IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
April 18, 2023 Session

ANTONIA ANDREANA SMITH v. ANTHONY KENYATTA SMITH

Appeal from the Chancery Court for Shelby County
No. CH-19-1592 Gadson W. Perry, Chancellor

No. W2022-00704-COA-R3-CV

In this divorce action, Wife appeals the trial court's classification and distribution of assets, formation of a parenting plan, and calculation of Husband's child support obligation. Wife also appeals the denial of her petition for criminal contempt. As appellee, Husband raises issues regarding the allocation of the parties' equity in the marital property, the enrollment of the child in private school, and the distribution between the parties of education expenses for the child. Upon review, we affirm the trial court's decisions regarding the division of the parties' property after minor modification, vacate the trial court's decisions regarding child custody and child support, and remand the case to the trial court for further proceedings. Wife is barred from appealing the denial of her criminal contempt petition and we decline to award Wife her attorney's fees incurred on appeal.

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

J. STEVEN STAFFORD, P.J., W.S., delivered the opinion of the court, in which ARNOLD B. GOLDIN and CARMA DENNIS MCGEE, JJ., joined.

Melissa C. Berry and Rebecca A. Bobo, Memphis, Tennessee, for the appellant, Antonia Andreana Smith.

Anthony Kenyatta Smith, Germantown, Tennessee, Pro se.

OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff/Appellant Antonia Andreana Smith ("Wife") and Defendant/Appellee Anthony Kenyatta Smith ("Husband") were married in October 2015. The parties have one

minor child, a son born in January 2017.[1] At some point, difficulties arose in the marriage. Although both parties and the child remained in the marital home, the parties separated in October 2019. On November 15, 2019, Wife filed a complaint for divorce in the Shelby County Chancery Court ("the trial court"). Husband later filed an answer and countercomplaint.

Wife filed a motion to establish a temporary parenting plan, child support, and alimony on March 9, 2020. Therein, she stated that she and the child had moved out of the marital residence in February 2020 because of Husband's increased agitation and intimidation following her filing of the divorce complaint. Wife requested "pendente lite alimony in futuro, alimony in solido, rehabilitative alimony, and/or transitional alimony[,]" her attorney's fees, and for the trial court to approve her proposed parenting plan. Ultimately, the parties entered into a consent order on March 25, 2020, establishing a temporary parenting schedule. Pursuant to this schedule, Husband would have parenting time with the child from Thursday to Monday one week and Wednesday to Thursday the next week. The parties also agreed that the minor child was not to be left alone with Husband's mother.[2] This plan remained in place for the duration of the proceedings.

Then, on October 5, 2020, Husband filed an emergency motion for permission to travel with the child for fall break and to establish a holiday parenting schedule. Husband alleged that Wife was unreasonably withholding consent to Husband's travel plans and that Wife was generally unwilling to co-parent with Husband. The trial court denied Husband's emergency motion on October 9, 2020, finding that Husband had not presented sufficient proof to modify the temporary parenting plan already in place. However, the trial court did not specifically prohibit Husband from travelling with the child on his scheduled days.

Shortly thereafter, Wife filed a motion seeking to adopt the parental bill of rights[3] and to require either parent to submit a specific itinerary prior to traveling with the child. Wife alleged that, despite the trial court's denial of his emergency motion that same day, Husband traveled with the child to Florida on October 9, 2020, providing Wife with minimal notice of the trip itinerary only after he and the child had arrived in Florida. On October 16, 2020, the trial court entered a consent order ("the Travel Consent Order") adopting the parental bill of rights and setting additional requirements as to the sharing of travel information when travelling with the child out of state. Specifically, the trial court ordered that a parent traveling with the child out-of-state or more than one hundred miles from Shelby County for more than twenty-four hours needed to provide the non-traveling parent with an itinerary with "the planned dates and times of departure and return, the intended destinations, mode of transportation, addresses, and telephone numbers" forty-

[1] Husband has two minor children from a previous marriage whose custody is not at issue in this case.

[2] Wife testified at trial that Husband's mother had some physical limitations after suffering an aneurysm prior to the parties' marriage.

[3] *See* Tenn. Code Ann. § 36-6-101(a)(3)(B)(i)–(ix).

eight hours prior to departing. If travelling by plane, train, or boat, the traveling parent needed to provide the departure, arrival, and connection information as well.

The Shelby County Divorce Referee ("the Divorce Referee") heard Wife's motion for pendente lite support on several days in October 2020. At the start of the hearing, Wife's counsel announced that Wife was no longer seeking alimony, only child support. In its October 28, 2020 order on the motion, the trial court relied on the Divorce Referee's findings as to the proper values for monthly child support, which depended on whether the child was enrolled in aftercare with his school. The trial court stated that it would not require the child to change school systems. The school's tuition of $1,292.50 per month was assessed as the amount of monthly work-related childcare. Wife's gross income was found to be $8,258.00 per month and Husband's gross income was found to be $10,725.00 plus an "in-home credit" for Husband's two older children of $1,207.50 per month. Accordingly, the presumptive child support to be paid by Husband going forward was assessed at $1,146.00 per month, with the trial court reserving the right to reassess the amount based on the child's enrollment in his school's aftercare program. The trial court found that Husband owed an arrearage of $6,895.00 for February 2020, when Wife and the child moved out of the marital home, through October 2020. Husband's prior payment of $2,400.00 was credited against this amount,[4] leaving $4,495.00 to be paid directly to Wife. Wife was also awarded $5,000.00 in partial payment of her attorney's fees.

Later, on October 1, 2021, Wife filed a petition to find Husband in criminal contempt for alleged violations of the Travel Consent Order. Wife alleged that on seven separate occasions Husband had traveled out of state with the child without providing the itinerary information forty-eight hours in advance, if at all. Wife also alleged that Husband had left the child alone with his mother despite the parties' agreement in March 2020. In his October 25, 2021 response, Husband denied that his conduct constituted criminal contempt. Husband admitted that on multiple occasions he did not provide an itinerary that matched all of the trial court's specification in the Travel Consent Order forty-eight hours prior to departure. However, for some of the trips complained of by Wife, Husband argued that he did not travel with the child for more than twenty-four hours such that the Travel Consent Order's requirements did not apply, and for others Husband believed Wife would be able to discern certain itinerary aspects from the details he did provide such that Wife was provided with reasonable notice.

The divorce action was heard in early November 2021. At the outset of the trial, the parties stipulated that the marital residence would be valued at $410,000.00, that neither party would seek alimony other than attorney's fees, and that the parties would consent to a declaration of divorce rather than dispute the grounds. Husband stipulated as to an error

[4] Husband began paying $800.00 per month in August 2020 as the parties attempted to avoid the need for a child support hearing.

in his calculations on the child support worksheet attached to his proposed parenting plan.[5] The parties also agreed that evidence regarding Wife's petition for criminal contempt would be presented contemporaneously with the proof about the underlying divorce.

