IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 07, 2015 Session

CATHERINE MARIE SCHMALZER DICK v. DOUGLAS CHARLES DICK

Appeal from the Chancery Court for Williamson County
No. 39884 Robbie T. Beal, Judge

No. M2013-02461-COA-R3-CV – Filed July 14, 2015

This is an appeal from a final decree of divorce. Appellant Husband and Appellee Wife have one minor child. The trial court's final decree of divorce included a division of marital property previously agreed to in a consent order, which also included an agreement regarding the sale of the marital residence. The trial court also ordered Husband to pay Wife's COBRA benefits for three months. Concurrently with the entry of the final decree of divorce, the trial court entered a permanent parenting plan naming Wife as primary residential parent of the parties' minor child. The trial court found Husband guilty of four counts of criminal contempt for failure to comply with an interim parenting order, and ordered him to pay five thousand dollars in attorney's fees arising from wife's petition for criminal contempt. In addition, the trial court ordered Husband to pay Wife's attorney an additional twenty thousand dollars toward her attorney's fees. We affirm in part, reverse in part, vacate in part, and remand for further proceedings in accordance with this opinion.

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

KENNY ARMSTRONG, J., delivered the opinion of the court, in which J. STEVEN STAFFORD, P.J., W.S., and ARNOLD B. GOLDIN, J., joined.

Deana C. Hood and Casey Ashworth, Franklin, Tennessee, for the appellant, Douglas Charles Dick.

Russ Heldman, Franklin, Tennessee, for the appellee, Catherine Marie Schmalzer Dick.

OPINION

I. Factual History and Procedure

Appellant Douglas Charles Dick ("Husband") and Appellee Catherine Marie Schmalzer Dick ("Wife") were married in October 2001. At the time of divorce, the parties had one child age eleven. During the marriage, Husband worked as an accounting manager earning an annual gross income of approximately $81,000. At the time of trial, Husband was 48 years old and was generally in good physical health. Although she had been a stay at home mother for most of the parties' marriage, at the time of the divorce, Wife was working as a part-time manager of a café, earning approximately $9.00 per hour. Wife is also the beneficiary of a trust fund, which has a value in excess of $1,000,000. In 2012, Wife had income from the trust fund of approximately $110,000, which consisted of interest income, dividends, and capital gains.

Prior to filing her complaint in this case, Wife filed a Petition for an Order of Protection concerning an incident that occurred on May 15, 2011. Wife alleged in her petition that Husband choked her and threw her out the back door. Husband denied that he "choked" Wife, but did admit that, during the argument, he put his hands on her neck and walked her to the back door. On May 16, 2011, Husband was charged with domestic assault arising from this incident.

Wife's complaint for legal separation was filed on June 20, 2011. On July 27, 2011, the parties entered an agreed order concerning the order of protection, possession of the

marital residence, temporary support, and parenting time for Husband. As is relevant to this appeal, the parties agreed that neither would drink alcohol pending further orders of the court.

On August 8, 2011, Husband filed an Answer and Counter-Complaint for Divorce. On September 26, 2011, the parties entered a second agreed order, wherein they agreed that neither party would "drink alcohol during their parenting time with the minor child." They further agreed that "neither party will drink alcohol within twelve (12) hours prior to their parenting time with the minor child."

On February 28, 2012, Wife filed a motion requesting the trial court to require Husband to sign documents allowing the marital residence to be put on the market for immediate sale. In response, Husband requested that the trial court enforce the parties' agreed order and maintain the status quo pending a final hearing. At the time, Wife and the parties' child were living in the marital residence. Wife was paying the mortgages on the home, and Husband was paying $800 per month to Wife toward household expenses. On April 10, 2012, Wife filed another motion requesting that the marital residence be put on the market for sale and that Husband be required to sign all necessary documents.

On October 31, 2012, the parties entered into another agreed order dividing the majority of the marital property. With regard to the marital residence, the agreed order stated:

> **REAL PROPERTY**: The parties own the real property located at 1096 Cedarview Lane, Franklin, Williamson County,

Tennessee 37067 as joint tenants by the entirety. Said property is currently listed with Kathy Garrett of Zeitlin Realtors for a sale price of $497,900. By December 1, 2012, Husband shall, at his sole expense, refinance all the indebtedness encumbering this property and remove Wife's name from the first and second (HELOC) mortgages.

***

Upon the closing of said refinance, Wife shall execute a quitclaim deed transferring all her right, title and interest in said property to Husband. Said quitclaim deed shall be prepared by Husband at Husband's expense. On or before December 1, 2012, Husband shall pay Wife the sum of $200,000.00 cash, lump sum, which represents her premarital, separate property inheritance interest, and an additional amount of $15,000 which represents an equitable marital interest in and to said property, for a total amount of $215,000. The property shall be removed from the market for sale for the purpose of the refinancing process. In the event of said refinance by December 1, 2012, Husband shall not be responsible for any fees or costs charged by Kathy Garrett or Zeitlin Realtors, under the current listing agreement. Upon refinance, Husband shall be solely responsible for paying any and all new mortgage indebtedness encumbering said real property. In the event of said refinance by December 1, 2012, Wife and the minor child shall vacate the residence and property by December 15, 2012. In the event Husband is unable to refinance by December 1, 2012, the marital residence shall be placed back on the market for sale with, Kathy Garrett of Zeitlin Realtors, at a price suggested by the realtor, and listed in accordance with the Order of September 1, 2012.

***

In the event the property must be sold, and after payment of the mortgage and HELOC indebtedness, realtor's fees and necessary closing costs, Wife shall receive the first $215,000 and Husband shall receive the next $52,000. Thereafter, Husband will receive any remaining net proceeds from sale as part of a division of marital property, which shall be charged to Husband as marital

> property at a final hearing in this cause. Pending (1) Husband's payment to Wife of $215,000 and the refinance and removing of her name as required herein or (2) the closing of the sale of the real property, whichever occurs first, Husband shall continue to pay Wife the sum of $800.00 per month as reimbursement to maintain his portion of his obligation concerning the mortgage indebtedness, according to the Order of September 11, 2012.

