IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 3, 2023 Session

DOMINIC JOSEPH SCHANEL v. SARABETH RICHARDSON

Appeal from the Circuit Court for Sumner County
No. 83CC1-2019-CV-660 Joe Thompson, Judge

No. M2022-00800-COA-R3-CV

This appeal arises from a divorce after a very brief marriage. The parties had one young son at the time of the divorce. The trial court declared the parties divorced, named the mother primary residential parent, largely adopted her proposed parenting plan, and calculated child support after imputing income to the mother based on a finding of voluntary underemployment. The father appealed and raises three issues, primarily arguing that he should be named primary residential parent or at least have additional parenting time. The mother raises a host of issues regarding various other provisions of the parenting plan. For the following reasons, we affirm the decision of the circuit court as modified.

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

CARMA DENNIS MCGEE, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S., and JEFFREY USMAN, J., joined.

Adam A. Zanetis, Franklin, Tennessee, for the appellant, Dominic Joseph Schanel.

Karla C. Miller, Nashville, Tennessee, for the appellee, Sarabeth Richardson.

OPINION

I. FACTS & PROCEDURAL HISTORY

Dominic Joseph Schanel ("Father") and Sarabeth Richardson ("Mother") married in October 2017. At the time, Father was 26 years old, and Mother was approximately 30. Prior to the marriage, both parties had resided with their respective parents on family farms with multiple other family members. Father and Mother began constructing a house on a

28-acre tract of land owned by Father. However, their marriage began to fall apart shortly after a honeymoon trip "out west." Although they remained married, Father and Mother were "kind of on and off" thereafter. They resided together "here and there" for a couple of weeks at a time, alternating between Father's family's farm and Mother's family's farm. During this time, Mother became pregnant. Father and Mother resided together at her family's farm for a month or two before their son, Tobias, was born on February 3, 2019.

Two weeks after Tobias was born, Father left Mother's family's farm and rented a two-bedroom house in an effort to establish "an independent marital home" for him, Mother, and Tobias. However, Mother refused to leave her family's residence and remained there with Tobias. She and Tobias continued to live with her mother, sister, and brother-in-law, while Father resided in the house he rented. The driving distance between their residences was 45 minutes. Mother and Father officially separated in April 2019. Father worked full-time in the construction industry and drove a dump truck on the weekends to make extra money. Mother had obtained a bachelor's degree from Middle Tennessee State University and originally planned to attend veterinary school, but she remained unemployed throughout the parties' relationship aside from selling essential oils online. Mother took Tobias to visit Father after work and on some weekends.

In July 2019, Father filed a complaint for divorce. At that point, Tobias was five months old, and the parties had been married just a year and a half. Father asserted that it was in the best interest of Tobias for the parties to share joint custody or for him to be named primary residential parent. He attached a proposed parenting plan in which each parent would have 182.5 days of parenting time, alternating on a week-to-week schedule. Mother filed an answer and counter-complaint for divorce. She asserted that she should be named primary residential parent and that Father should be allowed "graduated and supervised parenting time." She proposed that Father eventually have parenting time every other weekend, for a total of 80 days per year. However, before this schedule would begin, Mother proposed that Father should start with a "graduated" schedule. For the first month, Mother proposed that Father have two-hour visits at her home supervised by her. For the second month, she proposed three-hour visits once per week unsupervised. Only during the third month did Mother propose overnight visits for Father, and then only from Fridays at 6 p.m. to Saturdays at noon. She also claimed that Father should be required to take an 8-hour parenting class in addition to other classes before the regular parenting schedule would go into effect. On August 16, 2019, the trial court entered a temporary order granting Father parenting time with six-month-old Tobias once a week for a four-hour visit and for two specified weekends pending the hearing on a temporary parenting plan. The order provided that both parents must keep all firearms in a gun safe when exercising their parenting time.

Three weeks later, on September 6, 2019, the trial court held a hearing to establish a temporary parenting plan. At the outset, Father's counsel informed the trial judge that Father's visits with Tobias were going well, but the exchanges were not. Father testified

that Mother and several of her family members met him at the end of their driveway to exchange Tobias for the first visit, at which point Mother told him that she disagreed with the trial judge's ruling allowing Father to visit and believed it was unhealthy for Tobias. Father said that when he returned Tobias four hours later, Mother and her family members again met him at the end of the driveway, and Mother "became moderately hysterical," saying that Tobias was "acting funny" and "felt odd." Father said he described all the details of the visit and assured Mother that he and Tobias had a "really pleasant" visit. Father testified that his next four-hour visit also went well without any problems for Tobias. However, Father's first scheduled overnight visit did not go as planned. A few minutes before Father arrived at Mother's house for his scheduled 3:30 pickup, he sent a text message to Mother to let her know that he was almost there. At 3:33 p.m., Mother responded and stated that Tobias was in the hospital "having trouble with his tummy" and that he would soon be released and headed home. Father was admittedly angry that Mother had not informed him that she was taking Tobias to the hospital. Father believed that Mother was opposing his efforts to be part of Tobias's life in order to get revenge against him for filing for divorce. He noted that Mother was still attempting to reconcile with him while also insisting that he have only supervised parenting time.

Father testified that his work schedule was from about 6:00 a.m. to 2:30 or 3:00 p.m., but this could vary based on the construction project. Thus, Father conceded that if the trial court granted him equal parenting time on a week-to-week rotation, Tobias would be in the care of Father's mother or possibly a day care during his work hours. Still, Father testified that he desired to "be a father" to Tobias and "be a significant part of his life," spending time with him in the evenings and not just every other weekend.

Counsel for Mother then raised an issue regarding a Facebook post with pictures from Father's visit with Tobias where a gun was visible lying on a table. Father explained that all of his family members came to see the infant for his first visit with Father because they had not seen him in months, and Tobias's grandfather "had his gun on him" when he arrived and laid his pistol on the table during the visit. The trial judge stated that the parties had "caught me at a bad time" because a teenager in another custody case before the court had recently shot herself. He added, "If you want to make sure you never see your son again, let this repeat itself."

Mother testified as well. When asked to share her concerns regarding Father's parenting abilities, Mother explained that she was concerned about him doing basic things to care for Tobias like changing diapers, bathing him, maintaining sleep schedules, and feeding him. Mother said she had been taking parenting classes in order to learn how to do these things. The trial judge expressed concern about Mother taking Tobias to the hospital on the day of Father's first scheduled overnight visit and asked her to explain what happened. She testified that she took Tobias to the hospital because he had been crying for hours with constipation and she hoped to be back in time for Father to pick him up for the visit. The trial judge cautioned Mother that she needed to notify Father of any significant

physical health event, which, he said, would include taking an infant to the hospital. Next, the trial judge asked Mother why she had her family present at exchanges, and she initially stated that she had a "fear" of guns. However, Mother later conceded that she owned a gun herself and used it for hunting. In any event, the judge instructed the parties that family members did not need to be involved at exchanges.

Mother testified that she was currently "in school to get [her] master's degree online" but otherwise was a stay-at-home mother. She had already obtained a pre-veterinarian bachelor's degree with a major in biology and a minor in chemistry. Mother said her long-term plan was to have a career using her master's degree in ultrasound sonography. She was enrolled in a fourteen-month program with one year left to complete. Mother's counsel suggested that it would "probably be fair" to "impute her a minimum wage" income for child support purposes, but Father's counsel suggested a higher number given that Mother had a bachelor's degree.

Toward the end of the hearing, the trial judge asked Father what he thought about attending a parenting class. Father said that he had already completed "the required class," but the trial judge explained that the class Father had taken was "[t]he Court-ordered parenting seminar." The trial judge suggested a class on "the nuts and bolts of parenting." Father said that if he needed to take one then he would be more than happy to do it. The trial judge then announced that the current schedule would remain in place for the time being, but once Father completed the class, the parties must agree on "more parenting time" for Father or the trial judge would decide the schedule for them. The judge also "highly recommended" that the parties watch a certain documentary about the effects of divorce on children.

On October 9, 2019, the trial court entered its written order from the hearing on the temporary parenting plan. The order stated that the current schedule would remain in place "until Father completes the parenting class," which would consist of a "basic caregiving class for a child that is unable to articulate his/her needs." The current schedule provided parenting time for Father every Wednesday afternoon from 3:30 until 8:00 p.m., and every other weekend from 3:30 p.m. Friday until 6:00 p.m. Sunday. The order provided that once Father completed the required classes, "the parties, through their attorneys[,] should agree on more parenting time for father." Father was ordered to pay $400 per month in child support. Both parties were ordered to keep all firearms in a gun safe during their parenting time.

Father completed the required "parenting program" on October 14, shortly after the written order was entered. Around this time, however, Mother obtained an ex parte order of protection against Father based on the fact that Tobias's grandfather had a pistol at Father's first visit with Tobias. Mother's counsel would later concede that she acted on the advice of prior counsel and was "arguably misled about the proper way to proceed." After a hearing, the ex parte order of protection was dismissed. However, Father had been

denied parenting time with Tobias pending the hearing on the matter. During the hearing, the trial judge verbally directed Mother to make up the parenting time Father lost.

Father filed a motion to amend his complaint to assert that Mother had interfered with his parenting time on multiple occasions. Thus, he asserted that it was in the best interest of Tobias for Father to be named primary residential parent. In December 2019, Father filed a motion asking the trial court to set parenting time for the upcoming holidays and for the visits that were missed due to the ex parte order of protection. Inexplicably, this motion was never resolved by the court. In February 2020, Tobias turned one year old. In April 2020, Father filed a petition for criminal contempt against Mother, alleging that she had denied him court-ordered parenting time.[1] Within this petition, Father pointed out that the temporary order directed the parties to agree on more parenting time for him once he completed the required class. However, this petition was never resolved by the court either. Mother also denied Father parenting time at the beginning of the Covid-19 pandemic, causing him to miss two weekends and three Wednesday visits.

In November 2020, Father filed a motion for primary custody pending the final hearing and for a psychological evaluation of Mother. He argued that Mother had "continually attempted to thwart" his parenting time in various ways, by obtaining the ex parte order of protection; seeking medical care for the child in a manner that prevented his parenting time; lying to medical providers about Father's home; alleging abuse and drug abuse to medical providers; refusing to resolve his missed parenting time; offering only minimal time for holiday visits; refusing to agree to additional time in the summer; "refus[ing] to cooperate in good faith toward an agreement of increased parenting time for Father"; and refusing to cooperate in mental health counseling. Additionally, Father alleged that Mother was insisting that she have video calls with one-year-old Tobias each Saturday and Sunday of Father's every-other-weekend visits, unreasonably interfering with his parenting time. Father again reminded the court that he had completed the required parenting class, a year earlier, and that the parties were directed to agree on more parenting time for him once he completed the class. Father asked the trial court to grant him primary custody pending the final hearing and to order Mother to submit to a mental evaluation, particularly to rule out "Munchausen syndrome by proxy." After a hearing, of which we have no transcript, the trial court set "holiday parenting time" and limited Mother to two video calls with Tobias during Father's holiday time. The court denied Father's motion for custody and a mental evaluation, stating only that the parties did not have sufficient funds to afford such an evaluation.

[1] Father alleged that when he went to pick up Tobias for his every-other-weekend visit beginning on December 20, Mother advised him that she would not allow the visit because they had "started Christmas time," even though no order was entered to that effect. Father alleged that Mother sent him a text message on December 24 unilaterally imposing a schedule for the week after Christmas that only gave him one additional hour of parenting time than ordered and required him to make the drive to her home six times in eight days. His petition also noted the denial of his parenting time as a result of the ex parte order of protection.

