundowner's disease, and he was unable to explain the disease or its symptoms during his testimony. In fact, he had trouble stating who lived with him in his home. The maternal grandmother testified that her husband's disease causes forgetfulness and an inability to carry a

conversation on some days, but that he did not create a threat to Jayden's care. Despite this, we agree with the trial court that the grandparents' health creates a legitimate concern that affects Mother's ability to provide a stable and satisfactory environment for Jayden.

Because the trial court set forth specific findings of fact based on its analysis of the relevant statutory factors, we are able to correlate the trial court's findings with the associated factors. Accordingly, we can discern that the trial court found Tenn. Code Ann. § 36-6-106(a)(1), regarding "[t]he love, affection and emotional ties existing between the parents and child" favored both parents equally, and (2), (3), (6), and (9) favored Father. Although we have concluded that the evidence preponderates against one of the trial court's finding, that § 36-6-106(a)(2) favors Father, which considers, inter alia, the degree to which a parent has been the primary caregiver, the evidence does not preponderate against the court's findings regarding the other relevant factors which favor Father.

We note that Mother contends the trial court failed to consider other statutory factors which would have weighed in Mother's favor. However, the trial court is only required to consider the *relevant* statutory factors that influenced its decision; it is not required to analyze non-relevant factors. *Coley v. Coley*, No. M2007-00655-COA-R3-CV, 2008 WL 5206297, at *6 (Tenn. Ct. App. Jan. 9, 2008). This is because not every factor is applicable in a given case, and the trial judge is required to consider only the factors which are applicable. *Harless v. Harless*, No. E2006-00192-COA-R3CV, 2007 WL 906757, at *6-7 (Tenn. Ct. App. Mar. 26, 2007) (internal citations omitted).

Mother also contends that the trial court would not have designated Father as the primary residential parent if it had granted her post-trial motion to reopen the proof. Mother filed a motion to reopen the proof prior to the entry of a written order based on newly obtained information from Father's ex-girlfriend, who had dated Father from November 2013 until March 2014. The ex-girlfriend alleged in an affidavit that she witnessed Father "being verbally and physically abusive to the parties' minor son." Specifically, she alleged that Father had "thumped" and "smacked" Jayden on the head and made derogatory remarks. She further alleged that Father has a firearm in the home that is not under lock and within range of Jayden. The trial court determined that "the motion on its face did not establish grounds to grant the request and a hearing is not necessary."

As our Supreme Court stated in *Simpson v. Frontier Community Credit Union*, 810 S.W.2d 147 (Tenn. 1991):

Permitting additional proof, after a party has announced that proof is closed, is within the discretion of the trial court, and unless it appears that

its action in that regard has permitted injustice, its exercise of discretion will not be disturbed on appeal.

Id. at 149 (internal citations omitted).

While any injury to a child is a matter of great concern, the record supports the trial court's conclusion that Mother was aware of the identity of Father's girlfriend prior to trial and the evidence she now seeks to introduce could have been obtained during pre-trial discovery. Moreover, Mother was privy to Father's "lifestyle" because she lived in Father's home for a considerable length of time. Where a party fails to procure evidence which, with ordinary diligence, she might have procured, a motion for a new trial for the purpose of introducing such new evidence may be properly denied. *Salisbury v. Salisbury*, 657 S.W.2d 761, 770-71 (Tenn. Ct. App. 1983) (citing *Tipton v. Smith*, 593 S.W.2d 298, 302 (Tenn. Ct. App. 1979)). Here, Mother failed to use ordinary diligence, as she could have easily discovered the information contained in the affidavit before trial; as a result, the trial court did not abuse its discretion in denying Mother's motion to reopen the proof.

Returning to the evidence in the record, the trial court was faced with the difficult decision of designating one of two good parents to be the primary residential parent who were equal in their love and affection for their child. Nevertheless, the evidence does not preponderate against the trial court's findings that Father is in a better position than Mother to provide Jayden with a stable, satisfactory environment, and that Father has a structured job which allows him to be home with the child each evening, while Mother's work schedule requires her to rely on her parents to care for the child during the week.

Because a decision regarding the child's best interest should be designed to promote their best interests by placing them in an environment that will best serve their physical and emotional needs, *see Barnes v. Barnes*, No. W2002-00428-COA-R3-CV, 2002 WL 31387268, at *3 (Tenn. Ct. App. Oct, 23, 2002); *Parker*, 986 S.W.2d at 562, and having concluded that the record supports the finding that Father is best equipped to meet the child's needs, we affirm the designation of Father as the primary residential parent.

II. THE PARENTING SCHEDULE

Mother also contends that the trial court erred in failing to maximize Mother's parenting time by awarding her only 100 days of visitation, in contrast to Father's award of 265 days.

Tennessee Code Annotated § 36-6-106(a) specifically provides that, taking into account the child's best interests, the trial court shall adopt a parenting plan and schedule that permits each parent to enjoy the maximum participation possible in the child's life

that is consistent with the factors set forth in the statute, the location of the residences of the parents, the child's need for stability, and all other relevant factors. However, trial courts have broad discretion in fashioning parenting plans that best suit the unique circumstances of each case. *Parker*, 986 S.W.2d at 563.

