IN THE COURT OF APPEALS OF TENNESSEE
FOR THE WESTERN SECTION
AT JACKSON

ANGEL CHANDLER,	)	
	)	
Appellant-Respondent,	)	
	)	**No.** _____
v.	)	
	)	**Gibson County Chancery Court**
JOSEPH MARION BARKER,	)	**No. 16979**
	)	
Appellee-Petitioner.	)	

BRIEF OF APPELLANT-RESPONDENT ANGEL CHANDLER

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STATEMENT OF THE ISSUE

Whether the trial court, on remand from this Court, erred as a matter of law and infringed upon Ms. Chandler's constitutional rights by continuing to impose, *sua sponte*, an overnight "paramour" restriction despite undisputed evidence that the restriction is contrary to the best interests of the children and despite the absence of any evidence in the record that would support a conclusion that such a restriction is in the best interests of the children?

STATEMENT OF THE CASE

This case presents a troubling example of a trial court demonstrating its unwillingness to adhere to the law by ignoring the overwhelming evidence of record regarding the best interests of the children. These unusual circumstances require not merely a second reversal of the trial court, but the entry by this Court of an expedited order reversing the trial court and ordering that the permanent parenting plan order in this case not contain the overnight paramour restriction imposed by the trial court. That restriction infringes on Appellant-Respondent Angel Chandler's rights as a parent to exercise visitation with her children and rights as an individual to be free from government intrusion in her relationship with her partner of nine years, in the absence of any evidence that such a clause serves the best interests of the two teenage children in this matter.

This is the second time this matter comes before this Court as a result of the *sua sponte* imposition of an overnight paramour restriction by the Gibson County Chancery Court. Previously, even though no evidence then existed in the record to demonstrate that such a restriction was necessary as being in the best interest of the parties' minor teenage children, the trial court originally imposed this restriction because of its mistaken belief that the laws and public policy of the State of Tennessee, as embodied in Rule 23:00 of the Local Rules of the 28th Judicial District ("Local Rule 23"),[1] mandated the inclusion of an overnight paramour restriction in every case and without exception.

[1] Local Rule 23 purported to amend the Permanent Parenting Plan Order form developed and promulgated by the Administrative Office of the Courts by requiring the inclusion of the following restriction on a parent's visitation and custody rights: "Any paramour of either parent to whom a parent is not legally married is not to spend the night in the presence of or in the same residence with any minor child of the parties." No revisions to Local Rule 23 have been adopted in response to this Court's September 19, 2009, Opinion.

Ms. Chandler timely appealed and Mr. Barker did not oppose Ms. Chandler on appeal and did not file any brief.[2] On September 18, 2009, this Court issued its opinion reversing the decision of the trial court and remanding to allow the trial court to reconsider in light of the Court's holding that the trial court's conclusion that Local Rule 23 mandated such a restriction was erroneous as a matter of law.[3] In its opinion, this Court noted that "the trial court's decision to include the paramour provision did not arise from a finding based on evidence that such a provision was in the best interests of these children."[4] This Court made clear that the trial court, on remand, must determine whether the imposition of a "paramour" restriction "serves the children's best interest in this case."[5]

On remand from this Court, the trial court concluded that a hearing was required to determine the best interests of the children, despite the fact that ample undisputed evidence was already in the record, including but not limited to the report of the court-appointed psychologist, Dr. David Pickering, whose findings and methodology have never been questioned by any party or the trial court. Dr. Pickering's report was discussed by this Court in its September 18, 2009, opinion. Further, the trial court insisted on a hearing even though Mr. Barker continued to not oppose Ms. Chandler's position regarding the overnight paramour restriction. As the transcript of the December 3, 2009, proceedings before the trial court reflect, the trial court justified its view that a hearing was necessary based on the fact that this Court's order referenced "further

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[2] Given that state of affairs, Ms. Chandler filed a motion pursuant to Tenn. R. App. P. 29 to have the case submitted on the record and Ms. Chandler's brief.

[3] Barker v. Chandler, No. W2008-02255-COA-R3-CV, 2009 Tenn. App. LEXIS 631, at *15-16 (Tenn. Ct. App., Sept. 18, 2009) (copy attached as Exhibit A).

[4] Id. at *11.

[5] Id. at *16.

proceedings consistent with this Opinion."[6] Moreover, in the interim, and despite the reversal and remand from this Court, the trial court insisted that the overnight paramour restriction should remain in place until a hearing was held and a ruling issued, apparently on the basis that, despite this Court's reversal of his prior ruling, not keeping the overnight paramour restriction in place would somehow have amounted to "prejudg[ing]" the matter.[7]

On March 24, 2010, the trial court held a hearing at which the only witnesses to testify were Ms. Chandler and Mr. Barker (who was called by the trial court and again did not oppose Ms. Chandler's position). At the completion of that hearing, and after hearing argument from the parties, the trial court ruled from the bench that it was in the best interests of the children for the overnight paramour restriction to be included in the permanent parenting plan order. The trial court's ruling was memorialized in an Order entered on May 10, 2010, which attached and incorporated the transcript of the March 24, 2010, hearing. The trial court's articulated rationale for doing so did not point to any specific circumstances relating to the parties' children nor to any evidence, much less definite evidence, that the children would be harmed in the absence of such a restriction, and ignored the record evidence that the relationship of the children with Ms. Chandler's partner was a positive one.[8]

On May 27, 2010, Ms. Chandler filed her Notice of Appeal.[9] Mr. Barker has again indicated, through his counsel of record, that he will not oppose Ms. Chandler on appeal and will not file a brief, and Ms. Chandler has contemporaneously filed a motion under Tenn. R. App. P.

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[6] December 3, 2009, transcript at 13-17.

[7] See December 3, 2009, transcript at 20.

[8] See March 24, 2010, hearing transcript at 62.

