

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 23, 2015 Session

IN RE JORDIN M.

**Appeal from the Juvenile Court for Rutherford County
No. 6906C Donna Scott Davenport, Judge**

No. M2013-02275-COA-R3-JV - Filed April 9, 2015

In this juvenile court case, Father filed a petition to modify the parenting plan to make him the primary residential parent. At the beginning of the hearing, the parties stipulated that there had been a material change of circumstances. We have concluded that the evidence does not preponderate against the trial court's determination that it was in the child's best interest for Mother to be the primary residential parent.

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

ANDY D. BENNETT, J., delivered the opinion of the court, in which RICHARD H. DINKINS and W. NEAL MCBRAYER, JJ., joined.

Bert W. McCarter and Aaron J. Conklin, Murfreesboro, Tennessee, for the appellant, Daniel M.

Jennifer Potts, Murfreesboro, Tennessee, for the appellee, Jacqueline W.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

On August 13, 2008, Jacqueline W. ("Mother") filed a petition against Daniel M. ("Father") to establish parentage and to make her the primary residential parent of Jordin, a child born in April 2008. The court held a hearing on December 2, 2008, upon Mother's petition for parentage and Father's counter-petition,¹ and the parties announced that they had

¹Father's actual counter-petition is not part of the record on appeal.

reached an agreement. The court declared Father Jordin's biological father² and announced the details of the agreement from the bench, which included making Mother the primary residential parent and giving Father parenting time during three weekends a month (total of 155 days a year). Unfortunately, the parties did not lodge proposed orders with the court to memorialize this agreement for over a year.

In an order entered on April 19, 2010, the trial court gave a detailed history of the case and adopted Mother's proposed parenting plan. The court made some corrections to the parenting plan, and awarded Mother a judgment in the amount of \$1,100 for retroactive child support. The court also stated: "Mother is strongly cautioned by this Honorable Court to improve her behavior towards the Father." Incorporating language from its opinion letter, the court stated: "I must frankly state that you [Mother] have gone out of your way to make everything difficult for [Father] regarding his daughter. . . . This Court expects you to correct your behavior and act like a civilized human being when dealing with the father of your child."

Father filed a motion to alter or amend and, in an order dated June 11, 2010, the trial court granted Father's motion based upon evidence not known prior to the March 1, 2010 hearing, of Mother's continuing misbehavior and unwillingness to foster the relationship between Father and the child. The trial court modified the parenting plan to a week-on, week-off shared parenting schedule.

The present appeal arises from Father's filing, on July 13, 2012, of a petition to modify parenting plan and for an ex parte restraining order. Father described the June 11, 2010 order as "referencing multiple occasions on which the Mother willfully withheld the child from the Father during his scheduled parenting time as well as finding the Mother in violation of a previous Court Order admonishing both parents not to harass each other by calling the police absent a real emergency or real child abuse/neglect" Father asserted he would show that a "significant and material change of circumstances has occurred" and, as a result, the week-on, week-off parenting schedule was no longer in the best interests of the child. At Father's request, the court issued an ex parte order restraining Mother from removing the minor child from Father's custody pending a hearing on July 17, 2012.

At the hearing, the court admonished Mother concerning her legal troubles, including driving on a suspended license, threats made by her boyfriend, and failing to take the orders of the court seriously. Mother was ordered to answer Father's questions concerning her fiancé, including his background and any legal issues, on the ground that this information "impacts the care of the minor child when she is with the Mother." The child was to be

²Father waived his right to DNA testing.

returned to Mother for regular parenting time.

The hearing

The hearing on Father's petition to modify the parenting plan was held over four days in April and July 2013. (The parties agreed to have the magistrate make the final decision.) At the beginning of the proof, on April 15, 2013, the parties stipulated that there had been a material change of circumstances. Thus, the only issue before the court was the best interest of the child.

The parties agreed to call their expert witnesses first. Father called Christine Nusser, a licensed clinical social worker, who began counseling Jordin on April 6, 2012, and had seen her every two weeks since then. Father asked Ms. Nusser to help Jordin deal with "issues of custody and tensions between the two households" and other issues as they came up. According to Ms. Nusser, Jordin "grows very tense anytime anything about her mother comes up in the sessions." Ms. Nusser testified that Mother called her and was upset that Jordin was seeing her for therapy. Ms. Nusser stated that she offered to sit down and talk with Mother, but Mother never made an appointment, so Ms. Nusser never had an opportunity to meet with Mother. When asked about Jordin's interactions with Father, Ms. Nusser stated that, "she adores him." She further stated that Jordin was "very relaxed" and "very affectionate" with Father.

Asked about Jordin's developmental level, Ms. Nusser testified that she had some concerns in that regard. There seemed to be some lag in Jordin's skill development. Ms. Nusser also observed extreme anxiety on some occasions. She further stated that Jordin recognized the conflict between her parents, which caused her anxiety. In addition, Ms. Nusser observed that, at times, Jordin was "very obviously screening what she says" And there were instances where Ms. Nusser perceived Jordin "as being frightened to say what she has to say." Ms. Nusser testified about one source of anxiety for Jordin: the refusal of Mother to allow Jordin to bring a favorite bear to Father's house. According to Ms. Nusser, the conflict regarding the bear put Jordin in the middle between her parents and is "typical of other situations that have occurred that she's been very upset about." Ms. Nusser further testified that, once Mother learned that Jordin was in counseling, Jordin's demeanor changed and she became more guarded about what she would say.

