Cite as 2013 Ark. App. 277

ARKANSAS COURT OF APPEALS

DIVISION I
No. CA12-687

	OPINION DELIVERED MAY 1, 2013
JONATHAN FAULKNER APPELLANT	APPEAL FROM THE LINCOLN COUNTY CIRCUIT COURT [NO. DR-2009-63-3]
V.	HONORABLE WILLIAM BENTON, JUDGE
NANCY FAULKNER, BRI AMBER HOVEN, and KIM OWEN APPELLEES	REMANDED FOR FURTHER FINDINGS

ROBERT J. GLADWIN, Chief Judge

Appellant Jonathan Faulkner appeals the May 1, 2012 custody-and-visitation order filed by the Lincoln County Circuit Court. He argues that the trial court erred by granting his mother, appellee Nancy Faulkner, custody of his daughter, K.F., without finding him unfit. We remand for further findings.

K.F. was born August 8, 2007, to appellee Bri Amber Hoven and appellant, who were unmarried at the time. In September 2008, appellant filed a petition for the establishment of paternity and custody of K.F. On November 13, 2008, an agreed order was entered that recognized appellant as the biological father of K.F., awarded joint legal custody to appellant and Ms. Hoven, and awarded primary physical custody to Ms. Hoven and visitation to appellant. Following the entry of the agreed order, appellant, Ms. Hoven, and K.F. lived with appellee Kim Owen, the maternal grandmother of K.F., in Star City, Arkansas, for some

period of time until appellant and Ms. Hoven separated. Ms. Hoven and K.F. continued to live with Ms. Owen until Ms. Hoven moved to New York, at which time Ms. Owen became K.F.'s primary caregiver.

After discovering that Ms. Hoven had left K.F. with Ms. Owen and moved to New York, appellant filed a petition for change of custody. At that time, appellant was living with his mother, Ms. Faulkner, in his aunt's home in Lake Village, Arkansas. Ms. Owen filed a motion to intervene with an attached petition for custody; however, an order was never entered allowing the intervention, and Ms. Owen's petition for custody was never filed.

In December 2009, just prior to the final hearing on appellant's petition, appellant and Ms. Owen reached an agreement whereby appellant would have custody of K.F., subject to specific visitation with Ms. Owen and other various restrictions intended to ensure that Ms. Owen and her family would be able to retain a close relationship with K.F. Ms. Hoven did not appear at the hearing in which the agreement was approved, and Ms. Faulkner did not object. The agreed order granting appellant temporary custody was entered on December 21, 2009.

On February 16, 2010, appellant filed a notice of intent to relocate to Blytheville, Arkansas, along with his new wife, Magen, based on his acceptance of employment there. Ms. Owen filed an objection to this relocation, asserting that it was not in K.F.'s best interest and that it was merely an effort to alienate K.F. from her. Ms. Owen did not request a hearing on her objection but merely attempted to exercise visitation pursuant to the December 21, 2009 agreed order.

A hearing was held on February 28, 2010, during which appellant alleged that Ms. Owen and her husband sexually abused K.F. There were also allegations that K.F. was being coached to make these allegations of sexual abuse. Unsure as to the truthfulness of these allegations, the trial court awarded temporary custody of K.F. to Ms. Faulkner. In arriving at this ruling, the trial court indicated as follows:

> Either somebody is or one or more persons is abusing the system by filing unfounded sexual abuse complaints, and repeatedly, and using the child, coaching the child, which, in my opinion, constitutes abuse, using the child for these malevolent purposes if that's true; I'm not making that finding today; or somebody is sexually abusing this child.

Upon being awarded temporary custody of K.F., Ms. Faulkner filed her own petition for custody on April 20, 2011, noting that K.F. was now in a stable home environment and able to visit both appellant and Ms. Owen. She asserted that there was a noticeable change in the demeanor of K.F. in that she seemed to be happy and carefree, whereas while she was in the care of appellant and his new wife, K.F. was unhappy and afraid. There were also no further allegations regarding sexual abuse after temporary custody was awarded to Ms. Faulkner.

