IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs January 3, 2023

EVON KAY CREGER v. DANIEL WILLIAM CREGER

Appeal from the Chancery Court for Rutherford County
No. 19CV-68 Bonita Jo Atwood, Judge

No. M2022-00558-COA-R3-CV

In this divorce action, the trial court distributed the parties' marital assets and debts, fashioned a parenting plan naming the mother primary residential parent and providing the father with fifty-five annual days of co-parenting time, and set the father's child support obligation. The father has appealed. Discerning no reversible error, we affirm the trial court's judgment. Deeming this to be a frivolous appeal, we grant the mother's request for reasonable attorney's fees and costs incurred on appeal and remand this issue to the trial court for a determination regarding the amount.

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

THOMAS R. FRIERSON, II, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S., and ARNOLD B. GOLDIN, J., joined.

P. Edward Schell, Franklin, Tennessee, for the appellant, Daniel William Creger.

Daryl M. South and David O. Haley, Murfreesboro, Tennessee, for the appellee, Evon Kay Creger.

OPINION

I. Factual and Procedural Background

This case originated with the filing of a complaint for divorce by the plaintiff, Evon Kay Creger ("Mother"), against the defendant, Daniel William Creger ("Father"), in the Rutherford County Chancery Court ("trial court") on January 18, 2019. Mother stated that the parties had been married since August 2005. Two daughters were born during the marriage, K.C. and A.C. ("the Children"), who were ages thirteen and eleven,

respectively, at the time of the complaint's filing. Mother initially sought a divorce on the ground of irreconcilable differences.

On May 6, 2019, Mother filed an amended petition, adding the ground of inappropriate marital conduct by Father. Mother sought to be designated primary residential parent of the Children and requested entry of a temporary parenting plan. On May 8, 2019, the trial court appointed a special master to hear the "interim issues," including an appropriate temporary parenting plan.

On May 22, 2019, Mother filed a petition for an order of protection, alleging that Father had followed her in his vehicle and driven aggressively behind her when she had the Children in her car. Mother further stated that Father was very angry, had sent harassing text messages, and had a history of domestic violence. The trial court entered an *ex parte* order of protection that same day, which was later consolidated with the instant divorce proceedings by agreed order.

On June 6, 2019, Father was charged with a violation of the order of protection for driving to Mother's new home and for texting one of the parties' daughters. The trial court entered an agreed order on June 24, 2019, providing that the Children would continue in counseling with Elysse Beasley and that Father would schedule joint sessions with the Children and Ms. Beasley so that the parties could request a recommendation and status evaluation from Ms. Beasley within approximately six weeks of the order's entry.

On August 14, 2019, Father filed an answer and counter-petition, averring additional grounds for divorce and requesting that he be designated primary residential parent of the Children. On November 22, 2019, the trial court entered an agreed order providing that Father would receive regular intervals of co-parenting time with the Children on specified days and during specified two- to four-hour periods, with the visits taking place in a "public setting." The order further directed that: (1) the parties and the Children would continue their counseling sessions with Ms. Beasley; (2) the Children would each receive a psychological evaluation by Dr. Jay Woodman; and (3) neither party would discuss the case, counseling sessions, or psychological evaluations with the Children or make disparaging remarks about the other parent in the presence of the Children.

On February 18, 2020, Mother filed a motion seeking restriction of Father's co-parenting time. In support, Mother alleged that Father had violated the trial court's order by, *inter alia*, discussing with the Children the divorce proceedings and also speaking to them about Mother and her counsel in a derogatory manner. Mother asserted that she possessed a recording of Father's comments. On April 16, 2020, the trial court entered another agreed order stating that Father's visitation would be temporarily suspended and that Father and the Children would "intensify and expedite" their counseling sessions

with Dr. Woodman until Dr. Woodman could reach a conclusion that Father's co-parenting time should resume or be suspended or restricted.

On April 28, 2020, Father filed a motion seeking to bifurcate the divorce and order of protection proceedings and to set a hearing respecting the latter. Mother filed a response opposing bifurcation, postulating that the order of protection proceedings were inextricably linked to the divorce and co-parenting issues. Father's counsel was allowed to withdraw by order dated June 1, 2020, and Father's new counsel entered a notice of appearance on June 10, 2020.

On August 28, 2020, Father filed a motion seeking reduction or temporary suspension of his child support obligation. Father, who had previously been employed as the chief executive officer of a dermatology practice, claimed that since the beginning of the COVID-19 pandemic, he had been unable to obtain employment in the medical field despite having applied to more than ten positions per month in several different states. Father filed another motion on October 16, 2020, requesting (1) co-parenting time with the Children, (2) dismissal of the order of protection, (3) permission to sell unimproved real property owned by the parties, (4) reduction of his child support obligation, (5) waiver of mediation, (6) requirement that the parties file proposed parenting plans, and (7) designation of a trial date. On October 29, 2020, Father's counsel filed a motion to withdraw from his representation of Father. On November 5, 2020, the trial court entered an agreed order substituting Father's counsel.

Following a hearing conducted on November 19, 2020, the trial court entered an agreed order on December 3, 2020, stating that the parties had agreed to list their unimproved real property for sale. The court determined that the requirement of mediation should be waived and that the order of protection relating to the Children should be terminated. With respect to the order of protection applicable to Mother, however, the court determined that it would remain in full force and effect. The court also found that little or no progress had been made during counseling sessions involving Father and the Children. A new counselor, Laura Tucker-Huggins, was appointed to work with the parties and the Children toward the "concept of reunification between father and the children."

