IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 5, 2003 Session

KENNETH W. MARTIN v. MARTHA MARTIN

Appeal from the Chancery Court for Sumner County
No. 2001D-364 Tom E. Gray, Chancellor

No. M2002-02350-COA-R3-CV - Filed April 16, 2004

After a sixteen-year marriage and two children, Husband and Wife both filed for divorce. Wife stipulated that Husband was entitled to a divorce. After hearing the evidence, the trial court fashioned a parenting plan which named Mother the primary residential parent with visitation for Husband; accepted the parties' stipulation with respect to the marital property; divided the remaining contested marital property; and ordered the parties to pay their own attorney's fees. Husband appeals. We affirm the judgment of the trial court.

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

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and WILLIAM B. CAIN, J., joined.

Clark Lee Shaw, Nashville, Tennessee, for the appellant, Kenneth W. Martin.

Bruce N. Oldham, Sue Hynds Dunning, Gallatin, Tennessee, for the appellee, Martha Gambrell Martin.

OPINION

Kenneth Martin ("Husband") and Martha Martin ("Wife") were married on June 8, 1985, and lived in Sumner County throughout their marriage. Two children were born during the marriage, a daughter ("Daughter") born on August 16, 1990, and a son ("Son") born on April 10, 1995.

Wife filed a complaint for divorce on July 9, 2001, seeking divorce on the grounds of irreconcilable differences and inappropriate marital conduct. Wife sought custody of the minor children. Husband answered and counterclaimed for divorce on the grounds of adultery and inappropriate marital conduct and sought custody of the minor children.

On February 21, 2002, Wife filed a stipulation that Husband was entitled to an absolute divorce on the ground of inappropriate marital conduct pursuant to Tenn. Code Ann. § 36-4-129.[1] Prior to trial, the parties agreed to divide most of their property pursuant to a stipulation.[2] There were a few items still contested at the time of trial: a framed "Glamour Shot" photograph of Wife and Daughter, a compact disc collection, video camera and related equipment, certain household furniture, an outdoor bridge, and the Mayo Clinic Medical book.

After the trial commenced, and when Wife was testifying about the "Glamour Shot" photograph that she wanted,[3] Husband requested a recess. Upon resumption of the hearing, Husband, through counsel, announced to the court hat he wanted to withdraw all stipulations relating to the division of property and litigate everything. The trial court denied the request stating that it had already accepted and approved it.

Apparently as a result of this ruling, Husband became dissatisfied with his attorney and requested another recess. Upon returning to the courtroom, Husband's attorney sought the court's permission to withdraw. The trial court granted leave to withdraw and asked Husband whether he wished to proceed *pro se* or whether he wanted a continuance to obtain other counsel. A short recess was taken and then Husband stated that he wanted a continuance so that he could hire another attorney. The trial court continued the matter to allow Husband an opportunity to retain new counsel.

The trial resumed on July 3, 2002, to take up the parenting plan and the issues involving the disputed personal property items. The trial court entered its final order January 9, 2003, *nunc pro tunc* for July 18, 2002. The trial court awarded the kitchen table and chairs, the "Glamour Shot" photograph, the Mayo Clinic book and one-half of the compact discs to Wife. The trial court awarded Husband one-half of the compact discs, the living room rocker, the living room lamp, the video camera and related equipment and the yard bridge. With respect to attorney fees, the trial court ordered the parties to pay their own.

---

[1]On appeal, Husband raises for the first time a claim that his due process rights were violated because the trial court failed to determine to whom the divorce should be awarded before taking proof on the issues of custody and division of marital property. *See Anderton v. Anderton*, 988 S.W.2d 675 (Tenn. Ct. App. 1998). Wife correctly points out that at the outset of the April 15, 2002, hearing, the trial court announced that it was granting Husband an absolute divorce on the grounds of inappropriate marital conduct. Clearly, Husband lacks a factual basis in which to complain. In addition, Husband waived this issue by failing to raise it below. Tenn. R. App. P. 36(a).

