

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
January 26, 2016 Session

**BILL FRANK BRAINERD v. ALISA RHEANNE BRAINERD**

**Appeal from the Circuit Court for Sumner County  
No. 2013CV715 Jane W. Wheatcraft, Judge**

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**No. M2015-00362-COA-R3-CV – Filed November 30, 2016**

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In this appeal arising from the parties' divorce, the husband challenges the trial court's valuation of his interest in a limited partnership, division of the marital estate, awards of transitional alimony and alimony in solido, child support order, and adoption of the wife's proposed permanent parenting plan. The husband also appeals the trial court's denial of his motion for a restraining order. We conclude that the evidence does not preponderate against the trial court's valuation of the husband's interest in the limited partnership. We also conclude that the trial court did not err in denying Husband's motion for a restraining order. However, because the trial court failed to provide sufficient findings of fact and conclusions of law, we are unable to effectively review the remainder of the issues raised by the husband on appeal. Therefore, we vacate the judgment of the trial court with regard to these remaining issues and remand for further proceedings in accordance with this opinion.

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

W. NEAL MCBRAYER, J., delivered the opinion of the court, in which D. MICHAEL SWINEY, C.J., and RICHARD H. DINKINS, J., joined.

Tarsila Crawford, Nashville, Tennessee, for the appellant, Bill Frank Brainerd.

Bruce N. Oldham, Gallatin, Tennessee, for the appellee, Alisa Rheanne Brainerd.

## OPINION

### I. FACTUAL AND PROCEDURAL BACKGROUND

On June 24, 2013, after fifteen years of marriage, Bill Frank Brainerd (“Husband”) filed for a divorce from his wife, Alisa Rheanne Brainerd (“Wife”), in the Circuit Court for Sumner County, Tennessee. Wife filed a counterclaim for a divorce. Both parties requested that the court equitably divide their marital property and debt. Wife also requested alimony. The marriage produced two children, aged fourteen and eleven. Husband agreed that Wife should be named primary residential parent for the children and only requested that the court establish reasonable visitation.

#### A. TESTIMONY AT THE HEARING

The court held an evidentiary hearing on May 29, 2014. At the outset, Husband stipulated that Wife was entitled to a divorce based on his adultery. Thus, the hearing focused on the valuation and division of marital property, the terms of the parenting plan, child support, and alimony.

At the time of the hearing, Husband was forty-five, and Wife was forty-nine. During their fifteen-year marriage, the parties had accumulated a modest amount of assets and minimal debt. They each had retirement accounts, cars and personal property. Husband also had a one-percent interest in a limited partnership, SabeRex Group, Ltd. In addition, the couple jointly owned a home and checking and savings accounts. The marital debt included a mortgage, a car note, and a small amount of credit card debt.

The parties could not agree on the value of Husband’s interest in SabeRex. Husband testified that he was prohibited by the terms of a confidentiality agreement from disclosing the value of the partnership but tried to assure the court that his interest had little value. Wife, on the other hand, testified that she overheard Husband admit that the partnership was worth between five and seven million dollars. Wife also conducted her own research into the SabeRex’s worth, which she claimed corroborated Husband’s admission. Based on her research and Husband’s income from the interest during the marriage, she valued the interest at \$54,000.

Another source of contention was Wife’s earning capacity. Both parties were college educated and worked full-time at the beginning of the marriage. After the birth of their first child, however, they agreed Wife would stay home and raise their children. Consequently, Wife was not employed outside the home between 2001 and 2007. From 2008 through the time of the hearing, Wife worked one day per week as an ultrasonographer at a nearby medical center.

Wife testified that she wanted to continue working part-time until their youngest

child graduated from high school. She conceded that no physical or mental disability prevented her from seeking full-time employment. After the divorce, she planned to increase her work hours while remaining a part-time employee. To avoid incurring child care expenses, she planned to work the additional hours during Husband's parenting time. While acknowledging Wife had been a stay-at-home mother for the previous eleven years, Husband claimed she was capable of working full-time after the divorce. According to Husband, Wife could return to full-time employment within six to eight months after the divorce.

Wife explained that, even though they were in school, the children still needed her care. The son had been diagnosed with "intermittent exotropia," which involved a disconnect between his visual reception and his brain reception. He completed nine months of vision therapy, and while he had recently been more successful in school, the condition had not been cured. The condition most notably affected his progress in math, necessitating a weekly tutor. Wife testified that the son also had difficulty completing homework, sometimes spending two to three hours on homework per night.