The trial court further stated that it was "adamantly and strenuously admonish[ing] each party that they are not to discuss any matter associated with this divorce with the minor children, nor disparage the other party in the presence of the children and counseling," noting that "[v]iolations of this admonishment will be taken very seriously." The court awarded Father unsupervised, daytime periods of co-parenting time with the Children during certain holidays and on Saturdays, pending further orders. The court also stated that Father could call the Children up to three times per week.

On June 2, 2021, Father filed a motion requesting that the trial court "reconsider or review the real estate transaction as ordered on November 19, 2020." According to Father, he had placed a sign on the property with his telephone number and had received offers from various interested parties. Father asserted that the realtor appointed by the court had suggested an auction of the property and that Father disagreed with this course of action. For proof, Father attached offers concerning the property to his motion as well as a transcript of his text messages with the court-appointed realtor.

The trial court conducted a hearing on July 7, 2021, regarding Father's motion and considered testimony from Father, the realtor, and another witness. The court subsequently entered an order on July 20, 2021, making the following findings:

> 1. The Order of the Court as filed December 3, 2020 is very clear and [Father] has been non-cooperative and has intentionally and deliberately disobeyed the Order of the Court.
>
> 2. The Court finds it proper to apologize to Mr. Muse and Ms. Taylor [the realty agents] due to the difficulties they have encountered as and selling agents and as a result of professional board complaints levied against them by [Father].
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> 3. The Court finds that Mr. Muse and Ms. Taylor are experts within this field and that [Father] is not a real estate expert, nor a soil scientist, but has decided upon his own to disregard the Court's orders and to run the sale upon his perceived terms.
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> 4. The Court finds that [Father] is not above the law and is appalled by the actions of [Father].

Accordingly, the trial court ordered Father to immediately remove all signs he had placed upon the property as well as the lock on the gate preventing access to the property. The court also directed that Mother would handle the sale of the property and ordered Father to refrain from interfering with the sale of the property. The court further decreed that Father was prohibited from speaking with third parties regarding purchase of the property and that he should dismiss the complaints he had filed against the realtors. On July 27, 2021, the trial court entered an agreed order substituting counsel for Father.

On December 1, 2021, Father filed motions seeking to dissolve the order of protection concerning Mother and seeking a reduction or temporary suspension of his child support obligation. Father averred that he had not been charged with a violation of the order of protection for over two years and that the existence of the order of protection had hindered his ability to procure employment. Mother opposed these motions.

On December 13, 2021, the trial court entered an agreed order stating that Father would begin enjoying co-parenting time with the Children every other weekend from Friday at 5:00 p.m. to Sunday at 5:00 p.m. Father was also awarded co-parenting time of three hours every other Thursday evening for a "date/dinner night." Father was further permitted to communicate with the Children via text, email, or telephone.

The trial court entered a subsequent order on December 17, 2021, concerning Father's pending motions. The court denied Father's request to dissolve the order of protection, noting that this issue would be addressed at trial. The court also denied Father's request to reduce or suspend his child support obligation, finding that Father had the ability to provide support. The court ordered that the parties could each collect a $50,000.00 disbursement from the funds being held by the title company from the sale of their unimproved real property and that the remaining funds being held by the title company would be deposited with the court. The matter was set for trial on March 3, 2022. Thereafter, the title company filed notice that it had deposited the remaining proceeds from the real property's sale with the court in the amount of $1,071,361.95.

On February 17, 2022, Mother filed a statement of issues, income, and expenses pursuant to 16th Judicial District Local Rule 12.02. Therein, Mother indicated that her monthly gross income was $13,333.00 from her employment and that she also received quarterly bonuses of $9,000.00 as well as $1,718.00 per month in child support. Mother claimed monthly expenses for herself and the Children in the amount of $13,003.59. As evidence, Mother attached pay stubs, income tax returns, and other documentation. Father filed his statement on March 2, 2022, the day before trial, claiming that he had no income and that he had total monthly expenses of $7,090.90.

The trial court conducted a hearing in this matter on March 3, 2022. At the outset, Mother's counsel objected to consideration of Father's statement filed pursuant to Local Rule 12.02 because it was not signed under oath and was not filed at least eight judicial days before the hearing in accordance with the rule's requirements. Mother's counsel also pointed out that Father had never filed a witness list or an exhibit list. When questioned by the court, Father's counsel admitted that he had reviewed the court's local rules before accepting the representation and that he had known about the trial date for approximately six weeks. The court determined that Father should be precluded from presenting any documentary evidence or other witnesses at trial. Accordingly, the trial proceeded, and the court heard testimony from the parties; Lieutenant David Cutshaw, Smyrna Police Department; Brad Muse, realtor; as well as Ms. Beasley and Ms. Tucker-Huggins, counselors.

Following trial, on March 9, 2022, Father filed with the trial court a statement demonstrating that his trial counsel had been the subject of disciplinary actions in other states. On March 30, 2022, the trial court entered an agreed order substituting Father's counsel.

On April 12, 2022, the trial court entered a comprehensive final judgment of divorce. The court made extensive findings concerning Father's behavior both prior to and since entry of the order of protection, including that Father had "chased" Mother and the Children down the highway using his vehicle. Furthermore, he had disobeyed the court's order by texting the Children. The court also found that Father had disobeyed the standard order issued by the court upon filing of the divorce complaint by purchasing a new vehicle and withdrawing $100,000.00 in marital funds. Moreover, he had disobeyed the court's other orders by intentionally and deliberately interfering with the sale of marital property and by failing to pay his equal share of the counseling costs. The court noted that Father had failed to consistently attend counseling sessions with the Children and had made derogatory and disparaging remarks concerning Mother's intelligence, body parts, and weight in the presence of the Children. The court concluded that Father's relationship with the Children was strained and had been for numerous years prior to the divorce proceedings due in part to his difficulty with controlling anger and his propensity to blame Mother and the Children for his behavior.

