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IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
June 19, 2019 Session

GLENN A. STARK v. JANA A. BURKS

Appeal from the Juvenile Court for Henry County
No. 23475 Andrew Brigham, Judge

No. W2018-01283-COA-R3-JV

In this action concerning enforcement or modification of a permanent parenting plan, the trial court analyzed the issues in accordance with the provisions of Tennessee Code Annotated Title 36 concerning child custody matters, rather than Title 37, involving dependency and neglect proceedings. Following the trial court's modification of the parties' permanent parenting plan, the father filed post-trial motions seeking the appointment of a guardian *ad litem* and entry of an order providing for joint counseling sessions with the father and the child. The trial court denied these motions and awarded the mother attorney's fees as the prevailing party pursuant to Tennessee Code Annotated § 36-5-103(c). The father has appealed. Discerning no reversible error, we affirm.

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

THOMAS R. FRIERSON, II, J., delivered the opinion of the court, in which J. STEVEN STAFFORD, P.J., W.S., and CARMA DENNIS MCGEE, J., joined.

J. Neil Thompson, Huntingdon, Tennessee, for the appellant, Glenn A. Stark.

Teresa McCaig Marshall, Paris, Tennessee, for the appellee, Jana A. Burks.

OPINION

I. Factual and Procedural Background

On November 25, 2009, the State of Tennessee, on behalf of Jana A. Burks ("Mother"), filed a petition in the Henry County Juvenile Court ("trial court") seeking to establish the paternity of a minor child, R.B. ("the Child"), who was born earlier that same year. Mother alleged that Glenn A. Stark ("Father") was the biological father of the

Child. A DNA test subsequently completed on March 30, 2010, showed the probability of Father's paternity of the Child to be 99.999995%. The parties thereafter proceeded to establish an agreed permanent parenting plan ("PPP"), which was approved for entry by the trial court on July 14, 2010. On August 6, 2010, the trial court issued a final order incorporating the parties' PPP and awarding Mother a judgment for child support arrearage.

On September 11, 2013, the trial court entered an agreed order modifying the PPP. Subsequently, on April 21, 2014, the trial court entered an order modifying Father's current child support obligation and clarifying the amount of arrearage owed by Father.

On December 10, 2014, Father filed a motion to compel visitation. In his motion, Father averred that he had not been given the opportunity to exercise his visitation rights with the Child during the Christmas holidays as provided by the parties' current PPP. Father stated that Mother refused to communicate with him regarding the visitation schedule. One week later, on December 17, 2014, Mother filed a motion seeking an order "restraining and prohibiting [Father] . . . from contacting" Mother or the Child pending further court order. Mother referenced statements made by the Child, alleging that Father had touched the Child in a sexual and inappropriate manner on multiple occasions during his co-parenting time. Mother supported her request by referring the trial court to an April 2014 forensic interview of the Child, wherein the Child allegedly provided specific details concerning such abuse. Mother further informed the court that she had enrolled the Child in ongoing counseling to cope with the alleged abuse. On February 9, 2015, Judge Vicki S. Snyder entered an order recusing herself from this matter. The case was thereafter heard by Judge Andrew Brigham by interchange.

The trial court conducted a hearing concerning the parties' motions on November 10, 2015. In addition to hearing the testimony of the parties and reviewing the Child's forensic interview, the court also considered testimony from the child's counselor, a daycare worker, Father's adult daughter, and Father's mother. On November 16, 2015, the trial court entered an order granting Mother's motion for a restraining order and modifying the parties' PPP. In reaching its decision, the trial court applied the burden of proof set forth in Tennessee Code Annotated § 36-6-101(a)(2)(B), requiring that a party seeking modification of a PPP "prove by a preponderance of the evidence a material change in circumstances." The court then determined that Mother had demonstrated, by a preponderance of the evidence, that Father had touched the Child in an inappropriate manner on more than one occasion, which constituted a material change in circumstance affecting the Child. The court specifically found in pertinent part:

> To conclude that the proof does not support this determination [that abuse had occurred] would require the court to disregard the child's statements during the forensic interview and instead conclude that her allegations were false. The court would further be forced to conclude that [the Child] was likewise repeating this falsity to [her counselor], Dr. Pickering, and to Mother. This canard would have to be the product of the mind of a 4 year old child and would need [to] be repeated consistently over the space of several months. The court cannot reach this conclusion when weighing the totality of the evidence. The court understands that Father is placed in the position of having to prove that something did not occur; a difficult task, to be sure. Nevertheless, the court is compelled to this conclusion.
>
> In addition, if one is to conclude that [the Child's] disclosures during the forensic interview are a fabrication, then one must also conclude that [the Child] is able to convince [her counselor], a licensed mental health professional for 21 years, of the authenticity of her story. The court is not prepared to reach this conclusion.
>
> The court notes, again, that the child made consistent disclosures to different people over a period of time.

