IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs February 1, 2024

SARAH BERL v. THOMAS BERL

Appeal from the Chancery Court for Williamson County
No. 21CV-50661J Deanna B. Johnson, Judge

No. M2023-00558-COA-R3-CV

This appeal stems from a post-divorce custody modification in which the father sought increased parenting time with his minor daughter, I.B. The trial court agreed with the father that a material change in circumstances had occurred and that a modification of the father's parenting time was warranted. The trial court also awarded the father $15,000.00, or roughly half, of his attorney's fees incurred in the trial court proceedings. The mother appeals the trial court's decision. Because the father was, for the most part, the prevailing party at trial and proceeded in good faith, the trial court did not abuse its discretion in awarding the father a portion of his attorney's fees. We affirm the trial court's ruling as to attorney's fees. However, we vacate the portion of the trial court's final judgment placing a price cap on the minor child's therapy fees. Consequently, the trial court's judgment is affirmed as modified. Finally, we decline to award either party their attorney's fees incurred on appeal.

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

KRISTI M. DAVIS, J., delivered the opinion of the Court, in which W. NEAL MCBRAYER and CARMA DENNIS MCGEE, JJ., joined.

Adam Zanetis, Franklin, Tennessee, for the appellant, Sarah Berl.

C. Diane Crosier and Hannah R. Ellis, Franklin, Tennessee, for the appellee, Thomas Berl.

OPINION

BACKGROUND

Thomas Berl ("Father") and Sarah Wendell[1] ("Mother") were married for approximately twenty-one years before divorcing in 2011 in Norwich, Connecticut. Mother and Father share five children, only one of whom, I.B., is still a minor.[2] Under the original parenting arrangement, Mother had primary residential custody, and Father had two weekends per month with the children, plus some holidays.

In May of 2014, a Lewis County, New York court entered an order allowing Mother to relocate to Tennessee with three of the parties' children. The 2014 order provided Father parenting time the third weekend of every month to be exercised in the Nashville area. The order also provided Father parenting time during the children's spring breaks in odd-numbered years and fall breaks during even-numbered years, as well as two seven-day blocks in the summer of 2014. In future summers, Father would have four weeks of parenting time, and the 2014 order required Father to notify Mother, in writing, by April 15 the days on which Father wanted to exercise his summer parenting time. The parties were ordered to work together to coordinate the children's summer activities. Mother was ordered to pay $200.00 toward flights for the children, unless the flights cost less than $400.00, and then Mother was to pay fifty percent of the cost. Mother was also ordered to pay Father for her share of the travel expenses within thirty days of receipt of the flight confirmations.

Mother relocated to Tennessee in 2014. Then, in 2016, the Lewis County, New York court entered an agreed stipulation adjusting the parties' travel arrangements and amending the 2014 order as relevant: 1) Father would have the children for spring and fall breaks during even-numbered years; 2) I.B. could fly unaccompanied on direct flights, so long as Mother or Father, or a designated family member agreed on by the parties, dropped off and retrieved I.B. at the airport gate; and 3) after the age of fifteen, I.B. could fly on connecting flights unaccompanied.

Father remained in Connecticut and for a period of time, the parties co-parented successfully. Problems arose, however, particularly around Father's spring break and summer parenting time. In late 2017, Mother asked Father if he would allow Mother to take out a life insurance policy on Father for the benefit of the parties' children. Although

[1] This case is captioned as *Berl v. Berl*; however, the record shows that Mother now goes by Sarah Wendell.

[2] The other children are not at issue in this appeal and are mentioned only for context. As is the policy of this Court, we opt to refer to the minor child at issue by initials to protect the child's privacy.

a life insurance policy was already in place per the original divorce decree, Mother did not feel that the policy amount was sufficient for five children. Father declined Mother's request. Then, when I.B. was to travel to Connecticut for her 2018 spring break with Father, Mother claimed that it was not Father's year for spring break with I.B., despite the 2016 stipulation.

