

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 22, 2015 Session

DAVID SOLIMA v. STEPHANIE SOLIMA

**Appeal from the Circuit Court for Williamson County
No. 04229 Robbie T. Beal, Judge**

No. M2014-01452-COA-R3-CV – Filed July 30, 2015

Mother, the primary residential parent, filed a petition seeking permission to relocate to Texas with the parties' minor son. Father opposed Mother's petition and filed a separate petition to be designated the primary residential parent. One week before trial, Mother notified the court that her petition to relocate was moot because she no longer needed to relocate; the trial proceeded on Father's petition. Following trial, the court did not name Father the primary residential parent but increased Father's residential parenting time. The trial court also modified child support by imputing additional income to Father upon a finding his current income was "significantly less than . . . his ability to earn," and decreasing Mother's because she recently lost her job and was unemployed as of the trial. Father appealed, contending that the trial court erred by failing to designate him as the primary residential parent. He also contends the court erred in modifying child support based on imputed income above his salary, and a finding that Mother's ability to earn had diminished. Mother did not allege that Father was voluntarily or willfully underemployed; therefore, Father was not put on notice the issue would be tried. Furthermore, because the issue was not tried by consent, the court erred in imputing income to Father. Accordingly, we reverse the imputation of additional income to Father and remand the issue of child support. We affirm the trial court in all other respects.

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

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.

Connie Reguli and Julia Shaver, Brentwood, Tennessee, for the appellant, David Solima.

Lawrence J. Kamm, Nashville, Tennessee, for the appellee, Stephanie Solima.

OPINION

Stephanie Solima (“Mother”) and David Solima (“Father”) were divorced in July 2006, and Mother was designated the primary residential parent for the parties’ only child, a son born in November 2001. The final divorce decree contained a provision prohibiting Mother from consuming alcoholic beverages when the parties’ son was in her custody. This provision was modified on April 8, 2013, to prohibit both parents from drinking alcohol in excess in the presence of their child. At all relevant times, the parties were operating under a parenting plan adopted on April 8, 2013.¹

On July 9, 2013, Mother lost her job in Tennessee, and, on August 20, 2013, she found a job and committed to relocating to Dallas, Texas. On October 16, 2013, Mother filed a petition seeking permission to relocate and the entry of restraining orders against Father (“Petition to Relocate”).

Father filed a timely response opposing Mother’s petition to relocate; Father also filed a separate petition to modify the parenting plan seeking, in part, to be designated as the primary residential parent (“Petition to Modify”). Mother filed a response opposing Father’s Petition to Modify. Neither the Petition to Modify nor Mother’s response included any allegations that Father was underemployed.

By agreed order, Mother’s Petition to Relocate and Father’s Petition to Modify were set for trial on April 10, 2014. One week before trial, Mother notified Father that she no longer needed to relocate because her out-of-state employment had been terminated. Two days later, Mother filed a motion for a continuance concerning Father’s Petition to Modify. The trial court denied the motion for a continuance, and the trial proceeded as scheduled on Father’s Petition to Modify.

Father’s Petition to Modify was tried on April 10 and 11, 2014. The parties’ son, who was 12 years old at the time, testified in chambers, and Mother and Father testified in open court. Mother and Father offered conflicting testimony about Mother’s alcohol consumption and the severity of the child’s reaction to the possibility of relocation. Father testified that Mother drank enough to scare the parties’ son and that the idea of moving to Texas had made the child physically sick. Father also introduced into evidence Mother’s credit card bills, which indicated that she purchased alcohol each month. Mother testified that she had a glass of wine most evenings and that she used much of the

¹Father appealed the April 8, 2013 modification of the parenting plan; this court affirmed the modification. *See Solima v. Solima*, No. M2013-01074-COA-R3-CV, 2015 WL 1186251 (Tenn. Ct. App. Mar. 11, 2015), *no perm. app. filed*.

alcohol she purchased as gifts or for cooking. Mother admitted that she had called Father derogatory names but denied that she had done so in the child's presence.

