IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
October 19, 2022 Session

STACIE NICOLE MARTIN WADDELL v. DAVID SEWALL WADDELL

Appeal from the Circuit Court for Shelby County
No. CT-003296-17 Felicia Corbin Johnson, Judge

No. W2020-00220-COA-R3-CV

In this divorce case, Wife/Appellant appeals the trial court's: (1) pre-trial rulings concerning certain entities; (2) denial of her motions for leave to amend the complaint for divorce; (3) pre-trial procedural rulings; (4) evidentiary rulings; (5) designation of Husband/Appellee as the primary residential parent and parent with sole decision-making authority over the parties' child; (6) child support award; (7) alimony award; (8) denial of retroactive temporary support; and (9) denial of her request for attorney's fees. Wife also asks this Court to award her attorney's fees incurred in this appeal. For the reasons discussed below, we vacate in part, reverse in part, and affirm in part. Wife's request for appellate attorney's fees is denied.

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

KENNY ARMSTRONG, J., delivered the opinion of the court, in which ARNOLD B. GOLDIN and CARMA DENNIS MCGEE, JJ., joined.

Rachael Putnam and Hallie Flanagan, Memphis, Tennessee, for the appellant, Stacie Nicole Martin Waddell.

G. Coble Caperton and Warren P. Campbell, Memphis, Tennessee, for the appellee, David Sewall Waddell.

Blaine Smith, Nashville, Tennessee and Jonathan Nelson, Memphis, Tennessee, for the appellee, Cumberland Trust & Investment Company, in its capacity as trustee of the DSW Trust #2.

Jeremy Alpert, Memphis, Tennessee, for the appellee, David S. Waddell, in his capacity as trustee of the Waddell Trust and DSW Trust.

Jonathan Hancock and Shayna Giles, Memphis, Tennessee, for the appellee, Waddell & Associates, LLC.

Melody McAnally and Elizabeth Chance, Memphis, Tennessee, for the appellee, AMWJR, Inc. f/k/a Waddell & Associates, Inc.

OPINION

I. Background

This appeal arises from a contentious divorce that has been pending since 2017. The record is voluminous, so in the interest of judicial economy, we will discuss only those facts and proceedings that are relevant to this appeal.

Stacie Waddell ("Wife") and David Waddell ("Husband") married in March 2002. Two children were born to the marriage, Easton (d/o/b September 2002) and Saylor (d/o/b March 2006) (together, the "Children"). For most of the marriage, Husband was the President and CEO of Waddell & Associates, Inc. ("W&A, Inc."), a company his mother and father founded in 1985. Although Wife was primarily a stay-at-home mother during the marriage, she also worked at W&A, Inc. as the Global Communications Director but did not receive a salary during her tenure there.

At the time of its founding, Husband's parents owned 100% of the shares of W&A, Inc. stock. Eventually, two other individuals, Alvin Wunderlich and Phyllis Scruggs, obtained shares in the company (333 and 177, respectively). In 2005, Husband's father created the Waddell Trust, with an initial *res* of $42,000.00. Husband was named Trustee, and Husband and the Children were named as beneficiaries of the trust. Around this time, the Waddell Trust purchased Mr. Wunderlich's 333 shares for $400,000, which was payable under a promissory note. In 2009, Husband's father created a second trust, the DSW Trust, and placed 667 shares of W&A, Inc. stock (all of the stock Husband's parents owned) into that trust. Again, Husband was named Trustee, and Husband and the Children were named as beneficiaries of the trust. With this transfer of shares, the Waddell Trust and the DSW Trust together owned 85% of the shares of W&A, Inc. stock.

In April 2016, W&A, Inc. redeemed the remaining 177 shares, i.e., the remaining 15% of shares, in W&A, Inc. stock. At this time, Husband, as Trustee of both trusts, merged the Waddell Trust into the DSW Trust. Also, around this time, Focus Financial Partners, LLC ("Focus") and Waddell & Associates, LLC ("W&A, LLC")[1] purchased all

[1] W&A, LLC is a wholly owned subsidiary of Focus.

of W&A, Inc.'s assets. After the sale, W&A, Inc. changed its name to AMWJR, Inc., which subsequently entered into a plan of dissolution and has since been fully dissolved.

On April 13, 2016, the DSW Trust #2 (together with the Waddell Trust and the DSW Trust, the "Trusts," and together with W&A, LLC and AMWJR, Inc., the "Entities") was created. The Grantor of the DSW Trust #2 was the DSW Trust, by Husband, as Trustee of the DSW Trust. The Trustee of the DSW Trust #2 was Husband, individually. The beneficiaries of this trust are Husband and the Children. In his capacity as Trustee of both the DSW Trust and the DSW Trust #2, Husband decanted the trust property from the DSW Trust into the DSW Trust #2. In short, all of the amounts received from the sale of W&A, Inc. were moved into the DSW Trust #2. On April 7, 2017, Husband resigned as Trustee of the DSW Trust #2, and Cumberland Trust & Investment Company ("Cumberland Trust") became the Trustee.

On August 4, 2017, Wife filed her initial complaint for divorce in the Circuit Court for Shelby County ("trial court"). Wife alleged irreconcilable differences, asked to be named the primary residential parent of the Children, and asked for both temporary and permanent child support. Wife did not plead for alimony. On September 5, 2017, Wife filed her amended complaint for divorce and alleged that Husband was guilty of inappropriate marital conduct.[2] Wife also joined the Entities as defendants, alleging that each entity held assets that were "marital in nature." Additionally, Wife asked for attorney's fees and expenses, but she did not specifically ask for alimony.[3] On September 13, 2017, Wife filed her first motion for *pendente lite* support, requesting temporary alimony, child support, and attorney's fees. As will be discussed further, *infra*, Wife filed several requests for temporary support throughout the divorce proceedings. Although the parties participated in a multi-day, temporary-support hearing, that hearing never concluded, and Wife was never awarded ongoing temporary support, *see* further discussion *infra*. On October 31, 2017, the parties entered into a consent order on a temporary parenting schedule.

On November 10, 2017, W&A, LLC filed a motion to intervene for the limited purpose of protecting the property of the company. On November 14, 2017, the parties entered into consent protective orders concerning confidential information belonging to the Entities. In part, these orders required the parties to allow a third-party vendor to "collect all copies of electronically stored and/or print copies of downloads and all computers and removable media . . . ever used by Wife on behalf of any business entity in which Defendant now has an interest, or has had an interest in the past, as well as access codes, passwords and/or authorization codes." On November 28, 2017, Husband filed an answer to Wife's

[2] For completeness, we note that Husband filed his answer to the original complaint for divorce seven minutes prior to Wife filing her amended complaint. Accordingly, Wife filed a motion to amend her original complaint, which was granted in November 2017.

[3] Wife included the standard request that she be awarded "such other and further relief both general and special as under the pleadings and proof she may be entitled to in the premises[.]"

amended complaint and a counter-complaint for divorce. In part, Husband asserted that Wife failed to state a claim against the Entities and failed to demonstrate that the trial court had subject-matter jurisdiction over the Entities. Husband also asked to be named the Children's primary residential parent.

In January 2018, the Entities filed motions to dismiss, alleging that Wife's amended petition failed to state a claim against any of the Entities. In May 2018, the trial court heard the motions to dismiss and denied them by order of May 23, 2018. In June and September 2018, the Entities filed motions to revise, arguing that the trial court erred in denying the motions to dismiss.

On July 2, 2018, the parties entered into an agreed temporary parenting plan. In pertinent part, the parties agreed that they would care for the Children on an alternating weekly basis and agreed to the schools the Children would attend for the 2018-2019 school year. The temporary parenting plan also ordered that each child would attend counseling regularly with Dr. Mary Wanat to aid during this transitional period. Lastly, the plan awarded the parties joint decision-making authority.

In August 2018, Judge Yolanda Kight was elected to the bench and replaced Judge David Rudolph who had presided over the case. Due to a conflict involving Husband's counsel, Judge Kight recused herself, and the case was reassigned to Judge Felicia Corbin-Johnson.

On October 18, 2018, the trial court heard, *inter alia*, arguments on the Entities' motions to revise. During the hearing, the trial judge questioned whether Wife's amended complaint pleaded facts sufficient to keep the Entities as defendants in the litigation. Thereafter, on October 30, 2018, Wife filed a motion for leave to amend the complaint, seeking to add additional facts, *see* further discussion *infra*.

By order of October 31, 2018, the trial court granted the Entities' motions to revise and set a hearing on the motions to dismiss for that day. Given Wife's counsel's statements at this hearing, discussed further, *infra*, the trial court dismissed all Entities except for the DSW Trust #2. Concerning the DSW Trust #2, the trial court took its motion under advisement and allowed Wife to research a specific issue. Thereafter, Wife and Cumberland Trust (on behalf of the DSW Trust #2) filed supplemental briefing on the issue. By order of December 13, 2018, the trial court entered an order dismissing all Entities except for the DSW Trust #2.

Also, on December 13, 2018, the trial court entered an agreed order modifying the scheduling order. In pertinent part, the order provided that: (1) the deadline for Wife to produce expert reports was February 13, 2019; (2) the deadline for Husband and Cumberland Trust to produce expert reports was March 1, 2019; (3) the deadline to conclude all expert depositions was on or before April 15, 2019; (4) the deadline to

conclude the deposition of a Cumberland Trust representative and any other non-expert witness was on or before April 12, 2019; and (5) the final trial was set for May 29, 2019.

By order of January 20, 2019, the trial court entered an order dismissing the DSW Trust #2. On January 23, 2019, Wife filed a motion to extend the expert deadlines, citing two reasons for the extension, i.e., (1) to allow for a hearing on Wife's request for attorney's fees; and (2) to give Wife the benefit of taking Husband's deposition before the expert deadline. According to the motion, Wife's deposition of December 11, 2018 took several days, and Wife had not yet deposed Husband.[4]

On January 24, 2019, Wife produced an additional 2,400 files of documents to Husband's counsel. These files included documents related to the Entities. This production was the catalyst for contempt proceedings against Wife and the confiscation of Wife's personal devices. On February 4, 2019, Husband filed: (1) a motion for Rule 37 sanctions against Wife; and (2) a petition to find Wife in criminal contempt and for injunctive relief. That same day, the trial court held a hearing on Husband's application for injunctive relief. Thereafter, the trial court ordered Wife to turn over all documents that fell within the scope of the November 2017 orders by 5 p.m. that day. The trial court also instructed Wife to turn over her personal devices, i.e., cell phone, laptop, iPad, camera, to her counsel, which Wife did. The trial court did not enter a written order until February 11, 2019. On February 7, 2019, the trial court held another hearing on Husband's motion for injunctive relief.

On February 8, 2019, the trial court heard Wife's motion for leave to amend the complaint, wherein Wife sought to add the DSW Trust #2 back as a party to the divorce. The trial court took Wife's motion under advisement. On the same day, unbeknownst to her counsel, Wife removed, from her counsel's office, the personal devices she had previously turned over.

Due to Wife's actions on February 8, on February 11, 2019, the trial court entered three orders against Wife. In part, these orders enjoined Wife to turn all of her personal devices over to a third party, Insight Discovery ("Insight") and provide Insight with all of her passwords. That same day, Husband filed an amended petition to find Wife in contempt and added a civil contempt allegation. Also, on that day, Wife's previous counsel announced that she was withdrawing as Wife's counsel. On February 13, 2019, the trial court entered an order on the preservation and retrieval of information from Wife's devices and online storage accounts. In part, this order required Wife's counsel to make a privilege log concerning all data that Wife's counsel received from Insight. Although Wife's current counsel had yet to file a formal notice of appearance (she did so on March 12, 2019), she signed the foregoing order. On March 27, 2019, Wife filed a motion to set aside, modify, suspend, and/or stay the February 13, 2019 order concerning Wife's devices.

[4] The record shows that Wife never deposed Husband before trial.

Briefly, in a March 28, 2019, hearing, the trial court allowed Wife's new counsel to file "any additional arguments that [she thought] should have been made that weren't made" concerning Wife's motion for leave to amend the complaint. On April 2, 2019, Wife filed a revised and supplemental motion for leave to amend complaint and petition to set aside fraudulent transfer and to join third-party transferees, in which she alleged new factual allegations and legal claims. On April 5, 2019, the trial court notified the parties via email that it was denying Wife's motion for leave to amend the complaint and that a written order would follow.

On April 18, 2019, Wife filed a motion to compel and/or for attorney's fees and temporary support alleging that Husband was intentionally obstructing the conclusion of the temporary support hearing. On May 3, 2019, Wife filed a motion to continue the May 29, 2019 trial date, alleging, in part, that not a single issue had been resolved, discovery was ongoing, witness lists had not been disclosed, exhibit lists had not been disclosed, depositions had either not been completed or had not been taken, and that a temporary support hearing had taken place over five days without a final adjudication. Furthermore, Wife alleged that she had not had time to prepare for the final trial because she had to defend herself in the pending contempt proceedings.

From May 8 through 10, 2019, the trial court began the hearing on Husband's petition to hold Wife in contempt. Also, on May 10, 2019, the trial court heard Wife's motion to set aside the February 13, 2019 order concerning Wife's devices, Wife's motion for a continuance, and Wife's motion to compel concerning attorney's fees and temporary support. The trial court orally denied Wife's motion to set aside and denied in part and granted in part her motion for attorney's fees and temporary support. The trial court also orally denied Wife's request for a continuance. Also, on this day, the trial court entered a *sua sponte* order compelling the turnover of company and trust property and the appointment of a Special Master. This order instructed the Special Master to contact individuals who might have had property belonging to the Entities and to index such property.

On May 15, 2019, Wife filed an answer to Husband's counter-complaint for divorce. The trial court resumed the contempt proceedings on May 15, and on May 16, 2019, the trial court orally ruled that it would not find Wife in contempt.

On May 22, 2019, the trial court entered an order denying Wife's motion for a continuance. That same day, the trial court also entered its written order denying Wife's motion for leave to amend the complaint. Additionally, on May 22, 2019, the trial court entered an order denying in part and granting in part Wife's motion to compel and/or for attorney fees and temporary support.

Also, on May 22, 2019, Husband filed a motion *in limine* (the "first motion *in*

limine") to exclude testimony from Wife's expert witnesses. On May 25 and 27, 2019, Wife's counsel emailed Husband's counsel with a "working witness list for trial." Thereafter, on May 28, 2019, Husband filed a second motion *in limine* (the "second motion *in limine*) to exclude the testimony of witnesses Wife revealed four days before trial. By order of May 29, 2019, the trial court granted Husband's first motion *in limine* and excluded testimony from Wife's expert witnesses. That same day, the final trial began.

On May 30, 2019, the trial court entered an order denying Husband's petitions for civil and criminal contempt. By order of June 4, 2019, the trial court granted Husband's second motion *in limine*, which resulted in several of Wife's other witnesses being excluded from testifying.

The trial court held the final trial on May 29, 30, 31, June 3, 27, 28, and July 1, 2, 3 (ending in the early hours of July 4), 2019. The following witnesses testified: (1) Ms. Alison Kosman, Wife's former assistant; (2) Ms. Nicole Beers who was hired before the divorce to help with the Children; (3) Dr. Mary Wanat, Ph.D., the Children's psychologist; (4) Wife; (5) Dr. David Strauser, Husband's vocational expert; (6) Husband; (7) Mr. Robert Vance, CPA, Husband's expert and a forensic certified public accountant and economist; (8) Mr. Richard Smith, Husband's friend; and (9) the Children. 125 exhibits were entered into evidence. The trial court held additional hearings on August 14 and 15, 2019, and September 11, 2019.

On September 11, 2019, the trial court entered the final decree of divorce, which incorporated the trial court's findings of facts and conclusions of law and the permanent parenting plan. The trial court also entered the permanent parenting plan separately. Relevant here and discussed at length, *infra*, the trial court: (1) granted Husband final decision-making authority and named him the primary residential parent for both Children; (2) awarded Wife $3,200 per month in child support until Easton reached majority (thereafter Wife would receive $2,100 per month in child support until Saylor reached majority); (3) awarded Wife $15,810.50 in transitional alimony for 66 months; (4) denied Wife's request for retroactive temporary support; and (5) denied Wife's request for attorney's fees.

After entering the final decree and parenting plan, the trial court heard post-trial issues related to the Special Master and the trial court's May 10, 2019 *sua sponte* order. Thereafter, Wife timely appealed.

II. Issues

Wife raises eleven issues for review, which are stated in her appellate brief as follows:[5]

[5] Although these issues are a verbatim recitation of the issues as stated in Wife's appellate brief,

1. Did the trial court err in granting Appellees' Motion to Revise and thereafter dismissing Waddell and Associates, LLC, Waddell and Associates, Inc., Waddell Trust, DSW Trust, and DSW Trust #2 as Defendants in the divorce case?

2. Did the trial court err in denying Wife's Motion to Amend and her Revised and Supplemental Motion for Leave to Amend and Petition to Set Aside Fraudulent Conveyance and to Join Third Parties?

3. Did the trial court err in ordering the destruction of attorney-client materials and files, the destruction of Wife's email accounts, and in ordering the confiscation of Wife's electronic devices?

4. Did the trial court err in denying Wife's Motion for Continuance and in excluding Wife's fact and expert witnesses?

5. Did the trial court err in refusing to consider all evidence related to the assets, including the assets placed in trust, and made an equitable division an impossibility?

6. Did the trial court err in designating Husband as the primary residential parent with sole decision-making authority in contradiction of the weight of the evidence?

7. Did the trial court err in determining the amount and duration of the child support award?

8. Did the trial court err in denying Wife's request for temporary support during the pendency of the divorce?

9. Did the trial court err in determining the type, amount, and duration of the alimony award to Wife?

10. Did the trial court err in not awarding Wife her attorney fees and suit expenses?

11. Should Wife be awarded her reasonable attorney's fees and expenses incurred on appeal?

As Appellees, the Trusts raise an additional issue, as stated in their brief:

1. Whether Wife abandoned her claims against the Waddell and DSW Trusts in the Trial Court resulting in waiver on appeal?[6]

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we present them in a different order, for reasons discussed, *infra*.

[6] We note that W&A, LLC and AMWJR, Inc.'s brief states: "To the extent any of the issues not

III. Standard of Review

We review a non-jury case "*de novo* upon the record with a presumption of correctness as to the findings of fact, unless the preponderance of the evidence is otherwise." ***Bowden v. Ward***, 27 S.W.3d 913, 916 (Tenn. 2000) (citing Tenn. R. App. P. 13(d)). The trial court's conclusions of law are reviewed *de novo* and "are accorded no presumption of correctness." ***Brunswick Acceptance Co., LLC v. MEJ, LLC***, 292 S.W.3d 638, 642 (Tenn. 2008). Given the number of issues raised in this appeal, where a standard of review differs from that set out above, we will discuss it under the issue heading.

IV. Analysis

In the interest of judicial economy, we have grouped Wife's issues into the following 7 categories: (1) issues regarding the Entities; (2) issues concerning injunctions and Wife's electronic devices; (3) pre-trial procedural issues; (4) evidence related to assets in trust; (5) issues concerning the Children; (6) Wife's support; and (7) Wife's attorney's fees.

A. Issues Regarding the Entities

As set out above, two of Wife's issues concern the Entities. Wife first argues that the trial court erred when it granted the Entities' respective motions to revise and when it dismissed the Entities as defendants. As discussed further below, our review of these issues is limited to Wife's claims concerning the DSW Trust #2 because she waived her claims as to the other entities. Wife also raises an issue concerning the trial court's denial of her motion for leave to amend the complaint and her revised and supplemental motion for leave to amend and petition to set aside fraudulent transfer and to join third-party transferees.

1. Wife Waived Her Claims Concerning all Entities Except the DSW Trust #2[7]

Although Wife originally sought to include all of the Entities as defendants in the divorce action, she expressly abandoned most of these claims during litigation. Turning to the record, on October 31, 2018, after the trial court granted the Entities' motions to revise, it held a hearing on the Entities' motions to dismiss. In that hearing, Wife's counsel stated: "What I think is reasonable under the circumstances is certainly to dismiss the entities except for [the] DSW [Trust #]2." When the trial court asked Wife's counsel if the other

addressed in this Brief pertain to AMWJR and/or W&A LLC, Appellees incorporate by reference the arguments and defenses on such issues as stated in the Brief of the Appellees Waddell Trust, DSW Trust, and DSW Trust #2 and Brief of the Appellee David Sewall Waddell as if stated fully herein."

[7] Sections (IV)(A)(1)-(3) address Wife's first issue: "Did the trial court err in granting Appellees' Motion to Revise and thereafter dismissing Waddell and Associates, LLC, Waddell and Associates, Inc., Waddell Trust, DSW Trust, and DSW Trust #2 as Defendants in the divorce case?"

entities would be dismissed "by lack of opposition," Wife's counsel confirmed. Accordingly, the trial court ruled:

> The [c]ourt is going to dismiss, after considering all of the motions, the memorandums, the arguments of counsel, statements of [Wife's counsel] today that she is not in opposition considering the [c]ourt's desire to . . . streamline the case and for judicial economy, Waddell and Associates, LLC; Waddell and Associates, Inc.; Waddell Trust and . . . DSW Trust will be dismissed.

Although the trial court took the DSW Trust #2's dismissal under advisement, it later dismissed that entity as well. At the February 8, 2019 hearing on Wife's motion for leave to amend the complaint, Wife's counsel reiterated that she was not seeking to bring all of the dismissed Entities back into the lawsuit, to-wit:

> So we have filed our motion to amend. The only difference . . . is that we are not asking to add back all those parties. The only party that we are asking back, which frankly is the benefit of the discovery that we've been doing all these months, is that now we understand that DSW [Trust#] 2 is now the one that holds the assets which are at issue.

From the foregoing statements, Wife clearly and unequivocally waived her right to pursue claims against W&A, LLC, AMWJR, Inc. (f/k/a W&A, Inc), the Waddell Trust, and the DSW Trust as defendants in the lawsuit. "It is well settled that issues not raised at the trial level are considered waived on appeal." ***Moses v. Dirghangi***, 430 S.W.3d 371, 381 (Tenn. Ct. App. 2013) (citing ***Waters v. Farr***, 291 S.W.3d 873, 918 (Tenn. 2009)); *see also* ***Duke v. Duke***, 563 S.W.3d 885, 898 n.2 (Tenn. Ct. App. 2018). The policy behind this decree is that relief should not be granted to a party "who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error." Tenn. R. App. P. 36. This same principle applies when a party raises an issue but then expressly abandons it at the trial level. *See* ***Carroll v. Morgan Cnty. Bd. of Educ.***, No. E2017-00038-COA-R3-CV, 2017 WL 5712903, at *3 (Tenn. Ct. App. Nov. 28, 2017) (holding that the plaintiff's attorney's express declaration to the trial court that the plaintiff was not pursuing an issue resulted in the waiver and abandonment of the plaintiff's right to raise that issue on appeal). Because Wife failed "to take whatever action was reasonably available to prevent . . . the harmful error," i.e., Wife expressly abandoned her claims against W&A, LLC, AMWJR, Inc. (f/k/a W&A, Inc), the Waddell Trust, and the DSW Trust, she cannot complain on appeal that the trial court erred in dismissing these entities. Accordingly, our review is limited to the trial court's orders granting the DSW Trust #2's motions to revise and dismiss. We turn to those issues.

