

FILED

09/01/2023

Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs May 16, 2023

MONICA A. DAVALOS (DALE) v. DOUGLAS C. DALE

Appeal from the Circuit Court for Hamilton County
No. 17D1856 W. Jeffrey Hollingsworth, Judge

No. E2022-00859-COA-R3-CV

This is a post-divorce action involving the question of whether the alimony obligor's transitional alimony obligation was properly terminated due to the alimony recipient's purported cohabitation with a third party. The wife, as the alimony recipient, was found to be cohabiting with her parents. As such, the trial court analyzed whether the wife had rebutted the statutory presumption that she no longer needed alimony, concluding that she had not rebutted that presumption. Accordingly, the husband's transitional alimony obligation was terminated. The wife timely appealed. Upon review, we determine that the trial court's order terminating the husband's transitional alimony obligation must be vacated due to a lack of necessary findings. We remand this matter to the trial court for additional findings concerning the wife's residential situation at the time of trial.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Vacated; Case Remanded**

THOMAS R. FRIERSON, II, J., delivered the opinion of the court, in which D. MICHAEL SWINEY, C.J., and W. NEAL MCBRAYER, J., joined.

Robert N. Meeks, Chattanooga, Tennessee, for the appellant, Monica A. Davalos (Dale).

Jillyn M. O'Shaughnessy and Lawson Konvalinka, Chattanooga, Tennessee, for the appellee, Douglas C. Dale.

OPINION

I. Factual and Procedural History

Monica A. Davalos (Dale) ("Wife") filed a complaint for divorce on August 28, 2017, in the Hamilton County Circuit Court ("trial court"), naming Douglas C. Dale ("Husband") as the defendant. According to Wife, she and Husband had married in North

Carolina in 1998 and subsequently had two children together: a daughter born in 2000 and a son born in 2004. On October 19, 2018, the trial court entered a final divorce decree (“Final Decree”). In the Final Decree, the trial court named Husband primary residential parent of the parties’ two minor children and granted him co-parenting time of 313 days per year. The court found Wife to have a monthly net income of \$2,249 and stated that her “ability to greatly increase her income is limited.” The court noted that Wife had been a “stay at home” mother and homemaker during most of the parties’ twenty-year marriage and that Husband’s earning capacity was much greater due to his education and professional experience. Consequently, the court ordered Husband to pay Wife \$1,000 per month in transitional alimony.¹ The court directed that Husband’s obligation to pay transitional alimony would terminate in November 2029 when Wife reached the age of fifty-nine and one-half years. Additionally, the court ordered that the transitional alimony award “shall be terminated if [Wife] remarries or cohabitates with a third person” and that the alimony award could be modified if “Wife becomes eligible to collect from some of the retirement plans which she has been awarded before she reaches 59 ½ years of age.”

On February 19, 2021, Husband filed a petition seeking to terminate his transitional alimony obligation, alleging that Wife had been cohabitating with her father since January 2021. On April 14, 2021, Wife filed an answer to the petition, denying that she was cohabitating with her father. Husband subsequently filed an amended petition to include the allegation that Wife had accessed funds from her retirement account as an additional ground to terminate his transitional alimony obligation.

On April 5, 2022, the trial court conducted a hearing regarding whether Husband should remain obligated to pay transitional alimony to Wife. Wife was the only witness who testified during the hearing. Before calling her as a witness, Husband’s counsel recounted some of Wife’s testimony given during a deposition taken on October 22, 2021. In that deposition, Wife stated that her father had quitclaimed to her an interest in real property—a family ranch consisting of approximately eighty-eight acres in New Mexico (“the Ranch”)—in June 2020. Concomitant with this transfer, Wife reported that she had undertaken the responsibility of continuing her father’s thirty-year-long legal battle with the city of Tularosa, New Mexico, to acquire the right to irrigate the Ranch. She declared that in New Mexico, water is “gold” and estimated that the litigation had already cost approximately \$100,000. In addition, Wife reported that she had paid “\$10,000-plus” to build an irrigation infrastructure for the Ranch, which she described as the “tip of the iceberg.” Wife moved to the Ranch in December 2020, having stayed there with her parents earlier in the year for at least a month during the early pandemic shutdown.

¹ The trial court noted that “[r]ehabilitative alimony is usually preferred in this type of case. However, in this case, [Wife] has already gone back to school and received the education necessary to pursue the career she has chosen.” The court also considered that Wife would “receive well over \$200,000 in cash” as a result of the divorce.

Wife testified that the Ranch consisted of two relevant dwellings. The first was a modular home where Wife's father and stepmother were living. The second dwelling, which Wife described as her "primary residence," was an "adobe house." She testified that the adobe house was a 100-year-old adobe structure that lacked electricity and required cooking on a wood stove and the use of candles for light. Wife related that she had paid all electric bills for the modular home since she had moved to New Mexico and "usually [ate dinner] with her parents every night." She also claimed that she had purchased the propane used for cooking at the modular home and had helped buy groceries for her parents and herself, which she had stored in their refrigerator. She further acknowledged that she showered and washed her clothes at the modular home. Although located on the same real property parcel, Wife claimed that the two dwellings had separate addresses. She testified that the modular home was located at 133 Round Mountain Road, while the adobe house was located at 131 Round Mountain Road.

During Wife's direct examination at trial, Husband's counsel introduced Wife's New Mexico driver's license as an exhibit. The address listed on her driver's license was "133 Round Mountain Rd," which was the address of the modular home. Wife stated that she had continued to work as an esthetician since moving to New Mexico. Wife also testified that she had conveyed a life estate in the Ranch to her father on November 4, 2020. Accordingly, her parents continued to live in the modular home but did not pay her any rent. Wife further reported that she had also given her parents the use of her car, a Honda Civic, while she continued to pay the insurance and sometimes bought gasoline for the vehicle.