The parents disputed the amount of the expenses for the children's extracurricular activities and whether it would be appropriate to incorporate these amounts into Husband's child support payment. Since finishing therapy, the son had developed interests in hip hop dance and basketball. Wife testified that the son loved participating in these activities and consequently had developed increased self-confidence. The daughter was heavily involved in competitive cheerleading. In the past, she had been part of a traveling competition team. At the time of the hearing, the daughter had been accepted onto her high school cheerleading squad. Husband and Wife disagreed over whether being a member of the high school squad would prevent her from participating in the traveling squad.

Because of the substantial disparity between the two parties' incomes, Wife requested alimony. For the previous six or seven years, Husband had worked in sales. Husband's gross monthly income was \$10,342.15. By contrast, Wife's gross monthly income was \$1,603.75. Although Husband's monthly income would easily cover his estimated, post-divorce monthly expenses of \$2,700, Wife testified she needed an additional \$2,096.05 to make ends meet.

The parties' dispute with regard to the residential parenting schedule focused on two issues. First, Husband asked the court to award him one overnight stay with the children during the week. Wife objected, claiming Husband would not help the children with their homework. Second, Husband opposed a restriction in Wife's proposed parenting plan that would prevent female children from staying overnight at his home when he was exercising his parenting time. Wife asserted that the restriction was justified, although she did not believe Husband would behave inappropriately with their daughter. According to Wife, Husband had a history of sexual liaisons with women he

met through internet websites, and Husband had “used the children to make sexual connections.”

## B. CIRCUIT COURT RULING

On July 2, 2014, the court entered a final decree of divorce, which incorporated by reference a previously filed memorandum opinion. The court granted Wife a divorce on the ground of adultery. The court awarded each party their respective retirement accounts and any requested personal property. Husband also received his interest in SabeRex. The court ordered the parties to pay off their marital debt, other than the mortgage, from their joint savings account and to divide the remaining funds equally. With the joint checking account, the court awarded two-thirds to Wife and one-third to Husband.

The court named Wife the primary residential parent of the children, adopted Wife’s proposed permanent parenting plan, and awarded Husband visitation every other weekend and Tuesdays for three hours. The court set child support at \$2,476.25 per month, including an upward deviation for the expenses associated with the children’s extracurricular activities.

The court awarded the marital home to both parties with the proviso that Wife would remain in the home with the children until the youngest child graduated from high school. After the youngest child graduated, the house would be sold, and the proceeds divided equally between Husband and Wife. While Wife remained in the marital home, the court ordered Husband to make the monthly mortgage payment of \$1,035.82 as transitional alimony. The court awarded Wife an additional \$200.00 per month as alimony for two years. The court also ordered Husband to pay Wife’s attorney’s fees.

Both Husband and Wife filed motions to alter or amend. Wife also filed a motion for civil contempt based on Husband’s failure to pay child support as ordered. In response, Husband filed a motion to reduce child support and to restrain Wife from making derogatory remarks about him to the children and on social media.

After a hearing on the pending motions, the court entered a supplemental memorandum on January 23, 2015, intended to “correct[] deficiencies in the original Order.” In the supplemental memorandum, among other things, the court valued the marital home and Husband’s interest in SabeRex and awarded the home to Wife in fee simple along with the responsibility for paying the mortgage. As a consequence of the change in the division of the marital estate, the court reconsidered the previous transitional alimony award and ordered Husband to pay Wife \$1,500 per month in transitional alimony until the youngest child graduated from high school. The court denied Wife’s motion for contempt and Husband’s motion for a restraining order and to reduce child support. The court’s supplemental ruling was incorporated in an Amended Final Decree of Divorce, entered on March 23, 2015.

## II. ANALYSIS

Husband raises numerous issues on appeal. First, he challenges the court's valuation of his interest in the limited partnership, the division of the marital estate, and the award of transitional alimony and attorney's fees to Wife. Second, Husband raises several issues with the award of child support, including the calculation of Wife's monthly gross income, the upward deviation for special expenses, and the allowance of various credits on the child support worksheet. Third, he contends the court erred in adopting Wife's proposed permanent parenting plan. Finally, Husband asserts the trial court erred in denying his motion for a restraining order. Wife requests this Court award her attorney's fees incurred on appeal.

