KATHERINE THERESA DeVAULT,	)	
	)	
Plaintiff/Appellant,	)	Appeal No.
	)	01-A-01-9601-CV-00012
v.	)	
	)	Davidson Circuit
JAMES CANON DeVAULT, JR.,	)	No. 93D-3363
	)	
Defendant/Appellee.	)	

FILED

August 28, 1996

Cecil W. Crowson
Appellate Court Clerk

COURT OF APPEALS OF TENNESSEE

MIDDLE SECTION AT NASHVILLE

APPEAL FROM THE CIRCUIT COURT FOR DAVIDSON COUNTY

AT NASHVILLE, TENNESSEE

THE HONORABLE MURIEL ROBINSON, JUDGE

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AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED

SAMUEL L. LEWIS, JUDGE

OPINION

This is an appeal by plaintiff/appellant, Katherine Theresa DeVault, from those parts of the trial court's divorce decree that awarded the parties joint custody of their minor twin sons, awarded child support, and granted defendant/appellee, James Canon DeVault, Jr., two months of visitation during the summer.

The parties married in January 1972. In 1984, they separated allegedly because of defendant's infatuation with the manager of his photography studio. The parties later reconciled and reunited. On 2 February 1989, the parties had twin sons, Samuel and Daniel.

In September 1993, defendant moved out of the marital home after stating that he wanted a "looser, freer, less rigid lifestyle." He told plaintiff that he did not love her anymore and that he wanted to date other women. Plaintiff testified that she felt "grief as if someone had died" when defendant moved out.

During the previous year, defendant had been very hostile and angry. According to plaintiff, he drank heavily when he was home. He allegedly used foul language and instigated arguments.

Prior to leaving the marital home, defendant spent increasing amounts of time away from home where he was allegedly renovating the parties' rental property. Defendant later admitted that he had spent much of the time with his paramour. Defendant helped his paramour find her current residence and spends ten to fifteen hours per week there. The trial court issued a restraining order in October 1993 preventing defendant from having the minor children around anyone with whom he was romantically involved.

Defendant is a professional photographer. He has also developed a business in property renovation. Plaintiff is a self-employed graphic designer and art director. She has an office in her home.

Plaintiff filed a complaint for divorce on 13 September 1993. During the period preceding the trial, plaintiff filed motions for restraining orders. Claiming that defendant violated the restraining orders, plaintiff filed a petition for contempt of court which she amended twice. On one occasion, plaintiff called the police who arrested defendant for disorderly conduct. Defendant also filed a motion for a restraining order, numerous motions to dissolve the restraining orders issued against him, and a counter-petition for contempt.

The trial court held a trial on the 9th and 10th of November 1994. The final decree granted plaintiff an absolute divorce on the grounds of defendant's inappropriate marital conduct. The court awarded joint custody to the parties. It granted plaintiff physical custody and defendant visitation every other weekend and Wednesday evenings. Defendant also received physical custody of the children in June and July with plaintiff receiving custody during the middle weekend of each of those months. The court alternated the children's holiday schedule between the parties. As to child support, the court deviated from the child support guidelines based on its finding that defendant was underemployed and ordered defendant to pay child support of $800.00 a month.

Plaintiff filed a notice of appeal on 12 May 1995. This court, however, held that the order was not final because it did not address the contempt petitions and because the parties had not given notice that defendant had satisfied his repayment obligation as required by the final decree. On 8 August 1995, the trial court

entered an order dismissing plaintiff's and defendant's petitions for contempt and stating that defendant had satisfied his obligation. Thereafter, plaintiff filed a notice of appeal on 6 September 1995 and moved to consolidate the records of the two appeals. On appeal, plaintiff presented four issues and defendant presented one issue. Plaintiff's first two issues are as follows:

> I. Whether the trial court erred in ordering joint custody of twin boys where Husband and Wife "cannot get along" and are incapable of reaching agreement on matters concerning the children.
>
> II. Whether the trial court erred in not awarding sole custody to Wife where Husband's admitted and inappropriate marital conduct caused the break-up of the marriage, and where his relationship with his paramour continues in the presence of the children.

A trial court "is vested with wide discretion in matters of divorce, alimony and attorney's fee, custody and support of minor children and appellate courts will not interfere except upon a clear showing of an abuse of that discretion." ***Marmino v. Marmino***, 34 Tenn. App. 352, 355, 238 S.W.2d 105, 107 (1950). "In cases involving child custody, the decision of the Trial Judge who saw and heard the witnesses, is to be given great, if not controlling effect, and [this court] will interfere only where we find a palpable abuse of discretion, or a judgment against the great weight of the evidence." ***Cecil v. State ex rel. Cecil***, 192 Tenn. 74, 77, 237 S.W.2d 558, 559 (1951).

