IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 25, 2015 Session

DANIEL J. VELEZ v. CHRISTY M. VELEZ

Appeal from the Circuit Court for Montgomery County
No. MC-CC-CV-DV-10-1754 Michael R. Jones, Judge

No. M2014-01115-COA-R3-CV – Filed June 30, 2015

This is the second appeal arising from the parties' divorce and post-divorce filings. In the first appeal, we affirmed the division of marital property and the parenting schedule but reversed the award of child support and remanded with instructions to impute Mother's income based on the minimum wage. We reversed the award of alimony in solido and remanded with instructions to award Mother rehabilitative alimony in an amount and for a duration to be determined by the trial court. We also found that Mother was entitled to recover attorney's fees incurred in the first appeal in an amount to be determined by the trial court. Prior to conducting hearings on remand, both parties filed petitions and motions with the trial court seeking additional relief in a variety of forms, including petitions to modify the parenting plan. Upon conclusion of the hearings on remand, the trial court set child support, awarded Mother rehabilitative alimony for 39 months at $800 a month, denied both parents' petitions to modify the parenting plan, and awarded Mother $2,600 for attorney's fees incurred in the first appeal. Finding no reversible error, we affirm the trial court in all respects.

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

FRANK G. CLEMENT, JR., P.J., M.S., delivered the opinion of the Court, in which RICHARD H. DINKINS and W. NEAL MCBRAYER, JJ., joined.

Jon S. Jablonski, Nashville, Tennessee, for the appellant, Christy M. Velez.

Carrie W. Gasaway,[1] Clarksville, Tennessee, for the appellee, Daniel J. Velez.

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[1] Ms. Gasaway prepared the appellee's brief and argued the case before this court. Thereafter, Ms. Gasaway's license to practice law was suspended, and on June 24, 2015, Ms. Gasaway voluntarily surrendered her license to practice law. Therefore, the Clerk of this court is requested to provide a copy of this opinion to the appellee, Daniel J. Velez.

OPINION

Daniel J. Velez ("Father") and Christy M. Velez ("Mother") were married in 1998 and have two minor children, Ethan, born in July 2003, and Kaili, born in June 2007. During the marriage, both parties had a high school diploma, and Mother was a stay-at-home mom, occasionally working minimum wage jobs, while Father was in the United States Navy until his discharge in October 2008 when he began receiving disability for post-traumatic stress disorder. Subsequently, Father began working for a civilian contractor making $70,000 a year. When the children entered school, the parties placed them in a private school, Clarksville Academy.

The parties separated in August 2010 and were divorced by Final Decree entered on May 4, 2011. The trial court awarded Mother a lump sum of in solido alimony of $25,000, and identified and divided the marital estate, awarding Mother an additional $92,870. In addition, the trial court found Father's income to be $9,238 per month based upon his salary, military benefits, and social security benefits.[2] The trial court found Mother's income to be $1,642, based upon imputed income of $8 per hour and social security benefits she received from Father's disability. Pursuant to the Permanent Parenting Plan, Mother was designated as the primary residential parent, and the parties were awarded equal parenting time and joint decision-making authority. Father was allowed to claim both children on the federal tax exemption since Mother was not employed during the divorce proceedings. The trial court set child support at $586 per month, taking into account Father's payment of private school tuition; however, once Father's social security disability benefits ceased, benefits Mother also received, the court ordered that child support would increase to $866.

Mother appealed, challenging, *inter alia*, the parenting plan, the imputation of income to her, alimony, and the computation of child support. In our opinion in the first appeal, we reversed the award of child support and remanded with instructions to impute Mother's income based on the minimum wage.[3] We also determined that Mother was entitled to rehabilitative alimony, not alimony in solido, and we remanded with instructions to determine the amount and duration of rehabilitative alimony. We affirmed the trial court in all other respects. Mother also sought to recover the attorney's fees she incurred on appeal, and, finding that Mother prevailed on several of the issues on appeal

[2] Specifically, the trial court found that Father's salary was $5,833 per month, military disability $1,600 per month, social security $1,355 per month, and social security received by Mother of $450 per month.

[3] *Velez v. Velez*, No. M2011-01949-COA-R3-CV, 2012 WL 3104922 (Tenn. Ct. App. July 31, 2012).

and was entitled to recover at least some of her fees, we remanded for the trial court to determine the amount of her fees she was entitled to recover.

While on remand, both parties filed pleadings asking the trial court to modify the parenting plan. Father requested to be designated the primary residential parent based on Mother's alleged inappropriate behavior. Mother sought to modify the parenting plan due to the children's medical and therapy treatment plans and Father's alleged anger issues. She also requested a right of first refusal to be with the children when Father could not during his parenting time. Mother also asserted a claim for items of personal property that were awarded to her in the Final Decree of Divorce which Father had allegedly refused to provide to her. These issues and those required by our remand were tried on October 3, 2013, and January 7, 2014.

