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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CV-17-236

ADRIANA WILHELM APPELLANT V. GREG WILHELM APPELLEE	**Opinion Delivered:** January 24, 2018 APPEAL FROM THE WASHINGTON COUNTY CIRCUIT COURT [NO. 72DR-16-702] HONORABLE MARK LINDSAY, JUDGE AFFIRMED

WAYMOND M. BROWN, Judge

Appellant appeals from the circuit court's December 2, 2016 decree of divorce. On appeal, she argues that (1) the circuit court's findings do not support awarding primary custody to appellee; (2) a complete review of the evidence and the record on de novo review favors awarding primary custody to appellant; (3) the circuit court erred by refusing to consider joint custody; (4) if the custody award is reversed, the award of child support should be reopened; and (5) if the custody award is reversed, the award of attorney's fees should be vacated. We affirm.[1]

[1]Appellant's counsel is advised that Arkansas Supreme Court Rule 4-2(a)(6) states that "[t]he appellant's brief shall contain a concise statement of the case without argument." While appellant's statement of the case violates this rule in that it is clearly argumentative, it is not so flagrant that we must order rebriefing. Appellant's counsel is further advised that Arkansas Supreme Court Rule 4-2(a)(5) states that "[a]ll material information recorded in a transcript (stenographically reported material) must be abstracted." Arkansas Supreme Court Rule 4-2(a)(8) states that "[t]he addendum shall contain true and legible copies of the non-transcript documents in the record on appeal." Appellant erroneously placed a copy of the

The parties were married on January 10, 2004. Two children—K.W. and L.W.—were born of the marriage. Appellant filed her complaint for divorce on April 28, 2016, noting that the parties had ceased living together as husband and wife on or about February 5, 2016, and alleging general indignities as the supporting ground. She sought temporary and permanent care, custody and control of the parties' children, stating herself to be the fit and proper person between the parties, and temporary and permanent child support.[2] Appellee filed his answer on May 11, 2016, in which he denied the above-referenced assertions and raised affirmative defenses. On May 12, 2016, appellee filed a counterclaim for divorce from appellant, asserting that appellant abandoned the marital home on February 7, 2016, and adultery as the ground in support thereof. He also asserted certain affirmative defenses. He sought custody of and child support for the parties' two children in addition to other items. Appellee answered denying the same assertions on May 27, 2016, and asserting certain affirmative defenses.

Following a hearing on August 31, 2016, the circuit court entered a temporary order in which it stated the following:

> IT IS FURTHER ORDERED that the parties made an agreement on or about February 5, 2016, as it related to . . . custody and visitation of the parties' minor children and as it relates to said agreement, the parties [sic] find that there is no evidence that the minor children have been harmed under the present custody and visitation which has been agreed to by the parties and that it is in the best interest of the minor children that the parties continue to exercise the terms of visitation as

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part of the transcript from the hearing before the circuit court in the addendum; however, because the same portion was properly abstracted, we do not order rebriefing.

[2]Issues of property division were also asserted but are not subject of the current appeal.

> agreed to by the parties and the same shall continue until October 3, 2016, which is the date scheduled for the final hearing in this matter; and
>
> IT IS FURTHER ORDERED that pursuant to the aforementioned agreement, the Court finds that [appellant] shall be the temporary custodian of the parties' minor children subject to the rights of [appellee] to exercise visitation with the minor children from the time school is out on Wednesday until the immediate following Thursday morning at which time [appellee] shall deliver the minor children to school and if there is no school then [appellee's] visitation on each Wednesday shall begin at 3:30 p.m. and continue until 8:00 a.m. the immediate following morning. Additionally, pursuant to agreement between the parties, [appellee] shall be granted visitation with the minor children on alternating weekends beginning when school is out on Friday or, if no school, then at 3:30 p.m. and continuing until the children are returned to school on the immediate following Monday morning, or if there is no school, then until 8:00 a.m. on the immediate following Monday morning. The Court orders and directs that in the event [appellant] has work requiring her to be out of town or in any event, unable to be at her home by 6:00 p.m. then she shall immediately notify [appellee] that she will not be available, giving [appellee] the option to keep the minor children while [appellant] is away[.]

The circuit court declined to award child support.

A hearing on appellant's complaint for divorce and appellee's counterclaim for the same was held on October 3 and 4, 2016. Eighteen witnesses testified, including both parties. At the conclusion, the circuit court gave the parties the opportunity to file briefs on specific issues that are not pertinent to this appeal; it chose not to hear closing arguments that day. Appellee filed a posttrial brief on October 24, 2016; appellant did not file a posttrial brief. The circuit court reconvened on October 31, 2016.

From the bench, the circuit court orally granted appellee's counterclaim for divorce and dismissed appellant's complaint for divorce. Regarding joint custody, it stated:

> The Legislature has seen fit to enact a statute that says that joint custody is favored in Arkansas. And I said, the statute was enacted by the Legislature. I've never seen an appellate court case that said joint custody is favored by the courts in Arkansas. But that having been done, I do feel an obligation to consider it in every case. And I don't—I've never ordered it when the parties weren't agreeable to it. So I did ask

