THE DEFERENTIAL ABUSE OF DISCRETION STANDARD

A REVIEW OF KEY COMPONENTS AND CONCEPTS IN CONJUNCTION WITH TENNESSEE RULE OF CIVIL PROCEDURE 52.01

PRESENTED BY

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I. HISTORICAL REVIEW OF TENNESSEE'S ABUSE OF DISCRETION STANDARD

An in-depth analysis of the abuse of discretion standard of review is stated in *BIF, a Div. of Gen. Signals Controls, Inc. v. Service Constr. Co., Inc.*, No. 87-136-II, 1988 WL 72409 (Tenn. Ct. App. July 13, 1988). The most relevant portion reads:

> **The meaning of the abuse of discretion standard of review has become muddied and imprecise with the passage of time. Appellate courts, seemingly able to recognize abuse of discretion when they see it, rarely attempt to define the standard**.
> . . . .
>
> [But for a few exceptions], our published opinions state only that judicial discretion connotes "conscientious judgment, not arbitrary action," and that a court abuses its discretion when it "acts contrary to uncontradicted substantial evidence and ignores all valid criteria."
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> Trial courts' adjudicative decision-making is never completely shielded from appellate review. However, the abuse of discretion standard is a "review constraining concept" implying less intense appellate review and, therefore, less likelihood of reversal.
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> The standard conveys two notions. First, it indicates that the trial court has the authority to choose among several legally permissible, sometimes even conflicting, answers. . . . Second, it indicates that the appellate court will not interfere with the trial court's decision simply because it did not choose the alternative the appellate court would have chosen.
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> . . . .

> **Discretionary decisions must take applicable legal principles into account**. If the trial court misconstrues or misapplies the law, its discretion lacks the necessary legal foundation and becomes an abuse of discretion. **Accordingly, "abuse of discretion" may connote an error of law, an error of fact, or an error in the substance or form of the trial court's order**.
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> Appellate courts' deference to trial courts' "discretionary" decisions should not promote result-oriented opinions or seemingly irreconcilable precedents. The law's need for consistency, predictability, and reliability requires the elimination of apparently whimsical authority on both the trial and appellate levels. **In order to ensure a rational standard of review, a trial court's discretionary decisions should be reviewed to determine: (1) whether the factual basis of the decision is supported by sufficient evidence; (2) whether the trial court has correctly identified and properly applied the applicable legal principles; and (3) whether the trial court's decision is within the range of acceptable alternatives**.

BIF, 1988 WL 72409, at *2-3 (emphasis added) (internal citations and footnotes omitted).

II. *BIF* AND ITS PROGENY

The BIF analysis has been recognized as "one of the clearest descriptions of what [abuse of discretion standard] means." *Flautt & Mann v. Council of City of Memphis*, 285 S.W.3d 856, 871 (Tenn. Ct. App. 2008) ("Because we must review the trial court's decision for an abuse of discretion, an examination of that standard of review is necessary. Justice Koch, formerly a judge on this Court, gave one of the clearest descriptions of what this standard means[.]").

The clarity provided by the rational three-prong analysis from *BIF* has led to its application in numerous appeals involving a broad spectrum of discretionary decisions. *See, e.g.*, *Flautt*, 285 S.W.3d at 871-73 (challenge to a finding of contempt); *State ex rel. Flowers v. Tenn. Trucking Ass'n Self Ins. Grp. Trust*, 209 S.W.3d 602, 610 (Tenn. Ct. App. 2006) (finding of contempt); *Helderman v. Smolin*, 179 S.W.3d 493, 500-01 (Tenn. Ct. App. 2005) (challenge to a decision to strike portions of an expert's affidavit); *JWT, L.P. v. Printers Press, Inc.*, No. M2001-02590-COA-R3-CV, 2002 WL 31397317, at *10-11 (Tenn. Ct. App. Oct. 24, 2002) (challenge to the denial of discretionary costs); *Mays v. Mays*, No. W2000-03067-COA-R3-CV, 2002 WL 1751333, at *8-9 (Tenn. Ct. App. Feb. 5, 2002) (award of attorney's fees); *White v. Vanderbilt Univ.*, 21 S.W.3d 215, 222-23 (Tenn. Ct. App. 1999) (decision to exclude evidence); *Wilkinson v. Wilkinson*, No. 01A01-9808-CV-00446, 1999 WL 969698, at *4-5 (Tenn. Ct. App. Oct. 26, 1999)

(challenge to the discretionary decision to deny a motion for medical examination of a party under Tenn. R. Civ. P. 35).