2. Grant of the DSW Trust #2's Motion to Revise

As discussed briefly, *supra*, the trial court initially denied the DSW Trust #2's motion to dismiss. Thereafter, the DSW Trust #2 filed a motion to revise and asked the trial court to amend its order denying the motion to dismiss. Alternatively, the DSW Trust #2 sought interlocutory appeal of the trial court's order denying its motion to dismiss. In the motion to revise, the DSW Trust #2 argued that the trial court committed an error of law by allowing the trust to remain as a party to the lawsuit. Specifically, the DSW Trust #2 argued that: (1) Wife failed to allege facts sufficient to support any claims against the DSW Trust #2; (2) the governing trust agreement precluded Wife's claims against the DSW Trust #2 as a matter of law; and (3) the DSW Trust #2's presence as a party was not necessary for Wife to obtain complete relief in the divorce proceeding. While the DSW Trust #2's motion to revise was pending, the case was transferred to Judge Corbin-Johnson.

A motion to revise concerns interlocutory orders rather than final judgments. As such, it falls under Tennessee Rule of Civil Procedure 54.02, which provides that

> any order or other form of decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, *and the order or other form of decision is subject to revision at any time before the entry of the judgment adjudicating all the claims and the rights and liabilities of all the parties*.

Tenn. R. Civ. P. 54.02(1) (emphasis added); *see also* Tenn. R. App. P. 3(a) (emphasis added) ("[A]ny order that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not enforceable or appealable *and is subject to revision at any time before entry of a final judgment adjudicating all the claims, rights, and liabilities of all parties*."); *see also* ***Discover Bank v. Morgan***, 363 S.W.3d 479, 488 (Tenn. 2012) ("[M]otions seeking relief from a trial court's decision adjudicating fewer than all the claims, rights, and liabilities of all the parties, should be filed pursuant to Rule 54.02."). Because interlocutory orders are "subject to revision at any time before the entry of the [final] judgment," Tenn. R. Civ. P. 54.02(1), Rule 54.02 allows litigants "a limited opportunity to readdress previously determined issues and afford[s] trial courts an opportunity to revisit and reverse their own decisions." ***Harris v. Chern***, 33 S.W.3d 741, 744 (Tenn. 2000). Indeed, Rule 54.02 "confers upon the trial court 'the privilege of reversing itself up to and including the date of entry of a final judgment.'" ***Id.*** (quoting ***Louis Dreyfus Corp. v. Austin Co.***, 868 S.W.2d 649, 653 (Tenn. Ct. App. 1993)).

This Court reviews a trial court's ruling on a motion to revise under an abuse of discretion standard. ***Harris***, 33 S.W.3d at 746 (citing ***Donnelly v. Walter***, 959 S.W.2d 166, 168 (Tenn. Ct. App. 1997)); *see also* ***Discover Bank***, 363 S.W.3d at 487. As the Tennessee Supreme Court has explained,

> The abuse of discretion standard does not allow the appellate court to substitute its judgment for that of the trial court, ***Williams v. Baptist Mem'l Hosp.***, 193 S.W.3d 545, 551 (Tenn. 2006); ***Myint v. Allstate Ins. Co.***, 970 S.W.2d 920, 927 (Tenn. 1998), and we will find an abuse of discretion only if the court "applied incorrect legal standards, reached an illogical conclusion, based its decision on a clearly erroneous assessment of the evidence, or employ[ed] reasoning that causes an injustice to the complaining party." ***Konvalinka v. Chattanooga-Hamilton Cnty. Hosp. Auth.***, 249 S.W.3d 346, 358 (Tenn. 2008); *see also* ***Lee Med., Inc. v. Beecher***, 312 S.W.3d 515, 524 (Tenn. 2010).

Wright ex rel. Wright v. Wright, 337 S.W.3d 166, 176 (Tenn. 2011).

In granting the motion to revise, the trial court recognized that it had the discretion to revisit any previous interlocutory order. The trial court found that it should revisit the motion to dismiss, in pertinent part, because: (1) it may have been error to keep the DSW Trust #2 in as a party to the case; (2) it was in the parties' best interests for the trial court to review the motion to dismiss before considering whether to grant the DSW Trust #2's interlocutory appeal as appeals are often financially burdensome; (3) the trial court's revisiting of the motion to dismiss would not prejudice either party; and (4) because the trial court inherited the case after the motion to dismiss was decided, justice would best be served by having the current trial judge review the motion.

On appeal, Wife argues that the trial court applied an incorrect legal standard when it granted the motion to revise and that its order should be vacated. However, in her appellate brief, Wife relies on an incorrect statement of the law. Specifically, Wife argues that

> [b]ecause the Tennessee Supreme Court has ruled that a motion to revisit under Rule 54.02 should be analyzed under the framework for a Rule 59.04 motion to alter or amend, the trial court may grant a motion to revisit only: (1) when the controlling law has changed before a judgment becomes final; (2) when previously unavailable evidence becomes available; or (3) when, in unique circumstances, the judgment should be amended to correct a clear error of law or to prevent injustice. ***Harris***, 33 S.W.3d 741.

Because the trial court did not rely on the above elements when granting the motion to revise, Wife argues that it abused its discretion.

Although Wife cites "***Harris***, 33 S.W.3d 741" for her appellate argument, her statement of the law and citation, *supra*, are inaccurate. In ***Harris***, the Tennessee Supreme Court addressed the standard trial courts should apply "[w]hen additional evidence is submitted in support of a Rule 54.02 motion to revise a grant of summary judgment[.]"

Harris, 33 S.W.3d at 745. Because the Tennessee Supreme Court concluded that there was no Tennessee case law regarding the standard a trial court should apply in ruling on a Rule 54.02 motion to revise, it looked to Rule 59.04 to "offer some guidance in determining the standard for revising non-final orders." ***Id.*** at 744. In so doing, the Tennessee Supreme Court acknowledged both the similarities and differences between Rule 54.02 and Rule 59.04. It continued by analyzing two cases, ***Bradley v. McLeod***, 984 S.W.2d 929 (Tenn. Ct. App. 1998), and ***Schaefer v. Larsen***, 688 S.W.2d 430 (Tenn. Ct. App. 1984), both of which applied Rule 59.04 with differing results. ***Harris***, 33 S.W.3d at 744. Relevant here, in ***Bradley***, this Court opined that Rule 59.04 motions may be granted under the three circumstances cited by Wife above. *See* ***Bradley***, 984 S.W.2d at 933. Indeed, Wife's appellate brief quotes ***Bradley*** almost verbatim but cites to ***Harris*** for support. Importantly, in ***Harris***, the Tennessee Supreme Court concluded that "neither ***Schaefer*** nor ***Bradley*** adequately addresse[d] both imperatives as regards Rule 54.02 motions to revise when additional evidence is submitted to overcome a grant of partial summary judgment." ***Harris***, 33 S.W.3d at 745. In reaching this conclusion, the Tennessee Supreme Court set out new elements for trial courts to consider *when presented with additional evidence in support of a Rule 54.02 motion to revise a grant of summary judgment*. ***Id.*** On this Court's review, the ***Harris*** Court did *not* "rule[] that a motion to revisit under Rule 54.02 should be analyzed under the framework for a Rule 59.04 motion to alter or amend[,]" nor did the ***Harris*** Court hold that a trial court may grant a motion to revise only when one of the three elements cited by Wife applies. Accordingly, Wife's reliance on Rule 59.04 and the above cited elements is misplaced.

Contrary to Wife's arguments, the trial court did not apply an incorrect legal standard. As discussed, *supra*, under Rule 54.02, a trial court has discretion to revisit any interlocutory orders before entry of a final judgment. Tenn. R. Civ. P. 54.02(1); *see also* Tenn. R. App. P. 3(a). Rule 54.02 grants trial courts such discretion for the exact reason articulated by the trial court during the hearing on the motion to revise, i.e., to "get [the issue] right." The record shows that the trial court reviewed both the motion to revise and the underlying motion to dismiss in preparation for the hearing on the motion to revise. The trial court expressed concern that requiring the DSW Trust #2 to remain in the case may have been error, and the trial court wanted to revisit this issue to prevent any legal error or injustice to both the parties and the DSW Trust #2. Such action was well within the trial court's discretion. Having determined that the trial court did not err in granting the motion to revise, we now turn to review its grant of the DSW Trust #2's motion to dismiss.

3. Grant of the DSW Trust #2's Motion to Dismiss[8]

[8] In this portion of her appellate brief, Wife makes a two-page argument that the trial court "abused its discretion in failing to fully consider Wife's [m]otion for [l]eave to [a]mend prior to granting Appellees' [m]otion to dismiss." This is a separate issue from whether the trial court erred when it granted the DSW Trust #2's motion to revise and motion to dismiss, and it is an issue that Wife did not list in her statement of the issues for appeal. The contents of appellate briefs are governed by Rule 27 of the Tennessee Rules

A motion to dismiss challenges the legal sufficiency of the complaint rather than the strength of the plaintiff's proof or evidence. ***Phillips v. Montgomery Cnty.***, 442 S.W.3d 233, 237 (Tenn. 2014) (quoting ***Webb v. Nashville Area Habitat for Humanity, Inc.***, 346 S.W.3d 422, 426 (Tenn. 2011)). "In analyzing the legal sufficiency of the complaint, we must presume that all factual allegations in the complaint are true and construe them in favor of the plaintiff." ***Foster v. Chiles***, 467 S.W.3d 911, 914 (Tenn. 2015) (citing ***Lind v. Beaman Dodge, Inc.***, 356 S.W.3d 889, 894 (Tenn. 2011) (citing ***Stein v. Davidson Hotel Co.***, 945 S.W.2d 714, 716 (Tenn.1997))). "A trial court should grant a motion to dismiss '*only when it appears that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief*.'" ***Runyon v. Zacharias***, 556 S.W.3d 732, 737 (Tenn. Ct. App. 2018) (emphasis in original) (quoting ***Webb***, 346 S.W.3d at 426). We review a motion to dismiss *de novo* with no presumption of correctness. *See* ***Myers v. AMISUB (SFH), Inc.***, 382 S.W.3d 300, 307 (Tenn. 2012).

Although "[a] complaint 'need not contain detailed allegations of all the facts giving rise to the claim,' [] it 'must contain sufficient factual allegations to articulate a claim for relief.'" ***Webb***, 346 S.W.3d at 427 (quoting ***Abshure v. Methodist Healthcare-Memphis Hospitals***, 325 S.W.3d 98, 103-04 (Tenn. 2010)). "'The facts pleaded, and the inferences reasonably drawn from these facts, must raise the pleader's right to relief beyond the speculative level.'" ***Webb***, 346 S.W.3d at 427 (quoting ***Abshure***, 325 S.W.3d at 104). Furthermore, "courts are not required to accept as true assertions that are merely legal arguments or 'legal conclusions' couched as facts." ***Runyon***, 556 S.W.3d at 737 (Tenn. Ct. App. 2018) (citing ***Webb***, 346 S.W.3d at 427) (quoting ***Riggs v. Burson***, 941 S.W.2d 44, 47-48 (Tenn. 1997)).

Turning to Wife's September 5, 2017 amended complaint, she alleged the following concerning the DSW Trust #2:

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of Appellate Procedure, which requires an appellant's brief to list "[a] statement of the issues presented for review . . . ." Tenn. R. App. P. 27(a)(4). The statement of the issues is vitally important to the appeal as it provides this Court with the questions that we are asked to answer on review. The statement is also significant because our "[a]ppellate review is generally limited" to those issues listed in it. ***Hodge v. Craig***, 382 S.W.3d 325, 334 (Tenn. 2012) (citing Tenn. R. App. P. 13(b)). Indeed, "[c]ourts have consistently held that . . . [a]n issue not included [in the statement of the issues] is not properly before the Court of Appeals." ***Hawkins v. Hart***, 86 S.W.3d 522, 531 (Tenn. Ct. App. 2001). Accordingly, appellants should endeavor to frame each issue "as specifically as the nature of the error will permit," ***Hodge***, 382 S.W.3d at 335 (citing ***Fahey v. Eldridge***, 46 S.W.3d 138, 143-44 (Tenn. 2001); ***State v. Williams***, 914 S.W.2d 940, 948 (Tenn. Crim. App. 1995)), as this Court is not required to "search[] for hidden questions" in appellants' briefs. ***Hodge***, 382 S.W.3d at 334 (citing Bryan A. Garner, *Garner on Language and Writing* 115 (2009); Robert L. Stern, *Appellate Practice in the United States* § 10.9, at 263 (2d ed.1989)). Having failed to include as an issue whether the trial court erred when it granted the DSW Trust #2's motion to dismiss before fully considering Wife's motion for leave to amend the complaint, Wife has waived this issue.

> 6. Rule 19.01 of the Tennessee Rules of Civil Procedure provides as follows: A person who is subject to service of process shall be joined as a party if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest, or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reasons of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person properly should join as a plaintiff but refuses to do so, he or she may be made a defendant, or in a proper case, an involuntary plaintiff.
>
> 7. Wife hereby amends her Complaint and adds Waddell & Associates, LLC, Waddell & Associates, Inc., Waddell Trust, DSW Trust, and DSW Trust #2 as additional Defendants in this cause.
>
> ***
>
> 12. Defendant, DSW Trust #2, is a Tennessee trust. Such Party Defendant is joined in this cause to bring it within the jurisdiction and control of this [c]ourt. The Defendant Trust holds assets and monies that are marital in nature and in which assets Wife seeks an equitable interest and division. The trustee for said trust is Cumberland Trust . . . . The parties have made substantial contributions to the value of the trust during the marriage.
>
> 13. Wife hereby joins . . . DSW Trust #2 as Defendant[] in this cause.

In the amended complaint, Wife also asked that she "receive an equitable distribution of any and all marital assets held by . . . [the] DSW Trust #2."

By order of January 29, 2019, the trial court granted the DSW Trust #2's motion to dismiss. In dismissing the trust without prejudice, the trial court found that Wife's amended complaint failed to: (1) identify or state a cause of action against the DSW Trust #2; (2) state a claim upon which relief could be granted; and (3) sufficiently allege that the DSW Trust #2 was a Tennessee Rule of Civil Procedure 19.01 party.

From the amended complaint, this Court, like the trial court, struggles to understand the nature of Wife's claim(s) for relief against the DSW Trust #2, i.e., how the DSW Trust #2 injured Wife such that she could maintain a cause of action against the trust. On our review, Wife pleaded no facts to allege that she was harmed by the DSW Trust #2. Rather, it appears that the focus of Wife's argument in opposition to the motion to dismiss was that the DSW Trust #2 was a necessary party under Tennessee Rule of Civil Procedure Rule

19.01. Briefly, Rule 19.01 governs the joinder of indispensable and necessary parties. In pertinent part, it provides that "[a] person who is subject to service of process shall be joined as a party if . . . in the person's absence complete relief cannot be accorded among those already parties[.]" Tenn. R. Civ. P. 19.01. In the trial court, Wife argued that, without the DSW Trust #2, equitable and complete relief in the divorce would be precluded because, as Wife asserted, the DSW Trust #2 contained marital property subject to division by the trial court. Returning to the amended complaint, Wife's allegations that the DSW Trust #2 held assets that were "marital in nature," and that the parties made substantial contributions to the trust during marriage were no more than legal arguments, which the trial court was not required to accept as true. *See* ***Runyon***, 556 S.W.3d at 737. Indeed, Wife failed to plead any factual allegations concerning what marital assets the DSW Trust #2 held and/or how the DSW Trust #2 came to hold such assets. As such, Wife's amended complaint failed to plead allegations sufficient to show that the DSW Trust #2 held marital assets and/or was a necessary party to the divorce. ***Webb***, 346 S.W.3d at 427. Accordingly, we affirm the trial court's dismissal of the DSW Trust #2 because the amended complaint failed to: (1) state a claim upon which relief could have been granted against the DSW Trust #2; and (2) failed to allege sufficient facts to show that the DSW Trust #2 was a necessary party under Rule 19.01.

4. Wife's Motion for Leave to Amend the Complaint and Wife's Revised and Supplemental Motion for Leave to Amend Complaint and Petition to Set Aside Fraudulent Transfer and to Join Third-Party Transferees[9]

Wife appeals the trial court's denial of both her October 30, 2018 motion for leave to amend the complaint, and her April 2, 2019 revised and supplemental motion for leave to amend and petition to set aside fraudulent transfer and to join third-party transferees. We note that, although filed as one pleading, Wife separates her April 2, 2019 pleading into a: (1) revised and supplemental motion for leave to amend; and (2) petition to set aside fraudulent transfer and to join third-party transferees. Given our conclusion on this issue, there is no need to address Wife's separation of this pleading.

On appeal, Wife does not argue that the trial court erred in its substantive denials of her motions. Rather, Wife's entire appellate argument is premised on her allegation that the trial court refused to "fully consider" the motions. Specifically, in her appellate brief, Wife alleges that the trial court "acted arbitrarily in depriving Wife of her right to present her claims" because "[a]t no point did the [t]rial [c]ourt hold a hearing on either Wife's . . . motion for leave to amend complaint for absolute divorce or her revised and supplemental motion for leave to amend." This Court is perplexed by Wife's argument concerning the motion for leave to amend the complaint as it is clear from the record that the trial court

[9] This section addresses Wife's second issue: "Did the trial court err in denying Wife's Motion to Amend and her Revised and Supplemental Motion for Leave to Amend and Petition to Set Aside Fraudulent Conveyance and to Join Third Parties?"

dedicated significant time and effort to deciding the motion. Turning to the record, on February 8, 2019, the trial court held a hearing on Wife's motion for leave to amend the complaint. During the hearing, the trial court engaged in a lengthy discussion with Wife's counsel before taking the motion under advisement. When Wife retained new counsel, the trial court allowed Wife's new counsel to file *supplemental* briefing on the motion for leave to amend the complaint. Rather than file supplemental briefing, on April 2, 2019, Wife chose to file a new motion with extensive new allegations. Regardless of whether the April 2, 2019 filing was one motion or two, the record is clear that Wife never set this/these motion(s) for a hearing; it was her burden to do so if she wanted the trial court to hear the motion(s). Although, on the day before trial began, Wife requested that the trial court hear the petition to set aside fraudulent transfer concurrently with the divorce, it was not error for the trial court to deny such request on the eve of trial. Indeed, the trial court noted that Wife failed to secure a fiat so that the petition could be heard and proper notice given to all parties. The trial court concluded that, to the extent the petition was separate from the motion, the petition was untimely and improper because it had not been set and notice had not been given to the parties named in the petition.[10] Given the foregoing, the record does not support Wife's arguments that the trial court failed to "fully consider" the motion for leave to amend the complaint or the revised and supplemental motion for leave to amend and petition to set aside fraudulent transfer and to join third-party transferees.

Despite Wife's failure to brief the substantive issue, given the importance of the October 30, 2018 motion for leave to amend the complaint and the effect its denial had on the outcome of this case, we address the trial court's substantive holding that Wife's proposed amendments in the 2018 motion for leave to amend the complaint would have been futile. *See* ***Owen v. Long Tire, LLC***, No. W2011-01227-COA-R3-CV, 2011 WL 6777014, at *4 (Tenn. Ct. App. Dec. 22, 2011) ("We recognize that there are times when this Court, in the discretion afforded it under Rule 2 of the Tennessee Rules of Appellate Procedure, may waive the briefing requirements to adjudicate the issues on their merits.").

[10] At the pre-trial hearing the day before trial began, Wife's counsel argued that the trial court previously considered and denied the revised and supplemental motion in its May 22, 2019 amended order denying Wife's motion for leave to amend complaint for absolute divorce. In that hearing, the trial court clarified that it had neither heard nor ruled on Wife's April 2, 2019 revised and supplemental motion and petition to set aside. The trial court also clarified that it treated the revised and supplemental motion and petition to set aside as one filing. In their appellate briefs, Husband and the Trusts also rely on the trial court's May 22, 2019 order to show that the trial court ruled on both the revised and supplemental motion and the petition to set aside. On our review, the order did not dispose of the foregoing motion/petition. Indeed, in the order, the trial court explicitly found that it "did not consider this new pleading with the pending motion for leave currently under advisement for ruling." The trial court further found that it "advised Wife and Husband's attorneys that the [c]ourt did not consider the supplemental motion filed on April 2, 2019, but the [c]ourt *would likely deny it* on other grounds for repeated failure to cure deficiencies." Emphasis added. The trial court then noted that "Wife has never set her revised and supplemental motion to be heard[.]" Accordingly, we conclude that Wife's revised and supplemental motion and petition to set aside was denied in the final decree of absolute divorce, wherein the trial court held that "[a]ll pending petitions and motions filed in this case that have not been heard are hereby denied[.]"

We review a trial court's decision concerning a motion for leave to amend under an abuse of discretion standard. ***Merriman v. Smith***, 599 S.W.2d 548, 559 (Tenn. App. 1979).

Tennessee Rule of Civil Procedure Rule 15.01 governs amended pleadings. Under Rule 15.01, if a responsive pleading has already been served, "a party may amend the party's pleadings only by written consent of the adverse party or by leave of court; and leave shall be freely given when justice so requires." Tenn. R. Civ. P. 15.01. The Tennessee Supreme Court has "emphasized the liberality of this rule where pre-trial amendments are sought and noted that Rule 15.01 substantially lessened the exercise of pre-trial discretion on the part of the trial judge." ***Gardiner v. Word***, 731 S.W.2d 889, 891 (Tenn. 1987) (citing ***Branch v. Warren***, 527 S.W.2d 89 (Tenn. 1975)). However, leave to amend is not mandatory and is sometimes unwarranted. The factors courts should weigh in considering a motion for leave to amend include: (1) undue delay in filing the amendment; (2) lack of notice to the opposing party; (3) bad faith by the moving party; (4) repeated failure to cure deficiencies by previous amendments; (5) undue prejudice to the opposing party; and (6) futility of the amendment. ***Merriman***, 599 S.W.2d at 559. The sole factor the trial court considered in denying Wife's motion for leave to amend the complaint was futility. Accordingly, we turn to review whether allowing Wife's proposed second amended complaint would have been futile.

From what this Court can deduce from hearing transcripts and Wife's pleadings, Wife sought to add the DSW Trust #2 as a Rule 19.01 necessary party on the allegation that it held marital assets, and a court order concerning such assets would be enforceable only if the trust was a party to the divorce case. Specifically, Wife alleged that, through the Focus Transaction, Focus purchased Husband's book of business, the use of the Waddell name, and Husband's community reputation. Wife further alleged that the compensation for such "items" was placed into the DSW Trust #2. The following amendments in the proposed second amended complaint concern this allegation:

> 14. On April 1, 2016, the parties engaged in the Focus Transaction.
>
> 15. Focus Financial Partners, LLC purchased Husband's ongoing relationships with his clients.
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> 16. Focus Financial Partners, LLC purchased Husband's professional network.
>
> 17. Focus Financial Partners, LLC purchased Husband's community reputation.
>
> 18. Focus Financial Partners, LLC purchased the right to use Husband's name.

> 19. The compensation for the items listed in paragraphs 15, 16, 17, and 18 was placed in DSW Trust #2.
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> ***
>
> 33. Waddell & Associates, Inc. is referred to as the Seller in the Contribution Purchase Agreement involved in the Focus Transaction.
>
> ***
>
> 37. The assets purchased by Focus Financial Partners, LLC such as Husband's book of business and personal, professional, and enterprise goodwill were marital assets.

Based on Wife's allegations in the proposed second amended complaint: (1) W&A, Inc. was the seller in the Focus Transaction (paragraph 33); (2) W&A, Inc. sold Husband's ongoing relationship with his clients, his professional network, his community reputation, and the right to use his name (paragraphs 33; 15-18); (3) these assets amounted to Husband's personal, professional, and enterprise goodwill and were marital assets (paragraph 37); and (4) compensation for the foregoing was placed into the DSW Trust #2 (paragraph 19).