[9] Ms. Chandler originally attempted to file her Notice of Appeal and the December 3, 2009, and March 24, 2010, transcripts on May 20, 2010. The Notice of Appeal and the transcripts were not filed by the trial court clerk, but instead were returned to Ms. Chandler's counsel by mail. Ms. Chandler submitted a second Notice of Appeal, and the trial court clerk has confirmed to Ms. Chandler's counsel that this Notice of Appeal was accepted and filed on May 27, 2010.

2 requesting that this Court suspend certain aspects of the rules, including the requirements in Tenn. R. App. P. 24, 25, and 26, so that the determination of this appeal can be expedited because if the trial court's erroneous ruling is not immediately reversed, the result will be to entirely prevent Ms. Chandler from being able to have summer visitation at her home with her children this year.[10]

[10] See March 24, 2010 Hearing Transcript at 28 ("Q. The 30 days that we have in June after school is out in May, that's your parenting time. A. Yes. Q. Those days divide up about 50 days for you and about 315 days for Mr. Barker. A. (Witness nods in positive.) Q. Thirty of those 50 days are the month of June.").

STATEMENT OF THE FACTS

The majority of the facts in this matter relevant to the Court's consideration on appeal were set forth by this Court in its earlier opinion in this matter. For convenience, that portion of this Court's opinion is reproduced below:

> Angel Chandler ("Mother") and Joseph Marion Barker ("Father") were married in February 1992. They had two children during the marriage, Z.B., born April 9, 1993 ("Son"), and C.B., born May 10, 1995 ("Daughter").[11] After Father engaged in an extramarital affair with his now-current wife, Mother filed a petition for divorce. In November 1998, the trial court entered a final decree of divorce, in which Mother was designated as the primary residential parent of Daughter, and Father was designated as the primary residential parent of Son. Each parent had regular parenting time with the child who lived with the other parent. This parenting plan did not include any provision restricting the parents from having any person present, overnight or otherwise, while the child resided with the parent.
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> About a year after the divorce, Mother began a relationship with a same-sex partner, M.C., with whom she now lives. At some point, Father married his current wife. In January 2001, upon agreement of the parties, the trial court modified the parenting plan to designate Mother as the primary residential parent of Son as well as Daughter. This modified parenting plan likewise did not prohibit the parties from having an overnight paramour in the presence of the children.
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> In August 2002, Mother moved to North Carolina with her partner M.C. At that time, Mother and Father agreed that Father would be the primary residential parent for the children. Several years later, Mother moved back to Trenton, Gibson County, Tennessee, where Father lived along with his wife ("Stepmother") and the children. Mother's partner, M.C., lived in both North Carolina and in Trenton with Mother, "splitting time" between the two states.
>
> After Mother moved back to Tennessee, on May 22, 2007, Father filed a petition to modify the parties' parenting plan. Mother filed a counter-petition for modification. On November 19, 2007, the trial court entered a consent order requiring all of the parties involved -- Father, Mother, Stepmother, M.C., and the two children -- to make themselves available for psychological evaluations and testing. The trial court also ordered that, pending final resolution, Father would be the primary residential parent of Son, and Mother would be the primary residential parent of Daughter.

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[11] Z.B. is now seventeen years old, and C.B. is now fifteen years old.

The court-ordered evaluations were conducted by clinical psychologist David Pickering, Ph.D. ("Dr. Pickering"). On May 1, 2008, after completing the evaluations, Dr. Pickering submitted his report to the trial court. The report detailed the results of the mental status examinations and psychological testing for each subject, as well as observations about the parties' interactions with their respective partners and with the children. The report indicated that Son had a positive relationship with both parents, as well as Stepmother and M.C. The report also indicated that Daughter had a positive relationship with Mother and M.C., and that she had a fair relationship with Father. However, Dr. Pickering had substantial criticism of Stepmother and her parenting of Daughter, and he indicated that, unfortunately, Father tended to follow Stepmother's lead with Daughter. He characterized Daughter's relationship with Stepmother as quite problematic. Dr. Pickering indicated that Daughter suffered from depression stemming from her difficult relationship with Stepmother and opined that requiring Daughter to continue to reside with Stepmother would cause Daughter's emotional condition to further deteriorate.

In the conclusion of his report, Dr. Pickering recommended that Father remain the primary residential parent of Son, and that Mother remain the primary residential parent of Daughter. He noted that this arrangement would expose Daughter to Mother's paramour (M.C.) when she stayed at Mother's home and weighed this against the potential damage to Daughter's mental and emotional state from continuing to reside with Stepmother:

> Father is married to [Stepmother], so [Daughter] and [Son] are not exposed to any paramours at their father's home. However, since [Mother] is involved in a same sex relationship, and the State of Tennessee does not allow or recognize either same sex marriage or civil unions, their exposure to [M.C.], by definition, involves exposure to their mother's paramour. [Son] has positive relationships with all adults in this evaluation, and there appears to be no reason living with one parent would be better for him than living with the other. However, [Daughter's] relationship with [Stepmother] is so extremely negative, and [Stepmother's] actions toward [Daughter], no matter how good intentioned, appear to be exacerbating her depression, and could also be encouraging [Daughter] to behave negatively as an oppositional response to demands she perceives from [Father]. If [Daughter] were to live with [Father and Stepmother], it is likely the situation will deteriorate further, rather than improve. It is therefore recommended that the children's wishes guide the resolution of this situation. I would recommend placement with [Father and Stepmother] for [Son], and with [Mother] for [Daughter].

Dr. Pickering recommended liberal visitation for each parent and suggested that the children should be allowed to have frequent visitation together in the same

household. He cited research showing no adverse impact on children living with parents with same-sex partners, and he indicated that the trial court would need to address issues involving the cohabitation of Mother and M.C. "It will be for the court to decide [issues] concerning [M.C.], due to the paramour clause in most visitation orders. However, current results do indicate [M.C.] is a positive parent surrogate for both children, and has appropriate relationships with them both."

