

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs February 4, 2026

CEDRIC D. COLEMAN v. CANDACE MARIE COLEMAN**Appeal from the Circuit Court for Shelby County
No. CT-005063-13 Felicia Corbin Johnson, Judge**

No. W2024-01311-COA-R3-CV

Mother appeals the trial court's decision to award the parties essentially equal parenting time despite the parties' inability to communicate effectively, Father's almost-three-year absence from the ten-year-old child's life, and the court-appointed expert's recommendation that Father's parenting time be increased incrementally. We reverse the trial court's decision and remand for reconsideration of the parenting time issue.

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

J. STEVEN STAFFORD, P.J., W.S., delivered the opinion of the court, in which THOMAS R. FRIERSON, II, and W. NEAL MCBRAYER, JJ., joined.

Laurie W. Hall, Tiffany Taylor Bowders and Julie Chapman, Memphis, Tennessee, for the appellant, Candace Marie Coleman.¹

Melissa C. Berry and Rebecca A. Bobo, Memphis, Tennessee, for the appellee, Cedric D. Coleman.²

OPINION**I. FACTUAL AND PROCEDURAL BACKGROUND**

Plaintiff/Appellee Cedric D. Coleman ("Father") and Defendant/Appellant Candace Marie Coleman ("Mother") were married in September 2009. One child, a son, Aiden, was born to the marriage in August 2013. Father filed a complaint for absolute divorce in the

¹ Appellant was represented by Nick Rice and Jessica Ferrante in the trial court.

² Appellee was represented by Mitchell D. Moskovitz in the trial court.

Shelby County Circuit Court (“the trial court”) on November 25, 2013, and the final decree of absolute divorce was entered on May 6, 2014.

A permanent parenting plan was entered on July 16, 2014, establishing Mother as the child’s primary residential parent. Father received 106 days of parenting time, to be exercised according to a graduated schedule. The plan contained no specific holiday or school vacation schedule and directed the parties to attend mediation or file a petition to modify the plan in the event no agreement could be reached. Decisions regarding the child were to be made jointly, with Mother awarded final decision-making authority.

Then on November 12, 2014, Father filed a petition for criminal and civil contempt and to modify the parenting plan. He alleged that Mother’s interference with his scheduled parenting time was both willful disobedience constituting criminal contempt and a material change in circumstances requiring modification of the parenting plan. He further alleged that Mother’s failure to complete the required parenting class amounted to civil contempt. Father also asked that a specific holiday schedule be set. In his proposed modified plan, Father would receive 149 days of parenting time and the parties would alternate holidays and extended school vacations. The proposed plan also included contingencies allowing Father or his parents to pick the child up for Father’s scheduled parenting time.

The trial court addressed Father’s petition in a consent order entered February 23, 2015. The petition for criminal and civil contempt was dismissed. But the trial court approved a new permanent parenting plan, entered February 2, 2015, to wholly replace the July 2014 plan. In the February 2015 parenting plan, Mother remained the child’s primary residential parent and Father received 125 days of parenting time; Father would exercise his parenting time on the second and fourth weekend of each month and overnight every Tuesday evening. The parties would alternate parenting time on holidays and school vacations. Mother retained final decision-making authority.

The next filing in the case was Father’s December 5, 2022 petition for criminal contempt, to modify the permanent parenting plan, and for immediate injunctive relief. Therein, Father alleged that Mother began unilaterally withholding visitation with the child in March 2020. Father explained that during his parenting time on March 10, 2020, he encouraged the child to complete ten push-ups and then, when the child completed those ten, to complete additional push-ups. Father stated that Mother “voiced significant displeasure over Aiden’s sore arms” the next day and “‘informed’ Father of her unilateral decision to deny Father his upcoming weekend parenting time.” He submitted that there was “no legitimate basis or justification for Mother’s refusal to allow Father to exercise parenting time.” Father alleged that Mother’s interference amounted to criminal contempt, constituted a material change in circumstances requiring modification of the parenting plan, and would result in irreparable harm if not rectified.³ Father’s proposed modified

³ Father later voluntarily dismissed the charge of criminal contempt.

parenting plan awarded equal parenting time by way of the child alternating weeks with each parent. The proposed plan further provided that in the event the parties had a decision-making dispute, no change would be made without written agreement or court order. A fiat was entered on December 7, 2022, directing Mother to “cooperate and fully comply” with the February 2015 parenting plan pending further order of the court.

Mother responded to the petition in January 2023. She explained that completion of the push-ups was used to punish the then-six-year-old child as part of Father’s pattern of severe corporal punishment. Mother stated that the Tennessee Department of Children’s Services (“DCS”) opened an investigation around this time. But she believed the investigation had stalled due to the COVID-19 pandemic and did not know the current status. Mother alleged that the parties agreed that Father would not exercise any parenting time during DCS’s investigation and that she “would call Father before his scheduled visits, and they agreed Father’s visits would not occur during that time.” She further explained that “after a few of these calls, when Mother called Father prior to another scheduled visit, Father told Mother to stop calling him about them.” According to Mother, she “stopped calling Father, and Father failed to see the parties’ son for approximately thirty-three (33) months[,]” during which time Father did not “call, text, or email Mother about seeing their child.” Mother’s response included a counter-petition to modify the parenting plan and for Father to begin reunification counseling with the child. Mother proposed Eric Cassius as the reunification counselor.

The trial court entered a consent order on February 14, 2023, directing the parties and the child to “participate in reconciliation counseling with [Mr.] Eric Cassius for the ultimate purpose of restoring Father’s parenting time.” The consent order further provided that neither party would seek to enforce the operative parenting schedule and, instead, “both parties shall reasonably refer to [Mr.] Cassius’ recommendations relative to temporary parenting time. Notwithstanding, nothing herein shall preclude a party from seeking relief from and/or modification of the terms set forth herein by filing the appropriate pleading with the [c]ourt.”⁴

Mother filed a petition in December 2023, asking that the child be allowed to testify at the hearing of the cross-petitions to modify the parenting plan. She stated that the child was ten years old and “mature enough to articulate his opinion and his feelings[,]” and that his testimony would be beneficial to the trial court.

Father opposed the petition and denied that the trial court “should involve the parties’ 10-year-old child in this litigation any further than Mother already has.” (emphasis omitted). He alleged that “upon information and belief, Mother regularly and frequently

⁴ There appears to be no serious dispute that Father filed at least two police reports regarding Mother’s alleged interference with his parenting time and that this provision was included to prevent future such reports. Mother was not arrested in connection with any of Father’s complaints.

discusses the litigation with Aiden, likely exerting undue influence over Aiden and pressuring Aiden to say and do what he perceives his *mother* wants.” Father further alleged that “during her deposition on October 5, 2023, Mother admitted to ‘frequently’ discussing and ‘probing’ 10-year-old Aiden regarding the litigation, a modified parenting schedule, and Mother’s representation to Aiden that the ‘ball is in [his] court.’” (Emphasis omitted).

Mother submitted a proposed modified parenting plan in February 2024, providing Father with eighty days of parenting time according to a graduated timeline. Thereunder, Father would have in-person reunification counseling with the child once per week for six weeks, and if all six sessions were attended, Father would then have parenting time on the second and fourth weekend of each month. The parties would alternate parenting time on holidays and school vacations, and Mother would have ultimate decision-making authority after good-faith consultation with Father.

The matter was heard over the course of four days between February and March 2024: February 9, 15, and 16, and March 28.⁵ After opening statements, the trial court offered some colloquy about its understanding of the case. The trial court noted that “if [Mother] has been the primary parent and the sole parent for three years, then presumably she’s feeling some kind of way about [Father] now wanting to be involved and perhaps the way that he has gone about facilitating that relationship.” The court also explained that “[w]hatever was going on with [Father] that he was not present for three years when Aiden was very young, that’s significant[,]” and Father would “be held accountable for that. But at the same time, we have to move beyond that.”

Mr. Cassius was stipulated as an expert in psychological counseling. He explained his goal as having Father and the child “be able to talk and get to know each other and spend time together and see how the two of them interacted and be there.” He stated that he first met with the child on March 23, 2023 and with Father on April 20, 2023. Mr. Cassius testified that Father explained his almost-three-year absence from the child’s life as the result of the COVID-19 pandemic and “other things going on,” like Father “building his practice, his business. He was doing a lot of things.” According to Mr. Cassius, Father took responsibility for not being in the child’s life “only to the point that he had other things going on.” Mr. Cassius also recalled that Father “turned the blame back on [Mother] for not answering the phone or not keeping in communication with him.” Mr. Cassius later noted that Father would often “come in [after conflict with the child] and try to make excuses for what has happened and kind of . . . try to smooth things over with him but not necessarily taking any responsibility.” Mr. Cassius also testified to observing selfishness from Father.

⁵ By agreement, Father’s testimony was paused to allow Mr. Cassius and the child to testify out of order. Thus, some of Father’s testimony was proffered before Mr. Cassius’s and Aiden’s testimony, some between, and some after.

Ultimately, between February 2023 and January 2024 Mr. Cassius met with the child individually three times, with Father individually twice, and with the child and Father approximately ten times; Mother joined Father and the child at the end of two or three sessions, primarily for scheduling purposes or to help emotionally regulate the child. Mr. Cassius's progress notes from the reunification counseling sessions and his emails to counsel relating his thoughts regarding the progress being made were entered as evidence.⁶ His notes from the child's first session indicated that, "[o]n one hand [Aiden] wants to see [Father,] on the other hand it's been so long that he has a hard time remembering what it was like just with [Father]." Mr. Cassius noted that the child had started calling his stepfather "Dad" and was "[n]ervous about what to call [Father.]"

In his notes from his initial session with Father, Mr. Cassius stated that Father believed Mother was bitter after the divorce because Father no longer wanted to be in a relationship with her. The notes also stated: "[Father] explains he only punished [the child] with whoopings [but] tried to find a way to punish without whooping, which is why he had [the child] doing pushups (25 pushups) then 25 with [F]ather after." Mr. Cassius's notes from this session also indicated that Father expressed concern that calling the child directly, rather than communicating through Mother, would get the child in trouble with Mother. Mr. Cassius testified to his belief that this fear was unfounded based on his observations of the parties.

Mr. Cassius testified to having heard some sort of confrontation between Father and Mother's husband in his office early on in the course of the counseling sessions. He agreed that the confrontation was concerning and not healthy for the child. He also agreed hypothetically that it would be concerning if there was another public confrontation between Mother's husband and Father during the course of the litigation, regardless of who "started" the altercation.⁷ The confrontation in Mr. Cassius's office was briefly mentioned in his May 31, 2023 progress note.

Mr. Cassius's notes from May 31 also indicated that it was clear that the child "was feeling pulled [between]" Mother and Father and that after the child expressed his disappointment in them, both parents "could see the emotional toll it was taking on Aiden." The notes stated Mr. Cassius's belief that Father was not a risk of harm to the child and that moving forward with visitation may be in the child's best interest. This assessment was also included in an email sent by Mr. Cassius to the parties' attorneys.

After Father's first parenting time with the child in June 2023, Mr. Cassius's notes indicated that the child expressed enjoying his time with Father and that he would not mind

⁶ For the sake of clarity, our transcription of Mr. Cassius's writings includes some added punctuation and omits some obvious spelling mistakes and unnecessary capitalizations. These minor technical changes are not indicated.

⁷ Father later testified to another brief verbal altercation with Mother's husband at the airport.

spending more time with Father. The child's interest in spending more time with Father was reiterated in Mr. Cassius's notes from the next session as well. In his notes from a July 2023 session, Mr. Cassius explained that he was "[c]ontinuing to discuss visitation with both parents as Aiden begins school; [Father] wants him more yet [Mother] seems a little nervous yet wants Aiden to have time with [Father]."⁸ Mr. Cassius confirmed this progress in an email to the parties and their attorneys, in which he further explained that if overnight visitation the first weekend in August went well, he "believe[d] that the parents and their counsel should come up with an idea of shared custody so Aiden continue[d] to have a relationship with his biological father." And after the next session following the overnight visitation, Mr. Cassius noted: "Both Aiden and [Father] seem good together. . . . There doesn't seem to be any negatives Aiden seems to be enjoying the time with [Father]" Mr. Cassius also noted that "[w]hen [Father] is in the office he sometimes tries too hard to convince Aiden and the counselor that all is good."

However, after a session in September 2023, Mr. Cassius noted that "Aiden feels like he has a hard time expressing himself when [Father] is in the office. [Father] heard him when Aiden corrected him yet Aiden still seems a little guarded, not wanting to upset [Father] or [Mother]." Mr. Cassius testified that communication had been set back in a way, because "at one point Aiden was willing to express himself in the beginning, he was talking, and then kind of started hesitating about what he said when [Father] was in the room." He stated his belief that the child "was feeling stuck in the middle" and did not want to upset either parent or "hurt anybody's feelings." Although Mr. Cassius explained that the child worried that spending more time with Father would hurt Mother, he clarified that he did not think Mother was actively fostering this belief.

Then in an October 2023 email to the parties and counsel, Mr. Cassius stated that "Aiden seems happy and content with the visitation with [F]ather. Both he and [F]ather were having fun, joking, and enjoying each other's company." The email confirmed an overnight visitation scheduled for November 10 through 12, 2023.

Mr. Cassius's notes from November 13, 2023 described the reactions of the child and Father to missing the scheduled visit. His understanding was that Father's mother was supposed to pick the child up for Father's parenting time but went to the wrong location; when the grandmother and Mother were able to get in touch to see if alternate arrangements could be made, "Aiden said he would just stay with [Mother]." Mr. Cassius noted that the child stated that "he now only wants every other weekend with [Father] and that he doesn't fully trust [Father] now"⁹ and was "visibly upset [Mr. Cassius] wanted [the child] to be open with [Father] about how [the child] was upset." Mr. Cassius's notes continued:

⁸ Mr. Cassius testified to his belief that this nervousness was "pretty normal" for Mother at this stage of the reunification attempt.

⁹ Mr. Cassius explained in a later letter and at trial that part of the child's distrust was based on Father having also missed the scheduled parenting time two weeks prior.

When I brought [Father] in he was already defensive and tried to convince Aiden it wasn't his fault and wanted to know why [the child] keeps changing his mind. He tried to convince Aiden that previous times before he started counseling were due to [M]other not communicating.

When I tried to redirect, [Father] had a difficult time as Aiden continued to be upset. [Father] then proceeded to try and get him to stop crying but by explaining he can't cry all the time because he needs to be tougher, which Aiden did not like. As our time got short, I asked [Father] to leave the room so I could do a little damage control with Aiden. . . . I then brought [Father] in by himself and explained to him that Aiden needed to hear that he was sorry for the mistake and not why it isn't his fault or [the grandmother's] fault. [Father] had a very hard time in session empathizing and stated a few times "what about how I feel."