At the October 2013 hearing, Mother testified that she began attending Brown Mackie College in May 2011 to obtain a degree as an Occupational Therapy Assistant, that she graduated in August 2013, and that she would be licensed within six to eight weeks. At the January 2014 hearing, she testified that she had begun working as an independent contractor for an occupational therapy firm, More than Words, and expected to have enough patients within six months to work 32 hours per week, at $24 per hour. She stated that her school tuition totaled $41,000, and that she now had $47,000 in loans, of which $28,000 was for her education. She did not provide any documentation of her tuition or her loans; however, she introduced an income and expense statement showing that her income for 2011 totaled $506 and monthly expenses totaled $5,077, that her income for 2012 totaled $169 and monthly expenses totaled $5,077, and that her income for 2013 was zero and monthly expenses totaled $4,146. She also stated that she had spent all of the marital assets awarded to her in the 2011 divorce for a variety of reasons.

In order to prove a material change in circumstances, Mother entered into evidence Father's medical information under seal showing his diagnoses and necessary prescription medications. She relied on Father's former wife's testimony, Nickie Donaldson, who testified that Father would not take his medicine and that he became easily frustrated around the children.

Mother also introduced into evidence her child care expenses from April 2011 through September 2013, which set forth the monthly amounts Mother paid.

As for Mother's attorney's fees incurred in the first appeal, she introduced into evidence billing invoices and an affidavit from her attorney indicating a total of $10,350 in fees. She also testified that her previous attorney had billed her $2,800 for work done in the first appeal; however, she had no documentation regarding these services.

With regard to her claim that Father had failed to provide to her numerous items of personal property she had been awarded in the 2011 divorce, she entered into evidence an

extensive list of the items awarded to her at trial. She requested that Father be ordered to provide them to her or, in the alternative, that he pay her $5,000 in damages for the value of the personal property.

Father testified that he was laid off on May 31, 2013, due to a lack of business, and that he had been drawing unemployment compensation at $261 per week since then, which would cease December 31, 2013. He further testified that he was attending classes at Austin Peay University to obtain an undergraduate degree.

At the conclusion of the trial on remand, the trial court found that Mother's need for rehabilitative alimony would cease as of June 2014 because she will have accomplished her desire to be fully employed in her chosen area, occupational therapy. Based on the relative incomes and the cost of her education, the court awarded Mother rehabilitative alimony in the amount of $800 per month for a period of 39 months, from April 2011 through June 2014, totaling $31,200. Finding that Mother had received $25,000 in alimony payments from Father since the divorce, the court ordered Father to pay Mother the remaining balance owing of $6,200 as rehabilitative alimony.

In calculating child support, the trial court imputed income to Mother at the federal minimum wage of $7.25 an hour to determine child support. The trial court also did an excellent job of identifying the four distinct time periods to be considered for awarding child support: (1) April 2011 through September 2011, when the Social Security disability benefit ceased; (2) October 2011 through March 2013, when Mother filed her motion for consideration of her child care expenses in the computation of child support; (3) April 2013 through May 2013, when Father lost his job; and (4) June 2013 through June 2014, when Mother would be fully employed.

After determining the amount of child support to be paid by Father for each of the four periods identified above, the court determined the arrearage and awarded a judgment accordingly. As for the period from June 2013 through June 2014, the trial court found that Father's income included his veterans' benefit of $1,701 per month and unemployment compensation in the amount of $261 per week, or $1,131 per month. The trial court also imputed income to Father at $10 per hour, or $1,733 per month. Based on these sums, the trial court set Father's monthly gross income for the period from June 2013 through June 2014 at $4,565 per month.

As for Mother's claim for child care expenses and the income tax exemptions, the court stated that Mother had not requested child care expenses prior to filing her motion in March 2013, and ruled that it would not consider Mother's child care expenses prior to that time. The court then found Mother's child care expenses to be $67 per month from March 2013 through May 2013, and zero from June 2013 through June 2014. The court also ruled that Mother could claim the federal income tax exemptions in 2014 if Father had no taxable income.

With regard to Mother's attorney's fees incurred in the first appeal, the trial court awarded her $2,600 out of the $10,350 fee she requested. As for the attorney's fees Mother incurred on remand, the trial court denied the request due in part to Father's unemployment and a general lack of liquid assets. With regard to the parties' respective petitions to modify the parenting plan, the trial court determined that the children have thrived under the existing plan and that there is no evidence to support a modification. As for Mother's claim regarding items of personal property awarded in the divorce, the court found the testimony conflicting and denied Mother's claim.

