

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 22, 2017 Session

MICHAEL TODD SANSOM v. AMANDA JANE SANSOM

**Direct Appeal from the Chancery Court for Williamson County
No. 40794 Michael Binkley, Judge**

No. M2016-01111-COA-R3-CV

This is a post-divorce child custody and parental relocation case. Father petitioned the trial court to modify the parties' parenting plan to designate him as the minor child's primary residential parent and to allow him to relocate the child from Tennessee to Virginia. Mother opposed Father's petition and filed a counter-petition requesting the court modify the residential parenting schedule to reflect Father's move to Virginia. The trial court found that a material change in circumstances existed to permit an examination of whether changing the child's primary residential parent from Mother to Father was in the child's best interest. After an analysis of the best interest factors set forth in Tennessee Code Annotated section 36-6-106(a), the court concluded that it would be in the child's best interest to remain in Tennessee with Mother as her primary residential parent. The court also adopted Mother's proposed residential parenting schedule. The trial court then calculated Father's retroactive and prospective child support obligations and awarded Mother the attorney's fees she incurred in defending Father's petitions and successfully pursuing her own. Father subsequently filed a Rule 59 motion to alter or amend the trial court's judgment and to reopen the proof in the matter. The trial court denied Father's request and awarded Mother additional attorney's fees she incurred in defending the motion to alter or amend. Father has appealed the trial court's determination that Mother should remain the child's primary residential parent, the new residential parenting schedule, the court's application of Tennessee's parental relocation statute, the calculation of the income of the parties, the calculation of child support, and the award of attorney's fees. We conclude that the trial court erred in calculating the amount of Father's monthly gross income. The award of child support is therefore vacated and remanded for reconsideration. We affirm the judgment of the trial court in all other respects. We decline both parties' requests for attorney's fees incurred on appeal.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Vacated in part, Affirmed in Part, and Remanded

BRANDON O. GIBSON, J., delivered the opinion of the court, in which RICHARD H. DINKINS and W. NEAL MCBRAYER, JJ., joined.

Demeka Kay Church, Franklin, Tennessee, for the appellant, Todd Michael Sansom.

Joanie Lucie Abernathy, Franklin, Tennessee, for the appellee, Amanda Jane Sansom.

OPINION

I. FACTS & PROCEDURAL HISTORY

Appellant, Todd Michael Sansom (“Father”), and Appellee, Amanda Jane Sansom (“Mother”), were divorced in the Chancery Court for Williamson County, Tennessee on September 18, 2012. The parties are parents of one child, a daughter, born in December 2010 (the “Child”). The final decree of divorce incorporated a parenting plan agreed to by the parties, which designated Mother as the primary residential parent of the Child. Pursuant to this initial parenting plan, Mother was given 285 days of residential parenting time per year with the Child, and Father was given 140 days of parenting time per year.¹

At the forefront of this case at trial and on appeal is Mother’s struggle with alcohol abuse. The trial court found that “[a]t the time of the divorce in September 2012, Mother was struggling emotionally with Father’s adultery and the break-up of the parties’ marriage. Mother continued to struggle emotionally and clearly ‘self-medicated’ with alcohol until September 8, 2014.” Mother has admitted she is an alcoholic, and she has apparently battled with the disease for quite some time. During the parties’ marriage, Mother was arrested twice for driving under the influence, once in 2008 and once in 2009. Mother testified that upon discovering that she was pregnant with the parties’ Child in 2010, she engaged in a period of abstinence during her pregnancy and while she was breastfeeding the Child. The trial court made a specific finding that “Mother’s [alcohol] abuse was under control for a period of time until approximately December 2011 or the following month, January 2012.”

Unfortunately, Mother’s sobriety hit another stumbling block beginning the week after the parties’ divorce in September 2012. Testimony throughout this litigation included stories told by the Child’s babysitters, Father, Father’s current wife, and others, of several incidents where Mother was clearly intoxicated on multiple occasions between September 2012 and September 2014. Mother’s regression into alcohol abuse culminated

¹These are the number of days of parenting time reflected on the parenting plan ordered by the trial court at the time of the parties’ divorce. Father, however, contends that these days were inaccurately calculated and that he actually exercised more than 140 days of parenting time. As is discussed further herein, we reject Father’s argument that he should be credited with more than 140 days of parenting time.

with her being arrested for her third offense for driving under the influence on September 8, 2014.

On September 12, 2014, Father filed a petition to modify the parties' parenting plan along with a motion for an *ex parte* restraining order and emergency temporary custody of the Child after learning that Mother had been again charged with driving under the influence. Father's petition to modify the parenting plan alleged that Mother's third offense of driving under the influence constituted a material change in circumstances pursuant to Tennessee Code Annotated section 36-6-101(a)(c), and it was in the Child's best interest to modify that parenting plan to designate Father as the primary residential parent for the Child. Father's motion for an *ex parte* restraining order and for emergency temporary custody of the Child set forth the same allegations made in his petition to modify the parenting plan as a basis for the court to grant Father temporary emergency custody of the Child and to restrain Mother from removing the Child from Father's control. Father further alleged that he was concerned Mother may take the Child outside the jurisdiction of the Court upon being served with Father's petition. That same day, the trial court granted Father's emergency motions, finding that there was reason to believe Mother might remove the Child from Father and/or out of the Court's jurisdiction and refuse to let Father see the Child.