These findings were reiterated and expanded upon in an email to the parties and counsel. Therein, Mr. Cassius stated

When [Father] entered the room he was in a positive mood, yet, he immediately tried to do damage control rather than address Aiden's sad mood. Even while trying to get him to recognize Aiden's mood he stated "what about my feelings." I continued to try and get him to see that Aiden was continuing to be upset but he started talking about Aiden being too sensitive. I eventually asked him to leave Aiden and I alone so I could do some damage control explaining to Aiden how sensitive these custody battles are and how I know he doesn't want to upset [either parent] and he feels pulled.^[10] I usually push for the child to express himself but this time [F]ather would keep interrupting as if he had an agenda due to the missed exchange the previous weekend.

After talking to Aiden and getting him to cool off I let him go home and brought [Father] back and told him all he had to say was he was "sorry things got messed up and we will try better next time[.]" And that [] talking about the past and what has happened between him and [Mother] and Aiden wasn't necessary at all. He seemed to take that in stride, yet he seems so fixated on how much time he has and he isn't seeing how stressed this is making his son.

In the email, Mr. Cassius did note his belief that Mother should have made the decision about whether to make alternate arrangements for the visit rather than leave the question to the child. At trial, Mr. Cassius again described Father's reaction as "doing damage

¹⁰ Mr. Cassius clarified that he would not actually refer to the situation as a "custody battle" around the child.

control[,]" "not really giving Aiden a chance to express how he was feeling[,]" and "trying to get [the child] to see what happened, basically, from his point of view."

In his notes from an individual session with the child on December 11, 2023, Mr. Cassius stated that Aiden "started by saying he didn't think he wanted to see [Father] again unless it was in therapy." Mr. Cassius noted that the child stated "that [Father] was showing him police reports that were not real and that he felt like [Father] would question him and accuse him of lying. [The child] said he felt like [Father] has an 'agenda' when he's with him. 'He tries to get me to say [Mother] is lying.'" Mr. Cassius's notes further indicated that "[the child] said it made him uncomfortable and I can't disagree with him."¹¹ Mr. Cassius noted that he gave the child permission to tell both parents to stop talking about the other in front of him and informed the parents of this. His notes also indicated that at the end of the session, Mother asked if the child had disclosed that "his grades were slipping and that he couldn't stop thinking about this," but the child had not mentioned this issue during the session.

Mr. Cassius wrote a letter to Mother's counsel on December 20, 2023. The letter was forwarded to all parties and made an exhibit at trial. Therein, Mr. Cassius explained that the child was "ambivalent about spending more time" with Father at the start of the previous counseling session but that he believed that the child was "more receptive to the visitation on the weekend" after the session. The letter went on to explain that Mr. Cassius had been informed that Father and the child "had a disagreement about Aiden's behavior" during Father's parenting time the subsequent weekend, December 15 through 17, 2023. The letter stated:

Aiden said [F]ather accused him of lying again about his visits with him. When Aiden called [Father] a liar, [Father] became upset and cornered him against the wall grabbed him by the collar and tore his shirt. Prior to that, Aiden said he was crying in the truck and at the restaurant and wanted to call [M]other, but he was not allowed to. (Aiden has a phone but [F]ather does not allow him to use it at his house and previously stated that it was a court order that he could not use the phone at his house.)^[12]

Aiden stated: [Father] asked, "why he was crying no one has done anything to you"; "You can lie to me, but I can't lie to you?" Aiden stated that he stayed with his grandmother for most of Saturday that weekend and [F]ather left after the incident. Saturday night they were together again with [Father's now-fiancée] and played games for about 20 minutes, and then he played video games the rest of the night. Aiden said he acted like he was

¹¹ Mr. Cassius testified that if, hypothetically, Father had shown the child a police report, doing so would have been inappropriate. Father denied showing the child any police reports.

¹² Mr. Cassius testified that he was not aware of any court order prohibiting the child from using his phone to call Mother during Father's parenting time; our review of the record reveals none.

having fun because he was scared, and he just wanted to go home. I asked him “did [Father] ever apologize?” and he said “no.”

. . . On Monday prior to me talking to Aiden or [M]other, [Father] came to my office without an appointment, knocked on my office door while I was on the phone and stated he needed to talk to me. I asked him to wait until I finished, yet when I went to the waiting room [Father] had left and according to another client waiting, he said “he had to leave and would call later.” I did not hear from [Father], and I have not talked to him since, but I did receive an e-mail with a picture of Aiden smiling sitting at a table. I am unsure at what [Father] was trying to say sending me a picture, yet it just seems as if he is again doing damage control.

It is my belief that [Father] and Aiden need to continue in the therapeutic process before we continue visitation. I would also suggest that [Father] do some individual therapy and a parenting class before continuing with visitations. As a family therapist I always try to help families work together and I try my best to get them to communicate without escalation and honestly, especially when children are involved. After hearing what Aiden has explained, I cannot in good conscience say there is not a risk that [Father] will get upset and act inappropriately toward Aiden.

Mr. Cassius testified that the only time Father appeared in his office without an appointment was immediately after the child made the allegations of a physical altercation. He also stated that Father sent him two emails expressing a desire to speak with him on the Monday and Tuesday following the weekend visit. Mr. Cassius acknowledged that he did not attempt to contact Father or Father’s counsel prior to sending the December 20, 2023 letter to Mother’s counsel. At trial, Mr. Cassius noted that he found it significant that the child said that he did not want to see Father so close to the holidays and that “he must be pretty serious if he doesn’t want to be there on Christmas with [Father].”¹³

On January 17, 2024, Mr. Cassius noted that Mother and the child did not attend the scheduled session because Mother was afraid to drive in the snow. Father “came to the

¹³ The trial court sought to clarify whether the child specifically said he did not want to see Father for Christmas or whether Mr. Cassius made the decision to suspend visitation over the holidays, based on the December 20 letter describing Aiden as merely “ambivalent.” The following exchange then occurred between Mr. Cassius and the court:

- A. I think it was more so that Aiden just told me that he was scared at that point, that he was feeling fear, you know, of being around [Father] and he didn’t want to go. And I even talked to him. It’s like, you know, Christmas is coming up.
- Q. Okay. But he didn’t tell you, “I don’t want to spend time with Daddy.” He was just saying he was feeling afraid.
- A. He’s feeling fearful.
- Q. Fearful. Okay. Okay.
- A. He didn’t trust what [Father] was doing.

session with his [now-fiancée]" but did not accept Mr. Cassius's offer to participate in a virtual counseling session with the child due to concerns the child would not have "the privacy he needs." According to the notes, Father was "very upset about how things have gone and was very emotional, believing there is nothing he can do to make things better." The notes further explained that Father "expressed just wanting to have a relationship with Aiden and doesn't understand how Aiden, who he stated felt happy when he left [Father's] house, changed his tune so quickly." Mr. Cassius noted that Father showed him a number of text messages to the child's phone that had not received any response.

Mr. Cassius met with the child individually on January 24, 2024, noting that Father "cancelled prior to the counseling session." Mr. Cassius stated that the child expressed not wanting to go to Father's home anymore and said that he "could forgive [Father] but he has a hard time forgetting what [Father] is acting like." The notes indicated that even after "talking freely together," the child "would not budge off his stance with [F]ather, stating he 'doesn't control his feelings. He will lecture me about things in the evening or be upset about something and then act like nothing happened the next day.'"

Father and the child had their last joint session on January 30, 2024. In his notes, Mr. Cassius explained that the child refused his request to hold hands with Father as part of the session, in which "[e]ach time a person talked the other had to listen and repeat what the other person said before responding." The session again involved the December 2023 incident, with Mr. Cassius noting:

Aiden began by saying he felt [F]ather overreacted to the situation when he grabbed his shirt and pushed him up against the wall. Aiden said that he felt that this bordered on abuse and not discipline. His Father repeated what he said and began to explain to Aiden that in [Father's] house [Aiden] will not disrespect any adults. [Father] went on to talk about social media and that it is disrespectful to post videos with music that has foul language in it and being wild jumping on furniture etc. He made sure to explain that [such] behavior is disrespectful to him, his mother, his stepfather, his grandparents, and more.

Aiden was able to paraphrase what [Father] had said and attempted to defend his choice of music as being music TikTok added for him and he doesn't listen to that music usually. [Father] then repeated to him [that] in [Father's] house there will certain rules and when he is with [Father] he has to follow [the rules] or [Father] will discipline him.

Aiden tried to explain to [F]ather that he only said to him that [Father] was lying about a past situation and not calling [Father] a liar all the time.

Aiden became tearful during the discussion and seemed to understand what [F]ather was stating. When asked about how he feels that [Father] is repeating what he said, he said that he thought [F]ather heard him but wasn't listening or understanding how he feels.

I asked [Father] to explain what he thought Aiden was feeling, I asked him to “put himself in Aiden’s shoes for a moment.” His response is that he feels “spoiled.” I tried to get him to be more empathetic yet he went back to he is “spoiled.”

I asked Aiden again how he feels about trying to work this out with [Father] and he stood firm to “I don’t want to.” I then asked [Father] to express how he feels hearing this. He then stated “he is good, I have prayed on it and I’m good with whatever happens.” He went on to tell Aiden that he loves him and will always love him but he is good whether he spends time with him or not and he will always be there for him if Aiden needs him but he is good either way.^[14]

....

Aiden repeated what he had heard from [F]ather and myself; he understood what was happening. Yet he stood strong and [r]epeated he isn’t ready to spend more time with [Father] in counseling or otherwise. At one point, [Father] tried to show a little affection by rubbing Aiden’s head and Aiden immediately pulled away.

Mr. Cassius’s notes also indicated that Father’s now-fiancée “sat in the session as support for [Father]” and at one point “chimed in about her own relationship with her parents and how she misses her father as well.”

At trial, Mr. Cassius testified that while the child originally wanted more time with Father, he now wants less time with Father. Mr. Cassius stated his belief that this change is because the child is “afraid. He doesn’t want to put himself in a situation where he’s going to be talked to . . . or, you know, possibly assaulted again.” Mr. Cassius testified that he believed the child’s account of the December 2023 physical altercation.¹⁵ He further stated that he had not seen any evidence that the child has lied to him or that Mother had attempted to alienate the child from Father.

Mr. Cassius opined that:

I still see a need for them to have some time together, but they need to go through some more counseling with each other to get to a point where Aiden is not fearful or scared of what’s going on. . . . I want him to have time with [Father], because I think it’s important growing up to have time with

¹⁴ When asked about these comments, Father stated: “I said I am good if my son does not want to spend quality time that he’s supposed to[,]” and that “it’s not about not going to see my son. It’s I’m not going to deal with going back and forth and starting issues to have Aiden (inaudible). That is about my son growing and being a better person.”

¹⁵ He stated that he did not report the incident to DCS because it would unnecessarily complicate having the case heard and he believed the February 2023 consent order directing the parties to follow his recommendations would adequately protect the child.

[F]ather. But I definitely think there needs to be some things in place before that happens, and I would hope that . . . a weekend here, a weekend there, without necessarily overnights right now, would be okay.

But at the same time I want to make sure that Aiden is safe, and if Aiden is not feeling safe, then I would suggest doing some kind of supervised visitation until . . . it gets to a point where he's feeling much safer with [Father] and better in the situation and they're communicating better and things are getting along better.

He further stated that "even in the beginning, [the child] really wanted this. . . . But then as time went on, and I think the more [Father] pressured or disciplined . . . it was like, too much too fast with [Father] . . . it felt like to me." Mr. Cassius suggested that Father's visitation should remain supervised until Aiden feels safe with Father and then incremental increases could be made, such as day visits and then overnights, to "get it back to, you know, maybe every other weekend." Mr. Cassius agreed that the child should not be the sole arbiter of how much time he spends with each parent and that both the paternal and maternal grandparents should continue to be involved in the child's life.

The child was allowed to testify in chambers, with the trial court judge, the attorneys, and the court reporter present. Prior to the child's arrival, Mother's counsel attempted to clarify whether the trial court judge would just be asking the factual questions proposed by the attorneys or if she would also be considering whether to give the child's preference as to parenting time any credence. Father's counsel was opposed to both the child testifying and "making decisions about how he's disciplined and where he lives." The trial court stated: "I am never ever going to consider the preference of a ten-year-old." The court further stated: "It would have to be facts that are so extraordinary that there are other facts that would support the child's preference. This is not the case for that." And the trial court explained that "the only winner here" would be Aiden, not either parent. The court continued:

You know, we're taking a lot of shots, and I haven't even heard cross-examination [of Father]. I haven't heard from [Mother]. I haven't heard from [Mother]. I haven't heard from the [other] witnesses. But what I've heard is not that bad thus far. We have to figure out how to save this young man.

We have to figure out how to get his father, who -- who should be the strong role model, involved and integrated in his life. I don't care what [Father] has done. I haven't heard anything about [Father] doing anything that would rise to the level that he does not need to have a meaningful relationship so that he can help [Mother] raise this young man[.]

In talking with the trial court about his understanding of the almost three years that Father did not exercise any parenting time, the child explained that his parents told different stories, with Mother saying that Father stopped calling and Father saying that Mother

stopped answering. The trial court stated: “I don’t think it’s important why you weren’t spending as much time with your dad as you should have. What I think is important is that we figure out for you to spend as much time with your dad as possible now and never have that time interrupted again, right?” The child agreed that both parents love him and want what is best for him.

The child recounted the December 2023 incident. About going to visit Father, the child stated: “I didn’t really want to go, but I just kind of felt that I had no choice. So I’m like, may as well just accept it, you know?” The child explained that Father limited the amount of pizza he could have at dinner, when Father usually did not do so, which upset him. When they went back to Father’s house, the child was “not, like, full-blown crying,” but “shedding some tears” in the bathroom, at which point Father came in and asked why he was crying and they “had this big old talk” and “a little . . . back-and-forth.” The child denied “smart-mouth[ing]” Father. The child stated that Father “had [him] up against a wall” and then “grabbed [his] collar and lifted [him] up by it, and [Father] was like, ‘I ain’t no liar. I ain’t no liar. You got the wrong one tonight.’” The child explained that he went to bed after this. He spent the next day with his grandmother and did not spend time with Father until the following day for church. The child stated that Father grabbing him by the collar scared him and that “I just thought he would, like, never do that, you know? And it kind of hurt me.”

As for the 2020 push-up incident, the child opined that he had likely been crying because he wanted to end the visit early and go back to Mother’s house. The trial court explained that Father “was probably hurt by that,” that it was not fair to Father or the child to say that he wanted to go back to Mother’s house during Father’s parenting time, and that the child would “have to think about how [Father] might be feeling.”

Besides holding him up by his collar and the push-ups, the child remembered Father disciplining him another time with a “whooping” and spanking the child’s bottom with his hand. The child agreed that Father’s aggressive style of discipline was his only real complaint about Father and said that during the “times that he’s not aggressive, [Father’s] like, really nice and thoughtful and stuff.” He further agreed that coming up with some non-aggressive means for discipline would make him feel better about spending time with Father. Based on the court’s questioning, the child explained that he liked spending time with Father when Father was “nicer than he was now” and getting to see him made the child feel special, but that when Father, in the court’s words, “got a little bit too aggressive” the child no longer felt special but instead sad. The trial court emphasized that there would be ground rules for Father’s parenting time, with Father not using corporal punishment, the parents agreeing on disciplinary measures, and the child being respectful and not “mouth[ing] off” or going “back and forth” with Father.

