IN THE COURT OF APPEALS

MICHELLE MARIE YOUNG NELSON,	)	LOUDON GENERAL SESSIONS
	)	C.A. NO. 03A01-9602-GS-00065
	)	
Plaintiff-Appellant	)	
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	)	
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	)	
vs.	)	HON. JOHN GIBSON
	)	JUDGE
	)	
	)	
	)	
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	)	
ROBERT RICHARD NELSON,	)	AFFIRMED IN PART, MODIFIED IN
	)	PART AND REMANDED WITH
	)	INSTRUCTIONS
Defendant-Appellee	)	

L. CAESAR STAIR III, and ELIZABETH K. B. MEADOWS, Knoxville, for Appellant.

JOHN D. LOCKRIDGE and SCARLETT A BEATY, Knoxville, for appellee.

OPINION

McMurray, J.

This action began as a divorce action between the parties. After an extensive bench trial, the court awarded a divorce pursuant to T.C.A. § 36-4-129. Custody of the parties minor children was given to the husband with the wife having specified visitation privileges. The court further ordered child support to be paid in accordance with the Child Support Guidelines; however no specific amount of child support was established. Finally, the court divided the marital property between the parties. From the judgment of the trial court this appeal resulted. We affirm in part, modify in part and remand with instructions.

Generally stated, the appellant wife takes issue with the court's judgment regarding child custody and visitation. She further complains that the trial court erred in making a disposition of the family home.

The appellee husband complains of the court's failure to establish and award child support during the pendency of the divorce action and in failing to establish a specific amount of child support.

Our standard of review in non-jury cases is governed by Rule 13(d), Tennessee Rules of Appellate procedure. "Unless otherwise required by statute, review of findings of fact by the trial court in civil actions shall be de novo upon the record of the trial

court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." In a de novo review, the parties are entitled to a reexamination of the whole matter of law and fact and this court should render the judgment warranted by the law and evidence. Thornburg v. Chase, 606 S.W.2d 672 (Tenn. App. 1980); American Buildings Co. v. White, 640 S.W.2d 569 (Tenn. App. 1982); Tennessee Rules of Appellate Procedure, Rule 36. We note that no such presumption attaches to conclusions of law. See Adams v. Dean Roofing Co., 715 S.W.2d 341, 343 (Tenn. App. 1986).

These parties met at a fundamentalist church which they both attended. They were married in July, 1984. At that time, Mr. Nelson was a claims representative for Allstate Insurance Company and Dr. Nelson had recently received her Doctorate of Veterinary Medicine degree. Dr. Nelson worked somewhat intermittently during the next two years. Testimony at trial indicated that job stress in conjunction with Mr. Nelson's desire to have a full-time housewife led to this arrangement.

In the fall of 1986 the Nelsons moved to Tennessee. Mr. Nelson was still working as a claims representative for Allstate Insurance. Dr. Nelson did not seek employment outside the home because the parties planned to start a family and she was to stay home and be a full-time mother and wife. The first of two sons,

Jonathan, was born on June 22, 1988, and Ethan was born on Oct. 1, 1990.

In late 1993, Dr. Nelson began suffering from severe depression. She spent ten days in the hospital. The day after she returned home, November 24, while she was in the shower, Mr. Nelson, aided by his mother, took the two young boys away from the home. Mr. Nelson, his sons and his mother stayed in various hotels pending the filing of this action. Mr. Nelson filed a complaint for divorce and sought an ex parte temporary injunction prohibiting Dr. Nelson from interfering with his custody of the children and his possession of the marital home.

On December 14, 1993, a hearing was held regarding the temporary custody of the two young sons. Mr. Nelson retained custody while Dr. Nelson was allowed to see her sons for two hours every other day.

The case was thereafter tried on the merits at a bench trial which lasted four days. After hearing testimony from numerous witnesses called on behalf of each party and the parties themselves, including several clinical psychologists, the trial court granted the divorce, awarded sole custody of the children to Mr. Nelson, ordered that the parties would retain the marital residence as tenants in common, with Mr. Nelson having an option to purchase

Dr. Nelson's interest in the home for $24,000.00 with payments spread over ten years at 5% interest.

We will first look to the issue of child custody. In Bah v. Bah, 668 S.W.2d 663 (Tenn. App. 1983), this court recognizing that the paramount concern in child custody cases is the welfare and best interest of the child, adopted "what we believe is a common sense approach to custody, one which we will call the doctrine of 'comparative fitness.'" Id. at 666. The Bah court further stated that "[f]itness 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 the two or more available custodians is more or less fit than others."

There was extensive evidence introduced at the trial relating to the comparative fitness of each parent. We see have no reason to set out in detail the strengths and weaknesses of either party. To do so would serve no purpose. The record reflects that the court did apply the "comparative fitness test" in making his custody determination. Suffice it to say that the evidence does not preponderate against the trial court's custody determination. Further, in child custody cases trial courts are vested with wide discretion in matters of child custody and reviewing courts will not interfere except upon a showing of an abuse of discretion.

Grant v. Grant, 39 Tenn. App. 539, 286 S.W.2d 349, 350 (1954); Marmino v. Marmino, 34 Tenn. App. 352, 238 S.W.2d 105, 107 (1951). We affirm the trial court's award of custody to the appellee.

