

RICKY LEE FARLEY, )  
 )  
 Plaintiff/Appellant, ) Appeal No.  
 ) 01-A-01-9606-CH-00285  
 v. )  
 ) Cheatham Chancery  
 DONNA ELAINE FARLEY, ) No. 7485  
 )  
 )  
 Defendant/Appellee. )

COURT OF APPEALS OF TENNESSEE  
MIDDLE SECTION AT NASHVILLE

**FILED**  
**November 27, 1996**  
**Cecil W. Crowson**  
**Appellate Court Clerk**

APPEAL FROM THE CHANCERY COURT FOR CHEATHAM COUNTY  
AT ASHLAND CITY, TENNESSEE

THE HONORABLE ALLEN WALLACE, CHANCELLOR

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AFFIRMED AND REMANDED

MEMORANDUM OPINION<sup>1</sup>

This is an appeal by plaintiff Ricky Lee Farley ("father"), from the judgment of the chancery court which changed custody of his two minor children from him to their mother, Donna Elaine Farley, defendant/appellee ("mother").

The children's parents were divorced on 21 December 1993 by a final decree entered in the Chancery Court for Cheatham County. The decree incorporated the parties' Marital Dissolution Agreement ("MDA") and awarded the father custody of the parties' two minor children, Calvin Lee born 1 February 1989 and Caleb Adam Lee born 8 December 1991. The MDA as incorporated by the court granted the mother visitation every weekend.

Subsequently, the father filed a petition to modify the final decree. He sought an increase in child support and payment of insurance coverage for the children. The mother filed an answer and counter-complaint in which she denied the father was entitled to any relief and alleged that she was entitled to a change of custody because there had been a change of circumstances since the entry of the divorce decree.

The mother alleged that it was in the best interest of the children that the court award her custody because the father was not a fit and proper person to have custody. She did not list any specific acts but alleged that the father's care of the children was detrimental to their well being. She also alleged she was

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<sup>1</sup>Court of Appeals Rule 10(b):

The Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion, it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in a subsequent unrelated case.

better suited to care for the children because she was regularly employed, had suitable housing for the children, and was better equipped to care for their health, safety, and morals.

The matter was heard on 4 December 1994. The evidence at trial showed that one of the children made a prank call to 911 causing the police to come to the father's home; that the younger child, Caleb, played with matches while unsupervised and that he cut his lip while experimenting with his father's shaving equipment. The evidence also showed that the father refused to allow the older child, Calvin, to participate in a school play, and that the father failed to seek treatment for a strep throat infection that Calvin had for two days.

In addition, the evidence showed that the father was a very controlling person and that he had harassed the mother and yelled at her in the presence of the children. Moreover, there was evidence that the father had women spend the night with him while the children were in his home and that the father occasionally spent the night with the children in other women's homes.

Calvin, at the time of the trial, was enrolled in the first grade. His report card showed that he made satisfactory grades and indicated two absences and no days tardy while in kindergarten. The father testified that the children's environment in day to day activities had not changed since the divorce. Regarding the children's improper conduct, the father testified that he had discussed their actions with them after each occurrence and explained the reasons why they should not have done what they did. He also testified that he and the mother did have arguments and that he had spent the night with women in the children's presence but that no such incidents had occurred since June 1995.

On 22 January 1996, the court dismissed the original petition and awarded the mother custody. The court also set alternating weekend and holiday visitation and ordered the father to pay the mother child support of \$540.00 per month. A motion to alter or amend was filed on the grounds that the mother did not prove the father unfit. The father additionally alleged that the mother neglected to schedule doctors' appointments for the children. Following a hearing on the petition to alter or amend, the court determined that custody would remain with the mother but amended the visitation schedule to allow the father to visit with the children on his days off from work. In making his determination, the judge stated as follows:

In review of this case, there was plenty here to change the custody. Mr. Farley had females, maybe a couple of them, going to and from his house, spending the night with the children there, having them bring their own children to his house. It's just an environment that I thought was not proper.