Regarding the allegation that she had accessed funds from a retirement account, Wife explained that she had borrowed \$100,000 from the account and was required to repay the same sum within three years. She further stated that she was able to borrow from the retirement account without an early withdrawal penalty pursuant to the "CARES Act." Relating to her annual income, Wife reported she earned \$50,000 per year working as a full-time esthetician and part-time yoga instructor. Because she had successfully acquired water rights shortly before trial and could irrigate a portion of the Ranch, Wife testified that she planned to use the Ranch to grow cannabis plants. She related that she had received an email two weeks prior to the hearing from the state of New Mexico granting her a license to grow up to 16,000 cannabis plants. Wife later clarified that she would be limited to growing only 401 plants during her first year. According to Wife, each plant would yield one to ten pounds of salable product, for which "the going market [rate/value] is \$1,500 per pound."²

Concerning her residential circumstances, Wife testified during trial that she had recently purchased a home, utilizing the proceeds from the sale of her home in Tennessee,

² Wife later testified that "if you grow right and grow well, [the cannabis] can average between \$1,500 to \$2,500 per pound."

and was no longer living in the adobe house. She purported to have purchased the home for \$147,000 and claimed that it was worth “double” or “triple” that amount. Wife clarified that her new home was “two minutes” from the Ranch and that her “address is now 81 Round Mountain Road.” Wife stated that the home was fully habitable, in contrast to the adobe house, which would have required extensive renovation as well as updates to the plumbing and electrical systems that were not cost-effective.

After both parties’ counsel completed their examination of Wife, the trial court asked both parties whether they had any further testimony to offer, to which both counsel apparently responded in the negative. In turn, the court stated that it needed to “look at a few things here real quick,” and instructed the parties to take a short break. Upon returning from the short recess, the court began to announce its oral ruling.

The court first addressed the additional allegation Husband had raised in his amended petition, stating:

[T]his Court imposed some conditions; one being that if Ms. Davalos became eligible to be paid from retirement accounts, specifically the pension that Mr. Dale would be eligible for -- if she were eligible to be paid from that pension for her portion of that pension, then the alimony would end or be adjusted. That’s not what happened here. The evidence is that she borrowed from her IRA, and that’s a different situation. So that condition was not met.

The trial court subsequently addressed Husband’s asserted ground for termination of alimony contained in his original petition: Wife’s alleged cohabitation with a third person. The court noted that although Wife may have spent considerable time at the adobe home, she also spent extensive time at the modular home where her parents resided. The court considered that Wife had frequently bathed, cooked, and slept at the modular home. Furthermore, the court stated that Wife’s parents had not paid her any rent and that “[s]he gave them a car. She paid for gas. She has paid for food. She has, to a large degree, begun to support her father and stepmother.” Lastly, the trial court considered Wife’s annual income of \$50,000 and estimated revenue from growing cannabis. The court ultimately determined that she had cohabited with a third person and lacked the need for transitional alimony. Accordingly, the court ordered the termination of Husband’s alimony payments and requested briefing from both parties as to whether Wife should repay Husband for the alimony payments that he had made while the modification petition was pending.

At that point, a discussion ensued among the court and both parties’ counsel as to whether the court had clearly conveyed that it was about to make its final ruling. Wife’s counsel objected to the court’s ruling following the ruling’s conclusion, stating that Wife’s counsel had desired to put on additional proof. At the end of the discussion, however, Wife’s counsel withdrew his objection.

On May 6, 2022, Husband filed a petition seeking to terminate his alimony obligation retroactively to the date of the original petition's filing. The trial court entered an order on May 25, 2022, terminating Husband's transitional alimony obligation as of the date of the petition's filing upon finding that Wife was cohabitating with her parents and no longer had a need for the alimony payments. The court also ordered Wife to repay the eleven transitional alimony payments that Husband had tendered during the pendency of the modification action. Wife timely appealed.

II. Issues Presented

Wife has raised several issues on appeal, which we have condensed and rephrased as follows:

1. Whether the trial court erred by failing to allow Wife to present her case in chief or rebuttal proof through testimony or other evidence.
2. Whether the trial court erred in granting Husband's petition and terminating his transitional alimony obligation.
3. Whether the trial court erred by awarding to Husband attorney's fees and expenses at trial.
4. Whether the trial court erred in not awarding to Wife her attorney's fees and expenses at trial.
5. Whether Wife is entitled to her attorney's fees and expenses for this appeal.

Husband raises an additional issue before this Court:

6. Whether Husband is entitled to attorney's fees on appeal.

III. Standard of Review

We review a non-jury case *de novo* upon the record, with a presumption of correctness as to the findings of fact unless the preponderance of the evidence is otherwise. *See* Tenn. R. App. P. 13(d); *Bowden v. Ward*, 27 S.W.3d 913, 916 (Tenn. 2000). We review questions of law *de novo* with no presumption of correctness. *Bowden*, 27 S.W.3d at 916 (citing *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 924 (Tenn. 1998)). The trial court's determinations regarding witness credibility are entitled to great weight on appeal and shall not be disturbed absent clear and convincing evidence to the contrary. *See Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2002).

