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ARKANSAS COURT OF APPEALS

DIVISIONS II & III
No. CA11-722

DINA HARTSELL APPELLANT V. LELION MARK WEATHERFORD APPELLEE	**Opinion Delivered** February 22, 2012 APPEAL FROM THE GARLAND COUNTY CIRCUIT COURT, [NO. DR-2007-57-III] HONORABLE THOMAS LYNN WILLIAMS, JUDGE REVERSED AND REMANDED

JOSEPHINE LINKER HART, Judge

Dina Hartsell appeals from the denial of her petition to relocate to the State of California with her minor child. On appeal, she argues that the trial court erred in denying her permission to relocate. We reverse and remand.

Although we review traditional equity cases de novo, we will affirm the trial court's findings of fact unless they are clearly erroneous or clearly against the preponderance of the evidence. *Grover v. Grover*, 101 Ark. App. 346, 276 S.W.3d 740 (2008). A finding of fact is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been committed. *Id.* In reviewing the trial court's findings, we give due deference to the trial court's superior position to determine the credibility of the witnesses and the weight to be accorded to each witness's testimony. *Id.* However, we give a trial court's conclusions of law no deference on appeal. *Bass v. Bass*, 2011 Ark. App. 753, 387 S.W.3d 218.

Hartsell testified that she desired to relocate to California because she enrolled in the

California National Guard and had been selected for Officer Candidate School. She stated that she currently had permission from her unit that allowed her to fulfill her drill obligation in Arkansas, pending the resolution of her relocation petition. She further testified that she had been accepted at UCLA, where she intended to pursue a degree in global sustainability. Upon relocation, Hartsell intended to live with her mother in a three-bedroom, three-bath home in Marina Del Rey, California. She looked forward to her mother being able to help her in raising her five-year-old child. Hartsel stated she would also be closer to her extended family, which includes an uncle, an aunt, and several cousins. Hartsell stated that she has no extended family in Arkansas. She also stated that there were several excellent schools in Marina Del Rey, and that city was close to several southern California recreational sites such as Disneyland, Sea World, children's museums, the Getty Museum, and the West Hollywood Hills Planetarium. Finally, Hartsell stated that she found maintaining visitation with the child's father was "very important," and she proposed extending summer and Christmas visitation to accomplish it.

Appellee Lelion Mark Weatherford testified that he currently had every-other-weekend visitation. He claimed that communication with Hartsell was difficult because she only communicated in writing. Weatherford admitted that he had not provided health insurance for the minor child, but claimed that it was Hartsell's fault because she had not provided the child's social security number to him, despite the fact that it had already been provided on the support affidavits that Hartsell had filed. Weatherford did not present evidence concerning extended family relationships, local leisure activities, or whether Arkansas colleges and universities offered a major equivalent to the one being pursued by Hartsell at UCLA.

In denying Hartsell's relocation petition, the trial court made the following findings.

> (1) The reason for relocation: Plaintiff unilaterally seeks to join the California National Guard and go to college at UCLA. There is no evidence before the Court that the Plaintiff cannot enter the Arkansas National Guard and go to college locally. In fact, she is presently drilling with the Arkansas National Guard. The Court does not find that the California employment and education is in the best interest of the child.
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> (2) Education, health and leisure opportunities in new location: The Court finds that the opportunities of Los Angeles may be different than Hot Springs, they are by no means superior. Hot Springs has museums, parks, lakes, and amusement activities. The child is in First Step School. There is no evidence to the schooling to be had in Los Angeles. An interruption of the present schooling is not in the best interest of the child. The opportunities in Los Angeles do not rise to being in the best interest of the child.
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> (3) Visitation and communication for the non-custodial parent: The parties do not communicate. Adding 1,800 miles to the communication lines would end the visitation and communication of these parties. This is not in the best interest of the child.
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> (4) Effect of move on extended relationships: As stated above, the 1,800 miles would most probably end these Arkansas relationships. This is not in the best interest of the child.
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> (5) Preference of the child: There is no evidence of the child's preference or as to her maturity. It is noted that the child's present age is five.

