IN THE COURT OF APPEALS OF TENNESSEE
FOR THE WESTERN SECTION
AT JACKSON

ANGEL CHANDLER,	)	
	)	
Appellant-Respondent,	)	
	)	**No. W2008-02255-COA-R3-CV**
v.	)	
	)	**Gibson County Chancery Court**
JOSEPH MARION BARKER,	)	**No. 16979**
	)	
Appellee-Petitioner.	)	

BRIEF OF APPELLANT-RESPONDENT ANGEL CHANDLER

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STATEMENT OF THE ISSUE

Whether the trial court erred as a matter of law and infringed upon Ms. Chandler's constitutional rights by imposing an overnight "paramour" restriction in a permanent parenting plan order on the basis that such a provision was required, as reflected by a local rule, in every parenting plan order without regard to the evidence.

STATEMENT OF THE CASE

This case presents an obvious and straightforward legal error requiring correction by this Court.

In connection with a modification petition premised upon a relocation resulting in both parties residing in Trenton, Tennessee, the Gibson County Chancery Court imposed a restriction on the parental and individual rights of Appellant-Respondent Angel Chandler that had never before been imposed in the ten years since Ms. Chandler and Appellee-Petitioner Joseph Marion Barker were divorced – an overnight "paramour" restriction. The trial court imposed this new restriction despite the fact that no evidence existed in the record demonstrating that such a restriction was in the best interest of the parties' minor children, both of whom are now teenagers. The imposition of such a restriction upon Ms. Chandler is particularly onerous given that Ms. Chandler was sharing a home at the time with her same-sex partner of nine years.

Ms. Chandler objected to the inclusion of such a restriction by the trial court. (R. Vol. II, at 8-9, 15.)[1] In overruling her objection, the trial court announced its mistaken belief that the laws and public policy of the State of Tennessee mandate the inclusion of an overnight "paramour" restriction in the parenting plan as a matter of law and without exception. (R. Vol. II, at 15-20.) The trial court's erroneous understanding of the requirements of Tennessee law was without doubt influenced by the existence of Rule 23:00 of the Local Rules of the 28th Judicial District ("Local Rule 23"). Local Rule 23 purports to amend the Permanent Parenting Plan Order form developed and promulgated by the Administrative Office of the Courts by requiring the inclusion of the following

[1] Citations to the record on appeal will appear in the following format: R. Vol. #, at page #.

restriction on a parent's visitation and custody rights: "Any paramour of either parent to whom a parent is not legally married is not to spend the night in the presence of or in the same residence with any minor child of the parties." (A copy of Local Rule 23 is attached as Exhibit A.)

The proceedings before the Gibson County Chancery Court commenced as a result of Mr. Barker's Petition to Modify Shared Parenting and Other Related Matters ("Petition to Modify") that sought modification of the parties' custody and visitation arrangements in light of the fact that both parents now lived in Trenton, Tennessee. (R. Vol. I, at 59-61.) In a consent order dated November 19, 2007, the trial court ordered Mr. Barker and his spouse ("Mrs. Barker"), and Ms. Chandler and her partner, to make themselves available for evaluations by a court-approved psychologist, Dr. David Pickering. (R. Vol. I, at 72-73.) The Confidential Report of Custodial Evaluation issued by the court-approved psychologist made a number of findings, including that Ms. Chandler's partner "is a positive parent surrogate for both children and has appropriate relationships with them both." (R. Vol. IV, Exhibit 1 at 18.)

At the May 15, 2008 hearing on the Petition to Modify, the parties stipulated that Dr. Pickering's report and findings were "admissible for all purposes, including appeal of this Order." (R. Vol. I, at 81.) After conducting its own review, the Court entered the Report into the record. (Id.) Nevertheless, during the May 15, 2008 hearing, and in its September 4, 2008 Order entered after that hearing, the trial court announced and ordered that an overnight "paramour" restriction must be included in the parenting plan. (R. Vol. I, at 82, 84; R. Vol. II, at 15.)

On October 2, 2008, the trial court entered the Permanent Parenting Plan Order. (R. Vol. I, at 100-108.) Over Ms. Chandler's objections,[2] the Plan included the overnight "paramour" restriction required by Local Rule 23 and that the trial court believed was mandatory in Tennessee. (R. Vol. I, at 103.) The trial court did not question the accuracy or validity of Dr. Pickering's findings; in fact, the court recognized that Dr. Pickering had concluded that Ms. Chandler's partner was a "positive influence" on the children. (R. Vol. I, at 82; R. Vol. II, at 17.) Instead, the trial court held that the issue of "adverse impact" was simply irrelevant. (R. Vol. II, at 16.) Accordingly, despite the uncontested factual record before it, the court considered itself to have the authority to impose an overnight "paramour" restriction in all parenting plan orders as a "matter of law," regardless of the circumstances or the facts in the record. (R. Vol. I, at 84; R. Vol. II, at 19 ("I don't know any Judge in this state that does not preclude paramours overnight when children are present in the home.")).

Ms. Chandler timely filed her Notice of Appeal concerning the inclusion of the overnight "paramour" restriction in the Permanent Parenting Plan Order and concerning the trial court's ruling at the May 15, 2008, hearing as memorialized in its Order dated September 4, 2008. (R. Vol. I, at 115-116.) Ms. Chandler seeks reversal of the trial court's imposition of the overnight "paramour" restriction and a declaration that Local Rule 23 is invalid.

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[2] By Order dated October 2, 2008, the trial court expressly affirmed that Ms. Chandler had not waived her objection to the inclusion of the paramour restriction by signing the Permanent Parenting Plan Order. (R. Vol. I, at 109-110.)

STATEMENT OF THE FACTS

Ms. Chandler and Mr. Barker have been divorced for over 10 years. (R. Vol. I, at 12-19.) They had two children together: a daughter, C.B., now age 13; and a son, Z.B., now age 15.[3] As part of the divorce proceedings, the Madison County Chancery Court determined that each party was "a fit and proper person" to have custody of their two children. (R. Vol. I, at 12.) That court found that it was in the best interests of the children for Ms. Chandler to have "exclusive care, custody, and control" of their daughter C.B., and for Mr. Barker to have the same with respect to their son Z.B. (R. Vol. I, at 12-13.) The Madison County Order also granted both parents alternating weekend visitation rights. (R. Vol. I, at 13.) The Madison County Order did not contain any type of "paramour" or other restriction concerning who either parent could have present during their custody and visitation time with the children. (R. Vol. I, at 12-19.) Since the divorce, both Mr. Barker and Ms. Chandler have entered long-term relationships. Mr. Barker and his current wife have been married for five years. (R. Vol. IV, at 6.) About a year after the divorce, Ms. Chandler met her now-partner, and they have remained together ever since. (R. Vol. IV, at 2.)

In 2000 and 2002, Mr. Barker and Ms. Chandler agreed to modifications to the parenting plan, which were each approved and entered by the Madison County Chancery Court.[4] (R. Vol. I, at 25-26; R. Vol. I, at 41-43.) As with the original custody and

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[3] Ms. Chandler has identified only herself and Mr. Barker by full name, in order to protect the privacy of the other persons involved including Mr. Barker's current wife, Ms. Chandler's partner, and the two teenage children.

[4] In 2000, the parties modified the custody order so that Ms. Chandler would have custody of both Z.B. and C.B. (R. Vol. I, at 25-26). In 2002, the parties agreed to a consent order specifying that Mr. Barker would be the primary residential parent of both children, with Ms.

visitation order, the modified parenting plans did not impose a "paramour" or any other similar restriction on the parties.

In 2007, the parties appeared in Gibson County Chancery Court, to which the case had been transferred, on Mr. Barker's petition to modify the shared parenting plan. (R. Vol. I, at 59-61.) Mr. Barker sought to modify the parties' prior visitation schedule in light of the fact that both parents had moved to Trenton, Tennessee. (R. Vol. I, at 59.) In a consent order dated November 19, 2007, the Chancellor ordered Mr. Barker, his spouse ("Mrs. Barker"), Ms. Chandler, and her partner to make themselves available for evaluations by a court-approved psychologist. (R. Vol. I, at 72.) The Order specified that pending final resolution of the matter, Mr. Barker would be the primary residential parent of Z.B. and that Ms. Chandler would be the primary residential parent of C.B., and granted both parents alternate weekend visitation rights. (R. Vol. I, at 72-73.) No overnight "paramour" restriction was placed on the parties' custody or visitation rights in this Order.

In an eighteen-page report dated May 1, 2008, Dr. David Pickering, the court-approved psychologist, submitted his findings regarding the children's relationships with their parents and Ms. Chandler's partner and Mr. Barker's wife. (R. Vol. IV, Exhibit 1 ("Report").) Among other issues, this Report addressed whether it would be in the best interests of the children for the Court to impose an overnight "paramour" restriction on Ms. Chandler. As part of his evaluation, Dr. Pickering interviewed all the subjects separately, administered various tests, and observed the interactions between the children and the adults in completing an assigned task. (R. Vol. IV, Exhibit 1 at 1-2.)

Chandler having visitation during school breaks, during holidays, and for eight weeks during the summer. (R. Vol. I, at 41-43.)

In his report, Dr. Pickering made a number of positive – and no negative – findings regarding the children's relationship with Ms. Chandler's partner, including:

- That both Z.B. and C.B. "appeared to interact well with [Ms. Chandler's partner], and she appeared to interact with them in a positive and supportive manner." (R. Vol. IV, Exhibit 1 at 15.)

- That Ms. Chandler's partner appeared to be "emotionally stable and capable of providing appropriate support and nurturance to the children and to Ms. Chandler." (R. Vol. IV, Exhibit 1 at 16.)

- That Ms. Chandler's partner "is a positive parent surrogate for both children and has appropriate relationships with them both." (R. Vol. IV, Exhibit 1 at 18.)

- That Ms. Chandler was more likely to provide "emotional security and mental stability" to the children in light of the positive relationship that her partner has with both Z.B. and C.B., in contrast with the "extremely negative" relationship that C.B. has with Mr. Barker's wife. [R. Vol. IV, Exhibit 1 at 16.)