After the three-day trial, both parties submitted proposed findings of fact and conclusions of law. In March 2022, the parties entered a consent order amending the temporary parenting schedule set out in March 2020. The order established which parent would have custody of the child for certain holidays during spring and summer of 2022.

Eventually, the trial court entered its final decree of divorce on April 27, 2022. As separate property, Wife was awarded the following: (1) her engagement ring and heirloom fur coat; (2) the rental property in Wife's name; (3) the premarital balances of two retirement accounts in Wife's name; (4) the entire value of eight bank and investment accounts in Wife's name; and (5) the premarital balance of credit card debt and interest in Wife's name. As separate property, Husband was awarded the following: (1) his premarital car; (2) the three rental properties and one timeshare in Husband's name; (3) the premarital balance of three retirement accounts in Husband's name; (4) the entire value of eleven bank and investment accounts in Husband's name; and (5) the premarital balance of credit card debt and interest in Husband's name. The trial court determined that the post-marital increase in value of the parties' retirement accounts and the post-marital increase in credit card debt and interest of both parties constituted marital property. However, the trial court awarded each party the marital portions of their separate assets and liabilities. The parties were awarded the vehicles they individually owned and were driving. Both parties were also awarded the savings accounts in their names for the benefit of the child.

The trial court calculated that the parties' combined gross annual income totaled $253,724.52, with Wife earning forty-two percent of that amount and Husband earning fifty-eight percent. Husband's 2020 capital gains accounted for eleven percent of the parties' income and the trial court adjusted the parties' contributions accordingly. Thus, Wife accounted for thirty-one percent of the parties' total gross annual income and Husband accounted for sixty-nine percent. The trial court relied on the short duration of the marriage and both parties' ability to acquire income and assets to support themselves in returning the parties to their pre-marriage financial condition. The trial court also determined that "the property to which the parties both contributed should be divided pro rata and inversely based on the parties' respective incomes to account for the fact that [Husband] earns more than [Wife] and benefits more than [Wife] from being allowed to keep the marital portions of his pre-marital assets[.]" Thus, Wife was awarded sixty-nine percent of the parties' single jointly-titled bank account and the net equity of the marital residence, and Husband was awarded thirty-one percent. Husband was ordered to refinance the mortgage on the marital residence to remove Wife's responsibility for the same. The

[5] The child support worksheet provided by Husband included Wife's gross rental income of $1,300.00 rather than her net rental income of $171.61.

net equity of the home was to be calculated by subtracting the amount of the mortgage from the stipulated $410,000.00 fair market value of the home.

The trial court reviewed each of the factors set out in Tennessee Code Annotated section 36-1-106(a) in creating a parenting plan in the best interest of the child. Ultimately, the trial court found that five factors favored Wife, three factors favored Husband, and eight factors were neutral or not applicable. Wife was designated the child's primary residential parent. The trial court fashioned a parenting plan by combining certain aspects of the parties' proposed parenting plans: (1) Husband's proposed parenting schedule of four days on and four days off for 182.5 days each; (2) Wife's proposed holiday schedule of alternating even and odd years; and (3) joint decision-making for all major decisions with Husband's proposed caveats.[6] Regarding child support, the trial court determined Wife's monthly gross income to be $8,966.12 and Husband's monthly gross income to be $12,177.59. Husband was given an in-home credit for his other minor children and a credit for paying the child's medical insurance.[7] Wife was to be solely responsible for the child's tuition for January through May 2022. Thereafter, the parties would equally divide the cost of tuition for the child to continue attending his same school system. The parties were directed to submit new child support worksheets reflective of these figures and the trial court's determinations regarding custody.

As to Wife's petition for criminal contempt, the trial court found that Husband had failed to fully comply with the Travel Consent Order from October 2020 requiring itineraries prior to overnight travel with the child. However, the trial court found that Wife had not provided proof that Husband's conduct met the higher standard for criminal contempt—that the failure to follow the Travel Consent Order was willful or undertaken for a bad purpose. Thus, the trial court denied Wife's petition and request for her related attorney's fees. The trial court did award Wife $10,224.05 in attorney's fees for her effort in pursuing child support pendente lite. Husband was credited his previous payment of $5,000.00 in connection with that motion.

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[6] In his pretrial proposed parenting plan, Husband submitted the following caveats to his request for joint decision-making:

> (1) a good-faith duty to discuss all major decisions and an attempt to reach a joint decision; (2) deference to [the child's] pediatrician, dentist, or other medical professional if the parties disagree about non-emergency health care decisions; (3) either parent to be able to take [the child] to the church of his or her choice if they cannot agree on [the child's] religious upbringing; (4) disagreements about education to be resolved by mediation, if [Wife] or [Husband] requests it, and by the [trial court] otherwise; and (5) [Husband] to have final decision-making authority about extracurricular activities that start during the months of August-January, and [Wife] for activities that start from February through July.

[7] Husband was already paying for medical insurance for his other two children and incurred no additional costs in insuring the subject child. However, Husband was awarded a credit for one-third of the total cost of insuring all three children.

Wife filed her notice of appeal to this Court on June 1, 2022. Then on June 27, 2022, the trial court entered an order "supplementing and finalizing" the final decree of divorce. Therein, the trial court stated that the parties could continue following the division of holidays in the parties' March 2022 consent order modifying the temporary parenting plan, denied Wife's request to permanently expand the parental bill of rights, and adopted the parties' consolidated proposed permanent parenting plan order with minor alterations. Then, on July 12, 2022, the trial court entered the finalized permanent parenting plan. Husband's child support obligation was listed as $153.00 per month. Husband filed his own notice of appeal.

II. ISSUES PRESENTED

Wife raises six issues on appeal, which are taken from her brief with minor alterations:

> 1. The trial court erred in its classification of assets.
> 2. The trial court erred by not dividing the marital assets equitably in accordance with Tennessee Code Annotated § 36-4-121.
> 3. The trial court erred by not fashioning a parenting plan in the best interest of the minor child of the parties.
> 4. The trial court erred in calculating Wife's monthly gross income and Husband's child support obligation.
> 5. The trial court erred by not finding Husband in criminal contempt of its previous orders.
> 6. Wife is entitled to an award of attorney's fees related to this appeal.

Husband raises additional issues in the posture of appellee, which are taken from his brief:

> 1. Regarding dividing the remaining marital property only, did the trial court err in the calculation and allocation of the parties' total gross income?
> 2. Did the trial court err in the allocation of the net equity in the marital residence?
> 3. Did the trial court err in ordering the minor child to remain at St. George's private school to start Kindergarten?
> 4. Did the trial court err in the requiring Husband to pay half of private school expenses?