On May 15, 2008, a hearing was conducted on the parties' motions for modification of the parenting plan. Dr. Pickering's report was submitted to the trial court for review and was entered into evidence. The parties told the trial court that they had agreed to follow the recommendations in Dr. Pickering's report regarding the shared parenting provisions. Accordingly, they completed a standard form permanent parenting plan, developed by Tennessee's Administrative Office of the Courts ("AOC"), setting out the terms of the residential schedules for the children. This form included what is known as a "paramour provision," stating that "[a]ny paramour of any parent and that parent are not to spend the night in the same residence when that parent and one of the minor children are present." The AOC form is consistent with Rule 23:00 of the Rules of Chancery Court for the 28th Judicial District ("Local Rule 23"), which requires inclusion of the paramour provision in the AOC permanent parenting plan form.

Although Mother generally agreed with the permanent parenting plan, she objected to the inclusion of the paramour provision, given that M.C. lived with her in her home. The trial court noted Mother's objection but insisted that the paramour provision remain intact "like all in the rest of [parenting plans in] the state of Tennessee." The trial court clarified that "we're not talking about adverse impact [on the children] . . . . We're not going to make a distinction between paramours of one sex or the other." The trial court added, "I'm not saying that [Mother] and [M.C.] cannot be together. I'm specifically saying that they cannot sleep together while a child is in the house. . . . Apparently, Dr. Pickering found [M.C.] to be a positive influence. The issue is paramour overnight." The trial court reiterated, "I think that's a policy across the state of Tennessee. I don't know any Judge in this state that does not preclude paramours overnight when the children are present in the home." The trial court commented that, "if there's a reason not to put that in a permanent parenting plan, this will have to come from the wisdom of our appellate courts."

Within weeks after the hearing, Mother and Daughter moved back to live with M.C. in North Carolina. Naturally, this relocation altered the parties' parenting arrangements and also hindered the ability of Son and Daughter to see each other. The parties continued to agree that Mother would be the primary residential parent for Daughter, and Father agreed to Daughter's relocation to North Carolina with Mother. As before, the parties completed a parenting plan setting out the terms of the children's residential schedules. On September 4, 2008, the trial court entered an order consistent with the parties' agreement, and

> on October 2, 2008, it signed the new parenting plan. The final order and the parenting plan both included the paramour provision to which Mother had objected at the May 15, 2008 hearing. The order stated that, "as a matter of law, the paramour clause is required by the laws and public policy of the State of Tennessee . . . ." The trial court noted in its order that Mother reserved the right to challenge on appeal the inclusion of the paramour provision based on her view that such a provision is not required as a matter of law and that, in the alternative if such a provision is required, it violates her constitutional rights to equal protection, privacy, and due process.[12]

The only additional facts pertinent to the present appeal are those that have arisen more recently. Since this Court's prior ruling in this matter, the parties' fifteen-year-old daughter, C.B., decided that she wished to move back to Trenton to attend her prior school, and the parties agreed to permit C.B. to return to Tennessee and have Mr. Barker serve as her custodial parent. At the March 24, 2010, hearing, the undisputed testimony was that C.B. found it hard to switch schools and make new friends and wanted to return to Trenton to go to school with the friends she had already established.[13]

Additionally, since the time of this Court's original ruling on appeal, after Ms. Chandler incurred significant extra expenses in order to be able to have custody of her daughter without violating the paramour restriction imposed by the trial court,[14] once C.B. decided to move back to Trenton and Ms. Chandler was laid off from her employment, Ms. Chandler and her partner simply could no longer afford to maintain the prior residential living arrangement where Ms. Chandler's partner would stay at night in a different side of the duplex from Ms. Chandler and the children. Thus, once Ms. Chandler and her partner could no longer afford to occupy both

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[12] 2009 Tenn. App. LEXIS 631, at *2-10 (internal pagination and footnotes omitted).

[13] See March 24, 2010, Hearing Transcript at 21-22, 29-30.

[14] During the March 24, 2010, hearing, Ms. Chandler testified regarding the steps that had been taken with respect to occupying both sides of a duplex so that Ms. Chandler could comply with the overnight paramour restriction and how expensive that arrangement was, estimating that it cost her approximately $18,000, as well as how disruptive it was to her ability to parent her children. (March 24, 2010, hearing transcript at 22-24.)

sides of a duplex (an arrangement that was only made necessary as a result of the imposition of the paramour restriction in the first place), Ms. Chandler and her partner resumed sharing one residence. It then became impossible for Ms. Chandler to have visitation with her children in her home without violating the paramour restriction imposed by the trial court. Thus, Ms. Chandler has been unable since July 2009 to have her children come visit her at her home.[15] Despite this Court's prior reversal and remand, and as the testimony demonstrates, Ms. Chandler has been effectively prevented from exercising her right of visitation with her children for eight months while this matter has been pending before the trial court on remand as a result of the trial court's insistence on both a hearing and on leaving the paramour restriction in place throughout this process.[16] Ms. Chandler repeatedly testified that the effect of the overnight paramour restriction is to deny her the ability to have visitation with her children at her home without violating the court's order.[17]

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[15] See March 24, 2010, Hearing Transcript at 20, 23, 25-26.

[16] See March 24, 2010, Hearing Transcript at 25-26.

[17] See March 24, 2010, Hearing Transcript at 48-50. Ms. Chandler repeatedly stressed this state of affairs during the trial court's own questioning of her at the March 24, 2010, hearing:

> A. Yes, sir. Well, in order for them to come and visit me – I live with my partner, and financially it is a great hardship to not do that. So that if in order to have my kids visit me for any periods of time in North Carolina and for them to come – [C.B.] asks me regularly, When am I going to get to come see you guys? I'm like, I want you to come see me, but right we're going to have to do this another way. I can't afford to have separate residence particularly right now.
>
> * * *
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> A. I've never been denied visitation. I just can't bring them up to where I am because of the paramour clause.
>
> * * *
>
> A. I haven't made an attempt to bring them to North Carolina since we only have one residence.
>
> Q. Okay.

