

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
October 24, 2014 Session

**AIMEE LORRAINE HOWELL v. CLINT AUSTIN HOWELL**

**Appeal from the Chancery Court for Sumner County  
No. 2012DM68 Tom E. Gray, Chancellor**

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**No. M2013-02260-COA-R3-CV - Filed December 30, 2014**

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In this divorce action, Father appeals the rehabilitative alimony and alimony *in solido* awarded to Mother, the amount of parenting time he received, the designation of Mother as sole decision-maker and the failure of the trial court to find that Mother was voluntarily underemployed. We affirm the award of rehabilitative alimony and alimony *in solido* and the designation of Mother as primary residential parent; we vacate and remand for further consideration the residential parenting schedule, the allocation of decision-making authority, and the determination of Mother's income.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part, Vacated in Part, and Remanded**

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

Kimberly N. Gray and Erin Monet King, Franklin, Tennessee, for the appellant, Clint Austin Howell.

James B. Hawkins, Gallatin, Tennessee, and Brenda Miller Stiles, Hendersonville, Tennessee, for the appellee, Aimee Loraine Howell.

**OPINION**

Aimee Howell ("Mother") and Clint Howell ("Father") were married on June 16, 2001; one child was born to the marriage. On February 16, 2012, Mother filed a Complaint for Absolute Divorce alleging adultery, inappropriate marital conduct, and irreconcilable differences; she requested, *inter alia*, that she be named primary residential parent and that she receive child support and spousal support. Pursuant to Mother's motion, the court

entered an order on March 30, adopting a temporary parenting plan which designated Mother as primary residential parent and set Father's parenting time every Wednesday from 5:00 p.m. to 7:00 p.m. and every other weekend from Saturday at 9:00 a.m. until Monday at 6:00 p.m.; the order also granted Mother exclusive possession of the marital home; and ordered Father to pay support of \$935.00 every two weeks.<sup>1</sup>

On November 19, 2012, Father answered and counter-claimed, requesting *inter alia*, that he be designated primary residential parent. On March 12, 2013, pursuant to Father's motion, the court entered an order modifying Father's parenting time by making his weekly Wednesday visitation an overnight visitation.

Trial took place on July 10, 2013. On September 10 the court entered a final decree awarding an absolute divorce to Mother on the grounds of inappropriate marital conduct; dividing the marital property; and awarding Mother rehabilitative alimony of \$1,200.00 per month for five years and alimony *in solido* of \$10,000.00 to pay a portion of her attorney fees. The permanent parenting plan, incorporated in the final decree, designated Mother as primary residential parent and Father as alternate residential parent; granted Mother 264 days of parenting time and Father 101 days; and provided that Mother would exercise decision-making authority regarding the son's education, non-emergency health care, extracurricular activities, and religious upbringing.

Father appeals, raising the following issues:

1. Whether the court erred by ordering a parenting plan that fails to achieve the maximum participation possible for each parent in the child's life by awarding Father only 95 days of annual parenting time and by granting Mother sole decision making rights.
2. Whether or not the trial court erred in its award of alimony *in solido* to Wife in the amount of \$10,000.
3. Whether the trial court erred in its award of rehabilitative alimony for a five year period.
4. Whether the trial court erred when it failed to make a finding that the Mother was intentionally underemployed.

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<sup>1</sup> The court did not designate the support as either child support or spousal support, but stated that "[Mother] is Ordered to maintain the household bills using the funds paid to her by [Father]."

## DISCUSSION

### I. SPOUSAL SUPPORT

Pursuant to Tenn. Code Ann. §36-5-121(d)(1), a court may award spousal support in the form of rehabilitative alimony, alimony *in futuro*, transitional alimony, alimony *in solido*, or a combination of these. The decision to award alimony requires the court to balance the factors set forth at Tenn. Code Ann. § 36-5-121(i)<sup>2</sup> and typically hinges on the unique facts of the case. See *Anderton v. Anderton*, 988 S.W.2d 675, 683 (Tenn. Ct. App. 1998). Trial courts have broad discretion to determine whether spousal support is needed and, if so, the nature, amount, and duration of support. See *Garfinkel v. Garfinkel*, 945 S.W.2d 744, 748 (Tenn. Ct. App. 1996). Appellate courts will not alter such awards absent an abuse of discretion. *Riggs v. Riggs*, 250 S.W.3d 453, 456–457 Tenn. Ct. App. 2007 (citing *Lindsey v. Lindsey*, 976 S.W.2d 175, 180 (Tenn. Ct. App. 1997)). Moreover, the appellate courts are disinclined to second-guess a trial court’s decision regarding spousal support unless it is not supported by the evidence or is contrary to public policy. *Brown v. Brown*, 913 S.W.2d 163, 169 (Tenn. Ct. App. 1994).