Both parties raise several issues on appeal. Mother contends that the trial court erred in the amount and duration of rehabilitative alimony; in the award of attorney's fees she incurred in the first appeal; in declining to award her attorney's fees for the remand hearings; in failing to modify the parenting plan; in its calculation of child support in regards to her child care expenses and the allocation of the federal income tax exemption; and in denying her claim for the personal property awarded in the divorce.

Father contends that the trial court imputed excessive income to him for the time period between June 2013 and June 2014. He also contends the trial court erred by not awarding him sole decision-making authority given Mother's failure to notify him of the children's doctor's appointments and in failing to require Mother to contribute to the children's private school tuition.

ANALYSIS

I. ALIMONY

Mother contends the trial court erred by failing to award her sufficient rehabilitative alimony. Specifically, she argues that her monthly living expenses, totaling between $4,000 and $5,000, were in excess of her income and she incurred loans for school tuition and living expenses totaling approximately $50,000, while Father's monthly income totaled $9,238 from April 2011 to October 2011, when his disability ended and his monthly income was reduced to $7,188 which continued until he lost his job in May 2013. Mother requests at least $2,000 per month from April 2011 through May 2013, and $800 per month thereafter until June 2014, when Mother expected to become fully rehabilitated.

As we requested, the trial court properly considered the factors in Tennessee Code Annotated § 36-5-121 in determining the duration and amount to award Mother for

rehabilitative alimony.[4] In its thorough analysis of the issue, the trial court noted that Father had a greater earning capacity than Mother at the time of divorce; however, at the time of the hearings on remand, Father was unemployed through no fault of his own, had no present job prospects, and planned to attend college to obtain an undergraduate degree. The trial court also noted that Mother had completed her educational courses for occupational therapy and found that her earning capacity was currently greater than Father's. Based on these facts, the relative incomes and cost of her education, while properly excluding Mother's discretionary spending which greatly exceeded her means, the trial court awarded rehabilitative alimony in the amount of $800 per month for a period of 39 months, from April 2011 through June 2014, when Mother would become fully rehabilitated.

Trial courts are afforded wide discretion in determining whether there is a need for spousal support, and if so, the nature, amount, and duration of the award. *Gonsewski v. Gonsewski*, 350 S.W.3d 99, 105 (Tenn. 2011) (citing *Bratton v. Bratton*, 136 S.W.3d 595, 605 (Tenn. 2004); *Burlew v. Burlew*, 40 S.W.3d 465, 470 (Tenn. 2001); *Crabtree v. Crabtree*, 16 S.W.3d 356, 360 (Tenn. 2000)). Absent an abuse of discretion, a trial court's decision to award spousal support will not be disturbed on appeal. *Id.*

Discretionary decisions require "a conscientious judgment, consistent with the facts, that takes into account the applicable law." *White v. Beeks*, No. E2012-02443-SC-R11-CV, __ S.W.3d __, 2015 WL 2375458, at *7 (Tenn. May 18, 2015) (citing *Lee Medical, Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010)).[5] Although "[t]he abuse of discretion standard of review does not . . . immunize a [trial] court's decision from any meaningful appellate scrutiny," *Lee Medical*, 312 S.W.3d at 524 (citing *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 211 (Tenn. Ct. App. 2002)), the abuse of discretion standard of review envisions "a less rigorous review of the [trial] court's decision and a decreased likelihood that the decision will be reversed on appeal." *Id.* (citing *Beard v. Bd. of Prof'l Responsibility*, 288 S.W.3d 838, 860 (Tenn. 2009); *State ex rel. Jones v. Looper*, 86 S.W.3d 189, 193 (Tenn. Ct. App. 2000)). Nevertheless, the discretionary standard of review "does not permit reviewing courts to second-guess the court below, *White v. Vanderbilt University*, 21 S.W.3d 215, 223 (Tenn. Ct. App. 1999), or to substitute their discretion for the [trial] court's." *Id.* (citing *Henry v. Goins*, 104 S.W.3d 475, 479 (Tenn. 2003); *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998)).

As our Supreme Court explained in *Lee Medical*:

[4] In its order, the trial court references Tenn. Code Ann. § 36-5-101, but it appears that the trial court correctly reviewed the factors set forth in Tenn. Code Ann. § 36-5-121.

[5] At the time of filing this opinion, a petition for rehearing was pending with respect to the Supreme Court's decision in *White v. Beeks*.