On December 19, 2012, Wife filed an emergency application for an immediate order requiring Husband to respond to an offer that had been made on the marital residence. The offer was $10,000 lower than the asking price, and required the parties to pay $8,500 in closing costs. Husband's attorney, Deana Hood, was recovering from a medical procedure and was unavailable to appear in court for the hearing on Wife's emergency application. Husband was given the choice by the trial court to accept the trial court's ruling allowing the sale of the residence, or Husband could accept representation by Ms. Hood's husband, a licensed attorney. Husband chose to accept representation from Ms. Hood's husband. The trial court ultimately ruled in favor of Wife, and, on December 20, 2012, ordered Husband to sign, by noon that day, the written offer to purchase the marital residence.

Although the trial court acknowledged that alimony was not appropriate in this case, in the final decree of divorce, the trial court nonetheless ordered Husband to pay Wife's attorney's fees in the amount of $25,000. Five thousand dollars was awarded for the criminal contempt petition filed by Wife, and the remaining twenty thousand dollars was awarded due to the acrimonious nature of the divorce and in consideration of the "court file dealing with the sale of the marital residence." Additionally, the trial court ordered Husband to pay

Wife's COBRA benefits for three months.

Concurrently with the final decree of divorce, the trial court entered a permanent parenting plan awarding Wife primary residential parent status. Husband was granted 120 days of parenting time, and Wife received 245 days. For purposes of child support, the trial court determined that Husband's gross income was $6,827.11 per month. The court found that "Mother has the ability to earn, both with employment as well as proceeds from her investments, $6,827.11 per month. Both parties' incomes should be equal at that amount for child support purposes in the parenting plan, based upon the days and income provided." Although the parenting plan required Wife to consult with Husband, it granted Wife final decision making authority with regard to the child's education, non-emergency healthcare, and extra-curricular activities. Additionally, Husband was ordered to take the parties' child to her extra-curricular activities during his parenting time. The parenting plan included a paramour clause prohibiting "either party from having any overnight guests of the opposite sex to whom they are not related while the minor child is present." The final decree of divorce also found Husband in criminal contempt for violating an interim agreed order that prohibited the parties from drinking alcohol during their respective parenting time.

II. Issues

The following issues are presented for appeal by Husband:

1. Did the Trial Court abuse its discretion in ordering Husband to sign a contract for the sale of his property and to convey his property without the benefit of due process?
2. Did the Trial Court abuse its discretion by refusing to allow Husband to exercise the first option to purchase the marital residence prior to the acceptance of any listing or

offering price by a potential buyer?
3. Did the trial court err in awarding Wife COBRA benefits for three months?
4. Did the trial court err in awarding attorney's fees to Wife in the amount of $25,000?
5. Did the trial court err in calculating Wife's income for child support purposes by failing to include earned and unearned dividends in her total income?
6. Did the trial court err in failing to maximize the possible participation of both parents pursuant to TCA §36-6-106(a) in making its determination regarding parenting time?
7. Did the trial court err in granting Mother sole decision making authority with regard to the child's education, non-emergency healthcare, and extra-curricular activities and in forcing Husband to take his minor child to extracurricular activities during his parenting time?
8. Did the trial court err in ordering that neither party shall have any overnight guests of the opposite sex to whom they are not related while the minor child is present?
9. Did the Trial Court err in finding Husband in criminal contempt?

The following issues are presented for appeal by Wife:

10. Did the trial court err in awarding Wife attorney's fees in the amount of only $25,000?
11. Did the trial court err in setting the amount of the bond for stay on appeal at a combined total of only $12,500?
12. Should Wife be awarded her attorney's fees and expenses on appeal?

III. Standard of Review

Because this case was tried by the trial court, sitting without a jury, our review of the trial court's factual findings is de novo upon the record, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. *See* Tenn. R. App. P. 13(d); ***Kendrick v. Shoemake***, 90 S.W.3d 566, 570 (Tenn. 2002); ***Hass v. Knighton***, 676 S.W.2d 554, 555 (Tenn. 1984). We review the trial court's resolution of questions of law de novo, with no presumption of correctness. ***Kendrick***, 90 S.W.3d at 569.

IV. Analysis

A. Sale of the Marital Residence

Concerning the sale of the marital residence, the final judgment of divorce states, in relevant part, that:

> The former marital residence . . . has been sold, with Wife receiving $200,000 from said sale as her separate property and $15,000 from said sale as her marital property, and with Husband receiving $52,000 from said sale as his separate property and $13,900.48 from said sale as his marital property; and:
>
> ***
>
> Husband has gone through significant steps to get the marital residence refinanced but there is no basis why Wife would have had to abide or wait for conditions for refinance to be satisfied; Wife worked within her legal rights in previously requesting the Court to sell the martial residence and there is no reason for the Court to second-guess or step back in and attempt to remedy those particular issues in equity; the Court, through the Honorable Timothy Easter, Chancellor, has already found the sale of the material residence was appropriate at a fair price; further, taking the foregoing things in context, Wife, through her actions in mandating or requiring the sale that was anticipated by the Agreed Order, did not dissipate any property and there is no reason for the Court to award Husband any additional equity from residence that he may have lost through Wife asserting her rights; and therefore all of Husband's claims concerning this issue are denied.

Husband raises two concerns regarding the sale of the marital residence. First, Husband questions whether the trial court abused its discretion in ordering him to sign a contract for the sale of the property and ordering him to convey his interest in the property without the benefit of due process. Husband also questions whether the trial court abused its

discretion by refusing to allow him to exercise the first option to purchase the marital residence prior to the acceptance of the buyer's offer.

1. Due Process

We will address each of Husband's arguments in turn. In arguing that the trial court abused its discretion and interfered with Husband's constitutional rights by forcing him to convey his property without ensuring a fair market price and without due process, Husband contends that the trial court did not comply with Tennessee Code Annotated Section 36-4-121(a)(3), which empowers a trial court to "effectuate its decree by divesting and reinvesting title to such property and . . . to order a sale of such property . . . ." ***Id***. The statute further states that "the court, in its discretion, may impose any additional conditions or procedures upon the sale of property in divorce cases as are reasonably designed to ensure that such property is sold for its fair market value." Tenn. Code Ann. §36-4-121(a)(3)(C). Husband also argues that during the December 20, 2012 hearing, he was prohibited from being represented by his attorney of choice because his attorney of record was unavailable due to a medical condition.