Regarding alimony, our Supreme Court has “repeatedly and recently observ[ed] that trial courts have broad discretion to determine whether spousal support is needed and, if so, the nature, amount, and duration of the award.” *Gonsewski v. Gonsewski*, 350 S.W.3d 99, 105 (Tenn. 2011). As to the standard of appellate review applicable when a modification of alimony is at issue, our Supreme Court has explained:

Because modification of a spousal support award is “factually driven and calls for a careful balancing of numerous factors,” *Cranford v. Cranford*, 772 S.W.2d 48, 50 (Tenn. Ct. App. 1989), a trial court’s decision to modify support payments is given “wide latitude” within its range of discretion, *see Sannella v. Sannella*, 993 S.W.2d 73, 76 (Tenn. Ct. App. 1999). In particular, the question of “[w]hether there has been a sufficient showing of a substantial and material change of circumstances is in the sound discretion of the trial court.” *Watters v. Watters*, 22 S.W.3d 817, 821 (Tenn. Ct. App. 1999) (citations omitted). Accordingly, “[a]ppellate courts are generally disinclined to second-guess a trial judge’s spousal support decision unless it is not supported by the evidence or is contrary to the public policies reflected in the applicable statutes.” *Kinard v. Kinard*, 986 S.W.2d 220, 234 (Tenn. Ct. App. 1998); *see also Goodman v. Goodman*, 8 S.W.3d 289, 293 (Tenn. Ct. App. 1999) (“As a general matter, we are disinclined to alter a trial court’s spousal support decision unless the court manifestly abused its discretion.”).

Bogan v. Bogan, 60 S.W.3d 721, 727 (Tenn. 2001); *see Wiser v. Wiser*, No. M2013-02510-COA-R3-CV, 2015 WL 1955367, at *3 (Tenn. Ct. App. Apr. 30, 2015).

We also review a trial court’s award of attorney’s fees and its decision to admit or exclude evidence according to an abuse of discretion standard. *See Wright ex rel. Wright v. Wright*, 337 S.W.3d 166, 176 (Tenn. 2011); *Biscan v. Brown*, 160 S.W.3d 462, 468 (Tenn. 2005); *In re Estate of Greenamyre*, 219 S.W.3d 877, 886 (Tenn. Ct. App. 2005) (“[A] trial court will be found to have ‘abused its discretion’ only when it applies an incorrect legal standard, reaches a decision that is illogical, bases its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party.”) (internal citations omitted).

IV. Exclusion of Additional Evidence

Wife argues that “the trial court abused its discretion when it failed to allow [Wife] the opportunity to present rebuttal proof OR her case in chief[.]” She contends that when the trial court began its ruling from the bench, her counsel had not rested, was unaware that the court was about to rule, and notified the trial court that Wife desired to put on her case in chief. Upon review, we disagree with Wife’s contentions.

It is well-established Tennessee law that parties must timely object and may not withhold an objection as an “ace in the hole” to be played if the court rules against them. *See Varley v. Varley*, 934 S.W.2d 659, 667 (Tenn. Ct. App. 1996). Furthermore, as our Supreme Court has elucidated:

Tennessee Rule of Appellate Procedure 36(a) provides that a party is not entitled to relief if that party is “responsible for an error or . . . failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error.” Tenn. Rule App. P. 36(a). “It is an elementary principle of law that a party may not register an objection, later withdraw that objection, and subsequently raise the issue post-trial.” *State v. Garrin*, No. 02C01-9501-CR-00028, 1996 WL 275034 at *5 (Tenn. Ct. Crim. App. May 24, 1996).

Akers v. Prime Succession of Tennessee, Inc., 387 S.W.3d 495, 508 (Tenn. 2012).

In the case at bar, after extensively questioning Wife during the hearing, her counsel stated: “Okay. All right. That’s all I have.” The trial court then asked Husband’s counsel if she had any more testimony to present, to which she responded in the negative. The court next announced, “Okay. Give me a few minutes. Let me look at a few things here real quick, and I’ll be right back out.” After a short recess, the hearing was reconvened and the court began its lengthy oral ruling, explaining:

When the final decree was put down -- I know there was some amendments to it afterwards, but the alimony that was awarded from the beginning and continued to be -- excuse me -- yeah, transitional alimony. And under the statute, transitional alimony is non-modifiable. That means that a change in circumstances, just in and of itself, does not justify a modification.

What the statute says is that it can be modified if the party receiving the alimony cohabitates with a third person or remarries or if the Court imposes conditions that would cause modification.

In this particular case, this Court imposed some conditions; one being that if Ms. Davalos became eligible to be paid from retirement accounts, specifically the pension that Mr. Dale would be eligible for -- if she were eligible to be paid from that pension for her portion of that pension, then the alimony would end or be adjusted. That’s not what happened here. The evidence is that she borrowed from her IRA, and that’s a different situation. So that condition was not met.

Another condition, of course, under the statute and in the Court's order was whether or not she cohabitated with another person, a third person. And that's what this case turns on.

And hands-on what we mean by cohabitation is what we discussed at the beginning of this case. The usual situation is that the person receiving the alimony cohabitates with -- I'll use the term "paramour," and they live together and share expenses. And then that can cause -- that's not, again, what happened here, but that doesn't mean necessarily that there is not cohabitation.

Ms. Davalos went back to New Mexico, moved onto the family property. That's fine. But she lived in very close proximity to her dad and her stepmother. While she may have spent a lot of time in the adobe structure, she also spent a lot of time in the modular home that they live in. She showered there. She went there from time to time to cook, although she also cooked some at the adobe. She sometimes slept there.