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<sup>2</sup> The factors are as follows:

- (1) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;
- (2) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party’s earnings capacity to a reasonable level;
- (3) The duration of the marriage;
- (4) The age and mental condition of each party;
- (5) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;
- (6) The extent to which it would be undesirable for a party to seek employment outside the home, because such party will be custodian of a minor child of the marriage;
- (7) The separate assets of each party, both real and personal, tangible and intangible;
- (8) The provisions made with regard to the marital property, as defined in § 36-4-121;
- (9) The standard of living of the parties established during the marriage;
- (10) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party;
- (11) The relative fault of the parties, in cases where the court, in its discretion, deems it appropriate to do so; and
- (12) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

In awarding Mother alimony, the trial court stated:

The Court finds that this is a case for Rehabilitative Alimony. The Court finds that [Mother] has a need, and that [Father] has the ability to pay. The Court finds that [Mother] recently received a General Equivalent Diploma which is recognized as a High School Diploma, and that she has examined the Programs offered by Volunteer State Community College. The Court finds that she has decided to pursue the Respiratory Assistant Program<sup>3</sup> for which she must first take some basic classes. The Court finds that [Father] shall pay [Mother] \$1,200.00 per month as Rehabilitative Alimony for a period of five (5) years effective August 2013. The Court finds that the alimony terminates upon the remarriage of [Mother]. The Court finds that [Mother] shall be awarded a portion of her attorney fees as alimony *in solido* upon the filing of an Affidavit of Time by her attorney. The Court hereby awards [Mother \$10,000.00] as alimony [*in solido*].

Father contends that court abused its discretion by awarding Mother rehabilitative alimony for a period of five years and that the court erred in awarding Mother \$10,000.00 as alimony *in solido*. We will begin our analysis by reviewing the evidence relative to Father's ability to pay and Mother's need, as those two factors are the most important determinations in awarding spousal support. *Varley v. Varley*, 934 S.W.2d 659, 668 (Tenn. Ct. App. 1996).

Father testified that he did not have the ability to pay alimony because he was unemployed at the time of the trial; his income and expense statement reported that he had no income, with the notation that "Husband's unemployment claim has not yet been processed." He testified that he had accepted a position as a systems engineer with Truven Health Analytics, Inc., beginning five days after the trial, which would pay an annual salary of \$75,000.00, plus benefits; this amount was also reflected on the child support worksheet, where his monthly gross salary was set at \$6,250.00. On his income and expense statement he reported monthly expenses of \$6,100.83, which included \$2,025.83 in "support payments" and \$1,100.00 for legal fees. Considering the nature of these expenses and the fact that they were subject to modification, if not elimination, in the divorce proceeding, we discount them and conclude that the evidence shows Father has the ability to pay alimony.

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<sup>3</sup> The record does not show the basis for the court's finding that Mother had decided to pursue a respiratory assistant program; Mother testified that she desired to continue her education to become a radiology technician. In light of our holding *infra* that the record supports the award of rehabilitative alimony, this discrepancy is immaterial.

As a starting point in determining whether Mother has a need for alimony, it is necessary to first determine the amount of her monthly income as shown by the evidence. The court did not make a finding of Mother's income when it made the award of alimony, and there was conflicting evidence on this issue—the child support worksheet recorded, without explanation, that Mother had a monthly income of \$400.00, while on her income and expense statement Mother reported receiving income of \$2,175.00 per month, \$2,025.00 of which she recorded as “husband's current family support payment” and \$150.00 as “gross monthly” income. Mother's checking account statements showed that deposits totaling \$39,321.33 were made over a sixteen month period from March 2012 to June 2013.<sup>4</sup> She testified that Father's support payments,<sup>5</sup> her employment earnings, gifts from her parents,<sup>6</sup> and miscellaneous “pay pal” payments from her friends<sup>7</sup> were deposited into the account.