The child confirmed parts of both parents' testimony. He testified that he had heard Mother call Father derogatory names and that Mother's drinking had scared him "a few times." However, he also testified that Mother "makes sure she doesn't drink too much" when she is going to drive. Additionally, the parties' son testified that he felt "sad" and "scared" about moving to Texas but did not indicate that he had suffered from any of the physical reactions Father had testified about. The court found that the parties' son was a "very credible witness" and stated that "the Court puts weight on his testimony." Although the child expressed a preference regarding the designation of the primary residential parent, the trial court did not rely on his stated preference because it was apparent to the court that the child was trying to please both parents with his testimony.

Both parties also testified about their income and employment. When Mother's attorney asked questions indicating Father was voluntarily underemployed, Father's counsel objected on the ground the issue had not been raised in the pleadings. The trial court overruled the objection and instructed Father to answer the questions. Father testified that he was forced to retire from a position at General Motors with a salary of \$86,000 per year and had been working for the Williamson County Schools system for several years. His current annual income, including retirement benefits, was approximately \$32,000. He also testified that he was 60 years old and that he had made many attempts to find a better-paying position but had been unsuccessful.

Mother testified that she had been unemployed since March 14, 2014, around four weeks before trial, and currently had no income. Based on her W-2 forms, Mother's gross income for 2013 was around \$70,000. Mother's pay stubs from 2014 indicated that she had been paid \$6,666 per month in gross income for three months.

The trial court made an oral ruling at the end of trial and issued a written order in June 2014. The trial court found that a material change in circumstance had occurred because the child was now 12 years old, "the child had given clear opinions . . . which alone would cause the Court to believe there has been a change of circumstances," and "violations of the parenting plan warranted a reconsideration of that plan."

The trial court then conducted a best interest analysis based upon the relevant factors in Tenn. Code Ann. § 36-6-106. The court expressed concern regarding Mother's use of alcohol; however, it did not find "that her alcohol use is such that the Court is fearful for the safety of the child," and it found that the preponderance of the evidence did not show that "Mother has abused alcohol to excess in violation of the Court's order" Further, the trial court was concerned about Mother's behavior, finding that she had undermined Father's parenting time and made derogatory statements about

Father in the child's presence. The court described her behavior as "contemptuous," but it did not find that her behavior was "to the point where the Mother is alienating the affections of the minor child from the Father." The trial court also found that "both parents have said and done things that are inappropriate and demonstrates [sic] to the Court that they have no regard for each other" and that "[t]he Court does not believe that either parent would foster a very good relationship with the other, and both parents believe that they would be better off if the other parent were dead."

After expressing these concerns, the trial court found that the child had "come to rely upon the continuity of the schedules of the parenting plans," and that it was not in the best interest of the child to change the primary residential parent or to "overhaul" the parenting plan. Thus, the court ruled that Mother would remain the primary residential parent and that it would only make "some slight modifications" to the parenting plan.

Although such relief was not requested in the Petition to Modify or Mother's response, the trial court also adjusted the parties' incomes for purposes of child support. Regarding this issue, the trial court's order states:

6. For purposes of child support, the Court finds that the father built a career at General Motors, retired and would prefer to work in our school system. The Court applauds that decision although his income is significantly less than what his ability to earn is.

a. Father's counsel, Attorney Reguli, did state that a finding of underemployment is generally incumbent on a petitioning party to assert in their pleadings that a parent is underemployed. The Court agrees with this, but the Court is modifying its parenting plan orders and therefore, the Court finds that it is under the obligation to reconsider the child support issue. The Court is therefore increasing the Father's gross monthly income to \$4,000 (four thousand dollars) per month based on his ability to earn. The Court is also decreasing the Mother's gross monthly income to \$5,000 (five thousand dollars) per month based on her ability to earn.

The trial court's order does not contain any findings regarding Mother's income; however, the court stated in its oral ruling that it reduced Mother's monthly income because Mother had recently lost her job and no longer had the ability to earn her prior salary. Father and Mother appealed.

ANALYSIS

On appeal, Father contends the trial court erred by failing to designate him as the primary residential parent and by modifying each party's gross income for purposes of child support. Mother contends she should have been awarded attorney's fees she incurred in the trial court; she also seeks to recover the attorney's fees incurred on appeal. We will address these issues in turn.