STANDARD OF REVIEW

"In reviewing the trial court's visitation order for an abuse of discretion, the child's welfare is given 'paramount consideration,' and 'the right of the noncustodial parent to reasonable visitation is clearly favored.'" Eldridge v. Eldridge, 42 S.W.3d 82, 85 (Tenn. 2001) (quoting Suttles v. Suttles, 748 S.W.2d 427, 429 (Tenn. 1988)). Even under the abuse of discretion standard, the trial court's decision will constitute an abuse of discretion where, as here, the trial court "'reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining.'" Small v. Small, No. M2009-00248-COA-R3-CV, 2010 Tenn. App. LEXIS 74 at *59 (Tenn. Ct. App., Jan. 28, 2010) (copy included in Appendix of Unpublished Decisions attached as Collective Exhibit B) (quoting Eldridge, 42 S.W.3d at 85).

Further, although trial courts are afforded broad discretion with respect to decisions relating to custody and visitation, "they still must base their decisions on the proof and upon the appropriate application of the applicable principles of law." Earls v. Earls, 42 S.W.3d 877, 886 (Tenn. Ct. App. 2000); see Hogue v. Hogue, 147 S.W.3d 245, 251 (Tenn. Ct. App. 2004). Such decisions by trial courts are subject to *de novo* review "with a presumption that the trial court's findings of fact are correct unless the evidence preponderates otherwise." Id. "No presumption attaches to the lower court's conclusions of law." Bates v. Bates, No. 03A01-9412-CH-00426, 1995 Tenn. App. LEXIS 200 at *2 (Tenn. Ct. App. Mar. 30, 1995) (copy included in Appendix of Unpublished Decisions attached as Collective Exhibit B).

A. Yes. Because I was – I mean, I wanted to follow the Court's order.

Q. Okay.

A. The only way to have them is to violate the Court's order.

(March 24, 2010, hearing transcript at 48-50.)

SUMMARY OF ARGUMENT

The message sent by this Court through its prior opinion reversing the trial court could not have been clearer—an overnight paramour restriction in this case could not be justified based on general conclusions or a general notion that children *can* be adversely affected by exposure to a paramour being present overnight, even when a court has tried to give that general notion binding effect by embodying it in a Local Rule. Rather, consistent with the result in a number of Tennessee appellate decisions, a trial court may impose such a restriction only if definite evidence in the record shows that the best interests of these children in this case are served by doing so.

Upon remand from this Court, the trial court has again erred by *sua sponte* imposing an overnight paramour restriction in the absence of any evidence of record that would demonstrate that the exclusion of such a restriction would be harmful to, or would jeopardize, Ms. Chandler's teenage children. Rather, the trial court merely parroted a portion of this Court's opinion as its rationale for the imposition of the restriction in very general terms, stating: "A paramour overnight, abuse of alcohol and abuse of drugs are clearly common sense understanding that children can be adversely affected by such exposure, as found from the legions of cases in the state of Tennessee."[18] This was the entirety of the trial court's substantive analysis and rationale for its decision.

In fact, the evidence of record before the trial court actually demonstrated that the imposition of this paramour restriction was contrary to the best interests of the children because it served to arbitrarily require Ms. Chandler to divert scarce financial resources from her family to the maintenance of two residences, instead of continuing to share one home with her partner,

[18] March 24, 2010, hearing transcript at 62.

and by acting as a disruptive force in her relationship with her partner and her children. Further, because Ms. Chandler now no longer has the financial resources to maintain two residences, absent reversal by this Court, this restriction on Ms. Chandler's rights will continue to prevent Ms. Chandler from exercising visitation with her children at her home and prevent the children from spending time with Ms. Chandler's partner who, the undisputed evidence reflects is a "positive parental surrogate."

The trial court's overnight paramour restriction imposed upon Ms. Chandler's parenting and individual rights cannot be justified under the well-settled legal principles that guide courts in making visitation decisions. The record contains no evidence whatsoever indicating any risk of harm or possible jeopardy to the children that would result from the overnight presence of Ms. Chandler's partner in the home. Rather, the trial court based its ruling on generalized moral concerns regarding the presence of paramours. If the Court were to affirm the trial court's determination under these circumstances, such an act would violate Ms. Chandler's right to parental autonomy, due process, and equal protection under both the state and federal constitutions.

ARGUMENT

I. THE TRIAL COURT'S *SUA SPONTE* DECISION TO IMPOSE AN OVERNIGHT "PARAMOUR" RESTRICTION SHOULD BE REVERSED.

In remanding this case to the trial court, this Court's opinion delivered a clear message—an overnight paramour restriction in this case could not be justified based on general conclusions or a general notion that children *can* be adversely affected by exposure to a paramour being present overnight, even if a court had tried to give that general notion binding effect by embodying it in a Local Rule. Rather, consistent with the result in a number of Tennessee appellate decisions, the trial court in this case may only impose such a restriction if the best interests of ***these children*** in ***this case*** are served by doing so.

Yet, the trial court's own words at the close of the March 24, 2010, hearing articulating why it ruled as it did by simply parroting a portion of this Court's September 19, 2009, opinion demonstrate that the trial court's ruling neither turned on the particular facts of this case nor took into account well-settled Tennessee law regarding what evidence is required before a court can impose such a restriction on a parent: "[T]he Court finds that the admonition in the other section of the permanent parenting plan is in the best interest of the children. A paramour overnight, abuse of alcohol and abuse of drugs are clearly common sense understanding that children can be adversely affected by such exposure, as found from the legions of cases in the state of Tennessee."[19] The trial court's *sua sponte* imposition of an overnight paramour restriction is unsupported by any evidence, much less definite evidence, showing that in the absence of such a restriction the parties' children will be harmed or jeopardized. This ruling must be reversed.