At the conclusion of his report, Dr. Pickering made specific findings on eleven topics related to the "attributes, characteristics, and issues" relevant to custody decisions. (R. Vol. IV, Exhibit 1 at 16-17.) In each of the eleven categories, Dr. Pickering evaluated Ms. Chandler higher or equivalent to Mr. Barker. As but one example, the Report states: "Parenting skills: Ms. Chandler appears to be better able to deal with the children in a positive and appropriate manner. Mr. Barker was noted to be quite critical of [C.B.] during the observation session and it was also observed that Mrs. Barker not only joined in, but also invited [Z.B.] to add his comments criticizing [C.B.]" (R. Vol. IV, Exhibit 1 at 16.) Dr. Pickering recommended that the children be placed with the primary custodial parent of their choice, specifically, Z.B. with Mr. Barker and C.B. with Ms. Chandler. (R. Vol. IV, Exhibit 1 at 17.) As to visitation for non-residential parents, Dr. Pickering recommended that it be "liberal." (R. Vol. IV, Exhibit 1 at 18.) With respect to an

overnight "paramour" restriction, Dr. Pickering deferred to the court's legal authority to impose one, but noted that Ms. Chandler's partner was a "positive parent surrogate" to both children. (R. Vol. IV, Exhibit 1 at 18.) Dr. Pickering added that "research indicates that children raised in homes with same-sex parents/parent surrogates tend to develop normal social relationships, and are no more likely to display same-sex sexual orientation than children raised in more traditional two parent homes."[5] (R. Vol. IV, Exhibit 1 at 18.)

At the hearing on Mr. Barker's petition to modify custody and visitation on May 15, 2008, the parties stipulated that Dr. Pickering's report and findings were "admissible for all purposes, including appeal of this Order." (R. Vol. I, at 81.) After conducting its own review, the trial court entered the Report into the record. (Id.) Despite Dr. Pickering's report and findings, during the May 15, 2008 hearing, the Chancellor ordered that an overnight "paramour" restriction must be included in the parenting plan. (R. Vol. II, at 15.) Over Ms. Chandler's repeated objections, language imposing that restriction was included in the trial court's September 4, 2008 Order entered after the hearing and in the Permanent Parenting Plan Order. (R. Vol. I, at 82, 84, 103.)

STANDARD OF REVIEW

Although trial courts are afforded broad discretion with respect to decisions relating to custody and visitation, "they still must base their decisions on the proof and

[5] To the extent that there was any issue regarding Ms. Chandler's relationship with her partner, Dr. Pickering observed that such conflict appeared to be entirely generated from Mr. Barker and his wife's disapproval of Ms. Chandler's sexual orientation. See R. Vol. IV, Exhibit 1 at 15 (observing Mr. Barker making "highly critical" statements about C.B. in front of the family and "insinuated criticism of the lifestyle of [Ms. Chandler and her partner's] lifestyle, and of [C.B.]'s stated wish to live with her mother."); R. Vol. IV, Exhibit 1 at 16 (noting that "Mr. Barker disapproves strongly of Ms. Chandler's sexual orientation and living arrangements, and voices his disapproval openly and frequently. . . . Further, Mrs. Barker tends to join in the criticism and may at times initiate it.").

upon the appropriate application of the applicable principles of law." Earls v. Earls, 42 S.W.3d 877, 886 (Tenn. Ct. App. 2000); see Hogue v. Hogue, 147 S.W.3d 245, 251 (Tenn. Ct. App. 2004). Such decisions by trial courts are subject to *de novo* review "with a presumption that the trial court's findings of fact are correct unless the evidence preponderates otherwise." Id. "No presumption attaches to the lower court's conclusions of law." Bates v. Bates, No. 03A01-9412-CH-00426, 1995 Tenn. App. LEXIS 200 at *2 (Tenn. Ct. App. Mar. 30, 2005) (copy attached as Exhibit B). Further, even under an abuse of discretion standard, the trial court's imposition of the overnight "paramour" restriction in this case would be subject to reversal because of the trial court's "appli[cation of] an incorrect legal standard." Eldridge v. Eldridge, 42 S.W.3d 82, 85 (Tenn. 2001).

SUMMARY OF ARGUMENT

The trial court erred as a matter of law by imposing an overnight "paramour" restriction that severely restricts Ms. Chandler's parental and individual rights. The trial court's sole justification for imposing that restriction upon Ms. Chandler was a belief that such a restriction is required as a matter of law in every permanent parenting plan order, a legally erroneous view colored to a great extent by the requirements of Local Rule 23. Local Rule 23 requires such a provision be included in every parenting plan order in the 28th Judicial District. By imposing such a mandatory requirement without regard to evidence regarding the welfare interests of the children, Local Rule 23 is inconsistent with Tennessee statutory law and, therefore, invalid.

The restriction imposed upon Ms. Chandler cannot be justified under the well-settled legal principles that are to guide courts in making custody and visitation decisions.

In this particular instance, the overnight "paramour" restriction imposed upon Ms. Chandler was improper because the statutory requirements for a modification simply were not met. There was simply no evidence in the record that would be sufficient to prove that imposing that requirement would serve the best interests of the minor children in this case. There was no evidence in the record that unrestricted visitation would harm the minor children and, in fact, there was evidence before the trial court that would support a conclusion that continued unrestricted visitation would actually be beneficial to the welfare of Ms. Chandler's children. Finally, if this Court were to somehow ratify the trial court's erroneous decision and fail to invalidate Local Rule 23, such an act would violate both the state and federal constitutions.

ARGUMENT

I. LOCAL RULE 23, BEING INCONSISTENT WITH TENNESSEE STATUTORY LAW, IS INVALID AND CANNOT JUSTIFY THE OVERNIGHT "PARAMOUR" RESTRICTION IMPOSED IN THIS CASE.

"In child custody cases, the welfare and best interest of the children are the paramount concerns and the determination of the children's best interest must turn on the particular facts of each case." In re Parsons, 914 S.W.2d 889, 893 (Tenn. Ct. App. 1995) (citing Holloway v. Bradley, 230 S.W.2d 1003 (Tenn. 1950)). "The courts must devise custody arrangements that promote the development of the children's relationship with both parents and interfere as little as possible with post-divorce family decision-making." Earls, 42 S.W.3d at 885. "The inquiry is factually driven and requires the courts to carefully weigh numerous considerations." Id. "Courts may restrict lawful activities that would jeopardize the child's welfare during visitation if there is ***definite*** evidence that to

permit the right would jeopardize the child." Hogue, 147 S.W.3d at 251 (emphasis added).

The overnight "paramour" restriction imposed by the trial court was not entered because of any evidence that doing so was in the best interest of Ms. Chandler's children nor any evidence that doing otherwise would somehow jeopardize Ms. Chandler's children. Rather, the record below clearly reflects that the trial court's erroneous belief that such restrictions are required as a matter of law, as set forth in Local Rule 23, was the sole justification for imposing the overnight "paramour" restriction in this case. Local Rule 23 requires the inclusion of the following restriction on a parent's visitation and custody rights in every permanent parenting plan order entered in the 28th Judicial District: "Any paramour of either parent to whom a parent is not legally married is not to spend the night in the presence of or in the same residence with any minor child of the parties."

The ability of the 28th Judicial District to adopt local rules derives from, and is explicitly limited by, Tennessee Supreme Court Rule 18. Tenn. Sup. Ct. R. 18(a) provides in pertinent part:

> The judges in each judicial district shall adopt written uniform local rules prescribing procedures for
>
> (1) setting cases for trial;
> (2) obtaining continuances;
> (3) disposition of pre-trial motions;
> (4) settlement or plea bargaining deadlines for criminal cases;
> (5) preparation, submission and entry of orders and judgments.
>
> Each judicial district may also adopt other uniform rules not inconsistent with the statutory law, the Rules of the Supreme Court, the Rules of Appellate Procedure, the Rules of Civil Procedure, the Rules of Criminal Procedure, the Rules of Juvenile Procedure, and the Rules of Evidence.

Tenn. Sup. Ct. R. 18(c) further explicitly provides that "any local rule that is inconsistent with a statute or a procedural rule promulgated by the Supreme Court shall be invalid." See also Tigg v. Pirelli Tire Corp., 232 S.W.3d 28, 35 (Tenn. 2007) (holding that "local trial courts are empowered to enact and enforce local rules as long as those rules do not conflict with general law").[6]

Local Rule 23 is invalid because it is inconsistent with the statute that sets forth the mandatory aspects of a Permanent Parenting Plan in Tennessee – Tenn. Code Ann. § 36-6-404(a). An overnight "paramour" restriction is not included in the mandated statutory requirements set forth in Section 36-6-404(a) and is not included in the Permanent Parenting Plan Order form developed by the Administrative Office of the Courts under the authority conferred by Tenn. Code Ann. § 36-6-404(c)(3). Clearly, if the legislature had desired for an overnight "paramour" restriction to be included in every Parenting Plan Order, it would simply have included such a requirement in Tenn. Code Ann. § 36-6-404(a).[7] Furthermore, the fact that the legislature did not do so is entirely consistent with Tennessee's "historically strong protection of parental rights." See Broadwell v. Holmes, 871 S.W.2d 471, 475 (Tenn. 1994); Hawk v. Hawk, 855 S.W.2d 573, 579 (Tenn. 1993); see also Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

Indeed, the statutes governing parenting plans in Tennessee reflect the presumption that parents are responsible for making the decisions related to the care and custody of their children, and that the government may not interfere with those decisions

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[6] Tenn. Code Ann. § 16-2-511 echoes this requirement regarding local rules.

[7] Cf. Overstreet v. TRW Commercial Steering Div., 256 S.W.3d 626, 633 (Tenn. 2008) (applying the well-known canon of statutory interpretation that to express one thing is to exclude others in order to infer the General Assembly's intent as to whether to permit certain *ex parte* communications with treating physicians).

absent a showing that a restriction is necessary to prevent harm to the child. The statutory framework expressly provides that a parenting plan shall "[p]rovide that each parent may make the day-to-day decisions regarding the care of the child while the child is residing with that parent." Tenn. Code Ann. § 36-6-404(a)(6). While those parental rights may be limited in some circumstances as part of a parenting plan, such restrictions are authorized only when "required to protect the welfare of the child." Tenn. Code Ann. § 36-6-404(a)(4)(F); see Marlow v. Parkinson, 236 S.W.3d 744, 751 (Tenn. Ct. App. 2007) ("The purpose of restraints on parental conduct is to protect the child.").

The fact that overnight "paramour" restrictions are not ***mandatory*** under Tennessee law is also plain from a review of Tennessee jurisprudence. See, e.g., Eldridge, 42 S.W.3d at 89-90 (". . . in an appropriate case a trial court ***may*** impose restrictions on a child's overnight visitation in the presence of non-spouses.") (emphasis added); Cosner v. Cosner, E2007-02031-COA-R3-CV, 2008 Tenn. App. LEXIS 493, at **16-18 (Tenn. Ct. App. Aug. 22, 2008) (emphasizing lack of evidence of any adverse consequences to children resulting from custodial parent allegedly having a live-in "paramour") (copy attached as Exhibit C); In re Parsons, 914 S.W.2d at 893 (noting that determination of the children's best interest "must turn on the particular facts of each case."); Bates, 1995 Tenn. App. LEXIS 200 at *3 (reversing the imposition of a "paramour" restriction when there was no evidence showing that the presence of the "paramour" during visitation would cause harm to the minor child).