As an initial matter, Wife's proposed second amended complaint alleged that W&A, Inc., not Husband, was the seller in the Focus Transaction. As such, by Wife's own allegations, W&A, Inc., not Husband, would be entitled to compensation from the transaction. However, for completeness, we address Wife's allegation in the proposed second amended complaint that "Husband's book of business and personal, professional, and enterprise goodwill were marital assets."

Goodwill is an intangible asset. ***McKee v. McKee***, No. M2009-01502-COA-R3-CV, 2010 WL 3245246, at *3 (Tenn. Ct. App. Aug. 17, 2010). The nature of the goodwill determines whether it could be considered a marital asset subject to division on divorce. "Personal" or "professional" goodwill, as the name suggests, belongs to the individual. It is the "[g]oodwill attributable to an individual's skills, knowledge, efforts, training, or reputation in making a business successful." *Goodwill*, BLACK'S LAW DICTIONARY (11th ed. 2019). It is well-settled in Tennessee that personal goodwill is not a marital asset. ***McKee***, 2010 WL 3245246, at *3; ***Cunningham v. Cunningham***, No. W1999-02054-COA-R3-CV, 2000 WL 33191364, at *3 (Tenn. Ct. App. Oct. 20, 2000); ***Smith v. Smith***, 709 S.W.2d 588, 592 (Tenn. Ct. App. 1985) ("[P]rofessional goodwill is not a marital asset which would be accounted for in making an equitable distribution of the marital estate."). "Enterprise" or "business" goodwill belongs to an enterprise or business. Included in this goodwill is "[a] business's reputation, patronage, and other intangible assets that are considered when appraising the business, especially for purchase."

Goodwill, BLACK'S LAW DICTIONARY (11th ed. 2019). As this Court has explained,

> "[g]oodwill" in the context of business valuation has been defined as "a reasonable expectation of [a business'] continued profitable operation." *See* ***T.H. Eng'g & Mfg., Inc. v. Mussard***, No. E2001-02406-COA-R3-CV, 2002 WL 1034029, at *2 (Tenn. Ct. App. May 23, 2002). As this Court recognized with regard to valuation of goodwill:
>
> > Many factors are involved; the name of the firm, its reputation for doing business, the location, the number and character of its customers, the former success of the business, and many other elements which would be advantageous in the operation of the business.
>
> ***Id.***

Fuller v. Fuller, No. E2016-00243-COA-R3-CV, 2016 WL 7403791, at *5 (Tenn. Ct. App. Dec. 21, 2016).

In the context of a divorce, our courts have noted a "fine line" between "the personal goodwill of a practitioner and the business goodwill of a *practitioner's business*." ***Hartline v. Hartline***, No. E2012-02593-COA-R3-CV, 2014 WL 103801, at *13 (Tenn. Ct. App. Jan. 13, 2014) (emphasis added). Although we have "recognized the existence of 'enterprise' or 'business' goodwill as a distinct concept from professional or personal goodwill, this Court has been reluctant to allow enterprise goodwill to be divided as a marital asset upon divorce when the business involved is a sole proprietorship [of a spouse]." ***Lunn v. Lunn***, No. E2014-00865-COA-R3-CV, 2015 WL 4187344, at *6 (Tenn. Ct. App. June 29, 2015) (internal citations omitted). However, this Court has determined that a distinction may be considered between a spouse's personal goodwill in the community and the goodwill of his or her professional business "where the practitioner has one or more partners or pre-established contracts that could be assumed by another practitioner." ***Hartline***, 2014 WL 103801, at *13 (citing ***York v. York***, No. 01-A-01-9104-CV-00131, 1992 WL 181710 at *3 (Tenn. Ct. App. July 31, 1992)). The reasoning behind this consideration being that professional practices with multiple partners or pre-established contracts "do not depend solely on the professional reputation of" the practitioner, i.e., the divorcing spouse. ***York***, 1992 WL 181710 at *3; *see also* ***Fuller***, 2016 WL 7403791, at *5-6 (holding that where a source of a spouse's income "could be sold or assigned pursuant to a recognized method of valuation," such income was separate and distinct from personal goodwill and divisible as a marital asset on divorce). Importantly, in such cases, the spouse had an *ownership interest* in the business where the valuation of the business's goodwill was in question.

By Wife's own allegations in the proposed second amended complaint, Husband was *not* the owner of W&A, Inc. Rather, Wife alleged in paragraph 8 that "[a]t the time of the Focus Transaction, the stock was nominally owned one hundred percent (100%) between the Waddell Trust and the DSW Trust." Although Wife failed to specifically state to which "stock" she was referring, in paragraph 26 she alleged that "the DSW Trust and the Waddell Trust continue to own one hundred percent (100%) of the Waddell & Associates, Inc. (now referred to as AMWJR, Inc.) stock." Thus, according to the proposed second amended complaint, at no time did Husband have an ownership interest in W&A, Inc. such that the enterprise goodwill of the company could be valued as a marital asset in the divorce. As to Wife's allegations that Focus purchased Husband's personal and professional goodwill, aside from her allegation that W&A, Inc., not Husband, was the seller in the transaction, even if Focus purchased this goodwill directly from Husband, such goodwill is not a marital asset subject to division on divorce. *See* ***McKee***, 2010 WL 3245246, at *3; ***Cunningham***, 2000 WL 33191364, at *3; ***Smith***, 709 S.W.2d at 592.

A close reading of Wife's proposed second amended complaint reveals that "Husband's book of business, personal, professional, and enterprise goodwill" were the only marital assets that Wife alleged were placed into the DSW Trust #2. Thus, as discussed above, by Wife's own allegations, the DSW Trust #2 did not contain marital property. We note that Wife also raised what appears to be an alter ego/fraud claim concerning Husband's control over the DSW Trust #2. Wife alleged that Husband removed himself as trustee of the DSW Trust (we presume Wife meant to allege that Husband removed himself as trustee of the DSW Trust #2), partially in anticipation of divorce, and that his removal "was to shield the trust's assets from Wife's claims to the property placed in the Trust." Additionally, Wife alleged that Husband removed himself as trustee "in an effort to hide [his] dominion and control over the Trusts." As discussed, *supra*, Wife's own allegations show that she had no claim to the property she alleged to be in the DSW Trust #2. Thus, allowing Wife to file the proposed second amended complaint and to join the DSW Trust #2 as a party would have been futile because, by Wife's own allegations, the trust did not contain marital property subject to division in the divorce. Accordingly, we affirm the trial court's denial of Wife's October 30, 2018 motion for leave to amend the complaint.

B. Issues Concerning Injunctions and Wife's Electronic Devices[11]

We now turn to Wife's issue concerning the injunctions against her and the confiscation of her electronic devices and email accounts. A review of the relevant procedural background is helpful here. As mentioned above, Wife worked as W&A, Inc.'s Global Communications Director prior to the divorce. In that role, Wife was given access

[11] This section addresses Wife's ninth issue: "Did the trial court err in ordering the destruction of attorney-client materials and files, the destruction of Wife's email accounts, and in ordering the confiscation of Wife's electronic devices?"

to confidential and proprietary information belonging to, at the time, W&A, Inc. After the Focus Transaction in 2016, this information belonged to W&A, LLC and/or AMWJR, Inc. To protect such information from becoming public, on November 14, 2017, shortly after Wife filed for divorce, the parties entered into a *consent* protective order and order expanding temporary mutual injunction. In part, these orders required the parties to allow a third-party vendor to "collect all copies of electronically stored and/or print copies of downloads and all computers and removable media . . . ever used by Wife on behalf of any business entity in which Defendant now has an interest, or has had an interest in the past, as well as access codes, passwords and/or authorization codes." W&A, LLC was ordered to pay the cost of the third-party vendor's services.

In January 2019, it became apparent that Wife did not produce all of the documents required under the November 14, 2017 order, and that she still retained proprietary information belonging to W&A, LLC and/or AMWJR, Inc. This discovery led to the trial court's entry of four orders in February 2019. Relevant here, the first of these orders, the February 11, 2019 order granting in part and reserving in part Husband's application for injunctive relief, required Wife to turn over all documents within the scope of the November 14, 2017 order to Husband's counsel. We note that, although the order was entered on February 11, 2019, it appears the trial court ruled orally on this issue on February 4, 2019. The order also required Wife to turn over her electronic devices, including her cell phones, computer, cameras, flash drives, and external hard drives, to her counsel "for safekeeping until the [trial c]ourt [could] make a determination on how to best access information off of [Wife's] devices." If Wife had any documents within the scope of the November 14, 2017 order stored on a third-party online storage account, she was ordered to produce a copy of those documents and then delete them from her online storage account.

The record shows that Wife turned over her electronic devices to her counsel, but shortly thereafter, as discussed above, retrieved them from her counsel's office. Accordingly, in the February 11, 2019 order of injunction, Wife was ordered to deliver her devices to Insight, the third-party vendor hired to inspect them. This order also required Wife to provide Insight with her "passwords, credentials and access information to all online storage and webmail accounts." The order provided that "[n]o device mentioned above will be returned to anyone without a [c]ourt [o]rder." Also on February 11, 2019, the trial court entered an order modifying the February 4, 2019, order granting in part and reserving in part Husband's application for injunctive relief wherein the trial court restrained Wife "from destroying, deleting, erasing, modifying, or otherwise failing to preserve documents and/or information that come[s] within the scope of the 11/14/2017 [o]rder that [Wife] may have stored and/or shared with a third[-]party or on a third[-]party online file storage account[.]"

By order of February 13, 2019, the trial court again ordered Wife to deliver, to Insight by 10 a.m. on February 14, 2019, "all documents and devices that Wife provided to [her counsel's] firm on Monday, February 11, 2019 as well as all documents and devices

that may not have been provided" to her counsel, including her phones, iPad, computer, cameras, flash drives, and external hard drives. Again, the trial court ordered Wife to provide Insight with the passwords to her email accounts and cloud-based storage accounts. Insight was ordered to extract forensic data from all devices from January 1, 2014 until the date the order was entered. Insight was also ordered to make archived copies of Wife's online file storage accounts and email accounts. Thereafter, Insight was to create an index of the contents of the information it collected from Wife's devices and accounts and provide such index to Wife's counsel. Then, Wife's counsel was to prepare a privilege log for all privileged documents and/or communications. After the privilege log was provided to Husband's counsel, Insight would release the non-privileged material to Husband's counsel. The order also provided that Insight would "remove all company property belonging to Waddell & Associates, LLC from Wife's devices before returning the devices to Wife." On March 27, 2019, Wife filed a motion to set aside, modify, suspend, and/or stay the February 13, 2019 order.

On May 8, 9, and 10, 2019, the trial court held hearings on various motions, including Wife's motion to set aside the February 13, 2019 order. During these hearings, it became apparent that third-parties to the divorce action may have received proprietary documents and information belonging to all of the Entities, not simply W&A, LLC and/or AMWJR, Inc. As a result, the trial court appointed a Special Master to "work with the individuals identified so far and any other individuals who may have property belonging to [the Entities], to retrieve that property, and turn that property over to Insight[.]" On May 10, 2019, the trial court heard argument from Wife's counsel regarding the magnitude of the privilege log that Wife's counsel was required to create under the February 13th order, to-wit: "I think they may agree with me that this may be a task that cannot be done in that I have to certify things as privileged that I can't see and they're in the millions." Although the trial court denied the motion to set aside, it took under advisement "the motion to modify only as it relate[d] to the feasibility of the privilege log[.]" Thereafter, the trial court ordered, *sua sponte*, that the Special Master would work with Wife's counsel and Insight to "figure out an appropriate resolution" concerning the magnitude of data taken from Wife's devices and the privilege log. We note that the May 10, 2019 order provided that the "Special Master [would] also be charged with ensuring that any property belonging to [the Entities] contained on any devices . . . [would be] indexed and then permanently deleted." The trial court's order made clear that the only documents Wife could possess concerning the Entities were those she obtained through discovery.

Turning to her appellate arguments, Wife begins this section of her brief by arguing that "[t]he totality of the [trial c]ourt's action beginning with the February 11, 2019 Order through the entry of the *Sua sponte Order Compelling Turnover of Company and Trust Property and Appointing Special Master* on May 10, 2019" was an abuse of discretion which violated Wife's fundamental right to privacy." She concludes this section of her brief by arguing that "[t]he actions of the trial court constitute an abuse of discretion resulting in a violation of Wife's fundamental rights and are not supported by any evidence

that Wife ever violated any of the orders entered on November 14, 2017 and all such orders should be vacated." Although it is unclear from her briefing, we deduce that Wife asks this Court to vacate the following orders: (1) February 11, 2019 order granting in part and reserving in part Husband's application for injunctive relief; (2) February 11, 2019 order of injunction; (3) February 11, 2019 order modifying the February 4, 2019, order granting in part and reserving in part Husband's application for injunctive relief; (4) February 13, 2019 order on the preservation and retrieval of information from Wife's electronic devices and online storage accounts and webmail accounts; and (5) May 10, 2019 *sua sponte* order compelling turnover of company and trust property and appointing a Special Master.

Wife fails to develop any substantive argument as to why this Court should vacate the foregoing orders. Tennessee Rule of Appellate Procedure 27(a)(7)(A) requires an appellant's brief to contain an argument setting forth "the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons *why the contentions require appellate relief*, with *citations to the authorities* and appropriate references to the record (which may be quoted verbatim) relied on." Tenn. R. App. P. 27(a)(7)(A) (emphasis added). This portion of Wife's brief reads mostly as a procedural history of the orders, discussed *supra*, with Wife alleging some "facts" but failing to cite to the record. Although Wife makes sweeping statements that the trial court abused its discretion and invaded her privacy, she fails to develop this argument. Indeed, in the three pages of this portion of her appellate brief, Wife cites to only one legal authority, ***West v. Media General Convergence, Inc.***, 53 S.W.3d 640, 643 (Tenn. 2001), a Tennessee Supreme Court case concerning Tennessee's recognition of the tort of false light invasion of privacy. Wife cites to ***West*** twice in support of her arguments that "Tennessee Courts have recognized the right to privacy as 'the right to be let alone; the right of a person to be free from unwarranted publicity,'" and that "[t]he trial court's orders resulted in an 'intrusion [that] has gone beyond the limits of decency. . . ." This is the extent of Wife's "argument."

"This [C]ourt has repeatedly held that a party's failure to cite authority for its arguments or to argue the issues in the body of its brief constitute a waiver on appeal." ***Forbess v. Forbess***, 370 S.W.3d 347, 355 (Tenn. Ct. App. 2011) (citing ***Newcomb v. Kohler Co.***, 222 S.W.3d 368, 401 (Tenn. Ct. App. 2006) (failure "to cite to any authority or to construct an argument regarding [a] position on appeal" constitutes a waiver of the issue); ***Bean v. Bean***, 40 S.W.3d 52, 55-56 (Tenn. Ct. App. 2000) ("Courts have routinely held that the failure to make appropriate references to the record and to cite relevant authority in the argument section of the brief as required by Rule 27(a)(7) constitutes a waiver of the issue.")); *see also* ***Tellico Village Property Owners Ass'n, Inc. v. Health Solutions, LLC***, No. E2012-00101-COA-R3-CV, 2013 WL 362815, at *3 (Tenn. Ct. App. Jan. 30, 2013). Indeed, "[i]t 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." ***Sneed v. Bd. of Prof'l Responsibility of Sup. Ct.***, 301 S.W.3d 603,

615 (Tenn. 2010).

Although Wife asks us to vacate "all such orders," this Court notes that vacating these orders would not provide Wife any relief in view of the fact that Insight completed its review of the data found on Wife's devices more than three years ago. However, based on the following section of Wife's brief, we deduce that Wife may be seeking the return of her property, but she does not explicitly ask for such remedy from this Court, to-wit:

> To this day Wife is without her phones, laptops, ipads, email accounts, and icloud accounts as the Special Master is holding all such items pending the outcome of this appeal. If this Court does not vacate the trial court's orders pertaining to these devices, email accounts, and electronic storage accounts[,] all such material and accounts will be destroyed. The actions of the trial court constitute an abuse of discretion resulting in a violation of Wife's fundamental rights and are not supported by any evidence that Wife ever violated any of the orders entered on November 14, 2017 and all such orders should be vacated.

On this Court's review, it does not appear that any of the orders Wife cited in this portion of her brief called for the destruction of her devices or accounts, and Wife does not cite to the record to support her argument that "all such material and accounts will be destroyed." Given Wife's waiver of this issue, we decline to vacate any of the trial court's February 2019 orders.

C. Pre-Trial Procedural Issues[12]

Wife raises two pre-trial procedural issues for our review–whether the trial court erred when it: (1) denied her second motion for continuance; and (2) excluded certain of her fact and expert witnesses from testifying at trial. We review a trial court's ruling on a motion for continuance under an abuse of discretion standard. *See* ***Sliger v. Sliger***, 181 S.W.3d 684, 687 (Tenn. Ct. App. 2005). We review pre-trial discovery issues such as the trial court's ruling concerning Wife's fact and expert witnesses under the same standard. *See* ***Riley v. Whybrew***, 185 S.W.3d 393, 399 (Tenn. Ct. App. 2005). As discussed, above, "[a] trial court abuses its discretion only when it 'applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining.'" ***Eldridge v. Eldridge***, 42 S.W.3d 82, 85 (Tenn. 2001) (quoting ***State v. Shirley***, 6 S.W.3d 243, 247 (Tenn. 1999) (brackets in original). Under the abuse of discretion standard, a trial court's ruling "will be upheld so long as reasonable minds can disagree as to propriety of the decision made. ***Id.*** (quoting ***State v. Scott***, 33 S.W.3d 746, 752 (Tenn. 2000)); *see also* ***State v. Gilliland***, 22 S.W.3d 266, 270 (Tenn. 2000).

[12] Section (C)(1)-(2) addresses Wife's third issue: "Did the trial court err in denying Wife's Motion for Continuance and in excluding Wife's fact and expert witnesses?"

1. Denial of Second Motion for Continuance

"Decisions regarding continuances are fact-specific," and "motions for a continuance should be viewed in the context of all the circumstances existing when the motion [was] filed." ***Nagarajan v. Terry***, 151 S.W.3d 166, 172 (Tenn. Ct. App. 2003). In determining whether to grant a continuance, courts consider: (1) the length of time the proceeding has been pending; (2) the reason for the continuance; (3) the diligence of the party seeking the continuance; (4) and the prejudice to the requesting party if the continuance is not granted. ***Id.*** "In order to prove that a requested continuance is justified, the party requesting the continuance 'must supply some 'strong excuse' for postponing the trial date.'" ***Tidwell v. Burkes***, No. M2015-01270-COA-R3-CV, 2016 WL 3771553, at *5 (Tenn. Ct. App. July 8, 2016) (quoting ***Howell v. Ryerkerk***, 372 S.W.3d 576, 580-81 (Tenn. Ct. App. 2012) (quoting ***Barber & McMurray, Inc. v. Top-Flite Dev. Corp. Inc.***, 720 S.W.2d 469, 471 (Tenn. Ct. App. 1986))).

The crux of Wife's second motion for continuance was that the first year-and-a-half of the case was spent litigating whether the Entities should be included as parties in the divorce. For this reason, Wife argued that she had not had time to prepare for trial and that a continuance was warranted because discovery was outstanding, witness and exhibit lists had yet to be disclosed, depositions had not been scheduled or completed, and a temporary support hearing had not yet concluded. Wife further argued that a continuance was appropriate because: (1) her counsel was relatively new to the case and required time to review all of the pleadings in the matter; (2) her counsel had been engaged in complying with the trial court's February 2019 orders, discussed *supra*, and were unable to prepare for trial; (3) Wife had spent substantial time and resources defending against Husband's petitions for contempt; and (4) Wife was without the financial resources to adequately prepare for trial.

Turning to the record, when Wife filed the second motion for continuance on May 3, 2019, the case had been pending for almost two years. The record shows that the case originally was set for trial on December 10, 2018. On October 18, 2018, the trial court entered a consent order that, *inter alia*, continued the trial until February 11, 2019. On December 6, 2018, Wife filed a motion to revise consent scheduling order and to continue trial date. In this first motion for continuance, Wife made many of the same arguments she made in the motion now on review, i.e., that discovery was outstanding and that she lacked the financial ability to prosecute the divorce. On December 13, 2018, by agreement of the parties, the trial court continued the February 11, 2019 trial date until May 29, 2019.

As discussed above, on January 24, 2019, Wife produced 2,400 files of documents to Husband's counsel. This production was the catalyst for the contempt proceedings against Wife and led to the confiscation of her devices, discussed at length, *supra*. By order of January 29, 2019, the DSW Trust #2, the remaining entity, was dismissed from

the case. On February 4, 2019, the trial court orally ordered Wife to deliver her computer, iPhone, and three flash drives to her previous counsel's office, which she did. On Friday, February 8, 2019, the trial court heard Wife's motion for leave to amend the complaint, wherein she sought to add the DSW Trust #2 back as a party to the divorce. That same day, unbeknownst to her previous counsel, Wife retrieved the devices from her counsel's office. On Monday, February 11, 2019, Wife's previous counsel announced to the trial court that she was withdrawing due to Wife's actions. Although Wife's new counsel did not file a notice of appearance until March 12, 2019, the record shows that she was representing Wife around February 11, 2019. Thereafter, the parties simultaneously litigated the injunctions and contempt proceedings against Wife while also moving forward in preparation for trial. As mentioned above, Wife filed the second motion for continuance on May 3, 2019, which motion the trial court denied by order entered May 22, 2019.

Although the parties spent considerable time litigating whether the Entities should be joined in the divorce, Wife had several months after the majority of this litigation ended to prepare for trial. In the months leading up to trial, the parties were not only preparing for trial but also were litigating the injunctions and contempt proceedings against Wife. While such litigation was certainly costly and time consuming, we note, as the trial court did in its order denying Wife's motion for continuance, that the foregoing litigation was the result of Wife's actions. Likewise, and as discussed further, *infra*, Wife's actions prevented the temporary support hearing, scheduled for February 13, 2019, from proceeding as her previous counsel withdrew two days prior to the scheduled hearing. Nevertheless, we also note, as will be discussed further, *infra*, that Wife had received approximately $315,000 in distributions from the marital estate to use towards attorney's fees and expenses, and she was awarded an additional $64,000 from the marital estate via the trial court's May 22, 2019 order on Wife's motion to compel and/or for attorney's fees and temporary support. In view of the foregoing, we conclude that Wife's reasons for a second continuance did not constitute a "strong excuse"; as such, the trial court did not abuse its discretion in denying her request.

2. Exclusion of Wife's Expert and Fact Witnesses

Wife appeals the trial court's exclusion of her expert and fact witnesses. Specifically, Wife argues that "the [t]rial [c]ourt failed to articulate *any* appropriate basis for its exclusion of Wife's expert testimony or for its exclusion of Wife's fact witnesses within its orders." (Emphasis in original).[13] We disagree. We first review the exclusion of Wife's expert witnesses. This issue is predicated on two scheduling orders, under which the parties operated during the litigation. Turning to the record, on October 18, 2018, the parties entered into a consent order setting deadlines and trial date. In pertinent part, this order provided an October 31, 2018 deadline for Wife to submit her expert disclosures.

[13] In this portion of her briefing, Wife fails to cite to the trial court's amended order concerning the exclusion of her expert witnesses wherein the trial court stated its bases for such exclusion.