The trial court also found that it was in the Child's best interest for custody to remain with Mother and for Father to have no contact with the Child until further order of the court, based on the recommendation of the Child's counselor and the significant distance between Mother's and Father's residences. The court further determined:

> [U]pon a favorable recommendation of [the Child's] mental health professionals, contact may well resume between [the Child] and Father. Such is for a future date. Absent an agreement, such contact would be by court order, must involve input from [the Child's] mental health professionals, must involve circumstances that would indicate that a threat to [the Child's] safety no longer exists, and must be in her best interests.

Father filed a timely notice of appeal from the trial court's November 16, 2015 order; however, this Court dismissed the appeal, determining that the November 16, 2015 order was not final because it failed to address whether Father's child support obligation should be modified. This Court therefore remanded the matter to the trial court.

Father subsequently filed two motions on June 12, 2017. First, Father requested that the trial court allow joint mental health counseling sessions for the Child and Father. Father additionally requested that the court use the counselor's evaluations from those sessions to determine the appropriate modification of Father's co-parenting time with the Child. Father argued that his only avenue for restoration of co-parenting rights would be for the trial court to allow counseling sessions wherein a medical professional could evaluate Father and the Child to determine whether restoration of visitation rights would serve the Child's best interest. Second, Father filed a motion asking the court to appoint a guardian *ad litem* to protect the interest of the Child in this matter. Mother filed responses to each of Father's motions, asserting that the motions should be denied and that she should be awarded attorney's fees related thereto.

On July 3, 2018, the trial court amended its previous order to provide that Father's child support obligation had not been modified following the change in co-parenting schedule. A second order was entered on the same date, denying Father's motions for joint counseling sessions and appointment of a guardian *ad litem*. The court found that the Child's best interest would not be served by ordering the Child to participate in sessions with another counselor. With respect to the appointment of a guardian *ad litem*, the court expressed concern that appointing a guardian *ad litem* would necessitate further interviews of the Child, during which she would be subjected to "bringing up these memories." The trial court specified that Father could depose the Child's current counselor to evaluate whether the counselor believed that the appointment of a guardian *ad litem* served the welfare of the Child. Should the counselor believe that a guardian *ad litem* was needed, the trial court would "address that appointment." Furthermore, Mother's request for attorney's fees was denied.

Also on July 3, 2018, Mother filed a "Motion Pursuant to Rule 52.02 of the Rules of Civil Procedure and Motion for General Relief." In this motion, Mother asked the trial court to amend its findings or make additional findings of fact and requested that the court reconsider its prior ruling and award her attorney's fees based upon her inability to pay them. Father filed a notice of appeal on July 13, 2018.

On September 11, 2018, the trial court entered an order concerning Mother's motion, determining the relief sought to be in the nature of a Tennessee Rule of Civil Procedure 59 motion to alter or amend. The trial court concluded that Mother was entitled to an award of attorney's fees concerning her defense of the post-trial motions filed by Father. As support, the court determined that Tennessee Code Annotated § 36-5-103(c) provided authority to award attorney's fees to Mother. Mother was accordingly awarded attorney's fees in the amount of $7,085.57 related to her defense of Father's motions seeking appointment of a guardian *ad litem* and for joint counseling.

II. Issues Presented

Father presents the following issues for our review, which we have restated slightly:

1. Whether the trial court erred by treating this matter as a custody action pursuant to Tennessee Code Annotated Title 36 rather than a dependency and neglect action pursuant to Tennessee Code Annotated Title 37.

2. Whether the trial court erred by failing to appoint a guardian *ad litem* when Mother filed her motion alleging sexual abuse of the Child by Father.

3. Whether the trial court erred by failing to grant Father's post-trial motion to appoint a guardian *ad litem*.

4. Whether the trial court erred by denying Father's post-trial motion requesting joint counseling sessions with the Child.

5. Whether the trial court erred by awarding to Mother a judgment for attorney's fees.

III. Standard of Review

We review a trial court's findings of fact *de novo* with a presumption of correctness unless the preponderance of the evidence is otherwise. *See* Tenn. R. App. P. 13(d); *Nashville Ford Tractor, Inc. v. Great Am. Ins. Co.,* 194 S.W.3d 415, 424 (Tenn. Ct. App. 2005). "[F]or the evidence to preponderate against a trial court's finding of fact, it must support another finding of fact with greater convincing effect." *Rawlings v. John Hancock Mut. Life Ins. Co.,* 78 S.W.3d 291, 296 (Tenn. Ct. App. 2001). We review questions of law *de novo*. *See Wells v. Tenn. Bd. of Regents,* 231 S.W.3d 912, 916 (Tenn. 2007). "We defer to the trial court's determinations of witness credibility because the trial judge could observe the witnesses' demeanor and hear in-court testimony." *Coleman v. Olson*, 551 S.W.3d 686, 694 (Tenn. 2018).