I. PRIMARY RESIDENTIAL PARENT

In an action to change the primary residential parent, the party seeking the change must prove that a material change in circumstances has occurred and that it is in the best interests of the child to modify the current custody arrangement. Tenn. Code Ann. § 36-6-101(a)(1)(B) (2013); *Boyer v. Heimermann*, 238 S.W.3d 249, 259-60 (Tenn. Ct. App. 2007). Neither party contests the trial court's determination that a material change in circumstances was proven. Father, however, contends that the trial court's best interest analysis was flawed and that the relevant best interest factors favor designating him as the primary residential parent. Mother contends the trial court identified and applied the relevant best interest factors, made findings of fact and conclusions of law as mandated by Tenn. R. Civ. P. 52.01, and that the evidence does not preponderate against the trial court's ruling that she should continue as the primary residential parent.

In the context of a petition to change the primary residential parent, the General Assembly has set forth a non-exclusive list of fifteen factors to be considered, to the extent relevant, in Tenn. Code Ann. § 36-6-106(a) (2013). Determining a child's best interest is a fact-sensitive inquiry, and, depending upon the significance of certain facts, a single factor can control the outcome of this determination. As we have explained:

Ascertaining a child's best interests does not call for a rote examination of each of [the relevant] factors and then a determination of whether the sum of the factors tips in favor of or against the parent. The relevancy and weight to be given each factor depends on the unique facts of each case. Thus, depending upon the circumstances of a particular child and a particular parent, the consideration of one factor may very well dictate the outcome of the analysis.

In re Marr, 194 S.W.3d 490, 499 (Tenn. Ct. App. 2005).

The determination of where the best interests of the child lie is a factual question. *In re T.C.D.*, 261 S.W.3d 734, 742 (Tenn. Ct. App. 2007). On appeal, we presume that the trial court's findings on this matter are correct unless the evidence preponderates against them. *Armbrister v. Armbrister*, 414 S.W.3d 685, 693 (Tenn. 2013); *see* Tenn. R. App. P. 13(d). In order for evidence to preponderate against a finding of the trial court, it

must support another finding of fact with greater convincing effect. *Watson v. Watson*, 196 S.W.3d 695, 701 (Tenn. Ct. App. 2005) (citing *Walker v. Sidney Gilreath & Assocs.*, 40 S.W.3d 66, 71 (Tenn. Ct. App. 2000)).

Father contends the trial court erroneously emphasized the importance of continuity without properly considering the adverse effects of Mother's alcohol use and her attempt to relocate to Texas, which demonstrate that she is not providing a stable environment for the child. He also contends that Mother's use of derogatory names for him justifies a change in the primary residential parent because it demonstrates that she is unwilling to foster the relationship between Father and the parties' son.

A. CONTINUITY AND STABILITY

One factor the courts are to consider when making custody determinations is “[t]he importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment.” See Tenn. Code Ann. § 36-6-106(a)(3) (2013).² Although it does not trump the other best interest factors, continuity is a significant factor in child custody cases because stability is important to any child's well-being. *Gaskill v. Gaskill*, 936 S.W.2d 626, 630 (Tenn. Ct. App. 1996); see *In re Sidney J.*, 313 S.W.3d 772, 777 (Tenn. 2010) (“Continuity and the length of time the child has lived in a stable, satisfactory environment are important factors in determining the best interests of a child.”) (internal quotation marks omitted); *Wall v. Wall*, No. W2010-01069-COA-R3-CV, 2011 WL 2732269, at *30 (Tenn. Ct. App. July 14, 2011) (noting that continuity in a child's life and the degree to which one parent has been the primary caregiver are “powerful considerations”).

“The purpose of the emphasis on continuity and the primary caregiver is to provide children without an intact family with as much stability and security as possible.” *Maxwell v. Woodard*, No. M2011-02482-COA-R3-CV, 2013 WL 2420500, at *20 (Tenn. Ct. App. May 31, 2013). Accordingly, when the evidence shows that continuity does not provide a child with stability, the justification for maintaining the current custody arrangement diminishes, and the evidence may support a finding that it is in the child's best interest to change custody. See *id.*; *Wall*, 2011 WL 2732269, at *30.