In determining matters of child custody, the primary concern is the best interest and welfare of the parties' minor children. All rights of the parties will yield to that primary concern. The best interest of the child is the paramount consideration. It is the "polestar, the alpha and omega." ***Bah v. Bah***, 668 S.W.2d 663, 665 (Tenn. App. 1983).

Although not expressly barred by statute, courts have, in general, disfavored joint custody over the years. ***Gray v. Gray***, 885 S.W.2d 353, 354 (Tenn. App. 1994). Courts have expressed a concern that joint custody arrangements harm rather than help children. ***Garner v. Garner***, 773 S.W.2d 245, 248 n.3 (Tenn. App. 1989). This court, more than fifty years ago, stated that "[i]t is generally very unwise to divide the custody of a child between contending parties because it is hardly possible for a child to grow up and live a normal, happy life under such circumstances." ***Logan v. Logan,*** 26 Tenn. App. 667, 674, 176 S.W.2d 601, 603 (1943). Just this year, however, the General Assembly passed the following act:

> Section 1. Tennessee Code Annotated. Section 36-6-101. Is amended by designating the existing language of subsection (a) as (a)(1) and by adding the following new section (a)(2):
>
> > (2) Except as provided in the following sentence, neither a preference nor a presumption for or against joint legal custody, joint physical custody or sole custody is established, but the court shall have the widest discretion to order a custody arrangement that is in the best interest of the child. Unless the court finds by clear and convincing evidence to the contrary, there is a presumption that joint custody is in the best interest of a minor child where the parents have agreed to joint custody or so agree in open court at a hearing for the purpose of determining the custody of the minor child. For the purpose of assisting the court in making a determination whether an award of joint custody is appropriate, the court may direct that an investigation be conducted. The burden of proof necessary to modify an order of joint custody at a subsequent proceeding shall be by a preponderance of the evidence.

1996 Tenn. Pub. Acts ch. 1046 (amending TENN. CODE ANN. § 36-6-101). By enacting this chapter, the General Assembly of Tennessee has adopted as the public policy of this state the concept that there be neither a preference nor a presumption for or against joint legal custody, joint physical custody, or sole custody.

While the facts of the instant case indicate that the parties

will have some problem with joint custody, it is evident that most of these problems come from plaintiff. It is clear from a reading of the record that the present relationship between the parties is, at best, acrimonious. We are of the opinion, however, that a great deal of the acrimony is a result of plaintiff's feelings of being spurned by defendant. We are also of the opinion that an award of sole custody to plaintiff would restrict defendant's role in his children's lives. Such a restriction would be highly disruptive to the children because defendant has been extraordinarily involved in his sons' lives in the past.

We find nothing in the statute that provides that courts shall allow joint custody only in cases where the parties are on friendly terms. Plaintiff's argument, in essence, attempts to have us adopt a rule of law to this effect. Under this interpretation, the child's best interest would be decided as a matter of law given a certain set of objective facts rather than determined according to the trial judge's observations and assessment of the unique facts of each case.

The trial court, after seeing and hearing the witnesses and reviewing the entire record, deemed it in the children's best interest that their custody be joint. The trial court based upon an assessment of the parties' character, demeanor, and credibility had an optimistic view in this regard. We cannot say that her optimism is an abuse of discretion. We defer to the trial court's decision to award joint custody. In joint custody cases as in all custody cases, the determination "rests within the sound discretion of the Trial Judge who is in a superior position to judge the credibility and competency of the parents as custodians." ***Gray,*** 885 S.W.2d at 354.

The evidence in this case does not preponderate against the trial court's decision to award joint custody. We are not in the position to second guess the trial court based upon a rule of thumb disfavoring joint custody where parties are antagonistic. If the joint custody is unworkable, it would be a material change in circumstances warranting the court's reanalysis of the custodial arrangement. ***Dalton v. Dalton***, 858 S.W.2d 324, 326 (Tenn. App. 1993). In the past, this court has deferred to a trial judge's discretion in awarding joint custody. In doing so, we stated as follows:

> The bitterness between mother and father make any division of custody difficult for the children. However, if they can endure it, and they are apparently doing so, there is no reason why the children should not receive such benefit as may be available from the society of both parents.
>
> . . . .
>
> This court has expressed reservations about "joint custody", however that expression may be defined. Those reservations continue, and may well come into play in the future in this case, because the children may find that they are unable to endure the weekly shift from one parent to the other. Moreover, the emotional state of the children, their progress, or lack of progress in school, or other matters relating to their welfare may require a re-examination of the present arrangement.