Because Local Rule 23 mandates the inclusion of an overnight "paramour" restriction regardless of the evidence in any particular case, this local rule is inconsistent

with Tennessee statutory law and is, therefore, invalid. See Tenn. Sup. Ct. R. 18; Tigg, 232 S.W.3d at 35.

A restriction on a parent's lawful activity justified only on the basis of an invalid local rule should not be tolerated under any circumstances. The onerous burden on Ms. Chandler's parental and individual rights flowing from the restriction imposed by the trial court here cannot be overstated, however. The overnight "paramour" restriction improperly imposed by the trial court prohibits Ms. Chandler from allowing her same-sex partner, with whom she has been in a relationship for nine years, to stay in the same home overnight while either or both of Ms. Chandler's minor children are present. Because the original parenting plan entered at the time of the parties' divorce, as well as subsequent modifications to that plan in 2000 and 2002, did not contain any type of "paramour" restriction, both of Ms. Chandler's minor children have long had unrestricted visitation and custody time with Ms. Chandler and her partner.

This new overnight "paramour" restriction precludes Ms. Chandler from deciding what living arrangement is best for her children during her custody and visitation time. It also prevents her from deciding how to allocate financial resources to best take care of her children, requiring Ms. Chandler and her partner to maintain two separate households. These significant restrictions are made all the more intolerable by the fact that the uncontradicted proof in the record before the trial court not only established that there is no child welfare basis for the overnight "paramour" restriction imposed against Ms. Chandler, but instead would support a conclusion that actual harm to the minor children could come from the overnight "paramour" restriction.

II. THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT A CONCLUSION THAT AN OVERNIGHT "PARAMOUR" RESTRICTION IN THE PERMANENT PARENTING PLAN ORDER WAS IN THE BEST INTEREST OF THE MINOR CHILDREN.

As discussed above, the trial court did not seek to justify the imposition of the overnight "paramour" restriction on the basis that doing so was in the best interest of the children. Nor was there any evidence in the record before the trial court that would show that modifying the custody and visitation arrangements to add an overnight "paramour" restriction would be in the best interest of the children. The new restriction imposed on Ms. Chandler's parental and individual rights simply cannot be justified under the well-settled legal principles that should have guided the trial court's determination and that cannot be bypassed merely because of the inconsistent requirements that Local Rule 23 seeks to impose. See Tenn. Code Ann. § 36-6-101(a)(2)(B)-(C).

The law is clear that custody and visitation decisions "should be guided by the best interests of the child." Hogue, 147 S.W.3d at 253 (citing Turner v. Turner, 919 S.W.2d 340, 346 (Tenn. Ct. App. 1995); see also Kendrick v. Shoemake, 90 S.W.3d 566, 570 (Tenn. 2002) (establishing that, on a petition to modify an existing custody order, the court must determine whether "a material change in circumstances has occurred, and whether the modification is in the child's best interests"); Tenn. Code Ann. § 36-6-101(a)(2)(B)-(C). With respect to restrictions upon parental conduct, "[w]hat matters is whether the parental conduct during visitation is harmful to the child." Hogue, 147 S.W.3d at 253.[8] Accordingly, a court may not impose restrictions such as the overnight

[8] As discussed further in Section III, infra, these rulings also reflect the fact that custody and visitation cases are decided against the backdrop of the fundamental right to raise a child without governmental interference absent a compelling interest – a fundamental right that is guaranteed by both the Tennessee and United States Constitutions. See Broadwell, 871 S.W.2d at 475; Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (holding that government may not

"paramour" restriction imposed against Ms. Chandler in this case based on "unsubstantiated beliefs" about what would be harmful to the child. Neely v. Neely, 737 S.W.2d 539, 544 (Tenn. Ct. App. 1987). Instead, the court must be presented with "definite evidence" that permitting the parental or individual right "would jeopardize the child." Hogue, 147 S.W.3d at 253; Eldridge, 42 S.W.3d at 89.[9]

Such requirements for imposing this type of restriction clearly were not satisfied based on the evidence presented to the trial court. Here, the uncontradicted proof actually established that there is no child welfare basis at all for the overnight "paramour" restriction imposed against Ms. Chandler. There was absolutely no evidence – and certainly no "definite" or "competent" evidence – presented to the trial court that unrestricted visitation and custody would harm Z.B. or C.B. Neither party nor the trial court questioned or attempted to contradict Dr. Pickering's conclusion that Ms. Chandler's partner is "a positive parent surrogate for both children and has appropriate relationships with them both" or that children growing up in same-sex homes tend to develop normal social relationships. (R. Vol. IV, Exhibit 1 at 18.) Nor was there any evidence before the trial court suggesting that, in the many years in which Ms. Chandler had unrestricted visitation and custody, the couple had ever acted inappropriately in front

---

"unreasonably interfere[] with the liberty of parents and guardians to direct the upbringing and education of children under their control.").

[9] In Eldridge, the Tennessee Supreme Court reinstated a trial court's decision, finding that permitting a lesbian mother to have unfettered visitation rights in the presence of her live-in same-sex partner was not an abuse of discretion. 42 S.W.3d at 89-90. In reversing the judgment of the court of appeals, the Tennessee Supreme Court emphasized that given that "the right of the noncustodial parent to reasonable visitation is clearly favored," a court may impose such a restriction only "if there is *definite* evidence that to permit the right would jeopardize the child in either a physical or moral sense." Id. at 85 (quotations omitted; emphasis added); see also Marlow, 236 S.W.3d at 751 (noting that "the restraints to be placed on a parent should be well-defined and 'must involve conduct that competent evidence shows could cause harm to the child'" (citation omitted)).

of the children. Indeed, the record showed that, after nine years of unrestricted contact with her, the children had a "positive and supportive" relationship with Ms. Chandler's partner and that she was a "positive parental surrogate." Despite this record, the trial court imposed the overnight "paramour" restriction in the parties' parenting plan *for the first time* and purportedly as "a matter of law."

Accordingly, the trial court's decision to impose the overnight "paramour" restriction must be reversed.[10]

III. AFFIRMING THE TRIAL COURT'S IMPOSITION OF AN OVERNIGHT "PARAMOUR" CLAUSE UNDER THESE CIRCUMSTANCES WOULD VIOLATE THE STATE AND FEDERAL CONSTITUTIONS.

"Parents have a fundamental constitutional interest in the care and custody of their children under both the United States and Tennessee constitutions." Keisling v. Keisling, 92 S.W.3d 374, 378 (Tenn. 2002); Hawk, 855 S.W.2d at 578 (discussing Wisconsin v. Yoder, 406 U.S. 205 (1972)); see also Stanley v. Illinois, 405 U.S. 605, 651 (1972) (noting that the right to custody and care of one's children has found protection in the due process and equal protection clauses of the 14th Amendment and the 9th Amendment). As the Tennessee Supreme Court has explained, "when no substantial harm threatens a child's welfare, the state lacks a sufficiently compelling justification for the infringement on the fundamental right of parents to raise their children as they see fit." Hawk, 855 S.W.2d at 577. Although the state's *parens patriae* interest is greater in the context of a

[10] To the extent the trial court's ruling was in any way grounded upon Mr. Barker's anti-gay beliefs, such beliefs were not properly a basis for the restriction. In re Parsons, 914 S.W.2d at 894 (holding that the Court "does not sit as moral arbiter[] making judgments on what is acceptable social behavior" in rejecting father's petition for change in custody because mother lived with her lesbian partner).

divorce, the court must nonetheless weigh the constitutional rights of parents when fashioning custody and visitation orders. Neely, 737 S.W.2d at 543.

The vigorous constitutional protections accorded to parents reflect not only an interest in protecting "childrearing autonomy," but also a concern over protecting the privacy rights of families generally, including the right of a family to define its members. See, e.g., Moore v. City of East Cleveland, 431 U.S. 494, 506 (1977) (holding that the Constitution prevents the government "from standardizing its children and its adults by forcing all to live in certain narrowly defined family patterns."). The constitutional right of parents over the custody and care of their children is not the exclusive province of those parents in married intact families, but lies with parents in "non-traditional" families as well. See Nale v. Robertson, 871 S.W.2d 674, 680 (Tenn. 1994) (rejecting argument that Hawk limited the protection of parental rights to "an intact nuclear family with fit parents"); Stanley, 405 U.S. at 651 ("Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony.").

In light of these principles, the trial court's ruling and Local Rule 23 cannot pass constitutional muster. There can be no reasonable doubt that the overnight "paramour" restriction on Ms. Chandler's custody and visitation rights substantially interferes with her ability to raise her children as she sees fit. If not reversed, the imposition of this restriction, as a practical matter, can and will have destructive effects on Ms. Chandler's family. The lower court's ruling effectively prohibits Ms. Chandler from choosing to raise her children in a unified household with her long-term partner. At a minimum, this inability to have a single familial household has financial consequences, if not also serious emotional costs, for both the children and Ms. Chandler.

Further, the imposition of an overnight "paramour" restriction in any case implicates individual privacy rights and the right to form an intimate, familial relationship as guaranteed by both the state and federal constitutions. See, e.g., Roberts v. U.S. Jaycees, 468 U.S. 609, 617-18 (1984) (holding that "choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme."). The imposition of the overnight "paramour" restriction on Ms. Chandler severely constrains her ability to live as a couple with her same-sex partner. Permitting that restriction to stand, when it was based upon a local rule that purports to require such a restriction in every case and under circumstances where there was simply no evidence in the record that the restriction was in the best interests of her minor children, would clearly violate Ms. Chandler's privacy rights and her right to form an intimate, familial relationship as guaranteed by the state and federal constitutions. See, e.g., Lawrence v. Texas, 539 U.S. 558 (2003); Campbell v. Sundquist, 926 S.W.2d 250 (Tenn. Ct. App. 1996).[11]

Finally, the imposition of the overnight "paramour" restriction in this case also raises serious issues regarding whether the "demand that persons similarly situated be treated alike" required by the equal protection provisions of the both the Tennessee and

[11] Although it is not necessary to the Court's inquiry here, Appellant notes that "both the Tennessee Constitution and this State's constitutional jurisprudence establish that the right to privacy provided to Tennesseans under our Constitution is in fact more extensive than the corresponding right to privacy provided by the Federal Constitution." Campbell, 926 S.W.2d at 261 (holding that textual sources of right to privacy in the Tennessee Constitution include Art. 1, sections 1, 2, 3, 7, 8, 19, and 27). The textual sources to the right to privacy under the United States Constitution include Amendments I, III, IV, V, IX. Griswold v. Connecticut, 381 U.S. 479 (1965).

federal constitutions is met. Lanier v. Rains, 229 S.W.3d 656, 666 (Tenn. 2007).[12] Additionally, Local Rule 23's requirement of an overnight "paramour" restriction in every parenting plan is discriminatory on its face against unmarried parents, as well as facially discriminatory as to sexual orientation, because gays and lesbians are not permitted to marry in Tennessee.[13]

Where a classification interferes with the exercise of a fundamental right, including the right of intimate association, the state must show that "the burden is precisely tailored to serve a compelling governmental interest." State v. Crain, 972 S.W.2d 13, 16 (Tenn. Crim. App. 1998) (citing Plyler v. Doe, 457 U.S. 202, 217 (1982)). If subjected to that test, there is no question that the treatment of Ms. Chandler would not pass constitutional muster. There is simply no compelling state interest for burdening or restricting Ms. Chandler's fundamental right to an intimate, familial relationship with her partner as the trial court has done. Nevertheless, this Court need not decide the level of scrutiny required because this classification would fail even the rational basis test. Hooper v. Bernalillo Cty. Assessor, 472 U.S. 612, 618 (1985).