Tobias turned two years old in February 2021. In August, Mother filed a motion to suspend Father's parenting time. She alleged that twice during the summer months Tobias had returned from visits with Father with a rash or red marks around his upper legs and genital area. Mother also asserted that the exchanges were becoming increasingly volatile and that father had "attempted to hit her with his vehicle." After a hearing, of which we have no transcript, the trial court found that it did not have enough information regarding any injuries to the child to warrant suspending Father's parenting time. The trial court directed the parties to exchange the child at the local police department going forward.

Prior to trial, Father filed a proposed parenting plan designating him as primary residential parent, with Mother having 87 days of parenting time per year, generally every other weekend and for a "dinner visit" on Wednesdays. Mother filed a proposed parenting plan with the opposite schedule, giving Father 87 days of parenting time. The divorce trial was held on December 29, 2021. Tobias was two years and ten months old. Father still lived in the two-bedroom house he rented near his family's farm. Mother continued to reside at her family's farm, in which she held a one-third interest. Mother's sister and brother-in-law had recently moved out, so the only other person residing there was Mother's mother. Both parents accused the other of verbal or emotional abuse. Father testified that he had no issues with alcohol and, although he admitted to marijuana use in the past, he had last used it many years before Tobias was born. He said he enjoyed hunting and recreational shooting but kept his firearms in a gun safe. Father had a concealed carry license and said that he normally carried his firearm but did not when he had parenting time due to the trial court's order.

Father was still working for the same employer but testified that he had recently moved from working in the quarry to the trucking division. He said he made the move primarily because he had been working a lot of hours and hoped to have more time with Tobias at the conclusion of the divorce trial. Father described his current work schedule as "fairly flexible" and ranging between 40 and 60 hours per week. He generally started work between 5:00 and 6:00 a.m. and ended between 2:00 and 5:00 p.m. He was not required to work weekends but said he generally did when he did not have Tobias because the litigation over the past two years had been so expensive. He was current on his child support. For purposes of calculating child support, Father said it would be fair to include ten to fifteen hours of overtime per week based on what he was working at the time of trial. His commute to work was about 50 minutes. Father testified that his family's farm was only four miles from his house and that his mother could come to his home by 5:00 a.m. to babysit Tobias there on days when he worked. For backup options, he planned to let Tobias stay with his neighbors, a retired couple he had known for years who also owned the home he was renting, or in a professional day care setting.

Father reiterated that he wanted to be "a real part" of Tobias's life and that he had expressed that desire from the very beginning. He pointed out that the current parenting

schedule had been set by temporary order two years earlier, in October 2019, and that the order stated he would be given more parenting time as soon as he completed a parenting class. Father said that he had completed the class and yet his parenting time was never increased. He pointed out that he had filed a motion for primary custody pending the final hearing and other motions in response to Mother's denial of his parenting time, although some of his motions were never resolved. Father said he had also asked Mother directly for more parenting time beyond what was ordered. However, according to Father, Mother had not offered him any additional parenting time aside from inviting him to the zoo and the pumpkin patch with Mother also present.[2] Father said he was not comfortable spending parenting time with Mother due to the many allegations she had made against him during this litigation while simultaneously seeking to rekindle their relationship. He testified that Mother had continued to pursue reconciliation with him for the past two years, sending him text messages in the middle of the night, pictures from their wedding and honeymoon, and things of that nature. At the same time, he noted that she obtained an ex parte order of protection against him and tried to suspend his parenting time over red marks in the child's diaper area, which, according to Father, were diaper rash.[3] Father said the reason he had requested a mental evaluation for Mother and accused her of having Munchausen by proxy was because she took Tobias to the doctor "after every single visit" Father had with him for the first several weeks and made some "flat out dishonest" statements. He also noted that Mother accused him of trying to run over her during a custody exchange.[4] Father additionally noted that Mother made bizarre allegations against him and his family members in her discovery responses, alleging that Father's mother had tried to "poison" her with both gluten and opiates; accusing his family of incest; and suggesting that Father planned their "rugged road trip" out west in a scheme to cause Mother to have a miscarriage. In short, Father said he did not believe that Mother would encourage Tobias to have a strong relationship with him. In fact, he said, "[I]t's pretty obvious that she's

[2] Father acknowledged that Mother did offer to "make up" some of the parenting time Father had been denied, but disputes had arisen. According to Father, Mother would offer times that were not equivalent to what he had missed. For example, she had denied him "three or four Wednesdays" of his evening visits and offered to make it up with a visit in which Father "basically [] would have driven [Tobias] home, put him to sleep, gotten up, gotten him ready and brought him back." On another occasion, she sent him a text message offering to make up the missed weekend from the order of protection by allowing Father to care for Tobias for the remainder of that afternoon until noon the next day. Father declined, telling Mother that he wanted a full weekend to make up for the one he missed because breaking it up would double his drive time and take away time with Tobias. Father attempted to schedule a weekend visit instead, but Mother declined, insisting, "There are no rules on how time is made up." According to Father, some of the time still had not been made up at the time of trial.

[3] He introduced text messages between the parties from that summer in which Father had asked Mother about redness and Mother stated that Tobias tends to get diaper rash during the summer months when he is playing outside in the heat and sweating around the leg band area of his diaper.

[4] Father explained that he and Mother were having a disagreement about property issues and he got into his car to leave, but Mother was holding onto his car with her hands on the door, yelling at him through the window. He said he repeatedly told her to "get off" the car, and when she finally stepped back, he drove away. However, he denied attempting to strike her with his vehicle and insisted that she was "standing outside the side of my vehicle."

trying very hard to make sure I don't have any relationship with him at all."

When asked if he and Mother have a very positive co-parenting relationship, Father said, "Not really." He conceded that he "[does not] really like [Mother] at this point," but he said he does not say anything derogatory about Mother to Tobias, and when Tobias brings up Mother, he addresses her positively. However, Father was concerned about conversations that Tobias was having with Mother about him. Father introduced a video, obtained during discovery, of Mother and Tobias having a discussion about "bad people" and whether Daddy was "bad" and "a bad teacher." For his part, Father said he had watched the documentary on parenting issues that the trial judge recommended and found it very helpful. Father noted that the trial judge had also recommended, during an earlier hearing, that the parties attend co-parenting counseling "at the Babb Center," which was a course "specifically tailored to help couples who were getting divorced or being separated and dealing with a coparenting situation on resolving their issues." Father testified that he asked Mother about attending the counseling "a number of times." He testified that he wanted to attend the sessions and thought they would have been very beneficial, and though he "tried very hard to convince her to attend," Mother "always refused very adamantly." Father said he eventually stopped asking because it became a point of contention during exchanges.

Father said that he and Mother primarily communicate through text messages and limited in-person contact during exchanges. However, he testified that Mother had insisted on calling Tobias every Saturday and Sunday of his every-other-weekend parenting time, even early in the litigation when it would make young Tobias cry. Father believed that given the limited time he had with Tobias, it would be healthier for the child to spend "one or two days in peace [and] quiet" rather then dealing with Mother's calls when Tobias was too young to understand the situation. Even though Tobias was two at the time of trial, Father testified that he still loses interest in phone calls pretty quickly. He explained that Tobias is excited to hear who is on the phone but then doesn't say much. Father said he had to physically hold Tobias in his lap with the phone or else "he'll end up just running off." Father encouraged the conversations for a reasonable duration, but when Tobias wanted to do something else, he let him go. He also explained that Mother sometimes strayed from the purpose of the calls and began making accusations against him in front of Tobias. He said that during video calls, Mother would ask him to walk around the house with the phone or go to certain locations, so he believed she was "fishing for something to complain about." As a result, Father had been limiting Mother to "voice only" calls.

Mother's proposed parenting plan contained a "right of first refusal" provision requiring Father to be the "sole caregiver" for Tobias during his parenting time, and in the event he was unable to do so, Mother had the right to care for him until Father became available. Father testified that he was opposed to such a provision because it would be "incredibly cumbersome and unnecessary." He said he had always been the sole caregiver for Tobias during his parenting time with only one exception early in the litigation when

he had to work and his parents cared for Tobias. However, because of the distance between their homes, Father worried that Mother's proposed provision might require him to exchange Tobias with her early in the morning or before bed if he needed child care.

On major decisions regarding education, non-emergency health care, religious upbringing, and extracurricular activities, Father proposed that the parties be required to consult and make a good faith effort to reach a joint decision. In the event that they were unable to agree, Father proposed that he make the final determination. He testified that the parties had not had any major disagreements on medical issues, but he said that Mother generally was not notifying him of any decisions to be made. He said Mother had not given him reports from Tobias's doctor visits in quite some time, and the only way he knew Tobias had been to the doctor was from seeing the charges to his insurance. He said the parties had not discussed Tobias's educational future yet. Father believed that each parent should make decisions about church attendance during his or her own parenting time. Father admittedly had concerns about whether they could reach joint agreements given their "track record," but he said that regardless of the ruling, he would make a good faith effort to work with Mother on decision-making. He said that "every aspect of our relationship as coparents and our relationship with our son would be better if we could reach a consensus on things, so I am absolutely interested in working as hard as possible to reach that."

For purposes of calculating child support, Father asked the court to impute income to Mother. He explained that before the parties married, he had told Mother that he was "perfectly happy" to be the sole income earner but that she was also "welcome to get a job" if she wanted them to have more money. Father noted that Mother had previously informed the court of her enrollment in a fourteen-month sonography class and her intention to have a career in that field, although to his knowledge she had not done so. Father said that Mother should be able to get "a perfectly decent job" with her college degree, noting that he only had a GED and was working for an hourly wage plus overtime. For tax purposes, Father asked to take the tax exemption for Tobias at least so long as Mother remained unemployed.

At the conclusion of Father's testimony, the trial judge announced that he wanted to go ahead and hear from Mother as the next witness. Mother testified that she was currently "self-employed" at her family's farm. She explained that they had dairy goats and bred them and intended to sell them, and they also sold products made from goat milk such as soap. She said she had decided against pursuing a veterinarian degree when she met Father because she would have had to move away to attend veterinary school. However, Mother testified that she was currently "using [her] degree" by working on the family farm. She described her daily "work schedule" of caring for the goats and doing chores around the farm. When asked about her income from this endeavor, Mother responded, "I'm making some income, but it's not a monthly income." Mother anticipated that she would "eventually" earn an income from her work but said that she was "still

working to get that off the ground." She had some pregnant goats but did not know how many would be born in the next season. Mother believed that she would eventually earn "probably as much as a normal person makes" once she started selling goats. When asked about her income from selling goat milk soap, she replied, "It's not monthly really so much. It's between $250 and $300. It's been several months in a row." When asked if she had any other monthly income, Mother said she continued to sell essential oils online, but again, it was "not a monthly thing." She said she was not currently selling essential oils every month because she was "too busy with the goats and being a full-time stay-at-home mother." She said she understood that the court may impute income to her but that it was more important for her to be with Tobias. She was unsure whether she would be filing income taxes for the year but said, "I don't think so." Still, Mother stated that she would receive a tax benefit by claiming Tobias as a dependent.

When asked to describe her relationship with Tobias, Mother said, "As every nurturing mother is. We love each other so much[.]" Mother said she and Tobias spend all day together and that he accompanies her around the farm when she does chores. Mother testified that co-parenting with Father had been "difficult at times" because she found it difficult to communicate with him, as Father would become "very hostile." Mother suggested that Tobias was "a little afraid" of Father "[f]rom what I can see and from what I've heard," although she did not elaborate on this statement. Still, Mother insisted that she wanted Tobias to have a good relationship with Father and that she had tried to facilitate their relationship. When asked in what ways had she facilitated their relationship, Mother said she had tried calling Father so that he and Tobias could talk on the phone, as Tobias could not call on the phone by himself. Mother also noted that she had "extended the invitation" for Father to go with her and Tobias to the zoo and the pumpkin patch. She also claimed that she had offered him parenting time outside of her presence "for his vacation."