English v. Shouse, No. 01-A-01-9108-CH-00285, 1991 WL 274517, at *3-*4 (Tenn. App. 27 Dec. 1991). From a review of this record, we cannot say that a preponderance of the evidence is against the trial court's order. In this case, as in most divorce cases, the evidence focusing on the welfare of the children is sparse. Plaintiff's first two issues are without merit.

Plaintiff's third issue is "[w]hether the trial court erred in giving Wife insufficient visitation during the summer vacation to allow appropriate bonding with the children."

The standard of review in custody and visitation cases is the same.

> Our review of a trial court's decision regarding visitation and custody is governed by Tenn.R.App.P. 13(d). Thus, we review the record de novo with the presumption that the trial court's findings of fact are correct. However, we review the details of the trial court's custody and visitation arrangements to determine whether the trial court abused its discretion.

Neely v. Neely, 737 S.W.2d 539, 544 (Tenn. App. 1987) (citations omitted). "As a general rule, the details of custody and visitation are peculiarly within the broad discretion of the trial judge." ***Collins v. Collins***, 1993 WL 177159, at *2 (Tenn. App. 1993). As with custody issues, the best interest of the child is the paramount concern when establishing visitation rights. ***Pizzillo v. Pizzillo, Jr.***, 884 S.W.2d 749, 755 (Tenn. App. 1994). "A child's interests are well-served by a custody and visitation arrangement that promotes the development of relationships with both the custodial and noncustodial parent." ***Id.*** at 755. We are of the opinion that the trial court did not abuse its discretion by awarding defendant extended visitation during the summer months and that the evidence preponderates in favor of the trial court's judgment.

Plaintiff's primary complaint with the visitation arrangement is that it does not give her enough time to bond with the children during the summer months. This argument is without effect. First, plaintiff argues that defendant has nearly nine consecutive weeks of visitation while she only has two weeks of uninterrupted visitation. In truth, defendant does not have nine weeks of uninterrupted visitation. During defendant's visitation in June and July, plaintiff has visitation the middle weekend of each month. Second, as pointed out by defendant, plaintiff has the remaining ten months of the year to bond with the twins. Finally, plaintiff argued that her two weeks of visitation "would necessarily be devoted to generally getting the boys ready for school, including purchasing clothes and school supplies." It is

not true that plaintiff's two weeks must be spent on these activities. While the last few weeks of summer are often spent shopping for the new school year, that does not have to be the case. Plaintiff can shop earlier in the summer or early in the school year. Moreover, defendant could help in preparing the children for school by taking them shopping near the end of July. Finally, purchasing clothes and school supplies does not require two weeks of effort.

Plaintiff compares this case with the case of ***Mahaffey v. Mahaffey***, No. 01-A-01-9306-PB-00251, 1993 WL 496833 (Tenn. App. 1993). In ***Mahaffey***, this court merely affirmed the decision of the trial court which awarded the mother six weeks of uninterrupted visitation during the child's summer break. ***Id.*** at *4. ***Mahaffey*** did not set a precedent for courts to follow in every case.

Plaintiff failed to show the trial court abused its discretion regarding the details of the visitation arrangement. Thus, the trial court's visitation schedule is affirmed.

Plaintiff's final issue is "[w]hether Wife should be awarded her attorney fees and other costs necessitated by this appeal."

This court may award attorney's fees incurred during an appeal "[w]here the services of a parent's attorney inures to the benefit of a minor child or children . . . ." ***Dalton v. Dalton***, 858 S.W.2d 324, 327 (Tenn. App. 1993) (citing ***Salisbury v. Salisbury***, 657 S.W.2d 761 (Tenn. App. 1983)). In ***Dalton***, this court explained: "It is true that parents are equally responsible for furnishing necessaries for their children. T.C.A. Sec. 34-1-101. However, the expense of dealing with a situation created by one of the parents is properly chargeable to that parent in the

exercise of sound discretion." ***Id.***; ***Ragan v. Ragan***, 858 S.W.2d 332, 333-34 (Tenn. App. 1993).