[2]The stipulation provided that Husband would retain the marital home. Wife was awarded another piece of real property. It was further stipulated that the parties were to be awarded any and all checking, savings, IRA, 401K, pension and/or retirement accounts held in their names individually. In order to equalize the respective equities, Husband agreed to pay Wife $70,000.

[3]Wife explained that the photograph had great significance to her since it was taken when she was thirty and her daughter was three. Wife explained that she had given her Husband separate photographs of herself as a gift but that this portrait was not a gift to him but rather for herself.

Husband appeals, taking issue with the trial court's division of property, the parenting plan, failure to award attorney fees, and certain evidentiary issues.

I. Attempt To Withdraw Stipulation

Prior to the start of the trial on April 15, 2002, the parties submitted written stipulations regarding distribution of most of the marital estate. At the beginning of the trial, counsel for Wife announced in open court, with all parties and counsel present, that the parties had reached a distribution agreement regarding most of the marital assets. The terms of the stipulation were explained in detail to the court and counsel for both parties participated and agreed:

> COUNSEL FOR WIFE: Now, these are my client's values. Mr. Blanton has put his client's values on his pretrial memorandum. But we've already decided how to distribute all of this, regardless of any ascertainment of value by the Court.
>
> There's two parcels of real estate. There is the marital residence located at 1496 A. B. Wade Road in Portland, Tennessee. That's the residence of the parties prior to the separation. There's also a parcel of property located at 601 North Russell Street in Portland, Tennessee, which is titled in the name of the wife only. Mr. Martin will retain the marital residence. There is no debt on that. Mrs. Martin will retain 601 North Russell Street property, and there is a debt on that and she will be liable for that.
>
> She also operates a business out of that real estate called Martha's Portrait Studio, which does have some value, and she will be awarded any and all interest in Martha's Portrait Studio, with one exception that I'll get to a little later on.
>
> Both parties have IRAs that were rollovers from previous employers. Each party will keep any and all accounts in their name individually.
>
> THE COURT: Each party to keep his or her own IRA?
>
> COUNSEL FOR WIFE: That's correct, sir, and any and all other accounts that are in their own names individually. They both have checking accounts, that sort of stuff. They'll keep that individually.
>
> The household goods, with rare exception, have already been divided and there are a few disputed items in the list of household goods. If Your Honor will turn to the second page of that exhibit, I tried to put a star in the left-hand margin on the disputed items.

The reason we're going ahead and giving the Court a summary of the marital property is, as you make your determination on the disputed items, you'll be able to see what all each person has received.

THE COURT: Okay. Marked by asterisk, filed with the Court, that I take is disputed is a kitchen table and chairs, living room ornaments, lamps, some CDs, video camera, a bridge, some Mayo medical books, living room rocking chair. Are those the items that are in dispute?

COUNSEL FOR WIFE: Yes, sir.

COUNSEL FOR HUSBAND: There's also a photo.

COUNSEL FOR WIFE: I'm sorry. Yes, there is a photo in dispute.

THE COURT: Where is that photo on here?

COUNSEL FOR WIFE: I think I forgot it.

THE COURT: Write it on there.

COUNSEL FOR HUSBAND: I have it listed in my pretrial memorandum, Your Honor, on Page 5.

THE COURT: Tell me what it is.

COUNSEL FOR HUSBAND: It's a Glamour Shot photo of the wife and child.

COUNSEL FOR WIFE: In addition to that, Your Honor, because there is a significant disparity in the equity value of the property divided to this point in time, Mr. Martin will pay to Mrs. Martin the sum of $70,000 as satisfaction of all of her claims against any of the assets awarded against him.

THE COURT: He'll pay her $70,000 as satisfaction of - -

COUNSEL FOR WIFE: Of any claims of hers - -

THE COURT: As an equitable division of the marital estate?

COUNSEL FOR WIFE: Yes, sir. Now, there are a few other items that are in Mr. Martin's possession right now that we have decided Mrs. Martin is to receive. I have it enumerated, although I don't think that's a problem between Mr. Blanton and I.

COUNSEL FOR HUSBAND: That's correct, Your Honor.