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<sup>4</sup> The following amounts were deposited into Mother's account: \$288.90 (period ending March 20, 2012); \$1,817.56 (period ending May 18, 2012); \$2,334.04 (period ending June 20, 2012); \$2,231.87 (period ending July 19, 2012); \$3,200.53 (period ending August 20, 2012); \$2,005.64 (period ending October 19, 2012); \$3,925.78 (period ending November 23, 2012); \$1,713.82 (period ending December 19, 2012); \$1,992.49 (period ending January 22, 2013); \$2,554.56 (period ending February 21, 2013); \$4,066.90 (period ending March 20, 2013); \$3,705.44 (period ending April 18, 2013); \$5,403.90 (period ending May 20, 2013); and \$4,079.90 (period ending June 20, 2013). The statements for the April and September 2012 periods are not in the record.

<sup>5</sup> The order entered on March 30, 2012, required Father to pay support of \$935.00 every two weeks. On her income and expense statement Mother reported receiving income of \$2,025.00 monthly from Father as support and \$150.00 as “gross monthly” income. Handwritten on the form next to the typed entry of \$2,025.00 was “935 x 2.” Father reported on his income and expense statement that he paid \$2,025.83 monthly in “support payments”. Neither party explained the discrepancy in the amount ordered by the court and the amount shown on their income and expense statements as to what Father paid. In the absence of an explanation, in determining Mother's income we have utilized the \$1,870.00 monthly support total ordered by the court.

<sup>6</sup> The bank deposits include the following gifts Mother testified that she received from her parents over a seven month period: \$291.00 (October 11, 2012), \$500.00 (November 23, 2012), \$1,013.39 (February 25, 2013), \$130.00 (March 25, 2013), \$125.00 (March 20, 2013), \$120.00 (April 4, 2013), \$1,689.00 (May 10, 2013), and \$1,142.00 (May 28, 2013). We agree with Father that monetary gifts Mother received from her parents should be included in the calculation of her income in the determination of her need for alimony.

<sup>7</sup> Mother testified that some of the funds deposited into her account were not hers but, rather, were funds for a high school reunion she was coordinating (\$669.72 during the period ending June 20, 2012), funds for a floral arrangement for a friend (\$65.00 for the period ending August 20, 2012), and funds for the purchase of items from a store that a friend had asked her to make (\$7.00 for the period ending January 22, 2013); deducting these amounts from the stated months nets in the following income figures: \$1,664.32 (period ending June 20, 2012); \$3,135.53 (period ending August 20, 2012); and \$1,985.49 (period ending January 22, 2013).

In determining Mother's monthly income for alimony purposes, it is necessary to deduct the amount of the funds that Mother testified were deposited into her account but were not her funds, totaling \$741.72, and the \$1,870.00 monthly which she received in temporary support; we also include the amounts Mother received from her parents over the seven months, totaling \$5,010.39. In this manner, we average Mother's monthly income to be \$1,019.26.<sup>8</sup> On her income and expense statement, Mother reported her monthly expenses to be \$3,423.00; in light of her monthly income of \$1,019.26 the evidence shows that Mother has a need for support for purposes of an award of alimony.

Having determined that the record supports a finding of Mother's need for alimony and Father's ability to pay, we address the court's award of rehabilitative alimony and alimony *in solido*, respectively.

Father acknowledges in his brief that "[Mother] is somewhat disadvantaged in her current ability to earn a living"; he argues that the five year period for rehabilitative alimony is in excess of the time it would take Mother to complete her education and "exceeds the bounds of reasonableness."

Tenn. Code Ann. §36-5-121(e)(1) provides:

Rehabilitative alimony is a separate class of spousal support, as distinguished from alimony *in solido*, alimony *in futuro*, and transitional alimony. To be rehabilitated means to achieve, with reasonable effort, an earning capacity that will permit the economically disadvantaged spouse's standard of living after the divorce to be reasonably comparable to the standard of living enjoyed during the marriage, or to the post-divorce standard of living expected to be available to the other spouse, considering the relevant statutory factors and the equities between the parties.