On September 16, 2014, Mother filed a response to Father's motion for an *ex parte* restraining order and for emergency custody of the Child. Mother admitted to her arrest but generally denied the remainder of Father's allegations and alleged that Father's true motive for filing his petition was that he was no longer employed in Tennessee and desired to relocate to Virginia. Mother also filed numerous affidavits and letters from people supporting her effort to regain custody of the Child. The same day, the trial court heard proof from Mother and Father regarding the continuation of the temporary restraining order issued on September 12, 2014. At the conclusion of the proof, the court determined that the restraining order should not be vacated but should be modified so that Mother could resume her regular visitation with the Child when and so long as she complied with certain conditions, including the following: (1) completely abstaining from alcohol and any controlled substances except as prescribed; (2) attending two alcoholics anonymous meetings per week and providing her attorney with documentation proving her attendance; (3) obtaining and wearing a secure continuous remote alcohol monitor (SCRAM) device that would monitor her compliance with the court's order; and (4) not driving the Child in a vehicle that is not equipped with appropriate child restraints and an interlock device that will disable the ignition of the automobile unless Mother successfully completes a breath test confirming she has not consumed alcohol. After the full hearing, the trial court denied Father's request for temporary emergency custody of the Child.

On October 29, 2014, Mother filed an answer to Father's petition to modify the parenting plan and a counter-petition of her own to modify the parenting plan and to enforce the parties' current parenting plan. In her answer and counter-petition, Mother alleged that she was having problems with Father paying child support on time and that he had not been exercising all of his parenting time until after he filed the instant lawsuit. Mother requested that the court modify the parties' parenting plan to eliminate portions of Father's parenting time, to require Father's child support be paid by direct deposit, and to award her attorney's fees and costs. On September 16, 2015, Father amended his original petition to reflect his relocation to the state of Virginia. In his amended petition, Father stated that he had given notice of his relocation to Mother as required by Tennessee Code Annotated section 36-6-108 on or about January 27, 2015, and Mother had not filed a Petition in opposition to his relocation. Father again requested that the parenting plan be changed to designate him as the Child's primary residential parent, that the court modify the parties' parenting plan accordingly, and that the court award him attorney's fees and costs.

The case on Father's petition and amended petition to modify the parenting plan and on Mother's counter-petition to modify the parenting plan was set for trial on October 14, 2015, at which time the court heard testimony of the parties and witnesses and admitted numerous items into evidence. The court then reconvened on November 20, 2015, to hear testimony of a subpoenaed witness who failed to appear on October 14, 2015. The court took the matter under advisement at the close of proof on November 20, 2015. On February 8, 2016, the court issued written findings of fact and conclusions of law.

The trial court's findings of fact and conclusions of law issued on February 8, 2016 are a detailed and thorough analysis of the litany of issues raised by the parties in this case. The court found that Mother had remained alcohol free since September 8, 2014. Mother entered the Williamson County General Sessions DUI Program on February 10, 2015, and the trial court determined that Mother had been successful in that program. The court also noted the testimony of witnesses who said that Mother and the Child had a "loving relationship." After the parties' divorce, Mother purchased a home in Franklin, Tennessee, where she and the Child still resided at the time of trial. The testimony at trial was that the Child has friends in her neighborhood in Franklin, and she also takes piano lessons and attends school and church there. The court noted that, in March 2015, Father moved to Virginia with his new wife, which is approximately eight and one half (8 ½) hours away from the Child, without having a temporary parenting schedule in place. Even when the Child was with Father, Father delegated many of his parenting responsibilities to his new wife. Father testified that he would be unwilling to spend time with the Child in Tennessee after she begins Kindergarten in August 2016, even though he had a brother who lived in Brentwood, Tennessee.

The court then went on to address Father's request that he be named the Child's primary residential parent. Pursuant to Tennessee Code Annotated section 36-6-101(a)(2)(B), the court first determined that there had been a material change in circumstances that would allow the court to consider modifying the parties' current parenting plan.² Second, the court examined whether a change in the Child's primary residential parent was in her best interest by weighing the statutory best interest factors set forth in Tennessee Code Annotated section 36-6-106(a). In doing so, the trial court articulated each factor listed in the statute, determined whether it was applicable to the facts of this case, and, if it was applicable, the court explained the evidence it relied on to decide whether that particular factor weighed in favor of Mother, Father, or evenly for both. The court also found that, for purposes of Tennessee's parental relocation statute, the Child was spending substantially more time with her Mother than her Father. After analyzing what was in the best interest of the Child, the court determined that the child should remain in Tennessee with her Mother as her primary residential parent. In light of this decision and Father's move to Virginia, the court also set forth a new residential parenting schedule for the parties. The court further indicated that it would award Mother some amount of attorney's fees for defending Father's petition. Due to a lack of clarity with respect to the parties' incomes and other child support worksheet entries, the court determined that the parties should reconvene before the court at a later date to determine Father's child support obligation and the amount of attorney's fees Mother should be awarded.

On March 4, 2016, the parties returned to court to discuss the outstanding issues of child support and attorney's fees pursuant to the court's February 8, 2016 order. On April 14, 2016, the court entered an order disposing of all of the issues between the parties. This order incorporated the court's February 8, 2016 written findings of fact and conclusions of law, formally denied Father's petitions to modify the parenting plan and to relocate with the Child, granted Mother's petition to modify the parenting plan, adopted Mother's proposed plan with slight modifications, set Father's gross monthly income at \$8,477.00 per month and Mother's gross monthly income at \$5,166.00 per month, calculated Father's current child support obligation to be \$974.00 per month retroactive to July 1, 2015, awarded Mother a judgment for retroactive child support in the amount of \$4,859.00, and awarded Mother \$30,000.00 in attorney's fees.

On May 13, 2016, Father filed a pleading styled "Father's Rule 59 Motion to Alter or Amend and Motion to Reopen the Proof, for Temporary Restraining Order and for

²The trial court found that "even though Father was aware of Mother's propensities to abuse alcohol and despite these known facts, Father still agreed Mother would be the Primary Residential Parent without restriction, the Court believes Father has proven by a preponderance of the evidence a material change of circumstances through the facts showing the escalation of Mother's abuse of alcohol after the parties' divorce, all of which has affected the child's well-being in a meaningful way."