III. STANDARD OF REVIEW

This Court has recently described the standard of review in a divorce case heard without a jury as follows:

> We review the trial court's findings of fact de novo with a presumption of

> correctness and will honor those findings unless the preponderance of the evidence is otherwise. ***Snodgrass v. Snodgrass***, 295 S.W.3d 240, 245 (Tenn. 2009) (citing ***Keyt v. Keyt***, 244 S.W.3d 321, 327 (Tenn. 2007)); *see* Tenn. R. App. P. 13(d) ("Unless otherwise required by statute, review of findings of fact by the trial court in civil actions shall be de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise."). However, we review the trial court's conclusions of law with no presumption of correctness. ***Id.*** at 245–46 (citing ***Keyt***, 244 S.W.3d at 327).

Prichard v. Prichard, No. W2022-00728-COA-R3-CV, 2023 WL 2726776, at *3 (Tenn. Ct. App. Mar. 31, 2023).

IV. ANALYSIS

First, we note that Husband is proceeding pro se in this appeal after being represented by counsel in the trial court proceedings. As such, we keep the following principles in mind:

> Parties who decide to represent themselves are entitled to fair and equal treatment by the courts. The courts should take into account that many pro se litigants have no legal training and little familiarity with the judicial system. However, the courts must also be mindful of the boundary between fairness to a pro se litigant and unfairness to the pro se litigant's adversary. Thus, the courts must not excuse pro se litigants from complying with the same substantive and procedural rules that represented parties are expected to observe.
>
> The courts give pro se litigants who are untrained in the law a certain amount of leeway in drafting their pleadings and briefs. Accordingly, we measure the papers prepared by pro se litigants using standards that are less stringent than those applied to papers prepared by lawyers.

Hessmer v. Hessmer, 138 S.W.3d 901, 903 (Tenn. Ct. App. 2003) (citations omitted).

A.

The parties each dispute various aspects of the trial court's distribution of their assets. Tennessee statutes draw a distinction between marital property and separate property, thus "[t]he division of the marital estate in divorce cases 'necessarily begins with the classification of the parties' property as either marital or separate property.'" ***Prichard***, 2023 WL 2726776, at *3 (quoting ***Green v. Green***, No. W2019-01416-COA-R3-CV, 2021 WL 1343569, at *4 (Tenn. Ct. App. Apr. 12, 2021)).

Tennessee Code Annotated section 36-4-121(b)(4)[8] defines the separate property of divorcing parties, which includes, but is not limited to, property acquired prior to the marriage. Marital property is defined in relevant part as follows:

> all real and personal property, both tangible and intangible, acquired by either or both spouses during the course of the marriage up to the date of the final divorce hearing and owned by either or both spouses as of the date of filing of a complaint for divorce, except in the case of fraudulent conveyance in anticipation of filing, and including any property to which a right was acquired up to the date of the final divorce hearing, and valued as of a date as near as reasonably possible to the final divorce hearing date.

Tenn. Code Ann. § 36-4-121(b)(2)(A). The classification of the parties' property as either separate or marital "is a question of fact to be determined in light of all relevant circumstances." ***Snodgrass***, 295 S.W.3d at 245–46 (citing ***Langford v. Langford***, 220 Tenn. 600, 421 S.W.2d 632, 634 (1967); ***Cutsinger v. Cutsinger***, 917 S.W.2d 238, 241 (Tenn. Ct. App. 1995)).

"Separate property is not part of the marital estate and is therefore not subject to division." ***Larsen-Ball v. Ball***, 301 S.W.3d 228, 231 (Tenn. 2010). In contrast, the trial court is directed by statute to divide the marital property equitably between the parties. ***Id.***; s*ee* Tenn. Code Ann. § 36-4-121(a)(1) ("In all actions for divorce or legal separation, the court having jurisdiction thereof may, upon request of either party, . . . equitably divide, distribute or assign the marital property between the parties without regard to marital fault in proportions as the court deems just.").

Section 36-4-121(a)(1) requires an *equitable* division of marital property, not an *equal* division. Indeed, "[a] trial court's decision regarding equitable division of marital property 'is not a mechanical one and is not rendered inequitable because it is not precisely equal or because both parties did not receive a share of each piece of property.'" ***Green***, 2021 WL 1343569, at *4 (quoting ***Brown v. Brown***, 913 S.W.2d 163, 168 (Tenn. Ct. App. 1994)). "The trial court is empowered to do what is reasonable under the circumstances and has broad discretion in the equitable division of the marital estate." ***Keyt***, 244 S.W.3d at 328. Section 36-4-121 provides a non-exhaustive list of factors to be considered by the trial court in creating an equitable division of marital property. *See* Tenn. Code Ann. § 36-4-121(c) (including eleven specific factors and a twelfth factor directing the court to consider "[s]uch other factors as are necessary to consider the equities between the parties"); *see also* ***Manis v. Manis***, 49 S.W.3d 295, 306 (Tenn. Ct. App. 2001) (holding that appellate courts reviewing a distribution of marital property "ordinarily defer to the trial judge's decision unless it is inconsistent with the factors in Tenn. Code Ann. § 36-4-

[8] The Legislature amended this statute in 2022. We cite to the version of the statute in effect when Wife filed the divorce complaint throughout this Opinion.

121(c) or is not supported by a preponderance of the evidence").

Here, the trial court provided detailed charts outlining its classification and division of the parties' property. The trial court determined that the parties had each owned rental real property and certain personal property prior to the marriage, which it classified as separate property. The trial court also classified the bank and investment accounts belonging to the parties individually to be separate property, with each party receiving the full value of the accounts in their name. The premarital value of the parties' retirement accounts was classified as separate property; so too was the premarital debt of the parties.

In dividing the marital property, the trial court awarded each party that which they brought to the marriage or to which they individually contributed, namely those assets in their individual names, including the post-marital increase in the parties' financial and retirement accounts and debt. Each party received the car he or she had purchased during the marriage and the bank account he or she had opened for the benefit of the child. The trial court also awarded the parties pro rata shares of the jointly-titled property based on the inverse percentage of the total gross income contributed by that party. The value of the marital residence was stipulated prior to the start of trial and the parties shared a single jointly-titled bank account. As Husband was found to make sixty-nine percent of the parties' total gross income, he was awarded thirty-one percent of the equity in the marital residence, and Wife, found to earn thirty-one percent of the total gross income, was awarded sixty-nine percent equity in the house.[9] In total, the trial court valued the marital estate at $624,489.88. Husband was awarded $391,192.87, or approximately 62.6 percent of the marital property. Wife was awarded $233,297.01, or approximately 37.4 percent of the marital property.

We discern no reversible error in the trial court's manner of distributing the parties' marital property, generally. However, the parties agree regarding a series of classification errors and each alleges separate mathematical errors, which together require a slight modification to the trial court's judgment.