The burden that has been imposed on Ms. Chandler is an especially harsh one: It conditions her custody and visitation of her children on dividing her family life into two households instead of one and diminishing resources that could be used to take care of her children. And this burden has been imposed in this matter without any showing of

---

[12] The textual sources for the right to equal protection under the Tennessee state constitution include Article 1, section 8 and Article XI, section 8. The textual sources for the right to equal protection under the United States Constitution include Amendment XIV, section 1.

[13] Although the question of whether marital status classifications constitute facial discrimination on the basis of sexual orientation is an open one in this state, at least one state Supreme Court has held that where same-sex couples are not permitted to marry, a law that discriminates on the basis of marital status necessarily treats same-sex and opposite sex couples differently. Alaska Civil Liberties Union v. State, 122 P.3d 781, 788 (Ak. 2005).

harm to the children and under circumstances in which current Tennessee law prevents her from proving her commitment to her partner through marriage. Accordingly, it can only be seen as a classification that is either unrelated to any legitimate interest or related to an illegitimate interest, such as moral disapproval of gay and lesbian couples. See, e.g., Romer v. Evans, 517 U.S. 620, 634-36 (1996) (holding that disapproval of gay and lesbian people is not a legitimate basis for government to discriminate against the group); see also City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446-47 (1985) (holding that disapproval of a class of people is not a legitimate basis for the government to disadvantage that group); Palmore v. Sidoti, 466 U.S. 429, 432-34 (1984) (same); United States Dep't of Agric. v. Moreno, 413 U.S. 528, 541-44 (1973) (same).

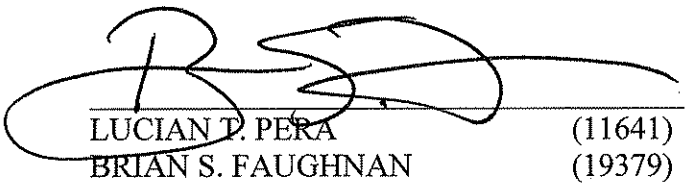
Thus, if the trial court's ruling based upon Local Rule 23's blanket inclusion of an overnight "paramour" restriction and in the absence of any evidence in the record of harm to Ms. Chandler's minor children were permitted to stand, the result would be the violation of Ms. Chandler's parental rights, right to privacy, and right to equal protection, as guaranteed under the state and federal constitutions.

CONCLUSION

For the reasons set forth above, Ms. Chandler respectfully requests that the Court reverse the overnight "paramour" restriction imposed by the Gibson County Chancery Court's September 4, 2008, order, and the October 2, 2008, Permanent Parenting Plan Order. The uncontradicted evidence in the record established that there would be no harm to the children resulting from unrestricted contact with Ms. Chandler's partner and, further, that such unrestricted contact was beneficial to the children. Under the well-established laws of this state and under the state and federal constitutions, the trial court's

intervention in Ms. Chandler's decisions about how to best raise her children, financially and otherwise, was wholly unwarranted and must be overturned.

Because Gibson County Chancery Court has continuing jurisdiction over the parties' Permanent Parenting Plan, future modifications of the Plan will include the overnight "paramour" restriction if Local Rule 23 is left to stand. As shown above, there is no statutory or other mandate in this state that all parenting plans include an overnight paramour restriction "as a matter of law." Indeed, such a mandate would be contrary to the well-established rule that there must be definite or competent evidence that those individual children in that particular situation would be harmed absent the restriction. Accordingly, Ms. Chandler also requests that the Court declare that Local Rule 23 is inconsistent with Tennessee statutory law and, therefore, invalid.



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CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing was duly served upon Mark Johnson, 124 E. Court Square, Trenton, Tennessee 38382 by regular United States mail postage prepaid, this 23rd day of December, 2008.

BRIAN S. FAUGHNAN

495654-1

EXHIBIT A

RULES OF CHANCERY COURT

Twenty-Eighth Judicial District

of

Tennessee

www.tsc.state.tn.us

REVISED September 24, 2008

George R. Ellis
Chancellor
Twenty-Eighth Judicial District of Tennessee
The Chancery Building
204 North Court Square
Trenton, Tennessee 38382

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22:00 COMPENSATION OF THE CLERK AND MASTER WHEN NOT OTHERWISE FIXED

A. Pursuant to Sections 8-21-401 and 8-21-404 TCA, the Clerk and Master is authorized and empowered to collect as commission, unless otherwise fixed by order of the Court in the case, the following:

(a) For selling (real or personal) property, collecting, receiving and paying out the proceeds:

Ten (10%) percent on the first $6,000.00 with a minimum fee of $300.00
Of remaining amount 5% up to $ 20,000
4% up to $ 80,000
3% up to $150,000
2% up to $500.000
1% up to and over $750,000

23:00 PARENTING PLAN

Pursuant to Public Chapter 127, amending T. C. A. 36-6-404, the Administrative Office of the Courts developed a parenting plan form that shall be used consistently by each court within the state that approves parenting plans pursuant to 36-6-403 or 36-6-404. The A. O. C. mandated to distribute this form for the use of those courts no later than June 1, 2005.

Based on this new public chapter, the A. O.C. , in consultation with the Family Law Section of the Tennessee Bar Association and the Tennessee Judicial Conference Domestic relations Committee and other knowledgeable persons, finalized the form that can be found on the A. O. C. website at www.tsc.state.tn.us (under PROGRAMS) or copies of the Parenting Plan may be obtained from the Clerk's offices. This court shall require under "J. OTHER" on the Parenting Plan, the following provisions:

"Any paramour of either parent to whom a parent is not legally married is not to spend the night in the presence of or in the same residence with any minor child of the parties. The parents shall not use any illegal drugs, consume any alcohol or allow any other person to use any illegal drugs or alcohol in the presence of the minor children."

Parenting Plan must be signed by mother and father unless the attorney of record has power of attorney.

A wage assignment order by the court must be attached to the parenting plan for the clerk to mail certified.

24:00 ADOPTION OF RULES

WHEREFORE, IT IS CONSIDERED, ORDERED, AND ADJUDGED, the foregoing rules of the Chancery Court of the Twenty-Eighth Judicial District of Tennessee are hereby adopted and shall be forthwith entered upon the Minutes of the four courts.

IT IS FURTHER ORDERED AND ADJUDGED, that these rules shall become effective on the first day of November, 1995, and revised and amended on September 24, 2008.

George R. Ellis
Chancellor
Twenty-Eighth Judicial District
of Tennessee

EXHIBIT B

*1995 Tenn. App. LEXIS 200, **

FRANCES ELAINE SLAGLE BATES, Plaintiff-Appellee, v. STEVEN MARK BATES, Defendant-Appellant.

C/A NO. 03A01-9412-CH-00426

COURT OF APPEALS OF TENNESSEE, EASTERN SECTION

1995 Tenn. App. LEXIS 200

March 30, 1995, FILED

SUBSEQUENT HISTORY: Petition for Rehearing Granted April 28, 1995, Reported at: 1995 Tenn. App. LEXIS 274.

PRIOR HISTORY: [*1] CHANCERY COURT. UNION COUNTY. HONORABLE BILLY JOE WHITE, CHANCELLOR.

DISPOSITION: AFFIRMED AS MODIFIED. REMANDED

CASE SUMMARY

PROCEDURAL POSTURE: Appellant former husband challenged an order of the Chancery Court of Union County (Tennessee) dividing the martial assets owned by him and appellee former wife, granting him limited visitation with the child, and ordering that his girlfriend should not be in the child's presence. The trial court held that the girlfriend directly led to the marital breakup, that her presence upset the wife, and that she should not be allowed around the child.

OVERVIEW: The trial court divided the assets unevenly between the parties. There was no evidence as to the fair market value of the marital assets. The trial court did not err in making the unequal division when it stated that the award was made in lieu of awarding the wife an attorney's fee, the wife presented a case for alimony, and the husband did not have enough income to pay rehabilitative alimony. The designation of the wife's award as alimony in solido was appropriate. The trial court also properly set visitation by providing for the best interests of the child. The court reversed in part as to the order that did not allow the husband's girlfriend to come into contact with the child. It affirmed as modified. The trial court apparently considered that the wife would be offended by her child being in the presence of the girlfriend. The court found that the trial court could not consider the best interests of the mother in enacting such a restriction. There was no evidence presented that the girlfriend's presence was detrimental to the child's emotional or physical well being.

OUTCOME: The court modified the judgment and deleted the provision that prohibited the child from being in the presence of the husband's girlfriend. It affirmed in all other respects and remanded the case to the trial court.

CORE TERMS: visitation, marriage, alimony, preponderate, spouse, best interest, upset, equitable, division of property, parties' property, disproportionate, personalty, marital, decreed, breakup, solido, minor son, adversely affect, justifiably, weekend, married, conclusions of law, contributed, assigned, awarding, custody, visitation rights, minor child, mortgage debt, former spouse's

LEXISNEXIS® HEADNOTES Hide

Civil Procedure > Appeals > Standards of Review > De Novo Review

Family Law > Child Custody > Visitation > General Overview

Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > Property Distribution > Characterization > Marital Property

HN1 An appellate court's review is de novo; however, the record developed below comes to it accompanied by a presumption of correctness that "carries the day" unless it finds that the evidence preponderates against a trial court's findings of fact. Tenn. R. App. P. 13(d). No presumption attaches to a trial court's conclusions of law. A trial court has wide discretion in the visitation and division of property. For this reason, an appellate court gives those decisions great weight and will only interfere with them when it finds an abuse of discretion. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Appeals > Records on Appeal

HN2 An appellate court's review is limited by and to the evidence offered below. More Like This Headnote

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

HN3 Tenn. Code Ann. § 36-4-121(d) directs that a trial court shall give special consideration to a spouse having physical custody of a child or children of the marriage. More Like This Headnote

Family Law > Marital Termination & Spousal Support > Spousal Support > Modification & Termination > General Overview

Family Law > Marital Termination & Spousal Support > Spousal Support > Obligations > Rehabilitative Support

HN4 Since a husband does not have sufficient income to pay periodic or rehabilitative alimony, it is appropriate to designate the disproportionate portion of a wife's award as alimony in solido. Such alimony is favored in the law. More Like This Headnote

Family Law > Child Custody > Visitation > General Overview

HN5 There must be more than the feelings of the wronged spouse. There must be proof that an association with a given individual is potentially harmful to a child in some way in order to restrict the child's association with that person in child visitation cases. More Like This Headnote | *Shepardize:* Restrict By Headnote

COUNSEL: JOHN D. LOCKRIDGE and SCARLETT A. BEATTY of LOCKRIDGE & BECKER, P.C., Knoxville, for Appellant.