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[19] March 24, 2010, hearing transcript at 62.

A. THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT A CONCLUSION THAT AN OVERNIGHT PARAMOUR RESTRICTION IS IN THE BEST INTEREST OF THE MINOR CHILDREN, AND THERE IS RECORD EVIDENCE SUGGESTING THAT ITS INCLUSION IS CONTRARY TO THEIR BEST INTEREST.

Tennessee law is clear that custody and visitation decisions "should be guided by the best interests of the child." Hogue, 147 S.W.3d at 253 (citing Turner v. Turner, 919 S.W.2d 340, 346 (Tenn. Ct. App. 1995). Not only are the welfare and best interest of the children the "paramount concerns," but "the determination of the children's best interest must turn on the particular facts of each case." In re Parsons, 914 S.W.2d 889, 893 (Tenn. Ct. App. 1995) (citing Holloway v. Bradley, 230 S.W.2d 1003 (Tenn. 1950)). "The courts must devise custody arrangements that promote the development of the children's relationship with both parents and interfere as little as possible with post-divorce family decision-making." Earls, 42 S.W.3d at 885. "The inquiry is factually driven and requires the courts to carefully weigh numerous considerations." Id.

The statutes governing parenting plans in Tennessee reflect the presumption that parents are responsible for making the decisions related to the care and custody of their children, and that the government may not interfere with those decisions absent a showing that a restriction is necessary to prevent harm to the child. The statutory framework expressly provides that a parenting plan shall "[p]rovide that each parent may make the day-to-day decisions regarding the care of the child while the child is residing with that parent." Tenn. Code Ann. § 36-6-404(a)(6). While those parental rights may be limited in some circumstances as part of a parenting plan, such restrictions are authorized only when "required to protect the welfare of the child." Tenn. Code Ann. § 36-6-404(a)(4)(F); see Marlow v. Parkinson, 236 S.W.3d 744, 751 (Tenn. Ct. App. 2007) ("The purpose of restraints on parental conduct is to protect the child."). "Courts may restrict lawful activities that would jeopardize the child's welfare during visitation if there is

definite evidence that to permit the right would jeopardize the child." Hogue, 147 S.W.3d at 251 (emphasis added).

Accordingly, a court may not impose restrictions such as the overnight paramour restriction at issue in this case based on "unsubstantiated beliefs" about what would be harmful to the child. Neely v. Neely, 737 S.W.2d 539, 544 (Tenn. Ct. App. 1987). Instead, the court must be presented with "definite evidence" that permitting the parental or individual right "would jeopardize the child." Hogue, 147 S.W.3d at 253; Eldridge, 42 S.W.3d at 89.[20]

The trial court's own articulation of its ruling quoted above runs afoul of each of the legal standards articulated above. This two-sentence oral ruling, which comprises the entirety of the trial court's expressed rationale for its ruling, is entirely unmoored from any analysis of specifically whether the imposition of the paramour restriction ***in this case*** and as to ***these children*** is necessary in order to avoid jeopardizing their health or well being as is clearly required under Tennessee law.

The trial court's *sua sponte* overnight paramour restriction prohibits Ms. Chandler from allowing her same-sex partner, with whom she has been in a relationship for nine years, to stay in the same home overnight while either or both of Ms. Chandler's minor children are present. Ms. Chandler and her same-sex partner, however, share a residence.[21] This overnight paramour

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[20] In Eldridge, the Tennessee Supreme Court reinstated a trial court's decision, finding that permitting a lesbian mother to have unfettered visitation rights in the presence of her live-in same-sex partner was not an abuse of discretion. 42 S.W.3d at 89-90. In reversing the judgment of the court of appeals, the Tennessee Supreme Court emphasized that given that "the right of the noncustodial parent to reasonable visitation is clearly favored," a court may impose such a restriction only "if there is *definite* evidence that to permit the right would jeopardize the child in either a physical or moral sense." Id. at 85 (quotations omitted; emphasis added); see also Marlow, 236 S.W.3d at 751 (noting that "the restraints to be placed on a parent should be well-defined and 'must involve conduct that competent evidence shows could cause harm to the child'" (citation omitted)).

[21] As explained during the March 24, 2010, hearing, although they never should have had to go to such lengths in light of this Court's prior reversal of the trial court's determination in this matter, Ms. Chandler and her partner expended substantial funds, estimated at approximately $18,000, and resources

restriction precludes Ms. Chandler from deciding what living arrangement is best for her children during her visitation time, as she cannot have them stay with her in her North Carolina home without violating the trial court's order.

The trial court has continued to impose this significant overnight paramour restriction upon Ms. Chandler despite the fact that nothing in the record establishes that there is any child welfare basis for doing so in this case. Instead, all of the record evidence – including the previously presented evidence that was available in the record to the trial court immediately after this Court's remand order, and the additional testimony received by the trial court during the March 24, 2010, hearing demonstrates that the overnight paramour restriction is causing actual harm to Ms. Chandler and Mr. Barker's children because it is preventing Ms. Chandler from exercising her visitation right in the only economically viable manner—having her children come stay with her at her home in North Carolina.

After previously saying that its imposition of the overnight paramour restriction was not "about adverse impact [on the children],"[22] the trial court, on remand, has now attempted to justify the imposition of the overnight paramour restriction as serving the best interests of the children. Yet, there was no evidence in the record to support the trial court's conclusion that an overnight paramour restriction was necessary for the best interest of the children and certainly no definite evidence that unrestricted visitation would harm or jeopardize Z.B. or C.B.