The trial court determined that both counselors who testified were credible. According to the initial counselor, Ms. Beasley, Father had told A.C. that he wanted to "watch Mother suffer" and had admitted to making inappropriate comments to the Children regarding their bodies and Mother's body. The subsequent counselor, Ms. Tucker-Higgins, testified that Father maintained a weak bond with the Children and had continued to make disparaging remarks to the Children about their bodies and Mother's body, including sexual comments. The court credited Ms. Tucker-Higgins's assessment that it would be detrimental to the Children for Father to exercise equal co-parenting time. The court further credited the testimony of Lt. David Cutshaw concerning his "numerous" encounters with Father regarding visitation after the order of protection was issued.

The trial court found Mother to be a credible witness as well, determining that Father had emotionally and physically abused Mother by throwing cans at her, shoving her, and making derogatory remarks regarding her. In contrast, the court found Father's testimony to be "problematic" and "weighed his testimony accordingly." The court awarded the parties a divorce in accordance with Tennessee Code Annotated § 36-4-129(b) (2021).

Following its consideration of the factors listed in Tennessee Code Annotated § 36-4-121(c) (2021) concerning an equitable distribution of marital assets, the trial court determined that both parties (1) possessed significant earning capacity, (2) had substantial estates at the time of the marriage, and (3) were of similar ages. The court again noted that Father had liquidated marital assets to support his lifestyle following the parties' separation. The court further found that Father had failed to pursue gainful employment while Mother had maintained her employment and income. The court thus proceeded to

divide the parties' marital assets and debts in what it determined to be an equitable fashion.

Considering the testimony at trial, the court issued a restraining order preventing Father's contact with Mother for one year. The court dismissed the previously entered order of protection pursuant to Father's request due to his claim that it interfered with his ability to obtain employment. The court then analyzed the factors enumerated in Tennessee Code Annotated § 36-6-106 to determine which parent should be designated primary residential parent and how co-parenting time should be divided. Based on the testimony of the counselors, the trial court concluded that joint decision-making responsibility would not be in the Children's best interest.

Finding that the applicable factors listed in Tennessee Code Annotated § 36-6-106 primarily weighed in Mother's favor, the trial court determined that Mother should be designated as primary residential parent and that Father would enjoy fifty-five days of co-parenting time with the Children annually, to be exercised primarily on alternating weekends. Mother was granted sole decision-making responsibility respecting the Children.

Regarding Father's income, the trial court determined that Father was voluntarily unemployed, finding that he had failed to actively pursue employment since March 2020 due to the order of protection. The court found that Father had earned $92,967.00 in 2019 before his termination and that he possessed a bachelor of science degree and the ability to earn income. The court also found that Father's stated reasons for failing to pursue gainful employment were not credible, noting that Father had withdrawn $100,000.00 from a marital retirement account in 2020 and purchased a new vehicle in his company's name while insisting that he did not have sufficient funds from which to pay child support. The court concluded that Father had relied on the use of marital assets to fund his lifestyle rather than seeking gainful employment. The court therefore set Father's income at $92,967.00 for child support purposes. As such, Father's child support obligation was set at $1,005.00 per month.

The trial court ordered Father to pay retroactive child support for seventeen months, from the date of the divorce complaint's filing to the date of the child support order's entry in June 2020, in the amount of $1,005.00 per month, for a total of $17,085.00. The court also ordered Father to pay one-half of the counseling costs in the amount of $11,046.76 as well as unpaid medical expenses and expenses related to the marital residence that had been paid by Mother.

The trial court entered a permanent parenting plan ("PPP") naming Mother primary residential parent of the Children and awarding her 310 days of co-parenting time per year. Father was awarded 55 days of co-parenting time per year, to be exercised on alternating weekends and some holidays. A child support worksheet was also entered

demonstrating that Father's support obligation was set at $1,005.00 per month. Father timely appealed.

II. Issues Presented

Father presents the following issues for this Court's review, which we have restated slightly:

1. Whether the trial court erred in its distribution of the parties' marital property.

2. Whether the trial court erred by awarding Father only fifty-five days of co-parenting time per year.

3. Whether the trial court erred by refusing to consider Father's exhibits, including his witness and exhibit list, his proposed parenting plan, his proposed division of marital assets and liabilities, and other documents.

Mother presents the following additional issue, which we have also restated slightly:

4. Whether Father's appeal is frivolous such that Mother should receive an award of damages.

III. Standard of Review

We review a non-jury case *de novo* upon the record with a presumption of correctness as to the findings of fact unless the preponderance of the evidence is otherwise. *See* Tenn. R. App. P. 13(d); *Bowden v. Ward*, 27 S.W.3d 913, 916 (Tenn. 2000). We review questions of law *de novo* with no presumption of correctness. *Bowden*, 27 S.W.3d at 916 (citing *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 924 (Tenn. 1998)); *see also In re Estate of Haskins*, 224 S.W.3d 675, 678 (Tenn. Ct. App. 2006). In addition, the trial court's determinations regarding witness credibility are entitled to great weight on appeal and shall not be disturbed absent clear and convincing evidence to the contrary. *See Morrison v. Allen*, 338 S.W.3d 417, 426 (Tenn. 2011); *Jones v. Garrett,* 92 S.W.3d 835, 838 (Tenn. 2002).