Stay of Judgment.” Father’s pleading was premised on allegations that he had proof that Mother had been driving with the Child in a vehicle that was not equipped with an interlock device. Father further contended that the court should alter or amend its order with respect to the weighing of the best interest factors under Tennessee Code Annotated section 36-6-106(a). Finally, Father requested that the court amend its order on Father’s child support obligation to account for an additional child that had been born to Father and his new wife in April 2016. The trial court heard proof on Father’s motion on June 13, 2016, including testimony from private investigators hired by Father, as well as from the parties themselves. On June 28, 2016, the trial court issued an order holding that the proof presented by Father did not rise to the level necessary to convince the court that it should have reached a different result than it reached in its previous orders. The court specifically found:

Father has failed to show that Mother breached her sobriety date, nor did the evidence show Mother drove a vehicle without an interlock device for the purpose of circumventing alcohol testing. The Court does not want to conclude that Father’s actions in filing the present Motion are based in retribution but there is a lack of evidence to support Father’s motions.

In sum, the trial court denied Father’s Rule 59 motion to alter or amend, motion to reopen the proof, for temporary restraining order, and for stay of judgment. The court did order that Father would be given credit for the additional in-home child that had been recently born. The court awarded Mother \$8,562.50 in attorney’s fees for defending Father’s post-trial motions.

II. ISSUES PRESENTED

Father presents the following issues for review on appeal:

1. Whether the trial court erred in weighing the factors of Tennessee Code Annotated section 36-6-106 to determine the best interest of the child?³
2. Whether the trial court erred in failing to change the primary residential parent from Mother to Father?
3. Whether the trial court erred in adopting Mother’s proposed parenting plan?

³Although Father lists this as only one issue on appeal, he actually alleges that the trial court erred in weighing eleven distinct factors listed in Tennessee Code Annotated section 36-6-106.

4. Whether the trial court erred in its application of the relocation statute?
5. Whether the trial court erred in its calculation of gross monthly incomes for each party?
6. Whether the trial court erred in its calculation of retroactive and prospective child support according to the Tennessee Child Support Guidelines?
7. Whether the trial court erred in denying [Father's] Rule 59 motion to alter or amend and motion to reopen the proof, for temporary restraining order, and for stay of judgment?
8. Whether the trial court erred in its award of attorney's fees to [Mother]?
9. Whether the trial court erred in failing to award [Father] his attorney's fees?

Mother presents the following additional issue for review:

10. Whether Mother should be awarded attorney's fees on appeal?

III. STANDARD OF REVIEW

In nonjury cases, this Court's review is *de novo* upon the record of the proceedings in the trial court, with a presumption of correctness as to the trial court's factual determinations, unless the evidence preponderates against those findings. Tenn. R. App. P. 13(d); *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn.1993). The trial court's conclusions of law, however, are afforded no such presumption. *Campbell v. Florida Steel*, 919 S.W.2d 26, 35 (Tenn.1996).

IV. DISCUSSION

1. Best Interest Determination

In the case at bar, the trial court determined that it was in the Child's best interest for her to remain with her Mother in Tennessee. Father challenges this decision in a myriad of different ways on appeal. At the outset of our analysis, we note that, particularly regarding the issue of what is in the Child's best interest, Father appears to be

asking this Court to reevaluate each fact heard by the trial court and simply reach a different conclusion than that of the trial judge. The vast majority of Father's arguments do not take into account the deferential standard of review by which we assess a trial court's decisions regarding child custody. *See Koch v. Koch*, 874 S.W.2d 571, 575 (Tenn. Ct. App. 1993) ("Trial courts are vested with wide discretion in matters of child custody and the appellate courts will not interfere except upon a showing of erroneous exercise of that discretion."). Appellate courts are not inclined to relitigate factual issues on appeal that were reasonably resolved by the trier of fact, which, in this case, was the trial judge. *See* Tenn. R. App. P. 13(d). To that end, we find Father's arguments to this Court that he simply does not agree with the conclusion reached by the trial court to be unavailing.

The forgoing notwithstanding, we turn to our evaluation of Husband's contention that the trial court erred in weighing the factors of Tennessee Code Annotated section 36-6-106 to determine the best interest of the Child. Tennessee Code Annotated section 36-6-106 states that when a court is determining what is in a child's best interest, a court shall consider all relevant factors, including fifteen (15) that are expressly written into the statute for a court's consideration. *See* Tenn. Code Ann. § 36-6-106 (a)(1) through (15). In the case at bar, the trial court took great care to articulate and analyze each one of these factors. Father appeals the trial court's determinations with respect to factors (1), (2), (4), (5), (7), (8), (9), (10), (12), (14), and (15).

(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.

The trial court found that both Mother and Father had a "strong, healthy, and stable relationship" with the child. However, the court also found that Mother performs the vast majority of the daily needs of the Child, while Father delegated these responsibilities to his current wife. The trial court therefore found that factor one (1) favored Mother.

On appeal, Father contends that "the trial court should not have considered the assistance Father receives from his wife to discount his providing for [the Child's] daily needs." In support of this argument, Father cites to three cases⁴ for the proposition that Tennessee courts have rejected the theory that a parent's parenting time should be reduced because they have other persons caring for the child during their parenting time.

⁴The three cases cited by Father are *Robinson v. Robinson*, No. 2003-02289-COA-R3-CV, 2005 WL 1541861 (Tenn. Ct App. June 30, 2005); *Price v. Bright*, No. E2003-02738-COA-R3-CV, 2005 WL 166955 (Tenn. Ct. App. Jan. 26, 2005); and *Kawatra v. Kawatra*, 182 S.W.3d 800 (Tenn. 2005).

Father's reliance on these cases for purposes of a best interest analysis under Tennessee Code Annotated section 36-6-106 is misplaced. Each of the cases cited by Father reject the notion that a trial court may deduct days from a parent's parenting time for purposes of calculating the amount of time each parent spends with the child at issue. That is an altogether different question than the one in Tennessee Code Annotated section 36-6-106(a)(1) regarding the "strength, nature, and stability of the child's relationship with each parent." We find no error in the trial court's conclusion that this factor favors Mother.