Mother admitted that she did not tell Father about Tobias's two-year-old well-child visit at the pediatrician and that she had stopped telling him about some appointments. However, she claimed that Father was aware of other doctor visits and that they had attended one visit together. Mother said she was hesitant to notify Father about doctor visits because Father had accused her of Munchausen by proxy based on the amount of times she took Tobias to the doctor. She testified that Father had accused her of having a mental illness even before the divorce litigation began. She was asked about the numerous allegations she made regarding Father and his family members in her discovery responses and insisted that they were true. For instance, she believed his mother had tried to poison her with gluten. She continued to suspect that Father had tried to force a miscarriage by taking her on the road trip out west. Despite such accusations, Father introduced pages from a journal that Mother had maintained, and in an entry from May 2021, just a few months before the divorce trial in December, Mother wrote that she had been "setting the dinner table as if [Father] is coming home" and that she always cooked extra food in case he decided to come home.

When asked to share her concerns about Father's ability to parent, Mother said "It's just always hostile in front of Tobias." She testified that Father had been "aggressive" toward her in front of Tobias by raising his voice, screaming or yelling, and "advancing" toward her, and there were occasions "in the past" when Father was holding Tobias at an exchange and would not let her take him. Mother believed that Father was not "emotionally equipped" to deal with Tobias. She said she had observed Father during video calls being hostile toward Tobias by "the way that he talks to him" when telling him to sit down. **(id)** Mother testified that Father permitted her to have some phone calls with Tobias but that he had also denied some calls. She asked the trial court to reinstate her video calls for twenty minutes, although not every day. She asked to be named the sole decisionmaker for all major decisions for Tobias, stating that she and Father had historically had a hard time making decisions together.

Mother was also asked to explain the circumstances surrounding the video of her talking to Tobias about "bad people" and Father. Mother said that her mother had taken the video when she was unaware that she was being filmed. She said, "Tobias and I were having a conversation about our sexual abuse prevention course education thing that we do." She said "for some reason" this led into the discussion about Father and him being a "bad teacher." Mother denied that she speaks derogatorily about Father in front of Tobias or tells Tobias that Father is bad. At that point, the trial judge responded, "Other than in that video, right?" Mother claimed she was saying, "That was bad, but not he is bad." The trial judge then remarked that Mother was "parsing words a little bit."

Mother recalled that the trial judge had suggested counseling and admitted that Father had asked her about it. She said "the reason why I was [] so against it was because he said he wanted them to pretty much say that I was mentally ill through the counseling." Mother noted that she had already been accused of having Munchausen by proxy and said she was "concerned with everything just being twisted." She said, "I just don't want to go to something and have it be used against me to say that I have a mental illness or something like that." The trial judge explained that this was only co-parenting counseling and not a psychological evaluation. After encouraging Mother to participate, the judge asked her again if she would be willing to try it. Mother said yes. The trial judge then asked Father if he had any reservations about co-parenting counseling. He conceded that he had some "doubts" as to whether it would be productive, but he said if the court felt that something could be gained from it he would "absolutely" go. Father hoped the counseling would lead to agreements between the two of them "on moving forward as coparents with our son" and noted that a more amiable relationship would benefit Tobias the most.

The trial judge then began to announce his oral ruling before any other witnesses testified, but neither party objected. The trial judge found sufficient fault on the part of both parties for the breakdown of the marriage and declared the parties divorced. He found both parties credible but said that both had "some unhealthy traits with respect to each other

that skews their version of the truth." The trial judge stated that he had fifteen factors to consider in order to decide who should be primary residential parent and why. Noting the temporary parenting schedule, the trial judge found that Mother had performed the majority of the parenting responsibilities. At the same time, the court recognized that Father had not had an equal "opportunity" to perform this role because of the unique circumstances of this case and the parties' very brief marriage. Regarding the willingness of the parties to facilitate the parent-child relationship with the other parent, the trial judge conceded that he was bothered by the video tape of Mother talking to Tobias about Father. He cautioned Mother that such behavior could not happen again. The judge found that Mother had not made "a wonderful attempt" to offer Father more time with Tobias. However, the judge ultimately found that both parents shared some blame for being intransigent and were "just stubborn and want it to be your way." He found that the continuity factor weighed in favor of Mother because she had primary custody pursuant to the court's temporary order, which was in effect for two years. Finally, the judge noted that Mother had more time to spend with Tobias because she had chosen to stay at home rather than work. The judge noted that Father's work schedule requires him to work five days a week and sometimes more. As such, he designated Mother as primary residential parent for Tobias. The judge started with her parenting plan "as a base" but made some modifications. Father would continue to have parenting time every other weekend and a "dinner visit" every Wednesday. Father would have three weeks of summer parenting time and certain federal holidays. The judge declined to adopt the "right-of-first refusal" provision proposed by Mother. He limited Mother's phone calls during Father's parenting time. The judge required all guns to remain in a safe whenever Tobias is present, noting again the separate case before him involving the death of a child. The judge did not order co-parenting counseling but strongly suggested it. He ordered joint decision-making for major decisions.

Regarding child support, the trial judge found Mother willfully underemployed. He noted the current job market in which employers were "begging people to come work" and the fact that Mother had a bachelor's degree. He added, "I can't allow you to reap a windfall of an exorbitant child support payment by prescribing no income to you." The judge imputed income to Mother of $35,936 per year, representing "the median income of a female in Tennessee." Father's income was averaged over the past two years and set at roughly $75,000. He would receive the child tax exemption each year given his income and Mother's lack of income.

The final decree of divorce setting forth these rulings was entered on February 28, 2022. Father filed a motion for clarification or for additional findings pursuant to Tennessee Rule of Civil Procedure 52.02. He sought clarification regarding certain aspects of the parenting schedule. In addition, Father questioned the trial judge's ruling regarding firearms. He asserted that the trial court did not "cite to any specific evidence presented at trial" or explain why the provision was in the best interest of Tobias. Father noted that he was a hunter and recreational shooter and contended that the firearm provision would make doing these things impossible. He also pointed out that the provision would prevent him

from lawfully carrying a handgun. Father argued that he should be permitted to lawfully carry a handgun and to hunt and shoot with Tobias when he reached the appropriate age.

Mother filed a motion to alter or amend with respect to several other provisions of the final decree. She also filed a separate motion to clarify. Relevant to this appeal, she asked the trial court to award her the tax exemption for Tobias. Mother conceded that she was unsure at trial whether she would be filing an income tax return for the current year, but she claimed that after "researching the tax requirements" she now planned to file one. She suggested that the tax exemption could impact her ability to receive government assistance for the child including food stamps and insurance, as well as 2021 tax credits she had received. She also asked the trial court to "reduce her imputed income amount to reflect the facts of this case." She clarified that she "does not suggest that she should not work in any capacity" but was merely asking that the amount "be reduced."

After a hearing, the trial court entered an additional order clarifying and altering a few provisions of the final decree. It refused to alter the amount of income imputed to Mother. It also refused to alter the provision regarding firearms. The order stated that Mother could take the tax exemption for 2021 but that Father would claim Tobias "each year thereafter." However, the attached parenting plan provided that the parties would alternate taking the exemption. As such, the trial court entered an amended order resolving the conflict, providing that the parties would alternate taking the exemption.

Father timely filed a notice of appeal to this Court. Thereafter, an agreed order was entered acknowledging that the trial court had "never heard or disposed of" Father's motion for holiday and missed visitation or his petition for criminal contempt. The order states that these matters were voluntarily dismissed in order to ensure that all claims had been adjudicated.[5]

II. ISSUES PRESENTED

Father presents the following issues for review on appeal:

1. Did the trial court err in determining that Mother should be the primary residential parent of the minor child, and did the trial court err in its application and consideration of the best interest factors by failing to enter a parenting schedule that maximizes parenting time for Father?

[5] The record also contains a petition for civil contempt filed by Father while this appeal was pending, alleging fifteen counts of civil contempt against Mother based on denial of his parenting time. However, "a contempt proceeding is sui generis and is considered incidental to the case out of which it arises," so "the fact that an appeal is filed does not prevent the trial court from hearing a contempt petition." *Rosebrough v. Caldwell*, No. W2020-00538-COA-R3-CV, 2021 WL 5769961, at *4 (Tenn. Ct. App. Dec. 6, 2021) (quotation omitted). An "unresolved contempt petition does not serve as a barrier to finality." *Est. of Bentley v. Byrd*, 556 S.W.3d 211, 216 n.8 (Tenn. Ct. App. 2018).

2. Did the trial court err in entering an order which requires both parties to store all firearms in a safe when the minor child is present?
3. Is Father entitled to his reasonable attorney fees and costs incurred in litigating this appeal?

In her posture as appellee, Mother asks this Court to affirm her designation as primary residential parent. However, she argues that the trial court erred in other rulings and presents the following additional issues, as we perceive them, for review:

1. Whether the trial court erred in ordering joint decision-making responsibility;
2. Whether the trial court erred in determining the holiday schedule and summer vacation schedule;
3. Whether the trial court erred in awarding Father the tax exemption for the child in alternating years;
4. Whether the trial court erred in denying Mother's request for "right of first refusal" in the event Father is unavailable to care for the child;
5. Whether the trial court erred in limiting Mother's phone calls with the child;
6. Whether the trial court erred in crafting a provision regarding the child's contact with a relative;
7. Whether the trial court erred in finding Mother voluntarily underemployed and in the income it imputed to her; and
8. Whether Mother should be awarded her attorney fees on appeal.

For the following reasons, we affirm the decision of the circuit court as modified and remand for further proceedings.[6]

III. DISCUSSION

A. Parenting Schedule

Father argues that the trial court erred in designating Mother primary residential parent and in adopting a parenting schedule that failed to maximize his parenting time. At the outset, we recognize that "[t]rial courts have broad discretion in matters relating to child custody." *Brown v. Brown*, 571 S.W.3d 711, 715 (Tenn. Ct. App. 2018). As such, a trial court's decision as to which parent should be designated the primary residential parent is reviewed for abuse of discretion. *See Kelly v. Kelly*, 445 S.W.3d 685, 696 (Tenn. 2014). "[A] trial court's designation of a primary residential parent 'often hinge[s] on subtle factors, including the parents' demeanor and credibility during the divorce proceedings,'" so appellate courts are reluctant to second-guess the trial court's decision. *Brown*, 571 S.W.3d at 716 (quoting *Gaskill v. Gaskill*, 936 S.W.2d 626, 631 (Tenn. Ct. App. 1996)).

[6] Although Mother complained in her brief about the trial judge announcing his ruling before she presented her witnesses, she did not present any issue on appeal assigning error to that decision.

The Tennessee Supreme Court has repeatedly "emphasized the *limited* scope of review to be employed by an appellate court in reviewing a trial court's factual determinations in matters involving child custody and parenting plan developments." *C.W.H. v. L.A.S.*, 538 S.W.3d 488, 495 (Tenn. 2017). "Appellate courts should not overturn a trial court's decision merely because reasonable minds could reach a different conclusion." *Id.* (citing *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001)). According to our Supreme Court,

> Because decisions regarding parenting arrangements are factually driven and require careful consideration of numerous factors, *Holloway v. Bradley*, 190 Tenn. 565, 230 S.W.2d 1003, 1006 (1950); *Brumit v. Brumit*, 948 S.W.2d 739, 740 (Tenn. Ct. App. 1997), trial judges, who have the opportunity to observe the witnesses and make credibility determinations, are better positioned to evaluate the facts than appellate judges. *Massey-Holt v. Holt*, 255 S.W.3d 603, 607 (Tenn. Ct. App. 2007). 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. *Id.* "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, 693 (Tenn. 2013).