And through a series of transactions, Ms. Davalos became the owner of the property and became owner of that modular home in which her parents live. They don't pay any rent. They don't pay her anything. I'm not criticizing that. I'm not saying you should charge your parents rent. I'm just saying it's a fact of this case that they don't pay her any rent on the property that she owns.

She gave them a car. She has paid for gas. She has paid for food. She has, to a large degree, begun to support her father and stepmother. Again, I'm not criticizing that in any way. It's fine. It could be admirable to do that.

But Ms. Davalos went there and chose to start supporting her father and chose to assume \$100,000 in legal fees that he owed. And I think that establishes the situation in which she is, again, to some -- to a large degree supporting her dad and her stepmother.

So under the law, she would have to rebut the presumption. I think that establishes cohabitation, as I see it defined. It's not the usual case, but I think it fits under the definition of cohabitation.

Then she has to rebut the presumption that she no longer needs -- that she is supporting someone else; therefore, the presumption arises that she no longer needs the transitional alimony. She has the responsibility or the burden to rebut that. I don't think that has happened in this case.

She has got an income of \$50,000. She owns a house worth 3- to \$400,000 that she bought for cash for \$150,000. Again, good thinking. Good deal. But you own that house free and clear. You have a \$50,000 income. You have assumed all those liabilities, including the legal fees that have been paid, which you were not required to do.

And just taking some rough calculation from your intended cannabis business, I think you said that your initial planting would be restricted to 400 plants. And you said you could get one to ten pounds of product per plant. And you could get 15- to \$2,500 per pound for the product.

Well, the arithmetic using 5 pounds per plant for product, 400 plants, that's 2,000 pounds, times 1,500 is \$3 million gross. And that's just getting started.

And, I mean, as I said, that's gross. I'm sure there are a lot of expenses that would have to be taken off of that \$3 million. But even if you had -- even if you had a 10 percent margin, that's \$300,000 profit. So I just can't say that Ms. Davalos has rebutted the presumption that has arisen that she does not need the transitional alimony anymore. And I'm going to grant the motion of the petition, and I'm going to end the alimony at this point.

I just think under these circumstances we have a case of cohabitation and a case in which it has not been established that, even with the cohabitation, that the recipient Ms. Davalos has need of that alimony anymore.

After the court's determination that Wife had cohabitated with a third party and failed to rebut the statutory presumption that she no longer needed alimony, Husband's counsel requested repayment of alimony that Husband had paid since the filing of his original petition in February 2021. The following exchange then took place:

Husband's Counsel: I filed a petition in February of last year. He paid I think through February of this year or January.

Husband: January.

Husband's Counsel: So I guess that's 11 -- no. That's 12 months that he -- or 11 if you were to start March 1st.

The Court: I don't know how this works as far as dating back. I know with child support we would go

back to the date of the filing of the petition. I don't know if that's the same in this case or not.

Husband's Counsel: It should -- well, the same facts remain when we filed that petition on what you based it on. Our petition was not based on the retirement money that she took out. It was based on the cohabitation. We filed it in February of 2020. She was cohabitating and took on all these expenses.

So our position is that -- I don't -- the case law most certainly supports it. Otherwise, people could do continuance after continuance after continuance to not -- to keep getting their alimony paid.

Wife's Counsel: That's not what happened in this case.

Husband's Counsel: We agreed --

Wife's Counsel: We agreed to suspend the alimony because I asked for a continuance. [H]e hasn't paid alimony -- he hasn't paid her alimony in several, several months.

And, Judge, I don't think the Court let me put on my side of the proof. You just -- you said you were going to go look at something. You didn't say "do you have any proof," did you, Judge? Did I miss that?

The Court: Why didn't you tell me something?

Wife's Counsel: I didn't know what --

The Court: I said, Do you have anything else? And you said, No.

Wife's Counsel: Not of this -- not of -- not on that -- on her case in chief.

The Court: Well, I mean, you're a lawyer of long standing, Mr. Meeks. When a judge screws up, you stand up and say, Judge, you screwed up.

Wife's Counsel: I didn't know you were going --

The Court: I said I'm going to make a decision.

Wife's Counsel: You said you were going to go look at something.

The Court: Well --

Wife's Counsel: I mean, I don't -- let me talk to her. It may be that she doesn't think she can rebut it. I just don't want to waive it, Judge.

The Court: Well, all right.

Wife's Counsel: You understand.

The Court: Well, no, I don't understand why you didn't tell me, Judge, whoa, stop. I've never had a problem with a lawyer telling me, Judge, don't jump the gun here, hold on a second. I've never --

Wife's Counsel: I didn't know what you were looking at.

The Court: I've never held that against anybody.

Wife's Counsel: I didn't know what you were looking at.

The Court: Well, it was pretty obvious.

Wife's Counsel: Let me ask her if she wants to --

The Court: Well, no. I tell you what I'm going to do. I have to be at -- (indiscernible). I was going to be a little late just to do this. And I have -- but I do have to be there, and it ends right at 1[:00]. So I'll be back about 1:15, and we'll see what we're going to do.

Wife's Counsel: I'll ask the court reporter --

Husband's Counsel: He doesn't have another witness. He is asking about putting back on Ms. Davalos after he had complete open-ended questioning with her. I didn't object to a single question being outside of my direct. I mean, this is --

Wife's Counsel: Judge, I'll --

Husband's Counsel: I understood you to be going to come back and tell us our opinion -- your opinion.

Wife's Counsel: I'll ask the court reporter, and if I should have --

Husband's Counsel: It was obvious before you gave your opinion that that's what you were doing. So if he wanted more evidence, he should have said it before you actually said what your final opinion was.

