IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 18, 2016 Session

IN RE EMILY M.[1]

Appeal from the Juvenile Court for Rutherford County
No. 4858C Donna Davenport, Judge

No. M2015-01017-COA-R3-JV – Filed November 30, 2016

This appeal arises from the change in the designation of the primary residential parent and the modification of a residential parenting schedule. Mother appeals, contending that certain factual findings made by the court are unsupported by the record and that the court erred in restricting her parenting time. The court's findings are supported by the record and did not abuse its discretion in reducing Mother's parenting time; accordingly, we affirm the judgment.

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

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

Guy R. Dotson, Jr. and John C. Taylor, Murfreesboro, Tennessee, for the appellant, Melissa I. (C.).

Darrell L. Scarlett, Murfreesboro, Tennessee, for the appellee, Dalivus M.

OPINION

I. FACTUAL AND PROCEDURAL HISTORY

This appeal involves the modification of a parenting plan. Emily M. was born to Dalivus M. ("Father") and Melissa C. ("Mother") in February 2004. In November 2009, an agreed order was entered that contained a parenting plan that named Mother as primary residential parent and set equal parenting time for the parties.[2]

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[1] This Court has a policy of protecting the identity of children by initializing the last names of the parties.

[2] It is apparent that Mother and Father were not married at the time of Emily's birth and that Mother subsequently married and had additional children; none of those children are the subject of this proceeding.

On February 28, 2014, Father filed a petition for a temporary restraining order and to modify the parenting plan to name him as primary residential parent, alleging that Mother engaged in "erratic, irrational, and dangerous" behavior and had been "committed to the V[eterans] A[ffairs] hospital . . . for psychological and drug abuse reasons." Father attached several police reports relating to Mother's behavior on December 26, 2013, January 18, 2014, and February 11, 2014 to his petition. The court granted the order on the same day, restraining Mother from "coming about the minor child . . . for any purpose or reason, pending further orders of the court." By agreed order entered April 9, 2014, Mother agreed to submit to a drug test every Friday, and if she passed the drug test, she would have supervised visitation every Saturday from 3:00 to 6:00 p.m. Following a hearing on April 23, 2014, an order was entered on July 1 ("the July 1 order"), permitting Mother to visit Emily at school, have supervised parenting time on Saturdays, and requiring Mother to undergo drug tests monthly instead of weekly.

A hearing on the petition to modify was held before a magistrate on October 29 and December 3, 2014. In the course of the hearing, Father, Mother, Mother's husband, and Mother's father testified and seven exhibits were admitted, including a transcript of the hearing on the temporary restraining order, Mother's medical records, and the deposition of Dr. Harry Steuber, a psychologist who performed an evaluation of Mother. The magistrate thereafter issued a memorandum opinion, which was incorporated into an order, entered April 20, 2015. The magistrate found that a material change in circumstances had occurred "based upon the previously unknown extent of Mother[']s mental health issues resulting in Mother's various hospitalizations," as well as "Mother's lack of veracity to the Father about the nature and extent of her mental health issues and her resulting ability to care for the child." The magistrate made findings pertinent to the factors at Tennessee Code Annotated section 36-6-106(a) and awarded custody to Father after finding "that the Father is the fit and proper person to exercise the duties of primary residential parent."[3] The magistrate modified the parenting plan to, *inter alia*, grant Mother unsupervised parenting time from 10 a.m. on Saturday to 4 p.m. on Sunday on the first and third weekend of each month; provide a holiday visitation schedule; permit Mother to visit with the child at school; provide that "major decisions . . . shall be made by the Father"; and require Mother to pay $213 per month in child support. The magistrate also entered a $2,343 judgment in favor of Father for past child support and awarded Father $9,930 in attorney's fees. Mother filed a notice of appeal on May 22, 2015, and this Court remanded the case for entry of an order by the juvenile court confirming the magistrate's decision. Pursuant to Tennessee Code Annotated section 37-1-104(f) and Rule 4(d) of the Tennessee Rules of Juvenile Procedure, the juvenile court

[3] In its order, the court used the word "custody," which is "the term used in [Tennessee Code Annotated section 36-6-101(a)(2)(B)] which we equate to the designation of 'primary residential parent.'" *Rigsby v. Edmonds*, 395 S.W.3d 728, 734-35 (Tenn. Ct. App. 2012) (citing *Scofield v. Scofield*, No. M2006-00350-COA-R3-CV, 2007 WL 624351, at *3 (Tenn. Ct. App. February 28, 2007), *no appl. perm. appeal filed*; *see also Armbrister v. Armbrister*, 414 S.W.3d 685, 703 (Tenn. 2013).

submitted a supplemental record, which contained a confirmation order entered by the juvenile court judge on April 24, 2015.

