

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs May 1, 2026

FILED

08/20/2026

Clerk of the
Appellate Courts

KENNETH LUCAS v. HEATHER FIFIELD

Appeal from the Juvenile Court for Sullivan County
No. 22jv44652 Raymond C. Conkin, Jr., Judge

No. E2025-01429-COA-R3-JV

This appeal requires us to determine whether the trial court erred in modifying the parties' parenting plan and in calculating child support after naming Father the primary residential parent. Mother/Appellant appeals the trial court's grant of Father/Appellee's petition to name him primary residential parent. Father appeals the trial court's calculation of child support. We conclude that the trial court erred in denying Mother's attempts to introduce evidence of alleged child abuse by Father. Because this evidence is relevant to the best interest factors and was not considered by the trial court, we vacate the trial court's orders on custody and child support.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court
Vacated and Remanded

STEVEN W. MARONEY, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., C.J., and KRISTI M. DAVIS, J., joined.

Heather Fifield, Wilmore, Kentucky, appellant, pro se.

J. Matthew King, Kingsport, Tennessee, and Jason Andrew Creech, Johnson City, Tennessee, for the appellee, Kenneth Lucas.

OPINION

I. Background

Appellant Heather Fifield ("Mother") and Appellee Kenneth Lucas ("Father"), who were never married, are the natural parents of the minor child at issue in this case, K.C.L. (d/o/b May 2020) (the "Child").

On December 1, 2022, Father filed a petition in the Juvenile Court for Sullivan County (“trial court”), seeking to establish paternity and for entry of a proposed permanent parenting plan (“PPP”). Father filed an amended petition on February 28, 2023. According to Father’s amended petition, he and Mother lived together with the Child in Tennessee until November 7, 2022, when the parties separated, and Mother moved to Kentucky. Father averred that, “The minor [C]hild now live[s] half of the time with Father in Kingsport and half of the time with Mother in Kentucky per agreement and conduct of the parties.” Father’s petition further stated that, “Mother and Father have had numerous discussions about agreeing to an equal time parenting plan[,] and[,] since January 1, 2023[,] the parties have been sharing equal time on a two-week rotating schedule.” The proposed PPP attached to Father’s petition contemplated that he and Mother would be joint primary residential parents, with 182.5 days of parenting time each, “on a two (2) week rotating schedule.”

On March 27, 2023, the trial court entered an interim order, wherein it: (1) established Father’s paternity; (2) ordered the parties to continue with equal parenting time on a week-to-week rotating basis; (3) noted Mother’s concerns for the safety of the Child while in Father’s custody; (4) ordered Father’s visitation would be supervised; (5) ordered no contact between the parties pending further order of the court; and (5) ordered the parties to mediate. The trial court reserved all other matters for hearing.

The parties proceeded to mediation as evidence by a handwritten “Mediation Agreement” dated June 5, 2023. Although there is no report from the mediator, the parties’ Mediation Agreement states, in part, that: (1) “The parties will have equal parenting [time] by having the [C]hild two weeks and two weeks”; (2) the parties’ respective child support will be determined “based on 182.5 days each. Father’s gross monthly [income of] \$4,398 and Mother’s gross monthly [income of] \$3,640”; and (3) “Mother’s child care is \$350 per month to be verified.” The Mediation Agreement also contained the following caveat: “Parties to agree to Permanent Parenting Plan prior to [C]hild entering school or return to mediation if cannot agree regarding where [Child will] attend school and when [he will be enrolled].”

On October 8, 2024, the trial court entered an order incorporating a PPP and Child Support Worksheet. Therein, the trial court noted that Father “submitted a Permanent Parenting Plan that reflects the mediated agreement of the Parties.” The incorporated PPP, signed by Father but not by Mother, awarded 182.5 days to each parent but did not name either parent as the Child’s primary residential parent. Rather, the PPP stated that the primary residential parent designation was “[w]aived by Mother and Father (only if by agreement). Child must reside and equal amount of time with both parties.” The PPP also included the caveat set out in the Mediation Agreement, requiring the parties to agree to a PPP prior to the Child being enrolled in school. The PPP further stated that, “Should the parents disagree about this Parenting Plan or wish to modify it, they must make a good faith effort to resolve the issue by [mediation by a neutral party chosen by the parents or

the Court] before returning to Court.”

The incorporated Child Support Worksheet charged Mother with \$142.00 in monthly child support based on the parties’ gross monthly incomes and payment of additional expenses as set out in the Mediation Agreement, *supra*. However, the incorporated PPP stated that “[F]ather shall pay to [Mother] as regular child support the sum of \$142.00 ... monthly.” The incorporated PPP goes on to say, “If this is a deviation from the Child Support Guidelines, explain why: Deviation of \$142.00 by agreement of the parties.” The October 8, 2024 order appears to be a final order insofar as it states that “[a]ll pending motions in this matter have been resolved,” and relieves the parties’ respective attorneys from further representation. There is no indication that either party appealed the October 8th order.

Giving rise to the instant appeal, on March 27, 2025, Father filed a petition to modify the PPP.¹ Therein, Father averred:

1. That a Parenting Plan giving Father . . . 182.5 days with the [C]hild and Mother . . . 182.5 days with the [C]hild, was approved and entered as an Agreed Permanent Parenting Plan on October 8, 2024.²
2. That said Agreed Permanent Parenting Plan Order states in Section J, number 6, that, “Parties to agree on Permanent Parenting Plan prior to child entering school or return to mediation if the parties cannot agree regarding where to attend school and when to enter.”
3. That the [C]hild has reached school age and Father has attempted to consult with Mother about the [C]hild’s upcoming school year and the parties