A child custody determination must be made "on the basis of the best interest of the child." Tenn. Code Ann. § 36-6-106(a).[7] "In taking into account the child's best interest, the court shall order a custody arrangement that permits both parents to enjoy the maximum participation possible in the life of the child," consistent with the location of the residences of the parents, the child's need for stability, and all other relevant factors. *Id.* Tennessee Code Annotated section 36-6-106(a) contains a list of factors for consideration, where applicable. *See id.* Here, the trial court examined the list of factors relevant to the best

[7] All of the statutes referenced herein are the versions that were in effect when the initial complaint was filed.

interest analysis and made findings regarding each one. As such, we will examine them in turn. We note, however, that both parents desired to be designated as primary residential parent, and neither suggested that an equal parenting schedule was in the best interest of Tobias. We also note that "[d]etermining best interest is not a mathematical formula wherein one can find that certain factors favor one parent over another and then somehow add up the factors to determine the end result." *Broadnax v. Lawrence*, No. E2016-01176-COA-R3-CV, 2017 WL 2482986, at *26 (Tenn. Ct. App. June 8, 2017).

The first factor for consideration is "[t]he 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." Tenn. Code Ann. § 36-6-106(a)(1). Regarding this factor, the trial court found:

> The parties' testified that their plan was for the Wife to stay home with the child while the Husband worked and was the primary bread winner. The court cannot discount the temporary parenting plan, however it will not be [a] defining factor. The Court finds that the Mother has formed a stronger bond with the child and performed a majority of the parenting responsibilities.

In its attached oral ruling, the trial judge found that the parties' marriage had fractured very quickly, which resulted in Tobias forming a stronger bond with Mother and her performing a majority of the parenting responsibilities. The evidence supports the trial court's findings regarding this factor.[8]

The second factor for consideration is:

> Each parent's [] past and potential for future performance of parenting responsibilities, including the willingness and ability of each of the parents

[8] Father argues that the trial judge's statement that he "can't discount the temporary parenting plan," combined with the fact that he ultimately adopted a schedule much like the temporary one, show a violation of Tennessee Code Annotated section 36-6-406(e). The statute provides that "[i]n entering a permanent parenting plan, the court shall not draw any presumptions from the temporary parenting plan." Tenn. Code Ann. § 36-6-406(e). We recognize that "a trial court cannot simply maintain the current provisions of a temporary parenting plan, in an effort to leave the parties' situation as is in order to maintain the status quo." *Ash v. Ash*, No. M2018-00901-COA-R3-CV, 2019 WL 4231922, at *4 (Tenn. Ct. App. Sept. 6, 2019) (quotation omitted). However, we have also explained that, "[w]hile courts 'shall not draw any presumptions from [a] temporary parenting plan,' Tenn. Code Ann. § 36-6-406(e), when a temporary parenting plan is in place for a long time, courts may consider that when determining the details of a permanent plan." *Woody v. Woody*, No. E2020-01200-COA-R3-CV, 2022 WL 678976, at *20 (Tenn. Ct. App. Mar. 8, 2022). Reading the trial judge's statement in context, he said that he "can't discount the temporary order, but it certainly is not a defining factor." We also note that Mother was the primary caretaker for the child even prior to the temporary parenting plan. Thus, we discern no reversible error by the trial judge.

> [] 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 [] 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 [] to honor and facilitate court ordered parenting arrangements and rights, and the court shall further consider any history of either parent [] denying parenting time to either parent in violation of a court order.

Tenn. Code Ann. § 36-6-106(a)(2). Regarding this factor, the final decree stated, "The court finds that both parties have evidenced stubbornness in their ability and willingness to coparent. Therefore, the court finds that this is an equal factor which does not favor either party." However, the attached transcript of the oral ruling reveals that the judge's discussion of this factor at trial included a stern warning to Mother regarding her behavior. He stated:

> THE COURT: I'm going to be frank with you, [Mother], that tape bothers me.
> [MOTHER]: The video, Your Honor?
> THE COURT: Yes. It doesn't matter whether you're saying he's bad or you're saying what he did is bad. A child that's two-and-a-half years old, almost three in February, that's a distinction without a difference. You have to figure out a way for his problem or your problems with [Father] to be just that. Your problems are with [Father]. When it comes to your son, you are a sponge. You absorb, but you don't let anything out back towards him, especially if it makes any sort of mark against [Father]. I would tell you the same thing, but I'm speaking more directly to you because of the video. That sort of thing can't happen. I'll say a little bit more about that in a minute.
>
> I don't think there's been a wonderful attempt to offer more time. There's been some make-up time offered. I think the parties both share some blame for being intransigent in how they deal with the other when it comes to co-parenting time. You're both just stubborn and want it to be your way. I applaud the fact that [Father] went to the parenting skills class that I ordered. But, at the end, I believe this is an equal factor. I don't believe it favors either party.

Pointing to the issues the trial judge acknowledged in his oral ruling, and the testimony as to numerous instances in which Mother interfered with his parenting time, Father argues that this factor clearly weighed in his favor. Mother argues that this factor should have weighed in her favor, as she was the parent who attempted to "rise above the fray."

From our review of the record, the evidence preponderates against the trial court's

finding that this factor was equal between both parties. The record reflects that Mother has steadfastly opposed Father's efforts to visit with Tobias since this proceeding began when he was five months old. At that point, Father proposed equal parenting time, but Mother insisted on "graduated and supervised" parenting time and parenting classes for Father. Mother told Father at his first visit that she disagreed with the trial judge's ruling allowing him to have visits and believed it was unhealthy for Tobias. She became hysterical when Father returned Tobias stating that he "felt odd," and after every single one of his first few visits, she took him to the doctor. On the day of Father's first scheduled weekend visit, Mother took Tobias to the hospital, without telling Father, which prevented his visit from taking place as scheduled. Even after Father promptly completed the required parenting class, Mother did not agree to additional parenting time for Father despite the order providing that the parties "should agree on more parenting time for father." The trial judge recognized this, stating, "I don't think there's been a wonderful attempt [by Mother] to offer more time." To the contrary, she sought to limit Father's time even further. Mother obtained an ex parte order of protection against Father, which was dismissed, but it resulted in him missing parenting time with Tobias that she was directed to make up. Mother filed a motion to suspend Father's parenting time over what Father described as diaper rash. It is undisputed that she has denied him parenting time in violation of court orders. *See id.* ("the court shall further consider any history of either parent [] denying parenting time to either parent in violation of a court order"). Mother also made numerous accusations against Father and his family throughout the litigation. She admittedly did not tell Father about all doctor appointments for Tobias. As the trial court noted in connection with this factor, the video of Mother was also troubling, as Mother was discussing "bad people" with Tobias and whether Father was "bad" or "a bad teacher." We also note that Mother adamantly refused Father's requests for her to attend co-parenting counseling that she knew was recommended by the trial judge. At trial, Father expressed his concern that Mother was "trying very hard to make sure I don't have any relationship with [Tobias] at all." Although the record supports the trial court's finding that both parties have demonstrated stubbornness in their dealings with one another, we conclude that Mother's actions have not demonstrated a sincere willingness or ability "to facilitate and encourage a close and continuing parent-child relationship" between Father and Tobias, consistent with the best interest of the child. *See id.* This factor weighs in favor of Father.

The third factor provides that "[r]efusal to attend a court ordered parent education seminar may be considered by the court as a lack of good faith effort in these proceedings." Tenn. Code Ann. § 36-6-106(a)(3). The trial court found this factor inapplicable, stating that "both parties have attended a court ordered parenting education seminar." On appeal, Father notes that "it does not appear that Mother took the parenting seminar at all." We agree with Father on this point. We find nothing in the record to suggest that Mother completed "a court ordered parent education seminar," but at the same time, we find nothing to show that she was ever ordered to do so. At the temporary custody hearing, the trial court acknowledged that Father had already completed "[t]he Court-ordered parenting seminar." Mother testified that she had been taking parenting classes at a pregnancy center

since before Tobias was born. However, there was no mention of a court order requiring Mother to complete any seminar. As such, we cannot say that the trial court erred in ultimately finding this factor, regarding refusal to attend a court-ordered seminar, inapplicable. *See, e.g.*, *In re McKayla H.*, No. W2020-01528-COA-R3-JV, 2023 WL 2809507, at *15 n.13 (Tenn. Ct. App. Apr. 6, 2023) ("It does not appear that the parties were required to attend such seminar, and this factor is inapplicable."); *Lanier v. Lanier*, No. M2014-02293-COA-R3-CV, 2016 WL 7176980, at *9 (Tenn. Ct. App. Dec. 9, 2016) ("factor (3) is not applicable, as there is no evidence in the record that either parent refused to attend a court ordered parenting seminar").[9]

The next factor to consider is "[t]he disposition of each parent to provide the child with food, clothing, medical care, education and other necessary care." Tenn. Code Ann. § 36-6-106(a)(4). The trial court found that this factor weighed equally in favor of both parties, as "both care about your child very much and would do whatever you needed to, to provide for your child." The trial court had no concerns about either parent's disposition to provide for the child, and neither do we. Father argues that the trial court should have weighed this factor in his favor because of Mother's continued unemployment. "While a parent's financial ability to provide for the child may be relevant, this factor is not to be judged solely on an assessment of the parents' respective incomes, assets, and/or liabilities." *Kincade v. Kincade*, No. M2017-00797-COA-R3-CV, 2018 WL 1631415, at *6 (Tenn. Ct. App. Apr. 4, 2018). Rather, "the focus should be on each parent's *disposition to provide*, which may hinge on each parent's track record of providing and each parent's present intention to provide for the child in the future." *Id.* Moreover, this factor is not limited to providing the child with food and clothing but also "medical care, education and other necessary care." Tenn. Code Ann. § 36-6-106(a)(4). Overall, the record supports the trial judge's finding that this factor weighs equally in favor of both parties.

The fifth factor is "[t]he degree to which a parent has been the primary caregiver, defined as the parent who has taken the greater responsibility for performing parental responsibilities." Tenn. Code Ann. § 36-6-106(a)(5). Noting that this factor considers which parent "has taken the greater responsibility," the trial court found that this factor did not weigh in favor of either party considering "the unique factual circumstances surrounding this relationship." It found that this was not a situation in which both parents had an "equal opportunity" to perform parental responsibilities and one parent stood above the other. To the contrary, it found that "the parties were never given equal opportunity to perform parenting responsibilities" in this case. We cannot say that the evidence preponderates against these findings.

[9] We do recognize, however, that Father completed his court-ordered parenting seminar and the additional basic caregiving class he was ordered to complete, he viewed the documentary suggested by the trial judge, and he attempted to convince Mother to attend the co-parenting class recommended by the judge.