### A. STANDARD OF REVIEW

In a non-jury case, our review of the trial court's factual findings is *de novo* upon the record, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. *See* Tenn. R. App. P. 13(d). Our review of questions of law is *de novo*, with no presumption of correctness. *Armbrister v. Armbrister*, 414 S.W.3d 685, 692 (Tenn. 2013).

Most of the issues raised by Husband implicate matters within the trial court's discretion. *See Armbrister*, 414 S.W.3d at 693 (details of permanent parenting plans); *Gonsewski v. Gonsewski*, 350 S.W.3d 99, 105 (Tenn. 2011) (nature, amount, and duration of alimony awards); *Keyt v. Keyt*, 244 S.W.3d 321, 327 (Tenn. 2007) (division of marital property); *Richardson v. Spanos*, 189 S.W.3d 720, 725 (Tenn. Ct. App. 2005) (child support decisions). Our review of discretionary decisions is limited. *Beard v. Bd. of Prof'l Responsibility*, 288 S.W.3d 838, 860 (Tenn. 2009). We do not "second-guess the court below" or "substitute [our] discretion for the lower court's." *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010). Nonetheless, a lower court's discretionary decisions do not escape appellate scrutiny. *Id.* In reviewing discretionary decisions, we consider "(1) whether the factual basis for the decision is properly supported by evidence in the record, (2) whether the lower court properly identified and applied the most appropriate legal principles applicable to the decision, and (3) whether the lower court's decision was within the range of acceptable alternative dispositions." *Id.*

### B. DIVISION OF THE MARITAL ESTATE

#### 1. Valuation of Husband's Partnership Interest

Before we address Husband's challenge to the trial court's division of the marital estate, we must consider his subsidiary argument that the court incorrectly valued his interest in SabeRex. "Dividing a marital estate necessarily begins with the systematic identification of all of the parties' property interests." *Owens v. Owens*, 241 S.W.3d 478,

485 (Tenn. Ct. App. 2007). Next, the court is to “classify each of these property interests as either separate or marital property” and “place a reasonable value on each piece of property subject to division.” *Id.* at 485-86. “Once the parties’ marital property has been classified and valued, the trial court’s goal is to divide the marital property in an essentially equitable manner.” *Id.* at 489-90. Neither party disputes the classification of their property interests or the valuation of any property other than the SabeRex interest.

Because the “value of marital property is a fact question,” we will presume the trial court’s valuation is correct unless the evidence preponderates otherwise. *Wallace v. Wallace*, 733 S.W.2d 102, 107 (Tenn. Ct. App. 1987). Here, the trial court’s valuation is supported by the preponderance of the evidence. The trial court valued Husband’s interest at \$54,000 based on Wife’s testimony. Husband had the opportunity to submit valuation evidence but failed to do so. “The burden is on the parties to produce competent evidence of value, and the parties are bound by the evidence they present.” *Id.* The trial court properly based its valuation on the only value evidence in the record.

## 2. Division of Marital Property

We next turn to Husband’s claim that the court’s division of the marital estate was inequitable because the court awarded the majority of the marital property to Wife. “A division of marital property is not rendered inequitable simply because it is not precisely equal.” *Owens*, 241 S.W.3d at 489. The trial court’s decision, however, must be guided by consideration of the relevant statutory factors, including:

- (1) The duration of the marriage;
- (2) The age, physical and mental health, vocational skills, employability, earning capacity, estate, financial liabilities and financial needs of each of the parties;
- (3) The tangible or intangible contribution by one (1) party to the education, training or increased earning power of the other party;
- (4) The relative ability of each party for future acquisitions of capital assets and income;
- (5)(A) The contribution of each party to the acquisition, preservation, appreciation, depreciation or dissipation of the marital or separate property, including the contribution of a party to the marriage as homemaker, wage earner or parent, with the contribution of a party as homemaker or wage earner to be given the same weight if each party has fulfilled its role;
- (B) For purposes of this subdivision (c)(5), dissipation of assets means wasteful expenditures which reduce the marital property available for equitable distributions and which are made for a purpose contrary to the marriage either before or after a complaint for divorce or legal separation has been filed.
- (6) The value of the separate property of each party;

- (7) The estate of each party at the time of the marriage;
- (8) The economic circumstances of each party at the time the division of property is to become effective;
- (9) The tax consequences to each party, costs associated with the reasonably foreseeable sale of the asset, and other reasonably foreseeable expenses associated with the asset;
- (10) The amount of social security benefits available to each spouse; and
- (11) Such other factors as are necessary to consider the equities between the parties.