FRANK L. FLYNN, JR., of PRYOR, FLYNN, PRIEST & HARBER, Knoxville, for Appellee.

JUDGES: Charles D. Susano, Jr., J., CONCUR: (Concurring and Dissenting Opinion), Houston M. Goddard, P.J. (E.S.), Herschel P. Franks, J.

OPINION BY: Charles D. Susano, Jr.

OPINION

OPINION

Susano, J.

The trial court granted Wife [1] an absolute divorce on the ground of inappropriate marital conduct, terminating a marriage of just over four years. Husband appeals, arguing that the division of the parties' property and debts is not equitable; that the trial court should have granted him more visitation with his son; and that the court erred in decreeing that during his visitation the minor child "shall not be in the company or presence of Leeann Myers." We will review these issues in the order stated.

FOOTNOTES

1 In this opinion, the parties will be referred to as "Husband" and "Wife."

[*2] HN1 Our review is de novo; however, the record developed below comes to us accompanied by a presumption of correctness that "carries the day" unless we find that the evidence preponderates against the trial court's findings of fact. Tenn. R. App. P. 13(d); *Hass v. Knighton,* 676 S.W.2d 554, 555 (Tenn. 1984); *Doles v. Doles,* 848 S.W.2d 656, 661 (Tenn. App. 1992). No presumption attaches to the lower court's conclusions of law. *Union Carbide Corp. v. Huddleston,* 854 S.W.2d 87, 91 (Tenn. 1993). We are also mindful of the fact that a trial court has wide discretion in the matters presently under review in this case, i.e., visitation and division of property. *Marmino v. Marmino,* 34 Tenn. App. 352, 238 S.W.2d 105, 107 (Tenn. App. 1950); *Harrington v. Harrington,* 798 S.W.2d 244, 245 (Tenn. App. 1990). For this reason, we give those decisions great weight and will only interfere with them when we find an abuse of discretion. *Kelly v. Kelly,* 679 S.W.2d 458, 460 (Tenn. App. 1984). **[*3]**

This is a case of many debts and few assets. The trial court awarded the parties' personalty along the lines suggested by Wife. There was no testimony regarding the fair cash market value of any of these items. In the absence of such testimony, we are unable to find that the evidence preponderates against the trial judge's implied finding that he was making an equitable division of this personal property. Without values, we are also unable to evaluate the impact of this division on the overall division of the parties' property and debts. HN2 Our review is limited by and to the evidence offered below. *Nelms v. Tennessee Farmers Mutual Ins. Co.,* 613 S.W.2d 481, 483 (Tenn. App. 1978).

At trial, the parties focused on their residence [2], the mortgage debt, and the parties' other debts. Husband testified that their realty was worth $ 33,000. A licensed real estate appraiser testified that the property was worth $ 40,000 as of March 25, 1992, the time of his appraisal; but stated that he could not express an opinion as to the property's present value without a current inspection. He testified that the fact the property was not permanently connected to the **[*4]** sewer system would necessarily lower his opinion of value. We do not believe that his opinion as of an earlier date, given his own reluctance to extrapolate it to the current time, is evidence of current value and we have not considered it as such.

FOOTNOTES

2 The residence was purchased in 1991 for approximately $ 30,000.

The Chancellor found marital debts of approximately $ 9,533. He burdened Wife with $ 5,253 of the debts, while assigning debts of $ 4,280 to Husband [3]. He awarded Wife the parties' realty, subject to the mortgage debt of $ 23,545, on condition that she refinance the mortgage within 45 days, thereby relieving Husband of his obligation to the mortgage holder. She was also ordered to pay $ 2,332 of the debts assigned to her out of the proceeds from the refinancing. The effect of all of this

was to award Wife an asset [4] with a net equity of $ 9,455 ($ 33,000 less $ 23,545), and debts of $ 5,253 or a "bottom line" net of $ 4,202, plus the personalty of an undetermined value; while awarding Husband personalty, **[*5]** again with an undetermined value, and debts of $ 4,280.

FOOTNOTES

[3] The trial court did not address Husband's testimony that he owed his girlfriend's mother $ 5,500. This was a debt that he incurred during the parties' first separation. He used the money to purchase poker machines, out of which he hoped to pay the debt. We believe that it is equitable, in this case, to leave this debt with Husband.

[4] The award of the marital residence to Wife is in keeping with T.C.A. § 36-4-121(d) HN3 which directs that the court "shall give special consideration to a spouse having physical custody of a child or children of the marriage."

The trial court recognized that he was making an unequal division of the parties' property and debt. To the extent that it was not equitable, he decreed that the disproportionate portion of Wife's award would go to her as alimony in solido. He also pointed out that the disproportionate award was being made in lieu of awarding Wife an attorney fee of $ 1,500. We believe that the court's award was appropriate **[*6]** in this case. Wife presented an unchallenged affidavit of expenses that exceeded her income and the child support award. The proof reflected that Husband was involved in an admitted affair with Leeann Myers from at least early 1992 to September, 1993. There was some proof that this relationship was continuing to the date of the hearing. There was no testimony that Wife's conduct [5] significantly contributed to the breakup of this marriage. Wife made out a case for alimony. *See* Hawkins v. Hawkins, 883 S.W.2d 622, 625 (Tenn. App. 1994); Duncan v. Duncan, 686 S.W.2d 568, 571-72 (Tenn. App. 1984). HN4 Since Husband did not have sufficient income to pay periodic or rehabilitative alimony, it was appropriate to designate the disproportionate portion of Wife's award as alimony in solido. Such alimony is favored in the law. Spalding v. Spalding, 597 S.W.2d 739, 741 (Tenn. App. 1980). While no issue was assigned as to the award of alimony in solido, we believe it was fairly raised by the appellant in his attack on the division of property and debts; however, we find that the evidence does not **[*7]** preponderate against the trial court's exercise of its discretion on the division of property. Husband's first issue is found to be without merit.

FOOTNOTES

[5] Husband said the parties constantly argued and "we just didn't get along very well;" but he did not say Wife was the cause or source of these problems.

The trial court awarded Husband the following visitation with his minor son, who was seventeen months old at the time of trial:

1. Every Sunday from 8:30 a.m. to 6:00 p.m.

2. Every Wednesday after work until Thursday morning.

3. Wednesday-Thursday visitation to continue until noon Thanksgiving Day.

4. Every July 4th, Memorial Day, labor Day, Presidents' Day, and Easter, from 8:00 a.m. to 1:00 p.m.

5. Christmas visitation from 6:00 p.m. December 23 to 6:00 p.m. December 24.

When the child is five years sold, Husband's visitation changes to "alternate weekends and holidays along with two weeks of summer visitation."

Husband urged the trial court to award him one week each month plus alternate weekends, "split holidays," **[*8]** and two days in the weeks he did not have weekend visitation. He argued that he had shown his interest in the child and his ability to care for him, particularly by virtue of the fact that he cared for the child during the day from November, 1993, to April/May, 1994, when he was unemployed and Wife was employed outside the home. The trial court heard this testimony presented in person. We have reviewed it and considered it along with the other evidence touching upon the issue of visitation. We do not find that the evidence preponderates against the trial court's exercise of its discretion in establishing visitation. The task before the trial court was to set visitation so as to provide for the best interest of the child considering the circumstances of the parties and their child. We find no abuse of the Chancellor's discretion.

The Chancellor decreed that Husband could not have his child in the presence of Leeann Myers during his visitation time. He made the following findings regarding Ms. Myers:

> I don't have a thing in the world against [Ms. Myers]. She's been involved in something that I assume she'd say she shouldn't be involved with, but it's not fair to the mother of this **[*9]** child under the circumstances here today, with the testimony about loss of temper, threats and things of that nature, it's certainly -- the child at seventeen months old, it's not fair to the mother to allow Ms. Myers to be around this child. So I don't expect that to happen.

We believe that the evidence preponderates against the Chancellor's findings of "temper, threats and things of that nature" which impact the best interest of the child. Certainly, there were incidents and phone conversations between Wife and Ms. Myers, particularly in 1993, that do not speak well of the latter; but that was then, and this is now. Furthermore, there was no showing that any of this took place in the sight and/or hearing of the parties' child, who, at the time, was one year old or thereabouts. We do not find evidence that Ms. Myers' conduct, distasteful though much of it was, is calculated in the future to be harmful to the child, physically, emotionally, or otherwise. In the absence of such proof, the restriction in this case is not justified by the best interest of the child standard applicable to custody/visitation decisions. To the extent that the trial court imposed the restriction because **[*10]** it felt that Wife would be offended or hurt by the mere fact that the child is in the company of a woman whose conduct arguably caused or substantially contributed to the breakup of the marriage, it incorrectly substituted the best interest of Wife for the appropriate standard, the best interest of the child. The trial court's conclusion of law in this respect is erroneous. We find that the trial court committed error when it decreed the child could not be in the presence of Ms. Myers during Husband's visitation.

In his dissent, Judge Goddard opines "that Ms. Myers' association with the child would justifiably upset the mother and, of necessity, adversely affect the child." He also states that Husband did not specifically raise the restriction on association as an issue on this appeal.

With respect to the first point made by Judge Goddard, we again reiterate that the attitude of Wife is not the controlling determination. Experience teaches that frequently a wronged spouse (and Wife was certainly an innocent spouse based on the record before us) is "justifiably upset" about her former spouse's association with and, sometimes, the latter's marriage to an individual who was actively **[*11]** involved in the deterioration and dissolution of the earlier marriage. In fact, experience teaches that an individual is sometimes even upset when his/her former spouse remarries even though the new spouse was not involved in the breakup of the marriage; but can these upset feelings, in either case, without more, justify a restriction such as the one in this case? We think not.

HN5 There must be more than the feelings of the wronged spouse. There must be proof that an association with a given individual is potentially harmful *to* the child in some way in order to restrict the child's association with that person. There was no such showing in this case. At the time of the two in-person incidents which obviously are a part of Judge Goddard's concern, the child was, on the first occasion, one to two months old, and, at the time of the later incident, approximately seven months old. As we pointed out earlier, there was no showing that the child was aware of these incidents or impacted by them. Furthermore, there was no proof of any trouble between Wife and Ms. Myers from September, 1993, to July 21, 1994, the date of the trial.