The rational three-prong analysis was cited or applied in challenges to a variety of discretionary decisions in numerous family law cases. *See, e.g.*, *Johnson v. Johnson*, No. M2008-00236-COA-R3-CV, 2009 WL 890893, at *3 (Tenn. Ct. App. Apr. 2, 2009) (child support); *Troglen v. Troglen*, No. E2004-00912-COA-R3-CV, 2005 WL 990567, at *3-4 (Tenn. Ct. App. Apr. 28, 2005) (child support); *Downing v. Downing*, No. W2003-00561-COA-R3-CV, 2004 WL 1196100, at *3 (Tenn. Ct. App. May 27, 2004) (child support); *Sullivan v. Sullivan*, 107 S.W.3d 507, 510 (Tenn. Ct. App. 2002) (alimony); *Grice v. Grice*, No. M2001-02105-COA-R3-CV, 2002 WL 31558103, at *3 (Tenn. Ct. App. Nov. 20, 2002) (alimony); *Williams v. Williams*, No. W2001-00101-COA-R3-CV, 2002 WL 1349517, at *2 (Tenn. Ct. App. June 20, 2002) (custody and child support); *State ex rel. Vaughn v. Kaatrude*, 21 S.W.3d 244, 248 (Tenn. Ct. App. 2000) (child support).

The rational three-prong analysis was also applied by the Tennessee Supreme Court in *Lee Medical, Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010).

III. *Lee Medical, Inc. v. Beecher*

At issue in *Lee Medical, Inc. v. Beecher* was a pretrial discovery dispute; specifically, whether the trial court erred by refusing to order the discovery of the hospital's peer review committee's report and other records sought by the plaintiff, Lee Medical, Inc., that related to the decision of one of the defendants, a hospital, to stop outsourcing the vascular access services at its hospitals that Lee Medical previously provided. *Lee Med.*, 312 S.W.3d at 524.

Citing or quoting from numerous authorities cited in *BIF* and *Flautt & Mann*, the Supreme Court stated that the abuse of discretion standard envisions "a less rigorous review of the [trial] court's decision and a decreased likelihood that the decision will be reversed on appeal," and "it does not permit reviewing courts to second-guess the court below, or to substitute their discretion for the [trial] court's." *Lee Med.*, 312 S.W.3d at 524 (citations omitted). Significantly, however**,** the Supreme Court recognized that "[t]he abuse of discretion standard of review does not, however, immunize a [trial] court's decision from any meaningful appellate scrutiny." *Id.* (citing *Boyd v. Comdata Network, Inc*., 88 S.W.3d 203, 211 (Tenn. Ct. App. 2002)). The Court further stated:

> **Discretionary decisions must take the applicable law and the relevant facts into account**. *Konvalinka v. Chattanooga-Hamilton County Hosp. Auth*., 249 S.W.3d 346, 358 (Tenn. 2008); *Ballard v. Herzke*, 924 S.W.2d 652, 661 (Tenn. 1996). An abuse of discretion occurs when a court strays

> beyond the applicable legal standards or when it fails to properly consider the factors customarily used to guide the particular discretionary decision. *State v. Lewis*, 235 S.W.3d 136, 141 (Tenn. 2007). . . .
>
> To avoid result-oriented decisions or seemingly irreconcilable precedents, **reviewing courts should review a [trial] court's discretionary decision to determine (1) whether the factual basis for the decision is properly supported by evidence in the record, (2) whether the [trial] court properly identified and applied the most appropriate legal principles applicable to the decision, and (3) whether the [trial] court's decision was within the range of acceptable alternative dispositions**. *Flautt & Mann v. Council of Memphis*, 285 S.W.3d 856, 872-73 (Tenn. Ct. App. 2008) (quoting *BIF, a Div. of Gen. Signal Controls, Inc. v. Service Constr. Co.*, No. 87-136-II, 1988 WL 72409, at *3 (Tenn. Ct. App. July 13, 1988) (No Tenn. R. App. P. 11 application filed)). **When called upon to review a [trial] court's discretionary decision, the reviewing court should review the underlying factual findings using the preponderance of the evidence standard contained in Tenn. R. App. P. 13(d) and should review the lower court's legal determinations de novo without any presumption of correctness**. *Johnson v. Nissan N. Am., Inc.*, 146 S.W.3d 600, 604 (Tenn. Ct. App. 2004); *Boyd v. Comdata Network, Inc.*, 88 S.W.3d at 212.

Id. at 524-25 (emphasis added).