On cross-examination, Ms. Nusser acknowledged that she had only spoken to Mother once in a phone call. Mother was upset because Ms. Nusser had been counseling Jordin for about four months without Mother's knowledge. Father had not wanted Mother to know about the counseling because he felt that she would undermine the process. Ms. Nusser did not think Father was putting any pressure on Jordin to say particular things in therapy. Ms.

Nusser testified that Father tape recorded a portion of one therapy session in which Jordin was asked about where she wanted to live. She had a discussion with Jordin about the fact that a judge was going to make some decisions about how much time she would spend with each parent. It was Ms. Nusser's understanding that Father's wife had mentioned the possibility of some changes to Jordin. Ms. Nusser testified that, since Jordin had started seeing Elyse Beasley, a counselor Mother selected to talk with Jordin, Jordin had become more guarded.

Ms. Beasley, the clinical psychologist called as an expert witness by Mother, began seeing Jordin in August of 2012. She testified that the scope of her treatment was to "evaluate [Jordin] in terms of mood, affect, just to see how she's doing, whether there's anything going on or anything distressing going on [with] her." On voir dire, Ms. Beasley acknowledged that she was not providing counseling for the child. On direct examination, Ms. Beasley was asked why Mother started bringing Jordin to see her. Mr. Beasley stated that Mother was served with papers indicating that Jordin had been in counseling for a number of months with another therapist and "there were some allegations in those papers regarding [Mother's] relationship with Jordin which concerned her and surprised her, and she felt that she needed to bring her in, in essence, for a second . . . opinion as to whether there were problems with her daughter."

Ms. Beasley saw Jordin every other week. She described the child as being friendly, but also observed that Jordin was guarded "in terms of what she will say and what she won't say, what she'll talk about and what she won't talk about." When asked her opinion about why Jordin was guarded, Ms. Beasley stated her belief that Jordin "is getting asked questions by her father. She's getting asked questions by her mother. And there seems to be some lines drawn in terms of, you know, what she says to them." Ms. Beasley continued, "And she tends to be a pleaser. I think she wants to please both of her parents. She loves both of her parents. And — and I think this is her way of trying not to get in the — in the middle."

On cross-examination, Ms. Beasley testified that she performed a mental status examination to evaluate Jordin's mood and affect, and to observe her relationship with her mother. Based upon Ms. Beasley's observations, Jordin's relationship with her mother "appears to be a healthy one." She saw no indications that Mother was coaching Jordin about what she should say. Ms. Beasley had not had a chance to see Father interact with Jordin. She communicated with him by email. Based on her conversations with Father, Ms. Beasley had some concerns that he might be putting pressure on Jordin. She testified as follows:

He has said a couple of things to me that gave me some — some concern. One thing that he had mentioned — and this was in a — the one meeting that we had with him — that he had information regarding something that had been

said in a session that Jordin had had with Ms. Nusser, and that Jordin had disclosed something to Ms. Nusser that she had asked Ms. Nusser not to disclose to — to her father. And he told me what this statement was. And I said, Well, how did you learn about that? And he said, Well, Ms. Nusser told me. So one concern that I had was regarding some of the confidentiality in that therapeutic relationship where he was, obviously, getting some information that perhaps he should not have gotten.

And the other thing that he had said was that he had tape-recorded some of — at least one session. You know, I don't know whether there was more than one, but that he had tape-recorded one session. Which, again, gives him access to information that normally would be confidential. And that puts him, whether he's doing it consciously or unconsciously, in a position where — where he's got information that, obviously, could be manipulated.

Ms. Beasley testified that she saw, in Ms. Nusser's notes, that Jordin said she was aware there was a court date to decide where she was going to live. Jordin had said this to Ms. Beasley as well. Ms. Beasley did not think it was appropriate for a child Jordin's age (four years old) to be involved in, or even be aware of, that kind of litigation because it puts them in the middle. She testified that she had noticed that Jordin withdrew when her parents took her to the doctor's office and there was some difficulty, which showed her tendency to detach from conflict. When Ms. Beasley asked Jordin what her stepmother gave her for Christmas, Jordin said she did not know. Ms. Beasley interpreted the latter as showing a discomfort with discussing what happened in Father's household. Ms. Nusser sent Ms. Beasley a letter in which she said she was becoming increasingly alarmed about Jordin, but she never provided Ms. Beasley with any further details about what was causing this alarm (as requested by Ms. Beasley). Ms. Beasley testified that she never saw any "major red flags" with respect to Jordin's condition. Based upon her evaluations of Jordin, Ms. Beasley was "not seeing those things that Ms. Nusser has seen."