We note that our record contains no transcripts or Rule 24 statements of the evidence for the hearings that took place on August 21, 2012, December 20, 2012, January 10, 2013, or January 15, 2013. These hearings involved, inter alia, issues regarding the sale of the marital residence. Accordingly, in the absence of any record of the relevant proceedings, this Court cannot make a meaningful review of this issue. This Court's review is limited to the

appellate record, and it is incumbent upon the appellant to provide a record that is adequate. ***Chiozza v. Chiozza***, 315 S.W.3d 482, 489 (Tenn. Ct. App. 2009)(internal citations omitted). In the absence of either a Rule 24 statement of the evidence filed, or a transcript of the proceedings, "this Court must presume that every fact admissible under the pleadings was found or should have been found in the appellee's favor." ***McDonald v. Onoh***, 772 S.W.2d 913, 914 (Tenn. Ct. App. 1989). The failure of the appellant to ensure that an adequate transcript or record on appeal is filed in the appellate court constitutes an effective waiver of the appellant's right to appeal. *See, e.g.,* ***In re Estate of Tipps***, 907 S.W.2d 400, 402 (Tenn.1995). ***Chiozza v. Chiozza***, 315 S.W.3d 482, 492 (Tenn. Ct. App. 2009).

Upon our review of the documents that *are* contained in the record, the only document from which we can adduce the trial court's reasoning regarding the sale of the marital residence is the trial court's January 18, 2013 order on Husband's Rule 60 motion. In this order, the trial court stated in relevant part:

> After having listened to the testimony of Ms. Garrett [the realtor], after having listened to [Husband's] statement, what he thinks the property is worth, and after receiving [Wife's] testimony what she believes the property is worth, and considering all of the evidence that is in the record, I am hereby making a finding that the amount of this contract that we have been calling the Houston offer of $487,500 is a fair market value for the marital property of these parties. . . .
> The amount, even considering the closing cost issue . . .that [the parties] are going to have to pay, even considering the net amount they will receive after taking on the closing cost obligation, is a fair market value for this piece of property. . .

As evidenced by this order, the trial court specifically determined that the sale price represented the fair market value of the property, even considering the closing costs paid by the parties. Without a transcript of the hearing, we, of course, do not know the particulars of Ms. Garrett's testimony, nor what was included in "Husband's statement." In short, there is nothing for us to review. Additionally, the agreed order entered on October 31, 2012 specifically stated that "[i]n the event Husband is unable to refinance by December 1, 2012, the marital residence shall be placed back on the market for sale with, Kathy Garrett of Zeitlin Realtors, at a price suggested by the realtor, and listed in accordance with the Order of September 1, 2012." For these reasons, we affirm the trial court's ruling on this issue.

2. <u>Right of First Refusal</u>

Husband also questions whether the trial court abused its discretion by refusing to allow him to exercise the first option to purchase the marital residence prior to the acceptance of the offering price by the buyer. The agreed order entered October 31, 2012 allows Husband to "exercise the first option to purchase the marital residence prior to the acceptance of any listing or offering price by a potential buyer." On December 31, 2012, shortly after Husband was ordered to sign the contract of sale on the marital residence, counsel for Husband filed a Rule 60 motion to set aside the September 4, 2012 order. The only complaint made in Husband's Rule 60 motion is that the trial court's order of September 4, 2012 granted the mediator in the case the power to make the final decision as to whether an offer should be accepted or countered. Husband's Rule 60 motion never mentions being

denied the right to exercise his option to purchase the residence. As with the due process argument, there are no Rule 24 statements of evidence or transcripts regarding the hearings held on the marital residence. Therefore, we are unable to make a meaningful review. Accordingly, we affirm the trial court's ruling regarding the sale of the marital residence.

B. COBRA Benefits

"The role of an appellate court in reviewing an award of spousal support is to determine whether the trial court applied the correct legal standard and reached a decision that is not clearly unreasonable." ***Broadbent v. Broadbent***, 211 S.W.3d 216, 220 (Tenn. 2006). Therefore, Appellate courts will not second-guess a trial court's decision unless there is an abuse of discretion. ***Robertson v. Robertson***, 76 S.W.3d 337, 343 (Tenn. 2002). "An abuse of discretion occurs when the trial court causes an injustice by applying 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) (internal citations omitted).

In its final judgment of divorce, the trial court found that "alimony was not specifically requested other than attorney's fees, which was appropriate. Husband has a significant ability to earn and Mother has significant assets that are her separate property. Therefore, alimony would not have been properly requested in this case and has not been requested." Notwithstanding this finding, the trial court found that "pursuant to [TCA 36-5-121 (k)], and for a period of an additional three (3) consecutive months, Husband shall pay

costs of Wife's monthly health and dental insurance premium through COBRA."

Tennessee Code Section 36-5-121 outlines the different types of alimony and what factors a court should use in determining the type and duration of any alimony it awards. Tennessee Code Section 36-5-121(k) states that "the court may direct a party to pay the premiums for insurance insuring the health care costs of the other party, in whole or in part, for such duration as the court deems appropriate."

An order requiring one party to pay the health insurance premiums of the other is regarded as an award of alimony and is subject to the provisions contained in section 36-5-121(a). ***O'Daniel v. O'Daniel***, 419 S.W.3d 280, 289 (Tenn. Ct. App. 2013), appeal denied (Tenn. Nov. 13, 2013). "Because the award of health insurance premiums is an award of alimony, the award must be considered under the overall penumbra of need and ability to pay." ***Guiliano v. Guiliano***, No. W2007-02752-COA-R3-CV, 2008 WL 4614107, at *5 (Tenn. Ct. App. Oct. 15, 2008). In this case, the trial court determined that this is not an appropriate case for alimony because "Mother has significant assets that are her separate property." It is undisputed that Wife has over $1 million dollars in separate assets, and has the ability to pay her own insurance premiums. Upon consideration of the entire record in this case, including Wife's need and Husband's ability to pay, we see no reasonable basis for Husband to pay Wife's COBRA premiums. In making this award, the trial court abused its discretion. Accordingly, the portion of the trial court's ruling requiring Husband to pay Wife's COBRA benefits for three months is reversed.