The order also provided for a December 14, 2018 deadline for the parties to exchange expert reports. The record shows that Wife provided her expert disclosures to Husband on October 30, 2018. Relevant here, Wife disclosed both Mr. Mike Yopp and Ms. Cindy MacAulay as experts. In the disclosure, Wife provided that Mr. Yopp was expected to testify

> regarding specific actions taken by David Sewall Waddell and others which will allow for the Court to conclude (i) that David Sewall Waddell placed marital assets into the Waddell Trust, the DSW Trust and/or the DSW Trust #2 and (ii) that David Sewall Waddell exercised dominion and control over the Waddell Trust, the DSW Trust and/or the DSW Trust #2 such a[s] to render David Sewall Waddell the true owner of the trust assets, which are marital assets. *Pursuant to Court order, Mr. Yopp will render a report in this case by December 14, 2018, which will more specifically set forth precise subject matter of his expected testimony in this matter.*

(Emphasis added). Concerning Ms. MacAulay's testimony, Wife provided that she was expected to testify

> regarding the structure and the terms of the Focus Transaction as described in the Contribution Purchase Agreement and the documents produced in Discovery. Ms. MacAulay will describe and distinguish the assets within the transaction, identifying property which was sold by Waddell & Associates, Inc, and property which was sold by Husband. *Pursuant to Court order, Ms. MacAulay will render a report in this case by December 14, 2018.*

(Emphasis added).

On December 13, 2018, the day before the deadline for the parties to exchange expert reports, the trial court entered a second order modifying the previous scheduling order. As discussed, *supra*, in this order, the trial court set February 13, 2019 as Wife's deadline to produce her expert reports. Husband was ordered to provide his expert reports by March 1, 2019. The order also provided that expert witness depositions would conclude by April 5, 2019. On January 23, 2019, Wife filed a motion to extend the deadline for expert reports, but this motion was never heard. It is undisputed that Wife never produced expert reports from Mr. Yopp or Ms. MacAulay.

On May 22, 2019, Husband filed the first motion *in limine* to exclude the testimony of Mr. Yopp and Ms. MacAulay. In this motion, Husband argued, *inter alia*, that Wife failed to produce her expert reports by the February 13, 2019 deadline, that she could not show good cause for such failure, and that allowing Wife's experts to testify would deny Husband a fair rebuttal. From the record, it does not appear that Wife filed a response to this motion. On May 28, 2019, the trial court heard the first motion *in limine*. At the

hearing, Wife's counsel argued that Husband was "properly on notice" of Wife's experts. By order of May 29, 2019, the trial court granted the first motion *in limine*. On May 31, 2019, the trial court entered an amended order on the motion, wherein it made, *inter alia*, the following findings of fact: (1) Wife timely disclosed her expert witnesses, and in the disclosure, Wife represented that she would produce the expert reports by December 14, 2018, as ordered in the first scheduling order; (2) a second scheduling order extended the deadline for Wife to produce her expert reports until February 13, 2019; (3) on January 23, 2019, Wife filed a motion to extend the deadline for expert reports, but the motion was never heard, and no extension was granted; (4) Wife failed to follow the scheduling order because she did not produce the expert reports; (5) it would be unfairly prejudicial to Husband to allow Mr. Yopp and Ms. MacAulay to testify because, under the second scheduling order, Husband was to have two weeks after Wife produced her expert reports to produce his expert reports, and the parties would then have the opportunity to depose the experts; (6) as a result of Wife's failure to follow the scheduling order and to produce expert reports, Husband was denied a fair opportunity for rebuttal; and (7) Wife could not show good cause for failing to produce such reports.

A trial court is given discretion to enter a scheduling order that provides time limits for the parties to complete discovery. Tenn. R. Civ. P. 16.01(1)(C). "If a party or party's attorney fails to obey a scheduling or pretrial order . . . the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just[.]" Tenn. R. Civ. P. 16.06; *see also* ***Waters v. Coker***, No. M2007-01867-COA-RM-CV, 2008 WL 4072104, at *7 (Tenn. Ct. App. Aug. 28, 2008) ("It is within the trial judge's discretion to decide what orders, if any, to issue as a consequence of a party's failure to obey a scheduling order."). We cannot say that the trial court abused its discretion when it excluded Mr. Yopp and Ms. MacAulay from testifying as experts. In her October 30, 2018 expert disclosure, Wife acknowledged that she was under a court order to produce expert reports by a date certain, and she also represented that she would comply with this order. Although Wife's counsel argued at the hearing that Husband was "properly on notice" of Wife's experts, Wife's October 30, 2018 disclosure provided very general information concerning the expected testimony. For example, in the disclosure concerning Mr. Yopp, Wife noted that Mr. Yopp would render a report "which [would] more specifically set forth precise subject matter of his expected testimony in this matter." As the trial court found in its order, Wife was unable to show good cause for failing to produce the expert reports. While it does not appear that Wife filed a response to the first motion *in limine*, at the hearing on the motion, Wife's counsel explained that Wife did not file the expert reports because her experts "have not felt comfortable releasing anything in writing" until they reviewed all discovery documents for fear of violating the trial court's injunctions, discussed at length, *supra*. As previously discussed, the trial court entered the orders of injunction due to Wife's actions. Accordingly, we agree with the trial court that Wife's explanation does not show good cause as to why the reports were never produced. Furthermore, the record shows that Husband relied on Wife's representations that she would provide expert reports, and he anticipated taking Wife's experts' depositions after receiving their reports, as contemplated

in the December 13, 2018 scheduling order. It is undisputed that expert depositions were never taken. Although a trial court may continue a final trial date to allow for expert depositions, for the reasons discussed at length, *supra*, the trial court did not abuse its discretion when it denied Wife's motion for continuance. Under these circumstances, allowing Wife's expert witnesses to testify would have prejudiced Husband as he would have been unable to prepare adequate rebuttals to the experts' testimony. Accordingly, we conclude that the trial court did not abuse its discretion in excluding Mr. Yopp's and Ms. MacAulay's testimony.

Wife also argues that the trial court "arbitrarily excluded" nine of Wife's other witnesses from testifying. Turning to the record, on May 28, 2019, Husband filed his second motion *in limine* to exclude testimony of witnesses Wife revealed four days before trial. Therein, Husband sought to exclude eight fact witnesses and presumably one expert witness, Wife's treating physician,[14] on the basis that Wife failed to disclose them as witnesses in discovery, a fact that appears to be undisputed. Indeed, the record shows that Wife's counsel sent emails listing witnesses to Husband's counsel on May 25 and May 27, 2019, when the case was set for trial to begin on May 29, 2019. At the hearing on the second motion *in limine*, Wife failed to provide good cause for her delay in disclosing the lay witnesses and made no argument regarding the same. Concerning Wife's treating physician, her counsel argued that, because Wife discussed her diagnosis and treatment from said physician during her deposition, the physician should be allowed to testify concerning the same. However, Wife's counsel also admitted that, in her 2017 response to Husband's interrogatories, Wife represented that she did not and has never had a medical or psychological condition. Despite making the foregoing representations, and despite not designating her treating physician as an expert (or fact) witness, at trial, Wife sought to admit medical records at trial (which her counsel produced to Husband's counsel on May 27, 2019) and further sought to have her treating physician testify about these records. During the hearing on the second motion *in limine*, the trial court stated that it was not going to allow a trial by "ambush," and Husband was entitled, as all parties are, to rely on Wife's discovery responses. Accordingly, by order of June 4, 2019, the trial court granted the second motion *in limine*.

We conclude that the trial court did not abuse its discretion by excluding Wife's nine witnesses, which she disclosed mere days before the final trial. Under Tennessee Rule of Civil Procedure 26.05(1), Wife had a duty to seasonably supplement her discovery responses "with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of that testimony." Tenn. R. Civ. P. 26.05(1). "A

[14] It is unclear if Wife sought to introduce her treating physician as an expert or fact witness. In the email to Husband's attorney, Wife's attorney indicated that Wife's treating physician would testify to "[W]ife's health conditions, presentation, symptoms, diagnosis, treatment plan, [and] prognosis."

party who[,] without substantial justification[,] fails to supplement or amend responses to discovery requests as required by Rule 26.05 is not permitted, unless such failure is harmless, to use as evidence at trial . . . any witness or information not so disclosed." Tenn. R. Civ. P. 37.03(1). As the trial court correctly noted, "[t]he rules concerning discovery were promulgated to allow the parties to ascertain relevant facts pertaining to their case, thus narrowing the issues in order to reach a decision on the merits without 'trial by ambush.'" ***Austin v. City of Memphis***, 684 S.W.2d 624, 632 (Tenn. Ct. App. 1984). Wife had ample opportunity to supplement her discovery responses to include the nine individuals as potential witnesses. Allowing testimony from undisclosed witnesses, when Husband was without the opportunity to interview or depose them, would certainly have been prejudicial to him. Accordingly, we cannot conclude the trial court erred when it granted the second motion *in limine*.

D. Evidence Related to Assets in Trust[15]

Wife's next stated issue is: "Did the trial court err in refusing to consider all evidence related to the assets, including the assets placed in trust, and made an equitable division an impossibility?" As to this issue, Wife's argument appears to be that the trial court erred in its equitable division of the marital estate because it "refused to consider the assets placed in trust by Husband during the marriage[.]" Although it is not clear to which "trust" Wife refers, for reasons discussed, *infra*, such distinction is immaterial for purposes of our analysis. We note that Wife does not dispute the trial court's division of assets that it found to be marital property.

In her appellate brief, Wife argues that despite her requests, the trial court "refused to consider the assets placed in trust by Husband during the marriage and Husband's interests in his various businesses which Wife consistently alleged were marital in nature." As support for this argument, Wife cites pre-trial hearings and part of her opening statement at trial wherein Wife's counsel engaged in a lengthy discussion with the trial court concerning whether the trial court would hear proof on whether a trust held marital assets. At the pre-trial hearing and during Wife's opening statement, the trial court repeated that it would not hear such evidence because: (1) it had dismissed all of the Entities; and (2) Wife's amended complaint failed to allege a claim that a trust held marital assets.[16] Despite this pronouncement, the trial court also stated: "I'm just going to hear the case. I'm going to hear the witnesses. I will take objections." On May 29, 2019, during Wife's opening statement, the trial court invited Wife's counsel to make an offer of proof at the end of trial to preserve the issue for appeal, to-wit:

> Well, we'll just have to see as we go because I can't forecast the entire case. I'm just trying to narrow the issue because it sounds like you want to put on

[15] This section addresses Wife's fourth issue.

[16] As discussed, *supra*, we affirm the trial court's orders on both of these issues.

> a lot of proof to present this case, and I'm not going to let you do it in the case in chief. *Now if you want to take it up as an offer of proof at the end, I'll be glad to let you have at it*. But I'm not going to draw this case out on this type of evidence.
>
> So please try to—try to focus on what the parties' income is, the custody of the children, alimony, attorney fees, the division of the assets. *To the extent you're contending that there were assets related to the . . . Focus transaction, if those assets are part of the trust, then hold that and make that offer at the end of the case*.

(Emphases added).

The Tennessee Rules of Appellate Procedure require the appellant to prepare the record on appeal so that it conveys a fair, accurate, and complete account of what transpired with respect to those issues that are the bases of appeal. Tenn. R. App. P. 24(b). This burden begins when the parties are before the trial court. If a party attempts to admit evidence that the party argues is relevant to the case, but the trial court excludes such evidence, the party must then make an offer of proof to preserve the issue of the evidence exclusion for appeal. "'[I]t is essential that a proper offer of proof be made in order that the appellate court can determine whether or not [inclusion or exclusion of evidence] was reversible.'" ***Harwell v. Walton***, 820 S.W.2d 116, 118 (Tenn. Ct. App. 1991) (quoting ***State v. Goad***, 707 S.W.2d 846, 853 (Tenn. 1986)). We will not reverse a trial court's evidentiary ruling if the appellant fails to make an offer of proof regarding the substance of the evidence. ***Dickey v. McCord***, 63 S.W.3d 714, 723 (Tenn. Ct. App. 2001) (citing ***Shepherd v. Perkins Builders***, 968 S.W.2d 832, 834 (Tenn. Ct. App. 1997)); ***Anderson v. Am. Limestone Co.***, 168 S.W.3d 757, 762 (Tenn. Ct. App. 2004).

From Wife's brief, we cannot ascertain whether she attempted to make an offer of proof concerning whether any of the trusts held marital assets. Indeed, Wife fails to cite to any portion of the trial transcript to show that: (1) she attempted to admit evidence concerning trust assets; or (2) made an offer of proof when such evidence was excluded. Our appellate rules require an appellant to set forth an argument as to each issue with *appropriate references to the record*. Tenn. R. App. P. 27(a)(7)(A); Tenn. R. Ct. App. 6(a). "No complaint of . . . action by the trial court will be considered on appeal unless the argument contains a specific reference to the page or pages of the record where such action is recorded. No assertion of fact will be considered on appeal unless the argument contains a reference to the page or pages of the record where evidence of such fact is recorded." Tenn. R. Ct. App. 6(a). In order to preserve the record so as to allow this Court to review a specific action of the trial court, it was Wife's burden to cite to the portion of the record where such alleged error occurred. "[T]his Court is not charged with the responsibility of scouring the appellate record for any reversible error the trial court may have committed." ***Owen***, 2011 WL 6777014, at *4.

Nevertheless, on this Court's extensive review of the almost 3,000 pages of the trial transcript, we conclude that Wife never made an offer of proof during trial, although she was given the opportunity to do so. On the third day of trial, Wife's counsel asked the trial court, "And Your Honor will allow me to do a proffer at the conclusion of the trial[,]" to which the trial court responded, "Yes." Also, in the middle of Husband's closing argument, the following exchange occurred:

> Trial Court: . . . And what is very interesting is the fact—and I think I recall saying that they could make an offer of proof, that we wouldn't take them up during the trial, but that they could make an offer of proof. They have not made an offer of proof in this case.
>
> Wife's Counsel: Your Honor, I thought that would be done at the end, after all of these proceedings were concluded because that would be on the record outside of Your Honor's presence.
>
> Husband's Counsel: Got to let us know.
>
> Wife's Counsel: That was my—I did let that was my understanding of what the [c]ourt—Your Honor's instructions were.
>
> Trial Court: I thought we were going to make it at the end of this case, after the witnesses all testified, then we would. But I'm ready to conclude this case now.
>
> Wife's Counsel: Well, Your Honor, my understanding was that you would not—you wouldn't be hearing the offer of proof because it would be done outside the presence of the jury or a jury trial or outside of Your Honor's presence. I didn't want to waste the [c]ourt's time or opposing counsel's time doing an offer of proof on the record when it wasn't going to be considered by—obviously an offer of proof, not to be considered by you. So if I misunderstood Your Honor's instructions on that, I apologize. But it is still my intention—
>
> Trial Court: Well, in a bench trial, I mean, the [c]ourt doesn't consider it. The system understands that when a judge hears a case in a bench trial that the judge is presumed to be able to sort through and not, you know, consider evidence that's properly before it and evidence that's not, but I'm not inclined to try this case again for offers of proof at this point.
>
> Wife's Counsel: Well, maybe that's where I'm confused, Your Honor. When I've done them before, it's been me and the court reporter in the courtroom

> after the proceedings concluded. It's part of the record, but it's nothing that opposing counsel has to be a part of or that Your Honor—
>
> Trial Court: Who will have a chance to cross-examine if they decide to on an offer of proof? But we will take that up at the appropriate time. Have you notified counsel that you plan to make an offer of proof?
>
> Wife's Counsel: Yes, Your Honor. It was discussed at the beginning of the proceedings. It was actually discussed in the motion *in limine* hearings when Your Honor—
>
> Trial Court: What I recall is that I said if any of these witnesses needed to testify that they would have to testify at the end of the trial, not after the trial, but at the end of the trial. So again, have y'all been on notice that.
>
> Husband's Counsel: We haven't received a notice that any of [Wife's] experts will be testifying.
>
> Trial Court: It is not scheduled. I mean, when do you think you're going to do this? In August or September or October some time?
>
> Wife's Counsel: And maybe it's the mode of the offer of proof that you're thinking versus what I'm thinking, Your Honor.
>
> Trial Court: Well, they would have to be present for an offer of proof[.] So, you know, I mean, I'm raising this issue and all the sudden you stand up and say, well, you know, I was going to make it, but they're saying they haven't been put on notice of that. And I was waiting for the motion to be—you know, the request to be made to make the offer. But we'll take that up. But again, I don't want to get off track here.

On this Court's review of the record, this was the last discussion concerning an offer of proof, and Wife never made such an offer. Because Wife never made an offer of proof, this Court is unable to determine whether the trial court's exclusion of evidence concerning marital assets allegedly placed in trust(s) was reversible. ***Harwell***, 820 S.W.2d at 118 (quoting ***Goad***, 707 S.W.2d at 853). Accordingly, we affirm the trial court's ruling excluding such evidence. ***Dickey***, 63 S.W.3d at 723 (citing ***Shepherd***, 968 S.W.2d at 834); ***Anderson***, 168 S.W.3d at 762 (Tenn. Ct. App. 2004).

E. Issues Concerning the Children

We now turn to the issues concerning the Children. We note that Easton reached majority while this appeal was pending. Accordingly, our analysis will focus on Saylor

concerning the designation of the primary residential parent and the parent with decision-making authority. Although we focus on Saylor, because the parties presented evidence and the trial court made findings concerning both Children, some facts concerning Easton are included in our discussion as necessary. Wife's issues concerning child support pertain to both Children, for reasons discussed below. On appeal, Wife alleges that the trial court erred when it designated Husband as Saylor's primary residential parent with sole decision-making authority. Wife also appeals the trial court's child support award and its denial of her request for retroactive child support. We turn to these issues.

1. Permanent Parenting Plan Issues[17]

Under Tennessee Code Annotated section 36-6-404(a), any final decree for a divorce involving a minor child shall incorporate a permanent parenting plan into the decree. Tenn. Code Ann. § 36-6-404(a). A permanent parenting plan is "a written plan for the parenting and best interests of the child, including the allocation of parenting responsibilities and the establishment of a residential schedule . . . ." Tenn. Code Ann. § 36-6-402(3). A permanent parenting plan shall, *inter alia*, "[e]stablish the authority and responsibilities of each parent with respect to the child," Tenn. Code Ann. § 36-6-404(a)(2), and "[a]llocate decision-making authority to one (1) or both parties regarding the child's education, health care, extracurricular activities, and religious upbringing." Tenn. Code Ann. § 36-6-404(a)(5). As mentioned, *supra*, every permanent parenting plan shall also include a residential schedule, "which designates the primary residential parent and designates in which parent's home the child will reside on given days during the year." ***Cummings v. Cummings***, No. M2003-00086-COA-R3-CV, 2004 WL 2346000, at *7 (Tenn. Ct. App. Oct. 15, 2004); *see also* Tenn. Code Ann. § 36-6-402(5).[18] In any proceeding concerning child custody and visitation, "the best interests of the child shall be the standard by which the court determines and allocates the parties' parental responsibilities." Tenn. Code Ann. § 36-6-401(a); *see also* Tenn. Code Ann. § 36-6-106(a). The Tennessee General Assembly has expressed that "[t]he best interests of the child are served by a parenting arrangement that best maintains a child's emotional growth, health and stability, and physical care." Tenn. Code Ann. § 36-6-401(a).

Furthermore, "trial courts are vested with wide discretion in matters of child custody.'" ***Schaeffer v. Patterson***, No. W2018-02097-COA-R3-JV, 2019 WL 6824903, at *4 (Tenn. Ct. App. Dec. 13, 2019) (quoting ***Johnson v. Johnson***, 165 S.W.3d 640, 645 (Tenn. Ct. App. 2004)). Appellate courts will not interfere with a trial court's custody determination absent an abuse of discretion. ***Dungey v. Dungey***, No. M2020-00277-COA-R3-CV, 2020 WL 5666906, at *2 (Tenn. Ct. App. Sept. 23, 2020) (quoting ***C.W.H. v.***

[17] Section (E)(1) addresses Wife's sixth issue: "Did the trial court err in designating Husband as the primary residential parent with sole decision-making authority in contradiction of the weight of the evidence?"

[18] A primary residential parent is "the parent with whom the child resides more than fifty percent (50%) of the time." Tenn. Code Ann. § 36-6-402(4).

L.A.S., 538 S.W.3d 488, 495 (Tenn. 2017)). However, "[w]hile 'the details of child custody and visitation arrangements are generally left to the discretion of the trial court . . . this discretion is not unbounded.'" ***K.B.J. v. T.J.***, 359 S.W.3d 608, 615-16 (Tenn. Ct. App. 2011) (quoting ***D v. K***, 917 S.W.2d 682, 685 (Tenn. Ct. App. 1995)).

Before proceeding to Wife's substantive issues, we first address the trial court's oral findings of fact and credibility findings as both significantly influenced its decision concerning Saylor.

a. Trial Court's Oral Findings

As with many of the previous issues in this case, a background of the procedural history concerning this issue is helpful. Turning to the record, on July 3, 2019, after closing arguments on the final day of trial, the trial court made extensive oral findings of fact concerning the Children, discussed further, *infra*. Although the trial court designated Husband as Easton's primary residential parent and granted him decision-making authority over Easton's educational and medical decisions, at this time, the trial court took all issues concerning Saylor under advisement.

The parties returned to court on August 14, 2019, when the trial court held a hearing on various post-trial issues, including designating Saylor's primary residential parent and the parent with decision-making authority. At this hearing, Wife's counsel represented to the trial court that Wife was not present because she was ill. During the hearing, Husband's counsel alleged that, since the trial court's July 3, 2019 ruling, "[Wife] has blocked [Husband's] phone number." Wife's counsel objected "to any testimony of facts . . . by [Husband's counsel]," and stated "[i]f we need to have a hearing about what allegations he's about to go into, fine." Thereafter, counsel continued to argue to the trial court concerning whether Wife had blocked Husband's telephone number. During this time, it was alleged that when the telephone number for Wife was called a message played concerning a "Verizon restriction." No evidence was presented to the trial court concerning the issue with Wife's telephone number. Despite not receiving any evidence and having only the allegations of Husband's counsel as support, the trial court essentially took such allegations as proof of fact, to-wit:

> Now I can set this hearing off and I can have another hearing, and [Husband's counsel] can come in and prove this, but see, I'm not going to keep playing games with your client.
>
> ***
>
> [Wife's counsel], again, this is why we are where we are. Your client does things that you're not aware of or you come in and take positions that you don't have full information and we spend time. If your client has cut off

> [Husband], I want to know that because that is going to affect my decision [concerning Saylor].
>
> ***
>
> And I will delay designating primary residential parent to take that into account.

Ultimately, the trial court continued its decision concerning Saylor so Wife could "come in to answer for these allegations that have been made against her."

The next day, the trial court resumed the hearing. Wife was again absent, her counsel representing that she was at a minor medical center because she was very ill. Wife's counsel made statements to the trial court concerning the "Verizon restriction" message, to-wit:

> I attempted to contact that number on my cell phone number, received the same message: Verizon, we're sorry, the call cannot be connected, Verizon restrictions. I contacted my client and advised her of that. She was unaware of those restrictions. She contacted Verizon. Apparently, there's a thousand-dollar balance on the account that she's been unable to pay, but she is able to send and receive text messages. The [C]hildren's phones are working.
>
> Verizon could not tell her why that number was doing that, but it's not a blocking of [Husband] issue. It is an issue with the phone overall. So I have provided to counsel for [Husband] this morning a telephone number that [Husband] has confirmed is working. [Wife] answered the phone this morning.

When the trial court asked Husband's counsel if he agreed with the above statements, he responded:

> Yes, Your Honor. Just to add to what [Wife's counsel] stated. We did agree on phone numbers; however, that [***] number, that is the cell phone number that's with Verizon that we have had shown in [Wife's] billing records. The phone -- the [C]hildren's phones are still working, so still a little perplexed why her phone isn't working right now. But we do have another phone number . . . .

Thereafter, the trial court questioned:

> Trial Court: How does [Wife] explain that? I mean, if all phones are on one account, the bill is past due, how is she explaining that? How—or how is

Verizon explaining that to her?