The evidence bearing on the standard of living that the parties maintained during the marriage and the standard each could expect after the marriage included Mother's testimony that they had been married for twelve years; that she worked as a secretary at a chiropractor's office and as an assistant manager at an establishment known as Curves to support the family while Father obtained his bachelor's degree; and that she had not worked outside the home since the birth of their son. Mother, who completed home school education in 1992 and

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<sup>8</sup> Starting with \$39,321.33 (total deposits), we subtract \$24,310.00 (support payments) and \$741.72 (funds held for other people) which equals a gross income, as reflected in the bank statements, of \$14,269.69. We then divide \$14,269.69 by the 14 months covered by the statements to produce an average monthly income of \$1,019.26.

earned her GED a month before the trial, testified that she wanted to continue her education at Volunteer State Community College “studying to become a radiology technician”; that it would take seven semesters to obtain her certificate; and that pursuing this objective would allow her to achieve a higher earning capacity. The evidence also included Father’s testimony, along with tax and payroll records, which showed that Father earned \$38,660.00 in 2007, \$132,869.68 in 2011 and \$48,968.07 during the first six months of 2012; and that he had accepted employment at an annual salary of \$75,000.00 beginning five days after the trial.

The evidence clearly shows that Father will continue to enjoy a standard of living reasonably comparable to that enjoyed during the marriage. The award of rehabilitative alimony will allow Mother to pursue an education to enhance her job skills and earning capacity and is consistent with the statute; the award is necessary for Mother to increase her earning capacity such that she may achieve the standard of living reasonably comparable to that she enjoyed during the marriage. *See Duke v. Duke*, 2012 WL 1971144 at \*5 (Tenn. Ct. App. June 1, 2012) (“The purpose of rehabilitative alimony is to afford the disadvantaged spouse an opportunity to acquire or enhance job skills, education, or both in order to enable him or her to be self-sufficient.”). While Father complains of the duration of the award, there is no basis in the record to hold that the evidence preponderates against the five year period. After Mother completes her education and job readiness training, it is appropriate to consider that other matters might impact her ability to re-enter the workforce after six years or require further adjustment as she goes forward. On the record before us, we cannot conclude that the court abused its discretion with respect to the award.

With respect to the award of alimony *in solido*, Father contends that Mother has sufficient funds to pay her own attorney fees, asserting that she received \$25,956.21 in the division of marital property,<sup>9</sup> gifts from her parents to assist in paying her attorney fees, and support throughout the pendency of the divorce.

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<sup>9</sup> The court awarded Mother the following case assets:

1) Fifty (50%) per cent of the ING account minus 325.00 for mediator fees	20,275.00
2) Fifty (50%) per cent of the 1st Tennessee saving account account	2,500.00
3) Fifty (50%) per cent of the remaining equity of the Home	<u>3,181.21</u>
	25,956.21

Our Supreme Court in *Gonsewski v. Gonsewski* stated the following regarding alimony *in solido* to pay attorney's fees:

The decision whether to award attorney's fees is within the sound discretion of the trial court. As with any alimony award, in deciding whether to award attorney's fees as alimony *in solido*, the trial court should consider the factors enumerated in Tennessee Code Annotated section 36-5-121(i). A spouse with adequate property and income is not entitled to an award of alimony to pay attorney's fees and expenses. Such awards are appropriate only when the spouse seeking them lacks sufficient funds to pay his or her own legal expenses, or the spouse would be required to deplete his or her resources in order to pay them. Thus, where the spouse seeking such an award has demonstrated that he or she is financially unable to procure counsel, and where the other spouse has the ability to pay, the court may properly grant an award of attorney's fees as alimony.

350 S.W.3d 99, 113 (Tenn. 2011) (internal citations omitted).

Pursuant to the court's instruction, Mother's counsel submitted an affidavit of fees she incurred in the course of the proceedings, totaling \$16,699.80. Mother testified that she had been paying fees through funds that she was receiving from her parents as well as her earnings and the support payments she received from Father. Considering the cash assets Mother received in the division of marital property as well as her monthly income and expenses, it is apparent that she does not have adequate property or income to pay her attorney fees without depleting her resources; the court did not abuse its discretion in awarding her alimony *in solido*.

Accordingly, we affirm the court's award of rehabilitative alimony and alimony *in solido*.