Wife's Counsel: If I was mistaken and you made it clear, I'll withdraw my request, Judge. I'll ask the court reporter.

The Court: We'll come back at 1:15.

Husband's Counsel: In any event, he knew ten minutes before you actually got to your true ruling that you were obviously ruling, and he could have said it right then. He didn't because he didn't know what -- he didn't know if you were going to side with him.

Wife's Counsel: Well, I would have filed -- I would have asked for a directed verdict or a judgment notwithstanding or whatever I needed to do.

The Court: Mr. Meeks, I mean, I look at one party. You have been in here 150 times minimum. And I look at one party. Have you got anything else? No. Do you got anything else? No. Okay. Let me go look at something, and I'll be right back out. It's crystal clear what's going on.

Wife's Counsel: And if it's clear, I'll withdraw. I'll withdraw my request.

The Court: So that's the order of the Court. I'm going to stick with that. And, Ms. O'Shaughnessy, if you'll draw it up.

Our review of the record clearly reflects that Wife's counsel was provided the opportunity to question Wife extensively. Wife provided detailed answers concerning, *inter alia*, her litigation of water rights, cannabis farming, living situation regarding the adobe and modular homes, why her driver's license listed the modular home's address, the amount she was obligated to refund her retirement account, and her purchase of a new home since the deposition. Wife's counsel asked numerous questions on cross and re-cross examination, without limitation. When his examination of Wife was completed, Wife's counsel stated, "That's all I have." When the trial court inquired whether any additional proof was forthcoming, neither party's counsel responded in the affirmative. At that point, the trial court recessed for a short break, later reconvening court to issue an oral ruling. Wife's counsel did not object on the basis of allegedly having additional proof to offer until after the court completed its oral ruling.

As this Court has previously explained concerning a trial court's exclusion of evidence:

An erroneous exclusion of evidence requires reversal only if the evidence would have affected the outcome of the trial had it been admitted. *Pankow v. Mitchell*, 737 S.W.2d 293, 298 (Tenn. Ct. App. 1987). Reviewing courts cannot make this determination without knowing what the excluded evidence would have been. *Stacker v. Louisville & N. R.R. Co.*, 106 Tenn. 450, 452, 61 S.W. 766 (1901); *Davis v. Hall*, 920 S.W.2d 213, 218 (Tenn. Ct. App. 1995); *State v. Pendergrass*, 795 S.W.2d 150, 156 (Tenn. Crim. App. 1989). Accordingly, the party challenging the exclusion of evidence must make an offer of proof to enable the reviewing court to determine whether the trial court's exclusion of proffered evidence was reversible error. Tenn. R. Evid. 103(a)(2); *State v. Goad*, 707 S.W.2d 846, 853 (Tenn. 1986); *Harwell v. Walton*, 820 S.W.2d 116, 118 (Tenn. Ct. App. 1991). Appellate courts will not consider issues relating to the exclusion of evidence when this tender of proof has not been made. *Dickey v. McCord*, 63 S.W.3d 714, 723 (Tenn. Ct. App. 2001); *Rutherford v. Rutherford*, 971 S.W.2d 955, 956 (Tenn. Ct. App. 1997); *Shepherd v. Perkins Builders*, 968 S.W.2d 832, 833-34 (Tenn. Ct. App. 1997).

As stated, an offer of proof must contain the substance of the evidence and the specific evidentiary basis supporting the admission of the evidence. Tenn. R. Evid. 103(a)(2). These requirements may be satisfied by presenting the actual testimony, by stipulating to the content of the excluded evidence, or by presenting an oral or written summary of the excluded evidence. Neil P. Cohen, *et al. Tennessee Law of Evidence* § 103.4, at 20 (3d ed. 1995).

Hampton v. Braddy, 270 S.W.3d 61, 65 (Tenn. Ct. App. 2007) (quoting *Thompson v. City of LaVergne*, No. M2003-02924-COA-R3-CV, 2005 WL 3076887, at *9 (Tenn. Ct. App. Nov. 16, 2005) (“[T]he failure of [a party] to make an offer of proof constitutes a waiver of the right to challenge the exclusion of this testimony.” (emphasis added))).

In the case at bar, Wife never made an offer of proof concerning any testimony that was excluded. *See* Tenn. R. Evid. 103(a)(2). Inasmuch as Wife did not provide an offer of proof concerning what evidence her additional testimony may have provided, we conclude that she waived her right to challenge the exclusion of additional testimony or evidence on appeal. *See Hampton*, 270 S.W.3d at 65.

Furthermore, this case does not involve a trial court’s entirely barring a witness from testifying. We reiterate that Wife was allowed to testify extensively during trial. The record reveals that on direct and cross examination, Wife answered several questions related to when she began to reside on the Ranch, whether she had paid for the Ranch’s utilities and repairs, and the general circumstances surrounding her living situation. No other witnesses were proffered. In addition, the trial court asked if there would be additional testimony before taking a short recess and then reconvening court to announce its ruling. It was only following the trial court’s extensive oral ruling concerning termination of the alimony obligation that Wife’s counsel objected, stating that he had not been permitted to present all proof. However, after discussion with the court, Wife’s counsel withdrew his objection. Therefore, even if the objection to the supposed exclusion of evidence was timely, the issue has been waived for consideration on appeal. *See Akers*, 387 S.W.3d at 508. By reason of the foregoing, we conclude that Wife’s argument concerning exclusion of additional evidence is unavailing.

V. Termination of Husband’s Alimony Obligation

Wife argues that the trial court abused its discretion in terminating Husband’s obligation to pay transitional alimony upon finding that Wife was cohabitating with a third person and no longer had a financial need for alimony. Wife also urges that the court failed to make a finding regarding Husband’s ability to pay.