Wife's Counsel: They don't have an explanation, Your Honor. That was the first thing I instructed her to do when I couldn't get through on that number is to contact them and find out why that number is receiving that message when you call it that there are Verizon restrictions. She got no answer. She was going to—

Trial Court: So is it still restricted today?

Wife's Counsel: Yes. I mean, you can attempt to call it from the [c]ourt's phone if you'd like, Your Honor.

Trial Court: Okay. Well, I just don't find that that's very credible.

Wife's Counsel: Well, Your Honor, I would invite the [c]ourt—

Trial Court: I would find it more credible if Verizon verified that. I just don't find that credible. They would not block—why would a phone company block one number and not all numbers associated with that account if it was a billing issue?

Wife's Counsel: I don't know, Your Honor. But if the [c]ourt wants to try that number so that you can verify—

Trial Court: No, no, no. I believe that it's restricted. I have no doubt about that. I just don't find it credible that the reason that it's being restricted is because of payment when other numbers on that account are working.

Wife's Counsel: And I don't—I agree with you, and that's why I said what I said it. It has a balance, but the other phones are working, so I don't understand it either.

Trial Court: So [Wife] could very well just restrict her number to anyone calling that number, not just [Husband], not just block his number, maybe the whole phone is blocked.

Wife's Counsel: What would Your Honor like me to do?

Trial Court: I don't know. I just don't find that it's credible. And your client's not here. But if you-all have reached an agreement on that, that's fine. I just don't think that it's credible.

Wife's counsel also represented to the trial court that part of the issue with Wife's telephone number was that Wife has had multiple telephone numbers throughout the litigation. We recall that Wife was ordered to turn over her cell phone for forensic evaluation at the beginning of litigation. Since that time, Wife testified (at trial) that she would purchase "burner" phones, resulting in her having different telephone numbers at different times. Thereafter, counsel for both parties continued arguments concerning the parties' communications with each other. We emphasize that no evidence was presented to the trial court concerning the issue with Wife's telephone number. Nevertheless, based on the foregoing arguments, it appears that the trial court determined that Wife was purposefully blocking Husband's telephone number and not communicating with him. When Wife's counsel argued that Wife was not blocking Husband's telephone number and that there was a "situation with these phones," the trial court stated "I don't agree with that." When Wife's counsel represented to the trial court that Wife was unaware her telephone numbers were not working, the trial court stated:

> Trial Court: So if she's—so let me make sure I understand. So your client has so many numbers, is so busy, she's so preoccupied—
>
> Wife's Counsel: No.
>
> Trial Court: —that she doesn't know when she is able to get phone calls, she doesn't know when she misses phone calls, she has—you know, she's just not organized enough to know that she's not getting important calls from her lawyer, from her son, from her soon-to-be ex-husband. So then if the school is attempting to call her and there's an issue with Saylor and—I mean, there's an emergency, are they going to have to go through this same scenario where they can't reach her for a week or the phone's restricted, but she doesn't know why or we've got four different numbers so they've got to call four numbers to get through to her? Or is she going to provide them with a phone number that is going to be available to them in the event of an emergency? Because if she's having these problems with her lawyer and her children's father, then again—see, you're trying to explain the situation, and I appreciate the situation that you're in, but ultimately, it goes back-to the responsibility and the judgment of [Wife]. And it is just time and time and time again, that it's just the [c]ourt just is having a hard time understanding.

This Court focuses on the foregoing comments by trial court because, later in the August 15, 2019 hearing, the trial court found that it was in Saylor's best interest for Husband to be named her primary residential parent with sole decision-making authority. In coming to this conclusion, the trial court provided additional commentary and made new findings of fact:

Which parent do I believe is mature, is level headed, is able to communicate, is able to identify resources, consult those resources, has displayed themselves the entire litigation as being professional, as being cooperative, has come to court on a regular basis, has never been absent from court for important hearings, *who has not claimed to have illnesses, having to go to the doctor during important, you know -- having health issues, that never knows when -- allegedly having health issues* that you never know when they're going to be available, when they're not going to be available? *If something were to happen with the children and emergency decisions had to be made, you know, which person is going to be able to stop everything that they're doing and get to the school, get to the phone*, identify resources, put a plan in action to make sure that the children are well taken care of?

***

And again, we have had in the 50 -- of the Dow Jones, the largest one-day decline -- the fourth -- in the history of the Dow Jones, the fourth largest -- the fourth largest decline in the history of the Dow Jones occurred on yesterday. And while that was occurring, which parent was here? [Husband]. And he's here again today. And we're here to make a decision about the [C]hildren. And where's [Wife]? She was sick yesterday and today she's at a minor med. Need I say any more?

***

[Wife] has not shown herself to be reliable, to be trustworthy, to be credible in many instances. The [c]ourt has serious judgment—serious concerns with regard to her judgment in several different instances. *Her relationship with the [C]hildren, even though she has been the primary residential parent, her guidance—these children don't need a friend, they need a parent.* And [Husband] will be able to monitor. He'll be able to make those decisions. He won't—the [C]hildren won't be caught in a limbo situation where they are bootstrapped having to go back and forth between lawyers and communicate, taking weeks and weeks upon time to make simple decisions about the children. I think this will allow the children to be—they will know what to expect. It will provide the stability that they need.

***

[Wife] can be as involved as she would like to be or as little involved as she would like to be in those decisions. That totally rests upon her. But at least the [C]hildren will know at the end of the day that they can sit down

> with their father and that their father is going to do what's in their best interest. They know that their father has done what's in their best interest. *During this divorce, they were it was implanted in their minds that they were that Dad was not—that he was being selfish, that he was not providing for them, that their mom didn't have food, that their mom couldn't travel, that their mom couldn't—but Mom had a whole lot of money that she spent during this case.* There was hundreds and hundreds of thousands of dollars that she utilized. She chose to utilize those dollars for her attorney. *She liquidated assets by agreement and she chose how to use those, but yet she implanted in those children's minds that they were almost destitute. That's what she did; no one else. Dad didn't do that. Dad never said, oh, I'm not going to give you money for food or you can only have $500 a month for food. Dad never said, you can't go on vacation. You can take a vacation with me, but Mom, oh, no, you can't—Dad never said those things.* But these children sat down with this [c]ourt and they were of the opinion that they were being treated unfairly and their mom was being []treated [un]fairly and that Dad was the source of that confusion. Well, now that's all over with.

(Emphases added). The foregoing findings were incorporated into the trial court's written findings of fact and conclusions of law and provided the basis for the trial court's credibility findings, discussed *infra*. These findings were also reduced to writing in the trial court's September 11, 2019 order on final decision-making and primary residential parent status of the parties' Children ("order on decision-making and primary residential parent").

The above findings are in stark contrast to the findings the trial court made on July 3, 2019, at the close of trial. For example, on July 3, 2019, the trial court praised Wife for doing

> an extraordinary job adjusting to the changes, [Husband] not being in the home, given some of the financial constraints that she's had to work with, the emotional toll that the divorce has taken upon her, the financial toll it has taken upon her, she has still remained very vigilant and active in the [C]hildren's lives, involved very intricately in the details, the planning, the scheduling. And even though she acknowledges that there was a period of time where she was just off the—I forget how she characterized it, but was not as attentive as she would have liked to have been given the pressure that she was feeling from her divorce and separation from her husband, she still was able to do the best job that she could do under the circumstances with the [C]hildren.

On July 3, 2019, the trial court also found "that both parents [were] equally fit in terms of their morality, their physical health, their mental health and their emotional fitness." The trial court's August 15, 2019 findings characterize Wife as an unreliable, unstable,

deceitful, and manipulative person who is incapable of making good decisions on behalf of the Children.

From our review of the record, the only intervening events between the trial court's disparate findings concerning Wife's parental fitness were the hearings on August 14 and 15, 2019. We deduce from the trial court's August 15, 2019 oral findings and comments as well as its September 11, 2019 order on decision-making and primary residential parent that the trial court was frustrated with Wife and questioned both the legitimacy of her absence from court and her counsel's allegations that Wife's telephone was not working properly. If these two matters concerned the trial court, it should have heard evidence and admitted proof on the same, but it did not do so. Rather, the trial court relied on the statements of Husband's counsel, discussed *supra*, as evidence to support Husband's allegations that Wife blocked Husband's telephone number or that Wife blocked all telephone numbers after the trial. This reliance is exemplified by the following statements from the trial court during the August 14, 2019 hearing:

> So [Wife] should be prepared for every phone that she has to account for it. I'm not going to have [Husband] testify. I don't think that it's proper, but we all know what the issues are. And I don't think [Husband's counsel]—[Husband's counsel] has been very credible to this [c]ourt. I don't think that he's going to tell this [c]ourt that his client is not able to communicate on the phone number that your client is providing and that he's getting a restricted message or recording back. And I expect your client to come in and tell the truth.

Furthermore, the trial court's September 11, 2019 order on decision-making and primary residential parent shows the trial court's reliance on statements made primarily by Husband's counsel. From these statements, we conclude that the trial court's findings were predicated on statements of the parties' counsel, not on sworn testimony from the parties themselves or any other such evidence, e.g., an affidavit from Verizon explaining why Wife's telephone number was restricted. Nevertheless, in its September 11, 2019 order, the trial court found:

> 8. Based upon an ongoing pattern of behavior exhibited by Wife, Husband's inability to contact Wife in a case of an emergency to communicated about issues affecting the [C]hildren and Husband having to obtain the assistance of the court and Wife's counsel to obtain a working cellular phone number, concerns about Wife's credibility, and the parties['] inability to make joint decisions concerning the [C]hildren, the [c]ourt finds that it is in the [C]hildren's best interest that Husband have the final decision-making authority on all decisions affecting the [C]hildren after consulting with Wife.

After making the above findings, the trial court found:

> 9. It is within the trial court's discretion to permit *additional proof* after a party has announced the close of its proof and, "unless it appears that its action in that regard has permitted injustice, its exercise of discretion will not be disturbed on appeal." ***In re Faith F.***, No. M2009-02473-COA-R3-JV (Tenn. Ct. App. Feb. 11, 2017) (quoting ***Simpson v. Fronteir Cmty. Credit Union***, 810 S.W., 2d 147, 149 (Tenn. 1991)); *see also*, ***Higgins v. Steide***, 355 S.W. 2d 533, 535 (Tenn. Ct. App. 1959).

(Emphasis added). We reiterate and emphasize that *the trial court never reopened proof* during the August hearings. Rather, it is clear that the trial court relied on statements of Husband's counsel in lieu of proof. This was an error of law and an abuse of discretion as it is well-established that "statements and arguments of counsel are neither evidence nor a substitute for testimony." ***Elliott v. Cobb***, 320 S.W.3d 246, 250 (Tenn. 2010) (citing ***Metropolitan Gov't of Nashville and Davidson County v. Shacklett***, 554 S.W.2d 601, 605 (Tenn. 1977); ***Hathaway v. Hathaway***, 98 S.W.3d 675, 681 (Tenn. Ct. App. 2002)).

On review, the record shows that the trial court's reliance on the statements of Husband's counsel as proof that Wife blocked Husband's telephone number and/or all telephone numbers ostensibly influenced the trial court's findings of fact and conclusions of law concerning Saylor. This Court will not consider the arguments of counsel at the August 14 or 15, 2019 hearings as proof that Wife blocked any telephone numbers from calling her, including Husband's. This Court's review of the evidence is limited to that which was properly presented to the trial court. On our review of the record, no such evidence was proffered to show that Wife blocked Husband from contacting her or that there was ever an emergency concerning the Children where Wife was unreachable. To the contrary, the evidence showed that Wife had been reachable during multiple difficult situations involving the Children. We remain mindful of the foregoing procedural history and the trial court's abuse of discretion as we turn to our analysis concerning Saylor.

b. Credibility Findings

As noted above, the trial court's August 15, 2019 oral findings also served as the basis for the trial court's credibility findings, to-wit:[19]

[19] The footnotes from this portion of the trial court's findings of fact and conclusions of law cite almost exclusively to the August 15, 2019 hearing transcript. The only other citation is to the trial court's order granting Wife's oral request for a general continuance entered June 7, 2019. In this order, the trial court found that Wife was unable to attend trial because she allegedly was ill. Although it is apparent from the order that the trial court questioned Wife's illness, the trial court found that "all parties and counsel received documentation regarding Wife's medical evaluation." On this Court's review of the record, Wife was never questioned under oath concerning her alleged illness during this time.

> Based on his testimony, demeanor, and conduct during the pendency of this case, the [c]ourt finds Husband has shown himself to be reliable, forthcoming, communicative, cooperative, and trustworthy. Husband was not absent from important court hearings. Although Husband is not the perfect spouse or parent, he holds himself accountable for his own failings, whether it be his infidelity or the shortcomings in his parenting. Therefore, this [c]ourt finds Husband's testimony to be credible.
>
> In contrast, Wife[] has shown herself to be not reliable, guarded, not available, difficult to communicate with, irresponsible, and untrustworthy. Wife has failed to appear in court for the final trial or a subsequent hearing; and each explanation Wife offered for those absences were unreliable. When confronted with her failings as a spouse or parent, Wife is defensive, makes excuses, and blames others. Moreover, Wife's lack of candor and the irresponsible ways she has prosecuted her own divorce, causes this Court to question her judgment in many instances. Thus, this Court finds Wife's testimony not credible.

In ***Wells v. Tennessee Board of Regents***, 9 S.W.3d 779 (Tenn. 1999), the Tennessee Supreme Court explained that

> trial courts are able to observe witnesses as they testify and to assess their demeanor, which best situates trial judges to evaluate witness credibility. *See* ***State v. Pruett***, 788 S.W.2d 559, 561 (Tenn. 1990); ***Bowman v. Bowman***, 836 S.W.2d 563, 566 (Tenn. Ct. App. 1991). Thus, trial courts are in the most favorable position to resolve factual disputes hinging on credibility determinations. *See* ***Tenn-Tex Properties v. Brownell-Electro, Inc.***, 778 S.W.2d 423, 425-26 (Tenn. 1989); ***Mitchell v. Archibald***, 971 S.W.2d 25, 29 (Tenn. Ct. App. 1998). Accordingly, appellate courts will not re-evaluate a trial judge's assessment of witness credibility absent clear and convincing evidence to the contrary. *See* ***Humphrey v. David Witherspoon, Inc.***, 734 S.W.2d 315, 315-16 (Tenn. 1987); ***Bingham v. Dyersburg Fabrics Co., Inc.***, 567 S.W.2d 169, 170 (Tenn. 1978).

Wells, 9 S.W.3d at 783. Although this Court routinely defers to a trial judge's assessment of a witness' credibility, such findings are not absolute. Rather, where there is clear and convincing evidence undermining a trial court's credibility finding, this Court will reverse the finding and proceed with its review on the evidence alone. ***Id.***

We conclude that there is clear and convincing evidence to undermine the trial court's credibility finding. On this Court's review, the trial court made no credibility findings in its July 3, 2019 oral ruling. According to the record, the credibility findings the trial court made on August 15, 2019 were predicated on the statements of the parties'

counsel rather than on evidence. Despite the lack of evidence, the trial court found that "Wife's explanation for providing an inoperable telephone number to Husband [was] not credible." Similarly, despite not hearing any testimony concerning Wife's alleged illness, the trial court found "Wife's explanation for her absence in court [was] not credible." As discussed above, the trial court's reliance on statements from the parties' counsel as proof was error, and the trial court abused its discretion when it made findings predicated on such statements. Accordingly, we give little weight to the trial court's credibility findings and proceed with our own review of the evidence.

c. Primary Residential Parent

On September 11, 2019, the trial court entered the final decree of absolute divorce. The final decree incorporated, by reference, the trial transcripts from July 3 (the hearing ending in the early hours of July 4), August 14, August 15, and September 11, 2019.[20] The trial court also incorporated, *inter alia*, its written findings of fact and conclusions of law and the permanent parenting plan into the final decree.[21] As discussed, *supra*, ultimately,

[20] It is well-settled in Tennessee that where a trial court incorporates its oral rulings into a written order that this Court shall also review the trial court's oral statements as if they were written into the order. ***Terry v. Jackson-Madison Cty. Gen. Hosp. Dist.***, 572 S.W.3d 614, 629 (Tenn. Ct. App. 2018) (citation omitted). Generally, the oral statements of a trial court help this Court to better understand a trial court's reasoning and decision. However, here, the combined pages of transcript that the trial court incorporated into the final decree totaled 535 pages and contained arguments of counsel as well as the trial court's oral findings. Although this Court has reviewed the foregoing transcripts, we caution trial courts to be discerning when incorporating transcripts into orders and to focus on the oral findings that would aid this Court in its review.

[21] On this Court's review, the trial court's written findings of fact and conclusions of law are almost identical to Husband's proposed findings of fact and conclusions of law, an issue that Wife fleetingly raises in her argument but does not state as an issue on appeal. Briefly, our Supreme Court has expressed a preference for trial courts to prepare their own findings of fact and conclusions of law rather than relying on those prepared by counsel. ***Smith v. UHS of Lakeside, Inc.***, 439 S.W.3d 303, 314-15 (Tenn. 2014). However, the use of party-prepared findings of fact and conclusions of law is not forbidden as long as two conditions are satisfied. ***Id.*** at 315-16. "First, the findings and conclusions must accurately reflect the decision of the trial court. Second, the record must not create doubt that the decision represents the trial court's own deliberations and decision." ***Id.*** at 316 (citations omitted). In short, "the ultimate concern is the fairness and independence of the trial court's judgment." ***Id.***; ***Malone v. Viele***, No. E2021-00637-COA-R3-CV, 2021 WL 6111711, at *6 (Tenn. Ct. App. Dec. 27, 2021) (concluding that the party-prepared findings and conclusions accurately reflected the trial court's decision and did not cast doubt that the decision represented the trial court's own deliberations).

This Court has reviewed all of the trial court's oral rulings from July 3, August 14, August 15, and September 11, 2019 and has compared such rulings against the written findings of fact and conclusions of law, entered September 11, 2019. We note that much of the September 11, 2019 hearing was dedicated to the trial court reviewing the proposed findings of facts and conclusions of law and editing them to conform to the trial court's ruling. As it concerns the trial court's written findings regarding the Children, in its oral rulings, the trial court never explicitly found that any of the Tennessee Code Annotated section 36-6-106(a)(1)-(15) factors, discussed at length, *infra*, favored one parent over the other, but the trial court made such findings in the written findings of facts and conclusions of law. Nevertheless, and although there is

the trial court concluded that it was in Saylor's best interest for Husband to be named her primary residential parent with sole decision-making authority, after consultation with Wife. The trial court also ordered that the parties continue the week-to-week schedule they had been operating under in the temporary parenting plan. Although Wife does not appeal the trial court's "week-to-week" schedule, she appeals the designation of Husband as Saylor's primary residential parent and his sole decision-making authority. We turn to those issues now.

When fashioning a residential schedule, the trial court is instructed to

> make residential provisions for each child, consistent with the child's developmental level and the family's social and economic circumstances, which encourage each parent to maintain a loving, stable, and nurturing relationship with the child. . . . If the limitations of § 36-6-406 are not dispositive of the child's residential schedule,[22] the court shall consider the factors found in § 36-6-106(a)(1)-(15).[23]

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one other discrepancy, discussed further, *infra*, the written findings of fact and conclusions of law generally reflect the trial court's own deliberations. Still, we urge trial courts to prepare their own findings of facts and conclusions of law and not to rely solely on that which has been prepared by the parties.

[22] Tennessee Code Annotated section 36-6-406 instructs a court to limit the residential time for a parent that has engaged in certain specified conduct or who exhibits certain traits, including, in pertinent part: (1) willful abandonment; (2) physical or sexual abuse; (3) emotional abuse; (4) neglect or nonperformance of parental duties; or (5) an emotional or physical impairment which interferes with parental responsibilities. Neither party argues that the trial court should have used Tennessee Code Annotated section 36-6-406 to limit residential time with either parent.

[23] The factors set out at Tennessee Code Annotated section 36-6-106(a)(1)-(15) are:

> (1) The strength, nature, and stability of the child's relationship with each parent, including whether one (1) parent has performed the majority of parenting responsibilities relating to the daily needs of the child;
>
> (2) Each parent's or caregiver's past and potential for future performance of parenting responsibilities, including the willingness and ability of each of the parents and caregivers to facilitate and encourage a close and continuing parent-child relationship between the child and both of the child's parents, consistent with the best interest of the child. In determining the willingness of each of the parents and caregivers to facilitate and encourage a close and continuing parent-child relationship between the child and both of the child's parents, the court shall consider the likelihood of each parent and caregiver to honor and facilitate court ordered parenting arrangements and rights, and the court shall further consider any history of either parent or any caregiver denying parenting time to either parent in violation of a court order;
>
> (3) Refusal to attend a court ordered parent education seminar may be considered by the court as a lack of good faith effort in these proceedings;

Tenn. Code Ann. § 36-6-404(b). "In taking into account the child's best interest, the court shall order a custody arrangement that permits both parents to enjoy the maximum participation possible in the life of the child consistent with the factors set out [above], the location of the residences of the parents, the child's need for stability and all other relevant factors." Tenn. Code Ann. § 36-6-106(a).

We begin our review with Tennessee Code Annotated section 36-6-106(a)(1), which looks at the "strength, nature, and stability of the child's relationship with each parent, including whether one (1) parent has performed the majority of parenting responsibilities

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> (4) The disposition of each parent to provide the child with food, clothing, medical care, education and other necessary care;
>
> (5) The degree to which a parent has been the primary caregiver, defined as the parent who has taken the greater responsibility for performing parental responsibilities;
>
> (6) The love, affection, and emotional ties existing between each parent and the child;
>
> (7) The emotional needs and developmental level of the child;
>
> (8) The moral, physical, mental and emotional fitness of each parent as it relates to their ability to parent the child. . . .
>
> (9) The child's interaction and interrelationships with siblings, other relatives and step-relatives, and mentors, as well as the child's involvement with the child's physical surroundings, school, or other significant activities;
>
> (10) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment;
>
> (11) Evidence of physical or emotional abuse to the child, to the other parent or to any other person. The court shall, where appropriate, refer any issues of abuse to juvenile court for further proceedings;
>
> (12) The character and behavior of any other person who resides in or frequents the home of a parent and such person's interactions with the child;
>
> (13) The reasonable preference of the child if twelve (12) years of age or older. The court may hear the preference of a younger child upon request. The preference of older children should normally be given greater weight than those of younger children;
>
> (14) Each parent's employment schedule, and the court may make accommodations consistent with those schedules; and
>
> (15) Any other factors deemed relevant by the court.

Tenn. Code Ann. § 36-6-106(a)(1)-(15). We note that this was the version of the statute in effect when Wife filed her initial complaint for divorce and that all of the statutes referenced herein are the versions that were in effect when the initial complaint was filed.

relating to the daily needs of the child." Tenn. Code Ann. § 36-6-106(a)(1). Despite the overwhelming evidence that Wife has been Saylor's primary caretaker, in its written findings, the trial court found that this factor favored Husband. The evidence does not support this finding. Saylor testified that even when Wife worked as the Global Communications Director for W&A, Inc., she was still "full time with the kids."[24] Both Children testified that, before the divorce, they did not spend much time with Husband as he would "come home late" or "go out of town a lot." When Husband was home, the Children testified that he would "usual[ly]" come home at dinner and would "go in his office and then [the Children and Wife] would just . . . be in the family room and kitchen area." The Children's testimony was corroborated by Ms. Alison Kosman and Ms. Nicole Beers. Ms. Kosman worked as Wife's personal assistant prior to the divorce. She testified that Wife was the parent who cooked the Children's dinner, helped with their homework, and attended their extra-curricular activities. Similarly, Ms. Beers, who was hired prior to the divorce to help with the Children, testified that Wife was the parent who handled the Children's schedules and everything related to their care. She further testified that Wife was the parent who would sit with the Children to discuss their days and help with their homework. She also testified that, when Husband was in town, he arrived home around dinner time, said hello to the Children, and then would leave the room and not eat dinner with them. In his testimony, Husband admitted that, prior to the divorce, his usual practice was not to eat dinner with the Children nor discuss their days with them. Wife testified that she was the parent who arranged all of the Children's doctor's appointments, camps, and extra-curricular activities. Wife also testified that she was the day-to-day parent who cooked the Children dinner and helped them with their homework.

