IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs June 9, 2014, and September 2, 2014

CHRISTINA JUNE QUINN v. SCOTT ALLEN DIEHL

Appeal from the Circuit Court for Wilson County
No. 2012CV302 Clara W. Byrd, Judge and Don R. Ash, Judge

Nos. M2013-00326-COA-R3-CV and - Filed October 31, 2014
M2014-00536-COA-R3-CV - Filed October 31, 2014

Mother and Father were divorced in 2009 and Mother was named the primary residential parent of their two children. Father later filed a petition to modify the parenting plan, and the court changed the primary residential parent designation to Father. Mother filed one petition to modify in 2012 and another petition in 2014 in an effort to become the primary residential parent again. The court entered orders denying each petition, and Mother appealed both orders. We affirm the trial court's judgments in all respects.

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

ANDY D. BENNETT, J., delivered the opinion of the court, in which RICHARD H. DINKINS, and W. NEAL MCBRAYER, JJ., joined.

Christina J. Quinn, Goodlettsville, Tennessee, Pro Se.

No appellee brief filed.

MEMORANDUM OPINION[1]

FACTUAL AND PROCEDURAL BACKGROUND

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[1]Rule 10(b) of the Court of Appeals' Rules provides:

(b) This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

This matter presents the appellate court with a confusing record. There are no transcripts of important hearings. There is a poor statement of evidence that was apparently intended by the trial court to cover two hearings approximately a year apart. The appellant's briefs fail to meet the requirements of the appellate rules and are difficult to comprehend, and there are no briefs from the appellee. These inadequacies create a witch's brew for appellate disaster and judicial headaches.

Christina June Quinn ("Mother") and Scott Allen Diehl ("Father") married in July 1995. Their son was born in 1996, and their daughter was born in 2000. In September 2009, they obtained a divorce based upon irreconcilable differences. The parties' permanent parenting plan provided that Mother would be the primary residential parent and Father would have parenting time for 120 days a year.

Father filed a petition to modify the parenting plan in February 2010. He alleged that Mother had made false accusations of child abuse against him, that the children were unhappy and were having problems at school, and that Mother's cousin was living with Mother and had hit one of the children. Father requested that he be made the primary residential parent or, in the alternative, that he be given additional parenting time.

In an order issued on May 19, 2011, the court found a material change of circumstances had occurred since the initial parenting plan was entered and that it was in the children's best interest to change the primary residential parent from Mother to Father. The court noted the following in its order:

> This court as attorney and judge has tried many divorce and post divorce parenting cases. This is the first time that the court has been presented with two children desiring to testify and tell the court his/her preference. These children provided the reason for his/her preference was that he/she did not feel safe with the mother and did feel safe with the father. One might expect such testimony if the father had been the primary residential parent, but he was not.

On June 7, 2012, Mother filed a petition seeking emergency and permanent custody of the children. Mother alleged the atmosphere at the home of Father and his then-wife was stressful for the children and that both Father and the children's step-mother made disparaging comments to the children about Mother. Mother also opposed a pending relocation by Father to North Carolina. Mother asserted the move was vindictive and had no reasonable purpose. The parties agreed Mother would have temporary custody of the children pending Father's relocation but that Father would remain the primary residential parent as provided in the parenting plan. The trial court entered an agreed order to this effect

on June 22, 2012.

The trial court then held a hearing on Mother's petition in January 2013. By order entered January 8, 2013, the court dismissed Mother's petition after finding Mother did not prove a material change of circumstances had occurred since the entry of the current parenting plan naming Father the primary residential parent. The court approved Father's relocation with the children to North Carolina, finding the move had a reasonable purpose. The court also approved a new parenting plan that Father proposed based on Father's relocation. The new parenting plan awarded Father 267 days with the children and awarded Mother 98 days with the children.