After a series of emails, Mother agreed that I.B. would travel to Connecticut for spring break. In an email dated February 27, 2018, Mother agreed to drop I.B. off at the Nashville airport on Friday, March 23, 2018, the day spring break began, for I.B.'s flight. Mother then emailed Father again, approximately five hours later, explaining that she would be unable to drop I.B. off that day and demanding that Father change the flight to another day. On March 18, 2018, Father emailed Mother to remind her to arrange I.B.'s transportation to the airport for her flight on March 23. He stated that he could not change I.B.'s flight without incurring additional fees. In a response email, Mother claimed that she could not take time off of work to take I.B. to the airport:

> You have been working for over two decades. I feel fortunate, at 51 years old, [t]hat after raising 5 children (almost), I have my first salaried position. I do not receive paid time off. So, if I take time off, I don't get paid. My salary range keeps me in the lowest tax bracket. (I haven't filed taxes for two years). One day unpaid has a significant impact on me. Given your poor planning and violation of the divorce agreement, and the huge discrepancy between our incomes, I do not believe a judge would rule that I was in violation of our agreement.
>
> Anything beyond this point, would be a favor to you. This is difficult for me to consider given your refusal to assist me wi[t]h the request I made via email on 11/16/17. If you decide to reconsider your decision and send evidence of your reconsideration, I will be happy to ask my employer permission to take time off and lose pay.

Ultimately, Mother did not take I.B. to the airport on March 23, 2018, resulting in a loss of parenting time for Father, as well as additional costs to change the flight to the next day. It is undisputed that the "favor" to which Mother refers in the above email is Father's refusal to let Mother take out a life insurance policy on Father.

The foregoing is par for the course with Mother and Father. Following spring break of 2018, they experienced substantial difficulty in coordinating I.B.'s travel to Connecticut during breaks from school. On more than one occasion, Father requested that I.B. spend

the entire summer with Father.[3] According to Father, he made this request because he was remarried and thus had child care during the work days, and because by this point several of I.B.'s adult siblings resided with Father while attending college in the northeast. Each time Father requested that I.B. spend the summer with him, Mother declined, and instead informed Father that I.B. would be attending camps during the summers while Mother worked and that Mother would send Father his share of the bills. The following summer, 2019, Father again requested additional time with I.B.; instead, Mother stated that I.B. would attend YMCA camps while Mother worked, and Mother would send Father his share of the associated bills. On a different occasion, Mother sent I.B. to stay with Mother's parents for several weeks in the summer and then sent Father a $3,100.00 bill for child care.

By way of another example, the parties agreed that I.B. would not travel to Connecticut for spring break in 2020 due to the onset of the Covid-19 pandemic. They further agreed that Father would instead have an additional week of summer parenting time, for a total of five weeks. This plan, however, did not come to fruition. Mother would not coordinate with Father to arrange the additional week and instead claimed, in an email dated May 9, 2020, that Mother could not coordinate with Father on the summer dates because she had to first enroll I.B. in summer camps. In the same email, Mother also stated that she needed to make up her lost parenting time when I.B. attended her paternal grandmother's funeral the previous fall.

On August 3, 2021, Father filed a petition to enroll the parties' divorce decree and the subsequent modifications with the Chancery Court for Williamson County (the "trial court"). On November 22, 2021, Father filed a petition for modification of his parenting time in the trial court. As grounds for the petition, Father alleged, *inter alia*, that Mother failed to cooperate with Father in coordinating I.B.'s summer plans; that Mother failed to comply with the parenting plan resulting in a loss of parenting time for Father on numerous occasions; that Mother withheld important information about I.B. from Father; and that Mother moved several times with I.B. without providing notice to Father. Father asked that his parenting time be modified and, along with his petition, filed a proposed parenting plan. As relevant to the issues on appeal, Father's proposed plan provided Father with ninety-six days of parenting time and maintained Father's every third weekend parenting time. It also provided that Father's summer parenting time with I.B. would begin on the Saturday prior to Memorial Day and end on the third Saturday in July each year. Father testified at trial that his primary motivation for the requested modification was to have a set summer schedule for I.B. so that he could schedule vacations and summer plans. Father also requested his reasonable attorney's fees and filed a motion to compel mediation.