Here, the trial court was concerned about Mother's use of alcohol and the impact of relocation on the child. The court found that, although Mother consumed alcohol, she had not done so in excess or put the child's safety at risk; thus, she had not violated the alcohol consumption provision in the parenting plan. While the child testified that Mother's drinking scared him, he also testified that Mother took care not to drink too

²In 2014, the General Assembly amended this section of the Tennessee Code and moved this factor to Tenn. Code Ann. § 36-6-106(a)(10) (2015). See 2014 Tenn. Pub. Acts 617, § 4.

much when she knew she was going to drive. Additionally, the record does not contain any indication that Mother has ever been arrested or cited for any alcohol-related incidents. Mother's credit card records demonstrate that she purchased alcohol but not that she consumed all of it herself, and based on the trial court's resolution of this issue, it found Mother's testimony about this subject to be credible. *See Interstate Mech. Contractors, Inc. v. McIntosh*, 229 S.W.3d 674, 678 (Tenn. 2007) ("The trial court's findings on credibility and weight of the evidence may be inferred from the manner in which the court resolves the conflicts in the testimony and decides the case."). Thus, the evidence does not preponderate against the trial court's findings regarding Mother's alcohol consumption.

Similarly, the evidence does not preponderate against the trial court's findings concerning the proposed relocation to Texas. Mother and Father offered conflicting accounts of their son's reaction to the proposed relocation. The child's testimony indicated that he felt "sad" and "scared" about possibly relocating but not that he suffered from severe ill-effects as Father claimed. The trial court expressly found that the child was a credible witness, and based on the trial court's resolution of the conflicts in the testimony and decision in this case, it is implicit that the trial court found Mother to be more credible than Father on this issue. *See id.* The trial court did find that "*if* the Mother *were* to move from the state . . . it *would be* devastating on [sic] the child and have a significant impact on the child's well-being," (emphasis added); however, the relocation did not occur. The evidence does not preponderate in support of a finding that the prospect of relocating to Texas inflicted physical or psychological damage on the child. Consequently, the evidence supports the trial court's findings regarding the proposed relocation.

The trial court was concerned about Mother's use of alcohol and the impact that relocation would have had on the child; however, the court did not find that these concerns undermined the stability provided by the current parenting plan, and the evidence does not preponderate against these findings.

B. WILLINGNESS TO FOSTER A CONTINUING RELATIONSHIP

Father contends that Mother's use of derogatory names for him in the child's presence justifies a change in custody because it demonstrates that Mother is unable or unwilling to foster a meaningful relationship between Father and the parties' child.

When assessing a child's best interests in the context of a custody determination, courts may consider "[e]ach parent's or caregiver's past and potential for future performance of parenting responsibilities, including the willingness and ability of each of the parents and caregivers to facilitate and encourage a close and continuing parent-child

relationship between the child and both of the child's parents" Tenn. Code Ann. § 36-6-106(a)(10) (2013).³ Like continuity, this factor may, depending upon the circumstances of the case, be an important part of the court's best interests determination and "may very well dictate the outcome of the analysis." *See In re Marr*, 194 S.W.3d at 499. Indeed, "the greater willingness of one parent to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent has been the decisive factor in determining parenting arrangements." *In re Zamorah B.*, No. M2011-00864-COA-R3-JV, 2013 WL 614449, at *6 (Tenn. Ct. App. Feb. 15, 2013).⁴

In *Zamorah*, the mother prevented the father from exercising court-ordered visitation and yelled or cursed at him in the presence of their child. *Id.* at *7. Several witnesses testified that, despite the mother's consistently hostile and disrespectful conduct, the father did not retaliate in kind. *See id.* at *8. Accordingly, this court determined that the evidence did not preponderate against the trial court's findings that the mother had repeatedly refused to abide by court orders regarding the use of derogatory remarks about the father and that the mother was "completely unwilling" to facilitate the relationship between the father and the child. *Id.* at *6, *9.

In this case, however, the trial court's findings do not indicate that one party has engaged in egregious behavior while the other has steadfastly maintained his or her willingness to co-parent. To the contrary, the trial court found that both Mother and Father struggled to foster the relationship between their child and the other parent. According to the trial court, neither parent "would foster a very good relationship with the other. . . ." and "both parents have said and done things that are inappropriate and demonstrates [sic] to the Court that they have no regard for each other." Instead of finding that one parent was more willing to co-parent than the other, the trial court found that both parents were unwilling to do so.

There is ample evidence to support the finding that Mother and Father are equally unable or unwilling to co-parent. While one parent's greater willingness to co-parent may justify a change in the primary residential parent, *see id.* at *6, the inability of *both* parents to co-parent does not favor one parent over the other in such a decisive manner that a change in custody is in the best interests of the child. Accordingly, Father's argument on this point is not persuasive.