Mother filed a notice of appeal with respect to the trial court's order dated January 8, 2013. While the case was on appeal, Mother filed another petition in the trial court to modify the parenting plan. In this petition, which was filed on August 20, 2013, Mother alleged that Father and his wife were physically and verbally abusive towards both the son and the daughter and that this abuse constituted a material change of circumstances. By the time Mother filed this petition, the parties' son had moved out of Father's house and was residing with Mother in Tennessee. Mother asserted in her petition that it was not in the children's best interest to separate them. Mother then filed a petition for contempt on December 20, 2013, based on Father's alleged failure to comply with the terms of the parenting plan then in effect. Mother alleged Father was interfering with her telephonic communication with the children and with her visitation rights. Mother also filed a motion for default judgment on the basis that Father had not filed a response to Mother's petition to modify the parenting plan filed on August 20, 2013.

The trial court held a hearing on January 21, 2014, and issued an order on February 7. The trial court first ruled that changing the son's residence from Father to Mother constituted a material change of circumstances. The court then determined that it was in the son's best interest to change his primary residential parent to Mother but that it was in the daughter's best interest for Father to remain her primary residential parent. The court denied Mother's motion for contempt and her motion for default judgment. On March 6, 2014, Mother filed a notice of appeal with respect to the trial court's order dated February 7, 2014.

ANALYSIS

Our review of the trial court's judgments is de novo upon the record, accompanied by a presumption of correctness of the trial court's findings of fact, unless the preponderance of the evidence is otherwise. TENN. R. APP. P. 13(d); *Armbrister v. Armbrister*, 414 S.W.3d 685, 692 (Tenn. 2013); *Rigsby v. Edmonds*, 395 S.W.3d 728, 734 (Tenn. Ct. App. 2012). We review a trial court's conclusions of law de novo, according them no presumption of

correctness. *Armbrister*, 414 S.W.3d at 692; *Rigsby*, 395 S.W.3d at 734. A trial court's determinations of whether a material change of circumstances has occurred and where the best interest of a child lie are factual issues. *Armbrister*, 414 S.W.3d at 692-93; *In re T.C.D.*, 261 S.W.3d 734, 742 (Tenn. Ct. App. 2007). Appellate courts must, therefore, presume a trial court's factual findings on these matters are correct and not overturn them unless the evidence preponderates to the contrary. *Armbrister*, 414 S.W.3d at 693.

As our Supreme Court has explained,

> Because decisions regarding parenting arrangements are factually driven and require careful consideration of numerous factors, *Holloway v. Bradley*, 230 S.W.2d 1003, 1006 (1950); *Brumit v. Brumit*, 948 S.W.2d 739, 740 (Tenn. Ct. App. 1997), trial judges, who have the opportunity to observe the witnesses and make credibility determinations, are better positioned to evaluate the facts than appellate judges. *Massey-Holt v. Holt*, 255 S.W.3d 603, 607 (Tenn. Ct. App. 2007).

Id.

Mother has filed two different notices of appeal, which we have consolidated. The two final orders that Mother appeals were issued in response to two different petitions Mother filed seeking to modify the parenting plan to change the primary residential parent designation from Father to Mother. Mother filed the first petition at issue in June 2012, which resulted in the trial court's order dated January 8, 2013 ("2013 Order"). Before we had an opportunity to address Mother's appeal of this order, however, Mother filed another petition in August 2013, which resulted in the trial court's order dated February 7, 2014, which was amended on March 7, 2014 ("2014 Order").

MOTHER'S APPEAL OF THE 2013 ORDER

In the petition she filed in June 2012, Mother alleged that "due to the actions and treatment of the Father towards the children that permanent and irreparable harm will come to the children if custody is not immediately given to her." The "actions" and "treatment" Mother cited related to negative comments Father and his wife allegedly made about Mother that caused stress to the children. Mother also contested Father's move to North Carolina with the children, asserting the relocation did not have a reasonable purpose. Mother asserted that both the negative comments and the relocation constituted material changes of circumstances. Mother also alleged that the purpose of Father's move was to interfere with her relationship with the children. Mother contended that it was in the children's best interest to change the primary residential parent from Father to Mother.