A final hearing was held on February 27, 2012, as to the issues of custody and visitation, including testimony from expert witnesses. After hearing the evidence, the trial court took the matter under advisement and entered an order on May 1, 2012, granting custody to Ms. Faulkner, subject to the visitation rights of appellant and Ms. Owen. It is undisputed that the trial court never made a finding that appellant was unfit. Appellant filed a timely notice of appeal from the order.

The standard for review in child-custody cases is well established. This court has made clear that it considers the evidence de novo but will not reverse unless the trial court's findings are clearly erroneous or clearly against the preponderance of the evidence. *Delgado v. Delgado*, 2012 Ark. App. 100, 389 S.W.3d 52. Findings are clearly against the preponderance of the evidence when the court is left with an irrefutable and express belief that a mistake has occurred. *Id.* Importantly, this court gives deference to the superior position of the trial court to view and judge the credibility of the witnesses in these matters. *Id.*

Deference to the trial court is even greater in cases involving child custody, as a heavier burden is placed on the trial court to "utilize to the fullest extent its powers of perception in evaluating the witnesses, their testimony, and the best interest of the child." *Delgado*, *supra*. Child-custody cases are unique because there are no other cases in which the superior position of the trial court to assess witness credibility carries as much weight. *Id.* Finally, this court has stated that the primary consideration in child-custody cases is the welfare and best interests of the children; all other considerations are secondary. *Id.*

In *Stamps v. Rawlins*, 297 Ark. 370, 761 S.W.2d 933 (1988), our supreme court addressed the issue of when custody can be awarded to a third party:

> We have only one statute on custody, and it provides that the award shall be made solely on the basis of the welfare and best interests of the child and must be made without regard to the sex of the parent. Ark. Code Ann. § 9-13-101 (1987). The statute makes no reference to whom custody may be awarded. However, under our case law it is clear that a stepparent can be awarded custody of a minor child. *See, e.g.*, *Goins v. Edens*, 239 Ark. 718, 394 S.W.2d 124 (1965). Nevertheless, our case law specifically establishes a preference for natural parents in custody matters, and provides that the preference must prevail unless it is established that the natural parent is unfit. *Goins v. Edens*, *supra*; *Hancock v. Hancock*, 198 Ark. 652, 130 S.W.2d 1 (1939); *Loewe*

> *v. Shook*, 171 Ark. 475, 284 S.W. 726 (1926). The court of appeals followed this preference in a case very similar to the one at bar. *McKee v. Bates*, 10 Ark. App. 51, 661 S.W.2d 415 (1983). The preference is based on the child's best interests.

Id. at 372, 761 S.W.2d at 935. When the trial court continued to refer to the best interest of the child, appellant's counsel asserted that there must be a determination that appellant was unfit before custody could be awarded to either grandmother.

In addressing the validity of a grandparent-visitation statute, the United States Supreme Court stated that the interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests. *Troxel v. Granville*, 530 U.S. 57 (2000). The Due Process Clause of the Fourteenth Amendment is the barrier that protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children from the actions of the State. *Id.* at 66–67. *see also Linder v. Linder*, 348 Ark. 322, 72 S.W.3d 841 (2002).

The Arkansas Supreme Court has held that, as between a parent and a grandparent, the law awards custody of a minor child to the parent unless that parent is incompetent or unfit to have custody of the child. *Jones v. Strauser*, 266 Ark. 441, 585 S.W.2d 931 (1979). In *Lloyd v. Butts*, 343 Ark. 620, 37 S.W.3d 603 (2001), our supreme court specified as follows:

> Courts are very reluctant to take from the natural parents the custody of their child, and will not do so unless the parents have manifested such indifference to its welfare as indicates a lack of intention to discharge the duties imposed by the laws of nature and of the state to their offspring suitable to their station in life. When, however, the natural parents so far fail to discharge these obligations as to manifest an abandonment of the child and the renunciation of their duties to it, it then becomes the policy of the law to induce some good man or woman to take the waif into the bosom of their home.