Apparently, Judge Goddard is concerned that Wife will transmit **[*12]** to the parties' son her ill will toward Ms. Myers, and that this, in turn, will adversely affect him if he is allowed to be in the presence of Ms. Myers. If this happens, it will be because of conduct on the part of Wife that is not proper. Trial courts frequently impose a restriction on both parties that neither will say anything bad about the other in the presence of the child. If we impose a restriction on the child's association with Ms. Myers, we are, in effect, deferring to and, inferentially, countenancing improper conduct on the part of Wife This we should not do.

Judge Goddard argues that Mr. Bates did not specifically raise the association issue in his brief. We believe the issue was properly raised. On the question of visitation, Mr. Bates stated the issue as follows:

> Whether the trial court erred in failing to give appellant more extensive visitation with the parties' minor son.

Thus it can be seen that Husband felt that his visitation rights --burdened with the restriction regarding Ms. Myers--were not "extensive" enough. The restriction necessarily impacted the extent of his visitation rights. He sought to extend the time he had with his son; but he also sought **[*13]** to eliminate the restriction that prevented him from having the child around Ms. Myers.

It is clear from the parties' briefs that each side knew this matter was an issue on appeal. In his brief, Husband argued as follows:

> Additionally, Appellant would suggest that the trial court's directive that he not be permitted to have the minor child in the presence of Ms. Myers is unreasonable and unduly limits his constitutional right to freedom of association. Certainly, the Appellant realizes that there are certain situations in which it would be inappropriate to have a minor child present. On the other hand, there is nothing to suggest that the Appellant is incapable of discerning what those situations are. Accordingly, Appellant would suggest that the court's restriction in this regard be eliminated or at least modified to state that neither party shall keep the child overnight in a situation where that party is entertaining a member of the opposite sex with whom they are engaged in a sexual relationship and to whom they are not married.

Wife, in her brief, countered that argument as follows:

> Appellant also apparently is contending that the Trial Court erred in restricting **[*14]** the Appellant from taking the child around or having the child in the presence of his paramour, LeeAnn Myers.
>
> It is apparent from the record that the Appellant's romantic and adulterous relationship with LeeAnn Myers was the basic cause of the parties' divorce. Ms. Myers had been a problem not only in the marriage, but also had been guilty of violent conduct toward Appellant in the presence of Appellee. LeeAnn Myers had also made numerous phone calls to Appellee which apparently were intended to cause problems in the parties' marriage. LeeAnn Myers had gotten pregnant twice by the Appellant and had terminated

> one pregnancy by abortion, and the other by miscarriage. The Trial Court, after hearing all of the parties, decided it would be in the child's best interest that the child not be taken around or placed in the presence of LeeAnn Myers, and Appellee would contend that this is not an abuse of the Trial Court's discretion. Appellee would not object to both Appellant and Appellee being restricted from keeping the child overnight in a situation where the party is entertaining a member of the opposite sex with whom they are engaged in a sexual relationship and to whom they are not **[*15]** married as suggested by Appellant's counsel in Appellant's Brief. . . .

The issue of the propriety of the restriction on visitation is properly before us.

The judgment of the trial court is modified to delete the visitation provision that "the minor son shall not be in the company or presence of Leeann Myers." In all other respects, the judgment of the trial court is affirmed. Exercising our discretion, we tax the costs of this appeal to the appellant and his surety.

Charles D. Susano, Jr., J.

CONCUR:

(Concurring and Dissenting Opinion)

Houston M. Goddard, P.J. (E.S.)

Herschel P. Franks, J.

CONCUR BY: Houston M. Goddard (In Part)

DISSENT BY: Houston M. Goddard (In Part)

DISSENT

OPINION CONCURRING IN PARTAND DISSENTING IN PART

Goddard, P.J. (E.S.)

I concur with all of the determinations of the majority opinion except the one relating to its reversal of the Trial Court's order prohibiting the parties' child from being in the presence of LeeAnn Myers.

As pointed out in the majority opinion, Ms. Myers was the principal factor in the failure of the parties' marriage. Moreover, it is undisputed that she has in the past repeatedly and cruelly harassed the mother, and that while Mr. Bates was still married **[*16]** to Mrs. Bates she became impregnated by him on two occasions, one resulting in an abortion and the other a miscarriage. In light of this, I conclude that the child should not be exposed to Ms. Myers, and have no trouble in believing that Ms. Myers' association with the child would justifiably upset the mother and, of necessity, adversely affect the child.

Because of the foregoing circumstances coupled with the fact that Mr. Bates did not specifically raise the child's association with Ms. Myers as an issue, I would affirm the Chancellor in all respects.

Houston M. Goddard, P.J. (E.S.)

EXHIBIT C

*2008 Tenn. App. LEXIS 493, **

KRISTI LEANNE COSNER v. CHARLES ARTHUR COSNER

E2007-02031-COA-R3-CV

COURT OF APPEALS OF TENNESSEE, AT KNOXVILLE

2008 Tenn. App. LEXIS 493

June 19, 2008, Session
August 22, 2008, Filed

SUBSEQUENT HISTORY: Later proceeding at Cosner v. Cosner, 2008 Tenn. App. LEXIS 518 (Tenn. Ct. App., Aug. 22, 2008)

PRIOR HISTORY: [*1]
Tenn. R. App. P. 3 Appeal as of Right; Judgment of the General Sessions Court Reversed; Case Remanded. Appeal from the General Sessions Court for Loudon County. No. 9156. William H. Russell, Judge.

DISPOSITION: Judgment of the General Sessions Court Reversed; Case Remanded.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant mother sought review of the decision of the General Sessions Court for Loudon County (Tennessee), which found in favor of appellee father and changed primary custody of the parties' children from the mother to the father. The mother had filed a petition to modify and enforce the final decree of divorce and the father had filed a counterpetition alleging a material change of circumstances warranting a chance of custody.

OVERVIEW: In the parties' post-divorce case, the trial court found that it was in the children's best interest to transfer custody from the mother to the father because the mother had allegedly been living with a man to whom she was not married and who was separated from, but still married to, someone else. The appellate court held that the evidence did not establish a material change of circumstances justifying a change in custody in the absence of proof that the mother's alleged conduct had affected the children in an adverse way. The appellate court therefore reversed the trial court's judgment with instructions to the trial court to dismiss the father's counterpetition for change of custody. The father did not prove a material change of circumstances affecting the children's wellbeing in a material way justifying the drastic remedy of changing custody pursuant to Tenn. Code Ann. § 36-6-101(a)(2)(B). The record offered no proof that the mother neglected the children because of sexual indiscretion, nor that they suffered any adverse consequence because of the presence of her boyfriend at her residence.

OUTCOME: The appellate court reversed the judgment and the trial court's award of attorney fees and court costs against the mother. The case was further remanded to the trial court with directions to dismiss the father's counterpetition, and for such further action as might be necessary; costs on appeal were assessed to the father.

CORE TERMS: custody, change of circumstances, parenting, married, change of custody, visitation, well-being, boyfriend, cohabitation, decree, sexual, residential, material change, best

interest, preponderates, modification, co-parenting, married man, minor children, counter-petition, divorce, custody arrangements, custody determination, preponderance, live-in, ceased, counseling, designated, withdraw, subpoena

LEXISNEXIS® HEADNOTES Hide

Civil Procedure > Trials > Bench Trials

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Standards of Review > Fact & Law Issues

Evidence > Inferences & Presumptions > Presumptions

Evidence > Procedural Considerations > Burdens of Proof > Preponderance of Evidence

HN1 In a nonjury case, ordinarily review is de novo upon the record of the proceedings below, with a presumption of correctness as to the trial court's factual determinations that appellate courts must honor unless the evidence preponderates against those findings, Tenn. R. App. P. 13(d). The trial court's conclusions of law are accorded no such presumption. When the trial court fails to make factual findings, there is nothing to which the presumption of correctness can attach. Under these circumstances, appellate courts must conduct their own independent review of the record to determine where the preponderance of the evidence lies. More Like This Headnote

Civil Procedure > Appeals > Records on Appeal

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Family Law > Child Custody > Procedures

Family Law > Child Custody > Visitation > General Overview

HN2 Trial courts are vested with wide discretion in matters involving custody of children. Accordingly, a trial court's decision regarding custody or visitation should be set aside only when it 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. Although trial courts must be able to exercise broad discretion in matters of child custody and visitation, they still must base their decisions on the proof and upon the appropriate application of the pertinent principles of law. Appellate courts will not reverse a trial court's decision regarding custody unless the record clearly demonstrates that the trial court has abused its discretion. A discretionary judgment of a trial court should not be disturbed unless it affirmatively appears that the trial court's decision was against logic or reasoning, and caused an injustice or injury to the party complaining. More Like This Headnote

Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata

Family Law > Child Custody > Awards > General Overview

Family Law > Child Custody > Procedures

HN3 Custody and visitation decisions are among the most important decisions that courts make. Promoting the child's welfare by creating an environment that promotes a nurturing relationship with both parents is the chief purpose in custody decisions. Because children are more likely to thrive in a stable environment, the courts favor existing custody arrangements. A custody decision, once made and implemented, is considered res judicata upon the facts in existence or reasonably foreseeable when the decision was made. More Like This Headnote

Family Law > Child Custody > Modification > Changed Circumstances

HN4 Tenn. Code Ann. § 36-6-101(a)(2)(B) provides that in cases wherein a party seeks to modify an existing custody arrangement, the threshold issue is whether a material change in circumstances has occurred since the initial custody

determination. More Like This Headnote

Family Law > Child Custody > Modification > Changed Circumstances

HN5 See Tenn. Code Ann. § 36-6-101(a)(2)(B).

Family Law > Child Custody > Modification > Changed Circumstances

HN6 The circumstances of children and their parents inevitably change - children grow older, their needs change, one or both parties remarry. But not all changes in the circumstances of the parties and the child warrant a change in custody. There are no hard and fast rules for when there has been a change of circumstance sufficient to justify a change in custody. A court's decision with regard to modification of custody is contingent upon the circumstances presented, and the court should consider whether: 1) the change occurred after the entry of the order sought to be modified; 2) the changed circumstances were not reasonably anticipated when the underlying decree was entered; and 3) the change is one that affects the child's wellbeing in a meaningful way. Custody decisions are not intended and should not be designed to reward parents for prior virtuous conduct, nor to punish them for their human frailties or past missteps. More Like This Headnote

Family Law > Child Custody > Awards > Standards > Best Interests of Child

Family Law > Child Custody > Modification > Changed Circumstances

HN7 The party seeking to change an existing custody arrangement has the burden of proving that there has been a material change of circumstances, Tenn. Code Ann. § 36-6-101(a)(2)(B). If the person seeking the change of custody cannot demonstrate that the child's circumstances have changed in some material way, the trial court should not reexamine the comparative fitness of the parents, or engage in a best interests of the child analysis. In the absence of proof of a material change in the child's circumstances, the trial court should not change custody. More Like This Headnote

Family Law > Child Custody > Awards > General Overview

Family Law > Child Custody > Modification > General Overview

HN8 A custodial parent's nonmarital sexual activities may be appropriately considered in the context of a custody decision. Cohabitation alone does not necessarily provide grounds for changing custody when there is no proof that it has or will adversely affect the children. A parent's sexual conduct, if practiced inappropriately or indiscriminately, can adversely affect a child's wellbeing, and in those cases, such conduct can be an important factor in custody determinations. Sexual indiscretion does not, by itself, disqualify a parent from being awarded custody, but it may be a relevant factor if it involves the neglect of the child. More Like This Headnote

Family Law > Child Custody > Awards > General Overview

HN9 A trial court should not fashion a custody decision as punishment of a party for human frailties, past missteps, or perceived moral shortcomings in the absence of demonstrated adverse consequence to the children. More Like This Headnote

COUNSEL: Paul Dillard, Maryville, Tennessee, for the Appellant, Kristi Leanne Cosner.