¹ Father styled his pleading a “Petition to Modify Parenting Plan”; however, his proposed PPP named Father as the Child’s primary residential parent. As noted, the original PPP did not name a primary residential parent; thus, we interpret Father’s petition as one seeking a change in custody, *i.e.* a change in the primary residential parent designation. We have previously recognized that courts have the ability to treat any pleading according to the type of relief sought, regardless of its title. *Estate of Doyle v. Hunt*, 60 S.W.3d 838 (Tenn.Ct.App.2001). As this Court has recognized, the Tennessee Rules of Civil Procedure “do not require and, in fact, admonish courts against exalting form over substance.” *Anderson v. DTB Corp.*, No. 89-172-II, 1990 WL 33380, at *2 (Tenn. Ct. App. Mar. 28, 1990). Indeed, courts are not bound by the title of a pleading. *Bemis Co., Inc. v. Hines*, 585 S.W.2d 574, 576 (Tenn.1979); *Estate of Doyle*, 60 S.W.3d at 842. Rather, the court is to give effect to the pleading’s substance and treat it according to the relief sought therein. *Id.* (citing *Norton v. Everhart*, 895 S.W.2d 317 (Tenn.1995); *Fann v. City of Fairview*, 905 S.W.2d 167 (Tenn. Ct. App. 1994). As the Tennessee Supreme Court has explained, it is well settled that courts are “not bound by the title of the pleading[] but ha[ve] the discretion to treat the pleading according to the relief sought.” *Norton*, 895 S.W.2d at 319 (citing *Fallin v. Knox County Bd. of Comm’rs*, 656 S.W.2d 338, 342 (Tenn. 1983); *State v. Minimum Salary Dep’t of A.M.E. Church*, 477 S.W.2d 11, 12 (Tenn. 1972)). This liberal principle of construction is to be applied to pleadings as well as motions. *Anderson*, 1990 WL 33380, at *2.

² The October 8, 2024 PPP entered by the trial court actually indicates that it is a “proposed” plan as opposed to an “agreed” plan, or one “ordered by the court,” although the corresponding October 8, 2024 order incorporating the PPP states that the PPP “reflects the mediated agreement of the Parties”.

have been unsuccessful at coming to an agreement. Therefore, there has been a material change in circumstance that affects the [C]hild's best interest and requires a modification of the child custody arrangement.

On May 14, 2025, Mother filed "Mother's Rule 60.01 Motion to Correct Error in the October 8, 2024 Order and Parenting Plan." Therein, Mother asserted that the trial court's October 8th order and PPP contained a clerical mistake, discussed *infra*.

On August 8, 2025, the trial court heard Father's petition to modify custody and Mother's Rule 60.01 motion.³ By order of August 18, 2025 (as amended on December 2, 2025), the trial court held that Mother's Rule 60.01 motion was denied as moot. Specifically, the trial court noted "the parties' intent to deviate from the child support guidelines to require neither party to pay support to the other" such that any "miscalculation of child support . . . is moot." By the same order, the trial court granted Father's petition to modify custody. The trial court found that

the parties agree the current parenting plan is no longer workable as the [C]hild has reached school age and it would be impossible to maintain a rotating schedule giving each parent two consecutive weeks with the [C]hild, given that the Mother and Father live approximately 4 hours apart. As such, the court finds a material change of circumstances has occurred which necessitates a modification of the Parenting Plan

The trial court then proceeded to analyze the best interest factors set out in Tennessee Code Annotated section 36-6-106(a), discussed *infra*. The trial court adopted Father's proposed PPP, which named Father as the Child's primary residential parent and ordered that the Child would attend school in Kingsport, Father's residence. Under the PPP, Mother was granted visitation every third weekend, from Friday at 7:00 p.m. to Sunday at 7:00 p.m., with the parties rotating holidays (except Mother's Day and Father's Day) and summers. Although Mother received far less parenting time than Father, as discussed further below, the PPP states that each parent will spend 182.5 days with the Child per year. This appears to be a typographical error in the PPP; however, it likely led the trial court to order Father's counsel to prepare a Child Support Worksheet, recalculating

the support obligation based upon an equal division of days for each parent, setting Father's income at \$5,800 per month, Mother's income will be imputed as if earning minimum wage and working 40 hours per week (\$1256

³ The record reveals no corresponding petition filed by Mother to modify the October 8, 2024 PPP. However, at trial, Mother introduced her own competing proposed PPP. At that time Mother's attorney indicated that Mother sought to change only the Child's residential schedule; however, Mother's PPP listed her as the Child's primary residential parent. Accordingly, we interpret Mother's motion as one to modify custody, *see also* fn. 1, *supra*.

per month) given the fact that she is currently enrolled in school and earning no income. Credit for other children, health insurance cost, etc. will also be incorporated into the calculation per the child support regulations. The child support obligation shall commence on September 1, 2025.

The prepared Child Support Worksheet complied with the trial court's order insofar as it stated that each party has 182.5 days of parenting time, which is not what the trial court actually ordered, *supra*. The worksheet also contained a typographical error insofar as it indicated that Mother, as opposed to Father, is the Child's primary residential parent, when the trial court clearly ordered that the primary residential parent is Father. The worksheet calculated Father's child support obligation at \$640.00 per month. Mother appeals.

II. Issues

Mother raises the following issues for review as stated in her brief:

I. Whether the trial court committed reversible error by compelling the parties to participate in mediation in violation of T.C.A. § 36-6-409(5) after the court had judicially determined that safety risks required a "no-contact" order and supervised visitation.

II. Whether the trial court erred in entering the October 8, 2024 Order where (1) Mother had withdrawn her consent to the underlying mediated agreement prior to entry; (2) the Order was entered in violation of the mandatory notice and signature requirements of Tenn. R. Civ. P. 58 and Sullivan County Local Rule 9; and (3) the Order contained material variances from the parties' original handwritten agreement.

III. Whether the trial court erred as a matter of law by applying *res judicata* to exclude evidence of a 2024 substantiated child sexual abuse finding based on: (1) an October 2024 Order that was a procedural nullity; and (2) a factually impossible timeline that erroneously characterized a 2024 safety finding as having existed prior to a June 2023 mediation.