## **II. PARENTING PLAN**

### ***A. The Residential Parenting Schedule***

Custody determinations, residential schedules, and parenting responsibility decisions are within the broad discretion of the trial judge; accordingly, we review those decisions under an abuse of discretion standard. *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001) (citing *Suttles v. Suttles*, 748 S.W.2d 427, 429 (Tenn. 1988)). An abuse of discretion occurs when the trial court "applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining." *Id.* We review

the trial court's factual findings *de novo* upon the record, accompanied by a presumption of correctness, unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d). When the trial court does not make specific findings of fact, we review the record to determine where the preponderance of the evidence lies. *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997).

In the final decree the court designated Mother as primary residential parent and adopted the parenting plan she proposed, with one modification. Father contends that the trial court failed to consider the factors listed at Tenn. Code Ann. §36-6-106(a) and Tenn. Code Ann. §36-6-404(b) in setting his residential parenting time; he asserts that the court “failed to order a custody arrangement that permits both parents to enjoy the maximum participation possible” in the child’s life.

Tenn. Code Ann. §36-6-106(a), applicable in proceedings requiring the court to make a custody determination, mandates that any such determination be made in the best interest of the child and provides:

In taking into account the child’s best interest, the court shall order a custody arrangement that permits both parents to enjoy the maximum participation in the life of the child consistent with the factors set forth in this subsection (a)<sup>[10]</sup>, the location of the residences of the parents, the child’s need for stability and all other relevant factors.

Tenn. Code Ann. § 36-6-404(b) requires that a final decree incorporate a permanent parenting plan, defined in § 36-6-402(3) as “a written plan for the parenting and best interests of the child, including the allocation of parental responsibilities and the establishment of a residential schedule, as well as an award of child support consistent with chapter 5 of this title.” With respect to the crafting of parenting plans, § 36-6-404(b) requires that each plan include a residential schedule which, *inter alia*, “encourage[s] each parent to maintain a loving, stable and nurturing relationship with the child.”<sup>11</sup>

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<sup>10</sup> At the time the court entered the order under review §36-6-106(a) included a list of ten specific factors to be considered by the court. By Ch. 617 Pub. Acts of 2014, effective July 1, 2014, §36-6-106(a) was amended by replacing the ten factors with a new list of fifteen factors.

<sup>11</sup> At the time the court entered the order under review, the statute also set forth a list of sixteen factors to be considered in setting the residential schedule. By Ch. 617 Pub. Acts of 2014, §36-6-404(b) was amended by replacing the list of sixteen factors with language directing the court to consider the fifteen factors at §36-6-106(a) when determining the residential schedule and designating the primary residential parent.

(continued...)

The court made several findings in designating Mother as primary residential parent;<sup>12</sup> in adopting the residential schedule proposed by Mother, however, the court did not make any findings or identify whether it applied the factors at §36-6-106(a), § 36-6-404(b), or a combination of the two statutes. Inasmuch as there is little substantive difference between the factors in the two statutes and in light of the court's exercise of its authority under § 36-6-404(b) in designating Mother as primary residential parent, our analysis will consider the factors in § 36-6-404(b).<sup>13</sup>

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<sup>11</sup>(...continued)

<sup>12</sup> The court stated:

The Court finds that the Mother shall be named the Primary Residential Parent of the parties' minor child [ ], and that the Father shall be named the Alternate Residential Parent. In making this determination the Court examined the relevant factors to make such a determination. The Court found that as to the love and affection between the child and the parents was equal. The Court found that the issue of emotional ties between the child and the parents weigh[s] more in Mother's favor. Factors as to education weighed in favor of the Mother as she put the child in a pre-k program. The Court found that as to the issue of continuity in the child's life to weigh more in favor of the Mother as she has been the child's primary caretaker since birth. The Court found as to the factor of the mental and physical health of the minor child and the parents ability and willingness to provide care thereof was equal as to both parents. The Court found that the child's school and community record did not apply as no proof was provided as to this factor. The Court found that as to the disposition of a parent to provide financially for the child to weigh in favor of the Father.

As another factor that the Court considered to determine whom to name as the primary residential parent the Court found that there was testimony by the Mother that there was an incident when the child was an infant on a trip to St. Louis that the Father picked up the child who was screaming and yelled at the child to shut up. The Court despite Father's testimony otherwise that said event did not occur, believes Mother's testimony that said event did in fact occur. The Court adopts the Mother's parenting plan as proposed at trial as modified by the Memorandum dated July 17, 2013, which is attached to this Order to be incorporated herein[.]