Joseph H. Crabtree, Jr., Sweetwater, Tennessee, for the Appellee, Charles Arthur Cosner.

JUDGES: SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

OPINION BY: SHARON G. LEE

OPINION

In this post-divorce case, the primary issue presented is whether the evidence preponderates against the trial court's determination that custody of the parties' two children should be changed from the mother to the father. After a brief hearing at which neither the mother nor her counsel was present, the trial court applied a comparative fitness analysis without discussing or ruling upon whether a material change of circumstances had occurred. The trial court held it to be in the children's best interest to transfer custody from the mother to the father because the mother had allegedly been living with a man to whom she was not **[*2]** married and who was separated from, but still married to, someone else. We hold that the evidence does not establish a material change of circumstances justifying a change in custody in the absence of proof that the mother's alleged conduct has affected the children in an adverse way. We, therefore, reverse the judgment of the trial court with instructions to the trial court to dismiss Father's counter-petition for change of custody and remand for such further action as may be necessary consistent with this opinion.

OPINION

I. Background

The parties, Kristi Leanne Cosner ("Mother") and Charles Arthur Cosner ("Father") were divorced by decree entered on January 31, 2005. Two children had been born to the marriage: William Blake Cosner (born on 10/21/89) and Anjelika Marie Cosner (born on 7/8/93). The agreed permanent parenting plan was incorporated by reference into the divorce decree; it provided that Mother was the primary residential parent, with visitation provided to Father every Wednesday from 6:00 p.m. until Thursday at 8:00 a.m., every other weekend, various holidays, and two weeks in the summer.

On March 24, 2006, Mother filed a petition "to modify and enforce final decree of **[*3]** divorce" alleging that Father had not paid one-half of medical expenses for the children as agreed in the permanent parenting plan, and that Father "has had a significant increase in salary and the child support should therefore be modified to reflect said increase." Father answered and filed a counter-petition alleging that Mother had "unilaterally taken steps to deny [Father] any visitation with his youngest child" Anjelika, that Mother had not paid one-half of the children's extracurricular expenses as agreed in the permanent parenting plan, and that Mother had failed to provide Father with summer visitation as set forth in the parenting plan. Father later amended his counter-petition to allege a material change of circumstances warranting a change of custody, stating the following particulars:

> [Mother] has alienated Anjelika from [Father] and has perniciously engaged in a pattern of conduct designed to undermine [Father's] relationship with Anjelika.
>
> [Mother] does not model proper parental behavior in that she has maintained a number of sexual relationships with men, brought them to her home with the children present, some of whom are married.
>
> [Mother] is unstable and is prone to **[*4]** outbursts of anger in the presence of the children, which is detrimental to their well-being and is calculated to undermine the children's relationship with [Father].
>
> The modification of the Permanent Parenting Plan as designating [Father] as the Primary Residential Parent is in the best interest of the parties' children.

Three days before the hearing, Mother's attorney, A. Wayne Henry, filed a motion to withdraw as her counsel. The day of the hearing, Mr. Henry appeared in court and presented his motion to withdraw, but neither his client (Mother) nor a witness subpoenaed by Father (Mother's alleged live-in boyfriend and the father of her newborn child) appeared in court. The following colloquy occurred at the beginning of the hearing:

> THE COURT: Where is your client? Is this her?
>
> MR. HENRY: No, it isn't. I'm not exactly sure, Your Honor. I talked - I tried to call and talk to her in the last - since this morning and - I mean, she was somewhere between taking her child - taking care of her child and going to work.
>
> THE COURT: All right. Are you ready?
>
> MR. CRABTREE [Father's attorney]: Yes, Your Honor.
>
> THE COURT: All right. Everybody that's going to testify or thinks they may testify in this **[*5]** matter, please stand and raise your right hand. Hold on a minute. Are you withdrawing?
>
> MR. HENRY. Yes, Your Honor. I have a motion to withdraw.
>
> THE COURT: Have you got an order?
>
> MR. HENRY: I do not.
>
> THE COURT: Prepare an order to be released.
>
> Whereupon, Wayne Henry left proceedings.)
>
> * * *
>
> MR. CRABTREE: Your Honor, I would like to note for the record that I had subpoenaed David Neubert and it was referenced - there was an order entered on the continuance from the last time we were here. He was under subpoena. And it stated - he was under subpoena for the last hearing. The order stated that he would remain under subpoena until today. And for the record, he is the boyfriend of Mrs. Cosner, the former Mrs. Cosner.

THE COURT: He's not here. Do you have a remedy in that? You can either ask for a continuance or you can proceed.

> MR. CRABTREE: Well, I would prefer to proceed.
>
> THE COURT: All right.

Two persons testified at the hearing: a licensed clinical social worker who had been seeing Anjelika for counseling, and Father. After the brief hearing, the trial court entered an order ruling that Father "is the best person to have primary custody and to be designated the primary resident for parent [sic] **[*6]** of the parties' two minor children." The trial court further found that "because of [Mother's] co-habitation with a married man in the presence of the children and with whom she has conceived and born [sic] a child is not a fit or proper person to have the responsibilities of primary

residential parent." The trial court's order disallowed Mother from any visitation with her children until she "ceased her cohabitation with a man to whom she is not married . . . ." As already noted, the trial court provided no discussion or finding related to whether a material change of circumstances had occurred that affected the children's well-being and that justified a change of custody, as required by Tennessee statute and case law.

Shortly after the trial court's order, Mother filed a motion for new trial and/or to alter or amend the judgment, alleging that her then-counsel Mr. Henry had advised her shortly before the hearing that "she would have thirty days to obtain new counsel and at least sixty days for a new hearing date," and that Mr. Henry had advised her that she did not need to be at the hearing, which would be postponed. Following a hearing on Mother's post-judgment motion, the trial **[*7]** court denied it, and Mother's appeal to this court followed.

II. Issue Presented

The issue we address in this appeal is whether the trial court erred in changing primary custody of the parties' children from Mother to Father.

III. Analysis

A. Standard of Review

HN1 In a non-jury case, ordinarily our review is *de novo* upon the record of the proceedings below, with a presumption of correctness as to the trial court's factual determinations that we must honor unless the evidence preponderates against those findings. Tenn. R. App. P. 13(d); ***Wright v. City of Knoxville***, 898 S.W.2d 177, 181 (Tenn. 1995); ***Union Carbide Corp. v. Huddleston***, 854 S.W.2d 87, 91 (Tenn. 1993). The trial court's conclusions of law are accorded no such presumption. ***Campbell v. Florida Steel Corp.***, 919 S.W.2d 26, 35 (Tenn. 1996); ***Presley v. Bennett***, 860 S.W.2d 857, 859 (Tenn. 1993). In the present case, the trial court made virtually no findings of fact, and no finding regarding the threshold determination of whether a material change in circumstance had occurred warranting the modification of the parenting plan to change custody from Mother to Father. When the trial court fails to make factual findings, there is nothing to **[*8]** which the presumption of correctness can attach. ***Hickman v. Continental Baking Co.***, 143 S.W.3d 72, 75 (Tenn. 2004); ***Curtis v. Hill***, 215 S.W.3d 836, 839 (Tenn. Ct. App. 2006); ***Kesterson v. Varner***, 172 S.W.3d 556, 566 (Tenn. Ct. App. 2005); ***Archer v. Archer***, 907 S.W.2d 412, 416 (Tenn. Ct. App. 1995). Under these circumstances, "we must conduct our own independent review of the record to determine where the preponderance of the evidence lies." ***Brooks v. Brooks***, 992 S.W.2d 403, 405 (Tenn. 1999); ***Kendrick v. Shoemake***, 90 S.W.3d 566, 570 (Tenn. 2002); ***Devorak v. Patterson***, 907 S.W.2d 815, 818 (Tenn. Ct. App. 1995).

HN2 Trial courts are vested with wide discretion in matters involving custody of children. ***Edwards v. Edwards***, 501 S.W.2d 283, 291 (Tenn. Ct. App. 1973). Accordingly, a trial court's decision regarding custody or visitation should be set aside only when it "falls outside the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence found in the record." ***Eldridge v. Eldridge***, 42 S.W.3d 82, 88 (Tenn. 2001). We are aware of the tremendous impact a custody decision has on the life of a child. Although trial courts must be able to **[*9]** exercise broad discretion in matters of child custody and visitation, they still must base their decisions on the proof and upon the appropriate application of the pertinent principles of law. ***D v. K***, 917 S.W.2d 682, 685 (Tenn. Ct. App. 1995). We will not reverse a trial court's decision regarding custody unless the record clearly demonstrates that the trial court has abused its discretion. ***Otis v. Cambridge Mut. Fire Ins. Co.***, 850 S.W.2d 439, 442 (Tenn. 1992). A discretionary judgment of a trial court should not be disturbed unless it affirmatively appears that "the trial court's decision was against logic or reasoning, and caused an injustice or injury to the party complaining." ***Marcus v. Marcus***, 993 S.W.2d 596, 601 (Tenn. 1999) (quoting ***Ballard v. Herzke***, 924 S.W.2d 652, 661 (Tenn. 1996)).

B. Change of Custody

We begin our review by reaffirming the premise that HN3 custody and visitation decisions are among the most important decisions that courts make. ***Curtis,*** 215 S.W.3d at 839; ***Steen v. Steen,*** 61 S.W.3d 324, 327 (Tenn. Ct. App. 2001); ***Adelsperger v. Adelsperger,*** 970 S.W.2d 482, 484 (Tenn. Ct. App. 1997). Promoting the child's welfare by creating an environment that promotes a nurturing **[*10]** relationship with both parents is the chief purpose in custody decisions. ***Aaby v. Strange,*** 924 S.W.2d 623, 629 (Tenn. 1996). Because children are more likely to thrive in a stable environment, the courts favor existing custody arrangements. ***Id.*** at 627; ***Taylor v. Taylor,*** 849 S.W.2d 319, 332 (Tenn. 1993); ***Hoalcraft v. Smithson,*** 19 S.W.3d 822, 828 (Tenn. Ct. App. 1999). A custody decision, once made and implemented, is considered *res judicata* upon the facts in existence or reasonably foreseeable when the decision was made. ***Young v. Smith,*** 193 Tenn. 480, 246 S.W.2d 93, 95 (Tenn. 1952); ***Steen,*** 61 S.W.3d at 327; ***Solima v. Solima,*** 7 S.W.3d 30, 32 (Tenn. Ct. App. 1998).