Wife asserts that the trial court erred by not equally dividing the marital assets.[10]

[9] The same percentage distribution applied to the parties' singular shared bank account, which contained approximately $10.00.

[10] Wife emphasizes that neither party had advocated for anything other than an equal division of the marital property until Husband submitted his proposed findings of fact and conclusions of law after trial. Wife asserts that she would not have agreed to stipulate that neither party was a candidate for alimony if she knew that Husband would argue for an unequal distribution of the estate. However, no conditions were placed on the announcement of the stipulation prior to trial and there is no requirement that a trial court divide the parties' marital property equally. *See* Tenn. Code Ann. § 36-4-121(a)(1) (directing a trial court to "equitably divide" the marital property "in proportions as the court deems just"); ***Kocher v. Bearden***, 546 S.W.3d 78, 85 n.8 (Tenn. Ct. App. 2017) ("It is the duty of this Court to apply the controlling law, for which there is a basis in the record, whether or not cited or relied upon by the parties." (quoting ***Coffee v. Peterbilt of Nashville, Inc.***, 795 S.W.2d 656, 658 n.1 (Tenn. 1990))).

She argues that the trial court placed too much emphasis on the relatively short duration of the parties' marriage, rather than the fact that the parties had both substantially contributed to the acquisition and growth of the marital estate. Husband disagrees with this assignment of error, instead arguing that Wife received too large a percentage of the equity in the marital home based on her shorter residence in and smaller contribution to the upkeep of the home.

Respectfully, neither argument overcomes the substantial deference owed to the trial court's division of marital property. Trial courts have broad discretion in establishing the equitable division of marital assets. ***Keyt***, 244 S.W.3d at 328. "We therefore give great weight on appeal to the trial court's division and 'will ordinarily defer to the trial court's division . . . unless it is inconsistent with the factors in [section] 36-4-121(c) or is not supported by a preponderance of the evidence.'" ***Prichard***, 2023 WL 2726776, at *12 (quoting ***Perkins v. Perkins***, No. W2021-01246-COA-R3-CV, 2023 WL 2446807, at *3 (Tenn. Ct. App. Mar 10, 2023)). Looking to section 36-4-121(c), the trial court found four factors to be especially relevant in dividing the parties' marital property: "(1) the relatively short duration of the parties' marriage before separation (four years); (2) the parties' comparable relative ability for future acquisitions of assets and income; (3) the estate of each party at the time of the marriage; and (4) the value of each party's separate property." We cannot say that the preponderance of the evidence weighs against the trial court's consideration of the relevant factors.

The parties were married for four years prior to Wife's filing for divorce. *See* Tenn. Code Ann. § 36-4-121(c)(1) (considering "[t]he duration of the marriage"). The trial court found the parties to both be "highly-educated, successful, high-earning professionals" whose "formidable" abilities to acquire assets and income were neither diminished nor enhanced by the marriage. *See* Tenn. Code Ann. § 36-4-121(c)(4) (considering "[t]he relative ability of each party for future acquisitions of capital assets and income"). The parties were found to have each brought "significant separate property, in the form of rental properties, investments, and retirement accounts, into their marriage." *See* Tenn. Code Ann. § 36-4-121(c)(6) (considering "[t]he value of the separate property of each party"), (7) ("[t]he estate of each party at the time of the marriage"). The trial court also considered the fact that, although Husband brought more into the marriage and consistently earned more than Wife throughout the course of the marriage, "each party is now, and was before the marriage, fully capable of supporting himself or herself." *See* Tenn. Code Ann. § 36-4-121(c)(8) (considering "[t]he economic circumstances of each party at the time the division of property is to become effective"). Moreover, other than the marital residence and a single jointly-owned bank account with a minor value, the parties kept their finances separate, with each party responsible for certain shared expenses but otherwise free to spend his or her money as seen fit. While the parties both contributed substantially to the marriage and to their own retirement and investment accounts, neither party contributed to the assets of the other. *See* Tenn. Code Ann. § 36-4-121(c)(5)(A) (considering "[t]he contribution of each party to the acquisition, preservation, appreciation, depreciation or dissipation of the

marital or separate property . . .").

In awarding the parties the marital portions of their individual accounts and then dividing the equity in the parties' shared property relative to their inverse contribution to the total gross annual income, the trial court walked the line between two cases dealing with marriages of short duration. *Compare* ***Batson v. Batson***, 769 S.W.2d 849, 860 (Tenn. Ct. App. 1988) (affirming modified 94.5/5.1 percent division of marital property because, "[i]n cases involving a marriage of relatively short duration, it is appropriate to divide the property in a way that, as nearly as possible, places the parties in the same position they would have been in had the marriage never taken place." (citing ***In re Marriage of McInnis***, 62 Or. App. 524, 661 P.2d 942, 943 (1983))), *with* ***Bates v. Bates***, No. M2010-02590-COA-R3-CV, 2012 WL 2412447, at *5 (Tenn. Ct. App. June 26, 2012) (affirming 70.2/29.8 percent division after finding that, although the marriage was of short duration, "in light of the entire record, it would not be equitable to place the parties in the same position they would have been in had the marriage never taken place"). The trial court explicitly stated that it was formulating a "straightforward" equitable allocation of the parties' marital property by using these cases that had "reached opposite outcomes[,]" based on the statutory factors it found relevant to the case at hand.

It is not the role of an appellate court to "substitute its judgment for that of the trial court." ***Mumford v. Mumford***, No. E2002-01338-COA-R3-CV, 2004 WL 483213, at *9 (Tenn. Ct. App. Mar. 12, 2004) (quoting ***Eldridge v. Eldridge***, 42 S.W.3d 82, 85 (Tenn. 2001)). "A trial court's discretionary decision must take into account applicable law and be consistent with the facts before the court" but "[a]ppellate courts ordinarily permit discretionary decisions to stand when reasonable judicial minds can differ concerning their soundness." ***Id.*** (citing ***Overstreet v. Shoney's, Inc.***, 4 S.W.3d 694, 709 (Tenn. Ct. App. 1999)). Here, the trial court thoroughly considered the applicable case law, the facts, and the equities of the parties in formulating its division of marital property; as such, we will not disturb its judgment on appeal. *See* ***Webb v. Webb***, No. W2021-01227-COA-R3-CV, 2023 WL 568331 (Tenn. Ct. App. Jan. 27, 2023) (affirming 87/13 percent division of marital assets where one party brought significantly more separate property to the short marriage and contributed more to the principal joint asset); ***Long v. Long***, 642 S.W.3d 803, 828 (Tenn. Ct. App. 2021) (finding that the trial court's consideration of the statutory factors "was consistent with logic and reason and that the result to these parties was equitable" although the trial court's 51/49 percent distribution was not mathematically equal), *perm. app. denied* (Tenn. Feb. 10, 2022); ***Prichard***, 2023 WL 2726776, at *12 (affirming 59.5/40.5 percent division of marital property where "trial court did not abuse its broad discretion" in fashioning the distribution); ***Larsen-Ball***, 301 S.W.3d at 236–37 (affirming 60/40 percent division where it was "apparent from the trial court's order that the trial court considered the relevant factors").