The sixth and seventh factors are, respectively, "[t]he love, affection, and emotional ties existing between each parent and the child," and "[t]he emotional needs and developmental level of the child." Tenn. Code Ann. § 36-6-106 (a)(6), (7). The trial court found that these factors did not favor either parent, and we agree. The eighth factor is the "moral, physical, mental and emotional fitness of each parent as it relates to their ability to parent the child." Tenn. Code Ann. § 36-6-106(a)(8). The trial court noted that no psychological examinations had been performed but stated that nothing led the court to believe that either parent was unfit. Again, we agree. Father argues that this factor should have weighed in his favor because Mother continued to make "outlandish allegations" against him and his family, showing she had "mental, emotional, and moral problems." At trial, Father flatly denied Mother's accusations. Interestingly enough, however, the trial judge ultimately found that "both parties were truthful and credible based on their skewed perception of the truth." In his oral ruling, the trial judge added:

> I believe both of these parties. I don't think either one of them is a serial liar. Do I believe that they both have some unhealthy traits with respect to each other that skews their version of the truth? Yeah, I do. You know, I think [Father] can be a little didactic and a little bit, we're going to do this by the book, this is what the order says, we're going to follow it exactly this way, you know.
>
> Most of the successful co-parenting relationships have a lot of flexibility in it. I mean, it's just easy. It's just like backstroking in a pool. You don't think anything about it. That has to go away. I think -- you know, I don't mean this to be rude, [Mother], but, you know, Toby is your only child, right?
>
> [Mother]: Yes, sir.
>
> The Court: And, you know, I was a little bit of an older parent. I think you were a little bit older when Toby was born. And what ends up happening with older parents and their only child, we tend to hover, and I think you are a hoverer. And I think you've got -- if you don't -- if you don't stop that, he's never going to make it in the real world because the real world won't be there with him all the time, and you've got to trust.
>
> So I don't think I have a serial liar. I don't think either party is necessarily not credible, but I do think each party's personality traits with respect to the other creates a skewed perceptive of that box in the middle of the room.

Giving due deference to the trial judge's ability to observe the witnesses and assess their credibility, we will not second-guess the trial judge's findings with respect to this factor.[10]

[10] We also note Father's argument that the trial judge should have made findings regarding Mother's journal entry about setting the dinner table with a space for Father and considered "what kind of impact" this would have on a two-year-old child. However, there was no testimony about this issue at trial. The

The ninth factor, regarding the child's interaction with relatives and involvement with physical surroundings, was also deemed to be equal between the parents. Tenn. Code Ann. § 36-6-106(a)(9). The record supports this conclusion as well. The tenth factor concerns continuity and the length of time the child has lived in a stable, satisfactory environment. Tenn. Code Ann. § 36-6-106(a)(10). The trial court found that neither parent had contributed to an environment that was unsafe for the child and that he had developed in a healthy and age appropriate manner. However, the court found that this factor weighed in favor of Mother "[d]ue to the child's routine during the pendency of these proceedings which started several months after the child's birth." We agree with the trial court's assessment of this factor as well.

Factors eleven, twelve, and thirteen were also deemed either equal or inapplicable, as they involve evidence of abuse, the character or behavior of persons who frequent the home, and the preference of an older child. Tenn. Code Ann. § 36-6-106(a)(11)-(13). We likewise find these factors equal or inapplicable, as both parents alleged verbal or emotional abuse by the other. The fourteenth factor is "[e]ach parent's employment schedule, and the court may make accommodations consistent with those schedules." Tenn. Code Ann. § 36-6-106(a)(14). The trial court found that this factor weighed in favor of Mother "because she has chosen to stay at home with the child as allowed by her circumstances." The trial court found that Father "has a work schedule that requires him to work five days a week and sometimes six." The transcript suggests that this was a decisive factor in the trial court's decision, as the judge immediately added, "So, for that reason, I am going to make [Mother] the primary residential parent."

On appeal, Father argues that "electing not to work should not be a factor that weighs in Mother's favor." According to Father, "[t]he trial court's ruling amounts to awarding the Mother significant parenting time for not seeking to financially support the minor child while punishing the Father for going above and beyond to support the minor child." He argues that "Mother should certainly not be applauded for refusing to seek gainful employment." In the context of analyzing this best interest factor, however, these arguments are misplaced. *See In re McKayla H.*, 2023 WL 2809507, at *14 ("Regarding factor (14), because Father is unemployed, he has more flexibility to care for the Child. Thus, factor (14) weighs in favor of Father."). As this Court has said before,

> [W]hile virtually all divorced parents must work outside the home, and some parents must work atypical hours, it is not punishment to the parent to consider the effect of her work schedule on the child. Rather, it is the court's job to ensure that the everyday quality of the child's life is not sacrificed to

page from Mother's journal was simply admitted as an exhibit. We cannot fault the trial judge for failing to discuss the impact on Tobias when no one testified about any such impact or questioned Mother about the circumstances, so it is not clear if Tobias even understood what Mother was doing.

> meet the parents' needs or desires. Consideration of how "child-friendly" each parent's schedule must necessarily be part of that determination. "[T]he child's best interest i[s] the paramount consideration. It is the polestar, the *alpha and omega*." *Bah v. Bah*, 668 S.W.2d 663, 665 (Tenn. Ct. App. 1983) (emphasis in original). In this case, it is not unfair to [the parent] to consider the effect of her work schedule on [the child]; rather, it is unfair to [the child] not to consider it.

Wall v. Wall, No. W2010-01069-COA-R3-CV, 2011 WL 2732269, at *28 (Tenn. Ct. App. July 14, 2011); *see also Kathryne B.F. v. Michael B.*, No. W2013-01757-COA-R3-CV, 2014 WL 992110, at *10 (Tenn. Ct. App. Mar. 13, 2014) (Kirby, J., concurring) ("Emphasis on the 'fairness' to one parent or another is misguided; the trial court's focus should instead be on the child's best interest. In this case, if Father's work schedule means that the child must spend the majority of his waking hours in the care of someone other than his parent, that must be considered.").[11]

Framing the issue in a manner consistent with the traditional comparative fitness analysis, we ask: "Which parent's work schedule is *better suited* to serve the best interest of the child?" *Brown*, 571 S.W.3d at 724. In *Brown*, for example, we found that a mother's work schedule "would provide the most stability for the child and would minimize the number of hours the child is in the care of third parties," as the father sometimes worked overtime and extended hours. *Id.* at 725. Likewise, in *In re Jayden C.*, No. M2014-00957-COA-R3-JV, 2015 WL 1384346, at *2, *5 (Tenn. Ct. App. Mar. 23, 2015), we explained that a father who was home each evening was in a better position "to provide [the child] with a stable, satisfactory environment," where the mother was gone to work twelve hours per day and relied on her parents to care for the child.

Here, Father testified that he had recently moved from the quarry to the trucking division primarily because he hoped to have more time with Tobias at the end of the divorce trial. His current work schedule was "fairly flexible" but ranged between 40 and 60 hours per week. His work hours generally ranged from 5:00 or 6:00 a.m. to somewhere between 2:00 and 5:00 p.m. His commute to and from work was 50 to 55 minutes. Father planned for his mother to come to his home by 5:00 a.m. to babysit Tobias there on days when he worked. Mother, on the other hand, had no outside employment. As such, we agree with the trial court that this factor strongly favors Mother.

In summary, the evidence preponderates in favor of the trial court's findings of fact concerning the aforementioned best interest factors, with the exception of factor two.

[11] *See also Wright v. Wright*, No. W2018-02163-COA-R3-CV, 2020 WL 1079266, at *17 (Tenn. Ct. App. Mar. 6, 2020) (observing that a parent's "decision not to seek out-of-town employment so that he can spend more time with the child" could certainly be considered for a finding of voluntary underemployment but that it "may actually weigh in Husband's favor concerning his desire to parent the child").

Having considered all of the best interest factors, particularly in light of each parent's employment schedule, we cannot say that the trial court abused its discretion in designating Mother as primary residential parent for Tobias. That decision was within "the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence found in the record." *Armbrister*, 414 S.W.3d at 693.

Aside from the designation of primary residential parent, Father further argues that the trial judge's parenting schedule awarded him "very little parenting time" and failed to maximize his time with the child in accordance with Tennessee Code Annotated section 36-6-106(a). The statute provides that "the court shall order a custody arrangement that permits both parents to enjoy the maximum participation possible in the life of the child consistent with" the best interest factors. *Id.* This Court has explained, however, that the statute does not mandate equal parenting time and that the overarching standard is the best interest of the child. *Rajendran v. Rajendran*, No. M2019-00265-COA-R3-CV, 2020 WL 5551715, at *9 (Tenn. Ct. App. Sept. 16, 2020). Here, Father has 102 days per year, while Mother has 263. Ideally, the trial court would have fashioned a visitation schedule that permitted Father to have more parenting time, as it said it would do in its temporary order. *See, e.g.*, *Hindiyeh v. Abed*, No. M2017-00410-COA-R3-CV, 2018 WL 1953213, at *10 (Tenn. Ct. App. Apr. 25, 2018) ("Given the Trial Court's findings, it is puzzling why the Trial Court entered a permanent parenting plan granting Husband only 80 days of parenting time with the Child per year to Wife's 285. . . . Husband's late work schedule in itself does not justify such a minimal award of parenting time."). However, Father was awarded more days than the parent in *Hindiyeh.* "The abuse of discretion standard does not require a trial court to render an ideal order, even in matters involving visitation, to withstand reversal. Reversal should not result simply because the appellate court found a 'better' resolution." *Eldridge*, 42 S.W.3d at 88. The fact that this Court might have made a different decision in the first instance does not necessarily mean that the trial court abused its discretion. *Leverette v. Tenn. Farmers Mut. Ins. Co.*, No. M2011-00264-COA-R3-CV, 2013 WL 817230, at *34 (Tenn. Ct. App. Mar. 4, 2013) ("While we may have made a different decision in the first instance, after closely reviewing the extensive record in this case, we cannot conclude that the trial court abused its discretion."); *Dodd v. Dodd*, 737 S.W.2d 286, 291 (Tenn. Ct. App. 1987) ("[W]hile this Court might have made a different decision, we cannot say that he abused his discretion."). "Under this standard, we will uphold the trial court's determination, irrespective of our inclination to decide the issue differently, so long as the trial court's decision is within the range of acceptable alternatives." *Artist Bldg. Partners v. Auto-Owners Mut. Ins. Co.*, 435 S.W.3d 202, 220 (Tenn. Ct. App. 2013) (citing *Tait v. Tait*, 207 S.W.3d 270, 275 (Tenn. Ct. App. 2006)). It is not the function of appellate courts to "tweak" a residential parenting schedule in the hope of finding a more reasonable result than the trial court did. *Eldridge*, 42 S.W.3d at 88.

Although Father suggests that he should have been awarded "more" time, he does not suggest any specific schedule that would have better served Tobias's interest under the circumstances. Both parties proposed an every-other-weekend schedule. Here, the trial

court applied the correct law, the evidence does not preponderate against its factual findings with the exception of one factor, and we ultimately conclude that its decision is within the range of acceptable alternative dispositions given Father's work hours and lengthy commute.

B. Decision-Making Authority

Next, we will address Mother's contention that the trial court abused its discretion by ruling that the parties would have joint decision-making responsibility for major decisions regarding education, non-emergency health care, religious upbringing, and extracurricular activities. Mother argues that the trial court should have awarded her sole decision-making authority in all these areas because "the overwhelming proof was that these parties do not trust each other and that they do not communicate or co-parent well." In response, Father argues that Mother should not be awarded sole decision-making authority because it was Mother who demonstrated "an unwillingness to appropriately co-parent with Father" by refusing to attend co-parenting counseling with him and fighting to ensure that, if he did not reconcile with her, he would receive as little time as possible with Tobias.

The only legal authority Mother cites in support of her argument is Tennessee Code Annotated section 36-6-407(c), which provides:

> (c) Except as provided in subsections (a) and (b), the court shall consider the following criteria in allocating decision-making authority:
> (1) The existence of a limitation under § 36-6-406;
> (2) The history of participation of each parent in decision making in each of the following areas: physical care, emotional stability, intellectual and moral development, health, education, extracurricular activities, and religion; and whether each parent attended a court-ordered parent education seminar;
> (3) Whether the parents have demonstrated the ability and desire to cooperate with one another in decision making regarding the child in each of the following areas: physical care, emotional stability, intellectual and moral development, health, education, extracurricular activities, and religion; and
> (4) The parents' geographic proximity to one another, to the extent that it affects their ability to make timely mutual decisions.