On appeal, Hartsell argues that the trial court improperly shifted the burden to her to prove that her proposed move offered some advantage because there was no evidence or testimony presented to prove that she had an improper motive for relocating. Further, she contends that the trial court's findings that purportedly supports its denial of her petition to relocate are not supported by the record. We agree.

In *Hollandsworth v. Knyzewski*, 353 Ark. 470, 109 S.W.3d 653 (2003), the supreme court held that when a custodial parent seeks to relocate with a minor child out of state, there is a presumption in favor of relocation. It is up to the parent opposing the move to prove that the relocation would not be in the best interest of the child. *Id.* In determining the best interest of the child with regard to a relocation, the *Hollandsworth* court stated five "matters" that a trial

court should consider:

> (1) the reason for the relocation; (2) the educational, health, and leisure opportunities available in the location in which the custodial parent and children will relocate; (3) visitation and communication schedule for the noncustodial parent; (4) the effect of the move on the extended family relationships in the location in which the custodial parent and children will relocate, as well as Arkansas; and, (5) preference of the child, including the age, maturity, and the reasons given by the child as to his or her preference.

Id. at 485, 109 S.W.3d at 663-665. The supreme court emphasized, however, that "the custodial parent no longer has the obligation to prove a real advantage to herself or himself and to the children in relocating." *Id.*

It was obvious from the trial court's findings that it improperly required Hartsell to prove that her proposed relocation to California offered some material advantage. This requirement was clearly abrogated by the *Hollandsworth* court when it overruled *Staab v. Hurst*, 44 Ark. App. 128, 868 S.W.2d 517 (1994), and its progeny. The trial court's misapplication of the law was particularly evident when it recited that Hartsell had not proved that opportunities offered by joining the California National Guard and attending UCLA were not available in Arkansas and that the education and leisure activities in southern California were superior to those available in Hot Springs. Regarding the latter, there was no evidence concerning the quality or even the existence of the "museums, parks, lakes, and amusement activities" in Hot Springs. The trial court nonetheless found that they were equivalent to the offerings in Los Angeles. Likewise, while Hartsell confirmed on cross-examination that the minor child was enrolled in a preschool program called "First Step," there was no evidence about the quality of the program, whether interrupting it by a relocation would adversely affect the child, or that a similar program was not available in southern California.

The trial court also misinterprets the fourth *Hollandsworth* factor—"the effect of the move on the extended family relationships in the location in which the custodial parent and children will relocate, as well as Arkansas." Hartsell testified that a move to southern California would enhance the extended family relationships by allowing the minor child to have extensive contact with her maternal grandmother, with whom she would be living, as well as her uncle, her aunt, and several cousins. No mention was made of the existence of either party's extended family in the child's present location.

We acknowledge that there is obviously a strained relationship between Hartsell and Weatherford. However, there is no basis in the record for the trial court to find that the parties did not communicate—it was undisputed that Hartsell communicated in writing with Weatherford. Moreover, there was no evidence that Hartsell had ever failed to abide by any court order. Accordingly, the trial court's finding that the parties "do not communicate" and that the relocation would "end" visitation and communication is not supported by the evidence in the record, not to mention the inconsistency within this finding. Without belaboring the point, if the parties do not communicate, then their being farther apart would not adversely affect the situation.

Finally, we note that the trial court stated after each finding that it was not "in the best interest of the child." Merely reciting this mantra does not change the substance of the finding or the application of law that these findings betray. We hold that the trial court erred by shifting the burden of proof to the custodial parent. Accordingly, we reverse and remand to the trial court for further proceedings.

Reversed and remanded.

VAUGHT, C.J., and GLADWIN, WYNNE, ABRAMSON, and HOOFMAN, JJ., agree.

Benjamin D. Hooten, for appellant.

Hurst, Morrissey & Hurst, P.L.L.C., by: *Travis J. Morrissey*, for appellee.