[3] The 2014 order provides that both parents shall have "other reasonable parenting time upon reasonable notice and approval for both parties[.]"

Mother answered Father's petition on February 3, 2022, denying the purported grounds for modification asserted by Father. Mother also requested her attorney's fees. Around the same time, Father began attempting to schedule his spring break parenting time for 2022. In an email dated February 8, 2022, Mother wrote to Father regarding I.B.'s spring break:

> I will not be sending [I.B.] for Spring break or Summer break at this point. (1) I cannot afford my portion of the flights (2) [I.B.] says she doesn't want to come. I am so grateful you decided to register our divorce documents in the State of Tennessee, because, as I understand it, [i]n Tennessee, [I.B.] can refuse to spend time with you if she does not want to. And, a Tennessee judge will honor [I.B.'s] decision. At this point, because I have had to hire legal representation, I will have my attorney instruct me as to how to go forward. Certainly, I am under no obligation to you as you are in contempt of our agreement on several points.
>
> I will not be helping you fund flights if [I.B.] refuses to attend vacations in the future. I will no longer require [I.B.] to attend visitation weekends if she does not want to. In fact, for all the money you paid your attorney in Tennessee to start a conflict with me, you could have just paid me the money you owed me. At this point, I am not going to take any action and I will let the attorney[s] do their jobs.

The dispute over 2022 spring break prompted Father to file a motion to compel Mother's compliance with the parties' parenting plan. I.B. ultimately visited Father for spring break in 2022, and Father dismissed his motion. At trial, however, Father testified that hiring a lawyer is the reason he successfully exercised his parenting time for spring break of 2022.

The parties attended mediation on April 6, 2022, but it was unsuccessful. Accordingly, the case proceeded to a final hearing which was eventually set for February 17, 2023. Only a few days before the final hearing, Father filed a new proposed parenting plan. Under Father's amended proposed plan, Father had seventy days of parenting time with I.B., and the proposed summer schedule was as follows: "In 2023, Father shall have [I.B.] from Saturday, June 10, 2023, to Saturday, July 15, 2023. For summer 2024, Father shall have [I.B.] from Saturday, June 8, 2024, to July 13, 2024."[4]

[4] By the time of the final hearing, summer 2023 and summer 2024 were the only remaining years before I.B. would reach the age of majority. Father testified at trial that he filed the amended proposed plan after speaking with I.B. and receiving her input on how she wanted to spend her remaining summers prior to reaching majority.

At the final hearing on February 17, 2023, the trial court heard brief testimony from I.B. and extensive testimony from Mother and Father. I.B. testified that she has good relationships with both parents but that she also desires free time during the summer to work and to see her boyfriend. Father's testimony, in general, was that he wanted the trial court to set a firm schedule for the summer given the parties' difficulty in coordinating Father's parenting time and the associated travel. Father testified that the problems with Mother made it difficult for Father to book vacations and that I.B. missed family trips in the past. Mother testified that she regretted some of her actions but that Father could be difficult to deal with as well. For example, Father conceded at trial that he did not always pay Mother on time for some of I.B.'s out-of-pocket medical expenses.

The trial court ruled orally at the end of the final hearing, concluding that Father proved a material change in circumstances warranting a modification to his parenting time. Primarily, the trial court based its decision on the fact that the parties simply could not agree on parenting time for Father. In pertinent part, the trial court's final order provides:

> The Court finds that [I.B.] is nine (9) years older than she was when the prior Order was entered in 2014, and her needs have changed. Things have also changed for the parents' living conditions. Mother has moved eight (8) times since moving to Tennessee in 2014 and Father is remarried with two (2) step-daughters. The parties' adult daughter, Judah, also lives with Father.
>
> Additionally, there have been several failures to adhere to the current parenting plan. First, Mother has failed to adhere to the provisions of the existing parenting plan in terms of not notifying Father of her change of address. In fact, Mother admitted that she failed to notify Father pursuant to the existing plan on four (4) occasions.
>
> Second, the Order entered May 2014 provides that there shall be such other reasonable parenting time upon reasonable notice and approval for both parties. Father has requested additional reasonable parenting time pursuant to the 2014 Order and Mother denied Father's requests for no good reason and purely out of spite.
>
> Third, Father missed a day of Spring Break in 2018 and the Court finds that Mother failed to ensure [I.B.] made her flight on March 23, 2018, for spiteful reasons. Father agreed to forego exercising his time for Spring Break 2020 during spring break due to Covid concerns and Mother agreed that Father could make up his time for Spring Break 2020 with an extra week that summer. Despite this agreement, Mother did not allow Father to make up the time he missed for Spring Break 2020 during the summer of 2020.