> Discretionary decisions must take the applicable law and the relevant facts into account. *Konvalinka v. Chattanooga-Hamilton County Hosp. Auth*., 249 S.W.3d 346, 358 (Tenn. 2008); *Ballard v. Herzke*, 924 S.W.2d 652, 661 (Tenn. 1996). An abuse of discretion occurs when a court strays beyond the applicable legal standards or when it fails to properly consider the factors customarily used to guide the particular discretionary decision. *State v. Lewis*, 235 S.W.3d 136, 141 (Tenn. 2007). A court abuses its discretion when it causes an injustice to the party challenging the decision by (1) applying an incorrect legal standard, (2) reaching an illogical or unreasonable decision, or (3) basing its decision on a clearly erroneous assessment of the evidence. *State v. Ostein*, 293 S.W.3d 519, 526 (Tenn. 2009); *Konvalinka v. Chattanooga-Hamilton County Hosp. Auth*., 249 S.W.3d at 358; *Doe 1 ex rel. Doe 1 v. Roman Catholic Diocese of Nashville*, 154 S.W.3d at 42.
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> To avoid result-oriented decisions or seemingly irreconcilable precedents, reviewing courts should review a [trial] court's discretionary decision to determine (1) whether the factual basis for the decision is properly supported by evidence in the record, (2) whether the [trial] court properly identified and applied the most appropriate legal principles applicable to the decision, and (3) whether the [trial] court's decision was within the range of acceptable alternative dispositions. *Flautt & Mann v. Council of Memphis*, 285 S.W.3d 856, 872-73 (Tenn. Ct. App. 2008) (quoting *BIF, a Div. of Gen. Signal Controls, Inc. v. Service Constr. Co.*, No. 87-136-II, 1988 WL 72409, at *3 (Tenn. Ct. App. July 13, 1988) (No Tenn. R. App. P. 11 application filed)). When called upon to review a lower court's discretionary decision, the reviewing court should review the underlying factual findings using the preponderance of the evidence standard contained in Tenn. R. App. P. 13(d) and should review the lower court's legal determinations de novo without any presumption of correctness. *Johnson v. Nissan N. Am., Inc*., 146 S.W.3d 600, 604 (Tenn. Ct. App. 2004); *Boyd v. Comdata Network, Inc*., 88 S.W.3d at 212.

Lee Medical, 312 S.W.3d at 524-25.

Rehabilitative alimony is "intended to assist an economically disadvantaged spouse in acquiring additional education or training which will enable the spouse to achieve a standard of living comparable to the standard of living that existed during the marriage or the post-divorce standard of living expected to be available to the other spouse." *Gonsewski*, 350 S.W.3d at 108 (citing Tenn. Code Ann. § 36-5-121(e)(1); *Robertson v. Robertson*, 76 S.W.3d 337, 340-41 (Tenn. 2002)). The fundamental purpose of alimony is to eliminate spousal dependency where possible. *Id.* at 110. When

determining whether to award alimony and the "nature, amount, length, and manner of payments," courts are required to consider the factors set forth in Tennessee Code Annotated § 36-5-121(i).[6] *Id.* at 109-110. However, the two most important factors to consider are the disadvantaged spouse's need and the obligor spouse's ability to pay. *Id.* (citing *Riggs v. Riggs*, 250 S.W.3d 453, 457 (Tenn. Ct. App. 2007); *Bratton*, 136 S.W.3d at 605; *Robertson*, 76 S.W.3d at 342; *Burlew*, 40 S.W.3d at 470).

Turning to the facts of this case, we find no error with the trial court's award of rehabilitative alimony totaling $31,200. At the time of divorce in 2011, Mother was the economically disadvantaged spouse; however, she has since completed her degree in occupational therapy and obtained employment. At the January 2014 hearing, she testified that she had found part-time employment at More than Words, earning $12 per patient or $24 per hour, and that she would become a full-time employee by the end of June 2014. She received considerable cash assets upon the dissolution of the marriage totaling $92,870. Since the divorce, she spent most of her assets and incurred loans totaling $47,000, of which only $28,000 was for an educational loan. Father, on the other hand, had been unemployed since May 2013 with no job prospects as of the remand hearings and had enrolled in college to obtain his undergraduate degree.

Considering all of the above, we have determined that the record reveals an evidentiary foundation for the trial court's ruling; specifically, the trial court identified and applied the correct legal principles, and the award of $800 per month for a period of 39 months was a reasonable alternative available to the court. Therefore, the trial court did not abuse its discretion in its award of rehabilitative alimony to Mother.