IV. Whether the trial court erred in its best-interest analysis under T.C.A. § 36-6-106 by (1) mischaracterizing the [C]hild's biological siblings as "the ex-husband's children," thereby failing to apply the judicial presumption against separating siblings; and (2) crediting Father with a support system consisting of maternal relatives who testified to having zero interaction with Father's household.

V. Whether the trial court abused its discretion in its best-interest analysis under T.C.A. § 36-6-106 by (1) relying on a medical communication record (Exhibit 8) that was intentionally and selectively edited to omit 54% of the parties' interactions; and (2) crediting Father as the primary manager of healthcare despite unrefuted evidence of medical concealment, unilateral care, and the termination of Mother's access to the [C]hild's medical records.

In the posture of Appellee, Father raises the following additional issues for review as stated in his brief:

1. Whether Appellant has waived challenges to prior orders and evidentiary issues.
2. Whether the trial court erred in its calculation of the number of parenting days to Appellant in its calculation of child support.
4. Whether Appellee should be awarded his attorney fees on appeal.

III. Standard of Review

The Tennessee Supreme Court has explained the standard of review for decisions relating to parenting plans as follows:

In this non-jury case, 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)[, *superseded by statute on other grounds*, Tenn. Code Ann. § 36-6-101(a)(2), as recognized in **Armbrister v. Armbrister**, 414 S.W.3d 685, 704 (Tenn. 2013)]; **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 . . . [Nonetheless,] determining the details of parenting plans is "peculiarly within the broad discretion of the trial judge." **Suttles v. Suttles**, 748 S.W.2d 427, 429 (Tenn. 1988) (quoting **Edwards v. Edwards**, 501 S.W.2d 283, 291 (Tenn. Ct. App. 1973)). "It is not the function of appellate courts to tweak a [residential parenting schedule] in the hopes of achieving a more reasonable result than the trial court." **Eldridge v. Eldridge**, 42 S.W.3d 82, 88 (Tenn. 2001). A trial court's decision regarding the details of a residential parenting schedule should not be reversed absent an abuse of discretion. *Id.* "An abuse of discretion occurs when the trial court . . . appl[ies] an incorrect legal standard, reaches an illogical result, resolves the case on a clearly erroneous assessment of the evidence, or relies on reasoning that causes an injustice." **Gonsewski v. Gonsewski**, 350 S.W.3d 99, 105 (Tenn. 2011). A trial court abuses its discretion in establishing a residential parenting schedule "only when the trial court's ruling falls outside the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence found in the record." **Eldridge**, 42 S.W.3d at 88.

Armbrister, 414 S.W.3d at 692-93.

The applicable analysis differs depending on whether the trial court is asked to modify a child's custody arrangement or whether it is asked to modify the details of the residential parenting schedule. This Court has outlined the analysis to be employed when, as in this case, a child's primary residential parent (as opposed to simply the details of the residential parenting schedule) is at issue:

Adjudicating disputes over who should be designated the primary residential parent is one of a court's greatest responsibilities. *Massey-Holt v. Holt*, 255 S.W.3d 603, 607 (Tenn. Ct. App. 2007). A court's designation of the primary residential parent as part of a final decree of divorce is considered res judicata upon the facts in existence or those which were reasonably foreseeable when the decision was made. *Steen v. Steen*, 61 S.W.3d 324, 327 (Tenn. Ct. App. 2001). However, because circumstances change in unanticipated ways, courts are statutorily empowered to modify a primary residential parent designation. See Tenn. Code Ann. § 36-6-101(a)(1) (A decree awarding custody of minor child "shall remain within the control of the court and be subject to such changes or modification as the exigencies of the case may require.").

Courts apply a two-step analysis to requests to change the primary residential parent designation. *Keisling v. Keisling*, 196 S.W.3d 703, 718 (Tenn. Ct. App. 2005). The threshold issue is whether a material change in circumstance has occurred since the court's prior custody order. See *Armbrister v. Armbrister*, 414 S.W.3d 685, 697-98 (Tenn. 2013); Tenn. Code Ann. 36-6-101(a)(2)(B). Only if a material change in circumstance has occurred do we consider whether a modification is in the child's best interest. *Armbrister*, 414 S.W.3d at 705. The "determinations of whether a material change of circumstances has occurred and where the best interests of the child lie are factual questions." *In re T.C.D.*, 261 S.W.3d 734, 742 (Tenn. Ct. App. 2007).

Skowronski v. Wade, No. M2014-01501-COA-R3-CV, 2015 WL 6509296, at *5 (Tenn. Ct. App. Oct. 27, 2015).

IV. Pro Se Status

Before addressing the foregoing issues, we further note that, although Mother was represented by counsel in the trial court, she is proceeding pro se in this appeal. This Court has explained the rights and responsibilities of pro se litigants, to-wit:

Parties who decide to represent themselves are entitled to fair and equal treatment by the courts. The courts should take into account that many pro se litigants have no legal training and little familiarity with the judicial system. However, the courts must also be mindful of the boundary between fairness

to a pro se litigant and unfairness to the pro se litigant's adversary. Thus, the courts must not excuse pro se litigants from complying with the same substantive and procedural rules that represented parties are expected to observe.

Murray v. Miracle, 457 S.W.3d 399, 402 (Tenn. Ct. App. 2014) (quoting *Young v. Barrow*, 130 S.W.3d 59, 62-63 (Tenn. Ct. App. 2003) (internal citations omitted)); *see also Hessmer v. Hessmer*, 138 S.W.3d 901, 903 (Tenn. Ct. App. 2003). Consequently, a pro se litigant should not “be permitted to shift the burden of the litigation to the courts or to their adversaries.” *Young*, 130 S.W.3d at 63. Further, a pro se litigant must comply with the same rules that lawyers must observe. *Watson v. City of Jackson*, 448 S.W.3d 919, 926 (Tenn. Ct. App. 2014).