C. Attorney's fees

With regard to attorney's fees, the trial court made the following findings:

> Having utilized and labeled Husband with the fault of this divorce which was acrimonious, and considering the Court file dealing with the sale of the marital residence, Wife is hereby awarded a judgment for her attorney's fees against Husband in the amount of twenty thousand dollars ($20,000), which is reasonable; and Husband shall pay directly to Wife's attorney, Russ Heldman, twenty thousand dollars ($20,000) within ninety (90) days of August 7, 2013.

Both Husband and Wife appeal the issue of attorney's fees. Husband argues that he should not have been ordered to pay Wife's attorney's fees in the amount of $25,000 ($5,000 of which were awarded for the criminal contempt charges). Wife, on the other hand, argues that the trial court should have awarded her attorney's fees in excess of $25,000.

It 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). The amount and type of alimony awarded is within the sound discretion of the trial court. Therefore, appellate courts will not alter such awards absent an abuse of discretion. ***Riggs v. Riggs***, 250 S.W.3d 453, 456-57 (Tenn. Ct. App. 2007) (internal citations omitted).

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) which include:

> (i) In determining whether the granting of an order for payment of support and maintenance to a party is appropriate, and in determining the nature, amount, length of term, and manner of payment, the court shall consider all relevant factors, including:
> (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, as defined in § 36-4-121;
> (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 (West). However, need and the ability to pay are the critical

factors in setting the amount of an alimony award. ***Koja v. Koja***, 42 S.W.3d 94, 100 (Tenn. Ct. App. 2000) (internal citations omitted).

Wife argues that Husband should be charged with more of her overall attorney's fees because Wife alleges that Husband was overly litigious in regard to the sale of the marital residence. Wife relies on the case ***Gilliam v. Gilliam***, 776 S.W.2d 81 (Tenn. Ct. App. 1988) to support her position. However, we conclude that the facts in ***Gilliam*** are distinguishable from the case at bar. In the ***Gilliam*** case, the court found that Husband filed false responses, made false allegations, attempted to hide assets, and demonstrated a complete unwillingness to cooperate. ***Gilliam***, 776 S.W.2d at 86. Here, Husband did not exhibit such egregious behavior and the trial court made no such findings. Perhaps the most important distinction between ***Gilliam*** and this case, is that in ***Gilliam***, requiring Wife to use marital assets to pay her attorney fees would have had the effect of totally extinguishing the liquid assets she received. ***Id***. at 87.

It is well settled that a spouse with adequate property and income is not entitled to an award of alimony to 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, or the spouse would be required to deplete his or her resources in order to pay them. *See* ***Houghland v. Houghland***, 844 S.W. 2d 619, 623 (Tenn. Ct. App. 1992)("Where the court awards wife alimony in solido adequate for her needs and attorney's fees, however, it may be improper for the trial court to make an

additional award of alimony *in solido* for payment of the wife's attorney's fees."); ***Harwell v. Harwell***, 612 S.W. 2d 182, 185 (Tenn. Ct. App. 1980)("Where the wife has demonstrated she is financially unable to procure counsel, and where the husband has the ability to pay, the court may properly order the husband to pay the wife's attorney fees."); ***Koja v. Koja***, 42 S.W.3d 94, 100 (Tenn. Ct. App. 2000)("[A]lthough Mrs. Koja received a substantial portion of the marital assets and an ample award of alimony in futuro, she continues to have some need of assistance in paying her attorney's fees to avoid a depletion of the assets that the trial court awarded for her future support.).

Although the trial court noted that approximately one of the three trial court volumes generated in this case related to the status and sale of the marital residence, the trial court made no other findings. In awarding attorney's fees, the trial court was silent as to Wife's need and Husband's ability to pay. Wife argues that the award should be affirmed because Husband adopted a pugnacious posture and did not seek to minimize conflict. However, in making this argument, Wife does not cite to any instance in which she sought to minimize conflict between the parties. As proof of Husband's "pugnacious posture," Wife argues that this court should consider the hearing before Judge Timothy Easter which resulted in the parties relisting the marital residence for sale.

While Rule 24(a) of the Tenn. R.App. P. does place the primary burden on the appellant to prepare a proper record on appeal, the appellee shares some of the responsibility to make sure the record is complete. *See* ***McDonald v. Onoh***, 772 S.W.2d 913, 914

(Tenn.Ct.App.1989), *cert. denied,* 493 U.S. 859, 110 S.Ct. 168, 107 L.Ed.2d 125 (1989) ("The Tennessee Rules of Appellate Procedure place the responsibility for the preparation of the transcript or a statement of evidence squarely on the shoulders of the parties."). ***Svacha v. Waldens Creek Saddle Club***, 60 S.W.3d 851, 855 (Tenn. Ct. App. 2001). However, as previously discussed in this opinion, the transcript is not in the record and therefore cannot be considered.

In this case, the final judgment of divorce clearly states that "alimony was not specifically requested other than attorney's fees, which was appropriate. Husband has a significant ability to earn and Mother has significant assets that are her separate property. Therefore, alimony would not have been properly requested in this case and has not been requested."

In ***Fox v. Fox***, 657 S.W.2d 747, 749 (Tenn. 1983), our Supreme Court stated:

> The right to an allowance of legal expenses is not absolute. It is conditioned upon a lack of resources to prosecute or defend a suit in good faith. This rule is to enable the wife, when destitute of means of her own, to obtain justice and to prevent its denial ... If a spouse does not have separate property of her own which is adequate to defray the expenses of suit, certainly she should not be denied access to the courts because she is unable to procure counsel.