When the parties returned to court on July 15, 2013, Father recalled Ms. Nusser as a witness. She testified that she had continued to give therapy to Jordin since the time of the previous hearing. Ms. Nusser was concerned about an incident on Mother's Day when the parents were exchanging the child in the parking lot of the police station and Jordin became frightened and upset when Mother grabbed her and refused to give her to the stepmother. The police came out of the building and responded to the situation.

Ms. Nusser noticed that Jordin was not excited about her baby brother like she used to be; Jordin said that she was "not allowed to hold him, that she's not allowed to do things for him. And she's not — she doesn't understand that. . . . She presents the impression that

she feels separated in the family, that it's her mother and Steven [Mother's fiancé] and the baby, and then she's separate from that." Jordin reported that Mother told her that her mother (the child's grandmother) was "not a nice person, that she's been mean to" Mother. This was confusing to Jordin because she liked seeing her grandparents.

According to Ms. Nusser, Jordin talked about court a lot:

She will say things like, I want it to be 50-50. And then she'll think about it, and she says, No, I'm confused, and then she'll say something else. She appears to be coached on what she should say to me. She's told me that whatever happens in Ms. Beasley's office she's not allowed to talk to me about anymore, it's a secret.

Ms. Nusser opined that Jordin needed a "safe place and she needs to be able to talk about her feelings openly and honestly. . . . And to have to remember what she's supposed to say to who, or to feel pressure about this, is very difficult for a young child." Ms. Nusser opined that Jordin felt safe and included in Father's home.

On cross-examination, Ms. Nusser acknowledged that she thought both parties, not just Mother, had been talking to Jordin about court. Ms. Nusser also admitted that she had been conducting sessions at Father's home for a little over a month.

Mother called Chastity Hofmann as a character witness. She had known Mother for almost nine years and testified that Mother was a "terrific mother" and that she herself trusted her children with Mother.

Shirley Masteller, Mother's landlord, was the next witness for Mother. She testified that Mother kept a clean home and that the yard was always mowed. Ms. Masteller felt that Mother's was probably the best cared for of all seventeen of the homes that she managed. She described Jordin as "very interactive"; she seemed to be "a very happy child." Ms. Masteller had many opportunities to observe Mother and Jordin together and stated that they seemed to get along well and were "very loving."

Father then began to call his non-expert witnesses, the first of whom was Steven Trout, Mother's fiancé. Mr. Trout admitted that he had been arrested for driving under the influence in April 2012, but stated that was his only arrest. He was questioned about an arrest for domestic assault in January 2012, and responded that that offense had been expunged. Counsel stated that he had still been arrested and questioned Mr. Trout about previous testimony during which he allegedly denied this arrest. Mr. Trout testified about the details of the domestic assault and stated that he never pushed Mother. He stated that

Mother was now a stay-at-home mom.

On cross-examination, Mr. Trout described Mother as having a “wonderful, loving relationship” with Jordin. Mother preferred to have Jordin with her and would only rarely use a babysitter. They would go on outings to the park or to Chuck E. Cheese or to other places. Mr. Trout testified that he had a “great relationship with Jordin.” She would cuddle up with him on the couch. She always wanted to play on their indoor putting green: “she wants to put her hat on and her golf shoes, and she’s got her own golf clubs. . . . She’s always hugging me, and telling me she loves me” When asked how he would describe Father’s relationship with Mother, Mr. Trout stated that Father was “kind of controlling.” In Mr. Trout’s opinion, Father did not really help facilitate co-parenting. According to Mr. Trout, Jordin often came back sick from Father’s house.

Suzanne Ogletree, Mother’s mother (Jordin’s maternal grandmother) was the next to testify. Ms. Ogletree testified that Mother and Mr. Trout fought “continually.” She had helped them out financially many times. When Ms. Ogletree refused to prevent Mother’s car from being repossessed, Mother stopped letting her see Jordin, whereas she had previously been seeing the child on a daily basis. This occurred in February or March 2013. After consulting with an attorney, Ms. Ogletree contacted Father, who invited her to his home to talk about seeing Jordin. Father now allowed Jordin to spend the night with Ms. Ogletree every Friday they had her. Ms. Ogletree found that a negative impression she had previously formed about Father and stepmother was not accurate. Jordin loved her stepsister.

Ms. Ogletree described an incident that occurred at Chuck E. Cheese when Mother became enraged and yelled at her because Ms. Ogletree allowed Jordin to interact with Kent, Mother’s brother, something Mother considered inappropriate due to things he had done in the past. Ms. Ogletree stated that Mother had not always been a truthful person. She further testified that Mother did not facilitate a relationship between Jordin and Father and his wife. On one occasion, when referring to Father’s wife, Mother stated, “That f---ing b---h is not her mother.” This was allegedly said in Jordin’s presence. Ms. Ogletree stated that Jordin was admonished if she mentioned Father or stepmother in Mother’s presence.

On cross-examination, Ms. Ogletree admitted that, in March of 2013, she had gone to Mother’s attorney and expressed concerns about Father and his wife. Ms. Ogletree acknowledged that Mother called her several times but she had not returned the phone calls. As to the incident at Chuck E. Cheese, Ms. Ogletree admitted that Mother had asked her not to allow Jordin to be around Kent and that she allowed Jordin to be around Kent anyway.