The governing statute in a case such as this one, HN4 Tenn. Code Ann. § 36-6-101(a)(2)(B), provides that in cases wherein a party seeks to modify an existing custody arrangement, the threshold issue is whether a material change in circumstances has occurred since the initial custody determination:

> HN5 If the issue before the court is a modification of the court's prior decree pertaining to custody, the petitioner must prove by a preponderance of the evidence a material change in circumstance. A material change of circumstance does not require a showing **[*11]** of a substantial risk of harm to the child. A material change of circumstance may include, but is not limited to, failures to adhere to the parenting plan or an order of custody and visitation or circumstances that make the parenting plan no longer in the best interest of the child.
>
> > (i) In each contested case, the court shall make such a finding as to the reason and the facts that constitute the basis for the custody determination.

Tenn. Code Ann. § 36-6-101(a)(2)(B).

We recognize that HN6 the circumstances of children and their parents inevitably change - children grow older, their needs change, one or both parties remarry. But not all changes in the circumstances of the parties and the child warrant a change in custody. There are no hard and fast rules for when there has been a change of circumstance sufficient to justify a change in custody. ***Cranston v. Combs,*** 106 S.W.3d 641, 644 (Tenn. 2003). A court's decision with regard to modification of custody is contingent upon the circumstances presented, and the court should consider whether:

> 1) the change occurred after the entry of the order sought to be modified,
>
> 2) the changed circumstances were not reasonably anticipated when the underlying **[*12]** decree was entered, and
>
> 3) the change is one that affects the child's well-being in a meaningful way.

Kendrick, 90 S.W.3d at 570; ***Blair v. Badenhope,*** 77 S.W.3d 137 (Tenn. 2002); ***Cranston,*** 106 S.W.3d at 644. Custody decisions are not intended and should not be designed to reward parents for prior virtuous conduct, nor to punish them for their human frailties or past missteps. ***Curtis,*** 215 S.W.3d at 840; ***Oliver v. Oliver,*** No. M2002-02880-COA-R3-CV, 2004 Tenn. App. LEXIS 264, 2004 WL 892536 at *2 (Tenn. Ct. App. M.S., filed Apr. 26, 2004); ***Kesterson,*** 172 S.W.3d at 561; ***Earls v. Earls,*** 42 S.W.3d 877, 885 (Tenn. Ct. App. 2000).

HN7 The party seeking to change an existing custody arrangement has the burden of proving that there has been a material change of circumstances. Tenn. Code Ann. § 36-6-101(a)(2)(B). If the person seeking the change of custody cannot demonstrate that the child's circumstances have changed in some material way, the trial court should not reexamine the comparative fitness of the parents, ***Caudill v. Foley***, 21 S.W.3d 203, 213 (Tenn. Ct. App. 1999), or engage in a "best interests of the child" analysis. In the absence of proof of a material change in the child's circumstances, the trial court should not **[*13]** change custody. ***Curtis***, 215 S.W.3d at 840; ***Hoalcraft***, 19 S.W.3d at 828.

Applying the above analysis to the present case, our review of the record persuades us that the evidence preponderates against a conclusion that Father has proven a material change of circumstances affecting the children's well-being in a material way that would justify the "drastic remedy" of changing custody. ***Curtis***, 215 S.W.3d at 841; *see also* ***Perez v. Kornberg***, No. M2004-01909-COA-R3-CV, 2006 Tenn. App. LEXIS 379, 2006 WL 1540254 at *16 (Tenn. Ct. App. W.S., filed June 6, 2006); ***Oliver***, 2004 Tenn. App. LEXIS 264, 2004 WL 892536 at *5.

The first of the two persons to testify at the hearing was Stephanie Viars, a licensed clinical social worker who had been seeing Anjelika for counseling for approximately nine months. Ms. Viars stated that she began counseling with Anjelika "to help [her] relationship with her dad." Ms. Viars testified that Anjelika was uncomfortable with Father's new wife and that was part of the reason why Anjelika did not want to visit with Father. Ms. Viars testified that Anjelika "didn't speak very much about her mother's home at all," and upon specific questioning, stated that Anjelika did not tell her that Mother was living with a married man **[*14]** and did not tell her that Mother was pregnant with that man's child. When asked whether she believed it was appropriate for Anjelika "to live in a home with a mother who's co-habitating with a married man with whom she's just had a child," Ms. Viars stated, "[t]hat's a moral issue that I don't think that I'm in a position to comment on."

Father also testified at the hearing. When asked why he believed that a change of custody was appropriate under the circumstances, Father stated, "well, at the present time, [Mother] is currently living with a man who is married, who, you know, is still married, and has a new baby by him." Regarding the alleged live-in boyfriend, Father's attorney asserted to the trial court that there was a divorce action (presumably the boyfriend's) filed in February of 2005 in Knox County and "no further action has been taken on it." Father alleged that the boyfriend moved in with Mother in late 2006, apparently nearly two years after his divorce action had been filed and was pending. When asked how he knew this, Father stated, "you could drive by and see his vehicle, and also my children told me." Father further testified that Mother had "cussed my wife in public **[*15]** several times," and once called his new wife a "bitch" in front of their daughter. Father presented no evidence tending to show that the children's relationship with Mother and their residence at her house was in any way detrimental to their well-being.

Following the hearing, the trial court ruled that custody of the children should be changed and that Father should be designated primary residential parent, and entered an order providing the following:

> [Father] is the best person to have primary custody and to be designated the primary resident for parent [sic] of the parties' two minor children, William Blake Cosner and Anjelika Marie Cosner. [Father] has established that he has a more than adequate residence, can provide a safe and stable home life and a good moral environment for the parties' minor children.
>
> [Mother] shall be entitled to standard co-parenting as set forth in the local rules for the General Sessions Court, Loudon County, Tennessee, provided however, that said co-parenting time shall not begin until such time as [Mother] has ceased her cohabitation with a man to whom she is not married and that at no time shall [Mother] be allowed

> overnight co-parenting time with the **[*16]** parties' minor children while she is engaged in such a relationship. The Court specifically finds that because of [Mother's] co-habitation with a married man in the presence of the children and with whom she has conceived and born a child [sic] is not a fit or proper person to have the responsibilities of primary residential parent.

When the proof presented by Father contained in the record is examined, it is doubtful that Father proved by a preponderance of the evidence his allegation that Mother was living with a man who was still married to someone else. But even assuming *arguendo* that the allegations of cohabitation and recent birth of Mother's third child by her live-in paramour are true, they are insufficient to justify a change of custody under the circumstances. HN8 A custodial parent's non-marital sexual activities may be appropriately considered in the context of a custody decision. ***Curtis,*** 215 S.W.3d at 841; ***Earls,*** 42 S.W.3d at 890. While we do not condone Mother's alleged conduct, we have repeatedly pointed out that "cohabitation alone does not necessarily provide grounds for changing custody when there is no proof that it has or will adversely affect the children." ***Id.;*** *see* **[*17]** ***Nelson v. Nelson,*** 66 S.W.3d 896, 902 (Tenn. Ct. App. 2001); ***Fain v. Fain,*** No. M1999-02261-COA-R3-CV, 2000 Tenn. App. LEXIS 834, 2000 WL 1879548 at *5 (Tenn. Ct. App. E.S., filed Dec. 29, 2000)***;*** ***Varley v. Varley,*** 934 S.W.2d 659, 666-67 (Tenn. Ct. App. 1996); ***Sutherland v. Sutherland,*** 831 S.W.2d 283, 286 (Tenn. Ct. App. 1991). A parent's sexual conduct, if practiced inappropriately or indiscriminately, can adversely affect a child's well-being, and in those cases, such conduct can be an important factor in custody determinations. ***Berry v. Berry,*** No. E2004-01832-COA-R3-CV, 2005 Tenn. App. LEXIS 320, 2005 WL 1277847 at *5 (Tenn. Ct. App. E.S., filed May 31, 2005). In ***Parker v. Parker,*** 986 S.W.2d 557, 563 (Tenn. 1999), the Tennessee Supreme Court acknowledged that "sexual indiscretion does not, by itself, disqualify a parent from being awarded custody, but it may be a relevant factor if it involves the neglect of the child." *See also* ***Lockmiller v. Lockmiller,*** No. E2002-02586-COA-R3-CV, 2003 Tenn. App. LEXIS 953, 2003 WL 23094418 at *5 (Tenn. Ct. App. E.S., filed Dec. 30, 2003) .

The record before us offers no proof that Mother neglected the children because of sexual indiscretion, nor that they suffered any adverse consequence because of the presence of her boyfriend, **[*18]** allegedly the father of the children's half-sibling, at her residence. Father, who had the burden of proof to establish a material change of circumstances, presented no evidence regarding the children's health, schooling, welfare, or general well-being while in Mother's custody. The parties' son is barely mentioned in the entire record at all.

As we have already noted, HN9 a trial court should not fashion a custody decision as punishment of a party for human frailties, past missteps, or perceived moral shortcomings in the absence of demonstrated adverse consequence to the children. ***Curtis,*** 215 S.W.3d at 840; ***Kesterson,*** 172 S.W.3d at 561; ***Earls,*** 42 S.W.3d at 885; ***Oliver,*** 2004 Tenn. App. LEXIS 264, 2004 WL 892536 at *2. Not only does the language of the trial court's order indicate that the trial court did exactly that in its ruling, but the literal import of the trial court's order that Mother's "co-parenting time shall not begin until such time as [Mother] has ceased her cohabitation with a man to whom she is not married" means that the trial court barred the children from all contact with their mother, who had raised them from birth, until she stopped living with the alleged father of her newborn child. Under the **[*19]** circumstances presented here, we hold that the evidence preponderates against the conclusion that a material change of circumstances occurred that warranted a change of custody from Mother to Father, and we further hold that the trial court abused its discretion in ordering the change of custody.

IV. Conclusion

The trial court's judgment modifying the parenting plan by changing custody of the children from Mother to Father is reversed. Considering the successful outcome of Mother's appeal in this matter,

the trial court's award of attorney's fees and court costs against Mother is also reversed. The case is remanded to the trial court with directions to dismiss Father's counter-petition, and for such further action as may be necessary, consistent with this opinion. Costs on appeal are assessed to the Appellee, Charles Arthur Cosner.

SHARON G. LEE, JUDGE