We will next look to the issue of child support. Trial courts are required to determine the amount of child support based upon the provisions of the Child Support Guidelines promulgated by the Department of Human Services. The amount calculated pursuant to the guidelines carries with it a rebuttable presumption that the amount is reasonable. See T.C.A. § 36-5-101. In this case the court stated in its final judgment:

* * * *

> 4. **CHILD SUPPORT**: The wife shall pay weekly child support to the husband commensurate with the child support guidelines except during the period of time in the summer when the children are with her.
>
> The husband shall pay weekly child support to the wife commensurate with the child support guidelines during the summer when the wife has visitation with the exception of the third week in July during which time no child support shall flow from either party.
>
> The husband shall also pay child support commensurate with the guidelines to the wife during the last two weeks in December of each year.

* * * *

In our opinion, the above provisions do not comply with the Child support guidelines or T.C.A. § 36-5-101 in that the court failed to make a determination of the amount of child support which

should have been ordered under the child support guidelines. Accordingly, we are of the opinion that the case must be remanded for a determination of the child support payable under the child support guidelines and if a deviation is allowed, a written finding that the application of the child support guidelines would be unjust or inappropriate in accordance with T.C.A. § 36-5-101.

The husband raises a further issue relating to child support. He insists that the wife should have been required to pay child support and contribute to medical and dental expenses during the pendency of the divorce. Since on remand, the court is to consider child support in accordance with the Child Support Guidelines, we do not find it necessary to address the matter further.

In our next inquiry we will examine the issue of visitation privileges granted to the mother. The court set out specific visitation privileges as follows:

> [The wife shall have visitation rights on] the first and third weekends, when the husband has full custody, from Friday evenings at 6:00 p.m. until Sunday evening at 6:00 p.m.; from the day school is out at Christmas until New Year's day at 6:00 p.m., except husband is to have children on Christmas Day of each year from 9:00 a.m. until 7:00 p.m.; spring vacation from school; three hours from 5:00 p.m. until 8:00 p.m. on Thursday of each week wife does not have weekend visitation; in the summer months from two days after school is out until two days before school starts, the wife is to have custody of the children with the husband to have same visitation rights as the wife except the third week in July he shall have

the children for one full week to take them on a vacation trip.

By an amended final judgment, the court extended the mother's visitation to include Wednesday and Thursday from 5:00 p.m. until 8:00 p.m. of each week that she does not have weekend visitation. We find the visitation privileges granted to the mother to be quite liberal. She complains, however, that the Wednesday and Thursday visits should be overnight visits rather than limited to 8:00 p.m. We find the visitation granted to the wife to be reasonable. It is in the best interest of the children that there be some degree of stability in the home life of the children. We believe that further overnight visitation would further disrupt an already unsettling home life. We decline to increase the visitation privileges granted to the mother.

The husband complains that the court erred in granting full summer visitation privileges to the mother and in holiday visitation. We recognize that the trial court has wide discretion in matters of child support, custody and visitation. The details of custody and visitations are peculiarly within the broad discretion of the trial court. Edwards v. Edwards, 501 S.W.2d 283 (Tenn. App. 1973). Our review of the trial court's decision regarding visitation is de novo with the presumption that the trial court's findings of fact are correct, but we review the details of the

trial court's visitation arrangement to determine whether the trial court abused its discretion. Neely v. Neely, 737 S.W.2d 539, 544 (Tenn. App. 1987). In reviewing the trial court's decision, we note that the welfare of the child has always been the paramount consideration for the courts. Luke v. Luke, 651 S.W.2d 219, 221 (Tenn. 1983).

Upon consideration, we are of the opinion that the trial court was in error in granting full summer visitation to the mother, reserving only one week in July to the father. We, therefore, modify the judgment of the trial court to allow the father two weeks in July rather than one. In all other respects the judgment of the trial court, as to visitation, is affirmed.

The appellant also complains of the way and manner in which the court made disposition of the marital residence. The court ordered that the parties would retain title to their real property as tenants in common subject to the following:

> a. The husband shall for a period of fifteen (15) days, have the option to purchase the wife's interest at the sum of $24,400.00 secured by a second mortgage loan on the property and payable at the rate of $2,440.00 per year on the principal, plus 5% interest on the unpaid balance.
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> b. If the husband does not exercise said option, the wife shall have the same option for a period of fifteen (15) days from the date the husband's option

expires. The time will begin on the date the final decree is entered and no appeal of this case is made.

c. During this period the person in possession shall be responsible for mortgage payment, and shall keep insurance in full force and effect. The equity shall be considered as profit to be divided by tenants in common on sale.

d. If neither party exercises this option, and no agreement can be reached by the parties as to disposition of the property, then either party may petition the court for a court sale of the property for division.

We are of the opinion that the disposition of the marital residence by the court is inequitable as to the wife in that the interest rate to be paid by the husband is well below the established market. Secondly, we agree with the appellee that the trial court's judgment is unclear in that it also states that the equity would be considered as profit to be divided by tenants in common on sale.

On remand, we are of the opinion that the marital residence should be sold either as the parties may agree or as the court shall order, absent an agreement, and the equity in the property divided equally between the parties.

In our discretion, costs of this appeal are taxed equally between the parties. This case is remanded to the trial court for such other and further action as may be required consistent with this opinion.

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Don T. McMurray, J.

CONCUR:

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Herschel P. Franks, J.

_____
Clifford E. Sanders, Sp. J.

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ROBERT RICHARD NELSON,	)	AFFIRMED IN PART, MODIFIED IN
	)	PART AND REMANDED WITH
	)	INSTRUCTIONS
Defendant-Appellee	)	

ORDER

This appeal came on to be heard upon the record from the General Sessions Court of Loudon County, briefs and argument of counsel. Upon consideration thereof, this Court is of the opinion that there was reversible error in the trial court.

This case is remanded to the trial court for such other and further action as may be required consistent with this opinion. In our discretion, costs of this appeal are taxed equally between the parties.

PER CURIAM