<sup>13</sup> The factors include:

- (1) The parent's ability to instruct, inspire, and encourage the child to prepare for a life of service, and to compete successfully in the society that the child faces as an adult;
- (2) The relative strength, nature, and stability of the child's relationship with each parent, including whether a parent has taken greater responsibility for performing parenting responsibilities relating to the daily needs of the child;
- (3) The willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, consistent with

(continued...)

Although Father does not specifically appeal the designation of Mother as primary residential parent, upon our review of the record the evidence does not preponderate against that decision. With respect to the parenting schedule, however, we have determined that it is necessary to vacate so much of the order that adopts the parenting schedule and remand for further consideration.

Both parents testified relative to the statutory factors, specifically as to the activities in which each engaged with the child, the closeness that each maintained with him, and that each had an employment schedule which would allow the parent to provide necessary attention to the child before and after school. Much of the testimony related to concerns each had with respect to Tenn. Code Ann. § 36-4-404(b)(3). Father acknowledged that the son needed both his mother and father and that, accordingly, he was willing to co-parent; that he and Mother live in the same school district and he lives one mile from the child's school; he also testified as to difficulties he had with Mother in attempting to assist the son in adapting

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<sup>13</sup>(...continued)

the best interests of the child;

(4) Willful refusal to attend a court-ordered parent education seminar may be considered by the court as evidence of that parent's lack of good faith in these proceedings;

(5) The disposition of each parent to provide the child with food, clothing, medical care, education and other necessary care;

(6) The degree to which a parent has been the primary caregiver, defined as the parent who has taken the greater responsibility for performing parental responsibilities;

(7) The love, affection, and emotional ties existing between each parent and the child;

(8) The emotional needs and developmental level of the child;

(9) The character and physical and emotional fitness of each parent as it relates to each parent's ability to parent or the welfare of the child;

(10) The child's interaction and interrelationships with siblings and with significant adults, as well as the child's involvement with the child's physical surroundings, school, or other significant activities;

(11) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment;

(12) Evidence of physical or emotional abuse to the child, to the other parent or to any other person;

(13) The character and behavior of any other person who resides in or frequents the home of a parent and such person's interactions with the child;

(14) The reasonable preference of the child if twelve (12) years of age or older. The court may hear the preference of a younger child upon request. The preference of older children should normally be given greater weight than those of younger children;

(15) Each parent's employment schedule, and the court may make accommodations consistent with those schedules; and

(16) Any other factors deemed relevant by the court.

to the divorce.<sup>14</sup> Mother testified that she has been the child's primary caregiver, and that, as a consequence, they have a very close relationship; she testified several times that the son should be with her and spend as little time with Father as possible.<sup>15</sup>

As we consider Father's objection to the parenting schedule we find it appropriate to consider the two temporary plans under which the parties operated prior to the entry of the permanent parenting plan. The first plan provided that Father would exercise parenting time every Wednesday from 5:00 p.m. to 7:00 p.m. and every other weekend from Saturday at 9:00 a.m. until Monday at 6:00 p.m.; a year later that plan was modified to make Father's weekly Wednesday visitation an overnight visitation.<sup>16</sup> We have determined that, under the original plan, Father exercised 52 days of parenting time, excluding holidays, and Mother exercised the remaining 313 days; when the plan was modified, Father exercised 104 days of parenting time, excluding holidays, and Mother exercised the remaining 261 days.<sup>17</sup> The permanent parenting plan provided that Father would exercise parenting time every other weekend from Friday at 6:00 p.m. until Sunday at 6:00 p.m.<sup>18</sup> As noted earlier, in the final

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<sup>14</sup> Father testified that Mother "threatened to move back with her family in North Carolina and never let me see my son again."

<sup>15</sup> In this regard, Mother recounted an incident where Father used profanity in the presence of the child, that Father would drink to excess, and that she believed he suffered from bulimia.

<sup>16</sup> The court entered the original plan in 2012 pursuant to Mother's motion to approve her temporary parenting plan and then modified the plan in 2013 pursuant to Father's motion to modify his parenting time. Neither motion was included in the record on appeal.