The record does not contain a transcript of the hearing on Mother's petition filed in June 2012. As a party who is representing herself, "Mother is entitled to fair and equal treatment but 'is not excused from complying with the applicable substantive and procedural law' imposed on litigants that are represented by counsel.'" *Chandler v. Chandler*, No. W2010-01503-COA-R3-CV, 2012 WL 2393698, at *6 (Tenn. Ct. App. June 26, 2012) (quoting *Britt v. Chambers*, No. W2006-00062-COA-R3-CV, 2007 WL 177902, at *3 (Tenn. Ct. App. Jan. 25, 2007)). The Court of Appeals has explained that the parties are responsible for providing a record for the Court to review on appeal:

> "The duty to see to it that the record on appeal contains a fair, accurate, and complete account of what transpired with respect to the issues being raised on appeal falls squarely on the shoulders of the parties themselves, not the courts." *Trusty v. Robinson*, No. M2000-01590-COA-R3-CV, 2001 WL 96043, at *1 (Tenn. Ct. App. Feb. 6, 2001) (citing Tenn. R. App. P. 24(b); *State v. Ballard*, 855 S.W.2d 557, 560-61 (Tenn. 1993); *Realty Shop, Inc. v. RR Westminister Holding, Inc.*, 7 S.W.3d 581, 607 (Tenn. Ct. App. 1999); *Nickas v. Capadalis*, 954 S.W.2d 735, 742 (Tenn. Ct. App. 1997)).

Chandler, 2012 WL 2393698, at *6.

Mother initially prepared a statement of the evidence to which Father objected. Father then proposed a statement of the evidence, which the trial court adopted after making certain changes. *See* TENN. R. APP. P. 24(c), (e). The statement of the evidence that the trial court approved included the following relevant portions:

> Upon questioning by the Mother, the daughter stated that she did want to live with her mother because she didn't want to start over again. She stated that she didn't want to have to change schools again. She also stated that if she moved to North Carolina with her dad she would be excited about being closer to the beach. She testified that the Father and his wife did yell and cuss at times. She testified that she gets along with her stepmom, stepsister, and stepbrother. . . . Mother . . . had [a picture] of the mother and their cousin helping [the daughter] with her science project. It is disputed whether [the daughter] testified that her dad and step-mother didn't have the time or money to help her do it. . . . [The daughter] testified that Mother's cousin, Mr. Townes, the Mother's cousin with whom the Mother lives, was at the VA hospital for an appointment and that's why he wasn't there for court. She also testified that since he has been going to the doctor, Mr. Townes has gotten medicine to control his temper. [The daughter] testified that the mother was looking for a home with more land to move to but that the mother said the

children would stay at the same school. It is disputed whether [the daughter] also testified that the step-mother was cheating on her father and that this was told to her by her father and step-sister. It is further disputed that she testified that if her father and step-mother divorced she did not want to have to live alone with her father, that it would be creepy.

The second witness called by the Mother was the Father, SCOTT A. DIEHL. He testified that he had moved to North Carolina because of a job transfer and also to be closer to his parents, who were in Maryland. Father testified that he had not let the mother talk to the children on the phone for over a year due to problems with having a phone number that he could use. He testified that Chris Townes had forbidden him on more than one occasion to call the cellular phone number that was his, and that he did not have a different phone number for the Mother on which to call. The Father also admitted to sending derogatory texts to the Mother and calling her names that were read to the court. . . . He testified that he had taken the son to the doctor for cutting himself. The Father testified, over the Mother's objection, that he knew the son did not want to move to North Carolina, and said it was because of the son's girlfriend. He testified that the son had been in trouble in school (Mt. Juliet High School) and had been on probation. When asked about taking the children to the doctor, the Father testified that he had not taken the children to the dentist or eye doctor while with him. When asked about going to the doctor he then said that he had a few times for small things. . . . Father testified that he doesn't return home from work until 9 or 10 p.m.

