IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

CAROL DENISE LICK STAPLES,	IN THE CHANCERY COURT OF FAYETTE COUNTY, No. 10851
Plaintiff-Appellee,	THE HONORABLE DEWEY C. WHITENTON, JUDGE
Vs.	C.A. No. 02A01-9604-CH-00091
	AFFIRMED
MELVIN RAY STAPLES,	John S. Wilder, Sr., Andrew S. Johnston of Somerville,
Defendant-Appellant.	For Appellee
	Richard G. Rosser of Somerville For Appellant

MEMORANDUM OPINION[1]

CRAWFORD, J.

This appeal involves child custody and visitation ordered by the trial court in a final decree of divorce.

Plaintiff, Carol Denise Lick Staples (hereinafter Mother), and defendant, Melvin Ray Staples (hereinafter Father), were divorced by decree entered March 3, 1995. The decree awarded each a divorce from the other upon grounds of inappropriate marital conduct and divided the marital property. The decree awarded temporary custody of their four year old child, Thomas, to Mother, but postponed a decision on the issue of permanent custody. After hearings to determine the issue of permanent custody and visitation, the court entered an order on September 13, 1995 that awarded joint custody of the child to the parties with Mother having custody and control from August 15 to June 15 of each year, and Father having custody and control from June 15 to August 15 of each year. The order granted Father visitation rights consisting of weekends in Minnesota provided that Mother has two weeks advanced notice, half of Christmas vacation and spring school vacation in Tennessee. The order also provided that each party may call the child by telephone while he is in the

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[1]Rule 10 (Court of Appeals). Memorandum Opinion. -- (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 When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in a subsequent unrelated case.

custody of the other and that each party may be with the child on the child's birthday. Father filed a "Motion to Alter, Amend, Rehear, or for New Trial" which was denied by the trial court. Father has appealed and presents four issues for review: (1) whether the trial court erred in considering the report of Mother's psychiatrist; (2) whether the trial court erred in granting joint custody of the parties' minor child with Mother being designated as the custodial parent; (3) whether the trial court erred in its order of visitation rights; and (4) whether the trial court erred in denying Father's Motion to Alter, Amend, Rehear or for New Trial.

Father testified that Mother tried to move to Minnesota with their child and their belongings without telling him. He alleged that Mother has a problem with prescription drugs, marijuana, and alcohol, and that she has emotional problems and suffers from depression. Father claims that he did not abandon Mother, but that she told him he could not stay, and that after the separation, he continued to send her money. Father claims that he is patient with the child, and has a good relationship with the child. He presented testimony that he is a good father, and that Mother yelled at and slapped the child. Father lives with his father, but would find a suitable place to live if he was awarded custody.

Mother and the child live with her parents in Brooklyn Park, Minnesota. She described her parents' home as very comfortable and relaxing with a clean and wonderful atmosphere for the child. She claims that Father abandoned her and the child on three different occasions. Mother explained that her prescription drug use and depression stemmed from a spider bite, and that she does not have any emotional problems. She admitted that she had used the marijuana with Father in the past but stated that she no longer uses it. Mother presented testimony that she was a good and loving mother, and claimed that she has never slapped the child. She claims that she has a loving relationship with the child and wants what is best for the child.

Father, in his first issue, asserts that the Chancellor erred in considering the report of Dr. Kenneth Klein, Mother's psychiatrist. Father's counsel objected to the use of the report on the grounds that the report was inadmissible hearsay, that the doctor was not subject to cross-examination, that the doctor testified without being under oath to testify truthfully, and

that the doctor gave an expert opinion without his qualifications being presented or tested. The Chancellor requested a psychological evaluation of the parties which was performed by a court-appointed psychiatrist, Dr. John Hutson. In addition, Mother presented a report by her doctor, Dr. Klein. Although both reports were hearsay and neither doctor was subject to cross-examination, the court considered both reports. In his Trial Opinion, filed August 30, 1995, the Chancellor stated, "[T]he Court has considered the psychological reports, realizing that cross-examination was not available and that such reports would normally not be admissible in an adversarial proceeding. The Court, of course, has reviewed all of the testimony and evidence in the cause in reaching the decision being delineated in this Trial Opinion." At the hearing of Father's Motion to Alter, Amend, Rehear or for New Trial, the Chancellor further stated as follows:

> I made this decision based -- you can ignore all the psychological reports. I made this decision based on the evidence that I heard and I put it in there. I stated that it was not admissible evidence. I made this decision based on the evidence I heard in Court.
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> * * * * * * *
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> I consider these reports as advisory only. They were not admissible because they were hearsay on both sides, and as I said, I made this evidence -- I considered this as background information and I've so stated in the Trial Opinion.

These reports were hearsay and should not have been admitted in evidence. Since we have determined that the trial court erred in allowing the report into evidence, we must now consider the effect of such error. T.R.A.P. 36(b) provides:

> **Rule 36**. **(b) Effect of Error.** A final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process.

After examining the record before us, we conclude that the admission of the reports was harmless error because the Chancellor based his decision on the evidence not the reports. There is ample evidence in the record to support the findings of the trial court. ***See Bishop v. R.E.B. Equipment Service, Inc.***, 735 S.W.2d 449 (Tenn. App. 1987). Therefore, the error in the admission of the report does not merit reversal of the trial court's decision.

In his second and third issues, Father argues that the trial court erred in awarding primary custody to Mother and in allowing only limited visitation rights to Father. Father asserts that the proof at trial showed that the child's best interest would have been served by granting him sole custody of the child.