The trial court accepted the stipulations and began to hear testimony from Wife regarding the parenting plan and the disputed personal property items. Wife had completed most of her testimony, and was in the process of testifying about the contested "Glamour Shot" photograph, when counsel for Husband asked for a recess. After a brief recess, Husband's attorney announced that Husband wished to withdraw all stipulations regarding any marital property division between the parties. The trial court denied the request and continued the hearing. Specifically, the trial court stated in pertinent part:

> What the Court finds is that there had been negotiations going on between the parties and these agreements were arrived at prior to coming in today. They were announced as stipulations, meaning that both sides sitting here agreed to them. I decline to now allow Mr. Martin, after hearing some testimony or sitting here, deciding I want to make this fully, 100 percent, ever issue contested, every piece of property contested.
>
> And I might say he also had stipulated that he would pay to Mrs. Martin $70,000 as part -- or an equitable division of the marital estate.
>
> Let me say that I've looked over what has been marked in as Exhibit 1, which basically contains the marital estate, and I say "basically" because it may contain everything in the marital estate.
>
> As I look it over, the marital residence at A.B. Wade Road has a present value of $153,000. It has no mortgage on it. The property -- and he receives that property.
>
> At 601 North Russell Street in Portland, Tennessee, it has a fair market value of $100,000. There is $88,000 on that. Mrs. Martin is to receive that property and she is to pay the indebtedness of the $88,000 and hold him harmless.
>
> I look on down through the assets of the estate, I see that Mrs. Martin has a Magellan account, IRA of $46,000. She has two others in her name which total $8,000. But Mr. Martin has $80,000 in a 401K. He has $7,277 in another investment account, and $5,609 in another account.
>
> And after looking at that, even though he has taken most of the tangible personal property that these parties have acquired during their marriage -- but Mrs. Martin agreed with this, with the exception of the disputed items–and he agreed prior to coming into court, and I decline to now allow him to say I withdraw that.

Husband complains that the trial court erred by denying his request to withdraw his stipulations relying on a case from another state. However, we believe the beginning point for our analysis of Husband's complaint is *Harbour v. Brown for Ulrich*, 732 S.W.2d 598 (Tenn. 1987),

wherein our Supreme Court considered whether "a trial judge can enter a valid Order of Compromise and Dismissal after being informed by one of the parties that consent to the compromise has been withdrawn" and held that the trial court could not. *Id.* a 599. In *Harbour*, the parties announced to the court that they had reached a settlement agreement, but its terms were not recited to the court. *Id.* In *Harbour*, the Supreme Court quoted *Corpus Juris Secundum* for the general rule that:

> The power of the court to render a judgment by consent is dependent on the existence of the consent of the parties at the time the agreement received the sanction of the court **or** is rendered and promulgated as a judgment.

Harbour, 732 S.W.2d at 599, quoting 49 C.J.S. *Judgments* § 174 (b).

In the matter before us, Husband does not dispute that an agreement existed, but maintains that the trial court erred by denying his request to withdraw his consent during the testimony of Wife concerning the contested "Glamour Shot" photograph. The appropriate inquiry is whether the agreement was made in open court, on the record, and its terms were duly recorded. *See Environmental Abatement, Inc. v. Astrum R.E. Corp*., 27 S.W.3d 530, 540 (Tenn. Ct. App. 2000) (holding oral agreement reached at mediated judicial settlement conference was subject to withdrawal because it was not made on the record or in open court); *REM Enterprises, Ltd. v. Frye*, 937 S.W.2d 920 (Tenn. Ct. App. 1996) (upholding oral settlement agreement announced in open court); *Callison v.Callison*, Obion Equity No. 1, 1988 WL 10050 (Tenn. Ct. App. Sept. 29, 1988) (HISTORY) (upholding oral stipulations sanctioned in open court); TENNESSEE CIRCUIT COURT PRACTICE, *Stipulations* § 10.6 at 621. Here, the stipulations were entered in open court on the record. Moreover, the stipulations were set out in the parties' pre-trial memoranda. Accordingly, we affirm the trial court's denial of Husband's request to withdraw the stipulations.