Mother appeals, articulating the following issues:

1. Whether the trial court abused its discretion in making its findings, conclusions and permanent parenting plan order.
2. Whether the trial court erred in restricting Mother's parenting time.

II. STANDARD OF REVIEW

In *Armbrister v. Armbrister*, our Supreme Court set forth the standard of review to be applied in this case:

> In this non-jury case, our review of the trial court's factual findings is de novo upon the record, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. We review the trial court's resolution of questions of law de novo, with no presumption of correctness. …
>
> A trial court's determinations of whether a material change in circumstances has occurred and whether modification of a parenting plan serves a child's best interests are factual questions. Thus, appellate courts must presume that a trial court's factual findings on these matters are correct and not overturn them, unless the evidence preponderates against the trial court's findings.

414 S.W.3d 685, 692–93 (Tenn. 2013) (internal citations and quotations omitted).

III. ANALYSIS

In his petition, Father sought to be named as primary residential parent and for the court to determine Mother's parenting time; at the hearing on the petition, Father requested that the parenting schedule put in place in the July 1 order, in which Mother was permitted supervised visitation on Saturdays from 8:00 a.m. to 6:00 p.m., be left in place.

In our resolution of the matters raised on appeal, we are reviewing the court's application of the two-step analysis under Tennessee Code Annotated section 36-6-101(a) (2014) to requests made in juvenile court to change the designation of the primary residential parent or to modify the residential parenting schedule. *In re Teven A.*, No. M2013-02519-COA-R3-JV, 2014 WL 7419292, at *3 (Tenn. Ct. App. Dec. 29, 2014). The threshold determination for either is whether a material change in circumstances has

occurred; if so, the court then considers whether a change in primary residential parent is in the child's best interest by examining the factors at Tennessee Code Annotated section 36-6-106(a). *Armbrister*, 414 S.W.3d at 697–98; *Gentile v. Gentile*, No. M2014-01356-COA-R3-CV, 2015 WL 8482047, at *4 (Tenn. Ct. App. Dec. 9, 2015).

A. Material Change of Circumstance

When a change in designation of the primary residential parent is sought, Tennessee Code Annotated section 36-6-101(a)(2)(B) requires the petitioner to prove by a preponderance of the evidence that a material change of circumstance occurred; he or she is not required to prove that a substantial risk of harm to the child exists. "The change must be 'significant' before it will be considered material. *In re T.C.D.*, 261 S.W.3d 734, 744 (Tenn. Ct. App. 2007). When a modification of the residential parenting schedule is sought, however, a material change of circumstance must be found to have occurred, but "[t]he threshold for finding a material change . . . is low." *Gentile*, 2015 WL 8482047, at *7 (citing *Rose v. Lashlee*, M2005-00361-COA-R3-CV, 2006 WL 2390980, at *2 n.3 (Tenn. Ct. App. Aug. 18, 2006)); Tenn. Code Ann. § 36-6-101(a)(2)(C).

In a section titled "Material Change of Circumstance," the order states in full:

> In Order to modify the current court order of custody, the court must find a material change of circumstance, in accordance with T.C.A. § 36-6-101(a)(2)(B), exists since the entry of the last Order of the Court. In this case, the court so finds based upon the previously unknown extent of Mother['s] mental health issues resulting in Mother's various hospitalizations. Additionally, the court has weighed Mother's lack of veracity to the Father about the nature and extent of her mental health issues and her resulting ability to care for the child as [a] significant fact in determining [that a] material change of circumstance has in fact occur[r]ed. Although the court acknowledges that the first two of the hospitalizations occurred during Father's parenting time, the third did not. Additionally, these symptoms did not exhibit themselves inside a vacuum coinciding with the date of hospitalizations. The court finds that *Mother suffers from chronic mental health and substance abuse issues which have a negative impact upon her ability to care for the child in this case the extent of which was not previously considered by the court or the parties.*

(Emphasis added.)