Our Supreme Court has explained the principles of statutory interpretation as follows:

> When dealing with statutory interpretation, well-defined precepts apply. Our primary objective is to carry out legislative intent without broadening or restricting the statute beyond its intended scope. *Houghton v. Aramark Educ. Res., Inc.*, 90 S.W.3d 676, 678 (Tenn. 2002). In construing legislative enactments, we presume that every word in a statute has meaning and purpose and should be given full effect if the obvious intention of the General Assembly is not violated by so doing. *In re C.K.G.*, 173 S.W.3d 714, 722 (Tenn. 2005). When a statute is clear, we apply the plain meaning without complicating the task. *Eastman Chem. Co. v. Johnson*, 151 S.W.3d 503, 507 (Tenn. 2004). Our obligation is simply to enforce the written language. *Abels ex rel. Hunt v. Genie Indus., Inc.*, 202 S.W.3d 99, 102 (Tenn. 2006). It is only when a statute is ambiguous that we may reference the broader statutory scheme, the history of the legislation, or other sources. *Parks v. Tenn. Mun. League Risk Mgmt. Pool*, 974 S.W.2d 677, 679 (Tenn. 1998). Further, the language of a statute cannot be considered in a vacuum, but "should be construed, if practicable, so that its component parts are consistent and reasonable." *Marsh v. Henderson*, 221 Tenn. 42, 424 S.W.2d 193, 196 (1968). Any interpretation of the statute that "would render one section of the act repugnant to another" should be avoided. *Tenn. Elec. Power Co. v. City of Chattanooga*, 172 Tenn. 505, 114 S.W.2d 441, 444 (1937). We also must presume that the General Assembly was aware of any prior enactments at the time the legislation passed. *Owens v. State*, 908 S.W.2d 923, 926 (Tenn. 1995).

In re Estate of Tanner, 295 S.W.3d 610, 613-14 (Tenn. 2009).

With regard to a trial court's finding that a material change in circumstance has occurred warranting modification of the parties' permanent parenting plan, our Supreme Court has explained:

> 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.
>
> 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." *Suttles v. Suttles*, 748 S.W.2d 427, 429 (Tenn. 1988) (quoting *Edwards v. Edwards*, 501 S.W.2d 283, 291 (Tenn. Ct. App. 1973)). "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." *Eldridge v. Eldridge*, 42 S.W.3d 82, 88 (Tenn. 2001). 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 illogical result, resolves the case on a clearly erroneous assessment of the evidence, or relies on reasoning that causes an injustice." *Gonsewski v. Gonsewski*, 350 S.W.3d 99, 105 (Tenn. 2011). 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." *Eldridge*, 42 S.W.3d at 88.

Armbrister v. Armbrister, 414 S.W.3d 685, 692-93 (Tenn. 2013) (other internal citations omitted).

IV. Applicable Law

We note, first and foremost, that Father has not specifically appealed the trial court's determination that he had committed sexual abuse against the Child. Accordingly, Father has waived consideration of this issue. *See Champion v. CLC of Dyersburg, LLC*, 359 S.W.3d 161, 163 (Tenn. Ct. App. 2011) ("An issue not raised in an appellant's statement of the issues may be considered waived."). Instead, Father asserts that the trial court erred in analyzing this case as a child custody matter, pursuant to Tennessee Code Annotated Title 36, rather than as a dependency and neglect matter pursuant to Title 37 of the Code. In its November 16, 2015 order, the trial court relied upon various provisions contained within Title 36, explaining:

> Matters before the [trial] court were [Father's] Motion to Compel Visitation filed December 10, 2014, and [Mother's] Motion, filed December 17, 2014, to terminate contact between [Father and the Child]. In essence, this is a matter that goes to either enforcement of, or a modification to, the parties' Parenting Plan.

* * *

> This is a custody case between unmarried parents proceeding pursuant to Title 36 of our state's statutory code . . . .

Following our thorough review of the record, we agree with the trial court's application of child custody law in this action.

As the trial court noted, the pleadings that precipitated the November 2015 hearing in this matter were (1) Father's motion seeking to compel Mother to comply with the parties' PPP concerning Father's co-parenting time and (2) Mother's motion seeking to terminate contact between Father and the Child due to allegations of abuse. As the trial court properly found, these pleadings concerned enforcement or modification of the PPP. Tennessee Code Annotated § 36-6-502 (2017) grants a trial court the authority to enforce parental visitation rights and sanction parties who fail to comply. Although a party governed by a court-ordered visitation schedule must comply therewith, that party has the opportunity to seek modification of the existing plan through a motion filed with the trial court. *See* Tenn. Code Ann. § 36-6-510 (2017). Tennessee Code Annotated §§ 36-6-404 and -405 (2017) set forth the process a trial court must follow in considering whether modification of a permanent parenting plan is necessary.