However, the only factor Mother discusses in her brief is the parties' inability to cooperate and co-parent effectively.

"[P]arenting responsibility decisions are peculiarly within the broad discretion of the trial judge; accordingly, we review these decisions under an abuse of discretion standard." *Erdman v. Erdman*, No. M2018-01668-COA-R3-CV, 2019 WL 6716305, at *6 (Tenn. Ct. App. Dec. 10, 2019) (citing *Christie v. Christie*, No. M2012-02622-COA-R3-

CV, 2014 WL 4293966, at *2 (Tenn. Ct. App. Aug. 28, 2014)). A trial court's decision as to which parent is vested with decision-making authority is reviewed under the abuse of discretion standard. *Rogin v. Rogin*, No. W2012-01983-COA-R3-CV, 2013 WL 3486955, at *15 (Tenn. Ct. App. July 10, 2013). This standard "'recognizes that the trial court is in a better position than the appellate court to make certain judgments.'" *Id.* (quoting *Eldridge*, 42 S.W.3d at 88). "'Absent some compelling reason otherwise, considerable weight must be given to the judgment of a trial court in a divorce proceeding in respect to the credibility of the parties and their suitability as custodians.'" *Yates v. Yates*, No. M2008-00552-COA-R3-CV, 2009 WL 1470465, at *2 (Tenn. Ct. App. May 26, 2009) (quoting *Mimms v. Mimms*, 780 S.W.2d 739, 744 (Tenn. Ct. App. 1989)).

On the issue of decision-making authority, this Court recently considered and rejected an argument similar to Mother's in *Smallbone v. Smallbone*, No. M2020-01556-COA-R3-CV, 2022 WL 1405655 (Tenn. Ct. App. May 4, 2022). In that case, the father was designated primary residential parent, although the parties had fairly equal parenting time, and he argued on appeal that the trial court abused its discretion in granting both parties joint decision-making authority. *Id.* at *1, *7. The parties had a long history of parental conflict, and a psychologist had been working with the parents on "lowering the level of parental discord," but he testified at trial that they "still needed help with joint decision making," as they had different communication styles and "trust was an issue." *Id.* at *3. The father complained that it was "difficult to co-parent" with the mother or reach a joint decision without a mediator. *Id.* Thus, he contended that joint decision-making authority was inappropriate because the parties had "not demonstrated an ability to cooperate." *Id.* at *7. For instance, he noted, the mother failed to provide him with copies of the children's health insurance cards, objected to counseling, and deliberately scheduled medical appointments at times when he could not attend. *Id.* "Even so," this Court concluded, "we cannot say that the court abused its discretion in the allocation of decision-making authority." *Id.* We observed that the parents "appear capable of reaching joint decisions on matters of great importance to the children," as they had agreed on their children's current schools and extracurricular activities at trial, and their disagreements on medical issues had been "more logistical than substantive." *Id.* Thus, we affirmed joint decision-making authority. *Id.*

Similarly, in *Hasley v. Lott*, No. M2022-01141-COA-R3-JV, 2023 WL 4633509, at *11 (Tenn. Ct. App. July 20, 2023), we found no abuse of discretion in the trial court's award of joint decision-making authority despite the mother's argument that it was "clear that these parties will be unable to agree on major decisions." We acknowledged that "decision making between the parties has not always gone smoothly," but we also pointed out that the parties had successfully made "major, mutual decisions, such as choosing a pediatrician for [the child]," along with some more minor logistical decisions. *Id.* at *12. Although there had been "friction, as in many parenting arrangements," we concluded that the parties had "the ability to communicate and arrive at decisions in the best interest of the child." *Id.* Thus, we found no abuse of discretion in the decision. *Id.*

Here, for major decisions regarding education, non-emergency health care, religious upbringing, and extracurricular activities, Father proposed that the parties be required to consult and make a good faith effort to reach a joint decision. He testified that working to reach a consensus on these decisions "would ultimately be best." In the event that they were unable to make the decision jointly, he asked to be the final decision maker. Father testified that the parties had not had any major disagreements on medical issues but that Mother generally had not been notifying him of any decisions to be made. He said Mother had not given him reports from Tobias's doctor visits in quite some time, and he learned about appointments from seeing charges on his health insurance statements. However, Father noted that the parties did consult and agree on a vaccination schedule for Tobias. Given the child's young age, the parties had not discussed his educational future yet, nor did they participate in extracurricular activities. Father believed that each parent should make decisions regarding religious upbringing and church attendance during their own parenting time. He did have concerns about whether they could reach an agreement given their "track record," but he said that regardless of the ruling, he would make a good faith effort to work with Mother on decision-making. Mother testified that she should be sole decision maker because she and Father had a hard time "historically" making decisions together.

Relevant to this issue,[12] the trial court found that both parents were equally disposed to provide Tobias with medical care and education. Although Mother has taken the position that "Father doesn't believe in vaccinations or any type of medical care," the trial court found that "[Father's] testimony regarding vaccinations and general medical care for the child cured the Court's concerns." The trial court specifically noted that Father had agreed to vaccinations for Tobias. It also noted Father's testimony regarding what he would do if the child had a fever and found that Father's position was not unreasonable, and in fact, the judge said, "[a]s a parent, that's probably what I would do." Thus, the judge found that "both parties are willing to do what they need to do to provide for the child." The trial court also found that because of the unique circumstances of this case, Father and Mother were not given the same "opportunity" to perform parenting responsibilities. It found that "both parties have evidenced stubbornness in their ability and willingness to coparent." Still, the trial judge explained that he ultimately decided not to name one parent as the sole decision maker over the other "because that gives one person a hand up[.]" He added, "these people are going to learn how to cooperate if it kills me, and it probably will, but they are going to learn how to." He "strongly suggest[ed] the parties attend co-parenting counseling together," but it was not ordered.

[12] Some of these findings were made in the context of the trial court's general best interest analysis pursuant to Tennessee Code Annotated section 36-6-106(a). However, this Court has looked to such findings in the event that a trial court failed to make specific findings of fact related to the criteria for allocating decision-making authority found in section 36-6-407(c). *See Gergel v. Gergel*, No. E2020-01534-COA-R3-CV, 2022 WL 1222945, at *41 (Tenn. Ct. App. Apr. 26, 2022).

We do note the irony in Mother's argument that she and Father have difficulty co-parenting, and therefore, she should be named the sole decision-maker. Early in the divorce proceeding, the trial judge recommended that the parties attend co-parenting counseling at the Babb Center, which was a course "specifically tailored to help couples who were getting divorced . . . and dealing with a coparenting situation on resolving their issues." Father tried to get Mother to go with him but she adamantly refused. We considered a similar situation, factually, in *DeVault v. DeVault*, No. 01-A-01-9601-CV00012, 1996 WL 482968 (Tenn. Ct. App. Aug. 28, 1996). In that case, a trial court had awarded joint custody to parents, and the mother argued on appeal that this was an abuse of discretion because the parties "cannot get along" and were "incapable of reaching agreement on matters concerning the children." *Id.* at *2. We held that the trial court's decision was not an abuse of discretion, explaining:

> While the facts of the instant case indicate that the parties will have some problem with joint custody, it is evident that most of these problems come from plaintiff. It is clear from a reading of the record that the present relationship between the parties is, at best, acrimonious. We are of the opinion, however, that a great deal of the acrimony is a result of plaintiff's feelings of being spurned by defendant. We are also of the opinion that an award of sole custody to plaintiff would restrict defendant's role in his children's lives. . . .
>
> . . .
>
> The trial court, after seeing and hearing the witnesses and reviewing the entire record, deemed it in the children's best interest that their custody be joint. The trial court based upon an assessment of the parties' character, demeanor, and credibility had an optimistic view in this regard. We cannot say that her optimism is an abuse of discretion. We defer to the trial court's decision to award joint custody. In joint custody cases as in all custody cases, the determination "rests within the sound discretion of the Trial Judge who is in a superior position to judge the credibility and competency of the parents as custodians." *Gray* [*v. Gray*, 885 S.W.2d 353, 354 (Tenn. Ct. App. 1994)].

Id. at *3.

In a later case, we summarized *Devault* as finding that "the mother should not be permitted to, by her behavior, make joint custody unworkable and then be awarded sole custody." *Dix v. Carson*, No. 02A01-9704-CV-00093, 1998 WL 886555, at *12 (Tenn. Ct. App. Dec. 17, 1998).

In the case before us, Father expressed a willingness to make a good faith effort to work with Mother on decision making and acknowledged that "every aspect of our relationship as coparents and our relationship with our son would be better if we could reach a consensus on things, so I am absolutely interested in working as hard as possible

to reach that." He attended the court-ordered parenting seminar and took other measures to work toward co-parenting. The parties had not faced many major decisions yet due to the child's young age, such as those involving extracurricular activities or educational matters. However, they had come to an agreement on a vaccination schedule for him. Mother had made some medical decisions unilaterally in the past but only because she excluded Father from such decisions, evidencing a lack of cooperation on her part. Thus, the trial judge's stated concern regarding giving one parent "a hand up" over the other was legitimate. Ultimately, we conclude that the trial judge's ruling was "among the reasonable alternatives supported by the proof in this case." *Eldridge*, 42 S.W.3d at 89.

C. Holiday and Summer Vacation Schedule

The next issue raised by Mother is whether the trial court erred in determining the parenting schedule for certain holidays and summer vacation. Father testified that he gets three weeks of vacation per year and that he is off work on federal holidays. Accordingly, the trial court adopted a parenting plan providing that he would "have the benefit of every three-day federal holiday (federal holidays that fall on either Monday or Friday) that he has off." For federal holidays falling on a Friday, his parenting time would run from Thursday at 4:00 p.m. to Sunday at 6:00 p.m. for the holiday weekend. For federal holidays falling on Monday, it runs from Friday at 4:00 p.m. to Monday at 6:00 p.m. Thus, the plan specified that Father would have Tobias every Martin Luther King Day, Presidents Day, Memorial Day, and Labor Day. Mother argues that this was an abuse of discretion and that these holidays should be alternated. We discern no abuse of discretion, as this was an appropriate means of giving Father more parenting time given his work schedule.[13]

We now turn to summer parenting time. The parenting plan entered after the divorce trial provided that Father would receive three nonconsecutive weeks of parenting time during the summer. Mother filed a motion to alter or amend, requesting that she be awarded the same three weeks of parenting time in the summer. The trial court agreed that Mother should have some uninterrupted parenting time in order to travel with Tobias, but it did not award her three weeks. It adopted the following amended provision for summer vacation:

> The day-to-day schedule shall apply except as follows: The Father shall be entitled to three non-consecutive weeks during the summer with the child. . . .
>
> The Mother shall receive summer vacation time with the child for one period of time from Wednesday at 8:00 p.m., after the Father's Wednesday visitation, through the next two subsequent weekends immediately following

[13] Mother argues that this Court should clarify whether Father gets these holidays in the event that he has to work. However, in response to the post-trial motions, the parties agreed to adopt language proposed by Father regarding his parenting time during federal holidays "for more clarity." The order specifically provides that "Father is only granted this additional federal holiday time on holidays he is not working."

that Wednesday, including weekdays.