> Fourth, Mother has failed to reimburse Father for her portion of [I.B.'s] travel costs in the timeframe required under the current parenting plan. The current plan requires Mother to pay Father her contribution of travel costs within thirty (30) days of receipt of confirmation that [I.B.] has made the flight(s) and of varication [*sic*] of the costs. On average, Mother has reimbursed Father 161 days after confirmation of flight(s) being made and costs verified.
>
> Fifth, the Order of 2014 prohibits the parties from disparaging one another, but Mother has admitted to disparaging Father in violation of the Order.
>
> The Court also finds that the parties are unable to engage in a meaningful and amicable co-parenting relationship. Particularly, Mother makes snide remarks, is spiteful and vengeful and the parties cannot cooperate on scheduling Father's summer vacations. And on one occasion at least, [I.B.] missed the family vacation with her father and step-siblings because the parties could not agree on parenting times.

The trial court then applied the best interest factors found at Tennessee Code Annotated section 36-6-106[5] and determined that a modification of the parenting schedule was in I.B.'s best interests. The trial court ordered that "Father shall have five (5) weeks with [I.B.] in 2023 from June 10, 2023, to July 15, 2023. And in 2024, Father will have five (5) weeks with [I.B.] from June 8, 2024, to July 13, 2024." The trial court concluded that Mother should have sixty days from I.B.'s departure from Nashville to reimburse Father for travel expenses.

Although not requested by either party, the trial court also ruled that I.B. would continue seeing her current therapist unless the cost per visit exceeds $75.00; in the event the cost exceeds $75.00, the trial court ordered that "Mother will need to find a counselor in-network." Finally, the trial court awarded Father $15,000.00 in attorney's fees, stating

---

[5] Section 36-6-106(a) provides, in pertinent part, that:

> In a suit for annulment, divorce, separate maintenance, or in any other proceeding requiring the court to make a custody determination regarding a minor child, the determination shall be made on the basis of the best interest of the child. In taking into account the child's best interest, the court shall order a custody arrangement that permits both parents to enjoy the maximum participation possible in the life of the child consistent with the factors set out in this subsection (a), the location of the residences of the parents, the child's need for stability and all other relevant factors.

The statute goes on to provide a list of non-exclusive relevant factors.

that "Father shall have a judgment against Mother for this amount upon which execution may issue."

Mother timely appealed to this Court.

ISSUES

Mother raises the following issues on appeal, which we restate slightly:

I. Did the trial court err in its assessment of attorney's fees?

II. Did the trial court err in adding a limitation to therapy costs for I.B.?

III. Is Mother entitled to her reasonable attorney's fees and costs incurred in litigating this appeal?

Father responds to Mother's issues and, in his posture as appellee, asserts that he is entitled to his attorney's fees incurred on appeal. Alternatively, Father argues that the parties should be responsible for their own appellate attorney's fees.

DISCUSSION

On appeal, Mother does not challenge the trial court's substantive decision regarding the parenting time modification. Rather, Mother primarily takes issue with the trial court's assessment of attorney's fees.

> 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.

Tenn. Code Ann. § 36-5-103(c).

> This Court has held that "[i]n cases involving the custody and support of children, . . . it has long been the rule in this State that counsel fees incurred on behalf of minors may be recovered when shown to be reasonable and appropriate." *Deas v. Deas*, 774 S.W.2d 167, 169 (Tenn. 1989). Although "[t]here is no absolute right to such fees, . . . their award in custody and support proceedings is familiar and almost commonplace." *Id.* at 170.