Pursuant to Tennessee Code Annotated § 36-6-406(a)(2) (2017), a trial court is justified in limiting a parent's co-parenting time under certain circumstances, such as when a child has been subjected to physical or sexual abuse by that parent. Tennessee Code Annotated § 36-6-404(b) further directs that when fashioning a child's residential schedule, should Tennessee Code Annotated § 36-6-406 not be fully dispositive of a modification action, a trial court "shall consider the factors found in § 36-6-106(a)(1)-(15)." Tennessee Code Annotated § 36-6-106 (2017) authorizes a trial court to fashion a custody arrangement that serves the best interest of a child. This section specifically empowers trial courts to consider factors including, but not limited to, the "moral, physical, mental and emotional fitness of each parent as it relates to their ability to parent the child," as well as "[e]vidence of physical or emotional abuse to the child . . . ." *See* Tenn. Code Ann. § 36-6-106(a)(8), (11).

The above-referenced code sections are clearly applicable to and controlling of the issues in the case at bar. Although the parties were never married, they maintained a valid PPP concerning the Child's residential schedule with each parent. The language in Father's motion, wherein he sought enforcement of the parties' PPP, and Mother's

motion, wherein she requested cessation of Father's co-parenting time, raised the precise issues contemplated by the provisions of Title 36 detailed above.

Father's filing of a motion to compel visitation on December 10, 2014, initiated the most recent proceedings in this matter. In his motion, Father requested that the trial court enforce the parties' PPP following Mother's denial of his co-parenting time with the Child. The statutory provisions within Title 36 afford a non-residential parent, like Father, the ability to request that a trial court enforce his court-ordered co-parenting time. *See* Tenn. Code Ann. § 36-6-502. Because Father sought enforcement of his visitation rights, the trial court's application of custody law in resolving his motion was proper.

Similarly, in her counter-motion filed on December 17, 2014, Mother sought relief tantamount to a request for modification of the residential co-parenting schedule. In her motion, Mother acknowledged that the PPP granted Father co-parenting time. Despite having withheld the Child from Father absent a court order, Mother requested that the trial court restrain and prohibit Father from further contact with the Child in order to protect the Child from further abuse. A trial court considering a modification of child custody may specifically contemplate evidence of physical abuse in determining whether a material change in circumstance has occurred. *See* Tenn. Code Ann. § 36-6-106(a)(11). Statutory authority governing child custody arrangements specifically provides that a trial court may restrict parental visitation, as was requested by Mother, in cases where the court finds reliable evidence of child sexual abuse. *See* Tenn. Code Ann. § 36-6-406. We conclude that the trial court in the instant action correctly applied the provisions contained within Title 36 when making its determination concerning whether the parties' PPP should be modified.

We further conclude that the trial court did not prejudice Father by referencing certain provisions contained within Title 37 in its November 2015 order, as such references were beneficial to the court's interpretation of the child custody statutes contained in Title 36. For example, in making its determination in the case at bar, the trial court considered whether the Child was the victim of "child sexual abuse" as that term is defined in Tennessee Code Annotated § 37-1-602. We determine that the inclusion of sexual abuse as a factor to be considered when fashioning a co-parenting schedule would logically and reasonably implicate the trial court's consideration of applicable law defining child sexual abuse. *See* Tenn. Code Ann. §§ 36-6-106, -406. We therefore find no error in the trial court's application of provisions defining child sexual abuse, as stated in Title 37, to a child custody proceeding when the facts of the proceeding necessitated consideration of whether the Child had been subjected to sexual abuse.

Father contends that the trial court erred by failing to treat this case as a dependency and neglect action pursuant to Title 37. Father relies on this Court's opinions in *Cox v. Lucas*, No. E2017-02264-COA-R3-CV, 2018 WL 5778969 (Tenn. Ct. App. Nov. 2, 2018), *rev'd*, 576 S.W.3d 356 (Tenn. 2019), and *Minyard v. Lucas*, No. E2017-02261-COA-R3-CV, 2018 WL 5778967 (Tenn. Ct. App. Nov. 2, 2018), *rev'd*, 576 S.W.3d 351 (Tenn. 2019), in support of his contention. We note, however, that our Supreme Court recently reversed this Court's rulings in *Cox* and *Minyard* that the circuit court lacked subject matter jurisdiction because the underlying allegations sounded in dependency and neglect rather than child custody. *See Cox v. Lucas*, 576 S.W.3d 356 (Tenn. 2019); *Minyard v. Lucas*, 576 S.W.3d 351 (Tenn. 2019). The High Court ultimately determined that the circuit court retained subject matter jurisdiction in those actions, in which the petitioners sought to modify the parties' permanent parenting plans, despite the nature of the allegations in the modification petitions. *Id*.

We find Father's reliance on the *Cox* and *Minyard* decisions to be unavailing. In contrast to the situations presented in those cases, this proceeding originated in juvenile court and remained in juvenile court. Nonetheless, the gravamen of the action concerned whether the parties' prior, valid PPP should be enforced as written or modified due to the allegations that Father had abused the Child. Upon our thorough review of the nature of the parties' pleadings and the proceedings, we discern no error in the trial court's application of child custody law, pursuant to Tennessee Code Annotated Title 36, in its adjudication of this case.