(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.

The trial court began its review of this factor by acknowledging that Mother did make several mistakes with the Child during the periods when she was using alcohol. However, the court found that since Mother has been sober "she has shown remarkable change in her overall attitude with regard to her parenting responsibilities and has encouraged a close and continuing parent/child relationship between Father and [the Child]." On the other hand, the court found it significant that Father had "refused" to comply with his court-ordered parenting responsibility of securing life insurance to provide for the Child in the event of his death. The court ultimately held that this factor weighed in favor of Mother. Father has not alleged anything on appeal that amounts to an abuse of discretion as to the trial court's finding on this factor.

(4) The disposition of each parent to provide the child with food, clothing, medical care, education and other necessary care.

The trial court concluded that "both parents are equally capable of providing [the Child] with food, clothing, medical care, education and other needs and thus this factor weighs evenly for both parties." On appeal, Father does not actually allege that this conclusion was in error. Father simply theorizes that "during any future period of active

consumption of alcohol, Mother's disposition to provide for the child was and will be compromised." The record supports the trial court's decision that this factor weighs evenly for both parents.

(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.

The trial court held that this factor weighed heavily in favor of Mother, finding that Mother "has been primarily involved in the day-to-day responsibilities as a primary caregiver in performing the day-in-and-day-out rigorous parental responsibilities of taking care and managing a five-year old child at every level needed in order to maintain a stable and healthy environment for [the Child]." The court also found that while Father had taken on some responsibility for the Child, he had "side-stepped" others. While Father alleges that he took the lead in enrolling the Child in preschool and piano lessons, he makes no compelling argument that the trial abused its discretion in weighing this factor in favor of Mother.

(6) The love, affection, and emotional ties existing between each parent and the child.

Father does not dispute the validity of the trial court's finding that this factor weighs evenly for Mother and Father.

(7) The emotional needs and developmental level of the child.

The trial court found that this factor favored Mother. Again acknowledging the great strides Mother has made toward sobriety, the court commended Mother for her "hard work" and found that "from all of the proof that Mother's abuse of alcohol is currently under control as evidenced by her much-improved conduct, outlook on life, and her overall attitude which has not only been corroborated by mother but also by other witnesses."

In support of his position that the trial court reached an illogical conclusion regarding this factor, Father reiterates Mother's history of alcohol abuse, all of which was heard and considered by the trial court. Father also points to the fact that Mother allows the Child to use a pacifier. In its ruling, the trial court stated that "Father has tried to convince the Court that [the Child's] use of a pacifier while she was four (4) years old is an issue. The Court believes in the overall scheme of things, this matter is insignificant in determining what is in the best interests of the parties' child." We agree. Father's remaining arguments as to this factor contain allegations against Mother that were not

introduced into evidence at trial and were only raised by Father at the hearing on his motion to reopen the proof, a motion that was properly denied by the trial court.⁵ We conclude that the evidence does not preponderate against the trial court's finding that this factor favored Mother.

(8) The moral, physical, mental and emotional fitness of each parent as it relates to 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.

The trial court found that “both parents have the moral, physical, mental and emotional fitness as it relates to their ability to parent the child,” and that “the Court believes that at this time this factor weighs evenly for both parties.” Father disagrees, stating that “the trial court abused its discretion in holding this factor as equal, as the facts of this case demonstrate that Mother is comparatively less fit [than] Father, particularly in this factor.” Once again, Father recites Mother's history of drinking in support of his position. We again note that the trial court fully heard and considered these facts when making its determination, and Father has not proven that the trial court abused its discretion in holding that “[b]ased upon Mother's history of being alcohol free and her commitment to her AA program, the Court believes that at this time this factor weighs evenly for both parties.”

(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.

The trial court found that the Child has strong bonds with both her Father's new family and her maternal extended family. The court concluded that “[t]his factor appears to weigh evenly for both parents.” Our review of the record supports that determination, and Father makes no persuasive argument to support his position to the contrary.

⁵Father also appeals the trial court's denial of his motion to alter or amend and to reopen proof. We affirm the decision of the trial court on that issue, and our analysis thereof is discussed in section (IV)(7).

(10) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment.

The trial court held that this factor weighs heavily in favor of Mother, finding that “Mother has in fact been the primary caretaker of the parties’ child . . . and except for the period of time of Mother’s abuse of alcohol, Mother’s environment she has provided for the child is in fact a stable and satisfactory environment.” Father cites the case of *Ward v. Ward*, No. M2012-01184-COA-R3-CV, 2013 WL 3198157 at *26 (Tenn. Ct. App. June 20, 2013), for the proposition that continuity of care does not always equate to stability. While we agree with that statement in theory, we do not agree that the evidence in this case preponderates against the trial court’s finding that, in addition to being the Child’s primary caregiver, Mother has chiefly provided a stable environment for the Child.

(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.

The trial court found that this factor weighed evenly for both parties because there is “no proof of the character or behavior of any person who frequents either parent’s home as being problematic.” On appeal, the sum total of Father’s contention that the trial court abused its discretion by not finding that this factor weighs in favor of Father is that “Father has his wife and their son in his home. Father’s wife is expecting a second child. [The Child] is loving and bonded with Father, her step mother and her brother. Mother has two (2) roommates, and has had a married couple as roommates in her home since the parties[’] 2012 divorce.” Even if true, these allegations do not give rise to an abuse of the trial court’s discretion.

(14) Each parent’s employment schedule, and the court may make accommodations consistent with those schedules.

The trial court found that this factor weighs evenly for both Mother and Father. Although he disagrees with the decision, Father concedes that the trial court’s finding does not rise to the level of an abuse of discretion.

(15) Any other factors deemed relevant by the court.