> the parties to consider whether or not they would be agreeable to joint custody, and the answer was no.
>
> . . . .
>
> Now, if I had not thought that you were both good parents, I would not have asked you to consider or if you would consider joint custody. I think you're both fit to be parents. But I have to make a decision here. It is clear to me that the plan for the two of you for some time was [appellant] was going to concentrate on that job whatever it meant[.] . . . I note that she had—I think it was called a lead parent—has been a lead parent. And I also note that many, many times—and this is according to the neighbors that lived with the Wilhelms. . . . But the neighbors in the neighborhood testified that it was [appellee] that they saw bring the kids home. It was [appellee] they saw bringing the groceries home. It was [appellee] that was out in the yard playing with the kids until [appellant] came home. [Appellant] was seen from time to time in the yard. But the testimony of the neighbors was that [appellee] was the one who took care of the kids and that it was often that [appellant] was not off in time to take the kids home and be with them immediately after school. And that's just the way they worked it, and everybody seemed to be happy with it until the parties separated, and then the normal jockeying started of the parties started to improve their positions with regard to their chances of getting custody. Now, the testimony, and [appellee] agreed with this, that lately [appellant] had not had to travel as much, that she has had more time. He does not deny that. But his job has not changed a bit. I know that he is going—he hasn't changed his job, and he's been available and that hasn't changed. And I don't know what your job is going to bring in the future, but you're going to have to be available to do whatever you have to do in your job.

The circuit court then awarded custody of the minor children to appellee, with visitation to appellant. The circuit court ordered appellant to pay $1,443.81 per paycheck in child support to appellee with no percentage awarded for future bonuses at that time, denied appellee an award of alimony, and awarded an undetermined amount of attorney's fees to appellee depending on the affidavit of fees ordered to be submitted by appellee's counsel to the circuit court. On December 2, 2016, the circuit court entered its decree of divorce, which was virtually identical to its oral rulings with the exception that (1) the child support award was reduced to $981.00 biweekly, (2) appellee was awarded twenty-one percent of

any future bonus to appellant, and (3) appellee was awarded $18,116.66 in attorney's fees plus $1,145.10 in costs. [3] This timely appeal followed.

In custody matters, this court considers the evidence de novo and does not reverse unless the circuit court's findings of fact are clearly erroneous.[4] A finding is clearly erroneous when, although there is evidence to support it, the court is left with a definite and firm conviction that the circuit court made a mistake.[5] Because the question of whether the circuit court's findings are clearly erroneous turns largely on the credibility of the witnesses, we give special deference to the superior position of the trial judge to evaluate the witnesses, their testimony, and the child's best interest.[6] The supreme court has held that there is no other case in which the superior position, ability, and opportunity of the trial court to observe the parties carries a greater weight than one involving the custody of minor children.[7] The best interest of the children is the polestar in every child-custody case; all other considerations are secondary.[8]

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[3]Appellant does not appeal from the grant of appellee's counterclaim for divorce and the dismissal of her complaint for divorce.

[4]*Burr v. Burr*, 2015 Ark. App. 640, at 6, 476 S.W.3d 195, 198 (citing *Chaffin v. Chaffin*, 2011 Ark. App. 293).

[5]*Id.*

[6]*Grantham v. Lucas*, 2011 Ark. App. 491, at 4, 385 S.W.3d 337, 340 (citing *Sharp v. Keeler*, 99 Ark. App. 42, 44, 256 S.W.3d 528, 529 (2007)).

[7]*Fox v. Fox*, 2015 Ark. App. 367, at 6, 465 S.W.3d 18, 22 (citing *Taylor v. Taylor*, 345 Ark. 300, 47 S.W.3d 222 (2001)).

[8]*Id.*

Appellant's first two arguments warrant being addressed together as appellant argues that a complete review of the evidence does not support the circuit court's findings in support of its award of custody to appellee. In support of her contention that the circuit court erred in its best-interest determination awarding custody to appellee, she analyzes a list of factors that she asserts support awarding custody of the children to her and then supports her analyses with certain witness testimony. Appellant essentially asks this court to reweight the evidence, which it cannot do. Credibility determinations are left to the trial court.[9]

Appellant's third argument is that the circuit court erred by refusing to consider joint custody. We disagree. Although our legislature has amended Arkansas Code Annotated section 9-13-101 to state that an award of joint custody is favored in Arkansas, joint custody is by no means mandatory.[10] Furthermore, a failure by the circuit court to award joint custody does not mean that the circuit court failed to consider awarding the same. The circuit court expressly stated from the bench that both parties were good parents, but that it would not award joint custody where the parties were not agreeable to a joint-custody arrangement. It went on to state that both parties had declined to entertain joint custody when asked by the circuit court. Accordingly, the circuit court clearly considered awarding joint custody, but appellant's own unwillingness to consider the same was a contributing

[9]*Newman v. Ark. Dep't of Human Servs.*, 2016 Ark. App. 207, at 13, 489 S.W.3d 186, 194 (citing *Ford v. Ark. Dep't of Human Servs.*, 2014 Ark. App. 226, at 2, 434 S.W.3d 378, 380, 381).

[10]*Louton v. Dulaney*, 2017 Ark. App. 222, at 9, 519 S.W.3d 367, 373 (citing Ark. Code Ann. § 9-13-101 (a)(1)(A)(iii) (Repl. 2015).

factor to the circuit court's decision not to award joint custody. A person cannot complain of an alleged erroneous action of the circuit court if she induced such action.[11]

Because appellant's fourth and fifth arguments regarding child support and attorney's fees and costs were put forth by appellant in the event that this court reversed the circuit court's award of custody to appellee—and we decline to do so—we do not address said arguments.

Affirmed.

GLADWIN and WHITEAKER, JJ., agree.

Cullen & Co., PLLC, by: *Tim Cullen*, for appellant.

Gunn Kieklak Dennis LLP, by: *Jennifer Lloyd*, for appellee.

[11]*Id.* at 11, 519 S.W.3d at 374 (citing *Clark v. Ark. Dep't of Human Servs.*, 2016 Ark. App. 286, 493 S.W.3d 782).