In a case involving the proper classification and distribution of assets incident to a divorce, our Supreme Court has elucidated the applicable standard of review as follows:

> This Court gives great weight to the decisions of the trial court in dividing marital assets and "we are disinclined to disturb the trial court's decision unless the distribution lacks proper evidentiary support or results

> in some error of law or misapplication of statutory requirements and procedures." *Herrera v. Herrera*, 944 S.W.2d 379, 389 (Tenn. Ct. App. 1996). As such, when dealing with the trial court's findings of fact, we review the record de novo with a presumption of correctness, and we must honor those findings unless there is evidence which preponderates to the contrary. Tenn. R. App. P. 13(d); *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993). Because trial courts are in a far better position than this Court to observe the demeanor of the witnesses, the weight, faith, and credit to be given witnesses' testimony lies in the first instance with the trial court. *Roberts v. Roberts*, 827 S.W.2d 788, 795 (Tenn. Ct. App. 1991). Consequently, where issues of credibility and weight of testimony are involved, this Court will accord considerable deference to the trial court's factual findings. *In re M.L.P.*, 228 S.W.3d 139, 143 (Tenn. Ct. App. 2007) (citing *Seals v. England/Corsair Upholstery Mfg. Co.*, 984 S.W.2d 912, 915 (Tenn. 1999)). The trial court's conclusions of law, however, are accorded no presumption of correctness. *Langschmidt v. Langschmidt*, 81 S.W.3d 741, 744-45 (Tenn. 2002).

Keyt v. Keyt, 244 S.W.3d 321, 327 (Tenn. 2007).

This Court reviews a trial court's determination of an appropriate parenting plan according to an abuse of discretion standard. *See Morelock v. Morelock*, No. E2016-00543-COA-R3-CV, 2017 WL 3575890, at *1 (Tenn. Ct. App. Aug. 18, 2017) (quoting *Kelly v. Kelly*, 445 S.W.3d 685, 692 (Tenn. 2014)). "[C]ustody and visitation arrangements are among the most important decisions confronting a trial court in a divorce case. The needs of the children are paramount; while the desires of the parents are secondary." *Gaskill v. Gaskill*, 936 S.W.2d 626, 630 (Tenn. Ct. App. 1996).

Father's issue on appeal concerning the exclusion of evidence is also reviewed under an abuse of discretion standard. *Hill v. Hill*, No. M2006-01792-COA-R3-CV, 2008 WL 110101, at *4 (Tenn. Ct. App. Jan. 9, 2008). As our Supreme Court has previously instructed:

> A trial court abuses its discretion by applying an incorrect legal standard or reaching an illogical or unreasonable decision that causes an injustice to the complaining party. In reviewing the trial court's exercise of discretion, we presume that the trial court's decision is correct and review the evidence in a light most favorable to upholding the decision. Discretionary decisions, however, require a conscientious judgment, consistent with the facts, that takes into account the applicable law.

White v. Beeks, 469 S.W.3d 517, 527 (Tenn. 2015) (internal citations omitted). Furthermore, "[c]oncluding that a trial court improperly excluded otherwise admissible

evidence does not end the inquiry." *White v. Vanderbilt Univ.*, 21 S.W.3d 215, 223 (Tenn. Ct. App. 1999). Unless the erroneous exclusion of the evidence would have affected the outcome of the trial, this Court will not reverse the judgment based on the trial court's evidentiary decision. *Id.*

IV. Marital Property Equitable Distribution

In his initial issue, Father argues that the trial court erred in its distribution of the parties' marital property. As Mother points out, however, Father has failed to include in his appellate brief a table meeting the requirements of Tennessee Court of Appeals Rule 7, which provides in pertinent part:

> (a) In any domestic relations appeal in which either party takes issue with the classification of property or debt or with the manner in which the trial court divided or allocated the marital property or debt, the brief of the party raising the issue shall contain, in the statement of facts or in an appendix, a table in a form substantially similar to the form attached hereto. This table shall list all property and debts considered by the trial court, including: (1) all separate property, (2) all marital property, and (3) all separate and marital debts.
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> (b) Each entry in the table must include a citation to the record where each party's evidence regarding the classification or valuation of the property or debt can be found and a citation to the record where the trial court's decision regarding the classification, valuation, division, or allocation of the property or debt can be found.
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> (c) If counsel disagrees with any entry in the opposing counsel's table, counsel must include in his or her brief, or in a reply brief if the issue was raised by opposing counsel after counsel filed his or her initial brief, a similar table containing counsel's version of the facts.

Accordingly, "in all cases where a party takes issue with the classification and division of marital property, the party must include in its brief a chart displaying the property values proposed by both parties, the value assigned by the trial court, and the party to whom the trial court awarded the property." *Kanski v. Kanski*, No. M2017-01913-COA-R3-CV, 2018 WL 5435402, at *6 (Tenn. Ct. App. Oct. 29, 2018) (quoting *Akard v. Akard*, No. E2013-00818-COA-R3-CV, 2014 WL 6640294, at *4 (Tenn. Ct. App. Nov. 25, 2014)).