Father next called Mother to the stand. Asked how she was facilitating a relationship with Father, Mother testified:

[W]henever I make my phone calls to her — which I make two phone calls a week while she’s away — I ask her if she’s having fun, you know, make sure she’s having fun at her dad’s house. She tells me stuff that she’s doing. I’m like, That’s great, I’m glad you’re having fun over there. When she comes home, she tells me things that she does. And, you know, I’m like, That’s awesome, you know. She — recently he took her to the movies. She was telling me about it. I’m like, I’m so glad you had a good time, baby. And I’m — you know, I’m glad she enjoys spending time with her dad. She should enjoy spending time with her dad. I don’t want her to have a terrible time over there. That would be — that would just be wrong.

Father then questioned Mother about instances when she had supposedly refused to allow Jordin to take her favorite bear from Mother’s house to Father’s house. Mother explained that the bear was getting old and she recently had to sew its neck back together. She was afraid something would happen to the bear at Father’s house and that she would be unable to fix it. Mother stated that she had allowed Jordin to take the bear to Father’s house on occasion. She denied ever “ripping” the bear out of Jordin’s hands.

Mother testified that, when the judgment was handed down in June of 2010, “it humbled me beyond all belief. And ever since then, I have done my best to try to keep my head down and my mouth shut, because that is what is in the best interest of Jordin.” Mother characterized Father as trying to dictate to her what she should do rather than being cooperative regarding parenting issues.

On cross-examination, Mother talked about her relationship with Jordin. They played games, including educational games, together and went outside to play as much as possible. She was the primary parent to take Jordin to her doctor and dentist appointments. She informed Father about the appointments, but he did not come. Mr. Trout generally went to the appointments. Mother testified that, after she found out that Father was taking Jordin to Ms. Nusser, she took the child to Ms. Beasley for a second opinion. She informed Father that she was doing this. Mother described an incident that occurred when she and Father met at the doctor’s office for Jordin to talk about getting a flu shot. When Mother went over to give Jordin a hug, Father picked up the child and left. (He was concerned that Mother was still contagious from the flu, but she had determined that she was not.) Then, despite Mother’s reservations, Father went to another doctor and had the child get a flu shot.

Mother was asked how she had tried to improve communications with Father since the 2010 court date. She stated:

I do try to be more civil with him and not get agitated with him because of

Jordin. You know, she's getting older. She sees a lot of things, you know. I don't want her to have to see her parents not getting along. I want her, you know, to know that we both love her and we want what's best for her.

Mother described an instance when Father had texted unkind messages to her on her phone after Mother had a short phone conversation with Jordin, including the following: "You're so stupid. Jordin was not distracted. She doesn't like you or want to talk to you, as I always have to make her talk to you when you call."

Mother gave the following testimony regarding the Mother's Day incident:

A. I went to hand her to her dad, and his wife steps in and tries to snatch her out of my arms and take her. And I was like, you know, Please don't do that, just let her dad take her. And they start, What's the big deal? You know, just saying all kinds of stuff. And I was like, You know what? I can put her in the car then. They're like, Get away from the car, get away from me. And they start screaming, Get the police, get the police, and all this other stuff. And Then I was like, This is — like, it was ridiculous. Like, they just start screaming for the police to come out.

Q. How many times has [stepmother] come to the exchanges of Jordin?

A. She — this was the only exchange that she had been to in four and a half years.

Q. She doesn't generally come?

A. No, she doesn't. And then I finally — I gave Jordin to [Father]. I was like, Just put her in the car. And he handed her to [stepmother], who was yelling at me. Which, that's going to upset my child, because my child sees two people yelling at her mother. That's going to upset her. You know, I wasn't yelling at them. I was talking as calmly as I could, because of Jordin. And Jordin's crying, and I try to go over there to her. And [stepmother] literally stands in between me and her and is like, Get away, get away. Wouldn't let me check on Jordin or anything. The police have — the police come out because, you know, they were screaming, Get the police, and everything. So the police come out and they're like, What's going on?

...

I had to ask a police officer to check on my daughter to make sure she was okay, because they wouldn't even let me check on her. Like — and kept me

from her. This is ridiculous. Like, I don't care if — if his wife comes to the exchanges. I — I don't care. But, you know, if I'm handing her to her dad, just let her dad take her and put her in the car. You know, anytime that Steve has taken Jordin, it's — I was pregnant and I'd be like, Do you mind handing her to Steve, because I'm pregnant, or because I just had surgery, you know, and that sort of thing. So it's never just been Steve rushing in there and trying to snatch Jordin from him.

Mother proposed that she be the primary residential parent. When asked why she thought this plan was in Jordin's best interest, Mother testified that Jordin needed to be "at one home on a more constant basis" rather than shuttling back and forth between homes, especially as she was about to start school. Mother was also concerned that Jordin "would become more alienated away from me if she did go to live with her dad because, I mean, they do make it very clear that they don't want . . . her to have a relationship with me." Mother characterized Father as trying to dictate what she should do instead of cooperating in a spirit of coparenting.