But our deference to a trial court's judgment does not allow us to ignore an agreed misapplication of the facts. *See* ***Gonsewski v. Gonsewski***, 350 S.W.3d 99, 105 (Tenn. 2011)

(noting that a trial court's decision should not be second-guessed absent an abuse of discretion, which includes, but is not limited to, when the trial court relies on "a clearly erroneous assessment of the evidence"). As Wife argues, the trial court considered eighteen financial accounts to be separate property rather than marital property, despite the fact that no proof was put on by either party that these accounts were owned before the marriage or contained funds that were acquired prior to the marriage. Husband agrees that the trial court erred in classifying these accounts as separate property but asserts that the total value of the accounts is minimal and the trial court's division—with each party retaining their own accounts—is an equitable distribution of the assets. Eight of these accounts, valued at $18,407.61, were owned by Wife and allocated as her separate property. Ten of these accounts, valued at $33,644.00, were owned by Husband and allocated as his separate property. From our review, there was no indication in the record that these accounts were not marital property. Indeed, both parties classified these eighteen accounts as marital property in their pretrial briefs. However, both parties also proposed that the trial court should award the entire value of each of these accounts to the party that owned the account.

In some cases, a trial court classifying property as separate property rather than as marital property awarded wholly to one spouse may constitute harmless error. *See* Tenn. R. App. P. 36(b) ("A final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process."); ***Bates***, 2012 WL 2412447, at *4 (finding the trial court classifying certain property as marital and awarding it to husband rather than classifying it as husband's separate property was harmless error). Indeed, the total value of combined marital and separate assets awarded to each party would not change if these accounts were properly classified as marital property and awarded to the party who owned the account, as contemplated by both parties in their pretrial briefs. And based on the trial court's calculations, this change in classification would result in only a .2 percent difference in the parties' shares of the marital estate. *See* ***Prichard***, 2023 WL 2726776, at *8 (noting that the adjustment of the trial court's miscalculation of the value of wife's bank account created only a .3 percent difference in the parties' awarded percentage of the marital property and "[c]onsidering this adjustment to the overall distribution of the marital assets, we conclude that this error was harmless").

In this case, however, the otherwise fairly harmless classification error has been compounded by two slight mathematical errors in the trial court's calculation of the parties' contributions to their total gross annual income. First, as Husband points out in his brief, the trial court miscalculated how much of the parties' total gross annual income was comprised of Husband's 2020 capital gains. From our review, it appears that the trial court calculated the percentage of the parties' total gross annual income attributable to Husband's capital gains without adding the value of the capital gains to the parties' total gross annual income. Husband made $27,150.00 in 2020 capital gains. When added to Husband's regular annual income of $146,131.08, this creates a total gross annual income

of $173,281.08. And, as Wife argues, the trial court erred slightly in calculating Wife's gross annual income as well. From our review, it appears that the trial court included Wife's $171.61 net monthly income from her rental property twice in calculating her gross monthly income for child support purposes, which created the basis for its determination of Wife's gross annual income for equitable division purposes. When the net rental income is added to Wife's regular monthly income, as shown by her paystub, of $8,622.90, this creates a gross monthly income of $8,794.51 and a gross annual income of $105,534.12.

Using these numbers, the parties had a total gross annual income of $278,815.20. Husband accounts for 62.1 percent of this amount, and Wife accounts for 37.9 percent. Applying these percentages inversely as the trial court intended, Husband should receive 37.9 percent of the equity in the marital residence and the parties' joint bank account, and Wife should receive 62.1 percent.

When both the classification error and the calculation errors are rectified, the percentage of marital property each party is awarded changes significantly. Classifying the eighteen accounts as marital property increases the parties' marital estate to $676,541.49. Correcting the income of the parties, and thus the inversely proportional percentage of the marital residence and the jointly-titled bank account each party receives, means that Wife's marital property award totals $240,875.27, or 35.6 percent of the marital estate. Husband's award totals $435,666.22, or 64.4 percent. Important to note is the fact that the distribution of particular assets is not changing—each party retains each of the financial accounts in his or her name and the entire value of his or her respective retirement accounts. However, now Wife receives $97,458.01 in equity from the marital residence and $6.15 from the parties' joint bank account; Husband receives $59,479.21 in equity and $3.75 from the account. With these modifications, we affirm the trial court's division of the parties' marital property. *See* ***Batson***, 769 S.W.2d at 855 (affirming subject to modifications where "the trial court misclassified several assets and failed to deal with others" but "the overall effect of the trial court's distribution [was] equitable").

B.

Next, the parties raise several issues regarding the permanent parenting plan established by the trial court. As our Supreme Court has explained:

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

> judge." ***Suttles v. Suttles***, 748 S.W.2d 427, 429 (Tenn. 1988) (quoting ***Edwards v. Edwards***, 501 S.W.2d 283, 291 (Tenn. Ct. App. 1973)). "It is not the function of appellate courts to tweak a [residential parenting schedule] in the hopes of achieving a more reasonable result than the trial court." ***Eldridge v. Eldridge***, 42 S.W.3d 82, 88 (Tenn. 2001). A trial court's decision regarding the details of a residential parenting schedule should not be reversed absent an abuse of discretion. ***Id.*** "An abuse of discretion occurs when the trial court . . . appl[ies] an incorrect legal standard, reaches an illogical result, resolves the case on a clearly erroneous assessment of the evidence, or relies on reasoning that causes an injustice." ***Gonsewski v. Gonsewski***, 350 S.W.3d 99, 105 (Tenn. 2011).

Armbrister v. Armbrister, 414 S.W.3d 685, 693 (Tenn. 2013) (alteration in original). Accordingly, we will not overturn a trial court's formation of a parenting plan for an abuse of discretion unless the trial court's ruling "falls outside the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence found in the record." ***Id.*** (quoting ***Eldridge***, 42 S.W.3d. at 88).

Tennessee Code Annotated section 36-6-106(a) provides that all custody determinations regarding a minor child should be "made on the basis of the best interest of the child." When creating a permanent parenting plan, a trial court is directed to create an arrangement that "permits both parents to enjoy the maximum participation possible in the life of the child[,]" while remaining consistent with "the location of the residences of the parents," "the child's need for stability[,]" and fifteen non-exclusive best interest factors.[11] Tenn. Code Ann. § 36-6-106(a); *see also* Tenn. Code Ann. § 36-6-404 (stating that the same factors should be used to determine a residential schedule unless certain factors under section 36-6-406, which are not applicable here, are dispositive). The trial court's determination of where the child's best interest lies is a factual question, which we presume correct unless the evidence preponderates otherwise. ***Solima v. Solima***, No. M2014-01452-COA-R3-CV, 2015 WL 4594134, at *4 (Tenn. Ct. App. July 30, 2015) (first citing ***In re T.C.D.***, 261 S.W.3d 734, 742 (Tenn. Ct. App. 2007); and then citing ***Armbrister***, 414 S.W.3d at 693); *see also* Tenn. R. App. P. 13(d).