V. Failure to Appoint Guardian *Ad Litem*

Father asserts that the trial court erred in failing to appoint, *sua sponte*, a guardian *ad litem* for the Child following the filing of Mother's motion containing allegations of sexual abuse. Similarly, Father asserts that the trial court erred in denying his June 12, 2017 motion seeking appointment of a guardian *ad litem*. We disagree with both assertions.

First, Father asserts that appointment of a guardian *ad litem* was mandatory in this case pursuant to Tennessee Code Annotated § 37-1-149(a)(1) (2014), which provides in relevant part:

> The court at any stage of a proceeding under this part, on application of a party or on its own motion, shall appoint a guardian ad litem for a child who is a party to the proceeding if such child has no parent, guardian or custodian appearing on such child's behalf or such parent's, guardian's or custodian's interests conflict with the child's or in any other case in which

> the interests of the child require a guardian. The court, in any proceeding under this part resulting from a report of harm or an investigation report under §§ 37-1-401 -- 37-1-411, shall appoint a guardian ad litem for the child who was the subject of the report.

As this Court has previously explained, "[t]he reference to 'this part' in the above [subsection] apparently refers to Part 1 of Title 37 of the code, which includes actions brought as dependent and neglected, unruly, or delinquency proceedings. The cited statutes refer to mandatory child abuse reports." *In re Jonathan S. C-B*, No. M2010-02536-COA-R3-JV, 2012 WL 3112897, at *21 (Tenn. Ct. App. July 31, 2012). Having determined that in this action, Mother sought modification of a permanent parenting plan rather than an adjudication of dependency and neglect, we determine that Tennessee Code Annotated § 37-1-149(a)(1) is inapplicable hereto.

Concerning Father's assertion that the trial court erred in failing to appoint a guardian *ad litem* upon Father's request, we note that the trial court is only required to appoint a guardian *ad litem* to represent a child in certain instances. For example, as previously elucidated, the trial court is required to appoint a guardian *ad litem* pursuant to Tennessee Code Annotated § 37-1-149(a)(1) in "actions brought as dependent and neglected, unruly, or delinquency proceedings." *See id.*; *see also* Tenn. Sup. Ct. R. 40. In addition, pursuant to Tennessee Supreme Court Rule 13, appointment of a guardian *ad litem* is mandatory in proceedings involving termination of parental rights. The provisions of Title 36, however, involving modifications of parenting plans create no such mandate.[1]

By contrast, Tennessee Supreme Court Rule 40A provides that the trial court "may" appoint a guardian *ad litem* for a child involved in a custody proceeding, "when the court finds that the child's best interests are not adequately protected by the parties and that separate representation of the child's best interests is necessary." Rule 40A goes on to provide, however, that "Courts should not routinely appoint guardians ad litem in custody proceedings. Rather, the court's discretion to appoint guardians ad litem shall be exercised sparingly." Prior decisions of this Court have clarified that the appointment of a guardian *ad litem* pursuant to Rule 40A is discretionary. *See, e.g.*, *Newsome v. Porter*, No. M2011-02226-COA-R3-PT, 2012 WL 760792, at *2 (Tenn. Ct. App. Mar. 7, 2012).

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[1] Although Tennessee Code Annotated § 36-4-132 (2017) provides that a guardian *ad litem* may be appointed by the court in "an action for dissolution of marriage involving minor children," the parties herein were not married and, even if they had been, the language of the statute is discretionary rather than mandatory concerning such appointment.

Tennessee Rule of Civil Procedure 17.03 provides that a trial court shall "appoint a guardian ad litem to defend an action for an infant or incompetent person who does not have a duly appointed representative, or whenever justice requires." A trial court's decision concerning whether "justice requires" appointment of a guardian *ad litem* pursuant to Rule 17.03 is likewise discretionary and as such will be given deference on appeal. *See Gann v. Burton*, 511 S.W.2d 244, 247 (Tenn. 1974). "A court abuses its discretion when it causes an injustice to the party challenging the decision by (1) applying an incorrect legal standard, (2) reaching an illogical or unreasonable decision, or (3) basing its decision on a clearly erroneous assessment of the evidence." *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010).

In this action, the trial court acted within its discretion in choosing not to appoint a guardian *ad litem* pursuant to Father's request. We note that neither party requested the appointment of a guardian *ad litem* prior to the trial court's hearing on the merits conducted on November 10, 2015. Mother's petition alleging sexual abuse was filed in December 2014. In his motion to appoint a guardian *ad litem*, filed on June 12, 2017, nearly three years following the filing of Mother's petition and almost two years after trial, Father failed to allege with any specificity the type of harm caused to the Child's interests because of the trial court's failure to previously appoint a guardian *ad litem*. Following our thorough review of the record, we do not determine the trial court acted against logic or harmed the child in its decision to proceed with modification of the permanent parenting plan absent the appointment of a guardian *ad litem*.