Taylor v. Fezell, 158 S.W.3d 352, 360 (Tenn. 2005); *see also St. John-Parker v. Parker*, 638 S.W.3d 624, 638 (Tenn. Ct. App. 2020) (collecting cases demonstrating that "section 36-5-103(c) has been broadly interpreted in many ways"); *Dale v. Dale*, No. M2018-01999-COA-R3-CV, 2019 WL 7116204, at *2 (Tenn. Ct. App. Dec. 20, 2019) ("This provision has been construed broadly to permit the award of attorney fees in corollary matters, such as actions to modify visitation rights." (citing *Coleman v. Coleman*, No. W2011-00585-COA-R3-CV, 2015 WL 479830, at *11 (Tenn. Ct. App. Feb. 4, 2015))).

An award of attorney's fees to the prevailing party under section 36-5-103(c) is within the trial court's discretion. *Strickland v. Strickland*, 644 S.W.3d 620, 635 (Tenn. Ct. App. 2021) (citing *Eberbach v. Eberbach*, 535 S.W.3d 467, 475 (Tenn. 2017)). This Court "will not overturn the trial court's decision absent an abuse of discretion." *Id.* "A trial court abuses its discretion when it applies an incorrect legal standard, reaches an illogical conclusion, bases its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party." *Standley v. Standley*, No. M2021-00591-COA-R3-CV, 2022 WL 1448226, at *4 (Tenn. Ct. App. May 9, 2022) (citing *Wright ex rel. Wright v. Wright*, 337 S.W.3d 166, 176 (Tenn. 2011)). Factors to consider include the parties' financial circumstances, status as prevailing party, and the requesting party's good faith. *Dale*, 2019 WL 7116204, at *3 (citing *Fichtel v. Fichtel*, No. M2018-01634-COA-R3-CV, 2019 WL 3027010, at *26 (Tenn. Ct. App. July 10, 2019); *Shofner v. Shofner*, 181 S.W.3d 703, 719 (Tenn. Ct. App. 2004)). While proof of inability to pay may be considered, "such consideration will not be controlling." *Taylor*, 158 S.W.3d at 360 (citing *Sherrod v. Wix*, 849 S.W.2d 780, 785 (Tenn. Ct. App. 1992)).

Here, Mother challenges the assessment of attorney's fees on several bases. First, she emphasizes that Father was not the prevailing party in every respect. Mother argues that Father was only awarded one additional week of parenting time when his "original request for relief included a request for three or four additional weeks of summer parenting time each summer[.]" Mother also points out that the trial court gave Mother additional time to pay her portion of I.B.'s travel fees, as Mother originally had thirty days to pay such fees and now has sixty days.

Nonetheless, the fact that the trial court's order was favorable to Mother in some respects does not mean that an award of attorney's fees to Father is foreclosed. *Standley*, 2022 WL 1448226, at *5. The heart of the issue in this case is Father's desire to have additional summer parenting time with I.B. and to have a set schedule for said parenting time. Indeed, the vast majority of the proof at trial dealt with the parties' failed attempts to coordinate I.B.'s spring break and summer plans with Father. The trial court granted Father that relief. Not only did the trial court grant Father the primary relief sought, but it deemed Mother's testimony not credible as to several points. The trial court also called Mother's behavior, at different points in the ruling, "egregious[,]" "spiteful and

vengeful[,]" and "not good parenting and not good for the minor child." The record supports these findings, and they are relevant to Father's status as the prevailing party.[6] *See Standley*, 2022 WL 1448226, at *5 (affirming award of attorney's fees to father where mother's bad behavior "precipitated [the f]ather's petition to modify custody, and [the m]other's subsequent refusal to consent to the parties' previous agreement delayed the resolution of the custody matter"). In any event, "[a] party need not prevail on every issue in order to be considered the prevailing party for purposes of attorney fees." *Stancil v. Stancil*, No. M2017-01485-COA-R3-CV, 2018 WL 1733452, at *3 (Tenn. Ct. App. Apr. 10, 2018) (citing *Wiser v. Wiser*, No. M2013-02510-COA-R3-CV, 2015 WL 1955367, at *10 (Tenn. Ct. App. Apr. 30, 2015)).