IV. TENNESSEE RULE OF CIVIL PROCEDURE 52.01: FINDINGS REQUIRED

Tennessee Rule of Procedure 52.01 was amended in 2009 to require trial courts to make specific findings of facts and conclusions of law in all bench trials:

> In all actions tried upon the facts without a jury, the court shall find the facts specially and shall state separately its conclusions of law and direct the entry of the appropriate judgment. . . . If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. . . .

Tenn. R. Civ. P. 52.01.

A. RATIONALE FOR THE RULE 52 MANDATE

The underlying rationale for the Rule 52.01 mandate is that it facilitates appellate review by "affording a reviewing court a clear understanding of the basis

of a trial court's decision," and in the absence of findings of fact and conclusions of law, "this court is left to wonder on what basis the court reached its ultimate decision." *In re Estate of Oakley*, No. M2014-00341-COA-R3-CV, 2015 WL 572747, at *10 (Tenn. Ct. App. Feb. 10, 2015) (citing *Lovlace v. Copley*, 418 S.W.3d 1, 35 (Tenn. 2013)) (emphasis added). Further, **compliance with the mandate of Rule 52.01 enhances the authority of the trial court's decision because it affords the reviewing court a clear understanding of the basis of the trial court's reasoning**. *Gooding v. Gooding*, 477 S.W.3d 774, 782 (Tenn. Ct. App. 2015); *In re Zaylen R.*, No. M2003-00367-COA-R3-JV, 2005 WL 2384703, at *2 (Tenn. Ct. App. Sept. 27, 2005); *Kendrick v. Shoemake*, 90 S.W.3d 566, 571 (Tenn. 2002).

Our Supreme Court explained the reasoning for the mandate as follows:

> Requiring trial courts to make findings of fact and conclusions of law is generally viewed by courts as serving three purposes. First, findings and conclusions facilitate appellate review by affording a reviewing court a clear understanding of the basis of a trial court's decision. Second, findings and conclusions also serve "to make definite precisely what is being decided by the case in order to apply the doctrines of estoppel and res judicata in future cases and promote confidence in the trial judge's decision-making." A third function served by the requirement is "to evoke care on the part of the trial judge in ascertaining and applying the facts." Indeed, by clearly expressing the reasons for its decision, the trial court may well decrease the likelihood of an appeal.

Lovlace, 418 S.W.3d at 34-35 (internal citations and footnotes omitted).

B. FINDINGS OF FACT SHOULD INCLUDE

There is no bright-line test by which to assess the sufficiency of the trial court's factual findings. *Id*. at 35. The general rule is that "the findings of fact must include as much of the subsidiary facts as is necessary to disclose to the reviewing court the steps by which the trial court reached its ultimate conclusion on each factual issue." *Lovlace*, 418 S.W.3d at 35. When the trial court fails to make specific findings of fact, no presumption of correctness arises because "there was nothing found as a fact which we may presume correct." *Brooks v. Brooks*, 992 S.W.2d 403, 405 (Tenn. 1999). "Simply stating the trial court's decision, without more, does not fulfill [the Rule 52.01] mandate." *Barnes v. Barnes*, No. M2011-01824-COA-R3-CV, 2012 WL 5266382, at *8 (Tenn. Ct. App. Oct. 24, 2012).

Because "[d]iscretionary decisions must take the applicable law and the relevant facts into account," *Lee Med.*, 312 S.W.3d at 524, an appellate court's deference to a trial

court's discretionary decision for which Rule 52.01 compliance is required may diminish or abate when the record does not reveal which legal principles and facts the trial court relied upon in making its decision. *Gooding*, 477 S.W.3d at 783. Further, the trial court's failure to make findings and to identify the reasoning underlying a discretionary decision may result in a remand or the appellate court conducting a de novo review. *See In re Noah J.*, No. W2014-01778-COA-R3-JV, 2015 WL 1332665, at *5 (Tenn. Ct. App. Mar. 23, 2015); *Gooding*, 477 S.W.3d at 783.

The court in *In re Noah J.* elected to remand because:

> **[W]e cannot determine whether the trial court applied an incorrect legal standard or relied on reasoning that caused an injustice because we do not know what legal standard the court applied, or what reasoning it employed**. *See Halliday v. Halliday*, No. M2011-01892-COA-R3-CV, 2012 WL 7170479, at *12 (Tenn. Ct. App. Dec. 6, 2012), *perm. app. denied* (Tenn. Apr. 11, 2013) (explaining that "this Court cannot determine whether the trial court abused its discretion" in the absence of factual findings by the trial court); *see also In re Connor S.L.*, No. W2012-00587-COA-R3-JV, 2012 WL 5462839, at *4 (Tenn. Ct. App. Nov. 8, 2012) ("findings of fact are particularly important in cases involving the custody and parenting schedule of children," and **without such findings "we are unable to afford appropriate deference to the trial court's decision**"). "'Discretionary choices are not left to a court's inclination, but to its judgment; and its judgment is to be guided by sound legal principles.'" *State v. Lewis*, 235 S.W.3d 136, 141 (Tenn. 2007) (quoting Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. App. Prac. & Process 47, 58 (2000)). Thus, an abuse of discretion will be found "when the trial court . . . fails to properly consider the factors on that issue given by the higher courts to guide the discretionary determination." *Id.*

In re Noah J., 2015 WL 1332665, at *5 (emphasis added).