Other than noting that both parties had at times failed to follow the court’s orders, the trial court did not find any other factors that it deemed relevant to the determination of what was in the Child’s best interest. Father argues that the trial court should have considered the credibility of the parties and determined that Mother was not credible, and that its failure to do so is reversible error. In this case, however, the trial court did not

make any specific credibility findings, and Father has not offered any authority for this Court's ability to make that determination simply by reviewing the record. To the contrary, this Court has repeatedly held that the trier of fact, "having observed the demeanor of the witnesses and heard their testimony," is far better positioned to assess a witness's credibility than appellate courts who are reading a cold record. *See In re M.J.H.*, 196 S.W.3d 731, 746 (Tenn. Ct. App. 2005).

In sum, the trial court conducted a proper best interest analysis in this case, and the evidence does not preponderate against the trial court's findings on any one of these factors. We conclude that the determinations made by the trial court were each within the spectrum of rulings that could reasonably flow from the applicable facts and law, and we therefore affirm the judgment of the trial court with respect to what is in the best interest of the Child.

2. Primary Residential Parent

We next address Father's assertion that the trial court erred in failing to change Father to the Child's primary residential parent. After the trial court determined that a material change in circumstances had occurred, it then analyzed the factors set forth in Tennessee Code Annotated section 36-6-106(a)(1) through (15). The court ultimately found that it would be in the child's best interest to remain in Tennessee with Mother as her primary residential parent. As we have already determined in section (1) above, Father has not shown that the trial court abused its discretion when weighing the factors of Tennessee Code Annotated section 36-6-106(a). As such, we affirm the trial court's decision that it would be in the best interest of the Child for Mother to remain her primary residential parent.

3. Permanent Parenting Plan

Father next challenges the parenting plan adopted by the trial court. Trial courts "are better positioned to evaluate the facts" regarding parenting arrangements because these issues "are factually driven and require careful consideration of numerous factors." *Armbrister v. Armbrister*, 414 S.W.3d 685, 693 (Tenn. 2013). Father contends that the plan fails to maximize the participation of both parents in the life of the child. It bears repeating that Father made the unilateral decision to move to Virginia, which is more than eight (8) hours away from the Child. The court specifically found that the existing arrangement was unworkable and that the plan it was adopting maximized each parent's ability to participate in the Child's life. Father also asserts that the trial court erred in changing the parenting plan to allow Mother to have sole decision making authority with respect to the child, rather than Father and Mother sharing in decision making. "The parents geographic proximity to one another, to the extent that it affects their ability to

make timely mutual decisions” is a proper factor for consideration by the trial court pursuant to Tennessee Code Annotated section 36-6-407(c)(4), and we do not conclude that the trial court abused its discretion in designating Mother as the sole decision maker for the Child.

4. Relocation Statute

We next address Father’s contention that the trial court erred in its application of Tennessee Code Annotated section 36-6-108, also known as Tennessee’s parental relocation statute, which governs the terms under which a parent may “relocate outside of the state or more than fifty (50) miles from the other parent within the state.” *See* Tenn. Code Ann. § 36-6-108. Specifically, Father asserts that the trial court erroneously concluded that Mother and Father did not spend substantially equal amounts of time with the Child. Father also contends that the trial court incorrectly concluded that Father’s notice to Mother that he intended to relocate should have included the fact that he desired to relocate *with the Child*.

Regarding Father’s argument that the trial court erred in finding that Mother and Father did not spend substantially equal amounts of time with the Child, we should begin by explaining the significance of this determination. In the case at bar, Father was attempting to relocate to Virginia with the Child. Therefore, the standard the trial court was required to apply to Father’s request differed depending on whether the court found that Mother and Father were spending roughly equal amounts of time with the Child or not. *See* Tenn. Code Ann. § 36-6-108. Pursuant to Tennessee Code Annotated section 36-6-108(c), if the court determined that Mother and Father were actually spending substantially equal amounts of time with the Child, then no presumption in favor of or against the Child’s relocation would arise, and the court would determine whether to grant Father’s petition to relocate with the Child based on the best interests of the child. *See* Tenn. Code Ann. § 36-6-108(c). On the other hand, if the court had determined that Father was spending substantially more time with the Child than Mother, which Father insists he was, Father would have been able to take advantage of the provisions set forth in Tennessee Code Annotated section 36-6-108(d)(1). Pursuant to section (d)(1), “the parent spending the greater amount of time with the child *shall be permitted* to relocate with the child unless the court finds’ that the parent opposing the relocation has proven one of the enumerated grounds.” *Aragon v. Aragon*, No. M2014-02292-SC-R11-CV, --- S.W.3d ---, 2017 WL 1021962, (Tenn. 2017).

The initial parenting plan entered in this case when the parties divorced in 2012 named Mother as the primary residential parent with 285 days of parenting time per year and Father as the alternate residential parent with 140 days of parenting time per year. On appeal, Father asserts that the schedule set forth in the initial parenting plan provides

him with at least 208 days of parenting time with the Child.⁶ The part of the parenting schedule disputed by Father is his visitation with the Child beginning on Saturday at 11:00 a.m. and ending Monday at 6:00 p.m. The trial court calculated this interval of time as two (2) days that the Child spends with Father. Father, however, argues that this stretch of time should count as three (3) days. The Tennessee Child Support Guidelines provide the following guidance on the issue:

For purposes of this chapter, a “day” of parenting time occurs when the child spends more than twelve (12) consecutive hours in a twenty-four (24) hour period under the care, control or direct supervision of one parent or caretaker. The twenty-four (24) hour period need not be the same as a twenty-four (24) hour calendar day. Accordingly, a “day” of parenting time may encompass either an overnight period or a daytime period, or a combination thereof.