As mentioned above, on July 2, 2018, the parties entered into a temporary parenting plan, under which the Children would alternate weeks with the parents. The record shows that, at this time, Husband began assuming more parenting responsibilities, and he made an effort to be home at a regular time to have dinner with the Children. Husband testified that he adjusted his work schedule so he traveled on the weeks the Children were not with him. However, the record shows that the paternal grandmother provides considerable care for the Children during Husband's parenting time. According to the record, both the paternal grandmother and Husband's assistant transport the Children, and the Children testified that the paternal grandmother cooks and cleans for them. Saylor testified that Husband is "gone a lot, so when [she's] at his house, [she] feel[s] more alone because [she's] just . . . in [her] room the whole time[.]" Concerning her relationship with each parent, Saylor testified that, although she is close with Husband, she has a closer relationship with Wife. Given the foregoing, the trial court erred in not assigning significant weight to Wife's role as Saylor's primary caregiver.

[24] After the Children testified *in camera*, the trial court commented to the parties that the Children's testimonies "were very legitimate, were very credible, [and] were very helpful."

We note that the trial court made additional written findings as to this factor concerning the parties' ability to communicate with each other and to make decisions jointly. We discuss these findings below in our review of the trial court's designation of Husband as the parent with decision-making authority.

The second factor asks courts to consider "[e]ach parent's . . . past and potential for future performance of parenting responsibilities, including the willingness and ability of each of the parents . . . to facilitate and encourage a close and continuing parent-child relationship between the child and . . . the parents, consistent with the best interest of the child." Tenn. Code Ann. § 36-6-106(a)(2). In its July 3, 2019 oral ruling, the trial court found that

> [i]n terms of encouraging and facilitating a close and continuing relationship, there needs to be more flexibility between [Husband] and [Wife] putting the [C]hildren's needs first, recognizing that they are both young teens now and that they have their own schedules, their own agenda, their own desires. . . . So in terms of facilitating and encouraging, there wasn't much testimony on that.

In its written findings, the trial court found that "[b]oth parties are equally qualified as it relates to their past and potential performance of parenting responsibilities." Also, in its written findings, the trial court found that "[b]oth parties can encourage a close and continuing parent-child relationship between each child and the other parent." Despite the foregoing, the trial court also found that this factor favored Husband, to-wit:

> Husband has made consistent efforts to act in the best interest of the [C]hildren by shielding them from this litigation. In contrast, the [c]ourt finds Wife has failed to consistently encourage a close and healthy relationship between the [C]hildren and Husband. For example, during the litigation, Wife has implanted into the [C]hildren's minds that their father is selfish, not providing for them, their mother has no money for food or travel, despite Wife utilizing hundreds of thousands of dollars.

These written findings reflect the trial court's oral ruling from August 15, 2019, discussed *supra*.

Turning to the record, it is clear that the Children were negatively affected by the divorce. Easton testified that it seemed like his parents were "at war," and Dr. Wanat's testimony showed that the Children were exhausted by the divorce proceedings. It is also clear that the Children are very intelligent and observant. In their testimony, they expressed concern over whether Wife was "going to have any money" and whether they were "still going to have the house" when the divorce was finalized. The evidence does not show that this concern was the result of Wife "implant[ing]" anything into the Children's minds;

rather, the Children's concerns were based on their own observations of the parties and circumstances. As Easton testified, he had "gathered [that Wife] has had a pretty big purse . . . with a lot of different debit and credit cards," but "a lot more recently, every time she tries to use one, they always say it's been maxed out or it's declined." The following testimony further shows that Wife actually declined to discuss the litigation with the Children:

> Trial Court: But really, I am so sorry that you all have had to worry about this. I did not know that you all were worried about your finances. But your parents are—have prepared.
>
> Saylor: We aren't worried about, like, ours. We're worried about our mom's.
>
> Easton: We know the parents are going to take care of us; that's not the question. The question is, what's happening to our parents because no one's able to tell us anything?
>
> Trial Court: Well, they're not supposed to talk to you about the case, and they don't want to worry you. But your dad and your mom—
>
> Easton: See, that's what worries us more. Since no one is telling us anything, all we do is assume.
>
> Saylor: That's not a good way.

In view of the foregoing, the evidence preponderates against the trial court's finding that this factor favored Husband. We conclude that this factor does not weigh in either party's favor.

The third factor concerns a party's "refusal to attend a court ordered parent education seminar[.]" Tenn. Code Ann. § 36-6-106(a)(3). Both parties completed this requirement, and the trial court found this factor inapplicable. We agree.

Concerning the fourth factor, i.e., "[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 favored both parties equally. The record supports this finding.

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). Concerning this factor, the trial court found:

> Wife was the primary caregiver during the marriage; however, since the separation, Husband has reconciled his family's needs with the demands of his career. Thus, both parties have equally performed parental responsibilities. This factor favors both parties.

As discussed at length, *supra*, the evidence preponderates against the trial court's conclusion that this factor favors both parties. The record shows that Wife has been Saylor's primary caregiver and has shouldered the majority of parenting responsibilities. This factor unquestionably favors Wife.

Turning to the sixth factor, i.e., "[t]he love, affection, and emotional ties existing between each parent and the child," Tenn. Code Ann. § 36-6-106(a)(6), the trial court found that this factor favored both parties. Although the record shows that Saylor is bonded more closely with Wife, the record also supports the trial court's finding that Husband was is sensitive to the Child's feelings, emotionally connected to her, and able to have meaningful conversations with her. We agree that this factor favors the parties equally.

Factor seven asks courts to consider "[t]he emotional needs and developmental level of the child." Tenn. Code Ann. § 36-6-106(a)(7). In its written findings, the trial court found that "[w]hile Wife was able to meet the emotional and developmental needs of the [C]hildren when they were younger, Husband's parenting style best meets their current emotional and developmental needs." Accordingly, the trial court found that this factor favored Husband. In so doing, the trial court focused on Husband's and Wife's decisions concerning Easton and his behavioral and learning challenges. The trial court made no written findings concerning Saylor's emotional or developmental needs. As discussed, *supra*, Saylor is bonded more closely with Wife. The record also shows that, while Wife has been Saylor's primary caregiver, Saylor has excelled in school, participated in many extra-curricular activities, had many friends, and has been emotionally stable. Although Wife testified that she was concerned that the divorce was causing Saylor anxiety, the record shows that Saylor is a well-adjusted child. Accordingly, as it concerns Saylor, the evidence preponderates against the trial court's finding that this factor favored Husband. From the evidence, we conclude that this factor favors Wife.

Factor eight concerns "[t]he 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). As discussed above, in its July 3, 2019 oral findings, the trial court found that each parent was morally, physically, mentally, and emotionally fit to parent the Children. The trial court changed this finding on August 15, 2019, discussed *supra*. Although the trial court's written findings of fact and conclusions of law found that "[b]oth parties [were] equally fit in terms of their moral, physical, mental, and emotional health," the trial court "took issue" with an incident involving Saylor that occurred during the divorce and concluded that this factor favored Husband. For discretion, this Court will not discuss what transpired with the Child. However, on our review, Wife's response to the incident was in

no way improper, and we conclude that the trial court erred in drawing an adverse opinion of Wife based on this occurrence. Although the trial court found that "Husband has acted appropriately in parenting the parties' [C]hildren," there was evidence concerning some of Husband's parenting decisions that were questionable. Without enumerating those questionable decisions, suffice it to say that these decisions do not cause this Court to question Husband's fitness or ability to parent Saylor. Based on the proof in the record, the evidence preponderates against the trial court's finding that this factor favors Husband, and we conclude that this factor favors the parties equally.

Factor nine is:

> The child's interaction and interrelationships with siblings, other relatives and step-relatives, and mentors, as well as the child's involvement with the child's physical surroundings, school, or other significant activities.

Tenn. Code Ann. § 36-6-106(a)(9). In its July 3, 2019 oral ruling, the trial court stated that it would not separate the Children because they interacted well together and because Saylor looked up to her brother. In its written findings, the trial court found:

> The [C]hildren interact with each other well. It also appears that the [C]hildren have positive interactions with their paternal grandmother. The paternal grandmother on occasion provides childcare and transports the [C]hildren. Consequently, this factor favors a parenting arrangement where the [C]hildren will be together and interact with their paternal grandmother.

From our review, the trial court made no finding that this factor favored either parent. Concerning the trial court's finding that the Children were bonded with their paternal grandmother and that she "on occasion provide[d] childcare and transport[ation]," the record shows that the paternal grandmother provides this care when Husband is unable to care for the Children during his parenting time. We also note that Saylor testified that she prefers staying at Wife's house because it is closer to her friends, and she feels isolated at Husband's house because it is a long distance from all of her friends. Accordingly, while we agree that this factor favors a parenting arrangement where the Children stay together, it also favors a parenting arrangement where Saylor primarily resides at Wife's residence. As such, this factor favors Wife.

The trial court found that factor ten, i.e., "[t]he importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment," Tenn. Code Ann. § 36-6-106(a)(10), favored both parties equally. As support for this conclusion, the trial court found that "[t]he parties have navigated the week-to-week schedule since the entry of the . . . [t]emporary [p]arenting [p]lan," and "it appears that the [C]hildren have adjusted to the week-to-week schedule." The record shows that Saylor has lived in the marital residence for over eight years (the majority of her life), that she

considers that residence as "home," and that she desires to continue residing with Wife. As discussed above, Saylor testified that she feels lonely and isolated at Husband's residence while Wife's residence is a stable and loving environment. This is exemplified by the evidence that the Children asked to stay with Wife during their final exams because they found that environment more supportive and conducive to study. Although there is no evidence to show that Husband's residence is unsatisfactory, it is clear that Wife's residence provides stability and continuity for Saylor. Accordingly, the evidence preponderates against the trial court's conclusion that this factor favors the parties equally. We conclude that this factor favors Wife.

The eleventh factor considers "[e]vidence of physical or emotional abuse to the child [or] to the other parent[.]" Tenn. Code Ann. § 36-6-106(a)(11). Although Wife testified that Husband was abusive, the trial court found such allegations "unfounded and not credible." Accordingly, the trial court found that neither the parties nor the Children were abused by either parent or any other person, and that the factor was inapplicable. The evidence does not preponderate against the trial court's finding that this factor is inapplicable.

Concerning the twelfth factor, i.e., "[t]he character and behavior of any other person who resides in or frequents the home of a parent and such person's interactions with the child," Tenn. Code Ann. § 36-6-106(a)(12), the trial court found this factor inapplicable. Although the record shows that the paternal grandmother frequents Husband's home and is often responsible for caring for the Children during Husband's parenting time, there is no evidence that her character or behavior is such that she should not interact with Saylor.

The thirteenth factor requires courts to consider "[t]he reasonable preference of the child if twelve (12) years of age or older." Tenn. Code Ann. § 36-6-106(a)(13). At the time of her testimony, Saylor was thirteen years old. Although the trial court stated, in its written findings, that "[t]his factor is considered," it made no determination as to whether the factor favored either party. In pertinent part, the trial court found that "[t]he [C]hildren expressed that they wanted to live with both of their parents," and "[w]hen Saylor was asked what would constitute her 'ideal' living arrangement, she stated that she did not know" but expressed "that she preferred having the exchanges on Mondays instead of Sundays." The transcript of the Children's testimony supports the trial court's finding that the Children desired to live with both parents and that Saylor preferred Monday exchanges. Although Saylor testified that she did not know her "ideal [living] situation," from her statements, it appears that she was uncomfortable providing such opinion because she knew that her parents would read the transcript of her testimony:

> Wife's Counsel: So Saylor, when Easton said that he wanted to live at Mom's house, you nodded, but before you said you didn't know. Can you share with us what you're thinking?

Saylor: I don't feel very comfortable with them reading it.

Despite her hesitancy, Saylor later testified:

> Mom is like—she's, like, always there. She's, like, mainly, like, helping us. All the time, us before her.
>
> And my dad's like—I get along better with my mom because we've always been, like, the closer ones. And yeah. But when I'm with my dad, it's like two guys in the house, oh, my gosh. But I mean, we don't always get along, my dad and I. But yeah, I'm closer with my mom, but still close to my dad.

We infer from Saylor's testimony that, although she desires to spend time with Husband, she prefers to live primarily with Wife; however, it is clear that she was afraid to convey this in her testimony because she knew both parents would read the transcript. Accordingly, the evidence supports that this factor favors Wife.

The trial court concluded that the fourteenth factor, i.e., "[e]ach parent's employment schedule," Tenn. Code Ann. § 36-6-106(a)(14), favored both parties. The trial court found that "Husband's employment schedule is conducive to the week-to-week schedule," and, "[a]lthough Wife is not employed, she will be seeking employment in the future which should also be conducive to the week-to-week schedule." Wife testified that she did not have any plans concerning employment, but that she hoped to work in the future. As discussed, *supra*, Husband altered his work schedule so that he travels on the weeks he does not have the Children. Accordingly, the record supports the trial court's finding that this factor favors both parties.

The final factor courts consider is a catchall provision, i.e., "[a]ny other factors deemed relevant by the court." Tenn. Code Ann. § 36-6-106(a)(15). Regarding this factor, in its oral findings from July 3, 2019, the trial court expressed concern regarding Easton's educational and behavioral challenges and explained why it believed Husband was better suited to make educational and medical decisions on Easton's behalf. The trial court also discussed its concern regarding the incident with Saylor, mentioned *supra*. However, the trial court took the primary residential parent designation and decision-making authority concerning Saylor under advisement. Later, in its written findings for this factor, the trial court granted Husband decision-making authority. As such, we review the findings in that context.

In a recent decision from this Court, we reiterated that, when fashioning a permanent parenting plan,

> [t]rial courts are not simply to perform a rote examination of each factor and tally up those in favor of each party. ***Beaty v. Beaty***, No. M2020-00476-

> COA-R3-CV, 2021 WL 2850585, at *3 (Tenn. Ct. App. July 8, 2021) (quoting ***Steakin v. Steakin***, No. M2017-00115-COA-R3-CV, 2018 WL 334445 at *5 (Tenn. Ct. App. Jan. 9, 2018)). Instead, the relevancy and weight of the factors depend on the specific circumstances of the case. ***Id.*** Indeed, any one factor may prove determinative in the trial court's analysis of an appropriate parenting plan. ***Grissom v. Grissom,*** 586 S.W.3d 387, 393 (Tenn. Ct. App. 2019) (quoting ***Solima v. Solima***, No. M2014-01452-COA-R3-CV, 2015 WL 459134, at *4 (Tenn. Ct. App. July 30, 2015)).

Bean v. Bean, No. M2022-00394-COA-R3-CV, 2022 WL 17830533, at *6 (Tenn. Ct. App. Dec. 21, 2022). From the record, we conclude that the trial court abused its discretion in designating Husband as Saylor's primary residential parent. The evidence clearly shows that: (1) Wife has been Saylor's primary residential parent; (2) Saylor has a closer bond with Wife and prefers to stay at Wife's residence; and (3) while in Wife's primary care, Saylor has excelled in school and is an intelligent, emotionally stable, and well-adjusted child. The record shows that the parenting arrangement that would best maintain Saylor's emotional growth, health and stability, and physical care is one where Wife is her primary residential parent. Tenn. Code Ann. § 36-6-401(a). Accordingly, we reverse the trial court's designation of Husband as Saylor's primary residential parent and designate Wife as Saylor's primary residential parent.

d. Decision-Making Authority

As set out above, a permanent parenting plan shall also:

> Allocate decision-making authority to one (1) or both parties regarding the child's education, health care, extracurricular activities, and religious upbringing. The parties may incorporate an agreement related to the care and growth of the child in these specified areas, or in other areas, into their plan, consistent with the criteria in this part. Regardless of the allocation of decision making in the parenting plan, the parties may agree that either parent may make emergency decisions affecting the health or safety of the child;

Tenn. Code Ann. § 36-6-404(a)(5). We recall our General Assembly's stated findings concerning this issue, to-wit:

> Parents have the responsibility to make decisions and perform other parental duties necessary for the care and growth of their minor children. In any proceeding between parents under this chapter, the best interests of the child shall be the standard by which the court determines and allocates the parties' parental responsibilities. . . . The general assembly finds the need for stability and consistency in children's lives.

Tenn. Code Ann. § 36-6-401(a)(1).

When determining how to structure decision-making authority on behalf of a child, trial courts are required to consider, in pertinent part, the following:

> (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.

Tenn. Code Ann. § 36-6-407(c). As an initial matter, it is undisputed that the parties are unable to make decisions jointly. Accordingly, the trial court did not err in awarding one parent sole decision-making authority after consultation with the other parent.

Although the trial court did not make specific findings concerning Tennessee Code Annotated section 36-6-407(c), the following written findings of fact and conclusions of law are applicable to the issue of decision-making authority:

> During the marriage, Husband has attempted to be involved in the educational decisions made over the course of these [C]hildren's lives, but Wife would not allow it and ma[d]e unilateral decisions to the detriment of the [C]hildren. Husband was not an absent parent but has done everything possible for his family. During the litigation, Husband has consistently made efforts to include Wife in the decision-making process while considering a variety of options and professionals, such as teachers or counselors. Also, during the litigation, Wife had difficulties communicating with Husband, her own lawyer and other professionals, thereby placing the C]hildren in the middle. This factor favors Husband.
>
> ***
>
> Given the unusually high level of litigation and acrimony between the parties, the [c]ourt doubts their ability to make joint decisions affecting the minor children without resorting to litigation or the [C]hildren unnecessarily

> being in the middle of the parties' disagreements. Thus, it is imperative for this [c]ourt to designate a sole decision maker on decisions affecting the [C]hildren.
>
> When it comes to making decisions affecting the minor children, Husband has shown that he can communicate with Wife and the [C]hildren; identify resources and options; and consult those resources and options prior to deciding. Further, Husband has shown himself to be cooperative and readily accessible in the event of an emergency; however, the same cannot be said of Wife. The [c]ourt finds the [C]hildren's education needs are paramount. Unfortunately, Easton has struggled academically and behaviorally, attending three (3) schools in three (3) years, despite Wife being the primary caretaker and making unilateral decisions. Saylor's schooling choices in the future will be a potential issue. To avoid situations where the [C]hildren are placed in the middle, the [c]ourt must award a parent the final decision-making ability. Husband is best suited to ensure the [C]hildren's needs are met; and this [c]ourt has confidence in Husband's decision-making ability. As such, this factor favors Husband.

We note that many of the above written findings were taken from the trial court's oral findings of August 15, 2019.

Turning to the record, the majority of evidence regarding decision-making on behalf of the Children concerned Easton. The record shows that, although the parties differed in their approaches and opinions concerning the best course of action for Easton's future, both parents made decisions on Easton's behalf that they thought would benefit him. Both parents testified that, although they tried to engage the other parent in decisions involving Easton, the other parent was often non-responsive and non-communicative. This resulted in both parties making unilateral decisions on behalf of the child. However, the record shows that Wife was the parent who, more often than not, elicited the help of professionals on Easton's behalf. Although not an "absent parent," the record shows that Husband's employment often took him away from the family, which resulted in him not being as actively involved in decisions concerning the Children. As discussed above, the trial court also drew adverse opinions concerning Wife's judgment and ability to parent Saylor after an incident involving the Child. As articulated, *supra*, this Court does not draw the same opinions, and we conclude that Wife handled the situation appropriately and in a manner that allowed her to continue to have a close relationship with Saylor, and with the Child being able to confide in her. We also reiterate that there is no evidence to show that Wife was not "readily accessible in the event of an emergency." Rather, the record shows that Wife was "readily accessible" when the Children needed her. In fact, little evidence was presented concerning Saylor other than proof that she excelled in school and was well-adjusted. Indeed, the record shows that Wife has made more decisions on Saylor's behalf than Husband, and those decisions have led to Saylor being an intelligent, driven, and

compassionate teenager. Accordingly, we conclude that the trial court abused its discretion in awarding Husband sole decision-making authority over Saylor, and we award Wife sole decision-making authority over Saylor after consultation with Husband.

2. Child Support Award

a. Post-Divorce[25]

Wife challenges the trial court's denial of an upward deviation in child support as well as the duration of the award. As this Court has explained, "[pa]rents have 'deeply rooted moral responsibilities' to support their minor children." ***Richardson v. Spanos***, 189 S.W.3d 720, 724 (Tenn. Ct. App. 2005) (internal citations omitted). "In addition to this moral responsibility, Tennessee law imposes a legal obligation on parents to support their minor children in a manner commensurate with their own means and station in life." ***Id.*** (citing Tenn. Code Ann. § 34-1-102(a); ***Wade v. Wade***, 115 S.W.3d 917, 920 (Tenn. Ct. App. 2002)). "Awards of child support are governed by the Child Support Guidelines [(the "Guidelines")] promulgated by the Tennessee Department of Human Services Child Support Services Division." ***Taylor v. Fezell***, 158 S.W.3d 352, 357 (Tenn. 2005).[26] When determining a child support award, trial courts shall apply the Guidelines as a rebuttable presumption. Tenn. Code Ann. § 36-5-101(e)(1)(A). "The[] Guidelines are a minimum base for determining child support obligations," and the presumptive child support amount "may be increased according to the best interest of the child . . . [and] the circumstances of the parties[.]" Tenn. Comp. R. & Regs. 1240-02-04-.01(4). "Because child support decisions retain an element of discretion, we review them using the deferential 'abuse of discretion' standard." ***Richardson***, 189 S.W.3d at 725.

The trial court found that child support should be calculated using Husband's earning capacity of $1,000,000.00 gross income per year and no income for Wife. Applying this gross income, under the Guidelines, Husband's presumptive child support obligation was $3,200.00 per month for two children and $2,100.00 per month for one child. Tenn. Comp. R. & Regs. 1240-02-04-.07(2)(g)(1)(i), (ii). In its findings of facts and conclusions of law, the trial court determined Husband's support obligation in accordance

[25] Section (E)(2)(a) addresses Wife's seventh issue: "Did the trial court err in determining the amount and duration of the child support award?"

[26] We note that there have been three versions of the Guidelines in effect during the pendency of this case, the August 2008 version, the May 2020 version, and the October 2021 version (current); the August 2008 version applies here. The 2008 Guidelines apply in "every judicial . . . action to establish . . . child support . . ., whether the action is filed before or after the effective date of [the Guidelines], where a hearing which results in an order . . . modifying . . . support is held after the effective date of [the Guidelines]." Tenn. Comp. R. & Regs. 1240-02-04-.01(2)(a). Wife filed her complaint for divorce on August 4, 2017, and the trial court heard the issue of child support at the trial in 2019. Because the hearing that resulted in an order of child support occurred after the August 2008 effective date but before the May 2020 effective date, the 2008 Guidelines apply to this case.

with the presumption in the Guidelines and denied Wife's request for an upward deviation

> because Husband will be paying the Special Expenses of the [C]hildren. Wife will receive $3,200[.00] per month for two children to feed, entertain, transport, clothe, house, and provide for their needs.

In the permanent parenting plan, the trial court ordered that "[Husband] shall pay the reasonable and necessary educational expenses, extracurricular activities and special expenses of the [C]hildren."