Mother does not contest the holding that a material change of circumstance occurred but argues that the evidence in the record does not support the finding, italicized above; she argues that there is "no evidence . . . to indicate that, at the time of trial,

Mother lacked an ability to care for Emily." She relies upon the VA medical records and Dr. Steuber, which she contends "indicate, in no uncertain terms, that Mother was capable of caring for Emily on a shared schedule, that Mother is at low risk and required no interventions of any kind." Mother's brief does not cite to the record to support this statement. Upon our review, the holding is supported by the record, specifically, Father's testimony and the medical records, as detailed below.

The medical records span more than 300 pages dating back to June 2013 and cover Mother's three hospitalizations (in November 2013, January 2014 and February 12 through March 3, 2014). Numerous psychiatry and psychology outpatient notes are recorded. From the February through March 2014 hospitalization, the medical records report: that "she is here on court mandated psychiatric care and will stay for 14 days minimum"; that "Patient has been diagnosed with severe and persistent mental illness and has received either 30 or more days of psychiatric hospital care or has had three or more episodes of psychiatric hospitalization"; that "Patient cannot be left alone with kids"; that Mother was educated about dangers of marijuana and alcohol use in children's presence; and that "Miss C. should not be left alone with the kids given Miss C.'s recent psychotic flare up and continued marijuana and alcohol use." The medical records show that Mother tested positive for cannabis on February 12; that her thought process was "circumstantial, delusional at times"; that she has "[c]hronic mental health issues; chronic substance use issues; medication non-compliance"; and that her "[c]hief complaint and goal for treatment [were]: marijuana use; paranoid delusions." A doctor's progress note from February 26, 2014 reads:

> P[a]t[ient] is exhibiting full blown symptoms of Sc[h]izophrenia and it seems that cannabis is not the only factor that has attributed p[a]t[ient]'s frequent episodes of psychosis. Additionally, DCS needs to be informed that p[a]t[ient] can not have custody of kids due to risk of relapse. P[a]T[ient] needs to be stable for at least 6 months before she could be left alone with her kids. P[a]t[ient] has immediately relapsed in the past few months, does not agree to take IM Meds and had poor compliance in the past.
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> Will appreciate SW assistance in contacting the DCS 7 informing them of the risk involved."

The records also report that, during that same hospitalization, Mother attempted to hide a digital key to the ward in which she was being housed; the doctor's note indicates that Mother was planning to escape. Progress notes from a previous hospitalization in January 2014 reflect a diagnosis of "bipolar- mixed with psychosis" and "cannabis use disorder severe"; it also states that Mother "was admitted via the emergency department on January 18, 2014, after being brought by police at family's request for bizarre behavior around her kids." On January 23, 2014, a progress note from a doctor states that

"Patient is wanting to go home tomorrow. One concern is that she did not follow up at the time of her last discharge." That last discharge was on November 25, 2013, after being hospitalized on November 21 for the electrolyte imbalance and due to reports from her family that she was "irritable, agitated, using profanities and bizarre behavior lasting 4 days." Following her discharge, a progress note dated January 6, 2014 by a clinical psychologist reflects that Mother attended weekly therapy sessions to work on decreasing her symptoms of PTSD and major depressive disorder . . . [Mother] was scheduled for an appointment with this provider and no-showed many appointments. [Mother] was contacted . . . and no phone messages were returned."

At the hearing, Father testified that he was unaware of Mother's medical history; that Mother had told him that she was in the hospital for a sodium deficiency but "none of the other disorders . . . or risks were mentioned [and] [n]ever once did cannabis use come up"; and that he found out about Mother's postpartum psychosis, bipolar disorder, and marijuana use from Mother's husband.

The record does not preponderate against the factual finding supporting the determination that a material change in circumstance had occurred due to the nature and severity of Mother's mental health issues. Mother relies, without citation, on the VA records and deposition testimony of Dr. Steuber to preponderate against this finding. The VA records and testimony of Dr. Steuber support the court's finding that Mother's mental illness and previous substance abuse issues negatively impact her ability to care for Emily.[4] We affirm the court's finding of a material change of circumstance,[5] and we

[4] For example, Dr. Steuber agreed on cross examination that he had "continuing concerns about [Mother's] continuing or continued emotional stability" and agreed that "safeguards or measures, checks and balances . . . [should be] put in place to ensure that [Mother] maintains an appropriate condition to properly parent the child" "for the safety and welfare of the child."