With regard to these requirements, this Court has previously explained:

> [I]t is essential that the parties comply with Rule 7 in order to aid this Court in reviewing the trial court's decision. The table required by Rule 7, allows this Court to easily and correctly determine the valuation and distribution of the marital estate as ordered by the trial court. Further, the Rule 7 table, allows this Court to ascertain the contentions of each party as to the correct valuations and proper distribution, as well as the evidence in the record which the party believes supports its contention. Consequently, a table, in full compliance with Rule 7, is vital as this Court must consider the *entire* distribution of property in order to determine whether the trial court erred. Moreover, this Court is under no duty to minutely search the record for evidence that the trial court's valuations may be incorrect or that the distribution may be improper.

Kanski, 2018 WL 5435402, at *6 (quoting *Harden v. Harden*, No. M2009-01302-COA-R3-CV, 2010 WL 2612688, at *8 (Tenn. Ct. App. June 30, 2010)) (internal citations in *Harden* omitted in *Kanski*).

As the *Kanski* Court also explained, "[w]e previously have held that "where an appellant fails to comply with this rule, that appellant waives all such issues relating to the rule's requirements." *Kanski*, 2018 WL 5435402, at *6 (quoting *Stock v. Stock*, No. W2005-02634-COA-R3-CV, 2006 WL 3804420, at *5 n.3 (Tenn. Ct. App. Dec. 28, 2006)). Although "this Court may 'suspend the requirements of Rule 7 for 'good cause,'" *Kanski*, 2018 WL 5435402, at *6 (quoting *Hopwood v. Hopwood*, No. M2015-01010-COA-R3-CV, 2016 WL 3537467, at *7 (Tenn. Ct. App. June 23, 2016)) (in turn quoting Tenn. R. Ct. App. 1(b)), we discern no good cause for such a suspension in this case. *See Williams v. Williams*, No. E2021-00432-COA-R3-CV, 2022 WL 1043632, at *15 (Tenn. Ct. App. Apr. 7, 2022). We therefore deem Father's issue presented concerning the propriety of the trial court's marital property distribution to be waived.

V. Co-Parenting Residential Schedule

Father next takes issue with the trial court's designated co-parenting schedule. Father contends that the trial court erred by awarding him only fifty-five days of annual co-parenting time with the Children. Mother counters that the residential schedule set forth in the trial court's PPP was appropriate and in the best interest of the Children.

At the time of a divorce when at least one minor child is involved, as occurred in this case, the trial court must "make a custody determination" "on the basis of the best interest of the child." *See* Tenn. Code Ann. § 36-6-106(a) (Supp. 2022). The court is required to apply statutory "best interest" factors enumerated in Tennessee Code Annotated § 36-6-106(a) to determine a custody arrangement in the best interest of the

Child. The version of Tennessee Code Annotated § 36-6-106(a) (2021) applicable to this action provided:[1]

> In a suit for annulment, divorce, separate maintenance, or in any other proceeding requiring the court to make a custody determination regarding a minor child, the determination shall be made on the basis of the best interest of the child. 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 this subsection (a), 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:
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> (1) The strength, nature, and stability of the child's relationship with each parent, including whether one (1) parent has performed the majority of parenting responsibilities relating to the daily needs of the child;
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> (2) Each parent's or caregiver's past and potential for future performance of parenting responsibilities, including the willingness and ability of each of the parents and caregivers to facilitate and encourage a close and continuing parent-child relationship between the child and both of the child's parents, consistent with the best interest of the child. In determining the willingness of each of the parents and caregivers to facilitate and encourage a close and continuing parent-child relationship between the child and both of the child's parents, the court shall consider the likelihood of each parent and caregiver to honor and facilitate court ordered parenting arrangements and rights, and the court shall further consider any history of either parent or any caregiver denying parenting time to either parent in violation of a court order;
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> (3) Refusal to attend a court ordered parent education seminar may be considered by the court as a lack of good faith effort in these proceedings;
>
> (4) The disposition of each parent to provide the child with food, clothing, medical care, education and other necessary care;

[1] Effective March 18, 2022, the General Assembly has amended Tennessee Code Annotated §36-6-106(a) to add as an additional best interest factor "[w]hether a parent has failed to pay court-ordered child support for a period of three (3) years or more." *See* 2022 Tenn. Pub. Acts, Ch. 671 (H.B. 1866).

(5) The degree to which a parent has been the primary caregiver, defined as the parent who has taken the greater responsibility for performing parental responsibilities;

(6) The love, affection, and emotional ties existing between each parent and the child;

(7) The emotional needs and developmental level of the child;

(8) The moral, physical, mental and emotional fitness of each parent as it relates to their ability to parent the child. The court may order an examination of a party under 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 under § 33-3-105(3). The court order required by § 33-3-105(3) must contain a qualified protective order that limits the dissemination of confidential protected mental health information to 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;

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

(10) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment;

(11) Evidence of physical or emotional abuse to the child, to the other parent or to any other person. The court shall, where appropriate, refer any issues of abuse to juvenile court for further proceedings;

(12) The character and behavior of any other person who resides in or frequents the home of a parent and such person's interactions with the child;

(13) The reasonable preference of the child if twelve (12) years of age or older. The court may hear the preference of a younger child upon request. The preference of older children should normally be given greater weight than those of younger children;

(14) Each parent's employment schedule, and the court may make accommodations consistent with those schedules; and

(15) Any other factors deemed relevant by the court.