Indeed, there was clear evidence in the record that suggested that removing the paramour restriction would be in the best interests of the children. As was the case when this Court heard

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for approximately a year and a half to be able to maintain two separate households to permit Ms. Chandler to be able to have custody of her daughter and visitation with her son without violating the paramour restriction. (See March 24, 2010, hearing transcript at 22-24.) Ultimately, their economic circumstances changed significantly and they simply can no longer afford to maintain two homes to satisfy the paramour restriction when Ms. Chandler's children are present.

[22] Barker v. Chandler, 2009 Tenn. App. LEXIS 631, at *9.

the prior appeal, neither the parties nor the trial court questioned or attempted to contradict Dr. Pickering's conclusion that Ms. Chandler's partner is "a positive parent surrogate for both children and has appropriate relationships with them both" or that children growing up in same-sex homes tend to develop normal social relationships.[23] Nor was there any evidence before the trial court even suggesting that, in the many years during which Ms. Chandler had unrestricted visitation and custody, the couple had ever acted inappropriately in front of the children. Indeed, after remand, the record before the trial court still showed that, after nine years of unrestricted contact with her, the children had a "positive and supporting" relationship with Ms. Chandler's partner and that she was a "positive parental surrogate." The trial court's continued imposition of an overnight paramour restriction amounts to a clear abuse of discretion and must be reversed.

Upon completion of the March 24, 2010 hearing, the trial court, before announcing its ruling from the bench, recapped the proceedings that had taken place before it and, in so doing, mischaracterized certain aspects of the testimony presented to it and identified two "concerns" that it had.

The trial court mischaracterized the nature of Ms. Chandler's testimony regarding her children not having visited her in North Carolina since July 2009 when her daughter moved back to Trenton. The trial court's statement that Ms. Chandler "has made no overture to arrange such a visit" is a grossly inaccurate characterization of the evidence before the trial court.[24] Ms. Chandler clearly testified that once it was no longer economically feasible for her and her same-sex partner to occupy two sides of a duplex, as they had been doing previously solely in order to

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[23] Barker v. Chandler, 2009 Tenn. App. LEXIS 631 at *7; see also Department of Human Services and Child Welfare Agency Review Bd. v. Howard, 238 S.W.3d 1, 7 (Ark. 2006) (citing with approval trial court's finding that "[c]hildren of lesbian or gay parents are equivalently adjusted to children of heterosexual parents.").

[24] March 24, 2010, hearing transcript at 60.

be able to comply with the trial court's overnight paramour restriction, there was simply no way Ms. Chandler, while sharing a residence with her partner, could have her children come visit her in North Carolina without violating the overnight paramour restriction.[25]

Remarkably, the trial court seems in its ruling to have somehow taken into account, and held against Ms. Chandler, her efforts to comply with the overnight paramour restriction. That assertion by the trial court, referring to Ms. Chandler's home in North Carolina, that Ms. Chandler "has made no overture to arrange such a visit," was made just before the trial court went on to note Mr. Barker's testimony that "he did not attempt to enforce the paramour clause," "that it would not be feasible to enforce the paramour clause while Ms. Chandler lives in North Carolina," and "that the paramour clause shall have no effect and has not prevented the mother from seeing her children."[26] To the extent the trial court allowed such testimony by Mr. Barker to influence its evaluation or interpretation of Ms. Chandler's position concerning why her children could not visit her in North Carolina, it would be a remarkable position for a trial court to take, apparently suggesting the unimportance of compliance with its own order; further, it would also ignore the clear representations made by Ms. Chandler and her counsel that Ms. Chandler had followed the order and would never engage in conduct to violate the order under some theory that no one would ever know about the violation.[27]

The trial court's determination as to the overnight paramour restriction apparently was also influenced by two articulated concerns. The first concern that the trial court expressed was that "[i]n reviewing the file, the Court had particular concern that the subpoena issued for [Ms. Chandler's same-sex partner] for the November hearing was returned with the notation that,

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[25] March 24, 2010, hearing transcript at 25-26, 48-50.

[26] March 24, 2010, hearing transcript at 60-61.

[27] March 24, 2010, hearing transcript at 45-46.

quote, Subject has avoided service even after speaking with [Ms. Chandler's same-sex partner] and setting a time to perform services, end of quote, for that trial."[28] This "concern" is a *non sequitur* having absolutely nothing to do with the question that was before the trial court.[29]

With respect to the second of the trial court's apparent concerns, the trial court stated: "It is of great concern to this Court that [C.B.] returned to the home of her father after staying with Angel Chandler until July of 2009 after her former strongly-held views as reported by the evaluation of Dr. Pickering."[30] It is difficult to read the trial court's expression of concern as anything other than an indication of a belief that somehow [C.B.] did not want to be around Ms. Chandler and her same-sex partner. Yet, not only would that be exactly the type of "unsubstantiated belief" about what would be harmful to the child that Tennessee courts have found insufficient to justify a restriction parental rights,[31] but drawing such a conclusion seems impossible without ignoring the undisputed testimony that was provided to the trial court during the hearing. Specifically, Ms. Chandler explained that [C.B.'s] decision to move back to Trenton was driven by a desire to be with her friends at her old school, that she had problems at her new school in North Carolina.[32] Ms. Chandler's testimony in this regard was undisputed at the hearing. Furthermore, Ms. Chandler also testified that her daughter asks her "regularly, When

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[28] March 24, 2010, hearing transcript at 57.

[29] As noted in Dr. Pickering's report, Ms. Chandler's partner participated fully in the court-ordered psychological evaluation of the family, the children, and their relationships with Mr. Barker's wife and Ms. Chandler's partner. Given that the trial court never questioned the soundness of Dr. Pickering's findings that Ms. Chandler's partner was a "positive parental surrogate" for the children, this purported concern is not part of any legitimate analysis of whether the overnight paramour restriction is necessary for the best interests of the children.