[5] In addition to the factual finding contested by Mother that has been addressed above, Mother takes issue with the following two findings contained in the order's three-page "Findings of Fact" section:

> Mother testified at trial and at the April 23, 2014 hearing that this hospitalization was for a bladder infection.
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> ***
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> Mother has stopped taking prescribed medication and is no longer seeing a therapist. . . . She has declared herself fully well.

The record does not support the first finding. Mother never testified that she had a bladder infection; she testified (and the medical records bear out) that she was hospitalized for hyponatremia, or an electrolyte balance she attributed to "low sodium," a kidney issue. As to the second finding, Mother testified that she continues to attend individual therapy, though she is not still seeing a psychiatrist regularly, and is still taking an antidepressant. Her testimony was corroborated by Dr. Steuber, who stated that from his review of her therapy sessions, it was "apparent that she was making good progress."

proceed to determine whether a change in the residential parenting schedule and in the designation of the primary residential parent would be in Emily's best interest.

B. Modification of the Residential Parenting Schedule

After determining that a material change of circumstances has occurred, the court must decide whether the change is of such a magnitude that modification of the parenting schedule is warranted, utilizing the factors at Tennessee Code Annotated section 36-6-106(a)[6] and, if applicable, section 36-6-406. *See* Tenn. Code Ann. §§ 36-6-405(a) (2010)

We agree with Mother that these two findings are not supported by the record; however, the remaining findings in that section, which set forth Mother's dishonesty, hospitalizations, marriage issues, visitation with Emily during the pendency of the case, and Father's work and home life, are fully supported by the record.

[6] Section 36-6-106(a) reads:

> (a) 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 court shall consider all relevant factors, including the following, where applicable:
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> (1) The strength, nature, and stability of the child's relationship with each parent, including whether one (1) parent has performed the majority of parenting responsibilities relating to the daily needs of the child;
> (2) 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, consistent with the best interest of the child. In determining the willingness 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, the court shall consider the likelihood of each parent and caregiver to honor and facilitate court ordered parenting arrangements and rights, and the court shall further consider any history of either parent or any caregiver denying parenting time to either parent in violation of a court order;
> (3) Refusal to attend a court ordered parent education seminar may be considered by the court as a lack of good faith effort in these proceedings;
> (4) The disposition of each parent to provide the child with food, clothing, medical care, education and other necessary care;
> (5) The degree to which a parent has been the primary caregiver, defined as the parent who has taken the greater responsibility for performing parental responsibilities;
> (6) The love, affection, and emotional ties existing between each parent and the child;
> (7) The emotional needs and developmental level of the child;
> (8) The moral, physical, mental and emotional fitness of each parent as it relates to

(providing that "[t]he process established by § 36-6-404(b) shall be used to establish an amended parenting plan"); Tenn. Code Ann. § 36-6-404(b) (2014) (providing that "[i]f the limitations of § 36-6-406 are not dispositive of the child's residential schedule, the court shall consider the factors found in § 36-6-106(a)(1)-(15)").

The court made factual findings relating to factors (1), (2), (4), (5), (6), (7), (8), (9), (10), (11), and (12) of section 36-6-106(a); of these eleven findings, eight favored Father, three favored the parties equally, and none favored Mother. Of the eight factors held to favor Father, Mother argues that factors (2), (7), (8), and (11) are unsupported by the record. We will address each factor in turn.

With respect to factor (2), the court found that "Mother's future ability to perform her parenting responsibilities is seriously hindered by her current undertreated chronic mental health issues." Mother argues that this finding "completely ignores the overwhelming evidence in the medical records and uncontroverted testimony of the witnesses that Mother had received significant, consistent, and on-going treatment for her

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> their ability to parent the child. The court may order an examination of a party under Rule 35 of the Tennessee Rules of Civil Procedure and, if necessary for the conduct of the proceedings, order the disclosure of confidential mental health information of a party under § 33-3-105(3). The court order required by § 33-3-105(3) must contain a qualified protective order that limits the dissemination of confidential protected mental health information to the purpose of the litigation pending before the court and provides for the return or destruction of the confidential protected mental health information at the conclusion of the proceedings;
> (9) The child's interaction and interrelationships with siblings, other relatives and step-relatives, and mentors, as well as the child's involvement with the child's physical surroundings, school, or other significant activities;
> (10) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment;
> (11) Evidence of physical or emotional abuse to the child, to the other parent or to any other person. The court shall, where appropriate, refer any issues of abuse to juvenile court for further proceedings;
> (12) The character and behavior of any other person who resides in or frequents the home of a parent and such person's interactions with the child;
> (13) The reasonable preference of the child if twelve (12) years of age or older. The court may hear the preference of a younger child upon request. The preference of older children should normally be given greater weight than those of younger children;
> (14) Each parent's employment schedule, and the court may make accommodations consistent with those schedules; and
> (15) Any other factors deemed relevant by the court.

