JULIA JONES,	)	
	)	
Plaintiff/Appellee,	)	
	)	Appeal No.
	)	01-A-01-9601-CV-00038
VS.	)	
	)	Sumner Circuit
	)	No. 14204-C
SAMUEL ROBERT JONES, JR.,	)	
	)	
Defendant/Appellant.	)	

FILED

September 11, 1996

Cecil W. Crowson
Appellate Court Clerk

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

APPEALED FROM THE CIRCUIT COURT OF SUMNER COUNTY
AT GALLATIN, TENNESSEE

THE HONORABLE THOMAS GOODALL, JUDGE

GARY M. WILLIAMS
116 Shivel Drive
Hendersonville, Tennessee 37075
Attorney for Plaintiff/Appellee

JOE P. BINKLEY
First American Center, Suite 2395
315 Deaderick Street
Nashville, Tennessee 37201

THOMAS F. BLOOM
500 Church Street, 5th Floor
Nashville, Tennessee 37219
(Appeal Only)
Attorneys for Defendant/Appellant

AFFIRMED IN PART; REVERSED IN PART;
AND REMANDED

BEN H. CANTRELL, JUDGE

CONCUR:
TODD, P.J., M.S.

CONCURRING IN PART AND
DISSENTING IN PART:
KOCH, J.

O P I N I O N

The trial court granted the parties a divorce, and awarded joint custody of the four children of the marriage to both parents. Actual physical custody of the two older children was granted to the father; physical custody of the two younger children was granted to the mother. The father appealed, arguing that he was the more fit parent, that it was error to separate the children, and that he should have been granted physical custody of all four. We reverse the award of joint custody to both parents. In all other respects, we affirm the trial court.

I.

Samuel Robert Jones Jr. and Julia Jones were married in 1977. The parties had many problems during their eighteen years of marriage. Their difficulties with one another apparently came to a head in April of 1995, during a stormy episode in which Mr. Jones allegedly assaulted his wife.

The couple separated, and the wife applied to the Circuit Court of Sumner County for an Order of Protection against the husband. The court granted the wife an Ex Parte Order of Protection on April 18, 1995. After subsequent hearing, the court made the Order of Protection permanent.

The terms of the order left Mrs. Jones with temporary custody of Sam Paul Jones II, then age 12 and Stephen Jones, then age 10. Mr. Jones was granted temporary custody of Christie Jones, age 16 and August Jones, age 15. The order contained provisions for regular visitation by all the children with the non-custodial parent. The wife was granted temporary possession of the marital home, and the

husband was ordered to pay her $285 per week in temporary alimony and child support.

The wife filed for divorce on May 10, 1995 and asked for custody of all four children. The husband answered and counter-claimed, also asking for custody of all the children. Subsequent to these pleadings, both parties filed motions with the court: the wife filed a Motion for Contempt against the husband, claiming that he failed to make child support payments in a timely way; the husband filed a Motion to Amend the Order of Protection, asking the court to terminate visitation by the two older children, on the ground that they did not want to visit with their mother, and that they in fact refused to allow the father to take them to their mother for their scheduled weekend visitation.

On June 27, 1995, the court conducted a hearing on both motions. Much to the surprise of both parties, the court's subsequent order declared the parties to be divorced as of the date of the hearing, with the issue of fault reserved pending a final hearing. The custody arrangement in the Order of Protection was continued as it was. The issue of visitation was held under advisement, with neither party compelled to deliver the children in their custody for visitation to the other. Future support payments by the husband were ordered to be paid by wage assignment from his employer. The court also ordered the Department of Human Services to conduct home studies of both parties.

The husband and wife had been undergoing counseling from William H. Anderson, Ed.D., a Licensed Clinical Psychologist and Certified Addiction Counselor, following an episode a year earlier, when the husband had been involved in an alcohol-related car wreck. The psychologist had also seen the two older children as the therapeutic relationship with the parents developed. Prior to final hearing, the

husband filed a motion, which the court granted, to compel the wife to make the two younger children available to Dr. Anderson for psychological evaluation.

The final hearing was held on September 26, 1995. Dr. Anderson was the only witness to testify. He strongly commended the parenting skills of Mr. Jones and his dedication to his children. At the same time, he found the wife to be "experiencing some very abnormal internal responses to life." He had held two sessions at which all four children were present, and he expressed the opinion that it was in the best interest of the children that they be reunited with each other and with the father.

Nonetheless, on October 17, 1995, the trial court entered a Final Decree of Divorce, which ordered that custody continue to be divided in the same way as in the Protective Order. The court declined to set specific visitation at that time, but recited that it "strongly encourages the parents and children to work together in arranging liberal visitation. If such arrangements cannot be made, then either party may, by motion, ask the Court to set specific visitation."

In response to a subsequent motion by the husband to set specific visitation with the younger children, and also to alter and amend the Final Decree of Divorce, and to stay the court's order pending appeal, the court ordered that the younger children visit with their father every other weekend from Friday at 5:00 p.m. to Sunday at 6:00 p.m. The court also recited that it ". . . would want the parties' two oldest minor children, Christie Elise Jones and August Samuel Leonard Jones, to visit with their mother, but the Court is not issuing a mandate pursuant to that end." The court denied the other relief requested by Mr. Jones. This appeal followed.