Tenn. Comp. R. & Reg. 1240-02-04-2 (10). Pursuant to this definition of a day, we conclude that the trial court was correct in counting the period beginning Saturdays at 11:00 a.m. and ending Mondays at 6:00 p.m. as two (2) days rather than three (3) days. Our calculation of the days in this case is as follows:

Saturday 11:00 a.m. through Sunday 11:00 a.m. = Day 1

Sunday 11:00 a.m. through Monday 11:00 a.m. = Day 2

Monday 11:00 a.m. through Monday 6:00 p.m. = 7 hours (not a day)

In support of his calculation of days, Husband gives the example of *Stogner v. Stogner*, No. M2011-00503-COA-R3-CV, 2012 WL 1965598 (Tenn. Ct. App. May 31, 2012), in which this Court held that a father whose parenting time began on Friday at 6:00 p.m. and ended at 8:00 a.m. the following Monday should be credited with three (3) days. In *Stogner*, this Court applied the same logic as we have in this case, but what Father misunderstands is the difference in the facts. Father does not pick the Child up on Friday evening; he picks her up on Saturday morning. The calculation of days in the *Stogner* case was as follows:

Friday 6:00 p.m. through Saturday 6:00 p.m. – Day 1

Saturday 6:00 p.m. through Sunday 6:00 p.m. – Day 2

⁶According to the trial court, Father never even alleged that the number of days was incorrect until he filed his pretrial brief two days before trial.

Sunday 6:00 p.m. through Monday 8:00 a.m. – Day 3 (14 hours)

Stogner, 2012 WL 1965598 at *4. Father also asserts that his weekly overnight visits with the Child that begin on Wednesdays at 11:00 a.m. and end on Thursdays at 5:00 p.m. should count as two (2) days instead of one (1) day as the trial court held. Again, we agree with the trial court and calculate that time period as follows:

Wednesday 11:00 a.m. through Thursday 11:00 a.m. – Day 1

Thursday 11:00 a.m. through Thursday 5:00 p.m. – 6 hours (not a day)

Father further contends that the trial court erred because the court should not have considered the assistance Father receives from other people in caring for the Child during his residential time in determining the days that Father was actually spending with the Child for purposes of the relocation statute. We disagree with Father's characterization of the trial court's analysis on this point. From our review of the record, the trial court discussed Father's delegation of his parenting responsibilities during its analysis of the best interest factors under Tennessee Code Annotated section 36-6-106(a), but we do not see where this played a role in the court counting "days" for purposes of the parental relocation statute. Ultimately, the trial court held that Father was given 140 days of parenting time under the parties' parenting plan, which is 38% of the time, and that "Father has failed to establish by a preponderance of the evidence that the days of parenting time were . . . calculated incorrectly." We agree and conclude that Mother was spending substantially more time with the Child than Father was in this case.

Finally, Father asserts that the trial court improperly imposed a legal requirement on him to inform Mother that he was not only planning to relocate but that he was planning to relocate *with the Child*. Tennessee Code Annotated section 36-6-108(a) requires a parent who desires to relocate to send notice to the other parent no later than sixty (60) days before the move, with the notice containing: "(1) Statement of intent to move; (2) Location of proposed new residence; (3) Reasons for proposed relocation; and (4) Statement that the other parent may file a petition in opposition to the move within thirty (30) days of receipt of the notice." Tenn. Code Ann. § 36-6-108. While the trial court's order does state that Father's notice of relocation to Mother did not alert Mother that he intended to relocate with the Child, and that the first time Father requested that he be allowed to relocate with the Child was twenty-seven (27) days before trial, this does not appear to have affected the court's analysis or conclusion regarding whether Father could relocate with the Child. In sum, we find no error in the trial court's application of the parental relocation statute.

5. Gross Incomes of the Parties

Father also disputes the trial court's calculation of the gross incomes of the parties, which is a factor in determining Father's child support obligation. After testimony of the parties and witnesses was heard on October 14, 2015 and November 20, 2015, and the court issued its written findings of fact and conclusions of law on February 8, 2016, the parties again returned to court on March 4, 2016 in order to address the remaining issues of child support and attorney's fees. As a result of the March 4, 2016 hearing, and the accompanying exhibits presented to the court, the court entered an order on April 14, 2016 that included findings of fact and conclusions of law regarding the income of the parties for purposes of calculating child support. Specifically, the court made the following findings:

a. Father's Monthly Income

| | |
|---|---------|
| - Farm Income | \$3,500 |
| - Dividend & Interest (Average of 2013 & 2014) | \$742 |
| - Capital Gains (Average of 2013 & 2014) | \$1,183 |
| - Annual cash gift | \$1,166 |
| - Gift of real estate (based on 30-year mortgage using 3.25% interest) | \$1,886 |

Total: \$8,477.00

b. Mother's Monthly Income

| | |
|------------|---------|
| W-2 income | \$5,166 |
|------------|---------|

Total: \$5,166.00

On appeal, Father agrees that the trial court correctly found that he earns \$3,500.00 per month from his family farm in Virginia, \$742.00 per month for interest and dividends, \$1,183.00 per month in capital gains, and \$1,166.00 per month in gifts from his mother. Father argues, however, that the trial court erred in including a gift of real estate that Father received as gross income for purposes of child support. Tennessee's Child Support Guidelines offer the following instruction on determining a parent's gross income for purposes of calculating child support:

Gross income of each parent shall be determined in the process of setting the presumptive child support order and shall include all income from any source (before deductions for taxes and other deductions such as credits for other qualified children), whether earned or unearned, and includes, but is not limited to, the following:

- (i) Wages;
- (ii) Salaries;
- (iii) Commissions, fees, and tips;
- (iv) Income from self-employment;
- (v) Bonuses;
- (vi) Overtime payments;
- (vii) Severance pay;
- (viii) Pensions or retirement plans . . . ;
- (ix) Interest income;
- (x) Dividend income;
- (xi) Trust income;
- (xii) Annuities;
- (xiii) Net capital gains;
- (xiv) Disability or retirement benefits that are received from the Social Security Administration . . . ;
- (xv) Workers compensation benefits, whether temporary or permanent;
- (xvi) unemployment insurance benefits;
- (xvii) Judgments recovered for personal injuries and awards from other civil actions;
- (xviii) Gifts that consist of cash or other liquid instruments, or which can be converted to cash;**
- (xix) Prizes;
- (xx) Lottery winnings; and
- (xxi) Alimony or maintenance received from persons other than parties to the proceeding before the tribunal.