Trial courts are vested with wide discretion in matters of child custody and the appellate courts will not interfere except upon a showing of erroneous exercise of that discretion. ***Mimms v. Mimms***, 780 S.W.2d 739, 744-45 (Tenn. App. 1989). In child custody and visitation cases, the welfare and best interests of a child are the paramount considerations and the rights, desires and interests of the parents become secondary. ***Neely v. Neely***, 737 S.W.2d 539, 542 (Tenn. App. 1987). In ***Bah v. Bah***, 668 S.W.2d 663 (Tenn. App. 1983), the Court established some guidelines for making the determination of best interest:

> We adopt what we believe is a common sense approach to custody, one which we will call the doctrine of "comparative fitness." The paramount concern in child custody cases is the welfare and best interest of the child. ***Mollish v. Mollish***, 494 S.W.2d 145, 151 (Tenn. App. 1972). There are literally thousands of things that must be taken into consideration in the lives of young children, ***Smith v. Smith***, 188 Tenn. 430, 437, 220 S.W.2d 627, 630 (1949), and these factors must be reviewed on a comparative approach:
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> > Fitness for custodial responsibilities is ***largely a comparative matter***. No human being is deemed perfect, hence no human can be deemed a perfectly fit custodian. Necessarily, therefore, the courts must determine which of two or more available custodians is more or less fit than others.
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> ***Edwards v. Edwards***, 501 S.W.2d 283, 290-91 (Tenn. App. 1973) (emphasis supplied).

Bah, 668 S.W.2d at 666.

The trial court must also consider the factors as set forth in T.C.A. § 36-6-106 (1996):

> **36-6-106. Child custody. --** In a suit for annulment, divorce, separate maintenance, or in any other proceeding requiring the court to make a custody determination regarding a minor child, such determination shall be made upon the basis of the best interest of the child. The court shall consider all relevant factors including the following where applicable:
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> (1) The love, affection and emotional ties existing between the parents and child;

> (2) The disposition of the parents to provide the child with food, clothing, medical care, education and other necessary care and the degree to which a parent has been the primary caregiver;
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> (3) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment;
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> (4) The stability of the family unit of the parents;
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> (5) The mental and physical health of the parents;
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> (6) The home, school and community record of the child;
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> (7) The reasonable preference of the child if twelve (12) years of age or older. The court may hear the preference of a younger child upon request. The preferences of older children should normally be given greater weight than those of younger children;
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> (8) Evidence of physical or emotional abuse to the child, to the other parent or to any other person; and
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> (9) The character and behavior of any other person who resides in or frequents the home of a parent and such person's interactions with the child.

Since this case was tried by the court sitting without a jury, we review the case ***de novo*** upon the record with a presumption of correctness of the findings of fact by the trial court. Unless the evidence preponderates against the findings, we must affirm absent error of law. T.R.A.P. 13 (d). This presumption applies in child custody cases. ***Hass v. Knighton***, 676 S.W.2d 554, 555 (Tenn. 1984).

The trial court was faced with conflicting evidence concerning the fitness of Mother and the fitness of Father as a parent. The trial judge as the trier of fact had the opportunity to observe these parties and their manner and demeanor on the witness stand, and the weight, faith and credit accorded to their testimony by the trial judge is entitled to great weight in this Court. ***Mays v. Brighton Bank***, 832 S.W.2d 347, 351-52 (Tenn. App. 1992); ***Sisk v. Valley Forge Ins. Co.***, 640 S.W.2d 844, 849 (Tenn. App. 1982).

Bearing in mind the mandate of a comparative fitness test and a review of the entire record in this case, we have reached the conclusion that the evidence does not preponderate against the finding by the trial court that the award of joint custody with primary custody to Mother is in the best interest of this child. The Chancellor considered carefully the factors set out by our General Assembly and the testimony of the witnesses, and he gave their testimony the weight, faith and credit which he felt the testimony deserved.

Father's next issue on appeal is whether the trial court erred in its decision on

visitation. He claims that the visitation granted by the trial court is limited and inequitable. In ***Edwards v. Edwards***, 501 S.W.2d 283, 291 (Tenn. App. 1973), this Court stated: "[T]he details of custody of and visitation with children are peculiarly within the broad discretion of the Trial Judge whose decisions are rarely disturbed." T.C.A. § 36-6-301 (1996) provides:

> **36-6-301. Visitation. --** After making an award of custody, the court shall, upon request of the non-custodial parent, grant such rights of visitation as will enable the child and the non-custodial parent to maintain a parent-child relationship unless the court finds, after a hearing, that visitation is likely to endanger the child's physical or emotional health.

We disagree with Father's assertion that the visitation schedule ordered by the trial court is "limited." We conclude, under the circumstances of this case, that the Chancellor's decision should not be disturbed. The best interests of the child are served by his decision, and Father and the child will still be able to maintain a parent-child relationship.

Finally, Father argues that the trial court erred when it denied his Motion to Amend, Alter, Rehear or for New Trial. He claims that the trial court erred in not allowing him to present evidence in support of his position that the visitation schedule was inequitable. The Chancellor refused to hear any new evidence about circumstances after the entry of the Custody/Visitation Order. The Chancellor stated, "[A]nything that's happened since the -- the entry of the Order is a whole new situation that you'll have to file for relief on. If she's in contempt of Court or whatever for not complying with the Decree, as far as visitation or anything else . . . then it seems to me that's a whole new -- that's a separate petition." The hearing on the Motion to Alter, Amend, Rehear or for New Trial was not an evidentiary hearing but was an opportunity to argue mistakes of law by the trial court. The Chancellor correctly refused to consider matters not properly encompassed in a post-trial motion.

Accordingly, the judgment of the trial court is affirmed. Costs of appeal are assessed against the appellant.

W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.

CONCUR:

ALAN E. HIGHERS, JUDGE

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DAVID R. FARMER, JUDGE