Rachel Ogletree, Mother's sister-in-law, testified as a character witness for Mother. Rachel and her four-year-old son Trent would have frequent play dates with Mother and Jordin. Rachel stated that Mother and Jordin had a loving, caring relationship. Rachel had no relationship with her mother-in-law, Ms. Susie Ogletree, because Ms. Ogletree had different ideas about how to care for Trent. Rachel did not believe that Ms. Ogletree was honest.

Father re-called Mother to the stand for redirect examination. Mother admitted that she, Mr. Trout, and Jordin had stayed at Ms. Ogletree's house for a period of time in 2011 while they were waiting for their apartment to be ready. After she discovered that Father was taking Jordin to Ms. Nusser, she decided to take her to Ms. Beasley for a second opinion and informed Father that she was doing this. She testified that she did not discuss court with Jordin because she did not think it was appropriate. She did not tell Jordin not to talk about certain matters with Ms. Nusser.

The next witness was Father. He described his relationship with Jordin, stating that she thought of him as a "superhero." He loved to spend time having fun with Jordin and also made sure to teach her proper values. Father testified that, when she first came back from Mother's house, Jordin was "real guarded," but she would quickly get back to her "old self." As to facilitating a relationship with Mother, Father testified that he always had and that, "even with the circumstances as bad as her mother has made them, I've still went out of my way." According to Father, there was a lot of negativity coming from Mother, and "It's always drama with her." Father testified that he was able to accept the role of the primary

caregiver and that Jordin and his wife had a very close relationship. Father felt that Mother was not supportive of the relationship between his wife and Jordin. He recounted the Mother's Day incident: His version was that he had taken Jordin from Mother and then handed her to his wife, then Mother had reacted and taken her away from his wife, resulting in a scene. Father expressed concern that Jordin, now a five-year-old, should not have to filter what she said.

Father admitted being on probation for attempted delivery of MDMA.³ Asked what was best for Jordin, Father stated that she should live with Father and his family and go to school so that she would have "the opportunity for a good life that she deserves." He went on to say that Jordin did not deserve "to grow up in a life of deceit . . . , and secrets and lies. I mean, that worries me that she's going to grow up and be just a liar" Father stated that Jordin "keeps secrets from me because she thinks she's going to get in trouble." This troubled him because Jordin did not "know the difference between what's a good secret, what's a bad secret, what's right, what's wrong. You've got to tell them, you know."

On cross-examination, Father testified that Mother was ninety-five to one hundred percent at fault for the fact that the parties did not get along. He stated that, since the parties were in court in 2010, he had made an effort to facilitate a better relationship with Mother. He cited his willingness to give up some of his parenting time on various holidays. He did not feel that Mother had done her part. Father was asked about Mother's willingness to change the exchange time to Sunday instead of Monday:

A. That was my idea, so that — because it was best for Jordin.

Q. Okay. And she agreed to do that?

A. But that's not facilitating a relationship between me and the child. That's making it more convenient for the child. That has nothing to do with being a better relationship.

Q. So that didn't make it more convenient for you to have the exchanges —

A. It makes it more convenient for Jordin. There's no reasons for her to have to get up so early to drive. Especially in the wintertime, when it's cold —

Q. [Father], I'm asking you did it make it more convenient for you to exchange on Sundays —

A. No.

Q. — rather than Mondays?

Then why was it your idea to change the exchange time?

A. Because it was better for Jordin. There was no reason for Jordin to have to get up that early in the morning — to get up in the cold and have to go.

³An illegal drug commonly know as "Ecstasy."

There was — it just — you don't — it made no sense.

Q. Okay.

A. But I'm up anyways. Whether it's convenient for me is — I mean, I was already up.

Q. So you —

A. I get up.

Q. But you admit you requested that of [Mother]?

A. Because it was better for Jordin. And I told her at the time —

THE COURT: All right. Listen. Listen. Don't get — just answer her question.

THE WITNESS: Okay.

THE COURT: Listen to her question and just answer it.

THE WITNESS: All right.

BY MS. POTTS [Counsel for Mother]:

Q. It was your recommendation to do that; correct?

A. Correct.

Q. And [Mother] agreed to that?

A. Correct.

Father testified that he started taking Jordin to see Ms. Nusser in March 2012, months before he filed his petition. He did not inform Mother of this. Father admitted that he intentionally hid the fact that he was taking Jordin to the counselor from Mother. He acknowledged that the parties' parenting plan required all non-emergency health care decisions to be made jointly. At the end of one counseling session, Father came in and videotaped part of the session. Father stated that Jordin told him she wanted to stay at his house and he told her that he was "fighting for her." He felt that this was appropriate. He admitted allowing Jordin to see Ms. Ogletree despite Mother's objections.