In addition, we note that Husband does not complain on appeal about the distribution of property as set out in the stipulations. He does not claim any error as to any specific piece of property disposed of according to the stipulation or claim that the overall distribution was inequitable. He merely disputes the fact that he was not permitted to withdraw his consent. However, he has claimed no harm from that refusal. Indeed, the only assets awarded to Wife that Husband specifically asks this court to award him are the Glamour Shot and the entire compact disc collection, neither of which was included in the stipulations.

II. DIVISION OF PROPERTY

Husband complains that the trial court erred by awarding the "Glamour Shot" photograph and half of the compact disc collection, both of which he claims to be his separate property, to Wife. Wife testified that the photograph had been taken when Wife was thirty and the daughter was three years old and was a personal item to her. At the time the photograph was made, Wife had other photographs of herself made that she gave as a gift to Husband. Husband insists that he wanted the disputed photograph because he thought it was wonderful and that Wife had given him the whole set of photographs as a present.

Tennessee, being a "dual property" state, recognizes two distinct classes of property: "marital property" and "separate property." *Batson v. Batson*, 769 S.W.2d 849, 856 (Tenn. Ct. App. 1988). The distinction is important because, in an action for divorce, only marital property is divided between the parties. Tenn. Code Ann. § 36-4-121(a)(1); *Brock v. Brock*, 941 S.W.2d 896, 900 (Tenn. Ct. App. 1996). Separate property is not part of the marital estate subject to division. *Cutsinger v. Cutsinger*, 917 S.W.2d 238, 241 (Tenn. Ct. App. 1995). Accordingly, when it comes to dividing a divorcing couple's property, the court should initially identify the separate property, if any, belonging to each party. *Anderton v. Anderton*, 988 S.W.2d 675, 679 (Tenn. Ct. App. 1998).

The general rules for determining whether property is separate or marital are found in statute. Tenn. Code Ann. §§ 36-4-121(b)(1) & -121(b)(2). Of course, the courts must apply these rules to the specific facts of each case, and the determination of whether property is jointly or separately held depends upon the circumstances. *Langford v. Langford*, 220 Tenn. 600, 421 S.W.2d 632, 634 (1967). Whether an asset is separate property or marital property is a question of fact. *Cutsinger*, 917 S.W.2d at 241; *Sherrill v. Sherrill*, 831 S.W.2d 293, 295 (Tenn. Ct. App. 1992). Thus, a trial court's classification decisions are entitled to great weight on appeal. *Wilson v. Moore*, 929 S.W.2d 367, 372 (Tenn. Ct. App. 1996). These decisions will be presumed to be correct unless the evidence preponderates otherwise, *Hardin v. Hardin*, 689 S.W.2d 152, 154 (Tenn. Ct. App. 1983), or unless they are based on an error of law. *Mahaffey v. Mahaffey*, 775 S.W.2d 618, 622 (Tenn. Ct. App. 1989).

Regarding the "Glamour Shot" photograph, the trial court noted the conflicting testimony of the parties as to whether or not the photograph was a gift to Husband. The trial court accepted Wife's testimony that the photograph was not a gift to Husband, but rather was made for herself to commemorate her thirtieth birthday and her daughter's third birthday. Consequently, the court treated the photo as marital property and awarded it to Wife. The evidence does not preponderate against the trial court's finding that the photograph was not a gift to Husband and, therefore, not his separate property. With regard to the compact disc collection, Husband has offered no argument or basis for his claim that the collection was his separate property and provided no reference to any proof in the record for any potential basis. Wife testified the couple had belonged to a mail-order music club and had acquired approximately 100 compact discs. Husband testified Wife could have a portion of the collection, approximately 30 compact discs. The evidence does not preponderate against the trial court's finding that the collection was marital property.

After classification of the parties' property as either marital or separate, the trial court is charged with equitably dividing, distributing, or assigning the marital property in "proportions as the court deems just." Tenn. Code Ann. § 36-4-121(a)(1). The court is to consider several factors in its distribution. Tenn. Code Ann. § 36-4-121(c) (listing the factors to be considered). The court may consider any other factors necessary in determining the equities between the parties, Tenn. Code Ann. § 36-4-121(c)(11), except that division of the marital property is to be made without regard to marital fault. Tenn. Code Ann. § 36-4-121(a)(1). An equitable division is the goal, and equity must be considered in light of the unique facts of each situation. *Batson*, 769 S.W.2d at 859.