As an alternative to vacating and remanding, the reviewing court may conduct a de novo review of the record to determine where the preponderance of the evidence lies and enter judgment accordingly. *See Lovlace*, 418 S.W.3d at 36; *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997); *Gooding*, 477 S.W.3d at 783 (stating "Because there are no findings of fact for us to review, we shall conduct our own de novo review to first determine where the preponderance of the evidence lies and then determine whether the evidence, when applied to the applicable legal principles, provides a proper factual foundation for the decision challenged on appeal, that being the parenting schedule.").

V. EXAMPLES OF FINDINGS OF FACT

A. EXCELLENT FINDINGS OF FACT

The following findings from a trial court's order terminating parental rights in *In re Austin C.*, No. M2013-02147-COA-R3-PT, 2014 WL 4261178 (Tenn. Ct. App. Aug. 27, 2014).[1] **Caveat**: Note that the trial court: 1) made findings about each relevant factor; and 2) included sufficient subsidiary facts to allow the reviewing court to understand "the steps by which the trial court reached its ultimate conclusion on each factual issue." *See Lovlace,* 418 S.W.3d at 35.

> In examining the factors set forth in Tennessee Code Annotated section 36-1-113(i), the Court looks first to whether [Mother] "has made such an adjustment of circumstance, conduct, or conditions as to make it safe" and in Austin's best interest to be in her home. Beginning in or after April 2013, [Mother] began living alone in a residence in White Bluff, paid for by her friend . . . . While this is a more stable living arrangement than her moving from place to place since January 2012, it is uncertain how permanent a home it is and whether she will keep drug users out of her home. Because [Mother] does not have an income and does not show a full commitment to a drug-free lifestyle, the Court finds that it would not be safe and in Austin's best interest to be in her home.
>
> Secondly, it appears to the Court that [Mother] "has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible." [Mother] has a history, at least since 2009, of drug abuse. She participated in a treatment program in 2009. She relapsed in 2010, and as a result, she lost custody of her daughter . . . for a period of time. The State's intervention was unsuccessful in deterring [Mother] from continuing drug use. Using drugs and associating with a drug user lead to her losing custody of [her daughter] again in 2012, along with losing custody of Austin. This occurred in spite of warnings to [Mother] by DCS staff about behaviors that could result in such a loss. In fact, she continues to live with . . . a know [sic] drug user, in violation of the Court's Order. Additionally, she currently has four criminal charges pending against her. It appears to the

[1] The findings of fact are in the record of *In re Austin C.*, but only a few of the findings appear in the Court of Appeals opinion.

> Court that [Mother] has failed to make lasting adjustments and there is little to indicate that she is going to do so.
> . . . .
>
> As to the ninth factor, [Mother] has not paid child support consistent with the child support guidelines.
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> Based on the foregoing findings and the application of the factors required by Tennessee Code Annotated section 36-1-113(i), the Court has determined by clear and convincing evidence, that it is in the best interests of Austin that his mother's parental rights be terminated.

B. INSUFFICIENT FINDINGS OF FACT

On the other end of the spectrum, the following "findings of fact" are insufficient because no **facts** were found, even though they are called "findings."

> The Court affirmatively finds that the Respondent should have parenting times with the minor children during school year for three (3) weekends per month from Friday at 6:00 PM until Sunday at 6:00 PM.
>
> The Court further finds as follows:
> a) That the parties should alternate holidays as previously ordered by the Court;
> b) That in regard to summers, the Respondent/Counter Petitioner should have the first week and last week of summer, with the remaining weeks in summer alternated . . . ;
> c) That the parties shall make joint non-emergency decisions regarding children; . . .

What is missing, in the context of Tenn. R. Civ. P. 52.01, from the above example is a "fact." To plagiarize the popular Wendy's television commercial, "Where's the . . . ~~Beef~~ . . . Fact?" The lesson to be learned here is that **simply stating: "The Court affirmatively finds . . ." does not constitute a finding of fact**.