In its July 3, 2018 order, the trial court explained that appointment of a guardian *ad litem* would require the guardian to interview the Child and again "subject this child to bringing up these memories [of abuse]." The trial court suggested that Father could depose the Child's counselor, however, to ascertain whether she believed that appointment of a guardian *ad litem* would benefit the Child. The trial court clearly weighed the Child's welfare in not being required to repeat the details of her abuse with Father's interest in providing the Child with an independent advocate. We determine that the trial court's decision not to appoint a guardian *ad litem* was logical, reasonable, and in the Child's best interest. We therefore conclude that the trial court did not abuse its discretion in declining to appoint a guardian *ad litem* for the Child post-trial upon Father's motion.

VI. Denial of Request for Counseling

Father argues that the trial court erred in denying his post-trial request for joint counseling with the Child. In its July 3, 2018 order, the trial court stated that it did not

wish to "subject this child to another counselor." Explaining its rationale for denying Father's request for counseling sessions with the Child, the court reasoned:

> The Court realizes that the Order from November 2015 was somewhat draconian in that the Court denied [Father] access to his child to simultaneously protect the child but did not sever the father's relationship with the child. The Court could not envision a different situation to address this matter. The Order was not taken lightly and the Court gave [its] best effort. Until the Order is changed, the Court looks at this from the child's best interest. If the child's therapist were to recommend visitation that was in the child's best interest, then the Court could go forward with that.

In its November 2015 order, the trial court carefully weighed the evidence presented before reaching its conclusion that the Child had been sexually abused by Father. As a result of that determination, the court concluded that the Child's best interest was served by prohibiting Father's further contact with her at that time. Similarly, in its July 3, 2018 order concerning whether joint counseling sessions with Father and the Child should be ordered, the trial court carefully considered the Child's interest in not being subjected to the trauma of having to confront her abuser while also acknowledging the court's responsibility of not prejudicing Father's rights.

Because the trial court had concluded that the Child should have no contact with Father due to the abuse perpetrated by Father, the request for joint counseling sessions with the Child was essentially a request for modification of the November 2015 order's residential co-parenting schedule. This Court has elucidated that decisions concerning "[c]hild custody and visitation disputes require the courts to focus on the welfare and best interests of the child." *Pizzillo v. Pizzillo,* 884 S.W.2d 749, 755 (Tenn. Ct. App. 1994). Tennessee Code Annotated § 36-6-112(c)(1) (2017), addressing those welfare considerations in custody cases involving child abuse allegations, states as follows:

> If an allegation that a child is abused is supported by a preponderance of the evidence, then the court shall consider such evidence of abuse in determining the visitation arrangement that is in the best interest of the child, and the court shall not place a child in the custody of a parent who presents a substantial risk of harm to that child.

Furthermore, Tennessee Code Annotated § 36-6-301 (2017) addresses the determination of visitation rights for a parent found to have abused his or her child, providing in pertinent part:

> If the [trial] court finds that the noncustodial parent has physically or emotionally abused the child, the [trial] court may require that visitation be supervised or prohibited until such abuse has ceased or until there is no reasonable likelihood that such abuse will recur.

Id.

In this action, the trial court determined that Father had sexually abused the Child based on the evidence presented at trial. The trial court relied in part on its own review of the audiovisual recordings of the Child's forensic interview, which the court found to be credible. The court also placed great reliance upon the testimony of Ms. Owens, the Child's counselor, in concluding in its November 2015 order that the Child would be subjected to a substantial risk of harm if the court permitted Father to continue communicating with the Child. Ms. Owens testified that the Child had disclosed details to her concerning the Child's abuse by Father that were consistent with the Child's forensic interview. According to Ms. Owens, the Child also exhibited symptoms of trauma, such as anger, anxiety, difficulty in sleeping, and loss of appetite. The Child disclosed no other trauma to Ms. Owens during the many sessions they had together other than abuse by Father. As the trial court noted in its November 2015 order, Ms. Owens stated "affirmatively and with no equivocation that she believed [the Child] had been abused." Ms. Owens also related that she had not detected any signs that the Child had been coached or exposed to inappropriate messages. Ms. Owens therefore recommended that the Child have no contact with Father due to fear that the Child would be retraumatized, opining that the Child was afraid of Father.

Our review of the evidence in this matter preponderates in favor of the trial court's November 2015 co-parenting order. Pursuant to Tennessee Code Annotated § 36-6-301, the trial court was authorized to require that visitation be discontinued until the Child's safety was no longer in jeopardy. In his motion, Father sought to have a different counselor evaluate the Child and him in a joint session in order to elicit an opinion concerning whether re-establishment of Father's parenting time would be in the Child's best interests. He correctly restated the trial court's requirement, as established in the November 2015 order, that a psychological evaluation of the Child be undertaken prior to any court-ordered modification of the PPP allowing contact. As the trial court explained in its resultant July 3, 2018 order, however, Father failed to prove that a material change in circumstance had occurred since entry of the November 2015 order modifying the parties' PPP. The court noted that Father had the opportunity to depose Ms. Owens in order to secure a recommendation concerning whether contact between Father and the Child would be in the Child's best interest. The July 3, 2018 order clearly provided that

until such a recommendation was made by the Child's counselor, contact between Father and the Child would not be allowed.