Tenn. Code Ann. § 36-4-121(c) (Supp. 2012).<sup>1</sup>

Despite the statutory factors, the division of marital property “is not a mechanical process.” *Flannary v. Flannary*, 121 S.W.3d 647, 650 (Tenn. 2003). In light of the particular facts of the case, some statutory factors may be more relevant than others. *Tate v. Tate*, 138 S.W.3d 872-75 (Tenn. Ct. App. 2003). Because the court failed to provide any information from which we can discern the basis for its decision to divide the marital property in the manner it did, we are unable to determine whether the court applied the correct legal standard or “whether the manner in which the trial court weighed the factors in Tenn. Code Ann. § 36-4-121(c) is consistent with logic and reason.” *Owens*, 241 S.W.3d at 490.

We have repeatedly emphasized the importance of providing findings of fact and conclusions of law in accordance with Rule 52.01 of the Tennessee Rules of Civil Procedure. *See, e.g., Burnett v. Burnett*, No. M2014-00833-COA-R3-CV, 2015 WL 5157489, at \*4-5 (Tenn. Ct. App. Aug. 31, 2015). The requirement of detailed findings of fact and conclusions of law is “not a mere technicality.” *In re K.H.*, No. W2008-01144-COA-R3-PT, 2009 WL 1362314, at \*8 (Tenn. Ct. App. May 15, 2009) (discussing a similar requirement found in Tenn. Code Ann. § 36-1-113(k)). Absent these findings, we are “left to wonder on what basis the court reached its ultimate decision.” *Id.* “Simply stating the trial court’s decision, without more, does not fulfill this mandate.” *Barnes v. Barnes*, No. M2011-01824-COA-R3-CV, 2012 WL 5266382, at \*8 (Tenn. Ct. App. Oct. 24, 2012).

When confronted with insufficient findings of fact, an appellate court is not without alternatives. One alternative is to vacate the decision and remand so that the trial court can make specific findings of fact and conclusions of law. *Lovlace v. Copley*, 418 S.W.3d 1, 36 (Tenn. 2013). Another alternative is to conduct a de novo review of the

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<sup>1</sup> Although Tennessee Code Annotated § 36-4-121 has twice been amended since the hearing in this case, neither amendment affected the statutory factors that a court must consider when dividing a marital estate. 2014 Tenn. Pub. Acts 791 (ch. 786); 2015-1 Tenn. Code Ann. Adv. Legis. Serv. 252 (ch. 202) (LexisNexis).

record to determine where the preponderance of the evidence lies. *Id.* The appropriate alternative depends on the particular circumstances of the case, including the adequacy of the record, the fact-intensive nature of the case, and whether witness credibility determinations must be made. *See id.* (declining to conduct a de novo review because credibility determinations were necessary to resolve factual disputes); *Town of Middleton v. City of Bolivar*, No. W2011-01592-COA-R3-CV, 2012 WL 2865960, \*26 (Tenn. Ct. App. July 13, 2012) (stating that independent review is appropriate when the case involves a legal issue or the court’s decision is “readily ascertainable”).

The equitable division of marital property is a fact-intensive inquiry involving the careful weighing of the relevant statutory factors. Moreover, the reason behind the court’s division of this estate is not readily ascertainable from the record. Under these circumstances, we vacate the court’s division and remand for entry of an order in compliance with Rule 52.01. *See Kirby v. Kirby*, No. M2015-01408-COA-R3-CV, 2016 WL 4045035, at \*5-6 (Tenn. Ct. App. July 25, 2016) (vacating and remanding case when lower court “did not specify which of the factual findings it applied in making its determination regarding marital property distribution”); *Turman v. Turman*, No. W2014-01297-COA-R3-CV, 2015 WL 1744278, at \*4-7 (Tenn. Ct. App. Apr. 14, 2015) (vacating and remanding case when court could not discern whether lower court applied appropriate legal standard).

## C. ALIMONY

### 1. Transitional Alimony

We next address Husband’s argument that the court erred in awarding Wife transitional alimony of \$1,500 per month for seven years. Husband claims Wife did not need this award because she received adequate resources from the division of the estate and was capable of supporting her household by working full-time. Wife, on the other hand, maintains that it is in the children’s best interest for her to continue working on a part-time basis, and thus, she needs the level of support awarded until the children both reach the age of eighteen.