Tenn. Comp. R. & Reg. 1240-02-04-.04(3)(a)(1) (emphasis added).

The only category of “gross income” outlined above that could be construed to include the gift to Father of the house is “[g]ifts . . . of cash or other liquid instruments, . . . which can be converted to cash.” However, the trial court conceded in its findings of fact and conclusions of law that “there is no preceden[t] for whether or not a one-time gift of a home should be considered in the child support calculations under Tennessee’s Child Support Guidelines as interpreted by our appellate courts.” Furthermore, other than the fact that the figures were proposed by Mother’s counsel, it is not clear from the record how the trial court settled on a thirty (30) year mortgage, or how it concluded that

Father's loan would be at an interest rate of 3.25%.⁷ The Child Support Guidelines allow a court the discretion to average a parent's income over a period that is proper under the specific facts of a particular case.⁸ However, in this case, we do not construe that principle to extend so far as imputing the value of Father's home in Virginia into the calculation of his gross monthly income by fashioning a hypothetical mortgage at a speculative interest rate.

Father next takes issue with the court's determination of Mother's income. Father asserts that the trial court erred in declining to include rental income that Mother had received when calculating her gross monthly income. With regard to this issue, the trial court made a specific finding that "Mother's previous rental income will cease in May 2016 and therefore, the Court has not included any rental income in Mother's income, however, it is incumbent on Mother to report same in the event she continues to receive rental income." We conclude that this decision by the trial court is supported by the record and does not constitute an abuse of the court's discretion in determining Mother's income.

We vacate the trial court's calculation of Father's gross income with respect to the inclusion of the value of Father's home in Virginia, we affirm the trial court's calculation of Mother's gross income, and we remand for the trial court to recalculate Father's child support obligation accordingly.

6. Retroactive and Prospective Child Support Calculations

Father next argues that the trial court erred in calculating his prospective child support obligation at \$974.00 per month. First, Father repeats his assertions regarding the error in the calculation of his income. Because we have already disposed of this issue, we move on to Father's second argument. According to Father, the trial court's order setting his current child support obligation should be reversed because the court did not first make a finding that a significant variance existed between the amount of child support he was paying under the original child support order, which was \$419.00, and the new child support amount, which was set at \$974.00.⁹ Generally speaking, a child support order is not eligible for modification unless a "significant variance" exists

⁷At the hearing regarding child support and attorney's fees on March 4, 2015, counsel for Mother explained to the trial court that "on the Virginia house, the way I came up with \$1,886 a month is I took a 30-year mortgage on a 400,000-house at 3.25 percent and put that in his income figure."

⁸"Variable income such as commissions, bonuses, overtime pay, dividends, etc. should be averaged over a reasonable period of time consistent with the circumstances of the case and added to a parent's fixed salary or wages to determine gross income." Tenn. Comp. R. & Reg. 1240-02-04-.04(3)(b).

⁹We again acknowledge that this amount will most likely decrease to some extent when child support is recalculated with Father's corrected gross income figure.

between the amount of the current support order and the proposed new support order. *See* Tenn. Comp. R. & Reg. 1240-2-4-.05(2). The Guidelines define a “significant variance” as being “at least a fifteen percent (15%) change between the amount of the current support order . . . and the amount of the proposed presumptive support order¹⁰,” which, in this case, would require a change of only \$62.85 per month in Father’s child support obligation. *See id.* Mother contends that Father has waived his ability to make this argument on appeal because he never alleged at trial that a significant variance did not exist in order to modify support. We agree. Not only did Father not raise this as an issue at trial, he did not even raise it as an issue in his Rule 59 motion to alter or amend. We have repeatedly held that “[u]nder Tennessee law, issues raised for the first time on appeal are waived.” *Black v. Blount*, 938 S.W.2d 394, 403 (Tenn. 1996). Furthermore, Father does not allege that a significant variance in his child support obligation did not exist. In fact, he seeks to take advantage of the trial court’s modification of his child support obligation for purposes of giving him credit for his newly born in-home child. For all of these reasons, we find Father’s choice to raise this as an issue as puzzling as it is futile.

Father further challenges the court’s child support calculations with respect to its award of retroactive child support. The trial court awarded Mother a judgment for retroactive support in the amount of \$4,859.00 for the period spanning July 1, 2015 through February 1, 2016. According to Father, this calculation should be reversed because the trial court did not explain why it chose July 1, 2015 for the effective date of modification. However, in his brief on appeal, Father acknowledges that “[t]he trial court has the discretion to order the modification of child support effective as of the date of the modification petition, the date of the final hearing, or any appropriate date in between.” *Huntley v. Huntley*, 61 S.W.3d 329, 337 (Tenn. Ct. App. 2001). Moreover, Father made no objection to the court’s declaration that it would be setting retroactive support back to July 1, 2015 when he had the opportunity during the hearing regarding child support. Father also asserts that the court failed to give him credit for amounts he expended on the Child for work-related childcare. Father makes no citations to the record for evidence of what funds he spent on the Child for her daycare during the relevant timeframe. Nevertheless, Father’s attorney asked the trial court to credit Father with \$288.89 per month for work-related childcare, and the trial court granted Father’s request. With the exception of our previous determination that Father’s gross income should be recalculated, we affirm the trial court’s award of retroactive child support.