Fox, 657 S.W.2d at 749. It is undisputed that in the case at bar, Wife has over $1,000,000 in separate assets. As such, she has ample resources with which to pay attorney's fees. Therefore, we reverse the ruling of the trial court awarding Wife attorney's fees.

On appeal, Wife has also requested that this Court award her attorney fees in

defending this appeal. An award of appellate attorney fees is a matter that is within this Court's sound discretion. ***Archer v. Archer***, 907 S.W.2d 412, 419 (Tenn. Ct. App. 1995). In considering a request for attorney fees on appeal, we consider the ability of the party seeking the fee award to pay such fees, his or her success on appeal, whether the appeal was taken in good faith, and any other equitable factors relevant in a given case. ***Darvarmanesh v. Gharacholou***, No. M2004–00262–COA–R3–CV, 2005 WL 1684050 at *16 (Tenn. Ct. App. July 19, 2005). Considering all of the relevant factors, we respectfully decline to exercise our discretion to award Wife her attorney's fees in this appeal.

D. Calculation of Child Support

With regard to child support, the final judgment of divorce states, "Mother has the ability to earn, both with employment as well as proceeds from her investment, $6,827.11 per month. Both parties' incomes should be equal at that amount for child support purposes in the Parenting Plan, based upon the days and income provided." Trial courts have discretion to determine the amount of child support within the confines of the child support guidelines promulgated by the Tennessee Department of Human Services. ***Hommerding v. Hommerding***, 2009 WL 1684681, at *3 (Tenn. Ct. App. June 15, 2009); ***Hanselman v. Hanselman***, No. M1998-00919-COA-R3CV, 2001 WL 252792, at *2 (Tenn. Ct. App. Mar.15, 2001); *see* Tenn. Code Ann. § 36–5–101(e)(2) (courts shall apply child support guidelines as rebuttable presumption when setting child support). When an appellate court reviews a trial court's child support award, we must consider "(1) whether the decision has a

sufficient evidentiary foundation, (2) whether the court correctly identified and properly applied the appropriate legal principles, and (3) whether the decision is within the range of acceptable alternatives." ***State ex rel. Vaughn v. Kaatrude***, 21 S.W.3d 244, 248 (Tenn. Ct. App. 2000). We will not substitute our judgment for that of the trial court simply because we might have selected another alternative, but we will set aside a discretionary decision if it is not supported by the evidence or if it is contrary to the law. ***Id.***

Here, Husband argues that the trial court erred in calculating Wife's income for purposes of determining child support. Specifically, Husband argues that the trial court failed to include both "earned and unearned" dividends in her total income. Husband is a W-2 employee and, as such, his income is easily determined. Wife works part-time earning $9.00 per hour. Additionally, Wife earns interest and dividends from her investments. In 2012, Wife's income from all sources was $110,140. Wife argues that her income in 2012 was much higher than normal because she sold stocks in order to cover her litigation expenses. Wife further argues that it would not be an abuse of discretion for the trial court to exclude her 2012 income because it was an abnormal year. We disagree.

The Tennessee Child Support Guidelines define gross income as including:

> all income from any source (before deductions for taxes and other deductions such as credits for other qualified children), whether earned or unearned, and includes, but is not limited to . . .
>
> ***
>
> (ix) interest income;
> (x) dividend income;
> (xi) trust income;

(xii) annuities;
(xiii) Net capital gains

Tenn. Comp. R. & Regs. 1240-02-04-.04.

The Tennessee Supreme Court has held that "[t]he Child Support Guidelines do not exempt isolated capital gains from inclusion as gross income. Indeed, we have observed, generally, capital gains are included in the definition of gross income." ***Moore v. Moore***, 254 S.W.3d 357, 360 (Tenn. 2007) (internal citations omitted). Furthermore, "[i]n addition to the inclusion of capital gains as "gross income," the Child Support Guidelines also include items such as bonuses, gifts, severance pay, and prizes, all of which are typically nonrecurring income as "gross income." Tenn. Comp. R. & Regs. 1240-2-4-.03(3)(a)(1) (1994). ***Id.***

The law clearly requires the inclusion of all of Wife's 2012 income both earned and unearned in her gross income. The child support guidelines explicitly state that "variable income such as commissions, bonuses, overtime pay, dividends, etc. shall be averaged over a reasonable period of time consistent with the circumstances of the case and added to a parent's fixed salary or wages to determine gross income." Tenn. Comp. R. & Regs. 1240-02-04-.04. Unfortunately, "[t]he guidelines themselves do not prescribe how variable income should be averaged. Therefore, it is left to the courts to determine on a case-by-case basis the most appropriate way to average fluctuating income." ***Hanselman v. Hanselman***, No. M1998-00919-COA-R3CV, 2001 WL 252792, at *3-4 (Tenn. Ct. App. Mar. 15, 2001).

Here, Husband provided evidence of Wife's income for the three years prior to trial. The amounts contained in this income summary were taken directly from the parties' tax

returns for 2010, 2011, and 2012. According to Husband's exhibit, Wife's income was: $60,842 in 2010; $66,874 in 2011; and $110,140 in 2012. Using these amounts, Wife's average annual gross income for the relevant three years is $79,285.33, or $6,607.11 per month. If we average Wife's income for 2011 and 2012, Wife's average annual gross income for the relevant two years is $88,507, or $7,375.58 per month. The trial court calculated Wife's income at $6,827.11 per month. Thus, the amount calculated by the trial court is higher than Wife's three-year average income, but lower than her two-year average income. Accordingly, we conclude that there was a sufficient evidentiary foundation to support the trial court's calculation of Wife's income and that the $6,827.11 is within the range of acceptable alternatives. We, therefore, affirm the trial court's ruling with regard to Wife's income. After reviewing the remainder of the child support worksheet attached to the parenting plan, we conclude that the trial court correctly set child support based on the income of both parties pursuant to the child support guidelines.