³In 2014, this factor was moved to Tenn. Code Ann. § 36-6-106(a)(2) (2015). *See* 2014 Tenn. Pub. Acts 617, § 4.

⁴*See In re Jonathan S. C-B*, M2010-02536-COA-R3-JV, 2012 WL 3112897, at *19-20 (Tenn. Ct. App. July 31, 2012); *Howe v. Howe*, E2008-02580-COA-R3-CV, 2010 WL 323068, at *4 (Tenn. Ct. App. Jan. 28, 2010); *Morman v. Morman*, M2005-00931-COA-R3-CV, 2006 WL 2068757, at *5 (Tenn. Ct. App. July 25, 2006).

For the reasons stated herein, we affirm the trial court's decision for Mother to continue as the primary residential parent.

II. CHILD SUPPORT

On appeal, Father challenges both the trial court's decision to impute income to him based on a finding of willful underemployment and its determination that Mother had the ability to earn \$5,000 per month.

A. IMPUTING INCOME TO FATHER

Father contends that the trial court erred by imputing additional income to him based on a finding of willful underemployment because that issue had not been raised in the pleadings.

The Tennessee Rules of Civil Procedure require all pleadings in which a party sets forth a claim for relief to contain "(1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the pleader seeks." Tenn. R. Civ. P. 8.01. This rule establishes a "liberal notice pleading standard, which recognizes that the primary purpose of pleadings is to provide notice of the issues presented to the opposing party and to the court." *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011). Providing notice of the issues to be tried allows the opposing party to adequately prepare for trial. *See Abshure v. Methodist Healthcare-Memphis Hosp.*, 325 S.W.3d 98, 103 (Tenn. 2010); *Keisling v. Keisling*, 92 S.W.3d 374, 377 (Tenn. 2002).

Historically, courts strictly enforced the rule that "irrespective of what may be proved a court cannot decree to any plaintiff more than he claims in his bill or other pleadings." *Fidelity-Phenix Fire Ins. Co. of New York v. Jackson*, 181 S.W.2d 625, 629 (Tenn. 1944). "[T]he purpose of pleadings is to give notice to all concerned regarding what may be adjudicated, a judgment beyond the scope of the pleadings is beyond the notice given the parties and thus should not be enforced." *Brown v. Brown*, 281 S.W.2d 492, 497 (Tenn. 1955). This rule has relaxed over time, and today the Tennessee Rules of Civil Procedure provide that, except with respect to default judgments, "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings" as long as the propriety of such relief was litigated and the opposing party had the opportunity to assert defenses against it. *See* Tenn. R. Civ. P. 54.03. Accordingly, parties may agree to try matters not asserted in the pleadings by consent. *See* Tenn. R. Civ. P. 15.02 ("When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.").

Despite the relaxation of pleading requirements, this court has stated that “[a]n unpled issue cannot serve as the basis of a judgment in favor of the plaintiff absent trial by consent.” *Randolph v. Meduri*, 416 S.W.3d 378, 385 (Tenn. Ct. App. 2011) (citing *Rawlings v. John Hancock Mut. Life Ins. Co.*, 78 S.W.3d 291, 300 (Tenn. Ct. App. 2001)). A trial court commits error when it bases a decision, even in part, upon conclusions concerning an issue that was not raised in the pleadings or tried by consent. *See Rawlings*, 78 S.W.3d at 302. “In determining whether a judgment is beyond the scope of the pleadings, the pleadings must be given a liberal construction with all reasonable intendments taken in favor of the judgment.” *Brown*, 281 S.W.2d at 497.

Here, as Father contends, the issue of willful or voluntary underemployment was not raised in the pleadings. The issues tried in April 2014 concerned Father’s Petition to Modify and Mother’s response to his petition, and neither of these pleadings contained any allegations of willful or voluntary underemployment. Moreover, it is abundantly clear from reading the transcript of the evidence that the parties did not try the issue of underemployment by consent because Father’s attorney objected to questions related to underemployment. In fact, the trial court’s final order acknowledges that Father objected to this line of questioning because the issue was not pled.