II. CHILD SUPPORT

Mother contends the trial court erred in its calculation of child support by failing to award her all of her child care expenses since the divorce. She also contends the trial court erred in failing to allocate the federal income tax exemption to her as the primary residential parent. Father contends the trial court erred in its calculation of child support

[6] These factors include, but are not limited to, the relative earning capacity, obligations, needs, and financial resources of each party, the relative education and training of each party, duration of the marriage, the age, mental condition and physical condition of each party, the separate assets of each party, provisions made with regard to the marital property, the standard of living of the parties established during the marriage, the extent to which each party has made such tangible and intangible contributions to the marriage, the relative fault of the parties, and such other factors as are necessary to consider the equities between the parties. *See* Tenn. Code Ann. § 36-5-121(i).

by imputing income to him; he also challenges the ruling regarding private school tuition.[7] We shall address each issue in turn.

A. Child Care Expenses

We begin our analysis by recognizing that Mother did not seek modification of the child support in May 2011 when she began attending classes. The first time Mother filed a written request for a modification of the child support to allocate for work-related child care expenses was March 22, 2013, when she filed the Motion on Remand and for Recomputation of Support, for Modification of Parenting Plan, and for Contempt.

During the hearings on remand, she introduced into evidence a "child support payments" document in which she showed her child care expenses. Beginning in May 2011, the exhibit showed that Mother had child care expenses of $213 per month through September 2011; thereafter, she had child care expenses of $340 per month from October 2011 through July 2012, and from August 2012 through May 2013, child care expenses of $67 per month. She contends that the court should have applied Mother's child care expenses set forth in the exhibit to award child support during the relevant time periods.

The trial court found that Mother did not request any consideration of her child care expenses until she filed her motion in March 2013. Based on this finding, the trial court announced that it would not consider Mother's child care expenses incurred prior to April 2013.

The record reflects that the trial court correctly identified and applied Tennessee Code Annotated § 36-5-101(f)(1), which provides that an order for the payment of child support "shall be a judgment entitled to be enforced as any other judgment of a court of this state," and "*shall not be subject to modification as to any time period or any amounts due prior to the date that an action for modification is filed* . . . ." (Emphasis added). Thus, "a court has no power to alter a child support award as to any period of time occurring prior to the date on which an obligee spouse files his or her petition." *Alexander v. Alexander*, 34 S.W.3d 456, 460 (Tenn. Ct. App. 2000); *see also Rutledge v. Barrett*, 802 S.W.2d 604, 606 (Tenn. 1991). Pursuant to the foregoing authority, and specifically Tennessee Code Annotated § 36-5-101(f)(1), because Mother did not request a modification of child support until March 22, 2013, she is not entitled to a retroactive modification of child support at any time prior to that date.

[7] Father also notes that, at some point after the trial, he received notification that he would resume receiving Social Security Disability benefits, a portion of which goes to Mother. He requests that this court modify the child support calculation to reflect the anticipated benefit; however, no evidence concerning this issue was presented to the trial court. Thus, we shall not consider this issue.

As for Mother's child care expenses incurred thereafter, Mother introduced into evidence an exhibit that established that she paid child care expenses in the amount of $67 per month for the period from April 2013 through May 2013. The trial court allocated Mother $67 per month in work-related child care expenses when determining child support from April 2013 through May 2013. This decision is supported by the evidence; therefore, we find no error with the trial court's allocation of Mother's child care expenses.

B. Federal Income Tax Exemption

In the 2011 Final Decree of Divorce, the trial court allocated the federal income tax exemption for the parties' two children to Father. On remand, Mother asked the court to allocate the exemptions to her due to the fact she was now employed and Father was not. The trial court ordered that "if the father has no taxable income at this time, the mother should be able to claim any exemption for 2014."

Mother contends that she is entitled to claim the tax exemption for two reasons: 1) she is the primary residential parent, and 2) she now has income.

The Tennessee Child Support Guidelines, Tenn. Comp. R. & Reg. 1240-2-4-.03(6)(b)(2)(ii) provide an assumption that the primary residential parent should claim the tax exemption for the child; however, this decision is discretionary, and the trial court may choose which parent to allocate the income tax exemption. *Farmer v. Stark*, No. M2007-01482-COA-R3-CV, 2008 WL 836092, at *9 (Tenn. Ct. App. Mar. 27, 2008) (citing *Chandler v. Chandler*, No. W2006-00493-COA-R3-CV, 2007 WL 1840818, at *9 (Tenn. Ct. App. June 28, 2007) ("The decision of a trial court regarding the allocation of exemptions for minor children is discretionary and should rest on facts of the particular case.")).