E. Parenting Plan

Husband raises three issues regarding the parenting plan: (1) whether the trial court erred in failing to maximize the parenting time of both parties; (2) whether the trial court erred in granting Wife final decision making authority with regard to the child's education, non-emergency healthcare, and extra-curricular activities after consultation with Husband and in ordering Husband to take the parties' daughter to extracurricular activities during his parenting time; and (3) whether the trial court erred in including a paramour clause

prohibiting either party from having any overnight guests of the opposite sex to whom they are not related while the minor child is present. We will address each of Husband's arguments.

We first note that 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). Therefore, 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) (internal citations omitted). "It is not the function of appellate courts to tweak a [residential parenting schedule] in the hopes of achieving a more reasonable result than the trial court." ***Eldridge v. Eldridge***, 42 S.W.3d 82, 88 (Tenn. 2001). A trial court's decision regarding the details of a residential parenting schedule should not be reversed absent an abuse of discretion. ***Id.*** "An abuse of discretion occurs when the trial court ... appl[ies] an incorrect legal standard, reaches an illogical result, resolves the case on a clearly erroneous assessment of the evidence, or relies on reasoning that causes an injustice." ***Gonsewski v. Gonsewski***, 350 S.W.3d 99, 105 (Tenn. 2011). A trial court abuses its discretion in establishing a residential parenting schedule "only when the trial court's ruling falls outside the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence found in the record." ***Armbrister v. Armbrister***, 414 S.W.3d 685, 692-93 (Tenn. 2013) (quoting ***Eldridge***, 42 S.W.3d at 88).

1. Maximum Parenting Time

Father first argues that the trial court failed to order a parenting arrangement that allows him to enjoy the "maximum participation possible" in his child's life, consistent with the child's best interest. Tennessee Code Annotated section 36-6-106(a) states in relevant part:

> 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 in subdivisions (a)(1)-(10), the location of the residences of the parents, the child's need for stability and all other relevant factors. The court shall consider all relevant factors, including the following, where applicable:
> (1) The love, affection and emotional ties existing between the parents or caregivers and the child;
> (2) The disposition of the parents or caregivers to provide the child with food, clothing, medical care, education and other necessary care and the degree to which a parent or caregiver has been the primary caregiver;
> (3) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment; provided, that, where there is a finding, under subdivision (a)(8), of child abuse, as defined in § 39-15-401 or § 39-15-402, or child sexual abuse, as defined in § 37-1-602, by one (1) parent, and that a nonperpetrating parent or caregiver has relocated in order to flee the perpetrating parent, that the relocation shall not weigh against an award of custody;
> (4) The stability of the family unit of the parents or caregivers;
> (5) The mental and physical health of the parents or caregivers. The court may, when it deems appropriate, order an examination of a party pursuant to Rule 35 of the Tennessee Rules of Civil Procedure and, if necessary for the conduct of the proceedings, order the disclosure of confidential mental health information of a party pursuant to § 33-3-105(3). The court order required by § 33-3-105(3) shall contain a qualified protective order that, at a minimum, expressly limits the dissemination of confidential

> protected mental health information for the purpose of the litigation pending before the court and provides for the return or destruction of the confidential protected mental health information at the conclusion of the proceedings;
> (6) The home, school and community record of the child;
> (7)(A) The reasonable preference of the child, if twelve (12) years of age or older;
> (B) The court may hear the preference of a younger child on request. The preferences of older children should normally be given greater weight than those of younger children;
> (8) Evidence of physical or emotional abuse to the child, to the other parent or to any other person; provided, that, where there are allegations that one (1) parent has committed child abuse, as defined in § 39-15-401 or § 39-15-402, or child sexual abuse, as defined in § 37-1-602, against a family member, the court shall consider all evidence relevant to the physical and emotional safety of the child, and determine, by a clear preponderance of the evidence, whether such abuse has occurred. The court shall include in its decision a written finding of all evidence, and all findings of facts connected to the evidence. In addition, the court shall, where appropriate, refer any issues of abuse to the juvenile court for further proceedings;
> (9) The character and behavior of any other person who resides in or frequents the home of a parent or caregiver and the person's interactions with the child; and
> (10) 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. . . .

Tenn. Code Ann. § 36-6-106. Father argues that the trial court should have equally divided the parenting time. Instead, the parenting plan awards Husband 120 days of parenting time and Wife 245 days of parenting time. In determining the parenting schedule, the trial court

discusses each of the applicable statutory factors of section 36-6-106.[1] Of the ten factors addressed by the trial court, most of the factors did not weigh in favor of one party over another. For example, the trial court found that both parties "have significant emotional ties to [the child]. That criteria goes to the benefit of both parties." Additionally, the trial court found that although the mental health of the parties was at issue, there is "no significant proof that either parent has mental health issues." The trial court further found that "both parties failed to promote a relationship [between] the minor child and the other parent."

The trial court found two factors weighed in favor of Wife. Specifically, the trial court found that Husband "has caused an increase in the amount of stress in the household through some of his actions, most notably the domestic violence incident. This factor weighs slightly in favor of the Wife . . . ." The trial court also found that:

> Father has been an active father and is bonded significantly with the child. With that being said though, the Court believes that Mother has been the primary caregiver, she has been the one primarily responsible just as a stay at home mom would. Father has been a very good provider for the family. However, the Court weighs the fact that Mother has been the primary caregiver relatively heavily for Mother in this case.

The trial court further provided extensive findings of fact with regard to the factors contained in section 36-6-106. After a thorough review of the record, we are unable to conclude that the evidence preponderates against the trial court's findings. Therefore, we affirm the trial

[1] On July 1, 2014, the factors contained in section 36-6-106(a) were amended to comport with the factors contained in sections 36-6-108(e) and 36-4-404(b). However, as this case was heard in 2013, our analysis is based on the statute in effect at that time.

court's decision naming Wife as primary residential parent of the parties' child. We also affirm the trial court's decision not to include a week on/week off schedule in the parenting plan and to award Husband 120 days of parenting time.