The trial court properly conducted a best interest analysis considering the above-listed factors. Upon doing so, the court determined that of the applicable factors, all but one weighed in Mother's favor inasmuch as factor nine weighed equally. Based on our review of the evidence, we determine that the evidence supports the trial court's findings. We reiterate that a trial court's determination of an appropriate permanent parenting plan is reviewed according to an abuse of discretion standard. *See Morelock v. Morelock*, No. E2016-00543-COA-R3-CV, 2017 WL 3575890, at *1 (Tenn. Ct. App. Aug. 18, 2017).

During trial, the court heard testimony from two counselors who had worked with Father and the Children. Ms. Beasley testified that she began counseling sessions with the Children and the parties pursuant to a court order entered on June 24, 2019. Ms. Beasley reported that while Mother was always compliant with scheduling and appeared in a timely manner for sessions, Father was prone to be late, to leave early, and had failed to show for seven sessions. Ms. Beasley further related that the Children conveyed feeling hurt by Father's failure to participate in counseling with them.

According to Ms. Beasley, Father also made disparaging remarks concerning Mother during the sessions with the Children, including that Mother and her attorney had "orchestrated" the incident resulting in entry of the order of protection. She added that the Children had described themselves as feeling fearful and threatened by Father's actions during that incident such that his characterization of it was not only disparaging of Mother but also dismissive of the Children's feelings. Ms. Beasley further articulated that Father had referred to Mother as an "alcoholic" during sessions with the Children. Moreover, she related a particular incident wherein A.C. had expressed fear that Father might kill Mother, to which Father had responded that Mother was in a "terrible place" and that he would rather watch her "suffer."

Ms. Beasley opined that the Children did not seem to have a close relationship with Father when counseling began because they described Father as not attentive or nurturing toward them. The Children informed Ms. Beasley that when they visited Father, he would sleep a great deal, would not interact, and did not provide them with meals. They reported that his actions were not much different before the separation and that Mother made up for his lack of attention when she was in the home. The Children also voiced a fear of Father because they had observed him act physically violent toward Mother, describing an incident wherein Father had thrown beer cans at Mother's head.

Ms. Tucker-Higgins testified that she was appointed as a counselor for the Children by the trial court in an effort to reconcile the father-daughter relationships. Ms.

Tucker-Higgins stated that she had met with each child and each parent individually before beginning family sessions. According to Ms. Tucker-Higgins, Mother had always been appropriate, timely, and compliant with the sessions. Ms. Tucker-Higgins included that she had not identified any alienating behavior on the part of Mother.

With respect to Father, Ms. Tucker-Higgins stated that Father had made disparaging remarks to the Children about Mother's weight and body. Some of these comments were sexual in nature. Ms. Tucker-Higgins explained that she deemed the comments inappropriate and discussed this with Father. However, Father continued to make derogatory remarks.

Ms. Tucker-Higgins described Father's bond with the Children as "very weak." Ms. Tucker-Higgins related that when she discussed concerns with Father during the session, he would appear to understand but would later repeat the negative behaviors. Ms. Tucker-Higgins also reported that A.C., the younger child, had experienced increased anxiety and possibly depression due to her relationship with Father.

Based on her experience with the family, Ms. Tucker-Higgins opined that it would be in the Children's best interest for the trial court to designate Mother primary residential parent. She also propounded that it would be in the Children's best interest to spend alternating weekends with Father. According to Ms. Tucker-Higgins, the Children were not ready to spend longer periods of time with Father, and she opined that equal co-parenting time would be detrimental to the Children. Ms. Tucker-Higgins stressed that the parties could not successfully make joint decisions concerning the Children.

Mother testified that before she filed for divorce, Father spent a "couple of years" during which he was disengaged from her and the Children. Mother related that he had been sleeping "a lot," seemed depressed and angry, yelled often, and had destroyed personal property in the house. According to Mother, Father was also known to make demeaning and negative comments to and about her. Mother described the family's interactions as "walking on eggshells" to avoid angering Father, and she noted that this situation was upsetting for her and the Children. Mother also recalled the incident leading to her seeking an order of protection wherein Father followed her vehicle closely with his at a high rate of speed, frightening her and the Children. Mother indicated that she was still fearful of Father at the time of trial.

Considering the evidence presented in light of the above-listed statutory factors, we conclude that the trial court did not abuse its discretion when fashioning the parties' co-parenting residential schedule. The evidence demonstrated that Mother had been the Children's primary caregiver and had performed the majority of parenting responsibilities while Father was disengaged and inattentive. Father's behavior during the divorce proceedings also demonstrated that he would not be likely to experience improved performance of parenting responsibilities in the future or to facilitate and encourage the

Children's relationship with Mother. Although both parents provided income to the household to pay for necessities for the Children, Mother had maintained her employment post-divorce while Father had failed to do so or to contribute to family expenses.

The evidence established that Mother enjoyed a closer bond with the Children than Father and was nurturing and attentive whereas Father had alienated the Children with his behavior toward them and Mother. The counselors testified that Father's behavior had affected the Children's mental and emotional health in a negative manner. Mother provided the Children with stability and continuity, encouraged and supported their efforts in counseling, and worked to ensure that they felt safe. Conversely, considerable evidence was presented regarding Father's emotional abuse, which had caused the Children anxiety and distress. Importantly, the Children's counselor, Ms. Tucker-Higgins, specifically opined that Father's visitation time should be limited due to the effect of his behavior on the Children's mental health.

Upon careful review, we conclude that the evidence preponderates in favor of the trial court's determination that the PPP and the co-parenting schedule contained therein were in the best interest of the Children and that the trial court did not abuse its discretion in this regard. Therefore, we affirm the trial court's judgment respecting its co-parenting residential schedule.