Plaintiff relies on both ***Dalton*** and ***Ragan*** to support her claim to attorney's fees. In ***Dalton***, the court awarded the mother her attorney's fees incurred on appeal and affirmed the award of attorney's fees incurred at the trial level. ***Dalton***, 858 S.W.2d at 327. The facts of the case, unlike the present case, revealed that the father's actions caused the case to come to trial. Because he made it impossible for the couple to exercise joint custody, the mother was forced to seek a change of custody. ***Id.*** at 326-27. The court also awarded the mother her attorney's fees incurred on appeal in ***Ragan***. Once again, the court recognized that the father caused the mother to incur the expenses because he brought the appeal. ***Ragan***, 858 S.W.2d 333-34.

In the present case, there is no evidence that defendant's actions created a situation which caused plaintiff to bring an appeal for the benefit of the children. While it is true that the trial court awarded plaintiff a divorce because of defendant's inappropriate marital conduct, that conduct was not what instigated the present appeal. Instead, it was plaintiff's adherence to her belief that joint custody was unworkable which prompted the appeal. For these reasons, we are of the opinion that plaintiff is not entitled to her attorney's fees resulting from this appeal.

In his brief, defendant raised the issue of "[w]hether the trial judge abused her discretion in deviating from the child support guidelines based upon her subjective feelings that the father's economic picture would improve rather than basing the father's child support obligation upon the objective and undisputed evidence of the father's earning capacity, earning history, and his

income at the time of trial."

The child support guidelines "shall be applied as a rebuttable presumption in all child support cases." TENN. COMP. R. & REGS. ch. 1240-2-4-.02(7) (1994). The trial court may award an amount different than that required by the guidelines, if it finds "the evidence is sufficient to rebut the presumption that the application of the guidelines is the correct amount . . . ." ***Id.***

> [T]he court must make a written or specific finding that the application of the child support guidelines would be unjust or inappropriate in a particular case [and] must state the amount that would have been required under the guidelines and include a justification for deviation from the guidelines which takes into consideration the best interest of the child.

Id.

It is the opinion of this court that it is impossible to make the determinations necessary to deviate from the guidelines based on the information in the record of this case. To explain, it is impossible to determine if the evidence of defendant's income reflects his business' income or his personal income. Moreover, it is obvious that the net income figures were not calculated in accordance with the guidelines. For example, defendant claims that in 1988 his gross income was $132,800.00 and his net income was $-2,782.00. Under the guidelines, the court is to calculate the obligor's net income as follows:

> Net income is calculated by subtracting from gross income of the obligor's FICA (6.2% Social Security + 1.45% Medicare for regular wage earners and 12.4% Social Security + 2.9% Medicare for self-employed, as of 1991, or any amount subsequently set by federal law as FICA tax) the amount of withholding tax deducted for a single wage earner claiming one withholding allowance . . . and the amount of child support ordered pursuant to a previous order of child support for other children.

Id. 1240-2-4-.03(4). Given that defendant does not pay any other child support, it is inconceivable that the subtraction of the

other tax items listed in the guidelines from defendant's gross income would produce a negative net income.

Not only does the evidence fail to provide the information necessary to apply the guidelines, it does not establish that defendant was underemployed. The only evidence is that either his or his business' gross income has decreased since the 1988 gross income amount of $132,800.00. Nevertheless, the gross income amount reported for the first nine months of 1994, $97,415.00, is not much less than that reported for 1988.[1] We are of the opinion that the evidence does not preponderate in favor of the trial court's finding that defendant is underemployed.

The decision of the trial court as to child support is reversed and remanded. On remand, the trial court shall hear evidence on the amount of defendant's net income as defined in the guidelines and determine the correct net income amount. Thereafter, the court shall enter an order requiring defendant to pay child support equal to thirty-two percent of his net income as required by the guidelines. ***Id.*** 1240-2-4-.03(5).

For the foregoing reasons, the decision of the trial court is affirmed as to all findings except as to child support. In regard to child support, the finding of the court that defendant is underemployed is reversed. The case is remanded to the trial court to determine the amount of defendant's net income, to award the proper amount of child support, and to hear any further necessary proceedings. Costs on appeal are taxed one-half to

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[1] To elaborate, defendant's gross monthly income in 1988 was $11,066.00. In the first nine months of 1994, defendant's gross monthly income was $10,823.00. We determined defendant's 1988 gross monthly income by dividing the gross income reported by defendant on a document titled "Income History" by twelve. We determined defendant's gross monthly income for 1994 by fist adding together the figures provided by defendant for his photography business gross income, rental property income, and renovation income. We then divided the sum by nine.

plaintiff/appellant, Katherine Theresa DeVault, and one-half to defendant/appellee, James Canon DeVault, Jr.

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SAMUEL L. LEWIS, JUDGE

CONCUR:

_____
Henry F. Todd, P.J., M.S.

_____
Ben H. Cantrell, J.