The Guidelines provide for "extraordinary expenses," including educational expenses and special expenses. "Extraordinary expenses are in excess of the[] average amounts and are highly variable among families." Tenn. Comp. R. & Regs. 1240-02-04-.07(2)(d). Accordingly, such expenses "are considered on a case-by-case basis in the calculation of support and are added to the basic support award as a deviation so that the actual amount of the expense is considered in the calculation of the final child support order[.]" Tenn. Comp. R. & Regs. 1240-02-04-.07(2)(d). The Guidelines provide that extraordinary educational expenses

> (i) . . . may be added to the presumptive child support as a deviation. Extraordinary educational expenses include, but are not limited to, tuition, room and board, lab fees, books, fees, and other reasonable and necessary expenses associated with special needs education or private elementary and/or secondary schooling that are appropriate to the parents' financial abilities and to the lifestyle of the child if the parents and child were living together.
>
> ***
>
> (iii) If a deviation is allowed for extraordinary educational expenses, a monthly average of these expenses shall be based on evidence of prior or anticipated expenses and entered on the Worksheet in the deviation section.

Tenn. Comp. R. & Regs. 1240-02-04-.07(2)(d)(1)(i), (iii). Similarly, special expenses

> (i) . . . incurred for child rearing which can be quantified may be added to the child support obligation as a deviation from the [presumptive child support order]. Such expenses include, but are not limited to, summer camp, music or art lessons, travel, school-sponsored extra-curricular activities, such as band, clubs, and athletics, and other activities intended to enhance the athletic, social or cultural development of a child, but that are not otherwise required to be used in calculating the child support order as are health insurance premiums and work-related childcare costs.

> (ii) A portion of the basic child support obligation is intended to cover average amounts of these special expenses incurred in the rearing of a child. When this category of expenses exceeds seven percent (7%) of the monthly [basic child support obligation], then the tribunal shall consider additional amounts of support as a deviation to cover the full amount of these special expenses.

Tenn. Comp. R. & Regs. 1240-02-04-.07(2)(d)(2)(i), (ii). Under Tennessee Code Annotated section 36-5-101(e)(1)(B) and the Guidelines, it was Wife's burden to prove, by a preponderance of the evidence, that child support in excess of the presumptive amounts was reasonably necessary to provide for the needs of the Children. Tenn. Code Ann. § 36-5-101(e)(1)(B); Tenn. Comp. R. & Regs. 1240-02-04-.07(2)(g)(1). Exhibits admitted into evidence by both parties supported that the Children had extraordinary educational expenses, i.e., their private school tuition and additional academic support for Easton, as well as special expenses, i.e., summer camps and various extra-curricular activities.

Although the trial court denied Wife's request for a $6,800.00 per month upward deviation in child support (for a total monthly child support award of $10,000.00 per month), the trial court effectively provided for this additional support when it ordered Husband to pay "the reasonable and necessary educational expenses, extracurricular activities and special expenses of the [C]hildren." A list of these expenses and the associated cost was attached as an exhibit to the trial court's findings of fact and conclusions of law. Turning to the exhibit, it shows that Father's monthly expenses for the Children's educational and special expenses totaled $9,810.82 per month, more than Wife's requested upward deviation. These expenses included: (1) tuition for the Children's schools (including meal plans); (2) fees for the Children's extra-curricular activities, i.e., volleyball, choir, and guitar lessons; (3) costs associated with extra educational support for Easton; (4) costs associated with the Children's camps; (5) medical and prescription costs; (6) and school uniforms/clothing. Because the trial court ordered Husband to pay the foregoing expenses, Wife will not be required to spend her resources on these expenses for the Children. Accordingly, we conclude that the trial court did not err when it denied Wife's request for an upward deviation in child support.

Wife also appeals the duration of the trial court's child support order. Under Tennessee Code Annotated section 34-1-102(b),

> [p]arents shall continue to be responsible for the support of each child for whom they are responsible *after the child reaches eighteen (18) years of age if the child is in high school*. The duty of support shall continue until the child graduates from high school or the class of which the child is a member when the child attains eighteen (18) years of age graduates, whichever occurs first.

Tenn. Code Ann. § 34-1-102(b) (emphasis added). Accordingly, if a child turns 18 and remains enrolled in high school, parents have a continuing obligation to support the child until either the child graduates or the class in which the child is a member when he or she turns 18 graduates, whichever occurs first. In the permanent parenting plan, the trial court ordered:

> [Husband] shall pay to [Wife] as regular child support the sum of $3,200[.00] per month to be paid on the first day of each month until Easton['s] 18th birthday or until the class of which the child is a member when the child attains 18 years of age graduates from high school, whichever occurs first. Then, [Husband]'s child support obligation will be reduced to $2,100[.00] until Saylor['s] 18th birthday, until the class of which the child is a member when the child attains 18 years of age graduates from high school, whichever occurs first.

The effect of the trial court's order results in Husband's child support obligation for both Children terminating before they would graduate from high school, assuming they continue to be enrolled in school. Because such order clearly contradicts the established law on this issue, we conclude the trial court abused its discretion when it determined the duration of Husband's child support obligation. Accordingly, we reverse the portion of the trial court's support order concerning the duration of support and instruct the trial court to enter a support order that complies with Tennessee Code Annotated section 34-1-102(b).

b. Retroactive Child Support[27]

We next turn to Wife's argument that the trial court erred when it denied her request for retroactive child support. Although the trial court addressed this issue together with the issue of retroactive temporary spousal support, because these are distinct issues, we address them separately.

Concerning a retroactive temporary support award, the trial court found:

> Wife's contention that she did not have a temporary support hearing, her need for funds to repair the marital home, and that Husband has not paid temporary support are without merit. Husband has paid in excess of $400,000[.00] to Wife and/or for the benefit of her and the minor children during the pendency of the divorce. Additionally, Wife could have concluded her temporary support hearing but for her conduct. Further, Wife will be awarded over

[27] Section (E)(2)(b) partially addresses Wife's eighth issue: "Did the trial court err in denying Wife's request for temporary support during the pendency of the divorce?" *See* Section (F)(2), *infra*, for further discussion of this issue.

> $400,000[.00] of liquid assets, plus any income and support she may receive. Thus, Wife is not entitled to a retroactive temporary support award.

We will address the trial court's finding that Wife could have had a temporary support hearing "but for her conduct," *infra*. However, we reiterate that parents have moral responsibilities and *legal obligations* to support their minor children. *See* ***Richardson***, 189 S.W.3d at 724 (citing Tenn. Code Ann. § 34-1-102(a)); ***Wade***, 115 S.W.3d at 920. In short, Husband was required to support the Children during the pendency of the divorce regardless of whether Wife's behavior prevented a temporary support hearing. Because the trial court never entered an order concerning a temporary child support award, it should have considered whether to award Wife retroactive child support. *See* ***Curry v. Curry***, No. M2007-02446-COA-R3-CV, 2008 WL 4426895, at *12 (Tenn. Ct. App. Sept. 18, 2008) (citing Tenn. Code Ann. § 34-1-102(a); ***Smith v. Gore***, 728 S.W.2d 738, 745, 751 (Tenn. Ct. App. 1987)) ("In Tennessee, biological parents, even without a court order, have both a statutory and common law obligation to support their children if they have the ability to do so.").

> Turning to the Guidelines,
>
> > (1) Unless the rebuttal provisions of Tennessee Code Annotated §§ 36-2-311(a)(11) or 36-5-101(e) have been established by clear and convincing evidence provided to the tribunal, then, *in cases in which initial support is being set, a judgment must be entered to include an amount of monthly support due up to the date that an order for current support is entered*:
> >
> > ***
> >
> > (b) From the date:
> >
> > 1. Of separation of the parties in a divorce or in an annulment.

Tenn. Comp. R. & Regs. 1240-02-04-.06(1) (emphasis added). However, a trial court may deviate from the "presumption that a judgment for retroactive support shall be awarded back to . . . the date of the separation of the parties[.]" Tenn. Comp. R. & Regs. 1240-02-04-.06(2)). Such deviation *shall* be supported by *written findings* in the trial court's order that include:

> (a) *The reasons the tribunal*, pursuant to Tennessee Code Annotated §§ 36-2-311(a)(11)(A) or 36-5-101(e)(1)(C), *deviated from the presumptive amount of child support that would have been paid pursuant to the Guidelines*; and
>
> (b) *The amount of child support that would have been required under the*

Guidelines if the presumptive amount had not been rebutted; and

(c) A *written finding by the tribunal* that states how, in its determination,

> 1. Application of the Guidelines would be unjust or inappropriate in the particular case before the tribunal; and
>
> 2. The best interests of the child or children who are subject to the support award determination are served by deviation from the presumptive guideline amount.

Tenn. Comp. R. & Regs. 1240-02-04-.06(2) (emphases added); *see also* Tenn. Code Ann. § 36-5-101(e)(1)(F).[28]

Turning to the record, the trial court did not enter a judgment for an amount of monthly child support due from the date of separation through the date the child support order was entered. *See* Tenn. Comp. R. & Regs. 1240-02-04-.06(1). The trial court also did not make any of the required findings concerning why a retroactive child support judgment should not have been entered. *See* Tenn. Comp. R. & Regs. 1240-02-04-.06(2). Although the record shows that the Children had extraordinary and special expenses that Husband paid during the pendency of the divorce, discussed, *supra*, the trial court's combination of all of Wife's *pendente lite* support into one number, i.e., "in excess of $400,000[.00]," leaves this Court to question what portion of that amount was for child support. Without a finding of the presumptive monthly support obligation and a finding concerning the amount of support Husband paid for the Children during the pendency of the divorce, this Court cannot determine whether the trial court abused its discretion when it denied Wife's request for retroactive child support. Similarly, we are unable to determine whether the trial court found that a deviation from the presumptive support amount was necessary and in the Children's best interests because it did not provide any written findings. Tenn. Comp. R. & Regs. 1240-02-04-.06(2); *see also* Tenn. Code Ann. § 36-5-101(e)(1)(F); ***Knipper v. Enfinger***, No. W2019-02130-COA-R3-JV, 2020 WL 5204227, at *8 (Tenn. Ct. App. Aug. 31, 2020).[29]

In the absence of appropriate findings of fact, we vacate the trial court's order

[28] Tennessee Code Annotated section 36-2-311(a)(11)(A) concerns retroactive support in a parentage action, and is inapplicable to this case. Tennessee Code Annotated section 36-5-101(e)(1)(C) concerns retroactive support awards under the Guidelines "in cases where the parents of the minor child are separated or divorced, but where the court has not yet entered an order of child support[.]" Tenn. Code Ann. § 36-5-101(e)(1)(C). However, we note that the factors that would allow for deviation under Tennessee Code Annotated section 36-5-101(e)(1)(C), i.e., abandonment, are inapplicable here.

[29] In addition to the statutory requirements, Tennessee Rule of Civil Procedure 52.01 requires trial courts, in non-jury actions, to make specific findings of fact and conclusions of law in its final orders. *See* ***Butler v. Pitts***, No. W2016-01674-COA-R3-CV, 2017 WL 3432688, at *4 (Tenn. Ct. App. Aug. 10, 2017).

concerning retroactive child support and remand the matter to the trial court for entry of an order containing the necessary findings. The trial court is not precluded from reopening proof on this issue. *See* ***Vance v. Vance***, No. M2017-00622-COA-R3-CV, 2018 WL 1363323, at *7 (Tenn. Ct. App. Mar. 16, 2018); ***Williams v. Williams***, No. W2016-01602-COA-R3-CV, 2017 WL 3535322, at *6 (Tenn. Ct. App. Aug. 17, 2017). In making its judgment, the trial court is instructed to follow the Guidelines, which provide the proper procedure for calculating a retroactive support amount and mandate that the support amount "shall be calculated . . . using the Guidelines *in effect at the time of the hearing on retroactive support*." Tenn. Comp. R. & Regs. 1240-02-04-.06(3) (emphasis added). Accordingly, if the trial court conducts an additional hearing concerning Husband's retroactive child support obligation, it is instructed to use the Guidelines in effect at that time. Otherwise, the trial court should use the Guidelines in effect during the trial.

F. Issues Concerning Wife's Support

We now turn to the issues concerning support for Wife. Tennessee Code Annotated section 36-5-121(a) provides that, in any action for divorce, a "court may award alimony to be paid by one spouse to or for the benefit of the other[.]" Tenn. Code Ann. § 36-5-121(a). A court may also, in its discretion, order one spouse to pay for the support and maintenance of the other spouse while a divorce is pending. Tenn. Code Ann. § 36-5-121(b). With the foregoing in mind, we turn to the issue of Wife's transitional alimony award.

1. Transitional Alimony Award[30]

The Tennessee General Assembly has recognized "that the contributions to the marriage as homemaker or parent are of equal dignity and importance as economic contributions to the marriage." Tenn. Code Ann. § 36-5-121(c)(2). Further, the General Assembly has acknowledged that there is often an economic detriment to the spouse who "focuses on nurturing the personal side of the marriage, including the care and nurturing of the children," because such spouse "subordinated [their] own personal career for the benefit of the marriage." Tenn. Code Ann. § 36-5-121(c)(1). Accordingly, where

> one (1) spouse suffers economic detriment for the benefit of the marriage, the general assembly finds that the economically disadvantaged spouse's standard of living after the divorce should be reasonably comparable to the standard of living enjoyed during the marriage or to the post-divorce standard of living expected to be available to the other spouse, considering the relevant statutory factors and the equities between the parties.

[30] This section addresses Wife's fifth issue: "Did the trial court err in determining the type, amount, and duration of the alimony award to Wife?"

Tenn. Code Ann. § 36-5-121(c)(2).

"Once the trial court has found a party to be economically disadvantaged relative to his or her spouse, it must determine the nature, amount, length of term, and manner of payment of the award." ***Perry v. Perry***, 114 S.W.3d 465, 467 (Tenn. 2003). Under Tennessee Code Annotated section 36-5-121(d)(1), "[t]he court may award rehabilitative alimony, alimony *in futuro*, also known as periodic alimony, transitional alimony, or alimony *in solido* . . . ." Tenn. Code Ann. § 36-5-121(d)(1). The General Assembly has expressed a preference for rehabilitative alimony to allow "a spouse, who is economically disadvantaged relative to the other spouse, [to] be rehabilitated, whenever possible[.]" Tenn. Code Ann. § 36-5-121(d)(2). For a spouse to be rehabilitated, they must

> achieve, with reasonable effort, an earning capacity that will permit the economically disadvantaged spouse's standard of living after the divorce to be reasonably comparable to the standard of living enjoyed during the marriage, or to the post-divorce standard of living expected to be available to the other spouse, considering the relevant statutory factors and the equities between the parties.

Tenn. Code Ann. § 36-5-121(d)(2); *see also* Tenn. Code Ann. § 36-5-121(e)(1). However, courts may award alimony *in futuro* where rehabilitation is not feasible. Tenn. Code Ann. § 36-5-121(d)(4), (f)(1). Tennessee Code Annotated section 36-5-121(f)(1) provides that alimony *in futuro*

> is a payment of support and maintenance on a long term basis or until death or remarriage of the recipient. Such alimony may be awarded when the court finds that there is relative economic disadvantage and that rehabilitation is not feasible, meaning that the disadvantaged spouse is unable to achieve, with reasonable effort, an earning capacity that will permit the spouse's standard of living after the divorce to be reasonably comparable to the standard of living enjoyed during the marriage, or to the post-divorce standard of living expected to be available to the other spouse, considering the relevant statutory factors and the equities between the parties.

Tenn. Code Ann. § 36-5-121(f)(1); *see also* Tenn. Code Ann. § 36-5-121(d)(4). Courts may also award transitional alimony "when the court finds that rehabilitation is not necessary, but the economically disadvantaged spouse needs assistance to adjust to the economic consequences of a divorce[.]" Tenn. Code Ann. § 36-5-121(d)(4); *see also* Tenn. Code Ann. § 36-5-121(g)(1). Finally, courts may award alimony *in solido*, also called "lump sum alimony," which "is a form of long-term support, the total amount of which is calculable on the date the decree is entered, but which is not designated as transitional alimony." Tenn. Code Ann. § 36-5-121(h)(1). "Alimony *in solido* may be awarded in lieu of or in addition to any other alimony award, in order to provide support . . . where

appropriate." Tenn. Code Ann. § 36-5-121(d)(5).

"[I]n determining the nature, amount, length of term, and manner of payment," trial courts are required to consider all relevant factors set forth in Tennessee Code Annotated Section 36-5-121(i), discussed further, *infra*.[31] All relevant statutory factors are to be considered by the trial court, but "the two that are considered the most important are the disadvantaged spouse's need and the obligor spouse's ability to pay." ***Gonsewski v. Gonsewski***, 350 S.W.3d 99, 110 (Tenn. 2011) (quoting ***Riggs v. Riggs***, 250 S.W.3d 453, 457 (Tenn. Ct. App. 2007)). Trial courts have broad discretion in awarding spousal support, ***Bratton v. Bratton***, 136 S.W.3d 595, 605 (Tenn. 2004), and this Court is

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[31] The statutory factors for courts to consider are:

> (1) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;
>
> (2) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earnings capacity to a reasonable level;
>
> (3) The duration of the marriage;
>
> (4) The age and mental condition of each party;
>
> (5) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;
>
> (6) The extent to which it would be undesirable for a party to seek employment outside the home, because such party will be custodian of a minor child of the marriage;
>
> (7) The separate assets of each party, both real and personal, tangible and intangible;
>
> (8) The provisions made with regard to the marital property;
>
> (9) The standard of living of the parties established during the marriage;
>
> (10) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party;
>
> (11) The relative fault of the parties, in cases where the court, in its discretion, deems it appropriate to do so; and
>
> (12) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

Tenn. Code Ann. § 36-5-121(i).

"disinclined to second-guess a trial judge's spousal support decision" absent a trial court's abuse of discretion. ***Kinard v. Kinard***, 986 S.W.2d 220, 234 (Tenn. Ct. App. 1998). As thoroughly discussed above, a trial court abuses its discretion when it applies the incorrect legal standard and reaches a decision that is clearly unreasonable. ***Bogan v. Bogan***, 60 S.W.3d 721, 733 (Tenn. 2001) (citing ***Overstreet v. Shoney's, Inc.***, 4 S.W.3d 694, 709 (Tenn. Ct. App. 1999)).

Although Wife did not plead for alimony in her initial complaint or amended complaint, the trial court allowed her to amend her complaint during trial to add a request for alimony. Turning to the final decree, the trial court awarded Wife non-modifiable transitional alimony in the sum of $15,810.50 per month for sixty-six (66) months, beginning July 31, 2019 until December 31, 2024, for a total of $1,043,493.00. The trial court also ordered Husband to: (1) provide Wife's COBRA coverage by paying her COBRA premiums for 15 months after entry of the final decree; and (2) pay the equivalent amount of money Husband was paying for Wife's COBRA premiums to Wife for the following 21 months. The foregoing awards were designated as alimony *in solido*.[32] Tenn. Code Ann. § 36-5-121(d)(5).

In determining the nature, amount, and term of Wife's alimony award, the trial court appropriately considered each factor in Tennessee Code Annotated section 36-5-121(i) and made specific findings of fact and conclusions of law. From her briefing, it appears that Wife's issues lie with the trial court's findings and conclusions regarding the first and ninth factors. The first factor asks courts to consider the "[t]he relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources." Tenn. Code Ann. § 36-5-121(i)(1). Concerning income, the trial court "did not include any income for Wife, despite it[s] finding that nothing prohibit[ed] Wife from working." However, the trial court found that Wife had an earning capacity of $182,000.00 per year and required no additional education, training, or other rehabilitation to reach this income.

On appeal, Wife argues that the trial court erred in its findings concerning her earning capacity. First, Wife argues that the evidence does not support that Wife had an earning capacity of $182,000.00. Wife's support for this argument is two-fold. First, Wife argues that she never received an income during her tenure as W&A, Inc.'s Global Communications Director and, second, that the trial court contradicted itself when it imputed no income to Wife for child support purposes but found that Wife was capable of earning $182,000.00. As to the second argument, concerning both child support and alimony, the trial court found that Wife had no income. However, for alimony purposes, the trial court found that Wife had an earning *capacity*, i.e., was capable of earning based on her employment history, volunteer history, and education, of $182,000.00. We do not conclude that such finding was error. Wife presented no evidence concerning what income

[32] Wife does not specifically appeal this alimony *in solido* award.

she was capable of earning. However, Husband's vocational expert, Dr. Strauser, testified that Wife had the capacity to obtain and maintain employment in public relations, fundraising management, marketing management, and as a vice president of operations, and that any of these positions would allow for a yearly income between $142,260.00 and $182,138.00. In the absence of any evidence to contradict Dr. Strauser's testimony, it was not error for the trial court to find that Wife had an earning capacity of $182,000.00. As to Wife's first argument, the fact that Wife did not earn income during the marriage does not, *ipso facto*, establish that Wife is incapable of securing employment or a higher income in the future. The evidence shows, and the trial court found, that Wife has substantial contacts in Memphis, and is "very intelligent, capable, and qualified to do very well in the professional world if she applies herself." Indeed, aside from her work with W&A, Inc., Wife has served on numerous non-profit boards in the Memphis area and has substantial business contacts.

Turning to Husband's earning capacity, the trial court found that it was $1,000,000.00 per year but noted that, since 2016, Husband had not earned more than $758,408.00 in income from employment. The trial court did not consider any assets in trust when determining Husband's income. On appeal, Wife asserts, without any citation to the record, that Husband's average earnings prior to the divorce filing were $3,500,000.00.[33] The record shows that Husband's average wages earned from 2013-2017 were $1,281,652.00. The record also supports the trial court's finding that Husband's wages in 2016 and 2017 were $734,506.00 and $758,408.00, respectively. Accordingly, the evidence does not preponderate against the trial court's finding that Husband had an earning capacity of $1,000,000.00 at the time of divorce. Wife also argues that the trial court erred when it "failed to consider Husband's access to and control of over $8,000,000.00 in trust assets" in determining his income from "all other sources." Again, Wife fails to provide any citation to the record to show the amount of trust assets. As discussed at length, *supra*, Wife failed to make an offer of proof concerning trust assets, and the record does not support Wife's allegation that Husband had access to and control of over $8,000,000.00 in trust assets. Given the foregoing, we conclude that the evidence supports the trial court's findings concerning the parties' earning capacities.

The first factor also requires courts to consider the parties' respective needs. At trial, Wife sought an alimony award of $64,000.00 per month. The trial court found that

[33] We deduce that Wife calculated this figure by using Husband's previous tax returns. We note that Husband's 2016 tax return showed a capital gain of over $8,000,000. Husband explained in his testimony that the gain was the result of the Focus transaction, but that such gain belonged to the DSW Trust. Although the DSW Trust was a grantor trust, because Husband's father (the grantor of the trust) had recently died, Husband became liable for the taxes resulting from the capital gain that the DSW Trust experienced. Husband testified that he paid the taxes on the capital gain with reimbursement from the trust. Based on this testimony, the trial court found that Husband did not make $8,000,000 in 2016 and declined to use that number to calculate his earning capacity. The evidence in the record supports the trial court's findings.

Wife failed to provide sufficient evidence to substantiate her expenses and that her expenses were rebutted by Husband's expert, Mr. Vance. Accordingly, the trial court adjusted Wife's monthly expenses based on the evidence and found that Wife's need, including the Children and pet expenses, totaled $19,010.50 per month. The trial court then subtracted the child support award from Wife's total expenses to arrive at an alimony award of $15,810.50. Although Wife takes issue with the trial court's reduction of her expenses, she provides no argument or citation to the record concerning how such reduction was an error. After adjusting Husband's monthly expenses, the trial court found his need, including the Children and pet expenses, to be $28,729.44 per month. Wife does not challenge this finding. On this Court's review, the record supports the trial court's calculation of the parties' respective needs.