The parenting plan grants Husband 120 days and gives Wife 245 days. However, our review of the parenting plan reveals that the schedule does not actually provide Father with 120 days. The overall schedule grants Father three overnights every other weekend, and the parties alternate most holidays and school vacations. We note that the trial court did not include the entire winter break in its shared parenting schedule, nor did the court allocate any traditional three day weekend holidays (*i.e.* MLK Day, President's Day, Good Friday, Memorial Day, and Labor Day) in the holiday schedule. When we count the actual days set out in the parenting plan, Husband only receives approximately 104 days of parenting time, as opposed to 120 days. While the trial court's decision rejecting Husband's proposed week-on/week-off schedule is supported by the record, there is no justification in the record for denying Husband the 120 days of parenting time awarded to him by the trial court. Given the discrepancy in the number of days awarded to Husband and the number of days he actually received, we vacate the schedule outlined in the parenting plan and remand the matter with instructions to the trial court to increase Husband's parenting time so that he receives the 120 days awarded to him.

2. Decision Making Authority

Husband next argues that the trial court erred in granting Wife final decision making

authority with regard to the child's education, non-emergency healthcare, and extra-curricular activities and in forcing Husband to take the child to her extra-curricular activities during his parenting time. The trial court made the following observations:

> With regard to major decisions . . . the court acknowledges that the parents have had a significant issue with regard to communicating one with the other about the child. It seems that they are unable to do so. I don't believe that it's appropriate that joint decisions be made with regard to some of the major decisions that relate to the child.

The trial court thoroughly discussed Wife's obligation to communicate with Husband regarding these major decisions. The trial court provided specific examples of decisions requiring Wife to communicate with Husband, i.e., what school the child should attend, and what tutoring is necessary. However, the trial court ultimately awarded Wife final decision-making authority with regard to the educational decisions of the child. Given the trial court's finding that the parents have difficulty communicating with one another concerning decisions affecting the child, we conclude that there was sufficient reason for the court to appoint one parent as the ultimate decision maker while still mandating communication and consultation between the parties.

In discussing the child's extracurricular activities, the court found that Wife has historically taken the lead in choosing the extracurricular activities for the child to date and that she should continue to do so. As a result of granting Wife final decision making authority with regard to the child's extra-curricular activities, the court also gave Wife the

responsibility of paying for those activities. Both parties were ordered to ensure the child's attendance at regular meeting and practice times during their parenting time. Of concern to both parties was the child's participation in competitive swimming. Wife argued that Husband should find a swim team for the child to practice with when Husband is out of state with the child on vacation. Husband argued that he should not have to worry about facing a contempt charge if the child misses a swim practice during his parenting time. In addressing this issue, the parenting plan entered by the trial court contains the following language:

> If the child is involved in an extra-curricular activity which has regular meeting times, regular practice times, competitions or other events related thereto, the parent who has parenting time during these meeting, practices, competitions or events, shall insure that the child attends the meetings, practices, competitions or events related to the extracurricular activity. That is obviously within reason. For example, if a parent is out of State for a vacation, the parent is not required to take the child to the meeting, practices, competitions or other events related to the extracurricular activity. This paragraph applies to the swim team in which the child is currently involved.

The trial court further urged the parties to use common sense in determining what is reasonable. Given the significant findings of fact contained in the final judgment of divorce considering the testimony of both parties, we cannot conclude that the trial court abused its discretion in either granting Wife final decision making authority after consultation with Husband, or in requiring Husband to take the child to her regularly scheduled practices and meets during his parenting time. Therefore, this portion of the parenting plan is affirmed.

3. <u>Paramour Clause</u>

Husband objects to the inclusion of a "paramour provision" in the Permanent Parenting Plan. The language included in the plan states "[n]either party shall have any overnight quests of the opposite sex to whom they are not blood related or married while the minor child is present." Although the trial court stated that it believes that the inclusion of the paramour clause was appropriate, the court made no findings of fact to support its decision.

In the case of ***Barker v. Chandler***, we reviewed the question of whether trial courts in Tennessee are *required* to include a paramour provision in a parenting plan. We held "that the trial court was not required to include the paramour provision in the permanent parenting plan." ***Barker v. Chandler***, No. W2008-02255-COA-R3-CV, 2009 WL 2986105, at *5 (Tenn. Ct. App. Sept. 18, 2009). The second time ***Barker v. Chandler*** came before this court, we held that the trial court abused its discretion by including a paramour clause in the parenting plan because there was no evidence to support the finding that the provision was in the best interests of the children or that the presence of Mother's partner had any harmful effects on the children. ***Barker v. Chandler***, No. W2010-01151-COA-R3-CV, 2010 WL 2593810, at *6 (Tenn. Ct. App. June 29, 2010).

In reviewing the record here there is very little testimony regarding the need for a paramour provision in the parenting plan. Wife was asked by her attorney whether she wanted the clause included in the parenting plan "for protection purposes of the child," and she answered in the affirmative. There was no further testimony regarding the need to

include a paramour clause in the parenting plan. In reviewing the statutory factors used to determine custody, the trial court's ruling stated that it had "no reason to question the character or behavior of any person who frequents each parent's home." As there are no findings by the trial court that this provision was either necessary, or in the best interest of the child, we reverse this portion of the trial court's ruling.

F. Criminal Contempt

In the final judgment of divorce, the trial court determined that Husband willfully and intentionally violated the Agreed Order of September 26, 2011. The only evidence before the trial court regarding the criminal contempt was Husband's deposition testimony in which he admitted to drinking during his parenting time while on vacation with his family on four separate occasions. As a result, the court found Husband guilty of four counts of willful criminal contempt for drinking during his parenting time. The trial court sentenced Husband to serve ten days in the Williamson County Jail for each of those counts, for a total of forty consecutive days. The trial court then suspended Husband's sentence in its entirety and ordered Husband to pay Wife's counsel $5,000 in attorney's fees. Following the contempt hearing, Husband's counsel moved for acquittal arguing that Wife failed to prove the matter beyond a reasonable doubt, because Husband's admission, by itself, was insufficient proof.