Magistrate's decision

The court made detailed findings of fact and conclusions of law in a written ruling on August 28, 2013. The court noted "a marked difference in the Mother's testimony in these proceedings than previously exhibited" and felt that she had "made strides." As to Father, the court stated:

[T]he Court has concerns regarding his credibility regarding a desire to co-parent the child. Specifically, on cross-examination, the Father admitted that he failed to notify the Mother of Ms. Nusser's counseling of Jordin, because he did not think it would be "beneficial." Father also admitted that he recorded the child's counseling sessions to obtain a recording of the child's

preference to reside with the Father.

The Father testified that he initiated Ms. Nusser without the advice and consent of the Mother, and has told [Ms.] Nusser negative things about himself but *never* about the Mother. The Court finds this testimony to lack credibility.

Father testified that the child should spend time with his wife rather than the Mother when he is out of town. However, the Father also testified that the child needs limited parenting time with the Mother until the child is older, but doesn't want to limit contact with Mother. Father fails to give Mother any credit for the child's happiness, and being largely well-adjusted, even given the week-on, week-off parenting schedule.

The court went on to analyze the factors relevant to best interest pursuant to Tenn. Code Ann. § 36-6-106(a). We will include this analysis below.

The court concluded that it was in the child's best interest for Mother to be appointed the primary residential parent. The court entered a modified parenting plan under which Mother has 255 days and Father has 110 days of parenting time. Father's time is on the first, second, and fourth weekends of every month and on holidays. In its final order, entered on September 30, 2013, the trial court adopted the findings of fact and conclusions of law contained in its August 28 ruling. Father appeals from that decision.

On appeal, Father argues that the trial court erred in determining the facts regarding the comparative fitness of the parents and in determining the primary residential parent.

STANDARD OF REVIEW

In an appeal of a decision rendered after a bench trial, we review the trial court's findings of fact de novo with a presumption of correctness unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993). Moreover, we "give great weight to the trial court's assessment of the evidence because the trial court is in a much better position to evaluate the credibility of the witnesses." *Boyer v. Heimermann*, 238 S.W.3d 249, 255 (Tenn. Ct. App. 2007). We review questions of law de novo with no presumption of correctness. *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 628 (Tenn.1999).

With respect to a petition to modify a permanent parenting plan to change the primary residential parent, the threshold issue is whether there has been a material change of circumstances since the plan took effect. See Tenn. Code Ann. § 36-6-101(a)(2)(B);

Cranston v. Combs, 106 S.W.3d 641, 644 (Tenn. 2003). If the trial court finds that there has been a material change in circumstances, it must then determine whether it is in the child's best interests to modify the parenting plan as requested. *See* Tenn. Code Ann. § 36-6-106(a); *Cranston*, 106 S.W.3d at 644. In this case, the parties stipulated at trial that there had been a material change in circumstances. Therefore, the only issues before this court concern the child's best interest and the parenting plan.

A trial court's determinations as to "whether a material change in circumstances has occurred and whether modification of a parenting plan serves a child's best interests are factual questions." *Armbrister v. Armbrister*, 414 S.W.3d 685, 692 (Tenn. 2013). We presume that the trial court's findings of fact are correct unless the evidence preponderates against them. Tenn. R. App. P. 13(d). To preponderate against the trial court's findings of fact, the evidence "must support another finding of fact with greater convincing effect." *Austin v. Gray*, No. M2013-00708-COA-R3-CV, 2013 WL 6729799, at *6 (Tenn. Ct. App. Dec. 18, 2013). "Because decisions regarding parenting arrangements are factually driven and require careful consideration of numerous factors, trial judges, who have the opportunity to observe the witnesses and make credibility determinations, are better positioned to evaluate the facts than appellate judges." *Armbrister*, 414 S.W.3d at 693 (citations omitted). Thus, "[a] trial court's decision regarding the details of a residential parenting schedule should not be reversed absent an abuse of discretion." *Id.* A trial court abuses its discretion when its decision "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." *Eldridge v. Eldridge*, 42 S.W.3d 82, 88 (Tenn. 2001).

ANALYSIS

I. Consideration of facts

Father argues that the trial court erred in its determination of the facts regarding the comparative fitness of the parents. Thus, we must determine whether the evidence preponderates against the trial court's findings of fact with respect to the comparative fitness of the parents. Father makes two main arguments in this regard.

A.

First, Father asserts that the trial court erred in its consideration of the parties' expert witness testimony. In making this argument, Father focuses solely upon the trial court's analysis of Ms. Nusser's testimony. According to Father, the court put undue emphasis on Ms. Nusser's use of the first names of Father and his wife during her testimony and the fact that she conducted therapy sessions in Father's home during the month prior to the hearing.

The trial court felt that Ms. Nusser’s use of first names might reflect a lack of professional separation between Ms. Nusser and Father’s family. As Father points out, however, Ms. Nusser also referred to Mother and her family members by their first names in her testimony. While the trial court may have drawn undue significance from Ms. Nusser’s use of first names, we consider this to be harmless error in light of other evidence that Ms. Nusser was biased in favor of Father, including the fact that she shared information from confidential therapy sessions she had with Jordin with Father and allowed him to videotape part of at least one session. With respect to Ms. Nusser’s decision to conduct therapy sessions in Father’s home, Father points to Ms. Nusser’s unrefuted testimony that in-home therapy is not an unusual practice. Under the circumstances of this case, we believe it was not unreasonable for the trial court to consider Ms. Nusser’s decision to work with Jordin in Father’s home as part of a pattern of unprofessional closeness with Father.