The ninth factor is the "standard of living of the parties established during the marriage[.]" Tenn. Code Ann. § 36-5-121(i)(9). Concerning this factor, the trial court found that the parties enjoyed a high standard of living during the marriage, wherein they did not save, but "spent the money they earned and lived above their means." The trial court found that the parties often spent considerable money traveling with the Children, and that the parties' excessive spending was not limited to the time during the marriage. The trial court found that, throughout the divorce proceedings, "the parties continued to live above their means and the marital estate [was] all but depleted." Considering her standard of living after the divorce, the trial court found that Wife would receive the marital residence and be afforded "a comparable standard of living, except for travel, as the parties cannot continue to travel around the world and spend excessive amounts as they did during their marriage." Similarly, the trial court found that Husband's monthly expenses would allow him to enjoy a standard of living comparable to that which he enjoyed during the marriage. Turning to the record, the evidence supports the trial court's findings that the parties enjoyed a high standard of living during the marriage, and that they lived above their means, saved very little, and that the marital estate was relatively small. Further, it is clear that the marital estate was significantly depleted by the divorce process. The record also shows that the parties should be able to live comfortably with the amounts allocated toward their monthly expenses.

Although Wife did not raise arguments concerning the remaining statutory factors, we briefly review them against the trial court's findings. Concerning the education and training of the parties, the trial court found that Wife has a bachelor's degree in business and public relations and a master's degree in communication. Tenn. Code Ann. § 36-5-121(i)(2). The trial court further found that Wife had seventeen years of experience in the business community through her work as W&A, Inc.'s Global Communications Director, through her retail business,[34] through her volunteering on various non-profit boards and through fundraising efforts for such non-profits. Tenn. Code Ann. § 36-5-121(i)(2).

[34] The record shows that the parties owned, but Wife operated, a retail clothing business for a few years during the marriage called Blu Champagne.

Concerning Husband's education and training, the trial court found that he had a bachelor's degree and a master's degree in business administration. Tenn. Code Ann. § 36-5-121(i)(2). The trial court concluded that neither party required additional education or training to improve his or her earning capacity. On this Court's review, the record supports the above findings.

Regarding the third and fourth factors, the trial court found that the parties were married seventeen years, that Husband was 46 years old, Wife was 45 years old, and neither party suffered from mental conditions. Tenn. Code Ann. § 36-5-121(i)(3), (4). Concerning the physical condition of each party, Tenn. Code Ann. § 36-5-121(i)(5), the trial court found that Husband was diagnosed with Type 1 diabetes, but that it was managed. The trial court further found that "Wife's testimony regarding her physical condition is not substantiated by medical proof nor credible," and that her testimony was inconsistent with her answers to Husband's first set of interrogatories, wherein Wife represented that she had no medical conditions. Thus, the trial court found that both parties were "physically and mentally fit to obtain and maintain gainful and competitive employment." Tenn. Code Ann. § 36-5-121(i)(5). Concerning the sixth factor, the trial court found that the Children were teenagers and would not hinder Wife's ability to work outside of the home during the remaining years of the Children's minority. Tenn. Code Ann. § 36-5-121(i)(6). The trial court found that the parties had very limited separate property. Tenn. Code Ann. § 36-5-121(i)(7). The record supports these findings.

Concerning the division of the marital property, the trial court deemed the division equitable where Wife was awarded over $400,000.00 in cash-equivalent assets. Tenn. Code Ann. § 36-5-121(i)(8). The trial court also found that the parties made tangible and intangible contributions to the marriage and to each other. Tenn. Code Ann. § 36-5-121(i)(10). Wife was a homemaker who also worked for W&A, Inc. as Global Communications Director. Additionally, Wife represented Husband and W&A, Inc. through her numerous volunteer efforts. Husband supported the family financially and also supported Wife's business endeavors as well as her position within W&A, Inc. Regarding the eleventh factor, the trial court found that both parties were guilty of inappropriate marital conduct and both parties were at fault for the demise of the marriage. Tenn. Code Ann. § 36-5-121(i)(11). Finally, the trial court considered that Wife would be receiving alimony unencumbered by taxes, and that social security and Medicare tax would be withheld from Husband's income. Tenn. Code Ann. § 36-5-121(i)(12). From our review, the record supports these findings.

Based on the foregoing, the trial court found that Wife was a disadvantaged spouse who required "financial assistance to 'bridge the gap' from the time of the divorce to a certain time in the future and to soften the 'economic blow' of divorce." However, it also found that Wife had "the education, skills, and experience warranting an earning capacity of $182,000[.00] per year[,] thus, rehabilitation [was] not necessary." Accordingly, the trial court concluded that an alimony award of $15,810.50 for 66 months was appropriate

given "Wife['s] need and Husband['s] ability to pay" and was "necessary for Wife's support and maintenance to adjust to the economic consequences of this divorce."

Although it is somewhat unclear, it appears from her appellate brief that Wife's argument on appeal is that she cannot be rehabilitated, thus, she maintains that the trial court erred in not awarding her long-term support. We recall that alimony *in futuro* may be awarded when rehabilitation is not feasible. Tenn. Code Ann. § 36-5-121(d)(4), (f)(1). Wife seems to argue that rehabilitation is not feasible because she will never earn the income necessary to enjoy: (1) the standard of living the parties' enjoyed during the marriage; and (2) the standard of living that Husband will enjoy post-divorce due to his higher earning capacity. *See* Tenn. Code Ann. § 36-5-121(d)(2); *see also* Tenn. Code Ann. § 36-5-121(e)(1). Wife's argument is contrary to the trial court's findings.

As discussed above, after adjusting Wife's monthly expenses based on the evidence in the record, the trial court found Wife's individual need and/or standard of living to be around $15,810.00. Also discussed above, Wife's appellate brief fails to cite to any evidence showing that this finding, i.e., that Wife's need and/or standard of living was higher than $15,810.00, was incorrect.[35] As discussed, *supra*, the trial court found that Wife had an earning capacity of $182,000.00, the gross monthly income from which is $15,167.00. Assuming a slightly lower net monthly income, such income would provide Wife with a "reasonably comparable standard of living" to that which she enjoyed during the marriage. *See* Tenn. Code Ann. § 36-5-121(d)(2); *see also* Tenn. Code Ann. § 36-5-121(e)(1). Furthermore, Wife can reach this earning capacity without any additional education or training. Indeed, Wife has two advanced degrees and has been active in the Memphis business community throughout the entire marriage. Based on the foregoing facts, the evidence does not preponderate against the trial court's finding that Wife did not need to be rehabilitated. Lastly, it is important to recognize that the trial court found that Husband was able to pay Wife $15,810.00 per month in alimony. With an earning capacity of $1,000,000.00, the trial court calculated Husband's net monthly income after taxes as $54,166.00. With this net monthly income, Husband can afford to pay both his expenses and the Children's extra expenses (totaling $28,729.44), $3,200.00 per month in child support, and $15,810.50.00 in alimony. However, Husband cannot afford to pay Wife $64,000.00 per month in alimony as this amount, coupled with Husband's expenses, would be higher than Husband's net monthly income.

We are mindful that divorcing couples are often forced into a lower standard of living after divorce because they cannot afford the same standard of living with double the households and double the expenses. Indeed, "two persons living separately incur more

[35] As support for her argument that she had a higher standard of living during the marriage, Wife cites to the trial court's comment, not finding, that "these parties have enjoyed over a million dollars in income in one year." Such comment from the trial court during the trial hardly amounts to evidence demonstrating that the trial court's findings concerning Wife's need were incorrect.

expenses than two persons living together[,] [t]hus, in most divorce cases[,] it is unlikely that both parties will be able to maintain their pre-divorce lifestyle once the proceedings are concluded." ***Gonsewski***, 350 S.W.3d at 113 (quoting ***Kinard***, 986 S.W.2d at 234); *see also* ***Robertson v. Robertson***, 76 S.W.3d 337, 340 (Tenn. 2002) ("The parties' incomes and assets will not always be sufficient for them to achieve the same standard of living after divorce that they enjoyed during the marriage."). For this reason, the marital standard of living is simply one of many factors a court considers when awarding alimony. ***Robertson***, 76 S.W.3d at 340; *see* Tenn. Code Ann. § 36-5-121(i)(9). From the record, we conclude that the parties ostensibly will be able to reasonably maintain their pre-divorce standards of living, with the exception of the extensive travel enjoyed during the marriage. In view of the alimony factors, the record does not preponderate against the trial court's factual findings or its award of $15,810.00 per month in transitional alimony to Wife for 66 months. Because the trial court's award does not constitute an abuse of discretion, we affirm the transitional alimony award.

2. Retroactive Temporary Support[36]

Wife contends that the trial court erred when it denied her requests for alimony, attorney's fees, and/or expert fees during the pendency of the divorce. Under Tennessee Code Annotated section 36-5-121(b), a

> court may, *in its discretion*, at any time pending the final hearing, upon motion and after notice and hearing, make any order . . . to compel a spouse to pay any sums necessary for the support and maintenance of the other spouse, to enable such spouse to prosecute or defend the suit of the parties and to make other orders as it deems appropriate.

Tenn. Code Ann. § 36-5-121(b) (emphasis added). As discussed above, the trial court denied Wife's request for a temporary retroactive support award because: (1) Husband paid "in excess of $400,000[.00] to Wife and/or for the benefit of her and the minor [C]hildren during the pendency of the divorce;" (2) Wife could have concluded her temporary support hearing, but for her conduct; and (3) Wife was awarded over $400,000.00 in liquid assets from the marital estate. We review a trial court's decision concerning retroactive support under an abuse of discretion standard.

On appeal, Wife's entire argument concerning this issue is that: (1) she consistently requested temporary support during the proceedings; (2) a temporary support hearing was conducted over several days but was never completed; and (3) the trial court "refused to permit Wife to complete the last day of the[] temporary support hearing[]." Accordingly, Wife argues that the trial court abused its discretion when it denied her request for

[36] This section addresses the remainder of Wife's eighth issue. *See* Section (E)(2)(b), *supra*, for further discussion.

retroactive support.

A brief review of the procedural history is helpful here:

- On August 3, 2017, Wife withdrew $125,000.00 from the parties' joint account.
- On August 4, 2017, Wife filed her initial complaint for divorce and requested "that she be awarded child support both *pendente lite* and permanent." As discussed above, Wife did not plead for alimony.
- On September 5, 2017, Wife filed her amended complaint for divorce and requested attorney's fees and expenses but, again, did not specifically plead for alimony.
- On September 13, 2017, Wife filed her first motion, requesting *pendente lite* alimony, child support, and attorney's fees. She set the motion for a hearing on October 6, 2017. By email dated September 25, 2017, a representative from Wife's counsel's office asked the trial court to strike the October 6, 2017 setting.
- On November 13, 2017, Wife filed her second motion, again seeking *pendente lite* alimony, child support, and attorney's fees. She set the motion for a hearing on November 20, 2017. At some point, this hearing was reset for February 1, 2018. On January 22, 2018, a representative from Wife's counsel's office emailed the trial court asking to strike the February 1, 2018 date and indicating that the matter would be reset at a later time.
- On February 16, 2018, Wife filed her third *pendente lite* motion, requesting alimony, child support, attorney's fees, and expert fees. She set this motion for hearing on March 15, 2018. It does not appear that the trial court heard this motion on March 15, 2018.
- On February 22, 2018, Wife filed her motion for suit expenses wherein she alleged that Husband had provided her with only $1,500.00 since August 2017, and she asked that the trial court order Husband to provide her $135,000.00 towards her attorney's fees and other suit expenses.
- On April 17, 2018, Wife filed her fourth *pendente lite* motion, seeking alimony, child support, and attorney's fees. She set this motion for a hearing on June 5, 2018. It does not appear that the trial court heard this motion on June 5, 2018.
- On June 21, 2018, the first trial judge entered an order referring Wife's motion for suit expenses, motion for mediation fees, and motion for *pendente lite* support to the divorce referee.
- On July 28, 2018, the temporary support hearing began before the divorce referee and the hearing continued on September 17, 2018, October 9, 2018, and October 17, 2018.

The record shows that the parties did not complete the temporary support hearing on October 17, 2018. On February 8, 2019, in a hearing on an unrelated matter, counsel for the parties discussed scheduling issues hindering the conclusion of the temporary support hearing. Wife alleged that Husband was obstructing the conclusion of the hearing.

The trial court acknowledged that Wife "need[ed] to have a hearing," and ordered Husband to make himself available mid-February to conclude the temporary support hearing. The record shows that the parties were set to return to the divorce referee on February 13 and 14, 2019.

As discussed at length, *supra*, also on February 8, 2019, Wife retrieved her devices from her previous counsel's office. This action resulted in Wife's previous counsel withdrawing from representation on February 11, 2019, two days before the parties were set to return to the divorce referee to conclude the temporary support hearing. Although Wife alleged that she had hired new counsel and was retrieving her devices to give to her new counsel, Wife made the decision to access her devices and fire her attorney mere days before the parties were set to conclude the temporary support hearing. Thus, the record shows that the reason the parties did not conclude the temporary support hearing in February 2019 was, as the trial court found, due to Wife's conduct.

On April 18, 2019, Wife filed a motion to compel and/or for attorney's fees and temporary support alleging that Husband was intentionally obstructing the conclusion of the temporary support hearing. In this motion, Wife averred that she set the temporary support hearing for May 10, 2019, and asked the trial court to compel Husband's attendance at the hearing. In the alternative, Wife asked the trial court to award her $200,000.00 towards her attorney's fees and suit expenses. On May 10, 2019, the trial court heard Wife's motion. By order entered May 22, 2019, the trial court denied the motion in part and granted it in part, to-wit:

> 1. Wife's request to conclude the temporary support hearing before the Divorce Referee is denied. The parties' resources are better used to prepare for the final trial. The final trial is less than a month away; and thus, having the parties and the [c]ourt spend time and resources on a temporary support hearing before the Divorce Referee at this point would be imprudent;
>
> 2. Wife's request for attorney's fees is granted in part. Based on representations made by counsel for the parties Wife has received approximately $315,000[.00] in marital assets since the filing of the divorce; whereas Husband has paid $379,900[.00], to his attorney for fees and for lawsuit expenses; resulting in a difference of $64,000[.00]. The most recent Rule 14(C) Affidavit filed by Husband reflects a SunTrust Checking Account having a balance of $89,000[.00]. Thus, equalizing between the parties the funds Husband used to pay his attorney would be equitable;
>
> 3. As such, the [c]ourt hereby awards a judgment in the amount of $64,000[.00] in favor of Wife. . . . Wife should use said award to pay her lawyers and any other expenses that she deems appropriate to prepare her case for trial;

4. Husband shall pay the sum of $64,000[.00] to Wife's counsel by Wednesday, May 22, 2019.

Although Wife provides no citation to the record to support her allegation, we presume that Wife's appellate argument that the trial court "refused to permit Wife to complete the last day of the[] temporary support hearings" concerns the foregoing order. Indeed, Wife wholly fails to cite to the trial court's order on her motion to compel and/or for attorney's fees and temporary support in this portion of her appellate brief. On our review of the trial court's order and the record, we conclude that it was not error for the trial court to deny Wife's request to conclude the temporary support hearing nineteen days before trial was scheduled to begin. Wife had ample opportunity to conclude the temporary support hearing before this time, but her own decisions led to its postponement. We agree with the trial court that, by the time Wife requested another setting for the temporary support hearing, the parties' time and resources were better spent in preparation for trial. Furthermore, as the trial court found in the foregoing order, Wife received approximately $315,000.00 in marital assets during the divorce to use towards litigation expenses, and she received another $64,000.00 in marital funds a few days before trial began. According to the record, this amount was in addition to the $400,000.00 Wife received in support during the litigation. As such, we cannot conclude that the trial court erred when it denied Wife's request to complete the temporary support hearing or when it denied Wife's request for retroactive support in the form of alimony and/or attorney's fees and expenses.

G. Wife's Attorney's Fees

Wife's final issues concern the attorney's fees she incurred at trial and on appeal. We consider each in turn.

1. At Trial[37]

As the Tennessee Supreme Court has explained,

> [i]t is well-settled that an award of attorney's fees in a divorce case constitutes alimony *in solido*. *See* Tenn. Code Ann. § 36-5-121(h)(1) ("alimony *in solido* may include attorney fees, where appropriate"); ***Herrera v. Herrera***, 944 S.W.2d 379, 390 (Tenn. Ct. App. 1996). . . . As with any alimony award, in deciding whether to award attorney's fees as alimony *in solido*, the trial court should consider the factors enumerated in Tennessee Code Annotated section 36-5-121(i). A spouse with adequate property and income is not entitled to an award of alimony to

[37] This section addresses Wife's tenth issue: "Did the trial court err in not awarding Wife her attorney fees and suit expenses?"

> pay attorney's fees and expenses. ***Umstot v. Umstot***, 968 S.W.2d 819, 824 (Tenn. Ct. App. 1997). Such awards are appropriate only when the spouse seeking them lacks sufficient funds to pay his or her own legal expenses, *see* ***Houghland v. Houghland***, 844 S.W.2d 619, 623 (Tenn. Ct. App. 1992), or the spouse would be required to deplete his or her resources in order to pay them, *see* ***Harwell v. Harwell***, 612 S.W.2d 182, 185 (Tenn. Ct. App. 1980). Thus, where the spouse seeking such an award has demonstrated that he or she is financially unable to procure counsel, and where the other spouse has the ability to pay, the court may properly grant an award of attorney's fees as alimony. *See* ***id.*** at 185.

Gonsewski, 350 S.W.3d at 113.

Turning to the final decree, the trial court declined to award Wife attorney's fees incurred at trial. The trial court noted that "the amount of attorney's fees paid [during the litigation] were equalized from the marital estate and Husband's earnings per the [trial court]'s order." From the trial court's findings of facts and conclusions of law, it is clear that the trial court also declined to award Wife additional attorney's fees because "the way Wife prosecuted her divorce was irresponsible and wasteful." Specifically, the trial court found that

> Wife pursued legal theories and factual contentions not warranted by existing law, without having evidentiary support, and without taking time to verify the facts, even after having the opportunity for further investigation or discovery. Wife failed to avail herself of discovery by failing to take any witness or opposing party depositions; failing to disclose witnesses in discovery as ordered; and failing to provide expert reports to Husband's counsel as ordered. Wife never took Husband's deposition even though he was the CEO, President and head person in charge at Waddell & Associates at all times relevant to the allegations and issues raised by Wife in this divorce. Wife incurred $170,000 in expert's fees and she suggested that her expert's testimony would support her legal theories and factual contentions. The [c]ourt finds that Wife incurring $170,000 in expert's fees and not exchanging her expert's reports was irresponsible and a waste of marital resources. The [c]ourt finds Wife's pattern of unnecessarily draining the marital estate to pay for her litigation expenses to be akin to her contentiousness towards Husband's decision-making without learning the facts firsthand. . . . Given the drain Wife's tactics placed on the marital estate, the [c]ourt could have ordered Wife to pay a portion of Husband's attorney's fees had there been funds available to do so.

Although we will not discuss it again here, as discussed at length above, the record supports the trial court's finding that Wife's prosecution of the divorce was irresponsible and wasteful. Furthermore, the record shows that Wife received substantial funds, i.e., approximately $315,000.00 in marital assets (liquidated *by agreement of the parties*), during the divorce to use for attorney's fees and expert witnesses, and she received an additional $64,000.00 in marital funds a few days before trial began to use for attorney's fees. How Wife chose to apply those funds was within her discretion, but Husband should not be responsible for Wife's decisions (and behavior) that caused her to accrue additional costs in prosecuting the divorce. Accordingly, we conclude that the trial court did not abuse its discretion in ordering the parties to pay their respective attorney's fees.

In this portion of her appellate brief, Wife also asks this Court to reverse the trial court's order requiring her to pay $50,000.00 of the Special Master's fee. Wife failed to raise the Special Master's fee as an issue in her statement of the issues for appeal. Accordingly, this issue is waived. *See* Tenn. R. App. P. 27(a)(4); ***Hawkins***, 86 S.W.3d at 531.

2. On Appeal[38]

Wife asks this Court to award her attorney's fees incurred on appeal. In Tennessee, "litigants are responsible for their own attorney's fees absent a statute or agreement between the parties providing otherwise." ***Darvarmanesh v. Gharacholou***, No. M2004-00262-COA-R3-CV, 2005 WL 1684050, at *16 (Tenn. Ct. App. July 19, 2005) (citing ***State v. Brown & Williamson Tobacco Corp.***, 18 S.W.3d 186, 194 (Tenn. 2000)). In this portion of her appellate brief, Wife fails to cite to any legal authority or agreement between the parties that would allow for her attorney's fees to be paid by Husband. However, we note that Tennessee Code Annotated section 36-5-103(c) allows this Court, in its discretion, to award attorney's fees "in regard to any suit or action concerning the adjudication of the custody . . . of any child[.]" Tenn. Code Ann. § 36-5-103(c). Aside from Wife's waiver of this issue, *see* Tenn. R. App. P. 27(a)(7)(A); ***Forbess***, 370 S.W.3d at 355, as discussed, *supra*, we agree with the trial court that the way in which Wife prosecuted the divorce was irresponsible and wasteful. Unfortunately, Wife's reckless prosecution continues in her pursuit of this appeal. As discussed at length in this Opinion, Wife has: (1) pursued legal theories on appeal that she conceded at trial; (2) made arguments in her briefing that she failed to designate as issues in the appeal; (3) wholly ignored portions of the record to advance her allegations; (4) presented "factual" allegations without citation to the record and in contradiction to the evidence in the record; (5) often failed to present cogent arguments to support her allegations; and (6) often failed to cite to relevant legal authority to support her arguments. Given the foregoing, we deny Wife's request for appellate attorney's fees.

[38] This section addresses Wife's eleventh and final issue: "Should Wife be awarded her reasonable attorney's fees and expenses incurred on appeal?"

V. Conclusion

For the foregoing reasons, we affirm in part, reverse in part, and vacate in part the trial court's orders. Specifically, we affirm the trial court's: (1) grant of the DSW Trust #2's motion to revise and motion to dismiss; (2) denial of Wife's motion for leave to amend the complaint and her revised and supplemental motion for leave to amend complaint and petition to set aside fraudulent transfer and to join third-party transferees; (3) denial of Wife's second motion for a continuance; (4) grant of the motions *in limine*; (5) decision to exclude evidence related to the trusts at trial; (6) denial of an upward deviation in child support; (7) transitional alimony award; (8) denial of Wife's request for retroactive temporary alimony and/or attorney's fees; and (9) order that the parties shall pay their respective attorney's fees from trial. We reverse: (1) the trial court's designation of Husband as Saylor's primary residential parent; (2) the trial court's award of sole decision-making authority to Husband; and (3) the duration of the child support award. We vacate the trial court's denial of Wife's request for retroactive temporary child support. We deny Wife's request for appellate attorney's fees. Finally, due to Wife's waiver, as discussed at length, *supra*, we do not address the trial court's: (1) grant of the motions to revise and the motions to dismiss of W&A, LLC, AMWJR, Inc., the Waddell Trust, and the DSW Trust; and (2) orders concerning Wife's devices, email accounts, and electronic storage accounts. The case is remanded for such further proceedings as are necessary and consistent with this opinion. Costs of the appeal are assessed one-half to the Appellant, Stacie Nicole Martin Waddell, and one-half to the Appellee, David Sewall Waddell, for all of which execution may issue if necessary.

s/ Kenny Armstrong
KENNY ARMSTRONG, JUDGE