II.

The proper standard of appellate review in child custody cases is *de novo* upon the record with a presumption of the correctness of the trial court's findings. See *Hass v. Knighton*, 676 S.W.2d 554, 555 (Tenn. 1984). The paramount consideration in determining child custody is the welfare and best interest of the child or children involved. *Bah v. Bah*, 668 S.W.2d 664 (Tenn.App. 1983). The expert opinion of a psychologist who has examined family members can be of great help to the court in determining which parent is best qualified to exercise custody, but it is not a substitute for the judgment of the trial court, or of this court. See *Starnes v. Starnes*, No. 01-A-01-9010-CV-00373 (Middle Section, Court of Appeals, filed March 6, 1991).

We must accord the determination of the trial court great deference on appeal, because the court had the opportunity to observe the manner and demeanor of the witness on the stand, and our own review is limited to the written record alone. See *Town of Alamo v. Forcum-James Co.*, 205 Tenn. 478, 327 S.W.2d 47 (1959). Dr. Anderson's credibility has not been put at issue by the appellee, but the weight that should be accorded his testimony was properly a matter for the trial court's judgment.

Dr. Anderson is not a child psychologist, nor is he a psychiatrist. He never visited the parties at home, but had to glean all his information from a series of fifty minute sessions in his office. He found that the wife harbored delusions, including beliefs that the husband was having affairs, and that he had an improper relationship with the daughter.

Dr. Anderson encouraged Mrs. Jones to keep a diary of her thoughts, then read pages of the diary into the record during his testimony. Though we have grave reservations about such a breach of the confidential relationship between psychologist and patient, the wife did not object at trial, and so we must consider the import of those pages.

The writings of Mrs. Jones clearly revealed great anger towards men, an inability to relate to other women, some bizarre suicidal ideation, and a belief that her psychological problems arose from sexual abuse she had experienced as a young child at the hands of a family friend. Dr. Anderson characterized one passage as "homicidal as well as suicidal" which read "I have a cast iron skillet, 12-inch, forged in South Pittsburgh at Lodge Manufacturing, and I will not hesitate to use it if provoked."

We do not quarrel with Dr. Anderson's conclusion that Mrs. Jones suffers from psychological problems, nor with his recommendation that she seek further counseling, although we suspect that fear of disclosure of confidential revelations may discourage her from pursuing her therapeutic options. However we do not believe that Mrs. Jones' psychological condition necessarily disqualifies her from custody of her younger children.

The home study ordered by the court included an examination of the living conditions and arrangements in her home, an interview with Mrs. Jones about such matters as family social activities and her attitude towards discipline, and contacts with three references supplied by Mrs. Jones. On the basis of this investigation, the DHS social counselor concluded: "After a thorough home study of Mrs. Jones, this agency believes her home is appropriate and the children would be well taken care of if she were granted custody."

The report cards of Sam Paul and Stephen for the first six weeks of the 1995-96 school year were made a part of the record. They did not indicate any conduct or discipline problems, and they showed regular attendance. Both boys earned high grades, and appear to be honor students. Since problems at home often manifest themselves in school as well, this further indicates the wife's fitness to care for the children.

III.

In his counter-complaint for divorce, Mr. Jones alleged that "there has been an enormous amount of turmoil in the parties' marriage caused by the wife's erratic and unpredictable behavior towards the children and him." Among other things, the husband claimed that the wife had more than once driven recklessly in order to frighten the children, that she had neglected and insulted the daughter, that she had told all the children that she hated them and wished they had never been born, and that the children had come home from school on occasion to find the house unlocked, with no one at home.

This court does not take such allegations lightly, but the wife denied them in her answer to the counter-complaint, and if the husband attempted to prove them at the hearing of June 27, 1995, we unfortunately have no basis upon which to review his testimony, as the record before us does not contain a transcript from that hearing. The husband claims that he is afraid that the wife will harm the children, but apparently the only legal actions he has ever taken to protect them are the current proceedings for custody.

There is evidence in the record, however, that the husband was verbally abusive towards the wife, and that he had a t-shirt made up, which he wore in the presence of the children, that read "Married to a Whore and a Slut." He also taped the wife while she slept (she talked in her sleep) and played the tape for the children. He also admitted telephoning her over 150 times over a three month period after resuming visitation with the younger children, demanding to speak to them. If he really feared that the wife's psychological condition might lead her to harm the children, surely he would not have risked worsening that condition by demeaning and harrassing her.

Pursuant to the orders of the court, Dr. Anderson met with the two younger children twice. Both sessions were conducted with the older children in attendance as well. Dr. Anderson concluded from the two interviews that "these four children need to live together," because "[i]n many respects the two older children are the role models providing warmth, love, care, and support that the two younger boys need." However, despite his reliance on Dr. Anderson's expertise, the father has apparently made no effort to maximize contact between the older and younger children by encouraging the older children to visit with their mother, and no such visitation has occurred, in defiance of the trial court's twice-expressed wishes. By contrast, the wife has fully cooperated with the trial court's order to allow the husband visitation with the younger children.