Tenn. Code Ann. § 36-6-106(a).

issues." Mother does not cite to any specific evidence in the record in support of this contention and, upon our review, the agreement is without merit.[7]

Mother testified that she is on antidepressants and is in therapy to treat her mental health issues. Significant to our review of this finding, Dr. Steuber agreed on cross examination that he had "continuing concerns about [Mother's] continuing or continued emotional stability" and agreed that "safeguards or measures, checks and balances . . . [should be] put in place to ensure that [Mother] maintains an appropriate condition to properly parent the child" "for the safety and welfare of the child." Weighed against this testimony, the characterization of her mental conditions as being undertreated is not inconsistent with the evidence. In view of the testimonial and documentary evidence, and giving the deference due to the court's adverse credibility finding with respect to Mother,[8] we conclude that the evidence does not preponderate against the court's findings with respect to factor (2).

With respect to factor (7), the court stated that it "heard no proof as to special emotional or developmental issues with the child… . However, the court finds that the Father is better position[ed] to deal with these needs as they may arise over time." The court did not explain why this factor was found in favor of Father. Mother argues that "[n]o evidence of any kind was presented" to support such a ruling, and in his brief on appeal, Father does not cite to testimony or proof in the record that would support this finding. In the absence of a stated factual basis for this finding, we are unable to affirm it.

With respect to factor (8), the court found that:

[T]he overwhelming evidence exists as has been addressed previously

[7] The argument section of Mother's brief does not contain any citations to the record as required by Rule 27(a)(7)(A) of the Tennessee Rules of Appellate Procedure and Rule 6(a)(4), (b) of the Rules of the Court of Appeals. For example, Mother argues that "the findings of fact and conclusions of law made by the trial court completely ignore and entirely fail to acknowledge the evidence related to the most recent and relevant medical records and professional opinions of her treating VA physicians as well as Dr. St[e]uber." In the "Visitation" section of the order however, the court acknowledged the medical records and the professional opinions contained in those records by stating that "[t]he medical records indicate that her conditions have improved for now but also that a recurrence of these behaviors is highly probable especially if Mother does not seek treatment timely."

[8] The order states that "Mother's lack of veracity with herself, the court and the Father regarding the extent of her mental health issues creates serious concern that she will not be forthcoming in the future when her ability to parent the child is impaired." This finding relative to her lack of veracity was clear and is not contested on appeal. "We give great deference to the trial court's findings with regard to credibility of witnesses, . . . and we will not overturn such findings absent clear and convincing evidence to the contrary." *Gentile*, 2015 WL 8482047, at *6 *(citing In re Alexandra J. D.*, E2009-00459-COA-R3-JV, 2010 WL 5093862 at *3 (Tenn. Ct. App. Dec. 10, 2010)*; Kelly v. Kelly*, 445 S.W.3d 685, 692 (Tenn. 2014)).

> regarding Mother's mental and emotional health issues as well as physical health due to her disability. The court finds Mother has placed her own desire to parent the child above the child's well being to the point of denying the extent of her issues and refusing to address them forthrightly.

In addressing this factor, Mother does not cite to specific evidence that preponderates against this finding, but rather argues that:

> The uncontroverted evidence presented at trial indicates that Mother very aggressively addressed her mental health issues, going beyond the recommendations of her treating professionals and reaching a level of stability and positive prognosis giving rise to the professional opinion that Mother is fully capable of returning to the pre-TRO shared schedule. The Court's finding that Mother refused to forthrightly address her mental health issues bears absolutely no reflection of the evidence presented at trial.

The medical records contain progress notes from doctors, psychiatrists, psychologists, and nurses that state, in addition to the reproduced portions in section A, *supra*, that Mother has a "diagnosis of severe and persistent mental illness"; recite that Mother's stated goal was to get out of the hospital so she could be with her children; and reflect her requests to be released prior to completing treatment so that she could go home to her children. A doctor's note from her November 2013 hospitalization states that Mother "still insisted to leave A[gainst] M[edical] A[dvice]." Upon our review of the evidence, this finding is supported by the record, which reveals Mother's history of downplaying her mental illnesses to the court and to Father.