Transitional alimony is appropriate if the court finds one spouse is economically disadvantaged and needs financial assistance in adjusting to the economic consequences of divorce, but rehabilitation is not necessary. Tenn. Code Ann. § 36-5-121(d)(2), (d)(4) (2014). This type of alimony is “designed to aid a spouse who already possesses the capacity for self-sufficiency” but needs temporary financial assistance to adjust to the economic reality of one income. *Gonsewski*, 350 S.W.3d at 109.

Alimony decisions are factually driven and “involve the careful balancing of many factors.” *Id.* at 105. The General Assembly has directed courts to consider the factors in Tennessee Code Annotated § 36-5-121(i) when making these awards. The factors

include:

- (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.

Tenn. Code Ann. § 36-5-121(i). The two most important factors are “the disadvantaged spouse’s need and the obligor spouse’s ability to pay.” *Gonsewski*, 350 S.W.3d at 110.

Our ability to review the court’s award is hampered again by the lack of findings of fact. The court found that Wife is economically disadvantaged and not in need of rehabilitation. Beyond those minimum findings, however, there is no indication that the court considered the statutory factors. Simply stating that \$1,500 in transitional alimony is necessary for Wife to “provide a home for herself and the children” and that Husband has the ability to pay is insufficient under these circumstances. We are left to wonder whether the court applied the appropriate legal standard in reaching its ultimate conclusion.

The factual basis and the trial court's reasoning on the alimony award, much like that on the division of the marital estate, is not readily ascertainable. *See Horine v. Horine*, No. E2013-02415-COA-R3-CV, 2014 WL 6612557, at \*8 (Tenn. Ct. App. Nov. 24, 2014) (vacating alimony award for lack of sufficient findings to justify the award). Furthermore, the trial court's division of the marital estate on remand may impact the decision on alimony. *See* Tenn. Code Ann. § 36-5-121(i)(8); *Kirby*, 2016 WL 4045035, at \*9; (affirming that a trial court may award alimony only after the court has equitably divided the parties' marital property). Therefore, we vacate the award of transitional alimony and remand for reconsideration of the type, duration and amount of alimony, if any, to be awarded and for the entry of sufficient findings of fact and conclusions of law. *See Donaldson v. Donaldson*, No. M2015-01035-COA-R3-CV, 2016 WL 3662305, at \*4 (Tenn. Ct. App. June 30, 2016) (vacating and remanding alimony award when lower court made insufficient findings with regard to need).

## 2. Alimony in Solido

For similar reasons, we must vacate and remand the court's award of attorney's fees to Wife. Generally, attorney's fee awards are considered alimony in solido. *Gonsewski*, 350 S.W.3d at 113. As with all alimony awards, the court must consider the appropriate statutory factors in Tennessee Code Annotated § 36-5-121(i). *Id.* Again, we find no indication that the court considered the statutory factors when making this decision, and the award of fees as alimony may be impacted by the division of marital property following remand. *See Kirby*, 2016 WL 4045035, at \*9.

## D. CHILD SUPPORT

### 1. Voluntary Underemployment

Now, we turn our attention to Husband's appeal of the trial court's award of child support. The first step in determining child support is setting the parties' gross income. Tenn. Comp. R. & Regs. 1240-02-04.04(3); *see also Milam v. Milam*, No. M2011-00715-COA-R3-CV, 2012 WL 1799029, at \*3 (Tenn. Ct. App. May 17, 2012) ("The integrity of a child support award is dependent upon the trial court's accurate determination of both parents' gross income."). Here, the court set each parent's gross monthly income based on their actual income. Husband claims the trial court erred in refusing to impute additional gross income to Wife because she is willfully underemployed.

Under the Tennessee Child Support Guidelines, the court may impute additional income to a parent if the court determines that parent is willfully underemployed. Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)(2)(i). They state the following:

The Guidelines do not presume that any parent is willfully and/or voluntarily under or unemployed. The purpose of the determination is to

ascertain the reasons for the parent's occupational choices, and to assess the reasonableness of these choices in light of the parent's obligation to support his or her child(ren) and to determine whether such choices benefit the children.

*Id.* 1240-02-04-.04(3)(a)(2)(ii).