The next witness called by the Mother was MINDY DIEHL, the Father's wife. . . . She . . . testified that she had written in the children's medical records that the Mother was bi-polar without any proof. . . .

The next witness called by the Mother was JAIMIE L. PALMER, who testified to the fact that the Father did not call at his call times on Tuesday and Thursday to speak with the children and that there were some times when the Mother would have the kids call him and he wouldn't answer the phone and that these events took place in her front yard.

The last witness called by the Mother was herself, CHRISTINA JUNE QUINN. She testified that there was an on-going DCS investigation against the Diehl's and asked the judge to read TCA code 36-6-112. . . . The Mother tried to explain what had happened in the last court about the Father telling lies and that he had turned in Dr. reports saying he was there when he wasn't. . .

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At the close of the Mother's proof, Father's counsel orally moved that the Mother's Petition for a change of custody be dismissed pursuant to Tenn. R. Civ. P. 41.02, as the Mother had not proven a material change of circumstances which warranted a change of custody in the best interest of the children. She asked that the parenting plan they submitted be approved by the court, and also that Mr. Chris Townes, who is the Mother's cousin who lives with her, be deemed a missing witness and that the court draw a negative inference that his testimony would not have been favorable to the Mother, the Father having tried on numerous occasions to have him served with a subpoena for his appearance. The Court agreed and deemed Mr. Townes to be a "missing witness" and drew a negative inference by his failure to appear.

Regarding the mother's Petition in Opposition [to Father's moving to North Carolina], the Court specifically found that the mother had not met her burden of proof. By applying TCA 36-6-108(d)(1), the Court found that the father's relocation had a reasonable purpose; that there was no proof that the father's relocation would pose a threat of specific and serious harm to the children that outweighs the threat of harm to the children of a change of custody; and that the father's motive for relocation was not vindictive, and it was not intended to defeat or deter visitation rights of the mother.

The Judge asked the Father's counsel to draw the Order by the next day and that the Father should have the children enrolled in school in North Carolina by the end of the week.

In the 2013 Order dismissing Mother's petition, the trial court wrote the following:

IT IS . . . ORDERED that the Mother's Petition for Emergency and Permanent Custody is dismissed upon the oral motion of Father's counsel for involuntary dismissal after the Mother's proof pursuant to Rule 41.02, Tenn. R. Civ. P. The Court specifically finds that, after hearing the Mother's proof, she has not met her burden of proof concerning Count I of her Petition, which contains her request for emergency and permanent custody. The Mother has not proven that there has been a material change in circumstances since the entry of the last Order in this cause, as required by Tenn. Code Ann. § 36-6-101. The Court further specifically finds that the Mother has not met her burden of proof concerning Count II of her Petition, which contains her petition in opposition to the Father's relocation to North Carolina with the two

> minor children of this marriage. Applying Tenn. Code Ann. § 36-6-108(d)(1), the Court finds that the Father's relocation has a reasonable purpose; that there is no proof that the Father's relocation would pose a threat of specific and serious harm to the children that outweighs the threat of harm to the children of a change of custody; and that the Father's motive for relocation is not vindictive, and it is not intended to defeat or deter visitation rights of the Mother.

In her appeal of the 2013 Order, Mother asserts the trial court erred in allowing Father to relocate with the children to North Carolina. She also contends that Father's move to North Carolina constituted a material change of circumstances justifying a change in the children's primary residential parent from Father to her.

We will first address the trial court's decision permitting Father to relocate to North Carolina. A parent who spends a greater amount of time with his children "shall be permitted to relocate" with the children unless a court finds (a) the relocation does not have a reasonable purpose; (b) the relocation would pose a threat of specific and serious harm to the children that outweighs the threat of harm from a change of custody; or (c) the parent's motive for relocating with the children is vindictive. Tenn. Code Ann. § 36-1-108(d)(1). According to the statement of evidence, Father testified he moved to North Carolina because of a job transfer and to be closer to his parents. The trial court specifically determined that Father's relocation had a reasonable purpose; that there was no proof the move would pose a threat of specific and serious harm to the children that outweighed the threat of harm to the children of a change of custody; and that the move was not motivated by vindictiveness. Mother has not shown that the evidence preponderated against the trial court's findings, as she must to establish that the trial court erred in approving Father's request to relocate with the children. Thus, we affirm the trial court's approval of Father's relocation to North Carolina with the children.

