

# ARKANSAS COURT OF APPEALS

DIVISION III  
No. CA 08-1110

ROBERT LYNN ANDERSON  
APPELLANT

V.

SHERRI LYNN ANDERSON  
APPELLEE

**Opinion Delivered** APRIL 15, 2009

APPEAL FROM THE WASHINGTON  
COUNTY CIRCUIT COURT,  
[NO. DR2007-1078-4]

HONORABLE MARY ANN GUNN,  
JUDGE

AFFIRMED

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**JOHN B. ROBBINS, Judge**

This is an appeal of a divorce proceeding heard in Washington County Circuit Court. Appellant Robert L. Anderson appeals the trial court's order that (1) awarded custody of the parties' son to appellee Sherri L. Anderson, and (2) found that five trucks were marital property instead of appellant's separate property. We affirm the trial court's order.

We first consider the custody determination. The standard of review in child-custody appeals is well settled. We review the evidence de novo, but we will not reverse the findings of fact unless it is shown that they are clearly contrary to the preponderance of the evidence. *Skokos v. Skokos*, 344 Ark. 420, 40 S.W.3d 768 (2001); *Thompson v. Thompson*, 63 Ark. App. 89, 974 S.W.2d 494 (1998). We give special deference to the superior position of the trial court to evaluate and judge the credibility of the witnesses in child-custody cases. *Taylor v. Taylor*, 345 Ark. 300, 304, 47 S.W.3d 222, 224 (2001); *Hamilton v. Barrett*, 337 Ark. 460, 989

S.W.2d 520 (1999). A finding is clearly against the preponderance of the evidence when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Hollinger v. Hollinger*, 65 Ark. App. 110, 986 S.W.2d 105 (1999). See also *Dunham v. Doyle*, 84 Ark. App. 36, 129 S.W.3d 304 (2003). The best interest of the child is the polestar in every child custody case; all other considerations are secondary. See *Norwood v. Robinson*, 315 Ark. 255, 866 S.W.2d 398 (1993).

The parties married in 1998 and divorced in 2008. During their marriage, a son was born, Lucas. Robert, Sherri, and Lucas resided in a mobile home in Alpena, Arkansas, along with Sherri's two sons from a prior marriage, Derrick and Cory. At the time the parties separated in 2007 and divorced in 2008, the boys' ages were approximately seventeen (Derrick), fourteen (Cory), and five (Lucas).

Robert worked intermittently in pipeline construction, which required him to be out of town or out of state for weeks at a time. In the waning years of the marriage, there was undoubtedly friction in the household, especially between Robert and Derrick, and at least one physical altercation between them. Sherri contended that Derrick intervened to protect Cory from Robert's assault. In contrast, Robert contended that Derrick was an uncontrollable, undisciplined teen. The end result was that Derrick was sent to live with his grandmother and had since left for military training in Georgia. Cory remained in the household. Sherri acknowledged some sibling rivalry between Cory and Lucas, but she maintained that they shared a close relationship. Robert thought that Cory also had behavior problems (picking on Lucas) and a seizure disorder, so he questioned Sherri allowing Cory

to act as a babysitter for Lucas. Robert also had concerns that another babysitter smoked in Lucas's presence, which was bad for his respiratory system.

Sherri believed that Robert had, for the entirety of their marriage, control and anger issues. Sherri contended that Robert was never happy with her housecleaning, her method of raising or disciplining the children, or the state of their finances. Sherri ultimately left the home, Lucas, and all her belongings, for about a month in April 2007. In May 2007, Sherri and Robert obtained mutual orders of protection against one another. In those orders, each was granted week-on-week-off custody of Lucas. Sherri filed a complaint for divorce in June 2007. Sherri lived with a girlfriend and her husband (the Sigulinskys) in West Fork for a few months, while Robert resided in the mobile home and retained their belongings. Sherri moved into an apartment in West Fork in the fall of 2007. Sherri had a full-time job during the week and a part-time job on the weekend.

The meetings in Berryville for the parties to exchange Lucas were routinely less than friendly. Robert habitually made crude and nasty remarks to Sherri and Mr. Sigulinsky, who rode with Sherri for those exchanges, and Robert would often follow in his truck closely behind her vehicle as she left the exchanges. During the pendency of the divorce case, Robert made two abuse/neglect allegations to DHS about Sherri, which were both ultimately determined to be unfounded.

At the final hearing conducted in January 2008, the trial judge heard testimony from the DHS worker, both parties, the Sigulinskys, Sherri's mother, Robert's sister, and some neighbors in Alpena.