In the trial of a criminal contempt case, the defendant is presumed to be innocent until he is found guilty beyond a reasonable doubt. ***Nashville Corp. v. United Steelworkers of America***, 215 S.W.2d 818, 821 (Tenn. 1948). But once the defendant is found guilty and the

case is appealed, he is burdened with the presumption of guilt, and in order to obtain a reversal, he must overturn this presumption by showing that the evidence preponderates in favor of his innocence. ***Robinson v. Air Draulics Eng'g Co.***, 377 S.W.2d 908, 912 (Tenn. 1964) (internal citations omitted).

It is a fundamental concept of justice that the *corpus delicti* of a crime may not be established by a confession or an admission of the accused standing alone. ***State v. Housler***, 193 S. W.3d 476, 490 (Tenn. 2006); ***State v. Smith***, 24 S.W.3d 274, 281 (Tenn. 2000); ***Williams v. State***, 80 Tenn. 211, 213-14 (Tenn. 1883). As such, the confessions of Husband that he violated the order prohibiting drinking while exercising parenting time without corroborating evidence will not support a conviction. *See* ***Ricketts v. State***, 241 S.W.2d 604, 605 (Tenn. 1951). Husband's confession must be corroborated by evidence which, independently of the confessions, tends to establish that the crime occurred. ***Id.***

Wife argues that the trial court committed no error in finding Husband guilty of criminal contempt. Wife argues that the recent Tennessee Supreme Court opinion, ***State v. Bishop***, 431 S.W.3d 22, 58-59 (Tenn.) cert. denied, 135 S. Ct. 120, 190 L. Ed. 2d 92 (2014) supports her position. In ***Bishop***, our Supreme Court adopted a "modified trustworthiness" corroboration test:

> The modified trustworthiness standard is not a lesser standard than the traditional *corpus delicti* rule. Its focus is different. While the traditional rule required only "slight" evidence of the *corpus delicti*, the trustworthiness standard requires "substantial" independent evidence to bolster a defendant's extrajudicial confession or admission. ***Opper v. United States***,

> 348 U.S. at 93, 75 S. Ct. 158; ***Smith v. United States***, 348 U.S. at 157, 75 S. Ct. 194.
>
> ***
>
> Here is the "modified trustworthiness" corroboration test in a nutshell. When a defendant challenges the admission of his extrajudicial confession on lack- of-corroboration grounds, the trial court should begin by asking whether the charged offense is one that involves a tangible injury. If the answer is yes, then the State must provide substantial independent evidence tending to show that the defendant's statement is trustworthy, plus independent prima facie evidence that the injury actually occurred. If the answer is no, then the State must provide substantial independent evidence tending to show that the defendant's statement is trustworthy, and the evidence must link the defendant to the crime.

Bishop, 431 S.W.3d at 58-59.

The only evidence before the trial court regarding the criminal contempt of Husband was his deposition testimony in which he admitted to drinking during his parenting time while on vacation with his family on four separate occasions. Wife did not introduce into evidence any corroborating witnesses (even though they were known to her), receipts, lab results, or any other evidence whatsoever from which the trial court could find Husband guilty of criminal contempt beyond a reasonable doubt. Therefore, we reverse this portion of the trial court's order.

As part of his sentence, the trial court ordered Husband to pay an additional $5,000 in fees to Wife's attorney. Tennessee Code Annotated section 29-9-103 states that the "punishment for contempt may be by fine or by imprisonment or both." It has long been the

law that a fifty-dollar fine and ten days' imprisonment are all that a chancery court may impose for criminal contempt. ***Butler v. Butler***, No. 02A01-9409-CH-00218, 1995 WL 695123, at *2 (Tenn. Ct. App. Nov. 21, 1995) (citing ***Weidner v. Friedman***, 126 Tenn. 677, 151 S.W. 56 (Tenn. 1912). Wife cites the case of ***Clarkson v. Clarkson***, No. M2006-02239-COA-R3-CV, 2007 WL 3072772 (Tenn. Ct. App. 2007) to support her position that the trial court properly awarded attorney fees as punishment for contempt. We find Wife's reliance on ***Clarkson*** is misplaced. The ***Clarkson*** court noted that a prior decision of this Court held that "a court may award attorney's fees as a sanction for a properly made finding of contempt." ***Battleson v. Battleson***, 223 S.W.3d 278, 287 (Tenn. Ct. App. 2006). However, the specific cases cited in ***Battleson*** involved awards under Tennessee Code Annotated 29–9–105, which only governs contempts involving the performance of an act forbidden by an order. The ***Clarkson*** court found no authority for Wife's proposition that attorney's fees are generally recoverable by any party who successfully brings a contempt petition. ***Clarkson***, 2007 WL 3072772, at *8 n. 2 (Tenn. Ct. App. Oct. 22, 2007). In the case at bar, the trial court made no finding that the attorney's fee award in the contempt matter was for damages under 29-9-105. Furthermore, we have previously reversed the trial court's ruling finding Husband in contempt. For these reasons, the trial court's award of $5,000 toward Wife's attorney's fees is also reversed.

V. Conclusion

For the foregoing reasons, we affirm the trial court's decision with regard to the sale

of the marital residence. We reverse the trial court's order requiring Husband to pay Wife's COBRA benefits for three months. We reverse the trial court's order requiring Husband to pay Wife's attorney's fees in the amount of $20,000. We affirm the trial court's order calculating child support. We affirm the portion of the parenting plan granting Husband 120 days of parenting time and Wife 245 days of parenting time, and remand this issue for a fresh determination of the parenting schedule in accordance with this opinion. We affirm the trial court's order granting Wife final decision making authority after consultation with Husband. We reverse the trial court's inclusion of the paramour clause in the parenting plan. We reverse the trial court's order finding Husband guilty on four counts of criminal contempt. Also reversed is the award of $5,000 in attorney's fees to be paid by Husband to Wife's attorney for her criminal contempt petition. We respectfully deny Wife's request for attorney's fees and expenses on appeal. Costs of the appeal are assessed equally against the parties, and their sureties, for all of which execution may issue if necessary. These holdings pretermit all other issues raised on appeal.

_____

KENNY W. ARMSTRONG, JUDGE