¹⁰However, a variance of only seven and one-half percent (7.5%) is required if the court determines that the gross income of the parent seeking the modification qualifies as a “low income provider.” Tenn. Comp. R. & Reg. 1240-2-4-.05(2). This provision of the Guidelines is not relevant to the case at bar.

7. Motion to Alter or Amend and Reopen Proof

On May 13, 2016, Father filed a motion to alter or amend the trial court's judgment entered April 14, 2016, to reopen the proof, and for a temporary restraining order and stay of judgment. Father alleged that he had new proof that Mother had been driving with the Child in a vehicle that was not equipped with an interlock device, which was contrary to the court's previous orders. Father further contended that the court should alter or amend its order with respect to the weighing of the best interest factors under Tennessee Code Annotated section 36-6-106(a). Father also requested that the court give him credit with respect to his child support obligation to account for an additional in-home child that had been born to Father and his new wife in April 2016. The trial court heard the matter on June 13, 2016, including testimony from private investigators hired by Father, as well as testimony from the parties. On June 28, 2016, the trial court issued an order holding that the proof presented by Father did not rise to the level necessary to convince the court that it should have reached a different result than it reached in its previous orders, finding that "Father has failed to show that Mother breached her sobriety date, nor did the evidence show Mother drove a vehicle without an interlock device for the purpose of circumventing alcohol testing." The court went on to say that, although it did not want to conclude that Father's motive for filing the instant motion was retribution, there was no evidence to support the relief sought in Father's motions. The court ultimately denied Father's motions with the exception of giving him credit for the additional in-home child that had been recently born.

We review a trial court's decision of whether or not to grant a Motion to Alter or Amend under an abuse of discretion standard. *Stricklin v. Stricklin*, 409 S.W.3d 8, 10 (Tenn. Ct. App. 2015). "The purpose of a Rule 59.04 motion to alter or amend a judgment is to provide the trial court with an opportunity to correct errors before the judgment becomes final." *In re M.L.D.*, 182 S.W.3d 890, 895 (Tenn. Ct. App. 2005)(citations omitted). These motions should "be granted when the controlling law changes before the judgment becomes final; when previously unavailable evidence becomes available; or to correct a clear error of law or to prevent injustice." *Id.* These motions "should not be used to present new, previously untried or unasserted theories or legal arguments." *Christopher v. E. Tenn. Spine and Orthopedic Specialists, P.C.*, No. E2014-02552-COA-R3-CV, 2015 WL 5012756 at *4 (Tenn. Ct. App. Aug. 15, 2015) (*no perm. app. filed*) (quoting *In re M.L.D.*, 182 S.W.3d at 895). The trial court found that Father was aware that Mother was driving her Father's vehicle by at least February 18, 2016, and he did not file this motion until May 13, 2016. Based on this lapse of time, the court concluded that Father had not exercised due diligence in filing his motion. Further, the court found that "even if Father exercised due diligence there has been absolutely nothing offered that rises to the level of significant evidence" to cause this court to alter or amend its April 14, 2016 ruling.

Our review of the record supports the trial court's conclusion that Father failed to exercise due diligence with respect to presenting the evidence alleged in his motion to alter or amend and reopen the proof. We further conclude that the trial court did not abuse its discretion in holding that the proof proffered by Father would not have changed the outcome of the court's analysis.

8. Trial Court's Award of Attorney's Fees to Mother

Tennessee Code Annotated section 36-5-103(c) provides a court with the discretion to award reasonable attorney's fees to a party who is successful in a dispute over child support and/or child custody. *See* Tenn. Code Ann. § 36-5-106(c). Awards of attorney's fees under this statute are now "familiar and almost commonplace." *Deas v. Deas*, 774 S.W.2d 167, 170 (Tenn. 1989). The trial court in this case ultimately denied Father's petitions to modify the parenting plan and to relocate with the Child, granted Mother's petition to modify the parenting plan, and adopted Mother's proposed new parenting plan with slight modifications. Father makes absolutely no coherent argument on appeal as to how the trial court erred in awarding Mother attorney's fees. Based on our review of the record, we determine that the trial court properly exercised its discretion in awarding attorney's fees to Mother for defending Father's petitions.

9. Trial Court's Decision to Not Award Attorney's Fees to Father

In three sentences of his appellate brief, Father sets forth his argument as to why the trial court erred in failing to award attorney's fees to him at trial. Father states that "the trial court erred in ruling Mother was to retain custody of the parties' child as stated above. Thus, Mother should not have been awarded attorney's fees in this matter. Rather, Father should have been awarded his attorney's fees in this matter." Having already determined that the trial court did not err in refusing to designate Father as the Child's primary residential parent, we also affirm the court's decision to not award attorney's fees to Father for losing his petition to modify custody.

10. Attorney's Fees on Appeal

Father and Mother have both requested that this Court make an award to them the attorney's fees they have incurred on appeal. The determination of whether to award attorney's fees on appeal is within the sole discretion of the appellate court. *Moses v. Moses*, E2008-00257-COA-R3-CV, 2009 WL 838105, at *10 (Tenn. Ct. App. Mar. 31, 2009) (*no perm. app. filed*) (citing *Archer v. Archer*, 907 S.W.2d 412, 419 (Tenn. Ct. App. 1995)). Although Father arguably took a "throw everything at the wall and hope something sticks" approach to this appeal, which was largely ineffective, both litigants

were at least partially successful on appeal. We therefore decline to award either party attorney's fees incurred on appeal.

IV. CONCLUSION

For the foregoing reasons, we vacate the calculation of Father's child support obligation and remand this issue for reconsideration. We affirm the judgment of the trial court in all other respects. We decline both parties' requests for attorney's fees incurred on appeal. Costs of this appeal are taxed one-half to the appellee, Amanda Jane Sansom, and one-half to the appellant, Todd Michael Sansom, and his surety, for which execution may issue if necessary.

BRANDON O. GIBSON, JUDGE