V. Mediation and Validity of the October 8, 2024 Order

In her first two issues, Mother makes several arguments concerning the trial court's March 27, 2023 interim order requiring the parties to mediate, and its entry of the October 8, 2024 order, which allegedly incorporated the parties' Mediation Agreement.

First, Mother contends that the March 27, 2023 order contains conflicting rulings insofar as the trial court held that, “[t]he Parties shall have no contact pending further order of the Court,” but also held that, “[t]he parties shall submit to mediation.” Specifically, Mother contends that these two rulings were mutually exclusive. We disagree. The trial court's ruling for the parties to submit to mediation is consistent with a “further order of the Court” so as to be an exception to the no contact ruling, though perhaps different phrasing might have made the coordination between the two simultaneous rulings more clear. Regardless, there is no indication that Mother raised any issue in the trial court concerning the alleged conflict.

Nonetheless, on appeal, Mother cites Tennessee Code Annotated section 36-6-409(5) for the proposition that the trial court erred in ordering mediation when the parties were under a no-contact order. The statute provides, in relevant part, that:

(5) If an order of protection issued in or recognized by this state is in effect or if there is a court finding of domestic abuse or criminal conviction involving domestic abuse within the marriage that is the subject of the proceeding for divorce or separate support and maintenance, the court may order mediation or refer the parties to mediation only if:

(A) Mediation is agreed to by the victim of the alleged domestic or family violence;

(B) Mediation is provided by a certified mediator who is trained in domestic and family violence in a specialized manner that protects the safety of the victim; and

© The victim is permitted to have in attendance at mediation a supporting person of the victim's choice, including, but not limited to, an attorney or advocate. No victim may provide monetary compensation to a nonattorney advocate for attendance at mediation. The other party may also have in attendance at mediation a supporting person of such party's choice, including, but not limited to, an attorney or advocate.

Mother's reliance on this statute is misplaced. There is no indication that an "order of protection" was entered in this case. Furthermore, there is no "court finding of domestic abuse," and there is no evidence of any "criminal conviction." Accordingly, the trial court was not precluded from ordering mediation. Finally, and perhaps most importantly, Mother attended the June 5, 2023 mediation, without ever bringing any of the arguments she now espouses on appeal to the attention of the trial court. "It is well settled that issues not raised at the trial level are considered waived on appeal." *Moses v. Dirghangi*, 430 S.W.3d 371, 381 (Tenn. Ct. App. 2013) (citing *Waters v. Farr*, 291 S.W.3d 873, 918 (Tenn. 2009)).

Mother next argues that the trial court's October 8, 2024 order was improperly entered because: (1) Mother had withdrawn her consent to the underlying Mediation Agreement prior to entry; (2) the Order was entered in violation of the mandatory notice and signature requirements of Tennessee Rule of Civil Procedure 58 and Sullivan County Local Rule 9; and (3) the Order contained material variances from the parties' original handwritten agreement.

Again, Mother failed to raise any of the foregoing arguments in the trial court. Mother did not file an appeal of the October 8, 2024 order. Rather, she filed a Tennessee Rule of Civil Procedure 60.01 motion. Therein, Mother asserted one clerical error in the October 8, 2024 order, to-wit:

The clerical mistake was as follows: the monthly child care for [M]other, \$350, was never listed in the child support worksheet. Further, Section III of the Parenting Plan, subsection 2, left blank the agreed upon obligation for retroactive child support.

Based on the foregoing assignment of error, Mother asked the trial court to correct the Child Support Worksheet. However, in her Rule 60 motion, Mother did not aver that she withdrew her consent to the Mediation Agreement, nor did she cite any of the alleged "material variances from the parties' original [Mediation] [A]greement," of which she now complains on appeal. Having failed to raise these issues in the trial court, Mother has waived them on appeal. *Moses*, 430 S.W.3d at 381.

VI. Evidentiary Issue

Mother's third appellate issue is whether the trial court abused its discretion by erroneously applying the doctrine of res judicata to bar evidence related to Father's alleged sexual abuse of Mother's daughter from a previous marriage — evidence Mother asserts is relevant to the best-interest analysis.

We review a trial court's decisions admitting or excluding evidence under an abuse of discretion standard. *Biscan v. Brown*, 160 S.W.3d 462, 468 (Tenn. 2005). When applying the abuse of discretion standard to evidentiary decisions, we also consider “(1) whether the decision has a sufficient evidentiary foundation; (2) whether the trial court correctly identified and properly applied the appropriate legal principles; and (3) whether the decision is within the range of acceptable alternatives.” *Danny L. Davis Contractors, Inc. v. Hobbs*, 157 S.W.3d 414, 419 (Tenn. Ct. App. 2004) (quoting *Crowe v. First Am. Nat'l Bank*, No. W2001-00800-COA-R3-CV, 2001 WL 1683710, at *9 (Tenn. Ct. App. Dec. 10, 2001)).

We have noted that “[a] custody decision, once final, is res judicata upon the facts in existence or reasonably foreseeable when the decision was made.” *Scofield v. Scofield*, No. M2006-00350-COA-R3-CV, 2007 WL 624351, at *3 (Tenn. Ct. App. Feb.28, 2007) (citing *Young v. Smith*, 193 Tenn. 480, 246 S.W.2d 93, 95 (Tenn.1952)). As such, here Father argues that, if “the fact[] [of Father's abuse] [was] in existence or reasonably foreseeable when the [trial court entered its October 8, 2024] decision,” Mother is precluded from relitigating that issue in defense of Father's petition to modify custody.

A. Requirement to Make Offer of Proof and Exceptions

Initially, however, Father contends that Mother has waived any issue regarding the admissibility of evidence concerning his alleged abuse because she failed to make an offer of proof in the trial court. Indeed, Tennessee Rule of Evidence 103(a) provides, in relevant part, that, “Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . [i]n case the ruling is one excluding 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.” As this Court has explained, a trial court's ruling to exclude evidence does not constitute reversible error unless “a substantial right of the party is affected.” *Gillum v. McDonald*, No. M2003-00265-COA-R3-CV, 2004 WL 1950730, at *4 (Tenn. Ct. App. Sept. 2, 2004) (quoting Tenn. R. Evid. 103(a)). Where evidence has been excluded, the Tennessee Rules of Evidence also require that “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’ within which the questions were asked.” *Id.* (quoting Tenn. R. Evid. 103(a)(2)) (emphasis added).