Mother next argues the trial court erred in ruling that Mother had failed to prove a material change of circumstances had occurred justifying a change in the primary residential parent. Modification of a court's prior order with regard to which parent is designated the primary residential parent is governed by statute:

> If the issue before the court is a modification of the court's prior decree pertaining to custody, the petitioner must prove by a preponderance of the evidence a material change in circumstance. A material change of circumstance does not require a showing of a substantial risk of harm to the child. A material change of circumstance may include, but is not limited to, failures to adhere to the parenting plan or an order of custody and visitation or

> circumstances that make the parenting plan no longer in the best interest of the child.

Tenn. Code Ann. § 36-6-101(a)(2)(B).

A petition to change a child's primary residential parent requires the court to conduct a two-step analysis. "The threshold question is whether a material change in circumstances has occurred since the entry of the prior [custody] order." *Boyer v. Heimermann*, 238 S.W.3d 249, 259 (Tenn. Ct. App. 2007). Only if the court finds a material change in circumstances does it proceed to consider whether changing custody is in the child's best interest. *Id*.

The Supreme Court has explained that there are no definitive rules in determining whether a material change in circumstances has occurred when considering a petition to change the primary residential parent designation:

> Although there are no bright-line rules for determining when such a change has occurred, there are several relevant considerations: (1) whether a change has occurred after the entry of the order sought to be modified; (2) whether a change was not known or reasonably anticipated when the order was entered; and (3) whether a change is one that affects the child's well-being in a meaningful way.

Cranston v. Combs, 106 S.W.3d 641, 644 (Tenn. 2003) (citing *Kendrick v. Shoemake*, 90 S.W.3d 566, 570 (Tenn. 2002)); *see Boyer*, 238 S.W.3d at 255-257 (discussing evolution of the standard for finding a material change in circumstances).[2]

Mother contends that Father's move to North Carolina constituted a material change of circumstances and that it was in the children's best interest to modify the primary parent designation from Father to her. Although Father's move occurred after the entry of the order designating him as the primary residential parent and may not have been reasonably anticipated when Father was named the primary residential parent, Mother fails to establish

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[2]In *Armbrister v. Armbrister*, 414 S.W.3d 685 (Tenn. 2013), the Supreme Court addressed the difference in proof required to show a material change of circumstances for purposes of modifying a prior decree pertaining to the primary parent designation (Tenn. Code Ann. § 36-1-101(a)(2)(B)) as opposed to modifying a prior decree pertaining to a residential parenting schedule (Tenn. Code Ann. § 36-6-101(a)(2)(C)). The *Armbrister* Court explained that the General Assembly made a policy decision to make it easier to establish a material change of circumstances for purposes of modifying the residential parenting schedule. Thus, a party seeking to modify a *residential schedule* need no longer establish an alleged change in circumstances was not known or reasonably anticipated when the prior *residential schedule* was put into place. *Armbrister*, 414 S.W.3d at 701-04.

that the relocation was one that affected the children's well-being in a meaningful way, as she must to establish a material change of circumstances. *See Cranston*, 106 S.W.3d at 644.