[30] March 24, 2010, hearing transcript at 61.

[31] See Neely, 737 S.W.2d at 544.

[32] See March 24, 2010, hearing transcript at p. 21-22, 29-30.

am I going to get to come see you guys?"[33] That testimony, undisputed in the record, directly undercuts the trial court's effort to try to draw the type of negative inference the trial court clearly drew with respect to the decision of a teenager to want to move back to Trenton and return to high school with her friends.

In light of the clear lack of any evidence in the record, much less any definite evidence, to show that the children would be harmed or jeopardized in the absence of an overnight paramour restriction, the items that the trial court pointed to as causing "concern" appear, at best, to demonstrate that the trial court failed to comprehend the record before it, the legal standard governing determination of the issue before it, or both. At worst, the trial court's "concerns" are capable of being read by members of the public as little more than pretextual justifications for a ruling the trial court was making on the basis of its own personal view of morality. Viewed in either light, neither of the trial court's expressed concerns can justify its continued imposition of the overnight paramour restriction on Ms. Chandler. See, e.g., Small, 2010 Tenn. App. LEXIS 74 at **59-60 (finding that trial court abused its discretion in imposing a paramour restriction when there was "no clear and definite evidence suggesting that contact with Husband's girlfriend would jeopardize the child's health or well-being"); Cosner v. Cosner, E2007-02031-COA-R3-CV, 2008 Tenn. App. LEXIS 493, at **16-18 (Tenn. Ct. App. Aug. 22, 2008) (emphasizing lack of evidence of any adverse consequences to children resulting from custodial parent allegedly having a live-in paramour) (copy included in Appendix of Unpublished Decisions attached as Collective Exhibit B); In re Parsons, 914 S.W.2d at 894 (holding that the Court "does not sit as moral arbiter[] making judgments on what is acceptable social behavior" in rejecting father's petition for change in custody because mother lived with her lesbian partner); Bates, 1995 Tenn.

[33] Id. at 49.

App. LEXIS 200 at *3 (reversing the imposition of a paramour restriction when there was no evidence showing that the presence of the paramour during visitation would cause harm to the minor child).

Accordingly, the trial court's decision to impose the overnight paramour restriction must be reversed.

B. AFFIRMING THE TRIAL COURT'S *SUA SPONTE* IMPOSITION OF AN OVERNIGHT PARAMOUR CLAUSE UNDER THESE CIRCUMSTANCES WOULD VIOLATE THE STATE AND FEDERAL CONSTITUTIONS.

"Parents have a fundamental constitutional interest in the care and custody of their children under both the United States and Tennessee constitutions." Keisling v. Keisling, 92 S.W.3d 374, 378 (Tenn. 2002); Hawk v. Hawk, 855 S.W.2d 573, 578 (Tenn. 1993) (discussing Wisconsin v. Yoder, 406 U.S. 205 (1972)); see also Stanley v. Illinois, 405 U.S. 605, 651 (1972) (noting that the right to custody and care of one's children has found protection in the due process and equal protection clauses of the 14th Amendment and the 9th Amendment). As the Tennessee Supreme Court has explained, "when no substantial harm threatens a child's welfare, the state lacks a sufficiently compelling justification for the infringement on the fundamental right of parents to raise their children as they see fit." Hawk, 855 S.W.2d at 577; see also Broadwell v. Holmes, 871 S.W.2d 471, 475 (Tenn. 1994) (acknowledging that Tennessee has "historically strong protection of parental rights"). Although the state's *parens patriae* interest is greater in the context of a divorce, the court must nonetheless weigh the constitutional rights of parents when fashioning custody and visitation orders. Neely, 737 S.W.2d at 543.

The vigorous constitutional protections accorded to parents reflect not only an interest in protecting "childrearing autonomy," but also a concern over protecting the privacy rights of families generally, including the right of a family to define its members. See, e.g., Moore v. City

of East Cleveland, 431 U.S. 494, 506 (1977) (holding that the Constitution prevents the government "from standardizing its children and its adults by forcing all to live in certain narrowly defined family patterns."). The constitutional right of parents over the custody and care of their children is not the exclusive province of those parents in married intact families, but lies with parents in "non-traditional" families as well. See Nale v. Robertson, 871 S.W.2d 674, 680 (Tenn. 1994) (rejecting argument that Hawk limited the protection of parental rights to "an intact nuclear family with fit parents"); Stanley, 405 U.S. at 651 ("Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony.").

In light of these principles, the trial court's ruling, if not reversed, simply cannot pass constitutional muster. There can be no reasonable doubt that the overnight paramour restriction on Ms. Chandler's visitation rights substantially interferes with her ability to raise her children as she sees fit. The imposition of this restriction, as a practical matter, can and will have destructive effects on Ms. Chandler's family. The lower court's ruling effectively prohibits Ms. Chandler from exercising her visitation rights as long as she continues to share a home with her long-term, same-sex partner.