Mother contends that Father had notice that child support was an issue because his petition requested a modification of the existing parenting plan and schedule, which, if granted, would have required a modification of child support. *See Joiner v. Griffith*, No. M2004-02601-COA-R3-CV, 2006 WL 2135441, at *5 (Tenn. Ct. App. July 31, 2006) (“The modification of custody and significant change in the visitation schedule necessitate a modification of child support.”); *see also Leonardo v. Leonardo*, No. M2014-00372-COA-R3-CV, 2015 WL 3852802, at *8 (Tenn. Ct. App. June 18, 2015) (holding that filing a petition to modify child visitation or the residential parenting schedule triggers a review of the parents’ respective child support obligations), *no perm. app. filed*.

We agree with Mother that Father was on notice that child support would be modified if he were designated the primary residential parent or if the change in the days allocated to each parent under the parenting schedule created a significant variance in the amount of child support owed. In fact, Father submitted a proposed parenting plan that modified the child support section contained in the April 2013 parenting plan;⁵ however, that was based on a change in parenting time. The foregoing notwithstanding, notice that child support may be modified based on a change in the primary residential parent or parenting time does not, without more, put a party on notice that he or she is alleged to be

⁵ Specifically, Father’s proposed plan indicated that Mother would be required to pay him child support while the April 2013 plan provided that Father was to pay Mother support.

underemployed and that the court may impute additional income to him or her when calculating or modifying child support.

As stated above, the purpose of pleadings is to provide notice of the issues to be tried so the parties may prepare to present evidence related to those issues. *See Abshure*, 325 S.W.3d at 103; *Keisling*, 92 S.W.3d at 377. However, evidence that may be relevant to demonstrating actual income can be significantly different from that which is relevant to determining whether a parent is underemployed. This distinction is made apparent by the differences in the factors that must be considered in determining whether a parent is willfully or voluntarily underemployed, *see* Tenn. Comp. R. & Regs. 1240-2-4-.04(3)(a)(2)(iii), and in making adjustments to a parent's basic child support obligation based on amount of parenting time. *See* Tenn. Comp. R. & Regs. 1240-2-4-.08(2)(c)(4). Thus, evidence that is relevant to modification of child support based on a change in the amount of parenting time may be very different from the evidence that is relevant to whether a party is voluntarily or willfully underemployed.

Based on these legal principles, we have concluded that Father was not on notice that the issue of voluntary underemployment would be tried. Therefore, the trial court erred by imputing income to Father for calculating his basic child support obligation. Nevertheless, because each party's respective parenting time was modified by the trial court, it was incumbent on the court to determine whether that created a significant variance and, if so, to modify child support pursuant to the guidelines.⁶

In holding that Father did not have notice that voluntary underemployment would be an issue at trial, we are mindful of this court's decision in *Howard v. Howard*, No. 03A01-9811-CV-00374, 1999 WL 427596, (Tenn. Ct. App. June 25, 1999). In that case, the father argued that the trial court erred when it ordered an upward deviation in his child support obligation because the issue was not explicitly raised in the pleadings. *Id.* at *2. This court affirmed the trial court, stating that the father had notice that deviation was an issue because the trial court would necessarily have to consider the grounds for deviation in order to decide the father's own petition to modify his support obligation. *Id.* at *3-4. As this court explained:

[D]etermining the proper amount of support under the guidelines requires an examination of the criteria for deviation The father asked the [trial court] to determine the proper amount of support under the guidelines

⁶Before modifying a child support order, courts must determine whether a significant variance exists. *See* Tenn. Code Ann. § 36-5-101(g)(1); Tenn. Comp. R. & Regs. 1240-2-4-.05(2)(a), -.05(3).

based on his current income. That request of necessity required the Court to look at the criteria for deviation to determine that proper amount of support.

Id. at *4.

Although the reasoning in *Howard* was correct based on the facts of that case, it does not control here. In *Howard*, the pleadings contained explicit references to child support modification, and the proceedings in the trial court solely concerned child support. *See id.* at *1, *3. Here, neither the Petition to Modify nor Mother's response mentions child support at all, and the proceedings in the trial court were almost entirely about custody. In addition, broader application of the reasoning in *Howard* would require parties to prepare to present evidence on a host of factually diverse issues based only on a generic request for relief. Such a result would hinder the opposing party's ability to prepare for trial and undermine one of the core purposes of pleadings. *See Webb*, 346 S.W.3d at 426; *Abshure*, 325 S.W.3d at 103; *Keisling*, 92 S.W.3d at 377.