As part of his expert witness argument, Father also asserts that the trial court mistakenly concluded in its findings of facts that Ms. Nusser testified to a belief that Mother was “emotionally oppressive to the child.” Father argues that the trial court erred in failing to find that Mother emotionally abused Jordin. Father conflates two different determinations by the trial court. During the course of the trial, Ms. Nusser gave her definition of “emotional abuse” and gave specific behaviors exhibited by Jordin that fit within that definition. Based upon this testimony, the trial court allowed Ms. Nusser to testify to statements made by Jordin under the hearsay exception provided in Tenn. R. Evid. 803(25).⁴

After all of the proof had been heard, including the testimony of Mother’s expert, Ms. Beasley, the trial court made findings of fact with respect to each of the statutory factors regarding best interest set forth at Tenn. Code Ann. § 36-6-106(a).⁵ Factor eight is “Evidence of physical or emotional abuse to the child, to the other parent or to any other person. . . .” Tenn. Code Ann. § 36-6-106(a)(8). With respect to this factor, the trial court found: “The Court heard no proof regarding child abuse. Therefore, the Court finds that this factor is not applicable.”

⁴ Rule 803(25) of the Tennessee Rules of Evidence provides, in pertinent part, that the following shall not be excluded by the hearsay rule:

Provided that the circumstances indicate trustworthiness, . . . statements about abuse or neglect made by a child alleged to be the victim of physical, sexual, or psychological abuse offered in a civil trial relating to custody, shared parenting, or visitation.

⁵ Tennessee Code Annotated section 36-6-106(a) was amended effective July 1, 2014. See 2014 TENN. PUB. ACTS ch. 617, § 4. All of the citations in this opinion are to the version of Tenn. Code Ann. § 36-6-106(a) in effect prior to that amendment.

The trial court allowed Ms. Nusser to testify about Jordin’s statements under a hearsay exception for alleged child abuse, including emotional abuse. The court’s evidentiary ruling was not conclusive as to its ultimate decision on the issue of child abuse. In addition to Ms. Nusser’s testimony, the court heard the testimony of Mother’s expert, Ms. Beasley, the testimony of both parents, and other witnesses. After hearing all of evidence, the trial court concluded that there was no proof of abuse. This determination rests in part on the trial court’s assessment of the credibility of the witnesses. Where issues of credibility are involved, we will accord considerable deference to the trial court’s factual findings. *Roberts v. Roberts*, 827 S.W.2d 788, 795 (Tenn. Ct. App. 1991).

The evidence does not preponderate against the trial court’s findings regarding the testimony of Father’s expert witness.

B.

Father’s second argument regarding comparative fitness is that the trial court erred in its consideration of the character and behavior of Mother and Father under factor nine.

Factor nine of Tenn. Code Ann. § 36-6-106(a) reads: “The character and behavior of any other person who resides in or frequents the home of a parent . . . and the person’s interactions with the child.” The trial court included the criminal records of Mother and Father in its analysis of factor nine and found the factor to weigh equally against both parties. Father rightly points out that this factor does not contemplate consideration of the character and behavior of Father and Mother. However, Tenn. Code Ann. § 36-6-106(a) provides that the court “shall consider all relevant factors, including the following.” Thus, the enumerated factors are non-exclusive.

It was within the court’s discretion to consider the criminal records of Mother and Father, and it was harmless error for the court to do so under factor nine. Without Mother’s and Father’s criminal records as part of factor nine, only the criminal charges against Mr. Trout remain. Thus, this factor would arguably weigh in Father’s favor. Combined with the weight of Mother’s and Father’s criminal charges under other relevant considerations, however, the total effect of all of the criminal charges would be the same as found by the trial court—equally against both parties.

II. Judgment against weight of the evidence

Father asserts that the evidence preponderates against the trial court’s findings of fact with respect to the statutory factors regarding best interests.

- Factor one: “The love, affection and emotional ties existing between the parents . . . and the child.” Tenn. Code Ann. § 36-6-106(a)(1). The trial court found that this factor favored both parents equally, and Father agrees with the trial court.
- Factor two: “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 or caregiver has been the primary caregiver.” Tenn. Code Ann. § 36-6-106(a)(2). The trial court found this factor to favor both parties equally. Father asserts that the evidence preponderates against this finding because the evidence showed that Father was financially stable, concerned with Jordin’s educational needs, and had the financial ability to provide for her needs, whereas Mother frequently borrowed money from her mother, was unemployed, had her car repossessed, and was completely reliant on her fiancé financially. There was also evidence, however, that Mother was concerned with Jordin’s educational needs, that she was voluntarily unemployed in order to be a stay-at-home mom, that she allowed her car to be repossessed so that she would have the money to pay for an attorney, and that her fiancé had a stable, well-paid position that allowed Mother to stay home with the children. In light of the trial court’s superior ability to evaluate the demeanor and credibility of the witnesses, we cannot say that the evidence preponderates against the trial court’s determination that factor two weighs equally in favor of both parties.
- Factor three: “The importance of continuity in the child’s life and the length of time the child has lived in a stable, satisfactory environment.” Tenn. Code Ann. § 36-6-106(a)(3). As to this factor, the trial court found as follows:

The proof shows that the Mother is the primary caregiver for the minor child including taking the child to doctor’s appointments in Murfreesboro, etc. In the Father’s home, the step-mother plays a large part in the day-to-day care of the child. Additionally, the proof presented before the Court includes the Father’s recent relocation to Wilson County from Davidson County. Therefore, continuity for the child’s life, the Court finds in favor of the Mother.

Father argues that the court erred here because the parents were following a week-on, week-off parenting schedule. Father further asserts that his decision to purchase a home was counted against him, whereas Mother’s moves from rental property to rental property, need to borrow money from her family, reliance on her fiancé for financial support, repossessed car, and “admitted domestic violence within her home” were not counted against her. Father does not cite to the record to support any of

these statements. Moreover, the focus of factor three is continuity in the child's life. Mother's reliance on her fiancé or borrowing money from her parents does not necessarily affect the child's well-being. As the trial court states, Mother was the one to take Jordin to her doctor's appointments. Father did not spend as much time with her; rather, step-mother provided much of the day-to-day care during Father's parenting time. Father moved to a different county, which would necessitate a change in schools for the child. The evidence does not preponderate against the trial court's finding that factor three favors Mother.

- Factor four: "The stability of the family unit of the parents." Tenn. Code Ann. § 36-6-106(a)(4). The trial court found this factor to favor Father, and Father agrees.
- Factor five: "The mental and physical health of the parents." Tenn. Code Ann. § 36-6-106(a)(5). The trial court found this factor to favor both parties equally. Father agrees.
- Factor six: "The home, school and community record of the child." Tenn. Code Ann. § 36-6-106(a)(6). The trial court found this factor not to be applicable.
- Factor seven: Preference of the child. Tenn. Code Ann. § 36-6-106(a)(7). Given the child's age, the trial court found this factor not to be applicable.
- Factor eight: "Evidence of physical or emotional abuse to the child . . ." Tenn. Code Ann. § 36-6-106(a)(8). The trial court found "no proof regarding child abuse" and found this factor inapplicable. Father argues that Ms. Nusser's testimony establishes that the evidence preponderates against this finding. We have already addressed this argument. *See* Part I.A. above.
- Factor nine: "The character and behavior of any other person who resides in or frequents the home of a parent or caregiver and the person's interactions with the child." Tenn. Code Ann. § 36-6-106(a)(9). The trial court found that this factor weighed equally in favor of both parties. Father assigns error to the fact that the trial court discussed the criminal behavior of Mother and Father under this factor. As we discussed above, while factor nine may weigh in Father's favor, the criminal behavior of Mother and Father are other relevant factors that may be considered by the court in determining what is in Jordin's best interest. *See* Part I.B. above. The evidence does not preponderate against the trial court's determination that the net effect of all of this evidence would weigh equally in favor of both parties.
- Factor ten: "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 both of the child's parents, consistent with the best interest of the child." Tenn. Code Ann. § 36-6-106(a)(10). As to this factor, the court stated:

As recited previously in this case and throughout the history of this Court's involvement on behalf of the minor child, the greatest barrier for Jordin is each parent's inability to behave in a mature fashion as co-parents of the child. The constant bickering and contempt for one another will only impact this child as she grows if both parents do not find the ability to work together. Therefore, as to this factor the Court finds equally against the parties.

Father asserts that the court erred in failing to "fully recognize the previous orders of the Court, wherein the Court admonished the Mother on numerous occasions." As the trial court reminded the parties at the hearing, the relevant time period here is what happened after the last modification in June 2010. Father also cites the testimony of Ms. Nusser, Suzanne Ogletree, and Rachel Ogletree as supporting a conclusion that "Mother's childish, vindictive and inappropriate behavior had not changed." Credibility is certainly important here. The trial court credited the testimony of Mother over that of Father and concluded that she had "made strides." The Court had "concerns regarding [Father's] credibility regarding a desire to co-parent the child." The evidence does not preponderate against the trial court's finding regarding factor ten.

Overall, the evidence does not preponderate against the trial court's finding that it was in Jordin's best interest for Mother to be the primary residential parent. The trial court found a "marked difference in the Mother's testimony in these proceedings than previously exhibited" and found that she had "made strides" with regard to keeping Jordin's best interest as her primary concern. By contrast, the trial court had concerns regarding Father's credibility, particularly with respect to his desire to co-parent Jordin. The court stated that the parents' inability to co-parent was the "greatest barrier for Jordin."

CONCLUSION

The judgment of the trial court is affirmed in all respects. Costs of this appeal are assessed against the appellant, Daniel M., and execution may issue if necessary.

ANDY D. BENNETT, JUDGE