Further, the imposition of an overnight paramour restriction implicates individual privacy rights and the right to form an intimate, familial relationship as guaranteed by both the state and federal constitutions. See, e.g., Roberts v. U.S. Jaycees, 468 U.S. 609, 617-18 (1984) (holding that "choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme."). The imposition of the overnight paramour restriction on Ms. Chandler severely constrains her ability to live as a couple with her same-sex partner. Permitting that restriction to stand, where there was simply no

evidence in the record that the restriction was in the best interests of the teenage children in this case, would clearly violate Ms. Chandler's privacy rights and her right to form an intimate, familial relationship as guaranteed by the state and federal constitutions. See, e.g., Lawrence v. Texas, 539 U.S. 558 (2003); Campbell v. Sundquist, 926 S.W.2d 250 (Tenn. Ct. App. 1996).[34]

Finally, the imposition of the overnight paramour restriction in this case also raises serious issues regarding whether the "demand that persons similarly situated be treated alike" required by the equal protection provisions of the both the Tennessee and federal constitutions is met. Lanier v. Rains, 229 S.W.3d 656, 666 (Tenn. 2007).[35] Where a classification interferes with the exercise of a fundamental right, including the right of intimate association, the state must show that "the burden is precisely tailored to serve a compelling governmental interest." State v. Crain, 972 S.W.2d 13, 16 (Tenn. Crim. App. 1998) (citing Plyler v. Doe, 457 U.S. 202, 217 (1982)). If subjected to that test, there is no question that the treatment of Ms. Chandler by the trial court in this case would not pass constitutional muster. There is simply no compelling state interest for burdening or restricting Ms. Chandler's fundamental right to an intimate, familial relationship with her partner as the trial court has done.[36]

The burden that has been, and continues to be, imposed on Ms. Chandler is an especially harsh one: Fundamentally, the trial court's imposition of this restriction seeks to require Ms.

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[34] Although it is not necessary to the Court's inquiry here, it must be noted that "both the Tennessee Constitution and this State's constitutional jurisprudence establish that the right to privacy provided to Tennesseans under our Constitution is in fact more extensive than the corresponding right to privacy provided by the Federal Constitution." Campbell, 926 S.W.2d at 261 (holding that textual sources of right to privacy in the Tennessee Constitution include Art. 1, sections 1, 2, 3, 7, 8, 19, and 27). The textual sources to the right to privacy under the United States Constitution include Amendments I, III, IV, V, IX. Griswold v. Connecticut, 381 U.S. 479 (1965).

[35] The textual sources for the right to equal protection under the Tennessee state constitution include Article 1, section 8 and Article XI, section 8. The textual sources for the right to equal protection under the United States Constitution include Amendment XIV, section 1.

[36] Nevertheless, this Court need not decide the level of scrutiny required because this classification would fail even the rational basis test. Hooper v. Bernalillo Cty. Assessor, 472 U.S. 612, 618 (1985).

Chandler to have to choose between her partner and her children. As the testimony at the March 24, 2010, hearing made plain, as long as Ms. Chandler is living under the same roof as her same-sex partner, she cannot exercise her visitation rights by having her children visit her at home in North Carolina without disrupting her family life. If she can only exercise her visitation rights somewhere other than her home, then the trial court's determination necessarily forces her to diminish resources that could be used to take care of, and provide for, her children. This burden has been imposed in this case without any showing of harm to the children and under circumstances in which current Tennessee law, as well as current North Carolina law, prevents her from proving her commitment to her partner through marriage.[37] Accordingly, it can only be seen as a classification that is either unrelated to any legitimate interest or related to an illegitimate interest, such as moral disapproval of gay and lesbian couples. See, e.g., Romer v. Evans, 517 U.S. 620, 634-36 (1996) (holding that disapproval of gay and lesbian people is not a legitimate basis for government to discriminate against the group); see also City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446-47 (1985) (holding that disapproval of a class of people is not a legitimate basis for the government to disadvantage that group); Palmore v. Sidoti, 466 U.S. 429, 432-34 (1984) (same); United States Dep't of Agric. v. Moreno, 413 U.S. 528, 541-44 (1973) (same).

The trial court's extended questioning of Ms. Chandler during the March 24, 2010, hearing further suggests that the imposition of the paramour restriction was based not on any evidence in the record in this case, much less any definite evidence, but on the trial court's personal views about morality. The transcript reflects that the trial court was uninterested in the

[37] Although the question of whether marital status classifications constitute facial discrimination on the basis of sexual orientation is an open one in this state, at least one state Supreme Court has held that where same-sex couples are not permitted t o marry, a law that discriminates on the basis of marital status necessarily treats same-sex and opposite sex couples differently. Alaska Civil Liberties Union v. State, 122 P.3d 781, 788 (Ak. 2005).

actual effect of the presence of Ms. Chandler's partner on the family and teenage children, and instead was focused upon questions of morals and inquiries about how Ms. Chandler would feel if her husband, who is now remarried, were to have a paramour in his home overnight.[38] To the extent that Ms. Chandler's testimony in response to this line of questioning by the trial court influenced the trial court's decision and to the extent it would be relied upon by this Court as providing a justification for affirming the trial court's determination, any such consideration would raise serious constitutional questions.[39]

Thus, if the trial court's ruling were permitted to stand under these circumstances, the result would be the violation of Ms. Chandler's parental rights, right to privacy, and right to equal protection, as guaranteed under the state and federal constitutions.

CONCLUSION

For the reasons set forth above, Ms. Chandler respectfully requests that the Court reverse the overnight paramour restriction imposed by the Gibson County Chancery Court's May 10, 2010 Order. The uncontradicted evidence in the record established that there would be no harm to the children resulting from unrestricted contact with Ms. Chandler's partner and, further, that such unrestricted contact was beneficial to the children. Under the well-established law of this state and under the state and federal constitutions, the trial court's intervention in Ms. Chandler's decisions about how to best raise her children, financially and otherwise, was wholly unwarranted and must be overturned. Finally, given the exigencies of the situation here and the burdens that have already been improperly imposed on Ms. Chandler's parental and individual rights, Ms. Chandler respectfully asks this Court to refrain from another remand of this case to

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[38] March 24, 2010, hearing transcript at 47-54.

[39] See Romer, 517 U.S. at 634-36.

the trial court and, instead, to issue an opinion rendering a final determination that the overnight paramour restriction is not to be imposed.

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CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing was duly served upon Mark Johnson, 124 E. Court Square, Trenton, Tennessee 38382 by regular United States mail postage prepaid, this 28th day of May, 2010.

BRIAN S. FAUGHNAN

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