Mother also argues that "it does not appear that the trial court considered the parties' incomes or the Mother's ability to pay Father the sum of $15,000.00 for attorney fees." Mother further argues that the trial court "failed to consider that Mother would still exercise the vast majority of overall parenting time, that Mother would still be responsible for the needs and expenses of I.B. for the vast majority of the time, and that Mother would be responsible for those needs and expenses on a limited income." This dovetails with another argument Mother makes in her appellate brief, which is that the trial court's findings are insufficient to determine whether the award was reasonable.

We disagree. The trial court's order is sufficient and demonstrates that it adequately considered the parties' incomes. In its oral ruling, which is attached to and incorporated in its entirety into the final judgment, the trial court points out both parties' annual income as well as their incurred attorney's fees.[7] This is similar to the situation we faced in *Standley*, in which the mother argued on appeal that the trial court did not appropriately weigh the parties' ability to pay before awarding the father his attorney's fees. 2022 WL 1448226, at *5. This Court affirmed the trial court's ruling:

> [I]n its February 24, 2020 order on [the f]ather's attorney's fees, the trial court discussed the parties' respective incomes. Thus, at the time it awarded

[6] This is not to say that Father's behavior is entirely without issue. As stated already, Father admitted at trial that he has not always paid Mother in a timely manner for some of I.B.'s out-of-pocket medical expenses. The record also shows that in November of 2020, an emergency situation involving I.B. arose, and Mother attempted to call Father regarding that situation. Father was on vacation at the time and refused to take Mother's calls. Mother maintained at trial that while her emails tend to paint her in a poor light, Father has treated Mother poorly in the past, both over the phone and in person. While we are not at liberty to dispense with the trial court's credibility findings about the parties, we acknowledge that Father plays his own role in the parties' difficulties.

[7] The trial court found that Father makes about $249,000.00 per year while Mother makes about $60,000.00. Neither party disputes this finding on appeal. Mother also testified that Father pays her $750.00 in child support on a biweekly basis.

> [the f]ather's attorney's fees, it appears that the trial court not only was aware of each parties' income, but that it also considered income in reaching its decision. Regardless, [the f]ather's ability to pay—or [the m]other's inability to pay—his attorney's fees is not the controlling question here. *See Taylor v. Fezell*, 158 S.W.3d 352, 360 (Tenn. 2005) (citing *Sherrod v. Wix*, 849 S.W.2d 780, 785 (Tenn. Ct. App. 1992)). Because attorney's fee awards in child custody proceedings "are not primarily for the benefit of the custodial parent but rather to facilitate a *child's* access to the courts," *Sherrod*, 849 S.W.2d at 784 (citing *Graham v. Graham*, 204 S.W. 987, 989 (Tenn. 1918)) (emphasis added), when a trial court awards attorney's fees under section 36-5-103(c), it "*may* consider proof of inability to pay, but such consideration will not be controlling." *Taylor*, 158 S.W.3d at 360 (citing *Sherrod*, 849 S.W.2d at 785) (emphasis added).

Id.

The same result applies to the present case. It is clear from the record that the trial court properly considered the parties' ability to pay both by discussing their incomes and the amount of attorney's fees they each incurred, and then by awarding Father approximately half of the attorney's fees he incurred in the proceeding. Father's fees totaled $28,659.75 by the time of trial; yet, the trial court ordered Mother to pay only $15,000.00 of those fees. Consequently, the record shows that the trial court considered Mother's financial situation in making the award. Mother essentially argues that the parties' ability to pay should have been the weightiest factor in the trial court's analysis because Mother makes much less money than Father. Nonetheless, Mother's ability to pay is not controlling. *Id.*

Rather, when awarding attorney's fees pursuant to section 36-5-103(c), courts may consider other factors such as status as prevailing party and good or bad faith. *See Dale*, 2019 WL 7116204, at *3. Here, the factors other than ability to pay militate heavily against Mother. Moreover, "attorney's fee awards in child custody proceedings 'are not primarily for the benefit of the custodial parent but rather to facilitate a *child's* access to the courts. . . .'" *Standley*, 2022 WL 1448226, at *5 (quoting *Sherrod*, 849 S.W.2d at 784). The record in this case establishes that I.B. was missing her already limited time with Father due in large part to Mother's inability to co-parent.