When the trial court stated that she “really want[ed] [the child] to spend some time with [Father] sooner than later,” the child stated that he “would be fine with that, although

that's not what [he] want[ed]." The child acknowledged that the most recent parenting schedule involved seeing Father every other weekend and stated that he wanted to keep that schedule. He explained that he wanted this schedule because he likes being in Mother's house more than being in Father's house, as he has "gotten more comfortable there." The trial court acknowledged that this reasoning made perfect sense but emphasized that under this schedule the child would be spending approximately twenty-six days a month with Mother and only four days a month with Father. When asked what he thought about those amounts, the child said "I think that's fine for me." The following exchange then occurred between the child and the court:

Q: You think it's fine? Uh-huh. But suppose [Father] wants to spend more time with you? Should we think about what [Father] wants, too, or should we not think about [Father] wants?

A: We -- we should.

....

Q: So if we should think about what [Father] wants, then we're going to have to find a solution so that [Father] can be involved in your life. And he can teach you all the things that he wants his son to know and learn. And you can have a loving relationship with your dad, and you can go to school, and you can brag on your dad.

....

Q: You have a bond, right?

A: Yeah.

Q: That's right. Because he's your dad. He's not anybody else's dad. He doesn't have any other kids. You're it, right? You?

A: Yeah.

Q: Right? That's your dad, right?

A: Yes

Q: Am I right about that? That's all. That's -- that's all he has, is you. Little old you.

....

Q: Okay. So he's all you have. [sic] That's it. You're his only child. His only son. And then you have your mommy and your stepdaddy, right? Okay. So you have two other people that love you that you are a son to, but he has only you. So he is very -- it's very important to him to have you in his life. And he wants and he looks forward to the day that you are going to want to have him in your life more than just on weekends. So this is . . . what you may be thinking now, but maybe at some point you'll say, "oh gosh. You know, I just love spending so much time with my dad. I'm so thankful that he's here. I really appreciate the time that I'm spending with him. I want to spend more time with him."

When asked about an every-other-week schedule, the child stated that he would not really want that but he would be okay with it.

Visitation was scheduled for the following day, a Saturday, with Father exercising parenting time from 10:00 am to 6:00 pm. Father was directed to not use any corporal punishment, and the child was allowed to keep his cellphone with him. Father testified later that the visit went well.

Father testified that from February 2015 through May 2020, he was unable to exercise all of the parenting time afforded under the February 2015 parenting plan. He stated that once every two or three months, Mother “would find excuses when she didn’t want [him] to have [the child], to keep [him] from spending time with [the child].” Nevertheless, Father explained that he and the child had a great relationship prior to May 2020, and that the child “knew when he came over to [Father’s] house it was like the fun house. So [they were] going to have fun, be out all day.”

Father also explained the push-up incident that gave rise to the DCS investigation in 2020, although his testimony on the issue was somewhat less than cohesive, both internally and against other documents in the record. During direct examination, Father stated that the child would often cry for no reason and that the two of them had a conversation about appropriate reasons for crying, i.e., being hurt or disappointed. Father explained that he told the child that if he continued to cry for no reason, “then we’re going to do some activities to show you that we’re going to try to get through this.” According to Father, when the child again cried without cause during his weekend parenting time in May 2020, Father told the child to complete ten push-ups; after the child told Father that completing the push-ups was easy, Father had the child do ten more push-ups, with Father doing the second set with the child.¹⁶ Father testified that Mother called him the next week to explain that he would no longer be able to see the child based on the push-ups and the child’s arms being sore. Father explained that the only other option beyond the push-ups would be corporal punishment, which he did not want to do.

Then, on cross-examination, Father denied both that he “made” the child do any push-ups and that the push-ups were done in response to the child’s crying. Father also denied that Mother called him about the incident and would not agree that the incident

¹⁶ The DCS report about this incident admitted into evidence agreed that the event occurred in May 2020, but indicated that Father stated that he did “make Aiden do push ups because Aiden was upset. [Father] stated that the first 25 he did them with Aiden. [Father] stated that Aiden said that doing push ups were easy. [Father] stated that he told Aiden since they are so easy then do 25 more by your self.”

Alternatively, Father’s December 2022 petition stated that the incident occurred during Father’s Tuesday-night visitation in March 2020. According to the petition, Father “encouraged Aiden to try” to do ten push-ups, and after he completed those and “exclaimed that he felt ‘strong,’” Father “encouraged Aiden to try and do additional push-ups.”

occurred in May 2020 rather than March 2020, because he could not remember.¹⁷ Father stated that he could not recall his deposition testimony, but that “if that’s what I told you, then that’s what we did.” The portions of the deposition read into the record indicated that Father had previously testified that he made the child do twenty-five push-ups because the child was “always crying and whining because he’s spoiled,” and then they did another twenty-five push-ups together.

Father stated that he cooperated with the DCS investigation, no wrong-doing was found, and the case was closed, although Mother continued to interfere with his parenting time. He stated that he called and emailed Mother to attempt to visit with the child. Father testified that Mother did not respond to his emails and did not reach out to him about exercising his parenting time once between May 2020 and December 2022. During cross-examination, Father acknowledged that his phone records showed that Mother called him on May 22, May 26, June 2, June 5, and June 16, 2020, dates that corresponded to his scheduled parenting time, and that Father made no calls to Mother during this time or at any point until January 2023.¹⁸ Father provided emails showing that he made multiple attempts between May 2020 and January 2023 to communicate with Mother about exercising parenting time with the child and that he received no response. These emails were introduced into evidence. During cross-examination, Father acknowledged that these emails were sent to a different address than the address he had successfully used to communicate with Mother in the past.¹⁹ Father stated that he did not attempt to contact Mother by text message based on the recommendation of a mediator used by the parties “before [they] met with the judge.”²⁰

Father explained that despite the December 2022 fiat requiring Mother to comply with the February 2015 parenting plan, the next time he saw the child was in reunification counseling with Mr. Cassius in April 2023. Father stated that the child was happy to see him and although the child might have also been a little nervous, they were able to get back to their normal relationship quickly.

¹⁷ Subsequently, Father stated that the incident “happened well before May,” and later, that it “happened somewhere between March and April.”

¹⁸ The phone records indicated that these calls each had short durations, with two calls on May 22 for three seconds and then one minute and twenty-three seconds, respectively, one fifteen-second call on May 26, one eight-second call on June 2, one ten-second call on June 5, and then two calls on June 16 for twenty seconds and then eleven seconds, respectively. Father stated that these short calls were the parents arguing and “having words back and forth.”

¹⁹ Mother later confirmed that her email address had not changed from the one used by Father previously and that she had never used the new address or provided it to Father. A clerk from Mother’s counsel’s law firm also testified that emails he sent to the new address used by Father in January and February 2024 immediately bounced back as undeliverable because the email address did not exist. Father’s December 2022 petition was sent to this new email address.

²⁰ During her testimony, Mother introduced a 2014 text message from Father, in which he proclaimed that he would only speak to her about the child “either through [Mother] calling [him] and leaving a voicemail or emailing [him].”

Father stated that he met with Mr. Cassius between seven and ten times, including five to seven times with the child as well. He testified that the child began wanting to visit with him more during the course of the counseling, which was difficult because there was no set visitation schedule. Father stated that Mother would not respond promptly to Mr. Cassius's attempts to establish available dates for visitation. According to Father, overnight visitation resumed in June 2023, and he exercised three weekends of parenting time between then and November 2023. He stated that visitation went well, he and the child had fun, and they were able to rebuild their bond. Father explained that he was unable to exercise visitation one weekend in November 2023 because his mother was supposed to pick the child up but went to the wrong location. The last time Father exercised overnight visitation with the child was in December 2023, prior to Christmas. Father then saw the child in counseling with Mr. Cassius in January 2024, and had the daytime visit in February 2024.

Father explained that he was not comfortable with Mr. Cassius and did not "trust this process" because Mr. Cassius did not attempt to hear his side of the December 2023 incident "until after [his] Christmastime that [he] missed with [his] son."²¹ He testified that he was concerned about the child's allegations of a physical altercation and that,

I think, you know, the reason why I had concerns, it was said that he had a torn shirt. I never grabbed Aiden. I turned him with his shoulders. I never turned -- nobody has proven or showed any torn shirt.^[22] Now, I turned my son. He said I cornered him in the wall. He was in the -- he was in the restroom.

I walked in because he was crying. He could continuously cry. I never hit him. I told him to go to bed at 10:00 at night. He woke up the rest of the -- on the weekend, which is Saturday and Sunday. He went to go spend time with his grandparents. He went to -- we played games at night, had no issue. I took pictures of -- of everything that happened, so no one will say that --

²¹ After this testimony from Father, the trial court stated:

I was a little surprised when [Mr.] Cassius testified that he had not done more to reach out to [Father], especially if he was going to suspend parenting time. I -- I really didn't think that his explanation was reasonable. That was just such a critical moment and time, and . . . I hear what you're saying, [Father]. That gave me some concern. I just didn't understand the logic in not reaching out, especially if -- after you had made attempts to reach him, and parenting time is gone. . . . I just don't think that we should do things like that. I think there needs to be transparency and good communication, especially when you're dealing with a child and a parent, so I understand what you're saying about that.

The trial court later stated that she did not think that Mr. Cassius's decision to suspend Father's visitation without speaking with Father or his counsel about the incident was in the child's best interest.

²² Pictures of a torn shirt were provided with Mother's fourth supplement to Father's request for production of documents and introduced into evidence.

the same clothes that he left in, he came in. Nobody's provided a shirt that was obviously -- said that I torn, I broke, or whatever they want to use. No abuse was going on with my son. If anything, I cared too much with him being disrespectful to an adult, and I made him go to bed early.

. . . I did not tear [the shirt] -- anything that Aiden had on or did not have on at all. I have not torn anything.

When asked if he had ever physically or inappropriately disciplined the child, Father testified that: "I have not physically disciplined my son. Have I ever did it in his ten years, I have whipped him a couple times, yes." Father later denied "whipping" or "whoop[ing]" the child, which he explained would involve hitting the child on the rear end, but stated that he might "spank [the child] on his hand."

Father testified that the child has his own bedroom at Father's house. While Father initially designated a room on the second floor as the child's, he has since had the child move into a room near Father's on the first floor. He denied that the room change was meant to punish the child and was instead about increasing their bond and being able to better supervise the child. Father stated that he wants "more opportunity to spend time with [the] child to teach him some things that he needs to learn[.]" like tying his shoes, good penmanship, and household chores.

Father testified that his parents are divorced and his father has re-married. He stated that his parents would help take care of the child. He explained that it is "[v]ery, very important" to him that he has a good relationship with his parents and he talks with them every day.

Father testified that he did accept some of the responsibility for not seeing the child for almost three years. He stated that not seeing the child affected his health and it took approximately twelve to eighteen months to get his "health back up" from "a very bad place." He also stated that he used this time and more the next year to save up money for attorney's fees. Father later denied that health issues were part of his reason for not seeing the child between May 2020 and December 2022. Father described Mother as a "bare minimum parent" because she does not work so it is actually her husband's income that provides for the child.

Father testified that he wants to do what is in the child's best interest, which he stated was equal parenting time. He did not think the graduated parenting schedule in Mother's proposed parenting plan was in the child's best interest. He stated that he has "fought for ten years to be in [his] son's life" and he has "been held back for ten years." Father explained:

I just want to be in my son's life, not partially, not sometimes, but equally, so I can be . . . a better influence in my son's life to make sure that he's

successful.

Because it's on me as well. It's not only [Mother]. It's on us as a family, us as sharing parenting time with our child together. And I don't want that to be -- why eighty days? Why sixty days? Share parenting time because we had this child together, which is our child. And I think that's fair for me.

And I'm not saying it's fair -- it's not the fair thing to do if that's what you see, but I'm asking you to at least see the vision of an African American community and how kids are struggling not having their parents in their life, not having their fathers here in the city. And I'm a valuable father in the city, a public figure,^[23] that wants to really help my son and help him to be successful.

He further explained:

I do want to be in my son's life. I love my son. I want to be an impact. I want to be with him daily. I don't want to be a weekend father; I want to be a weekday father.

I want to be able to have an impact in the African-American community, to be around my son and raise him and give him discipline and give him structure and show him what it takes to be a good son and a great public figure and be able to be part of his daily life.

Father did mention potentially "stair-step[ping]" his parenting time with the child as the school year was ending, to "slowly progress to give [the child] more time" to get used to Father having increased parenting time.

Mother testified that the December 2022 fiat to enforce the February 2015 parenting plan was the first she heard of this lawsuit or Father's apparent interest in exercising parenting time. She explained that upon receiving the fiat, she began bringing the child to the designated exchange point on the days set out in the parenting plan. She provided photos from the scheduled exchanges immediately following her receipt of the fiat—December 25, 2022, and January 17, 24, and 27, 2023—the metadata of which confirmed the date and time.²⁴ Mother stated that she and the child arrived early to the scheduled exchanges and then waited twenty or twenty-five minutes past the scheduled time, but Father did not appear on these dates.

Then on January 30, 2023, Mother was informed by the sheriff's office that Father had filed a police report against her. Mother explained that shortly after she informed the

²³ Father testified that he is "a public figure . . . a State Farm insurance agent[.]" and that being a public figure means that he is "in front of people . . . a leader, an innovator."

²⁴ Mother acknowledged that there was one scheduled exchange that she did not bring the child to during this time.

sheriff's deputy that she had not heard from Father in almost three years, she received a call from Father. Mother stated that she was not arrested for custodial interference in relation to this police report.

Mother also discussed the push-up incident during Father's last visitation with the child in May 2020. She explained that the child was "kind of wimpy" about his arms upon returning from a Tuesday night visit at Father's house. The child whimpered in his sleep that night and was unable to raise or extend his arms the next day. Mother stated that when the child's arms still were not better that Friday, she called Father, who said that he made the child do push-ups "as punishment because he wasn't being responsible." Mother explained that the child was still complaining about his arms the following Tuesday, so she called Father and the parties agreed that visitation that night should not occur.

Mother clarified that she initially did not call DCS directly, but instead called the nonemergency police line to file a report. She stated that she did eventually call a case worker. Mother testified that she called Father the following Tuesday to suggest that visitation should not occur due to the ongoing DCS investigation, to which Father agreed. Mother called again that weekend and the second following Tuesday, again suggesting that visitation be suspended during the pending investigation, to which Father also agreed.²⁵ However, Mother stated that during this latest call, on June 16, 2020, Father "was like, look, do not call me again[,] and so she did not call again for future visitation.

According to Mother, she and Father had previously emailed, called, and texted, and her contact information had not changed. Still, she testified that after June 2020, the next time she heard from Father in any manner was the phone call in January 2023, following her conversation with the deputy. But Mother explained that she stayed in touch with Father's family even after Father asked her to stop calling him. She stated that Father's mother visited with the child and Father's aunt called to check in on the child occasionally. She also brought the child to the wake for Father's grandfather and to meet with Father's sister at a basketball game. Mother testified: "Anybody that has said something about seeing Aiden and wanting to be in his life, why would I stop that? That's just greater for him. So I kept in contact with everybody that's kept in contact with me."