We conclude that the trial court was incorrect in referencing the material change in circumstance standard applicable to modification of a final, existing PPP in its July 3, 2018 order. As this Court has previously explained:

> "'The concept of requiring a parent seeking modification to prove a material change in circumstances originated out of this Court's recognition that existing parenting orders are considered *res judicata* on the facts as they existed at the time the most recent order was entered.'" *Stricklin v. Stricklin*, 490 S.W.3d 8, 16 (Tenn. Ct. App. 2015) (quoting *Canada v. Canada*, No. W2014-02005-COA-R3-CV, 2015 WL 5178839, at *6 (Tenn. Ct. App. Sept. 4, 2015)). Accordingly, "[a] custody decision, 'once final,' is *res judicata*" as to the facts in existence when the decision was made. *Kennedy v. Kennedy*, No. M2016-01635-COA-R3-CV, 2017 WL 2713632, at *3 (Tenn. Ct. App. Jun. 23, 2017) (*no perm. app. filed*); *Hawk v. Hawk*, No. E2015-01333-COA-R3-CV, 2016 WL 901518, at *8 (Tenn. Ct. App. Mar. 9, 2016) (*no perm. app. filed*). "Final custody orders" are *res judicata* and cannot be modified absent a material change of circumstance. *Holley v. Ortiz*, No. M2015-01432-COA-R3-CV, 2017 WL 729754, at *8 (Tenn. Ct. App. Feb. 24, 2017) (*no perm. app. filed*). "After a permanent parenting plan has been incorporated into *a final order or decree*, the parties are required to comply with it unless and until it is modified as permitted by law." *C.W.H. v. L.A.S.*, [538] S.W.3d [488], 2017 WL 6462395, at *5 (Tenn. Dec. 19, 2017) (citing *Armbrister v. Armbrister*, 414 S.W.3d 685, 697 (Tenn. 2013)) (emphasis added).
>
> However, this standard for modifying a custody order does not apply when there is no final custody order in existence and the parties are only operating under a temporary order. *See Dillard v. Jenkins*, No. E2007-00196-COA-R3-CV, 2007 WL 2710017, at *3-4 (Tenn. Ct. App. Sept. 18, 2007). Temporary custody orders are not entitled to the same res judicata protections as a final order. *McClain v. McClain*, No. E2016-01843-COA-R3-CV, [539] S.W.3d [170], 2017 WL 4217166, at *18 (Tenn. Ct. App. Sept. 21, 2017) (*no perm. app. filed*). Similarly, we have held that it was not necessary to show a material change of circumstance where the initial custody order the parties sought to modify did not become final due to the filing of a motion to alter or amend. *See DuBois v. DuBois*, No. M1999-00330-COA-R3-CV, 2001 WL 401602, at *6 (Tenn. Ct. App. Apr. 23,

> 2001); *Young v. Young*, No. 01A01-9801-CH-00047, 1998 WL 730188, at *3 (Tenn. Ct. App. Oct. 21, 1998). In those cases, we explained that when the parties sought modification of the non-final custody order through a motion to alter or amend, that situation did not present "a change of custody case" requiring a material change of circumstance. *Id.* Simply put, "the doctrine of res judicata does not apply when the judgment sought to be given res judicata effect is not final." *DuBois*, 2001 WL 401602, at *6 (quoting *Young*, 1998 WL 730188, at *3). As long as the judgment has not become final, the trial court may alter or amend it either on its own motion or at the request of one of the parties, as it may "change its mind" after reconsidering the proof and the applicable law. *Id.* By the same token, we have found the material change of circumstance standard inapplicable where the court's initial custody ruling was only an oral ruling and no final written order had been entered. *See Hughes v. Hughes*, No. M2013-01558-COA-R3-CV, 2014 WL 7181844, at *8 (Tenn. Ct. App. Dec. 16, 2014). However, in *Hughes*, we held that the trial court's application of the modification standard to consider the existence of a material change of circumstance was harmless error because the result, in that case, would have been the same under either analysis. *Id.* at *9.

Dishon v. Dishon, No. M2017-01378-COA-R3-CV, 2018 WL 3493159, at *13 (Tenn. Ct. App. July 20, 2018) (quoting *In re Samuel P.*, No. W2016-01665-COA-R3-JV, 2018 WL 1046784, at *11 (Tenn. Ct. App. Feb. 23, 2018) (footnote omitted)).

The *Dishon* Court explained that because the father had timely filed a motion to alter or amend concerning the trial court's parenting plan order, which was pending when he filed his petition seeking amendment of that order, the parenting plan order had not yet become final and, accordingly, the father did not have to show a material change in circumstance in order to seek modification. *Dishon*, 2018 WL 3493159, at *14. Nevertheless, the *Dishon* Court determined that the trial court's reference to the material change in circumstance standard when considering modification of the parenting plan order was harmless error. *Id*. at *15. The *Dishon* Court affirmed the trial court's denial of the father's modification petition because the evidence presented at the original trial and at the subsequent modification hearing supported the trial court's determination that the parenting plan order was still in the child's best interest. *Id*.