The initial decision to allocate the exemption to Father, which was included in the 2011 Final Decree of Divorce, is res judicata and is not subject to modification in this second appeal for it was not an issue remanded to the trial court. *See Jackson v. Smith*, 387 S.W.3d 486, 491 (Tenn. 2012). Whether Mother is entitled to claim the exemption in the future is subject to the discretion of the trial court. The trial court ruled that Mother could claim any exemption for 2014 "if the father has no taxable income at this time." This decision was based on the fact that Father was unemployed as of the remand hearings. We have concluded that this decision is one of the reasonable alternatives available based on the facts existing as of the remand hearing. *See Lee Medical*, 312 S.W.3d at 524-25. Therefore, the trial court did not abuse its discretion.

C. Imputation of Income to Father

Father challenges the imputation of income to him on two grounds. He contends the trial court erred by attributing unemployment benefits to him after they had ceased on December 31, 2013, and by imputing income to him of $10 per hour.

The trial court found that Father received veterans' benefits in the amount of $1,701 per month, that Father had been unemployed since May 31, 2013, when his employer laid him off due to lack of work, and that Father had been receiving unemployment compensation benefits since June 2013 in the amount of $1,131 per month. Because Father was unemployed and had chosen to return to school, the trial court additionally imputed income to Father at $10 per hour or $1,733 per month. The trial court noted that Father's unemployment benefits ceased December 31, 2013, but stated that "[e]ffectively for this period, the court is imputing income including the unemployment even though the father could not draw both," and the trial court calculated this to be roughly $16.50 per hour. The trial court found that Father's resume "has some skills though it is apparent that he must have additional education to be able to make the money that he was making." Based on these findings, the trial court set Father's income from June 2013 through June 2014 at $4,565 per month.

Father argues that he received unemployment compensation through December 31, 2013, and that his income forward should not reflect this amount. He also contends that it was error to impute income to him of $10 per hour because there was no evidence that Father could make that amount, particularly with only a high school diploma and, even more importantly, while drawing unemployment.

Under Tennessee law, imputing income for the purposes of child support payments is appropriate (1) if a parent has been determined by a tribunal to be willfully and/or voluntarily underemployed or unemployed, (2) when there is no reliable evidence of income, or (3) when the parent owns substantial non-income producing assets. Tenn. Comp. R. & Regs. 1240-2-4-.04(3)(a)(2)(i) (2008).

Examples of reliable evidence include tax returns for prior years and paycheck stubs. Tenn. Comp. R. & Regs. 1240-2-4-.04(3)(a)(2)(i)(2005). The Rule also expressly anticipates that other information may be used as reliable evidence insofar as it allows the court to determine a parent's current ability to support or where retroactive support is at issue, a parent's ability to support in prior years. Tenn. Comp. R. & Regs. 1240-2-4-.04(3)(a)(2)(iv)(I)(I) (2008).

We find no error with the trial court's decision to impute income to Father at the rate of $16.50 per hour because, even though the court correctly noted that at the time of trial he had "no prospects of a job," Father had been earning $70,000 per year prior to being laid off due to lack of work. Thus, it was reasonable for the court to conclude that

he had the potential for obtaining employment at the rate of $16.50 per hour, representing an annual income of $34,320, which is less than half of Father's previous income.[8] We, however, find that the court erred by including his unemployment benefit because Father had exhausted that benefit and Father could not receive unemployment benefits if he was gainfully employed. Thus, we respectfully disagree with the means by which the court imputed income of $16.50 per hour, but not with the amount. Accordingly, we affirm the trial court's determination that Father's gross income for purposes of setting child support is $4,565 per month for the period at issue.

D. Private School Tuition

Father contends that the trial court erred by failing to require Mother to pay a pro rata share of the children's tuition, fees and expenses associated with their private school attendance retroactive to the beginning of their schooling.

The trial court ruled:

> It seems clear to the court that if the parties were married at this time and had the same economic realities as they do now, that neither child would be attending private school. At this point, both are attending private school and the father has paid for the school through the end of this year. It does appear that the children have the need for the attention that a private school is able to provide.

Private school tuition is an extraordinary educational expense and private school expenses should be considered on a case-by-case basis. *Richardson v. Spanos*, 189 S.W.3d 720, 728 (Tenn. Ct. App. 2005) (citing Tenn. Comp. R. & Regs. 1240-2-4-.07(2)(d)(1)(ii)). Further, the courts must consider whether the private elementary or secondary schooling is "appropriate to the parents' financial abilities and to the lifestyle of the child if the parents and the child were living together." *Id.* (quoting Tenn. Comp. R. & Regs. 1240-2-4-.07(2)(d)(1)(ii)). The trial court made the finding that the parents could not afford to continue to pay for private school tuition due to the economic realities existing as of trial, and the court did not order either parent to pay the cost of their children's private schooling. Nevertheless, that cost was applied to the child support worksheet, and Mother was allocated 22% of that cost when calculating the adjusted support obligation. Consequently, this expense was prorated based on each parent's percentage share of income, with Mother's being 22% and Father's being 78%. Accordingly, we find no abuse of discretion with the trial court's decision regarding the apportionment of this expense.