After hearing testimony regarding the few disputed items, the trial court considered the living room rocker, the living room lamp, the video camera, the yard bridge, kitchen table and chairs, and the compact disc collection as marital property and awarded Wife the table and chairs and half of the compact disc collection. With respect to Husband, the trial court awarded him the living room rocker, the living room lamp, the video camera and related equipment and the bridge in the yard and one-half of the compact disc. The trial court attempted to forge a compromise concerning the division of the disputed marital property. The trial court divided the contested marital property in an equitable manner. Husband, in fact, does not allege the distribution was inequitable. We affirm the trial court's division of marital property.

III. Residential Schedule of Children

A final divorce decree must incorporate a permanent parenting plan for any minor children involved. Tenn. Code Ann. § 36-6-404(a). Husband appeals the trial court's parenting plan which makes Wife the primary residential parent for the two minor children. A parenting plan is defined in Tenn. Code Ann. § 36-6-402(3) as "a written plan for the parenting and best interests of the child, including the allocation of parenting responsibilities and the establishment of a residential schedule, as well as an award of child support consistent with title 36, chapter 5." According to Tenn. Code Ann. § 36-6-404, a permanent parenting plan shall:

> (a)(1) Provide for the child's changing needs as the child grows and matures, in a way that minimizes the need for further modifications to the permanent parenting plan;
> (2) Establish the authority and responsibilities of each parent with respect to the child, consistent with the criteria in this part;
> (3) Minimize the child's exposure to harmful parental conflict;
> (4) Provide for a process for dispute resolution, before court action, unless precluded or limited by § 36-6-406; . . .
> (5) Allocate decision-making authority to one (1) or both parties regarding the child's education, health care, extracurricular activities, and religious upbringing. The parties may incorporate an agreement related to the care and growth of the child in these specified areas, or in other areas, into their plan, consistent with the criteria in this part. Regardless of the allocation of decision making in the parenting plan, the parties may agree that either parent may make emergency decisions affecting the health or safety of the child;
> (6) Provide that each parent may make the day-to-day decisions regarding the care of the child while the child is residing with that parent;
> (7) Provide that when mutual decision making is designated but cannot be achieved, the parties shall make a good faith effort to resolve the issue through the appropriate dispute resolution process, subject to the exception set forth in subdivision (a)(4)(F);
>
> . . .

Under the legislation, the court is to determine a residential schedule, which designates the primary residential parent and designates in which parent's home the child will reside on given days during the year. Tenn. Code Ann. § 36-6-402(5). A residential schedule is defined as:

> . . . the schedule of when the child is in each parent's physical care, and it shall designate the primary residential parent [the parent with whom the child resides more than 50% of the time]; in addition, the residential schedule shall designate in which parent's home each minor child shall reside on given days of the year, including provisions for holidays, birthdays of family members, vacations, and other special occasions, consistent with the criteria of this part; provided, that nothing contained herein shall be construed to modify any provision of § 36-6-108; . . . .

Tenn. Code Ann. § 36-6-402(5). When fashioning the residential schedule, the court is instructed to take into account the factors listed in Tenn. Code Ann. § 36-6-404(b):

> . . . the court shall make residential provisions for each child, consistent with the child's developmental level and the family's social and economic circumstances, which encourage each parent to maintain a loving, stable, and nurturing relationship with the child. The child's residential schedule shall be consistent with this part. If the limitations of § 36-6-406 are not dispositive of the child's residential schedule,[4] the court shall consider the following factors:
>
> (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 which 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 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;

[4]Tenn. Code Ann. § 36-6-406 instructs a court to limit the residential time for a parent that has engaged in certain specified conduct or exhibits certain traits, including, but not limited to: (1) willful abandonment; (2) physical or sexual abuse; (3) emotional abuse; (4) neglect or nonperformance of parental duties; or (5) an emotional or physical impairment which interferes with parental responsibilities. Neither party herein argues that the trial court should have utilized Tenn. Code Ann. § 36-6-406 to limit residential time with either parent.