Mother stated that the child went into the reunification counseling with Mr. Cassius excited and "[i]t was pretty good in the beginning." She testified that she never spoke poorly about Father to the child or otherwise tried to interfere with his relationship with Father. She explained that initially, she would try to redirect any nervousness or hesitation on the child's part in relation to visitation with Father by "bringing up all his new gadgets and stuff that he received." But doing so became harder as time went on, because those things had been "taken away," and then "things started turning" and it "became difficult to get Aiden excited about going to reunification." She testified that the child would cry after

²⁵ These dates matched Father's phone records.

the counseling sessions, he began having nightmares, and she “was noticing a big change in [the child’s] personality and his sleep habits and in his grades.” She opined that some of this change might have been related to Father hanging up on the child more than once, after which the child was visibly upset. She further explained that Father missed three visits scheduled by Mr. Cassius. Mother also testified regarding the December 2023 incident, explaining that the child came home “flustered” and “not himself” and his shirt collar was torn. She stated that the child called Mr. Cassius himself that evening without her knowledge or instruction.

Mother explained that she has remarried and the child now also has a three-year-old half-brother and a twenty-four-year-old stepbrother, both of whom he gets along with and loves. Mother explained that Aiden plays with his younger brother and tries to teach him things, including learning to walk. Aiden’s older brother does not live with them but will occasionally pick him up from school or take him shopping; the older brother also comes to family dinners. The child also has a “really good relationship” with Mother’s husband, who does not treat the child any differently from his other children. Mother’s husband brings the child for his haircuts, and they play basketball and go to the movies together. But Mother stated that her husband can also “discipline [the child] and talk to him, and Aiden doesn’t feel like a mouse[.]” She explained that “he’s able to correct [the child] when he’s wrong, and Aiden can still stand strong. . . . There’s not an intimidation factor in there. There’s not a threat of, you know, ‘oh gosh something’s going to happen to me if I make a mistake.’” Mother testified that her husband has not been physically or verbally abusive toward either herself or the child.

Mother described the activities she and the child do together, saying she tries “to do a mix of fun stuff, educational stuff, and then, like, even cooking stuff.” Mother did recognize that there are some things that Father can teach the child, but she denied that the child needs Father to teach him how to tie his shoes or do household chores. She stated that the child has his own bedroom and bathroom, and that he makes his bed, cleans these spaces, and does his own laundry.

Mother acknowledged that she and Father do not communicate effectively despite her efforts,²⁶ and that there is a mutual lack of confidence and trust between them. Mother testified to her confusion that Father brought this lawsuit without first contacting her and asking to resume parenting time; she stated that she “never blamed [Father] for being gone” between May 2020 and December 2022, and she “just thought he had things to handle.” She also explained that after visitation was suspended at Mr. Cassius’s direction in

²⁶ Mother’s proposed parenting plan included a requirement that both parents would subscribe to a particular app and “only communicate with each other through [the app] when discussing any matter involving the minor child[], unless there is an emergency, in which case, a phone call or text messages are permitted.” The parents were also directed to use the app to keep track of “need-to-know events / changes such as daycare being closed or an extracurricular activity.” During the trial, Father’s counsel stipulated to the use of the app.

December 2023, Father made no requests for parenting time until after the child's testimony in February 2024.

Ultimately, Mother agreed that she wants the child to have a meaningful relationship with Father. To foster that relationship, she stated her belief that Father and the child “need to work on building trust, consistency” and that the child “needs to see some love from [Father], and he needs to see some consistency from him.” And that, particularly after Father's remarks at their last counseling session, the child “needs to see a desire to get to see him.” Mother did not think that having the child begin spending every other week with Father without first building this consistency would be healthy for him. Rather, Mother opined that her parenting plan, where Father would receive parenting time every other weekend only after attending six consecutive counseling sessions, would be in the child's best interest.

After the close of proof, the trial court offered some thoughts and made some factual findings.²⁷ The court again emphasized that the reasons for Father's almost-three-year absence from the child's life were less relevant than his present attempts to resume exercising parenting time. The trial court was clear that it did not believe that, even if the child's accounts of the events were accurate, either the 2020 push-up incident or the December 2023 incident amounted to abuse or reasonable cause for Father's visitation to be suspended. The trial court took issue with Mr. Cassius suspending visitation without giving Father the opportunity to explain what happened, particularly as “sometimes kids embellish facts, make things up. Sometimes their perception is different.”

The trial court expressly acknowledged that the parents are “still not able to communicate at all, period. So we have two very accomplished parents that can't communicate. The most basic, fundamental task is communication. If you can't communicate, there's not much [of] anything.” Later, the trial court explained that the parties “have had an opportunity to air [their] differences, to say the things that [they] wanted to say.” While the court stated that it had heard the parents and “hoped that each of [them] have heard each other[,]” it did not think that they had done so, noting that “[t]hat's the scary part.”

As part of its oral findings of fact, the trial court stated that “the proof has clearly shown that mom has been the primary residential parent, since Aiden's been born and that she's done, primarily a great job at raising Aiden,” and that “she's tried to be a good mom and has been steady and stable for Aiden for the most part.” The trial court offered its “opinion that [Father] does need to play a meaningful role in Aiden's life.” The court expressed wanting Father to “have more than every other weekend with Aiden” and “envisioned [Father] having twelve days a month and [Mother] having eighteen days a

²⁷ Additionally, as part of their closing statements, counsel for both parties agreed that a material change of circumstances had occurred.

month with Aiden.” However, the trial court was clear that it wanted counsel, Father, Mother, and Mother’s husband to work together to establish the actual parenting schedule.²⁸ Father was granted visitation beginning the following day, a Friday, at 6:00 pm to Sunday at 3:00 pm for the Easter holiday.

Then on May 2, 2024, the trial court issued a further oral ruling as to the best interest factors. *See* Tenn. Code Ann. § 36-6-106(a). The trial court found that the majority of the factors did not favor either parent, namely factors (2) (related to the parents’ past and future performance of parenting responsibilities), (4) (related to the parents’ ability to meet the child’s basic needs), (7) (related to the emotional needs of the child), (11) (related to evidence of abuse to the child or other parent), (12) (related to the persons living with each parent), and (14) (related to the parents’ schedules).²⁹

The trial court also found that certain factors favored Mother, specifically factors (1) (related to the strength and stability of the child’s relationship with each parent), (5) (related to the child’s primary caregiver), (10) (related to the importance of continuity in the child’s life), and (13) (related to the preference of the child). The trial court noted in relation to factor (16) (related to any failure to pay child support) that Father had continued to meet his child-support obligation even during the time he was not actively involved in the child’s life.³⁰

The trial court further found that factors (6) (related to the love and affection between the child and each parent) and (8) (related to the mental and emotional fitness of the parents) were generally equal between the parents, while also noting that Father had somewhat more work to do to strengthen these aspects of the parent-child relationship. And the trial court did not expressly find that factor (9) (related to the child’s relationships with family) favored either parent, but noted that the child has two brothers through Mother’s current marriage and would continue to spend plenty of time with his relatives.

The trial court again stated that that the child needs to have a relationship with both parents. The court emphasized that the parents need to learn to communicate effectively and encourage the child’s esteem for each other.

²⁸ The trial court acknowledged that Father’s fiancée could offer her input on the schedule to Father, but she would not be directly involved in creating the schedule and would ultimately “have to go along with the program.”

²⁹ The trial court did not make any findings related to factor (3), involving either parent’s refusal to attend a court-ordered parenting seminar; whether the parties had been ordered to attend a seminar is unclear. Father’s counsel stated that Father had attended the seminar and we found no evidence that Mother refused to do so.

³⁰ There was very little testimony on this point, and indeed, no child support worksheet accompanied the copy of the February 2015 parenting plan included in the record, but there does not appear to be any dispute that Father met his child support obligation.

The trial court adjudicated the cross-petitions to modify the permanent parenting plan by order of June 6, 2024. The trial court denied Mother's petition for modification but granted Father's petition and concluded that a material change in circumstances had occurred such that a modification of the February 2015 parenting plan was necessary. The order indicated that Mother would remain the child's primary residential parent and that a modified permanent parenting plan would soon be entered. The order then expressly incorporated the transcripts from the March 28 and May 2, 2024 rulings to resolve "[a]ny and all issues not otherwise addressed herein[.]"

The trial court's modified permanent parenting plan was entered on July 29, 2024. Mother was designated as the child's primary residential parent and awarded 207 days of parenting time; Father was awarded 158 days of parenting time to be exercised the second and fourth week of each month. The parties would alternate parenting time for holidays and school vacations. The parties shared joint decision-making authority with "a good faith duty to discuss all major decisions with one another and attempt to reach a joint decision. In the event of a dispute they cannot resolve, the parties shall maintain status quo pending either a written agreement or [c]ourt order." Among several special provisions, including the use of the parenting app stipulated to during trial, the parenting plan provided: "No corporal punishment. Both parents shall discuss and agree on the discipline each parent will use during their parenting time to promote consistency and continuity for the child."

Then on August 13, 2024, Mother filed a petition for emergency injunction. She alleged that after Father's first overnight parenting time under the modified plan, the child's school contacted DCS to report potential abuse by Father based on the child's statement that Father had punched the child in the chest three times. Mother further alleged that, "[u]pon information and belief, Aiden reported that he told his Father that his chest hurt and that Father replied, saying that Aiden never cared that Father's chest hurt when Aiden told the counselor he did not want to spend time with [] Father" and that "Aiden has reported that he is 'scared' of [] Father." Mother asserted that an injunction suspending Father's visitation would be in the manifest best interest of the child and that "[i]f immediate action is not taken, the child will suffer from being forced into the sole care of a man who has been physically violent with the child in direct violation of this [c]ourt's orders and safeguards on this very issue." In the alternative, Mother requested that Father's parenting time be supervised.

The trial court denied Mother's petition the next day. The order provided that, "[g]iven the history of this case, the [c]ourt has concerns regarding the veracity of the child's allegations and whether the child is trying to manipulate an outcome that he wants to achieve." The trial court further concluded that it "does not believe that the child is in danger while in Father's care and custody, nor does the [c]ourt have any concerns that Father is going to hurt or harm the minor child."

Mother voluntarily dismissed her petition for emergency injunction and then filed

this appeal.

II. ISSUES PRESENTED

Mother raises the following issues on appeal:

1. The trial court erred in disregarding the opinion of the court appointed expert, Eric Cassius, in determining an amended permanent parenting plan.
2. The trial court erred by not ordering a limited parenting schedule due to abandonment pursuant to T.C.A. § 36-6-406, T.C.A § 36-6-404(b) and T.C.A § 36-6-101(2)(A)(iv).
3. The trial court erred in its analysis of the best interest factors under T.C.A. § 36-6-106(a) by refusing to consider the child's preference, thereby failing to properly weigh all best interest factors.
4. Mother should be awarded attorney fees and litigation expenses on appeal.

Father also seeks his appellate attorney's fees.

III. STANDARD OF REVIEW

It is well settled that in matters of child custody, visitation, and related issues, trial courts are given broad discretion; consequently, appellate courts are reluctant to second-guess a trial court's determinations regarding these important domestic matters absent an abuse of that discretion. *See Armbrister v. Armbrister*, 414 S.W.3d 685, 693 (Tenn. 2013); *Harwell v. Harwell*, 612 S.W.2d 182, 185 (Tenn. Ct. App. 1980). "An abuse of discretion occurs when the trial court . . . appl[ies] an incorrect legal standard, reaches an illogical result, resolves the case on a clearly erroneous assessment of the evidence, or relies on reasoning that causes an injustice." *Gonsewski v. Gonsewski*, 350 S.W.3d 99, 105 (Tenn. 2011). "A trial court abuses its discretion in establishing a residential parenting schedule 'only when the trial court's ruling falls outside the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence found in the record.'" *Armbrister*, 414 S.W.3d at 693 (quoting *Eldridge v. Eldridge*, 42 S.W.3d 82, 88 (Tenn. 2001)). "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*, 42 S.W.3d at 88. At the same time, the trial court's "discretion is not unbounded, it must be based on proof and appropriate legal principles." *Hogue v. Hogue*, 147 S.W.3d 245, 251 (Tenn. Ct. App. 2004) (citing *D v. K*, 917 S.W.2d 682, 685 (Tenn. Ct. App. 1995)).

In conducting our review, we consider the trial court's factual findings de novo with a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn.

R. App. P. 13(d); *Kelly v. Kelly*, 679 S.W.2d 458, 460 (Tenn. Ct. App. 1984). Whether a material change in circumstances has occurred and whether the modification of a parenting plan serves a child's best interest are questions of fact. *Armbrister*, 414 S.W.3d at 692. The court's legal conclusions are not afforded a presumption of correctness. *Id.* at 693. Additionally, "appellate courts will not re-evaluate a trial judge's assessment of witness credibility absent clear and convincing evidence to the contrary." *Wells v. Tenn. Bd. of Regents*, 9 S.W.3d 779, 783 (Tenn. 1999) (citations omitted).

As noted, *supra*, the trial court's June 6, 2024 written order served primarily as a vehicle for incorporating its oral rulings from March 28 and May 2, 2024. Indeed, the three-page order was accompanied by more than one hundred pages of transcript. While the transcripts do contain the trial court's findings of fact, these findings come wrapped in much additional colloquy and this Court is left to sort between the two. This does not comply with the mandate that a trial court "find the facts specially and . . . state separately its conclusions of law." Tenn. R. Civ. P. 52.01; *see also Smith v. All Nations Church of God*, No. W2021-00846-COA-R3-CV, 2022 WL 4492199, at *3 n.5 (Tenn. Ct. App. Sept. 28, 2022) ("[I]t should not fall to this Court to parse out a trial court's ruling from its colloquy."). And this practice undermines our ability to give the required deference to the trial court's assessment of the evidence. *See Kelly*, 679 S.W.2d at 460. Moreover, the trial court did not make findings of fact in relation to all contested issues; for example, the trial court repeatedly acknowledges that Father was "MIA" for almost three years but offers little insight as to the cause of this extended absence despite the parties' competing accounts. For those issues where no factual findings were made, no presumption of correctness can attach, and this Court is tasked with determining where the preponderance of the evidence lies. *Archer v. Archer*, 907 S.W.2d 412, 416 (Tenn. Ct. App. 1995) (citing *Kelly*, 679 S.W.2d at 460). In doing so, we will endeavor as is possible to follow the trial court's lead and refer to its oral statements and exchanges made throughout trial. *See Wheeler v. Wheeler*, No. M2015-00377-COA-R3-CV, 2016 WL 3095695, at *7 n.9 (Tenn. Ct. App. May 24, 2016) (reviewing the evidence *de novo* but still considering the trial court's oral ruling even where the ruling was not expressly incorporated into the written order because the "ruling provide[d] context for the holding in the written order").