As this Court has explained:

Tennessee law recognizes four types of spousal support: (1) alimony *in futuro*, also known as periodic alimony; (2) alimony *in solido*, also known as lump-sum alimony; (3) rehabilitative alimony; and (4) transitional alimony. Tenn. Code Ann. § 36-5-121(d) (2017); *Mayfield v. Mayfield*, 395 S.W.3d 108, 115 (Tenn. 2012). Transitional alimony, at issue in the case at bar, “is appropriate when a court finds that rehabilitation is not required but that the economically disadvantaged spouse needs financial assistance in adjusting to the economic consequences of the divorce.” See *Gonsewski v. Gonsewski*, 350 S.W.3d [99,] 109 [(Tenn. 2011)] (citing Tenn. Code Ann. § 36-5-121(d)(4), (g)(1); *Riggs v. Riggs*, 250 S.W.3d 453, 456 n.5 (Tenn. Ct. App. 2007)).

Scherzer v. Scherzer, No. M2017-00635-COA-R3-CV, 2018 WL 2371749, at *6 (Tenn. Ct. App. May 24, 2018). Our Supreme Court has further clarified:

Transitional alimony assists the disadvantaged spouse with the “transition to the status of a single person.” [*Gonsewski*, 350 S.W.3d] at 109 (internal quotation marks omitted). Rehabilitative alimony “is designed to increase an economically disadvantaged spouse’s *capacity* for self-sufficiency,” whereas “transitional alimony is designed to aid a spouse who already possesses the capacity for self-sufficiency but needs financial assistance in adjusting to the economic consequences of establishing and maintaining a household without the benefit of the other spouse’s income.” *Id.* Consequently, transitional alimony has been described as a form of short-term “bridge-the-gap” support designed to “smooth the transition of a spouse from married to single life.” *Engesser v. Engesser*, 42 So.3d 249, 251 (Fla. Dist. Ct. App. 2010).

Transitional alimony is payable for a definite period of time and may be modified only if: (1) the parties agree that it may be modified; (2) the court provides for modification in the divorce decree, decree of legal separation, or order of protection; or (3) the recipient spouse resides with a third person following the divorce. Tenn. Code Ann. § 36-5-121(g)(2).

Mayfield v. Mayfield, 395 S.W.3d 108, 115 (Tenn. 2012).

As noted in *Mayfield*, Tennessee Code Annotated § 36-5-121(g)(2) (Supp. 2022) provides the following contingencies that may operate to render transitional alimony modifiable:

(2) Transitional alimony shall be nonmodifiable unless:

- (A) The parties otherwise agree in an agreement incorporated into the initial decree of divorce or legal separation, or order of protection;
- (B) The court otherwise orders in the initial decree of divorce, legal separation or order of protection; or
- (C) The alimony recipient lives with a third person, in which case a rebuttable presumption is raised that:
 - (i) The third person is contributing to the support of the alimony recipient and the alimony recipient does not need the amount of support previously awarded, and the court should suspend all or part of the alimony obligation of the former spouse; or
 - (ii) The third person is receiving support from the alimony recipient and the alimony recipient does not need the amount of alimony previously awarded and the court should suspend all or part of the alimony obligation of the former spouse.

(Emphasis added).

Wife posits that the trial court erred in determining that she was cohabitating with her parents because she owned and stayed in a separate residence. Whether cohabitation is occurring under the applicable alimony statute is a factual determination that we review *de novo* with a presumption of correctness. *See Azbill v. Azbill*, 661 S.W.2d 682, 686-87 (Tenn. Ct. App. 1983).

As the trial court correctly noted, cohabitation need not involve a paramour and “the type of relationship a party has with a cohabiting third person is irrelevant to whether the cohabitation statute applies.” *See Scherzer*, 2018 WL 2371749, at *17; *Hickman v. Hickman*, No. E2013-00940-COA-R3CV, 2014 WL 786506, at *6 (Tenn. Ct. App. Feb. 26, 2014) (“Tennessee courts have consistently held that the ‘lives with a third person’ language applies to any third person, including adult children.”). *See also Woodall v. Woodall*, No. M2003-02046-COA-R3-CV, 2004 WL 2345814, at *4 (Tenn. Ct. App. Oct. 15, 2004) (stating that “the nature of the relationship” between alimony recipient and third person “is irrelevant to the statute”).³ However, “[t]his Court has stated on several

³ As Husband concedes in his appellate brief, cases involving alimony *in futuro* are “highly informative and applicable here” because the alimony *in futuro* statute contains an identical cohabitation provision. *See*

occasions that “the living situation *at the time of trial* must be considered in determining whether the [cohabitation] statute applies.” *Hickman*, 2014 WL 786506, at *4 (quoting *Strait v. Strait*, No. E2005-02382-COA-R3-CV, 2006 WL 3431933 at *5 (Tenn. Ct. App. Nov. 29, 2006)).