Based on the foregoing, we reverse the trial court's calculation of child support based on Father's imputed income.⁷

B. MOTHER'S EARNING CAPACITY

Mother lost her job four weeks before trial and was seeking employment at the time of trial. Based on this new development, the fact that child support for the existing parenting plan was based on Mother's former salary of \$6,666 per month, and Mother's employment prospects, the trial court found that Mother had the ability to earn \$5,000 per month. Father contends that the court abused its discretion when it determined that Mother no longer had the ability to earn her prior salary.⁸

Setting child support is a discretionary matter. *State ex rel. Vaughn v. Kaatrude*, 21 S.W.3d 244, 248-49 (Tenn. Ct. App. 2000) (citing *State ex rel. Coleman v. Clay*, 805 S.W.2d 752, 755 (Tenn. 1991)). As we have explained:

[W]e review child support decisions using the deferential "abuse of discretion" standard of review. This standard requires us to consider (1) whether the decision has a sufficient evidentiary foundation, (2) whether

⁷Father also contends that the evidence preponderated against a finding that he was willfully or voluntarily underemployed. Our decision renders this issue moot; therefore, it will not be addressed.

⁸Father never argued that Mother failed to properly plead this issue. Accordingly, that argument has been waived. *See Waters v. Farr*, 291 S.W.3d 873, 918 (Tenn. 2009) ("One cardinal principle of appellate practice is that a party who fails to raise an issue in the trial court waives its right to raise that issue on appeal.").

the court correctly identified and properly applied the appropriate legal principles, and (3) whether the decision is within the range of acceptable alternatives. See *BIF v. Service Constr. Co.*, No. 87-136-II, 1988 WL 72409, at *2 (Tenn. Ct. App. July 13, 1988) (No Tenn. R. App. P. 11 application filed). While we will set aside a discretionary decision if it rests on an inadequate evidentiary foundation or if it is contrary to the governing law, we will not substitute our judgment for that of the trial court merely because we might have chosen another alternative.

The goal of the statutes and regulations governing child support is to assure that children receive support reasonably consistent with their parent or parents' financial resources. See *Shell v. Law*, No. 03A01-9608-CV-00251, 1997 WL 119581, at *4 (Tenn. Ct. App. March 18, 1997), *perm. app. dismissed* (Tenn. Jan. 29, 1998). The statutes and regulations promote this goal by requiring the courts to set child support using guidelines developed by the Tennessee Department of Human Services to promote both efficient child support proceedings and dependable, consistent child support awards. See Tenn. Code Ann. § 36-5-101(e) (Supp. 1999); Tenn. Comp. R. & Regs. r. 1240-2-4-.02(2)(b), (c) (1994).

Katrude, 21 S.W.3d at 248-49.

The abuse of discretion standard of review envisions “a less rigorous review” of a trial court's decision and “a decreased likelihood that the decision will be reversed on appeal.” *Lee Medical, Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010) (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). “It reflects an awareness that the decision being reviewed involved a choice among several acceptable alternatives.” *Lee Medical*, 312 S.W.3d at 524. Thus, the appellate courts may not second-guess the trial court or substitute their discretion for that of the trial court. *Id.* “The abuse of discretion standard of review does not, however, immunize a [trial] court's decision from any meaningful appellate scrutiny.” *Id.*

Discretionary decisions must take the applicable law and the relevant facts into account. *Id.* (citing *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.⁹ *Lee Medical*, 312 S.W.3d at 524.

⁹In *Lee Medical*, the Supreme Court states the same standard of review as that in *Katrude*:

(continued...)

“The fairness of a child support award depends on an accurate determination of both parents’ gross income or ability to support.” *Massey v. Casals*, 315 S.W.3d 788, 795 (Tenn. Ct. App. 2009). Generally, a parent’s gross income is equivalent to her earning capacity or ability to support. *Id.* Gross income is usually established by introducing pay stubs, tax returns, or other credible records demonstrating income. *See Kaatrude*, 21 S.W.3d at 249; Tenn. Comp. R. & Regs. 1240-2-4-.04(3)(a)(2)(iv)(I) (listing “tax returns for prior years, check stubs, or other information for determining current ability to support” as examples of “reliable evidence of income”).