(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. . . .
(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.

These factors incorporate those set out in Tenn. Code Ann. § 36-6-106, the statute which guided the trial court in custody determinations prior to the parenting plan legislation. That statute has not been repealed, and both parties rely on it. The factors set out in Tenn. Code Ann. § 36-6-106 are still relevant as are factors established by the courts. The primary concern in determinations of a child's residential placement remains the best interests of the child, and consideration of the factors under Tenn. Code Ann. § 36-6-404(b) still necessitates a comparative analysis.

Thus, by statute as well as case law, the welfare and best interests of the children are the paramount concern in custody and residential placement determinations, and the goal of any such decision is to place the child in an environment that will best serve his or her needs. *Parker v. Parker*, 986 S.W.2d 557, 562 (Tenn. 1999); *Lentz v. Lentz*, 717 S.W.2d 876, 877 (Tenn. 1986); *Luke v. Luke*, 651 S.W.2d 219, 221 (Tenn. 1983). The General Assembly has found that "[t]he best interests of the child are served by a parenting arrangement that best maintains a child's emotional growth, health and stability, and physical care." Tenn. Code Ann. § 36-6-401(a). The aim of a custodial or residential arrangement is to promote the child's welfare by creating an environment that promotes a nurturing relationship with each parent. Tenn. Code Ann. § 36-6-404(b); *Aaby v. Strange*, 924 S.W.2d 623, 629 (Tenn. 1996).

Trial courts must exercise broad discretion in child custody matters. *Parker*, 986 S.W.2d at 563. Like a custody decision, a determination of the best residential placement plan for a child must

turn on the particular facts of each case. Such decisions often hinge on the trial court's assessment of the demeanor and credibility of the parents and other witnesses. *Adelsperger v. Adelsperger*, 970 S.W.2d 482, 485 (Tenn. Ct. App. 1997). The trial court is in a far better position than this court to observe the demeanor of the witnesses and resolve the issues in the case that are based on the credibility of the witnesses. *McCaleb v. Saturn Corp.*, 910 S.W.2d 412, 415 (Tenn. 1995); *Whitacker v. Whitacker*, 957 S.W.2d 834, 837 (Tenn. Ct. App. 1997).

Because of the discretion given trial courts in this area and because of the fact specific nature of such decisions, appellate courts are reluctant to second-guess a trial court's determination regarding custody and visitation. *Nelson v. Nelson*, 66 S.W.3d 896, 901 (Tenn. Ct. App. 2001); *Rutherford v. Rutherford*, 971 S.W.2d 955, 956 (Tenn. Ct. App. 1997) (quoting *Gaskill v. Gaskill*, 936 S.W.2d 626, 631(Tenn. Ct. App. 1996)). Accordingly, this court will decline to disturb the parenting plan fashioned by the trial court herein unless that decision is based on a material error of law or the evidence preponderates against it. *Adelsperger*, 970 S.W.2d at 485.

Here, the trial court determined that the Wife would be the primary residential parent and that Husband be given liberal residential time. Husband asserts that the trial court did not properly consider the factors relevant to a custody, or residential schedule, determination. He essentially argues some factors should have weighed more heavily in the trial court's consideration and/or that the trial court failed to consider some factors.

The trial court made extensive findings of fact and recounted the testimony of the witnesses. With regard to the primary custody issue, the trial court specifically set out five factors enumerated in Tenn. Code Ann. § 36-6-106 it found relevant and found that Husband had intentionally involved the children in the divorce proceedings, had insisted on arguing with Wife in front of the children, and had made derogatory remarks about Wife to the children. The court also found that Wife had been the primary caregiver of the children prior to the separation and was actively involved in their education. The court also found that Wife's desire to provide counseling for the children weighed in Wife's favor.

Both parties presented testimony and made arguments about the other's failings. No purpose is served by our recounting the details of those arguments herein. We have carefully reviewed the record herein as well as the trial court's ruling in light of specific arguments raised by Husband. We find there is no basis to conclude that the trial court did not fully consider all factors relevant to the custody or parenting plan for these children. The evidence does not preponderate against any of the trial court's factual findings. We find the trial court adopted a plan designed to serve the children's best interests. Accordingly, we affirm the parenting plan adopted by the trial court.