The trial court ruled from the bench, stating that, "I would be very inclined to basically split the time between the parents," but "the location of the residences of the parents . . . are so far apart right now that it's not practical to make an equal division of the time between the parents." The proof at trial substantiates the trial court's findings that Father is able to provide more stability as the primary residential parent, attending to Jayden's daily needs as well as his extracurricular activities, healthcare, and education, and that the child has thrived in his care. In comparison, Mother's work schedule causes her to heavily rely on her parents in caring for Jayden. Her parents feed and care for the child during the week, and transport him to and from school. Mother testified that a typical day with Jayden is usually not until the weekend, when she is not working. As a result, the evidence in the record does not preponderate against the trial court's decision regarding the division of parenting time, and we affirm the trial court's parenting plan.

III. RETROACTIVE CHILD SUPPORT

Mother contends the trial court's final order fails to comply with Tenn. Code Ann. § 36-2-311, which requires, inter alia, a determination of retroactive support and liability for Mother's maternity costs. *See* Tenn. Code Ann. § 36-2-311(a)(11) and (13).

It is a well-settled principle that parents must, as a general rule, support their children until they reach the age of majority. *See* Tenn. Code Ann. § 34-1-102(a), (b) (2001); *Smith v. Gore*, 728 S.W.2d 738, 750 (Tenn. 1987). A "parent's obligation to support, as well as the child's right to support, exist regardless of whether [there is] a court order" *State ex rel. Hayes v. Carter*, No. W2005-02136-COA-R3-JV, 2006 WL 2002577, at *2 (Tenn. Ct. App. July 6, 2006) (citing Tenn. Code Ann. § 36-2-311; *Berryhill v. Rhodes*, 21 S.W.3d 188, 192 (Tenn. 2000); *State ex rel. Vaughn v. Kaatrude*, 21 S.W.3d 244, 248 (Tenn. Ct. App. 2000)). "The obligation to support a child exists from the child's birth, and upon entry of an order establishing paternity, the father is liable for support back to that date." *State ex rel. Clark v. Wilson*, No. M2001-01626-COA-R3CV, 2002 WL 31863296, at *3 (Tenn. Ct. App. Dec. 23, 2002).

"An award for retroactive child support is generally considered to have two purposes: to benefit the parties' child and to reimburse the custodial parent for contributing more than [that parent's] fair share to the child's support." *State ex rel. Stewart v. Lockett*, No. M2001-00809-COA-R3-JV, 2002 WL 121636, at *2 (Tenn. Ct. App. Jan. 30, 2002) (citing *Kaatrude*, 21 S.W.3d at 250). The trial court's decision regarding whether to award retroactive child support is reviewed under an abuse of discretion standard. *State ex rel. Kennamore v. Thompson*, No. W2009-00034-COA-R3-

JV, 2009 WL 2632759, at *2 (Tenn. Ct. App. Aug. 27, 2009) (citing *State ex rel. Coleman v. Clay*, 805 S.W.2d 752, 755 (Tenn. 1991)). The foregoing notwithstanding, the trial court must exercise its discretion within the strictures of the Child Support Guidelines and the applicable statutes. *Berryhill*, 21 S.W.3d at 193. A trial court abuses its discretion when it applies an incorrect legal standard or reaches a decision which is against logic or reasoning that causes an injustice to the party complaining. *Williams v. Baptist Mem'l Hosp.*, 193 S.W.3d 545, 551 (Tenn. 2006) (quoting *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999)).

Mother was residing with her parents when Jayden was born in October 2007. When the child was three to five months old, Mother and Father reconciled and began residing together until the spring of 2011, when the couple separated, and Mother and Jayden moved back into her parents' home. Soon thereafter, the trial court entered an order in August 2011 establishing paternity and requiring Father to pay Mother \$95 per week. The parties were separated at the time the order was entered, but they reconciled again a few months later only to separate one last time in early 2013.

On September 24, 2013, which was two years after Father filed his petition to establish paternity, Mother filed her answer and counter-petition in which she sought, inter alia, retroactive child support and the reasonable expenses associated with the birth of the minor child.

The case went to trial in March of 2014. At one point during the trial, Father's counsel attempted to introduce Father's past payments of child support into evidence to establish that there was no child support arrearage. When Mother's counsel objected to the introduction of such evidence, indicating that back child support was not at issue, the following colloquy ensued:

The Court: [Mother's counsel], you're saying there's not an issue on back child support?

[Mother's counsel]: No, Your Honor. We acknowledge he's made those payments.

The Court: I kind of wonder why it's even relevant then, [Father's counsel].

[Father's counsel]: Well, if they're saying there's no back child support, Your Honor, and stipulate to that, I will withdraw making them as an exhibit.

Thereafter, neither party introduced evidence on the subject of child support or medical costs associated with the child's birth.