VI. Evidentiary Sanctions by Trial Court

Father next posits that the trial court erred by excluding Father's exhibits during trial, including his witness and exhibit list, his proposed parenting plan, his proposed division of marital assets and liabilities, and other documents. We note that the trial court's exclusion of Father's documentary evidence was the result of Father's failure to comply with 16th Judicial District Local Rule 12.02, which states:

> (A) No less than eight (8) Judicial Days prior to the Final Hearing of any contested divorce action, the Plaintiff and Defendant shall file a "Statement in Compliance with Rule 12.02," in the form shown in Appendix H attached hereto. Both parties shall attach proof of income (i.e. latest W-2, 1099, most recent tax return, or other such proof) to their Rule 12.02 Statement. All such statements shall be signed by the filing party under oath. These statements shall be considered the testimony of the parties as to the issues contained therein.
>
> (B) Valuations and listings of all assets and debts are mandatory. . . .

(C) Statements under this rule shall be signed by the respective party, under oath, and their counsel, if any.

(D) Witness and Exhibit Lists for a contested divorce trial shall be filed in accordance with Rule 3.01.

Local Rule 3.01 provides that witness and exhibit lists shall be filed with the clerk and exchanged by counsel "at least three (3) full Judicial Days prior to trial." Local Rule 3.01 further provides that failure to do so "shall be grounds for exclusion" of witnesses and exhibits.

Father acknowledges in his appellate brief that his trial counsel failed to file the above-listed documents "until late in the afternoon of the day preceding trial." A review of the trial transcript reveals that although Father's Rule 12.02 Statement was filed with the trial court in the late afternoon on the day before trial, Father's witness and exhibit lists were never filed with the court. Before the trial began, the chancellor questioned Father's trial counsel concerning his knowledge and understanding of the local rules. Father's counsel acknowledged that he was aware of the local rules and understood them. Although Father was allowed to testify during trial on his own behalf, the trial court precluded Father from calling additional witnesses or presenting exhibits due to his failure to abide by the court's local rules.

It is a long-standing principle that "trial courts are accorded a wide degree of latitude in their determination of whether to admit or exclude evidence, even if such evidence would be relevant." *Dickey v. McCord*, 63 S.W.3d 714, 723 (Tenn. Ct. App. 2001); *see Pennington v. Pennington*, No. M2007-00181-COA-R3-CV, 2008 WL 1991117, at *3 (Tenn. Ct. App. May 7, 2008) ("Trial courts have broad discretion with respect to the admission or exclusion of evidence and the enforcement of local rules."). In addition, trial courts clearly maintain the authority to formulate their own local rules. *See Killinger v. Perry*, 620 S.W.2d 525, 525 (Tenn. Ct. App. 1981) (explaining that a trial court "has authority to make its own rules").

As Father points out, when determining the proper sanction for a party's failure to name a witness on a witness list, trial courts ordinarily should consider:

> the explanation given for the failure to name the witness, the importance of the testimony of the witness, the need for time to prepare to meet the testimony, and the possibility of a continuance. In the light of these considerations, the court may permit the witness to testify, or it may exclude the testimony, or it may grant a continuance so that the other side may take the deposition of the witness or otherwise prepare to meet the testimony.

Pennington, 2008 WL 1991117, at *3 (*quoting Strickland v. Strickland*, 618 S.W.2d 496, 501 (Tenn. Ct. App. 1981)).

Father urges that the trial court abused its discretion by declining to waive its local rules and by failing to perform the analysis described in *Pennington*. Father also contends that he was prejudiced by the trial court's decision to limit his ability to present evidence at trial. We determine, however, that Father's arguments are impacted by his failure to make an offer of proof at trial in compliance with Tennessee Rule of Evidence 103(a) ("Error may not be predicated upon a ruling which . . . excludes evidence unless a substantial right of the party is affected, and . . . the substance of the evidence and the specific evidentiary basis supporting admission were made known to the court by offer or were apparent from the context."). This failure ordinarily renders the issue waived. *See Hill*, 2008 WL 110101, at *5-6. As the *Hill* Court explained:

> The Tennessee Rules of Evidence provide that a trial court's error may not be predicated upon a ruling which admits or excludes evidence unless "a substantial right of the party is affected," and when the ruling excludes evidence, "the substance of the evidence and the specific evidentiary basis supporting admission were made known to the court by offer or were apparent from the context." Tenn. R. Evid. 103. As the rule of evidence provides, the burden was on Mother to preserve the substance of the evidence [the excluded witness] was expected to present so that this court may determine whether a substantial right has been affected. Unfortunately, once the trial court excluded [the witness], Mother did not make an offer of proof.
>
> The due process right to a full hearing before a court includes the right to introduce evidence and have judicial findings based upon such evidence. *Baltimore & Ohio R.R. Co. v. United States*, 298 U.S. 349, 368-69, 56 S. Ct. 797, 80 L. Ed. 1209 (1936). An erroneous exclusion of evidence, however, does not require reversal unless we can determine the evidence would have affected the outcome of the trial had it been admitted. *Pankow v. Mitchell*, 737 S.W.2d 293, 298 (Tenn. Ct. App. 1987). The appellate courts cannot make such a determination without knowing what the excluded evidence would have been. *Stacker v. Louisville & N. R.R. Co.*, 106 Tenn. 450, 61 S.W. 766, 766 (Tenn. 1901); *Davis v. Hall*, 920 S.W.2d 213, 218 (Tenn. Ct. App. 1995); *State v. Pendergrass*, 795 S.W.2d 150, 156 (Tenn. Crim. App. 1989). It is for these reasons that the burden is on the party challenging the exclusion of evidence to make an offer of proof to enable the appellate court to determine whether the exclusion of proffered evidence was reversible error. Tenn. R. Evid. 103(a)(2); *State v. Goad*, 707 S.W.2d 846, 853 (Tenn. 1986); *Harwell v. Walton*, 820 S.W.2d 116, 118 (Tenn. Ct. App. 1991).