The trial court's order reflects that it considered each of the factors listed in section 36-6-106(a). Therein, the trial court ruled that five factors favored Wife,[12] three factors

[11] This statute has been amended to include a sixteenth factor. We rely on the version of the statute in effect at the time Wife filed her complaint for divorce.

[12] These included factor (1) regarding the strength and nature of the relationship between the parent and the child, factor (2) regarding the past and potential performance of responsibilities, factor (5) regarding which parent was the primary caregiver, factor (8) regarding the moral, physical, and mental fitness of the parent, and factor (10) regarding continuity.

favored Husband,[13] four factors were neutral,[14] and three factors were not applicable.[15] Wife disputes the trial court's consideration of multiple factors and its ultimate decision to award the parties equal parenting time. We will therefore consider each of the disputed factors in turn.[16]

Wife first asserts that the trial court erred in finding that factor (3) was neutral. This factor allows the trial court to consider a parent's refusal to attend a court ordered parent education seminar as a lack of good faith effort. Tenn. Code Ann. § 36-6-106(a)(3). The trial court found this factor to be neutral because "[b]oth parents have attended the Court-ordered parenting seminar." The trial court indicated that Wife had submitted a notice of completion and that Husband had not submitted any paperwork but had testified to his completion. Wife argues that, because the record contains no evidence that Husband completed the seminar, this factor should favor her. It appears, however, that the trial court simply credited Husband's testimony that he had completed the course. A trial court's determination of witness credibility is "entitled to great weight on appeal and shall not be disturbed absent clear and convincing evidence to the contrary." ***Haiser v. McClung***, No. E2021-00825-COA-R3-CV, 2022 WL 16559449, at *7 (Tenn. Ct. App. Nov. 1, 2022) (citation omitted), *perm. app. denied* (Tenn. Mar. 8, 2023). As the record contains no evidence to refute Husband's testimony, we agree that this factor is neutral.

Wife also takes issue with factor (7), concerning "[t]he emotional needs and developmental level of the child[.]" Tenn. Code Ann. § 36-6-106(a)(7). The trial court explained that the child was "happy, well-adjusted, and healthy" and had a "strong, healthy, and stable bond" with both parents and with Husband's other sons. But the trial court found this factor to favor Husband because his proposed parenting plan "proposes equal time with [the child] for himself and for [Wife], which is important for [the child's] emotional needs and developmental level, especially as [the child] begins formal schooling[.]" Wife compares the trial court's finding that this factor favors Husband because he had proposed the equal parenting schedule to the facts in ***K.B.J. v. T.J.***, 359 S.W.3d 608 (Tenn. Ct. App. 2011). There, the trial court based its decision to designate the father as the primary

[13] These included factor (7) regarding the emotional needs of the child, factor (9) regarding the child's interactions with relatives, and factor (14) regarding the parents' schedules.

[14] These included factor (3) regarding the refusal to attend a court ordered parent education seminar, factor (4) regarding the disposition of the parent to provide necessary care, factor (6) regarding the love and affection between the parent and child, and factor (12) regarding the character of others residing in the home.

[15] These included factor (11) regarding physical or emotional abuse, factor (13) regarding the preference of children twelve or older, and factor (15) involving any other factor deemed relevant. The trial court also found new factor (16), involving a parent's failure to pay court-ordered child support for three or more years, to not be applicable.

[16] Wife also argues that the trial court improperly considered the fact that Wife enrolled the child in his present school system without consulting Husband to be relevant to factor (1). On the whole, however, the trial court found factor (1), involving "the strength, nature, and stability of the child's relationship with each parent," Tenn. Code Ann. § 36-6-106(a)(1), to favor Wife. We do not disturb this finding.

residential parent on its frustration with the mother's refusal to agree to a pure joint custody arrangement. ***Id.*** at 617. This Court found it "axiomatic that a parent must be able to refuse to submit to an equal parenting arrangement the parent believes in good faith is not in the best interest of her children without fearing that her refusal will become, in whole or in part, the basis for an adverse ruling." ***Id.*** Finding this factor to favor Husband simply because he proposed equal parenting time and Wife did not goes against this directive. From our review, it appears that both parents are actively invested in supporting the child's emotional needs and developmental level. On the whole, then, we must conclude that this factor favors both parties equally and is therefore neutral.

Wife argues that the trial court similarly erred in finding factor (9) to favor Husband instead of being neutral. This factor concerns "[t]he 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 discussing this factor, the trial court found that both Husband and Wife were making significant efforts to "facilitate and support a positive relationship" between the child and his brothers. Indeed, Wife's efforts to maintain a relationship between the three boys influenced the trial court's decision to weigh factor (2) in her favor. Yet, the trial court again found that this factor favored Husband because his proposed parenting schedule "would align with [Husband's] existing schedule" for his other children. In the face of the trial court's determination that both parties were supportive of the child's relationships, this finding appears to punish Wife both for not proposing an equal parenting plan and for not having other children in her home. The record shows that both parties are actively maintaining the relationships between the child and his extended family. This factor is neutral.

Wife also asserts that the trial court's determination that factor (14), involving "[e]ach parent's employment schedule[,]" favored Husband instead of being neutral was in error. The trial court focused on Husband's position being remote because of the COVID-19 pandemic in finding that Husband had greater flexibility than Wife, "both in terms of the time that he spends with [the child] and in transporting [the child] to school and otherwise." The record does not support this finding. The parties testified to instances where Husband could not exchange the child at the agreed-upon time based on his work obligations, even though he was working remotely at the time. Conversely, Wife testified to the flexibility within her own employment to allow for working remotely when required. On these facts, the factor does not favor either party and is therefore neutral.

Accordingly, seven factors are neutral, five factors favor Wife, and no factors favor Husband. The fact that Wife has more factors weighted in her favor than Husband does not end our inquiry, however. Rather, this court has explained:

> Ascertaining a child's best interests does not call for a rote examination of each of [the relevant] factors and then a determination of whether the sum of

> the factors tips in favor of or against the parent. The relevancy and weight to be given each factor depends on the unique facts of each case. Thus, depending upon the circumstances of a particular child and a particular parent, the consideration of one factor may very well dictate the outcome of the analysis.