In *Woodall*, the wife had been cohabiting with a third party before the alimony termination petition was filed but had resumed living alone by the time of trial. *See Woodall*, 2004 WL 2345814, at *4. In analyzing whether the cohabitation provision of the applicable statute would apply, this Court explained:

We begin by holding that the evidence does not preponderate against the trial court’s finding that [the wife] was not living with Mr. Bishop at the time of the hearing. This finding is important because the situation that existed at the time of trial must be considered in applying the statute. That is because, first, the statute uses the present tense, “In all cases where a person is receiving alimony in futuro and the alimony recipient **lives** with a third person” Tenn. Code Ann. § 36-5-101(a)(3) (emphasis added). Second, even if the presumptions of support and lack of need arise and are un rebutted, the court’s remedy is to “suspend all or part of the alimony obligation,” not terminate the alimony. Tenn. Code Ann. § 36-5-101(a)(3)(A) and (B) (emphasis added). The clear implication is that if the situation justifying suspension ceases to exist, the alimony recipient may seek reinstatement of support from the former spouse. *See Azbill*, 661 S.W.2d at 687 (ordering suspension of alimony payments from the date of the filing of the modification petition “until such time as a change of circumstances warrants reinstatement in whole or in part”). *Id.* at 687.

Thus, a cohabiting alimony recipient whose alimony is suspended in whole or in part on the basis of Tenn. Ann. § 36-5-101(a)(3) could later seek a reinstatement or modification based on changed circumstances, specifically that he or she is no longer living with a third person and is no longer receiving any support from, or contributing support to, that person. We can see no authority for, and no purpose to be served by, requiring a ruling based on past cohabitation and the filing and hearing of a subsequent request for reinstatement when cohabitation ceases before the trial on the original modification petition. The trial court should, as did the court herein, consider the situation that existed at trial.

Id. at *5 (footnote omitted). *See also Akers v. Powers*, No. E2021-01028-COA-R3-CV, 2022 WL 2812896, at *6 (Tenn. Ct. App. Apr. 13, 2022) (determining that the trial court erred by considering that the wife had third parties living in her home in the past when that

Hickman, 2014 WL 786506, at *5.

was no longer the situation at the time of trial); *Wiser*, 2015 WL 1955367, at *5 (“An obligor spouse cannot rely on [the statutory cohabitation provision] to terminate or suspend alimony payments if the alleged cohabitation ceased before the modification petition was tried.”); *Gentry v. Gentry*, No. M2007-00876-COA-R3-CV, 2008 WL 275881, at *5 (Tenn. Ct. App. Jan. 31, 2008) (holding that the trial court erred in applying the cohabitation provision of the applicable statute because “regardless of whether [the wife] had lived with [a third party], and regardless of the length of time, she was living alone in the marital residence long before the petition was filed”).

In the instant action, Wife was the sole witness who testified at trial. Wife acknowledged that she had initially resided with her parents for approximately a month after relocating to New Mexico in 2020. Wife also acknowledged that while living in the adobe house on the Ranch during the following months, Wife had (1) paid her parents’ utility bills; (2) eaten dinner with her parents at the modular home every night; and (3) showered, cooked, and washed her clothes at the modular home. As such, the proof was clear that Wife cohabited with her parents for a time prior to giving her deposition in October 2021.

By the time of trial, however, Wife testified that she had purchased a home located “two minutes” from the Ranch at 81 Round Tree Road. Wife indicated that this residence was fully habitable and included functional plumbing and electricity. According to Wife, she had a contractor examine the adobe house and determined that it could not be renovated in a cost-effective manner. Wife also articulated that in order to have a functional place to live, she had purchased at auction the home located at 81 Round Tree Road approximately four months prior to trial, paying \$147,000 from the proceeds from the sale of her home in Tennessee. Wife estimated that the home was probably worth two to three times the amount of the purchase price. Wife also stated that she no longer paid her parents’ utility bills.

In the trial court’s May 25, 2022 order, the court concluded that Wife “cohabitates with her father and stepmother.” The court’s use of “cohabitates” rather than “cohabitated” indicates an apparent conclusion that Wife was cohabitating with her parents at the time of trial. In its attached findings of fact, however, the trial court found that Wife’s cohabitation was demonstrated as follows:

[Wife] lived in very close proximity to her dad and her stepmother. While she may have spent a lot of time in the adobe structure, she also spent a lot of time in the modular home that they live in. She showered there. She went there from time to time to cook, although she also cooked some at the adobe. She sometimes slept there.

And through a series of transactions, Ms. Davalos became the owner of the property and became owner of that modular home in which her parents

live. They don't pay any rent. They don't pay her anything. I'm not criticizing that. I'm not saying you should charge your parents rent. I'm just saying it's a fact of this case that they don't pay her any rent on the property that she owns.

She gave them a car. She has paid for gas. She has paid for food. She has, to a large degree, begun to support her father and stepmother. Again, I'm not criticizing that in any way. It's fine. It could be admirable to do that.

But Ms. Davalos went there and chose to start supporting her father and chose to assume \$100,000 in legal fees that he owed. And I think that establishes the situation in which she is, again, to some -- to a large degree supporting her dad and her stepmother.

Accordingly, it appears that the trial court only considered Wife's residential circumstances as they existed upon her initial relocation to New Mexico when determining whether cohabitation had occurred. While not directly addressing Wife's testimony regarding her purchase of a separate residence four months before trial in the respective section of its factual findings dealing with cohabitation, the trial court did address such in its later findings regarding Wife's need, stating: "She owns a house worth 3- to \$400,000 that she bought for cash for \$150,000. Again, good thinking. Good deal. But you own that house free and clear." Clearly, the court relied upon this fact and other facts to determine that Wife no longer maintained a need for alimony.

We note, however, that before undertaking an analysis of Wife's ongoing need for spousal support, the trial court was required to determine that Wife was cohabiting with a third party at the time of trial. See *Woodall*, 2004 WL 2345814, at *6 (explaining that because the wife's cohabitation had ended by the time of the trial, the wife's current need was not put at issue and should not have been examined). Although the trial court purported to assess cohabitation at the time of trial in its May 25, 2022 order, the court appeared to disregard Wife's testimony regarding her purchase of a separate residence four months prior to trial when analyzing whether the cohabitation with her parents was ongoing. We reiterate that Wife was the only witness who testified at trial and her testimony concerning her current living situation was unrebutted.