[8] Moreover, this is below the imputed annual gross income of $37,589 for male parents. *See* Tenn. Comp. R. & Regs. 1240-02-04-.04(2)(iv)(I).

III. MODIFICATION OF THE PARENTING PLAN

While this matter was remanded to the trial court, both parents sought to modify the parenting plan and schedule in various ways, but the trial court denied all relief requested. Mother sought to compel Father's compliance with his medical treatment program and asked the court to periodically review his behavior. She also sought to compel Father to comply with the children's treatment program and a right of first refusal to keep the children when Father was unable to care for them.

More specifically, Mother asserts a material change exists based on Father's failure to take his prescription medications resulting in behavior that negatively affects the children. She relies on the testimony of Father's former wife, who stated that Father would not take his medication and would become easily frustrated and yell at the children while he was caring for them. Mother also argues that she should be allowed a right of first refusal because Father has since become divorced, and his former wife is no longer in the home.

For his part, Father asked the court to give him sole decision-making authority concerning the children. Father asserts that a material change exists based on the parties' inability to communicate and Mother's failure to share joint decision-making authority regarding the children's healthcare treatment. However, we note that Father's petition for modification, filed in January 2013, requested that he be named the primary residential parent, but did not request that he have sole decision-making authority. Nonetheless, Father's proposed parenting plan, filed in October 2013, requested that he have sole decision-making authority regarding the children's education, non-emergency healthcare, and extracurricular activities.

Modification of an existing parenting plan requires a two-step analysis. *See Armbrister v. Armbrister*, 414 S.W.3d 685, 697 (Tenn. 2013) (citing Tenn. Code Ann. § 36-6-101(a)(2)(B)-(C); Tenn. Code Ann. § 36-6-106(a); *see also Kendrick v. Shoemake*, 90 S.W.3d 566, 570 (Tenn. 2002); *Boyer v. Heimermann*, 238 S.W.3d 249, 255 (Tenn. Ct. App. 2007)). The trial court must first determine whether a material change in circumstances has occurred. *Id.* at 697-98. According to Tennessee Code Annotated § 36-6-101(a)(2)(C), a parent must "prove by a preponderance of the evidence a material change of circumstance affecting the child's best interest," but "a showing of a substantial risk of harm to the child" is unnecessary. If the court finds a material change in circumstances, the trial court must then determine whether a modification of the parenting plan is in the child's best interest in consideration of the factors set forth in Tennessee Code Annotated § 36-6-106(a). *Armbrister*, 414 S.W.3d at 697.

Here, the trial court did not make an express finding that a material change in circumstances had or had not occurred. The court's most significant finding regarding the children's best interests reads as follows: "The proof is that the children have thrived

during the parenting time schedule from the time of the divorce." The relevant portion of the court's findings on this issue read as follows:

> The court has reviewed carefully Exhibit 8 [father's medical records introduced under seal]. From this review, it is obvious that the father believes that the constant post-divorce activities are his cause for his problems. The proof is that the children have thrived during the parenting time schedule from the time of the divorce. There is no evidence upon which the court believes that it should change the parenting time.
>
> The mother desires to have a right of first refusal. These parties need to communicate only to the benefit of the children. Constant questioning of the children by both sides must stop. The right of first refusal would only make the situation worse.
>
> There is no doubt that any mother or father should follow the advice of his/her physician. There is no factual basis at this time from which the court would consider the mother or anyone monitoring the father's private medical issues. Should it have some effect on the children, the court would do so. At this point, there is no showing that there has been any negative affect on the children.

Based on these findings, the trial court did not modify the parenting plan.

It is implicit from the above ruling that the trial court did not find that a material change in circumstances had occurred. Alternatively, if a material change had occurred, the court made the specific affirmative finding that "the children have thrived during the parenting time schedule from the time of the divorce." Thus, the trial court expressly found that it was not in the children's best interests to modify the parenting schedule or plan. Having reviewed the record, we concur with the best interest finding and affirm the trial court's determination to not modify the parenting plan or schedule.

IV. MARITAL PROPERTY

While the case was on remand, Mother asserted that Father failed to deliver household goods awarded to her in the 2011 divorce. She asked the court to order him to deliver the property, or, alternatively, to award her a monetary judgment of $5,000.