Willful underemployment is a question of fact that requires careful consideration of all the relevant circumstances. *Reed v. Steadham*, No. E2009-00018-COA-R3-CV, 2009 WL 3295123, at \*2 (Tenn. Ct. App. Oct. 14, 2009). In making this determination, the court may consider: (1) the parent's employment history, education, training and ability to work; (2) any evidence of an inappropriately extravagant lifestyle; (3) whether the parent has the responsibility of caring for a handicapped or seriously ill child or other relative; (4) whether the parent is pursuing additional training or education which hampers the parent's ability to work full-time; and (5) any additional relevant factors. Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)(2)(iii). When the issue is whether a stay-at-home parent should be considered willfully underemployed, the court must consider: (1) whether the parent was a full-time caretaker during the marriage; (2) the length of time the parent has fulfilled this role; and (3) the age of the minor children. *Id.*

In this case, the court made no factual findings with regard to whether Wife is willfully underemployed. In the absence of any factual findings, we are unable to determine whether the trial court properly assessed the reasonableness of Wife's decision to continue part-time employment after the divorce in light of her obligation to support her children. The parties provided conflicting evidence on this issue, and as an appellate court, we are not in the position to resolve this factual dispute. *See Lovlace*, 418 S.W.3d at 36 (declining to conduct a de novo review because credibility determinations were necessary to resolve factual disputes). Therefore, we vacate the court's child support order and remand for reconsideration of Wife's monthly gross income in light of Husband's willful underemployment claim. *See Rogin v. Rogin*, No. W2012-01983-COA-R3-CV, 2013 WL 3486955, at \*8 (Tenn. Ct. App. July 10, 2013) (vacating and remanding when court failed to explain the basis for its calculation of income for child support purposes).

## 2. Remaining Child Support Issues

Husband also challenges the court's upward deviation for the expenses associated with the children's extracurricular activities and the credits awarded to Wife for work-related child care and recurring uninsured medical expenses. Because we have vacated the court's determination of Wife's monthly gross income, which is the first step in determining child support, the court on remand should reconsider these remaining child support issues as well.

## E. PERMANENT PARENTING PLAN

We next consider Husband's challenge to the court's adoption of Wife's proposed permanent parenting plan. Husband complains that the court did not award him overnight residential time during the week and that the court included a restriction that prohibited female children from remaining overnight in his home during his parenting time. At the hearing, Wife testified that Husband was not entitled to overnight time during the week because he had never helped the children with their homework during the marriage. She also claimed that the disputed restriction in her proposed plan was necessitated by Husband's sexual history.

While a trial court has broad discretion in fashioning the details of a parenting plan, the touchstone is the best interest of the child. Tenn. Code Ann. § 36-6-404(b) (2010);<sup>2</sup> *see also Maupin v. Maupin*, 420 S.W.3d 761, 770 (Tenn. Ct. App. 2013). In the absence of a finding that the limitations in Tennessee Code Annotated § 36-6-406<sup>3</sup> apply, a trial court's goal is to craft a permanent parenting plan that promotes the children's best interest, which requires consideration of the statutory best interest factors. Tenn. Code Ann. § 36-6-404(b).

Here, the court adopted Wife's proposed permanent parenting plan without finding that the plan was in the children's best interest. The court's rulings do not refer to the statutory best interest factors at all. Mother suggests that the parenting plan was appropriate due to Husband's past behavior, but parenting plans should never be used as a punishment or a reward to parents for their past behavior. *Earls v. Earls*, 42 S.W.3d 877, 885 (Tenn. Ct. App. 2000); *Turner v. Turner*, 919 S.W.2d 340, 346 (Tenn. Ct. App. 1995); *Long v. Long*, 488 S.W.2d 729, 733 (Tenn. Ct. App. 1972).

In this instance, we conclude that an independent review of the record and determination of whether the adoption of this parenting arrangement serves the children's best interest is inappropriate. Trial judges "are better positioned to evaluate the facts" in cases involving parenting arrangements, which "are factually driven and require careful

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<sup>2</sup> In 2014, the General Assembly amended Tennessee Code Annotated § 36-6-404(b) by replacing its list of factors with the best interest factors found in Tennessee Code Annotated § 36-6-106(a). 2014 Tenn. Pub. Acts 349 (ch. 617). Even prior to the amendment, the analysis under the two statutes was "quite similar." *See Armbrister*, 414 S.W.3d at 697. The pre-2014 version of Tennessee Code Annotated § 36-6-404 is applicable to this matter.