Mother also argues Father and his wife made negative statements to the children about Mother, and that these statements constitute a material change of circumstances. In her brief, Mother refers to conduct Father allegedly engaged in and statements he allegedly made that are not supported by the statement of evidence. Mother's brief does not comply with Tenn. R. App. P. 27(a)(6), however, which requires the brief to contain "[a] statement of facts, setting forth the facts relevant to the issues presented for review *with appropriate references to the record*." (Emphasis added.) "'This Court's authority to review a trial court's decision is limited to those issues for which an adequate legal record has been preserved.'" *Reed's Track Hoe & Dozier Serv. v. Dwyer*, No. W2012-00435-COA-R3-CV, 2012 WL 6094127, at *5 (Tenn. Ct. App. Dec. 7, 2012) (quoting *Taylor v. Allstate Ins. Co.*, 158 S.W.3d 929, 931 (Tenn. Ct. App. 2004)). In the absence of a transcript, the statement of evidence that the trial court approved is the only record of evidence we can consider to determine whether the court erred in reaching its judgment dismissing Mother's petition. We cannot consider conduct Mother alleges Father engaged in that is not supported by the statement of evidence.

From our review of the evidence, as set forth in the statement of evidence, we are unable to conclude the evidence preponderated against the trial court's conclusion that Mother failed to prove a material change of circumstances had occurred since Father was named the primary residential parent in May 2011. The statement of evidence does not support Mother's allegation that Father and his wife spoke negatively about Mother to the children, as Mother alleged in her 2012 petition to modify. Without a showing of a material change of circumstances, the trial court had no basis on which to conduct a best interest analysis.[3]

Mother next contends the trial court erred by not transferring the case from Wilson County to Sumner County, where she resided. After Father relocated to North Carolina and neither he nor the children resided in Wilson County, Mother filed a request for intercounty transfer. Mother filed this request on December 27, 2012. The hearing on Mother's petition to modify was scheduled to be heard in the Wilson County court on January 7, 2013. Father filed a notice stating he did not receive Mother's request for intercounty transfer until January 4, 2013, less than 72 hours before Mother's petition was scheduled to be heard.

[3]Mother contends the trial court erred by failing to consider the children's testimony about where they would like to live when it dismissed Mother's petition to name her the primary residential parent. Consideration of a child's stated preference is a factor when conducting a best interest analysis, Tenn. Code Ann. § 36-6-106(a)(13), but it does not come into play when determining whether a material change of circumstances has been established.

Rule § 9.01(a) of the Rules of Practice and Procedure in the Circuit, Chancery, and Criminal Courts for the Fifteenth Judicial District requires that all parties in circuit court schedule their motions to be heard with the judge's secretary and that the motion itself include a notice specifying the date, place, and time that the motion will be heard. Mother's "request" is in the form of a motion, and Mother failed to include in her filing any notice of the date, place, or time that the motion would be heard. In addition, Rule 6.04 of the Rules of Civil Procedure requires that a written motion and notice of the hearing must be served "not later than five (5) days before the time specified for the hearing . . . ." Mother offers no proof that she in fact served Father more than three days in advance of the hearing scheduled for January 7, 2013, which is the time she apparently anticipated a ruling on her request.

It is not clear from the record whether the trial court ever issued an order responding to Mother's request. In light of the fact that Mother failed to comply with either the local rule § 9.01(a) or Rule 6.04 of the Rules of Civil Procedure, however, we find Mother has no cause to complain that the court did not grant her the relief she sought.

MOTHER'S APPEAL OF THE 2014 ORDER

We now turn to the petition to modify the parenting plan that Mother filed in August 2013, while Mother's appeal of the 2013 Order was still pending. In this petition, Mother asserted that the parties' son was living with her and that their daughter was living with Father in North Carolina. Mother alleged the children's step-mother was physically and verbally abusive towards the children and that this abuse constituted a material change of circumstances. Mother asserted that it was in the children's best interest to live under the same roof and that Mother should be named the primary residential parent of both children.

Father did not object to having Mother named the primary residential parent of the parties' son, but he did object to her being named the primary residential parent of their daughter. The trial court held a hearing on January 21, 2014, and issued an order on February 7. The court determined that there had been a material change of circumstances with regard to the parties' son and that it was in the son's best interest that Mother be his primary residential parent. Turning to the parties' daughter, the court found that there had been a material change of circumstances with respect to her because the parties had agreed Mother would be the primary residential parent of her brother. The court then found that it was in the daughter's best interest that Father remain her primary residential parent. As part of its order, the trial court stated that the statement of evidence that it approved from the earlier hearing, in January 2013, should "proceed to the Court of Appeals, [and] shall be submitted as it complies with the oral judgment of this court." The court denied Mother's motion for default and her motion for contempt without explanation.