Sherri told about the deterioration of the marriage and her concerns about Robert's behavior toward her older sons. Robert testified that Sherri basically abandoned their son Lucas in April 2007 and did not check on him at any time while Robert had custody of Lucas, that she was a terrible parent to the older boys, that she would not communicate with him about Lucas's welfare, that she had an unkempt household, that she was verbally and physically abusive toward him (Robert), and that she failed to protect Lucas from his aggressive older brothers. Robert admitted that he had made the two DHS reports, but he believed they were reasonable because Sherri was not medicating Lucas for his bronchitis, and she allowed a babysitter who smoked to be around Lucas. Robert acknowledged that he often worked away from town, but testified that if he were awarded custody, he would find work locally, which he was seeking. Robert said he was currently not working due to an injury. Robert thought Sherri's current work schedule prevented her from being available to properly care for Lucas.

Sherri's mother testified that Robert exhibited a tendency to anger quickly and that he had cussed her on the phone. The DHS worker testified that she investigated the complaints of abuse/neglect, finding no basis in them. The worker interviewed the children and examined Sherri's apartment, finding it clean and suitable for her and her two sons. In speaking to the boys, the worker discerned that Cory and Lucas shared a healthy relationship. In determining if Lucas was being denied proper health care, the worker said that Lucas seemed entirely well, although the complaint just days before was that Lucas was very ill with bronchitis. The worker was assured that the babysitter went outside to smoke. The

neighbors' testimony added little to no relevant evidence. The Sigulinskys testified that they observed controlling behavior while Sherri and Robert were together. For example, Mrs. Sigulinsky remembered Robert calling Sherri's cell phone up to eight times during a lunch with her, and she recalled that group family plans they made were cancelled most of the time. They thought that Sherri was effectively cut off from friends during the marriage.

The trial judge rendered findings from the bench, stating that she had carefully listened to and observed each witness in making her conclusions. Relevant to the custody issue, the judge found the DHS case worker's testimony to be credible; that Robert and Sherri both had some anger issues but that Sherri would be granted a divorce; that joint custody would not be a viable option; that Sherri was the primary care-giver who provided a clean, safe home with Lucas's half brother and would be the primary custodian of Lucas; that Robert would be granted liberal visitation with encouragement to extend visitation when Robert was off work and to allow telephone visitation when Robert was working out of town; and that Sherri must communicate with Robert about Lucas.

Robert appeals the custody finding, arguing that it is clearly erroneous. Robert's brief focuses in large measure on the fact that the parties shared joint custody during the pendency of the case. However, a temporary order is just that—temporary by nature.

Although Arkansas Code Annotated section 9-13-101(b)(1)(A)(ii) was amended in 2003 to specifically permit a court to consider an award of joint custody, joint or equally divided custody remains disfavored in Arkansas. *Dansby v. Dansby*, 87 Ark. App. 156, 189 S.W.3d 473 (2004). The crucial factor bearing on the propriety of joint custody is the mutual

ability of the parties to cooperate in reaching shared decisions in matters affecting the child's welfare. *Thompson v. Thompson*, 63 Ark. App. 89, 974 S.W.2d 494 (1998). That was clearly not a tenable solution here. It appears that even Robert agrees that joint custody was not a viable solution. The trial judge was forced to choose one parent or the other in this case, bearing in large measure on the judge's credibility determinations.

The evidence showed that during their marriage in the same household, Sherri provided the day-to-day care, especially considering that Robert's employment required him to be absent for weeks at a time. The fact that a parent has been the primary caretaker, while not determinative, is relevant and worthy of consideration. *Thompson v. Thompson*, 63 Ark. App. 89, 974 S.W.2d 494 (1998).

The general rule regarding siblings is that young children should not be separated from each other in the absence of exceptional circumstances. *See Lloyd v. Butts*, 343 Ark. 620, 37 S.W.3d 603 (2001). Robert correctly states that this general rule does not apply with equal force in cases where the children are half-siblings. *Riddle v. Riddle*, 28 Ark. App. 344, 775 S.W.2d 513 (1989). Nonetheless, it is a relevant circumstance. To the extent that Robert complains about Cory's behavior toward Lucas, there was evidence upon which the trial court could find that his concern was unfounded.

The circuit judge was left to view the facts and circumstances in the aggregate, not each fact in isolation, in determining in whose custody Lucas's best interest was served. Here, the trial judge evaluated a multitude of facts, which support the award of custody to Sherri. Moreover, Robert was awarded liberal visitation with the court's encouragement that the

parties agree to greater visitation. Because we are not left with a distinct and firm conviction that a mistake was made, we affirm this point.