Although Mother's failure to make an offer of proof concerning the excluded evidence usually would result in waiver of any issue concerning that evidence, as we have

explained, there are

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).

Hill v. Hill, No. M2006-01792-COA-R3-CV, 2008 WL 110101, at *5 (Tenn. Ct. App. Jan. 9, 2008).

“According to Rule 103(a)(2), an offer of proof is not needed when the substance of the evidence and the reasons for admission ‘were apparent from the context within which questions were asked.’ This could occur when the witness’s previous responses, the wording of the question, and other evidence in the case reveal the substance of the excluded testimony.” ***Gillum***, 2004 WL 1950730, at *5 (quoting Neil P. Cohen et al., Tennessee Law of Evidence § 1.03[5][a] and [c]).

In ***Gillum***, the trial court refused to hear evidence of any conduct prior to the parties’ divorce, which occurred five months before the filing of the petition to modify child custody. ***Gillum***, 2004 WL 1950730, at *4. The father in ***Gillum*** specifically complained of the exclusion of evidence that mother “shot at” a paramour while the child was present and insisted that this incident was relevant to the question of Mother’s fitness for custody. Like Mother here, Mr. Gillum did not make an offer of proof in the trial court, and, on appeal, Ms. Gillum argued that he waived any issue concerning the exclusion of the disputed evidence. This Court disagreed, concluding that Mr. Gillum’s failure to make an offer of proof did not bar his appellate issue because the exceptions to Rule 103(a) were present. Specifically, we held that father’s failure to make an offer of proof “is not fatal because the substance of the excluded evidence is apparent from the context of the questions. Thus, it is not necessary to examine whether the trial court’s exclusion of the evidence constitutes plain error, as asserted by [f]ather.” ***Id.*** at *5.

Here, Father’s attorney objected to each of Mother’s attempts to elicit testimony concerning the alleged sexual abuse based on his assertion that Mother knew about the allegations of sexual abuse prior to entry of the trial court’s October 8, 2024 custody order. For example:

Q [to Mother]. And then, it’s fair to say that in January of 2023, supervised visits [between the Child and Father] began?

A. No. I voluntarily, you know, just would have a, give a visitation-type schedule until my daughter disclosed the sexual abuse.

MR. KING[, Father's attorney]: Judge . . . Again, Judge, I know what she [Mother] wants to say. They've got an agenda. This case isn't about that [the sexual abuse allegations]. It really is about what has gone on since the Court entered the [October 8, 2024] order.

THE COURT: All right.

MS. CANTER: And I'm not trying—

THE COURT: At this point, let's just cover parenting time.

MS. CANTER: Trying to get into parenting time.

THE WITNESS: Okay. I apologize.

THE COURT: Yeah. I don't need reasons at this point, why things went—

MS. CANTER: We'll get there. And if the Judge decides—

THE COURT: Just give me the mechanics of what was going on.

Later, Father was questioned by Mother's attorney as follows:

Q [to Father]. And then, in terms of what you testified to regarding fitness to be a better parent to handle any school issues, what would you do, and how would you handle any issues that arose at school, upon the school finding out you were substantiated for sexual abuse?

MR. KING: Judge, I would object. Again, res judicata. That was all alleged prior to the entry of the [October 8, 2024] court order, and they settled their case anyway. I mean, this is what, you can't do that.

MS. CANTER: It's a fair question.

MR. KING: You can't—no, it's not a fair question. It's improper under res judicata. The law states you can't try to relitigate facts that were known at the time of, prior to the entry of the court order. I mean, you can't do it.

THE COURT: Ms. Canter, you were kind of mid question there. I'm going to let you finish asking your question. Don't respond to it yet.

Q. Upon the school becoming aware of the substantiation of sex abuse, how do you plan to be present at school activities and be around children, given the fact that of that?

THE COURT: Can you give me a time frame?

MS. CANTER: It's fair to say that you were substantiated by the Department of Children's Services for sexual abuse of [Mother's] daughter after the mediated agreement worked out, were you not?

MR. KING: Judge, it's the court order. It's the order.

MS. CANTER: But was it contemplated at the time they mediated?

THE COURT: I don't understand. What are you saying, Mr. King? What is it you're saying?

MR. KING: I'm saying that there's the date, you know, this is entirely inappropriate, but we're going to address it, I guess. Have to now. It's out. But there's a letter substantiating [Father] for sex abuse, that's all it says. The date of the report is 5/1/24. That's the date it was reported. That's before

mediation. The report date, yes it is. Mediation's in June, so it's even before the mediated agreement. And they settled their case anyway. Technically, he doesn't receive the letter of substantiation for a couple months later, but that's still prior to 10/8/2024. It's all before.

MS. CANTER: But it's after the mediated agreement.

MR. KING: Judge—

MS. CANTER: At the time of mediation—

MR. KING: It's a court order. . . . This is wrong. It's a court order before—

MS. CANTER: It is relevant to the best interest factor of moral character of either party.

MR. KING: Not a previously known fact.

THE COURT: Let her finish.

MS. CANTER: And again, we have a mediated agreement. It was in June of 2023. The substantiation was not known at that time, and I plan to offer my client for more detail on that, why it occurred, and how. The Parenting Plan was never signed by my client, and I think she can offer reasons as to why. It wasn't because she wasn't communicating with her lawyer. And it's relevant, certainly, in our position, to best interest.

THE COURT: You want to respond to anything you haven't already said, Mr. King?

MR. KING: No, not that I haven't already said. I stand on what I said, vehemently. No, I'm good. Thank you.