Here, the evidence about Mother’s income consisted of her W-2 forms from 2013, paystubs from 2014, and Mother’s own testimony concerning her current unemployment. Mother testified that she had been unemployed for four weeks at the time of trial, which was unrefuted. She also stated that her gross income in 2013 was around \$70,000, and she presented three months of 2014 paystubs which established that her gross income was \$6,666 per month prior to losing her job. Based on this evidence and Mother’s prospects for obtaining employment, the trial court found that Mother had the ability to earn \$5,000 per month or \$60,000 per year.

Father argues that this determination was error because the evidence in the record shows that Mother has the ability to earn \$80,000 per year, which is based on Mother’s prior income of \$6,666 per month. Although Mother’s annual gross income in 2014 would have been \$80,000 if her employment had continued for the full year, the proof at trial was that Mother had been unemployed for four weeks. Missing three months of work at a salary of \$6,666 per month is equivalent to losing nearly \$20,000 in gross income. Thus, when it reduced Mother’s annual gross income from \$80,000 per year to \$60,000 per year, the trial court implicitly found that it should take Mother three months

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, Inc. v. Beecher, 312 S.W.3d 515, 524 (Tenn. 2010).

to find comparable employment. This was based in part on Mother's testimony that it took her nearly two months to find the out-of-state position that prompted her 2013 petition to relocate.

Based on the foregoing, the trial court's determination of Mother's ability to earn is properly supported by the evidence and is within the range of acceptable alternatives. Accordingly, the trial court did not abuse its discretion when it calculated that Mother had the ability to earn \$5,000 per month.

Based upon the above rulings concerning the income attributable to Father and Mother, on remand the trial court should calculate the parties' respective child support obligations pursuant to the federal guidelines and applicable statutes, rules and regulations. *See* Tenn. Code Ann. § 36-5-101(g)(1); Tenn. Comp. R. & Regs. 1240-2-4-.05(3); Tenn. Code Ann. § 36-5-101(g)(1); Tenn. Comp. R. & Regs. 1240-2-4-.05(2)(a).

III. ATTORNEY'S FEES

Mother contends that the trial court erred when it failed to award her attorney's fees. Mother also requests that this court award her the attorney's fees she incurred on this appeal.

The trial court is vested with wide discretion when determining whether to award attorney's fees. *Threadgill v. Threadgill*, 740 S.W.2d 419, 426 (Tenn. Ct. App. 1987); Tenn. Code Ann. § 36-5-103(c) (permitting a spouse to recover attorney's fees for actions concerning child custody "which fees may be fixed and allowed by the court, before whom such action or proceeding is pending, in the discretion of such court."). We review a trial court's discretionary decision regarding attorney's fees pursuant to the abuse of discretion standard. *See Armbrister*, 414 S.W.3d at 693; *see also Gonsewski v. Gonsewski*, 350 S.W.3d 99, 105 (Tenn. 2011). After reviewing the record pursuant to this standard, we find no error with the trial court's decision requiring that the parties pay their own attorney's fees. Accordingly, we affirm this decision.

Whether to award attorney's fees on appeal is within this court's sole discretion. *Wilson v. Wilson*, No. M2008-02073-COA-R3-CV, 2009 WL 1037943, at *4 (Tenn. Ct. App. April 17, 2009) (citing *Archer v. Archer*, 907 S.W.2d 412, 419 (Tenn. Ct. App. 1995)). In considering a request for attorney's fees, we examine "the ability of the requesting party to pay the accrued fees, the requesting party's success in the appeal . . . and any other equitable factor that need be considered." *Dulin v. Dulin*, No. W2001-02969-COA-R3-CV, 2003 WL 22071454, at *10 (Tenn. Ct. App. Sept. 3, 2003) (citing *Folk v. Folk*, 357 S.W.2d 828, 829 (Tenn. 1962)). After considering these factors, we decline to award Mother her attorney's fees on appeal.

IN CONCLUSION

We affirm the judgment of the trial court in all respects except for the decision to impute additional income to Father and the calculation of child support that was based on that decision. Therefore, the judgment of the trial court is affirmed in part and reversed in part, and this matter is remanded for proceedings consistent with this opinion. Costs are assessed equally between Mother and Father.

FRANK G. CLEMENT, JR., JUDGE