With respect to factor (11), the court found "significant evidence of ongoing emotional abuse due to Mother's erratic behaviors toward her husband, this child and other children in her home." Mother argues that this finding is unsupported because "no evidence whatsoever was presented in relation to this finding." In her testimony Mother conceded that marital arguments were occurring. Her husband testified that there was "a lot of arguing"; on cross examination, he agreed that the children were exposed to some screaming and cursing that was directed at him, and that he had gone to Father to tell him that he should take action on Emily's behalf because Mother was being violent in the home. The foregoing testimony, together with other evidence in the medical records reflecting Mother's erratic behavior, supports the finding.

Upon our review of the findings as to the factors at section 36-6-106(a), we have determined that the evidence does not support the finding that Father is better positioned to deal with Emily's emotional or developmental needs as they may arise over time; the evidence does not preponderate against the findings relative to the remaining ten factors.

We proceed to address Mother's concerns regarding the modification of the parenting schedule.

Under the heading of "Visitation," the order states:

> Father is requesting ongoing supervised visits. The court is obligated to maximize parenting time with both parents to the extent possible and in considering the best interest of the child. Mother has been exercising supervised visits with the child for several months at the time of trial. By all accounts, these visits have been going well. The Court continues to be concerned about the long term mental and emotional health of the Mother and her propensity to be dishonest with herself, the Father and the Court. The medical records indicate that her conditions have improved for now but also that a recurrence of these behaviors is highly probable especially if Mother does not seek treatment timely and chooses as she has done in the past to seek the use of marijuana to ameliorate her symptoms rather than seek medical treatment.

The court then proceeded to award Mother unsupervised parenting time on the first and third weekend of each month from 10:00 a.m. on Saturday until 4:00 p.m. on Sunday. The parties were also to "alternate holidays," with a holiday defined as "the day of the holiday from 8:00 a.m. until 5:00 p.m." The Court concluded this section of its order by stating: "The Court specifically finds that award of visitation to be in the child's best interest in that it continues a bond between Mother and child but does not expose the child to extended periods in the Mother's home without daily personal interaction with the Father."

Mother contends that the court erred in setting a parenting schedule that "severely and inappropriately limited" her parenting time without making a finding pursuant to Tennessee Code Annotated § 36-6-406[9] that her conduct justified such a limitation.

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[9] Section 36-6-406 provides in pertinent part:

> (a) . . . [A] parent's residential time as provided in the permanent parenting plan or temporary parenting plan shall be limited if it is determined by the court, based upon a prior order or other reliable evidence, that a parent has engaged in any of the following conduct:
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> (1) Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting responsibilities; or
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> (2) Physical or sexual abuse or a pattern of emotional abuse of the parent, child or of another person living with that child as defined in § 36-3-601.
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> (b) The parent's residential time with the child shall be limited if it is determined by the court, based upon a prior order or other reliable evidence, that the parent resides with a person who has engaged in physical or sexual abuse or a pattern of emotional abuse of

In *Armbrister*, the Supreme Court made clear that:

> Because decisions regarding parenting arrangements are factually driven and require careful consideration of numerous factors, trial judges, who have the opportunity to observe the witnesses and make credibility determinations, are better positioned to evaluate the facts than appellate judges. Thus, determining the details of parenting plans is peculiarly within the broad discretion of the trial judge. It is not the function of appellate courts to tweak a [residential parenting schedule] in the hopes of achieving a more reasonable result than the trial court. A trial court's decision regarding the details of a residential parenting schedule should not be reversed absent an abuse of discretion. An abuse of discretion occurs when the trial court ... appl[ies] an incorrect legal standard, reaches an

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the parent, child or of another person living with that child as defined in § 36-3-601.

(c) If a parent has been convicted as an adult of a sexual offense under § 39-15-302, title 39, chapter 17, part 10, or §§ 39-13-501 – 39-13-511, or has been found to be a sexual offender under title 39, chapter 13, part 7, the court shall restrain the parent from contact with a child that would otherwise be allowed under this part. If a parent resides with an adult who has been convicted, or with a juvenile who has been adjudicated guilty of a sexual offense under § 39-15-302, title 39, chapter 17, part 10, or §§ 39-13-501 – 39-13-511, or who has been found to be a sexual offender under title 39, chapter 13, part 7, the court shall restrain that parent from contact with the child unless the contact occurs outside the adult's or juvenile's presence and sufficient provisions are established to protect the child.