MS. CANTER: I mean, it's troubling that the mediated agreement was in place, but then over a year passed before an order went down, but—

THE COURT: All right. And at this point, I'm going to sustain the objection. I'll leave the door open to see if it may become fair game down the road. At this point, sustained.

Then, later in the testimony, Mother was questioned as follows:

Q [to Mother]. Now, I want to go back to when this case started, and let's first talk about the mediated agreement that's been introduced as an exhibit herein. When you went to mediation, were you aware of a substantiation by the Department of Children's Services?

A. No. My daughter hadn't even been interviewed by the forensic investigator at that time. It was just reported.

Q. When do you recall your daughter being interviewed? And I don't want to know what she said, I'm just specifically looking for the time frame when she was interviewed by a forensic interviewer.

A. It was in the end of June, beginning of July, possibly.

Q. Okay. Was it, do you recall it being before or after this mediation occurred?

A. It was definitely after the mediation, give or take, 30 days after, but it

definitely, because at that point, I didn't know all of the details of what had happened.

Q. And when you went to mediation, made the mediated agreement, I think you just answered my question, but is it truly fair to say, you didn't have the knowledge that you gained after mediation?

A. No.

MR. KING[, Father's attorney]: Judge, I'm going to, I object to the response to the question. I am not objecting to Ms. Cantor's[, Mother's attorney,] question. I think she's trying to tailor the questions properly, but I object to this narrative about, trying to back door in this stuff that was known prior to the entry of the court order. It's irrelevant. They can't rely upon it.

MS. CANTER: And Judge, I mean, I'll just go ahead and address it now. I don't want to get off track. But, [Mother] has obviously testified that at the time of the mediated agreement, she was not aware of details and of the Department's substantiation. And for that reason, that is why our argument is that it is relevant to the best interest factor of moral fitness.

MR. KING My response is, there's a report made prior to the mediation agreement and prior to the [October 8, 2024] court order being entered. What they're alluding to was known to everyone. . . . [I]t's irrelevant. And when you look at their Rule 60, they didn't raise any of that. . . . They're trying to litigate today what was known yesterday. You can't do that. . . .

THE COURT: [Mother], let me ask you a question. At what point did you become aware, and I don't want details, but at what point did you become aware that there had been an incident or a conduct that may have been inappropriate with regard to your daughter? At what point did you first become aware of that? Approximately, I don't mean an exact date.

THE WITNESS[, Mother]: At, that's kind of a tough one to answer, just because back whenever I contacted the Department of Children's and Family Services, I only knew a very minute, like, small amount of what all was done. And then after the forensic interview, I realized how gory and bad it really was.

THE COURT: In relation to the mediation, you were aware of it at that point.
.. [t]hat there was some type of conduct?

THE WITNESS: Yes, not the severity of it, but just, just really, what I was aware of at the time didn't really look anything compared to what I eventually found out that he had done.

THE COURT: Objection sustained.

From the foregoing testimony, the substance of the evidence excluded in this case and the reasons for admission could not be more apparent. Father's own attorney stated, "there's a letter substantiating [Father] for sex abuse, that's all it says."

Further, the testimony excerpts above make clear that the trial court agreed with Father's argument that the alleged abuse was not relevant to whether there had been a material change in circumstance. As a result, the trial court found that "any alleged misconduct was both moot and *res judicata* as the alleged misconduct occurred prior to mother entering into the agreed parenting plan outlined in the parties mediation agreement dated June 5, 2023 and encompassed in the order and parenting plan signed by the court on October 8, 2024." However, the trial court's analysis disregards the fact that, throughout these proceedings, Mother has maintained that the evidence of alleged abuse is relevant to the trial court's *best interest* analysis — an analysis distinct from determination of whether there has been a material change of circumstance. As her attorney states in the foregoing portions of the transcript: (1) "[the evidence of abuse] is relevant, certainly, in our position, to best interest"; (2) "our argument is that [evidence of abuse] is relevant to the best interest factor of moral fitness"; and (3) "[the evidence of abuse] is relevant to the best interest factor of moral character of either party."

Here, as the trial court found in its final order, the parties agreed that the Child reaching school age constituted a material change in circumstance.⁴ However, because we

⁴ Regarding a material change in circumstance to justify a change in custody, Tennessee Code Annotated section 36-6-101(a)(2)(B)(i) provides:

(i) If the issue before the court is a modification of the court's prior decree pertaining to custody, the petitioner must prove by a preponderance of the evidence a material change in circumstance. A material change of circumstance does not require a showing of a substantial risk of harm to the child. A material change of circumstance may include, but is not limited to, failures to adhere to the parenting plan or an order of custody and visitation or circumstances that make the parenting plan no longer in the best interest of the child.

Tenn. Code Ann. § 36-6-101(a)(2)(B)(i).

As set out in context above, in its final order, the trial court noted the parties' agreement that "the

conclude that the evidence of Father’s alleged abuse is particularly relevant to statutory best interest factors 8, 11, and 15, *see* discussion *infra*, it was error for the trial court to deny this evidence.