Id. at 624, 37 S.W.3d at 606.

While there is preference in custody cases to award a child to its biological parent, that preference is not absolute. *Dunham v. Doyle*, 84 Ark. App. 36, 129 S.W.3d 304 (2003). The welfare of the child is the polestar in every child-custody case, and the appellate courts accordingly have upheld the trial court's award to a grandparent when it was in the child's best interest. *Id; Vance v. Butler*, 270 Ark. 770, 606 S.W.2d 153 (Ark. App. 1980); *Rains v. Alston*, 265 Ark. 108, 576 S.W.2d 505 (1979); *Jones*, *supra*. The rights of parents are not proprietary and are subject to their related duty to care for and protect the child; the law secures their preferential rights only as long as they discharge their obligations. *Dunham*, *supra*.

Our appellate courts have also awarded custody to a third party, despite the parental preference, when there has been an abandonment of the child by the natural parent for a substantial period of time, *see Coffee v. Zolliecoffer*, 93 Ark. App. 61, 216 S.W.3d 636 (2005), or in guardianship situations, where it was in the best interest of the child. *See Gantt v. Ark. Dep't of Human Servs.*, 2013 Ark. App. 217; *Furr v. James*, 2013 Ark. App. 181, 427 S.W.3d 94.

The instant case does not fit one of these narrowly carved exceptions to the parental-preference rule—it is an initial custody award involving a biological parent who has not abandoned his child for a substantial period of time. Accordingly, we hold that the trial court erred in awarding custody of K.F. to Ms. Faulkner absent a finding that appellant was unfit.

The record before us is replete with evidence that would have supported a finding that appellant was unfit. K.F. was made to be a part of seven attempts to falsely accuse a

family member of sexual abuse, which caused her to be physically examined at least three times. None of these accusations were ever substantiated. Although appellant's wife was alleged to have made all but the final allegation, appellant unequivocally testified that he knew his wife had made the allegations and acknowledged that he was the one who had told her to do it. The trial court noted that there were no additional allegations of sexual abuse after the trial court removed K.F. from appellant's custody. Additionally, appellant repeatedly violated the trial court's order by failing to support K.F. financially while she was in Ms. Faulkner's care, by failing to exercise his court-ordered visitation with K.F., and by thwarting visitation efforts by Ms. Owen. Despite this evidence, the trial court specifically stopped short of making a finding that appellant was unfit.

All the issues raised before the trial court are before the appellate court for decision, and our de novo standard of review involves a determination of factual questions as well as legal issues. *ConAgra, Inc. v. Tyson Foods, Inc.*, 342 Ark. 672, 30 S.W.3d 725 (2000). We have authority to review both law and fact and, acting as judges of both law and fact as if no decision had been made in the trial court, sift the evidence to determine what the finding of the trial court should have been, and render a decree upon the record made in the trial court. *Id.* The appellate court may always enter such judgment as the trial court should have entered upon the undisputed facts in the record. *Id.*

Despite that authority, the clear-error aspect of our standard of review is more deferential toward the findings of fact made by the trial court. In custody matters, moreover, we give special deference to the circuit court's weighing of the multitude of circumstances comprising the best interest of the children. *Taylor v. Taylor*, 345 Ark. 300, 47 S.W.3d 222

(2001). Our supreme court has stated that the law can and should maintain the traditional appellate flexibility to affirm a judgment as modified or remand for more findings in cases that, before amendment 80, would have been chancery matters. *See Ferguson v. Green*, 266 Ark. 556, 587 S.W.2d 18 (1979). In this case, we remand to the trial court for a specific finding regarding the fitness of appellant.

Remanded for further findings.

PITTMAN and VAUGHT, JJ., agree.

Worsham Law Firm, P.A., by: *Richard E. Worsham*, for appellant.

Joseph P. Mazzanti, III, for appellee Nancy Faulkner.

Bell & Boyd, P.A., by: *Michael W. Boyd*, for appellee Kim Owen.