<sup>3</sup> Tennessee Code Annotated § 36-6-406 specifies that a court may order restrictions on a parent's residential time if the court determines that the parent has engaged in certain types of conduct, which are not applicable to this case. Tenn. Code Ann. § 36-6-406 (2014).

consideration of numerous factors.” *Armbrister*, 414 S.W.3d at 693. Resolving these issues is a task for the trial court. *See In re Noah J.*, No. W2014-01778-COA-R3-JV, 2015 WL 1332665, at \*5-6 (Tenn. Ct. App. Mar. 23, 2015) (vacating and remanding lower court’s decision to limit Father to supervised visitation when “[t]he order did not reference any factors that guided the court’s decision, and the court did not make any written findings.”)

Therefore, we vacate the court’s decision adopting Wife’s proposed parenting plan and remand for entry of an order that “specifically address[es] the best interest of the child[ren] and articulate[s] the factors relied on by the trial court in reaching its decision.” *Iman v. Iman*, No. M2012-02388-COA-R3-CV, 2013 WL 7343928, at \*13 (Tenn. Ct. App. Nov. 19, 2013). Although the court need not list every applicable statutory factor and an accompanying conclusion, the trial court is required to “consider all the applicable factors.” *See Pandey v. Shrivastava*, No. W2012-00059-COA-R3-CV, 2013 WL 657799, at \*4 (Tenn. Ct. App. Feb. 22, 2013).

#### F. RESTRAINING ORDER

Husband’s final argument concerns the trial court’s denial of his motion for an order restraining Wife from making derogatory comments about him. Because the permanent parenting plan adopted by the court already included this restraint, we conclude that the court did not err in denying Husband’s motion. *See* Tenn. Code Ann. § 36-6-101(a)(3)(A)(vi) (2010)<sup>4</sup> (Each parent is granted in all custody orders the “right to be free of unwarranted derogatory remarks made about such parent or such parent’s family by the other parent to or in the presence of the child.” ).

#### G. ATTORNEY’S FEES ON APPEAL

Wife requests an award of her attorney’s fees incurred on appeal. “An award of appellate attorney’s fees is a matter within this Court’s sound discretion.” *Chaffin v. Ellis*, 211 S.W.3d 264, 294 (Tenn. Ct. App. 2006). When considering requests for attorney’s fees, we consider “the requesting party’s ability to pay such fees, the party’s success on appeal, whether the party sought the appeal in good faith, and any other equitable factors relevant in a given case.” *Beyer v. Beyer*, 428 S.W.3d 59, 84 (Tenn. Ct. App. 2013); *see also Luplow v. Luplow*, 450 S.W.3d 105, 119-20 (Tenn. Ct. App. 2014). Taking these factors into account, we decline to award Wife her attorney’s fees on appeal.

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<sup>4</sup> Subsequent amendments to Tennessee Code Annotated § 36-6-101 did not change the right of each parent to be free from unwarranted derogatory remarks. *See* 2014 Tenn. Pub. Acts 349 (ch. 617); 2015-1 Tenn. Code Ann. Adv. Legis. Servs. 297 (ch. 238) (LexisNexis).

### III. CONCLUSION

Because the trial court failed to provide sufficient findings of fact and conclusions of law to explain the division of the marital estate, the awards of transitional alimony and alimony in solido, the determination of Wife's monthly gross income, and the adoption of the permanent parenting plan, we vacate those portions of the court's decision and remand for entry of an order in compliance with Rule 52.01 of the Tennessee Rules of Civil Procedure. On remand, the court should equitably divide the marital property, as previously valued by the court, in light of the appropriate statutory factors. Only after equitably dividing the marital estate should the court consider the type, amount and duration of any alimony award. The court must also consider the reasonableness of Wife's choice to work part-time as set forth in the Child Support Guidelines and establish child support accordingly. The current permanent parenting plan will remain in effect pending the entry of an order adopting a permanent parenting plan that is in the best interest of the children.<sup>5</sup> In all other respects, the decision of the trial court is affirmed.

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W. NEAL MCBRAYER, JUDGE

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<sup>5</sup> We recognize that the judge that heard this matter, the Honorable Jane Wheatcraft, is a retired judge and may no longer be available to make the requisite findings and enter judgment accordingly. In such an event, a new evidentiary hearing may be necessary. *See Brubaker v. Beckham*, No. M2014-01751-COA-R3-CV, 2016 WL 3178054, at \*5 (Tenn. Ct. App. May 26, 2016).