B. Substantial Right

Having determined that an exception to the Rule 103(a) offer-of-proof requirement applies here, and that the evidence Mother sought to introduce was not barred by the doctrine of *res judicata*, we turn to the question of whether the trial court’s exclusion of the disputed evidence affected a substantial right. Tenn. R. Evid. 103(a). On this question, we again turn to *Gillum*, where the Court explained that “[t]o determine whether it was more probable than not that a substantial right was affected we must consider all the relevant proof in order to determine the impact of the disputed evidence.” *Gillum*, 2004 WL 1950730, at *5. In applying this standard, the *Gillum* Court concluded that the trial court’s decision, “[l]imiting the evidence to post-divorce conduct[,] substantially impaired the trial court’s ability to make an informed custody decision based on the best interest of the child and the comparative fitness of the parents.” *Id.* In holding that the trial court “exceeded its discretion by excluding pre-divorce evidence,” this Court concluded that the excluded evidence “was significant and relevant and excluding such evidence more probably than not affected the substantial rights of the parties and the child, whose best interest is at the heart of the inquiry.” *Id.*

In the recent case of *In re Remington G.*, No. M2021-00680-COA-R3-PT, 2025 WL 79934 (Tenn. Ct. App. Jan. 13, 2025), which dealt with a petition to establish parentage and for entry of a permanent parenting plan, “the child was just over three years old and had several ongoing health problems that required various therapies to treat.” *Id.* at *4. The parents disputed which of them was better suited to care for the child’s special needs.

current parenting plan is no longer workable as the [C]hild has reached school age and it would be impossible to maintain a rotating schedule giving each parent two consecutive weeks with the [C]hild, given that the Mother and Father live approximately 4 hours apart.” Based on the parties’ agreement, the trial court found “a material change of circumstances has occurred.”

On appeal, neither party disputes this finding, and we agree that the record supports the trial court’s conclusion that the parties’ rotating, two-week schedule is no longer feasible in view of the Child reaching school age. *See, e.g., Stone v. Crawford*, No. E2006-02187-COA-R3-CV, 2007 WL 3087691, at *6 (Tenn. Ct. App. Oct. 24, 2007) (“Due to the child’s need for more consistency as he reached school age, as agreed to by both parties, we are unable to conclude that the evidence preponderates against the Trial Court’s conclusion that a material change in circumstances was proven such that a modification of the residential parenting schedule was necessary and in the child’s best interest.”); *J.E.B. v. J.C.W.*, No. E2003-02782-COA-R3-JV, 2004 WL 2083713, at *2 (Tenn. Ct. App. Sept. 15, 2004) (noting that, “The parties agree that a material change in circumstances has occurred in that the child has now reached school age and, because the parties live over two hours apart, they cannot continue alternating custody every week with a child enrolled in school. Circumstances now dictate that one of the parents be declared the primary residential custodian.”).

As the *Remington G.* Court explained, the trial court’s “limiting the evidence came in the context of [m]other trying to play audio of [f]ather speaking to [m]other regarding the medication the child had been prescribed.” *Id.*

The *Remington G.* Court first determined that mother’s failure to make an offer of proof in the trial court was not fatal to her appellate issue because “the witness’s previous responses, the wording of the question, and other evidence in the case reveal the substance of the excluded testimony.” *Id.* (citing *Gillum*, 2004 WL 1950730, at *5 (citation omitted)). Applying the *Gillum* instruction to “consider[] all the relevant proof in order to determine the impact of the disputed evidence,” *Id.* (citing *Gillum* 2004 WL 1950730, at *5), the *Remington G.* Court concluded that “[f]ather’s ability to provide care for the child, including medical care he has disagreements with, was of central importance to the best interests of the child.” *Id.* Specifically, the Court held that

The record before us contains numerous instances where the court limited evidence simply based on the time limitation. . . . All of this evidence would have been directly related to the child’s best interests, and the court should have heard this evidence. We, therefore, believe the [exclusion of this evidence] affected the outcome of the trial.

Id. at *5. The same is true here. Therefore, we conclude that the trial court abused its discretion and erred by excluding evidence of Father’s alleged sexual abuse.

VII. Best Interest

“While a trial court has broad discretion in fashioning a parenting plan, the touchstone is the best interest of the child.” *Smallbone v. Smallbone*, No. M2020-01556-COA-R3-CV, 2022 WL 1405655, at *4 (Tenn. Ct. App. May 4, 2022). Tennessee Code Annotated section 36-6-106(a) contains a non-exclusive list of best-interest factors for the trial court to consider in determining custody arrangements. Here, evidence concerning Father’s alleged sexual abuse of Mother’s daughter from another relationship is particularly relevant to statutory factors 8, 11, and 15:

(8) The moral, physical, mental and emotional fitness, of each parent as it relates to their ability to parent the child. . . .;

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

(15) Whether a parent has had custody or parenting time reduced or restricted in the past and if so, the reasons custody or parenting time was relinquished[.]

Tenn. Code Ann. § 36-6-106(a).

As to factor 8, in its final order, the trial court found:

8. Factor 8 both parents are fit morally, physically, mentally and emotionally to parent the child. Mother attempted to raise an issue regarding Father's fitness to care for the child and the court found any alleged misconduct was both moot and res judicata as the alleged misconduct occurred prior to mother entering into the agreed parenting plan outlined in the parties mediation agreement dated June 5, 2023 and encompassed in the order and parenting plan signed by the court on October 8, 2024.

As to factor 11, the trial court merely found that, "Factor 11 is inapplicable for the reasons set forth in the discussion of factor 8 above." The trial court also found that "[f]actor 15 is inapplicable."

As discussed above, on March 27, 2023, the trial court entered an interim order, wherein it noted Mother's concerns for the safety of the Child while in Father's custody and ordered Father's visitation would be supervised. Yet, in its August 18, 2025 order, for reasons not apparent from the record or the order, the trial court found that statutory factor 15 (*i.e.*, "[w]hether a parent has had custody or parenting time reduced or restricted in the past and if so, the reasons custody or parenting time was relinquished") was inapplicable. This was error.

As to the excluded evidence of Father's alleged abuse, whether Father perpetrated abuse on another child is significant and relevant to this Child's best interest. In finding, as to statutory factors 8 and 11, that this evidence was barred as "moot and res judicata," the trial court abused its discretion by incorrectly identifying and failing to properly apply the appropriate legal principles. See **Danny L. Davis Contractors, Inc.**, 157 S.W.3d at 419. Specifically, we conclude that the trial court's decision to deny evidence of Father's alleged abuse of another child, "substantially impaired the trial court's ability to make an informed custody decision based on the best interest of th[is] [C]hild". **Gillum**, 2004 WL 1950730, at *5. Accordingly, as was the finding in **Gillum**, "excluding such evidence more probably than not affected the substantial rights of the parties and the child, whose best interest is at the heart of the inquiry." *Id.*

Because the question of Father's abuse is relevant to the Child's best interest, on remand, the trial court must allow Mother to develop the record and to present evidence

concerning same. Although the trial court ultimately may conclude that such evidence does not change its best interest analysis, it must explain its reasons for such finding after considering the evidence Mother tenders. To this end, we vacate the trial court's custody order.