IV. ANALYSIS

This appeal stems from the trial court's decision to replace the parties' February 2015 parenting plan, under which Father received parenting time on the second and fourth weekend of each month and overnight every Tuesday evening, with the July 2024 parenting plan, under which Father receives parenting time on the second and fourth week of each month. Mother's argument, in essence, is that the trial court abused its discretion in entering this modified plan because the plan does not serve the child's best interest. She argues that the trial court failed to properly consider (1) all of the relevant statutory factors, (2) Mr. Cassius's recommendations, and (3) the child's testimony.

A. Statutory Factors

We begin by looking to the statutes.³¹ Under Tennessee Code Annotated section 36-6-101(a)(2)(C), before the trial court may modify a permanent parenting plan, a material change in circumstances affecting the child's best interest must be proven by a preponderance of the evidence. Section 36-6-405 governs the modification of the plan once such a change has been established. It provides, in part, that if the parties cannot agree on the specifics of a modified plan, the court must resort to the process set out in section 36-6-404(b). Tenn. Code Ann. § 36-6-405(a). In relation to the inclusion of a residential schedule within a permanent parenting plan, section 36-6-404(b) provides:

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

Section 36-6-406, in turn, involves the mandatory and discretionary limitation of a party's parenting time based on certain conduct. As relevant here, a parent's residential time "shall be limited" if the court finds that (1) the parent has engaged in "[w]illful abandonment that continues for an extended period of time or substantial refusal to perform parenting responsibilities" and (2) the limitation is in the child's best interest. Tenn. Code Ann. § 36-6-406(a)(1); *see also* Tenn. Code Ann. § 36-6-101(a)(2)(A)(iv) ("If it is determined by the court, based upon a prior order or reliable evidence, that a parent has willfully abandoned a child for a period of eighteen (18) months, . . . then, unless the court finds by clear and convincing evidence to the contrary, the abandoning parent's residential time . . . shall be limited.").

If the considerations under section 36-6-406 are not dispositive, those factors set out in section 36-6-106 become applicable. Section 36-6-106 begins by noting that decisions related to child custody "shall be made on the basis of the best interest of the child." Tenn. Code Ann. § 36-6-106(a). In analyzing 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." *Id.* The non-exclusive list of factors for the court to consider includes the following:

- (1) The strength, nature, and stability of the child's relationship with each

³¹ At all times, the statutes referred to in this Opinion are those in place at the time Father's December 2022 petition for modification was filed.

parent, including whether one (1) parent has performed the majority of parenting responsibilities relating to the daily needs of the child;

(2) Each parent's or caregiver's past and potential for future performance of parenting responsibilities, including the willingness and ability of each of the parents and caregivers to facilitate and encourage a close and continuing parent-child relationship between the child and both of the child's parents, consistent with the best interest of the child. In determining the willingness of each of the parents and caregivers to facilitate and encourage a close and continuing parent-child relationship between the child and both of the child's parents, the court shall consider the likelihood of each parent and caregiver to honor and facilitate court ordered parenting arrangements and rights, and the court shall further consider any history of either parent or any caregiver denying parenting time to either parent in violation of a court order;

(3) Refusal to attend a court ordered parent education seminar may be considered by the court as a lack of good faith effort in these proceedings;

(4) The disposition of each parent to provide the child with food, clothing, medical care, education and other necessary care;

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

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

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

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

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

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

(11) Evidence of physical or emotional abuse to the child, to the other parent or to any other person. . . . ;

(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;
- (15) Any other factors deemed relevant by the court; and
- (16) Whether a parent has failed to pay court-ordered child support for a period of three (3) years or more.

Tenn. Code Ann. § 36-6-106(a).

Here, the parties filed cross-petitions for modification of the February 2015 parenting plan, both alleging a material change in circumstances. The parties then agreed at trial, and the trial court found, that such a change had occurred. In making its ruling on the child's best interest, the trial court expressly considered those factors set out in section 36-6-106(a). On appeal, Mother argues that the trial court erred in not first considering section 36-6-406(a)(1) and limiting Father's parenting time based on his abandonment of the child between May 2020 and December 2022. Of course, Father denies that he willfully abandoned the child based on Mother's alleged interference with his visitation following the 2020 push-up incident. Father also argues that Mother has waived this argument based on her failure to specifically raise section 36-6-406 in the trial court.³²

Generally, an issue not raised in the trial court cannot be raised on appeal. *See Powell v. Cmty. Health Sys., Inc.*, 312 S.W.3d 496, 511 (Tenn. 2010) (explaining that it "is axiomatic that parties will not be permitted to raise issues on appeal that they did not first raise in the trial court"); *Goughenour v. Goughenour*, No. M2022-00297-COA-R3-CV, 2023 WL 3269661, at *4 (Tenn. Ct. App. May 5, 2023) (finding that the father had waived his appellate issue regarding section 36-6-406 when he did not raise the matter in the trial court or cite to any law that would "require the trial court to consider the same *sua sponte*"). Based on the mandatory language included in section 36-6-406, however, this Court has not always strictly applied this maxim. *See, e.g., O'Rourke v. O'Rourke*, No. M2007-01833-COA-R3-CV, 2010 WL 4629035, at *15–16 (Tenn. Ct. App. Nov. 10, 2010) (finding the mother to have waived the issue of the application of section 36-6-406 but still addressing the evidentiary support for the trial court's decision not to limit the father's parenting time based on that section); *Bean v. Bean*, No. M2022-00394-COA-R3-

³² Father further argues that the trial court did obviously consider his absence from the child's life as part of its best interest analysis, as shown by the court's decision not to award him the equal parenting time he requested. It is true that under Father's proposed parenting plan, he would receive 182.5 days of parenting time to be exercised from Sunday to Sunday every other week, while under the trial court's permanent parenting plan he received 158 days of parenting time to be exercised from Monday to Sunday on the second and fourth weeks of each month. The differential in parenting time is evidently based on certain months containing five weeks, such that Mother receives approximately three additional weeks per year under the trial court's modified plan. Respectfully, although we acknowledge Father's argument that the trial court did not adopt his proposed plan wholesale, we cannot agree these three weeks countermand the functional equivalency of parenting time awarded in the week-to-week basis of the trial court's parenting schedule.

CV, 2022 WL 17830533, at *8 (Tenn. Ct. App. Dec. 21, 2022) (acknowledging that the mother did not specifically reference section 36-6-406 in her pre-trial pleadings but finding that the issue was tried by consent because “she did reference allegations of abuse by Father, present significant proof in support of those allegations, and specifically ask that Father’s parenting time be limited due to the abuse” and filed a motion prior to entry of the final order referencing the section without objection).

From our review of the record, it does not appear that Mother specifically raised section 36-6-406 in her response to Father’s petition for modification or in her counter-petition. Still, Mother clearly included Father’s absence from the child’s life between May 2020 and December 2022 as part of the material change of circumstances requiring a modification of the February 2015 parenting plan. The cause of this absence and its effect on the child’s relationship with Father also formed a not insignificant portion of the testimony presented. And throughout trial and its oral rulings, the trial court repeatedly acknowledged Father’s extended absence in discussing the child’s best interest, which could be viewed as an implicit ruling that a limitation solely based on this absence would not serve the child’s best interest. *See Morgan Keegan & Co. v. Smythe*, 401 S.W.3d 595, 608 (Tenn. 2013) (noting that “when construing orders and judgments, effect must be given to that which is clearly implied, as well as to that which is expressly stated”).

Because there is some evidence that the trial court did consider whether Father willfully abandoned the child and whether a limitation based on any such abandonment would be in the child’s best interest, we cannot say with certainty that the trial court failed to apply section 36-6-406 to this case as argued by Mother. But as will be discussed in great detail, *infra*, the trial court’s sparse findings on this issue are but one of our concerns with the trial court’s analysis. We find guidance in the case of *Burden v. Burden*, in which this Court recognized the overlap between conduct requiring limitation under section 36-6-406 and conduct relevant to the child’s best interest under section 36-6-106, ultimately addressing all applicable factors contemporaneously.³³ 250 S.W.3d 899, 913–14, 918 n.9 (Tenn. Ct. App. 2007) (“We also decline to rule on whether the allegations of abuse against [the father] trigger § 36-6-406(a)’s provisions mandating a limitation of parenting time. Because the provisions of §§ 36-6-106(a) and 36-6-404(b) provide a sufficient basis to decide this issue, there is no need to decide the § 36-6-406(a) question.”).

B. Other Considerations

As part of every decision related to child custody and visitation, the touchstone of the analysis must be the child’s best interest. *Bah v. Bah*, 668 S.W.2d 663, 665 (Tenn. Ct. App. 1983) (describing the child’s best interest as “the polestar, the *alpha and omega*”); *Darvarmanesh v. Gharacholou*, No. M2004-00262-COA-R3-CV, 2005 WL 1684050, at *3 (Tenn. Ct. App. July 19, 2005) (“Out of all of the factors which may be relevant in a

³³ The *Burden* decision is addressed in more detail, *infra*.

given case, the welfare and best interest of the child must be the court's paramount concerns." (citations omitted)). The law on this point is clear: "[r]egardless of the parents' interest in a custody arrangement, the overriding responsibility of the court is to approve or order a parenting plan that promotes the best interest and welfare of the particular child[.]" **Cummings v. Cummings**, No. M2003-00086-COA-R3-CV, 2004 WL 2346000, at *9 (Tenn. Ct. App. Oct. 15, 2004). In other words, "[t]he needs of the children are paramount; the desires of the parents are secondary." **Shofner v. Shofner**, 181 S.W.3d 703, 715–16 (Tenn. Ct. App. 2004) (citing **Lentz v. Lentz**, 717 S.W.2d 876, 877 (Tenn. 1986)).

Even the statutory directive to allow each parent the maximum possible participation in the child's life must be interpreted in this light. See **In re Emma E.**, No. M2008-02212-COA-R3-JV, 2010 WL 565630, at *5 (Tenn. Ct. App. Feb. 17, 2010). ("It is incumbent on courts to develop a parenting schedule that will facilitate a child's relationship with both parents to the greatest degree possible, at all times viewing its decision through the lens of the child's best interests."); **Swett v. Swett**, No. M1998-00961-COA-R3-CV, 2002 WL 1389614, at *8 (Tenn. Ct. App. June 27, 2002) ("The propriety of a divided custody arrangement should be analyzed by focusing on the effect it will have on the child."). Indeed, "[t]he plain language of [s]ection 36-6-106(a) directs courts to order custody arrangements that allow each parent to enjoy the maximum possible participation in the child's life only to the extent that doing so is consistent with the child's best interests." **Flynn v. Stephenson**, No. E2019-00095-COA-R3-JV, 2019 WL 4072105, at *7 (Tenn. Ct. App. Aug. 29, 2019) (quoting **In re Cannon H.**, No. W2015-01947-COA-R3-JV, 2016 WL 5819218, at *6 (Tenn. Ct. App. Oct. 5, 2016)); see also Tenn. Code Ann. § 36-6-101(a)(2)(A)(i) (providing that "neither a preference nor a presumption for or against joint legal custody, joint physical custody, or sole custody is established, but the court shall have the widest discretion to order a custody arrangement that is in the best interest of the child").

Along these lines, a key function of a permanent parenting plan is to "[m]inimize the child's exposure to harmful parent conflict[.]" Tenn. Code Ann. § 36-6-404(a)(3). And "[f]lexible parenting arrangements that require frequent collaboration can 'undermine the psychological well-being of [the] parents' and expose '[the child] to high levels of parental conflict' when the parents cannot resolve disputes amicably." **In re Piper H.**, No. W2015-01943-COA-R3-JV, 2016 WL 5819211, at *5 (Tenn. Ct. App. Oct. 5, 2016) (quoting **Swett**, 2002 WL 1389614, at *7). Thus, although joint custody arrangements are authorized by statute and are "appropriate in certain limited circumstances," these arrangements "are generally disfavored by the courts of this state due to the realization that such rarely serves the best interest of the child." **Darvarmanesh**, 2005 WL 1684050, at *7 (collecting cases); see also **Zabaski v. Zabaski**, 2002 WL 31769116, at *5 (Tenn. Ct. App. Dec. 11, 2002) (noting that "[a] schedule whereby custody of a minor child alternates between the parents during each school week is quite unusual"). As we have previously explained,

The statute does not require that joint custody be awarded only when the

parents are on friendly terms[;] however, in order for a joint custody arrangement to serve the best interest of the child, it requires a “harmonious and cooperative relationship between both parents.” “While we have stopped short of rejecting this type of custody arrangement outright, divided or split custody should only be ordered when there is *specific, direct proof* that the child’s interest will be served best by dividing custody between the parents.”

Darvarmanesh, 2005 WL 1684050, at *7 (citations omitted); *see also Kathryn B.F. v. Michael B.*, No. W2013-01757-COA-R3-CV, 2014 WL 992110, at *10 (Tenn. Ct. App. Mar. 13, 2014) (Kirby, J., concurring) (“Emphasis on the ‘fairness’ to one parent or another is misguided; the trial court’s focus should instead be on the child’s best interest.”). This reasoning is likewise applicable to “an analogous decision under the parenting plan statute to award equal residential parenting time with joint decision-making authority.” *In re Emma E.*, 2010 WL 565630, at *6.

C. Best Interest

With these considerations in mind, we turn to our analysis of the trial court’s ruling. The trial court ultimately awarded Father 158 days of parenting time, to be exercised the second and fourth weeks of each month, and ordered that the parties would share “a good faith duty to discuss all major decisions with one another and attempt to reach a joint decision.” As noted by Father, this is not the exactly equal parenting schedule he proposed because some months contain five weeks. Nevertheless, the trial court’s schedule requires the child to switch between houses for an entire week at a time multiple times each month. Each exchange has the potential to upset the child’s sense of stability and expose the child to parental conflict. *See Swett* 2002 WL 1389614, at *8 (including among the considerations for implementing “divided custody arrangements” whether the arrangement will be “unduly disruptive for the child”). When viewed through this lens of disruption, the parenting schedule entered by the trial court has much in common with other joint custody arrangements despite the slight differential in the parties’ parenting time. The trial court did not make any express findings that this functionally equal division of parenting time and joint decision-making authority served the child’s best interest. To the contrary, the trial court’s findings weigh against such a parenting schedule.