Husband contends that this presents an issue of credibility. We acknowledge that the trial court's determinations regarding witness credibility are entitled to great weight on appeal and shall not be disturbed absent clear and convincing evidence to the contrary. See *Morrison v. Allen*, 338 S.W.3d 417, 426 (Tenn. 2011); *Jones*, 92 S.W.3d at 838. In this case, however, the trial court made no explicit credibility findings concerning Wife's testimony. Moreover, as previously explained, the trial court appeared to accept Wife's testimony concerning the purchase of a separate residence when analyzing her need for ongoing alimony.

We acknowledge that the trial court, as fact finder, must determine whether Wife's purchase of a new residence and purported change in living situation is genuine. As this Court has previously explained:

We are mindful that a modification petition based on cohabitation will often trigger an end to that cohabitation. Faced with a potential loss of support, an alimony recipient could predictably choose to end the situation that jeopardizes that support. Whether the change in residence of the alimony recipient or the third party is genuine and permanent or whether it is a temporary subterfuge is a factual question to be determined by the fact finder. Even where the move is determined to be genuine, however, the paying former spouse may be entitled to some relief, in the form of suspension of all or part of the alimony payments, from the time of the filing of the modification petition until the change in residence. The appropriateness of such relief would, of course, depend on the facts and particularly whether the recipient rebutted the presumption of lack of need during the relevant period.

Evans v. Evans, No. M2002-02947-COA-R3-CV, 2004 WL 1882586, at *5 (Tenn. Ct. App. Aug. 23, 2004).

In this cause, the trial court's findings do not address whether the court found that Wife's change in living situation prior to trial was genuine or a "subterfuge." Although the trial court appeared to credit Wife's testimony concerning the purchase of a new residence when analyzing her lack of need, we are unable to construe the court's lack of discussion of this fact when addressing cohabitation. Ergo, we conclude that the trial court's findings concerning whether Wife was cohabiting at the time of trial are incomplete, necessitating vacation of the court's May 25, 2022 order and remand for additional findings concerning Wife's living situation at the time of trial. We note that if, upon remand, the court determines that Wife cohabited with her parents for a period of time but such cohabitation had ceased by the time of trial, Husband could be entitled to a temporary suspension of all or part of the alimony payments during the period between his petition's filing and the cessation of cohabitation. See *Strait v. Strait*, No. E2005-02382-COA-R3-CV, 2006 WL 3431933, at *7 (Tenn. Ct. App. Nov. 29, 2006).

VI. Attorney's Fees at Trial

Wife argues that the trial court erred by awarding attorney's fees to Husband. In her appellate brief, Wife makes no averment as to the amount of fees awarded and only cites to the trial court's order in support of her claim. However, the court neither mentioned nor awarded attorney's fees in its order; instead, it simply assessed court costs to Wife. In short, nothing in the appellate record suggests that the trial court awarded attorney's fees to Husband. As such, we are unable to review this issue.

Wife further argues that the trial court erred by not awarding attorney's fees to her. Tennessee Code Annotated § 36-5-103(c) (2021) provides:

A prevailing party may recover reasonable attorney's fees, which may be fixed and allowed in the court's discretion, from the nonprevailing party in any criminal or civil contempt action or other proceeding to enforce, alter, change, or modify any decree of alimony, child support, or provision of a permanent parenting plan order, or in any suit or action concerning the adjudication of the custody or change of custody of any children, both upon the original divorce hearing and at any subsequent hearing.

(Emphasis added).

In the case at bar, Husband was the prevailing party at trial. As such, the trial court clearly did not abuse its discretion in failing to award attorney's fees to Wife based upon § 36-5-103(c). However, upon remand, if the trial court reaches a different conclusion concerning the alimony issue, the court has the discretion to also revisit the attorney's fee issue.

VII. Attorney's Fees on Appeal

Finally, both parties contend that they are entitled to attorney's fees incurred with regard to this appeal. We note that the determination of whether to award fees on appeal is within this Court's discretion. *See Dover v. Dover*, No. E2019-01891-COA-R3-CV, 2020 WL 7224368 (Tenn. Ct. App. Dec. 8, 2020) (citing *Archer v. Archer*, 907 S.W.2d 412, 419 (Tenn. Ct. App. 1995)). "When considering a request for attorney's fees on appeal, we also consider the requesting party's ability to pay such fees, the requesting party's success on appeal, whether the requesting party sought the appeal in good faith, and any other equitable factors relevant in a given case." *Id.* (quoting *Chaffin v. Ellis*, 211 S.W.3d 264, 294 (Tenn. Ct. App. 2006)). Exercising our discretion, we decline to award attorney's fees on appeal to either party.

VIII. Conclusion

For the foregoing reasons, we vacate the trial court's order terminating Husband's transitional alimony obligation due to a lack of necessary findings. We remand this matter to the trial court for additional findings concerning Wife's living situation at the time of trial. Upon remand, the trial court may consider whether Husband is entitled to any suspension of his alimony payments if temporary cohabitation is found. The trial court may also consider whether either party is entitled to an award of attorney's fees. Costs on appeal are assessed one-half to Monica A. Davalos and one-half to Douglas C. Dale.

s/Thomas R. Frierson, II

THOMAS R. FRIERSON, II, JUDGE