Similarly, in this matter, although the trial court's November 2015 order was not final, we determine that the trial court's reliance upon the material change in circumstance standard when analyzing whether the PPP should be modified was harmless error. Unlike *Dishon*, the trial court in the case at bar was not presented with additional

proof following the filing of Father's modification petition. Accordingly, in its July 3, 2018 order concerning whether joint counseling sessions with Father and the Child should be ordered, the court reiterated its earlier determination that cessation of contact between Father and the Child was in the Child's best interest based on the evidence presented at trial. Based on our review of that evidence, we have concluded the evidence supports the trial court's determination in that regard. Despite the fact that no additional proof accompanied the modification petition, the trial court properly considered the Child's interest in not being subjected to the trauma of having to further recount the abuse allegations with an additional counselor when the court determined that the November 2015 co-parenting order should not be modified.

We find no reversible error in the trial court's denial of Father's motion for a court-appointed counselor to conduct joint counseling sessions despite the court's order of no contact between Father and the Child. Father may still avail himself of the option of deposing the Child's current counselor in order to determine whether some form of contact may be reinstated without injury to the Child's emotional or physical health.

VII. Award of Attorney's Fees

Finally, Father contends that the trial court erred in awarding Mother attorney's fees. The court granted Mother an award of attorney's fees related to Father's June 12, 2017 motions for appointment of a guardian *ad litem* and participation in joint counseling with the Child. The court determined that it had the authority to award such fees pursuant to Tennessee Code Annotated § 36-5-103(c) (2017), which provides:

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

"Tennessee courts long have recognized that the decision to grant attorney's fees under section 36-5-103(c) is largely within the discretion of the trial court and that, absent an abuse of discretion, appellate courts will not interfere with the trial court's finding." *Eberbach v. Eberbach*, 535 S.W.3d 467, 475 (Tenn. 2017).

Father argues that Mother's request for attorney's fees should have been denied because the filing of these motions constituted necessary steps for him to take in order to

restore his parenting time with the Child. As the trial court pointed out, however, Father had available an alternative method for determining whether appointment of a guardian *ad litem* and participation in counseling were in the Child's best interest, which consisted of deposing the Child's counselor. Because this alternative method could have been exercised prior to Father's filing of his June 12, 2017 motions, we determine Father's assertion concerning the "necessity" of filing these motions to be unavailing.

We further determine that the trial court, having denied Father's motions for appointment of a guardian *ad litem* and for participation in counseling, properly exercised its discretion in reimbursing Mother's attorney's fees incurred in defending against these motions. *See* Tenn. Code Ann. § 36-5-103(c); *Eberbach*, 535 S.W.3d at 475. Father's motions for appointment of a guardian *ad litem* and participation in counseling fit within the purview of Tennessee Code Annotated § 36-5-103(c) inasmuch as Mother prevailed in enforcing the trial court's prior adjudication of issues concerning the parties' PPP. In ruling on Mother's request for an award of attorney's fees, the trial court considered the disparity in the parties' incomes, which the court noted to be quite significant. We conclude that the trial court did not abuse its discretion in awarding attorney's fees to Mother, pursuant to Tennessee Code Annotated § 36-5-103(c), and we therefore affirm the award of attorney's fees.

To the extent that Mother has asserted in the argument section of her appellate brief that she should receive an award of attorney's fees on appeal, we note that Mother did not raise the issue of attorney's fees on appeal in her statement of the issues. As our Supreme Court has elucidated:

> Appellate review is generally limited to the issues that have been presented for review. Tenn. R. App. P. 13(b); *State v. Bledsoe,* 226 S.W.3d 349, 353 (Tenn. 2007). Accordingly, the Advisory Commission on the Rules of Practice and Procedure has emphasized that briefs should "be oriented toward a statement of the issues presented in a case and the arguments in support thereof." Tenn. R. App. P. 27, advisory comm'n cmt.

Hodge v. Craig, 382 S.W.3d 325, 334 (Tenn. 2012); *see Owen v. Long Tire, LLC,* No. W2011-01227-COA-R3-CV, 2011 WL 6777014, at *4 (Tenn. Ct. App. Dec. 22, 2011) ("The requirement of a statement of the issues raised on appeal is no mere technicality."). Because Mother did not raise the issue of attorney's fees on appeal in her statement of the issues, we determine this issue to be waived. *See Champion v. CLC of Dyersburg, LLC,* 359 S.W.3d 161, 163 (Tenn. Ct. App. 2011) ("An issue not raised in an appellant's statement of the issues may be considered waived.").

IX. Conclusion

For the foregoing reasons, we affirm the trial court's judgment in its entirety. Regarding Mother's request for an award of attorney's fees incurred on appeal, we determine that such issue has been waived. Costs on appeal are assessed to the appellant, Glenn A. Stark. This case is remanded to the trial court for enforcement of the judgment and collection of costs assessed below.

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THOMAS R. FRIERSON, II, JUDGE