In making its ruling, the trial court was clear that it was troubled by the antagonistic relationship between the parties. It noted that the parties were unable to communicate effectively, stressing that communication is “[t]he most basic, fundamental task” required in co-parenting. The trial court was also concerned that the parties would be unable to set aside their differences for the sake of the child. These findings do not support the trial court’s decision to award the parties substantially equal parenting time. *Compare In re Emma E.*, 2010 WL 565630, at *7 (“In conclusion, the juvenile court expressed confidence in the parties’ ability to share joint decision-making authority and equal parenting time; we find insufficient reason to second-guess that assessment.”), and *Zabaski*, 2002 WL

31769116, at *5 (finding itself unable to say that the alternate-week schedule was the best possible solution but acknowledging that the evidence did not preponderate against the schedule, where the parents were able to communicate and agree with each other for the child's benefit), with *Rajendran v. Rajendran*, No. M2019-00265-COA-R3-CV, 2020 WL 5551715, at *8 (Tenn. Ct. App. Sept. 16, 2020) ("On the whole, it appears that the parties' continuing lack of trust and inability to cooperate are barriers to the joint parenting arrangement ordered by the trial court."), *In re Piper H.*, 2016 WL 5819211, at *5 ("Although not expressly stated in its order, the juvenile court clearly determined that a parenting schedule requiring frequent communication and collaboration by Mother and Father would not serve Piper's best interests. Having reviewed the evidence of the vitriolic relationship between Mother and Father, we agree."), and *Darvarmanesh*, 2005 WL 1684050, at *8 ("The record in this case reveals a heightened level of animosity between the parties and an inability to communicate regarding [the child], thereby making a joint custody arrangement undesirable."). Nor do they support the implementation of shared decision-making authority contingent on "good faith" attempts to reach an agreement. See *In re Grace N.*, No. M2014-00803-COA-R3-JV, 2015 WL 2358630, at *12 (Tenn. Ct. App. May 14, 2015) (holding that the statutory factors did not support joint decision-making because one party was historically the primary caregiver of the child and the trial court found that the parties were not able to effectively communicate). The parents' inability to communicate is a serious impediment to the type of cooperation required to successfully navigate a week-on, week-off parenting schedule. Awarding the parents essentially joint custody despite their obvious inability to cooperate does not seem to be in furtherance of the child's best interest.

This decision is, unfortunately, not the only cause for concern within the trial court's ruling. To be sure, the trial court repeatedly acknowledged the need to focus on the child's best interest. Respectfully, however, the trial court's statements make it obvious that Father's desire for more parenting time was the real impetus behind the modified parenting schedule. Indeed, even before any witnesses were called to the stand, the trial court recognized Father for "coming in and fighting so hard" to increase his parenting time and appeared inclined to simply "move beyond" Father's absence from the child's life, whatever the cause. Later, the trial court stated that "[w]e have to figure out how to get [F]ather, who -- who should be the strong role model, involved and integrated in [the child's] life." The court reiterated simply: "I don't care what [Father] has done." At the same time, when Mother's counsel objected to Father's request for visitation with the child while the trial was ongoing, the trial court highlighted the three months since their last visit in December 2023.

The trial court also expressed discontentment with the extent of Mr. Cassius's involvement in the case and the control ceded to him in the court's February 2023 order. From the very beginning of trial, the court expressed its disagreement with Mr. Cassius's methodology, stating that Mr. Cassius "gave Aiden too much power within too short of a period of time" and that it would have made different choices in his place. The trial court

was clear that it would be increasing Father's parenting time in its judgment and that not allowing Father any parenting time with the child while the trial was ongoing would only "delay the inevitable." Then, before Father was cross-examined and before Mother was ever brought to the stand, the trial court explained that it was prepared to offer a ruling "expeditiously" and would not need even a week to consider the matter. These statements do not seem to be based on concern for the child's best interest, particularly as the trial court had not yet heard from the parent with whom the child has spent the majority of his time.

The circumstances of this case bear a striking resemblance to those in *Burden*. There, the father filed for divorce and requested joint custody. 250 S.W.3d at 902. The trial court adopted the father's proposed week-to-week parenting schedule ex parte. In her response, the mother sought a more flexible schedule, where the child would see the father no fewer than two days a week.

After the mother alleged that the father had a history of abusive behaviors and an "emotional impairment" that negatively affected his relationship with the child, the court appointed a psychologist to conduct a custodial evaluation. The psychologist's report, introduced into evidence at trial, "concluded that [the mother] has historically been [the child's] primary caretaker; that [the father] has a distant relationship with [the child], thanks in large part to his emotional and psychological problems; and that the week-to-week joint custody arrangement is harmful to [the child][.]" *Id.* at 903. The report recommended that the temporary parenting schedule "should be replaced with an arrangement that makes [the mother] the primary residential parent while giving [the father] reasonable visitation rights." *Id.* The court issued a memorandum opinion at the conclusion of trial, holding that the parenting schedule would "remain as is[.]" *Id.* at 904.

The trial court's order contained minimal explanation for its decision to continue the week-to-week parenting schedule. In particular, the trial court stated: "The first thing I'll say is I've read a lot of evaluations and so forth, and I don't like this one. I don't like the way it is done. I don't like the results." *Id.* The trial court was specifically unhappy with the report's conclusion that the father's psychological issues and physical violence toward the mother required the reduction of his time with the child, noting: "Today is the first time I have ever really met [the father]. He is a totally harmless, gentle person. He is not overly aggressive." *Id.* The court also stated that "I guess he has some aggression or problems[.]" but that the "problems are of no consequence in this litigation" and the father "would be a totally good parent." *Id.* Additionally, the court explained that, "I know from reading this record and listening to this proof that if this [c]ourt were to limit [the father] to just a nominal visitation schedule his parenting is over. He would just be overwhelmed, and there would be no close relationship there between him and his child." *Id.* at 908.

This Court determined that the trial court's explanation for its departure from the evidence in the mother's favor and the expert's recommendation was "inadequate in

several respects.” *Id.* at 908. The “most obvious and serious flaw in the court’s opinion [was] its failure to prioritize the best interest of the child.” *Id.* We noted that the court “lament[ed] the discussion at trial of [the father’s] ‘emotional problems,’ but [did] not address the undisputed evidence that [the father’s] problems have had an impact on [the child].” *Id.* at 909. We were also concerned that the trial court seemed to be predicting that the mother would so interfere with her own proposed parenting plan that the father’s parenting would be “over,” despite the lack of evidence that the mother had a history of such extreme interference with the father’s rights. We found that “the court’s language— ‘his parenting is over . . . He would just be overwhelmed’—again suggest[ed] that it was concerned more with [the father’s] parental rights than with [the child’s] best interest.” *Id.* at 910.

We further determined that focusing on the father’s interests impacted the trial court’s analysis of certain statutory factors, particularly those related to the strength and consistency of the parents’ relationships with the child. We noted the undisputed testimony that the father’s psychological problems had “negatively impacted [the child] in various ways.” *Id.* at 906. The undisputed evidence also established that the mother was the child’s primary caregiver and the primary performer of parenting responsibilities prior to the divorce, while the father admittedly had “little interaction” with the child. *Id.* at 912. And the court acknowledged the child’s preference to live with the mother but “then disregarded it without explaining why it was doing so” or “why overriding that preference [was] in the child’s best interest.”³⁴ *Id.* at 909 & n.6. While we recognized the deference owed to the trial court’s crediting of the father’s assertion that the mother had created a rift in the father-daughter relationship, we concluded that “the evidence nevertheless preponderate[d] in favor of a finding that [the child] has a much closer relationship with [the mother] and that other factors, unrelated to [the mother’s] conduct, are primarily responsible for the deterioration in the relationship between [the child] and [the father].” *Id.* at 913.

The trial court also did not discuss the evidence of the father’s abuse of the mother, sometimes in the presence of the child, in terms of his fitness as a custodial parent. The court disregarded the undisputed facts concerning the father’s psychological problems and the associated aggressive behavior based on its belief in the father’s gentleness. *Id.* at 909, 914. Instead, the court seemed to excuse the father’s violent actions, both because the mother “knew about [the father’s problems] before she married him” and because “I think that she was never injured and she can pretty much take care of herself[.]” *Id.* at 909. We again acknowledged the trial court’s right to determine the credibility of the witnesses before it but explained that “the court cannot simply disregard the weight of the evidence of a substantive issue on the basis of nothing more than its own conclusory statements

³⁴ In *Burden*, the child was eleven years old at the time of trial and thus her preference was not a mandatory consideration under section 36-6-106(a). We concluded that “[a]lthough it probably would not have been an error of law to not consider the child’s preference at all, the manner in which the court considered it, and then seemingly disregarded it without explanation, is further evidence of the court’s failure to base its decision on the best interest of the child.” *Id.* at 909 n.6.

regarding a party's character." *Id.* at 914.

The trial court's over-reliance on the father's testimony stood in sharp contrast to its under-reliance on the appointed expert's report. We noted that "no evidence was introduced questioning the qualifications or credibility of the court-appointed expert" and that the report was received into evidence without objection. *Id.* at 906. The report concluded that the equal co-parenting time was "causing more harm than good" because the father was not an equally fit parent and did not have an equal relationship with the child compared to the mother. *Id.* at 906–07. The report further recommended that a more traditional schedule, limiting the father's parenting time to every other weekend, one day during the week, and extended summer visitation, would better serve the child. But the court ignored the report's conclusions because it did not "like the results." *Id.* at 917. Despite its rejection of the parts of the report unfavorable to the father, we noted that the court "heavily referenced" those portions critical of the mother and her "overly close relationship" with the child. *Id.* We found that "it could hardly be more clear" that the mother-daughter relationship was the psychologist's "secondary concern." *Id.* The trial court provided no justification or evidentiary basis for its focus on this ancillary issue but utter disregard for the report's primary conclusion. We concluded that the report and its findings were therefore due more weight in the analysis of the child's best interest.³⁵

This Court ultimately reversed the trial court's custody determination as "contrary to the weight of the evidence" and adopted the parenting schedule proposed by the mother *Id.* at 918. We determined that when considered in the proper light—with a focus on the child's best interest rather than the father's parental rights—the evidence preponderated in favor of the conclusion that the mother was a more fit custodian than the father. Unfortunately, the trial court's emphasis on Father's interests is similarly visible throughout its analysis. Our review of the evidence in this case leads us to the same conclusion as the Court in *Burden*.

i.

One example of the prioritizing of Father's parental rights over the child's best interest is in the trial court's treatment of Mr. Cassius's notes, testimony, and recommendations. Of course, "[e]xpert testimony is not conclusive, even if uncontradicted, but [] rather purely advisory in character, and the trier of fact may place whatever weight it chooses on such testimony." *Thurmon v. Sellers*, 62 S.W.3d 145, 162 (Tenn. Ct. App. 2001). But the court "still must have *some* valid evidentiary basis for its contrary conclusions[,]" such as rejecting the testimony "if it finds that it is inconsistent with the

³⁵ The *Burden* panel explained that the trial court's treatment of the expert's recommendations would have been entitled to greater deference if the psychologist had testified at trial rather than solely through the "cold printed word." *Id.* (quoting *Deitmen v. Deitmen*, No. 86-30-II, 1986 WL 6057, at *1 (Tenn. Ct. App. May 29, 1986)).

facts in the case or otherwise unreasonable.” *Burden*, 250 S.W.3d at 915 (quoting *Cocke Cnty. Bd. of Highway Comm’rs v. Newport Util. Bd.*, 690 S.W.2d 231, 235 (Tenn. 1985)); see also *Wells*, 9 S.W.3d at 783 (noting that deference is not owed in the face of clear and convincing evidence contrary to the trial court’s credibility determinations).

At no point did the trial court find that Mr. Cassius was anything other than credible. And the trial court had no qualms about accepting Mr. Cassius’s testimony and notes as they related to the child’s excitement to reunite with Father and the apparent success of the initial counseling sessions and first few visits. Indeed, the trial court emphasized that reunification was initially going well and Father and the child were “getting there” in terms of rebuilding a relationship, based in large part on Mr. Cassius’s notes. For example, in its March 28, 2024 ruling, the trial court stated: “[The child] was well on his way [to “a great relationship” with Father]. I mean, if you look at these sessions in April, May, June, July, August, September. He’s getting there.”

Beyond these topics however, the trial court gave little credence to Mr. Cassius’s notes and testimony. The trial court did not put nearly as much emphasis on those aspects of Mr. Cassius’s testimony related to the child’s later distrust and fear of Father and lack of excitement for visiting with Father. The trial court did not seem at all moved by Mr. Cassius’s description of Father’s defensive, selfish, and apathetic behavior. Nor did the trial court put any weight on Mr. Cassius’s ultimate recommendation that Father’s parenting time be increased only gradually through incremental changes.

The lack of credence given to the parts of Mr. Cassius’s testimony unfavorable to Father appears to stem from the unfounded notion that Mr. Cassius failed to treat Father fairly or offer him the chance to defend himself from the child’s allegations. One such failure purportedly occurred in November 2023 after Father’s mother did not arrive at the proper exchange point. The trial court repeatedly referred to the missed visit as “a simple mistake” that the court would not have held against its own father. In critiquing Mr. Cassius’s response to this incident, the trial court lamented the “missed opportunity[] to navigate that situation in a way where Father felt that he was heard, Aiden felt that he was heard.”

Regarding the subsequent counseling session, the trial court empathized with Father’s “perception” and desire to “defend himself” in the session. But Father did not testify to anything beyond the fact that the visit was missed. So then, the trial court found Mr. Cassius and his notes credible to the extent they relayed Father’s efforts to explain himself; the suggestion in the same notes that Father was merely doing “damage control,” only concerned with his own feelings, and wholly unable to empathize with the child or offer even a simple apology, though unopposed, was not afforded similar consideration. In other words, the trial court seems to have found the idea that Mr. Cassius might not have fully heard Father’s perspective more notable than it did the idea that Father was utterly disinterested in hearing the child’s perspective.

The trial court also expressed disappointment in Mr. Cassius's response to the December 2023 incident. In particular, the trial court stated that, "whatever [Father] did, it was just wrong" for Mr. Cassius to suspend visitation without "some intervention" or offering Father the opportunity to explain the situation. And yet, the record shows that Mr. Cassius did offer Father more than one chance to explain shortly after visitation was suspended.

At the next scheduled counseling session, approximately one month later, Father opted to meet with Mr. Cassius individually, rather than allow the child to join the session electronically for fear of Mother overhearing the discussion. Mr. Cassius noted that Father's focus during the session was on his own emotions rather than those of the child. Although another counseling session was scheduled for the following week, Mr. Cassius noted that Father cancelled prior to the session. So the evidence shows that Father was presented with two opportunities to offer his perspective on the incident and was more interested in explaining the situation to Mr. Cassius than in potentially repairing the child's lack of trust.

Still, the session where both Father and the child were present—the third opportunity for Father to explain and rectify the December 2023 incident—was hardly more successful. Mr. Cassius recounted that Father was again focused on his own emotions and unable to empathize with the child. Instead, Father renewed the very issues at the heart of the incident: his insistence that the child's behavior was disrespectful and his right to discipline the child how he sees fit. Despite the child's obvious discomfort with Father's past physicality, he still attempted to rub the child's head during the session. Perhaps most distressing, Mr. Cassius noted that Father very directly expressed his ambivalence in relation to seeing or not seeing Aiden. Father did not dispute that he told the child that he would be "good" if the child did not want to see him; Father once more chose to satisfy his own purposes rather than attempt to further his relationship with the child. Not only do Father's words and actions reflect poorly on his emotional fitness to parent the child, they weigh against the trial court's finding that Father was not permitted sufficient opportunity to explain himself. See *Wells*, 9 S.W.3d at 783; *Chaffin v. Ellis*, 211 S.W.3d 264, 286 (Tenn. Ct. App. 2006) (noting that even discretionary decisions "must be based on the proof at trial and the applicable principles of law").