On appeal, Mother maintains that she should also be awarded three weeks of summer parenting time. However, we discern no abuse of discretion in the trial court's decision. As Father noted at the hearing on the post-trial motions, Mother already has "plenty of uninterrupted time" given that he only has Tobias every other weekend and on Wednesdays for a dinner visit.

Finally, Mother argues that this Court should delete the language in the summer provision providing that the "day-to-day schedule" will apply except as otherwise provided. She argues that this language permits Father to have his alternating weekends of parenting time in addition to three weeks of vacation time, which combine to result in nine-day periods of parenting time. Again, it is not the role of this Court to tweak the trial court's parenting plan, and we discern no abuse of discretion in the trial court's summer parenting schedule.

D. Right of First Refusal

Mother also argues that the trial court erred by declining to include a "right of first refusal" provision. This Court reviews a trial court's decision regarding such a provision for abuse of discretion. *See, e.g.*, *Kincade,* 2018 WL 1631415, at *9 (concluding that a trial judge's refusal to adopt a right-of-first-refusal provision was reasonable and not an abuse of discretion where it would have been triggered every day the parent worked); *Dillard v. Dillard*, No. M2007-00215-COA-R3-CV, 2008 WL 2229523, at *9 (Tenn. Ct. App. May 29, 2008) ("The inclusion of the first right of refusal provision in the parenting plan falls well within the spectrum of possible reasonable rulings in this case, and thus, we do not believe the trial court abused its discretion in declining to remove it from the plan.").

Mother's proposed parenting plan stated that Father was required to be the "sole caregiver" for Tobias during his parenting time, and in the event he was unable to do so, Mother had the right of first refusal to care for him until Father became available. Father testified that he had been the sole caregiver during his parenting time with only one exception early in the litigation. However, he opposed such a provision because it would be "incredibly cumbersome and unnecessary." He explained that in the event he did need childcare, he might have to exchange Tobias early in the morning or before bed given the distance between his home and Mother's home. During the trial judge's oral ruling, he stated that he was eliminating Mother's proposed "right of first refusal" language from the permanent parenting plan. On appeal, Mother argues that the trial court's decision was an abuse of discretion because "the overwhelming proof was that the Mother was available to care for the child 24/7 because she does not work outside the home." Given Father's testimony, and in light of the fact that Mother already has far more parenting time than Father, we cannot say that the trial judge's decision was an abuse of discretion.

E. Telephone Calls

Next, we address Mother's contention that the trial court erred in awarding her only one five-minute phone call during Father's weekend visits and two five-minute phone calls during week-long visits in the summer. The trial court's order provided that Mother would be permitted these calls "pursuant to the parental bill of rights." The court ruled that Mother was "not entitled to video calls." In the transcript, the trial judge noted that Father generally only has parenting time with Tobias two days out of fourteen, and therefore, he needed "solid uninterrupted time without the distraction of a video phone call."

The only authority Mother cites on appeal is Tennessee Code Annotated section 36-6-101(a)(3), which provides, in pertinent part, that "[e]xcept when the court finds it not to be in the best interests of the affected child," a custody order in a divorce action shall grant to each parent during periods when the child is not in that parent's possession "[t]he right to unimpeded telephone conversations with the child at least twice a week at reasonable times and for reasonable durations." Mother argues that the trial court's decision was too "restrictive" and that video calls should have been permitted because they are "quite common nowadays and there was no testimony that the Father could not accommodate video calls." However, Father testified at length about the difficulties he had with Mother due to her insistence on calling Tobias on Saturdays and Sundays during his weekend parenting time and wanting to talk long after Tobias lost interest. He also testified as to his reasons for discontinuing Mother's video calls and limiting her to telephone calls instead, as she appeared to be "fishing for something to complain about." Mother proposed twenty-minute calls, but even she had complaints about how the calls were going, as she criticized Father for always telling Tobias to "sit down" and making him "sit in one spot in his lap." Having heard this testimony, the trial court limited the number and duration of Mother's calls and eliminated video calls. This decision was within the range of reasonable alternatives and not an abuse of discretion.

F. Contact with a Relative

Next, Mother argues that the trial court erred in fashioning a particular provision of the parenting plan, upon which the parties agreed, regarding contact with a certain relative. Father testified at trial that he had some issues with this particular relative when he was a child and that he would stipulate to never leave Tobias in the relative's presence unattended. During Mother's testimony, her attorney stated that the relative was "no longer an issue" because Father had agreed that the relative would "never be the sole caregiver" for Tobias, and Mother responded affirmatively. The final decree of divorce stated that "the parties have stipulated that there will be no contact between the minor child in the sole custody and care of [the relative]." In her motion to alter or amend, when recounting various provisions of the parenting plan, Mother noted, "The Court upheld the parties' agreement that the child will never be left in the sole care and custody of [the relative]."

Despite the parties' agreement on the terms of the stipulation at trial, Mother now argues that the language in the divorce decree is "problematic" and "muddies the waters." She argues that the provision should be modified to state that Tobias should have "no contact with [the relative] whatsoever." We find no basis for modifying the divorce decree given the terms of the parties' stipulation at trial and Mother's representation that it was "no longer an issue." Mother never requested the relief she now seeks on appeal. *See Bell v. Todd*, 206 S.W.3d 86, 93 (Tenn. Ct. App. 2005) ("[W]e must decline to consider arguments that were not presented to the court below and that are being raised for the first time on appeal.").

G. Parenting Plan Restriction Regarding Firearms

We now consider Father's argument that the trial court erred "in entering an order which requires both parties to store all firearms in a safe when the minor child is present." At oral argument before this Court, however, Father's counsel conceded that Father is not opposed to a restraint requiring him to keep his firearms in a safe while inside the home, as he already practices "safe storage." Father's counsel clarified that Father's concern is that the order prevents him from having a firearm outside the home during his parenting time. Father points out that the trial court "made no findings" regarding why either parent should not be permitted to carry a firearm. In fact, during the post-trial hearing, when counsel argued that Father is "a very safe gun owner," the trial judge responded, "I know. . . . I'm not saying he's not a safe gun owner." Instead, every time the issue came up during various hearings, the trial judge referenced the facts of another custody case involving another family. Thus, it is clear that the trial court's restriction was not based on the evidence presented in the case at bar.

"While the details of visitation arrangements are generally left to the discretion of the trial court, this discretion is not unbounded, it must be based on proof and appropriate legal principles." *Hogue v. Hogue*, 147 S.W.3d 245, 251 (Tenn. Ct. App. 2004); *see also Bargmann v. Bargmann*, No. M2010-00096-COA-R3-CV, 2011 WL 1026095, at *5 (Tenn. Ct. App. Mar. 22, 2011) (stating that the ruling must be one that "might reasonably result from an application of the correct legal standards to the evidence found in the record"). "Courts may restrict lawful activities that would jeopardize the child's welfare during visitation if there is definite evidence that to permit the right would jeopardize the child." *Hogue*, 147 S.W.3d at 251 (citing *Eldridge*, 42 S.W.3d at 89). However, "[s]uch restraints should be well defined and must involve conduct that competent evidence shows could cause harm to the child." *Id.* at 254. "The purpose of restraints on parental conduct is to protect the child." *Id*. Thus, "[w]hat matters is whether the parental conduct during visitation is harmful to the child." *Id.* at 253.

This Court has repeatedly vacated and/or reversed restrictions imposed without any evidentiary justification. *See, e.g.*, *Camacho v. Camacho*, No. M2021-00994-COA-R3-CV, 2022 WL 5325998, at *9 (Tenn. Ct. App. Oct. 7, 2022) (explaining that "a non-

consensual paramour provision cannot be affirmed without evidence that it is in the best interests of the children" and finding that the trial court's single-sentence provision "contain[ed] no finding that such a prohibition is in the best interests of the children, much less factual findings that would serve as the basis for that determination"); *Brantley v. Brantley*, No. M2016-01999-COA-R3-CV, 2017 WL 4083881, at *1-2 (Tenn. Ct. App. Sept. 15, 2017) (vacating a restriction on "homosexual activity" that was imposed without an evidentiary hearing and remanding and instructing the trial court that "generalized 'paramour' and 'lifestyle' restrictions" must involve conduct that competent evidence shows could cause harm to the child); *Mashburn v. Mashburn*, No. E2015-01173-COA-R3-CV, 2016 WL 3639495, at *10 (Tenn. Ct. App. June 30, 2016) ("There is almost no evidence in the record regarding Katrina, and none that suggests her presence would pose a risk of harm or detriment to the child. Under these circumstances, we delete from the parenting plan the provision forbidding Katrina to spend the night with Father when the child is present."); *Dick v. Dick*, No. M2013-02461-COA-R3-CV, 2015 WL 4314032, at *13 (Tenn. Ct. App. July 14, 2015) ("Although the trial court stated that it believes that the inclusion of the paramour clause was appropriate, the court made no findings of fact to support its decision. . . . As there are no findings by the trial court that this provision was either necessary, or in the best interest of the child, we reverse this portion of the trial court's ruling."); *Bargmann*, 2011 WL 1026095, at *5-6 (vacating a paramour provision that was imposed by the trial judge sua sponte and without evidentiary justification, and noting that the trial court's "personal notions of moral rectitude are no substitute for proof of actual or threatened harm to the children"); *Mitchell v. Mitchell*, No. M2001-01609-COA-R3-CV, 2003 WL 21051742, at *2-5 (Tenn. Ct. App. May 12, 2003) (reversing an order requiring Alcoholics Anonymous attendance and counseling without a hearing, as "the parents could have agreed on counseling as part of a parenting plan, but in the absence of such agreement, a hearing would be necessary to determine if counseling for the children or the parents was indicated").

On the other hand, parenting plan restrictions supported by a sufficient evidentiary basis and sufficient findings have been affirmed. *See, e.g.*, *Goughenour v. Goughenour*, No. M2022-00297-COA-R3-CV, 2023 WL 3269661, at *4-5 (Tenn. Ct. App. May 5, 2023) (concluding that a trial court did not abuse its discretion by ordering a father not to consume alcohol in the child's presence where the record reflected incidents where the father was intoxicated and yelling at another individual while the child was under his care and the trial court made findings regarding his alcohol consumption); *Rogers v. Rogers*, No. E2002-02300-COA-R3-CV, 2003 WL 21673678, at *4 (Tenn. Ct. App. July 14, 2003) (affirming and extending a restriction on a parent's consumption of alcohol during his parenting time when there was "substantial evidence of the husband's problems with alcohol"); *Buckles v. Riggs*, 106 S.W.3d 668, 678 (Tenn. Ct. App. 2003) (affirming a prohibition on alcohol consumption during parenting time where the father's drinking had negatively impacted the child); *see also Williams v. Williams*, No. E2021-00432-COA-R3-CV, 2022 WL 1043632, at *13-14 (Tenn. Ct. App. Apr. 7, 2022) (modifying a divorce decree on appeal to prohibit a husband from consuming alcohol during his parenting time "in order to ensure

the safety of the Child" when the trial court found that he had been drinking and driving with the child in the vehicle).