VIII. Modification of Child Support

When, as in this case, a PPP is modified to change the primary residential parent, a child support order must be entered. "The modification of custody and significant change in the visitation schedule necessitate a modification of child support." *Joiner v. Griffith*, No. M2004-02601-COA-R3-CV, 2006 WL 2135441 at *5 (Tenn. Ct. App. July 31, 2006); *see also Solima v. Solima*, No. M2014-01452-COA-R3-CV, 2015 WL 4594134 at *7 (Tenn. Ct. App. July 30, 2015); *Leonardo v. Leonardo*, No. M2014-00372-COA-R3-CV, 2015 WL 3852802, at *8 (Tenn. Ct. App. June 18, 2015). Having vacated the trial court's custody decision, it is also necessary to vacate its order on child support. However, as a point of practice, and as guidance on remand, we briefly discuss the trial court's child support analysis.

As noted above, the PPP entered by the trial court contained a typographical error concerning the parties' actual parenting time. Mother was awarded visitation every three weeks, from Friday to Sunday. In addition, the trial court ordered that, "Mother shall receive one extra weekend per month if she comes to Rogersville, TN or Kingsport, TN to utilize that parenting time." Although Mother received significantly less parenting time than Father, the PPP incorporated into the trial court's October 8, 2024 order erroneously states that each parent will receive 182.5 days per year of parenting time. Perhaps the number of days stated in the PPP is a typographical error; however, the trial court's final order stated that, "Counsel is directed to recalculate the support obligation *based upon an equal division of days for each parent*" (emphasis added).

Although a trial court may deviate from the Child Support Guidelines, in doing so, the Tennessee Rules and Regulations require the trial court to explain the basis of that decision, to-wit:

DEVIATIONS FROM THE CHILD SUPPORT GUIDELINES.

(1) Consideration of the Child's Best Interests; Written Findings to Support the Deviation.

- (a) The amounts of support established by these Guidelines are rebuttable.
- (b) The tribunal may order as a deviation an amount of support different from the amount of the presumptive child support order if the deviation complies with the requirements of this paragraph (1) and with this chapter. The amount or method of such deviation is within the discretion of the tribunal provided, however, the tribunal must state in its order the basis for the deviation and

the amount the child support order would have been without the deviation. In deviating from the Guidelines, primary consideration must be given to the best interest of the child for whom support under these Guidelines is being determined.

(c) When ordering a deviation from the presumptive amount of child support established by the Guidelines, the tribunal's order shall contain written findings of fact stating:

1. The reasons for the change or deviation from the presumptive amount of child support that would have been paid pursuant to the Guidelines; and
2. The amount of child support that would have been required under the Guidelines if the presumptive amount had not been rebutted; and
3. How, in its determination,

(i) Application of the Guidelines would be unjust or inappropriate in the particular case before the tribunal; and

(ii) The best interests of the child for whom support is being determined will be served by deviation from the presumptive guideline amount.

Tenn. R. & Reg. § 1240-02-04-.07.

We cannot determine whether the trial court intended to deviate from the Child Support Guidelines or whether its calculation of child support based on an incorrect statement of the parties' parenting time was plain error. Regardless, our decision to vacate the trial court's custody order and remand for further consideration of evidence concerning Father's alleged abuse may result in the trial court reaching a different parenting arrangement and, consequently, child support determination. However, we caution that, on remand, the trial court should either base its determination of child support on the parties' actual parenting time in compliance with the Child Support Guidelines, or, if the trial court intends to deviate from the guidelines, it should enter an order containing the findings required under section 1240-02-04-.07 of the Tennessee Rules and Regulations.

IX. Attorney's Fees

Father asks this Court to award him attorney's fees, expenses, and frivolous appeal damages related to this appeal. Concerning frivolous appeal damages, Tennessee Code Annotated section 27-1-122 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.

Tenn. Code Ann. § 27-1-122. “An appeal is frivolous when it has ‘no reasonable chance of success,’ *Jackson v. Aldridge*, 6 S.W.3d 501, 504 (Tenn. Ct. App. 1999), or is ‘so utterly devoid of merit as to justify the imposition of a penalty.’” *Whalum v. Marshall*, 224 S.W.3d 169, 181 (Tenn. Ct. App. 2006) (quoting *Combustion Eng’g, Inc. v. Kennedy*, 562 S.W.2d 202, 205 (Tenn. 1978)). Whether we award frivolous appeal damages rests solely in this Court’s discretion, *Chiozza v. Chiozza*, 315 S.W.3d 482, 493 (Tenn. Ct. App. 2009), and we exercise such discretion “sparingly so as not to discourage legitimate appeals.” *Whalum*, 224 S.W.3d at 181. Based on our review of the record, our decision in favor of the Appellant, and in the exercise of our discretion, we decline to award damages on the basis of frivolous appeal.

All remaining issues and arguments are pretermitted.

X. Conclusion

For the foregoing reasons, the trial court’s custody and child support orders are vacated. Father’s request for frivolous-appeal damages is denied. The case is remanded for such further proceedings as may be necessary and are consistent with this opinion, including, but not limited to: (1) consideration of Mother’s evidence of Father’s alleged abuse; (2) reconsideration of the best interest factors in view of the abuse evidence; and (3) recalculation of child support in compliance with the Child Support Guidelines or entry of an order explaining any deviation therefrom. Costs of the appeal are assessed to the Appellee, Kenneth Lucas. Execution for costs may issue if necessary.

s/ Steven Maroney
STEVEN W. MARONEY, JUDGE