The record shows that the husband has demonstrated a vindictive attitude towards the wife that is not conducive to the best interests of the children. We accordingly believe that his fitness to exercise custody has not been shown to be greater than hers. In light of all the proof in this case, we cannot say that the evidence preponderates against the determination of the trial court that the husband should exercise physical custody of the older children only, and that the wife should exercise custody of the younger children.

We do have a problem, however, with the court's decision to designate the custody arrangement it has reached as joint custody. While arrangements for joint custody or shared parenting are specifically permitted by statute "as the welfare and interest of the child or children may demand," Tenn. Code Ann. § 36-6-101(a), this court has repeatedly pointed out that joint custody arrangements will rarely succeed where there is hostility and ill will between the parents. *Gray v. Gray*, 885 S.W.2d 353 (Tenn. Ct. App. 1994), *Malone v. Malone*, 842 S.W.2d 621, 623 (Tenn. Ct. App. 1992), *Dodd v. Dodd*, 737 S.W.2d 286, 289-90 (Tenn. Ct. App. 1987).

Of course in many cases where a court orders joint custody, it also dictates in what manner the custodians will exercise their joint responsibilities. In some cases, actual physical custody alternates between the parents. *Garner v. Garner*, 773 S.W.2d 245 (Tenn. App. 1989). *McDaniel v. McDaniel*, 743 S.W.2d 167 (Tenn. App. 1987). In others, physical custody remains with one parent while the other gets to participate in decision-making on a matter of importance, such as the education of the minor child. *Lewis v. Lewis*, 741 S.W.2d 900 (Tenn. App. 1987). Such arrangements depend for their success on a high degree of cooperation between the parents, so it is perhaps not surprising that they should frequently fail.

In the present case, the court failed to state how the parties should share the parenting responsibilities for the children not in their custody. The trial court conceded that the decision to award the parents joint custody was a "cop-out" and that it was motivated by the desire that Ms. Jones not believe that she has "been robbed . . . of her two other children." While a trial court may tailor the language of a divorce or custody decree in such a manner as to avoid increasing the rancor between the parties, it is debatable whether the welfare of the children is served by establishing the fiction that the parties will be sharing responsibility for their upbringing, when in fact they seem unable to agree on anything.

We therefore modify the order of the trial court by eliminating that portion of it relating to joint custody. We also direct the trial court to enter an order establishing a well-defined liberal arrangement that will permit these children to have a significant relationship with both of their parents and all of their siblings. We note that the court retains the right to restrict the visitation rights of either party, if that party fails to comply with the visitation order, or acts in such a manner as to damage the relationship of any of the children with the non-custodial parent.

IV.

The husband's appeal also involved several issues involving property and alimony, which we will deal with briefly.

The trial court awarded the marital home to the wife. The husband asked us to award the marital home to him, in the event we modify child custody in accordance with his wishes, so that the four children could continue to live in the home that they grew up in. Since we affirm the trial court on custody, we also affirm the allocation of marital property.

The husband also claimed that the trial court abused its discretion in ordering the husband to pay the wife $100 per week in transitional assistance for six months. We note that the husband is gainfully employed, and earns over $38,000 a year managing a business owned by his father. Though the wife has a teaching license, she has not practiced that profession since the birth of her oldest child. Prior to the divorce, she inherited some money from her father, and bought a limousine with the intention to start a limousine service. The new business has apparently not worked out, and given the wife's age, and her long absence from the job market, the need for rehabilitative alimony appears to us to be clear.

During the marriage, the wife was insured under the health plan supplied by the husband's employer. After the trial court declared them divorced, the husband eliminated the wife's insurance coverage but failed to notify her that he had taken that step. The wife underwent a tubal ligation prior to October 17, 1995, the date on which the Final Decree of Divorce was filed, incurring expenses of about $5,100.

The husband argues that once the parties were declared to be divorced, he was not prohibited from cancelling her insurance, and that he was not obligated to notify her of his action. The trial court ordered the husband to pay the outstanding medical bills, and to hold the wife harmless for them. While it is generally true that a

party cannot be held liable for a debt incurred by a former spouse after the dissolution of a marriage, see 27B C.J.S. *Divorce* § 547 (1986), we are persuaded that under the unusual circumstances of this case, the trial court's action was correct.

V.

The judgment of the trial court awarding joint custody to the parties is reversed. The remaining part of the judgment is affirmed. Remand this cause to the Circuit Court of Sumner County for further proceedings consistent with this opinion. Tax the costs on appeal to the appellant.

_____
BEN H. CANTRELL, JUDGE

CONCUR:

_____
HENRY F. TODD, PRESIDING JUDGE
MIDDLE SECTION

WILLIAM C. KOCH, JR., JUDGE
SEPARATE OPINION CONCURRING IN
PART AND DISSENTING IN PART