Mother filed a motion to alter or amend the order, and, in response, the trial court filed an amended order on March 7, 2014. In its amended order, the court addressed each of the statutory factors it considered in conducting its best interest analysis to support its ultimate conclusion that Father should remain the daughter's primary residential parent. *See* Tenn. Code Ann. § 36-6-106(a). The court wrote:

> (1) As to the love, affection and emotional ties existing between the parents or caregivers and the child, the court finds for both parties equally;
>
> (2) As to the disposition of the parents or caregivers to provide the child with food, clothing, medical care, education and other necessary care and the degree to which a parent or caregiver has been the primary caregiver, the court finds the Father has provided more of primary caregiver responsibilities;
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> (3) As to the importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment, the court finds for Father, as daughter has resided with Father for an extended amount of time prior to this hearing;
>
> (4) As to the stability of the family unit of the parents or caregivers, the court finds for both parties equally;
>
> (5) As to the mental and physical health of the parents or caregivers, the court finds for both parties equally;
>
> (6) As to the home, school and community record of the child, the court finds for Father, as daughter has resided with Father for an extended amount of time prior to this hearing and the child has done well in school;
>
> (7) The court did not hear testimony as to the reasonable preference of the child;
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> (8) The court did not hear testimony proving evidence of physical or emotional abuse to the child, to the other parent or to any other person;
>
> (9) As to the character and behavior of any other person who resides in or frequents the home of a parent or caregiver and the person's interactions with the child, the court finds for both parties since they both have third party support;

> (10) Each parent's or caregiver's past and potential for future performance of parenting responsibilities, including the willingness and ability of each of the parents and caregivers to facilitate and encourage a close and continuing parent-child relationship between the child and both of the child's parents, with the best interest of the child, the court finds both parents have equally contributed to the tension in the family unit.

On appeal, Mother argues the trial court erred by denying her petition for modification of the parenting plan, her motion for default, and her motion for contempt.

We turn first to Mother's argument that the trial court erred by refusing to name her the primary residential parent of the parties' daughter. Trial courts have broad discretion in determining which parent should be the primary residential parent, and appellate courts are reluctant to second-guess a trial court's decision on this issue when so much depends on the trial court's assessment of the witnesses' credibility. *Reinagel v. Reinagel*, No. M2009-02416-COA-R3-CV, 2010 WL 2867129, at *4 (Tenn. Ct. App. July 21, 2010); *Scofield v. Scofield*, No. M2006-00350-COA-R3-CV, 2007 WL 624351, at *2 (Tenn. Ct. App. Feb. 28, 2007); *see Thompson v. Thompson*, No. M2011-02438-COA-R3-CV, 2012 WL 5266319, at *5 (Tenn. Ct. App. Oct. 24, 2012) (explaining that "[c]ustody and visitation or parenting plan determinations often hinge on subtle factors, including the parents' demeanor and credibility during the divorce proceedings themselves"). The Court of Appeals will reverse or modify a trial court's decision, however, if it determines the decision is based on an error of law, the evidence preponderates against the finding that there has or has not been a material change of circumstances, or if the child's interests will be best served by a different arrangement. *Steen v. Steen*, 61 S.W.3d 324, 328 (Tenn. Ct. App. 2001); *Placencia v. Placencia*, 3 S.W.3d 497, 499 (Tenn. Ct. App. 1999); *Scofield*, 2007 WL 624351, at *2.