Father does not object to the parenting plan requirement of keeping firearms stored while his son is present in his home. His narrow objection is to the gun storage limitation imposed by the trial court insofar as it keeps him from being able to carry a firearm outside the home at all while his child is present. Considered in the narrow context of the Father's challenge, and keeping the above discussed principles in mind, we note that the trial court's parenting plan restriction regarding firearms simply stated that all guns must remain in a safe whenever the child is present, including concealed weapons, without *any* findings regarding the child's best interest, the evidence presented at trial, or any legal authority for such a restriction.[14] In its oral ruling, the trial judge discussed the facts of the separate custody case that had been before him involving another child and made clear that this incident was the reason for its restriction in this case. When the issue arose again at the post-trial hearing, the trial judge again referenced incidents that had occurred in other cases. The trial court then entered an amended order stating that its firearm provision was in the best interest of the child given "safety concerns for a child of his age," and it was "not meant as a punishment to the parties." Because the record reflects that the trial court imposed this restriction based on the facts of other cases, and it did not make any factual findings to support the need for the restriction on carrying a firearm outside the home, we delete the trial court's firearm provision in its entirety and modify the parenting plan to state, as the parties agreed, that firearms shall be stored in a gun safe when the child is present inside the home. We reiterate that the trial court's discretion on visitation matters "is not unbounded, it must be based on proof and appropriate legal principles." *Hogue*, 147 S.W.3d at 251. This particular decision was not.

G. Tax Exemption

We now turn to financial matters. Mother argues that the trial court erred in ruling that the parties would alternate taking the tax exemption for Tobias. To briefly recap, the trial court originally ruled that Father would receive the exemption every year "given his income and [Mother's] lack of income." Mother filed a motion to alter or amend, arguing that she could benefit from the tax exemption. Thereafter, the trial court ruled that the parties would alternate the tax exemption. On appeal, Mother argues that the trial court should have awarded her the exemption every year because she was designated as primary residential parent. She also notes that she "expected to earn more" in the future and that the trial court imputed an income to her for child support purposes.

"The allocation of tax exemptions for children of divorcing parents is a matter of discretion with the trial court[.]" *Smith v. Smith*, No. M2007-00439-COA-R3-CV, 2008

[14] Tennessee Code Annotated section 36-6-406 also addresses restrictions in temporary or permanent parenting plans, but the trial court did not mention any provisions of this statute.

WL 2343296, at *3 (Tenn. Ct. App. June 4, 2008). Even though the Tennessee Child Support Guidelines contain an assumption that the primary residential parent will claim the tax exemption for the child, the decision regarding the exemption is ultimately discretionary with the trial court and should depend on the facts of the particular case. *Neveau v. Neveau*, No. E2015-02221-COA-R3-CV, 2017 WL 2459731, at *12 (Tenn. Ct. App. June 7, 2017); *see also Eaves v. Eaves*, No. E2006-02185-COA-R3-CV, 2007 WL 4224715, at *8-9 (Tenn. Ct. App. Nov. 30, 2007) (stating that the child support guideline is "not really a rule at all, but a mathematical 'assumption' regarding an unrelated matter"). For instance, "[w]e have, on occasion, reversed the trial court's award of the federal tax exemptions to the primary residential parent, where the alternate residential parent had substantial income and need for the exemptions and [the primary residential parent] had little or no income[.]" *Long v. Long*, No. M2006-02526-COA-R3-CV, 2008 WL 2649645, at *11 (Tenn. Ct. App. July 3, 2008); *see, e.g.*, *Neveau*, 2017 WL 2459731, at *12 ("In light of Mother's negligible income, the exemption is of no use to Mother at this time. . . .[W]here Father stands to gain greater benefit from the exemption, we find that the exemption should be awarded to Father until such time as Mother, the primary residential parent, gains employment."). The trial court also has discretion to award each party use of the exemption in alternating years. *See, e.g.*, *Hasley*, 2023 WL 4633509, at *12-13 ("it was within the range of acceptable alternatives for the trial court to alternate the exemption between the parents each year").

At oral argument before this Court, Mother's counsel was asked if the tax exemption would essentially be worthless to Mother given her negligible income, and her counsel could not identify any way that Mother would in fact benefit from it. Consequently, Mother has not shown that the trial court abused its discretion in declining to award her the tax exemption every year.[15]

H. Voluntary Underemployment

Mother also argues that "the trial court erred in finding [her] to be voluntarily unemployed or underemployed and in the income it imputed to her." However, Mother's argument on appeal is somewhat difficult to follow. A brief overview of the applicable law is helpful at the outset. The Tennessee Child Support Guidelines provide:

> 2. Imputed Income.
> (i) Imputing additional gross income to a parent is appropriate in the following situations:
> (I) If a parent has been determined by a tribunal to be willfully underemployed or unemployed; or
> (II) When there is no reliable evidence of income due to a parent failing to participate in a child support proceeding or a parent failing to supply

[15] We note that Father did not raise any issue on appeal regarding the tax exemption.

adequate and reliable financial information in a child support proceeding; or
(III) When the parent owns substantial non-income producing assets, the court may impute income based upon a reasonable rate of return upon the assets.

Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)(2). As such, the first of the three avenues for imputing additional gross income to a parent is upon a determination of willful underemployment. *See id.* The Guidelines contain the following provisions regarding that issue:

(ii) Determination of Willful Underemployment or Unemployment.
The Guidelines do not presume that any parent is willfully underemployed or unemployed. The purpose of the determination is to ascertain the reasons for the parent's occupational choices, to assess the reasonableness of these choices in light of the parent's obligation to support his or her child(ren), and to determine whether such choices benefit the children.
(I) A determination of willful underemployment or unemployment is not limited to choices motivated by an intent to avoid or reduce the payment of child support.
I. The determination may be based on any intentional choice or act that adversely affects a parent's income.
II. Under the Guidelines, however, incarceration of a parent shall not be treated as willful underemployment or unemployment for the purpose of establishing or modifying a child support order.
(II) *Once a parent has been found to be willfully underemployed or unemployed, additional income can be allocated to that parent to increase the parent's gross income to an amount which reflects the parent's income potential or earning capacity, and the increased amount shall be used for child support calculation purposes*. The additional income allocated to the parent shall be determined using the following criteria:
I. The parent's past and present employment; and
II. The parent's education and training.
(III) A determination of willful underemployment or unemployment shall not be made when an individual enlists, is drafted, or is activated from a Reserve or National Guard unit for full-time service in the Armed Forces of the United States.

(iii) Factors to be Considered When Determining Willful Underemployment or Unemployment.
The following factors may be considered by a tribunal when making a determination of willful underemployment or unemployment:
(I) The parent's past and present employment;
(II) The parent's education, training, and ability to work;

> (III) The State of Tennessee recognizes the role of a stay-at-home parent as an important and valuable factor in a child's life. In considering whether there should be any imputation of income to a stay-at-home parent, the tribunal shall consider:
> I. Whether the parent acted in the role of full-time caretaker while the parents were living in the same household;
> II. The length of time the parent staying at home has remained out of the workforce for this purpose; and
> III. The age of the minor children.
> (IV) A parent's extravagant lifestyle, including ownership of valuable assets and resources (such as an expensive home or automobile), that appears inappropriate or unreasonable for the income claimed by the parent;
> (V) The parent's role as caretaker of a handicapped or seriously ill child of that parent, or any other handicapped or seriously ill relative for whom that parent has assumed the role of caretaker which eliminates or substantially reduces the parent's ability to work outside the home, and the need of that parent to continue in that role in the future;
> (VI) Whether unemployment or underemployment for the purpose of pursuing additional training or education is reasonable in light of the parent's obligation to support his/her children and, to this end, whether the training or education will ultimately benefit the child in the case immediately under consideration by increasing the parent's level of support for that child in the future; and
> (VII) Any additional factors deemed relevant to the particular circumstances of the case.

Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)(2) (emphasis added).[16] On appeal, Mother argues that the trial court's decision "finding her willfully underemployed was an abuse of discretion" because Tobias was only two years old, Father was the sole provider during the short-term marriage, and she was a stay-at-home mother, "a decision that is not unreasonable under the facts of this case." Thus, Mother appears to challenge the trial court's initial decision to find her voluntarily underemployed.

Notably, however, this section of Mother's brief concludes by stating that "*Mother did not ask the Court to impute no income to her, she asked that her income be set at $1,256.00 per month*." (emphasis added). Mother had proposed this sum, before the trial court, based on a minimum wage income. If Mother concedes that she "did not ask the Court to impute no income to her" and "asked that her income be set at" a level higher than

[16] In addition, "[t]he court has the option of imputing additional gross income to an underemployed parent where there is no reliable evidence of income." *Dilley v. Dilley*, No. M2009-02585-COA-R3-CV, 2011 WL 2015395, at *8 (Tenn. Ct. App. May 23, 2011) (citing Tenn. Comp. R. & Regs. 1240-2-4-.04(3)(a)(2)(i); *see, e.g.*, *Sims v. Sims*, No. E2007-00136-COA-R3-CV, 2008 WL 220279, at *1 (Tenn. Ct. App. Jan. 28, 2008).

her actual income, then Mother necessarily has conceded that a basis existed for "imputing" income to her based on her earning capacity, *i.e.*, she was voluntarily underemployed. *See* Tenn. Comp. R. & Regs. 1240-02-04-.04(3)(a)(2)(ii)(II) ("Once a parent has been found to be willfully underemployed or unemployed, additional income can be allocated to that parent to increase the parent's gross income to an amount which reflects the parent's income potential or earning capacity, and the increased amount shall be used for child support calculation purposes."); *Garrett v. Elmore*, No. M2013-01564-COA-R3-JV, 2014 WL 3763806, at *8 (Tenn. Ct. App. July 29, 2014) ("Once a court finds a parent willfully and/or voluntarily unemployed, the next step is to determine the parent's potential earnings or earning capacity[.]"); *Armbrister v. Armbrister*, No. E2010-01561-COA-R3-CV, 2011 WL 5830466, at *6 (Tenn. Ct. App. Nov. 21, 2011) ("Once it is determined that Father was voluntarily underemployed, the next matter for the trial court to address is the proper amount of income to impute."). To "impute" income means to "assign or attribute an income level to the parent that may not reflect the parent's actual gross income." *Massey v. Casals*, 315 S.W.3d 788, 795 (Tenn. Ct. App. 2009). Because Mother concedes on appeal that "Mother did not ask the Court to impute no income to her, she asked that her income be set at $1,256.00 per month," she cannot now complain that the trial court erred in finding her to be voluntarily underemployed.[17]

Mother's final argument with respect to this issue is that the trial court erred "in the income it imputed to her." She notes that she proposed that her income be set at $1,256 and per month and that the trial court set her income at $35,936 per year. However, Mother does not cite any legal authority in support of this argument. The only authority she cited in this section of her brief was a case addressing whether a trial court should find a parent underemployed if his or her reason for having a lower paying job was in good faith and not intended to reduce his or her income. Because Mother does not construct any legal argument regarding the amount of income to be imputed, we deem this issue waived. *See Sneed v. Bd. of Pro. Resp. of Supreme Ct.*, 301 S.W.3d 603, 615 (Tenn. 2010) ("It is not the role of the courts, trial or appellate, to research or construct a litigant's case or arguments for him or her, and where a party fails to develop an argument in support of his or her contention or merely constructs a skeletal argument, the issue is waived.").

I. Attorney Fees

Both Mother and Father request an award of attorney fees on appeal pursuant to Tennessee Code Annotated section 36-5-103(c). This statute provides a basis for this Court to award appellate attorney fees, in our discretion, to a prevailing party. *Eberbach v. Eberbach*, 535 S.W.3d 467, 475 (Tenn. 2017). Mother alternatively requests an award of her fees as alimony in solido. We respectfully decline each party's request for attorney

[17] From our review of the record in the trial court, Mother took different positions regarding the imputation of income when she had different attorneys. However, we will analyze the issue based on the position she has taken on appeal.

fees on appeal.

IV. CONCLUSION

For the aforementioned reasons, we affirm the decision of the circuit court as modified and remand for further proceedings. Costs of this appeal are taxed equally to the appellant, Dominic Joseph Schanel, and to the appellee, Sarabeth Richardson, for which execution may issue if necessary.

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CARMA DENNIS MCGEE, JUDGE