<sup>17</sup> In calculating the number of days of parenting time, we have utilized the definition of "day" in the Child Support Guidelines:

"Days" -- For purposes of this chapter, a "day" of parenting time occurs when the child spends more than twelve (12) consecutive hours in a twenty-four (24) hour period under the care, control or direct supervision of one parent or caretaker. The twenty-four (24) hour period need not be the same as a twenty-four (24) hour calendar day. Accordingly, a "day" of parenting time may encompass either an overnight period or a daytime period, or a combination thereof.

Tenn. Comp. R. & Regs. 1240-2-4-.02 (10). We did not include holidays in our calculation inasmuch as the parents alternate holidays in successive years.

<sup>18</sup> The parenting plan recites that Father will spend 101 days with the child and Mother will spend 264 days. The child support worksheet accompanying the plan, however, recites that the child spends 95 days with Father and 270 days with Mother. There is no explanation in the record for this discrepancy.

decree, the court did not make findings of fact relative to the statutory factors or otherwise explain the allocation of parenting time.

The absence of findings by the court impedes our review, particularly as to those factors, such as Tenn. Code Ann. §36-6-404(b)(3), as to which there was significant conflicting testimony; we believe that the resolution of the conflicts depends *inter alia* on an assessment of the credibility of the parties.<sup>19</sup> In addition, there is no indication that the court

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<sup>19</sup> The following excerpt from Father's testimony is an example:

Q. Has the divorce been difficult on [ ]?

A. Yes.

Q. Do you believe [ ] been adapting to the situation?

A. No.

Q. Why not?

A. I want to answer that and I want to tell you what he said, but I can't do that.

Q. What have you observed? Or what do you think the issue is?

A. It's really hard on him going back and forth and back and forth and back and forth.

Q. You heard your wife testify that he's actually been seeing a therapist. Did you know about that prior to today?

A. Yes.

Q. And did your wife explain this to you?

A. No.

Q. Okay. Did your wife ever come to you and say, hey, [ ] seeing a therapist. Can you -- would you like to participate?

A. No.

Q. Has your wife ever spoken to you about her concerns of [ ] adapting or not adapting to the situation?

A. No.

Q. Can you tell the Court, have you attempted to discuss with your wife [ ] issues, as far as not adapting or -- or lack thereof, with you wife? Have you done so?

A. Yes.

Q. What happened?

A. She refuses to have any contact with me at all.

Q. Do you believe you and your wife have the ability to -- in the past, have you and your wife had the ability to co-parent [ ] together since the divorce had been filed?

A. Since the divorce had been filed?

Q. Yes.

A. Have we had the ability to? I have. I've made my best efforts.

Q. Do you believe your wife has?

A. Absolutely not.

Q. Mr. Howell, you -- do you realize that you and your wife are still stuck together for the rest of your lives?

A. Yes.

(continued...)

considered Father's work schedule and the proximity of his home to the child's school in approving the parenting plan. *See* Tenn. Code Ann. § 36-6-404(b)(15), (16). Accordingly, we vacate this portion of the plan and remand the case for the adoption of appropriate findings in support of the residential parenting time schedule adopted by the court.

### ***B. Allocation of Decision Making Authority***

We next address Father's contention that the court abused its discretion by awarding Mother sole decision-making authority and that the decision is not supported by Tenn. Code Ann. §36-6-407(b).

Tenn. Code Ann. §36-6-404(a)(5) requires that a permanent parenting plan allocate decision-making authority regarding the child's education, health care, extracurricular activities, and religious upbringing to one or both of the parties. Tenn. Code Ann. §36-6-407(b) provides that courts may award decision making authority to only one parent if the court finds that:

- (1) A limitation on the other parent's decision-making authority is mandated by § 36-6-406<sup>20</sup>;
- (2) Both parents are opposed to mutual decision making; or
- (3) One (1) parent is opposed to mutual decision making, and such opposition is reasonable in light of the parties' inability to satisfy the criteria for mutual decision-making authority.

The court did not make any findings relative to the grant of decision making authority to Mother. While Mother proposed in her parenting plan that she have sole authority, she testified that she and Father communicate by email regarding the welfare of their child and that this manner of communication works. Father testified that in the past he and Mother had difficulty in effectively communicating regarding the medical care of the child, but that he

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<sup>19</sup>(...continued)

Q. Because you're [ ] parents?

A. Yes.

Q. Are you willing to - - are you going to be able to go forward and separate the fact that y'all were married and just concentrate on being parents and trying to do what's best for []?