(d) A parent's involvement or conduct may have an adverse effect on the child's best interest, and the court may preclude or limit any provisions of a parenting plan, if any of the following limiting factors are found to exist after a hearing:

(1) A parent's neglect or substantial nonperformance of parenting responsibilities;
(2) An emotional or physical impairment that interferes with the parent's performance of parenting responsibilities as defined in § 36-6-402;
(3) An impairment resulting from drug, alcohol, or other substance abuse that interferes with the performance of parenting responsibilities;
(4) The absence or substantial impairment of emotional ties between the parent and the child;
(5) The abusive use of conflict by the parent that creates the danger of damage to the child's psychological development;
(6) A parent has withheld from the other parent access to the child for a protracted period without good cause;
(7) A parent's criminal convictions as they relate to such parent's ability to parent or to the welfare of the child; or
(8) Such other factors or conduct as the court expressly finds adverse to the best interests of the child.

Tenn. Code Ann. § 36-6-406(a)–(d) (2010).

> illogical result, resolves the case on a clearly erroneous assessment of the evidence, or relies on reasoning that causes an injustice. A trial court abuses its discretion in establishing a residential parenting schedule "only when the trial court's ruling falls outside the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence found in the record.

Armbrister, 414 S.W.3d at 693 (internal citations and quotations omitted).

In crafting the modification to the parenting plan, the court was particularly concerned with, and put much weight on, Mother's lack of veracity to the court and to Father regarding the extent of her mental health issues and the possibility that she would not be forthcoming in the future if her ability to parent Emily was impaired. The court's concern was supported by the medical records and testimony in the record. We have determined that all of the court's findings as to eleven of the statutory factors, save one, are supported by the preponderance of the evidence. Considering the record as a whole, the trial court did not abuse its discretion in adopting a parenting schedule that permits Mother unsupervised overnight weekend visits with Emily twice per month and on alternating holidays. It was not necessary for the court to make a finding with respect to section 36-6-406 because the modification to the parenting schedule does not severely and inappropriately limit Mother's parenting time. Accordingly, we affirm the modified parenting schedule.

C. Change in Designation of Primary Residential Parent

After concluding that the statutory factors favored Father, the court designated him as primary residential parent. We are mindful that "'[c]ustody and visitation determinations often hinge on subtle factors, including the parents' demeanor and credibility during ... proceedings themselves,' [and thus] appellate courts 'are reluctant to second-guess a trial court's decisions.'" *Gentile*, 2015 WL 8482047, at *4 (Tenn. Ct. App. Dec. 9, 2015) (quoting *In re Alexandra J. D.*, No. E2009-00459-COA-R3-JV, 2010 WL 5093862, at *3 (Tenn. Ct. App. Dec. 10, 2010)). Further, "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." *Galaway v. Galaway*, No. M2015-00670-COA-R3-CV, 2016 WL 1291966, at *4 (Tenn. Ct. App. Mar. 31, 2016) (citing *Reinagel v. Reinagel*, M2009-02416-COA-R3-CV, 2010 WL 2867129, at *4 (Tenn. Ct. App. July 21, 2010); *Scofield*, 2007 WL 624351, at *2; *Armbrister*, 414 S.W.3d at 693). Although the change in the designation of primary residential parent is not specifically challenged by Mother on appeal, the evidence does not preponderate against the majority of the court's findings, and we discern no abuse of discretion in its determination that Father should be named the primary residential parent. We therefore affirm the court's determination.

D. Attorney's Fees

Father contends that he is entitled to his attorney's fees incurred on appeal in accordance with the following provision of the agreed order entered November 25, 2009:

> ". . . if either party files litigation regarding the minor child, Emily M[.], and they are unsuccessful in their litigation[,] they shall be responsible for the other party's reasonable attorney fees."

Father filed the petition at issue and has been successful before the trial court and on appeal. We do not construe the language of the agreed order as providing for an award of attorney's fees under the scenario where, as here, a party has appealed a ruling on a petition that the other parent initiated. We respectfully decline to award Father his attorney's fees incurred on appeal.

IV. CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court in designating Father as primary residential parent and in modifying the parenting schedule.

RICHARD H. DINKINS, JUDGE