IV. EXCLUSION OF TESTIMONY OF CHILDREN

On April 8, 2002, just seven days before the scheduled trial date, Husband filed a motion requesting that the court hear testimony from both minor children, ages seven and eleven, as to their

preference for their permanent residential parent. At the trial, the trial court denied the motion but stated:

> I'm not going to hear the preference of the children. If they were fact witnesses on other matters, that's something that I might hear the preference, but I am not going to hear the preference of a child who is 11 and a child who is less than that.[5]

The children were not offered as fact witnesses.

Following trial, Husband filed a motion under Tenn. R. Civ. P. 52.02 and 59, arguing that the trial court should have permitted Daughter to testify regarding her observation of sexual activity between Wife and her boyfriend. The trial court denied the motion on the basis:

> That neither of the parties' children were proffered at trial as fact witnesses. Husband had ample opportunity to present either or both of the children as fact witnesses, and had he done so, the Court would probably have permitted them to testify in that from all indications available to the Court, they appear to be intelligent and of an appropriate age where they would understand the oath, which is the requirement for qualification of children as fact witnesses.

Husband does not claim that the children's testimony constituted newly discovered evidence. It appears that Husband knew of the substance of any testimony Daughter, or either child, would give and elected not to call them as fact witnesses. The trial court properly noted that Husband had ample opportunity to call the children as fact witnesses at the trial and chose not to do so. Generally, in order for a party to obtain a new trial based on newly discovered evidence, it must be shown that the evidence was discovered after the trial, that it could not have been discovered earlier with due diligence, that it is material and not merely cumulative or impeaching, and that the evidence will probably change the result if a new trial is granted. *Estate of Hamilton v. Morris*, 67 S.W.3d 786, 797-98 (Tenn. Ct. App. 2001). Husband made no such showing and therefore had no basis to prevail on his motion. We affirm the trial court's ruling denying Husband's post-trial motion.

[5]In its order denying the post-trial motion, the court stated it had declined to hear preference testimony from the children "because of the ages of the children . . . and because the Husband, despite the Court's order to the contrary, had discussed the case with the children prior to hearing." The court recounted that Husband had testified at his deposition that "he had been encouraging the children to get down on their knees and pray that they will get to come live with him with the trial over."

V. ATTORNEY'S FEES

Husband requests an award of attorney's fees on appeal pursuant to Tenn. Code Ann. § 36-5-103(c). That statute permits reasonable attorney fees to be awarded to the prevailing party in an action to enforce any decree for alimony and/or child support, or in regard to an action concerning the adjudication of custody or change of custody of any child or children of the parties. Husband is not the prevailing party on the custody issue.

Husband also argues that the trial court abused its discretion by failing to award him attorney's fees at trial. Tennessee follows the American Rule requiring "litigants to pay their own attorney's fees in the absence of a statute or contractual provision otherwise." *State v. Brown & Williamson Tobacco Corp.*, 18 S.W.3d 186, 194 (Tenn. 2000); *John Kohl & Co. v. Dearborn & Ewing*, 977 S.W.2d 528, 534 (Tenn. 1998).

It has become well settled that an award of attorney's fees in divorce cases is considered alimony or spousal support, generally characterized as alimony *in solido*. *Yount v. Yount*, 91 S.W.3d 777, 783 (Tenn. Ct. App. 2002). Like other spousal support, an award of attorney's fees is available to either spouse. Alimony or spousal support is authorized by statute, and a number of cases cite as the basis for attorney's fees as an award of alimony Tenn. Code Ann. § 36-5-101(a)(1), which authorizes courts to order "suitable support and maintenance of either spouse by the other spouse . . . according to the nature of the case and the circumstances of the parties. . . ." *See, e.g.*, *Mitts v. Mitts*, 39 S.W.3d 142, 147 (Tenn. Ct. App. 2000); *Smith*, 912 S.W.2d at 160-61; *Gilliam*, 776 S.W.2d at 86. *See also* JANET L. RICHARDS, RICHARDS ON TENNESSEE FAMILY LAW § 14-3(a)(2) (1997).