> An offer of proof should contain the substance of the evidence excluded and the evidentiary basis supporting the admission of the evidence. Tenn. R. Evid. 103(a)(2). These requirements may be satisfied by presenting the actual testimony, stipulating the content of the excluded evidence, or presenting a summary, oral or written, of the excluded evidence. *Harrison v. Laursen*, No. 01A01-9705-CH-00238, 1998 WL 70635, at *3 (Tenn. Ct. App. Feb. 20, 1998) (citing Neil P. Cohen et al., *Tennessee Law of Evidence* § 103.4, at 20 (3d ed.1995)). Generally, the appellate courts will not consider issues relating to the exclusion of evidence when this tender of proof has not been made. *Dickey v. McCord*, 63 S.W.3d 714, 723 (Tenn. Ct. App. 2001); *Rutherford v. Rutherford*, 971 S.W.2d 955, 956 (Tenn. Ct. App. 1997); *Shepherd v. Perkins Builders*, 968 S.W.2d 832, 833-34 (Tenn. Ct. App. 1997).
>
> Our courts have recognized two exceptions to the rule requiring an offer of proof. The first is contained in the rule itself and applies when the substance of the evidence and the specific evidentiary basis supporting admission is apparent from the context of the questions. The second has been fashioned by the courts and applies when exclusion of the evidence seriously affects the fairness of the trial. *First Nat'l Bank & Trust Co. v. Hollingsworth*, 931 F.2d 1295, 1305 (8th Cir. 1991). Neither of these exceptions is in play here.
>
> The record does not provide sufficient information for us to determine the substance of [the witness's] testimony. Accordingly, we are not able to determine whether her testimony would have affected the outcome of the trial. We therefore find no error with the trial court's decision to exclude the testimony of [the witness].

Id. (footnote omitted).

Similarly, here, we are unable to determine whether Father's excluded documentary evidence would have affected the outcome of the trial due to Father's failure to make an offer of proof concerning these documents. We likewise determine that neither of the exceptions to requiring an offer of proof is applicable here. As such, we conclude that Father has waived the issue presented concerning the trial court's exclusion of his documentary evidence. *Id*.

VII. Damages for Frivolous Appeal

Turning now to Mother's issue, Mother asserts that Father's appeal is frivolous such that she should be awarded damages pursuant to Tennessee Code Annotated § 27-1-122 (2017), which provides:

> When it appears to any reviewing court that the appeal from any court of record was frivolous or taken solely for delay, the court may, either upon motion of a party or of its own motion, award just damages against the appellant, which may include, but need not be limited to, costs, interest on the judgment, and expenses incurred by the appellee as a result of the appeal.

As this Court has previously explained regarding frivolous appeals:

> Parties should not be forced to bear the cost and vexation of baseless appeals. Accordingly, in 1975, the Tennessee General Assembly enacted Tenn. Code Ann. § 27-1-122 to enable appellate courts to award damages against parties whose appeals are frivolous or are brought solely for the purpose of delay. Determining whether to award these damages is a discretionary decision.
>
> A frivolous appeal is one that is devoid of merit or one that has no reasonable chance of succeeding.

Young v. Barrow, 130 S.W.3d 59, 66-67 (Tenn. Ct. App. 2003) (internal citations omitted).

In the case at bar, Father has waived two of his three issues by failing to present this Court with a Court of Appeals Rule 7 table and also by failing to make an offer of proof at trial concerning his excluded evidence. In addition, Father was unsuccessful regarding his sole remaining issue, which required him to demonstrate an abuse of discretion by the trial court. As such, we agree with Mother that this appeal is frivolous. *See, e.g.*, *Williams v. Williams*, 286 S.W.3d 290, 298 (Tenn. Ct. App. 2008) ("[T]he issues raised by Husband on appeal are reviewed for an abuse of discretion, a notably high standard of review. Any objective review of these factors would cause a reasonable person to conclude that Husband's appeal had 'no reasonable chance of success.'"); *Self v. Dawn*, No. E2021-01130-COA-R3-CV, 2022 WL 17348893, at *11 (Tenn. Ct. App. Dec. 1, 2022) (deeming the appeal frivolous when the appellant, *inter alia*, failed to present a proper Rule 7 table); *Terrazzano v. Terrazzano*, No. M2019-00400-COA-R3-CV, 2019 WL 6320354, at *2 (Tenn. Ct. App. Nov. 26, 2019) (deeming the appeal frivolous when the appellant "failed to present this court with a record showing that she

[was] entitled to any relief whatsoever"). We therefore grant Mother's request for an award of reasonable attorney's fees and costs incurred on appeal.

VIII. Conclusion

For the foregoing reasons, we affirm the judgment of the trial court. We grant Mother's request for attorney's fees and costs incurred on appeal and remand for the trial court to determine the reasonable amount of same. Costs on appeal are taxed to the appellant, Daniel William Creger.

s/Thomas R. Frierson, II

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THOMAS R. FRIERSON, II, JUDGE