In sum, the trial court considered the correct factors in its decision, and the ruling falls within "the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence found in the record." *Eldridge v. Eldridge*, 42 S.W.3d 82, 88 (Tenn. 2001) (citing *State ex. rel Vaughn v. Kaatrude*, 21 S.W.3d 244, 248 (Tenn. Ct. App. 2000)). Thus, we discern no abuse of discretion by the trial court.

Next, Mother argues that the trial court erred in placing a $75.00 cap on I.B.'s therapy fees. To reiterate, the trial court held that if the cost of I.B.'s therapy exceeds $75.00 per session, I.B. will have to see a different, in-network provider. The record shows that the parties have previously disagreed about the cost of I.B.'s sessions because the therapist Mother selected is not an in-network provider under I.B.'s health insurance. Father took issue with that decision in the past and, at one time, insisted that Mother find an in-network provider for I.B.

However, on appeal, Mother argues that the trial court erred in imposing the $75.00 cap because it was not part of the relief sought by Father. Mother is correct. With regard to out-of-pocket medical costs, the operative proposed parenting plan Father filed shortly before trial provides that the Connecticut court maintains jurisdiction over issues involving child support and health insurance. Moreover, Father testified at trial that he was happy with I.B.'s therapist and would not want I.B. to change at this point, as she is also very happy with her current therapist. Although Father explained that he originally wanted Mother to find an in-network therapist, he ultimately testified that "[the therapist] is doing good work with that young lady and I'll support it." Father also concedes in his appellate brief that he did not ask for a cap on the therapy sessions.

Under these particular circumstances, we deem it prudent to vacate the trial court's ruling as to the cap on I.B.'s therapy sessions. Neither party sought this relief before the trial court, and Father's own petition for modification provided that this issue is controlled by the Connecticut court. In light of both parties' testimony that I.B. is working well with her current therapist, and Father's testimony that he is now supportive and will continue to help pay for the therapist, this portion of the trial court's ruling is vacated.

Finally, both parties claim that they are entitled to their appellate attorney's fees pursuant to Tennessee Code Annotated section 36-5-103(c). "In addition to applying to fees at trial, Tenn. Code Ann. § 36-5-103(c) also applies to attorney fees incurred on appeal." *Strickland*, 644 S.W.3d at 635–36 (citing *Paschedag v. Paschedag*, No. M2016-00864-COA-R3-CV, 2017 WL 2365014, at *5 (Tenn. Ct. App. May 31, 2017)). Whether to award appellate attorney's fees is in our discretion, and we, like the trial court, consider various factors including the parties' economic circumstances and the prevailing party. *See id.* (awarding the wife her appellate attorney's fees where her approximate monthly income was $3,831.00 and the husband's approximate monthly income was $24,500.00).

Here, we exercise our discretion in declining to award either party their attorney's fees. While Father has prevailed on the substantial issues in this case, both at trial and on appeal, Mother prevailed on the issue as to therapy costs. Father also testified at trial that he can afford his own attorney's fees, and Mother has less annual income than Father. Mother is also responsible for a portion of Father's attorney's fees incurred below. Under

the circumstances, we conclude that Mother and Father must each pay their own respective attorney's fees incurred on appeal.

In sum, we affirm the trial court's award of $15,000.00 in attorney's fees to Father. We vacate the $75.00 cap on I.B.'s therapy sessions, and otherwise affirm as modified the trial court's ruling. Mother and Father are each responsible for their own respective attorney's fees incurred in this appeal.

CONCLUSION

The judgment of the Chancery Court for Williamson County is affirmed as modified, and the case is remanded to the trial court for further proceedings consistent with this opinion. Costs on appeal are taxed one-half to the appellant, Sarah Wendell, and one-half to the appellee, Thomas Berl, for which execution may issue if necessary.

_____

KRISTI M. DAVIS, JUDGE