Moving to the second issue on appeal, the disposition of five trucks, we examine the evidence and ruling on that point. The parties owned a mobile home and twenty-nine acres in Alpena, Arkansas, and they accrued significant debt. Sherri left with little to no personalty when she moved out of their home, although she took her vehicle, a 2006 Nissan Altima, with approximately \$17,500 of debt on it. What remained in Robert's possession were all the personal goods. Sherri made a hand-written list (Plaintiff's Exhibit 7) of all those goods, including the mobile home, a motorcycle, other vehicles, equipment, household appliances, small decorative items, and the like. Sherri testified that, with a few exceptions not relevant here, all the items were purchased during the marriage, and she considered them "marital property." In Robert's testimony regarding that exhibit, Robert said that there were some items that were not "marital," specifically referencing five trucks, listed as:

07 Ford 4WD Truck

2 older Ford rangers

76 Chevy 4WD Truck

older full size ford white Truck

Robert testified that he was presently driving the 2007 Ford and that it and other property were collateral for debt in a consolidated note. When asked if he wanted to keep the 2007 truck, Robert replied, "I'm looking to settle this matter however it's fit. . . . If we have to, we'll sell everything, including that '06 Nissan." Robert testified that the two older Ford

Rangers and older full-size Ford were “junk,” adding that one older Ford “ain’t even mine,” and finally that the 1976 Chevy was given to him by Tom Williams.

The judge found all the vehicles, including the Nissan, to be marital property. The judge awarded possession of the Nissan to Sherri to use for the benefit of the child, but also gave Sherri the sole burden of satisfying the indebtedness on it, which she had been paying since she left the marital residence. The remaining “big ticket” items were declared marital property, subject to an agreed division within thirty days or sale on the courthouse steps, to be applied to marital debt and any excess proceeds evenly divided.<sup>1</sup>

Appellant argues that it was clearly erroneous not to award him the 2007 Ford that he was driving because he was left without transportation that he needed for work and for the benefit of the child. However, his testimony on that point was to the contrary. Robert conceded that this truck was marital property, subject to equitable division.

Appellant argues that it was clearly erroneous not to award to him as his sole property the 1976 Chevy because it was a gift from a co-worker Tom Williams. Arkansas Code Annotated § 9-12-315 (Repl. 1998) defines “marital property” as “all property acquired by either spouse subsequent to the marriage,” subject to certain exceptions. There is a presumption that all property acquired during a marriage is marital property. *McDermott v. McDermott*, 336 Ark. 557, 986 S.W.2d 843 (1999); *Layman v. Layman*, 292 Ark. 539, 731 S.W.2d 771 (1987); *Boggs v. Boggs*, 26 Ark. App. 188, 761 S.W.2d 956 (1988). The

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<sup>1</sup>Ark. R. App. P.--Civ. 2(d) permits an appeal from any order that is final as to the issue of custody, regardless of whether the order resolves all other issues. *Ford v. Ford*, 347 Ark. 485, 65 S.W.3d 432 (2002).

applicable exceptions listed in the statute include: (1) Property acquired prior to marriage, or by gift, or by bequest, or by devise, or by descent; (2) Property acquired in exchange for property acquired prior to the marriage or in exchange for property acquired by gift, bequest, devise, or descent. Ark. Code Ann. § 9-12-315 (b). However, Sherri testified that everything she wrote down on that list was marital, with specific noted exceptions. There was no documentary evidence pertaining to ownership introduced so it was simply left to the trial judge to determine whose testimony to believe. *Noland v. Noland*, 330 Ark. 660, 956 S.W.2d 173 (1997); *Holaday v. Fraker*, 323 Ark. 522, 920 S.W.2d 4 (1996).

As to the three older vehicles, Robert's testimony was not that they were not marital, but rather that they had minimal value as "junk." One of those he said "ain't even mine." The trial court did not clearly err in finding those to be marital property. To the extent they might have been considered outside the marital estate, they were in Robert's opinion basically worthless.

It must be remembered that the trial judge is vested with a measure of flexibility in apportioning the total assets held in the marital estate upon divorce, and the critical inquiry is how the total assets are divided. See *Canady v. Canady*, 290 Ark. 551, 721 S.W.2d 650 (1986). The trial judge is thus given broad powers under the statute to distribute all property in divorce cases, marital and non-marital, in order to achieve an equitable distribution. *Smith v. Smith*, 32 Ark. App. 175, 798 S.W.2d 442 (1990). The parties were made equally responsible for significant marital debts tied to the list of marital assets. Robert has failed to demonstrate clear error amounting to inequity in this case.

For the foregoing reasons, we affirm the trial court's decision on custody and the inclusion of the five trucks as part of the marital estate.

KINARD and BAKER, JJ., agree.