Mother testified that Father refused to return the property, and she entered into evidence a list that itemized voluminous items of personal property. Father testified that the majority of items Mother claims were damaged or lost when the parties moved from Virginia to California while they were married. On cross-examination, Mother admitted that she signed and submitted a claim to the Navy for damaged or broken items that

included numerous items on the personal property list. The trial court dismissed her claim upon the following finding:

> The evidence is conflicting concerning the delivery of the household goods. The father has submitted a list of items damaged in transit. There is no way for the court to compare these lists and determine if these are the same items. The court will not grant the mother a judgment for any items. It may be that there is a vacuum cleaner in the father's possession. The court is unable to determine if that is the same vacuum cleaner or not.

Having concluded that the evidence does not preponderate against the trial court's findings, we affirm the dismissal of this claim.

V. ATTORNEY'S FEES

A. Attorney's Fees Incurred in the First Appeal

Mother contends that the trial court erred in awarding her only 25% of the attorney's fees she incurred in the first appeal.

Attorney's fees in a divorce action constitute alimony in solido. *Gonsewski*, 350 S.W.3d at 113. When determining whether to award attorney's fees, the trial court must consider the relevant factors regarding alimony set forth in Tennessee Code Annotated § 36-5-121(i). *Id.* Moreover, trial courts are afforded wide discretion in determining whether there is a need for attorney's fees as alimony in solido, and the trial court's decision will not be disturbed on appeal absent an abuse of discretion. *Id.* at 105.

In the first appeal, we determined that Mother had prevailed on several of the issues and concluded that she is entitled to recover "a portion of the fees she incurred on appeal." Accordingly, we remanded this issue to the trial court to determine the amount she is reasonably entitled to recover. *Velez v. Velez*, No. M2011-01949-COA-R3CV, 2012 WL 3104922, at *9 (Tenn. Ct. App. July 31, 2012).

On remand, the trial court awarded Mother $2,600 in attorney's fees, or roughly 25% of the $10,350 in attorney's fees she incurred in the first appeal.[9] She contends that, since she was successful on the majority of her claims on appeal, she should receive more than 25% of her requested fee. Specifically, she contends that she should receive 75% of the award because she was successful on three of her four claims in the first appeal.

[9] Mother also claimed to have incurred an additional $2,800 for previous counsel who filed notices of appeal and set up the bonds for the first appeal, but Mother did not introduce bills or affidavits from counsel who charged $2,800 in fees.

What Mother fails to mention is that Father was unemployed at the time of the hearings on remand, and Mother had completed her education and obtained employment in her licensed field, which must be considered in the context of need for such alimony and the ability to pay alimony in solido in the form of attorney's fees. Based upon these important factors, and realizing that trial courts are afforded wide discretion in determining whether to award attorney's fees, *Gonsewski*, 350 S.W.3d at 105, we find no abuse of discretion afforded the trial court on this issue and affirm the award of $2,600 for attorney's fees incurred by Mother in the first appeal.

B. Attorney's Fees on Remand

Mother further contends that the trial court erred in declining to award her attorney's fees on remand following the first appeal for the hearings held on October 3, 2013, and January 7, 2014.

The trial court declined to award Mother her attorney's fees incurred upon remand because Father did not have the ability to pay. Specifically, Father became unemployed in May 2013 and continued to be unemployed throughout the remand hearings, with no present prospects for employment. As such, we find no abuse of discretion in declining to award Mother attorney's fees for the remand hearings.

C. Attorney's Fees Incurred in the Second Appeal

Mother seeks to recover the attorney's fees she incurred in this, the second appeal. Whether to award attorney's fees on appeal is a matter within the sole discretion of this court. *Hill v. Hill*, No. M2006-02753-COA-R3-CV, 2007 WL 4404097, at *6 (Tenn. Ct. App. Dec.17, 2007) (citing *Archer v. Archer*, 907 S.W.2d 412, 419 (Tenn. Ct. App. 1995)). 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." *Id.* at *6 (citing *Dulin v. Dulin*, No. W2001-02969-COA-R3-CV, 2003 WL 22071454, at *10 (Tenn. Ct. App. Sept.3, 2003)).

While Father had greater earning capacity at the time of the divorce, he has since become unemployed, and Mother has become fully rehabilitated and her earning capacity is now greater than his. Moreover, Mother has been unsuccessful on a majority of her claims in this appeal. For these reasons, and in an exercise of our discretion, we respectfully deny Mother's request to recover her attorney's fees incurred on appeal.

IN CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded with two-thirds of the costs of appeal assessed against the appellant, Christy M. Velez, and one-third of the costs assessed against the appellee, Daniel J. Velez.

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FRANK G. CLEMENT, JR., JUDGE