Solima v. Solima, No. M2014-01452-COA-R3-CV, 2015 WL 4594134, at *4 (Tenn. Ct. App. July 30, 2015) (quoting ***In re Marr***, 194 S.W.3d 490, 499 (Tenn. Ct. App. 2005)).

Moreover, section 36-6-106(a) does not limit consideration to only the enumerated factors. Rather, courts may consider "[a]ny other factors deemed relevant by the court." Tenn. Code Ann. § 36-6-106(a)(15). In this case, the contentious relationship between the parties is clearly relevant to the parties' ability to jointly parent the child. At trial, Wife argued against an equal parenting schedule because "[i]t requires a huge degree of communication" and the parties "do not communicate, so [they] do not have a good co-parenting relationship." Wife also points to the difficulties Husband and his ex-wife have faced as a result of the amount of communication necessary with an equal parenting schedule. Husband admitted at trial that "co-parenting has been a challenge" and that the parties had each had opportunities where they could have communicated better. But Husband testified that he believes that a fifty-fifty parenting schedule "does force you to co-parent."

We have previously explained the necessary amount of cooperation that is inherent in an equal parenting arrangement:

> Joint custody arrangements are appropriate in certain limited circumstances. However, while authorized by statute, joint custody arrangements are generally disfavored by the courts of this state due to the realization that such rarely serves the best interest of the child.
>
> The statute does not require that joint custody be awarded only when the parents are on friendly terms, however, in order for a joint custody arrangement to serve the best interest of the child, it requires a "harmonious and cooperative relationship between both parents." "While we have stopped short of rejecting this type of custody arrangement outright, divided or split custody should only be ordered when there is *specific, direct proof* that the child's interest will be served best by dividing custody between the parents."

Darvarmanesh v. Gharacholou, No. M2004-00262-COA-R3-CV, 2005 WL 1684050, at *8 (Tenn. Ct. App. July 19, 2005) (citations omitted) (collecting cases); *see also* ***In re Emma E.***, No. M2008-02212-COA-R3-JV, 2010 WL 565630, at *6 (Tenn. Ct. App. Feb. 17, 2010) (applying ***Darvarmanesh*** to the question of whether an equal parenting arrangement should have been awarded); ***Zabaski v. Zabaski***, No. M2001-02013-COA-R3-CV, 2002 WL 31769116 (Tenn. Ct. App. Dec. 11, 2002) (finding joint custody

appropriate where the record revealed the parents were able to communicate effectively regarding their son, they shared parenting and household duties while married, and one of the parties suggested a joint custody arrangement); ***Gray v. Gray***, 885 S.W.2d 353, 354–55 (Tenn. Ct. App. 1994) (finding that the evidence demonstrated that both parents were very active in the child's life and there was no apparent animosity between the parties). Thus, the ability of the parties to communicate effectively and cooperatively is highly relevant to the determination of a parenting schedule in line with the child's best interest.

Since ***Darvarmanesh***, section 36-1-106 has been updated to include a directive for trial courts to fashion a parenting plan that "permits both parents to enjoy the maximum participation possible in the life of the child consistent with the [listed best interest factors], 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). It is clear that the trial court here placed significant emphasis on allowing the parties to have equal time with the child. In its discussion of the statutory factors, the trial court stated that Husband's proposed equal parenting schedule would maximize the child's time with both parents, which it identified more than once as "[t]he paramount statutory concern[.]"

However, this Court has indicated that the instruction to maximize parents' participation "does not mandate that the trial court establish a parenting schedule that provides equal parenting time." ***Gooding v. Gooding***, 477 S.W.3d 774, 784 n.7 (Tenn. Ct. App. 2015). And "the General Assembly has expressly declared that in any proceeding involving custody or visitation of a minor child, the overarching standard by which the court determines and allocates the parties' parental responsibilities is the best interests of the child." ***In re Cannon H.***, No. W2015-01947-COA-R3-JV, 2016 WL 5819218, at *6 (Tenn. Ct. App. Oct. 5, 2016) (internal quotation marks omitted) (quoting Tenn. Code Ann. § 36-6-401(a)); *see also* ***Luke v. Luke***, 651 S.W.2d 219, 221 (Tenn. 1983) (stating that for courts adjudicating child custody disputes, "the welfare of the child has always been the paramount consideration"). Indeed,

> despite the additional language added to section 36-6-106(a), another section of our child custody and visitation statutory scheme continues to provide that "neither a preference nor a presumption for or against joint legal custody, joint physical custody or sole custody is established, but the court shall have the widest discretion to order a custody arrangement that is in the best interest of the child."

Rajendran v. Rajendran, No. M2019-00265-COA-R3-CV, 2020 WL 5551715, at *9 (Tenn. Ct. App. Sept. 16, 2020) (quoting Tenn. Code Ann. § 36-6-101(a)(2)(A)(i)). So the trial court, with its stated emphasis on awarding the parties the maximum participation possible, erred by applying an incorrect legal standard. *See* ***Armbrister***, 414 S.W.3d at 693. Moreover, our foregoing discussion of the misclassification of some best interest factors shows that the trial court's ultimate decision to award equal parenting time was also based on an erroneous assessment of the evidence or otherwise relied on incorrect reasoning. ***Id.***

Therefore, we vacate the parenting plan created by the trial court.

In ***Rajendran***, this Court faced similar circumstances to the case presently before us. There, the trial court had fashioned an equal parenting plan, despite the animosity and lack of trust between the parents. ***Rajendran***, 2020 WL 5551715, at *9. The parties had also struggled to be flexible and cooperative while co-parenting. ***Id.*** at *10. After reconsideration on appeal, the majority of the best interest factors favored the mother, only slightly fewer were neutral, and no factors favored the father. ***Id.*** at *7. Considering these facts and the distance between the parties' homes, we reversed the trial court's equal parenting plan, and remanded for the entry of a parenting plan naming the mother as primary residential parent and awarding the father "liberal, though not equal, visitation." ***Id.*** at *11.

Here, however, the facts are not as clear that an equal parenting schedule would not be in the child's best interest. While the trial court in ***Rajendran*** had made multiple oral findings regarding the strength of the animosity between the parents, the relationship between the parties before us now tends more toward uncooperative than outright hostile and untrusting. And the record does not show that distance between the parties' homes is an issue. Thus, while we remand for the trial court to form a parenting plan in the child's best interest based on the modification of the factors above, we leave the specifics of the plan to the trial court's discretion. *See* ***Armbrister***, 414 S.W.3d at 693 (finding that establishing the details of a parenting plan is best left to the trial court). The current parenting plan will remain in effect until the trial court enters a new temporary or permanent parenting plan.[17]

Wife also raises concerns regarding several other aspects of the trial court's parenting plan. She requests reconsideration of (1) the determination that use of physical discipline should be up to the discretion of each parent, (2) the non-inclusion of the extended parental bill of rights, (3) the requirement that she pay the child's entire tuition for January through May 2022, and (4) the distribution of summer camp costs. For his part, Husband argues that the trial court erred in allowing the child to remain in his same private school system and requiring the parties to equally split the cost of tuition. Each of these decisions are fundamentally tied to the trial court's determination of the child's best interest and its formation of an appropriate parenting plan. The allocation of parenting time established on remand will determine whether the trial court's original determinations on these issues are in the child's best interest. Accordingly, we vacate the trial court's parenting plan in its entirety and direct the trial court to revisit these issues on remand. *See* ***Rajendran***, 2020 WL 5551715, at *12 (vacating the trial court's allocation of decision-making authority for reconsideration on remand after altering parenting schedule).