A. Yes. That's what I've been trying to do for the past year and a half.

Q. Do you believe your wife has been doing the same thing?

A. No.

<sup>20</sup> Mother does not contend that any of the restrictions at Tenn. Code Ann. § 36-6-406 are applicable in this case.

was willing to co-parent with Mother. As with the parenting schedule, because the court did not make findings relative to the grant of decision-making authority, a determination of credibility, or otherwise explain its order in that regard, we are unable to perform our review.<sup>21</sup> Accordingly, we vacate this portion of the parenting plan and remand for the adoption of appropriate findings of fact in support of the allocation of authority.

### ***C. Child Support***

Father contends that the court failed to consider the financial gifts that Mother received from her parents in determining Mother's gross income for the purpose of setting child support; he also contends that the court's decision to set Mother's income at \$400.00 per month is not supported by the record and that the trial court should have imputed income to Mother.

The statutes and regulations on child support are intended to "assure that children receive support reasonably consistent with their parent or parents' financial resources." *State ex rel. Vaughn v. Kaatrude*, 21 S.W.3d 244, 248–249 (Tenn. Ct. App. 2000). Courts are therefore required to use child support guidelines developed by the Tennessee Department of Human Services "to promote both efficient child support proceedings and dependable, consistent child support awards." *Id.* at 249; *see also* Tenn. Code Ann. § 36-5-101(e); Tenn. Comp. R. & Regs. 1240-02-04-.01(3)(b), (c). The child support guidelines provide that gross income "shall include all income from any source", including "[g]ifts that consist of cash or other liquid instruments, or which can be converted to cash." Tenn. Comp. R. & Reg. 1240-02-04-.04(3)(a)(1)(xviii). Pursuant to Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)2(i)(I), a court may impute income "[i]f a parent has been determined by a tribunal to be willfully and/or voluntarily underemployed or unemployed." Courts should increase an underemployed parent's gross income to an amount that reflects the parent's income potential or earning capacity based upon his or her educational level and previous work experience. *See Dilley v. Dilley*, 2011 WL 2015395 (Tenn. Ct. App. May 23, 2011), at \*7–8; *see also* Tenn. Comp. R. & Regs. 1240-02-04-.02(3)(a)2(ii)(II).

As noted earlier, the child support worksheet stated, without explanation, that Mother had a monthly income of \$400.00. It is apparent that the court did not consider Mother's gifts in its determination of her monthly gross income as required by Tenn. Comp. R. & Reg. 1240-02-04-.04(3)(a)(1)(xviii). As evidenced by our earlier discussion of Mother's income, the financial gifts she received from her parents contribute to her monthly income of

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<sup>21</sup> In this regard, we note that neither party testified that he or she opposed decision making authority being mutual.

\$1,019.26. Consequently, we vacate the award of child support and remand the case for redetermination of the parties' respective child support obligations.<sup>22</sup>

### III. ATTORNEY FEES ON APPEAL

Mother requests an award of attorney fees incurred on appeal. Whether to award attorney's fees on appeal is within this Court's sole discretion. *Archer v. Archer*, 907 S.W.2d 412, 419 (Tenn. Ct. App. 1995). In considering a request for attorney's fees, we look at "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 factors that need be considered." *Hill v. Hill*, No. M2006-02753-COA-R3-CV, 2007 WL 4404097, at \*6 (Tenn. Ct. App. Dec. 17, 2007) (citing *Dulin v. Dulin*, No. W2001-02969-COA-R3-CV, 2003 WL 22071454, at \*10 (Tenn. Ct. App. Sept. 3, 2003)). Considering these factors, we decline to award Mother attorney fees on appeal.

### CONCLUSION

For the foregoing reasons, we affirm the award of rehabilitative alimony and alimony *in solido* and the designation of Mother as primary residential parent. We vacate the residential parenting schedule, the allocation of decision-making authority, and the determination of Mother's income and remand the case for a redetermination in accordance with this opinion.

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RICHARD H. DINKINS, JUDGE

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<sup>22</sup> In this regard, Father has raised as an issue whether the court erred in failing to find that Mother was intentionally underemployed; the court made no finding in this regard. As part of its redetermination, the court should address Father's contention.