But even more than that in this case . . . Mr. Farley was an overbearing husband. . . . [T]hat's the impression I got out of this case. Mr. Farley has always been in charge, he's going to be in charge. You know, you speak when you're spoken to and you do as I say so. . . .

And in this case, I think Mrs. Farley will be much more cooperative with Mr. Farley than he would, the other way around. And that had a bearing on this Court also. Mr. Farley would do it if it's all right with him. I really believe Mrs. Farley will do it because she is thinking what's in the best interest of the children.

On appeal, the father presents only one issue: whether the trial court erred in changing the custody of the parties' minor children from the father to the mother.

The standard of review in custody cases is governed by Tennessee Rule of Appellate Procedure 13(d) which provides that this court shall review the record de novo with a presumption of the correctness of the trial court's findings of facts. Unless the evidence preponderates against the findings, we must affirm absent error of law. *In re Parsons*, 914 S.W.2d 889, 895 (Tenn. App.

1995). As this court has stated, it gives great weight to the decisions of the trial court "because the judge saw the witness face to face and heard them testify." **Riddick v. Riddick**, 497 S.W.2d 740, 742 (Tenn. App. 1973).

The trial court exercises continuing control over custody of a minor child after the divorce decree has otherwise become final. **Smith v. Haase**, 521 S.W.2d 49, 51 (Tenn. 1975). In a matter such as this, regarding the custody and support of minor children, the trial court is vested with wide discretion. As such, this court, on appeal, will not interfere with the trial court's determination except upon a clear showing of abuse of this discretion. **Marmino v. Marmino**, 238 S.W.2d 105, 107 (Tenn. App. 1950)(citations omitted).

The paramount consideration in awarding custody of a minor child is the best interest and welfare of the child. **Luke v. Luke**, 651 S.W.2d 219, 221 (Tenn. 1983); **Rowles v. Reynolds**, 196 S.W.2d 76, 79 (Tenn. App. 1946). This court has characterized the custody determination as follows:

To arrive at the point of deciding with whom to place a child in preparation for a caring and productive adult life requires consideration of many relevant factors, including but certainly not limited to the age, habits, mental and emotional make-up of the child and those parties competing for custody; the education and experience of those seeking to raise the child; their character and propensities as evidenced by their past conduct; the financial and physical circumstances available in the home of each party seeking custody and the special requirements of the child; the availability and extent of third-party support; the associations and influences to which the child is most likely to be exposed in the alternatives afforded, both positive and negative; and where is the greater likelihood of an environment for the child of love, warmth, stability, support, consistency, care and concern, and physical and spiritual nurture.

**Bah v. Bah**, 668 S.W.2d 663, 666 (Tenn. App. 1983). This court has recognized that, "[f]itness for custodial responsibilities is

largely a comparative matter. . . . Necessarily, therefore, the courts must determine which of two or more available custodians is more or less fit than others." *Edwards v. Edwards*, 501 S.W. 2d 283, 290-91 (Tenn. App. 1973), quoted in *Koch v. Koch*, 874 S.W.2d 571, 575 (Tenn. App. 1993).

In this case, nothing in the record indicates that the mother is unfit to have custody. On the other hand, evidence showed that the husband not only engaged in behavior harmful to the children, but that he possessed certain characteristics affecting his ability to cooperate with the mother for the children's best interest. In light of a comparative fitness analysis, we conclude that the evidence does not preponderate against the finding of the trial court that the change of custody to the mother is in the best interest of these children.

Therefore, the judgment of the trial court is affirmed in all respects, and the cause is remanded to the trial court for further necessary proceedings. Costs on appeal are taxed to the plaintiff/appellant.

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SAMUEL L. LEWIS, JUDGE

CONCUR:

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HENRY F. TODD, PRESIDING JUDGE,  
MIDDLE SECTION

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BEN H. CANTRELL, JUDGE