Mother argues that the trial court abused its discretion in failing to consider Mr. Cassius's opinions on the relationship between Father and the child or his recommendation that Father's parenting time be increased incrementally. Father argues that the trial court's treatment of Mr. Cassius's testimony is entitled to more deference than suggested by Mother. He attempts to distinguish this case from *Burden*, relied on by Mother, because that case involved only a written expert report rather than any in-person testimony. Father is correct that while a trial court is in the best position to assess the credibility of in-person testimony, so that such determinations are entitled to significant weight on appeal, the trial

court enjoys no advantage in relation to expert opinions offered only through written documents. *Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn. 1997) (noting that this Court “may draw its own conclusions about the weight and credibility of [solely written expert] testimony, since we are in the same position as the trial judge”).

The issue, however, is that the trial court failed to make any findings to support the inconsistent weight it placed on Mr. Cassius’s testimony. To be sure, as noted by Mother, the trial court readily accepted those portions of his testimony favorable to Father. The trial court did not suggest that Mr. Cassius’s later testimony was somehow less credible or that there was any question about his training or expertise. Nor does the record reveal that the trial court disregarded the portions of Mr. Cassius’s testimony less favorable to Father’s position based on some other testimony it found more credible; his recounting of the counseling sessions went essentially undisputed. So there is not actually any credibility determination to which we must defer in considering the trial court’s treatment of the in-person testimony and it is not that the trial court found the testimony to be inconsistent with the facts in the record. *See Cocke Cnty. Bd. of Highway Comm’rs*, 690 S.W.2d at 235. While the trial court is not bound by the opinion of an expert, even an expert appointed by the court itself, *Thurmon v.*, 62 S.W.3d at 162, the undisputed facts cannot simply be disregarded because the trial court believes that “[i]f I had been the counselor, I would have handled that totally different.”

Moreover, Mr. Cassius’s recommendation was not markedly different from those of the parents, who both suggested a graduated reunification schedule to some extent. Instead, the trial court’s comments suggest that it discounted Mr. Cassius’s methodology due to concern that he treated Father unfairly and gave little weight to his opinions on this basis. But this Court has previously held that endorsing only portions of the expert proof while ignoring others without providing justification is suspect. *See Burden*, 250 S.W.3d at 914, 917 (“It appears that the court engaged in unjustified judicial ‘cherry-picking’ of the expert report, crediting those portions where it ‘like[d] the results’ and discrediting the rest, with no valid evidentiary basis for doing so.”).

Respectfully, the trial court appears to have credited Mr. Cassius’s testimony only as far as it benefitted Father and aligned with his goal of increased parenting time and discredited the rest, notwithstanding the weight of evidence. *See Burden*, 250 S.W.3d at 915 (“Here, the problem is not simply that the court disagreed with the expert; it is that the court adopted a viewpoint not only diametrically opposed to the expert’s, but unsupported by the weight of the evidence.”). The disregard for those parts of Mr. Cassius’s testimony critical of Father suggests that fairness to Father and his interests, not the strength of the parent-child relationship, was at the forefront of the trial court’s analysis.

ii.

The trial court’s handling of the child’s testimony was similarly skewed by a focus

on fairness to Father. Early on in its interview with the child, the trial court again downplayed Father's extended absence from the child's life, stating that the reason the child had not been "spending as much time with [Father] as [he] should have" was not important. Instead, what was important was arranging "for [the child] to spend as much time with [Father] as possible now and never hav[ing] that time interrupted again[.]"

Then, despite minimizing the almost-three-year period that Father was absent from his life, the trial court highlighted that three months had passed since the child had last seen Father. The child was not especially concerned with the cessation of Father's parenting time, particularly because he felt that Father had gone "too far" with his attempt at discipline in December 2023. The trial court responded with examples of discipline it faced "back in the day," apparently contesting the child's opinion that Father had gone "too far" by comparing how much harder Father could have been on him.³⁶

The trial court also appeared to excuse Father's behavior during the December 2023 incident, asking the child if he had "smart-mouth[ed]" Father or said something "inappropriate." Although Aiden denied that he said anything inappropriate, the trial court instructed him on multiple occasions that he would need to follow certain "ground rules" when Father's parenting time resumed, including not "act[ing] out," "hav[ing] a smart mouth," or going "back and forth" with Father.³⁷ Later, in emphasizing that not following these ground rules would result in the child being disciplined, the trial court explained that

³⁶ This was a recurring theme for the trial court. For example, the trial court was equally dismissive of the relative severity of the 2020 push-up incident during its oral ruling on March 28, 2024:

I mean, [] are we really here because of pushups? Because this father made his son do twenty-five or fifty or even one hundred pushups, and his arms were hurting. Well, heck, my arms hurt if I do ten. We talk about pushups. He could've knocked him outside of his head, taken him outside and got a switch, a leather belt, used the belt buckle on him, punched him upside the nose, then . . . it would have really been something to report, and we wouldn't be here.

³⁷ As part of the later discussion regarding Father having parenting time the next day, the trial court again downplayed "whatever happened on that night when Aiden was sass[ing] [Father]" in relation to the discipline it had experienced. And when Mother's counsel attempted to clarify whether there had been any proof that the child had "sass[ed]" Father, the trial court stood behind its characterization of the child's testimony:

Aiden testified that they went back and forth. Back and forth, you don't go back and forth with a parent. When a parent is talking, you stand there, and you keep your mouth shut.

. . . .

When a father is talking to a son, the son is to stand there and be respectful. You don't go back and forth.

Notably, Father offered no testimony to the effect that the child had spoken disrespectfully; Father adamantly denied that "an incident" even occurred. A trial court's personal views should not overshadow the evidence actually in the record. See *Hogue*, 147 S.W.3d 251 (noting that even discretionary decisions "must be based on proof and appropriate legal principles").

“Tennessee does allow corporal punishment. So [Father] can wear you out on your buttocks. He can’t injure you, but he can discipline you.” While the trial court did state that the parties would need to agree on the different steps of discipline and the consequences the child could face, the court seemed intent on rationalizing Father’s conduct as both justified and restrained, regardless of the child’s impression.

The trial court further stated that Father “was probably hurt” by the child saying that he wanted to leave the December 2023 visit early. The trial court explained that:

just like it’s not a good way for [Father] to discipline you by grabbing you or being aggressive with you because you say something that he doesn’t like, same thing. It’s not good for you to threaten him and say, well [] I want to go back to my mom, [] because you don’t like what he’s doing or saying.

. . . .

So we’re going to work with [Father], and we’re going to make sure that [Father] understands that, if you say something like that, he’s not to let it get under his skin. But at the same time, I want you to remember that that’s not something that you should say, because you’re not going to get to go back to your mom’s house. You’re going to have to stay there and tough it out and work it out, right? Because that’s what we have to do.

On the one hand, the child is being told to shield Father’s feelings, while being told to suppress his own on the other. And it does not seem particularly child-focused to not only equate a child’s words with a parent’s physical aggression, but to also call the child’s expression of discomfort a “threat” against the parent.

In asking about his preferred parenting schedule, the trial court again emphasized that the child needed to consider Father’s feelings. When the child stated that he would like to spend two weekends with Father each month, the trial court urged the child to consider what Father wants:

Now, what if [Father] wanted to spend more time with you than just on the weekends? Because he wants to be involved in making sure that you grow up to be the best young man that you could possibly be, and he wants to help your mom raise you, right? He wants to help her, because Mom is Mom and Dad is Dad, and they think differently. But suppose he wants to be more involved because he thinks that perhaps he can teach you some things that only a man can teach you and that he should be the one to teach you these things because . . . he’s your daddy, he’s your father. What do you think about that, if he wants to spend more than four days a month?

The trial court also highlighted that Aiden would only spend four days a month with Father under such a schedule. After the child accepted this arrangement as “fine for [him,]” the

trial court again admonished the child's lack of consideration for what Father wants: "You think it's fine? Uh-huh. But suppose [Father] wants to spend more time with you? Should we think about what [Father] wants, too, or should we not think about [Father] wants?"

Again using the lens of Father's interests, the trial court tried another tack: placing the weight of Father's paternal ambitions on Aiden's shoulders as his only child. The trial court stressed that although Aiden is also a son to Mother and her husband, Father is "not anybody else's dad" and Aiden is "all he has." As such, the trial court explained, "it's very important to [Father] to have [the child] in his life." Then, when the child expressed being scared of Father and uncomfortable spending more time with Father due to his fear that Father would again get physical with him, the trial court insisted "Well, [Father] is not going to do that. He's not going to do that. So we're going to have to give him a chance. You're going to have to give him a chance. Sounds like you don't want to give him a chance." So again, the trial court's focus seems to be on fairness to Father. The child's discomfort with spending time with Father was eclipsed by the trial court's spotlight on Father's desire to be involved in the child's life and "teach [him] some things." But this emphasis on Father's interest in parenting his only child rings somewhat hollow in the face of the trial court's lack of consideration of the almost-three-year period during which Father failed to make this interest manifest.

Because the child was younger than twelve years old at the time of trial, the trial court was under no statutory mandate to consider his preference. *See* Tenn. Code Ann. § 36-6-106(a)(13) (including the "reasonable preference of the child if twelve (12) years of age or older" among the best interest factors). Yet, neither was the trial court prohibited from doing so. *Id.* Even when consideration of the child's stated preference is mandatory, the preference "is not binding upon the trial court but [] just one of the factors to be considered by the court in making its custody determination." *Smith v. Smith*, No. 01A01-9511-CH-00536, 1996 WL 526921, at *4 (Tenn. Ct. App. Sept. 18, 1996).

Ultimately, the child expressed a preference to continue with a schedule where Father was granted parenting time every other weekend. He did not deny previously enjoying being with Father or wanting to spend more time with Father, but he was clear that the December 2023 incident changed how he felt. The child also stated, however, that he was now uncomfortable spending more time with Father because he was afraid that Father would grab him by his collar again, "or something worse." Mother argues that the trial court failed to fully consider the child's testimony in making its ruling.

As with Mr. Cassius, the trial court appears to have placed greater weight on the child's initial interest and excitement about the reunification with Father and very little weight on his current feelings. The trial court acknowledged to the child that he had "been honest about [Father]." But the trial court also repeatedly minimized the child's fear and distrust of Father, seeming convinced that the child was not "quite as afraid" as he said he was but rather attempting to "manipulate" everyone involved. In any event, the trial court

expressly acknowledged that Father's actions hurt the child's feelings and scared him, "without a doubt." Accepting the trial court's finding that the child was less afraid of Father than he voiced does not require us to ignore that he is indeed frightened of Father to some degree. Nor does the trial court's determination of the child's credibility on this issue justify its overt championing of Father's interests during the child's testimony.

iii.

Another example of the trial court's focus on Father's parental rights can be seen in the findings the trial court both did and did not make. First, the parties had differing accounts as to the push-up incident which instigated the DCS investigation in 2020, with Father himself offering multiple versions of the event. The trial court did not clarify which of these accounts it found most credible but ultimately found that, however many push-ups the child did or whether Father "encouraged" the child to complete the push-ups or used them as punishment, the incident did not amount to abuse. Similarly, Father and the child recounted the December 2023 incident quite differently. The trial court again did not make a finding as to which account it credited before concluding that Father did not do anything abusive to the child. While we do not find that the evidence preponderates against the trial court's finding that Father did not abuse the child, we are troubled by the trial court's apparent disregard for the numerous discrepancies in Father's testimony and his continued lack of concern for the child's feelings.

A second key issue is Father's extended absence from the child's life. Despite recognizing that Father went almost three years without exercising any parenting time, the trial court inexplicably found no evidence of neglect. For example, in its May 2, 2024 ruling, the trial court stated: "There's been no other evidence that Father has done anything to neglect his son. Yes, noted, he was absent, missing in action for close to three years." At the same time, the trial court did not make any findings as to the cause of Father's absence, despite the parties' conflicting explanations; indeed, the trial court was adamant that the reason Father was not in the child's life during this time was unimportant to the calculation of his future parenting time. We simply cannot agree.

Of course, Father's own phone records undermine his story that his visitation ended because Mother stopped answering his calls and emails. The records showed that Mother made seven calls to Father between May 22 and June 16, 2020, and that Father made no calls to Mother during this time or at any time until January 2023.³⁸ Notably, this most

³⁸ Similar to its dissatisfaction with Mr. Cassius's efforts to allow Father to explain himself, the trial court seemed concerned that Mother also failed to ask Father about the push-up incident. In its March 28, 2024 ruling, the trial court stated: "And the concern that I have is that when this happened, did anybody call [Father] and say, well, dad, why'd you do it? Do you know that Aiden is hurting?" In the same breath, the trial court had high ambitions for Father's response if he had been informed of the child's soreness:

recent call came only after Father reported Mother to the police for custodial interference following the issuance of the ex parte fiat resuming visitation according to the February 2015 parenting plan. And although Father offered no proof to support his allegation of interference, Mother provided photographs establishing her presence at the scheduled time and place. Father did introduce eight emails seeking to schedule parenting time he purportedly sent to Mother between May 26, 2020 and January 2023. However, he failed to offer any reason these emails were not sent to the address he had previously used to communicate with Mother. Mother also introduced evidence establishing that Father had unilaterally instituted the ban on text messaging. So then, the proof clearly preponderates against Father's version of events: Father made no serious efforts to contact Mother at any point during the almost three years he was not exercising any parenting time.

We also find it difficult to imagine how voluntarily removing himself from the child's life would fail to qualify as neglect, especially in light of the child's young age. *See* Tenn. Code Ann. §§ 36-6-406(d)(1) (including among those reasons allowing the court to limit parenting time, the parent's "neglect or substantial nonperformance of parenting responsibilities"), 36-6-402(2) (defining "parenting responsibilities" as "those aspects of the parent-child relationship in which the parent makes decisions and performs duties necessary for the care and growth of the child"). In May 2020, the child was six years and nine months old. When reunification counseling began in April 2023, the child was nine years and eight months old. Father's thirty-five month absence means that he missed approximately thirty percent of the child's life. It is well established that placing a child in the care of a virtual stranger creates the risk of substantial psychological harm. *See In re Braelyn S.*, No. E2020-00043-COA-R3-PT, 2020 WL 4200088, at *17 (Tenn. Ct. App. July 22, 2020) (determining, in the context of parental rights termination, that the child would be at risk of substantial psychological harm if custody were restored to the father who had been apart from the child for five years and was a "virtual stranger."); *In re Antonio J.*, No. M2019-00255-COA-R3-PT, 2019 WL 6312951, at *9 (Tenn. Ct. App.

And [Father] should have said, 'oh, he's hurting? Well, let me come over and see about my son.' And then what do you do, [Father]? You rush on over and you check on your kid to see if his arms are hurting. And then what he do? You broke him arms. Right? 'Son, I'm sorry. I didn't know that you were hurting. Come here. Let me rub your arms.' That's what parents do. Right?