In its amended order, the trial court addressed each of the factors it is directed by the legislature to consider in determining the daughter's best interest. Factor (11) concerns "physical or emotional abuse to the child." Tenn. Code Ann. § 36-6-106(a)(11). Contrary to Mother's assertion that Father and his wife were physically and emotionally abusive toward the children, the court wrote that it "did not hear testimony proving evidence of physical or emotional abuse to the child . . . ." There is nothing in the statement of evidence about physical or emotional abuse. The daughter testified that Father and her stepmother yelled and swore "at times." However, yelling and swearing do not constitute physical abuse, and the statement of evidence does not suggest the yelling and swearing rose to the level of emotional abuse.

The statement of evidence does not indicate that either Mother or Father would be inappropriate as the daughter's primary residential parent. Our role is not to second-guess

the trial court when determining the daughter's best interest, and we do not have sufficient information to alter the court's ultimate determination of the daughter's best interest when we are not able to assess the witnesses' credibility and demeanor.[4] Mother has failed to show that the evidence preponderates against the trial court's determination that it is in the daughter's best interest that Father remain her primary residential parent. Accordingly, we affirm the trial court's judgment denying Mother's petition and naming Father as the daughter's primary residential parent.

Next, we consider Mother's argument that the trial court erred by denying her motion for a default judgment and her motion to hold Father in contempt of court. We review a trial court's decision to grant or deny a motion for default judgment using an abuse of discretion standard. *State ex rel. Jones v. Looper*, 86 S.W.3d 189, 193 (Tenn. Ct. App. 2000). "[A]n appellate court will not reverse a decision that lies within the discretion of the trial court unless it affirmatively appears that the lower court's decision was against logic or reasoning and caused injustice to the complaining party." *Id*.

The trial court does not explain in its order dated February 7, 2014, or its amended order dated March 7, 2014, its reason for denying Mother's motion for a default judgment. Mother contends the court should have granted her a default judgment based on Father's failure to respond to her petition to modify filed in August 2013. However, based on the court's order denying Mother's petition, it appears that Father participated in the hearing on January 14, 2014, and that he had a basis on which to object to the relief Mother was seeking. In general, courts prefer to decide a case on the merits rather than by granting one party a default judgment. *Reynolds v. Battles*, 108 S.W.3d 249, 251 (Tenn. Ct. App. 2003). Mother does not explain the basis for her argument that the trial court erred in denying her motion for a default judgment, and without a transcript from the hearing, we have no basis on which to conclude the trial court erred. We, therefore, affirm the trial court's judgment denying Mother's request for a default judgment.

As with default judgments, we review a trial court's decision on a motion for contempt using an abuse of discretion standard. *Konvalinka v. Chattanooga-Hamilton Cnty. Hosp. Auth.*, 249 S.W.3d 346, 358 (Tenn. 2008). The trial court denied Mother's motion to hold Father in contempt without explanation. The bases for Mother's motion for contempt

[4]We recognize that the trial court stated that it "did not hear testimony as to the reasonable preference of the child," and that the statement of evidence provided that the daughter testified that she wanted to live with Mother. However, the daughter's testimony dated from January 2013, and by the time of the hearing a year later on Mother's August 2013 petition to modify, the daughter had been living with Father for quite some time. It is possible, also, that the trial court did not find the daughter's testimony in January 2013 to be credible.

included her inability to telephone the children when they were with Father and Father's interference with her visitation with the children. The statement of evidence is silent on both of these issues. The statement of evidence only addresses whether Father was able to contact Mother when the children were with him, whether Father called the children when they were with Mother, and whether the children were able to contact Father when they were with Mother. Moreover, the statement of evidence does not address Mother's allegation that Father was interfering with her ability to exercise her visitation with the children. Because the statement of evidence does not support Mother's argument on the issue of contempt, we hold the trial court did not abuse its discretion in denying Mother's motion for contempt.

CONCLUSION

For the reasons stated above, we affirm the trial court's judgments in all respects. Costs of this action shall be taxed to the appellant, Christina June Quinn, for which execution shall issue, if necessary.

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ANDY D. BENNETT, JUDGE