Because attorney's fees are considered alimony or spousal support, an award of such fees is subject to the same factors that must be considered in the award of any other type of alimony. *Yount*, 91 S.W.3d at 783; *Lindsey v. Lindsey*, 976 S.W.2d 175, 181 (Tenn. Ct. App. 1997). Therefore, the statutory factors listed in Tenn. Code Ann. § 36-5-101(d)(1) are to be considered in a determination of whether to award attorney's fees. *Langschmidt v. Langschmidt*, 81 S.W.3d 741, 751 (Tenn. 2000); *Kincaid v. Kincaid*, 912 S.W.2d 140, 144 (Tenn. Ct. App. 1995).

There are no hard and fast rules for spousal support decisions, and such determinations require a "careful balancing" of the relevant factors. *Anderton v. Anderton*, 988 S.W.2d 675, 682-83 (Tenn. Ct. App. 1998). Initial decisions regarding the entitlement to spousal support, as well as the amount and duration of spousal support, hinge on the unique facts of each case and require a careful balancing of all relevant factors. *Robertson v. Robertson*, 76 S.W.3d 337, 338 (Tenn. 2002); *Watters v. Watters*, 22 S.W.3d 817, 821 (Tenn. Ct. App. 1999). Among these factors, the two considered to be the most important are the disadvantaged spouse's need and the obligor spouse's ability to pay. *Robertson*, 76 S.W.3d at 342; *Bogan*, 60 S.W.3d at 730; *Manis v. Manis*, 49 S.W.3d 295, 304 (Tenn. Ct. App. 2001). Of these two factors, the disadvantaged spouse's need is the threshold consideration.

Because support decisions are factually driven and involve considering and balancing numerous factors, appellate courts give wide latitude to the trial court's discretion. *Miller*, 81 S.W.3d at 774; *Cranford*, 772 S.W.2d at 50. Trial courts have broad discretion to determine whether spousal support is needed and, if so, its nature, amount and duration. *Burlew v. Burlew*, 40 S.W.3d 465, 470 (Tenn. 2001). Appellate courts are generally disinclined to second-guess a trial court's spousal support decision unless it is not supported by the evidence or is contrary to public policies reflected in the applicable statutes. *Bogan*, 60 S.W.3d at 733; *Kinard*, 986 S.W.2d at 234-35; *Brown*, 913 S.W.2d at 169. Our role is to determine whether the award reflects a proper application of the relevant legal principles and that it is not clearly unreasonable. *Bogan*, 60 S.W.3d at 733. When the trial court has set forth its factual findings in the record, we will presume the correctness of those findings so long as the evidence does not preponderate against them. Tenn. R. App. P. 13(d); *Bogan*, 60 S.W.3d at 733; *Crabtree v. Crabtree*, 16 S.W.3d 356, 360 (Tenn. 2000).

Although other standards of review have been expressed in some cases, the Tennessee Supreme Court has made it clear that "[t]he allowance of attorney's fees is largely in the discretion of the trial court, and the appellate court will not interfere except upon a clear showing of abuse of that discretion." *Aaron*, 909 S.W.2d at 411 (citing S*torey*, 835 S.W.2d at 597 and *Crouch v. Crouch*, 53 Tenn. App. 594, 606, 385 S.W.2d 288, 293 (Tenn. Ct. App. 1964)).

In the case herein, Husband did not claim to be and did not demonstrate that he was economically disadvantaged relative to Wife. Consequently, he was not entitled to spousal support and the trial court properly denied his request for attorney's fees. Likewise, Husband's request that this court award him attorney's fees on appeal is denied. We affirm the trial court's ruling with respect to attorney's fees. The parties reached an equitable distribution of their properties with a few contested exceptions for sentimental items and the trial court properly ordered both parties to pay their own attorney's fees.

VI. CONCLUSION

We affirm the trial court's judgment in all respects. Costs are taxed to the appellant, Kenneth W. Martin.

_____

PATRICIA J. COTTRELL, JUDGE