As with Mr. Cassius, we conclude that the evidence weighs against both of these impressions.

To be sure, Father denied that Mother called him about the incident during cross-examination. On the other hand, Father stated otherwise in his December 2022 petition and during direct examination, as did Mother. And Father's phone records were introduced as an exhibit at trial, with Father himself admitting that the records showed that Mother made several calls to him during this period while showing no calls to Mother by him. Moreover, the trial court's rosy impression of Father's hypothetical response bears little resemblance to the antipathy Father has exhibited for the child's emotions throughout trial and his complaints that the child is spoiled and cries too much. While a trial court is entitled to make credibility determinations based on the conduct of the parties during their testimony, it is still required to base its findings on the evidence introduced. *See Chaffin*, 211 S.W.3d at 286; *Hogue*, 147 S.W.3d at 251.

Nov. 25, 2019) (concluding, in the termination context, that placing the children in the mother's custody would put them at risk of substantial harm because the children were "very young" when they were removed and had "little to no contact" with the mother for more than a year). This lack of communication is especially appalling when viewed in contrast to Father's testimony that he speaks to his parents every day because maintaining a relationship with them is "[v]ery, very important" to him.

The trial court did note the importance of the child feeling loved by Father. In its March 28, 2024 ruling, the trial court explained that the child will not be "emotionally and psychologically whole unless he has that opportunity to understand that his dad does love him and that his dad wants to make up for that lost time." And yet, the trial court seemed unwilling to acknowledge that Father bore any significant responsibility for his strained relationship with Aiden. Even to the extent that the trial court recognized that Father's absence from the child's life had some effect on their relationship, it minimized the almost three years during which Father chose to exercise no parenting time in favor of the three months during which his visitation was suspended by Mr. Cassius. The trial court noted that, "if this had been just an ordinary case where there had been no interruption in the parenting relationship, the father-son relationship, then perhaps it could have withstood, perhaps, a short time where there was no parent time. But given how far they had come" As discussed, *supra*, the trial court both downplayed Father's physical aggression with the child and ignored his disregard for the child's emotions, seemingly dismissing the role Father's actions might have played in forming the child's impression of him.

In contrast, the trial court highlighted Mother's responsibility to ensure the child holds Father in positive esteem. The trial court both suggested that Mother "encourage [the child] and help him see the bright side, refocus him" and noted the need for Mother to "say[] things to [the child] about -- that help him increase his esteem with regard to [Father]. In other words, how he feels about his dad." The court was clear that "only [Mother] can do that. If [Mother] can't do that, then that's just something that Aiden is not going to have." Such guidance seems misplaced in light of Mother's undisputed testimony that she did not blame Father for his extended absence, did not speak negatively about Father to the child, and ensured that the child was able to stay connected to members of Father's family. It also further illustrates the misguided focus of the trial court's perspective: Mother's words and actions are apparently crucial to the child's relationship with Father, but Father's own words and actions are of little import compared to his interest in more parenting time. We cannot agree that Father's stated desire to be a part of the child's life in the future erases his past decision to remove himself from the child's life or his present failure to show any interest in fostering a positive relationship with the child. See *In re Mariah H.*, No. E2016-02091-COA-R3-PT, 2017 WL 2829820, at *15 (Tenn. Ct. App. June 30, 2017) (affirming the trial court's finding that the father's "actions speak louder than words").

At last we reach the trial court's consideration of the best interest factors set out in section 36-6-106. The trial court found that ten factors were equal or essentially equal and four factors favored Mother. While we agree with a large part of the trial court's analysis, we also conclude that Father's interests again overshadowed the child's interests in relation to certain factors.

The evidence supports the trial court's finding that several factors do not favor one parent over the other. The parties seem equally able to meet the child's needs, there was nothing concerning suggested about the character of the other people living in their homes, and they each have flexible schedules amenable to co-parenting. *See* Tenn. Code Ann. § 36-6-106(a)(4) (related to the parents' ability to meet the child's basic needs), (12) (related to the persons living with each parent), (14) (related to the parents' schedules). Neither party refused to attend a court-ordered parenting seminar or failed to pay court-ordered child support. *See* Tenn. Code Ann. § 36-6-106(a)(3) (related to any refusal to attend a seminar), (16) (related to any failure to pay child support). And as noted, *supra*, the evidence does not preponderate against the finding that there was no proof of physical or emotional abuse in either household.³⁹ *See* Tenn. Code Ann. § 36-6-106(a)(11) (related to evidence of abuse to the child or other parent).

So too does the evidence support the trial court's finding that multiple factors weigh strongly in Mother's favor. There is no question that Mother has been the child's primary caregiver and source of continuity throughout the child's life. *See* Tenn. Code Ann. § 36-6-106(a)(5) (related to the child's primary caregiver), (10) (related to the importance of continuity in the child's life). Nor can there be any doubt that the child has a stronger and more stable relationship with Mother than with Father or that the child's preference would be to spend most of his time with Mother and only two weekends per month with Father. *See* Tenn. Code Ann. § 36-6-106(a)(1) (related to the strength and stability of the child's relationship with each parent), (13) (related to the preference of the child).

The trial court did not make any express findings as to the child's other relationships beyond the fact that he has two brothers through Mother's current marriage and will "continue to spend plenty of time with that side of his family and his relatives." Not only has Mother fostered a positive relationship between Aiden and his brothers, she has also overseen the child's involvement with school and extracurricular activities and ensured that the child remained in contact with his paternal family during Father's extended absence from his life. The record indicates that this factor favors Mother. *See* Tenn. Code Ann. §

³⁹ We have some concern regarding the reliability of the trial court's reassurances to the child that Father will not use physical discipline moving forward, however. Father was equivocal in his testimony as to both whether he had ever physically disciplined the child and what form that discipline might have taken. In any event, it is clear that he and Mother have different understandings of appropriate means of correcting the child's behavior, which could impact the effectiveness of the July 2024 parenting plan's prohibition on corporal punishment.

36-6-106(a)(9) (related to the child's interaction with relatives and involvement with his environment and other activities).

We cannot conclude, however, that the record supports the trial court's finding that the remaining factors are equal or substantially equal between the parties. In discussing factor (2), the trial court found that "both parties are equally suited to perform the necessities and the responsibilities that Aiden is going to need." *See* Tenn. Code Ann. § 36-6-106(a)(2) (related to the parents' performance of parenting responsibilities). "Parenting responsibilities" are defined by statute as "those aspects of the parent-child relationship in which the parent makes decisions and performs duties necessary for the care and growth of the child." Tenn. Code Ann. § 36-6-402(2). Such duties include:

- (A) Providing for the child's emotional care and stability, including maintaining a loving, stable, consistent, and nurturing relationship with the child and supervising the child to encourage and protect emotional, intellectual, moral, and spiritual development;
- (B) Providing for the child's physical care, including attending to the daily needs of the child, such as feeding, clothing, physical care, and grooming, supervision, health care, and day care, and engaging in other activities that are appropriate to the developmental level of the child and that are within the social and economic circumstances of the particular family;
- (C) Providing encouragement and protection of the child's intellectual and moral development, including attending to adequate education for the child, including remedial or other education essential to the best interests of the child;
- (D) Assisting the child in developing and maintaining appropriate interpersonal relationships;
- (E) Exercising appropriate judgment regarding the child's welfare, consistent with the child's developmental level and the family's social and economic circumstances; and
- (F) Providing any financial security and support of the child in addition to child support obligations[.]

Id. On the whole, the record supports the trial court's finding that both parents are capable of successfully parenting the child and performing these duties moving forward. But this finding addresses only part of factor (2), which relates to the parents' "potential for future performance of parenting responsibilities" as well as their *past* performance of such responsibilities. Tenn. Code Ann. § 36-6-106(a)(2). And for nearly three years, it was left to Mother to provide for the child's emotional, physical, and intellectual welfare and development. Despite the trial court's efforts to minimize Father's extended absence, Father, of his own volition, did not perform these or any other parental duties for approximately one-third of the child's life. This factor therefore favors Mother.

The trial court likewise focused on Father's potential in considering factors (6), (7), and (8) to be neutral. *See* Tenn. Code Ann. § 36-6-106(a)(6) (related to the love and affection existing between the child and each parent), (7) (related to the emotional needs of the child), (8) (related to the mental and emotional fitness of the parents). The trial court found that both parties love and are loved by the child. Again, while generally true, this finding seems to wholly ignore the almost three years Father was not participating in the child's life. This absence undoubtedly interfered with the emotional ties presently existing between Aiden and Father. And it does not seem reasonable to disregard the child being, at best, uncomfortable with spending more time with Father or Father's undisputed ambivalence toward seeing the child. Even if the push-up incident and the December 2023 incident do not rise to the level of abuse contemplated by factor (11), we cannot ignore their effect on the child's affection toward Father. There is no reason to assume that the father-son relationship has been permanently damaged, but at present, the child shares stronger emotional ties with Mother.

Additionally, Father has not yet shown any real concern for the child's emotional needs or stage of development. Even accepting the trial court's finding that the push-up incident was not abusive, having a six-year-old child do enough push-ups that his arms were sore for days does raise some concern for Father's past understanding of the child's developmental level. His continued complaints that the child, only just ten years old at the time of reunification, is spoiled and cries too much also do not bode well for Father's present awareness of the child's development level. And Mr. Cassius's notes and testimony indicate that, rather than attempting to assuage the child's fears and disappointments, Father was primarily focused on "doing damage control" and getting the child to accept his version of events. Then, after choosing not to participate in the child's life for nearly three years, upon reunification Father immediately sought to enforce his rules with a disciplinary style clearly at odds with Mother's own technique.

In weighing the child's best interest, we must consider the parents' actions, not just their words. *See In re Keilyn O.*, No. M2017-02386-COA-R3-PT, 2018 WL 3208151, at *8 (Tenn. Ct. App. June 28, 2018) ("Although Mother testified that she was both willing and able, her actions proved otherwise."); *In re Jonathan M.*, No. E2018-00484-COA-R3-PT, 2018 WL 5310750, at *5 (Tenn. Ct. App. Oct. 26, 2018) ("When evaluating willingness, we look for more than mere words."). The trial court found "[n]othing wrong" with Father's "more military-like" parenting style, noting: "Kids sometimes need that." And yet, little emphasis was placed on the fact that the child has grown into, by all accounts, a "sweet, smart young man" who is considerate of the feelings of others while under Mother's sole guidance—her "more gentle approach, more talking, loving, and understanding" parenting style—for the past three years. Father's desire to be a more involved parent seems somewhat disconnected from any real understanding of the child before him, a child three years older than the one he remembers and perhaps not as malleable or deferential as he would prefer. As noted by the trial court, Father "really do[es] have a lot of hard work to do" to match his stated interest in being more involved in the

child's life with actions demonstrating an actual interest in parenting Aiden as he is now. These factors relating to the emotional needs of the child, the emotional fitness of the parents, and the emotional ties between the parents and child weigh in favor of Mother.

Overall then, the majority of the statutory best interest factors support Mother over Father, with the remaining factors not supporting either parent to a greater degree. This, of course, does not mean that Father is unfit to parent the child. *See Bah*, 668 S.W.2d at 666 (“Fitness for custodial responsibilities is *largely a comparative matter*. No human being is deemed perfect, hence no human can be deemed a perfectly fit custodian. Necessarily, therefore, the courts must determine which of two or more available custodians is more or less fit than others.” (citation omitted)). But it does indicate that a substantially equal parenting schedule is not supported by the evidence.

Respectfully, the trial court's conclusion that children's best interests generally require spending plentiful time with their fathers, however valid, appears to have overshadowed its analysis of whether, in light of all of the circumstances, *this* child's best interest is served by having him spend essentially half of his time with *this* father. No one has suggested that the child does not need to spend time with Father or that Father should not be granted any parenting time. Instead, Mr. Cassius, Mother, and even Father himself recognized that—based on Father's extended absence from the child's life and the rocky progress of the reunification attempt—it would be in the child's best interest to reintroduce him to spending larger quantities of time with Father gradually. The 125 days of parenting time awarded to Father under the July 2024 parenting plan seems only a minimal increase from the 106 days he received under the February 2015 plan. And yet, 125 days seems a much more drastic increase when compared to the 0 days of parenting time Father actually exercised between May 2020 and June 2023. Moreover, the trial court's every-other-week parenting schedule requires a level of communication and cooperation that these parents were found not to possess. We simply cannot say that the modified parenting plan established by the trial court is supported by the weight of the evidence or within “the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence found in the record.” *Armbrister*, 414 S.W.3d at 693 (quoting *Eldridge*, 42 S.W.3d at 88). We therefore reverse the trial court's judgment and remand for the entry of a parenting plan more closely aligned with the child's best interest. In the interim, we reinstate the February 2015 parenting plan.

Of course, our decision should in no way be read as a condemnation of the trial court or its impartiality. It is clear that the trial court takes its role in the child custody process seriously, and we have the utmost faith in its ability to incorporate the above considerations into its analysis of the child's best interest on remand.

We note, however, that “[e]vents and lives have not stood still while this custody dispute has been in the courts.” *Wall v. Wall*, No. W2010-01069-COA-R3-CV, 2011 WL 2732269, at *26 (Tenn. Ct. App. July 14, 2011) (quoting *Gorski v. Ragains*, No. 01A01-

9710-GS-00597, 1999 WL 511451, at *4 (Tenn. Ct. App. July 21, 1999)). Accordingly,

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

Kathryne B.F., 2014 WL 992110, at *7 (internal citations omitted) (quoting *In re C.W.*, 420 S.W.3d 13, 22 (Tenn. Ct. App. 2013)). “In light of the passage of time and the nature of this case, the trial court may, in its discretion, consider additional evidence to ensure that any custody order is based on the parties’ actual circumstances.” *In re Noah J.*, No. W2014-01778-COA-R3-JV, 2015 WL 1332665, at *6 (Tenn. Ct. App. Mar. 23, 2015).

D. Attorney’s Fees

Both parties seek their appellate attorney’s fees. Neither party offers any non-skeletal justification for these requests. See *Sneed v. Bd. of Prof. Resp. of Sup. Ct.*, 301 S.W.3d 603, 615 (Tenn. 2010) (“It is not the role of the courts, trial or appellate, to research or construct a litigant’s case or arguments for him or her, and where a party fails to develop an argument in support of his or her contention or merely constructs a skeletal argument, the issue is waived.”). We therefore exercise our discretion to decline to award either party their attorney’s fees. See *Eberbach v. Eberbach*, 535 S.W.3d 467, 476 (Tenn. 2017) (noting that both statutes under which attorney’s fees might have been awarded “expressly provide for the use of the court’s discretion in determining whether attorney’s fees are warranted in a particular case” (citing Tenn. Code Ann. §§ 27-1-122, 36-5-3(c))).

V. CONCLUSION

The judgment of the Shelby County Circuit Court is reversed, and this matter is remanded to the trial court for further proceedings consistent with this Opinion. Costs of this appeal are taxed to Appellee Cedric D. Coleman, for which execution may issue if necessary.

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