At the conclusion of trial, the trial court ruled on the issues that had been tried from the bench, and then asked counsel for both parties if anything else needed to be addressed. Significantly, Mother's counsel did not request retroactive child support or the reasonable expenses associated with the birth of their child.

Although Mother stipulated that Father paid \$95 a week pursuant to the 2011 order and affirmatively waived in open court any claim for back child support or costs associated with the birth of the child, she contends on appeal that she cannot waive retroactive child support, relying on the well-established principle that a custodial parent may not waive the minor child's right of support. *A.B.C. v. A.H.*, No. E2004-00916-COA-R3CV, 2005 WL 74106, at *7 (Tenn. Ct. App. Jan. 13, 2005); *see also State ex rel. Dauda v. Harris*, No. W2006-01314-COA-R3JV, 2007 WL 906746, at *4 (Tenn. Ct. App. Mar. 26, 2007) (“[E]ven when parents undertake to make their own child support arrangements or to circumvent the obligation all together, the courts have the power-and are, in fact, legally bound-to set and enforce the parent's support obligation unless and until same is modified pursuant to the statutory scheme.”); *State ex rel. Wrzesniewski v. Miller*, 77 S.W.3d 195, 197 (Tenn. Ct. App. 2001) (“The duty of support cannot be permanently bargained away; agreements not to seek future increases in child support are likewise void as against public policy.”); *Witt v. Witt*, 929 S.W.2d 360, 363 (Tenn. Ct. App. 1996) (“We find and hold that agreements, incorporated in court decrees or otherwise, which relieve a natural or adoptive parent of his or her obligation to provide child support are void as against public policy as established by the General Assembly.”); *State v. Morris*, No. C.A. 44, 1990 WL 2867, at *2 (Tenn. Ct. App. Jan. 19, 1990) (“This Court has held it is against public policy to allow a custodial parent to waive a child's right to support.”). Although a parent cannot waive a child's right of support, we have concluded that the facts of this case present a narrow exception to this important legal principle.

In the present case, the parties did not agree that Father's arrears, if any, would be forgiven. To the contrary, Mother filed a petition seeking retroactive child support and reasonable expenses for the birth of the child, and Mother was afforded the opportunity to present evidence regarding these claims. However, when Father attempted to introduce evidence to prove that he had fully paid his support obligations, Mother objected to the relevancy of such evidence, and affirmatively represented to the judge in open court that there was no issue with back child support. Accordingly, the trial court ruled the evidence irrelevant. Moreover, not only was Father precluded from introducing proof that he had paid child support, Mother presented no evidence to show an arrearage or any costs she incurred associated with the birth of the child. Furthermore, when the judge ruled from the bench, he asked counsel if he had failed to address any issue, and Mother's counsel did not ask the court to rule on her claim for back child support or costs associated with the birth. As a consequence, the trial court did not rule on the non-issues.

Based on the above, we have concluded that Mother had the opportunity to present proof at trial in support of her claim, but she failed to introduce any evidence from which the court could find that any support was owed. Moreover, because she objected to Father's attempt to introduce evidence that he had paid his child support obligations, it would cause an injustice for this court to allow her to now claim that an arrearage is owed. Additionally, Mother announced to the trial court that there was no issue concerning back child support, and, therefore, she did not afford the trial court the opportunity to rule on the issue; accordingly, the issue of back child support cannot be raised for the first time on appeal. *Lobertini v. Brown*, No. M2006-01485-COA-R3-JV, 2008 WL 275883, at *3 (Tenn. Ct. App. Jan. 31, 2008) (citing *Dulin v. Dulin*, No. W2001-02969-COA-R3-CV, 2003 WL 22071454, at *4 (Tenn. Ct. App. Sept. 3, 2003); see also *Harlan v. Hardaway*, 796 S.W.2d 953, 957 (Tenn. Ct. App. 1990) ("Appellate courts do not, as a general rule, consider issues not dealt with in the trial court and not properly developed in the proof.")).

IV. ATTORNEY'S FEES

Both parties seek to recover their attorney's fees on appeal. The decision of whether to award a party their reasonable attorney's fees on appeal is within our sole discretion. *Harris v. Harris*, 83 S.W.3d 137, 141 (Tenn. Ct. App. 2001) (citing Tenn. Code Ann. § 36-5-103). In determining whether an award is appropriate, we take into consideration "the ability of the requesting party to pay the accrued fees, the requesting party's success in the appeal, whether the requesting party sought the appeal in good faith, and any other equitable factor that need be considered." *Hill v. Hill*, No. M2006-02753-COA-R3-CV, 2007 WL 4404097, at *6 (Tenn. Ct. App. Dec. 17, 2007) (quoting *Dulin*, 2003 WL 22071454, at *10). As the trial court noted, this decision was difficult because both parties are good parents that obviously love and care for their child. Even though Father was successful on appeal, Mother's claims were not without merit, and, therefore, we hold that each party should be responsible for their own attorney's fees on appeal.

IN CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed equally between the parties.

FRANK G. CLEMENT, JR., JUDGE