[17] "It is entirely permissible for the trial court on remand to allow the parties to attempt to reach an agreement regarding custody of [the child] consistent with this [O]pinion." ***Darvarmanesh***, 2005 WL 1684050, at *8 n.4 (citing ***Cummings v. Cummings***, No. M2003-00086-COA-R3-CV, 2004 WL 2346000, at*10 (Tenn. Ct. App. Oct. 15, 2004)). If the parties are unable to reach an agreement, the trial court shall implement a parenting plan consistent with this Opinion.

Along with the issues regarding the custody and care of the child, Wife asks us to review the trial court's calculation of Husband's child support obligation. Because the child support worksheet relies on the number of days each parent has custody of the child, this determination will depend on the trial court's formation of a parenting plan consistent with the child's best interest. *See* ***K.B.J.***, 359 S.W.3d at 618 (remanding the issue of child support because the custody arrangement was altered on appeal). So the trial court's determination of Husband's child support obligation is vacated and remanded to the trial court for calculation consistent with the new parenting plan.

We note, as Wife argues, that the trial court erred slightly in calculating Wife's gross monthly income.[18] However, we are also aware that "[e]vents and lives have not stood still while this custody dispute has been in the courts." ***Wall v. Wall***, No. W2010-01069-COA-R3-CV, 2011 WL 2732269, at *26 (Tenn. Ct. App. July 14, 2011) (quoting ***Gorski v. Ragains***, No. 01A01-9710-GS-00597, 1999 WL 511451, at *4 (Tenn. Ct. App. July 21, 1999)). Thus,

> when a trial court is directed to reconsider an issue on remand that involves the circumstances of children and their parents, "the trial court should endeavor to ascertain and give effect to the parties' actual circumstances, which will necessarily change over the course of time, e.g., people remarry, have more children, insurance premiums rise and fall, and child care needs change." Accordingly, the trial court may, in its discretion, consider such additional evidence to [e]nsure that any custody order is based on "the parties' actual circumstances."

Kathryne B.F. v. Michael B., No. W2013-01757-COA-R3-CV, 2014 WL 992110, at *7 (Tenn. Ct. App. Mar. 13, 2014) (internal citations omitted) (quoting ***In re C.W.***, 420 S.W.3d 13, 22 (Tenn. Ct. App. 2013)); *see also* ***In re Carter K.***, No. M2017-01507-COA-R3-JV, 2018 WL 896060, at *6 (Tenn. Ct. App. Feb. 14, 2018) ("In light of the passage of time and events taking place in the lives at stake, the juvenile court may, in its discretion, consider additional evidence to ensure that any custody order is based on the parties' current actual circumstances."); ***In re Noah J.***, No. W2014-01778-COA-R3-JV, 2015 WL 1332665, at *6 (Tenn. Ct. App. Mar. 23, 2015) ("This opinion should not be construed as preventing the parties from putting on additional evidence regarding the child custody issue on remand."). Upon remand, the trial court may, in its discretion, hear and consider additional evidence regarding the best interest of the child, the pertinent statutory factors, and the parties' current financial circumstances.

C.

[18] See section A, *supra*, for our discussion of the proper calculations.

Next, Wife asserts that the trial court erred by not finding Husband in criminal contempt of its previous orders. While acknowledging that Husband did not follow the requirements set out in the Travel Consent Order from October 2020, the trial court found that "the standard for criminal contempt requires more" than civil contempt in terms of what sort of conduct constitutes willfulness. Determining that Wife's proof at trial did not establish this higher standard, the trial court denied the petition for criminal contempt.

"Our Supreme Court has held that the double jeopardy protections provided by the Fifth Amendment to the United States Constitution and Article I, Section 10 of the Tennessee Constitution apply to defendants in criminal contempt proceedings." ***Marlow v. Marlow***, 563 S.W.3d 876, 882 (Tenn. Ct. App. 2018) (citing ***Ahern v. Ahern***, 15 S.W.3d 73, 80 (Tenn. 2000)); *see also* ***Overnite Transp. Co. v. Teamsters Local Union No. 480***, 172 S.W.3d 507, 510 (Tenn. 2005) ("Criminal contempt cases are subject to the double jeopardy provisions in the federal and state constitutions. Thus, an appeal from an acquittal of criminal contempt is barred." (internal citations omitted)). Accordingly, Wife is barred from appealing the trial court's denial of her petition for criminal contempt. Wife's request for attorney's fees related to the contempt petition is similarly without merit.

D.

Finally, Wife argues that she is entitled to her attorney's fees in relation to this appeal. This Court is vested with discretionary authority to award fees and costs to the prevailing party in proper cases, including proceedings to "enforce, alter, change, or modify any decree of alimony, child support, or provision of a permanent parenting plan order, or in any suit or action concerning the adjudication of the custody or change of custody of any children[.]" Tenn. Code Ann. § 36-5-103(c). "In determining whether an award for attorney's fees is warranted, we should consider, among other factors, the ability of the requesting party to pay his or her own attorney's fees, the requesting party's success on appeal, and whether the requesting party has been acting in good faith." ***Shofner v. Shofner***, 181 S.W.3d 703, 719 (Tenn. Ct. App. 2004) (citation omitted). However, "where both parties are partially successful on appeal, this Court has held that no attorney fees should be awarded in respect to the appeal." ***Grande v. Grande***, No. E2022-00981-COA-R3-CV, 2023 WL 5311997, at *6 (Tenn. Ct. App. Aug. 18, 2023) (quoting ***Young v. Young***, 971 S.W.2d 386, 393 (Tenn. Ct. App. 1997)). Here, Wife and Husband have both been partially successful on appeal. Accordingly, we exercise our discretion to deny Wife's request that Husband be ordered to pay her appellate attorney's fees.

V. CONCLUSION

The judgment of the Shelby County Chancery Court is affirmed in part and vacated in part and this matter is remanded to the trial court for all further proceedings necessary and consistent with this Opinion. Costs of this appeal are taxed to the parties equally, for which execution may issue if necessary.

S/ J. Steven Stafford
J. STEVEN STAFFORD, JUDGE